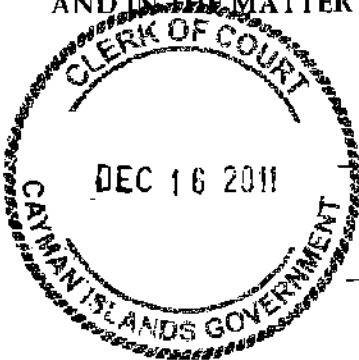
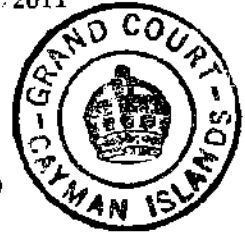


IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION

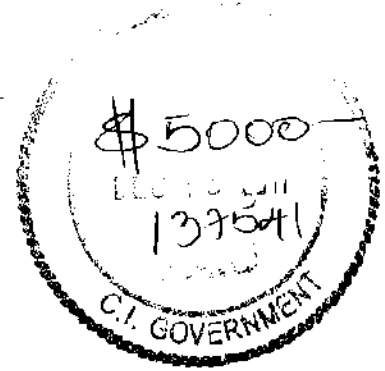
CAUSE NO: FSD <sup>196</sup> OF 2011

IN THE MATTER OF THE COMPANIES LAW (2011 REVISION)

AND IN THE MATTER OF YA OFFSHORE GLOBAL INVESTMENTS LTD



PETITION



TO: THE GRAND COURT OF THE CAYMAN ISLANDS

THE HUMBLE PETITION of Callisto Absolute Return Fund Ltd and Mevrouw R.M. Bonnerjee shows that:

A. The Company

1. YA Offshore Global Investments Ltd ("the Company") is an open-ended investment company incorporated on 28 November 2001 as an exempted company under the laws of the Cayman Islands with limited liability.
2. The registered office of the Company is situated at Walkers Corporate Services Limited, Walker House, 67 Mary Street, George Town Grand Cayman, Cayman Islands.
3. The directors of the Company are:
  - (a) Mark Angelo of New Jersey, USA ("Mr Angelo"). Mr Angelo is the founder of, and holds a controlling interest in, Yorkville.

(b) Matthew Beckman ("Mr Beckman"). Mr Beckman is a limited partner in Yorkville.

(c) Gerald Eicke ("Mr Eicke"). Mr Eicke is a limited partner in Yorkville.

(referred to collectively below as "the Directors").

**B. The Petitioners**

4. The First Petitioner is a company incorporated in the British Virgin Islands.
5. The Second Petitioner is an individual resident in The Netherlands.
6. The First Petitioner is the registered holder of 1507.808 shares in the Company which were allotted to it on 1 July 2005.
7. The Second Petitioner is the registered holder of 25.7 of shares in the Company which were allotted to him on 1 July 2006.

**C. The Management**

8. The Investment Manager of the Company is Yorkville Advisors LLC ("Yorkville"). Yorkville serves as the Investment Manager to both the Company and YA Global Investments LP ("the Master Fund") of which the Company is a feeder fund.
9. The principals of Yorkville are:
  - (a) Mr Angelo, who is the President and Managing Member of and holds a controlling interest in, Yorkville which he co-founded in February 2001.
  - (b) Mr Beckman, who is a Managing Member of Yorkville and has been with the firm since 2001.
  - (c) Mr Eicke, is a Managing Member of Yorkville and has been with the firm since 2002; and

- (d) David Gonzalez ("Mr Gonzalez"). Mr Gonzalez is a Managing Member of Yorkville and has been with the firm since 2001.

10. Yorkville holds itself out on its website as:

*"An alternative investment manager and provider of specialty financing solutions...providing flexible, innovative debt and equity investments and financing in publicly listed companies in a variety of sectors including energy, mining, technology media & telecommunication (TMT), healthcare and shipping. Yorkville specializes in providing flexible, innovative debt and equity financing in publicly listed companies. Yorkville tailors its financings according to each company's need and offers a mix of debt structures, bridge financings, asset backed notes, equity facilities and, in some cases, equity injections."*

11. Yorkville further holds itself out on its website as employing:

*"...professionals who bring extensive knowledge about capital markets and the desire to assist companies in addressing their financing needs. Our team represents a wide range of experience in the securities industry. Yorkville Advisors is a pioneer in the development of equity finance, particularly the Standby Equity Distribution Agreement or SEDA."*

12. The Company's administrator is Swiss Financial Services (Bahamas) Ltd ("the Administrator").

13. The Company's auditor is Goldstien Golub Kessler LLP ("the Auditor). The Auditor is auditor of both the Company and the Master Fund.

