Docket #0023 Date Filed: 10/7/2024

Case No. 3:24-cv-01531-X

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,

Reorganized Debtor.

DUGABOY INVESTMENT TRUST and HUNTER MOUNTAIN INVESTMENT TRUST,

Appellants,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P. and HIGHLAND CLAIMANT TRUST,

Appellees.

On Appeal from the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, Adv. Pro. No. 23-03038-sgj
Hon. Stacey G. C. Jernigan

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CORPORATE DISCLOSURE STATEMENT

Appellee Highland Capital Management, L.P. is a limited partnership, the general partner of which is HCMLP GP LLC, a privately held limited liability company. No publicly held corporation owns 10% or more of the interests in either entity.

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I. ISSUES PRESENTED

1. Whether the Bankruptcy Court properly dismissed Count 1 pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6) for failure to state a claim?

2. Whether the Bankruptcy Court properly dismissed Count 2 pursuant to FRCP 12(b)(1) and FRCP 12(h)(3) for lack of subject matter jurisdiction?

3. Whether the Bankruptcy Court properly dismissed Count 3 pursuant to FRCP 12(b)(1) for lack of subject matter jurisdiction?

II. STANDARD OF REVIEW

An appellate court reviews a dismissal under FRCP 12(b)(1), 12(b)(6), and 12(h)(3) de novo. *S. Recycling, L.L.C. v. Aguilar (In re S. Recycling, L.L.C.)*, 982 F.3d 374, 379 (5th Cir. 2020) ("We review a dismissal for lack of subject matter jurisdiction under 12(b)(1) de novo[]" but "'review evidentiary rulings [with respect thereto]' … 'for abuse of discretion.'") (citations omitted); *Sanders v. Boeing Co.*, 2021 U.S. App. LEXIS 23088, at *3-4 (5th Cir. Aug. 4, 2021) ("We review de novo the district court's … dismissal for lack of subject-matter jurisdiction [under FRCP 12(h)(3)]."); *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 643 B.R. 162, 169 (N.D. Tex. 2022) ("An appellate court reviews a dismissal under Rule 12(b)(6) de novo").

III. STATEMENT REGARDING ORAL ARGUMENT

The issues on appeal are straightforward. Appellees do not believe oral argument would assist the Court.

IV. COUNTERSTATEMENT OF THE CASE

A. The Bankruptcy Case

On October 16, 2019, Highland Capital Management, L.P. ("HCM"), filed a voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code (the "Bankruptcy Case"). The Bankruptcy Case is pending in the U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court").

On January 9, 2020, James Dondero, HCM's co-founder and former CEO, agreed to cede all control positions at HCM because of concerns about his ability to function as an estate fiduciary. The Bankruptcy Court approved the appointment of an independent board consisting of John Dubel, Russell Nelms, and James P. Seery, Jr., to manage the Bankruptcy Case and estate. B.D.I. 339.[1] The Bankruptcy Court subsequently appointed Mr. Seery as HCM's Chief Restructuring Officer and Chief Executive Officer. B.D.I. 854.[2]

B. Confirmation of HCM's Plan and the Approval of the Indemnity Trust

On November 24, 2020, HCM filed its *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [B.D.I. 1472] (the "Proposed Plan"). The Proposed Plan provided for the monetization of HCM's assets for the benefit of its prepetition creditors. A key component of the Proposed Plan was the creation of the

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[1] "B.D.I." refers to the docket maintained by the Bankruptcy Court in Case No. 19-34054-sgj11.

[2] The orders appointing the independent directors and Mr. Seery included gatekeeper provisions to protect HCM's fiduciaries from harassing litigation. B.D.I. 339 ¶ 10; B.D.I. 854 ¶ 5.

Highland Claimant Trust (the "Claimant Trust") pursuant to the terms of the *Highland Claimant Trust Agreement* (the "CTA") and the Delaware Statutory Trust Act, 12 DEL. CODE ANN. § 3801 *et seq.* (the "DSTA") for the exclusive benefit of the Claimant Trust Beneficiaries. The final version of the CTA was publicly filed at B.D.I. 1811 with an amendment to correct a scrivener's error at B.D.I. 1875.

The CTA clearly stated that the Claimant Trust was a Delaware statutory (not common law) trust under the DSTA and that it was to be "governed by, and construed in accordance with[,] the laws of the State of Delaware, including all matters of constructions, validity, and performance." CTA § 2.1(a) (ROA.002378); § 11.10 (ROA.002408).

Concerned that Mr. Dondero would continue his baseless campaign of retribution against HCM and its fiduciaries, the CTA granted the Claimant Trustee (*i.e.*, Mr. Seery) the authority to create and manage an indemnification reserve:

> 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.

CTA Art. 6.1(a) (ROA.002401). Under the CTA, the Claimant Trust's indemnification obligations are senior to all obligations to the Claimant Trust Beneficiaries. *Id.*

Mr. Dondero and multiple entities under his control, including Appellant Dugaboy Investment Trust ("Dugaboy"), objected to confirmation of the Proposed Plan.[3] B.D.I. 1661, 1667, 1669, 1670, 1673, 1675, 1676. But none of them—including Dugaboy and Appellant Hunter Mountain Investment Trust ("HMIT")—objected to the CTA.

On February 22, 2021, the Bankruptcy Court, with the support of 99.8% of creditors in amount and over the Dondero entities' objections, entered the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* [B.D.I. 1943] (ROA.000687-000776) (the "Confirmation Order"), which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [B.D.I. 1943-1] (ROA.000777-000842) (the "Plan").

