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

In re:

**HIGHLAND CAPITAL
MANAGEMENT, L.P.,**

Reorganized Debtor.

Chapter 11

Case No. 19-34054-sgj11

**HUNTER MOUNTAIN
INVESTMENT TRUST,**

Appellant,

v.

**HIGHLAND CAPITAL
MANAGEMENT, L.P.; THE
HIGHLAND CLAIMANT TRUST;
and JAMES P. SEERY, JR.**

Appellees.

Civil Case No. 3:24-cv-01786-BW

**APPELLANT’S RESPONSE TO APPELLEES’
MOTION TO DISMISS APPEAL**



TABLE OF CONTENTS

I. INTRODUCTION.....1
II. BACKGROUND.....3
III. ARGUMENT8
 A. The Motion to Dismiss Should Be Denied Because the Order Is a Final
 Appealable Order.....8
IV. CONCLUSION11

TABLE OF AUTHORITIES

Page(s)

Cases

Grace v. Vannoy.....8, 9, 11

Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983).....9, 11

Appellant Hunter Mountain Investment Trust (“**HMIT**”) opposes the Motion to Dismiss filed by Appellees Highland Capital Management, L.P. (“**HCMLP**”), the Highland Claimant Trust (“**Claimant Trust**”), and James P. Seery, Jr. (“**Seery**”) [Dkt. 17] (HMIT, Claimant Trust, and Seery are collectively the “**Highland Parties**”) (“**Motion to Dismiss**”). The Motion to Dismiss should be denied because the bankruptcy court’s order granting the Highland Parties’ motion to stay is directly appealable as of right.

I. INTRODUCTION

This appeal arises from the bankruptcy court’s order indefinitely staying proceedings in which HMIT seeks to remove Seery as the trustee of the Claimant Trust. Seery breached his fiduciary duties and created numerous conflicts of interest that harm all beneficiaries of the Claimant Trust. Among other breaches of duty, Seery has used a grossly excessive portion of the Claimant Trust’s assets to fund a \$50 million indemnity sub-trust and reserve another \$90 million to pay his own legal and other potential expenses, rather than using those funds to pay the claims of Claimant Trust beneficiaries. To remedy these breaches, and pursuant to the bankruptcy court’s gatekeeping function under the Fifth Amended Plan of Highland Capital Management, L.P. (as modified), HMIT requested leave from the bankruptcy court to bring suit in Delaware to remove Seery as trustee (the “**Motion for Leave**”).

Rather than substantively responding to HMIT's Motion for Leave, HCMLP and the Claimant Trust filed a motion to stay in an effort to delay the proceedings despite the resulting, and obvious irreparable harm to HMIT from doing so ("**Motion to Stay**").¹ Seery joined the Motion to Stay.² On June 24, 2024, in an order dated June 22, 2024, the bankruptcy court granted the Motion to Stay, which order is the subject of this appeal (the "**Order**").³ In the Order, the bankruptcy court indefinitely stayed resolution of HMIT's Motion for Leave to file the Delaware Complaint "until a court of competent jurisdiction enters final, non-appealable orders resolving" two other proceedings,⁴ which went beyond the relief that even HCMLP and the Claimant Trust had sought.

The Order is a directly appealable order, and the Motion to Dismiss should be denied. Indefinitely staying HMIT's Motion for Leave is effectively an order dismissing the action, which will cause HMIT to suffer irreparable harm. This is because the Claimant Trust will, by its terms, likely be dissolved and Seery's duties as Trustee complete by the time the indefinite stay is lifted.⁵ HMIT will thus lose

¹ See generally App. 001630-1637.

² App. 001638-1639.

³ Order Extending Stay of Contested Matter [Docket No. 4000], Dkt. 4104, dated June 24, 2024 (App. 001693-1695) ("**Stay Order**").

⁴ *Id.* at p. 3 (App. 001695)

⁵ Under the Claimant Trust Agreement, the Claimant Trust is to be dissolved no "later than three years from the Effective Date unless the Bankruptcy Court, upon motion made within the six-month period before such third anniversary . . . determines that a fixed period extension (not to exceed two years, together with any prior extensions) is necessary[.]" The Court entered an order confirming this provision of the Claimant Trust Agreement. See Order (I) Confirming the Fifth

forever its right to seek to remove Seery as trustee. Further, in the interim, Seery's dissipation of the Claimant Trust's assets will continue unabated. For these reasons, the Order functions as a dismissal of HMIT's Motion for Leave, making the Order appealable as of right.

