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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 (sgj)
Reorganized Debtor.	

APPENDIX IN SUPPORT OF MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL

Hunter Mountain Investment Trust ("HMIT") files this Appendix in Support of its Motion for Leave to File an Interlocutory Appeal.

Exhibit	Case No./Dkt. No.	Description	Appendix Page(s)
1	19-34054-sgj-11 Dkt. 3699	Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adverary [sic] Proceeding, dated March 28, 2023	001-039
2	23-03038-sgj Dkt. 1	Complaint to (I) Compel Disclosures about the Assets of the Highland Claimant Trust and (II) Determine (A) Relativity Value of those Assets, and (B) Nature of Plaintiffs' Interests in the Claimant Trust, dated May 10, 2023	040-068

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3	19-34054-sgj-11 Dkt. 3903	Memorandum Opinion and Order Pursuant to Plan "Gatekeeper Provision" and Pre-Confirmation "Gatekeeper Orders": Denying Hunter Mountain Investment Trusts' Emergency Motion for Leave to File Verified Adversary Proceeding, dated August 25, 2023	069-174
4	23-03038-sgj Dkt. 14	Memorandum of Law in Support of Highland Capital Management, L.P. and The Highland Claimant Trust's Motion to Dismiss Complaint, dated November 22, 2023	175-205
5	23-03038-sgj Dkt. 17	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) Relativity Value of those Assets, and (B) Nature of Plaintiffs' Interests in the Claimant Trust, dated December 29, 2023	206-236
6	19-34054-sgj-11 Dkt. 4000	Motion for Leave to File a Delaware Complaint, dated January 1, 2024	237-375
7	19-34054-sgj-11 Dkt. 4013	Highland's Motion to Stay Contested Matter [Dk No. 4000] or for Alternative Relief, dated January 16, 2024	376-384
8	19-34054-sgj-11 Dkt. 4019	James P. Seery, Jr.'s Joinder to Highland Capital Management L.P.'s Motion to Stay Contested Matter [Dk No. 4000] or for Alternative Relief and Emergency Motion to Expedite Hearing on Motion for Stay, dated January 22, 2024	385-387
9	23-03038-sgj Dkt. 26	Memorandum Opinion and Order Granting Motion to Dismiss Adversary Proceeding in which Contingent Interest Holders in Chapter 11 Plan Trust Seek a Post-Confirmation Valuation of Trust Assets, dated May 24, 2024	388-424
10	19-34054-sgj-11 Dkt. 4087	Hunter Mountain Investment Trust's Supplement to Response to Motion to Stay, dated June 11, 2024	425-454
11	19-34054-sgj-11 Dkt. 4091	Transcript of June 12, 2024 Status Conference on Motion to Stay Contested Matter	455-503
12	19-34054-sgj-11 Dkt. 4104	Order Extending Stay of Contested Matter [Docket No. 4000], dated June 24, 2024	504-510

Dated: July 8, 2024

Respectfully submitted,
STINSON LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 8, 2024, 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
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EXHIBIT 1

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

In re:	§	
	§	
HIGHLAND CAPITAL	§	**Chapter 11**
MANAGEMENT, L.P.	§	
	§	**Case No. 19-34054-sgj11**
Debtor.	§	

HUNTER MOUNTAIN INVESTMENT TRUST'S EMERGENCY MOTION FOR LEAVE TO FILE VERIFIED ADVERARY PROCEEDING

Hunter Mountain Investment Trust ("HMIT"), Movant, files this Emergency Motion for Leave to File Verified Adversary Proceeding ("Motion"), both in its individual capacity and as a derivative action on behalf of the Reorganized Debtor, Highland Capital Management, L.P. ("HCM" or "Reorganized Debtor") and the Highland Claimant Trust against Muck Holdings, LLC ("Muck"), Jessup Holdings, LLC ("Jessup"), Farallon

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IN THE UNITED STATES BANKRUPTCY COURT
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In re:	§	
	§	
HIGHLAND CAPITAL	§	**Chapter 11**
MANAGEMENT, L.P.	§	
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Capital Management, LLC ("Farallon"), Stonehill Capital Management, LLC ("Stonehill"), James P. Seery, Jr. ("Seery") and John Doe Defendant Nos. 1-10 (Muck, Jessup, Stonehill, Farallon, Seery and the John Doe Defendant Nos. 11-10 are collectively "Respondents" or "Proposed Defendants").

I. Good Cause for Expedited Relief

1. HMIT seeks leave to file an Adversary Proceeding pursuant to the Court's "gatekeeping" orders, as well as the injunction and exculpation provisions in the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (Doc. 1943), as modified (the "Plan").[1] A copy of HMIT's proposed Verified Adversary Proceeding ("Adversary Proceeding") is attached as Exhibit 1 to this Motion. This Motion is separately supported by objective evidence derived from historical filings in the bankruptcy proceedings,[2] as well as the declarations of James Dondero, dated May 2022 (Ex. 2), James Dondero, dated February 2023 (Ex. 3), and Sawnie A. McEntire with attached evidence (Ex. 4). [3]

[1] The exculpation provisions were recently modified by a decision of the Fifth Circuit. Such provisions apply to James P. Seery, Jr. only and are limited to his capacity as an Independent Director. *Matter of Highland Cap. Mgmt., L.P.*, 48 F.4th 419, 438 (5th Cir. 2022).

[2] Unless otherwise referenced, all references to evidence involving documents filed in the Debtor's bankruptcy proceedings (Case No. 19-34054-sgj11 (Bankr. N.D. Tex.)) are cited by "Doc." reference. HMIT asks the Court to take judicial notice of the documents identified by such entries.

[3] The supporting declarations will be cited as Dondero 2022 Dec. (Ex. 2), Dondero 2023 Dec. (Ex. 3), and McEntire Dec. (Ex. 4).

2. The expedited nature of this Motion is permitted under Fed. R. Bank P. 9006 (c)(1), which authorizes a shortened time for a response and hearing for good cause. For the reasons set forth herein, HMIT has shown good cause and requests that the Court schedule a hearing on this Motion on three (3) days' notice, and that any responses be filed no later than twenty-four hours before the scheduled hearing.[4]

3. HMIT brings this Motion on behalf of itself and derivatively on behalf of the Reorganized Debtor and the Highland Claimant Trust ("Claimant Trust"), as defined in the Claimant Trust Agreement (Doc. 3521-5) ("CTA").[5] Upon the Plan's Effective Date, Highland Capital Management, LP, as the original Debtor ("Original Debtor"), transferred its assets, including its causes of action, to the Claimant Trust, including the causes of action set forth in the attached Adversary Proceeding. The attached Adversary Proceeding alleges claims which are substantially more than "colorable" based upon plausible allegations that the Proposed Defendants, acting in concert, perpetrated a fraud,[6] including a fraud upon innocent stakeholders, as well as breaches of fiduciary

[4] Expedited action on this Motion is also warranted to hasten Movants' opportunity to file suit, pursue prompt relevant discovery, and reduce the threat of loss of potentially key evidence. Upon information and belief, Seery has been deleting text messages on his personal iPhone via a rolling, automatic deletion setting.

[5] Solely in the alternative, and in the unlikely event HMIT's proposed causes of actions against Seery, Stonehill, Farallon, Muck, and/or Jessup are considered to be "Estate Claims" as those terms are used and defined within the CTA and Exhibit A to the Notice of Final Term Sheet [Docket No. 354] in HCM's bankruptcy (and without admitting the same), HMIT alternatively seeks standing to bring this action as a derivative action on behalf of the Litigation Sub-Trust as appropriate.

[6] Neither this Motion nor the proposed Adversary Complaint seeks to challenge the Court's Orders or the Plan. In addition, neither this Motion nor the proposed Adversary Complaint seeks to redistribute the assets of the Claimant Trust in a manner that would adversely impact innocent creditors. Rather, the

duties and knowing participation in (or aiding and abetting) breaches of fiduciary duty. The Adversary Proceeding also alleges that the Proposed Defendants did so collectively by falsely representing the value of the Debtor's Estate, failing to timely disclose accurate values of the Debtor's Estate, and trading on material non-public information regarding such values. HMIT also alleges that the Proposed Defendants colluded to manipulate the Debtor's Estate—providing Seery the opportunity to plant close business allies into positions of control to approve Seery's compensation demands following the Effective Date.

4. Emergency relief is needed because of a fast-approaching date (April 16, 2023) that one or more of the Proposed Defendants *may* argue, depending upon choice of law, constitutes the expiration of the statute of limitations concerning some of the common law claims available to the Claimant Trust, as well as to HMIT.[7] Although HMIT offered to enter tolling agreements from each of the Proposed Defendants, they either rejected HMIT's requests or have not confirmed their willingness to do so, thereby necessitating the expedited nature of this Motion.[8] Because this Motion is subject to the

proposed Adversary Proceeding seeks to benefit all innocent stakeholders while working within the terms and provisions of the Plan, as well as the Claimant Trust Agreement.

[7] The first insider trade at issue involved the sale and transfer of Claim 23 in the amount of $23 million held by ACMLD Claim, LLC to Muck on April 16, 2021 (Doc. 2215).

[8] HMIT has been diligent in its efforts to investigate the claims described in this Motion, including the filing of a Tex. R. Civ. P. Rule 202 proceeding in January 2023, which was not adjudicated until recently in March 2023. Those proceeding were conducted in the 191st Judicial District Court in Dallas County, Texas, under Cause DC-23-01004. *See* McEntire Dec. Ex. 4 and the attached Ex. 4-A. Farallon and Stonehill defended those proceedings by aggressively arguing, in significant part, that the discovery issues were better undertaken in this Court.[8] The Rule 202 Petition was recently dismissed (**necessarily without prejudice**)

Court's "gatekeeping" orders and the injunction provisions of the Plan, emergency leave is required.

5. This Motion will come as no surprise to the Proposed Defendants. Farallon and Stonehill were involved in recent pre-suit discovery proceedings under Rule 202 of the Texas Rules of Civil Procedure relating to the same insider trading allegations described in this Motion. Muck and Jessup, special purpose entities created and ostensibly controlled by Farallon and Stonehill, respectively, also were provided notice of these Rule 202 Proceedings in February 2023.[9] Like this Motion, the Rule 202 Proceedings focused on Muck, Jessup, Farallon, and Stonehill and their wrongful purchase of large, allowed claims in the Original Debtor's bankruptcy based upon material non-public information. Seery is also aware of these insider trading allegations because of a prior written demand.

6. In light of the Proposed Defendants' apparent refusal to enter tolling agreements, or their failure to fully affirm their willingness to do so, HMIT is forced to seek emergency relief from this Court to proceed timely with the proposed Adversary Proceeding before the expiration of any *arguable* limitations period.[10]

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on March 8, 2023, ostensibly based on such arguments. However, it is telling that Stonehill and Farallon admitted during the Rule 202 Proceedings to their "affiliation" with Muck and Jessup and that they bought the Claims through these entities.

[9] *See* Dec. of Sawnie McEntire, Ex. 4.

[10] HMIT respectfully requests that this Motion be addressed and decided on an expedited basis that provides HMIT sufficient time to bring the proposed action timely. In the event the Court denies the requested relief, HMIT respectfully requests prompt notice of the Court's ruling to allow HMIT sufficient

II. Summary of Claims

7. HMIT requests leave to commence the proposed Adversary Proceeding, attached as Exhibit 1, seeking redress for breaches of duty owed to HMIT, breaches of duties owed to the Original Debtor's Estate, aiding and abetting breaches of those fiduciary duties, conspiracy, unjust enrichment, and fraud. HMIT also alleges several viable remedies, including (i) imposition of a constructive trust; (ii) equitable disallowance of any unpaid balance on the claims at issue;[11] (iii) disgorgement of ill-gotten profits (received by Farallon, Stonehill, Muck and Jessup) to be restituted to the Claimant Trust; (iv) disgorgement of ill-gotten compensation (received by Seery) to be restituted to the Claimant Trust; (v) declaratory judgment relief; (vi) actual damages; and (vii) punitive damages.

III. Standing

8. **HMIT.** Prior to the Plan's Effective Date, HMIT was the largest equity holder in the Original Debtor and held a 99.5% limited partnership interest. HMIT currently holds a Class 10 Claim as a contingent Claimant Trust Interest under the CTA

time to seek, if necessary, appropriate relief in the United States District Court. In order to have a fair opportunity to seek such relief on a timely basis and protect HMIT's rights and the rights of the Reorganized Debtor, HMIT will need to seek such relief on or before Wednesday, April 5, 2023, if this Motion has not been resolved.

[11] In the alternative only, subordination of Muck's and Jessup's General Unsecured Claim Trust Interests and Subordinated Claim Trust Interests to all other interests in the Claimant Trust, including HMIT's Contingent Trust Interest, is necessary and appropriate to remedy Muck's and Jessup's wrongful conduct, and is also consistent with the purposes of the Bankruptcy Code.

(Doc. 3521-5). Upon information and belief, all conditions precedent to HMIT's certification as a vested Claimant Trust Beneficiary would be readily satisfied but for the Defendants' wrongful actions and conduct described in this Motion and the attached Adversary Proceeding.

9. **Reorganized Debtor.** Although HMIT has standing as a former Class B/C Equity Holder, Class 10 claimant, and now contingent Claimant Trust Interest under the CTA,[12] this Motion separately seeks authorization to prosecute the Adversary Proceeding derivatively on behalf of the Reorganized Debtor and Claimant Trust. All conditions precedent to bringing a derivative action are satisfied.

10. Fed. R. Civ. P. 23.1 provides the procedural steps for "derivative actions," and applies to this proceeding pursuant to Fed. R. Bank. P. 7023.1. Applying Rule 7023.1, the Proposed Defendants' wrongful conduct occurred, and the improper trades consummated, in the spring and early summer of 2021, before the Effective Date in August 2021. During this period, HMIT was the 99.5% Class B/C limited partner in the original Debtor. As such, HMIT has individual standing to bring this action because Seery owed fiduciary duties directly to HMIT at that time, and the other Proposed Defendants aided and abetted breaches of those duties at that time.

[12] The last transaction at issue involved Claim 190, the Notice for which was filed on August 9, 2021. (Doc. 2698).

11. The derivative nature of this proceeding is also appropriate because any demand on Seery would be futile.[13] Seery is the Claimant Trustee under the terms of the CTA. Furthermore, any demand on the Oversight Board to prosecute these claims would be equally futile because Muck and Jessup, both of whom are Proposed Defendants, dominate the Oversight Board.[14]

12. The "classic example" of a proper derivative action is when a debtor-in-possession is "unable or unwilling to fulfill its obligations" to prosecute an otherwise colorable claim where a conflict of interest exists. *Cooper*, 405 B.R. at 815 (quoting *Louisiana World*, 858 F.2d at 252). Here, because HMIT's proposed Adversary Proceeding includes claims against Seery, Muck, and Jessup, the conflicts of interest are undeniable. Seery is the Trustee of the Claimant Trust Assets under the CTA, and he also serves as the "Estate Representative."[15] Muck and Jessup, as successors to Acis, the Redeemer Committee and UBS, effectively control the Oversight Board, with the responsibility to "monitor and oversee the administration of the Claimant Trust and the Claimant Trustee's performance . . . ."[16]

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[13] Any demand on the Litigation Sub-Trust would be equally futile for the same reasons addressed herein, since the Litigation Trustee serves at the direction of the Oversight Board.

[14] *See* Footnote 8, *infra.* In December 2021, several stakeholders made a demand on the Debtor through James Seery, in his capacity as Trustee to the Claimant Trust, to pursue claims related to these insider trades.

[15] *See* Claimant Trust Agreement (Doc. 3521-5), Sec. 3.11.

[16] *Id.* at Sec. 4.2(a) and (b).

13. Creditors' committees frequently bring suit on behalf of bankruptcy estates. Yet, it is clear that any ***appropriately designated party*** also may bring derivative claims. *In re Reserve Prod., Inc.*, 232 B.R. 899, 902 (Bankr. E.D. Tex. 1999) (citations omitted); *see In re Enron Corp.*, 319 B.R. 128, 131 (Bankr. S.D. Tex. 2004). As this Court has held in *In Re Cooper*:

> In Chapter 11 [cases], there is both a textual basis . . . and, frequently, a non-textual, equitable rationale for granting a creditor or creditors committee derivative standing to pursue estate actions (*i.e.*, the equitable rationale coming into play when the debtor-in-possession has a conflict of interest in pursuing an action, such as in the situation of an insider-defendant).

In re Cooper, 405 B.R. 801, 803 (Bankr. N.D. Tex. 2009) (also noting that "[c]onflicts of interest are, of course, frequently encountered in Chapter 11, where the metaphor of the 'fox guarding the hen house' is often apropos"); *see also In re McConnell*, 122 B.R. 41, 43-44 (Bankr. S.D. Tex. 1989) ("[I]ndividual creditors can also act in lieu of the trustee or debtor-in-possession . . . ."). Here, the Proposed Defendants are the "*foxes guarding the hen house*," and their conflicts of interest abound.[17] Proceeding in a derivative capacity is necessary, if not critical.

[17] *See Citicorp Venture Cap., Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 987 (3d Cir. 1998) (settlement noteholders purchased Debtors' securities with "the benefit of non-public information acquired as a fiduciary" for the "dual purpose of making a profit and influenc[ing] the reorganization in [their] own self-interest."), *see also, Wolf v. Weinstein*, 372 U.S. 633, 642, 83 S.Ct. 969, 10 L.Ed.2d 33 (1963) ("Access to inside information or strategic position in a corporate reorganization renders the temptation to profit by trading in the Debtor's stock particularly pernicious.").

14. The proposed Adversary Proceeding also sets forth claims that readily satisfy the Court's threshold standards requiring "colorable" claims, as well as the requirements for a derivative action. This Motion, which is supported by objective evidence contained in historical filings in the bankruptcy proceedings, also incorporates sworn declarations. At the very least, this additional evidence satisfies the Court's threshold requirements of willful misconduct and fraud set forth in the "gatekeeping" orders, as well as the injunction and exculpation provisions in the Plan.[18] This evidence also supports well-pleaded allegations exempted from the scope of the releases included in the Plan.

15. HMIT is an appropriate party to bring this action on behalf of the Reorganized Debtor and the Claimant Trust. If successful, the Adversary Proceeding will likely recover well over $100 million for the Claimant Trust, thereby enabling the Reorganized Debtor and Claimant Trust to pay off any remaining innocent creditors and make significant distributions to HMIT as a vested Claimant Trust Beneficiary.

16. As of December 31, 2022, the Claimant Trust had distributed 64.2% of the total $397,485,568 par value of all Class 8 and Class 9 unsecured creditor claims. The

[18] HMIT recognizes that it is an "Enjoined Party" under the Plan. The Plan requires a showing, *inter alia*, of bad faith, willful misconduct, or fraud against a "Protected Party." Seery is a "Protected Party" and an "Exculpated Party" in his capacity as an Independent Director. Muck and Jessup *may* be "Protected Parties" as members of the Oversight Committee, but they were not "protected" when they purchased the Claims before the Effective Date. While it is HMIT's position that Farallon and Stonehill do not qualify as "Protected Parties," they are included in this Motion in the interest of judicial economy.

Claims acquired by Muck and Jessup have an allowed par value of $365,000,000. Based on these numbers, the innocent unsecured creditors hold approximately $32 million in allowed claims.[19]

17. As of December 31, 2022, the Claimant Trust has distributed $255,201,228.[20] On a *pro rata* basis, that means that innocent creditors have received approximately $22,373,000 in distributions against the stated value of their allowed claims. That leaves a remaining unpaid balance of approximately $9,627,000.

18. Muck and Jessup already have received approximately $232.8 million on their Claims. Assuming and original investment of approximately $160 million, this represents over $72 million in ill-gotten profits that, if disgorged, would be far more than what is required to fully pay all other innocent creditors - immediately placing HMIT in the status of a vested Claimant Trust Beneficiary. The benefits to the Reorganized Debtor, the Claimant Trust and innocent stakeholders are undeniable.[21]

19. Seery and the Oversight Board should be estopped from challenging HMIT's status to bring this derivative action on behalf of the Claimant Trust. Seery, Muck and Jessup have committed fraud, acted in bad faith and have unclean hands, and they should not be allowed to undermine the proposed Adversary Proceeding - which seeks

[19] Doc. 3653.

[20] *Id.*

[21] Further, under the present circumstances and time constraints, this Motion should be granted to avoid the prospect of the loss of some of HMIT's and the Claimant Trust's claims and denial of due process.

to rectify significant wrongdoing. To hold otherwise would allow Seery, Muck, Jessup, Stonehill, and Farallon the opportunity to not just "guard the hen house," but to also open the door and take what they want.[22] HMIT seeks a declaratory judgment of its rights, accordingly.

IV. The Proposed Defendants

20. Seery acted in several capacities during relevant times. He served as the Debtor's Chief Executive Officer ("CEO") and Chief Restructuring Officer ("CRO"). He also served as member of the Debtor's Independent Board.[23] He currently serves as Claimant Trustee under the CTA and remains the CEO of the Reorganized Debtor.

21. There is no doubt Seery owed the Original Debtor's Estate, as well as equity, fiduciary duties, including the duty of loyalty and the duty to avoid conflicts of interest. *See In re Xtreme Power Inc.*, 563 B.R. 614, 632-33 (Bankr. W.D. Tex. 2016) (detailing fiduciary duties owed by corporate officers and directors under Delaware law); *Louisiana World*, 858 F.2d at 245-46 (detailing duties owed by debtors-in-possession).[24]

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[22] "The doctrine of 'unclean hands' provides that "a litigant who engages in reprehensible conduct in relation to the matter in controversy ... forfeits his right to have the court hear his claim, regardless of its merit. [T]he purpose of the clean hands maxim is to protect the court against misuse by one who, because of his conduct, has forfeited his right to have the court consider his claims, regardless of their merit. As such it is not a matter of defense to be applied on behalf of a litigant; rather it is a rule of public policy." *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 80–81 (Del. Ch. 2008) (citations omitted) (internal quotations omitted for clarity).

[23] Seery is the beneficiary of the Court's "gatekeeping" orders and is an "exculpated" party in his capacity as an Independent Director. He is also a "Protected Party."

[24] The Internal Affairs Doctrine dictates choice of law. Here, the Debtor, Highland Capital Management, was organized under the law of Delaware. As much, Seery's fiduciary duties and claims involving breaches of those duties will be governed by Delaware law.

22. Farallon and Stonehill are capital management companies which manage hedge funds; they are also Seery's close business allies with a long history of business ventures and close affiliation. Although they were strangers to the Original Debtor's bankruptcy on the petition date, and were not original creditors, they became entangled in this bankruptcy at Seery's invitation and encouragement—and then knowingly participated in the wrongful insider trades at issue. By doing so, Seery was able to plant friendly allies onto the Oversight Board to rubber stamp compensation demands. The proposed Adversary Proceeding alleges that Farallon and Stonehill bargained to receive handsome pay days in exchange.

23. Muck and Jessup are special purpose entities, admittedly created by Farallon and Stonehill on the eve of the alleged insider trades, and they were used as vehicles to assume ownership of the purchased claims.[25] The record is clear that Muck and Jessup ***did not exist*** before confirmation of the Plan in February 2021.[26] Now, however, Muck and Jessup serve on the Oversight Board with immense powers under the CTA.[27] When they purchased the claims at issue, Muck and Jessup were ***not*** acting in their official capacities on the Oversight Committee and, therefore, they were not "Protected Persons" under the Plan.

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[25] *See* Ex. 4-B, Rule 202 Transcript at 55:22-25.

[26] *See* McEntire Dec., Ex. 4, Ex. 4-D, Ex. 4-E. Muck was created on March 9, 2021 before the Effective Date. Jessup was created on April 8, 2021, before the Effective Date.

[27] *See* Doc. 3521-5, Sec. 4(a) and 4(b).

24. By trading on the alleged material non-public information, Farallon, Stonehill, Muck, and Jessup became non-statutory "insiders" with duties owed directly to HMIT at a time when HMIT was the largest equity holder.[28] *See S.E.C. v. Cuban*, 620 F.3d 551, 554 (5th Cir. 2010) ("The corporate insider is under a duty to 'disclose or abstain'—he must tell the shareholders of his knowledge and intention to trade or abstain from trading altogether."). In this context, there is no credible doubt that Farallon's and Stonehill's dealings with Seery were ***not*** arms-length. Again, Farallon and Stonehill were Seery's past business partners and close allies.[29] By virtue of the insider trades at issue, Farallon and Stonehill acquired control (acting through Muck and Jessup) over the Original Debtor and Reorganized Debtor through Seery's compensation agreement and awards, as well as supervisory powers over the Claimant Trust. This makes Farallon and Stonehill paradigm non-statutory insiders.

25. HMIT also seeks recovery against John Doe Defendant Nos. 1 through 10.[30] It is clear Farallon and Stonehill refuse to disclose the precise details of their legal

[28] Because of their "insider" status, this Court should closely scrutinize the transactions at issue.

[29] Farallon and Stonehill are two capital management firms (similar to HCM) with whom Seery has had substantial business relationships. Also, Seery previously served as legal counsel to Farallon. Seery also has a long-standing relationship with Stonehill. GCM Grosvenor, a global asset management firm, held four seats on the Redeemer Committee (an original member of the Unsecured Creditors Committee in HCM's bankruptcy). Upon information and belief, GCM Grosvenor is a significant investor in Stonehill and Farallon. GCM Grosvenor, through Redeemer, also played a large part in appointing Seery as a director of Strand Advisors and approved his appointment as HCM's CEO and CRO.

[30] Farallon and Stonehill consummated their trades concealing their actual involvement through Muck and Jessup as shell companies. Farallon's and Stonehill's identities were not discovered until much later after the fact.

relationships with Muck and Jessup. They resisted such discovery in the prior Rule 202 Proceedings in state district court.[31] They also refused to disclose such details in response to a prior inquiry to their counsel.[32] Furthermore, the corporate filings of both Muck and Farallon conspicuously omit the identity of their respective members or managing members.[33] Accordingly, HMIT intends to prosecute claims against John Doe Defendant Nos. 1 -- 10 seeking equitable tolling pending further discovery whether Farallon and Stonehill inserted intermediate corporate layers between themselves and the special purpose entities (Muck and Jessup) they created. *See In re ATP Oil & Gas Corp.,* No. 12-36187, 2017 WL 2123867, *4 (Bankr. S.D. Tex. May 16, 2017) (lsgur .J.); *see also In re IFS Fin. Corp.* No. 02-39553, 2010 WL 4614293, *3 (Bankr. S.D. Tex. No. 2, 2010) ("The identity of the party concealing the fraud is immaterial, the critical factor is whether any of the parties involved concealed property of the estate." "In either case, the trustee must demonstrate that despite exercising diligence, he could not have discovered the identity of the [unnamed] defendants prior to the expiration of the limitations period.") *ATP Oil,* 2017 WL 2123867 at *4. That burden is easily satisfied here.

[31] *See* McEntire Dec., Ex. 4.

[32] *See* McEntire Dec., Ex. 4, *see also*, Ex. 4-F.

[33] *See* Ex. 4-D, Ex. 4-E.

V. Background

26. As part of this Court's Governance Order, an independent board of directors—which included Seery as one of the selections of the Unsecured Creditor's Committee—was appointed to the Board of Directors (the "Board") of Strand Advisors, Inc., ("Strand Advisors"), the Original Debtor's general partner. Following approval of the Governance Order, the Board then appointed Seery as the Original Debtor's CEO and CRO. [34] Following the Effective Date of the Plan, Seery now serves as Trustee of the Claimant Trust (the Reorganized Debtor's sole post-reorganization limited partner), and continues to serve as the Reorganized Debtor's CEO. [35]

27. Imbued with his powers as CEO and CRO, Seery negotiated and obtained bankruptcy court approval of several settlements prior to the Effective Date, resulting in the following approximate allowed claims (hereinafter "Claims"):[36]

Creditor	**Class 8**	**Class 9**
Redeemer	$137 mm	$0 mm
Acis	$23 mm	$0 mm
HarbourVest	$45 mm	$35 mm
UBS	$65 mm	$60 mm
(Totals)	$270 mm	$95 mm

[34] Doc. 854, Order Approving Retention of Seery as CEO/CRO.

[35] *See* Doc. 1943, Order Approving Plan, p. 34.

[36] Orders Approving Settlements [Doc. 1273, Doc. 1302, Doc. 1788, Doc. 2389].

Each of the settling parties curiously sold their Claims to Farallon or Stonehill (or their affiliated special purpose entities) shortly after they obtained court approval of their settlements. One of these "trades" occurred within just a few weeks before the Effective Date. Farallon and Stonehill coordinated and controlled the purchase of these Claims through Muck and Jessup, and they admitted in open court that Muck and Jessup were created to allow their purchase of the Claims.[37]

28. HMIT alleges that Seery filed (or caused to be filed) deflated, misleading projections regarding the value of the Debtor's Estate,[38] while inducing unsecured creditors to discount and sell their Claims to Farallon and Stonehill. But as reflected in the attached declarations, it is now known that Seery provided material, non-public information to Farallon. The circumstantial evidence is also clear that both Farallon and Stonehill had access to and used this non-public information in connection with their purchase decisions.

29. Farallon and Stonehill are registered investment advisors who have their own fiduciary duties to their investors, and they are acutely aware of what these duties entail. Yet, upon information and belief, they collectively invested over $160 million dollars to purchase the Claims in the absence of any publicly available information that

[37] *See* Ex. 4-B, Rule 202 Transcript at 55:22-25.

[38] The pessimistic projections were issued as part of the Plan Analysis on February 2, 2021. [Doc. 1875-1]. The Debtor projected 0% return on Class 9 claims and only 71.32% return on Class 8 Claims.

could rationally justify such investments. These "trades" become even more suspect because, at the time of confirmation, the Plan provided pessimistic projections advising stakeholders that the Claim holders would never receive full satisfaction:

- From October 2019, when the original Chapter 11 Petition was filed, to January 2021, just before the Plan was confirmed, the valuation of HCM's assets dropped over $200 million from $566 million to $328.3 million.[39]
- HCM's Disclosure Statement projected payment of 71.32% of Class 8 claims, and 0% of claims in Classes 9-11;[40]
    - This meant that Farallon and Stonehill invested more than $103 million in Claims ***when the publicly available information indicated they would receive $0 in return on their investment as Class 9 creditors and substantially less than par on their Class 8 Claims***.
- In HCM's Q3 2021 Post-Confirmation Report, HCM reported that the amount of Class 8 claims expected to be paid dropped even further from 71% *to 54%*;[41]

30. In the third financial quarter of 2021, just over $6 million of the projected $205 million available to satisfy general unsecured creditors was disbursed.[42] No additional distributions were made to the unsecured claimholders until, suddenly, in Q3 2022 almost $250 million was paid toward Class 8 general unsecured claims—**$45 million more than was *ever* projected**.[43]

[39] Doc. 1473, Disclosure Statement, p. 18.

[40] Doc. 1875-1, Plan Supplement, p. 4.

[41] Doc 2949.

[42] Doc 3200.

[43] Doc 3582.

31. According to Highland Capital's Motion for Exit Financing,[44] and a recent motion filed by Dugaboy Investment Trust,[45] there remain ***substantial*** assets to be monetized for the benefit of the Reorganized Debtor's creditors. Thus, upon information and belief, Stonehill and Farallon, stand to realize significant profits on their wrongful investments. In turn, Stonehill and Farallon will garner (and already have garnered) substantial fees – both base fees and performance fees – as the result of their acquiring and/or managing the Claims. Upon information and belief, HMIT also alleges that Seery has received excessive compensation and bonuses approved by Farallon (Muck) and Stonehill (Jessup) as members of the Oversight Board.

32. As evidenced in the supporting declarations (Exs. 2 and 3):

- Farallon admitted it conducted no due diligence and relied upon Seery in making its multi-million-dollar investment decisions at issue.[46]

- Farallon admitted it was unwilling to sell its stake in these Claims at any price because Seery assured Farallon that the Claims were tremendously valuable.[47]

- Farallon bragged about the value of its investment referencing non-public information regarding Amazon, Inc.'s ("Amazon") interest in acquiring Metro-Goldwyn-Mayer Studios Inc. ("MGM").[48]

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[44] Doc 2229.

[45] Doc 3382.

[46] *See* Ex. 2, 2022 Dondero Declaration.

[47] *See* Ex. 2, 2022 Dondero Declaration, Ex. 3, 2023 Dondero Declaration.

[48] *See* Ex. 3, 2023 Dondero Declaration.

- Farallon was unwilling to sell its stake in the newly acquired Claims even though publicly available information suggested that Farallon would lose millions of dollars on its investment.[49]

Farallon can offer ***no credible explanation*** to explain its significant investment, and its refusal to sell at any price, ***except*** Farallon's access to material non-public information. In essence, Seery became the guarantor of Farallon's significant investment. Farallon admitted as much in its statements to James Dondero.

33. The same holds true for Stonehill. Given the negative, publicly available information, Stonehill's multi-million-dollar investments make no rational sense unless Stonehill had access to material non-public information.

34. Fed. R. Bank. P. 2015.3 requires debtors to "file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest." However, no public reports required by Rule 2015.3 were filed. Seery testified they simply "fell through the cracks." [50]

35. Six days prior to the filing of the motion seeking approval of the HarbourVest Settlement, Seery acquired material non-public information regarding Amazon's interest in acquiring MGM.[51] Upon receipt of this material non-public

[49] *See* Ex. 3, 2023 Dondero Declaration, *see also* Doc. 1875-1.

[50] Doc. 1905, February 3, 2021, Hearing Transcript, 49:5-21.

[51] *See* Adversary No. 20-3190-sgj11, Doc. 150-1.

information, MGM should have been placed on the Original Debtor's "restricted list," but Seery continued to move forward with deals that involved MGM stock and notes.[52] Because the Original Debtor additionally held direct interests in MGM,[53] the value of MGM was of paramount importance to the value of the estate.

36. Armed with this and other insider information, Farallon—through Muck—proceeded to invest in the Claims and, acting through Muck, acceded to a powerful position on the Oversight Board to oversee future distributions to Muck and itself. It is no coincidence Seery invited his business allies into these bankruptcy proceedings with promises of great profits. Seery's allies now oversee his compensation.[54]

37. The Court also should be aware that the Texas States Securities Board ("TSSB") opened an investigation into the subject matter of the insider trades at issue, and this investigation has not been closed. The continuing nature of this investigation

[52] As part of the HarbourVest Settlement, Seery negotiated the purchase of HarbourVest's interest in HCLOF for approximately $22.5 million as part of the transaction. Approximately 19.1% of HCLOF's assets were comprised of debt and equity in MGM. The HCLOF interest was not to be transferred to the Debtor for distribution as part of the bankruptcy estate, but rather to "to an entity to be designated by the Debtor"—*i.e.*, one that was not subject to typical bankruptcy reporting requirements. Doc. 1625, p. 9, n. 5. Doc. 1625.

[53] *See* Doc. 2229, Motion for Exit Financing.

[54] Amazon closed on its acquisition of MGM in March 2022, but the evidence strongly suggests that agreements for the trades already had been reached - while announcement of the trades occurred strategically after the MGM news became public. Now, as a result of their wrongful conduct, Stonehill and Farallon profited significantly on their investments, and they stand to gain substantially more profits.

underscores HMIT's position that the claims described in the attached Adversary Proceeding are plausible and certainly far more than merely "colorable."

VI. Argument

A. HMIT has asserted Colorable Claims against Seery, Stonehill, Farallon, Muck, and Jessup.

38. Unlike the terms "Enjoined Party," "Protected Party," or "Exculpated Party," the Plan does not define what constitutes a "colorable" claim. Nor does the Bankruptcy Code define the term. However, relevant authorities suggest that a Rule 12(b)(6) standard is an appropriate analogue.

39. The Fifth Circuit has held that a "colorable" claim standard is met if a [movant], such as HMIT, has asserted claims for relief that, on appropriate proof, would allow a recovery. A court need not and should not conduct an evidentiary hearing but must ensure that the claims do not lack any merit whatsoever. *Louisiana World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 248 (5th Cir. 1988). Stated differently, the Court need not be satisfied there is an evidentiary basis for the asserted claims but instead should allow the claims if they ***appear*** to have ***some*** merit.

40. Other federal appellate courts have reached similar conclusions. For example, the Eighth Circuit holds that "creditors' claims are colorable if they would survive a motion to dismiss." *In re Racing Services, Inc.*, 540 F.3d 892, 900 (8th Cir. 2008); *accord In Re Foster*, 516 B.R. 537, 542 (B.A.P. 8th Cir. 2014), aff'd 602 Fed. Appx. 356 (8th Cir. 2015) (*per curiam*). The Sixth Circuit has adopted a similar test requiring that the court

look ***only*** to the face of the complaint to determine if claims are colorable. *In re The Gibson Group, Inc.*, 66 F.3d 1436, 1446 (6th Cir. 1995) (emphasis added).

41. Although there is a dearth of federal court authorities in Texas, other federal courts have adopted the same standard—*i.e.*, a claim is colorable if it is "plausible" and could survive a motion to dismiss. *See In re America's Hobby Center, Inc.*, 223 B.R. 273, 282 (S.D.N.Y 1998). In addition, in the non-bankruptcy context, the District Court for the Northern District of Texas explained that "[t]he requirement of a 'colorable claim' means only that the plaintiff must have an '*arguable* claim' and not that the plaintiff must be able to succeed on that claim." *Gonzales v. Columbia Hosp. at Med. City Dallas Subsidiary, L.P.*, 207 F. Supp. 2d 570, 577 (N.D. Tex. 2002) (Emphasis added).

42. Thus, in this instance, this Court's gatekeeping inquiry is properly limited to whether HMIT has stated a plausible claim on the face of the proposed pleadings involving "bad faith," "willful misconduct," or "fraud." Because the face of the Adversary Complaint alleges plausible facts, HMIT's Motion is properly granted. Clearly, the attached Adversary Proceeding would survive a Rule 12(b)(6) challenge. Furthermore, the supporting declarations and documentary evidence provide additional support, and the circumstantial evidence proves that Farallon and Stonehill, strangers to the bankruptcy on the petition date, would not have leaped into these proceedings without undisclosed assurances of profit.

B. Fraud

43. As set forth in the proposed Adversary Proceeding, HMIT alleges a colorable claim for fraud—both fraud by knowing misrepresentation and fraud by omission of material fact. Here, these allegations of fraud are appropriately governed by Texas law under appropriate choice of law principals.[55]

44. Seery had a duty to not provide material inside information to his business allies. But, he did so. At the latest, Seery became aware of the potential sale of MGM in December 2020 when he received an email from Jim Dondero.[56] Thus, Seery knew at that time that this potential sale would likely yield significant value to the Original Debtor's Estate. Yet, the financial disclosures associated with the Plan's confirmation, which were provided only a month later, presented an entirely different outlook for both Class 8 and Class 9 unsecured creditors.[57] Seery knew at that time that these pessimistic disclosures were misleading, if not inaccurate.

45. There is no credible doubt Seery intended that innocent stakeholders would rely upon the pessimistic projections set forth in the Plan Analysis. Indeed, the singular purpose of the Plan Analysis was to advise stakeholders. As such, HMIT alleges that Seery knowingly made misrepresentations with the intention that innocent stakeholders

[55] However, Delaware law is substantially similar on the elements of fraud. *See Malinals v. Kramer*, No. CIV.A. CPU 6-11002145, 2012 WL 174958, at 2 (Del. Com. PI. Jan. 5, 2012)

[56] *See,* Dondero 2022 Dec., Ex. 2-1.

[57] *See* Doc. 1875-1, Plan Analysis, February 1, 2021.

would rely, and that he failed to disclose material information concerning his entanglements with Farallon and Stonehill, as well as the related negotiations that were chock full of conflicts of interest.

46. On the flip side of this conspiracy coin, Farallon and Stonehill were engaged in negotiations to acquire the Claims at discounted prices; and, they successfully did so. HMIT alleges that their success was based on knowledge that the financial disclosures associated with the Plan Analysis were significantly understated. Otherwise, it would make no financial sense for Farallon and Stonehill to do the deals at issue. Indeed, Farallon admitted that it would not sell the Claims at any price, expressing great confidence in the substantial profits it expected even in the absence of any supporting, publicly available information.[58]

47. All of the Proposed Defendants had a duty of affirmative disclosure under these circumstances. Seery always had this duty. Muck, Jessup, Farallon, and Stonehill assumed this duty when they became non-statutory "insiders." Thus, all of the Proposed Defendants are liable for conspiring to perpetrate a fraud by omission of material facts.

48. HMIT also claims that Seery and the other Proposed Defendants failed to disclose material information concerning Seery's involvement in brokering the Claims in exchange for *quid pro quo* assurances of enhanced compensation. Seery's compensation

[58] Ex. 3, 2023 Dondero Declaration.

should be disgorged or, alternatively, such compensation constitutes a damage recoverable by the Reorganized Debtor and Claimant Trust as assignees (or transferees) of the Original Debtor's causes of action. This compensation was the product of the alleged self-dealing, breaches of fiduciary duty, and fraud.

C. Breaches and Aiding and Abetting Breaches of Fiduciary Duties

49. It is beyond dispute Seery owed fiduciary duties to the Estate. *See Xtreme Power*, 563 B.R. at 632-33 (detailing fiduciary duties owed by corporate officers and directors under Delaware law);[59] *Louisiana World*, 858 F.2d at 245-46 (5th Cir. 1988) (detailing duties owed by debtors-in-possession). Although Seery did not buy the Claims at issue, he stood to profit from these sales because his close business allies would do his bidding after they had acceded to positions of power and control on the Oversight Board. Muck and Jessup were essentially stepping into the shoes of three of the largest unsecured creditors who were already slated to serve on the Oversight Board. Thus, by acquiring their Claims, all of the Proposed Defendants knew that Muck and Jessup would occupy these powerful oversight positions after the Effective Date.

50. Thus, the alleged conspiracy was successfully implemented before the Effective Date. Farallon and Stonehill now occupy control positions through the shell

[59] The *Xtreme* case also notes that "several Delaware courts have recognized that 'directors who are corporate employees lack independence because of their substantial interest in retaining their employment." 563 B.R. at 633-34. Because Muck and Jessup are now in control of Seery's compensation, it follows that Seery is beholden to them, and Seery's disclosure of inside information to Stonehill and Farallon confirms his conflict of interest.

entities (Muck and Jessup) overseeing large compensation packages for Seery. Of course, this control (and the opportunity to control) presented a patent conflict of interest which Seery should have avoided, but instead knowingly created, fostered, and encouraged. HMIT alleges that Seery breached his duty to avoid this conflict or otherwise disclose this conflict and Farallon and Stonehill aided and abetted this breach.

51. The Original Debtor, as an investment adviser registered with the SEC, is also required to make public disclosures on its Form ADV, the uniform registration form for investment advisers required by the SEC. These Form ADV disclosures, which were in effect at the time of the insider trades at issue, explicitly forbade "any access person from trading either personally or on behalf of others . . . on material non-public information or communicating material non-public information to others in violation of the law or duty owed to another party."[60] It now appears these representations were false when made. Seery's alleged conduct also violated, at minimum, the duties Seery owed in his various capacities with the Original Debtor under the Form ADV disclosures.

52. Although initially strangers to the original bankruptcy, by accepting and using inside information, Farallon and Stonehill became "temporary insiders" and thus owed separate duties to the Estate. *See S.E.C. v. Cuban*, 620 F.3d 551 (5th Cir. 2010) ("[E]ven

[60] *See, e.g.*,

https://files.adviserinfo.sec.gov/IAPD/Content/Common/crd_iapd_Brochure.aspx?BRCHR_VRSN_ID=777026.

an individual who does not qualify as a traditional insider may become a 'temporary insider' if by entering 'into a special confidential relationship in the conduct of the business of the enterprise [they] are given access to information solely for corporate purposes." *In re Washington Mut., Inc.*, 461 B.R. 200 (Bankr. D. Del. 2011), *vacated in part*, 08-12229 MFW, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012) (finding that equity committee stated colorable claim for equitable disallowance against creditors who "became temporary insiders of the Debtors when the Debtors gave them confidential information and allowed them to participate in negotiations with JPMC for the shared goal of reaching a settlement that would form the basis of a consensual plan of reorganization"; vacated in part as a condition of settlement only);[61] *See also, In re Smith*, 415 B.R. 222, 232-33 (Bankr. N.D. Tex. 2009) ("[a]n insider is an entity or person with 'a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor.' 'Thus, the term "insider" is viewed to encompass two classes: (1) per se insiders as listed in the Code and (2) extra-statutory insiders that do not deal at arm's length.'" (citations omitted)). Farallon, Stonehill, Muck, and Jessup clearly fall into this latter category.

[61] Although the *Washington Mutual* case was subsequently vacated, the Court's intellectual reasoning remains valid because the vacatur was mandated by a mediated settlement, not because the court's logic was flawed or changed, and the court expressly noted that the parties' settlement was conditioned on vacatur. *See In re Washington Mut., Inc.*, No. 08-12229 MFW, 2012 WL 1563880, *8 (Bankr. D. Del. Feb. 24, 2012) ("grant[ing] partial vacatur . . . *in furtherance of the settlement embodied in the Plan*," and noting that "absent the requested vacatur, the collapse of the Plan could result in the termination of the Global Settlement Agreement." (emphasis added)).

53. Because Farallon and Stonehill (acting through Muck and Jessup) now hold the majority of the seats on the Oversight Board, they, along with Seery, exercise control of the reorganization proceedings. At no time were Farallon, Stonehill, or Seery's plans disclosed to the other creditors or equity. In fact, the only inference that can be reasonably drawn is that Farallon and Stonehill brazenly sought to conceal their involvement by establishing shell entities—Muck and Jessup—to nominally hold the Claims and create an opaque barrier to any effort to identify the "*Oz behind the curtain*." Such conduct aligns precisely with the inequitable conduct detailed in *Citicorp* and *Adelphia* (discussed below).

54. In sum, the proposed Adversary Proceeding sets forth plausible allegations that Stonehill and Farallon were aware of Seery's fiduciary duties. Indeed, as registered investment advisors, both Farallon and Stonehill were acutely aware of Seery's fiduciary obligations, including, without limitation, the duty to act in the best interests of the Original Debtor's Estate and the duty not to engage in insider trading that would benefit Seery, as an insider, and themselves, as non-statutory insiders. By accepting and then acting on material non-public information, Farallon and Stonehill (as well as Muck and Jessup) aided and abetted breaches of these fiduciary duties. By placing themselves in positions to control Seery's compensation, Farallon and Stonehill (acting through Muck and Jessup) induced, encouraged, aided and abetted Seery's self-dealing.

D. Equitable Disallowance is an Appropriate Remedy

55. HMIT also seeks equitable disallowance. Although the Fifth Circuit in *Matter of Mobile Steel Co.* generally limited the court's equitable powers to subordination rather than disallowance,[62] the Fifth Circuit **did *not* foreclose** the viability of equitable disallowance as a potential remedy. *See* 563 F.2d 692, 699 n. 10 (5th Cir. 1977). Binding U.S. Supreme Court precedent in *Pepper v. Litton* also permits bankruptcy courts to fashion disallowance remedies. 308 U.S. 295, 304-11 (1939). Bankruptcy Code § 510, which supplies the authority for equitable subordination, was "intended to codify case law, such as *Pepper v. Litton . . . and is not intended to limit the court's power in any way…. Nor does [it] preclude a bankruptcy court from completely disallowing a claim in appropriate circumstances*." *In re Adelphia Commun. Corp.*, 365 B.R. 24, 71-72 (Bankr. S.D.N.Y. 2007), *aff'd in part sub nom. Adelphia Recovery Tr. v. Bank of Am., N.A.*, 390 B.R. 64 (S.D.N.Y. 2008), *adhered to on reconsideration*, 05 CIV. 9050 (LMM), 2008 WL 1959542 (S.D.N.Y. May 5, 2008) (emphasis and omissions in original).[63]

56. The Fifth Circuit's decision in *Mobile Steel* also was premised on the notion that disallowance would not add to the quiver of defenses to fight unfairness because

[62] Equitable subordination is an inadequate remedy in this instance.

[63] In *Washington Mutual*, the Court's intellectual reasoning when imposing disallowance is instructive. *See In re Washington Mut., Inc.*, No. 08-12229 MFW, 2012 WL 1563880, *8 (Bankr. D. Del. Feb. 24, 2012) ("grant[ing] partial vacatur . . . *in furtherance of the settlement embodied in the Plan*," and noting that "absent the requested vacatur, the collapse of the Plan could result in the termination of the Global Settlement Agreement." (emphasis added)).

creditors "are fully protected by subordination" and "[i]f the misconduct directed against the bankrupt is so extreme that disallowance might appear to be warranted, then *surely* the claim is either invalid or the bankrupt possesses a clear defense against it." *Mobile Steel*, 563 F.2d at 699 n. 10 (emphasis added). Importantly, however, the factual scenarios considered in *Mobile Steel* do not exist here.

57. Here, Muck and Jessup purchased both Class 8 and Class 9 Claims, and they now effectively occupy more than 90% of the entire field of unsecured creditors in these two claimant tiers. Thus, subordination cannot effectively address the current facts where the Original Debtor's CEO and CRO conspired directly with close business allies who acquired the largest unsecured claims to the detriment of other innocent creditors and *former equity*. The reasoning in published cases from other circuits supports this conclusion. *See Adelphia*, 365 B.R. at 71-73; *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 991 n. 7 (3d Cir. 1998).

58. The purpose of equitable subordination is to assure that the wrongdoer does not profit from bad conduct. In the typical case, subordination to other creditors will achieve this deterrence. But, it is clear that the Third Circuit's decision in *Citicorp* was structured to use subordination as just one tool in a larger tool box to make sure "at a minimum, the remedy here should deprive – [the fiduciary] of its profit on the purchase of the notes." *Id* at 991. In *Adelphia*, the Southern District of New York also used equitable

subordination as a remedy to address wrongs of non-insiders who aided and abetted breaches a fiduciary duty by the debtor's management. 365 B.R. at 32.

59. But subordination cannot adequately address the wrongful conduct at issue. This is because subordination is typically limited to instances where one creditor is subordinated to other creditors, not equity. Here, for all practical purposes, there are only a few other unsecured creditors with relatively small stakes. Therefore, subordination as a weapon of deterrence is neutered.

60. In sum, by engaging in the alleged wrongful acts, including aiding and abetting Seery's breaches of fiduciary duty, Farallon, Stonehill, Muck, and Jessup should not be rewarded. The Proposed Defendants engaged in alleged conduct which damaged the Original Debtor's estate, including improper agreements to compensate Seery under the terms of the CTA. Equitable disallowance is an appropriate remedy which, when combined with disgorgement of all ill-gotten profits, will deprive the Proposed Defendants of their ill-gotten gains.

E. Disgorgement and Unjust Enrichment

61. The law is clear that disgorgement is an available remedy for breach of fiduciary duty both under Texas Law, see *Kinzbach Tool Co. v. Corbett-Wallace Corporation*, 160 S.W. 2d 509 (Tex. 1942), and under Delaware law, see *Metro Storage International, LLC v. Harron*, 275 A.3d 810 (Del. Ch. 2022). Disgorgement is also an appropriate remedy for unjust enrichment under Texas law, *Hunter v. Shell Oil Co.,* 198 F.2d 485 (5th Cir. 1952),

and under Delaware law, *In re Tyson Foods, Inc. Consolidated Shareholder Litigation*, 919 A.2d 563 (Del. Ch. 2007).[64]

62. Likewise, the imposition of a constructive trust is proper for addressing unjust enrichment under both Delaware and Texas law, see *Teacher's Retirement System of Louisiana v. Aidinoff*, 900 A.2d 654 (Del. Ch. 2006) and *Hsin-Chi-Su v. Vantage Drilling Company*, 474 S.W. 3d 384 (Tex. App. – 14th Dist. 2015), pet. denied. The elements of unjust enrichment are: (1) the defendant must have gained a benefit (2) at the expense of plaintiff, (3) and retention of that benefit must be shown to be unjust. *See Restatement (Third) of Restitution and Unjust Enrichment* §321, cmt. e (2011).

63. Here, the imposition of a constructive trust and disgorgement are clearly appropriate to provide redress for the alleged breaches of fiduciary duty and the knowing participation in (or aiding and abetting) those breaches. Furthermore, the imposition of a constructive trust and disgorgement are appropriate to disgorge the improper benefits that all of the Proposed Defendants received by virtue of collusion and insider trading.

64. As set forth in the proposed Adversary Proceeding, Seery gained the opportunity to have his compensation demands rubber stamped. The other Defendants gained the opportunity to purchase valuable claims at a discount knowing that

[64] It is likely that the Internal Affairs Doctrine will dictate that Delaware choice of law governs the breach of fiduciary duty claims.

pessimistic financial projections were false and that the upside investment potential was great. Retention of the benefits they received would be unjust and inequitable.

65. Clearly, the Debtor's Estate was damaged by virtue of the claimed conduct. Seery obtained profits and compensation to the detriment of that estate as well as the estate of the Reorganized Debtor, other innocent creditors and HMIT, as former equity and as a contingent Claimant Trust Beneficiary.

F. Declaratory Relief

66. HMIT also seeks declaratory relief pursuant to Fed. R. Bank P. 7001(9). Specifically, HMIT seeks a declaratory judgment that: (a) there is a ripe controversy concerning HMIT's rights and entitlements under the Claimant Trust Agreement; (b) as a general matter, HMIT has standing to bring an action against a trustee even if its interest is considered "contingent;" (c) HMIT's status as a Claimant Trust Beneficiary is fully vested upon disgorgement of the ill-gotten profits of Muck and Jessup, and by extension, Farallon and Stonehill; (d) HMIT's status as a Claimant Trust Beneficiary is fully vested upon the equitable disallowance of the Claims held by Muck and Jessup over and above their initial investments; (e) Seery is properly estopped from asserting that HMIT is not an appropriate party to bring this derivative action on behalf of the Reorganized Debtor and/or the Claimant Trust because of fraudulent conduct, bad faith, willful misconduct, and unclean hands; (f) Muck and Jessup are properly estopped from asserting that HMIT is not an appropriate party to bring this derivative action on behalf of the Reorganized

Debtor and the Claimant Trust because of their fraudulent conduct, bad faith, willful misconduct, and unclean hands; and (g) all of the Proposed Defendants are estopped from asserting that HMIT does not have standing in its individual capacity due to their fraudulent conduct, bad faith, willful misconduct, and unclean hands.

G. HMIT has Direct Standing.

67. The Texas Supreme Court recently held that "a partner or other stakeholder in a business organization has constitutional standing to sue for an alleged loss in the value of its interest in the organization." *Pike v. Texas EMC Mgt., LLC*, 610 S.W.3d 763, 778 (Tex. 2020). In so holding, the Court considered federal law and found that the traditional "incantation that a shareholder may not sue for the corporation's injury" is really a question of capacity, which goes to the merits of a claim, rather than an issue of standing that would impact subject matter jurisdiction. *Id.* at 777 (noting that the 5th Circuit and "[o]ther federal circuits agree that a plaintiff has standing to sue for the lost value of its investment in a corporation"). Because Seery, Muck, Jessup, Stonehill, Farallon's alleged actions devalued HMIT's interest in the Debtor's Estate, including, without limitation, payment of excessive compensation to Seery, HMIT has standing to pursue its common law claims directly. HMIT also has direct standing to seek declaratory relief as set forth in the proposed Adversary Proceeding.

VII. Prayer

WHEREFORE, PREMISES CONSIDERED, Hunter Mountain Investment Trust respectfully requests this Court grant HMIT leave authorizing it to file the Adversary Complaint, attached as Exhibit 1, as an Adversary Proceeding in this United States Bankruptcy Court for the Northern District of Texas, in its own name and as a derivative action on behalf of the Debtor Highland Capital Management, L.P., against Muck Holdings, LLC, Jessup Holdings, LLC, Farallon Capital Management, LLC, Stonehill Capital Management, LLC, James P. Seery, Jr., and John Doe Defendants Nos. 1 – 10, and further grant HMIT all such other and further relief to which HMIT may be justly entitled.

Dated: March 28, 2023

Respectfully Submitted,
PARSONS MCENTIRE MCCLEARY PLLC

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Attorneys for Hunter Mountain Investment Trust

CERTIFICATE OF CONFERENCE

Beginning on March 24, 2023, and also on March 27, 2023, the undersigned counsel conferred either by telephone or via email with all counsel for all Respondents regarding the relief requested in the foregoing Motion, including John A. Morris on behalf of James P. Seery, and Brent McIlwain on behalf of Muck Holdings LLC, Jessup Holdings LLC, Stonehill Capital Management, and Farallon Capital Management. Mr. Seery is opposed to this Motion. Based upon all communications with Mr. McIlwain, it is reasonably believed his clients are also opposed and we advised him that this recitation would be placed in the certificate of conference.

/s/ Sawnie A. McEntire
Sawnie A. McEntire

CERTIFICATE OF SERVICE

I certify that on the 28th day of March 2023, a true and correct copy of the foregoing Motion was served on all counsel of record or, as appropriate, on the Respondents directly.

/s/ Sawnie A. McEntire
Sawnie A. McEntire

EXHIBIT 2

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Counsel for Plaintiffs The Dugaboy Investment Trust and the 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,	§	Adversary Proceeding No. _____
vs.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P. and HIGHLAND CLAIMANT TRUST,	§	
Defendants.	§	

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

Plaintiffs The Dugaboy Investment Trust ("Dugaboy") and Hunter Mountain Investment Trust ("HMIT" and collectively with Dugaboy, the "Plaintiffs") file this adversary complaint (the "Complaint") against Defendants Highland Capital Management, L.P. ("HCM" or the "Debtor") and the Highland Claimant Trust (the "Claimant Trust," and collectively with HCM, the "Defendants"), seeking: (1) disclosures about all distributions and an accounting of the assets and liabilities currently held in the Claimant Trust; (2) a determination of the value of the assets and liabilities; and (3) declaratory relief setting forth the nature of Plaintiffs' interests in the Claimant Trust.

PRELIMINARY STATEMENT

1. As holders of Contingent Claimant Trust Interests[1] that vest into Claimant Trust Interests once all creditors are paid in full, and as defendants in litigation pursued by Marc S. Kirschner ("Kirschner") as Trustee of the Litigation Sub-Trust (which seeks to recover damages on behalf of the Claimant Trust), Plaintiffs file this Complaint to obtain information about the assets and liabilities of the Claimant Trust, which was established to monetize and liquidate the assets of the HCM bankruptcy estate.

2. Defendants' October 21, 2022, January 24, 2023, and April 21, 2023 post-confirmation reports show that even with inflated claims and below-market sales of assets, cash available – if not squandered in self-serving litigation – is more than enough to pay class 8 and class 9 creditors in full. With more than $100 million in assets left to monetize (not even counting related party notes), and almost $550,000 in assets already monetized, even after burning through more than $100 million in professional fees, there is and was more than enough money to pay the inflated $387 million in creditor claims the Debtor allowed. These numbers compel the question

[1] Capitalized terms not defined have the meanings set forth herein. If no meaning is set forth herein, the terms have the meaning set forth in the Fifth Amended Plan of Reorganization (as Modified) [Docket No. 1808].

– "What was all of this for, other than to justify outsize fees and bonuses for the professionals involved?" See paragraphs 17-18 below. And despite repeated and increasingly specific requests, the Debtor has never provided granular enough information to specifically identify all of the monies raised and where all the money has gone, including another hundred million dollars that appears to be unaccounted. *Id*.

3. Accordingly, Plaintiffs and the entire estate would benefit from a close evaluation of current assets and liabilities. Such evaluation will also show whether assets were marked below appraised value during the pandemic and unreasonably held on the books ***at those crisis period values***, along with overstated liabilities, to justify continued litigation. That litigation has served to enable James P. Seery ("Mr. Seery") and other estate professionals to carefully extract nearly every last dollar out of the estate (along with incentive fees), leaving little or nothing for the owners that built the company.

4. Significantly, Kirschner seems to concede the merits of Plaintiffs' position. After Plaintiffs began seeking the relief sought herein (originally by way of motion), Kirschner himself sought a stay of the massive litigation he instituted to evaluate whether the estate actually needed to collect additional funds. Plaintiffs and other defendants in that litigation agreed to the stay but could not convince the Debtor to provide the kind of fulsome disclosure that would allow Plaintiffs to evaluate for themselves the status of the estate, which secrecy continues to leave Plaintiffs with suspicions that prevent an overall resolution of the bankruptcy with no further need for indemnification reserves. Rather, Debtor continues to provide summary information that is not sufficient to enable Plaintiffs to determine the amounts of money being spent on administration and litigation, and not sufficient to determine whether if all litigation ceased, the estate could pay all creditors with money to spare for equity. Plaintiffs are especially concerned because the

information they have gleaned suggests inappropriate self-dealing that undermines confidence in the Debtor's financial reporting, making the relief sought herein all the more important.

5. While grave harm has already been done by the Defendants' excessive litigation and unnecessary secrecy, valuation now would at least enable the Court to put an end to this already long-running case and salvage some value for equity. As this Court observed in *In re ADPT DFW Holdings*, where there is significant uncertainty about insolvency, protections must be put in place so that the conduct of the case itself does not deplete the equity. In some cases, the protection is in the form of an equity committee; here a prompt valuation of the estate is needed.

6. Upon information and belief, during the pendency of HCM's bankruptcy proceedings, creditor claims and estate assets have been sold in a manner that fails to maximize the potential return to the estate, including Plaintiffs. Rather, Mr. Seery, first acting as Chief Executive Officer and Chief Restructuring Officer of the Debtor and then as the Claimant Trustee, facilitated the sale of creditor claims to entities that had undisclosed business relationships with Mr. Seery; entities that Mr. Seery knew would approve inflated compensation to him when the hidden but true value of the estate's assets were realized. Because Mr. Seery and the Debtor have failed to operate the estate in the required transparent manner, they have been able to justify pursuit of unnecessary avoidance actions (for the benefit of the professionals involved), even though the assets of the estate, if managed in good faith, should be sufficient to pay all creditors.

7. Further, by understating the value of the estate and preventing open and robust scrutiny of sales of the estate's assets, Mr. Seery and the Debtor have been able to justify actions to further marginalize equity holders that otherwise would be in the money, such as including plan and trust provisions that disenfranchise equity holders such as Plaintiffs by preventing them from having any input or information unless the Claimant Trustee certifies that all other interest holders

have been paid in full. Because of the lack of transparency to date, unless the relief sought herein is granted, there will be no checks and balances to prevent a wrongful failure to certify, much less any process to ensure that the estate has been managed in good faith so as to enable all interest holders, including the much-maligned equity holders, to receive their due.

8. By demonizing the estate equity holders, withholding information, and manipulating the sales of claims and assets, Mr. Seery and the Claimant Trust have maximized the potential for a grave miscarriage of justice and at this time it appears their underhanded plan is succeeding.

9. By June 30, 2022, the estate had $550 million in cash and approximately $120 million of other assets despite paying what appears in reports to be over $60 million in professional fees and selling assets non-competitively, perhaps as much as $75 million below market price.[2] As detailed below, total pre-confirmation professional fees are now over $100 million.

10. On information and belief, the value of the assets in the estate as of June 1, 2022 was:

Highland Capital Assets		**Value in Millions**	
		Low	**High**
Cash as of Feb 1. 2022		$125.00	$125.00
Recently Liquidated	$246.30		
Highland Select Equity	$55.00		
Highland MultiStrat Credit Fund	$51.44		
MGM Shares	$26.00		
Portion of HCLOF	$37.50		
Total of Recent Liquidations	$416.24	$416.24	$416.24
Current Cash Balance		**$541.24**	**$541.24**
Remaining Assets			
Highland CLO Funding, LTD		$37.50	$37.50
Korea Fund		$18.00	$18.00
SE Multifamily		$11.98	$12.10

[2] Examples of non-competitive sales are set forth in letters to the United States Trustee dated October 5, 2021, November 3, 2021 and May 11, 2022.

Affiliate Notes[3]		$50.00	$60.00
Other (Misc. and legal)		$5.00	$20.00
Total (Current Cash + Remaining Assets)		**$663.72**	**$688.84**

11. By June 2022, Mr. Seery had also engineered settlements making the inflated face amount of the major claims against the estate $365 million, but which traded for significantly less.

Creditor	Class 8	Class 9	Beneficiary	Purchase Price
Redeemer	$137.0	$0.0	Claim buyer 1	$65 million
ACIS	$23.0	$0.0	Claim buyer 2	$8.0
HarbourVest	$45.0	$35.0	Claim buyer 2	$27.0
UBS	$65.0	$60.0	Claim buyers 1 & 2	$50.0
TOTAL	**$270.0**	**$95.0**		**$150.0 million**

12. Mr. Seery made no efforts to buy the claims into the estate or resolve the estate efficiently. Mr. Seery never made a proposal to the residual holders or Mr. Dondero and never responded to the many settlement offers from Mr. Dondero with a reorganization (as opposed to liquidation) plan, even though many of Mr. Dondero's offers were in excess of the amounts paid by the claims buyers.

13. Instead, Mr. Seery brokered transactions enabling colleagues with long-standing but undisclosed business relationships to buy the claims without the knowledge or approval of the Court. Because the claims sellers were on the creditors committee, Mr. Seery and those creditors had been notified that "Creditors wishing to serve as fiduciaries on any official committee are advised that they may not purchase, sell or otherwise trade in or transfer claims against the Debtor while they are committee members absent an order of the Court." These transactions are particularly suspect because, depending on the claim, the claims buyers paid amounts only fractionally higher, equivalent to, or, in some cases, less than the value the Plan estimated would be paid three years later. Sophisticated claims buyers responsible to investors of their own would

[3] Some of the Affiliate Notes should have been forgiven as of the MGM sale and/or have other defenses, but litigation continues over that also.

not pay what appeared to be full price unless they had material non-public information that the claims could and would be monetized for much more than the public estimates made at the time of Plan confirmation – as indeed they have been.

14. On information and belief, Mr. Seery provided such information to claims buyers, rather than buying the claims in to the estate for the roughly $150 million for which they were sold. By May 2021, when the claims transfers were announced to the Court, the estate had over $100 million in cash and access to additional liquidity that could have been used to retire the claims for the sale amounts, leaving an operating business in the hands of its equity owners.

15. Specifically, Mr. Seery could and should have investigated seeking sufficient funds from equity to pay all claims and return the estate to the equity holders. This was an obvious path because the estate had assets sufficient to support a $59 million line of credit, as Mr. Seery eventually obtained. If funds had been raised to pay creditors in the amounts for which claims were sold, much of the massive administrative costs run up by the estate would never have been incurred because the larger amounts would not have been needed. One such avoided cost would be the post-effective date litigation pursued by Mr. Kirschner, as Litigation Trustee for the Litigation Sub-Trust, whose professionals likely charged over $2000 an hour for senior lawyers and over $800 an hour for first year associates (data obtained from other cases because there has been no disclosure in the HCM bankruptcy of the cost of the Kirschner litigation). However, buying the claims to resolve the bankruptcy and enabling equity to resume operations would not have had the critical benefit to Mr. Seery that his scheme contained: placing the decision on his incentive bonus, perhaps as much as $30 million or more, in the hands of grateful business colleagues who received outsized rewards for the claims they were steered into buying. The parameters of Mr. Seery's incentive compensation is yet another item cloaked in secrecy, contrary to the general rule that the

hallmark of the bankruptcy process is transparency. These circumstance show why Plaintiffs are right to be concerned and why it is critical that transparency be achieved.

16. But worse still, even with all of the manipulation that appears to have occurred, Plaintiffs believe that the combination of cash and other assets held by the Claimant Trust in its own name and held in various funds, reserve accounts, and subsidiaries, if not depleted by unnecessary litigation, would still be sufficient to pay all Claimant Trust Beneficiaries in full, with interest now.

17. Set forth below is Plaintiffs' best estimate of the assets of the estate. Plaintiffs have been seeking information to enable to them to confirm the accuracy of their estimates, but the Debtor has refused to provide the necessary information to do so. Indeed, after the last quarterly report, in which Debtor provided some but not all of the information Plaintiffs were seeking, Plaintiffs sent a revised list, more precisely targeting the remaining information sought. Because Debtor failed to respond, it remained necessary to file this adversary proceeding.

18. This is Plaintiffs' best estimate of the assets of the Highland estate and its cash flows. It is obvious that even if off by a significant percent, no further litigation to collect assets for the estate is needed to pay creditors. Moreover, the ample solvency of the estate was or should have been obvious to the estate professionals for quite some time, making the substantial cash burn in the estate utterly unconscionable.

	Assets		Amount	Backup
HCMLP Assets to be Monetized[1]				
As of 3/31/23 (Est.)				
	Highland CLO Funding, f/k/a Acis Loan Funding, Ltd. ("HCLOF")		$ 25,000,000	Debtor Pleading (re ACIS) Dkt 1235 Filed 08/18/21 p.3n.10 ($25 m); 3/31/23 DAF Multi-Strat Statement ($19.5 m est); more value in the 1.0 CLOS (Brentwood – 17%;Gleneagles – 1%;Grayson – 5%;Greenbriar-23%;Liberty-18%;Rockwall-15%)

	Highland Multi Strategy Credit Fund, L.P. ("MS")		30,817,992	ADV 3/31/23 (rev 4/24/2023)
	Highland Restoration Capital Partners Master LP & Highland Restoration Capital Partners, L.P. ("RCP")		24,192,773	ADV 3/31/23 (rev 4/24/2023)
	Stonebridge-Highland Healthcare Private Equity Fund ("Korea Fund")		5,701,330	ADV 3/31/23 (rev 4/24/2023)
	SE Multifamily Holdings LLC ("SE Multifamily")		12,400,000	Communications with Debtor that apparently values it higher
	Other		5,000,000	Other investments on the post-confirmation report
	Assets as of 3/31/21 (Est.)[1]		**$ 103,112,095**	
HCMLP Monetizations & Management Fees (est.)		**Sale date if known**		
10/31/19 - 3/31/23 (Est.)				
	Targa	October ?, 2021	$ 37,500,000	Uptick from COVID; market communications
	Trussway	Sept. 1, 2022	180,000,000	90% of sales price 200MM, net of debt; need confirmation
	Cornerstone	Jan. 23, 2023	132,500,000	Assume 53% of sales price obtained because: HCM owns about 50% of RCP and 60% of Crusader (and assume increase in value of MGM within Cornerstone should have been enough to offset its debt) Sale announced May 12, 2022
	SSP	Month/date/2020	18,000,000	Market communications
	MGM Direct	Mar. 17, 2022	25,000,000	@ $145, **sale announced May 2021**
	Petrocap	Aug. 10, 2021	2,684,886	Dkt, 2537, sale motion
	Uchi	Aug. 6, 2021	9,750,000	Dkt 2687, sale order
	Jefferies Account & DRIP		60,000,000	FV form 206, net of debt, but NXRT moved from $40-$80ish; don't know when monetized, so number could be low
	Terrell (raw land)		500,000	FV Form 206
	Mgmt Fees/Dist/Fund loan repayments (est.)		30,000,000	3 years mgmt fees, misc distributions in MS/RCP/Korea, loan paybacks
	Siepe		3,500,000	Market communications
	HCLOF		35,000,000	Calculated based on DAF distributions
	Total Monetizations & Cash Flows (Est.)		**$ 534,434,886**	
	Total Assets as of 3/31/23 & Prior Monetizations & Management Fees		**$ 637,546,981**	

Cash Roll			
10/31/19 - 3/31/23 (Est.)			
Cash as of 10/31/2019		$ 2,286,000	
Monetizations & Cash Flows (10/31/19 - 3/31/23)		534,434,886	
Less: Cash on Hand as of 3/31/23		(57,000,000)	ADV 3/31/23
Fees, Distributions & Other Receipts (10/31/19 - 3/31/23)[2]		$ 479,720,886	
Administrative Fees Paid		$ 100,781,537	Dkt 3756 filed on 4/21/23 ($33,005,136 for Professional fees (bk); $7,604,472 for Professional fees (nonbk); $60,171,929 for all prof fees and exp (Debtor & UCC). Note: this appears to "Preconfirmation." What are the post confirmation amounts?)
Cumulative Payments to Creditors		276,709,651	Dkt 3756 - Unsecured, priority, secured and admin.
Other Unknown Payments or ?		102,229,698	The $102 million is calculated by subtracting cumulative payments to creditors and known pre conf prof fees and costs from the $479 million determined above. Where are these funds; what were they used for?
Fees & Distributions Paid (10/31/19 - 3/31/23)		$ 479,720,886	
[1]*Does not include approximately $70MM in affiliate notes*			
[2]*Includes $100MM of fees paid during bankruptcy*			

19. In short, it appears that the professionals representing HCM, the Claimant Trust, and the Litigation Sub-Trust have been litigating claims against Plaintiffs and others, even though the only beneficiaries of any recovery from such litigation would be Plaintiffs in this adversary proceeding (and of course the professionals pressing the claims). It is only the cost of the pursuit of those claims that threatens to depress the value of the Claimant Trust sufficiently to justify continued pursuit of the claims, creating a vicious cycle geared only to enrich the professionals, including Mr. Seery, and to strip equity holders of any meaningful recovery. Even with the stay of

the Kirschner litigation, the Debtor continues to pursue litigation, such as its vexatious litigant motion, and presumably opposing this litigation, that unnecessarily depletes the estate.

20. Based upon the restrictions imposed on Plaintiffs, including the unprecedented inability for Plaintiffs, as holders of Contingent Claimant Trust Interests, to access virtually any financial information related to the Claimant Trust, Plaintiffs have little to no insight into the value of the Claimant Trust assets versus the Claimant Trust's obligations and no method to independently ascertain those amounts until Plaintiffs become Claimant Trust Beneficiaries. Because Mr. Seery and the professionals benefiting from Mr. Seery's actions have ensured that Plaintiffs are in the dark regarding the estate's assets and liabilities, as well as the estate's professional and incentive fees that are rapidly depleting the estate, there is a compelling need for the relief sought herein.

21. In bringing this Complaint, Plaintiffs are seeking transparency about the assets currently held in the Claimant Trust and their value—information that would ultimately benefit all creditors and parties-in-interest by moving forward the administration of the Bankruptcy Case.

JURISDICTION AND VENUE

22. This adversary proceeding arises under and relates to the above-captioned Chapter 11 bankruptcy case (the "Bankruptcy Case") pending before the United States Bankruptcy Court for the Northern District of Texas (the "Court").

23. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

24. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(A) and (O).

25. In the event that it is determined that the Court, absent consent of the parties, cannot enter final order or judgments over this matter, Plaintiffs do not consent to the entry of a final order by the Court.

THE PARTIES

26. Dugaboy is a trust formed under the laws of Delaware.

27. HMIT is a trust formed under the laws of Delaware.

28. HCM is a limited partnership formed under the laws of Delaware with a business address of 100 Crescent Court, Suite 1850, Dallas, Texas 75201.

29. The Claimant Trust is a statutory trust formed under the laws of Delaware with a business address of 100 Crescent Court, Suite 1850, Dallas, Texas 75201.

CASE BACKGROUND

30. On October 16, 2019 (the "Petition Date"), HCM, a 25-year Delaware limited partnership in good standing, filed for Chapter 11 restructuring in the United States Bankruptcy Court for the District of Delaware.

31. At the time of its chapter 11 filing, HCM had approximately $400 million in assets (ultimately monetized for much more as a result of market events, such as the sale of HCM's portfolio companies for substantial profits, as was always planned by Mr. Dondero) and had only insignificant debt owing to Jeffries, with whom it had a brokerage account, and one other entity, Frontier State Bank. [Dkt. No. 1943, ¶ 8]. HCM's reason for seeking bankruptcy protection was to restructure judgment debt stemming from an adverse arbitration award of approximately $190 million issued in favor of the Redeemer Committee of the Crusader Funds, which, after offsets and adjustments, would have been resolved for about $110 million. Indeed, the Redeemer Committee sold its claim for about $65 million, well below the expected $110 million,[4] and indeed, even below amounts for which Dondero offered to buy the claim.

[4] Reports that Redeemer Committee was paid $78 million note that in addition to the claim, the Committee sold other assets as well, which on information and belief, amounted to about $13 million.

32. At the urging of the newly-appointed Unsecured Creditors Committee (the "Committee"), and over the objection of HCM and its management, the Delaware Bankruptcy Court transferred the bankruptcy case to this Court on December 4, 2019. It seems likely that the creditors sought this transfer to take advantage of antipathy the Court had exhibited to HCM and its management in the ACIS bankruptcy.[5] Shortly after the transfer, and likewise influenced by the adverse characterizations of HCM management in the ACIS bankruptcy, the U.S. Trustee, notwithstanding the Debtor's apparent solvency, sought appointment of a chapter 11 trustee.

33. To avoid the appointment of a chapter 11 trustee and the potential liquidation of a potentially solvent estate, the Committee and the Debtor agreed that Strand Advisors, Inc., HCM's general partner, would appoint a three-member independent board (the "Independent Board") to manage HCM during its bankruptcy. The three board members were:

a. James P. Seery, Jr. – (who was selected by arbitration awardee and Committee member, the Redeemer Committee);
b. John Dubel – (who was selected by Committee member UBS); and
c. Former Judge Russell Nelms – (who was selected by the Debtor).

34. The Bankruptcy Court almost immediately and then repeatedly let the Debtor's professionals know that its feelings about Mr. Dondero and other equity holders had not changed – a disclosure that led inexorably to the many acts that now threaten to wipe out entirely the value of the equity. For example, at one of the earliest hearings, the Court rejected recommendations by

[5] For example, at a hearing in Delaware Bankruptcy Court on the Motion to Transfer Venue to this Court, Mr. Pomerantz, counsel for Debtor stated, "The debtor filed the case in this district because it wanted a judge to preside over this case that would look at what's going on with this debtor, with this debtor's management, this debtor's post-petition conduct, without the baggage of what happened in a previous case, which contrary to what Acis and the committee says, has very little do with this debtor." [December 2, 2019 Hearing Transcript at 79, Case No. 19012239 (CSS), Docket No. 181]. The taint of the ACIS case can be seen in that, without having read or even seen the supposedly offending complaint, during the ACIS case Judge Jernigan called Mr. Dondero not just vexatious, but "transparently vexatious," for allegedly having sued Moody's for failing to downgrade certain CLOs that ACIS had been manipulating in violation of its indentures and even though the Plaintiff in the supposedly offending case was not Mr. Dondero or any company he controlled [September 23, 2020 Hearing Transcript at 51-52, In re Acis Capital Management, L.P. and Acis Capital Management GP, LLC, Case No. 18-30264-SGJ-11, Docket No. 1186].

Judge Nelms, suggesting he was bamboozled because he was under management's spell. Specifically, Judge Jernigan admitted that normally "Bankruptcy Courts should defer heavily to the reasonable exercise of business judgment by a board… But I'm concerned that Dondero or certain in-house counsel has -- you know, they're smart, they're persuasive… they have exercised their powers of persuasion or whatever to make the Board and the professionals think that there is some valid prospect of benefit to Highland with these [actions], when it's really all about . . . Mr. Dondero." [February 19, 2020 Hearing Transcript at 177.]

35. At around the same time that the Court telegraphed animus towards Mr. Dondero, it also squelched oversight by responsible professionals who could and would have ensured transparency. When the Committee and the Debtor reported to the Court that they had agreed to use Judge Jones and Judge Isgur in Houston as mediators to potentially resolve the bankruptcy case, Judge Jernigan stated that she was "surprised that Judge Jones' or Judge Isgur's staff expressed that they had availability." Debtor's counsel then asked if he could independently follow up with staff for Judges Jones and Isgur regarding their availabilities, and Judge Jernigan said, "I'll take it from here." Six days later, Judge Jernigan simply said, "my continued thought on that [mediation by Judges Jones and Isgur] is that they just don't have meaningful time." [July 14, 2020 Hearing Transcript at 121.] In retrospect, this avoided scrutiny of the case by professionals who would recognize and potentially curtail the Court's unprecedented, immediately biased conduct of the case. This sent a powerful message to Mr. Seery and the other professionals who developed strategies to enrich themselves to the detriment of any possibility of a quick reorganization with equity regaining control.

36. Meanwhile, not realizing the turn the bankruptcy was about to take, Mr. Dondero had agreed to step down as CEO of the Debtor and to the appointment of an Independent Board only

because he was assured that new, independent management would expedite an exit from bankruptcy, preserve the Debtor's business as a going concern, and retain and compensate key employees whose work was critical to ensuring a successful reorganization.

37. None of that happened. Almost immediately, Mr. Seery emerged as the *de facto* leader of the Independent Board. On July 14, 2020, the Court retroactively appointed Mr. Seery Chief Executive Officer and Chief Restructuring Officer, vesting him with the fiduciary responsibilities of a registered advisor to investors and fiduciary responsibilities to the estate. [Dkt. No. 854]. And although Mr. Seery publicly represented that he intended to restructure and preserve HCM's business, privately he was engineering a much different plan.

38. Mr. Seery's public-facing statements stand in stark contrast to what actually happened under his direction and control. For example, Mr. Seery initially reported consistently positive reviews of the Debtor's employees, describing the Debtor's staff as a "lean" and "really good team." He also testified: "My experience with our employees has been excellent. The response when we want to get something done, when I want to get something done, has been first-rate. The skill level is extremely high."

39. Yet, despite these glowing reviews, Mr. Seery failed to put a key employee retention program into place, and although key employees supported Mr. Seery and the Debtor through the plan process, ultimately Mr. Seery fired most of those employees. It was clear that Mr. Seery was firing anyone with perceived loyalty to Mr. Dondero, no doubt leaving remaining staff fearful of challenging Mr. Seery, lest they too be fired.

40. From the start, and before there was much litigation to speak of, the Court regularly referred to Mr. Dondero and related parties as "vexatious litigants," emboldening the Debtor to do the same, even while admitting it had not presented evidence that Mr. Dondero was a vexatious

litigant. This was plainly a carryover from the ACIS case where the Court labelled Mr. Dondero a "transparently" vexatious litigant based on pleadings she had only heard about from parties opposing Dondero and admittedly had not read herself. Ironically, the first time Mr. Dondero was labeled "vexatious" by the Court in the HCM case, he was defending himself from three lawsuits initiated by the Debtor and had commented on proposed settlements in the case, but had not himself initiated any actions in the case. Thereafter, though, the Debtor and its professionals repeated the mantra that Dondero and his companies were vexatious litigants to successfully oppose sharing information about the estate with them.

41. In addition to the Debtor's mistreatment of employees, under the control of the Independent Board, most of the ordinary checks and balances that are the hallmark of bankruptcy were ignored. Despite providing regular and robust financial information to the Committee, the Debtor inexplicably failed and refused to file quarterly 2015.3 reports, leaving stakeholders, including Plaintiffs, in the dark about the value of the estate and the mix of assets it held, bought or sold. Amplifying the lack of transparency, Mr. Seery further engineered transactions that also served to hide the real value of the estate.

42. For example, he authorized the Debtor to settle the claims of HarbourVest (which claims had initially been valued at $0) for $80 million, in order to acquire HarbourVest's interest in Highland CLO Funding, Ltd. ("HCLOF"), gain HarbourVest's vote in favor of its Plan, and hide the value of Debtor's interest in HCLOF by placing it into a non-reporting subsidiary. This created another pocket of non-public information because the pleadings supporting the 9019 settlement valued the HCLOF interest at $22 million, when, on information and belief, it was worth $34.1 million at the time, about $40 million when the settlement was consummated, and over $55 million 90 days later when the MGM sale was announced.

43. At the same time, Mr. Seery and the Independent Board deliberately shut out equity holders from any discussion surrounding the plan of reorganization or HCM's efforts to emerge from bankruptcy as a going concern. Indeed, as noted above, Mr. Seery failed to meaningfully respond to the many proposals made by residual equity holders to resolve the estate and never encouraged any dialogue between creditors and equity holders. These failures only contributed to the difficulty of getting stakeholders' buy-in for a reorganization plan and significantly undermined an efficient exit from bankruptcy.

44. Worse still, while knowing that HCM had sufficient resources to emerge from bankruptcy as a going concern (and, on information and belief, while knowing that the estate was solvent), Mr. Seery and the Independent Board failed to propose any plan of reorganization that contemplated HCM's continued post-confirmation existence. Instead, and inexplicably, the very first plan proposed contemplated liquidation of the company, as did all subsequent plans.

45. While secretly engineering the total destruction of HCM, Mr. Seery also privately settled multiple proofs of claim against the estate at inflated levels that were unreasonable multiples of the Debtor's original estimates. He did this notwithstanding the Debtor's early and vehement objection to many of the claims as baseless. But instead of litigating those objections in a manner that would have exposed the true value of the claims, on information and belief, Mr. Seery settled the claims as a means of brokering sales of the claims at 50-60% of their face values. That is, the inflated values softened up claims sellers to induce them to sell. Had the Debtor instead fought the inflated proofs of claim in open court, it could have settled the claims for closer to true value and ensured that the estate had sufficient resources to pay them.

46. It is also no coincidence that virtually all original proofs of claim were sold to buyers that had prior business relationships with Mr. Seery and/or affiliates of Grosvenor (a

company with which Mr. Seery has a long personal history)—buyers that ultimately would be positioned to approve a favorable compensation and bonus structure for Mr. Seery.

47. That the claims sales happened at all is curious in light of the scant publicly-available information about the value of the estate. It would have been impossible, for example, for any of the claims buyers to conduct even modest due diligence to ascertain whether the purchases made economic sense. In fact, the publicly-available information purported to show a net decrease in the estate's asset value by approximately $200 million in a matter of months during the global pandemic. Dkt. 2949. Given the sophistication of the claims-buyers, their purchases of claims at prices that in some cases exceeded published expected recoveries (according to the schedules then available to the public) would only make sense if they obtained inside information regarding the transactions undertaken by Debtor management that would justify the transfer pricing.

48. And indeed, the claims could and would be monetized for much more than the publicly-available information suggested (as only one with inside information would know). In October 2022, $250 million was paid to Class 8 holders. That is about 85% of the inflated proofs of claim and $90 million more than plan projections. On information and belief, claims buyers have thus had an over 170% annualized return thus far, with more to come. On information and belief, Mr. Seery will use this "success" to justify an incentive bonus estimated in the range of $30 million or more, while engineering the estate to prevent equity holders from objecting or even knowing.

49. At the same time, the Claimant Trust has made no distributions to Contingent Claimant Trust Interest holders and has argued in various proceedings that no such distributions are likely. No wonder. The cost of holding open the estate, including unnecessary litigation costs,

appears to have exceeded $140 million post-confirmation, and seems geared to ensure that no such distributions can occur, even though it can now be projected that the litigation is not needed to pay creditors. *See* Docket No. 3410-1.

50. It is worth noting that it appears that virtually all of the claims trades brokered on behalf of Committee members seem to have occurred while those entities remained on the Committee. Yet at the outset of their service, Committee members were instructed by the United States Trustee that "Creditors wishing to serve as fiduciaries on any official committee are advised that they may *not* purchase, sell or otherwise trade in or transfer claims against the Debtor while they are committee members absent an order of the Court." Thus, the claims trades violated Committee members' fiduciary duty to the estate while lining the pockets of Mr. Seery and other Debtor professionals, to the detriment of creditors and residual equity holders.

51. The sales of claims were not the only transactions shrouded in secrecy. As further detailed in other litigation, assets were sold with insufficient disclosures, no competitive bidding, no data room, and without inviting equity (which may have at one time had the knowledge to make the highest bid) to participate in the sales process. Indeed, on occasion assets were sold for amounts less than Mr. Dondero's written offers. This exacerbated the harms caused by the lack of transparency characterized by the Court's indifference to the Debtor's complete failure to abide by its Rule 2015 disclosure obligations.

52. In short, the lack of transparency combined with at least the appearance of bias, if not actual bias of the Bankruptcy Court, emboldened and enabled an opportunistic CRO to manipulate the bankruptcy to enrich himself, his long-time business associates, and the professionals continuing to litigate to collect fees to pay claims that, but for that manipulation, could have been resolved with money left over for equity.

STATEMENT OF FACTS

A. Plaintiffs Hold Contingent Claimant Trust Interests

53. As of the Petition Date, HCM had three classes of limited partnership interests (Class A, Class B, and Class C). *See* Disclosure Statement [Docket No. 1473], ¶ F(4).

54. The Class A interests were held by Dugaboy, Mark Okada ("Okada"), personally and through family trusts, and Strand Advisors, Inc. ("Strand"), HCM's general partner. The Class B and C interests were held by HMIT. *Id.*

55. In the aggregate, HCM's limited partnership interests were held: (a) 99.5% by HMIT; (b) 0.1866% by Dugaboy, (c) 0.0627% by Okada, and (d) 0.25% by Strand.

56. On February 22, 2021, the Court entered the Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief [Docket No. 1943] (the "Confirmation Order") [Docket No. 1808] (the "Plan").

57. In the Plan, General Unsecured Claims are Class 8 and Subordinated Claims are Class 9. *See* Plan, Article III, ¶ H(8) and (9).

58. In the Plan, HCM classified HMIT's Class B Limited Partnership Interest and Class C Limited Partnership Interest (together, Class B/C Limited Partnership Interests) as Class 10, separately from that of the holders of Class A Limited Partnership Interests, which are Class 11 and include Dugaboy's Limited Partnership Interest. *See* Plan, Article III, ¶ H(10) and (11).

59. According to the Plan, Contingent Claimant Trust Interests distributed to the Holders of Class A Limited Partnership Interests are subordinate to the Contingent Claimant Trust Interests distributed to the Holders of Class B/C Limited Partnership Interests. *See* Plan, Article I, ¶44.

60. In the Confirmation Order, the Court found that the Plan properly separately classified those equity interests because they represent different types of equity security interests in HCM and

different payment priorities pursuant to that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, as amended (the "Limited Partnership Agreement"). Confirmation Order, ¶36; Limited Partnership Agreement, §3.9 (Liquidation Preference).

61. The Court overruled objections to the Plan lodged by entities it deemed related to Mr. Dondero, including Dugaboy. In doing so, the Court acknowledged that Dugaboy has a residual ownership interest in HCM and therefore "technically" had standing to object to the Plan. *See* Confirmation Order, ¶¶ 17-18.

62. Based on the Debtor's financial projections at the time of confirmation, however, the Court found that the plan objectors' "economic interests in the Debtor appear to be extremely remote." *Id.*, ¶ 19; *see also id.*, ¶ 17 ("the remoteness of their economic interests is noteworthy").

63. The Plan went Effective (as defined in the Plan) on August 11, 2021, and HCM became the Reorganized Debtor (as defined in the Plan) on the Effective Date. *See* Notice of Occurrence of the Effective Date of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. [Docket No. 2700].

64. The Plan created the Claimant Trust, which was established for the benefit of Claimant Trust Beneficiaries, which is defined to mean:

> the Holders of Allowed General Unsecured Claims, Holders of Allowed Subordinated Claims, including, upon Allowance, Disputed General Unsecured Claims and Disputed Subordinated Claims that become Allowed following the Effective Date, and, only upon certification by the Claimant Trustee that the Holders of such Claims have been paid indefeasibly in full plus, to the extent all Allowed unsecured Claims, excluding Subordinated Claims, have been paid in full post-petition interest from the Petition Date at the Federal Judgment Rate in accordance with the terms and conditions set forth in the Claimant Trust Agreement and all Disputed Claims in Class 8 and Class 9 have been resolved, Holders of Allowed Class B/C Limited Partnership Interests, and Holders of Allowed Class A Limited Partnership Interests

See Plan, Article I, ¶27; *see also* Claimant Trust Agreement, Article I, 1.1(h).

65. Plaintiffs hold Contingent Claimant Trust Interests, which will vest into Claimant Trust Interests upon indefeasible payment of Allowed Claims.

66. Depending on the realization of asset value less debts, Plaintiffs may become Claimant Trust Beneficiaries.

67. The Post Confirmation Quarterly Reports for the First Quarter of 2023 [Docket No. 3756 and 3757], show distributions of $270,205,592 to holders of general unsecured claims, which is 68% of the total allowed general unsecured claims of $397,485,568. This amount is far greater than was anticipated at the time of confirmation of the Plan. About $277 million has been distributed to creditors when secured, priority and administrative creditors are also considered.

B. Debtor Has Failed To Disclose Claimant Trust Assets

68. Upon information and belief, the value of the estate, as held in the Claimant Trust, has changed markedly since Plan confirmation. Not only have many of the assets held by the estate fluctuated in value based on market conditions, with some increasingly in value dramatically, but Plaintiffs are aware that many of the major assets of the estate have been liquidated or sold since Plan confirmation, locking in increased value to the estate.

69. The estate is solvent and has always been solvent. Nonetheless, Mr. Seery has remained committed to maximizing professional fees and incentive fees by increasing the total claims amount to justify litigation to satisfy those inflated claims.

70. As noted above, by June of 2022, starting with $125 million in cash, the estate liquidated other assets of over $416 million, building a cash war chest of over $541 million. Thus, with the remaining less-liquid assets, the total value of the estate's assets as of June 2022 was over $600 million, excluding related party notes.

71. Contrasting those assets with the claims against the estate demonstrates that further collection of assets was (and is) unnecessary.

72. As set forth above, while the inflated face amount of the claims sold was $365 million, the sale price was about $150 million. The estate therefore easily had the resources to retire the claims for the sale amounts, leaving an operating business in the hands of its equity owners.

73. Instead, Mr. Seery liquidated estate assets at less-than-optimal prices, without competitive process, without including residual equity holders, and in all cases required strict non-disclosure agreements from the buyers to prevent any information flowing to the public, the residual equity, or the Court. This uncharacteristic secrecy enabled Mr. Seery and the professionals to maintain the delicate balance of keeping just enough assets to pay professionals and incentive fees but still maintain the pretense that further litigation was needed.

74. Each effort by Plaintiffs, Mr. Dondero and related companies to obtain information to assess whether interference was necessary to stop the continued looting has been vigorously opposed, and ultimately rejected by an apparently biased Court. Plaintiffs were unable to cause the Debtor to provide the most basic of reports, including Rule 2015 statements, and Plaintiffs' efforts to obtain even the most basic details regarding asset sales and professional fees have all been denied. Rather, such details are in the hands of a select few, such as the Oversight Board of the Claimant Trust.

75. The Plan requires the Claimant Trustee to determine the fair market value of the Claimant Trust Assets as of the Effective Date and to notify the applicable Claimant Trust Beneficiaries of such a valuation, as well as distribute tax information to Claimant Trust Beneficiaries as appropriate. *See* Plan, ¶Art. IV(B)(9).

76. But no like information regarding valuation of the Claimant Trust Assets is available to Plaintiffs as holders of Contingent Claimant Trust Interests, even though Plaintiffs, as contingent beneficiaries of a Delaware statutory trust, are entitled to financial information relating to the trust.

C. Plaintiffs Are Kirschner Adversary Proceeding Defendants

77. On October 15, 2021, Marc S. Kirschner, as Litigation Trustee of the Litigation Sub-Trust, commenced the Kirschner Adversary Proceeding against twenty-three defendants, including Plaintiffs, alleging various causes of action. *See Marc S. Kirschner, as Litigation Trustee of the Litigation Sub-Trust vs. James Dondero*, *et al.*, Adv. Pro. No. 21-03076-sgj, Adv. Proc. No. 21-03076, Docket No. 1 (as amended by Docket No. 158).

78. The Litigation Sub-Trust was established within the Claimant Trust as a wholly owned subsidiary of the Claimant Trust for the purpose of investigating, prosecuting, settling, or otherwise resolving the Estate Claims, with any proceeds therefrom to be distributed by the Litigation Sub-Trust to the Claimant Trust for distribution to the Claimant Trust Beneficiaries. *See* Plan, Article IV, ¶ (B)(4).

79. Any recovery from the Kirschner Adversary Proceeding will be distributed to Claimant Trust Beneficiaries.

80. Depending on the realization of asset value less debts, Plaintiffs may become Claimant Trust Beneficiaries.

81. The Litigation Sub-Trust is pursuing claims against Plaintiffs in the Kirschner Adversary Proceeding, which, if they become Claimant Trust Beneficiaries, would be the recipients of distributions of such recovery (less the cost of litigation). Therefore, Plaintiffs require the requested information in order to properly analyze and evaluate the claims asserted against

them in the Kirschner Adversary Proceeding and to determine whether those claims have any validity.

FIRST CLAIM FOR RELIEF
(Disclosures of Claimant Trust Assets and Request for Accounting)

82. Plaintiffs repeat and re-allege the allegations in each of the foregoing paragraphs as though fully set forth herein.

83. Due to the lack of transparency into the assets of the Claimant Trust, Plaintiffs are unable to determine whether their Contingent Claimant Trust Interests may vest into Claimant Trust Interests.

84. Certain information about the Claimant Trust Assets has already been provided to others, including Claimant Trust Beneficiaries and the Oversight Board for the Claimant Trust.

85. Information about the Claimant Trust Assets would help Plaintiffs evaluate whether settlement of the Kirschner Adversary Proceeding and other proceedings is feasible, which would further the administration of the bankruptcy estate, benefitting all parties in interest.

86. This Court specifically retained jurisdiction to ensure that distributions to Holders of Allowed Equity Interests are accomplished pursuant to the provisions of the Plan. *See* Plan, Article XI.

87. The Plan provides that distributions to Allowed Equity Interests will be accomplished through the Claimant Trust and Contingent Claimant Trust Interests. *See* Plan Article III, (H)(10) and (11).

88. The 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.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment Regarding Value of Claimant Trust Assets)

89. Plaintiffs repeat and re-allege the allegations in each of the foregoing paragraphs as though fully set forth herein.

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.

91. If the value of the Claimant Trust assets exceeds the obligations of the estate, then several pending adversary proceedings aimed at recovering value for HCM's estate can be justly deemed unnecessary to pay creditors in full. As such, the pending adversary proceedings could be brought to a swift close, allowing creditors to be paid and the Bankruptcy Case to be brought to a close, ultimately stopping the bloodshed.

