IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	**Chapter 11**
CORELLE BRANDS ACQUISITION HOLDINGS LLC, *et al.*,	§	**Case No. 23-90716 (MI)**
Reorganized Debtors.[1]	§	**Jointly Administered**
	§	**Re: Docket Nos. 1013, 1146, and 1156**

REORGANIZED DEBTORS' SUPPLEMENTAL BRIEF REGARDING EXCULPATION ISSUES RAISED BY THE UNITED STATES TRUSTEE

Corelle Brands Acquisition Holdings Inc. and certain of its affiliates, each of which is a Reorganized Debtor[2] in the Chapter 11 Cases, respectfully submit this supplemental brief (this "**Supplemental Brief**") regarding the Exculpation Provision and the legal import of *Highland*, including the governance documents appointing the independent directors in *Highland* and the circumstances thereof, and further reply to the U.S. Trustee's Limited Objection, in accordance with the *Joint Stipulation and Agreed Order Setting Briefing Schedule Regarding Exculpation Under Debtors' Plan of Reorganization* [Docket No. 1156] (the "**Joint Stipulation**").

[1] The reorganized debtors in these chapter 11 cases, along with the last four digits of their respective employer identification numbers or registration numbers in the applicable jurisdictions, are as follows: Corelle Brands (Texas) Inc. (2526); Corelle Brands Acquisition Holdings LLC (9089); Corelle Brands Acquisition Intermediate Holdings Inc. (3303); Corelle Brands Holdings Inc. (3318); Corelle Brands (Charleroi) LLC (7347); Corelle Brands LLC (0566); Corelle Brands (Corning) LLC (8085); Corelle Brands (Latin America) LLC (8862); EKCO Group, LLC (7167); EKCO Housewares, Inc. (0216); EKCO Manufacturing of Ohio, Inc. (7300); Corelle Brands (Canada) Inc. (5817); Instant Brands (Canada) Holding Inc. (4481); Instant Brands Inc. (8272); and Corelle Brands (GHC) LLC (9722). The address of the reorganized debtors' corporate headquarters is 3025 Highland Parkway, Suite 700, Downers Grove, IL 60515.

[2] Capitalized terms used but not immediately defined herein shall have the meanings ascribed to them elsewhere herein, in the *Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization of Instant Brands Acquisition Holdings Inc. and its Debtor Affiliates* [Docket No. 1146-1] (the "**Plan**"), or in the *Debtors' Reply and Memorandum of Law in Support of Final Approval and Confirmation of the Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization of Instant Brands Acquisition Holdings Inc. and its Debtor Affiliates* [Docket No. 1117] (the "**Confirmation Brief**"), as applicable. The rules of interpretation set forth in Article I.B of the Plan shall apply hereto (except that all references herein to "sections" refer to sections of the Bankruptcy Code). For the avoidance of doubt, all references herein to "Articles" refer to articles of the Plan.

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Preliminary Statement

1. The U.S. Trustee's Limited Objection raised a narrow legal issue: whether the Debtors' independent directors (the "**IB Independents**") may be exculpated consistent with Fifth Circuit law, including, among others, *Matter of Highland Capital Management, L.P. ("Highland")*. 48 F. 4th 419 (5th Cir. 2022), *petition for cert. filed*, No. 22-631 (U.S. Jan. 5, 2023) (No. 22-631). The answer is yes. Over two decades of Fifth Circuit law confirms that disinterested individuals who take on fiduciary duties to a debtor in bankruptcy may be exculpated under a chapter 11 plan of reorganization. Indeed, in *Highland*, the Fifth Circuit modified and then approved an exculpation provision that is virtually identical to the exculpation provision here, finding that the independent directors in that case (the "**Highland Independents**") were entitled to exculpation because, like debtors in possession, the Highland Independents were tasked with the duties of a trustee under section 1107(a) and, therefore, had similar rights to a trustee, including exculpation. The IB Independents are directly analogous.

2. This Court asked at the Combined Hearing whether the *Highland* court's approval of exculpation for the Highland Independents was a function of a bankruptcy court order in that case. It was not. In fact, contrary to the U.S. Trustee's assertions in its Limited Objection, *no* order of the bankruptcy court in *Highland* appointed the Highland Independents as directors, much less appointed them as chapter 11 trustees under section 1104. Rather, the Highland Independents were appointed at Highland Capital's non-debtor general partner *in lieu* of the appointment of a chapter 11 trustee pursuant to a settlement between Highland Capital and the creditors' committee in that case. Nothing in the relevant settlement order entered by Judge Jernigan (attached hereto as **Exhibit D**) indicates otherwise.

3. The U.S. Trustee's remaining arguments likewise fail. Although the Highland Independents were appointed post-petition, as the U.S. Trustee points out, U.S. Trustee Obj. ¶ 11,

the timing of that appointment was not relevant to the Fifth Circuit's legal analysis, as even a cursory reading of the opinion demonstrates. Neither was any perceived "unique[ness]" about the three-member governance structure that the settlement in that case contemplated. *Id.* As the pertinent analysis of the *Highland* opinion makes crystal clear, the critical fact was that the Highland Independents functioned *like* a chapter 11 trustee by operation of a different section of the Bankruptcy Code, section 1107(a): "[l]ike a debtor-in-possession, the [Highland Independents were] entitled to all the rights and powers of a trustee. *See* 11 U.S.C. § 1107(a) . . . . It follows that the [Highland Independents] are entitled to the limited qualified immunity for any actions short of gross negligence." *Highland*, 48 F.4th at 437. The same reasoning applies here.

4. Finally, the U.S. Trustee has not—and cannot—cite any binding authority suggesting that exculpation of disinterested directors is categorically prohibited under the Bankruptcy Code. In *In re Pacific Lumber Company ("Pacific Lumber")*, 584 F.3d 229 (5th Cir. 2009), for example, a case which the U.S. Trustee argues somehow limits exculpation solely to creditors' committees and chapter 11 trustees, U.S. Trustee Obj. ¶ 10, the plan did not seek to exculpate *any* independent directors or managers of a debtor. The Fifth Circuit, therefore, had no occasion in that case to consider the question presented here. The Fifth Circuit did, however, consider this question in *Highland*, and it unequivocally held that the exculpation of the Highland Independents was proper.

5. This Court should reject the U.S. Trustee's request to fashion an across-the-board prohibition against exculpation of independent directors not supported anywhere in Fifth Circuit law and rule that the IB Independents may be "Exculpated Parties" worthy of the Exculpation Provision's protection.

Relevant Background

I. The Debtors' Chapter 11 Cases and the Combined DS and Plan

6. A more fulsome description of the background of the Chapter 11 Cases can be found in the Disclosure Statement and the Confirmation Brief, but the facts and procedural history relevant to this Supplemental Brief are set out below.

7. The Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in June 2023 and, in early January 2024, filed the solicitation version of the Combined DS and Plan. Docket No. 926-1. Except as explicitly set forth in the Confirmation Order, the solicitation version of the Combined DS and Plan was the same version that was subsequently approved and confirmed by the Bankruptcy Court. Docket No. 1146-1.

8. Relevant here, Article XI.D (as modified by paragraph 29(a) of the Confirmation Order) provides for the exculpation of certain of the fiduciaries of the Debtors' Estates for post-petition acts or omissions in connection with, related to, or arising out of the Chapter 11 Cases, so long as such act or omission is not adjudicated to be willful misconduct or gross negligence. Article XI.D's protections apply only to the "Exculpated Parties," which is defined under the Plan to include only "(a) the Debtors, (b) each independent director of the Debtors, and (c) the Creditors' Committee and each of its members." Plan, Art. I.A.90 (together with Article XI.D, the "**Exculpation Provision**").

II. The U.S. Trustee's Limited Objection to the Combined DS and Plan

9. The U.S. Trustee objected to the Plan and raised a single legal objection to the Exculpation Provision: that Fifth Circuit law prohibits exculpation of the IB Independents and, thus, the Exculpation Provision cannot be approved with respect to the IB Independents. The U.S. Trustee argued that the IB Independents cannot be exculpated because they were not appointed (a) by court order, (b) "to act together as [a] bankruptcy trustee" as part of a "unique corporate

governance structure," (c) after the commencement of the Chapter 11 Cases. U.S. Trustee Obj. ¶ 11. The U.S. Trustee's Limited Objection did not dispute that the IB Independents owed fiduciary duties to the Debtors, were in fact independent, or otherwise failed to comply with those fiduciary duties (nor could it).

III. The Combined Hearing, Confirmation Order, and Request for Supplemental Briefs

10. On February 22, 2024, the Bankruptcy Court held the Combined Hearing to consider final approval of the Disclosure Statement and confirmation of the Plan. With respect to the Exculpation Provision, after hearing argument on the present issue, the Bankruptcy Court ordered the parties to provide additional briefing with respect to the meaning of the Fifth Circuit's decision in *Highland*. The Bankruptcy Court framed the central issue for this supplemental briefing as follows:

> I appreciate the issue on trying to further understand exactly what Highland Capital means, and I really don't know how I'm going to come down on that. I just—I've never had to really drill down to the question that we're at, which is whether this is a function of the order or whether it's a function of independence. I think that's where we are.

Ex. A at 45:18–24. The Bankruptcy Court also requested for the parties to submit a copy of the pertinent order issued by Judge Jernigan in *Highland*. *Id.* at 43:22–44:2. The Reorganized Debtors conferred with the U.S. Trustee, and the parties agree that the order attached hereto as **Exhibit D** (the "**Settlement Order**") constitutes the order discussed at the Combined Hearing.[4]

11. Following the Combined Hearing, the Debtors filed a revised form of proposed Confirmation Order that contained the following provision: "Pursuant to the Bankruptcy Court's ruling at the Combined Hearing, the independent directors of the Debtors shall not be deemed

[4] The parties similarly agree that the motion attached hereto as **Exhibit C** (including the settlement term sheet contained therein) (the "**Settlement Motion**") is what was referenced in Judge Jernigan's Settlement Order.

'Exculpated Parties' pending further order of the Bankruptcy Court." Docket No. 1140 ¶ 29(b). This language was added to the proposed form of Confirmation Order with the consent of the U.S. Trustee.

12. On February 23, 2024, the Bankruptcy Court entered the Confirmation Order approving the Disclosure Statement on a final basis and confirming the Plan, which contained the language in the immediately preceding paragraph. In addition, before entering the Confirmation Order, the Bankruptcy Court added the following proviso to the agreed-upon added language: "provided, if the Court subsequently authorizes [the IB Independents'] exculpation, the exculpation will be effective as of the date of entry of this Order." Confirmation Order ¶ 29(b). The Plan became effective and was substantially consummated on February 27, 2024. Docket No. 1161.

13. On February 26, 2024, the Debtors and U.S. Trustee executed and filed, and the Bankruptcy Court signed and entered, the Joint Stipulation, providing that the parties would submit supplemental briefing as directed at the Combined Hearing by March 8, 2024. Docket No. 1156.

14. The Reorganized Debtors hereby submit this Supplemental Brief in accordance with the Joint Stipulation and as directed by the Bankruptcy Court at the Combined Hearing.

Argument

I. The Plan's Exculpation Provision Is Permitted Under Fifth Circuit Law

A. Fifth Circuit Law Permits Exculpation of Independent Directors

15. The Fifth Circuit has long recognized that the Bankruptcy Code permits exculpation of non-debtors in appropriate circumstances, including independent and disinterested non-debtors who owe fiduciary duties to the debtors.

16. For example, over twenty years ago, in *In re Smyth ("Smyth")*, 207 F.3d 758, 761–62 (5th Cir. 2000), the Fifth Circuit held that a chapter 11 trustee should not be subject to personal

liability—*i.e.*, may be exculpated—unless he or she is found to have acted with gross negligence. Notably, the court rooted its holding in "the nature of the trustee's duties," including "[t]he requirement that [the] trustee maintain disinterestedness," which the Fifth Circuit noted "often results in the selection of trustees who have limited historical knowledge of the debtor's business or prior understanding of the industry in which the business is operated." *Id.* at 762. Based on these duties, along with the policy goals of encouraging responsible individuals to serve in the position of trustee, the Fifth Circuit concluded that a gross negligence standard "struck the proper balance between the difficulties of the task assumed by [the] trustees and the need to protect the interest of creditors and other parties in the bankruptcy case." *Id.*; *see also In re Hilal ("Hilal")*, 534 F.3d 498, 500 (5th Cir. 2008) (affirming that the trustee and the trustee's professionals "cannot be subject[] to personal liability for damages . . . unless they . . . act[] with gross negligence").

17. The Fifth Circuit next revisited exculpation provisions in *Pacific Lumber*, again confirming the availability of exculpation for disinterested third parties that owe fiduciary duties to a debtor. 584 F.3d at 251–53. Important here—and directly responsive to the Bankruptcy Court's question at the Combined Hearing, Ex. A at 37:23–24—the confirmed plan in *Pacific Lumber* did *not* seek to exculpate any independent director or manager of a debtor (nor, for that matter, did it seek to exculpate any of the debtors themselves). *Pacific Lumber*, 584 F.3d at 253. Rather, the confirmed plan defined "Exculpated Parties" as "(i) the Plan Proponents and their respective officers, directors, professionals, members, agents and employees, (ii) the Reorganized Entities and their respective officers, directors, professionals, members, agents and employees, and (iii) the Committee, its members and Professionals." Ex. B; *see also Pacific Lumber*, 584 F.3d at 251. Thus, the central question before the court was whether the exculpation of the *plan proponents* (who, far from being disinterested, became owners of the reorganized entities

following consummation of the plan), the reorganized debtors, and "their respective officers, directors, professionals, members, agents, and employees" was permissible under Fifth Circuit law. *Pacific Lumber*, 584 F.3d at 251–53. The Fifth Circuit concluded that it was not, but it did affirm that exculpation may be provided to the creditors' committee and its members, because "[t]he Creditors' Committee and its members [were] the only disinterested volunteers among the parties sought to be released." *Id.* (citing section 1103(c) and noting that section 1103(c) "implies committee members have qualified immunity for actions within the scope of their duties").[5]

18. Finally, and most recently, in *Highland*, the Fifth Circuit again approved an exculpation provision, specifically holding that independent directors may be exculpated. 48 F.4th at 437. An extended discussion of the facts in *Highland* is warranted.

19. Facing myriad unpaid judgments for fraud, among other things, Highland Capital Management L.P. ("**Highland Capital**") filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas. *Id.* at 424. This provoked "a nasty breakup" between Highland Capital and its co-founder, James Dondero ("**Dondero**"), who owned and controlled the debtor through the debtor's general partner, Strand Advisors, Inc. ("**Strand**"). *Id.* at 424–26. Citing Highland Capital's history of self-dealing, and seeking to remove Dondero from a position of control over the debtor, the United States Trustee for Region 6 (the "**Region 6 UST**") filed a motion to appoint a chapter 11 trustee under section 1104(a). *See In re Highland Cap. Mgmt., L.P.*, No. 19-34054-SGJ11 (Bankr. N.D. Tex. Dec. 23, 2019) [Docket No. 271].

[5] In *Matter of Ondova Ltd. Co. ("Ondova")*, 914 F.3d 990 (5th Cir. 2019) (per curiam), issued just three years before *Highland*, a former principal of the debtor appealed a district court ruling that "entitled [the chapter 11 trustee] to absolute immunity for all actions taken pursuant to a court order, and . . . qualified immunity for all other acts within the scope of his trustee duties." *Id.* at 993. Persuaded by "sister circuits," the Fifth Circuit upheld the district court's ruling, "hold[ing] that bankruptcy trustees in the Fifth Circuit are entitled to qualified immunity for personal harms caused by actions that, while not pursuant to a court order, fall within the scope of their official duties." *Id.*

20. During the pendency of that motion, however, Highland Capital announced a settlement with the official committee of unsecured creditors in that case (the "**Highland UCC**" and, the settlement between Highland Capital and the Highland UCC, the "**Highland-UCC Settlement**") to supplant the debtor's management, and specifically Dondero,[6] in lieu of appointing a bankruptcy trustee. Under the terms of the Highland-UCC Settlement, Dondero stepped down as a director of Strand in favor of a three-member board of independent directors at Strand (*i.e.*, the Highland Independents), who would have "sole and exclusive management and control of the Debtor." Ex. C ¶ 2. The bankruptcy court overruled the Region 6 UST's objection to the Highland-UCC Settlement and entered the Settlement Order approving it. Ex. D. Notably, the Settlement Order *did not* appoint the independent directors as chapter 11 trustees, under section 1104 or otherwise. It did not even appoint the directors in any respect. Rather, it approved the term sheet embodying the Highland-UCC Settlement (which contemplated governance changes at Strand, ***a non-debtor***) as well as proposed compensation of the Highland Independents. *See id.*[7]

21. Notwithstanding the Highland-UCC Settlement, the Region 6 UST nonetheless continued to seek appointment of a chapter 11 trustee at Highland Capital—the debtor entity itself. Highland Capital objected to the Region 6 UST's motion, arguing, among other things, that the newly-established independent board rendered a chapter 11 trustee redundant. Ex. E ¶ 3, n.2 ("Either the [Region 6] UST is seeking to appoint a chapter 11 trustee who will serve the exact

[6] Strand and Dondero, its sole shareholder—both non-debtors—went along with the Highland-UCC Settlement, and in fact signed a joint stipulation with Highland Capital and the Highland UCC, so as to assuage certain jurisdiction-related arguments raised by the Region 6 UST. *See* Ex. H at 73:21–74:6 & 76:22–24.

[7] The Settlement Order also barred any claim against the Highland Independents in their official roles without the bankruptcy court authorizing the claim as a "colorable claim of willful misconduct or gross negligence." Ex. D ¶ 10. This provision, however, had no bearing on the Fifth Circuit's decision in *Highland*, as the Settlement Order was not appealed. *Highland*, 48 F.4th at 426. Rather, the central question in *Highland* was whether the exculpation provision contained in Highland Capital's *plan of reorganization* was lawful. *Id.* at 426–29.

same function as the [Highland Independents] or the [Region 6] UST is seeking to unseat the [Highland Independents] and unwind this Court's order approving the Settlement Motion."). After a lengthy hearing, the bankruptcy court sustained Highland Capital's objection and declined to appoint a chapter 11 trustee. The bankruptcy court found that the "overhaul [of] the entire corporate governance structure as to this debtor . . . sanitized the problems" that may have otherwise warranted appointment of a chapter 11 trustee. Ex. F at 114:15–19.

22. A little over a year later, with the help of the Highland Independents, Highland Capital proposed, obtained confirmation of, and consummated a chapter 11 plan. *Highland*, 48 F.4th at 427–28. Relevant here, the confirmed plan proposed to exculpate a broad array of entities, including the debtor, Strand, the Highland Independents, the Highland UCC (and its members), and various professionals and employees. *Id.* at 427.

23. On direct appeal of the confirmation order, certain creditors, including Dondero, challenged the exculpation provision in Highland Capital's plan, and the Fifth Circuit again approved the exculpation provision in large part. *Id.* at 437–38. Citing *Pacific Lumber* and *Smyth*, among other authorities, the Fifth Circuit recognized that the Bankruptcy Code provides authority to exculpate creditors' committees (and their members), as well as bankruptcy trustees, for actions within the scope of their statutory duties. *Id.* at 437. Moreover, with respect to the Highland Independents, even though the Highland Independents were *not* appointed as chapter 11 trustees under section 1104, the Fifth Circuit recognized that the Highland-UCC Settlement resulted in the Highland Independents serving in a role that *resembled* that of a trustee. *Id.* at 425 ("The [Highland UCC] selected a board of three independent directors to act as a quasitrustee and to govern Strand and Highland Capital."). The Fifth Circuit held, "***[l]ike a debtor-in-possession***, the [Highland Independents were] entitled to the rights and powers of a trustee." *Id.* at 437 (citing section 1107(a)

& 7 Collier on Bankr. ¶ 1101.01 (15th ed. 2018) (which discuss the role and duties of a debtor in possession under the Bankruptcy Code)). In the very next sentence, the Fifth Circuit continued: "It follows that the [Highland Independents] are entitled to the limited qualified immunity for any actions short of gross negligence." *Id.* In other words, the Highland Independents were exculpated because they were disinterested and, pursuant to section 1107(a), exercised the same rights and discharged the same duties as a bankruptcy trustee. The Fifth Circuit then approved Highland Capital's exculpation provision, but only insofar as it applied to the debtor, the Highland Independents, and the Highland UCC (and its members). *Id.* at 438.

B. The Plan's Exculpation Provision Is Consistent with Fifth Circuit Law, Including *Highland*

24. Here, there can be little doubt that the Exculpation Provision strictly complies with Fifth Circuit law.

25. As an initial matter, consistent with *Smyth*, *Hilal*, *Ondova*, *Pacific Lumber*, and *Highland*, the Exculpation Provision explicitly excludes claims for gross negligence.[8] Plan, Art. XI.D (excluding "claims related to any act or omission that is determined in a Final Order to have constituted willful misconduct (including actual fraud) or gross negligence" from the Exculpation Provision). Likewise, the Exculpation Provision is strictly limited to releasing claims for post-petition conduct. Confirmation Order ¶ 29(a) ("Notwithstanding anything in Article XI.D to the contrary, the scope of claims listed in Article XI.D as being exculpated under the Plan is temporally limited to claims arising during the period between the Petition Date and the Effective Date.").

26. Moreover, the Exculpation Provision applies only to the Debtors, the IB Independents, and the Creditors' Committee (and its members), Plan, Art. I.A.90, and therefore

[8] The Exculpation Provision is also identical to the ones in *Hilal*, *Pacific Lumber*, and *Highland* in that it excludes claims for willful misconduct.

falls squarely within the scope of *Smyth* and its progeny—including *Highland*. In particular, there is no dispute that the IB Independents—like the Highland Independents who were lawfully exculpated—owed fiduciary duties to the Debtors and duly performed their duties. *See* Confirmation Order ¶ X ("Throughout the Chapter 11 Cases, the Debtors and their Related Parties have fulfilled any fiduciary duties or obligations owed to the Estates and protected the interests of all of the Debtors' constituents with an even hand.").[9] And, like the Highland Independents, the IB Independents undisputedly were "entitled to all the rights and powers of a trustee" under section 1107(a), and thus qualify for the same protection and relief that the Fifth Circuit permitted in *Highland*. *See Highland*, 48 F.4th at 437. Indeed, just as here, the Highland Independents were not appointed to serve as a chapter 11 trustee, nor were they appointed by court order. *See infra* ¶¶ 29–34. And yet, as this Court noted at the Combined Hearing, the Fifth Circuit still held that the Highland Independents were entitled to exculpation, consistent with Fifth Circuit law and section 1107(a). *Highland*, 48 F.4th at 437; *see also* Ex. A at 37:5–12; Confirmation Brief ¶ 108.

27. Finally, although there may be a question about whether *Highland*'s rationale may justify extending exculpation to other fiduciaries beyond independent directors, the Bankruptcy Court need not decide the outer bounds of this authority here because the Exculpation Provision is limited to independent directors, and Fifth Circuit law is clear that disinterested directors who owe fiduciary duties to a debtor may be exculpated for acts taken pursuant to those duties. *See, e.g.*, *Smyth*, 207 F.3d at 762 (exculpating a chapter 11 trustee after noting that trustees are disinterested); *Pacific Lumber*, 584 F.3d at 253 ("The Creditors' Committee and its members are the only *disinterested* volunteers among the parties sought to be released here."); *Highland*, 48 F.4th at 437.

[9] The Debtors' directors—including the IB Independents—are "Related Parties" of the Debtors. Plan, Art. I.A.200.

These authorities compel approval of the Exculpation Provision and the inclusion of the IB Independents in "Exculpated Parties." *See* Confirmation Brief ¶ 111 (citing multiple instances where this Court approved exculpation provisions like the one at issue here and also citing one unpublished Bankruptcy Court opinion that reached a contrary conclusion).

C. The U.S. Trustee's Attempts To Distinguish *Highland* Are Meritless

28. The U.S. Trustee's Limited Objection, by contrast, would have this Court *narrow* the scope of Fifth Circuit law without so much as an iota of support in any of the cases on which he relies. According to the U.S. Trustee, under *Highland* and its antecedents, an independent director can be exculpated only if the independent director was appointed (a) by court order, (b) "to act together as [a] bankruptcy trustee" as part of a "unique corporate governance structure," (c) after the commencement of a chapter 11 case. U.S. Trustee Obj. ¶ 11. But this reading misconstrues the relevant factual record in *Highland* and relies on factual distinctions that are immaterial to the holdings in the applicable Fifth Circuit cases.

(i) The Highland Independents Were Not Appointed by Court Order

29. First, the U.S. Trustee's assertion that appointment by court order is a prerequisite to exculpation of an independent director is dispelled by the fact that ***the Highland Independents were not appointed by court order***; in fact, the Highland Independents were not even directors of Highland Capital—they were appointed as directors at Strand, Highland Capital's *non-debtor* general partner, which controlled the debtor. Ex. C ¶ 1 (the settlement "contemplates the creation of a new independent board of directors . . . at . . . the Debtor's general partner and ultimate party in control"); *In re Highland Cap. Mgmt., L.P. ("Highland Aug. 2021 Opinion")*, No. 19-34054-SGJ11, 2021 WL 3418657 at * 5 (Bankr. N.D. Tex. Aug. 4, 2021) ("Three new independent directors . . . were appointed to govern the Debtor's general partner . . . which, in turn, manages the Debtor."), *aff'd in part, vacated in part sub nom. Charitable DAF Fund LP v. Highland Cap.*

Mgmt. LP, No. 3:21-CV-01974-X, 2022 WL 4538466 (N.D. Tex. Sept. 28, 2022). The Settlement Order was necessary because the Highland-UCC Settlement contemplated that the debtor would pay and indemnify the Highland Independents. *See* Ex. G ¶ 15 ("[T]hrough the Settlement Motion, the Debtor is *only* requesting authority from this Court to pay the Independent Directors [with estate assets] . . . . ***The Debtor is not seeking authority to appoint the Independent Directors to the board of a non-debtor entity***.") (first emphasis in original).[10]

30. It also bears emphasis that, far from being assigned any duties under the Settlement Order, the Highland Independents owed fiduciary duties to Highland Capital by operation of Delaware corporate law and the governance documents relating to Strand, Highland Capital's non-debtor general partner. *See* Ex. H at 76:14–19 ("[O]bviously, this Debtor is a limited partnership and it acts through a general partner. It's the general partner that controls the Debtor entity. And while . . . the general partner may not technically be in bankruptcy, it's the structure of these entities such that it controls the Debtor."). This Court has held that whoever manages a bankruptcy estate—even if it is "puppeteers acting through a general partner"—owes fiduciary duties to the estate. *In re Houston Reg'l Sports Network, L.P. ("Houston Regional")*, 505 B.R. 468, 482 (Bankr. S.D. Tex. 2014).[11] Indeed, Judge Jernigan agreed with this Court's reasoning in *Houston*

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[10] Indeed, Highland Capital further clarified as follows:

> [T]he Debtor is not seeking authority from this Court to appoint the Independent Directors. Nor is the Debtor seeking this Court's authority, generally, to enter into the Governing Documents. [The general partner], as a non-debtor entity, is appointing the Independent Directors and executing the Governing Documents to effectuate such appointment of its own volition consistent with Delaware corporate law and its governing documents.

Ex. G ¶ 14.

[11] For the avoidance of doubt, this Court's ruling in *Houston Regional* with respect to fiduciary duties was preliminary. 505 B.R. at 481, n.3 ("Although the Court strongly believes that the directors have fiduciary responsibilities, the Court is not reaching a final conclusion on this matter until and unless an alleged breach of the duty occurs. Instead, the Court describes the reasons why it has concluded—on a preliminary basis—that fiduciary responsibilities exist.").

Regional and held that Strand "has fiduciary duties to the Debtor as a general partner." Ex. F at 113:13–17. Thus, the Highland Independents' duties to Highland Capital flowed independently of any court order.

31. Here, just like in *Highland*, the IB Independents were not appointed by court order. And just like the Highland Independents, all fiduciary duties owed by the IB Independents to the Debtors and their Estates were creatures of bankruptcy and state corporate law. As such, the IB Independents are entitled to exculpation because they exercised the rights and performed the duties of a trustee "*[l]ike a debtor-in-possession*" under section 1107(a). *Highland*, 48 F.4th at 437. The fact that the IB Independents were not appointed by court order is therefore irrelevant to the question of whether the IB Independents may be exculpated under the Plan.[12]

(ii) The Highland Independents Were Not Appointed To Act as a Bankruptcy Trustee

32. The U.S. Trustee next asserts that an independent director may not be exculpated unless the independent director was appointed "to act . . . as [a] bankruptcy trustee" as part of a "unique corporate governance structure." U.S. Trustee Obj. ¶ 11. This again misses the mark, as neither the Settlement Order in *Highland*, Ex. D, nor the settlement term sheet it approved, Ex. C at Docket No. 281-1, remotely suggest that the Highland Independents were appointed as a chapter 11 trustee *pursuant to* section 1104(a), which governs the appointment of a chapter 11 trustee.[13]

[12] Even if the Highland Independents had in fact been appointed by court order, that would be a distinction without a difference. In *Ondova*, the Fifth Circuit held (albeit in a per curiam opinion) that estate fiduciaries could be exculpated for "actions taken within the scope of their official duties," even if such actions were not "taken pursuant to a court order." *Ondova*, 914 F.3d at 993. *Ondova*, thus, teaches that exculpation is not limited to "actions taken pursuant to a court order." *See id.*

In *Highland*, the Fifth Circuit noted that "[t]he parties agree[d] that Pacific Lumber control[led]." 48 F.4th at 435. Therefore, the Fifth Circuit cited *Ondova* in *Highland* but did not discuss it in any detail.

[13] Indeed, the only mention of a chapter 11 trustee in either document is in the term sheet: one of the settlement terms between Highland Capital and the Highland UCC was that the Highland UCC's right to seek

The foregoing is underscored by the fact that the Region 6 UST continued to prosecute its motion for appointment of a chapter 11 trustee *notwithstanding* the bankruptcy court's approval of the Highland-UCC Settlement and the appointment of the Highland Independents.

33. Indeed, as Judge Jernigan clarified on multiple occasions, the appointment of the Highland Independents was ***in lieu*** of a chapter 11 trustee. *E.g.*, Ex. F at 113:7–12 (noting that, in the Highland UCC's "reasonable view," the Highland Independents "could serve as a much more favorable vehicle *than a Chapter 11 trustee*"); *id.* at 113:22–114:8 (explaining the advantages that the Highland Independents had over a chapter 11 trustee); *id.* at 116:14–19 (finding that the installation of the Highland Independents "fixed the problem" that "existed as of the petition date" that may have otherwise given cause for appointing a chapter 11 trustee); *Highland Aug. 2021 Opinion*, at *8 ("the [Highland Independents] were proposed by the UCC *to avoid the appointment of a trustee*"); *In re Highland Cap. Mgmt., L.P.*, No. 19-34054-SGJ-11, 2023 WL 5523949, at *2, n.7 (Bankr. N.D. Tex. Aug. 25, 2023) (noting that the Highland Independents "were appointed *in lieu of a chapter 11 trustee being appointed*").

34. In reality, as the Fifth Circuit recognized, the Highland Independents were merely akin to debtors in possession exercising the rights and duties of a trustee under section 1107(a). In this respect, the Highland Independents' roles were no different than that of the IB Independents or any other independent director of a distressed company. True, the circumstances surrounding the Highland Independents' role and the tasks they needed to undertake in order to adequately fulfill their role were different, but that is an axiomatic truth: no two directorships will ever be the same. Far from providing a reason to deny exculpation from the IB Independents, the fact that the

appointment of a chapter 11 trustee was not waived by their consent to the new governance structure. *See* Ex. C at Docket No. 281-1.

Highland Independents were not appointed as trustees *supports* exculpating the identically-situated IB Independents here.

(iii) Post-Petition Appointment Is Irrelevant

35. Finally, contrary to the U.S. Trustee's assertions, the timing of the appointment of an independent director is irrelevant to whether an independent director may be exculpated under Fifth Circuit jurisprudence. Nowhere in the Fifth Circuit's *Highland* opinion did it state that the timing of the appointment was a relevant factor in affirming the scope of exculpation in that case. Moreover, the U.S. Trustee cannot articulate a persuasive reason why it should matter. Even if the U.S. Trustee's proposed limitation was the law (and it is not), there would be an easy workaround that would render such "rule" pointless: independent directors could resign immediately before a debtor files its bankruptcy petition and then have the debtor reappoint them immediately after. That sort of formalism serves no function. As the Fifth Circuit in *Highland* made clear, consistent with decades of case law upholding exculpation for disinterested non-debtors who owe fiduciary duties to, and serve, a debtor's bankruptcy estate, exculpation of independent directors is permissible. 48 F.4th at 437.

II. Narrowing Fifth Circuit Jurisprudence May Harm Future Distressed Companies

36. Finally, as the Debtors established in their Confirmation Brief, the new rule proposed by the U.S. Trustee—which would essentially categorically bar exculpation of independent directors—is contrary to the public policy rationale animating the Fifth Circuit's exculpation jurisprudence.

37. In sustaining Highland Capital's objection to the U.S. Trustee's motion to appoint a chapter 11 trustee, Judge Jernigan correctly observed that replacement of directors or management before or after a bankruptcy filing is routine:

> This case is no different than numerous other large Chapter 11 cases when, often before the petition date but sometimes after, old board members resign, new board members are brought in, CEOs are ousted. It's common. It avoids the possible need for a Chapter 11 trustee. It brings integrity to the process and hopefully preserves the ability to reorganize. Creditors sometimes demand it. The debtor's professionals sometimes suggest it. Sometimes, current management resigns before being told they'll need to. This is one of the realities with distressed companies.

Ex. F at 115:25–116:9.

38. In approving appropriately tailored exculpation provisions over the years, the Fifth Circuit has repeatedly emphasized the importance in striking a balance between discouraging bad behavior and encouraging qualified, disinterested individuals to serve the estates. *Smyth*, 207 F.3d at 761–62 (noting that there are "conflicting policy considerations; too little protection might expose a [fiduciary] to excessive personal liability and dissuade capable people from becoming [fiduciaries], while too much protection would jeopardize the goal of responsible estate management"); *Pacific Lumber*, 584 F.3d at 253 (observing that, absent discouraging actions against committee members, it would "be extremely difficult to find members to serve on an official committee" (citing 7 Collier on Bankr. ¶ 1103.05(4)(b) (15th ed. 2018))).

39. These same considerations further support rejecting the U.S. Trustee's counterarguments here. Absent receiving basic protective immunities afforded to other estate fiduciaries in chapter 11 proceedings, qualified individuals would be reluctant to serve as independent directors, which would disadvantage potential chapter 11 debtors who may want or need to appoint independent directors to successfully reorganize, including through a chapter 11 filing. *See In re Alpha Nat. Res., Inc.*, 556 B.R. 249, 260–61 (Bankr. E.D. Va. 2016) ("As a policy matter, exculpations are necessary to ensure that capable, skilled individuals are willing to assist in the reorganization efforts in chapter 11 cases."); Am. Bankr. Inst. Comm'n to Study the Reform of Chapter 11: 2012-2014, *Final Report and Recommendations*, 23 Am. Bankr. Inst. L. Rev. 1,

273 (2015) (the public policy underlying exculpation provisions includes "encouraging parties to engage in the process and assist the debtor in achieving a confirmable plan—actions that committees, committee members, other estate representatives and their professionals, and certain parties (such as key lenders) may not be willing to undertake in the face of litigation risk"); Br. of the Am. Coll. of Bankr. as Amicus Curiae in Supp. of Neither Party, *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023) (No. 23-124).

[Remainder of page intentionally left blank]

WHEREFORE, for the reasons stated herein, the Reorganized Debtors respectfully (a) submit that applicable Fifth Circuit law, including *Highland*, allows the IB Independents to be "Exculpated Parties" under the Plan and (b) request that the Bankruptcy Court (i) overrule the U.S. Trustee's Limited Objection with prejudice and (ii) rule that "the [IB Independents] shall . . . be deemed 'Exculpated Parties.'" *See* Confirmation Order, ¶ 29(b).

Dated: March 8, 2024
Houston, Texas

HAYNES AND BOONE, LLP

/s/ Charles A. Beckham, Jr.

Charles A. Beckham, Jr. (TX Bar No. 02016600)
Arsalan Muhammad (TX Bar No. 24074771)
David A. Trausch (TX Bar No. 24113513)
1221 McKinney Street, Suite 4000
Houston, Texas 77010
Tel.: (713) 547-2000
Email: charles.beckham@haynesboone.com
arsalan.muhammad@haynesboone.com
david.trausch@haynesboone.com

-and-

DAVIS POLK & WARDWELL LLP
Brian M. Resnick (admitted *pro hac vice*)
Elliot Moskowitz (admitted *pro hac vice*)
Steven Z. Szanzer (admitted *pro hac vice*)
Garrett L. Cardillo (admitted *pro hac vice*)
Moshe Melcer (admitted *pro hac vice*)
450 Lexington Avenue
New York, New York 10017
Tel.: (212) 450-4000
Email: brian.resnick@davispolk.com
elliot.moskowitz@davispolk.com
steven.szanzer@davispolk.com
garrett.cardillo@davispolk.com
moshe.melcer@davispolk.com

Counsel to the Reorganized Debtors

Certificate of Service

I certify that, on March 8, 2024, I caused a copy of the foregoing document to be served via the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Charles A. Beckham, Jr.
Charles A. Beckham, Jr.

Exhibit A

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	§	CASE NO. 23-90716-11
	§	HOUSTON, TEXAS
INSTANT BRANDS ACQUISITION HOLDINGS, INC., ET AL,	§	MONDAY,
	§	FEBRUARY 22, 2024
DEBTORS.	§	10:30 A.M. TO 11:57 A.M.

CONFIRMATION HEARING

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

(Recorded via CourtSpeak; No log notes provided.)

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APPEARANCES:

FOR THE DEBTORS:	DAVIS POLK & WARDWELL, LLP Brian Resnick, Esq. Elliot Moskowitz, Esq. 450 Lexington Avenue New York, NY 10017 212-450-4000
FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS:	DLA PIPER LLP (US) James P. Muenker, Esq. 1900 North Pearl Street Suite 2200 Dallas, TX 75201 214-743-4559
FOR THE OBJECTING SUPPLIER, MIDEA:	ARENTFOX SCHIFF Brett D. Goodman, Esq. 1301 Avenue of the Americas 42nd Floor New York, NY 10019 212-484-3900
FOR THE US TRUSTEE:	Jayson Ruff, Esq. 515 Rusk Ave., Ste. 3516 Houston, TX 77002

(Please also see Electronic Appearances.)

HOUSTON, TEXAS; MONDAY, FEBRUARY 22, 2024; 10:30 A.M.

THE COURT: Okay. We're here in the Instant Brands acquisition case. It's 23-90716. You should have made electronic appearances. Let's go ahead and start the hearing, if we could, please.

If you wish to speak on the phone, you'll need to press five Star when you're ready to speak.

Good morning.

MR. RESNICK: Good morning, Your Honor. I'm Brian Resnick of Davis Polk & Wardwell on behalf of the Debtors, I'm joined today by my colleagues, Elliott Moskowitz, Steven Sandler, and Garrett Cardillo, as well as our co-counsel from Haynes and Boone, Arsalan Muhammad and David Trausch, as well as the Debtor's CRO, Adam Hollerbach from AlixPartners and Scott Cockerham from AlixPartners, as well.

On the line, Your Honor, we should have members of the Instant Brands board and management team, as well as I see Ronen Bojmel from Guggenheim is is on video as well. And Emily Young from Epiq is the Debtor's claims and solicitation agent.

And Your Honor, as you know, we are here today for Confirmation of the Plan. But as you're also aware, Your Honor, we have an outstanding dispute with Medea that I believe we were awaiting a ruling on.

So before continuing, I just wanted to see if Your Honor has a preference of how to handle the process today.

THE COURT: I've reviewed all the briefing that got filed with respect to the dispute. I'd made a preliminary ruling last week. The briefing confirms the preliminary ruling. Not going to restate it here. That's the ruling.

MR. RESNICK: Thank you, Your Honor. We appreciate that and I would note that that in light of that ruling, our understanding is that we also have resolution as of about ten minutes ago in the hallway of Medea's plan objections as well, which we will we'll get into, Your Honor, but I think that that will be resolved.

THE COURT: Thank you.

MR. RESNICK: So Your Honor, we filed a revised form of proposed Confirmation Order yesterday at Docket No. 1121, along with the changed pages only redline at Docket No. 1124. We filed the solicitation version of the combined Disclosure Statement and Plan on January 11th at Docket No. 926-1. This is the version that is attached to the proposed order.

And we filed our confirmation brief at Docket No. 1117.

So, Your Honor, by way of housekeeping first, I

would like to move into evidence the Declarations in support of the Plan. First is the Declaration of Adam Hollerbach, the company's CRO, filed a Docket No. 1118, which provides the general evidentiary support for the Plan.

The second is the Declaration of Mr. Ronan Bojmel of Guggenheim that was filed at Docket No. 1119, which provides the evidentiary support for Exhibit C to the combined Disclosure Statement and Plan, which is the valuation analysis.

And third is the Declaration of Emily Young of Epiq, filed at Docket No. 1115, regarding the solicitation, voting, and tabulation of ballots.

As noted earlier, the Declarants are in the live and virtual courtroom and available for cross-examination. Our understanding, though, is that none of the objectors intend to conduct a cross-examination.

THE COURT: Is there any objection to the admission of ECF 1118, 1119 and 1115 as substantive evidence at today's hearing?

(No audible response.)

THE COURT: The three Declarations are admitted.

Does any party have any cross-examination for any of the three declarants?

(No audible response.)

THE COURT: All right. There is no

cross-examination.

Go ahead, Mr. Resnick.

MR. RESNICK: Thank you, Your Honor.

There were three formal objections filed ahead of the confirmation objection deadline. One was by Wintrust (phonetic), and that was resolved consensually with language we added. That was a cure cost objection.

Certain pre-petition Plaintiffs who sued the Debtors for alleged economic harm stemming from a labeling defect, filed a limited objection yesterday. That was two weeks after the objection deadline. But notwithstanding the lateness of it, we are agreeing to confirm on the Record, Your Honor, that, in fact, that harm is used in the defined term, product liability claim, includes economic harm, as well. So I think with that that resolves their issue as we understand it.

THE COURT: Let me ask them to address that question then. We do have an objection that is filed by -- I believe it is Michelle Havens and L.C. Wilkerson. Would their counsel please press five star if you're not in the courtroom and confirm that that resolves your objection.

(No audible response.)

THE COURT: I don't see them appearing. That sounds to me like it should resolve the objection. That's very similar to the language that they asked me to be

included in the written Confirmation Order. We're going to make a Docket entry that the parties stipulate that economic harms are, in fact, included in the harms that are preserved for litigation.

And with that, I will overrule the objection based on what appears to be a resolution of it, but also a failure to prosecute it. And given that announcement, I think there is no longer a valid objection.

MR. RESNICK: Thank you, Your Honor.

That leaves two timely filed formal objections on the Docket. One is the objection by Medea, and as mentioned, that is resolved. And in due course, I will turn it over to my colleague, Mr. Moskowitz, who will explain the resolution and then the objection by the United States Trustee's Office on the exculpation issue.

Before turning to that, Your Honor, I just wanted to say, you know, as Your Honor is aware, you know, arriving at this point, this is a big deal in the case. This has been, you know, quite a case, and it would not be possible, but for the countless hours of hard work and good faith and extensive negotiations and cooperation among the Debtors and the various parties-in-interest.

And so with that, Your Honor, in terms of the Plan, I would note that -- I'm not going to -- I know Your Honor has had quite a week and and quite a day yesterday and

evening last night. I'm happy to talk about any aspect of it, but I'm inclined to keep it relatively brief and only go into the things that Your Honor needs to know.

Our filed brief covers all the confirmation standards, and I don't think Your Honor needs me to repeat them.

I would note that this Plan was very heavily voted in favor on by all -- it was voted in favor of by all of the lender class and by most of the unsecured creditors, other than one that swamped the amount test. And that is a potential target of the litigation trust. So it's, of course, not surprising that someone who's a target of that trust voted against the Plan. And given the magnitude of their claim that caused the unsecured classes to reject.

But if it weren't for that vote, we would have overwhelmingly had the vote in favor. So with that, Your Honor, I would note -- sorry, one more thing to note that we resolved Tianxi's issue. And apologies if I'm mispronouncing that. I think everybody does, but -- and we filed a stipulation on the Docket and that is at Docket 1131. There's a redacted version at 1130, and that one is awaiting Your Honor's signature at 1130.

THE COURT: I had not seen that yet. Let me take a look.

MR. RESNICK: Thank you.

THE COURT: Is 1130 the cleaner or the redacted?

MR. RESNICK: 1130 is the redacted.

THE COURT: So I really need to look at this.

(Pause in the proceedings.)

THE COURT: Is the draft language in paragraph 4 of the stipulation incorporated in the current draft of the Confirmation Order?

MR. RESNICK: It certainly should be. Yes, it is, Your Honor.

THE COURT: Thank you.

MR. RESNICK: It's paragraph 30 of the Confirmation Order.

THE COURT: Is there any objection to the Court approving the joint stipulation that was filed at ECF 31?

(No audible response.)

MR. RESNICK: I think that's 1131.

THE COURT: Right, this is the unredacted order only, not the unredacted motion.

MR. RESNICK: Got it.

THE COURT: Right. If we're sending the order, it's going to become public. So am I misreading something that you're telling me?

I'll think it off for a minute, but isn't that the right one to do?

MR. RESNICK: 1130 is the one that is public.

THE COURT: The motion. But the order -- you're not asking me to seal the order, are you?

MR. RESNICK: Mr. Sands is going to address this one.

MR. SANDS: We filed two versions of the order itself, one under 1130 and the other one, which is not under -- which is the public version. And then the 1131 is the sealed version.

THE COURT: Of the order?

MR. SANDS: Of the order itself, Correct.

THE COURT: Why are we sealing an order?

MR. SANDS: Because it's the stipulation that has provisions in it that we had to keep confidential.

THE COURT: How are any -- how is anyone going to know that I've issued an order? I mean, I'm not sure what we're doing here. You're saying 1130 is an order that's different than 1131?

MR. RESNICK: Yes. It doesn't include there's the redacted language in 1130. It is visible to Your Honor in 1131.

So I would propose like --

THE COURT: Which one do you want me to sign?

MR. RESNICK: Both.

THE COURT: Both. Hold on.

(Pause in the proceedings.)

MR. RESNICK: Just a few words in paragraph 6, Your Honor.

THE COURT: Yeah. I want to see what those are.

MR. RESNICK: And Your Honor, the the attachment to the stipulation, which is the commercial agreement between the two parties, is only attached to 1031, not 1030.

THE COURT: 1131.

MR. RESNICK: I'm sorry. 1131, not 1130.

THE COURT: Why are we sealing those words in paragraph 6, where those don't seem confidential even a little bit? Am I missing something?

MR. RESNICK: Those are -- it deals with potential eventualities that are not public right now. And the fact that we have to address those issues possibly in the future, we don't want to cause any consternation whatsoever in the public.

THE COURT: That's -- I just. I don't see why we would keep that confidential.

MR. RESNICK: Right, we could resubmit the order without that redacted version and just make sure that we redact the agreement that's actually attached.

THE COURT: But can I tell you what I'll be comfortable with? And let's -- I think it'll work for you is let's delete the redactions in six. I don't think they're needed. And then change the order to reference the

documents that are filed under seal at 1131, to where we have a nice clean order. It does reference something that's under seal that we're approving, which is the agreement, but I'm okay with that.

I'd like to -- I want the order to be as public as possible.

MR. RESNICK: Okay.

THE COURT: Will that work? Just incorporated by reference to the other thing that got sealed?

MR. RESNICK: Yeah, I think it -- I think it should work.

THE COURT: Okay. I'm going to orally order that 1131 be permanently sealed, and then we'll just call for an agreed order to be uploaded that implements that.

Thank you.

MR. RESNICK: Thank you, Your Honor.

THE COURT: So where does that take us?

MR. RESNICK: I think that takes us to the only two things to address, which is the settlement -- the plan objection settlement with Medea and as well as the US Trustee's objection. I'm happy to take them in either order.

THE COURT: Let me just say I told you my ruling on Medea. But I really did appreciate both parties or all three parties filing the briefs. They they were exactly

what I needed in order to really review the final case law. I did read the cases and the ruling I made was correct, but the briefing was important that we could be sure to get it correct. And I'm very confident now in the ruling.

But I appreciate both y'all's briefs and Medea's brief and the lender's briefs that came in on that. I know that was combined a bit, but they were helpful. So thank you.

MR. RESNICK: Thank you, Your Honor.

THE COURT: All right. So let's go to the US -- or what is the resolution with Medea. And we have that announcement made.

MR. RESNICK: Yep.

MR. MOSKOWITZ: Good morning, Your Honor. For the Record, Elliot Moskowitz of Davis Polk for the Debtors.

I am pleased to report that we have a resolution of Medea's plan objection. And I think it's -- I think it's pretty clear what the resolution is.

And just to tell you how it came about, so they raised a number of issues and their plan objection. We filed a brief responding to them. They reviewed that brief, and we conferred. And in fact, there is language in that brief that they found to be very helpful in stating plainly really what the plan already says.

And so the resolution is, I will read into the

Record the language that's in our brief. It's a sentence or two and that it doesn't change anything about the Plan. It just confirms the Debtor's understanding and their understanding of what these Plan provisions actually say. And just helpful to have, like, an avoidance of doubt, basically, in the Record.

THE COURT: So let's do it.

MR. MOSKOWITZ: I shall read it. This is on the --

THE COURT: Do we have anybody from Media here or on the phone?

MR. MOSKOWITZ: Yes, Your Honor.

THE COURT: Okay, great.

MR. MOSKOWITZ: All right. So just for the Record, I'm reading from Docket No. 1117. This is page five of our brief. In particular, the provision that I'm reading from is paragraph 6(c), where it starts with the plan is feasible. The key part of it is where it says at bottom. But I'm just going to read the sentence before, which is is helpful for context.

So what we say there, and we believe all this to be true and sitting in the Plan is as follows:

Contrary to the objecting supplier's contention, Docket No. 1024, paragraphs 2931, the combined DSM plan provides great detail regarding product liability claims and

their treatment under the Plan, e.g., Articles 2(d), 7(l), and 10(g)(2).

And here's the key language that they wanted us to report in Court as our as part of the resolution.

"At bottom, such claims fit into one of two categories pre-petition general unsecured claims Class 4, or administrative claims, depending on the temporal nature of the claims. Given the service and publication of the bar date notice in accordance with the bar date order, the universe of pre-petition product liability claims is fixed and pursuant to Article 5(b)(1), the amount of post-petition product liability claims entitled to Administrative Claims status, if any, will be known by the Administrative Claims bar date."

That's the part that they wanted me to read into the Record. In addition also reporting something that's already known, but just to read it into the Record.

"The bar date notice was published in accordance with this Court's directives in USA Today."

I believe that that is a complete recitation of the resolution to the entire Plan objection. But of course, I'll cede the podium if my colleague has anything further to add.

THE COURT: Thank you.

MR. GOODMAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. GOODMAN: Brett Goodman, ArentFox Schiff for Medea.

Just a few things, Your Honor. First of all, thank you for the time that your Court Chambers has afforded us over the last several weeks, it's obviously been quite a sprint to get to this point. Extensive briefing and work from all the firms involved, and I was on the Hornblower call first day, last night, so I. I know how busy your chambers has been, so.

THE COURT: It just sort of all got combined in one day. We're actually not that busy. If you look at it over several days. It was just a bad day yesterday, so.

MR. GOODMAN: Understood.

THE COURT: Whataburger was delicious at 12:15 this morning.

(Laughter)

MR. GOODMAN: Understand that as well. I've been there, too, but we do thank you, Your Honor.

And Medea, obviously not surprisingly, respectfully disagrees with the Court's confirmation of the preliminary ruling, and the product liability and third party indemnification provisions of the Plan with respect to indemnity claims and rights with respect to Medea.

We understand your ruling. We reserve our rights

with respect to any appeal, as well as the Phase 2 briefing component under our stipulation with the Debtors. But with that, we don't view that as an impediment to confirmation. So that's one thing, Your Honor, and Mr. Moskowitz adequately read into the Record the certain clarifications that were helpful to us with respect to some of the objections that we had had raised.

I did also liked and wanted to note that obviously there was publication of the combined Plan and Disclosure Statement as well.

The only other item I wanted to address, and I think we have agreement on is that the Debtors will be providing to us a list within 24 hours of today of all of the defined product liability claims. As of today, obviously, there's the administrative claims bar date that that, you know, will continue, but what we had discussed over the last several weeks and out in the hallways we have our list, they have theirs. If theirs is different or larger or in any way than ours, we just need to reconcile that for the purposes of that.

So I understand that that representation has been made. And with that, Your Honor, we don't have anything further for today.

THE COURT: I just want to be sure the parties are in agreement on something that that you said. And I

don't have any issue with it here.

MR. GOODMAN: Sure.

THE COURT: I don't want there to be ambiguity. In terms of our ruling on whether the purchase orders are their own contracts, et cetera, you're reserving the right to appeal that. That's fine with me.

But then you said that won't affect confirmation, and I want to know if there is an agreement by all parties that it won't affect confirmation, so that if, for example, we get reversed on that ruling and it turns out that everything was assigned over, including the indemnity rights and so they don't apply, is everyone agreeing that confirmation doesn't cut off that argument? Because it sounds like it's important to you.

MR. GOODMAN: Yeah, it's a good question, Your Honor.

THE COURT: And I don't know that that's what -- I thought they told me that you --

MR. GOODMAN: From Medea's standpoint, it doesn't get in the way of what the Debtors need to do today. But I guess that's a question for --

THE COURT: I want to know what the agreement is on that.

MR. GOODMAN: For others.

THE COURT: This is just an avoidance of

ambiguity in terms of what we're doing, Mr. Moskowitz, I don't care about the resolution, but I don't want there to be ambiguity about what we're doing.

MR. MOSKOWITZ: Thank you, Your Honor. Elliot Moskowitz, for the Record.

The short answer is that there's no impediment to confirmation anymore. Their plan objection is resolved. Maybe Your Honor is asking a slightly different question, which is, okay, the Plan gets confirmed today. And then what happens if a long time from now, God forbid, there's a reversal of Your Honor's --

THE COURT: Tomorrow the District Court steps in and said, "My God, how did he do that?" Right? You know, they reversed me all of a sudden.

MR. MOSKOWITZ: Impossible, but let's just conjure it up. So then what happens with respect to confirmation? I think the Plan remains confirmed, and that's -- and I'll just -- let me just --

THE COURT: I do, too. I just want to be sure that we're all on the same wavelength, because it seems to me that if I got this wrong, that you've done your best to get those personal injury claimants the best deal they can can get, and there isn't really a way to come back and amend and make it any better anyway. So if I've got it wrong, I think the plan still works. It just means people may get

paid less and that was a risk fully described.

I'm okay with all this. I just want to be sure whether it was part of -- just a mutual understanding, and I think it's all the right answer. But, again, this is just to avoid ambiguity six months from now.

MR. MOSKOWITZ: Think it's all correct. Let me just have 30 seconds to confer, Your Honor, if I may?

Thank you so much.

(Pause in the proceedings.)

MR. GOODMAN: Your Honor, if it would be helpful, while it might be helpful for their conversation as well. Again, Brett Goodman for for Medea.

I just wanted to to note that there's language in the Confirmation Order that was adopted from the stipulation between the parties with respect to the Phase One and Phase Two briefing that stays the product liability claims and certain third party indemnification pending any appeals through a final order.

There's also a limited -- a more limited stay with respect to certain other regulatory-type retained causes of action. So to the extent the Plan is confirmed and we go through the appeal process with respect to the claims that I think Your Honor is concerned about that are or noting that are defined, they're not proceeding anyway until there's a final ruling.

So just to the extent that that's helpful, because that is included in the Confirmation Order.

THE COURT: The other thing I think -- tell me if I'm wrong about this, your client may have all sorts of defenses to liability, but there's nothing here that bars a direct suit against your client. Right? You're just saying we don't have liability, but individuals could still sue your client, and then --

MR. GOODMAN: Oh, direct actions were -- are -- yeah, they're out there.

THE COURT: So we're not airing individuals. I don't think by doing it this way. Yeah. Okay. I just wanted to be --

MR. GOODMAN: It's just with respect, I think, to the nominal nature that they're being treated.

THE COURT: Right.

MR. GRASSO: Good morning, Your Honor. Sean Grasso (phonetic), Dechert LLP, for the Ad Hoc Group, of course, of the lenders, we agree with your statement. The Plan needs -- can be confirmed and either will go effective or not on the effective date, depending on what they do or they don't do. And all parties stands on whatever happens as a result of the confirmation.

Nobody waives anything. Everybody deserves everything. But the Plan can be confirmed based on your

understanding.

THE COURT: I don't think if I confirm it that y'all can then not go effective because you don't like something.

MR. GRASSO: No, no, no, no, of course not.

THE COURT: Okay.

MR. GRASSO: People can do certain things to prevent the plan from going effective. And if they do it, we'll deal with it. If they don't, they don't. And -- but we understand that at least on our side, we take the risk of reversal. We think the risk is extremely minimal with all due respect. But we understand that.

THE COURT: I think the ruling was perfect.

MR. GRASSO: I absolutely agree and thank you very much.

THE COURT: Thank you.

MR. Moskowitz?

MR. MOSKOWITZ: Again for the Record, Elliot Moskowitz.

That's all fine. The Plan can be confirmed. No issue. No one's waiving any rights, I don't think. I don't think Your Honor is asking anyone to waive any rights with respect to what happens afterwards, but -- and so with that, we're perfectly content to provide that answer.

Your Honor, just in response to the other couple

of points, my colleague was correct. We also did commit to providing in the next 24 hours the list. The only tweak, I would say is it's a draft list which will work -- if there are any discrepancies between our information and Medea's information, we will work to reconcile that. That's the whole point of providing the list.

So we will provide them with a draft list within the next 24 hours of the claims.

And then finally, Your Honor, not to quibble. Of course, they have their appeal rights. There is -- he did reference, though, a Phase Two. We will confer about that. It is our position that there should be no Phase Two based on where Your Honor's ruling came out.

Obviously it doesn't need to be decided today, but we will confer about that and if we have any issue or disputes about that, we'll come back to Your Honor.

Thank you.

THE COURT: All right. That work for you?

MALE SPEAKER: Your Honor, it does and obviously all rights reserved.

The only other question I had for Your Honor is that I'm assuming that there will be a separate decision in order from which to appeal from? I know, again, Chambers has been incredibly busy or how --

THE COURT: I'm happy to. I'm also happy to just

have the oral ruling stand and not write a separate opinion. The Docket entry, it's effectively an objection. And I'm overruling your objection by confirming the Plan that keeps these rights. It's just it turns out that under Fifth Circuit law, it is a -- this is the opposite of the purchase orders, right? It's a separable provision of the Plan.

If they find that there is no indemnity that can be enforced, that will override that provision of the plan. Right?

MALE SPEAKER: Your Honor, I do think it would be cleaner if if it's not an imposition on the Court to have a separate order. I think it will --

THE COURT: We'll get you a separate order.

MALE SPEAKER: Thank you.

THE COURT: It won't be today.

MALE SPEAKER: That's fine, Your Honor.

THE COURT: We'll get you a separate order.

MALE SPEAKER: That's fine.

THE COURT: Go ahead and make a note of that. We'll get that done.

MALE SPEAKER: Thank you.

THE COURT: Do you need findings of fact and conclusions of law separate, or do you just want the order that references back to what we said in our preliminary and now final ruling?

MALE SPEAKER: To the extent the findings of fact are adopted from that ruling, I would just --

THE COURT: It will normally say for the reasons set forth on the Record on these two dates, comma, we order -- are you okay with that?

MALE SPEAKER: If that's -- that's certainly fine, Your Honor. Thank you.

THE COURT: Okay. Thank you.

MALE SPEAKER: Yes. And I think Your Honor anticipated it, we would want to make sure that any order that's issued incorporates all of that, so that so that the District court has the benefit of Your Honor's analysis as stated on the Record. So as long as it scoops all that in, we're very content.

THE COURT: Yep. We'll do that.

MALE SPEAKER: Thank you, Your Honor.

MALE SPEAKER: Thank you, Your Honor.

THE COURT: Thank you.

Or save your money and don't appeal. Right? You could do that.

(Laughter)

MALE SPEAKER: Thank you, Your Honor. I believe that brings us to the US Trustee's objection.

THE COURT: Right. So I'm going to take about five minutes and cover some Chapter 13 matters, and then

we'll come back and we'll deal with the exculpation.

MALE SPEAKER: Perfect. Thank you, Your Honor.

THE COURT: Thank you.

Y'all can either stay here or leave, whatever you want to do.

(Recess taken from 10:59 a.m. to 11:10 a.m.)

THE COURT: All right, let's go back to our confirmation hearing.

How did y'all want to deal with the exculpation issue?

MR. RESNICK: Thank you, Your Honor.

Would you like to hear from me first, or Mr. Ruff?

THE COURT: I need to hear from you both. And don't care about the order.

MR. RESNICK: I'm happy to take it. Thank you, Your Honor. Once again for the Record, Brian Resnick of Davis Polk on behalf of the Debtors.

Your Honor, we addressed this in our brief, but suffice it to say, we were mindful of the resolution that Your Honor approved in *Talen*. And we crafted our exculpation provision accordingly. The Debtors, the Committee and its members and the Debtor's independent directors are broadly exculpated for post-petition actions, while all other parties are narrowly exculpated in line with

Section 1125 of the Bankruptcy Code, and both groups are then protected by a gatekeeper provision.

Your Honor, the Debtor's independent directors, like the independent directors who were exculpated in *Highland*, they owed, they owe, and they duly performed their fiduciary duties to the Debtors pursuant to Section 1107(a) of the Bankruptcy Code. It is undisputed that throughout the Chapter 11 cases, the Debtor's independent directors duly performed all their responsibilities with the utmost level of care, loyalty, good faith, and diligence.

This is set forth in Mr. Hollenbeck's Declaration, and the US Trustee does not contest that. Your Honor, controlling case law supports permitting exculpation of those who owe fiduciary duties to the estate under Section 1107(a), a Chapter 11 Debtor-In-Possession has the same duties, including fiduciary duties as a Trustee.

And as Your Honor wrote in *Houston Regional Sports Network* in a Chapter 11 case in which no Trustee is appointed, the fiduciary duties to the estate rest with the Debtor-In-Possession's directors and the Debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders, as would the Trustee for a Debtor out of out of possession.

Your Honor, the US Trustee contends that only a certain kind of especially unique type of director can be

exculpated under *Highland Capital*, one that is appointed post-petition pursuant to an order of the Bankruptcy Court establishing a unique corporate governance structure.

Your Honor, we disagree. When you look at the appointed post-petition part, we don't see any distinguishing factor. The appointment -- what happened in that case, as Your Honor is aware, the Court approved a settlement between the Debtors and the Unsecured Creditors Committee. It did set forth a governance structure, but there's nothing different or unique about the duties that were owed by the independent directors in that case and in here.

It was appointed by the Court, but we don't see that as a distinguishing factor. And then the US Trustee also claims that the directors in that case were appointed to act as the Debtor's Bankruptcy Trustee.

We don't agree with that reading of the *Highland Capital*. We don't think that Judge Jernigan's governance order -- it doesn't say anything about a Chapter 11 Trustee or these directors operating as the Chapter 11 Trustee. In fact, if you were to search the word Trustee is nowhere to be found in the governance order other than by reference to the US Trustee, which obviously has a different meaning.

I would note that anecdotally, for what it's worth. we have one of the same independent directors,

Mr. John Doubell (phonetic). Both is operating in Highland capital as an independent director as well as an Instant Brands, and his view is certainly that the role is very similar and in fact identical from a fiduciary perspective.

And so while it's an interesting fact that the independent directors in *Highland* were appointed pursuant to Court Order approving a settlement between the Debtors and the Unsecured Creditors Committee, we don't believe that that's where they derive their right to exculpation. That right stemmed from them being fiduciaries of the estate, irrespective of how, when, or in what fashion they assumed that role.

THE COURT: But wouldn't that be true of non-independent directors or fiduciaries of the estate? So there must be something more than just being a director that entitles you to exculpation or authorizes exculpation.

MR. RESNICK: Yes, Your Honor, I view that as a function of their independence, and --

THE COURT: Do you think they do need to be independent to be entitled to exculpation?

MR. RESNICK: My personal view is that they do not, but --

THE COURT: But a personal view doesn't matter.

MR. RESNICK: Exactly. But I understand that *Highland Capital*, I think, can be read to support the view

that they have to be independent fiduciaries.

THE COURT: So, I mean, I want to go back and reread *Highland Capital*, but you're telling me you think the distinction is if you have an independent director with fiduciary duties appointed for the purposes, among other things, of going through a reorganization, exculpation may be appropriate, but otherwise not. And it doesn't matter the date on which they undertook those duties is that --

MR. RESNICK: That's right, Your Honor. And I would say that, you know, these are directors that are operating for a Debtor-In-Possession under 1107(a), neither of these cases involve the appointment of a Chapter 11 Trustee under 1104(a), which may which may be different.

But so that's exactly right, Your Honor. We're not asking Your Honor to determine the scope of who is not entitled to indemnification under *Highland Capital*, because we're only asking Your Honor to determine that independent directors under these facts, which we think for the relevant purposes, are the same as as *Highland Capital* are entitled to exculpation.

THE COURT: Thank you.

MR. RESNICK: Thank you.

THE COURT: Morning, Mr. Ruff.

MR. RUFF: Good morning, Your Honor. Good to see you again.

THE COURT: Good to see you. I'm seeing too much of you these days.

MR. RUFF: That's -- well, my wife says the same thing, so. Your Honor, Jason Ruff for the United States Trustee for the Record.

Your Honor, the Fifth Circuit has been clear in both its decisions that have kind of focused on this area. And this is going back to *In re: Pacific Lumber* and then *Highland Capital*, basically, the Fifth Circuit reiterated just so that because in case it wasn't clear what it had already said in *In re: Pacific Lumber*, and the exculpations are limited to Debtors, Committees and their members and to Trustees and for activities taking place during the cases.

And in other words, from the petition date to the effective date. Any plans or cases cited by the Debtors here are simply not binding or authoritative. In other words, what may have been done in -- pursuant to an agreement or who knows what happened in those other cases? But what is clear is what the Fifth Circuit has already said in *In re: Highland Capital*.

THE COURT: I just want to be sure I'm hearing the distinction you're making correctly. So let's assume we have an independent director who begins to function prior to the date of the petition, continues to function after the date of the petition, and serves in a quasi-Trustee role

from the date of the petition forward.

Are you saying that I can exculpate that person from petition date forward, but that the exculpation can't apply to the pre-petition date conduct of that person? Are you saying something different?

MR. RUFF: No, Your Honor, I apologize for not being more clear.

THE COURT: No.

MR. RUFF: So let me just -- independent directors, our argument is I think the Debtors actually said what our argument was and and basically what *In re: Highland Capital* says is that independent directors are not entitled to exculpation, period, full stop -- unless they are appointed pursuant to a Court Order.

When you go back and read *In re: Highland Capital*, the Court highlighted the fact that there was in -- I forget what they called the order some sort, but there was an order that was entered in that directed the appointment of the independent director and set forth what their duties were. And so they were acting in effect because of the Court Order, as a pseudo Trustee.

So they weren't announcing new law or doing anything of a carve-out. Trustees have always been entitled to these protections, as is Debtors and and Committees and their members, the independent directors in that --

THE COURT: Not Debtors. You said as if Debtors.

MR. RUFF: Debtors.

THE COURT: A Debtor gets exculpation?

MR. RUFF: Debtors get exculpation, correct.

THE COURT: Okay.

MR. RUFF: I must be mumbling and and I apologize. My mom tried to get me to stop mumbling when I was a child and it never took.

THE COURT: You're not mumbling.

MR. RUFF: Your Honor, so again -- so just to be clear, it's Debtors, Committees and their members, and Trustees. The independent directors in *Highland Capital* again were appointed by the Court pursuant to an order post-petition.

THE COURT: Right.

MR. RUFF: That's why the Fifth Circuit viewed them as being -- as having the duties of a Trustee.

Now, I understand the logical maybe breakdown there in that, you know, Debtors are are innate, you know, entities other than what their officers and directors and employees do for them. But be that as it may, the Fifth Circuit has not allowed for officers or directors or employees or professionals or any other, quote/unquote, "Estate Fiduciaries" to be exculpated. The estate fiduciary's role that other districts or other circuits

allow exculpation for, is not the rule here in the Fifth Circuit? The Fifth --

THE COURT: I just want to put *Highland Capital* up on the screen, and I want to see this exclusionary language. I do understand that that's -- that was the situation we had in *Highland Capital*. And you may be right that in *Highland Capital*, it excludes everybody else.

MR. RUFF: I think if you go down to -- so it's 437 is the page where the -- I think the Court addresses.

THE COURT: Let me just see. Is this the right one?

MR. RUFF: I don't know that that is the right one. I can give you the cite, Your Honor.

THE COURT: Why don't you do that?

MR. RUFF: It's 48 F.4th 419 and then I believe you'd want to go down to 437 through 438.

(Pause in the proceedings.)

THE COURT: Okay.

(Pause in the proceedings.)

MR. RUFF: Your Honor, the paragraph there that has the notes at the front, 28 and 29, the in sum, I think.

THE COURT: I just want to read this language right here.

(Pause in the proceedings.)

THE COURT: So tell me how -- I understand the

facts in this case were that it was the independent directors were appointed pursuant to a Court Order. But if you have an independent director with the identical fiduciary duties, I don't see the Fifth Circuit as saying that the reason for the exculpation was the Court Order. The reason for the exculpation was they were independent governance Trustees.

Where? Tell me logically why we would make the distinction you're making, because it doesn't look like they limited it to somebody that is Court-ordered, but anybody else doesn't fall in here. I mean, it is very limited.

MR. RUFF: Well, Your Honor, I think if you went back and read *In re: Pacific Lumber*, there were officers and directors there, and they were carved out of the exculpation. And I think the only reason -- so in the in sum here talks about Debtors --

THE COURT: Officers and directors, fine. But I'm talking an independent director. Were there independent directors in *Pacific Lumber* that they didn't --

MR. RUFF: Well, I don't know that being an independent director necessarily makes that much of a difference, Your Honor. They all have fiduciary duties, which would be the Third Circuit's.

THE COURT: Right.

MR. RUFF: You know, they allow in the Third

Circuit, for example, exculpations for the fiduciaries of the estate, including officers, directors. We have a different rule here. It's limited to what the the Code allows for. And under 524(3) and 1103 for the Committees and then for Trustees under the -- in which I think was the *Halal* decision that that made certain that Trustees could be shielded by an exculpation for the activities undertaken in the case.

THE COURT: But it says right here like a Debtor-In-Possession --

MR. RUFF: It's right above that. It's as -- that leaves the one main question, can they exculpate independent directors, which is a capitalized term. It's these under *Pacific Lumber* and they answer in the affirmative.

And it says, "As the Bankruptcy Court's governance order clarified, non traditional as it may be, the independent directors were appointed again pursuant to that order, to act as a Bankruptcy Trustee for *Highland Capital*."

THE COURT: But then it says, like a Debtor-In-Possession, the independent directors are entitled to all the rights and powers of a Trustee, and they cite to 1107(a).

MR. RUFF: Correct, Your Honor, but I think you

can't divorce it from the sentence that's before it. They they were again appointed by the Court to act as a Trustee. It was the governance order that that appointed them and directed them to act.

THE COURT: You're saying without that order, an independent director is not exercising the rights and powers of a Trustee?

MR. RUFF: Correct. I don't think there's any case law that says that they are, not here in the Fifth Circuit.

THE COURT: 1107(a) is what they cite to that. They cite to 1107(a).

MR. RUFF: They're saying 1107(a) because they're they're viewing them as, again, I call a pseudo-Trustee. They're not they don't have the title of Trustee, but they were appointed pursuant to a Court Order and directed to act.

And Your Honor, I think the only fair way to read it, that the reason it's the only way, a fair way to read it this way is, again, because *In re: Pacific Lumber*, there were officers and directors and other estate, quote/unquote, "Fiduciaries," that they didn't extend exculpation to.

THE COURT: Were there independent directors in *Pacific Lumber*?

MR. RUFF: I can't say. I went back and read the

case yesterday.

THE COURT: Let's take a look. Let's take a look and see.

MR. RUFF: And in *Pacific Lumber* and all I could find was a search was -- of the terms was officers and directors.

THE COURT: But I think everybody's agreeing that a non-independent director is not entitled to exculpation under Fifth Circuit law. The issue is whether -- they're the reason why in *Highland Capital* that they were allowed exculpation is because they had to act independently as a Trustee would have to act independently with no other duties, or whether it was because there was an order that said that.

But let's just see if there were independent directors here, and I'll look for the word independent.

(Pause in the proceedings.)

THE COURT: The Creditors Committee and its members are the only disinterested volunteers among the parties sought to be released here. So they, assuming that sentence means what it seems to say, there were not independent directors because everybody else --

MR. RUFF: Well, there were -- and that

THE COURT: -- was interested, I guess.