**D. Background**

14. The Company operates as a mutual fund and is an offshore "feeder fund" in a master/feeder structure. The Master Fund is the master fund in this structure.

15. The Company offers participating, non-voting shares ("the Shares"), which represented a capital interest in the Company with a par value of US\$0.001 for each share. The minimum required investment by an Investor is US\$500,000, but the Directors may reduce or raise this minimum requirement.
16. The Company's Private Placement Memorandum ("the PPM") confirms that the Company's investment objective, which is shared with the Master Fund, is to achieve superior risk-adjusted returns primarily by making directly negotiated private equity and equity-related investments and, to a lesser extent, debt investments in public and private companies.
17. The PPM also confirms that, as part of its ordinary business, the Company will be investing all or substantially all of its assets in the Master Fund in exchange for an interest therein. The PPM provides relevantly as follows:

*The Master Fund's investments will consist primarily of structured equity line commitments, debt instruments, convertible debt instruments, convertible preferred securities and cash or cash equivalents of US and foreign issuers. The Master Fund generally will invest in such instruments at a discount to their trading price in the public markets. The Master Fund may invest an unlimited amount of its assets in illiquid or restricted securities of both public and private companies.*

18. The Investment Manager, Yorkville, has existed in various iterations since 2001. In particular:
  - (a) On January 2, 2001, Mr Angelo founded Cornell Capital Partners LP ("CCP"), the precursor in name to the Master Fund. CCP was formed and domiciled in Delaware, USA, and designed to pool the funds of a limited number of investors for investment in securities and other financial instruments.

- (b) In 2001, Yorkville formed the Company. Its original name was Yorkville Advisors Offshore, Ltd. This Company was renamed Cornell Capital Partners Offshore, Ltd. in 2003.
  - (c) In 2005, Yorkville formed an onshore feeder fund to the Master Fund in the United States, called Cornell Capital Partners (US) LP. Yorkville's interests in CCP were eventually transferred to this onshore feeder fund as the US based element of the Master Fund.
  - (d) In 2005, Yorkville formed Cornell Capital Master Fund, Ltd. in the Cayman Islands ("CCM"). CCP was made a wholly-owned subsidiary of CCM.
  - (e) In 2007, Yorkville re-domiciled CCP in the Cayman Islands and reinstalled it as the Master Fund to which the onshore and offshore feeders were directed. CCP's name was also changed at this time to YA Global Investments LP. The Master Fund is therefore the current iteration of CCP.
  - (f) At the same time, the Company's name was changed to YA Offshore Global Investments Ltd, and the onshore feeder fund's name was changed to YA Global Investments (US) LP ("YA Onshore").
19. In its capacity as Investment Manager to the Company, Yorkville focuses on alternative financing structures. These include Private Investment in Public Equity ("PIPE") transactions and Standby Equity Distribution Agreements ("SEDAs"). These structures offer liquidity to financially troubled companies ("Portfolio Companies") in exchange for equity positions in those Portfolio Companies at a discount to market. These typically included convertible debentures (which are floorless, and often referred to as "toxic" or "death spiral" financings).

20. The financing operated by Yorkville operates such that.
- (a) The investments facilitated by Yorkville require the Portfolio Companies to pay above-market fees upfront. Essentially, Yorkville acts by advancing these fees and rolling the fee amount in the loan amount. The borrower will then have to repay the fees together with the loan. This upfront fee structure, from a credit perspective, is extremely adverse to investors as the only takers are credit-impaired target companies who are only willing to pay excessive fees because no one else will lend to them.
  - (b) In its capacity as Investment Manager, Yorkville receives an annual management fee, which is usually set out usually around 2% of the investment. The management fee is calculated using the Net Asset Value ("the NAV") of the Fund. Importantly, the higher the NAV at the end of each year, the higher the fee which Yorkville, and its principals the Directors, will receive.
  - (c) Yorkville's investment agreements are also generally structured so that Yorkville will receive a 20% "incentive fee". The incentive fee is calculated using the year-end profits of the Fund. The more profits calculated at year end, the higher the incentive fee for Yorkville and its principals.
  - (d) In SEDA and PIPE transactions, the transaction documentation is also structured so that Yorkville acquires a significant stake in the Portfolio Company at a discounted rate.
21. Using the Company and the Master Fund, Yorkville procures US investors to subscribe for limited partnership interests of YA Onshore and non-US and tax-exempt investors purchase shares of the Company. These feeder funds then invest their capital solely in the limited partnership interests of the Master Fund, which in turn invests in third-party securities pursuant to its stated investment strategies.