II. BACKGROUND

On January 1, 2024, HMIT filed its Motion for Leave,⁶ seeking to file the Delaware Complaint⁷ under the gatekeeping provision of the Fifth Amended Plan of Highland Capital Management, L.P. (as modified). As set forth in HMIT's Motion for Leave, HMIT has standing to pursue Seery's removal because it is actually "in the money" or, alternatively, should be deemed "in the money" with the rights of a vested beneficiary.⁸ Yet Seery refuses to acknowledge HMIT's status, and this failure breaches his duty of good faith and fair dealing.⁹ HMIT also has standing as an intended contingent beneficiary under Delaware law.¹⁰ However, it is Seery's

Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief ("**Plan Confirmation**") § IV.B.14 (App. 000713-714). The three-year period expired on August 11, 2024. On July 1, 2024, Highland moved to extend the term of the Claimant Trust until August 11, 2025. *See* Amended Motion for an Order Extending Duration of Trusts, in Bankr. Case No. 19-34054, at Dkt. 4109, of which the Court can take judicial notice, and the bankruptcy court granted the motion at Dkt. 4144.

⁶ App. 001468-1605.

⁷ *Id.* at Dkt. 4000-1 (App. 001507-1523).

⁸ App. 001487-1494 at ¶¶ 30-46; Pursuant to the Claimant Trust Agreement, upon paying all Class 8 and Class 9 unsecured creditors in full with interest, Seery is bound to file a "GUC Payment Certification" declaring that the holders of Contingent Interests (including HMIT) are vested beneficiaries. Claimant Trust Agreement § 5.1(c) (App. 001551).

⁹ App. 001496-1500 at ¶¶ 50-60.

¹⁰ App. 001487-1494 at ¶¶ 30-46.

actions as a fiduciary, not the valuation of the estate itself, that is the core of HMIT's claim to be asserted under the Motion for Leave.

In response, HCMLP and the Claimant Trust filed the Motion to Stay.¹¹ HCMLP and the Claimant Trust argued in the Motion to Stay that all proceedings related to the Motion for Leave should be indefinitely stayed until entry of a final, non-appealable order in a separately filed adversary proceeding commenced by The Dugaboy Investment Trust (“**Dugaboy**”) and HMIT (the “**Valuation Proceeding**”).¹² In the Valuation Proceeding, Dugaboy and HMIT sought a determination by the bankruptcy court of the value of the estate and an accounting of the assets held by the Claimant Trust. HCMLP moved to dismiss the Valuation Proceeding, arguing, among other things, that both Dugaboy and HMIT lack standing because they are purportedly not beneficiaries of the Claimant Trust.¹³ HCMLP alternatively argued that the claims in the Valuation Proceeding should be dismissed because: (1) the Court lacks subject matter jurisdiction, (2) HMIT improperly seeks an advisory opinion, (3) the claims are barred by collateral

¹¹ App. 001630-1637.

¹² *Dugaboy Inv. Trust, et al v. Highland Capital Mgmt., L.P., et al.*, Adv. Proc. No. 23-03038-sgj (Bankr. N.D. Tex.), 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, Dkt. 1, dated May 10, 2023 (“**Valuation Complaint**”) (App. 001744-1771).

¹³ Memorandum of Law in Support of Highland Capital Management L.P. and the Highland Claimant Trust's Motion to Dismiss Complaint, Adv. Proc. 23-03038, Dkt. 14, dated November 22, 2023 (“**Motion to Dismiss**”) at ¶ 10 (App. 001787-1788).

estoppel, and (4) the claims fail as a matter of law.¹⁴ Dugaboy and HMIT opposed the motion to dismiss.¹⁵

HCMLP argued in its Motion to Stay that the Motion for Leave should be indefinitely stayed until the Valuation Proceeding is finally concluded, including appeals, because a ruling on whether HMIT is a beneficiary of the Claimant Trust in the Valuation Proceeding will “necessarily dispose” of the Motion for Leave.¹⁶ However, the bankruptcy court’s decision to issue a stay on this flawed premise is incorrect for two primary reasons. First, HMIT has been and will continue to be prejudiced by an indefinite stay, and HCMLP would not have been harmed by a denial of the requested stay. Second, the issues in the Delaware Complaint and the Valuation Proceeding are not identical because the two proceedings assert different bases for the claims in each proceeding. On May 24, 2024, the bankruptcy court granted the motion to dismiss the Valuation Proceeding under Rule 12(b)(6) based on its finding that Dugaboy had not plausibly alleged it had a right to the information sought in the Valuation Proceeding.¹⁷ The Court’s order did not address the issue of HMIT’s standing.

¹⁴ *See id* at App. 001793-1807, ¶¶ 22-48.

¹⁵ The Dugaboy Investment Trust and Hunter Mountain Investment Trust’s Response to the Highland Parties’ Motion to Dismiss Complaint, Adv. Proc. 23-03038, Dkt. 17, dated December 29, 2023 (App. 001809-1838).

¹⁶ App. 001631 at ¶ 2.

