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

In re	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Reorganized Debtor.[1]	§	
	§	

OBJECTION OF THE DUGABOY INVESTMENT TRUST TO MOTION FOR AN ORDER FURTHER EXTENDING DURATION OF TRUSTS

[1] The *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., (As Modified)* [Dkt. 1808] ("*Plan*"), filed by Highland Capital Management, L.P. ("*HCMLP*") became effective on August 11, 2021 (the "*Effective Date*").

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TABLE OF CONTENTS

The Dugaboy Investment Trust ("Dugaboy") hereby objects to the motion of the Highland Claimant Trust ("Claimant Trust") and the Highland Litigation Sub-Trust ("Litigation Trust," and together with the Claimant Trust, the "Trusts"), formed under the confirmed and effective Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified) [Dkt. 1808] ("Plan"), for entry of an order further extending the duration of the Trusts through and including August 11, 2026 ("Motion") [Dkt. 4213].

I. INTRODUCTION

1. Over four years after Plan confirmation and after having disbursed more $376 million on $397 million of allowed claims, the Trusts seek a year extension of their existence without any specific justification for needing additional time. Yet under the Claimant Trust Agreement ("CTA"), "[t]he Claimant Trust shall not continue . . . except to the extent reasonably necessary to monetize and distribute the Claimant Trust Assets . . ." [CTA, § 2.2(a)], and the Claimant Trustee is duty-bound to "manage and monetize the Claimant Trust Assets in an expeditious but orderly manner with a view towards maximizing value within a reasonable time period. . . ." [CTA, 2.3(b)(i)]. These concepts of an expeditious and prompt monetization of the Claimant Trust Assets are echoed throughout the CTA:

a. "The Claimant Trust shall be administered by the Claimant Trustee . . . to oversee the . . .monetization of the Reorganized Debtor Assets . . . with a view toward maximizing value ***in a reasonable time*** . . . ." CTA § 2.3(b)(viii) (emphasis added).

b. "[T]he Claimant Trustee shall, in an ***expeditious but orderly manner***, monetize the Claimant Trust Assets, make timely distributions and ***not unduly prolong the duration of the Claimant Trust***." CTA § 3.2(a) (emphasis added).

c. "The Claimant Trustee will monetize the Claimant Trust Assets with a view toward maximizing value ***in a reasonable time***." CTA § 3.2(a) (emphasis added).

2. This means the Claimant Trust will pay (at least) another year of Mr. Seery's $150,000 a month salary plus potential additional unknown sums, along with paying the cost of a staff of numerous but unspecified others, and a huge complement of expensive professionals, to preside over what is admittedly largely a pile of cash. The Motion fails to provide any financial data to support the Motion other than conclusory, unsupported references to litigation. In other words, as explained below, the Trusts fail to allege a good faith basis or cause to extend the duration of the Trusts. In the absence of any data- or evidentiary-driven justification for the Motion, it should be denied.

3. Moreover, the Trusts fail to admit that they actually seek to remain in existence for several more years, with all the concomitant costs. The Debtor just filed a motion for approval of a settlement with Hunter Mountain Investment Trust (discussed further below) that indicates the Trusts intend to remain in existence until 2029.[2] At a minimum, Dugaboy (and any other interested parties) should be permitted to take discovery as to whether it is necessary for the Trusts to continue to exist, and, if so, for how long they are actually necessary, and what their continued existence will cost.

II. ARGUMENT

A. The Trusts' Motion Fails to Provide the Justification Necessary to Support the Requested Extension

4. Extending the duration of the Trusts is not a matter to be lightly undertaken. The Trusts were supposed to have ended already, under the terms of the CTA. CTA § 14 (contemplated

[2] *See* Motion for Entry of an Order Pursuant to Bankruptcy Rule 9019 and 11 U.S.C. § 363 Approving Settlement With The HMIT Entities And Authorizing Actions Consistent Therewith, filed May 19, 2025, Bankr. Dkt. No. 4216 at ¶ 21 ("Subject to certain conditions precedent, the Indemnity Trust will make subsequent distributions Pro Rata to the Holders of allowed Class 10 Claims or Equity Interests with a final distribution date estimated to be on or about April 1, 2029.").

three-year term from the Effective Date). An extension is only permitted if it is "necessary" to complete the liquidation of the Claimant Trust Assets. *Id*. Nothing in the Trusts' Motion provides and explanation of how the extension is "necessary."

5. Rather, the Trusts' Motion raises a host of questions, all of which should be answered before entering any order allowing the Trusts to continue in existence: (1) Why hasn't the estate been liquidating more assets so that distributions can be made to creditors and former equity? (2) What particular assets remain in the estate and what is the value of those assets? (3) How much money is in the indemnity sub-trust? (4) How many employees are the Trusts continuing to employ on work related to the estate and what compensation (including bonuses) have those employees received or been promised? (5) Is the compensation being paid to the Trusts' professionals reasonable given the very limited duties remaining?

6. Obtaining answers to these questions is essential because, although the operative plan is a liquating plan, the Trusts appear to be focusing on litigation instead of proceeding with the timely and orderly liquidation of the Claimant Trust's assets for the benefit of the creditors and former equity, which is the Claimant Trust's express purpose.

7. This is especially so in this case where it is evident that the estate has sufficient assets to pay all unsecured creditors in full, meaning that the Litigation Trustee does not have standing to prosecute its claims in the Kirschner Litigation and that case should be dismissed, not deployed as an excuse to keep the Trusts alive and spend more of the estate's funds.[3] If in fact an analysis of the estate shows that all creditors can be paid, then the duty of good faith and fair dealing (which the

[3] *See* 26 C.F.R. § 301.7701-4(d) ("However, if the liquidation is unreasonably prolonged or if the liquidation purpose becomes so obscured by business activities that the declared purpose of liquidation can be said to be lost or abandoned, the status of the organization will no longer be that of a liquidating trust."); *Est. of Cornell v. Johnson*, 367 P.3d 173, 178 (Idaho 2016) ("[V]esting cannot be postponed by unreasonable delay in distributing an estate and [] when there is such delay, contingent interests vest at the time distribution should have been made.") (discussed in RESTATEMENT (SECOND) OF TRUSTS, § 198 (1959)); *see also Edwards v. Gillis*, 146 Cal.Rptr.3d 256, 263 (Cal.App. 4 Dist., 2012) ("when there is [unreasonable] delay contingent interests vest at the time distribution should have been made.").

CTA acknowledges applies, CTA 4.3) requires the Trustee to make the payments, make the GUC Payment Certification, pay the holders of Contingent Interests (former equity) and dissolve the Trusts, not keep them artificially alive to benefit the administrators of the Trusts and their professionals.

8. Requesting at least one more year to liquidate and wind down the estate is particularly troublesome in view of the already colossal and largely unexplained spending by the Debtor, the Trusts, and their professionals to date. As Dugaboy has previously pointed out, estate professionals have earned more than $250 million in fees and continue to accrue fees at an alarming and irresponsible rate. Yet the post-confirmation estate has been structured in a way that precludes any checks on this unmitigated spending. Ironically, Pachulski and the Unsecured Creditors Committee advocated removal of pre-bankruptcy management to avoid the cannibalization of the estate, but "independent" management has somehow been permitted to do that very thing.

9. In light of the estate's solvency, the former equity holders have made continuous efforts to obtain meaningful financial information about the estate and to hold estate professionals accountable for their continued professional spend. After all, any continued erosion of the estate comes directly out of the pockets of Class 10 and 11 claimholders. This is particularly true for Dugaboy, now that HMIT has attempted to negotiate a pot of cash for itself despite the continued information vacuum that the Trusts have insisted on maintaining.

10. The consequence of the Court's continued refusal to scrutinize Mr. Seery's management of the Claimant Trust and the value of the estate is significant. Any reasonable observer could surmise that the Claimant Trust has sufficient assets to pay Class 8 and 9 claimholders in full with interest and to certify that Class 10 and 11 claimholders are "Claimant Trust Beneficiaries" with a right to the surplus of the estate.

11. But without the Court's willingness to examine the reasons for the Trusts' continued existence and their continued spending, Mr. Seery may continue to hold the Claimant Trust hostage

to protect his own interests—in direct contravention of his fiduciary duties under applicable Delaware Trust law. That is precisely why the Court should demand answers and transparency (or allow necessary discovery) prior to granting the Trusts' Motion.

B. A Substantial Portion of the Remaining Litigation Was Commenced or Expanded by the Debtor

12. The Trusts argue that a continuation of their existence is necessary because of unresolved litigation that they contend was caused by Mr. Dondero and his affiliates. Specifically, the Trusts claim that "a significant portion of the Claimant Trusts' time has been devoted to addressing litigation initiated or caused by James Dondero and his affiliates" and attach Exhibit B, which contains a list of that unresolved litigation. Motion at ¶ 13.

13. An analysis of Exhibit B, however, demonstrates that a substantial portion of the unresolved litigation was necessitated by Debtor conduct, or commenced or expanded by the Debtor, and/or stayed indefinitely at the behest of the Debtor. And none of it justifies the proposed year-long extension of the life of the Trusts.

- *Dondero v. Jernigan*, Case No. 24-10287 (5th Cir.) (Jernigan Recusal Litigation): This is a case in which the Fifth Circuit has acknowledged that "a strong argument could be made that [Judge Jernigan] had a duty to recuse." April 16, 2025 Fifth Circuit Panel Op. at 15. In other words, it is a case that Dondero and Dugaboy were and are justified in pursuing. In any event, few proceedings relating to recusal remain, and the Trusts make no effort to quantify the reserve needed to resolve the case.
- *HCMFA v. HCMLP*, Case No. 23-10534 (5th Cir.) ("*Highland II*") (Confirmation/Gatekeeper Appeal): This is an appeal justifiably taken to ensure that this Court properly implemented the Fifth Circuit's instructions in *In re Highland Cap. Mgmt., L.P.*, 48 F.4th 419 (5th Cir. 2022) ("*Highland I*") by narrowing the scope of the Plan's injunction provision and gatekeeper clause coextensively with the Plan's

exculpation provision. HCMFA recently *prevailed* in the appeal, and the Fifth Circuit *denied* Highland's petition for rehearing, its petition for rehearing en banc, and its motion to stay the mandate pending a petition for writ of certiorari. *See Highland Capital Mgmt., L.P. v. Highland Cap. Mgmt. Fund Advisors, L.P.*, No. 23-10534, Dkt. No. 68 (March 18, 2025) (finding the Bankruptcy Court erred by failing to follow *Highland I*'s instruction to narrow the injunction provision and gatekeeper clause); *id.*, Dkt. 83 (April 28, 2025) (denying petitions for rehearing and rehearing en banc); *id.*, Dkt. No. 105 (May 22, 2025) (denying the Debtor's motion to stay the mandate). Indeed, it is the Debtor and the Trusts that have been pursuing costly efforts to impermissibly broaden the gatekeeper and to chill oversight of the estate, all of which have been rejected.[4] In any event, few proceedings relating to the blue-penciling of the gatekeeper clause remain (except the Debtor's own misguided effort to seek Supreme Court review of the Fifth Circuit's order upholding *Highland I*), and the Trusts make no effort to quantify the reserve needed to resolve the case.

- *HMIT v. HCMLP*, Case No. 3:23-cv-02071-E (N.D. Tex.) (Claims Trading Appeal): This is a case where the Debtor and the Court insisted on a full evidentiary hearing to determine, under the overbroad gatekeeper clause, whether HMIT and Dugaboy had stated a colorable claim. But the Fifth Circuit in *Highland II* has now held that the Bankruptcy Court had no gatekeeping authority over the many of the claims raised by HMIT. Thus, much of the cost of the gatekeeping proceedings could have been avoided had Highland not encouraged the Bankruptcy Court to adopt an unduly restrictive reading of the Fifth Circuit's directive in *Highland I* and to retain the

[4] *See also* December 23, 2024 Memorandum Opinion and Order (denying HCMLP's Motion to Deem the Dondero Entities Vexatious Litigants), Civil Action No. 3:21-cv-0881-X, Doc. 234.

overbroad protection of the original gatekeeper clause. Moreover, the proposed settlement between HMIT, the Debtor, and the Trusts would resolve this case, removing it as a justification for extension of the Trusts.

- *HCRE v. HCMLP*, Case No. 3:24-cv-1479-S (N.D. Tex.) (HCRE Appeal of Bad Faith Order): The Bankruptcy Court granted the Debtor's motion for bad faith finding and sanctions against NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC ("HCRE"), and HCRE appealed that order. The appeal is fully briefed and pending in the District Court. This litigation would have been simple and considerably less costly had the Debtor not fought to keep it alive solely for the purpose of seeking sanctions, and insisted on a conducting a full evidentiary hearing on a proof of claim that HCRE had long sought to withdraw. In other words, the Debtor and Trusts are responsible for multiplying the cost. But in any event, few proceedings relating to the Bad Faith Order remain, and the Trusts make no effort to quantify the reserve needed to resolve the matter.
- *Dugaboy v. HCMLP*, Case No. 3:24-cv-01531-X (N.D. Tex.) (Appeal of Dugaboy Valuation Dismissal): In this litigation, Dugaboy simply sought information about distributions and an accounting of the assets and liabilities held by the Claimant Trust, the same information that is necessary to determine whether the pending Motion is necessary. This litigation would have been simple and less costly had the Claimant Trust simply provided this information. But in any event, the pending appeal relates to a narrow issue, and the Trusts make no effort to quantify the reserve needed to resolve the matter.
- *HMIT v. Seery*, Case No. 3:24-cv-01786- BW (N.D. Tex.): In this proceeding, HMIT sought removal of Seery as Claimant Trustee through a motion for leave that was

stayed by the Bankruptcy Court. But based on *Highland II*, this is a dispute over which the Bankruptcy Court has no gatekeeping authority. Thus, all of the costs of the gatekeeping proceedings were incurred because of the Debtor's and Trusts' wrongful application of the gatekeeper clause of the Plan.

- *Kirschner v. Dondero*, Adv. Proc. No. 21-03076-sgj (Bankr. N.D. Tex.): This proceeding was instituted by Mr. Kirschner, the Litigation Trustee, and stayed in the Bankruptcy Court pursuant to a request made by Mr. Kirschner. Moreover, it is by now apparent that the costly litigation never should have been filed because the estate is, and always has been, solvent and capable of paying all creditors' claims in full.
- Dugaboy's Motion to Preserve Evidence and Compel Forensic Imaging of James P. Seery, Jr.'s iPhone, Bankr. Dkt. No. 3802: This dispute was stayed, along with several other disputes, pursuant to the Bankruptcy Court's Order Granting In Part and Denying In Part Motion To Stay And To Compel Mediation [Dkt. No. 3897] on August 2, 2023. And the motion was only made necessary because Mr. Seery admittedly failed to preserve communications sent from and received on his personal cell phone. In any event, the Trusts make no effort to quantify the reserve needed to resolve the dispute.
- *Highland v. Daugherty*, Adv. Proc. No. 25-03055-sgj (Bankr. N.D. Tex.) (Objection to Patrick Daugherty's Remaining Disputed Proof of Claim): This dispute was commenced by the estate against Patrick Daugherty. Mr. Dondero and his entities have no involvement in the dispute.

14. In short, nothing in the Trusts' Exhibit B supports the notion that Mr. Dondero and his affiliates have prevented a full liquidation and winding down of the estate. Nor does Exhibit B help demonstrate why another year would be necessary to deal with the straggling disputes listed or give any indication of how much money they Trusts believe they need to spend to resolve the disputes.

Without any analysis of the costs versus the benefits of pursuing or defending the above litigation and the budgets for doing so, the litigation is not a valid basis to extend the life of the Trusts. At a minimum, Dugaboy should be allowed discovery with respect to these issues so that remaining stakeholders and the Court may evaluate whether the Trusts' Motion has any merit.

15. Setting aside Exhibit B, the Fifth Circuit has acknowledged that the Bankruptcy Court itself has wrongfully contributed to the unnecessary costs in the estate. Specifically, the Fifth Circuit found, in reversing the contempt order that the Bankruptcy Court had levied on Mr. Dondero, that "Highland incurred virtually all its contempt-related expenses because the bankruptcy court permitted extensive discovery and conducted a marathon evidentiary hearing to unearth Dondero's role in filing the Motion. But Dondero's intentions were relevant only to criminal contempt—a sanction the bankruptcy court was powerless to impose." *Matter of Highland Cap. Mgmt., L.P.*, 98 F.4th 170, 176 (5th Cir. 2024). The Bankruptcy Court similarly permitted the Debtor's witch hunt in the HCRE matter discussed above, which is likely to suffer a similar fate when it reaches the Fifth Circuit, as an entirely unnecessary but expensive exercise in hunting for an excuse to punish Mr. Dondero and his affiliates.

C. The Trusts Should Be Compelled to Provide Additional Information.

16. Given all of these open questions, Dugaboy objects to the continuation of the Trusts unless they provide credible evidence justifying the delay in liquidating the estate, efforts being undertaken to distribute remaining assets to the Class 9 Claimants, and the financial information referenced above. Dugaboy also responds to make it clear that it continues to maintain (and does not waive any argument), among other things, that: (i) counsel that filed the Motion has conflicts of interest and is charging unnecessary fees; (ii) the indemnity fund that has been set aside is excessive; (iii) creditors should be paid in full now; (iv) Mr. Seery should not continue to be paid $150,000 a

month; (v) Dugaboy has a vested interest and is entitled to distributions; and (vi) this case should be resolved.

17. With respect to the Litigation Trust, it has recognized, by staying its only litigation,[5] that litigation to increase the estate's coffers is unnecessary because the estate has more than sufficient assets to pay all creditors in full. Nonetheless, extremely expensive counsel for the Litigation Trust still appears at hearings, including those not remotely pertinent to the Litigation Trust (which is nearly all of the hearings occurring at this juncture). Dugaboy therefore respectfully requests that the Litigation Trust and its professionals cease all such activities unless those activities are undertaken at no expense to the estate. For the same reason, if the Litigation Trust or its professionals are receiving any periodic stipends (such as flat fees or data hosting fees), Dugaboy requests that those also be ceased.[6]

D. The United States Trustee Should Intervene and Investigate.

18. By this Objection, Dugaboy reiterates its prior pleas[7] and requests that the United States Trustee intervene and investigate the post-confirmation management of the Debtor's estate to encourage better oversight and transparency. The post-confirmation trust structure created by the Debtor has been the linchpin of its efforts to obfuscate estate value and to prevent resolution of the estate for the benefit of all creditors. It appears as though post-confirmation management is content to indefinitely increase the pot for the Indemnity Sub-trust, so long as that creates enough of a drain to make the estate look insolvent and to prevent the payoff of creditor claims. Indeed, it appears that Mr. Seery is intent on disenfranchising former equity rather than efficiently and timely monetizing

[5] The Litigation Trustees' Motion to Stay the Adversary Proceeding, filed March 24, 2023, Adv. Pro. No. 21-03076-sgj at Dkt. 324.

[6] Nothing in this response should be construed as a waiver of Dugaboy's rights, as allowed by law, to challenge the attorneys' fees received by either counsel for the Claimant Trust or the Litigation Trust, which rights are specifically reserved.

[7] *See, e.g.*, Letter dated August 20, 2024 from Counsel from Dugaboy to Executive Office of the US Trustee annexed hereto as Exhibit A.

and resolving the estate as required by the CTA. As such, Dugaboy continues to believe that such an intervention is proper and would benefit all parties involved in this bankruptcy to the extent that the Motion is granted and the Trusts are extended.

III. CONCLUSION

For the foregoing reasons, Dugaboy requests that the Trusts' Motion be denied or, alternatively, if it is granted, the Trusts should be compelled to produce the information requested in this response.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 29, 2025, a true and correct copy of this document was served electronically via the Court's CM/ECF system to the parties registered or otherwise entitled to receive electronic notices in this case.

/s/Deborah Deitsch-Perez
Deborah Deitsch-Perez

Exhibit A

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August 20, 2024

VIA EXPRESS MAIL

Ms. Tara Twomey
Director
Executive Office for U.S. Trustees
Department of Justice
441 G Street, NW, Suite 6150
Washington, D.C. 20530

Re: *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj (Bankr. N.D. Tex.)

Dear Ms. Twomey:

I am writing to further update you on further developments in the Chapter 11 bankruptcy proceeding of Highland Capital Management, L.P. ("Highland') that we believe should be of interest to the Executive Office of the United States Trustee ("EOUST") and the acting United States Trustee. As explained in previous correspondence to your office, my firm represents several stakeholders in the Highland bankruptcy, including The Dugaboy Investment Trust ("Dugaboy")—a former equity holder and a current Class 10 creditor—and Highland's co-founder, James D. Dondero.

This letter summarizes (1) my clients' view of why and how the Highland bankruptcy progressed as it did, (2) the problems endemic in that bankruptcy, (3) the problematic mechanics of Highland's plan of reorganization and post-confirmation structure, and (4) the developments that continue to detrimentally impact Highland's estate and stakeholders.

SUMMARY OF BANKRUPTCY

The Highland bankruptcy is unusual for many reasons. Proceedings continue nearly five years after the company's Chapter 11 petition was filed (on October 16, 2019). The court-confirmed plan of reorganization calls for the total liquidation of what we now know is (and likely always has been) a solvent estate. Over the course of the case, equity and pre-bankruptcy management were marginalized and silenced. Key employees were retained then fired without being paid earned compensation. And the estate's hired professionals have made hundreds of millions of dollars at the expense of estate stakeholders.

