



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

PATRICK DAUGHERTY,

Plaintiff,

v.

HIGHLAND CAPITAL  
MANAGEMENT, L.P., HIGHLAND  
EMPLOYEE RETENTION ASSETS  
LLC, HIGHLAND ERA  
MANAGEMENT LLC, and JAMES  
DONDERO,

Defendants,

and

HIGHLAND EMPLOYEE  
RETENTION ASSETS LLC,

Nominal Defendant.

C.A. No.

PUBLIC VERSION  
FILED JULY 11, 2017

**VERIFIED COMPLAINT**

Patrick Daugherty brings this action against Highland Capital Management, L.P., a Delaware limited partnership (“Highland Capital”), Highland Employee Retention Assets LLC, a Delaware limited liability company (“Highland Employee Retention Assets” or “HERA”), Highland ERA Management LLC (“Highland ERA Management”), and James Dondero to collect a judgment entered in Daugherty’s favor in Texas against

Highland Employee Retention Assets; to return assets fraudulently transferred from Highland Employee Retention Assets; for dissolution of Highland Employee Retention Assets and distribution of its assets; for breach of fiduciary duty against Highland ERA Management and Dondero in connection with self-dealing transactions involving Highland Employee Retention Assets; for aiding and abetting breach of fiduciary duty against Highland Capital in connection with those self-dealing transactions; for breach of the implied covenant of good faith and fair dealing against Highland ERA Management and Dondero; and for indemnification and fees on fees against Highland Capital under its partnership agreement.

### **Introduction**

1. On December 1, 2016, the Court of Appeals for the Fifth District of Texas at Dallas issued a Mandate in the lawsuit captioned *Highland Capital Management, L.P. v. Daugherty*, 12-04005, District Court of Dallas County, Texas, 68th Judicial District (Dallas) (the “Texas Action”), concluding over four years of litigation between Highland Capital, Highland Employee Retention Assets, and Daugherty. The appellate court affirmed the final judgment of the trial court.

2. The final judgment of the trial court included the following provisions, with the judge's handwritten markup:

Furthermore, the Court, after considering the jury's findings regarding HERA's breach of the implied covenant of good faith and fair dealing, finds and concludes that Daugherty is entitled to relief hereinafter given.

It is therefore further ORDERED that Daugherty have and recover \$2,600,000 from HERA, ~~representing the full value of Daugherty's interest in HERA as determined by the jury.~~

It is further ORDERED that Daugherty shall no longer have any ownership or other interest in HERA or any proceeds or accounts arising from Daugherty's prior interest in HERA that were not distributed to Daugherty prior to the entry of this judgment, Daugherty having been awarded the full value of that interest in HERA as determined by the jury.

It is further ORDERED that total amount of the actual damages rendered against HERA herein will bear prejudgment interest at the rate of 5% simple interest from May 22, 2012, until the day before this judgment is signed.

It is further ORDERED that the total amount of the judgment here rendered against HERA will bear interest at the rate of 5% per annum, compounded annually, from the date this judgment is signed until paid.

3. Under the final judgment, Daugherty was awarded \$2.6 million in damages against Highland Employee Retention Assets, plus pre- and post-judgment interest, as compensation for the diminution of value of Daugherty's units as a result of Highland Employee Retention Assets' breach of the implied covenant of good faith and fair dealing.

4. The Texas court rejected the notion that the damages award extinguished Daugherty's interest in Highland Employee Retention Assets, striking that language from the form of judgment proposed by Highland Employee Retention Assets.

5. Highland Employee Retention Assets has failed to satisfy Daugherty's judgment. During 2013 and 2014, after the Texas Action commenced, Dondero, Highland ERA Management, and Highland Capital caused Highland Employee Retention Assets to fraudulently or otherwise wrongfully transfer its assets to Highland Capital, which purportedly left Highland Employee Retention Assets insolvent.

6. In this action, Daugherty seeks to have Highland Employee Retention Assets, Highland Capital, Dondero, and Highland ERA Management satisfy his Texas judgment and return fraudulently transferred assets to Highland Employee Retention Assets.

7. Further, because Highland Employee Retention Assets can no longer fulfill its original limited purpose, which was the retention of Highland Capital employees, it should be dissolved. Once its fraudulently or wrongfully transferred assets are returned, those assets should be distributed to Daugherty as the sole remaining member.

8. Daugherty also brings claims on behalf of himself and Highland Employee Retention Assets against Highland ERA Management, Dondero, and Highland Capital for self-dealing transactions that Highland ERA Management and Dondero caused Highland Employee Retention Assets to enter into for the benefit of Highland Capital.