¹⁷ 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

Then, on June 24, 2024, the bankruptcy court issued its Order granting HCMLP's Motion to Stay "until a court of competent jurisdiction enters final, non-appealable orders resolving" the Valuation Proceeding.¹⁸ The bankruptcy court went further, however, and stayed the proceeding not just until the resolution of the Valuation Proceeding, as HCMLP had requested, but also until the resolution of a second proceeding currently on appeal. Specifically, the bankruptcy court stayed HMIT's Motion for Leave until resolution of HMIT's pending appeal of the bankruptcy 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 "**Claims Trading Proceeding**").¹⁹

On July 8, 2024, HMIT timely filed two notices of appeal from the bankruptcy court's Order staying the underlying proceedings. In the first, the subject of the present Motion to Dismiss, HMIT asserted that the Order is appealable as of right because it functions as a dismissal on the merits of HMIT's Motion for Leave ("**Appeal as of Right**"). On September 16, 2024, HMIT filed its opening brief on

Assets, Adv. Proc. 23-03038, Dkt. 26, dated May 24, 2024 (App. 001875-1910), at p. 32 (App. 001906).

¹⁸ Order Extending Stay of Contested Matter [Docket No. 4000], Dkt. 4104, dated June 24, 2024 (App. 001693-1695) ("**Stay Order**"), at p. 3 (App. 001695).

¹⁹ *Id.* at p. 2 (App. 001694). The bankruptcy court refers to this order as the "Order Denying Leave" in the Stay Order.

appeal in this proceeding. HMIT alternatively filed the second notice of appeal in the event the Order is construed as interlocutory (“**Interlocutory Appeal**”). As the Highland Parties concede, HMIT properly and timely filed a motion for leave to appeal the Order with that notice of appeal.²⁰ On July 25, 2024, HMIT filed a petition for writ of mandamus seeking an order directing that the Order be reversed with remand instructions to allow the matter to proceed (“**Writ Petition**”).²¹ Like the Interlocutory Appeal, HMIT expressly filed the Writ Petition “in the alternative” in light of “the lack of clarity in the law about the appropriate mechanism for obtaining review” of the Order.²² As such, HMIT never “acknowledge[d] that the [Order] is interlocutory and cannot be appealed ‘as of right,’” as the Highland Parties contend.²³ Instead, because of the murky state of the law for challenging an indefinite stay order, HMIT has filed such notices of appeal and petitions as it considers necessary to ensure that the Order receives appellate review.

²⁰ Mot. to Dismiss, ECF Doc. No. 17, at ¶ 8.

²¹ *Hunter Mountain Inv. Trust v. Highland Capital Mgmt., L.P., et al.*, Case No. 24-cv-01912-E (N.D. Tex.), at Dkt 1, of which the Court can take judicial notice.

²² *Id.*, p. 10, fn. 30; *Id.* p. 11, fn. 35.

²³ Mot. to Dismiss, p. 5 ¶ 9.

III. ARGUMENT

A. The Motion to Dismiss Should Be Denied Because the Order Is a Final Appealable Order.

While orders on motions to stay are typically not appealable collateral orders, as the Fifth Circuit explained in *Grace v. Vannoy*, appellate jurisdiction is properly exercised over “‘a ‘small class’ of collateral orders [that] ‘are too important to be denied immediate review.’”²⁴ A stay that has “the practical effect” of a dismissal falls into this small class.²⁵

In *Grace*, the Fifth Circuit evaluated whether a district court’s order staying a habeas proceeding while a prisoner exhausted his state court remedies was an appealable collateral order.²⁶ Under *Grace*, a collateral order may be immediately reviewed when the decision is “conclusive,” “resolve[s] important questions separate from the merits,” and is “effectively unreviewable on appeal from the final judgment in the underlying action.”²⁷ The *Grace* court noted that “importance and unreviewability are inseparable inquiries” because “whether a question is unreviewable for purposes of the collateral-order doctrine depends on a value

²⁴ 826 F.3d 813, 815-16 (5th Cir. 2016) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009)).

²⁵ *Id.* at 817 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13 (1983)).

²⁶ 826 F.3d at 815.