92. In addition, professionals associated with the estate—including but not limited to Mr. Seery, Pachulski, Development Specialists, Inc., Kurtzman Carson Consultants, Quinn Emanuel, Mr. Kirschner, and Hayward & Associates—are continuing to incur and receive millions of dollars a month in professional fees, thereby further eroding an estate that is either solvent or could be bridged by a settlement that would pay the spread between current assets and current allowed creditor claims. Fees for Pachulski range from $460 an hour for associates to $1,265 per hour for partners, and fees for Quinn Emanuel lawyers range from $830 an hour for first year associate to over $2100 per hour for senior partners. At these rates, depletion of the estate will occur rapidly.

THIRD CLAIM FOR RELIEF
(Declaratory Judgment and Determination Regarding Nature of Plaintiff's Interests)

93. Plaintiffs repeat and re-allege the allegations in each of the foregoing paragraphs as though fully set forth herein.

94. In the event that the Court determines that the Claimant Trust assets exceed the obligations of the bankruptcy estate in an amount sufficient so that all Allowable Claims may be indefeasibly paid, Plaintiffs seek a declaration and a determination that the conditions are such that their Contingent Claimant Trust Interests are likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries.[6]

95. Such a declaration and a determination by the Court would further assist parties in interest, such as Plaintiffs, to ascertain whether the estate is capable of paying all creditors in full and also paying some amount to residual interest holders, as contemplated by the Plan and the Claimant Trust Agreement.

WHEREFORE, Plaintiffs pray for judgment as follows:

(i) On the First Claim for Relief, Plaintiffs seek an order compelling Defendants to disclose the assets currently held in the Claimant Trust, transactions completed that affect the Claimant Trust directly or indirectly, and all liabilities of the Claimant Trust;; and

(ii) On the Second Claim for Relief, Plaintiffs seek a determination of the relative value of those assets in comparison to the claims of the Claimant Trust Beneficiaries; and

(iii) On the Third Claim for Relief, Plaintiffs seek a determination that the conditions are such that all current Claimant Trust Beneficiaries could be paid in full, with

[6] To be clear, Plaintiffs do not ask the Court to determine that they are Claimant Trust Beneficiaries or otherwise to convert their contingent interests into non-contingent interests. All of that must be done according to the terms of the Plan and the Claimant Trust Agreement.

such payment causing Plaintiffs' Contingent Claimant Trust Interests to vest into Claimant Trust Interests; and

(iv) Such other and further relief as this Court deems just and proper.

Dated: May 10, 2023

Respectfully submitted,

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EXHIBIT 3

The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 25, 2023

United States Bankruptcy Judge

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

IN RE:	§	
	§	**Chapter 11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	**Case No. 19-34054-sgj-11**
Reorganized Debtor.	§	

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[1]
[BANKR. DKT. NOS. 3699, 3760, 3815, and 3816]

I. INTRODUCTION

BEFORE THIS COURT is yet another post-confirmation dispute relating to the Chapter 11 bankruptcy case of Highland Capital Management, L.P. ("Highland" or "Reorganized Debtor").

[1] On August 2, 2023, this court signed an Order [Bankr. Dkt. No. 3897] that was agreed to among various parties, after the filing of a Motion to Stay and Compel Mediation [Bankr. Dkt. No. 3752] filed by James D. Dondero and related entities. Pursuant to paragraph 7 of that order, certain pending matters in the bankruptcy court are stayed pending mediation. The parties did not agree to stay the matter addressed in this Memorandum Opinion and Order.

It is now more than two and half years since the confirmation of Highland's Plan[2]—the Plan having been confirmed on February 22, 2021.[3] The Plan was never stayed; it went effective on August 11, 2021 ("Effective Date"), and it was affirmed almost in its entirety by the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), in late summer 2022, including an approval of the so-called Gatekeeper Provision[4] therein. The Gatekeeper Provision—and how and whether it should now be exercised or interpreted to allow a certain lawsuit to be filed—is at the heart of the current *Emergency Motion for Leave to File Verified Adversary Proceeding* [Bankr. Dkt. Nos. 3699, 3760, 3815, 3816] (collectively, the "Motion for Leave") filed by a movant known as Hunter Mountain Investment Trust ("HMIT").

A. Who is the Movant, HMIT?

Who is HMIT? It is undisputed that it is a former equity owner of Highland. It held 99.5% of Highland's Class B/C limited partnership interests and was classified in a Class 10 under the confirmed Plan, which class treatment provided it with a contingent interest in the Highland Claimant Trust ("Claimant Trust") created under the Plan, and as defined in the Claimant Trust Agreement. This means that HMIT could receive consideration under the Plan if all claims against Highland are ultimately paid in full, with interest. As later further discussed, it is undisputed that

[2] Capitalized terms not defined in this introduction shall have the meaning ascribed to them below.

[3] The court entered its *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief* ("Confirmation Order")[Bankr. Dkt. No. 1943].

[4] In an initial opinion dated August 19, 2022, the Fifth Circuit affirmed the Confirmation Order in large part, "revers[ing] only insofar as the plan exculpates certain non-debtors in violation of 11 U.S.C. § 524(e), strik[ing] those few parties from the plan's exculpation, and affirm[ing] on all remaining grounds." *In re Highland Capital Management, L.P.*, No. 21-10449, 2022 WL 3571094, at *1 (5th Cir. Aug. 19, 2022). On September 7, 2022, following a petition for limited panel rehearing filed by certain appellants on September 2, 2022, "for the limited purpose of clarifying and confirming one part of its August 19, 2022 opinion," the Fifth Circuit withdrew its original opinion and replaced it with its opinion reported at *NexPoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419, 424 (5th Cir. 2022). The substituted opinion differed from the original opinion only by the replacement of one sentence from section "IV(E)(2) – *Injunction and Gatekeeper Provisions*" of the original opinion: "The injunction and gatekeeper provisions are, on the other hand, perfectly lawful." was replaced with "We now turn to the Plan's injunction and gatekeeper provisions." In all other respects, the Fifth Circuit panel's original ruling remained unchanged. Petitions for writs of certiorari regarding the Confirmation Order have been pending at the United States Supreme Court since January 2023.

HMIT's only asset is its contingent interest in the Claimant Trust. It has no employees or revenue. HMIT's representative has testified that HMIT is liable on more than $62 million of indebtedness owed to The Dugaboy Investment Trust ("Dugaboy"), a family trust of which James Dondero ("Dondero"), the co-founder and former chief executive officer ("CEO") of Highland, and his family members are beneficiaries, and that Dugaboy also is paying HMIT's legal fees. HMIT vehemently disputes the suggestion that it is controlled by Dondero.

B. What Does the Movant HMIT Seek Leave to File?

HMIT seeks leave to file an adversary proceeding ("Proposed Complaint")[5] in the bankruptcy court to bring claims on behalf of itself and, derivatively, on behalf of the Reorganized Debtor and the Claimant Trust for alleged breach of fiduciary duties by the Reorganized Debtor's CEO and Claimant Trustee, James P. Seery, Jr. ("Seery") and conspiracy against: (1) Seery; and (2) purchasers of $365 million face amount of ***allowed*** unsecured claims in this case, who purchased their claims post-confirmation but prior to the occurrence of the Effective Date of the Plan ("Claims Purchasers,"[6] and with Seery, the "Proposed Defendants"). To be clear (and as later further explained), the claims acquired by the Claims Purchasers were acquired by them after extensive litigation, mediation, and settlements were approved by the bankruptcy court and after the original claims-holders had voted on the Plan and after Plan confirmation. As later explained,

[5] In its original Motion for Leave filed at Bankruptcy Docket No. 3699 on March 28, 2023, HMIT sought leave to file the proposed complaint ("Initial Proposed Complaint") attached as Exhibit 1 to the Motion for Leave. Nearly a month later, on April 23, 2023, HMIT filed a *Supplement to Emergency Motion for Leave to File Verified Adversary Proceeding* ("Supplement") [Bankr. Dkt. No. 3760], a revised proposed complaint as Exhibit 1-A, and stating that "[t]he Supplement is not intended to supersede the [Motion for Leave]; rather, it is intended as a supplement to address procedural matters and to bring forth additional facts that further confirm the appropriateness of the derivative action." Supplement, ¶ 1 and Exhibit 1-A. It is this revised proposed complaint to which this court will refer, when it uses the defined term "Proposed Complaint," even though HMIT filed redacted versions of its Motion for Leave on June 5, 2023 at Bankruptcy Docket Nos. 3815 and 3816 that attached the Initial Proposed Complaint as Exhibit 1.

[6] The Claims Purchasers identified in the Proposed Complaint are Farallon Capital Management, LLC ("Farallon"); Muck Holdings, LLC ("Muck"), which is a special purpose entity created by Farallon to purchase allowed unsecured claims against Highland; Stonehill Capital Management, LLC ("Stonehill"); and Jessup Holdings, LLC ("Jessup"), which is a special purpose entity created by Stonehill to purchase allowed unsecured claims against Highland.

the Claims Purchasers filed notices of their purchases as required by Bankruptcy Rule 3001(e)(2), and no objections were filed thereto. In any event, various damages or remedies are sought against the Proposed Defendants revolving around the Claims Purchasers' claims purchasing activities.

C. Why Does HMIT Need to Seek Leave?

As alluded to above, HMIT filed its Motion for Leave to comply with the provision in the Plan known as a "gatekeeper" provision ("Gatekeeper Provision") and with this court's prior gatekeeper orders entered in January and July 2020, which all require that, before a party may commence or pursue claims relating to the bankruptcy case against certain protected parties, it must first obtain (1) a finding from the bankruptcy court that its proposed claims ("Proposed Claims") are "colorable"; and (2) specific authorization by the bankruptcy court to pursue the Proposed Claims.[7] The Gatekeeper Provision was not included in the Plan *sans raison*. Indeed, as the Fifth Circuit recognized in affirming confirmation of the Plan, the Gatekeeper Provision (along with the other "protection provisions" in the Plan) had been included in the Plan to address the "continued litigiousness" of Mr. James Dondero ("Dondero"), Highland's co-founder and former chief executive officer ("CEO"), that began prepetition and escalated following the post-petition "nasty breakup" between Highland and Dondero, by "screen[ing] and prevent[ing] bad-faith litigation against Highland Capital, its successors, and other bankruptcy participants that could disrupt the Plan's effectiveness."[8]

[7] To be clear, the Gatekeeper Provision in the Plan was not the first or even second injunction of its type issued in this bankruptcy case. The Gatekeeper Orders were entered by the bankruptcy court pre-confirmation: (a) in January 2020, just a few months into the case, as part of this court's order approving a corporate governance settlement between Highland and its unsecured creditors committee, in which Dondero, Highland's co-founder and former CEO, was removed from any management role at Highland and three independent directors ("Independent Directors") were appointed in lieu of a chapter 11 trustee being appointed ("January 2020 Order"); and (b) in July 2020, in this court's order authorizing the employment of Seery (one of the three Independent Directors) as the Debtor's new Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative ("July 2020 Order," together with the January 2020 Order, the "Gatekeeper Orders").

[8] *See Highland Capital*, 48 F.4th at 427, 435.

D. Some Further Context Regarding Post-Confirmation Litigation Generally.

Since confirmation of the Plan, hundreds of millions of dollars have been paid out to creditors under the Plan, and there are numerous adversary proceedings and contested matters still pending, at various stages of litigation, in the bankruptcy court, the district court, and the Fifth Circuit, almost exclusively involving Dondero and entities that he owns or controls. To be sure, the post-confirmation litigation in this case does not consist of the usual adversaries and contested matters one typically sees by and against a reorganized debtor and/or litigation trustee, such as preference or other avoidance actions and litigation over objections to claims that are still pending after confirmation of a plan. Indeed, the claims of the largest creditors in this case (with claims asserted in the aggregate of more than one billion dollars) were successfully mediated and incorporated into the Plan—a plan which was ultimately accepted by the votes of an overwhelming majority of Highland's non-insider creditors. Dondero and entities under his control were the only parties who appealed the Confirmation Order, and Dondero and entities under his control have been the appellants in virtually every appeal that has been filed regarding this bankruptcy case. Petitions for writs of mandamus (which have been denied) have been filed in the district court and in the Fifth Circuit by some of these same entities, including one by HMIT, when this court denied setting an ***emergency*** hearing on the instant Motion for Leave (HMIT had sought a setting on three-days' notice).

A recent list of active matters involving Dondero and/or entities and/or individuals affiliated or associated with him, filed in the bankruptcy case by Highland and the Claimant Trust, reveals that there were at least 30 pending and "Active Dondero-Related Litigation" matters as of July 14, 2023: six (6) proceedings in this court; six (6) active appeals or actions are pending in the District Court for the Northern District of Texas; seven (7) appeals in the Fifth Circuit; two (2)

petitions for writs of certiorari in the United States Supreme Court; and nine (9) other proceedings or actions with or affecting the Highland Parties ("Highland," the "Claimant Trust," and "Seery") in various other state, federal, and foreign jurisdictions.[9]

The above-described context is included because the Proposed Defendants assert that the Motion for Leave is just a continuation of Dondero's unrelenting barrage of meritless and harassing litigation, making good on his oft-mentioned alleged threat to "burn down the place" after not achieving the results he wanted in the Highland bankruptcy case. Indeed, the Motion for Leave was filed after two years of unsuccessful attempts by, first, Dondero personally, and then HMIT to obtain pre-suit discovery from the Proposed Defendants (i.e., the Claims Purchasers) through two different Texas state court proceedings, pursuant to Tex. R. Civ. P. 202 ("Rule 202"). In each of these Rule 202 proceedings, Dondero and HMIT espoused the same Seery/Claims

[9] *See* Bankr. Dkt. No. 3880 (filed on July 14, 2023, providing a list of "Active Dondero-Related Litigation" and noting that the list is "a summary of active pending actions only and does not include actions that were resolved by final orders, including actions finally resolved after appeals to the U.S. District Court for the Northern District of Texas and/or the U.S. Court of Appeals for the Fifth Circuit."). Just since the filing by the Highland Parties of the list, ***three*** of the appeals pending in the Fifth Circuit have been decided against the Dondero-related appellants, two of which upheld the district court's dismissal of appeals by Dondero-related entities of bankruptcy court orders based on the lack of bankruptcy appellate standing on behalf of the appellant. On July 19, 2023, the Fifth Circuit affirmed the district court's dismissal of an appeal by NexPoint Advisors, L.P. ("NexPoint") of bankruptcy court orders approving professional compensation on the basis that NexPoint did not meet the bankruptcy appellate standing test of being a "person aggrieved" by the entry of the orders. *NexPoint Advisors, L.P. v. Pachulski Stang Ziehl & Jones, L.L.P. (In re Highland Capital Management, L.P.)*, 74 F.4th 361 (5th Cir. 2023). On July 31, 2023, the Fifth Circuit affirmed the district court's dismissal of an appeal by Dugaboy—the Dondero family trust that, like the movant here in this Motion for Leave, was the holder of a limited partnership interest in Highland, and, as such, now has a contingent interest in the Claimant Trust—which had appealed a bankruptcy court order approving a Rule 9019 settlement on the same basis: Dugaboy did not meet the bankruptcy appellate standing test of being a "person aggrieved" by the entry of the settlement order. *The Dugaboy Inv. Tr. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, No. 22-10960, 2023 WL 4861770 (5th Cir. July 31, 2023). The July 31, 2023 ruling followed the Fifth Circuit's ruling on February 21, 2023, affirming the district court's dismissal of an appeal by Dugaboy of yet another bankruptcy court order for lack of bankruptcy appellate standing. *The Dugaboy Inv. Tr. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, No. 22-10831, 2023 WL 2263022 (5th Cir. Feb. 28, 2023). These rulings by the Fifth Circuit are discussed in greater detail below. The third ruling by the Fifth Circuit since July 14, 2023, was issued by the Fifth Circuit in a per curium opinion not designated for publication on July 26, 2023, this one affirming the district court's affirmance of yet another Rule 9019 settlement order of the bankruptcy court that was appealed by Dugaboy, agreeing with the district court that the bankruptcy court had jurisdiction to approve a settlement among the Debtor, an entity affiliated with the Debtor but not a debtor itself, and UBS (the Debtor's largest prepetition creditor and the seller of its claims to the Claims Purchasers, which is one of the claims trading transactions HMIT complains about in the Proposed Complaint). *See The Dugaboy Inv. Tr. v. Highland Capital Mgt., L.P.*, No. 22-10983, 2023 WL 4842320 (5th Cir. July 26, 2023).

Purchasers conspiracy theory espoused in the Motion for Leave—that Seery must have provided one or more of the Claims Purchasers with material nonpublic information to induce them to want to purchase large, allowed, unsecured claims at a discount; a *quid pro quo* is suggested, such that the Claims Purchasers were allegedly told they would make a hefty profit on the claims they purchased and, in return, they would gladly "rubber stamp" Seery's "excessive compensation" as the Claimant Trustee of the Claimant Trust. In sum, HMIT alleges this constituted wrongful "insider trading" of the bankruptcy claims. In addition, certain lawyers for Dondero and Dugaboy sent letters reporting this alleged conspiracy and "insider trading" to the Texas State Securities Board ("TSSB") and the Executive Office of the United States Trustee ("EOUST").

It is against this background and in this context that the court must analyze, in the exercise of its gatekeeping function under the confirmed Plan and its prior Gatekeeping Orders, whether HMIT should be allowed to pursue the Proposed Claims (i.e., whether the Proposed Claims are "colorable" claims as contemplated under the Gatekeeper Orders and the Gatekeeper Provision of the Plan). The court held an evidentiary hearing on the Motion for Leave on June 8, 2023 ("June 8 Hearing"), during which the court admitted exhibits and heard testimony from three witnesses both in support of and in opposition to the Motion for Leave. Having considered the Motion for Leave, the response of the Proposed Defendants thereto, HMIT's reply to the response, and the arguments and evidence presented at the hearing on the Motion for Leave, the court denies HMIT's request for leave to pursue its Proposed Claims. The court's reasoning is set forth below.

II. BACKGROUND

A. Highland's Bankruptcy Case, Dondero's Removal as CEO, and the Plan

Highland was co-founded in Dallas in 1993 by Dondero and Mark Okada ("Okada"). It operated as a global investment adviser that provided investment management and advisory services and managed billions of dollars of assets, both directly and indirectly through numerous

affiliates. Highland's equity interest holders included HMIT (99.5%), Dugaboy (0.1866%), Okada, personally and through trusts (0.0627%), and Strand Advisors, Inc. ("Strand"), which was wholly owned by Dondero and was the only general partner of Highland (0.25%). On October 16, 2019 (the "Petition Date"), Highland, with Dondero in control[10] and acting as its CEO, president, and portfolio manager, and facing a myriad of massive, business litigation claims – many of which had finally become or were about to be liquidated (after a decade or more of contentious litigation in multiple fora all over the world—filed for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. The bankruptcy case was transferred to the Northern District of Texas, Dallas Division in December 2019. The official committee of unsecured creditors (the "Committee") (and later, the United States Trustee) expressed a desire for the appointment of a chapter 11 trustee due to concerns over and distrust of Dondero, his numerous conflicts of interest, and his history of alleged mismanagement (and perhaps worse).

After many weeks under the specter of a possible appointment of a trustee, Highland and the Committee engaged in substantial and lengthy negotiations, resulting in a corporate governance settlement approved by this court on January 9, 2020.[11] As a result of this settlement, Dondero relinquished control of Highland and resigned his positions as officer or director of Highland and its general partner, Strand,[12] and three independent directors ("Independent Directors") were

[10] Mark Okada resigned from his role with Highland prior to the Petition Date.

[11] This order is hereinafter referred to as the "January 2020 Order" and was entered by the court on January 9, 2020 [Bankr. Dkt. No. 339] pursuant to the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding the Governance of the Debtor and Procedures for Operation in the Ordinary Course* [Bankr. Dkt. No. 281].

[12] Dondero agreed to this settlement pursuant to a stipulation he executed and that was filed in connection with Highland's motion to approve the settlement. *See Stipulation in Support of Motion of the Debtor for Approval of Settlement With the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in Ordinary Course* [Bankr. Dkt. No. 338].

chosen to lead Highland through its chapter 11 case: Seery, John S. Dubel, and retired bankruptcy judge Russell Nelms. Given the Debtor's perceived culture of constant litigation while Dondero was at the helm, it was purportedly not easy to get such highly qualified persons to serve as independent board members. At the hearing on the corporate governance settlement motion, the court heard credible testimony that none of the Independent Directors would have taken on the role without (1) an adequate directors and officers' ("D&O") insurance policy protecting them; (2) indemnification from Strand that would be guaranteed by the Debtor; (3) exculpation from mere negligence claims; and (4) a gatekeeper provision prohibiting the commencement of litigation against the Independent Directors without the bankruptcy court's prior authority. The gatekeeper provision approved by the court in its January 9 Order states,[13]

> No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director's agents, or any Independent Director's advisors relating in any way to the Independent Director's role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director's agents, or any Independent Director's advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

Dondero agreed to remain with Highland as an unpaid portfolio manager following his resignation and did so "subject at all times to the supervision, direction and authority of the Independent Directors" and to his agreement to "resign immediately" "[i]n the event the Independent Directors determine for any reason that the Debtor shall no longer retain Dondero as an employee"[14] and to "not cause any Related Entity to terminate any agreements with the Debtor."[15] The court later

[13] January 2020 Order, 3-4, ¶ 10.

[14] January 2020 Order, 3, ¶ 8.

[15] *Id.* at ¶ 9.

entered, on July 16, 2020, an order approving the appointment of Seery as Highland's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative,[16] which included essentially the same "gatekeeper" language with respect to the pursuit of claims against Seery acting in these roles. The gatekeeper provision in the July 2020 Order was essentially the same as the gatekeeper provision in the January 2020 Order:

> No entity may commence or pursue a claim or cause of action of any kind against Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

July 2020 Order, 3, ¶5. Neither the January 2020 Order nor the July 2020 Order were appealed.

Throughout the summer of 2020, Dondero informally proposed several reorganization plans, none of which were embraced by the Committee or the Independent Directors. When Dondero's plans failed to gain support, he and entities under his control engaged in substantial, costly, and time-consuming litigation for Highland.[17] As the Fifth Circuit described the situation, after Dondero's plans failed "he and other creditors began to frustrate the proceedings by objecting to settlements, appealing orders, seeking writs of mandamus, interfering with Highland Capital's management, threatening employees, and canceling trades between Highland Capital and its clients."[18] On October 9, 2020, Dondero resigned from all positions with the Debtor and its

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[16] *See* the July 16, 2020 order approving the retention by Highland of Seery as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative, *nunc pro tunc*, to March 15, 2020 ("July 2020 Order") [Bankr. Dkt. No. 854].

[17] According to Seery's credible testimony during the hearing on confirmation of the Plan that had been negotiated between the Committee and the Independent Directors, Dondero had threatened to "burn the place down" if his proposed plan was not accepted. *See* Transcript of Confirmation Hearing dated February 3, 2021 at 105:10-20. Bankr. Dkt. No. #1894.

[18] *Highland Capital*, 48 F.4th at 426 (citing *Highland Cap. Mgmt., L.P. v. Dondero (In re Highland Capital Mgmt., L.P.)*, Ch. 11 Case No. 19-34054-SGJ11, Adv. No. 20-03190-SGJ11, 2021 WL 2326350, at *1, *26 (Bankr. N.D. Tex.

affiliates in response to a demand by the Independent Directors made after Dondero's purported threats and disruptions to the Debtor's operations.[19]

The Independent Directors and the Committee had negotiated their own plan of reorganization which culminated in the filing by Highland of its *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the "Plan") [Bankr. Dkt. No. 1808] on January 22, 2021.[20] Highland had negotiated settlements with most of its major creditors following mediation and had amended its initially proposed plan to address the objections of most of its creditors, leaving only the objections of Dondero and entities under his control (the "Dondero Parties") at the time of the confirmation hearing,[21] which was held over two days in early February 2021. The Plan is essentially an "asset monetization" plan pursuant to which the Committee was dissolved, and four new entities were created: the Reorganized Debtor; a new general partner for the Reorganized Debtor called HCMLP GP, LLC; the Claimant Trust (administered by Seery, its trustee); and a Litigation Sub-Trust (administered by its trustee, Marc Kirschner). Highland's various servicing agreements were vested in the Reorganized Debtor, which continues to manage collateralized loan obligation vehicles ("CLOs") and various other investments postconfirmation. The Claimant Trust owns the limited partnership interests in the Reorganized Debtor, HCMLP GP LLC, and the Litigation Sub-Trust and is charged with winding down the Reorganized Debtor over a three-year period by monetizing its assets and making

June 7, 2021) where this court "h[eld] Dondero in civil contempt, sanctioning him $100,000, and comparing this case to a 'nasty divorce.'").

[19] *See* Highland Ex. 13. The court shall refer to exhibits offered and admitted at the June 8 Hearing on the Motion for Leave by the Highland Parties as "Highland Ex. ___" and to exhibits offered and admitted by HMIT as "HMIT Ex. ___."

[20] The *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* was filed on November 24, 2020 ("Disclosure Statement") [Bankr. Dkt. No. 1473].

[21] The only other objection remaining was the objection of the United States Trustee to the Plan's exculpation, injunction, and release provisions.

distributions to Class 8 and Class 9 creditors as Claimant Trust Beneficiaries. The Claimant Trust is overseen by a Claimant Trust Oversight Board ("CTOB"), and pursuant to the terms of the Plan and the Claimant Trust Agreement ("CTA"),[22] the CTOB approved Seery's compensation package as the CEO of the Reorganized Debtor and the Claimant Trustee. Following their acquisition of their unsecured claims, representatives of Claims Purchasers Muck and Jessup became members of the CTOB.[23] Seery's compensation included the same base salary that he was receiving as CEO and CRO of Highland, plus an added incentive bonus tiered to recoveries and distributions to the creditors under the Plan. The Plan provides for the cancellation of the limited partnership interests in Highland held by HMIT, Dugaboy, and Okada and his family trusts in exchange for each holder's pro rata share of a contingent interest in the Claimant Trust ("Contingent Claimant Trust Interest"), as holders of allowed interests in Class 10 (holders of Class B/C limited partnership interests) or Class 11 (holders of Class A limited partnership interests) under the Plan.

B. Dondero Communicates Alleged Material Non-Public Information ("MNPI") to Seery, and Seery Allegedly Provides the MNPI to the Claims Purchasers in Furtherance of an Alleged Fraudulent Scheme to Have the Claims Purchasers "Rubber Stamp" His Compensation as Claimant Trustee Post-Confirmation

1. The December 17, 2020 MGM Email

Between Dondero's forced resignation from Highland in October 2020 and the confirmation hearing in February 2021, Dondero engaged in what appeared to be attempts to thwart, impede, and otherwise interfere with the Plan being proposed by the Independent Directors and the Committee. In the midst of this, on December 17, 2020, Dondero sent Seery[24] an email

[22] Highland Ex. 38

[23] The CTOB had three members: a representative of Muck (Michael Linn), a representative of Jessup (Christopher Provost), and an independent member (Richard Katz). *See* Joint Opposition ¶ 79.

[24] Dondero sent the email to others as well but did not copy counsel for the Independent Directors (including Seery) in violation of the terms of an existing temporary restraining order that enjoined Dondero from, among other things, "communicating . . . with any Board member" (including Seery) without including Debtor's counsel. Morris Dec. Ex. 23 ¶ 2(a). Citations to "Morris Dec. Ex. _" are to the exhibits attached to the *Declaration of John A. Morris in Support*

(the "MGM Email") that featured prominently in HMIT's Motion for Leave. According to HMIT and Dondero, the MGM Email contained material nonpublic information ("MNPI") regarding the possibility of an imminent acquisition of Metro-Goldwyn-Mayer Studios, Inc. ("MGM"), likely by either Amazon or Apple.[25] At the time Dondero sent the MGM Email, Dondero sat on the board of directors of MGM, and the Debtor owned MGM stock directly. The Debtor also managed and partially owned a couple of other entities that owned MGM stock and managed various CLOs that owned some MGM stock as well. HMIT alleges now that Seery later misused and wrongfully disclosed to the Claims Purchasers this purported MNPI as part of a *quid pro quo* scheme, whereby the Claims Purchasers agreed to approve excessive compensation for Seery in the future (in exchange for him providing this allegedly "insider" information that inspired them to purchase unsecured claims with an alleged expectation of future large profits).[26] A timeline of events (in late 2020) in the weeks leading up to Dondero's MGM Email to Seery, following Dondero's departure from Highland, helps to put the email in full context:

- October 16: Dondero and his affiliates attempt to impede the Debtor's trading activities by demanding—with no legal basis—that Seery cease selling certain assets;[27]

- November 24: Bankruptcy Court enters an Order approving the Debtor's Disclosure Statement, scheduling the confirmation hearing on the Debtor's Plan for January 13, 2021, and granting related relief;[28]

- November 24–27: Dondero personally interferes with the Debtor's

of Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Joint Opposition to Hunter Mountain Investment Trust's Motion for Leave to File Verified Adversary Proceeding, Bankr. Dkt. No. 3784.

[25] *See* Proposed Complaint ¶ 45.

[26] *See id.* ¶ 3 ("Thus, acting within a cloak of secrecy, Seery provided close business acquaintances, the [Claims Purchasers], with material non-public information concerning the value of assets which they then used to purchase the largest approved unsecured claims."); ¶ 4 ("As part of the scheme, the [Claims Purchasers] obtained a position to approve Seery's ongoing compensation – to Seery's benefit and also to the detriment of the Claimant Trust, the Reorganized Debtor, and HMIT.").

[27] *See* Highland Ex. 14, Dondero-Related Entities' October 16, 2020 Letter; Highland Ex. 15, *Memorandum Opinion and Order Holding Dondero in Contempt for Violation of TRO*, 13-15.

[28] *See* Bankr. Dkt. No. 1476.

implementation of certain securities trades ordered by Seery;[29]

- November 30: The Debtor provides written notice of termination of certain shared services agreements it had with Dondero's two non-debtor affiliates, NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA"; together with NexPoint, the "Advisors");[30]

- December 3: The Debtor makes written demands to Dondero and certain affiliates for payment of all amounts due under certain promissory notes they owed to the Debtor, that had an aggregate face amount of more than $60 million—this was part of creating liquidity for the Debtor's Plan;[31]

- December 3: Dondero responds with what appeared to be a threat of some sort to Seery in a text message: "***Be careful what you do -- last warning***;"[32]

- December 10: Dondero's interference and apparent threat cause the Debtor to seek and obtain a temporary restraining order ("TRO") against Dondero;[33]

- December 16: This court denies as "frivolous" a motion filed by certain affiliates of Dondero, in which they sought "temporary restrictions" on certain asset sales;[34] and

- December 17: Dondero sends the unsolicited MGM Email[35] to Seery, which violates the TRO entered just a week earlier.[36]

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[29] *See* Highland Ex. 15, 30-36.

[30] Morris Decl. Ex. 17; *see also* Transcript of June 8, 2023 Hearing on HMIT's Motion for Leave ("June 8 Hearing Transcript"), 273:23-24.

[31] Morris Decl. Exs. 18-21; *see also* June 8 Hearing Transcript, 273:23-274:1.

[32] Morris Decl. Ex. 22 (emphasis added); *see also* June 8 Hearing Transcript, 273:1-12 (where Seery testified about receiving the threat from Dondero: "A: [T]his came after he threatened me. He threatened me in writing. I'd never been threatened in my career. I've never heard of anyone else in this business who's been threatened in their career. So anything I would get from him, I was going to be highly suspicious.").

[33] *See* Morris Decl. Ex. 23, *Order Granting Debtor's Motion for a Temporary Restraining Order Against James Dondero* entered December 10, 2020 [Adv. Pro. No. 20-3190 Dkt. No. 10].

[34] *See* Morris Decl. Ex. 24, Transcript of December 16, 2020 Hearing, 63:5-64:15.

[35] Highland Ex. 11.

[36] Seery testified at the June 8 Hearing that Dondero knowingly violated the TRO when he sent the MGM Email:

> [The MGM Email] . . . followed the imposition of a TRO for interfering with the business. He knew what was in the TRO and he knew what it applied to, and it restricted him from communicating with me or any of the other independent directors without Pachulski [Debtor's counsel] being on it. Furthermore, Pachulski had advised Dondero's counsel that not only could they not communicate with us, if they wanted to communicate they had to prescreen the topics. And how do we know that? Because Dondero filed a motion to modify the TRO. And that was all before this email.

June 8 Hearing Transcript, 273:13-22.

The MGM Email had the subject line "Trading Restriction re MGM – material non public information" and stated:

> Just got off a pre board call, board call at 3:00. Update is as follows: Amazon and Apple actively diligencing in Data Room. Both continue to express material interest. Probably first quarter event, will update as facts change. Note also any sales are subject to a shareholder agreement.[37]

Seery credibly testified at the June 8 Hearing that he was "highly suspicious" when he received the MGM Email. This was because, among other reasons, Dondero sent it ***after***: (i) unsuccessful efforts to impede the Debtor's trading activities (followed by the TRO); (ii) the "be careful what you do" text to Seery by Dondero: (iii) Highland's termination of its shared service arrangements with Dondero's various affiliated entities; (iv) the bankruptcy court's approval of the disclosure statement; and (v) Highland's demand to collect on the demand notes for which Dondero and his entities were liable.[38] Highland's Chapter 11 case was fast approaching the finish line. Moreover, MGM was already on the restricted list at Highland Capital, and had been for a long time, and Dondero would know this.[39] Still further, as of December 17, 2020 (the date Dondero sent the unsolicited MGM Email to Seery), Dondero no longer owed a duty of any kind to the Debtor or any entity controlled by the Debtor, having surrendered in January 2020 direct and indirect control of the Debtor to the Independent Board as part of the corporate governance settlement[40] and having resigned from all roles at the Debtor and affiliates in October 2020. Still further, Dondero—to the extent he was sharing with Seery MNPI that he obtained as a member of the board of directors of MGM—would have been violating his own fiduciary duties to MGM.

[37] Highland Ex. 11.

[38] June 8 Hearing Transcript, 273:1-274:4.

[39] June 8 Hearing, 215:21-216:9.

[40] *See* Bankr. Dkt. Nos. 339, 354-1 (Term Sheet)).

In any event, in a declaration filed by Dondero in support of HMIT's Rule 202 petition in Texas state court for pre-suit discovery,[41] he indicated that his goal in sending the MGM E-mail was to impede the Debtor and Seery from engaging in any transactions involving MGM:

> On December 17, 2020, I sent an email to employees at HCM, including the then Chief Executive Officer and Chief Restructuring Officer Jim Seery, containing non-public information regarding Amazon and Apple's interest in acquiring MGM. I became aware of this information due to my involvement as a member of the board of MGM. ***My purpose was to alert Seery and others that MGM stock, which was owned either directly or indirectly by HCM, should be on a restricted list and not be involved in any trades***.

It is noteworthy that ***Dondero's labeling of the MGM Email (in the subject line) as a communication containing "material non public information" did not make it so***. In fact, it appears from the credible evidence presented at the June 8, 2023 hearing on HMIT's Motion for Leave that the MGM Email did not disclose information to Seery that was not already made available to the public at the time it was sent. Seery testified that he did not think the MGM Email contained MNPI and that he did not personally "take any steps . . . to make sure that MGM stock was placed on a restricted list at Highland Capital after [he] received [the MGM Email]" because—as earlier noted—"MGM was already on the restricted list at Highland Capital . . . before I got to Highland."[42] Indeed, MGM was ultimately purchased by Amazon after a sale process that had been quite publicly discussed in media reports for several months[43] and that was officially

[41] Highland Ex. 9 ¶ 3 (emphasis added).

[42] June 8 Hearing Transcript, 215:21-216:9. Seery elaborated upon further questioning from HMIT's counsel that he did not think the indications in the MGM Email (that came from a member of the board of directors of MGM) that "it was probably a first-quarter event" and that "Amazon and Apple were actively diligencing – are diligencing in the data room, both continue to express material interest" were not MNPI. *Id.*, 217:23-218:10. He testified that "it was clear [before he received the MGM Email] from the media reports and the actual quotes from Kevin Ulrich of Anchorage, who was the chairman at MGM, that a transaction would have to take place very quickly. And, in fact, the transaction did not take place in the first quarter." *Id.*, 219:3-7.

[43] *See* Highland Ex. 25 ("MGM has held preliminary talks with Apple, Netflix and other larger media companies . . . . MGM, in particular, seems like a logical candidate to sell this year. Its owners include Anchorage Capital, Highland Capital and Solus Alternative Asset Management, hedge funds that acquired the company out of bankruptcy in 2010.") (article dated 1/26/20); Highland Ex. 26 (describing prospects of an MGM sale, noting that, among its largest

announced to the public in late May 2021 (just a few weeks after the Claims Purchasers purchased some of their claims, but a few months ***before*** certain of their claims—the UBS claims—were purchased).[44] For example, as early as January 2020, Apple and Amazon were identified as being among a new group of "Big 6" global media companies, and MGM was identified as being a leading media acquisition target. Indeed, according to at least one media report on January 26, 2020, "MGM, in particular, seems like a logical candidate to sell this year" having already held "preliminary talks with Apple, Netflix and other larger media companies."[45] In October 2020, the Wall Street Journal reported that MGM's largest shareholder, Anchorage Capital Group ("Anchorage"), was facing mounting pressure to sell the company. Anchorage was led by Kevin Ulrich, who also served as Chairman of MGM's Board. The article reported that "[i]n recent months, Mr. Ulrich has said he is working toward a deal," and he specifically named Amazon and Apple as being among four possible buyers.[46] Thus, no one following the MGM story would have been surprised to learn in December 2020 that Apple and Amazon were conducting due diligence and had expressed "material interest" in acquiring MGM. Dondero testified during the June 8 Hearing that, at the time he sent the MGM Email, he "knew with certainty from the board level that Amazon had hit our price, and it was going to close in the next couple of months,"[47] that "as of December 17th, Amazon had made an offer that was acceptable to MGM, [and that] that's what the board meeting was. We were going into exclusive negotiations to culminate the merger with

shareholders, was "Highland Capital Management, LP") (article October 11, 2020). *See also* Highland Exs. 27-30 & 34 (various other articles regarding possible sale/suitors of MGM, dated in years 2020 and 2021, and ultimately announcing sale to Amazon on May 26, 2021, for $8.4 billion).

[44] The MGM-Amazon deal was ultimately consummated in March 2022 for approximately $6.1 billion, net of cash acquired, plus approximately $2.5 billion in debt that Amazon assumed and immediately repaid.

[45] Highland Ex. 25.

[46] Highland Ex. 26.

[47] June 8 Hearing Transcript, 127:2-4.

them."[48] Notwithstanding this testimony, Dondero eventually admitted (after a lengthy and torturous cross examination) that he did not actually communicate this supposed "inside" information to Seery in the MGM Email. He did not "say anything about Amazon hitting the price." He did not say anything about the MGM board going into exclusive negotiations with Amazon "to culminate the merger with them." Rather, he communicated information that Seery and any member of the public who cared to look could have gleaned from publicly available information as of December 17, 2020, regarding a much-written-about potential MGM transaction that involved interest from numerous companies, including, specifically, Amazon and Apple. When questioned why "[he felt] the need to mention Apple [in the MGM Email] if Amazon had already hit the price," Dondero simply answered, "The only way you generally get something done at attractive levels in business is if two people are interested," suggesting that he specifically ***did not*** communicate the purported inside information he obtained as a MGM board member—that Amazon had met MGM's strike price and that the MGM board was moving forward with exclusive negotiations with Amazon—because he wanted it to appear that there was still a competitive process going on that included both Amazon and Apple.[49]

Even if the MGM Email contained MNPI on the day it was sent (four months prior to the first of the Claim Purchases that occurred in April 2021), the information was fully and publicly disclosed to the market in the days and weeks that followed. For example, on December 21, 2020, just four days later, a Wall Street Journal article titled *MGM Holdings, Studio Behind 'James Bond,' Explores a Sale*, reported that MGM had "tapped investment banks Morgan Stanley and LionTree LLC and begun a formal sale process," and had "a market value of around $5.5 billion, based on privately traded shares and including debt." The Wall Street Journal Article reiterated

[48] *Id.*, 161:10-14.

[49] June 8 Hearing Transcript, 162:2-6.

that (i) Anchorage "has come under pressure in recent years from weak performance and defecting clients, and its illiquid investment in MGM has become a larger percentage of its hedge fund as it shrinks," and (ii) "Mr. Ulrich has told clients in recent months he was working toward a deal for the studio and has spoken of big technology companies as logical buyers."[50] (*Id*. Ex. 27.) The Wall Street Journal's reporting was picked up and expanded upon in other publications soon after. For example:

- On December 23, 2020, Business Matters published an article specifically identifying Amazon as a potential suitor for MGM. The article, titled *The world is net enough! Amazon joins other streaming services in £4bn bidding war for Bond films as MGM considers selling back catalogue*, cited the Wall Street Journal article and further reported that MGM "hopes to spark a battle that could interest streaming services such as Amazon Prime";[51]

- On December 24, 2020, an article in iDropNews specifically identified Apple as entering the fray. In an article titled *Could Apple be Ready to Gobble Up MGM Studios Entirely?*, the author observed that "it's now become apparent that MGM is actually up on the auction block," noting that the Wall Street Journal was "reporting that the studio has begun a formal sale process" and that Apple—with a long history of exploratory interest in MGM—would be a likely bidder;[52] and

- On January 15, 2021, Bulwark published an article entitled *MGM is For Sale (Again)* that identified attributes of MGM likely to appeal to potential purchasers and handicapped the odds of seven likely buyers—with Apple and Amazon named as two of three potential buyers most likely to close on an acquisition.[53]

Finally, Highland and entities it controlled did not sell their MGM stock while the MGM-Amazon deal was under discussion and/or not made public but, instead, they tendered their MGM holdings in connection with, and as part of, the ultimate MGM-Amazon transaction after it closed in March 2022.

[50] Highland Ex. 27.

[51] Highland Ex. 28.

[52] Highland Ex. 29.

[53] Highland Ex. 30.

2. No Evidence to Support HMIT/Dondero's Assumptions that Seery Shared Alleged MNPI in the MGM Email with Claims Purchasers

One of HMIT's allegations in the Proposed Complaint it seeks leave to file—which is central to HMIT's and Dondero's conspiracy theory—is that Seery shared the alleged MNPI from the MGM Email with the Claims Purchasers (or at least Farallon—the owner/affiliate of Muck, one of the Claims Purchasers) and that the Claims Purchasers only acquired the purchased claims ("Purchased Claims") based on, and because, of their receipt of the MNPI from Seery. HMIT essentially admits in the original version of its Motion for Leave that it has no direct evidence that Seery communicated the alleged MNPI to any of the Claims Purchasers. Rather, its allegation is based on inferences it wants the court to make based on "circumstantial" evidence and on the Dondero Declarations that were attached to the Motion for Leave, which described communications Dondero purportedly had with one or two representatives of Farallon in the "late spring" of 2021 concerning Farallon's recent acquisition of certain claims in the Highland bankruptcy case.[54] Based on these communications, HMIT and Dondero only assume Seery must have provided the MNPI about MGM to Farallon, which must have caused both Farallon and the other Claims Purchaser, Stonehill, to acquire the Purchased Claims.[55]

At the June 8 Hearing, HMIT offered Dondero's testimony that he had three telephone conversations with two representatives of Farallon, Mike Linn ("Linn") and Raj Patel ("Patel"),

[54] Motion for Leave (Bankr. Dkt. No. 3699) ¶ 1 and Ex. 3; *see also* Highland Ex. 9, *Declaration of James Dondero* (with Exhibit 1) dated February 15, 2023.

[55] Motion for Leave (Bankr. Dkt. No. 3699) ¶ 28. HMIT subsequently filed the final version of the Motion for Leave that was revised to withdraw the Dondero Declarations and delete all references therein to the Dondero Declarations (but, notably, leaving in the allegations that were based on the Dondero Declaration(s)). This was done after the court ruled that it would allow the Proposed Defendants to examine Dondero regarding his Declarations. HMIT contended at that point that the court should consider the Motion for Leave on a no-evidence Rule 12(b)(6) type basis (but could not explain why it had attached the Dondero Declarations as evidence that "supported" the Motion for Leave, if it believed no evidence should be considered). *See* Motion for Leave (Bankr. Dkt. No. 3816) ¶ 28; *see also infra* pages 45 to 47 regarding the "sideshow" litigation that occurred prior to the June 8 Hearing over whether the hearing on the Motion for Leave would be an evidentiary hearing.

who allegedly told him that they purchased the claims without conducting any due diligence and based solely on Seery's assurances that the claims were valuable. These conversations allegedly took place on May 28, 2021—two days after the MGM-Amazon deal was officially announced to the public (on May 26, 2021). Dondero also testified that a photocopy of handwritten notes ("Dondero Notes")[56] (which were partially cut off) were notes he took contemporaneously with these short telephone conversations he initiated (one with Patel and two follow-up conversations with Linn).[57] He testified that his purpose in taking these notes and in initiating the phone calls was that "[w]e'd been trying nonstop to settle the case for two-plus years. . . . [a]nd when we heard the claims traded, we realized there were new parties to potentially negotiate to resolve the case . . . [s]o I reached out [to] the Farallon guys,"[58] and further, on *voir dire* from the Proposed Defendants' counsel, that the purpose of taking the notes was so that he had "a written record of the important points that [he] discussed . . . so I know how to address it the next time."[59] The handwritten notes[60] stated:

Raj Patel bought it because of Seery	*1*
50-70¢ not compelling	*2*
Class 8	*3*
Asked what would be compelling	*4*
-- No Offer	*5*
Bought in Feb/March timeframe	*6*
Bought assets w/ Claims	*7*
Offered him 40-50% premium	*8*
130% of cost; "Not Compelling"	*9*
No Counter; Told Discovery coming	*10*

[56] HMIT Ex. 4. The handwritten notes were admitted into evidence after *voir dire*, not for the truth of anything Patel or Linn allegedly said to him during the three telephone conversations, but as Dondero's "present sense impression" of the telephone conversations.

[57] June 8 Hearing Transcript, 133:1-136:3.

[58] *See id.*, 133:13-23.

[59] *See id.* (on *voir dire*), 144:1838-145:4.

[60] HMIT Ex. 4. The court has placed in a table and numbered each line for ease of reference. The table does not include the separate apparent partial date from the top left corner that Dondero testified was the date that he made the initial call to Patel: May 28, 2021.

On direct examination, Dondero testified that line 1 is what he wrote contemporaneously with the short call he initiated to Patel of Farallon in which Patel allegedly told Dondero "that he bought it because Seery told him to buy it and they had made money with Seery before"[61] and that Farallon "bought [the claim] because he was very optimistic regarding MGM"[62] before referring him to Linn, a portfolio manager at Farallon. Dondero testified that the rest of the handwritten notes (reflected in lines 2 through 10 of the table) were notes he took contemporaneously with two telephone conversations he had with Linn following his call to Patel, with lines 2-8 referring to Dondero's first call with Linn and lines 9 and 10 referring to his second call with Linn.[63] Dondero testified that the "50-70¢" in line 2 referred to his offer to Linn to pay 70 cents on the dollar to buy Farallon's[64] claims because "[w]e knew that they had – that the claims had traded around 50 cents" and "[w]e wanted to prevent the $5 million-a-month burn" (referring to attorney's fees in the Highland case) and that "not compelling Class 8" in lines 2-3 referred to Linn's response to him that the offer was not compelling.[65] Dondero testified that lines 4-5 referred to him asking Linn what amount would be compelling and to Linn's response that "he had no offer."[66] Dondero testified that lines 6-8 referred to Linn telling Dondero that Farallon bought the claims in the February, March timeframe and that Dondero told Linn that, given that the estate was spending $5 million a month on legal fees, Farallon should want to sell its claims and Linn's alleged response that "Seery told him it was worth a lot more."[67] Lastly, Dondero testified on direct examination

[61] June 8 Hearing Transcript, 134:7-10, 135:13-22.

[62] *Id.*, 139:3-11.

[63] *Id.*, 136:4-138:16.

[64] As noted above, Farallon did not acquire any of the Purchased Claims; rather, Farallon created a special purpose entity, Muck, to acquire the claims.

[65] June 8 Hearing Transcript, 136:4-16.

[66] *Id.*, 136:17-23.

[67] *Id.*, 137:6-138:7.

that the last two lines referred to a second telephone conversation he had with Linn in which Dondero offered 130 percent of cost for the claims and that Linn told him that the offer was not compelling, and he would not give a price at which he would sell.[68]

On cross-examination, Dondero acknowledged that, though he had testified that the handwritten notes were intended to be a written record of the important points from the telephone conversations he had with Patel and Linn, there was no mention in the notes of: (1) MGM: (2) or that Farallon was very optimistic about MGM; (3) the sharing of MNPI; (4) a *quid pro quo;* or (5) Seery's compensation, and that his last note—"Told Discovery coming"—was a reference to Dondero telling Linn (not Linn telling Dondero) that discovery was coming in response to Dondero's own supposition that Farallon must have traded on MNPI.[69] Cross-examination also revealed that Farallon never told Dondero that Seery gave them MNPI, and that Dondero only ***believed*** Seery ***must have*** given Farallon MNPI, because Farallon (Patel and Linn) had told him that the only reason Farallon bought their claims was because of their prior dealings with Seery, which Dondero took to mean that they had conducted no due diligence on their own prior to acquiring the claims. Dondero also testified that he did not have any personal knowledge as to how Seery's compensation package, as CEO of the Reorganized Debtor and Claimant Trustee, was determined because he was "not involved" in the setting of Seery's compensation pursuant to the Claimant Trust[70] and that he never discussed Seery's compensation with Farallon.[71]

As noted earlier, Dondero attempted to obtain discovery from the Claims Purchasers in a Texas state court pursuant to Rule 202 of the Texas Rules of Civil Procedure. The Texas state

[68] *Id.*, 138:8-22.

[69] *Id.*, 190:14-191:25. Dondero testified that he told Linn that discovery "would be coming in the next few weeks" and noted that "this has been a couple years. . . . [w]e've been trying for two years to get . . . discovery in this."

[70] *Id.*, 200:13-201:1.

[71] *Id.*, 208:23-209:8.

court denied the First Rule 202 petition on June 1, 2022, after having considered the amended petition, the responses, the record, applicable authorities and having conducted a hearing on the petition on June 1, 2022.[72]

3. Dondero Unsuccessfully Seeks Discovery and to Have Various Agencies and Courts Outside of the Bankruptcy Court Acknowledge His Insider Trading Theories

Dondero acknowledged at the June 8 Hearing that the verified petition ("First Rule 202 Petition") he signed and filed on July 22, 2021, in the first Texas Rule 202 proceeding—just weeks after his telephone calls with Linn and Patel—was true and accurate. In it, he swore under oath as to what Linn told him in the telephone call concerning Farallon's purchase of the claims, and the only reason he gave for wanting discovery was that Linn told him Farallon bought the claims "sight unseen—relying entirely on Seery's advice solely because of their prior dealings."[73] Dondero acknowledged, as well, that his sworn statement that he filed in support of an amended verified Rule 202 petition filed in the same Texas Rule 202 proceeding, but nearly ten months later (in May 2022), described the same telephone conversation he had with Linn, and it did not mention MGM at all and did not say that Linn told him that Seery gave him MNPI; rather, the sworn statement stated only that "On a telephone call between Petitioner and Michael Lin[n], a representative of Farallon, Mr. Lin[n] informed Petitioner that Farallon had purchased the claims sight unseen and with no due diligence—100% relying on Seery's say-so because they had made so much money in the past when Seery told them to purchase claims" and that Linn did not tell him that Seery gave them MNPI, but he concluded that Seery gave Farallon MNPI based on what Linn did tell him.[74]

[72] Highland Ex. 7.

[73] *Id.*, 193:8-194:16; Highland Ex. 3, *Verified Petition to Take Deposition before Suit and Seek Documents*, ¶ 21. The first Texas Rule 202 proceeding in which Dondero sought discovery regarding the Farallon acquisition of its claims was brought by Dondero, individually, in the 95th Judicial District, Dallas County, Texas.

[74] *Id.*, 195:11-197:17; Highland Ex. 4, *Amended Verified Petition to Take Deposition before Suit and Seek Documents*, ¶ 23.

Nine days later, Dondero filed a declaration in the same proceeding, in which he described the same call with Linn as follows:[75]

> Last year, I called Farallon's Michael Lin[n] about purchasing their claims in the bankruptcy. I offered them 30% more than what they paid. I was told by Michael Lin[n] of Farallon that they purchased the interests without doing any due diligence other than what Mr. James Seery—the CEO of Highland—told them, and that he told them that the interests would be worth far more than what Farallon paid. Given the value of those claims that Seery had testified in court, it made no sense to me that Mr. Lin[n] would think that the claims were worth more than what Seery testified under oath was the value of the bankruptcy claims.

Dondero further stated in his declaration that "I have an interest in ensuring that the claims purchased by [Farallon] are not used as a means to deprive the equity holders of their share of the funds," and that "[i]t has become obvious that despite the fact that the bankruptcy estate has enough money to pay all claimants 100 cents on the dollar, there is plainly a movement afoot to drain the bankrupt estate and deprive equity of their rights. Accordingly, "I commissioned an investigation by counsel who have been in communication with the Office of the United States Trustee."[76] Dondero attached as Exhibit A to his declaration a letter from Douglas Draper ("Draper"), an attorney with the law firm of Heller, Draper & Horn, L.L.C. in New Orleans, to the office of the General Counsel, Executive Office for U.S. Trustees, dated October 5, 2021, in which Draper opens the letter by stating that "[t]he purpose of this letter is to request that your office investigate the circumstances surrounding the sale of claims by members of the [Creditors' Committee] in the bankruptcy of [Highland]," and later noted that he "became involved in Highland's bankruptcy through my representation of [Dugaboy], an irrevocable trust of which Dondero is the primary beneficiary."[77] Mr. Draper laid out the same allegations of insider claims trading, breach of

[75] Highland Ex. 5, ¶ 2.

[76] *Id.*, ¶¶ 3-4.

[77] *Id.*, Ex. A, 1-2.

fiduciary duties, and conspiracy that HMIT seeks to bring in the Proposed Complaint.[78] The U.S. Trustee's office took no action. Dondero made a second and third attempt to get the U.S. Trustee's office to conduct an investigation into the same allegations laid out in Draper's letter, this time in "follow-up" letters to the Office of the U.S. Trustee on November 3, 2021, and six months later, on May 11, 2022, through another lawyer, Davor Rukavina ("Rukavina"), in which Rukavina wrote "to provide additional information regarding the systemic abuses of bankruptcy process occasioned during the [Highland] bankruptcy."[79] Again, the U.S. Trustee's office took no action.

On February 15, 2023, Dondero filed yet another sworn statement about his alleged conversation with Linn, this time in support of a Verified Rule 202 Petition ***filed by HMIT*** ("Second Rule 202 Petition"), filed in a different Texas state court (Texas District Court, 191st Judicial District, Dallas County, Texas), following Dondero's unsuccessful attempts throughout 2021 and 2022 to obtain discovery in the First Rule 202 proceeding and based on the same allegations of misconduct by Seery and Farallon.[80] In this new sworn statement, Dondero describes for the first time the "call" he had with Linn as having been "phone calls" with Patel and Linn and ***mentions MGM*** and Farallon's alleged optimism about the ***expected sale of MGM***:[81]

> In late Spring of 2021, I had phone calls with two principals at Farallon Capital Management, LLC ("Farallon"), Raj Patel and Michael Linn. During these phone calls, Mr. Patel and Mr. Linn informed me that Farallon had a deal in place to purchase the Acis and HarbourVest claims, which I understood to refer to claims that were a part of settlements in the HCM Bankruptcy Proceedings. Mr. Patel and Mr. Linn stated that Farallon agreed to purchase these claims based solely on conversations with Seery because they had made significant profits when Seery told them to purchase other claims in the past. They also stated that they were particularly optimistic because of the expected sale of MGM.

[78] *Id.*, Ex. A, 6-11.

[79] HMIT Ex. 61.

[80] Highland Ex. 9.

[81] *Id.*, ¶ 4.

The Second Rule 202 Petition was also denied by the second Texas state court on March 8, 2023.[82]

HMIT, in an apparent attempt to provide support for its argument that the Proposed Claims are "colorable," stated in its Motion for Leave that "[t]he Court also should be aware that the Texas States [sic] Securities Board ("TSSB") opened an investigation into the subject matter of the insider trades at issue, and this investigation has not been closed. The continuing nature of this investigation underscores HMIT's position that the claims described in the attached Adversary Proceeding are plausible and certainly far more than merely 'colorable.'"[83] But, two days before opposition briefing was due, on May 9, 2023, the TSSB issued a letter ("TSSB Letter") to Highland, informing it that "[t]he staff of the [TSSB] has completed its review of the complaint received by the Staff against [Highland]. The issues raised in the complaint and information provided to our Agency were given full consideration, and a decision was made that no further regulatory action is warranted at this time."[84] HMIT's counsel (frankly, to the astonishment of the court) objected to the admission of the TSSB Letter at the June 8 Hearing "on the grounds of relevance, 403, hearsay, and authenticity . . . [a]nd I also . . . think it's important that the decision by a regulatory body has no bearing on this cause of action or the colorability of this claim, and the Texas State Securities Board will tell you that. This is completely and utterly irrelevant to your inquiry."[85] The court overruled HMIT's objection to the relevance of this exhibit—considering, among other things, that HMIT, in its Motion for Leave, specifically mentioned the allegedly open TSSB "investigation" as relevant evidence the court "should be aware" of in making its determination of whether the Proposed Claims were "colorable."[86]

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[82] Highland Ex. 10.

[83] Motion for Leave, ¶ 37.

[84] *See* Highland Ex. 33.

[85] June 8 Hearing Transcript, 323:22-324:3.

[86] *Id.*, 324:4-328:2.

C. Claims Purchasers Purchase Claims and File Notices of Transfers of Claims

To be clear about the time line here, it was after confirmation of the Plan but prior to the Effective Date of the Plan, that the Claims Purchasers: (1) purchased several large unsecured claims that had been allowed following, and as part of, Rule 9019 settlements, each of which were approved by the bankruptcy court, after notice and hearing, prior to the confirmation hearing; and (2) filed notices of the transfers of those claims pursuant to Rule 3001(e)(2) of the Federal Rules of Bankruptcy Procedure. The noticing of the claims transfers began on April 16, 2021, with the notice of transfer of the claim held by Acis Capital Management to Muck, and ended on August 9, 2021, with the notices of transfers of the claims held by UBS Securities to Muck and Jessup:

Claimant(s)	**Date Filed/ Claim No.**	**Asserted Amount**	**Claim Settled/Allowed? If so, Amount**	**Date Filed/ Rule 3001 Notice Dkt. No.**
Acis Capital Management LP and Acis Capital Management, GP LLC (together, "Acis")	12/31/2019 Claim No. 23	$23,000,000	Yes[87] $23,000,000	4/16/2021 Bankr. Dkt. No. 2215 (Muck)
Redeemer Committee of the Highland Crusader Fund (the "Redeemer Committee")	4/3/2020 Claim No. 72	$190,824,557	Yes[88] $137,696,610	4/30/2021 Bankr. Dkt. No. 2261 (Jessup)
HarbourVest 2017 Global Fund, LP, HarbourVest 2017 Global AIF, LP, HarbourVest Partners LP, HarbourVest Dover Street IX Investment LP, HV International VIII Secondary LP, HarbourVest Skew Base AIF LP (the "HarbourVest Parties")	4/8/2020 Claim Nos. 143, 147, 149, 150, 153, 154	Unliquidated	Yes[89] $80,000,000 in aggregate ($45,000,000 General Unsecured Claim, and $35,000,000 subordinated claim)	4/30/2021 Bankr. Dkt. No. 2263 (Muck)

[87] Bankr. Dkt. No. 1302. The Debtor's settlement with Acis was approved over the objection of Dondero. Bankr. Dkt. No. 1121.

[88] Bankr. Dkt. No. 1273.

[89] Bankr. Dkt. No. 1788. The Debtor's settlement with the HarbourVest Parties was approved over the objections of Dondero, Bankr. Dkt. No. 1697, and Dugaboy and the Get Good Trust. Bankr. Dkt. No. 1706.

UBS Securities LLC, UBS AG, London Branch (the "UBS Parties")	6/26/2020 Claim Nos. 190, 191	$1,039,957,799.40	Yes[90] $125,000,000 in aggregate ($65,000,000 General	8/9/2021 Bankr. Dkt. No. 2698 (Muck) and Bankr. Dkt. No. 2697 (Jessup)

HMIT insists that it "made no sense" for the Claims Purchasers to buy the Purchased Claims because "the publicly available information [] did not offer a sufficient potential profit to justify the publicly disclosed risk," and "their investment was projected to yield a small return with virtually no margin for error."[91] Dondero testified that it was ***his*** view that there was insufficient information in the public to justify the claims purchases.[92] But, HMIT's arguments here are contradicted by the information that was publicly available to Farallon and Stonehill at the time of their purchases and by HMIT's own allegations. In advance of Plan confirmation, Highland projected that Class 8 general unsecured creditors would recover 71.32% on their allowed claims. In the Proposed Complaint, HMIT sets forth the amounts the Claims Purchasers purportedly paid for their claims.[93] Taking into account the face amount of the allowed claims, the Claims Purchasers' projected profits (in millions of dollars) were as follows:

Creditor	Class 8	Class 9	Ascribed Value[94]	Purchaser	Purchase Price	Projected Profit
Redeemer	$137.0	$0.0	$97.71	Stonehill	$78.0	$19.71
Acis	$23.0	$0.0	$16.4	Farallon	$8.0	$8.40

[90] Bankr. Dkt. No. 2389. The Debtor's settlement with the UBS Parties was approved over the objections of Dondero, Dkt. No. 2295, and Dugaboy and the Get Good Trust. Bankr. Dkt. Nos. 2268, 2293.

[91] Proposed Complaint, ¶ 3.

[92] June 8 Hearing Transcript, 187:3-7 ("Q: And it's your testimony that there wasn't sufficient information in the public for them to buy – this is your view – that there wasn't sufficient information in the public to justify their purchases. Is that your view? A: Correct.).

[93] *Id.*, ¶ 42.

[94] "Ascribed Value" is derived by multiplying the Class 8 amount by the projected recovery of 71.32% for that class.

HarbourVest	$45.0	$35.0	$32.09	Farallon	$27.0	$5.09
UBS	$65.0	$60.0	$46.39	Stonehill & Farallon	$50.0	($3.61)

As HMIT acknowledges, by the time Dondero spoke with Farallon in the "late spring" of 2021, the Claims Purchasers had acquired the allowed claims previously held by Acis, Redeemer, and HarbourVest.[95] Based on an aggregate purchase price of $113 million for these three claims, the Claims Purchasers would have expected to net over $33 million in profits, or nearly 30% on their investment, had Highland met its projections. The Claims Purchasers would make even more money if Highland beat its projections, because they also purchased the Class 9 claims and would therefore capture any upside. In this context, HMIT's and Dondero's assertions that it did not "make any sense" for the Claims Purchasers to purchase their claims when they did does not pass muster—given the publicly available information about potential recoveries under the Plan. Dondero even acknowledged, on cross-examination, that he was prepared to pay ***30 percent more*** than Farallon had paid, even though he did not think there was sufficient public information available to justify Farallon's purchase of the claims.[96] Dondero essentially testified that he wanted to purchase Farallon's claims because he wanted to be in a position of control to force a settlement or resolution of the bankruptcy case, post-confirmation, under terms acceptable to him. He did not want to try to settle by negotiating with Farallon and Stonehill ***as creditors***, but instead he wanted to purchase the claims because "if we owned all the claims, it would settle the case."[97]

[95] *See* Complaint, ¶ 41 n.12. The UBS claims were not acquired until August 2021, long after the alleged "*quid pro quo*" was supposedly agreed upon and the MGM-Amazon deal was announced in the press in late May 2021. *See*, Highland Ex. 34, *Amazon's $8.45 Billion Deal for MGM is Historic But Feels Mundane* (dated May 26, 2021).

[96] June 8 Hearing Transcript, 187:8-11.

[97] *Id.*, 187:12-189:10.

D. Fifth Circuit's Approval of the Gatekeeper Provision in Plan, Recognition of Res Judicata Effect of the Prior Gatekeeper Orders, and the Bankruptcy Court's Order Approving Highland's Motion to Conform Plan

Harkening back to February 22, 2021, after a robust confirmation hearing, this court entered its order confirming the Plan, over the objections of Dondero and Dondero-Related Parties, specifically questioning the good faith of their objections. The court found, after noting "the remoteness of their economic interests" that "[it] has good reason to believe that [the Dondero Parties] are not objecting to protect economic interests they have in the Debtor but to be disruptors. Dondero wants his company back. This is understandable, but it is not a good faith basis to lob objections to the Plan."[94] The Plan became effective on August 11, 2021.

Of relevance to the Motion for Leave, the confirmed Plan included certain exculpations, releases, and injunctions designed to protect the Debtor and other bankruptcy participants from bad-faith litigation. These participants included: Highland's employees (with certain exceptions); Seery as Highland's CEO and CRO; Strand (after the appointment of the Independent Directors); the Independent Directors; the successor entities; the CTOB and its members; the Committee and its members; professionals retained in the case; and all "Related Persons." The injunction provisions contained a Gatekeeper Provision which is similar to the gatekeeper provisions in the prior Gatekeeper Orders in that it provided that the bankruptcy court will act as a "gatekeeper" to screen and prevent bad-faith litigation against the Protected Parties. The Gatekeeper Provision in the Plan states, in pertinent part:[98]

> No Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case . . . without the Bankruptcy Court (i) first determining, after notice and a hearing, that such claim or cause of action represents ***a colorable claim of any kind***, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically

[98] Plan, 50-51 (emphasis added).

> authorizing such Enjoined Party to bring such claim or cause of action against such Protected Party.

The Plan defines Protected Parties as,

> collectively, (i) the Debtor and its successors and assigns, direct and indirect majority-owned subsidiaries, and the Managed Funds, (ii) the Employees, (iii) Strand, (iv) the Reorganized Debtor, (v) the Independent Directors, (vi) the Committee, (vii) the members of the Committee (in their official capacities), (viii) the Claimant Trust, (ix) the Claimant Trustee, (x) the Litigation Sub-Trust, (xi) the Litigation Trustee, (xii) the members of the [CTOB] (in their official capacities), (xiii) [HCMLP GP LLC], (xiv) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (xv) the CEO/CRO; and (xvi) the Related Persons of each of the parties listed in (iv) through (xv); [but excluding Dondero and Okada and various entities including HMIT and Dugaboy].

The court notes that the Gatekeeper Provision in the Plan provides protection to a broader number of persons than the persons protected under the January 2020 Order (addressing the Independent Directors and their agents and advisors) and the July 2020 Order (addressing Seery in his role as CEO and CRO of the Debtor). But, at the same time, it is less restrictive than the gatekeeping provisions under the Gatekeeper Orders, in that the gatekeeping provisions in the prior orders shield the protected parties from any claim that is not both "colorable" ***and*** a claim for "willful misconduct or gross negligence," effectively providing the protected parties under the prior orders with a limited immunity from claims of simple negligence or breach of contract that do not rise to the level of "willful misconduct or gross negligence," whereas the Gatekeeping Provision under the Plan does not act as a release or exculpation of the Protected Parties in any way because it does not prohibit any party from bringing ***any kind of claim*** against a Protected Party, provided the proposed claimant first obtains a finding in the bankruptcy court that its proposed claims are "colorable."[99]

[99] It should be noted that--as discussed further below--there are, separately in the Plan, exculpations as to a smaller universe of persons--*e.g.,* the Debtor, the Committee and its members, and the Independent Directors.

Dondero and some of the entities under his control appealed[100] the Confirmation Order directly to the Fifth Circuit, arguing, among other issues, that the Plan's exculpation, release, and injunction provisions, including the Gatekeeper Provision (collectively, the "Protection Provisions") impermissibly provide certain non-debtor bankruptcy participants with a discharge, purportedly in contravention of the provisions of Bankruptcy Code § 524(e)'s statutory bar on non-debtor discharges. As noted above, the Fifth Circuit, "affirm[ed] the confirmation order in large part" and "reverse[d] ***only insofar as the plan exculpates*** certain non-debtors in violation of 11 U.S.C. § 524(e), strik[ing] those few parties ***from the plan's exculpation***, and affirm[ed] on all remaining grounds."[101] The Fifth Circuit specifically found the "injunction and gatekeeping provisions [to be] sound" and found that it was only "the ***exculpation*** of certain non-debtors" that "exceed[ed] the bankruptcy court's authority," agreeing with the bankruptcy court's conclusions that the Protection Provisions were legal, necessary under the circumstances, and in the best interest of all parties" in part, and only disagreeing to the extent that the ***exculpation*** provision improperly extended to certain bankruptcy participants other than Highland, the Committee and its members, and the Independent Directors and "revers[ing] and strik[ing] the few unlawful parts

[100] On appeal, the appellant funds ("Funds"), whom this court found to be "owned and/or controlled" by Dondero despite their purported independence, also asked the Fifth Circuit to vacate this court's factual finding "because it threatens the Funds' compliance with federal law and damages their reputations and values" and because "[a]ccording to the Funds, the characterization is unfair, as *they* are not litigious like Dondero and are completely independent from him." *NexPoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th at 434. Applying the "clear error" standard of review, the Fifth Circuit "le[ft] the bankruptcy court's factual finding undisturbed" because "nothing in this record leaves us with a firm and definite conviction that the bankruptcy court made a mistake in finding that the Funds are 'owned and/or controlled by [Dondero]." *Id.* at 434-35.

[101] *See supra* note 4. The Fifth Circuit replaced its initial opinion with its final opinion a few days after certain appellants had filed a short (four-and-one-half pages) motion for rehearing (the "Motion for Rehearing") on September 2, 2022. The movants had asked the Fifth Circuit to "narrowly amend the [initial] Opinion in order to confirm the Court's holding that the impermissibly exculpated parties are similarly struck from the protections of the injunction and gatekeeper provisions of the plan (in other words, that such parties cannot constitute 'Protected Parties')." In the final Fifth Circuit opinion, same as the initial Fifth Circuit opinion, the Fifth Circuit stated that, with regard to the Confirmation Order, the panel would "reverse only insofar as the plan exculpates certain non-debtors in violation of 11 U.S.C. § 524(e), strike those few parties from the plan's exculpation, and affirm on all remaining grounds." *Highland Capital*, 48 F.4th at 424. No findings, discussion, or rulings regarding the injunction and gatekeeper provisions that were in the initial Fifth Circuit opinion were disturbed.

of the Plan's ***exculpation provision***."[102] The Fifth Circuit then remanded to the Bankruptcy Court "for further proceedings in accordance with the opinion."[103]

In the course of analyzing the Protection Provisions under the Plan, the Fifth Circuit noted that the protection provisions in the January and July 2020 Orders appointing the Independent Directors and Seery as CEO and CRO of Highland were *res judicata* and that "*those* orders have the effect of exculpating the Independent Directors and Seery in his executive capacities" such that "[d]espite removal from the exculpation provision in the confirmation order, the Independent Directors' agents, advisors, and employees, as well as Seery in his official capacities are all exculpated to the extent provided in the January and July 2020 Orders."[104]

The Reorganized Debtor filed a motion in the bankruptcy court to conform the plan to the Fifth Circuit's mandate, proposing that only one change was needed to make the Plan compliant with the Fifth Circuit's ruling: narrow the defined term for "Exculpated Parties" to read as follows:

> "Exculpated Parties" means, collectively, (i) the Debtor, (ii) the Independent Directors, (iii) the Committee, and (iv) members of the Committee (in their official capacities).

The Reorganized Debtor proposed that this one simple revision of this defined term removed the exculpations deemed by the Fifth Circuit to violate section 524(e) of the Bankruptcy Code, and that no other changes would be required to conform the Plan and Confirmation Order to the Fifth Circuit's mandate. Some of the Dondero-related entities objected to the motion to conform, arguing that the Fifth Circuit's ruling required more surgery on the Plan than simply narrowing the defined term "Exculpated Parties." On February 27, 2023, this court entered its order granting

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[102] *Id.* at 435.

[103] *Id.* at 440. The Fifth Circuit's docket reflects that it issued its Judgment and mandate on September 12, 2022.

[104] *Highland Capital*, 48 F.4th at 438 n.15. The Fifth Circuit stated, "To the extent Appellants seek to roll back the protections in the bankruptcy court's January 2020 and July 2020 orders (which is not clear from their briefing), such a collateral attack is precluded." *Id.*

Highland's motion to conform the Plan, ordering that one change be made to the Plan – revising the definition of "Exculpated Parties" – and no more.[105] The objecting parties' direct appeal of this order has been certified to the Fifth Circuit and is one of the numerous currently active appeals by Dondero-related parties pending in the Fifth Circuit.

E. HMIT's Motion for Leave

HMIT filed its emergency Motion for Leave on March 28, 2023, which, with attachments, as first filed, was 387 pages in length, including an initial proposed complaint ("Initial Proposed Complaint") and two sworn declarations of Dondero that were attached as "objective evidence" in "support[ ]" of the Motion for Leave,[106] and with it, an application for an emergency setting on the hearing on the Motion to Leave. On April 23, 2023, HMIT filed a pleading entitled a "supplement" to its Motion to Leave ("Supplement"),[107] to which it attached a revised proposed verified complaint ("Proposed Complaint")[108] as Exhibit 1-A to the Motion for Leave and stated that "[t]he Supplement is not intended to amend or supersede the [Motion for Leave]; rather, it is intended as a supplement to address procedural matters and to bring forth additional facts that further confirm the appropriateness of the derivative action."[109] The HMIT Motion for Leave was later amended to eliminate the Dondero Declarations and references to the same (but not the underlying allegations that were supposedly supported by the Dondero Declarations).[110]

[105] Bankr. Dkt. No. 3672.

[106] Bankr. Dkt. No. 3699.

[107] Bankr. Dkt. No. 3760.

[108] *See supra* note 5.

[109] Supplement ¶ 1.

[110] Bankr. Dkt. Nos. 3815 and 3816. Both of these filings had the Initial Proposed Complaint attached as Exhibit 1 to the Motion for Leave.

As earlier noted, HMIT desires leave to sue the Proposed Defendants regarding ***the post-confirmation, pre-Effective Date purchase of allowed unsecured claims***. The Proposed Defendants would be:

> **Seery,** who was a stranger to Highland until approximately four months following the Petition Date when he was brought in as one of the three Independent Directors, and now serves as the CEO of the Reorganized Debtor and the Trustee of the Claimant Trust (and also was previously Highland's CRO during the case, then CEO, and, also, an Independent Board Member of Highland's general partner during the Highland case). Seery is best understood as the man who took Dondero's place running Highland—per the request of the Committee.
>
> **Claims Purchasers,** who were strangers to Highland until the end of the bankruptcy case. They are identified as Farallon Capital Management, LLC ("Farallon"); Muck Holdings, LLC ("Muck"), which was a special purpose entity created by Farallon to purchase unsecured claims against Highland; Stonehill Capital Management, LLC ("Stonehill"); and Jessup Holdings, LLC ("Jessup"), which was a special purpose entity created by Stonehill to purchase unsecured claims against Highland (collectively, the "Claims Purchasers"). The Claims Purchasers purchased $240 million face value of already-allowed unsecured claims post-confirmation and pre-Effective Date in the spring of 2021 and another $125 million face value of already-allowed unsecured claims in August 2021. Bankruptcy Rule 3001(e) notices—giving notice of same—were filed on the bankruptcy clerk's docket regarding these purchases. The claims had previously been held by the creditors known as the Crusader Redeemer Committee, Acis Capital, HarbourVest, and UBS (three of these four creditors formerly served on the Committee during the Highland bankruptcy case).
>
> **John Doe Defendants Nos. 1-10**, which are described to be "currently unknown individuals or business entities who may be identified in discovery as involved in the wrongful transactions at issue."
>
> **Highland,** as a nominal defendant. HMIT added Highland as a nominal defendant in the Revised Proposed Complaint attached to the Supplement.
>
> **Claimant Trust**, as a nominal defendant. HMIT added the Claimant Trust as a nominal defendant in the Revised Proposed Complaint attached to the Supplement.

The proposed plaintiffs would be:

> **HMIT,** which, again, was the largest equity holder in Highland and held a 99.5% limited partnership interest (specifically, Class B/C limited partnership interests). HMIT is the holder of a Class 10 interest under the Plan, pursuant to which HMIT's limited partnership interest in Highland was extinguished as of the Effective Date in exchange for a pro rata share of a contingent interest in the Claimant Trust.

Highland, as a nominal party. HMIT wishes to bring its complaint on behalf of itself and derivatively on behalf of the Reorganized Debtor.

Claimant Trust, as a nominal party. HMIT wishes to bring its complaint on behalf of itself and derivatively on behalf of the Claimant Trust.

In the Proposed Complaint, HMIT asserts the following six counts: Count I (against Seery) for breach of fiduciary duties; Count II (against the Claims Purchasers and John Doe Defendants) for knowing participation in breach of fiduciary duties; Count III (against all Proposed Defendants) for conspiracy; Count IV (against Muck and Jessup) for equitable disallowance of their claims; Count V (against all Proposed Defendants) for unjust enrichment and constructive trust; and Count VI (against all Proposed Defendants) for declaratory relief.[111] The gist of the Proposed Complaint is as follows. HMIT asserts that something seems amiss regarding the post-confirmation/pre-Effective Date purchase of claims by the Claims Purchasers. Actually, more bluntly, HMIT asserts that "wrongful conduct occurred" and "improper trades" were made.[112] HMIT believes the Claims Purchasers paid around $160 million for the $365 million face amount of claims they purchased. HMIT believes that this amount was too high for any rational claim purchaser (particularly hedge funds who expect high returns) to have paid for the claims—based on Highland's Disclosure Statement and Plan projections regarding the projected distributions under the Plan to holders of allowed unsecured claims. And, of course, Dondero purports to have concluded from the three phone conversations he had with representatives of one of the Claims Purchasers that they did no due diligence before purchasing the claims. Therefore, HMIT surmises, Seery must have given these Claims Purchasers MNPI regarding Highland that convinced them that it was to their economic advantage to purchase the claims. In particular, HMIT surmises Seery must have shared

[111] In the Initial Proposed Complaint, HMIT proposed to bring claims against the various Proposed Defendants in seven counts, including a count for fraud by misrepresentation and material nondisclosure against all Proposed Defendants. In the Proposed Complaint, HMIT abandons its claim for fraud by misrepresentation and material nondisclosure.

[112] Motion for Leave, 7.

MNPI regarding the likely imminent sale of MGM, in which Highland had, directly and indirectly, substantial holdings. As noted earlier, MGM was ultimately purchased by Amazon after a sale process that had been quite publicly discussed in media reports for several months and that was officially announced to the public in late May 2021 (just a few weeks after the Claims Purchasers purchased some of their claims, but a few months ***before*** certain of their claims—the UBS claims—were purchased).[113] In summary, while the Proposed Complaint is lengthy and at times hard to follow, it boils down to allegations that: (a) Seery filed (or caused to be filed) deflated, pessimistic, misleading projections regarding the value of the Debtor's estate in connection with the Plan, (b) then induced very sophisticated unsecured creditors to discount and sell their claims to the likewise very sophisticated Claims Purchasers, (c) which Claims Purchasers are allegedly friendly with Seery, and are now happily approving Seery's allegedly excessive compensation demands post-Effective Date (resulting in less money in the pot to pay off the creditor body in full, and, thus, a diminished likelihood that HMIT will realize any recovery on its contingent Class 10 interest). HMIT argues that Seery should be required to disgorge his compensation. It appears that HMIT also seeks other damages in the form of equitable disallowance of the Claims Purchasers' claims and disgorgement of distributions on account of those claims, the imposition of a constructive trust over all disgorged funds, and declaratory relief.

HMIT claims that, in seeking to file the Proposed Complaint, it is seeking to protect the rights and interests of the Reorganized Debtor, the Claimant Trust, and "innocent stakeholders" who were allegedly injured by Seery's and the Claims Purchasers' alleged conspiratorial and

[113] The MGM-Amazon deal was ultimately consummated in March 2022 for approximately $6.1 billion, net of cash acquired, plus approximately $2.5 billion in debt that Amazon assumed and immediately repaid. Credible testimony from Seery at the June 8 Hearing revealed that Highland and entities it controlled tendered their MGM holdings in connection with the Amazon transaction (they did not sell their holdings while the MGM-Amazon deal was under discussion and/or not made public).

fraudulent scheme to line Seery's pockets with excessive compensation for his role as Claimant Trustee. In its Motion for Leave, HMIT states that "[t]he attached Adversary Proceeding alleges claims which are substantially more than 'colorable' based upon plausible allegations that the Proposed Defendants, acting in concert, perpetrated a fraud, including a fraud upon innocent stakeholders, as well as breaches of fiduciary duties and knowing participation in (or aiding or abetting) breaches of fiduciary duty."[114]

F. Is HMIT Really Dondero by Another Name?

The Proposed Defendants argue that HMIT's Motion for Leave is nothing more than a continuation of the harassing and bad-faith litigation by Dondero and his related entities that the Gatekeeper Provisions were intended to prevent and, thus, this is one of multiple reasons that the Motion for Leave should be denied.

To be clear, HMIT asserts that it is controlled by Mark Patrick ("Patrick"), who has been HMIT's administrator since August 2022. Patrick asserts that he is not influenced or controlled by Dondero, in general, and specifically not in its efforts to pursue the Proposed Claims against Seery and the Claims Purchasers. However, the testimony elicited at the June 8 Hearing—the hearing at which HMIT had the burden of showing the court that its Proposed Claims were "colorable" such that it should be allowed to pursue them through the filing of the Proposed Complaint—paints a different picture. Somewhat tellingly, HMIT chose not to call Patrick—allegedly HMIT's only representative and control person—as a witness in support of its Motion for Leave. Rather, Dondero was HMIT's first witness called in support of its motion, and the first

[114] *See* Motion for Leave (Bankr. Dkt. No. 3816) ¶ 3. HMIT notes, in a footnote 6, that "Neither this Motion nor the proposed Adversary Complaint seeks to challenge the Court's Orders or the Plan. In addition, neither this Motion nor the proposed Adversary Complaint seeks to redistribute the assets of the Claimant Trust in a manner that would adversely impact innocent creditors. Rather, the proposed Adversary Proceeding seeks to benefit all innocent stakeholders while working within the terms and provisions of the Plan, as well as the Claimant Trust Agreement."

questions on direct from HMIT's counsel were aimed at establishing that Dondero was not behind the filing of the Motion for Leave and the pursuit of the Proposed Claims.[115] Dondero testified that he did not (i) "have any current official position" with HMIT, (ii) "attempt to exercise [control] on the business affairs of [HMIT]," (iii) "have any official legal relationship with [HMIT] where [he] can attempt to exercise either direct or indirect control over [HMIT]," or (iv) "participate in the decision of whether or not to file the proceedings that are currently pending before Judge Jernigan."[116] After HMIT rested, Highland and the Claimant Trust called Patrick as a witness, and he testified that he was the administrator of HMIT, that HMIT does not have any employees, operations, or revenues, and, when asked if HMIT owned any assets, Patrick testified, with not a great deal of certainty, that "it's my understanding it has a contingent beneficiary interest in the Claimants [sic] Trust" and that is the only asset HMIT has.[117] Patrick testified that HMIT did not owe any money to Dondero personally, but acknowledged that in 2015, HMIT had issued a secured promissory note in favor of Dondero's family trust, Dugaboy, in the amount of approximately $62.6 million (the "Dugaboy Note") in exchange for Dugaboy transferring a portion of its limited partner interests in Highland to HMIT; the Dugaboy Note was secured in part by the Highland limited partnership interests purchased from Dugaboy.[118] Patrick admitted that, if HMIT's Class 10 interest has no value, HMIT would have no ability to pay the Dugaboy Note.[119] He further testified that neither he nor any representative of HMIT had ever spoken with any representative of Farallon or Stonehill, that he had no personal knowledge about any *quid pro quo*, the amount of due diligence Farallon or Stonehill conducted prior to buying their claims, or the terms of

[115] *See* June 8 Hearing Transcript, 113:10-25.

[116] *Id.*

[117] June 8 Hearing Transcript, 307:7-308:2.

[118] *Id.*, 303:11-305:1; Highland Ex. 51, HMIT's $62,657,647.27 *Secured Promissory Note* dated December 24, 2015, in favor of Dugaboy.

[119] *Id.*, 308:3-16.

Seery's compensation package (until the terms were disclosed to them in opposition to the Motion for Leave).[120] Patrick admitted that Dugaboy was paying HMIT's attorneys' fees pursuant to a settlement agreement between HMIT and Dugaboy.[121]

On cross-examination by HMIT's counsel, Patrick further testified that HMIT has not filed any litigation, as plaintiff, other than its efforts to be a plaintiff in the Motion for Leave and its action as a petitioner in the Texas Rule 202 proceeding filed earlier in 2023 in the Texas state court.[122] HMIT's counsel argued that the point of this questioning was that "they're just trying to draw Dondero into this and – this vexatious litigant argument, and we're just developing the fact that obviously Hunter Mountain has only filed – attempting to file this action and a Rule 202 proceeding.[123] But, Dondero and HMIT's counsel referred during the June 8 Hearing to the First Rule 202 Petition (where Dondero was the petitioner) and the Second Rule 202 Petition (where HMIT was the petitioner) as "our" Rule 202 petitions, and also to the numerous attempts at getting the discovery (that Dondero had warned Linn was coming) in the collective. For example, in objecting to the admission of Highland's Exhibit 10 – the Texas state court order denying and dismissing the Second Rule 202 Petition – on the basis of relevance, HMIT's counsel referred to the order as "an order denying ***our second"*** Rule 202 Petition.[124] And, Dondero testified that his warning to Linn in May 2021 that "discovery was coming" was "my response to I knew they had traded on material nonpublic information" and that "I thought it would be a lot easier to get

[120] *Id.*, 308:18-312:12. This testimony from Patrick came after HMIT's counsel objection to counsel's line of questioning regarding Patrick's personal knowledge of the facts supporting the allegations in the Proposed Complaint on the basis that he was invading the attorney work product privilege, which was overruled by this court; HMIT's counsel argued (311:4-19) that the line of questioning was an "invasion of attorney work product . . . [b]ecause they might – he would have knowledge from the efforts and investigation through attorneys in the case."

[121] *Id.*, 312:24-313:18.

[122] *Id.*, 315:3-9.

[123] *Id.*, 316:6-11.

[124] *Id.*, 58:11-13. The court overruled HMIT's relevance objection and admitted Highland's Exhibit 10 into evidence. *Id.*, 58:14-15.

discovery on a situation like this than it has been for the last two years" and that "***we've*** been trying for two years to get . . . discovery."[125]

Dondero's use of an entity over which he exerts influence and control to pursue his own agenda in the bankruptcy case is not new. Rather, this has been part of Dondero's *modus operandi* since the "nasty breakup" between Dondero and Highland that culminated with Dondero's ouster in October 2020, whereby Dondero, after not getting his way in the bankruptcy court, continued to lob objections and create obstacles to Highland's implementation of the Plan through entities he owns or controls. As noted above, the Fifth Circuit specifically upheld this court's finding in the Confirmation Order that Dondero owned or controlled the various entities that had objected to confirmation of the Plan and appealed the Confirmation Order, where the Dondero-related appellants made similar protestations that they are not owned or controlled by Dondero and asked the Fifth Circuit to vacate this court's factual finding because, among other reasons, "[a]ccording to the Funds, the characterization is unfair, as *they* are not litigious like Dondero and are completely independent from him."[126] Based on the totality of the evidence in this proceeding, the court finds that, contrary to the protestations of HMIT's counsel and Patrick otherwise, Dondero is the driving force behind HMIT's Motion for Leave and the Proposed Complaint. The Motion for Leave is just one more attempt by Dondero to press his conspiracy theory that he has pressed for over two years now, unsuccessfully, in Texas state court through Rule 202 proceedings, with the Texas State Securities Board, and with the United States Trustee's office.

[125] *Id.*, 191:5-25.

[126] *Highland Capital*, 48 F.4th at 434-435.

G. Opposition to Motion for Leave: Arguing No Standing and No "Colorable" Claims

Highland, the Claimant Trust, and Seery (together, the "Highland Parties") filed a joint opposition ("Joint Opposition") to HMIT's Motion for Leave on May 11, 2023.[127] The Claims Purchasers filed a separate objection ("Claims Purchasers' Objection") to the Motion for Leave on May 11, 2023, as well.[128] In the Joint Opposition, the Highland Parties urge the court to deny HMIT leave to pursue the Proposed Claims because, as a threshold matter, HMIT does not have standing to bring them, directly or derivatively against the Proposed Defendants. They argue, in the alternative, that the Motion for Leave should be denied even if HMIT had standing to pursue the Proposed Claims because none of the Proposed Claims are "colorable" claims as that term is used in the Gatekeeper Provision of the Plan (and Gatekeeper Orders).[129]

The Claims Purchasers likewise argue that HMIT lacks standing to complain about claims trading in the bankruptcy which occurred between sophisticated Claims Purchasers and sophisticated sellers ("Claims Sellers"), represented by skilled bankruptcy and transactional counsel. Moreover, they argue HMIT cannot show that it or the Reorganized Debtor or the Claimant Trust were injured by the claims trading at issue because the Purchased Claims had already been adjudicated as allowed claims in the bankruptcy case—thus, distributions under the Plan on account of the Purchased Claims remain the same, the only difference being who holds the claims. Moreover, even if HMIT could succeed in equitably subordinating the validly transferred ***allowed*** claims, HMIT would still be in the same position it is today: the holder of a

[127] Bankr. Dkt. Nos. 3783. Highland, the Claimant Trust, and Seery also filed on May 11 a *Declaration of John A. Morris in Support of Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Joint Opposition to Hunter Mountain Investment Trust's Motion for Leave to File Verified Adversary Proceeding* ("Morris Declaration") that attached 44 Exhibits in support of the Joint Opposition. Bankr. Dkt. No. 3784.

[128] Bankr. Dkt. No. 3780.

[129] *See* Joint Opposition ¶ 139 ("Because HMIT lacks standing, this Court need not reach the merits of HMIT's proposed Adversary Complaint. As a matter of judicial economy, however, the Highland Parties respectfully request that this Court address the lack of merit as an alternative basis to deny the Motion.").

contingent, speculative Class 10 interest that would only be paid after payment, in full, with interest, of all creditors under the Plan. The Claims Purchasers argue in the alternative that the Proposed Claims are not "colorable."

Finally, the Proposed Defendants argue that the standard of review for assessing whether the Proposed Claims are "colorable" (as such term is used in the Gatekeeper Provision and Gatekeeping Orders) is a standard that is a higher than the "plausibility" standard applied to Rule 12(b)(6). They argue that HMIT should be required to meet a higher bar with respect to colorability that includes making a *prima facie* showing that the Proposed Claims have merit (and/or are not without foundation) which requires HMIT to do more than meet the liberal notice-pleading standards.

H. HMIT's Reply to the Proposed Defendants' Opposition to the Motion for Leave

In its reply brief ("Reply"), filed by HMIT on May 18, 2023,[130] it argues that it has constitutional standing as an "aggrieved party" to bring the Proposed Claims on behalf of itself.[131] HMIT also argues that it has standing under Delaware Trust law to bring a derivative action on behalf of the Claimant Trust and that it not only has standing to bring the Proposed Claims derivatively on behalf of the Reorganized Debtor under the Plan, but it is the best party to bring the claims.[132] Finally, HMIT maintains that the standard of review that the bankruptcy court should apply in assessing the "colorability" of the Proposed Claims is no greater than the standard of review applied to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), which would require the bankruptcy court to look only to the "four corners" of the Proposed Complaint

[130] Bankr. Dkt. No. 3785.

[131] *See* Reply ¶ 7.

[132] See, Reply ¶ 23 n.5, where HMIT argues "The nature of this injury, in addition to Seery's influence over the Claimant Trust, and the lack of prior action by the Claimant Trust to pursue the claims HMIT seeks to pursue derivatively, among other things, demonstrate that HMIT is not only a proper party to assert its derivative claims – but the best party to do so."

and "not weigh extraneous evidence,"[133] take all allegations as true, and view all allegations and inferences in a light most favorable to HMIT. As discussed in greater length below, HMIT argues that, under this standard, the bankruptcy court should not consider evidence in making its determination as to whether the Proposed Complaint presents "colorable" claims.

I. Litigation within the Litigation: The Pre- June 8 Hearing Skirmishes

Suffice it to say there was significant activity before the Motion for Leave actually was presented at the June 8 hearing. HMIT sought an emergency hearing on its Motion for Leave (wanting a hearing on three days' notice). When the bankruptcy court denied an emergency hearing, HMIT unsuccessfully pursued an interlocutory appeal of the denial of an emergency hearing to the district court. HMIT then petitioned for a writ of mandamus at the Fifth Circuit regarding the emergency hearing denial, which was denied by the Fifth Circuit on April 12, 2023.

Next, there were multiple pleadings and hearings regarding ***what kind of hearing*** the bankruptcy court should or should not hold on the Motion for Leave—particularly focusing on whether or not it would be an evidentiary hearing.[134] The resolution of this issue turned on what standard of review the court should apply in exercising its gatekeeping function and determining the colorability of the Proposed Claims. HMIT (although it had submitted two declarations of Dondero with its original Motion for Leave and approximately 350 pages of total evidentiary support) was adamant that there should be no evidence presented at the hearing on the Motion for Leave, arguing that the standard for review should be the plausibility standard under Rule 12(b)(6)

[133] *See* Reply ¶ 47.

[134] Highland, joined by Seery and the Claims Purchasers, had filed a motion asking the bankruptcy court to set a briefing schedule on the Motion for Leave and to schedule a status conference, indicating that Highland's proposed timetable for same was opposed by HMIT. HMIT subsequently filed a response unopposed to a briefing schedule and status conference, but, before the status conference, HMIT filed a brief, stating it was opposed to there being any evidence at the ultimate hearing on the HMIT Motion for Leave—arguing the bankruptcy court did not need evidence to exercise its gatekeeping function and determine if HMIT has a "colorable" claim. Rather, the court need only engage in a Rule 12(b)(6)-type plausibility analysis.

motions to dismiss such that "the threshold inquiry is very, very low. Evidence is not allowed. . . . [S]imilar to a 12(b)(6) inquiry, [the court] is limited to the four corners of the principal pleading – in this case, the complaint, or now the revised complaint."[135] Counsel for the Proposed Defendants argued that the standard of review for colorability here, in the specific context of the court exercising its gatekeeping function under the Plan, is more akin to the standards applied under the Supreme Court's *Barton Doctrine*[136] pursuant to which that the bankruptcy court must apply a higher standard than the 12(b)(6) standard, including the consideration of evidence at the hearing on the motion for leave; if the standard of review presents no greater hurdle to the movant than the 12(b)(6) standard applied to every plaintiff in every case, then the gatekeeping provisions mean nothing and do nothing to protect the parties from the harassing, bad-faith litigation they were put in place to prevent.[137] On May 22, 2023, after receipt of post-hearing briefing on the issue, the court entered an order stating that "the court has determined that there may be mixed questions of fact and law implicated by the Motion for Leave" and "[t]herefore, the parties will be permitted to present evidence (including witness testimony) at the June 8, 2023 hearing [on the Motion to Leave] if they so choose."

Two days later, HMIT filed an emergency motion for expedited discovery or alternatively for continuance of the June 8, 2023 hearing, seeking expedited depositions of corporate

[135] Transcript of April 24, 2023 Status Conference, Bankr. Dkt. No. 3765 ("April 24 Transcript"), 14:6-11.

[136] The *Barton Doctrine* was established in the 19th century Supreme Court case of *Barton v. Barbour*, 104 U.S. 126 (1881), and states that a party wishing to sue a court-appointed trustee or receiver must first obtain leave of the appointing court by making a *prima facie* case that the claim it wishes to bring is not without foundation.

[137] *See* April 24 Transcript, 36:24-37:4 ("[W]e're exactly today where the Court had predicted in entering [the Confirmation Order], that the costs and distraction of this litigation are substantial. And if all we're doing is replicating a 12(b)(6) hearing on a motion for leave, we're actually not doing anything to reduce, as the Court made clear, the burdens, distractions, of litigation."); 37:5-13 ("The Fifth Circuit likewise cited *Barton* in its order affirming the confirmation order. Specifically, it also explained that the provisions, these gatekeeper provisions requiring advance approval were meant to 'screen and prevent bad-faith litigation.' Well that – if that means only what the Plaintiff[ ] say[s] it does, then it really doesn't do anything at all to screen. There's no gatekeeping because their version of what that means is always policed under 12(b)(6) standards.").

representatives of the Claims Purchasers and of Seery and production of documents pursuant to deposition notices and subpoenas duces tecum that HMIT had attached to the motion. On May 26, 2023, this court held yet another status conference. Following the status conference, the court granted in part and denied in part HMIT's request for expedited discovery by ordering only Seery and Dondero to be made available for depositions prior to the June 8 Hearing. The court reached what seemed like appropriate middle ground by allowing the deposition of Seery and allowing the other parties to depose Dondero (for whom sworn declarations had been submitted), but the court was not going to allow any more discovery (i.e., of the Claims Purchasers) at so late an hour. The court was aware that HMIT and Dondero had been seeking discovery relating to the very claims trades that are the subject of the Revised Proposed Complaint from the Claims Purchasers in Texas state court "Rule 202" proceedings for approximately two years, where their attempts were rebuffed.

Approximately 60 hours before the June 8 Hearing, HMIT filed its Witness and Exhibit List disclosing for the first time two potential expert witnesses (along with biographical information and a disclosure regarding the subject matter of their likely testimony). Highland, the Claimant Trust, and Seery filed a joint motion to exclude the expert testimony and documents ("Motion to Exclude"), which the court ultimately granted in a separate order.

