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

<p>In re:</p> <p>HIGHLAND CAPITAL MANAGEMENT, L.P.,</p> <p style="text-align: center;">Reorganized Debtor.</p>	<p>Chapter 11</p> <p>Case No. 19-34054-sgj11</p>
<p>DUGABOY INVESTMENT TRUST and HUNTER MOUNTAIN INVESTMENT TRUST,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>HIGHLAND CAPITAL MANAGEMENT, L.P. and HIGHLAND CLAIMANT TRUST,</p> <p style="text-align: center;">Defendants.</p>	<p>Adv. Pro. No. 23-03038-sgj</p>

**THE HIGHLAND PARTIES' REPLY IN FURTHER SUPPORT OF  
MOTION TO DISMISS COMPLAINT**



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The Highland Parties, the defendants in the above-captioned adversary proceeding, reply to Plaintiffs' *Response* [Docket No. 17] (the "**Response**") and respectfully submit the following in further support of their Motion seeking to dismiss the Action.<sup>1</sup>

### I. PRELIMINARY STATEMENT

1. The Claimant Trust is a Delaware statutory trust that was created by the Plan and is governed by the Delaware Statutory Trust Act. Under the Trust Act, whether a party is a beneficiary (here, a Claimant Trust Beneficiary) is determined by the plain language of the governing instrument (here, the CTA). Under the CTA, Plaintiffs (a) hold only contingent, unvested interests in the Claimant Trust, (b) are not Claimant Trust Beneficiaries, and (c) will not become Claimant Trust Beneficiaries unless they vest—and Plaintiffs will not vest unless and until all senior claims, including indemnification claims, are indefeasibly paid in full, all contingent claims in Class 8 and 9 are resolved, and the Claimant Trustee has certified as much to this Court, *none* of which has occurred.

2. To avoid the applicable language in the Plan and CTA, Plaintiffs argue—for the first time—that beneficiary status is determined by Delaware common law, not the CTA or the Trust Act. Plaintiffs are wrong. The Act explicitly defines the “beneficial owners” of a Delaware Statutory Trust by reference to the “governing instrument of the statutory trust.” In other words, *the CTA determines when and if Plaintiffs are Claimant Trust Beneficiaries*. Under the CTA, Plaintiffs are not Claimant Trust Beneficiaries and have no rights as beneficiaries.

3. In addition to their new legal theory, Plaintiffs continue to assert that this Court should deem them Claimant Trust Beneficiaries because they are “in the money” and are “likely to vest.” But this Court has already determined that is not how the CTA or Plan works. Under the

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<sup>1</sup> Capitalized terms used but not defined herein shall take on the meaning ascribed thereto in the Motion and the *Memorandum of Law* [Docket No. 14] (the “**MOL**”) filed in support of the Motion. Further references to the Motion include the MOL.

Plan and CTA, whether Plaintiffs are “in the money” based on estimated assets and liabilities at a particular moment in time has no bearing on whether they have “vested” or are “likely to vest.”

4. Moreover, this Court has already ruled that it lacks “the power to equitably deem HMIT’s Contingent Trust Interest to be vested....” Ultimately, under the Plan, the CTA, and applicable law, Plaintiffs are not Claimant Trust Beneficiaries—and will not become Claimant Trust Beneficiaries unless and until they have actually vested. The Motion should be dismissed under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

## II. REPLY

### A. Plaintiffs Are Not Beneficiaries of the Claimant Trust Under Delaware Law

5. In the Response, Plaintiffs assert a new, but flawed, legal argument as to why they should be considered beneficiaries of the Claimant Trust. Plaintiffs’ argument, however, ignores the statutory law governing the Claimant Trust and the clear language of the Plan and CTA.

6. Plaintiffs argue that Delaware trust law does not define “beneficiary” and that this Court must ignore the CTA and apply the definition of “beneficiary” in the Restatement (Third) of Trusts (the “**Restatement**”). The Claimant Trust, however, is a Delaware statutory trust governed by the Delaware Statutory Trust Act (the “**Trust Act**,” Chapter 38 of Title 12 of the Delaware Code).<sup>2</sup> Contrary to Plaintiffs’ assertions, the Trust Act defines “beneficial owner” and uses that term exclusively to refer to the beneficial owners (*i.e.*, the beneficiaries of a Delaware statutory trust). Under the Trust Act, a trust’s “beneficial owners” are “any owner[s] of a beneficial interest in a statutory trust, the fact of ownership to be determined and evidenced ... in conformity to the applicable provisions of the governing instrument of the statutory trust.”<sup>3</sup> In other words, a statutory trust’s “beneficial owners” are the parties defined as such in the trust’s governing

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<sup>2</sup> See, e.g., CTA §§ 2.1(a); 11.10.