Much of this was facilitated by the predilections of the presiding judge, who at the outset harbored persistent negative opinions about Highland's pre-bankruptcy management. As Highland's counsel no doubt realized, those opinions could be leveraged to pursue Highland's bankruptcy agenda so long as Mr. Dondero was painted as the villain along the way. That perhaps

explains why Highland's counsel began referring to Mr. Dondero as "vexatious" and "litigious" early in the case and repeated the refrain so often that the Bankruptcy Court adopted those monikers in multiple rulings. Ironically, when those labels first appeared, Mr. Dondero was not a plaintiff in a single action against the estate but was a defendant in at least four. And the label worked: Mr. Dondero has been sidelined by the Bankruptcy Court, locked out of any meaningful participation in the reorganization of the estate, and robbed of any path to recovering any portion of the approximately $860 liquidation-value estate that should have emerged as a going concern from bankruptcy.

Prior to confirmation, Mr. Dondero spent tens of millions of his own money attempting to salvage and retrieve residual value from the company he founded and which he knew could emerge from bankruptcy viable and intact. For that reason, Highland's favorite refrain that Mr. Dondero threatened to "burn the place down" (a threat that only James P. Seery, Jr., Highland's current CEO, seemingly ever heard) makes no sense—Mr. Dondero has always argued that Highland is "highly solvent," and it was always his goal to retake the helm after repayment of creditors in full. It makes no sense that he would he threaten to burn down the company that he created and intended to return to after bankruptcy. Paradoxically, while Mr. Dondero was putting together dozens of settlement offers in an effort to resolve the company's bankruptcy, Highland and its post-bankruptcy management were planning to do the equivalent of burning the place down, by agreeing to a plan of liquidation at the demand of litigation creditors whose only goal was to see Mr. Dondero punished. All the while, neither post-bankruptcy management nor its counsel ever denied that Highland's estate was solvent.

What we know now is that, as a consequence of the obfuscation of estate solvency, the oversight of a biased judge, and a systemic indifference to the type of transparency that is supposed to be the hallmark of the public bankruptcy process, myriad problems have arisen and persisted. Among other things:

- Although Highland came into bankruptcy with more than $560 million in net assets and a single liquidated judgment creditor (holding an arbitration award of what was expected to be approximately $110 million), a quick restructuring of that debt and a reorganization did not occur as planned. Instead, a bankruptcy petition that was filed in Delaware (Highland's state of organization) landed in the United States Bankruptcy Court for the Northern District of Texas, over the objection of Highland's counsel (at a time when it was still aligned with pre-bankruptcy management) and has persisted unabated for nearly five years.

- Without any evidentiary hearing to ascertain the company's financial status or management adequacy, Mr. Dondero immediately was forced out of management (under the threat of the appointment of a chapter 11 trustee) and then unceremoniously fired from his position as an unpaid portfolio manager when he vocalized his disagreement with decisions being made by bankruptcy management.

- Mr. Dondero made dozens of unanswered offers to settle the estate, many of which projected greater recoveries to creditors than what bankruptcy management had promised and all of which would have allowed Highland to continue as a going concern. After refusing to respond to those offers, Highland unveiled its own liquidation plan and refused to change course. Because the Bankruptcy Court approved virtually everything Highland's new management proposed, the Court ignored prior management's claims of solvency, refused to appoint an examiner to

determine solvency, failed to insist that Highland file required Rule 2015.3 reports, and confirmed a plan calling for the total liquidation of Highland's assets and the winding up of its business.

- At a time when Highland's bankruptcy management was reporting massive losses in value to the estate (approximately $238 million over a less than 12-month period) and a $100 million increase in creditor claims (further eroding estate value), two hedge funds, Farallon Capital Management ("Farallon") and Stonehill Capital Management ("Stonehill") (through their proxies Muck Holdings and Jessup holdings, respectively) bought the majority of outstanding unsecured creditor claims for approximately $160 million.[1] As far as we are aware, Farallon and Stonehill purchased the claims without conducting any due diligence. Prior letters to your office have explained why our clients (and other bankruptcy stakeholders) believe that Farallon and Stonehill made these investments only because they had access to non-public information regarding the value of Highland's estate. Yet to date, the Bankruptcy Court has foreclosed all efforts by former equity to obtain information or to pursue other relief (including lawsuits for insider trading, breach of fiduciary duty, and fraud) relating to the claims trades. Notably, at the time of the trades, based on our clients' estimates, the estate had cash of over $100 million and could have instead resolved the selling unsecured creditors' claims and returned the remaining estate to equity.

- Remarkably, within 14 months of the effective date of Highland's plan of reorganization, the estate had paid out $250 million to unsecured creditors and has since paid out another $160 million, representing a windfall return to Farallon and Stonehill.

- And during the bankruptcy proceedings, estate professionals have earned more than $250 million in fees and continue to accrue fees at an astronomical rate. Yet the post-confirmation estate has been structured in a way that precludes any checks on this unmitigated spend. Ironically, Highland's counsel and the Unsecured Creditors Committee advocated removal of pre-bankruptcy management to avoid the cannibalization of the estate, but independent management seemingly has been permitted to do that very thing.

Against this backdrop, it is little wonder that Mr. Dondero and former equity (now deemed "Contingent Interest Holders" under the plan of reorganization) have refused to stand down. They continue to demand information, explanations, and accountability from the management and professionals that have seen fit to liquidate a solvent company and rack up fees at the expense of residual equity holders.

REGULATORY FRAMEWORK

As discussed at length in my prior letter of September 8, 2023, the USTP's mission is "to promote the integrity and efficiency of the nation's bankruptcy system for the benefit of all stakeholders." USTP, *FY 2024 Performance Budget Congressional Submission* (March 2023)

[1] Our clients are informed and believe that Michael Linn and Rajev Patel at Farallon, and John Motulsky at Stonehill were involved in the transactions at issue and that Farallon and Stonehill purchased the claims based on representations made to them by Mr. Seery.

("USTP, *Congressional Submission*"). That mission depends in critical part on transparency, one of the core "linchpins" of the bankruptcy system. *See* Clifford J. White, *USTP Focuses on Professional Fees, Corporate Governance, and Predictability and Transparency in Chapter 11*, ABI Journal Vol. XXXV, No. 5 (May 2016) ("White, *Transparency in Chapter 11*").

The need for transparency is particularly acute with respect to plan-created post-confirmation trusts. Indeed, the USTP has recognized that the increasing use of post-confirmation trusts (which are often "thinly described in the disclosure statement and the plan of reorganization") has compromised transparency in bankruptcy. White, *Transparency in Chapter 11*, at 9. As a result, a Commission of the American Bankruptcy Institute ("ABI") has recommended changes in law that would require more detailed disclosures surrounding the management and operation of post-confirmation trusts. *See* ABI Commission to Study the Reform of Chapter 11, *Final Report and Recommendations* (2012-2014) ("Commission Report").[2] The goal of such changes would be to ensure that all stakeholders, including the public, can see what is transpiring and can have access to critical information. *Id.*

The Commission Report identified several problems involving post-confirmation trusts like the ones that currently govern the Highland estate. Specifically, the Report notes that, prior to confirmation, stakeholders have little or no time to review trust and organizational documents, and then after confirmation, courts do not actively oversee operations or administration of trusts. Further, with respect to governance and operation of post-confirmation entities, disclosure is frequently inadequate. As a result, the Report recommends amendment of the Bankruptcy Code to require, among other things, specific disclosures regarding the assets of the reorganized debtor or other post-confirmation entity, the details of the claims and interests in dispute, and the details of any reconciliation or distribution process. And the U.S. Trustee's office has actively objected to post-confirmation trust structures that obfuscate transparency. *See, e.g.*, *In re INFOW*, No. 22-60020 (Bankr. S.D. Tex. 2022) (criticizing debtor for creating a litigation trust structure that would "avoid shining a light on the entities" and urging court to reject the opaque structure).

In short, it is the duty of the EOUST to administer the USTP in a manner that effectuates the program's core mission, including by demanding transparency in the pre- and post-confirmation management of bankruptcy estates, ensuring that pre- and post-confirmation reports contain meaningful detail that will allow creditors and other stakeholders to evaluate the financial operations and health of the debtor's business, and promoting expediency in the resolution of bankruptcy estates.

PLAN MECHANICS AND POST-REORGANIZATION STRUCTURE

This regulatory backdrop makes apparent that the structure of Highland's post-confirmation estate presents many of the transparency problems that the EOUST has sought to eliminate.

On February 22, 2021, the Bankruptcy Court confirmed Highland's Fifth Amended Plan of Reorganization (as Modified) (the "Plan"), and that Plan became effective on August 11, 2021. *See In re Highland Capital Mgmt., L.P.*, Case No. 19-34054-sgj (Bankr. N.D. Tex.), Dkts. 1943,

[2] Notably, the acting CEO and Chief Restructuring Officer in the Highland bankruptcy, James P. Seery, Jr., was a Commission member and personally signed the Commission Report. *See https://commission.abi.org/commission-members*.

2700.[3] The Plan called for the timely and orderly liquidation of Highland's estate and the payment of 11 classes of claims. Claims 1-7 consist of secured, priority, and convenience claims. Class 8 consists of general unsecured claims. Class 9 consists of subordinated claims. And Highland's former equity holders, including Dugaboy and Hunter Mountain Investment Trust ("HMIT"), were assigned Class 10 and 11 claims. *See* Dkt. 1943, Ex. A at Art. III, § B.

The Plan contemplated that most of Highland's assets would be monetized and managed by a Claimant Trust pursuant to a separate Claimant Trust Agreement ("CTA"). The CTA named Mr. Seery (Highland's acting CEO and Chief Restructuring Officer) as the Claimant Trustee, whose management of the Claimant Trust was to be overseen by a five-member Oversight Board, to include at least two disinterested members. Dkt. 3521-1 at § 4.1.[4]

Under the terms of the Claimant Trust Agreement, "Claimant Trust Beneficiaries" include (1) holders of allowed general unsecured claims, (2) holders of allowed subordinated claims, and (3) upon certification by the Claimant Trustee that holders of allowed general unsecured claims and allowed subordinated claims have been paid in full with interest, the holders of Class 10 and 11 claims. Dkt. 3521-5 at § 1.1(h). Consistent with the Plan's waterfall, upon paying holders of claims in Classes 1-9 in full with interest, the Claimant Trustee is obligated to file with the Bankruptcy Court a certification (called the "GUC Certification" in the CTA) deeming Class 10 and 11 claimholders "Beneficiaries" of the CTA with entitlement to distributions of residual assets. *Id.* at § 5.1(c).

The Plan also called for the creation of a Litigation Sub-Trust, managed by a Litigation Trustee, to litigate claims for the benefit of the estate, and a Reorganized Debtor, tasked with managing a smaller bucket of assets and winding down certain managed funds. Dkt. 1943 at ¶ 42(b); *id.*, Ex. A at Art. IV, § B.1.

The Plan did not contemplate the creation of any other trusts or entities for the management of Highland's post-reorganization assets. Nonetheless, four months after Plan confirmation, Highland filed a motion seeking the Bankruptcy Court's authorization to create an "Indemnity Subtrust" (the "Indemnity Subtrust Motion"). Dkt. 2491. According to the Motion, the Indemnity Subtrust would be funded by the estate through an indemnity subtrust account with a balance of "not less than $25 million" that would conditionally indemnify post-confirmation professionals "in lieu of obtaining D&O insurance." *Id.* at ¶¶ 21, 26. The parties conditionally indemnified under the Indemnity Subtrust include Mr. Seery as Claimant Trustee, the Oversight Board and its members, their professionals, the Litigation Trustee, Reorganized Debtor and its partners, members, directors, and officers, and the new general partner of the Reorganized Debtor and its partners, members, directors, and officers (including Mr. Seery). *Id.* at ¶ 18 n.8; *see also* CTA, Dkt. 3521-5 at § 8.2. Over various objections, the Bankruptcy Court granted the Indemnity Subtrust Motion on July 21, 2021. Dkt. 2599.

The Indemnity Subtrust Motion identified Mr. Seery as the "Indemnity Trust Administrator." Dkt. 2491 at ¶ 21. In his capacity as such, Mr. Seery was given total control over the administration of the Indemnity Subtrust:

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[3] All references to "Dkt." Herein are to the docket in Highland's main bankruptcy case, unless otherwise specified.

[4] The original Oversight Board consisted of representatives of the Unsecured Creditors Committee, including representatives of Acis Capital Management, L.P., the Redeemer Committee, UBS AG London Branch, and Meta-E Discovery. CTA, Dkt. 3521-5 at § 4.1. David Pauker and Paul McVoy (the representative from Meta-E) were named the two "disinterested" members. *Id.*

> . . . For any action contemplated or required in connection with the operation of the Indemnity Trust, and for any guidance or instruction to be provided to the Indemnity Trustee, such functions, rights and responsibility shall be vested in the Indemnity Trust Administrator, and the Indemnity Trustee will take written directions from the Indemnity Trust Administrator, in such form specified in the Indemnity Trust Agreement and otherwise satisfactory to the Indemnity Trustee.

Id. And although Highland's Motion assured the Court that "[b]eneficiaries will not be involved in or have any rights with respect to the administration of the Indemnity Trust or have any right to direct the actions of the Indemnity Trustee with respect to the Indemnity Trust or the assets held in the Indemnity Trust Account," Highland carved out Mr. Seery (to the extent he is acting in his capacity as Indemnity Trust Administrator) from that exclusion. *Id.*

RECENT DEVELOPMENTS

Since our last correspondence, there have been several additional developments in the Highland bankruptcy that should be of interest to the EOUST.

Highland Remains Highly Solvent. As discussed in our last correspondence to your office, after being ordered by the Bankruptcy Court to do so, on July 6, 2023, Highland filed a consolidated balance sheet dated May 31, 2023 (the "Balance Sheet") disclosing, at a high level, the assets and liabilities of the Reorganized Debtor, its general partner, the Claimant Trust. That balance sheet revealed that Highland had approximately $152 million on hand with only $139 million in additional distributions to be made. Dkt. 3872. Since that time, Highland has made additional distributions to allowed unsecured creditors in Classes 8 and 9, bringing its total outstanding liabilities to unsecured creditors to $84 million and the estate's net value to $107 million. Notably, that value does not account for any recoveries in the *Kirschner v. Dondero, et al.* adversary proceeding, which was stayed by the Bankruptcy Court in April 2023, at the request of the Litigation Trustee, when it became apparent that additional funds might not be necessary to settle the estate. *See* Adv. Proc. No. 21-03076-sgj, Dkt. 338. The estate's reported net value also excludes any recovery from the so-called "notes litigation"—a series of adversary proceedings instituted by Highland to recover on various promissory notes—for which the defendants have already deposited security of approximately $72 million into the registry of the United States District Court for the Northern District of Texas. *See Highland Capital Mgmt., L.P. v. NexPoint Asset Mgmt., L.P., et al.*, Case No. 3:21-cv-00881-X (N.D. Tex.), Dkts. 149, 151, 160-162, 187.

That Balance Sheet disclosed that, contrary to the representations made by Highland and its management to the Bankruptcy Court and the public for years now, *Highland's estate is solvent.* According to the Balance Sheet, as of May 2023, the Claimant Trust has approximately $250 million in assets (of which an estimated $180 million is cash) and only about $126 million in remaining Class 8 and 9 claims. Dkt. 3872 at Ex. A. Since that time, the Post-Confirmation Reports reflect that an additional $29.3 million has been paid to general unsecured creditors. *See* Dkts. 3955, 3956, 4130, 4131. That leaves a balance of $84,138,939 in remaining Class 8 and 9 claims. *See* Post-Confirmation Reports, Dkts. 4130 at 7; 4131 at 7 (subtracting the total "Paid Cumulative" from the "Allowed Claims" amounts). The Reports do not disclose the current cash position of the Claimant Trust. Cash may have increased or decreased. But in the worst case, adjusting the cash from amounts shown in the Balance Sheet by the amounts paid to Classes 8 and 9, the Trust still has plenty of cash to resolve all outstanding Class 8 and 9 claims.

Nor do the assets disclosed in the Balance Sheet include a fully cash-funded indemnity account (reportedly now containing $50 million) that could be used to pay creditors if it is not consumed by the estate's professionals. *See* Dkt. 3872 at Ex. A n.1. In addition, to reduce the Claimant Trust's book value, Highland purported to add "non-book" adjustments to the balance sheet. One such adjustment gives zero asset value to the notes payable in the "notes litigation." *Id.* at Ex. A. However, as previously explained, $72 million of those notes are now fully bonded by cash deposited in the registry of District Court.

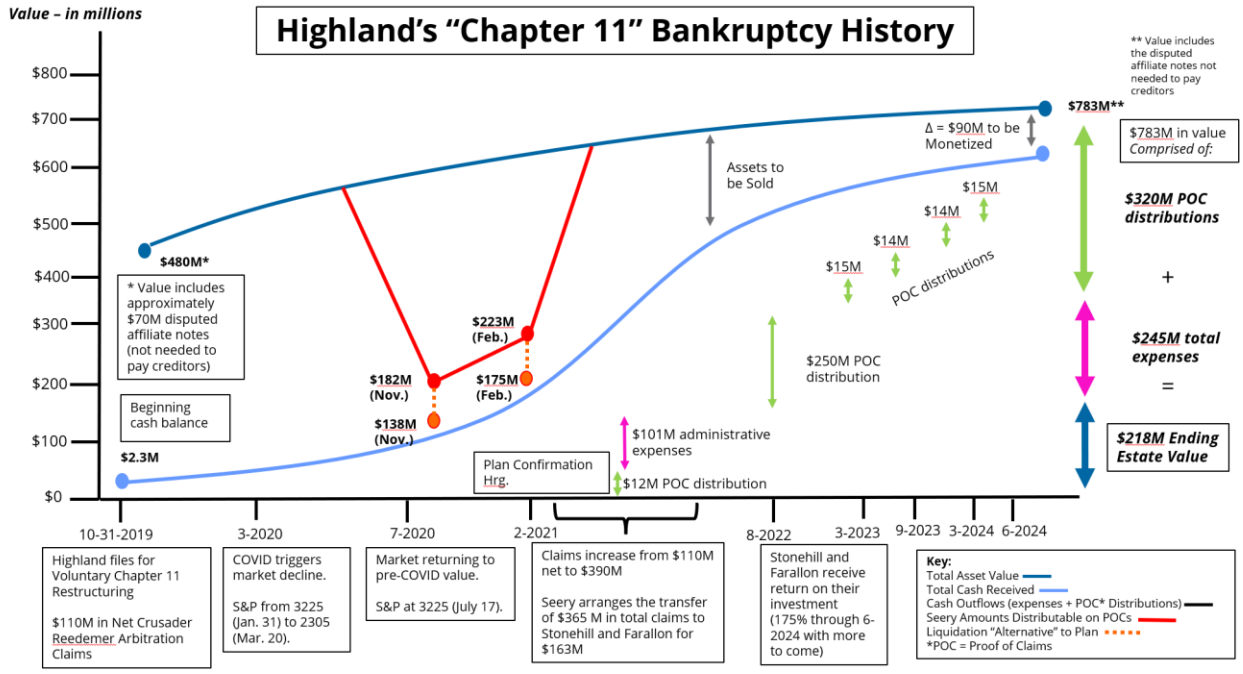
Another accounting "adjustment" includes a $90 million "additional indemnification reserve," on top of the at least $35 million (but perhaps as high as $50 million) cash indemnity reserve, with no explanation. *See* Dkt. 3872 at Ex. A. Importantly, were it not for the approximately $125-$140 million indemnity reserve—which is $100 million more than Highland originally told the Bankruptcy Court it would need to ensure estate professionals—Highland's creditors could have been paid and the estate returned to equity months if not years ago.

Highland's recent admission that it is solvent is significant for other reasons as well. First, the admission flies in the face of representations repeatedly made to the Court, creditors, and other stakeholders—including in the Plan and supporting documents—that the estate was insolvent and incapable of paying creditors in full.[5] That position led to the confirmation of a Chapter 11 Plan that did not call for the reorganization of Highland but instead called for its premature liquidation and winding up. That position also allowed Highland's management to repeatedly argue to the courts (including the Bankruptcy Court and the relevant courts of appeal) that equity holders lacked standing to pursue any challenges to bankruptcy orders or management's actions.

Following is a picture of what we understand has actually happened to Highland's financial picture during the course of the Chapter 11 bankruptcy proceedings:

[*Remainder of Page Intentionally Left Blank*]

[5] As previous letters to your office have described, Mr. Dondero and other constituents close to the Highland enterprise have repeatedly told the Court that Highland has always been solvent and, with proper management, could have been reorganized in a manner enabling it to pay creditors in full, to retain key employees, and to continue in business for the benefit of investors and creditors.