During the full-day June 8 Hearing on the Motion to Leave, the court admitted over 50 HMIT exhibits and over 30 Highland/Claimant Trust exhibits. The court heard testimony from HMIT's witnesses Dondero and Seery (as an adverse witness) and from the Highland Parties' witness Mark Patrick, the administrator of HMIT since August 2022 (as an adverse witness). The bankruptcy court allowed HMIT to make a running objection to all evidence—as it continued to argue that evidence was not appropriate.

III. LEGAL ANALYSIS

In determining whether HMIT should be granted leave, pursuant to the Gatekeeper Provision of the Plan and the court's prior Gatekeeper Orders, to pursue the Proposed Claims, the court must address the issue of whether HMIT would have ***standing*** to bring the Proposed Claims in the first instance. If so, the next question is whether the Proposed Claims are "***colorable***." But prior to getting into the weeds on ***standing*** and "***colorability,***" some general discussion regarding the topic of claims trading in the bankruptcy world seems appropriate, given that HMIT's Proposed Claims are based, in large part, on allegations of ***improper*** claims trading.

A. Claims Trading in the Context of Bankruptcy Cases—Can It Be Tortious or Otherwise Actionable?

As noted, at the crux of HMIT's desired lawsuit is what this court will refer to as "claims trading activity" that occurred shortly after the Plan was confirmed, but before the Plan went effective. HMIT believes that the claims trading activity gave rise to various torts: breach of fiduciary duty on the part of Seery; knowing participation in breach of fiduciary duty by the other Proposed Defendants; and conspiracy by all Defendants. HMIT also believes that the following remedies should be imposed: equitable disallowance of the Purchased Claims; disgorgement of the alleged profits the Claims Purchasers made on their purchases; and disgorgement of all Seery's compensation received since the beginning of his "collusion" with the other Defendants. Without a doubt, the Motion for Leave and Proposed Complaint revolve almost entirely around the claims trading activity.

This begs the question: ***When (or under what circumstances) might claims trading activity during a bankruptcy case give rise to a cause of action that either the bankruptcy estate or an economic stakeholder in the case might have standing to bring?*** Here, the claims trading

wasn't even "during a bankruptcy case" really—it was post-confirmation and pre-effective date, and it happened to be: (a) after mediation of the claims, (b) after Rule 9019 settlement motions, (c) after objections by Dondero and certain of his family trusts were lodged, (d) after evidentiary hearings, and (e) after orders were ultimately entered ***allowing*** the claims (and in most cases, such orders were appealed). The further crux of HMIT's desired lawsuit is that Seery allegedly "wrongfully facilitated and promoted the sale of large unsecured creditor claims to his close business allies and friends" by sharing ***material non-public information*** to them regarding the potential value of the claims (i.e., the potential value of the bankruptcy estate), and this is what made the claims trading activity particularly pernicious. The alleged sharing of MNPI allegedly caused the Claims Purchasers to purchase their claims without doing any due diligence and with knowledge that the claims would be worth much more than the Plan's "pessimistic" projections might have suggested, and also allowed Seery to plant friendly allies into the creditor constituency (and on the post-confirmation CTOB) that would "rubber stamp" his generous compensation. This is all referred to as "not arm's-length" and "collusive." Notably, the MNPI mostly pertained to a likely future acquisition of MGM by Amazon (which transaction, indeed, occurred in 2022, after being publicly announced in Spring of 2021); as noted earlier, Highland owned, directly and indirectly, common stock in MGM. Also notably, there had been rumors and media attention regarding a potential sale of MGM for many months.[138] In summary, to be clear, HMIT's desired lawsuit is laced with a theme of "insider trading"—although this isn't a situation of securities trading *per se* (i.e., the unsecured Purchased Claims were not securities), and, as noted earlier, the Texas State Securities Board has not seen fit to investigate the claims trading activity.

So, preliminarily, is claims trading in bankruptcy sinister *per se*? The answer is no.

[138] *E.g.,* Benjamin Mullin, *MGM Holdings, Studio Behind 'James Bond,' Explores a Sale,* THE WALL STREET JOURNAL (Dec. 21, 2020, 6:38 p.m.).

The activity of investing in distressed debt (which frequently occurs during a bankruptcy case—sometimes referred to as "claims trading") is ubiquitous and, indeed, has been so for a very long time. As noted by one scholar:

> The creation of a market in bankruptcy claims is the single most important development in the bankruptcy world since the Bankruptcy Code's enactment in 1978. [Citations omitted.] Claims trading has revolutionized bankruptcy by making it a much more market-driven process. [Citations omitted.] . . . The development of a robust market for all types of claims against debtors has changed the cast of characters involved in bankruptcies. In addition to long-standing relational creditors, like trade creditors or a single senior secured bank or bank group, bankruptcy cases now involve professional distressed debt investors, whose interests and behavior are often quite different than traditional relational counterparty creditors.

Adam J. Levitin, *Bankruptcy* Markets*: Making Sense of Claims Trading*, 4 BROOK. J. CORP. FIN. & COM. L. 64, 65 (2010) (hereinafter "*Bankruptcy Markets*").[139]

As a pure policy matter, some practitioners have bemoaned this claims trading phenomenon, suggesting that "distressed debt traders may sacrifice the long-term viability of a debtor for the ability to realize substantial and quick returns on their investments."[140] Others suggest that claims trading in bankruptcy is beneficial, in that it allows creditors of a debtor an early exit from a potentially long bankruptcy case, enabling them to save expense and administrative hassles, realize immediate liquidity on their claims (albeit discounted), and may

[139] *See also* Aaron Hammer & Michael Brandess, *Claims Trading: The Wild West of Chapter 11s*, AM. BANKR. INST. JOURNAL 62 (Jul./Aug. 2010); Chaim Fortgang & Thomas Mayer, *Trading Claims and Taking Control of Corporations in Chapter 11,* 12 CARDOZO L. REV. 1, 25 (1990) (noting that "the first recorded instance of American fiduciaries trading claims against insolvent debtors predates all federal bankruptcy laws and goes back to 1790" when the original 13 colonies were insolvent, owing tremendous amounts of debt to various parties in connection with the Revolutionary War; early American investors purchased these debts for approximately 25% of their par value, hoping the claims would be paid at face value by the American government).

[140] Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2016 (2002). *See also* Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153 (2004); Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C. L. REV. 129 (2005).

even permit them to take advantage of a tax loss on their own desired timetable.[141] On the flipside, "[c]aims trading permits an entrance to the bankruptcy process for those investors who want to take the time and effort to monitor the debtor and contribute expertise to the reorganization process."[142]

So, what are the "rules of the road" here? What does the Bankruptcy Code dictate regarding claims trading? The answer is nothing. The Bankruptcy Code itself has no provisions whatsoever regarding claims trading. The only thing resembling any regulation of claims trading during a bankruptcy case is found at Federal Rule of Bankruptcy Procedure 3001(e)—the current version of which went into effect in 1991—and it imposes extremely light regulation—if it could even be called that. This rule requires, in pertinent part (at subsection (2)), that "[i]f a claim other than one based on a publicly traded note, bond, or debenture" is traded during the case after a proof of claim is filed, notice/evidence of that trade must be filed with the bankruptcy clerk by the transferee. The transferor shall then be notified and given 21 days to object. If there is an objection, the bankruptcy court will hold a hearing regarding whether a transfer, in fact, took place. If there is no objection, nothing further needs to happen, and the transferee will be considered substituted for the transferor.

There are several things noteworthy about Rule 3001(e)(2). First, the only party given the opportunity to object is the ***transferor*** of the claim (presumably, in the situation of a dispute regarding whether there was truly an agreement regarding the transfer of the claim). Second, there is no need for a bankruptcy court order approving the transfer (except in the event of an objection

[141] *See Bankruptcy Markets*, at 70. *See also In re Kreisler,* 546 F.3d 863, 864 (7th Cir. 2008) ("Claims trading allows creditors to opt out of the bankruptcy system, trading an uncertain future payment for an immediate one, so long as they can find a purchaser.").

[142] *Bankruptcy Markets* at 70 (citing, among other authorities, Edith S. Hotchkiss & Robert M. Mooradian, *Vulture Investors and the Market for Control of Distressed Firms*, 43 J. FIN. ECON. 401, 401 (1997) (finding that "vulture investors add value by disciplining managers of distressed firms").

by the alleged transferor). Third, the ***economic consideration paid need not be disclosed to the court or anyone***. Fourth, there is no requirement or definition of timeliness. Finally, it explicitly does not apply with regard to publicly traded debt. This, alone, means that many claims trades are not even reported in a bankruptcy case. But it is not just publicly traded debt that will not be reflected with a Rule 3001(e) filing. For example, bank debt, in modern times, is often syndicated (i.e., fragmented into many beneficial holders of portions of the debt) and only the administrative agent for the syndicate (or the "lead bank") will file a proof of claim in the bankruptcy—thus, as the syndicated interests (participations) change hands, and they frequently do, there typically will not be a Rule 3001(e) notice filed.[143] To be clear here, this syndication-of-bank-debt fact, along with the fact that there are financial products whereby bank debt might be carved up into economic interests separate and apart from legal title to the loan, means there are many situations in which trading of claims during a bankruptcy case is not necessarily transparent or, for that matter, policed by the bankruptcy court. This is the world of modern bankruptcy. Most of the claims trading that gets reported through a Rule 3001(e) notice is the trading of small vendor claims. And this is all regarded as private sale transactions for the most part.[144]

Suffice it to say that there is not a wealth of case law dealing with claims trading in a bankruptcy context. Perhaps this is not surprising, since it is not prohibited and ***is mostly a matter of private contract between buyer and seller***. The case law that does exist seems to arise in situations of perceived bad faith of a purchaser—for example, when there was an attempt to control voting and/or ultimate control of the debtor through the plan process (not always problematic, but

[143] Anne Marrs Huber & Thomas H. Young, *The Trading of Bank Debt in and Out of Chapter 11*, 15 J. BANKR. L. & PRAC. 1, 1, 3 (2006).

[144] Note that Bankruptcy Rule 3001(e) was very different before 1991. Between 1983-1991, the rule required that parties transferring claims inform the court that a transfer of claims was taking place and also disclose the consideration paid for the transferred claims. A hearing would take place prior to the execution of a trade. Judicial involvement was required and resulted in judicial scrutiny of transactions—something that simply does not exist today.

there are outlier cases where this was found to cross a line and result in consequences such as disallowing votes on a plan or even equitable subordination of a claim).[145] Another type of case that has generated case law is where the purchaser of claims occupied a fiduciary status with the debtor.[146] Still another type of case that has generated case law is where there is an attempt to cleanse claims that might have risks because of a seller's malfeasance, by trading the claim to a new claim holder.[147]

The following is a potpourri of the more notable cases that have addressed claims trading in different contexts. Most of them imposed no adverse consequences on claims traders: *In re Kreisler*, 546 F.3d 863, 864 (7th Cir. 2008) (where a corporation named Garlin, that was owned by the individual chapter 7 debtors' sister and close friend, purchased a $900,000 bank claim for $16,500, and there was no disclosure of Garlin's connections to debtors and no Rule 3001(e)(2) notice was filed, the Seventh Circuit reversed the bankruptcy court's invocation of the doctrine of equitable subordination to the claim, stating: "Equitable subordination is generally appropriate only if a creditor is guilty of misconduct that causes injury to the interests of other creditors;" the Seventh Circuit further stated that it could "put to one side whether the court's finding of inequitable conduct was correct" because even if there was misconduct, it did not harm the other creditors, who were in the same position whether the original creditor or Garlin happened to own the claim; the Seventh Circuit did note that Garlin's decision to purchase the original bank

[145] *In re Applegate Prop. Ltd.,* 133 B.R. 827, 836 (Bankr. W.D. Tex. 1991) (designating votes of an affiliate of the debtor that purchased a blocking position to thwart a creditor's plan because it was done in bad faith); *In re Allegheny Int'l, Inc.,* 118 B.R. 282, 289–90 (Bankr. W.D. Pa. 1990) (because of bad faith activities, the court designated votes of a claims purchaser who purchased to get a blocking position on a plan). *But see In re First Humanics Corp.,* 124 B.R. 87, 92 (Bankr. W.D. Mo. 1991) (claims purchased by debtor's former management company to gain standing to file a plan to protect interest of the debtor was in good faith).

[146] *See In re Exec. Office Ctrs., Inc.*, 96 B.R. 642, 649-650 (Bankr. E.D. La. 1988) (and numerous old cites therein).

[147] *Enron Corp. v. Ave. Special Situations Fund II, LP (In re Enron Corp.),* 340 B.R. 180 (Bankr. S.D.N.Y. 2006), *vacated, Enron Corp. v. Springfield Assocs., L.L.C. (In re Enron Corp.),* 379 B.R. 425 (S.D.N.Y 2007); *Enron Corp. v. Ave. Special Situations Fund II, LP (In re Enron Corp.),* 333 B.R. 205, 211 (Bankr. S.D.N.Y. 2005).

creditor's claim might have disadvantaged the other creditors if it interfered with the trustee's own potential settlement with the original bank creditor (note that the trustee argued that she had been negotiating a deal with bank under which bank might have reduced its claims); however, the trustee presented no evidence that any deal with the bank was imminent or even likely; thus, whether such a deal could have been reached was speculation; equitable subordination was therefore improper."); *Viking Assocs., L.L.C. v. Drewes (In re Olson),* 120 F.3d 98, 102 (8th Cir. 1997) (case involved the actions of an entity known as Viking in purchasing all of the unsecured claims against the bankruptcy estate of two chapter 7 debtors, Hugo and Jeraldine Olson; Viking was a related entity, owned by the debtors' children, and purchased $525,000 of unsecured claims for $67,000; while the bankruptcy court had discounted the claims down to the purchase amount and subordinated Viking's discounted claims to the claims of the other unsecured creditors, relying on section 105 of the Bankruptcy Code, the Eighth Circuit held that the bankruptcy court lacked the authority to do this, and, thus, reversed and remanded; the Eighth Circuit noted that in 1991, Bankruptcy Rule 3001(e)(2) was amended "to restrict the bankruptcy court's power to inspect the terms of" claims transfers. *Id.* at 101 (citing *In re SPM Mfg. Corp.,* 984 F.2d 1305, 1314 n. 9 (1st Cir. 1993)); the text of the rule makes clear that the existence of a "dispute" depends upon an objection by the ***transferor***; where there is no objection by the ***transferor***, there is no longer any role for the court); *Citicorp. Venture Capital, Ltd. v. Official Committee of Unsecured Creditors (In re Papercraft Corp.),* 160 F.3d 982 (3d Cir. 1998) (large investor who held seat on board of directors of debtor and debtor's parent, and who also had nonpublic information regarding the debtor's value, anonymously purchased 40% of the unsecured claims at a steep discount during the chapter 11 case, and then, having obtained a blocking position for plan voting purposes, proposed a plan to acquire debtor; the claims purchaser's claims were equitably reduced to amount

paid for the claims since investor was a fiduciary who was deemed to have engaged in inequitable conduct); *Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am. (In re Figter),* 118 F.3d 635 (9th Cir. 1997) (Ninth Circuit affirmed bankruptcy court's ruling that a secured creditor's purchase of 21 out of 34 unsecured claims in the case was in good faith and it would not be prohibited from voting such claims on the debtor's plan, pursuant to Bankruptcy Code section 1126(e)); *In re Lorraine Castle Apartments Bldg. Corp.,* 145 F.2d 55, 57 & 58 (7th Cir. 1945) (in a case under the old Bankruptcy Act, in which there were more restrictions on claims trading, a debtor and two of its stockholders argued that the claims of purchasers of bonds should be limited to the amounts they paid for them; bankruptcy court special master found, "that, though he did not approve generally the ethics reflected by speculation in such bonds," there was no cause for limitation of the amounts of their claims, pointing out that the persons who had dealt in the bonds were not officials, directors, or stockholders of the corporation and owed no fiduciary duty to the estate or its beneficiaries—rather they were investors or speculators who thought the bonds were selling too cheaply and that they might make a legitimate profit upon them; the district court agreed, as did the Seventh Circuit, noting that "[t]o reduce the participation to the amount paid for securities, in the absence of exceptional circumstances which are not present here, would reduce the value of such bonds to those who have them and want to sell them. This would result in unearned, undeserved profit for the debtor, destroy or impair the sales value of securities by abolishing the profit motive, which inspires purchasers."); *In re Washington Mutual, Inc.*, 461 B.R. 200 (Bankr. Del. 2011), *vacated in part*, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012) (discussion of an equity committee's potential standing to pursue equitable subordination or equitable disallowance of the claims of certain noteholders who had allegedly traded their claims during the chapter 11

case while having material non-public information; while bankruptcy court originally indicating these were viable tools, court later vacated its ruling on this after a settlement was reached).

Suffice it to say that the courts have, more often than not, been unwilling to impose legal consequences, for an actor's involvement with claims trading. At most, in outlier-type situations during a case, courts have taken steps to disallow claims for voting purposes or to subordinate claims to other unsecured creditors for distribution purposes.[148] But the case at bar does not present facts that are typical of any of the situations in reported cases.

For one thing, unlike in the reported cases this court has located, there ***seems to have been complete symmetry of sophistication among the claim sellers and claim purchasers here—and complete symmetry with HMIT for that matter***. All persons involved are highly sophisticated financial institutions, hedge funds, or private equity funds. No one was a "mom-and-pop" type business or vendor that might be vulnerable to chicanery. The claims ranged from being worth $10's of millions of dollars to $100's of millions of dollars in face value. And, of course, the sellers/transferors of the claims have never shown up, subsequent to the claims trading

[148] Note that, while some cases suggest that outright disallowance of an unsecured claim, in the case of "inequitable conduct" might be permitted (not merely equitable subordination to unsecured creditors)—usually citing to *Pepper v. Litton*, 308 U.S. 295 (1939)—the Fifth Circuit has suggested otherwise. *In re Mobile Steel Co., Inc.,* 563 F.2d 692, 699-700 (5th Cir. 1977) (cleaned up) (noting that "equitable considerations can justify only the subordination of claims, not their disallowance" and also noting that "three conditions must be satisfied before exercise of the power of equitable subordination is appropriate[:] (i) The claimant must have engaged in some type of inequitable conduct[;] (ii) The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant[; and] (iii) Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act." In *Mobile Steel*, the Fifth Circuit held that the bankruptcy judge exceeded the bounds of his equitable jurisdiction by disallowing a group of claims and also reversed the subordination of certain claims, on the grounds that the bankruptcy court had made clearly erroneous findings regarding alleged inequitable conduct and other necessary facts. *Contrast In re Lothian Oil Inc.,* 650 F.3d 539 (5th Cir. 2011) (involving the question of whether a bankruptcy court may ***recharacterize*** a claim as equity rather than debt; the court held yes, but it has nothing to do with inequitable conduct *per se*; rather section 502(b)'s language that a claim should be allowed unless it is "unenforceable against the debtor and property of the debtor, under any agreement or applicable law...." is the relevant authority; unlike equitable subordination, recharacterization is about looking at the true substance of a transaction not the conduct of a party (if it looks like a duck and quacks like a duck, it's a duck—i.e., equity); the court indicated that section 105 is not a basis to recharacterize debt as equity; it's a matter of looking at state law to determine if there is any basis and looking at the nature of the underlying transaction—as either a lending arrangement or equity infusion.

transactions, to complain about anything. Everyone involved here is, essentially, a behemoth and there is literally no sign of innocent creditors getting harmed. Second, the case at bar is unique in that the claims traded here ***had all been allowed after objections, mediation, and Rule 9019 settlements during the bankruptcy case***. Thus, the amounts that would be paid on them were "locked in," so to speak. There was no risk to a hypothetical claims-purchaser of disallowance, offset, or any "claw-back" litigation (or—one might have reasonably assumed—any type of litigation). Third, the terms for distributions on unsecured claims had been established in a confirmed plan (although the claims were purchased before the effective date of the Plan). Thus, there was a degree of certainty regarding return on investment for the Claims Purchasers here that was much higher than if the claims had been purchased early, during, or mid-way through the case.[149] ***This was post-confirmation, pre-effective date claims purchasing.*** Interestingly, all three of these facts might suggest that little due diligence would be undertaken by any hypothetical purchaser. The rules of the road had been set. The court makes this observation because HMIT has suggested there is something highly suspicious about the fact that Farallon allegedly told Dondero that it did no due diligence before purchasing its claims (leading him to conclude that the Claims Purchasers must have purchased their claims based on receiving MNPI from Seery). Not only has there been no colorable evidence suggesting that insider information was shared, but the lack of due diligence in this context does not reasonably seem suspicious. The claims purchases

[149] *See discussion* in BANKRUPTCY MARKETS, at 91:

> Some claims purchasers buy before the bankruptcy petition is filed, some at the beginning of the case, and some towards the end. For example, there are investors who look to purchase at low prices either when a business is failing or early in the bankruptcy and ride through the case until payouts are fairly certain. [Citations omitted.] These investors might be hoping to buy at 30 cents on the dollar and get a payout at 70 cents on the dollar. Perhaps if they waited another six months, the payout would be 74 cents on the dollar, but the additional 4 cents on the dollar for six months might not be a worthwhile return for the time value of the investment. Other investors might not want to assume the risk that exists in the early days of a case when the fate of the debtor is much less certain, but they would gladly purchase at 70 cents on the dollar at the end of the case to get a payout of 74 cents on the dollar six months later.

were almost like passive investments, at this point—there was no risk of a claim objection and there was a confirmed plan, with a lengthy disclosure statement that described not only plan payment terms and projections, but essentially anything that any investor might want to know.

To reiterate, here, HMIT seeks leave to assert the following causes of action:

I. Breach of Fiduciary Duties (Seery)

II. Knowing Participation in Breach of Fiduciary Duties (Claims Purchasers)

III. Conspiracy (all Proposed Defendants)

IV. Equitable Disallowance (Claims Purchasers)

V. Unjust Enrichment and Constructive Trust (all Proposed Defendants)

VI. Declaratory Judgment (all Proposed Defendants)

The court struggles to fathom how any of these proposed causes of action or remedies can be applied in the context of: (a) post-confirmation claims trading; (b) where the claims have all been litigated and allowed.

In reflecting on the case law and various Bankruptcy Code provisions, the court can fathom the following hypotheticals in which claims trading during a bankruptcy case might be somehow actionable:

> **Hypothetical #1**: The most obvious situation would be if a purchaser of a claim files a Rule 3001(e) Notice, and the seller/transferor then files an objection thereto. There would then be a contested hearing between purchaser and seller regarding the validity of the transfer with the bankruptcy court issuing an appropriate order after the hearing on the objection. ***As noted, there was no objection to the Rule 3001(e) notices here***.
>
> **Hypothetical #2:** Alternatively, there could be a breach of contract suit between purchaser and seller if one thinks the other breached the purchase-sale agreement somehow. Perhaps torts might also be alleged in such litigation. ***As noted, there is no dispute between purchasers and sellers here.***
>
> **Hypothetical #3:** If there is believed to be fraud in connection with a plan, a party in interest might, pursuant to section 1144 of the Bankruptcy Code, move for

revocation of the plan "at any time before 180 days after the date of entry of the order for confirmation" and the court "may revoke such order if and only if such order was procured by fraud." ***As noted, here HMIT has suggested that the "pessimistic" plan projections may have been fraudulent or misrepresentations somehow. The time elapsed long ago to seek revocation of the Plan.***

Hypothetical #4: As discussed above, in rare situations (bad faith), during a Chapter 11 case, before a plan is confirmed, a claims purchaser's claim might not be allowed for voting purposes. *See* Sections 1126(e) of the Bankruptcy Code ("the court may designate any entity whose acceptance or rejection of such plan was not in good faith"). ***Obviously, in this case, this is not applicable—the claims were purchased post-confirmation.***

Hypothetical #5: As discussed above, in rare situations (inequitable conduct), a court might equitably subordinate ***claims*** to ***other claims***. *See* Section 510(c) of the Bankruptcy Code. But here**,** HMIT is seeking either: (a) equitable subordination of the ***claims*** of the Claims Purchaser to HMIT's ***Class 10 former equity interest*** (in contravention of the explicit terms of section 510(c)) or, (b) ***equitable disallowance*** of the claims of the Claims Purchasers (in contravention of *Mobile Steel*).

Hypothetical #6: Bankruptcy Code section 502(b)(1) and the Fifth Circuit's *Lothian Oil* case may permit "recharacterization" of a claim from debt to equity in certain circumstances, but not in circumstances like the ones in this case. Here, the claims have already been adjudicated and allowed (some after mediation, and all after Rule 9019 settlement orders). The only way to reconsider a claim in a bankruptcy case that has already been allowed is through Bankruptcy Code section 502(j) ("A claim that has been allowed or disallowed may be reconsidered for cause. . . according to the equities of the case."). The problem here is that Bankruptcy Rule 9024 provides that a motion for "reconsideration of an order allowing or disallowing a claim against the estate ***entered without a contest*** is not subject to the one year limitation prescribed in Rule 60(c)" (emphasis added). Here there was most definitely "a contest" with regard to all of these purchased claims. ***Thus, it would appear that any effort to have a court reconsider these claims pursuant to section 502(j) is untimely—as it has been well beyond a year since they were allowed.***

Hypothetical #7: If a party believes "insider trading" occurred there are governmental agencies that investigate and police that. ***Here, the purchased claims (which were not based on bonds or certificated equity interests) would not be securities so as to fall under the SEC's purview. Moreover, there was evidence that HMIT or Dondero-Related entities requested that the Texas State Securities Board investigate the claims trading and the board did not find a basis to pursue anyone for wrongdoing***.

Hypothetical #8: The United States Trustee can investigate wrongdoing by a debtor or unsecured creditors committee. While the United States Trustee would naturally have concerns about members of an unsecured creditors committee (or an officer of a debtor-in-possession) adhering to fiduciary duties and not putting their

> own interests above those of the estate, here, there are a couple of points that seem noteworthy. One, the claims trading activity was post-confirmation so—while certain of the claim-sellers may have still been on the unsecured creditors committee, as the effective date of the plan had not yet occurred—the circumstances are very different than if this had all happened during the early, contentious stages of the case. It seems inconceivable that there was somehow a disparity of information that might be troubling—the Plan had been confirmed and it was available for the world to see. The whole notion of "insider information" (just after confirmation here) feels a bit off-point. Bankruptcy practitioners and judges sometimes call bankruptcy a fishbowl or use the "open kimono" metaphor for good reason. It is generally a very open process. And information-sharing on the part of a debtor-in-possession or unsecured creditors committee is intended to be robust. *See, e.g.,* Bankruptcy Code sections 521 and 1102(b)(3). In a way, HMIT here seems to be complaining about this very situation that the Code and Rules have designed.

In summary, claims trading is a highly ***unregulated*** activity in the bankruptcy world. ***HMIT is attempting to pursue causes of action here that, to this court's knowledge, have never been allowed in a context like this***.

B. Back to Standing—Would HMIT Have Standing to Bring the Proposed Claims?

The Proposed Defendants argue that HMIT lacks standing to bring the Proposed Claims, either: (a) derivatively on behalf of the Reorganized Debtor and Claimant Trust, or (b) directly on behalf of itself. Thus, they argue that this is one reason that the Motion for Leave should be denied.

In making their specific standing arguments, the parties analyze things slightly differently:

The Claims Purchasers focus primarily on HMIT's lack of ***constitutional*** standing but also argue that HMIT does not have ***prudential*** standing under Delaware trust law to bring the Proposed Claims either individually or derivatively. Why do they mention Delaware trust law? Because the Claimant Trust is a Delaware statutory trust governed by the Delaware Statutory Trust Act, 12 Del. C. §§ 3801–29.[150]

The Highland Parties' standing arguments focus almost entirely on HMIT's lack of ***prudential*** standing under Delaware trust law to bring the Proposed Claims.

HMIT argues that the Proposed Defendants "play fast and loose with standing arguments" and that HMIT has ***constitutional*** standing as a "party aggrieved"[151] to bring the Proposed Claims on behalf of itself. HMIT also argues that it has standing under Delaware trust law to bring a

[150] *See* Proposed Complaint, ¶ 26.

[151] Proposed Complaint, ¶7.

derivative action on behalf of the Claimant Trust, and that it not only has standing to bring the Proposed Claims derivatively on behalf of the Reorganized Debtor under the Plan, but it is the best party to do so.

1. The Different Types of Standing: Constitutional Versus Prudential

The parties are addressing two concepts of standing that can sometimes be confused and misapplied by both attorneys and judges: ***constitutional Article III standing***, which implicates federal court subject matter jurisdiction,[152] and the narrower standing concept of ***prudential standing***, which does not implicate subject matter jurisdiction but nevertheless might prevent a party from having capacity to sue, pursuant to limitations set by courts, statutes or other law.

Article III constitutional standing works as follows: a plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing three elements: (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent—not conjectural or hypothetical, (2) that there is a causal connection between the injury and the conduct complained of, and (3) it must be likely, not speculative, that the injury will be redressed by a favorable decision.[153] "If the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve."[154] These elements ensure that a plaintiff has "'such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[155]

[152] Article III, Section 2 of the U.S. Constitution gives federal courts jurisdiction over enumerated cases and controversies.

[153] *See Thole v. U.S. Bank, N.A.*, 140 S.Ct. 1615, 1618 (2020)(citing the Supreme Court's seminal case on the tripartite test for Article III constitutional standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), where the Supreme Court stated that "the irreducible constitutional minimum of standing contains [the] three elements"); *see also Spokeo*, 578 U.S. at 338; *Abraugh v. Altimus*, 26 F.4th 298, 302 (5th Cir. 2022) (citing *id.*).

[154] *Transunion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021)(cleaned up).

[155] *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Apart from this minimal constitutional mandate, courts and statutes have set other limits on the class of persons who may seek judicial remedies—and this is the concept of prudential standing. In its recent opinion in *Abraugh v. Altimus*,[156] the Fifth Circuit set forth a detailed analysis of the two types of "standing," noting that the term "standing" is often "misused" in our legal system, which has led to confusion for both attorneys and judges.[157] The constitutional standing that is necessary for a court to exercise subject matter jurisdiction is broader than prudential standing and is only the first hurdle a party must clear before pursuing a claim in federal court.

The Fifth Circuit explained that ***in addition to*** Article III constitutional standing, "courts have occasionally articulated other 'standing' requirements that plaintiffs must satisfy under certain conditions, ***beyond those imposed by Article III***,"[158] such as the "standing" requirement that might be imposed by a statute or by jurisprudence. The *Abraugh* case was a perfect example of the latter.

Abraugh involved the civil rights statutes that provide, among other things, that "a party must have standing under the state wrongful death or survival statutes to bring [a § 1983 cause of action]" and noted that these statutes impose additional "standing" requirements that are a matter of prudential standing, not constitutional standing.[159] In *Abraugh*, the Fifth Circuit reversed and remanded a district court's dismissal of a § 1983 civil rights cause of action—noting that the district court had stated that it was dismissing based on a "lack of subject matter jurisdiction" because the plaintiff in that action lacked standing.[160] The plaintiff was the mother of a prisoner

[156] 26 F.4th 298.
[157] *Id.* at 303.
[158] *Id.* at 302 (emphasis added).
[159] *Id.* at 302-303.
[160] *Id.* at 301.

who died by suicide while in custody who brought a § 1983 action against Louisiana correctional officers and officials. After finding that the plaintiff/mother lacked standing under Louisiana's wrongful death and survival statutes (because there had been a surviving child and wife of the prisoner who were the proper parties with capacity to sue), the district court held that it was dismissing for lack of subject matter jurisdiction. The Fifth Circuit pointed out that the plaintiff/mother may have lacked standing under Louisiana's wrongful death and survival statutes to bring the claim under § 1983, but that type of standing was matter of ***prudential*** standing, and the plaintiff/mother actually ***did*** have ***Article III*** constitutional standing ("a constitutionally cognizable interest in the life of her son").[161] Thus, the district court's error was ***not*** in finding that the plaintiff/mother lacked prudential standing but in improperly conflating the two standing concepts when it held that it had lacked ***subject matter jurisdiction*** to consider any of the plaintiff's/mother's amended complaints.[162] The Fifth Circuit noted specifically that[163]

> prudential standing does not present a jurisdictional question, but "a merits question: who, according to the governing substantive law, is entitled to enforce the right?" As the Federal Rules of Civil Procedure make clear, "an action must be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a)(1). And a violation of this rule is a failure of "prudential" standing. "Not one of our precedents holds that the inquiry is jurisdictional." It goes only to the validity of the cause of action. And "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction."

Somewhat relevant to this prudential standing discussion is the fact that, in this bankruptcy case, there have been dozens of appeals of bankruptcy court orders by Dondero and Dondero-related entities. In connection therewith, both the district court and the Fifth Circuit, in evaluating the ***appellate standing*** of the appellants, have taken pains to distinguish between the concepts of:

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[161] *Id.*

[162] *Id.* at 301, 303-304. The Fifth Circuit opined that "the district court did not err in describing [the mother's] inability to sue under Louisiana law as a defect of 'standing[, b]ut it is a defect of prudential standing, not Article III standing" thus technically not implicating the federal court's subject matter jurisdiction. *Id.* at 303.

[163] *Id.* at 304 (cleaned up).

(a) traditional, constitutional standing, and (b) a type of prudential standing known as the "person aggrieved" test, which is applied in the Fifth Circuit in determining whether a party has ***standing to appeal a bankruptcy court order***—which it describes as a narrower and "more exacting" standard than constitutional standing. As explained in a Fifth Circuit opinion addressing the standing of a Dondero-related entity called NexPoint to appeal bankruptcy court orders allowing professional fees, the "person aggrieved" standard that is typically applied to ascertain bankruptcy ***appellate*** standing originated in a statute in the Bankruptcy Act. The Fifth Circuit continued to apply it after Congress removed the provision when it enacted the Bankruptcy Code in 1978.[164] Because it is narrower and "more exacting" than the test for Article III constitutional standing, it involves application of prudential standing considerations.[165] The Fifth Circuit describes the "person aggrieved" test for bankruptcy appellant standing as requiring that an appellant show that it was "*directly and adversely affected pecuniarily* by the order of the bankruptcy court," requiring "a higher causal nexus between act and injury than traditional standing . . . that best deals with the unique posture of bankruptcy actions."[166] In affirming the district court's dismissal of NexPoint's appeal of the bankruptcy court's fee orders, due to NexPoint's lack of prudential standing under the "person aggrieved" test, the court rejected NexPoint's argument that it had standing to appeal

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[164] *NexPoint Advisors, L.P. v. Pachulski Stang Ziehl & Jones, L.L.P. (In re Highland Capital Management, L.P.)*, No. 22-10575, 2023 WL 4621466, *2 (5th Cir. July 19, 2023)(citing *In re Coho Energy Inc.*, 395 F.3d 198, 202 (5th Cir. 2004)(cleaned up)).

[165] *Id.* at *1, **4-6 (where the Fifth Circuit repeatedly throughout its opinion refers to the "person aggrieved" test for standing in bankruptcy actions as a test for "prudential standing."); *see also Dondero v. Highland Capital Mgt., L.P.*, Civ. Act. No. 3:20-cv-3390-X, 2002 WL 837208 (N.D. Tex. Mar. 18, 2022)(where the district court, in addressing Dondero's standing to appeal a bankruptcy court order approving a Rule 9019 settlement (between Highland and Acis Capital Management GP LLC), notes that "[i]t is substantially more difficult to have standing to appeal a bankruptcy court's order than it is to pursue a typical complaint under Article III of the U.S. Constitution" and that "the Fifth Circuit has long recognized that bankruptcy cases' wide-reaching scope calls for a more stringent standing test.").

[166] *See id.* at *3 (cleaned up). The court quotes its 2018 opinion in *Matter of Technicool Sys., Inc. (In re Technicool)*, 896 F.3d 382, 385 (5th Cir. 2018), which explains why the "person aggrieved" prudential standing standard is applied in bankruptcy actions: "Bankruptcy cases often involve numerous parties with conflicting and overlapping interests. Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, *quite limited*." *Id.* (cleaned up).

because "it meets traditional Article III standing requirements [and that the more exacting] prudential standing considerations such as the 'person aggrieved' standard" did not survive the Supreme Court's 2014 *Lexmark*[167] opinion,[168] which addressed standing issues in the context of false advertising claims under the Lanham Act and reminded that courts may not "limit a cause of action that Congress has created merely because 'prudence' dictates."[169] The Fifth Circuit held that the Supreme Court's reminder in *Lexmark* did not nullify the "person aggrieved" test for prudential standing in bankruptcy appeals, citing its own decision in *Superior MRI Services Inc. v. Alliance Healthcare Services, Inc.*[170] (rendered a year after *Lexmark* was decided), in which it held that *Lexmark* applied only to the circumstances of that case, "rather than broadly modifying—or undermining—*all* prudential standing concerns, such as the one animating the 'person aggrieved' standard in bankruptcy appeals."[171]

Similarly, in yet another appeal in this bankruptcy case involving three Dondero-related entities as appellants (NexPoint, Dugaboy, and HCMFA)—this one an appeal of a bankruptcy court order authorizing the creation of an indemnity subtrust and entry into an indemnity trust agreement—the district court noted the parties' confusion about the standing issue, as exemplified in the parties' reference to constitutional standing when they were actually arguing that they had prudential standing under the "person aggrieved" test: "Although the parties frame this issue as one of constitutional standing . . . they cite case law and present arguments about the prudential

[167] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

[168] *Id.* at *2.

[169] *See id.* at *4 (cleaned up).

[170] 778 F.3d 502 (5th Cir. 2015).

[171] *NexPoint*, 2023 WL 4621466 at *4 (cleaned up). The Fifth Circuit explicitly stated that "*Lexmark* does not expressly reach prudential concerns in bankruptcy appeals and brought no change relevant here." *Id.* at *5 (cleaned up).

standing requirement embodied in the 'person aggrieved' test."[172] The district court noted that it had an "independent obligation to consider constitutional standing before reaching its prudential aspects."[173] The district court dismissed the appeal as to Dugaboy and HCMFA for lack of standing but, upon concluding that NexPoint did have standing, dismissed the appeal as to it on the merits. The Fifth Circuit affirmed.[174] Interestingly, the court noted that, while the parties did not contest the district court's determination that NexPoint had standing to pursue the appeal, it "may consider prudential standing issues *sua sponte*."[175] In doing so, the Fifth Circuit recognized the distinction between constitutional standing and the prudential "person aggrieved" test applied to bankruptcy appeals, which "is, of necessity, quite limited" and "an even more exacting standard than traditional constitutional standing," as it requires an appellant to show that it is "directly, adversely, and financially impacted by a bankruptcy order."[176]

In summary, in analyzing whether HMIT would have standing to bring the Proposed Claims, this court must ***first*** determine whether HMIT would have constitutional standing under Article III (which is a subject matter jurisdiction hurdle) and, assuming it does, then ***additionally*** address whether HMIT would also have prudential standing (i.e., capacity to sue) pursuant to any applicable statutes (e.g., Delaware statutes), jurisprudence, or other substantive law that might ***limit*** who may sue. Notwithstanding HMIT's argument that it has standing under the "person

[172] *Highland Capital Mgt. Fund Advisors, L.P. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, Civ. Act. No. 3:21-cv-1895-D, 2002 WL 270862, *1 (N.D. Tex. Jan. 18, 2022)(cleaned up). The district court dismissed the appeals of two of the appellants, Dugaboy and HCMFA, finding that they lacked both constitutional standing and prudential standing under the "person aggrieved" test and affirmed the bankruptcy court's order after finding the third appellant, NexPoint, to have prudential standing under the "person aggrieved" test. *Id.* at **1-3 and *4.

[173] *Id.* at *1 n.2.

[174] *Highland Capital Mgt. Fund, L.P. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, 57 F.4th 494 (5th Cir. 2023).

[175] *Id.* at 501 (cleaned up).

[176] *Id.*

aggrieved" test[177]—which, as discussed above, is a matter of prudential standing—this is applied only in the context of bankruptcy ***appellate*** matters.[178] As noted in its most recent opinion discussing standing in an appeal from the Highland bankruptcy case, the Fifth Circuit reiterated that the "person aggrieved" test is a test for bankruptcy ***appellate*** standing, which is narrower than a party in interest's right to be heard in bankruptcy cases in general.[179] The court rejected an argument that Bankruptcy Code § 1109, which provides that "[a] party in interest . . . may raise and may appear and be heard on any issue in a case under this chapter" confers ***appellate*** standing, noting that "one's standing to appear and be heard before the bankruptcy court [is] a concept distinct from standing to appeal the merits of a decision" and that the "person aggrieved" test for bankruptcy appellate standing is narrower than the test for determining one's standing to appear and be heard in a bankruptcy proceeding.[180]

Thus, the court will now analyze whether HMIT would, at a minimum, have constitutional standing to bring the Proposed Claims.

2. HMIT Would Lack Article III Constitutional Standing to Bring the Proposed Claims.

As noted above, the Supreme Court and the Fifth Circuit have made clear that constitutional standing is necessary for a court to exercise subject matter jurisdiction. It is only the first hurdle a party must clear before pursuing a claim in federal court. HMIT, as plaintiff, would bear the

[177] HMIT insists that it has constitutional standing to bring claims on its individual behalf "as an aggrieved party." *See* Reply, ¶ 7.

[178] HMIT's argument in this matter that it has constitutional standing because it is a "party aggrieved" incorrectly conflates the prudential bankruptcy appellate "person aggrieved" test with the broader test that is applied to constitutional standing. The court is not being critical of this mistake. As noted at *supra* note 149, the Fifth Circuit in *Abraugh* pointed out that courts and attorneys alike have created confusion by misusing the term "standing" when they equate a lack of "standing," in all instances, with a lack of subject matter jurisdiction, even when the party is found to lack only prudential standing. Thus, HMIT is not alone in its confusion over the two different concepts of standing.

[179] *See NexPoint*, 2023 WL 4621466 at *6.

[180] *Id.* at *6 (cleaned up)("Because Section 1109(b) expands the right to be heard [in a bankruptcy proceeding] to a wider class than those who qualify under the 'person aggrieved' standard, courts considering the issue have concluded that merely being a party in interest is insufficient to confer ***appellate*** standing.")(emphasis added).

burden of establishing: (1) that it suffered an injury in fact that is concrete, particularized, and actual or imminent—not conjectural or hypothetical, (2) that there is a causal connection between the injury and the conduct complained of, and (3) it must be likely, not speculative, that the injury will be redressed by a favorable decision.[181]

Concrete and Particularized; Actual or Imminent. As the Supreme Court made clear in the *Lujan* case, the injury in fact element requires a showing that the injury was "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[182] The Supreme Court in the *Spokeo* case expounded on the "concrete and particularized" requirements of the "injury in fact" element. Particularization requires a showing that the injury "must affect the plaintiff in a personal and individual way," but while particularization is necessary, it alone is "not sufficient," because an injury in fact must also be "concrete."[183] And, concreteness is "quite different from particularization."[184] A "concrete" injury must be "real," and "not abstract," though it does not mean that the injury must be "tangible," as the injury can be intangible and nevertheless be concrete.[185] In addition to the concreteness and particularization requirements, an injury in fact must be "actual or imminent" such that "allegations of injury that is merely conjectural or hypothetical do not suffice to confer standing."[186] "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly*

[181] *See supra* note 153.
[182] *Lujan*, 504 U.S. at 560 (cleaned up).
[183] *Spokeo*, 578 U.S. at 339.
[184] *Id.* at 340.
[185] *Id.*
[186] *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009).

impending"; "allegations of *possible* future injury are not sufficient."[187]

Traceability - Causal Connection. As to the second element—that the injury was caused by the defendant—the Supreme Court in *Lujan* further described it as requiring a showing that "the injury has to be fairly traceable to the challenged action of the defendant."[188] The "fairly traceable" test requires an examination of "the causal connection between the assertedly unlawful conduct and the alleged injury."[189]

Redressability. The third element—redressability—requires the court to examine the connection "between the alleged injury and the judicial relief requested."[190] "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court."[191] "[A] court must determine that there is an available remedy which will have a 'substantial probability' of redressing the plaintiff's injury."[192]

The Claims Purchasers argue that HMIT lacks constitutional standing to pursue the claims asserted in the Proposed Complaint because: (i) neither HMIT nor the Bankruptcy Estate was injured by the Claim Purchasers' acquisition of the claims; and (ii) the Proposed Complaint lacks a theory of cognizable damages to the Reorganized Debtor, the Claimant Trust, and/or the beneficiaries of the Claimant Trust.[193]

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[187] *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013)(cleaned up); *see also Abdullah v. Paxton*, 65 F.4th 204, 208 (5th Cir. 2023)("[Injury] cannot be speculative, conjectural, or hypothetical [and] [a]llegations of only a 'possible' future injury similarly will not suffice.")(cleaned up).

[188] *Lujan*, 504 U.S. at 560-61 (cleaned up).

[189] *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984).

[190] *Id.* (noting "it is important to keep the ['fairly traceable' and 'redressability'] inquiries separate if the 'redressability' component is to focus on the requested relief.").

[191] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

[192] *City of Los Angeles v. Lyons*, 461 U.S. 95, 129 n.20 (1983)(Marshall, J., dissenting)(cleaned up); *see also Ondrusek v. U.S. Army Corps of Engineers*, Civ. Act. No. 3:22-cv-1874-N, 2023 WL 2169908, at *5 ("Plaintiffs have not demonstrated that any available remedy would be sufficiently likely to relieve their alleged economic losses. Without a showing of redressability, those harms also cannot support Plaintiff's Article III standing.").

[193] As noted earlier, certain of the Proposed Defendants—the Highland Parties—do not focus on HMIT's lack of constitutional standing to pursue the Proposed Claims against them, but on its lack of prudential standing under

The court agrees with the Claims Purchasers' argument here. What is HMIT's concrete and particularized injury—that is "real" and is not abstract? That is not conjectural or hypothetical? That is actual or imminent?

Recall that, under the Plan, HMIT holds a Class 10 contingent interest in the Claimant Trust that only realizes value if all creditors are paid in full with interest. HMIT alleges the following injury: it has suffered a devaluation of its unvested Contingent Claimant Trust Interest by virtue of the alleged over-compensation of Seery as the Claimant Trustee—Seery's alleged over-compensation depletes the assets in the Claimant Trust available for distribution to creditors under the Plan, such that there is less likely a chance that HMIT ultimately receives any distributions on account of its Class 10 Contingent Claimant Trust Interest.[194] Yet, HMIT testified, through both witnesses Dondero and Patrick, that it had no personal knowledge of what Seery's actual compensation is under the CTA at the time HMIT filed its Motion for Leave. It was clear that HMIT's allegations regarding Seery's "excessive" compensation were based entirely on Dondero's pure speculation. In reality, Seery's base salary is exactly what the bankruptcy court approved during the bankruptcy case by a court order (after negotiations between Seery and the Committee). The CTA now further governs his compensation. The CTA, which was publicly filed ***in advance of*** the Plan confirmation hearing and approved by this court as part of the Plan

applicable law. Because constitutional standing is a matter of subject matter jurisdiction, the court has an independent duty to determine whether HMIT would have constitutional standing to pursue the Proposed Claims in federal court. The issue cannot be forfeited or waived by a party. *See Abraugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Moreover, courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.")(cleaned up); *Abraugh*, 26 F.4th at 304 ("It is our constitutional duty, of course, to decline subject matter jurisdiction where it does not exist—and that is so whether the parties challenge Article III standing or not.")(cleaned up).

[194] At the June 8 Hearing, HMIT's counsel was unable to identify any other injury HMIT has alleged to have suffered. HMIT's counsel acknowledged that claims trades, in and of themselves, would not "involve injury to the Reorganized Debtor and to the Claimant Trust" and that claims trades are "normally outside the purview of the bankruptcy court" but that "[h]ere, we have alleged . . . . injury [that] takes the form of unearned excessive fees that Mr. Seery has garnered as a result of his relationship and arrangements, as we have alleged, with the Claims Purchasers." June 8 Hearing Transcript, 67:16-68:8. HMIT can only point to Seery's excess compensation as injury.

(which has been affirmed by the Fifth Circuit), specifically provides that Seery's post-Effective Date compensation would include a "Base Salary" (again, same as during the bankruptcy case), a "success fee," and "severance."[195] The CTA discussed the role of the Committee and then the CTOB in setting the success fee and severance and the like. A fully executed copy of the CTA was admitted into evidence at the June 8 Hearing. HMIT is essentially arguing that its injury (i.e., diminished likelihood of realizing value on its Contingent Claimant Trust Interest) stems from a court-sanctioned and creditor-approved process for approving compensation to Seery. Moreover, HMIT has failed to plead facts sufficient to show that, even if Seery received excessive compensation and that compensation is ordered to be returned, HMIT's Contingent Claimant Trust Interest will ever vest. The district court and the Fifth Circuit in various appeals by Dugaboy, another Dondero-related entity that, similar to HMIT, was a holder of a limited partnership interest in Highland whose interests were terminated as of the Effective Date of the Plan in exchange for a Contingent Claimant Trust Interest, have repeatedly rejected Dugaboy's claims to have standing based on the ***speculative nature of its alleged injuries as a contingent beneficiary of the Claimant Trust under the Plan***. For example, the Fifth Circuit affirmed the district court's dismissal of an appeal by Dugaboy of the bankruptcy court's order authorizing the creation of an indemnity subtrust, wherein Judge Fitzwater found that, in addition to lacking prudential standing under the

[195] The Disclosure Statement that was approved by this court, after notice and a hearing, on November 24, 2020, provided that "The salient terms of each Trustee's employment, including such Trustee's duties and compensation shall be set forth in the Claimant Trust Agreement . . . ." The CTA was part of a Plan Supplement (as amended) that was filed in advance of the confirmation hearing and provided:

> Compensation. As compensation for any services rendered by the Claimant Trustee in connection with this Agreement, the Claimant Trustee shall receive compensation of $150,000 per month (the "Base Salary"). Within the first forty-five days following the Confirmation Date, the Claimant Trustee, on the one hand, and the Committee, if prior to the Effective Date, or the Oversight Board, if on or after the Effective Date, on the other, will negotiate go-forward compensation for the Claimant Trustee which will include (a) the Base Salary, (b) a success fee, and (c) severance.

See Highland Ex. 38, at § 3.13(a)(i).

"person aggrieved" test to appeal the bankruptcy court's order, Dugaboy lacked constitutional standing "because they have not identified any injury fairly traceable to the Order: ***the injuries identified are speculative at best and nonexistent at worst***."[196] HMIT's allegations of injury are, without a doubt, "merely conjectural or hypothetical" and are only speculative of possible future injury if its Contingent Claimant Trust Interest ever vests."[197] The court finds that HMIT would not meet the "concrete and particularized" or the "actual or imminent" requirements for an "injury in fact," and, thus, would lack constitutional standing to pursue the Proposed Claims.

With regard to the second requirement of constitutional standing—whether HMIT could show "traceability" with respect to the Claims Purchasers and/or Seery (i.e., a "causal connection between the assertedly unlawful conduct and the alleged injury"[198]), as noted above, there is only a speculative injury. Even if there is unlawful conduct asserted (i.e., sharing of MNPI to Claims Purchasers who then, as a *quid pro quo*, rubber stamped excessive compensation for Seery), there is nothing other than a hypothetical theory of an alleged injury (i.e., an allegedly less likelihood of a distribution on a Contingent Claimant Trust Interest).

With respect to the third requirement of constitutional standing—whether HMIT can show "redressability" (i.e., that it is likely, not speculative, that the injury can be redressed by a favorable

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[196] *Highland Capital Mgt. Fund Advisors, L.P. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, Civ. Act. No. 3:21-cv-1895-D, 2022 WL 270862, *1 n.2 (N.D. Tex. Jan. 28, 2022), *aff'd* 57 F.4th 494 (5th Cir. 2023)(emphasis added); *see also* Judge Scholer's opinion in *Dugaboy Inv. Tr. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, Civ. Act. No. 3:21-cv-2268-S, 2022 WL 3701720, *3 (N.D. Tex. Aug. 8, 2022)(cleaned up), *aff'd per curium*, No. 22-10831, 2023 WL 2263022 (5th Cir. Feb. 28, 2023) (where Dugaboy had argued that "***its pecuniary interest is . . . a potential recovery under the Plan as one of Debtor's former equity holders***" and that "it ha[d] standing as a 'contingent beneficiary' under the Plan, or a beneficiary who will be entitled to payment after all creditors are paid in full," and Judge Scholer stated, "This assertion is premised on the assumption that Dugaboy's 0.1866% pre-bankruptcy limited partnership interest in Debtor—which was extinguished under the Plan—makes it a contingent beneficiary of the creditor trust created under the Plan. . . . [S]uch a 'speculative prospect of harm is far from a direct, adverse, pecuniary hit' as required to confer standing."

[197] *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009).

[198] *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984).

decision), there are multiple problems here.[199] The major remedy sought here is the equitable disallowance of the allowed Purchased Claims (and disgorgement and/or constructive trust of amounts paid or owed to the Claim Purchasers on account of their claims). There is no such remedy available here. As noted earlier, there is a similar concept of ***equitable subordination*** of a claim to another claim, or of an interest to another interest, pursuant to Bankruptcy Code section 510(c). But under the literal terms of section 510(c), ***claims cannot be subordinated to interests***. Moreover, the Fifth Circuit noted in the *Mobile Steel* case,[200] that ***equitable disallowance*** of a claim (as opposed to equitable subordination of a claims) is not an available remedy. Bankruptcy Code section 502(b)(1) and the Fifth Circuit's *Lothian Oil* case might permit "recharacterization" of a claim from debt to equity in certain circumstances—but not based on inequitable conduct but rather on the nature of a financial transaction. In any event, here, the claims have already been adjudicated and allowed (some after mediation, and all after Rule 9019 settlement orders). The only way to reconsider a claim in a bankruptcy case that has already been allowed is through Bankruptcy Code section 502(j) ("A claim that has been allowed or disallowed may be reconsidered for cause. . . according to the equities of the case."). As noted earlier, the problem here is that Bankruptcy Rule 9024 provides that a motion for "reconsideration of an order allowing or disallowing a claim against the estate ***entered without a contest*** is not subject to the one year limitation prescribed in Rule 60(c)" (emphasis added). As further noted earlier, here there was most definitely a "contest" with regard to all of these purchased claims. ***Thus, it would appear***

[199] *See supra* notes 182-184 and accompanying text. The court will note that, as discussed *supra* note 141 and pages 71-72, the remedy of equitable subordination (as to the Claims Purchasers) would not redress HMIT's alleged injury (because equitable subordination of claims to interests is not an available remedy in the Fifth Circuit and thus subordination of the Purchased Claims to other claims would not change HMIT's distributions from the Claimant Trust, if any), and because outright disallowance of all or part of the already allowed Purchased Claims is not an available remedy either, HMIT would not be able to meet the "redressability" requirement with respect to the Claims Purchasers.

[200] *In re Mobile Steel Co., Inc.*, 563 F.2d 692 (5th Cir. 1977).

that any effort to have a court reconsider and potentially disallow these claims pursuant to section 502(j) is untimely—as it has been well beyond a year since they were allowed.

3. HMIT Would Also Lack Prudential Standing to Bring the Proposed Claims.

Even if HMIT would have constitutional standing to bring the Proposed Claims in an adversary proceeding filed in the bankruptcy court, the Proposed Claims would still be barred if HMIT would lack prudential standing to bring them under applicable state or federal law. HMIT argues that it does have prudential standing under both federal bankruptcy law and Delaware law to pursue the Proposed Claims derivatively and also to bring the Proposed Claims in its individual capacity.

With regard to "federal bankruptcy law," HMIT argues that it has standing pursuant to: (a) Rule 23.1 of the Federal Rules of Civil Procedure, pertaining to derivative actions, which "applies to this proceeding pursuant to" Rule 7023.1 of the Federal Rules of Bankruptcy Procedure, and (b) *Louisiana World Exposition v. Federal Insurance Co. ("LWE")*,[201] the Fifth Circuit's leading case addressing when a creditors committee may be granted standing to bring causes of action on behalf of a bankruptcy estate. But, federal bankruptcy law does not confer standing ***where the plaintiff otherwise lacks standing under applicable state law***. In other words, whether HMIT would have prudential standing to sue under Delaware law is dispositive of the issue, regardless of the forum. Rule 23.1 "speaks only to the adequacy of the . . . pleadings," and "cannot be understood to 'abridge, enlarge, or modify any substantive right,'"[202] including a right (or lack thereof) to bring a derivative action under the substantive law of Delaware. Additionally, HMIT's reliance on *LWE* is misplaced: *LWE* permits creditors, in certain circumstances ***during*** a bankruptcy case, to "file

[201] 858 F.2d 233 (5th Cir. 1988).

[202] *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991)(quoting 28 U.S.C. § 2072(b)).

suit on behalf of a debtor-in-possession or a trustee"[203] and does not apply to a party's right to sue, derivatively, on behalf of the Reorganized Debtor or any entity that is the assignee of the former bankruptcy estate's assets. Upon confirmation of the Plan, the bankruptcy estate of Highland ceased to exist;[204] Highland is no longer a debtor-in-possession but a reorganized debtor, and the Claimant Trust is a new entity created under the Plan and Claimant Trust Agreement. Even if *LWE* did apply in this ***post***-confirmation context, it supports the application of Delaware law to the issue of prudential standing and does not supersede state-law requirements for standing. In *LWE*, before addressing the requirements a creditors' committee must meet to sue derivatively on behalf of a bankruptcy estate as a matter of federal bankruptcy law, the Fifth Circuit conducted a lengthy analysis to determine "as a threshold issue" whether the creditors' committee in that case could assert its claims under Louisiana law.[205] The court specifically addressed whether the creditors' committee could pursue a derivative action under Louisiana law and concluded that "there is no bar in Louisiana law to actions brought by or in the name of a corporation against the directors and officers of the corporation which benefit only the creditors of the corporation; indeed, Louisiana law specifically recognizes such actions."[206] So, even under *LWE* (which the court does not think applies in this post-confirmation context), if HMIT would be barred from bringing a derivative action on behalf the Reorganized Debtor or Claimant Trust under state law, the analysis stops there.[207] Thus, the court looks to Delaware law to determine if HMIT would have prudential standing to pursue the derivative claims on behalf the Reorganized Debtor and the Claimant Trust.

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[203] *LWE*, 858 F.2d at 247.

[204] *See In re Craig's Stores*, 266 F.3d 388, 390 (5th Cir. 2001).

[205] *LWE*, 858 F.2d at 236-45.

[206] *Id.* at 243.

[207] *See In re Dura Automotive Sys., LLC*, No. 19-123728 (Bankr. D. Del. June 10, 2020), Docket No. 1115 at 46 (where the Delaware bankruptcy court denied the creditors' committee standing to sue derivatively on behalf of a Delaware LLC because the committee lacked standing under the Delaware LLC Act, stating, "To determine that the third party

HMIT acknowledges that both the Reorganized Debtor and the Claimant Trust are organized under Delaware law, and thus the cause of action against Seery alleging breach of fiduciary duties to the Reorganized Debtor and the Claimant Trust are governed by Delaware law under the "Internal Affairs Doctrine."[208] In addition, because HMIT's breach of fiduciary duties claim is governed by Delaware law, its aiding and abetting theory of liability as to the Claims Purchasers is also governed by Delaware law.[209] For the reasons set forth below, the court finds that HMIT would lack prudential standing under Delaware law to bring the claims set forth in the Proposed Complaint, derivatively, on behalf of either the Claimant Trust or the Reorganized Debtor.

a) First, HMIT Would Lack Prudential Standing Under Delaware Law to Bring Derivative Actions on behalf of the Claimant Trust.

The Claimant Trust is a Delaware statutory trust governed by the Delaware Statutory Trust Act, 12 Del. C. §§ 3801–29,[210] and "to proceed derivatively against a Delaware statutory trust, a plaintiff has the burden of satisfying the continuous ownership requirement" such that "the plaintiff must be a beneficial owner" continuously from "the time of the transaction of which the plaintiff complains" through "the time of bringing the action."[211] This requirement is "mandatory and exclusive" and only "a beneficial owner" "has standing to bring a derivative claim on behalf of the

may bring the claim under the derivative basis and, thus, step into the shoes of the debtor to pursue them, the Court must look to the law of the debtors' state of incorporation or formation.").

[208] Motion for Leave, ¶ 21 and n.24; *see also* Plan Art. XII.M ("corporate governance matters . . . shall be governed by the laws of the state of organization" of the respective entity); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081–82 (Del. 2011) ("In American corporation law, the internal affairs doctrine is a dominant and overarching choice of law principle."). The Reorganized Debtor and the Claimant Trust are both organized under the laws of Delaware.

[209] *See Xtreme Power Plan Tr. v. Schindler (In re Xtreme Power)*, 563 B.R. 614, 632, 645 (Bankr. W.D. Tex. 2016) (applying Delaware law to claim for aiding and abetting breach of fiduciary duty involving Delaware corporation headquartered in Texas).

[210] *See* Proposed Complaint, ¶ 26.

[211] *Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at *19 n.123 (Del. Ch. June 15, 2011), *aff'd* 38 A.3d 1254 (Del. 2012); 12 Del C. § 3816(b).

Trust."[212] The Highland Parties argue that HMIT is not a "beneficial owner" of the Claimant Trust and, therefore, would lack standing to bring derivative claims on behalf of the Claimant Trust. HMIT argues to the contrary: that it ***is*** currently, and was at all relevant times, a "beneficial owner" of the Claimant Trust under Delaware trust law such that it would have standing to bring derivative claims on behalf of the Claimant Trust if it were allowed to proceed with the filing of the Proposed Complaint. The disagreement turns on the nature of HMIT's interest under the Plan and the Claimant Trust Agreement and whether HMIT, as a holder of such interest, would be considered a "beneficial owner" of the Claimant Trust under Delaware trust law.

As noted, pursuant to the Plan, HMIT's former limited partnership interest in Highland was cancelled as of the Effective Date in exchange for its pro rata share of a "Contingent Claimant Trust Interest," as defined under the Plan.[213] HMIT argues that its Contingent Claimant Trust Interest makes it a contingent beneficiary of the Claimant Trust, which makes it a present "beneficial owner" under Delaware trust law.

The Highland Parties argue that HMIT is not a "beneficial owner" of the Claimant Trust; rather, the "beneficial owners" of the Claimant Trust are the "Claimant Trust Beneficiaries,"[214] which are defined in the Plan and the CTA as "the Holders of Allowed General Unsecured Claims" (which are in Class 8 under the Plan) and "Holders of Allowed Subordinated Claims" (which are in Class 9 under the Plan); [215] HMIT, a holder of a Class 10 interest under the Plan, is neither.

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[212] *In re Nat'l Coll. Student Loan Tr. Litig.*, 251 A.3d 116, 191 (Del. Ch. 2020) (citing *CML V, LLC v. Bax*, 28 A.3d 1037, 1042 (Del. 2011)). HMIT acknowledges this requirement in its Reply: "Delaware statutory trust law provides that a plaintiff in a derivative action on behalf of a trust must be a beneficial owner at the time of the action and at the time of the transaction." Reply, ¶ 19 (citing 12 Del C. § 3816).

[213] *See* Plan Art. III.H.10 and Art. I.B.44.

[214] Section 2.8 of the CTA provides, "The Claimant Trust Beneficiaries shall be the sole beneficiaries of the Claimant Trust . . . ." HMIT Ex. 26, § 2.8.

[215] *See* Plan Art. I.B.44 ("'*Claimant Trust Beneficiaries*' means the Holders of Allowed General Unsecured Claims, Holders of Allowed Subordinated Claims, including, upon Allowance, Disputed General Unsecured Claims and Disputed Subordinated Claims that become Allowed following the Effective Date, and, only upon certification by the

HMIT, as the holder of a "Contingent Claimant Trust Interest," has only an ***unvested*** contingent interest in the Claimant Trust and, as such, is not a "beneficial owner" of the Claimant Trust for standing purposes under Delaware trust law. HMIT argues that it "should be treated as a vested Claimant Trust Beneficiary due to [the Proposed Defendants'] wrongful conduct and considering the current value of the Claimant Trust Assets before and after the relief requested herein."[216] The court disagrees.

HMIT's status as a "beneficiary" of the Claimant Trust is defined by the CTA itself, pure and simple. The CTA specifically provides that "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. It 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 based on HMIT's unsupported allegation of wrongdoing on the part of Seery, the Claimant Trustee. Thus, the court finds that HMIT is not a "beneficial owner" of the Claimant Trust and, therefore, lacks prudential standing under Delaware law to bring derivative claims on behalf of the Claimant Trust.[217]

Claimant Trustee that the Holders of such Claims have been paid indefeasibly in full plus, to the extent all Allowed unsecured Claims, excluding Subordinated Claims, have been paid in full, post-petition interest from the Petition Date at the Federal Judgment Rate in accordance with the terms and conditions set forth in the Claimant Trust Agreement and all Disputed Claims in Class 8 and Class 9 have been resolved, Holders of Allowed Class B/C Limited Partnership Interests, and Holders of Allowed Class A Limited Partnership Interests."); CTA § 1.1(h). *See also*, CTA, 1 at n.2 ("For the avoidance of doubt, and as set forth in the Plan, Holders of Class A Limited Partnership Interests and Class B/C Limited Partnership Interests will be Claimant Trust Beneficiaries 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 in accordance with the terms and conditions set forth herein and in the Plan."). HMIT Ex. 26.

[216] Proposed Complaint ¶ 24.

[217] *See Nat'l Coll.*, 251 A.3d at 190–92 (dismissing creditors' derivative claims because they were not "beneficial owners of the Trusts"); *Hartsel*, 2011 WL 2421003, at *19 n.123 (dismissing derivative claims by investors that "no longer own shares" because "those investors no longer have standing to pursue a derivative claim").

b) HMIT Would Likewise Lack Prudential Standing Under Delaware Law to Bring Derivative Actions on behalf of the Reorganized Debtor.

HMIT acknowledges that the Reorganized Debtor, Highland Capital Management, L.P., is a Delaware limited liability partnership governed by the Delaware Limited Partnership Act, 6 Del. C. § 17-101, *et seq.*[218] To bring "a derivative action" on behalf of a limited partnership, "the plaintiff must be a partner or an assignee of a partnership interest" continuously from "the time of the transaction of which the plaintiff complains" through "the time of bringing the action."[219]

HMIT is not a partner, general or limited, of the Reorganized Debtor limited partnership. HMIT ***was*** a limited partner in the original debtor (specifically, a holder of Class B/C Limited Partnership interests in Highland), but that limited partnership interest was extinguished on August 11, 2021 (the Effective Date of the Plan) per the terms of the Plan, and HMIT does not own any partnership interest in the newly created Reorganized Debtor limited partnership.[220] Because HMIT would not hold a partnership interest in the Reorganized Debtor at "the time of bringing the action," it "lacks derivative standing" to bring claims "on the partnership's behalf."[221] HMIT likewise cannot satisfy "the continuous ownership requirement"; when HMIT's limited partnership interest in the original Debtor was cancelled on the Plan's Effective Date, HMIT "los[t] standing to continue a derivative suit" on behalf of the Debtor.[222] Finally, to the extent HMIT

[218] Proposed Complaint ¶ 25.

[219] 6 Del. C. § 17-1002; *see Tow v. Amegy Bank, N.A.*, 976 F. Supp. 2d 889, 904 (S.D. Tex. 2013) ("The [Delaware] partnership act facially bars any party other than a limited partner from suing derivatively. . . . Delaware courts historically have interpreted the provisions as giving the partners exclusive rights to sue for breach of another party's fiduciary duties to them.") (quoting *CML V, LLC v. Bax*, 6 A.3d 238, 245 (Del. Ch. 2010), *aff'd* 28 A.3d 1037 (Del. 2011)); *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1265 n.87 (Del. 2016) ("The statutory foundation for the continuous ownership requirement in the corporate realm is echoed in the limited partnership context.") (citing 6 Del. C. § 17-211(h)).

[220] *See* Plan Art. IV.A.

[221] *Tow*, 976 F. Supp. 2d at 904 (dismissing derivative claims by creditor on behalf of partnership for lack of standing).

[222] *El Paso*, 152 A.3d at 1265 (cleaned up) (dismissing derivative action for lack of standing where plaintiff's partnership interest was extinguished by a merger transaction); *see also Schmermerhorn v. CenturyTel, Inc. (In re*

seeks to bring a "double derivative" action on behalf of the Claimant Trust based on claims purportedly held by its wholly owned subsidiary, the Reorganized Debtor, HMIT lacks standing. A "double derivative" action is a suit "brought by a shareholder of a parent corporation to enforce a claim belonging to a subsidiary that is either wholly owned or majority controlled."[223] And, under Delaware law, "parent level standing is required to enforce a subsidiary's claim derivatively."[224] Because HMIT would lack derivative standing to bring claims on behalf of the parent Claimant Trust,[225] it also would lack standing to bring a double derivative action.

c) Finally, HMIT Would Also Lack Prudential Standing under Applicable Law to Bring the Proposed Claims As ***Direct*** Claims.

HMIT argues that it has "direct" standing to pursue the Proposed Claims on behalf of itself, individually.[226] But just because HMIT asserts that some or even all of the Proposed Claims are direct, not derivative claims, does not make it so: "a claim is not 'direct' simply because it is pleaded that way."[227] Rather, in determining whether claims are direct or derivative, a court must "look at the substance of the Petition, and the nature of the wrongs alleged therein, rather than the Plaintiffs' characterization."[228] And, under Delaware law, "whether a claim is solely derivative or

SkyPort Global Commcn's, Inc.), 2011 WL 111427, at *25–26 (Bankr. S.D. Tex. Jan. 13, 2011) (holding that pre-petition shareholders "lack standing to bring a derivative claim" under Delaware law because they "had their equity interests in the company extinguished pursuant to the merger under the Plan"); *In re WorldCom, Inc.*, 351 B.R. 130, 134 (Bankr. S.D.N.Y. 2006) ("[T]he cancellation of WorldCom shares under the Plan … prevents the required continuation of shareholder status through the litigation.") (cleaned up).

[223] *Lambrecht v. O'Neal*, 3 A.3d 277, 282 (Del. 2010).

[224] *Sagarra*, 34 A.3d at 1079–81 (capitalization omitted) (citing *Lambrecht*, 3 A.3d at 282).

[225] *See supra* pp. 80-82.

[226] *See e.g.*, Motion for Leave ¶ 10 ("HMIT has individual standing to bring this action because Seery owed fiduciary duties directly to HMIT at that time . . . ."); *id.* ¶ 67 (arguing that "HMIT has [d]irect [s]tanding"); Proposed Complaint ¶ 24 ("HMIT has constitutional standing and capacity to bring these claims both individually and derivatively.").

[227] *Schmermerhorn*, 2011 WL 111427, at *26 (quoting *Gatz v. Ponsoldt*, 2004 WL 3029868 at *7 (Del. Ch. Nov. 5, 2004)).

[228] *See id.* (citing *Armstrong v. Capshaw, Goss & Bowers LLP*, 404 F.3d 933, 936 (5th Cir. 2005)); *see also Moore v. Simon Enters., Inc.*, 919 F.Supp. 1007, 1009 (N.D. Tex. 1995)("The determination of whether a claim is a derivative claim or a direct claim is made by reference to the nature of the wrongs alleged in the complaint, and is not limited by a [party's] characterization or stated intention.")(cleaned up).

may continue as a dual-natured claim 'must turn ***solely*** on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?'"[229] "In addition, to prove that a claim is direct, a plaintiff 'must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.'"[230] Similarly, in the bankruptcy context, whether a creditor can assert a claim directly or whether the claim belongs to the estate turns on the nature of the injury for which relief is sought: "[i]f the harm to the creditor comes about only because of harm to the debtor, then its injury is derivative, and the claim is property of the estate," such that "only the bankruptcy trustee has standing to pursue the claim for the estate . . . ."[231] "To pursue a claim on its own behalf, a creditor must show this direct injury is not dependent on injury to the estate."[232]

As a reminder, HMIT argues that the injury it has suffered is a devaluation of its interests in the Claimant Trust by virtue of alleged over-compensation of Seery as the Claimant Trustee. HMIT was unable, when pressed during closing arguments, to identify any other injury. It essentially admitted that the claims trades, in and of themselves, would not have harmed the Claimant Trust, the Reorganized Debtor, or individual stakeholders, including HMIT, ***since the Claims Purchasers acquired already allowed unsecured claims, such that the distributions on those claims pursuant to the Plan would be unchanged in the hands of new holders of the claims***.

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[229] *El Paso*, 152 A.3d at 1260 (quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)) (emphasis in original).

[230] *Id.* (quoting *Tooley*, 845 A.2d at 1033); *see also Schmermerhorn*, 2011 WL 111427, at *24 (same).

[231] *Meridian Cap. CIS Fund v. Burton (In re Buccaneer Res., L.L.C.)*, 912 F.3d 291, 293 (5th Cir. 2019) (citing 11 U.S.C. § 541(a)(1)).

[232] *Id.*; *see also Schertz-Cibolo-Universal City Indep. Sch. Dist. v. Wright (In re Educators Grp. Health Tr.)*, 25 F.3d 1281, 1284 (5th Cir. 1994)("If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate.")(citations omitted).

Thus, by its own concessions, any alleged harm to HMIT (through devaluation of assets in the Claimant Trust) "comes about only because of harm to the debtor," so the alleged "injury is derivative."[233] The court concludes that all of the claims set forth in the Proposed Complaint allege derivative claims only, and that none would be direct claims against the Proposed Defendants. Thus, HMIT would lack prudential standing to bring any of the Proposed Claims in the Proposed Complaint, so its Motion for Leave should be denied.

d) Some Final Points Regarding Standing.

In this standing discussion, one should not lose sight of the fact that there are both procedural safeguards in place, as well as certain independent individuals in place with fiduciary duties that might act in the event of any shenanigans regarding Claimant Trust activities. Under section 4.1 of the CTA (approved as part of the Plan process), the CTOB, which includes an independent disinterested member in addition to representatives of the Claims Purchasers,[234] oversees the Claimant Trustee's performance of his duties, approves his compensation, and may remove him for cause. Moreover, there is a separate "Litigation Trustee" in this case who was brought in, post-confirmation, as an independent fiduciary to pursue claims and causes of action. These independent persons are checks and balances in the post-confirmation wind down of Highland. This is what creditors voted on in connection with the Plan. Seery and the Claims Purchasers are not in sole control of anything. The CTA, as well as Delaware law, very clearly set forth who can bring an action in the event of some colorable claim. This is the reality of prudential

[233] *Meridian*, 912 F.3d at 293–94 ("The creditors' injury (reduced bankruptcy recovery) derived from injury to the debtor (the loss of estate assets), so only the estate could sue the third parties."); *see also El Paso,* 152 A.3d at 1260–61 & n.60 (holding that claim "claims of corporate overpayment are normally treated as causing harm solely to the corporation and, thus, are regarded as derivative") (collecting cases); *Gerber v EPE Holdings, LLC*, 2013 WL 209658, at *12 (Del. Ch. Jan. 18, 2013) (holding that claims were derivative because plaintiff had "not identified any independent harm suffered by the limited partners"; "the partnership suffered all the harm at issue—it paid too much").

[234] *See supra* note 23 and accompanying text.

standing. Just as in the *Abraugh* case, where Louisiana law dictated that a mother could not bring a wrongful death case when the deceased prisoner had a surviving wife and child, Delaware law and the CTA dictate here that a contingent beneficiary cannot bring the Proposed Claims here. This is separate and apart from whether the claims are colorable.

C. Are the Proposed Claims "Colorable"?

1. What is the Proper Standard of Review for a "Colorability" Determination?

Although the court has determined that HMIT would ***not*** have standing (constitutional or prudential) to bring the Proposed Claims, this court will nevertheless evaluate whether the claims—assuming HMIT somehow has standing—might be "colorable." This, in turn, requires the court to assess what the legal standard is to determine if a claim is "colorable." As a reminder, the Plan's Gatekeeper Provision and this court's prior Gatekeeper Orders entered in January and July 2020 each required that, before a party may commence or pursue claims relating to the bankruptcy case against certain protected parties, it must first obtain a finding from the bankruptcy court that its proposed claims are "colorable." The Gatekeeper Provision and Gatekeeper Orders did not specifically define "colorable" or what type of legal standard should apply.

HMIT argues that the standard for review to be applied by this court is the same as a simple "plausibility" standard used in connection with a Rule 12(b)(6) motions to dismiss. In other words, the court should simply assess whether the allegations of the Proposed Complaint, taken as true and with all inferences drawn in favor of the movant, state a ***plausible*** claim for relief (i.e., colorable equals plausible), and that this standard does not allow for the weighing of evidence by the court.[235] The Proposed Defendants, however, argue that the test for colorability should be more

[235] Reply, ¶ 5 ("[T]he determination of 'colorability' does not allow the 'weighing' of evidence. At most, a Rule 12(b)(6) 'plausibility' standard applies.").

akin to the test applied under the *Barton* doctrine,[236] under which a plaintiff must make a *prima facie* case that a proposed claim against a bankruptcy trustee is "not without foundation." In this regard, they argue that the court can and should consider evidence outside of the four corners of the complaint—especially since HMIT attached to its Motion for Leave, as "evidence" to support it, two declarations of Dondero (as part of a 350-page attachment) and only attempted to withdraw those declarations after the Highland Parties urged that they be permitted to cross-examine Dondero on them.

This court ultimately determined that the "colorability" standard was somewhat of a mixed question of fact and law and, therefore, the parties could put on evidence at the June 8 Hearing if they so-chose. The court would not require it. It was up to the parties. But, in any event, the Proposed Defendants should have an opportunity to cross-examine Dondero on the statements made in his declarations since the declarations had been filed on the docket and the court had reviewed them at this point. HMIT attempted to withdraw the declarations and any reference to them in the Motion for Leave, by filing redacted versions of the Motion for Leave,[237] less than 72 hours before the June 8 Hearing; however, the redacted versions did not redact any allegations in the Motion for Leave that were purportedly supported by the Dondero declarations. Also, HMIT called Dondero as a direct witness, in addition to calling Seery as an adverse witness at the June 8 Hearing, albeit subject to its running objection to the evidentiary format of the hearing.[238] HMIT also filed a witness and exhibit list attaching 80 exhibits and over 2850 pages of evidence and

[236] *Barton v. Barbour,* 104 U.S. 126 (1881).

[237] Bankr. Dkt. Nos. 3815 and 3816.

[238] *See* June 8 Hearing Transcript, 7:20-24, 112:11-13.

moved for the admission of those exhibits at the June 8 Hearing (again, subject to its running objection to the evidentiary format of the hearing).[239]

In determining what appropriate legal standard applies here in the "colorability" analysis, the context in which the Gatekeeper Provision of the Plan was approved seems very relevant. In determining that the Gatekeeper Provision was legal, necessary, and in the best interest of all of the parties, this court set forth in the Confirmation Order a lengthy discussion of the factual support for it, and made specific findings relating to Dondero's post-petition litigation and the need for inclusion of the Gatekeeper Provision in the Plan.[240] This court observed that "prior to the commencement of the Debtor's bankruptcy case, and while under the direction of Dondero, the Debtor had been involved in a myriad of litigation, some of which had gone on for years and, in some cases, over a decade" and that "[d]uring the last several months, Dondero and the Dondero Related Entities have harassed the Debtor, which has resulted in further substantial, costly, and time-consuming litigation for the Debtor."[241] This court further found that: (1) Dondero's post-petition litigation "was a result of Dondero failing to obtain creditor support for his plan proposal and consistent with his comments, as set forth in Seery's credible testimony, that if Dondero's plan proposal was not accepted, he would 'burn down the place,'"[242] (2) without the Gatekeeper Provision in place, "Dondero and his related entities will likely commence litigation against the Protected Parties after the Effective Date" and that "the threat of continued litigation by Dondero and his related entities after the Effective Date will impede efforts by the Claimant Trust to monetize assets for the benefit of creditors and result in lower distributions to creditors because of

[239] *See Hunter Mountain Investment Trust's Witness and Exhibit List in Connection with Its Emergency Motion for Leave to File Verified Adversary Proceeding, and Supplement* ("HMIT W&E List")[Bankr. Dkt. No. 3818] and n.1 thereto; *see also* June 8 Hearing Transcript, 33:7-10.

[240] *See* Confirmation Order ¶¶ 76-79.

[241] *Id.* ¶ 77.

[242] *Id.* ¶ 78. *See supra* note 12.

costs and distraction such litigation or the threats of such litigation would cause,"[243] and, (3) "unless the [court] approves the Gatekeeper Provision, the Claimant Trustee and the Claimant Trust Oversight Board will not be able to obtain D&O insurance,[244] the absence of which will present unacceptable risks to parties currently willing to serve in such roles." Thus, as set forth in the Confirmation Order, the Gatekeeper Provision (and the Gatekeeper Orders as well, which were approved based on the same concerns regarding the threat of continued litigation by Dondero and his related entities) required Dondero and related entities to make a threshold showing of colorability, noting that the:

> Gatekeeper Provision is also within the spirit of the Supreme Court's "Barton Doctrine." *Barton v. Barbour*, 104 U.S. 126 (1881). The Gatekeeper Provision is also consistent with the notion of a prefiling injunction to deter vexatious litigants, that has been approved by the Fifth Circuit in such cases as *Baum v. Blue Moon Ventures, LLC,* 513 F.3d 181, 189 (5th Cir. 2008), and *In re Carroll,* 850 F.3d 811 (5th Cir. 2017)."[245]

The Fifth Circuit, in approving the Gatekeeper Provision on appeal, noted that that the Plan injunction and Gatekeeper Provision "screen and prevent bad-faith litigation against Highland Capital, its successors, and other bankruptcy participants that could disrupt the Plan's effectiveness."[246]

Again, the court believes it is appropriate to consider the context in which—and the purpose for which—the Gatekeeper Orders and Gatekeeper Provision were entered in assessing

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[243] *Id.*

[244] Asd noted at ⁋ 79 of the Confirmation Order, the bankruptcy court heard testimony from Mark Tauber, a Vice President with AON Financial Services, the Debtor's insurance broker ("AON"), regarding his efforts to obtain D&O insurance for the post-confirmation parties implementing the Plan. Mr. Tauber credibly testified that of all the insurance carriers that AON approached to provide D&O insurance coverage after the Effective Date, the only one willing to do so ***without an exclusion for claims asserted by Mr. Dondero and his affiliates*** required that the Confirmation Order approve the Gatekeeper Provision.

[245] *Id.* ¶ 80.

[246] *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P.* (*In re Highland Cap. Mgmt., L.P.*), 48 F.4th 419, 435 (5th Cir. 2022).

how "colorability" should work here. It seems that applying HMIT's proposed Rule 12(b)(6) "plausibility" standard would impose no hurdle at all to litigants and would render the threshold for bringing claims under the Gatekeeper Provision and Gatekeeper Orders entirely duplicative of the motion to dismiss standard that every litigant already faces.

The authorities cited by HMIT in support of its argument for applying a Rule 12(b)(6) standard are inapposite. HMIT has cited no authority that addresses the appropriate standard for assessing the "colorability" of claims in the context of a plan gatekeeper provision—specifically, one implemented in response to a demonstrated need to screen and prevent continued bad-faith, harassing litigation against a chapter 11 debtor that would impede the debtor's implementation of a plan, which is what we have here. HMIT relies on a bevy of cases that include benefits coverage disputes under ERISA, Medicare coverage disputes, and constitutional challenges[247]—none of which implicate the *Barton* doctrine and vexatious-litigant concerns that were referenced by the court in the Plan as justifications for the gatekeeping provisions at issue here.

In affirming the Plan's Gatekeeper Provision, the Fifth Circuit stated, "Courts have long recognized bankruptcy courts can perform a gatekeeping function" and noted, by way of example, that "[u]nder the '*Barton* doctrine,' the bankruptcy court may require a party to 'obtain leave of

[247] *See Gonzales v. Columbia Hosp. at Med. City Dallas Subsidiary, L.P.*, 207 F. Supp. 2d 570, 577 (N.D. Tex. 2002) (assessing whether an employee has "a colorable claim to vested benefits" such that the employee may be considered a "participant" under ERISA); *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1129 (5th Cir. 1996) (same); *Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 790 (7th Cir. 1996) (same); *Lake Eugenie Land & Dev., Inc. v. BP Expl. & Prods. (In re Deepwater Horizon)*, 732 F.3d 326, 340 (5th Cir. 2013) (holding that claims administrator incorrectly interpreted class settlement agreement by permitting "claimants [with] no colorable legal claim" to receive awards); *Richardson v. United States*, 468 U.S. 317, 326 n.6 (1984) (discussing whether criminal defendant's double jeopardy claim was "colorable" such that it could be appealed before final judgments); *Trippodo v. SP Plus Corp.*, 2021 WL 2446204, at *3 (S.D. Tex. June 15, 2021) (assessing whether plaintiff stated a "colorable claim" against proposed additional defendants in determining whether plaintiff could amend complaint); *Reyes v. Vanmatre*, 2021 WL 5905557, at *3 (S.D. Tex. Dec. 13, 2021) (same); *Family Rehab., Inc. v. Azar*, 886 F.3d 496, 504 n.15 (5th Cir. 2018) (assessing whether plaintiff raised a "colorable claim" to warrant the district court's exercise of jurisdiction over a Medicare coverage dispute); *Am. Med. Hospice Care, LLC v. Azar*, 2020 WL 9814144, at *5 (W.D. Tex. Dec. 9, 2020) (same); *Harry v. Colvin*, 2013 WL 12174300, at *5 (W.D. Tex. Nov. 6, 2013) (considering whether plaintiff asserted a "colorable constitutional claim" such that the court could exercise jurisdiction); *Sabhari v. Mukasey*, 522 F.3d 842, 844 (8th Cir. 2008) (same); *Stanley v. Gonzales*, 476 F.3d 653, 657 (9th Cir. 2007) (same).

the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity."[248] As noted above, the Fifth Circuit found that the Gatekeeper Provision, which "requires that, before any lawsuit is filed, the plaintiff must seek the bankruptcy court's approval of the claim as 'colorable'"—*i.e.*, to "screen and prevent bad-faith litigation,"—is "sound."[249]

On balance, the court views jurisprudence applying the *Barton* doctrine and vexatious litigant injunctions—while not specifically addressing the "colorability" standard under gatekeeping provisions in a plan[250]—as more informative on how to approach "colorability" than any of the other authorities presented by the parties. One example is *In re VistaCare Group, LLC*.[251]

In *VistaCare*, the Third Circuit noted that, under the *Barton* doctrine, "[a] party seeking leave of court to sue a trustee must make a prima facie case against the trustee, showing that its claim is not without foundation," and emphasized that the "not without foundation" standard, while similar to the standard courts apply in evaluating Rule 12(b)(6) motions to dismiss, "involves a greater degree of flexibility" than a Rule 12(b)(6) motion to dismiss because "the bankruptcy court, which given its familiarity with the underlying facts and the parties, is uniquely situated to determine whether a claim against the trustee has merit," and "is also uniquely situated to determine the potential effect of a judgment against the trustee on the debtor's estate."[252] To satisfy the "*prima facie* case standard," "the movant must do more than meet the liberal notice-pleading

[248] *Id.* at 438 (cleaned up).

[249] *Id.* at 435.

[250] The court acknowledges that the *Barton* doctrine itself would not be directly applicable here because HMIT is proposing to bring the Proposed Complaint in the bankruptcy court – the "appointing" court of Seery.

[251] 678 F.3d 218 (3d Cir. 2012).

[252] *Id.* at 232-233 (cleaned up).

requirements of Rule 8."[253] "[I]f the [bankruptcy] court relied on mere notice-pleading standards rather than evaluating the merits of the allegations, the leave requirement would become meaningless."[254] This court agrees with the notion, that "[t]o apply a less stringent standard would eviscerate the protections" of the Gatekeeper Provision and Gatekeeper Orders.[255] The court notes, as well, that courts in the *Barton* doctrine context regularly hold evidentiary hearings on motions for leave to determine if the proposed complaint meets the necessary threshold for pursuing litigation. The Third Circuit in *VistaCare* noted that "[w]hether to hold a hearing [on a motion for leave to bring suit against a trustee] is within the sound discretion of the bankruptcy court,"[256] and that "the decision whether to grant leave may involve a 'balancing of the interests of all parties involved,'" which will ordinarily require an evidentiary hearing.[257] The Third Circuit applied "the deferential abuse of discretion standard" in considering whether the bankruptcy court's granting of leave should be affirmed on appeal.[258]

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[253] *In re World Mktg. Chi., LLC*, 584 B.R. 737, 743 (Bankr. N.D. Ill. 2018) (cleaned up; collecting cases).

[254] *Leighton Holdings, Ltd. v. Belofsky (In re Kids Creek Partners, L.P.)*, 2000 WL 1761020, at *2 (N.D. Ill. Nov. 30, 2000).

[255] *World*, 584 B.R. at 743 (quoting *Leighton*, 2000 WL 1761020, at *2).

[256] *VistaCare*, 678 F.3d at 232 n.12.

[257] *Id.* at 233 (quoting *In re Kashani*, 190 B.R. 875, 886–87 (9th Cir. BAP 1995)). The Third Circuit noted that the bankruptcy court's holding of an evidentiary hearing on the motion for leave was appropriate (though not required in every case)). *Id.* at 232 n.12.

[258] *Id.* at 224 ("We review a bankruptcy court's decision to grant a motion for leave to sue a trustee under the deferential abuse of discretion standard.") (citing *In re Linton*, 136 F.3d 544, 546 (7th Cir. 1998); *In re Beck Indus., Inc.*, 725 F.2d 880, 889 (2d Cir. 1984)). Courts of appeal routinely apply the deferential abuse of discretion standard to a bankruptcy court's decision regarding whether leave should be granted to sue a trustee. Although the Fifth Circuit has not squarely addressed this issue, all nine Circuits that have considered this issue have also adopted an abuse-of-discretion standard. *See In re Bednar*, 2021 WL 1625399, at *3 (B.A.P. 10th Cir. Apr. 27, 2021) ("[T]he Bankruptcy Court's decision to decline leave to sue the Trustee under the *Barton* doctrine is reviewed for abuse of discretion . . . .") (citing *VistaCare*); *SEC v. N. Am. Clearing, Inc.*, 656 F. App'x 969, 973–74 (11th Cir. 2016) ("Although we have never determined the standard of review for a challenge to the denial of a *Barton* motion, other Circuits that have considered the issue review a lower court's ruling on a *Barton* motion for an abuse of discretion.") (citing *VistaCare*); *In re Lupo*, 2014 WL 4653064, at *3 (B.A.P. 1st Cir. Sept. 17, 2014) ("Appellate courts review a bankruptcy court's decision to deny a motion for leave to sue under the abuse of discretion standard.") (citing *VistaCare*); *Grant, Konvalinka & Harrison, PC v. Banks (In re McKenzie)*, 716 F.3d 404, 422 (6th Cir. 2013) (holding that abuse-of-discretion standard applies to *Barton* doctrine); *Alexander v. Hedback*, 718 F.3d 762 (8th Cir. 2013) (applying abuse-of-discretion standard to *Barton* doctrine).

The Fifth Circuit has affirmed a bankruptcy court's conducting of an evidentiary hearing, in the context of applying a *Barton* doctrine analysis as to a proposed lawsuit against a trustee, without any concern that the inquiry was somehow improper.[259]

Similarly, courts in the vexatious litigant context, where there was an injunction requiring a movant to seek leave to pursue claims, have required movants to "show that the claims sought to be asserted have sufficient merit," including that "the proposed filing is both procedural and legally sound," and "that the claims are not brought for any improper purpose, such as harassment."[260] "For a prefiling injunction to have the intended impact, it must not merely require a reviewing official to apply an already existing level of review," such as the "plausibility" standard for a Rule 12(b)(6) motion.[261] Rather, courts apply "an additional layer of review," and "may appropriately deny leave to file when even part of the pleading fails to satisfy the reviewer that it warrants a federal civil action" or that the "litigant's allegations are unlikely," especially "when prior cases have shown the litigant to be untrustworthy or not credible . . . ."[262]

In summary, the court rejects HMIT's positions: (a) that it need only show, at most, that the allegations in the Proposed Complaint are "plausible" under the Rule 12(b)(6) standard for motions to dismiss; and (b) that this court improperly conducted an evidentiary hearing on the Motion for Leave (i.e., that consideration of evidence in this context is impermissible). The court notes, again, that HMIT's argument that this court is not permitted to consider evidence in making its "colorability" determination is completely contradictory to HMIT's actions in filing the Motion

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[259] *See Howell v. Adler (In re Grodsky)*, 2019 WL 2006020, at *4 (Bankr. E.D. La. Apr. 11, 2019) (dismissing an action under *Barton* after "a close examination" by the bankruptcy court of the evidence regarding the trustee's actions and finding that "the plaintiffs' allegations are not based in fact"), *aff'd* 799 F. App'x 271 (5th Cir. 2020).

[260] *Silver v. City of San Antonio*, 2020 WL 3803922, at *1 (W.D. Tex. July 7, 2020) (denying leave to file lawsuit); *see also Silver v. Perez*, 2020 WL 3790489, at *1 (W.D. Tex. July 7, 2020) (same).

[261] *Silver*, 2020 WL 3803922, at *6.

[262] *Id.*

for Leave, where it attached two Dondero declarations as part of 350 pages of "objective evidence" that "supported" its motion.

The court concludes that the appropriate standard to be applied in making its "colorability" determination in ***this*** bankruptcy case, in the exercise of its gatekeeping function pursuant to the two Gatekeeper Orders and the Gatekeeper Provision in ***this*** Plan, is a broader standard than the "plausibility" standard applied to Rule 12(b)(6) motions to dismiss. It is, rather, a standard that involves ***an additional level of review***—one that places on the proposed plaintiff a burden of making a prima facie case that its proposed claims are ***not without foundation***, are ***not without merit***, and are ***not being pursued for any improper purpose such as harassment***. Additionally, this court may, and should, take into consideration its ***knowledge*** of the ***bankruptcy proceedings*** and ***the parties*** and any additional evidence presented at the hearing on the Motion for Leave. For ease of reference, the court will refer to this standard of "colorability" as the "Gatekeeper Colorability Test." The court considers this test as a sort of hybrid of what the *Barton* doctrine contemplates and what courts have applied when considering motions to file suit when a vexatious litigant bar order is in place.

2. HMIT's Proposed Complaint Does Not Present "Colorable" Claims Under this Court's Gatekeeper Colorability Test or Even Under a Rule 12(b)(6) "Plausibility" Standard.

The court finds, in the exercise of its gatekeeping function under the Gatekeeper Orders and the Gatekeeping Provision in the Plan, that the Motion for Leave should be denied as the claims set forth in the Proposed Complaint are not "colorable" claims. The court makes this determination after considering evidence admitted at the June 8 Hearing, including the testimony of Dondero, Patrick, and Seery, and the numerous exhibits offered by HMIT and the Highland Parties. HMIT's Proposed Claims lack foundation, are without merit, and appear to be motivated by the improper purposes of vexatiousness and harassment. But, even under the less stringent

"plausibility" standard under Rule 12(b)(6) motions to dismiss, where all allegations must be accepted as true, HMIT's "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," fail to "[]cross the line from conceivable to plausible."[263]

HMIT makes unsubstantiated and conclusory allegations in its Motion for Leave and Proposed Complaint that the Claims Purchasers purchased the large allowed unsecured claims only because Seery, while he was CEO of Highland prior to the Effective Date of the Plan, provided them with MNPI and assurances that the Purchased Claims were very valuable. This was allegedly in exchange for their agreement to approve, in their future capacities as members of the CTOB, excessive compensation for Seery in his capacity as the Claimant Trustee after the Effective Date of the Plan. This was an alleged *quid pro quo* that HMIT claims establishes Seery's breach of fiduciary duties and the Claims Purchasers' conspiracy to participate in that breach. As discussed below, these allegations are unsubstantiated and conclusory allegations, and they do not support the inferences that HMIT needs the court to make when it analyzes whether the Proposed Claims are "colorable"—or even merely plausible.

a) HMIT's Proposed Breach of Fiduciary Duties Claim Set Forth in Count I of the Proposed Complaint

Based on HMIT's Proposed Complaint and the evidence admitted at the June 8 Hearing, the court finds that HMIT has not pleaded facts that would support a "colorable" breach of fiduciary duties claim against Seery, under this court's Gatekeeper Colorability Test, nor a plausible claim pursuant to the Rule 12(b) standard. HMIT alleges that Seery breached his fiduciary duties (i) "[b]y disclosing material non-public information to Stonehill and Farallon"

[263] *Ashcroft v. Iqbal*, 556 U.S. 662, 679–80 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

before their purchase of certain Highland claims, and (ii) by receiving "compensation paid to him under the terms of the [CTA] since the Effective Date of the Plan in August 2021."[264]

As earlier noted, both the Reorganized Debtor and the Claimant Trust are organized under Delaware law and, thus, its proposed Count I against Seery for breach of fiduciary duties to these entities is governed by Delaware law under the "Internal Affairs Doctrine."[265] Under Delaware law, "[t]o bring a claim for breach of fiduciary duty, a plaintiff must allege '(1) that a fiduciary duty existed and (2) that the defendant breached that duty.'"[266] HMIT fails to plausibly or sufficiently allege either element such that its breach of fiduciary duty claims against Seery could survive.

Under Delaware law, officers and directors generally owe fiduciary duties only to the entity and its stakeholders as a whole, not to individual shareholders.[267] Because Seery did not owe any "duty" to HMIT directly and individually, the Proposed Complaint fails to state a claim for breach of fiduciary duties to HMIT. HMIT's "legal conclusion[]" that Seery "owed fiduciary duties to HMIT, as equity, and to the Debtor's Estate"[268] "do[es] not suffice" to plausibly allege the existence of any actionable fiduciary relationship.[269] And as discussed earlier in the standing section, HMIT does not have standing to assert a breach of fiduciary claim derivatively on behalf

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[264] Proposed Complaint ¶¶ 64–67.