**E. Constitutional documents**

22. The PPM confirms that the Company is to be managed and its affairs supervised by the Directors. The PPM provides that:

*“A Director shall not be indemnified by [the Company] against any action, proceeding, cost, charge, expense, loss, damage, claim or liability incurred by reason of acts or omissions constituting gross negligence, as that term is defined or construed by the laws of the State of New Jersey, wilful misconduct or breach of fiduciary duty by that Director”.*

23. The Petitioners have requested copies of the Memorandum and Articles of Association of the Company, but wrongfully and in breach of section 29 of the Companies Law (2011 Revision) the Company has failed and refused to provide the same.
24. As Investment Manager of the Company, and as a matter of common law, Yorkville is a fiduciary to the Company. Yorkville therefore owes the following fiduciary duties to the Company:
- (a) To act in the best interests of investors;
  - (b) To exercise any powers granted to Yorkville responsibly and in accordance with the purpose for which it was granted;
  - (c) To account for any money or other property of the Company;
  - (d) Not to place itself in a position where its duty to the Company conflicts with its own interests; and
  - (e) To comply with all obligations imposed by the Exempted Limited Partnership Law and the Partnership Law.

**F. Breaches by Yorkville and/or the Directors**

25. Wrongfully and/or in breach of fiduciary duty and/or in breach of contract, Yorkville and the Directors failed in their duties in the particular respects hereinafter set out:

- (a) By engaging in self dealing.
- (b) By intentionally over-valuing the Company's assets for personal gain, including by manipulating the Company's accounts in order to off-set negative returns, preserve false profit margins, and preserve its ability to secure its incentive fees and instructing bankers to destroy documents which would suggest an unfavourable valuation.
- (c) By intentionally manipulating the stock price of portfolio companies for Yorkville's benefit and to the detriment of the Company.
- (d) By appointing personal friends or former fraternity brothers of Angelo some with no business experience to positions within Portfolio Companies so that they could channel inside information back to Yorkville and direct their companies to transact business with Yorkville which were for Yorkville's exclusive benefit ("cronyism").

26. As a result of these actions, the Petitioners' investments in the Company have been significantly eroded. The Petitioners have lost confidence in the ability of the Directors of the Company properly to conduct and manage the affairs of the Company in accordance with their fiduciary duties, as the Company's business appears to date to have been conducted only to benefit the Directors. In addition, there is plainly a need for the affairs of the company to be investigated by an independent liquidator appointed by the Court who can bring claims against the Directors and Yorkville to recover the losses suffered by the Company

## Self Dealing

### *Investment in Advance Communications Technologies*

27. On 28 April 2003, ADVR entered into a financing agreement with CCP for US\$2.5 million. CCP received a 10% fee of the total sales in return for entering into the purchase agreement.
28. On the same day, the two parties entered into another equity line of credit agreement for \$50 million. CCP's fees in the transaction were 5% of each advance in cash.
29. In or around late 2003, Mr Angelo decided that he wanted to increase his share in Yorkville. In order to do so, it was necessary for Mr Angelo to buy the partnership interests of Mr Joe Donahue and Mr Robert Farrell. However, he lacked the funds to do so.
30. In or around January 2004, Mr Angelo approached Mr Wayne Danson, the CEO of Advanced Communications Technologies ("ADVC"), a Portfolio Company, and asked him to assist Mr Angelo to gain control of partnership shares held by Mr Donahue and Mr Farrell. In particular:
  - (a) With Mr Danson's assistance, Mr Angelo engineered a \$3 million six month promissory note from the Master Fund to ADVC. The note was non-interest bearing unless it was not repaid when it came due. The note would come due at the end of a 24-week period commencing on 23 February 2004.
  - (b) ADVC then immediately used \$2,625,000. of the loan to purchase the interests in Yorkville held by Mr Donahue and Mr Farrell, keeping the remaining funds as a bonus for its participation in the arrangement. This transaction and the short-term promissory note are reflected in ADVC's March 31, 2004 ["10-Q"]. The size of the interest in Yorkville that was

acquired is not stated in the 10-Q. As of March 31, 2004, ADVC had repaid \$500,000 of the note and issued 360,750,260 shares of common stock under its Equity Line of Credit Facility. At the time ADVC purchased these interests, the interests represented over 60% of the outstanding partnership shares in Yorkville.