Mr. Seery Has Held the Estate Hostage to Protect His Own Interests. Despite the Plan's requirement that Mr. Seery's management of the Claimant Trust be supervised by a five-member, partially independent Oversight Board, that governance structure continues to be ignored. The five-member Board no longer exists. Instead, the Board is comprised of two claims buyers, Muck Holdings and Jessup Holdings, and one ostensibly disinterested member, Richard Katz, about whom no information demonstrating independence was provided with his appointment. *See* Dkt. 2801. The Board's current membership creates potential governance problems. For example, the Board must in many instances approve actions undertaken by the Claimant Trustee by a "majority" vote. *See* Dkt. 3521-5 at §§ 3.3(b)(i)-(xii), 3.4, 3.8, 3.9, and 4.6(a). But if any Board member has a conflict or *potential* conflict of interest with respect to an issue at hand (including, without limitation, a pecuniary interest in the issue), then the conflicted member cannot vote. *Id.* at § 4.6(c). In the case of the current three-member Board, any potential conflict of interest derails a majority vote and precludes the Board from approving actions contemplated by the Claimant Trustee.[6]

Even without this governance problem, the Claimant Trust lacks the requisite safeguards to prevent abuse by the Claimant Trustee. That has proven particularly problematic when it comes to the Claimant Trust's indemnity obligations. Specifically, the CTA states:

> Notwithstanding anything to the contrary contained herein, the Claimant Trustee shall distribute to holders of Trust Interests at least annually the Cash on hand net

[6] There is ample risk of a potential conflict in this case. Two of the three Board members, Muck Holdings and Jessup Holdings, are defendants in a proposed adversary proceeding involving allegations of use of material non-public information in connection with claims trading. *See* Dkt. 3699. Although the Bankruptcy Court denied HMIT leave to pursue the adversary proceeding (*see* Dkts. 3903, 3904), that ruling is currently on appeal. *See Hunter Mountain Investment Trust v. Highland Capital Mgmt., L.P.*, Case No. 3:23-cv-02071-E. And Muck and Jessup—as holders of the majority of remaining Class 8 and 9 claims—have a financial interest in how the estate is managed and when and how claims are paid.

> of any amounts that . . . (d) are necessary to satisfy the reserve for other liabilities incurred or anticipated by the Claimant Trustee in accordance with the Plan and this Agreements (including, but not limited to, indemnification obligations and similar expenses in such amounts and for such period of time as the Claimant Trustee determines, in good faith, may be necessary and appropriate, which determination shall not be subject to the consent of the Oversight Board, may not be modified without the express written consent of the Claimant Trustee, and shall survive the termination of the Claimant Trust) . . . .

CTA, Dkt. 3521-5 at § 6.1(a) (emphasis added). In other words, Mr. Seery, as both Claimant Trustee and the Indemnity Trust Administrator, has the sole authority to reserve for potential indemnification obligations *without any input from or approval by* the Oversight Board or other supervision. This is problematic because Mr. Seery (both as Claimant Trustee and the owner of the Reorganized Debtor's general partner) is one of the principal indemnified parties who stands to benefit from the funding of the indemnification reserve. That means Mr. Seery has a vested financial interest in all decisions he makes regarding the indemnification reserve, including how much to reserve and whether to pay out of the reserve to indemnified parties, including himself. Mr. Seery's unfettered right to control the Indemnity Subtrust is a material deviation from the Plan: while the Plan always contemplated a conditional indemnification right to certain parties, such right was to be supervised by the Oversight Board. But the Oversight Board now has no role in the supervision of the indemnification reserve, and the only person with supervisory authority has a conflict of interest.

There can be no doubt that this conflict of interest already has detrimentally impacted the estate and its stakeholders. The Claimant Trust has long had sufficient assets to pay Classes 8 and 9 in full with interest, which should have triggered the filing of a GUC Certificate and the payment of the surplus estate to Classes 10 and 11. Yet none of this has happened. Instead, Mr. Seery has chosen to fund an increasingly sizeable indemnification reserve without any discernable justification other than as a subterfuge to avoid certifying that holders of Classes 10 and 11 are Claimant Trust Beneficiaries.

The Bankruptcy Court Has Abdicated Any Responsibility to The Estate. In light of the estate's solvency, it should come as no surprise that former equity holders (the current Class 10 and 11 claimholders) have redoubled their efforts to obtain meaningful financial information about the estate and to hold estate professionals accountable for their continued massive professional spend. After all, any continued erosion of the estate comes directly out of the pockets of Class 10 and 11 claimholders. To that end, on May 10, 2023, Dugaboy and HMIT filed an Adversary Complaint to (I) Compel Disclosures About the Assets of the Highland Claimant Trust and (II) Determine (A) Relative Value of Those Assets, and (B) Nature of Plaintiffs' Interests in the Claimant Trust ("Dugaboy Adversary Proceeding"). Dkt. 3778; *see also Dugaboy Investment Trust v. Highland Capital Mgmt., L.P.*, No. 23-03038-sgj, Dkt. 1. The Dugaboy Adversary Proceeding sought detailed information regarding the current assets of the Claimant Trust and a determination that estate assets are now sufficient to pay Class 8 and 9 claimholders in full with interest, such that Dugaboy and HMIT should be declared a Claimant Trust Beneficiary with a right to the surplus of the estate. Indeed, in that filing—which predated Highland's filing of the Balance Sheet by more than two months—Dugaboy provided the Court with an estimate of the value of the estate based on information Dugaboy and others had been able to gather from third-party sources (but that Highland has been unwilling to verify). *See* Dkt. 3778 at ¶ 10. Dugaboy

has continued to pursue that information despite persistent roadblocks erected by Highland and the Bankruptcy Court and now believes that Highland's financial picture is as follows:

Estate as of June 2024

Sources		**Amount**
Cash Sales Proceeds		693
Non-Cash Assets Remaining		90
Total Cash + Non-Cash Value of Estate		783
Uses		
Distributions to Creditors		320
Debtor Operating Costs		41
Legal/Professional Fees		204
Total		565
Current Estate Value		218
Owed to Creditors	84	
Remaning Value in the Estate	**134**	

In other words, any rational factfinder could and should conclude that the Claimant Trustee has sufficient funds to fulfill the directive of the Claimant Trust Agreement by completing the monetization of the estate, paying all unsecured creditors in full, and declaring Dugaboy and HMIT Claimant Trust Beneficiaries pursuant to the required GUC Certification. Instead, the Bankruptcy Court appears determined to conclude—based on no evidence—that the Claimant Trust may need an additional $120 million or more to defend litigation that does not yet exist and that nobody has been able to describe. *See* Feb. 14, 2024 Hr'g Tr., Ex. B, at 33:12-35:9.

On November 22, 2023, Highland filed a motion to dismiss the Dugaboy Adversary Proceeding, arguing among other things that the Bankruptcy Court lacks subject matter jurisdiction to order the relief sought and that Dugaboy lacks standing to seek any relief because it is not a Claimant Trust Beneficiary under the CTA. *See* Dugaboy Adversary Proceeding, Dkt. 14.

Thereafter, on January 1, 2024, HMIT filed a Motion for Leave to File Delaware Complaint (the "Delaware Motion for Leave"), in which it sought permission from the Bankruptcy Court to proceed with the removal of Mr. Seery as the Claimant Trustee because of Mr. Seery's hopeless conflict of interest in administering both the Claimant Trust and the Indemnification Subtrust, of which he is a primary beneficiary. *See* Dkt. 4000. In that motion, HMIT argued that, in light of the estate's cash position, Mr. Seery's failure to pay of Classes 8 and 9 and to certify that Dugaboy and HMIT are Claimant Trust Beneficiaries is a breach of fiduciary duty and a breach of the duty of good faith and fair dealing warranting his removal. *See id.*

Just over two weeks later, on January 16, 2024, Highland moved to stay the Delaware Motion for Leave, arguing that the issue of Dugaboy's status as a Claimant Trust Beneficiary and

its standing to proceed against the Claimant Trust should be resolved first in the context of the Dugaboy Adversary Proceeding. *See* Dkt. 4013. Over HMIT's objection, the Court stayed proceedings on the Delaware Motion for Leave pending the outcome of two other recent appeals involving Dugaboy and HMIT. Dkt. 4033. In doing so, the Court repeatedly emphasized its continuing belief that Dugaboy and HMIT lack standing to pursue any remedies against the estate and its professionals because they are not "Claimant Trust Beneficiaries" under the CTA. *See, e.g.*, Jan. 24, 2024 Hr'g Tr., Ex. A, at 24:21-25:5, 30:15-21. Given what we know about the timing of appeals emanating from this bankruptcy, the Bankruptcy Court's stay order will be in place long after the Claimant Trust is dissolved. In other words, the stay order is an effective dismissal of HMIT's proposed complaint against Mr. Seery.

On February 14, 2024, the Bankruptcy Court held a hearing on Highland's motion to dismiss the Dugaboy Adversary Proceeding. During that hearing, Judge Jernigan was overtly hostile to counsel for Dugaboy and HMIT, repeatedly interrupting counsel and making numerous negative comments about her clients. For example, in response to arguments by counsel that Dugaboy is "in the money" based on Highland's own disclosures (including the Balance Sheet), such that it should have standing to be heard on issues relevant to its entitlement to the estate's surplus waterfall, the Judge retorted that "your client is its own worst enemy," had filed too many appeals in the bankruptcy case, and that she could never value the Claimant Trust in view of the amount being spent on attorneys' fees. *See* Feb. 14, 2024 Hr'g Tr., Ex. B, at 29:8-19. Judge Jernigan also voiced her belief that the litigation stemming from Highland's bankruptcy "is never going to end" and is "going to go on forever whether [Dugaboy] get[s] the information or not." *Id.* at 44:19-45:3. For that reason, the Judge flatly refused to consider whether the indemnity reserve (in the neighborhood of $125-140 million) being amassed by Mr. Seery far outstrips the cost of any litigation that could possibly be pursued at this stage of bankruptcy proceedings.[7]

The consequence of the Bankruptcy Court's refusal to scrutinize—at any level—Mr. Seery's management of the Claimant Trust and the value of the estate is significant. Any reasonable observer could surmise that the Claimant Trust has sufficient assets to pay Class 8 and 9 claimholders in full with interest and to certify that Class 10 and 11 claimholders are "Claimant Trust Beneficiaries" with a right to the surplus of the estate. That would mean Class 10 and 11 claimholders have standing to pursue claims against the estate and its professionals, to seek removal of Mr. Seery as Claimant Trustee, and to obtain critical information about the value of the Claimant Trust and the assets of the estate. But without the Court's willingness to examine the value of the estate, Mr. Seery may continue to hold the Claimant Trust hostage to protect his own interests—in direct contravention of his fiduciary duties under applicable Delaware trust law. That is precisely the sort of problem that the USTP has attempted to address by demanding disclosures and transparency from post-confirmation professionals charged with protecting debtor estates for the benefit of stakeholders.

CONCLUSION

The post-confirmation trust structure created by Highland has been the linchpin of its efforts to obfuscate estate value and to prevent resolution of the estate for the benefit of all

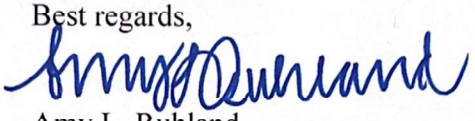
[7] Notably, Judge Jernigan repeatedly asked what sort of damages are being sought in current litigation against the estate and its professionals, but that question is not relevant to the determination of whether the indemnity reserve is being appropriately funded. The estate and its professionals are not entitled to draw from the indemnity reserve to pay damages for actions that constitute bad faith, fraud, gross negligence, criminal conduct, or willful misconduct—precisely the sort of conduct at issue in current litigation. *See* Dkt. 1943 at Ex. A, Art. IX, § C.

creditors. At present, it looks as though post-confirmation management is content to increase the pot for the Indemnity Subtrust infinitely, so long as that creates enough of a drain to make the estate look insolvent and to prevent the payoff of creditor claims. Indeed, it appears that Mr. Seery is intent on disenfranchising former equity (Class 10 and 11 claimholders) rather than efficiently and timely monetizing and resolving the estate as required by the CTA. From the comments made by Judge Jernigan at the February 14, 2024 hearing, it appears the Bankruptcy Court is also content to allow Highland to continue along this path without the burden of Court oversight or scrutiny.

This is precisely the type of circumstance where the U.S. Trustee should intervene. Highland's use of post-confirmation trusts to avoid transparency, to avoid Court scrutiny, and to line the pockets of bankruptcy professionals is the sort of abuse the USTP counsels against. We urge your office to investigate the post-confirmation management of Highland's estate and to require the acting U.S. Trustee to intervene, take positions, and file appropriate briefing to encourage better oversight and transparency.

To the extent we can answer any questions about the contents of this letter or provide additional information that would be helpful the EOUST, we would be happy to do so. In addition, we are available to meet in person to discuss these issues at your convenience.

Best regards,



Amy L. Ruhland

Enclosure

EXHIBIT A

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

	)	**Case No. 19-34054-sgj-11**
In Re:	)	Chapter 11
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	January 24, 2024
	)	9:30 a.m. Docket
Reorganized Debtor.	)	
	)	- HIGHLAND'S MOTION FOR BAD FAITH FINDING [3851]
	)	- HIGHLAND'S MOTION TO STAY CONTESTED MATTER [4013]
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Reorganized Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7760
For NexPoint Real Estate Partners, LLC:	Charles William "Bill" Gameros, Jr. HOGE & GAMEROS, LLP 6116 N. Central Expressway, Suite 1400 Dallas, TX 75206 (214) 765-6002
For Hunter Mountain Investment Trust, The Dugaboy Investment Trust:	Deborah Rose Deitsch-Perez Michael P. Aigen STINSON, LLP 2200 Ross Avenue, Suite 2900 Dallas, TX 75201 (214) 560-2201
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

DALLAS, TEXAS - JANUARY 24, 2024 - 9:32 A.M.

THE CLERK: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, The Honorable Stacey Jernigan presiding.

THE COURT: Good morning. Please be seated. All right. We have a video hearing this morning in certain Highland Capital Management matters. We're not going to do an appearance roll call because we've started a new, I think, more efficient system where we just have people log in their appearance when they come onto the video WebEx. And so we're going to rely on that.

All right. So we have two matters. One has been long-scheduled. It's Highland's motion for a bad faith finding and attorneys' fees against NexPoint Real Estate Partners in connection with proof of claim litigation. So we have that set.

And then we had an expedited motion to stay a contested matter set by Highland. Highland is wanting to stay any litigation on a newly-filed motion by Hunter Mountain Investment Trust to sue Mr. Seery in the Delaware Chancery Court or Delaware state court system.

I'm thinking it probably makes sense to consider that expedited motion for a stay first. Does anyone on the line disagree with that sequence?

MR. MORRIS: Your Honor, this is John Morris from

Pachulski for Highland. I don't disagree with it. I was prepared to handle the other matter first, simply because it was filed first, but I defer to the Court if that's the Court's wishes.

THE COURT: Well, I'm just thinking it's probably the shorter matter and there may be folks who will drop off, I don't know, maybe.

MR. MORRIS: Oh. Then that makes sense.

THE COURT: Okay. All right. Well, I'll hear what Highland wants to say first, please.

MR. MORRIS: Okay. Good morning, Your Honor. Before I get to that, just a couple of housekeeping matters. I don't mean to be the policeperson here, but there are, at least showing on my screen, a number of participants just by phone number. There's somebody who's identified as Participant. It may be that the Court has the information as to the identity of these folks, but I thought the purpose was to disclose the identity of anybody who's attending this hearing.

So I see, for example, phone numbers beginning with 202 or 312. There's somebody who's listed, at least on my screen, as "Participant." I don't think that was the intent of the rule. And, again, I don't mean to be the policeperson here. Somebody just joined with a telephone number beginning 469.

If I'm mistaken, you know, please just correct me, but I thought the idea was that there would be transparency as to

who was here.

THE COURT: Okay. The idea is, because of national rules at the Administrative Office of the Courts, post-September 21, 2023, because of so-called anti-broadcasting rules, if you're a participant in the case you may watch by video a court proceeding, but if you're not a participant you can only listen in, audio.

So it may be that those that you're seeing is just, you know, they may have chosen to use the term Participant, but they may be only audio. Of course, it seems less --

MR. MORRIS: Okay.

THE COURT: -- significant when we don't have human beings taking the witness stand in the courtroom.

So, Mike, can you answer, are the anonymous people, are they all audio?

THE CLERK: No. They're not. Not -- excuse me. Let me do this, Judge.

Okay. Anyone with a number, you need to identify yourself for the Court. I see a 202, a 312, and a 469 and 703. If you cannot identify yourself, we will have to expel you from the hearing.

THE COURT: And, again, --

(Inaudible interruption.)

THE COURT: Again, if you aren't identified, you're going to be expelled from the WebEx. You can always call in,

audio, but you -- not my rule. A rule from Washington, DC. So, does anyone at this point want to identify themselves?

(No response.)

THE COURT: Okay. Hearing no identification, they'll be expelled. And then, again, if they want to call in, they can call in, but no video WebEx.

All right. Any other housekeeping matters?

MR. MORRIS: Just one other, Your Honor. It's with some very mixed feelings that I report to the Court that our star paralegal, Aja Cantey, has left us. She has moved on to become the head bankruptcy paralegal at Paul Weiss. You know how much I rely on my paralegals. But my sadness has been assuaged a bit by Andrea Bates, who joined us recently. She is on the line today. She'll be assisting me in today's hearing.

I just wanted to, you know, let the Court knows that there has been a change, that we have supreme confidence in Ms. Bates, who joins us from Skadden Arps.

THE COURT: Okay.

MR. MORRIS: And I just -- I just didn't want there to be any surprises there.

THE COURT: All right. Thank you for announcing that.

MR. SANJANA: Your Honor, I'm sorry to interrupt. Your Honor?

THE COURT: Yes?

MR. SANJANA: I'm sorry to interrupt.

THE COURT: Who is this?

MR. SANJANA: Hi. This is Jason Sanjana at Reorg -- this is Jason Sanjana at Reorg Research. I was the 202 number. And I just wanted to -- I was always on audio, and I'm on audio now.

THE COURT: Okay.

MR. SANJANA: But I was on mute until now. So, --

THE COURT: Okay.

MR. SANJANA: -- I just wanted to let you know that.

THE COURT: Okay.

MR. SANJANA: But it may have been appearing as on WebEx for you, but it isn't.

THE COURT: Okay. All right. I appreciate you clarifying that for us, Jason.

Okay. Anything else?

MR. MORRIS: No, Your Honor.

THE COURT: All right. Well, we had this motion to stay the contested matter of Hunter Mountain wanting relief from the gatekeeper provision to sue Mr. Seery in Delaware. So I'll hear what Highland has to say with regard to its motion for a stay.

MR. MORRIS: Okay. Thank you, Your Honor. John Morris; Pachulski Stang Ziehl & Jones; for Highland Capital

Management. We're here today on Highland's motion for a very limited stay of Hunter Mountain's motion for leave to sue Mr. Seery.

I have a short deck to use to assist in today's presentation, and I would ask Ms. Bates to put that up on the screen.

While we're waiting for that, just so it's clear, the motion was originally filed at Docket No. 4013.

THE COURT: Okay.

MR. MORRIS: And, you know, as an overarching theme here, the basis for the stay is that the issues in the motion for leave pertaining to whether or not Hunter Mountain is a beneficiary under the Claimant Trust Agreement are the very issues that are going to be -- that have been fully briefed and that are going to be argued just three weeks from now in connection with Highland's motion to dismiss Hunter Mountain's valuation complaint.

And I think that the easiest thing to do here, Your Honor, if we can -- if we could go to the next slide, is just to think about what's -- what the pleadings are. What's the relief that is being requested and what's the basis for the relief?

And so you'll see -- and this is in our motion -- but I find it helpful to actually focus on exactly what the complaint is. The complaint that we're seeking to stay

includes four or five causes of action. You'll find up on the screen Paragraph 35 of the proposed complaint. It follows the heading Roman Numeral V, Causes of Action. And this is the basis for the complaint. It's solely relying on Delaware corporate law, Section 3327 of the Delaware corporate law. And that law allows, you know, certain people the ability to seek the removal of the Trustee.

As set forth in Hunter Mountain's own pleading, under Section 3327, relief can be sought only if it's in accordance with the governing instrument, and Hunter Mountain is not making that claim here, or by a trustor, another officeholder, or a beneficiary. There's no contention that Hunter Mountain is a trustor, there's no contention that it's a court, there's no contention that it's another officeholder.

Therefore, under Hunter Mountain's complaint that they seek to file to remove Mr. Seery, they must be a beneficiary. This Court must determine that Hunter Mountain is a beneficiary. That's what their complaint says, and there really can't be any dispute about that because each of the causes of action uses the very highlighted language that follows from the statute that they're relying upon.

And let's compare that with Hunter Mountain's motion -- complaint for valuation information. So if we can go to the next slide. They have three causes of action in that lawsuit, and every one of those causes of action also requires a

determination that Hunter Mountain is a beneficiary under the Claimant Trust Agreement.

The first cause of action can be found in Paragraphs 82 to 88, and it demands disclosure of trust assets and an accounting. They claim that they need the information, quote, to determine whether their claimant -- contingent Claimant Trust interests may vest into Claimant Trust interests.

You know, for me, Your Honor, that's already a -- shouldn't they know they're not beneficiaries? They have already conceded in Paragraph 83 that they are not holders of Claimant Trust interests but merely have unvested contingent Claimant Trust interests.

But beyond that, as the Court knows from prior litigation, only Claimant Trust beneficiaries have rights to obtain information, and those rights are severely limited.

So you have a concession that Hunter Mountain is not a Claimant Trust beneficiary. You have a document that's been adopted by this Court, approved by this Court, approved by the Fifth Circuit Court of Appeals, that expressly gives only Claimant Trust beneficiaries very limited information rights. And Hunter Mountain here seeks to ignore all of that.