²⁷ *Id.* at 816.

judgment about what is lost unless the party is permitted to immediately appeal.”²⁸ As the *Grace* court observed, while it is rare, stay orders are immediately reviewable when they present a “*Moses Cone* situation,”²⁹ which occurs when “[t]here would be no more merits over which to litigate” if the stay order is not immediately reviewed.³⁰

Here, the Order satisfies the *Grace* factors and presents a *Moses Cone* situation. HMIT seeks leave to file the Delaware Complaint raising breaches of fiduciary duty claims against Seery and seeking to remove him as trustee. As detailed in its Motion for Leave, HMIT has pleaded serious allegations against Seery that require immediate consideration and Seery’s immediate removal as Claimant Trustee.³¹ These allegations include, but are not limited to, allegations that Seery breached his duty of loyalty by failing to pay creditors, failing to file required certifications, and failing maximize the value of the Claimant Trust for the benefit of its beneficiaries.³² Seery also has used (and continues to use) the Claimant Trust to his own pecuniary advantage by funding an increasingly sizable indemnification reserve (pursuant to an Indemnity Sub-trust).³³ He also continues to remain

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 817 (quoting *EEOC v. Neches Butane Prods. Co.*, 704 F.2d 144, 151 (5th Cir. 1983)).

³¹ App. 001468-1605.

³² *Id.* at Dkt. 4000-1 (App. 001507-1523).

³³ App. 001482-1485 at ¶¶ 19-26.

employed at \$150,000 a month.³⁴ He also has effectively given himself a release from liability by attempting to prevent any action against him from proceeding until it is equitably moot. Seery's actions (and inactions) will continue to prejudice and harm HMIT as long as they continue.³⁵ For these and other reasons, HMIT seeks his immediate removal.

Indefinitely prohibiting HMIT from pursuing its claims, which is the effect of the Order, will prevent a court from ever reaching the merits of HMIT's claims. The Order requires entry of a final, non-appealable order in two separate matters (the Valuation Proceeding and the Claims Trading Proceeding) before the indefinite stay is lifted. Once the pending appeals of those matters wind their way through the appellate courts (and potentially beyond, if any proceedings are necessary on remand),³⁶ the Claimant Trust will by its terms be dissolved and Seery's duties as Claimant Trustee complete.³⁷ The funds of the Claimant Trust will be further

³⁴ App. 001543 at § 3.13(a)(i).

³⁵ App. 001485 at ¶ 25.

³⁶ See Case No. 24-cv-01912-E, p. 20, Chart A-1: Demonstrating Actual Timing from Appeal of Bankruptcy Court Order to Fifth Circuit Judgment, of which the Court can take judicial notice (time to conclude appeals through the Fifth Circuit, much less a petition for certiorari to the United States Supreme Court can be in excess of two years).

³⁷ Under the Claimant Trust Agreement, the Claimant Trust is to be dissolved no "later than three years from the Effective Date unless the Bankruptcy Court, upon motion made within the six-month period before such third anniversary . . . determines that a fixed period extension (not to exceed two years, together with any prior extensions) is necessary[.]" See Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief ("Plan Confirmation") § IV.B.14 (App. 000713-714). The three-year period expired on August 11, 2024. On July 1, 2024, Highland moved to extend the term of the Claimant Trust until August 11, 2025. See Amended Motion for an Order Extending Duration

dissipated. This means there will likely be no merits to litigate in the Delaware Complaint by the time the bankruptcy court addresses the merits of HMIT's Motion for Leave. The Order thus has "the practical effect" of dismissing HMIT's proceeding seeking leave to file the Delaware Complaint.³⁸

Thus, HMIT's motion for leave raises important questions concerning the propriety of Seery's actions as, and his right to remain, trustee, which are "too important to be denied immediate review."³⁹ Without immediate review, the merits of HMIT's claim will never see the light of day due to the passage of time, which is a classical *Moses Cone* situation. This places the Order in the "small class of collateral orders" that are immediately reviewable by this Court.⁴⁰ As a result, HMIT's Appeal as of Right was properly filed, this Court has jurisdiction over this appeal, and the Motion to Dismiss should be denied.

IV. CONCLUSION

The bankruptcy court's Order indefinitely staying HMIT's Motion for Leave to file the Delaware Complaint has the practical effect of dismissing the action because HMIT will suffer irreparable harm while the stay is in place, and the merits of HMIT's Motion for Leave will likely be mooted by the time the stay is lifted. As

of Trusts, in Bankr. Case No. 19-34054, at Dkt. 4109, of which the Court can take judicial notice, and the bankruptcy court granted the motion at Dkt. 4144.

³⁸ 826 F.3d. at 817 (quoting *Moses H. Cone*, 460 U.S. at 13).

³⁹ *Grace*, 826 F.3d at 815-16.

⁴⁰ *Id.*

a result, the Order is directly reviewable by this Court, and the Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2024, a copy of the foregoing document was served on all parties of record via the Court's electronic filing system.

/s/ Deborah Deitsch-Perez

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. Bank. P. 8013(f)(3)(A) because this document contains 2,872 words.
2. This document complies with the typeface requirements of Fed. R. Bank. P. 8015(a)(5) and the type-style requirements of Fed. R. Bankr. P. 8015 (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word, typeface Times New Roman, 14-point type (footnotes in 12-point type).

/s/ Deborah Deitsch-Perez