MR. RUFF: There was, I think, a defined term in

the Plan. Release parties included the Committee, the Debtor's officers and directors and their attorneys, and --

THE COURT: Right.

MR. RUFF: -- it was very broad, as we often see in Plans of -- and so it was the released parties in that Plan that were given the exculpation.

THE COURT: Right.

MR. RUFF: And the Court struck out all those other parties except for the Debtors and the Committee in that case.

THE COURT: Right. But it says here -- and this is the sentence I want to look at. The Creditors Committee and its members are the only disinterested volunteers among the parties sought to be released here.

Now maybe you can say the others weren't volunteers because the independent directors are compensated.

MR. RUFF: No. They're appointed. Yeah, they're appointed by the shareholders of the company.

THE COURT: No, they're not, I don't think.

MR. RUFF: Independent directors are usually appointed by shareholders or shareholders.

THE COURT: Independent directors are appointed by shareholders?

MR. RUFF: Yeah. Your Honor, I did -- I can't

say how it is but for every single case, but in general, the shareholders get to appoint who their directors are going to be on their board.

THE COURT: Ordinarily, I just didn't know that independent directors --

MR. RUFF: Independent directors is the only thing that makes them independent is they're not -- they are just -- their only connection to the company is as a director of the company. They're not employed by the company otherwise. They're not major shareholder of the company. They are truly just an outsider coming in and sitting on the board.

But they have the same fiduciary duties as every other director that sits on that board.

THE COURT: Right.

MR. RUFF: Which run to the shareholders primarily.

THE COURT: Not after bankruptcy.

MR. RUFF: But then again, Your Honor, then why are not all directors? I mean, this is I understand the logical --

THE COURT: I don't know, no. I think that that's a really critical issue is why does independence matter?

MR. RUFF: I beg -- so with all due respect, I

disagree, Your Honor, because, I mean, professionals have the same duty that runs to the estate as well, too. The officers of the corporation have the same -- you know, the world changes once you file a bankruptcy for a Debtor, right? That's just the Debtor's duties change, but that's no different for an independent director versus a non-independent director.

So I don't think the distinction is there. Again, I don't think we can -- when you go back and look at the *Highland* decision, I don't think you can. The Court makes much of the fact -- and the distinguishing factor there is this Order that appointed those directors post-petition.

And I don't think -- and even if Your Honor doesn't agree with me on that, I don't think there's any facts here to suggest that this director in this case that's before Your Honor today was appointed post-petition. They were appointed pre-petition.

THE COURT: No, no. And I don't believe under *Highland* that they can be exculpated for anything that they did pre-petition.

I'm sustaining your objection to the extent that the exculpation might apply to their pre-petition conduct.

They can be gatekeepers for their pre-petition conduct, but not exculpation, but for post-petition conduct

of an independent director, I actually don't think we have a clear answer in *Highland Capital* as to what happens with that.

MR. RUFF: I understand and I admit when I read it again, I think the logic of -- sort of breaks down a little bit because Debtors are not -- they're innate objects, other than the but for the people that act on their behalf and directors who direct them to do things.

But again, Your Honor, getting back to this, the independent directors, the title does not mean that there's some special creature of bankruptcy. There are independent directors sit on boards all the time, and --

THE COURT: I agree with that, but.

MR. RUFF: And so --

THE COURT: The independent directors in *Highland Capital* may have been appointed by a Court Order, but I don't know that that changed their status or duties, did it?

MR. RUFF: Well, I think it did, because I think that's why the Fifth Circuit viewed them as being similar to a Trustee, because they were not similar to a Committee who comes into a case and has these fiduciary duties imposed on them by the Code. A Debtor has duties imposed on it by the Code. These independent directors, by virtue of that Court Order, had duties imposed on them pursuant to that Court Order. That was -- that's the thing that made them unique,

not the title independent director.

THE COURT: What were the -- how were their duties different than the independent directors here?

MR. RUFF: Well, you know, I can't say for certain what it was other than that it was identified. Normally, director's duties would be pursuant to the corporation's documents, as well as State law, wherever the corporation was, was formed.

Here, the duties were imposed by a specific Court Order instead, so that that layered on whatever they might have had otherwise outside of, you know, bankruptcy law, they had the force of a Bankruptcy Court Order here that that defined what it was that they were to be doing.

THE COURT: Can I get the parties at -- let me back up for a minute.

What's the rush in getting a Confirmation Order entered, as opposed to trying to resolve this one question before we enter an order? Can we give it a few days, or do you all have a rush to get an order entered?

MR. RUFF: No rush for the US Trustee, Your Honor, but --

THE COURT: I'm thinking maybe a week to get some briefing in on this question. Really I only want one thing done. What I want to do is I want to get a copy of the order from where the parties can stipulate that this was

Judge Jernigan's Order, and I want to read her order and see what it says.

MR. RUFF: For what it's worth, Your Honor, I know it's not a reported decision, but I know that Judge Jones took this issue up in *Serta Simmons* and and he agreed with the US Trustee on the point that we're making here that -- you know.

For what it's worth, I know it's not binding. It's some -- it's somewhat persuasive. It's not necessarily, you know, authoritative in any form that Your Honor can certainly --

THE COURT: Yes. I don't see any harm other than the potential delay of getting the parties to file by Monday a copy of Judge Jernigan's appointment order. I can always look it up, but I would rather have it stipulated by the parties if that's the order that we're talking about.

MR. RESNICK: Your Honor we have a -- the recognition hearing in Canada, and then we want to go effective. But I do think perhaps there's a way Your Honor can confirm the plan, while still leaving this issue outstanding.

And while we hope Your Honor rules in our favor and the plan reflects our way, should Your Honor rule in the other direction, the plan would be self-effectuating and the independent directors would not be included.

THE COURT: Do you want to just uploaded an Order that preserves this issue for the briefing, but says that the Plan is effective?

MR. RESNICK: Correct.

THE COURT: And this is sort of a detachable question.

MR. RESNICK: Correct, Your Honor.

THE COURT: You okay with that?

MR. RUFF: I'm fine with that, Your Honor.

THE COURT: Okay. Let me get you to do an order that does that, then.

MR. RESNICK: Thank you, Your Honor.

THE COURT: But the Plan meets all the requirements of the Bankruptcy Code. It meets the cram down requirements of 1129(b). The Plan has been filed in good faith. It has overwhelming support, despite the fact that we're going under 1129(b).

I appreciate the issue on trying to further understand exactly what *Highland Capital* means, and I really don't know how I'm going to come down on that. I just -- I've never had to really drill down to the question that we're at, which is whether this is a function of the order or whether it's a function of independence. I think that's where we are.

MR. RESNICK: Exactly, Your Honor. And one thing

we didn't focus on, but we could do that in the briefing or otherwise, but was the actual governance order itself. And because we think when Your Honor looks at that, you'll see that there is no difference -- to answer your last question, there is no difference in our view.

THE COURT: That's why I want to see it. I haven't seen it.

MR. RESNICK: Exactly.

THE COURT: If I've seen it, it's been months since I've seen it.

So let's -- I do want you, though, in the -- I'll let you craft how you're going to preserve this toggle of the exculpation, but I'm not going to exculpate anyone for pre-petition conduct.

MR. RESNICK: Correct, Your Honor, we had initially provided for that, and the US Trustee made two informal comments, both the one that they objected on and that one. And we consensually made that change.

THE COURT: Okay. What else do we need to do then?

MR. RESNICK: That would be it, Your Honor.

So, you know, with that it's been a -- it's been a long case, and I just wanted to thank Your Honor, as well as all the parties, and in particular the management team for their their Herculean efforts in getting the the company

through this process. And we look forward to emergence and seeing the, you know, the company's future success.

THE COURT: I appreciate that. I've got somebody on the phone that wants to talk. Let me see who this is.

From Austin 447-5000, who do we have?

MR. CHAPPELL: Good morning, Your Honor. This is Ryan Chappell. Can you hear me okay?

THE COURT: I can, Mr. Chappell. Good morning.

MR. CHAPPELL: Your Honor, I represent Brittany Gonzales, who maintains personal injury claims against the Debtor, Instant Brands individually and as a representative of her two minor children. And I'm looking at the proposed order, Docket No. 1121. We would like to object to paragraph 31, which my understanding, based on the representations made today on the Record, is that this paragraph would indefinitely stay litigation of all product liability claims subject to a contractual dispute between the Debtor --

THE COURT: Hold on just a minute. Let me put it in front of me, Mr. Chappell.

MR. CHAPPELL: Yes, sir.

THE COURT: Paragraph 31, you said.

MR. CHAPPELL: Your Honor, I believe it's on page 38 -- paragraphs 31 and 40, page 38.

THE COURT: Okay. I'm there.

MR. CHAPPELL: Okay. And again, just just to repeat myself quickly while you're looking at the provision, Your Honor, my understanding, based on the representations made today, is that this paragraph indefinitely stays litigation of all product liability claims, subject to a contractual dispute between the Debtor and the potential indemnity cause.

I believe it's contrary to the terms of the actual Plan. And it also -- it could be the Plan protects personal injury claimants. I believe this provision is overbroad and appears to apply to all product liability claims, regardless of whether or not they're connected to the suppliers or this particular dispute. The stay is indefinite. It precludes personal injury claims from adjudicating their claims, something that they -- that they will have to do regardless of the outcome of the dispute between the industries and the Debtor.

The claimants weren't a party to the stipulation. To my knowledge, the objecting parties has entered into the stipulation. The Debtor has nothing to do with our litigation. It would substantially harm my client's minor children or excuse me, a minor child who has severe burns. She's been -- her claims have been pending since 2021.

Our claims have to be adjudicated. The contractual dispute between the Debtor and potential

indemnitors, we don't believe should delay that litigation moving forward. And that was --

THE COURT: Do you know whether the manufacturer was --

MR. CHAPPELL: I'm sorry I interrupted.

THE COURT: Yeah, was Medea the manufacturer on yours or somebody else was the manufacturer?

MR. CHAPPELL: It was not, to my knowledge, Your Honor.

THE COURT: All right. Let me ask you --

MR. CHAPPELL: Your Honor, to be crystal clear, I'm -- that's my knowledge sitting here today, I do not believe that they were.

THE COURT: Let me ask the Debtors to respond then. Looks like pretty simple solution.

I think when this was drafted, we had multiple objections. Now we just have the one, so.

Mr. Moskowitz?

MR. MOSKOWITZ: For the Record, Elliot Moskowitz.

I just -- we're making the sausage live. I would ask just ask counsel on the phone just to double-check that this is not, in fact, a Medea product. We think that it is. So and I think that's relevant to the question that we're discussing here.

THE COURT: All right.

MR. CHAPPELL: Your Honor, did I understand in your conversations with the attorney for the Trustee that they are looking at a couple of issues over the next few days?

THE COURT: Well, no, not that would pertain to this. The concept is we're going to go ahead and issue a Confirmation Order probably tomorrow. What investigation would it require in your part to figure out if your client is a Medea manufacturer issue? Because the problem is, if Medea wins this, then your client may have a proof of claim, but there may be nothing to cover it and pay it with.

And so I'm not sure that the litigation should proceed when all you have is a proof of claim. The Plan attempts to bring in indemnification provisions arising out of the purchase of these from the suppliers so that your clients will then have a source of funds.

MR. CHAPPELL: Well, there are none of the Defendants in the litigation as well, Your Honor.

THE COURT: Well, yeah, if you want to dismiss the Debtor, this is easy, but I don't think you're planning to do that, so okay.

MR. CHAPPELL: Your Honor, can I touch base with the underlying trial counsel and then circle back with Debtors counsel to that later today?

THE COURT: Yeah. And on a preliminary basis,

let me ask if the parties can live with this. If it's a non-Medea claim, I don't see any reason why it ought to be stayed. If it's a Medea claim, it does seem to me that we need to wait to see what that appeal looks like, so that there's a source of money to pay your client with, but we could add a provision that would allow you to come in and seek relief, depending on what you learn -- something like that.

Mr. Moskowitz, can you all live with those three distinctions?

MR. MOSKOWITZ: Judge, if you could just repeat that, Your Honor, if you don't mind? Thank you.

THE COURT: If it's a non-Medea claim, they can proceed to prosecute it. If it's a Medea claim, they can't proceed to prosecute it, but they can come in and seek relief from this injunctive provision if the facts and circumstances warranted at some point, and make it specific only to Mr. Chappell's client. He's the only one that has this concern.

MR. MOSKOWITZ: Is it irrelevant to Your Honor that they missed the objection deadline and are just raising this now for the first time? Is that --

THE COURT: Well, this isn't the Plan. This is the Confirmation Order, right?

MR. MOSKOWITZ: Yes.

THE COURT: Yeah. If I take this provision out, this is the Confirmation Order, he's okay with it. This is -- that was objections to the Plan that they missed.

MR. MOSKOWITZ: A moment, Your Honor, if you will. Thank you.

MR. CHAPPELL: And Your Honor, while he's taking the moment, I'm sorry if just to make sure that I have the three provisions down that you just stated, did you run through them quickly? And I apologize.

THE COURT: If the claim is not against -- if it's not a Medea manufactured product or a Medea sold product -- I'm actually not certain if they sold or manufactured. If they're not the Indemnitor, then you could just proceed. If they are the indemnitor and if they appeal, then you can't, until that's over because there will be no one to defend it.

But then we would also include for your clients only a relief valve that if you need some special circumstance relief, you can come back to Court and we'll see if that can be granted.

MR. CHAPPELL: Thank you, Your Honor. I understand.

THE COURT: How long will it take you to figure out if it's a Medea based claim?

MR. CHAPPELL: Your Honor, I hope to be able to

figure it out today.

THE COURT: Okay.

(Pause in the proceedings.)

MR. RESNICK: For what it's worth, Your Honor, I mean, just so we have, like, a clear Record about what happened -- and we did file this on February 6th. The objection deadline was February 8th. Obviously, today is February 22nd, and we're hearing about this for the first time.

So, I mean, for the Record, we would argue that this is an untimely objection, and we put that before, Your Honor, as well as we consider these issues.

THE COURT: He's voicing the objection only to the order. Was this in the Plan? It doesn't matter to me when a proposed order was filed. You filed a Plan. That's all that we required people to object to by a certain deadline.

So I'll overrule the objection. I understand it, I'm sympathetic to it, but I don't think that's what the Order said.

MR. RESNICK: That's fine, Your Honor. Okay, a moment.

(Pause in the proceedings.)

MR. RESNICK: Okay, we've been monopolizing the podium on this issue and I think it affects others as well.

So we're happy to let others speak for a moment if we --

What's that? Go ahead, Bryan.

Yeah. I think, Your Honor, there may be other people who want to address confirmation issues, given that this was just raised for his first time live at the hearing. I think we'd like to consult with the clients on it, and maybe take a few minutes to have -- I think there were other people who maybe want to address other confirmation issues. And then we can come back to this while some of our team members consult with the clients.

Does that work?

THE COURT: I've got eight minutes and then I can come back in the afternoon.

MR. RESNICK: hopefully we can get it done in eight minutes.

THE COURT: Okay. What other objections do we have that people want to voice?

MR. RESNICK: I don't know if they were objections or or statements.

THE COURT: Do we have anybody else that wants to speak?

(No audible response.)

MR. MUENKER: Good morning, Your Honor. James Muenker of DLA Piper, on behalf of the Official Committee of Unsecured Creditors.

Since I've got a few minutes, I'll make a brief statement. As Your Honor knows, we did file a letter or submit a letter in connection with solicitation on the Plan. Also filed a statement in support of the Plan. The Committee does support confirmation of the Plan today. We believe that the Plan provides the best recovery possible for the unsecured creditors, as a whole, by both preserving whatever rights may exist under existing indemnification obligations and insurance, as well as a recovery for those who cannot benefit from that, who are still left over from the liquidating trust.

The other thing I'd like to point out, Your Honor, is, earlier in the case before you were involved, Unsecured Creditors were also able to receive significant benefits from the critical vendor orders. Substantial amount of the unsecured creditor claim pool was paid down through that process, as well as through the sale that closed.

So all in all, we think it was a successful result for Unsecured Creditors in this case. And I want to acknowledge and expressly thank the the Debtors and their counsel, as well as the lenders and their counsel, for their constructive approach and receptiveness to all of the Committee's requests and concerns during the course of the case.

I think it's been ultimately a good result, and so for those reasons, we support confirmation encouraged the Plan to be confirmed.

Thank you, Your Honor.

THE COURT: Thank you. I appreciate the comments. And I know the Debtor's counsel does as well.

I can come back at 1:45 if y'all --

MR. MOSKOWITZ: No, no, no. We got it, Your Honor. It's quick.

THE COURT: Okay.

MR. MOSKOWITZ: For the Record, Elliot Moskowitz for the Debtors.

So, Your Honor, first of all, we are we are highly confident that this is a Medea claim, and I can report that we're fine with the Court's resolution. Let me just make sure we understand it and we're talking about the same thing.

If it is correct that this is a Medea claim -- and by the way, this is specifically it's a Medea claim. They did not they did not sue the Debtor, they sued the manufacturer, but some of the Plaintiff's counsel in the product liability space have been doing that as sort of an attempted end run around the automatic stay. And so the Plan addresses this, and treats those claims as if they're brought also against the Debtor and the indemnity applies to

them, et cetera.

The Plan addresses a situation like this. So if we're talking about a claim against Medea, which we think we are, then we're perfectly happy with the resolution that says that the stipulation -- sorry, they sued the -- I misspoke, they sued the retailer, not the manufacturer. Okay. Medea is the manufacturer.

THE COURT: All right.

MR. MOSKOWITZ: In any case, so we're perfectly happy with the resolution that says that if they think that they have some special circumstance or argument that would relieve them of their -- of the provision that says that this matter is stayed for six months, that they can come into Court and make an argument to the Court and file papers to seek that result, but otherwise, until that relief is issued, this provision applies to them as well. We're perfectly happy with that resolution.

THE COURT: But if it's a non-Medea claim, then they're free to just proceed, right?

MR. MOSKOWITZ: If it is a non-Medea claim, yes.

THE COURT: Okay. So that's --

MR. MOSKOWITZ: But it is a Medea claim.

THE COURT: Okay. Well he needs to check on that, but that's what I suggested.

Yes, sir.

MR. GOODMAN: Your Honor, Brett Goodman, ArentFox Schiff for Medea.

Just two points on this, I think, just to clarify Mr. Moskowitz's statement, the six-month stay is related to retain causes of action on regulatory. The stay continues through a Final Order with respect to product liability claims --

THE COURT: Right.

MR. GOODMAN: -- in paragraph 31. So that's that's one.

I don't have an issue with Your Honor's proposal. I just want to confirm that this right that's being given is is specific only to the Gonzalez.

THE COURT: It is.

MR. GOODMAN: Okay. Thank you, Your Honor.

THE COURT: Mr. Chappell, you're okay with this?

MR. CHAPPELL: Yes, Your Honor, and I appreciate the clarification. I'm looking at the proposed order right now. The six-month limitation pertains to retain causes of action. The product liability stay or injunction is pending a full and final order fully resolving the foregoing issues. Okay?

THE COURT: Okay.

MR. CHAPPELL: Your Honor, so I understand it's -- if it's not a Medea claim, it can go forward. We believe

that there is some sort of special circumstance or argument that we can make that allows that should allow the claim to move forward, we can reserve the right going forward.

THE COURT: Right. We'll just -- I'll have them run the Order by you and let's -- but you're going to need to look at it this afternoon because I need to get this entered in the morning.

MR. CHAPPELL: I understand, Your Honor, I appreciate it.

THE COURT: Thank you, Mr. Chappell.

You may not have been here earlier today, I don't -- were you here at the beginning of the hearing?

MR. CHAPPELL: I was, Your Honor.

THE COURT: Okay, so you heard what the ruling was.

What else do we need to do?

MR. CHAPPELL: You're ruling on the relevant issue, Your Honor?

THE COURT: My ruling that, in fact, the indemnity does apply.

MR. CHAPPELL: Yes, Your Honor, I did hear that. Thank you.

THE COURT: But they may -- they have said they might waste some money and appeal that, we're going to give them a chance to get that done.

(Laughter)

MR. CHAPPELL: That is their right.

MR. MOSKOWITZ: I think we need a briefing schedule for the exculpation issue.

THE COURT: I don't care, because if we're going to go ahead and go effective, we have time to get that done. Why don't the parties just agree and then file a stipulation as to the briefing schedule?

MR. MOSKOWITZ: Perfect. We'll do that, Your Honor.

THE COURT: If that works, because I want to I like your idea of doing the toggle. We'll get the order confirmed. People can go in and get their money, and we'll worry about exculpation on the briefing schedule that you can agree to with Mr. Ruff.

MR. MOSKOWITZ: Perfect. Thank you, Your Honor.

THE COURT: Okay. Thank you all very much. I appreciate everything you all are doing and we will recess till this afternoon.

MR. MOSKOWITZ: Thank you.

THE COURT: Thank you.

MR. CHAPPELL: Thank you, Your Honor.

(Hearing concluded at 11:57 a.m.)

* * * * *

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

/S/ MARY D. HENRY

*CERTIFIED BY THE AMERICAN ASSOCIATION OF ELECTRONIC REPORTERS AND TRANSCRIBERS, CET**337*

JUDICIAL TRANSCRIBERS OF TEXAS, LLC

JTT TRANSCRIPT #68261

DATE FILED: FEBRUARY 23, 2024

Exhibit B

APPENDIX A TO MRC/MARATHON FIRST AMENDED PLAN, AS FURTHER MODIFIED, WITH TECHNICAL MODIFICATIONS

UNIFORM GLOSSARY OF DEFINED TERMS FOR PLAN DOCUMENTS

APPENDIX A TO MRC/MARATHON FIRST AMENDED PLAN, AS FURTHER MODIFIED, WITH TECHNICAL MODIFICATIONS

Uniform Glossary of Defined Terms for Plan Documents

Unless the context otherwise requires, the following terms, when used in initially capitalized form in the Disclosure Statement, related exhibits, and Plan Documents, shall have the following meanings. Such meanings shall be equally applicable to both the singular and plural forms of such terms. Any term used in capitalized form that is not defined herein but that is defined in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning ascribed to such term by the Bankruptcy Code or the Bankruptcy Rules (with the Bankruptcy Code controlling in the event of a conflict or ambiguity). Certain defined terms used in only one Section of the Disclosure Statement are defined in such Section. The rules of construction set forth herein and in section 102 of the Bankruptcy Code shall apply. All references to the "Plan" shall be construed, where applicable, to include references to the Plan and all its exhibits, appendices, schedules, supplements and annexes (and any amendments made in accordance with their terms or applicable law).

A-1 Timber Notes means Scopac's 6.55% Series B Class A-1 Timber Collateralized Notes due 2028, with an original principal amount of $160.7 million.

A-2 Timber Notes means Scopac's 7.11 % Series B Class A-2 Timber Collateralized Notes due 2028, with an original principal amount of $243.2 million.

A-3 Timber Notes means Scopac's 7.71 % Series B Class A-3 Timber Collateralized Notes due 2028, with an original principal amount of $463.3 million.

Administrative Expense **means** (a) any cost or expense of administration of the Reorganization Cases incurred before the Effective Date and allowable under section 503(b) of the Bankruptcy Code (including without limitation (x) claims arising under sections 503(b)(3), 503(b)(4) and 503(b)(9) of the Bankruptcy Code and (y) claims asserted by members of the Committee for reimbursement of actual, necessary expenses pursuant to section 503(b)(3)(F) of the Bankruptcy Code which Committee members are permitted to assert) and entitled to priority under section 507(a)(2) of the Bankruptcy Code including, without limitation, (i) any actual and necessary post-petition cost or expense of preserving the Estates or operating the businesses of the Debtors, (ii) any payment required to cure a default on an Assumed Contract, (iii) any post-petition cost, indebtedness, or contractual obligation duly and validly incurred or assumed by a Debtor in the ordinary course of its business, and (iv) compensation or reimbursement of expenses of professionals to the extent allowed by the Bankruptcy Court under sections 330(a) or 331 of the Bankruptcy Code and (b) any fee or charge assessed against the Estates under 28 U.S.C. § 1930.

Administrative Expense Claim means any Claim for the payment of an Administrative Expense.

Administrative Expense Claims Bar Date means the thirtieth day after the Effective Date or such other date as may be fixed by order of the Bankruptcy Court.

Affiliate has the meaning set forth in section 101(2) of the Bankruptcy Code.

Allowed means Bankruptcy Court approval of a Claim or Interest.

Allowed Amount of any Claim or Interest means the amount at which that Claim or Interest is Allowed.

Allowed Claim; Allowed Interest means any Claim or Interest in any of the Debtors or their respective Estates, (i) proof of which was filed on or before the Bar Date (defined below), (ii) if no such proof of Claim or Interest has been timely filed, which has been or hereafter is listed by such Debtor in its Schedules as liquidated in amount and not disputed or contingent or (iii) any Interest registered in the stock or membership register, as the case may be, maintained by or on behalf of the Debtor as of the Record Date, in each such case in clauses (i), (ii) and (iii) above, a Claim or Interest as to which no objection to the allowance thereof, or action to equitably subordinate or otherwise seek recovery from the Holder of the Claim or Interest, has been interposed within the applicable period of

limitation fixed by the Plan, the Bankruptcy Code, the Bankruptcy Rules, or a Final Order, or as to which an objection has been interposed and such Claim has been allowed in whole or in part by a Final Order.

Assets means all property in which a Debtor holds a legal or equitable interest, including all property described in 11 U.S.C. § 541 and all property disclosed in such Debtor's respective Schedules and the Disclosure Statement.

Assumed Contracts means, collectively, an executory contract or unexpired lease that is subject to assumption or rejection under section 365 of the Bankruptcy Code that is identified in the Plan Supplement and which either of the Reorganized Entities intends to assume pursuant to the Plan.

Avoidance Actions means any claim or Cause of Action or right under chapter 5 of the Bankruptcy Code, including all fraudulent-conveyance and fraudulent-transfer laws, all non-bankruptcy laws vesting in creditors' rights to avoid, rescind or recover on account of transfers, all preference laws, the Uniform Fraudulent Transfer Act, state laws of similar import and the proceeds thereof.

Ballot means each of the ballot forms for voting to accept or reject the Plan distributed to all Holders of Impaired Claims entitled to vote on the Plan.

Balloting and Claims Agent means Logan & Company, Inc.

Bank of America means Bank of America, N.A., as lender and as agent for itself and any other lender parties to the Scopac Loan Agreement.

Bankruptcy Code means title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.*, as in effect on the Petition Date, together with all amendments and modifications thereto subsequently made, to the extent applicable to the Reorganization Cases.

Bankruptcy Court means the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division, or such other court having jurisdiction over the Reorganization Cases.

Bankruptcy Rules means the Federal Rules of Bankruptcy Procedure and the local rules and general orders of the Bankruptcy Court, as in effect on the Petition Date, together with all amendments and modifications thereto subsequently made applicable to the Reorganization Cases.

BAPCPA means the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8,119 Stat. 51 (2005).

Bar Date means the date(s) by which any Entity asserting certain Claims against the Debtors must have filed a Proof of Claim or be forever barred from asserting such Claims against the Debtors or their Estates, as established by any order(s) of the Bankruptcy Court or the Plan.

Bar Date Order means the order entered by the Bankruptcy Court establishing July 17, 2007 as the general Bar Date and August 17, 2007 as the Bar Date applicable to Governmental Units, and any subsequent order by the Bankruptcy Court amending, revising, rescinding or superseding the same, including but not limited to the Supplemental Bar Date Order.

Britt means Britt Lumber Co., Inc., a wholly owned subsidiary of Palco.

Business Day means any day other than a Saturday, Sunday, or legal holiday (as such term is defined in Bankruptcy Rule 9006(a)).

California Permits means the Permits issued by California pursuant to the HCP.

Cash means United States Dollars in the form of checks drawn on available funds or wire transfers of immediately available funds.

Causes of Action means all causes of action, rights, Claims, and demands against any Persons that the Debtors or their Estates own or have an interest in or can assert in any fashion, or which could be asserted by the Debtors on behalf of any Creditor or Creditor representative under the Bankruptcy Code as Debtors in Possession, including but not limited to actions under 11 U.S.C. § 510 to subordinate Claims.

CDF means the California Department of Forestry and Fire Protection.

CDF Harvest Limit means the applicable annual harvest limit established by the CDF for each watershed.

Claim has the meaning set forth in section 101(5) of the Bankruptcy Code, against any Debtor or any Estate whether or not asserted.

Claimant means the Holder of a Claim.

Class means a category of Holders of Claims or Interests, as set forth in Articles III of the Plan pursuant to section 1122 of the Bankruptcy Code.

Class 6 Distribution Adjustment means, subject to the limitation contained Section 4.6.2.1 of the Plan, a reduction dollar for dollar by the amount determined by the following equation: (a) the sum of (i) the Allowed Scopac Loan Claim and (ii) any postpetition financing provided to Scopac and (iii) any Other Secured Claim required to be paid under the Plan by Scopac, in excess of the fair market value as of the Effective Date of any cash, auction rate securities or other assets in the SAR Account as of the Effective Date; plus (b) the sum of accrued but unpaid Scopac Administrative Expense Claims in excess of $5,000,000, as such claims may be estimated as of the Effective Date; minus (c) any accrued but unpaid receivables arising after the Petition Date owed from Palco to Scopac net of any accrued but unpaid receivables arising after the Petition Date owed from Scopac to Palco as of the Effective Date.

Collateral means any property or interest in property of an Estate that is subject to a Lien to secure the payment or performance of a Claim, which Lien is not subject to avoidance or otherwise invalid under the Bankruptcy Code or applicable state law.

Committee means the Official Committee of Unsecured Creditors for the Debtors appointed by the U.S. Trustee on January 25, 2007, as presently constituted.

Confirmation, Confirmation of the Plan, or ***Plan Confirmation*** means the approval of the Plan by the Bankruptcy Court at the Confirmation Hearing.

Confirmation Date means the date on which the Confirmation Order is entered on the docket of the Bankruptcy Court.

Confirmation Hearing means the hearing held by the Bankruptcy Court pursuant to section 1128 of the Bankruptcy Code to consider Confirmation of the Plan, as such hearing may be adjourned or continued from time to time.

Confirmation Order means the order of the Bankruptcy Court confirming the Plan pursuant to section 1129 and other applicable sections of the Bankruptcy Code.

Creditor means any Person or Entity holding a Claim against a Debtor's Estate or pursuant to section 102(5) of the Bankruptcy Code against property of the Debtor that arose or is deemed to have arisen on or prior to the Petition Date.

Debtor means any of the Palco Debtors or Scopac.

Debtors means the Palco Debtors and Scopac.

Deficiency Claim means a Claim of a Claimant that asserts a Secured Claim against one or more of the Debtors equal to the amount by which such Claim exceeds the Allowed Secured Claim.

DIP Order means the Bankruptcy Court's order dated July 31, 2007 authorizing the Palco Debtors to enter into the Palco DIP Facility.

Disclosure Statement means the Joint Disclosure Statement in Support of the Respective Plans of Reorganization Proposed by (1) Mendocino Redwood Company, LLC and Marathon Structured Finance Fund L.P.; (2) The Bank of New York Trust Company, N.A., Indenture Trustee for the Timber Notes; and (3) the Debtors and Maxxam Inc., Maxxam Group Holdings Inc., and Maxxam Group Inc., dated February 29, 2008, including all exhibits attached thereto or referenced therein, as submitted pursuant to section 1125 of the Bankruptcy Code and approved by the Bankruptcy Court, as such Joint Disclosure Statement may be further amended, supplemented, or modified from time to time.

Disputed Claim means a Claim that is not an Allowed Claim, including a Claim that is, in whole or in part: (a) listed on the Schedules as, or proof of which is filed as, unliquidated, disputed or contingent; (b) as to which a Proof of Claim designating such Claim as liquidated in amount and not contingent was not timely and properly filed; (c) as to which a Debtor, Reorganized Entity, or other party in interest has filed a timely objection or request for estimation in accordance with the Bankruptcy Code and Bankruptcy Rules; or (d) is otherwise disputed by a Debtor, a Reorganized Entity or other party in interest in accordance with applicable law, which objection, request for estimation or dispute has not been withdrawn or determined by a Final Order.

Distribution means any distribution by or on behalf of the Debtors, the Reorganized Entities, the PLC Litigation Trust and the SPC Litigation Trust to the Holders of Allowed Claims pursuant to the Plan.

Distribution Date, when used with respect to each Claim and Interest, means as soon as practicable after the later of (a) the Effective Date, (b) the date a Claim becomes payable pursuant to any agreement between the Debtors (or, upon the occurrence of the Effective Date, the Reorganized Entities, as the case may be), or (c) solely with respect to Disputed Claims and Disputed Interests as of the Effective Date, no later than 30 days after the date upon which the Claim or Interest becomes an Allowed Claim or Allowed Interest.

Effective Date means the date specified by the Plan Proponents in a notice filed with the Bankruptcy Court as the date on which this Plan shall take effect, and which occurs after (i) the Confirmation Order becomes a Final Order; and (ii) each of the conditions precedent to the Effective Date provided for in Article XI of the Plan have been satisfied or waived.

Entity has the meaning set forth in section 101(15) of the Bankruptcy Code.

Environmental Obligations means, with respect to any Debtor or Reorganized Entity such entity or entities' obligations to Governmental Units to comply, complete, perform, satisfy and/or provide for satisfaction of pre-petition, current, ongoing, executory and/or future regulatory or statutory obligations, including, without limitation, (i) approved THPs, WWDRs, Cleanup and Abatement Orders, Streambed Alteration Agreements, and related permits or authorizations, and may include for example, requirements for completion or correction, monitoring and reporting, winterization, drainage improvement, restoration, inspection, study; (ii) the California State and federal ITPs, which include the HCP, and the associated Implementation Agreement (the "IA"), and the Agreement Relating to Enforcement of AB 1986; (iii) consistency determinations under the California Endangered Species Act that are based upon the federal ITPs, including the HCP and the IA; and (iv) those obligations described in the Claims filed by the California Resources Agency, the California Department of Forestry and Fire Protection, the California Department of Fish and Game, the California Wildlife Conservation Board, the California State Water Resources Board, the California Regional Water Quality Control Board, North Coast Region, the U.S. Fish and Wildlife Services, the U.S. Department of the Interior, the National Marine Fisheries Service, and the U.S. Department of Commerce.

Environmental Plans means the HCP.

EPA means the Federal Environmental Protection Agency.

Equity Interests or ***Interests*** means the rights of the Holders of the equity securities of a Debtor.

Estate means the legal entity administering the property of a Debtor, in its capacity as a debtor in possession, between the Petition Date and the Effective Date, created pursuant to section 541 of the Bankruptcy Code.

Exculpated Parties means (i) the Plan Proponents and their respective officers, directors, professionals, members, agents and employees, (ii) the Reorganized Entities and their respective officers, directors, professionals, members, agents and employees, and (iii) the Committee, its members and Professionals.

Exit Financing means the proposed financing discussed in Section 7.8 of the Plan.

Final Order means an order of a court: (a) as to which the time to appeal, petition for writ of certiorari, or otherwise seek appellate review or to move for reargument, rehearing, reconsideration or stay has expired and as to which no appeal, petition for writ of certiorari, or other appellate review, or proceedings for reargument, rehearing, reconsideration or stay shall then be pending; or (b) as to which any right to appeal, petition for certiorari, or move for reargument, rehearing or stay shall have been waived in writing by all parties with such right; or (c) in the event that an appeal, writ of certiorari, or other appellate review or reargument, rehearing, reconsideration or stay thereof has been sought, which order shall have been affirmed by the highest court to which such order was appealed or from which writ of certiorari or other appellate review or reargument, rehearing, reconsideration or stay was sought, and as to which the time to take any further appeal, to petition for writ of certiorari, to otherwise seek appellate review, and to move for reargument, rehearing, reconsideration or stay shall have expired; *provided, however*, that the possibility that a motion under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure or under section 1144 of the Bankruptcy Code, or any analogous rule under the Bankruptcy Rules, may be filed with respect to such order shall not cause such order not to be a Final Order.

General Unsecured Claim means a Claim against a Debtor that is not a Secured Claim, an Administrative Expense Claim, a Trade Claim, a Priority Tax Claim, an Other Priority Claim, a Non-Debtor Affiliate Claim or a Professional Compensation Claim (but shall not include Claims that are disallowed or released, whether by operation of law or pursuant to order of the Bankruptcy Court, written release or settlement, the provisions of the Plan or otherwise), which Claims are classified in Classes 7, 8 and 9 and treated under Article IV of the Plan; *provided, however,* that the term "General Unsecured Claim" shall not include (i) the Palco DIP Loan Claim, and (ii) the Palco Term Loan Claim.

Governmental Unit has the meaning ascribed to such term in section 101(27) of the Bankruptcy Code.

HCP means the Habitat Conservation Plan for the Properties of Pacific Lumber, Scotia Pacific, and Salmon Creek Corporation, dated February, 1999 approved in March 1999 in connection with consummation of the Headwaters Agreement, which covers multiple species and encompasses substantially all of the Timberlands.

Headwaters Agreement means the agreement among Palco, Scopac, Salmon Creek, the United States, and California pursuant to which the those companies transferred to the United States government 5,600 acres of timberlands in exchange for $300 million, approximately 7,700 acres of timberlands, and federal and state government-approved habitat conservation and sustained yield plans.

Headwaters Litigation means the claim filed by Palco and Scopac with the Claims Board against the North Coast Water Board, the State Water Board and the State of California (Claim No. G558159) alleging that the defendants have substantially impaired the contractual and legal rights of Palco and Scopac under the Headwaters Agreement, and the subsequent damages lawsuit entitled *The Pacific Lumber Company and Scotia Pacific Lumber Company LLC v. State of California, et al.* filed by Palco and Scopac in the Superior Court of Fresno County, California (No. CECG 0422).

Headwaters Timberlands means the 5,600 acres of timberlands transferred by Salmon Creek, Palco and Scopac to the United States government upon consummation of the Headwaters Agreement.

Holder means any Person holding an Interest or Claim.

Impaired means a Claim or a Class of Claims that is impaired within the meaning of section 1124 of the Bankruptcy Code.

Inter-Debtor Claim means any Claim held by any Debtor against any other Debtor, which claim is classified in Class 10 and treated under Article IV of the Plan.

Intercompany Contracts means any contract or agreement by or between any of the Debtors including, but not limited to, the following: (i) the New Reciprocal Rights Agreement; (ii) the New Master Purchase Agreement; (iii) the New Services Agreement; (iv) the New Additional Services Agreement; (v) the Master Lease Agreement; (vi) the Amended and Restated Lease; (vii) the Sales and Marketing Assistance Agreement; and (viii) the Development and Sales Assistance Agreement, as any of such agreements or contracts have been amended through the date of the Disclosure Statement.

Interim Compensation Order means the order entered by the Bankruptcy Court on January 24, 2007 establishing procedures for interim compensation and reimbursement of expenses of professionals of the Debtors and the Committee.

IRS means the Internal Revenue Service.

ITP means Incidental Take Permit, which authorizes certain actions that might otherwise constitute a prohibited "take" of an endangered or threatened species which is otherwise protected by the state and federal Endangered Species Acts.

LIBOR means London Interbank offered rate of interest.

Lien has the meaning set forth in section 101(37) of the Bankruptcy Code.

Liquidation Analysis means the liquidation analysis attached as Exhibit E to the Disclosure Statement.

Marathon means, collectively, Marathon Structured Finance Fund L.P. and certain of its affiliates that are lenders to the Palco Debtors

MAXXAM means MAXXAM Inc., MGHI's parent.

MGHI means MAXXAM Group Holdings Inc., MGI's parent.

MGI means, MAXXAM Group Inc., Palco's parent.

Mill or Scotia Mill means the lumber mill of Palco located in Scotia and operated by Palco, together with all Assets of the Debtors currently associated with or anticipated to be associated with Mill on and after the Effective Date.

Mill Working Capital means the marked-to-market value of the ordinary course current receivables and current inventories, less the amount of the current payables of Newco.

MMCAs means the marbled murrelet conservation areas and are also known as the Ancient Redwood Groves.

MRC means, collectively, Mendocino Redwood Company, LLC and certain of its affiliates.

MRC/Marathon Plan Proponents means, collectively, MRC and Marathon.

Newco means the Reorganized Entity that will include the assets of the Mill and the Timberlands, together with any and all Assets of the Debtors currently associated with or anticipated to be associated with Mill and the Timberlands on and after the Effective Date, provided that Newco will not own any of the Assets to be owned by Townco.

New Master Purchase Agreement means that certain agreement dated July 20, 1998 by and between Scopac and Palco governing the sale of Scopac Timber.

Non-Debtor Affiliate means any Entity that is an affiliate of any of the Debtors (other than another Debtor), within the meaning of section 101(2) of the Bankruptcy Code, including but not limited to MGI, MAXXAM Group Holdings Inc., and MAXXAM.

Non-Debtor Affiliate Claim means a Claim by a Non-Debtor Affiliate against a Debtor, including but not limited to the following Claims, which are collectively classified in Class 11: (i) Claims arising from those certain funds loaned by MGI to Palco during 2005 on an unsecured and subordinated basis totaling approximately $6,000,000; (ii) Claims arising from those certain funds loaned by MGI to Palco during 2006 on an unsecured and subordinated basis totaling approximately $30,900,000; (iii) Claims arising from the Lump Sum Purchases; and (iv) Claims arising from MAXXAM's provision of general and administrative assistance and other services to the Debtors, including risk-management services, accounting services, income tax reporting and compliance services, treasury and cash-management services, legal services and employee-benefit services general and administrative assistance and other services which, as of the Petition Date, totaled approximately $1,782,542, and subsequent to the Petition Date totaled in excess of $1,200,000.

North Coast Water Board means the California North Coast Regional Water Quality Control Board.

Option A means the plan for complying with California's sustained yield requirements, which has been approved by the California Department of Forestry and Fire Protection and is currently being relied on by Scopac to obtain approval of its THPs.

Option C means an alternative procedure for timber owners to comply with California's sustained yield requirements.

Ordinary Course Professionals Order means the order entered by the Bankruptcy Court on or about July 17, 2007 permitting the Debtors to employ professionals in the ordinary course of their business without the necessity of filing individual retention applications for each professional.

Other Priority Claim means a Claim (or portion thereof), if any, entitled to priority under section 507(a) of the Bankruptcy Code, other than a Priority Tax Claim, an Administrative Expense Claim or a Professional Compensation Claim, which claim is classified in Class 1 and treated under Article IV of the Plan.

Other Secured Claim means any Secured Claim other than the following: (i) the Palco DIP Loan Claim; (ii) the Palco Term Loan Claim; (iii) the Scopac Loan Claim; and (iv) the Scopac Timber Note Secured Claims, which Claim, together with Secured Tax Claims are classified in Class 2 and treated under Article IV of the Plan.

Palco means The Pacific Lumber Company, a wholly owned subsidiary of MGI.

Palco DIP Loan means the senior secured debtor-in-possession financing provided to the Palco Debtors by Marathon pursuant to the Debtor-In-Possession Revolving Credit Agreement, dated as of August 6, 2007.

Palco DIP Loan Claim means a Claim arising under the Palco DIP Loan, which claim is classified in Class 3 and treated under Article IV of the Plan and which shall not include any Claim for any deficiency, which is waived by the Holder of such Claim in consideration for the releases and other good and valuable consideration given and embodied under the Plan.

Palco Debtors means, collectively, Palco, Britt, Salmon Creek, Scotia Inn, and Scotia Development.

Palco General Unsecured Claim means a General Unsecured Claim against Palco, which Claim is classified in Class 7 and treated under Article IV of the Plan together with Palco Trade Claims.

Palco Revolving Credit Agreement means that certain Revolving Credit Agreement, dated as of July 18, 2006 by and among Palco and Britt, as borrowers, and Marathon, as Administrative Agent and as a lender.

Palco Revolving Credit Facility means the five year $60.0 million senior secured asset based revolving credit facility evidenced by the Palco Revolving Credit Agreement.

Palco Term Loan means the five year $85.0 million senior secured term loan provided pursuant to the Palco Term Loan Agreement.

Palco Term Loan Agreement means that certain Term Loan Agreement, dated as of July 18, 2006, by and among Palco and Britt, as borrowers, and Marathon, as Administrative Agent and as a lender.

Palco Term Loan Claim means a Claim arising under the Palco Term Loan Agreement, which claim is classified in Class 4 and treated under Article IV of the Plan and which shall not include any Claim for any deficiency, which is waived by the Holder of such Claim in consideration for the releases and other good and valuable consideration given and embodied under the Plan.

Palco Trade Claim means a General Unsecured Claim against the Palco Debtors for goods, supplies, equipment, or services utilized by the Palco Debtors in the operation of their businesses, which Claim is classified in Class 7 and treated under Article IV of the Plan together with Palco General Unsecured Claims.

Pension Plan means any ongoing, defined benefit pension plans to which a Debtor is a contributing sponsor or member of a contributing sponsor's controlled group and to which Title IV of the Employee Retirement Income Security Act applies, including without limitation, the Palco Retirement Plan, Employer Identification No./Plan No. 13-3318327/003.

Person means any person, including without limitation, any individual, entity, corporation, partnership, limited liability company, limited liability partnership, joint venture, association, joint stock company, estate, trust, unincorporated association or organization, official committee, *ad hoc* committee or group, governmental agency or political subdivision thereof, the U.S. Trustee, and any successors or assigns of any of the foregoing.

Petition Date means January 18, 2007, the date on which the Debtors' Reorganization Cases were commenced with the filing of voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

Plan means the First Amended Joint Plan of Reorganization for the Debtors, as Further Modified, with Technical Modifications, proposed by the Plan Proponents, dated July 8, 2008 under Chapter 11 of the United States Bankruptcy Code, including all exhibits attached thereto or referenced therein, as the same may be amended, modified, or supplemented from time to time.

Plan Documents means, collectively, the Plan, the Disclosure Statement, and all documents, attachments, and exhibits attached to the Plan or the Disclosure Statement that aid in effectuating the Plan, as the same may be amended, modified, or supplemented, in accordance with their terms.

Plan Proponents means, collectively, the MRC/Marathon Plan Proponents and the Committee.

Plan Supplement means the supplement to the Plan in form and substance satisfactory to the Plan Proponents and the Reorganized Entities to be filed with the Bankruptcy Court not later than ten (10) days prior to the Voting Deadline, which shall contain forms of final documents described in the Plan.

PLC Funding Amount means that certain $500,000 to be loaned or caused to be loaned by Newco to the PLC Litigation Trust on the Effective Date which amount shall be used by the PLC Litigation Trustee pending the receipt by the PLC Litigation Trust of recoveries on account of the PLC Litigation Trust Assets solely for the purposes (i) of investigating and prosecuting the PLC Litigation Trust Assets, (ii) paying Statutory Fees as set forth in Section 13.5 of the Plan, and (iii) paying the costs and expenses of the PLC Litigation Trust. Interest shall accrue on the outstanding principal balance of the PLC Funding Amount at the rate of seven and one-half percent per annum

(7.5%) until the PLC Funding Amount (together with all accrued interest) has been repaid in full in accordance with the Plan. The term of such loan shall be until the termination of the PLC Litigation Trust in accordance with the Plan.

PLC Litigation Trust means a trust formed in accordance with the PLC Litigation Trust Agreement effective as of the Effective Date (i) into which the PLC Litigation Trust Assets not retained, released, waived or enjoined under Article VIII of the Plan shall automatically vest upon the transfer of Causes of Action by the Reorganized Entities on the Effective Date and into which the Estates and Debtors shall be deemed to have automatically granted, on behalf and for the benefit of their creditors, all of their rights to pursue all such PLC Litigation Trust Assets and receive all recoveries therefrom, and (ii) to administer the proceeds of any such Causes of Action and to act as the disbursing agent for the proceeds of such PLC Litigation Trust Assets.

PLC Litigation Trust Agreement means the trust agreement for the PLC Litigation Trust in the form to be contained in the Plan Supplement.

PLC Litigation Trust Assets means (a) that certain $10.6 million to be provided by Newco to the PLC Litigation Trust on the Effective Date which amount shall be used by the PLC Litigation Trustee first for payment to Holders of Allowed Claims classified in Classes 7 and 8, second to repay the PLC Funding Amount and SPC Funding Amount, and, finally, any remaining amounts returned to the Reorganized Entities, and (b) Causes of Action of the Palco Debtors for money damages only, transferred, assigned and otherwise conveyed to the PLC Litigation Trust on the Effective Date; *provided, however*, for avoidance of doubt, PLC Litigation Trust Assets shall not include rights to setoff under section 553 of the Bankruptcy Code; *provided, further, however*, PLC Litigation Trust Assets shall not include the following: (i) Causes of Action against any Debtor, MRC/Marathon Plan Proponent (in any capacity, including without limitation, Marathon, as lender to the Palco Debtors), any member (solely in that capacity) or professional of the Committee, the Committee, any Reorganized Entity and the Holder of the Class 5 Scopac Loan Claim; (ii) Avoidance Actions under section 547(b)(4)(a) of the Bankruptcy Code (i.e., ninety (90) day preference actions), with respect to trade creditors of the Palco Debtors that (x) supply the Reorganized Entities in the ordinary course of their business with goods and services, and (y) are identified in writing by the Reorganized Entities to the PLC Litigation Trustee within ten (10) Business Days after the PLC Litigation Trustee submits a written list of potential defendants to the Reorganized Entities; (iii) Avoidance Actions under section 547(b)(4)(a) of the Bankruptcy Code (i.e., ninety (90) day preference actions), with respect to trade creditors of Scopac; (iv) Causes of Action with respect to accounts receivables, tax refunds, tax rebates and any other amounts owed to the Debtors or the Reorganized Entities by account debtors; (v) the Debtors' claims in the Headwaters Litigation and the proceeds thereof; (vi) Causes of Action with respect to Environmental Obligations; (vii) Causes of Action of Scopac; (viii) the SPC Litigation Trust Assets; (ix) the PLC Funding Amount; and (x) the SPC Funding Amount.

PLC Litigation Trust Participation means an uncertificated, nontransferable, Pro Rata beneficial interest in the net recoveries of the PLC Litigation Trust after prosecution, settlement or abandonment of the PLC Litigation Trust Assets, subject to the terms and conditions of the PLC Litigation Trust Agreement. PLC Litigation Trust Participations (a) shall be noted in the books and records of the PLC Litigation Trust, (b) shall not be evidenced by a writing, and (c) may not be transferred, sold, assigned, hypothecated or pledged, except that they may be assigned or transferred by will, intestate succession, or operation of law.

PLC Litigation Trustee means the trustee(s) of the PLC Litigation Trust, as designated in the Plan and the PLC Litigation Trust Agreement. In the prosecution of any PLC Litigation Trust Assets, the PLC Litigation Trustee shall obtain the benefit of any tolling provisions or extensions available to the Palco Debtors' Estates and/or the Palco Debtors prior to the Confirmation Date or Effective Date, including those set forth in sections 108(a), 546(a), 549(d) and 550(f) of the Bankruptcy Code.

Post-petition Interest means simple interest accruing from the Petition Date calculated at the effective interest rate for 90-day securities obligations issued by the United States Treasury on the Effective Date or, if no such securities were issued on the Effective Date, on the date of issuance immediately preceding the Effective Date.

Priority Tax Claim means a Claim of a Governmental Unit of the kind specified in sections 502(1) and 507(a)(8) of the Bankruptcy Code.

Pro Rata means, with reference to any Distribution on account of any Allowed Claim or Allowed Interest in a Class, a Distribution equal in amount to the ratio (expressed as a percentage) that the amount of such claims bears to the aggregate amount of all Allowed Claims in the same Class.

Professional Compensation Claim means a Claim for compensation, indemnification or reimbursement of expenses incurred by Professionals retained by the Debtors and the Committee pursuant to sections 327, 328, 330, 331, or 503(b) of the Bankruptcy Code in connection with the Reorganization Cases.

Professionals means those Persons (a) employed pursuant to an order of the Bankruptcy Court in accordance with sections 327, 328, or 1103 of the Bankruptcy Code and to be compensated for services pursuant to sections 327, 328, 329, 330, or 331 of the Bankruptcy Code, for which compensation and reimbursement has been allowed by the Bankruptcy Court pursuant to section 503(b)(1) of the Bankruptcy Code, and/or (b) for which compensation and reimbursement has been allowed by the Bankruptcy Court or is sought pursuant to section 503(b)(4) of the Bankruptcy Code.

Proof of Claim means any proof of claim filed with the Bankruptcy Court or the Balloting and Claims Agent with respect to a Debtor pursuant to section 501 of the Bankruptcy Code and Bankruptcy Rules 3001 or 3002.

Quarterly Payment Date means the last Business Day of the month following the end of each calendar quarter after the Effective Date; *provided, however,* that if the Effective Date is within forty-five (45) days of the end of a calendar quarter, the first Quarterly Distribution Date will be the last Business Day of the month following the end of the first calendar quarter after the calendar quarter in which the Effective Date falls.

Qui Tam Relators means Richard Wilson and Chris Maranto.

Qui Tam Actions means the action filed by the Qui Tam Relators filed on behalf of the United States against the Debtors and related non-debtor parties in the United States District Court for the Northern District of California, case number C-06-7497 and the action filed on behalf of the State of California against the Debtors and related non-debtor parties in San Francisco Superior Court, case number CGC-06-4585.

Qui Tam Claims means the nine Proofs of Claim filed by the Qui Tam Relators in the Debtors' Reorganization Cases, which have been numbered as claims 511 through 519, consecutively, and with respect to which, on February 28, 2008, the Bankruptcy Court approved a settlement, pursuant to which such claims were reduced to $1.00 each, but any rights of the Qui Tam Relators to pursue non-debtor defendants were preserved.

Real Property Assumed Contract means, collectively, an Assumed Contract (i) relating to a Debtor's interest in real property, and (ii) granting rights or interest related to or appurtenant to the applicable real property, including all easements, license, permits, rights, privileges, immunities, options, rights of first refusal, powers, uses, usufructs, reciprocal easement or operating agreements, vault, tunnel or bridge agreements or franchises, development rights, and any other interests in real estate or right *in rem* related to the applicable real property.

Record Date means the date of entry of the order approving the Disclosure Statement.

Released Parties means (i) the Plan Proponents and their respective officers, directors, professionals, members, agents and employees, and (ii) the Reorganized Entities and their respective officers, directors, professionals, members, agents and employees.

Reorganization Case means any of the cases under chapter 11 of the Bankruptcy Code commenced by the Debtors currently pending in the Bankruptcy Court as Jointly Administered Chapter 11 Case Nos. 07-20027 through 07-20032.

Reorganized Entity or Reorganized Entities mean, collectively, Newco and/or Townco, in each case as applicable.

Restructuring Transactions means, collectively, those sales, mergers, consolidations, restructurings, dispositions, liquidations, transfers of assets or dissolutions that the Plan Proponents and the Reorganized Entities determine to be necessary and appropriate to effect a corporate restructuring in accordance with the Plan.

Salmon Creek means Salmon Creek LLC, a wholly owned subsidiary of Palco, and, as applicable, its predecessor Salmon Creek Corporation.

Salmon Creek Timberlands means approximately 1,300 acres of timberlands owned by Salmon Creek, in respect of which Scopac has the timber harvest rights.

SAR Account means funds held in a reserve account titled the Scheduled Amortization Reserve Account and used to support principal payments on the Scopac Timber Notes.

Schedules means the schedules, statements, and lists filed by the Debtors with the Bankruptcy Court pursuant to Bankruptcy Rule 1007, as may be amended or supplemented from time to time.

Scopac means Scotia Pacific Company LLC, a limited liability company wholly owned by Palco.

Scopac General Unsecured Claim means a General Unsecured Claim against Scopac, including, but not limited to, any Claim by Holders of Scopac Timber Notes on account of the Scopac Timber Notes that is not a Secured Claim, which Claims are classified in Class 9 and treated under Article IV of the Plan; *provided, however,* that the term "Scopac General Unsecured Claim" shall not include Scopac Trade Claims.

Scopac Loan Agreement means that certain agreement dated as of July 20, 1998 by and between Scopac, as borrower, and Bank of America, N.A., as lender and as agent for itself and any other lender parties, pursuant to which Scopac could borrow in order to pay up to one year's interest on the Scopac Timber Notes on a senior secured basis.

Scopac Loan Claim means any Claim arising from the Scopac Loan Agreement, which claim is classified in Class 5 and treated under Article IV of the Plan.

Scopac Timber Notes means, collectively, the A-1 Timber Notes, the A-2 Timber Notes and the A-3 Timber Notes.

Scopac Trade Claim means a General Unsecured Claim against Scopac for goods, supplies, equipment, or services utilized by Scopac in the operation of its business, which shall include claims of former employees and which Claim is classified in Class 8 and treated under Article IV of the Plan; *provided, however,* that the term "Scopac Trade Claim" shall not include (i) Claims asserted by former Insiders, (ii) the Palco DIP Loan Claim, and (iii) the Palco Term Loan Claim.

Scotia means Scotia, California.

Scotia Inn means Scotia Inn Inc., a wholly owned subsidiary of Palco.

Scotia Development means Scotia Development LLC, a wholly owned subsidiary of Palco.

Secured Claim means any Claim that is (a) secured in whole or part, as of the Petition Date, by a Lien against property of a Debtor that is valid, perfected, and enforceable under applicable law and is not subject to avoidance under the Bankruptcy Code or applicable nonbankruptcy law, or (b) subject to setoff under section 553 of the Bankruptcy Code; *provided, however,* with respect to both (a) and (b) above, a Claim is a Secured Claim only to the extent of the value, net of any senior Lien, of the Estate's interest in the assets or property securing any such Claim or the amount subject to setoff, as the case may be.

Secured Tax Claim means any Secured Claim of a Governmental Unit that absent its secured status would be entitled to priority in right of payment under sections 502(1) and 507(a)(8) of the Bankruptcy Code (including without limitation any related Secured Claim for penalties).

Securities Act means the Securities Act of 1933, 15 U.S.C. §§ 77a-77m, as in effect on the Petition Date, together with all amendments and modifications thereto subsequently made applicable to the Reorganization Cases.

Semi-Annual Payment Date means June 15 and December 15; *provided, however,* if such day is not a Business Day then the Semi-Annual Payment Date shall be the first Business Day thereafter.

SPC Funding Amount means those funds to be loaned or caused to be loaned by the Timber Notes Indenture Trustee to the SPC Litigation Trust on the Effective Date which amount shall be used by the SPC Litigation Trustee pending the receipt by the SPC Litigation Trust of recoveries on account of the SPC Litigation Trust Assets solely for the purposes (i) of investigating and prosecuting the SPC Litigation Trust Assets and (ii) paying the costs and expenses of the SPC Litigation Trust.

SPC Litigation Trust means a trust formed in accordance with the SPC Litigation Trust Agreement effective as of the Effective Date (i) into which the SPC Litigation Trust Assets not retained, released, waived or enjoined under Article VIII of the Plan shall automatically vest upon the transfer of Causes of Action by the Reorganized Entities on the Effective Date and into which the Scopac Estate and Scopac shall be deemed to have automatically granted, on behalf and for the benefit of their creditors, all of their rights to pursue all such SPC Litigation Trust Assets and receive all recoveries therefrom, and (ii) to administer the proceeds of any such Causes of Action and to act as the disbursing agent for the proceeds of such SPC Litigation Trust Assets.

SPC Litigation Trust Agreement means the trust agreement for the SPC Litigation Trust in the form to be filed with the Court by the SPC Litigation Trustee on or before the Effective Date, or as soon thereafter as practicable.

SPC Litigation Trust Assets means Causes of Action of Scopac for money damages only, subject to any liens retained pursuant to this Plan by the Timber Notes Indenture Trustee for the benefit of the Holders of Class 6 Allowed Scopac Timber Note Secured Claims; *provided, however*, for avoidance of doubt, SPC Litigation Trust Assets shall not include rights to setoff under section 553 of the Bankruptcy Code; *provided, further, however,* SPC Litigation Trust Assets shall not include the following: (i) Causes of Action against any Debtor, MRC/Marathon Plan Proponent (in any capacity, including without limitation, Marathon, as lender to the Palco Debtors), any member (solely in that capacity) or professional of the Committee, the Committee, any Reorganized Entity and the Holder of the Class 5 Scopac Loan Claim; (ii) Avoidance Actions under section 547(b)(4)(a) of the Bankruptcy Code (i.e., ninety (90) day preference actions), with respect to trade creditors of Scopac that (x) supply the Reorganized Entities in the ordinary course of their business with goods and services, and (y) are identified in writing by the Reorganized Entities to the SPC Litigation Trustee within ten (10) Business Days after the SPC Litigation Trustee submits a written list of potential defendants to the Reorganized Entities; (iii) Avoidance Actions under section 547(b)(4)(a) of the Bankruptcy Code (i.e., ninety (90) day preference actions), with respect to trade creditors of the Palco Debtors; (iv) Causes of Action with respect to accounts receivables, tax refunds, tax rebates and any other amounts owed to the Debtors or the Reorganized Entities by account debtors; (v) Causes of Action with respect to Environmental Obligations; (vi) Causes of Action of the Palco Debtors, including their claims in the Headwaters Litigation, and the proceeds thereof; (vii) the PLC Litigation Trust Assets; (viii) the PLC Funding Amount; and (ix) the SPC Funding Amount. Notwithstanding anything to the contrary contained in the Plan, the Confirmation Order, or herein, the SPC Litigation Trust Assets shall include all of Scopac's claims in the Headwaters Litigation, which shall vest in the SPC Litigation Trust subject to any liens, claims and encumbrances (including, without limitation, the lien of the Timber Notes Indenture Trustee for the benefit of the Holders of Class 6 Allowed Scopac Timber Note Secured Claims).

SPC Litigation Trust Participation means an uncertificated, nontransferable, Pro Rata beneficial interest in the net recoveries of the SPC Litigation Trust (as set forth in Section 8.10.2 of the Plan) after prosecution, settlement or abandonment of the SPC Litigation Trust Assets, subject to the terms and conditions of the SPC Litigation trust Agreement. SPC Litigation Trust Participations (a) shall be noted in the books and records of the SPC Litigation Trust, (b) shall not be evidenced by a writing, and (c) may not be transferred, sold, assigned, hypothecated or pledged, except that they may be assigned or transferred by will, intestate succession, or operation of law.

SPC Litigation Trustee shall be the person nominated by the to serve as the SPC Litigation Trustee in accordance with Section 8.6.2 of the Plan.

State Water Board means the California State Water Resources Control Board.

Supplemental Bar Date Order means the order entered by the Bankruptcy Court establishing September 5, 2007 as the Bar Date for unknown creditors.

SYP means the sustained yield plan approved as part of the Headwaters Agreement and later invalidated by a California state court, which covers multiple species and encompasses substantially all of the Palco Timberlands.

Tax Claim means any Claim for any and all federal, state, county and local income, ad valorem, excise, stamp and other taxes of any type or nature whatsoever.

THP means a timber harvesting plan required to be filed with and approved by the CDF prior to the harvesting of timber.

Timber Notes Indenture means the indenture dated July 20, 1998, as amended from time to time, by and between the Debtor and U.S. Bank & Trust, as original trustee, which indenture governs the terms of the Scopac Timber Notes.

Timber Notes Indenture Trustee means The Bank of New York, N.A., or its successors and assigns, as substitute trustee under the Timber Notes Indenture.

Timberlands means any timberlands owned by Palco, Scopac, or Salmon Creek, including, without limitation, approximately 200,000 acres of timberlands owned by Scopac and the Salmon Creek Timberlands.

TMDLs means total maximum daily load limits.

Townco means the Reorganized Entity that will include any and all Assets of the Debtors currently associated with or anticipated to be associated with Scotia, including, without limitation, industrial use facilities, the cogeneration plant, 270 homes, various commercial properties, and the Britt mill in Arcata, California, and all of the land associated with these Assets, on and after the Effective Date, provided that Townco will not own any of the Assets to be owned by Newco.

U.S. Trustee means the United States Trustee for the Southern District of Texas.

Voting Deadline means the deadline set by the Bankruptcy Court for submitting Ballots on the Plan.

WWDRs means watershed-wide waste discharge requirements.

APPENDIX A TO MRC/MARATHON FIRST AMENDED PLAN, AS FURTHER MODIFIED, WITH TECHNICAL MODIFICATIONS

UNIFORM GLOSSARY OF DEFINED TERMS FOR PLAN DOCUMENTS

APPENDIX A TO MRC/MARATHON FIRST AMENDED PLAN, AS FURTHER MODIFIED, WITH TECHNICAL MODIFICATIONS

Uniform Glossary of Defined Terms for Plan Documents

Unless the context otherwise requires, the following terms, when used in initially capitalized form in the Disclosure Statement, related exhibits, and Plan Documents, shall have the following meanings. Such meanings shall be equally applicable to both the singular and plural forms of such terms. Any term used in capitalized form that is not defined herein but that is defined in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning ascribed to such term by the Bankruptcy Code or the Bankruptcy Rules (with the Bankruptcy Code controlling in the event of a conflict or ambiguity). Certain defined terms used in only one Section of the Disclosure Statement are defined in such Section. The rules of construction set forth herein and in section 102 of the Bankruptcy Code shall apply. All references to the "Plan" shall be construed, where applicable, to include references to the Plan and all its exhibits, appendices, schedules, supplements and annexes (and any amendments made in accordance with their terms or applicable law).

A-1 Timber Notes means Scopac's 6.55% Series B Class A-1 Timber Collateralized Notes due 2028, with an original principal amount of $160.7 million.

A-2 Timber Notes means Scopac's 7.11 % Series B Class A-2 Timber Collateralized Notes due 2028, with an original principal amount of $243.2 million.

A-3 Timber Notes means Scopac's 7.71 % Series B Class A-3 Timber Collateralized Notes due 2028, with an original principal amount of $463.3 million.

Administrative Expense **means** (a) any cost or expense of administration of the Reorganization Cases incurred before the Effective Date and allowable under section 503(b) of the Bankruptcy Code (including without limitation (x) claims arising under sections 503(b)(3), 503(b)(4) and 503(b)(9) of the Bankruptcy Code and (y) claims asserted by members of the Committee for reimbursement of actual, necessary expenses pursuant to section 503(b)(3)(F) of the Bankruptcy Code which Committee members are permitted to assert) and entitled to priority under section 507(a)(2) of the Bankruptcy Code including, without limitation, (i) any actual and necessary post-petition cost or expense of preserving the Estates or operating the businesses of the Debtors, (ii) any payment required to cure a default on an Assumed Contract, (iii) any post-petition cost, indebtedness, or contractual obligation duly and validly incurred or assumed by a Debtor in the ordinary course of its business, and (iv) compensation or reimbursement of expenses of professionals to the extent allowed by the Bankruptcy Court under sections 330(a) or 331 of the Bankruptcy Code and (b) any fee or charge assessed against the Estates under 28 U.S.C. § 1930.

Administrative Expense Claim means any Claim for the payment of an Administrative Expense.

Administrative Expense Claims Bar Date means the thirtieth day after the Effective Date or such other date as may be fixed by order of the Bankruptcy Court.

Affiliate has the meaning set forth in section 101(2) of the Bankruptcy Code.

Allowed means Bankruptcy Court approval of a Claim or Interest.

Allowed Amount of any Claim or Interest means the amount at which that Claim or Interest is Allowed.

Allowed Claim; Allowed Interest means any Claim or Interest in any of the Debtors or their respective Estates, (i) proof of which was filed on or before the Bar Date (defined below), (ii) if no such proof of Claim or Interest has been timely filed, which has been or hereafter is listed by such Debtor in its Schedules as liquidated in amount and not disputed or contingent or (iii) any Interest registered in the stock or membership register, as the case may be, maintained by or on behalf of the Debtor as of the Record Date, in each such case in clauses (i), (ii) and (iii) above, a Claim or Interest as to which no objection to the allowance thereof, or action to equitably subordinate or otherwise seek recovery from the Holder of the Claim or Interest, has been interposed within the applicable period of

limitation fixed by the Plan, the Bankruptcy Code, the Bankruptcy Rules, or a Final Order, or as to which an objection has been interposed and such Claim has been allowed in whole or in part by a Final Order.

Assets means all property in which a Debtor holds a legal or equitable interest, including all property described in 11 U.S.C. § 541 and all property disclosed in such Debtor's respective Schedules and the Disclosure Statement.

Assumed Contracts means, collectively, an executory contract or unexpired lease that is subject to assumption or rejection under section 365 of the Bankruptcy Code that is identified in the Plan Supplement and which either of the Reorganized Entities intends to assume pursuant to the Plan.

Avoidance Actions means any claim or Cause of Action or right under chapter 5 of the Bankruptcy Code, including all fraudulent-conveyance and fraudulent-transfer laws, all non-bankruptcy laws vesting in creditors' rights to avoid, rescind or recover on account of transfers, all preference laws, the Uniform Fraudulent Transfer Act, state laws of similar import and the proceeds thereof.

Ballot means each of the ballot forms for voting to accept or reject the Plan distributed to all Holders of Impaired Claims entitled to vote on the Plan.

Balloting and Claims Agent means Logan & Company, Inc.

Bank of America means Bank of America, N.A., as lender and as agent for itself and any other lender parties to the Scopac Loan Agreement.

Bankruptcy Code means title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.*, as in effect on the Petition Date, together with all amendments and modifications thereto subsequently made, to the extent applicable to the Reorganization Cases.

Bankruptcy Court means the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division, or such other court having jurisdiction over the Reorganization Cases.

Bankruptcy Rules means the Federal Rules of Bankruptcy Procedure and the local rules and general orders of the Bankruptcy Court, as in effect on the Petition Date, together with all amendments and modifications thereto subsequently made applicable to the Reorganization Cases.

BAPCPA means the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8,119 Stat. 51 (2005).

Bar Date means the date(s) by which any Entity asserting certain Claims against the Debtors must have filed a Proof of Claim or be forever barred from asserting such Claims against the Debtors or their Estates, as established by any order(s) of the Bankruptcy Court or the Plan.

Bar Date Order means the order entered by the Bankruptcy Court establishing July 17, 2007 as the general Bar Date and August 17, 2007 as the Bar Date applicable to Governmental Units, and any subsequent order by the Bankruptcy Court amending, revising, rescinding or superseding the same, including but not limited to the Supplemental Bar Date Order.

Britt means Britt Lumber Co., Inc., a wholly owned subsidiary of Palco.

Business Day means any day other than a Saturday, Sunday, or legal holiday (as such term is defined in Bankruptcy Rule 9006(a)).

California Permits means the Permits issued by California pursuant to the HCP.

Cash means United States Dollars in the form of checks drawn on available funds or wire transfers of immediately available funds.

Causes of Action means all causes of action, rights, Claims, and demands against any Persons that the Debtors or their Estates own or have an interest in or can assert in any fashion, or which could be asserted by the Debtors on behalf of any Creditor or Creditor representative under the Bankruptcy Code as Debtors in Possession, including but not limited to actions under 11 U.S.C. § 510 to subordinate Claims.

CDF means the California Department of Forestry and Fire Protection.

CDF Harvest Limit means the applicable annual harvest limit established by the CDF for each watershed.

Claim has the meaning set forth in section 101(5) of the Bankruptcy Code, against any Debtor or any Estate whether or not asserted.

Claimant means the Holder of a Claim.

Class means a category of Holders of Claims or Interests, as set forth in Articles III of the Plan pursuant to section 1122 of the Bankruptcy Code.

Class 6 Distribution Adjustment means, subject to the limitation contained Section 4.6.2.1 of the Plan, a reduction dollar for dollar by the amount determined by the following equation: (a) the sum of (i) the Allowed Scopac Loan Claim and (ii) any postpetition financing provided to Scopac and (iii) any Other Secured Claim required to be paid under the Plan by Scopac, in excess of the fair market value as of the Effective Date of any cash, auction rate securities or other assets in the SAR Account as of the Effective Date; plus (b) the sum of accrued but unpaid Scopac Administrative Expense Claims in excess of $5,000,000, as such claims may be estimated as of the Effective Date; minus (c) any accrued but unpaid receivables arising after the Petition Date owed from Palco to Scopac net of any accrued but unpaid receivables arising after the Petition Date owed from Scopac to Palco as of the Effective Date.

Collateral means any property or interest in property of an Estate that is subject to a Lien to secure the payment or performance of a Claim, which Lien is not subject to avoidance or otherwise invalid under the Bankruptcy Code or applicable state law.

Committee means the Official Committee of Unsecured Creditors for the Debtors appointed by the U.S. Trustee on January 25, 2007, as presently constituted.

Confirmation, Confirmation of the Plan, or ***Plan Confirmation*** means the approval of the Plan by the Bankruptcy Court at the Confirmation Hearing.

Confirmation Date means the date on which the Confirmation Order is entered on the docket of the Bankruptcy Court.

Confirmation Hearing means the hearing held by the Bankruptcy Court pursuant to section 1128 of the Bankruptcy Code to consider Confirmation of the Plan, as such hearing may be adjourned or continued from time to time.

Confirmation Order means the order of the Bankruptcy Court confirming the Plan pursuant to section 1129 and other applicable sections of the Bankruptcy Code.