[265] Motion for Leave, ¶ 21 and n.24; *see also* Plan Art. XII.M ("corporate governance matters . . . shall be governed by the laws of the state of organization" of the respective entity); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081–82 (Del. 2011) ("In American corporation law, the internal affairs doctrine is a dominant and overarching choice of law principle."). The Reorganized Debtor and the Claimant Trust are both organized under the laws of Delaware.

[266] *Brooks v. United Dev. Funding III, L.P.*, 2020 WL 6132230, at *30 (N.D. Tex. Apr. 15, 2020) (quoting *Joseph C. Bamford & Young Min Ban v. Penfold, L.P.*, 2020 WL 967942, at *8 (Del. Ch. Feb. 28, 2020)).

[267] *See Gilbert v El Paso Co.*, 1988 WL 124325, at *9 (Del. Ch. Nov. 21, 1988) ("[D]irectors' fiduciary duty runs to the corporation and to the entire body of shareholders generally, as opposed to specific shareholders or shareholder subgroups.") *aff'd,* 575 A.2d 1131 (Del. 1990); *Klaassen v Allegro Dev. Corp.*, 2013 WL 5967028, at *11 (Del. Ch. Nov. 7, 2013) (same).

[268] Proposed Complaint ¶ 63.

[269] *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

of the Claimant Trust or Reorganized Debtor. But even if HMIT had sufficiently alleged the existence of a fiduciary duty by Seery to HMIT—or to the Reorganized Debtor or Claimant Trust that HMIT would have standing to assert—Seery's alleged communications with Farallon would not have breached those duties.

HMIT alleges that Seery ""disclose[d] material non-public information to Stonehill and Farallon," and they "acted on inside information and Seery's secret assurances of great profits."[270] But the Proposed Complaint does not make any factual allegations regarding HMIT's "conclusory allegations," and its "legal conclusions" are "purely speculative, devoid of factual support," and therefore "stop[] short of the line between possibility and plausibility of entitlement to relief"[271] (and certainly stop short of being "colorable"). HMIT never alleges when any of these purported communications occurred, what material non-public information Seery provided, and what "assurances of great profits" he made to Farallon or to Stonehill. At the June 8 Hearing, Dondero could only clarify that he believed the MGM Email to have been MNPI and that he ***believed*** that Seery ***must have*** communicated that MNPI to Farallon at some point between December 17, 2020 (the date the MGM Email was sent) and May 28, 2021 (the day that Dondero alleges to have had three telephone calls with representatives of Farallon, Messrs. Patel and Linn, regarding Farallon's purchase of the bankruptcy claims). Dondero alleges that, during these phone calls, Patel and Linn gave Dondero no reason for their purchase of the claims that "made [any] sense." Dondero and Patrick also both testified that neither of them had any personal knowledge: (a) of a *quid pro quo* arrangement between Seery and the Claims Purchasers, (b) of Seery having actually communicated any information from the MGM Email to Farallon, or (c) whether Seery's post-Effective Date compensation had or had not been negotiated in an arms' length transaction. Dondero only

[270] Proposed Complaint ¶¶ 3, 64; *see also id.* ¶¶ 13–14, 40, 47, 50.

[271] *Reed v. Linehan (In re Soporex, Inc.)*, 463 B.R. 344, 367, 386 (Bankr. N.D. Tex. 2011) (cleaned up).

speculates regarding these things, because it "made no sense" to him that the Claims Purchasers would have acquired the bankruptcy claims without having received the MNPI. But HMIT admits in the Proposed Complaint that Farallon and Stonehill purchased the Highland claims at discounts of 43% to 65% to their allowed amounts. Thus, they would receive at least an 18% return based on publicly available estimates in Highland's court-approved Disclosure Statement.[272] The evidence established that, if the acquisition of the UBS claims is excluded—recall that the UBS claims were not purchased until August 2021, which was after the May 28, 2021 phones calls that Dondero made to Farallon personnel—the Claims Purchasers would have expected to net over $33 million in profits, or nearly a 30% return on their investment, had Highland met its projections (this is based on the aggregate purchase price of $113 million for the non-UBS claims purchased in the Spring 2021).

To be clear, the only purported MNPI identified in HMIT's Proposed Complaint was the MGM Email Dondero sent to Seery containing "information regarding Amazon and Apple's interest in acquiring MGM." But, the evidence showed that this information was widely reported in the financial press at the time. Thus, it could not have constituted MNPI as a matter of law.[273] Moreover, the evidence showed that Dondero ***did not*** communicate in the MGM Email the actual inside information that he claimed to have obtained as a board member of MGM–which was that Amazon had met MGM's "strike price" and that the MGM board was going into exclusive negotiations with Amazon to culminate the merger with them (and, thus, Apple was no longer considered a potential purchaser). Dondero admitted that he included Apple in the MGM Email for the purpose of making it look like there was a competitive process still ongoing. In other

[272] Proposed Complaint ¶¶ 3, 37, 42.

[273] *See, e.g.*, *SEC v. Cuban*, 2013 WL 791405, at *10–11 (N.D. Tex. Mar. 5, 2013) (holding that information is not "material, nonpublic information" and "'becomes public when disclosed to achieve a broad dissemination to the investing public'") (quoting *SEC v. Mayhew*, 121 F.3d 44, 50 (2d Cir. 1997)).

words, the MGM Email, at the very least, did not include MNPI and, at worst, was deceptive regarding the status of the negotiations between MGM and potential purchasers.

As to HMIT's allegations that Seery's post-Effective Date compensation is "excessive" and that the negotiations between Seery and the CTOB "were not arm's-length,"[274] the evidence at the June 8 Hearing reflected that the allegations are completely speculative, without any foundation whatsoever, and lack merit. And they are also simply not plausible. HMIT fails to allege facts in the Proposed Complaint that would support a reasonable inference that Seery breached his fiduciary duty to HMIT or the estate as a result of bad faith, self-interest, or other intentional misconduct rising to the level of a breach of the duty of loyalty.[275]

b) HMIT's Proposed Claims Set Forth in Counts II (Knowing Participation in Breach of Fiduciaries) and III (Conspiracy)

HMIT seeks to hold the Claims Purchasers secondarily liable for Seery's alleged breach of fiduciaries duties on an aiding and abetting theory in Count II of the Proposed Complaint[276] and, along with Seery, on a civil conspiracy theory of liability in Count III of the Proposed Complaint.[277] Because HMIT's breach of fiduciary duties claim is governed by Delaware law, its aiding and abetting breach of fiduciary duties claim against the Claims Purchasers (Count II) is also governed by Delaware law.[278] HMIT's conspiracy cause of action against the Claims

[274] Proposed Complaint ¶¶ 4, 13, 54, 74.

[275] *See Pfeffer v. Redstone*, 965 A.2d 676, 690 (Del. 2009) (dismissing claim for breach of duty of loyalty against a director where "conclusory allegations" failed to give rise to inference that director failed to perform fiduciary duties); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 507 (Del. Ch. 2000) (dismissing claim for breach of fiduciary duty where "[a]though the complaint makes the conclusory allegation that the defendants breached their duty of disclosure in a 'bad faith and knowing manner,' no facts pled in the complaint buttress that accusation.").

[276] Proposed Complaint ¶¶ 69-74.

[277] Proposed Complaint ¶¶ 75-81.

[278] *See Xtreme Power Plan Tr. v. Schindler (In re Xtreme Power)*, 563 B.R. 614, 632, 645 (Bankr. W.D. Tex. 2016) (applying Delaware law to claim for aiding and abetting breach of fiduciary duty involving Delaware corporation headquartered in Texas).

Purchasers and Seery (Count III), on the other hand, does not involve a matter of "internal affairs" or of corporate governance, so it is governed by Texas law under the Plan.[279]

As an initial matter, because HMIT does not present either a "colorable"—or even plausible claim—that Seery breached his fiduciary duties, it cannot show that it has alleged a "colorable" or plausible claim for secondary liability for the same alleged wrongdoing.[280] In addition, HMIT's civil conspiracy claim against the Claims Purchasers and Seery is based entirely on Dondero's speculation and unsupported inferences and, thus, HMIT has not "colorably" alleged, or even plausibly alleged, its conspiracy claim. Under Texas law, "civil conspiracy is a theory of vicarious liability and not an independent tort."[281] "[T]he elements of civil conspiracy [are] "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result."[282] While HMIT alleges that "Defendants conspired with each other to unlawfully breach fiduciary duties,"[283] it is simply a "legal conclusion" and not the kind of allegation that the court must assume to be true even for purposes of determining plausibility under a motion to dismiss.[284]

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[279] *Klinek v. LuxeYard, Inc.*, 596 S.W.3d 437, 450 n.9 (Tex. App. – Houston [14th Dist.] 2020) (applying Delaware law to fiduciary duty claim and Texas law to conspiracy theory); (Plan Art. XII.M)(which provides for the application of Texas law to "the rights and obligations arising under this Plan" except for "corporate governance matters.")

[280] *See English v. Narang*, 2019 WL 1300855, at *14 (Del. Ch. Mar. 20, 2019) ("As a matter of law and logic, there cannot be secondary liability for aiding and abetting an alleged harm in the absence of primary liability.") (cleaned up; collecting cases); *Hill v. Keliher*, 2022 WL 213978, at *10 (Tex. App. Jan. 25, 2022) ("[A] defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable.") (quoting *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996)). Because HMIT's breach of fiduciary duty claim is governed by Delaware law, its aiding and abetting theory of liability is also governed by Delaware law. *See Xtreme Power Plan Tr. v. Schindler (In re Xtreme Power)*, 563 B.R. 614, 632, 645 (Bankr. W.D. Tex. 2016) (applying Delaware law to claim for aiding and abetting breach of fiduciary duty involving Delaware corporation headquartered in Texas). By contrast, "conspiracy is not an internal affair" or a matter of corporate governance, so it is governed by Texas law under the Plan. *Klinek v. LuxeYard, Inc.*, 596 S.W.3d 437, 450 n.9 (Tex. App. – Houston [14th Dist.] 2020) (applying Delaware law to fiduciary duty claim and Texas law to conspiracy theory); (Plan Art. XII.M).

[281] *Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019).

[282] *Id.* at 141 (cleaned up).

[283] Proposed Complaint ¶ 76.

[284] *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 555 U.S. at 565–66).

HMIT repeats four times that Seery provided MNPI to Farallon and Stonehill as a "as a *quid pro quo*" for "additional compensation,"[285] each time based upon conclusory allegations based "upon information and belief" and, frankly, pure speculation from Dondero that his imagined "scheme," "covert *quid pro quo,*" and secret "conspiracy" between Seery, on the one hand, and Farallon and Stonehill, on the other,[286] ***must have*** occurred because "[i]t made no sense for the [Claims] Purchasers to invest millions of dollars for assets that – per the publicly available information – did not offer a sufficient potential profit to justify the publicly disclosed risk" (i.e., "[t]he counter-intuitive nature of the purchases at issue compels the conclusion that the [Claims] Purchasers acted on inside information and Seery's assurance of great profits.")[287] Importantly, HMIT admits that the Claims Purchasers would have turned a profit based on the information available to them at the time of their acquisitions of the Purchased Claims.[288] HMIT's allegations about the level of potential profits were contradicted by their own allegations and other evidence admitted at the June 8 Hearing. But Dondero's speculation about what level of projected return would be sufficient to justify the acquisition of the claims by the Claims Purchasers, or any other third-party investor, does not give rise to a plausible inference that they acted improperly.[289] Thus, HMIT cannot meet

[285] Proposed Complaint ¶ 77; *see also id.* ¶¶ 4, 47, 74.

[286] *See id.* ¶ 3 ("Thus, acting within a cloak of secrecy, Seery provided close business acquaintances, the other Defendants with material non-public information concerning the value of assets which they then used to purchase the largest approved unsecured claims.").

[287] *Id.*

[288] *See, e.g.*, *id.* ¶ 3 (alleging that acquiring the claims "did not offer a ***sufficient*** potential profit to justify the publicly disclosed risk")(emphasis added); ¶ 43 ("Furthermore, although the publicly available projections suggested only a small margin of error on any profit potential for its significant investment . . . ."); ¶ 49 ("Yet, in this case, it would have been *impossible* for Stonehill and Farallon (in the absence of inside information) to forecast *any* ***significant*** profit at the time of their multi-million-dollar investments given the publicly available, negative financial information.") (third emphasis added).

[289] In fact, the court did not allow Mr. Dondero to testify regarding what kind of information a hypothetical investor in bankruptcy claims would require or what level of potential profits would justify the purchase of bankruptcy claims by investors in the bankruptcy claims trading market because he was testifying as a fact witness, not an expert. Thus, the court only allowed Dondero to testify as to what data ***he*** (or entities he controls or controlled) would rely on, what ***his*** risk tolerance would have been, and what level of potential profits ***he*** would have required to purchase an allowed unsecured bankruptcy claim in a post-confirmation situation. June 8 Hearing Transcript, 129:6-130:4.

its burden, under the Gatekeeper Colorability Test, of making a prima facie showing that its allegations do not lack foundation or merit. Nor can it meet a plausibility standard.

In addition, contrary to the Proposed Complaint's statement that it would have been "***impossible*** for Stonehill and Farallon (in the absence of insider information) to forecast ***any*** significant profit at the time of their multi-million-dollar investments," the evidence showed there were already reports in the financial press that MGM was engaging with Amazon, Apple, and others in selling its media portfolio, and thus the prospect of an MGM transaction increasing the value of, and return on, the Purchased Claims, "at the time of their multi-million-dollar investments" was publicly available information.[290] HMIT's suggestion that the Claims Purchasers were in possession of inside information not publicly available when they acquired the Purchased Claims is simply not plausible. Nor is HMIT's allegation that "[u]pon information and belief" Farallon "conducted no due diligence but relied on Seery's profit guarantees" plausible. The allegations regarding Farallon not conducting any due diligence are based, again, entirely on Dondero's speculation and inferences he made from what Patel and Linn (of Farallon) allegedly told him on May 28, 2021; Dondero did not testify that either Patel or Linn ever told him specifically that they had conducted no due diligence. HMIT's allegations in the Proposed Complaint that ***Farallon*** "conducted no due diligence," are based on Dondero's speculation, unsubstantiated, and contradicted by the testimony of Seery, who testified that emails to him from Linn in June 2020 and later in January 2021 indicated to him that Farallon, at least, had been conducting some level of due diligence in that they had been following and paying attention to the

[290] The court notes, as well, that the Claim Purchasers acquired the UBS claims in August 2021—approximately two and a half months ***after*** the announcement of the MGM-Amazon transaction (which was on May 26, 2021)—a fact that HMIT makes no attempt to harmonize with its conspiracy theory that the Claims Purchasers profited from the misuse of MNPI allegedly given to them by Seery.

Highland case.[291] In addition, there are no allegations in the Proposed Complaint regarding whether Stonehill conducted due diligence or not, and Patrick testified that neither he nor HMIT had any personal knowledge of how much due diligence Farallon or Stonehill did prior to acquiring the Purchased Claims.[292] The court finds and concludes that HMIT's allegations of aiding and abetting and conspiracy in Counts II and III of the Proposed Complaint are based on unsubstantiated inferences and speculation, lack internal consistency, and lack consistency with verifiable public facts. Accordingly, HMIT has failed to show that these claims have a foundation and merit and has also failed to show that they are plausible.

c) HMIT's Proposed Claims Set Forth in Counts IV (Equitable Disallowance), V (Unjust Enrichment and Constructive Trust), and VI (Declaratory Relief) of the Proposed Complaint

i. Count IV (Equitable Disallowance).

In Count IV of its Proposed Complaint, HMIT seeks "equitable disallowance" of the claims acquired by Farallon's and Stonehill's special purpose entities Muck and Jessup, "to the extent over and above their initial investment," and, in the alternative, equitable subordination of their claims to all claims and interests, including HMIT's unvested Class 10 Contingent Claimant Trust Interest, "given [their] willful, inequitable, bad faith conduct" of allegedly "purchasing the Claims based on material non-public information" and being "unfairly advantaged" in "earning significant profits on their purchases."[293] As noted above, these remedies are not available to HMIT.[294]

First, HMIT's request to equitably subordinate the Purchased Claims to all claims and interests is not permitted because Bankruptcy Code § 510(c), by its terms, permits equitable

[291] *See* June 8 Hearing Transcript, 239:6-21.

[292] *See id.*, 310:19-312:2.

[293] Proposed Complaint ¶¶ 83-87.

[294] *See infra* pages 74-75.

subordination of a ***claim to other claims*** or an ***interest to other interests*** but does not permit equitable subordination of a ***claim to interests***.

Second, "equitable" disallowance of claims is not an available remedy in the Fifth Circuit pursuant to the *Mobile Steel* case.[295]

Third, reconsideration of an already-allowed claim in a bankruptcy case can only be accomplished through Bankruptcy Code § 502(j), which, pursuant to Federal Rule of Bankruptcy Procedure 9024, allows reconsideration of allowance of a claim that was allowed following ***a contest*** (which is certainly the case with respect to the Purchased Claims) based on the "equities of the case." But this is only if the request for reconsideration is made within the one-year limitation prescribed in Rule 60(c) of the Federal Rules of Civil Procedure. HMIT's request for disallowance of Muck and Jessup's Purchased Claims (if it could somehow be construed as a request for reconsideration of their claims), is clearly untimely, as it is being made well beyond a year since their allowance by this court following contests and approval of Rule 9019 settlements. Thus, the court finds that HMIT has not alleged a colorable or even plausible claim in Count IV of the Proposed Complaint and, therefore, the Motion for Leave should be denied.

ii. Count V (Unjust Enrichment and Constructive Trust)

In Count V of the Proposed Complaint, HMIT alleges that, "by acquiring the Claims using [MNPI], Stonehill and Farallon were unjustly enriched and gained an undue advantage over other creditors and former equity" and that "[a]llowing [the Claims Purchasers] to retain their ill-gotten benefits would be unconscionable;" thus, HMIT alleges, the Claims Purchasers "should be forced to disgorge all distributions over and above their original investment in the Claims as restitution for their unjust enrichment" and "a constructive trust should be imposed on such proceeds . . . ."[296]

[295] *In re Mobile Steel Co., Inc.*, 563 F.2d 692 (5th Cir. 1977).

[296] Proposed Complaint ¶¶ 89-93.

HMIT alleges further that "Seery was also unjustly enriched by his participation in this scheme and he should be required to disgorge or restitute all compensation he has received from the outset of his collusive activities" and "[a]lternatively he should be required to disgorge and restitute all compensation received since the Effective Date" over which a constructive trust should be imposed.[297] HMIT has not alleged a colorable or even a plausible claim for unjust enrichment or constructive trust in Count V.

Under Texas law,[298] "[u]njust enrichment is not an independent cause of action but rather characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay."[299] Thus, "when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory."[300] Here, as noted above, HMIT's only alleged injury is a diminution of the value of its unvested Contingent Claimant Trust Interest by virtue of Seery's allegedly having wrongfully obtained excessive compensation, with the help of the Claims Purchasers. ***Yet Seery's compensation is governed by express agreements*** (i.e., the Plan and the CTA). Thus, HMIT's claim based on unjust enrichment is not an available theory of recovery.

iii. Count VI (Declaratory Relief)

HMIT seeks declaratory relief in Count VI of the Proposed Complaint, essentially, that Dondero's conspiracy theory is correct and that HMIT's would succeed on the merits with respect

[297] *Id.* ¶ 94.

[298] Under the Plan, Texas law governs HMIT's "claim" for unjust enrichment because it is not a "corporate governance matter." (Plan Art. XII.M.) It also governs HMIT's "claim" for constructive trust, which "is merely a remedy used to grant relief on the underlying cause of action." *Sherer v. Sherer*, 393 S.W.3d 480, 491 (Tex. App. 2013).

[299] *Taylor v. Trevino*, 569 F. Supp. 3d 414, 435 (N.D. Tex. 2021) (cleaned up); *see also Yowell v. Granite Operating Co.*, 630 S.W.3d 566, 578 (Tex. App. 2021) (same).

[300] *Taylor*, 569 F. Supp. 3d at 435 (quoting *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000)).

to the Proposed Claims if it were permitted leave to bring them in an adversary proceeding.[301] But, a request for declaratory relief is not "an independent cause of action"[302] and "in the absence of any underlying viable claims such relief is unavailable."[303] This court has already found and concluded that HMIT would not have constitutional or prudential standing to bring the underlying causes of action in the Proposed Complaint. This court has also found and concluded that all of the Proposed Claims are without foundation or merit and are not even plausible and are all; being brought for the improper purpose of continuing Dondero's vexatious, harassing, bad-faith litigation. Thus, HMIT would not be entitled to pursue declaratory judgement relief as requested in Count VI of the Proposed Complaint.

d) HMIT Has No Basis to Seek Punitive Damages

HMIT separately alleges that the Claims Purchasers' and Seery's "misconduct was intentional, knowing, willful, in bad faith, fraudulent, and in total disregard of the rights of others," thus entitling HMIT to an award of punitive damages under applicable law. But, HMIT abandoned its proposed fraud claim that was in its Original Proposed Complaint, so its sole claim for primary liability is Seery's alleged breach of his fiduciary duties. And under Delaware law, the "court cannot award punitive damages in [a] fiduciary duty action."[304]

[301] Proposed Complaint ¶¶ 96-99.

[302] *See Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 932 (5th Cir. 2023).

[303] *Green v. Wells Fargo Home Mtg.*, 2016 WL 3746276, at *2 (S.D. Tex. June 7, 2016) (citing *Collin Cty. v. Homeowners Ass'n for Values Essential to Neighborhoods*, 915 F.2d 167, 170–71 (5th Cir. 1990)); *see also Hopkins v. Cornerstone Am.*

[304] *Buchwald v. Renco Grp. (In re Magnesium Corp. of Am.)*, 539 B.R. 31, 52 (S.D.N.Y. 2015) (citing *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1154 (Del. Ch. 2006)), *aff'd* 682 F. App'x 24 (2d Cir. 2017).

3. HMIT Does Not Present "Colorable" Claims Under this Court's Gatekeeper Colorability Test Because It Seeks to Bring the Proposed Complaint for Improper Purposes of Harassment and Bad-Faith, Vexatiousness.

Under this court's Gatekeeper Colorability Test, in addition to showing that its allegations and claims are not without foundation or merit, HMIT must also show that the Proposed Claims are not being brought for any improper purpose. Taking into consideration the court's knowledge of the bankruptcy proceedings and the parties and the evidence presented at the hearing on the Motion for Leave, the court finds that HMIT is acting at the behest of, and under the control or influence of, Dondero in continuing to pursue harassing, bad faith, vexatious litigation to achieve his desired result in these bankruptcy proceedings. So, in addition to failing to show that its Proposed Claims have foundation and merit, HMIT cannot show that it is pursuing the Proposed Claims for a proper purpose and, thus, cannot meet the requirements under the Gatekeeper Colorability Test; HMIT's Motion for Leave should be denied.

IV. CONCLUSION

The court concludes, having taken into consideration both its knowledge of the bankruptcy proceedings and the parties and the evidence presented at the hearing on the Motion for Leave, that HMIT's Motion for Leave should be denied for three independent reasons: (1) HMIT would lack constitutional standing to bring the Proposed Claims (and, thus, the federal courts would lack subject matter jurisdiction over the Proposed Claims); (2) even if HMIT would have constitutional standing to pursue the Proposed Claims, it would lack prudential standing to bring the Proposed Claims; and (3) even if HMIT would have both constitutional standing and prudential standing to bring the Proposed Claims, it has not met its burden under the Gatekeeper Colorability Test of showing that its Proposed Claims are "colorable" claims—that the Proposed Claims are not without foundation, not without merit, and not being pursued for an improper purpose. Moreover,

even if this court's Gatekeeper Colorability Test should be replaced with a Rule 12(b)(6) "plausibility" standard, the Proposed Claims are not plausible.

Accordingly,

IT IS ORDERED that HMIT's Motion for Leave be, and hereby is **DENIED**.

###End of Memorandum Opinion and Order###

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	Case No. 19-34054-sgj11
Reorganized Debtor.	
DUGABOY INVESTMENT TRUST and HUNTER MOUNTAIN INVESTMENT TRUST,	Adv. Pro. No. 23-03038-sgj
Plaintiffs,	
vs.	
HIGHLAND CAPITAL MANAGEMENT, L.P. and HIGHLAND CLAIMANT TRUST,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF HIGHLAND CAPITAL MANAGEMENT L.P. AND THE HIGHLAND CLAIMANT TRUST'S MOTION TO DISMISS COMPLAINT

[1] The Reorganized Debtor's last four digits of its taxpayer identification service address for the Reorganized Debtor is 100 Crescent Court, Suite 18

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Highland Capital Management, L.P. ("Highland" or the "Debtor," as applicable), and the Highland Claimant Trust (the "Claimant Trust," and together with Highland, the "Highland Parties"), the defendants in the above-captioned adversary proceeding, hereby submit this memorandum of law in support of their *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* (the "Motion") seeking to dismiss the above-captioned action (the "Action").

I. PRELIMINARY STATEMENT[2]

1. The Complaint should be dismissed in its entirety. Pursuant to Rule 12(b)(1), this Court lacks subject matter jurisdiction over the Action because the Claims are either moot or seek impermissible advisory opinions. Even if the Court had jurisdiction (and it does not), the Claims should be dismissed under Rule 12(b)(6) because they fail to state claims as a matter of law.

2. Under the express terms of the CTA and the Plan, holders of Contingent Trust Interests are not "Claimant Trust Beneficiaries" and have no rights, including information rights, unless and until their contingent, inchoate interests vest. Despite holding only unvested Contingent Trust Interests with no rights in the Claimant Trust, Plaintiffs stubbornly seek "financial information" regarding the Claimant Trust Assets and specifically request: (a) an accounting of the Claimant Trust Assets, (b) a determination as to the value of those assets compared to liabilities, and (c) a determination whether Plaintiffs' Contingent Trust Interests "will vest."

3. Count One, which seeks an accounting of the assets and liabilities of the Claimant Trust, has been rendered moot by the Pro Forma Adjusted Balance Sheet filed in July 2023 and other publicly-available information, which discloses the very information demanded. The relief

[2] Capitalized terms not defined in this Preliminary Statement shall have the meanings ascribed to them below.

sought in Count Three, namely, a determination as to whether Plaintiffs' Contingent Trust Interests are "likely to vest," is moot, seeks an impermissible advisory opinion, and is barred by collateral estoppel. In September 2023, four months after the Complaint was filed, this Court found that whether the Contingent Trust Interests might someday vest is dependent on a multitude of unknown and unknowable factors, for example, the amount of senior indemnification expenses that must be reserved for and ultimately paid by the Claimant Trust. Based, in part on those unknown senior expenses, this Court determined that the Contingent Trust Interests were "not in the money." This Court lacks jurisdiction to render an opinion on Count Three and, to the extent that it could, it already has and Plaintiffs are collaterally estopped from re-litigating this issue. For the same reasons, there is no declaratory relief available to Plaintiffs that has not already been addressed in the Court's prior ruling.

4. Even if the Court had subject matter jurisdiction over the Claims, the Complaint fails as a matter of law under Rule 12(b)(6). Plaintiffs' equitable claim (Count One) is foreclosed by the plain and unambiguous terms of the CTA, the Plan, and this Court's prior orders. Plaintiffs, as holders of Contingent Trust Interests, have no rights—including information rights—under the CTA. Under the circumstances, equity cannot abrogate the terms of that agreement or be used to create non-existent rights or extra-contractual duties, such as those relating to the disclosure of financial information or an accounting. This is especially so when Plaintiffs and their affiliates have unclean hands as vexatious adversaries to the entity against who they claim to seek equity.[3] Plaintiffs' claims for declaratory relief (Counts Two and Three) also fail as a matter of law because

[3] In addition to the numerous actions in which the Plaintiffs and their affiliates have attacked the Highland Parties or failed to honor their obligations to the Highland Parties, plaintiff HMIT is a defendant in an action on a note owed to Highland with current principal and interest owed in excess of $98 million, discussed *infra*.

there is no cognizable underlying claim. For the reasons herein and discussed further below, the Complaint should be dismissed.

II. RELEVANT BACKGROUND

A. The Bankruptcy Case

5. On October 16, 2019 (the "Petition Date"), Highland filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Case"). As of the Petition Date, Highland had three classes of limited partnership interests (Class A, Class B, and Class C). *See* Disclosure Statement [Docket No. 1473], ¶ F(4). The Class A interests were held by The Dugaboy Investment Trust ("Dugaboy"),[4] Mark Okada's family trusts, and Strand Advisors, Inc. The Class B and C interests were held by Hunter Mountain Investment Trust ("HMIT"). *Id.* On January 9, 2020, an independent board of directors, which included James P. Seery, Jr., was appointed to manage Highland's Bankruptcy Case and estate. [Docket No. 339]. Mr. Seery was appointed Highland's Chief Executive Officer and Chief Restructuring Officer in July 2020. [Docket No. 854].

B. The Plan

6. On February 22, 2021, the Court entered the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* [Bankr. Docket No. 1943] (the "Confirmation Order"), which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Bankr. Docket No. 1943-1] (the "Plan"). The Plan became effective on August 11, 2021 [Docket No. 2700] (the "Effective Date"). Pursuant to the Plan:

- General Unsecured Claims were classified as Class 8 and Subordinated Claims were classified as Class 9.

[4] Dugaboy is James Dondero's family trust.

- HMIT's Class B Limited Partnership Interest and Class C Limited Partnership Interest were classified as Class 10.

- Class A Limited Partnership Interests, including Dugaboy's, were classified as Class 11.

- The Claimant Trust, a Delaware statutory trust, was established pursuant to that certain *Claimant Trust Agreement*, effective as of August 11, 2021 (the "CTA"),[5] for the benefit of "Claimant Trust Beneficiaries;"[6]

- Holders of allowed general and subordinated unsecured Claims (*i.e.*, Class 8 and 9) received beneficial interests in the Claimant Trust (collectively, the "Trust Interests") and became "Claimant Trust Beneficiaries;" and

- Holders of the Debtor's prepetition partnership interests (*i.e.*, Class 10 and 11) were allocated unvested contingent interests (the "Contingent Trust Interests") in the Claimant Trust that would vest if, and only if, the Claimant Trustee certifies that all Claimant Trust Beneficiaries (*i.e.*, Class 8 and 9) have been paid in full, Class 8 has received post-petition interest, and all disputed claims in Class 8 and 9 have been resolved.

(*See generally* Plan Art. III, IV.)

C. Information Rights Under the CTA

7. By design, the clear terms of the CTA limit information rights. Section 3.12(a) of the CTA provides that the Claimant Trustee has no duty to provide an accounting of the Claimant Trust Assets to any party, including Claimant Trust Beneficiaries. CTA, § 3.12(a) ("Except as otherwise provided herein, nothing in this Agreement requires the Claimant Trustee to file any accounting ....").

8. Section 3.12(b) of the CTA provides limited information rights solely to "Claimant Trust Beneficiaries":

> The Claimant Trustee shall provide quarterly reporting to the Oversight Board and Claimant Trust Beneficiaries of (i) the status of the Claimant Trust Assets, (ii) the balance of Cash held by the Claimant Trust (including in each of the Claimant Trust Expense Reserve and Disputed Claim Reserve), (iii) the determination and any re-

[5] All capitalized terms used but not defined herein have the meanings given to them in the CTA.

[6] The CTA was expressly incorporated into and is a part of the Plan. Confirmation Order ¶ 25; Plan Art. IV, § J. The final form of the CTA was filed with the Court as Docket No. 1811-2 as modified by Docket No. 1875-4.

> determination, as applicable, of the total amount allocated to the Disputed Claim Reserve, (iv) the status of Disputed Claims and any resolutions thereof, (v) the status of any litigation, including the pursuit of the Causes of Action, (vi) the Reorganized Debtor's performance, and (vii) operating expenses; provided, however, that the Claimant Trustee may, with respect to any Member of the Oversight Board or Claimant Trust Beneficiary, redact any portion of such reports that relate to such Entity's Claim or Equity Interest, as applicable and any reporting provided to Claimant Trust Beneficiaries may be subject to such Claimant Trust Beneficiary's agreement to maintain confidentiality with respect to any non-public information.

CTA, § 3.12(b).

9. Nothing in the CTA or the Plan grants any other information rights, and, in fact, the CTA is clear that there are no information rights outside those in Section 3.12(b). *See* CTA, § 5.10(a) ("The Claimant Trust Beneficiaries shall have no rights other than those set forth in this Agreement, the Confirmation Order, or the Plan (including any Plan Supplement documents incorporated therein)"). Thus, the only entities with information rights under the Plan are "Claimant Trust Beneficiaries," and those rights (a) are limited, (b) do not include rights to asset or subsidiary level information, and (c) can be further limited by the Claimant Trustee as appropriate to "maintain confidentiality."

10. Under the express terms of the Plan, the CTA, and this Court's prior orders, the "Claimant Trust Beneficiaries"[7] are the holders of Allowed Claims in Class 8 and Class 9. *See* CTA, § 1.1(h); Plan Art. I.B.27.[8] HMIT holds Class 10 interests and Dugaboy holds Class 11 interests, and therefore, neither Plaintiff is a "Claimant Trust Beneficiary." Instead, Plaintiffs hold

[7] "Claimant Trust Beneficiaries" are defined 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.

See, e.g., CTA, § 1.1(h).

[8] *See also In re Highland Cap. Mgt., L.P.*, 19-34054-SGJ-11, 2023 WL 5523949, at *35 (Bankr. N.D. Tex. Aug. 25, 2023), discussed further *infra*.

unvested "Contingent Trust Interests." *See, e.g.*, Plan, Art. I.B.44; CTA, §§ 1.1(h), 5.1(c). Contingent Trust Interests "shall not have any rights under" the CTA, and holders of such interests will not "be deemed 'Beneficiaries'" "unless and until" they vest in accordance with the Plan and CTA. *Id.* Specifically, under the CTA, Plaintiffs' Contingent Trust Interests in the Claimant Trust will *not* vest and Plaintiffs will have *no* rights under the CTA unless and until (a) all Class 8 and Class 9 Claims are paid indefeasibly in full with interest, (b) all disputed claims are resolved, and (c) the Claimant Trustee certifies as much to this Court. *Id.* Class 8 and Class 9 Claims cannot be paid until indemnification claims are satisfied.[9] It is indisputable that Plaintiffs' Contingent Trust Interests have not vested under the terms of the Plan and the CTA. *See Highland Cap.*, 2023 WL 5523949, at *35. Plaintiffs are not "Claimant Trust Beneficiaries" and have no information rights.

D. Dugaboy Files the Valuation Motion

11. On June 30, 2022, Dugaboy filed its *Motion for Determination of the Value of the Estate and Assets Held by the Claimant Trust* [Docket No. 3382] (the "Initial Valuation Motion"), seeking "a determination by this Court of the current value of the estate and an accounting of the assets currently held by the Claimant Trust and available for distribution to creditors." Thereafter, on September 21, 2022, Dugaboy filed a supplemental motion [Docket No. 3533] (the "Supp. Valuation Motion" and, together with the Original Valuation Motion, the "Valuation Motion"). Therein, Dugaboy requested that the Court enter "an order: (i) finding that Dugaboy has standing in these bankruptcy proceedings under 11 U.S.C. § 1109(b), Delaware trust law, and Article III of the United States Constitution; and (ii) setting an evidentiary hearing to ascertain the assets

[9] *See, e.g.*, CTA Art. 6.1 (providing that distributions to Claimant Trust Beneficiaries are junior to the Claimant Trust's expenses, including, among other things, amounts "necessary to pay or reserve for reasonably incurred or anticipated Claimant Trust Expenses," which include indemnification costs). This priority of payment under the Plan and CTA was upheld by the Fifth Circuit when affirming this Court's order authorizing the creation of the indemnity sub-trust, the purpose of which was to reserve or retain any cash reasonably necessary to satisfy contingent liabilities. *See In the Matter of Highland Cap. Mgt., L.P.*, 57 F4th 494, 502 (5th Cir 2023).

currently available for distribution to allowed claimants, to determine the current value of those assets, and to determine whether there is a potential for settling the estate now ...." The Valuation Motion was supported by HMIT. [Docket No. 3467]. Highland objected to the Valuation Motion. [Docket No. 3465].

12. On November 15, 2022, the Court held a status conference, during which the Court expressed concerns about whether the Valuation Motion should be filed as an adversary proceeding since it sought equitable relief. On December 7, 2022, after the parties submitted briefing on this issue, [*see* Docket Nos. 3637, 3638, 3639], the Court issued its order [Docket No. 3645] (the "Valuation Order"), in which it found that an adversary proceeding was necessary with regard to the relief sought in the Valuation Motion. The Court explained that "the essence of the Dugaboy Value Motions is a request for an accounting," which constitutes "equitable relief that does not appear to be provided for in the confirmed chapter 11 plan." *Id.* at 4. The Court further found that "Dugaboy and HMIT have not pointed to any provision of the CTA that establishes a right to an accounting," and "[i]t would appear that Dugaboy and HMIT may be frustrated that they did not negotiate or obtain the same oversight rights as the actual Claimant Trust Beneficiaries in the Plan and CTA." Valuation Order at 5 (quoting CTA §§ 3.12(a), (b)).

E. Plaintiffs File the Complaint

13. On May 10, 2023, Plaintiffs commenced this Action against Highland and the Claimant Trust by filing their complaint [Adv. Pro. No. 23-03038, Docket No. 1] (the "Complaint"). In their Complaint, Plaintiffs seek an equitable accounting of the Claimant Trust Assets so they can determine if their Contingent Claimant Trust Interests "are likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries."

14. In their first count ("Count One"), Plaintiffs request an accounting "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." Plaintiffs maintain, *inter alia*, that "[d]ue to the lack of transparency into the assets of the Claimant Trust, Plaintiffs are unable to determine whether their Contingent Claimant Trust Interests may vest into Claimant Trust Interests." Compl. ¶¶ 82-88.[10]

15. In their second count ("Count Two"), Plaintiffs seek a declaratory judgment regarding the value of the Claimant Trust Assets. Plaintiffs specifically maintain that "[o]nce 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." Compl. ¶ 90.

16. In their third count ("Count Three," and collectively with Count One and Count Two, the "Claims"), Plaintiffs seek a declaration and determination that "[i]n the event that the Court determines that the Claimant Trust assets exceed the obligations of the bankruptcy estate in an amount sufficient so that all Allowable Claims may be indefeasibly paid … the conditions are such that their Contingent Claimant Trust Interests are likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries." Compl. ¶ 94.

F. The Court Denies HMIT Leave to File Adversary Proceeding

17. Around the same time, HMIT separately filed its *Emergency Motion for Leave to File Verified Adversary Proceeding* [Docket No. 3699], which was later supplemented and

[10] Plaintiffs allege that Highland "failed and refused to file quarterly 2015.3 reports, leaving stakeholders, including Plaintiffs, in the dark about the value of the estate and the mix of assets it held, bought or sold." Compl. ¶ 41. Plaintiffs' allegations about the lack of transparency in the Bankruptcy Case is tired and purposefully misleading. ***Highland has complied with every single pre- and post-Effective Date disclosure obligation***—except for the Rule 2015.3 disclosure. The Fifth Circuit has denied Dugaboy's appeal of the denial of its post-confirmation motion to compel compliance with Rule 2015.3, (*see* Case No. 22-10831, Document No. 46), and this Court has found that "it is not as though the Claimant Trustee is operating 'under the radar'" (Valuation Order at 5). Moreover, as previously disclosed in this Court, the failure to file the 2015.3 reports during the case was a direct result of actions of persons who work for Plaintiffs and their affiliates, and in any event, at all time Plaintiffs' control person had full access to the information they cry about. Nevertheless, Plaintiffs continue with their baseless allegations about the lack of transparency in this case.

modified [Docket Nos. 3760, 3815, and 3816] (collectively, the "Motion for Leave").[11] In the Motion for Leave, HMIT sought leave to sue Highland, Mr. Seery, Stonehill, and Farallon[12] falsely alleging both direct and derivative claims for "insider trading" and breach of fiduciary duty (the "Proposed Claims").

18. On August 25, 2023, this Court issued its order denying the Motion for Leave on multiple grounds. *See Highland Cap.*, 2023 WL 5523949 (the "Order Denying Leave"). In the Order Denying Leave, the Court found that, *inter alia*: (a) HMIT was not a "Claimant Trust Beneficiary" and not a "beneficial owner" of the Claimant Trust; (b) HMIT should not be treated as a "Claimant Trust Beneficiary" after "considering the current value of the Claimant Trust Assets …."; (c) HMIT held "only an ***unvested*** contingent interest in the Claimant Trust," and "HMIT's status as a 'beneficiary' of the Claimant Trust is defined by the CTA itself, pure and simple;" and (d) the Court "does not have the power to equitably deem HMIT's Contingent Trust Interest to be vested ...." *Id.* at 35.

G. Highland Files the Pro Forma Adjusted Balance Sheet Ahead of Mediation in July 2023

19. On April 20, 2023, James Dondero and certain of his controlled affiliates (collectively, the "Dondero Parties") filed their *Motion to Stay and to Compel Mediation* [Docket No. 3752] (the "Mediation Motion"), which was granted, in part, on August 2, 2023, [Docket No. 3897].[13] On July 6, 2023, in furtherance of mediation and in compliance with an agreed-upon Court order [Docket 3870], Highland filed a *pro forma* adjusted balance sheet [Docket No. 3872] (the "Pro Forma Adjusted Balance Sheet"). The Pro Forma Adjusted Balance Sheet disclosed a

[11] Each version of the Motion for Leave attached a proposed complaint [Docket Nos. 3699-1, 3760-1, 3815-1, 3816-1] (the last version, the "Proposed Complaint").

[12] Stonehill and Farallon refer to, respectively, Stonehill Capital Management, LLC and Farallon Capital Management, LLC.

[13] The mediation did not result in a settlement. *See* Docket No. 3964.

point-in-time $152 million in assets (of which only $37 million was cash or restricted cash) and $130 million in liabilities for a total equity value of $22 million, which, even assuming the equity value could be distributed (and it cannot be), is well short of the $126 million needed to pay Allowed Class 8 and Class 9 claims (exclusive of interest).

20. The information disclosed on the Pro Forma Adjusted Balance Sheet was consistent with information that had already been disclosed in the Bankruptcy Case as of April 2023, [*see* Bankr. Docket Nos. 3756 and 3757] (the "Post-Confirmation Reports"), and through these disclosures should have resolved any good faith dispute around receiving sufficient information with which to make a global settlement offer. These enhanced Post-Confirmation Reports were publicly filed to provide interested parties substantially more information than was required. *See, e.g.*, Docket No. 3757 at 13-15 (Addendum showing (i) "Quarter-ending cash, Disputed Claims Reserve, and Indemnity Trust summary;" (ii) liabilities, including remaining disputed/expunged or pending claims, (iii) disbursements to Classes 8 and 9, and (iv) "Remaining investments, notes, and other assets").

H. HMIT Seeks Reconsideration of Order Denying Leave Based on the Pro Forma Adjusted Balance Sheet

21. On September 8, 2023, HMIT filed its motion for reconsideration of the Order Denying Leave [Docket No. 3905] (the "Motion to Reconsider"), falsely and misleadingly contending that the Pro Forma Adjusted Balance Sheet (a) provided an accounting of the Claimant Trust Assets and (b) proved that (i) the value of the Claimant Trust Assets exceeded liabilities and (ii) HMIT was "in the money" and (c) its interests were likely to vest and that HMIT therefore had standing as a "Claimant Trust Beneficiary." On October 6, 2023, the Court denied the Motion to Reconsider [Docket No. 3936] (the "Order Denying Reconsideration"). The Court found that, in pertinent part, the Balance Sheet did not "demonstrate that HMIT's contingent interest is 'in the

money,'" noting that "HMIT does not give proper attention to the voluminous supplemental notes" in the Balance Sheet that are "integral to understanding the numbers therein." *Id.* at 3 (citing Notes 5 and 6 of the Balance Sheet which show that Highland will operate at an "operating loss prospectively," and that the administrative expenses and legal fees continue to deplete assets, among other things). The Court also found that the Balance Sheet did not constitute "newly discovered evidence" because it did not contain information that was materially different from the information disclosed on the Post-Confirmation Reports, filed three months earlier. *Id.* at 2-3.

III. ARGUMENT

A. The Court Does Not Have Subject Matter Jurisdiction Over Counts One and Three

22. The Court does not have subject matter jurisdiction to adjudicate Counts One and Three. Counts One and Three are moot, and Count Three impermissibly seeks an advisory opinion.

1. Legal Standard

23. A motion under Rule 12(b)(1) must be considered before any motion on the merits because subject matter jurisdiction is required to determine the validity of any claim. *See Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994). "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Id.* "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998) (internal quotations omitted).

2. Counts One and Three are Moot

i. Count One is Moot in Light of the Pro Forma Adjusted Balance Sheet

24. Count One is moot in light of the Pro Forma Adjusted Balance Sheet and must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). For a court to have subject matter jurisdiction over a suit, a "controversy must remain live throughout the suit's existence." *Bazzrea v. Mayorkas*, 3:22-CV-265, 2023 WL 3958912, at *3 (S.D. Tex. June 12, 2023). "A case becomes moot—and therefore no longer a 'Case' or 'Controversary' for purpose of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Yarls v. Bunton*, 905 F.3d 905, 909 (5th Cir. 2018) (internal quotations omitted).

25. Here, the issue presented in Count One is no longer "live." In Count One, Plaintiffs seek (a) "information regarding the Claimant Trust assets," including the amount of assets and liabilities, so that (b) Plaintiffs can "determine whether their Contingent Claimant Trust Interests may vest into Claimant Trust Interests." Compl. ¶¶ 82-88. As discussed *supra*, the Pro Forma Adjusted Balance Sheet provides this very information. It shows the value of the Claimant Trust Assets, the Claimant Trust's 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). HMIT admitted as much in its Motion to Reconsider when it specifically (but incorrectly) maintained that, based on the assets and liabilities shown on the Pro Forma Adjusted Balance Sheet, "***[HMIT's] Contingent Claimant Trust Interest will vest, or put colloquially, [HMIT] is 'in the money.'"*** Motion to Reconsider ¶¶ 5-8 (emphasis added).[14] The Post-

[14] Although Plaintiffs have effectively admitted the Pro Forma Adjusted Balance Sheet moots their requested relief, as this Court is aware, the current value of the Claimant Trust Assets does not dictate when or if Plaintiffs' Contingent Trust Interests will ever vest. Whether and when Contingent Trust Interests may someday vest depends upon the satisfaction of the conditions set forth in the CTA and the Plan, and this Court "does not have the power to equitably deem HMIT's Contingent Trust Interest to be vested ..." regardless of whether the value of the pro forma assets exceeds the pro forma value of the liabilities on a particular date. Order Denying Leave at *35.

Confirmation Reports, filed prior to the Complaint in filed in April 2023, similarly disclose the financial information requested in Count One, including, *inter alia*, the cash and the identification of remaining assets.

26. The Pro Forma Adjusted Balance Sheet and Post-Confirmation Reports have thus eliminated the "actual controversary" at the core of Count One, and there is no conceivable relief available to Plaintiffs through this claim that has not already been provided. Count One is therefore moot. *See Bazzrea*, 2023 WL 3958912, at *4 (finding plaintiffs' claims moot where events that occurred after the complaint was filed "eliminated the actual controversy—the court cannot provide effectual relief and thus the plaintiffs' claims are moot.") Accordingly, Plaintiffs have not met their burden to establish that the Court has subject matter jurisdiction over Count One, and it should be dismissed under Rule 12(b)(1).

ii. Count Three is Moot Because the Court has Already Held that Contingent Claimant Interests are Not "In the Money"

27. Count Three, seeking a declaration regarding whether Plaintiffs' Contingent Trust Interests "are likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries," Compl. ¶ 94, is moot because the Court already decided this issue. As discussed above, in its Motion to Reconsider, HMIT incorrectly argued that the Pro Forma Adjusted Balance Sheet showed that HMIT's Contingent Trust Interests were "in the money" and likely to vest, rendering HMIT a "Claimant Trust Beneficiary." In its Order Denying Reconsideration, the Court found that Contingent Trust Interests are not "in the money,"[15] and that HMIT is, therefore, not a Claimant Trust Beneficiary. As the Court explained, Plaintiffs' reliance on the assets and liabilities disclosed on the Pro Forma Adjusted Balance Sheet in support of its argument that its interests

[15] Although the Court's finding related to HMIT's Contingent Trust Interest, this ruling applies equally to Dugaboy, because both Plaintiffs both hold Contingent Trust Interests.

were "likely to vest" demonstrated a fundamental misunderstanding of the Pro Forma Adjusted Balance Sheet and the vesting mechanics in the CTA. Again, under the CTA, Contingent Trust Interests vest only if, among other things, Class 8 and Class 9 are paid in full. And as the Court further stated, the Claimant Trust Assets at any point in time will only be available for distribution to those classes after they are monetized and all fees and expenses, including indemnification obligations, are satisfied. *See* Order Denying Reconsideration at 3. In other words, as this Court found, unless and until such contingent obligations are *known and satisfied* and all Class 8 and Class 9 Claims have been actually paid in full, Contingent Trust Interests are not "in the money" and will not "vest."

28. The Court's finding in its Order Denying Reconsideration, in which the Court determined that Contingent Trust Interests are not "in the money," has thus eliminated any "live" controversy presented by the relief sought in Count Three, namely, a determination whether Plaintiffs' Contingent Trust Interests "are likely to vest into Claimant Trust Interests." For the foregoing reasons, Counts One and Three are moot. The Court does not have subject matter jurisdiction over Counts One and Three under Rule 12(b)(1), and such claims should be dismissed.

3. Count Three Improperly Seeks an Advisory Opinion

29. The Court also does not have subject matter jurisdiction to rule on Count Three because it impermissibly seeks an advisory opinion. Under Article III of the Constitution, "no justiciable controversy is presented when ... the parties are asking for an advisory opinion." *Paragon Asset Co. Ltd v. Gulf Copper & Mfg. Corp.*, 1:17-CV-00203, 2020 WL 1892953, at *1 (S.D. Tex. Feb. 11, 2020) (internal quotations omitted). The "well-established constitutional ban on advisory opinions" seeks to ensure that federal courts determine "specific disputes between parties, rather than hypothetical legal questions, and in doing so, conserve judicial resources." *Texas v. Travis County*, 272 F. Supp. 3d 973, 980 (W.D. Tex. 2017), *aff'd sub nom. Texas v. Travis*

County, Texas, 910 F.3d 809 (5th Cir 2018); *see also Hodgson v. H. Morgan Daniel Seafoods, Inc.*, 433 F.2d 918, 920 (5th Cir. 1970) ("We cannot render an advisory opinion on hypothetical or abstract facts.")

30. In Count Three, Plaintiffs impermissibly ask the Court to determine whether (a) current Claimant Trust Beneficiaries "***may be*** indefeasibly paid" and (b) "Contingent Claimant Trust Interests ***are likely*** to vest." Compl. ¶ 94 (emphasis added). Any such determination is dependent upon several hypothetical future events concerning, among other things, asset values and recoveries (*e.g.*, whether the Fifth Circuit sustains the Dondero Parties' appeal in the Notes Litigation, and the Claimant Trust actually recovers the bonded amounts), actual future Claimant Trust expenses, and the nature and extent of indemnification obligations.[16] As discussed *supra*, indemnification expenses are senior to distributions to the Claimant Trust Beneficiaries, and Claimant Trust Beneficiaries cannot be paid in full unless and until such indemnification expenses are liquidated and satisfied. Contingent Trust Interests therefore cannot vest unless and until indemnification claims are known and paid (and all Class 8 and Class 9 Claims are thereafter paid).

31. In light of the widespread litigation, additional threatened litigation, and continued accrual of related legal fees and expenses, the amount of indemnification obligations remains unknown. Thus, any determination as to whether Plaintiffs' Contingent Trust Interests "are likely to vest" is contingent upon a number of unknown and contingent variables, including (a) the amount of indemnification obligations and (b) and whether sufficient cash remains to pay Classes 8 and 9 in full after those indemnification obligations (and other expenses) are satisfied. Such an abstract determination is precisely the type of relief precluded by the constitutional ban on advisory

[16] The Highland Parties request that the Court take judicial notice of the active litigation in the Bankruptcy Case, as reflected in the *Amended Notice of Filing of Active Litigation Involve and/or Affecting the Highland Parties* [Docket No. 3880].

opinions. *See JPay LLC v. Burton*, 3:22-CV-1492-E, 2023 WL 5253041, at *10 (N.D. Tex. Aug. 15, 2023) (dismissing case for lack of subject matter jurisdiction and declining "to render an advisory opinion on the value of the aggregated claims of a contingent, theoretical class" where such determination is contingent on a "hypothetical facts"). Accordingly, Plaintiffs have failed to show that the Court has subject matter jurisdiction to adjudicate Count Three, and it should be dismissed under Rule 12(b)(1).

B. Count Three is Barred by Collateral Estoppel

32. Count Three is also barred by the doctrine of collateral estoppel. Collateral estoppel is referred to as "issue preclusion" and prevents relitigating the same issues or facts decided in a prior proceeding. Collateral estoppel precludes the re-litigation of issues or facts actually litigated in the original action, whether or not the second suit is based on the same cause of action. *See Houston Professional Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016). "By precluding parties from contesting matters that they have had a full and fair opportunity to litigate, [collateral estoppel] protect[s] against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions." *In re Reddy Ice Holdings, Inc.*, 611 B.R. 802, 808 (Bankr. N.D. Tex. 2020) (internal quotations omitted). Collateral estoppel applies when: "(1) the issue at stake is identical to the one involved in the earlier 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 action." *Oyekwe v. Research Now Group, Inc.*, 542 F. Supp. 3d 496, 506 (N.D. Tex. 2021), appeal dismissed, 21-10580, 2021 WL 8776378 (5th Cir Dec. 28, 2021). These elements are easily met here.

33. The issue presented by Count Three—whether Plaintiffs' "Contingent Claimant Trust Interests are likely to vest into Claimant Trust Interests" (Compl. ¶ 94)—is the same as the

issue at stake, and actually litigated, in connection with the Motion for Leave. In support of its Motion to Reconsider, HMIT argued that it had standing to assert its Proposed Claims because HMIT was "in the money" and its Contingent Trust Interests "will vest." *See* Motion to Reconsider. In adjudicating the Motion to Reconsider, the Court determined that HMIT did not have standing to bring the Proposed Claims because its Contingent Trust Interests were not "in the money." *See* Order Denying Reconsideration at 3. The issue of whether Contingent Trust Interests were "in the money" for purposes of the Motion to Reconsider, and whether Contingent Trust Interests are "likely to vest," for purposes of this Complaint, are one and the same. This issue was, without question, litigated in connection with the Motion for Leave. The issue was raised by HMIT in its Motion to Reconsider, contested by the Highland Parties, submitted to this Court for adjudication, and expressly determined. *See Reddy*, 611 B.R. at 810 ("The requirement that an issue be 'actually litigated' for collateral estoppel purposes simply requires that the issue is raised, contested by the parties, submitted for determination by the court, and determined.") (internal quotations omitted). The first and second elements of collateral estoppel are thus met.

34. The third prong of collateral estoppel—whether the Court's prior ruling on this same issue was necessary or essential to the Order Denying Reconsideration—is likewise satisfied. The Court's finding that Contingent Trust Interests were not "in the money" was necessary to the Court's ultimate determination that HMIT did not have standing to assert the Proposed Claims. In other words, to determine whether HMIT could file the Motion for Leave, and later whether to grant the Motion to Reconsider, the Court was required to consider whether Contingent Trust Interests have vested. This was the only issue underlying the Motion to Reconsider, and it was necessary to the Order Denying Reconsideration. Plaintiffs are therefore collaterally estopped from re-litigating this same issue of whether their Contingent Trust Interests will vest. *See In re*

Derosa-Grund, 567 B.R. 773, 798 (Bankr. S.D. Tex. 2017) (debtor collaterally estopped from re-litigating issue of whether debtor owned film treatment where this same issue "was necessary" to determination on motion to reopen; was determined; and "Debtor cannot now relitigate this issue in an effort to prove that EMG owns the Treatment").[17] Accordingly, Count Three is barred by collateral estoppel, and for this additional reason, this claim should be dismissed.

C. Plaintiffs' Claims Fail as a Matter of Law

35. Even if the Court had subject matter jurisdiction over Counts Two and Three, the Complaint fails to state plausible claims upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6) as to all Counts. To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550

[17] Although Dugaboy was not a party in the Motion for Leave, literal identity of the parties is not required as part of the collateral estoppel analysis so long as the party against whom enforcement is sought was in privity with a party involved in the initial decision. Privity exists where a non-party's interests were adequately represented in the first suit. *See Derosa-Grund*, 567 B.R. at 798 n. 21 (Bankr S.D. Tex. 2017) (noting "federal courts will bind a nonparty whose interests were represented adequately by a party in the original suit," and "[t]he Fifth Circuit has found that adequate representation exists between a party and a non-party 'where a party to the original suit is so closely aligned to the non-party's interests as to be his virtual representative.'") (quoting *Terrell v. DeConna*, 877 F.2d 1267, 1270 (5th Cir. 1989)). Here, there can be no question that Dugaboy's interests were sufficiently aligned as to the issue of whether Contingent Trust Interests have vested, where both Dugaboy and HMIT hold those interests and Dugaboy was funding HMIT's litigation. *See Meador v. Oryx Energy Co.*, 87 F. Supp. 2d 658, 665 (E.D. Tex. 2000) (non-party's interests were "sufficiently aligned" with party in previous suit for purposes of claim preclusion where, in both cases, "the plaintiffs' claims derive solely from rights" alleging arising from the same conveyance that was interpreted conclusively in prior suit).

U.S. at 557). "When well-pleaded facts fail to meet th[e] [*Twombly*] standard, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679. Dismissal is proper under Rule 12(b)(6) when, taking the facts alleged in the complaint as true, it appears that the plaintiff "cannot prove any set of facts that would entitle it to the relief it seeks." *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995). "[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." *Johnson v. Wells Fargo Bank, NA*, 999 F. Supp. 2d 919, 926 (N.D. Tex. 2014) (internal quotations omitted). Courts have "complete discretion" to either accept or exclude such evidence for purposes of the motion to dismiss. *Id*.

1. Plaintiffs' Equitable Accounting Claim Fails as a Matter of Law

36. Count One, which seeks an accounting of the Claimant Trust Assets, fails to state a claim upon which relief can be granted under Rule 12(b)(6).

i. Plaintiffs Have No Rights to Financial Information Because They are Not Claimant Trust Beneficiaries

37. Plaintiffs have no rights to information regarding the Claimant Trust Assets.

38. ***First***, as discussed above and as this Court has found, it is indisputable that Plaintiffs, holding only "Contingent Trust Interests," are not "Beneficiaries" under the CTA.[18] *See* Order Denying Leave at *35. As such, Plaintiffs have *no rights* under the CTA. *See id.* (quoting CTA, § 5.1(c)). Plaintiffs ignore this language and fail to offer any support for their broad request for financial information, other than vaguely asserting that they "are unable to determine whether their Contingent Claimant Trust Interests may vest into Claimant Trust Interests." Compl. ¶ 83. As this Court found, while Plaintiffs may be "frustrated" that they did not negotiate the same rights

[18] As discussed above, the Court may take judicial notice of the CTA. *See Johnson*, 999 F. Supp. 2d at 926 (taking judicial notice of document that is a matter of public record when considering Rule 12(b)(6) motion).

as the "actual Claimant Trust Beneficiaries," (Valuation Order at 5), there is simply no foundation—in law, equity, or otherwise—for Plaintiffs' request for financial information. Plaintiffs acknowledge that they are not "Claimant Trust Beneficiaries" but nevertheless imply, without any supporting facts or authority, that they should not only be treated as such, but should receive information not otherwise available to Claimant Trust Beneficiaries. In so arguing, Plaintiffs blatantly disregard the plain terms of the CTA, the Plan, and this Court's prior orders, which expressly foreclose the relief sought in their Claims.

39. ***Second***, and for largely these same reasons, equitable relief is not available where, as here, the parties' rights and obligations at issue are set forth in the agreement. *See In re Am. Home Mortg. Holdings, Inc.*, 386 Fed. Appx. 209, 212-13 (3d Cir. 2010) (affirming bankruptcy court's denial of equitable relief to distributions under trust documents where, among other things, the trust documents controlled distribution of monthly payments, and the Trust Certificate "cannot be rewritten on equitable grounds," and noting "[i]n interpreting the provisions of the Trust Documents, we apply Delaware law, which instructs that a party is bound by the plain meaning of clear and unequivocal contract terms."); *Grunstein v. Silva*, CIV.A. 3932-VCN, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009) ("Where those [fiduciary] rights arise from a contract that specifically addresses the matter at issue, the court evaluates the parties' conduct within the framework they themselves crafted, instead of imposing more broadly defined equitable duties.").

40. Here, the CTA expressly provides that (a) Plaintiffs are not Beneficiaries of the Claimant Trust, and, therefore, (b) Plaintiffs have no rights under the CTA. *See supra* ¶¶ 10-13. *supra*. Accordingly, the plain language of the CTA forecloses the notion that Plaintiffs have any right—equitable or otherwise—to financial information on the Claimant Trust Assets. Plaintiffs'

attempt to re-write the CTA on equitable grounds in order to grant non-beneficiaries information rights is entirely without merit.

41. ***Third***, even if Plaintiffs were Claimant Trust Beneficiaries, any information rights would still be limited. Section 3819(a) of the Delaware Statutory Trust Act (the "Trust Act") governs information rights for beneficiaries of Delaware statutory trusts and ascribes primacy to the trust's agreement:

> ***Except to the extent otherwise provided in the governing instrument of a statutory trust***, each beneficial owner of a statutory trust ... has the right, ***subject to such reasonable standards ... as may be established by the trustees or other persons who have authority to manage the business and affairs of the statutory trust***, to obtain from the statutory trust from time to time upon reasonable demand for any purpose reasonably related to the beneficial owner's interest as a beneficial owner of the statutory trust ....

12 Del. C. § 3819(a) (emphasis added); *see also In re Natl. Coll. Student Loan Trusts Litig.*, 251 A.3d 116, 150 (Del. Ch. 2020) (Trust Agreements "are the governing instruments of the Trusts under the DST Act.") Here, the CTA *does* "otherwise provide." As discussed *supra*, pursuant to the CTA and the Plan, only "Claimant Trust Beneficiaries," by design, have information rights, which are set forth in section 3.12(b) of the CTA. *See* CTA § 3.12(b) (providing that the **only** entities with information rights under the Plan are "Claimant Trust Beneficiaries.") And the Claimant Trust Beneficiaries' rights (a) are limited, (b) do not include rights to asset or subsidiary level information, and (c) can be further limited by the Claimant Trustee as appropriate to "maintain confidentiality."

42. Any duties running from the Claimant Trustee to actual Beneficiaries of the Claimant Trust relating to the disclosure of information are expressly limited by the CTA. 12 Del. C. § 3806(c) ("To the extent that … a trustee … has duties (including fiduciary duties) to a … beneficial owner or to another person that is a party to or is otherwise bound by a governing instrument, the trustee's … duties may be … restricted or eliminated by provisions in the governing

instrument ….") Thus, even the actual Claimant Trust Beneficiaries would not have the broad information rights that Plaintiffs (who, again, are not even Claimant Trust Beneficiaries) seek here. This further undermines Plaintiffs' unsupported allegations that they have any equitable rights to information on the Claimant Trust Assets.

ii. Any Claim for an Equitable Accounting Fails Under Delaware Law

43. To the extent Count One is treated as one for an accounting cognizable in equity, it likewise fails. Under Delaware law,[19] an accounting is not a cause of action sounding in equity. *Williams v. Lester*, 2023-0042-SG, 2023 WL 4883610, at *3 (Del. Ch. Aug. 1, 2023). It is an equitable remedy by which a fiduciary may be caused to account for property subject to trust. *Id.* A claim for an accounting lies only where "(i) there are mutual accounts between parties, (ii) a fiduciary relationship exists and the defendant has a duty to account, or (iii) the accounts are all on one side but there are circumstances of great complication." *Bus. Funding Group, Inc. v. Architectural Renovators, Inc.*, C.A. 12655, 1993 WL 104611, at *2 (Del. Ch. Mar. 31, 1993); *see also McMahon v. New Castle Assoc.*, 532 A2d 601, 605 (Del. Ch. 1987) ("[A] request for an accounting by a *fiduciary* is a recognized basis for chancery jurisdiction," noting "equity shall rarely, if ever, have to be resorted to in order to determine the state of accounts in a purely commercial relationship."); 12 Del. C. § 3806(c). Where, as here, an agreement sets forth the fiduciary relationship between the parties, an extra-contractual relationship cannot be created. *See Grunstein v. Silva*, CIV.A. 3932-VCN, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009) ("Where those [fiduciary] rights arise from a contract that specifically addresses the matter at issue, the court evaluates the parties' conduct within the framework they themselves crafted, instead of imposing more broadly defined equitable duties.")

[19] There can be no dispute that Delaware law applies to Plaintiffs' Claims. The Claimant Trust is a statutory trust formed under the laws of Delaware and governed by the Trust Act. Trust Act, 12 Del. C. § 3801 *et seq.*

44. The CTA governs the parties' rights and obligations. Pursuant to the CTA, Plaintiffs, as holders of Contingent Trust Interests, "***shall have no rights***" thereunder, and there is no underlying fiduciary relationship between the Claimant Trustee and Plaintiffs. Plaintiffs do not allege as such, nor could they. The Court cannot impose any duties of disclosure other than what is set forth in the CTA. Plaintiffs' equitable accounting claim fails as a matter of law. *See Bus. Funding Group*, 1993 WL 104611, at *2 (denying claim for equitable accounting where "the parties' relationship, which is defined exclusively by the purchase and sale agreements, involves an arm's-length commercial dealing and bears none of the earmarks of a fiduciary relationship," noting the "plaintiff negotiated the protection it needed in the [] agreements," which "does not create a fiduciary relationship"); *Natl. Coll.*, 251 A.3d at 150 ("[T]he plain language of the Trust Agreement forecloses any notion that the Owner Trustee owes any extra-contractual duties (fiduciary or otherwise)" to non-owner deal parties, noting "[i]f the drafters of the Trust Agreement … had intended the Owner Trustee to administer the Trusts in the interests of another deal party, the Trust Agreements would have said so.").[20]

45. Under these circumstances, Plaintiffs fail to show why equity should abrogate the terms of the CTA agreement to create extra-contractual rights relating to the disclosure of financial information or an accounting. This is especially true in light of Plaintiff HMIT's "unclean hands." HMIT is a defendant in an action on a note owed to Highland with current principal and interest owed in excess of $98 million. *See* Adv. Pro. No. 21-03076-sgj, Docket No. 1, Count 24 (breach of contract claim arising out of HMIT note). HMIT cannot seek equitable relief relating to the

[20] *See also Henry v. CitiMortgage, Inc.*, 4:11-CV-83, 2011 WL 2261166, at *8 (E.D. Tex. May 10, 2011), *report and recommendation adopted*, 2011 WL 2214007 (E.D. Tex. June 7, 2011) (dismissing claim for equitable accounting where "Plaintiff does not explain why she is entitled to an accounting, let alone allege any facts to support her requests," noting "an accounting is an equitable remedy and not an independent cause of action."); *Johnson v. Wells Fargo Bank, NA*, 999 F. Supp 2d 919, 935 (N.D. Tex. 2014) (dismissing plaintiff's request for equitable relief because there is a contract between the parties that governs the dispute.")

disclosure of assets of the Claimant Trust when HMIT's own behavior has violated principles of equity and righteous dealing on issues relevant to the instant Action. Plaintiffs' equitable claim for financial information on the Claimant Trust is without foundation or support, blatantly disregards the CTA and other applicable documents, and fails to allege a cognizable claim. For this additional reason, Count One should be dismissed.

2. Plaintiffs' Claims for Declaratory Relief Fail as a Matter of Law

46. Plaintiffs' claims for declaratory relief—Counts Two and Three—also fail to state claims under Rule 12(b)(6). To sustain a claim for declaratory or injunctive relief, a plaintiff must first plead a viable underlying cause of action. *See Collin County, Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods*, 915 F.2d 167, 170-71 (5th Cir. 1990)) (the "federal declaratory judgment act is remedial only … it is the defendant's underlying cause of action against the plaintiff that is litigated in a suit under the act"); *see also Henry*, 2011 WL 2261166, at *8 ("The Declaratory Judgment Act is a procedural device that creates no substantive rights and requires the existence of a justiciable controversy."); *Sivertson v. Citibank, N.A. as Tr. for Registered Holders of WAMU Asset-Back Certificates WAMU Series No. 2007-HE2 Tr.*, 390 F. Supp. 3d 769, 794 (E.D. Tex. 2019) (same). "Where all the substantive, underlying claims are subject to dismissal, a claim for declaratory relief cannot survive." *Wallace v. U.S. Bank, N.A.*, No. 4:17-CV-437, 2018 WL 1224508, at *2 (E.D. Tex. Mar. 9, 2018).

47. Plaintiffs' Claims for declaratory relief in Counts Two and Three fail to state plausible claims because there is no underlying controversy. They are premised on Count One, which, as discussed, is not a cognizable claim. *See* Compl. ¶¶ 90 ***("[o]nce 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," and a declaration that "the conditions are such that their Contingent

Claimant Trust Interests are likely to vest into Claimant Trust Interests") (emphasis added). Since there is no basis to "compel" the disclosure of financial information and Count One fails as a matter of law, Plaintiffs' claims for declaratory relief, which are dependent upon such disclosure, likewise fail as a matter of law. *See Johnson*, 999 F. Supp. 2d at 935 ("Because the undersigned has determined that none of Plaintiffs claims can withstand dismissal at this time, Plaintiff's requests for declaratory and injunctive relief as well as an accounting cannot survive.")[21]

48. The value of the Claimant Trust Assets and liabilities at any given point is irrelevant to a determination whether Plaintiffs' Contingent Trust Interests "are likely to vest." Contingent Trust Interests cannot vest until (a) all Claimant Trust Assets are liquidated, (b) all expenses, including indemnification expenses, are known and have been satisfied, and (c) Claimant Trust Beneficiaries are thereafter paid in full. Until these and other critical variables are known, the financial information Plaintiffs seek in their Complaint is meaningless for purposes of determining "vesting." *See supra* ¶¶ 36-27. There is no justiciable controversy underlying Plaintiffs' claims for declaratory relief. Counts Two and Three should be dismissed. The Claims fail as a matter of law, and the Complaint should be dismissed in its entirety.

IV. CONCLUSION

WHEREFORE, Highland respectfully requests that the Court grant the Motion and enter an order in the form annexed to the Motion as **Exhibit A**, and grant such further relief as the Court deems just and proper.

[21] *See also Washington v. JP Morgan Chase Bank, N.A.*, 3:18-CV-1870-K-BN, 2019 WL 587289, at *8 (N.D. Tex. Jan. 18, 2019), *report and recommendation adopted*, 2019 WL 586048 (N.D. Tex. Feb. 12, 2019) ("Because Plaintiff has failed to state a plausible underlying claim, Plaintiff's claims for injunctive and declaratory relief should also be dismissed."); *Henry*, 2011 WL 2261166, at *9 ("As Plaintiff has alleged no facts that would lead to the conclusion that a present controversy exists between her and Defendants, Plaintiff does not have a right to relief under the Declaratory Judgment Act.")

Dated: November 22, 2023

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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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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,

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[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,

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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.

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EXHIBIT 6

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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.[1]	§	

MOTION FOR LEAVE TO FILE A DELAWARE COMPLAINT

[1] The *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., (As Modified)* [Dkt. No. 1808] (the "***Plan***"), filed by Highland Capital Management, L.P. ("***HCMLP***") became effective on August 11, 2021 (the "***Effective Date***").

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I. PRELIMINARY STATEMENT

1. Movant Hunter Mountain Investment Trust ("Movant") seeks leave to file a complaint in Delaware Chancery Court seeking the removal of James P. Seery, Jr. ("Mr. Seery") as Trustee of the Claimant Trust created pursuant to the plan of reorganization of Highland Capital Management, L.P. ("Highland" or the "Debtor"). Under applicable Delaware law, removal of a trustee is warranted when the trustee commits a breach of trust, substantially impairs the administration of the trust through the Trustee's continued service, is unwilling or unable to perform his duties properly, or has hostility toward one or more beneficiaries that threatens efficient administration of the trust. As set forth below in greater detail, all four of these circumstances exist here.

2. Mr. Seery has breached his duties, including his duty of loyalty by using Claimant Trust assets to fund a separate indemnity sub-trust (to pay his own potential legal expenses – in a blatant conflict of interest) instead of using those assets to pay the claims of Claimant Trust beneficiaries. In addition, Mr. Seery is overtly hostile to Movant—the holder of Class 10 claims and the largest holder of Contingent Trust Interests under the Claimant Trust. Either of these circumstances alone justifies Mr. Seery's removal, but the combination requires it. The attached proposed Delaware complaint states a "colorable" claim, and this Motion should be granted.

II. STATEMENT OF FACTS

A. Highland's Plan Contemplated Orderly "Monetization" of Highland's Assets, Payment of Eleven Classes of Claims, and Winding Up of Highland's Business

3. The Bankruptcy Court entered an order (the "Confirmation Order") confirming the Fifth Amended Plan of Highland Capital Management, L.P. (as Modified) (the "Plan") on February 22, 2021.[2] In broad strokes, the Plan called for "the orderly wind-down of the Debtor's estate,

[2] Confirmation Order, Dkt. 1943.

including the sale of assets and certain of its funds over time, with the Reorganized Debtor continuing to manage certain other funds, subject to the oversight of the Claimant Trust Oversight Board."[3]

4. The Plan contemplated payment of 11 classes of claims. Classes 1 through 7 have already been paid. The remainder are: Class 8, comprising general unsecured claims, of which 93% of allowed claims have been paid;[4] Class 9, comprising subordinated claims; Class 10, comprising Class B/C limited partnership interest claims; and Class 11, comprising Class A limited partnership interest claims.[5] Highland's former equity holders were assigned Class 10 and 11 claims. Movant Hunter Mountain Investment Trust is the only holder of Class 10 claims and owner of the lion's share of the residual equity in Highland.[6]

5. The Plan contemplated that all of Highland's assets would be managed through three entities: (1) a Claimant Trust, (2) a Litigation Sub-Trust, and (3) the Reorganized Debtor.[7] The Claimant Trust was tasked with administering "Claimant Trust Assets" and serving as the Reorganized Debtor's limited partner.[8] The Litigation Sub-Trust, a sub-trust of the Claimant Trust, was tasked with pursuing "Estate Claims."[9] And the Reorganized Debtor was tasked with

[3] *Id.*, ¶ 2.

[4] *See* Dkts. 3956 at p. 7 and 3757 at p. 13.

[5] *See* Plan, Ex. A to Dkt. 1943, at Art. III, §§ B, H.

[6] *See* Plan at Art. I, § B, ¶¶ 34-36.

[7] *See* Plan at Art. IV, § A.

[8] The Plan defines "Claimant Trust Assets" to mean all assets of the estate that are not "Reorganized Debtor Assets," including all causes of action, available cash, proceeds realized from such assets, any rights of setoff or recoupment and other defenses with respect to such assets, any assets transferred to the Claimant Trust by the Reorganized Debtor, the limited partnership interests in the Reorganized Debtor, and the ownership interests in the Reorganized Debtor's new general partner. *See* Plan at Art. I, § B, ¶ 26.

[9] *See* Plan at Art. IV, § A. The Plan defines "Estate Claims" to mean "any and all estate claims and causes of action against [James] Dondero, [Mark] Okada, other insiders of the Debtor, and any of their related entities, including any promissory notes held by any of the foregoing. Plan at Art. I, § B, ¶ 60; Dkt. 354, Ex. A at p. 4 (defining "Estate Claims" to mean "claims and causes of action against Mr. Dondero, Mr. Okada, other insiders of the Debtor, and each of the Related Entities, including any promissory notes held by any of the foregoing.").

administering the "Reorganized Debtor Assets" and managing the wind down of the "Managed Funds."[10]

B. The Confirmation Order and the Plan Contemplated the Creation of a Claimant Trust Managed by Mr. Seery under the Supervision of an Oversight Board

6. The confirmed Plan contemplated the creation of a "Claimant Trust," to be created pursuant to a separate Claimant Trust Agreement, the "CTA."[11] According to the Bankruptcy Court, the whole reason for the Claimant Trust was to "manage and monetize the Claimant Trust Assets for the benefit of the Debtor's economic stakeholders."[12] The Court further observed that, upon full payment of allowed claims, the Claimant Trust contemplated that "any residual value would then flow to the holders of Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests)."[13]

7. Beneficiaries of the Claimant Trust are termed "Claimant Trust Beneficiaries," a term defined to mean (1) holders of allowed general unsecured claims, (2) holders of allowed subordinated claims, and upon certification by the Claimant Trustee that holders of allowed general unsecured and allowed subordinated claims have been paid in full with interest, and (3) holders of allowed Class A and B/C limited partnership interests.[14] Notably, the CTA repeatedly instructs that the Claimant Trustee is to act "with a view toward maximizing value in a reasonable time" for the purpose of

[10] *See* Plan at Art. IV, § B. The Plan defines "Reorganized Debtor Assets" to mean "any limited and general partnership interests held by the Debtor, the management of the Managed Funds and those Causes of Action (including, without limitation, claims for breach of fiduciary duty), that, for any reason, are not capable of being transferred to the Claimant Trust." Plan at Art. I, § B, ¶ 115. The Plan defines "Managed Funds" to mean Highland Multi-Strategy Credit Fund, L.P., Highland Restoration Partners, L.P., and any other investment vehicle managed by Highland pursuant to an executory contract. Plan at Art. I, § B, ¶ 84.

[11] *See* Plan at Art. IV, § B.

[12] *See* Confirmation Order, Dkt. 1943, at ¶ 2.

[13] *Id.* at ¶ 42(c).

[14] *See* CTA, Dkt. 3521-5, at ¶ 1.1(h).

distributing the Claimant Trust assets to Claimant Trust Beneficiaries.[15] Consistent with the Confirmation Order's description of the Plan's waterfall, upon paying the holders of claims in Classes 1-9 in full with interest, the Claimant Trustee is obligated to file with the Bankruptcy Court a certification (called the "GUC Certification" in the CTA) deeming holders of Class A, B, and C limited partnership interests (*i.e.*, Class 10 and 11 claims holders) "Beneficiaries" of the CTA with entitlement to distributions of residual assets under the terms of the CTA.[16]

8. Under the Plan, Mr. Seery is the designated Claimant Trustee tasked with the obligation to oversee the administration and distribution of Claimant Trust Assets to unsecured claims and equity interests represented by Classes 8 through 11.[17] Importantly, both the Confirmation Order and the Plan contemplated that Mr. Seery's management of the Claimant Trust would be supervised by a five-member committee (comprised of at least two disinterested members), referred to in the CTA as the "Oversight Board."[18]

9. In its Confirmation Order, the Bankruptcy Court described the Oversight Board's role and its membership at some length. According to the Court, "[t]he Claimant Trust, the Claimant Trustee, the management and monetization of the Claimant Trust Assets, and the management of the Reorganized Debtor…**will all be managed and overseen by the Claimant Trust Oversight Committee**."[19] In terms of the Board's membership, the Court explained that the members of the Unsecured Creditors Committee ("UCC") had volunteered to serve as the initial members of the

[15] *Id.* at ¶ 2.3(b)(viii); *see also id.* at ¶ 2.3(b)(i) (Claimant Trustee must act "in an expeditious but orderly manner with a view toward maximizing value"), ¶ 3.2(a) ("Claimant Trustee shall, in an expeditious but orderly manner, monetize the Claimant Trust Assets, make timely distributions and not unduly prolong the duration of the Claimant Trust.").

[16] *Id.* at § 5.1(c).

[17] *See* Plan, Ex. A to Dkt. 1943, at Art. I, § B, ¶ 28 and Art. IV, § B.1.

[18] *See Id* at Art. IV, § B.2; CTA, ¶¶ 1.1(ll), 4.1. Despite the CTA's mandate that the Oversight Board "shall" be comprised of at least two disinterested members, the initial Board's makeup consisted of four members of the UCC and only one disinterested member, David Pauker. *See id.*, ¶ 1.1(ll).

[19] *See* Confirmation Order, Dkt. 1943, at ¶ 42(a) (emphasis added).

Oversight Board.[20] The Confirmation Order goes on to discuss in detail the initial members and their qualifications to serve.[21] In approving their appointment, the Court emphasized Mr. Seery's testimony that "he believe[d] the selection of the . . . members of the Claimant Trust Oversight Board [was] in the best interests of Debtor's economic constituents."[22] Plainly, the Court believed that a five-member Board would oversee Mr. Seery's conduct as Claimant Trustee to ensure that the Plan would be fully performed.

10. The Plan likewise contemplated that the five-member Oversight Board would supervise Mr. Seery's monetization of Claimant Trust assets and his management and distribution of those assets after monetization. Indeed, the Plan expressly stated that the Oversight Board would oversee "the management and monetization of the Claimant Trust Assets, [] the management of the Reorganized Debtor . . . and the Litigation Sub-Trust . . ., subject to the terms of the Claimant Trust Agreement."[23] The CTA, in turn, provides that the Oversight Board "shall," among other things: (1) "consult with and advise the Claimant Trustee and Litigation Trustee as to the administration and management of the Claimant Trust and the Litigation Sub-Trust;" and (2) "oversee, review, and govern the activities of the Claimant Trust, including the Litigation Sub-Trust, and the performance of the Claimant Trustee and Litigation Trustee."[24] The CTA further limits the Claimant Trustee's power to undertake certain actions without "vote of a simple majority of the Oversight Board pursuant to the notice and quorum requirements" of the Agreement.[25] Thus, the Claimant Trustee should consult the Oversight Board before terminating or extending the term of the Claimant Trust, litigating or settling any "Material Claims," selling or monetizing certain assets, including Reorganized Debtor

[20] *Id.* at ¶ 8.
[21] *Id.* at ¶ 44.
[22] *Id.* at ¶ 42.
[23] *See* Plan, Ex. A to Dkt. 1943, at Art. IV, § B.2.
[24] CTA, Dkt. 3521-5, at ¶ 4.2(a).
[25] *Id.* at ¶ 3.3(b).

assets valued at greater than $3 million, making certain cash distributions to Claimant Trust Beneficiaries, making distributions on "Disputed Claims," reserving cash or cash equivalents to meet contingent liabilities (including indemnification obligations), borrowing, investing Claimant Trust assets, changing the Claimant Trustee's compensation, or retaining certain counsel, experts, advisors, or other professionals.[26] In other words, the Oversight Board, as originally conceived, was contemplated to have a substantial governance role in the day-to-day activities of the Claimant Trust and the Claimant Trustee.

11. In its September 7, 2022 opinion, confirming the Plan in part, the Fifth Circuit likewise observed that, "[t]he whole operation is overseen by a Claimant Trust Oversight Board (the "Oversight Board") comprised of four creditor representatives and one restructuring advisor."[27] Notably, in the same opinion, the Fifth Circuit struck down a provision of the Plan purporting to exculpate from liability parties other than Highland, the UCC and its members, and the three independent directors appointed to manage Highland during bankruptcy, holding that broader exculpation was inconsistent with 11 U.S.C. § 524(e).[28] In short, the Fifth Circuit refused to exculpate Mr. Seery for actions taken in his role as Claimant Trustee and expressed the understanding that his post-confirmation conduct as Trustee of the Claimant Trust would be affirmatively overseen by an independent Oversight Board.

C. The Plan Did Not Contemplate, but the Court Subsequently Approved, the Creation of an Indemnity Subtrust

12. One entity the Plan did not contemplate was an indemnity sub-trust designed to cover potential post-confirmation claims against estate professionals. Instead, Mr. Seery testified

[26] *Id.* at ¶ 3.3(b)(i)-(xii).

[27] *Matter of Highland Capital Management, L.P.*, 48 F.4th 419, 427 (5th Cir. 2022).

[28] *Id.* at 438. Nor is Mr. Seery exculpated for "any acts or omissions…arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct." Confirmation Order, Dkt 1943, at ¶ Y.

extensively during the hearing on Plan confirmation that Highland would obtain director and officer ("D&O") insurance to cover any claims against or liabilities imposed on those individuals charged with implementing the Plan. Indeed, one of the conditions to the Plan becoming effective was "the Debtor obtaining D&O Insurance acceptable to the Debtor, the Committee, the Claimant Trust Oversight Committee, and the Litigation Trustee."[29] Nonetheless, four months after Plan confirmation, Highland filed a motion with the Bankruptcy Court seeking authorization to create a new "Indemnity Subtrust" designed to maintain an indemnity trust account with a balance of "not less than $25 million" that would conditionally indemnify post-confirmation professionals "in lieu of obtaining D&O insurance."[30]

13. The parties to be conditionally indemnified under the Indemnity Subtrust include Mr. Seery as Claimant Trustee, the Oversight Board and its members (described below), their professionals, the Litigation Trustee, the Reorganized Debtor and its partners, members, directors, and officers, and the new general partner of the Reorganized Debtor and its partners, members, directors, and officers (including Mr. Seery).[31] In support of the Subtrust Motion, Mr. Seery testified that he and other post-confirmation management "intend[ed] to look for insurance coverage that would appropriately replace the Indemnity Trust if that's a more efficient vehicle."[32] Over various objections, the Court granted Highland's Subtrust Motion on July 21, 2021.[33]

[29] *See* Motion for Entry of an Order (I) Authorizing the (A) Creation of an Indemnity Subtrust and (B) Entry into an Indemnity Trust Agreement and (II) Granting Related Relief (the "Subtrust Motion"), Dkt. 2491 at ¶ 13.

[30] *Id.* at ¶¶ 21, 26.

[31] *See id.* at ¶ 18 n.8; *see also* CTA, Dkt. 3521-5 at § 8.2.

[32] July 19, 2021 Hearing Transcript, Dkt. 2598 at 45:14-25.

[33] Order Approving Debtor's Motion for Entry of an Order (I) Authorizing the (A) creation of an Indemnity Subtrust and (B) Entry into an Indemnity Trust Agreement and (II) Granting Related Relief, Dkt. 2599.

14. The Subtrust Motion identified Mr. Seery as the "Indemnity Trust Administrator."[34] In his capacity as Administrator, Mr. Seery was given total control of the administration of the Indemnity Subtrust:

> …For any action contemplated or required in connection with the operation of the Indemnity Trust, and for any guidance or instruction to be provided to the Indemnity Trustee, **such function, rights and responsibility shall be vested in the Indemnity Trust Administrator, and the Indemnity Trustee will take written directions from the Indemnity Trust Administrator**, in such form specified in the Indemnity Trust Agreement and otherwise satisfactory to the Indemnity Trustee.[35]

And although Highland's motion assured the Court that **"[b]eneficiaries will not be involved in or have any rights with respect to the administration of the Indemnity Trust** or have any right to direct the actions of the Indemnity Trustee with respect to the Indemnity Trust or the assets held in the Indemnity Trust Account," Highland carved out Mr. Seery (to the extent he is acting in his capacity as Indemnity Trust Administrator) from that exclusion.[36]

D. Despite Governance Protections Contained in the Confirmation Order, the Plan, and the CTA, with Regard to Indemnification Issues, Mr. Seery Operates with Unfettered Discretion and without Supervision of the Contemplated Oversight Board

15. Notwithstanding that creditor constituencies voted to support, and the Bankruptcy Court approved, the Plan, understanding that there would be a partially independent, five-member Oversight Board supervising the monetization and distribution of estate assets, that contemplated governance structure has long since been ignored and has failed to safeguard the Claimant Trust. The representations in the Plan, the findings by this Court, and the belief of the Fifth Circuit that Mr. Seery's conduct as Claimant Trustee would be affirmatively overseen to assure that the Plan would be fully performed, are – at least as to the appropriate use of funds and indemnification -- all false.

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[34] *See* Subtrust Motion, Dkt. 2491, at ¶ 21 under "Indemnity Trust Administrator" on p. 8.

[35] *Id.* (emphasis added) under "Governance of the Indemnity Trust" on p. 9.

[36] *Id.* (emphasis added).

16. The five-member Board no longer exists. Instead, the Board is comprised of two claims buyers (and current Claimant Trust Beneficiaries)—Muck Holdings and Jessup Holdings—and one ostensibly disinterested member, Richard Katz,[37] about whom no information demonstrating independence was provided with his appointment.[38] Although the CTA mandates that the Board includes two disinterested members, there has only ever been Mr. Katz. That contrivance creates potential governance problems. For example, the Board must in many instances approve actions undertaken by the Claimant Trustee by a "majority" vote.[39] But if any Board member has a conflict or *potential* conflict of interest with respect to an issue at hand (including, without limitation, a pecuniary interest in the issue), then the conflicted member cannot vote.[40] In the case of the current three-member Board, any potential conflict of interest thus derails a majority vote and precludes the Board from approving actions contemplated by the Claimant Trustee.

17. Even without this governance problem, contrary to the impression left by the provisions of the Plan discussed above,[41] the Claimant Trust lacks the requisite safeguards to prevent abuse by the Claimant Trustee. That has proven particularly problematic when it comes to the Claimant Trust's indemnity obligations. Specifically, the CTA states:

> Notwithstanding anything to the contrary contained herein, the Claimant Trustee shall distribute to the holders of Trust Interests at least annually the Cash on hand net of any amounts that…(d) are necessary to satisfy or reserve for other liabilities incurred or anticipated by the Claimant Trustee in accordance with the Plan and this Agreement **(including, but not limited**

[37] While Movants have little to go on, if Mr. Katz is the Richard Katz of Torque Point Advisors, he may have interacted with Mr. Seery while he was at Lehman Brothers. *See* TORQUE POINT ADVISORS, https://www.torquepointllc.com/ (last visited Dec. 20, 2023) (involved in restructuring of Lehman Brothers Holdings Inc.) and Jim Seery, LINKEDIN, (listing Lehman Brothers, 1999-2009) [App. 110-112]. Furthermore, the Claims Purchasers, Muck and Jessup are proposed defendants, together with Mr. Seery and others, in a separate proposed adversary proceeding involving allegations of use of material non-public information. As such, Movant has alleged that at least two members of the Oversight Board are in an alleged conspiracy with Mr. Seery. *See* Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding, Dkt. 3816.

[38] *See* Notice of Appointment of Members of the Oversight Board of the Highland Claimant Trust, Dkt. 2801.

[39] *See* CTA, Dkt. 3521-5 at §§ 3.3(b)(i)-(xii), 3.4, 3.8, 3.9, and 4.6(a).

[40] *See id.* at § 4.6(c).

[41] See notes 18 to 28 *supra* and accompanying text.

> **to, indemnification obligations and similar expenses in such amounts and for such period of time as the Claimant Trustee determines, in good faith, may be necessary and appropriate, which determination shall not be subject to 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)**….[42]

18. In other words, Mr. Seery, both as the Claimant Trustee and as the Indemnity Trust Administrator, effectively has the sole authority to reserve for potential indemnification obligations ***without any*** Oversight Board or other supervision. This is problematic because Mr. Seery (both as claimant Trustee and as the owner of the Reorganized Debtor's general partner) is one of the principal indemnified parties who stand to benefit from the funding of the indemnification reserve. That means Mr. Seery has a vested financial interest in all decisions he makes regarding the indemnification reserve, including how much to reserve and whether to pay out of the reserve to indemnified parties, including himself. Mr. Seery's unfettered right over the Indemnity Sub-Trust is a material deviation from the Plan: while the Plan always contemplated a conditional indemnification right to certain parties, such right was to be supervised by the Oversight Board. Not only has the Oversight Board with its mechanism for independent members been removed from the supervision of the indemnification *res*, but the sole party with authority over the indemnification *res*, Mr. Seery, is conflicted.

E. Mr. Seery Has Used the Indemnification Reserve to Avoid Paying Creditors in Full and to Benefit Himself

19. Mr. Seery has used the Claimant Trust and the Indemnity Subtrust to his own pecuniary advantage. The Claimant Trust now has more than sufficient assets to pay holders of Classes 8 and 9 in full with interest with surplus available to former equity. Yet it has failed to do so, despite the mandate of the CTA that Mr. Seery act expeditiously to maximize value for Claimant Trust Beneficiaries. Instead, he has been funding an increasingly sizeable indemnification reserve

[42] CTA, Dkt. 3521-5 at § 6.1(a) (emphasis added).

without any discernable justification other than as a subterfuge for avoiding certifying that holders of Class 10 and 11 claims (including Movant) are Claimant Trust Beneficiaries.

20. Based on a consolidated balance sheet filed on July 6, 2023, the Claimant Trust has about $250 million in assets (of which an estimated $180 million is cash) and, at that time, only about $126 million in remaining non-Dondero-related Class 8 and 9 claims.[43]

Highland Claimant Trust
Summarized Consolidated Balance Sheet (1)
As of May 31, 2023
The accompanying notes are integral to understanding this balance sheet
(Estimated and unaudited, $ in millions)

	Balance per books	adjustments (see notes)	Adjusted balance
Assets			
Cash and equivalents	$ 13	$ -	$ 13
Disputed claims reserve (2)	12	-	12
Other restricted cash	12	-	12
Investments (3)	118	(12) (6)	106
Notes receivable, net (4)	86	(83) (4)	3
Other assets	6	-	6
Total assets	**$ 247**	**$ (95)**	**$ 152**
Liabilities			
Secured and other debt	$ -	$ -	$ -
Distribution payable (2)	12	-	12
Additional indemnification reserves	-	90 (5)	90
Other liabilities	15	13 (5)	28
Total liabilities (5)	**$ 27**	**$ 103**	**$ 130**
Book/adjusted book equity (see accompanying notes) (5)	**220**	**(198)**	**22**
Total liabilities and book/adjusted book equity	**$ 247**	**$ (95)**	**$ 152**
Supplemental Info: (7)			
Sum of remaining allowed Class 8 Trust Beneficiaries, excluding interest	$ 27		
Sum of remaining allowed Class 9 Trust Beneficiaries, excluding interest	99		
Sum of face amount of pending Class 8/9 potential Trust Beneficiaries, excluding interest	13		
Sub-total	$ 139		

21. Since that time, the Post-Confirmation Reports for the period ending September 30, 2023 reflect that an additional $14,361,077 has been paid to GUCs, with $6,805,592 being paid to GUC Classes 6 and 7, leaving a balance of $119,222,451 remaining in Class 8 and 9 claims (subtracting the total "Paid Cumulative" from the "Total Allowed" amounts as reflected on page 7 of those Reports and adding in the amounts paid to GUC Classes 6 and 7).[44] The Reports do not disclose

[43] Notice of Filing of the Current Balance Sheet of the Highland Claimant Trust, Dkt. 3872 at Ex. A. The Claimant Trust's asset balance is exclusive of any recovery on litigation against dozens of defendants by Marc S. Kirschner, the Trustee of the Litigation Sub-Trust (the "Kirschner Action").

[44] *See* Amended Post-Confirmation Reports of Reorganized Debtor and of the Highland Claimant Trust, Dkts. 3955 and 3956.

the current cash position of the Claimant Trust. Cash may have increased or decreased. But in the worst case, adjusting the cash from amounts shown in the May 31, 2023 Balance Sheet by the amount paid out to Classes 8 and 9, the Trust still has cash of at least $165 million, and remaining Class 8 and 9 claims that now total less than $120 million.

22. Notably, the Claimant Trust's balance sheet assets do not include a fully cash-funded at least $35 million indemnity account (reportedly now $50 million) that presumably may be used to pay creditors in the event it is not consumed by the estate's professionals.[45] In addition, to reduce the Claimant Trust's book value, Highland purports to add "non-book" adjustments to the balance sheet. One such adjustment gives zero asset value to certain notes payable by Mr. Dondero and his alleged affiliates.[46] However, $70 million of those notes are now fully bonded by cash deposited in the registry of the District Court.[47]

23. Another accounting "adjustment" creates a $90 million "additional indemnification reserve," on top of the at least $35 (or $50) million cash indemnity reserve, with no explanation.[48] Indeed, were it not for the at least $125-140 million in inappropriate indemnity reserves—which is $100 million more than Debtor originally proposed it would need in insurance coverage when it sought approval of the Indemnity Subtrust—Highland's creditors could have been paid, the estate closed, and the residual estate returned to equity months if not years ago.

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[45] *See* Notice of Filing of the Current Balance Sheet of the Highland Claimant Trust, Dkt. 3872 at Ex. A, Note 1. The information provided does not make it clear whether the $90 million reserve is reduced by the $15 million increase in the Indemnity Sub-Trust.

[46] *Id.* at Ex. A.

[47] *See* Order Granting Joint Agreed Emergency Motion for Order Approving Stipulation for the Bonding of Judgments and Stays of Executions Pending Appeals, Dkt. 149; Notices of Bonding, Case No. 3:21-cv-00881-X (N.D. Tex.), Dkts. 151, 152, 160-162 [App. 039-078].

[48] *See* Notice of Filing of the Current Balance Sheet of the Highland Claimant Trust, Dkt. 3872 at Ex. A.

24. As the Post-Confirmation Reports reveal, all of the administrative claims, secured claims, and priority claims have been paid in full.[49] Thus, as a practical matter, the Claimant Trust could pay the Class 8 and 9 claims in full with interest, Mr. Seery could file the GUC Certification,[50] and Movant (along with other Holders of Class A, B, and C of limited partnership interests) would become a fully vested Claimant Trust Beneficiary under the terms of the CTA.[51] All of these steps could be, and indeed, should have been, completed without any interference from the Indemnity Subtrust Administrator.