The CTA was incorporated into the Plan, and Mr. Seery was designated the trustee of the Claimant Trust (the "Claimant Trustee"). Plan Art.1.B.28 (ROA.000788); Art. IV.J (ROA.000819); CTA Art. 1.1(e) (ROA.002374); Confirmation Order ¶ 45 (ROA.000720). The Confirmation Order authorized HCM

[3] The Bankruptcy Court found the filing of the Proposed Plan, among other factors, catalyzed Mr. Dondero's litigation onslaught—brought directly and through proxies like Appellants—against HCM and its management, including Mr. Seery. Order at 5 (ROA 000010) (citing *NexPoint Adv., L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 48 F.4th 419, 426 (5th Cir. 2022)).

to execute the CTA and create the Claimant Trust. Confirmation Order ¶¶ A, G, and H (ROA.000747, ROA.000750).

On June 25, 2021, after HCM was unable to procure cost-effective insurance because of Mr. Dondero's reputation for vexatious litigation, HCM filed a motion seeking authority to (a) create the Highland Indemnity Trust (the "Indemnity Trust") as a special purpose trust to hold cash and other assets to secure the indemnification obligations under the Plan and CTA and (b) appoint Mr. Seery as the Indemnity Trust administrator (the "Indemnity Trust Administrator"). B.D.I. 2491.

Dugaboy and other Dondero-affiliated entities objected, but the Bankruptcy Court overruled their objections and approved the Indemnity Trust. B.D.I. 2599 (ROA.000874-000876), *aff'd Highland Cap. Mgmt. Fund Adv., L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 2022 U.S. Dist. LEXIS 15658 (N.D. Tex. Jan. 28, 2022); *aff'd* 57 F.4th 494 (5th Cir. 2023).[4] Although Dugaboy and other Dondero entities objected to the creation of the Indemnity Trust, they never challenged Mr. Seery's dual role as Claimant Trustee and Indemnity Trust Administrator or alleged it created a conflict of interest. B.D.I. 2563.

On August 11, 2021, the Plan became effective [B.D.I. 2700] (the "Effective Date").

[4] On appeal, the Fifth Circuit affirmed the creation of the Indemnity Trust and confirmed that the Claimant Trust's indemnification obligations are senior obligations. *See, e.g., Highland*, 57 F.4th 57 F.4th 494, 503 n.7 (5th Cir. 2023).

On September 7, 2022, the Fifth Circuit affirmed the Confirmation Order and the Plan in all material respects. *NexPoint*, 48 F.4th at 424.

Since entry of the Confirmation Order, neither HCM's actual creditors nor the Oversight Board, which has been actively involved since the Effective Date, has raised any concerns with the management of the estate. Mr. Dondero and his controlled affiliates, like Appellants, are the *only* parties litigating with the estate.[5]

C. <u>Structure of Plan and Creation of Claimant Trust and Indemnity Trust</u>

The Plan classified all general unsecured creditors into Class 8 (general unsecured claims) and Class 9 (subordinated claims). Order at 6 (ROA.000011). "HMIT's and Dugaboy's former limited partnership interests in Highland were classified as Class 10 and Class 11, respectively." *Id.*

On the Effective Date, all limited partnerships in HCM were canceled and "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)." *Id.* The Indemnity Trust (administered by Mr. Seery, as Indemnity Trust Administrator) was also created on the Effective Date. The Claimant Trust (a)

[5] A summary of Mr. Dondero's and his controlled affiliates' litigation against the estate is reflected in the *Amended Notice of Filing of Active Litigation Involving and/or Affecting the Highland Parties* [B.D.I. 3880]. That notice is dated as of July 31, 2023, and Mr. Dondero and his affiliates have filed multiple new appeals to this Court and the Fifth Circuit since then. Mr. Dondero's vexatious conduct forced HCM to file a motion seeking a pre-filing injunction in this Court. Case No. 3:21-cv-00881-X, Docket Nos. 136, 137 (N.D. Tex. Jul. 6, 2023).

holds the limited partnership interests in Reorganized HCM and (b) is the sole beneficiary of the Litigation Sub-Trust. *Id.* The Claimant Trust and Mr. Seery, as Claimant Trustee, are overseen by the Claimant Trust Oversight Board. CTA § 4.1(ROA.002392).

Under the Plan, holders of Class 8 and Class 9 Claims received "Claimant Trust Interests" and became "Claimant Trust Beneficiaries." Order at 6 (ROA.000011). As holders of Class 10 and Class 11 Claims, HMIT and Dugaboy received contingent, unvested "Contingent Claimant 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. In other words, HMIT and Dugaboy will become 'Claimant Trust Beneficiaries' if, and only if, the vesting conditions occur." *Id.* at 6-7 (ROA.000011-000012); *see also* CTA § 1.1(h) (ROA.002374), § 5.1(c) (ROA.002398); Plan Art. I.B.27 (ROA.000788), I.B.44 (ROA.000790).

The Bankruptcy Court's ruling in the Order that Appellants are not Claimant Trust Beneficiaries was consistent with its prior order on the same issue entered in response to another motion filed by HMIT that sought leave to sue Mr. Seery for alleged breaches of fiduciary duty. *In re Highland Cap. Mgmt., L.P.*, 2023 Bankr.