Creditor means any Person or Entity holding a Claim against a Debtor's Estate or pursuant to section 102(5) of the Bankruptcy Code against property of the Debtor that arose or is deemed to have arisen on or prior to the Petition Date.

Debtor means any of the Palco Debtors or Scopac.

Debtors means the Palco Debtors and Scopac.

Deficiency Claim means a Claim of a Claimant that asserts a Secured Claim against one or more of the Debtors equal to the amount by which such Claim exceeds the Allowed Secured Claim.

DIP Order means the Bankruptcy Court's order dated July 31, 2007 authorizing the Palco Debtors to enter into the Palco DIP Facility.

Disclosure Statement means the Joint Disclosure Statement in Support of the Respective Plans of Reorganization Proposed by (1) Mendocino Redwood Company, LLC and Marathon Structured Finance Fund L.P.; (2) The Bank of New York Trust Company, N.A., Indenture Trustee for the Timber Notes; and (3) the Debtors and Maxxam Inc., Maxxam Group Holdings Inc., and Maxxam Group Inc., dated February 29, 2008, including all exhibits attached thereto or referenced therein, as submitted pursuant to section 1125 of the Bankruptcy Code and approved by the Bankruptcy Court, as such Joint Disclosure Statement may be further amended, supplemented, or modified from time to time.

Disputed Claim means a Claim that is not an Allowed Claim, including a Claim that is, in whole or in part: (a) listed on the Schedules as, or proof of which is filed as, unliquidated, disputed or contingent; (b) as to which a Proof of Claim designating such Claim as liquidated in amount and not contingent was not timely and properly filed; (c) as to which a Debtor, Reorganized Entity, or other party in interest has filed a timely objection or request for estimation in accordance with the Bankruptcy Code and Bankruptcy Rules; or (d) is otherwise disputed by a Debtor, a Reorganized Entity or other party in interest in accordance with applicable law, which objection, request for estimation or dispute has not been withdrawn or determined by a Final Order.

Distribution means any distribution by or on behalf of the Debtors, the Reorganized Entities, the PLC Litigation Trust and the SPC Litigation Trust to the Holders of Allowed Claims pursuant to the Plan.

Distribution Date, when used with respect to each Claim and Interest, means as soon as practicable after the later of (a) the Effective Date, (b) the date a Claim becomes payable pursuant to any agreement between the Debtors (or, upon the occurrence of the Effective Date, the Reorganized Entities, as the case may be), or (c) solely with respect to Disputed Claims and Disputed Interests as of the Effective Date, no later than 30 days after the date upon which the Claim or Interest becomes an Allowed Claim or Allowed Interest.

Effective Date means the date specified by the Plan Proponents in a notice filed with the Bankruptcy Court as the date on which this Plan shall take effect, and which occurs after (i) the Confirmation Order becomes a Final Order; and (ii) each of the conditions precedent to the Effective Date provided for in Article XI of the Plan have been satisfied or waived.

Entity has the meaning set forth in section 101(15) of the Bankruptcy Code.

Environmental Obligations means, with respect to any Debtor or Reorganized Entity such entity or entities' obligations to Governmental Units to comply, complete, perform, satisfy and/or provide for satisfaction of pre-petition, current, ongoing, executory and/or future regulatory or statutory obligations, including, without limitation, (i) approved THPs, WWDRs, Cleanup and Abatement Orders, Streambed Alteration Agreements, and related permits or authorizations, and may include for example, requirements for completion or correction, monitoring and reporting, winterization, drainage improvement, restoration, inspection, study; (ii) the California State and federal ITPs, which include the HCP, and the associated Implementation Agreement (the "IA"), and the Agreement Relating to Enforcement of AB 1986; (iii) consistency determinations under the California Endangered Species Act that are based upon the federal ITPs, including the HCP and the IA; and (iv) those obligations described in the Claims filed by the California Resources Agency, the California Department of Forestry and Fire Protection, the California Department of Fish and Game, the California Wildlife Conservation Board, the California State Water Resources Board, the California Regional Water Quality Control Board, North Coast Region, the U.S. Fish and Wildlife Services, the U.S. Department of the Interior, the National Marine Fisheries Service, and the U.S. Department of Commerce.

Environmental Plans means the HCP.

EPA means the Federal Environmental Protection Agency.

Equity Interests or ***Interests*** means the rights of the Holders of the equity securities of a Debtor.

Estate means the legal entity administering the property of a Debtor, in its capacity as a debtor in possession, between the Petition Date and the Effective Date, created pursuant to section 541 of the Bankruptcy Code.

Exculpated Parties means (i) the Plan Proponents and their respective officers, directors, professionals, members, agents and employees, (ii) the Reorganized Entities and their respective officers, directors, professionals, members, agents and employees, and (iii) the Committee, its members and Professionals.

Exit Financing means the proposed financing discussed in Section 7.8 of the Plan.

Final Order means an order of a court: (a) as to which the time to appeal, petition for writ of certiorari, or otherwise seek appellate review or to move for reargument, rehearing, reconsideration or stay has expired and as to which no appeal, petition for writ of certiorari, or other appellate review, or proceedings for reargument, rehearing, reconsideration or stay shall then be pending; or (b) as to which any right to appeal, petition for certiorari, or move for reargument, rehearing or stay shall have been waived in writing by all parties with such right; or (c) in the event that an appeal, writ of certiorari, or other appellate review or reargument, rehearing, reconsideration or stay thereof has been sought, which order shall have been affirmed by the highest court to which such order was appealed or from which writ of certiorari or other appellate review or reargument, rehearing, reconsideration or stay was sought, and as to which the time to take any further appeal, to petition for writ of certiorari, to otherwise seek appellate review, and to move for reargument, rehearing, reconsideration or stay shall have expired; *provided, however*, that the possibility that a motion under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure or under section 1144 of the Bankruptcy Code, or any analogous rule under the Bankruptcy Rules, may be filed with respect to such order shall not cause such order not to be a Final Order.

General Unsecured Claim means a Claim against a Debtor that is not a Secured Claim, an Administrative Expense Claim, a Trade Claim, a Priority Tax Claim, an Other Priority Claim, a Non-Debtor Affiliate Claim or a Professional Compensation Claim (but shall not include Claims that are disallowed or released, whether by operation of law or pursuant to order of the Bankruptcy Court, written release or settlement, the provisions of the Plan or otherwise), which Claims are classified in Classes 7, 8 and 9 and treated under Article IV of the Plan; *provided, however,* that the term "General Unsecured Claim" shall not include (i) the Palco DIP Loan Claim, and (ii) the Palco Term Loan Claim.

Governmental Unit has the meaning ascribed to such term in section 101(27) of the Bankruptcy Code.

HCP means the Habitat Conservation Plan for the Properties of Pacific Lumber, Scotia Pacific, and Salmon Creek Corporation, dated February, 1999 approved in March 1999 in connection with consummation of the Headwaters Agreement, which covers multiple species and encompasses substantially all of the Timberlands.

Headwaters Agreement means the agreement among Palco, Scopac, Salmon Creek, the United States, and California pursuant to which the those companies transferred to the United States government 5,600 acres of timberlands in exchange for $300 million, approximately 7,700 acres of timberlands, and federal and state government-approved habitat conservation and sustained yield plans.

Headwaters Litigation means the claim filed by Palco and Scopac with the Claims Board against the North Coast Water Board, the State Water Board and the State of California (Claim No. G558159) alleging that the defendants have substantially impaired the contractual and legal rights of Palco and Scopac under the Headwaters Agreement, and the subsequent damages lawsuit entitled *The Pacific Lumber Company and Scotia Pacific Lumber Company LLC v. State of California, et al.* filed by Palco and Scopac in the Superior Court of Fresno County, California (No. CECG 0422).

Headwaters Timberlands means the 5,600 acres of timberlands transferred by Salmon Creek, Palco and Scopac to the United States government upon consummation of the Headwaters Agreement.

Holder means any Person holding an Interest or Claim.

Impaired means a Claim or a Class of Claims that is impaired within the meaning of section 1124 of the Bankruptcy Code.

Inter-Debtor Claim means any Claim held by any Debtor against any other Debtor, which claim is classified in Class 10 and treated under Article IV of the Plan.

Intercompany Contracts means any contract or agreement by or between any of the Debtors including, but not limited to, the following: (i) the New Reciprocal Rights Agreement; (ii) the New Master Purchase Agreement; (iii) the New Services Agreement; (iv) the New Additional Services Agreement; (v) the Master Lease Agreement; (vi) the Amended and Restated Lease; (vii) the Sales and Marketing Assistance Agreement; and (viii) the Development and Sales Assistance Agreement, as any of such agreements or contracts have been amended through the date of the Disclosure Statement.

Interim Compensation Order means the order entered by the Bankruptcy Court on January 24, 2007 establishing procedures for interim compensation and reimbursement of expenses of professionals of the Debtors and the Committee.

IRS means the Internal Revenue Service.

ITP means Incidental Take Permit, which authorizes certain actions that might otherwise constitute a prohibited "take" of an endangered or threatened species which is otherwise protected by the state and federal Endangered Species Acts.

LIBOR means London Interbank offered rate of interest.

Lien has the meaning set forth in section 101(37) of the Bankruptcy Code.

Liquidation Analysis means the liquidation analysis attached as Exhibit E to the Disclosure Statement.

Marathon means, collectively, Marathon Structured Finance Fund L.P. and certain of its affiliates that are lenders to the Palco Debtors

MAXXAM means MAXXAM Inc., MGHI's parent.

MGHI means MAXXAM Group Holdings Inc., MGI's parent.

MGI means, MAXXAM Group Inc., Palco's parent.

Mill or Scotia Mill means the lumber mill of Palco located in Scotia and operated by Palco, together with all Assets of the Debtors currently associated with or anticipated to be associated with Mill on and after the Effective Date.

Mill Working Capital means the marked-to-market value of the ordinary course current receivables and current inventories, less the amount of the current payables of Newco.

MMCAs means the marbled murrelet conservation areas and are also known as the Ancient Redwood Groves.

MRC means, collectively, Mendocino Redwood Company, LLC and certain of its affiliates.

MRC/Marathon Plan Proponents means, collectively, MRC and Marathon.

Newco means the Reorganized Entity that will include the assets of the Mill and the Timberlands, together with any and all Assets of the Debtors currently associated with or anticipated to be associated with Mill and the Timberlands on and after the Effective Date, provided that Newco will not own any of the Assets to be owned by Townco.

New Master Purchase Agreement means that certain agreement dated July 20, 1998 by and between Scopac and Palco governing the sale of Scopac Timber.

Non-Debtor Affiliate means any Entity that is an affiliate of any of the Debtors (other than another Debtor), within the meaning of section 101(2) of the Bankruptcy Code, including but not limited to MGI, MAXXAM Group Holdings Inc., and MAXXAM.

Non-Debtor Affiliate Claim means a Claim by a Non-Debtor Affiliate against a Debtor, including but not limited to the following Claims, which are collectively classified in Class 11: (i) Claims arising from those certain funds loaned by MGI to Palco during 2005 on an unsecured and subordinated basis totaling approximately $6,000,000; (ii) Claims arising from those certain funds loaned by MGI to Palco during 2006 on an unsecured and subordinated basis totaling approximately $30,900,000; (iii) Claims arising from the Lump Sum Purchases; and (iv) Claims arising from MAXXAM's provision of general and administrative assistance and other services to the Debtors, including risk-management services, accounting services, income tax reporting and compliance services, treasury and cash-management services, legal services and employee-benefit services general and administrative assistance and other services which, as of the Petition Date, totaled approximately $1,782,542, and subsequent to the Petition Date totaled in excess of $1,200,000.

North Coast Water Board means the California North Coast Regional Water Quality Control Board.

Option A means the plan for complying with California's sustained yield requirements, which has been approved by the California Department of Forestry and Fire Protection and is currently being relied on by Scopac to obtain approval of its THPs.

Option C means an alternative procedure for timber owners to comply with California's sustained yield requirements.

Ordinary Course Professionals Order means the order entered by the Bankruptcy Court on or about July 17, 2007 permitting the Debtors to employ professionals in the ordinary course of their business without the necessity of filing individual retention applications for each professional.

Other Priority Claim means a Claim (or portion thereof), if any, entitled to priority under section 507(a) of the Bankruptcy Code, other than a Priority Tax Claim, an Administrative Expense Claim or a Professional Compensation Claim, which claim is classified in Class 1 and treated under Article IV of the Plan.

Other Secured Claim means any Secured Claim other than the following: (i) the Palco DIP Loan Claim; (ii) the Palco Term Loan Claim; (iii) the Scopac Loan Claim; and (iv) the Scopac Timber Note Secured Claims, which Claim, together with Secured Tax Claims are classified in Class 2 and treated under Article IV of the Plan.

Palco means The Pacific Lumber Company, a wholly owned subsidiary of MGI.

Palco DIP Loan means the senior secured debtor-in-possession financing provided to the Palco Debtors by Marathon pursuant to the Debtor-In-Possession Revolving Credit Agreement, dated as of August 6, 2007.

Palco DIP Loan Claim means a Claim arising under the Palco DIP Loan, which claim is classified in Class 3 and treated under Article IV of the Plan and which shall not include any Claim for any deficiency, which is waived by the Holder of such Claim in consideration for the releases and other good and valuable consideration given and embodied under the Plan.

Palco Debtors means, collectively, Palco, Britt, Salmon Creek, Scotia Inn, and Scotia Development.

Palco General Unsecured Claim means a General Unsecured Claim against Palco, which Claim is classified in Class 7 and treated under Article IV of the Plan together with Palco Trade Claims.

Palco Revolving Credit Agreement means that certain Revolving Credit Agreement, dated as of July 18, 2006 by and among Palco and Britt, as borrowers, and Marathon, as Administrative Agent and as a lender.

Palco Revolving Credit Facility means the five year $60.0 million senior secured asset based revolving credit facility evidenced by the Palco Revolving Credit Agreement.

Palco Term Loan means the five year $85.0 million senior secured term loan provided pursuant to the Palco Term Loan Agreement.

Palco Term Loan Agreement means that certain Term Loan Agreement, dated as of July 18, 2006, by and among Palco and Britt, as borrowers, and Marathon, as Administrative Agent and as a lender.

Palco Term Loan Claim means a Claim arising under the Palco Term Loan Agreement, which claim is classified in Class 4 and treated under Article IV of the Plan and which shall not include any Claim for any deficiency, which is waived by the Holder of such Claim in consideration for the releases and other good and valuable consideration given and embodied under the Plan.

Palco Trade Claim means a General Unsecured Claim against the Palco Debtors for goods, supplies, equipment, or services utilized by the Palco Debtors in the operation of their businesses, which Claim is classified in Class 7 and treated under Article IV of the Plan together with Palco General Unsecured Claims.

Pension Plan means any ongoing, defined benefit pension plans to which a Debtor is a contributing sponsor or member of a contributing sponsor's controlled group and to which Title IV of the Employee Retirement Income Security Act applies, including without limitation, the Palco Retirement Plan, Employer Identification No./Plan No. 13-3318327/003.

Person means any person, including without limitation, any individual, entity, corporation, partnership, limited liability company, limited liability partnership, joint venture, association, joint stock company, estate, trust, unincorporated association or organization, official committee, *ad hoc* committee or group, governmental agency or political subdivision thereof, the U.S. Trustee, and any successors or assigns of any of the foregoing.

Petition Date means January 18, 2007, the date on which the Debtors' Reorganization Cases were commenced with the filing of voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

Plan means the First Amended Joint Plan of Reorganization for the Debtors, as Further Modified, with Technical Modifications, proposed by the Plan Proponents, dated July 8, 2008 under Chapter 11 of the United States Bankruptcy Code, including all exhibits attached thereto or referenced therein, as the same may be amended, modified, or supplemented from time to time.

Plan Documents means, collectively, the Plan, the Disclosure Statement, and all documents, attachments, and exhibits attached to the Plan or the Disclosure Statement that aid in effectuating the Plan, as the same may be amended, modified, or supplemented, in accordance with their terms.

Plan Proponents means, collectively, the MRC/Marathon Plan Proponents and the Committee.

Plan Supplement means the supplement to the Plan in form and substance satisfactory to the Plan Proponents and the Reorganized Entities to be filed with the Bankruptcy Court not later than ten (10) days prior to the Voting Deadline, which shall contain forms of final documents described in the Plan.

PLC Funding Amount means that certain $500,000 to be loaned or caused to be loaned by Newco to the PLC Litigation Trust on the Effective Date which amount shall be used by the PLC Litigation Trustee pending the receipt by the PLC Litigation Trust of recoveries on account of the PLC Litigation Trust Assets solely for the purposes (i) of investigating and prosecuting the PLC Litigation Trust Assets, (ii) paying Statutory Fees as set forth in Section 13.5 of the Plan, and (iii) paying the costs and expenses of the PLC Litigation Trust. Interest shall accrue on the outstanding principal balance of the PLC Funding Amount at the rate of seven and one-half percent per annum

(7.5%) until the PLC Funding Amount (together with all accrued interest) has been repaid in full in accordance with the Plan. The term of such loan shall be until the termination of the PLC Litigation Trust in accordance with the Plan.

PLC Litigation Trust means a trust formed in accordance with the PLC Litigation Trust Agreement effective as of the Effective Date (i) into which the PLC Litigation Trust Assets not retained, released, waived or enjoined under Article VIII of the Plan shall automatically vest upon the transfer of Causes of Action by the Reorganized Entities on the Effective Date and into which the Estates and Debtors shall be deemed to have automatically granted, on behalf and for the benefit of their creditors, all of their rights to pursue all such PLC Litigation Trust Assets and receive all recoveries therefrom, and (ii) to administer the proceeds of any such Causes of Action and to act as the disbursing agent for the proceeds of such PLC Litigation Trust Assets.

PLC Litigation Trust Agreement means the trust agreement for the PLC Litigation Trust in the form to be contained in the Plan Supplement.

PLC Litigation Trust Assets means (a) that certain $10.6 million to be provided by Newco to the PLC Litigation Trust on the Effective Date which amount shall be used by the PLC Litigation Trustee first for payment to Holders of Allowed Claims classified in Classes 7 and 8, second to repay the PLC Funding Amount and SPC Funding Amount, and, finally, any remaining amounts returned to the Reorganized Entities, and (b) Causes of Action of the Palco Debtors for money damages only, transferred, assigned and otherwise conveyed to the PLC Litigation Trust on the Effective Date; *provided, however*, for avoidance of doubt, PLC Litigation Trust Assets shall not include rights to setoff under section 553 of the Bankruptcy Code; *provided, further, however*, PLC Litigation Trust Assets shall not include the following: (i) Causes of Action against any Debtor, MRC/Marathon Plan Proponent (in any capacity, including without limitation, Marathon, as lender to the Palco Debtors), any member (solely in that capacity) or professional of the Committee, the Committee, any Reorganized Entity and the Holder of the Class 5 Scopac Loan Claim; (ii) Avoidance Actions under section 547(b)(4)(a) of the Bankruptcy Code (i.e., ninety (90) day preference actions), with respect to trade creditors of the Palco Debtors that (x) supply the Reorganized Entities in the ordinary course of their business with goods and services, and (y) are identified in writing by the Reorganized Entities to the PLC Litigation Trustee within ten (10) Business Days after the PLC Litigation Trustee submits a written list of potential defendants to the Reorganized Entities; (iii) Avoidance Actions under section 547(b)(4)(a) of the Bankruptcy Code (i.e., ninety (90) day preference actions), with respect to trade creditors of Scopac; (iv) Causes of Action with respect to accounts receivables, tax refunds, tax rebates and any other amounts owed to the Debtors or the Reorganized Entities by account debtors; (v) the Debtors' claims in the Headwaters Litigation and the proceeds thereof; (vi) Causes of Action with respect to Environmental Obligations; (vii) Causes of Action of Scopac; (viii) the SPC Litigation Trust Assets; (ix) the PLC Funding Amount; and (x) the SPC Funding Amount.

PLC Litigation Trust Participation means an uncertificated, nontransferable, Pro Rata beneficial interest in the net recoveries of the PLC Litigation Trust after prosecution, settlement or abandonment of the PLC Litigation Trust Assets, subject to the terms and conditions of the PLC Litigation Trust Agreement. PLC Litigation Trust Participations (a) shall be noted in the books and records of the PLC Litigation Trust, (b) shall not be evidenced by a writing, and (c) may not be transferred, sold, assigned, hypothecated or pledged, except that they may be assigned or transferred by will, intestate succession, or operation of law.

PLC Litigation Trustee means the trustee(s) of the PLC Litigation Trust, as designated in the Plan and the PLC Litigation Trust Agreement. In the prosecution of any PLC Litigation Trust Assets, the PLC Litigation Trustee shall obtain the benefit of any tolling provisions or extensions available to the Palco Debtors' Estates and/or the Palco Debtors prior to the Confirmation Date or Effective Date, including those set forth in sections 108(a), 546(a), 549(d) and 550(f) of the Bankruptcy Code.

Post-petition Interest means simple interest accruing from the Petition Date calculated at the effective interest rate for 90-day securities obligations issued by the United States Treasury on the Effective Date or, if no such securities were issued on the Effective Date, on the date of issuance immediately preceding the Effective Date.

Priority Tax Claim means a Claim of a Governmental Unit of the kind specified in sections 502(1) and 507(a)(8) of the Bankruptcy Code.

Pro Rata means, with reference to any Distribution on account of any Allowed Claim or Allowed Interest in a Class, a Distribution equal in amount to the ratio (expressed as a percentage) that the amount of such claims bears to the aggregate amount of all Allowed Claims in the same Class.

Professional Compensation Claim means a Claim for compensation, indemnification or reimbursement of expenses incurred by Professionals retained by the Debtors and the Committee pursuant to sections 327, 328, 330, 331, or 503(b) of the Bankruptcy Code in connection with the Reorganization Cases.

Professionals means those Persons (a) employed pursuant to an order of the Bankruptcy Court in accordance with sections 327, 328, or 1103 of the Bankruptcy Code and to be compensated for services pursuant to sections 327, 328, 329, 330, or 331 of the Bankruptcy Code, for which compensation and reimbursement has been allowed by the Bankruptcy Court pursuant to section 503(b)(1) of the Bankruptcy Code, and/or (b) for which compensation and reimbursement has been allowed by the Bankruptcy Court or is sought pursuant to section 503(b)(4) of the Bankruptcy Code.

Proof of Claim means any proof of claim filed with the Bankruptcy Court or the Balloting and Claims Agent with respect to a Debtor pursuant to section 501 of the Bankruptcy Code and Bankruptcy Rules 3001 or 3002.

Quarterly Payment Date means the last Business Day of the month following the end of each calendar quarter after the Effective Date; *provided, however,* that if the Effective Date is within forty-five (45) days of the end of a calendar quarter, the first Quarterly Distribution Date will be the last Business Day of the month following the end of the first calendar quarter after the calendar quarter in which the Effective Date falls.

Qui Tam Relators means Richard Wilson and Chris Maranto.

Qui Tam Actions means the action filed by the Qui Tam Relators filed on behalf of the United States against the Debtors and related non-debtor parties in the United States District Court for the Northern District of California, case number C-06-7497 and the action filed on behalf of the State of California against the Debtors and related non-debtor parties in San Francisco Superior Court, case number CGC-06-4585.

Qui Tam Claims means the nine Proofs of Claim filed by the Qui Tam Relators in the Debtors' Reorganization Cases, which have been numbered as claims 511 through 519, consecutively, and with respect to which, on February 28, 2008, the Bankruptcy Court approved a settlement, pursuant to which such claims were reduced to $1.00 each, but any rights of the Qui Tam Relators to pursue non-debtor defendants were preserved.

Real Property Assumed Contract means, collectively, an Assumed Contract (i) relating to a Debtor's interest in real property, and (ii) granting rights or interest related to or appurtenant to the applicable real property, including all easements, license, permits, rights, privileges, immunities, options, rights of first refusal, powers, uses, usufructs, reciprocal easement or operating agreements, vault, tunnel or bridge agreements or franchises, development rights, and any other interests in real estate or right *in rem* related to the applicable real property.

Record Date means the date of entry of the order approving the Disclosure Statement.

Released Parties means (i) the Plan Proponents and their respective officers, directors, professionals, members, agents and employees, and (ii) the Reorganized Entities and their respective officers, directors, professionals, members, agents and employees.

Reorganization Case means any of the cases under chapter 11 of the Bankruptcy Code commenced by the Debtors currently pending in the Bankruptcy Court as Jointly Administered Chapter 11 Case Nos. 07-20027 through 07-20032.

Reorganized Entity or Reorganized Entities mean, collectively, Newco and/or Townco, in each case as applicable.

Restructuring Transactions means, collectively, those sales, mergers, consolidations, restructurings, dispositions, liquidations, transfers of assets or dissolutions that the Plan Proponents and the Reorganized Entities determine to be necessary and appropriate to effect a corporate restructuring in accordance with the Plan.

Salmon Creek means Salmon Creek LLC, a wholly owned subsidiary of Palco, and, as applicable, its predecessor Salmon Creek Corporation.

Salmon Creek Timberlands means approximately 1,300 acres of timberlands owned by Salmon Creek, in respect of which Scopac has the timber harvest rights.

SAR Account means funds held in a reserve account titled the Scheduled Amortization Reserve Account and used to support principal payments on the Scopac Timber Notes.

Schedules means the schedules, statements, and lists filed by the Debtors with the Bankruptcy Court pursuant to Bankruptcy Rule 1007, as may be amended or supplemented from time to time.

Scopac means Scotia Pacific Company LLC, a limited liability company wholly owned by Palco.

Scopac General Unsecured Claim means a General Unsecured Claim against Scopac, including, but not limited to, any Claim by Holders of Scopac Timber Notes on account of the Scopac Timber Notes that is not a Secured Claim, which Claims are classified in Class 9 and treated under Article IV of the Plan; *provided, however,* that the term "Scopac General Unsecured Claim" shall not include Scopac Trade Claims.

Scopac Loan Agreement means that certain agreement dated as of July 20, 1998 by and between Scopac, as borrower, and Bank of America, N.A., as lender and as agent for itself and any other lender parties, pursuant to which Scopac could borrow in order to pay up to one year's interest on the Scopac Timber Notes on a senior secured basis.

Scopac Loan Claim means any Claim arising from the Scopac Loan Agreement, which claim is classified in Class 5 and treated under Article IV of the Plan.

Scopac Timber Notes means, collectively, the A-1 Timber Notes, the A-2 Timber Notes and the A-3 Timber Notes.

Scopac Trade Claim means a General Unsecured Claim against Scopac for goods, supplies, equipment, or services utilized by Scopac in the operation of its business, which shall include claims of former employees and which Claim is classified in Class 8 and treated under Article IV of the Plan; *provided, however,* that the term "Scopac Trade Claim" shall not include (i) Claims asserted by former Insiders, (ii) the Palco DIP Loan Claim, and (iii) the Palco Term Loan Claim.

Scotia means Scotia, California.

Scotia Inn means Scotia Inn Inc., a wholly owned subsidiary of Palco.

Scotia Development means Scotia Development LLC, a wholly owned subsidiary of Palco.

Secured Claim means any Claim that is (a) secured in whole or part, as of the Petition Date, by a Lien against property of a Debtor that is valid, perfected, and enforceable under applicable law and is not subject to avoidance under the Bankruptcy Code or applicable nonbankruptcy law, or (b) subject to setoff under section 553 of the Bankruptcy Code; *provided, however,* with respect to both (a) and (b) above, a Claim is a Secured Claim only to the extent of the value, net of any senior Lien, of the Estate's interest in the assets or property securing any such Claim or the amount subject to setoff, as the case may be.

Secured Tax Claim means any Secured Claim of a Governmental Unit that absent its secured status would be entitled to priority in right of payment under sections 502(1) and 507(a)(8) of the Bankruptcy Code (including without limitation any related Secured Claim for penalties).

Securities Act means the Securities Act of 1933, 15 U.S.C. §§ 77a-77m, as in effect on the Petition Date, together with all amendments and modifications thereto subsequently made applicable to the Reorganization Cases.

Semi-Annual Payment Date means June 15 and December 15; *provided, however,* if such day is not a Business Day then the Semi-Annual Payment Date shall be the first Business Day thereafter.

SPC Funding Amount means those funds to be loaned or caused to be loaned by the Timber Notes Indenture Trustee to the SPC Litigation Trust on the Effective Date which amount shall be used by the SPC Litigation Trustee pending the receipt by the SPC Litigation Trust of recoveries on account of the SPC Litigation Trust Assets solely for the purposes (i) of investigating and prosecuting the SPC Litigation Trust Assets and (ii) paying the costs and expenses of the SPC Litigation Trust.

SPC Litigation Trust means a trust formed in accordance with the SPC Litigation Trust Agreement effective as of the Effective Date (i) into which the SPC Litigation Trust Assets not retained, released, waived or enjoined under Article VIII of the Plan shall automatically vest upon the transfer of Causes of Action by the Reorganized Entities on the Effective Date and into which the Scopac Estate and Scopac shall be deemed to have automatically granted, on behalf and for the benefit of their creditors, all of their rights to pursue all such SPC Litigation Trust Assets and receive all recoveries therefrom, and (ii) to administer the proceeds of any such Causes of Action and to act as the disbursing agent for the proceeds of such SPC Litigation Trust Assets.

SPC Litigation Trust Agreement means the trust agreement for the SPC Litigation Trust in the form to be filed with the Court by the SPC Litigation Trustee on or before the Effective Date, or as soon thereafter as practicable.

SPC Litigation Trust Assets means Causes of Action of Scopac for money damages only, subject to any liens retained pursuant to this Plan by the Timber Notes Indenture Trustee for the benefit of the Holders of Class 6 Allowed Scopac Timber Note Secured Claims; *provided, however*, for avoidance of doubt, SPC Litigation Trust Assets shall not include rights to setoff under section 553 of the Bankruptcy Code; *provided, further, however,* SPC Litigation Trust Assets shall not include the following: (i) Causes of Action against any Debtor, MRC/Marathon Plan Proponent (in any capacity, including without limitation, Marathon, as lender to the Palco Debtors), any member (solely in that capacity) or professional of the Committee, the Committee, any Reorganized Entity and the Holder of the Class 5 Scopac Loan Claim; (ii) Avoidance Actions under section 547(b)(4)(a) of the Bankruptcy Code (i.e., ninety (90) day preference actions), with respect to trade creditors of Scopac that (x) supply the Reorganized Entities in the ordinary course of their business with goods and services, and (y) are identified in writing by the Reorganized Entities to the SPC Litigation Trustee within ten (10) Business Days after the SPC Litigation Trustee submits a written list of potential defendants to the Reorganized Entities; (iii) Avoidance Actions under section 547(b)(4)(a) of the Bankruptcy Code (i.e., ninety (90) day preference actions), with respect to trade creditors of the Palco Debtors; (iv) Causes of Action with respect to accounts receivables, tax refunds, tax rebates and any other amounts owed to the Debtors or the Reorganized Entities by account debtors; (v) Causes of Action with respect to Environmental Obligations; (vi) Causes of Action of the Palco Debtors, including their claims in the Headwaters Litigation, and the proceeds thereof; (vii) the PLC Litigation Trust Assets; (viii) the PLC Funding Amount; and (ix) the SPC Funding Amount. Notwithstanding anything to the contrary contained in the Plan, the Confirmation Order, or herein, the SPC Litigation Trust Assets shall include all of Scopac's claims in the Headwaters Litigation, which shall vest in the SPC Litigation Trust subject to any liens, claims and encumbrances (including, without limitation, the lien of the Timber Notes Indenture Trustee for the benefit of the Holders of Class 6 Allowed Scopac Timber Note Secured Claims).

SPC Litigation Trust Participation means an uncertificated, nontransferable, Pro Rata beneficial interest in the net recoveries of the SPC Litigation Trust (as set forth in Section 8.10.2 of the Plan) after prosecution, settlement or abandonment of the SPC Litigation Trust Assets, subject to the terms and conditions of the SPC Litigation trust Agreement. SPC Litigation Trust Participations (a) shall be noted in the books and records of the SPC Litigation Trust, (b) shall not be evidenced by a writing, and (c) may not be transferred, sold, assigned, hypothecated or pledged, except that they may be assigned or transferred by will, intestate succession, or operation of law.

SPC Litigation Trustee shall be the person nominated by the to serve as the SPC Litigation Trustee in accordance with Section 8.6.2 of the Plan.

State Water Board means the California State Water Resources Control Board.

Supplemental Bar Date Order means the order entered by the Bankruptcy Court establishing September 5, 2007 as the Bar Date for unknown creditors.

SYP means the sustained yield plan approved as part of the Headwaters Agreement and later invalidated by a California state court, which covers multiple species and encompasses substantially all of the Palco Timberlands.

Tax Claim means any Claim for any and all federal, state, county and local income, ad valorem, excise, stamp and other taxes of any type or nature whatsoever.

THP means a timber harvesting plan required to be filed with and approved by the CDF prior to the harvesting of timber.

Timber Notes Indenture means the indenture dated July 20, 1998, as amended from time to time, by and between the Debtor and U.S. Bank & Trust, as original trustee, which indenture governs the terms of the Scopac Timber Notes.

Timber Notes Indenture Trustee means The Bank of New York, N.A., or its successors and assigns, as substitute trustee under the Timber Notes Indenture.

Timberlands means any timberlands owned by Palco, Scopac, or Salmon Creek, including, without limitation, approximately 200,000 acres of timberlands owned by Scopac and the Salmon Creek Timberlands.

TMDLs means total maximum daily load limits.

Townco means the Reorganized Entity that will include any and all Assets of the Debtors currently associated with or anticipated to be associated with Scotia, including, without limitation, industrial use facilities, the cogeneration plant, 270 homes, various commercial properties, and the Britt mill in Arcata, California, and all of the land associated with these Assets, on and after the Effective Date, provided that Townco will not own any of the Assets to be owned by Newco.

U.S. Trustee means the United States Trustee for the Southern District of Texas.

Voting Deadline means the deadline set by the Bankruptcy Court for submitting Ballots on the Plan.

WWDRs means watershed-wide waste discharge requirements.

Exhibit C

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*)
Maxim B. Litvak (Texas Bar No. 24002482)
Gregory V. Demo (NY Bar No. 5371992) (*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
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachary Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel and Proposed 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.	§	

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

The above-captioned debtor and debtor in possession (the "Debtor") files this motion (the "Motion") for the entry of an order (the "Order") approving the terms of a settlement

[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.

between the Debtor and the Committee (as defined below) regarding governance of the Debtor and procedures for operations in the ordinary course of business, as embodied in the term sheet attached hereto as **Exhibit A** (the "Term Sheet"). In support of this Motion, the Debtor respectfully represents as follows:

Preliminary Statement

1. Following weeks of negotiations, the Debtor and the Committee have reached a proposed settlement, which contemplates the creation of a new independent board of directors (the "Independent Directors") at Strand Advisors, Inc. ("Strand"), the Debtor's general partner and ultimate party in control, and the implementation of certain protocols governing the operation of the Debtor's business in the ordinary course. The Independent Directors will consist of the following three highly qualified and independent individuals: James Seery, John Dubel, and a third director to be selected by or otherwise acceptable to the Committee.[2] Two of the Independent Directors were chosen by the Committee and the third Independent Director will be selected by or otherwise acceptable to the Committee. Background information for each of the Independent Directors is attached hereto as **Exhibit B**.

2. Pursuant to the Term Sheet, and effective upon entry of the Order, James Dondero will no longer be a director, officer, managing member, or employee of the Debtor or Strand and will have no authority, directly or indirectly, to act on the Debtor's behalf. Going forward, the Independent Directors, through Strand, will have sole and exclusive management and control of the Debtor. The Independent Directors will have the discretion to appoint an interim

[2] The Committee's agreement to the Term Sheet in its entirety is contingent upon the selection of a third Independent Director acceptable to the Committee. In the event the Committee and the Debtor cannot reach an agreement on an acceptable Independent Director to fill the third seat of the Board of Directors, the Term Sheet shall be null and void.

Chief Executive Officer (the "CEO") who will manage the Debtor's day-to-day business operations. Subject to Court approval, the Debtor still intends to retain Development Specialists, Inc. ("DSI") to provide a Chief Restructuring Officer (the "CRO") that will serve at the direction of the Independent Directors (or CEO, if appointed).

3. It bears emphasis that the Independent Directors will not be mere figureheads. The Debtor and the Committee envision that the Independent Directors will be actively involved and intimately familiar with all material aspects of the Debtor's business and restructuring efforts. Moreover, with guidance of the CRO and CEO (if appointed), the Independent Directors will endeavor to prevent any negative influence Mr. Dondero or any of his affiliates or agents may have on the Debtor and its employees. Further, as part of the Term Sheet, the Committee will be granted standing to pursue estate claims against Mr. Dondero and other former insiders of the Debtor who were not employed by the Debtor as of the execution of the Term Sheet. The Committee will also retain the right to move for a chapter 11 trustee.

4. In sum, the Term Sheet resolves months of litigation between the Debtor and the Committee over the Debtor's governance structure and operating protocols, allowing all parties to refocus on a path forward for this chapter 11 case. With the Independent Directors in place, the Debtor can move forward expeditiously, efficiently, and effectively with the substantive aspects of this case and consider any available restructuring options that will maximize value for all constituents. The Debtor therefore urges the Court to approve the Term Sheet and allow the key economic interest holders to proceed with a productive restructuring effort.

Jurisdiction and Venue

5. The United States Bankruptcy Court for the District of Northern District of Texas, Dallas Division (the "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).

6. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

7. The statutory bases for the relief requested herein are sections 105(a) and 363 of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

Background

8. 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").

9. To assist and coordinate the restructuring process, the Debtor retained DSI and Bradley D. Sharp to serve as the CRO on October 7, 2019. On October 29, 2019, the Debtor filed the *Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, Additional Personnel, and Financial Advisory and Restructuring Related Services, Nunc Pro Tunc as of the Petition Date* [Docket No. 74] (the "CRO Motion") seeking to formally retain the CRO. The CRO Motion remains pending, and the Debtor is filing a supplement to the CRO Motion concurrently herewith.

10. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court. On November 12, 2019, the Committee filed an omnibus objection to the CRO Motion, cash management motion, and

motion for approval of ordinary course protocols [Docket No. 130] (the "Committee Objection"), raising various concerns regarding the Debtor's governance and business practices.

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

12. On December 23, 2019, the U.S. Trustee filed a motion in this Court to appoint a chapter 11 trustee for the Debtor [Docket No. 271] (the "Trustee Motion"). Although the Debtor will be filing a separate response to the Trustee Motion, it suffices to say that the Trustee Motion (filed without even considering the proposed Term Sheet) completely lacks merit given the governance changes and other resolutions encompassed in the Term Sheet agreed to by the Committee, as the representative of the primary economic stakeholders here.

Terms of the Proposed Settlement

13. Pursuant to the Term Sheet, the Debtor and the Committee have agreed to: (a) implement certain changes to the Debtor's governance, including the appointment of the Independent Directors; (b) provide the Committee with additional transparency into the operation of the Debtor's business; (c) retain the CRO on updated terms; and (d) implement certain protocols governing the ordinary course business operations of the Debtor. The terms of this agreement are contained in the Term Sheet.[4] A summary of the Term Sheet is as follows:

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

[4] In the event of any inconsistency between the summary of the Term Sheet contained herein and the Term Sheet, the Term Sheet will govern.

Independent Directors

The Debtor's general partner, Strand will appoint the following three (3) Independent Directors: James Seery, John Dubel, and a third director to be selected by or otherwise acceptable to the Committee. The Independent Directors will be granted exclusive control over the Debtor and its operations. Among other things, the Independent Directors shall conduct a review of all current employees as soon as practicable following the Independent Directors' appointment, determine whether and which employees should be subject to a key employee retention plan and/or key employee incentive plan and, if applicable, propose plan(s) covering such employees. The appointment and powers of the Independent Directors and the corporate governance structure shall be pursuant to the documents attached to the Term Sheet (the "Governing Documents"), which documents shall be satisfactory to the Committee. Once appointed, the Independent Directors (i) cannot be removed without the Committee's written consent or Order of the Court, and (ii) may be removed and replaced at the Committee's direction upon approval of the Court (subject in all respects to the right of any party in interest, including the Debtor and the Independent Directors, to object to such removal and replacement).

The Independent Directors shall be compensated in a manner to be determined, with an understanding that the source of funding, whether directly or via reimbursement, will be the Debtor.

As soon as practicable after their appointments, the Independent Directors shall, in consultation with the Committee, determine whether a CEO should be appointed for the Debtor. If the Independent Directors determine that appointment of a CEO is appropriate, the Independent Directors shall appoint a CEO acceptable to the Committee as soon as practicable, which may be one of the Independent Directors. Once appointed, the CEO cannot be removed without the Committee's written consent or Order of the Court.

The Committee shall have regular, direct access to the Independent Directors, provided, however that (1) if the communications include FTI Consulting Inc. ("FTI"), Development Specialists Inc. ("DSI") shall also

	participate in such communications; and (2) if the communications include counsel, then either Debtor's counsel or, if retained, counsel to the Independent Directors shall also participate in such communications.
Role of Mr. James Dondero	Upon approval of the Term Sheet by the Bankruptcy Court, Mr. Dondero will (1) resign from his position as a Board of Director of Strand Advisors, Inc., (2) resign as an officer of Strand Advisors, Inc., and (3) resign as an employee of the Debtor.
CRO	Bradley Sharp and DSI shall, subject to approval of the Court, be retained as the CRO to the Debtor and report to and be directed by the Independent Directors and, if and once appointed, the CEO. Mr. Sharp's and DSI's retention is subject to this Court's approval. The Debtor has filed the CRO Motion, as supplemented as of the date hereof, which requests authority to retain Mr. Sharp and DSI.[5] DSI and all other Debtor professionals shall serve at the direction of the CEO, if any, and the Independent Directors.
Estate Claims	The Committee is granted standing to pursue any and all estate claims and causes of action against Mr. Dondero, Mr. Mark Okada, other insiders of the Debtor, and each of the Related Entities, including any promissory notes held by any of the foregoing (collectively, the "Estate Claims"); provided, however, that the term Estate Claims will not include any estate claim or cause of action against any then-current employee of the Debtor.
Document Management, Preservation, and Production	The Debtor shall be subject to and comply with the document management, preservation, and production requirements attached to the Term Sheet, which requirements cannot be modified without the consent of the Committee or Court order (the "Document Production Protocol"). Solely with respect to the investigation and pursuit of Estate Claims, the document production protocol will acknowledge that the Committee will have access to the privileged documents and communications that are

[5] For the avoidance of doubt, the Debtor is not seeking retention of the CRO pursuant to this Motion. The Debtor is seeking such relief pursuant to the CRO Motion (as supplemented).

	within the Debtor's possession, custody, or control ("Shared Privilege"). With respect to determining if any particular document is subject to the Shared Privilege, the following process shall be followed: (i) the Committee will request documents from the Debtor, (ii) the Debtor shall log all documents requested but withheld on the basis of privilege, (iii) the Debtor shall not withhold documents it understands to be subject to the Shared Privilege; (iv) the Committee will identify each additional document on the log that the Committee believes is subject to the Shared Privilege, and (v) a special master or other third party neutral agreed to by the Committee and the Debtor shall make a determination if such documents are subject to the Shared Privilege. The Committee further agrees that the production of any particular document by the Debtor under this process will not be used as a basis for a claim of subject matter waiver.
Reporting Requirements	The Debtor shall be subject to and comply with the reporting requirements attached to the Term Sheet, which reporting requirements cannot be modified without the consent of the Committee or Court order (the "Reporting Requirements").
Plan Exclusivity	The Independent Directors may elect to waive the Debtor's exclusive right to file a plan under section 1121 of the Bankruptcy Code.
Operating Protocols	The Debtor shall comply with the operating protocols attached to the Term Sheet, regarding the Debtor's operation in the ordinary course of business, which protocols cannot be modified without the consent of the Committee or Court order (the "Operating Protocols" and, together with the Reporting Requirements, the "Protocols").

14. By this Motion, the Debtor is seeking the Court's approval of the Term Sheet, the terms contained therein, and the exhibits attached thereto. For the avoidance of doubt, approval of the Term Sheet includes the approval of the following:

- Independent Directors: The appointment of James Seery, John Dubel, and a third director to be selected by or otherwise acceptable to the Committee as the Independent Directors of Strand, the Debtor's general partner, with power to oversee the operations of the Debtor as set forth in the Term Sheet. Mr. Seery and Mr. Dubel were selected by the Committee, and the Debtor agreed to their appointment as Independent Directors. The Debtor is also seeking approval of the Governing Documents appointing the Independent Directors, to the extent required, and the authority to compensate the Independent Directors either directly from the assets of the Debtor or via the reimbursement of Strand of any compensation paid to the Independent Directors.

- Document Management and Preservation: The implementation of the Document Production Protocol, which will govern how the Debtor retains and produces documents and information to the Committee during the pendency of its bankruptcy case. The Debtor is also agreeing to the allow the Committee to access certain documents that are otherwise subject to the Shared Privilege to assist the Debtor in investigating the Estate Claims.

- Estate Claims. The Debtor has agreed to grant the Committee standing to pursue any Estate Claims. Estate Claims do not include claims or causes of action against any current employees of the Debtor; however, if any employee ceases to be employed by the Debtor, the Committee will have standing to pursue claims against such former employee.

- Reporting Requirements and Operating Protocols: The Debtor has agreed to provide certain reporting to the Committee and to operate under certain protocols, which set forth the parameters of how the Debtor can conduct its business without the requirement of Court approval. The Protocols provide, in certain circumstances, how the CRO and the Independent Directors will oversee the Debtor's operations. The purpose of the Protocols is to allow the Debtor to function in the ordinary course of its business while providing transparency to the Committee.

15. The Debtor believes that appointing the Independent Directors and otherwise effectuating the terms of the Term Sheet is in the best interests of the Debtor, its estate, and its creditors. The Term Sheet will allow the Debtor to proceed with a productive reorganization effort that will maximize value for all constituents. Accordingly, the Debtor seeks approval of the Term Sheet.

Relief Requested

16. By this Motion, the Debtor seeks entry of an order pursuant to sections 105(a), 363(b)(1), and 363(c)(1) of the Bankruptcy Code and Bankruptcy Rule 9019: (a) approving the Debtor's settlement with the Committee as set forth in the Term Sheet and outlined herein; (b)

authorizing the Debtor to take any action as may be reasonably required to effectuate the terms of the Term Sheet, including entering into the Governing Documents and compensating – either directly or through reimbursement – the Independent Directors; (c) granting the Committee standing to pursue the Estate Claims; and (d) granting related relief.

Authority for the Relief Requested

A. Section 363(c)(1) of the Bankruptcy Code Authorizes the Debtor to Enter Into Certain Aspects of the Term Sheet in the Ordinary Course

17. Because the Debtor is not settling any claims or causes of action through the Term Sheet or otherwise expending estate resources, the Debtor believes that it has the authority to effectuate the majority of the transactions and compromises set forth in the Term Sheet without Court approval under section 363(c)(1) of the Bankruptcy Code. Specifically, section 363(c)(1) provides:

> [i]f the business of the debtor is authorized to be operated under section. . . 1108. . . of this title. . . the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1). As such, a debtor may engage in postpetition actions if the debtor is authorized to operate its business under section 1108 and such transactions are "in the ordinary course of business."

18. An activity is "ordinary course" if it satisfies both the "horizontal test" and the "vertical test." *See, e.g., Denton Cty. Elec. Coop. v. Eldorado Ranch, Ltd.* (*In re Denton Cty. Elec. Coop.*), 281 B.R. 876, 882 n.12 (Bankr. N.D. Tex. 2002); *see also In re Roth American, Inc.*, 975 F.2d 949, 952 (3d Cir. 1992). The vertical test looks to "whether the transaction subjects a

hypothetical creditor to a different economic risk than existed when the creditor originally extended credit." *In re Patriot Place, Ltd.*, 486 B.R. 773, 793 (Bankr. W.D. Tex. 2013). The horizontal test considers "whether the transaction was of the sort commonly undertaken by companies in the industry." *Id.* Here, both the vertical test and horizontal test are satisfied.

19. Under the Term Sheet, the Debtor is seeking authority to (a) appoint the Independent Directors at Strand (a non-debtor entity), (b) have Mr. Dondero removed from his role at the Debtor and Strand; (c) agree to seek the retention of the CRO under a revised engagement letter that provides that the CRO will report to the Independent Directors; (d) grant the Committee standing to pursue the Estate Claims; (e) enter into and implement the Document Production Protocols; (f) grant the Independent Directors the exclusive right to determine whether to waive exclusivity; and (g) enter into and implement the Protocols. Only the compensation of the Independent Directors, the entrance into the Protocols (which provide the Committee with certain right to object to the Debtor engaging in a "Transaction" (as defined in the Protocols) and allow the Debtor to seek a hearing before this Court on an expedited basis), and the grant of standing to the Committee to pursue Estate Claims could be construed as outside of the ordinary course of business. The balance of the terms of the Term Sheet either involve non-debtors[6] or will be the subject of separate motions seeking Court approval at the appropriate time.

B. The Court Should Approve the Term Sheet Under Rule 9019 of the Bankruptcy Code

20. Although the Debtor believes that it has authority to implement the majority of the Term Sheet in the ordinary course of its business under section 363(c), the Debtor is seeking

[6] With respect to the Independent Directors, they are being appointed to a new independent board of Strand, the Debtor's general partner, and Strand is not a debtor in this case or subject to this Court's jurisdiction.

this Court's approval of the Term Sheet under section 105 of the Bankruptcy Code and Rule 9019 of the Bankruptcy Rules out of an abundance of caution. Section 105(a) of the Bankruptcy Code provides in relevant part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105(a) has been interpreted to expressly empower bankruptcy courts with broad equitable powers to "craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain." *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) (en banc); *see also Southmark Corp. v. Grosz* (*In re Southmark Corp.*), 49 F.3d 1111, 1116 (5th Cir. 1995) (stating that section 105(a) of the Bankruptcy Code "authorizes bankruptcy courts to fashion such orders as are necessary to further the substantive provisions of the Code").

21. 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).

22. 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. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *see also 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, after appropriate notice and a hearing, approve

a compromise or settlement so 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.

23. In making this determination, the United States Court of Appeals for the Fifth Circuit applies a three-party test, "with a focus on comparing 'the terms of the compromise with the rewards of litigation.'" *Official Committee of Unsecured Creditors v. Cajun Elec. Power Coop. by & through Mabey (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.*

24. 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 Mortg. 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 Mortg. Corp., 68 F.3d at 918 (citations omitted).

25. Here, the Debtor submits that effectuating the transactions set forth in the Term Sheet satisfies the Fifth Circuit's three-part test. The settlement embodied in the Term Sheet was driven in large part by the Debtor's creditors and has the support of the Committee, which consists of the Debtor's principal creditors. The Term Sheet was negotiated at arm's length, and there was no fraud or collusion in its negotiation. The settlement is also fair and reasonable and in the best interests of the Debtor's estate and also resolves the open disputes regarding the CRO Motion, the *Motion of Debtor for Interim and Final Orders Authorizing (A) Continuance of Existing Cash Management System, (B) Continued Use of the Prime Account, (C) Limited Waiver*, as supplemented [Docket Nos. 51 & 259], and *Precautionary Motion of the Debtor for Order Approving Protocols for the Debtor to Implement Certain Transactions in the Ordinary Course of Business* [Docket No. 76].

26. The Debtor and members of the Committee have been entangled in highly contentious litigation that has spanned many years and multiple venues. As evidenced by the brief history of the Debtor's bankruptcy case,[7] that contention and mistrust has carried over into this proceeding and could derail any chance that the Debtor has to successfully reorganize and structure a plan to pay its creditors. The governance and operational changes set forth in the Term Sheet, will provide greater transparency to the Committee and start the process of rebuilding the trust necessary to negotiate a successful resolution of this case. Without the Term Sheet, the Debtor

[7] *See, e.g., Declaration of Frank Waterhouse in Support of First Day Motions* [Docket No. 11], *Motion of the Official Committee of Unsecured Creditors for an Order Transferring Venue of this Case to the United States Bankruptcy Court for the Northern District of Texas* [Docket No. 85], *Omnibus Objection of the Official Committee of Unsecured Creditors to the Debtor's (I) Motion for Final Order Authorizing Continuance of the Existing Cash Management System, (II) Motion to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officers, and (III) Precautionary Motion for Approval of Protocol for "Ordinary Course" Transactions* [Docket No. 130], and *United States Trustee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee* [Docket No. 271].

anticipates that the Committee would move to appoint a chapter 11 trustee and the U.S. Trustee has already done so (without even seeing the Term Sheet). The Debtor will contest such motions because the appointment of a chapter 11 trustee could gravely harm the Debtor's business. The implementation of the Term Sheet will head off any potential issues that could arise, eliminate costly, time consuming and uncertain litigation, and give the Debtor sufficient breathing room to work towards rebuilding trust with its creditor body and allow the Debtor to exit bankruptcy and preserve the value of its business. The Debtor's bankruptcy case has been pending for over two and a half months, and it is time for the parties to put the acrimony that marked the initial stages of this case behind them and to move forward in a productive manner – precisely what the Term Sheet seeks to accomplish.

C. Consummating the Settlement Agreement is a Sound Exercise of the Debtors' Business Judgment.

27. Section 363(b)(1) of the Bankruptcy Code authorizes a debtor in possession to "use, sell, or lease, other than in the ordinary course of business, property of the estate," after notice and a hearing. It is well established in this jurisdiction that a debtor may use property of the estate outside the ordinary course of business under this provision if there is a good business reason for doing so. *See, e.g., ASARCO, Inc. v. Elliott Mgmt. (In re ASARCO, L.L.C.)*, 650 F.3d 593, 601 (5th Cir. 2011) ("[F]or the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors, and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business.") (*quoting In re Cont'l Air Lines, Inc.*, 780 F.3d 1223, 1226 (5th Cir. 1986)); 441 B.R. 813, 830 (Bankr. S.D. Tex.

2010); *GBL Holding Co., Inc. v. Blackburn/Travis/Cole, Ltd. (In re State Park Bldg. Grp., Ltd.)*, 331 B.R. 251, 254 (Bankr. N.D. Tex. 2005).

28. The transactions contemplated by the Term Sheet are within the sound business judgment of the Debtor. The Term Sheet resolves potentially costly and protracted litigation with the Committee over the Debtor's corporate governance and will give the Debtor the breathing room necessary to negotiate and effectuate the terms of a plan acceptable to the Debtor's creditors. Further, providing standing to the Committee to investigate Estate Claims and the payment of the Independent Directors from the assets of the estate are each necessary components of the Term Sheet. The Committee would not have agreed to the Term Sheet without the grant of standing to investigate Estate Claims. Moreover, Strand, a non-debtor, is unable to cover the costs of the Independent Directors. As such, there is a good business reason for the Debtor's payment of the Independent Directors' compensation: the Term Sheet and the appointment of the Independent Directors would not have been agreed to or possible without that condition.[8] The foregoing is sufficient grounds to approve the Term Sheet and authorize the Debtor to effectuate the terms of the Term Sheet under Section 363(b)(1).

No Prior Request

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

[8] Further, although the Debtor seeks to reimburse Strand for the cost of the Independent Directors, the Debtor is otherwise obligated to reimburse Strand for any costs or expenses incurred by Strand in its management of the Debtor. *See* Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., § 3.10(b).

Notice

30. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee; (b) the Office of the United States Attorney for the Northern District of Texas; (c) the Debtor's principal secured parties; (d) counsel to the Committee; and (e) 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, for the reasons set forth herein, the Debtor respectfully requests that the Court enter an Order, substantially in the form attached hereto as **Exhibit C**, (a) approving the Debtor's settlement with the Committee as set forth in the Term Sheet and outlined herein; (b) authorizing the Debtor to take any action as may be reasonably required to effectuate the terms of the Term Sheet, including entering into the Governing Documents and compensating – either directly or through reimbursement – the Independent Directors; and (c) granting related relief.

Dated: December 27, 2019

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*)
Maxim B. Litvak (Texas Bar No. 24002482)
Gregory V. Demo (NY Bar No. 5371992)
(*admitted pro hac vice*)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
E-mail: jpomerantz@pszjlaw.com
ikharasch@pcszjlaw.com
mlitvak@pszjlaw.com
gdemo@pszjlaw.com

-and-

/s/ Melissa S. Hayward
HAYWARD & ASSOCIATES PLLC
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachary Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel and Proposed Counsel for the Debtor and Debtor in Possession

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Highland Capital Management, L.P.

Preliminary Term Sheet

This term sheet ("Term Sheet") outlines the principal terms of a proposed settlement between Highland Capital Management, L.P. (the "Debtor") and the Official Committee of Unsecured Creditors (the "Committee") in the chapter 11 case captioned In re Highland Capital Mgm't, L.P, Case No. 19-34054 (SGJ) (the "Chapter 11 Case"), pending in the Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court"), to resolve a good faith dispute between the parties related to the Debtor's corporate governance, and specifically, the Committee's various objections to certain relief being sought by the Debtors in the Chapter 11 Case [Del. Docket No. 125]. *This Term Sheet shall be subject to approval by the Bankruptcy Court.*

Topic	Proposed Terms
Parties	Highland Capital Management, L.P. (the "Debtor"). The Official Committee of Unsecured Creditors of Highland Capital Management, L.P. (the "Committee").
Independent Directors	The Debtor's general partner, Strand Advisors, Inc., will appoint the following three (3) independent directors (the "Independent Directors"): James Seery, John Dubel, and a third director to be selected by or otherwise acceptable to the Committee. The Independent Directors will be granted exclusive control over the Debtor and its operations. Among other things, the Independent Directors shall conduct a review of all current employees as soon as practicable following the Independent Directors' appointment, determine whether and which employees should be subject to a key employee retention plan and/or key employee incentive plan and, if applicable, propose plan(s) covering such employees. The appointment and powers of the Independent Directors and the corporate governance structure shall be pursuant to the documents attached hereto as **Exhibit A**, which documents shall be satisfactory to the Committee. Once appointed, the Independent Directors (i) cannot be removed without the Committee's written consent or Order of the Court, and (ii) may be removed and replaced at the Committee's direction upon approval of the Court (subject in all respects to the right of any party in interest, including the Debtor and the Independent Directors, to object to such removal and replacement). The Independent Directors shall be compensated in a manner to be determined with an understanding that the

	source of funding, whether directly or via reimbursement, will be the Debtor. As soon as practicable after their appointments, the Independent Directors shall, in consultation with the Committee, determine whether an interim Chief Executive Officer (the "CEO") should be appointed for the Debtor. If the Independent Directors determine that appointment of a CEO is appropriate, the Independent Directors shall appoint a CEO acceptable to the Committee as soon as practicable, which may be one of the Independent Directors. Once appointed, the CEO cannot be removed without the Committee's written consent or Order of the Court. The Committee shall have regular, direct access to the Independent Directors, provided, however that (1) if the communications include FTI Consulting Inc. ("FTI"), Development Specialists Inc. ("DSI") shall also participate in such communications; and (2) if the communications include counsel, then either Debtor's counsel or, if retained, counsel to the Independent Directors shall also participate in such communications.
Role of Mr. James Dondero	Upon approval of this Term Sheet by the Bankruptcy Court, Mr. Dondero will (1) resign from his position as a Board of Director of Strand Advisors, Inc., (2) resign as an officer of Strand Advisors, Inc., and (3) resign as an employee of the Debtor.
CRO	DSI shall, subject to approval of the Bankruptcy Court, be retained as chief restructuring officer ("CRO") to the Debtor and report to and be directed by the Independent Directors and, if and once appointed, the CEO. The retention and scope of duties of DSI shall be pursuant to the Further Amended Retention Agreement, attached hereto as **Exhibit B**. DSI and all other Debtor professionals shall serve at the direction of the CEO, if any, and the Independent Directors.
Estate Claims	The Committee is granted standing to pursue any and all estate claims and causes of action against Mr. Dondero, Mr. Okada, other insiders of the Debtor, and each of the Related Entities, including any promissory notes held by any of the foregoing (collectively, the "Estate Claims"); provided, however, that the term Estate Claims will not

	include any estate claim or cause of action against any then-current employee of the Debtor.
Document Management, Preservation, and Production	The Debtor shall be subject to and comply with the document management, preservation, and production requirements attached hereto as **Exhibit C**, which requirements cannot be modified without the consent of the Committee or Court order (the "Document Production Protocol"). Solely with respect to the investigation and pursuit of Estate Claims, the document production protocol will acknowledge that the Committee will have access to the privileged documents and communications that are within the Debtor's possession, custody, or control ("Shared Privilege"). With respect to determining if any particular document is subject to the Shared Privilege, the following process shall be followed: (i) the Committee will request documents from the Debtor, (ii) the Debtor shall log all documents requested but withheld on the basis of privilege, (iii) the Debtor shall not withhold documents it understands to be subject to the Shared Privilege; (iv) the Committee will identify each additional document on the log that the Committee believes is subject to the Shared Privilege, and (v) a special master or other third party neutral agreed to by the Committee and the Debtor shall make a determination if such documents are subject to the Shared Privilege. The Committee further agrees that the production of any particular document by the Debtor under this process will not be used as a basis for a claim of subject matter waiver.
Reporting Requirements	The Debtor shall be subject to and comply with the reporting requirements attached hereto as **Exhibit D**, which reporting requirements cannot be modified without the consent of the Committee or Court order (the "Reporting Requirements").
Plan Exclusivity	The Independent Directors may elect to waive the Debtor's exclusive right to file a plan under section 1121 of the Bankruptcy Code.
Operating Protocols	The Debtor shall comply with the operating protocols set forth in **Exhibit D** hereto, regarding the Debtor's operation in the ordinary course of business, which protocols cannot be modified without the consent of the Committee or Court order.

Reservation of Rights	This agreement is without prejudice to the Committee's rights to, among other things, seek the appointment of a trustee or examiner at a later date. Nothing herein shall constitute or be construed as a waiver of any right of the Debtor or any other party in interest to contest the appointment of a trustee or examiner, and all such rights are expressly reserved.

Exhibit A

Debtor's Corporate Governance Documents

Exhibit B

Amended DSI Retention Letter

Exhibit C

Document Production Protocol

PSZJ Revisions 12/23/19
Privileged & Confidential
Subject to FRE 408

Exhibit D

Reporting Requirements

WRITTEN CONSENT OF SOLE STOCKHOLDER AND DIRECTOR

OF

STRAND ADVISORS, INC.

[_____]

Pursuant to the provisions of the General Corporation Law of the State of Delaware (the "DGCL") and consistent with the provisions of the Certificate of Incorporation (the "Certificate") and Bylaws (the "Bylaws") of Strand Advisors, Inc., a Delaware corporation (the "Company"), the undersigned, being the holder of all of the issued and outstanding shares of common stock, par value $0.01 per share, of the Company and the sole director of the Company (the "Stockholder"), acting by written consent without a meeting pursuant to Section 228 of the DGCL and Article IV, Section 6, and Article XII of the Bylaws, does hereby consent to the adoption of the following resolutions and to the taking of the actions contemplated thereby, in each case with the same force and effect as if presented to and adopted at a meeting of the stockholders:

I. AMENDMENT OF BYLAWS

WHEREAS, it is acknowledged that the Board of Directors of the Company (the "Board") has heretofore been fixed at one (1) and that the Board currently consists of James Dondero;

WHEREAS, pursuant to Article XII of the Bylaws, the Stockholder wishes to amend the Bylaws in the manner set forth on **Appendix A** hereto (the "Bylaws Amendment") to increase the size of the Board from one (1) to three (3) directors; and

NOW, THEREFORE, BE IT RESOLVED, that the Bylaws Amendment is hereby authorized and approved and the Board is increased from one (1) to three (3) directors;

RESOLVED FURTHER, that any officer of the Company is authorized to take any such actions as may be required to effectuate the Bylaws Amendment; and

RESOLVED FURTHER, that any action taken by any officer of the Company on or prior to the date hereof to effectuate such Bylaws Amendment is hereby authorized and affirmed.

II. ELECTION OF DIRECTORS

WHEREAS, the Stockholder desires to appoint James Seery, John Dubel, and _____ to the Board and desires that such individuals constitute the whole Board;

NOW, THEREFORE, BE IT RESOLVED, that James Seery, John Dubel, and _____, having consented to act as such, be, and each of them hereby is, appointed as a director, to serve as a director of the Company and to hold such office until such director's respective successor shall have been duly elected or appointed and shall qualify, or until such director's death, resignation or removal;

RESOLVED FURTHER, that any officer of the Company is authorized to take any such actions as

may be required to effectuate the appointment of the foregoing directors, including executing an indemnification agreement in favor of such directors in substantially the form attached hereto as **Appendix B** (each, an "Indemnification Agreement");

RESOLVED FURTHER, that any action taken by any officer of the Company on or prior to the date hereof to effectuate the appointment of such directors, including the execution of an Indemnification Agreement, is hereby authorized and affirmed.

RESOLVED FURTHER, that James Dondero and any other directors of the Company are hereby removed as directors of the Company;

RESOLVED FURTHER, that the directors appointed pursuant to these resolutions shall, pursuant to the terms of the Bylaws, appoint a Chairman of the Board.

III. STIPULATION WITH THE BANKRUPTCY COURT

WHEREAS, on October 16, 2019, Highland Capital Management, L.P. ("HCMLP") filed for chapter 11 bankruptcy protection in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Bankruptcy Case");

WHEREAS, the Company is the general partner for HCMLP;

WHEREAS, the Bankruptcy Case was transferred to the Bankruptcy Court for the Northern District of Texas, Case No. 19-34054-sgj11 (the "Texas Court") by order of the Bankruptcy Court for the District of Delaware on December 4, 2019;

WHEREAS, the Company and the Stockholder wish to enter into a stipulation with HCMLP and the Official Unsecured Creditors Committee appointed in the Bankruptcy Case (the "Committee"), such stipulation to be approved by the Texas Court, whereby the Stockholder will agree (a) not to transfer or assign his shares in the Company or exercise the voting power of such shares to remove any member of the Board appointed pursuant to these resolutions or further change the authorized number of directors from three (3) directors; (b) to exercise the voting power of his shares so as to cause each member of the Board appointed by this resolutions to be re-elected at upon the expiration of his or her term; and (c) upon the death, disability, or resignation of _____, will exercise the voting power of such shares so as to cause the resulting vacancy to be filled by a successor that is both independent and acceptable to the Stockholder and the Committee (the "Stipulation");

WHEREAS, for purposes of the Stipulation, "independent" would exclude the Stockholder, any affiliate of the Stockholder, and any member of management of the Company; and

WHEREAS, it is in the intent of the parties that the Stipulation will no longer be effective or bind Strand or the Stockholder following the termination of the Bankruptcy Case.

NOW, THEREFORE, BE IT RESOLVED, that the Company is authorized to take such actions as may be necessary to enter into and effectuate the Stipulation in the manner and on the terms set forth above, including, but not limited to, further amending the Certificate, Bylaws, or any other corporate governance documents; and

RESOLVED FURTHER, that Scott Ellington, as an officer of the Company, is authorized to take any such actions as may be required to enter into and effectuate the Stipulation in the manner set forth herein; and

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RESOLVED FURTHER, that any action taken by Scott Ellington or any other officer of the Company on or prior to the date hereof to effectuate such Stipulation is hereby authorized and affirmed.

[Signature pages follow.]

IN WITNESS WHEREOF, the undersigned has executed this Written Consent as of the respective date and year first appearing above.

STOCKHOLDER:

_____
James Dondero

[Signature Page to Written Consent of Sole Stockholder of Strand Advisors, Inc.]

First Amendment to Bylaws of
Strand Advisors, Inc.

Strand Advisors, Inc. (the "Company"), a corporation organized and existing under and by virtue of the General Corporation Law of the State of Delaware, does hereby certify that the Company's sole stockholder, acting by written consent without a meeting, resolved to amend the Company's Bylaws (the "Bylaws") as follows:

1. Article III, Section 2, of the Bylaws is hereby deleted in its entirety and replaced with the following:

> Section 2. Number of Directors. The number of directors which shall constitute the whole Board shall be three (3).

2. The following shall be added as Section 6 to Article III of the Bylaws:

> Section 6. Director Qualifications. Each director appointed to serve on the Board shall (A) (i) be an independent director, (ii) not be affiliated with the corporation's stockholders, and (iii) not be an officer of the corporation; and (B) have been (x) nominated by the stockholders, (y) a retired bankruptcy judge and nominated jointly by the stockholders and any official committee of unsecured creditors in the chapter 11 bankruptcy of Highland Capital Management, L.P. (the "Committee") currently pending in the Bankruptcy Court for the Northern District of Texas (the "Court"), Case No. 19-34054-sgj11; or (z) nominated by the Committee and reasonably acceptable to the stockholders.

3. The following shall be added as Section 7 to Article III of the Bylaws:

> Section 7. Removal of Directors. Once appointed, the Independent Directors (i) cannot be removed without the Committee's written consent or Order of the Court, and (ii) may be removed and replaced at the Committee's direction upon approval of the Court (subject in all respects to the right of any party in interest, including the Debtor and the Independent Directors, to object to such removal and replacement).

Except as expressly amended hereby, the terms of the Company's Bylaws shall remain in full force and effect.

[Signature Page Follows]

IN WITNESS WHEREOF, the Company has caused this amendment to be signed this [__] day of [__], 20__.

STRAND ADVISORS, INC.

_____
By: Scott Ellington
Its: Secretary

INSERT STRAND ADVISORS, INC. LETTERHEAD

[_____]

[NAME]
[ADDRESS]
[ADDRESS]
[ADDRESS]

Re: Strand Advisors, Inc. – Director Agreement

Dear [_____]:

On behalf of Strand Advisors, Inc. (the "Company"), I am pleased to have you join the Company's Board of Directors. This letter sets forth the terms of the Director Agreement (the "Agreement") that the Company is offering to you.

1. APPOINTMENT TO THE BOARD OF DIRECTORS.

a. Title, Term and Responsibilities.

i. Subject to terms set forth herein, the Company agrees to appoint you to serve as a Director on the Company's Board of Directors (the "Board"), and you hereby accept such appointment the date you sign this Agreement (the "Effective Date"). You will serve as a Director of the Board from the Effective Date until you voluntarily resign, are removed from the Board, or are not re-elected (the "Term"). Your rights, duties and obligations as a Director shall be governed by the Certificate of Incorporation and Bylaws of the Company, each as amended from time to time (collectively, the "Governing Documents"), except that where the Governing Documents conflict with this Agreement, this Agreement shall control.

ii. You acknowledge and understand that the Company is the general partner of Highland Capital Management, L.P. ("HCMLP") and that HCMLP is currently the debtor in possession in a chapter 11 bankruptcy proceeding pending in the Northern District of Texas (the "Bankruptcy"). Your rights, duties, and obligations may in certain instances require your involvement, either directly or indirectly, in the Bankruptcy and such rights, duties, and obligations may be impacted in whole or in part by the Bankruptcy.

b. Mandatory Board Meeting Attendance. As a Director, you agree to apply all reasonable efforts to attend each regular meeting of the Board and no fewer than fifty percent (50%) of these meetings of the Board in person, and no more than fifty percent (50%) of such meetings by telephone or teleconference. You also agree to devote sufficient time to matters that may arise at the Company from time to time that require your attention as a Director.

c. Independent Contractor. Under this Agreement, your relationship with the Company will be that of an independent contractor as you will not be an employee of the Company nor eligible to participate in regular employee benefit and compensation plans of the Company.

d. Information Provided by the Companies. The Company shall: (i) provide you with reasonable access to management and other representatives of the Company, except to the extent that any such access may impair any attorney client privilege to which the Company may be entitled; and (ii) furnish all data, material, and other information concerning the business, assets, liabilities, operations, cash flows,

properties, financial condition and prospects of the Company that you reasonably request in connection with the services to be provided to the Company. You will rely, without further independent verification, on the accuracy and completeness of all publicly available information and information that is furnished by or on behalf of the Company and otherwise reviewed by you in connection with the services performed for the Company. The Company acknowledges and agrees that you are not responsible for the accuracy or completeness of such information and shall not be responsible for any inaccuracies or omissions therein, provided that if you become aware of material inaccuracies or errors in any such information you shall promptly notify the Board of such errors, inaccuracies or concerns. You are under no obligation to update data submitted to you or to review any other information unless specifically requested by the Board to do so.

2. COMPENSATION AND BENEFITS.

a. Retainer. The Company will pay you a retainer for each month you serve on the Board (the "Retainer") to be paid in monthly installments of $[TBD]. The Company's obligation to pay the Retainer will cease upon the termination of the Term.

b. Expense Reimbursement. The Company will reimburse you for all reasonable travel or other expenses, including expenses of counsel, incurred by you in connection with your services hereunder, in accordance with the Company's expense reimbursement policy as in effect from time to time.

c. Invoices; Payment.

i. In order to receive the compensation and reimbursement set forth in this Section 2, you are required to send to the Company regular monthly invoices indicating your fees, costs, and expenses incurred. Payment will be due to you within 10 business days after receipt of each such invoice, subject to the Company's receipt of appropriate documentation required by the Company's expenses reimbursement policy.

ii. You further agree that the Company's obligation to pay the compensation and reimbursement set forth in this Section 2 is conditioned in all respects on the entry of a final order in the court overseeing the Bankruptcy that authorizes and requires HCMLP to reimburse the Company for all such payments to you.

d. Indemnification; D&O Insurance. You will receive indemnification as a Director of the Company on the terms set forth in that certain Indemnification Agreement, dated December 5, 2019, a copy of which is attached hereto as **Appendix A** (the "Indemnification Agreement"). You will also be provided coverage under the Company's directors' and officers' insurance policy as set forth in the Indemnification Agreement.

e. Tax Indemnification. You acknowledge that the Company will not be responsible for the payment of any federal or state taxes that might be assessed with respect to the Retainer and you agree to be responsible for all such taxes.