They don't care that they're not a Claimant Trust beneficiary. They don't care that they're seeking more than even Claimant Trust beneficiaries are entitled to. They don't care that they're seeking information that they have no right

to receive.

But the whole premise of Count One is dependent on whether they're a Claimant Trust beneficiary, which is the exact same issue that has to be decided in the motion to remove Mr. Seery.

The second cause of action is for declaratory judgment on the value of the trust assets. That can be found in Paragraphs 89 to 92. And, you know, these are their words. This isn't my -- these aren't my words. This isn't argument. This is just asking the Court to read Hunter Mountain's own pleading. And it depends -- the second cause of action depends on whether the Defendants have been compelled to provide the information about the Claimant Trust assets. The Court can't make a declaratory judgment unless Highland has been compelled to provide the information. But for the reasons I just discussed, Highland can't be compelled to provide any information to Hunter Mountain or Dugaboy because they're not Claimant Trust beneficiaries.

For the same reasons, the third cause of action, which seeks declaratory judgment regarding the nature of the Plaintiffs' interests, you know, there's a whole host of reasons why these causes of action are deficient and why the motion to dismiss ought to be granted, but I'll save that for February 14th. The point now is that, just like the second cause of action, they seek a determination that the Claimant

Trust interests are likely to vest, an advisory opinion if I've ever heard of one. But be that as it may, it -- still, it's an acknowledgement that they're not Claimant Trust beneficiaries.

And so, in both cases, in both lawsuits, the central question is, is Hunter Mountain a Claimant Trust beneficiary?

If we can go to the next slide, let's look at the briefing, because there's really no dispute about this. There's no dispute about it at all. Look at Highland's motion to dismiss the valuation complaint. Right up in Paragraph 2, we say explicitly: Despite holding only unvested contingent trust interests with no rights in the Claimant Trust, Plaintiffs stubbornly seek financial information regarding Claimant Trust assets. This is the basis for the motion to dismiss, that they're not Claimant Trust beneficiaries.

And it's not as if this is the only place in the pleading where this is discussed. If you go to Docket No. 14 in this adversary proceeding, as you can see in the footnote, there's an extensive analysis that explains why Plaintiffs have no rights to financial information, precisely because they're not Claimant Trust beneficiaries.

And it's not as if Hunter Mountain says we're wrong, it's not an issue. They know it's an issue, and they go to great lengths to address it.

If we can go to the next slide. This is from their

opposition to the motion to dismiss. In Paragraph 10, they say the Claimant Trust Agreement evidences an intent that Plaintiffs become Claimant Trust beneficiaries when Claimant Trust assets are sufficient to pay all lower-ranked claims in full, with interest. Again, their pleading, not mine. And it shows that they understand the hurdle they have to come --

Now, there's lots of other stuff in these pleadings regarding other theories for why these claims fail, but all of them fail if they're not a Claimant Trust beneficiary.

And I'd ask the Court to pay particular attention to Paragraphs 40 to 52 in Hunter Mountain's pleading in opposition to the motion to dismiss. As you can see in the footnote, they have an extensive legal argument as to why Plaintiffs are allegedly -- why Plaintiffs allegedly, quote, have a legal right to obtain the information they seek. That's the same issue that's got to be decided in the motion for leave to sue Mr. Seery.

And what's really interesting, Your Honor, is not only do they make the argument in opposition to the motion to dismiss, they basically cut-and-pasted -- I credit Mr. Demo for helping me out; he pointed this out to me this morning, so I want to give credit where credit is due -- they cut-and-pasted the exact same argument in their motion for leave to sue Mr. Seery. So if you just compare Paragraphs 41 to 46 of Hunter Mountain's opposition to Highland's motion to dismiss the

valuation complaint to Paragraphs 31 to 37 of Hunter Mountain's motion for leave to sue Mr. Seery, you'll see they're making the exact same argument as to why they contend they're a Claimant Trust beneficiary.

Again, don't take our word for it. This isn't argument. This is just looking at their own pleading. Right? They're saying in both cases they're Claimant Trust beneficiaries. They're fighting it, right? They know they have to get over that hurdle, because if they don't they can't pursue these claims.

If we can go to the next slide. You've got Highland's reply. Again, extensive discussion. It's the very first point in the very first paragraph, under the Trust Act, whether a party is a beneficiary: Here, a Claimant Trust beneficiary is determined by the plain language of the governing trust -- here, the Claimant Trust Agreement.

And, again, if you take a look at the footnote, our reply in Paragraphs 5 through 9 provides further argument as to why Plaintiffs are not beneficiaries of the Claimant Trust under the plan, the Claimant Trust Agreement, or under applicable law.

So I think it's pretty clear from the pleadings, it's pretty clear from the parties' positions, it's pretty clear from the Delaware law that Hunter Mountain relies upon to move Mr. Seery, Section 3327, that the causes of action in that

proposed complaint and the causes of action in Hunter Mountain's valuation complaint all depend on whether or not Hunter Mountain is a beneficiary under the plan, under the Claimant Trust Agreement, and under Delaware law. And all of those issues are going to be argued in just three weeks. All of those issues are going to be decided by the Court thereafter.

If we can go to, yeah, this next slide. So, yesterday, Hunter Mountain filed its response to the motion for a stay. And I just want to address some of the arguments that were made.

You know, the first argument that they made concerned the legal standard. They said, oh, Highland didn't use the proper legal standard. We disagree. This isn't a motion for injunctive relief. It's not a motion for a stay pending appeal. It's a motion asking the Court to prudently police its own docket.

And here's, here's the irony, Your Honor. Again, don't take my word for it. Take Ms. Deitsch-Perez and her clients' word for it. Because just last year, in connection with their motion for a stay pending the mediation, in a pleading that was filed on 4/20, they said that the Court has the discretion to issue a stay. They relied on *Clinton v. Jones*, exactly as Highland has done to seek a stay in this case. Okay? So the very standard and the case citation that they criticize today

is the very standard and case citation that they relied upon last April.

And here, it gets even better. Because Ms. Deitsch-Perez, on behalf of her client, Hunter Mountain, joined in Dugaboy and Mr. Dondero's motion for a stay. She and her client personally adopted the very standard that they're criticizing today. You can't make this stuff up.

The standard is the right standard. The Court certainly has the discretion to police its own docket.

The second point that they make is that, you know, they'll be really prejudiced without a stay. I say it's the exact opposite. Everybody will be prejudiced without a stay. The Court will be prejudiced. Highland will be prejudiced. Mr. Dondero. Hunter Mountain. All of us will be prejudiced because we will wind up litigating the exact same issue twice. We will expend further resources. And of greatest concern to us is that we might wind up with inconsistent results.

There's no question that -- I shouldn't say there's no question. In all likelihood, a decision will be had on Highland's motion to dismiss the valuation complaint in short order, since argument is scheduled just three weeks from now and the matter is fully briefed. And as Your Honor knows, that -- if we prevail and the Court finds, as it's indicated in prior rulings, that Hunter Mountain is not a Claimant Trust beneficiary and has no rights to this information, and they

appeal that, that'll get assigned to a particular district judge.

If the stay is denied and we proceed with the litigation of the Hunter Mountain complaint that seeks to remove Mr. Seery and we prevail on that one, that'll go to a different judge, in all likelihood, since there's more than, I think, two dozen judges in the District Court. They'll be on completely separate tracks. And you run the -- you run the real risk -- I mean, actually, it's not a real risk, from our point, given the substance -- but you definitely run the risk of inconsistent decisions.

So I know, and I'll close in a moment with some comments about the wisdom of this whole exercise, but I know -- I know how much Mr. Dondero, you know, wants to challenge Mr. Seery. But that doesn't -- that doesn't make it the efficient thing to do. It doesn't make it the fair thing to do, when we're litigating the exact same issues right now.

The third, the third notion, the third argument they make is really they attempt to rewrite their complaint. They try to suggest that the issues are not identical. They suggest that, you know, they've got theories of breach of fiduciary duty and good faith and fair dealing. You know what, Your Honor? You just have to go back to Paragraph 35 of the proposed complaint. That are the legal theories of their case. And to the extent that there's a notion of fiduciary

duty in there, it is predicated on Section 337. In fact, it's predicated -- if you'll give me just one moment -- it's predicated on Section 337 -- 3327(1): The officeholder has committed a breach of trust.

It's not a stand -- there is no standalone breach of fiduciary duty claim, nor could there be. Because as the Court is likely aware, there's a very specific provision in the trust agreement that's been affirmed by this Court, the District Court, the Fifth Circuit, that specifically disclaimed any fiduciary duty to anybody but a Claimant Trust beneficiary. So you couldn't have a standalone breach of fiduciary duty claim. It just doesn't exist.

So they can try if they want to characterize their claims however they want. They should be held to the pleading that they filed. It's the one that we'll be defending if the motion for stay is denied or if the Debtor sees the light of day.

But I do want to close with just some general observations about this. Right? They want to -- they suggest, you know, Highland wants to avoid the suit to remove Mr. Seery. No, we don't. What we want to do is the right thing here. There is no dispute that neither Mr. Dondero, Mr. Patrick, or Hunter Mountain serve on the Claimant Trust Board. They have no personal knowledge of anything concerning the Claimant Oversight Board. And Hunter Mountain's proposed complaint

cites no facts concerning the governance of the Claimant Oversight Board.

Instead, they seek to file another complaint, borne out of grievances, based on rank speculation, untenable inferences, and fabricated tales, lacking in common sense, frankly, that is woefully ignorant of the evidence that has already been admitted against it.

According to Hunter Mountain, the Claimant Trust Board is missing in action. They have abandoned their fiduciary duty. They have ceded control of the Claimant Trust to Mr. Seery to do what he wishes, even if it's acting against Stonehill and Farallon's own interests. Right? The complaint said, oh, Mr. Seery is arbitrarily withholding distributions so he can supposedly enrich himself by getting the same salary that this Court approved it'll be four years ago in July.

You can't make this stuff up, Your Honor. The whole premise doesn't make any sense at all. Why doesn't it make any sense at all? Because Mr. Dondero [sic] is accountable. He is fully accountable. He's accountable for the Claimant Oversight Board and he is accountable to every holder of an actual vested claimant beneficial interest in the trust. He owes them fiduciary duties. Hunter Mountain is not in that group. But Mr. Seery is most definitely accountable to the people who had allowed claims and the people today who are Claimant Trust beneficiaries.

And here's the thing. Hunter Mountain knows that the Claimant Oversight Board is not missing in action. Hunter Mountain knows that Mr. Seery is not acting unilaterally. How does it know that? Because we had a trial last June. And during that trial -- you can find this at Docket No. --

MS. DEITSCH-PEREZ: Your Honor? I -- Your Honor, I regret --

THE COURT: Stop.

MS. DEITSCH-PEREZ: -- interrupting.

THE COURT: Okay. What do you want to say, Ms. Deitsch-Perez?

MS. DEITSCH-PEREZ: I regret interrupting Mr. Morris, but this is not an evidentiary hearing and Mr. Morris is now testifying to things that are not in his pleadings. It's just not a fair way to proceed and the Court should not allow it. Thank you.

THE COURT: Okay.

MR. MORRIS: If I may, Your Honor, just to --

THE COURT: Go ahead.

MR. MORRIS: We received a response -- we received a response yesterday --

THE COURT: Uh-huh.

MR. MORRIS: -- that accused Highland of filing this motion for the stay in order to avoid having this heard. I'd like to -- all I'm doing is responding to the very argument

that they made yesterday.

THE COURT: Okay. You may respond. I overrule that objection.

MR. MORRIS: Thank you. So, and this is all really important, because there's evidence in the record at Exhibits 39, 40, and 41 that were admitted last June that show a very active, responsible Claimant Oversight Board fulfilling their fiduciary duties in negotiating an incentive compensation package for Mr. Seery. And they want to file a complaint that says the Claimant Oversight Board has abandoned its responsibilities, that they're missing in action.

And I want to be really careful here. I want to -- I want to really be transparent here, frankly. Stonehill and Farallon are two of the biggest claimholders. They both hold seats on the board. Does it make any sense at all that they would allow Mr. Seery to do all this at their own expense if they didn't think it was justified?

This is very important, Your Honor. No one who holds a valid, vested claim in the Claimant Trust, who is a Claimant Trust beneficiary, not one of them is complaining about Mr. Seery's management. Not one of them is complaining about his decisions concerning reserves. Not one of them is complaining about whether he has or hasn't made distributions or how much he's distributing. Not one of them has suggested to the Court that Mr. Seery is acting unlawfully. Nobody

holding a claim, a vested claim in the trust is complaining about anything. The only person complaining is Mr. Dondero, the same person who has been the sole source of litigation since the effective date.

He and his counsel should be careful for what they wish for. If Highland's motion for a stay is denied, Highland will respond to the motion and will serve another Rule 11 motion, just as it did when Mr. Dondero filed his ridiculous lawsuit claiming that my firm actually represented him personally back in 2019. Your Honor may have seen how this ended. It ended with the withdrawal of that motion. And this motion will head for the same result.

And I say all of this, Your Honor, because I want to be respectful. I want to make sure everybody's eyes are wide open. I want to ensure everybody understands that we're not seeking a stay here because we're afraid of anything. And I want everybody to know that if the stay is denied or this motion is ever heard, that the first thing that's going to happen is there will be a response and a Rule 11 motion, because it has no basis in law and it has no basis in fact. Highland seeks a stay not to avoid a hearing on the merits but because it makes no sense to keep litigating the same issue over and over again. We are not the same. The stay should be granted.

Thank you, Your Honor.

THE COURT: I have two follow-up questions. First, I think I heard you say February 14th is when the Court --

MR. MORRIS: Yes.

THE COURT: -- is set to have a hearing on the motion to dismiss the complaint seeking valuation. Correct?

MR. MORRIS: Yes.

THE COURT: And --

MR. MORRIS: Yes, Your Honor.

THE COURT: And your motion for a stay here is 'Please stay hearing this latest Hunter Mountain motion to file a complaint until not only this Court has ruled on the February 14th matter but until all levels of appeals have been exhausted on that.' Am I correct about your request?

MR. MORRIS: Yes, Your Honor.

THE COURT: Okay. And my second question: When Ms. Deitsch-Perez started objecting to your argument, I think you were alluding to a trial this Court had on Hunter Mountain's motion to sue Farallon and Stonehill as well as Mr. Seery with regard to what I'll call claims purchasing activity. Is that what you were alluding to?

MR. MORRIS: It was, Your Honor.

THE COURT: Okay.

MR. MORRIS: And I was alluding to it for the very singular purpose of pointing out that there was evidence admitted into the record against Hunter Mountain that shows

the Claimant Oversight Board fulfilling its fiduciary duties and doing exactly what this Court would expect the Claimant Oversight Board would do.

And I point that out only to contrast that evidence, which has already been admitted, with allegations in the proposed complaint that somehow the Claimant Oversight Board has ceded control to Mr. Seery and they're missing in action. It's just -- they know it's not true. They have the evidence.

THE COURT: Okay. And I said two follow-up questions, but I actually have this additional question. This was on my brain, this -- I couldn't remember what month -- the trial, where I ruled on whether Hunter Mountain should be granted leave to sue Farallon and Stonehill and Mr. Seery. This was on my brain because, you know, I've issued a lot of opinions during the Highland case, but I remembered writing extensively on whether Hunter Mountain had standing back in connection with that motion. And in fact, I'm going to hold it up.

MR. MORRIS: Yep.

THE COURT: I wrote a 105-page opinion -- which I don't know if anyone besides my law clerk and I read it, because it's not entertaining -- but I wrote a 105-page opinion denying Hunter Mountain -- different lawyer at the time, not Ms. Deitsch-Perez -- denying Hunter Mountain leave

to sue what I'll call the Claims Purchasers -- Farallon, Stonehill, as well as Mr. Seery. They wanted to sue Mr. Seery for breach of fiduciary duty. And I had multiple reasons for denial, but lack of standing was one of those reasons.

And I went and printed the opinion yesterday to refresh my memory, did I rule on this already? I thought I ruled on this already. And 23 pages of my 105-page opinion deals with the lack of standing of Hunter Mountain. Twenty-three pages, and 85 footnotes, by the way, within that 23 pages, so it's a very dense 23 pages. I went through constitutional standing and I went through prudential standing, and I said Hunter Mountain failed under both tests.

So this is a very longwinded question: What I'm hearing you argue, Mr. Morris, is I'm going to rule one way or another on February 14th, and then there will likely be appeals, so let's don't have to reinvent the wheel. But is there something about my opinion, my 105-page opinion, that isn't -- I mean, have I already addressed this, or is there something I missed in that opinion regarding standing? Has something changed? This was August 2023.

So maybe it's not fair to ask you, because this was more the Claims Purchasers' lawyers' fight, right, and Mr. Seery's, more than --

MR. MORRIS: Right.

THE COURT: -- the Reorganized Debtor? They were the ones who briefed it and argued it. So maybe it's not something that you bothered to read in detail. But I feel like I've ruled on this. And --

MR. MORRIS: So, --

MS. DEITSCH-PEREZ: Your Honor, may --

THE COURT: First Mr. Morris, and then I'll let you, Ms. Deitsch-Perez.

MR. MORRIS: So, a couple of observations, Your Honor.

THE COURT: Uh-huh.

MR. MORRIS: First of all, I read every word that Your Honor wrote, --

THE COURT: I'm sorry.

MR. MORRIS: -- as I do for all judicial.

THE COURT: Okay.

MR. MORRIS: Yeah, right?

Second of all, this issue was addressed by the Court. It was addressed pretty extensively. It was addressed further, frankly, on -- there was a subsequent post-trial motion by Hunter Mountain challenging that very finding --

THE COURT: The motion for reconsideration.

MR. MORRIS: -- and it challenged that very finding.

THE COURT: Uh-huh.

MR. MORRIS: That's right. It challenged that very

finding based on the same *pro forma* balance sheet that's at -- that we're saying kind of moots this whole exercise, at least the valuation proceeding.

But I'm sure Your Honor is not aware of it, but Hunter Mountain has appealed that decision, and they are challenging, you know, every word, I think, in your order. Every word in seven interlocutory orders that preceded it.

And unlike the resolution of the issue that will be had on February 14th, where Hunter Mountain's lack of beneficial ownership in the Claimant Trust is front and center, that issue is one of a very, very long laundry list of issues that are going to the District Court. And we have no reason to believe, we have no -- right? It's one of a million issues, and there's no certainty at all that the District Court is ever going to get to that issue. Right? We don't know how they're going to -- it's just starting now. I don't even think the opening brief -- I think the opening brief might have been filed a day or two ago. I'll start looking at that shortly.

But, so that's why we didn't think that was particularly relevant. We did note that in our footnote. I mean, we did point out that this -- that, you know, there is an appeal of the Hunter Mountain decision of last June. But given the girth of the appeal and the number of matters that are being adjudicated, you know, I wouldn't -- we're not here saying

you should stay the latest Hunter Mountain motion in order to get a result there, because it doesn't seem, you know, maybe they address it, maybe they don't. There's no way to say because it's just not -- it's just buried in there. It's buried in the laundry list.

Another thing I'll say is that you did, you did address it. You did address it pretty comprehensively. But we have new pleadings, you know, with arguably some new shades of argument. But the motion for leave to remove Mr. Seery is based solely on Section 3327 of the Delaware law, which turns right back to the terms of the Claimant Trust.

I'm sure that we're going to wind up at the same spot, whether it's through res judicata, collateral estoppel. I mean, I think we've made a number of these arguments already. But the point here is, why do we have to litigate these issues for a third time?

THE COURT: Okay. Thank you.

All right. Ms. Deitsch-Perez, I'll hear from you.

MS. DEITSCH-PEREZ: Okay. And Mr. Aigen is going to pull up a PowerPoint.

Just to -- and go to Slide 2. But just to jump ahead, the motion for leave is predicated on Delaware Code 3327, and it has in it a number of criteria for why a trustee should be removed. The issues are entirely different than in a valuation proceeding, and a Delaware court may well have a

different view of what a beneficiary is for the purpose of Delaware Code 3327 and the importance of making sure that Delaware trustees are not hostile or unable to act.

I'm also going to jump ahead and answer one of the -- what Mr. Morris added in his last slide, which was new, claiming that, oh, no, it's perfectly clear that the Oversight Board is on the job, so really you, as an equitable matter, you shouldn't worry about this, because Mr. Seery is supervised.

One, that's not in his pleadings. But more importantly, he's mixing apples and oranges, because the evidence in the former trial had to do with approving his compensation. The issue in the motion for leave to bring a suit to remove Mr. Seery is the fact that the Claimant Trust structurally does not -- it gives Mr. Seery complete discretion over the issue of moving money into the indemnity subtrust. It's an entirely different issue than the issue that was raised in the trial in June, and Mr. Morris should and probably does know that, and so has been -- well, his comment was misleading at best.

THE COURT: Okay. Different --

MS. DEITSCH-PEREZ: But let's take a look at --

THE COURT: Different causes of action, different theories, but still it boils down to whether Hunter Mountain is a Claimant Trust beneficiary, right?

MS. DEITSCH-PEREZ: Or whether it will be treated as a Claimant Trust beneficiary, --

THE COURT: Okay.

MS. DEITSCH-PEREZ: -- which is an additional basis.

THE COURT: I don't know what that distinction, where it comes from.