- (c) On February 11, 2005, Hudson Street received a distribution of exactly \$2,625,000 from Yorkville in exchange for all of Hudson Street's recently acquired partnership interests in Yorkville. Yorkville also extended the term of the promissory note to ADVC, which still had \$2,000,000 outstanding and was now long overdue, to June 30, 2005. ADVC used \$1,725,000 of the distribution proceeds to repay the principle on the note, leaving a balance of \$275,000. These events are reflected in ADVC's February 11, 2005 8-K, and essentially show that ADVC sold the partnership shares to partnership interests which were redeemed back by Yorkville for exactly the same sum.
  - (d) Mr Angelo therefore used assets of the Master Fund to increase his own ownership stake in Yorkville, and therefore to access a greater share of the fees Yorkville earned from the Master Fund and the Company's investments in it.
  - (e) Neither the Master Fund or the Company received anything in return from the loan arrangement with ADVC, as the loan was interest free and ADVC was paid \$350,000 of the loan funds as its fee.
  - (f) Further, the Company lost the opportunity to have its investments in the Master Fund invested in a legitimate investment with a chance for a return.
31. Yorkville and ADVC have continued to agree further deals despite a dramatic decrease in Yorkville's stock value. In particular:

- (a) On February 14, 2007 ADVR and CCP entered into a further securities purchase agreement for \$1.5 million.
  - (b) On July 24, 2007, ADVR entered into yet another purchase agreement for \$2.75 million. Pursuant to that agreement CCP received 10% of the gross proceeds of the transaction as well as \$15,000 in structuring fees and \$5,000 in due diligence fees. Yorkville also earned \$125,000 in "monitoring fees" for Yorkville, which were paid directly from the proceeds of the closings.
32. In 2009 Yorkville assigned its interests in ADVR to another company, BBM Holdings, Inc.
33. As a result of the actions above and the manipulation of ADVC:
- (a) Yorkville's principals were able to buyout other principals with assets of the Master Fund, including the Company's investments, and thereby increase their individual positions.
  - (b) The extension of the promissory note term also ensured that the initial loan to ADVC that facilitated this manoeuvre would be effectively interest free. In other words, the Master Fund reaped no benefit from the improper use of its assets for the principal's private gain.
  - (c) For its part, ADVC and its investors received only an ongoing additional obligation to Yorkville (the remainder of the note) as ADVC was manipulated into spinning a valuable asset for essentially nothing. If ADVC had retained the interest in Yorkville it had acquired for \$2,625,000 it would have had access to the many years of significant fee returns Yorkville and its principals enjoyed. Instead, ADVC was made to spin that asset back to Yorkville for no profit, leaving in place its dependence on its Equity Line of Credit Facility with Yorkville.

- (d) The end result was that Yorkville pocketed large upfront fees and acted to the detriment of the Master Fund and the Company it advises; and
- (e) Yorkville exposed its investors, including the Company, to an extremely adverse situation in that ADVR stock lost 96% of its value since Yorkville's last investment.

*Investment in Celerity Systems*

34. In 2003, Mr Angelo employed the same strategy applied in relation to ADVC with another Portfolio Company, Celerity Systems, in order to engineer a further consolidation of his position as majority owner of Yorkville. In particular:
- (a) Yorkville had invested heavily in Celerity. By early 2003 it had essentially taken over the company.
  - (b) When the Celerity CEO resigned Mr Angelo inserted a personal friend, Robert Legonsky, as the new CEO.
  - (c) Mr Angelo knew that Mr Legonsky had no relevant qualifications, was not a member of any relevant professional body, and had no other experience to enable him to perform the requirements of the role of CEO of Celerity. Mr Legonsky was essentially a "puppet CEO".
  - (d) With Mr Legonsky's assistance, Mr Angelo caused the Master Fund to invest an additional \$5,240,000 dollars of the Master Fund's money into Celerity. This investment took the form of \$4,000,000 in common shares and \$1,240,000 in convertible notes. Celerity raised the funds for the purchase through a sale of 2,000,000,000 shares of common stock to the Master Fund for \$4,000,000, and by issuing convertible notes payable to the Master Fund in the amount of \$1,240,000. These transactions are reflected in Celerity's December 31, 2003 10-K (filed April 15, 2004).