9. Finally, Daugherty seeks indemnification from Highland Capital for his defense costs, including attorneys' fees, in the Texas Action to the extent that such costs were incurred in defending claims against him "by reason of any act performed or omitted to be performed in the name of or on behalf of [Highland Capital], or in connection with [Highland Capital's] business." He also seeks fees on fees in prosecuting this action.

### **The Parties**

10. Daugherty resides in Dallas, Texas. Daugherty was a partner and senior executive of Highland Capital and certain of its affiliates from 1998 until 2011, when Daugherty resigned.

11. Defendant Highland Capital is a Delaware limited partnership with its principal place of business at 300 Crescent Court #700, Dallas, Texas 75201. Highland Capital was co-founded by defendant Dondero and non-party Mark Okada and is controlled by them, their affiliates, and various trusts for their benefit and the benefit of their immediate families. Dondero

is Highland Capital's president. Highland Capital is an SEC-registered investment adviser that claims to have approximately \$14.9 billion of assets under management.

12. Defendant and nominal defendant Highland Employee Retention Assets is a Delaware limited liability company that was formed on June 23, 2009.

13. Defendant Highland ERA Management, a Delaware limited liability company, was formed on February 1, 2013. Dondero was and is the president and the sole member of Highland ERA Management. As demonstrated below, it is a mere instrumentality and Dondero's alter ego. Dondero is subject to this Court's jurisdiction under 10 *Del. C.* § 3104.

**Daugherty's Interest in Highland Employee Retention Assets**

14. Highland Capital performed poorly during the 2008-2009 financial crisis. Late in 2008, Highland Capital was viewed as a firm likely to default. It had very little cash and available assets for incentive-compensation purposes. Accordingly, Highland Employee Retention Assets was created by Highland Capital to curb employee resignations by offering



[REDACTED]

[REDACTED]

[REDACTED]

17. Under the Limited Liability Company Agreement of Highland Employee Retention Assets LLC dated [REDACTED], the purpose of Highland Employee Retention Assets

[REDACTED]

Ex. A, § [REDACTED]

18. Daugherty became a member of Highland Employee Retention Assets on October 26, 2009, subject to a vesting schedule requiring Daugherty to remain employed at Highland Capital through [REDACTED]

19. Under his award agreement, Daugherty was initially awarded [REDACTED] and was the largest holder in Highland Employee Retention Assets.

20. Daugherty's ownership percentage increased as other employees resigned from Highland Capital prior to vesting. Daugherty

remains a member of Highland Employee Retention Assets and holds

[REDACTED]

### **Highland Employee Retention Assets' Mistreatment of Daugherty**

21. Daugherty resigned from Highland Capital on September 28, 2011. At the time of his resignation, Daugherty was a director of Highland Employee Retention Assets.

22. On February 16, 2012, all the directors of Highland Employee Retention Assets except Daugherty removed Daugherty as a director. *See* Ex. B. Immediately thereafter, the newly composed board executed a Second Amended and Restated Agreement (drafted by Thomas Surgent, Highland Capital's assistant general counsel and chief compliance officer) (the "2012 Amendment"). *See* Ex. C.

23. On March 6, 2012, Brian Collins, Highland Capital's director of human resources, distributed the 2012 Amendment to all unit holders of Highland Employee Retention Assets.

24. The 2012 Amendment added a new [REDACTED], which included [REDACTED]:

a. [REDACTED]

[REDACTED]

[REDACTED]



testified under court order in another legal matter involving Dondero, Highland Capital commenced the Texas Action against Daugherty. The Texas Action was filed just seven weeks after the 2012 Amendment.

26. Daugherty responded in the Texas Action with counterclaims against Highland Capital for breach of contract and defamation and third-party claims against Highland Employee Retention Assets and others. Daugherty alleged breach of contract and breach of the covenant of good faith and fair dealing against Highland Employee Retention Assets and Highland Capital based on the 2012 Amendment.

27. During the Texas Action, Dondero sought to gain control of Highland Employee Retention Assets by buying its units held by current and former employees of Highland Capital.