25. The failure to pay creditors has had a material impact on the Movant and other Holders of Class A, B, and C of limited partnership interests. In the first nine months of 2023, Debtor and the Claimant Trust accumulated $48,447,234 in (undisclosed) expenses,[52] for an average of $5.4 million per month. Even after the voluntary stay of the *Kirschner* litigation, which appears to have been a significant cost-driver, the Debtor and the Claimant Trust have continued to accumulate $4.6 million per month in expenses. While monies to pay Class 8 and Class 9 Claims remain unimpaired, cash to pay the former equity holders continues to disappear as undisclosed expenses.

26. As explained below in greater detail, the proposed Delaware Complaint sets forth claims that are both plausible under federal pleading standards[53] and "colorable" under this Court's articulated gatekeeping standard.

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[49] *See* Amended Post-Confirmation Reports of Reorganized Debtor and of the Highland Claimant Trust, Dkts. 3955 and 3956.

[50] *See* CTA, Dkt. 3521-5 at §§ 1.1(aa), 5.1(c).

[51] *See id.*, §§ 1.1(h), 5.1.

[52] *See* Dkt. 3756, 3757, 3888, 3889, 3955, and 3956 (showing Claimant Trust expenditures of $60,421,756 and Debtor expenditures of $37,430,919 in Q1 – Q3 2023, then subtracting out $29,405,441 in distributions to creditors and $20 million presumably added to the Indemnity Sub-Trust).

[53] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face" in order to survive a motion to dismiss pursuant to Rule 12(b)(6)).

III. ARGUMENT

A. The Proposed Complaint Alleges a Colorable Claim That Mr. Seery Should be Removed as Claimant Trustee

27. According to this Court, to state a "colorable" claim under the gatekeeping provision of the Plan (the "Gatekeeper Provision"), a moving party must do more than allege a "plausible" claim for relief—the standard applied by federal district courts in deciding whether a claim can proceed under Federal Rule of Civil Procedure 12(b)(6).[54] Instead, a movant in this Court must survive an "***additional level of review***."[55] Specifically, the movant bears the "burden of making a prima facie case that its proposed claims are ***not without foundation***, are ***not without merit***, and are ***not being pursued for any improper purpose such as harassment***."[56] And in deciding whether the movant has met this prima facie burden, the Court "may, and should, take into consideration its ***knowledge*** of the ***bankruptcy proceedings*** and ***the parties*** and any additional evidence presented at the hearing on the Motion for Leave."[57] The Court termed this new standard the "Gatekeeper Colorability Test."[58]

28. As set forth below, Movant's Delaware complaint meets the Court's Gatekeeper Colorability Test because it sets forth a *prima facie* case under Delaware law that Mr. Seery should

[54] Movant has objected and continues to object to the Court's ruling with respect to the standard that should be applied under the Gatekeeper Provision. Movant has appealed the Court's rulings regarding this standard. *See* Hunter Mountain Investment Trust's Second Notice of Appeal, Dkt. 3945. No admission is made by or on behalf of Movant in connection with this Motion regarding the "colorability" standard applied by the Court or the Court's related substantive and procedural rulings. Movant expressly reserves all of Movant's substantive and procedural rights and waives none of the same in connection with this Motion, the proposed Complaint, or otherwise. Movant believes the proper standard is set forth in *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007) (holding a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face" in order to survive a motion to dismiss pursuant to Rule 12(b)(6)), and that this standard is also satisfied by this Motion.

[55] Memorandum Opinion, Dkt. 3903 at p. 91 (emphasis in original).

[56] *Id.* (emphases in original).

[57] *Id.* (emphases in original).

[58] Movant disagrees with this new test and is challenging this test on appeal at this time. Nothing in this current Motion should be deemed an admission or an acknowledgment of the propriety of this test. *See* Dkt. 3915.

be removed as Claimant Trustee. Moreover, Movant's Delaware complaint is not brought for any improper purpose but, rather, to protect Movant's sizeable residual interest in the Claimant Trust.

1) Movant's Delaware Complaint Sets Forth a *Prima Facie* Case for Removal of Mr. Seery as Claimant Trustee

29. Under Delaware law, the Court of Chancery may remove the trustee of a Delaware statutory trust "on [its] own initiative or on petition of a trustor, another officeholder, or beneficiary" in any of five circumstances:

> a) *The officeholder has committed a breach of trust*; or
>
> b) *The continued service of the officeholder substantially impairs the administration of the trust*; or
>
> c) The court, having due regard for the expressed intention of the trustor and the best interests of the beneficiaries, determines that notwithstanding the absence of a breach of trust, there exists:
>
> i. A substantial change in circumstances;
>
> ii. *Unfitness, unwillingness or inability of the officeholder to administer the trust or perform its duties properly; or*
>
> iii. *Hostility between the officeholder and beneficiaries or other officeholders that threatens the efficient administration of the trust*.

Del. Code Ann. tit. 12, § 3327 (emphases added). As set forth below in greater detail, Movant is an intended beneficiary of the Claimant Trust and, as such, Movant is entitled to ask a Delaware court to remove Mr. Seery as Claimant Trustee because he has engaged in multiple acts warranting his removal under Delaware statute. Accordingly, Movant's complaint sets forth a *prima facie* case, and the Court should grant its Motion and allow the case to proceed.

2) Movant Has Standing to Seek Mr. Seery's Removal

30. At the outset, in reality, Movant should be recognized as being "in the money" and a vested beneficiary with the associated standing to pursue the proposed Delaware complaint. In any event, however, Movant also has standing to seek removal of Mr. Seery because Movant is an intended (albeit contingent) beneficiary of the Claimant Trust under the CTA. *All* beneficiaries,

including contingent beneficiaries, have standing under Delaware law to seek to remove a trustee. To argue otherwise – that only "vested" beneficiaries under the CTA may bring such an action – is to impermissibly limit the statute.

31. The Delaware Code does not define the term "beneficiary," but Delaware courts follow the RESTATEMENT (THIRD) OF TRUSTS,[59] 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.[60]

32. Further, the RESTATEMENT expressly contemplates that contingent beneficiaries may file suit to enforce a private trust:

> *"Beneficiaries."* A suit to enforce a private trust ordinarily (see Reporter's Note) may be maintained by any beneficiary whose rights are or may be adversely affected by the matter(s) at issue. The beneficiaries of a trust include any person who holds a beneficial interest, present or future, vested or contingent.[61]

And "enforcement" extends to "enforcement proceedings in a more comprehensive sense, such as petitions for removal of a trustee . . . even though no breach-of-trust issue is involved."[62]

33. Delaware courts routinely hold that, in 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

[59] *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).

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

[61] RESTATEMENT (THIRD) OF TRUSTS, § 94 cmt. b (2012).

[62] *Id.*, § 94, Reporter's Notes, cmt. a(1).

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

34. 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.[63] 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."[64] Nothing in the CTA indicates that Movants are merely "incidental beneficiaries."

35. In light of the RESTATEMENT and the definition in Black's Law Dictionary, it is reasonable and sensible to interpret the word "beneficiary" used in Section 3327 of the Delaware statute to include contingent beneficiaries. Rules of statutory interpretation support this conclusion. As the Delaware Supreme Court has explained, a court "may not engraft upon a statute language which has been clearly excluded therefrom by the Legislature." *Guiricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982) (citing *Wilmington Trust Co. v. Barry*, 338 A.2d 575, 578 (Del Super. 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."

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

[64] *Id.*

36. 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").

37. In short, neither the applicable Delaware statute nor Delaware case law limits the term "beneficiary" to "vested" beneficiaries to the exclusion of contingent ones.

38. The Claimant Trustee will no doubt argue that the language of the CTA purportedly strips Movant of its standing to seek removal of the Trustee. In particular, the CTA states that holders of Contingent Trust Interests (including Movant) "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')."[65] The Agreement further states that "Equity Holders will only be deemed 'Beneficiaries' under this Agreement upon the filing of a GUC Payment Certification with the Bankruptcy Court."[66] But Delaware law makes clear that a trust agreement, however worded, may

[65] CTA, Dkt. 3521-5 at § 5.1(c).
[66] *Id.*

not strip the trustee's duty of good faith and fair dealing.[67] And in this case, observance of that duty precludes any argument that the language of the CTA undercuts Movant's standing.

39. 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)).

40. The duty of good faith and fair dealing is particularly important here, where Movant's status as a "beneficiary" under the CTA is purportedly dependent upon Mr. Seery's discretion to file a GUC Certification declaring Movant's status 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). "Thus, parties are liable for breaching the covenant when their conduct frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms." *Id.* (internal quotations omitted).

41. Given the purpose of the covenant, "it is possible to rest a claim of breach of the implied covenant of good faith and fair dealing on the assertion that defendants have deliberately

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

prevented the occurrence of conditions precedent." *Injective Labs Inc. v. Wang*, No. CV 22-943-WCB, 2023 WL 3318477, at *7 (D. Del. May 9, 2023) (quoting *Benerofe v. Cha*, No. 14614, 1998WL 83081, at *6 (Del. Ch. Feb. 20, 1998)). *See also Snow Phipps Grp., LLC v. Kcake Acquisition, Inc.*, No. CV 2020-0282-KSJM, 2021 WL 1714202, at *53 (Del. Ch. Apr. 30, 2021) (noting the duty of good faith and fair dealing "requires some cooperation ... either by refraining from conduct that will prevent or hinder the occurrence of that condition or by taking affirmative steps to cause its occurrence") (internal quotes omitted).

42. Mr. Seery's failure and refusal to pay the Class 8 and 9 creditors, in an attempt to prevent the Contingent Interest Holders' interests from vesting under the terms of the CTA, falls squarely within the scope of the duty of good faith and fair dealing. In *Injective Labs Inc. v. Wang*, the defendant asserted a counterclaim for the breach of the implied duty of good faith and fair dealing. The defendant argued that plaintiff breached the implied duty by "sending a belated request that [defendant] satisfy a condition precedent, knowing that it was effectively impossible for him to do so." *Injective Labs Inc. v. Wang*, 2023 WL 3318477, at *7. The court rejected plaintiff's motion to dismiss the counterclaim, holding "[t]hat allegation, and in particular the allegation that [plaintiff] knew that [defendant] would be unable to satisfy the condition precedent . . . is directed to the type of conduct that typically falls within the scope of the implied duty of good faith and fair dealing." *Id.*

43. In another case, the Court of Appeals for the Seventh Circuit affirmed summary judgment against a defendant because the defendant "did not exercise good faith under the contract by attempting to hinder the occurrence of the condition precedent in the contract." *Unit Trainship, Inc. v. Soo Line R. Co.*, 905 F.2d 160, 162-63 (7th Cir. 1990). There, the parties entered a contract for the running of a unit-train between Chicago and Seattle. *Id.* at 161. Because the running of the unit-train required the approval of the Interstate Commerce Commission ("ICC"), the parties filed a joint petition with the ICC seeking approval. *Id.* Thereafter, one party moved to withdraw from the ICC

proceeding and failed to participate in the joint petition, thereby stymieing the condition precedent to the performance of the contract. *Id.* The Seventh Circuit, applying Illinois law, which is similar in this regard to Delaware law, held that "where a party's obligation is subject to a condition precedent, a duty of good faith and fair dealing is imposed upon that party to cooperate and to not hinder the occurrence of the condition." *Id.* at 163.

44. These cases inform the Claimant Trustee's contractual duties under Delaware law. In *Injective Labs Inc.*, the plaintiff/counterclaim defendant prevented the performance of a condition precedent, which violated the duty of good faith and fair dealing. 2023 WL 3318477, at *7. In *Unit Trainship*, one of the parties to the relevant contract prevented the occurrence of a condition precedent, which violated the duty of good faith and fair dealing. 905 F.2d at 163. Similarly, here the Claimant Trustee is deliberately refusing to pay the unsecured creditors in Classes 8 and 9 with interest, thereby breaching his duty to pay Classes 10 and 11. That violates the Trustee's duty of good faith and fair dealing and fatally undermines any argument that Movant lacks standing to seek removal of the Trustee.

45. As other RESTATEMENT jurisdictions have recognized, Mr. Seery's conduct 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 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.App. 4 Dist., 2012) ("when there is [unreasonable] delay contingent interests vest at the time distribution should have been made."). 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 July 2023, and in all probability as early as September 2022.[68] And the CTA requires Mr. Seery as Claimant Trustee to "make timely distributions and not unduly prolong the duration of the Claimant Trust."[69] Had Mr. Seery fulfilled that mandate, he could and should have distributed remaining funds to Classes 8 and 9 by July 2023, filed the GUC Certification with the Court, and begun distributing remaining assets to Classes 10 and 11. In short, Movant's interests were properly vested under the CTA many months ago, and Delaware law therefore treats Movant as a Claimant Trust Beneficiary, regardless of the language of the CTA.

46. Indeed, any argument that the CTA precludes Movant from vindicating its rights (including by seeking removal of the Trustee) only underscores why Delaware law is crafted the way it is. Were it not for the duty of good faith and fair dealing imposed by Delaware law, Mr. Seery arguably could increase the funds set aside for indemnification continually, hold final distributions to Class 8 and Class 9 creditors in abeyance, and refuse to file the GUC Certification based on the theoretical possibility that he might in the future need to draw upon more than the originally contemplated indemnity reserve of $25 million to pay his own legal expenses (all while drawing a salary of $150,000 per month). And it appears that, for now, Mr. Seery is content to do just that. This is exactly the kind of conflict that Section 3327 of the Delaware Code was designed to prevent, and the duty of good faith and fair dealing in Delaware precludes the Claimant Trustee from relying on the language of the CTA to prevent the Delaware courts from remedying the conflict. Under these circumstances, Movant has standing to proceed under Delaware law.

[68] 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. 013-017] and MGM [*see* App. 009-012]. The September 2022 positions were CCS Medical [*see* App. 018-022] and Trussway [*see* App. 023-025].

[69] CTA, Dkt. 3521-5 at § 3.2(a).

3) Delaware Law Mandates Movant's Complaint Proceed in Delaware Court

47. Under Delaware law, beneficial owners of a trust are entitled to seek redress in the courts of Delaware, regardless of the language of the relevant trust agreement: "Except by agreeing to arbitrate any arbitrable matter in a specified jurisdiction or in the State, ***a beneficial owner who is not a trustee may not waive its right to maintain a legal action or proceeding in the courts of the State with respect to matters relating to the organization or internal affairs of a statutory trust***." Del. Code Ann. tit. 12, § 3804(e) (emphasis added). This is because the removal of a trustee is a "matter[] relating to the organization or internal affairs of a statutory trust." *United Bhd. of Carpenters Pension Plan v. Fellner*, C.A. No. 9475-VCN, 2015 WL 894810, at *2 n. 13 (Del. Ch. Feb. 26, 2015). Where a company's internal affairs are involved, Delaware law disregards the forum selection clause in the parties' trust agreement. *Id.*

48. Because Movant's Delaware complaint seeks relief relating to the internal affairs of the Claimant Trust, Movant is entitled to have its dispute decided by the courts of Delaware, regardless of any contrary choice of forum clause in the CTA.[70] The Court should permit Movant to file its Delaware complaint in the Delaware Chancery Court.

4) There Are Multiple Grounds for Seery's Removal

49. As set forth in the proposed Delaware Complaint, Mr. Seery's removal as Claimant Trustee is warranted for multiple reasons. Specifically, Mr. Seery has breached his duty of loyalty by failing to pay creditors, failing to file the GUC Certification, and failing to certify that equity holders in Classes 10 and 11 (of which Movant is the largest) are vested under the CTA. Seery has failed to act expeditiously as required under the terms of the CTA,[71] and has failed to maximize the value of the Claimant Trust for the benefit of the Claimant Trust Beneficiaries by filing unnecessary

[70] *See* CTA, Dkt. 3521-5 at § 11.11.

[71] *See, e.g.*, *id.* at §§ 2.2(b), 2.3(b)(i), 3.2(a).

proceedings, including the Kirschner Action, and spending inordinate amounts of cash. Those breaches of duty warrant Mr. Seery's removal under Del. Code Ann. tit. 12, § 3327(1). Further, Mr. Seery's roles as both Claimant Trustee and as Indemnity Subtrust Administrator substantially impairs the administration of the Claimant Trust, warranting his removal under Del. Code Ann. tit. 12, § 3327(2). In addition, Mr. Seery's removal is warranted under Del. Code Ann. tit. 12, § 3327(3)(b) and (c) because he is unwilling to perform his duties as Claimant Trustee, and has manifested a personal hostility toward, and conflict with, Movant and the holders of Contingent Trust Interests.

a) Mr. Seery Has Breached His Duty of Loyalty

50. The facts set forth above demonstrate without doubt that Mr. Seery has breached his duty of loyalty in administering the Claimant Trust. A trustee breaches the duty of loyalty by acting in his own self-interest "[i]nstead of evaluating what was in the best interests of [a] [t]rust." *Paradee v. Paradee*, No. 4988-VCL, 2010 WL 3959604, at *10 (Del. Ch. Oct. 5, 2010). "Self-interested transactions involving a fiduciary or one in a confidential relationship with another are presumptively fraudulent and voidable in equity. If the transaction is challenged, the burden of persuasion to justify upholding the transaction is on the fiduciary." *Hardy v. Hardy*, No. CIV.A. 7531-VCP, 2014 WL 3736331 at *8 (Del. Ch. July 29, 2014) (internal quotations omitted). Significantly, and importantly in this case, an inequitable action taken "does not become permissible simply because it is legally possible" within the letter of the law or the language of an agreement. *Coster v. UIP Companies, Inc.*, 255 A.3d 952, 953 (Del. 2021) (citing *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971)). Self-dealing amounts to a breach of duty of loyalty. *See Taglialatela v. Galvin*, No. 5841-MA, 2015 WL 757880, at *4 (Del. Ch. Feb. 23, 2015); *Walls v. Peck*, Civ. A. No. 497, 1979 WL 26236, at *4 (Del. Ch. Oct. 24, 1979); GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 543 (3d ed. 2019) ("The trustee must administer the trust with complete loyalty to the

interests of the beneficiary, without consideration of the personal interests of the trustee or the interests of third persons.").

51. Indeed "[u]nlike corporate law, '[u]nder trust law, self-dealing on the part of a trustee is virtually prohibited.'" *Stegemeier v. Magness*, 728 A.2d 557, 563 (Del. 1999) (citing *Oberly v. Kirby*, 592 A.2d 445, 466 (Del. 1991). As a result, the interested trustee bears the burden of persuasion to justify upholding the transaction. *Id.*

52. In this case, as the Delaware Complaint alleges, Mr. Seery has breached his duty of loyalty. That breach was inevitable given the manner in which Mr. Seery and Highland constructed the Claimant Trust and the Indemnity Subtrust. As set forth above, Mr. Seery is the Trustee of the Claimant Trust with an absolute duty to manage and administer that trust for the benefit of the Trust's beneficiaries. But Mr. Seery is also the Indemnity Trust Administrator charged with funding and spending an indemnity reserve for the benefit of Indemnified Parties, including himself. His duties as Claimant Trustee and Indemnity Subtrustee are in hopeless conflict as a result of this arrangement.

53. As now apparent, that conflict has manifested to the detriment of the intended beneficiaries of the Claimant Trust, including Movant. Essentially, Mr. Seery is seeking to hold the assets of the Claimant Trust hostage by reserving an increasing and inexplicably gigantic indemnity reserve to benefit the Indemnified Parties, including himself.

54. But consider the nature of claims potentially triggering indemnification, such as the insider trading claims against Mr. Seery, Muck and Jessop.[72] If the potentially indemnified parties prevail, there can be no judgment to indemnify. If the potentially indemnified parties lose, the nature of the claim is such that there would be no indemnity owed – so how could $125 million in

[72] *See* Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding, Dkt. 3816.

indemnification reserves be needed? That large indemnity reserve is antithetical to the interests of the intended beneficiaries of the Claimant Trust.

55. Moreover, Mr. Seery's conduct in contravention of his duty of loyalty to beneficiaries of the Claimant Trust contravenes the language and intent of the Plan itself. The Plan does not require holders of Class 10 and 11 claims (or parties related thereto) to grant releases of liability to the Claimant Trustee or the Indemnified Parties, but by refusing to pay out Classes 8 and 9 and refusing to issue the required GUC Certification in favor of funding up to $125 million in indemnity reserves, that is functionally what Mr. Seery is seeking to leverage Classes 10 and 11 (and even other non-parties) to provide.[73]

56. Forcing Classes 10 and 11 to bear the cost of Mr. Seery's indemnification reserve also goes beyond what the CTA allows. Paragraph 8.2 of that Agreement expressly allows parties to sue Mr. Seery and other indemnified parties for actions that constitute fraud, willful misconduct, or gross negligence, provided that they seek Bankruptcy Court approval to proceed on such claims. In other words, not even the CTA contemplates that Classes 10 and 11 would grant full, general releases to the Indemnified Parties, much less fund their defense for cognizable claims under the Agreement. By trying to insulate himself from ***all*** claims as a condition of performing his mandatory duties under the CTA, Mr. Seery is putting his personal self-interest ahead of the beneficiaries of the Trust.

57. There is ample case law holding that a trustee may not make a release (or its equivalent) a condition of performing his duties to a trust. Indeed, as the Delaware Chancery Court has explained, "[a]lthough the practice of demanding a release is widespread, a trustee who insists on a release as the price [of] doing what is in the best interests of the trust—and what the trustee's fiduciary duties therefore require—engages in self-interested conduct by extracting a personal benefit

[73] Highland Parties' Objection to Motion to Stay and Motion to Compel Mediation, Dkt. 3796, at fn. 4.

at the expense of the trust and its beneficiaries." *J.P. Morgan Tr. Co. of Delaware, Tr. of Fisher 2006 Tr. v. Fisher*, No. CV 12894-VCL, 2021 WL 2407858, at *22 n.9 (Del. Ch. June 14, 2021), *judgment entered sub nom* (noting that "[t]he trustee's insistence on a release may also fuel the beneficiaries' concern about improper conduct, as it did in this case").

58. Similarly, the Southern District of New York has held that a fiduciary's refusal to distribute assets without getting a release can constitute a breach of fiduciary duty:

> Defendants also argue that the demand for a release was not a breach of fiduciary duty because there is no merit to KeyBank's underlying claims. I have held for the reasons stated above that some of KeyBank's claims have been properly pleaded and survive a motion to dismiss. Even if that were not the case, however, the First Amended Complaint properly alleges that the refusal to deliver stock to which KeyBank was entitled – based on the defendants' self-interested insistence that they be released from KeyBank's claims – was an abuse of defendants' control of the buyer that had nothing to do with the buyer's legitimate business interests and that instead served only the self-interests of the defendants themselves.

Keybank Nat'l Ass'n v. Franklin Advisers, Inc., 616 B.R. 14, 44 (Bankr. S.D.N.Y. 2020).

59. In yet another similar case, the Southern District of New York held that a trustee breached its fiduciary duties by insisting on indemnification before carrying out its contractual obligations. In *FMS Bonds, Inc. v. Bank of New York Mellon*, the plaintiffs, holders of industrial revenue bonds, filed suit for breach of contract and breach of fiduciary duty against the indenture trustee responsible for servicing the bonds. No. 15 CIV. 9375 (ER), 2016 WL 4059155, at *1 (S.D.N.Y. July 28, 2016). The plaintiffs alleged the trustee failed to file a timely proof of claim in the bankruptcy proceedings on behalf of the entities obligated to make payments under the bonds. *Id.* at 7. The trustee offered to file a late proof of claim, but only if the plaintiffs agreed to "further indemnification protection" for the trustee. *Id.* The plaintiffs argued that "where the Trustee's 'gross negligence' prevented bondholders from collecting on the Bonds, the Trustee's inaction and insistence on further indemnification in order to rectify that gross negligence was a breach of the Trustee's fiduciary duties." *Id.* at 13. The trustee moved to dismiss plaintiffs' breach of fiduciary duty

claim, and the court denied the motion, stating that the plaintiffs' allegations "that the Trustee . . . breached its fiduciary duties by insisting on indemnification before taking further action" properly pleaded a breach of fiduciary duty claim. *Id.* at 14.

60. The reasoning of these cases applies with equal force here. Mr. Seery is obligated under the CTA to administer the Claimant Trust expeditiously, with an aim toward maximizing value for the Trust's intended beneficiaries, and to distribute the Claimant Trust's assets to those beneficiaries within a reasonable time. Instead of doing so, Mr. Seery is increasing the indemnity reserve so he can indemnify himself and others against future, unidentified lawsuits, potentially in perpetuity. In other words, like the trustees in *Fisher*, *Keybank National Association*, and *FMS Bonds*, Mr. Seery is refusing to comply with his obligations under the relevant trust agreement to extract some benefit for himself. That is a breach of the duty of loyalty, and that is a sufficient basis for Movant to seek Mr. Seery's removal under Delaware law.

b) Mr. Seery's Continued Service Substantially Impairs the Administration of the Trust

61. Mr. Seery's dual roles as Claimant Trustee and Indemnity Subtrust Administrator create an irreconcilable conflict of interest that substantially impairs the administration of the trust. As Claimant Trustee, Mr. Seery has duties to the Claimant Trust Beneficiaries to timely pay the remaining Class 8 and 9 claims, and file the GUC Certification. However, Mr. Seery, as an Indemnified Party as well as Indemnity Subtrust Administrator, instead is using the assets of the Claimant Trust to fund a $35-50 million cash reserve to the Indemnity Subtrust and create an additional $90 million "indemnity reserve." In other words, Mr. Seery has chosen to pursue creation of an "indemnity wall" rather than perform his duties as Claimant Trustee. Under these circumstances, Mr. Seery's continued service as Claimant Trustee while he also serves as Indemnity Subtrust Administrator impairs the administration of the Claimant Trust, warranting his removal as Trustee.

c) Mr. Seery Is Hostile to Movant, the Largest Class 10 Equity Holder

62. "Removal of a trustee is appropriate where 'there exists . . . hostility between the trustee[] and the beneficiaries that threatens the efficient administration of the trust.'" *Matter of Jeremy Paradise Dynasty Tr.*, No. CV 2021-0354-KSJM, 2021 WL 3625375, at *1 (Del. Ch. Aug. 17, 2021). Where, as here, hostility rises to the point of preventing trust funds from being distributed, removal is appropriate. *See, e.g.*, *Taglialatela v. Galvin*, No. CIV.A. 5841-MA, 2013 WL 2122044, at *3 (Del. Ch. May 14, 2013) ("The ongoing hostility and lack of communication and trust between the Trustee and three of her siblings have prevented the trust funds from being distributed to the six beneficiaries in a reasonable time after the settlor's death. . . . I conclude that it is in the best interest of the beneficiaries here to remove [the Trustee.]").

63. There can be no doubt that Mr. Seery is hostile to Movant and the holders of Class 10 and 11 claims (the holders of Contingent Trust Interests under the CTA). Among other things:

- Mr. Seery has provided testimony on repeated occasions accusing Class 10 and 11 claims holders of "bad faith" and other misconduct;
- Mr. Seery has helped facilitate lawsuits against Class 10 and 11 claims holders, including the *Kirschner* Action;
- Mr. Seery has helped facilitate the filing of motions against Class 10 and 11 claims holders, including a Motion to Deem the Dondero Parties Vexatious Litigants, currently pending in the United States District Court for the Northern District of Texas;
- Mr. Seery not only has failed to communicate with the Class 10 and 11 claim holders about the estate's finances, but opposes their efforts to obtain such information;[74] and
- Mr. Seery has resisted and opposed relief sought by Class 10 and 11 claims holders, even where that relief was reasonable and designed to benefit the estate as a whole.[75]

[74] Memorandum of Law in Support of Highland Capital Management, L.P. and the Highland Claimant Trust's Motion to Dismiss Complaint Case No. 23-03038 (N.D. Tex.) at Dkt. 14 [App. 079-109]. The claim holders have requested this information since at least June 2022 (Dkt. 3382), which was approximately $80 million in estate expenses ago. *See* ¶ 25 *supra.*

[75] *See* Highland Capital Management, L.P.'s Memorandum of Law in Support of its Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief, Case No. 21-00881 (N.D. Tex.), Dkt. 137 [App. 031-038] (wherein the Reorganized Debtor (under the control of the Claimant Trust), defines "Dondero Entities" as including HMIT (Movant herein) at fn. 1; states "The Dondero Entities—all of which are dominated and controlled by or acting in concert with

64. The hostility described herein between Mr. Seery and the beneficiaries of the Claimant Trust is more than sufficient to warrant Mr. Seery's removal. In *Taglialatela*, the court removed the trustee because "ongoing hostility and lack of communication" between the trustee and beneficiaries "prevented the trust funds from being distributed" to the beneficiaries in a reasonable time. 2013 WL 2122044, at *3. Similarly, here, the hostility between Mr. Seery and the beneficiaries is so extreme that Mr. Seery refuses to administer the trust funds without first establishing an indemnity fund with potentially more than one hundred million dollars. That is impermissible under Delaware law.

65. For all the foregoing reasons, Movant's Delaware complaint sets forth a *prima facie* claim for removal of Mr. Seery as Trustee of the Claimant Trust, consistent with the applicable legal standard and also even consistent with this Court's new Gatekeeper Colorability Test.

B. Movant Seeks to File its Delaware Complaint for a Proper Purpose

66. Even though Movant does not agree with the Court's Gatekeeper Colorability Test, Movant can readily satisfy the next element of that test because it has a legitimate and proper reason to seek Mr. Seery's removal under Delaware law. As the allegations above make clear, Movant has no other legal avenue available to protect its sizeable interest in the assets of the Claimant Trust.

67. The latest information from the Highland Parties is that the Indemnity Subtrust now holds reportedly $50 million in cash, and that an additional $90 million of the Claimant Trust assets have been held in an indemnity reserve. That means that at least $140 million is currently being held for indemnity—on the sole authority of Mr. Seery in order to protect himself. Contrary to the

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Dondero, HCMLP's co-founder and ousted Chief Executive Officer—are engaged in a coordinated litigation strategy spanning nearly three years to wear down HCMLP and its management and undermine HCMLP's confirmed Plan." *Id.*, at ¶ 1.; "Thereafter, directly and through the Dondero Entities, he began interfering with the management of the estate, threatening HCMLP employees, challenging nearly every action taken to further HCMLP's reorganization, commencing new (and frivolous) litigation against HCMLP and its management both insider and outside of Bankruptcy Court…" *Id.* at ¶ 4; "Separately, in March 2023, HMIT sought leave to sue HCMLP for allegedly breaching its fiduciary duty and other obligations to HMIT—a prepetition equity holder…. However, HMIT's putative complaint is emblematic of the Dondero Entities' unceasing litigation--…" *Id.* at ¶ 30); Dec. 14, 2020 Depo. Tr. at 37:22-25 [App. 003]; Aug. 4, 2021 Hr'g Tr. At 66:15-18 [App. 007]; June 2, 2023 Depo. Tr. At 113:17-20 [App. 028].

representations in the Subtrust Motion, the amount now held for indemnity is 560% of the original $25 million represented. By comparison, for the pre-effective date period, the entire bankruptcy case only cost approximately $40 million in administrative fees through August 10, 2021.[76]

68. The Plan and Trusts have now turned into nothing more than vehicles for Mr. Seery to leverage to seek to force Class 10 and 11 Equity Holders, and even related party non-equity holders, to deliver releases and other consideration to Mr. Seery and the Indemnified Parties. By his conduct, Mr. Seery seeks the complete exculpation the Fifth Circuit denied him.[77] Under the guise of "indemnity," he holds assets that belong to beneficiaries, vested and contingent, entirely hostage at his sole and unfettered discretion. Meanwhile, Seery continues to collect his monthly compensation of $150,000 per month, plus authorize over $5 million in undisclosed monthly expenses. The present circumstances demonstrate that, if not stopped, Seery will continue to use his position in this manner until the Trusts are exhausted and the Plan is entirely frustrated. The creation of the Trusts and limitless authority of Mr. Seery have resulted in a conflict of interest which cannot be resolved without a court's appropriate, and entirely necessary, equitable resolution.

69. In short, the claims to remove Mr. Seery as Claimant Trustee are not without foundation, not without merit, and not being pursued for an improper purpose. Based on the Delaware law described herein, Movant meets the applicable legal standard, and also even this Court's Gatekeeper Colorability Test, and the Court should allow Movant to proceed with its complaint in Delaware.

IV. CONCLUSION

For all of the forgoing reasons, this Motion should be granted.

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[76] September 30, 2023, Post-confirmation Reports, Dkt. Nos. 3955 and 3956, p.2.

[77] *In re Highland Capital Management, L.P.,* 48 F.4th 419, 435 (5th Cir. 2022).

WHEREFORE, Movant requests the entry of an order i) granting this Motion for Leave; ii) determining that the Gatekeeping Provision is satisfied as applied to the Delaware Proceeding; and iii) authorizing Movant to file the Delaware Complaint.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that on December 21, 2023, counsel for Hunter Mountain Investment Trust conferred with opposing counsel regarding this motion and opposing counsel indicated that the Debtor is opposed.

/s/Deborah Deitsch-Perez
Deborah Deitsch-Perez

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 1, 2024, 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

EXHIBIT 1

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HUNTER MOUNTAIN INVESTMENT TRUST	)	
	)	
Plaintiff,	)	
	)	C.A.No. _____
v.	)	
	)	
JAMES P. SEERY, JR.	)	
	)	
Defendant.	)	

COMPLAINT TO REMOVE THE TRUSTEE

Plaintiff, Hunter Mountain Investment Trust ("HMIT"), by and through its undersigned counsel, hereby brings the following Complaint seeking the removal of Defendant James P. Seery, Jr. as Trustee of the Highland Claimant Trust (the "Claimant Trust") pursuant to 12 *Del. C.* § 3327(1), (3)(b), and/or (3)(c). In support, HMIT respectfully states as follows:

I. PARTIES

1. Plaintiff HMIT is a Delaware statutory trust that was formerly the largest equity holder in Highland Capital Management, L.P. (the "Debtor"), holding a 99.5% limited partnership interest. HMIT is now the largest holder of a Contingent Trust Interest in the Claimant Trust pursuant to the terms of the Claimant Trust Agreement ("**CTA**").[1]

[1] *See* **Exhibit 1**.

2. Defendant James P. Seery, Jr. ("Mr. Seery or Seery") is an individual citizen and resident of the State of New York. Mr. Seery may be served with process at 100 Crescent Court, Suite 1805, Dallas, Texas 75201. Mr. Seery acts as the Claimant Trustee under the CTA and as Trust Administrator of the Indemnity Subtrust as described herein. Mr. Seery may be served with process pursuant to 10 *Del. C.* § 3114 because he serves as the trustee of a Delaware statutory trust.

II. JURISDICTION

3. This Court has jurisdiction over this matter pursuant to 10 *Del. C.* § 341 and 12 *Del. C.* § 3327.

III. STANDING

4. HMIT seeks to have this Court remove Mr. Seery as Claimant Trustee of the Claimant Trust pursuant to 12 *Del. C.* § 3327. HMIT has standing as Plaintiff in this proceeding because it is a beneficiary within the meaning of Delaware trust law and, at a minimum, a contingent beneficiary under the terms of the Claimant Trust.

IV. FACTS

A. The Claimant Trust Agreement

5. In a chapter 11 bankruptcy proceeding in the Bankruptcy Court for the Northern District of Texas, the Debtor filed and the Bankruptcy Court confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as modified)* (*In re Highland Capital Management LP,* Case No. 19-34054-sgj11 in the

United States Bankruptcy Court for the Northern District of Texas, Doc. 1943 at Ex. A) (the "**Plan**").

6. Pursuant to the Plan, assets of the bankruptcy estate of the Debtor were transferred to the Claimant Trust.

7. The CTA identifies different "classes" of trust interests. In particular, Class 8 interests were distributed to Holders of Allowed Class 8 General Unsecured Claims; Class 9 interests were distributed to Holders of Allowed Class 9 Subordinated Claims; Class 10 interests were distributed to Holders of Allowed Class 10 Class B/C Limited Partnership Interests; and Class 11 interests were distributed to Holders of Allowed Class 11 Class A Limited Partnership Interests.

8. The CTA directs Seery, as Claimant Trustee, "to litigate and settle Claims in Class 8 and Class 9." (CTA at ¶ 2.3(b)(ii).)

9. After Class 8 and Class 9 interest holders are paid in full, the CTA directs Seery, as Claimant Trustee, to file with the Bankruptcy Court a "GUC Payment Certification." (CTA at ¶ 5.1(c).)

10. As described in the CTA, Class 10 and Class 11 interests are "Contingent Trust Interests," meaning they will not "vest" under the terms of the CTA until Class 8 and Class 9 interest holders are paid in full and the Claimant Trustee files the GUC Payment Certification. (CTA at ¶ ¶ 1.1(m) and 5.1(c).).

11. Among other things, the CTA requires Mr. Seery to pay the remaining Class 8 and 9 claims in full and file the GUC Certification, thereby "vesting" the Class 10 and 11 Equity Interests under the terms of the CTA. (CTA at ¶¶ 1.1(h), 1.1(aa), and 5.1.) In addition, he has the duty to do so timely and "not unduly prolong the duration of the Claimant Trust." (CTA at ¶ ¶ 2.2(b), 3.2(a), and 3.3(a).)

12. The Claimant Trust expressly does not indemnify parties for acts which are determined by order a court of competent jurisdiction to constitute willful fraud, willful misconduct, or gross negligence. (CTA at ¶ 8.2.)

B. The Indemnity Subtrust

13. Months after confirmation of the chapter 11 Plan and creation of the Claimant Trust, the Bankruptcy Court authorized the creation of the Indemnity Subtrust. The Indemnity Subtrust was created to provide a source of conditional indemnity, in lieu of liability insurance coverage, to parties identified as "Indemnified Parties" in Section 8.2 of the CTA, including Mr. Seery and the Claimant Trust Oversight Board to the extent they otherwise qualify under the terms of the CTA. According to the terms of the motion filed with the bankruptcy court seeking to create the Indemnity Subtrust, Mr. Seery placed himself in the position of Trust Administrator of the Indemnity Subtrust (to whom the trustee of the Indemnity Subtrust answers). Accordingly, Mr. Seery has exercised sole control of both the

Claimant Trust and Indemnity Subtrust with respect to all matters concerning indemnity.

14. Mr. Seery has an irresolvable conflict of interest whereby he has exclusive control over the Indemnity Subtrust—to the detriment of the Class 8 and 9 Claimants, and the Class 10 and 11 Equity Interests. In such position, Mr. Seery enjoys power in his sole and absolute discretion to direct administration of all aspects of the Indemnity Subtrust for his own benefit, and all matters relating to indemnity with respect to the Claimant Trust.

15. The sole conditional beneficiaries of the Indemnity Subtrust are the Indemnified Parties as defined in Section 8.2 of the Claimant Trust Agreement, including Seery himself and the Claimant Trust Oversight Board.

C. The Claimant Trust Has Sufficient Assets to Pay Class 8 and 9 Interest Holders

16. Based on a consolidated balance sheet filed on July 6, 2023, the Claimant Trust has about $250 million in assets (of which $180 million is cash) and only about $126 million in Class 8 and 9 claims.

Highland Claimant Trust
Summarized Consolidated Balance Sheet [1]
As of May 31, 2023
The accompanying notes are integral to understanding this balance sheet
(Estimated and unaudited, $ in millions)

	Balance per books	adjustments (see notes)	Adjusted balance
Assets			
Cash and equivalents	$ 13	$ -	$ 13
Disputed claims reserve [2]	12	-	12
Other restricted cash	12	-	12
Investments [3]	118	(12) [6]	106
Notes receivable, net [4]	86	(83) [4]	3
Other assets	6	-	6
Total assets	$ 247	$ (95)	$ 152
Liabilities			
Secured and other debt	$ -	$ -	$ -
Distribution payable [2]	12	-	12
Additional indemnification reserves	-	90 [5]	90
Other liabilities	15	13 [5]	28
Total liabilities [5]	$ 27	$ 103	$ 130
Book/adjusted book equity (see accompanying notes) [5]	220	(198)	22
Total liabilities and book/adjusted book equity	$ 247	$ (95)	$ 152
Supplemental Info: [7]			
Sum of remaining allowed Class 8 Trust Beneficiaries, excluding interest	$ 27		
Sum of remaining allowed Class 9 Trust Beneficiaries, excluding interest	99		
Sum of face amount of pending Class 8/9 potential Trust Beneficiaries, excluding interest	13		
Sub-total	$ 139		

17. Notably, the Claimant Trust's balance sheet assets do not include a fully cash-funded at least $35 million indemnity account (reportedly now $50 million) that presumably may be used to pay creditors to the extent it is not consumed by the estate's professionals. (*See Notice of Filing of Current Balance Sheet of the Highland Claimant Trust,* Dkt. 3872 at Ex. A, Note 1.)[2] To reduce the Claimant Trust's book value, the Debtor purports to add "non-book" adjustments to the balance sheet. One such adjustment gives zero asset value to the notes payable by alleged affiliates of Jim Dondero. (*See id.* at Ex. A.) However, $70 million of those notes are fully bonded by cash deposited in the registry of the district court. *See* Case No. 3:31-cv-00881-X (N.D. Tex.), *Order Granting Joint Agreed Emergency Motion*

[2] *See* **Exhibit 2**.

for Order Approving Stipulation for the Bonding of Judgments and Stays of Executions Pending Appeals [Dkt. 149] and *Notices of Bonding* [Dkts. 151, 152, and 160-162.[3]

18. Additionally, Mr. Seery declared a supplemental "indemnity account" now holding approximately $90 million, on top of the $35 (or $50) million cash indemnity reserve, for the benefit of the Indemnified Parties (including Mr. Seery).

19. Were it not for the inappropriate $125 million (or more) indemnity reserve, Debtor's creditors could and should have been paid, the estate closed and the residual returned to former equity months ago.

20. As a practical matter, the Claimant Trust could pay the Class 8 and 9 claims in full with interest, Mr. Seery could file the GUC Certification, and the Equity interests, including Plaintiff's, would fully "vest" under the terms of the CTA. All of these steps could be, and indeed, should have been, completed without any interference with the Indemnity Sub-Trust or Indemnity Trust.

D. Mr. Seery Refuses to Pay Class 8 and 9 Interest Holders, and thereby Seeks to Prevent HMIT's Class 10 Interests from Vesting, to Advance His Own Self-Interest.

21. As a result of Mr. Seery's roles as both Claimant Trustee and Trust Administrator of the Indemnity Subtrust, Mr. Seery is determined to hold the assets of the Claimant Trust "hostage" by creating an indemnity reserve and/or funding the

[3] *See* **Exhibit 3**.

Indemnity Subtrust to solely benefit the Indemnified Parties, including himself personally.

22. Mr. Seery's use of the Claimant Trust Asset's to build an indemnity "wall" for his own benefit rather than paying off the Class 8 and 9 claims, reflects an attempt to avoid "vesting" of equity Classes 10 and 11 under the CTA, of which HMIT is the largest interest holder. Such conduct is adverse to the interests of the Beneficiaries and the Contingent Beneficiaries of the Claimant Trust, including HMIT.

23. Mr. Seery's serving as both the Claimant Trustee and as the Trust Administrator of the Indemnity Subtrust therefore creates an irresolvable conflict of interest.

24. Seery has duties to the Claimant Trust Beneficiaries which include, without limitation: a) paying the remaining Class 8 and 9 claims in full, b) filing the GUC Certification, and c) vesting the Class 10 and 11 Equity Interests under the terms of the CTA. (CTA at ¶¶ 1.1(h), 1.1(aa), and 5.1.) In addition, Mr. Seery has the duty to do so timely and "not unduly prolong the duration of the Claimant Trust." (CTA at ¶ ¶ 2.2(b), 3.2(a), and 3.3(a).)

25. But, because Mr. Seery is a conditionally Indemnified Party, he self-servingly chooses essentially to use 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 in cash in the Claimant Trust. Meanwhile, Mr. Seery continues to collect substantial income in his capacity as Claimant Trustee rather than winding up the estate.

26. Simply put, Seery has chosen to dedicate assets of the Claimant Trust to erect an "indemnity wall" in front of himself instead of performing his remaining duties as the Claimant Trustee.

27. *De facto*, but for Mr. Seery's deliberate failure to pay the remaining Class 8 and 9 claims in full with interest from the liquid assets in the Trust, the Class 10 and 11 Equity Holders are Claimant Trust Beneficiaries.

28. Notwithstanding that creditor constituencies voted to support, and the Bankruptcy Court approved, the Plan, understanding that there would be a partially independent, five-member Oversight Board supervising the monetization and distribution of estate assets, that contemplated governance structure has long since been ignored and has failed to safeguard the Claimant Trust. The representations in the Plan, the findings by the Bankruptcy Court, and the belief of the Fifth Circuit that Mr. Seery's conduct as Claimant Trustee would be affirmatively overseen to assure that the Plan would be fully performed, are – at least as to the appropriate use of funds and indemnification -- all false.

E. Mr. Seery's Refusal to Administer the CTA Has Created Hostility between Mr. Seery and the Beneficiaries

29. The Claimant Trust, of which Mr. Seery is Trustee, owns the limited partnership interests in the Reorganized Debtor.[4]

30. In the United States District Court for the Northern District of Texas, Highland Capital Management, L.P. ("HCMLP"), the Reorganized Debtor, filed a *Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief*, (Dist. Ct. Case No. 3:21-cv-00881-X, Dkt. No. 136) and filed a Memorandum of Law (*Id.* at Dkt. No. 137) in support thereof.

31. In the Memorandum of Law, the Reorganized Debtor (under the control of the Claimant Trust), defines "Dondero Entities" as including HMIT (Movant herein) in footnote 1, page 1. The Memorandum of Law declares that, "The Dondero Entities—all of which are dominated and controlled by or acting in concert with Dondero, HCMLP's co-founder and ousted Chief Executive Officer—are engaged in a coordinated litigation strategy spanning nearly three years to wear down HCMLP and its management and undermine HCMLP's confirmed Plan." (*Id.*, p. 1.) The Memorandum further states, "Thereafter, directly and through the Dondero Entities, he began interfering with the management of the estate, threatening HCMLP employees, challenging nearly every action taken to further HCMLP's

[4] *Memorandum Opinion* [Dkt. No. 3903], at page 11.

reorganization, commencing new (and frivolous) litigation against HCMLP and its management both insider and outside of Bankruptcy Court…" (*Id.* at p. 2.)

32. In particular, with respect to HMIT, the reorganized Debtor's, Memorandum states, "[s]eparately, in March 2023, HMIT sought leave to sue HCMLP for allegedly breaching its fiduciary duty and other obligations to HMIT—a prepetition equity holder…. However, HMIT's putative complaint is emblematic of the Dondero Entities' unceasing litigation--…" (*Id.* at ¶ 30, p. 26.) Ironically, the Memorandum was wrong: HMIT's referenced motion sought leave to bring derivative claims ***on behalf of HCMLP***.

33. Mr. Seery's hostility to Dondero is also well documented in hearing testimony, depositions, and declarations Mr. Seery has provided since October of 2020.[5]

[5] *See* Highland Capital Management, L.P.'s Memorandum of Law in Support of its Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief, Case No. 21-00881 (N.D. Tex.), Dkt. 137 (wherein the Reorganized Debtor (under the control of the Claimant Trust), defines "Dondero Entities" as including HMIT (Movant herein) at fn. 1; states "The Dondero Entities—all of which are dominated and controlled by or acting in concert with Dondero, HCMLP's co-founder and ousted Chief Executive Officer—are engaged in a coordinated litigation strategy spanning nearly three years to wear down HCMLP and its management and undermine HCMLP's confirmed Plan." *Id.*, at ¶ 1.; "Thereafter, directly and through the Dondero Entities, he began interfering with the management of the estate, threatening HCMLP employees, challenging nearly every action taken to further HCMLP's reorganization, commencing new (and frivolous) litigation against HCMLP and its management both insider and outside of Bankruptcy Court…" *Id.* at ¶ 4; "Separately, in March 2023, HMIT sought leave to sue HCMLP for allegedly breaching its fiduciary duty and other obligations to HMIT—a prepetition equity holder…. However, HMIT's putative complaint is emblematic of the Dondero Entities' unceasing litigation--…" *Id.* at ¶ 30); Dec. 14, 2020 Depo. Tr. at 37:22-25 ("He has an interest in sticking his fingers in virtually everything but not providing any value. That's pretty consistent."); Aug. 4, 2021 Hr'g Tr. at 66:15-18 ("We wanted to make sure we had a clean, fast transaction. And based upon our dealings with the Dondero entities, we didn't think we could possibly have that."); June 2, 2023 Depo. Tr. at 113:17-20 ("… I don't think this was a complicated case at all. I think this could have been easily resolved. And with normal commercial actors, it would have been.").

34. Based on the above, there can be no question that Mr. Seery (a) is overtly hostile to Dondero, (b) contends that Dondero controls HMIT, and (c) is hostile to HMIT directly. Such hostility is well beyond mere discord.

V. CAUSES OF ACTION

35. Pursuant to 12 *Del. C.* § 3327, an "officeholder," including a trustee "may be removed in accordance with the terms of the governing instrument." 12 *Del. C.* § 3327. Additionally, "the Court of Chancery may remove an officeholder on the Court's own initiative or on petition of a trustor, another officeholder, or beneficiary" in any of five circumstances:

1) ***The officeholder has committed a breach of trust; or***
2) ***The continued service of the officeholder substantially impairs the administration of the trust***; or
3) The court, having due regard for the expressed intention of the trustor and the best interests of the beneficiaries, determines that notwithstanding the absence of a breach of trust, there exists:

a) A substantial change in circumstances;
b) ***Unfitness, unwillingness or inability of the officeholder to administer the trust or perform its duties properly; or***
c) ***Hostility between the officeholder and beneficiaries or other officeholders that threatens the efficient administration of the trust.***

12 Del. C. § 3327 (emphasis added).

Count I
(Removal of Seery for Breach of the Duty of Trust)

36. Plaintiff re-alleges and incorporates the allegations contained in the preceding paragraphs.

37. As Claimant Trustee, Mr. Seery owes duties to the Claimant Trust Beneficiaries to pay the remaining Class 8 and 9 claims in full and file the GUC Certification, thereby vesting the Class 10 and 11 Equity Interests under the terms of the CTA. (CTA at ¶¶ 1.1(h), 1.1(aa), and 5.1.) In addition, he has the duty to do so timely and "not unduly prolong the duration of the Claimant Trust." (CTA at ¶ ¶ 2.2(b), 3.2(a), and 3.3(a).)

38. Mr. Seery also has a duty of loyalty and may not act in his own self-interest to the detriment of the Claimant Trust.

39. Mr. Seery has engaged in self-dealing and otherwise breached his duty of loyalty by refusing to pay the Class 8 and 9 Claims in full with interest and refusing to file the GUC Payment Certification in an effort to prevent Class 10 and 11 equity interests from "vesting" under the terms of the CTA, in order to create a "wall" of indemnity for his own benefit while continuing to collect professional fees.

40. Mr. Seery's conduct constitutes a breach of the duty of loyalty and a breach of trust warranting Mr. Seery's removal.

Count II
(Removal of Mr. Seery for Impairment of the Administration of the Trust)

41. Plaintiff re-alleges and incorporates the allegations contained in the preceding paragraphs.

42. The administration of the CTA requires payment to the remaining Class 8 and 9 creditors and the filing of the GUC Certification.

43. The Claimant Trust has more than sufficient funds to pay the remaining Class 8 and 9 creditors with interest. Nevertheless, Mr. Seery refuses to do so.

44. By refusing to pay the Class 8 and 9 creditors, thereby preventing the Class 10 and 11 equity interests from "vesting" under the terms of the CTA, despite the Claimant Trust having ample money to do so, Mr. Seery is substantially impairing the administration of the Trust, warranting his removal.

Count III

(Removal of Mr. Seery for Unwillingness to Administer the Trust)

45. Plaintiff re-alleges and incorporates the allegations contained in the preceding paragraphs.

46. The administration of the CTA requires payment to the remaining Class 8 and 9 creditors and the filing of the GUC Certification.

47. The Claimant Trust has more than sufficient funds to pay the remaining Class 8 and 9 creditors with interest. Nevertheless, Mr. Seery refuses to do so.

48. By refusing to pay the Class 8 and 9 creditors, thereby preventing the Class 10 and 11 equity interests from "vesting" under the terms of the CTA, despite the Claimant Trust having ample money to do so, Mr. Seery is necessarily unwilling to administer the trust, warranting his removal.

Count IV
(Removal of Mr. Seery because his Continued Services Substantially Impairs the Administration of the Trust)

49. Plaintiff re-alleges and incorporates the allegations contained in the preceding paragraphs.

50. Mr. Seery's dual roles as Claimant Trustee and Indemnity Subtrust Administrator creates an irreconcilable conflict of interest.

51. As Claimant Trustee, Mr. Seery has duties to the Claimant Trust Beneficiaries to timely pay the remaining Class 8 and 9 claims, file the GUC Certification, and "vest" the Class 10 and 11 Equity Interests under the terms of the CTA.

52. However, Mr. Seery, as an Indemnified Party and as Indemnity Subtrust Administrator, is instead using assets of the Claimant Trust to fund a $50 million cash reserve to the Indemnity Subtrust and create an additional $90 million "indemnity reserve."

53. Mr. Seery's choice to pursue creation of an "indemnity wall" as Indemnity Subtrust Administrator rather than perform his duties as Claimant Trustee substantially impairs the administration of the trust, warranting his removal.

Count V

(Removal of Mr. Seery due to Hostility that Threatens Administration of the Trust)

54. Plaintiff re-alleges and incorporates the allegations contained in the preceding paragraphs.

55. The hostility between Mr. Seery and the beneficiaries does not merely "threaten" the efficient administration of the Claimant Trust, it has in fact led to Mr. Seery refusing to administer the Claimant Trust at all, warranting Mr. Seery's removal.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff HMIT respectfully requests that this Court:

(i) remove James P. Seery, Jr. as Claimant Trustee for the Highland Claimant Trust;

(ii) appoint a neutral and professional successor trustee that is not indemnified by the assets of the Claimant Trust;

(iii) award Plaintiff all costs and attorneys' fees against Defendant pursuant to 12 *Del. C.* § 3584; and

(iv) grant Plaintiff any and all other relief, at law or in equity, to which it is entitled.

Dated: January __, 2024	BAYARD, P.A. _____ Stephen B. Brauerman (#4952) 600 N. King St., Suite 400 Wilmington, Delaware 19801 (302) 655-5000 Attorneys for Plaintiff Hunter Mountain Investment Trust

EXHIBIT 1

EXECUTION VERSION

CLAIMANT TRUST AGREEMENT

This Claimant Trust Agreement, effective as of August 11, 2021 (as may be amended, supplemented, or otherwise modified in accordance with the terms hereof, this "Agreement"), by and among Highland Capital Management, L.P. (as debtor and debtor-in-possession, the "Debtor"), as settlor, and James P. Seery, Jr., as trustee (the "Claimant Trustee"), and Wilmington Trust, National Association, a national banking association ("WTNA"), as Delaware trustee (in such capacity hereunder, and not in its individual capacity, the "Delaware Trustee," and together with the Debtor and the Claimant Trustee, the "Parties") for the benefit of the Claimant Trust Beneficiaries entitled to the Claimant Trust Assets.

RECITALS

WHEREAS, on October 16, 2019, Highland Capital Management, L.P. filed with the United States Bankruptcy Court for the District of Delaware, a voluntary petition for relief under chapter 11 of the Bankruptcy Code, which case was subsequently transferred to the Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court") and captioned *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj11 (the "Chapter 11 Case");

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (as may be amended, supplemented, or otherwise modified from time to time, the "Plan"),[1] which was confirmed by the Bankruptcy Court on February 22, 2021, pursuant to the *Findings of Fact and Order Confirming Plan of Reorganization for the Debtor* [Docket No. 1943] (the "Confirmation Order");

WHEREAS, this Agreement, including all exhibits hereto, is the "Claimant Trust Agreement" described in the Plan and shall be executed on or before the Effective Date in order to facilitate implementation of the Plan; and

WHEREAS, pursuant to the Plan and Confirmation Order, the Claimant Trust Assets are to be transferred to the Claimant Trust (each as defined herein) created and evidenced by this Agreement so that (i) the Claimant Trust Assets can be held in a trust for the benefit of the Claimant Trust Beneficiaries entitled thereto in accordance with Treasury Regulation Section 301.7701-4(d) for the objectives and purposes set forth herein and in the Plan; (ii) the Claimant Trust Assets can be monetized; (iii) the Claimant Trust will transfer Estate Claims to the Litigation Sub-Trust to be prosecuted, settled, abandoned, or resolved as may be determined by the Litigation Trustee in accordance with the terms of the Litigation Sub-Trust Agreement, for the benefit of the Claimant Trust; (iv) proceeds of the Claimant Trust Assets, including Estate Claims, may be distributed to the Claimant Trust Beneficiaries[2] in accordance with the Plan; (v) the Claimant Trustee can resolve

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan. The confirmed Plan included certain amendments filed on February 1, 2021. *See Debtor's Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)*, Docket No. 1875, Exh. B.

[2] For the avoidance of doubt, and as set forth in the Plan, Holders of Class A Limited Partnership Interests and Class B/C Limited Partnership Interests will be Claimant Trust Beneficiaries 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 in accordance with the terms and conditions set forth herein and in the Plan.

Disputed Claims as set forth herein and in the Plan; and (vi) administrative services relating to the activities of the Claimant Trust and relating to the implementation of the Plan can be performed by the Claimant Trustee.

DECLARATION OF TRUST

NOW, THEREFORE, in order to declare the terms and conditions hereof, and in consideration of the premises and mutual agreements herein contained, the confirmation of the Plan and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Debtor, the Claimant Trustee, and the Delaware Trustee have executed this Agreement for the benefit of the Claimant Trust Beneficiaries entitled to share in the Claimant Trust Assets and, at the direction of such Claimant Trust Beneficiaries as provided for in the Plan.

TO HAVE AND TO HOLD unto the Claimant Trustee and his successors or assigns in trust, under and subject to the terms and conditions set forth herein and for the benefit of the Claimant Trust Beneficiaries, and for the performance of and compliance with the terms hereof and of the Plan; provided, however, that upon termination of the Claimant Trust in accordance with Article IX hereof, this Claimant Trust Agreement shall cease, terminate, and be of no further force and effect, unless otherwise specifically provided for herein.

IT IS FURTHER COVENANTED AND DECLARED that the Claimant Trust Assets are to be strictly held and applied by the Claimant Trustee subject to the specific terms set forth below.

ARTICLE I.
DEFINITION AND TERMS

1.1 Certain Definitions. Unless the context shall otherwise require and except as contained in this Section 1.1 or as otherwise defined herein, the capitalized terms used herein shall have the respective meanings assigned thereto in the "Definitions," Section 1.1 of the Plan or if not defined therein, shall have the meanings assigned thereto in the applicable Section of the Plan. For all purposes of this Agreement, the following terms shall have the following meanings:

(a) "Acis" means collectively, Acis Capital Management, L.P. and Acis Capital Management GP, LLP.

(b) "Bankruptcy Court" has the meaning set forth in the Recitals hereof.

(c) "Cause" means (i) a Person's willful failure to perform his material duties hereunder (which material duties shall include, without limitation, with respect to a Member, or to the extent applicable, the Claimant Trustee, regular attendance at regularly scheduled meetings of the Oversight Board), which is not remedied within 30 days of notice; (ii) a Person's commission of an act of fraud, theft, or embezzlement during the performance of his or her duties hereunder; (iii) a Person's conviction of a felony (other than a felony that does not involve fraud, theft, embezzlement, or jail time) with all appeals having been exhausted or appeal periods lapsed; or (iv) a Person's gross negligence, bad faith, willful misconduct, or knowing violation of law in the performance of his or her duties hereunder.

(d) "Claimant Trust Agreement" means this Agreement.

(e) "Claimant Trustee" means James P. Seery, Jr., as the initial "Claimant Trustee" hereunder and as defined in the Plan, and any successor Claimant Trustee that may be appointed pursuant to the terms of this Agreement.

(f) "Claimant Trust" means the "Highland Claimant Trust" established in accordance with the Delaware Statutory Trust Act and Treasury Regulation Section 301.7701-4(d) pursuant to this Agreement.

(g) "Claimant Trust Assets" means (i) other than the Reorganized Debtor Assets (which are expressly excluded from this definition), all other Assets of the Estate, including, but not limited to, all Causes of Action, Available Cash, any proceeds realized or received from such Assets, all rights of setoff, recoupment, and other defenses with respect, relating to, or arising from such Assets, (ii) any Assets transferred by the Reorganized Debtor to the Claimant Trust on or after the Effective Date, (iii) the limited partnership interests in the Reorganized Debtor, and (iv) the ownership interests in New GP LLC. For the avoidance of doubt, any Causes of Action that, for any reason, are not capable of being transferred to the Claimant Trust shall constitute Reorganized Debtor Assets.

(h) "Claimant Trust Beneficiaries" means 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.

(i) "Claimant Trust Expense Cash Reserve" means $[•] million in Cash to be funded pursuant to the Plan into a bank account of the Claimant Trust on or before the Effective Date for the purpose of paying Claimant Trust Expenses in accordance herewith.

(j) "Claimant Trust Expenses" means the costs, expenses, liabilities and obligations incurred by the Claimant Trust and/or the Claimant Trustee in administering and conducting the affairs of the Claimant Trust, and otherwise carrying out the terms of the Claimant Trust and the Plan on behalf of the Claimant Trust, including without any limitation, any taxes owed by the Claimant Trust, and the fees and expenses of the Claimant Trustee and professional persons retained by the Claimant Trust or Claimant Trustee in accordance with this Agreement.

(k) "Committee Member" means a Member who is/was also a member of the Creditors' Committee.

(l) "Conflicted Member" has the meaning set forth in Section 4.6(c) hereof.

(m) "Contingent Trust Interests" means the contingent interests in the Claimant Trust to be distributed to Holders of Class A Limited Partnership Interests and Class B/C Limited Partnership Interests in accordance with the Plan.

(n) "Creditors' Committee" means the Official Committee of Unsecured Creditors appointed pursuant to section 1102 of the Bankruptcy Code in the Chapter 11 Case, comprised of Acis, Meta-e Discovery, the Redeemer Committee and UBS.

(o) "Delaware Statutory Trust Act" means the Delaware Statutory Trust Act 12 Del C. §3801, et seq. as amended from time to time.

(p) "Delaware Trustee" has the meaning set forth in the introduction hereof.

(q) "Disability" means as a result of the Claimant Trustee's or a Member's incapacity due to physical or mental illness as determined by an accredited physician or psychologist, as applicable, selected by the Claimant Trustee or the Member, as applicable, the Claimant Trustee or such Member has been substantially unable to perform his or her duties hereunder for three (3) consecutive months or for an aggregate of 180 days during any period of twelve (12) consecutive months.

(r) "Disinterested Members" has the meaning set forth in Section 4.1 hereof.

(s) "Disputed Claims Reserve" means the reserve account to be opened by the Claimant Trust on or after the Effective Date and funded in an initial amount determined by the Claimant Trustee [(in a manner consistent with the Plan and with the consent of a simple majority of the Oversight Board)] to be sufficient to pay Disputed Claims under the Plan.

(t) "Employees" means the employees of the Debtor set forth in the Plan Supplement.

(u) "Employee Claims" means any General Unsecured Claim held by an Employee other than the Claims of the Senior Employees subject to stipulations (provided such stipulations are executed by any such Senior Employee of the Debtor prior to the Effective Date).

(v) "Estate Claims" has the meaning given to it in Exhibit A to the *Notice of Final Term Sheet* [Docket No. 354].

(w) "Equity Trust Interests" has the meaning given to it in Section 5.1(c) hereof.

(x) "Exchange Act" means the Securities Exchange Act of 1934, as amended.

(y) "General Unsecured Claim Trust Interests" means interests in the Claimant Trust to be distributed to Holders of Allowed Class 8 General Unsecured Claims (including Disputed General Unsecured Claims that are subsequently Allowed) in accordance with the Plan.

(z) "GUC Beneficiaries" means the Claimant Trust Beneficiaries who hold General Unsecured Claim Trust Interests.

(aa) "GUC Payment Certification" has the meaning given to it in Section 5.1(c) hereof.

(bb) "HarbourVest" means, collectively, HarbourVest 2017 Global Fund, L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment, L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners, L.P.

(cc) "Investment Advisers Act" means the Investment Advisers Act of 1940, as amended.

(dd) "Investment Company Act" means the Investment Company Act of 1940, as amended.

(ee) "Litigation Sub-Trust" means the sub-trust created pursuant to the Litigation Sub-Trust Agreement, which shall hold the Claimant Trust Assets that are Estate Claims and investigate, litigate, and/or settle the Estate Claims for the benefit of the Claimant Trust.

(ff) "Litigation Sub-Trust Agreement" means the litigation sub-trust agreement to be entered into by and between the Claimant Trustee and Litigation Trustee establishing and setting forth the terms and conditions of the Litigation Sub-Trust and governing the rights and responsibilities of the Litigation Trustee.

(gg) "Litigation Trustee" means Marc S. Kirschner, and any successor Litigation Trustee that may be appointed pursuant to the terms of the Litigation Sub-Trust Agreement, who shall be responsible for investigating, litigating, and settling the Estate Claims for the benefit of the Claimant Trust in accordance with the terms and conditions set forth in the Litigation Sub-Trust Agreement.

(hh) "Managed Funds" means Highland Multi-Strategy Credit Fund, L.P., Highland Restoration Capital Partners, L.P., and any other investment vehicle managed by the Debtor pursuant to an Executory Contract assumed pursuant to the Plan; *provided, however,* that the Highland Select Equity Fund, L.P. (and its direct and indirect subsidiaries) will not be considered a Managed Fund for purposes hereof.

(ii) "Material Claims" means the Claims asserted by UBS, Patrick Hagaman Daugherty, Integrated Financial Associates, Inc., and the Employees.

(jj) "Member" means a Person that is member of the Oversight Board.

(kk) "New GP LLC" means the general partner of the Reorganized Debtor.

(ll) "Oversight Board" means the board comprised of five (5) Members established pursuant to the Plan and Article III of this Agreement to oversee the Claimant Trustee's performance of his duties and otherwise serve the functions set forth in this Agreement and those of the "Claimant Trust Oversight Committee" described in the Plan. Subject to the terms of this Agreement, the initial Members of the Oversight Board shall be: (i) Eric Felton, as representative of the Redeemer Committee; (ii) Josh Terry, as representative of Acis; (iii) Elizabeth Kozlowski, as representative of UBS; (iv) Paul McVoy, as representative of Meta-e Discovery; and (v) David Pauker.

(mm) "Plan" has the meaning set forth in the Recitals hereof.

(nn) "Privileges" means the Debtor's rights, title and interests in and to any privilege or immunity attaching to any documents or communications (whether written or oral) associated with any of the Estate Claims or Employee Claims, including, without limitation, to,

attorney-client privilege and work-product privilege as defined in Rule 502(g) of the Federal Rules of Evidence; provided, however, that "Privileges" shall not include the work-product privilege of any non-Employee attorney or attorneys that has not been previously shared with the Debtor or any of its employees and the work-product privilege shall remain with the non-Employee attorney or attorneys who created such work product so long as it has not been previously shared with the Debtor or any of its employees, or otherwise waived.

(oo) "PSZJ" means Pachulski Stang Ziehl & Jones LLP.

(pp) "Redeemer Committee" means the Redeemer Committee of the Highland Crusader Fund.

(qq) "Registrar" has the meaning given to it in Section 5.3(a) hereof.

(rr) "Reorganized Debtor Assets" means any limited and general partnership interests held by the Debtor, the management of the Managed Funds and those Causes of Action (including, without limitation, claims for breach of fiduciary duty), that, for any reason, are not capable of being transferred to the Claimant Trust. For the avoidance of doubt, "Reorganized Debtor Assets" includes any partnership interests or shares of Managed Funds held by the Debtor but does not include the underlying portfolio assets held by the Managed Funds.

(ss) "Securities Act" means the Securities Act of 1933, as amended.

(tt) "Subordinated Beneficiaries" means the Claimant Trust Beneficiaries who hold Subordinated Claim Trust Interests.

(uu) "Subordinated Claim Trust Interests" means the subordinated interests in the Claimant Trust to be distributed to Holders of Allowed Class 9 Subordinated Claims in accordance with the Plan.

(vv) "TIA" means the Trust Indenture Act of 1939, as amended.

(ww) "Trust Interests" means collectively the General Unsecured Claim Trust Interests, Subordinated Claim Trust Interests, and Equity Trust Interests.

(xx) "Trust Register" has the meaning given to it in Section 5.4(b) hereof.

(yy) "Trustees" means collectively the Claimant Trustee and Delaware Trustee, however, it is expressly understood and agreed that the Delaware Trustee shall have none of the duties or liabilities of the Claimant Trustee.

(zz) "UBS" means collectively UBS Securities LLC and UBS AG London Branch.

(aaa) "WilmerHale" Wilmer Cutler Pickering Hale & Dorr LLP.

1.2 General Construction. As used in this Agreement, the masculine, feminine and neuter genders, and the plural and singular numbers shall be deemed to include the others in all

cases where they would apply. "Includes" and "including" are not limiting and "or" is not exclusive. References to "Articles," "Sections" and other subdivisions, unless referring specifically to the Plan or provisions of the Bankruptcy Code, the Bankruptcy Rules, or other law, statute or regulation, refer to the corresponding Articles, Sections and other subdivisions of this Agreement, and the words "herein," "hereafter" and words of similar import refer to this Agreement as a whole and not to any particular Article, Section, or subdivision of this Agreement. Amounts expressed in dollars or following the symbol "$" shall be deemed to be in United States dollars. References to agreements or instruments shall be deemed to refer to such agreements or instruments as the same may be amended, supplemented, or otherwise modified in accordance with the terms thereof.

1.3 Incorporation of the Plan. The Plan is hereby incorporated into this Agreement and made a part hereof by this reference.

ARTICLE II.
ESTABLISHMENT OF THE CLAIMANT TRUST

2.1 Creation of Name of Trust.

(a) The Claimant Trust is hereby created as a statutory trust under the Delaware Statutory Trust Act and shall be called the "Highland Claimant Trust." The Claimant Trustee shall be empowered to conduct all business and hold all property constituting the Claimant Trust Assets in such name in accordance with the terms and conditions set forth herein.

(b) The Trustees shall cause to be executed and filed in the office of the Secretary of State of the State of Delaware the Certificate of Trust and agree to execute, acting solely in their capacity as Trustees, such certificates as may from time to time be required under the Delaware Statutory Trust Act or any other Delaware law.

2.2 Objectives.

(a) The Claimant Trust is established for the purpose of satisfying Allowed General Unsecured Claims and Allowed Subordinated Claims (and only to the extent provided herein, Allowed Class A Limited Partnership Interests and Class B/C Limited Partnership Interests) under the Plan, by monetizing the Claimant Trust Assets transferred to it and making distributions to the Claimant Trust Beneficiaries. The Claimant Trust shall not continue or engage in any trade or business except to the extent reasonably necessary to monetize and distribute the Claimant Trust Assets consistent with this Agreement and the Plan and act as sole member and manager of New GP LLC. The Claimant Trust shall provide a mechanism for (i) the monetization of the Claimant Trust Assets and (ii) the distribution of the proceeds thereof, net of all claims, expenses, charges, liabilities, and obligations of the Claimant Trust, to the Claimant Trust Beneficiaries in accordance with the Plan. In furtherance of this distribution objective, the Claimant Trust will, from time to time, prosecute and resolve objections to certain Claims and Interests as provided herein and in the Plan.

(b) It is intended that the Claimant Trust be classified for federal income tax purposes as a "liquidating trust" within the meaning of section 301.7701-4(d) of the Treasury Regulations. In furtherance of this objective, the Claimant Trustee shall, in his business judgment,

make continuing best efforts to (i) dispose of or monetize the Claimant Trust Assets and resolve Claims, (ii) make timely distributions, and (iii) not unduly prolong the duration of the Claimant Trust, in each case in accordance with this Agreement.

2.3 Nature and Purposes of the Claimant Trust.

(a) The Claimant Trust is organized and established as a trust for the purpose of monetizing the Claimant Trust Assets and making distributions to Claimant Trust Beneficiaries in a manner consistent with "liquidating trust" status under Treasury Regulation Section 301.7701-4(d). The Claimant Trust shall retain all rights to commence and pursue all Causes of Action of the Debtor other than (i) Estate Claims, which shall be assigned to and commenced and pursued by the Litigation Trustee pursuant to the terms of the Litigation Sub-Trust Agreement, and (ii) Causes of Action constituting Reorganized Debtor Assets, if any, which shall be commenced and pursued by the Reorganized Debtor at the direction of the Claimant Trust as sole member of New GP LLC pursuant to the terms of the Reorganized Limited Partnership Agreement. The Claimant Trust and Claimant Trustee shall have and retain, and, as applicable, assign and transfer to the Litigation Sub-Trust and Litigation Trustee, any and all rights, defenses, cross-claims and counter-claims held by the Debtor with respect to any Claim as of the Petition Date. On and after the date hereof, in accordance with and subject to the Plan, the Claimant Trustee shall have the authority to (i) compromise, settle or otherwise resolve, or withdraw any objections to Claims against the Debtor, provided, however, the Claimant Trustee shall only have the authority to compromise or settle any Employee Claim with the unanimous consent of the Oversight Board and in the absence of unanimous consent, any such Employee Claim shall be transferred to the Litigation Sub-Trust and be litigated, comprised, settled, or otherwise resolved exclusively by the Litigation Trustee and (ii) compromise, settle, or otherwise resolve any Disputed Claims without approval of the Bankruptcy Court, which authority may be shared with or transferred to the Litigation Trustee in accordance with the terms of the Litigation Sub-Trust Agreement. For the avoidance of doubt, the Claimant Trust, pursuant to section 1123(b)(3)(B) of the Bankruptcy Code and applicable state trust law, is appointed as the successor-in-interest to, and representative of, the Debtor and its Estate for the retention, enforcement, settlement, and adjustment of all Claims other than Estate Claims, the Employee Claims, and those Claims constituting Reorganized Debtor Assets.

(b) The Claimant Trust shall be administered by the Claimant Trustee, in accordance with this Agreement, for the following purposes:

(i) to manage and monetize the Claimant Trust Assets in an expeditious but orderly manner with a view towards maximizing value within a reasonable time period;

(ii) to litigate and settle Claims in Class 8 and Class 9 (other than the Employee Claims, which shall be litigated and/or settled by the Litigation Trustee if the Oversight Board does not unanimously approve of any proposed settlement of such Employee Claim by the Claimant Trustee) and any of the Causes of Action included in the Claimant Trust Assets (including any cross-claims and counter-claims); provided, however, that Estate Claims transferred to the Litigation Sub-Trust shall be litigated and settled by the Litigation Trustee pursuant to the terms of the Litigation Sub-Trust Agreement;

(iii) to distribute net proceeds of the Claimant Trust Assets to the Claimant Trust Beneficiaries;

(iv) to distribute funds from the Disputed Claims Reserve to Holders of Trust Interests or to the Reorganized Debtor for distribution to Holders of Disputed Claims in each case in accordance with the Plan from time to time as any such Holder's Disputed Claim becomes an Allowed Claim under the Plan;

(v) to distribute funds to the Litigation Sub-Trust at the direction the Oversight Board;

(vi) to serve as the limited partner of, and to hold the limited partnership interests in, the Reorganized Debtor;

(vii) to serve as the sole member and manager of New GP LLC, the Reorganized Debtor's general partner;

(viii) to oversee the management and monetization of the Reorganized Debtor Assets pursuant to the terms of the Reorganized Limited Partnership Agreement, in its capacity as the sole member and manager of New GP LLC pursuant to the terms of the New GP LLC Documents, all with a view toward maximizing value in a reasonable time in a manner consistent with the Reorganized Debtor's fiduciary duties as investment adviser to the Managed Funds; and

(ix) to perform any other functions and take any other actions provided for or permitted by this Agreement and the Plan, and in any other agreement executed by the Claimant Trustee.

2.4 Transfer of Assets and Rights to the Claimant Trust; Litigation Sub-Trust.

(a) On the Effective Date, pursuant to the Plan, the Debtor shall irrevocably transfer, assign, and deliver, and shall be deemed to have transferred, assigned, and delivered, all Claimant Trust Assets and related Privileges held by the Debtor to the Claimant Trust free and clear of all Claims, Interests, Liens, and other encumbrances, and liabilities, except as provided in the Plan and this Agreement. To the extent certain assets comprising the Claimant Trust Assets, because of their nature or because such assets will accrue or become transferable subsequent to the Effective Date, and cannot be transferred to, vested in, and assumed by the Claimant Trust on such date, such assets shall be considered Reorganized Debtor Assets, which may be subsequently transferred to the Claimant Trust by the Reorganized Debtor consistent with the terms of the Reorganized Limited Partnership Agreement after such date.

(b) On or as soon as practicable after the Effective Date, the Claimant Trust shall irrevocably transfer, assign, and deliver, and shall be deemed to have transferred, assigned, and delivered, all Estate Claims and related Privileges held by the Claimant Trust to the Litigation Sub-Trust Trust free and clear of all Claims, Interests, Liens, and other encumbrances, and liabilities, except as provided in the Plan, this Agreement, and the Litigation Sub-Trust Agreement. Following the transfer of such Privileges, the Litigation Trustee shall have the power to waive the Privileges being so assigned and transferred.

(c) On or before the Effective Date, and continuing thereafter, the Debtor or Reorganized Debtor, as applicable, shall provide (i) for the Claimant Trustee's and Litigation Trustee's reasonable access to all records and information in the Debtor's and Reorganized Debtor's possession, custody or control, (ii) that all Privileges related to the Claimant Trust Assets shall transfer to and vest exclusively in the Claimant Trust (except for those Privileges that will be transferred and assigned to the Litigation Sub-Trust in respect of the Estate Claims), and (iii) subject to Section 3.12(c), the Debtor and Reorganized Debtor shall preserve all records and documents (including all electronic records or documents), including, but not limited to, the Debtor's file server, email server, email archiving system, master journal, SharePoint, Oracle E-Business Suite, Advent Geneva, Siepe database, Bloomberg chat data, and any backups of the foregoing, until such time as the Claimant Trustee, with the consent of the Oversight Board and, if pertaining to any of the Estate Claims, the Litigation Trustee, directs the Reorganized Debtor, as sole member of its general partner, that such records are no longer required to be preserved. For the purposes of transfer of documents, the Claimant Trust or Litigation Sub-Trust, as applicable, is an assignee and successor to the Debtor in respect of the Claimant Trust Assets and Estate Claims, respectively, and shall be treated as such in any review of confidentiality restrictions in requested documents.

(d) Until the Claimant Trust terminates pursuant to the terms hereof, legal title to the Claimant Trust Assets (other than Estate Claims) and all property contained therein shall be vested at all times in the Claimant Trust as a separate legal entity, except where applicable law in any jurisdiction requires title to any part of the Claimant Trust Assets to be vested in the Claimant Trustee, in which case title shall be deemed to be vested in the Claimant Trustee, solely in his capacity as Claimant Trustee. For purposes of such jurisdictions, the term Claimant Trust, as used herein, shall be read to mean the Claimant Trustee.

2.5 Principal Office. The principal office of the Claimant Trust shall be maintained by the Claimant Trustee at the following address: 100 Crescent Court, Suite 1850, Dallas, Texas 75201.

2.6 Acceptance. The Claimant Trustee accepts the Claimant Trust imposed by this Agreement and agrees to observe and perform that Claimant Trust, on and subject to the terms and conditions set forth herein and in the Plan.

2.7 Further Assurances. The Debtor, Reorganized Debtor, and any successors thereof will, upon reasonable request of the Claimant Trustee, execute, acknowledge and deliver such further instruments and do such further acts as may be necessary or proper to transfer to the Claimant Trustee any portion of the Claimant Trust Assets intended to be conveyed hereby and in the Plan in the form and manner provided for hereby and in the Plan and to vest in the Claimant Trustee the powers, instruments or funds in trust hereunder.

2.8 Incidents of Ownership. The Claimant Trust Beneficiaries shall be the sole beneficiaries of the Claimant Trust and the Claimant Trustee shall retain only such incidents of ownership as are necessary to undertake the actions and transactions authorized herein.

ARTICLE III.
THE TRUSTEES

3.1 Role. In furtherance of and consistent with the purpose of the Claimant Trust, the Plan, and this Agreement, the Claimant Trustee, subject to the terms and conditions contained herein, in the Plan, and in the Confirmation Order, shall serve as Claimant Trustee with respect to the Claimant Trust Assets for the benefit of the Claimant Trust Beneficiaries and maintain, manage, and take action on behalf of the Claimant Trust.

3.2 Authority.

(a) In connection with the administration of the Claimant Trust, in addition to any and all of the powers enumerated elsewhere herein, the Claimant Trustee shall, in an expeditious but orderly manner, monetize the Claimant Trust Assets, make timely distributions and not unduly prolong the duration of the Claimant Trust. The Claimant Trustee shall have the power and authority and is authorized to perform any and all acts necessary and desirable to accomplish the purposes of this Agreement and the provisions of the Plan and the Confirmation Order relating to the Claimant Trust, within the bounds of this Agreement, the Plan, the Confirmation Order, and applicable law. The Claimant Trustee will monetize the Claimant Trust Assets with a view toward maximizing value in a reasonable time.

(b) The Claimant Trustee, subject to the limitations set forth in Section 3.3 of this Agreement shall have the right to prosecute, defend, compromise, adjust, arbitrate, abandon, estimate, or otherwise deal with and settle any and all Claims and Causes of Action that are part of the Claimant Trust Assets, other than the Estate Claims transferred to the Litigation Sub-Trust, as the Claimant Trustee determines is in the best interests of the Claimant Trust; provided, however, that if the Claimant Trustee proposes a settlement of an Employee Claim and does not obtain unanimous consent of the Oversight Board of such settlement, such Employee Claim shall be transferred to the Litigation Sub-Trust for the Litigation Trustee to litigate. To the extent that any action has been taken to prosecute, defend, compromise, adjust, arbitrate, abandon, or otherwise deal with and settle any such Claims and Causes of Action prior to the Effective Date, on the Effective Date the Claimant Trustee shall be substituted for the Debtor in connection therewith in accordance with Rule 25 of the Federal Rules of Civil Procedure, made applicable by Rule 7025 of the Federal Rules of Bankruptcy Procedure, and the caption with respect to such pending action shall be changed to the following "[Claimant Trustee], not individually but solely as Claimant Trustee for the Claimant Trust, et al. v. [Defendant]".

(c) Subject in all cases to any limitations contained herein, in the Confirmation Order, or in the Plan, the Claimant Trustee shall have the power and authority to:

(i) solely as required by Section 2.4(d), hold legal title to any and all rights of the Claimant Trust and Beneficiaries in or arising from the Claimant Trust Assets, including collecting and receiving any and all money and other property belonging to the Claimant Trust and the right to vote or exercise any other right with respect to any claim or interest relating to the Claimant Trust Assets in any case under the Bankruptcy Code and receive any distribution with respect thereto;

(ii) open accounts for the Claimant Trust and make distributions of Claimant Trust Assets in accordance herewith;

(iii) as set forth in Section 3.11, exercise and perform the rights, powers, and duties held by the Debtor with respect to the Claimant Trust Assets (other than Estate Claims), including the authority under section 1123(b)(3) of the Bankruptcy Code, and shall be deemed to be acting as a representative of the Debtor's Estate with respect to the Claimant Trust Assets, including with respect to the sale, transfer, or other disposition of the Claimant Trust Assets;

(iv) settle or resolve any Claims in Class 8 and Class 9 other than the Material Claims and any Equity Interests;

(v) sell or otherwise monetize any publicly-traded asset for which there is a marketplace and any other assets (other than the Other Assets (as defined below)) valued less than or equal to $3,000,000 (over a thirty-day period);

(vi) upon the direction of the Oversight Board, fund the Litigation Sub-Trust on the Effective Date and as necessary thereafter;

(vii) exercise and perform the rights, powers, and duties arising from the Claimant Trust's role as sole member of New GP LLC, and the role of New GP LLC, as general partner of the Reorganized Debtor, including the management of the Managed Funds;

(viii) protect and enforce the rights to the Claimant Trust Assets by any method deemed appropriate, including by judicial proceedings or pursuant to any applicable bankruptcy, insolvency, moratorium or similar law and general principles of equity;

(ix) obtain reasonable insurance coverage with respect to any liabilities and obligations of the Trustees, Litigation Trustee, and the Members of the Oversight Board solely in their capacities as such, in the form of fiduciary liability insurance, a directors and officers policy, an errors and omissions policy, or otherwise. The cost of any such insurance shall be a Claimant Trust Expense and paid by the Claimant Trustee from the Claimant Trust Assets;

(x) without further order of the Bankruptcy Court, but subject to the terms of this Agreement, employ various consultants, third-party service providers, and other professionals, including counsel, tax advisors, consultants, brokers, investment bankers, valuation counselors, and financial advisors, as the Claimant Trustee deems necessary to aid him in fulfilling his obligations under this Agreement; such consultants, third-party service providers, and other professionals shall be retained pursuant to whatever fee arrangement the Claimant Trustee deems appropriate, including contingency fee arrangements and any fees and expenses incurred by such professionals engaged by the Claimant Trustee shall be Claimant Trust Expenses and paid by the Claimant Trustee from the Claimant Trust Assets;

(xi) retain and approve compensation arrangements of an independent public accounting firm to perform such reviews and/or audits of the financial books and records of the Claimant Trust as may be required by this Agreement, the Plan, the Confirmation Order, and applicable laws and as may be reasonably and appropriate in Claimant Trustee's discretion. Subject to the foregoing, the Claimant Trustee may commit the Claimant Trust to, and shall pay,

such independent public accounting firm reasonable compensation for services rendered and reasonable and documented out-of-pocket expenses incurred, and all such compensation and reimbursement shall be paid by the Claimant Trustee from Claimant Trust Assets;

(xii) prepare and file (A) tax returns for the Claimant Trust treating the Claimant Trust as a grantor trust pursuant to Treasury Regulation section 1.671-4(a), (B) an election pursuant to Treasury Regulation 1.468B-9(c) to treat the Disputed Claims Reserve as a disputed ownership fund, in which case the Claimant Trustee will file federal income tax returns and pay taxes for the Disputed Claim Reserve as a separate taxable entity, or (C) any periodic or current reports that may be required under applicable law;

(xiii) prepare and send annually to the Beneficiaries, in accordance with the tax laws, a separate statement stating a Beneficiary's interest in the Claimant Trust and its share of the Claimant Trust's income, gain, loss, deduction or credit, and to instruct all such Beneficiaries to report such items on their federal tax returns;

(xiv) to the extent applicable, assert, enforce, release, or waive any attorney-client communication, attorney work product or other Privilege or defense on behalf of the Claimant Trust (including as to any Privilege that the Debtor held prior to the Effective Date), including to provide any information to insurance carriers that the Claimant Trustee deems necessary to utilize applicable insurance coverage for any Claim or Claims;

(xv) subject to Section 3.4, invest the proceeds of the Claimant Trust Assets and all income earned by the Claimant Trust, pending any distributions in short-term certificates of deposit, in banks or other savings institutions, or other temporary, liquid investments, such as Treasury bills;

(xvi) request any appropriate tax determination with respect to the Claimant Trust, including a determination pursuant to section 505 of the Bankruptcy Code;

(xvii) take or refrain from taking any and all actions the Claimant Trustee reasonably deems necessary for the continuation, protection, and maximization of the value of the Claimant Trust Assets consistent with purposes hereof;

(xviii) take all steps and execute all instruments and documents necessary to effectuate the purpose of the Claimant Trust and the activities contemplated herein and in the Confirmation Order and the Plan, and take all actions necessary to comply with the Confirmation Order, the Plan, and this Agreement and the obligations thereunder and hereunder;

(xix) exercise such other powers and authority as may be vested in or assumed by the Claimant Trustee by any Final Order;

(xx) evaluate and determine strategy with respect to the Claimant Trust Assets, and hold, pursue, prosecute, adjust, arbitrate, compromise, release, settle or abandon the Claimant Trust Assets on behalf of the Claimant Trust; and

(xxi) with respect to the Claimant Trust Beneficiaries, perform all duties and functions of the Distribution Agent as set forth in the Plan, including distributing Cash from

the Disputed Claims Reserve, solely on account of Disputed Class 1 through Class 7 Claims that were Disputed as of the Effective Date, but become Allowed, to the Reorganization Debtor such that the Reorganized Debtor can satisfy its duties and functions as Distribution Agent with respect to Claims in Class 1 through Class 7 (the foregoing subparagraphs (i)-(xxi) being collectively, the "Authorized Acts").

(d) The Claimant Trustee and the Oversight Committee will enter into an agreement as soon as practicable after the Effective Date concerning the Claimant Trustee's authority with respect to certain other assets, including certain portfolio company assets (the "Other Assets").

(e) The Claimant Trustee has the power and authority to act as trustee of the Claimant Trust and perform the Authorized Acts through the date such Claimant Trustee resigns, is removed, or is otherwise unable to serve for any reason.

3.3 Limitation of Authority.

(a) Notwithstanding anything herein to the contrary, the Claimant Trust and the Claimant Trustee shall not (i) be authorized to engage in any trade or business, (ii) take any actions inconsistent with the management of the Claimant Trust Assets as are required or contemplated by applicable law, the Confirmation Order, the Plan, and this Agreement, (iii) take any action in contravention of the Confirmation Order, the Plan, or this Agreement, or (iv) cause New GP LLC to cause the Reorganized Debtor to take any action in contravention of the Plan, Plan Documents or the Confirmation Order.

(b) Notwithstanding anything herein to the contrary, and in no way limiting the terms of the Plan, the Claimant Trustee must receive the consent by vote of a simple majority of the Oversight Board pursuant to the notice and quorum requirements set forth in Section 4.5 herein, in order to:

(i) terminate or extend the term of the Claimant Trust;

(ii) prosecute, litigate, settle or otherwise resolve any of the Material Claims;

(iii) except otherwise set forth herein, sell or otherwise monetize any assets that are not Other Assets, including Reorganized Debtor Assets (other than with respect to the Managed Funds), that are valued greater than $3,000,000 (over a thirty-day period);

(iv) except for cash distributions made in accordance with the terms of this Agreement, make any cash distributions to Claimant Trust Beneficiaries in accordance with Article IV of the Plan;

(v) except for any distributions made in accordance with the terms of this Agreement, make any distributions from the Disputed Claims Reserve to Holders of Disputed Claims after such time that such Holder's Claim becomes an Allowed Claim under the Plan;

(vi) reserve or retain any cash or cash equivalents in an amount reasonably necessary to meet claims and contingent liabilities (including Disputed Claims and any indemnification obligations that may arise under Section 8.2 of this Agreement), to maintain the value of the Claimant Trust Assets, or to fund ongoing operations and administration of the Litigation Sub-Trust;

(vii) borrow as may be necessary to fund activities of the Claimant Trust;

(viii) determine whether the conditions under Section 5.1(c) of this Agreement have been satisfied such that a certification should be filed with the Bankruptcy Court;

(ix) invest the Claimant Trust Assets, proceeds thereof, or any income earned by the Claimant Trust (for the avoidance of doubt, this shall not apply to investment decisions made by the Reorganized Debtor or its subsidiaries solely with respect to Managed Funds);

(x) change the compensation of the Claimant Trustee;

(xi) subject to ARTICLE X, make structural changes to the Claimant Trust or take other actions to minimize any tax on the Claimant Trust Assets; and

(xii) retain counsel, experts, advisors, or any other professionals; provided, however, the Claimant Trustee shall not be required to obtain the consent of the Oversight Board for the retention of (i) PSZJ, WilmerHale, or Development Specialists, Inc. and (ii) any other professional whose expected fees and expenses are estimated at less than or equal to $200,000.

(c) [Reserved.]

3.4 Investment of Cash. The right and power of the Claimant Trustee to invest the Claimant Trust Assets, the proceeds thereof, or any income earned by the Claimant Trust, with majority approval of the Oversight Board, shall be limited to the right and power to invest in such Claimant Trust Assets only in Cash and U.S. Government securities as defined in section 29(a)(16) of the Investment Company Act; provided, however that (a) the scope of any such permissible investments shall be further limited to include only those investments that a "liquidating trust" within the meaning of Treasury Regulation Section 301.7701-4(d), may be permitted to hold, pursuant to the Treasury Regulations, or any modification in the Internal Revenue Service ("IRS") guidelines, whether set forth in IRS rulings, other IRS pronouncements, or otherwise, (b) the Claimant Trustee may retain any Claimant Trust Assets received that are not Cash only for so long as may be required for the prompt and orderly monetization or other disposition of such assets, and (c) the Claimant Trustee may expend the assets of the Claimant Trust (i) as reasonably necessary to meet contingent liabilities (including indemnification and similar obligations) and maintain the value of the assets of the Claimant Trust during the pendency of this Claimant Trust, (ii) to pay Claimant Trust Expenses (including, but not limited to, any taxes imposed on the Claimant Trust and reasonable attorneys' fees and expenses in connection with litigation), and (iii) to satisfy other liabilities incurred or assumed by the Claimant Trust (or to which the assets are otherwise subject) in accordance with the Plan or this Agreement).

3.5 Binding Nature of Actions. All actions taken and determinations made by the Claimant Trustee in accordance with the provisions of this Agreement shall be final and binding upon any and all Beneficiaries.

3.6 Term of Service. The Claimant Trustee shall serve as the Claimant Trustee for the duration of the Claimant Trust, subject to death, resignation or removal.

3.7 Resignation. The Claimant Trustee may resign as Claimant Trustee of the Claimant Trust by an instrument in writing delivered to the Bankruptcy Court and Oversight Board at least thirty (30) days before the proposed effective date of resignation. The Claimant Trustee shall continue to serve as Claimant Trustee after delivery of the Claimant Trustee's resignation until the proposed effective date of such resignation, unless the Claimant Trustee and a simple majority of the Oversight Board consent to an earlier effective date, which earlier effective date shall be no earlier than the date of appointment of a successor Claimant Trustee in accordance with Section 3.9 hereof becomes effective.

3.8 Removal.

(a) The Claimant Trustee may be removed by a simple majority vote of the Oversight Board for Cause for Cause immediately upon notice thereof, or without Cause upon 60 days' prior written notice. Upon the removal of the Claimant Trustee pursuant hereto, the Claimant Trustee will resign, or be deemed to have resigned, from any role or position he or she may have at New GP LLC or the Reorganized Debtor effective upon the expiration of the foregoing 60 day period unless the Claimant Trustee and a simple majority of the Oversight Board agree otherwise.

(b) To the extent there is any dispute regarding the removal of a Claimant Trustee (including any dispute relating to any compensation or expense reimbursement due under this Agreement) the Bankruptcy Court shall retain jurisdiction to consider and adjudicate such dispute. Notwithstanding the foregoing, the Claimant Trustee will continue to serve as the Claimant Trustee after his removal until the earlier of (i) the time when a successor Claimant Trustee will become effective in accordance with Section 3.9 of this Agreement or (ii) such date as the Bankruptcy Court otherwise orders.

3.9 Appointment of Successor.

(a) Appointment of Successor. In the event of a vacancy by reason of the death or Disability (in the case of a Claimant Trustee that is a natural person), dissolution (in the case of a Claimant Trustee that is not a natural person), or removal of the Claimant Trustee, or prospective vacancy by reason of resignation, a successor Claimant Trustee shall be selected by a simple majority vote of the Oversight Board. If Members of the Oversight Board are unable to secure a majority vote, the Bankruptcy Court will determine the successor Claimant Trustee on motion of the Members. If a final decree has been entered closing the Chapter 11 Case, the Claimant Trustee may seek to reopen the Chapter 11 Case for the limited purpose of determining the successor Claimant Trustee, and the costs for such motion and costs related to re-opening the Chapter 11 Case shall be paid by the Claimant Trust. The successor Claimant Trustee shall be appointed as soon as practicable, but in any event no later than sixty (60) days after the occurrence of the

vacancy or, in the case of resignation, on the effective date of the resignation of the then acting Claimant Trustee.

(b) Vesting or Rights in Successor Claimant Trustee. Every successor Claimant Trustee appointed hereunder shall execute, acknowledge, and deliver to the Claimant Trust, the exiting Claimant Trustee, the Oversight Board, and file with the Bankruptcy Court, an instrument accepting such appointment subject to the terms and provisions hereof. The successor Claimant Trustee, without any further act, deed, or conveyance shall become vested with all the rights, powers, trusts and duties of the exiting Claimant Trustee, except that the successor Claimant Trustee shall not be liable for the acts or omissions of the retiring Claimant Trustee. In no event shall the retiring Claimant Trustee be liable for the acts or omissions of the successor Claimant Trustee.

(c) Interim Claimant Trustee. During any period in which there is a vacancy in the position of Claimant Trustee, the Oversight Board shall appoint one of its Members to serve as the interim Claimant Trustee (the "Interim Trustee") until a successor Claimant Trustee is appointed pursuant to Section 3.9(a). The Interim Trustee shall be subject to all the terms and conditions applicable to a Claimant Trustee hereunder. Such Interim Trustee shall not be limited in any manner from exercising any rights or powers as a Member of the Oversight Board merely by such Person's appointment as Interim Trustee.

