Civil Action No. 3:24-cv-01531-X

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

In re: Highland Capital Management, L.P.,

***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, Adv. Proc. No. 23-03038-sgj
Hon. Stacey G.C. Jernigan, Presiding

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION[1]

Appellants filed their Complaint against Appellees Highland Capital Management, L.P. ("HCMLP") and the Highland Claimant Trust ("Claimant Trust") (collectively, "Appellees" or "Highland") to obtain information about the assets and liabilities of the Claimant Trust. Appellants alleged three claims in their adversary proceeding: Count I requested an accounting; Count II requested a declaratory judgment regarding the value of the Claimant Trust assets; and Count III requested a declaratory judgment and determination regarding the nature of Appellants' interests in the Claimant Trust.[2]

Contrary to Highland's arguments, Appellants' pleadings establish that their contingent interests already should have vested, and thus the law treats Appellants as Claimant Trust Beneficiaries regardless of the language of the CTA. Nor is Count III dependent upon hypothetical facts, as Highland contends. Instead, it is dependent only 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."[3] Thus, Highland's' Motion to Dismiss the Complaint should have been denied. Rather than accept the well-pleaded

[1] Appellants use the same defined terms as used in their Opening Brief, Docket No. 22 ("Appellant Brief"). Appellants refer to the responding brief (Dkt. No. 23) as "Appellee Brief." Appellants refer to Appellees collectively as "Highland" or "Appellees," unless otherwise indicated.
[2] Complaint, ROA.002613-2640
[3] Complaint at ¶ 94, ROA.002639.

allegations of the Complaint as true as required here, the bankruptcy court resolved Appellants' claims by dismissing Appellants' Complaint before Appellants could pursue their well-pled claims. In doing so, the bankruptcy court erred as a matter of law.

In arguing to the contrary, Highland makes several arguments, none of which are availing. For example, Highland argues that Appellants raised three new arguments and "claims" in their briefing and that these new arguments and "claims" should be ignored. Appellants pled the allegations complained about by Highland in their Complaint and none of the allegations actually constitute new claims. Highland just ignores pertinent facts pled in the Complaint demonstrating that Appellants have a right under both Texas and Delaware law to the information they seek. Highland also again argues that Count III seeks an advisory opinion because it allegedly is based on hypothetical facts, but Highland is wrong. Highland ignores that Appellants only seek a determination regarding the value of the estate at the time of this proceeding and no conjecture or estimates about future value are required for a court to make such a determination.

In the end, none of Highland's arguments justify the bankruptcy court's error. The Court should reverse.

II. ARGUMENTS AND AUTHORITIES

A. Highland's Argument that Appellants Raised New Arguments and "Claims" in Their Appellant Brief is Wrong.

Highland incorrectly argues that Appellants raised new arguments and "claims" in their Appellant Brief and that these arguments cannot be "used to defeat a motion to dismiss." Appellee Brief at 19. Specifically, Highland contends that these three arguments were new claims and not pled in the Complaint: "(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." Appellee Brief at 13. In support of its contention that these arguments should be disregarded, Highland cites *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.*), 2024 WL 4139647, at *5 (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). Appellee Brief at 12.

DAF is inapposite to the facts here. In *DAF*, the Court addressed whether plaintiffs properly pled a claim under Section 215 of the Investment Advisors Act ("IAA"), which allows a court to treat certain contracts made in violation of the IAA as void. *Id.* at *4. In that case, plaintiffs asserted only one claim, under Section 206

of the IAA (which imposes fiduciary duties on investment advisors), but actually never pled claims under Section 215. *Id.* The Court noted that the complaint never cited Section 215 and never even alleged that the agreement at issue was void because it violated the IAA. *Id.* In response, plaintiffs there argued that because Section 215 allows for equitable relief and plaintiffs asked for equitable relief in their complaint, they in essence asserted a claim under Section 215. *Id.* at *5.

The Court in *DAF* found that argument "far too attenuated" and held it was not sufficient that plaintiffs "asserted a claim under a statutory provision that was mentioned nowhere in their Complaint solely because of one of five forms of relief they claimed to be entitled to recover" was available under that statutory provision. *Id.* The Court reasoned that the defendants did not have fair notice of any claim under Section 215 because to hold otherwise "would effectively require defendants to look at each remedy a plaintiff requested and then by process of reverse engineering, determine every possible statutory provision that a plaintiff could conceivably use to seek that relief." *Id.* The Court also noted that it was not sufficient to raise a "new claim" argument in response to a motion to dismiss when that "claim" was not pled in the complaint. *Id.* Notably, nothing in the *DAF* opinion addresses purportedly new arguments or factual allegations made in response to a motion to dismiss; it only addressed new claims.