3. PROPRIETARY INFORMATION OBLIGATIONS.

a. Proprietary Information. You agree that during the Term and thereafter that you will take all steps reasonably necessary to hold all information of the Company, its affiliates, and related entities, which a reasonable person would believe to be confidential or proprietary information, in trust and confidence, and not disclose any such confidential or proprietary information to any third party without first obtaining the Company's express written consent on a case-by-case basis.

b. Third Party Information. The Company has received and will in the future receive from third parties confidential or proprietary information ("Third Party Information") subject to a duty on the Company's part to maintain the confidentiality of such information and to use it only for certain limited purposes. You agree to hold such Third Party Information in confidence and not to disclose itto anyone (other than Company personnel who need to know such information in connection with their work for Company) or to use, except in connection with your services for Company under this Agreement, Third Party Information unless expressly authorized in writing by the Company.

c. Return of Company Property. Upon the end of the Term or upon the Company's earlier request, you agree to deliver to the Company any and all notes, materials and documents, together with any copies thereof, which contain or disclose any confidential or proprietary information or Third Party Information.

4. OUTSIDE ACTIVITIES.

a. Investments and Interests. Except as permitted by Section 4(b), you agree not to participate in, directly or indirectly, any position or investment known by you to be materially adverse to the Company or any of its affiliates or related entities.

b. Activities. Except with the prior written consent of the Board, you will not during your tenure as a member of the Company's Board undertake or engage in any other directorship, employment or business enterprise in direct competition with the Company or any of its affiliates or related entities, other than ones in which you are a passive investor or other activities in which you were a participant prior to your appointment to the Board as disclosed to the Company.

c. Other Agreements. You agree that you will not disclose to the Company or use on behalf of the Company any confidential information governed by any agreement between you and any third party except in accordance with such agreement.

5. TERMINATION OF DIRECTORSHIP.

a. Voluntary Resignation, Removal Pursuant to Bylaws and Stockholder Action. You may resign from the Board at any time with or without advance notice, with or without reason. Subject to any orders or agreements entered into in connection with the Bankruptcy, you may be removed from the Board at any time, for any reason, in any manner provided by the Governing Documents and applicable law or by an affirmative vote of a majority of the stockholders of the Company.

b. Continuation. The provisions of this Agreement that give the parties rights or obligations beyond the termination of this Agreement will survive and continue to bind the parties.

c. Payment of Fees; Reimbursement. Following termination of this Agreement, any undisputed fees and expenses due to you will be remitted promptly following receipt by the Company of any outstanding invoices.

6. GENERAL PROVISIONS.

a. Severability. Whenever possible, each provision of this Agreement will be interpreted in such manner as to be effective and valid under applicable law. If any provision of this Agreement is held to be invalid, illegal or unenforceable such provision will be reformed, construed and enforced to render it valid, legal, and enforceable consistent with the intent of the parties insofar as possible.

b. Entire Agreement. This Agreement constitutes the entire agreement between you and the Company with respect to your service as a Director and supersedes any prior agreement, promise, representation or statement written between you and the Company with regard to this subject matter. It is entered into without reliance on any promise, representation, statement or agreement other than those expressly contained or incorporated herein, and it cannot be modified or amended except in a writing signed by the party or parties affected by such modification or amendment.

c. Successors and Assigns. This Agreement is intended to bind and inure to the benefit of and be enforceable by you and the Company and our respective successors, assigns, heirs, executors and administrators, except that you may not assign any of your rights or duties hereunder without the written consent of the Company.

d. Governing Law. This Agreement will be governed by the law of the State of Delaware as applied to contracts made and performed entirely within Delaware.

We are all delighted to be able to extend you this offer and look forward to working with you. To indicate your acceptance of the Company's offer, please sign and date this Agreement below.

Sincerely,

STRAND ADVISORS, INC.

By: Scott Ellington
Its: Secretary

[Signature Page Follows]

ACCEPTED AND AGREED:

_____
[NAME]
Date: _____

INDEMNIFICATION AGREEMENT

This Indemnification Agreement ("**Agreement**"), dated as of [_____], is by and between STRAND ADVISORS, INC., a Delaware corporation (the "**Company**"), and [_____] (the "**Indemnitee**").

WHEREAS, Indemnitee has agreed to serve as a member of the Company's board of directors (the "**Board**") effective as of the date hereof;

WHEREAS, the Board has determined that enhancing the ability of the Company to retain and attract as directors the most capable Persons is in the best interests of the Company and that the Company therefore should seek to assure such Persons that indemnification and insurance coverage is available; and

WHEREAS, in recognition of the need to provide Indemnitee with protection against personal liability, in order to procure Indemnitee's service as a director of the Company, in order to enhance Indemnitee's ability to serve the Company in an effective manner and in order to provide such protection pursuant to express contract rights (intended to be enforceable irrespective of, among other things, any amendment to the Company's Bylaws (as may be amended further from time to time, the "**Bylaws**"), any change in the composition of the Board or any change in control, business combination or similar transaction relating to the Company), the Company wishes to provide in this Agreement for the indemnification of, and the advancement of Expenses (as defined in Section 1(g) below) to, Indemnitee as set forth in this Agreement and for the coverage of Indemnitee under the Company's directors' and officers' liability or similar insurance policies ("**D&O Insurance**").

NOW, THEREFORE, in consideration of the foregoing and the Indemnitee's agreement to provide services to the Company, the parties agree as follows:

1. Definitions. For purposes of this Agreement, the following terms shall have the following meanings:

(a) "**Change in Control**" means the occurrence of any of the following: (i) the direct or indirect sale, lease, transfer, conveyance or other disposition, in one or a series of related transactions (including any merger or consolidation or whether by operation of law or otherwise), of all or substantially all of the properties or assets of the Company and its subsidiaries, to a third party purchaser (or group of affiliated third party purchasers) or (ii) the consummation of any transaction (including any merger or consolidation or whether by operation of law or otherwise), the result of which is that a third party purchaser (or group of affiliated third party purchasers) becomes the beneficial owner, directly or indirectly, of more than fifty percent (50%) of the then outstanding Shares or of the surviving entity of any such merger or consolidation.

(b) "**Claim**" means:

(i) any threatened, pending or completed action, suit, claim, demand, arbitration, inquiry, hearing, proceeding or alternative dispute resolution mechanism, or

any actual, threatened or completed proceeding, including any and all appeals, in each case, whether brought by or in the right of the Company or otherwise, whether civil, criminal, administrative, arbitrative, investigative or other, whether formal or informal, and whether made pursuant to federal, state, local, foreign or other law, and whether or not commenced prior to the date of this Agreement, in which Indemnitee was, is or will be involved as a party or otherwise, by reason of or relating to either (a) any action or alleged action taken by Indemnitee (or failure or alleged failure to act) or of any action or alleged action (or failure or alleged failure to act) on Indemnitee's part, while acting in his or her Corporate Status or (b) the fact that Indemnitee is or was serving at the request of the Company or any subsidiary of the Company as director, officer, employee, partner, member, manager, trustee, fiduciary or agent of another Enterprise, in each case, whether or not serving in such capacity at the time any Loss or Expense is paid or incurred for which indemnification or advancement of Expenses can be provided under this Agreement, except one initiated by Indemnitee to enforce his or her rights under this Agreement; or

(ii) any inquiry, hearing or investigation that the Indemnitee determines might lead to the institution of any such action, suit, proceeding or alternative dispute resolution mechanism.

(c) "**Controlled Entity**" means any corporation, limited liability company, partnership, joint venture, trust or other Enterprise, whether or not for profit, that is, directly or indirectly, controlled by the Company. For purposes of this definition, the term "control" means the possession, directly or indirectly, of the power to direct, or cause the direction of, the management or policies of an Enterprise, whether through the ownership of voting securities, through other voting rights, by contract or otherwise.

(d) "**Corporate Status**" means the status of a Person who is or was a director, officer, employee, partner, member, manager, trustee, fiduciary or agent of the Company or of any other Enterprise which such Person is or was serving at the request of the Company or any subsidiary of the Company. In addition to any service at the actual request of the Company, Indemnitee will be deemed, for purposes of this Agreement, to be serving or to have served at the request of the Company or any subsidiary of the Company as a director, officer, employee, partner, member, manager, trustee, fiduciary or agent of another Enterprise if Indemnitee is or was serving as a director, officer, employee, partner, member, manager, fiduciary, trustee or agent of such Enterprise and (i) such Enterprise is or at the time of such service was a Controlled Entity, (ii) such Enterprise is or at the time of such service was an employee benefit plan (or related trust) sponsored or maintained by the Company or a Controlled Entity or (iii) the Company or a Controlled Entity, directly or indirectly, caused Indemnitee to be nominated, elected, appointed, designated, employed, engaged or selected to serve in such capacity.

(e) "**Disinterested Director**" means a director of the Company who is not and was not a party to the Claim in respect of which indemnification is sought by Indemnitee. Under no circumstances will James Dondero be considered a Disinterested Director.

(f) "**Enterprise**" means the Company or any subsidiary of the Company or any other corporation, partnership, limited liability company, joint venture, employee benefit

plan, trust or other entity or other enterprise of which Indemnitee is or was serving at the request of the Company or any subsidiary of the Company in a Corporate Status.

(g) "**Expenses**" means any and all expenses, fees, including attorneys', witnesses' and experts' fees, disbursements and retainers, court costs, transcript costs, travel expenses, duplicating, printing and binding costs, telephone charges, postage, fax transmission charges, secretarial services, delivery services fees, and all other fees, costs, disbursements and expenses paid or incurred in connection with investigating, defending, prosecuting, being a witness in or participating in (including on appeal), or preparing to defend, prosecute, be a witness or participate in, any Claim. Expenses also shall include (i) Expenses paid or incurred in connection with any appeal resulting from any Claim, including, without limitation, the premium, security for, and other costs relating to any cost bond, supersedeas bond, or other appeal bond or its equivalent, and (ii) for purposes of Section 4 only, Expenses incurred by Indemnitee in connection with the interpretation, enforcement or defense of Indemnitee's rights under this Agreement, by litigation or otherwise. Expenses, however, shall not include amounts paid in settlement by Indemnitee or the amount of judgments or fines against Indemnitee.

(h) "**Exchange Act**" means the Securities Exchange Act of 1934, as amended, or any successor statute thereto, and the rules and regulations of the United States Securities and Exchange Commission promulgated thereunder.

(i) "**Expense Advance**" means any payment of Expenses advanced to Indemnitee by the Company pursuant to Section 4 or Section 5 hereof.

(j) "**Indemnifiable Event**" means any event or occurrence, whether occurring before, on or after the date of this Agreement, related to the fact that Indemnitee is or was a manager, director, officer, employee or agent of the Company or any subsidiary of the Company, or is or was serving at the request of the Company or any subsidiary of the Company as a manager, director, officer, employee, member, manager, trustee or agent of any other Enterprise or by reason of an action or inaction by Indemnitee in any such capacity (whether or not serving in such capacity at the time any Loss is incurred for which indemnification can be provided under this Agreement).

(k) "**Independent Counsel**" means a law firm, or a member of a law firm, that is experienced in matters of corporation law and neither presently performs, nor in the past three (3) years has performed, services for any of: (i) James Dondero, (ii) the Company or Indemnitee (other than in connection with matters concerning Indemnitee under this Agreement or of other indemnitees under similar agreements), or (iii) any other party to the Claim giving rise to a claim for indemnification hereunder. Notwithstanding the foregoing, the term "Independent Counsel" shall not include any Person who, under the applicable standards of professional conduct then prevailing, would have a conflict of interest in representing either the Company or Indemnitee in an action to determine Indemnitee's rights under this Agreement.

(l) "**Losses**" means any and all Expenses, damages, losses, liabilities, judgments, fines (including excise taxes and penalties assessed with respect to employee

benefit plans and ERISA excise taxes), penalties (whether civil, criminal or other), amounts paid or payable in settlement, including any interest, assessments, any federal, state, local or foreign taxes imposed as a result of the actual or deemed receipt of any payments under this Agreement and all other charges paid or payable in connection with investigating, defending, being a witness in or participating in (including on appeal), or preparing to defend, be a witness or participate in, any Claim.

(m) "**Person**" means any individual, corporation, firm, partnership, joint venture, limited liability company, estate, trust, business association, organization, governmental entity or other entity and includes the meaning set forth in Sections 13(d) and 14(d) of the Exchange Act.

(n) "**Shares**" means an ownership interest of a member in the Company, including each of the common shares of the Company or any other class or series of Shares designated by the Board.

(o) References to "**serving at the request of the Company**" include any service as a director, manager, officer, employee, representative or agent of the Company which imposes duties on, or involves services by, such director, manager, officer, employee or agent, including but not limited to any employee benefit plan, its participants or beneficiaries; and a Person who acted in good faith and in a manner he or she reasonably believed to be in and not opposed to the best interests of the Company in Indemnitee's capacity as a director, manager, officer, employee, representative or agent of the Company, including but not limited to acting in the best interest of participants and beneficiaries of an employee benefit plan will be deemed to have acted in a manner "**not opposed to the best interests of the Company**" as referred to under applicable law or in this Agreement.

2. Indemnification.

(a) Subject to Section 9 and Section 10 of this Agreement, the Company shall indemnify and hold Indemnitee harmless, to the fullest extent permitted by the laws of the State of Delaware in effect on the date hereof, or as such laws may from time to time hereafter be amended to increase the scope of such permitted indemnification, against any and all Losses and Expenses if Indemnitee was or is or becomes a party to or participant in, or is threatened to be made a party to or participant in, any Claim by reason of or arising in part out of an Indemnifiable Event, including, without limitation, Claims brought by or in the right of the Company, Claims brought by third parties, and Claims in which the Indemnitee is solely a witness.

(b) For the avoidance of doubt, the indemnification rights and obligations contained herein shall also extend to any Claim in which the Indemnitee was or is a party to, was or is threatened to be made a party to or was or is otherwise involved in any capacity in by reason of Indemnitee's Corporate Status as a fiduciary capacity with respect to an employee benefit plan. In connection therewith, if the Indemnitee has acted in good faith and in a manner which appeared to be consistent with the best interests of the participants and beneficiaries of an employee benefit plan and not opposed thereto, the Indemnitee shall be deemed to have acted in a manner not opposed to the best interests of the Company.

3. Contribution.

(a) Whether or not the indemnification provided in Section 2 is available, if, for any reason, Indemnitee shall elect or be required to pay all or any portion of any judgment or settlement in any Claim in which the Company is jointly liable with Indemnitee (or would be if joined in such Claim), the Company shall contribute to the amount of Losses paid or payable by Indemnitee in proportion to the relative benefits received by the Company and all officers, directors, managers or employees of the Company, other than Indemnitee, who are jointly liable with Indemnitee (or would be if joined in such Claim), on the one hand, and Indemnitee, on the other hand, from the transaction or events from which such Claim arose; provided, however, that the proportion determined on the basis of relative benefit may, to the extent necessary to conform to law, be further adjusted by reference to the relative fault of the Company and all officers, directors, managers or employees of the Company other than Indemnitee who are jointly liable with Indemnitee (or would be if joined in such Claim), on the one hand, and Indemnitee, on the other hand, in connection with the transaction or events that resulted in such Losses, as well as any other equitable considerations which applicable law may require to be considered. The relative fault of the Company and all officers, directors, managers or employees of the Company, other than Indemnitee, who are jointly liable with Indemnitee (or would be if joined in such Claim), on the one hand, and Indemnitee, on the other hand, shall be determined by reference to, among other things, the degree to which their actions were motivated by intent to gain personal profit or advantage, the degree to which their liability is primary or secondary and the degree to which their conduct is active or passive.

(b) The Company hereby agrees to fully indemnify and hold Indemnitee harmless from any claims of contribution which may be brought by officers, directors, managers or employees of the Company, other than Indemnitee, who may be jointly liable with Indemnitee.

(c) To the fullest extent permissible under applicable law, if the indemnification provided for in this Agreement is unavailable to Indemnitee for any reason whatsoever, the Company, in lieu of indemnifying Indemnitee, shall contribute to the amount incurred by Indemnitee, whether for judgments, fines, penalties, excise taxes, amounts paid or to be paid in settlement and/or for Expenses, in connection with any Claim relating to an Indemnifiable Event under this Agreement, in such proportion as is deemed fair and reasonable in light of all of the circumstances of such Claim in order to reflect (i) the relative benefits received by the Company and Indemnitee as a result of the event(s) and/or transaction(s) giving cause to such Claim; and/or (ii) the relative fault of the Company (and its directors, managers, officers, employees and agents) and Indemnitee in connection with such event(s) and/or transaction(s).

4. Advancement of Expenses. The Company shall, if requested by Indemnitee, advance, to the fullest extent permitted by law, to Indemnitee (an "**Expense Advance**") any and all Expenses actually and reasonably paid or incurred (even if unpaid) by Indemnitee in connection with any Claim arising out of an Indemnifiable Event (whether prior to or after its final disposition). Indemnitee's right to such advancement is not subject to the satisfaction of any standard of conduct. Without limiting the generality or effect of

the foregoing, within thirty (30) business days after any request by Indemnitee, the Company shall, in accordance with such request, (a) pay such Expenses on behalf of Indemnitee, (b) advance to Indemnitee funds in an amount sufficient to pay such Expenses, or (c) reimburse Indemnitee for such Expenses. In connection with any request for Expense Advances, Indemnitee shall not be required to provide any documentation or information to the extent that the provision thereof would undermine or otherwise jeopardize attorney-client privilege. Execution and delivery to the Company of this Agreement by Indemnitee constitutes an undertaking by the Indemnitee to repay any amounts paid, advanced or reimbursed by the Company pursuant to this Section 4, the final sentence of Section 9(b), or Section 11(b) in respect of Expenses relating to, arising out of or resulting from any Claim in respect of which it shall be determined, pursuant to Section 9, following the final disposition of such Claim, that Indemnitee is not entitled to indemnification hereunder. No other form of undertaking shall be required other than the execution of this Agreement. Each Expense Advance will be unsecured and interest free and will be made by the Company without regard to Indemnitee's ability to repay the Expense Advance.

5. Indemnification for Expenses in Enforcing Rights. To the fullest extent allowable under applicable law, the Company shall also indemnify against, and, if requested by Indemnitee, shall advance to Indemnitee subject to and in accordance with Section 4, any Expenses actually and reasonably paid or incurred (even if unpaid) by Indemnitee in connection with any action or proceeding by Indemnitee for (a) indemnification or reimbursement or advance payment of Expenses by the Company under any provision of this Agreement, or under any other agreement or provision of the Bylaws now or hereafter in effect relating to Claims relating to Indemnifiable Events, and/or (b) recovery under any D&O Insurance maintained by the Company, regardless of whether Indemnitee ultimately is determined to be entitled to such indemnification or insurance recovery, as the case may be. Indemnitee shall be required to reimburse the Company in the event that a final judicial determination is made that such action brought by Indemnitee was frivolous or not made in good faith.

6. Partial Indemnity. If Indemnitee is entitled under any provision of this Agreement to indemnification by the Company for a portion of any Losses in respect of a Claim related to an Indemnifiable Event but not for the total amount thereof, the Company shall nevertheless indemnify Indemnitee for the portion thereof to which Indemnitee is entitled.

7. Notification and Defense of Claims.

(a) Notification of Claims. Indemnitee shall notify the Company in writing as soon as reasonably practicable of any Claim which could relate to an Indemnifiable Event or for which Indemnitee could seek Expense Advances, including a brief description (based upon information then available to Indemnitee) of the nature of, and the facts underlying, such Claim, to the extent then known. The failure by Indemnitee to timely notify the Company hereunder shall not relieve the Company from any liability hereunder except to the extent the Company's ability to participate in the defense of such claim was materially and adversely affected by such failure. If at the time of the receipt of such notice, the Company has D&O Insurance or any other insurance in effect under which coverage for Claims related to Indemnifiable Events is potentially available, the Company shall give

prompt written notice to the applicable insurers in accordance with the procedures, provisions, and terms set forth in the applicable policies. The Company shall provide to Indemnitee a copy of such notice delivered to the applicable insurers, and copies of all subsequent correspondence between the Company and such insurers regarding the Claim, in each case substantially concurrently with the delivery or receipt thereof by the Company.

(b) Defense of Claims. The Company shall be entitled to participate in the defense of any Claim relating to an Indemnifiable Event at its own expense and, except as otherwise provided below, to the extent the Company so wishes, it may assume the defense thereof with counsel reasonably satisfactory to Indemnitee. After notice from the Company to Indemnitee of its election to assume the defense of any such Claim, the Company shall not be liable to Indemnitee under this Agreement or otherwise for any Expenses subsequently directly incurred by Indemnitee in connection with Indemnitee's defense of such Claim other than reasonable costs of investigation or as otherwise provided below. Indemnitee shall have the right to employ its own legal counsel in such Claim, but all Expenses related to such counsel incurred after notice from the Company of its assumption of the defense shall be at Indemnitee's own expense; provided, however, that if (i) Indemnitee's employment of its own legal counsel has been authorized by the Company, (ii) Indemnitee has reasonably determined that there may be a conflict of interest between Indemnitee and the Company in the defense of such Claim, (iii) after a Change in Control, Indemnitee's employment of its own counsel has been approved by the Independent Counsel or (iv) the Company shall not in fact have employed counsel to assume the defense of such Claim, then Indemnitee shall be entitled to retain its own separate counsel (but not more than one law firm plus, if applicable, local counsel in respect of any such Claim) and all Expenses related to such separate counsel shall be borne by the Company.

8. Procedure upon Application for Indemnification. In order to obtain indemnification pursuant to this Agreement, Indemnitee shall submit to the Company a written request therefor, including in such request such documentation and information as is reasonably available to Indemnitee and is reasonably necessary to determine whether and to what extent Indemnitee is entitled to indemnification following the final disposition of the Claim, provided that documentation and information need not be so provided to the extent that the provision thereof would undermine or otherwise jeopardize attorney-client privilege. Indemnification shall be made insofar as the Company determines Indemnitee is entitled to indemnification in accordance with Section 9 below.

9. Determination of Right to Indemnification.

(a) Mandatory Indemnification; Indemnification as a Witness.

(i) To the extent that Indemnitee shall have been successful on the merits or otherwise in defense of any Claim relating to an Indemnifiable Event or any portion thereof or in defense of any issue or matter therein, including without limitation dismissal without prejudice, Indemnitee shall be indemnified against all Losses relating to such Claim in accordance with Section 2, and no Standard of Conduct Determination (as defined in Section 9(b)) shall be required.

(ii) To the extent that Indemnitee's involvement in a Claim relating to an Indemnifiable Event is to prepare to serve and serve as a witness, and not as a party, the Indemnitee shall be indemnified against all Losses incurred in connection therewith to the fullest extent allowable by law and no Standard of Conduct Determination (as defined in Section 9(b)) shall be required.

(b) Standard of Conduct. To the extent that the provisions of Section 9(a) are inapplicable to a Claim related to an Indemnifiable Event that shall have been finally disposed of, any determination of whether Indemnitee has satisfied any applicable standard of conduct under Delaware law that is a legally required condition to indemnification of Indemnitee hereunder against Losses relating to such Claim and any determination that Expense Advances must be repaid to the Company (a "**Standard of Conduct Determination**") shall be made as follows:

(i) if no Change in Control has occurred, (A) by a majority vote of the Disinterested Directors, even if less than a quorum of the Board, (B) by a committee of Disinterested Directors designated by a majority vote of the Disinterested Directors, even though less than a quorum or (C) if there are no such Disinterested Directors, by Independent Counsel in a written opinion addressed to the Board, a copy of which shall be delivered to Indemnitee; and

(ii) if a Change in Control shall have occurred, (A) if the Indemnitee so requests in writing, by a majority vote of the Disinterested Directors, even if less than a quorum of the Board or (B) otherwise, by Independent Counsel in a written opinion addressed to the Board, a copy of which shall be delivered to Indemnitee.

Subject to Section 4, the Company shall indemnify and hold Indemnitee harmless against and, if requested by Indemnitee, shall reimburse Indemnitee for, or advance to Indemnitee, within thirty (30) business days of such request, any and all Expenses incurred by Indemnitee in cooperating with the Person or Persons making such Standard of Conduct Determination.

(c) Making the Standard of Conduct Determination. The Company shall use its reasonable best efforts to cause any Standard of Conduct Determination required under Section 9(b) to be made as promptly as practicable. If the Person or Persons designated to make the Standard of Conduct Determination under Section 9(b) shall not have made a determination within ninety (90) days after the later of (A) receipt by the Company of a written request from Indemnitee for indemnification pursuant to Section 8 (the date of such receipt being the "**Notification Date**") and (B) the selection of an Independent Counsel, if such determination is to be made by Independent Counsel, then Indemnitee shall be deemed to have satisfied the applicable standard of conduct; provided that such 90-day period may be extended for a reasonable time, not to exceed an additional thirty (30) days, if the Person or Persons making such determination in good faith requires such additional time to obtain or evaluate information relating thereto. Notwithstanding anything in this Agreement to the contrary, no determination as to entitlement of Indemnitee to indemnification under this Agreement shall be required to be made prior to the final disposition of any Claim.

(d) Payment of Indemnification. If, in regard to any Losses:

(i) Indemnitee shall be entitled to indemnification pursuant to Section 9(a);

(ii) no Standard of Conduct Determination is legally required as a condition to indemnification of Indemnitee hereunder; or

(iii) Indemnitee has been determined or deemed pursuant to Section 9(b) or Section 9(c) to have satisfied the Standard of Conduct Determination,

then the Company shall pay to Indemnitee, within thirty (30) business days after the later of (A) the Notification Date or (B) the earliest date on which the applicable criterion specified in clause (i), (ii) or (iii) is satisfied, an amount equal to such Losses.

(e) Selection of Independent Counsel for Standard of Conduct Determination. If a Standard of Conduct Determination is to be made by Independent Counsel pursuant to Section 9(b)(i), the Independent Counsel shall be selected by the Board and the Company shall give written notice to Indemnitee advising him of the identity of the Independent Counsel so selected. If a Standard of Conduct Determination is to be made by Independent Counsel pursuant to Section 9(b)(ii), the Independent Counsel shall be selected by Indemnitee, and Indemnitee shall give written notice to the Company advising it of the identity of the Independent Counsel so selected. In either case, Indemnitee or the Company, as applicable, may, within thirty (3) business days after receiving written notice of selection from the other, deliver to the other a written objection to such selection; provided, however, that such objection may be asserted only on the ground that the Independent Counsel so selected does not satisfy the criteria set forth in the definition of "Independent Counsel" in Section 1(k), and the objection shall set forth with particularity the factual basis of such assertion. Absent a proper and timely objection, the Person or firm so selected shall act as Independent Counsel. If such written objection is properly and timely made and substantiated, (i) the Independent Counsel so selected may not serve as Independent Counsel unless and until such objection is withdrawn or a court has determined that such objection is without merit; and (ii) the non-objecting party may, at its option, select an alternative Independent Counsel and give written notice to the other party advising such other party of the identity of the alternative Independent Counsel so selected, in which case the provisions of the two immediately preceding sentences, the introductory clause of this sentence and numbered clause (i) of this sentence shall apply to such subsequent selection and notice. If applicable, the provisions of clause (ii) of the immediately preceding sentence shall apply to successive alternative selections. If no Independent Counsel that is permitted under the foregoing provisions of this Section 9(e) to make the Standard of Conduct Determination shall have been selected within twenty (20) days after the Company gives its initial notice pursuant to the first sentence of this Section 9(e) or Indemnitee gives its initial notice pursuant to the second sentence of this Section 9(e), as the case may be, either the Company or Indemnitee may petition the Court of Chancery of the State of Delaware ("**Delaware Court**") to resolve any objection which shall have been made by the Company or Indemnitee to the other's selection of Independent Counsel and/or to appoint as Independent Counsel a Person to be selected by the Court or such other Person as the Court

shall designate, and the Person or firm with respect to whom all objections are so resolved or the Person or firm so appointed will act as Independent Counsel. In all events, the Company shall pay all of the reasonable fees and expenses of the Independent Counsel incurred in connection with the Independent Counsel's determination pursuant to Section 9(b).

(f) Presumptions and Defenses.

(i) Indemnitee's Entitlement to Indemnification. In making any Standard of Conduct Determination, the Person or Persons making such determination shall presume that Indemnitee has satisfied the applicable standard of conduct and is entitled to indemnification, and the Company shall have the burden of proof to overcome that presumption and establish that Indemnitee is not so entitled. Any Standard of Conduct Determination that is adverse to Indemnitee may be challenged by the Indemnitee in the Delaware Court. No determination by the Company (including by its Board or any Independent Counsel) that Indemnitee has not satisfied any applicable standard of conduct may be used as a defense to enforcement by Indemnitee of Indemnitee's rights of indemnification or reimbursement or advance of payment of Expenses by the Company hereunder or create a presumption that Indemnitee has not met any applicable standard of conduct.

(ii) Reliance as a Safe Harbor. For purposes of this Agreement, and without creating any presumption as to a lack of good faith if the following circumstances do not exist, Indemnitee shall be deemed to have acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Company if Indemnitee's actions or omissions to act are taken in good faith reliance upon the records of the Company, including its financial statements, or upon information, opinions, reports or statements furnished to Indemnitee by the officers or employees of the Company or any of its subsidiaries in the course of their duties, or by committees of the Board or by any other Person (including legal counsel, accountants and financial advisors) as to matters Indemnitee reasonably believes are within such other Person's professional or expert competence and who has been selected with reasonable care by or on behalf of the Company. In addition, the knowledge and/or actions, or failures to act, of any director, manager, officer, agent or employee of the Company (other than Indemnitee) shall not be imputed to Indemnitee for purposes of determining the right to indemnity hereunder.

(iii) Defense to Indemnification and Burden of Proof. It shall be a defense to any action brought by Indemnitee against the Company to enforce this Agreement (other than an action brought to enforce a claim for Losses incurred in defending against a Claim related to an Indemnifiable Event in advance of its final disposition) that it is not permissible under applicable law for the Company to indemnify Indemnitee for the amount claimed. In connection with any such action or any related Standard of Conduct Determination, the burden of proving such a defense or that the Indemnitee did not satisfy the applicable standard of conduct shall be on the Company.

10. Exclusions from Indemnification. Notwithstanding anything in this Agreement to the contrary, the Company shall not be obligated to:

(a) indemnify or advance funds to Indemnitee for Losses with respect to proceedings initiated by Indemnitee, including any proceedings against the Company or its managers, officers, employees or other indemnitees and not by way of defense, except:

(i) proceedings referenced in Section 4 above (unless a court of competent jurisdiction determines that each of the material assertions made by Indemnitee in such proceeding was not made in good faith or was frivolous); or

(ii) where the Company has joined in or the Board has consented to the initiation of such proceedings.

(b) indemnify Indemnitee if a final decision by a court of competent jurisdiction determines that such indemnification is prohibited by applicable law.

(c) indemnify Indemnitee for the disgorgement of profits arising from the purchase or sale by Indemnitee of securities of the Company in violation of Section 16(b) of the Exchange Act, or any similar successor statute.

11. Remedies of Indemnitee.

(a) In the event that (i) a determination is made pursuant to Section 9 that Indemnitee is not entitled to indemnification under this Agreement, (ii) an Expense Advance is not timely made pursuant to Section 4, (iii) no determination of entitlement to indemnification is made pursuant to Section 9 within 90 days after receipt by the Company of the request for indemnification, or (iv) payment of indemnification is not made pursuant Section 9(d), Indemnitee shall be entitled to an adjudication in a Delaware Court, or in any other court of competent jurisdiction, of Indemnitee's entitlement to such indemnification. Indemnitee shall commence such proceeding seeking an adjudication within 180 days following the date on which Indemnitee first has the right to commence such proceeding pursuant to this Section 11(a). The Company shall not oppose Indemnitee's right to seek any such adjudication.

(b) In the event that Indemnitee, pursuant to this Section 11, seeks a judicial adjudication or arbitration of his or her rights under, or to recover damages for breach of, this Agreement, any other agreement for indemnification, payment of Expenses in advance or contribution hereunder or to recover under any director, manager, and officer liability insurance policies or any other insurance policies maintained by the Company, the Company will, to the fullest extent permitted by law and subject to Section 4, indemnify and hold harmless Indemnitee against any and all Expenses which are paid or incurred by Indemnitee in connection with such judicial adjudication or arbitration, regardless of whether Indemnitee ultimately is determined to be entitled to such indemnification, payment of Expenses in advance or contribution or insurance recovery. In addition, if requested by Indemnitee, subject to Section 4 the Company will (within thirty (30) days after receipt by the Company of the written request therefor), pay as an Expense Advance such Expenses, to the fullest extent permitted by law.

(c) In the event that a determination shall have been made pursuant to Section 9 that Indemnitee is not entitled to indemnification, any judicial proceeding commenced

pursuant to this Section 11 shall be conducted in all respects as a de novo trial on the merits, and Indemnitee shall not be prejudiced by reason of the adverse determination under Section 9.

(d) If a determination shall have been made pursuant to Section 9 that Indemnitee is entitled to indemnification, the Company shall be bound by such determination in any judicial proceeding commenced pursuant to this Section 11, absent (i) a misstatement by Indemnitee of a material fact, or an omission of a material fact necessary to make Indemnitee's misstatement not materially misleading in connection with the application for indemnification, or (ii) a prohibition of such indemnification under applicable law.

12. Settlement of Claims. The Company shall not be liable to Indemnitee under this Agreement for any amounts paid in settlement of any threatened or pending Claim related to an Indemnifiable Event effected without the Company's prior written consent, which shall not be unreasonably withheld; provided, however, that if a Change in Control has occurred, the Company shall be liable for indemnification of the Indemnitee for amounts paid in settlement if an Independent Counsel (which, for purposes of this Section 12, shall be selected by the Company with the prior consent of the Indemnitee, such consent not to be unreasonably withheld or delayed) has approved the settlement. The Company shall not settle any Claim related to an Indemnifiable Event in any manner that would impose any Losses on the Indemnitee without the Indemnitee's prior written consent.

13. Duration. All agreements and obligations of the Company contained herein shall continue during the period that Indemnitee is a manager of the Company (or is serving at the request of the Company as a director, manager, officer, employee, member, trustee or agent of another Enterprise) and shall continue thereafter (i) so long as Indemnitee may be subject to any possible Claim relating to an Indemnifiable Event (including any rights of appeal thereto) and (ii) throughout the pendency of any proceeding (including any rights of appeal thereto) commenced by Indemnitee to enforce or interpret his or her rights under this Agreement, even if, in either case, he or she may have ceased to serve in such capacity at the time of any such Claim or proceeding.

14. Other Indemnitors. The Company hereby acknowledges that Indemnitee may have certain rights to indemnification, advancement of Expenses and/or insurance provided by certain private equity funds, hedge funds or other investment vehicles or management companies and/or certain of their affiliates and by personal policies (collectively, the "**Other Indemnitors**"). The Company hereby agrees (i) that it is the indemnitor of first resort (i.e., its obligations to Indemnitee are primary and any obligation of the Other Indemnitors to advance Expenses or to provide indemnification for the same Expenses or liabilities incurred by Indemnitee are secondary), (ii) that it shall be required to advance the full amount of Expenses incurred by Indemnitee and shall be liable for the full amount of all Expenses, judgments, penalties, fines and amounts paid in settlement to the extent legally permitted and as required by the terms of this Agreement and the Bylaws (or any other agreement between the Company and Indemnitee), without regard to any rights Indemnitee may have against the Other Indemnitors, and, (iii) that it irrevocably waives, relinquishes and releases the Other Indemnitors from any and all claims against the Other

Indemnitors for contribution, subrogation or any other recovery of any kind in respect thereof. The Company further agrees that no advancement or payment by the Other Indemnitors on behalf of Indemnitee with respect to any claim for which Indemnitee has sought indemnification from the Company shall affect the foregoing and the Other Indemnitors shall have a right of contribution and/or be subrogated to the extent of such advancement or payment to all of the rights of recovery of Indemnitee against the Company. The Company and Indemnitee agree that the Other Indemnitors are express third party beneficiaries of the terms of this Section 14.

15. Non-Exclusivity. The rights of Indemnitee hereunder will be in addition to any other rights Indemnitee may have under the Bylaws, the General Corporation Law of the State of Delaware (as may be amended from time to time, the "**DGCL**"), any other contract, in law or in equity, and under the laws of any state, territory, or jurisdiction, or otherwise (collectively, "**Other Indemnity Provisions**"). The Company will not adopt any amendment to its Bylaws the effect of which would be to deny, diminish, encumber or limit Indemnitee's right to indemnification under this Agreement or any Other Indemnity Provision.

16. Liability Insurance. For the duration of Indemnitee's service as a director of the Company, and thereafter for so long as Indemnitee shall be subject to any pending Claim relating to an Indemnifiable Event, the Company shall use best efforts to continue to maintain in effect policies of D&O Insurance providing coverage that is at least substantially comparable in scope and amount to that provided by similarly situated companies. In all policies of D&O Insurance maintained by the Company, Indemnitee shall be named as an insured in such a manner as to provide Indemnitee the same rights and benefits as are provided to the most favorably insured of the Company's directors. Upon request, the Company will provide to Indemnitee copies of all D&O Insurance applications, binders, policies, declarations, endorsements and other related materials.

17. No Duplication of Payments. The Company shall not be liable under this Agreement to make any payment to Indemnitee in respect of any Losses to the extent Indemnitee has otherwise received payment under any insurance policy, any Other Indemnity Provisions or otherwise of the amounts otherwise indemnifiable by the Company hereunder.

18. Subrogation. In the event of payment to Indemnitee under this Agreement, the Company shall be subrogated to the extent of such payment to all of the rights of recovery of Indemnitee. Indemnitee shall execute all papers required and shall do everything that may be necessary to secure such rights, including the execution of such documents necessary to enable the Company effectively to bring suit to enforce such rights.

19. Indemnitee Consent. The Company will not, without the prior written consent of Indemnitee, consent to the entry of any judgment against Indemnitee or enter into any settlement or compromise which (a) includes an admission of fault of Indemnitee, any non-monetary remedy imposed on Indemnitee or a Loss for which Indemnitee is not wholly indemnified hereunder or (b) with respect to any Claim with respect to which Indemnitee may be or is made a party or a participant or may be or is otherwise entitled to seek

indemnification hereunder, does not include, as an unconditional term thereof, the full release of Indemnitee from all liability in respect of such Claim, which release will be in form and substance reasonably satisfactory to Indemnitee. Neither the Company nor Indemnitee will unreasonably withhold its consent to any proposed settlement; provided, however, Indemnitee may withhold consent to any settlement that does not provide a full and unconditional release of Indemnitee from all liability in respect of such Claim.

20. Amendments. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by both of the parties hereto. No waiver of any of the provisions of this Agreement shall be binding unless in the form of a writing signed by the party against whom enforcement of the waiver is sought, and no such waiver shall operate as a waiver of any other provisions hereof (whether or not similar), nor shall such waiver constitute a continuing waiver. Except as specifically provided herein, no failure to exercise or any delay in exercising any right or remedy hereunder shall constitute a waiver thereof.

21. Binding Effect. This Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties hereto and their respective successors (including any direct or indirect successor by purchase, merger, consolidation or otherwise to all or substantially all of the business and/or assets of the Company), assigns, spouses, heirs and personal and legal representatives. The Company shall require and cause any successor (whether direct or indirect by purchase, merger, consolidation or otherwise) to all, substantially all or a substantial part of the business and/or assets of the Company, by written agreement in form and substance satisfactory to Indemnitee, expressly to assume and agree to perform this Agreement in the same manner and to the same extent that the Company would be required to perform if no such succession had taken place.

22. Severability. Each provision of this Agreement shall be considered severable and if for any reason any provision which is not essential to the effectuation of the basic purposes of this Agreement is determined by a court of competent jurisdiction to be invalid, unenforceable or contrary to the DGCL or existing or future applicable law, such invalidity, unenforceability or illegality shall not impair the operation of or affect those provisions of this Agreement which are valid, enforceable and legal. In that case, this Agreement shall be construed so as to limit any term or provision so as to make it valid, enforceable and legal within the requirements of any applicable law, and in the event such term or provision cannot be so limited, this Agreement shall be construed to omit such invalid, unenforceable or illegal provisions.

23. Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered by hand, against receipt, or mailed, by postage prepaid, certified or registered mail:

(a) if to Indemnitee, to the address set forth on the signature page hereto.

(b) if to the Company, to:

Strand Advisors, Inc.
Attention: Isaac Leventon

Address: 300 Crescent Court, Suite 700
Dallas, Texas 75201
Email: ileventon@highlandcapital.com

Notice of change of address shall be effective only when given in accordance with this Section 23. All notices complying with this Section 23 shall be deemed to have been received on the date of hand delivery or on the third business day after mailing.

24. Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF DELAWARE (OTHER THAN ITS RULES OF CONFLICTS OF LAW TO THE EXTENT THAT THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION WOULD BE REQUIRED THEREBY).

25. Jurisdiction. The parties hereby agree that any suit, action or proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby, whether in contract, tort or otherwise, shall be brought in the United States District Court for the District of Delaware or in the Court of Chancery of the State of Delaware (or, if such court lacks subject matter jurisdiction, in the Superior Court of the State of Delaware), so long as one of such courts shall have subject-matter jurisdiction over such suit, action or proceeding, and that any case of action arising out of this Agreement shall be deemed to have arisen from a transaction of business in the State of Delaware. Each of the parties hereby irrevocably consents to the jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such suit, action or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such court or that any such suit, action or proceeding which is brought in any such court has been brought in an inconvenient forum.

26. Enforcement.

(a) Without limiting Section 15, this Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral, written and implied, between the parties hereto with respect to the subject matter hereof.

(b) The Company shall not seek from a court, or agree to, a "bar order" which would have the effect of prohibiting or limiting the Indemnitee's rights to receive advancement of Expenses under this Agreement other than in accordance with this Agreement.

27. Headings and Captions. All headings and captions contained in this Agreement and the table of contents hereto are inserted for convenience only and shall not be deemed a part of this Agreement.

28. Counterparts. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which, when taken together, shall constitute one and the

same agreement. Facsimile counterpart signatures to this Agreement shall be binding and enforceable.

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

STRAND ADVISORS, INC.

By: _____
Name:
Title:

INDEMNITEE:

_____

Name: [_____]
Address: _____
_____
_____
Email:

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December ___, 2019

Attn: Independent Directors
Highland Capital Management, LP
300 Crescent Court, Ste. 700
Dallas, TX 75201

Re: Development Specialists, Inc. ("DSI")
Retention and Letter of Engagement

Dear Members of the Board:

Please accept this letter as our firm's formal written agreement (the "Agreement") to provide restructuring support services to Highland Capital Management, L.P. (the "Company"). This Agreement replaces and supersedes in all respects the letter agreement between DSI and the Company, dated October 7, 2019, as amended and revised by the letter agreement dated October 29, 2019. However, all fees and expenses incurred by DSI prior to the date hereof in accordance with such prior letter agreements will be paid by the Company, subject to allowance of such fees and expenses by the U.S. Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court"). The Agreement will become effective upon execution by duly authorized representatives of the respective parties and approval of the Bankruptcy Court.

Section 1 – Scope of Work

DSI will provide the following services (the "Services") to the Company:

1. Bradley D. Sharp will act as the Company's Chief Restructuring Officer ("CRO") with other DSI personnel to assist Mr. Sharp in carrying out those duties and responsibilities.
2. Subject to the terms of this Agreement, as CRO, Mr. Sharp will assume control of the Company's restructuring and direct the Company with respect to its bankruptcy filed on October 16, 2019 (the "Chapter 11 Case"), which Chapter 11 Case has now been transferred to the Bankruptcy Court.
3. Subject to the terms of this Agreement, Mr. Sharp will report to the Independent Directors and, if appointed, the Chief Executive Officer of the Company ("CEO") and will comply with the Company's corporate governance requirements.
4. As directed by the Independent Directors and/or CEO, the CRO will be responsible for the implementation and prosecution of the Chapter 11 Case, including negotiations with creditors, reconciliation of claims, and confirmation of a plan or plans of reorganization.
5. Provide other personnel of DSI ("Additional Personnel") to provide restructuring support services as requested or required to the Company, which may include but are not limited to:

Exhibit B

a. assisting the Company in the preparation of financial disclosures required by the Bankruptcy Code, including the Schedules of Assets and Liabilities, the Statements of Financial Affairs and Monthly Operating Reports;
b. advising and assisting the Company, the Company's legal counsel, and other professionals in responding to third party requests;
c. attending meetings and assisting in communications with parties in interest and their professionals, including the Official Committee of Unsecured Creditors appointed in the Chapter 11 Case;
d. providing litigation advisory services with respect to accounting matters, along with expert witness testimony on case related issues; and
e. rendering such other general business consulting services or other assistance as the Company may deem necessary and which are consistent with the role of a financial advisor and not duplicative of services provided by other professionals in this case.

DSI's ability to adequately perform the Services is dependent upon the Company timely providing reliable, accurate, and complete necessary information. The Company agrees that CRO will have (i) access to and the ability to communicate with any employee of the Company or any affiliate of the Company and (ii) access to any information, including documents, relating to the Company or any Company affiliate, including, but not limited to, information concerning collections and disbursements. The Company acknowledges that DSI or CRO are not responsible for independently verifying the veracity, completeness, or accuracy of any information supplied to us by or on behalf of the Company.

DSI will submit its evaluations and analyses pursuant to this Agreement in periodic oral and written reports. Such reports are intended to and shall constitute privileged and confidential information, and shall constitute the Company's property.

Although we do not predict or warrant the outcome of any particular matter or issue, and our fees are not dependent upon such outcomes, we will perform the Services with reasonable care and in a diligent and competent manner.

Section 2 – Rates, Invoicing and Retainer

DSI will be compensated at a rate of $100,000 per month, plus expenses (capped at $10,000 per month), for the services of Bradley D. Sharp as CRO and such DSI personnel (including Fred Caruso) as are required to fulfill Mr. Sharp's responsibilities as CRO; provided that if any single expense exceeds $1,000, DSI will provide reasonable documentation and will obtain the Company's prior written approval.

A number of DSI's personnel have experience in providing restructuring support services and may be utilized as Additional Personnel in this representation. Although others of our staff may

also be involved, we have listed below certain of the DSI personnel (along with their corresponding billing rates) who would likely constitute the Additional Personnel. The individuals are:

R. Brian Calvert	$640.00/hr.
Thomas P. Jeremiassen	$575.00/hr.
Eric J. Held	$495.00/hr.
Nicholas R. Troszak	$485.00/hr.
Spencer G. Ferrero	$350.00/hr.
Tom Frey	$325.00/hr.

The above rates are adjusted as of January 1 of each year to reflect advancing experience, capabilities, and seniority of our professionals as well as general economic factors.

We acknowledge receipt of a retainer of $250,000 from the Company. The purpose of the retainer is to secure a portion of our fees and expenses and to retain our status as a non-creditor should such be required for DSI to continue to provide the Services. As such, should a need arise to increase this retainer due to the level of Services DSI is providing or projected to provide, we will send the Company a supplement to this Agreement requesting the necessary increases and discuss with the Company the amount and timing of providing such increase to the retainer.

This retainer will be applied to our final invoice. If the retainer exceeds the amount of our final invoice, we will refund the difference to the Company at that time. In the event that periodic invoices are not paid timely, we will apply the retainer to the amounts owing on such invoices and, if applicable, any related late charges, and we will stop work until the retainer is replenished to the full amount required. If the retainer is not replenished within ten (10) days after the application of the retainer to unpaid balances, we reserve the right to terminate this Agreement in accordance with the provisions of Section 3 of this Agreement.

DSI also will be entitled to reimbursement for its reasonable costs and expenses. Such costs and expenses may include, among others, charges for messenger services, photocopying, travel expenses, long distance telephone charges, postage and other charges customarily invoiced by consulting firms. Airfare for international flights will be charged at the business class fare; provided that if any single expense exceeds $1,000, DSI will provide reasonable documentation and will obtain the Company's prior written approval.

This Agreement shall be presented to the Bankruptcy Court for approval and continuation, pursuant to Bankruptcy Code Section 363 and DSI's then-prospective obligations shall be contingent upon such approval.

Section 3 – Termination

Either the Company or DSI may terminate this Agreement for any reason with ten (10) business days' written notice. Notwithstanding anything to the contrary contained herein, the Company shall be obligated, in accordance with any orders of or procedures established by the Court, to pay and/or reimburse DSI all fees and expenses accrued under this Agreement as of the effective date of the termination.

Section 4 – Relationship of the Parties, Confidentiality

DSI will provide the Services to and for the Company, with select members of DSI assigned to specific roles for the benefit of the Company. These members will remain as DSI employees during the pendency of this case. Specifically, the parties intend that an independent contractor relationship will be created by this Agreement. Employees of DSI are not to be considered employees of the Company and are not entitled to any of the benefits that the Company provides for the Company's employees.

The Company acknowledges that all advice (written or oral) given by DSI to the Company in connection with DSI's engagement is intended solely for the benefit and use of the Company in considering the transaction to which it relates, and that no third party is entitled to rely on any such advice or communication. DSI will in no way be deemed to be providing services for any person not a party to this Agreement.

DSI agrees that all information not publicly available that is received by DSI from the Company in connection with this Agreement or that is developed pursuant to this Agreement, will be treated as confidential and will not be disclosed by DSI, except as required by Court order, or other legal process, or as may be authorized by the Company. DSI shall not be required to defend any action to obtain an order requiring disclosure of such information, but shall instead give prompt notice of any such action to the Company so that it may seek appropriate remedies, including a protective order. The Company shall reimburse DSI for all costs and fees (including reasonable attorney's fees) incurred by DSI relating to responding to (whether by objecting to or complying with) any subpoenas or requests for production of information or documents.

Section 5 – Indemnity

The Company shall name Bradley D. Sharp as its Chief Restructuring Officer and shall indemnify him on the same terms as provided to the Company's other officers and directors under the Company partnership agreement or other governing document and applicable state law. Mr. Sharp shall be included as an insured under any insurance policies or coverage available to officers and directors of the Company.

The Company shall additionally indemnify those persons, and only those persons, serving as executive officers on the same terms as provided to the Company's other officers and directors under the Company's partnership agreement or other governing document and applicable state law, along with insurance coverage under the Company's D&O policies. Any such indemnity shall survive the expiration or termination by either party of this Agreement. Except as provided in this Section and in Section 4, there shall be no indemnification of DSI, its affiliates or the Additional Personnel.

Each and every one of the personnel employed by DSI who works on this particular project, as well as DSI officers, directors, employees and agents (the "DSI Parties") shall not be liable to the Company, or any party asserting claims on behalf of the Company, except for direct damages found in a final determination (not subject to further appeal) by a court of competent jurisdiction to be the direct result of the bad faith, self-dealing or intentional misconduct or gross negligence of DSI.

Section 6 – Conflicts

DSI has made diligent inquiries to determine whether it or any of its professionals have any connections with the Company, its creditors, or other parties in interest in the Chapter 11 Case. Based on that review, the review of DSI's conflict files and responses to inquiries from DSI's professional staff, neither DSI nor its professionals have any known conflicts with the parties in this case. DSI will separately provide its connections to parties in this case and/or their professionals.

Section 7 – No Audit

The Company acknowledges that it is hiring DSI to assist and advise the Company in business planning and operations. DSI's engagement shall not constitute an audit, review or compilation, or any other type of financial statement reporting engagement that is subject to the rules of AICPA or other such state and national professional bodies.

Section 8 – Non-Solicitation

The Company agrees not to solicit, recruit or hire any employees or agents of DSI for a period of one year subsequent to the completion and/or termination of this Agreement; provided that the Company shall not be prohibited from (x) making general advertisements for employment not specifically directed at employees of DSI or (y) employees of DSI responding to unsolicited requests for employment.

Section 9 – Survival

The provisions of this Agreement relating to indemnification, the non-solicitation or hiring of DSI employees, and all other provisions necessary to the enforcement of the intent of this Agreement will survive the termination or expiration of this Agreement.

Section 10 – Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware without regard to conflicts of law principles.

Section 11 – Entire Agreement, Amendment

This Agreement contains the entire understanding of the parties relating to the subject matter of this Agreement and supersedes and is intended to nullify any other agreements, understandings or representations relating to the subject of this Agreement. This Agreement may not be amended or modified except in a writing signed by the parties.

If you are in agreement with the foregoing terms and conditions please indicate your acceptance by signing an original copy of this Agreement on the signature lines below, then returning one fully-executed Agreement to DSI's office. The Agreement will become effective upon execution by duly authorized representatives of the respective parties.

Very truly yours,

Bradley Sharp
Development Specialists, Inc.

AGREED AND ACKNOWLEDGED:

Highland Capital Management, L.P.
By: Strand Advisors, Inc., its general partner

_____
By: _____, Independent Director
Date: _____

A. Definitions

a. Electronically stored information" or "ESI" shall include all electronic files, documents, data, and information covered under the Federal Rules of Civil Procedure.

B. Preservation of ESI - Generally

a. Debtor acknowledges that they should take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control. This includes notifying employees possessing relevant information of their obligation to preserve such data.

C. Preservation of ESI – Specific Forms

a. For email, Debtor uses Outlook Email on an Exchange server. Veritas Enterprise Vault is used to archive emails. Journaling is and has been in active use since 2007, and all inbound, outbound, and in-system email .communications have been preserved and are not at risk of deletion due to normal document retention practices. Out of an abundance of caution, a copy of the latest email back-up, which was performed two months ago, shall be copied and stored at a secured location.
b. The file server used by Debtor was backed up approximately one week ago. A copy of this backup shall be created and stored on a portable hard drive at a secured location.
c. The Sharepoint server used by Debtor was backed up approximately one week ago. A copy of this backup shall be created in a format that maintains all potentially relevant information and stored at a secured location.
d. The Oracle E-Business Suite (EBS) server used by Debtor was backed up one week ago. A copy of this backup shall be created in a format and stored at a secured location.
e. The Advent Geneva accounting system used by Debtor was backed up approximately one week ago. Upon reasonable notice, the Committee may submit search criteria to Debtor to run searches in Advent Geneva. Subject to Debtor's rights to assert objections as provided by Part G herein, Debtor will provide the data resulting from such agreed searches pursuant to Part F herein..
f. The Siepe Database (data warehouse) used by Debtor was backed up approximately one week ago. A copy of this backup shall be created in a format and stored at a secured location.
g. For the Box account used by Debtor, to the extent routine data retention practices may result in file deletion, they shall be suspended pending further discussion with the Committee concerning the relevance of such data. Users of the Box account who have the ability to delete files shall be notified of the obligation to suspend deletion of any data stored in Box.
h. Bloomberg data is archived for five years. Debtor shall work with Bloomberg client services to preserve a copy of all such archived material, which shall be stored at a secured location, or otherwise extend the backup window in which Bloomberg preserves the data by reasonable time to be agreed by the parties.

i. Files may be saved locally on laptops/work computers used by employees of Debtor. This practice is discouraged, but may result in the creation of relevant ESI on local systems in a manner that will not be replicated elsewhere. Debtor shall therefore cease the deletion of data (*i.e.*, wiping) of any employee-assigned computer hard drives, such as for departing employees. Debtor shall furthermore instruct current employees not to delete files stored locally on their assigned computers.

D. Not Reasonably Accessible Documents

a. Absent an order from the Court upon a showing of good cause, a Party from whom ESI has been requested shall not be required to search for responsive ESI from sources that are not reasonably accessible without undue burden or cost. The following types of data stores are presumed to be inaccessible and are not subject to discovery, and need not be collected or preserved, absent a particularized need for the data as established by the facts and legal issues of the case:
   i. Deleted, slack, fragmented, or other data only accessible by forensics;
   ii. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system; and
   iii. On-line access data such as temporary internet files, history, cache, cookies, and the like.

b. To conduct collections in a focused and efficient manner, the Parties also agree to exclude the following file types from collection: Standard system file extensions including, but not limited to, BIN, CAB, CHK, CLASS, COD, COM, DLL DRV, EXE, INF, INI, JAVA, LIB, LOG, SYS and TMP and other file extensions and directories that likely do not contain user generated content such as files identified by hash value when compared to the National Software Reference Library reference data set (RDS Hash), a sub-project of the National Institute of Standards and Technology ("NIST"), of known traceable system and application files. This process is commonly referred to as "De-NISTing."

E. Collection and Search Methodology

a. Searches for emails in Debtor's custody shall be conducted by DSI on Debtor's Veritas Enterprise Vault storage using an unrestricted account at the earliest opportunity, but in no event later than [date]. DSI shall use an add-on component called Discovery Assistant, which enables searches based on email properties, such as senders, recipients, and dates. Discovery Assistant also permits text searching of email contents and the contents of electronic file attachments, although not pictures of text (*e.g.*, scanned PDFs). Debtor did not employ employee message or file encryption that would prevent reasonable operation of the Discovery Assistant search capabilities.

b. The results of email searches shall be produced to the Committee pursuant to Part F below, subject to completion of any review for privilege or other purposes contemplated by this Agreement.

c. A snapshot copy of Debtor databases (Oracle, Siepe) shall be created in a format to be specified later by agreement with the Committee per Part (C)(d), (f), above.

Prior to any production of responsive data from such a structured database Debtor will first identify the database type and version number, provide the vendor-originated database dictionary, if any, (identifying all tables in the database, their fields, the meaning of those fields, and any interrelation among fields) and any user manuals, or any other documentation describing the structure and/or content of the database, and a list of all reports that can be generated from the database. The list of reports shall be provided in native Excel (.xis or .xlsx) format.

d. The Geneva system is highly proprietary and shall not be collected, but the Committee will be given reasonable access to that system per Part C(e), above.
e. Debtor and Committee will meet and confer to discuss the scope of any necessary searches on the Box account.
f. Debtor file server contents, where requested by the Committee, shall be produced pursuant to Part F below.
g. Debtor shall propose a format for producing Sharepoint data. The Committee agrees that it is not necessary to reproduce the interface used by Debtor in the ordinary course of business for Sharepoint.

F. Format of Documents Produced

a. Non-database ESI shall be produced as black and white Group 4 TIFF files, with a resolution of 300 DPI. Page size shall be 8.5 x 11 inches unless, in the reasonable judgment of the Producing Party, a particular item requires a different page size, and original document orientation shall be maintained (i.e., portrait to portrait and landscape to landscape). A Requesting Party may, in good faith and reasonable judgment, request a color copy of a production document if it is necessary to convey the relevant and responsive information. Such color copies may be produced as single page JPG (JPEG) image files. The Requesting Party will bear the costs for color images.
b. The files shall be accompanied by a metadata load file, in a single standard format to be requested by the Receiving Party prior to any production (e.g., Opticon, Summation DII, or the like) showing the Bates number of each page, the appropriate unitization of the documents, and the entire family range. The Parties agree to meet and confer regarding the requested standard format prior to production.
c. The files shall be accompanied by a .DAT text file including the delimited fields identified in the Metadata List (below). No Party will have any obligation to manually generate information to provide the fields identified in the Metadata List.
d. The Producing Party reserves the right to make hard copy documents available for inspection and copying pursuant to Federal Rule of Civil Procedure 34.
e. In the event that a Party identifies hard copy documents for production, hard copy paper documents shall be scanned and will include, to the extent feasible, the following fields in the .DAT text file: PRODBEG, PRODEND, PAGECOUNT, FULLTEXT, and CUSTODIAN. The Parties agree to share equally in the cost of scanning hard copy documents.
f. For any documents that were scanned from hard copy paper documents, the Parties will produce images of hard copy documents unitized to the extent the

original documents appeared to be units in physical form, with attachments following parents, and with information that identifies the holder (or container) structure, to the extent such structure exists and it is reasonable to do so. The Producing Party is not required to OCR (Optical Character Recognition) hard copy documents. If the Receiving Party requests that hard copy documents be OCR'ed, the Receiving Party shall bear the cost of such request, unless the Parties agree to split the cost so that each has an OCR'ed copy of the documents.

g. For ESI that the Producing Party produces in TIFF or JPEG format, the Producing Party shall electronically "burn" a legible, unique Bates number onto each page. The Bates number shall, to the extent reasonably possible: (1) identify the Producing Party; (2) maintain a constant length of nine numeric digits (including 0-padding) across the entire production; (3) contain only alphanumeric characters, no special characters or embedded spaces; and (4) be sequential within a given document. If the Bates number conceals, interferes with, or otherwise obscures any information from the source document, the Producing Party, at the request of the Receiving Party, shall produce a copy that is not obscured.

h. For ESI that the Producing Party produces in TIFF format, if the Producing Party is producing the ESI subject to a claim that it is protected from disclosure under any confidentiality order entered in this matter, the Producing Party shall electronically "burn" the appropriate confidentiality designation onto each page of the document. If the designation conceals, interferes with, or otherwise obscures any information from the source document, the Producing Party, at the request of the Receiving Party, shall produce a copy that is not obscured.

i. The Parties agree to produce e-mail families intact absent a privilege or work product claim, so long as each document contains responsive information; for all documents that contain a responsive, non-privileged attachment, the following fields will be produced (if available) as part of the metadata load file to indicate the parent child or parent/sibling relationship:

    i. Production Bates begin
    ii. Production Bates end
    iii. Production Bates begin attachment
    iv. Production Bates end attachment

    Notwithstanding the aforementioned, all parties acknowledge that Debtor's. Veritas Enterprise Vault system does not have the ability to search for the family members of responsive documents, and that Debtor does not have an obligation to manually search for non-responsive family members of otherwise responsive documents.

j. Unless otherwise agreed, all dynamic date and time fields, where such fields are processed to contain a value, and all metadata pertaining to dates and times, will be standardized to Universal Coordinated Time (UTC) or Universal Coordinated Time + 1 (UTC+1) **[TBD]**. The Parties understand and acknowledge that such standardization affects only dynamic fields and metadata values and does not affect, among other things, dates and times that are hard-coded text within a file. Dates and times that are hard-coded text within a file (for example, in an email thread, dates and times of earlier messages that were converted to body text when subsequently replied to or forwarded; and in any file type, dates and times that are

typed as such by users) will be produced as part of the document text in accordance with the provisions herein.

k. Exceptions to the Production Format

l. Excel spreadsheets shall be produced in native application format, unless redactions are required. The Producing Party will make reasonable efforts to provide a TIFF image of a slip sheet with the Bates number of documents produced natively in its production. The corresponding native file shall be named by using the same Bates number identified on the placeholder TIFF image. Any Excel spreadsheet that requires redaction will be produced in TIFF format only. Certain types of databases are dynamic in nature and may contain information that is irrelevant. These files are sometimes large and would, if rendered to TIFF images completely, produce thousands of pages that would have little utility to a reviewer without the associated database.

m. To the extent information from a structured data repository, such as a database, is requested, responsive information will be produced via a report or export of such data to an appropriate program that is agreeable to the requesting Party. The Parties agree to meet and confer before such data is exported.

G. Production Format Shall Not Alter Authenticity, Admissibility, or Privilege Status

a. No Party shall object that ESI produced pursuant to this Protocol is not authentic by virtue of the ESI having been converted to TIFF. The Parties otherwise reserve all rights regarding their ability to object to the authenticity of documents.

b. Nothing in this Protocol shall be construed to affect in any way the rights of any Party to make any objection as to the production, discoverability, admissibility, or confidentiality of documents and ESI.

c. Nothing in this Protocol shall constitute a waiver by any Party of any claim or privilege or other protection from discovery.

d. Nothing in this Protocol shall be interpreted to in any way limit a Producing Parties right and ability to review documents for responsiveness prior to production.

e. Nothing in the Protocol shall require disclosure of irrelevant information or relevant information protected by the attorney-client privilege, work-product doctrine, or any other applicable privilege or immunity.

Metadata List

File Name	Field Description	Sample Values
BegBates	Bates number for the first page of the document	ABC-0000001
EndBates	Bates number for the last page of the document	ABC-0000002
BegAttach	Bates number for the first page of parent document	ABC-0000001
EndAttach	Bates number for the last page of last attachment	ABC-0000005
Pages	Number of printed pages of the document	2

Global Custodian	Custodian name produced in format: Lastname, Firstname.	Smith, Jane; Taylor, Michael
Confidentiality	Indicates if the document has been designated as "Confidential" or "Highly Confidential" pursuant to the applicable Protective Order	Confidential; Highly Confidential
Redacted	Descriptor for documents that have been redacted: "Yes" for redacted documents; "No" for non-redacted documents	Yes
Email Subject	Subject line of Email or	Text of the subject line
Document Subject	Subject value of documents	Text of the subject line
Date Sent	Date email sent	mm/dd/yyyy
Time Sent	Time email sent	hh:mm:ss AM
Date Last Modified	Date document was last modified	mm/dd/yyyy
Time Last Modified	Time document was last modified	hh:mm:ss AM
Date Created	Date document was first created	mm/dd/yyyy
To	All SMTP address of email recipients, separated by a semi-colon	Larry.murphy@email.com
From	All SMTP address of email author	Bart.cole@email.com
CC	All SMTP address of email "CC" recipients, separated by a semi-colon	Jim.James@gmail.com; bjones@yahoo.com
BCC	All SMTP address of email "BCC" recipients, separated by a semi-colon	mjones@gmail.com
Attach	The file name(s) of the documents attached to emails or embedded in files. Multiple files should be delimited by a semicolon	Filename.doc; filename2.doc
Title	The Title property of a file.	Title
Author	The Author property of a file	John Doe
MessageID	The email message ID	
FILENAME	The original name of the file excluding the path	C:\My Documents\letter.doc
DocType	Email, letter, memo, invoice, etc., if available	
Extension	The file extension	.doc

FileType	The actual file type of the document (Word, Excel, etc.) regardless of the file extension	
HashValue	MD5 Hash value of original file	
FilePath	The directory structure of the original file.	C:\My Documents\ letter.doc
PathToNative	The relative path to a produced native document	C:\VOL001\BATES000000001.xls
PathToText	The relative path to the accompanying text file	C:\VOL001\BATES000000001.txt
Volume	The production number or reference from the production	
Other Custodian	To the extent global deduplication is used, the field indicates the other custodians who also were in possession of the document at the time of collection	

I. **Definitions**

A. "Court" means the United States Bankruptcy Court for the Northern District of Texas.

B. "NAV" means (A) with respect to an entity that is not a CLO, the value of such entity's assets less the value of its liabilities calculated as of the month end prior to any Transaction; and (B) with respect to a CLO, the CLO's gross assets less expenses calculated as of the quarter end prior to any Transaction.

C. "Non-Discretionary Account" means an account that is managed by the Debtor pursuant to the terms of an agreement providing, among other things, that the ultimate investment discretion does not rest with the Debtor but with the entity whose assets are being managed through the account.

D. "Related Entity" means collectively (A)(i) any non-publicly traded third party in which Mr. Dondero, Mr. Okada, or Mr. Grant Scott, or Mr. John Honis (with respect to Messrs. Okada, Scott and Honis, only to the extent known by the Debtor) has any direct or indirect economic or ownership interest, including as a beneficiary of a trust; (ii) any entity controlled directly or indirectly by Mr. Dondero, Mr. Okada, Mr. Grant Scott, or Mr. John Honis (with respect to Messrs. Okada, Scott and Honis, only to the extent known by the Debtor); (iii) MGM Holdings, Inc.; (iv) any publicly traded company with respect to which the Debtor or any Related Entity has filed a Form 13D or Form 13G; (v) any relative (as defined in Section 101 of the Bankruptcy Code) of Mr. Dondero or Mr. Okada each solely to the extent reasonably knowable by the Debtor; (vi) the Hunter Mountain Investment Trust and Dugaboy Investment Trust; (vii) any entity or person that is an insider of the Debtor under Section 101(31) the Bankruptcy Code, including any "non-statutory" insider; and (viii) to the extent not included in (A)(i)-(vii), any entity included in the listing of related entities in **Schedule B** hereto (the "Related Entities Listing"); and (B) the following Transactions, (x) any intercompany Transactions with certain affiliates referred to in paragraphs 16.a through 16.e of the Debtor's cash management motion [Del. Docket No. 7]; and (y) any Transactions with Charitable DAF Fund, L.P. (provided, however, that additional parties may be added to this subclause (y) with the mutual consent of the Debtor and the Committee, such consent not to be unreasonably withheld).

E. "Stage 1" means the time period from the date of execution of a term sheet incorporating the protocols contained below the ("Term Sheet") by all applicable parties until approval of the Term Sheet by the Court.

F. "Stage 2" means the date from the appointment of a Board of Independent Directors at Strand Advisors, Inc. until 45 days after such appointment, such appointment being effective upon Court approval.

G. "Stage 3" means any date after Stage 2 while there is a Board of Independent Directors at Strand Advisors, Inc.

H. "Transaction" means (i) any purchase, sale, or exchange of assets, (ii) any lending or borrowing of money, including the direct payment of any obligations of another entity, (iii) the satisfaction of any capital call or other contractual

Exhibit D

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requirement to pay money, including the satisfaction of any redemption requests, (iv) funding of affiliates and (v) the creation of any lien or encumbrance.

I. "Ordinary Course Transaction" means any transaction with any third party which is not a Related Entity and that would otherwise constitute an "ordinary course transaction" under section 363(c) of the Bankruptcy Code.

J. "Notice" means notification or communication in a written format and shall include supporting documents necessary to evaluate the propriety of the proposed transaction.

II. Transactions involving the (i) assets held directly on the Debtor's balance sheet or the balance sheet of the Debtor's wholly-owned subsidiaries, including Jefferies Prime Account, and (ii) the Highland Select Equity Fund, L.P., Highland Multi Strategy Credit Fund, L.P., and Highland Restoration Capital Partners

A. **Covered Entities**: N/A (See entities above).

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

a) Stage 1 and Stage 2: ordinary course determined by the CRO.

b) Stage 3: ordinary course determined by the Debtor.

2. Related Entity Transactions

a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) Stage 3:

(1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

(2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages)

a) Except as set forth in (b) and (c) below, Transactions in excess of $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require three business days advance notice to Committee and if the Committee objects, the burden is on the

Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. Redemption requests payable to Related Entities will be held in escrow and will not prevent the winding up or liquidation of any fund or entity.

c) The Debtor may satisfy margin calls and short covers without providing the Committee advance notice if the exigencies do not allow advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category.

III. Transactions involving entities the Debtor manages and in which the Debtor holds a direct or indirect interest (other than the entities discussed in Section I above)

A. **Covered Entities**: See **Schedule A** hereto. **Schedule A** includes or will include all entities the Debtor manages and in which the Debtor holds a direct or indirect interest (other than the entities discussed in Section I above).[1]

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

a) Stage 1 and Stage 2: ordinary course determined by the CRO.

b) Stage 3: ordinary course determined by the Debtor.

2. Related Entity Transactions

a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) Stage 3:

(1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

[1] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

(2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages)

a) Except as set forth in (b) and (c) below, Transactions in excess of $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require three business days advance notice to Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. The Debtor will provide the Committee with five business days advance notice of any redemption requests made by and payable to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

c) The Debtor may satisfy margin calls and short covers without providing the Committee advance notice if the exigencies do not allow advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category.

IV. Transactions involving entities that the Debtor manages but in which the Debtor does <u>not hold a direct or indirect interest</u>

A. **Covered Entities**: See **<u>Schedule A</u>** hereto. **<u>Schedule A</u>** includes or will include all entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest.[2]

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

a) <u>Stage 1 and Stage 2</u>: ordinary course determined by the CRO.

b) <u>Stage 3</u>: ordinary course determined by the Debtor.

2. Related Entity Transactions

[2] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) Stage 3:

(1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

(2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages):

a) Except as set forth in (b) and (c) below, any Transaction that decreases the NAV of an entity managed by the Debtor in excess of the greater of (i) 10% of NAV or (ii) $3,000,000 requires five business days advance notice to Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. The Debtor will provide the Committee with five business days advance notice of any redemption requests made by and payable to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

c) The Debtor may take such steps as may be reasonably necessary to winddown any managed entity and make distributions as may be required in connection with such winddown to any required parties. The Debtor will provide the Committee with five business days advance notice of any distributions to be made to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category.

V. Transactions involving entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest.[3]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

VI. Transactions involving entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest.[4]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

VII. Transactions involving Non-Discretionary Accounts

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all non-discretionary accounts.[5]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

[3] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

[4] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

[5] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

VIII. Additional Reporting Requirements – All Stages (to the extent applicable)

A. DSI will provide detailed lists and descriptions of internal financial and operational controls being applied on a daily basis for a full understanding by the Committee and its professional advisors three (3) business days in advance of the hearing on the approval of the Term Sheet and details of proposed amendments to said financial and operational controls no later than seven (7) days prior to their implementation.

B. The Debtor will continue to provide weekly budget to actuals reports referencing their 13-week cash flow budget, such reports to be inclusive of all Transactions with Related Entities.

