STINSON LLP
Deborah Deitsch-Perez
Michael P. Aigen
2200 Ross Avenue, Suite 2900
Dallas, Texas 75201
Telephone: (214) 560-2201
Facsimile: (214) 560-2203
Email: deborah.deitschperez@stinson.com
Email: michael.aigen@stinson.com

Counsel for The Dugaboy Investment Trust and Hunter Mountain Investment Trust

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

In re:	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
Reorganized Debtor.	§	
DUGABOY INVESTMENT TRUST and HUNTER MOUNTAIN INVESTMENT TRUST,	§	
Plaintiffs,	§	Adv. Pro. No. 23-03038-sgj
vs.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P. and HIGHLAND CLAIMANT TRUST,	§	
Defendants.	§	

THE DUGABOY INVESTMENT TRUST AND HUNTER MOUNTAIN INVESTMENT TRUST'S RESPONSE TO THE HIGHLAND PARTIES' MOTION TO DISMISS COMPLAINT TO (I) COMPEL DISCLOSURES ABOUT THE ASSETS OF THE HIGHLAND CLAIMANT TRUST and (II) DETERMINE (A) RELATIVE VALUE OF THOSE ASSETS, and (B) NATURE OF PLAINTIFFS' INTEREST IN THE CLAIMANT TRUST

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. PRELIMINARY STATEMENT

1. Plaintiffs filed this adversary proceeding against Defendants Highland Capital Management, L.P. ("HCMLP") and the Highland Claimant Trust (the "Claimant Trust") (collectively, "Defendants") to obtain critical information about the assets and liabilities of the Claimant Trust, which was established under the Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan") [Bankr. Dkt. 1943-1] for the benefit of Claimant Trust Beneficiaries to monetize and liquidate the assets of the HCMLP bankruptcy estate.[1] Plaintiffs have sought this information since June 2022, while HCMLP spent the last 18 months exhausting significant resources to keep the financial status of the estate out of the public eye. Ironically, in the interim, the litigation trustee voluntarily stayed his avoidance action, effectively acknowledging what Plaintiffs have been arguing – that there is more than enough money in the estate to pay all creditors with interest. This is consistent with the disclosure of the Pro-Forma Adjusted Balance Sheet ("Balance Sheet")[2] in July 2023 evidencing that Plaintiffs are *in the money*[3] after all creditors have been paid with interest.

2. At the same time, HCMLP and the Claimant Trust have blocked Plaintiffs (and have indicated an intent to continue to block them) from seeking relief to which they would otherwise be entitled, by contending without evidence that Plaintiffs have no standing because they are purportedly not "in the money" – *i.e.*, able or even likely to recover anything from the Claimant Trust.

3. Given Plaintiffs' established interest and Defendants' "heads-I-win, tails-you-lose" arguments, further disclosure of the estate's financial status is warranted and required. As a result,

[1] Complaint to (I) Compel Disclosures About the Assets of the Highland Claimant Trust and (II) Determine (A) Relative Value of Those Assets, and (B) Nature of Plaintiffs' Interests in the Claimant Trust ("Complaint"), Dkt. No. 1, at ¶¶ 1, 64.

[2] Bankr. Dkt. 3872 at p.5.

[3] "In the money" is a colloquial term that has been used in this case to mean that the net assets of the Claimant Trust are sufficient to make it certain and/or likely that the Class 10 and/or 11 Claimholders will be entitled to payment from the estate.

Plaintiffs bring three claims in this adversary proceeding: Count One requests an accounting; Count Two requests a declaratory judgment regarding the value of the Claimant Trust assets; and Count Three requests a declaratory judgment and determination regarding the nature of Plaintiffs' interests in the Claimant Trust. These claims are necessary to rebut HCMLP and the Claimant Trust's continued disputation of the financial status of the estate.

4. Although the Balance Sheet disclosed the positive net value of the estate, HCMLP and the Claimant Trust continue to deny the estate's solvency and to block Plaintiffs' efforts to gain further insight into the financial condition of the estate — what assets are being sold and what expenses can be avoided. Plaintiffs are entitled to the information that will enable them to advocate to maximize recovery for former equity who are *in the money*.

5. Defendants' motion to dismiss should be seen in this light, and also viewed with skepticism due to the conflicts of interest, discussed below, that taint the decision-making of the Debtor and Claimant Trustee - who have a vested interest in obscuring the finances of Claimant Trust in order to justify keeping the estate open and maintaining lucrative positions for its administrators.[4]

6. Defendants engage in doublespeak when they argue that the disclosure of the Balance Sheet moots the Plaintiffs' claims, while also arguing that Plaintiffs cannot rely on the Balance Sheet because it reflects nothing more than alleged "estimates" and that market forces will cause variances. They cannot have it both ways.

7. Defendants also claim, albeit mistakenly, that Plaintiffs are collaterally estopped because the Bankruptcy Court already ruled in a separate proceeding that the Balance Sheet did not establish that Plaintiffs were *in the money*.[5] Plaintiffs disagree with Defendants' interpretation of the Balance Sheet, the appealed conclusions and impact of the Court's order, and whether collateral

[4] See paragraph 14 to 16 *infra*.

[5] Dkt. 14 at ¶¶ 32-34; Order Denying Motion of Hunter Mountain Investment Trust Seeking Relief Pursuant to Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024, Bankr. Dkt. 3936.

estoppel applies. The Court's order was not essential to the Court's determination on standing in those other proceedings. Furthermore, The Dugaboy Investment Trust ("Dugaboy") was not a party to those proceedings and, therefore, is not subject to collateral estoppel.

8. Plaintiffs' claims present ripe, justiciable controversies, and this Court has subject matter jurisdiction over Plaintiffs' claims. If Defendants' interpretation is wrong, then Plaintiffs have a right to protect their *in the money* status and to determine how the assets are currently being monetized and maximized for their benefit. If Defendants are correct in their interpretation of the data in the Balance Sheet, which they are not and for the sake of argument only, then Plaintiffs are still entitled to further investigate the current financial condition of the estate in light of continued litigation and monetization of assets. Either way, Plaintiff should be allowed to proceed with this action.