This case bears no resemblance to *DAF*. Appellants alleged three claims in the adversary proceeding: Count I requested an accounting; Count II requested a declaratory judgment regarding the value of the Claimant Trust assets; and Count III requested a declaratory judgment and determination regarding the nature of Appellants' interests in the Claimant Trust.[4] As explained below, the arguments that Highland alleges are new are neither new arguments nor new claims. Rather, they are previously made allegations (and arguments) supporting *existing* claims.

First, Highland argues that Appellants' assertion that "they are beneficiaries under Delaware common law" is improper based on the finding in *DAF* barring a party from raising new claims in response to a motion to dismiss. Appellee Brief at 18-19. Putting aside that this appeal does not present that procedural posture, Highland's assertion that Appellants raised new claims for the first time on appeal is wrong. Appellants cite Delaware common law in its briefing, not to raise a new or different claim than the claims asserted, but to support their existing claims. Specifically, Count I requested an accounting, and Appellants cited Delaware common law throughout their Appellant Brief (and the response to the Motion to Dismiss) to explain how Delaware courts interpret statutory language and to explain how and why Appellants should be treated as beneficiaries entitled to an accounting.

[4] Complaint, ROA.002613-2640

Appellant Brief at 20-22.[5] Highland fails to even attempt to explain how these arguments might constitute supposedly new claims that might be barred according to *DAF*.

Second, Highland argues that Appellants' assertion that a request for an accounting is available under Texas law is also an improper new claim under *DAF*. Appellee Brief at 22. Again, Highland is wrong. Appellants sought an accounting in Count I of their Complaint. They did not specify whether this right arose from Delaware law, Texas law, or both, as no such pleading requirement exists. Nor has Highland ever argued this was required. Notably, in its Motion to Dismiss, Highland argued that the accounting claim supposedly failed under both Delaware and Texas law,[6] meaning that Highland was clearly on notice that Appellants' claims might be based on Delaware or Texas law. Moreover, in response to Highland's Motion to Dismiss, Appellants specifically argued that they had a right to accounting under both Delaware and Texas law,[7] as Appellants also did in their Appellant Brief. Appellant Brief at 16-19. So this is not a situation where Appellants are raising a new argument for the first time on appeal. Highland makes no effort to argue how

[5] *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004) ("For that review, the complaint is construed in the light most favorable to plaintiff, accepting as true well-pleaded factual allegations and drawing all reasonable inferences in plaintiff's favor.").
[6] Motion to Dismiss at 22-23.
[7] Response to Motion to Dismiss at 21-23.

providing a choice-of-law analysis and explaining why Appellants have accounting rights under both Texas and Delaware law could constitute a new claim under *DAF*.

Third, Highland argues that, under *DAF*, Appellants' assertion that "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" is also a new argument not properly before the Court. Appellee Brief at 26. However, Appellants expressly made allegations regarding Mr. Seery's breach of the implied duty of good faith in their Complaint:

- "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." ROA.002615-2616 at ¶ 4.
- "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 for the benefits of the professionals involved), even though the assets of the estate, if managed in good faith, should be sufficient to pay all creditors." ROA.002616 at ¶ 6.
- "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." ROA.002616-2617 at ¶ 7.

Accordingly, Highland is simply incorrect. The allegations about Mr. Seery's breach of the duty of good faith and fair dealing are not new and were asserted in the

Complaint.[8] More importantly, however, these allegations are not new "claims" under *DAF*, and Highland makes no effort to justify its contention to the contrary. Highland's contention that Appellants impermissibly asserted supposedly new arguments and "claims" on appeal should be rejected by the Court.

B. The CTA Does Not Bar Appellants from Seeking Additional Financial Information from Appellees.

Highland next argues that "Appellants are not Claimant Trust Beneficiaries and therefore have no right to information regarding the Claimant Trust under the CTA and the DSTA." Appellee Brief at 17. Specifically, Highland argues that Appellants have no information rights under the CTA or Delaware law (Appellee Brief at 18), that Texas law providing Appellants with certain equitable claims does not apply (Appellee Brief at 22), and that the duty of good faith and fair dealing does not afford Appellants any right to obtain critical information (Appellee Brief at 26). Highland's arguments are unavailing for several reasons.