MS. DEITSCH-PEREZ: The distinction is that the parties cannot waive, in Delaware, the duty of good faith and fair dealing. And so if Mr. Seery is taking actions that prevent or attempt to prevent the Class 10 and 11 from becoming beneficiaries, then under Delaware law he would not be able to raise a lack of that status as a defense under 3327.

THE COURT: You're talking about the cause of action --

MS. DEITSCH-PEREZ: And so if --

THE COURT: Stop. You're talking about the cause of action and defenses thereto. We're talking about standing, which, as I mentioned, 23 pages, 85 footnotes, the last time Hunter Mountain wanted to sue Mr. Seery and Farallon and Stonehill. Some of it was constitutional standing, but a few pages was standing under Delaware law, and I said not a Claimant Trust beneficiary. Okay?

Regardless of what the causes of action and theories are, Hunter Mountain has to be a Claimant Trust beneficiary.

MS. DEITSCH-PEREZ: Or --

THE COURT: I've written on that extensively already,

and it sounds like I'm going to have to write on it one way or another extensively after February 14th.

Why should we not stay this new motion to file a new lawsuit, rather than reinvent the wheel again? Maybe it's going to be different --

MS. DEITSCH-PEREZ: Your Honor, --

THE COURT: -- with the valuation motion versus what I wrote in Summer 2023. I don't know. I haven't started looking at the pleadings in depth. But what is illogical --

MS. DEITSCH-PEREZ: Your Honor?

THE COURT: -- about this? I mean, this is, again, it's about judicial resources, efficiency, parties' resources. Why on earth would --

MS. DEITSCH-PEREZ: No, Your Honor, what it --

THE COURT: Go ahead.

MS. DEITSCH-PEREZ: The reason is there's a reason that the Supreme Court has a very high standard to stay other judicial proceedings. So not only must the applicant make a showing of likelihood of success, but the issue is whether they will be irreparably harmed by not having a stay and whether another party would be harmed by having a stay.

And here, because Highland seeks to stay this matter for years, if it turns out in the end that Your Honor's decision is overturned and Hunter Mountain is found to have standing, it will be too late to do anything about it if the cases are

not allowed to proceed in tandem.

Parties have a right to have their cases heard. The fact that there are similar issues means at some point there may be res judicata or collateral estoppel that deals with it. But there's not a rule that only one case can go forward.

Under Highland's theory, virtually Hunter Mountain could not bring any claims, anymore, ever. And that's not the law. Hunter Mountain is entitled to have this decided.

It may well be that Your Honor thinks there's no difference because of 3327 and is going to rule the same way. We don't think that that's correct. We think we will convince you that because Hunter Mountain is moving under 3327, there is a difference in standing. And in any event, that it should go to a Delaware court for that determination to be made. But if Your Honor stays this proceeding, --

THE COURT: And by the way, by the way, what does the Trust Agreement say about where things get litigated?

MS. DEITSCH-PEREZ: Delaware law says that you -- that --

THE COURT: I asked what the Trust Agreement said.

MS. DEITSCH-PEREZ: Delaware law --

THE COURT: I asked what the trust agreement said, because it would trump, right? A contractual agreement would --

MS. DEITSCH-PEREZ: No. That's the -- exactly. It

doesn't trump. Under Delaware law, and we cite a case for this, it's in the brief, a venue provision in an agreement does not override having matters of Delaware internal affairs decided in Delaware. So, no, the Trust Agreement does not automatically override Delaware law.

And so this goes back to the *Landis* -- the standard for stay under *Landis*. Who's harmed? Which harm is irreparable? Because Highland seeks to stay this matter for years. And Your Honor knows how long the Fifth -- the District Court and the Fifth Circuit have been taking to get to rulings. It could be one, two, two and a half, three, if it goes up to the Supreme Court. It could be years. And by that time, Mr. Seery will have continued doing the very things that the complaint seeks to challenge. That's not fair.

I understand there may be a tiny amount of additional work. Mr. Morris says this is all the same. Well, if it's all the same, then he's already done the work. And if Your Honor is convinced it's all the same, well, then you cut-and-paste the old opinion and put it down and the parties could go forward with their appeals.

The prior standing decision is up on appeal. The parties are entitled to go forward and have -- and have their judicial process. There is -- the amount of money Highland spends on these matters, such as bringing -- bringing the sanctions claim against Mr. Ellington and then suddenly dropping it in

the middle, it defies belief that their -- the real interest here isn't conserving resources. If in fact these are duplicative matters, then it will be easy enough to write them up.

And because Highland waited two weeks after the motion to leave was filed and only a week before its response was due, is it really credible that it hasn't already largely written its response? Was it so sure that this Court would do as it asked that it didn't bother to respond, that it set a hearing for a date after its response was due? That seems improbable, Your Honor. I certainly hope that they've gotten this largely written.

But in any event, we've given them -- they asked for and we've given them an additional week to write up its response to the motion to leave. I'd ask that the Court allow this to proceed, because Highland simply doesn't meet the standard, the very, very high standard for a motion to stay here.

THE COURT: All right.

MR. MORRIS: If I may, just a few comments, Your Honor?

THE COURT: Very briefly. Two minutes. Because I thought this was going to be a short matter, and we've been going --

MR. MORRIS: Yeah.

THE COURT: -- fifty minutes. Five-oh minutes. So,

go ahead.

MR. MORRIS: Yeah. Okay. Just, it's not the exact same thing. It has the exact same legal gating issue: Are they a beneficiary?

If the Court denies the stay -- and I assure the Court, I haven't written one word of this thing yet -- but if the Court denies the stay, we are going to be in major litigation. We reserve the right to take discovery. There will be an evidentiary hearing, of that I'm absolutely certain, when we get to that point, as appropriate under the gatekeeping order that's been adopted by this Court. So it will be expensive, it will be time-consuming, and it will ultimately yield absolutely nothing for the Movants here.

You know, we didn't set the date for today. Ms. Deitsch-Perez is exactly wrong about that. The Court set the date for today. We filed an emergency motion a week ahead of time. It's not like we waited until the last second. Right?

So I just, I take offense with all of that. I take offense to the reference to the Ellington sanctions motion. That got resolved because Mr. Ellington finally said he wasn't going to sue Mr. Seery. Had he done that when we asked him a hundred times before that, we never would have filed the motion. He refused to do it. That's why the motion was filed. And it was resolved -- not withdrawn, but resolved -- only after Mr. Ellington and his lawyer finally said they

weren't going to sue Mr. Seery.

So, you know, facts matter, Your Honor. Facts are very important to me. And I want to make sure that the factual record is a hundred percent accurate.

The fact of the matter is, at the end of the day, the Court should grant the stay. You know, if Hunter Mountain really wanted Mr. Dondero [sic] out, they should have included it in their complaint last summer and they shouldn't be allowed to come up with new claims that aren't even in the proposed complaint that's on file right now. There is no claim for breach of the duty of good faith and fair dealing. There isn't. And so they don't get to come here and argue against the stay based on a pleading that has yet to be filed.

The Court should grant the stay.

THE COURT: All right.

MS. DEITSCH-PEREZ: Your Honor?

THE COURT: No. I'm done. I've heard enough.

I am going to grant a stay. It's going to be slightly different from what is requested here. I'm going to grant a -- well, I'm going to grant a stay on this newest HMIT motion to sue Mr. Seery until at least the time I rule on the valuation motion, the motion to dismiss the valuation complaint. Okay? So it's argued February 14th. We know how this case works. I get voluminous submissions. I try to carefully go through them and make a careful ruling. And so

will I get a ruling out in April? That's just a wild guess, okay, but it's probably a reasonable guess.

So what I envision doing is having something like a status conference/scheduling conference shortly after I rule on the motion to dismiss the valuation complaint and decide, are we going to continue the stay to let maybe any appeals -- in fact, I'll probably set a status/scheduling conference shortly after the deadline for a notice of appeal. And we'll see, is there an appeal pending, what's going on big-picture, should I continue the stay? Okay? So I'm not saying it's going to be a two- or three-year stay, but I'm saying it's going to be at least an until-later-this-year stay, and we'll see where things stand in this case.

Now, let me give you a couple of reasons. I don't think the four-prong TRO standard test applies here: Irreparable harm; likelihood of success on the merits; balancing the parties' interests; the public interest. I don't feel the need to make that evaluation here because I do think this is just policing the Court's own docket, which of course any court has the discretion to police its own docket, in the interest of judicial economy and reducing expense. And so I am going to elaborate on that and why I'm exercising my discretion as such.

As I've alluded to a couple of times, August 25, 2023, Docket Entry No. 3903, this Court issued a 105-page opinion in

what I would call a very similar context, if not squarely down the middle of the fairway the same context. And the context, for the record, was Hunter Mountain, through a different attorney -- not Ms. Deitsch-Perez, a different attorney -- filed a motion for leave to sue Mr. Seery and Farallon and Stonehill, Claims Purchasers, for different causes of action. One of them was breach of fiduciary duty by Mr. Seery, I note, but there were different causes of action.

As I've noted here, and I'm saying this for the record in case there's an appeal of this order granting stay today, in the 105-page opinion that I issued denying Hunter Mountain leave to file the lawsuit against Mr. Seery and the Claims Purchasers, I did spend 23 pages, dense pages with 85 footnotes, explaining why I thought in that context Hunter Mountain has no constitutional standing as well as no prudential standing to sue Mr. Seery and the Claims Purchasers.

I note that the prior lawyer for Hunter Mountain, not Ms. Deitsch-Perez, gave very little oral argument or written argument on that. In fact, as I remember, he said, The person aggrieved standard is what applies and we're a person aggrieved.

And the Fifth Circuit as well as the U.S. Supreme Court seem to love the topic of standing. Okay? And I thought we needed a very thorough discussion of standing, okay, because I

thought, more likely than not, that's going to be the first issue -- of course, because it could be bear on subject matter jurisdiction -- that's going to be the first issue that a District Court, the Fifth Circuit, even the U.S. Supreme Court is going to focus on. So, 23 pages, 85 footnotes.

Now, there may be more or different things to say when we have the motion to dismiss on the valuation complaint. Okay?

(Echoing.)

THE COURT: Please turn off your speakers, whoever that is.

I will note that Delaware law, that would be the narrower question of prudential standing, right? And in my 23 pages, I actually spent more time on constitutional standing than prudential standing. And as Mr. Morris notes, the 105-page opinion is chock-full of other stuff besides standing. Okay? Colorability of the claim that Hunter Mountain wanted to bring and what is the standard the Court should apply under the gatekeeping provision. Okay? So, lots of other things.

Yes, it may be years before a higher court rules or different courts rule. And it may be slightly nuanced and different for the valuation thing. But I don't know why anyone would reasonably think I would go down this trail a third time for the same party. Okay? I went down it *ad nauseam* August 25, 2023. It sounds like I'm going to go down it *ad nauseam* again February 14th and thereafter, as I decide

what to do.

As far as abuse of discretion, I think my bosses -- the District Court, the Fifth Circuit, the Supreme Court -- would want to slap my hand if I didn't grant the stay. It's not just judicial economy to me, it's not just efficiency of the parties, but it's my bosses. It's the District Court, the Fifth Circuit. Why are you going to make us look at this yet again? Okay?

Maybe I'll have something different to say. Maybe I'll have something more to say in connection with the valuation motion. I don't know. And that's why I'm leaving open the possibility that we're going to have a status conference after I've ruled, after notices of appeal may have been filed, and we'll figure out, do I go forward with this motion for leave? I'll have a better idea, is there something new and different at this point?

But there is no way any responsible court would go forward a third time considering Hunter Mountain's standing under Delaware law, under constitutional law, as a Claimant Trust beneficiary. Okay? There's no way any reasonable court would do that, with it twice having been teed up. Okay?

So that is the ruling of the Court. We will put it on our tickler system to set a status conference on whether to continue a stay in place after I've ruled on the valuation motion to dismiss.

All right. Please upload an order, Mr. Morris, that reflects that.

MR. MORRIS: Okay. And just so there's no ambiguity, any further briefing on the motion for leave is also suspended? Is that right?

THE COURT: Correct. Yes. Correct. And, again, --

MR. MORRIS: All right.

THE COURT: -- I just want to say one more thing, actually, for the record. Not whining to anyone, but it's going to sound like whining. I checked yesterday, and I'm not even sure my numbers are perfectly accurate, it may be more than this, but I counted in the Highland case I have issued 13 -- well, there are 13 published opinions from this Court. And then if you go back to *Acis*, which was, one might say, a precursor to Highland, there were five more published opinions. And that's not even counting Reports and Recommendations to the District Court, of which there are many more, probably close to a dozen. And then I've heard -- I've heard; I've never checked it -- that there were something like 55 appeals. And that was I think about a year ago someone announced that in court.

So, again, I mean, this is not just about the parties, although I care about the parties and the lawyers. This is about judicial efficiency. This is overwhelming to the system, so to speak. Okay? And so, again, I think it would

be an abuse of discretion for sure if I didn't grant the motion to stay.

All right. I've said enough. And with that, we'll go on to Highland's motion for a bad faith finding and attorneys' fees against I call it HCRE, but I guess it's changed its name a long time ago to NexPoint Real Estate Partners, LLC. All right. Mr. Morris, are you presenting that?

MR. MORRIS: I am, Your Honor. Thank you very much. John Morris, Pachulski Stang, for Highland.

We're here on this hearing, Your Honor, to argue Highland's motion for a bad faith finding for an award of attorneys' fees in connection with the proof of claim and the prosecution of the proof of claim by HCRE.

The motion was originally filed at Docket 3851, and if Ms. Bates can put up the next deck, I'll walk the Court through this. This is pretty straightforward.

The starting point, the starting point here, Your Honor, as it ought to be, is HCRE's claim. And if we could just, yeah, go to this page. What I've put up on the screen here, or what Ms. Bates has put up on the screen, is a slide that shows two pieces of evidence, two documents that were admitted into evidence in this matter. The first is HCRE's proof of claim, and the second is HCRE's response to Highland's objection to that proof of claim. And these documents are critical (chiming) because it sets forth the entire basis for,

you know, for this litigation.

In the proof of claim, HCRE said, among other things, that it contends that all or a portion (chiming) of Highland's interest in an entity called SE Multifamily, quote, does not belong to the Debtor. Or may be property of (garbled).

So this is the proof of claim. They're saying all or a portion of Highland's interest in SE Multifamily isn't Highland's. Right? But Your Honor knows that that's just a statement without regard to how they get there. A proof of claim -- and this is really simple, and it's why this motion, I think, is pretty simple -- a proof of claim has to have some basis in the law. Somebody could have a breach of contract. Somebody could have a slip and fall. There could be a personal injury case against the Debtor. There could be a claim for breach of fiduciary duty or other tortious conduct. But there's got to be a legal theory on which a claimant is seeking to recover against the Debtor.

And the claimant here, HCRE, set forth those legal theories in their response. And that's the box that's below it. And it's based on the very agreement that's at issue, the Amended and Restated (garbled) LLC Agreement for SE Multifamily. It says, After reviewing the documentation, HCRE, quote, believes the organizational documents relating to SE Multifamily Holdings, LLC improperly allocates the ownership percentages -- so that's the issue -- of the members

thereto due to mutual mistake, lack of consideration, and failure of consideration. And these are the legal theories. They claim to reform, rescind, or modify the agreement.

Again, not argument, don't accept anything I say, just accept what HCRE says. These are their pleadings. They told the Court that they believed that Highland didn't have a right to its interest in SE Multifamily. They told the Court that they believed the document improperly allocated the percentages. They told the Court that Highland provided no consideration. They told the Court that they had claims for reformation, to rescind the agreement, or to modify the agreement. That's the whole basis for this litigation.

If we could go to the next slide. Because let's just look at some very simple terms of the agreement. This is unambiguous. Right? And this is an agreement that's drafted by Highland, by HCRE, all under Mr. Dondero's control. Everybody's rowing in the same direction. The testimony here was consistent, not only among Highland and HCRE witnesses but also, and very, very importantly, BH Equities. Right? We haven't spent a lot of time talking about BH Equities, but that evidence is in the record. BH Equities testified up, down, and sideways that the agreement was consistent with its intent, that it was fully aware that Highland had only put in $49,000, that Highland was getting a 46.0 percent interest. Right?

But in addition to BH Equities, Mr. Dondero, and we'll talk about this more in a moment, and Mr. McGraner testified to the same thing. And how could they not? Just look at these provisions. The first box is Schedule A to the agreement. It says, right, in contrast to the $291 million that was credited to HCRE Partners -- they actually didn't put in any of that; that's what the testimony showed -- Highland actually put in $49,000. But these are the percentages that they wrote.

And Your Honor will recall that in the 48 hours before the document was signed -- this is evidence in the record; I'm sorry I don't have citations to the specific exhibits -- but there's a back-and-forth in emails between Freddy Chang, I believe it was, and BH Equities about Schedule A and about the contributions.

And so none of this is an accident. And it's not just stated in Section -- ii Schedule A. It's set forth -- Highland's interest was set forth in Section 1.7, in Section 6.1A, in Section 9.3E, which is the liquidation provision. Right? This was the waterfall in the event of a liquidation. So these are the plain, unambiguous, uncontested terms of the agreement that everybody agreed to when the document was signed.

We can go to the next slide.

Despite that, Mr. Dondero swore under the penalty of

perjury that the proof of claim was true and correct. Remember, the proof of claim said that this really wasn't Highland's interest in SE Multifamily. I don't understand how he could do that, given the plain terms of the agreement. But his testimony was short and precise and unambiguous. It can be found at Pages 55 to 59. It's quoted there -- it's cited there in the footnote. If you just read those four pages, Your Honor.

And Your Honor cited to this pretty extensively on Pages 4 and 5 of the Court's decision in this matter. I've summarized just some of the Court's findings. It's not the Court's findings; it's Mr. Dondero's admissions. He didn't -- he didn't personally do any due diligence of any kind to make sure that Exhibit A was truthful and accurate before he authorized it to be filed. He filed it.

He didn't review or provide comments to the proof of claim or Exhibit A before it was filed. He didn't review the applicable agreements or any documents before signing the proof of claim. He had no idea whose -- where the genesis of the proof of claim was, who at HCRE worked with or who provided information to Bonds Ellis to allow Bonds Ellis to prepare the proof of claim. He had no information about what information was given to Bonds Ellis to formulate the proof of claim. He didn't know whether Bonds Ellis ever communicated with anybody the real estate group regarding the

proof of claim.

He also testified that he never specifically asked anybody in the real estate group if the proof of claim was truthful and accurate before he authorized it to be filed. He didn't check with any member of the real estate group to see whether or not they believed the proof of claim was truthful and accurate. He failed to -- he admitted he failed to do anything to make sure the proof of claim was truthful and accurate before he authorized his electronic signature to be affixed and have it filed on behalf of HCRE.

That's bad faith, Your Honor. You can't rely on some vague process or say 'I'm just relying on others,' because if that's the case, that's what I -- that's we said in our reply, that's the very important person defense, right? He's too busy, he just relies on others, he just signs stuff, and he's got no obligation to do anything. How do you sign something under the penalty of perjury in that milieu?

If the Court doesn't grant our motion here, it will be sending a signal that people can sign proofs of claim with no knowledge of the substance of the claim, with no knowledge of whether the claim is valid, with no knowledge as to whether or not the Court should take the time to adjudicate a disputed claim.

That's what will happen. Right? That will be the signal, that very important people are absolved of the

responsibility of doing basic due diligence before signing a proof of claim.

I think the signing of the proof of claim, the filing of the proof of claim, given what we know now, in particular what we know now, is bad faith.

And I know that HCRE in their opposition said, oh, well, you know, Mr. McGraner did stuff. I would urge the Court to look at Pages 109 to 112 of the transcript, because Mr. McGraner kind of distanced himself from the proof of claim. He said he didn't authorize it, he didn't approve the filing. He said he never gave any documents to Mr. Sauter. He never discussed the proof of claim with Mr. Dondero or anybody at Bonds Ellis. He didn't provide any comments to the proof of claim. He deferred to counsel. He didn't know if Mr. Sauter gave any documents to Bonds Ellis. He never gave the information to Bonds Ellis. He never discussed it with anybody but D.C. Sauter. Right?

So the two people, the only two people who are authorized to act on behalf of HCRE did absolutely nothing to make sure that there was at least a modicum of credibility, at least some basic level of diligence, at least some good-faith basis to assert that this interest that Highland has in SE Multifamily could be subject to challenge. Right? They did nothing.

If we can go to the next slide.

And then, as Your Honor will recall, they tried to withdraw the proof of claim. Right? That in and of itself we contend was an act of bad faith, and it was an act of bad faith for multiple reasons. There's no dispute that they tried to -- they filed their motion to withdraw the proof of claim immediately after taking Highland's depositions but immediately before I was about to depose their witness. It's a naked attempt to try to procure a patently unfair litigation advantage, particularly in light of the fact that HCRE was simultaneously trying to preserve its claims for another day.

If they had just -- and Your Honor made this point at the hearing, right? Just say unequivocally you're done with this. They couldn't do it. They tried to save it for another day.

And so the withdrawal of -- a motion to withdraw the proof of claim we're not saying is always bad faith. Look at what I say in the title of this slide. Under these circumstances, when you file it after taking discovery but before subjecting your people to discovery, and when you try to preserve your claims for another day, the Court properly denied that motion for leave to withdraw the proof of claim. And it stunk. And Your Honor I think rightly questioned whether or not this was, you know, a threat to the integrity of the bankruptcy system and the claims process, whether or

not this amounted to gamesmanship.