3.10 Continuance of Claimant Trust. The death, resignation, or removal of the Claimant Trustee shall not operate to terminate the Claimant Trust created by this Agreement or to revoke any existing agency (other than any agency of the Claimant Trustee as the Claimant Trustee) created pursuant to the terms of this Agreement or invalidate any action taken by the Claimant Trustee. In the event of the resignation or removal of the Claimant Trustee, the Claimant Trustee shall promptly (i) execute and deliver, by the effective date of resignation or removal, such documents, instruments, records, and other writings as may be reasonably requested by his successor to effect termination of the exiting Claimant Trustee's capacity under this Agreement and the conveyance of the Claimant Trust Assets then held by the exiting Claimant Trustee to the successor Claimant Trustee; (ii) deliver to the successor Claimant Trustee all non-privileged documents, instruments, records, and other writings relating to the Claimant Trust as may be in the possession or under the control of the exiting Claimant Trustee, provided, the exiting Claimant Trustee shall have the right to make and retain copies of such documents, instruments, records and other writings delivered to the successor Claimant Trustee and the cost of making such copies shall be a Claimant Trust Expense to be paid by the Claimant Trust; and (iii) otherwise assist and cooperate in effecting the assumption of the exiting Claimant Trustee's obligations and functions by his successor, provided the fees and expenses of such assistance and cooperation shall be paid to the exiting Claimant Trustee by the Claimant Trust. The exiting Claimant Trustee shall irrevocably appoint the successor Claimant Trustee as his attorney-in-fact and agent with full power of substitution for it and its name, place and stead to do any and all acts that such exiting Claimant Trustee is obligated to perform under this Section 3.10.

3.11 Claimant Trustee as "Estate Representative". The Claimant Trustee will be the exclusive trustee of the Claimant Trust Assets for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code (the "Estate Representative") with respect to the Claimant

Trust Assets, with all rights and powers attendant thereto, in addition to all rights and powers granted in the Plan and in this Agreement; provided that all rights and powers as representative of the Estate pursuant to section 1123(b)(3)(B) shall be transferred to the Litigation Trustee in respect of the Estate Claims and the Employee Claims. The Claimant Trustee will be the successor-in-interest to the Debtor with respect to any action pertaining to the Claimant Trust Assets, which was or could have been commenced by the Debtor prior to the Effective Date, except as otherwise provided in the Plan or Confirmation Order. All actions, claims, rights or interest constituting Claimant Trust Assets are preserved and retained and may be enforced, or assignable to the Litigation Sub-Trust, by the Claimant Trustee as an Estate Representative.

3.12 Books and Records.

(a) The Claimant Trustee shall maintain in respect of the Claimant Trust and the Claimant Trust Beneficiaries books and records reflecting Claimant Trust Assets in its possession and the income of the Claimant Trust and payment of expenses, liabilities, and claims against or assumed by the Claimant Trust in such detail and for such period of time as may be necessary to enable it to make full and proper accounting in respect thereof. Such books and records shall be maintained as reasonably necessary to facilitate compliance with the tax reporting requirements of the Claimant Trust and the requirements of Article VII herein. Except as otherwise provided herein, nothing in this Agreement requires the Claimant Trustee to file any accounting or seek approval of any court with respect to the administration of the Claimant Trust, or as a condition for managing any payment or distribution out of the Claimant Trust Assets.

(b) The Claimant Trustee shall provide quarterly reporting to the Oversight Board and Claimant Trust Beneficiaries of (i) the status of the Claimant Trust Assets, (ii) the balance of Cash held by the Claimant Trust (including in each of the Claimant Trust Expense Reserve and Disputed Claim Reserve), (iii) the determination and any re-determination, as applicable, of the total amount allocated to the Disputed Claim Reserve, (iv) the status of Disputed Claims and any resolutions thereof, (v) the status of any litigation, including the pursuit of the Causes of Action, (vi) the Reorganized Debtor's performance, and (vii) operating expenses; provided, however, that the Claimant Trustee may, with respect to any Member of the Oversight Board or Claimant Trust Beneficiary, redact any portion of such reports that relate to such Entity's Claim or Equity Interest, as applicable and any reporting provided to Claimant Trust Beneficiaries may be subject to such Claimant Trust Beneficiary's agreement to maintain confidentiality with respect to any non-public information.

(c) The Claimant Trustee may dispose some or all of the books and records maintained by the Claimant Trustee at the later of (i) such time as the Claimant Trustee determines, with the unanimous consent of the Oversight Board, that the continued possession or maintenance of such books and records is no longer necessary for the benefit of the Claimant Trust, or (ii) upon the termination and winding up of the Claimant Trust under Article IX of this Agreement; provided, however, the Claimant Trustee shall not dispose of any books and records related to the Estate Claims or Employee Claims without the consent of the Litigation Trustee. Notwithstanding the foregoing, the Claimant Trustee shall cause the Reorganized Debtor and its subsidiaries to retain such books and records, and for such periods, as are required to be retained pursuant to Section 204-2 of the Investment Advisers Act or any other applicable laws, rules, or regulations.

3.13 Compensation and Reimbursement; Engagement of Professionals.

(a) Compensation and Expenses.

(i) Compensation. As compensation for any services rendered by the Claimant Trustee in connection with this Agreement, the Claimant Trustee shall receive compensation of $150,000 per month (the "Base Salary"). Within the first forty-five days following the Confirmation Date, the Claimant Trustee, on the one hand, and the Committee, if prior to the Effective Date, or the Oversight Board, if on or after the Effective Date, on the other, will negotiate go-forward compensation for the Claimant Trustee which will include (a) the Base Salary, (b) a success fee, and (c) severance.

(ii) Expense Reimbursements. All reasonable out-of-pocket expenses of the Claimant Trustee in the performance of his or her duties hereunder, shall be reimbursed as Claimant Trust Expenses paid by the Claimant Trust.

(b) Professionals.

(i) Engagement of Professionals. The Claimant Trustee shall engage professionals from time to time in conjunction with the services provided hereunder. The Claimant Trustee's engagement of such professionals shall be approved by a majority of the Oversight Board as set forth in Section 3.3(b) hereof.

(ii) Fees and Expenses of Professionals. The Claimant Trustee shall pay the reasonable fees and expenses of any retained professionals as Claimant Trust Expenses.

3.14 Reliance by Claimant Trustee. Except as otherwise provided herein, the Claimant Trustee may rely, and shall be fully protected in acting or refraining from acting, on any resolution, statement, certificate, instrument, opinion, report, notice, request, consent, order or other instrument or document that the Claimant Trustee has no reason to believe to be other than genuine and to have been signed or presented by the proper party or parties or, in the case of facsimiles, to have been sent by the proper party or parties, and the Claimant Trustee may conclusively rely as to the truth of the statements and correctness of the opinions or direction expressed therein. The Claimant Trustee may consult with counsel and other professionals, and any advice of such counsel or other professionals shall constitute full and complete authorization and protection in respect of any action taken or not taken by the Claimant Trustee in accordance therewith. The Claimant Trustee shall have the right at any time to seek instructions from the Bankruptcy Court, or any other court of competent jurisdiction concerning the Claimant Trust Assets, this Agreement, the Plan, or any other document executed in connection therewith, and any such instructions given shall be full and complete authorization in respect of any action taken or not taken by the Claimant Trustee in accordance therewith. The Claimant Trust shall have the right to seek Orders from the Bankruptcy Court as set forth in Article IX of the Plan.

3.15 Commingling of Claimant Trust Assets. The Claimant Trustee shall not commingle any of the Claimant Trust Assets with his or her own property or the property of any other Person.

3.16 Delaware Trustee.

(a) The Delaware Trustee shall have the limited power and authority, and is hereby authorized and empowered, to (i) accept legal process served on the Claimant Trust in the State of Delaware; and (ii) execute any certificates that are required to be executed under the Delaware Statutory Trust Act and file such certificates in the office of the Secretary of State of the State of Delaware, and take such action or refrain from taking such action under this Agreement, in either case as may be directed in a writing delivered to the Delaware Trustee by the Claimant Trustee and upon which the Delaware Trustee shall be entitled to conclusively and exclusively rely; provided, however, that the Delaware Trustee shall not be required to take or to refrain from taking any such action if the Delaware Trustee shall believe, or shall have been advised by counsel, that such performance is likely to involve the Delaware Trustee in personal liability or to result in personal liability to the Delaware Trustee, or is contrary to the terms of this Agreement or of any document contemplated hereby to which the Claimant Trust or the Delaware Trustee is or becomes a party or is otherwise contrary to law. The Parties agree not to instruct the Delaware Trustee to take any action or to refrain from taking any action that is contrary to the terms of this Agreement or of any document contemplated hereby to which the Claimant Trust or the Delaware Trustee is or becomes party or that is otherwise contrary to law. Other than as expressly provided for in this Agreement, the Delaware Trustee shall have no duty or power to take any action for or on behalf of the Claimant Trust. For the avoidance of doubt, the Delaware Trustee will only have such rights and obligations as expressly provided by reference to the Delaware Trustee hereunder. The Delaware Trustee shall not be entitled to exercise any powers, nor shall the Delaware Trustee have any of the duties and responsibilities, of the Claimant Trustee set forth herein. The Delaware Trustee shall be one of the trustees of the Claimant Trust for the sole and limited purpose of fulfilling the requirements of Section 3807 of the Delaware Statutory Trust Act and for taking such actions as are required to be taken by a Delaware Trustee under the Delaware Statutory Trust Act. The duties (including fiduciary duties), liabilities and obligations of the Delaware Trustee shall be limited to those expressly set forth in this Section 3.16 and there shall be no other duties (including fiduciary duties) or obligations, express or implied, at law or in equity, of the Delaware Trustee. To the extent that, at law or in equity, the Delaware Trustee has duties (including fiduciary duties) and liabilities relating thereto to the Claimant Trust, the other parties hereto or any beneficiary of the Claimant Trust, it is hereby understood and agreed by the other parties hereto that such duties and liabilities are replaced by the duties and liabilities of the Delaware Trustee expressly set forth in this Agreement.

(b) The Delaware Trustee shall serve until such time as the Claimant Trustee removes the Delaware Trustee or the Delaware Trustee resigns and a successor Delaware Trustee is appointed by the Claimant Trustee in accordance with the terms hereof. The Delaware Trustee may resign at any time upon the giving of at least thirty (30) days' advance written notice to the Claimant Trustee; provided, that such resignation shall not become effective unless and until a successor Delaware Trustee shall have been appointed by the Claimant Trustee in accordance with the terms hereof. If the Claimant Trustee does not act within such thirty (30) day period, the Delaware Trustee may apply to the Court of Chancery of the State of Delaware for the appointment of a successor Delaware Trustee.

(c) Upon the resignation or removal of the Delaware Trustee, the Claimant Trustee shall appoint a successor Delaware Trustee by delivering a written instrument to the

outgoing Delaware Trustee. Any successor Delaware Trustee must satisfy the requirements of Section 3807 of the Delaware Statutory Trust Act. Any resignation or removal of the Delaware Trustee and appointment of a successor Delaware Trustee shall not become effective until a written acceptance of appointment is delivered by the successor Delaware Trustee to the outgoing Delaware Trustee and the Claimant Trustee and any undisputed fees, expenses and indemnity due to the outgoing Delaware Trustee are paid. Following compliance with the preceding sentence, the successor Delaware Trustee shall become fully vested with all of the rights, powers, duties and obligations of the outgoing Delaware Trustee under this Agreement, with like effect as if originally named as Delaware Trustee, and the outgoing Delaware Trustee shall be discharged of its duties and obligations under this Agreement.

(d) The Delaware Trustee shall be paid such compensation as agreed to pursuant to a separate fee agreement. The Claimant Trust shall promptly advance and reimburse the Delaware Trustee for all reasonable out-of-pocket costs and expenses (including reasonable legal fees and expenses) incurred by the Delaware Trustee in connection with the performance of its duties hereunder.

(e) WTNA shall not be responsible or liable for any failure or delay in the performance of its obligations under this Agreement arising out of or caused, directly or indirectly, by circumstances beyond its control, including without limitation, any act or provision of any present or future law or regulation or governmental authority; acts of God; earthquakes; fires; floods; wars; terrorism; civil or military disturbances; sabotage; epidemics; riots; interruptions, loss or malfunctions of utilities, computer (hardware or software) or communications service; accidents; labor disputes; acts of civil or military authority or governmental actions; or the unavailability of the Federal Reserve Bank wire or telex or other wire or communication facility.

(f) Any corporation or association into which WTNA may be converted or merged, or with which it may be consolidated, or to which it may sell or transfer all or substantially all of its corporate trust business and assets as a whole or substantially as a whole, or any corporation or association resulting from any such conversion, sale, merger, consolidation or transfer to which the Delaware Trustee is a party, will be and become the successor Delaware Trustee under this Agreement and will have and succeed to the rights, powers, duties, immunities and privileges as its predecessor, without the execution or filing of any instrument or paper or the performance of any further act.

ARTICLE IV.
THE OVERSIGHT BOARD

4.1 Oversight Board Members. The Oversight Board will be comprised of five (5) Members appointed to serve as the board of managers of the Claimant Trust, at least two (2) of which shall be disinterested Members selected by the Creditors' Committee (such disinterested members, the "Disinterested Members"). The initial Members of the Oversight Board will be representatives of Acis, the Redeemer Committee, Meta-e Discovery, UBS, and David Pauker. David Pauker and Paul McVoy, the representative of Meta-e Discovery, shall serve as the initial Disinterested Board Members; provided, however, that if the Plan is confirmed with the Convenience Class or any other convenience class supported by the Creditors' Committee, Meta-

E Discovery and its representative will resign on the Effective Date or as soon as practicable thereafter and be replaced in accordance with Section 4.10 hereof..

4.2 Authority and Responsibilities.

(a) The Oversight Board shall, as and when requested by either of the Claimant Trustee and Litigation Trustee, or when the Members otherwise deem it to be appropriate or as is otherwise required under the Plan, the Confirmation Order, or this Agreement, consult with and advise the Claimant Trustee and Litigation Trustee as to the administration and management of the Claimant Trust and the Litigation Sub-Trust, as applicable, in accordance with the Plan, the Confirmation Order, this Agreement, and Litigation Sub-Trust Agreement (as applicable) and shall have the other responsibilities and powers as set forth herein. As set forth in the Plan, the Confirmation Order, and herein, the Oversight Board shall have the authority and responsibility to oversee, review, and govern the activities of the Claimant Trust, including the Litigation Sub-Trust, and the performance of the Claimant Trustee and Litigation Trustee, and shall have the authority to remove the Claimant Trustee in accordance with Section 3.8 hereof or the Litigation Trustee in accordance with the terms of the Litigation Sub-Trust Agreement; provided, however, that the Oversight Board may not direct either Claimant Trustee and Litigation Trustee to act inconsistently with their respective duties under this Agreement (including without limitation as set in Section 4.2(e) below), the Litigation Sub-Trust Agreement, the Plan, the Confirmation Order, or applicable law.

(b) The Oversight Board shall also (i) monitor and oversee the administration of the Claimant Trust and the Claimant Trustee's performance of his or her responsibilities under this Agreement, (ii) as more fully set forth in the Litigation Sub-Trust Agreement, approve funding to the Litigation Sub-Trust, monitor and oversee the administration of the Litigation Sub-Trust and the Litigation Trustee's performance of his responsibilities under the Litigation Sub-Trust Agreement, and (iii) perform such other tasks as are set forth herein, in the Litigation Sub-Trust Agreement, and in the Plan.

(c) The Claimant Trustee shall consult with and provide information to the Oversight Board in accordance with and pursuant to the terms of the Plan, the Confirmation Order, and this Agreement to enable the Oversight Board to meet its obligations hereunder.

(d) Notwithstanding any provision of this Agreement to the contrary, the Claimant Trustee shall not be required to (i) obtain the approval of any action by the Oversight Board to the extent that the Claimant Trustee, in good faith, reasonably determines, based on the advice of legal counsel, that such action is required to be taken by applicable law, the Plan, the Confirmation Order, or this Agreement or (ii) follow the directions of the Oversight Board to take any action the extent that the Claimant Trustee, in good faith, reasonably determines, based on the advice of legal counsel, that such action is prohibited by applicable law the Plan, the Confirmation Order, or this Agreement.

(e) Notwithstanding provision of this Agreement to the contrary, with respect to the activities of the Reorganized Debtor in its capacity as an investment adviser (and subsidiaries of the Reorganized Debtor that serve as general partner or in an equivalent capacity) to any Managed Funds, the Oversight Board shall not make investment decisions or otherwise participate

in the investment decision making process relating to any such Managed Funds, nor shall the Oversight Board or any member thereof serve as a fiduciary to any such Managed Funds. It is agreed and understood that investment decisions made by the Reorganized Debtor (or its subsidiary entities) with respect to Managed Funds shall be made by the Claimant Trustee in his capacity as an officer of the Reorganized Debtor and New GP LLC and/or such persons who serve as investment personnel of the Reorganized Debtor from time to time, and shall be subject to the fiduciary duties applicable to such entities and persons as investment adviser to such Managed Funds.

4.3 Fiduciary Duties. The Oversight Board (and each Member in its capacity as such) shall have fiduciary duties to the Claimant Trust Beneficiaries consistent with the fiduciary duties that the members of the Creditors' Committee have to unsecured creditors and shall exercise its responsibilities accordingly; provided, however, that the Oversight Board shall not owe fiduciary obligations to any Holders of Class A Limited Partnership Interests or Class B/C Limited Partnership Interests until such Holders become Claimant Trust Beneficiaries in accordance with Section 5.1(c) hereof; provided, further, that the Oversight Board shall not owe fiduciary obligations to a Holder of an Equity Trust Interest if such Holder is named as a defendant in any of the Causes of Action, including Estate Claims, in their capacities as such, it being the intent that the Oversight Board's fiduciary duties are to maximize the value of the Claimant Trust Assets, including the Causes of Action. In all circumstances, the Oversight Board shall act in the best interests of the Claimant Trust Beneficiaries and in furtherance of the purpose of the Claimant Trust. Notwithstanding anything to the contrary contained in this Agreement, the foregoing shall not eliminate the implied contractual covenant of good faith and fair dealing.

4.4 Meetings of the Oversight Board. Meetings of the Oversight Board are to be held as necessary to ensure the operation of the Claimant Trust but in no event less often than quarterly. Special meetings of the Oversight Board may be held whenever and wherever called for by the Claimant Trustee or any Member; provided, however, that notice of any such meeting shall be duly given in writing no less than 48 hours prior to such meeting (such notice requirement being subject to any waiver by the Members in the minutes, if any, or other transcript, if any, of proceedings of the Oversight Board). Unless the Oversight Board decides otherwise (which decision shall rest in the reasonable discretion of the Oversight Board), the Claimant Trustee, and each of the Claimant Trustee's designated advisors may, but are not required to, attend meetings of the Oversight Board.

4.5 Unanimous Written Consent. Any action required or permitted to be taken by the Oversight Board in a meeting may be taken without a meeting if the action is taken by unanimous written consents describing the actions taken, signed by all Members and recorded. If any Member informs the Claimant Trustee (via e-mail or otherwise) that he or she objects to the decision, determination, action, or inaction proposed to be made by unanimous written consent, the Claimant Trustee must use reasonable good faith efforts to schedule a meeting on the issue to be set within 48 hours of the request or as soon thereafter as possible on which all members of the Oversight Board are available in person or by telephone. Such decision, determination, action, or inaction must then be made pursuant to the meeting protocols set forth herein.

4.6 Manner of Acting.

(a) A quorum for the transaction of business at any meeting of the Oversight Board shall consist of at least three Members (including no less than one (1) Disinterested Member); provided that if the transaction of business at a meeting would constitute a direct or indirect conflict of interest for the Redeemer Committee, Acis, and/or UBS, at least two Disinterested Members must be present for there to be a quorum. Except as set otherwise forth herein, the majority vote of the Members present at a duly called meeting at which a quorum is present throughout shall be the act of the Oversight Board except as otherwise required by law or as provided in this Agreement. Any or all of the Members may participate in a regular or special meeting by, or conduct the meeting through the use of, conference telephone, video conference, or similar communications equipment by means of which all Persons participating in the meeting may hear each other, in which case any required notice of such meeting may generally describe the arrangements (rather than or in addition of the place) for the holding hereof. Any Member participating in a meeting by this means is deemed to be present in person at the meeting. Voting (including on negative notice) may be conducted by electronic mail or individual communications by the applicable Trustee and each Member.

(b) Any Member who is present and entitled to vote at a meeting of the Oversight Board when action is taken is deemed to have assented to the action taken, subject to the requisite vote of the Oversight Board, unless (i) such Member objects at the beginning of the meeting (or promptly upon his/her arrival) to holding or transacting business at the meeting; (ii) his/her dissent or abstention from the action taken is entered in the minutes of the meeting; or (iii) he/she delivers written notice (including by electronic or facsimile transmission) of his/her dissent or abstention to the Oversight Board before its adjournment. The right of dissent or abstention is not available to any Member of the Oversight Board who votes in favor of the action taken.

(c) Prior to a vote on any matter or issue or the taking of any action with respect to any matter or issue, each Member shall report to the Oversight Board any conflict of interest such Member has or may have with respect to the matter or issue at hand and fully disclose the nature of such conflict or potential conflict (including, without limitation, disclosing any and all financial or other pecuniary interests that such Member may have with respect to or in connection with such matter or issue, other than solely as a holder of Trust Interests). A Member who, with respect to a matter or issue, has or who may have a conflict of interest whereby such Member's interests are adverse to the interests of the Claimant Trust shall be deemed a "Conflicted Member" who shall not be entitled to vote or take part in any action with respect to such matter or issue. In the event of a Conflicted Member, the vote or action with respect to such matter or issue giving rise to such conflict shall be undertaken only by Members who are not Conflicted Members and, notwithstanding anything contained herein to the contrary, the affirmative vote of only a majority of the Members who are not Conflicted Members shall be required to approve of such matter or issue and the same shall be the act of the Oversight Board.

(d) Each of Acis, the Redeemer Committee, and UBS shall be deemed "Conflicted Members" with respect to any matter or issue related to or otherwise affecting any of their respective Claim(s) (a "Committee Member Claim Matter"). A unanimous vote of the Disinterested Members shall be required to approve of or otherwise take action with respect to any

Committee Member Claim Matter and, notwithstanding anything herein to the contrary, the same shall be the act of the Oversight Board.

4.7 Tenure of the Members of the Oversight Board. The authority of the Members of the Oversight Board will be effective as of the Effective Date and will remain and continue in full force and effect until the Claimant Trust is terminated in accordance with Article IX hereof. The Members of the Oversight Board will serve until such Member's successor is duly appointed or until such Member's earlier death or resignation pursuant to Section 4.8 below, or removal pursuant to Section 4.9 below.

4.8 Resignation. A Member of the Oversight Board may resign by giving prior written notice thereof to the Claimant Trustee and other Members. Such resignation shall become effective on the earlier to occur of (i) the day that is 90 days following the delivery of such notice, (ii) the appointment of a successor in accordance with Section 4.10 below, and (iii) such other date as may be agreed to by the Claimant Trustee and the non-resigning Members of the Oversight Board.

4.9 Removal. A majority of the Oversight Board may remove any Member for Cause or Disability. If any Committee Member has its Claim disallowed in its entirety the representative of such entity will immediately be removed as a Member without the requirement for a vote and a successor will be appointed in the manner set forth herein. Notwithstanding the foregoing, upon the termination of the Claimant Trust, any or all of the Members shall be deemed to have resigned.

4.10 Appointment of a Successor Member.

(a) In the event of a vacancy on the Oversight Board (whether by removal, death, or resignation), a new Member may be appointed to fill such position by the remaining Members acting unanimously; provided, however, that any vacancy resulting from the removal, resignation, or death of a Disinterested Member may only be filled by a disinterested Person unaffiliated with any Claimant or constituency in the Chapter 11 Case; provided, further, that if an individual serving as the representative of a Committee Member resigns from its role as representative, such resignation shall not be deemed resignation of the Committee Member itself and such Committee Member shall have the exclusive right to designate its replacement representative for the Oversight Board. The appointment of a successor Member will be further evidenced by the Claimant Trustee's filing with the Bankruptcy Court (to the extent a final decree has not been entered) and posting on the Claimant Trustee's website a notice of appointment, at the direction of the Oversight Board, which notice will include the name, address, and telephone number of the successor Member.

(b) Immediately upon the appointment of any successor Member, the successor Member shall assume all rights, powers, duties, authority, and privileges of a Member hereunder and such rights and privileges will be vested in and undertaken by the successor Member without any further act. A successor Member will not be liable personally for any act or omission of a predecessor Member.

(c) Every successor Member appointed hereunder shall execute, acknowledge, and deliver to the Claimant Trustee and other Members an instrument accepting the appointment

under this Agreement and agreeing to be bound thereto, and thereupon the successor Member without any further act, deed, or conveyance, shall become vested with all rights, powers, trusts, and duties of a Member hereunder.

4.11 Compensation and Reimbursement of Expenses. Unless determined by the Oversight Board, no Member shall be entitled to compensation in connection with his or her service to the Oversight Board; provided, however, that a Disinterested Member shall be compensated in a manner and amount initially set by the other Members and as thereafter amended from time to time by agreement between the Oversight Board and the Disinterested Member. Notwithstanding the foregoing, the Claimant Trustee will reimburse the Members for all reasonable and documented out-of-pocket expenses incurred by the Members in connection with the performance of their duties hereunder (which shall not include fees, costs, and expenses of legal counsel).

4.12 Confidentiality. Each Member shall, during the period that such Member serves as a Member under this Agreement and following the termination of this Agreement or following such Member's removal or resignation, hold strictly confidential and not use for personal gain any material, non-public information of or pertaining to any Person to which any of the Claimant Trust Assets relates or of which such Member has become aware in the Member's capacity as a Member ("Confidential Trust Information"), except as otherwise required by law. For the avoidance of doubt, a Member's Affiliates, employer, and employer's Affiliates (and collectively with such Persons' directors, officers, partners, principals and employees, "Member Affiliates") shall not be deemed to have received Confidential Trust Information solely due to the fact that a Member has received Confidential Trust Information in his or her capacity as a Member of the Oversight Board and to the extent that (a) a Member does not disclose any Confidential Trust Information to a Member Affiliate, (b) the business activities of such Member Affiliates are conducted without reference to, and without use of, Confidential Trust Information, and (c) no Member Affiliate is otherwise directed to take, or takes on behalf of a Member or Member Affiliate, any actions that are contrary to the terms of this Section 4.12.

ARTICLE V.
TRUST INTERESTS

5.1 Claimant Trust Interests.

(a) General Unsecured Claim Trust Interests. On the date hereof, or on the date such Claim becomes Allowed under the Plan, the Claimant Trust shall issue General Unsecured Claim Trust Interests to Holders of Allowed Class 8 General Unsecured Claims (the "GUC Beneficiaries"). The Claimant Trustee shall allocate to each Holder of an Allowed Class 8 General Unsecured Claim a General Unsecured Claim Trust Interest equal to the ratio that the amount of each Holder's Allowed Class 8 Claim bears to the total amount of the Allowed Class 8 Claims. The General Unsecured Claim Trust Interests shall be entitled to distributions from the Claimant Trust Assets in accordance with the terms of the Plan and this Agreement.

(b) Subordinated Claim Trust Interests. On the date hereof, or on the date such Claim becomes Allowed under the Plan, the Claimant Trust shall issue Subordinated Claim Trust Interests to Holders of Class 9 Subordinated Claims (the "Subordinated Beneficiaries"). The

Claimant Trustee shall allocate to each Holder of an Allowed Class 9 Subordinated Claim a Subordinated Claim Trust Interest equal to the ratio that the amount of each Holder's Allowed Class 9 Claim bears to the total of amount of the Allowed Class 9. The Subordinated Trust Interests shall be subordinated in right and priority to the General Unsecured Claim Trust Interests. The Subordinated Beneficiaries shall only be entitled to distributions from the Claimant Trust Assets after each GUC Beneficiary has been repaid in full with applicable interest on account of such GUC Beneficiary's Allowed General Unsecured Claim, and all Disputed General Unsecured Claims have been resolved, in accordance with the terms of the Plan and this Agreement.

(c) Contingent Trust Interests. On the date hereof, or on the date such Interest becomes Allowed under the Plan, the Claimant Trust shall issue Contingent Interests to Holders of Allowed Class 10 Class B/C Limited Partnership Interests and Holders of Allowed Class 11 Class A Limited Partnership Interests (collectively, the "Equity Holders"). The Claimant Trustee shall allocate to each Holder of Allowed Class 10 Class B/C Limited Partnership Interests and each Holder of Allowed Class 11 Class A Limited Partnership Interests a Contingent Trust Interest equal to the ratio that the amount of each Holder's Allowed Class 10 or Class 11 Interest bears to the total amount of the Allowed Class 10 or Class 11 Interests, as applicable, under the Plan. Contingent Trust Interests shall not vest, and the Equity Holders 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"). Equity Holders will only be deemed "Beneficiaries" under this Agreement upon the filing of a GUC Payment Certification with the Bankruptcy Court, at which time the Contingent Trust Interests will vest and be deemed "Equity Trust Interests." The Equity Trust Interests shall be subordinated in right and priority to Subordinated Trust Interests, and distributions on account thereof shall only be made if and when Subordinated Beneficiaries have been repaid in full on account of such Subordinated Beneficiary's Allowed Subordinated Claim, in accordance with the terms of the Plan, the Confirmation Order, and this Agreement. The Equity Trust Interests distributed to Allowed Holders of Class A Limited Partnership Interests shall be subordinated to the Equity Trust Interests distributed to Allowed Holders of Class B/C Limited Partnership Interests.

5.2 Interests Beneficial Only. The ownership of the beneficial interests in the Claimant Trust shall not entitle the Claimant Trust Beneficiaries to any title in or to the Claimant Trust Assets (which title shall be vested in the Claimant Trust) or to any right to call for a partition or division of the Claimant Trust Assets or to require an accounting. No Claimant Trust Beneficiary shall have any governance right or other wright to direct Claimant Trust activities.

5.3 Transferability of Trust Interests. No transfer, assignment, pledge, hypothecation, or other disposition of a Trust Interest may be effected until (i) such action is unanimously approved by the Oversight Board, (ii) the Claimant Trustee and Oversight Board have received such legal advice or other information that they, in their sole and absolute discretion, deem necessary to assure that any such disposition shall not cause the Claimant Trust to be subject to entity-level taxation for U.S. federal income tax purposes, and (iii) either (x) the Claimant Trustee and Oversight Board, acting unanimously, have received such legal advice or other information that they, in their sole and absolute discretion, deem necessary or appropriate to assure that any such disposition shall not (a) require the Claimant Trust to comply with the registration and/or

reporting requirements of the Securities Act, the Exchange Act, the TIA, or the Investment Company Act or (b) cause any adverse effect under the Investment Advisers Act, or (y) the Oversight Board, acting unanimously, has determined, in its sole and absolute discretion, to cause the Claimant Trust to become a public reporting company and/or make periodic reports under the Exchange Act (provided that it is not required to register under the Investment Company Act or register its securities under the Securities Act) to enable such disposition to be made. In the event that any such disposition is allowed, the Oversight Board and the Claimant Trustee may add such restrictions upon such disposition and other terms of this Agreement as are deemed necessary or appropriate by the Claimant Trustee, with the advice of counsel, to permit or facilitate such disposition under applicable securities and other laws.

5.4 Registry of Trust Interests.

(a) Registrar. The Claimant Trustee shall appoint a registrar, which may be the Claimant Trustee (the "Registrar"), for the purpose of recording ownership of the Trust Interests as provided herein. The Registrar, if other than the Claimant Trustee, shall be an institution or person acceptable to the Oversight Board. For its services hereunder, the Registrar, unless it is the Claimant Trustee, shall be entitled to receive reasonable compensation from the Claimant Trust as a Claimant Trust Expense.

(b) Trust Register. The Claimant Trustee shall cause to be kept at the office of the Registrar, or at such other place or places as shall be designated by the Registrar from time to time, a registry of the Claimant Trust Beneficiaries and the Equity Holders (the "Trust Register"), which shall be maintained pursuant to such reasonable regulations as the Claimant Trustee and the Registrar may prescribe.

(c) Access to Register by Beneficiaries. The Claimant Trust Beneficiaries and their duly authorized representatives shall have the right, upon reasonable prior written notice to the Claimant Trustee, and in accordance with reasonable regulations prescribed by the Claimant Trustee, to inspect and, at the expense of the Claimant Trust Beneficiary make copies of the Trust Register, in each case for a purpose reasonable and related to such Claimant Trust Beneficiary's Trust Interest.

5.5 Exemption from Registration. The Parties hereto intend that the rights of the Claimant Trust Beneficiaries arising under this Claimant Trust shall not be "securities" under applicable laws, but none of the Parties represent or warrant that such rights shall not be securities or shall not be entitled to exemption from registration under the applicable securities laws. The Oversight Board, acting unanimously, and Claimant Trustee may amend this Agreement in accordance with Article IX hereof to make such changes as are deemed necessary or appropriate with the advice of counsel, to ensure that the Claimant Trust is not subject to registration and/or reporting requirements of the Securities Act, the Exchange Act, the TIA, or the Investment Company Act. The Trust Interests shall not have consent or voting rights or otherwise confer on the Claimant Trust Beneficiaries any rights similar to the rights of a shareholder of a corporation in respect of any actions taken or to be taken, or decisions made or to be made, by the Oversight Board and/or the Claimant Trustee under this Agreement.

5.6 Absolute Owners. The Claimant Trustee may deem and treat the Claimant Trust Beneficiary of record as determined pursuant to this Article 5 as the absolute owner of such Trust Interests for the purpose of receiving distributions and payment thereon or on account thereof and for all other purposes whatsoever.

5.7 Effect of Death, Incapacity, or Bankruptcy. The death, incapacity, or bankruptcy of any Claimant Trust Beneficiary during the term of the Claimant Trust shall not (i) entitle the representatives or creditors of the deceased Beneficiary to any additional rights under this Agreement, or (ii) otherwise affect the rights and obligations of any of other Claimant Trust Beneficiary under this Agreement.

5.8 Change of Address. Any Claimant Trust Beneficiary may, after the Effective Date, select an alternative distribution address by providing notice to the Claimant Trustee identifying such alternative distribution address. Such notification shall be effective only upon receipt by the Claimant Trustee. Absent actual receipt of such notice by the Claimant Trustee, the Claimant Trustee shall not recognize any such change of distribution address.

5.9 Standing. No Claimant Trust Beneficiary shall have standing to direct the Claimant Trustee to do or not to do any act or to institute any action or proceeding at law or in equity against any party upon or with respect to the Claimant Trust Assets. No Claimant Trust Beneficiary shall have any direct interest in or to any of the Claimant Trust Assets.

5.10 Limitations on Rights of Claimant Trust Beneficiaries.

(a) The Claimant Trust Beneficiaries shall have no rights other than those set forth in this Agreement, the Confirmation Order, or the Plan (including any Plan Supplement documents incorporated therein).

(b) In any action taken by a Claimant Trust Beneficiary against the Claimant Trust, a current or former Trustee, or a current or former Member, in their capacity as such, the prevailing party will be entitled to reimbursement of attorneys' fees and other costs; provided, however, that any fees and costs shall be borne by the Claimant Trust on behalf of any such Trustee or Member, as set forth herein.

(c) A Claimant Trust Beneficiary who brings any action against the Claimant Trust, a current or former Trustee, or a current or former Member, in their capacity as such, may be required by order of the Bankruptcy Court to post a bond ensuring that the full costs of a legal defense can be reimbursed. A request for such bond can be made by the Claimant Trust or by Claimant Trust Beneficiaries constituting in the aggregate at least 50% of the most senior class of Claimant Trust Interests.

(d) Any action brought by a Claimant Trust Beneficiary must be brought in the United States Bankruptcy Court for the Northern District of Texas. Claimant Trust Beneficiaries are deemed to have waived any right to a trial by jury

(e) The rights of Claimant Trust Beneficiaries to bring any action against the Claimant Trust, a current or former Trustee, or current or former Member, in their capacity as such, shall not survive the final distribution by the Claimant Trust.

ARTICLE VI.
DISTRIBUTIONS

6.1 Distributions.

(a) Notwithstanding anything to the contrary contained herein, the Claimant Trustee shall distribute to holders of Trust Interests at least annually the Cash on hand net of any amounts that (a) are reasonably necessary to maintain the value of the Claimant Trust Assets pending their monetization or other disposition during the term of the Claimant Trust, (b) are necessary to pay or reserve for reasonably incurred or anticipated Claimant Trust Expenses and any other expenses incurred by the Claimant Trust (including, but not limited to, any taxes imposed on or payable by the Claimant Trustee with respect to the Claimant Trust Assets), (c) are necessary to pay or reserve for the anticipated costs and expenses of the Litigation Sub-Trust, (d) are necessary to satisfy or reserve for other liabilities incurred or anticipated by the Claimant Trustee in accordance with the Plan and this Agreement (including, but not limited to, indemnification obligations and similar expenses in such amounts and for such period of time as the Claimant Trustee determines, in good faith, may be necessary and appropriate, which determination shall not be subject to consent of the Oversight Board, may not be modified without the express written consent of the Claimant Trustee, and shall survive termination of the Claimant Trustee), (e) are necessary to maintain the Disputed Claims Reserve, and (f) are necessary to pay Allowed Claims in Class 1 through Class 7. Notwithstanding anything to the contrary contained in this paragraph, the Claimant Trustee shall exercise reasonable efforts to make initial distributions within six months of the Effective Date, and the Oversight Board may not prevent such initial distributions unless upon a unanimous vote of the Oversight Board. The Claimant Trustee may otherwise distribute all Claimant Trust Assets on behalf of the Claimant Trust in accordance with this Agreement and the Plan at such time or times as the Claimant Trustee is directed by the Oversight Board.

(b) At the request of the Reorganized Debtor, subject in all respects to the provisions of this Agreement, the Claimant Trustee shall distribute Cash to the Reorganized Debtor, as Distribution Agent with respect to Claims in Class 1 through 7, sufficient to satisfy Allowed Claims in Class 1 through Class 7.

(c) All proceeds of Claimant Trust Assets shall be distributed in accordance with the Plan and this Agreement.

6.2 Manner of Payment or Distribution. All distributions made by the Claimant Trustee on behalf of the Claimant Trust to the Claimant Trust Beneficiaries shall be payable by the Claimant Trustee directly to the Claimant Trust Beneficiaries of record as of the twentieth (20th) day prior to the date scheduled for the distribution, unless such day is not a Business Day, then such date or the distribution shall be the following Business Day, but such distribution shall be deemed to have been completed as of the required date.

6.3 Delivery of Distributions. All distributions under this Agreement to any Claimant Trust Beneficiary shall be made, as applicable, at the address of such Claimant Trust Beneficiary (a) as set forth on the Schedules filed with the Bankruptcy Court or (b) on the books and records

of the Debtor or their agents, as applicable, unless the Claimant Trustee has been notified in writing of a change of address pursuant to Section 5.6 hereof.

6.4 Disputed Claims Reserves. There will be no distributions under this Agreement or the Plan on account of Disputed Claims pending Allowance. The Claimant Trustee will maintain a Disputed Claims Reserve as set forth in the Plan and will make distributions from the Disputed Claims Reserve as set forth in the Plan.

6.5 Undeliverable Distributions and Unclaimed Property. All undeliverable distributions and unclaimed property shall be treated in the manner set forth in the Plan.

6.6 *De Minimis* Distributions. Distributions with a value of less than $100 will be treated in accordance with the Plan.

6.7 United States Claimant Trustee Fees and Reports. **After the Effective Date, the Claimant Trust shall pay as a Claimant Trust Expense, all fees incurred under 28 U.S.C. § 1930(a)(6) by reason of the Claimant Trust's disbursements until the Chapter 11 Case is closed. After the Effective Date, the Claimant Trust shall prepare and serve on the Office of the United States Trustee such quarterly disbursement reports for the Claimant Trust as required by the Office of the United States Trustee Office for as long as the Chapter 11 Case remains open.**

ARTICLE VII.
TAX MATTERS

7.1 Tax Treatment and Tax Returns.

(a) It is intended for the initial transfer of the Claimant Trust Assets to the Claimant Trust to be treated as a grantor trust for federal income tax purposes (and foreign, state, and local income tax purposes where applicable) as if the Debtor transferred the Claimant Trust Assets (other than the amounts set aside in the Disputed Claim Reserve, if the Claimant Trustee makes the election described below) to the Claimant Trust Beneficiaries and then, immediately thereafter, the Claimant Trust Beneficiaries transferred the Claimant Trust Assets to the Claimant Trust. Consistent with such treatment, (i) it is intended that the Claimant Trust will be treated as a grantor trust for federal income tax purposes (and foreign, state, and local income tax purposes where applicable), (ii) it is intended that the Claimant Trust Beneficiaries will be treated as the grantors of the Claimant Trust and owners of their respective share of the Claimant Trust Assets for federal income tax purposes (and foreign, state, and local income tax purposes where applicable). The Claimant Trustee shall file all federal income tax returns (and foreign, state, and local income tax returns where applicable) for the Claimant Trust as a grantor trust pursuant to Treasury Regulation Section 1.671-4(a).

(b) The Claimant Trustee shall determine the fair market value of the Claimant Trust Assets as of the Effective Date and notify the applicable Beneficiaries of such valuation, and such valuation shall be used consistently by all parties for all federal income tax purposes.

(c) The Claimant Trustee may file an election pursuant to Treasury Regulation 1.468B-9(c) to treat the Disputed Claims Reserve as a disputed ownership fund, in which case the

Claimant Trustee will file federal income tax returns and pay taxes for the Disputed Claim Reserve as a separate taxable entity.

7.2 Withholding. The Claimant Trustee may withhold from any amount distributed from the Claimant Trust to any Claimant Trust Beneficiary such sum or sums as are required to be withheld under the income tax laws of the United States or of any state or political subdivision thereof. Any amounts withheld pursuant hereto shall be deemed to have been distributed to and received by the applicable Beneficiary. As a condition to receiving any distribution from the Claimant Trust, the Claimant Trustee may require that the Beneficiary provide such holder's taxpayer identification number and such other information and certification as may be deemed necessary for the Claimant Trustee to comply with applicable tax reporting and withholding laws. If a Beneficiary fails to comply with such a request within one year, such distribution shall be deemed an unclaimed distribution and treated in accordance with Section 6.5(b) of this Agreement.

ARTICLE VIII.
STANDARD OF CARE AND INDEMNIFICATION

8.1 Standard of Care. None of the Claimant Trustee, acting in his capacity as the Claimant Trustee or in any other capacity contemplated by this Agreement or the Plan, the Delaware Trustee, acting in its capacity as Delaware Trustee, the Oversight Board, or any current or any individual Member, solely in their capacity as Members of the Oversight Board, shall be personally liable to the Claimant Trust or to any Person (including any Claimant Trust Beneficiary) in connection with the affairs of the Claimant Trust, unless it is ultimately determined by order of the Bankruptcy Court or, if the Bankruptcy Court either declines to exercise jurisdiction over such action, or cannot exercise jurisdiction over such action, such other court of competent jurisdiction that the acts or omissions of any such Claimant Trustee, Delaware Trustee, Oversight Board, or Member constituted fraud, willful misconduct, or gross negligence. The employees, agents and professionals retained by the Claimant Trust, the Claimant Trustee, Delaware Trustee, Oversight Board, or individual Member shall not be personally liable to the Claimant Trust or any other Person in connection with the affairs of the Claimant Trust, unless it is ultimately determined by order of the Bankruptcy Court or, if the Bankruptcy Court either declines to exercise jurisdiction over such action, or cannot exercise jurisdiction over such action, such other court of competent jurisdiction that such acts or omissions by such employee, agent, or professional constituted willful fraud, willful misconduct or gross negligence. None of the Claimant Trustee, Delaware Trustee, Oversight Board, or any Member shall be personally liable to the Claimant Trust or to any Person for the acts or omissions of any employee, agent or professional of the Claimant Trust or Claimant Trustee taken or not taken in good faith reliance on the advice of professionals or, as applicable, with the approval of the Bankruptcy Court, unless it is ultimately determined by order of the Bankruptcy Court or, if the Bankruptcy Court either declines to exercise jurisdiction over such action, or cannot exercise jurisdiction over such action, such other court of competent jurisdiction that the Claimant Trustee, Delaware Trustee, Oversight Board, or Member acted with gross negligence or willful misconduct in the selection, retention, or supervision of such employee, agent or professional of the Claimant Trust.

8.2 Indemnification. The Claimant Trustee (including each former Claimant Trustee), WTNA in its individual capacity and as Delaware Trustee, the Oversight Board, and all past and present Members (collectively, in their capacities as such, the "Indemnified Parties") shall be

indemnified by the Claimant Trust against and held harmless by the Claimant Trust from any losses, claims, damages, liabilities or expenses (including, without limitation, attorneys' fees, disbursements, and related expenses) to which the Indemnified Parties may become subject in connection with any action, suit, proceeding or investigation brought or threatened against any of the Indemnified Parties in their capacity as Claimant Trustee, Delaware Trustee, Oversight Board, or Member, or in connection with any matter arising out of or related to the Plan, this Agreement, or the affairs of the Claimant Trust, unless it is ultimately determined by order of the Bankruptcy Court or other court of competent jurisdiction that the Indemnified Party's acts or omissions constituted willful fraud, willful misconduct, or gross negligence. If the Indemnified Party becomes involved in any action, proceeding, or investigation in connection with any matter arising out of or in connection with the Plan, this Agreement or the affairs of the Claimant Trust for which an indemnification obligation could arise, the Indemnified Party shall promptly notify the Claimant Trustee and/or Oversight Board, as applicable; provided, however, that the failure of an Indemnified Party to promptly notify the Claimant Trustee and/or Oversight Board of an indemnification obligation will not excuse the Claimant Trust from indemnifying the Indemnified Party unless such delay has caused the Claimant Trust material harm. The Claimant Trust shall pay, advance or otherwise reimburse on demand of an Indemnified Party the Indemnified Party's reasonable legal and other defense expenses (including, without limitation, the cost of any investigation and preparation and attorney fees, disbursements, and other expenses related to any claim that has been brought or threatened to be brought) incurred in connection therewith or in connection with enforcing his or her rights under this Section 8.2 as a Claimant Trust Expense, and the Claimant Trust shall not refuse to make any payments to the Indemnified Party on the assertion that the Indemnified Party engaged in willful misconduct or acted in bad faith; provided that the Indemnified Party shall be required to repay promptly to the Claimant Trust the amount of any such advanced or reimbursed expenses paid to the Indemnified Party to the extent that it shall be ultimately determined by Final Order that the Indemnified Party engaged in willful fraud, willful misconduct, or gross negligence in connection with the affairs of the Claimant Trust with respect to which such expenses were paid; provided, further, that any such repayment obligation shall be unsecured and interest free. The Claimant Trust shall indemnify and hold harmless the employees, agents and professionals of the Claimant Trust and Indemnified Parties to the same extent as provided in this Section 8.2 for the Indemnified Parties. For the avoidance of doubt, the provisions of this Section 8.2 shall remain available to any former Claimant Trustee, WTNA in its individual capacity and as Delaware Trustee, or Member or the estate of any decedent Claimant Trustee or Member, solely in their capacities as such. The indemnification provided hereby shall be a Claimant Trust Expense and shall not be deemed exclusive of any other rights to which the Indemnified Party may now or in the future be entitled to under the Plan or any applicable insurance policy. The failure of the Claimant Trust to pay or reimburse an Indemnified Party as required under this Section 8.2 shall constitute irreparable harm to the Indemnified Party and such Indemnified Party shall be entitled to specific performance of the obligations herein. The terms of this Section 8.2 shall survive the termination of this Agreement and the resignation or removal of any Indemnified Party.

8.3 No Personal Liability. Except as otherwise provided herein, neither of the Trustees nor Members of the Oversight Board shall be subject to any personal liability whatsoever, whether in tort, contract, or otherwise, to any Person in connection with the affairs of the Claimant Trust to the fullest extent provided under Section 3803 of the Delaware Statutory Trust Act, and all Persons asserting claims against the Claimant Trustee, Litigation Trustee, or any Members, or

otherwise asserting claims of any nature in connection with the affairs of the Claimant Trust, shall look solely to the Claimant Trust Assets for satisfaction of any such claims.

8.4 Other Protections. To the extent applicable and not otherwise addressed herein, the provisions and protections set forth in Article IX of the Plan will apply to the Claimant Trust, the Claimant Trustee, the Litigation Trustee, and the Members.

ARTICLE IX.
TERMINATION

9.1 Duration. The Trustees, the Claimant Trust, and the Oversight Board shall be discharged or dissolved, as the case may be, at such time as: (a) the Litigation Trustee determines that the pursuit of Estate Claims is not likely to yield sufficient additional proceeds to justify further pursuit of such Estate Claims, (b) the Claimant Trustee determines that the pursuit of Causes of Action (other than Estate Claims) is not likely to yield sufficient additional proceeds to justify further pursuit of such Causes of Action, (c) the Clamant Trustee determines that the pursuit of sales of other Claimant Trust Assets is not likely to yield sufficient additional proceeds to justify further pursuit of such sales of Claimant Trust Assets, (d) all objections to Disputed Claims and Equity Interests are fully resolved, (e) the Reorganized Debtor is dissolved, and (f) all Distributions required to be made by the Claimant Trustee to the Claimant Trust Beneficiaries under the Plan have been made, but in no event shall the Claimant Trust be dissolved later than three years from the Effective Date unless the Bankruptcy Court, upon motion made within the six-month period before such third anniversary (and, in the event of further extension, by order of the Bankruptcy Court, upon motion made at least six months before the end of the preceding extension), determines that a fixed period extension (not to exceed two years, together with any prior extensions) is necessary to facilitate or complete the recovery on, and liquidation of, the Claimant Trust Assets.

9.2 Distributions in Kind. Upon dissolution of the Claimant Trust, any remaining Claimant Trust Assets that exceed the amounts required to be paid under the Plan will be transferred (in the sole discretion of the Claimant Trustee) in Cash or in-kind to the Holders of the Claimant Trust Interests as provided in the Claimant Trust Agreement.

9.3 Continuance of the Claimant Trustee for Winding Up. After dissolution of the Claimant Trust and for purpose of liquidating and winding up the affairs of the Claimant Trust, the Claimant Trustee shall continue to act as such until the Claimant Trustee's duties have been fully performed. Prior to the final distribution of all remaining Claimant Trust Assets, the Claimant Trustee shall be entitled to reserve from such assets any and all amounts required to provide for the Claimant Trustee's own costs and expenses, including a reserve to fund any potential indemnification or similar obligations of the Claimant Trust, until such time as the winding up of the Claimant Trust is completed. Upon the dissolution of the Claimant Trust and completion of the winding up of the assets, liabilities and affairs of the Claimant Trust pursuant to the Delaware Statutory Trust Act, the Claimant Trustee shall prepare, execute and file a certificate of cancellation with the State of Delaware to terminate the Claimant Trust pursuant to Section 3810 of the Delaware Statutory Trust Act (such date upon which the certificate of cancellation is filed shall be referred to as the "Termination Date"). If the Delaware Trustee's signature is required for purposes of filing such certificate of cancellation, the Claimant Trustee shall provide the Delaware

Trustee with written direction to execute such certificate of cancellation, and the Delaware Trustee shall be entitled to conclusively and exclusively rely upon such written direction without further inquiry. Upon the Termination date, the Claimant Trustee shall retain for a period of two (2) years, as a Claimant Trust Expense, the books, records, Claimant Trust Beneficiary lists, and certificated and other documents and files that have been delivered to or created by the Claimant Trustee. At the Claimant Trustee's discretion, all of such records and documents may, but need not, be destroyed at any time after two (2) years from the Termination Date.

9.4 Termination of Duties. Except as otherwise specifically provided herein, upon the Termination Date of the Claimant Trust, the Claimant Trustee, the Oversight Board and its Members shall have no further duties or obligations hereunder.

9.5 No Survival. The rights of Claimant Trust Beneficiaries hereunder shall not survive the Termination Date, provided that such Claimant Trust Beneficiaries are provided with notice of such Termination Date.

ARTICLE X.
AMENDMENTS AND WAIVER

The Claimant Trustee, with the consent of a simple majority of the Oversight Board, may amend this Agreement to correct or clarify any non-material provisions. This Agreement may not otherwise be amended, supplemented, otherwise modified, or waived in any respect except by an instrument in writing signed by the Claimant Trustee and with the unanimous approval of the Oversight Board, and the approval of the Bankruptcy Court, after notice and a hearing; provided that the Claimant Trustee must provide the Oversight Board with prior written notice of any non-material amendments, supplements, modifications, or waivers of this Agreement. No amendment or waiver of this Agreement that adversely affects the Delaware Trustee shall be effective unless the Delaware Trustee has consented thereto in writing in its sole and absolute discretion.

ARTICLE XI.
MISCELLANEOUS

11.1 Trust Irrevocable. Except as set forth in this Agreement, establishment of the Claimant Trust by this Agreement shall be irrevocable and shall not be subject to revocation, cancellation or rescission by the Claimant Trust Beneficiaries.

11.2 Bankruptcy of Claimant Trust Beneficiaries. The dissolution, termination, bankruptcy, insolvency or other similar incapacity of any Claimant Trust Beneficiary shall not permit any creditor, trustee, or any other Claimant Trust Beneficiary to obtain possession of, or exercise legal or equitable remedies with respect to, the Claimant Trust Assets.

11.3 Claimant Trust Beneficiaries have No Legal Title to Claimant Trust Assets. No Claimant Trust Beneficiary shall have legal title to any part of the Claimant Trust Assets.

11.4 Agreement for Benefit of Parties Only. Nothing herein, whether expressed or implied, shall be construed to give any Person other than the Claimant Trustee, Oversight Board, and the Claimant Trust Beneficiaries any legal or equitable right, remedy or claim under or in

respect of this Agreement. The Claimant Trust Assets shall be held for the sole and exclusive benefit of the Claimant Trust Beneficiaries.

11.5 Notices. All notices, directions, instructions, confirmations, consents and requests required or permitted by the terms hereof shall, unless otherwise specifically provided herein, be in writing and shall be sent by first class mail, facsimile, overnight mail or in the case of mailing to a non-United States address, air mail, postage prepaid, addressed to:

(a) If to the Claimant Trustee:

Claimant Trustee
c/o Highland Capital Management, L.P.
100 Crescent Court, Suite 1850
Dallas, Texas 75201

With a copy to:

Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd, 13th Floor
Los Angeles, CA 90067
Attn: Jeffrey Pomerantz (jpomerantz@pszjlaw.com)
Ira Kharasch (ikharasch@pszjlaw.com)
Gregory Demo (gdemo@pszjlaw.com)

(b) If to the Delaware Trustee:

Wilmington Trust, National Association
1100 North Market Street
Wilmington, DE 19890
Attn: Corporate Trust Administration/David Young
Email: nmarlett@wilmingtontrust.com
Phone: (302) 636-6728
Fax: (302) 636-4145

Notice mailed shall be effective on the date mailed or sent. Any Person may change the address at which it is to receive notices under this Agreement by furnishing written notice pursuant to the provisions of this Section 11.5 to the entity to be charged with knowledge of such change.

11.6 Severability. Any provision hereof which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provisions in another jurisdiction.

11.7 Counterparts. This Agreement may be executed by the parties hereto in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument.

11.8 Binding Effect, etc. All covenants and agreements contained herein shall be binding upon, and inure to the benefit of, the Claimant Trust, the Claimant Trustee, and the Claimant Trust Beneficiaries, and their respective successors and assigns. Any notice, direction, consent, waiver or other instrument or action by any Claimant Trust Beneficiary shall bind its successors and assigns.

11.9 Headings; References. The headings of the various Sections herein are for convenience of reference only and shall not define or limit any of the terms or provisions hereof.

11.10 Governing Law. This Agreement shall in all respects be governed by, and construed in accordance with the laws of the State of Delaware, including all matters of constructions, validity and performance.

11.11 Consent to Jurisdiction. Each of the parties hereto, each Member (solely in their capacity as Members of the Oversight Board), and each Claimant Trust Beneficiary consents and submits to the exclusive jurisdiction of the Bankruptcy Court for any action or proceeding instituted for the enforcement and construction of any right, remedy, obligation, or liability arising under or by reason of this Agreement, the Plan or any act or omission of the Claimant Trustee (acting in his capacity as the Claimant Trustee or in any other capacity contemplated by this Agreement or the Plan), Litigation Trustee (acting in his capacity as the Litigation Trustee or in any other capacity contemplated by this Agreement or the Plan), the Oversight Board. or any individual Member (solely in their capacity as Members of the Oversight Board); *provided, however*, that if the Bankruptcy Court either declines to exercise jurisdiction over such action or cannot exercise jurisdiction over such action, such action may be brought in the state or federal courts located in the Northern District of Texas.

11.12 Transferee Liabilities. The Claimant Trust shall have no liability for, and the Claimant Trust Assets shall not be subject to, any claim arising by, through or under the Debtor except as expressly set forth in the Plan or in this Agreement. In no event shall the Claimant Trustee or the Claimant Trust Beneficiaries have any personal liability for such claims. If any liability shall be asserted against the Claimant Trust or the Claimant Trustee as the transferee of the Claimant Trust Assets on account of any claimed liability of, through or under the Debtor or Reorganized Debtor, the Claimant Trustee may use such part of the Claimant Trust Assets as may be necessary to contest any such claimed liability and to pay, compromise, settle or discharge same on terms reasonably satisfactory to the Claimant Trustee as a Claimant Trust Expense.

[Remainder of Page Intentionally Blank]

IN WITNESS HEREOF, the parties hereto have caused this Claimant Trust Agreement to be duly executed by their respective officers thereunto duly authorized on the day and year first written above.

Highland Capital Management, L.P.

By: _____
James P. Seery, Jr.
Chief Executive Officer and
Chief Restructuring Officer

Claimant Trustee

By: _____
James P. Seery, Jr., not individually but solely in his capacity as the Claimant Trustee

Wilmington Trust, National Association,
as Delaware Trustee

By: _____
Name: Neumann Marlett
Title: Bank Officer

EXHIBIT 2

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)
John A. Morris (NY Bar No. 2405397) (*admitted pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)
Hayley R. Winograd (NY Bar No. 5612569) (*admitted pro hac vice*)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
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HAYWARD PLLC
Melissa S. Hayward (TX Bar No. 24044908)
MHayward@HaywardFirm.com
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10501 N. Central Expy, Ste. 106
Dallas, TX 75231
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Facsimile: (972) 755-7110

Counsel for the Reorganized Debtor and the Highland Claimant Trust

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

In re:	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	Case No. 19-34054-sgj11
Reorganized Debtor.	§	

NOTICE OF FILING OF
THE CURRENT BALANCE SHEET OF THE HIGHLAND CLAIMANT TRUST

PLEASE TAKE NOTICE that, pursuant to the Court's *Order (A) Continuing Hearing on Motion to Stay and to Compel Mediation [Dkt. 3752] and (B) Directing Certain Actions in Advance of Continued Hearing* [Docket No. 3870], Highland Capital Management, L.P., the reorganized debtor in the above-captioned bankruptcy case, and the Highland Claimant Trust hereby file the

[1] The last four digits of the Reorganized Debtor's taxpayer identification number are 8357. The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

current balance sheet attached hereto as **Exhibit A** showing the general categories of assets and liabilities of the Highland Claimant Trust, subject to the accompanying notes.

[*Remainder of Page Intentionally Left Blank*]

Dated: July 6, 2023

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717)
John A. Morris (NY Bar No. 2405397)
Gregory V. Demo (NY Bar No. 5371992)
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jmorris@pszjlaw.com
gdemo@pszjlaw.com
hwinograd@pszjlaw.com

-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
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Fax: (972) 755-7110

Counsel for the Reorganized Debtor and the Highland Claimant Trust

EXHIBIT A

Highland Claimant Trust
Summarized Consolidated Balance Sheet [1]
As of May 31, 2023
The accompanying notes are integral to understanding this balance sheet
(Estimated and unaudited, $ in millions)

	Balance per books	adjustments (see notes)	Adjusted balance
Assets			
Cash and equivalents	$ 13	$ -	$ 13
Disputed claims reserve [2]	12	-	12
Other restricted cash	12	-	12
Investments [3]	118	(12) [6]	106
Notes receivable, net [4]	86	(83) [4]	3
Other assets	6	-	6
Total assets	**$ 247**	**$ (95)**	**$ 152**
Liabilities			
Secured and other debt	$ -	$ -	$ -
Distribution payable [2]	12	-	12
Additional indemnification reserves	-	90 [5]	90
Other liabilities	15	13 [5]	28
Total liabilities [5]	**$ 27**	**$ 103**	**$ 130**
Book/adjusted book equity (see accompanying notes) [5]	**220**	**(198)**	**22**
Total liabilities and book/adjusted book equity	**$ 247**	**$ (95)**	**$ 152**

Supplemental Info: [7]	
Sum of remaining allowed Class 8 Trust Beneficiaries, excluding interest	$ 27
Sum of remaining allowed Class 9 Trust Beneficiaries, excluding interest	99
Sum of face amount of pending Class 8/9 potential Trust Beneficiaries, excluding interest	13
Sub-total	$ 139

{SEE ACCOMPANYING NOTES ON THE FOLLOWING PAGE}

The information contained in this summarized consolidated balance sheet (the "Summary") is based on estimates, and therefore should not be relied upon, as actual results may differ materially from the estimates contained herein.

This Summary is neither an offer nor a solicitation of an offer to buy or sell securities.

Information contained herein is not indicative of, nor does it guarantee, future results. The information contained in this Summary is based on matters as they exist as of the date of preparation and not as of any future date. Valuations do not reflect performance in different economic or market cycles and there can be no assurances that valuations will be achieved. Trust Beneficiaries may experience materially different results and outcomes.

Highland Claimant Trust
Summarized Consolidated Balance Sheet [(1)]
As of May 31, 2023

Notes:

(1) This presentation is not in accordance with US GAAP and is unaudited, but has nevertheless been prepared in good faith and with the intention of providing the reader with a comprehensible understanding of the remaining assets and liabilities of the Highland Claimant Trust, Highland Capital Management, LP, HCMLP GP LLC, and Highland Litigation Trust (the "Consolidated Entities"). These entities have each been aggregated on a stand-alone basis, with intercompany amounts eliminated. Funds and entities that may otherwise be consolidated by one or more of the Consolidated Entities under US GAAP are not fully consolidated and rather are included solely at their equity value. For example, if Highland Capital Management, LP is a 20% investor in a managed fund with assets of $100 million and liabilities of zero that would normally require consolidation under US GAAP, the presentation contained herein reflects an investment of $20 million as opposed to fully consolidating the $100 million fund and reflecting minority interest of $80 million. The value of the Highland Indemnity Trust is not included herein. As of May 31, 2023, $35 million has been funded to the Highland Indemnity Trust. Highland Indemnity Trust beneficiaries are Claimant Trust Indemnified Parties. Any unused assets remaining after satisfying indemnification obligations will be transferred to the Highland Claimant Trust or otherwise be distributed to the Claimant Trust Beneficiaries in accordance with the Indemnity Trust Agreement. For presentation purposes, it is assumed that outstanding indemnification obligations will consume the entirety of the Highland Indemnity Trust. Further, no current recovery amount has been ascribed to the "Kirschner Adversary" as all such value is considered to be contingent, nor have any liabilities been reserved for various success fees payable to professionals associated with the Kirschner Adversary or any other litigations. Such liabilities are also contingent in nature.

(2) Amounts already authorized for distribution, but reserved in the Disputed Claims Reserve related to resolution of pending disputed claims.

(3) Value reflected herein consists primarily of ownership in private funds and subsidiaries, valued using NAV as the practical expedient, public & private investments (including residual sale escrows), valued at fair value, and SE Multifamily Holdings, LLC, valued using book equity value as of the most recent financials received. See note 6 for further information. There is substantial risk and uncertainty with respect to the timing and ultimate cash value to be received from monetizations of these investments and such value could ultimately be materially impacted by actual monetizations.

(4) Book amounts reflect principal amounts outstanding on various notes, without discount, adjustment, or estimates of future costs of collection, with two exceptions. The first exception is to the note receivable from Hunter Mountain Investment Trust for which over $90 million of principal and interest is currently due, payable, and in default. These notes are a component of the "Kirschner Adversary" which is currently stayed. These principal and interest amounts are fully reserved based on the assumption that Hunter Mountain Investment Trust has no other assets other than a contingent, unvested interest in the Highland Claimant Trust. That assumption is subject to change. The second exception relates to the note receivable from Highland Select Equity Master Fund, LP. This amount is fully reserved based on the pendency of the Ch. 7 proceeding for Highland Select Equity Master Fund, LP and the minimal remaining value of Highland Select Equity Master Fund, LP's assets, which is expected to be further consumed (at least in part) by trustee and professional fees. Aside from these exceptions, approximately $65 million of these principal amounts (further described below) are subject to ongoing litigation with various note counterparties who are contesting the validity of their obligations. These disputed amounts are contained within the "Balance per books" column herein without discount or adjustment. While the makers have asserted defenses, Highland believes they are meritless and is confident that judgments will ultimately be entered in Highland's favor. However, based on Mr. Dondero's history of failing to satisfy judgments entered against his affiliates by others (e.g., UBS, the Redeemer Committee, Joshua Terry, and Patrick Daugherty), the effect of complete non-payment of principal is reflected in the "adjustments" column, which also assumes non-payment of the currently performing $18 million note receivable from The Dugaboy Investment Trust. Ultimate recoveries from these notes could differ materially from the current principal outstanding depending on the outcome of the pending litigation and no recovery can be assured. Accrued interest is captured in the "Other assets" line item, subject to the exceptions discussed within this footnote. While there is currently a report & recommendation from the bankruptcy court for summary judgment, plus costs of collection, no costs of collection are reflected as assets on this balance sheet, so would be incremental. The estimated amount of such costs of collections are over $3 million.

Detail of note principal amounts subject to report & recommendations of the bankruptcy court, currently pending in district court (excludes accrued interest):

Note Maker	Principal O/S	Comments
NexPoint Advisors, LP	$ 25	Consists of a single note
NexPoint Real Estate Partners, LLC	12	fka HCRE Partners, LLC; five underlying notes comprise balance
NexPoint Asset Management, LP	11	fka Highland Capital Management Fund Advisors, LP; four underlying notes comprise balance
James Dondero	10	Three underlying notes comprise balance
Highland Capital Management Services, Inc.	7	Five underlying notes comprise balance
Sub-total	$ 65	

(5) The book equity amount reflects a multitude of estimates including, but not limited to the value of investments and collectability of notes receivable. For book purposes, no contingent liabilities or indemnification reserves have been recorded as liabilities that would reduce book equity, notwithstanding that it is currently expected that there will be a) a need to maintain further highly material indemnification reserves; and b) further incurrance of springing contingent liabilities if distribution milestones are achieved. The amount of further incremental indemnification reserves are currently expected to exceed $90 million, and may ultimately be greater, which will be required to be funded (at least in part) prior to any further material distributions to Trust Beneficiaries. In the absence of a global settlement that, among other things, fully and finally releases all Claimant Trust Indemnified Parties, Highland believes the additional indemnification reserves are required because, among other reasons, (a) based on the so-called "Dondero exclusion," insurance is likely to remain cost-prohibitive and/or unsatisfactory, leaving the Claimant Trust and Indemnity Trust assets as the sole sources of funding for indemnity obligations, (b) approximately twenty (20) matters are being actively litigated in at least 9 different forums; and (c) based on history, new litigation can be expected. Any unused assets remaining after satisfaction of indemnity obligations will be distributed as required by the Indemnity Trust Agreement. The amount of incremental springing contingent liabilities are expected to range from $5 million to $15 million, which are exclusive of various success fees associated with recoveries under the "Kirschner Adversary" and others. No reserves have been accrued for any current, pending, or threatened litigation brought by any Dondero-related parties. Lastly, it is expected that the trust and its subsidiaries will operate at an operating loss prospectively. The corresponding information in the "adjustments" column above is an estimate of the effects of these incremental indemnification reserves and contingent liabilities, but does not assume any expected future operating cash burn, which is expected to be significant.

6) The value of SE Multifamily Holdings LLC maintained on this balance sheet is $15.7 million, which is a component of the "Investments" line item and is based on a several years stale book-basis balance sheet. Notwithstanding Dondero-entities' previous disclosures of this interest at values of $20 million and $12 million, Highland also received interest from Dondero to acquire the interest for $3.8 million, among other assets. The purpose of this adjustment is to assume that the holding could be monetized at the lower $3.8 million level, which would result in a $11.9 million decrease to Highland's book equity if it were hypothetically transacted at that level. Highland has initiated proceedings in Delaware to receive books and records relating to SE Multifamily Holdings LLC, for which it has the contractual right and has been seeking for approximately a year, but for which Dondero-controlled entities have not provided to date.

7) Amounts described herein represent the face amounts of outstanding allowed and pending claims. The pending claim amounts do not include amounts that are the subject of various appeals or that are unliquidated. The allowed and pending claims (along with accrued interest) could ultimately be satisfied in part or in full using 1) the assets of the disputed claims reserve, 2) the residual amount of cash in the indemnity trust after satisfying all indemnification obligations, and 3) the residual amount of cash remaining after monetizing all other non-cash assets and paying liabilities and future expenses.

EXHIBIT 3

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

In re: **HIGHLAND CAPITAL MANAGEMENT, L.P.,** **Debtor.**	§ § § § § §	**Chapter 11** **Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P., **Plaintiff,** **v.** **NEXPOINT ASSET MANAGEMENT, L.P. (F/K/A HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.), et al.,** **Defendants.**	§ § § § § § § § § § § § § §	**Civ. Act. No. 3:21-cv-00881-X** **(Consolidated with 3:21-cv-00880-X; 3:21-cv-01010-X; 3:21-cv-01360-X; 3:21-cv-01362-X; 3:21-cv-01378-X; 3:21-cv-01379-X; 3:21-cv-03207-X; 3:22-cv-0789-X)**

ORDER GRANTING JOINT AGREED EMERGENCY MOTION FOR ORDER APPROVING STIPULATION FOR THE BONDING OF JUDGMENTS AND STAYS OF EXECUTIONS PENDING APPEALS

Upon consideration of the Parties' *Joint Agreed Emergency Motion for Order Approving Stipulation for the Bonding of Judgments and Stays of Execution Pending Appeals* (the "Motion"),[1] the Court hereby finds that the Motion should be GRANTED as set forth below. Accordingly,

IT IS HEREBY ORDERED that:

1. The Motion is **GRANTED** in its entirety.

1 Capitalized terms not defined in this Order shall have the meanings ascribed to them in the Motion.

2. The Parties' entry into the Binding Bonding Agreement, a copy of which is attached hereto as **Exhibit A**, is hereby **APPROVED.**

3. The Parties are directed to comply with each and every term of the Binding Bonding Agreement.

4. The deposit of any amounts required by the Binding Bonding Agreement into the Court Registry will be done in each case in accordance with Miscellaneous Order No. 45, entered by the U.S. District Court of the Northern District of Texas on October 7, 1997 (the "Misc. Order"). For the avoidance of doubt, this Order shall constitute the Court's express order authorizing the deposit or transfer of funds into the Court Registry as required by the terms of the Misc. Order, and the Clerk of Court shall accept this Order as the requisite order of the Court permitting the deposit or transfer of funds into the Court Registry.

5. This Court shall have and retain jurisdiction over all disputes arising out of or otherwise concerning the interpretation and enforcement of this Order.

IT IS SO ORDERED this 3rd day of August, 2023.

THE HONORABLE BRANTLEY STARR
UNITED STATES DISTRICT COURT JUDGE

EXHIBIT A

Binding Bonding Agreement

This Binding Bonding Agreement ("***Agreement***") is entered into by and between Highland Capital Management, L.P. ("***Highland***") and James Dondero, NexPoint Asset Management, L.P., NexPoint Advisors, L.P., NexPoint Real Estate Partners, LLC, and Highland Capital Management Services, Inc. (the "***Judgment Debtors***") (along with Highland, collectively the "***Parties***") with respect to judgments entered in US Dist. Court Case No. 3:21-cv-00881-X and its consolidated cause numbers (the "***Judgments***" in the "***District Court Case***").

RECITALS

WHEREAS, as of July 31, 2023, the Judgments entered in the District Court Case on July 6, 2023, total $68,902,707.24 ("***Combined Judgment Amount***"), inclusive of principal, pre- and post-judgment interest, and awarded fees and expenses;

WHEREAS, Highland and the Judgment Debtors dispute the finality of certain of the Judgments;

WHEREAS, Highland may execute upon the Judgments thirty (30) days after the entry of a final Judgment, unless the United States District Court for the Northern District of Texas (the "***District Court***") orders otherwise;

WHEREAS, the Judgment Debtors may stay execution of such Judgments by providing a supersedeas bond in conformance with the District Court's rules ("***Bond***") for each Judgment Debtor;

WHEREAS, the Parties seek to avoid the motion practice, expense, and harm caused by execution of the Judgments;

NOW THEREFORE, the Parties agree as follows:

AGREEMENT

1. The Parties will request the District Court to enter separate judgments ("***Individual Judgment Amount***") for each Judgment Debtor against each respective Judgment Debtor as follows (which the parties agree to consolidate for the purposes of appeal). Each Judgment Debtor shall Bond in the amount of 111% of its Individual Judgment Amount ("***Individual Bond Amount***") as set forth below (the Individual Bond Amounts collectively the "***Combined Bond Amount***"):

Party	Individual Judgment Amount	Individual Bond Amount
NexPoint Asset Management, L.P.	$3,628,692.37	$4,027,848.53

NexPoint Asset Management, L.P.	$8,441,524.65	$9,370,092.36
NexPoint Advisors, L.P.	$25,849,816.94	$28,693,296.80
NexPoint Real Estate Partners, LLC	$13,251,661.00	$14,709,343.70
Highland Capital Management Services, Inc.	$7,578,620.41	$8,412,268.66
James Dondero	$10,152,391.87	$11,269,154.90
Total	$68,902,707.24	$76,482,004.95

2. The Judgment Debtors shall Bond the Combined Bond Amount according to the following schedule ("***Bonding Schedule***"):

Date[1]	Additional Bonded Amount	Combined Bonded Amount
August 11, 2023	$30,000,000.00	$30,000,000.00
August 18 2023	$10,000,000.00	$40,000,000.00
August 25, 2023	$10,000,000.00	$50,000,000.00
September 8, 2023	$10,000,000.00	$60,000,000.00
October 11, 2023	$16,482,004.95	$76,482,004.95

3. In substitution for posting Bond, if, and only if, the registry of the District Court is willing to accept USD$ cash in lieu of a Bond conforming with the rules of the District Court, a Judgment Debtor may post cash as security to an interest-bearing account (if the registry maintains such an account) with the Registry of the District Court ("***Cash Security***"). For all purposes under this Agreement, including calculation of the Combined Bonded Amount under the Bonding Schedule, a Judgment Debtor shall be credited as having posted a Bond equivalent to 111% of all amounts posted as Cash Security only if (a) the interest rate payable on such Cash Security by the registry of the District Court is equal to or greater than the 5.35% Federal Judgment Rate applicable to the Judgments (or, if less, the "Top-up Interest" is paid as described in footnote 2 below) and (b) all interest paid on the Cash Security becomes part of the Cash Security and remains in the Registry of the District Court and available to satisfy the Judgments. If the Registry of the District Court is not willing to accept a Cash Security or does not accrue and apply interest to the Cash Security as required by the immediately preceding sentence hereof, the Judgment Debtor must post the required amount in the form of a supersedeas Bond consistent with the Federal Rules of Civil Procedure and the Local Rules for the District Court. Consistent with the foregoing,

[1] For avoidance of doubt, failure to post the required Combined Bond Amount by the calendar dates set forth in the Bonding Schedule will constitute a default permitting the plaintiffs to immediately begin enforcement and collection proceedings for the unbonded amounts then outstanding against each and every Judgment Debtor, unless the parties otherwise agree and adjust the Bonding Schedule, or the District Court extends the stay of execution. If at least $60 million in Bond (or the equivalent required amount in cash) has been posted on or before September 8, 2023, the parties will work in good faith to negotiate a fair and equitable schedule for completing Bonding if it cannot be completed by October 11, 2023; if Highland rejects the proposal of the remaining Judgment Debtors, Highland may begin collection efforts if Judgment Debtors have not obtained a stay of execution within 7 days of such rejection.

interest generated by any acceptable USD$ cash deposit to the Registry of the District Court shall be treated as part of the Bond with respect to the right of collection after finalization of appeals.[2]

4. Upon posting of (a) Bond or (b) if acceptable to the Registry of the District Court, Cash Security in substitution of a Bond, the Judgment Debtors shall notify Highland in writing to counsel of record of the Judgment Debtor(s) on whose behalf such Bond or Cash Security was posted and the amount of Combined Bond Amount posted for the purposes of satisfaction of the Bonding Schedule. Except as set forth in footnote 1, failure to post the required Combined Bond Amount by the calendar date above shall constitute an event of default permitting Highland to immediately begin enforcement and collection proceedings for the unbonded amounts against each Judgment Debtor.

5. Each of the Judgment Debtors hereby represents and warrants on its own behalf that it has not since January 1, 2023, engaged in any Fraudulent Transfers. For the purposes of this Agreement, "Fraudulent Transfer" shall have its meaning as defined in 11 U.S.C. §§ 544, 548.

6. None of the Judgment Debtors shall transfer any of its assets with a value of over $100,000 in one or a series of related transactions (an "***Asset Transfer***"), without providing five days (5) written notice to Highland (the "***Notice***") except that Notice is not required for (i) ordinary and customary payments to vendors, employees, contractors, or consultants, including for any bonuses that are already scheduled in the current compensation schedule, all consistent with recent past practice; (ii) payments made pursuant to the terms of a contract executed and effective prior to January 1, 2023 (payments under paragraph 6(i) and (ii) are referred to as "***Ordinary Course Payments***"), or (iii) transfers and transactions made for the purpose of bonding the Judgments. Notwithstanding the foregoing, other than with respect to Ordinary Course Payments being made pursuant to already existing written agreements, the Judgment Debtors *shall* provide Notice to Highland of all contemplated Asset Transfers between or among any Judgment Debtor, on the one hand, and any of Mr. Dondero or Scott Ellington or either of their immediate families or either of their affiliated entities (including Highgate Consulting Group, Inc., d/b/a Skyview Group ("***Skyview***")), on the other (any such contemplated Asset Transfer, an "***Insider Transaction***"). For the avoidance of doubt, items such as contractual payments to Skyview and its employees, scheduled bonus amounts, and medical reimbursements are not required to be disclosed to Highland so long as they otherwise constitute Ordinary Course Payments. While Notice of all other Insider Transactions is required, the Parties do not intend to restrict Asset

[2] As set forth above, the interest rate for by the deposit of Cash Security must be equal to or greater than the 5.35% statutory post-judgment interest rate applicable to the Judgments. In the event that the Cash Security interest rate available at the Registry of the District Court is less than the statutory 5.35% post-judgment interest rate applicable to the Judgments, each the Judgment Debtor shall post additional Cash Security or post additional Bond in the amount of the dollar difference between the Cash Security interest rate payable at the Registry of the District Court (as applied to the Judgments) and the 5.35% post-judgment statutory interest rate applicable to the Judgments ("***Top-Up Interest***"). Top-Up Interest must be deposited with the Registry of the District Court and added to the Cash Security on the first business day of each month. Failure to timely deposit Top-Up Interest shall be an event of default hereunder permitting Highland to immediately begin enforcement and collection proceedings for the unbonded amounts against each Judgment Debtor.

Transfers made as Ordinary Course Payments. The provisions of this Paragraph 6 shall expire (a) for each Judgment Debtor upon the posting of a Bond or Cash Security for its Individual Bond Amount or (b) upon the complete satisfaction of the Bonding Schedule. If Highland objects in writing to any Asset Transfer or Insider Transaction, the proposed transaction(s) may only be pursued if Highland has not moved on shortened notice and as expedited a basis as the District Court will accommodate for injunctive or other relief within 5 days of written notice of a Judgment Debtor's objection to Highland's objection (the Parties all hereby consent to having a motion under this provision heard on shortened notice or on an emergency basis), and such period has not been extended pursuant to a written agreement between the parties or by the Court upon good cause shown.

7. Prior to completion of the Bonding Schedule, and promptly following execution of this Agreement and entry of an order of the District Court approving this Agreement (and in any event on or before August 11, 2023), the Judgment Debtors shall grant (or cause to be granted) to Highland properly perfected, first-priority security interests (the "***Liens***") in collateral collectively up to the amount of $76.4 million ("***Interim Collateral***"). To the extent the Liens are perfected through the filing of a UCC-1, the Liens will be recorded with UCC-1 filings in Dallas County, Texas, and in the state of incorporation/formation of the debtor listed in the applicable UCC-1. Each Lien shall be released with respect to each Judgment Debtor as each Judgment Debtor posts a Bond or Cash Security equal to its Individual Bond Amount in accordance with this Agreement as follows: upon approval by the District Court of any Bond or Cash Security equal to an Individual Bond Amount, Highland shall release its lien and security interest on Interim Collateral in the amount of such Bond or Cash Security with respect to the asset of the particular Judgment Debtor posting such Bond or Cash Security.

8. So long as the Judgment Debtors are in strict compliance with the Bonding Schedule (time being of the essence), and paragraphs 6 and 7 concerning Interim Collateral, Highland shall take no action to execute upon the Judgments.

9. Upon execution of this Agreement, the Parties agree that they shall immediately submit this Agreement to the District Court as a stipulation to be entered on the District Court Case docket and approved by the Court.

AGREED BY COUNSEL TO THE PARTIES TO THIS AGREEMENT:

Deborah Deitsch-Perez

John A. Morris

DOCS_NY:48039.11 36027/004

Counsel to the Judgement Debtors

Counsel to Highland

Deborah Deitsch-Perez
Michael P. Aigen
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Email: Deborah.deitschperez@stinson.com
Email: Michael.aigen@stinson.com

Counsel for Defendants

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

In re: **HIGHLAND CAPITAL MANAGEMENT, L.P.,** **Debtor.**	§ § § § § §	**Chapter 11** **Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P., **Plaintiff,** **v.** **HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.** **Defendants.**	§ § § § § § § § § § § § §	**Civ. Act. No. 3:21-cv-00881-X** **(Consolidated with 3:21-cv-00880-X, 3:21-cv-01010-X, 3:21-cv-01378-X, 3:21-cv-01379-X)**

NOTICE OF BONDING

PLEASE TAKE NOTICE that, on August 8, 2023, in accordance with the terms of the Binding Bonding Agreement attached as Exhibit A to Order Granting Joint Agreed Emergency Motion for Order Approving Stipulation for the Bonding of Judgments and Stays of Executions Pending Appeals, as well as the Amended Final Judgments against the Judgment Debtors at Dkts

143-145 and 147, Defendants NexPoint Asset Management, L.P.; NexPoint Advisors, L.P.; and Highland Capital Management Services, Inc., tendered bond to the Treasury Registry for the United States District Court for the Northern District of Texas. Proof of payment is attached hereto as Exhibit 1.

Dated: August 10, 2023

Respectfully submitted,

/s/ Deborah Deitsch-Perez

Deborah Deitsch-Perez
State Bar No. 24036072
Michael P. Aigen
State Bar No. 24012196
STINSON LLP
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(214) 560-2201 telephone
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Email: deborah.deitschperez@stinson.com
Email: michael.aigen@stinson.com

Counsel for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 10, 2023, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on all parties registered to receive electronic notices in this case.

/s/ *Deborah Deitsch-Perez*
Deborah Deitsch-Perez

Exhibit 1

U.S. District Court

Texas Northern - Dallas

THIS IS A COPY

AMENDED RECEIPT

Receipt Date: Aug 8, 2023 2:56PM

Rcpt. No: 300007043 Trans. Date: Aug 8, 2023 2:56PM Cashier ID: #OH

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
701	Treasury Registry	DTXN321cv000881 /01 **FBO:** Nexpoint Asset Management LP	1	6000000.00	6000000.00

CD	Tender			Amt
CH	Check	#046304	08/8/2023	$6,000,000.00

Total Due Prior to Payment:	$6,000,000.00
Total Tendered:	$6,000,000.00
Total Cash Received:	$0.00
Cash Change Amount:	$0.00

RECEIPT AMENDED by staff #1788 8/8/2023 3:18 PM
AMENDMENT VERIFIED by staff #1774 8/8/2023 3:19 PM
Correction Reason: 03) Incorrect Case/Party Number

Only when the bank clears the check, money order, or verifies credit of funds, is the fee or debt officially paid or discharged. A $53 fee will be charged for a returned check.

Generated: Aug 8, 2023 3:12PM

U.S. District Court

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AMENDED RECEIPT

Receipt Date: Aug 8, 2023 3:01PM

Rcpt. No: 300007048 Trans. Date: Aug 8, 2023 3:01PM Cashier ID: #OH

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
701	Treasury Registry	Dtxn321cv000881 /01 **FBO:** Nexpoint Advisors LP	1	18798654.37	18798654.37

CD	Tender			Amt
CH	Check	#046302	08/8/2023	$18,798,654.37

Total Due Prior to Payment:	$18,798,654.37
Total Tendered:	$18,798,654.37
Total Cash Received:	$0.00
Cash Change Amount:	$0.00

RECEIPT AMENDED by staff #1788 8/8/2023 3:12 PM
AMENDMENT VERIFIED by staff #1774 8/8/2023 3:12 PM
Correction Reason: 03) Incorrect Case/Party Number

Only when the bank clears the check, money order, or verifies credit of funds, is the fee or debt officially paid or discharged. A $53 fee will be charged for a returned check.

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AMENDED RECEIPT

Receipt Date: Aug 8, 2023 2:59PM

Rcpt. No: 300007046 Trans. Date: Aug 8, 2023 2:59PM Cashier ID: #OH

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
701	Treasury Registry	Dtxn321cv000881 /01 **FBO**: Nexpoint Asset Management LP	1	6070217.02	6070217.02

CD	Tender			Amt
CH	Check	#046305	08/8/2023	$6,070,217.02

Total Due Prior to Payment:	$6,070,217.02
Total Tendered:	$6,070,217.02
Total Cash Received:	$0.00
Cash Change Amount:	$0.00

RECEIPT AMENDED by staff #1788 8/8/2023 3:29 PM
AMENDMENT VERIFIED by staff #1774 8/8/2023 3:29 PM
Correction Reason: 04) Incorrect Remitter

Only when the bank clears the check, money order, or verifies credit of funds, is the fee or debt officially paid or discharged. A $53 fee will be charged for a returned check.

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Receipt Date: Aug 8, 2023 3:07PM

Rcpt. No: 300007052 Trans. Date: Aug 8, 2023 3:07PM Cashier ID: #OH

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
701	Treasury Registry	Dtxn321cv000881 /01 **FBO**: Nexpoint Advisors LP	1	921379.59	921379.59

CD	Tender			Amt
CH	Check	#046303	08/8/2023	$921,379.59
			Total Due Prior to Payment:	$921,379.59
			Total Tendered:	$921,379.59
			Total Cash Received:	$0.00
			Cash Change Amount:	$0.00

RECEIPT AMENDED by staff #1788 8/8/2023 3:31 PM
AMENDMENT VERIFIED by staff #1774 8/8/2023 3:31 PM
Correction Reason: 07) Incorrect FBO 03) Incorrect Case/Party Number

Only when the bank clears the check, money order, or verifies credit of funds, is the fee or debt officially paid or discharged. A $53 fee will be charged for a returned check.

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Receipt Date: Aug 8, 2023 3:04PM

Rcpt. No: 300007050 Trans. Date: Aug 8, 2023 3:04PM Cashier ID: #OH

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
701	Treasury Registry	DTXN321cv000881 /01 **FBO:** Nexpoint Advisors LP	1	6129782.98	6129782.98

CD	Tender			Amt
CH	Check	#046306	08/8/2023	$6,129,782.98

Total Due Prior to Payment:	$6,129,782.98
Total Tendered:	$6,129,782.98
Total Cash Received:	$0.00
Cash Change Amount:	$0.00

RECEIPT AMENDED by staff #1788 8/8/2023 3:30 PM
AMENDMENT VERIFIED by staff #1774 8/8/2023 3:30 PM
Correction Reason: 07) Incorrect FBO

Only when the bank clears the check, money order, or verifies credit of funds, is the fee or debt officially paid or discharged. A $53 fee will be charged for a returned check.

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Receipt Date: Aug 8, 2023 2:15PM

Rcpt. No: 300007029 Trans. Date: Aug 8, 2023 2:15PM Cashier ID: #OH

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
701	Treasury Registry	DDTX321cv000881 /01 **FBO**: Highland Capital Management Services Inc	1	7578620.41	7578620.41

CD	Tender			Amt
CH	Check	#046300	08/8/2023	$7,578,620.41

Total Due Prior to Payment:	$7,578,620.41
Total Tendered:	$7,578,620.41
Total Cash Received:	$0.00
Cash Change Amount:	$0.00

RECEIPT AMENDED by staff #1788 8/8/2023 3:21 PM
AMENDMENT VERIFIED by staff #1774 8/8/2023 3:22 PM
Correction Reason: 03) Incorrect Case/Party Number

Only when the bank clears the check, money order, or verifies credit of funds, is the fee or debt officially paid or discharged. A $53 fee will be charged for a returned check.

Deborah Deitsch-Perez
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Email: Michael.aigen@stinson.com

Counsel for Defendants

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

In re: **HIGHLAND CAPITAL MANAGEMENT, L.P.,** **Debtor.**	§	**Chapter 11** **Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P., **Plaintiff,** **v.** **HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.** **Defendants.**	§	**Civ. Act. No. 3:21-cv-00881-X** **(Consolidated with 3:21-cv-00880-X, 3:21-cv-01010-X, 3:21-cv-01378-X, 3:21-cv-01379-X)**

NOTICE OF BONDING

PLEASE TAKE NOTICE that, on August 24, 2023, in accordance with the terms of the Binding Bonding Agreement attached as Exhibit A to Order Granting Joint Agreed Emergency Motion for Order Approving Stipulation for the Bonding of Judgments and Stays of Executions Pending Appeals, as well as the Amended Final Judgments against the Judgment Debtors at Dkts.

146 and 148, Defendants NexPoint Real Estate Partners LLC (f/k/a HCRE Partners LLC) and James Dondero tendered bond to the Treasury Registry for the United States District Court for the Northern District of Texas. Proof of payment is attached hereto as Exhibit 1.

Dated: August 28, 2023

Respectfully submitted,

/s/ Deborah Deitsch-Perez

Deborah Deitsch-Perez
State Bar No. 24036072
Michael P. Aigen
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Counsel for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 28, 2023, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on all parties registered to receive electronic notices in this case.

/s/ *Deborah Deitsch-Perez*
Deborah Deitsch-Perez

EXHIBIT 1

Generated: Aug 24, 2023 1:48PM

U.S. District Court

Texas Northern - Dallas

Receipt Date: Aug 24, 2023 1:48PM

Rcpt. No: 300007302 Trans. Date: Aug 24, 2023 1:48PM Cashier ID: #OH

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
701	Treasury Registry	DTXN321CV000881 /001 HIGHLAND CAPITAL MGMT SERVICES INC **FBO:** Nextpoint Real Estate Partners LLC	1	13251661.00	13251661.00

CD	Tender			Amt
CH	Check	#046362	08/24/2023	$13,251,661.00

Total Due Prior to Payment:	$13,251,661.00
Total Tendered:	$13,251,661.00
Total Cash Received:	$0.00
Cash Change Amount:	$0.00

Only when the bank clears the check, money order, or verifies credit of funds, is the fee or debt officially paid or discharged. A $53 fee will be charged for a returned check.

Generated: Aug 24, 2023 1:51PM

U.S. District Court

Texas Northern - Dallas

Receipt Date: Aug 24, 2023 1:51PM

Rcpt. No: 300007303 Trans. Date: Aug 24, 2023 1:51PM Cashier ID: #OH

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
701	Treasury Registry	DTXN321CV000881 /001 HIGHLAND CAPITAL MGMT SERVICES INC **FBO:** James Dondero	1	1248339.00	1248339.00

CD	Tender			Amt
CH	Check	#046361	08/24/2023	$1,248,339.00

Total Due Prior to Payment:	$1,248,339.00
Total Tendered:	$1,248,339.00
Total Cash Received:	$0.00
Cash Change Amount:	$0.00

Only when the bank clears the check, money order, or verifies credit of funds, is the fee or debt officially paid or discharged. A $53 fee will be charged for a returned check.

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Counsel for Defendants

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

In re: **HIGHLAND CAPITAL MANAGEMENT, L.P.,** **Debtor.**	§	**Chapter 11** **Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P., **Plaintiff,** **v.** **HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.** **Defendants.**	§	**Civ. Act. No. 3:21-cv-00881-X** **(Consolidated with 3:21-cv-00880-X, 3:21-cv-01010-X, 3:21-cv-01378-X, 3:21-cv-01379-X)**

NOTICE OF BONDING

PLEASE TAKE NOTICE that, on October 4, 2023, in accordance with the terms of the Binding Bonding Agreement attached as Exhibit A to Order Granting Joint Agreed Emergency Motion for Order Approving Stipulation for the Bonding of Judgments and Stays of Executions Pending Appeals [Dkt 149], as well as the Amended Final Judgments against the Judgment

Debtors [Dkts. 143-148], Defendants James Dondero, NexPoint Real Estate Partners LLC (f/k/a HCRE Partners LLC), NexPoint Asset Management LP, NexPoint Advisors LP, and Highland Capital Management Services, Inc. tendered top-up interest payments to the Treasury Registry for the United States District Court for the Northern District of Texas. Proof of payment is attached hereto as Exhibit 1.

Dated: October 4, 2023

Respectfully submitted,

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez
State Bar No. 24036072
Michael P. Aigen
State Bar No. 24012196
STINSON LLP
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(214) 560-2203 facsimile
Email: deborah.deitschperez@stinson.com
Email: michael.aigen@stinson.com

Counsel for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 4, 2023, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on all parties registered to receive electronic notices in this case.

/s/ *Deborah Deitsch-Perez*
Deborah Deitsch-Perez

EXHIBIT 1

Generated: Oct 4, 2023 9:24AM

U.S. District Court

Texas Northern - Dallas

Receipt Date: Oct 4, 2023 9:24AM

Rcpt. No: 300008032 Trans. Date: Oct 4, 2023 9:24AM Cashier ID: #AC

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
701	Treasury Registry	DTXN321CV000881 /005 JAMES DONDERO **FBO:** James Dondero	1	435.76	435.76
701	Treasury Registry	DTXN321CV000881 Nextpoint Real Estate Partners **FBO:** Nextpoint Real Estate Partners	1	4625.75	4625.75
701	Treasury Registry	DTXN321CV000881 /003 NEXPOINT ASSET MGMT LP **FBO:** Nextpoint Asset Management	1	4213.34	4213.34
701	Treasury Registry	DTXN321CV000881 /002 NEXPOINT ADVISORS LP **FBO:** Nextpoint Advisors	1	9023.37	9023.37
701	Treasury Registry	DTXN321CV000881 /001 HIGHLAND CAPITAL MGMT SERVICES INC **FBO:** Highland Capital Management	1	2645.46	2645.46

CD	Tender			Amt
CH	Check	#046437	10/3/2023	$20,943.68
			Total Due Prior to Payment:	$20,943.68
			Total Tendered:	$20,943.68
			Total Cash Received:	$0.00
			Cash Change Amount:	$0.00

Only when the bank clears the check, money order, or verifies credit of funds, is the fee or debt officially paid or discharged. A $53 fee will be charged for a returned check.

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Counsel for Defendants

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

In re: **HIGHLAND CAPITAL MANAGEMENT, L.P.,** **Debtor.**	§ § § § § §	**Chapter 11** **Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P., **Plaintiff,** **v.** **HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.** **Defendants.**	§ § § § § § § § § § § § §	**Civ. Act. No. 3:21-cv-00881-X** **(Consolidated with 3:21-cv-00880-X, 3:21-cv-01010-X, 3:21-cv-01378-X, 3:21-cv-01379-X)**

NOTICE OF BONDING

PLEASE TAKE NOTICE that, on October 12, 2023, in accordance with the terms of the Binding Bonding Agreement attached as Exhibit A to Order Granting Joint Agreed Emergency Motion for Order Approving Stipulation for the Bonding of Judgments and Stays of Executions Pending Appeals [Dkt 149], as well as the Amended Final Judgments against James Dondero [Dkt.

148], Defendant James Dondero tendered bond to the Treasury Registry for the United States District Court for the Northern District of Texas. Proof of payment is attached hereto as Exhibit 1.

Dated: October 12, 2023

Respectfully submitted,

/s/ Deborah Deitsch-Perez
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Counsel for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 12, 2023, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on all parties registered to receive electronic notices in this case.

/s/ *Deborah Deitsch-Perez*
Deborah Deitsch-Perez

EXHIBIT 1

Generated: Oct 12, 2023 4:16PM

U.S. District Court

Texas Northern - Dallas

Receipt Date: Oct 12, 2023 4:16PM

James Dondero

Rcpt. No: 300008175 Trans. Date: Oct 12, 2023 4:16PM Cashier ID: #OH

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
701	Treasury Registry	DTXN321CV000881 /005 JAMES DONDERO **FBO:** James Dondero	1	8904052.87	8904052.87

CD	Tender			Amt
CH	Check	#046450	10/12/2023	$8,904,052.87
			Total Due Prior to Payment:	$8,904,052.87
			Total Tendered:	$8,904,052.87
			Total Cash Received:	$0.00
			Cash Change Amount:	$0.00

Only when the bank clears the check, money order, or verifies credit of funds, is the fee or debt officially paid or discharged. A $53 fee will be charged for a returned check.

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Counsel for Defendants

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

In re: **HIGHLAND CAPITAL MANAGEMENT, L.P.,** **Debtor.**	§ § § § § §	**Chapter 11** **Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P., **Plaintiff,** **v.** **HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.** **Defendants.**	§ § § § § § § § § § § § §	**Civ. Act. No. 3:21-cv-00881-X** **(Consolidated with 3:21-cv-00880-X, 3:21-cv-01010-X, 3:21-cv-01378-X, 3:21-cv-01379-X)**

NOTICE OF BONDING

PLEASE TAKE NOTICE that, on November 1, 2023, in accordance with the terms of the Binding Bonding Agreement attached as Exhibit A to Order Granting Joint Agreed Emergency Motion for Order Approving Stipulation for the Bonding of Judgments and Stays of Executions Pending Appeals [Dkt 149], as well as the Amended Final Judgments against the Judgment

Debtors [Dkts. 143-148], Defendants James Dondero, NexPoint Real Estate Partners LLC (f/k/a HCRE Partners LLC), NexPoint Asset Management LP, NexPoint Advisors LP, and Highland Capital Management Services, Inc. tendered top-up interest payments to the Treasury Registry for the United States District Court for the Northern District of Texas. Proof of payment is attached hereto as Exhibit 1.