First, as alleged in the Complaint, under Delaware law, Appellants are intended (albeit contingent) beneficiaries of the Claimant Trust giving them, without limitation, equitable rights to investigate and prevent bad faith conduct. As Appellants explained in their Appellant Brief, the language of the CTA is not dispositive. Appellant Brief at 20-21. "Beneficiary," does not have a statutory

[8] *Lovick*, 378 F.3d at 437-438.

definition under Delaware law, and Delaware courts follow the RESTATEMENT (THIRD) OF TRUSTS,[9] which defines beneficiaries to include contingent beneficiaries. Appellant Brief at 21. Highland's only response to this is the argument that "'the beneficial owner' of a trust is determined by the trust's governing instrument." Appellant Brief at 19. This argument just ignores the applicable law. Although the CTA may define "beneficiaries," Delaware law dictates which entities and individuals have rights vis-à-vis a Delaware statutory trust. Delaware statutory law indisputably affords contingent beneficiaries (particularly under circumstances where such beneficiaries should be considered vested beneficiaries) as beneficiaries with rights under the CTA. *See* Appellant Brief at 18. As such, Appellants are beneficiaries "with an interest in the 'particular purposes of and matters involved in' this proceeding," and therefore they fall "within the class of persons authorized by statute to maintain [their] claims." *Berry v. Berry*, 646 S.W.3d 516, 529 (Tex. 2022).

In response, Highland relies on *Paul Cap. Advisors, L.L.C. v. Stahl*, 2022 WL 3418769 (Del. Ch. Aug. 17, 2022), as corrected (Aug. 25, 2022), to argue that the CTA "manifests HCM's intent, as settlor to *exclude* Dugaboy and HMIT from the definition of 'Claimant Trust Beneficiary.'" Appellee Brief at 20-21. Highland's

[9] *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*, Civ. No. 2017-0786-KSJM, 2021 WL 1197576, at *14 n. 203 (Del. Ch. Mar. 30, 2021), *aff'd,* 271 A.3d 741 (Del. 2022).

reliance on *Paul*, however, is misplaced. Unlike the plaintiff in *Paul*, an unpublished case, here Appellants' interests in the Claimant Trust are neither "incidental" nor derived from an outside contract. The court in *Paul* specifically relied on the fact that the trust agreements in that case were "fully integrated," but there is no merger clause in the CTA.[10] *Paul*, 2022 WL 3418769, at *2. Highland ignores this distinction.

Second, Highland argues that Texas law cannot apply to Appellants' claims. However, as argued at length in their Appellant Brief, Appellants are entitled to an accounting under Texas law because "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 Siekin LLP*, 348 F. Supp. 2d 772, 783 (N.D. Tex. 2004), *vacated on other grounds*, 465 F.3d 211 (5th Cir. 2006). Highland does not dispute this or even address this case.

Appellants have also cited two additional Texas cases (*Hill v. Hunt*, Civ. No. 3:07-CV-2020-O, 2009 WL 5178021, at *2 (N.D. Tex. Dec. 30, 2009) and *Berry v. Berry*, 646 S.W.3d 516, 529 (Tex. 2022)), to support their argument that the holder of any vested or contingent interest may bring an accounting claim against a trustee under Texas law. Appellant Brief at 18. Highland's only response to these two cases is that they are distinguishable because they relied on Title 9 of the Texas

[10] *See* CTA, ROA.000924-962.

Property Code. Highland fails to explain why this is a distinction with a difference (Appellee Brief at 23) and provides no countervailing authority stating that the law cited by Appellants should be ignored here.

Importantly, Highland also does not challenge the fact that 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. *See Hill v. Hunt*, Civ. No. 3:07-CV-2020-O, 2009 WL 5178021, at *2 (N.D. Tex. Dec. 30, 2009) (emphasis added) (citing Tex. Prop. Code § 111.004(6)); *Berry*, 646 S.W.3d at 529 (citing Tex. Prop. Code § 111.004(6)). Appellants are beneficiaries "with an interest in the 'particular purposes of and matters involved in' this proceeding," and therefore they fall "within the class of persons authorized by statute to maintain [their] claims." *Berry*, 646 S.W.3d at 529.

Third, Highland argues that the duty of good faith and fair dealing does not afford Appellants any right to obtain critical information from the Claimant Trust. Specifically, Highland argues that "Appellants are impermissibly attempting to use the implied covenant of good faith and fair dealing to rewrite the bargained for contractual terms of the CTA, which, among other things, allows Mr. Seery to set indemnification reserves and limits information rights." Appellee Brief at 27.