But it didn't end there. In closing argument, HCRE persisted with its attempt to try to preserve their claim. This is bad faith. They continued down the exact same path. They told the Court in closing argument at Pages 180 to 181 of the transcript, quote, They want you to make findings that we can't raise any of these other issues, decisions, et cetera, going forward. That's not proper on proofs of claim. Going forward. They wanted to preserve this issue for the future.

But this issue is their proof of claim. This issue is based on the legal theory set forth in Paragraph 5 of HCRE's response to the objection, the response that says they have claims for rescission, to rescind, to modify the agreement. Right? That's the whole legal theory of it. But they wanted Your Honor to simply say the proof of claim is gone but you all can go pursue another day the legal theories that underlied the entire process.

That's (garbled), Your Honor. That's what this is all about, the claims process. You have a claim. You have legal theories on which the claim is based. If your claim is denied or if the objection to the claim is sustained, done. They wouldn't have it. It's why the proof of -- it's why the motion withdraw was denied and why the Court should find that their attempt to preserve these claims for the future is bad

faith.

And the interesting thing, Your Honor, is this is (chiming) one of the very few rulings in the case that Mr. Dondero didn't appeal. I think even he acknowledges, like, like, this is just not -- that he didn't -- he didn't want this seeing the light of day in the District Court.

If we can go to the next slide. And this really amplifies the bad faith in filing the proof of claim. It's the testimony about the nature of the claim. And again, I -- we talk about this exhaustively in our papers, and so I haven't cited to everything, but this is just some of the nuggets from, you know, the testimony that's out there. Right?

Consideration. Mr. McGraner testified that Highland bankrolled HCRE's business. Your Honor can take judicial notice that Highland loaned millions of dollars to HCRE. Right? Those are part of the Notes Litigation that HCRE is now strenuously trying to avoid repaying in its appeal. Right? They're appealing that to the Fifth Circuit and they're trying -- right? We bankrolled the business, we shouldn't have our interest, and they don't want to pay the money back. It really -- this is *chutzpa*, where I'm from. Right?

Going on to the question of consideration -- because, again, this is in Paragraph 5 of the pleading -- there's the

admission that HCRE didn't have the financial wherewithal to close on the Key Bank loan by itself and it needed Highland to provide capital -- flexibility by co-signing on the loan. Right? Couldn't have done the deal without Highland, but they want to take the interest away from us. Bankrolled the whole project, but they want to take the deal away from us.

They include Highland in order to provide tax benefits, but they want to take the deal away from us. Both Mr. Dondero and Mr. McGraner were very clear that tax benefits was one of the reasons Highland was in this. And if Your Honor will recall, in the closing argument, I pointed Your Honor to just one of the tax returns that showed something like $30-plus million in income was allocated to Highland in order to shelter it from taxes. Right? I don't know that there's anything illegal about it. I take no opinion about it. Right? I have no view on it. But *The Little Engine That Could* that put in the $49,000 was suddenly stuck with $31 million of income. I'll wait to hear an explanation as to why Highland was included in the deal and whether taxes were a part of it.

Mr. McGraner also testified just --

(Audio cuts out.)

THE COURT: Okay. What happened?

MR. MORRIS: (begins speaking)

THE COURT: Okay. Mr. Morris, we lost your sound

for about 20 seconds, so if you could kind of repeat the last 20 seconds.

MR. MORRIS: Sure. So I'll try and summarize. On the consideration piece, they know there was consideration. They pursued a claim based on lack of consideration, but in the first point there's an admission about Highland having both bankrolled the whole operation, and in the second point there's the admission from Mr. McGraner that the deal would never have gotten done without Highland's financial wherewithal. And Mr. Dondero and Mr. McGraner admitted that there were tax benefits. And Your Honor saw those tax benefits, right? In my closing argument, I pointed to just one of the tax returns showing that Highland -- I called it *The Little Engine That Could*, who put in the $49,000, somehow got -- somehow got $31 million of income assigned to it. Right?

This was not an accident. Highland was there for tax reasons. Again, I take no view as to the propriety of that at this time, but the notion that there was no consideration is just -- it was ridiculous then, and their admissions show that it was ridiculous.

The next bullet point shows Mr. McGraner's admissions that on March 15, 2019, the deadline was approaching to amend the original LLC agreement to admit BH Equities and to have it retroactive to the prior August. He admitted that he

reviewed the draft Schedule A, which is what we looked at, right? It showed $49,000 and a 46.06 percent interest for Highland. He saw that it unambiguously showed Highland making a $49,000 contribution, getting the 46.06 percent interest. He believed Schedule A reflected his understanding of the terms between Highland and HCRE, and he knew of no obligation that Highland had to make any future capital contributions. I've cited to all of the testimony very specifically.

Mr. McGraner admitted that the allocation of the interest in Schedule A was consistent with the parties' negotiation of the waterfall and other provisions in the amended LLC agreement, that HCRE understood it accurately reflected the parties' intent.

How do you (garbled) proof of claim saying you have to reform, rescind, modify the agreement, when all of this is in your head? How do you do that in good faith? They both admitted that Schedule A reflected the parties' intent at the time it was signed.

It's the last bullet point that's really the head scratcher. What happened is Mr. Dondero, who also caused Highland to file for bankruptcy, didn't like the consequences of his decision. Nothing happened here, as I said in my closing argument, that doesn't happen in every bankruptcy case. The assets of the Debtor are marshaled for distribution

to the creditors. Highland's interest in HCRE is an asset of the estate. HCRE challenged Highland's title to that asset. That's what this litigation is about. And the only reason they challenged the title is because they didn't like the consequences of Mr. Dondero's decision to file Highland for bankruptcy.

That's not good faith. If that were good faith, every equity owner of every business would be able to claw back everything they'd given to a company, every loan that they'd given to a company, every -- like, they can't do that. That's not what the law -- there's no basis for that theory.

Finally, just deal with the attorneys' fees issues quickly. You know, the challenges to our fees are both petty and baseless, frankly. They said we should have avoided discovery. I don't know how you say that. We shouldn't have taken depositions. They took depositions, and we shouldn't have done that? We should have gone to trial where they had discovery and we didn't? That doesn't make a lot of sense to me, and I can't imagine it would make sense to any objective participant.

They claim our legal fees are *per se* excessive. The total legal fee is less than five percent of the value of Highland's interest in SE Multifamily, not according to us but according to Mr. Dondero's family trust, Dugaboy. They told this Court in -- on June 30, 2022, I think, in the very first motion for

information, that Highland's interest in SE Multifamily was $20 million. So we spent less than five percent of the value of that to get good, clean title. I don't think that's excessive by any means, particularly with the amount of hoops we were required to jump through.

Unidentified timekeepers. They say three people were not identified. It was a *de minimis* amount of money. We've addressed that in the brief.

Travel time. You know, again, an even more *de minimis* -- I think that's right -- a more *de minimis* amount of money, less than $10,000 for me and Ms. Winograd to go to Dallas. We billed out at half-time. They admit it. And ironically, you know, our compensation for nonworking travel time was part of the agreement that was authorized when Mr. Dondero was still the head of Highland. I don't know how you criticize that today when it's part of Mr. Dondero's own agreement.

Finally, they take issue with Mr. Adler's relatively modest invoice. I think he charged $700 an hour. He (garbled) 30 hours or something in August 2022 as we were preparing for depositions. Mr. Dondero and Mr. McGraner have admitted that tax issues were a driving force in including Highland in this. And if you look at the Amended and Restated LLC Agreement in the section that comes after Section A, there is a multipage tax analysis that I can't possibly get my head around. I'm not a tax lawyer. And we needed some help to

understand kind of what the tax implications were.

I think, under the circumstances, the need for the tax services was completely warranted, and the amounts here are relatively modest to the whole. You know, it's 30-some-odd hours in connection with depositions at a $700 hourly rate, when my firm doesn't provide tax advice.

So, you know, Your Honor, I think I'm done. I think there's multiple reasons for finding the bad faith here. This proof of claim should never have been filed. You know, if they wanted to withdraw it, they shouldn't have taken our depositions and they should have given us a clean bill of health without trying to reserve some right to bring future challenges to our title to the asset.

And once we got to the trial, it became clear that there's absolutely no basis for the claim, that through the admissions there is no question that the document reflected the intent of parties. Highland provided more than adequate consideration for its interest. It continues to hold its interest today. It continues, you know, to receive its allocation of income. And there's a reason for all of that.

And for those reasons, Your Honor, I think the time has come to start holding people to account here. You know, we did it, as I mentioned, with the Rule 11 on the motion for leave to sue us. We were able to get rid of that. I think the Court really needs to try to bring some discipline to this

process instead of allowing people -- instead of allowing Mr. Dondero and those working at his direction to just file things irresponsibly, without basis of fact, you know, just -- just because.

It's not a thing. You know, that's not what this Court ought to be doing. It's not what I ought to be doing. It's not what I want to be doing, I'll tell you that right now. And so I think there's a real need for a bad faith finding in this particular case. I think there's a real need for there to be consequences of putting the Court and the Reorganized Debtor through this process. Because this -- if Mr. Dondero had only searched his own memory, if he had only asked Mr. McGraner, hey, did the agreement actually reflect the intent of the parties, how could this ever have gotten filed? That's all he had to do, was ask himself the question. All he had to do was ask Mr. McGraner. Right? We wouldn't be here, Your Honor.

And for those reasons, we ask the Court to find that this whole filing and prosecution of this claim was in bad faith (chiming), that we should get an award of attorneys' fees.

THE COURT: All right.

MR. MORRIS: Thank you.

THE COURT: A couple of follow-up questions. Thank you. I think you just answered this question with your closing comment, that you think there was bad faith in both

the filing and the prosecution.

So, as I understand it, the filing of the proof of claim itself you say is bad faith because you say it was a baseless proof of claim, and it was signed without any due diligence on the part of the person who signed it, Mr. Dondero? And then we obviously had months of prosecution, if you will, litigation, after Highland's objection. And then the timing of the withdrawal I would say is kind of a third thing I hear being argued, correct?

MR. MORRIS: Yeah. I would just summarize it this way. The filing of the proof of claim itself was bad faith for all of the reasons that I've stated. The motion to withdraw under these circumstances was also bad faith because they did it after taking discovery and tried to protect their own witnesses from discovery while trying to preserve the claims. They wanted to assert them at another day. Counsel said it in his closing. You know, going forward. That's what he said. And then the third thing is the substance. There is no basis to reform the contract. There's, like, there's no factual basis for the claim itself.

THE COURT: Okay. And my last question -- famous last words, my last question -- if I were to award attorneys' fees here, I'm looking at sort of a summary page for Pachulski's fees. I'm looking at Docket 2852-6. I think this was an Exhibit F to that motion.

So, I always use timelines in my life. While HCRE filed its proof of claim on April 8, 2020, and then Highland objected to it in an omnibus pleading on July 30, 2020, Pachulski has started the clock running, so to speak, August 21st. So, to the extent there were fees incurred, looking at this, after the proof of claim was filed, 2020, thereafter I note HCRE filed a response to the objection October 19, 2020, then the move to disqualify Wick Phillips, dah, dah, dah, dah, dah, April 14, 2021.

I had understood you weren't billing time for the disqualification motion, but in fact it looks like you're only asking for time starting August 2021, correct?

MR. MORRIS: That's right. My intent -- and I think we started the clock then because that's -- you know, we may have filed an omnibus objection, I think we did file, and we're not including time for that. So that's when -- that's when the fees started to become incurred.

THE COURT: Okay.

MR. MORRIS: And if I made a mistake anywhere, I apologize, Your Honor, but the intent was certainly to include, consistent with Your Honor's prior order, every minute of time that was expended in connection with the disqualification motion.

THE COURT: Okay. I just --

MR. MORRIS: Okay. I'm reminded, actually, I'm

actually reminded that August 7th was also the effective date, so that's probably why we used that date.

THE COURT: Okay. Understood. Understood.

All right. I think those are all my questions, so I will hear from HCRE, or NexPoint Real Estate, I think they may prefer to be called. Who is making the argument there?

THE CLERK: He's on mute, Judge.

THE COURT: Okay. You're on mute. Is it Mr. Gameros?

THE CLERK: Yes.

THE COURT: Okay. Mr. Gameros, you're on mute.

MR. GAMEROS: No, I'm not. There we go.

THE COURT: Okay. Here we go.

MR. GAMEROS: Sorry. Good morning, Your Honor.

THE COURT: Good morning.

MR. GAMEROS: Bill Gameros for NexPoint Real Estate. I'm going to hopefully show a PowerPoint. Let's see. I just want to make sure that this is showing. Can everyone see it?

THE COURT: Not yet.

MR. GAMEROS: All right. Nope. How about that? No.

THE COURT: We're not here on our court equipment. Do others -- Mr. Morris, do you see it?

MR. MORRIS: I do not, Your Honor.

THE COURT: Okay.

MR. GAMEROS: Let me try it this way. I'm sorry.

THE COURT: We do not -- oops, now something is starting to happen. Or was. For a --

MR. GAMEROS: How about now?

THE COURT: Here we go. Oh.

MR. GAMEROS: Is it showing now?

THE COURT: Oh, here we go. We have it now, yes.

MR. GAMEROS: All right. I'm sorry about that, Your Honor.

THE COURT: Okay.

MR. GAMEROS: Hate to waste the Court's time.

THE COURT: No problem.

MR. GAMEROS: All right. We're here in response to HCMLP's motion for a bad faith finding and attorneys' fees. First, what are they asking for? Over $800,000 in fees to defend a singular proof of claim that had for it as actions six short depositions, not lengthy, limited written discovery, and a single-day evidentiary hearing.

NREP only has one matter before this Court, the proof of claim. It has discrete ownership. You've already seen that from Mr. Morris's slides. BH Equities. Mr. McGraner actually has a remote interest in it. There are a bunch of folks that have interests in it, so it's a discrete ownership structure.

And it's not a vexatious litigant. It didn't appeal when the Court denied and overruled the proof of claim. It hasn't done anything else.

It didn't file its claim in bad faith. We're going to go through that with some detail. It's never conducted itself in bad faith in front of this Court in any step in the process.

But most importantly today, Your Honor, two things. First, there's not a single case cited in Mr. Morris's slide deck, and it's -- there's none cited for a very simple reason. There is no authority regarding fees for an alleged bad faith proof of claim under 105. We couldn't find it. We looked for it. It hasn't happened. There's no authority for it. He hasn't showed you any, and the authorities that he had showed, there's none in his slide, but we're going to go through them in detail, Your Honor, there's no basis to award attorneys' fees.

I think intellectually the Court should look at this as a two-step process. First, is the proof of claim and its prosecution done in bad faith? I think the answer is going to be a resounding no. But if the Court thinks there is a bad faith -- is bad faith activity, the second step is what fees are possibly awardable.

First, it's styled as a bad faith finding. You look at when the proof of claim was filed and the process that got there. Your Honor, in our response brief, we provide detailed citations to the trial transcript that says a variety of things, including Bonds Ellis never talked to Mr. Dondero, but, contrary to what Mr. Morris told you this morning, Mr.

McGraner did. So there are folks at NREP that were working with Bonds Ellis when they filed the proof of claim.

But he did so, candidly, with one of the best bankruptcy -- that NREP filed its proof of claim with one of the best bankruptcy shops in the Metroplex is telling. They wanted to do it, and they wanted to do it right, and they hired very competent counsel to do that.

These two cases I think are important. It's not just if there's a mistake in the proof of claim, you don't sanction them. And just beating the proof of claim. Is not enough if they lose. Undenied authority. And I think it's telling here.

This Court has seen a lot of litigation on proofs of claim. Objections to all of them, with a host of settlements. That just didn't happen here, but that doesn't make those prior proofs of claim in bad faith, even though they would like you to think that that's true. It's not true and it's not fair. It's also not right.

How did they do it? First, they hired Bonds Ellis. And part of that process was Bonds Ellis did the drafting. Mr. Dondero testified as to how he signed it and the basis on which he signed it. Because despite all the derision from HCMLP about the process and not believing in it, the reality is the process exists, it's what happened, it's what was done, and they coordinated with counsel in its filing.

Just because it's not enforceable, for whatever reason, doesn't make it sanctionable.

What were they trying to accomplish? They did try to reallocate. They wanted a reallocation because HCMLP only put in a tiny amount of capital and it wasn't providing any services.

I don't think it's in dispute that the bankruptcy case has been adversarial. I sat through the prior hour this morning. Mr. Morris made reference to it during this particular motion as well. But it also made the amendment impractical. Not in dispute.

Importantly, Your Honor, in your opinion disallowing the claim and sustaining HCMLP's objection, you didn't find that it was done in bad faith, and Mr. Morris asked you to do it several times at trial. Quite frankly, Your Honor, this ground has been plowed. We don't need to plow it again. The chance for the bad faith finding was last year. He didn't get what he wanted, so now he's taking a second swing at this particular piñata, and it's not right.

But look what happened in the reply brief. These are what are items of bad faith. Bad motive, animus, ill will. That's *Yorkshire*. That's the surreptitious bankruptcy filing. *Brown*. First, not bad faith. What happens in *Brown*, of course, it's a home case, a loan servicer looking to foreclose. And the sanction itself was tiny. Not $800,000.

It was a small sanction. And this Court, you, Your Honor, specifically looked at that case in the past.

Page (phonetic) (garbled). Intentional, deceitful, bad faith, theft. That is not what happened here. Not even close.

Lopez. They don't discuss *Lopez* again. They never mention it. Why? Because *Lopez* has the 'but for' test in it for fees. But this case, unlike *Lopez*, which had multiple motions to compel, had none.

Your Honor, this case had one hearing before the evidentiary trial. A scheduling conference. I'm sorry, it had two. The motion to withdraw, which we believe should have been granted. Your Honor didn't grant it. I understand the Court's ruling. We didn't appeal it. I'm not appealing it right now. But we did try to withdraw the proof of claim. But *Lopez* finds bad faith under 105 for discovery abuse. It doesn't even apply to these facts.

So, looking at the Court's inherent powers, it's not a standard fee application under the Code, that matters, but most importantly, they've got to provide a causal link for 'but for.' *Lopez* tells you that. *Hagar* in the Supreme Court tells you that.

What happens instead at the motion to withdraw, Mr. Morris tells you he wants to win on the merits. The difference in a withdrawn proof of claim and a disallowed proof of claim is

zero. There would have been no difference at all. Nothing has changed. Except for the 'but for' causation analysis on fees. They spent over $375,000 to get there.

I mentioned it in the reply brief. It's on the slide. The *Johnson* factors. Completely absent from their reply brief. They genuflect at it in the initial motion. But me telling you the *Johnson* factors, Your Honor, is like telling you the standard for summary judgment. You don't want to hear it.

However, eight out of twelve *Johnson* factors do not favor this particular fee app. Time and labor required for everything after the withdrawal. Not required.

Novelty and difficulty. It's a proof of claim. It's neither novel nor difficult.

Preclusion of other employment. There's no evidence of that.

The customary fee for work in the community. Candidly, it's against it. Eight hundred grand for fighting a proof of claim is pretty stout.

Time limitations. There were none.

The amount involved and the results obtained. Candidly, Your Honor, almost twice the fees for the same outcome.

Undesirability of the case. No evidence of that.

And awards in similar cases. Here, Your Honor, the absence of 105 cases for proofs of claim, there are no

comparable awards. And I think that's important.

What is the standard you should be using in assessing whether to use your 105 powers? Clear and convincing, Your Honor. Your Honor needs to have a firm belief or conviction that this was done with malice, ill intent, bad faith, et cetera. That's not here.

Why do you know that? Mr. McGraner had his deposition taken. He showed up at trial. Mr. Dondero had his deposition. Showed up at trial. At no instance were they running away from testifying. Quite the contrary. They came to court, they answered Mr. Morris's questions, they answered my questions. If Your Honor had questions, they would have answered them, too.

They took this very seriously. This wasn't some slapdash proof of claim. They were really trying to get something accomplished.

Fees. Your Honor, this is the fee table. I turned it sideways. It's in our response to the motion. I think it's absolutely shocking. The number of hours that were expended and the fees that were expended, the cumulative total -- this is just for selected timekeepers, not everybody -- but I'd point Your Honor to the very bottom, post-motion to withdraw. If they had just said yes, we'll take the win, they wouldn't have had to spend $350,000 for these selected timekeepers, over $375,000 with the rest. That is a clear failure of the

'but for' test in *Lopez* and the cases that it cites.

So, our conclusion, Your Honor. First, the reply doesn't change anything. They don't give you any new authority or any basis to award sanctions or bad faith analysis, if for no other reason than the record is already closed. You've seen this all before. And when asked repeatedly for a bad faith finding, you didn't give it to them. No bad faith in the filing of the claim.

The requested fees are reasonable and necessary. Your Honor, so they flunk the *Johnson* factors. They fail the 'but for' test.

Respectfully, Your Honor, their motion should be denied. If it's not going to be denied, we would like an opportunity to file supplemental briefing addressing the new authorities in the reply brief. Your Honor, I don't think we need to go there. I think you should deny it outright.

Subject to questions from the Court, that concludes my presentation.

THE COURT: All right. A few follow-up questions. In arguing about the size of the potential fees if I get to bad faith, you've had a little bit of a theme of: It was just a proof of claim, it was not difficult, and this was not some "slapdash proof of claim." So you emphasize not reasonable fees for addressing the proof of claim, and you also stress can't find any authority where attorneys' fees have been

allowed for having to defend against a proof of claim.