28. On December 26, 2012, Dondero schemed with Ted Dameris, then a board member of Highland Employee Retention Assets and an employee of Highland Capital and a current board member of Highland Capital affiliate NexBank Capital, Inc., and employee of Highland Capital, to [REDACTED]

29. On January 18, 2013, and January 31, 2013, Highland Capital presented an [REDACTED]

[REDACTED]

[REDACTED]

30. On January 17, 2013, and January 18, 2013, the board of Highland Employee Retention Assets collaborated with Dondero to transfer the powers of the board to Highland ERA Management. At the time, Highland ERA Management was not validly formed under Delaware law.

31. On January 19, 2013, the board members of Highland Employee Retention Assets resigned after each received a [REDACTED] [REDACTED] and Highland ERA Management (i.e., Dondero) became the sole manager of Highland Employee Retention Assets. At the time, Highland ERA Management was not validly formed under Delaware law.

32. Highland Capital's director of human resources, Brian Collins, and Surgent peddled [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

33. On February 1, 2013, the date that Highland ERA Management was formed under Delaware law, Dondero executed the Third Amended and Restated Agreement of Highland Employee Retention Assets (again drafted

by Surgent), which [REDACTED]

[REDACTED] It [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Ex. D.

34. Also on February 1, 2013, Dondero executed an [REDACTED]

[REDACTED] on behalf of Highland Capital and Highland

Employee Retention Assets under which the parties [REDACTED]

[REDACTED]

[REDACTED] See Ex. E.

35. Highland Capital supposedly incurred \$1,142,284 in legal expenses in the Texas Action as of December 31, 2012, compared to \$154,029 incurred by Highland Employee Retention Assets over the same time period.

36. On February 7, 2013, Highland Capital, at the direction of Dondero, offered Daugherty [REDACTED]

[REDACTED] Highland Capital claimed that “the costs, expenses, and

diminution of the assets” exceeded Daugherty’s value in Highland Employee Retention Assets.

37. All Highland Employee Retention Assets unit holders except Daugherty purportedly sold their units to Highland Capital. Upon information and belief, however, Highland Capital used Highland Employee Retention Assets’ funds, not solely its own funds, to purchase the units.

38. On April 30, 2013, Dondero executed an Assignment Agreement on behalf of Highland Capital and Highland Employee Retention Assets, declaring that Highland Capital [REDACTED]

[REDACTED]

[REDACTED] *See Ex. F.*

39. The Assignment Agreement further resolved that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See id.*

40. Dondero, through Highland ERA Management, was and is in full control of Highland Employee Retention Assets and its assets. It was fitting, therefore, in the Texas Action when Dondero described himself as

“the man behind the curtain solving financial puzzles.” Dondero also refers to himself as “the wizard.”

41. In December 2013, approximately one month before trial in the Texas Action, Highland Capital placed Daugherty’s Highland Employee Retention Assets interests, valued at the time at approximately [REDACTED] into escrow, with the law firm Abrams & Bayliss LLP as escrow agent (the “Escrow”). *See* Ex. G. One year earlier, Abrams & Bayliss had represented Highland Employee Retention Assets in responding to a books and records demand by Daugherty relating to the Texas Action.

42. Under the Escrow, if Daugherty prevailed in the Texas Action, escrowed funds in the amount of the judgment—or the entire amount if the judgment exceeded the balance—were to be transferred to Highland Employee Retention Assets and then to Daugherty.

43. During the Texas Action on January 23, 2014, Dondero testified as follows regarding the Escrow:

Q. Okay. So -- so if, if Mr. Daugherty somehow prevails in his lawsuit against Patrick Boyce and Lane Britain and [Highland Employee Retention Assets], **what happens to Mr. Daugherty’s interest that’s being escrowed right now with a third-party escrow agent?**

A. **They go to him.**

Q. I’m sorry?

A. They go **to him** via to [Highland Employee Retention Assets] and then **to him**. (Emphasis added.)

44. Dondero also confirmed that Highland Capital's buyout of the unit holders in January and February 2013 extinguished the original limited purpose of Highland Employee Retention Assets:

Q. So -- why did the escrow agreement not get signed until December of 2013?

A. My recollection is as follows: After [Highland Employee Retention Asset] went from being an employee retention program with 30-odd participants clamoring for their money but it all mucked up in litigation, Highland [Capital] wrote a check for \$10 million to give those people, in all fairness, liquidity and what they deserved for staying around at Highland [Capital]. Once Highland [Capital] bought out all their units, there were only two unit holders, Highland [Capital] and Pat Daugherty, and **there was no retention purpose left in the vehicle.** (Emphasis added.)