9. Thus, Defendants' Motion to Dismiss should be denied for several reasons. First, neither the Balance Sheet nor the Court's order denying reconsideration moot Counts One or Three. Second, Count Three does not seek an advisory opinion. Third, Count Three is not barred by collateral estoppel. Fourth, Count One sufficiently states a claim for an accounting. Lastly, Counts Two and Three sufficiently state a claim for declaratory judgment.

II. BACKGROUND

10. Dugaboy and Hunter Mountain Investment Trust ("HMIT") (collectively, "Plaintiffs") are documented holders of denominated Contingent Claimant Trust Interests that become Claimant Trust Beneficiaries after all creditors are paid in full.[6] The Claimant Trust Agreement ("CTA")

[6] Complaint to (I) Compel Disclosures About the Assets of the Highland Claimant Trust and (II) Determine (A) Relative Value of Those Assets, and (B) Nature of Plaintiffs' Interests in the Claimant Trust ("Complaint"), Dkt. No. 1, at ¶ 1, 58, 65.

evidences an intent that Plaintiffs become Claimant Trust Beneficiaries when Claimant Trust assets are sufficient to pay all lower ranked claims in full with interest.[7]

11. Defendants filed post-confirmation reports (dated October 21, 2022, January 24, 2023, and April 21, 2023) ("Post-Confirmation Quarterly Reports") demonstrating that there is more than enough money in the estate to satisfy legitimate indemnity obligations and to otherwise pay Class 8 and 9 creditors in full.[8] With more than $100 million in assets remaining to monetize (not even counting related party notes), and almost $550 million in assets already monetized, there is enough money to pay the $387 million in allowed creditor claims.[9] The Post-Confirmation Quarterly Reports for the first quarter of 2023 also show distributions of $270,205,592 to holders of unsecured claims, which is 68% of the total value of allowed general unsecured claims of $397,485,568.[10] This amount is far greater than what was represented at the time of confirmation of the Plan.[11]

12. Plaintiffs have previously sought additional financial information without success.[12] Specifically, Plaintiffs have asked for more granular information to allow an even more detailed evaluation to specifically identify all of the money raised and how it has been used and distributed, ***including at least a hundred million dollars not clearly accounted for,*** based on the Defendants' financial filings.[13] But Defendants steadfastly refuse to provide this information.[14] Instead,

[7] *Id.* at ¶¶ 65-66.

[8] *Id.* at ¶ 2. Under the Plan, General Unsecured Claims were classified as Class 8 and Subordinated Claims were classified as Class 9. *Id.* at ¶ 57. The Plan also classified HMIT's Class B Limited Partnership Interest and Class C Limited Partnership Interest as Class 10 and Dugaboy's Limited Partnership Interest as Class 11. *Id.* at ¶ 58.

[9] *Id.* at ¶ 2.

[10] *Id.* at ¶ 67.

[11] *Id.* at ¶ 67.

[12] *Id.* at ¶ 17.

[13] *Id.* at ¶ 2.

[14] *Id.* at ¶ 17.

Defendants argue that Plaintiffs are wrong – that Plaintiffs are *not in the money* – but Defendants do so without providing any documentation to support their position.

13. Unquestionably, the value of the estate, as held in the Claimant Trust, has significantly changed since Plan confirmation.[15] Many of the estate's major assets have been liquidated or sold since then, increasing the value of the estate, and many of the assets held by the estate have significantly increased in value, also increasing the value of the estate.[16] But these current proceedings will enable Plaintiffs to further evaluate the current value of the estate, evaluate and protect the distributions to which Plaintiffs are entitled, and evaluate whether those who should be safeguarding the estate's value are doing so rather than enabling continual waste. Meanwhile, the selective financial information that has been provided suggests that inappropriate self-dealing has occurred - which on its own justifies a full accounting.[17]

14. Likewise, Defendants have failed to provide an ongoing portrait of the estate's finances. These current proceedings are therefore warranted so Plaintiffs and the bankruptcy court can know exactly what information is being utilized to stymie Plaintiffs' efforts to challenge Defendants' administration of the estate and Claimant Trust and Defendants' attempts to justify unnecessary litigation by the estate against its own beneficiaries. The refusal to provide access to additional financial information is especially troublesome given the blatant conflict of interest that exists. James Seery is both the Claimant Trustee and the Trust Administrator of the Indemnity Subtrust (to whom the trustee of the Indemnity Subtrust answers).[18] This creates an irresolvable conflict whereby Seery purports to have exclusive control over the Indemnity Subtrust—to the

[15] *Id.* at ¶ 68.

[16] *Id.* at ¶ 68.

[17] *Id.* at ¶ 4.

[18] *See Debtor's Motion for Entry of an Order (1) Authorizing the (A) Creation of an Indemnity Subtrust And (B) Entry into an Indemnity Trust Agreement and (II) Granting Related Relief* [Bankr. Dkt. 2491] (the "Subtrust Motion") at ¶ 21, pp. 8-9; Order approving the Subtrust Motion [Bankr. Dkt. 2599].

detriment of all Claimants and holders of Equity Interests. As the Trust Administrator of the Indemnity Subtrust, Seery directs administration of all aspects of the Indemnity Subtrust in his sole discretion.[19] The sole beneficiaries of the Indemnity Subtrust are the Indemnified Parties as defined in Section 8.2 of the CTA and subject to its terms, including Seery himself.

15. Seery has the following duties under the Claimant Trust: a) pay the remaining Class 8 and 9 claims in full, b) file the GUC Certification, and c) vest the Class 10 and 11 Equity Interests.[20] In addition, he has the legal duty to do so timely and "not unduly prolong the duration of the Claimant Trust."[21] But because he is an Indemnified Party, subject to the terms of the CTA, Seery chooses to use the remaining assets of the Claimant Trust to both fund a cash reserve to the Indemnity Subtrust, reportedly now totaling $50 million and, on top of that, create an additional "indemnity reserve" of some $90 million[22] in the Claimant Trust. Simply put, Seery has chosen (unilaterally and self-servingly) to dedicate the assets of the Claimant Trust to erect an "indemnity wall" in front of himself instead of using available funds consistent with his duties as the Claimant Trustee. These facts justify closer scrutiny of the Claimant Trust's finances.