<sup>3</sup> 12 Del. C. § 3801(a).

instrument.<sup>4</sup> And, because the Trust Act expressly defines “beneficial owners,” the Trust Act expressly precludes the application of any other definition of beneficiary, including that set forth in the Restatement. *See* 12 Del. C. § 3809 (“**Except to the extent otherwise provided in the governing instrument of a statutory trust or in this subchapter**, the laws of this State pertaining to trusts are hereby made applicable to statutory trusts”) (emphasis added).

7. Accordingly, the determination of whether Plaintiffs are “beneficiaries” of the Claimant Trust begins and ends with the CTA, which defines “Claimant Trust Beneficiaries” as:

the Holders of Allowed General Unsecured Claims, Holders of Allowed Subordinated Claims, and, only upon certification by the Claimant Trustee that the Holders of such Claims have been paid indefeasibly in full plus, to the extent applicable, post-petition interest at the federal judgment rate in accordance with the terms and conditions set forth herein, Holders of Allowed Class B/C Limited Partnership Interests, and Holders of Allowed Class A Limited Partnership Interests.<sup>5</sup>

Plaintiffs, who hold Class 10 and 11 interests, are not “Claimant Trust Beneficiaries” and “shall not have any rights under” the CTA and will not “be deemed ‘Beneficiaries’” “unless and until” they vest in accordance with the Plan and CTA.<sup>6</sup> The CTA and Plan are clear and unambiguous. Plaintiffs’ attempts to avoid the CTA, the Plan, and applicable law are unavailing.<sup>7</sup>

8. But even if the Restatement’s definition of “beneficiary” applied (it does not), Plaintiffs’ argument would still fail. In *Paul Capital Advisors, LLC*,<sup>8</sup> the Delaware Chancery Court looked to the Restatement to determine whether a party was a “beneficiary” of a Delaware common

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<sup>4</sup> *See In re Nat’l Collegiate Student Loan Trs. Litig.*, 251 A.3d 116, 190 (2020) (relying on the definition of “beneficial owner” under the Trust Act to determine which holders of interests in a statutory trust were owed fiduciary duties under Delaware laws pertaining to all trusts).

<sup>5</sup> CTA, § 1.1(h); Plan, Art. I.B.27.

<sup>6</sup> *See, e.g.*, Plan, Art. I.B.44; CTA, §§ 1.1(h), 5.1(c).

<sup>7</sup> Plaintiffs’ citation to *Estate of Tigani* and *Estate of Necastro*, which stand for the proposition that “statutory language” shouldn’t be interpreted restrictively, is equally unavailing. *See* Response ¶ 46. Whether Plaintiffs are beneficiaries of the Claimant Trust is determined by the Plan and CTA, not a Delaware statute that must be “interpreted.”

<sup>8</sup> *Paul Cap. Advisors, L.L.C. v. Stahl*, 2022 Del. Ch. LEXIS 195 (Del. Ch. Aug. 17, 2022), as corrected (Aug. 25, 2022).

law (*not* statutory) trust. Applying the Restatement’s definition,<sup>9</sup> the Chancery Court found that a trust’s “beneficiaries” are the persons defined as “beneficiaries” in the trust’s governing document:

According to the Defendants, [the fact that the trust agreements specify who the beneficiary is] ends the inquiry—the Plaintiffs are not beneficiaries. I agree. If the language of a trust’s governing document “is unambiguous, the Court looks no further and does not consider extrinsic evidence of intent.” The Court cannot “look to extrinsic evidence to read ambiguity into an unambiguous contract.” This is particularly true where, as here, the Trust Agreements at issue are fully integrated. The Trust Agreements identify only one beneficiary: MHT. “If the drafters of the Trust Agreement[s] ... had intended the [Trust Advisor] to administer the [Exchange] Trusts in the interests of another deal party, the Trust Agreements would have said so.” They do not. It is thus manifest from the language of the Trust Agreements that the settlor, MHT, intended itself to be the only beneficiary.<sup>10</sup>

The Chancery Court, finding that the movant was not a “beneficiary” under the governing instrument, dismissed the action for lack of standing.<sup>11</sup>

9. Likewise, Plaintiffs are not beneficiaries of the Claimant Trust under the clear and unambiguous language of the Plan and CTA. Highland, as settlor, did not “manifest its intention” to include Plaintiffs as beneficiaries. In fact, the Plan and the CTA *expressly exclude* Dugaboy and HMIT from the definition of Claimant Trust Beneficiaries. Plaintiffs are not beneficiaries of the Claimant Trust and lack standing under the CTA and Delaware law<sup>12</sup> to “compel” an accounting.