LEXIS 2104, at *118-19 (Aug. 25, 2023) ("HMIT's status as a 'beneficiary' of the Claimant Trust is defined in the CTA itself, pure and simple … 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."). HMIT appealed the Bankruptcy Court's August 2023 order and the matter is *sub judice*. Case No. 3:23-cv-02071-E (N.D. Tex.).[6]

D. Information Rights Under the CTA

By design, and consistent with the DSTA, the CTA grants limited information rights to Claimant Trust Beneficiaries. Significantly, the CTA provides that the Claimant Trustee has ***no*** duty or obligation to provide an accounting of the Claimant Trust Assets to anyone, including Claimant Trust Beneficiaries. CTA § 3.12(a) (ROA.002389) ("Except as otherwise provided herein, nothing in this Agreement requires the Claimant Trustee to file any accounting ....") Moreover, the information rights granted to "Claimant Trust Beneficiaries" are expressly limited:

[6] Although the order is on appeal, it is binding and cannot be collaterally attacked. *See, e.g., Comer v. Murphy Oil USA*, 718 F.3d 460, 467 (5th Cir. 2013) ("Accordingly, '[a] case pending appeal is res judicata and entitled to full faith and credit unless and until reversed on appeal.") (citing *Fid. Standard Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 510 F.2d 272, 272 (5th Cir. 1975)). Because Dugaboy and HMIT are under common control, they are in privity for purposes of res judicata. Order at 2 (ROA.000007) ("These two [Appellants] are controlled by Highland's co-founder and former President and Chief Executive Officer, James D. Dondero …."). The Bankruptcy Court's order with respect to HMIT thus also binds Dugaboy. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). Appellants are not Claimant Trust Beneficiaries and, under the Bankruptcy Court's prior order, lack standing to demand anything, including information, from the Claimant Trust.

> 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.

CTA § 3.12(b) (ROA.002389).

Neither the CTA nor the Plan grants any other information rights, and no other information rights can separately exist. *See* CTA § 5.10(a) (ROA.002400) ("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, (a) only "Claimant Trust Beneficiaries" have information rights and those rights (i) are limited, (ii) do not include rights to asset or subsidiary level information, and (iii) can be further limited by the Claimant Trustee as appropriate to "maintain confidentiality" and (b) no person or entity has the right to compel an accounting.

E. **The Bankruptcy Court Dismisses the Complaint with Prejudice**

Notwithstanding the clear terms of the Plan and CTA, on May 10, 2023, Appellants—two entities controlled by James Dondero, HCM's ousted founder, who admit they are not Claimant Trust Beneficiaries and thus have no information rights—filed their complaint (ROA.002613-002640) (the "Complaint"). In the Complaint, Appellants conceded that they are not Claimant Trust Beneficiaries yet argued the Claimant Trust should be forced to make broad disclosures to them about the Claimant Trust's assets and liabilities. The Complaint asserted the following causes of action:

- Count 1 (Disclosure of Claimant Trust Assets and Request for an Accounting): Count 1 sought an order compelling Appellees "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." Comp. ¶ 88 (ROA.002637). Appellants cited no law or provision of the CTA supporting Count 1.

- Count 2 (Declaratory Judgment Regarding Value of Claimant Trust Assets): If the Bankruptcy Court determined Appellants were entitled to the information requested in Count 1, Count 2 sought a declaration as to the value of the Claimant Trust's assets and liabilities. Comp. ¶ 90 (ROA.002638) ("Once Defendants are compelled to provide information about the Claimant Trust assets,

[Appellants] seek a determination from the Court of the relative value of the Claimant Trust assets compared to the bankruptcy estate obligations."). Appellants cited no law or provision of the CTA supporting Count 2.

- <u>Count 3 (Declaratory Judgment and Determination Regarding Nature of Plaintiff's Interests)</u>: Count 3 was expressly contingent on Count 2 (and thus Count 1) and sought a declaration that Appellants were "likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries" some day in the future. Comp. ¶ 94 (ROA.002639). Appellants cited no law or provision of the CTA supporting Count 3.

On November 22, 2023, Appellees moved to dismiss the Complaint under FRCP 12(b)(1) and 12(b)(6) (ROA.002656-002692) (the "<u>MTD</u>").

On December 29, 2023, Appellants filed their response to the MTD (ROA.002699-002728) (the "<u>Response</u>") in which they improperly alleged, for the first time, new legal and factual bases to support their Complaint, including that: (a) the Claimant Trustee is conflicted because he serves as the Claimant Trustee and Indemnity Trust Administrator and (b) notwithstanding the unambiguous language of the CTA and the Plan, the DSTA, and the unqualified concessions in their own Complaint (i) Appellants are current beneficiaries of the Claimant Trust under Delaware common law, (ii) the Claimant Trustee is obligated to vest their contingent, inchoate interests immediately—irrespective of the duties owed to senior

stakeholders—and that the failure to do so constitutes a breach of the duty of good faith and fair dealing, and (iii) they are entitled to an accounting of the Claimant Trust's assets under Delaware and Texas law. *See Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 2024 U.S. Dist. LEXIS 162355, at *15 (N.D. Tex. Sept. 10, 2024) ("However, '[i]t is wholly inappropriate to use a response to a motion to dismiss to essentially raise a new claim for the first time.'") (citations omitted).

On May 24, 2024, the Bankruptcy Court entered its order dismissing the Complaint with prejudice (ROA.000006-000041) (the "Order"). The Bankruptcy Court dismissed (a) Count 1 under FRCP 12(b)(6); (b) Count 2 under FRCP 12(b)(1) and 12(h)(3); and (c) Count 3 under FRCP 12(b)(1). Because the Bankruptcy Court found it lacked jurisdiction over Counts 2 and 3, it did not adjudicate whether Counts 2 and 3 should be dismissed under FRCP 12(b)(6).