IX. **Shared Services**

A. The Debtor shall not modify any shared services agreement without approval of the CRO and Independent Directors and seven business days' advance notice to counsel for the Committee.

B. The Debtor may otherwise continue satisfying its obligations under the shared services agreements.

X. Representations and Warranties

A. The Debtor represents that the Related Entities Listing included as **Schedule B** attached hereto lists all known persons and entities other than natural persons included in the definitions of Related Entities covered by Section I.D parts A(i)-(vii) above at the time of the execution of the Term Sheet.

B. The Debtor represents that the list included as **Schedule C** attached hereto lists all known natural persons included in the definitions of Related Entities covered by Section I.D parts A(i)-(vii) above at the time of the execution of the Term Sheet.

C. The Debtor represents that, if at any time the Debtor becomes aware of any person or entity, including natural persons, meeting the definition of Related Entities covered by Section I.D parts A(1)-(vii) above that is not included in the Related Entities Listing or Schedule C, the Debtor shall update the Related Entities Listing or Schedule C, as appropriate, to include such entity or person and shall give notice to the Committee thereof.

Schedule A[6]

Entities the Debtor manages and in which the Debtor holds a direct or indirect interest

1. Highland CLO Funding, Ltd. (0.63% Ownership Interest)
2. Dynamic Income Fund (0.26% Ownership Interest)

Entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest

1. Highland Prometheus Master Fund L.P.
2. NexAnnuity Life Insurance Company
3. PensionDanmark
4. Highland Argentina Regional Opportunity Fund
5. Longhorn A
6. Longhorn B
7. Collateralized Loan Obligations
   a) Rockwall II CDO Ltd.
   b) Grayson CLO Ltd.
   c) Eastland CLO Ltd.
   d) Westchester CLO, Ltd.
   e) Brentwood CLO Ltd.
   f) Greenbriar CLO Ltd.
   g) Highland Park CDO Ltd.
   h) Liberty CLO Ltd.
   i) Gleneagles CLO Ltd.
   j) Stratford CLO Ltd.
   k) Jasper CLO Ltd.
   l) Rockwall DCO Ltd.
   m) Red River CLO Ltd.
   n) Hi V CLO Ltd.
   o) Valhalla CLO Ltd.
   p) Aberdeen CLO Ltd.
   q) South Fork CLO Ltd.
   r) Legacy CLO Ltd.
   s) Pam Capital
   t) Pamco Cayman

Entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest

1. Highland Opportunistic Credit Fund
2. Highland Healthcare Opportunities Fund f/k/a Highland Long/Short Healthcare Fund
3. NexPoint Real Estate Strategies Fund
4. Highland Merger Arbitrage Fund
5. NexPoint Strategic Opportunities Fund
6. Highland Small Cap Equity Fund
7. Highland Global Allocation Fund

[6] NTD: Schedule A is work in process and may be supplemented or amended.

8. Highland Socially Responsible Equity Fund
9. Highland Income Fund
10. Stonebridge-Highland Healthcare Private Equity Fund ("Korean Fund")
11. SE Multifamily, LLC

Entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest

1. The Dugaboy Investment Trust
2. NexPoint Capital LLC
3. NexPoint Capital, Inc.
4. Highland IBoxx Senior Loan ETF
5. Highland Long/Short Equity Fund
6. Highland Energy MLP Fund
7. Highland Fixed Income Fund
8. Highland Total Return Fund
9. NexPoint Advisors, L.P.
10. Highland Capital Management Services, Inc.
11. Highland Capital Management Fund Advisors L.P.
12. ACIS CLO Management LLC
13. Governance RE Ltd
14. PCMG Trading Partners XXIII LP
15. NexPoint Real Estate Partners, LLC f/k/a HCRE Partners LLC
16. NexPoint Real Estate Advisors II LP
17. NexPoint Healthcare Opportunities Fund
18. NexPoint Securities
19. Highland Diversified Credit Fund
20. BB Votorantim Highland Infrastructure LLC
21. ACIS CLO 2017 Ltd.

Transactions involving Non-Discretionary Accounts

1. NexBank SSB Account
2. Charitable DAF Fund LP

PSZJ Draft 12/27/19

Schedule B

Related Entities Listing (other than natural persons)

PSZJ Draft 12/27/19

Schedule C

1. James Dondero
2. Mark Okada
3. Grant Scott
4. John Honis
5. Nancy Dondero
6. Pamela Okada
7. Thomas Surgent
8. Scott Ellington
9. Frank Waterhouse
10. Lee (Trey) Parker

November 2019

James P. Seery, Jr.

New York, NY



James P. Seery, Jr. is a high yield and distressed investing professional who was most recently a Senior Managing Director and co-Head of Credit at Guggenheim Securities LLC, where he is responsible for helping direct the development of a leveraged finance and credit distribution business. Prior to joining Guggenheim, Mr. Seery was the President and a senior investing partner of River Birch Capital, LLC, a $1.3bn global credit fund manager. In that role, he developed and led many of the firm's most profitable credit investments. Mr. Seery is a licensed attorney and was formerly a partner and co-Head of the Sidley Austin LLP New York Corporate Reorganization and Bankruptcy Group, and he also recently served as a Commissioner on The American Bankruptcy Institute's Commission to Study the Reform of Chapter 11.

Before his joining Sidley Austin, Mr. Seery was a Managing Director and the Global Head of Lehman Brothers' Fixed Income Loan business. In that position, he was responsible for managing the Lehman Brothers' Fixed Income investment grade and high yield loan businesses, including underwriting commitments, distribution, hedging, trading and sales (including CLO manager relationships), portfolio management, and restructuring. Mr. Seery was also a member of the Lehman Brothers' Fixed Income Operating Committee and Global Credit Products Operating Committee as well as the High Yield Commitment and New Business Committees. From 2000 to 2004, Mr. Seery ran Lehman Brothers' restructuring and workout businesses with responsibility for management of distressed corporate debt investments, and in 2008 he was a key member of the small team that successfully sold Lehman to Barclays.

Mr. Seery was selected as one of the Top Restructuring Lawyers in the U.S. Under 40 by *Turnarounds and Workouts* in 1999. Mr. Seery graduated in 1990 from New York Law School, *magna cum laude*, where he was an editor of the Law Review and Colgate University in 1984. He was a member of the Board of Directors of the Loan Syndications and Trading Association from 2006 to 2008 and a member of the INSOL International Lenders Group from 2016-2017.

JAMES P. SEERY, JR.
795 Columbus Ave., 12A
New York, New York 10025
631-804-2049 · jpseeryjr@gmail.com

Experience

Guggenheim Securities LLC, New York, New York Aug. 2017-Nov. 2019
Senior Managing Director, Co-Head Credit

- Responsible for developing leveraged finance and credit portfolio advisory businesses
- Management of teams of leveraged finance bankers and trading and sales professionals

River Birch Capital, LLC, New York, New York April 2012-July 2017
President, River Birch Capital, LLC

- President and senior investing partner at New York based $1.3bn global long-short credit fund focused on corporate credit from investment grade to distressed
- Responsible for originating, executing and managing stressed and distressed credit investments with a team of 6 investing partners and 5 analysts and traders
- Led finance and operations team with CFO/CCO; firm grew from approx. $200mm in 2012 to $1.3bn in 2017

Sidley Austin LLP, New York, New York May 2009-April 2012
Co-head New York Corporate and Reorganization Group

- Built and managed a creditor focused restructuring group as part of an international company side practice in a nearly 2000 attorney firm
- Represented banks, corporations, hedge funds, and structured investment vehicles in a variety of restructuring, financing and litigation matters

Lehman Brothers, New York, New York April 1999-May 2009
Global Head Fixed Income Loans

- Managing Director responsible for managing the global fixed income loan business, including investment grade and high yield commitments, global distribution, hedging, trading and sales, CLO origination, portfolio management, and restructuring; managed underwritten loan commitments and teams of credit sales and trading professionals as well as structuring, portfolio management and work-out specialists
- Member Fixed Income Operating Committee, Global Credit Products Operating Committee, and High Yield Commitment and New Business Committees
- Responsible for originating, structuring and managing proprietary distressed debt investments, rescue financings, and restructurings 1999-2004
- Key member of team that negotiated and completed the sale of Lehman Brothers to Barclays Sept. 2008; remained at Barclays through April 2009

Phillips Nizer, Garden City, New York May 1995-April 1999

- Senior Associate in corporate reorganization group of boutique New York City law firm

Cadwalader, Wickersham & Taft, New York, New York May 1989-May 1995

- Associate in corporate reorganization group of New York City based international law firm

Education

New York Law School, New York, New York, J.D., *magna cum laude*, Editor Law Review 1990
Colgate University, Hamilton, New York, B.A. History 1984

Experience

Director, River Birch International, Ltd. Board	2015-2017
Director, Camphill Foundation Board	2017-2019
Member, INSOL International Lenders Group Board	2016-2017
Commissioner, ABI Commission to Study Reform of Ch. 11	2012-2015
Director, Loan Syndications and Trading Association	2006-2008

Selected River Birch Sample Investments

Cash America International *5.75% Senior Unsecured Notes due 2018 and Litigation Claim – Developed and led execution of successful note purchase and make-whole litigation strategy based on company's improper spin of payday lending business; U.S. District Court published decision in note holders' favor led to settlement*

Chesapeake Energy Corp *6.775% Senior Notes due 2019 Litigation Claims – Developed and led execution of successful note purchase and make-whole litigation strategy based on company's improper call of notes; ultimately prevailed in $450mm judgment discussed in published Second Circuit and U.S. District Court decisions*

Caesars Entertainment Resort Properties *8% 1st Lien Notes due 2020; 11% 2d Lien Notes due 2021 – Developed and led (with senior investment analyst partner) execution of successful bankruptcy investment strategy focused on lower beta part of the capital structure of bankrupt casino operator; investment designed for high return with significant downside protection*

Intelsat Jackson Holdings *9.5% Senior Secured Notes due 2022 – Developed and led (with senior investment analyst partner) execution of successful new issue stressed secured note investment strategy; responsible for structuring and tightening covenant package and increasing size of offering after determining that potential litigation threat was low risk; responsible for recommending ICF 12.5% note investment in the low 80s in February 2018*

Motors Liquidation Company *GUC Trust Publicly Traded Units – Developed and led successful investment strategy in publicly traded bankruptcy liquidation units (GM); took the opposite side of sell-side analyst recommendations and engineered a successful settlement in high return/low downside position*

Hypo Alpe Adria Bank (Hetar) *Senior Guaranteed Notes – Developed and led (with senior investment analyst partner) execution of successful investment strategy in insolvent Austrian bank with notes guaranteed by an Austrian State*

Presidio Inc. *10.25% Senior Notes due 2023 – Developed and led execution of successful investment strategy to purchase newly developed mezzanine part of the capital structure on struggling new issue deal; ultimately sponsor purchased the mezzanine but aggressive structuring and bidding for the mezzanine tranche led to outsized allocation of new notes*

Nortel Networks Ltd. *6.875% Senior Notes due 2023 – Developed and led (with senior investment analyst partner) execution of bankruptcy liquidation strategy based on litigation and ultimate leverage of Canadian liquidating estate*

Selected Speaking Engagements

American Law Institute/ NYU Law – Credit Markets and Corporate Reorganization, New York City, April 2017
Moderator, *Auctions and Asset Sales In and Out of Bankruptcy*

University of Texas Law/American Bankruptcy Institute -- Emerging Valuation Issues in Bankruptcy, Las Vegas, March 2017
Panelist, *Determining Valuation and the Fulcrum Security*
Panelist, *Distressed Investments Strategies*

NYU Law – Claim Priority Roundtable, New York City, September 2016
Panelist, *Allocating Value in and Out of Bankruptcy*

University of Texas Law/ABI – Emerging Valuation Issues in Bankruptcy, Las Vegas, March 2016
Panelist, *ABI Commission Report Proposed Amendments and Their Impact on Valuation*

The M&A Advisor – Distressed Investing Summit, Palm Beach, January 2016
Panelist, *Using Options to Bridge Value Gaps*

NYU Law – Seligman Bankruptcy and Business Reorganization Workshop, New York City, September 2015
Panelist, *Valuation Approaches and Methodologies*

Skadden Arps/Colgate University – Law and Finance Summit, New York City, November 2014
Presenter, *Recent Developments in Bankruptcy and Distressed Debt*

Dubel & Associates, L.L.C.

John S. Dubel
Board of Directors Experience

- **Purdue Pharma Inc. – July 2019 to Present -** Independent Board Member and Chair of the Special Committee of Directors

  In addition to being a member of the Board of Directors of Purdue Pharma Inc., I am the Chair of the Special Committee of Independent Directors charged with overseeing the investigation of relationships between Purdue and Purdue owners, the Sackler family.

- **WMC Mortgage, LLC – Indirect Subsidiary GE – July 2018 to December 2019 -** Independent Board Member and Chair of the Special Independent Committee of Directors

  WMC's chapter 11 plan was recently confirmed and WMC will emerge from Chapter 11 in early December 2019. I am the Chair of the Special Independent Committee of Independent Directors for this indirect subsidiary of GE. The Special Committee was tasked with reviewing the relationship between the insolvent WMC and GE and resolving its insolvency issues through a court supervised chapter 11 proceeding. I was the lead person responsible for negotiations with the parent concerning the level of support that the parent was required to provide and worked with our creditors to negotiate a resolution amongst all parties.

- **Werner Co.** – January 2013 to Present – Sole Independent Director

  Werner is a global leader in access equipment, secure storage, light duty construction and fall protection products with operations across all geographies. A consortium of private equity investors bought the assets out of a bankruptcy proceeding in 2007. I was asked to serve on the Board as the sole Independent Director by the largest shareholder. Werner more than doubled the size of its business, diversified its product offering and substantially improved its EBITDA prior to its sale in July 2017. As an independent director, working with one other director, we lead the effort in the sale process that achieved an additional $180 million increase in the sale price of the company for its distressed investors. I am currently the lead director responsible for the resolution of post-sale purchase price adjustments.

- **Old PSG f/k/a Performance Sports Group** – August 2017 to December 2017

  Asked to serve on the Board, by the Official Equity Committee, after the sale of Performance Sports Group's assets. My role was to oversee the plan of reorganization process to drive to a smooth confirmation.

Dubel & Associates, L.L.C.

- **FXI Holdings** – September 2010 to October 2017 – Independent Director

  FXI is a leading producer of engineered polyurethane foam solutions serving the largest customers in the largest markets. It has the broadest customer and consumer reach of any North American foam producer. FXI's assets where purchased during a bankruptcy proceeding in 2009. I was asked to serve on the board of directors by one of the two private equity firms that owned FXI. Shortly after joining the Board, I was asked to Chair a Special Committee of the Board to manage certain litigation and government investigations related to alleged anti-trust infractions. FXI was the subject of over 50 different class action and individual litigations alleging damages in excess of $3 billion. Over a period of several years, FXI was able to settle all of its litigation for a minor fraction of the alleged damages and all investigations by the government were dropped. During this time, the company's performance improved in a consistent manner with EBITDA more than doubling. Once these litigations were settled, the company was marketed and ultimately sold in October 2017.

- **ResCap Liquidating Trust** – December 2013 to March 2017 – Chairman of the Board - December 2013 to late 2015

  After the ResCap chapter 11 plan was confirmed, I served on the Board of the ResCap Liquidating Trust, as FGIC's representative, to guide the wind down of the remaining assets and prosecute claims in excess of $4 billion against institutions that caused harm to ResCap. During this time, I also served as Liquidating Trustee while we brought on board a new in-house lawyer to prosecute these claims and transitioned this individual into the permanent Liquidating Trustee role.

- **FGIC Corporation and FGIC** - December 2008 to April 2014 – Chairman of the Board during various parts of that time frame – while serving as CEO

- **Barneys New York** – February 2012 to May 2012 – Sole Independent Director

  After Barneys' 2007 sale to Istithmar World, the Government of Dubai's private investment fund, Barneys was impacted by the recession in the late 2000's. I was brought in to serve as the sole independent director during the out of court restructuring process which resulted in a consensual change of control for Barneys to its distressed investor creditors.

- **The Leslie Fay Companies** – April 1993 to May 1996 – while serving as the EVP of Restructuring and CFO

- Mr. Dubel has also served as a member and chairperson of various ad hoc and official creditor committees.

Dubel & Associates, L.L.C.

John S. Dubel
Key Management Experience

- **Noble Environmental Power –** Restructuring Advisor to the Company - 2018

  Noble was the owner of two utility scale wind power plants in upstate New York which were in default on their debt instruments. Working closely with Noble's investment bankers we were able to complete a sale of these plants while keeping the companies out of chapter 11 and returning net sale proceeds to its shareholders.

- **SunEdison, Inc.** – Chief Executive Officer and Chief Restructuring Officer – 2016-2017

  SunEdison was the largest global renewable energy development company prior to its filing for chapter 11 in April 2016. SunEdison had over $10 billion of liabilities and 4,500 employees spread across operations in over 50 countries on 6 continents. A decline in energy prices along with loss of faith in management by investors and numerous litigations filed against the company caused the closing of the capital markets for SunEdison which led to its filing for chapter 11. I was brought in as a requirement of the DIP agreement. SunEdison's assets were sold in a manner to preserve the greatest value for its creditors. I am currently assisting the wind down SunEdison entity as requested.

- **Financial Guaranty Insurance Company** – Chairman and Chief Executive Officer – 2008-2014

  FGIC was the third largest monoline bond insurer, insuring in excess of $300 billion of public finance instruments, RMBS securitizations and CDS contracts with over $4 billion of capital. After the collapse of the residential mortgage market in the 2007/08 timeframe, FGIC lost its AAA ratings and experienced tremendous losses on its insurance contracts. This led to an insolvency proceeding under NY State insurance law with an innovative resolution through a pre-arranged rehabilitation plan. This enabled it to continue to pay its policy holders in a timely manner.

- **Residential Capital** – Co-Chairman of the Official Creditors Committee – 2012-2013

  ResCap, a wholly owned subsidiary of Ally Financial, was one of the largest mortgage originators in the US. FGIC was its 2nd largest creditor and after its chapter 11 filing in May of 2012, I was appointed as the Co-Chair of ResCap's Official Unsecured Creditors Committee. As the lead negotiator for the UCC, the UCC was able to negotiate an increase in the contribution to the plan of reorganization by the parent, Ally, from approximately $650 million to $2.1 billion. This contribution settled all of the litigation between Ally and Rescap and enabled ResCap to emerge from chapter 11.

- **Anchor Glass Container Corporation** – Chief Restructuring Officer – 2005-2006

  Anchor Glass was the 3rd largest manufacturer of glass containers in the US, with Anheuser Busch and Snapple as its largest customers, where it provided "just in time" deliveries to enable its customers plants to operate 24/7. Its third trip through chapter 11 resulted from poor contract pricing and high legacy costs. I worked closely with the CEO to renegotiate these contracts and reduce the cost structure which enabled it to emerge from chapter 11 as a viable business which continues to operate today.

- **RCN Corporation** – President and Chief Operating Officer - 2004

  RCN was a Bundled 3-product cable provider offering integrated voice, video and data products in the US Northeast, Midwest and West Coast markets with over $1.7 billion of debt incurred during its build out period. Working with the Lead Director, a pre-arranged chapter 11 plan was negotiated with all of its creditor constituencies to enable it to emerge as a profitable business in its markets where it continues to operate today.

- **Cable & Wireless America** – Chief Executive Officer – 2003-2004

  C&W America was a premier hosting business with 14% share of the US market and world class a Tier 1 IP Network. When its British parent company experienced financial difficulties, they attempted to abandon C&W America which caused stress for its major customers, including Yahoo, Google and others. A plan was put in place, though a chapter 11 process, to dramatically reduce its daily cash burn and sell the entity while maintaining its customer base.

- **Acterna Corporation** – Chief Restructuring Officer - 2003

  Acterna was a multi-national manufacturer of telecommunications and cable equipment with revenues of approximately $1.7 billion and debt of $1 billion prior to the industry down turn. I worked closely with the CEO to stabilize the operations and avoid a fire sale of the business. A quick turn through chapter 11 enabled it to emerge as a viable business, where upon the CEO was able to regrow the business and position it for a successful sale to an industry player 18 months later.

- **WorldCom, Inc.** – Chief Financial Officer – 2002, Advisor – 2003

  WorldCom was one of the largest telecommunication companies with assets of over $107 billion and operations across the globe. It filed for chapter 11 during 2002 due to a massive fraud which covered up the significant operational deficiencies and losses it was experiencing. I was brought in as a condition of the DIP agreement and worked closely with the CEO and other members of the senior management to stabilize the company, restructure the operations to reduce opex, provide stability to the international operations and assist with the plan of reorganization negotiations and confirmation.

- **CellNet Data Systems, Inc.** – Chief Restructuring Officer – 1999-2001

  CellNet was a startup technology company that provided smart grid and smart metering and billing solutions for the utility industry. After burning through in excess of $600 million of initial funding it was not able to access the capital markets to continue to build out its platform and realize the cost synergies across contracts that would make it profitable. Working closely with the new CEO, we reduced the cost structure and sold the company to one of its meter suppliers enabling it to continue to operate in a successful manner.

- **Barneys New York** – Chief Financial Officer – 1996-1999

  Barneys was, at this time, a family owned high end retail store chain operating with over 30 stores and international affiliations in Asia. After an uncontrolled growth plan and management that did not understand its cost structure, it filed for chapter 11. I was brought in a the request of the DIP lender to oversee the family's management, to control its costs, close unprofitable locations, renegotiate store leases and work out a consensual chapter 11 plan that included its largest creditors providing financing through a rights offering to enable Barneys to successfully emerge from chapter 11 as a profitable retailer.

- **The Leslie Fay Companies** – EVP Restructuring and Chief Financial Officer – 1993-1995

  Leslie Fay was one of the larger designer and manufacturer of ladies dresses, sportwear and suits in the US. A public company, it was the victim of fraud by its financial management team to hide the true cost of operations and manufacturing of its products. This led to a chapter 11 filing. I worked closely with the CEO and President to stabilize its financial management team, reduce costs and position it for an emergence from chapter 11.

- **Robert Maxwell Group** – Head of US Private Companies – 1991-1993

  Robert Maxwell was a British entrepreneur who invested heavily in the publishing space. After financial improprieties were uncovered and his subsequent suicide, I was appointed by the UK Administrators to run all of his US operations, which included over 40 private companies. I worked closely with the UK administers to realize value through sales of these US operations and turn those proceeds over to the UK Administrators.

Dubel & Associates, L.L.C.

Mr. Dubel is a past board member and officer of the Association of Insolvency and Reorganization Advisors, a Certified Insolvency and Reorganization Advisor and is a member of the Turnaround Management Association and the American Bankruptcy Institute. Mr. Dubel received a Bachelor in Business Administration degree from the College of William and Mary.

Dubel & Associates, LLC

Selected Case Studies

SunEdison, Inc.

John Dubel – Chief Executive Officer and Chief Restructuring Officer

Situation

- SunEdison (SUNE) was the largest global renewable energy development company prior to its filing for chapter 11 in April 2016. SUNE had over $10 billion of liabilities and 4,500 employees spread across operations in over 50 countries on 6 continents
- Continued downward pressure on energy prices caused renewable energy projects to experience stress. Lack of proper integration of acquisitions and overpayment on other acquisitions caused a liquidity crisis. Public spin-offs of profitable yieldco assets cut off cash flow that was needed to run the operations.
- Senior management control of the Yieldcos enabled borrowings from the Yieldcos which could not be repaid

Actions Taken

- Hired initially as CRO with a clear mandate to take on CEO responsibilities
- An immediate assessment of the opportunity to maintain a going concern was initiated.
- Programs were put in place to plug the employee exodus that SUNE was experiencing
- In consultation with our lenders made the determination that an orderly sale of assets was the best path to optimum value realization
- Maintained an open line of communication with the DIP, 1L and 2 L lenders to build back trust in the company
- Engaged with the Board of the Yieldcos, TERP and GLBL, to work towards a resolution of the disputes between the Yieldcos and SUNE

Results

- Took on CEO role after a short transition with the former CEO
- Reorganization of key personnel functions including the hiring of a new CFO and Controller provided stability in the Finance functions for the company to operate within the limits of the DIP agreement.
- Executed a global marketing process which resulted in over 60 asset sales with approximately $1.5 billion of gross proceeds
- Executed a plan which resulted in the transition of administrative and operational functions from SUNE to the Yieldcos which helped stabilize the value of our ownership stake in these entities

SunEdison, Inc. (continued)

John Dubel – Chief Executive Officer and Chief Restructuring Officer

Situation

- Class and individual litigation against SUNE and the Yieldcos related to these control issues ensued.
- Shortly after a Feb 2016 2L financing the company has exhausted those funds and was out of available funds to operate the business.
- Additional litigation commenced related to cancelled acquisitions.
- During this timeframe, the creditors lost faith in the CEO and CFO.
- SUNE filed for chapter 11 in late April 2016 funded by a DIP provided by the 1L and 2L creditors.

Actions Taken

- Engaged with the Board and management of the Yieldcos, TERP and GLBL, to start to work towards a resolution of the disputes between the Yieldcos and SUNE
- Put in place a path to seek resolution of all of the Class Action and individual shareholder litigations by seeking a mediation in the District Court and Bankruptcy Court litigation related to both SUNE and the Yieldcos
- Commenced negotiations to settle the various litigations amongst SUNE's creditor groups and between SUNE and its Yieldcos
- Worked closely with Chief Judge Morris, the mediator appointed in the case, to craft a resolution to all intercreditor disputes

Results

- Drove a plan, through a directed litigation strategy, to force a resolution of the over $3 billion of claims brought against SUNE by the Yieldcos which resulted in a cooperative sale of the Yieldcos netting SUNE approximately $825 million
- A replacement DIP agreement was put in place to eliminate certain concerned creditors and align the interests of the DIP lenders and the prepetition secured creditors.
- Settlements of the vast majority of class and individual shareholders were negotiated
- A mediated resolution amongst SUNE's creditor resulted in a successful chapter plan of reorg funded by a rights offering led by SUNE's 2L creditors

Financial Guaranty Insurance Company

John Dubel – Chief Executive Officer and member of the Board of Directors

Situation

- FGIC was the third largest monoline bond insurer, insuring in excess of $300 billion of public finance instruments, RMBS securitizations and CDS contracts
- At the start of 2008, FGIC was at risk of losing its AAA ratings
- The residential real estate meltdown caused FGIC to face billions of dollars of claims from CDS and RMBS contracts it had insured
- In addition, several of FGIC's largest public finance deals were on the cusp of defaulting
- In late 2009, FGIC's statuatory capital went negative and was subject to immediate takeover by the NYS Department of Financial Services

Actions Taken

- Raised capital surplus by $830 million through reinsurance agreements and preferred stock
- Negotiated settlements of CDS contracts
- Managed the workout of multiple public finance insurance contracts
- Managed affirmative litigation actions to recover from parties that harmed FGIC's insurance contracts
- Developed an innovative restructuring plan to allow FGIC to file a pre-arranged rehabilitation plan in NYS Court
- Positioned the company to be able to operate in the post rehabilitation environment to pay claims to policyholders in a timely manner

Results

- Planned and executed an orderly Rehabilitation Plan process which resulted in an innovative and precedent setting proceeding for FGIC's policyholders
- Managed down the overall exposure from $312 billion to under $30 billion
- Settled parent/subsidiary issues without litigation
- Recovered in excess of $1.25 billion for policyholders from parties that harmed FGIC's contracts
- All of these results were accomplished while maintaining an independent view towards protecting all policyholders interests

RCN Corporation – Integrated Triple Play Service Provider

John Dubel – President and Chief Operating Officer

Situation

- Bundled 3-product cable provider offering integrated voice, video and data products in the US Northeast, Midwest and West Coast markets
- Revenues of approximately $500 million
- Over 1 million connections
- $1.7 BN of debt in default
- Secured creditors pushing the Company to a forced liquidation
- Lack of confidence in management's business plan and ability to rationalize the business
- Company lacked adequate liquidity to maintain operations

Actions Taken

- Hired as President and CRO to lead RCN during this crisis.
- Implemented reorganization of operating costs achieving positive EBITDA and cash flow
- Actions included:
  - Rationalized customer base
  - Segmented Customer Service activity and automated where possible
  - Consolidated Network Operations to drive efficiency
  - Reduced IT functions
  - Reduced customer service call volume through web-based solutions
  - Simplified product offering
  - Generated Tech Operations savings

Results

- Streamlined operations and reduced breakeven costs achieving positive cash flow and EBITDA
- Reduced annualized SG&A costs by 20%
- Reduced headcount by 25%
- Improved Customer Service quality
- Company emerged with over $125 million of cash in hand
- Instituted rigorous cost reduction procedures within the company
- Positioned the company for future positive growth

Cable & Wireless America – Successfully Positioned the Company for a Sale

John Dubel – Chief Executive Officer

Situation

- Premier hosting business with 14% share of the US market by revenue and World Class Tier 1 IP Network
- Parent company's announcement of intention to exit the US market created uncertainty for customers, suppliers, and employees
- Daily cash burn estimated at $2M
- Need to stabilize standalone operations and facilitate a sale transaction

Actions Taken

- Negotiated terms of separation from parent company and obtained ongoing funding commitment
- Stabilized skittish customer base
- Took control of cash management and forecasting process
- Implemented cost cutting strategy to achieve cash flow breakeven within 9 months
- Managed extensive due diligence process by multiple bidders

Results

- Reduced daily cash burn to $0.7M
- Planned and executed orderly Chapter 11 filing with the support of a "stalking horse" bidder to facilitate a 363 sale
- Active auction process resulted in total bid consideration of $167.5M, a threefold increase over the stalking horse bid value

Acterna – Reduced Costs, Drove a Successful Turnaround

John Dubel – Chief Restructuring Officer

Situation

- Leading Telecom Network equipment supplier with worldwide operations that was facing a severe liquidity crisis
- Test equipment market was crippled by the drought of capital spending from Telecom Network companies
- Debt levels were not sustainable in then current market conditions

Actions Taken

- Assumed role of CRO to lead company through Chapter 11
- Restructured $1.0 BN of debt
- Preserved non-domestic assets across 30 countries necessary to a successful reorganization.
- Focused sales activity on core markets
- Worked with management to reduce SG&A costs
- Rationalized headcount through centralization of manufacturing activity
- Managed the subsidiary divestiture program
- Integrated worldwide cash control procedures improving liquidity

Results

- Acterna emerged from Chapter 11 with 80% less debt and a reduction of 85% of interest costs in less than 6 months
- Improved international cash liquidity sufficiently for non-US operations to become self funding
- Cash at emergence was over $60 million
- Reduced operating cash costs so the company was self funding and the DIP was never used to operate the company
- 18 months after C-11, Acterna announced a sale to JDS Uniphase, for a three fold increase in value.

WorldCom – Stabilized Operations and Finance Function

John Dubel – Chief Financial Officer

Situation

- A massive fraud which masked operational, financial and reporting issues crippled the company's credibility
- WorldCom suffered from excess debt with declining value of assets, financial fraud issues, contentious relationship with creditors, and a substantial cash burn
- Significant negative cash flow from international operations
- WorldCom filed for bankruptcy in July of 2002, becoming the largest bankruptcy filing in history at the time

Actions Taken

- Assumed role Chief Financial Officer until a permanent management team could be put in place then worked as financial advisor for pendency of Chapter 11 case
- Put turnaround teams, operational restructuring plans, and cash management plans in place
- Led the international restructuring efforts
- Assisted in negotiations with creditors
- Implemented an achievable 2003 business plan, facilitated several cost reduction initiatives, and managed the 13-week cash flow forecast
- Reduced capital spending

Results

- Achieved $2 BN of operational savings
- Increased cash flow by more than $100M in international operations and avoided bankruptcy in many jurisdictions
- Worked with all stakeholders to reach consensus on a plan of reorganization
- Successfully restructured the balance sheet

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.	§	Related to Docket Nos. 7 & 259

ORDER APPROVING SETTLEMENT WITH OFFICIAL COMMITTEE OF UNSECURED CREDITORS REGARDING GOVERNANCE OF THE DEBTOR AND PROCEDURES FOR OPERATIONS IN THE ORDINARY COURSE

Upon the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* (the "Motion"),[2] filed by the above-captioned debtor and debtor in possession (the "Debtor"); the Court having reviewed the Motion, and finding that (a) the Court has

[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 shall have the meanings ascribed to them in the Motion.

jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), and (c) notice of this Motion having been sufficient under the circumstances and no other or further notice is required; and having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and having determined that the relief sought in the Motion is in the best interests of the Debtor and its estate; and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on the terms and conditions set forth herein.

2. The Term Sheet is approved and the Debtor is authorized to take such steps as may be necessary to effectuate the settlement contained in the Term Sheet, including, but not limited to: (i) entering into the Governing Documents and compensating the Independent Directors for their services either directly or by reimbursing Strand for any costs incurred in connection with the appointment and compensation of the Debtor; (ii) implementing the Document Production Protocol; and (ii) implementing the Protocols.

3. Subject to the Protocols and the Term Sheet, the Debtor is authorized to continue operations in the ordinary course of its business.

4. Notwithstanding any stay under applicable Bankruptcy Rules, this Order shall be effective immediately upon entry.

5. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order, including matters related to the Committee's approval rights over the appointment and removal of the Independent Directors.

END OF ORDER

Exhibit D

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 9, 2020

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.	§	Related to Docket Nos. 7 & 259

ORDER APPROVING SETTLEMENT WITH OFFICIAL COMMITTEE OF UNSECURED CREDITORS REGARDING GOVERNANCE OF THE DEBTOR AND PROCEDURES FOR OPERATIONS IN THE ORDINARY COURSE

Upon the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* (the "Motion"),[2] filed by the above-captioned debtor and debtor in possession

[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 shall have the meanings ascribed to them in the Motion.

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(the "Debtor"); the Court having reviewed the Motion, and finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), and (c) notice of this Motion having been sufficient under the circumstances and no other or further notice is required; and having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and having determined that the relief sought in the Motion is in the best interests of the Debtor and its estate; and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on the terms and conditions set forth herein, and the United States Trustee's objection to the Motion is OVERRULED.

2. The Term Sheet is approved and the Debtor is authorized to take such steps as may be necessary to effectuate the settlement contained in the Term Sheet, including, but not limited to: (i) implementing the Document Production Protocol; and (ii) implementing the Protocols.

3. The Debtor is authorized (A) to compensate the Independent Directors for their services by paying each Independent Director a monthly retainer of (i) $60,000 for each of the first three months, (ii) $50,000 for each of the next three months, and (iii) $30,000 for each of the following six months, provided that the parties will re-visit the director compensation after the sixth month and (B) to reimburse each Independent Director for all reasonable travel or other expenses, including expenses of counsel, incurred by such Independent Director in connection with its service as an Independent Director in accordance with the Debtor's expense reimbursement policy as in effect from time to time.

4. The Debtor is authorized to guarantee Strand's obligations to indemnify each Independent Director pursuant to the terms of the Indemnification Agreements entered into by Strand with each Independent Director on the date hereof.

5. The Debtor is authorized to purchase an insurance policy to cover the Independent Directors.

6. All of the rights and obligations of the Debtor referred to in paragraphs 3 and 4 hereof shall be afforded administrative expense priority under 11 U.S.C. § 503(b).

7. Subject to the Protocols and the Term Sheet, the Debtor is authorized to continue operations in the ordinary course of its business.

8. Pursuant to the Term Sheet, Mr. James Dondero will remain as an employee of the Debtor, including maintaining his title as portfolio manager for all funds and investment vehicles for which he currently holds that title; provided, however, that Mr. Dondero's responsibilities in such capacities shall in all cases be as determined by the Independent Directors and Mr. Dondero shall receive no compensation for serving in such capacities. Mr. Dondero's role as an employee of the Debtor will be subject at all times to the supervision, direction and authority of the Independent Directors. In the event the Independent Directors determine for any reason that the Debtor shall no longer retain Mr. Dondero as an employee, Mr. Dondero shall resign immediately upon such determination.

9. Mr. Dondero shall not cause any Related Entity to terminate any agreements with the Debtor.

10. No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director's agents, or any Independent

Director's advisors relating in any way to the Independent Director's role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director's agents, or any Independent Director's advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

11. Nothing in the Protocols, the Term Sheet or this Order shall affect or impair Jefferies LLC's rights under its Prime Brokerage Customer Agreements with the Debtor and non-debtor Highland Select Equity Master Fund, L.P., or any of their affiliates, including, but not limited to, Jefferies LLC's rights of termination, liquidation and netting in accordance with the terms of the Prime Brokerage Customer Agreements or, to the extent applicable, under the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code. The Debtor shall not conduct any transactions or cause any transactions to be conducted in or relating to the Jefferies LLC accounts without the express consent and cooperation of Jefferies LLC or, in the event that Jefferies withholds consent, as otherwise ordered by the Court. For the avoidance of doubt, Jefferies LLC shall not be deemed to have waived any rights under the Prime Brokerage Customer Agreements or, to the extent applicable, the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code, and shall be entitled to take all actions authorized therein without further order of the Court

12. Notwithstanding any stay under applicable Bankruptcy Rules, this Order shall be effective immediately upon entry.

13. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order, including matters related to the Committee's approval rights over the appointment and removal of the Independent Directors.

END OF ORDER

Exhibit E

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*)
Maxim B. Litvak (Texas Bar No. 24002482)
Gregory V. Demo (NY Bar No. 5371992) (*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
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel and Proposed 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.	§	

OBJECTION OF THE DEBTOR TO UNITED STATES TRUSTEE'S MOTION FOR AN ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

The above-captioned debtor and debtor-in-possession (the "Debtor") files this objection (this "Objection") to the *United States Trustee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee* [Docket No. 271] (the "Trustee Motion"), filed by the United

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

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States Trustee for Region 6 (the "UST") on December 23, 2019. In support of this Objection, the Debtor respectfully represents as follows:

PRELIMINARY STATEMENT

1. The appointment of a chapter 11 trustee in this case would be a completely needless and wasteful exercise, and it would be wholly inconsistent with the interests of creditors, most of whom are represented by the Official Committee of Unsecured Creditors (the "Committee"). This Court has already approved (over the objection of the UST and no other economic stakeholder) the settlement between the Debtor and the Committee regarding governance issues and certain operating protocols. The Debtor's estate is now managed by a new independent board of directors (the "Independent Board") at Strand Advisors, Inc. ("Strand"), the Debtor's general partner. The Independent Board's fiduciary duty is foremost to the Debtor's estate, and the Independent Board may not be removed without Committee consent or approval of this Court. Pursuant to the settlement, the Debtor has also implemented certain protocols governing the operation of its business in the ordinary course.

2. The UST filed the Trustee Motion four days *before* the Debtor filed the Settlement Motion (as defined below), despite knowing that the Settlement Motion might be filed shortly thereafter. By not waiting to see the definitive terms of the settlement between the Debtor and the Committee, the Trustee Motion fails to take into account that James Dondero, the Debtor's co-founder and prior principal in control, has been irrevocably replaced and removed from any continuing management role with the Debtor (or its general partner, Strand). The Trustee Motion also fails to consider that the Independent Board has assumed control of the Debtor's management functions. In this regard, the Independent Board has the authority to hire a new Chief Executive

Officer (a "CEO"), if necessary, and to direct the actions of the Debtor's existing Chief Restructuring Officer (the "CRO"). Consistent with the governance requirements of applicable Delaware corporate and partnership law, the Independent Board is now in charge of Strand and thereby manages the Debtor for all purposes. The UST has argued that the Independent Board has duties to the shareholders of Strand. In fact, Mr. Dondero, the sole shareholder of Strand, has agreed not to take any action or exercise the voting power of his shares in Strand in any way that is inconsistent with the Committee settlement or any order of this Court approving the Committee settlement. Mr. Dondero has also relinquished any right to remove the Independent Directors except with Committee consent or Court approval. As such, the Independent Board's focus is on maximizing the value of the Debtor's estate.

3. The UST bases the Trustee Motion on prepetition misconduct that is no longer relevant now that the Debtor is governed by the Independent Board, which has the full support of the Committee. The UST cites to no precedent, and the Debtor is aware of none, that would support the extraordinary remedy of the appointment of a chapter 11 trustee under the circumstances here.[2] In fact, no outcome could be possibly worse from the perspective of this estate and the interests of stakeholders than appointing a single as yet unknown person to manage the Debtor's complex business and replace the highly qualified Independent Board that was just appointed with the Committee's support and this Court's approval.

[2] The UST notably never states what the UST expects a chapter 11 trustee to actually do in this case. The reasons for that are apparent. Either the UST is seeking to appoint a chapter 11 trustee who will serve the exact same function as the Independent Board or the UST is seeking to unseat the Independent Board and unwind this Court's order approving the Settlement Motion [Docket No. 339]. As such, the UST is either duplicating efforts and substantially increasing the costs and burdens to the estate or is impermissibly launching a collateral attack on this Court's order approving the Settlement Motion. Either result is impermissible.

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4. For these reasons and those set forth below, the Debtor strongly urges the Court to deny the Trustee Motion.

BACKGROUND

5. 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 Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court").

6. To assist and coordinate the restructuring process, the Debtor retained Bradley D. Sharp to serve as the CRO on October 7, 2019. On October 29, 2019, the Debtor filed the *Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, Additional Personnel, and Financial Advisory and Restructuring Related Services, Nunc Pro Tunc as of the Petition Date* [Docket No. 74] (the "CRO Motion"), seeking to formally retain the CRO. On December 27, 2019, the Debtor amended the CRO Motion consistent with the terms of the Settlement Motion [Docket No. 282]. The Court approved the CRO Motion, as amended, at the hearing on January 9, 2020 [Docket No. 342].

7. On October 29, 2019, the Committee was appointed by the United States Trustee in the Delaware Court.

8. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's bankruptcy case to this Court [Docket No. 186].[3] The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-

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

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.

9. On December 23, 2019, the UST filed the Trustee Motion, despite the Debtor having informed the Court and the UST that the Settlement Motion would be filed no later than December 27, 2019, assuming that a settlement had been reached with the Committee.

10. On December 27, 2019, the Debtor filed its *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). Pursuant to the Settlement Motion, the Debtor sought approval of a settlement with the Committee regarding: (a) wholesale changes to the Debtor's governance, including replacing Debtor's management by James Dondero with the Independent Board; (b) additional transparency for the Committee into the operation of the Debtor's business; (c) the Independent Board's possible retention of a CEO acceptable to the Committee and the retention of the CRO on updated terms; and (d) implementation of certain protocols governing the Debtor's ordinary course business operations.

11. The Independent Board is a highly qualified group consisting of James P. Seery, Jr., John S. Dubel, and Russell Nelms. Mr. Seery is a high yield and distressed investing professional with extensive experience managing large asset portfolios. Mr. Dubel has served as an independent director and restructuring professional in a wide variety of industries. The Honorable Mr. Nelms is a former bankruptcy judge in this District and a highly respected member of the bar.

12. Notwithstanding the qualifications of the Independent Board, the UST objected to the Settlement Motion on the principal basis that a chapter 11 trustee should be appointed instead. No other economic stakeholder objected to the proposed governance changes incorporated in the Settlement Motion.

13. On January 9, 2020, this Court overruled the UST's objection and approved the Settlement Motion [Docket No. 339]. In so ruling, this Court concluded that appointment of the Independent Board was a sound exercise of the Debtor's business judgment and that the settlement was fair and equitable and in the best interests of the Debtor's estate.

14. As part of the settlement with the Committee, James Dondero, as the principal of Strand, which is the general partner of the Debtor, agreed to appoint the Independent Directors and not to remove them except with Committee consent or approval of this Court. Mr. Dondero also agreed not to take any action or exercise the voting power of his shares in Strand in any way that is inconsistent with the Committee settlement or any order of this Court approving the Committee settlement. Strand has no business operations other than its general partnership role in the Debtor. Hence, the Independent Board's primary duty in this case is to the Debtor's estate.

15. Since entry of this Court's order approving the Settlement Motion, the Independent Board was installed and immediately began implementing the terms of the settlement and managing the Debtor on a going-forward basis. Indeed, the Independent Board has already conducted intensive and lengthy meetings with the Debtor's employees and professionals to understand the status of the Debtor's affairs, overseen the execution of certain ordinary course transactions, and initiated the process of charting a path forward. Additional meetings have been,

or are in the process of being, scheduled to allow the Board to address the Debtor's on-going business. Any chapter 11 trustee that may be appointed would thus be weeks behind the Board in what has been a rapidly developing case.

OBJECTION TO TRUSTEE MOTION

A. Appointment of a Trustee is an Extraordinary Remedy That Does Not Apply Here

16. Section 1104(a) of the Bankruptcy Code provides for the appointment of a chapter 11 trustee in only limited circumstances, including (1) for cause, and (2) if such appointment is in the interests of parties in interest. 11 U.S.C. § 1104(a).

17. As this Court stated in its decision in *In re Patman Drilling Int'l, Inc.*, the appointment of a chapter 11 trustee is a "draconian remedy." 2008 Bankr. LEXIS 715, at *15 (Bankr. N.D. Tex. Mar. 14, 2008). "A strong presumption exists that a Chapter 11 debtor should be permitted to remain in possession. The Movants have the burden of showing, ***by clear and convincing evidence***, that the appointment of a trustee is justified." *Id*. at *15-16 (emphasis added); *see also In re Cajun Electric Power Coop., Inc.*, 69 F.3d 746, 749 (5th Cir. 1995), *withdrawn in part on other grounds*, 74 F.3d 599 (5th Cir. 1996) (adopting dissent's position in 69 F.3d 746).

18. The UST implies that the Fifth Circuit's decision in *Cajun Electric* with respect to the applicability of the clear and convincing standard was withdrawn, but there is no indication of that in the dissenting opinion that was adopted by the court. Subsequent decisions within this Circuit, including this Court's opinion in *Patman Drilling*, continue to apply the clear and convincing standard in the context of a motion to appoint a chapter 11 trustee. *See, e.g., In re Amerejuve, Inc.*, 2015 Bankr. LEXIS 1496, at *16 (Bankr. S.D. Tex. Apr. 29, 2015) ("The parties

moving to appoint a trustee bear the burden, by clear and convincing evidence, of demonstrating that cause exists for the appointment of a trustee.") (citing, among other cases, *Cajun Electric*, 69 F.3d at 749, *withdrawn in part on other grounds*, 74 F.3d 599 (5th Cir. 1996)*; In re ATP Oil & Gas Corp*., 2013 Bankr. LEXIS 5698, 2013 WL 9792582, at *9 (Bankr. S.D. Tex. 2013)). Thus, there is a strong presumption *against* appointing a chapter 11 trustee, which "must be considered a last resort." *In re Marvel Entm't Group, Inc.*, 140 F.3d 463, 471 (3d Cir. 1998).

19. As set forth below, there is no evidence here that supports the need for a trustee – much less clear and convincing evidence. The Independent Board is now firmly in place and in control of the Debtor. The Independent Board is already taking a highly proactive approach to managing the Debtor, is quickly learning all about the Debtor's assets and various business affairs, and is otherwise executing the terms of the settlement. There is no reason to supplant the highly-qualified, consensual Independent Board with a new and unknown chapter 11 trustee.

20. The UST may make the technical argument that the Independent Board has duties to the shareholders of Strand (among other constituents), but this position ignores the terms of the Committee settlement. Although Mr. Dondero is the sole shareholder of Strand, he has agreed not to take any action or exercise the voting power of his shares in Strand in any way that is inconsistent with the Committee settlement or any order of this Court approving the Committee settlement. Mr. Dondero also has relinquished any right to remove the Independent Directors except with Committee consent or the approval of this Court. The Independent Board's primary duty is therefore to maximize the value of the Debtor's estate, which in turn also benefits Strand. *See In Re Houston Reg'l Sports Network, L.P.*, 505 B.R. 468, 481-82 (Bankr. S.D. Tex. 2014) ("The individuals who manage the Estate's affairs – whether 'officers and managing employees'

or puppeteers acting through a general partner – must respect the fiduciary sanctity of the operation of a bankruptcy estate.") (citations omitted).

21. Appointment of the Independent Board has fundamentally altered the Debtor's governance structure from the top down. The Independent Board, among other rights, has the power to hire and fire the Debtor's employees and to decide the terms on which employees will remain employed by the Debtor. Hence, there is no basis for the UST's unsubstantiated point that prior attempts at restricting the authority of the Debtor's management have failed. No prior governance change involved the removal of Mr. Dondero and appointment of independent management with sole authority to make the ultimate decisions on behalf of the Debtor.[4]

B. Prepetition Conduct by Replaced Management is Not "Cause" that Merits the Appointment of a Trustee

22. Section 1104(a)(1) provides for the appointment of a trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor ***by current management***, either before or after the commencement of the case, or similar cause . . . ." 11 U.S.C. § 1104(a)(1) (emphasis added).

23. The UST argues that cause exists to appoint a trustee based on the alleged prepetition misconduct of the Debtor's ***prior management***, including actions that were the subject of litigation commenced by the Redeemer Committee and Acis Capital.[5] Regardless of any alleged prepetition impropriety by the Debtor's prior management, no cause exists here to appoint a trustee because ***current management*** is now the newly installed Independent Board. *Adams v. Marwil*

[4] Notably, the prior restrictions on Debtor's management related only to the Crusader Fund. The Redeemer Committee of the Crusader Fund, the body best able to compare the prior restrictions on the Crusader Fund to the Debtor's current governance, is on the Committee that expressly supported the current governance.

[5] Both of these claimants are on the Committee in this case and supported the settlement with the Debtor that resulted in the appointment of the Independent Board.

(In re Bayou Group, LLC), 564 F.3d 541, 547 n.3 (2d Cir. 2009) ("[w]hen considering whether to appoint a trustee for cause, a court's focus is on the debtor's current management, not the misdeeds of past management.") (citation omitted). In *Bayou Group*, the court denied a motion of a U.S. Trustee to appoint a chapter 11 trustee in a case where an independent receiver had been appointed prepetition to manage the debtor's affairs and there was no evidence of mismanagement by such receiver, notwithstanding the improprieties of prior management. *Id*. at 547-548.

24. Here, by ignoring the settlement between the Debtor and the Committee, the UST has failed to consider that no cause exists to justify the appointment of a trustee because ***current management***, as contemplated by section 1104(a)(1), is now the Independent Board. The UST has also failed to cite to any case law (and the Debtor is aware of none) supporting the appointment of a trustee for cause where prepetition management has been replaced with new and independent management, especially when done so under the auspices of a settlement with the Committee approved by this Court.

C. <u>Appointment of a Trustee Would Not Be in the Best Interests of the Debtor's Estate</u>

25. Under section 1104(a)(2), a court must find that the appointment of a chapter 11 trustee is in the best interest of the bankruptcy estate generally, not simply for a select group or groups. *See* 7 COLLIER ON BANKRUPTCY ¶ 1104.02[3][d][i] (15th ed. 2007); *In re Sletteland*, 260 B.R. 657, 672 (Bankr. S.D.N.Y. 2001) ("[A] creditor group, no matter how dominant, cannot justify the appointment of a trustee or examiner simply by alleging that it would be in its interests. It must show that the appointment is in the interests of all those with a stake in the estate . . . ."); *In re Sea Queen Kontaratos Lines, Ltd.*, 10 B.R. 609, 610 (Bankr. D. Me. 1981)

(finding that a creditor confused "its own self interest with the interests of the estate and creditors generally" and denying motion to appoint trustee).

26. Here, no economic party in interest supports the appointment of a chapter 11 trustee in this case. The Committee, which represents the bulk of the creditor constituents in this case, entered into a settlement with the Debtor effectuating wholesale governance changes for the Debtor and implementing various operating protocols. That settlement was approved by this Court as a proper exercise of the Debtor's business judgment and as being in the best interests of the Debtor's estate, and such settlement has since been implemented by the Debtor. Any issues involving the Debtor's affiliates or insiders can be addressed by the Independent Board or the Committee consistent with the terms of the settlement. Hence, the parties and this Court have already determined that new independent management, rather than the appointment of a trustee, furthers the best interests of all stakeholders in this case.

27. The UST has offered no evidence or legal basis to the contrary and no justification or reason for appointing a chapter 11 trustee whose duties will duplicate those of the Independent Board. Further, the UST has articulated no reason why a chapter 11 trustee would better maximize the value of the Debtor's estate or better advance this case towards a confirmable plan or what a chapter 11 trustee would do differently than the Independent Board. The UST cannot argue that the chapter 11 trustee would be *more* qualified than the Independent Board because we do not know the identity of the trustee. It is likely that a trustee would be less qualified than the diverse and well-recognized expertise of the three-person Independent Board. Finally, as a practical matter, a chapter 11 trustee likely would seek to replace the CRO or other debtor professionals with their own staff. This would discard months of progress, and require duplicative

expenses to bring the Debtor's estate back to its current posture. Granting the UST's relief certainly will lead to lost time, lost expertise, and increased costs for the Debtor, with no articulated, much less likely, benefit for the Debtor's estate or its stakeholders.

CONCLUSION

28. For the reasons set forth herein, the Debtor requests that the Court enter an order denying the Trustee Motion. No cause exists to appoint a trustee in this case given that the Independent Board has been appointed, and the best interests of all parties in interest will be served by allowing the Independent Board to do its job by maximizing the value of this estate.

Dated: January 15, 2020

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*)
Maxim B. Litvak (Texas Bar No. 24002482)
Gregory V. Demo (NY Bar No. 5371992)
(*admitted pro hac vice*)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
E-mail: jpomerantz@pszjlaw.com
ikharasch@pcszjlaw.com
mlitvak@pszjlaw.com
gdemo@pszjlaw.com

-and-

/s/ Zachery Z. Annable
HAYWARD & ASSOCIATES PLLC
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel and Proposed Counsel for the Debtor and Debtor-in-Possession

Exhibit F

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

In Re:	)	**Case No. 19-34054-sgj-11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas January 21, 2020 9:30 a.m.
Debtor.	)	
	)	MOTIONS

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

APPEARANCES:

For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067 (310)_277-6910
For the Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Debtor:	Maxim B. Litvak PACHULSKI STANG ZIEHL & JONES, LLP 150 California Street, 15th Floor San Francisco, CA 94111-4500 (415) 263-7000
For the Debtor:	Melissa S. Hayward Zachery Z. Annable HAYWARD & ASSOCIATES, PLLC 10501 N. Central Expressway, Suite 106 Dallas, TX 75231 (972) 755-7104

APPEARANCES, cont'd.:

For the Official Committee of Unsecured Creditors:	Dennis M. Twomey SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7438
For the Official Committee of Unsecured Creditors:	Penny Packard Reid Juliana Hoffman SIDLEY AUSTIN, LLP 2021 McKinney Avenue, Suite 2000 Dallas, TX 75201 (214) 981-3413
For ACIS Capital Management GP, LLC, et al.:	Rakhee V. Patel WINSTEAD, P.C. 2728 N. Harwood Street, Suite 500 Dallas, TX 75201 (214) 745-5250
For the Issuer Group:	Amy K. Anderson JONES WALKER, LLP 811 Main Street, Suite 2900 Houston, TX 77002 (713) 437-1866
For the Issuer Group: *(Telephonic)*	James T. Bentley SCHULTE ROTH & ZABEL, LLP 919 Third Avenue New York, NY 10022 (212) 756-2000
For Redeemer Committee of the Highland Crusader Fund:	Mark A. Platt FROST BROWN TODD, LLC 100 Crescent Court, Suite 350 Dallas, TX 75201 (214) 580-5852
For Redeemer Committee of the Highland Crusader Fund: *(Telephonic)*	Marc B. Hankin JENNER & BLOCK, LLP 919 Third Avenue New York, NY 10022-3098 (212) 891-1600

APPEARANCES, cont'd.:

For the U.S. Trustee:	Lisa L. Lambert OFFICE OF THE UNITED STATES TRUSTEE 1100 Commerce Street, Room 976 Dallas, TX 75242 (214) 767-8967 Ext. 1080
For UBS AG London Branch, et al.:	Kimberly A. Posin LATHAM & WATKINS, LLP 355 South Grand Avenue Los Angeles, CA 90071-1560 (213) 485-1234
For UBS AG London Branch, et al.:	Asif Attarwala LATHAM & WATKINS, LLP 330 N. Wabash Avenue, Suite 2800 Chicago, IL 60611 (312) 876-7700
Recorded by:	Michael F. Edmond UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062
Transcribed by:	Kathy Rehling 311 Paradise Cove Shady Shores, TX 76208 (972) 786-3063

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

DALLAS, TEXAS - JANUARY 21, 2020 - 9:35 A.M.

THE COURT: Counsel in the courtroom first in Highland.

MR. POMERANTZ: Good morning, Your Honor. Jeff Pomerantz, John Morris, and Max Litvak from Pachulski Stang Ziehl & Jones, counsel for the Debtor.

THE COURT: Good morning.

MR. POMERANTZ: Also in the courtroom are the members of the independent board: John Dubel, Jim Seery, and Russell Nelms.

THE COURT: Good morning.

MS. HAYWARD: Good morning, Your Honor. Melissa Hayward and Zachery Annable on behalf of the Debtor.

THE COURT: Good morning.

MS. LAMBERT: Lisa Lambert with the U.S. Department of Justice representing William Neary, the United States Trustee. I believe Ms. Kippes will also be joining later this morning.

THE COURT: Okay. Good morning.

MS. LAMBERT: Thank you.

MR. TWOMEY: Good morning, Your Honor. Dennis Twomey, Penny Reid, and Juliana Hoffman on behalf of the Unsecured Creditors' Committee from Sidley Austin. Thank you.

THE COURT: Good morning.

MS. PATEL: Good morning, Your Honor. Rakhee Patel

of Winstead, P.C. on behalf of ACIS Capital Management, LP and ACIS Capital Management, GP, LLC.

THE COURT: Good morning.

MS. PATEL: Thank you.

MR. PLATT: Good morning, Your Honor. Mark Platt. I'm here on behalf of the Redeemer Committee of the Highland Crusader Fund. And Mark Hankin, I believe, is on the phone as well.

THE COURT: Okay. Good morning.

MS. POSIN: Good morning, Your Honor. Kim Posin of Latham & Watkins. Also here is Asif Attarwala from Latham. We represent creditor UBS Securities, LLC and UBS AG London Branch.

THE COURT: Good morning.

MS. ANDERSON: Good morning, Your Honor. Amy Anderson with Jones Walker on behalf of the Issuer Entities. And with me on the phone is Mr. James Bentley with Schulte Roth.

THE COURT: Okay. Thank you.

All right. That's all the courtroom appearances. If you're on the phone and wish to appear, you may go ahead. I think we heard at least Mr. Bentley, you're on the phone, correct?

MR. BENTLEY: Yes, Your Honor. Thank you.

THE COURT: All right. And we heard Mr. Mark Hankin

should be on the phone, correct?

MR. HANKIN: Yes, Your Honor.

THE COURT: All right. Anyone else wishing to appear?

All right. Well, we originally had quite a few things on the calendar, and it looks like we're down just to four or five maybe at this point, correct?

MR. POMERANTZ: That is correct, Your Honor. Again, Jeff Pomerantz; Pachulski Stang Ziehl & Jones.

There has been a flurry of paperwork. I have either inserts or replacements to things in your binders, or I have completely new binders. What would Your Honor prefer?

THE COURT: Well, by the way, you had a very helpful binder, whoever was responsible for that. I think just the inserts will do.

MR. POMERANTZ: Okay. May I approach?

THE COURT: You may. And I assume we're talking about the pleadings binder that you sent over Friday-ish?

MR. POMERANTZ: Correct.

THE COURT: Okay.

(Pause.)

THE COURT: Okay. Very good. Thank you.

MR. POMERANTZ: Your Honor, I thought I would take Your Honor through the agenda. And if the agenda that we provided today was helpful, we would propose to do it for all

hearings, if that would be acceptable.

THE COURT: That would be great, yes.

MR. POMERANTZ: Thank you, Your Honor.

So, Your Honor, number one on the agenda was the DSI retention motion. Your Honor has already entered an order approving that motion.

THE COURT: Uh-huh.

MR. POMERANTZ: Number two is the ordinary course of business protocol motion, which was rendered moot by Your Honor's approval of the settlement, so a notice of withdrawal of that motion has been filed on the docket.

THE COURT: Okay.

MR. POMERANTZ: The number three and four, the retentions of Foley Gardere and Lynn Pinker, we have agreed with the Committee and ACIS to continue those hearings. At the conclusion of this hearing, I will be asking perhaps for a couple of hearing dates --

THE COURT: Okay.

MR. POMERANTZ: -- over the next couple of months so that --

THE COURT: Okay.

MR. POMERANTZ: -- we can set these for the next one.

Number five is the PensionDanmark relief from stay motion. That also by agreement has been continued until the next date.

Number six is the settlement motion. The only trailing

issue, if Your Honor may recall, the CLO Issuers had raised some concerns that the ordinary course of business protocols would somehow impact the ability of the Debtor and the CLO Funds to operate in accordance with their contractual documents. We have been engaged with them and with the Creditors' Committee in discussions on how to address their concerns. We are still working on that, and we would ask that that matter continue to trail to the next hearing.

THE COURT: Okay. All right.

MR. POMERANTZ: Your Honor, number seven and number eight and number nine, we are -- we were -- they were -- they're unopposed. There have been some discussions, both in connection with the cash management motion and on the bonus motion, of the Committee and others. We would propose to hear those after the contested matters. So we would prefer to trail them until after the three contested matters.

THE COURT: All right.

MR. POMERANTZ: And Your Honor, the three contested matters remaining, we would propose to take them in the order of argument on the agreed protective order. There is opposition by the Trustee's Office. Then an argument on the Committee seal motion, and then followed by the United States Trustee's motion to appoint a trustee.

THE COURT: All right. I am good with that sequence. Anyone want to comment?

All right. So we'll start with the protective order.

MR. POMERANTZ: Your Honor, and I will cede the podium to my partner, John Morris, who will be handling argument on that.

THE COURT: All right. Thank you. Mr. Morris?

MR. MORRIS: Good morning, Your Honor.

THE COURT: Good morning.

MR. MORRIS: John Morris; Pachulski Stang Ziehl & Jones; for the Debtor.

Your Honor, the Committee and the Debtor have agreed upon the terms of a protective order. The protective order really is a garden-variety protective order. And if I may, I would just like to spend a couple of minutes giving the Court some background as to how we got here.

THE COURT: Okay.

MR. MORRIS: This case has been going on for three months, and obviously there's been a substantial exchange of information during the interim. The case was filed in mid-October. Almost immediately, the Debtor received substantial requests from the Committee's professionals, both the lawyers as well as the financial advisors. Under the leadership of Brad Sharp, who was acting at that point as the CRO, the Debtor acted very quickly to provide the information that it could.

Given that it was asked to produce documents on a very expedited basis, given that it was asked to produce information

on a wide variety of issues that didn't concern an adversary proceeding, that didn't concern a contested matter, some of which related to, for example, transactions that were being contemplated and we wanted to give the Committee visibility, for all those reasons, the documents were produced initially on a professional-eyes-only basis.

From time to time, the Committee sought the Debtor's consent to share certain of that information with the Committee members in order to enable the Committee members to fulfill their duties. And I won't go into detail, but most of the time we agreed. Sometimes we didn't.

The fact is, Your Honor, the parties worked very cooperatively throughout the fall, notwithstanding the adversarial nature of the proceedings, to provide information. And we continued on that basis until late December, when the Committee and the Debtor finally reached an agreement on the terms of a protective order, and that's what we filed I think on December 27th.

And the flow of information continued. The parties, I think it's fair to say, have relied upon the terms of that order. Under the guidance of the newly-appointed independent directors, the Debtor has continued to provide information to the Debtor as well as to other parties.

What information has been provided during this time? I think it's important for Your Honor to understand the

magnitude of just what the Debtor has done here. I think the Committee has made over 30 -- no, let me state it differently. The Debtor has made over 30 separate document productions. It covers more than 10,000 pages of material. It covers the laundry list of issues that the Committee is interested in, again, both with respect to contested matters and stuff that has absolutely nothing to do with anything that's on the Court's calendar today.

We've engaged in depositions. The Committee took three very extensive depositions of Mr. Sharp, the CRO, of Mr. Caruso, his partner at DSI, and they took a more-than-seven-hour deposition of Frank Waterhouse, the CFO of the Debtor. I defended each of those depositions. I didn't direct any of my witnesses not to answer a single question. So there's been full transparency here. I think there was maybe one question that I asked to be marked confidential because it pertained to the identity of investors in a nondebtor entity, and the Committee didn't object to that.

So there's been that free flow of information.

Of course, Your Honor, the Debtor has filed its schedules, its SOFAs. The Debtor sat for an almost-two-hour examination before the United States Trustee and creditors, answering questions about those documents at a 341 meeting that is going to be continued tomorrow morning.

The point here, Your Honor, is that the agreed-upon rules

as reflected in the protective order haven't hindered the flow of information. In fact, it's enhanced the ability of the Creditors' Committee to gain information.

In the absence of the cooperation between the Committee and the Debtor, Your Honor, I believe it's hard to imagine how we could have reached an agreement on things like corporate governance and the bonus motion, which includes information relating to personnel matters, salaries and things of that nature. And so this flow of information I think is helping the Debtor's estate, it's helping the process, and I think it ought to be encouraged, frankly.

As I mentioned earlier, another very critical component of the information-sharing is sharing with the Committee information relating to proposed transactions. That has nothing, again, to do with an adversary proceeding, has nothing to do with a contested matter, but it would really hinder the Debtor's ability to operate if it was in a contentious situation with the Committee over its day-to-day business. And so, again, this protective order enables the Debtor to carry forth its business.

I think it's important, Your Honor, to look at what the consequences of this have been. Neither the Committee nor anybody else has ever filed a motion to compel the Debtor to provide information. Neither the Committee nor any other party in interest has ever even requested a conference with

this Court or the Court in Delaware on matters relating to discovery.

No one has objected to the protective order except the United States Trustee. And we do appreciate the perspective and the position that the United States Trustee is in, but it's got to be taken into the context of this case. And in the context of this case, where the Committee is on board, where nobody else is objecting, the Court ought to ask itself why. And I think the reason why is because the process is really working, and it's working very well.

The people and the entities that are mentioned in the United States Trustee's objection, whether it's ACIS or the SEC or the PBGC or investors, they're all very sophisticated parties, they're all well aware of what's happening, they all have notice, and nobody is here objecting. And I think that's very important.

The good news, Your Honor, I think the good news, anyway, is the Committee and the Debtor have agreed to amend its form of protective order in a way that we hope and we believe goes a long way to addressing the United States Trustee's concerns. In particular, what we've done is we've added the United States Trustee as one of the parties who will receive everything. Okay. So we've amended that. And Your Honor, I have both clean and blacklines of the revised protective order, if you'd like me to hand it up.

THE COURT: All right. You may approach.

MR. MORRIS: And I can just show you exactly where these changes have been made.

THE COURT: Okay. Thank you. Thank you.

MR. MORRIS: So, Your Honor, you'll see in the blackline at Paragraph 2 on Page 7 that we've added in Subparagraph 2(f) the United States Trustee's Office. So they're now one of the people or entities --

THE COURT: Uh-huh.

MR. MORRIS: -- who will receive everything. And then on Page 11 in Paragraph 10, we've tried to make it very clear that the protective order is not intended to prevent the U.S. Trustee from disclosing discovery material in compliance with a subpoena or court order or a FOIA request, provided that the Debtor and the Committee are given notice pursuant to Paragraph 9 so that we have an opportunity to intervene if we think that there's a reason not to engage in that process.

So, as long as we receive notice, you know, the U.S. Trustee can be responsive in the way that I think, I think at least to some degree, they want to.

This order now, Your Honor, and I think this is -- I'll thank the Committee for pointing this out -- this order is now really wholly consistent with a protective order that was entered by Judge Hale in the *PHI* case. It was entered just last April, and it's filed at Docket #316. And that's a

protective order that wasn't entered in connection with an adversary proceeding or a contested matter. It was a protective order that was for use to all parties who wanted to participate in discovery at any stage of the case. It also included the United States Trustee's Office as one of the recipients of documents, and it specifically provided not only for confidential information but for professional-eyes-only designation. I have a copy of that order if it would be helpful for the Court to see.

THE COURT: All right. You may approach.

(Pause.)

MR. MORRIS: To the extent that there's any party who has not yet requested information or has not sought discovery, if the Court enters this order they'll be able to do so pursuant to this order. And to be clear, as soon as a party either requests or produces information, discovery information, they become a party to this document. And so they'll have all of the rights and the abilities to seek information, to challenge designations. So nobody's rights are really being curtailed in their ability to gain discovery. And at this point, Your Honor, we have both the Committee as well as the United States Trustee's Office who are going to see everything. And so if either the Committee or the Trustee's Office believe that the Debtor has improperly labeled or categorized any document as either confidential or

highly confidential, there's a process to be followed. And that process, I think, is quite reasonable. It's pretty standard, at least in my experience. They'll let us know that they disagree. We'll have a conversation. We'll either -- the Debtor will either agree to redesignate the document or we'll bring the matter to the Court for the Court's determination.

Sealing issues. Again, the U.S. Trustee's Office and the Committee will both be fully informed as to what's happening here. And if either of them has an issue, they can bring that to the Court's attention.

To the extent that there is a disputed matter before the Court on a sealing motion, the rules of engagement remain the same. There's nothing in this protective order that seeks to shift the burden. There's nothing in this protective order that seeks to change the burden. The only thing that it does is it attempts to identify, through the agreement with the Committee, the types of information that the Debtor reserves the right to designate as highly confidential.

It doesn't mean that that's now the standard that the Court has -- the Court will rule, employ whatever standard it thinks is appropriate, frankly. But it's a description, I think it's in Paragraph 12, of the type of information that we would mark as highly confidential. And I think the Committee would agree, if given the opportunity, to give the Court some

comfort that at this point the Debtor has been quite judicious and limiting in terms of the amount of information that they've designated for that particular category.

So, in summary, Your Honor, there's no dispute that it's needed. Gratefully, even the U.S. Trustee isn't telling the Court that a protective order is not needed. From the Debtor's perspective, it's not only needed, I would -- I daresay it's required. Because if you want the Debtor and the Committee to continue to engage in a free flow of information outside of an adversary proceeding, outside of a contested matter, this is the only way to do it. And I know that's what the Debtor wants. I believe that's what the Committee wants. It's why we've entered into this agreement. So these are matters that ought to be protected.

1102(b)(3) doesn't give all creditors a right to all documents. It gives them the right to information. And we believe that this agreement facilitates the Committee's ability to get information and to share it, as they determine, with their members.

Unless Your Honor has any questions, I have nothing further.

THE COURT: I do not. All right. Ms. Reid, did you -- it's a joint motion. Did you want to say something?

MS. REID: Yes, Your Honor. Penny Reid with Sidley Austin on behalf of the Creditors' Committee.

Just briefly, I would agree with Mr. Morris that this protective order was a heavily-negotiated protective order that took quite a while to get the parties' agreement, and it enabled the Creditors' Committee to get the documents it needed.

What is very important to note is two things. It does provide a mechanism for any party to object to the designation. And it's the burden of the party designating it to support the designation. And all disputes or anything related to this order comes to Your Honor. It's the jurisdiction of this Court to decide everything, which is also very important to our client.

THE COURT: Okay. Thank you.

MS. REID: Thank you, Your Honor.

THE COURT: All right. Ms. Lambert? Have we at least made some progress from your prospective with the added language?

MS. LAMBERT: We're making some progress, but not sufficient progress. May I approach the bench --

THE COURT: You may.

MS. LAMBERT: -- with the exhibit binders?

THE COURT: All right.

MS. LAMBERT: Your Honor, this is not, as the Debtor characterized it, a garden-variety protective order. This is not like the *PHI* order, which was a confidentiality order that

defined parameters for sharing information with the creditors. This is a motion that prevents the sharing of matters. Protective orders are granted in contested matters and in adversaries, not in the case in chief. Rule 23 is not available in the case in chief. Section 1102, the only statute that they cite, presumes sharing, not failing to disclose. And the reason --

THE COURT: Well, let me ask you this. I want to really drill down on this, because, you know, he used the words, counsel used the words garden-variety. And frankly, when I read these pleadings back in chambers, I thought, I think this is pretty standard fare, this protective order. I think I've signed something like this many times before.

And I get what you're saying. Well, let me see if I get what you're saying. It feels like your main issue is that we don't have a contested matter or an adversary proceeding. But what I will throw out is this: Had we had a motion for a 2004 exam, a gazillion times I have seen people come back with okay, we, debtor, will produce, but we want this protective order. And it ends up looking maybe almost identical to this one.

Another context I thought of was back shortly after the 2005 amendments when these new provisions were added with regard to creditors' committees and sharing in 1102(b), I very often saw, in complex Chapter 11s, a protocol order, we

sometimes called it, where a creditors' committee sort of wanted cover for their dos and don'ts, and it resulted in sort of a protective order. You know, I haven't gone back and looked and compared terms, but something like this.

MS. LAMBERT: Right.

THE COURT: So, --

MS. LAMBERT: And the *PHI* order is --

THE COURT: -- are we punishing -- is this a no good deed goes unpunished sort of thing? They didn't make the Creditors' Committee file a 2004 motion.