Dated: November 1, 2023

Respectfully submitted,

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez
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State Bar No. 24012196
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Counsel for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on November 1, 2023, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on all parties registered to receive electronic notices in this case.

/s/ *Deborah Deitsch-Perez*
Deborah Deitsch-Perez

EXHIBIT 1

Generated: Nov 1, 2023 1:49PM

U.S. District Court

Texas Northern - Dallas

Receipt Date: Nov 1, 2023 1:49PM

Rcpt. No: 300008516 Trans. Date: Nov 1, 2023 1:49PM Cashier ID: #OH

CD	Purpose	Case/Party/Defendant	Qty	Price	Amt
701	Treasury Registry	DTXN321CV000881 /005 JAMES DONDERO **FBO:** James Dondero	1	3798.75	3798.75
701	Treasury Registry	DTXN321CV000881 **FBO:** Nextpoint Real Estate Partners LLC	1	5275.40	5275.40
701	Treasury Registry	DTXN321CV000881 /003 NEXPOINT ASSET MGMT LP **FBO:** NexPoint Asset Management LP	1	4701.90	4701.90
701	Treasury Registry	DTXN321CV000881 /002 NEXPOINT ADVISORS LP	1	10069.64	10069.64
701	Treasury Registry	DTXN321CV000881 /001 HIGHLAND CAPITAL MGMT SERVICES INC	1	2952.20	2952.20

CD	Tender			Amt
CH	Check	#046504	11/1/2023	$26,797.89

Total Due Prior to Payment:	$26,797.89
Total Tendered:	$26,797.89
Total Cash Received:	$0.00
Cash Change Amount:	$0.00

Only when the bank clears the check, money order, or verifies credit of funds, is the fee or debt officially paid or discharged. A $53 fee will be charged for a returned check.

EXHIBIT 7

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Counsel for Highland Capital Management, L.P. and the Highland Claimant 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.	

HIGHLAND'S MOTION TO STAY CONTESTED MATTER [DKT NO. 4000] OR FOR ALTERNATIVE RELIEF

Highland Capital Management, L.P., the reorganized debtor in this chapter 11 case ("**HCMLP**"), and the Highland Claimant Trust (the "**Claimant Trust**" and, together with HCMLP, "**Highland**"), move the Court for an order staying all proceedings (the "**Stay Motion**") in connection with the *Motion for Leave to File a Delaware Complaint* [Docket No. 4000], filed by Hunter Mountain Investment Trust ("**HMIT**") on January 1, 2024 (the "**Delaware Motion for Leave**").

I. PRELIMINARY STATEMENT[1]

1. The relief HMIT seeks in the Delaware Motion for Leave depends on the Court's determination of whether HMIT is a beneficiary of the Plan-created Claimant Trust. That issue is already squarely before this Court in Adversary Proceeding No. 23-03038 (the "**Valuation Proceeding**"), in which HMIT is a plaintiff and in which Highland moved to dismiss HMIT's complaint on the basis that HMIT is not entitled to any of the relief it seeks in the complaint because, among other reasons, HMIT is not a beneficiary of the Claimant Trust under the plain terms of the Plan and Claimant Trust Agreement and under applicable law. Briefing on Highland's motion to dismiss the Valuation Proceeding will be complete by January 19, 2024, and oral argument is scheduled for February 14, 2024, just a month from now.

2. As explained more fully below, if this Court rules that HMIT is not a beneficiary of the Claimant Trust as a matter of law—and if HMIT does not prevail on its likely appeal of such a ruling—then the ruling will necessarily dispose of the Delaware Motion for Leave. It would be needlessly duplicative and wasteful of judicial and estate resources to litigate the same threshold issue in the Valuation Proceeding and again in this matter, particularly since the issue will be *sub judice* in the Valuation Proceeding in several weeks. Accordingly, Highland respectfully requests the Court stay all proceedings in connection with the Delaware Motion for Leave until there is a final, non-appealable determination in the Valuation Proceeding regarding whether or not HMIT

[1] This Court has jurisdiction over this case and this contested matter under 28 U.S.C. §§ 157(b) and 1334. Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409 because, among other things, this dispute is a contested matter under the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Docket No. 1943-1] (the "**Plan**") and involves the enforcement and construction of any right or remedy under the Claimant Trust Agreement or any act or omission of the Claimant Trustee acting in his capacity as such. Claimant Trust Agreement § 11.11. Capitalized terms used but not defined herein have the meanings ascribed to such terms in the Plan.

is a beneficiary of the Claimant Trust under the plain terms of the Plan and Claimant Trust Agreement and under applicable law.[2]

II. BACKGROUND

3. On December 7, 2022, the Court issued an order [Docket No. 3645] finding that an adversary proceeding was necessary with regard to the relief sought in a motion filed by The Dugaboy Investment Trust ("**Dugaboy**") [Docket No. 3382 and Docket No. 3533] (the "**Valuation Motion**"), which sought a "determination by this Court of the current value of the estate and an accounting of the assets currently held by the Claimant Trust and available for distribution to creditors."[3]

4. On May 10, 2023, Dugaboy and HMIT commenced the Valuation Proceeding by filing a complaint seeking essentially the same relief originally sought in the Valuation Motion. Highland filed a motion to dismiss the Valuation Proceeding on November 22, 2023 [Adv. Proc. 23-03038, Docket No. 13] (the "**Motion to Dismiss Valuation Complaint**"), asserting, among other arguments, that neither Dugaboy nor HMIT are beneficiaries of the Trust and, therefore, are not entitled to any of the relief sought in the Valuation Proceeding. Briefing on the Motion to Dismiss Valuation Complaint will be completed with the filing of Highland's reply in support on January 19, 2024, and oral argument is scheduled for February 14, 2024 [Adv. Proc. 23-03038, Docket No. 19], after which this Court will determine, among other things, whether HMIT is a beneficiary of the Trust.[4]

---

[2] Alternatively, if the Court denies the Stay Motion (a "**Denial Order**"), Highland respectfully requests that the Court simultaneously enter an order granting Highland an extension of time to respond to the Delaware Motion for Leave equal to 21 days from the date any Denial Order is entered.

[3] HMIT filed various pleadings in support of Dugaboy's Valuation Motion. *See* Docket Nos. 3467, 3605, 3606, and 3638.

[4] On March 28, 2023, HMIT filed a separate *Emergency Motion for Leave to File Verified Adversary Proceeding* [Docket No. 3699], which was later supplemented and modified [Docket Nos. 3760, 3815, and 3816] (collectively, the "**First Motion for Leave**"). On August 25, 2023, this Court denied the First Motion for Leave on the ground

5. This Court's ruling on whether HMIT is a Claimant Trust beneficiary in the Valuation Proceeding (and following the inevitably ensuing appeals if HMIT does not prevail in this Court) will necessarily directly affect the viability of the Delaware Motion for Leave.

6. The Delaware Motion for Leave seeks leave under the Plan's gatekeeper provision to file the five-count complaint attached to the Delaware Motion for Leave (the "**Proposed Delaware Complaint**") in the Delaware Court of Chancery, principally to remove James Seery as trustee of the Claimant Trust. HMIT explicitly bases each of the five counts in the Proposed Delaware Complaint on HMIT's allegation that, notwithstanding the plain terms of the Claimant Trust Agreement, it is somehow a beneficiary of the Claimant Trust under Delaware law.[5]

7. But whether HMIT is a Claimant Trust beneficiary under applicable law is already squarely before this Court in the Valuation Proceeding. A determination of HMIT's status vis-à-vis the Claimant Trust is coming, and it is coming undoubtedly sooner than it would come were the Delaware Motion for Leave fully litigated and then appealed. Instead, such a determination in the Valuation Proceeding that HMIT is *not* a beneficiary would necessarily dispose of the Delaware Motion for Leave. This Court should stay all proceedings related to the Delaware Motion for Leave pending a final, non-appealable determination regarding whether or not HMIT is a

(among others) that HMIT lacked standing to assert the claims because it is not a beneficiary under the Claimant Trust. Docket No. 3903; *In re Highland Cap. Mgmt., L.P.*, 2023 Bankr. LEXIS 2104, 2023 WL 5523949 (Bankr. N.D. Tex. Aug. 25, 2023) (the "**Order Denying Leave**"). HMIT has appealed the Order Denying Leave to the United States District Court for the Northern District of Texas (Case No. 3:23-cv-02071-E) along with seven (7) related interlocutory orders entered in connection with the First Motion for Leave. Given the scope of the appeal, it is unclear whether the District Court will address the Bankruptcy Court's determination that HMIT is not a beneficiary under the Claimant Trust.

[5] On January 19, 2024, Highland will file a reply in further support of its motion to dismiss the Valuation Proceeding that will establish conclusively that HMIT—the holder of a mere unvested, contingent interest in the Trust—is not a beneficiary of the Claimant Trust for any purpose under the plain terms of the Plan, the Claimant Trust Agreement, or applicable law.

beneficiary of the Claimant Trust under the plain terms of the Plan, the Claimant Trust Agreement, and applicable law.

III. RELIEF REQUESTED AND BASIS FOR IT

8. Because this Court (or, ultimately, the Fifth Circuit Court of Appeals) will determine conclusively whether HMIT is a beneficiary of the Claimant Trust, and because such a determination—if adverse to HMIT—will dispose of the Delaware Motion for Leave, Highland respectfully urges the Court to conserve judicial resources and the time, effort, and expense of the litigants and stay all proceedings in connection with the Delaware Motion for Leave until a final, non-appealable order determines HMIT's status vis-à-vis the Claimant Trust.[6]

9. Federal courts, including this Court, have the inherent power to control their own dockets and to stay proceedings when appropriate.[7] The Fifth Circuit Court of Appeals has also recognized the power to stay proceedings as part of the court's power to control its own docket and avoid wasting time and effort.[8] Courts are sensitive to the prejudice a stay would have on the non-moving party, such as "the hardship of being forced to wait for an indefinite and … lengthy time before their causes are heard."[9]

10. Here, HMIT will not be harmed by a stay of its latest (third) motion for leave to sue under the gatekeeper provision. HMIT is litigating, right now, the issue of whether it is a beneficiary of the Claimant Trust in the Valuation Proceeding before this Court. Staying the Delaware Motion for Leave will not force HMIT to wait *any* time for that issue to be litigated and

[6] Again, if the Court issues a Denial Order, Highland requests as alternative relief that its deadline to respond to the Delaware Motion for Leave be extended to the date that is 21 days after a Denial Order is entered. *See supra* n.2.

[7] *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 706–07 (1997) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants") (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936)).

[8] *See, e.g.*, *United States v. Rainey*, 757 F.3d 234, 241 (5th Cir. 2014).

[9] *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1076 (3d Cir. 1983) (citing *Landis*, 299 U.S. at 254–55).

decided, much less an "indefinite" or even "lengthy" time. Staying the Delaware Motion for Leave will have no effect on HMIT's ability to litigate the issue of its contingent, unvested interest in the Claimant Trust. HMIT will not be harmed by a stay.

11. A stay will, however, significantly conserve resources for this Court and for these parties. There is no good reason to require the parties to brief and argue during the course of (likely) months of litigation an issue that will be determined by this Court in the Valuation Proceeding after argument on February 14, 2024. A final, non-appealable order on the fundamental, threshold issue of whether HMIT is a beneficiary under the Claimant Trust will apply to the Delaware Motion for Leave, either by disposing of that motion because HMIT is not a Claimant Trust beneficiary or by precluding Highland from arguing that HMIT is not a Claimant Trust beneficiary in opposing the Delaware Motion for Leave.[10]

12. A stay of the Delaware Motion for Leave serves common sense, is well within this Court's discretion, and will allow HMIT full reign to litigate and appeal and appeal again the issue of whether it is a beneficiary of the Claimant Trust in the Valuation Proceeding already underway and significantly further along than the nascent Delaware Motion for Leave.

IV. CONCLUSION

13. For these reasons, the Court should grant this motion and stay all proceedings on the Delaware Motion for Leave until entry of a final, non-appealable order determining whether HMIT is or is not a beneficiary of the Claimant Trust under the plain terms of the Plan, the Claimant Trust Agreement, and applicable law.

[10] In such case, Highland reserves, and does not waive, all other defenses available to it.

Dated: January 16, 2024

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-and-

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/s/ Zachery Z. Annable

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Counsel for Highland Capital Management, L.P., and the Highland Claimant Trust

CERTIFICATE OF CONFERENCE

I hereby certify that, on January 14, 2024, John A. Morris, counsel for Highland Capital Management, L.P., wrote to HMIT's counsel and requested that counsel let Mr. Morris know by January 16, 2024 at 2:00 p.m. Central Time whether HMIT was opposed or unopposed to the relief requested in the foregoing Motion. HMIT is **OPPOSED** to the relief requested in the Motion.

/s/ Zachery Z. Annable
Zachery Z. Annable

EXHIBIT 8

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Attorneys for James P. Seery, Jr.

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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	Case No. 19-34054-sgj11
Reorganized Debtor.	)	

JAMES P. SEERY, JR.'S JOINDER TO HIGHLAND CAPITAL MANAGEMENT, L.P.'S MOTION TO STAY CONTESTED MATTER [DKT NO. 4000] OR FOR ALTERNATIVE RELIEF AND EMERGENCY MOTION TO EXPEDITE HEARING ON MOTION FOR STAY

James P. Seery, Jr. ("**Mr. Seery**") joins and adopts the reorganized debtor Highland Capital Management, L.P.'s *Motion to Stay a Contested Matter [Dkt No. 4000] or for Alternative Relief* [Docket 4013] (the "**Stay Motion**") and *Emergency Motion to Expedite Hearing on Motion for Stay* [Docket 4014] (the "**Emergency Motion**"). For the reasons set forth in the Stay Motion and the Emergency Motion, Mr. Seery respectfully requests that the Court grant the relief requested therein.

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

Mr. Seery respectfully requests that this Court enter an order (i) granting the relief requested in the Stay Motion and the Emergency Motion, and (ii) for any such other and further relief this Court deems just and appropriate.

Dated: January 22, 2024

WILLKIE FARR & GALLAGHER LLP

/s/ Joshua S. Levy
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Attorneys for James P. Seery, Jr.

CERTIFICATE OF SERVICE

The undersigned certifies that on January 22, 2024, a true and correct copy of the foregoing will be electronically mailed to the parties that are registered or otherwise entitled to receive electronic notices in this case pursuant to the Electronic Filing Procedures in the District.

/s/ Joshua S. Levy
Joshua S. Levy

EXHIBIT 9

The following constitutes the ruling of the court and has the force and effect therein described.

Signed May 24, 2024

United States Bankruptcy Judge

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

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

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS ADVERSARY PROCEEDING IN WHICH CONTINGENT INTEREST HOLDERS IN CHAPTER 11 PLAN TRUST SEEK A POST-CONFIRMATION VALUATION OF TRUST ASSETS

I. INTRODUCTION

Before the court is a motion to dismiss ("Rule 12(b) Motion") the above-referenced adversary proceeding ("Adversary Proceeding").[1] The Rule 12(b) Motion was filed by the two Defendants named in the Adversary Proceeding: Highland Capital Management, L.P. ("Highland" or the "Reorganized Debtor") and the Highland Claimant Trust ("Claimant Trust"). Highland obtained confirmation of a chapter 11 Plan[2] on February 22, 2021 (which Plan went effective on August 21, 2021). The Claimant Trust was established pursuant to the terms of the Plan and the Claimant Trust Agreement approved pursuant thereto. The Claimant Trust was created for the benefit of "Claimant Trust Beneficiaries," which was defined under the Plan and the Claimant Trust Agreement to be the holders of allowed general unsecured (Class 8) and subordinated claims (Class 9) against Highland.

The Adversary Proceeding was brought more than two-years post-confirmation by Plaintiffs Hunter Mountain Investment Trust ("HMIT") and The Dugaboy Investment Trust ("Dugaboy," and, together with HMIT, the "Plaintiffs").[3] These two Plaintiffs are controlled by Highland's co-founder and former President and Chief Executive Officer, James D. Dondero ("Dondero"). The Plaintiffs held equity interests (i.e., limited partnership interests) in Highland. Pursuant to the terms of the Highland Plan, Plaintiffs now hold ***unvested contingent interests*** in the Claimant Trust—since the limited partnership interests in Highland were cancelled in exchange for unvested contingent interests in the Claimant Trust. These contingent interests will vest if, and

---

[1] *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' Interests in the Claimant Trust* ("Motion to Dismiss"), Dkt. No. 13. A memorandum of law in support of the Motion to Dismiss ("MTD Brief") was filed at Dkt. No. 14.

[2] Capitalized terms not defined in this introduction shall be defined later herein.

[3] *See 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 Plaintiff's Interests in the Claimant Trust* ("Complaint"). Dkt. No. 1.

only if, the Claimant Trustee certifies that the Claimant Trust Beneficiaries (i.e., the Class 8 general unsecured claims and Class 9 subordinated claims under the Plan), have been paid in full ***and*** certain other obligations – primarily, the Claimant Trust's significant indemnity obligations – have been satisfied.

In this Adversary Proceeding, Plaintiffs seek: (1) an order from the bankruptcy court compelling the Reorganized Debtor and the Claimant Trustee to disclose certain information about the assets and liabilities remaining in the Claimant Trust, and, if they are compelled to disclose that information, (2) a declaratory judgment regarding the relative value of those assets and liabilities, and (3) if assets exceed liabilities, a declaratory judgment that HMIT's and Dugaboy's unvested contingent interests in the Claimant Trust are likely to vest at some point in the future.

To be clear, it is undisputed that neither HMIT nor Dugaboy are currently Claimant Trust Beneficiaries under the terms of the Plan and Claimant Trust Agreement and that the vesting conditions under the terms of the Plan and Claimant Trust Agreement have not occurred.

Highland and the Claimant Trust filed their Motion to Dismiss, seeking a dismissal, with prejudice, of all three counts of the Complaint. For the following reasons, the court grants the Motion to Dismiss.

I. JURISDICTION

This court has jurisdiction to consider and determine this matter pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A) and (O) and 1334.

II. BACKGROUND

A. The Bankruptcy Case and the Plan

Highland was a Dallas-based investment firm that was co-founded in 1993 by Dondero and Mark Okada. It managed billion-dollar investment portfolios and assets, both directly and indirectly, through numerous affiliates that were owned or controlled by Dondero. On October

16, 2019 (the "Petition Date"), Highland, with Dondero in control[4] and acting as its CEO, president, and portfolio manager, and facing a myriad of massive, business litigation claims, filed for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. The bankruptcy case was transferred to the Northern District of Texas, Dallas Division in December 2019.

Highland, a Delaware limited partnership, had three classes of limited partnership interests (Class A, Class B, and Class C) as of the Petition Date.[5] The Class A interests were held by the Plaintiff Dugaboy, and also Mark Okada's family trusts, and Strand Advisors, Inc. (the latter of which was an entity wholly owned by Dondero and was also Highland's only general partner). The Class B and C interests were held by the Plaintiff HMIT.[6]

Very shortly after the Petition Date, the official committee of unsecured creditors (the "Committee") threatened to seek the appointment of a chapter 11 trustee due to concerns over and distrust of Dondero, his numerous conflicts of interest, and his history of alleged mismanagement. Later, the United States Trustee actually moved for the appointment of a chapter 11 trustee. Under the specter of a possible appointment of a trustee, Highland engaged in substantial and lengthy negotiations with the Committee, resulting in a corporate governance settlement approved by this court on January 9, 2020.[7] As a result of this corporate governance settlement, Dondero relinquished control of Highland and resigned his positions as officer or director of Highland and its general partner, Strand,[8] although he stayed on with Highland as an unpaid portfolio manager.

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[4] Mark Okada resigned from his role with Highland prior to the Petition Date.

[5] *See Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* ("Disclosure Statement") Art. II(D)4, at 20. Bankr. Dkt. No. 1473.

[6] *Id.*

[7] Bankr. Dkt. No. 339.

[8] Dondero agreed to this settlement pursuant to a stipulation he executed and that was filed in connection with Highland's motion to approve the settlement. *See Stipulation in Support of Motion of the Debtor for Approval of*

Three independent directors ("Independent Directors") were chosen to lead Highland through its chapter 11 case: James P. Seery, Jr. ("Seery"), John S. Dubel, and retired bankruptcy judge Russell Nelms. Seery was appointed Highland's Chief Executive Officer and Chief Restructuring Officer in July 2020.[9] According to Seery's testimony at various hearings, it was during subsequent negotiations regarding a plan for Highland that Dondero made a threat to "burn down the place" if Dondero's own proposed plan terms were not accepted by the company and its creditors. Indeed, soon after Highland negotiated compromises with its major creditors in the case (*e.g.,* the Redeemer Committee of the Crusader Fund; Joshua Terry; Acis; UBS) and began pursuing a plan supported by those creditors, Dondero and entities under his control began engaging in substantial, costly, and time-consuming litigation in the Highland case.[10] As the Fifth Circuit has described the situation, after Dondero's plans failed, "he and others under his control began to frustrate the proceedings by objecting to settlements, appealing orders, seeking writs of mandamus, interfering with Highland's management, threatening employees, and canceling trades between Highland and its clients."[11]

Highland's negotiations with the Committee eventually culminated in the filing of the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the

Settlement With the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in Ordinary Course, Bankr. Dkt. No. 338.

[9] Bankr. Dkt. No. 854.

[10] As mentioned earlier, after January 2020, Dondero stayed on at Highland as an unpaid portfolio manager. In October 2020, Dondero resigned from all positions with Highland and its affiliates in response to a demand by the Independent Directors made after Dondero's purported threats and disruptions to the Debtor's operations.

[11] *NexPoint Advisors, L.P. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, 48 F.4th 419, 426 (citing *Highland Cap. Mgmt., L.P. v. Dondero (In re Highland Capital Mgmt., L.P.)*, Ch. 11 Case No. 19-34054-SGJ11, Adv. No. 20-03190-SGJ11, 2021 WL 2326350, at *1, *26 (Bankr. N.D. Tex. June 7, 2021) where this court "h[eld] Dondero in civil contempt, sanctioning him $100,000, and comparing this case to a 'nasty divorce.'").

"Plan"),[12] which was confirmed[13] in February 2021 over the objections of Dondero and Dondero-controlled entities. The Plan, which became effective on August 21, 2021 ("Effective Date"), is essentially an "asset monetization" plan pursuant to which the Committee was dissolved, and four new entities were created: the Reorganized Debtor; a new general partner for the Reorganized Debtor called HCMLP GP, LLC; the Claimant Trust (administered by Seery, its trustee); and a Litigation Sub-Trust (administered by its trustee, Marc Kirschner). The Claimant Trust owns the limited partnership interests in the Reorganized Debtor, HCMLP GP LLC, and the Litigation Sub-Trust and is charged with winding down Highland over a three-year period by monetizing its assets and making distributions to the "Claimant Trust Beneficiaries," as defined in the Plan and the CTA. General unsecured claims were classified as Class 8, and subordinated claims were classified as Class 9. Under the terms of the Plan, the holders of claims in Classes 8 and 9 received as of the Effective Date, in exchange for their claims, beneficial interests in the Claimant Trust and became "Claimant Trust Beneficiaries." HMIT's and Dugaboy's former limited partnership interests in Highland were classified as Class 10 and Class 11, respectively. Under the terms of the Plan, these interests were cancelled in exchange for ***unvested*** contingent interests in the Claimant Trust ("Contingent Trust Interests") that will vest if, and only if, the Claimant Trustee certifies that the Class 8 general unsecured claims and Class 9 subordinated claims have been paid in full, all disputed claims in Classes 8 and 9 have been resolved, ***and*** certain other obligations – primarily, the Claimant Trust's significant indemnity obligations – have been satisfied.[14] In other

[12] Bankr. Case Dkt. No. 1808.

[13] The Plan was confirmed on February 22, 2021. *See Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief* ("Confirmation Order"). Bankr. Dkt. No. 1943.

[14] *See generally* Plan, Arts. III & IV.

words, HMIT and Dugaboy will become "Claimant Trust Beneficiaries" if, and only if, the vesting conditions occur.

B. Information Rights under the CTA

The Claimant Trust is a Delaware statutory trust established pursuant to the terms of that certain *Claimant Trust Agreement* ("CTA"), effective August 11, 2021, for the benefit of Claimant Trust Beneficiaries, which are defined in the CTA to be[15]

> 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.

Under the clear terms of the CTA, information rights are limited, and the Claimant Trustee has no duty to provide an accounting of the Claimant Trust's assets to any party, including the Claimant Trust Beneficiaries.[16] The CTA grants limited information rights solely to a "Claimant Oversight Board"[17] and the Claimant Trust Beneficiaries:[18]

> The Claimant Trustee shall provide quarterly reporting to the Oversight Board and Claimant Trust Beneficiaries of (i) the status of the Claimant Trust Assets, (ii) the balance of Cash held by the Claimant Trust (including in each of the Claimant Trust Expense Reserve and Disputed Claim Reserve), (iii) the determination and any re-

[15] CTA § 1.1(h). The CTA was expressly incorporated into and is a part of the Plan. *See* Confirmation Order ¶ 25, at 27; Plan Art. IV(J). The final form of the CTA was filed with the court at docket number 1811-2, as modified by docket number 1875-4.

[16] CTA § 3.12(a) ("Except as otherwise provided herein, nothing in this Agreement requires the Claimant Trustee to file any accounting . . . ."); § 5.2 ("The ownership of the beneficial interests in the Claimant Trust shall not entitle the Claimant Trust Beneficiaries to any title in or to the Claimant Trust Assets (which title shall be vested in the Claimant Trust) or to any right to call for a partition or division of the Claimant Trust Assets ***or to require an accounting***.") (emphasis added).

[17] "Oversight Board" was defined in the CTA as "the board comprised of five (5) Members established pursuant to the Plan and Article III of this Agreement to oversee the Claimant Trustee's performance of his duties and otherwise serve the functions set forth in this Agreement and those of the "Claimant Trust Oversight Committee" described in the Plan. Subject to the terms of this Agreement, the initial Members of the Oversight Board shall be: (i) Eric Felton, as representative of the Redeemer Committee; (ii) Josh Terry, as representative of Acis; (iii) Elizabeth Kozlowski, as representative of UBS; (iv) Paul McVoy, as representative of Meta-e Discovery; and (v) David Pauker."

[18] CTA § 3.12(b).

> determination, as applicable, of the total amount allocated to the Disputed Claim Reserve, (iv) the status of Disputed Claims and any resolutions thereof, (v) the status of any litigation, including the pursuit of the Causes of Action, (vi) the Reorganized Debtor's performance, and (vii) operating expenses; provided, however, that the Claimant Trustee may, with respect to any Member of the Oversight Board or Claimant Trust Beneficiary, redact any portion of such reports that relate to such Entity's Claim or Equity Interest, as applicable and any reporting provided to Claimant Trust Beneficiaries may be subject to such Claimant Trust Beneficiary's agreement to maintain confidentiality with respect to any non-public information.

Nothing in the Plan or the CTA grants any other information rights, and, in fact, the CTA makes clear that the Claimant Trust Beneficiaries do not have any information rights outside of those limited information rights set forth in the CTA,[19] which do not include rights to the granular asset and subsidiary level information that the Plaintiffs are asking for in their Complaint (as later further discussed).

As earlier noted, the Claimant Trust Beneficiaries are defined in the CTA to be only the holders of allowed Class 8 general unsecured claims and allowed Class 9 subordinated claims unless and until the Contingent Trust Interests held by the holders of the former limited partnership interests (classified in Classes 10 and 11 under the Plan) vest, at which point, the Class 10 and Class 11 claimants will become Contingent Trust Beneficiaries.[20] The CTA specifically provides that the holders of 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 the Claimant Trustee files with the Bankruptcy Court a certification that all holders of general unsecured claims have been indefeasibly paid in full,

[19] CTA § 5.10(a) ("The Claimant Trust Beneficiaries shall have no rights other than those set forth in this Agreement, the Confirmation Order, or the Plan (including any Plan Supplement documents incorporated therein).").

[20] *See* CTA § 1.1(h); Plan Art. I.B.27.

including, as to Class 8 claims, "all accrued and unpaid post-petition interest consistent with the Plan and all Disputed Claims have been resolved (the 'GUC Payment Certification')."[21]

C. The Complaint and Motion to Dismiss

1. The Complaint

On May 10, 2023, HMIT and Dugaboy filed the Complaint in this Adversary Proceeding, asserting one claim for equitable relief and, if the court grants the request for equitable relief, two claims for declaratory relief.

In Count I,[22] entitled "First Claim for Relief - Disclosures of Claimant Trust Assets and Request for Accounting," Plaintiffs seek an order compelling Highland and the Claimant Trust "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 [alleged] wall of silence was erected, and all liabilities."[23] Plaintiffs acknowledge in their Complaint that, under the terms of the Plan and the CTA, they are not entitled to the information they seek: While "[t]he Plan requires the Claimant Trustee to determine the fair market value of the Claimant Trust Assets as of the Effective Date and to notify the applicable Claimant Trust Beneficiaries of such a valuation, as well as distribute tax information to Claimant Trust Beneficiaries as appropriate[,][24] . . . ***no like information regarding valuation of the Claimant Trust Assets is available to Plaintiffs as holders of Contingent Claimant Trust Interests*** . . . ."[25] Thus, Plaintiffs seek equitable relief

[21] *See* CTA § 5.1(c).

[22] For ease of reference, the court will refer to the Plaintiffs' "First Claim for Relief," "Second Claim for Relief," and "Third Claim for Relief" as Count I, Count II, and Count III, respectively.

[23] Complaint ¶¶ 82-88.

[24] *Id.* ¶ 75 (citing Plan, Art. IV(B)(9)).

[25] *Id.* ¶ 76.

in Count I – an order compelling the Highland Parties to disclose information that Plaintiffs admit they are not otherwise entitled to under the terms of the Plan and the CTA.

In Count II, entitled "Second Claim for Relief – Declaratory Judgment Regarding Value of Claimant Trust Assets," Plaintiffs seek a declaratory judgment and "determination from the Court of the relative value of the Claimant Trust assets compared to the bankruptcy estate obligations," "[o]nce Defendants are compelled to provide information about the Claimant Trust assets."[26]

Finally, in Count III, entitled "Third Claim for Relief – Declaratory Judgment and Determination Regarding Nature of Plaintiffs' Interests," the Plaintiffs seek a declaratory judgment and determination, "[i]n the event that the Court determines that the Claimant Trust assets exceed the obligations of the bankruptcy estate in an amount sufficient so that all Allowable Claims may be indefeasibly paid . . . that the conditions are such that their Contingent Claimant Trust Interests are likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries."[27] HMIT and Dugaboy, by asking the court for a declaratory judgment that "the conditions are such that their Contingent Claimant Trust Interests ***are likely to vest*** into Claimant Trust Interests, making them Claimant Trust Beneficiaries"[28] (if the court first grants the equitable relief requested in Count I and the declaratory relief in Count II), admit and acknowledge that they are ***not*** Claimant Trust Beneficiaries and that their Claimant Trust Interests ***have not vested*** under the terms of the Plan and CTA. In fact, HMIT and Dugaboy clarify in footnote 6, with respect to Count III, that "[they] do not ask the Court to determine that they are Claimant Trust Beneficiaries or otherwise to convert their contingent interests into non-contingent interests[,]" and they

[26] *Id.* ¶¶ 89-92, at 26. The court notes that Plaintiffs' request for declaratory relief in Count II is predicated on the court granting the equitable relief sought in Count I.

[27] *Id.* ¶¶ 93-95, at 27. The court notes that Plaintiffs' request for declaratory relief in Count III is predicated on the court granting the declaratory relief sought in Count II, which (as noted) is, in turn, predicated on the court granting the equitable relief sought in Count I.

[28] *Id.* ¶ 94, at 27 (emphasis added).

acknowledge that "[a]ll of that must be done according to the terms of the Plan and the Claimant Trust Agreement."[29]

2. The Valuation Motion, Precursor to the Complaint

This is not the first time Plaintiffs have sought a valuation and accounting from the Claimant Trustee. In fact, the Complaint was filed after two prior efforts by the Plaintiffs to seek a valuation and accounting for the purported purpose of having the court determine that the Claimant Trust assets exceeded liabilities such that they were "in the money" and therefore, they argued, their Contingent Trust Interests were likely to vest in the near future. The first time was via a motion[30] that Dugaboy (with the support of HMIT)[31] filed in June 2022, that this court denied[32] on the ground that it was procedurally defective – that the claims for equitable and declaratory relief sought therein must be brought as an adversary proceeding. Specifically, this court held that, in asking the court to determine whether Dugaboy was "in the money" and whether "its status as a holder of a 'Contingent Trust Interest' [would] soon spring into the status of a 'Claimant Trust Beneficiary,'" the Valuation Motion was asking "for the court to ***determine*** the ***extent*** of Dugaboy's ***interest*** in the ***property*** in the Creditor's Trust," which is a "proceeding to

[29] *Id.* ¶ 94 n.6, at 27.

[30] On June 30, 2022, Dugaboy filed a *Motion for Determination of the Value of the Estate and Assets Held by the Claimant Trust* in which Dugaboy sought "a determination by this Court of the current value of the estate and an accounting of the assets currently held the [sic] Claimant Trust and available for distribution to creditors" and, on September 21, 2022, a *Supplemental and Amended Motion for Determination of the Value of the Estate and Assets Held by the Claimant Trust* in which Dugaboy further stated that "the Court should conduct an evidentiary hearing and require disclosure by the Reorganized Debtor and Claimant Trustee of the value of the estate and all assets held by Claimant Trust that are available for distribution to creditors and residual equity holders." (together, the "Valuation Motion"). In the Valuation Motion, the movants sought a determination of the value of the assets of the Claimant Trust and the entry of "an order: (i) finding that Dugaboy has standing in these bankruptcy proceedings under 11 U.S.C. § 1109(b), Delaware trust law, and Article III of the United States Constitution; and (ii) setting an evidentiary hearing to ascertain the assets currently available for distribution to allowed claimants, to determine the current value of those assets, and to determine whether there is a potential for settling the estate now . . . . "

[31] HMIT filed a *Limited Response in Support of Certain Requested Relief* on August 24, 2022.

[32] *See Order Denying Motion [DE #3383] and Supplemental Motion [DE #3533] of Dugaboy Investment Trust Due to Procedural Deficiency: Adversary Proceeding is Required* ("Order Denying Valuation Motion"), entered on December 20, 2022. Bankr. Dkt. No. 3645.

determine the validity, priority, or extent of . . . [an] interest in property" under Fed. R. Bankr. P. 7001(2) that must be brought as an adversary proceeding.[33] Additionally, the court held that the movants' request for the court to make a determination of the current value of the estate and for an accounting of the Claimant Trust assets was a request for equitable relief that was not provided for in the Plan, and that such a request must be brought via an adversary complaint pursuant to Fed. R. Bankr. P. 7001(7).[34] Finally, the court held that the request in the Valuation Motion clearly was requesting a declaratory judgment as to the value of assets, the extent of Dugaboy's and HMIT's interests in assets, and ultimately, "a declaration as to Dugaboy's standing" that should be brought as an adversary proceeding under the terms of Fed. R. Bankr. P. 7001(9) as "a proceeding to obtain declaratory judgment relating to any of the foregoing [types of procedures listed in Rule 7001]."[35] Accordingly, the court denied the Valuation Motion "for procedural deficiency[,] without prejudice to the filing of an adversary proceeding."[36]

Next, Dugaboy and HMIT filed a motion seeking leave from this court to file the Complaint, pursuant to the "Gatekeeper Provisions" of the court's prior orders and the Plan (which have been discussed at length in various Highland opinions),[37] but then withdrew the motion for leave (the "Withdrawn Motion for Leave"), after Highland agreed at a status conference held on April 24, 2023 that leave of court was not necessary for the filing of this particular Adversary

[33] Order Denying Valuation Motion, 4.

[34] *Id.* Fed. R. Bankr. P. 7001(7) states that "a proceeding to obtain an injunction or other equitable relief, except when a . . . chapter 11 plan provides for the relief" is an adversary proceeding governed by Bankruptcy Rules 7001 *et seq.*

[35] *See id.* at 6 (quoting Fed. R. Bankr. P. 7001(9)).

[36] *Id.* at 6.

[37] *E.g., NexPoint Advisors, L.P. v. Highland Capital Management, L.P. (In re Highland Capital Management, L.P.)*, 48 F.4th 419, 439 (5th Cir. 2022) (Fifth Circuit upheld "Gatekeeper Provisions" approved by the bankruptcy court in this case, that required persons to obtain leave of the bankruptcy court before initiating action against certain parties).

Proceeding.[38] Plaintiffs then filed the Complaint that initiated this Adversary Proceeding on May 10, 2023.

3. Meanwhile, HMIT Files Gatekeeper Motion for Leave to File a Different Adversary Proceeding against the Claimant Trustee and Others Regarding Claims Trading

Meanwhile, HMIT filed a separate *Emergency Motion for Leave to File Verified Adversary Proceeding* ("HMIT Motion for Leave Regarding Claims Trading"),[39] which was later supplemented and modified.[40] HMIT's Motion for Leave Regarding Claims Trading should not be confused with its (and Dugaboy's) earlier Withdrawn Motion for Leave, just discussed. In the HMIT Motion for Leave Regarding Claims Trading, it sought leave pursuant to the Gatekeeper Provisions to sue Highland, Seery (i.e., the Claimant Trustee), and certain purchasers of large unsecured claims based upon allegations of "insider trading" and breach of fiduciary duty. A hearing was held on the HMIT Motion for Leave Regarding Claims Trading, following which the court took the matter under advisement.

While the matter was pending under advisement, Dondero and certain of his controlled entities (the "Dondero Parties") filed a *Motion to Stay and to Compel Mediation* (the "Mediation Motion"),[41] which was granted, in part, on August 2, 2023.[42] In compliance with an agreed-upon court order[43] and in furtherance of mediation, Highland filed a *pro forma* adjusted balance sheet

[38] In confirming that Highland had agreed that a gatekeeper motion would not be necessary "since the adversary would just be seeking a valuation and not monetary or other relief," Highland's counsel reported that Highland "does not believe [HMIT] or Dugaboy is entitled to any information whatsoever" and that "[t]hey certainly have no legal right to the information [which is] why they have to pursue . . . an equitable claim." Transcript of April 24, 2023 Status Conference, 4:7-23. Bankr. Dkt. No. 3765.

[39] Bankr. Dkt. No. 3699 (filed on March 28, 2023).

[40] *See* Bankr. Dkt. Nos. 3760, 3815, and 3816.

[41] Bankr. Dkt. No. 3757.

[42] Bankr. Dkt. No. 3897.

[43] Bankr. Dkt. No. 3870.

("Pro Forma Adjusted Balance Sheet") for the Claimant Trust,[44] which disclosed a May 31, 2023 point-in-time $152 million in assets (of which only $37 million was cash or restricted cash) and $130 million in liabilities, for a total equity value of $22 million. The information disclosed on the Pro Forma Adjusted Balance Sheet was consistent with information that had already been filed in the Bankruptcy Case in certain "Post-Confirmation Reports" as of April 2023.[45] Highland and the Claimant Trustee represent that the Post-Confirmation Reports were "enhanced" and publicly filed to provide interested parties substantially more information than was required, and that these disclosures should have resolved any good faith dispute around receiving sufficient information with which to make a global settlement offer.[46] In any event, the Pro Forma Adjusted Balance Sheet and Post-Confirmation Reports are now central to Highland and the Claimant Trustee's "mootness" argument later discussed herein.

On August 25, 2023, the court issued a 105-page memorandum opinion and order denying HMIT's Motion for Leave Regarding Claims Trading ("Order Denying Leave to Bring Claims Pertaining to Claims Trading")[47] on multiple grounds, including on the bases that: (a) HMIT lacked constitutional standing to bring the claims; (b) even if it had constitutional standing, it lacked prudential standing under Delaware trust law to bring the claims; and (c) the proposed claims also were not "colorable" claims that the court, pursuant to its gatekeeping function under the Gatekeeper Provisions, should allow HMIT to bring. The court found, among other things, that HMIT was not a "Claimant Trust Beneficiary" and not a "beneficial owner" of the Claimant Trust. The court further determined that HMIT should not be treated as a "Claimant Trust

[44] Bankr. Dkt. No. 3872 (filed July 6, 2023).

[45] *See* Bankr. Dkt. Nos. 3756 and 3757 ("Post-Confirmation Reports").

[46] MTD Brief ¶ 20, at 10.

[47] Bankr. Dkt. No. 3904.

Beneficiary" after both "considering the current value of the Claimant Trust Assets" and the allegations of wrongful conduct by the Claimant Trustee, as the court "does not have the power to equitably deem HMIT's Contingent Trust Interest to be vested." The court noted that "HMIT's status as a 'beneficiary' of the Claimant Trust is defined by the CTA itself, pure and simple," and it was undisputed that HMIT's Contingent Trust Interest had not vested yet under the terms of the Plan and the CTA.

On September 8, 2023, HMIT filed a motion to reconsider ("HMIT's Motion to Reconsider Lack of Standing")[48] the Order Denying Leave to Bring Claims Pertaining to Claims Trading. HMIT argued that the court should reconsider its ruling because the Pro Forma Adjusted Balance Sheet, filed in July 2023 (after the court took the HMIT Motion for Leave Regarding Claims Trading under advisement, but before the court issued its August 2023 Order Denying Leave to Bring Claims Pertaining to Claims Trading, established that (1) the value of the Claimant Trust assets exceeded liabilities; (2) HMIT was "in the money"; and (3) its unvested Contingent Trust Interest was likely to vest and, therefore, HMIT had both constitutional and prudential standing as a Claimant Trust Beneficiary to bring the proposed claims.

On October 6, 2023, the court entered an order denying reconsideration ("Order Denying HMIT's Motion to Reconsider Lack of Standing"),[49] finding that the Pro Forma Adjusted Balance sheet did not "demonstrate that HMIT's contingent interest [wa]s 'in the money,'" noting that HMIT d[id] not give proper attention to the voluminous supplemental notes" in the Pro Form Adjusted Balance Sheet that are "integral to understanding the numbers therein."[50] In addition

[48] Bankr. Dkt. No. 3905.

[49] Bankr. Dkt. No. 3936.

[50] Order Denying HMIT's Motion to Reconsider Lack of Standing, 3 (citing Notes 5 and 6 of the Balance Sheet, which show that Highland will operate at an "operating loss prospectively," and that the administrative expenses and legal fees continue to deplete assets, with "significant and widespread litigation result[ing] in massive indemnification obligations, as well as massive, continuing legal fees and expenses").

this court also found that the Pro Forma Adjusted Balance Sheet did not constitute "newly discovered evidence" because it did not contain information that was materially different from the information disclosed in the Post-Confirmation Reports, filed three months earlier.[51]

4. The Rule 12(b) Motion

As noted earlier, this Adversary Proceeding was briefly stayed pending a court-ordered[52] mediation that ultimately proved to have been unsuccessful.[53] Then, on November 22, 2023, Highland and the Claimant Trustee filed their Rule 12(b) Motion that is now pending before the court.[54]

In their Rule 12(b) Motion, Highland and the Claimant Trustee seek a dismissal of Counts I and III pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure[55] (made applicable herein pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure[56]) for ***lack of subject matter jurisdiction***—specifically, Counts I and III based on ***mootness***, and Count III based on the additional ground that Plaintiffs seek an ***impermissible advisory opinion.*** Thus, there is no ***justiciable controversy*** with respect to either of these counts. In addition to the lack of subject matter arguments, Highland and the Claimant Trustee also seek dismissal of Count III on the basis that the Plaintiffs are ***collaterally estopped*** from bringing the claim for declaratory relief. Finally,

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[51] *Id.* at 2-3.

[52] See, Bankr. Dkt. No. 3879, which was entered on August 2, 2023, granting, in part, the April 20, 2023 *Motion to Stay and to Compel Mediation* [Bankr. Dkt. No. 3752] filed by Dondero and certain of his affiliates in the main bankruptcy case.

[53] *See Joint Notice of Mediation Report* (filed on November 7, 2023). Bankr. Dkt. No. 3964.

[54] *See Order Approving Stipulation and Proposed Scheduling Order* (entered on November 21, 2023). Dkt. No. 12.

[55] Hereinafter, the court shall refer to a rule of the Federal Rules of Civil Procedure as "Rule ___."

[56] Hereinafter, the court shall refer to a rule of the Federal Rules of Bankruptcy Procedure as "Bankruptcy Rule ___."

the Highland Parties seek dismissal of all three counts pursuant to Rule 12(b)(6) (made applicable herein by Bankruptcy Rule 7012) for ***failure to state a claim upon which relief can be granted***.[57]

The court has considered the Rule 12(b) Motion, HMIT's and Dugaboy's response[58] in opposition, and the reply thereto.[59] Oral arguments were heard on February 14, 2024, following which this court took the matter under advisement.[60] Having considered all of this, the undisputed facts set forth in the Complaint, and certain facts of which this court takes judicial notice, and for the following reasons, this court concludes that: (a) it does not lack subject matter jurisdiction over Count I of the Complaint but that HMIT and Dugaboy have failed to state a claim upon which relief can be granted as to Count I, and thus, Count I should be dismissed pursuant to Rule 12(b)(6); (b) that Count II of the Complaint is not justiciable and that, pursuant to Rule 12(b)(1) and Rule 12(h)(3), Count II of the Complaint should be dismissed for lack of subject matter jurisdiction; and, (c) Count III of the Complaint is not justiciable and that, pursuant to Rule 12(b)(1), Count III of the Complaint should be dismissed for lack of subject matter jurisdiction.

III. CONCLUSIONS OF LAW

A. Legal Standards

"When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citation omitted). "Moreover, when a complaint could be dismissed for both lack of jurisdiction and failure to state a claim, the court

[57] *See generally* MTD Brief, 11-25.

[58] *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* ("Response"). Dkt. No. 17.

[59] *The Highland Parties' Reply in Further Support of Motion to Dismiss Complaint* ("Reply"). Dkt. No. 21.

[60] A transcript of the February 14 hearing was filed on February 20, 2024. Dkt. No. 25.

should dismiss only on the jurisdictional ground under Rule 12(b)(1), without reaching the questions of failure to state a claim under Rule 12(b)(6)"—a "practice [that] prevents courts from issuing advisory opinions." *Crenshaw-Logal v. City of Abilene, Texas*, 436 F. App'x 306 (5th Cir. 2011) (cleaned up). "The practice also prevents courts without jurisdiction 'from prematurely dismissing a case with prejudice.'" *Id.* (quoting *Ramming,* 281 F.3d at 161). Thus, the court will address the Rule 12(b)(1) issues and, then, to the extent the court finds that it has subject matter jurisdiction over any of the claims asserted by the Plaintiffs, the court will address the separate collateral estoppel argument and whether the Plaintiffs have failed to state a claim upon which relief can be granted.

1. *Rule 12(b)(1) – Lack of Subject Matter Jurisdiction*

As noted, the Defendants argue that the court lacks subject matter jurisdiction over Plaintiffs' claims asserted in Counts I and III of their Complaint, and, therefore, they must be dismissed pursuant to Rule 12(b)(1). The court notes that, pursuant to Rule 12(h)(3), the court "must dismiss the action" "if [it] determines at any time that it lacks subject matter jurisdiction," whether the issue is raised by a party or *sua sponte* by the court. This is so because federal courts have a "constitutional duty . . . to decline subject matter jurisdiction where it does not exist—and that is so whether the parties challenge Article III standing or not." *Abraugh v. Altimus*, 26 F.4th 298, 304 (5th Cir. 2022).

Under Article III of the Constitution, a federal court "may only adjudicate actual, ongoing controversies." *Shemwell v. City of McKinney, Texas*, 63 F.4th 480, 483 (5th Cir. 2023) (citing *Honig v. Doe*, 484 U.S. 305, 317 (1988)). and thus "[w]hether a case or controversy remains live throughout litigation is a jurisdictional matter." *Id.* (citations omitted). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). As noted by the Supreme

Court, "the doctrines of [constitutional standing,] mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language." *Id.* at 352 (citations omitted). The justiciability requirement found in Article III forms the basis of the overarching and, at times, overlapping well-settled rule that federal courts are not permitted to issue advisory opinions. *See Su v. F Elephant, Inc. (In re TMT Procurement Corp.)*, No. 21-20146, 2022 WL 38985, at *2 (5th Cir. Jan. 4, 2022) ("'[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions,' and parties must articulate 'concrete legal issues, presented in actual cases, not abstractions.'") (quoting *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947))). The Fifth Circuit in *Shemwell*[61] recently expounded on the "interplay among the justiciability doctrines" that are "rooted in the Constitution":

> Our justiciability doctrines – including mootness – are rooted in the Constitution. Under Article III of the Constitution, this court may only adjudicate actual, ongoing controversies. Accordingly, whether a case or controversy remains live throughout litigation is a jurisdictional matter. Reframed in the familiar taxonomy of standing and ripeness, this means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. Or, as the Court has sometimes articulated the interplay among the justiciability doctrines, standing generally assesses whether the [requisite] interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings.

The Supreme Court has interpreted the "cases" and "controversies" language in Article III "to demand that an actual controversy be extant at all stages of review, not merely at the time the complaint is filed," and, thus, "[i]f an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160-161 (2016)

[61] 63 F.4th at 483.

(cleaned up); *see also Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) ("Mootness is the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).") (cleaned up). "A case becomes moot, however, only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald,* 577 U.S. at 161 (cleaned up). In other words, "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purpose of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome" and "no matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Yarls v. Bunton*, 905 F.3d 905, 909 (5th Cir. 2018) (cleaned up).

As alluded to above, ripeness is another justiciability doctrine that originates in Article III's "case" or "controversy" requirement. *See also Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967) ("Ripeness is a constitutional prerequisite to the exercise of jurisdiction.")). "Ripeness 'separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review.'" *In re Boyd Veigel, P.C.*, 575 F. App'x 393, 396 (5th Cir. 2014) (quoting *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000) and citing and quoting *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947) on the doctrine of ripeness). The Fifth Circuit set forth the standard for determining whether a dispute is ripe for adjudication in *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583 (5th Cir. 1987): "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical. . . . A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if

further factual development is required." *Orix*, 212 F.3d at 895 (quoting *id.* at 586-87) (additional citations omitted).

As noted by the *Orix* court, "[m]any courts have recognized that applying the ripeness doctrine in the declaratory judgment context presents a unique challenge." When considering a declaratory judgment action (and Plaintiffs here are seeking declaratory relief in Counts II and III), the court must first determine whether the action is justiciable, as the court must do in connection with all claims for relief. Under the federal Declaratory Judgment Act, "any court of the United States" is authorized to "declare the rights and other legal relations" of parties in "a case of actual controversy." 28 U.S.C. § 2201; Fed. R. Civ. P. 57; *see also Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 534 (5th Cir. 2012). "That controversy must be of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." *Id.* (cleaned up).[62] The "unique challenge" that applying the ripeness doctrine to requests for declaratory judgment presents arises from the fact that declaratory judgments are "typically sought before a completed 'injury-in-fact' has occurred," *Orix*, 212 F.3d at 896 (quoting *Foster*, 205 F.3d 851, 857 (5th Cir. 2000)), and, "declaratory actions contemplate an 'ex ante determination of rights' that 'exists in some tension with traditional notions of ripeness.'" *Orix*, 212 F.3d at 896 (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 692 (1st Cir. 1994)). Notwithstanding this tension that exists in applying the justiciability requirements to declaratory judgment actions, "a declaratory judgment action, like any other action, must be ripe in order to be justiciable." *Id.* "Thus, courts will not grant declaratory judgments unless the suit is ripe for review." *Boyd Veigel*, 575 F. App'x at 396 (citing *Foster*, 205 F.3d at 857); *see also Mitchell*, 330 U.S. at 89 ("As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory

[62] The Fifth Circuit "interprets the § 2201 'case or controversy' requirement to be coterminous with Article III's 'case or controversy' requirement." *Id.* (quoting *Hosein v. Gonzales*, 452 F.3d 401, 403 (5th Cir. 2006)).

opinions. For adjudication of constitutional issues, concrete legal issues, presented in actual cases, not abstractions are requisite. This is as true of declaratory judgments as any other field.") (cleaned up).

In addressing the ripeness doctrine in the declaratory judgment context, the Fifth Circuit has stated that "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment," *Boyd Veigel*, 575 F. App'x at 396 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)), and that "[w]hether particular facts are sufficiently immediate to establish an actual controversy is a question that must be addressed on a case-by-case basis. *Orix*, 212 F.3d at 896 (citations omitted). "The controversy must be such that it can presently be litigated and decided and not hypothetical, conjectural, conditional or based upon the possibility of a factual situation that may never develop." *Val-Com Acquisitions Tr. v. Chase Home Fin., L.L.C.*, 434 F. App'x 395, 395-96 (5th Cir. 2011) (cleaned up).

"The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction, so the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Shemwell v. City of McKinney, Texas*, 63 F.4th 480, 483 (5th Cir. 2023) (citing *id.*) (cleaned up) *see also Val-Com*, 434 F. App'x at 396 ("The plaintiffs have the burden of establishing the existence of an actual controversy under the [Declaratory Judgment] Act."). "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

2. Rule 12(b)(6) – Failure to State a Claim upon which Relief Can Be Granted

As noted, Highland and the Claimant Trust also argue that all three counts of the Complaint should be dismissed pursuant to Rule 12(b)(6), made applicable herein by Bankruptcy Rule 7012, because Plaintiffs have failed "to state a claim upon which relief can be granted." To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "When well-pleaded facts fail to meet th[e] [*Twombly*] standard, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679. "In ruling on a Rule 12(b)(6) motion to dismiss, the court cannot look beyond the pleadings and must accept as true those well-pleaded factual allegations in the complaint," *Hall v. Hodgkins*, 305 F. App'x 224, 227 (5th Cir. 2008) (cleaned up), but it is "not bound to accept as true a legal conclusion couched as factual allegation." *Randall D. Wolcott MD PA v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (cleaned up). The court "may also consider matters of which it may take judicial notice, and it is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." *Hall v. Hodgkins*, 305 F. App'x at 227 (cleaned up). Dismissal is proper under Rule 12(b)(6), if, after taking the facts alleged in the complaint as true, "it appears certain that the plaintiff cannot prove any set of facts that would entitle it to the relief it seeks." *Test*

Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 570 (5th Cir. 2005) (quoting *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995)).

3. Collateral Estoppel

Highland and the Claimant Trust also argue that Plaintiffs' claims for declaratory relief asserted in Count III should be dismissed for the additional reason that Plaintiffs are collaterally estopped from bringing the claim. Collateral estoppel, or issue preclusion, is a preclusive doctrine that falls under the umbrella of the res judicata doctrine, which affords preclusive effect to final judgments, orders, and decrees of a federal court, including those of bankruptcy courts. *See In re Reddy Ice Holdings, Inc.*, 611 B.R. 802, 808 (Bankr. N.D. Tex. 2020) (quoting *Test Masters*, 428 F.3d at 571 ("The rule of res judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion.") and citing *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501-02 (2015)). Whereas "claim preclusion, or true res judicata, precludes parties from relitigating claims or causes of action that were or could have been raised in earlier litigation," *id.*, issue preclusion, or collateral estoppel, "prevents the same parties or their privies from relitigating [an issue of fact or law] . . . when: '(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision.'" *Bradberry v. Jefferson Co., Texas*, 732 F.3d 540, 548 (5th Cir. 2013) (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005)); *see also In re Reddy Ice*, 611 B.R. at 809-10 ("To establish collateral estoppel under federal law one must show: (1) that the issue at stake be identical to the one involved in the prior litigation; (2) that the issue has been actually litigated in the prior litigation; and (3) that the determination of the issue in the prior litigation has been a critical and necessary part of the judgment in that earlier action.") (quoting *Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 583 F.3d 348, 353 (5th Cir. 2009)). "By precluding parties from contesting matters that they have had a full and fair opportunity to litigate, these two

doctrines protect against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions." *In re Reddy Ice*, 611 B.R. at 808 (quoting *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008)). Although as a general rule res judicata must be pled as an affirmative defense, Fed. R. Bankr. P. 7008; Fed. R. Civ. P. 8(c)(1), "[i]f, based on the facts pleaded and judicially noticed, a successful affirmative defense appears, then dismissal under Rule 12(b)(6) is proper." *Hall v. Hodgkins*, 305 F. App'x at 227-28.[63]

B. Application of the Legal Standards Here

1. Count I – Disclosure and Accounting

a) Plaintiffs' equitable claim for disclosure and accounting in Count I cannot be considered "moot"; Defendants' motion to dismiss Count I pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction must be denied.

As earlier noted, in Count I of their Complaint, Plaintiffs seek an order compelling Highland and the Claimant Trust "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."[64] Plaintiffs, as holders of Contingent Trust Interests, have neither a contractual right to an accounting of the Claimant Trust assets nor a contractual right to whatever limited information rights under the terms of the Plan and CTA that are afforded to the Claimant Trust Beneficiaries. Plaintiffs acknowledge that they are not "Claimant Trust Beneficiaries." But they ask the court, without any supporting facts or authority, to treat them as such and to order the Defendants to disclose not just information that

[63] A court may also raise the issue of res judicata or collateral estoppel *sua sponte* in dismissing a claim or cause of action "in the interest of judicial economy where both actions were brought before the same court" or "where all of the relevant facts are contained in the record and all are uncontroverted." *McIntyre v. Ben E. Keith Co.*, 754 F. App'x 264-65 (5th Cir. 2018) (cleaned up).

[64] Complaint ¶ 88.

Claimant Trust Beneficiaries are entitled to under the Plan and CTA but also information and an accounting that is not otherwise available even to the Claimant Trust Beneficiaries. To be clear, the Plaintiffs are asking this court to disregard the unambiguous and plain terms of the CTA and the Plan and grant the relief sought in Count I based upon equitable considerations.

Ignoring for a moment the Defendants' Rule 12(b)(6) "failure to state a claim upon which relief may be granted" argument, this court will first focus on Defendants' argument that Plaintiffs' claim for equitable relief in Count I is moot and, thus, nonjusticiable and must be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

Highland and the Claimant Trust take the position that their filing of the Pro Forma Adjusted Balance Sheet in July 2023, nearly two months after the filing of the Complaint on May 10, 2023, renders moot the Plaintiffs' request for equitable relief in Count I because the balance sheet provided Plaintiffs (and all parties) with the very information Plaintiffs are asking for in Count I. Thus, "the issue presented in Count I is no longer 'live.'"[65] Highland and the Claimant Trust add that the Post-Confirmation Reports, filed on the bankruptcy court docket in April 2023, prior to the Complaint being filed, "similarly disclose the financial information requested in Count One, including, *inter alia*, the cash and the identification of remaining assets." In essence, Defendants argue that the filing of these two items "ha[s] thus eliminated the 'actual controversy' at the core of Count One, and there is no conceivable relief available to Plaintiffs through this claim that has not already been provided."[66]

Plaintiffs argue that Highland and the Claimant Trust's mootness argument is exactly backward—that the filing of the Pro Forma Balance Sheet has not eliminated the "actual

[65] MTD Brief ¶ 25.

[66] MTD Brief ¶¶ 25-26.

controversy" between the parties precisely ***because of*** the Defendants' persistent "contentions and arguments that the Balance Sheet is not conclusive [as to the issue of whether Plaintiffs' Contingent Trust Interests are likely to vest]" – that whether assets exceed liabilities at any one given point in time and whether Plaintiffs appear to be "in the money" is irrelevant to the question of vesting under the terms of the Plan and CTA.[67] Plaintiffs point out that Defendants have argued that Plaintiffs should not rely on the balance sheet, which, again, gives pro forma values as of May 31, 2023, adding that it is not determinative of whether Plaintiffs Contingent Trust Interests will likely vest at any point in the future because, under the terms of the CTA and Plan, Plaintiffs' unvested, contingent interests in the Claimant Trust will vest if, and only if, the Claimant Trustee files the GUC Payment Certification, certifying that the Class 8 general unsecured claims and Class 9 subordinated claims, the Claimant Trust Beneficiaries under the CTA who are entitled to distributions of the Claimant Trust assets and have other rights under the terms of the CTA, have been indefeasibly paid in full (including as to Class 8, accrued and unpaid post-petition interest), all disputed claims in Classes 8 and 9 have been resolved, ***and*** certain other obligations – primarily, the Claimant Trust's significant indemnity obligations – have been satisfied. Because it is impossible to know or predict, in particular, what the indemnity obligations and the professional fees will be going forward, it would be just as impossible for the court to make any determination of whether Plaintiffs are "in the money" or whether their contingent interests are likely to vest.

This court cannot conclude that Defendants' production and filing of the point-in-time Pro Forma Balance Sheet (as of May 31, 2023) and the Post-Confirmation Reports has rendered Plaintiffs' current request in Count I for information and an accounting moot. A balance sheet and financial disclosures generally are fluid concepts. Relevant information in early 2023 may not

[67] *See* Response ¶¶ 17-18.

remain relevant in mid-2024. Thus, Plaintiffs' equitable claim is not mooted by these earlier filed items, and the Count I request is justiciable. Accordingly, Defendants' motion to dismiss Count I under Rule 12(b)(1) for lack of subject matter jurisdiction will be denied. This determination simply means that the court has subject matter jurisdiction here to address Count I. Thus, this court will now consider whether Plaintiffs have stated a claim (in Count I) upon which relief can be granted under Rule 12(b)(6) standards.

b) Plaintiffs have failed to state a claim upon which relief can be granted in Count I; dismissal of Count I is proper under Rule 12(b)(6).

As noted above, dismissal under Rule 12(b)(6) is proper if, based upon the facts alleged in the Complaint, taken as true, as well as any judicially noticed facts, "it appears certain that the [Plaintiffs] cannot prove any set of facts that would entitle [them] to the relief [they] seek[ ]." *Test Masters*, 428 F.3d at 570 (quoting *C.C. Port, Ltd.*, 61 F.3d at 289). As noted above, in Count I, Plaintiffs, as holders of unvested contingent interests in the Claimant Trust, seek an order from this court compelling Defendants "to provide information regarding the Claimant Trust assets, including the amount of cash and the remaining non-cash assets," and a detailed accounting of "all transactions that have occurred since [an alleged] wall of silence was erected, and all liabilities." As also noted above, Plaintiffs have acknowledged[68] that their contingent interests in the Claimant Trust have not vested, and Plaintiffs are not Claimant Trust Beneficiaries; thus, under the terms of the CTA, they are not entitled to the information and accounting they seek and do not have even the limited information rights afforded to the Claimant Trust Beneficiaries under the CTA.[69]

The court takes judicial notice of its Order Denying Leave to Bring Claims Pertaining to Claims Trading, in which the court found that HMIT, as a holder of a "Contingent Claimant Trust

[68] *See supra* p.10.

[69] *See supra* pp. 7-9 (discussion of information rights under the terms of the CTA).

Interest" was not a Claimant Trust Beneficiary, who, under the terms of the CTA and Delaware law, are the "beneficial owners" of the Claimant Trust, and rejected HMIT's argument that its Contingent Claimant Trust Interest makes it a contingent beneficiary of the Claimant Trust, which, in turn, makes it a present "beneficial owner" under Delaware trust law.[70] The court concluded that, under Delaware Trust law, "HMIT's status as a 'beneficiary' of the Claimant Trust is defined by the CTA itself, pure and simple" and that under the terms of the CTA, the holders of Contingent Trust Interests have no rights under the agreement and will not "be deemed 'Beneficiaries'" under the CTA "'unless and until' they vest in accordance with the Plan and the CTA" and that "the court does not have the power to equitably deem HMIT's Contingent Trust Interest to be vested based on HMIT's unsupported allegation of wrongdoing on the part of . . . the Claimant Trustee."[71]

Now, as before, the court finds and concludes that under the terms of the CTA and Delaware law, Plaintiffs are not beneficiaries or "beneficial owners" of the Claimant Trust who would be entitled to assert rights under the CTA. The court specifically rejects an argument of Plaintiffs that Delaware trust law does not define "beneficiary," so the court should ignore the terms of the CTA and look to the definition of "beneficiary" under the Restatement (Third) of Trusts, under which they would be considered "beneficiaries" of the Claimant Trust, albeit a contingent beneficiary, who would be entitled under Delaware law to the relief they are requesting. The Claimant Trust is a Delaware statutory trust governed by the Delaware Statutory Trust Act (the "Trust Act," Chapter 38 of Title 12 of the Delaware Code), and the Trust Act does define "beneficial owner" and uses that term exclusively to refer to the beneficiaries of a Delaware statutory trust. Specifically, under the Trust Act, a statutory trust's "beneficial owners" are "any

[70] Order Denying Leave, 77-78.

[71] *Id.*, 78.

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***."[72] Thus, the question of whether Plaintiffs are "beneficiaries" of the Claimant Trust is (as the court concluded in the Order Denying Leave to Bring Claims Pertaining to Claims Trading) determined "by the CTA itself, pure and simple." And, under the terms of the CTA, "Claimant Trust Beneficiaries" is defined to exclude Plaintiffs, who hold Class 10 and 11 unvested, contingent interests in the Claimant Trust, unless and until the GUC Payment Certification has been filed by the Claimant Trust. Until then, Plaintiffs "shall not have any rights under [the CTA]" and will not "be deemed 'Beneficiaries' under [the CTA]."[73]

Plaintiffs ask the court to ignore the plain terms of the CTA and to grant them the relief they have requested on an equitable basis because they "are unable to determine whether their Contingent Claimant Trust Interests may vest into Claimant Trust Interests."[74] But, they have not alleged any set of facts that would entitled them to equitable relief either. The court makes the same observation regarding Plaintiffs as it made in its Order Denying Valuation Motion: It appears that Plaintiffs "may be frustrated that they did not negotiate or obtain the same oversight rights as the actual Claimant Trust Beneficiaries in the Plan and CTA." The Plan with the incorporated CTA was confirmed over three years ago now, and neither of the Plaintiffs objected to or appealed the terms of the Plan or CTA that dictate oversight rights.[75] The Fifth Circuit, in September 2022,

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[72] 12 Del. C. § 3801(a) (emphasis added).

[73] *See, e.g.*, Plan, Art. I.B.44; CTA §§ 1.1(h), 5.1(c).

[74] Complaint ¶ 83.

[75] HMIT did not file an objection to confirmation of the Plan and did not appeal the Confirmation Order. Dugaboy filed an objection to confirmation and appealed the Confirmation Order, but did not object to the terms of the CTA that limited oversight and information rights to "Claimant Trust Beneficiaries" and specifically excluded the holders of the unvested, contingent interests in the Claimant Trust – such as Plaintiffs – from having any rights under the CTA unless and until their interests vested, The CTA was filed prior to the confirmation hearing and Plaintiffs and other parties could have objected to the terms of the Plan or CTA; they could have complained then about any lack of transparency, oversight, and information rights they believe existed under the terms of the CTA. They did not.

affirmed the Confirmation Order and the terms of the Plan and its incorporated documents, including the CTA, in all respects other than striking certain exculpations. *NexPoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419 (5th Cir. 2022). As was the case when the court entered its Order Denying Leave to Bring Claims Pertaining to Claims Trading, "[i]t is undisputed that HMIT's [and Dugaboy's] Contingent Trust Interest[s] ha[ve] not vested under the terms of the Plan and the CTA, and the court does not have the power to equitably deem HMIT's [and Dugaboy's] Contingent Trust Interest[s] to be vested."[76] The court did not have that power back in August 2023 (when it entered the Order Denying Leave to Bring Claims Pertaining to Claims Trading), and the court does not have that power now. Equitable relief is not available where, as here, the parties' rights and obligations at issue are set forth in the Plan and the CTA. *See In re Am. Home Mortg. Holdings, Inc.*, 386 Fed. Appx. 209, 212-13 (3d Cir. 2010) (affirming bankruptcy court's denial of equitable relief to distributions under trust documents where, among other things, the trust documents controlled distribution of monthly payments, and the Trust Certificate "cannot be rewritten on equitable grounds," and noting "[i]n interpreting the provisions of the Trust Documents, we apply Delaware law, which instructs that a party is bound by the plain meaning of clear and unequivocal contract terms.").

Plaintiffs' make an argument that an implied covenant of good faith and fair dealing under Delaware law necessarily means that the terms of the CTA that govern the parties' rights, here, including the information rights and rights to an accounting from the Claimant Trustee that Plaintiffs are seeking in Count I, can be overridden here. The court disagrees. Courts will not use the implied covenant of good faith to override the rights and responsibilities that were bargained for in a trust agreement. *See IKB Int'l S.A. v. Wilmington Trust Co.*, 774 F. App'x 719, 727-28 (3d

[76] Order Denying Leave to Bring Claims Pertaining to Claims Trading, 78.

Cir. 2019)(citing *Homan v. Turoczy*, 2005 WL 2000756 (Del. Ch. Aug. 12, 2005)); *see also Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) ("Existing contract terms control such that implied good faith cannot be used to circumvent the parties' bargain or to create a free-floating duty unattached to the underlying legal document.") (cleaned up); *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1143 (Del. 1990) (holding that the "subjective standards [of good faith and fair dealing] cannot override the literal terms of an agreement.") (citation omitted). Because the terms of the CTA expressly address the Claimant Trustee's duties to provide, and parties' rights to receive, information and an accounting with respect to the Claimant Trust, and those duties do not inure to the benefit of the Plaintiffs, who are not Claimant Trust Beneficiaries, the implied covenant of good faith and fair dealing cannot be used by the Plaintiffs or the court to compel the Claimant Trustee to disclose the information or provide the accounting as requested in Count I.

After considering the facts alleged in the Complaint, taken as true, and the facts and record of which the court has taken judicial notice, the court has determined that Plaintiffs cannot prove any set of facts that would entitle them to the relief they seek. Thus, dismissal of their claim for disclosure of additional information and for an accounting in Count I under Rule 12(b)(6) is proper.

2. *Count II – Request for Declaratory Relief*

In Count II of the Complaint, Plaintiffs seek a declaratory judgment and "determination from the Court of the relative value of the Claimant Trust assets compared to the bankruptcy estate obligations," but this is only if "Defendants are compelled to provide information about the Claimant Trust assets" – in other words, this Count II request is conditioned on the court granting the equitable relief Plaintiffs seek in Count I.[77]

[77] Complaint ¶¶ 89-92.

Defendants seek dismissal of Count II under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Before the court can address Defendants' Rule 12(b)(6) motion, the court must first determine whether the claim for declaratory relief in Count II is justiciable such that the court has constitutional jurisdiction – subject matter jurisdiction – to consider and rule on the merits of Plaintiffs' claim.[78] As noted above,[79] Plaintiffs' request for declaratory relief in Count II is clearly predicated on the court first granting the relief requested in Count I: ordering the Defendants to disclose information about the Claimant Trust assets and liabilities (beyond what is contained in the Pro Forma Balance Sheet) and to provide to Plaintiffs a detailed accounting of all transactions involving the Claimant Trust. The court has concluded that Plaintiffs are not entitled to the information and accounting they have requested in Count I and that Count I should, thus, be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Because Plaintiffs' request for declaratory relief in Count II is predicated on the court granting the relief requested in Count I and the court has denied that relief, Count II has now been rendered moot or, at least, not ripe such that it is not justiciable. *See American Precision Ammunition, L.L.C. v. City of Mineral Wells*, 90 F.4th 820, 827 (2024) (where the Fifth Circuit affirmed the district court's Rule 12(b)(1) dismissal of a claim to reinstate an agreement as moot, where plaintiff's claim was predicated on a finding by the district court that the agreement was valid and

[78] Even though Defendants did not raise the issue of subject matter jurisdiction with respect to Count II, the court has an independent duty to assure itself that it has subject matter jurisdiction over a claim or cause of action before it addresses the merits of the claim under Rule 12(b)(6). *See supra* pp. 18-19; *see also Abraugh v. Altimus*, 26 F.4th 298, 304 (2022) (federal courts have a "constitutional duty . . . to decline subject matter jurisdiction where it does not exist—and that is so whether the parties challenge Article III standing or not.").

[79] *See supra* note 26.

enforceable, and the Fifth Circuit agreed with the district court that the agreement was unenforceable).[80]

In summary, the court has determined that Defendants' request for declaratory relief in Count II is not justiciable and, as such, Count II must be dismissed pursuant to Rule 12(h)(3) for lack of subject matter jurisdiction. Anything this court might conclude with respect to Defendants' motion to dismiss Count II under Rule 12(b)(6) would be an impermissible advisory opinion, so the court will not address Defendants' arguments that Count II should be dismissed for failure to state a claim upon which relief can be granted.

3. Count III – Request for Declaratory Relief

In Count III of the Complaint, Plaintiffs seek a declaratory judgment and determination, "[i]n the event that the Court determines that the Claimant Trust assets exceed the obligations of the bankruptcy estate in an amount sufficient so that all Allowable Claims may be indefeasibly paid . . . that the conditions are such that their Contingent Claimant Trust Interests are likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries."[81]

Defendants argue that the court should dismiss Count III under Rule 12(b)(1) for lack of subject matter jurisdiction on the basis that their request for declaratory relief in Count III is not justiciable because it is moot and otherwise seeks an impermissible advisory opinion. Defendants also argue that, if the court determines that it does have subject matter jurisdiction over Plaintiff's claim for declaratory relief in Count III, Count III should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, including on the ground that Plaintiffs

[80] Although Defendants did not argue in their briefing that Count II was not justiciable and so must be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, in so many words, Defendants did argue during oral argument that "Count II must . . . be dismissed because it depends on Highland being 'compelled to provide information about the Claimant Trust assets.' . . . So if the Court doesn't compel Highland, the Court has no ability to make the declaration that's sought." Feb. 14, 2024 Hrg. Trans., 17:9-13.

[81] *Id.* ¶¶ 93-95, at 27.

are collaterally estopped from asserting the claim for declaratory relief in Count III. The court agrees with Defendants that Count III is not justiciable and that Count III should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, and, thus, the court does not have jurisdiction to issue any pronouncement regarding the merits of Plaintiffs' claim for declaratory relief in Count III (and so it will not address Defendants' motion to dismiss pursuant to Rule 12(b)(6) with respect to Count III).

Similar to Plaintiffs' request for declaratory relief in Count II, Plaintiffs' request for declaratory relief in Count III is a contingent request – this one being predicated on the court first granting the declaratory relief in Count II, which, itself, is predicated on the court granting the equitable relief requested in Count I. Because Counts I and II are being dismissed for failure to state a claim and lack of subject matter jurisdiction, respectively, Plaintiffs' claim for declaratory relief in Count III is, thus, rendered not justiciable. That Counts II and III fall, if Count I falls, is inherent in the way Plaintiffs framed their claims and causes of action in the Complaint. Because Plaintiffs are not entitled to the information and accounting they are requesting in Count I, Plaintiffs' claims for declaratory relief in Counts II and III are rendered moot and/or not ripe and, thus, not justiciable. Plaintiffs' request for a declaratory judgment in Count III is not ripe for adjudication for the additional reason that Plaintiffs are asking the court to issue an opinion based on a set of "hypothetical, conjectural, conditional" facts "or based upon the possibility of a factual situation that may never develop" – the "likely" vesting of Plaintiffs' contingent interests in the Claimant Trust, making them Claimant Trust Beneficiaries. This is something federal courts are not permitted to do, even in the context of a request for declaratory relief (as is the case here with

Counts II and III).[82] The court finds and concludes that Plaintiffs' claim for declaratory relief in Count III is not justiciable and thus must be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

This being the case, the court, as it must, declines to address the merits of whether Count III should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted (including based on Defendants' collateral estoppel argument).

Accordingly,

IT IS ORDERED that Defendants' Motion to Dismiss Count I of the Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), be, and hereby is, **DENIED**;

IT IS FURTHER ORDERED that Plaintiffs have failed to state a claim upon which relief can be granted in Count I of the Complaint, and thus Count I of the Complaint is **DISMISSED** pursuant to Rule 12(b)(6);

IT IS FURTHER ORDERED that Count II of the Complaint is not justiciable and that, pursuant to Rule 12(b)(1) and Rule 12(h)(3), Count II of the Complaint is **DISMISSED** for lack of subject matter jurisdiction;

IT IS FURTHER ORDERED that Count III of the Complaint is not justiciable and that, pursuant to Rule 12(b)(1), Count III of the Complaint is **DISMISSED** for lack of subject matter jurisdiction.

###End of Memorandum Opinion and Order###

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[82] *See Val-Com Acquisitions*, 434 F. App'x at 395-96; *see also Boyd Veigel*, 575 F. App'x at 396 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)) (where the Fifth Circuit discusses the ripeness doctrine in the context of declaratory judgment actions and states that "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.").

EXHIBIT 10

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Counsel for 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.[1]	§	

HUNTER MOUNTAIN INVESTMENT TRUST'S SUPPLEMENT TO RESPONSE TO MOTION TO STAY

Hunter Mountain Investment Trust submits the following Supplement to Response to Stay in anticipation of the status conference, currently scheduled for June 12, 2024.

On January 1, 2024, Hunter Mountain Investment Trust ("HMIT") filed its Motion for Leave to File a Delaware Complaint [Dkt. No. 4000] (the "Motion for Leave"). HMIT filed the Motion for Leave, seeking permission to file a complaint in Delaware asking the court to remove James Seery as Clamant Trustee as a result of his breach of his fiduciary duties.

[1] The *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., (As Modified)* [Dkt. No. 1808] ("***Plan***"), filed by Highland Capital Management, L.P. ("***HCMLP***") became effective on August 11, 2021 (the "***Effective Date***").

HCMLP and the Highland Claimant Trust filed a motion ("Motion to Stay") asking the court to indefinitely stay all proceeding in connection with HMIT's Motion for Leave. On January 31, 2024, the court issued an Order Granting in Part Highland's Motion to Stay Contested Matter, in which the court stayed all proceedings until the court issued an order determining 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' Interests in the Claimant Trust [Adv. Proc. 23-03038-sgj, Dkt. No. 13], and holds a status conference with the parties in connection with the Motion for Leave to consider whether to terminate or extend the stay.

On May 24, 2024, the court issued its opinion on the Motion to Dismiss Complaint and the court scheduled a status conference pursuant to the order for June 12, 2024.

HMIT is filing this supplement to bring additional cases to the court's attention that are relevant to the standing issue. Specifically, attached is Exhibit A is a true and correct copy of the opinion issued by the Delaware Supreme Court in *Morris v. Spectra Energy Partners (DE) GP, LP*, 246 A.3d 121, 136 (Del. 2021).

Morris demonstrates how the Delaware Supreme Court has held that a standing analysis should be more flexible when a defendant controls the facts giving rise to standing. By way of example, although standing to assert derivative claims in the context of mergers typically requires equity ownership, there are exceptions. One of these exceptions includes when “the merger itself is the subject to a fraud claim, perpetrated to deprive shareholders of their standing to bring or maintain a derivative action.” *Morris*, 246 A.3d at 129 (Del. 2021). *Morris* stands for the

proposition that strict adherence to formulaic standing on a motion to dismiss must yield where the defendant's allegedly unfair conduct attempts to destroy standing.[2]

Similarly, HMIT also submits a true and correct copy of the following case: *Shaev v. Wyly*, 1998 WL 13858, at *4 (Del. Ch. Jan. 6, 1998) (equitable standing allowed to challenge excessive compensation of directors because "to deny standing on these facts would insulate defendants from potential liability for their alleged misdeeds"), as Exhibit B.

[2] HCMLP is familiar with each of these cases submitted here as they were cited in Appellant's Reply Brief, *Hunter Mountain Investment Trust v. Highland Capital Management, L.P.*, et al., Case No. 3:23-cv-02071-E, Doc. No. 38. https://www.kccllc.net/hcmlp/document/193405424040400000000001

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 11, 2024, 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

EXHIBIT A

HUNTER MOUNTAIN INVESTMENT TRUST'S SUPPLEMENT TO RESPONSE TO MOTION TO STAY

KeyCite Yellow Flag - Negative Treatment
Distinguished by SDF Funding LLC v. Fry, Del.Ch., June 16, 2022

246 A.3d 121
Supreme Court of Delaware.

Paul MORRIS, on behalf of all similarly situated unitholders of Spectra Energy Partners, L.P., Plaintiff Below, Appellant,
v.
SPECTRA ENERGY PARTNERS (DE) GP, LP, Defendant Below, Appellee.

No. 489, 2019
|
Submitted: October 28, 2020
|
Decided: January 22, 2021

Synopsis

Background: Former minority unitholder of acquired master limited partnership brought class action against general partner, alleging that merger exchange ratio was unfair because general partner agreed to merger that did not reflect material value of his derivative claims. The Court of Chancery, Sam Glasscock, Vice Chancellor, 2019 WL 4751521, dismissed the action. Minority unitholder appealed.

Holdings: The Supreme Court, Seitz, C.J., held that:

[1] challenge to fairness of merger itself was preserved for appeal;

[2] arguments about materiality were preserved for appeal; and

[3] derivative claim was material at motion to dismiss stage.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Standing.

West Headnotes (18)

[1] **Corporations and Business Organizations** Effect of merger, acquisition, reorganization, or dissolution
Corporations and Business Organizations Fairness of transaction

With limited exceptions, a merger extinguishes an equity owner's standing to pursue a derivative claim against the target entity's directors or controller, but the same plaintiff has standing to pursue a post-closing suit if they challenge the validity of the merger itself as unfair because the controller failed to secure the value of a material asset, like derivative claims that pass to the acquirer in the merger.

[2] **Corporations and Business Organizations** Fairness of transaction

To establish standing to pursue a claim challenging a merger because the equity owners are not being fairly compensated for the value of material derivative claims, the plaintiff must allege a viable derivative claim, that is material to the overall transaction, and will not be pursued by the buyer and is not reflected in the merger consideration.

6 Cases that cite this headnote

[3] **Appeal and Error** Corporations and other organizations

De novo review applies to a Court of Chancery's finding that a plaintiff lacked standing to pursue his post-merger claims challenging the fairness of a merger consideration for failure to recoup some or all of the value of the derivative claims.

5 Cases that cite this headnote

[4] **Action** Persons entitled to sue

Standing refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or redress a grievance.

3 Cases that cite this headnote

[5] **Action** Persons entitled to sue

Constitutional Law Advisory Opinions

Standing is required to ensure that the litigation before the tribunal is a "case or controversy" that is appropriate for the exercise of the court's judicial powers; it allows Delaware courts, as a matter of self-restraint, to avoid the rendering of advisory opinions at the behest of parties who are mere intermeddlers.

2 Cases that cite this headnote

[6] **Action** Persons entitled to sue

Standing is properly a threshold question that a court may not avoid.

3 Cases that cite this headnote

[7] **Action** Persons entitled to sue

If a plaintiff alleges a direct claim, it means that the equity owner has alleged that they have suffered the injury, and will receive the benefit of any recovery; thus, at least at the pleading stage, the plaintiff has met the injury-in-fact requirement and properly invoked the court's jurisdiction to redress an injury.

[8] **Corporations and Business Organizations** Derivative action as distinct from direct or individual action in general

For a derivative action, the equity owner acts in a representative capacity on behalf of an entity; in that representative capacity, the plaintiff steps into the shoes of the entity and asserts the injury on its behalf.

1 Case that cites this headnote

[9] **Corporations and Business Organizations** Effect of merger, acquisition, reorganization, or dissolution

An equity owner does not have standing to pursue derivative claims post-merger except when the merger itself is the subject to a fraud claim, perpetrated to deprive shareholders of their standing to bring or maintain a derivative action, and when the merger is essentially a reorganization that does not affect the equity owner's relative ownership in the post-merger enterprise.

1 Case that cites this headnote

[10] **Corporations and Business Organizations** Fairness of transaction

Corporations and Business Organizations Good faith and fiduciary duties

To state a direct claim with respect to a merger, a stockholder must challenge the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty resulting in unfair dealing or unfair price.

2 Cases that cite this headnote

[11] **Corporations and Business Organizations** Purchase or Sale of Stock to or from Director, Officer, or Agent

A cause of action for misuse of confidential corporate information, requires a plaintiff to demonstrate that: (1) the corporate fiduciary possessed material, nonpublic company information, and (2) the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information.

[12] **Appeal and Error** Nature or Subject-Matter of Issues or Questions

Challenge to fairness of merger itself was preserved for appeal by former minority unitholder of acquired master limited partnership, in action against general partner, where minority unitholder alleged that former public unitholders were harmed because general partner allowed acquiring business to engineer "roll up" of minority-held units involving merger between limited partnership and acquiring business on terms that were patently unfair

and unreasonable to limited partnership and its public unitholders, and that could not have been approved in good faith by new conflicts committee or general partner's board.

[13] **Appeal and Error** Nature or subject-matter in general

Arguments about materiality were preserved for appeal of dismissal of class action that had been brought by former minority unitholder of acquired master limited partnership alleging that merger exchange ratio was unfair because general partner agreed to merger that did not reflect material value of his derivative claims, since general partner disputed how court should consider litigation risk when assessing materiality by arguing that minority unitholder's chance of prevailing on derivative claims was "toss-up" or "one-in-five" chance.

[14] **Partnership** Persons entitled to sue; standing

Derivative claim was material at motion to dismiss stage, and therefore former minority unitholder of acquired master limited partnership had standing to bring class action alleging that merger exchange ratio was unfair because general partner agreed to merger that did not reflect material value of his derivative claims; even if it was proper to discount $660 million in damages alleged in complaint to reflect public unitholders' interest in derivative recovery, $112 million pro rata interest in derivative claim recovery was comparable to public unitholders' 17 percent proportional interest in merger consideration that was valued at $3.3 billion, i.e., $112 million had to be compared to $561 million.

[15] **Corporations and Business Organizations** Fairness of transaction

When the court is faced with a post-merger claim challenging the fairness of a merger based on the defendant's failure to secure value for derivative claims, (1) a court must decide whether the underlying derivative claims were viable; (2) the derivative claim recovery as pled must be material in relation to the merger consideration, and (3) the court should assess whether the complaint alleges that the acquirer would not assert the underlying derivative claim and did not provide value for it.

12 Cases that cite this headnote

[16] **Pretrial Procedure** Parties, Defects as to

Pretrial Procedure Construction of pleadings

When assessing standing at the motion to dismiss stage of the proceedings, a court must accept the plaintiff's factual allegations as true and draw all reasonable inferences in his favor; this does not mean that the court is bound by unreasonable, unsupported, or speculative derivative suit damages claims, but if it is reasonably conceivable that the plaintiff could recover the damages claimed in the complaint, the court must accept that allegation as true for purposes of the motion to dismiss for lack of standing.

[17] **Corporations and Business Organizations** Fairness of transaction

If the plaintiff has alleged a viable derivative claim, where it is reasonably conceivable that the claim is material when compared to the merger consideration and could result in the damages pled in the complaint challenging the merger on fairness grounds, the plaintiff has satisfied the materiality requirement at the motion to dismiss stage for standing purposes; a percentage-based risk reduction should not be applied at the pleading stage of the proceedings.

2 Cases that cite this headnote

[18] **Action** Persons entitled to sue

Standing is concerned only with the question of who is entitled to mount a legal challenge and not with the merits of the subject matter in controversy.

1 Case that cites this headnote

***124** Court Below – Court of Chancery of the State of Delaware, Consolidated C.A. No. 2019-0097

Upon appeal from the Court of Chancery. **REVERSED** and **REMANDED**.

Attorneys and Law Firms

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Before SEITZ, Chief Justice; VALIHURA, VAUGHN, TRAYNOR, and MONTGOMERY-REEVES, Justices, constituting the Court en Banc.

Opinion

SEITZ, Chief Justice:

[1] With limited exceptions, a merger extinguishes an equity owner's standing to pursue a derivative claim against the target entity's directors or controller. But the same plaintiff has standing to pursue a post-closing suit if they challenge the validity of the merger itself as unfair because the controller failed to secure the value of a material asset—like derivative claims that pass to the acquirer in the merger. Given the difficulties of pursuing such claims, not the least of which is proof that the equity owner received an unfair merger price for their ownership interest, the plaintiff might not prevail on the merits, but they have sufficiently alleged a direct claim to survive a motion to dismiss for lack of standing.

After a $3.3 billion "roll up" of minority-held units involving a merger between Enbridge, Inc. ("Enbridge") and Spectra Energy Partners L.P. ("SEP"), Paul Morris, a former SEP minority unitholder, lost standing to litigate an alleged $661 million derivative suit on behalf of SEP against its general partner, Spectra Energy Partners (DE) GP, LP ("SEP GP"). Morris reprised the derivative claim dismissal by filing a new class action complaint that alleged the Enbridge/SEP merger exchange ratio was unfair because SEP GP agreed to a merger ***125** that did not reflect the material value of his derivative claims.

The Court of Chancery granted SEP GP's motion to dismiss the new complaint for lack of standing. The court held that, to have standing to bring a post-merger claim, Morris had to allege a viable and material derivative claim that the buyer would not assert and provided no value for in the merger. Focusing on the materiality requirement, the court first discounted the $661 million recovery to $112 million to reflect the public unitholders' beneficial interest in the derivative litigation recovery. Then, the court discounted the $112 million further to $28 million to reflect what the court estimated was a one in four chance of success in the litigation. After the discounting, the $28 million—less than 1% of the merger consideration—was immaterial to a $3.3 billion merger.

On appeal, Morris argues that the court should not have dismissed the plaintiff's direct claims for lack of standing. We agree with Morris and find that, on a motion to dismiss for lack of standing, he has sufficiently pled a direct claim attacking the fairness of the merger itself for SEP GP's failure to secure value for his pending derivative claims. Thus, we reverse the Court of Chancery's judgment and remand for further proceedings.

I.

The plaintiff, Paul Morris, owned common units of SEP, a master limited partnership that traded on the New York Stock Exchange. [1] Enbridge owned 83% of SEP's outstanding units through a series of wholly-owned subsidiaries, including SEP GP. [2] Spectra Energy Corp ("SE Corp") was Enbridge's predecessor-in-interest.

Prior to selling to Enbridge, SE Corp agreed to a 50-50 joint venture with Phillips 66 whereby Phillips would contribute

$1.5 billion and SE Corp would contribute a one-third interest in two long haul natural gas pipelines, implying a $1.5 billion valuation of the contributed assets. Because SEP owned the assets, the parties proposed a "reverse dropdown" to sell the assets from SEP to SE Corp. To purchase the assets from SEP, SE Corp offered to "(i) surrender 20 million SEP limited partner units to SEP for redemption ... and (ii) waive its right to receive up to $4 million in incentive distribution rights [ ] for twelve consecutive quarters ...."[3] SEP GP authorized a conflicts committee to evaluate the reverse dropdown.

SEP's limited partnership agreement required the general partner's conflicts committee to act in "subjective good faith."[4] According to the complaint's allegations, a financial advisor identified three ways the transaction would provide value to SEP: the redeemed units, the waived distribution rights, and other reduced cash flow due to the loss of assets. Later, however, the adviser included only the first two components as consideration—valued at $946 million—and issued a fairness opinion. The conflicts committee recommended approval, and SEP GP's board approved the reverse dropdown.

After reviewing SEP's books and records, the plaintiff filed a class action derivative ***126** complaint on behalf of all owners of SEP public units against SEP GP and SE Corp. The complaint alleged that SEP only received $946 million in the reverse dropdown when SE Corp valued the assets at $1.5 billion. Morris pleaded three derivative claims, including a claim for breach of the limited partnership agreement's "good faith" obligation in approving the reverse dropdown.[5] The court dismissed two of the claims for failure to state a claim, but declined to dismiss the breach of the "good faith" obligation claim. The court found, after drawing all reasonable inferences in Morris's favor, that the complaint "made adequate allegations showing that under reasonably conceivable circumstances a facially unreasonable gap in consideration exists sufficient to infer subjective bad faith."[6] According to the court, "it was 'reasonably conceivable that the General Partner acted in subjective bad faith.' "[7] The parties conducted discovery and SEP GP moved for summary judgment. During the litigation, and with the motion summary judgment pending, Enbridge acquired SE Corp in a stock-for-stock merger, becoming SEP GP's ultimate parent and controller of SEP.

In March 2018, SEP's stock price declined by twenty percent in reaction to announcements from the Federal Energy Regulatory Commission ("FERC"). SEP recognized in its filings with the U.S. Securities and Exchange Commission that "[t]he change in FERC's policy has had a negative impact on the MLP sector" and that SEP "would attempt to mitigate the impact of the policy change."[8] In May, Enbridge offered a stock-for-stock exchange to buyout SEP's public unitholders. SEP's public unitholders would receive 1.0123 common shares of Enbridge in exchange for each publicly held common unit of SEP based on the SEP common units' and Enbridge common shares' closing price on the NYSE as of May 16, 2018. SEP closed at a unit price of $33.10 and Enbridge common shares closed at $32.70. According to the plaintiff, this was an opportunistic offer to squeeze out the public unitholders due to an artificially depressed trading price. Another three-member SEP GP conflicts committee went to work, two of whom were on the committee that reviewed the reverse dropdown transaction.

Morris's counsel sent a letter to the conflicts committee and told them that the derivative claim was worth more than $500 million and must be taken into account when negotiating the merger exchange ratio. Counsel also noted that the proposed offer was "woefully inadequate" and "fail[ed] to provide SEP and its public unitholders with any value associated with" the derivative claim.[9] After Morris's counsel met with the conflicts committee's legal and financial advisors, the conflicts committee ultimately determined that the value of the derivative claim, net of defense costs, "was less than $0."[10] The conflicts ***127** committee also found the value of the reverse dropdown to SEP to be about $1.5 billion after adding back the reduced distributions its advisor previously excluded.

As the parties negotiated the buyout, the conflicts committee decided to give no value to the derivative claim but attributed $4 million in saved litigation costs. They also agreed to an exchange ratio "whereby Enbridge would acquire all publicly held SEP units at an exchange ratio of 1.111 shares of Enbridge stock for each publicly held unit of SEP."[11] On August 24, 2018, SEP announced a definitive merger agreement with Enbridge and its wholly-owned subsidiaries where Enbridge would acquire all publicly held SEP units at an exchange ratio of 1.111 shares of Enbridge stock for each publicly held unit of SEP. The transaction was not subject to approval by a majority of the minority unitholders. The transaction was approved on December 13, 2018. At that time, Enbridge affiliates held about 83% of the outstanding units. About 39% of publicly held units voted in favor of

the transaction. After the deal closed, the court dismissed the derivative claim by stipulation of the parties. [12]

After another books and records request, Morris filed this class action on February 8, 2019 against SEP GP, as SEP's general partner, for breaching SEP's limited partnership agreement and the implied covenant of good faith and fair dealing. Morris claimed that the conflicts committee and SEP GP's board of directors failed to attribute appropriate value to the pre-merger derivative claim or secure any value for the claim. SEP GP moved to dismiss for lack of standing and failure to state a claim.

[2] The Court of Chancery dismissed Morris's complaint for lack of standing without reaching the arguments for failure to state a claim. The court applied the three-part test from its decision in *In re Primedia, Inc. Shareholders Litigation.* [13] The *Primedia* test applies to claims challenging a merger because the equity owners are not being fairly compensated for the value of material derivative claims. To establish standing the plaintiff must allege a viable derivative claim, that is material to the overall transaction, and will not be pursued by the buyer and is not reflected in the merger consideration. [14]

The court found Morris's derivative claim viable because it had already survived a motion to dismiss. [15] Also, the parties did not dispute that SEP's public unitholders received no value for the derivative claim, Enbridge did not intend to pursue the derivative claims post-merger, and Morris pled damages of $661 million. But the court dismissed Morris's two direct claims. First, the court discounted the $661 potential recovery to $112 million to reflect the public unitholders' proportionate share of the litigation recovery. And second, the court discounted the $112 million further to about $28 million to reflect a one-in-four chance of prevailing in the litigation. Finally, the court compared the $28 million to the $3.3 billion merger transaction and found it immaterial. Thus, the court granted SEP GP's motion to dismiss for lack of standing without reaching SEP GP's alternative ***128** argument that Morris failed to state a claim for relief.

II.

On appeal the parties have focused their attention on the Court of Chancery's application of its *Primedia* decision to assess standing. To reiterate, under *Primedia*'s three-part test, which applies to claims alleging an unfair merger because the price does not reflect the value of derivative claims, the plaintiff must allege a viable derivative claim assessed by a motion to dismiss standard. [16] The plaintiff must also allege that the derivative claim was material to the overall merger transaction, will not be pursued by the buyer, and is not reflected in the merger consideration. [17]

According to Morris, the Court of Chancery should not have dismissed his complaint for lack of standing because he pled in detail a direct claim that satisfied the *Primedia* factors. The parties and the court agreed that the derivative claim was viable because it had survived a motion to dismiss. They also agreed that Enbridge would not assert the claim and provided no value for the claim in the exchange ratio. And, as Morris alleged, the $112 million potential recovery was material to the $3.3 billion transaction. According to Morris, if the Court of Chancery had accepted his well-pleaded factual allegations as true and drawn all reasonable inferences in his favor, it would not have discounted the potential value of the claim such that it became immaterial to the merger value.

The defendants counter that Morris supposedly did not challenge the fairness of the exchange ratio, undermining the claim that SEP GP did not negotiate fair consideration for the public unitholders' SEP units. For the litigation discount issue, the defendants contend that Morris conceded in the Court of Chancery that the derivative claim should be discounted for litigation risk. The defendants also argue that discounting for litigation risk is consistent with prior cases. [18] And, according to the defendants, the "fraud exception to the continuous ownership rule" is the proper method to assess the plaintiff's standing to assert post-merger claims. [19]

[3] We review *de novo* the Court of Chancery's finding that the plaintiff lacked standing to pursue his post-merger claims challenging the fairness of the merger consideration for failure to recoup some or all of the value of the derivative claims. [20]

A.