16. By concealing the details of the Claimant Trust, Seery, as Claimant Trustee, can continue to frustrate the Plan by refusing to pay Class 8 and 9 claims holders, refusing to file the GUC Certification confirming that Plaintiffs are *in the money*, and thereby render the treatment of all remaining constituents under the Plan, both claimants and former equity, illusory. All claimants, including the Plaintiffs, have a right and, given Defendants' positions, a need to understand how the Claimant Trust is currently handling their money and interests.

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[19] *See* Subtrust Motion, Bankr. Dkt. 2491, at ¶ 21, pp. 8-9; CTA ¶ 6.1(a) which states that Claimant Trustee's determinations concerning reserves for indemnification are "**not subject to the consent of the Oversight Board, may not be modified without the express written consent of the Claimant Trustee, and shall survive the termination of the Claimant Trustee"** (emphasis added).

[20] *See* CTA at ¶¶ 1.1(h), 1.1(aa), and 5.1.

[21] *See* CTA at ¶ ¶ 2.2(b), 3.2(a), and 3.3(a).

[22] Notice of Filing of the Current Balance Sheet of the Highland Claimant Trust, Bankr. Dkt. 3872 at Ex. A.

III. ARGUMENT

A. The Balance Sheet Does Not Moot Count One.

17. Defendants argue in their Motion that "Count one is moot in light of the Balance Sheet and must be dismissed for lack of subject matter jurisdiction under Rule 12(B)(1)." Motion at ¶ 24. Specifically, Defendants argue that the Balance Sheet, which was filed on July 6, 2023, and discloses financial information as of May 31, 2023, "shows the value of the Claimant Trust Assets, the Claimant Trust liabilities, and the potential equity value available for Claimant Trust Beneficiaries (assuming all Claimant Trust Assets are liquidated at current valuations and liabilities are fixed)," and has "thus eliminated the 'actual controversy" between the parties. Motion at ¶¶ 25-26. But they are wrong. The dispute remains ongoing, not the least of which because of *Defendants* contentions and arguments that the Balance Sheet is not conclusive.

18. Defendants themselves argued on April 24, 2023, a month before the as-of date on the Balance Sheet, that "Mr. Dondero and Hunter Mountain and Dugaboy keep telling the Court assets exceed liabilities. Assets exceed liabilities. And you know our position on that, Your Honor. They may; they may not."[23] Defendants' telling observation contradicts their mootness argument and—importantly—reinforces Plaintiffs' claims for further disclosures. If the Balance Sheet provides all necessary information and is accurate, then it should be easy for Defendants to admit that holders of Contingent Claimant Trust Interests have vested into Claimant Trust Interests. If Defendants want to contest the logical conclusion drawn from the Balance Sheet—the only currently-available disclosure of its kind—then Defendants should be compelled to produce the financial information necessary to

[23] Apr. 24, 2023 Hrg. Trans., Bankr. Dkt. 3765, at 29:4 – 7.

support their position.[24] But Defendants refuse to do so. They instead ask this Court to rely on their ambiguous *ipsi dixits* without supporting proof.[25]

19. Additionally, despite disclosing only the Balance Sheet, Defendants have argued that Plaintiffs should not rely on it. Taken as true, the Balance Sheet confirms Plaintiffs' *in the money* status. Nonetheless, Plaintiffs are entitled to more detailed information, particularly in light of Defendants' arguments disclaiming their own Balance Sheet.

20. For example, the information contained in the Balance Sheet provides information as of May 31, 2023, but estate administration is ongoing.[26] Defendants argue as much: the Balance Sheet specifically states that the information contained in it "is based on matters as they exist as of the date of preparation and not as of any future date."[27]

21. Additionally, although the Balance Sheet assigns values to the Claimant Trust's assets and liabilities, it is unaudited and provides no detail regarding what is included in those values or how they were determined.[28] Thus, because there is no description of which assets have been sold or what value was realized as a result of those sales, there is no way to determine the current extent to which asset sales were materially mismanaged, causing Plaintiffs to be damaged. Further, there is no

[24] *In re Comu*, No. 09-38820-SGJ-7, 2014 WL 3339593, at *51 (Bankr. N.D. Tex. July 8, 2014), *aff'd, appeal dismissed sub nom*. *Comu v. King Louie Min., LLC*, 534 B.R. 689 (N.D. Tex. 2015), *aff'd sub nom*. *Matter of Comu*, 653 Fed. Appx. 815 (5th Cir. 2016) *and aff'd sub nom*. *Matter of Comu*, 653 Fed. Appx. 815 (5th Cir. 2016) (where this Court opined "Moreover, where [Debtor] remained silent about assets and material financial information, and 'chose to disclose material financial information *only* when directly asked or confronted with the truth,' his 'behavior justifies a presumption of fraud, as this is the essence of intent to deceive.' As the bankruptcy court in *In re Henley* pointed out, holding otherwise would send 'a dangerous message: that as long as a debtor eventually discloses his earlier omission, any earlier fraudulent intent is negated. In effect, this would mean that there are no consequences for a debtor's failure to make proper and timely disclosures.'" (citing *In re Henley*, 480 B.R. 708, 796 (Bankr. S.D. Tex. 2012)).

[25] For example, on May 1, 2023, "[t]he debtor's counsel asserted in oral argument that, based on all the [unspecified] record evidence, the debtor's assets would be completely depleted, likely in Class 8 — several classes higher than Dugaboy's priority class …" Matter of Highland Capital Management, L.P., No. 22-10960, 2023 WL 4861770, at *3 (5th Cir. July 31, 2023).

[26] Bankr. Dkt. 3872 at Exhibit A, p.5.

[27] *Id.* at p.6.