F. Appellants Appeal the Order

On June 7, 2024, Appellants appealed the Order (ROA.000001-000004) (the "Appeal"). In their opening brief [D.I. 22] (the "Brief"),[7] Appellants argue the Bankruptcy Court incorrectly dismissed Count 1 because (a) contrary to the allegations in the Complaint, Appellants *are* beneficiaries of the Claimant Trust under Delaware common law, (b) a request for an accounting is allegedly available under Texas law, and (c) the duties of loyalty, good faith, and fair dealing under Delaware common law require that Appellants be treated as beneficiaries. Brief at 16-25. ***None of these arguments were pled in the Complaint*** nor did Appellants ever seek leave to amend their pleading to add these allegations and claims.

Appellants also mistakenly argue the Bankruptcy Court erred in dismissing Counts 2 and 3 under FRCP 12(b)(6). *Id.* at 26. The Bankruptcy Court did not dismiss Counts 2 and 3 under FRCP 12(b)(6); it dismissed them under FRCP

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[7] The Brief contains numerous material misstatements and distortions of fact. For example, Appellants baselessly assert that HCM and its management have erected a "wall of silence" and have used that wall to pilfer the estate. *See, e.g.*, Brief at 4-5, 11-15. No evidence exists to support their baseless allegations nor have Appellants ever identified any disclosure rule, order, or regulation with which HCM has not complied—other than Federal Rule of Bankruptcy Procedure 2015.3. As to that, the Bankruptcy Court denied Dugaboy's belated, post-confirmation motion to compel compliance with Rule 2015.3 more than three years ago, an order affirmed on appeal. *Dugaboy Inv. Trust & Get Good Trust v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 2022 U.S. Dist. LEXIS 155600 (N.D. Tex. Aug. 8, 2022), *aff'd* 2023 U.S. App. LEXIS 4839 (5th Cir. Feb. 28, 2023). It is indisputable that HCM has filed *all* required (a) monthly operating reports from the petition date through confirmation, (b) quarterly operating reports from confirmation through the Effective Date, and (c) post-effective date reports. Moreover, with no obligation to do so, HCM also filed a *pro forma* adjusted balance sheet, which disclosed significant detail concerning the Claimant Trust's assets and liabilities as of May 31, 2023. Order at 14 (ROA.000019).

12(b)(1) and 12(h)(3) and found it lacked subject matter jurisdiction to determine whether they should be dismissed under FRCP 12(b)(6).

Finally, Appellants argue Count 3 does not seek an advisory opinion because it simply requests that the Bankruptcy Court determine whether the Claimant Trust's (unrealized and unliquidated) assets exceed its (unrealized and unliquidated) liabilities such that "Allowable Claims may be 'indefeasibly paid'" *Id.* at 26-30.

V. SUMMARY OF ARGUMENT

Appellants have conceded they are not and will not become Claimant Trust Beneficiaries—and thus lack any information rights—unless and until, among other conditions, the Claimant Trust's *realized* gains exceed all senior debts and expenses. Comp. ¶¶ 66, 80 (ROA.002634, ROA.002636). Nevertheless, Appellants ask this Court to overturn the dismissal of their Complaint to allow them to seek relief unavailable to the Claimant Trust's *actual* beneficiaries.

Appellants ignore the plain and unambiguous terms of the governing documents and applicable law, which bar their claims. The Bankruptcy Court was correct to dismiss the Complaint with prejudice, and the Order should be affirmed.

First, the Bankruptcy Court correctly found Count 1 failed to state a claim under FRCP 12(b)(6):

- In their Complaint, Appellants conceded they: (a) only hold Contingent Trust Interests; (b) are not Claimant Trust Beneficiaries; and (c) therefore "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 the [CTA] that are afforded to the Claimant Trust Beneficiaries." Order at 25-26 (ROA.000030-000031).

- Appellants "have not alleged any set of facts that would entitle[] them to equitable relief" and, in any event, the Court lacked the power to grant equitable relief "where, as here, the parties' rights and obligations at issue are set forth in the Plan and CTA." *Id.* at 26, 31 (ROA.000031, ROA.000036).

- Appellants' new (and contradictory) argument that they *are* Claimant Trust Beneficiaries relied on inapposite law from Delaware and Texas and ignored the plain terms of the CTA and applicable law, including the DSTA. *Id.* at 29-30 (ROA.000034-000035).

- Appellants' new argument for breach of the covenant of good faith and fair dealing failed because the Bankruptcy Court lacked the power to abrogate clear and unambiguous contractual terms and create new rights for Appellants. *Id.* at 31-32 (ROA.000036-000037).

Second, because Count 2 was expressly predicated on the Bankruptcy Court granting Count 1, Count 2 was "moot or, at least, not ripe such that it is not justiciable" and had to be dismissed under FRCP 12(b)(1) and 12(h)(3). *Id.* at 32-34 (ROA.000037-000039). Because the Bankruptcy Court found it lacked jurisdiction

to adjudicate Count 2, it did not address the merits of, or determine, Appellees' motion to dismiss Count 2 under FRCP 12(b)(6). *Id.* at 34-35 (ROA.000039-000040).