[4] **[5]** **[6]** The Court of Chancery dismissed Morris's complaint for lack of standing. Standing "refers to the right of a party to invoke the jurisdiction of a court to enforce a

claim or redress a grievance."[21] Standing ***129** is required to "ensure that the litigation before the tribunal is a 'case or controversy' that is appropriate for the exercise of the court's judicial powers."[22] It allows Delaware courts, "as a matter of self-restraint," to "avoid the rendering of advisory opinions at the behest of parties who are mere intermeddlers."[23] "[S]tanding is properly a threshold question that the Court may not avoid."[24]

[7] The standing inquiry "has assumed special significance in the area of corporate law."[25] Classifying a claim as either direct or derivative bears directly on standing and is in many ways outcome-determinative in post-merger litigation.[26] If a plaintiff alleges a direct claim, it means that the equity owner has alleged that they have suffered the injury, and will receive the benefit of any recovery.[27] Thus, at least at the pleading stage, the plaintiff has met the injury-in-fact requirement and properly invoked the court's jurisdiction to redress an injury.

[8] **[9]** In contrast, for a derivative action, the equity owner acts in a representative capacity on behalf of an entity. In that representative capacity, the plaintiff steps into the shoes of the entity and asserts the injury on its behalf.[28] If the equity holder has successfully jumped over 8 *Del. C.* § 327 of the Delaware General Corporation Law, Court of Chancery Rule 23.1, and our decisional law hurdles, standing exists to pursue a derivative claim on behalf of the entity.[29] But, under *Lewis v. Anderson*,[30] the equity owner no longer has standing to pursue derivative claims post-merger except in two instances—when the merger itself is the subject to a fraud claim, perpetrated to deprive shareholders of their standing to bring or maintain a derivative action; and when the merger is essentially a reorganization that does not affect the equity owner's relative ownership in the post-merger enterprise.[31]

The Supreme Court and the Court of Chancery are frequently called upon to ***130** draw the dividing line between direct and derivative claims following a merger. Our recent decision in *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*[32] is particularly relevant here, as it addressed standing following a merger in the context of a master limited partnership. In *El Paso*, the plaintiff filed derivative claims on behalf of the limited partnership against the general partner claiming that the limited partnership substantially overpaid for the assets in a transaction. While the derivative suits were pending, the limited partnership was acquired in a merger. Although the Court of Chancery recognized that a merger typically results in the plaintiff losing standing to pursue pending derivative claims, it characterized the plaintiff's claims as both direct and derivative, circumventing the post-merger standing impediment. The court also held that, even if the plaintiff's claims were purely derivative, they survived the merger because dismissal would leave the minority equity owners without a remedy for the general partner's unfair dealing.

On appeal, this Court reversed. First, we noted that standing in corporate cases is a threshold inquiry because it implicates the exercise of the court's jurisdiction.[33] We observed that derivative standing is a "creature of equity" that allows a court of equity to hear claims by equity owners "to prevent a complete failure of justice on behalf of the corporation."[34] We also viewed standing as a fluid concept, that can change as a result of "a myriad of subsequent legal or factual causes that occur while the litigation is in progress" such as the loss of the plaintiff's status as an equity holder.[35] If standing is lost, "the court lacks the power to adjudicate the matter, and the action will be dismissed as moot unless an exception applies."[36]

Second, we held that the plaintiff brought his claims as derivative claims, and his claims remained derivative claims throughout the litigation. Even though the plaintiff's derivative claims involved a limited partnership, where most rights are governed by agreement rather than fiduciary duties, our Court held that *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*,[37] and its two-part test for drawing a line between direct and derivative claims, applied.[38] Under *Tooley*, the court must answer ***131** two questions: "[w]ho suffered the alleged harm—the corporation or the suing stockholder individually," and "who would receive the benefit of the recovery or other remedy?"[39] In *El Paso*, we found under *Tooley* that the limited partnership suffered the harm and would benefit from any recovery. Thus, the plaintiff's claims were purely derivative, and under *Lewis v. Anderson* the derivative claims passed to the buyer following the merger. The plaintiff no longer had standing to pursue the derivative claims.

Finally, and directly relevant to this appeal, we recognized in *El Paso* that, even though the plaintiff lost standing to pursue derivative claims post-merger, a narrow avenue of relief was still available to the plaintiff—a direct claim challenging the

validity of the merger when the general partner failed to secure the value of material derivative claims in the merger for the minority equity owners:

> Under our law, equity holders confronted by a merger in which derivative claims will pass to the buyer have the right to challenge the merger itself as a breach of the duties they are owed. In many cases, it might be difficult to allege that the value they are receiving in the merger is unfair simply as a result of the failure to consider value associated with their derivative suit. But that reality may also suggest that, even according full value to the potential recovery in the derivative suit (rarely a guarantee), the plaintiffs still received fair value in the merger. ... The derivative plaintiff's recourse was to file a money damages challenge to the merger and prove that the failure to accord value to the limited partnership in the merger was somehow violative of his rights. [40]

In reaching this conclusion, we relied on our decision in *Parnes v. Bally Entertainment Corp.* [41] In *Parnes*, the plaintiff alleged that in negotiations between Bally Entertainment Corp. and Hilton Hotels Corp., the CEO's actions—requiring a bribe of "several substantial cash payments and asset transfers" before consenting to a merger—resulted in the stockholders receiving an unfair price. [42] After the merger closed, the Court of Chancery found the claim derivative and dismissed the complaint for lack of standing. We reversed, finding that the complaint "directly challenges the fairness of the process and the price in the Bally/Hilton merger." [43]

We distinguished the direct claim attacking the merger itself from the derivative claim in *Kramer v. Western Pacific Industries.* [44] In *Kramer*, the plaintiff alleged "wrongful transactions associated with the merger (such as the award of golden parachutes) [that] reduced the amount paid to [the target's] stockholders," but "did not allege that the merger ***132** price was unfair or that the merger was obtained through unfair dealing." [45] Our Court held that the complaint stated only a derivative claim for mismanagement. [46] Although the plaintiff alleged that wrongful transactions associated with the merger reduced the amount paid to the target's stockholders, "it did not allege that the merger price was unfair or that the merger was obtained through unfair dealing." [47] That "such a claim is asserted in the context of a merger does not change its fundamental nature." [48]

[10] Thus, in *Kramer* what the plaintiff failed to plead was a challenge to the merger itself rather than attack the side benefits secured by some merger participants. After *Parnes*, "to state a direct claim with respect to a merger, a stockholder must challenge the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price." [49] Finally, in *Parnes* we separated the standing inquiry from whether the complaint states a claim for relief. [50] After reversing the court on standing, we also reversed the court's conclusion that the complaint failed to state a claim under Rule 12(b)(6) because the complaint alleged sufficient facts of unfairness to overcome business judgment rule review. [51]

B.

As noted in *Parnes*, "it is often difficult to determine whether a stockholder is challenging the merger itself, or alleged wrongs associated with the merger ...." [52] After *Parnes*, the Court of Chancery was left to fill in the details. It was not an easy assignment. In *Golaine v. Edwards*, [53] the plaintiff challenged a $20 million payment to Kohlberg Kravis Roberts & Co., L.P. ("KKR") made in connection with a merger between The Gillette Company and Duracell International, Inc. KKR's affiliate, KKR Associates, L.P., owned 34% of Duracell's outstanding common stock. The defendants filed a motion to dismiss and claimed that Golaine's challenge to the $20 million payment was a derivative rather than direct claim because the plaintiff failed to allege that the merger terms were tainted by the $20 million fee. In granting the defendants' motion to dismiss,

the court concluded that the fee did not taint the merger negotiation process or the merger terms. Thus, the transaction was not unfair to Duracell's non-KKR stockholders, and the plaintiff failed to state an individual claim. It also held that the complaint failed to plead facts rebutting the business judgment rule's presumptive applicability to the Duracell board's decision to award KKR the fees or plead facts to support a waste claim.

***133** In applying *Parnes*, the court in *Golaine* focused less on standing and more on the merits of a post-merger direct claim, and remarked about how the two inquiries overlap at times:

> the derivative-individual distinction as articulated in *Parnes* is revealed as primarily a way of judging whether a plaintiff has stated a claim on the merits. ... *Parnes* can be straightforwardly read as stating the following basic proposition: a target company stockholder cannot state a claim for breach of fiduciary duty in the merger context unless he adequately pleads that the merger terms were tainted by unfair dealing. If the plaintiff cannot meet that pleading standard, then he has simply not stated a claim under Rule 12(b)(6). This merits focus of *Parnes* is, in my view, a more candid approach that places primary emphasis on whether compensable injury to the target stockholders is alleged rather than on whether the target stockholder's complaint has articulated only a waste or mismanagement claim for which there is likely no proper plaintiff on earth. [54]

In *In re Massey Energy Co. Derivative & Class Action Litigation*, [55] stockholders of a coal mining corporation filed derivative suits against the board and company officers for lack of oversight and to hold them responsible for the financial harm from a tragic mine disaster. While the derivative suits progressed, Massey's board entered into a merger agreement with another mining company. The plaintiffs sought a preliminary injunction to prevent the merger from closing, claiming that the Massey Board should have negotiated to have the derivative claims transferred into a litigation trust for the benefit of Massey stockholders. According to the plaintiffs, the merger was unfair because it allowed the buyer to acquire Massey without paying fair value for the value of the derivative claims.

While the merger had not yet closed and the court viewed the case through a preliminary injunction lens, the court had to grapple with the value of derivative claims and the loss of standing to pursue them once the merger closed. [56] First, the court found the *Caremark* [57] claims against the defendants viable. Second, and fatal to the plaintiffs' preliminary injunction claim, the court found that a best-case successful recovery of $95 million was immaterial to an $8.5 billion merger. Thus, given the relative immateriality of the derivative claims, the court was not persuaded on a preliminary injunction record that the merger would likely be found to be economically unfair to the Massey stockholders for failing to capture the value of the derivative claims. Importantly, the court did not couch its ruling on standing grounds. Instead, ***134** the court found that the plaintiff had failed to demonstrate a likelihood of success on the merits to earn a preliminary injunction enjoining the merger.

[11] After *Golaine* and *Massey*, the Court of Chancery in *Primedia* gathered the strands of these and other post-*Parnes* cases and knitted them together into a three-part test. In *Primedia*, the plaintiffs filed a derivative action on Primedia Inc.'s behalf and alleged that KKR traded on inside information in a 2002 preferred stock purchase. They sought disgorgement of KKR's profits under *Brophy v. Cities Service Co.* [58] While they litigated the derivative case, Primedia, Inc. merged with a private equity entity. The plaintiffs then filed a class action suit and alleged that the merger terms were unfair because the Primedia directors failed to obtain any value for the *Brophy* claim. They also argued that the merger conferred a special benefit on KKR because KKR knew any acquirer was unlikely to pursue the *Brophy* claim post-merger. The special benefit, according

to the plaintiffs, required court review of the merger under entire fairness.

Recognizing that the post-merger class action complaint required application of the *Parnes* decision, on a motion to dismiss the Court of Chancery read *Parnes* to require first an inquiry into standing, and second, an evaluation of the merits of the claims. [59] Drawing from the court's *Golaine* and *Massey* decisions, the court distilled the standing inquiry into a three-part test:

> A plaintiff claiming standing to challenge a merger directly under *Parnes* because of a board's alleged failure to obtain value for an underlying derivative claim must meet a three part test. First, the plaintiff must plead an underlying derivative claim that has survived a motion to dismiss or otherwise could state a claim on which relief could be granted. Second, the value of the derivative claim must be material in the context of the merger. Third, the complaint challenging the merger must support a pleadings-stage inference that the acquirer would not assert the underlying derivative claim and did not provide value for it. [60]

The Court of Chancery found the *Brophy* derivative claim viable because it ***135** would survive a motion to dismiss. For the materiality requirement, the court found potential recoverable damages of $190 million plus substantial prejudgment interest, which was material when compared to the $330 million merger. The court also noted that the amounts were material even if discounted to reflect the minority stockholders' beneficial interest in the litigation recovery. Primedia's minority stockholders owned 42% of its outstanding stock. Their *pro rata* share of the merger consideration was $133 million. Their *pro rata* share of a $190 million recovery on the *Brophy* claim would be $80 million.

In a parting comment illustrating the materiality of the derivative claims, the court risk-adjusted the potential recovery and found it material in relation to the proceeds the minority would receive in the merger:

> Clearly there is risk in the litigation, and to succeed, plaintiffs will have to prove materiality and *scienter*. These challenges, however, are not similar to those that led Chancellor Strine in *Massey Energy* to discount so heavily the value of the derivative claims. If I assume prevailing on the *Brophy* claim was a toss-up, or even a 1–in–5 proposition, the risk-adjusted, pre-interest recoveries for the minority of $40 million and $16 million, respectively, remain material when compared to their $133 million share of the proceeds from the Merger. [61]

After finding that the derivative claims were viable and material, the court also found that the acquirer would not assert the *Brophy* claim post-merger and provided no value for it in the merger consideration. Turning to whether the plaintiffs stated a claim for relief, the court held that it was reasonably conceivable that KKR received a special benefit in the merger because no acquirer likely would have pursued the *Brophy* claim post-merger, and the defendants did not extract value for or take steps to preserve the *Brophy* claim. Thus, the entire fairness standard of review applied to the merger, and the plaintiffs alleged sufficient grounds that the merger was not entirely fair. [62]

C.

[12] **[13]** In this appeal the procedural issues do not warrant lengthy discussion. After a review of the record, we are satisfied that Morris preserved for appeal a challenge to the fairness of the merger itself, and SEP GP disputed how the court should consider litigation risk when assessing materiality. Morris alleged that former public unitholders

were harmed because "SEP GP has allowed Enbridge to engineer the Roll-Up Transaction on terms that were patently unfair and unreasonable to SEP and its public unitholders, and that could not have been approved in good faith by the New Conflicts Committee or the SEP GP Board."[63] Specifically, Morris pled that "the New Conflicts Committee and the SEP GP Board utterly failed to attempt to (i) appropriately value the Derivative Claim, or (ii) secure any value for the Derivative Claim in its negotiations concerning the Roll-Up Transaction."[64] SEP GP also argued that Morris's chance ***136** of prevailing on the derivative claims was a "toss-up" or a "one-in-five" chance, essentially copying the odds from the *Primedia* decision.[65] Thus, the parties preserved their appellate arguments about materiality.

[14] The main issue on appeal is whether the Court of Chancery stayed true to the standard of review on a motion to dismiss for lack of standing. In other words, did the court accept as true all reasonable factual allegations in the complaint and consider whether it was reasonably conceivable that Morris asserted a direct claim that could lead to a $661 million recovery on the derivative claims? After our review of the complaint, we find that the court strayed from the proper standard of review, and Morris had standing to pursue his post-merger complaint.

As discussed earlier, to have standing, the plaintiff must plead a direct claim. Under *Parnes*, to plead a direct claim, the plaintiff must allege that the merger itself was unfair, "by charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price."[66] When the court is faced with a post-merger claim challenging the fairness of a merger based on the defendant's failure to secure value for derivative claims, we think that the *Primedia* framework provides a reasonable basis to conduct a pleadings-based analysis to evaluate standing on a motion to dismiss.

[15] First, the court must decide whether the underlying derivative claims were viable, meaning they would survive a motion to dismiss. Meritless derivative claims would have no impact on the merger price. Second, the derivative claim recovery as pled must be material in relation to the merger consideration. An immaterial derivative claim would have little or no impact on the merger price. For example, a $10 million derivative claim could not reasonably be expected to be material to a $1 billion merger value. The same derivative claim would be material to a $20 million merger. And finally, the court should also assess whether the complaint alleges that the acquirer would not assert the underlying derivative claim and did not provide value for it.[67]

[16] When assessing standing at the motion to dismiss stage of the proceedings, the court must accept the plaintiff's factual allegations as true and draw all reasonable inferences in his favor. This does not mean that the court is bound by unreasonable, unsupported, or speculative derivative suit damages claims. But if it is reasonably conceivable that the plaintiff could recover the damages claimed in the complaint, the court must accept that allegation as true for purposes of the motion to dismiss for lack of standing.

Here, the parties do not dispute the viability of the derivative claim. Morris's derivative claim survived a motion to dismiss. ***137** The parties also did not dispute that SEP GP secured no value for the derivative claim, and Enbridge would not assert the claim post-merger. Regarding materiality, Morris alleged that his derivative claim could lead to a more than $660 million damages award, including prejudgment interest, which was material when compared to a $3.3 billion merger.[68] The court could reasonably infer that if Morris prevailed on his challenge to the reverse dropdown transaction, Morris could recover at least $660 million.

The court, however, discounted the potential $660 million recovery to $112 million to reflect the minority unitholders' 17% beneficial interest in the derivative litigation recovery. The Court of Chancery then reduced the $112 million further to account for litigation risk because it was still "a litigable question whether Reduced GP Cash Flow represented value to the Partnership in the Reverse Dropdown, which would vindicate the Defendant's approval of the transaction objectively."[69] The court also held that even if SEP GP's valuation was incorrect, it would not breach the limited partnership agreement because Morris would still have to prove "the work of the Defendant's advisor, Simmons, on the Reverse Dropdown did not fit in the parameters of Section 7.10(b) of the Second A & R LPA."[70] The court observed that Morris would have to demonstrate that "SEP GP did not 'reasonably believe' that the valuation of the transaction was within Simmons' competence, negating any 'safe harbor' for the Defendant."[71] Finally, Morris would also "have to demonstrate the Defendant's subjective bad faith to recover damages on behalf of SEP ...."[72] Taking these difficulties into account, the court concluded:

> I find that the chance of success of the Derivative Claim was slim, and certainly less than one-in-four. Twenty-five percent of $112,370,000 is $28,092,500. This represents less than one percent of the total value of the Roll-Up. One percent is not material in the context of the Roll-Up. The Plaintiff consequently does not have standing to pursue his claims. [73]

We see two errors in the court's materiality analysis at the motion to dismiss stage of the proceedings. First, as discussed earlier, the court must accept Morris's factual allegations as true and draw all reasonable inferences in his favor. [74] In its prior decision the court found that Morris's complaint "made adequate allegations showing that under reasonably conceivable circumstances a facially unreasonable gap in consideration exists sufficient to infer subjective bad faith." [75] Thus, "it was 'reasonably conceivable that the General Partner acted in subjective bad faith.' " [76] It was ***138** also reasonably conceivable that, had Morris succeeded in the derivative suit challenging the reverse drop down transaction, the recovery could have been at least $660 million. Applying a further litigation risk discount at the pleading stage was inconsistent with the court's standard of review on a motion to dismiss for lack of standing.

Second, even if it was proper to discount the $660 million in damages alleged in the complaint to reflect the public unitholders' interest in the derivative recovery, to maintain equivalence, the court should have compared the $112 million *pro rata* interest in the derivative claim recovery to the public unitholders' proportional interest in the merger consideration. The public unitholders had a 17% interest in SEP. The merger consideration was valued at $3.3 billion. An apples-to-apples comparison would have compared $112 million to $561 million. [77] Under this calculation, the derivative claim was material at the motion to dismiss stage.

Neither *Massey* nor *Primedia* require a different result. As discussed earlier, in *Massey* the plaintiffs alleged in their complaint *Caremark* damages equal to the damages that the company suffered from the mining disaster—estimated to be $900 million to $1.4 billion. Even though the plaintiffs pled a viable *Caremark* claim, the court refused to equate the value of the *Caremark* claim with the damages suffered from the mine explosion. Unlike here, where Morris is entitled to certain presumptions in his favor, the court made its assessment as part of a preliminary injunction motion, where likelihood of success is one of the requirements. The court properly took into consideration the substantive difficulties confronting the plaintiff in proving and collecting on their *Caremark* claims. On an extensive record before the court, it predicted that the best-case recovery was $95 million, based not on the full damages caused the company by the mine disaster but on the policy limits for directors' and officers' insurance coverage. The plaintiff did not show a likelihood that it would succeed on its challenge to the fairness of the merger for failing to secure value for a $95 million derivative claim recovery as part of a $8.5 billion merger. [78] Importantly, the court did not apply a percentage reduction based on litigation risk. Instead, on a substantial record, the court gave the plaintiffs the benefit of their realistic, best-case recovery.

Primedia is also distinguishable. The court in *Primedia* found that the plaintiffs' *Brophy* claim was material and did not face the same impediments to recovery as the plaintiffs faced in *Massey*. It was only after the court found that the plaintiffs had a strong and material derivative case that the court concluded its analysis with what can be best characterized as confirmation of its materiality conclusion. The court stated that even if the *Brophy* claim "was a toss-up, or even a 1–in–5 proposition, the risk-adjusted, pre-interest recoveries for the minority of $40 million and $16 million, respectively, remain material when compared to their $133 million share of the proceeds from the Merger." [79] As we interpret the court's percentage risk adjustment, ***139** it served only as a hypothetical to illustrate the strength and materiality of the plaintiffs' claims even if there were obstacles to recovery.

[17] In any event, on a motion to dismiss for lack of standing, we are not addressing the likelihood of success on a preliminary injunction record. A percentage-based risk reduction should not be applied at this stage of the proceedings. If the plaintiff has alleged a viable derivative

claim, where it is reasonably conceivable that the claim is material when compared to the merger consideration and could result in the damages pled in the complaint, the plaintiff has satisfied the materiality requirement at the motion to dismiss stage for standing purposes. Morris has met this standard and his claims should not be dismissed for lack of standing.

III.

[18] Standing is concerned "only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter in controversy."[80] If the court finds that the plaintiff has standing, on the defendant's motion the court should also consider a motion to dismiss for failure to state a claim. For the first time on appeal, SEP GP has asked us to consider its motion to dismiss for failure to state a claim. Because the record is complex and it is not clear what has been incorporated by reference, we think that the Court of Chancery should consider the motion first. It also might be a better use of the court's scarce resources to consider a motion for summary judgment, after the completion of discovery, rather than a motion to dismiss. But we leave it to the Court of Chancery's discretion. We reverse the Court of Chancery's judgment and remand for further proceedings. Jurisdiction is not retained.

All Citations

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Footnotes

1 We take the facts from the complaint and the Court of Chancery's decision. *Morris v. Spectra Energy Partners (DE) GP, LP*, 2019 WL 4751521 (Del. Ch. Sept. 30, 2019).

2 Enbridge owned Spectra Energy Partners GP, LLC, which owned SEP GP.

3 *Morris*, 2019 WL 4751521, at *3.

4 *Id.* A "good faith" finding requires that "the person acting 'must believe that the determination or other action is in the best interests of the Partnership.' " *Id.* (citation omitted).

5 The plaintiff also pled breach of the implied covenant of good faith and fair dealing against SEP GP and tortious interference with the limited partnership agreement against SEP Corp.

6 *Morris*, 2019 WL 4751521, at *5 (quoting *Morris v. Spectra Energy Partners (DE) GP, LP*, 2017 WL 2774559, at *16 (Del. Ch. June 27, 2017)).

7 *Id.*

8 *Id.* at *6 (alteration in original). Later, however, and "contrary to initial expectations," "it did not 'meaningfully limit an MLP's ability to recover an income tax allowance in its cost of service.' " *Id.* at *7. (quoting Compl. ¶ 57). "SEP's public units realized a corresponding increase in market price." *Id.*

9 *Id.* at *6 (quoting the record).

10 *Id.* at *8.

11 *Id.* at *9 (citation omitted).

12 The Order dismissing the derivative claim "did not preclude the Plaintiff from prosecuting this Action." *Id.* at *9.

13 67 A.3d 455 (Del. Ch. 2013).

14 *Morris*, 2019 WL 4751521, at *11.

15 *Id.* at *12 ("*Primedia* asks whether the claim has 'survived a motion to dismiss.' The answer for the Derivative Claim is in the affirmative. That is the end of the viability inquiry.").

16 *Primedia*, 67 A.3d at 477 ("First, the plaintiff must plead an underlying derivative claim that has survived a motion to dismiss or otherwise could state a claim on which relief could be granted.").

17 *Id.*

18 As they argue, "the legal principle of whether a court should adjust for risk when valuing a derivative claim does not turn on the nature and degree of that risk. It is either appropriate to risk adjust or it is not." Answering Br. at 32. And they assert Delaware law supports their position in other contexts. *Id.* at 32–33 (citing *ONTI, Inc. v. Integra Bank*, 751 A.2d 904 (Del. Ch. 1999); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161 (Del. Ch. 1999), *aff'd*, 766 A.2d 437 (Del. 2000)).

19 Answering Br. at 35.

20 *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1256 (Del. 2016).

21 *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991) (citation omitted).

22 *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003).

23 *Ala. By-Prods. Corp. v. Cede & Co. on Behalf of Shearson Lehman Bros., Inc.*, 657 A.2d 254, 264 (Del. 1995) (quoting *Stuart Kingston*, 596 A.2d at 1382).

24 *Gerber v. EPE Hldgs. LLC*, 2013 WL 209658, at *12 (Del. Ch. Jan. 18, 2013) ("If there is no standing, there is no justiciable substantive controversy.").

25 *Ala. By-Prods.*, 657 A.2d at 264.

26 *See* *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004) ("The decision whether a suit is direct or derivative may be outcome-determinative.").

27 *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1245 (Del. 1999) ("Stockholders may sue on their own behalf (and, in appropriate circumstances, as representatives of a class of stockholders) to seek relief for direct injuries that are independent of any injury to the corporation.").

28 *Id.* ("A derivative claim is one that is brought by a stockholder, on behalf of the corporation, to recover for harms done to the corporation.").

29 *Ala. By-Prods.*, 657 A.2d at 264 ("For example, in order to have standing to initiate a shareholder derivative suit, a plaintiff must have been a shareholder at the time of the challenged transaction, as well as at the commencement of suit. In addition, this Court has held that a plaintiff must also maintain his shareholder status throughout the derivative litigation."); *see also Urdan v. WR Capital Partners, LLC*, 244 A.3d 668, 678–80 (Del. 2020) (recognizing that a stockholder who is involuntarily forced to sell their stock in a merger maintains the right to assert post-merger direct claims as an exception to the continuous ownership rule).

30 477 A.2d 1040 (Del. 1984).

31 *Feldman v. Cutaia*, 951 A.2d 727, 731 & n.20 (Del. 2008) ("It is now well established that a plaintiff may avoid dismissal of his derivative claims following a merger in only two distinct circumstances: where the claims asserted are direct, rather than derivative, or where one of the exceptions recognized in *Lewis v. Anderson* applies.").

32 152 A.3d 1248 (Del. 2016).

33 *El Paso*, 152 A.3d at 1256 ("Standing is therefore properly viewed as a threshold issue to 'ensure that the litigation before the tribunal is a "case or controversy" that is appropriate for the exercise of the court's judicial powers.' ") (quoting *Dover Historical Soc'y*, 838 A.2d at 1110).

34 *Id.* (quoting *Schoon v. Smith*, 953 A.2d 196, 202, 208 (Del. 2008)).

35 *Id.* (quoting *Gen. Motors Corp. v. New Castle Cty.*, 701 A.2d 819, 824 (Del. 1997)). As we recognized in *Lewis v. Anderson*, with limited exception, "[a] plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit." 477 A.2d at 1049; *see also El Paso*, 152 A.3d at 1265 ("This rule flows from the fact that, following a merger, 'the derivative claim —originally belonging to the acquired corporation—is transferred to and becomes an asset of the acquiring corporation as a matter of statutory law.' ") (citation omitted).

36 *El Paso*, 152 A.3d at 1256–57.

37 845 A.2d 1031 (Del. 2004).

38 *El Paso*, 152 A.3d at 1260 ("Because Brinckerhoff's claim sounds in breach of a contractual duty owed to the Partnership, we employ the two-pronged *Tooley* analysis to determine whether the claim 'to enforce the [Partnership's] own rights must be asserted derivatively' or is dual in nature such that it can proceed directly.") (alteration in original) (quoting *Loral Space & Commc'ns, Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 868 (Del. 2009)).

39 845 A.2d at 1035. It is worth noting that under *Tooley*, a claim can—in certain circumstances—be considered a dual-natured claim, *i.e.*, one that is both direct and derivative. *El Paso*, 152 A.3d at 1262 ("In unique circumstances, this Court has recognized that some claims can be dual-natured—that is, both direct and derivative.").

40 *El Paso*, 152 A.3d at 1251–52.

41 722 A.2d 1243 (Del. 1999).

42 *Id.* at 1246.

43 *Id.* at 1245.

44 546 A.2d 348 (Del. 1988).

45 *Parnes*, 722 A.2d at 1245.

46 *See* *Kramer*, 546 A.2d at 353.

47 *Parnes*, 722 A.2d at 1245.

48 *Id.*

49 *Id.*

50 *See* *id.* at 1246 ("Although we conclude that the Parnes complaint directly challenges the Bally merger, it does not necessarily follow that the complaint adequately states a claim for relief.").

51 *See* *id.* 1247 ("Using [the pleadings stage] standard, we find that the complaint states a claim challenging the fairness of the Bally/Hilton merger and challenging the Bally directors' approval of the merger as having lacked a rational basis.").

52 *Id.* at 1245.

53 1999 WL 1271882 (Del. Ch. Dec. 21, 1999).

54 *Id.* at *7 (footnotes omitted).

55 2011 WL 2176479 (Del. Ch. May 31, 2011).

56 In *Massey*, the plaintiffs sought to enjoin the merger or create a litigation trust pre-closing to hold the derivative claims.

57 *In re Caremark Int'l. Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996). *Caremark* claims govern director oversight liability, which require a plaintiff to show that "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously

failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone ex rel. AmSouth Bancorp. v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (emphasis in original). "Because of the difficulties in proving bad faith director action, a *Caremark* claim is 'possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.' " *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 55 (Del. 2017) (quoting *In re Caremark*, 698 A.2d at 967).

58 70 A.2d 5 (Del. Ch. 1949). *Brophy* and its progeny recognize a cause of action for a plaintiff to recover for misuse of confidential corporate information, which requires a plaintiff to demonstrate that "1) the corporate fiduciary possessed material, nonpublic company information; and 2) the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information." *In re Oracle Corp. Deriv. Litig.*, 867 A.2d 904, 934 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005) (TABLE); *see also Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 840 (Del. 2011) ("*Brophy* focused on the public policy of preventing unjust enrichment based on the misuse of confidential corporate information.").

59 *Primedia*, 67 A.3d at 477 ("As I understand the framework established by *Parnes*, a plaintiff wishing to assert such a claim must first establish standing to sue. If standing exists, then the plaintiff must still plead a viable claim."); *see also In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2018 WL 3120804, at *14 (Del. Ch. June 25, 2018) ("Having held that the Plaintiffs have standing to sue under Parnes, I next consider whether the Complaint states viable claims for breach of fiduciary duty."), *aff'd sub nom. IDT Corp. v. JDS1, LLC*, 206 A.3d 260 (Del. 2019) (TABLE); *In re Ply Gem Indus., Inc. S'holders Litig.*, 2001 WL 755133, at *6 (Del. Ch. June 26, 2001) ("Thus, by putting fairly before the Court the contention that [the plaintiffs] are challenging the fairness of the merger price or the merger process, Plaintiffs can survive the derivative-individual obstacle yet still fail to assert a claim that would allow them to move beyond a Rule 12(b)(6) confrontation.").

60 *Primedia*, 67 A.3d at 477.

61 *Id.* at 483 (emphasis in original).

62 The Court of Chancery has since followed *Primedia* in the context of post-merger challenges. *See In re Riverstone Nat'l, Inc. S'holder Litig.*, 2016 WL 4045411, at *8 (Del. Ch. July 28, 2016); *Houseman v. Sagerman*, 2014 WL 1600724, at *10–13 (Del. Ch. Apr. 16, 2014).

63 App. to Opening Br. at A077 (Compl. ¶ 105).

64 *Id.*

65 *See id.* at A0122 (Defendant Spectra Energy Partners (DE) GP, LP's Opening Br. in Support of its Mot. to Dismiss the Verified Class Action Compl. at 31 n.12) ("For instance, if the derivative claim were considered a toss-up, a theoretical $47 million recovery (without interest) would represent just 1.4% of the $3.3 billion merger consideration. If instead the claim had a one-in-five shot, the potential recovery of $19 million (without interest) for the unaffiliated unitholders would be just 0.57% of the total merger value.").

66 Parnes, 722 A.2d at 1245.

67 Primedia, 67 A.3d at 483. The rationale for this prong is that "[w]ithout such allegations and the resulting inferences, the merger consideration logically would incorporate value for the litigation, and the merger would not have harmed the sell-side stockholders." Id.

68 App. to Opening Br. at A0023 (Compl. ¶ 1 & n.3) (describing the derivative claim that survived the motion to dismiss as "potentially worth more than $660 million to SEP (and more than $110 million to SEP's public unitholders)").

69 Morris, 2019 WL 4751521, at *13.

70 Id.

71 Id.

72 Id. at *14.

73 Id. (footnotes omitted).

74 See Parnes, 722 A.2d at 1247 (finding that, after taking all pleaded facts as true and drawing reasonable inferences in the plaintiff's favor, the plaintiff's claim was direct and withstood dismissal); Primedia, 67 A.3d at 479 ("Assuming these allegations are true, as I must at this procedural stage, ...").

75 Morris, 2019 WL 4751521, at *5 (quoting Morris v. Spectra Energy Partners (DE) GP, LP, 2017 WL 2774559, *16 (Del. Ch. June 27, 2017)).

76 Id.

77 See Primedia, 67 A.3d at 482–83 (after finding the $190 million Brophy claim material to the $316 million merger, the court also discounted the Brophy claim's recovery to $80 million to reflect the stockholders' beneficial interest in the litigation recovery and compared it to the stockholders' $133 million *pro rata* share of the merger consideration).

78 In re Massey Energy Co., 2011 WL 2176479, at *28–29.

79 Primedia, 67 A.3d at 483.

80 Dover Historical Soc'y, 838 A.2d at 1110 (emphasis in original) (quoting Stuart Kingston, 596 A.2d at 1382).

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EXHIBIT B

HUNTER MOUNTAIN INVESTMENT TRUST'S SUPPLEMENT TO RESPONSE TO MOTION TO STAY

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re New Valley Corp. Derivative Litigation, Del.Ch., June 28, 2004

1998 WL 13858
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

SHAEV
v.
WYLY

No. 15559-NC.
|
Jan. 6, 1998.

Attorneys and Law Firms

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R. Franklin Balotti, Richards, Layton & Finger, Wilmington, DE.

Opinion

STEELE, Vice Chancellor.

***1** On defendants' Motion for Summary Judgment, I find that where plaintiff: (1) currently owns shares in two independent corporations that used to stand in a parent/wholly-owned subsidiary relationship and (2) once had legal standing as a shareholder of the parent to bring a double derivative action on behalf of the former subsidiary for its directors' alleged breach of fiduciary duty but (3) lost that legal standing when the parent "spun-off" the subsidiary, plaintiff nonetheless has equitable standing to bring a derivative action on behalf of the former subsidiary to recover for the alleged breach of fiduciary duty, even though the challenged actions occurred before plaintiff could have owned shares in the subsidiary.

Facts

Plaintiff, David B. Shaev, brings this derivative action on behalf of Sterling Commerce, Inc. ("Commerce"). Commerce was formed in December of 1995 as a wholly-owned subsidiary of Sterling Software, Inc. ("Software"). Plaintiff has owned shares of Software for several years, but he first became a shareholder of Commerce on September 30, 1996, as the result of a spin-off in which he received shares of Commerce as a dividend.

On February 12, 1996, several months before the spin-off, Commerce's directors, Sam Wyly, Charles J. Wyly, Evan A. Wyly, Sterling L. Williams, Warner C. Blow, Honor R. Hill and Robert E. Cook (collectively "defendants"), [1] granted themselves options on 9,000,000 shares of Commerce stock, exercisable at $24 per share. [2] Software's directors, at least four of whom were also directors of Commerce, approved the option plan on the same day. Software announced its approval of the option plan to its shareholders in a prospectus dated March 8, 1996. Software sold 18.4% of its Commerce shares in a public offering on March 13, 1996, and it divested itself of the remaining 81.6% in the spin-off.

Plaintiff alleges that the options, which may extract from Commerce between $139 million and $245 million, constitute excessive compensation to defendants. Plaintiff concedes that because he was a Software shareholder on March 8, 1996, he could have challenged the option plan at that time by filing a double derivative suit on Commerce's behalf. Once the Commerce spin-off was complete, and Software was no longer Commerce's parent, however, plaintiff lost his legal standing to bring a double derivative action on Commerce's behalf. Thus, on February 20, 1997, plaintiff filed suit derivatively on Commerce's behalf, alleging that defendants, "most of [whom] have two or three other full-time jobs ... as their primary occupations" and "cannot reasonably be expected to devote full time attention and service to the business of Commerce," [3] breached their fiduciary duty of loyalty by granting themselves excessive compensation in a self-interested transaction. Plaintiff seeks, *inter alia,* rescission of the option plan.

Defendants filed a Motion for Summary Judgment, arguing that because the board enacted the option plan when Commerce was a wholly-owned subsidiary of Software, they owed fiduciary duties solely to Software and its shareholders. Although plaintiff held Software shares at the time the options were granted, he did not bring suit in his capacity as a Software shareholder, double derivatively. Defendants contend that they owed plaintiff no fiduciary duty as a

"prospective" shareholder of Commerce and that plaintiff lacks standing to sue as a current shareholder of Commerce, because he does not satisfy the contemporaneous ownership requirement of 8 *Del. C.* § 327.

Discussion

2** A motion for summary judgment may be granted when no genuine issue of material fact is in dispute, and the moving party is entitled to judgment as a matter of law.[4] It is undisputed that at the time the option plan was created, Commerce was a wholly-owned subsidiary of Software. Defendants contend that under ***Anadarko Petroleum Corp. v. Panhandle Eastern Corp.,[5] "[t]he directors of a wholly owned subsidiary cannot be held liable to post-spin stockholders for actions taken by those directors prior to the spin-off."[6] Defendants argue that ***Anadarko*** is directly on point and mandates that summary judgment be granted in their favor.

A brief discussion of ***Anadarko'*** s facts will reveal that the case is not on all fours with the instant case. In ***Anadarko,*** the Supreme Court addressed "whether a corporate parent and directors of a wholly-owned subsidiary owe fiduciary duties to the prospective stockholders of the subsidiary *after* the parent declares its intention to spin-off the subsidiary."[7] On August 20, 1986, Panhandle, the parent corporation of Anadarko, announced that on October 1, 1986, it would "distribut[e] one share of Anadarko common stock for each issued and outstanding share of Panhandle stock held of record on September 12, 1986."[8] To increase the value of the spin-off, representatives of the two corporations applied, successfully, to the New York Stock Exchange to create a market in Anadarko stock before the date of distribution. Approximately three million Anadarko shares were traded on a when-issued basis, reflecting the value of Anadarko as an independent entity, before the dividend distribution date.[9] On September 30, 1996, one day before the distribution date, Anadarko's board, by a 3-2 vote, agreed to modify existing contracts between Panhandle and Anadarko in a manner that was favorable to Panhandle and unfavorable to Anadarko.

Anadarko sued Panhandle and the three former Anadarko directors who had approved the contract modifications. On appeal, Anadarko argued that the contracts were voidable because they were "unfair and were approved in violation of fiduciary duties owed to the prospective stockholders of Anadarko."[10] The Supreme Court began its analysis by stating two settled rules of law: (1) "a parent does not owe a fiduciary duty to its wholly[[-]owned subsidiary,"[11] and (2) "in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders."[12] Anadarko argued, *inter alia,* that the case at bar presented an exception to these general rules because "by setting a record date for the dividend distribution and by establishing a market for Anadarko shares to be traded on a when-issued basis," Panhandle created a class of beneficial owners of Anadarko stock to whom it and the Anadarko directors owed fiduciary duties.[13] The Supreme Court disagreed and held that even under the unique circumstances presented, no fiduciary duties were owed to the prospective Anadarko shareholders before the date of distribution.

3** ***Anadarko is not controlling in the present case. Software did nothing between the announcement of the spin-off and the distribution date that could arguably suggest it created fiduciary duties where there otherwise were none, and plaintiff does not claim that Commerce's directors owed him a duty as a prospective Commerce shareholder. Unlike ***Anadarko,*** the spin-off in the present action had not been announced, and may not even have been contemplated, at the time the events now challenged as a breach of fiduciary duty took place. While the general fiduciary duty rules of parents and wholly-owned subsidiaries stated in ***Anadarko*** apply, the distinct scenario addressed in ***Anadarko*** is not in issue here. At the time the option plan was enacted, Commerce owed fiduciary duties only to Software and Software's shareholders. That is why, as both parties concede, plaintiff could have filed a double derivative action on Commerce's behalf between March 8 and September 30. Plaintiff never instituted such an action, however. Instead, plaintiff filed a derivative action as a current Commerce shareholder.

This brings us to defendants' second argument. It is undisputed that the option plan was enacted on February 12, 1996, but that plaintiff did not become a Commerce shareholder until September 30, 1996. Thus, defendants contend that plaintiff lacks standing to bring this derivative action, and this Court must grant defendants' Motion for Summary Judgment as a matter of law, because plaintiff was not a Commerce shareholder at the time of the alleged wrong. 8 ***Del. C.*** § 327 states:

> In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which he complains or that his stock devolved upon him by operation of law.

Plaintiff argues that this presents a catch-22; he alleges that he can make out a case of corporate wrongdoing but, because of the strict application of some technical legal rules, he can sue neither derivatively nor double derivatively, and the alleged wrongdoers are insulated from suit. Plaintiff contends that a court of equity cannot sanction such a result. Indeed, this Court stated as much in ***Helfand v. Gambee.*** [14]

The plaintiff in ***Helfand*** owned shares in Twentieth Century Fox Film Corporation ("Fox of N.Y."). Fox of N.Y. produced and distributed films and, through its wholly-owned subsidiary, National Theaters Corp. ("NTC"), owned and operated movie theatres. In 1951, pursuant to an antitrust consent decree, Fox of N.Y. began a reorganization to separate its film production and distribution assets from its theatre assets. The result of the reorganization, in simplified terms, was that Fox of N.Y. and NTC were dissolved and replaced by two new corporations, respectively, Fox of Delaware and National Theatres, Inc. ("NTI"). The former shareholders of Fox of N.Y., including the plaintiff, held two shares of stock for each share of Fox of N.Y. they had owned, one in Fox of Delaware and one in NTI. The shares in Fox of Delaware represented the shareholders' interest in Fox's film production and distribution business, and the shares in NTI represented the shareholders' interest in Fox's theatre business.

4** The plaintiff later filed a derivative action on behalf of NTI seeking an accounting by its directors, who had also been directors of NTC, for their activities both before and after the reorganization. The director defendants moved to dismiss portions of the complaint on the grounds that, under section 327, the plaintiff had no standing to sue for alleged wrongdoing that occurred before she became a shareholder of NTI. It should be noted, although the ***Helfand Court did not, that before September of 1952, the plaintiff could have filed a double derivative action on behalf of NTC.

This Court allowed the plaintiff to pursue her derivative action, despite the language of section 327 and the fact that the plaintiff had voted in favor the reorganization. The Court found that the purpose of section 327, to prevent the purchasing of shares for the purpose of bringing a derivative action to recover for wrongdoing antedating the purchase, would not be served by preventing the plaintiff's suit because she was not such a purchaser. [15] The Court also noted that section 327 was not enacted "to prevent the correction of corporate wrongdoing." [16] Furthermore, the plaintiff had owned shares in Fox of N.Y. since 1941. Thus, the Court stated: "the fact that she holds two pieces of paper instead of one as evidence of her 1941 investment in Fox of New York should not ... foreclose her from complaining of acts antedating the incorporation of [NTI] when such corporation is in effect a successor to Fox of New York." [17]

This case is analogous to ***Helfand.*** Plaintiff here did not purchase shares in Commerce to bring suit for actions taken before he was a shareholder. Like the plaintiff in ***Helfand,*** plaintiff here "was not a direct party to a transaction which made [him] a stockholder de novo." [18] Rather, plaintiff has owned shares in Software for several years, and he became a shareholder in Commerce only because Software declared the stock dividend. Thus, the sole aim of section 327 would not be served by denying plaintiff standing to sue. [19] To the contrary, to deny standing on these facts would insulate defendants from potential liability for their alleged misdeeds.

Defendants argue that ***Helfand*** is no longer good law, having been implicitly overruled by ***Anadarko.*** Again, I believe defendants' interpretation of ***Anadarko*** misses the mark. The contemporaneous ownership requirement of section 327 was not implicated in ***Anadarko*** because the former subsidiary corporation brought suit on its own behalf; no shareholder sued derivatively. ***Anadarko'*** s holding, that under the circumstances of that case, the parent corporation did not assume fiduciary duties with respect to a class of prospective shareholders the parent created by its own actions, has no applicability to the present case, where plaintiff seeks relief for alleged wrongs that occurred when plaintiff could not have been a prospective shareholder because the impending spin-off had not been announced and may not even have been contemplated.

Conclusion

***5** Plaintiff, as a Software shareholder, had the right to bring a double derivative action on behalf of Commerce for a period of months. Why he did not do so is unclear. I decide only that Software's decision to divest itself of its entire interest in Commerce cannot, as a matter of law, deprive plaintiff of standing to bring a derivative action on behalf of Commerce, even where the challenged actions occurred before plaintiff owned shares in Commerce.

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 1998 WL 13858

Footnotes

1 Sterling Commerce, Inc., is a nominal defendant.

2 Honor R. Hill and Robert E. Cook did not vote in the original option grant; rather, they received their options automatically upon their election to Commerce's Board of Directors, on March 4, 1996. The right to receive the automatic options was established by the other five individual defendants, on February 12, 1996.

3 Complaint at para. 17.

4 *See, e.g.,* ***Berdel, Inc. v. Berman Real Estate Mgmt. Inc.,*** Del.Ch., C.A. No. 13579, Jacobs, V.C., (Dec. 15, 1997), Mem.Op. at 2.

5 Del.Supr., 545 A.2d 1171 (1988).

6 Defendants' Reply Brief in Support of Motion for Summary Judgment at 1.

7 ***Anadarko,*** 545 A.2d at 1172. (Emphasis added)

8 ***Id.*** at 1173.

9 ***Id.*** Trading also commenced on an “ex-distribution” basis, reflecting only the value of Panhandle, and continued to be traded the “regular way,” reflecting the combined value of both corporations. ***Id.***

10 ***Id.***

11 ***Id.*** at 1174. (Citations omitted)

12 ***Id.***

13 ***Id.***

14 Del.Ch., 136 A.2d 558 (1957).

15 ***Id.*** at 562.

16 ***Id.*** at 561.

17 ***Id.*** at 562.

18 ***Id.***

19 The sole purpose of section 327 is "to prevent what has been considered an evil, namely, the purchasing of shares in order to maintain a derivative action designed to attack a transaction which occurred prior to the purchase of the stock." ***Rosenthal v. Burry Biscuit Corp.,*** Del.Ch., 60 A.2d 106, 111 (1948).

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EXHIBIT 11

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

	)	**Case No. 19-34054-sgj-11**
In Re:	)	Chapter 11
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	June 12, 2024
	)	10:00 a.m. Docket
Reorganized Debtor.	)	
	)	STATUS CONFERENCE RE:
	)	HIGHLAND'S MOTION TO STAY
	)	CONTESTED MATTER
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Reorganized Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7760
For James P. Seery, Jr.:	Mark Stancil Joshua Seth Levy WILLKIE FARR & GALLAGHER, LLP 1875 K Street, NW Washington, DC 20006 (202) 303-1147
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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

DALLAS, TEXAS - JUNE 12, 2024 - 10:04 A.M.

THE CLERK: All rise.

THE COURT: Please be seated. We will now begin a status conference we have set in Highland Capital, Case No. 19-34054. This pertains to an order staying a contested matter that was initiated by Hunter Mountain Investment Trust.

All right. So let's get our lawyer appearances. We'll ask for Hunter Mountain, your appearance, please?

MS. DEITSCH-PEREZ: Good morning, Your Honor. This is Deborah Deitsch-Perez from Stinson for Hunter Mountain. Mr. Aigen is also on the line, I see, and he may assist me by pulling up a PowerPoint.

THE COURT: All right. I'm not sure why we're going to need a PowerPoint, but things are complex, shall we say, in this case as a general matter.

MS. DEITSCH-PEREZ: A short one.

THE COURT: So we will see what that's going to be about.

All right. For the Debtor, who do we have appearing?

MR. MORRIS: Good morning, Your Honor. It's John Morris from Pachulski Stang Ziehl & Jones on behalf of Highland Capital Management, LP.

THE COURT: Okay. I should say Reorganized Debtor, not Debtor. We're a few years down the road.

All right. Do we have other lawyers who want to appear

today?

MR. STANCIL: Your Honor, this is Mark Stancil from Willkie Farr & Gallagher. I'm joined by my colleague, Josh Levy. We represent Mr. Seery.

THE COURT: All right. Thank you.

Would that be all of our lawyer appearances, I presume?

All right. Well, let's be clear about why we are here. And I'm sure the lawyers will correct me if I'm wrong. There was a motion filed, I don't know, I would say January-ish of this year by Hunter Mountain Trust -- I'll call it a Gatekeeper Motion -- where Hunter Mountain was wanting leave of this Court to file a lawsuit in the Delaware Chancery Court against Mr. Seery regarding his role as the Claimant Trust Trustee. And we had a hearing January 25th, and the Court indicated it would stay the motion because I had -- I think that was when I had under advisement, maybe I'd just taken under advisement a Hunter Mountain motion for leave to file -- to go forward with another type of suit involving -- I think it was the Valuation Suit.

MS. DEITSCH-PEREZ: Your Honor? Your Honor?

THE COURT: Okay. So, anyway, I know I stayed the motion for leave to go forward in Delaware Chancery Court. Ms. Deitsch-Perez, what were you wanting to say?

MS. DEITSCH-PEREZ: I was going to say I believe Your Honor stayed the case awaiting your hearing and decision of

the motion to dismiss the valuation complaint.

MR. MORRIS: Correct.

THE COURT: All right. So, and I did go back and look at my order a few days ago, and I said we'd have a status conference after I ruled on that, right? So that's why we're here?

MR. MORRIS: Yes.

MS. DEITSCH-PEREZ: I think so. What Your Honor said was that you thought it was possible that your decision in the valuation case might bear on the motion to stay -- on the motion for leave, and so you stayed the matter, said we would have a status conference after it was decided. After it was decided, we called Ms. Ellison and asked for a status conference so that we could address whether or not the dismissal of the valuation complaint had any bearing on this matter.

In a nutshell, the Court dismissed the valuation complaint on the ground that the Plaintiffs had no standing to seek the valuation because the conditions in the CTA had not been met. Putting aside whether the parties believe that was correct -- it is being appealed -- the motion for leave is materially different and cannot and should not be decided on the same basis. And that's what we're here to discuss today.

THE COURT: All right. So we're here on the status conference because I ruled we would have a status conference

down the road to look at whether should we continue to stay the Hunter Mountain motion for leave to go forward in the Delaware Chancery Court.

So we're here pursuant to my prior order. And your client, Hunter Mountain, is arguing this is materially different, and so I can't figure out for the life of me why this is materially different. I'm just going to share my thinking right now. I have ruled three times now, right, that Hunter Mountain doesn't have standing. And I --

MS. DEITSCH-PEREZ: Your Honor, I --

THE COURT: And if it didn't have standing Time 1, 2, and 3, why on earth would it have standing now?

MS. DEITSCH-PEREZ: Your Honor, I'm prepared to explain why it's different. But if Your Honor has already decided on the basis of what you already have before you that Hunter Mountain has no standing, even though, here, the allegations concern -- are that Mr. Seery is deliberately manipulating the estate to maintain his tenure at his $150,000-a-month job by not paying creditors and refusing to issue the certification. And that allegation, and the fact that the law requires that this be decided by a Delaware court, if those things are not enough for Your Honor to believe that this matter is different and should be decided differently, then we would ask that you simply rule that Hunter Mountain has no standing and is not entitled to have a

Delaware court make the decision of the matters at issue in the motion for leave, and we would take it up at the same time as the valuation motion, so that the issue that Your Honor was concerned about --

THE COURT: What do you mean, you would take it up at the same time as the valuation motion?

MS. DEITSCH-PEREZ: In other words, if Your Honor were to rule right now, as you've indicated, that you believe that --

THE COURT: Right. You would appeal, and then what? What do you mean?

MS. DEITSCH-PEREZ: If I could finish, Your Honor. If Your Honor ruled that Hunter Mountain has no standing to seek leave to sue Mr. Seery in Delaware court and that the CTA overrides Delaware law if Delaware law --

THE COURT: Got it, got it, got it.

MS. DEITSCH-PEREZ: Right? Okay. If Your Honor were to rule that and deny the motion for leave, we would appeal that at the same time -- on the same timeline as the appeal of the valuation decision. And then Your Honor's concern about potentially conflicting rulings would not exist. We would consent to the same court hearing both so that we --

THE COURT: What makes you think a district judge would consolidate these two appeals? Or I guess it would be three appeals.

MS. DEITSCH-PEREZ: We have no control over that, but we would consent to it. The Debtor has expressed a concern about inconsistent rulings, and so if both parties sought for them to be -- the matters to be heard by the same judge -- we've done that in the past with all the -- with the reports and recommendations arising out of the withdrawal of the reference -- in every instance where the parties have requested the same judge to hear appeals from this Court, the District Court has agreed.

So while I certainly don't presume to control the District Court, we have good evidence that they would do so. And that would be the most efficient. It would minimize the chances of inconsistent rulings.

THE COURT: Okay. I'm going to hear your PowerPoint and see if there's something I'm missing, but this is really -- you said extremely different, or words to that effect. But I'm going to tell you right now, I would not -- to all the lawyers -- I would not be presumptuous and think that some district judge, let's say the one who has the current Hunter Mountain appeals, I don't know if it's one judge or two, is going to say, sure, we'll consolidate.

I mean, that's just not the way they work. Maybe you got lucky. Probably it was the Note Litigation, okay, where it made a ton of sense to consolidate that. But let me just be blunt. Bankruptcy is not their priority. The Constitution

requires that criminal matters be their priority. They're just, you know, they're not going to --

MS. DEITSCH-PEREZ: Your Honor, all we can do is ask.

THE COURT: They don't see the world the way we bankruptcy nerds see the world. Okay? That's just my experience. And I don't expect them to.

But, anyway, I -- who, by the way, has the Hunter Mountain appeals? Do we have that handy? I'm just curious.

MS. DEITSCH-PEREZ: I don't --

THE COURT: Judge Ada Brown? Does she have all of them, or just --

MR. MORRIS: She does. She has the main appeal of the order denying the motion for leave to sue Mr. Seery, Stonehill, and Farallon, the one that was the subject of the evidentiary hearing last June. She does have that matter right now.

THE COURT: And right now, do we have a judge assigned to the more recent order denying --

MS. DEITSCH-PEREZ: That was just --

THE COURT: -- Hunter Mountain leave?

MR. MORRIS: Not that I know of.

MS. DEITSCH-PEREZ: That was --

MR. MORRIS: That notice of appeal was just filed, I think, on June 7th, and I don't know if that's been assigned yet.

THE COURT: My law clerk over here is saying no. You're correct; there's no judge assigned to that. So we, you know, we --

MS. DEITSCH-PEREZ: So it is possible, then, that we could ask Judge Brown to hear all three. That's a possibility.

MR. MORRIS: May I be heard at some point, Your Honor?

THE COURT: Well, absolutely. Absolutely. But I am just, I'm focusing on procedure at the moment. And we'll let you explain why you think this is different, but surely you know where my brain is.

I've ruled three times now that Hunter Mountain does not have standing under the terms of the plan and under Delaware law. And three times, we have written lengthy opinions on that. And my impression, after sitting here 18 years, is the District Court is going to be very irritated with me and everyone else if I rule yet a fourth time on this and there is an appeal sent their way. Consolidation or no consolidation, at some point judicial economy and efficiency of the parties rears its head.

I mean, why wouldn't I stay this further and see how Judge Brown rules in the other matter? Heck, --

MS. DEITSCH-PEREZ: Your Honor, the --

THE COURT: -- at some point this plan could go

effective. I mean, excuse me, could be fully implemented. But I think we know why it hasn't been. My impression is certainly all we have left is to resolve all the litigation involving your client.

MS. DEITSCH-PEREZ: Your Honor, the reason you cannot stay it is because the Fifth Circuit and the Supreme Court have a very high standard for staying litigation, and by staying it you would be effectively denying the very relief that's being sought. Hunter Mountain is entitled to try to end this by removing a trustee with a conflict who is eating up the costs -- the money in the estate. And we're entitled to have that decided. And by staying it, you are effectively denying the relief. That's what's impermissible. The Fifth Circuit and the Supreme Court have set a very high bar to staying litigation.

This is not like the motion for mediation, where we harbored no illusion whatsoever that Your Honor would stay litigation over the Debtor's objection. The only --

THE COURT: Okay. It never would have occurred to me this was analogous to the motion to stay litigation. I think it's analogous to three different motions your client has filed and I've ruled on. I don't know, --

MS. DEITSCH-PEREZ: Your Honor, I will show you why it's different.

THE COURT: -- what number of pages, Courtney, were

our three rulings? And I say three because --

MS. DEITSCH-PEREZ: Your Honor?

THE COURT: -- there was a motion for reconsideration. I mean, a couple hundred pages of ink spilt that some district judge --

MS. DEITSCH-PEREZ: Your Honor?

THE COURT: -- has got to read? And why are we doing the same thing over and over? It's like the famous --

MS. DEITSCH-PEREZ: That's what I --

THE COURT: -- Einstein saying. You know, the famous Einstein saying. What did he say?

MR. MORRIS: The definition of insanity, Your Honor, doing the same thing over and over again, expecting a different result? That was going to be my opening line.

THE COURT: Oh, wow. Oh, wow. Okay. Well, that's --

MR. MORRIS: So we're in the same place.

THE COURT: -- definitely the one I was thinking.

MS. DEITSCH-PEREZ: Your Honor, the difference --

THE COURT: Okay. Ms. Deitsch, just --

MS. DEITSCH-PEREZ: The difference is that this was --

THE COURT: -- let's make -- just make your presentation and then we'll hear Mr. Morris's presentation. If something is horribly lost on me, this is your chance to

show me that I am totally missing the boat on why this situation is different.

MS. DEITSCH-PEREZ: Okay. There are two points here. One is we would like you to understand why it's different and see why it's different. But if you have already made up your mind, then simply deny the motion for leave, opine that the CTA overrides Delaware law, and the most efficient path is to have this evaluation and the insider trading case be appealed where that will be the most efficient use of resources.

So let me go -- could I ask --

MR. MORRIS: Your Honor, I apologize.

THE COURT: Okay. Before we do the whole PowerPoint, --

MR. MORRIS: I would love to be heard on the procedural point. Just the procedural point.

THE COURT: All right. You may, Mr. Morris.

MR. MORRIS: There is no motion to dismiss pending before the Court. What you're being asked to do, the Court doesn't have the authority to do. What we're here today to decide is whether or not to extend the stay. The answer is either going to be yes or no.

If the stay is extended, we're done. If the stay is not extended, then we're going to have to answer the complaint. And we're going to make a motion to dismiss. And we're going to have a whole -- with a Rule 11 motion, because this is all

collaterally estopped. But putting that aside for the moment, going to the District Court would be appropriate only if Hunter Mountain agrees that the issues are the exact same as raised in the stay.

You're about to hear a presentation that says, oh, no, no, they're not. These issues have never been heard before, they've never been briefed before, and there is no chance that it would be appropriate that the Court would have the authority to send this -- to make a decision on a case on a matter that's never been briefed. Right?

It's either a stay or it's not a stay. If it's a stay, let's go home. If it's not a stay, then we're going to answer the complaint with a motion to dismiss, and they can come back and tell us at that time, in writing, with notice, why they're not collaterally estopped by Your Honor's prior orders.

That's all.

THE COURT: Okay.

MS. DEITSCH-PEREZ: And that would normally be the case, Your Honor, but here the Court can sua sponte deny the motion. The Court has said repeatedly that it views it as the same. And so we are saying we would forego further briefing if Your Honor wanted to simply sua sponte dismiss the matter so that it could be appealed. And so it could be appealed on the same timeline more or less as the other matters that are proceeding.

I'll continue on now with --

THE COURT: Okay. Well, --

MS. DEITSCH-PEREZ: -- with the presentation.

THE COURT: I'll state the obvious. And as Mr. Morris said but I think you know very well, Ms. Deitsch-Perez, this is just a motion to unstay the contested matter -- I mean, it may be premature to call it a contested matter -- to unstay proceedings on Hunter Mountain's motion for leave to file a complaint in the Delaware Chancery Court. Should I keep the stay in place or not? Okay? So, --

MS. DEITSCH-PEREZ: I understand we're --

THE COURT: -- I don't think anyone has any confusion about that, and it's the reason why I said something about you having a PowerPoint. I was a little surprised that you would have a PowerPoint on this, but if you do, you do. I'll let you present it.

But I would never jump ahead, just so everyone is crystal clear, I would never jump ahead to a substantive ruling today that I'm denying your motion for leave to file the complaint in the Delaware Chancery Court. It would be either we're continuing the stay, we're going to continue the stay, please upload a new order supplementing my prior order saying the stay is going to be continued until whatever we decide, or it's going to be the stay is lifted, parties have, you know, 21 days to respond to Hunter Mountain's motion for leave to

file a complaint. Okay? So I hope there was no confusion on that.

MS. DEITSCH-PEREZ: No, Your Honor, we were simply responding to your repeated suggestion that this is the same and Hunter Mountain has no standing and the CTA overrides Delaware law, which was, if that was already determined and you did not need further explanation from the Reorganized Debtor on that in opposition, because we've already filed the motion for leave, then we would not argue as a procedural point that Your Honor could not simply make a decision.

THE COURT: Okay.

MS. DEITSCH-PEREZ: I understand that Mr. Morris is saying he does not want that because the whole goal here is to delay this long enough so that we can never be heard in Delaware. So I understand Mr. Morris's position.

MR. MORRIS: You know, Your Honor, I just, I so regret these ad hominem attacks. The fact of the matter is we don't have a pleading. We're about to hear arguments from Ms. Deitsch-Perez for the very first time. She's never briefed these issues. And I'm just going to leave it at that. This is just so improper.

THE COURT: All right. Well, how lengthy is your PowerPoint, and is it really geared towards the stay issue?

MS. DEITSCH-PEREZ: It is, Your Honor. It's seven slides.

THE COURT: Okay.

MS. DEITSCH-PEREZ: It's not very long. And there is nothing that we are going to raise that the Debtor is not aware of.

THE COURT: All right. Well, I'll let you present your seven slides. And, again, I think we're all crystal clear. This is just about is it time to lift the stay. And we've had a lot of preliminary discussions and I've made a lot of comments because it just seemed like the common-sense approach we might all agree to was let the District Court decide your appeal. She may say --

MS. DEITSCH-PEREZ: We do not agree to that --

THE COURT: -- Hunter Mountain has standing. She may say Hunter Mountain has standing, let them go forward with their valuation thing, with their suit they want to file against Farallon and whoever the other one was, I can't remember. You know, let them -- they have standing. She may view the plan documents, the Claimant Trust Agreement, Delaware law different. If she does, then absolutely I probably should lift the stay in this matter. I mean, I guess. I don't know.

MS. DEITSCH-PEREZ: Your Honor?

THE COURT: But it just seems like a matter of efficiency. You filed the appeals. You want it heard. You're entitled to that. Let that happen, and then we'll

figure out where we go from there. Except, as we well know, probably one party will file an appeal to the Fifth Circuit. So I'm just trying to understand what is rational here, and --

MS. DEITSCH-PEREZ: The Fifth Circuit has already rejected this very maneuver. And we have a slide that will tell you the --

THE COURT: Maneuver? What maneuver? What maneuver? Whose maneuver?

MS. DEITSCH-PEREZ: The maneuver is to stay a case, but it's the Debtor's request, to stay a case while awaiting other cases' decisions on standing. That's not proper. All of the cases should go up at the same time. If there's a dispositive ruling on standing at some point, well, it could be raised at that time. But there's no reason to stay, to prevent a party from having its day in court, because of the potential that another case is going to decide a similar or even the very same --

THE COURT: Okay. Present your PowerPoint and we'll perhaps better understand.

MS. DEITSCH-PEREZ: Okay. So, I'm --

Mike, if you can pull it up and go to Slide 2.

Okay. So, and before I get to that, yesterday we filed a notice of supplemental authority because since -- this is a very unusual circumstance.

THE COURT: Where did you file that?

MS. DEITSCH-PEREZ: In the bankruptcy. We filed a copy of the *Morris v. Spectra* Delaware case that the Debtor already had because we had found it, I think Mr. Aigen deserves the credit for this, and had provided it to the other counsel for HMIT to --

THE COURT: Okay. Just so you know, I've not seen it, I've not read it. So, --

MS. DEITSCH-PEREZ: Okay. I will describe it --

THE COURT: And I would not have been looking for it before a status conference.

MS. DEITSCH-PEREZ: Okay. I will -- it's very easy to describe. It's a Delaware case. And that was a case where someone was attempting to challenge -- a former shareholder was attempting to challenge a merger. And normally the rule in Delaware is, if you're not a shareholder, you can't challenge it anymore. You're not a shareholder; you can't challenge the merger.

But the claim there was that the Defendants had wrongfully caused the merger to eliminate the shareholders' ability to complain. And the Delaware Supreme Court said, gee, if someone deliberately does something to strip someone of their standing, we're not going to allow that, so we are going to allow someone who is no longer a shareholder to still complain about the merger.

And this is what we found, this is the most analogous

Delaware law we have found, and shows that it is appropriate, if someone does something that prevents someone from having standing, the Court should still allow the case to go forward.

So that's one reason why this is different. But the right to be heard in Delaware on an issue of the workings of a trust, on the issue of removing a trust, that's something that is subject to Delaware law and has to be decided by a Delaware court. And we cited in the opposition to the stay the *United Brotherhood* case and the Delaware statute that provides that.

And so that's another reason this case is different than the insider trading case or the valuation case, because this expressly involves the internal workings of a trust, which, even if you had a contract that had a venue provision, Delaware law says you can ignore that because this is important enough that we want this resolved by a Delaware court.

So, in Your Honor's decision dismissing the valuation proceeding, you relied on the Plaintiff's supposed agreement to the CTA as precluding them from challenging it or from invoking the duty of good faith and fair dealing. And I think you said something like that earlier today also. But that analysis is wrong here.

First, Hunter Mountain didn't negotiate or agree to the CTA. If you remember, at the time of the plan, the estate's projections were that payments would only be made through

Class 8. So Classes 10 or 11 had no reason to address the CTA.

But second, the duty of good faith and fair dealing can, should, really, must be raised when a party's actions actually prevent a condition precedent from occurring.

So the Court's conclusion that the existence of a condition precedent -- in other words, the conditions for vesting -- precludes a claim for good faith and fair dealing ignores the whole body of law that a party can't take advantage of his own wrongdoing.

So this isn't a case -- this usually comes up in the circumstance where somebody is claiming there's a breach of good faith and fair dealing because a party didn't do something that's expressly not required by the contract, where the duty of good faith and fair dealing is being used to contradict the contract. But that's not what's happening here.

Here, the complaint that is sought to be brought in Delaware is saying that Mr. Seery is thwarting the occurrence of the condition precedent, and the Plaintiff is entitled to have its allegations taken as true. And if that is true, that is the classic case for the invocation of good faith and fair dealing.

And we cite in the motion for leave the *Dunlap* case, the *Injective Labs* case, and the *Snow Phipps* case, all of which

are cases where there was some condition in the contract that the other side was alleged to be preventing from happening, and the courts allowed those -- either allowed the -- said that the parties (inaudible) to make that clear or allow the claim to go forward.

So these cases are directly counter to this case's mistaken conclusion that the vesting provision precludes HMIT from raising the good faith and fair dealing here. This is exactly when you must raise good faith and fair dealing, and it's entirely appropriate. So it is not like the valuation case, which was asking for information. It's not exactly like the insider trading case, either. Here, it is exactly when good faith and fair dealing governs.

So, for all of these reasons, the Court's prior decisions aren't governing here and are not a basis for staying or denying the gatekeeper matter.

But as we've said, if the Court's already decided otherwise, we would not object to the procedure of the Court sua sponte simply sending this on. What would not be fair would be stalling this case to prevent HMIT from seeking the Delaware decision-making to which it's entitled. And that's why, when the issue is a stay of court proceedings, the Fifth Circuit and the Supreme Court have a very high bar.

Mike, next slide. Mike, Slide 3. Okay.

Okay. So let's remember the standard for obtaining a

stay: A strong showing of likelihood to succeed on the merits; whether the movant -- that's the Debtor here -- will be irreparably harmed absent a stay; whether the issuance of a stay will injure other interested parties -- Hunter Mountain; and where the public interest lies.

And the Supreme Court has characterized the circumstances in which a stay is appropriate as rare. And that's the *Landis* case cited by the Northern District.

And Highland, in the motion for stay, doesn't address this standard at all. And in the initial hearing we had, Highland said, and the Court seemed to agree, well, the standard isn't required because, remember, when you all sought a stay for the mediation, you didn't raise the standard.

But that was very different, because for the mediation we had no illusion that Your Honor would grant a stay over the objection of the Debtor. So, really, what we were talking about in that circumstance is a consensual stay. And then the standard wouldn't apply.

Let's go to Slide 4, Mike.

Okay. And here is the case, the *Jamison* case, which relied on Supreme Court *Landis* case, said the defendant requested a stay pending the Supreme Court's rulings on two different cases where the same or virtually the same standing question was raised, and the Court denied the motion, saying that, because standing is an issue that can be raised at any

time, there was no reason to stay, because if the Supreme Court made a ruling that was dispositive it could be raised when that happened.

And that's exactly what the circumstance is here. The case should go forward, and if the Fifth Circuit makes a dispositive ruling, if there's a dispositive ruling that would end one of these other cases and is not distinguishable, it could be raised at that time.

So, go to the next slide.

Okay. And so the Fifth Circuit has also said discretionary stays, even when -- if they are lengthy or indefinite, should not be granted. That is exactly what the Debtor is asking for here. Let's take a look at how long things have been taking.

Go to Slide 6.

Okay. The Notes cases, the Court's reports and recommendations, December '22, the Notes case is still pending in the Fifth Circuit, the HarbourVest settlement. And this is not including the lower court, the District Court intermediate action. Two years. UBS, I mean, huge amounts of time. It's one and half to two years. All of them.

So if in fact the Court were to stay until a final decision, or even the decision of the next court, we are talking about a long enough time that it creates the very harm that the motion for leave -- that the complaint that Hunter

Mountain is trying to file is seeking to avoid.

This Court knows how long it takes to get through the District Court, out of the Fifth Circuit, much less, as we have with the release matter, going all the way to the Supreme Court.

So, if Hunter Mountain has to await a final nonappealable decision of the valuation proceeding before it can even start to seek to remove Seery in Delaware court, even winning would be a pyrrhic victory, because Mr. Seery will have remained employed and spending money and moving money into the indemnity subtrust for two or more years. And so a stay thereby creates irreparable harm for Hunter Mountain.

So, in sum, using the Claimant Trust Agreement to preclude Hunter Mountain from seeking removal of the Trustee actually underscores why Delaware law is crafted the way it is. Were it not for the duty of good faith and fair dealing imposed by Delaware law, Mr. Seery could arguably continually increase the funds set aside for indemnification, indefinitely withhold final distributions to Class 9 -- we believe Class 8 has already been paid in full -- and refuse to file the GUC certification.

Would it be okay if he paid everything other than $10 and refused to issue the GUC certification based on a theoretical possibility that he might need more money for indemnification? The amount that's been set aside for indemnification is so

much more than the $25 million that was originally contemplated at the time of the plan. So this is exactly the kind of conflict that Delaware Code Section 3327 regarding the removal of trustees is designed to prevent. It's designed to prevent the conflict where the trustee has a reason to hold onto the money that he or it is holding in trust for another party.

This is -- whatever the excess is, that belongs to Hunter Mountain. It doesn't belong to the professionals. It doesn't belong to Mr. Seery. And so someone who does not have this conflict should be making these decisions. And Hunter Mountain is entitled to go to Delaware for that decision.

So, putting this on ice is simply allowing the Claimant Trust to avoid scrutiny, and we would ask that Your Honor not do that.

Thank you.

THE COURT: Mr. Morris?

MR. MORRIS: Your Honor, I just want to begin where counsel left off. The excess -- if there is such a thing, and I don't know that there is, and I don't know that anybody will know until the case is over -- but the so-called excess belongs first to indemnified parties. Indemnified parties have a contractual right to be indemnified, frankly, before Class 8 or Class 9 receive a nickel, let alone Class 10 or 11.

So let's be really clear that what's happening here, as

Your Honor alluded to earlier, is that resources must be husbanded because of the ongoing onslaught of litigation. This case could be over tomorrow if Mr. Dondero would give a release to all protected parties.

So, just a little bit of background, though. Obviously, this issue of Hunter Mountain and Dugaboy's standing has been percolating for exactly two years. It was in June of 2022 that Mr. Draper on behalf of Dugaboy brought the first valuation motion. He was soon joined by Mr. Phillips on behalf of Hunter Mountain. That effort was the subject of substantial briefing over the rights or so-called rights or potential rights of Class 10 and Class 11, and ultimately Your Honor decided that the relief they sought was not appropriate as a contested matter and had to proceed as an adversary proceeding.

The next calendar year, 2023, we have a new lawyer for Hunter Mountain, Sawnie McEntire and his firm. Again, the issues of standing and Hunter Mountain's unvested contingent interest and the meaning of that were the subject of substantial litigation in 2023.

Now we've got a third lawyer, the Stinson firm, again representing Hunter Mountain, again raising basically the exact same issue.

Your Honor has issued multiple decisions that go into great detail. I want to just read just a couple of lines from

the Court's most recent decision that was filed at Docket No. 26 in Adversary Proceeding 23-03038.

On Page 29, the Court wrote that the Court "finds and concludes that under the terms of the CTA and Delaware law, Plaintiffs are not beneficiaries or beneficial owners of the Claimant Trust who would be entitled to assert rights under the CTA. The Claimant Trust is a Delaware statutory trust governed by the Delaware Statutory Trust Act, and the Trust Act does define 'Beneficial Owner' and uses that term exclusively to refer to the beneficiaries of a Delaware statutory trust. Specifically, under the Trust Act, a trust's -- a statutory trust's beneficial owners are any owners of a beneficial interest in a statutory trust, the fact of ownership to be determined and evidenced in conformity with the applicable provisions of the governing instrument of the statutory trust."

Your Honor went on at Page 30, said, "It appears that Plaintiffs may be frustrated that they did not negotiate or obtain the same oversight rights as the actual Claimant Trust beneficiaries in the plan and the CTA. The plan, with the incorporated CTA, was confirmed over three years ago now, and neither the Plaintiff -- neither of the Plaintiffs objected or appealed to the terms of the plan or the CTA that dictate those oversight rights. The Fifth Circuit, in September of 2022, affirmed the confirmation order and the terms of the

plan and its incorporated documents, including the CTA, in all respects other than striking certain exculpations."

Then, finally, Your Honor pointed out that "Plaintiffs make an argument that an implied covenant of good faith and fair dealing under Delaware law necessarily means that the terms of the CTA that govern the parties' rights here, including the information rights and the rights to an accounting from the Claimant Trustee that Plaintiffs seek in Count One can be overridden here. The Court disagrees. The Court will not use the implied covenant of good faith to override the rights and responsibilities that were bargained for in the trust agreement."

An exhaustive opinion. It is collateral estoppel at this point. I frankly think that Rule 11 gets implicated when lawyers continue to push issues that have already been decided.

It is the exact same issue. There is no claim for breach of good faith and fair dealing in the complaint. Just look at the proposed complaint that was filed at Docket No. 4000. Exhibit 1. There are five causes of action. Every one of them is premised not on a breach of good faith and fair dealing but on a breach of Delaware Corporate Law 3327. And as Your Honor knows from the extensive briefing that we've had, the Court looks to the trust document to determine the rights of the beneficiaries, and only beneficiaries have

rights under 3327.

This is law of the case. These parties are collaterally estopped from continuing to do this. The fact that they suggest that they could just bring lawsuit after lawsuit after lawsuit after lawsuit, where standing is always going to a threshold issue, until every single judge in the Northern District of Texas has an opportunity to weigh in is preposterous.

Let me go through -- let me just refer and respond to a couple of these last points. The statute that Ms. Deitsch-Perez cited in her first slide, 3804(e), it only applies if you're a beneficial owner. This Court has decided multiple times Hunter Mountain and Dugaboy are not beneficial owners.

Next. The duty of good faith and fair dealing, as I mentioned, it's not even a claim in the proposed complaint. And I know of no law, and I don't think anybody will ever be able to cite any law, that suggests a party to a contract owes a duty of good faith and fair dealing to someone with no rights under the contract. How is that even -- how does that even make sense?

I have no rights under the contract, that's what this Court has already held, but somehow Mr. Seery has an implied duty of good faith and fair dealing. Makes absolutely no sense.

The standard of likelihood of success on the merits.

Right? I don't think that standard applies when the Court is just policing its docket. But even if it did, likelihood of success on the merits? It's a certainty. The Court has already decided. We have won. Right? They can't -- they have no standing. So there's a hundred-percent certainty that we're likely to succeed on the merits.

This is not going to be lengthy or indefinite, and I will, you know, just say, Your Honor, that the Plaintiffs here have some control over this. There probably hasn't been five percent of the appeals where we don't get eventually some request for an extension of time. It happens every time. They're taking weeks now to file their appellate record. They're within the rules. They have the right to do. But if they want this to proceed more quickly, stop asking for extensions of time. We'll move quickly. We don't have a problem doing that at all.

Mr. Seery owes no --

MS. DEITSCH-PEREZ: Your -- I have to interrupt on that.

THE COURT: You will have your rebuttal time, but let Mr. Morris finish, please.

MR. MORRIS: Mr. Seery owes no duties to Hunter Mountain and to Dugaboy. He never has. We have an agreement. The agreement has been affirmed. The merits of that have been decided multiple times.

The Court should continue the stay here. The Court should allow the District Court, and, if necessary, the Fifth Circuit, to opine and let it take its course. Right? We're happy to work as quickly as they want. Not on an expedited basis, but within the rules. And if they do the same, I think this will get decided much quicker than they think.

In the alternative, Your Honor, if the Court for any reason wants to lift the stay, we would request 30 days to file an opposition here, and we will be filing a Rule 11.

I do just want to mention one last thing. Because as counsel pointed out, they filed a so-called supplement at 7:00 p.m. Eastern Time last night on the docket. I was out with my wife at the theater, and really haven't had any opportunity to look at this in any detail.

I will tell you that I -- Ms. Deitsch-Perez and I emailed multiple times yesterday. She and Mr. Aigen have been emailing me multiple times in the last week. No courtesy of a heads up. No suggestion that maybe we should adjourn this. No citation in their pleading as to why they think they get to file a surreply the eve before trial. There's no rule that allows them to do so.

And I would just, you know, just very quickly, Your Honor, the two cases that they cite are from 2021 and 1998. Those cases were decided even before Mr. Draper filed his first motion for valuation information two years ago.

The cases are easily distinguishable. They have nothing to do with statutory trusts. They have nothing to do with the definition of beneficiaries. They have nothing to do with Section 3327.

But I will say, Your Honor, if, upon reflection, the Court has any thought that those cases are at all relevant, we would respectfully request the opportunity to brief it. I don't think it's necessary. I think the filing was improper. But even if the Court accepts them, I think those cases are so easily distinguishable that it won't matter. But if, you know, it's not fair to be treated this way, to email multiple times, to give no notice, to file it 15 hours before a hearing, with no rule citation, with no right to do so, and expect the Court or expect me, frankly, to be prepared to fully address it. I've addressed it as best I'm able under the circumstances.

I think the motion to stay should be extended until a court of competent jurisdiction issues a final nonappealable, you know, affirmation, determination, on Your Honor's motion to dismiss the valuation proceeding.

THE COURT: All right. Before I hear any last word from Ms. Deitsch-Perez, I know Mr. Seery's counsel made an appearance. Is there anything you would like to say?

MR. STANCIL: No, Your Honor. I think Mr. Morris covered it quite well.

THE COURT: All right. Ms. Deitsch-Perez, you get the last word.

MS. DEITSCH-PEREZ: Your Honor, I've explained why this case is different and why a party cannot prevent another party from gaining rights under a contract. That is the epitome of breaching the contract by breaching the duty of good faith and fair dealing which is inherent in the contract.

Mr. Morris's argument that, oh, the stay is of no great moment because you could move expeditiously is incorrect, because, for example, the delays in the record, that is not something -- and he well knows, that is not something a party can control. The Court moves the record and the parties are stuck with however long that takes. And if one were to look at the record of the extensions in the appeals, they have -- equally well if not more so than the Debtor's side. And so I take exception to that.

And finally, the Reorganized Debtor is something of a bully. Every time that they don't like something, there has been a threat that we're going to seek sanctions. It's a way of trying to scare lawyers from exercising their duties to their clients. If he's going to make -- if the Debtor is going to make a sanctions motion, we'll fight it. We've fought it before. Sometimes they've threatened it and not done it.

But it is, I will point out, it is itself a violation of

Rule 11 to willfully and disingenuously threaten sanctions to try and prevent litigation. And that's what we think is going on here. It's a club.

If this matter is stayed, Hunter Mountain -- it's no different than if this Court simply denied the motion, because the passage of time will eviscerate what's in the estate.

Thank you.

THE COURT: I'm going to ask this question. I've asked it before in prior hearings, but I'm asking it again. And I always am asking it because of, well, a couple reasons. I've raised the issue of judicial economy and concerns about the efficient administration of justice and what's in the interest of the parties. How many appeals do we have pending or have been made since confirmation of the plan in February 2021? And I'm concerned about judicial economy, yes, but I'm also --

MS. DEITSCH-PEREZ: Your Honor, --

THE COURT: Let me -- here is another reason I ask. It is argued as part of the lawsuit you want to file that Mr. Seery isn't wrapping things up. But, of course, part of that hinges on are there appeals still pending. Okay? So I ask for those two reasons. I don't know if anyone has it at their fingertips, but it is --

MS. DEITSCH-PEREZ: Your Honor?

THE COURT: -- germane to everything I've heard here.

Okay? So who has --

MS. DEITSCH-PEREZ: Your Honor, there --

THE COURT: -- the answer at their fingertips? Either one of you?

MS. DEITSCH-PEREZ: Your Honor, there are not very many appeals still pending, but I would point out that some of these have been successful. That Your Honor's contempt decision was reversed. The release issue was partially reversed. So, --

THE COURT: Reversed and remanded for me to have follow-up hearings. So not done, by the way, but anyway, we'll have a hearing on that remand at some point.

MS. DEITSCH-PEREZ: But these are --

THE COURT: So, but anyway, the question was how many.

MS. DEITSCH-PEREZ: And I don't know exactly how many, but there are relatively few. If the issue is how much money is needed to be set aside for indemnification, there are relatively few appeals pending.

THE COURT: That is a non-answer. Okay?

MR. MORRIS: I'm counting, Your Honor.

THE COURT: Okay.

MS. DEITSCH-PEREZ: I would object to an off-the-cuff response.

MR. MORRIS: I'm counting.

MS. DEITSCH-PEREZ: We will follow up with the Court and give you an exact number.

THE COURT: You know what, I --

MR. MORRIS: I believe -- I think --

THE COURT: My decision today is likely not going to hinge on the precise answer here. Okay? I'm just asking a question because I'm worried about judicial economy and what's efficient, and I'm worried about a lingering continuing argument that Mr. Seery is not wrapping things up quickly enough. And I think the answer --

MS. DEITSCH-PEREZ: There's not a hundred million dollars.

THE COURT: -- to this question is relevant to both of those concerns. Having the precise answer, you know, no, but I'd like a ballpark answer --

MS. DEITSCH-PEREZ: Here's the --

THE COURT: -- at least, if not precise.

MR. MORRIS: Your Honor, the ballpark --

MS. DEITSCH-PEREZ: Here's the important answer, Your Honor.

MR. MORRIS: The ballpark --

MS. DEITSCH-PEREZ: It's there's not a hundred million dollars' worth of legal work left to do.

THE COURT: I just --

MS. DEITSCH-PEREZ: It's --

THE COURT: -- asked for the answer to a question, not an argument.

MR. MORRIS: Your Honor?

THE COURT: Mr. Morris, do you have an answer?

MR. MORRIS: It's approximately 55. But that includes --

MS. DEITSCH-PEREZ: There are not 55 appeals outstanding.

THE COURT: Stop interrupting. I want to hear the complete answer.

Fifty-five is what, the number of notices of appeal ever filed since the plan was confirmed?

MR. MORRIS: There are approximately 55 appeals that have been filed in the Highland bankruptcy case. Some of them, admittedly, include both an appeal to the District Court and then, you know, depending on the outcome there, an appeal to the Fifth Circuit. So it might involve the same case.

THE COURT: Okay.

MR. MORRIS: But there have been 55 appeals. Could be 54, could be 56, something like that.

THE COURT: Okay.

MR. MORRIS: And there's -- and there's probably -- there's probably at least eight or ten in the pipeline.

THE COURT: Eight or ten, do you mean still pending when you say in the pipeline?

MR. MORRIS: Still pending. Either haven't been briefed at all; they've been briefed and we're waiting for a court to rule; you know, it's in the District Court so we'll have to await the outcome there and then see if we go to the Fifth Circuit. I think there are -- I think we're waiting on several decisions for the Fifth Circuit. I think there are three matters in the pipeline in the Fifth Circuit, and there's probably four or five in the District Court.

MS. DEITSCH-PEREZ: Most of which have been largely briefed, so that we are awaiting decision. It's a small handful where there's still work to be done.

MR. MORRIS: Your Honor, just -- your decision last week, we don't even have a judge in the District Court. The notion that this is somehow, you know, on the precipice of completing litigation, it's just not realistic. I'll just leave it --

MS. DEITSCH-PEREZ: That's not the point. The point --

THE COURT: Look, I've heard about this enough. I know that sometimes, luck of the draw, you have a judge, let's say a district judge who doesn't have criminal jury trials week, week, week, week, week, for the next six months, and sometimes you have someone who just wrapped up something huge and can get to an appeal quickly. We're coming up on August before we know it, when we have changes of law clerks, new law

clerks coming in. And just who knows. Nobody can predict. But I just wanted sheer numbers.

And my last question on this is, we technically had a three-year trust duration, right? And I'm sure this is like every other one I've ever seen in all these years: There's an ability to extend the life of the trust. Am I correct that in August we have a three-year end of trust --

MR. MORRIS: Your Honor?

THE COURT: -- unless otherwise extended, Mr. Morris?

MR. MORRIS: Your Honor, you're exactly right. And we will be filing a motion, probably in the next week or two, to continue the trust, precisely because of all of this litigation will not be resolved on the third anniversary. So you're exactly right, Your Honor. We're in the process of drafting it. I can't see how it will be opposed, but I'm sure it will be.

We'll have a chart of all of the outstanding litigation. Your Honor will see how many pieces of litigation are still outstanding at that time. But I do expect to file that with the Court in the next week or two.

THE COURT: All right. And I won't get ahead of myself, but, really, the only thing, I'm guessing, after close to three years, that is left as far as trust administration is concluding these lawsuits. Probably all the assets have been liquidated, right, at this point? Or --

MR. MORRIS: You know, I don't know off the top of my head. I think there are a handful of assets, there may be a few assets that remain unsold. There's some, you know, managerial responsibilities over certain funds that we have to dispose of. But all of that is kind of irrelevant because all of that, I'm certain, will be completed before the end of the litigation cycle. You know, like, we can talk about the cases that are pending, but, you know, we had a new case filed just recently, right, for leave to remove Jim Seery as Trustee. And so, you know, if there's -- that's -- we're talking about the litigation that's pending. We also have to be concerned with what litigation Mr. Dondero might bring in the future. And, you know, if he can promise that he'll never bring another lawsuit, we might have a different view. But, you know, with the threat of ongoing litigation, yeah, we're just going to have to continue to husband resources.

But back to your specific question of the length of the trust, we do expect to file a motion shortly to extend the life of the trust, probably by a year, maybe two, but probably by a year.

THE COURT: Okay. All right. The Court --

MR. MORRIS: Your Honor, I really apologize, but I just have to tell you that I'm really low battery on my computer. For some reason, my charger is not working. And if I go blank, you'll know why. I'll switch to my phone.

THE COURT: Okay. Thank you.

As far as the ruling here today, I will extend the stay of this what I'll call a contested matter. Even though we don't have a response to Hunter Mountain's motion for leave to file the Delaware lawsuit on file yet, I'm calling it a contested matter that's been initiated by the Hunter Mountain motion. I'm going to extend the stay on letting the contested matter go forward until all appeals have been finally exhausted in connection with this Court's prior orders in which it has ruled Hunter Mountain does not have stay to either file the lawsuit -- oh, yes, I'm misspeaking, I meant to say standing just now when I said stay. The parties know the orders I'm talking about. Twice now, this Court has ruled that Hunter Mountain does not have standing to pursue litigation. The first time was in connection with when Hunter Mountain wanted to sue claims purchasers Farallon and Stonegate, I think it was called, Stonehill, and Mr. Seery concerning certain claims trading that, I'll call it, that happened during the case.

I ruled extensively then, and I hear Judge Brown has it on appeal now, why this Court thought Hunter Mountain did not have standing under the confirmation order, the plan, the Claimant Trust Agreement, or Delaware law.

And then I understand there's a new appeal when the Court ruled Hunter Mountain doesn't have standing to pursue a valuation complaint.

So, until all appeals, whether it ends in the District Court or ends in the Fifth Circuit or I suppose a cert petition could be filed to the Supreme Court, until all of those appeals have been exhausted, this matter will not go forward.

I have not been convinced today that the standing issues now with regard to this newest Hunter Mountain motion are sufficiently different where I should go forward and hear the motion for leave.

So, as I've alluded to a couple of times, I think it's in the interests of judicial economy and the efficient administration of justice and in the interests of the parties that I continue the stay in effect. I think there are very real issues that we do have, collateral estoppel and law of the case and other sorts of estoppel issues that would even preclude me, should preclude me, from looking at the current motion for leave.

But I will nevertheless look at the four-prong test for stays that traditionally are applied. Prong #1, whether there has been a showing of likelihood of success on the merits. Again, I view that I've already ruled on this, and I've spilt much ink on this, written well over a hundred pages on this. And I think there is a likelihood of success on the merits with regard to the issue of Hunter Mountain not having standing on appeal.

I think there would be certainly harm and injury here, I'll say irreparable harm, if we had to go through this yet again, yet again, yet again. The balance of harms certainly -- well, I don't just find the Reorganized Debtor to be harmed. Whether Hunter Mountain realizes it or not, everyone is going to be harmed if more litigation, more expense, is incurred litigating the same darn thing again. And again, based on what I've heard today, I don't see it any differently.

The cases that were filed at 7:00 p.m. Central Time last night, as I said, I wasn't even aware of it. I haven't looked at them. But they are older cases. It's not like something hot off the press from last week that Hunter Mountain would be justified in putting before the Court if it was germane. And just glancing at them, they don't seem to be relevant to this situation, where you have a plan that went out on notice, voting, opportunity for people to object, the Court approved the plan and the Claimant Trust Agreement in a confirmation order that was appealed.

We have, on top of that, the Delaware law that seemed to be fairly dispositive that Hunter Mountain is not to be deemed a beneficial owner of the trust.

So it is not in anyone's interest, as far as balancing of harms here, in this matter going forward, as long as the issues are primed for an appellate judge to either say you got

it wrong, Judge Jernigan, or you got it right. And the public interest is, I think, in favor of judicial economy and efficient administration of justice in this regard.

So if I go to the four-pronged test, it results in, I think, the stay being extended here. But, again, this is kind of a unique animal. I'm not sure that's even the way we should view it. The way we should view it is I've been asked again and again and again to rule on this issue. I've ruled on it -- I say three times because I did a lengthy order on a motion to reconsider the first time I did an order on this. So I have done three lengthy rulings on this.

I guess I'm just going to say, in closing, and I want this to be helpful but I'm guessing it might not be: The optics here, Ms. Deitsch-Perez, look terrible. Terrible. I mean, how else should it look to the Court? It's just like this has become a blood sport and the optics make it look like, well, it's not about justice and fairness. It's taken this very ugly turn some time ago that let's try --

MS. DEITSCH-PEREZ: We agree the --

THE COURT: -- let's try to destroy Mr. Seery. What else is a rational judge supposed to think?

MS. DEITSCH-PEREZ: Your Honor, Mr. Seery --

THE COURT: Now it's gotten to the point of raising the same issue again and again and again. And guess what. If this was going forward, if there was not going to be a stay in

place, I would be inclined to consider Rule 11 sanctions. How many times is it proper for a party to keep asking for the same thing again and again? You know, we'll use a different counsel this time. We'll say it's different this time. It's not different.

MS. DEITSCH-PEREZ: Your Honor, it is different, and Mr. Seery -- and put it -- take it away from Mr. Seery. The Claimant Trustee is the fiduciary for the parties who may benefit ultimately from the Claimant Trust. And so they have a right to make sure that the Claimant Trustee is not preventing their rights from vesting. It is a perfectly legitimate exercise. It is a perfectly legitimate endeavor.

And the optics do look bad. It looks like that the estate is doing everything it can to prevent scrutiny of that.

So we agree the optics are bad, but in exactly the opposite way. If there were transparency here, if we could actually get a trustee who doesn't have this conflict, this case could be resolved.

THE COURT: The 55 appeals, eight or ten of which are still in the pipeline. Relatively few, as you said. But we are three years post-effective date. That was the optics I'm talking about. There is no reason for this case not to be over except for this. That's the optics I'm talking about.

And it's one thing to legitimately exercise your right to appeal, a party's right to appeal when they disagree. God

bless America. That's what our judicial system is about. But when you start bringing the same motion again and again and again, that is definitely Rule 11 territory and definitely affects credibility. Okay?

Mr. Morris, if you're still there, please upload a simple form of order reflecting what the Court ruled today.

We are adjourned.

MR. MORRIS: I am. Thank you. Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 11:18 a.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **06/13/2024**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

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EXHIBIT 12

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 22, 2024

United States Bankruptcy Judge

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Case No. 19-34054-sgj
Reorganized Debtor.	

ORDER EXTENDING STAY OF CONTESTED MATTER
[DOCKET NO. 4000]

Having considered (a) *Highland's Motion to Stay Contested Matter [Dkt No. 4000] or for Alternative Relief* [Docket No. 4013] (the "Motion"),[1] filed by Highland Capital Management, L.P. ("HCMLP"), the reorganized debtor in the above-referenced bankruptcy case, and the Highland Claimant Trust (the "Trust," and together with HCMLP, "Highland"); (b) *James P. Seery, Jr.'s Joinder to Highland Capital Management, L.P.'s Motion to Stay Contested Matter [Dkt No. 4000] or for Alternative Relief and Emergency Motion to Expedite Hearing on Motion*

[1] Capitalized terms not defined herein shall take on the meaning ascribed to them in the Motion.

for Stay [Docket No. 4019], filed by James P. Seery, Jr.; (c) *Hunter Mountain Investment Trust's Response in Opposition to Highland's Motion to Stay Contested Matter [Dkt No. 4000] or for Alternative Relief* [Docket No. 4022], filed by Hunter Mountain Investment Trust ("HMIT"); (d) *Hunter Mountain Investment Trust's Supplement to Response to Motion to Stay* [Docket No. 4087], filed by HMIT; (e) the arguments heard at the hearing on the Motion on June 12, 2024 (the "Hearing"); and (f) all prior proceedings relating to this matter, including (i) the *Order Granting in Part Highland's Motion to Stay Contested Matter* [Docket No. 4033] (the "First Stay Order"), pursuant to which all proceedings in connection with the *Motion for Leave to File a Delaware Complaint* [Docket No. 4000] (the "Motion for Leave") were stayed (the "Stay") until the Court issued an order determining *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' Interests in the Claimant Trust* [Adv. Proc. 23-03038-sgj, Docket No. 13]; (ii) the Court's *Memorandum Opinion and Order Granting Motion to Dismiss Adversary Proceeding in Which Contingent Interest Holders in Chapter 11 Plan Trust Seek a Post-Confirmation Valuation of Trust Assets* [*id.* at Docket No. 27] (the "Dismissal Order"); (iii) HMIT's pending appeal of the Dismissal Order [*id.* at Docket No. 30] (the "Dismissal Appeal"); and (iv) HMIT's pending appeal of the Court's *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* [Docket No. 3903] (the "Order Denying Leave"), [*see* Case 3:23-cv-02071-E] (the "Appeal of Order Denying Leave," and together with the Dismissal Appeal, the "Appeals"); and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant

to 28 U.S.C. § 1409; and this Court having found that Highland's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and, this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein for the reasons set forth on the record during the Hearing; and after due deliberation and sufficient cause appearing therefor, it is **HEREBY ORDERED THAT**:

1. The Stay is hereby extended until a court of competent jurisdiction enters final, non-appealable orders resolving the Appeals (the "Resolution Orders");

2. HMIT is directed to seek a further status conference in connection with the Motion for Leave within ten (10) days of the entry of the Resolution Orders;

3. The Court shall retain exclusive jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

###End of Order###

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 22, 2024

United States Bankruptcy Judge

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Case No. 19-34054-sgj
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1. The Stay is hereby extended until a court of competent jurisdiction enters final, non-appealable orders resolving the Appeals (the "Resolution Orders");

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3. The Court shall retain exclusive jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

###End of Order###