[28] *Id*. ("This presentation is not in accordance with US GAAP and is unaudited . . ..").

information that would allow the parties or the Court to determine the reasonableness of all of the administrative costs that have been incurred to date and will be incurred in the future.[29] While the Balance Sheet certainly demonstrates that Plaintiffs are *in the money*, additional information is needed to make sure that the benefits which will flow to Plaintiffs are maximized and not wasted.

22. With respect to assets, there is no detail regarding the "Investments," only a vague estimation that $118 million of Investments exist. The Debtor filed an addendum to its March 31, 2023 Operating Report (Bankr. Dkt. 3757 at Addendum Item 5) ("Addendum")[30] disclosing certain remaining assets, but even that is opaque. For example, the Addendum discloses "[p]ost-sale escrows" from "two private equity companies."[31] But there is no disclosure of which companies it refers to, the amounts of the escrows, the conditions precedent to the release of the escrows, or the anticipated timing.[32] Additionally, the Debtor holds "direct or indirect interest in two private funds."[33] But Debtor has not disclosed which funds. What are their respective liquidity rules? Have they been going up or down in value? The Debtor also lists "other misc.," which includes "future revenue streams and receivables" without detail.[34] With respect to cash, while the Plaintiffs can estimate the estate's cash balance, where that cash is sitting and what structural or accounting restrictions are in place on its use remain unclear. Finally, Plaintiffs do not have a current perspective on future cash flows, their amounts, and their probability of continuing.

23. With respect to liabilities, the Balance Sheet shows $15 million in "[o]ther liabilities" and a purported adjustment of $13 million *additional* "[o]ther liabilities."[35] What is the basis for these

[29] Bankr. Dkt. 3872 at Exhibit A, p.5.
[30] Bankr. Dkt. 3757 at p. 15
[31] *Id*.
[32] *See, generally,* Addendum.
[33] Bankr. Dkt. 3757 at p. 15
[34] *Id*.
[35] Bankr. Dkt. 3872 at Exhibit A, p. 5.

liabilities? Are they owed to estate-affiliated parties that may be subject to negotiation or third-party service providers such as the office lease for which there really is no basis for negotiation? What is the payment deadline on these liabilities and is there interest running? What are the off-balance sheet "springing contingent liabilities" in Note 5 to the Balance Sheet?[36]

24. Further, the Balance Sheet purports to make four "adjustments" totaling $198 million in reduction in the value of the estate. While the notes explain the two asset-related "adjustments," there is no explanation of the basis for and amount of the $90 million "[a]dditional indemnification reserves" and the aforementioned $13 million in "[o]ther liabilities."

25. Financial statements of a company typically are comprised of a balance sheet, income statement, and a cash flow statement (also, if applicable, a Statement of Changes to Shareholder Equity). These collectively give a more detailed perspective of the company's finances, including but not limited to regarding what expenses have been incurred to date and likely will need to be incurred into the future and what revenues likely will be generated. Even with a company in liquidation, it is important to understand what, if any, expenses would need to continue and what, if any, additional cash will be generated. This information is vital to any party seeking to wrap up the estate. Further disclosures are required to facilitate the important decisions necessary to resolve this estate that has been "liquidating" post-Effective Date for over two and a half years—with no end in sight.

26. Notably, Defendants have previously raised the above-stated issues to avoid reliance on the Balance Sheet—the very same document they now incredibly claim "moots" Plaintiffs' Count One. Specifically, Defendants seek to disclaim any reliance on the Balance Sheet by stating that it is merely an estimate and *should not be relied upon by anyone*: "The information contained in this summarized consolidated balance sheet (the "Summary") is based on estimates, and therefore should

[36] *Id*. at p. 6

not be relied upon, as actual results may differ materially from the estimates contained herein."[37] But this is true gamesmanship. Defendants cannot provide estimates to claim that Defendants have received everything they need and then disclaim the reliability of that very same information. This classic doublespeak is precisely the type of "litigation posturing" that the Fifth Circuit warned about in *Fontenot v. McCraw*, 777 F.3d 741, 747-48 (5th Cir. 2015), when it stated that courts must give closer attention when a defendant claims to have mooted a case through the defendant's "voluntary conduct," as opposed to "official acts of third parties."

27. Plainly, Defendants' production of the Balance Sheet does not resolve Plaintiffs' claims. The financial status of the Claimant Trust and whether/when Plaintiffs are entitled to distributions is an ongoing controversy as a result of the ongoing sale of assets and distributions. When there is an ongoing controversy, a case is not moot. *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 377 n.40 (5th Cir. 2022) ("if there is an ongoing dispute giving a plaintiff standing, the case is not moot."); *Laza v. City of Palestine*, No. 6:17-CV-00533-JDK, 2021 WL 2856685, at *7 (E.D. Tex. July 8, 2021) (case is not moot because "[t]his controversy is ongoing and live . . . and Plaintiff has a concrete interest in the matter."); *In re RE Palm Springs II, LLC*, No. 3:20-CV-3486-B, 2021 WL 3213013, at *3 (N.D. Tex. July 29, 2021) ("Thus, under § 363(m), the sale of the Property does not moot SRC's appeal because there is an ongoing issue, which was properly preserved, as to whether HPS acted in good faith."); *Friends of Lydia Ann Channel v. U.S. Army Corps of Engineers*, No. 2:15-CV-514, 2016 WL 6876652, at *6 (S.D. Tex. Nov. 22, 2016) (case is not moot because "[t]here are ongoing controversies"). In sum, Count One should not be dismissed because Defendants' provision of information at one point in time, months ago, (the reliability of which Defendants have expressly disavowed) does not moot this ongoing controversy.

[37] Bankr. Dkt. 8372 at Exhibit A at p.6 (emphasis added).

B. The Court's Order Denying Reconsideration Does Not Moot Count Three.

28. Defendants argue that Count Three, which seeks a declaration regarding that Plaintiffs' Contingent Trust Interests are at least "likely to vest into Claimant Trust Interests, making them Trust Beneficiaries," is moot because the Court purportedly already decided this issue. Motion at ¶ 27. Specifically, Defendants argue that Plaintiff HMIT's Motion to Reconsider filed with respect to the Order Denying Leave, "incorrectly argued that the Pro Forma Adjusted Balance Sheet showed that HMIT's Contingent Trust Interests were 'in the money,' and likely to vest, and that the Court subsequently found that Contingent Trust Interests are not 'in the money.'" Motion at ¶ 27. Defendants claim that this eliminated any live controversy presented by Count Three. Motion at ¶ 28. Defendants are incorrect.