Third, because Count 3 was expressly predicated on the Bankruptcy Court granting the relief requested in Counts 1 and 2, Count 3 was "moot and/or not ripe and, thus, not justiciable." *Id.* at 35-36 (ROA.000040-ROA.000041). Count 3 also improperly requested an advisory opinion—a determination that the value of the Claimant Trust's unrealized and speculative assets and current and future liabilities was such that Appellants' unvested, contingent interests were "likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries." *Id.* The Bankruptcy Court correctly found that making such determination would require adopting a "set of 'hypothetical, conjectural, conditional' facts 'or [be] 'based upon the possibility of a factual situation that may never develop.'" *Id.* The Bankruptcy Court properly dismissed Count 3 pursuant to FRCP 12(b)(1). Again, because the Bankruptcy Court found it lacked jurisdiction, it did not adjudicate whether Count 3 should be dismissed under FRCP 12(b)(6). *Id.*

VI. <u>ARGUMENT</u>

For the reasons set forth herein, the Appeal is meritless and the Court should affirm the Order dismissing the Complaint.

A. Count 1 Fails to State a Claim Under FRCP 12(b)(6)

The Bankruptcy Court correctly found that Count 1 fails to state a claim upon which relief can be granted under FRCP 12(b)(6). To survive a motion to dismiss pursuant to FRCP 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). 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). "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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). A court may take judicial notice of matters of public record when considering a motion to dismiss for failure to state a claim. *See, e.g., T.L. Dallas (Special Risks), Ltd. v. Elton Porter Marine Ins.*, 2008 U.S. Dist. LEXIS 112613, at *5 (S.D. Tex. May 22, 2008).

1. Appellants Have No Rights to Financial Information or an Accounting Under the CTA and Applicable Law

Appellants are not Claimant Trust Beneficiaries and therefore have no right to information regarding the Claimant Trust under the CTA and the DSTA.[8]

[8] Even if Appellants were Claimant Trust Beneficiaries—and they admit they are not—they would have no right to the broad information they seek in Count 1. *Compare* Comp. ¶88 *with* CTA § 3.12(b) (ROA.002389).

a. Appellants Have No Information Rights Under the CTA or Delaware Law

Appellants hold only contingent and unvested "Contingent Trust Interests" and therefore are not "Beneficiaries" under the CTA. Appellants acknowledge as much. Comp. ¶¶ 59-60, 80 (ROA.002632, ROA.002636); Brief at 8, 10-11. Thus, Appellants have *no rights* under the CTA, which, as discussed above, grants limited information rights only to Claimant Trust Beneficiaries. CTA § 3.12(b) (ROA.002389). Moreover, the CTA expressly precludes *any* beneficiary from seeking an accounting of the Claimant Trust's assets. *Id.* § 3.12(a) (ROA.002389).

Ignoring the prior rulings and language of the CTA, Appellants broadly request financial information based on nothing but the assertion that they "are unable to determine whether their Contingent Claimant Trust Interests may vest into Claimant Trust Interests." Comp. ¶ 83 (ROA.002637). As the Bankruptcy Court found, Appellants may be "frustrated" that they did not negotiate the same rights as the "actual Claimant Trust Beneficiaries," Order at 30 (ROA.000035), but there is simply no basis—in law, equity, or otherwise—for Appellants' request for financial information, let alone their request for information that actual Claimant Trust Beneficiaries cannot obtain.

Recognizing the deficiencies in their Complaint, Appellants improperly alleged for the first time in the Response, and reiterate in the Brief, that they are beneficiaries under Delaware common law notwithstanding the language of the CTA

and the DSTA. But an argument raised for the first time in a response to a motion to dismiss cannot be used to defeat a motion to dismiss. *DAF*, 2024 U.S. Dist. LEXIS 162355, at *15 ("However, '[i]t is wholly inappropriate to use a response to a motion to dismiss to essentially raise a new claim for the first time.'") (citations omitted). Regardless of the propriety of the argument, Appellants are wrong.

Appellants argue that Delaware trust law supposedly does not define "beneficiary" and this Court should therefore apply the definition of "beneficiary" in the Restatement (Third) of Trusts (the "Restatement") when determining their information rights. Brief at 20-23. But ***under Delaware law—here, the DSTA—the "beneficial owner" of a trust is determined by the trust's governing instrument***. *See* 12 DEL. CODE ANN. § 3801(a) (defining "beneficial owner" (*i.e.*, beneficiary) of a Delaware statutory trust as "any owner 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."); *see also In re Nat'l Collegiate Student Loan Trs. Litig.,* 251 A.3d 116, 190 (2020) (relying on the definition of "beneficial owner" under the DSTA to determine which holders of interests in a statutory trust were owed fiduciary duties under Delaware law). Whether or how Delaware common law or the Restatement defines "beneficiaries"

is irrelevant to a ***Delaware statutory trust governed by the DSTA***.[9] Accordingly, and as the Bankruptcy Court properly found, under the DSTA, the determination of whether Appellants are "beneficiaries" of the Claimant Trust begins and ends with the clear and unambiguous terms of the CTA. Order at 29-30 (ROA.000034-000035).

But even if the Restatement applied (it does not), Appellants' argument would still fail. In *Stahl,* the Delaware Chancery Court looked to the Restatement to determine whether a party was a "beneficiary" of a Delaware common law (*not* statutory) trust. *Paul Cap. Advisors, L.L.C. v. Stahl,* 2022 Del. Ch. LEXIS 195 (Del. Ch. Aug. 17, 2022), as corrected (Aug. 25, 2022). Applying the Restatement's definition,[10] the Chancery Court found a trust's "beneficiaries" are the persons defined as "beneficiaries" in the trust's governing document. *Stahl,* 2022 Del. Ch. LEXIS 195 at *27–28 ("According to the Defendants, [the fact that the trust agreements specify who the beneficiary is] ends the inquiry—the Plaintiffs are not beneficiaries. I agree.") Like *Stahl*, the CTA and Plan clearly, unambiguously, and expressly manifests HCM's intent, as settlor, to *exclude* Dugaboy and HMIT from

[9] Because the DSTA expressly defines "beneficial owners," the DSTA expressly precludes the application of any other definition of beneficiary, including those in the Restatement. 12 DEL. CODE ANN. § 3809 ("***Except to the extent otherwise provided in the governing instrument of a statutory trust or in this subchapter***, the laws of this State pertaining to trusts are hereby made applicable to statutory trusts") (emphasis added).