- (e) This money was then used by Celerity to buy out the partnership share in Yorkville, with that share eventually being consolidated with Mr Angelo's majority position.
- (f) Despite being irreconcilably conflicted, Mr Angelo used assets belonging to the Master Fund, including the Company's investments, for personal gain and in breach of the fiduciary duties he owed the Master Fund and to the Company.
- (g) On February 11, 2005, the same date as the reacquisition of the ADVC interest, Celerity received a distribution of \$5,240,000 from Yorkville for its entire interest. Immediately prior to this distribution, Celerity's interest had been reclassified from a membership interest to a Preferential Rights Interest, which entitled it to receive distributions up to its original purchase price (\$5,240,000). These transactions are reflected in Celerity's February 11, 2005 8 K (filed February 18, 2005).
- (h) In 2003, Levin was bought out by a Portfolio Company under the control of one of Angelo's friends. Yorkville and the remaining principals then "bought back" the interest from Celerity for the exact same price two years later. The Master Fund received no interest or other remuneration in return for the misuse of its assets.
- (i) Yorkville's principals had therefore used Master Fund assets, including the Company's investments, to secure what amounted to an interest fee advance that they could use to buy out a partner and consolidate their position.

*Investment in NuWave Technologies*

35. In 2004, Mr Angelo and Yorkville again used assets of the Master Fund and another Portfolio Company, NuWave Technologies ("NuWave"), to finance a land deal for personal gain. In particular:
- (a) NuWave was a Portfolio Company that Yorkville acquired first by having the Master Fund acquire a substantial shareholding and subsequently by inserting yet another of Mr Angelo's personal friends, Mr George Kanakis, as a puppet CEO.
  - (b) Mr Angelo knew that Mr Kanakis had no qualifications, was not a member of any relevant professional body, and had no other experience to enable him to perform the requirements of the role of CEO of NuWave.
  - (c) In conjunction with Mr Kanakis, Yorkville then created a new entity called Lehigh Acquisition Corp ("Lehigh") which was a subsidiary of NuWave.
  - (d) Yorkville agreed with Lehigh that the Master Fund would provide an additional \$4,950,000 in financing to NuWave. These funds were immediately passed through to Lehigh.
  - (e) Lehigh used the funds to purchase a parcel of land in Cranford, New Jersey, USA from an entity named Stone Street Asset Management ("SSA"). SSA is an entity owned and controlled by the principals of Yorkville.
  - (f) SSA earned a profit of over \$2,000,000 on the sale of this land.
  - (g) Lehigh was subsequently acquired by Mr Angelo and other principals of Yorkville who retained the purchased land as an asset.

(h) Yorkville and its principals therefore used the Master Fund assets to reap a sizable personal profit on a land deal, while never actually selling the land.

36. In this instance, Yorkville once again used a Portfolio Company to spin a transaction intended to benefit Yorkville alone.

### **Manipulation of assets**

37. Yorkville has a duty to ensure that the assets of the Master Fund and the Company are valued and maintained in an accurate and professional manner with reference to accounting standards.

38. Throughout its engagement as Investment Manager, Yorkville has manipulated the estimated value of assets under management by using accounting treatments which have the effect of recouping higher management and incentive fees for the benefit of Yorkville and to the detriment of the investors including the Petitioners

### *Rates of return*

39. From 1 February 2001, to 1 July 2008, Yorkville never reported a monthly loss.

40. In 2008 and 2009, Yorkville reported total returns of 6.22% and 6.04%, respectively, on nearly \$1 billion in assets. Despite these returns, Yorkville was unable to meet investor redemption requests in 2008.

41. Yorkville nonetheless reported profits for both 2008 and 2009, based almost entirely on reported strong finishes to each year. Accordingly, in both 2008 and 2009 a profit was turned and Yorkville and its principals generated another year of 20% incentive fees.

42. In August 2009, Yorkville's practices and remarkable rate of return despite the global economic crisis of 2007 through to 2009, earned Yorkville attention from the Securities and Exchange Commission.

43. In 2010, the broad markets recorded solid yearly returns: the Dow Jones Industrials gained over 11%; the S&P 500 gained almost 13%; the NASDAQ 100 gained over 19%, and the Russell 2000 gained over 25%. By contrast, Yorkville reported its first down year. Between July 2008, the first down month in the Fund's history, and the end of 2010, Yorkville reported:
- (a) four down months in 2008;
  - (b) five down months in 2009; and
  - (c) ten down months in 2010.
44. By the end of 2010, the value of the Fund had fallen significantly, with the bulk of this reported drop only being posted in a 26.9% drop in December 2010. The Master Fund, which according to Yorkville had remained a billion dollar fund throughout most of the worst of the financial crisis, is now valued approximately \$500 million
45. Up until the end of 2010, and in breach of its fiduciary duties to investors such as the Plaintiff, Yorkville had been manipulating the assets of the Master Fund including the Company's investments. In particular it:
- (a) had accrued as assets of the Master Fund assets which were primarily security positions for which there was no market;
  - (b) had routinely listed the accrued but uncollected interest from convertible debentures the Fund held in Portfolio Companies as "gains." This interest had not yet been collected and, given the general state of the companies in the Fund's portfolio (75% failure rate), the chance of ever collecting a significant portion of this unrealized interest was slim. Nonetheless, Yorkville booked this owed interest that it would never receive as a gain to off-set negative returns and preserve its ability to finish each year with a profit on the books