Here's what I want you to address. Here is what is going through my brain here. This wasn't a proof of claim where, oops, they actually paid our invoice, we're not really owed this amount, sorry, mistake. It's not a situation where you filed a $105,000 proof of claim and in fact only $97,000 was due and owing. And I just use those as very common examples we see in the Bankruptcy Court.

This was, while not a liquidated amount, while not an amount used in the proof of claim, it was basically a multimillion-dollar issue, right? And I don't know if it was a tens-of-millions-of-dollar issue or more than that, but it was a multimillion-dollar issue, right?

MR. GAMEROS: Yes, Your Honor, I understand that.

THE COURT: I mean, that's stating the obvious, right, because you're saying that Highland wasn't really entitled to a 46-percent-whatever ownership interest in Multifamily, it would be something much, much lower than that. Okay. So I think we had in the record Mr. Dondero says the equity interest is worth $20 million. And we know there was a Key Bank loan of up to $500 million-plus. I mean, the proof of claim seeking reformation was ultimately a many-multimillion-dollar claim, if the theory prevailed, right?

MR. GAMEROS: That's right, Your Honor. It could have been.

THE COURT: Okay. So, again, assuming I get to the bad faith finding, I mean, shouldn't I look at these fees in that context? I mean, it wasn't just a proof of claim; it was a potentially multimillion dollar hit to the estate, a bundle of value that wouldn't be there for the creditors. Is that fair, or no?

MR. GAMEROS: Your Honor, I think it's blending some issues in a way that I don't think are appropriate. I think for analyzing whether or not it's a bad faith filing or bad faith prosecution, you have to look to see ill motive, animus, et cetera, and that's not present here. Instead, --

THE COURT: Yes. I'm just saying --

MR. GAMEROS: -- you've got Mr. Dondero --

THE COURT: I'm just saying assuming I get there. And I totally recognize I've got to look at the overall facts of the filing of the claim, of the prosecution, of the withdrawal. I have to look at all that to see do we have bad faith.

But assuming I get there, you've challenged the reasonableness. And it wasn't just some proof of claim. It's a complicated proof of claim, right? It's potentially a multi --

MR. GAMEROS: Your Honor, I understand that.

THE COURT: Okay, go ahead.

MR. GAMEROS: I'm sorry for interrupting, Your Honor.

Go ahead.

THE COURT: Oh, I'm just saying it was pretty darn complicated, the proof of claim. It wasn't quantified. And even though it wasn't quantified, it was clearly a multimillion dollar claim being asserted at the end of the day, the ownership interest that HCRE was trying to challenge.

MR. GAMEROS: That's the position, Your Honor. And they looked at that particular position at the time of filing and said the capital wasn't right, and their response to the objection lays out the different legal arguments. That's exactly what happened.

THE COURT: Okay. My next question is I think you're arguing that because I did not specifically find bad faith in my opinion -- I'm in the mood to talk about lengthy opinions today; it was a 39-page opinion, with 127 footnotes, disallowing the proof of claim -- because I did not make a finding of bad faith there, I'm somehow precluded at this juncture. Am I hearing your argument correctly?

MR. GAMEROS: Your Honor, I didn't say precluded. I just said we don't need to plow that ground again.

THE COURT: Well, --

MR. GAMEROS: I think you left the door open for this particular motion.

THE COURT: Uh-huh.

MR. GAMEROS: And that's what you did in your

opinion. And I just think you were asked repeatedly to make a bad faith finding, and at the time when you ruled disallowing the proof of claim, you didn't do it. You didn't say bad faith.

THE COURT: Okay.

MR. GAMEROS: That's all.

THE COURT: Okay. And then I guess my last question is you said if they, Highland, if they had just said yes, take the win, we wouldn't have all these fees. But I really want to drill down. Would that really have been a win, or would it have been a temporary stand-down? I mean, I begged you all to wrap it all up with language in connection with the withdrawal of the proof of claim. You know, agreed you weren't going to raise this issue again. And your client wouldn't let you do that.

So is it really fair to say, if they had just said yes and taken the win, we wouldn't have had these fees, when it appeared very likely that it was going to be new litigation in a different forum? What is your response to that?

MR. GAMEROS: Your Honor, we're looking back at what happened with hindsight, and I think if we're going to see the maybe-bad we should also see the maybe-good.

What's happened, in hindsight? Zero. Nothing. NREP hasn't done anything. Its proof of claim was disallowed last year, and nothing else has happened.

I think what really happened at the hearing and the motion to withdraw and what we were hearing from Highland, candidly, is they wanted to put a pin in that's our number forever, can't talk about it, don't want to do that. And the agreement allows for amendment.

And that was what we were hung up on. What if we need to amend this thing in the future? We don't want to be stuck with a 46 percent number that we can never get away from. And that was the problem. That was it.

THE COURT: All right. Thank you, Mr. Gameros.

Any rebuttal, Mr. Morris?

MR. GAMEROS: Thank you, Your Honor.

MR. MORRIS: I do. I'll be brief. It's exactly a $20 million issue. It's not millions of dollars. It's exactly $20 million. As I like to say, don't take my word for it, take Mr. Dondero's word for it.

In Dugaboy's pleading that was filed under seal on June 30, 2022, he included his analysis of the value of Highland's assets. I don't want to go through them all, but I'm happy to report that he valued Highland's interest in SE Multifamily in that document that he represented to the Court was worth $20 million. So, from our perspective, we were fighting to get good, clean title to a $20 million asset. That's Point #1.

Point #2, of course, the Court has inherent power under 105 to enter orders of this type. I -- honestly, you know,

the cases are what the cases are. So there's never been a case exactly like this. You know what? I've been doing this for a while. I've never seen a proof of claim as baseless as this one.

So the whole concept of the 'but for' thing, I'll talk about in a minute, but there's no question that the Court has the power to enter orders of this type, and I don't even think counsel disputes that.

I do want to address the notion that we asked the Court repeatedly for a bad faith finding and the Court declined to do it. That's because this Court does its job and does its job well. And I understood Your Honor when you denied it without prejudice. It was telling. And apparently counsel got the signal, too, that you want to make sure that, before you enter an order of that type, that HCRE has due process. And that's why it's denied without prejudice. Because I was raising the issue for the first time at the podium, and you reluctantly, properly, prudently decided that probably isn't fair. And so you wanted to make sure that this thing was fully briefed. And it's been briefed, and that's why we're here today, not because you made a decision back in November of 2022 that there was no bad faith, but simply that you wanted to make sure that HCRE had a full opportunity to address the charge.

Getting to the 'but for' issue. But for the filing of,

frankly, a fraudulent, baseless proof of claim, Highland would have more than $800,000 in its pocket today.

But for the filing of a motion to withdraw that sought an unfair litigation advantage while trying to preserve for the future more challenges to Highland's clear and good title to this asset, Highland would have more money in its pocket.

But for the conduct of a trial, the taking of depositions, and all of the rest of it, we wouldn't be here today. Highland would have more than $800,000 in its pocket.

The notion that we should have taken the win, frankly, is offensive. That we should have just allowed them. He wants the benefit of the $300,000 on the theory that we should have allowed him to take our depositions, not take their depositions, and fight another day. I just -- I'm speechless. I'll just leave it at that. The argument speaks for itself.

No motive? They had no motive here? They don't have ill will? They showed up at the hearing? Goodness, I hope that doesn't absolve them from filing a proof of claim with no basis in fact or law. Of course they showed up at the hearing. They would have been in contempt of court at that point had they not.

The only reason, apparently, they filed the proof of claim is because they didn't like the unintended consequences of the Highland bankruptcy that Mr. Dondero filed. In what world, in what courtroom, under what law, is that a good faith basis for

pursuing a proof of claim, because you don't like the unintended consequences of your own decisions? That's bad motive right there. To try to deny a debtor a $20 million asset because you didn't like the way it turned out.

Mr. Dondero, Mr. McGraner, HCRE were perfectly happy for Highland to have a 46.06 percent interest in exchange for a $49,000 contribution right up until the day they filed that proof of claim. Maybe until the day they filed for bankruptcy. I didn't ask that particular question.

It's not good faith to come to this Court, to file a proof of claim, to go through all of this, because you don't like the consequences of your own decision.

The Court really needs to ask itself whether or not it wants to sanction this. Whether it wants to allow litigants, claimants, to file proofs of claim with no due diligence, no basis in fact, no basis in law. I don't think the Court should do that. I think the bad faith finding is easy, frankly.

And with respect to our legal fees, they are what they are. The notion that this was overstaffed is kind of crazy. It was me, Ms. Winograd, and Ms. Cantey. We billed, the three of us, more than 82 percent of the total fee. And if you take out Mr. Adler, it's probably close to if not in excess of 90 percent of it. It is what it is.

My rates are higher than some of the attorneys Mr. Dondero

hires. It is what it is. He knew about that when he hired us. They're market rates. Clients from east coast to west coast, from north to south, pay those rates every day, with bankruptcy court approval. I'm sorry if he doesn't like to pay those kinds of rates at this point in time, but they are what they are and my client is entitled to get reimbursed for this bad faith conduct.

I have nothing further, Your Honor.

THE COURT: Okay. Thank you.

Well, no surprise, we'll take this under advisement and issue a written opinion and order.

No surprise, I'm going to say like I always say, we'll get to this as soon as our calendar will allow, but I'm not going to promise a date on that.

Obviously, I'm going to be refreshing my memory, going back and studying the memorandum opinion and order I issued sustaining Highland's objection to this proof of claim and going back and looking at the transcript from that hearing that was submitted.

And I say this a lot, that timelines matter a heck of a lot to me and they reveal a heck of a lot. And I will be studying the timeline here and considering its significance.

Some of the important facts that will matter here are that the HCRE proof of claim, again, was filed timely in this case. April 8, 2020. It was signed by Mr. Dondero as the

representative of HCRE.

The evidence I do remember is that Mr. Dondero was president and sole manager of HCRE and he had signed the limited liability agreement for SE Multifamily Holdings, I think is the name of the entity. He had signed the agreement for both Highland and HCRE. There was an original LLC agreement and there was also an amended LLC agreement.

And again, I always think timelines -- again, I've said it a million times -- are very revealing. This was not a very ancient transaction, a very old transaction, in the Highland universe. The evidence I saw -- and again, I always create a timeline -- was that it was actually August 23, 2018 that this SE Multifamily entity was created, and then it was sometime early first quarter of 2019 where there was an amendment of the LLC agreement that brought in the BH entity and its six percent interest. And then, of course, it was October 2019 when the bankruptcy was filed.

Again, why am I mentioning this? I'm mentioning it because this was fairly recent in Highland history that this whole SE Multifamily transaction, Project Unicorn, was done. And that matters to me because I would think memories should have been fresh relative to a lot of other things we've looked at during this case. And so that really is weighing on my brain here with regard to the bad faith possibility on the filing of the proof of claim and the prosecution. It, in my

view, could have been a quick process, doing the due diligence and assembling, you know, is there a good faith basis for this proof of claim or not. And that concerns me. That concerns me.

It, as I recall hearing the evidence, looked like, oh my goodness, look at the consequences now of this bankruptcy, and Highland falling out of the status of being a friendly partner with HCRE. We don't like this. We don't like this and we want to change this.

So, again, I'm sort of thinking out loud here. I'm sort of revealing where I'm leaning right now. It seems like this was a recent-enough transaction where someone could have assembled information pretty quickly and figured out if there was any basis to argue reformation.

And I never did have a clear idea why they would pack up their marbles and want to go home if there was some evidence. And again, the Bankruptcy Rules require the Court to enter an order whether withdrawal should be permitted or not. I very much wanted this to go away, and then there wasn't -- wordsmithing could not come up with a sentence everyone would agree on to make it go away.

So I will, again, be drilling down on the evidence here as to whether we have bad faith, but that's some of the timeline and evidence I'm going to be drilling down on here.

I think *The Little Engine That Could* was the phrase Mr.

Morris argued. I remember very well the evidence was that Highland put in $49,000 to get its membership interest in SE Multifamily Holdings, but I already heard that it was required ultimately to be a cosigner on a $500 million loan from Key Bank. It provided resources, at least until some point during the bankruptcy, to SE Multifamily. And again, the tax benefit of absorbing the income from the entity, which, again, it's nothing to sneeze at here.

All of that I think was addressed pretty thoroughly in my earlier opinion, but again, I'm going to go back and look at it and the evidence and give you a thorough ruling one way or another on the indicia of bad faith as well as the reasonableness of fee-shifting.

All right. It sounds like I'm going to see you on February 14th, or some of you, and so I shall see you then. We're adjourned.

THE CLERK: All rise.

MR. GAMEROS: Your Honor?

THE COURT: I'm sorry?

MR. GAMEROS: Your Honor?

THE COURT: Yes.

MR. GAMEROS: Yeah, I'm sorry. I did ask, if you weren't going to deny it outright, if I could file a brief surreply. Is that allowed?

THE COURT: No. I've got enough on briefing on this.

Thank you.

MR. GAMEROS: All right. Thank you.

(Proceedings concluded at 11:41 a.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **01/24/2024**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

INDEX

EXHIBIT B

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	February 14, 2024
	9:30 a.m. Docket
Reorganized Debtor.	
DUGABOY INVESTMENT TRUST, et al.,	**Adversary Proc. 23-3038-sgj**
Plaintiffs,	
v.	THE HIGHLAND PARTIES' MOTION TO DISMISS COMPLAINT [13]
HIGHLAND CAPITAL MANAGEMENT, L.P., et al.,	
Defendants.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

DALLAS, TEXAS - FEBRUARY 14, 2024 - 9:33 A.M.

THE CLERK: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, The Honorable Stacey Jernigan presiding.

THE COURT: Good morning. Please be seated. All right. We have a setting this morning in the adversary styled Dugaboy Investment Trust and Hunter Mountain Investment Trust versus Highland, Adversary 23-3038.

We have the Highland Parties' motion to dismiss the adversary.

Who is appearing for the Movant, Highland?

MR. MORRIS: Good morning, Your Honor. It's John Morris from Pachulski Stang Ziehl & Jones for the Movant.

THE COURT: All right. Thank you. And who do we have appearing for Plaintiffs/Respondents?

MS. DEITSCH-PEREZ: Good morning, Your Honor. It's Deborah Deitsch-Perez from Stinson.

THE COURT: All right.

MS. DEITSCH-PEREZ: And I would ask: Is anybody else having a little trouble hearing? The volume seems lower than usual here.

THE COURT: All right. It's loud and clear for the Court. What about you, Mr. Morris?

MR. MORRIS: It's no problem for me, Your Honor.

THE COURT: Okay.

MS. DEITSCH-PEREZ: Okay. I'll just listen hard.

THE COURT: All right. Well, I assume these are the only appearances we have.

As a reminder to folks on the WebEx, if you're a party in interest, fine, you can use both video and audio. But if you are not a case party in interest, the rules from Washington say it's supposed to be only an audio listen-in format for you.

All right. So let me quickly talk about our time issues. I have to give a CLE presentation on the other side of downtown at 12:00 noon today, so I really need to stop at about 11:30 or 11:35. You all have given a two-hour time estimate, so do you all think that is what you're going to need, an hour each?

MR. MORRIS: I do, Your Honor. I don't know that I'll need all that time, but I'll try and limit my opening remarks to 45 minutes and save 15 for rebuttal.

THE COURT: All right. What about you, Ms. Deitsch-Perez? Any issues there?

MS. DEITSCH-PEREZ: I would say the same.

THE COURT: Okay. Very good. Well, with that, Mr. Morris, I'll hear from you.

OPENING STATEMENT ON BEHALF OF THE MOVANTS

MR. MORRIS: Thank you, Your Honor. John Morris; Pachulski Stang Ziehl & Jones; for the Movant, Highland

Capital.

Your Honor, in the famous words of an old New Yorker, Yogi Berra, this is déjà vu all over again. Less than eight months ago, this Court issued rulings that held that HMIT was not a Claimant Trust beneficiary because its contingent interests have not vested. This Court ruled that HMIT was not in the money. This Court ruled that HMIT's rights as a contingent trust holder were determined solely with reference to the Claimant Trust agreement, and under the Claimant Trust agreement's clear and unambiguous provisions, they have no rights today.

Now, in their complaint, HMIT and Dugaboy basically ask for the same relief that they sought last year. They want information for the purported purpose of establishing that they are in the money, even though they told this Court last summer, based on available information, that they were in the money. They want a declaration that the value of trust assets exceeds the value of the trust liabilities, and they want a declaration that their contingent interests are likely to vest.

And I'll talk more about this in a moment, but it's really interesting, if you look at the last footnote of their complaint, they expressly ask the Court not to rule as to whether or not they are Claimant Trust beneficiaries. They only want the Court to rule in a declaratory judgment that

they're likely to vest. We'll talk about that more in a minute.

We need clear rulings on each of these matters, on each of the bases for which Highland moves to dismiss this complaint, because, you know, obviously, saying it once or twice hasn't been enough, so we need to say it one more time, loudly and clearly.

I've got a deck that I'll ask Andrea Bates to put up on the screen. I hope to go through it fairly quickly.

THE COURT: Okay.

MR. MORRIS: Ms. Bates, if you can put our deck up, please.

And I'd like to begin, once it's on the screen, just going through the three counts of the complaint. These are the counts that we're seeking to dismiss. They're -- they are, frankly, fairly straightforward.

(Pause.)

MS. BATES: Apologies. I got kicked out of the WebEx.

MR. MORRIS: Okay. (Pause.) Okay, great. If we can go to the next slide, please.

So, the first count, Your Honor, the first count of the complaint seeks the disclosure of trust assets and accounting, and an accounting. In Paragraph 83, they make it clear, they say, due to the lack of transparency into the assets of the

Claimant Trust, Plaintiffs are unable to determine whether the contingent Claimant Trust interests may vest into Claimant Trust interests. That's really an important allegation, because it's a concession. And there are other concessions. If you look at Paragraph 66, for example, it's a concession that they're not Claimant Trust beneficiaries. They know that. Right? No dispute. But they're seeking information to determine whether they may vest. That's what they're asking for.

And the next piece of this slide is also important because they're not just asking for information about assets and liabilities. They're asking for "details of all transactions that have occurred." Even under their theory of trying to figure out if they're in the money, why could that possibly be relevant? Details of transactions that have occurred. You know, Your Honor, we were here before the Court last spring on the mediation motion, and I recall Your Honor specifically asking Ms. Ruhland, what information? Because they were seeking information then for the mediation. What information could you possibly need other than assets and liabilities? And she didn't really have an answer.

Your Honor asked us -- and ordered us, frankly -- to produce that information, and we did. And that's the information that we'll talk about in a moment that HMIT relied upon to represent to the Court that it believed that the

entity was in the money.

But the important point here is why are they asking for details about transactions that have occurred? It's just a -- it's just -- when we talk about the equities at the end, I'm going to come back to that.

The important point here for Count One, Your Honor, they don't cite to or rely on any provision of the plan. They don't cite to or rely upon any provision of the Claimant Trust agreement. They don't cite to or rely upon any statute. This is a purely equitable claim.

If we can go to the next slide, please.

Count Two seeks a declaratory judgment concerning the value of the assets relative to the liabilities, but it's a conditional request. It requires that the Defendants be compelled to provide the information. And that's what it says in Paragraph 90. And it flows from that, according to them, that if assets exceed liabilities, all kinds of great things are going to happen. All affirmative proceedings can be deemed unnecessary. The bankruptcy court -- case can be brought to a close, and the bloodshed will stop.

But what's really interesting about this, and it portrays the intent of Hunter Mountain in this proceeding, is that they only want the affirmative proceeding to stop. If you look at Paragraph 91, and it's quoted there in the footnote, they only want pending adversary proceedings and get recovering value of

the HCMF -- HC -- the Highland estate.

So, presumably, they'll be allowed, right, they'll get paid. All creditors, according to them, if assets exceed liabilities, they get paid. And then all of the indemnified parties have nothing to use to defend themselves under the indemnities. That's what they're looking to do. It's really clear. And the Court should understand that they're not really ambiguous here. They want to look at all of the transactions. They want to, even under their theory that Class 8 and Class 9 should get paid, they should get everything else, there should be nothing left, and they should be able to continue to sue Mr. Seery and the Reorganized Debtor and the Claimant Trust and my firm from now until the end of time. That's the motivation here.

Let's look at Count Three. Count Three, they want a declaratory judgment regarding the nature of their interests in the Claimant Trust. But not really. But not really. What they want is a declaration and a determination that there are conditions, that the conditions are such that the contingent interests are "likely to vest." Again, if you look at the footnote, and we'll look at it in detail, they're again not asking the Court, because they know what the answer is going to be, they're not asking the Court to find that they are Claimant Trust beneficiaries, just that they are likely to vest at some point in the future.

They don't cite to or rely upon any provision of the plan. Again, they don't cite to or rely upon any provision in the Claimant Trust agreement or in any statute. It's a purely equitable claim.

If we can go to the next slide.

The terms of the Claimant Trust agreement determine when and if Plaintiffs are Claimant Trust beneficiaries, full stop. Under the Delaware Statutory Trust Act, whether a party is a beneficiary here, a Claimant Trust beneficiary, is determined by the plain language of the governing instrument -- here, the Claimant Trust agreement. And the plan, frankly, because the plan provisions matter in Articles III and IV. They also provide the same conditions for vesting.