[10] Restatement § 48 ("[A] person is a beneficiary of a trust if the settlor manifests an intention to give the person a beneficial interest; a person who merely benefits incidentally from the performance of the trust is not a beneficiary.").

the definition of "Claimant Trust Beneficiary." Thus, even if the Restatement applied (and it does not), it would not support Appellants' argument.

b. The CTA's Limits on Information Rights Are Authorized Under the DSTA

Even if Appellants were Claimant Trust Beneficiaries, any information rights would still be limited by the CTA. The DSTA 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 Nat'l Collegiate*, 251 A.3d at 150 (Trust Agreements "are the governing instruments of the Trusts under the DST Act."). Here, consistent with Section 3819(a) of the DSTA, the CTA *does* "otherwise provide." As discussed above, under the CTA and the Plan, only "Claimant Trust Beneficiaries," have information rights 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." CTA § 3.12(b)

(ROA.002389). The CTA further excuses the Claimant Trust from providing an "accounting" to anyone. CTA § 3.12(a) (ROA.002389).

As the Bankruptcy Court correctly found, Appellants (a) are not beneficiaries of the Claimant Trust; (b) have no rights to information regarding the Claimant Trust; and (c) lack the right to compel Highland or the Claimant Trust to do anything, let alone something that will violate the rights of the Claimant Trust's actual beneficiaries. Order at 29-31 (ROA.000034-000036).

2. <u>Texas Law Does Not Apply to Delaware Statutory Trusts nor Can Appellants Use Equity to Rewrite the CTA</u>

Recognizing the CTA, DSTA, and Delaware law bar their request for an accounting, Appellants pivot and argue Texas law governs their accounting claim and allows Appellants to obtain information about a Delaware statutory trust even though they are not "beneficiaries" under Delaware law. Brief at 16-19.

Appellants did not raise this argument in the Complaint and it is not properly before this Court. *DAF*, 2024 U.S. Dist. LEXIS 162355, at *15. Even if it were, Appellants cite no law supporting their argument that Texas law applies. Instead, they rely entirely on Appellee's supposed "concession" that an accounting is an "equitable remedy" and therefore governed by Texas law. Brief at 16.

In the MTD, Appellees established that there is no cause of action—equitable or otherwise—for an accounting under Delaware law. MTD ¶ 43 (ROA 002688). An accounting is an equitable *remedy* that may be imposed upon a trust fiduciary.

Williams v Lester, 2023 WL 4883610, at *3 (Del. Ch. Aug. 1, 2023).[11] Appellants mischaracterize Appellees' position, contending that by "conceding" that an accounting is an equitable *remedy*, Appellees have also "conceded" that an accounting is an equitable *claim* that can be pursued under substantive Texas law. Appellants' disingenuous reasoning notwithstanding, their argument that a cause of action for an accounting exists under Texas law fails.

Appellants cite two cases in support of their argument: *Berry v. Berry*, 646 S.W. 3d 516 (Tex. 2022) and *Hill v. Hunt*, 2009 U.S. Dist. LEXIS 121494 (N.D. Tex. Dec. 30, 2009). Neither case applied Texas common law or equity; rather, they relied exclusively on Title 9 of the Texas Property Code, which governs the creation, operation, and termination of Texas trusts. *Berry*, S.W. 3d at 527-28 (analyzing TEX. PROP. CODE, TIT. 9 (TRUSTS), § 101.001, *et seq*); *Hill*, 2009 U.S. Dist. LEXIS 121494 at *7-10 (same); *see also* TEX. PROP. CODE § 111.001 ("This subtitle may be cited as the Texas Trust Code"); *id.* § 111.002 ("This subtitle [*i.e.*, Title 9] and the Texas Trust Act … shall be considered one continuous statute …."); *id.* § 111.035 (providing Title 9 governs the duties and obligations of a trustee of a Texas trust); *id.* § 111.004(2) (defining who is a beneficiary for purposes of a Texas trust); *id.* §

[11] Despite conceding that an accounting is an equitable ***remedy*** (Brief at n.52), Appellants continue to insist, without citation to any case law or statute, that a ***claim*** for an accounting somehow still exists under Delaware law. *Id.*

115.001 (setting forth the Texas court's jurisdiction over proceedings against a trustee of a Texas trust and concerning a Texas trust).[12]

Texas trust law does not govern the Claimant Trust; the Claimant Trust is a Delaware statutory trust governed by the DSTA. Delaware law governs the Claimant Trust's internal affairs and dictates who is a beneficiary of the Claimant Trust and what rights parties have to information about the Claimant Trust's assets. *See, e.g., Hollis v. Hill*, 232 F.3d 460, 464-65 (5th Cir. 2000) ("Texas … follows the 'internal affairs doctrine.' … [T]he internal affairs of the foreign corporation, 'including but not limited to the rights, powers, and duties of its board of directors and shareholders and matters relating to its shares,' are governed by the laws of the jurisdiction of incorporation.") (citations omitted); *see also JUUL Labs, Inc. v. Grove*, 238 A.3d 904, 913-18 (Del. Ch. 2020) (finding internal affairs doctrine precluded a stockholder's use of the California Corporations Code to inspect books and records of a Delaware corporation). As set forth above, Appellants have *no* rights to an accounting or information under applicable Delaware law and cannot substitute Texas statutory trust law to avoid that inconvenient fact.