MS. LAMBERT: The difference --

THE COURT: They've produced. And then now they've negotiated this. I mean, --

MS. LAMBERT: The difference is very important, Your Honor. You have --

THE COURT: What is --

MS. LAMBERT: -- gone right to the crux. A motion for 2004 exam defines the areas to be discovered. An adversary proceeding defines the areas to be discovered. A motion for contested matter defines the issues that are subject to discovery. Here, --

THE COURT: They -- the Debtor --

MS. LAMBERT: -- no one --

THE COURT: -- didn't insist on that. The Debtor is just like, fine. We're going to in good faith produce.

MS. LAMBERT: But it's not the Debtor's issue.

THE COURT: We just want this order.

MS. LAMBERT: It's also the parties' issues, the other creditors. If you have some knowledge of what is at issue, you have some opportunity to come to the Court and say hey, I, the SEC, or I, Creditor X, also am interested in what --

THE COURT: But nothing about this order would prevent them from filing --

MS. LAMBERT: But they don't know --

THE COURT: -- a 2004 motion and seeking the information themselves, correct?

MS. LAMBERT: Right. And then they're going to have to fight the sealing provision. So -- or the fact that it's been designated highly confidential, which they would not have had to fight otherwise until an opportunity came and they knew what the information was. But now they don't have the information. See, the information would have been given to them as highly confidential, --

THE COURT: Uh-huh.

MS. LAMBERT: -- maybe labeled that way, in a protective order in connection with their litigation.

THE COURT: Uh-huh.

MS. LAMBERT: But now they don't even get to get it because it's already protected from them. Already insulated.

This is the problem.

So the -- if the Court compares the *PHI* order -- and the U.S. Trustee certainly understands that there must be sharing protocols or some type of confidentiality in general. This is not it, though. This goes way beyond that. There should be a provision that creditors can get information under certain circumstances.

If the Court looks at the orders that are typical in these cases, there is such a provision. That does not exist. In addition, the carve-out in the order for contested matters, 2004 exams, and adversaries is material. And they should be carved out here, too.

So those are the substantive, big-parameter issues of why this, as a matter of law, is problematic.

In addition, there are particular provisions that are untenable. The first is the limitation on the Government. And this goes all the way back to the *WorldCom* case, Your Honor. In *WorldCom*, a court entered an order for the examiner to be able to interview people under seal, basically, in confidence. An examiner prepared various reports. Later, the U.S. Attorney's Office sought to obtain those, and they were not able to because they had been done under seal originally and that was material to the disclosure of the information. This Court should not modify the statutory obligations that the parties have to refer matters, either for ethical or

criminal matters. The U.S. Trustee circulated the routine language that we ask for in every order of this type, and they declined to do it.

THE COURT: Show me that language.

MS. LAMBERT: I can -- I can provide the Court with a -- the language. I emailed it to them. I don't have it here right now, but I can provide it to the Court. But basically, I'm sure the Court has seen it before, we put it in all of our languages, and it says nothing in this order constrains the obligations of any party under ethical or federal statute to share information. But now what's required is, if the U.S. Trustee wants --

THE COURT: I don't know if I've ever signed -- I mean, that might be an exception that would swallow up the rule. I feel like I have -- I've approved language before that, you know, says kind of the sky is blue, nothing prevents a party from seeking modification of this order on notice to parties and a hearing.

MS. LAMBERT: Your Honor, --

THE COURT: I mean, --

MS. LAMBERT: -- the United States Trustee should not be required to come to this Court to tell -- or to tell the Debtor that they have a subpoena for information or that they're sending a criminal referral.

THE COURT: No, no, no. There's already an exception

on there for a subpoena.

MS. LAMBERT: No. No. The issue is --

THE COURT: But you don't think you have to give them notice if you did a subpoena?

MS. LAMBERT: I have to give them notice. If I have a FOIA request --

THE COURT: I mean, but you don't think that's appropriate?

MS. LAMBERT: No, Your Honor. I don't think it's appropriate that the U.S. Trustee, who has an obligation statutorily, and the Court has an obligation statutorily, to send matters to the U.S. Attorney's Office, that we have to disclose when we're doing that. No. And other parties in interest should be free to do that, too. That's what the statute says. We have an obligation to do that.

We don't have to tell them what our whole case is. It will become apparent if the U.S. Attorney's Office pursues it. They release the information, usually. But this is not standard. It has never been --

THE COURT: Okay. I just want the language that you --

MS. LAMBERT: All right.

THE COURT: -- you argue is standard, and you said that --

MS. LAMBERT: That language is, Nothing in this order

constrains anybody --

THE COURT: I want to see it. I want to get -- see examples.

MS. LAMBERT: All right. Well, I'm happy --

THE COURT: Because I don't remember -- maybe I've signed it a million times and I just don't remember, but I don't really remember that.

MS. LAMBERT: I'm happy to provide the Court with a number of orders signed by a number of judges in this district.

THE COURT: I would like to see it now.

MS. LAMBERT: Okay. Well, I will have Ms. Kippes provide that. But --

THE COURT: She's sitting in the back of the courtroom now.

MS. LAMBERT: I'm sure that she is.

So, the other thing is, Your Honor, --

THE COURT: Unless you can show me right now, look, here, in fact, is the garden-variety form of order, here is the language that time after time after time after time after time courts insist upon, --

MS. LAMBERT: Your Honor has not required -- Your Honor has not required them to provide any evidence that this language is standard. And it's not. So, --

THE COURT: I have a form of order that the

Creditors' Committee is supportive of and has heavily negotiated. And it just looks at first glance to me to be somewhat garden-variety. So, --

MS. LAMBERT: Well, --

THE COURT: -- you as the objector need to, you know, point out why it's not.

MS. LAMBERT: Your Honor, the appearance of this case is that there's a desire to keep it from being public. This Court routinely, all the time, says bankruptcy is an open process.

THE COURT: But I also, routinely, all the time, sign protective orders. And it's like, We'll have a hearing down the road if something needs to get in the record. This is about discovery outside the courtroom.

MS. LAMBERT: Correct. And the order in *PHI*, I think the Court will find, is very different from the order in this case. So -- and is useful for that reason. I anticipate the --

THE COURT: Okay. Go through the protective order in *PHI* and highlight for me provisions that it has --

MS. LAMBERT: It does not bar sharing with government entities. It is not as limiting to professional eyes, though it has some limitations. And it contemplates sharing with creditors under defined provisions.

THE COURT: Okay. Again, lengthy order. Point out

which provision from *PHI* you would like to see in this order.

MS. LAMBERT: All right. If the Court gives me a break, I will annotate the order.

The IRS, I anticipate the evidence will be, has an estimated claim of $8 million to $9 million that's on appeal. The SEC is involved in the oversight of this Debtor. The PBGC is a creditor.

THE COURT: They can file motions for a 2004 or file an adversary. Or they file a proof of claim, it's objected to, we can have discovery.

MS. LAMBERT: That changes the --

THE COURT: They got notice of this motion --

MS. LAMBERT: The change --

THE COURT: -- for approval of a protective order. Yes or no?

MS. LAMBERT: Yes. I'm not -- I question whether the IRS has as a creditor. I think they received notice because they're not really listed as a creditor, they're listed as contested.

THE COURT: Okay. But they got notice. They have able counsel that shows up all the time in cases.

MS. LAMBERT: So, Your Honor, the statute, 1102, presumes the disclosure of information, not the constraining of information.

THE COURT: But you would agree, would you not, that

many, many times courts have entered protective orders in connection with a Committee's 1102(b) obligations?

MS. LAMBERT: No.

THE COURT: Again, I use the analogy back shortly after the 2005 amendments, --

MS. LAMBERT: They're referred --

THE COURT: -- where people prospectively said hey, we want -- we want to be clear we're doing things correct, we'll share information with our constituency, we, the Creditors' Committee, but there's certain confidential, privileged items we may somehow get into our hands, and we want to --

MS. LAMBERT: It is --

THE COURT: -- be clear about what we have to share and what we should not.

MS. LAMBERT: It is true that the Court enters confidentiality orders in cases. I'm well aware of that. The issues of this one is different. It is not garden-variety. The difference goes right to the language of confidential versus protected.

Your Honor, another aspect of this case or this motion that is not workable is the sealing provision being co-extensive with those, the items that are designated as highly protected. You heard at the Federal Bar Association meeting only last week that the magistrate judges were talking about

striking these provisions routinely. The FJC's publication on protective orders and sealing also says it should not be coextensive, should be a separate motion to seal. The standards are totally different and much higher for sealing the documents. This is a public process, and it should be maintained as a public process.

THE COURT: All right. Any --

MS. LAMBERT: The Court delegates under this motion its responsibility to evaluate information to the Debtor unilaterally. The Debtor gets to make the decisions, not the Court. And nobody knows what those decisions are, except maybe the party that is asking for the information. If you don't know that the information exists and it's already subject to protection, you never get that opportunity.

It's for these reasons that the motion should be denied or tailored.

THE COURT: All right. Anything else?

You know, no one has mentioned this, but it danced through my brain: Part of the settlement I approved with the Committee contemplated sort of a common interest privilege on some things, right? Or am I misremembering that?

MR. MORRIS: They will have access, Your Honor, to information as part of their investigation. I can't tell you off the top of my head --

THE COURT: Okay. No one --

MR. MORRIS: -- the precise parameters of it.

THE COURT: No one can immediately tell me?

MR. MORRIS: Yeah.

THE COURT: Okay. Anything else?

MS. LAMBERT: Your Honor, if the Court would like, the U.S. Trustee is happy to annotate one of the orders and to provide a supplement with the orders that contain the language, both that the Court -- this Court has entered and other courts have entered from the district.

THE COURT: All right. Well, --

MR. MORRIS: Your Honor, just very briefly. John Morris, again. Pachulski Stang Ziehl & Jones.

THE COURT: This motion has been pending for a long time. It was actually filed in Delaware?

MR. MORRIS: It has.

THE COURT: Okay.

MR. MORRIS: And it's -- and we've relied on it.

THE COURT: Okay.

MR. MORRIS: The reason that I went through the background, Your Honor, is to give the Court the assurance that it's working, it's not being abused. By bringing the U.S. Trustee under the tent with the Creditors' Committee, you're going to have two independent parties who are going to review and challenge, if they think appropriate, the Debtor's designations.

Nobody is being prevented here from filing a motion, whether it's for a 2004 or another contested matter. Nobody here is -- just because something is marked as highly confidential doesn't mean that other people can't get access to it. They just need to come and use a device pursuant to which it's responsive. That's all it is. It is garden-variety, Your Honor. Thank you.

THE COURT: All right. I'm going to overrule the objections and approve the proposed agreed protective order as amended in accordance with the mark-up that was shown and the announcement made.

I am also, even though I think this is like saying the sky is blue, I'm also going to direct that the Debtor and Committee add a sentence at the very last paragraph that the Court reserves the right to amend or -- amend this order upon motion by any party in interest and notice and a hearing.

Again, I think that's probably a no-brainer, doesn't need to be said, but I'm going to direct it to be said in there. And, again, it would have to be on motion of a party in interest and notice and a hearing, and we can all come and argue whether some sort of amendment is needed to this order. And, you know, you already have provisions in there that contemplate, you know, someone may file a motion pursuant to this order, but we'll just throw that in for good measure.

Again, I feel like this is an agreed order that is not

substantially different from forms of order this Court and other courts have approved many times before. While the timing and context may seem different, feel different to the U.S. Trustee, I feel like, as we say in the law, it's a difference -- a distinction without a difference, or whatever the expression is.

Again, I allude to the many times in the past where a creditors' committee, early in the case, before there were contested matters, before there were adversary proceedings, filed motion for approval of protocols under 1102(b) regarding its obligation to share information, and by the time we showed up for the hearing, there was an agreed protective order that had been negotiated.

I compare it to the context of the committee or somebody files a motion for a 2004 exam early in the case, and then we come back with an agreed protective order.

I said before it's as though, to me, no good deed goes unpunished. We have cooperation early on the case, and now, you know, when this agreed protective order is proposed, the argument is, well, there wasn't a 2004, there wasn't a contested matter. Again, I don't think that distinction from other cases makes any meaningful difference. I think there's good cause pursuant to 1102(b), 105, and Rule 26. While maybe not triggered yet with a contested matter or adversary proceeding, I think there's good cause to approve this agreed

form of protective order.

All right. So, if you all could make those changes that we discussed here on the record, and I'll sign it right away.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. We now had the seal motion of the Committee that I think you all proposed we go to second today. And I'll tell you what floated through my head, reading these pleadings. It almost felt like a moot issue by this point. I don't know if anyone -- maybe I took your thunder here, but --

MR. TWOMEY: You did somewhat steal my thunder, Your Honor. I just wanted --

THE COURT: Okay.

MR. TWOMEY: Dennis Twomey again on behalf of the Creditors' Committee.

THE COURT: I'm sure you're going to articulate it much better than I just did.

MR. TWOMEY: If I might, Your Honor, maybe I'll take a minute just to describe the genesis of the motion, which, --

THE COURT: Uh-huh.

MR. TWOMEY: -- just like the motion you heard, is also about two months old and has been on ice for a while. The Committee filed a motion to seal back in early December in conjunction with, at the time, the Committee's objection, the omnibus objection to the Debtor's second-day motions. As you

just noted, those objections were all resolved as part of the governance settlement that you approved at the last hearing. In terms of what was covered by the motion to seal as part of that omnibus objection, which has now been resolved, the Committee had attached as Exhibits C and D two orders that were issued in the arbitration proceedings between the Debtor and the Redeemer Committee, which, as Your Honor is aware, the Redeemer Committee is a member of our Creditors' Committee here. And at the time of the filing, the Committee sought to seal the awards, primarily because the Debtor had previously expressed to the Redeemer Committee that the Debtor believed the rewards were subject to a protective order in that litigation. And the Redeemer Committee at the time, while --

THE COURT: Now, let me ask you to repeat what you just said, because I know this was brought up in the U.S. Trustee's motion. You alluded to a protective order in your motion. Are you saying now that you thought at the time there was a protective order in place in the arbitration that you might be running afoul of by disclosing it?

MR. TWOMEY: Correct.

THE COURT: Okay.

MR. TWOMEY: More specifically, Your Honor, we had to get our omnibus objection, the Committee's omnibus objection on file, and we wanted to include those awards as exhibits to our omnibus objection. And the Redeemer Committee, who sits

on our Creditors' Committee, had indicated to the full Committee that the Debtor had previously expressed the view that these awards were subject to that separate protective order in the other case.

And so, out of an abundance of caution, so that we could get our omnibus objection on file, we sought -- we filed the seal motion. And so that was sort of the genesis of the motion.

So we filed it out of an abundance of caution in order to press forward with our filing of the omnibus objection at the time. And since that time, we've had the opportunity to consider it more, and the Redeemer Committee has sort of indicated its views on the protective order. But most importantly, our objection, obviously, has now been resolved as part of the settlement that Your Honor approved last week.

So, given that, coming full circle, Your Honor, the Committee is no longer seeking the relief that we had requested in the seal motion, and so that's where things stand today. The Committee has communicated its position to both the U.S. Trustee and the Debtor, and that's where things stand.

So I believe the Debtor, in terms of the underlying merits, I believe the Debtor still believes that those awards contain some confidential information. Mr. Morris can speak to that. And obviously, the U.S. Trustee had objected to our

seal motion.

But, again, Your Honor, coming full circle to the point you raised initially, this really isn't an issue -- this isn't a motion that the Committee continues to pursue, because the objection, the underlying objection, the omnibus objection to those second-day motions has been resolved as part of last week's, or almost two weeks ago, the order that Your Honor entered.

THE COURT: All right. So, to recap: The two arbitration awards, or parts of them, I don't know if it was the whole thing, but they were attached to the omnibus objection, which is now moot because it was an objection to the cash management motion, the DSI retention application, and the ordinary course business protocols. That objection is totally moot, if you will, now, because the global settlement or the -- well, the settlement I approved last week resolved all the issues raised in that objection. So, well, I guess, I mean, what -- I was going to say, what would stop you from just withdrawing the objection?

MR. TWOMEY: We can -- I think we can withdraw the motion. Because it's a motion, obviously. We can withdraw the motion to file under seal. That's --

THE COURT: Well, and again, I'm not telling you how to do things, but I'm just saying that's what rolled through my mind as far as why this might be a moot point.

MR. TWOMEY: Understood, Your Honor. And certainly, from the Committee's perspective, we're not trying to, you know, add more --

THE COURT: Uh-huh.

MR. TWOMEY: -- more issues that don't need to be added. And I think that's exactly right. That's what I was going to --

THE COURT: And that's part of what I'm getting here. I mean, this could be a battle for another day. At some point, someone may want to file a pleading attaching those arbitration awards.

MS. LAMBERT: Your Honor, they are in evidence for the motion to appoint a Chapter 11 trustee. That's why we're having this motion before. The U.S. Trustee was constrained to file its pleading redacted and all the documents under seal --

THE COURT: Right.

MS. LAMBERT: -- because they're filed under seal here and the order seals it.

THE COURT: Okay. Well, I guess what you're saying is you're going to move, in connection with your trustee motion in a few minutes, for me to admit into evidence these arbitration awards we're arguing about right now?

MS. LAMBERT: That is correct.

THE COURT: Okay. Okay.

MR. TWOMEY: Thank you, Your Honor.

THE COURT: Thank you. Who else wishes to speak on this?

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

THE COURT: Uh-huh.

MR. MORRIS: Your Honor, my first point here was objection moot; procedurally nothing before the Court. I think that's been taken care of.

But it's a very important point. And the reason why it's very important is because the Redeemer award was first proffered by the Committee in opposition to the Debtor's motion for the appointment of a CRO. Old management was going to stay in place, and they were using -- I presume that they would have attempted to use the Redeemer award to show that, notwithstanding the Debtor's desire to appoint the CRO, old management was still in place.

The reason why it's very important to note that the objection that the Committee filed is now moot is because we're now here in a very different context. We're here because the United States Trustee's Office wants to offer the Redeemer awards into evidence in support of their motion for the appointment of a trustee. That motion is going to be determined under 1104. 1104 relates solely to current management. We were here two weeks ago, Your Honor, and the

Court approved an order appointing new management.

And so our first argument, Your Honor, is that there is no sealing issue for the Court to decide in the first instance because the Redeemer awards simply are not relevant and shouldn't be admitted into evidence, and we can leave it for another day when and if another party in interest seeks to either discover or otherwise introduce into evidence the Redeemer awards.

If you recall, the week before last we were here and the United States Trustee's Office attempted to elicit argument over prior acts that were described in Your Honor's ACIS decision, in a prior SEC order, in the Redeemer awards. And I think Your Honor properly at that point kind of shut it down and said, We're here on a motion to appoint new management. And we have new management. And I'm prepared to put my witness in the box who will testify that the independent directors are firmly in control of this debtor, that every single employee is under their authority and control, that they have the ability to fire any of them, that none of them are able to engage in any conduct that is outside their approval.

And so I think the Redeemer award -- and, frankly, we're going to have the same objection to the U.S. Trustee's offer of the ACIS opinion into evidence and the SEC order, because they're all related to conduct that took place prepetition

under old management.

1104, the only section upon which this motion is based, refers to current management. And I don't think that we want to spend a whole day. I mean, I just don't think it's relevant. And so if it's not relevant, then it's not admissible into evidence. The Court need not even get to the issue of sealing.

If the Court were inclined to introduce it into evidence, we would still request that it be marked under seal.

Specifically, Your Honor, under 107, the Debtor believes that there is a very compelling interest in keeping the Redeemer awards confidential. It does go into substantial allegations and findings pertaining to the Debtor's business practices. We do believe it contains confidential information, confidential commercial information, as required under 107. And the Debtor is very concerned. And you will hear the testimony from the independent directors about innuendo and rumor that can get into the marketplace and hinder the ability of the Debtor to reorganize and to go forward with their business operations.

So, in sum, Your Honor, I think we've got two points to make. One is that the Redeemer award has nothing to do with current management. There's no allegation that it has anything to do with current management. There won't be any facts to establish that the Redeemer award has anything to do

with current management. And we think that kind of ends everything.

But if Your Honor really is inclined to allow that into evidence, we would still ask that it be marked under seal.

THE COURT: Okay.

MR. MORRIS: Thank you.

MS. LAMBERT: Your Honor, the U.S. Trustee has two responses. And the first really goes to the motion to seal. Cause can be broader than the items listed. That goes all the way to *Little Creek* and is carried through into the Fifth Circuit's precedent on trustee appointment. The statute says "or similar cause."

So the U.S. Trustee has raised three issues in connection with the appointment of a trustee, and one of those issues is that the legal division of the Debtor has so much control over the Debtor's conduct that that establishes cause to appoint a trustee so that there is somebody to replace the (inaudible) decisions.

I anticipate the evidence will be that the Court in ACIS and that the arbitration award and the SEC opinion all go to those types of issues. That's number one.

Number two, technically, and it's not just a bureaucratic technicality under the facts, the management of this debtor has not changed. Individuals at Strand have changed. And the U.S. Trustee agrees that, under some circumstances, that might

resolve the issues. But not under the facts of this case. And that's because Dondero remains the sole shareholder of the Strand entity. And --

THE COURT: That's not management.

MS. LAMBERT: No, it's not.

THE COURT: It's an equity interest.

MS. LAMBERT: It's an equity interest. That's correct. Management has changed, but the management owes a fiduciary duty to the stockholder. And there are a lot of things --

THE COURT: Didn't they contract around that --

MS. LAMBERT: No.

THE COURT: -- in the settlement agreement?

MS. LAMBERT: Mr. Dondero contracted around various provisions, but the board did not. And the reason the board did not, I believe, is that the Delaware statute prohibits contracting around a fiduciary duty to shareholders. If you think about it, it makes a lot of sense.

THE COURT: I signed an order.

MS. LAMBERT: You did sign an order.

THE COURT: It's not a contract.

MS. LAMBERT: And you signed an order where Mr. Dondero constrained his rights to vote the stock and a variety of other things, but that doesn't change the fiduciary obligations of the board to Mr. Dondero's stock equity

interests. And the case law is that corporate fiduciary duties to shareholders, generally speaking, cannot be changed.

So it's a problem. It's a problem that, you know, it's not because I'm a genius, it's because I've played chess on this table a number of times that I know that this problem can arise. And it's an issue of conflict for the new board.

THE COURT: Okay. Let -- my brain needs to take things in a certain sequence. In all the arguments, we've bled over a little bit to your motion for appointment of a trustee. On the motion to seal, --

MS. LAMBERT: On the motion --

THE COURT: -- I am inclined, and tell me why I shouldn't, I'm inclined to punt. The objection is now moot. The motion to seal to which it attaches, in my mind, is moot. So I'm inclined to just deny for mootness, and then we --

MS. LAMBERT: Your Honor, --

THE COURT: -- punt to another day whether these arbitration awards get in in some context. Can -- is there any disagreement with that, so we can just roll into the U.S. Trustee's motion?

MS. LAMBERT: The U.S. Trustee is not subject to a protective order except one the Court's about to enter. At the time this was entered, the U.S. Trustee had no -- was not subject to the protective order, but we did receive these documents under the motion to seal order. So I need some

clarity on what I'm going to be doing.

This arbitration award was the basis, according to the declaration, the catalyst for the filing of this bankruptcy case. And the Court is considering and being asked to restrain its disclosure to the public. It's highly material to the facts of this case --

THE COURT: Okay.

MS. LAMBERT: -- generally.

THE COURT: All right. Well, again, my simple brain is going to take these things in sequence. I am denying the motion to seal merely for mootness, okay? I'm overruling the objection -- well, I'm deeming the objection of the Committee as moot, the omnibus objection to the CRO, the cash management motion. It's moot, and therefore the motion to seal relating to it is moot.

I haven't made any ruling broader than that with regard to this motion to seal.

Now, I realize there's the protective order I've just approved, and that has some relevance here, but we're done on the motion to seal. Okay? Denied for mootness only.

MS. LAMBERT: Dismissed for mootness?

THE COURT: Denied. Dismissed. Is there a distinction there that I'm glossing over?

MS. LAMBERT: I think, procedurally, dismissed for mootness.

THE COURT: All right. It's one or the other. Committee, you can draft the order as you think is appropriate. I dismiss/deny, either one.

All right. Let's --

MR. TWOMEY: Thank you, Your Honor.

THE COURT: Let's move to the motion for appointment of a trustee. I assume you're going to want opening statements. I've read the pleadings. They don't need to be lengthy.

OPENING STATEMENT ON BEHALF OF THE U.S. TRUSTEE

MS. LAMBERT: Judge Jernigan, the Debtor and the U.S. Trustee have agreed to do brief opening statements, and the U.S. Trustee is going to move for the admission of the binders to establish its case in chief. The Debtor has some objections, some of which you've already heard, to the U.S. Trustee's exhibits. And then we'll move to the Debtor's case in chief.

THE COURT: All right. In your opening statement, you're asking the Court to admit the ACIS opinion, the Redeemer Committee's arbitration award, the partial award dated March 3, 2019, the final award dated April 29, 2019, and an SEC order of September 25, 2014?

MS. LAMBERT: That is --

THE COURT: You're asking me, in your opening statement, to admit those?

MS. LAMBERT: No, Your Honor. I was going to do that after my opening statement, --

THE COURT: Well, I was confused.

MS. LAMBERT: -- but I will do it now if you'd like.

THE COURT: I misunderstood your statement.

MS. LAMBERT: I was going to make my opening statement, they're going to make their --

THE COURT: You may proceed.

MS. LAMBERT: All right.

THE COURT: You may proceed.

MS. LAMBERT: So, the issues in the motion to appoint a Chapter 11 trustee are three.

First, the management is the same because Strand is still the general partner. In some context, because the individuals at Strand have changed, it is material. On the other hand, it has created its own conflict, and that is the basis for the appointment of a trustee.

Number two, the legal team is central. I anticipate the evidence will be that many of the compliance issues that caused problems in past cases and have -- and the evidence will indicate that the management -- the legal management team ignored the advice of outside counsel. The Court's findings in the ACIS opinion go to individuals at the legal team who still remain there. And the testimony I anticipate will be that they continue to maintain control over compliance

decisions and other decisions at the Debtor, based on the testimony of the CRO.

And, finally, the efforts to keep this case *sub rosa* by filing expansive protective orders and seeking expansive sealing of documents that are central to the case continue to prevent the transparency that's necessary, and a Chapter 11 trustee would facilitate the transparency that the Court has always emphasized in all of its cases is a cornerstone of Chapter 11.

For these reasons, the U.S. Trustee seeks the appointment of a Chapter 11 trustee in this case.

THE COURT: All right. Other opening statements?

OPENING STATEMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: Good morning again, Your Honor. Jeff Pomerantz; Pachulski Stang Ziehl & Jones.

Your Honor, the burden is on the United States Trustee to demonstrate by clear and convincing evidence that cause exists for the appointment of a Chapter 11 trustee or that the appointment of a Chapter 11 trustee is in the best interest of parties. The Debtor intends to present the testimony of Mr. John Dubel, one of the Debtor's independent directors, which will demonstrate that the U.S. Trustee cannot come close to meeting its burden.

Rather, the testimony will unequivocally demonstrate that the alternative governance structure approved by this Court on

January 9th satisfactorily addresses any concerns with the Debtor's prepetition management, allows the parties to put the acrimony which marked the first three and a half months of this case behind them, and allows them to focus on efforts to restructure the Debtor's liabilities in an efficient and timely manner.

Specifically, the testimony will show that, since its employment, the board has been fully engaged in managing the Debtor's business. That a member of the board has physically been at the Debtor's headquarters for six of the seven days since their appointment, and that Mr. Dubel, the testifying witness, has devoted in excess of 80 hours to the engagement in the last 12 days.

The testimony will show that the board has met with department heads and received briefings from them regarding all facets of the Debtor's operations. And that, importantly, the Debtor's employees, including the legal department, are respecting the independent board members' authority and are fully cooperating with the board.

And lastly, that the board is effectively overseeing the implementation of the court-approved protocols.

Lastly, Your Honor, the evidence will demonstrate that the appointment of a Chapter 11 trustee would destabilize the business further, creating further uncertainty and adversely affect the Debtor's ability to restructure.

For these reasons, Your Honor, the Debtor opposes the appointment of a trustee. Thank you, Your Honor.

THE COURT: All right. Any other opening statements?

MR. TWOMEY: Your Honor, Dennis Twomey on behalf of the Committee. The Committee did file an objection, Your Honor, but does not intend to put forth any evidence. So if it's okay with Your Honor, we would prefer to just wait to make our statement until the end of the proceedings.

THE COURT: All right. That's fine.

MR. TWOMEY: Thank you.

THE COURT: Thank you. All right. Ms. Lambert?

MS. LAMBERT: Your Honor, Ms. Kippes has provided me with this Court's order in the *Adeptus* case, where the Court did include the standard language that the U.S. Trustee has about referring criminal or ethical obligations. I'm happy to present it to the Court.

THE COURT: All right. Well, you may. I've made my ruling, but --

(Pause.)

THE COURT: Again, I've made my ruling. And, you know, I don't know if this was heavily negotiated in that case. If it was, you know, fine. I just don't know.

MS. LAMBERT: If I may I approach the bench?

THE COURT: Okay. These are the proposed exhibits for the Trustee now?

MS. LAMBERT: Yes.

THE COURT: Okay.

MS. LAMBERT: Your Honor, I have an additional set of binders. I'd intended for the ones that I presented to the Court to be the work copies, and there to be an original set. Does the Court not need the original set?

THE COURT: Well, did you give one to Tom?

MS. LAMBERT: I did.

THE COURT: Okay. We're good, then. Well, Tom, don't work on yours.

MS. LAMBERT: No, I have an additional one.

THE COURT: Oh, well, if you have an additional one, fine.

MS. LAMBERT: Yeah.

THE COURT: Give it to Michael over here.

(Pause.)

MS. LAMBERT: Your Honor, the U.S. Trustee moves for the admission of all but Exhibit 6, which the U.S. Trustee hasn't been able to obtain, which is the transcript of the 341 meeting.

THE COURT: Okay. So, 1 through 5 and 7 through 11?

MS. LAMBERT: Yes, Your Honor.

THE COURT: All right. I know there are objections to some of these. Are there some that are not objected to?

MR. MORRIS: May I speak from here, Your Honor?

THE COURT: Yes.

MR. MORRIS: Okay. John Morris for the Debtor. The Debtor has no objection to Exhibits 4, 5, 8, and 9.

(U.S. Trustee's Exhibits 4, 5, 8, and 9 are received into evidence without objection.)

MR. MORRIS: With respect to Exhibit #7, which pertains to certain deposition designations, we've got a list here that we shared with the U.S. Trustee's Office yesterday that goes through each of the designations and identifies those with which we have objections, those with which we do not. We identified the bases for each of the objections, and we've also offered a limited set of counterdesignations, to which I understand the U.S. Trustee does not object.

If it would be easier, I could just mark this as an exhibit and give it to the Court for the Court's consideration.

THE COURT: All right. He's got a substitute, it sounds like, for Exhibit 7. Do you have an issue with that?

MS. LAMBERT: Your Honor, the U.S. Trustee put in the entire deposition, anticipating that the rule of completeness would be sought and due to the time constraints and the holiday weekend, not being able to change our depositions. So we don't have any objections to the rule of completeness and the entire deposition transcript, statement of a party, is in the binder under Tab 7.

THE COURT: All right. Well, --

MR. MORRIS: That's not what we were asking, Your Honor. We do not want the entire transcript admitted into evidence for any reason. The U.S. Trustee's Office specifically identified certain pages and lines, and we responded. And there's a very limited set of counterdesignations that we've offered simply for purposes, I think, of I say completeness in two instances and context in one. But nothing should go into evidence that is either unobjected to or if the Court overrules any of our objections. We don't want the whole transcript into evidence.

THE COURT: All right. So, do you need to look at his revised version of your Exhibit 7?

MS. LAMBERT: Well, I would, yes.

THE COURT: Okay. And, again, I understood he gave it to you earlier.

MS. LAMBERT: He gave it to me yesterday during the holiday.

The objections that they've made are on relevance, and the U.S. Trustee's response on the relevance is that the management issues go to the in-house counsel as well, and there's testimony about the in-house counsel. The only objections are on relevance, Your Honor, and because this is a bench trial, the Court has broader discretion on a relevance objection than it would in a jury trial, as the Court is

disciplined and can scan out those materials that are not relevant. And, more importantly, they are relevant to the case as the U.S. Trustee has alleged it.

MR. MORRIS: Your Honor, the relevance objections actually are not limited to issues of whether or not the testimony relates to current management. Some of them have to do with venue and I'm not even sure why it was designated. But we've made our objections, and I think it would be appropriate for the Court to rule. We understand that it's a bench trial, but that doesn't -- that doesn't negate the Rules of Evidence.

THE COURT: All right. Well, I certainly don't want to go back in chambers and read the entire deposition if that's not really what anyone was originally wanting me to do.

MS. LAMBERT: For this reason, Your Honor, the U.S. Trustee has designated the lines that were relevant in the U.S. Trustee's witness and exhibit list 7. And they corresponding have designated the lines that they feel are necessary for completeness and context.

THE COURT: Okay. I'm going to -- I guess I'm overruling the objection to 7. I will look at your deposition excerpts and I will look at what Mr. Morris has handed you as far as his supplemental excerpts. All right?

(U.S. Trustee's Exhibit 7 is received into evidence as specified. Debtor's supplement is received into evidence as

specified.)

MR. MORRIS: So then with respect to the exhibits, Your Honor, I don't know if you want to hear argument now on the objections.

THE COURT: All right. So, we have objections to 1, 2, and 3.

MR. MORRIS: Right. And those really just follow along the argument that I made earlier. All of these documents, the first one, I believe, is the ACIS opinion. The second is the Redeemer awards. The third is a more than five-year-old SEC cease-and-desist order. And our argument is that they should not come into evidence for any purpose. They all, to the extent -- you know, I'm not sure what they're trying to use with them, but, again, 1104 is crystal clear. It relates to the current management. None of the current managers were at the Debtor prior to two weeks ago, let alone at the time these orders were entered.

THE COURT: All right. Let me tell you where I am on this, Ms. Lambert. I almost think of this as a summary judgment issue on current management. I mean, I am inclined to agree with the Debtor's argument that 1104 -- is it (b)(1)? No. Which one? (a)(1). Just simply doesn't apply as a matter of law anymore because we're not talking about current management anymore.

Now, your U.S. Trustee motion lives another day, in my

view, because of 1104(a)(2), because you might still convince me that it's in the interest of creditors, equity holders, or other interests of the estate. But it almost feels like, again, a summary judgment issue on current management.

So, what is your response to that?

MS. LAMBERT: Your Honor, the Fifth Circuit case law is not limited to just management. Fraud, dishonesty, incompetence, or gross [mis]management of the affairs of the debtor by current management, either before or after the commencement of the case, or similar. Or similar cause. The U.S. Trustee is under 1104(a)(1). The Fifth Circuit precedent establishes that cause for purposes of (a)(1) should be considered like cause for bad faith or other factors such as *Little* --

THE COURT: So you're saying there's clear Fifth Circuit authority that says --

MS. LAMBERT: That --

THE COURT: -- similar cause --

MS. LAMBERT: -- inherent --

THE COURT: -- goes beyond the context of activities of current management?

MS. LAMBERT: Correct. Like inherent conflicts, which is what we have, an inherent conflict.

THE COURT: All right. Well, I am going to sustain the objection to those three, but without prejudice,

basically, to me reconsidering your offer, for example, during a rebuttal stage. Okay? If I hear something from witnesses that makes me see this in a different light. But my view now is that things changed when we replaced the current management structure of the Debtor, the management structure that it had when it filed bankruptcy, and all of these --

MS. LAMBERT: These issues -- these are not --

THE COURT: -- these orders --

MS. LAMBERT: Are not for current --

THE COURT: -- pertain to the prior regime.

MS. LAMBERT: No. The ACIS opinion, the Redeemer arbitration partial award, also go line by line to the legal counsel as being in control of decisions.

THE COURT: Okay. Again, I'm over -- I'm sustaining the objection to these exhibits, subject to you re-offering them after I've heard witness testimony --

MS. LAMBERT: But --

THE COURT: -- essentially as rebuttal evidence if you convince me that --

MS. LAMBERT: But this is my case-in-chief evidence.

THE COURT: I've ruled.

MS. LAMBERT: So, the Court is determining that cause must be management? Because these are being introduced for issues as to the counsel.

THE COURT: Well, give me -- make your best argument

again on why 11(a)(1) is broader than just the context of current management.

MS. LAMBERT: Cause can be items other than those that are listed. Or similar cause. That's what the statute says --

THE COURT: You're giving me a statutory interpretation I disagree with, but do you have Fifth Circuit authority binding on me --

MS. LAMBERT: Yes, Your Honor.

THE COURT: -- that --

MS. LAMBERT: It's cited in the U.S. Trustee's motion, and it is --

THE COURT: I mean, I know *Cajun Electric* and --

MS. LAMBERT: *Cajun Electric* involves an inherent conflict between --

THE COURT: But was that a context, I don't think it was, where a whole new slate of directors and managers had been put in place?

MS. LAMBERT: It was not a case involving wrongdoing. And so the facts are totally --

THE COURT: Conflicts of interest.

MS. LAMBERT: It involves directly conflicts of interest, yes, in the positions that must be decided by the controlling board.

THE COURT: I am --

MS. LAMBERT: And I --

THE COURT: -- asking you, had a whole new slate of officers and directors been brought in in *Cajun Electric*?

MS. LAMBERT: No, and that would not have resolved the --

THE COURT: It's been many years since I've read it.

MS. LAMBERT: That would not have resolved the problem in *Cajun Electric*.

THE COURT: Okay. So *Cajun Electric* is not --

MS. LAMBERT: But *Cajun Electric* stands for the proposition that cause is broader than the items listed here.

THE COURT: Of course. But it's still pertaining to current management. I'm not reading those words "for cause" out of the statute. I'm just saying I think --

MS. LAMBERT: Right.

THE COURT: -- they all pertain to current management.

MS. LAMBERT: But here's the thing on the Court's statutory construction.

THE COURT: I either have --

MS. LAMBERT: The Court has --

THE COURT: -- a binding case or not. I'm telling you what my interpretation of the statute is.

MS. LAMBERT: Right. Well, --

THE COURT: I either have a binding case or not.

MS. LAMBERT: -- *Cajun Electric* is binding and it establishes, as do *Little Creek* and other Fifth Circuit cases, in every context --

THE COURT: Okay.

MS. LAMBERT: -- where cause is used, --

THE COURT: But I am looking for a case on point.

MS. LAMBERT: Your Honor, this is a matter of statutory construction. The Court is reading out a full clause of the statute.

THE COURT: Okay.

MS. LAMBERT: Current management is at the --

THE COURT: I've ruled on the evidence. Do we want to talk about Exhibit 6, which was objected to, and Exhibit 10?

MS. LAMBERT: No. 6 is out. That was the transcript.

THE COURT: Oh, I'm sorry. 6 is out. So, 10 was the one that --

MS. LAMBERT: And 10, the purpose of 10 is to establish that Strand is -- Advisors is a Delaware corporation, and I think that's stipulated to.

THE COURT: Uh-huh.

MR. MORRIS: If that's the only fact for which it's offered, we withdraw the objection.

THE COURT: Okay. 10 is admitted.

(U.S. Trustee's Exhibit 10 is received into evidence.)

THE COURT: And 11, that's something that obviously I can take judicial notice of the docket entry in this case. Right?

MS. LAMBERT: Right.

THE COURT: Okay. So I just, I'll take judicial notice of 11.

All right. You may call your first witness.

MS. LAMBERT: Your Honor, the U.S. Trustee rests on its documentary exhibits.

THE COURT: All right. Debtor, your witness?

MR. MORRIS: Your Honor, before we call our case, we move for a directed verdict based on the evidence or lack thereof that was adduced.

THE COURT: Okay. Well, I'm going to deny that. I haven't had a chance to go back and look at this Frank Waterhouse deposition testimony. It may or may not resolve the issue. So, --

MR. MORRIS: Thank you, Your Honor. I just wanted to preserve the record.

The Debtor calls John Dubel.

THE COURT: All right. Mr. Dubel, if you could approach our witness box. Yes. Please raise your right hand. Please raise your right hand.

JOHN DUBEL, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Please be seated.

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good morning, Mr. Dubel. Take your time.

(Pause.)

MR. MORRIS: May I proceed, Your Honor?

THE COURT: You may.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Mr. Dubel, do you currently have a relationship to the Debtor?

A Yes, I do.

Q And can you describe for the Court your understanding of your relationship to the Debtor?

A Yes. I am one of the three independent directors appointed at the Strand Advisors, Inc. level, which is the general partner of Highland Capital Management, LP, which I'll probably refer to as HCMLP, just for brevity, Your Honor.

Q Okay. I may refer to it as the Debtor, if I may.

A You may.

Q Do you recall when you were appointed as an independent director?

A Yes. January 9th of 2020.

Q Okay. And prior to that time, did you personally have experience in bankruptcy and the insolvency areas?

A Yes, I do.

Q Can you describe that experience for the Court?

A My experience is about 35-plus years of working on all the arenas of the restructuring, both from creditor side, debtor side, as an investor in distressed. The majority of my work over the years has been in the debtor side of running companies as a CEO or a chief restructuring officer, sitting on boards of directors as an independent director for companies going through stress, either bankruptcy or restructuring.

Q And are there other independent directors at the Strand level today?

A There are.

Q And who are they?

A There are two of them. Russell Nelms, who is a retired bankruptcy judge from the Fort Worth area, and Mr. James Seery, who is an investor, also an attorney, but an investor in distressed, and has also practiced law.

Q Okay.

MR. MORRIS: I want to spend a few minutes, if I may, Your Honor, just asking the witness about the independent directors' activities --

THE COURT: Okay.

MR. MORRIS: -- since appointment.

BY MR. MORRIS:

Q Has the board, in fact, been engaged in managing the Debtor since being appointed?

A We have.

Q Can you describe for the Court generally the types of tasks that the independent directors have covered since their appointment?

A The first day of our appointment, on the 9th, we met as a board, which the board meeting actually continued through until the 10th, on that Friday, in which we sat down with the chief restructuring officer and his team. We met with the vast majority of the senior managers within the company to make sure that we could hear from them what was going on within the company and to convey to them what our duties and responsibilities were, so it was very clear to both the CRO and to all the management, the senior management, of what the responsibilities were for the independent board and how the protocol would work and how they would need to interact with us in a -- in what has now become a daily basis.

Q And since being appointed, have the independent directors received presentations from the Debtor and from DSI concerning the Debtor's operations, assets, and liabilities?

A We have.

Q Can you describe just generally the nature and scope of those presentations?

A Yes. So we've gone through, which is not untypical for

situations like this when you get involved, go through each of the departments and ask them to walk us through how their department works, what they're working on, key issues that are necessary for us to pay attention to immediately, key issues that we would look at further down the road, understand who the personnel are within the organization, their group.

And we, of course, because there were a lot of issues that were very time-sensitive, we reacted to those issues to be able to give them guidance on what we needed, what we needed further information for or what decisions we would make immediately on those decisions -- on those issues.

Q Since being appointed, have you -- have the independent directors also reviewed and authorized certain court filings?

A We have. We had a protocol in place where one or -- or all three, depending on the filings, are required to sign off on any filings before they're submitted to the Court so that we have a good understanding and can make sure that we have good -- good direction to our counsel as to what would be going forward.

Q Mr. Dubel, in the last 12 days, how much time have you personally spent managing the Debtor?

A In excess of 80 hours, probably closer to 90 hours. I don't keep a -- I'm fortunate I don't have to keep time records to the tenths of an hour like counsel does. But just in looking at my calendar, in excess of 80 hours. And it's

been literally every single day, Saturdays and Sundays included.

Q And to the best of your understanding, is the same true with respect to Mr. Nelms and Mr. Seery?

A Yes, it is. In fact, a lot of the time has been spent with them together on these issues. So, I, you know, I have firsthand knowledge of the amount of time that they are putting in also.

Q Can you describe for the Court the extent to which the three of you have been physically present in the Debtor's office since being appointed as independent directors?

A Yes. During the work days, which it's now I think been seven business days that the offices have been open, we have been there six of those days. Actually, seven, if you count this morning. We spent some time in the offices this morning working with folks before we came over here. And either one or all three of us have been there during those six days. We're trying to balance out the workload a little bit with the needs of the organization.

Q Can you describe for the Court the role that Mr. Sharp and DSI have played since the time that you were appointed as an independent director?

A Yes. Mr. Sharp, as the chief restructuring officer, and his team have provided us with a tremendous amount of information on the organization, on the assets of the various

different entities that the Debtor has to manage. Provided us with asset positions, liability issues, and has basically been very helpful in bringing us up to speed immediately on everything we need to know to understand how to operate the business, and acted in a very, you know, forthright manner.

Q Since being appointed, have the independent directors played a role in the implementation of the protocols that were part of the order appointing them?

A Yes. We have made sure that everybody -- all the senior managers in the organization understand what the protocols are and worked with either DSI or directly with us, depending on the facts and circumstances of the particular situation, so that the protocols are being followed. And we continue to do that on a daily basis.

Q Have you and the other directors had an opportunity to review proposed transactions since being appointed?

A Yes, we have, starting on Thursday, January 9th, through, actually, this morning. While we were sitting in court, we got confirmation of things that were taking place as it related to the protocols.

Q Since being appointed, have you and the other directors communicated with the Creditors' Committee and its professionals?

A We have. In accordance with the protocol, we have, but we would be doing that anyway, even if the protocols didn't

require it, because we feel it's good for the transparency in this case. But we have met with the Committee professionals many times and with the Committee members themselves via conference call.

Q Let's shift gears a little bit and talk about your interaction and the interaction of the other directors with the Debtor and its employees. Have the directors sought information from the Debtor's employees as part of the tasks that you've just described?

A Yes, we have.

Q And can you describe for the Court, you know, either by name or by title or by department, the places within the organization from which the directors have sought information?

A Yeah. So, I can kind of -- maybe it's easiest by department. There have been investment decisions that have been needed to be made. Part of those investment decisions require compliance reviews and a legal understanding of those decisions. So we have reached out to the three different department heads or the individuals responsible within those departments for information that was necessary for us to understand and be able to make decisions.

So, as an example, for compliance, making sure that whatever it is that's being asked of us is in accordance with all of the compliance requirements under the various different regulatory authorities, looking at it from a legal point of

view, making sure we understand how that transaction legally might fit in with something else, whether it's a related party issue or making sure that it fits in with the protocols.

And then, obviously, from the actual asset manager point of view, the trader, understanding how the impact of our decision would be able to be implemented in the ordinary course process of trading a position as necessary or holding onto a position.

Q To the best of your knowledge, have the independent directors timely received the information that was sought to fulfill your duties?

A We have.

Q And do you have any concerns that anyone at the Debtor has withheld information from you or the other directors?

A I do not. In fact, I think they've been very forthright in presenting us with information that we have requested and been very responsive.

Q To the best of your knowledge, have either of the other directors ever expressed any concern to you about the flow of information?

A No, they have not.

Q Do you have any reason to believe that any information provided to the independent directors by any of the employees at the Debtor is false or inaccurate?

A No, I do not.

Q Have you and the other independent directors requested to meet with certain employees?

A We've requested to meet with many of the employees, yes.

Q Can you just describe for the Court, again, either by title or by department, the employees with whom the directors have met thus far?

A Pretty much every single department head, whether it's the finance office through the chief financial officer, the controller, the -- looking through, then, to the chief compliance officer, the trading groups for a variety of different entities that we have under management. Our private equity group, the leadership in that. The legal group, looking -- we've met with pretty much everybody in the legal group to understand various issues and get a better understanding of the business. Human resources, et cetera.

Q Um, --

A Communications. Forgot about that one.

Q Have you or any of the other independent directors ever expressed any concerns about the reliability of information provided by any of the Debtor's employees?

A No, we have not.

Q Are you generally familiar with the Court's order that appointed you as an independent director?

A I am.

Q Are you generally familiar with the duties and

responsibilities that have been bestowed upon you as set forth in that order?

A I am.

Q Have you and the other independent directors discussed the scope and responsibilities for your duties as an independent director?

A We have.

Q And do you have a general understanding as to what those duties are?

A Yes. As the independent directors of Strand, we are the general partner for the Debtor's estate, HCMLP, and it's my understanding that those duties lie to -- go to the Debtor's estate, to maximize value for the Debtor.

Q And is it your understanding that the order that was entered was an order that was entered after the Committee and the Debtor reached an agreement for the appointment of new management?

A That is my understanding.

Q Okay. Did -- have the independent directors taken any steps to make sure that the Debtor's employees are aware of your duties and responsibilities?

A Yes. From the first day that we got there, as I mentioned earlier, we've met with all the department heads, explained to them what the roles and responsibilities are. Walked through with them the protocol that is laid out in the order. Asked

them to communicate that down into the organization.

We continue to walk around the offices. All of our employees, except with the exception of one or two who are overseas, all reside in the offices here in Dallas, and so we've walked around and met with many of the other employees. We've had our communications department put together communication that's been posted on the Intranet and -- the Intranet, the internal communications, and also on the company's website for all employees to see and understand. And we actually will be having an all-hands meeting this afternoon with all of the employees.

Q Do you have any concerns that any of the Debtor's employees either don't understand or don't respect the authority and role of the independent directors?

A I do not.

Q Have either of the other independent directors ever expressed to you any concern at all that any of the Debtor's employees either don't understand or fail to respect the authority and role that the three of you play?

A I've not heard any concerns, no.

Q Do you have any concerns at all that the Debtors engage in any transactions that don't have the independent directors' knowledge and approval?

A I do not.

Q Do you -- have the independent directors taken any steps

to try to prevent any unauthorized transactions from taking place?

A Yes, through communications directly with all of the individuals that could have the authority to do -- or the apparent authority to enter into transactions, making it very clear what our role and responsibility is, making it clear what they have to do in order to execute anything.

We've also engaged, through working with the chief restructuring officer and his team, to have them be continuously looking at transactions that take place through the Debtor's systems.

Q So, is it your understanding that the CRO has visibility into the movement of the Debtor's assets?

A Yes.

Q Okay. Do you have any concern that the independent directors are not firmly in control of the Debtor?

A I do not.

Q Have either of the other independent directors expressed any concern to you at all that the independent directors might not be fully in control of the Debtor?

A They have not expressed that.

Q I think you were in the courtroom for the argument that preceded your testimony; is that right?

A I was.

Q Um, --

A Or, except for a very short period of time.
Q Pursuant to the order that was entered by this Court, is it your understanding that the independent directors have the ability to fire any employee of the Debtor?
A That is my understanding and that is exactly what we have the authority to do.
Q And is it your understanding that the independent directors have the final authority over transactions that are being made on behalf of the Debtor?
A It is very clear in my mind that we have that authority.
Q Is there any aspect of the Debtor's business in which any employee of the Debtor has authority that exceeds any of the independent directors'?
A When you say exceeds, meaning overrides?
Q Correct.
A No. There's no -- no one has the authority that overrides our decisions. We may authorize people to do things, but no one has the authority to override our decisions.
Q And have the independent directors made that known to all of the department heads?
A We have.
Q And have the independent directors made that known to all of the employees in the legal department?
A We have.
Q And have the independent directors made that known to all

of the employees in the compliance department?

A I think there's only one person who's in Compliance, but --

Q That's --

A Our chief compliance officer. Yes.

Q I do love precision. Thank you.

Does the independent -- do you or any of the independent directors have any concerns at all that the message of control has not been adequately conveyed to the people who are executing your orders?

A I don't have any concerns about that.

Q Okay. Do you believe the independent directors -- have you begun to kind of familiarize yourself with the Debtor's operations, structures, and assets?

A Yes, we have.

Q And does the Debtor oppose the motion for the appointment of a trustee at this time?

A Yes, the Debtor does.

Q Can you explain to the Court why the Debtor opposes the appointment of a trustee at this time?

A Yes. There is a new management team in place, led by the -- you know, with the independent directors in place, having the authority over all of the actions of the Debtor. And we believe that, based upon the expertise of the three individuals, that we have the right expertise to run the

company, between legal, trading, restructuring, investment management, that the expertise that we bring to the table is what is necessary to run the company, and that if there were a change in that it would obviously cause a tremendous amount of disruption in the business. If there were a Chapter 11 trustee appointed, that it would have a tremendous negative impact on the Debtor's ability to create the greatest value for our creditors and other stakeholders.

Q Have any of the Debtor's employees quit since the independent directors were appointed?

A We've lost a couple of people. I just don't remember the exact timeline. But it's -- it has happened. It's -- you know, we've had three -- I think three resignations.

Q Okay. Does the Debtor have any concerns that if a trustee is appointed that the Debtor will be at risk of losing senior -- senior management or other -- you know, senior employees or other employees of the Debtor?

A Yes, we do.

Q And what's the basis for that concern?

A Our goal here is to reorganize the company and create the greatest value for our creditors and others. And if an appointment of a trustee was to be so ordered, that it would send the wrong message to the employees and the employees would lose confidence and seek employment elsewhere. And it's a vibrant market for employees right now.

Q Based on your experience in the insolvency area, do you have a view as to how the appointment of a Chapter 11 trustee might be viewed in the marketplace?

A This is a business that trades on credibility. It's not walking into a store and buying an item off of a shelf of a company that's in Chapter 11, but it's all about the credibility of the individuals. And if an appointment of a Chapter 11 trustee was so ordered, we think it would have a negative impact on our ability to continue to have that relationship with the third parties that we have to deal with on a daily basis.

Q Do you have a view as to whether or not the appointment of a trustee could impair the Debtor's ability to reorganize?

A I do.

Q And can you share that view with the Court?

A I think it's for the exact same things that I just mentioned. Our ability to create the greatest value and reorganize and -- would be impacted by, you know, loss of personnel who might not want to work in that environment and also the loss of the relationships in the trading partners that we have to deal with. And so it would -- it would inhibit our ability to reorganize properly for this and create greatest value.

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

THE COURT: All right. Cross?

CROSS-EXAMINATION

BY MS. LAMBERT:

Q Hello again. We talked before the hearing. But my name is Lisa Lambert. I'm with the U.S. Trustee's Office.

A Good morning, Ms. Lambert.

Q How are you?

A Good.

Q So, you're an independent director of Strand, and Strand is the general partner of the Debtor, right?

A That's correct.

Q And your testimony is that the duties to the Debtor trump any duties to the stockholders of Strand, right?

A It is my testimony that, as the general partner, our duties are to the Debtor's estate and to protect the Debtor's estate and create the greatest value there, which would ultimately benefit Strand.

Q Okay. So is it your testimony that there's no duty to the stockholders of Strand?

A Our duty is to the Debtor's estate as the general partner, and that would then protect Strand.

Q So your perspective is the duties are not in conflict? They are coextensive, right?

A I apologize. I don't know -- I'm not a lawyer, so --

Q I'm going to --

A -- the reference to coextensive might be something that's

a legal term, but --

Q But the duties are the same, --

A Uh, --

Q -- is your testimony?

A I don't know if they're the same. My -- my view is the duties are to the Debtor's estate as the general partner of Strand.

Q Okay. Mr. Dondero is the -- still a stockholder of Strand, right?

A As I understand, yes.

Q And Mr. Dondero currently is an employee of the Debtor?

A He is a nonpaid employee of the Debtor.

Q So if the decision came to terminate Mr. Dondero as an employee, do you think it impacts his -- your fiduciary role to him as the stockholder?

MR. MORRIS: Objection, Your Honor, to the extent all of this calls for a legal conclusion. I just want to make sure that we're just talking about the witness's lay understanding.

MS. LAMBERT: No. His understanding.

THE COURT: Okay. Over...

MS. LAMBERT: His under...

THE COURT: Overruled.

BY MS. LAMBERT:

Q What is your understanding?

A I'm sorry. Could you repeat the question, Ms. Lambert?
Q Mr. Dondero is an employee of the Debtor, whether unpaid or not. And does the board's -- the directors' decisions about whether to maintain him or terminate him, is that impacted by his holding all of the stock of Strand?
A From my perspective, it would have no impact. If there was a decision to be made to keep him on board or terminate, it would have no impact as to what his holdings are in Strand.
Q Why is that?
A Because our duties in managing the Debtor would be to figure out what the right answer is for the Debtor. And if that decision was to either keep him in place, as we currently have, or to terminate him because there was no longer a need for him at that level, it would be a decision we would make on behalf of managing the Debtor.
Q You would agree with me that he might have a different perspective on that, right?
A I don't know what his decision -- what his view would be. It may be different; it may not be. It depends on the facts and circumstances at the time that we would have to make that decision.
Q Now, you testified that you've been very busy with the activities of the Debtor. Did you have an opportunity to read the Court's ACIS opinion?
A Yeah. I've read multiple decisions or multiple filings on

-- on ACIS. I --

Q I'm talking about the published opinion. It's a little bit lengthy. You would have remembered seeing it, I think.

A I believe I did read that prior to our appointment, yes.

Q Okay. And then did you also read the Redeemer arbitration awards?

A I've read a few different Redeemer arbitration awards. I think there were two or three of them.

Q Two.

A Yeah.

Q And I'm talking about the partial --

A Yeah.

Q -- and the final judgments.

A Yes, I have.

Q Okay. You're aware that both of those opinions talk about the attorneys testifying with plausible deniability, --

MR. MORRIS: Your Honor?

MS. LAMBERT: -- the in-house counsel?

MR. MORRIS: Your Honor, I would just ask the witness not to answer the question until I state my objection.

This is exactly why we objected to the relevance of these exhibits into evidence, and now she's just doing orally what she has not yet been able to do with the admission of the documents.

She should establish a foundation first that there's

anybody in any of those decisions who are in control of the Debtor or who are deemed to be current management. Because the evidence at this point I think is undisputed that the independent directors are in fully -- are in full control of this enterprise. They -- everybody reports to them. All decisions are made with their knowledge and approval. And there's no evidence to the contrary.

So I don't, you know, I don't think the U.S. Trustee should be able to get through the back door what they're not able to get through the front door.

THE COURT: I sustain that objection.

BY MS. LAMBERT:

Q Have you worked with the in-house legal department?

A Of the Debtor?

Q Of the Debtor.

A Yes.

Q Can you name for me the employees of the legal department of the Debtor?

A I probably can't name all of them, but starting from the top, Scott Ellington. Isaac Leventon. J.P. Sevilla. Tim Cournoyer. Thomas Surgent is an in-house -- he's a lawyer. He's also our chief compliance officer. I don't know technically which -- whether he covers both. And then there have been others in the group that I -- I don't remember all the names. But those are the main folks that we've had to

deal with.

Q And Compliance is part of Legal, right?

A I don't technically know. I think it stands on its own. But Mr. Surgent is an attorney, as I understand.

Q And how often have you dealt with Mr. Ellington?

A In the seven days that we've been there, probably five or six of them he's had to travel for, you know, for work, so we haven't always, you know, seen him every day. But pretty much every day, including yesterday, when we were in the office.

Q And Mr. Leventon, how often have you consulted with him?

A Unfortunately, not as often as we would like, because Mr. Ellington -- Mr. Leventon had an auto accident that he was involved with, so he's been out of the office. But I've dealt with him a little bit over the last several days as he, you know, as he's allowed to -- as he's recuperating.

Q So, the board has been talking with the legal department almost every day, right?

A Yes.

Q And the legal department in this particular business is particularly important for management decisions, right?

A It's important to get information from them to inform us as the managers, meaning the board, yes.

Q You rely on their advice, don't you?

A We take into consideration what they -- what they share with us, yes.

Q And they have expertise in the areas of the legal issues that are central to this case, right?
A They have expertise. Fortunately, the board also has a tremendous amount of legal expertise, both in the -- specific to investment management and also corporate governance. And having been a CEO and a CRO and been involved for the last 35 years in some highly-contentious, litigious litigations, I've unfortunately picked up a little bit of how to understand what is given to me and interpret it.
Q All right. Have you had any hesitation in relying on their legal advice?
A No.
Q Are you aware that the -- that the Redeemer's arbitration award determines that their advice ignored the advice of outside counsel?
MR. MORRIS: Objection, Your Honor. Relevance.
THE COURT: Sustained.
MS. LAMBERT: Your Honor, the relevant --
BY MS. LAMBERT:
Q Are you aware that the ACIS Court also determined that Mr. Ellington and Mr. Leventon were providing affidavits for the Debtor rather than the Debtor, --
MR. MORRIS: Object, Your Honor.
MS. LAMBERT: -- Mr. Dondero?
MR. MORRIS: Same objection.

THE COURT: Sustained.

MS. LAMBERT: Your Honor, these -- both of these questions go to our presentation that the in-house counsel is not providing advice that's in the interest of the Debtor and has ignored outside counsel. It's relevant to whether -- to the case if current management knows that, which the evidence is unclear, and whether they're doing something about it. That's the United States Trustee's case.

THE COURT: All right. I don't think you've laid the foundation to go this route.

MS. LAMBERT: Okay.

BY MS. LAMBERT:

Q You're relying on the advice of the legal counsel on a daily basis, right?

A We take information from counsel and we process it. We talk as a group, meaning the board. And as I referenced earlier, two of our board members happen to be experienced lawyers, one of whom is an expert in corporate governance and bankruptcy law, having been a judge for 14 years. We sift the information that comes from all different parties and make our decisions based upon our experience in these situations. We talk to outside counsel also as necessary.

Q Are you aware of any concerns about the advice that your legal counsel in-house has provided to you?

A I'm sorry. Could you -- are -- excuse --

Q Are you aware of any concerns about the advice that the in-house legal counsel has provided to you?

A Nothing that's been provided to us, no. No concerns about that.

Q Are you aware of any concerns historically?

A I understand that there -- and have read that there were issues related to that on a historical basis, yes.

Q Has that impacted the way you interact with the legal counsel?

A Sure. A healthy dose of skepticism is always important whenever you get into a new situation, whether there are those allegations or rulings or what have you. It's always important to have a healthy set of skepticism on these things.

Q All right.

MS. LAMBERT: Your Honor, the U.S. Trustee moves for the admission of U.S. Trustee's 1, 2, and 3.

MR. MORRIS: *Voir dire*, Your Honor?

THE COURT: Pardon?

MR. MORRIS: *Voir dire*? Can I just ask a few questions?

THE COURT: You may. Uh-huh.

VOIR DIRE EXAMINATION

BY MR. MORRIS:

Q Sir, has -- have the members of the legal department been cooperative?

A Yes.
Q Have the members of the legal department been responsive to the independent directors' requests?
A Yes, they have.
Q Have the members of the legal department been authorized to do anything without the independent directors' knowledge and approval?
A No.
Q Are the independent directors aware of any member of the legal department having done anything without the knowledge and approval of any of the independent directors?
A I am not.
Q Do the members of the legal department all report to the independent directors?
A They report through the legal department organization, which reports to the independent directors.
Q And the independent directors ultimately have the sole authority as to whether or not to fire any member of the legal department, as true with any member of the organization; is that right?
A That is correct.
Q All right.

MR. MORRIS: I have no further questions.

MS. LAMBERT: Your Honor, the U.S. Trustee contends that this is -- these opinions are highly relevant to the

board's understanding of the current situation. The cooperativeness and the responsiveness and the doing of the acts for the board members is not the issue if the information that is being provided to the board is fundamentally unreliable. And that's the issue the U.S. Trustee wants to raise.

THE COURT: Okay. I sustain the objection and I overrule the request to have the Court admit Exhibits 1 through 3.

MS. LAMBERT: Your Honor, is it necessary for me to do an offer of proof, given that these exhibits are already in the binder and have been -- everybody is familiar with the desire that they be admitted?

THE COURT: All right. Well, if you're not wanting any testimony, if you're just wanting the admission of the exhibits, they will certainly be included in the record as offered but not admitted. So if there's an appeal, they're in there for the Court of Appeals to see.

CROSS-EXAMINATION, RESUMED

BY MS. LAMBERT:

Q So, it's your testimony that the Debtor's legal counsel have been cooperative, responsive, and doing acts for the board, and that ultimately the board acts as the sole authority, right?

A That's correct.

Q Has the legal counsel provided the board with any advice that they have -- that the board has disagreed with?

MR. MORRIS: Objection, Your Honor. To the extent that this calls for the disclosure of attorney-client communications, I would object.

THE COURT: All right. If you can answer without disclosing privileged information, you may answer.

THE WITNESS: Okay. May I ask if you could repeat the question, just so I --

BY MS. LAMBERT:

Q Has the board reached a determination that disagreed with the legal counsel's recommendations?

A I don't believe so.

Q Has the board sought outside legal counsel after receiving a report from in-house counsel that they -- that they wanted more information on?

A That would be very common practice for getting information from in-house counsel, then getting additional information from outside counsel. It's -- we have done that. I would say that's just a normal part of any organization, and I would do that in every situation I'm involved with, --

Q Okay. But --

A -- if it was so relevant.

Q But I'm asking a little different question, which is, to date, in this case, has the board done that?

A Have we sought advice from outside counsel on something --

Q That the in-house counsel provided advice on.

A Yes. And as I said, I think that's just a normal part of our understanding information so that we can make decisions.

Q Now, you testified that having a trustee would impact the Debtor's credibility in the market, right?

A That's my --

Q And ACIS --

A -- view.

Q -- had a trustee, correct?

A As I understand, yes.

Q And ACIS reorganized, didn't it?

A I am not familiar with the ACIS case, you know, whether it was a reorganization. I'm just not familiar with the details of it.

Q Okay. So, earlier, I had asked you if you were familiar with the ACIS opinion and with the ACIS case, and my understanding was you had read documents in the ACIS case. Right?

A I've read them. I haven't studied them. I believe ACIS was a reorganization, but I'm not familiar with the details of it.

MS. LAMBERT: No further questions.

THE COURT: All right. Any other examination?

MR. MORRIS: No, Your Honor.

THE COURT: All right. Thank you. You're excused.

(The witness steps down.)

THE COURT: Does the Debtor have other evidence?

MR. MORRIS: No, Your Honor. The Debtor rests.

THE COURT: All right.

MR. MORRIS: Oh, I apologize. The only exhibit that we did have that we noted on the exhibit list was the Court's order and the exhibits that appointed the independent directors. The protocols. We'd just --

THE COURT: All right. Well, the Court can take judicial notice of those.

MR. MORRIS: Exactly. And just for the record, it's at Docket #354-1.

THE COURT: Thank you.

MR. MORRIS: And I have a binder of exhibits if --

THE COURT: All right. You may approach with that. Thank you.

All right. And the Committee said it did not intend to put on evidence, correct?

MR. TWOMEY: That's correct.

THE COURT: All right. Any rebuttal evidence?

MS. LAMBERT: No, Your Honor.

THE COURT: All right. I'll hear closing arguments.

CLOSING ARGUMENT ON BEHALF OF THE U.S. TRUSTEE

MS. LAMBERT: Your Honor, Section 1104(a) is

structured with the clause about fraud, dishonesty, and gross [mis]management, referring to -- management. Thereafter, the statute says "or for other cause." The structure grammatically of the statute is important because the management provisions are one set and the "or for cause" is another.

The Fifth Circuit precedent is clear that there can be other types of cause. The inability to manage this Debtor and to rely on its in-house legal counsel is pervasive in the prior opinions and remains an issue today.

It is for this reason that the U.S. Trustee sought the admission of Exhibits 1 through 3. There are not just issues with Mr. Dondero, but there remains an issue with Dondero, which brings me to point two, which is that the Delaware corporate statute requires that there be a fiduciary duty to him. There are many contexts where one can contract around a fiduciary duty in partnerships, limited partnerships, but not in corporations, because corporations have the stockholder and creditor function. There is no evidence, no evidence, about what creditors there might be of Strand. We have no knowledge of that. And the Delaware case law is that there is a fiduciary duty to creditors.

But if there are no creditors, then that duty runs to Mr. Dondero. This remains a conflict of interest issue for consideration. And it is an actual conflict, especially

because Mr. Dondero remains in the Debtor as an employee. And the evidence is that, today, he, Mr. Ellington, and Mr. Leventon, all of whom have been cited in prior opinions as trying to establish plausible credibility, remain at the Debtor, advising the management. And the board -- no one questions that the board is some of the best people that we have. But the issue is that, as a board, they are separate from the Debtor, and there is a CRO in, but the CRO, I anticipate the evidence will be that the CFO relies on the in-house legal counsel, and that's -- the deposition transcript cites go to the reliance on in-house legal counsel for major decisions.

And so this remains a concern. And it is within Section 1104.

Finally, Your Honor, the effort to seal matters, including the *sine qua non*, the catalyst for the bankruptcy filing, the arbitration award, impede the ability of the public to understand the facts of this case, impede the ability of the regulators to understand this case, and it's too far. For these reasons, the U.S. Trustee moves for the appointment of a Chapter 11 trustee.

THE COURT: Let me just ask. I'm going to hit on something you said there at the end, because you've said it a few times. It concerns me a little. The words I remember Mr. Pomerantz using on day one, and maybe using a couple of times

thereafter, was that the Redeemer Committee's arbitration award created a liquidity problem at the Debtor's level and that was the impetus for the bankruptcy.

MS. LAMBERT: Yes, Your Honor.

THE COURT: That is a little bit more of a narrow statement than what I think your last sentence has implied.

MS. LAMBERT: Well, --

THE COURT: I mean, I hear what you're saying, tell me if I'm hearing wrong, that there are statements in that arbitration award that were the impetus for the bankruptcy filing and the public needs to hear that. But that's not what I heard Mr. Pomerantz say from day one. He said the arbitration award, $180 million in amount or whatever it was, in that neighborhood, caused a liquidity problem that caused the bankruptcy.

MS. LAMBERT: Yes, Your Honor. But the testimony is today that the Debtor's credibility in the market is important, and the Redeemer arbitration award and its basis -- I mean, it's not just that it was $180 million. It's that there was a basis for it -- they caused this bankruptcy [five-second audio recording malfunction at 11:40 a.m.] award.

THE COURT: Okay. Well, again, maybe I shouldn't have opened up that can of worms, but I just felt like there was incorrect --

MS. LAMBERT: The --

THE COURT: -- repeating of the words of the Debtor.

MS. LAMBERT: The Court is right to be precise, and it -- I suppose, from the U.S. Trustee's perspective, it's the straw that broke the camel's back, and that's what we meant in terms of a catalyst. And it is a judgment. But normally the public has the opportunity to know what the basis of the judgment is. And the basis of that ruling.

THE COURT: All right. Well, again, this is an issue that may come up on another day and the Court will decide whether it needs to come into the record. But, today, I didn't think it was relevant for the motion before the Court.

All right. Anything else?

MS. LAMBERT: Finally, Your Honor, the evidence is that, historically, the Debtor has had oversight externally as a result of the same kind of problems that led to this, and yet that did not work. And so for all those reasons, the U.S. Trustee moves for the appointment of a trustee.

THE COURT: All right. Other arguments?

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: Good morning again, Your Honor. Jeff Pomerantz; Pachulski Stang Ziehl & Jones; on behalf of the Debtor.

Just to pick up on the last point of your colloquy with Ms. Lambert, Your Honor was correct. My statements at the beginning of the case were that the reason the case was filed

was because of the Debtor's inability to satisfy the award which was about to be confirmed in a judgment. It's not inconsistent with what the testimony you heard today that the disclosure of that award in the current context, where management has completely changed, is totally irrelevant and would be unduly prejudicial, and that is why we have consistently sought to have that sealed and why we have indicated to Your Honor and Your Honor has ruled that it's not relevant for today's hearing.

Your Honor, the Trustee seeks appointment of a Chapter 11 trustee, notwithstanding Your Honor's January 9th approval of a settlement between the Debtor and the Committee that restructured management. And I think it's important to just highlight some of the things that the settlement that Your Honor approved did.

First, it involved a sweeping governance change, highlighted by the establishment of a new board of directors with three individuals who have exceptional reputations and a diverse skillset that makes them unquestionably qualified to manage a complex business such as the Debtor.

It also involved the removal of Mr. Dondero as the Debtor's decision-maker, along with his agreement, which is the subject, as Your Honor pointed out, of a separate court order, not to interfere with the board's performance of its duties, along with his agreement not to terminate substantial

contracts his affiliated entities have with the Debtor.

The settlement also established detailed operating protocols which provide significant transparency regarding the Debtor's operations and ensures, among other things, that the Committee will have visibility into any related transactions before they are consummated.

The settlement also granted standing to the Committee to investigate and prosecute certain insider claims, along with broad access to the Debtor's books and records, including attorney-client information necessary to prosecute those claims. While perhaps not unprecedented, this type of authority being granted to Committee at this early in the case is rarely granted and is quite unusual.

It is against this backdrop, Your Honor, that the Court must evaluate the Trustee's motion. The applicable standard, as you have heard, is under 1104 of the Bankruptcy Code, which provides that the Court shall appoint a trustee for cause or if the appointment is in the best interest of parties in interest or for other cause.

As Your Honor wrote in the *Patman Drilling* case years ago, "Appointment of a Chapter 11 trustee is a draconian remedy, and there is a strong presumption that Chapter 11 -- a debtor shall remain in possession."

And notwithstanding the Trustee's argument to the contrary, the courts in the Fifth Circuit, including Your

Honor in *Patman Drilling*, follow *Cajun Electric* and require a movant to demonstrate that appointment of a trustee is justified by clear and convincing evidence.