(c) had falsely valued assets in reliance on false appraisals. Pending discovery and/or interrogatories herein, the Petitioners rely upon the following:

- (i) In 2008, Yorkville caused the Fund to invest \$22 million in Levitz Furniture (“Levitz”).
- (ii) Soon thereafter, Levitz filed for bankruptcy and a creditors’ auction of the Levitz’s assets was held.
- (iii) Yorkville caused the Master Fund to make a creditor’s bid of \$2 million for the brand name “Levitz Furniture”.
- (iv) Yorkville then acquired an appraisal value of the name that was exactly the same as the amount invested in Levitz—\$22 million. This allowed Yorkville to write down the loss of the original investment over time, rather than taking the loss at once.
- (v) In this instance, Yorkville committed an additional \$2,000,000 in Master Fund assets for the sole purpose of acquiring a mechanism to allow Yorkville to spread the loss and protect its access to year-end profit-based incentive fees.

46. The total number of transactions in which the Master Fund has been engaged since inception is in the hundreds. An estimated 75% of Yorkville Portfolio Companies have become insolvent since the inception of the Master Fund.

47. Because of Yorkville’s misconduct and manipulation of the Master Fund’s assets, such action being a breach of Yorkville’s fiduciary duties, the Petitioners and other investors have been exposed to massive credit risk investments.

### Manipulation of stock price

48. Yorkville has a duty to the Master Fund and to the Company to ensure that stock prices are valued accurately at all times.
49. In breach of its fiduciary duties to the Plaintiff, Yorkville manipulated stock prices and habitually over-estimated the NAV (when compared to a mark to market method that takes into account illiquidity and other variables) in order to recoup higher management fees than it was properly due to receive. In particular:
  - (a) Yorkville calculated the NAV of the fund based on the closing price for Fund held securities on the last trading day of each month.
  - (b) Whenever Yorkville needed the closing price of a stock to close above a certain level in order to preserve a certain NAV level for the Fund, it would direct its brokers and trading partners to make purchases of that stock at the ask price immediately prior to the market close. This would drive the stock price up just before the close.
50. This strategy could be timed to inflate targeted Portfolio Company securities that would generate the greatest effect on the month-end bottom line. In addition:
  - (a) using the accrual method of accounting, had listed the accrued but uncollected interest from the convertible debentures held by the Master Fund as "gains" when in fact the money had never been realised or received.
  - (b) had valued the stock held by the Master Fund higher than is accurate using mark to marketing accounting principles, to cover the fact that the actual market value was low due to illiquidity or other variables.
51. The monthly NAV as determined by the Directors was based on fraudulent misinformation provided by Yorkville and was materially incorrect. If correct and

accurate information had been provided then the monthly NAV would have been determined at a much lower value. In the circumstances, no proper NAVs could be produced, and accordingly the NAVs produced by Yorkville were incorrect.

52. The stocks of the companies in the resulting YA Global portfolio performed much worse than would have been the case if the Yorkville managers had performed their advisory obligations to the fund investors.

*Excessive and unnecessary fees*

53. As Investment Manager, Yorkville has a duty to ensure that all fees charged by it for services are appropriate and reasonable in the circumstances.
54. Yorkville instead used assets of the Master Fund, and the investments of the Company, to pay excessive and unnecessary fees charged by other entities controlled by Yorkville. In particular:
  - (a) Yorkville used Master Fund assets to pay “consulting fees” to a Yorkville controlled entity, Stone Street Partners.
  - (b) The purpose and existence of such fees were never disclosed to the Limited Partners.
  - (c) Yorkville never explained, and could never explain, why outside consulting services would even be necessary given the supposed expertise of Yorkville itself.
  - (d) Yorkville set up these additional undisclosed fee relationships solely to misdirect additional Master Fund assets directly into the pockets of Mr Angelo and the other Principals.
  - (e) In addition, Yorkville was able to guarantee its 20% incentive fee only because Yorkville itself determined the Master Fund’s NAV by providing its own value estimates to its auditors;