29. A case becomes moot when "an intervening event renders the court unable to grant the litigant any effective relief whatever." *Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361, 368 (N.D. Tex. 2021); *see also DeOtte v. State*, 20 F.4th 1055, 1064 (5th Cir. 2021) (stating a case is moot when "any set of circumstances . . . eliminates [the] actual controversy after the commencement of a lawsuit"). However, "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Franciscan All.*, 553 F. Supp. 3d at 368.

30. As the cases cited above demonstrate, an ongoing controversy, such as the one that exists here, cannot be mooted. This Court's *dicta* that HMIT was not "*in the money*" at the time it issued its order is based on information that Defendants refuse to stand behind. It does not mean that HMIT is not "*in the money*" now nor does it mean that HMIT will never be "*in the money*." And, finally, the order on which Defendants seek to rely is currently on appeal and may be overturned.[38]

31. In sum, Plaintiffs have a concrete interest in a determination that its Contingent Trust Interests are effectively vested and this Court's previous order does not eliminate that interest. Thus,

[38] Hunter Mountain Investment Trust's Second Notice of Appeal, Bankr. Dkt. 3945.

Count Three is not moot and cannot be dismissed. Defendants' Motion should be denied because it is based on flawed legal arguments and misapprehends the nature of Plaintiffs' claims.

C. Count Three Does Not Seek an Advisory Opinion.

32. Defendants next argue that Count Three should be dismissed because it purportedly seeks an impermissible "advisory opinion," and, therefore, the Court does not have subject matter jurisdiction to rule on the claim.[39] Specifically, Defendants argue that Plaintiffs' requests for relief about whether they are or will be entitled to be paid are dependent on a number of unknown and contingent variables, rendering the request an "abstract determination" that is impermissible. Motion at ¶¶ 30-31.

33. "Although [d]eclaratory judgments cannot be used to seek an opinion advising what the law would be on a hypothetical set of facts . . ., declaratory judgment plaintiffs need not actually expose themselves to liability before bringing suit." *Frye v. Anadarko Petroleum Corp.*, 953 F.3d 285, 294 (5th Cir. 2019) (internal quotations omitted). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* (quotation omitted).

34. Here, Count Three is not dependent upon hypothetical facts. Count Three is only dependent upon a resolution of whether the "Claimant Trust assets exceed the obligations of the bankruptcy estate in an amount sufficient so that all Allowable Claims may be indefeasibly paid[.]"[40] Contrary to Defendants' argument, this does not require the Court to consider hypothetical future events like the outcome of the appeal in the Notes Litigation,[41] future Claimant Trust expenses, or the

[39] Motion at ¶ 29.

[40] Complaint at ¶ 94.

[41] *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*, et al, Case No. 21-cv-00881 (N.D. Tex.) at Dkt. 158 [App. 18-21].

nature and extent of indemnification obligations. Motion at ¶ 30. Instead, Count Three seeks a declaration that, at the time that this proceeding is decided, the Claimant Trust assets exceed the obligations of the bankruptcy estate such that Plaintiffs' Contingent Trust Interests are effectively vested. There is nothing "abstract" about this request. This is not an advisory opinion and the Court should reject Defendants' request to dismiss Count Three.

D. Count Three Is Not Barred by Collateral Estoppel.

35. Defendants next argue that Count Three should be dismissed because it is barred by the doctrine of collateral estoppel. Specifically, Defendants argue that the issue presented by Count Three, whether Plaintiffs' Contingent Interests are likely to vest, is purportedly the same issue already litigated in connection with HMIT's Motion to Reconsider. Motion at ¶ 33.

36. Collateral estoppel only applies if "(1) the issue at stake [is] ***identical*** to the one involved in the prior action; (2) the issue [was] actually litigated in the prior action; and (3) the determination of the issue in the prior action [was] ***a necessary part of the judgment*** in that earlier action." *Hacienda Records, L.P. v. Ramos*, 718 Fed. App'x 223, 228 (5th Cir. 2018) (emphases added). The Fifth Circuit has held that a previous decision is not "necessary" to the final judgment when it is "incidental, collateral, or immaterial to that judgment." *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168 (5th Cir. 1981) ("it has always been the rule that although an issue was fully litigated and a finding made on the issue in prior litigation, the prior judgment will not act as collateral estoppel as to the issue if the issue was not necessary to the rendering of the prior judgment, and hence was incidental, collateral, or immaterial to that judgment."). *See also OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, No. CV H-09-891, 2018 WL 5921228, at *6-8 (S.D. Tex. Nov. 13, 2018) (same). But the issue raised in Count Three is neither identical to the issues litigated in connection with HMIT's Motion to Reconsider nor was it a necessary part of the Court's resulting order.

37. This Court's prior decision does not address the current issue in dispute and certainly does not mean that HMIT (or somehow Dugaboy, who was not a party in those proceedings) is not "*in the money*" now, nor does it mean that HMIT (or Dugaboy) will never be *"in the money."* Accordingly, the issue at stake (as well as the parties) are not identical and collateral estoppel does not apply.