45. After a three-week trial in the Texas Action, the jury found that Highland Employee Retention Assets breached the implied covenant of good faith and fair dealing by adopting Section 12.1 in the 2012 Amendment. The jury awarded Daugherty damages of \$2.6 million plus interest. *See* Ex. H. The jury also found that Dondero and Highland Capital defamed Daugherty with malice. *See id.*

46. The jury also found that Daugherty breached contractual and fiduciary duties by retaining Highland Capital information after his Highland Capital employment, but awarded zero damages. Highland Capital would, however, recover its attorneys' fees in the amount of \$2.8 million plus interest. All parties appealed.

47. In September 2014, Highland Employee Retention Assets represented to the Texas court as follows regarding the Escrow:

A contingent interest in assets held in escrow pursuant to an Escrow Agreement, a true and correct copy of which is attached hereto as Exhibit 2 (the “Deposit Assets”). The Deposit Assets are not presently controlled by or available to [Highland Employee Retention Assets]. **Per the Escrow Agreement, if a final, non-appealable judgment against [Highland Employee Retention Assets] is reached, Abrams & Bayliss, LLP, as Escrow Agent, will transfer the Deposit Assets to [Highland Employee Retention Assets].**

Ex. I, Aff. ¶ 7 (emphasis added).

48. Highland Employee Retention Assets also filed an Affidavit with the Texas court disclosing that it was insolvent. Highland Employee Retention Assets further disclosed that it is liable to Highland Capital for legal expenses funded on its behalf in the total amount of \$7,459,568 and that only \$2,555,071 was included in the net worth computation because Highland Capital had written off \$4,904,497 of the liability as of December 31, 2013, because of “lack of collectability.”

### **The Disappearing Escrow Assets**

49. The appeal of the Texas Action lasted almost three years. On December 1, 2016, the appellate court affirmed the trial court judgment. Thus, Daugherty owed Highland Capital \$2.8 million (plus interest) in

attorneys' fees and Highland Employee Retention Assets owed Daugherty \$2.6 million (plus interest) in damages.

50. On December 2, 2016, Highland Capital filed a request for Writ of Execution, which was granted that same day.

51. Also on December 2, 2016—unknown to Daugherty—Abrams & Bayliss, which has served and currently serves as counsel for Highland Capital and its affiliates, resigned as escrow agent of the Escrow.

52. On December 5, 2016—unknown to Daugherty—Abrams & Bayliss delivered over [REDACTED] in Escrow assets to Highland Capital. It took only three days for Abrams & Bayliss to transfer to Highland Capital the same assets that took almost eight months for Highland Capital to transfer to the Escrow.

53. Also on December 5, 2016, the day Highland Capital secretly received the Escrow funds, Highland Capital filed a judgment lien on Daugherty's home. The judgment lien on Daugherty's home remains in place as of this filing.

54. On December 8, 2016, the Mandate of the appellate court was filed with the trial court in the Texas Action.

55. Also on December 8, 2016, Highland Capital requested a Writ of Garnishment in the Texas Action to seize Highland Employee Retention

Assets' assets owed to Daugherty under the judgment based on an affidavit of Scott Ellington, Highland Capital's general counsel and chief legal officer, that Daugherty had no other way to pay Highland Capital's attorneys' fees.

56. Also on December 8, 2016, the constable returned the first Writ of Execution unexercised as Daugherty was in New York on business through December 9, 2016.

57. On December 9, 2016, four days after Abrams & Bayliss returned the Escrow assets to Highland Capital, Highland Capital requested and was granted a second Writ of Execution.

58. Also on December 9, 2016, Highland Capital filed an Application for Turnover specifically directing that Daugherty's interest in NexBank Capital, Inc., and Trussway Holdings, Inc., be turned over to Highland Capital. Both NexBank and Trussway are entities controlled by Dondero, Okada, and Highland Capital, and both are the subject of related actions pending in this court. *See Hoyd v. Trussway Holdings, LLC*, Del. Ch., C.A. No. 2017-0260-SG; *Daugherty v. NexBank Capital, Inc.*, Del. Ch., C.A. No. 2017-0382-SG.

59. On December 14, 2016, nine days after Highland Capital secretly obtained the Escrow funds, Daugherty wired approximately [REDACTED]

██████████ to Highland Capital in satisfaction of its award of attorneys' fees in the Texas Action.