*Questionable Investments in Failing Portfolio Companies to engineer exorbitant fees*

55. Yorkville's investment activities show a pattern of repeat investments in companies with sinking stock prices. Annexe A attached to this petition list 46 such instances.
56. One of the basic rules of structured finance is to limit exposure to companies with weakening credit. Yorkville did not keep to these rules and there was a persistent conflict of interest between the managers at Yorkville and the investors they work for. The companies borrowing from the Fund use some of the loan proceeds to pay above-market fees to Yorkville. As a result, the YA Global portfolio is adversely skewed towards subpar companies without other borrowing options.
57. Certain of the loans Yorkville made as listed in Annexe B to this Petition appear to serve no other purpose than to dress up the Yorkville investment results. These annual loans approved by Yorkville equal a multiple (as high as 3 or 4 times) of the receiving company's eroding market value and its net asset value. Any reasonable valuation applied by Yorkville would have precluded making such investments.
58. There were related-party transactions which Yorkville engaged in with certain companies borrowing from the Fund (the "*Debtors*"), including instances where Yorkville's managing partners, in a transaction to buy out original Yorkville partners, sold interests in Yorkville to Debtors. The Debtors financed their acquisition of the advisor interest with funds from the Fund and some of the Fund's worst investments were a series of subsequent loans made to these same Debtors and their successor companies.
59. Yorkville commonly made loans to companies that were larger than the total amount of collateral owned by the companies. Yorkville was solely concerned about whether the debenture's coupon could be paid out of cash-flow of the company over the next year using the proceeds of the loan from Yorkville, because

when the Portfolio Company would not be able to pay the coupon or principal, Yorkville would simply issue a new debenture that would roll in the old principal amount with a new coupon and collect another restructuring fee for Yorkville.

*Investment in Advanced Viral Research Corp.*

60. Yorkville invested significant amounts of Fund capital in Advanced Viral Research Corp. (“ADVR”) between 2001 and 2008. Yorkville made these investments on behalf of the Fund despite the collapse of ADVR’s stock price during this period (from \$0.37 to \$0.01 between the first and last investment, with a current stock price of \$0.0004 (a 96% drop since the initial investment)). Yorkville’s serial investments in ADVR do not just reflect a poor investment strategy. The terms of these investments also demonstrate Yorkville’s use of distressed Portfolio Companies to churn exorbitant fees for itself at the expense of the Fund.
61. Yorkville caused the Fund to purchase \$1,500,000 in secured convertible debentures. As a part of the agreement, ADVR also committed to pay Yorkville “cash compensation equal to 10% of the gross proceeds of the convertible debentures purchased as well as a \$20,000 structuring fee and a \$10,000 due diligence fee.” These fees were subtracted from the \$1,500,000 Fund investment, leaving ADVR with “net proceeds of \$1,325,000 in connection with the agreement.” Yorkville invested \$1.5 million in Fund assets in a failing company so that it could extract fees—paid directly out of the Fund investment—that were not at all contingent on recouping a profit from this investment.

*Investment in Nanoscience Technologies, Inc.*

62. In 2005, Yorkville executed a \$1,000,000 convertible debt transaction with Nanoscience Technologies, Inc. (“NANS”). An upfront fee of \$50,000 was paid for a single \$500,000 tranche. In addition, an excessive escrow fee of \$140,000 was also paid in connection with this transaction to David Gonzalez, General Counsel

and Managing Member of Yorkville. Other instances of Mr. Gonzalez receiving escrow fees for loans made by the funds he advises are set out in Annexe C to this petition. NANS, therefore paid almost \$200,000 in fees to Yorkville to secure a \$300,000 loan from the Fund. Yorkville used Fund assets to draw an immediate profit for itself, while leaving the Fund with a worthless investment.

*Investment in U.S. Helicopter Corp.*

63. In 2008, Yorkville committed the Fund to a \$1,250,000 convertible debt transaction with portfolio company U.S. Helicopter Corp. ("**USHP**"). USHP immediately used \$613,000 from the loan to payoff a previous loan from the Fund. A portion of the loan was also used to pay Yorkville a \$25,000 structuring fee and a \$78,750 monitoring fee "for monitoring and managing the investment by [the Fund]." Yorkville not only committed additional Fund assets into a failing company in order to churn additional fees for itself off the top, but it also effectively double-charged the Fund for monitoring services. The Fund already paid Yorkville for general investment management services and there is no reason why the Fund should have paid an additional monitoring fee, out of its own assets, for this specific investment. Further instances of borrowers paying monitoring fees to Yorkville are set out in Annexe C to this Petition.