Highland does not dispute that, under Delaware law, a trust agreement may not eliminate the trustee's duty of good faith and fair dealing, nor does the CTA disclaim that duty.[11] As Appellants explained in their opening brief, observance of that duty precludes any conclusion that the language of the CTA somehow purportedly eliminates Appellants' right to receive information.

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). 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 Nat'l Collegiate Student Loan Trusts Litig.*, 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.'") (emphasis in original) (citing 12 Del. C. § 3806(c)).

Highland also ignores the cases cited in the Appellant Brief establishing that Mr. Seery's refusal to issue the GUC Certification and recognize the vesting of Classes 10 and 11 warrants treating those classes as fully vested. "[V]esting cannot

[11] CTA § 11.10, ROA.000960.

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." *Est. 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) ("[W]hen there is [unreasonable] delay, contingent interests vest at the time distribution should have been made."). In short, Appellants' contingent interests should have been recognized as vested long ago. Thus, as Appellants properly pled, the law treats Appellants as Claimant Trust Beneficiaries regardless of the language of the CTA.

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

As Appellants also argued in their opening brief, the bankruptcy court erred by concluding that Counts II and III of Appellants' Complaint, which seek declaratory relief, should be dismissed because those counts are "predicated on the court first granting the relief requested in Count I."[12] Specifically, Appellants argued that, because Count I states a valid claim, therefore Counts II and III—which are requests for declaratory relief based on entitlement to the same information sought in Count I—should not have been dismissed.

[12] Order at ROA.000110, 112.

In response, Highland argues that Appellants purportedly mischaracterize the basis for the bankruptcy court's dismissal of Counts II and III as a dismissal under Federal Rule of Civil Procedure 12(b)(6), rather than a dismissal for lack of subject matter jurisdiction. According to Highland, "this Court cannot reverse a decision that the Bankruptcy Court never made." Appellee Brief at 28-29.

There is no dispute that the bankruptcy court dismissed Count I under Rule 12(b)(6) and that Counts II and III were dismissed because they were "predicated on the court first granting the relief requested in Count I." *See* Opinion at 33 and 35. Therefore, regardless of whether Counts II and III were technically dismissed under Rule 12(b)(6) or for lack of subject matter jurisdiction, the underlying reason for the dismissal of Counts II and II was the dismissal of Count I under 12(b)(6). Accordingly, the dismissal of Counts II and III should be reversed if the Court concludes that the dismissal of Count I was improper.

D. Count Three Does Not Seek an Advisory Opinion.

Highland argues that the bankruptcy court properly dismissed Count III because it sought an impermissible advisory opinion. Appellee Brief at 29-32. Specifically, the bankruptcy court concluded that "Plaintiffs' request for 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."[13] As demonstrated in the Appellant Brief, the bankruptcy court was incorrect because Count III is based on well-pled facts and is not dependent upon mere hypothetical facts. Appellant Brief at 26-30.

As Appellants explained, Count III 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[.]"[14] Specifically, Count III 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 Appellants' Contingent Trust Interests are effectively vested. In response, Highland continues to argue that this determination will need to be made based on the "speculative, unrealized value of the Claimant Trust's assets." Appellee Brief at 31.

Highland is incorrect. As Appellants stated in their Appellant Brief, they are not seeking a declaration as to value at some future time. Appellants are specifically seeking a declaration related to the value of the assets when this proceeding is

[13] Order at ROA.000112.
[14] Complaint at ¶ 94, ROA.002639.

determined. Appellant Brief at 27-28. Appellees fail to address why such a determination would be "speculative."

In support of its finding that Appellants' claims were not ripe, the bankruptcy court cited *Val-Com Acquisitions Tr., v. Chase Home Fin., L.L.C.*, 434 F. App'x 395, 395-96 (5th Cir. 2011) for the proposition that federal courts are not permitted to issue an opinion based on hypothetical, conjectural and conditional facts.[15] In their Appellant Brief, Appellants explained that *Val-Com* is easily distinguished because there was no actual dispute or controversy at issue in that case. Appellant Brief at 29-30. Apparently, Highland concedes this point because it makes no mention of the case in its Appellee Brief. Instead, Highland now cites *Jpay LLC v. Burton*, No. 3:22-CV-1492-E, 2023 WL 5253041, at *10 (N.D. Tex. Aug. 15, 2023) for the proposition that a court cannot make an "abstract determination." Appellee Brief at 31.