60. On February 16, 2017, following a request from Daugherty to Abrams & Bayliss regarding the Escrow, given that Highland Employee Retention Assets had not satisfied Daugherty's judgment, Abrams & Bayliss unveiled the earlier events and transfers by which Highland Capital received the Escrow assets held for Daugherty:

By letter dated December 2, 2016, Abrams & Bayliss notified Highland that it was resigning as Escrow Agent pursuant to Paragraph 5 of the Escrow Agreement. By letter dated December 2, 2016, Highland informed Abrams & Bayliss that it was (i) accepting Abrams & Bayliss' resignation as Escrow Agent, (ii) waiving the ten-day notice period under Paragraph 5 of the Escrow Agreement, and (iii) directing Abrams & Bayliss to return the Deposit Assets to Highland in accordance with the instructions provided in the letter.

On December 3, 2016, Abrams & Bayliss informed Highland in writing that it agreed to the waiver of the notice period, such that Abrams & Bayliss' resignation was effective immediately. On December 5, 2016, Abrams & Bayliss returned the Deposit Assets to Highland in accordance with the December 2, 2016 instructions. Accordingly, Abrams & Bayliss no longer serves as Escrow Agent or holds Deposit Assets.

Ex. J.

61. That is, at the same time Highland Capital placed a judgment lien on Daugherty's family home and was sending a constable to Daugherty's doorstep to seize his assets, Highland Capital and its agents

were secretly diverting Highland Employee Retention Assets' funds reserved for Daugherty to Highland Capital.

62. The Abrams & Bayliss letter, tellingly, copied Highland Capital's general counsel and chief legal officer, Ellington, and its assistant general counsel, Isaac Leventon, as well as its attorney, Mark Katz, but not Highland Employee Retention Assets' attorney.

63. Efforts to collect Daugherty's judgment have failed, as Highland Employee Retention Assets claims to be insolvent. Through this action, Daugherty hopes to undo the transfer of assets in the Escrow and any other fraudulent transfers from Highland Employee Retention Assets so that Daugherty can collect his judgment and restore full value to his continuing interest in Highland Employee Retention Assets.

### **Daugherty's Indemnification Rights**

64. Section 4.1(h) of the Second Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 31, 2004 (the "Highland Partnership Agreement"), states:

Indemnification. The Partnership shall indemnify and hold harmless the General Partner and any director, officer, employee, agent, or representative of the General Partner (collectively, the "**GP Party**"), against all liabilities, losses, and damages incurred by any of them by reason of any act performed or omitted to be performed in the name of or on behalf of the Partnership, or in connection with the Partnership's business, including, without limitation, attorneys'

fees and any amounts expended in the settlement of any claims or liabilities, losses, or damages, to the fullest extent permitted by the Delaware Act; *provided, however*, the Partnership shall have no obligation to indemnify and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wanton misconduct.

Ex. K, § 4.1(h).

65. The General Partner under the Highland Partnership Agreement is Strand Advisors, Inc., a Delaware corporation (“Strand”).

66. From 2004, if not earlier, until he resigned from Highland Capital in 2011, Daugherty was an officer and agent of Strand. Daugherty, therefore, is a GP Party for purposes of the Highland Partnership Agreement.

67. Some of the untrue and unproven allegations made against Daugherty by Highland Capital in the Texas action included:

a. “Daugherty’s tenure at Highland had been characterized by extreme behavior, and his performance and ability to function in his job diminished over the years. Daugherty became increasingly unmanageable, erratic, and insubordinate, as well as hostile and belligerent to peers and subordinates at Highland. Recently, Daugherty admitted to Highland that two strokes he suffered years earlier had left him with dead spots in his brain that impacted his mental competence and conduct.” Ex. L, ¶ 8.

b. “During his last year of employment, a number of employees made complaints regarding Daugherty’s actions. Management

discussed these complaints with Daugherty, but his behavior persisted. Specifically, these complaints centered on Daugherty's abusive tirades. Daugherty frequently dehumanized employees, publicly berating them .... A number of these employees subsequently resigned from Highland or requested to be reassigned to departments in which they would not have to interact with Daugherty. Further, when complaints were brought to Daugherty's attention, he refused to acknowledge any problems with what he had done and said that he had a right to insult any man or woman at Highland in any way he saw fit, regardless of the purpose or content." *Id.*, ¶ 9.

c. "Daugherty's work effort and performance also significantly declined over the last year of his employment as he devoted less time to his duties and spent large amounts of time out of the office tending to non-business matters." *Id.*, ¶ 10.

68. Highland Capital asserted in the Texas Action that the conduct described in the above-referenced allegations "violated [Daugherty's] common law duties to Highland, as well as several agreements between him and Highland." *Id.*, ¶ 12. Highland Capital further asserted that Daugherty "breached a number of common law obligations related to his employment relationship." *Id.*, ¶ 21.