*Investment in TTC Technology Corp.*

64. TTC Technology Corp ("**TTC Tech**"), formerly known as SmartTire Systems, Inc., is a Yorkville portfolio company with a friend of Yorkville's principals, George O'Leary, as CEO. TTC Tech disclosed in its July 31, 2005, Annual Report that "our revenues are not sufficient to meet operating and capital expenses . . . and this is likely to continue for the foreseeable future." Nonetheless, on December 30, 2005, Yorkville approved a \$160,000,000 equity line for TTC Tech, with a commitment fee due to Yorkville of \$16,000,000. At the same time, Yorkville committed the Fund to a \$30,000,000 convertible debt transaction with TTC Tech. More than half the proceeds of this convertible debt transaction were then used to pay Yorkville's

\$16,000,000 commitment fee. The Fund's assets were routed through this failing Portfolio Company solely in order to generate a considerable fee for Yorkville, and on the basis that the equity line commitment was made *by the Fund* the commitment fee should have gone to the Fund, not Yorkville. Further instances of the borrowers paying commitment fees to Yorkville when they were due to the Fund are set out in Annexe C to this Petition.

### **Cronyism**

65. A number of individuals had no relevant business experience for their respective appointments as CEO of the portfolio Companies to which they were appointed and were friends or former fraternity brothers of Mark Angelo. Details are set out in Annexe D to this Petition.

### **Conclusion**

66. For the reasons set out above, it is contended that there is no appropriate alternative to liquidation for the Company and that the Company should be wound up on the grounds that it is just and equitable to do so for the following reasons:

- (a) There has been serious fraud, misconduct and/or oppression in regard to the affairs of the Company; and
- (b) The business of the Company is not being run in accordance with the legitimate expectation of the shareholders, including the Petitioners, and it is no longer possible or desirable to achieve the objects for which the Company was formed.

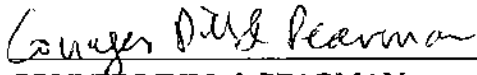
67. In the circumstances, it is not appropriate for the Directors to be allowed to continue in office, and it is just and equitable the Company should be wound up by the Court.

**YOUR PETITIONERS THEREFORE HUMBLY PRAY THAT:**

- (1) That the Company be wound up by the Court under the provisions of the Companies Law (2010 Revision).
- (2) Mark Longbottom and Jess Shakespeare of Kinetic Partners, The Harbour Centre, 42, North Church Street, George Town, Grand Cayman, Cayman Islands be appointed as Joint Official Liquidators of the Company (the "JOLs").
- (3) The JOLs not be required to give security for their appointment.
- (4) The JOLs be authorised to take such steps as may be necessary or expedient for the protection of the Company's assets, and for that purpose may exercise any of the powers specified in Part I and II of the Third Schedule to the Companies Law (2010 Revision) without further sanction of the Court, and for the avoidance of doubt such powers may be exercised within and outside the Cayman Islands. Specifically, but without prejudice to the generality of the foregoing, the JOLs shall have power:
  - (4.1) to bring or defend any action or other legal proceeding in the name of and on behalf of the Company;
  - (4.2) to take possession of, collect and get in the property of the Company and for that purpose to take all such proceedings as they consider necessary;
  - (4.3) to carry on the business of the Company so far as may be necessary for its beneficial winding up;
  - (4.4) to engage Attorneys and other professionally qualified persons to assist them in the performance of their functions; and
  - (4.5) to engage staff (whether or not as employees of the Company) to assist them in the performance of their functions.
- (5) The JOLs be authorised to act jointly and severally.
- (6) The JOLs be at liberty to apply for further directions concerning their functions and the exercise or proposed exercise of their powers.

- (7) No suit, action or other proceeding may be proceeded with or commenced against the Company except with the leave of the Court and subject to such terms as the Court may impose.
- (8) The remuneration and expenses of the JOLs be paid out of the assets of the Company.
- (9) The Petitioners' costs of and incidental to this Petition be paid from the assets of the Company as expenses within the Liquidation.
- (10) Such further or other relief be granted as the Court deems appropriate.

DATED this 16<sup>th</sup> day of December 2011



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**CONYERS DILL & PEARMAN**  
**Attorneys at Law for the Petitioners herein**

THIS PETITION was filed by Coryers Dill & Pearman, Attorneys at Law for and on behalf of the Petitioners herein whose address for service is that of its Attorneys, Cricket Square, Hutchins Drive, PO Box 2681, Grand Cayman KY1-1111, Cayman Islands