Not only has the U.S. Trustee not met his burden, but the facts demonstrate overwhelmingly that allowing the Debtor to remain in possession is clearly in the best interests of all parties in interest. In fact, no stakeholder supports the U.S. Trustee's motion, and the Creditors' Committee, which comprises the vast majority of unsecured claims in this case, opposes the motion.

This bankruptcy case has been pending for over three months and has been marked by significant acrimony and litigation over governance and control. With the installation of the board, the establishment of the protocols, the case is finally on a positive trajectory, and the Debtor, through the independent board, is now in a position to sit down and cooperatively work with the Committee to develop a plan so that the Debtor can exit Chapter 11 as quickly as possible. Appointment of a Chapter 11 trustee would create further uncertainty, adversely affect operations, and further delay the efforts of the Debtor towards developing an exit strategy.

The Trustee has advanced three principal arguments on why the Court should appoint a Chapter 11 trustee, none of which are persuasive.

First, the United States Trustee argues that a Chapter 11

trustee is the only remedy to address various forms of malfeasance that courts have found the Debtor to have committed in the past. In so arguing to the Court, the U.S. Trustee ignores the court-approved settlement, ignores the existence of the independent board, ignores the removal of Mr. Dondero from any position of control in the Debtor.

Section 1104 authorizes the appointment of a trustee for cause, including fraud, dishonesty, incompetence, or gross [mis]management of the affairs by current management. Case law is clear that the focus is on the actions of current management and not prior management. And, in fact, in the *Bayou* case from the Second Circuit, which we identified and cited, the Court refused to appoint a Chapter 11 trustee where new management had been installed and there had been no allegation that new management had committed any of those acts.

The Debtor doesn't dispute that, prepetition, the Debtor was involved in litigation where the courts found wrongdoing by the Debtor. However, those findings are irrelevant if the Debtor is under new management. New management, through the independent board, is now in control, managing the Debtor's operation. And importantly, James Dondero is not in a position of control anymore. And as I said, there have been no allegations that current management has engaged in any type of fraud or mismanagement or done anything not to engender

confidence by the Court or the creditors. The independent board consists of individuals with sterling reputations with substantial skill.

Second, the Trustee argues that the independent board is incapable of effectively managing the Debtor's affairs; the structures implemented in other situations to combat Debtor's bad acts have failed. Essentially, the Debtor [sic] is arguing that other members of management, including the legal team, may remain employed by the Debtor and the board will not be able to prevent the Debtor from engaging in the same type of activities that occurred prior to Chapter 11.

There is absolutely no evidence, Your Honor, to support the U.S. Trustee's unfounded allegations. Rather, all the evidence before Your Honor contradicts this argument and demonstrates that the independent board has been and continue to be an independent fiduciary to the estate and ensuring that the Debtor takes only actions that are, in fact, benefiting the estate and all parties in interest.

The only evidence before Your Honor regarding this is the testimony you heard from John Dubel, one of the independent directors. He testified as follows. Since his appointment was effective on January 9th, at least one member of the board has been present at the Debtor's headquarters for six of the seven business days. Mr. Dubel himself has worked over 80 hours on the Debtor since the 9th. He testified that he

believes that other members of the board have put in the same amount of work.

The board conducted a board meeting immediately upon its appointment on January 9th and January 10th, and has had many other informal discussions among themselves on a daily basis.

Mr. Dubel testified that the board has received comprehensive presentations from counsel, from the CRO and his team, and from each of the Debtor's department heads, and is in daily communications with all such parties. He testified that such presentations have covered the Debtor's structure, organizations, operations, assets and liabilities, and the rights and responsibilities of the board.

He testified that the board is reviewing and overseeing on a daily basis implementing -- implementation of the protocols approved by the Court.

He testified that, as any good board and fiduciary would do, he has reached out and he has been in contact with the Committee, the Committee members and their advisors on a variety of issues. He's also testified that he has -- that the board has reached out to department heads, who have provided information without question to the board, and that he believes and other members of the board believe that all such information is truthful and accurate information.

He's testified that the authority of the board has been communicated to employees, and that he believes and other

directors believe that the employees are respecting such authority and that the CRO and the independent board are providing critical interaction with the other Debtor's employees and approval of transactions that are required.

He's testified that resolution of the corporate governance will now allow the Debtor to move forward towards pursuing a plan, and that appointment of a trustee would be very divisive to the Debtor's operations and adversely affect operations.

In fact, Your Honor, the uncontradicted evidence is that the independent board members are doing exactly what an independent fiduciary like the trustee should or would be doing: assessing the Debtor's operations and assets and liabilities and evaluating how to maximize the Debtor's assets for all stakeholders.

Moreover, the Trustee's argument that prior structures implemented were insufficient is irrelevant. Never before has an independent board been installed in this company, and never before has Mr. Dondero been removed completely from a position of authority.

It is also telling that two of the litigants who have had significant dealings with the Debtor and its management over the last years -- the Redeemer Committee and ACIS, both members of the Committee -- oppose the U.S. Trustee's motion and believe that the current structure is in the best interests of the Debtor's stakeholders.

I would like to turn, Your Honor, to the last of the U.S. Trustee's arguments with respect to the fiduciary duty, which the Trustee says constitutes other cause because of some apparent conflict. First, Your Honor, I would mention that there is nothing in the pleadings regarding the fiduciary duty issue. When --

MS. LAMBERT: Your Honor, I object.

MR. POMERANTZ: Excuse me.

MS. LAMBERT: I couldn't put it in the pleadings because it didn't exist.

THE COURT: I'm not sure --

MR. POMERANTZ: Your Honor?

THE COURT: -- I understand the objection. He's about to say what was in your pleadings.

MS. LAMBERT: Right. And he's saying that I should have put it in my pleading, which was filed before there was any management agreement, at a time when it looked like there wasn't going to be a management agreement.

MR. POMERANTZ: Your Honor, then --

THE COURT: Well, --

MR. POMERANTZ: All right.

THE COURT: -- clarify. You were about to say there's nothing about --

MR. POMERANTZ: Yes.

THE COURT: -- breach of fiduciary duty in --

MR. POMERANTZ: I was going to say, --

THE COURT: -- the motion?

MR. POMERANTZ: -- Your Honor, that the motion that was filed was before the Committee settlement.

THE COURT: Right.

MR. POMERANTZ: The Committee settlement happened. We opposed. In our position, we addressed the fiduciary duty issue head-on. The U.S. Trustee chose not to file a reply.

THE COURT: Okay.

MR. POMERANTZ: The U.S. Trustee stood up and, Your Honor, cited case law on what Delaware fiduciary duty is. There is nothing in their pleadings. And the argument that she -- the Trustee could not --

MS. LAMBERT: I again object.

MR. POMERANTZ: -- put that in the pleading --

MS. LAMBERT: The reason that they raised this in their response is that, and they said in there, we anticipate the U.S. Trustee will raise it, it's because I raised it at the hearing on the management.

MR. POMERANTZ: Well, Your --

THE COURT: Okay. I overrule --

MR. POMERANTZ: Your Honor?

THE COURT: -- that objection. You can make your argument.

MR. POMERANTZ: I will move on. It -- my only point

was there was a little bit of trial by ambush here, with counsel standing up at the podium, talking about case law and talking about Delaware fiduciary duties. That's not in the record. But I'll move on, Your Honor.

Second, this issue was raised at the January 9th hearing and Your Honor ruled that there was no conflict. So, in some sense, it is res judicata to the issues that are here.

And most importantly, Your Honor, the Committee, as you know, has been extremely active in this case, is represented by competent professionals. There is no way that the Committee would have allowed management to come in if they believed that management would be subject to competing duties.

Nevertheless, Your Honor, I'd like to address the argument head-on. The Debtor is a limited partnership. The limited partnership is managed by Strand, which is the general partner. And the management of the Debtor is carried out by a board that has been installed at Strand at the general partnership level.

When the Debtor filed its bankruptcy, its managers at Strand owed a fiduciary duty to the bankruptcy estate. The managers owe a fiduciary duty to the bankruptcy estate in the same way that a trustee, if appointed, would owe a fiduciary duty to the bankruptcy estate. And the argument that Jim Dondero is an equity holder at Strand and somehow creates a conflict is a red herring. Strand is a single-purpose entity.

All it does is manage the Debtor. Strand has an obligation to manage the Debtor appropriately. If the board at Strand is fulfilling its duties to the Debtor, it's fulfilling Strand's duties to the Debtor.

So, in other words, Your Honor, what the board does that is in honor of its fiduciary duties: makes sure Strand is complying with its obligations and makes sure Strand is not subject to any claims that they have not fulfilled their obligations under the management agreement.

This was the situation in a case before Judge Isgur in 2014 in the *Houston Regional Sports* case, which we cite in our papers at 505 B.R. 468. The debtor, a limited partnership, was managed by a general partnership. The partners, ultimate partners, disagreed in how the company should proceed, and the company found itself subject to an involuntary bankruptcy proceeding. One of the partners, the Houston Astros -- I guess this is rag on Houston Astros week -- was --

THE COURT: Don't mention that, please.

MR. POMERANTZ: -- appointed a board member to the general partner and argued to Judge Isgur that that board member had duties to it as the general partner and that because of that, and since its consent was needed for any restructuring, that any Chapter 11 would have to fail.

Judge Isgur said no, no, no. A general partner, a board member of a general partner, regardless of that it was

appointed by the Houston Astros, who may have different views, had the obligations to the estate and to fulfill its the obligations to the estate, and that if they did anything in violation of that, it would create liability.

So that Judge Isgur directly challenged and opposed the conclusion that there's somehow a different fiduciary duty. Now, he did sort of, in a footnote, say that he wasn't finally determining fiduciary duty issues, but he did not find any conflict.

The same is true here. And the argument that there is somehow this conflict, somehow these competing interests, somehow that the board may act in favor of Jim Dondero that's not in favor the board and that's different than a trustee, that is essentially a red herring. It's hornbook law. When an estate files bankruptcy, its managers owe a fiduciary duty to the estate.

And who do we have on our board? We have a former judge. What better to have on a board, considering what its fiduciary duties are, as a former judge, a former bankruptcy judge who is well-familiar with what fiduciary duties exist and to whom they exist?

So, Your Honor, we don't think there's a conflict, and there's certainly not a conflict that would rise to the level of "other cause" that the Trustee is trying to fit and shoehorn its motion for appointment of a trustee.

In conclusion, Your Honor, the Trustee has not carried its burden of establishing that cause exists for the appointment of a Chapter 11 Trustee, that "other cause" exists, or that it is in the best interest of parties in interest. The corporate governance structure approved by the Court renders moot the concerns about the prepetition conduct and Debtor's prior management, and there's nothing been adduced through the testimony to lead to the conclusion that any of the members of the -- employees of the Debtor are not doing what they're supposed to be doing, reporting to the independent board, and that the independent board cannot fulfill their duties.

Appointment of a Chapter 11 trustee would adversely impact the Debtor's operations, jeopardize restructuring efforts. And for all of these reasons, Your Honor, the Debtor requests that the Court deny the Trustee's motion.

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

CLOSING ARGUMENT ON BEHALF OF THE OFFICIAL COMMITTEE

MR. TWOMEY: Thank you, Your Honor. I will be brief, but I do want to provide the Committee's perspective on this, given in particular 1104's focus on stakeholders.

As Your Honor is aware, the Committee represents the primary economic stakeholders in this case. Even more than most cases, the unsecured creditors in this case comprise the vast majority of creditors, given how little secured debt

there is. And Your Honor, the Committee which represents those unsecured creditors strongly disputes the notion that appointment of a Chapter 11 trustee would be in the best interest of stakeholders, for many of the same reasons as Mr. Clemente discussed at the prior hearing in support of the settlement.

The Committee believes the settlement approved by this Court a week and a half ago, and the corporate governance structures embodied therein, provide the Debtor with the best opportunity to maximize value in this case.

As described earlier, the Committee believes that the board members are highly qualified, with complementary skillsets. It's hard to imagine that there's a single trustee out there that could match their combined experience and expertise.

Any Chapter 11 trustee would face the same challenges that the board is facing, and those challenges just wouldn't magically go away by appointment of a trustee.

In addition, appointment of a Chapter 11 trustee at this point would lead to more delay getting up to speed, additional cost for the trustee trying to get up to speed in the case, and it obviously would basically undo the settlement that the Committee and the Debtor spent so much time trying to pull together.

As Your Honor has heard today, the board clearly has

rolled up their sleeves. They're becoming heavily involved in the case. And the Committee also has information and oversight rights and standing to pursue certain claims under the settlement that provides an additional check on all of this process going forward.

So, Your Honor, in light of the foregoing, especially the settlement that Your Honor approved a little over ten days ago, the U.S. Trustee simply can't meet its burden of showing, under these circumstances, that cause warrants appointment of a Chapter 11 trustee or that appointment of a Chapter 11 trustee would be in the best interest of stakeholders.

So, Your Honor, the Committee respectfully requests that the motion be denied.

THE COURT: Counsel for UBS, did you have something?

CLOSING ARGUMENT ON BEHALF OF THE UBS PARTIES

MS. POSIN: Yes, Your Honor. Thank you, Your Honor. Kim Posin of Latham & Watkins, counsel for creditors and Unsecured Creditors' Committee members, UBS Securities, LLC, and UBS AG London Branch.

Your Honor, just very briefly, I wanted to say that UBS has a very substantial claim against Debtors and this estate. We believe our claim to be in excess of $1 billion. And that results from a November 2019 judgment in the New York Supreme -- or Superior Court -- Supreme Court, excuse me, on a breach of contract claim.

So, as a very significant creditor of this estate, we have spent a substantial amount of time with the Committee and with Committee counsel over the last few weeks creating this new governance structure that the Court has put into place in the last week and a half.

We are hopeful and we fully expect that, now the new governance is in place, that the Debtors will be able to proceed with a path forward and avoid the distractions and, you know, influences that may have hindered their decision-making processes to date or before the new governance structure was put into place.

While we appreciate the U.S. Trustee's concerns with the pre-existing management structure, we believe that that broken structure has now been fixed. And unless and until the new governance structure proves to be unworkable or detrimental to the Debtor's estate or to its creditors in some fashion, the -- there is no need and it would be inappropriate to appoint a Chapter 11 trustee.

In fact, we agree with Mr. Twomey and Mr. Pomerantz that the appointment of a Chapter 11 trustee at this point in these cases would be detrimental, it would be disruptive, it would cause delays, and there's no assurances that any Chapter 11 trustee that could be appointed would be -- would have anywhere near the qualifications and capabilities of the new board members.

So, Your Honor, we believe it is in the best interests of all creditors, not just the numbers of this Committee, to deny the motion, to allow the new governance structure to proceed, and to give the board members an opportunity to manage the Debtor's decision-making processes to preserve value and hopefully to reach a resolution of this case in an appropriate manner as efficiently and effectively as possible.

THE COURT: All right. Thank you.

MS. POSIN: Thank you.

THE COURT: Anyone else? Any rebuttal? All right. We'll take a 15-minute break. It's 12:02. We'll come back at 12:17 and I'll give you a ruling.

THE CLERK: All rise.

(A recess ensued from 12:02 p.m. until 12:34 p.m.)

THE COURT: All right. We are going back on the record in the Highland case. This is the Court's ruling on the United States Trustee's motion for appointment of a trustee.

The Court has bankruptcy subject matter jurisdiction pursuant to 28 U.S.C. Section 1334. This is a statutory core proceeding pursuant to 28 U.S.C. § 157. The Court concludes it has constitutional authority to make a final ruling in this contested matter. And the Bankruptcy Code section that governs the merits of the motion is Section 1104.

Based on the totality of the evidence, the Court believes

-- well, let me back up. Based on case authority, the Court believes the legal standard is that there must be clear and convincing evidence establishing the need for a trustee. But even if I am misremembering the procedural history of *Cajun Electric*, and even if the Fifth Circuit later, on a rehearing, adopted a preponderance of the evidence standard that had been suggested in a prior dissent, I would still find here, under a preponderance of the evidence standard, that there are not grounds under Section 1104(a)(1) or (2) for the appointment of a trustee in this case. So the motion of the U.S. Trustee is denied.

I frequently say in court hearings, some folks know, that facts matter. It's kind of a mantra of mine. It seems like a very obvious statement, I know. But facts, evidence, really does matter. And here are some of the facts involved that are, frankly, quite atypical compared to what bankruptcy courts frequently see with trustee motions, motions to appoint a Chapter 11 trustee.

First, as I've noted a couple of times before, we have a well-constituted and well-represented Official Unsecured Creditors' Committee. Three of the four members of the Committee have extensive multi-year experience litigating with this debtor. They are collectively owed many millions of dollars. Actually, one Committee member, UBS, represented today it thinks it's owed a billion dollars.

They are, beyond any doubt, sophisticated, well-represented parties. And with all of their background and breadth of knowledge about this debtor and its now-former control person, Jim Dondero, with all of their history of distrust and acrimony, they do not at this juncture support a Chapter 11 trustee.

In fact, as we all know, the Committee and its professionals worked mightily for several weeks with the Debtor's professionals to come up with a new corporate governance structure that, in their reasonable view, could serve as a much more favorable vehicle than a Chapter 11 trustee.

They, as we all know, negotiated and chose three new independent board members of the general partner of the Debtor, Strand, which general partner, of course, ultimately controls the Debtor and has fiduciary duties to the Debtor as a general partner. And this new board not only has all the attributes, benefits of independence and an understanding of fiduciary duties, the Court has issued an order defining its role as such, but, in this Court's opinion, this new board has at least two distinct advantages over a Chapter 11 trustee.

First, with no offense to any of the Chapter 11 trustee candidates out there that might be able to serve, the three board members bring a fabulous skillset to the process. A retired bankruptcy judge, an individual with tremendous high-

yield investment and portfolio management experience, and an individual with significant experience as an independent director in difficult, large restructuring cases.

Second, the Debtor and the Committee professionals believe that a new board, with the ability to retain or terminate employees as they deem fit, would be less disruptive overall and could potentially preserve enterprise value better than the more drastic mechanism of a Chapter 11 trustee.

Moreover, in connection with this overhaul of governance, corporate governance, the UCC, the Official Unsecured Creditors' Committee, also negotiated mechanisms for transparency in the Debtor's operation of its business, and the Committee, Official Unsecured Creditors' Committee, was given standing to pursue certain actions.

So, back to my mantra. The bottom line is facts matter, and the facts are that we have sophisticated, well-heeled economic stakeholders who have worked mightily to essentially overhaul the entire corporate governance as to this debtor. They have sanitized the problems.

Again, some of these Unsecured Creditors' Committee have a history with this debtor. They have a history with putting checks and balances in place and those not ideally working. It is with this background that they have worked mightily for several weeks with Debtor's professionals to come up with this new corporate governance structure that, in their reasonable

view, provides the appropriate oversight and control that the mechanisms perhaps in prior situations did not provide.

The U.S. Trustee relies on the strict wording of Section 1104 in urging its motion. Specifically, the wording that, quote, The Court shall order the appointment of a trustee for cause, including fraud, dishonesty, incompetence, or gross [mis]management of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause.

The Court believes this statutory provision is aimed at problems or malfeasance with current management. All of this has been fixed. It's a very different scenario than when this case was filed. If there are problems with remaining employees, like in-house lawyers or treasurers or others, the board has the ability to terminate these individuals. But I had no evidence that there are specific problems with any particular remaining individuals.

Simply because I or another Court may have made statements in prior rulings about unreliable testimony or may have found evidence of fraudulent transfers is not a problem that taints this completely-overhauled management structure. Again, this was a complete overhaul. The facts and timing are such today that Mr. Dondero is no longer current management. Current management are the words used in Section 1104.

This case is no different than numerous other large

Chapter 11 cases when, often before the petition date but sometimes after, old board members resign, new board members are brought in, CEOs are ousted. It's common. It avoids the possible need for a Chapter 11 trustee. It brings integrity to the process and hopefully preserves the ability to reorganize. Creditors sometimes demand it. The debtor's professionals sometimes suggest it. Sometimes, current management resigns before being told they'll need to. This is one of the realities with distressed companies.

A new board and new management are not only a pragmatic solution, but this Court concludes are totally within the parameters and the provisions and overall structure of Chapter 11.

At bottom, the professionals for the Debtor and the Official Unsecured Creditors' Committee have fixed the problem, the problems with the current management that existed as of the petition date. I approved the new governance structure pursuant to Sections 363 and 105, and now we don't have the cause that 1104 refers to.

Moreover, I have no evidence that a trustee is in the best interest of parties pursuant to Section 1104(a)(2). So, no cause for a Chapter 11 trustee.

I reserve the right to supplement or amend in a form of order, but I will ask Debtor's counsel to submit a form of order.

All right. Well, turning to the remaining business, I know we had two or three other motions, and there were no objections to those motions.

MR. LITVAK: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. LITVAK: Max Litvak; Pachulski Stang Ziehl & Jones; on behalf of the Debtor.

THE COURT: Okay.

MR. LITVAK: I'm here to present those last three items on the agenda, which are 7, 8, and 9.

THE COURT: All right.

MR. LITVAK: And Your Honor, if I may suggest that we go in reverse order.

THE COURT: All right. I'm pulling out my agenda to the appropriate --

MR. LITVAK: Yes, Your Honor. Number 9 is the Mercer retention application.

THE COURT: Okay. That is the compensation expert professional, correct?

MR. LITVAK: Exactly right, Your Honor. We have no objections to this application, and Mercer has already, some time ago, actually, commenced rendering services for -- to the Debtor with respect to compensation issues.

THE COURT: All right. Again, we did not have any written objection. Anybody want to say anything about this

application?

All right. Well, notice has been proper. We have no objections. They appear to be well-qualified. I approve this under 327 and 328 of the Bankruptcy Code.

MR. LITVAK: Your Honor, would you like to see a proposed form of order, or -- it is essentially the same one that we filed with the application, except we have updated the caption because the application was actually originally filed in Delaware.

THE COURT: All right. No. You may simply upload it electronically, please.

MR. LITVAK: Yes, Your Honor. Will do. Thank you.

Moving to Number 8 on the agenda, Your Honor, is the bonus motion. It is the Debtor's motion to pay our ordinary course obligations under employee bonus plans. And Your Honor, there are no pending objections with respect to this motion. The U.S. Trustee has filed no objection. We did negotiate resolution with the Creditors' Committee that I wanted to tell you about.

THE COURT: Okay.

MR. LITVAK: We have agreed, for purposes of today, to exclude four statutory insiders.

THE COURT: All right.

MR. LITVAK: So, from our perspective, there are no -- no insiders who are covered by the motion. Or covered with

respect to the proposed order that we'd be submitting to you today, which has been reviewed and approved by the Creditors' Committee. There are a few others that are being pulled out as well.

But the net result of it, Your Honor, is that we are asking for approval of ordinary course plans in an amount that's substantially reduced from what was initially asked for, the initial request for relief.

Specifically, Your Honor, the order for relief here today is with respect to what we've called an annual bonus plan and also what we've called a -- as a deferred bonus plan. The annual bonus plan was actually approved almost a year ago, in February 2019. It relates to employee performance in 2018 calendar year. As I mentioned, it's all ordinary course. But the payments are in installments. So it's deferred compensation, which actually is a substantial portion of employee compensation in the industry as well as for this Debtor. Employees agree to take reduced salaries with the expectation that they're going to be compensated substantially with respect to bonuses.

And that is, in fact, what happened here, and what has happened in the ordinary course. And in February 2019, the company approved bonuses for employees for their performance in 2018, but employees will only be entitled to receive those bonuses to the extent they continue to be employed with the

Debtor on deferred payment dates. And there are four installments. Two were made prepetition and two remain to be paid. And what we're asking for today, Your Honor, is for your authority to continue to make those payments in the ordinary course.

So the third installment comes due on February, in February 2020, and then the fourth installment comes due in August 2020. So this year, next month, and then a few months down the road.

The deferred bonus plan goes back even further. It was approved in February 2017 for the 2016 calendar year. And it, in the ordinary course, is deferred 39 months, and those payments are actually tied in with certain publicly-traded allocated -- allocated publicly-traded stock. So an employee is awarded a certain amount, and that value is represented in publicly-traded stock, which is actually set aside, held by the company for the benefit of that employee.

If the employee sticks around for 39 months, then on the 39th month there will be a vesting. And the next vesting will be in May, May 2020 for the February 2017 awards.

And the stock in many cases has increased in value, just as the stock market has increased in value, generally speaking. So the amounts that were awarded in February 2017 have actually increased in value, and the employees would be expecting that, that if they're continuing to perform and do

their job and they're still employed on that date of when there is a vesting, that they would be entitled to that stock at the value -- at the market value of that stock on the vesting date.

Your Honor, another important thing that's significant about the Debtor's bonus plans is that they are not guaranteed. Even -- even when they're awarded. An employee has to continue to perform at a very high level or they can be terminated. Frankly, an employee can continue to perform at a high level and still be terminated. So someone can be terminated without cause, and then they will not be entitled to the bonus, unless they're there on the actual payment date. So, come February 28th, the employees that are there, the board will decide which employees are there. Presumably, it's the bulk of the employees. Then those employees will be entitled to what they have been awarded prepetition. And that's what we're asking the Court to approve today.

We're not asking Your Honor to approve anything with respect to 2019 bonuses yet. Frankly, the board is still getting its arms around that and making determinations as to what bonuses will be payable.

Your Honor, the board, the independent board, has closely evaluated the Debtor's employee compensation structure and reached a decision that most aspects of the bonus should be approved, to avoid potentially catastrophic consequences for

this estate.

The board has considered input from the Creditors' Committee. The board has decided to make certain modifications to the bonus plans as they were proposed in the initial filing. So the initial motion that we filed was actually filed in Delaware, I believe on November 26, 2019. And the matter was initially set for hearing on December 17th in Delaware. Then venue was transferred, and we have subsequently renoticed the hearing a couple of times to today, ultimately.

The bonus amounts -- as I mentioned, Your Honor, the board has decided with respect to the modifications to exclude the four statutory insiders as well as a few others, and the board intends to address the compensation of those employees separately.

The bonus amounts that are requested today, Your Honor, after reductions, now aggregate $1.8 million in February, $1.2 million in May, and $1.7 million in August, for a grand total of approximately $4.6 million, Your Honor. That would cover approximately 40 employees.

In the original motion, we actually asked for over $10 million, so this is more than cutting it in half. The board has had the benefit of a compensation expert, which is Mercer, who has confirmed that the Debtor's bonus, bonus plans, are well within market, and that if such bonuses are not paid, the

Debtor's employees would be severely undercompensated.

The bottom line, Your Honor, is that the board has concluded, in its sound business judgment, that continuing to honor the Debtor's ordinary course bonus obligations, as modified, to employees is critical. The failure to do so is likely to cause an employee exodus and will adversely prejudice the Debtor's efforts to maximize value for all constituents.

Your Honor, we're asking you to approve the payments, the bonus payments, under Sections 105 and 363 of the Bankruptcy Code as a sound exercise of business judgment. Also, under Section 1107 of the Bankruptcy Code in that the Debtor is exercising its fiduciary duty to try and maximize value, consistent with a couple opinions that we've run across in this district from Judge Lynn.

Most recently, Your Honor, there is a decision called *In re Tusa* -- T-U-S-A hyphen -- *Expo Holdings*, 2008 Bankr. LEXIS 2852. It's Judge Lynn's opinion from 2008 where he clarifies an earlier opinion, *In re CoServ*, 273 B.R. 487. He basically reaches the conclusion, Your Honor, that, under Section 1107, the Debtor has a fiduciary duty to maximize value, and maintaining relationships with employees is a necessity.

So, under the necessity of payment doctrine, we would ask Your Honor to approve these payments. Even though they were approved prepetition, they are coming due postpetition. We

would ask the Court to approve that.

Further, Your Honor, because we have carved out insiders, we do not believe that Sections 503(c)(1) or (c)(2) of the Bankruptcy Code apply at all to what we're asking for today, and that 503(c)(3) also doesn't apply. Even though that section is not limited to insiders, we don't think it applies because this is an ordinary course program and 503(c)(3) talks about outside the ordinary course.

Here, the bonus plans are entirely consistent with the ordinary course operations of the Debtor and completely consistent with prepetition practice.

Your Honor, in addition to the bonus plans, just as a minor point, there is what is called a dividend reinvestment plan where the Debtor will contribute -- gross up, effectively -- an employee contribution into an investment fund, which is actually with an affiliate called NexPoint. So, basically, employees of the Debtor are given the opportunity to invest in a couple of mutual funds that are run by affiliates. If they choose to do that, then the Debtor will gross up the value of those employees' investments as an employee benefit. So it's really just another form of compensation to employees. It's a 15 percent gross-up. And with respect to possible prepetition obligations under the DRIP, they're very nominal. Less than $30,000, if any. So we are asking approval in the motion up to $30,000, and then authority to continue the program in the

ordinary course.

The Debtor also has certain of its own funds invested in these mutual funds, and those mutual funds throw off dividends. And the Debtor in the ordinary course reinvests the dividends in those funds. And the Debtor is asking for authority to continue to do that.

These are not huge numbers, Your Honor, but it's -- it's maybe $10,000 to $20,000 a month.

For these reasons, Your Honor, the Debtor would urge you to approve the motion. If you need any further factual support, I'm prepared to offer it, but the motions are uncontested, as far as we know.

THE COURT: All right.

MR. LITVAK: Or the motion is.

THE COURT: All right. Well, I certainly didn't see written objections. Do we have comments from, first, the Committee? Are you willing to accept these facts as unrefuted, or do you have a desire to examine witnesses on this?

MR. TWOMEY: Absolutely not, Your Honor. Just wanted to confirm for Your Honor that the Committee did originally have issues with the scope of the relief requested in the motion as it was filed back in November, but the Committee and its advisors have worked with the Debtor, primarily through their directors and advisors, to narrow the scope of the

relief requested to the point where it is, in fact, acceptable to the Committee, as outlined by Mr. Litvak. So, the Committee is now comfortable with the narrowed relief as just outlined and is comfortable with the Court approving that requested relief.

THE COURT: All right. Well, we appreciate your role --

MR. TWOMEY: Thank you, Your Honor.

THE COURT: -- in negotiating some narrowing of the relief.

Anyone else? U.S. Trustee or anyone else have issues? All right. Ms. Lambert, you had something?

MS. LAMBERT: No. No issues, Your Honor. It is our understanding that any new bonus program will be subject to a separate motion.

THE COURT: All right. I think that's what I inferred, but maybe you should clarify on the record.

MR. LITVAK: Your Honor, I would like to clarify that, because we -- we actually have not reached that determination. We are evaluating what the bonus plan will look like, and then we'll confer with the board, do some research of our own, and make that determination. But if it would make Ms. Lambert happy, I'm sure we could agree to communicate to her our decision.

THE COURT: All right. So think what I'm hearing is

you're reserving the right to take the position that any new bonus program would be ordinary course of business and wouldn't need court approval?

MR. LITVAK: Yes, Your Honor.

THE COURT: All right. Well, then I am going to accept you at your word made on the record that you will communicate, you'll give notice to the U.S. Trustee if any new bonus plan is -- the Debtor desires to implement one and takes the position it doesn't need court approval, and then if she disagrees or the Committee disagrees, someone can file a motion to, whatever the motion would be worded, to have the Court weigh in on the subject.

MR. LITVAK: Yes, ma'am.

THE COURT: Okay. All right.

MR. LITVAK: Your Honor, I do have a proposed form of order, along with a redline against the original form of order that we had filed, if you'd care to see that with respect to the bonus motions.

THE COURT: You --

MR. LITVAK: If I may approach.

THE COURT: You can approach on that.

(Pause.)

THE COURT: Thank you.

MR. LITVAK: The redline primarily reflects changes that were requested by the Creditors' Committee, Your Honor.

THE COURT: Okay.

MR. LITVAK: And clarifying that the motion is granted as presented at the hearing today minus the few employees, insiders that I had mentioned.

THE COURT: All right. Well, the Court is going to approve the bonus motion as narrowed here on the record today. The Court believes that, based on the unrefuted facts, there's a sound exercise of business judgment reflected in this proposal, and that it would certainly be a preservation of value by keeping these bonuses in place that were negotiated or put in place prepetition. So the Court thinks this form of order looks fine and the motion is hereby approved.

MR. LITVAK: Thank you very much, Your Honor.

With that, I'll move to the last item on the agenda, which is Number 7, the cash management motion, which was filed some time ago as a first-day filing. Judge Sontchi did enter an interim order. We've been operating under the interim order ever since. It's been over three months now.

And at the last hearing, we were prepared to present the final order, but the U.S. Trustee, as I understand it, stood up and made a speaking objection to the effect that the Debtor should be required to bond a couple of brokerage accounts.

So the Debtor has two brokerage accounts that are at issue. There is a Jefferies account and then there's an account at Maxim. And there is a significant amount in terms

of value of securities there. At Jefferies, we're looking at in the range of $80 million, and at Maxim $30 million. At Jefferies, there is a margin balance, so basically a prepetition secured claim by Jefferies against the estate of $30 million.

We have gone to these brokers to ask them if they would be willing to participate in a bond or surety relationship of some sort with a third party. We have also gone out and obtained one quote so far with respect to how much that would cost. The one quote was in the range of $200,000 or $300,000.

The board -- I've discussed this with the board. It is the board's view that spending that money to buy a surety bond is not a good use of the estate's limited resources. But further, as a practical matter, Your Honor, we have gone to Jefferies, and they are unwilling to enter into surety -- they would be required to sign an indemnity agreement with a surety. So if a surety is ever called upon to pay because the securities that are supposed to be there for some reason are not there, then Jefferies would be obligated to reimburse the surety. That's the indemnity. And further, Jefferies would be required to become an approved depository here. They're not willing to do that.

So, Your Honor, I think we're at the position, from the Debtor's perspective, that we would ask you to, to the extent that the U.S. Trustee still has an objection, that we would

ask you to approve a waiver of the 345 requirement for cause, the cause being that the Debtor does not believe that this is a good use of estate resources. The Debtor is in the business of doing just this, which is money management, investing in securities. This is not a retail business that, on the side, is trying to make some money off securities. This is what the Debtor does. So it is a very unique set of facts here.

The Debtor also doesn't have the ability to move the accounts, particularly the one at Jefferies, because Jefferies has a significant margin balance which secures them. So they're not going to let us move the money out. So we're kind of stuck.

And it has never been an issue before, Your Honor. Jefferies, incidentally, has, we found out from their website -- it is obviously a highly-regulated entity, as is Maxim -- Jefferies has significant insurance in place. Beyond the SIPC coverage for securities accounts, which is tapped at $500,000, Jefferies has another -- an excess policy of $24-1/2 million on top of that, and maybe more.

So, Your Honor, from the Debtor's perspective, we would ask the Court to give us the waiver here under the unique circumstances here of 345 and that the Debtor be permitted to continue to maintain those two brokerage accounts in the ordinary course.

THE COURT: All right. Others wish to be heard?

MS. LAMBERT: So, to be clear, Your Honor, the United States Trustee didn't ask them to bond the amounts. The U.S. Trustee asked that the insurance parallel the specific insurance, or the bonding, parallel that, so that if the actual stocks are not there, there's something to go against, and so, therefore, making it parallel to the same kind of posting of collateral with the Fed in case an institution fails.

So, it is also possible to get insurance, just as Jefferies has, for the Debtor. And they're still outstanding on several requests. But if Jefferies won't sign the indemnification agreement, they won't sign it. So that's the issue. I mean, could they get insurance separately? I don't know. They haven't tried. But I will want the Court -- I mean, like Judge Houser will never ever grant this kind of relief. I want the Court to be aware that the estate is at risk if there's a problem at Jefferies or if there's a problem at the other institution.

THE COURT: All right. Anyone else wish to weigh in?

And I'm going to go back to my mantra. Facts matter. I'm not sure Judge Houser has ever had this type of entity. You know, it's not a retail store, it's not a restaurant, it's not an apartment complex. It's a debtor whose reason for existing is money management and investing. Not that it doesn't ever make mistakes, but, again, I think the unique circumstances of

this debtor in this case merit a waiver of the Section 345(b) requirement.

I think it would not be an exercise of reasonable judgment, under the facts I have before me, to require, you know, a $200,000 or $300,000 cost surety bond. So I grant the motion and grant the waiver.

And as with any order, I won't require this blue sky language, but certainly if, you know, Jefferies and Maxim, you know, it's well publicized, they go into distress themselves and we need to revisit this ruling, the Court would certainly be willing to revisit the issue if the world changes, and I think that's a good thing to do.

All right. Before we end matters on this motion, I left my notes on my desk, but I had in my brain that at one time there were four stray issues that the Committee had. And I just want to double-check these four stray issues were resolved with the settlement. I know there was an issue with regard to a couple, I mean, well, four recurring commitments of the Debtor. One regarding that life settlement entity, where the premium was something like a million dollars a month that Debtor was paying. There was another, you know, Singapore office and a Korea investment company. And I can't remember, I think the other was just general overhead provided. Have those issues been resolved, wrapped up in the settlement? I did not go back and double-check the

settlement.

MR. POMERANTZ: Your Honor, Jeff Pomerantz. We had interim approval under the cash management to do certain things.

THE COURT: Uh-huh.

MR. POMERANTZ: But Your Honor is correct that any continued intercompany cash management issues were covered by the protocols. So that is where we will be seeking authority to do any other type of intercompany transactions. It will not be pursuant to this cash management order, but it was important for this cash management order to become final because it did govern the case before the case got transferred here and we took action as we were permitted to do under the interim order.

THE COURT: Okay. So without asking you to recite every single sentence of the settlement motion and order, there's some sort of oversight and approval mechanism for those payments, those obligations?

MR. POMERANTZ: Correct. Correct. Correct. Intercompany transactions, related-party transactions, is a --

THE COURT: Just that general umbrella?

MR. POMERANTZ: -- is the general umbrella.

THE COURT: Okay.

MR. POMERANTZ: And there's a certain process and procedure how we would get approval from that, giving

visibility to the Creditors' Committee.

THE COURT: Okay. Counsel, did you want to add anything?

MR. TWOMEY: Just to confirm that's correct, Your Honor. We had an operating protocol that was approved as part of the settlement. And so, pursuant to that, these types of transactions will be, you know, for example, run by the Committee, and only if there are issues will we have to come back to the Court.

THE COURT: The general umbrella --

MR. TWOMEY: Yes.

THE COURT: -- of intercompany transactions? All right. I bet Retired Judge Nelms' ears perked up when he heard about life settlements. If you don't understand that comment, I'm sure he'll love to talk to you about *Life Partners*.

MR. POMERANTZ: Yes. We've had those discussions, Your Honor.

THE COURT: Okay.

MR. POMERANTZ: Your Honor, I think the only thing remaining to be done is a couple of dates.

THE COURT: Okay.

MR. POMERANTZ: We thought it would be helpful to set sort of, you know, essentially omnibus dates.

THE COURT: Okay.

MR. POMERANTZ: We may have things relating to the continued bonus programs to bring before the Court. May not. And just so people generally could know when to file things. So we've conferred with the Creditors' Committee counsel. I didn't have the opportunity to confer with the Trustee. But we have a date in February, perhaps either February 19th or 20th.

THE COURT: Okay.

MR. POMERANTZ: And then also a date in March, either the 10th, 11th, or 12th.

THE COURT: Okay. Let me see what we can do.

(Pause.)

THE COURT: Okay. We can give you 2/19 at 9:30 in the morning.

(Pause.)

THE COURT: Okay. We can give you Wednesday, March 11th, at 9:30.

MR. POMERANTZ: Thank you very much, Your Honor.

THE COURT: All right. So, for now, do we want to absolutely set some of these carryover matters? I know we had the retention application.

MR. POMERANTZ: We have the retention applications, we have the PensionDanmark, --

THE COURT: The Pension --

MR. POMERANTZ: -- and then we have the settlement

related to the CLO Issuer. So why don't we put all those three on for the 19th at 9:30 a.m.?

THE COURT: Okay. I think it's four things. I think there were two retention applications.

So, for now, Traci, we're going to set the Foley Gardere and Lynn Pinkerton retention applications on February 19th, as well as the Pension motion to lift stay. I can't remember the exact name of that. And then, okay, you said there's a CLO Issuers motion?

MR. POMERANTZ: Well, it was the -- it was the overall settlement motion, if Your Honor recalls, that I mentioned at the beginning of the hearing.

THE COURT: Oh, the language --

MR. POMERANTZ: That specific issue on the protocols.

THE COURT: -- they were hoping to have for protocols?

MR. POMERANTZ: Correct.

THE COURT: Okay. Yeah. So we'll carry over the settlement motion between the Committee and the Debtor. Even though I've entered an order, we actually have some carryover language. So we'll put that on the calendar again. No, all of those on February 19th. And, again, you'll coordinate with Traci if you have add-on matters that you need --

MR. POMERANTZ: Correct, Your Honor. And then we will file the appropriate agenda of that in advance and

provide Your Honor with notebooks so that Your Honor will know exactly what was on. I know Traci was -- did a great job of trying to figure it out, and we didn't make her life easier up until the agenda, but we promise to make both yours and her life easier going forward.

THE COURT: Well, for my life, the notebook and everything was great when I started looking at it over the weekend, so thank you. Appreciate it.

MR. POMERANTZ: Thank you very much, Your Honor.

THE COURT: All right. I appreciate everyone's positions and courtesies today. All right.

MR. POMERANTZ: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 1:17 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 **01/24/2020**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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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*)
Maxim B. Litvak (Texas Bar No. 24002482)
Gregory V. Demo (NY Bar No. 5371992) (*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
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel and Proposed 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 REPLY IN SUPPORT OF 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

The above-captioned debtor and debtor in possession (the "Debtor") hereby submits this reply (the "Reply") in support of the *Motion of the Debtor for Approval of*

[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.

1934054200108000000000005

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").[2]

In further support of the Settlement Motion, the Debtor respectfully states as follows:

Preliminary Statement

1. The settlement, embodied in the Term Sheet, resolves months of litigation between the Debtor and the Committee over the Debtor's governance structure and operations and allows the Debtor and the Committee to focus their efforts on moving this case to a resolution that benefits all stakeholders. The Debtor, the Committee, and the Committee's members, who are the Debtor's major creditors, agreed to the Term Sheet and have not objected to the Settlement Motion.

2. Further, although the Settlement Motion was properly noticed, the only party to file a full objection was the United States Trustee for Region 6 (the "UST").[3] In fact, (a) other than certain issuers of collateralized loan and debt obligations (the "Issuers"),[4] no investor in any fund or entity managed by the Debtor has objected to the Settlement Motion; (b) no governmental agency, including the Securities and Exchange Commission (the "SEC"), has

[2] All capitalized terms used but not defined herein have the meaning given to them in the Settlement Motion.

[3] *See United States Trustee's Objection to the Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operating in the Ordinary Course* [Docket No. 313] (the "UST Objection").

[4] On January 7, 2020, the Issuers filed the *Limited Objection to 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. 324] (the "Issuer Objection"). The Issuer Objection did not object to the settlement *per se* and, in fact, expressed that the Issuers were "pleased that the Debtor and the Committee have reached consensus early in this case on issues related to the Debtor's management." (Issuer Objection, ¶ 2.) Instead, the Issuers' limited objection was that the Term Sheet provided *too much* oversight of the Debtor's postpetition activities. The Debtor and the Committee are currently in discussions with the Issuers and hope to resolve the Issuer Objection.

objected to the Settlement Motion; and (c) no other party-in-interest has objected to the Settlement Motion.[5]

3. In the UST Objection, the UST raises various concerns regarding the Term Sheet and the manner in which the settlement embodied therein will be implemented. However, at its core, the UST Objection is an attempt by the UST to substitute its judgment for the judgment of the Debtor, the Committee, the Debtor's creditors and other parties-in-interest (including investors in the Debtor's managed funds and related entities), and the governmental agencies tasked with overseeing and regulating the Debtor, and to advocate for the appointment of a Chapter 11 trustee.[6] Although the UST is empowered with certain rights and duties under 28 U.S.C. § 586, substituting its judgment for the judgment of every major constituency in the Debtor's bankruptcy proceeding is not one of them.

Reply

4. In the UST Objection, the UST raises three general objections: (a) the Term Sheet leaves certain items to be resolved in the future, including "important legal issues;" (b) this Court lacks jurisdiction to implement the corporate governance matters or enforce the corporate governance matters set forth in the Term Sheet; and (c) the Term Sheet does not protect investors. Each of these three objections is addressed below.

---

[5] Jefferies LLC ("Jefferies") filed the *Statement and Reservation of Rights of Jefferies LLC in Response to Debtor's Motion 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. 312] (the "RoR"). The RoR was not an objection to the Settlement Motion, and the Debtor and Jefferies have agreed to certain language to be added to the proposed order approving the Settlement Motion, which resolves the RoR.

[6] On December 23, 2019, the UST filed the *United States Trustee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee* [Docket No. 271] (the "Trustee Motion"). Although the UST was informed that the Committee and the Debtor were attempting to resolve the Debtor's governance issues, the UST, through the Trustee Motion, sought the appointment of a Chapter 11 trustee to oversee the Debtor's estate. The Debtor intends to object to the Trustee Motion, and, on information and belief, believes that no party-in-interest in this case supports the Trustee Motion.

I. The Term Sheet

5. Identity of Third Independent Director. The Settlement Motion identified James Seery and John Dubel as proposed Independent Directors, but the UST objects that the Term Sheet did not disclose the identity of the third Independent Director. After the Settlement Motion was filed, the Debtor and the Committee agreed to a slate of four potential directors from which Messrs. Seery and Dubel would select the third Independent Director, and they have selected the Honorable Russell E. Nelms to be the third Independent Director. Judge Nelms' curriculum vitae is attached to this Reply as **Exhibit A**.

6. Independent Director Compensation. The UST objects that the compensation to be paid to the Independent Directors is not disclosed in the Term Sheet. Since filing the Settlement Motion, the Debtor and the Committee have discussed with the Independent Directors the amount of compensation to be paid to each Independent Director and have agreed that each Independent Director will receive a monthly payment of (a) $60,000 for each of the first three months, (b) $50,000 for each of the next three months, and (c) $30,000 for each of the following six months, provided that the parties will re-visit the director compensation after the sixth month (the "Director Compensation"). Although the Independent Directors will sit at Strand, the Debtor is seeking authority from this Court to pay the Director Compensation.

7. Appointment of Chief Executive Officer ("CEO"). The Term Sheet does not require the appointment of any CEO. Instead, the Term Sheet recognizes that the Independent Directors may determine, for any number of reasons, whether a CEO is necessary for the management of the Debtor. In that circumstance, the Independent Directors will consult with the Committee as to who should be appointed as CEO. The Independent Directors' ability

to determine that a CEO is necessary to the effective management of the Debtor is an ordinary and customary responsibility of a board of directors. As an ordinary course function, the appointment of an executive officer would not require court approval. Similarly, the appointment of a CEO for the Debtor would not require this Court's approval.

8. Further, if a CEO is appointed, the Term Sheet provides that the CEO can only be removed with the consent of the Committee ***or*** an order of this Court. This requirement is in place to protect any appointed CEO from improper termination by the Debtor, not to avoid the Bankruptcy Code or this Court, and is not unlike other cases where removal of a high ranking officer is an event of default.

9. Appointment of a Chapter 11 Trustee. The Term Sheet reserves the Committee's right to seek the appointment of a Chapter 11 trustee. This provision is not intended to limit the right of any other party-in-interest with proper standing to seek a Chapter 11 trustee.

10. Management Issues. The UST states that the Debtor's management issues extend to parties other than James Dondero and argues that because the Term Sheet does not provide the Committee with the right to pursue insider claims against current employees, that there may be "statute of limitations concerns." (UST Objection, ¶ 6.) The UST, however, does not specify its concerns nor does it indicate how any purported "statute of limitations concerns" in this case differ from those in every other Chapter 11 proceeding, including cases where (unlike here) a committee is *not* granted standing to pursue insider claims.

11. The Term Sheet, however, provides that that Independent Directors will "conduct a review of all current employees," and the Independent Directors will make their own

determination regarding whether any persons have engaged in improper conduct. The Term Sheet also provides that if an employee is terminated, then the Committee will have standing to pursue insider claims against such employee. Finally, nothing in the Term Sheet limits the Committee's right to seek standing to pursue insider claims against then-current employees or any other party, if the Committee believes that the statute of limitations is set to expire. Absent the Term Sheet, the Debtor would have the sole right to pursue insider claims (absent contrary order from this Court), no independent employee review would occur, and any statute of limitations concerns would still exist. The Committee and the Independent Directors having these rights is solely a function of the Term Sheet, and the Term Sheet ameliorates the concerns raised by the UST.

12. Attorney-Client Material. Under the Term Sheet, the Debtor has agreed to provide the Committee access to certain privileged documents and communications. The UST argues that this is insufficient as it will lead to additional litigation and that, to avoid litigation, a Chapter 11 trustee should be appointed to accede to all privileges afforded to the Debtor. This argument is a gross overstep and the clearest example of the UST attempting to substitute its judgment for the judgment of all other constituents in this case. The Debtor and the Committee have agreed to a mechanism to determine which potentially privileged documents and communications should be turned over to the Committee to facilitate the prosecution of the Estate Claims for the benefit of all parties-in-interest. That process will be overseen by this Court. It is not appropriate for the UST to substitute its judgment with respect thereto for that of the Debtor, the Committee, and the Debtor's major creditors.

II. The Court's Jurisdiction to Implement the Corporate Governance Matters

13. The UST argues that because Strand is not a debtor in this Case that the Court lacks jurisdiction to appoint the Independent Directors at Strand and to limit Mr. Dondero's rights as Strand's sole stockholder to remove those Independent Directors.[7] This is correct, and the Debtor does not contest the UST's position on this matter.

14. However, the Debtor is not seeking authority from this Court to appoint the Independent Directors. Nor is the Debtor seeking this Court's authority, generally, to enter into the Governing Documents. Strand, as a non-debtor entity, is appointing the Independent Directors and executing the Governing Documents to effectuate such appointment of its own volition consistent with Delaware corporate law and its governing documents.[8] The UST has not – and cannot – point to any provision in Delaware law prohibiting Strand's appointment of the Independent Directors or entrance into the Governing Documents.

15. In distinction, through the Settlement Motion, the Debtor is *only* requesting authority from this Court to pay the Independent Directors the Director Compensation and such other relief as the Court may determine is required to effectuate the appointment of the Independent Directors and to enter into the Governing Documents. Because the Debtor is seeking to use estate assets to pay directors of a non-debtor entity, the Debtor sought this Court's approval to make such payments. The Debtor is not seeking authority to appoint the Independent

[7] The UST Objection reflects a misunderstanding of Strand. The Debtor is a limited partnership and is managed by Strand as its general partner. Strand is the general partner of the Debtor only and does not manage or oversee any other entities or partnerships.

[8] Because the Debtor is a limited partner, it is managed by its general partner, Strand, rather than a board of directors or similar governing body. The Committee requested the appointment of an independent fiduciary with oversight authority over the Debtor, and it was determined that a change in Strand's board of directors would be the most efficient means of achieving that result.

Directors to the board of a non-debtor entity.

16. Further, the Debtor recognizes that this Court would not have the requisite authority to limit Mr. Dondero's right as the sole stockholder of Strand to remove the Independent Directors or to take any other action that could neuter the settlement embodied in the Term Sheet. To address that issue, the written consent of the sole stockholder of Strand (included in the Governing Documents) contemplates the parties entering into a stipulation which will address the concerns raised by the UST, among other things (the "Stipulation"). The Stipulation is subject to this Court's approval. As such, the Term Sheet provides an extra level of protection and Court oversight without running afoul of the jurisdictional issues raised by the UST. Ultimately, though, if Mr. Dondero attempts to remove the Independent Directors or otherwise act in a way that contravenes the Term Sheet, the Committee has reserved its right to immediately seek appointment of a Chapter 11 trustee.

III. The Term Sheet Protects Investors or Provides Transparency

17. Finally, the UST argues that "quantification" of "past issues" is not a sufficient basis for approving the Settlement Motion and that transparency is needed for all "investors and for government agencies charged with overseeing [the] Debtor." (UST Objection, ¶ 12.) This, however, is not an argument against the Settlement Motion. Rather, it is an argument for the UST's Trustee Motion. The Trustee Motion is set for a hearing on January 21, 2019, and the Debtor will file an objection to the Trustee Motion at the appropriate time.

18. However, the UST's purported objection still fails. The Term Sheet

creates the transparency for which the UST advocates.[9] In addition to providing a mechanism by which the Committee can investigate and potentially litigate prepetition transfers, it allows substantial oversight of the Debtor's postpetition activities, including transactions between "Related Entities" (as such term is defined in the Protocols). The Protocols thus create three layers of oversight of the Debtor's postpetition activities. Those activities will be reviewed by the CRO, the Independent Directors (consisting of two experienced professionals and a former federal bankruptcy judge), and, in relatively expansive circumstances, the Committee. The Protocols also require the Debtor to provide the Committee with regular reporting concerning its postpetition trades and investments. Finally, all of the Debtor's activities – both pre- and postpetition – will ultimately be subject to this Court's oversight. The substantial oversight afforded by the Term Sheet should address the concerns of any investor in any entity or fund managed by the Debtor.

19. For the foregoing reasons as well as those set forth in the Settlement Motion, the UST's arguments that the Settlement Motion does not provide transparency for both governmental agencies charged with overseeing the Debtor and the Debtor's investors or address purported lapses in fiduciary duties are not well founded. The UST has not provided any evidence that the Settlement Motion will not address these concerns. Instead, the UST has simply stated that there is insufficient transparency for investors and governmental agencies.

20. Finally, it is also important to reiterate that, although the Settlement Motion was properly noticed, no governmental agency, including the SEC, or investor has

[9] Although not the subject to the Settlement Motion, it should be noted that during the pendency of this case, the Debtor has provided the Committee with extensive formal and informal discovery concerning both the Debtor's pre- and postpetition activities.

objected to the Settlement Motion (with the exception of the Issuers, who believe the settlement provides *too much* oversight and transparency). The only party that has objected is the UST, and the UST does not have standing to object to the Settlement Motion on behalf of parties that themselves received notice and chose not to act. If any governmental agency (including the SEC) or any investor wished to object to the Settlement Motion, they had the right to do so but determined not to.

[Remainder of Page Intentionally Blank]

WHEREFORE, for the reasons set forth above and in the Settlement Motion, the UST Objection should be overruled in all respects and the settlement between the Debtor and the Committee should be approved on the terms set forth in the Settlement Motion.

Dated: January 8, 2020

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*)
Maxim B. Litvak (Texas Bar No. 24002482)
Gregory V. Demo (NY Bar No. 5371992)
(*admitted pro hac vice*)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
E-mail: jpomerantz@pszjlaw.com
ikharasch@pcszjlaw.com
mlitvak@pszjlaw.com
gdemo@pszjlaw.com

-and-

/s/ Melissa S. Hayward
HAYWARD & ASSOCIATES PLLC
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel and Proposed Counsel for the Debtor and Debtor in Possession

Russell Nelms
115 Kay Lane
Westworth Village, Texas, 76114
682-433-9110
rfargar@yahoo.com

Mr. Nelms served as a bankruptcy judge in Fort Worth, Texas from 2004 to 2018. During that time he consistently received top ratings from the Tarrant County Bar for his knowledge of the law, fairness, and judicial temperament. His experience, coupled with his unconventional sense of humor, led to frequent speaking engagements at bankruptcy forums in and outside of Texas.

On the bench, Judge Nelms counted kindness and compassion as his key virtues. This extended to lawyers and their clients. At the conclusion of any matter, however, Judge Nelms never lost sight of the fact that his job was to apply the law to the facts, regardless of where his sympathies might lie. As he often said, "A judge who always likes the result of his rulings is not a very good judge."

Off the bench, Judge Nelms loved the company of lawyers, but his favorite time of each day was the first 30 minutes of the work day. At that time, Judge Nelms would gather his chambers staff together to share jokes and catch up on "the big picture."

Mr. Nelms is no longer "The Judge." Still, he brings to his current endeavors the traits that served him well on the bench. Chief among those is the willingness to listen while reserving judgment. That trait is bolstered by patience, a commitment to solving problems quickly and economically, and an adherence to "doing the right thing."

Mr. Nelms received a B.A. with high honors from Texas Tech in 1975, and a J.D. with high honors from Texas Tech School of Law in 1978. He served in the United States Army Judge Advocate General's Corps from 1978 to 1984. Mr. Nelms practiced with Carrington, Coleman, Sloman and Blumenthal, LLP from 1984 to 2004, spending the last 15 years as a partner in its bankruptcy litigation section.

From 2012 to 2018, Mr. Nelms was a contributing editor to the Collier Handbook for Trustees and Debtors in Possession. For his service on the bench and to his community, Mr. Nelms was named as a Sergeant in the American Inns of Court.

Currently, Mr. Nelms is serving as the chairman of the independent board of directors of Warrior Custom Golf, a company in chapter 11 in Houston, Texas. He also serves as the trustee of the Think Financial Litigation Trust, a trust created by the confirmed plan of Think Financial, a debtor in possession in Dallas, Texas.

Exhibit H

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	January 9, 2020
	9:30 a.m. Docket
Debtor.	
	DEBTOR'S MOTION TO COMPROMISE CONTROVERSY WITH OFFICIAL COMMITTEE OF UNSECURED CREDITORS [281]

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

APPEARANCES:

For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtors:	Ira D. Kharasch PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Debtors:	Melissa S. Hayward Zachery Z. Annable HAYWARD & ASSOCIATES, PLLC 10501 N. Central Expressway, Suite 106 Dallas, TX 75231 (972) 755-7104

APPEARANCES, cont'd.

For the Official Committee of Unsecured Creditors:	Matthew A. Clemente Dennis M. Twomey SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
For the Official Committee of Unsecured Creditors:	Penny P. Reid SIDLEY AUSTIN, LLP 2021 McKinney Avenue, Suite 2000 Dallas, TX 75201 (214) 981-3413
For the Issuer Group: (Telephonic)	James T. Bentley SCHULTE ROTH & ZABEL, LLP 919 Third Avenue New York, NY 10022 (212) 756-2000
For the Issuer Group: (Telephonic)	James E. Bain JONES WALKER, LLP 811 Main Street, Suite 2900 Houston, TX 77002 (713) 437-1820
For Acis Capital Management GP, LLC:	Rakhee V. Patel Annmarie Antoinette Chiarello WINSTEAD, P.C. 2728 N. Harwood Street, Suite 500 Dallas, TX 75201 (214) 745-5250
For Redeemer Committee of the Highland Crusader Fund: (Telephonic)	Terri L. Mascherin JENNER& BLOCK, LLP 353 N. Clark Street Chicago, IL 60654-3456 (312) 923-2799
For Redeemer Committee of the Highland Crusader Fund: (Telephonic)	Mark B. Hankin JENNER & BLOCK, LLP 919 Third Avenue New York, NY 10022-3098 (212) 891-1600

APPEARANCES, cont'd.:

For the U.S. Trustee:	Lisa L. Lambert Meredyth A. Kippes OFFICE OF THE UNITED STATES TRUSTEE 1100 Commerce Street, Room 976 Dallas, TX 75242 (214) 767-8967
For Jefferies, LLC: (Telephonic)	Patrick C. Maxcy DENTONS US, LLP 233 South Wacker Drive, Suite 5900 Chicago, IL 60606-6361 (312) 876-8000
For Patrick Daugherty, Pro Se:	Patrick Daugherty
Recorded by:	Hawaii S. Jeng UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2006
Transcribed by:	Kathy Rehling 311 Paradise Cove Shady Shores, TX 76208 (972) 786-3063

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

DALLAS, TEXAS - JANUARY 9, 2020 - 9:56 A.M.

THE COURT: All right. Let's roll to Highland now. Let's get appearances from lawyers in the courtroom, please.

MR. POMERANTZ: Good morning, Your Honor. Jeff Pomerantz; Pachulski Stang Ziehl & Jones. Happy New Year, Your Honor.

THE COURT: Happy New Year.

MR. POMERANTZ: Here on behalf of the Debtor.

THE COURT: Okay. Thank you.

MS. HAYWARD: Good morning, Your Honor. Melissa Hayward and Zachery Annable on behalf of the Debtor.

THE COURT: Good morning.

MS. LAMBERT: Lisa Lambert, and I think Ms. Kippes will be joining me, representing William Neary, the United States Trustee.

THE COURT: Thank you.

MS. CHIARELLO: Good morning, Your Honor. Annmarie Chiarello and Rakhee Patel here on behalf of Acis Capital Management, LP and Acis Capital Management GP, LLC.

THE COURT: Thank you.

MR. CLEMENTE: Good morning, Your Honor. Matthew Clemente from Sidley Austin on behalf of the Official Committee of Unsecured Creditors. With me today are my partners Dennis Twomey and Penny Reid.

THE COURT: Okay. Good morning. All right. Is that

all of the courtroom appearances?

All right. We have several people on the phone. I think most of them are just listening in. If you're on the phone, though, and you wish to appear, you may do so at this time.

MR. BENTLEY: Good morning, Your Honor. This is James Bentley of Schulte Roth & Zabel. Also on the line is my co-counsel, Joseph Bain of Jones Walker. We represent the Issuers.

THE COURT: Okay. Good morning.

MS. MASCHERIN: Good morning, Your Honor. This is --

MR. MAXCY: Good morning. Patrick --

MS. MASCHERIN: Good morning, Your Honor. This is Terri Mascherin of Jenner & Block. Also on the line with me is my partner, Mark Hankin. We represent the Redeemer Committee of the Highland Crusader Fund, which is one of the members of the Unsecured Creditors' Committee.

THE COURT: Okay. Good morning.

MR. MAXCY: Good morning, Your Honor. This is Patrick Maxcy from Dentons US, LLP on behalf of Jefferies, LLC.

THE COURT: Okay. Thank you. All right. Well, I guess that is it for the phone appearances.

Mr. Pomerantz, we're -- we have just one matter on the calendar, the motion to compromise with the Committee. I saw two limited objections, and then a U.S. Trustee's broader

objection. I'll start with, Do you have any of these objections worked out?

MR. POMERANTZ: Yes, we do.

THE COURT: Okay.

MR. POMERANTZ: We believe we have the Jefferies objection worked out, as well as the objection of the Issuers. And I'll, during the course of my presentation, alert Your Honor to how that's worked out.

THE COURT: Okay.

MR. POMERANTZ: And then we'll have a revised order that basically addresses each of their concerns, or at least Jefferies' concerns, but the statements on the record for the Issuers' concerns.

THE COURT: Okay. Very good.

MR. POMERANTZ: Good morning again, Your Honor. Jeff Pomerantz; Pachulski, Stang, Ziehl & Jones. I'm joined in the courtroom by Ira Kharasch, Greg Demo, and John Morris from my office. I would also like to introduce the Court to the proposed new members of the board of directors of Strand Advisors, which is the Debtor's general partner. They're all sitting in the first row behind counsel's well. And that's Mr. James Seery, --

THE COURT: Good morning.

MR. POMERANTZ: -- Mr. John Dubel, --

THE COURT: Good morning.

MR. POMERANTZ: -- and the Honorable Russell Nelms.

THE COURT: Yes. I've met him before.

MR. POMERANTZ: As have we. We thought you would remember him.

The resumes of Mr. Seery and Mr. Dubel were attached to the motion filed on December 27th, and those two resumes and the resume of the Honorable Judge Nelms were attached to the reply that was filed last evening. And while Mr. Seery and Mr. Dubel may be new names to Your Honor, we know that you are familiar with Judge Nelms, who sat with you in this district.

THE COURT: Uh-huh.

MR. POMERANTZ: Also in the courtroom, Your Honor, is Brad Sharp, the Debtor's chief restructuring officer from DSI, --

THE COURT: Good morning.

MR. POMERANTZ: -- and his colleague, Fred Caruso, who spends most of his working hours at the Debtor's Dallas headquarters.

THE COURT: Good morning.

MR. POMERANTZ: We have the declaration of Mr. Sharp that we would move into evidence at this point in time.

THE COURT: All right. I've got a stack of paper. If you have an extra copy for me to use, --

MS. HAYWARD: Your Honor, may I approach with the --

THE COURT: You may.

MS. HAYWARD: Your Honor, it was filed, the declaration was filed. I'm not sure that we have a copy of --

MR. POMERANTZ: Your Honor, we will also at the appropriate time during my presentation, I'll bring up to Your -- ask to bring up to Your Honor revisions to the term sheet that was attached to the motion.

THE COURT: Okay.

MR. POMERANTZ: Copies have been given to Ms. Lambert as well as the Committee.

THE COURT: Okay. Very good. All right. Well, what was handed to me was the preliminary term sheet as well as the CVs for the proposed new board members. I don't see the declaration --

MR. POMERANTZ: Your Honor, if I may approach, I have a copy.

THE COURT: You may. All right. Very good.

MR. POMERANTZ: So we would move that declaration into evidence.

THE COURT: All right. The Court will admit this. It was filed on the docket at 327, but I will additionally admit it as Exhibit 1 today.

(Debtor's Exhibit 1 is received into evidence.)

THE COURT: At some point in time, I want to give parties the opportunity to cross-examine Mr. Sharp. Do you want to do that now, or shall we hear an opening statement?

MR. POMERANTZ: However Your Honor prefers. I mean, maybe it's helpful to hear argument first, and then, before the Trustee --

THE COURT: I think I'd like to hear opening statements and then we'll --

MR. POMERANTZ: Thank you.

THE COURT: -- make the opportunity available. Okay.

OPENING STATEMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: Your Honor, by way of background, we appeared before Your Honor on December 6th and December 19th. And during each of those hearings, we described for the Court negotiations that were underway between the Committee and the Debtor which, if successful, would have -- would eliminate the need for contested and uncertain and costly litigation regarding the appointment of a Chapter 11 trustee and really put this case in a position where the Debtor and the Committee would be able to work together constructively towards negotiation of a plan.

As a result of our hearing on December 19th, Your Honor entered a scheduling order that set deadlines for either the filing of a motion to approve a settlement, or alternatively, the filing of one or more motions for the appointment of a trustee.

As set forth and required by the scheduling order, we filed our motion on December 27th, and in that motion we

sought approval of a term sheet and ancillary documents between the Debtor and the Committee, which I'll describe shortly.

While a couple of items had not yet been agreed to at the time the motion was filed, I'm pleased to report that over the last couple of days we've been able to reach closure with the Committee with respect to those items, and there would also be some modifications to the term sheet, which I'll go through in a few moments.

The motion, Your Honor, seeks approval of the term sheet, which accomplishes a variety of things that, again, will allow the Debtor and the Committee to put the acrimony that has existed in this case for the first three months behind us and allow us to focus on productive matters. In the last 24 hours, as I mentioned, there have been a few changes to the term sheet that I will describe. And I would like to hand up Your Honor a redline and a clean copy of the revised term sheet and exhibits. May I approach?

THE COURT: All right. You may. Do you have an extra for the law clerk? Okay. Thank you.

(Pause.)

MR. POMERANTZ: Your Honor, the term sheet does a number of things. Would you like me to give Your Honor some time to look through the redlines?

THE COURT: No. You may proceed.

MR. POMERANTZ: Okay. The term sheet does a number of things. The first thing the term sheet does is appointment of an independent board at Strand Advisors. Strand Advisors is the GP of the Debtor. The Debtor is an LP. The Debtor previously had filed a motion to approve the retention of Brad Sharp as the chief restructuring officer, and that initial agreement and motion contain details regarding the scope of Mr. Sharp's authority and the scope of what the Debtor could do without Mr. Sharp's prior consent.

The Committee raised concerns that the structure was not sufficient to ensure that decisions were being made for the Debtor only in their best interests and without any inappropriate influence from Mr. Dondero.

To address the Committee's concerns, a focal point of the settlement was the Debtor's agreement to appoint an independent board of directors at Strand who would be responsible for managing the operations of the Debtor.

Over the last few weeks, a principal aspect of the negotiations between the Committee and the Debtor have been discussing who should the independent directors be. Conceptually, the Debtor and the Committee both agreed that the board should include, first, a person with significant industry experience in which the Debtor operates -- hedge funds, money management; second, a person with deep restructuring experience from the financial advisor side; and

third, a person with some sort of judicial or governmental experience.

The Debtor originally provided the Committee with three proposed candidates. The Committee considered the Debtor's request, but instead presented the Debtor with four different candidates and asked the Debtor to choose from those four. The Debtors interviewed each of those people and ultimately agreed on Messrs. Dubel and Seery, who were each on the original list.

As of the deadline to file the motion on December 27th, the Committee and the Debtor had still not agreed on the identity of the third board member, but the parties were hopeful that an agreement could ultimately be reached and we decided to go ahead and file the motion. As I'm sure Your Honor saw in the motion, it was contingent upon everyone agreeing on the third board member.

Ultimately, the Debtor and the Committee both agreed that Mr. Dubel and Mr. Seery could identify the third board member out of a pool of four people: Two of the people originally requested by the Committee and two people identified by the Debtor. This week and over the weekend, Mr. Seery and Mr. Dubel interviewed each of the four candidates, and ultimately decided on the appointment of Judge Nelms as the third independent board member.

The board, as it will be constituted going forward, in the

Debtor's opinion, consists of three exceptional individuals who are independent of the Debtor, have a sterling reputation in the community, and bring to the Debtor a variety of the skills that we believe, and believe the Committee agrees, gives the Debtor the best opportunity to achieve a consensual restructuring and otherwise manage the affairs of the Debtor in the best interests of the stakeholders.

It is contemplated that the Debtor will continue to retain the services of DSI as the chief restructuring officer, and ultimately the board will determine if it's important to retain a CEO going forward.

The second thing that the term sheet does, Your Honor, was the removal of Mr. Dondero as an officer and director of Strand and eliminate all of his control over decision-making of the Debtor. The Debtor recognized early on in this case that Mr. Dondero's continuing role with the Debtor in a position of authority made the Committee extremely uneasy. Accordingly, the term sheet provides for him removing himself as an officer and director of Strand and that he would no longer be in a position of control at the Debtor.

However, since the filing of the motion, over the last several days, concerns have been raised about whether removing Mr. Dondero from the business entirely would have unintended consequences. I believe I may have mentioned at prior hearings that, because of his involvement as a portfolio

manager under various contracts with third parties, that there could be adverse economic consequences to the Debtor if he didn't stay in some role.

As a result of discussions over the last 24 hours, the Committee has agreed and the Debtor agreed to modify the term sheet to allow the new board to decide whether to retain Mr. Dondero in his capacity as a portfolio manager, provided, however, that he will not receive any compensation and he will agree to resign if requested by the board.

In any event, he will have no decision-making control at all and he will report to the independent board.

The corporate governance documents that create the new independent board of Strand also provide that Mr. Dondero, as the owner of the equity in Strand, may not replace the board without the Committee consent or court order.

The third major aspect of the term sheet, Your Honor, was the agreement on operating protocols, and it really relates to the ground rules for the Debtor's operations going forward and when notice to the Committee is required of certain transactions that would otherwise be in the ordinary course of business.

Importantly, Your Honor, we are not trying to modify the Bankruptcy Code in any way. Any transactions out of the ordinary course of business would still be subject to Your Honor's approval.

However, in this case, as we indicated in the initial motion we filed when the case was in Delaware, whether or not something is ordinary is not straightforward in a case such as the Debtor's, given the nature of the Debtor's operations. So we thought it was important to establish ground rules up front, and establishing those ground rules was one of the things we did initially in the case. We had opposition from the Committee, and we've worked through the opposition and ultimately arrived at the operating protocols that are attached to the term sheet.

They have been slightly modified in nonmaterial ways in the documents I handed up to Your Honor.

They were subject to substantial negotiations between the Debtor and the Committee, and we also expect them to be the subject of future discussions with the Committee and the independent board after the independent board takes -- takes place. Takes over.

Two parties in interest, Your Honor, Jefferies and a group of Issuers, the CLOs, have filed comments to the term sheet, which I'll describe in a few moments.

THE COURT: Okay.

MR. POMERANTZ: The next aspect, Your Honor, of the term sheet was the provision of standing to the Creditors' Committee to pursue certain insider claims.

During the negotiations, the Committee requested immediate

standing to investigate and potentially prosecute claims against insiders to the extent those insiders were not employed by the Debtor. Granting standing at this stage of the case was a difficult give by the Debtor. However, the Committee impressed upon the Debtor the importance of them being able to control the filing of any actions against the insiders, and the Debtor decided to accede to the Committee's request.

It still remains the Debtor's hope that, with the creation of the independent board, that the Debtor, the Committee, and any insiders who might be subject to any such claims will be able to come together and negotiate a consensual resolution of this case. While all parties, I'm sure, can and know how to litigate, hopefully they will agree that a negotiated outcome is better than a litigated outcome.

The next aspect of the term sheet, Your Honor, was the document preservation protocols, and it provides for certain procedures to be put in place to address the Committee's concerns about document preservation. They are contained in an exhibit to the term sheet. Again, slight nonmaterial modifications were made in what I handed up to Your Honor. And essentially they provide also for the Committee's access to privileged documents to aid in their investigation and prosecution of claims to which they are granted standing, and also sets forth a procedure to be followed to address concerns

if the information is subject to shared privileges by several entities.