69. Highland Capital asserted claims for declaratory judgment, breach of Daugherty’s employment agreement, breach of a buy-sell agreement, breach of fiduciary duties, misappropriation of trade secrets, tortious interference, defamation, a request for attorneys’ fees, and a request for a permanent injunction.

70. Many of the allegations against Daugherty—particularly the allegations concerning Daugherty’s performance on behalf of Highland Capital—formed the basis for multiple claims, including both contractual and fiduciary-duty claims. Allegations regarding Daugherty’s acts on behalf of Highland Capital, which trigger Daugherty’s indemnification rights, pervaded Highland Capital’s claims in the Texas Action.

71. Daugherty was liable for breach of contract and breach of fiduciary duties based on the retention of confidential information *post-employment*, for which zero damages were awarded. He was not liable for, and successfully defended, all claims and allegations concerning his performance on behalf of Highland Capital. In fact, on the eve of trial, Highland Capital “non-suited” its allegations concerning Daugherty’s performance on behalf of Highland Capital. *See* Ex. M.

72. Daugherty incurred substantial attorneys' fees and costs in defending the baseless and unproven allegations regarding his performance on behalf of Highland Capital and is entitled to indemnification.

**Count One**  
**(Fraudulent Transfer)**  
**(Against All Defendants)**

73. Daugherty restates each of the foregoing allegations as if fully set forth in this paragraph.

74. One of the reasons that Highland Employee Retention Assets has failed to satisfy Daugherty's judgment in the Texas Action is that the defendants secretly caused the Escrow assets—reserved for a judgment in Daugherty's favor—to revert back to Highland Capital. Now Highland Employee Retention Assets claims to be insolvent.

75. Highland Capital and Dondero, through Highland ERA Management, exercise total control over Highland Employee Retention Assets and treat its funds as their own, which is routine for Dondero.

76. As an example, Josh Terry, a former Highland Capital employee, recently asserted in a lawsuit:

Okada, the co-founder of Highland, stated on February 10, 2016, "Dude are you aware Jim [Dondero] hasn't paid any taxes in the past year? And he took out a loan from NexBank to pay them but then he got caught up in one of the leverage situations he did with American [Airlines] and a couple of other stocks and he doesn't have the money until March 31 to

actually do this. So he's put a lien on his assets...but if some clerk there decides to put the lien on, it would be a PR nightmare. I was just in his office yelling at him, 'I approved the loan at the bank so you could pay your taxes but you never paid your taxes.'"

77. In this case, Dondero was not using money from his bank to pay his personal taxes, but was instead siphoning money from one of his subsidiaries. Highland ERA Management is nothing more than a mere instrumentality or alter ego of Dondero. All acts of Highland ERA Management advantaged Dondero and disadvantaged Daugherty.

78. Delaware has a potent fraudulent transfer statute enabling creditors, such as Daugherty, to challenge actions by parent companies siphoning assets from subsidiaries.

79. The transfer of Highland Employee Retention Assets' funds reserved for Daugherty in the Escrow to Highland Capital, achieved through the resignation of Abrams & Bayliss, constitutes a fraudulent transfer under Delaware law. It also contradicts sworn representations of the defendants and their agents in the Texas Action regarding the Escrow.

80. Highland Capital and Dondero should be required to return to Highland Employee Retention Assets all assets fraudulently or otherwise wrongfully transferred to Highland Capital by or on behalf of Highland Employee Retention Assets.

81. Given Highland Employee Retention Assets' failure to satisfy its judgment, and apparent lack of funds to do so, Daugherty is entitled to collect his judgment from Highland Capital and Dondero.

**Count Two**  
**(Dissolution of Highland Employee Retention Assets)**  
**(Against All Defendants)**

82. Daugherty restates each of the foregoing allegations as if fully set forth in this paragraph.

83. In the Texas Action, Daugherty was awarded damages that resulted from Highland Employee Retention Assets' breach of the implied covenant of good faith and fair dealing, which were measured by the devaluation of Daugherty's units at the time of the breach.

84. The trial judge in the Texas Action struck from the final order the concept that Daugherty was fully compensated for his units and those units were extinguished. To the contrary, Daugherty retains his interest in Highland Employee Retention Assets.

85. Daugherty is the sole remaining unit holder of Highland Employee Retention Assets. The purported purchases of units by Highland Capital in January and February 2013, using the funds of Highland Employee Retention Assets, were invalid transfers.