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<sup>9</sup> Restatement (Third) of Trusts § 48 (“[A] person is a beneficiary of a trust if the settlor manifests an intention to give the person a beneficial interest; a person who merely benefits incidentally from the performance of the trust is not a beneficiary.”)

<sup>10</sup> *Stahl*, 2022 Del. Ch. LEXIS 195 at \*27–\*28.

<sup>11</sup> Plaintiffs’ citation to an Idaho case based on an earlier version of the Restatement or a California case considering a California trust are irrelevant; the issues before the Court concern a Delaware statutory trust governed by Delaware law. CTA §§ 2.1(a); 11.10. Similarly, Plaintiffs’ reliance on Texas law regarding equitable remedies—citing *Wells Fargo Bank Tex., N.A. v. Foulston Siefkin LLP*, 348 F. Supp. 2d 772, 783 (N.D. Tex. 2004), a Texas case about a Texas testamentary trust—is utterly out of place. Plaintiffs’ argument that Texas law could somehow give Plaintiffs more standing than they have as non-beneficiaries under Delaware law, the Plan, and the CTA is misguided. Delaware law applies, and Plaintiffs cite no authority for why Texas law could or should govern. In any event, Plaintiffs’ arguments under Texas law are contingent on their being beneficiaries. Response pg. 21-22 (“[B]ecause Plaintiffs are beneficiaries of the Claimant Trust, they may bring claims under Texas law against the Claimant Trust for a trust accounting”). Plaintiffs are not Claimant Trust Beneficiaries, and their argument fails.

<sup>12</sup> Plaintiffs state that “as explained immediately above, Plaintiffs have legal rights, including a right to an accounting that [*sic*] under Delaware law, including the Delaware Statutory Trust Act, as well as the CTA.” Response, ¶ 54. Plaintiffs’ conclusory statement is unsupported and unsupportable. Plaintiffs have not “explained” why they have rights; they simply assert they have rights as beneficiaries because they want to be beneficiaries. That is not how the law works.

**B. All Counts Should Be Dismissed for Failure to State a Claim**

10. The gravamen of all three Counts in the Complaint is that the Claimant Trustee must provide Plaintiffs with information sufficient to show that Plaintiffs are “in the money” and then deem them vested Claimant Trust Beneficiaries under the CTA.<sup>13</sup> In asserting their Counts, Plaintiffs admit, as they must, that the CTA—not Delaware common law—governs Plaintiffs’ status as “beneficiaries” of the Claimant Trust. But as this Court has already found, Plaintiffs are not “in the money” and are not, and will not be, Claimant Trust Beneficiaries with rights under the CTA, unless and until they vest in accordance with the terms of the CTA.

11. Counts One and Three Are Moot: This Court previously found that, based on the disclosures in the Pro Forma Adjusted Balance Sheet, HMIT is “not in the money” and not a Claimant Trust Beneficiary. Yet Plaintiffs—despite their admissions in the Motion to Reconsider that the Pro Forma Adjusted Balance Sheet was sufficient to show Plaintiffs were “in the money”—continue to demand information to determine “whether their Contingent Claimant Trust Interests may vest into Claimant Trust Interests” under the CTA. Compl. ¶ 83. The Pro Forma Adjusted Balance Sheet provided that information<sup>14</sup> and showed that Plaintiffs were not “in the money.”<sup>15</sup>

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<sup>13</sup> In fact, Plaintiffs’ motives are highly suspect since they seek “information” to review *all* of the Claimant Trust’s post-effective date transactions, not just to determine whether they are “in the money.” Compl. ¶88 (“Defendants should be compelled to provide information regarding the Claimant Trust assets, including the amount of cash and the remaining non-cash assets, *and details of all transactions that have occurred* since the wall of silence was erected, and all liabilities.”) (emphasis added). This betrays an improper intent to second-guess—and potentially challenge—Highland’s business judgment.

<sup>14</sup> Indeed, Plaintiffs have already received more “information” than actual Claimant Trust Beneficiaries have a right to under the CTA (CTA, §§ 3.12(b); 5.10(a)), and HMIT relied on that information to argue (incorrectly) that it is “in the money.”

<sup>15</sup> Plaintiffs contend that Count One is not moot because they still need additional “detail” and “backup” of the Pro Forma Adjusted Balance Sheet’s numbers. *See* Response ¶¶ 17-27. In so arguing, Plaintiffs stubbornly cling to a false premise—that simply claiming to be “in the money” is relevant to being a Claimant Trust Beneficiary. It is not. Under the CTA, Plaintiffs will not be Claimant Trust Beneficiaries unless and until they vest, which requires, *inter alia*, the indefeasible payment of all senior claims, including indemnification claims.