[12] Appellants' argument that Texas statutory trust law governs directly contradicts their argument made in yet another motion seeking leave to sue Mr. Seery (B.D.I. 4000) (ROA.002315-002352) (the "Removal Motion"). The Removal Motion cites Delaware statutory law governing common law trusts for the proposition that Delaware courts have exclusive jurisdiction under Delaware statutory law to determine, *inter alia*, whether Appellants are beneficiaries of the Claimant Trust and whether that status allows them to remove Mr. Seery as Claimant Trustee. Removal Motion ¶¶ 47-48 (ROA.002342).

Finally, regardless of the choice of law, "[e]quitable relief is not available where, as here, the parties' rights and obligations at issue are set forth" in the operative agreement (*i.e.*, the Plan and the CTA). Order at 31 (ROA0036) (citing *In re Am. Home Mortg. Holdings, Inc.*, 386 F. App'x 209, 212-13 (3d Cir. 2010)) (finding a trust document that addresses an issue "cannot be rewritten on equitable grounds," and "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."); *King v. Baylor Univ.*, 46 F.4th 344, 368 (5th Cir. 2022) ("Texas courts have repeatedly expressed this limit. Once a court determines that a 'valid contract … imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy.' In other words, when 'the contract addresses the matter at issue, [the party invoking equity] is limited to the contract rather than equity when determining liability.'") (citations omitted); *Grunstein v. Silva*, 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.").

Here, the CTA expressly provides that (a) Appellants are not Claimant Trust Beneficiaries and therefore have no rights under the CTA and (b) no party—regardless of whether they are a Claimant Trust Beneficiary—has the right to an

accounting. Thus, whether styled as a claim or a remedy, the plain language of the CTA bars Appellants' attempt to obtain financial information concerning the Claimant Trust on equitable grounds. Order at 30-31 (ROA.000035-000036).

3. Appellants Cannot Use the Implied Covenant of Good Faith and Fair Dealing to Rewrite the CTA

Appellants argue Mr. Seery's alleged breach of the implied duty of good faith and fair dealing compels this Court to deem their contingent, inchoate interests vested because (a) they are beneficiaries of the Claimant Trust and (b) "the Claimant Trust had sufficient assets to pay unsecured creditors in Classes 8 and Class 9 in full with interest at least as early as May 2023, and in all probability as early as September 2022."[13] Brief at 25.

Again, as an initial matter, this argument was not pled in the Complaint and is not properly before this Court. *DAF*, 2024 U.S. Dist. LEXIS 162355, at *15.

Even if it were, Appellants' argument is premised on a misstatement of fact and law. First, Appellants are not beneficiaries of the Claimant Trust. Second, Appellants baselessly believe there are sufficient assets because Mr. Seery is unjustifiably reserving too much for indemnification claims. The Fifth Circuit, however, soundly rejected this argument and Appellants' attempts to curtail the

[13] The gravamen of the Complaint is that Appellants lack the information necessary to determine whether the value of the Claimant Trust's assets is sufficient to pay creditors in full. Yet Appellants' new argument is based on the Claimant Trust having "sufficient assets" to have paid unsecured claims as early as September 2022.

CTA's ability to satisfy its indemnification obligations. *Highland*, 57 F.4th at 503-04.[14]

But, more fundamentally, Appellants are impermissibly attempting to use the implied covenant of good faith and fair dealing to rewrite the bargained for contractual terms in the CTA, which, among other things, allows Mr. Seery to set indemnification reserves and limits information rights. The Bankruptcy Court correctly rejected that argument finding "[c]ourts will not use the implied covenant of good faith to override the rights and responsibilities that were bargained for in a trust agreement." Order at 31 (ROA.000036-000037) (citing *IKB Int'l S.A. v. Wilmington Trust Co.*, 774 F. App'x 719, 727-28 (3d Cir. 2019)) (citing *Homan v. Turoczy*, 2005 WL 2000756 (Del. Ch. Aug. 12, 2005)); *see also Dunlap v. State Farm Fire & 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).

"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

[14] The CTA and the Plan give Mr. Seery, as Claimant Trustee, the right, duty, and obligation to set indemnification reserves to protect the post-Effective Date estate and its fiduciaries from harassing litigation. The Indemnity Trust is the court-approved vehicle and structure to satisfy and secure the Claimant Trust's indemnification obligations to all parties entitled to indemnification under the CTA and Plan. *Id.*

respect to the Claimant Trust, and those duties do not inure to the benefit of the [Appellants], who are not Claimant Trust Beneficiaries, the implied covenant of good faith and fair dealing cannot be used by [Appellants] or the court to compel the Claimant Trustee to disclose the information or provide the accounting requested in Count 1." Order at 32 (ROA.000037).