86. Because Highland Employee Retention Assets can no longer fulfill its original limited purpose, the retention of Highland Capital employees, Highland Employee Retention Assets should be dissolved.

87. Section 18-802 of the LLC Act provides for dissolution when “it is not reasonably practicable to carry on the business in conformity with the limited liability company agreement.” That standard is met here. There are no more unit holder-employees eligible for deferred compensation.

88. To the extent Dondero purported to change the purpose of Highland Employee Retention Assets in February 2013, that amendment should be invalidated and ignored because it was self-dealing and a breach of fiduciary duty or the implied covenant of good faith and fair dealing. The purported amendment was inconsistent with the fundamental agreement of the parties when Highland Employee Retention Assets was established.

89. Judicial dissolution of Highland Employee Retention Assets is appropriate. The funds transferred from Highland Employee Retention Assets must be returned and then distributed to Daugherty as the sole remaining member.

**Count Three**  
**(Breach of Fiduciary Duties)**  
**(Against Highland ERA Management and Dondero)**

90. Daugherty restates each of the foregoing allegations as if fully set forth in this paragraph.

91. As a fiduciary, Highland ERA Management owed fiduciary duties to Highland Employee Retention Assets and its members. Fiduciary duties were not expressly disclaimed in Highland Employee Retention Assets' operating agreement.

92. Highland ERA Management is nothing more than a mere instrumentality or alter ego of Dondero. Thus, Dondero is bound by the same duties and liable for the same acts as his alter ego.

93. The adoption by Highland ERA Management, on the date of its formation, and Dondero of the Third Amended and Restated Agreement of Highland Employee Retention Assets was self-dealing and constituted a breach of fiduciary duties.

94. The execution of the Expense Allocation Agreement by Highland ERA Management, on the date of its formation, and Dondero, under which the parties [REDACTED]

[REDACTED]

[REDACTED] was self-dealing and a breach of fiduciary duties.

95. The execution by Highland ERA Management and Dondero of the April 30, 2013 Assignment Agreement, declaring that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] was self-dealing and a breach of fiduciary duties.

96. To the extent this claim is considered a derivative claim, Daugherty may bring such claim on behalf of Highland Employee Retention Assets. A member of a limited liability company interest may bring an action in the Court of Chancery in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.

97. Efforts to cause the manager, Highland ERA Management (or its alter ego, Dondero), to bring this claim are not likely to succeed because Highland Capital and its affiliates, including Highland ERA Management, have a direct and material conflict of interest in the transactions that are challenged. That is, the funds wrongfully transferred from Highland Employee Retention Assets went to Highland Capital and Dondero.

98. Daugherty has standing to bring a derivative claim because he is currently a member of Highland Employee Retention Assets and was a member of Highland Employee Retention Assets at the time of the transactions of which he complains.

99. Given Highland Employee Retention Assets' and Highland Capital's arguments in the Texas Action that Daugherty's interest in Highland Employee Retention Assets was extinguished, it was not until the Texas Action became final and non-appealable in December 2016 that it was clear Daugherty remained a member of Highland Employee Retention Assets and had standing to pursue this claim.

**Count Four**  
**(Aiding and Abetting Breach of Fiduciary Duties)**  
**(Against Highland Capital)**

100. Daugherty restates each of the foregoing allegations as if fully set forth in this paragraph.

101. The drafting of the Third Amended and Restated Agreement of Highland Employee Retention Assets by Highland Capital and its agents constituted aiding and abetting breach of fiduciary duties.

102. The receipt by Highland Capital of the assets of Highland Employee Retention Assets pursuant to the April 30, 2013 Assignment Agreement constituted aiding and abetting fiduciary duties.

103. A fiduciary relationship existed between Highland ERA Management and its alter ego, Dondero, and Highland Employee Retention Assets; there was a breach of fiduciary duties, as described above; and there was knowing participation in that breach by Highland Capital and its agents.

104. To the extent this claim is considered a derivative claim, Daugherty may bring such claim on behalf of Highland Employee Retention Assets. A member of a limited liability company interest may bring an action in the Court of Chancery in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.

105. Efforts to cause the manager, Highland ERA Management (or its alter ego, Dondero), to bring this claim are not likely to succeed because Highland Capital and its affiliates, including Highland ERA Management, have a direct and material conflict of interest in the transactions that are challenged. That is, the funds wrongfully transferred from Highland Employee Retention Assets went to Highland Capital and Dondero.