38. This Court's previous finding was not a necessary part of this Court's decision on HMIT's Motion for Leave or HMIT's Motion to Reconsider. The Court initially denied HMIT's Motion for Leave without any consideration of whether HMIT was "*in the money*." Therefore, the issue of whether HMIT was *"in the money"* cannot have been a "necessary" part of the Court's order. It also cannot be said to have been fully and fairly litigated, another prerequisite for collateral estoppel,[42] because it was only able to be raised in a post judgment motion without discovery or a hearing.[43]

39. Furthermore, the Court conceded that its dicta on whether HMIT was "*in the money*" was not necessary to its decision denying the Motion to Reconsider. Specifically, the Court found that there were no reasonable grounds to reopen the record based on the post-hearing financial disclosures because it believed that they were not materially different than the Post-Confirmation Reports filed by Debtor on April 21, 2023.[44] The Court went on to state that: "[s]o, to the extent HMIT is arguing that the 'post-hearing financial disclosure filings' are something akin to newly discovered evidence or otherwise a ground for a new hearing or altering findings, HMIT's argument lacks merit. Moreover, even if this court were to consider the 'post-hearing financial disclosure filings,' the court disagrees

[42] *In re USAA Gen. Indem. Co.*, 629 S.W.3d 878, 883 (Tex. 2021); *Diminico v. Lehman Bros.*, 84 F.3d 433, at *1 (5th Cir. 1996) (not designated for publication).

[43] *USAA*, 629 S.W.3d at 884.

[44] Order Denying Motion of HMIT Seeking Relief Pursuant to Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024 (Bankr. Dkt. 3936) at pp. 2-3.

with HMIT's central argument that they demonstrate HMIT's contingent interest is 'in the money….'"[45] In other words, per the Court's words, the finding on which Defendants seek to rely was unnecessary dicta and not a basis for the application of collateral estoppel. *Hicks*, 662 F.2d at 1168. Accordingly, collateral estoppel does not apply and Count Three should not be dismissed.

E. Count One Sufficiently States a Claim for Disclosures of Claimant Trust Assets and Request for Accounting.

1. Plaintiffs have a legal right to obtain the information that they seek in this proceeding.

40. Defendants argue that Plaintiffs have no right to any financial information as a matter of law because they allegedly hold only Contingent Trust Interests and are not beneficiaries under the CTA. Motion at ¶¶ 38-41. According to Defendants, the language of the CTA makes clear that only current beneficiaries have rights to information under the CTA. Defendants are incorrect. Plaintiffs are intended (albeit contingent) beneficiaries of the Claimant Trust.

41. The Delaware Code does not define the term "beneficiary," but Delaware courts follow the RESTATEMENT (THIRD) OF TRUSTS,[46] which defines beneficiaries to include contingent beneficiaries:

> *Persons who are beneficiaries: in general.* The "beneficiaries" of a trust are the persons or classes of persons, or the successors in interest of persons or class members, upon whom the settlor manifested an intention to confer beneficial interests (vested **or contingent**) under the trust, plus persons who hold powers of appointment (special or general) or have reversionary interests by operation of law. Also included are persons who have succeeded to interests of beneficiaries by assignment, inheritance, or otherwise.[47]

42. Delaware courts routinely hold that, when interpreting undefined statutory terms, courts must give those terms a "reasonable and sensible meaning in light of their intent and purpose." *Angstadt v. Red Clay Consol. Sch. Dist.*, 4 A.3d 382, 390 (Del. 2010). In ascertaining the "reasonable

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[45] *Id.* at p. 3.

[46] *See, e.g.*, *In re Tr. Under Will of Flint for the Benefit of Shadek*, 118 A.3d 182, 195 (Del. Ch. 2015); *Tigani v. Tigani*, No. CV 2017-0786-KSJM, 2021 WL 1197576, at *14 (Del. Ch. Mar. 30, 2021), *aff'd,* 271 A.3d 741 (Del. 2022).

[47] RESTATEMENT (THIRD) OF TRUSTS, § 48 cmt. a (2003) (emphasis added).

and sensible meaning" of terms, Delaware courts rely on dictionaries as a source of interpretation. *See id.*

43. Black's Law Dictionary defines "beneficiary" as, among other things, "[s]omeone who is designated to receive the advantages from an action or change . . . or to receive something as a result of a legal arrangement or instrument" and includes both "contingent benficiar[ies]" and "direct benficiar[ies]" within the definition without any qualification regarding their rights.[48] By contrast, Black's distinguishes an "incidental beneficiary" as a "third-party beneficiary, who, though benefiting indirectly, is not intended to benefit from a contract and thus does not acquire rights under the contract."[49] Nothing in the CTA indicates that Plaintiffs are merely "incidental beneficiaries."

44. In light of the RESTATEMENT and the definition in Black's Law Dictionary, it is reasonable and sensible to interpret the word "beneficiary" as used in Section 3327 of the Delaware statute to include contingent beneficiaries. Rules of statutory interpretation support this conclusion.

45. As the Delaware Supreme Court explained, a court "may not engraft upon a statute language which has been clearly excluded therefrom by the Legislature." *Giuiricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982) (citing *Wilmington Trust Co. v. Barry*, 338 A.2d 575, 578 (Del Super. Ct. 1975), *aff'd*, 359 A.2d 664 (Del. 1976)). If the Delaware Legislature had intended that only "vested" beneficiaries could bring an action to remove a trustee, as opposed to any beneficiary (whether residual or contingent), it would have so specified. In this case, the relevant statute—Del. Code Ann. tit. 12, § 3327—uses the term "beneficiary" without defining or limiting it. Accordingly, a court may not do what the Delaware Legislature refused to do by engrafting the term "vested" into the statute to qualify the term "beneficiary."

[48] *Black's Law Dictionary* (11th ed. 2019).

[49] *Id.*

46. Delaware courts refuse to read statutory language restrictively to exclude certain classes of beneficiaries. *See Estate of Tigani*, No. CV 7339-ML, 2016 WL 593169, at *14 (Del. Ch. Feb. 12, 2016) (holding that the "statute's use of the general term beneficiary, without any language restricting the class of beneficiary to whom it refers, fairly encompasses a vested beneficiary subject to divestiture"); *Estate of Necastro*, No. C.A. 10,538, 1991 WL 29958, at *1 (Del. Ch. Feb. 28, 1991) (rejecting a "restrictive reading" of "beneficiary" under 12 Del.C. § 2302(d) and instead holding that "Exceptants [whom the parties characterized as "contingent beneficiaries"] have standing . . . based upon their indirect interest in a share of the estate through their status as beneficiaries of a testamentary trust"). In short, neither the applicable Delaware statute nor Delaware case law limits the term "beneficiary" to vested beneficiaries, to the exclusion of contingent ones.