B. Appellants Mischaracterize the Basis for Dismissing Counts 2 and 3

The Bankruptcy Court correctly held Appellants requests for declaratory relief in Counts 2 and 3 were predicated on the Bankruptcy Court granting the relief requested in Count 1. Order at 35 (ROA.000040) ("That Counts II and III fall, if Count I falls, is inherent in the way [Appellants] framed their claims and causes of action in the Complaint."). The Bankruptcy Court also correctly found that, "[b]ecause [Appellants] are not entitled to the information and accounting they are requesting in Count 1, [Appellants'] claims for declaratory relief in Counts II and III are rendered moot and/or not ripe and, thus, not justiciable" and thus dismissed them under FRCP 12(b)(1) and FRCP 12(h)(3). *Id.*

Despite this ruling, Appellants allege the Bankruptcy Court erred in dismissing Counts 2 and 3 for failure to state a claim under FRCP 12(b)(6) and that this Court should find that Counts 2 and 3 state a valid claim. Brief at 26. But the Bankruptcy Court did not dismiss Counts 2 and 3 under FRCP 12(b)(6). It held it lacked subject matter jurisdiction over Counts 2 and 3 and could not rule on the

motions to dismiss Counts 2 and 3 for failure to state a claim. Order at 33-35 (ROA.000038-000040). Respectfully, this Court cannot reverse a decision that the Bankruptcy Court never made. In the unlikely event this Court reverses on Count 1, it should remand Appellee's MTD Counts 2 and 3 so the Bankruptcy Court can determine whether Appellants failed to state claims upon which relief can be granted.

C. <u>Count 3 Seeks an Impermissible Advisory Opinion</u>

As an independent basis for dismissing Count 3, the Bankruptcy Court properly found that it did not have subject matter jurisdiction to determine Count 3 because it impermissibly sought an advisory opinion. Order at 35 (ROA.000040). 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.*, 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 Cnty.*, 272 F. Supp. 3d 973, 980 (W.D. Tex. 2017), *aff'd sub nom. Texas v Travis Cnty.*, 910 F.3d 809 (5th Cir 2018).

In Count 3, Appellants asked the Bankruptcy Court to determine whether (a) current Claimant Trust Beneficiaries "*may be* indefeasibly paid" and (b) "Contingent

Claimant Trust Interests *are likely* to vest." Comp. ¶ 94 (ROA.002639) (emphasis added). That determination is dependent upon several hypothetical future events concerning, among other things, the amount of *realized* asset values and recoveries, actual future Claimant Trust expenses, and the scope and quantum of indemnification obligations. As discussed, indemnification expenses are senior to distributions to the Claimant Trust Beneficiaries, and Claimant Trust Beneficiaries cannot be paid in full until such indemnification expenses are liquidated and satisfied. Contingent Trust Interests therefore cannot vest until, among other things, all indemnification claims are known and paid (and all Class 8 and Class 9 Claims are thereafter paid in full with interest and all Disputed Claims are resolved).

In light of Mr. Dondero's widespread litigation, additional threatened litigation, and the continued accrual of related legal fees and expenses, the amount of indemnification obligations remains unknown. Order at 27 (ROA.000032).[15] Thus, any determination as to whether Appellants' Contingent Trust Interests "are likely to vest" hinges on a number of unknown and contingent variables, including (a) the amount of indemnification obligations, (b) the realized value of the Claimant Trust assets, and (c) whether sufficient cash remains to pay Classes 8 and 9 in full

[15] As shown by the avalanche of litigation caused by Mr. Dondero and his affiliates (*see* n.5 *supra*), the scope and quantum of indemnification obligations is—and will continue to be—both substantial and uncertain. Disturbingly, the litigation onslaught continues even though neither Mr. Dondero nor any of this affiliates have a vested interest in the Claimant Trust or are Claimant Trust Beneficiaries.

after indemnification obligations (and other expenses) are satisfied. *Id.* at 35 (ROA.000040). Such an abstract determination is precisely the type of relief precluded by the constitutional ban on advisory opinions. *JPay LLC v. Burton*, 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").

Appellants' only response is to state—as they did in the Complaint—that they are seeking "a declaration that, at the time that this proceeding is decided, the Claimant Trust assets exceed the obligations of the bankruptcy estate such that Appellants' Contingent Trust Interests are effectively vested." Brief at 28.[16] But, again, Appellants' contingent, inchoate interests "will vest if, and only if, … 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." Order at 6-7 (ROA.000011-000012). Whether the speculative, unrealized value of the Claimant Trust's assets exceeds the speculative, unrealized

[16] Notably, the requested declaration is legally irrelevant. Even if the Bankruptcy Court could determine that Appellants' unvested, contingent interests are "likely" to vest or will "effectively vest[]" at some unknown date in the future, such a determination would not confer any rights on them under the plain terms of the CTA.

value of the Claimant Trust's liabilities is therefore irrelevant. As Appellants concede, whether the Contingent Trust Interest will vest is based on, among other things, *realized* assets and liabilities. Comp. ¶¶ 66, 80 (ROA.002634, ROA.002636). Any determination as to whether the Contingent Trust Interests will vest is, definitionally, speculative. Appellants have failed to show that there is subject matter jurisdiction to adjudicate Count 3.

VII. CONCLUSION

The Bankruptcy Court properly dismissed the Complaint with prejudice.[17] This Court should deny the Appeal and affirm the Order.

[17] Appellants have not sought leave to amend the Complaint. Even if they had, leave to amend should be denied. There is no basis for the relief requested in Count 1, and any attempt to amend Count 1 would be futile. *DAF*, 2024 U.S. Dist. LEXIS 162355, at *15 ("Granting leave to amend a complaint is futile if 'the amended complaint would fail to state a claim upon which relief could be granted'") (citations omitted). Because Counts 2 and 3 are predicated on Count 1 being granted, amending Counts 2 and 3 would likewise be futile.

Dated: October 7, 2024

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