106. Daugherty has standing to bring a derivative claim because he is currently a member of Highland Employee Retention Assets and was a

member of Highland Employee Retention Assets at the time of the transactions of which he complains.

107. Given Highland Employee Retention Assets' and Highland Capital's arguments in the Texas Action that Daugherty's interest in Highland Employee Retention Assets was extinguished, it was not until the Texas Action became final and non-appealable in December 2016 that it was clear Daugherty remained a member of Highland Employee Retention Assets and had standing to pursue this claim.

**Count Five**  
**(Breach of Implied Covenant of Good Faith and Fair Dealing)**  
**(Against Highland ERA Management and Dondero)**

108. Daugherty restates each of the foregoing allegations as if fully set forth in this paragraph.

109. Under Delaware law, a duty of good faith and fair dealing is implied in every contract, including LLC agreements. The implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct that has the effect of preventing the other party to the contract from receiving the fruits of the bargain.

110. The implied covenant of good faith and fair dealing required Highland ERA Management and Dondero to refrain from arbitrary or

unreasonable conduct that benefited themselves at the expense of Highland Employee Retention Assets and its unit holders.

111. The adoption by Highland ERA Management, on the date of its formation, and Dondero of the Third Amended and Restated Agreement of Highland Employee Retention Assets was a breach of the implied covenant of good faith and fair dealing.

112. The execution of the [REDACTED] by Highland ERA Management, on the date of its formation, and Dondero, under which they [REDACTED]  
[REDACTED]  
[REDACTED] was a breach of the implied covenant of good faith and fair dealing.

113. The execution by Highland ERA Management and Dondero of the April 30, 2013 Assignment Agreement, declaring that Highland Capital held the [REDACTED]  
[REDACTED]  
[REDACTED] was a breach of the implied covenant of good faith and fair dealing.

**Count Six  
(Indemnification for Texas Action)  
(Against Highland Capital)**

114. Daugherty restates each of the foregoing allegations as if fully set forth in this paragraph.

115. As an officer and agent of Strand, Daugherty is indemnified

[REDACTED]

Ex. K, [REDACTED]

116. Daugherty successfully defended all claims and allegations against him in the Texas Action that were based on his employment performance on behalf of Highland Capital. Indeed, those allegations and claims were “non-suited” on the eve of trial. Daugherty’s only liability related to post-employment retention of information, for which zero damages were awarded.

117. Daugherty incurred substantial attorneys' fees in defending the baseless and unproven allegations regarding his performance as a Highland Capital employee. He is entitled to be indemnified for those fees.

**Count Seven  
(Fees on Fees)  
(Against Highland Capital)**

118. Daugherty restates each of the foregoing allegations as if fully set forth in this paragraph.

119. Daugherty is entitled to fees on fees in prosecuting his indemnification rights against Highland Capital in this action. Such a right is not specifically excluded from the Highland Partnership Agreement.

WHEREFORE, Daugherty respectfully requests that the Court:

- a. enter judgment in favor of Daugherty and against Highland Capital, Highland Employee Retention Assets, Highland ERA Management, and Dondero;
- b. order Highland Capital, Highland Employee Retention Assets, Highland ERA Management, and Dondero to satisfy the judgment against Highland Employee Retention Assets and in the Texas Action;
- c. order Highland Capital and Dondero to return to Highland Employee Retention Assets all of the assets that Highland Capital

fraudulently or otherwise wrongfully caused to be transferred from Highland Employee Retention Assets to Highland Capital or Dondero;

d. declare that Daugherty remains a member of Highland Employee Retention Assets;

e. declare that Daugherty is the sole member of Highland Employee Retention Assets;

f. dissolve Highland Employee Retention Assets and distribute its assets to Daugherty;

g. declare that Highland ERA Management and Dondero breached their fiduciary duties owed to Highland Employee Retention Assets and its unit holders;

h. declare that Highland Capital aided and abetted Highland ERA Management and Dondero's breach of fiduciary duties;

i. declare that Highland ERA Management and Dondero breached the implied covenant of good faith and fair dealing;

j. award Daugherty indemnification for costs, including attorneys' fees, incurred in defending the Texas Action;

k. award Daugherty fees on fees in prosecuting this action;

l. award Daugherty pre- and post-judgment interest;

- m. award Daugherty his reasonable costs and expenses incurred in connection with this action, including reasonable attorneys' fees; and
- n. grant such other relief that is just and proper.

*/s/ Thomas A. Uebler*

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