47. Defendants argue, incorrectly, that the language of the CTA purportedly strips Plaintiffs of standing. In particular, Defendants argue that the CTA provides that holders of Contingent Trust Interests (including Plaintiffs) "shall not have any rights under this Agreement, unless and until the Claimant Trustee files with the Bankruptcy Court a certification that all GUC Beneficiaries have been paid indefeasibly in full, including, to the extent applicable, all accrued and unpaid post-petition interest consistent with the Plan and all Disputed Claims have been resolved (the 'GUC Payment Certification')."[50] They further argue that the agreement provides that "Equity Holders will be deemed 'Beneficiaries' under this Agreement only upon the filing of a GUC Payment Certification with the Bankruptcy Court."[51] But Delaware law makes clear that a trust agreement, however worded, may not strip the trustee's duty of good faith and fair dealing and, importantly, the

[50] CTA, Bankr. Dkt. 3521-5 at § 5.1(c).

[51] *Id.*

CTA does not disclaim any such duties.[52] Here, observance of that duty precludes the argument that the language of the CTA destroys Plaintiffs' standing.

48. Under Delaware law, unless the governing trust agreement says otherwise, the trustee of a statutory trust has those duties set forth in common law, including the duties of loyalty, good faith, and due care. *See* Del. Code Ann. tit. 12, § 3809; *Rende v. Rende*, No. 2021-0734-SEM, 2023 WL 2180572, at *11 (Del. Ch. Feb. 23, 2023). And while a governing trust agreement may expressly disclaim these duties (although this one does not), Delaware law prohibits the elimination of the duty of good faith and fair dealing. *In re National Collegiate Student Loan Trusts Litigation*, 251 A.3d 116, 185-86 (Del. Ch. 2020) ("While parties may agree to waive default fiduciary duties, the DSTA forbids parties from eliminating the "implied contractual covenant of good faith and fair dealing.") (citing Del. Code. Ann. tit. 12, § 3806(c)).

49. Here, the duty of good faith and fair dealing is particularly important where Plaintiffs' status as "beneficiaries" under the Agreement is purportedly dependent upon Mr. Seery's discretion to file a GUC Certification declaring them as such. "Stated in its most general terms, the implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (internal quotations omitted).

50. As other RESTATEMENT jurisdictions have recognized, Mr. Seery's refusal to give the GUC Certification and recognize Plaintiffs vesting of Classes 10 and 11 warrants treating those classes as fully vested. "[V]esting cannot be postponed by unreasonable delay in distributing an estate and […] when there is such delay, contingent interests vest at the time distribution ***should*** have been

[52] The CTA is governed by Delaware law. *Id.* at § 11.10.

made." *Estate of Cornell v. Johnson*, 367 P.3d 173, 178 (Idaho 2016) (emphasis added) (discussed in RESTATEMENT (SECOND) OF TRUSTS § 198 (1959)); *see also Edwards v. Gillis*, 146 Cal.Rptr.3d 256, 263 (Cal. Ct. App. 4 Dist., 2012) ("when there is [unreasonable] delay contingent interests vest at the time distribution should have been made.").

51. As set forth above, the Claimant Trust had sufficient assets to pay unsecured creditors in Classes 8 and 9 in full with interest at least as early as May 2023, and in all probability as early as September 2022.[53] And the CTA requires Mr. Seery as Claimant Trustee to "make timely distributions and not unduly prolong the duration of the Claimant Trust."[54] Had Mr. Seery fulfilled that mandate, he could and should have distributed remaining funds to Classes 8 and 9 in July 2023 at the latest, filed the GUC Certification with the Court, and begun distributing remaining assets to Classes 10 and 11. In short, Plaintiffs' contingent interests *should have vested* many months ago. Therefore, the law treats Plaintiffs as Claimant Trust Beneficiaries regardless of the language of the CTA.

52. In sum, the Plan defines the "Contingent Claimant Trust Interests" to include the Claimant Trust Interests distributed to Holders of Class A, B, and C Limited Partnership Interests.[55] The CTA defines "Contingent Trust Interests" to be the contingent interests in the Claimant Trust to be distributed to the Class A, B, and C Limited Partnership Interests.[56] Finally, the CTA defines "Claimant Trust Beneficiaries to include Class A, B and C Limited Partnership Interests upon the filing of the GUC certification.[57] Class A, B and C Limited Partnership Interests are intentionally defined as contingent or secondary beneficial interests in the Plan and the CTA and are therefore not

[53] Two of the estate's major private equity positions sold in May 2022, and the remaining largest positions sold in September 2022. The May 2022 assets were Cornerstone Healthcare Group [*see* App. 05-09] and MGM [*see* App. 01-04]. The September 2022 positions were CCS Medical [*see* App. 10-14] and Trussway [*see* App. 15-17].

[54] CTA, Bankr. Dkt. 3521-5 at § 3.2(a).

[55] *See* Plan at Art. I, § B, ¶ 44.

[56] *See* CTA ¶ 1.1(m).

[57] *Id*., ¶¶ 1.1(h) and 5.1(c).

mere incidental or third-party beneficiaries.[58] Plaintiffs have standing and a right to seek the information that they request in their Complaint.

2. Plaintiffs' accounting claim is sufficient under Delaware and Texas law.

53. Defendants also argue that Count One must be dismissed to the extent it is treated as an equitable accounting claim. Motion at ¶ 43. Specifically, Defendants argue that an accounting is not a cause of action in equity but only an equitable remedy where a fiduciary may be compelled to provide an account for property subject to trust. Defendants further argue that here, the CTA governs the rights of the parties and does not provide Plaintiffs as holders of Contingent Trust Interests with any rights. Motion at ¶ 44. Defendants are wrong once again.

54. Initially, as explained immediately above, Plaintiffs have legal rights, including a right to an accounting that under Delaware law, including the Delaware Statutory Trust Act, as well as the CTA. Therefore, Count One is proper under Delaware law.