As I mentioned, Your Honor, three parties have filed responses to the motion. The first is Jefferies. Jefferies is a secured creditor of the Debtor with respect to its margin account held at Jefferies, and also has a similar account held by a non-debtor affiliate. They have asked for clarification that, one, nothing in the protocols or the motion affects its rights under the underlying agreements or the safe harbor provisions of the Bankruptcy Code entitling them to enforce their remedies; and two, that the Debtors will not trade in the prime account without Jefferies' consent, and if that consent is sought and not obtained, only subject to court order.

The Debtor has agreed to include language in the order to address Jefferies' concern, and at the conclusion of my presentation I'll submit to Your Honor an order and a redline containing that language.

THE COURT: Okay.

MR. POMERANTZ: The second objection -- or not objection, Your Honor -- the second statement was filed by a group of Issuers of CLO obligations.

THE COURT: Uh-huh.

MR. POMERANTZ: And they were concerned that certain aspects of the operating protocols which require notice to the

Committee prior to the Debtor being able to take certain actions could conflict with the provisions of the underlying agreements which might require the Debtor to take action on a more expedited basis.

Neither the Issuers or the Debtor are aware of any potential transactions that will arise prior to the next hearing before Your Honor on January 21st. We understand -- we were not party to these discussions between the Committee and the Issuers yesterday, but we understand the way it's been resolved is that the Issuers will withdraw their objection as it relates to going forward today, subject to being able to come back to the Court on the 21st and revisit the issue if additional changes are not made acceptable to them to resolve their issues and concerns.

THE COURT: Okay.

MR. POMERANTZ: But I think all parties acknowledge that over the next 12 days this is a theoretical issue rather than a practical issue.

THE COURT: Okay.

MR. POMERANTZ: This brings us, Your Honor, to the United States Trustee's opposition, which is really the only true objection to the motion that has been filed. No creditor has filed an objection, no investor has filed an objection, and no governmental agency -- which the U.S. Trustee in its objection purports to be pursuing their interests -- has filed

an objection, either.

As Your Honor probably recalls, at the December 19th hearing the Trustee indicated its intent to oppose any agreement between the Debtor and the Committee that would involve corporate governance and to file its own motion for the appointment of the trustee. That motion is currently scheduled for hearing on January 21st. We had asked the U.S. Trustee to reserve judgment on the Committee's and Debtor's agreement until after we had come to an agreement and after we had presented it to the Trustee, in hopes that it would address their concerns. However, as the Court told us -- as the U.S. Trustee told us and Your Honor at the December 19th hearing, there was nothing short of appointment of a trustee that would satisfy the Trustee.

The comments really didn't make sense to us, and I believe it perplexed Your Honor, but here we are.

At its core, Your Honor, the U.S. Trustee's objection is really a request that the Court substitute its business judgment for that of the Debtor and the Committee, the Committee who represents the substantial majority of all claims in this case, when both of them have decided that agreeing to certain changes in corporate governance, among other things, is preferable to the uncertain, costly, and time-consuming litigation over a trustee, and also the uncertainty, even if a trustee was appointed, on how the case

would be administered.

To the contrary, under the corporate governance proposal, we have three highly-qualified individuals who are poised to take over management of the Debtor, and each bring with them various skills that one trustee would not have.

The Trustee has filed its motion for appointment of a trustee, and I'm sure on the 21st will argue that the Code requires it. However, that's not the issue before Your Honor today. It's not whether a trustee is appropriate. It's whether the motion and the term sheet is a sound exercise of the Debtor's business judgment under Section 363, and, importantly, a reasonable compromise of the pending disputes between the Debtor and the Committee.

The Trustee's objection raises three general points, none of which have any merit. First, the Trustee argues that there is a lack of disclosure of significant matters. The first aspect that the Trustee raises to, or points to, is the absence of identification of the third board member and the absence of disclosure of the compensation that the board members will receive, which will be backstopped by the Debtor.

As I described before, Your Honor, the identity of the third member of the board was a fluid process which was only resolved earlier this week, and the Debtor did not believe that it was appropriate to reach agreement on director compensation until all board members could provide input.

Last night, we filed a reply to the Trustee's objection in which we disclosed the identity of the third board member, and we'll also disclose the proposed compensation to be provided to them, which essentially is as follows. Each member of the board will receive $60,000 a month for the first three months of the case, $50,000 a month for the next three months of the case, and the presumption thereafter would be $30,000 a month. However, people recognize that this case will look a lot differently six months from now, and while the presumption is $30,000, the Debtor, the independent board members, and the Committee will sit down, see how the case looks, and decide whether any modifications are appropriate.

The amount of compensation, which at first blush may seem significant, really reflects the significant amount of work that the Debtor, the Committee, and the independent directors anticipate will be required from them not only to get up to speed about the case, but to effectively manage this complex Debtor's business operations. The directors have heard from the Debtor and the Committee of all the issues, of all the concerns, and this is not an enviable task that they are undertaking. The compensation they are being provided thus far we believe is appropriate under the circumstances and commensurate with the work that they are going to be expected to complete.

If they are successful and they are able to achieve a

consensual restructuring here, the million and a half or so that will be spent on them will be best million and a half dollars I think spent in this case.

Your Honor, we also have updated corporate governance documents which --

(Pause.)

MR. POMERANTZ: Your Honor, may I approach with the updated corporate governance documents?

THE COURT: You may. Okay.

MR. POMERANTZ: As I will discuss in a moment, Your Honor, there is really no need for the Court to approve the corporate governance documents, as they have been executed by Strand, which is not a debtor before this Court. However, there are a couple of matters in those documents that I want to bring to the Court's attention that do impact on the Debtor.

THE COURT: Okay.

MR. POMERANTZ: First, as is typical for board members, Strand has agreed to indemnify the independent directors to the full extent permitted by law. The independent directors have requested that the Debtors backstop Strand's agreement, and the Debtor and the Committee agree, and the documents so provide.

Strand has also committed to obtain directors and officers coverage for the independent directors. It has been located,

it's in the process of being finalized and bound, and the Debtor will pay the cost of that coverage.

The independent directors have also asked for language in the order approving the settlement that requires a party seeking to assert a claim against the independent directors relating to their role as an independent director to demonstrate to this Court that a claim is colorable before filing the claim and providing the Court with jurisdiction over any such claim. This is language that's similar in other similar types of cases.

THE COURT: Uh-huh.

MR. POMERANTZ: That will be reflected in the order.

Next, the Trustee objects to the failure of the Debtor to identify who the potential chief executive officer of the Debtor will be. And essentially, she's arguing that you have to identify that CEO now; it has to be subject to court approval. However, there's no requirement that any company retain a CEO. It's not a corporate law requirement. And the fact that the board reserves the right to retain a CEO in the future is consistent with corporate law and is not a basis to deny the motion. And in any event, normally, the retention of a CEO is not a subject that is brought to the Court's attention for Court approval.

So the lack of any clarity over the identity of the CEO is a reflection of the fact that this independent board does not

know if a CEO is required. They will come in, they are going to interview all the employees, they're going to sit down with the CRO, they're going to sit down with counsel, they're going to sit down with the Committee, and ultimately they will decide if a CEO is to be retained. And if a CEO is to be retained, they will go through the process of identifying who that CEO is. But again, it's not a reason to deny the motion.

The Trustee has also argued that because the Committee is not granted standing to pursue claims against current employees, as opposed to former employees, that there might be some statute of limitations concerns with respect to claims against those employees. The argument doesn't really make sense to us. In the standard case, the Debtor retains causes of action. And the Committee can investigate causes of action. And at some point during the case, a Committee could come in and could demand that the Debtor prosecute them, and if the Debtor unreasonably refuses, could seek standing before the Court.

In this case, the Debtors agreed up front that the Committee has the standing to prosecute certain claims against insiders that are not employees of the Debtor, which obviates the need for standing. So we've gone one step more. But the Trustee is arguing that that leaves a void for the claims that are not subject to the agreement on standing.

However, the term sheet provides that the board is going

to make determinations on what employees should remain, what employees should not remain. To the extent the board terminates any employees and there are claims against them, then basically the Committee will have the ability to bring those claims.

To the extent that those people aren't terminated, we have no doubt that the Committee, in the course of its investigation, will determine whether claims should be brought against those people, and at some point in time may ask the Debtor to prosecute those claims or ultimately seek standing.

In any event, these things are not being swept under the rug. There's no real legitimate concern that there's any statute of limitations issue that will prevent those claims from being prosecuted.

I am very much aware and have no doubt that the Committee is going to be laser-focused on claims, and any concern that statute of limitations is going to lapse I think is not well-taken.

The Trustee next argues that the Court does not have the jurisdiction to implement the corporate governance matters, and for that reason the motion should be denied. They -- she argues that because Strand is not a debtor, that the Court has no authority to appoint --

MS. LAMBERT: Your Honor, I object. The United States Trustee is a he. I am not the United States Trustee,

and the attacks *ad hominem* are inappropriate.

THE COURT: All right. Well, clarification, the U.S. Trustee is the guy in Washington. But anyway, you may proceed.

MR. POMERANTZ: I apologize to Ms. Lambert.

MS. LAMBERT: Actually, he's downstairs right now. Bill Neary.

MR. POMERANTZ: I apologize to --

THE COURT: Oh, well, I thought you meant the big guy in Washington. But anyway, you may proceed.

MR. POMERANTZ: I apologize to Ms. Lambert and no offense was meant.

THE COURT: Okay.

MR. POMERANTZ: So, the U.S. Trustee argues that because Strand is not a debtor that the Court has no authority to appointment the independent directors and limit Mr. Dondero's right to remove the independent directors. The Debtor is not really seeking authority to appoint -- to have court authority for the appointment of the directors at Strand. Again, as I mentioned before, that authority exists outside of bankruptcy. Strand is not a debtor. Strand could appoint anyone it wants to carry out its responsibility as the general partner of the Debtor, and it's exercising its corporate authority to do so by installing a board at Strand.

Nor is the Debtor seeking court authority for Strand to

enter into the corporate governance documents. Other than the couple of items I mentioned before, Your Honor, Strand can enter into these documents without authority from this Court. The only court authority that was required: Debtor to backstop the indemnification obligations, Debtor to pay compensation to the board members, and Debtor to pay for the D&O policy.

With respect to the Court's right to limit Mr. Dondero's ability to terminate the independent directors, the term sheet contemplates the Court approving a stipulation which limits Mr. Dondero's ability to terminate the independent directors, and if he does in fact seek to terminate the appointment of the independent directors, he would be in violation of court order. But even more importantly, Your Honor, if he decided to terminate the independent directors without the Committee's consent and without the Debtor's consent, I wouldn't imagine it would take anyone very long to come back before Your Honor and ask Your Honor to very quickly appoint a trustee.

Accordingly, Your Honor, I think the argument of lack of jurisdiction over Strand is a red herring and should be denied.

Lastly, Your Honor, the Trustee makes a curious argument that a trustee is needed to protect all investors and governmental authorities. The Trustee argues that this case demands transparency which can only be accomplished by a

Chapter 11 trustee.

One thing I think the Debtor and the Committee and the U.S. Trustee will agree on, this case does demand transparency. And we believe we've installed a corporate governance structure, an operating protocol structure, a document preservation structure, that does just that, provides transparency that this Debtor has not been subject to and which is quite different from the case that was before Your Honor before.

So we believe that what the Debtor and the Committee have done is not only in the interests of the Debtor, the creditors, but investors and all governmental entities.

And no investor or governmental entity has had any concerns or any problems with what is being done. They haven't filed any objection. The U.S. Trustee apparently is proceeding by proxy asserting those interests.

Second, nothing in the term sheet or any of the documents limits the rights of investors or of governmental entities to seek a trustee, to seek documents, or to do anything they would -- that they would be entitled to do under the Bankruptcy Code.

In any event, Your Honor, the fact that the Trustee believes that a trustee is more appropriate, again, is an argument that they can make at the January 21st hearing. It's not a basis for denial of this motion.

In conclusion, Your Honor, the only economic stakeholders in this case believe that proceeding with the transactions contemplated by the term sheet is in the best interest of the estate, will maximize their ability to achieve a consensual restructuring, and move this case through the system as quickly and efficiently as possible. The term sheet is a valid exercise of the Debtor's business judgment under 363 and an appropriate compromise of controversy, and the Trustee's objections are really nothing more than a rehash of its request for an appointment of a trustee.

For all these reasons, Your Honor, we request that the Court overrule the U.S. Trustee's objection and approve the motion.

THE COURT: All right. Well, before I hear from our objectors, is there any friendly commentary? Mr. Clemente, I figured you might want to address this.

MR. CLEMENTE: I do, Your Honor. And good morning.

THE COURT: Good morning.

OPENING STATEMENT ON BEHALF OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

MR. CLEMENTE: For the record, Matthew Clemente from Sidley Austin on behalf of the Official committee of Unsecured Creditors. I do have some comments that I would like to make, Your Honor, some, so please bear with me. I will try and be brief.

THE COURT: Okay.

MR. CLEMENTE: I think as late as 1:00 o'clock in the morning I wasn't sure that I would be in front of you with this settlement fully in place in a manner that was satisfactory to my Committee. As I mentioned to you in my prior appearances in front of you, every provision was important to the Committee, and they all work together. As Your Honor can imagine, there was a lot of negotiation that took place, including late in the day and early morning, to come to that conclusion.

Some comments on our perspective as a committee, Your Honor. As an initial matter, we were absolutely not okay with the governance structure that was in place when the petition was filed. As we detailed in our objections to the CRO motion and the protocol motion back when the case was in Delaware, the Committee has very real and identifiable concerns about the Debtor's ability to dispatch its fiduciary duty. And the Committee very seriously contemplated moving for a Chapter 11 trustee daily. That conversation is something that the Committee continues to -- continued to engage in, Your Honor. So it's something that they considered very, very carefully.

That was the lens through which the Committee was approaching negotiations over the settlement agreement and the independent director structure. That's how they viewed it. That's the backdrop against which they came to it.

The Committee had two primary goals that it had sought to achieve with the settlement agreement. The first was to ensure that Mr. Dondero does not remain in a position of management authority or control in any fashion with the Debtor. Goal number two was to ensure that the value of the Debtor's estate is preserved and maximized. Those two goals needed to work together.

The Committee believes that the carefully-crafted settlement agreement achieves these objectives in a manner that is more beneficial to the estate than a potential Chapter 11 trustee and a related fight over its appointment at this time.

The lynchpin of the settlement, Your Honor, is the appointment of the three independent directors. And as Mr. Pomerantz outlined for you, that was the subject of intense discussion, negotiation, debate among the Committee and with the Debtor. But we believe that Mr. Seery, Mr. Dubel, and Judge Nelms are fully independent, highly qualified, and bring relevant and complementary skillsets to this board. Mr. Pomerantz referred to that, but we believe that the three directors all bring unique talents and attributes that will allow them to function effectively as a board and provide the appropriate oversight and direction that we believe is necessary here.

However, regardless of how independent or highly skilled

they may be, they would be of no use if they weren't bestowed with the appropriate power. So that was another point that was very important to the Committee, and we believe that the settlement does this. The settlement makes clear that the independent directors are granted exclusive control over the Debtor, including over all employees. That's absolutely critical to the Committee.

The settlement also provides that the CRO and the Debtor's professionals shall report and serve at the direction of the independent directors. That is also very important.

And let me be clear, Your Honor, because I think you may have raised this at a prior hearing: This is not a board that we expect to work at 50,000 feet, as demonstrated by the compensation structure that Mr. Pomerantz outlined for you. This will be a board that's hands-on, members of which will be on the ground, at the Debtor, with a strong presence and a clear message of who is in charge. That is critical for this Committee.

Additionally, as Mr. Pomerantz mentioned, the new board, in consultation with the Committee, is empowered to determine whether a CEO should be retained. It's possible that one of the independent directors could be that CEO, Your Honor. But we wanted to make clear that that was an important part of the structure, should the board determine that that was the way it wanted to go.

So, in sum, Your Honor, we believe that the independent board has the clear authority and the skillset that's necessary to take control and will be actively and aggressively doing so.

But let me be clear, rest assured, Your Honor, this is not going to be a board that answers to the Committee in that sense. I think that we will all be moving together directionally, but it's very possible that I will be in front of Your Honor arguing against a decision that this independent board made. So I want to assure Your Honor that although the Committee was very active and in fact picked Mr. Seery and Mr. Dubel, and then Mr. Pomerantz detailed how the third director was picked, we understand who their duty -- what their duty is and we also understand that they're not a rubberstamp for the Committee, Your Honor. And so I wanted to make that point to you to assure Your Honor that that's not the structure that's being set up here, nor are they the type of individuals that would allow that to happen.

Additionally, Your Honor, the settlement grants the Committee standing to pursue estate causes of action against the related parties. That was very important to us, Your Honor.

And in addition to that, the settlement provides the Committee access to privileged documents and sets forth a discovery protocol that will assist the Committee in its

investigation.

The Committee strongly believes that Mr. Dondero's repeated past behavior, that there are many questionable transactions that will need to be thoroughly investigated and pursued. And so having those causes of action with the economic party in interest related to those causes of action, the Committee and its constituencies, we thought was very important and very critical.

Granting standing, Your Honor, as I mentioned, avoids any issues regarding who will be controlling those claims.

I'll touch on this in a moment, but Mr. Pomerantz talked about Mr. Dondero remaining in name as an employee. Let me assure Your Honor that that is not a backdoor around the Committee's ability to investigate and immediately pursue claims against him should that be the course that we choose to take. So he's not part of that carve-out for current employees. That's not at all happening. That would never be something that my Committee would be comfortable with. So I wanted to make clear to Your Honor that that's not something that's happening with sort of this late edition of Mr. Dondero's continuing on in name as an employee.

Your Honor, the settlement also lays out a very detailed set of operating protocols which we do believe are appropriate and provides the Committee with transparency, which I've been expressing to Your Honor we've needed since this case has

started.

Finally, as we point out in our reply and as would always be the case, should new facts develop or the situation demand it, the Committee reserves the right to seek a Chapter 11 trustee, as does any other party in interest, to the extent it may be appropriate at that time.

In short, Your Honor, the Committee very carefully and diligently weighed the independent director option versus the Chapter 11 trustee option. The Committee had very clear goals in mind, as I expressed to you, and determined that those goals could be achieved in a value-maximizing manner through the independent director structure.

The negotiations were very intense, and it was only after the Committee determined that each piece of the settlement was to its satisfaction did it ultimately conclude that the settlement maximizes value for all stakeholders while at the same time protecting those stakeholders from exposure to continuing insider dealing, breaches of duty, and mismanagement.

Therefore, the Committee believes approving the settlement is in the best interest of the estate, and therefore it believes it should be approved.

I do want to offer a word about Mr. Dondero continuing as an employee. As Your Honor was aware, the term sheet as originally filed provided that Mr. Dondero would, among other

things, resign as an employee of the Debtor. Mid to late afternoon yesterday, Mr. Ellington called me and said that the Debtor was now of the view that Mr. Dondero should remain on as an employee in that capacity for the benefit of the estate. The Committee was, very appropriately, very skeptical of this, as well as the sort of last-minute offer, last-minute, you know, addition, however you want to view it -- some might argue retrade -- that Mr. Dondero was to leave the Debtor, period. That was our view. That was the way that the term sheet was initially structured. And under no circumstances was the Committee going to allow Mr. Dondero to have any control over this Debtor.

Your Honor, the Committee doesn't know what, if any, the consequences are of removing Mr. Dondero as an employee. And we're not conceding at all that there are any value lost by removing Mr. Dondero as an employee. Instead, what we're doing is we're staying true to our structure with the independent directors and we're empowering them to decide. And so it's consistent with, you know, our goals of having the independent director structure in place. And under the settlement as now constructed, even with this late addition or adjustment, Mr. Dondero would remain as an employee in name only, subject in all respects to the direction, oversight, and removal by the independent board. And importantly, should they decide to do that, Mr. Dondero shall resign. And he

shall receive no compensation.

So he will not be in control of this Debtor. The independent directors are. And he's not going to be empowered to make decisions on behalf of the Debtor. Instead, we're empowering our independent directors to make those decisions and determinations on behalf of the Debtor.

I wanted -- I thought it was important that I provide that perspective to Your Honor, as this is something that came in at a very, very late hour.

Overall, Your Honor, for the reasons I have stated and the reasons in our reply, the Committee, as a fiduciary of all creditors in this case, believes that the settlement is in the best interests of the creditors and should be approved. And at this time, it's the better alternative than the cost, delay, and uncertainty resulting from a Chapter 11 trustee fight and the potential appointment of a Chapter 11 trustee.

It is time to put the governance issues behind us, Your Honor, and to move forward to determine how to maximize value for the creditors and how to get them paid.

Your Honor, just regarding the specific resolutions of objections that Mr. Pomerantz put on the record, I agree with how Mr. Pomerantz characterized those, and the Committee is supportive of those resolutions as well.

Those are all my remarks, Your Honor, but I am happy to answer any questions or address any concerns Your Honor may

have.

THE COURT: Okay. Two follow-up questions. First, I know I asked you this at a previous hearing and you told me, but your Committee, as I recall, is very well constituted. Just remind me of the members.

MR. CLEMENTE: Yes.

THE COURT: You have a representative from the Redeemer Committee, --

MR. CLEMENTE: Yes, Your Honor.

THE COURT: -- which is a $140 million or so arbitration award?

MR. CLEMENTE: Yes, Your Honor.

THE COURT: Okay. And who else is on the Committee? Is an Acis representative?

MR. CLEMENTE: Acis is on the Committee, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: Meta-e Discovery, who is a trade vendor of the Debtor, is on the Committee. And UBS Securities, who is also --

THE COURT: Okay.

MR. CLEMENTE: -- a litigation claimant, is on the Committee.

It was the U.S. Trustee in Delaware's parting gift to me to name a four-member committee, Your Honor.

(Laughter.)

THE COURT: Okay. Makes it awkward at times. And then back to the Dondero subject.

MR. CLEMENTE: Yes, Your Honor.

THE COURT: I mean, again, both Mr. Pomerantz and you clarified that the proposal now is the new board will decide if he stays on, Mr. Pomerantz said as a portfolio manager.

MR. CLEMENTE: That is correct, Your Honor.

THE COURT: Am I -- I mean, I'm hearing that correctly?

MR. CLEMENTE: That is correct, Your Honor.

THE COURT: So, right now, whatever officer positions he has, he's technically not resigning? Or --

MR. CLEMENTE: He is resigning as an officer of the company, Your Honor.

THE COURT: Okay. He's resigning? So the board will just decide, is he going to be a portfolio manager or some -- whatever the employee title is?

MR. CLEMENTE: Or they could decide that he's not necessary.

THE COURT: Or not necessary? In any event, no compensation?

MR. CLEMENTE: That is correct, Your Honor.

THE COURT: Okay.

MR. CLEMENTE: And as you can see, the term sheet provides that Mr. Dondero shall not cause any related entity

to terminate any agreements with the Debtor as well. That was language that was added last night as well.

THE COURT: All right. So they're going to make the decision, does he help preserve value by staying in some capacity or not?

MR. CLEMENTE: That is correct, Your Honor.

THE COURT: Okay.

MR. CLEMENTE: That, cutting through it, that is the way that ultimately the Committee views it.

THE COURT: Okay.

MR. CLEMENTE: And if there's an opportunity -- and I'm not conceding that there is. I'm not conceding that he preserves any value.

THE COURT: Uh-huh.

MR. CLEMENTE: But we wanted to give the option to our independent directors to make that determination. Because if there's an opportunity to preserve value, that's what we're trying to achieve.

THE COURT: Okay. And I don't even know if you've thought through this. Would there be some sort of notice filed on record in the case if --

MR. CLEMENTE: If --

THE COURT: -- if the decision is made to --

MR. CLEMENTE: To -- to --

THE COURT: -- hire him or keep him as a portfolio

manager?

MR. CLEMENTE: So, I think the default under the term sheet, as revised, is he stays in that capacity in terms of name. The independent directors will -- they're subject to his control and direction, and they could decide to remove him.

THE COURT: Uh-huh.

MR. CLEMENTE: Perhaps if Your Honor --

THE COURT: Okay.

MR. CLEMENTE: We could provide notice if they make the determination to remove him, but I think the default is that, you know, he's in that -- he's remaining as that employee name currently. So that's the current default.

THE COURT: Okay. All right. Thank you.

MR. CLEMENTE: Thank you very much, Your Honor.

THE COURT: Well, Ms. Patel, you're getting up so I'll hear -- I don't know who all has been in the loop over this overnight development.

OPENING STATEMENT ON BEHALF OF ACIS CAPITAL MANAGEMENT

MS. PATEL: Your Honor, Acis has been in the loop as a member of the Committee. And I will be very brief with respect to Acis's individual comments. And I just want to be clear: Obviously, I'm here as counsel for Acis, and so this is Acis's individual position. Mr. Clemente aptly and very ably handled the Committee's overall position with respect to

this.

But Your Honor, I just want to, on behalf of Acis, make sure that, because of these developments, that's really -- I really had hoped to have zero role today, but I want to make sure that we're -- Acis is on record with respect to our position. And obviously, given Your Honor's knowledge and oversight of the long history of Acis's bankruptcy case and seeing some of the events that transpired there, I'm sure that this will all, against that backdrop, make an awful lot of sense.

But, you know, it's this continued role for Mr. Dondero that is of concern. You know, this issue even being raised within like the last 48 hours by Mr. Ellington, the timing of it just creates an issue. I mean, did this -- how could this possibly have come out of left field when this is such a huge part of what the Debtor does in its ordinary course of business, is serve as a portfolio manager, and these are contracts that have been negotiated, generally speaking, internally by Highland. So the fact that if Mr. Dondero were to exit the structure and there would be some potential ramifications to that, I've got to wonder how much of a surprise could that really have been to Highland folks.

But I just wanted to highlight, in connection with the term sheet -- this is the preliminary term sheet that was handed up Your Honor, and I believe Your Honor has a redline

version of it as well --

THE COURT: Uh-huh.

MS. PATEL: -- on Page 2, with respect to the role of Mr. James Dondero, there's various provisions in there. And I guess I would be remiss, Your Honor, if I didn't say, at least out of the gate, Acis obviously supports the implementation of this independent board of directors. We believe all the candidates are very capable and are -- we put our reliance upon them.

Obviously, we don't concede any issues. We'll see what we're going to do. But certainly, for the time being, we do support the entry of this agreement of the settlement -- or, I'm sorry, approval of the settlement agreement by the Court that lets the independent board be put into place.

But what I'll focus the Court on, on Page 2 under the role of Mr. James Dondero, it goes through various provisions as to what he'll resign to -- positions he'll resign from and that he will remain as an employee of the Debtor, including maintaining his title as portfolio manager for all funds and investment vehicles for which he currently holds that title. And then it goes on to provide as to who he'll report to and how he will be governed, which includes by the independent board, he will receive no compensation, and that he will be subject to at all times the supervision, direction, and authority of the independent directors.

Again, we have faith that the independent directors will oversee this and will govern his role accordingly. However, given Acis's history with how transactions have transpired at Highland, we remain highly cautious with respect to what happens next.

And to that end, Your Honor, the very last sentence there on Page 2, "Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor," is a key provision of this that keeps Acis, as a Committee member, on board with this agreement. I wanted to highlight that and note that, in the last less than 48 hours, in the last 12 hours, or maybe a little bit more than that, call it 18 to be safe, that's where -- that's a provision that's been -- that's where we've ended up. It's all of these issues have been going at lightning speed, but I did want to just, for the record and so everybody is clear, that is an important piece of this agreement to -- for Acis.

And as Your Honor knows, this Debtor, Highland, is wont to try to terminate agreements and to try -- in an attempt to try and transfer valuable contracts away and valuable revenue stream away from an entity to an alternate entity. And that's really the heart of our concern, Your Honor.

So, with that, I just wanted to be clear and be on record as to Acis's position. Thank you.

THE COURT: Thank you. All right.

MR. POMERANTZ: Your Honor, if I briefly may respond to the issues with Mr. Dondero while they are fresh in Your Honor's mind?

THE COURT: Okay. Okay.

MR. POMERANTZ: Your Honor, look, we appreciate the timing of this coming to the attention of the Committee as being less than optimal. As Your Honor can appreciate, this case that's been filed three months ago, a lot of people are looking very carefully at what's happening to the Debtor. Investors are looking. There was a transfer of venue. There have been a lot of reports about potential trustee motions. And we believe a lot of parties are waiting to see the outcome of this hearing and the trustee hearing to determine whether they will determine to continue to do business with the Debtor.

It's not only an issue of contractual rights. It's also an issue of whether investors feel comfortable on who is managing, who is managing their investments.

This issue of Mr. Dondero's continuing role has been something that at the Debtor we've continued to grapple with over the last several weeks. It's always been our thought that we should do nothing that would unduly harm the company from an economic standpoint. I think the Committee shares that. That if it's determined by an independent board -- and don't take current Debtor professionals, don't take current

Debtor employees' word for it -- but if they determine that there's an economic benefit by keeping him on to preserve material revenue stream, they should be able to make that determination. I think that's really at the core here. And I think the Committee got ultimately comfortable with it because it will be an independent board, the majority of the members identified and chosen by them and accepted by the Debtor.

So, again, we apologize to the parties and the Court for bringing this on late. It wasn't my intent to come here and present modified versions of the term sheet that hadn't been filed. But that's where we are, and that's why it has come up, and that's why it's an extremely important issue, because preserving whatever revenue we can for the Debtor is important.

Now, at the end of the day, the board may either decide that he doesn't preserve the revenue, or the negatives from keeping him involved with the company outweigh any benefits. And that's a decision they will have to make, and it'll be their province to make. So I just wanted to give Your Honor that perspective.

THE COURT: Okay.

MR. DAUGHERTY: Your Honor, may I approach?

THE COURT: Mr. Daugherty? You may.

OPENING STATEMENT ON BEHALF OF PATRICK DAUGHERTY

MR. DAUGHERTY: I apologize. I was not planning to

address the Court at all today. I would have had my attorney here for it. But I just ask a little bit of indulgence to represent myself *pro se* for this issue.

This is the first I've heard that Mr. Dondero would stay with the company. I think it's an awful idea. There's a litany of reasons for that.

By the way, I'm completely in support of this -- of this board that's been chosen. I have every confidence that they'll be able to make good decisions eventually. But they're stepping into this thing new. Obviously, I've been through this in your court with *Acis* and other matters, and I have deep, deep concerns about Mr. Dondero continuing in that role, simply because of the influence it has on the rest of the organization and the message that it sends, both internally and externally, of where the company goes from here.

So I just wanted to let you know my thoughts. I wasn't planning to make them. I haven't filed anything. But that's where I stand.

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

All right. Before we hear from the U.S. Trustee, who I know is going to have a lot to say, let me just circle back briefly to Jefferies counsel and the CLO Issuers' counsel. You heard the representations of Mr. Pomerantz earlier about, well, first, in the case of Jefferies, that the Debtor has

agreed to language to address your concerns. Do you want to weigh in on that and confirm that you're content that you're going to have language to work out your concerns?

OPENING STATEMENT ON BEHALF OF JEFFERIES, LLC

MR. MAXCY: Thank you, Your Honor. Patrick Maxcy for Jefferies.

No, I don't have anything additional to add to what Mr. Pomerantz said. The language that we have worked out will speak for itself and will be included in the order.

THE COURT: All right. Thank you.

And counsel for the CLO and CDO Issuers, do you confirm that you would be in agreement to basically withdraw your objections for now, but perhaps come back and make argument on the 21st if you have not worked out language with the Committee that you think works?

OPENING STATEMENT ON BEHALF OF THE ISSUER GROUP

MR. BENTLEY: James Bentley from Schulte Roth for the Issuers, Your Honor.

I believe the deal that Mr. Pomerantz and Mr. Clemente and I have discussed was adjourning our objection to the 21st, --

THE COURT: Okay.

MR. BENTLEY: -- rather than withdrawing it.

THE COURT: Okay.

MR. BENTLEY: We're -- we believe we will be able to

come up with language acceptable to the Issuers, but we would like to reserve the right to come back to the Court on our limited objection if we cannot, given that our issue is really -- really only relates to the 25 Issuers we represent.

THE COURT: Okay. Thank you very much.

All right. Ms. Lambert?

OPENING STATEMENT ON BEHALF OF THE UNITED STATES TRUSTEE

MS. LAMBERT: May it please the Court. As the Debtor acknowledges, the motion that they are settling, the issues that they are settling, are the issues that the U.S. Trustee has raised in his motion to appoint a Chapter 11 trustee. As a matter of statutory construction, Section 1104 does not contemplate settlement of these issues. 1112, in contrast, has a provision that if the Court finds and determines that there is cause to convert a case, there are unusual circumstances and the Court can find a reasonable justification for the wrongdoing or the error that occurred that led to cause -- for example, administrative defects in 1112, not filing monthly operating reports -- and that can be cured. The Court has to make a finding that those -- these defects can be cured within a reasonable period of time. Section 1104 contains no analog to his.

If the Court finds cause to direct the appointment of a Chapter 11 trustee, then the Court is supposed to appoint a Chapter 11 trustee. And *Trailer Ferry* and *AWECO* both stand

for the proposition that, on today's day, we're supposed to have evidence about what the management issues are that led to this agreement. There's been no evidence. There's been no allegations in the motion for settlement. And so the U.S. Trustee is prepared to put that evidence on.

And Your Honor, one aspect of this is that the arbitration agreement has been sealed. And there are people on the phone. I don't know who's on the phone. The U.S. Trustee has opposed the sealing of the arbitration -- not arbitration agreement, the arbitration judgment -- has opposed the sealing of that. And then they referenced a confidentiality order as the basis to seal it. The U.S. Trustee also opposed that confidentiality motion, which was filed subsequently to the motion to seal.

There is no confidentiality order. An interim order was entered sealing the arbitration award, but -- and the U.S. Trustee has honored that by redacting all of the pleadings that we filed relating to that, but it's important today for the U.S. Trustee to be able to discuss it in argument, and it is here -- and we have it prepared to be admitted into an exhibit.

So, to proceed with my argument, Your Honor, I need some clarification about what I can say.

THE COURT: You want clarification from me on what you can say?

MS. LAMBERT: Well, I mean, either that or we need to clear the room.

THE COURT: I've read the arbitration award.

MS. LAMBERT: Right.

THE COURT: It's in my brain.

MS. LAMBERT: Right. Okay.

THE COURT: Uh-huh.

MS. LAMBERT: And so one of the arguments here today is that the U.S. Trustee is representing the SEC and representing other Government agencies and things. No. Obviously, that is not the U.S. Trustee --

THE COURT: I didn't hear that.

MS. LAMBERT: Okay. The -- one of the positions has been, in the papers, is, well, that we don't have standing to raise their issues. And that's true.

THE COURT: Okay.

MS. LAMBERT: But the problem is that the U.S. Trustee has been constrained from discussing those issues with the SEC. The arbitration award is very relevant to the SEC's oversight. I anticipate the evidence today will be that the SEC, after the financial crisis of 2008, imposed restrictions on this Debtor on breach of fiduciary duty issues. I anticipate that the arbitration findings would be very relevant to whether those issues are ongoing or not.

THE COURT: Okay. Let me weigh in. I view the legal

standard that this Court has to weigh today as being: Is the Debtor proposing something that is reflective of sound business judgment, reasonable business judgment? And to the extent this is a compromise of controversies with the Committee, is this fair and equitable and in the best interest of the estate?

And as Mr. Pomerantz has said, you know, a lot of this maybe doesn't even need Court approval. But to the extent there are aspects of this that are appropriate to seek Court approval on, you know, this is my task. I have to look at what's presented, and is this reflective of sound business judgment? Is this fair and equitable? Is it in the best interest?

So, assuming there are tons of bad facts here reflected in the arbitration award, reflected in other evidence, bad facts that might justify a trustee, a Chapter 11 trustee, is this nevertheless, what's proposed today, a reasonable compromise of, you know, the trustee arguments the Committee could make or, you know, is this a reasonable framework for going forward? Okay?

So I guess what I'm saying is I'm confused about, you know, do I need to look at the arbitration award? Do we need to have evidence of all of that? I can assume that there are terrible facts out there that might justify a trustee, but I'm looking at what's proposed. Is this a fair and equitable way

to resolve the disputes? Is it sound business judgment? Frankly, is it a pragmatic solution here to preserve value? So that's the legal standard I have in my mind here.

MS. LAMBERT: Yes, Your Honor.

THE COURT: Okay.

MS. LAMBERT: The standard is whether it is fair and equitable to resolve the issues in the Chapter 11 trustee motion, and it is the U.S. Trustee's position that they are not resolved by this. And how are they not resolved? Number one, they're not resolved because the problems that led to the breach of fiduciary duty issues and findings are more pervasive, both based on this Court' finding in the *Acis* case and in the arbitration court's finding in Mr. Dondero. Other officers are implicated.

THE COURT: But how --

MS. LAMBERT: Other employees are implicated.

THE COURT: Okay. I feel like maybe we're talking at each other, not getting each other. I've got a proposed solution here to totally change the playing field, if you will. Bring in incredibly qualified people to --

MS. LAMBERT: Those people --

THE COURT: -- to change out the, you know, the person that you say breached fiduciary duties, the, you know, mismanagement, whatever bad labels we have here, but bring in a clean slate.

MS. LAMBERT: No, Your Honor, because employees remain at the Debtor who are problematic. The board that is appointed owes a fiduciary duty to whom? Strand. Dondero. He's still the board -- he is the sole stockholder. Yes. In addition, --

THE COURT: And they won't be taking directions from him.

MS. LAMBERT: In addition, --

THE COURT: The term sheet is they won't be taking directions from him.

MS. LAMBERT: Your Honor, there is no evidence before the Court today that Mr. Dondero has entered a stipulation. This is part of the problem. This continues --

THE COURT: Well, if he doesn't, in five minutes the Committee is going to be filing their trustee motion, right?

MS. LAMBERT: Well, then we haven't saved any time or any money. This is the whole issue. They have to put on evidence that this is a resolution of issues. We're going to have the motion to appoint a Chapter 11 trustee either way.

THE COURT: All right. Well, we did have the evidence of Mr. Sharp. Would you like to cross-examine him at this point?

MS. LAMBERT: Your Honor, I would like to put the U.S. Trustee's exhibits into evidence and then cross-examine him.

THE COURT: All right. Your exhibits?

MR. POMERANTZ: Your Honor, we would object to any exhibits. The Trustee has not filed an exhibit list.

MS. LAMBERT: Your Honor, this matter was set on an expedited basis and the Court does not require exhibit and witnesses lists when a matter is filed on an expedited basis. It's impossible, when a response is filed at 5:00 o'clock the evening before and supplements are made in the morning of the hearing, for the U.S. Trustee to put on a witness and exhibit list.

MR. POMERANTZ: Your Honor, we were here on the 19th. We set out a briefing schedule. And maybe it was a couple days short of normal notice. Ms. Lambert agreed to issue discovery by a certain date, and she at no point said that because there was 13 days' notice as opposed to longer period that she couldn't comply and provide a witness list.

We provided with a witness list. We provided an exhibit list. The Trustee's effort and attempt to now submit exhibits and rely on maybe there were some changes this morning, that just doesn't cut it, and that's not fair and that's not due process.

THE COURT: Okay. I sustain the objection. The exhibits won't be admitted since there was no exhibit list.

MS. LAMBERT: Your Honor, I do not have an exhibit list from them. And they --

THE COURT: Well, they haven't offered any.

MS. LAMBERT: They put on new exhibits this morning. The exhibits that the U.S. Trustee has are all things that they are familiar with.

THE COURT: Let me back up. They didn't introduce any exhibits. They --

MS. LAMBERT: But they introduced the declaration, they introduced the supplements to the agreement that were drafted this morning, they've introduced the new corporate resolutions, all of which they handed me this morning.

THE COURT: All right. Well, the declaration of Mr. Sharp, it's two pages long. It is, I don't think, any kind of surprise information.

MS. LAMBERT: Your Honor, --

THE COURT: I'll allow you to cross-examine him.

MS. LAMBERT: -- the U.S. Trustee's exhibits are no surprise, either. The *Acis* opinion is no surprise to anybody in this courtroom.

THE COURT: Okay. Well, what are your exhibits?

MS. LAMBERT: The --

THE COURT: I probably should have asked.

MS. LAMBERT: The exhibits are the *Acis* opinion, the arbitration awards or the determinations, both the partial and the final, and the SEC's original judgment. There are four exhibits.

THE COURT: All right. Well, Mr. Pomerantz, what would you like to say? One of them I have obviously seen, since I wrote it.

MR. POMERANTZ: Yes, you've written it. You wrote it.

(Laughter.)

MR. POMERANTZ: Your Honor, I think this is a tempest in a teapot. The Committee's brief that it filed in opposition to the CRO retention, the ordinary course protocols, and the cash management motion had a litany of description of the Redeemer litigation, of the SEC litigation. There are plenty of bad facts out here. Okay? We have an interim order to seal. There was no hearing set today for our final hearing.

The Trustee has objected to that order, and I suspect that will be heard on the 21st. We don't think it's appropriate to introduce the Redeemer award. However, we have read the redacted provisions or portion of the U.S. Trustee's brief, and we have no problem if the U.S. Trustee limits its argument to the redacted portion in presenting that to the Court.

In other words, we don't believe that the few sentences that were redacted need to be redacted.

However, to the extent they intend to submit the arbitration award, we don't think it's appropriate, we don't think it's necessary, we think Your Honor hit it right, that

the issues today are not whether there's mismanagement at the Debtor. Okay?

The U.S. Trustee's position is, notwithstanding this new structure, it doesn't work. She has a trustee motion on. She can argue on the 21st that it doesn't work. Nobody is prejudicing her right to do so.

We think it's prejudicial, it's unfair, it's procedurally improper to submit the Redeemer arbitration award and to allow the Trustee to do anything other than describe exactly what she has in her pleading.

THE COURT: Okay. I sustain the objection to those exhibits. Again, I've read them. They're in my brain. I wrote one of them. But I will allow you to cross-examine Mr. Sharp. So, Mr. Sharp, would you please come to the witness stand? Please raise your right hand.

BRADLEY SHARP, DEBTOR'S WITNESS, SWORN

THE COURT: All right. Please be seated.

MS. LAMBERT: To clarify, Your Honor, has the Court considered the *Acis* opinion and the arbitration opinions based on judicial notice?

THE COURT: And we're doing a lot of hair-splitting here. I'm just letting you know I -- the facts are in my brain. You can't extract them from my brain. Okay?

MS. LAMBERT: Okay.

THE COURT: I know there have been a lot of bad

things, arguably bad things. But to me, the real issue here today is whether this framework that has been heavily negotiated with the Committee reflects reasonable business judgment on the part of the Debtor, is a fair and equitable resolution of the Committee's, you know, arguments in favor of a trustee, and whether this makes, you know, sense going forward to allow this Debtor to go forward without a trustee. Okay?

So I really think that the evidence you want is not terribly relevant. We technically aren't here on a trustee motion today. We're here on whether a new board and the terms, the protocols suggested, reflect reasonable business judgment and reflect a fair compromise of arguments the Committee has raised. All right? So I don't know how much more clear I can make that. I guess the technical answer is I'm not taking judicial notice of those things for purposes of today.

All right. You may proceed.

CROSS-EXAMINATION

BY MS. LAMBERT:

Q Mr. Strand, can you state your name for --

A Sorry. Bradley Sharp, S-H-A-R-P.

Q Sharp. Mr. -- oh, sorry.

A No relation to Strand.

Q All right. Strand is the general partner of the Debtor,

right?
A That is correct.
Q And there has been no change in the board of the Debtor except Mr. Dondero's resignation; is that right?
A Well, it's a little different, because the -- Strand is the general partner of the Debtor.
Q Yes.
A So the new board will be acting and in control of the Debtor.
Q Yes. And there is -- Strand is a non-debtor, correct?
A That is correct.
Q And the stock of the non-debtor, Strand, is owned by Dondero?
A Mr. Dondero owns Strand Advisors.
Q In its entirety?
A That is correct.
Q So the board will owe a fiduciary duty to Mr. -- to Mr. Dondero?
A The board will have a fiduciary duty to the Debtor and to Strand Advisors.
Q All right.
A Their duty is to the entity.
Q The -- Strand, as the general partner, as an entity, owes a fiduciary duty to the Debtor, right?
MR. MORRIS: Objection to the extent it calls for a

legal conclusion.

THE COURT: Sustained.

BY MS. LAMBERT:

Q Do you know?

A As a lay person. I'm not an attorney.

Q Okay. So you don't know what the fiduciary roles of the board will be; is that right?

A Well, the fiduciary board will be acting -- you know, looking at it from my perspective as the chief restructuring officer, the new board will be acting as the Debtor-in-Possession. And, you know, they will be directing the Debtor-in-Possession. You know, the Debtor-in-Possession has duties to all parties in interest, and they will be directing the Debtor. They will be directing me as CRO.

Q And, in addition, there may be a CEO, right?

A That is contemplated, correct.

Q It is contemplated? It --

A It is -- it is an option that the board has if they think a CEO is necessary.

Q But you don't know whether a CEO is going to be appointed or not?

A That's up to the board.

Q And you don't know what the compensation for that individual might be, right?

A Again, that's up to the board.

Q Mr. Dondero is going to be an employee of the Debtor, right?
A That's correct.
Q And Mr. Dondero started the Debtor, correct?
A I believe so.
Q And he also started Strand, right?
A I believe that's correct.
Q And he is also in control of a number of entities that the Debtor does business with; is that right?
A That is correct.
Q Mr. Ellington is going to remain on with the Debtor?
A That -- Mr. Ellington is an employee. All employees are now subject to the board.
Q Okay. And Mr. Ellington's role with the Debtor is what?
A He is general counsel with the Debtor.
Q And there are other in-house attorneys with the Debtor, right?
A That's correct.
Q And who else is there currently?
A I don't have the list in front of me, you know, the employee list. As of now, because obviously this is still -- hasn't been effected, so the board has not made any decisions with respect to any employees going forward.
Q And the CFO remains the same?
A Yeah, that is, again, as of now. I don't know what the

board is going to do, if anything.

Q Do you have any anticipation of what you would recommend to the board regarding the CFO?

A You know, I have many recommendations I have not made to the board yet. I just met them this morning.

Q Are you aware that historically this Court has found that the lawyers provided bad advice to the Debtor?

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

THE COURT: Sustained.

BY MS. LAMBERT:

Q Do you have any knowledge about whether there have been findings that the law firm gave erroneous advice to the Debtor? Or, I mean, the in-house counsel gave erroneous advice.

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

THE COURT: Sustained.

MS. LAMBERT: Your Honor, I'm asking for the foundation.

THE COURT: Rephrase.

BY MS. LAMBERT:

Q Do you -- are you aware of any concerns about the in-house counsel?

A Yes.

Q What is your knowledge?

A I have read the rulings from this Court.

Q And what is your understanding of those rulings?
A I don't recall specifically. I read that early on when I was first employed. But there have been concerns with respect to, you know, management of the Debtor.
Q As the CRO, have you made any recommendations to change employees to date?
A As of now, I don't have a -- the board. You know, the board has just been employed. We have not made recommendations up to this point. We are still -- obviously, have been evaluating our position and what needs to happen. I think it's important for the Debtor at this time, a little stability would be a good thing for -- until we develop the direction going forward.
Q Are you familiar with the compensation terms for the directors?
A Yes.
Q And the directors are employees of Strand but paid by the Debtor; is that right?
A Oh, I'm not sure they're employees of Strand, but they are paid by the Debtor, their compensation. That's correct.
Q And yet the compensation is technically through Strand, right?
A They -- they are. They have to act through the general partner of the Debtor because of the corporate structure.
Q One of the portions of the agreement is that the Committee

acquires litigation claims. Are you familiar with that?
A I am.
Q Have you parsed out which litigation claims those might be at this point?
A I think the agreement says they have litigation claims against insiders and related parties. So I don't know what those individual claims are. I don't know what exists.
Q Are you aware that the Committee obtains the attorney-client privilege and work product privilege?
A Yeah. Subject to the terms of those agreements, correct.
Q Have you gone through the documents and determined which ones would fall on -- which attorney files would fall on which side?
A Not as of yet.
Q Have you been taking direction from Mr. Dondero?
A We've had -- I've had limited interaction with Mr. Dondero since my retention. You know, we have been complying with the protocols that we had been negotiating with the Committee and providing information to the Committee. We have been, as a result of those protocols, instructing management of the company on compliance with those protocols. So they have brought to us transactions that they would like to do. We have reviewed those transactions and compared it to the proposed protocols and have been enforcing those. So if management has asked to do a transaction that does not meet

within those protocols, we have been declining the transaction. And that -- you know, the company has agreed with that decision and accepted that decision.

Q When you say management, who are you -- to whom are you referring?

A You know, the whole management team at the company. In-house counsel. The CFO. You know, I've had limited interaction with Mr. Dondero. One interaction was he did question one of my decisions that I made. We discussed it and he accepted my conclusion.

Q You're at the Debtor every day?

A My team is.

Q You are not?

A I have had some travel restrictions due to a medical issue, but I have three of my team there every day.

Q Is Mr. Dondero there every day?

A I don't know. I don't think so. In the few days I'm there, I've not seen him.

Q Is Mr. Ellington there every day?

A No.

Q Who on the management team is there every day?

A You know, our primary interaction is with Isaac Leventon, Frank Waterhouse, the CFO. You know, primary interaction, you know, with David Klos, who is the controller, in dealing with the financial issues.

Obviously, we spend a lot -- my team spends a lot of time with the head of compliance.

Q Were you surprised by this addition that Mr. Dondero would remain as an employee?

A I can't say I was surprised. It is an issue that we struggle with, given the nature of this company's business. You know, I see the change in the language and, you know, as CRO, I am comfortable with it.

Q So, as CRO, if Mr. Dondero is necessary now, you recognize that he was necessary three weeks ago?

A I'm not saying that he's necessary. I'm saying that it is important for the board to be able to make that decision.

Q And it wasn't important when the settlement was filed?

A It was the -- it was a struggle at the time. I was concerned at the time it was filed the unintended consequences of Mr. Dondero resigning completely and disappearing, because there are a significant number of funds that the Debtor deals with related parties that are controlled by Mr. Dondero, and I was worried about the financial impact with it. I knew this issue was important to the Committee. And if that's something that the Debtor agreed to and the Committee agreed to, so be it.

You know, I think the last-minute compromise is acceptable and appropriate. I think the language as negotiated is going to be very helpful to the Debtor. And I think, then, it's up

to the board to make the decision, with full knowledge on what's the best avenue forward.

Q And the language as negotiated was added because, in the past, there have been problems with Mr. Dondero changing or terminating agreements with related entities, right?

A There was that -- I've seen that -- issues raised in the *Acis* case.

MS. LAMBERT: No further questions.

THE COURT: All right. Any redirect?

MR. POMERANTZ: Not from the Debtor.

THE COURT: Anyone have examination? No? All right. Thank you, Mr. Sharp. You're excused.

THE WITNESS: Thank you.

(The witness steps down.)

THE COURT: All right. Are we going to have any other, I guess, witnesses, evidence?

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: No, Your Honor. I just had a couple points. One, Ms. Lambert mentioned that she hadn't seen a copy of the stipulation referred to, which was prohibiting Mr. Dondero from terminating the board. There's a good reason for her not having seen it. I hadn't provided it to her. It just came this morning, right before the hearing. I have one signed copy. I have other copies that I could represent, even though they're unsigned, are the same, so I would like to

provide Your Honor. I'll keep the signed copy but provide you with an unsigned copy, but it's the same, and also give one to the U.S. Trustee.

THE COURT: But you've got a signature of Mr. Dondero on that?

MR. POMERANTZ: Yes, I do.

THE COURT: Okay.

MR. POMERANTZ: May I approach?

THE COURT: You may. Thank you.

MR. POMERANTZ: Your Honor, maybe for the record it would be appropriate for me to show Your Honor the signature, so you could say that you've seen it?

THE COURT: Yes. Yes.

MR. POMERANTZ: May I approach again?

THE COURT: You may. (Pause.) Okay. Thank you. The record will reflect I've seen Mr. Dondero's signature.

MR. POMERANTZ: Your Honor, one of the threads that Ms. Lambert said to Your Honor is that there were employees still remaining at the Debtor and that those employees may have been involved in some wrongdoing.

I submit, Your Honor, if Your Honor appointed a Chapter 11 trustee today, what would a Chapter 11 trustee do? A Chapter 11 trustee wouldn't terminate every employee at the Debtor. A Chapter 11 trustee, if he or she was doing what they should do, would go down to the company, would interview members of

the company, senior management, and decide who should stay on and who should not stay on.

That, I submit, Your Honor, is exactly what this board will do. So the concept of there being something different done, if you have a board here or not, I don't think makes sense.

And lastly, Your Honor, Ms. Lambert expressed the issue as whether it's fair and equitable to resolve the U.S. Trustee issues in this way. I don't think that's the standard. The only fair and equitable I understand is in plan confirmation. I think Your Honor said it straight, which is: Is this a valid exercise of the Debtor's business judgment and is it an appropriate compromise of controversy? That is the standard. And, again, we have always acknowledged that, notwithstanding how Your Honor rules today, the Trustee reserves the right to come back to court and argue a trustee is appropriate on the 21st.

We believe, Your Honor, that many of the cases, in this circuit and elsewhere, look to the continuing management of the company and whether management issues have been addressed as a significant factor in determining whether a trustee is appointed. And it'll come as no surprise, of course, if Your Honor grants our motion today, this will be a lynchpin of our opposition to the trustee motion.

But, again, those issues are for another day, and we

believe that we have satisfied our standard, and we request that Your Honor approve the motion.

THE COURT: All right. Other closing arguments?

CLOSING ARGUMENT ON BEHALF OF THE UNITED STATES TRUSTEE

MS. LAMBERT: Yes, Your Honor. As the Debtor acknowledges, the Court has no jurisdiction over Strand. This is a complicated structure. A trustee avoids all of the complications involved in the Court exercising jurisdiction over an entity that it doesn't have jurisdiction over.

To enter a stock stipulation related to a non-debtor is highly irregular, and Mr. Dondero is the person behind that. It has happened in cases where people have been in these kinds of structures, like that FSLIC used to put in these kinds of structures -- there's published opinion, the *Gaubert* case -- where the person continued to exercise control even though they had a stock trust.

The Court needs a person beholden to the Court. The evidence is that, historically, this Debtor has entered into things that breached its fiduciary duty and resulted in self-dealing and liability for the Debtor. The evidence is that these go beyond Mr. Dondero and the Court does not have jurisdiction over his stock. The Court does not have jurisdiction over Strand. The board members of Strand are not employees of the Court, they're employees of Strand, a non-debtor. These members have a fiduciary duty to Strand.

Yes, Strand is the general partner of this Debtor and has a fiduciary duty, but all these fiduciary duties intermix in ways that result in conflicts for this case. These conflicts are unnecessary. The Court could just appoint a trustee who only owes a fiduciary duty to the members and creditors of this case, as well as the next (inaudible).

There is no evidence that this is cheaper. There is no evidence that this is a total resolution, because issues are left open, such as whether or not a CEO is going to be appointed, how much that person is going to cost.

Finally, Your Honor, the sealing has constrained the ability of some of the parties to understand what's going on in this case. And that is material to the argument about who is here, because we don't know who -- that all the people who would have participated in this discussion had an opportunity to participate in it.

Yes, the creditors have a fiduciary duty, and I believe that they represented to the best of their ability, but they are not charged with the issues that others are charged with, such as the SEC.

There is no evidence that the officers are disinterested. Rather, the new officers are going to be conflicted by the nature of their position. There's no evidence that it's cheaper. And a trustee, if appointed, could be appointed on an hourly basis. This is a Chapter 11 trustee.

They argue that the trustee would not have the knowledge, and yet they've been able to find three candidates to serve for the board who are qualified. So there's no evidence that it would not be better to have a trustee for that reason as well.

The evidence is that, historically, the Redeemer Committee was set up to prevent these kinds of transactions and have oversight. Historically, the evidence is it did not work. For this reason, the statute provides a solution, and the Court should impose it. The Court should deny this motion as not being in the interest of the estate, as not being a sound exercise of discretion, because it's really the discretion of Strand, not the Debtor, and it will remain the discretion of Strand, not the Debtor.

Thank you.

THE COURT: All right. Anyone else have comments?

MR. POMERANTZ: Your Honor, just a couple of minor points.

THE COURT: Okay.

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: Ms. Lambert started by saying the Court doesn't have jurisdiction over Strand. I know I just handed her the stipulation, but the last paragraph of the stipulation specifically says that the parties stipulate and agree that the Court shall have exclusive jurisdiction over

all matters arising from or related to the interpretation and implementation of this stipulation and the adjudication of any parties breaching the stipulation.

So the Court does have jurisdiction now that the stipulation has been signed, assuming that the Court enters it, so I think that addresses that issue.

Your Honor, the evidence of the disinterestedness of the members of the board, we've provided their *curriculum vitaes*. We've made representations that they have no connections with the Debtor or any of the parties in interest. We don't think that, just because they become appointed and become a director of Strand, that that renders them disinterested [sic], and we think that the Trustee's arguments that being at a different level creates different duties is just not -- is not accurate. I don't think that the Committee would have had any appetite for this type of structure had they believed that each of these board members wouldn't feel that their fiduciary duty was to the Debtor's estate. And they all are seasoned restructuring people from different aspects, all understand their fiduciary duties well, and all are prepared to carry them out.

Lastly, the Trustee points to the historic issues, and specifically mentioned the Redeemer Committee and that structure didn't work. Well, I think it speaks volumes, Your Honor, that not only the Redeemer Committee, are they on the

Committee and the Committee has supported this motion, but the Redeemer Committee hasn't come to Your Honor and said that, notwithstanding that structure that may or may not have been effective, this structure is ineffective.

And at the end, Your Honor, the Trustee is trying to replace the business judgment of the Debtor. The Debtor is entitled to deference of the judgment, again, focusing on the correct standard. And, again, the Trustee will have her day in -- his day in court in connection with the ultimate trustee motion on the 21st.

Thank you, Your Honor.

THE COURT: Anyone else?

All right. Well, the Court is going to note a few things as part of its ruling, obviously. The new proposed independent board members for Strand, Strand obviously being the general partner of the Debtor, Highland -- Mr. James Seery, Mr. John Dubel, and retired Judge Russ Nelms -- are highly-qualified individuals with respect to the industry. Some of them with respect to restructuring. Certainly, in the case of retired Judge Nelms, with regard to fiduciary duties and the Bankruptcy Code requirements.

These three individuals were chosen by the Creditors' Committee, whose constituency is broad, whose constituency is owed well over $100 million. And they were chosen by the Committee after literally months of negotiation. Obviously,

this bankruptcy was filed in October, and it appears to this Court, from the representations of counsel, that from the very beginning of the case -- the Committee was, I guess, appointed a week or two after the case was filed in October -- there's been haggling over corporate governance of this Debtor.

So we have highly-qualified individuals. We have individuals who were chosen by the well-constituted Creditors' Committee. And what has been proposed to the Court is that it is these independent directors that would have sole and exclusive management and control of the Debtor.

An interesting jurisdictional argument has been made, and it's one of those arguments that, frankly, you know, sounds good when you first hear it, but when you really drill down about the governance structure here, I mean, obviously, this Debtor is a limited partnership and it acts through a general partner. It's the general partner that controls the Debtor entity. And while Strand Advisors, Inc., the general partner, may not technically be in bankruptcy, it's the structure of these entities such that it controls the Debtor. So the jurisdictional argument, when you drill down, feels a little off.

Moreover, we have language in the stipulation where Strand is stipulating and consenting, if you will, to this Court's exercise of jurisdiction over it.

There are many things about the compromise here that have

very compelling appeal. Among them, certainly, the Committee that's negotiated this term sheet retains the right at any time to move for a Chapter 11 trustee if it believes there are grounds. The Committee is granted standing to pursue estate claims, certain estate claims right off the bat, without having to come back and ask the Court, without having to rely on the Debtor to pursue that. There are document production provisions, document preservation provisions, a shared privilege negotiated, that are very powerful tools for the Committee, and certainly operating protocols that have been negotiated regarding the Debtor's operations that are very powerful tools for the Committee.

I said many times during the *Acis* case -- those who were here will remember -- that the company, *Acis*, was not a great fit for Chapter 11. Lots of companies aren't great fits for Chapter 11, I suppose, but the kind of business it was was kind of tough to maneuver in Chapter 11. Human beings and their expertise create value. And while we had a Chapter 11 trustee, a stranger come in and take control over Acis, you know, there's great uncertainty whether that stranger is going to be able to preserve value and have the smooth transition into Chapter 11 that's really going to be the best fit.

Here, as I've said earlier, the legal standard I view as controlling here is 363 and whether what has been proposed reflects reasonable business judgment. Is there a sound

business justification for proposing the independent slate of directors at the GP level for the Debtor, the protocols, the negotiation with the Committee, the document sharing, the standing given to them? Does all of this reflect reasonable business judgment? And I find, quite clearly, it does. I find it to be a pragmatic solution to the Committee's concerns about existing management and control.

And I think I used the words "fair and equitable," not just Ms. Lambert, because it is also presented to the Court as a 9019 compromise of disputes with the Committee, and we traditionally use a fair and equitable and best interest of the estate analysis in this context. So, to the extent that applies, I do find this a fair and equitable way of resolving the disputes with the Committee, and I find this to be in the best interest of the estate. So I do approve this.

And by approving this motion, I'm approving the term sheet as it's been presented, the various terms therein, the exhibits thereto. I'm specifically approving the new independent directors, the document management and preservation process, the standing to the Committee over certain of the estate claims, the reporting requirements, the operating protocols, the whole bundle of provisions.

Now, there is one specific thing I want to say about the role of Mr. Dondero. When Ms. Patel got up and talked about the newest language that has been added to the term sheet, she

highlighted in particular the very last sentence on Page 2 of the term sheet, the sentence reading, "Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor." Her statement that that was important, it really resonated with me, because, you know, as I said earlier, I can't extract what I learned during the *Acis* case, it's in my brain, and we did have many moments during the *Acis* case where the Chapter 11 trustee came in and credibly testified that, whether it was Mr. Dondero personally or others at Highland, they were surreptitiously liquidating funds, they were changing agreements, assigning agreements to others. They were doing things behind the scenes that were impacting the value of the Debtor in a bad way.

So not only do I think that language is very important, but I am going to require that language to be put in the order. Okay? So we're not just going to have an order approving the term sheet that has that language. I want language specifically in the order. You know, you can figure out where the appropriate place to stick it in the order is, but I want specific language in here regarding Mr. Dondero's role. I also -- the language in there that his role as an employee of the Debtor will be subject at all times to the supervision, direction, and authority of the Debtors, I want that language in there as well. Let's go ahead and put the language in there that at any time, in any event, the

independent directors can determine he's no longer going to be retained. I want that in the order.

And I'm sure most of you can read my mind why, but I want it crystal clear that if he violates these terms, he's violated a federal court order, and contempt will be one of the tools available to the Court. He needs to understand that. Mr. Ellington needs to understand that. You know, if there are any games behind the scene, not only do I expect the Committee is going to come in and highlight that to the Court and file a motion for a trustee or whatever, but we're going to have a contempt of court issue.

So, anybody want to respond to that?

MR. POMERANTZ: Your Honor, Jeff Pomerantz; Pachulski Stang Ziehl & Jones.

We hear Your Honor. What I thought I'd do now is I have a clean redline of the order, of course not including the provision you just requested, --

THE COURT: Uh-huh.

MR. POMERANTZ: -- which we will go back and upload and hope to get an order signed by Your Honor today, if you're around. But to go over the other changes, the changes to Jefferies, the other language changes I discussed before. I gave a copy to Ms. Lambert and to the Committee. May I approach with a --

THE COURT: You may.

MR. POMERANTZ: Thank you.

THE COURT: Okay. All right. (Pause.) All right. The form of order looks fine to me. Obviously, you'll add the Dondero-related language, and we may have further wording tweaks negotiated with the CLO Issuers. But, again, I approve all of this. I didn't say on the record the compensation, but certainly I am approving that as reasonable. I expect these three directors are going to be working very, very hard. And so, as you said, not 50,000-foot level monitoring, actually rolling up sleeves on-site, so I think the compensation is reasonable.

MR. POMERANTZ: Thank you, Your Honor. We will submit an order shortly that includes Your Honor's language requested.

THE COURT: Okay.

MR. POMERANTZ: Are you around this afternoon?

THE COURT: I am around, --

MR. POMERANTZ: Okay.

THE COURT: -- so just pick up the phone or send an email to Traci, my courtroom deputy, --

MR. POMERANTZ: Yes.

THE COURT: -- so she can tell me, "It's in your queue to sign."

MR. POMERANTZ: She has been extremely helpful and responsive.

THE COURT: Good. I'm glad to hear that.

MR. POMERANTZ: Yes.

THE COURT: Now, as far as future scheduling, I did have her sitting by, listening, in case we needed to discuss anything. Obviously, we're going to have a kind of a carryover placeholder on the 21st as part of the trustee motion hearing for any remaining issues with the CLO Issuer. And, you know, that's just a placeholder if necessary to hear language controversies.

My courtroom deputy was concerned, because you have a lot of pending motions that have just sort of sat there pending because this was the big issue, right? She wants to make sure she sets anything you need a setting on. And I don't know if you want to discuss that today or go back as a group and --

MR. POMERANTZ: We're happy to -- I think, you know, I think that's appropriate to do. We had the motion to appoint the CRO.

THE COURT: Uh-huh.

MR. POMERANTZ: That was pending. That gets resolved by this motion. We will submit an order --

THE COURT: Okay.

MR. POMERANTZ: -- with the new agreement that was attached to the term sheet.

We had the cash management order which Judge Sontchi had issued an interim order. We will have a final order with

respect to that.

THE COURT: Okay.

MR. POMERANTZ: We will be withdrawing the motion to approve ordinary course protocols which was originally on for hearing.

THE COURT: Uh-huh.

MR. POMERANTZ: I think on the 21st we have currently set a motion to approve the retention or Mercer, which is the Debtor's compensation consultant, --

THE COURT: Uh-huh.

MR. POMERANTZ: -- and an analog motion that was originally set for today with respect to insiders, non-insiders, but is on for non-insiders and insiders on the 21st, --

THE COURT: Uh-huh.

MR. POMERANTZ: -- which is the motion to approve bonuses.

THE COURT: Uh-huh.

MR. POMERANTZ: Of course, the Debtor's new board is going to be wanting to very carefully review that. And we are going back and today having our first new board meeting with the board to start bringing them up to speed. But we presently intend, subject to, obviously, their direction, to go forward on the 21st.

We also have the retention of Lynn Pinker and Foley

Gardere, which had been filed and was brought on for hearing previously. It had been delayed, again, for the board to look at the issues. We expect to have that on for the 21st. And I believe, I believe that would be it.

MS. LAMBERT: No, Your Honor, the --

MR. POMERANTZ: No?

MS. LAMBERT: -- U.S. Trustee has objected to the motion to seal, which was the second item on the Wilmington Court's docket that got -- and it got transferred here. The U.S. Trustee has also objected to the motion for protective order. The issues overlap. We request that they be set as quickly as possible.

MR. POMERANTZ: We're happy to set both of those for the 21st as well.

THE COURT: All right. So I think what I'm going to ask you to do is just get on the phone, one of you, with Traci and just make sure she's clear on everything you need set on the 21st, and then you can do a big notice of hearing, just kind of listing all of these matters.

MR. POMERANTZ: Your Honor, with respect to the CRO motion -- order and the cash management order, I was wondering if it would be helpful for my colleague Mr. Demo to go over the amendments to those orders -- we would like those to be entered today -- to see if Your Honor has any questions.

THE COURT: All right. That would be good. Mr.

Clemente, did you have something first?

MR. CLEMENTE: Just very quickly, Your Honor. We had filed our retention applications for the Committee professionals and filed CNOs, and your office had indicated you wanted to get through today, which I totally understand, but I just wanted to make sure that Your Honor didn't lose sight of those. I don't believe there were any objections to those, but I think your intent was probably to deal with them after today, but I just wanted to --

THE COURT: All right. Yes, it was to get through today.

MR. CLEMENTE: Yes.

THE COURT: So, since you've had plenty of time run on those, you can submit orders and I'll get them signed in chambers.

MR. CLEMENTE: Thank you very much, Your Honor. Appreciate it.

THE COURT: Okay. Thank you. Counsel?

MR. DEMO: Good afternoon, Your Honor. Greg Demo, Pachulski Stang, on behalf of the Debtor. I'm happy to keep this as brief as possible, but I think walking through the cash management motion has the most changes.

THE COURT: Okay.

MR. DEMO: The biggest change there, and we had discussed this with the United Stated Trustee in Delaware, is

that in our initial motion we disclosed that the Debtor had bank accounts at BBVA and then also at NexBank. Those accounts have been moved to East West Bank, --

THE COURT: Okay.

MR. DEMO: -- which is a party to a depository agreement with the United Stated Trustee.

THE COURT: Okay.

MR. DEMO: The only exception to that is a certificate of deposit that is at NexBank. It's a relatively small amount of money. It's $135,000. But it also is pledged as collateral on a lease. So that has been -- proven problematic to move. The Trustee for Delaware did say that was okay. I would hope that the Trustee for Texas would agree with that. We did disclose it in the initial debtor interview.

But those are the bank accounts. The bank accounts at BBVA and NexBank, with the exception of that CD, were all closed as of yesterday.

THE COURT: Okay.

MR. DEMO: So now we are going to be using East West Bank for all operating accounts, all cash, going forward.

The other two accounts are the account at Jefferies, which is the prime brokerage account.

THE COURT: Uh-huh.

MR. DEMO: That account, we are keeping open.

Obviously, there have been conversations with Jefferies that are going to be reflected in the proposed order on the settlement, but we do propose to keep the Jefferies prime brokerage account open as well.

And then we filed a supplement for another prime brokerage account that we have at a prime broker called Maxim Group. That account has $30 million in securities in it, give or take, and then literally like $100 in cash. The Debtor considers that account more an investment than actual operating account, but we would like to keep that account open as well, just so it can continue holding those securities.

Jefferies and Maxim, neither of them are on the depository list, so we are requesting a waiver of 345(b) for those two accounts, and then also requesting a waiver of 345(b) with respect to the certificate of deposit at NexBank.

THE COURT: Okay.

MR. DEMO: That's where we're at at cash management. And I guess, sorry, one more thing. In the original cash management motion, we had a series of intercompany transactions that we disclosed, and we had gotten interim relief from the Delaware court to make those payments up to a hundred -- or, $1.7 million. We are below that account, and on a go-forward basis, all of those intercompany transactions are getting subsumed into the settlement motion and the operating protocols and all of that. But we are asking for

final relief on the intercompany transactions that we made under the interim order.

THE COURT: Okay. All right. Who wishes to be heard on this? I don't know how much discussion we've had outside the courtroom on this.

MS. LAMBERT: We haven't -- normally, a bond would be appropriate for the Jefferies and the other small account. The estate is at risk on the CD, but it's not that much money. It's not worth bonding. It'll be more expensive to bond it.

NexBank, as you know, Your Honor, is a bank where Mr. Dondero is the CEO. So that was part of the reason that NexBank was carved out. But the -- so I would like them to bid bonds on the Jefferies and the other account. And if we -- let's carry it on those issues so that we can see how expensive bonding it would be, and if it's cost-prohibitive, maybe we reconsider. But in the past, the bonds haven't been very expensive, relatively.

MR. DEMO: We're happy to discuss that with the U.S. Trustee. I mean, just for the record, the Jefferies account, you know, does support a margin loan. It's $80 million in securities. It's $30 million at Maxim. They're SIPC. I mean, it's Jefferies and, you know, another large prime broker. Again, we're happy to discuss it with the Trustee. I don't know that it's necessary, but we will discuss it.

THE COURT: Okay. Well, you all can discuss it, and

if you have an unopposed order, an agreed order, --

MR. DEMO: Uh-huh.

THE COURT: -- you can upload it and I'll sign it. Otherwise, if you need hearing time on the 21st, --

MR. DEMO: Okay.

THE COURT: -- we'll get it all figured out then and --

MR. DEMO: Okay. All right.

THE COURT: -- resolve it then.

MR. DEMO: Thank you, Your Honor. And then I guess the other motion is the CRO retention. This one should hopefully be pretty brief. We are just filing a new proposed order that attaches the engagement letter, as has been modified by all of the settlement discussions. I believe the Committee is on board with that, and it's consistent. It was one of the attachments that you approved this morning in connection with the settlement.

THE COURT: All right. Comments on that?

A VOICE: None, Your Honor.

THE COURT: Committee, you're good?

MS. LAMBERT: The U.S. Trustee had also objected to the CRO motion, but it's some of the same issues that the Committee raised. And the CRO, my understanding, is now not an employee of the board but totally overseen by the board, and with that, we can withdraw our objection.

THE COURT: All right. Very good. I'll sign your order on the CRO, then.

MR. DEMO: Okay. Thank you, Your Honor.

THE COURT: All right. Well, if there's nothing else, I'll be on the lookout for your orders. And, again, if you could coordinate with Traci to make sure she's clear on everything you need set on the 21st.

MR. POMERANTZ: Thank you very much, Your Honor.

THE COURT: All right.

MR. CLEMENTE: Thank you, Your Honor.

MR. DEMO: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 11:54 a.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **12/10/2020**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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