12. Count Three Seeks an Advisory Opinion: Plaintiffs assert they should be deemed vested Claimant Trust Beneficiaries under the CTA. Plaintiffs allege that vesting is determined by “whether the ‘Claimant Trust assets exceed the obligation of the bankruptcy estate in an amount sufficient so that all Allowable Claims may be indefeasibly paid,’” and therefore is “not dependent upon hypothetical facts.” Plaintiffs are (willfully) misconstruing the terms of the CTA. Whether current Claimant Trust Beneficiaries “may be indefeasibly paid” and contingent claims “likely to vest”<sup>16</sup> is irrelevant. As this Court has found, under the CTA, among other things, Claimant Trust Beneficiaries *must be actually paid in full* before contingent interests will vest, and whether they will be (and whether Plaintiffs will vest) is contingent upon unknown and unknowable facts.

13. Count Three Is Barred by Collateral Estoppel: This Court previously found that Plaintiffs are not “in the money” and cannot be deemed vested under the CTA. *See* Order Denying Leave at \*34-35; Order Denying Reconsideration at 3-4. Plaintiffs maintain that Count Three is not barred by collateral estoppel because the prior decision did not address whether Plaintiffs are “‘*in the money*’ now” or whether they will “never be ‘*in the money*.’” Response ¶ 37. But the issues of whether Plaintiffs’ contingent interests are “likely to vest” or whether Plaintiffs are “in the money now” are one and the same with the Court’s prior determination that HMIT is not “in the money” because the conditions to vesting in the CTA *have not occurred and remain unknown*. Further, whether HMIT was “in the money” was a “necessary” part of the Court’s prior order. This Court found “HMIT’s status as a ‘beneficiary’ of the Claimant Trust is defined by the CTA itself, pure and simple” and expressly rejected HMIT’s argument that “its Contingent Claimant Trust Interest makes it a contingent beneficiary of the Claimant Trust, which makes it a present

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<sup>16</sup> Compl. ¶ 94.

‘beneficial owner’ under Delaware trust law.” Order Denying Leave at \*34-35.<sup>17</sup> In the Order Denying Reconsideration, the Court reiterated its finding that HMIT is not “in the money” and that its contingent interests have not vested under the Plan and CTA.<sup>18</sup>

**C. Counts Two and Three for Declaratory Relief Fail as a Matter of Law**

14. Counts Two and Three, which seek declaratory relief, fail to state plausible claims under Rule 12(b)(6) because there is no underlying controversy. These Counts, seeking declarations (a) regarding the Claimant Trust’s assets and liabilities and (b) whether Plaintiffs’ interests are likely to vest, are premised entirely on Count One. *See* Compl. ¶ 90 (“***Once Defendants are compelled to provide information about the Claimant Trust Assets***, Plaintiffs seek a determination from the Court of the relative value of the Claimant Trust Assets compared to the bankruptcy estate obligations...” (emphasis added)). As discussed, Count One fails as a matter of law because Plaintiffs are not Claimant Trust Beneficiaries and have no right to information—let alone to “compel” the disclosure of information—under the CTA. The relief sought in Count One is also moot. Plaintiffs claim to seek additional financial information for the purpose of knowing whether they are, or will foreseeably be, Claimant Trust Beneficiaries. But this Court has already found that, based on the Pro Forma Adjusted Balance Sheet, they are not. For all the reasons discussed in the Motion and further herein, any additional financial information will not change this result. Because Count One does not present a justiciable controversy

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<sup>17</sup> The Court explained that (i) “HMIT’s status as a ‘beneficiary’ of the Claimant Trust is defined by the CTA itself, pure and simple”; (ii) under the CTA “‘Contingent Trust Interests’ ‘shall not have any rights under this Agreement’ and will not ‘be deemed ‘Beneficiaries’ under this Agreement,’ ‘unless and until’ they vest in accordance with the Plan and the CTA”, and (iii) “[i]t is undisputed that HMIT’s Contingent Trust Interest has not vested under the terms of the Plan and the CTA, and the court does not have the power to equitably deem HMIT’s Contingent Trust Interest to be vested....” *Id.* at \*34-35.

<sup>18</sup> As noted in the Motion, Dugaboy’s interests are aligned with HMIT’s interests regarding whether Contingent Trust Interests have vested, and therefore, privity exists for purposes of collateral estoppel. *See* Motion ¶ 34 n. 17.

underlying Plaintiffs' claims for declaratory relief in Counts Two and Three, all three Counts should be dismissed.

### **III. CONCLUSION**

The Highland Parties respectfully request that the Court grant the Motion, dismiss the Complaint in its entirety, and grant any additional relief the Court deems appropriate.

Dated: January 19, 2024

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