55. Alternatively, Plaintiffs are entitled to bring an accounting claim under Texas law. "Questions of substantive law are controlled by the laws of the state where the cause of action arose, but matters of remedy and procedure are governed by the laws of the state where the action is sought to be maintained." *Wells Fargo Bank Texas, N.A. v. Foulston Siefkin LLP*, 348 F. Supp. 2d 772, 783 (N.D. Tex. 2004), *vacated on other grounds,* 465 F.3d 211 (5th Cir. 2006). Defendants assert that an action for an accounting "is an equitable remedy." Motion at ¶ 43. Thus, Defendants arguments based on Delaware law are misplaced because the law of the state where the action is sought to be maintained, Texas, applies in this regard. Motion at ¶¶ 39–45.

56. Under Texas law, courts have jurisdiction over claims seeking to "determine the powers, responsibilities, duties, and liability of a trustee," including "claims for a trust accounting."

[58] *See also Memorandum Opinion and Order Pursuant to Plan "Gatekeeper Provision" and Pre-Confirmation "Gatekeeper Orders": Denying Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding*, Bankr. Dkt. 3903, at p. 2.

Berry v. Berry, 646 S.W.3d 516, 527–28 (Tex. 2022). "Any interested person" may bring such a claim. *Id.* (citation omitted). An "interested person" includes a "beneficiary" as well as any other "person who is affected by the administration of the trust." *Id.* at 528 (citation omitted). A "beneficiary" is "a person for whose benefit property is held in trust, regardless of the nature of the interest." *Id.* (citation omitted). An "interest" includes "any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible." *Id.* (citation omitted). "Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding." *Id.* (citation and internal marks omitted).

57. In this case, the Plan created the Claimant Trust, which was established for the benefit of Claimant Trust Beneficiaries. Complaint at ¶ 64. "Claimant Trust Beneficiaries" include, by definition, "Holders of Allowed Class B/C Limited Partnership Interests, and Holders of Allowed Class A Limited Partnership Interests." Complaint at ¶ 64. Plaintiffs are holders of those partnership interests. Complaint at ¶¶ 53–59. As explained above, because Plaintiffs are beneficiaries of the Claimant Trust, they may bring claims under Texas law against the Claimant Trust for a trust accounting.

58. Defendants argue that Plaintiffs cannot sue for an accounting because their interests are contingent. Motion at ¶ 38. But under Texas law, the holder of "any interest, whether legal or equitable or both, present or future, vested *or contingent*, defeasible or indefeasible," as "may vary from time to time," may bring a claim for an accounting against the trustee. *Hill v. Hunt*, No. CIV.A. 3:07-CV-2020-, 2009 WL 5178021, at *2 (N.D. Tex. Dec. 30, 2009) (citing Tex. Prop. Code § 111.004(6)).

59. Further, because Plaintiffs can request an accounting under Texas law, Defendants' objection to Plaintiffs' claims for declaratory relief necessarily fails because, contrary to Defendant's

failed assertion, Plaintiffs have stated an underlying cause of action for the declaratory relief (an accounting). Motion at ¶¶ 46–47.

3. Defendants have not adequately demonstrated that either Plaintiff has unclean hands.

60. Defendants argue without authority that HMIT should be denied relief as a result of its "unclean hands." Motion at ¶ 45. Defendants' only support for this claim is a one-sentence reference to a currently pending lawsuit against HMIT, among others, for breach of a promissory note.[59] Not only was this lawsuit brought by a different party than those involved in this litigation, but Defendants fail to provide any evidence of any wrongdoing by HMIT (let alone Dugaboy) other than bald conclusory allegations in a complaint, let alone evidence of wrongdoing related to the allegations in this dispute.

F. Counts Two and Three Sufficiently State a Claim for Declaratory Judgment.

61. Defendants argue that Counts Two and Three, which seek declaratory relief, also fail to state a claim under Fed. R. Civ. P. § 12(b)(6) because they are based on Count One, and Count One is not a cognizable claim. Motion at ¶ 47. For the reasons discussed above, Count One does state a valid claim and therefore Counts Two and Three should not be dismissed.

62. Defendants also argue, without authority, that the value of the assets and liabilities of the Clamant Trust at any given point in time is irrelevant to whether Plaintiffs' Contingent Trust Interests are likely to vest because the Contingent Trust Interests cannot vest until several conditions are satisfied, including the liquidation of assets and expenses being paid. Motion at ¶ 48. Specifically, Defendants argue that "until these and other critical variables are known, the financial information Plaintiffs seek in their Complaint is meaningless for purposes of determining 'vesting'"[60] and therefore there is no controversy underlying these claims. Even if Defendants were correct, and they

[59] Motion at ¶ 45.

[60] *Id*. at ¶ 48.

are not, and these other variables must be determined first, the financial information sought by Defendants is exactly the information that will be necessary under the CTA to determine these variables and to determine when and how much Plaintiffs will be paid once these events occur. Defendants, of course, do not dispute this. In other words, it is nonsensical to claim that the requested information is "meaningless" just because the amounts payable to Plaintiffs may change in the future. The exact amounts do not need to be established at this time. The Court should decline Defendants' request to dismiss Counts Two and Three.

IV. CONCLUSION

63. Wherefore, Plaintiffs respectfully request that the Court deny the Motion in its entirety and grant any further relief as the Court deems proper and just.

Respectfully submitted,

STINSON LLP

/s/Deborah Deitsch-Perez

Deborah Deitsch-Perez
Texas Bar No. 24036072
Michael P. Aigen
Texas Bar No. 24012196
2200 Ross Avenue, Suite 2900
Dallas, Texas 75201
Telephone: (214) 560-2201
Facsimile: (214) 560-2203
Email: deborah.deitschperez@stinson.com
Email: michael.aigen@stinson.com
Counsel for The Dugaboy Investment Trust and the Hunter Mountain Investment Trust

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 29, 2023 a true and correct copy of this document was served electronically via the Court's CM/ECF system to the parties registered or otherwise entitled to receive electronic notices in this case.

/s/Deborah Deitsch-Perez
Deborah Deitsch-Perez