Jpay is also unavailing. In that case, the Court was only addressing whether the plaintiff satisfied the amount-in-controversy requirement for diversity jurisdiction. *Id.* at *1. To satisfy that requirement, the plaintiff argued that the Court should look—not only at the amounts in controversy in that case—but also at the damages it was seeking in another related case. *Id.* at *3. Specifically, the plaintiff was trying to include a "theoretical class" of users of the plaintiff's services that was

[15] Order at ROA.000112.

not before the Court. *Id.* at *10. The Court declined to do this because, to do so, the Court would have been "rendering an opinion about that hypothetical class on hypothetical facts," which constitutes a classic advisory opinion. *Id.* at *10. Here, by contrast, Appellants are seeking a determination of the value of Claimant Trust assets at the time of a decision in this proceeding, and those assets are the only issue in the underlying litigation. Thus, neither *Val-Com Acquisitions* nor *Jpay* supports the bankruptcy court's conclusion that Count III called for an impermissible advisory opinion.

E. Mr. Seery Cannot Withhold GUC Certification based on Future Legal Expenses that Are Uncertain

Finally, Highland argues that "[i]n 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 Appellants' Contingent Trust Interests 'are likely to vest' is contingent upon a number of unknown and contingent variables…." Appellee Brief at 30. However, under generally accepted accounting principles ("GAAP"), as encoded in the Accounting Standards Codification ("ASC"), simply because future contingent liabilities *may* cause the estate to become insolvent in the future does not mean that the estate *is* insolvent today.

Under ASC 450-20-25-2, for a potential future expense to be accrued on a balance sheet today, the future expense[16] must be (1) probable, meaning likely to occur in the future, and (2) reasonably estimable.[17] PriceWaterhouseCoopers' guide to United States financial statements indicates that probable "is generally considered a 75% threshold."[18] Estimable is met when the future expense is a specific amount or within a specific range of amounts.[19] If there is no certainty about what amount of expenses is most likely in the estimable range, then the lowest amount should be accrued.[20] Future expenses that do not meet the probable and estimable requirements "shall not be accrued" on a company's financials.[21] All of this is separate from "reserves," which are "an amount of unidentified or unsegregated assets held or retained for a specific purpose" that are not involved in the accrual process for the financial statements.[22]

Highland cannot reasonably claim Mr. Seery is withholding the GUC Certification based on the prospect of potential, uncertain, future legal expenses. The May 2023 Balance Sheet disclosed by Highland included no loss contingencies for

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[16] "The term loss is used for convenience to include many charges against income that are commonly referred to as expenses…" ASC 450-20-20.
[17] https://asc.fasb.org/450/20/showallinonepage.
[18] https://viewpoint.pwc.com/dt/us/en/pwc/accounting_guides/financial_statement_/financial_statement___18_US/chapter_23_commitmen_US/234_contingencies_US.html#pwc-topic.dita_1409044012150090.
[19] ASC 450-20-25-5.
[20] ASC 450-20-30-1.
[21] ASC 450-20-25-2 and 450-20-50-5.
[22] ASC450-20-50-1.

future litigation risks or expenses.[23] Highland has disclosed no such accruals since April 2023, and cannot do so because it has specifically argued that such amounts "remain[ ] unknown." Appellee Brief at 30. Accordingly, Highland's future litigation expenses are neither probable nor estimable and cannot meet the GAAP standards for a current, accrued financial liability. Furthermore, while Highland argues that Mr. Seery may "set indemnification reserves" (Appellee Brief at 27), ASC-40-20-50-1 makes it clear that loss reserves are about setting aside monies for potential future expenses, but have nothing to do with a company's current financial condition. As a result, future litigation expenditures are not a *current* reason to withhold the GUC Certification.[24] Even without the GUC Certification, the estate's balance sheet showing more assets than liabilities means that, under GAAP, there is net "equity" today for the Class 10 and 11 Claimants, including Appellants. Under GAAP, the fact that indemnity expenses may cause the estate to lose net equity tomorrow cannot change the fact that the Appellants have a clear financial interest today that the Court should deem standing to protect.

[23] ROA.001847-1848.

[24] Highland might argue it not bound by GAAP. However, absent an alternative, agreed standard, GAAP should be utilized as the generally accepted standard.

III. CONCLUSION

Appellants respectfully request that the Court reverse the bankruptcy court's Order dismissing Appellants' Complaint and remand the case with instructions to allow the adversary proceeding to go forward.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/Deborah Deitsch-Perez
Deborah Deitsch-Perez

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 21, 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