We cited in our papers a case called *Paul Capital Advisors*. *Paul Capital Advisors* is from the Delaware Chancery Court. And what's really interesting about that case, Your Honor, is in that case the plaintiff was seeking to remove a trustee. A lawyer by the name of Michael Hurst defended that case, and Mr. Hurst -- who's a -- Mr. Ellington's counsel today; he was before Your Honor in December on the Ellington stalking matter; he's a longtime lawyer for Mr. Dondero -- Mr. Hurst actually urged the court to dismiss the case on the grounds that the plaintiff wasn't a beneficiary under the plain terms of that trust agreement. And the court granted the motion to dismiss, just like the Court should grant the

motion to dismiss today.

So one of Mr. Dondero's own lawyers was in the Delaware Chancery Court making the exact same argument that we're making today, and that is, even referring to the *Restatement*, a trust's beneficiaries are the people who are defined as beneficiaries in the trust governing documents or that are otherwise reflective of the settlor's intent. That's what *Paul Capital Advisors* holds.

Here, the settlor specifically decided to exclude HMIT and Dugaboy as holders of the Class 10 and 11 claims from the definition of Claimant Trust beneficiaries. We know that. We're going to look at that language in a moment.

The Claimant Trust agreement includes very specific provisions concerning vesting, none of which refer to, concern, or are dependent on the value of the trust assets and liabilities at any moment in time.

Being in the money is legally irrelevant under the plain terms of the plan and under the plain terms of the Claimant Trust agreement and on the plain terms of the case that Mr. Hurst successfully argued in the Delaware Chancery Court known as *Paul Capital Advisors*.

If we can go to the next slide.

Let's look at the provisions. Let's see. Right? Because one of the bases for the motion to dismiss is that they have no rights under the plan. Neither Hunter Mountain nor Dugaboy

have any rights under the plan. And, you know, if you follow *Capital Advisors*, and, really, just as the Court did last summer when it decided, I think properly and appropriately, that Hunter Mountain and Dugaboy's rights are determined solely under the provisions of the plan, let's just look at those provisions.

The Claimant Trust agreement, in Section 3.12, specifically says that the agreement doesn't require the Claimant Trustee to file any accounting. That's the reasoning sought in Count One. Can't do it. No. Right? There's no obligation to do it.

If we can go to the next slide.

Section 3.12(b) provides -- requires the Claimant Trustee to provide quarterly reporting to Oversight Board and Claimant Trust beneficiaries. Again, no allegation that Hunter Mountain or Dugaboy is an Oversight Board member. No allegation that they're Claimant Trust beneficiaries. In fact, the whole purpose of the complaint, supposedly, is to get information so that they can determine whether or not they're likely to vest.

So, there's a concession that they're not Claimant Trust beneficiaries. And so only those two groups of people, Oversight Board members and Claimant Trust beneficiaries, are entitled to receive these quarterly reports. And because Hunter Mountain and Dugaboy don't fall into either group, they

have no rights under Section 3.12(b).

Just to make it abundantly clear -- if we go to the next slide -- let's look at the definition of Claimant Trust beneficiary. Again, this is right out of the Claimant Trust agreement, Section 1.1(h). And it says, holders of allowed general unsecured claims or allowed subordinated claims, and only upon the certification of the Claimant Trustee that all holders of claims have been paid indefeasibly in full. That's a reference to Class 10 and 11 with the holders of the former limited partnership interests. Only then do they vest. That's how they vest. You've got to file this certification saying that everybody has been paid in full.

And they say, oh, gee, well, if assets exceed liabilities, that must mean they're in the money and the Trustee should just pay them in full.

But that's not what that trust agreement says. And let's be clear. The trust agreement and the plan were adopted and confirmed by this Court more than three years ago now. It was the first week of February 2021. Those documents were subject to appeal, but nothing we're talking about today is -- was ever the subject of appeals. Right? So these are the agreements. They're sacrosanct. The Delaware Chancery Court says you've got to follow the agreement. So let's do that.

If we can go to the next slide.

Distributions. So, right, the Claimant Trustee has to

certify that everybody has been paid in full. But what about distributions? When are they going to get paid in full? According to the plain and unambiguous terms of the Claimant Trust agreement, the Claimant Trust agreement shall distribute to holders of trust interests at least annually the cash on hand -- here's the important word: net -- net of any amounts that, among other things, if you go down to (d), are necessary to satisfy or reserve for other liabilities incurred or anticipated by the Claimant Trustee, in accordance with the plan and this agreement, including but not limited to indemnification obligations.

So it doesn't matter if assets exceed liabilities. We don't believe that they do. We don't believe that there is any reason to even engage in the debate. And the reason for that is because we've got substantial indemnification obligations that must be reserved for. And if -- and -- and -- we'll talk about that more in a moment.

But that's the key. That's the key here. They don't vest. Right? Class 10 and 11 does not vest until the Claimant Trustee certifies that everybody has been paid in full. And nobody is going to be paid in full as long as the Claimant Trust has indemnification obligations that must be satisfied. The Claimant Trustee is a fiduciary. He owes the beneficiaries of indemnification rights the duty to make sure that the Claimant Trust has sufficient assets to satisfy the

indemnification obligations.

And do you know who's not here today, Your Honor? Any Claimant Trust beneficiary. Any Claimant Trust beneficiary who would -- there is nobody here complaining that Mr. Seery is abusing his rights. There's no -- nobody is complaining that he should be distributing the cash. Nobody is complaining that, you know, he's overwithholding. And we'll talk more about why, actually, what he's doing is proper, although that's not an issue before the Court today. The only issue before the Court, frankly, is Section 6.1. And it says the trust must reserve amounts necessary or deemed necessary to satisfy indemnity obligations.

If we can go to the next slide, please.

So now let's get to the motion to dismiss itself now that we have an understanding of exactly what the Claimant Trust agreement and the plan provide. Let's look back at what the Court did. The Court issued two very important rulings last year on these very issues. And in the Court's lengthy decision on the Hunter Mountain motion for leave, the Court concluded, quote, HMIT's status as a beneficiary of the Claimant Trust was designed by the Claimant Trust agreement itself, pure and simple. The Court was right then, and the Court will be right today when presumably it stands by its prior ruling.

Under the Claimant Trust agreement, contingent trust

interests have no rights until they vest. And there's no dispute that they have not vested because the Claimant Trustee has not filed a certification that everybody is getting paid in full. That's what the language of the document says. We really are done here.

But there's more, because after that hearing Hunter Mountain made another motion and said, wait, Your Honor, those disclosures that you required Highland to make in support of mediation, they show we're in the money. They've already swung and they've missed at this. They said, oh, we're in the money. And Your Honor, unlike HMIT, actually read the disclosures and actually saw all of the contingencies in there.

It's ironic that HMIT, of all people, would be telling the Court that they're in the money when their beneficial owners are actually appealing the $70 million Notes Litigation, when their beneficial owners are playing fast and loose with the value of assets that they control, such as HCRE. Right? But they're still here with the same tired story, maybe we're in the money.

Your Honor, you've ruled on this and we're done, as far as I'm concerned. You found, among other things, that they failed to give proper attention to the notes to the financial statements that were integral to understanding the numbers. I hope that they've done that now.

Your Honor ruled that they failed to take into account the widespread litigation that's caused massive indemnification claims and legal fees, all of which must be satisfied.

Based on this Court's decision less than five months ago -- I think it was actually eight months ago -- Counts One and Three are moot and they're otherwise barred by collateral estoppel.

If we can go to the next slide, please.

Count Two must also be dismissed because it depends on Highland being "compelled to provide information about the Claimant Trust assets." That's in Paragraph 90. So if the Court doesn't compel Highland, the Court has no ability to make the declaration that's sought.

But even if you could, right, there's -- Plaintiffs have no legally cognizable right. They don't cite to anything. They don't have an equitable claim to compel Highland to provide trust -- the information. There is no underlying controversy to be resolved. They have no right to this information. They have no equitable claim to this information.

As we set forth in Paragraph 39 of our moving brief, they can't come here seeking equity that's barred by the plain terms of the trust agreement. The trust agreement, again, reflects the settlor's intent. The settlor intended that he would provide or that the Claimant Trustee would provide

limited information to the claimant board members and Claimant Trust beneficiaries, of which neither Hunter Mountain nor Dugaboy are one. They can't use equity to just override the very plain meaning of the operative documents and the intent of the settlor.

The Claimant Trust agreement is determinative. Since the value of the trust assets and liabilities at any moment in time is irrelevant to the question of vesting, there is no justiciable controversy to resolve.

So, two reasons. I don't think the Court can order Highland to produce any information, so it fails for that reason. And even if it did, the whole issue is completely irrelevant, given the plain terms of the trust agreement and the plan, so there is no justiciable controversy.

If we can go to the next slide.

Some other grounds to dismiss Count One. Right? Again, no legal right to the information or an accounting. Again, the request for equitable relief is barred by the plain terms of the trust agreement since they're not Claimant Trust beneficiaries.

And it's worth noting, as I mentioned earlier when we saw the very provision in the trust agreement, even Claimant Trust beneficiaries have no right to an accounting, or any right to any information beyond that provided in Section 3.12. But, again, I don't want to suggest that Hunter Mountain or Dugaboy

have any entitlement. It's just to contrast where actual trust beneficiaries lie vis-à-vis Hunter Mountain and Dugaboy.

If we can go to the next slide.

Other grounds to dismiss Count Three. Again, in Count Three, Plaintiffs seek a declaration as to whether or not the Claimant Trust beneficiaries may be indefeasibly paid and whether the conditions are such that their claimant -- you know, contingent Claimant Trust interests are likely to vest into Claimant Trust interests, making them Claimant Trust beneficiaries, yet another admission that they're not Claimant Trust beneficiaries today.

These are inquiries that would require the Court to, among other things, handicap the likelihood of Mr. Dondero's appeal in the Notes Litigation and the amount that is going to be needed to satisfy future indemnity obligations.

I have a reference in this bullet to Docket No. 3880. Your Honor, that's the other piece of information that I think the Court required Highland to produce in connection with the mediation, where we identified all of the outstanding litigation that we have. You know, we are here today. I was in Dallas two weeks ago before Judge Scholer to have oral argument on the Advisors' appeal of the judgment that was entered in favor of Highland and against them a couple of years ago.

We obviously had a lot of paperwork to deal with on the

motion for leave, you know, to sue my firm that was withdrawn in the face of a Rule 11 motion.

You know, these are all things that weren't even on that list. We've got the appeal now of the original Hunter Mountain decision. Again, with so many issues on appeal, I don't even know if the District Court will ever get to the standing question, because there's like literally dozens of issues on appeal.

We were in Houston last week for a Fifth Circuit argument on Your Honor's order conforming the plan to the original Fifth Circuit decision on confirmation.

All of these things are expensive. Mr. Dondero is famous for complaining about how expensive this is, and yet he continues to drive these costs. This hearing is making it much less -- it's making it less likely that he's ever going to be in the money. Every time we have another court appearance, every time he files another complaint, every time he, you know, does things to cause us to spend money, his being in the money -- not that it's legally relevant; I don't want to make any suggestion that it is -- but that's why we need these indemnification reserves, because there is no end in sight.

We do have a vexatious litigant motion, Your Honor. Hopefully, that will be successful. Hopefully, that will curtail things in the future. But, you know, remains to be

seen. That's just something that we feel we need to do.

The Plaintiffs tacitly admit that these requests are for impermissible advisory opinions. Obviously, they are. Any time you're asking the Court to make a determination about what's likely to happen in the future that has no legal significance whatsoever, it's an advisory opinion.

And, again, this is what I referred to earlier. If you look at Footnote 6 to Paragraph 94 of the complaint, oddly, they don't ask the Court to determine that they're Claimant Trust beneficiaries. Maybe it's because they've already admitted that they're not. I don't know. They're not asking the Court to convert their contingent interests into noncontingent interests. Again, maybe because they're -- it's an acknowledgement and an admission that that can't happen. But here's the tell, because those issues must be done in accordance with the plan and the CTA. We agreed. There's no dispute. There is no judiciable, justiciable dispute here. We agreed that all of these issues are decided by the plain terms of the plan.

I think that's my last slide, so you can take this down.

I just briefly want to finish up with just some observations about equities. As a matter of law, equity can't trump contractual terms. But if for some reason the Court even wanted to consider the question, I would ask the Court to take very seriously Hunter Mountain and Dugaboy's pleadings

where they're asking not for information regarding assets and liabilities, but they want a review of all of the prior transactions. They want to second-guess everything the Claimant Trustee has done to date. That smells. Right? And it's not the first time we've dealt with this issue. You know, Your Honor can take judicial notice of their pleadings in the Fifth Circuit when they were appealing that 2015.3 ruling. They explicitly told the Fifth Circuit they want information so that they can bring more claims. Right?

So there's not a good faith basis for this. There's not a legal basis for it. There's not an equitable basis for it. The Court has ruled on these issues multiple times already. There is no judiciable controversy before the Court. And for all of those reasons, the Court should just dismiss this complaint.

I have nothing further, Your Honor.

THE COURT: All right. Mr. Morris, you referred to the list of pending matters. And last night at 10:00 o'clock in bed, I meant to pull this up because it was referred to in one of the pleadings as well, and I didn't do it. Could you tell me the docket entry that appears at?

MR. MORRIS: Yeah, I think it's 3880. I apologize. I'm actually looking at my phone. I wouldn't typically do this, but I'm going to see if I can quickly find that. But I believe it's 3880.

THE COURT: Okay.

(Court confers with Clerk.)

THE COURT: Okay. All right. Ms. Deitsch-Perez?

OPENING STATEMENT ON BEHALF OF RESPONDENTS

MS. DEITSCH-PEREZ: Thank you. This adversary proceeding actually has deep roots. It was started by motion a long time ago, long before that balance sheet was filed. And it was done because the Claimant Trustee and the estate have consistently obscured the available resources in order to make it harder for the residual equity holders to investigate whether the estate has been mismanaged, to their detriment.

THE COURT: Did you say --

MS. DEITSCH-PEREZ: Mr. Morris talked --

THE COURT: Can I -- you said they've obscured the resources?

MS. DEITSCH-PEREZ: Yes. They've obscured what's in the estate. If you -- we'll look more closely at that balance sheet, Your Honor. In addition to not having filed the 2015 reports, the balance sheet, you're right, has a number of notes on it. But the notes -- and we'll look at those and go through them -- don't -- don't -- aren't illuminating. If you look at the face of the balance sheet, there is enough money to pay everybody and have money left over.

You have to rely on obscure, undetailed notes and assertions and assumptions to say maybe, maybe there won't be

money left over. But on the face of the balance sheet, there is enough money to pay everybody.

And if there's enough money to pay everybody, the leftover money is HMIT's. It's not -- it's not the professionals'. It's not the Claimant Trustee's. What's being used now is the residual -- old residual equity's money.

So Mr. Morris brought up mediation, and that was an interesting point, because in the papers, arguing about whether or not Your Honor should grant mediation, the estate and Mr. Seery made it very clear there would only be a resolution if there were complete and total releases given and all litigation stopped. So that was clear. We understood that. And what was at stake, obviously, in any mediation is what's left. So, what are the residual -- what's the residual?

But if we can't find out what the residual is and we can't find out what actually is being released, this estate can't ever end. It's not the Plaintiffs here who are keeping the engine going. It's the Defendants, because they know exactly how to push the buttons to raise suspicions about whether something untoward has gone on.

And so let me test the premise of the Defendants here with a hypothetical. Because, remember, Defendants arguments for dismissal turn on the contention that the Claimant Trust agreement prevents Plaintiffs from being considered

beneficiaries, no matter how much money the Claimant Trust has -- or squandered, for that matter -- if Mr. Seery doesn't authorize payment of Class 8 and 9 creditors in full and affirmatively certify that Classes 10 and 11 are beneficiaries. So, unless he does that, it's the Defendants' position Plaintiffs have no means of redress.

So let's test that with a hypothetical. Let's say that Mr. Seery, let's say that the Claimant Trustee, to keep earning his $150,000 a month indefinitely, massively overspends professional fees to justify an objectively unreasonable indemnity reserve of $125 million. And let's say he deliberately dribbles out payments to Class 8 and 9 so that eventually the combination of interest, administration, and professional fees is sufficient to eliminate the amounts that would otherwise be payable to the last dollar of 8 and 9, much less Classes 10 and 11.

And let's make the hypothetical even more extreme. What if Mr. Seery moved money into the Indemnity Subtrust and paid it to phantom vendors? I'm not saying he did that. I don't want stories about how we're accusing him of something. This is a hypothetical. But let's say he did that. He put it in the subtrust, paid it to phantom vendors, who kicked it back to him, in order to keep the amount low enough to pay the last dollar to Classes 8 and 9.

Under the Defendants' theory here, that can't ever be

discovered, much less remedied. And so that's why, that's why there is an equitable argument here, and a practical argument, Your Honor.

Because Your Honor has said you want this to end. This has to end. Well, the only way it can end is if there's sunshine, if there's enough disclosure and investigation so everybody can get comfortable that releases are appropriate and the money that could be left is left there, and then everybody can go home. Because we are all really tired of this. But it's the Defendants that are keeping it going.

THE COURT: Let me interrupt you. There are many jurisdictional arguments, as you all know. Many issues for this Court, legal issues here. But here are two things that stand out above all. And one is do the Plaintiffs have a contractual right to the information they seek or not. Why should the Court look beyond the Creditor Trust agreement, the plan, the confirmation order, which are final? These issues were never complained about. There's not enough transparency in the trust agreement language: No one ever made that argument. It's not on appeal.

So, again, many jurisdictional arguments here, but why should I ignore clear contractual terms here? It almost feels like modifying the plan three years down the road. So --

MS. DEITSCH-PEREZ: It's not --

THE COURT: So, --

MS. DEITSCH-PEREZ: I'll say it's not, Your Honor. It's not, Your Honor, because under Delaware law and under the good faith and fair dealing, every contract in Delaware -- we're not in -- it's not a Texas contract -- in Delaware, there's a covenant of good faith and fair dealing. And when a party to a contract actually does things that prevent someone else from obtaining the benefits under the contract, then you don't read the contract literally, you read it to prevent the wrongdoer from getting the benefit of their wrongdoing. And that's --

THE COURT: Okay.

MS. DEITSCH-PEREZ: That's the reason Your Honor can and must allow this case to go forward. Because, otherwise, there is a terrible, terrible law that's being created. It enables somebody to --

THE COURT: Well, you say it's terrible law, but, again, the trust agreement was out there for consumption before the confirmation hearing. And your clients --

MS. DEITSCH-PEREZ: Well, --

THE COURT: -- or others could have come in and said, this just doesn't work, this lack of transparency, this lack of oversight, this lack of access to information. And you didn't.

MS. DEITSCH-PEREZ: Your Honor, who would have thought that the --

THE COURT: And not only that, but this is not -- I have no reason to believe this is atypical language. In the dozens if not hundreds of post-confirmation liquidating trust agreements I've seen, it looks like standard fare.

MS. DEITSCH-PEREZ: Your Honor, there is no -- no one could have contemplated at the time that we would be in the situation that we are now, with information not having been provided. Many Chapter 11s are much more cooperative. They're not liquidations. They're reorganizations. They're -- people are trying to end the estate, so they're sharing information. This is not a circumstance that could have been contemplated. And Your Honor can do something about it now.

THE COURT: Well, which brings me to my second sort of overarching issue that stands out, of all the different issues. And these are my own words more than anything I think I've read. It feels like what you're asking for, if there's a jurisdictional way to get there, if there's a legal way to get there, it feels like it would be a meaningless exercise, because the value in the trust is going down daily. It's going down hourly, as we speak. The value I could determine, if this goes to trial, would be completely meaningless a month, two months, five months, three years later, because of all the litiga...

MS. DEITSCH-PEREZ: Your Honor, but on that theory --

THE COURT: Please don't interrupt until I finish. I

want to make sure my point is clear. My law clerk --

MS. DEITSCH-PEREZ: Okay.

THE COURT: -- did bring in to me the list --

MS. DEITSCH-PEREZ: I understand.

THE COURT: -- the list of litigation. And even this, if we pulled up the right one, it's several months old, so even this is very dated.

But let me put it in very plain terms. It kind of feels like your client is its worst enemy in getting this relief, because your client, because of the fifty-something appeals and because of the motions for leave to bring litigation, is causing the value of this trust to plummet. And we're never -- it seems like a meaningless exercise. I'll never be able to make a declaratory judgment as your client wants me to, if I can get there legally and jurisdictionally. How could I get to a point of being able to value the trust and value the likelihood, determine the likelihood that your client is in the money when the legal fees are going up hourly because of all of these appeals?

I'm not saying your client isn't entitled to appeal, but I'm just saying he may be his own worst enemy. That strategy means he's probably never going to be in the money.

So these are my -- I just, I'm wanting you hopefully to focus on these two biggest overarching issues in my brain. The trust agreement --

MS. DEITSCH-PEREZ: Okay.

THE COURT: -- says what it says.

MS. DEITSCH-PEREZ: And I can do that, Your Honor.

THE COURT: I'm supposed to respect contractual terms. So that's overarching issue number one in my mind.

But second, again, I don't know what the legal term would be for meaningless exercise, but it's just, it's almost like an impossibility thing to ever declare a value that means anything when it's going to be different two weeks from now, --

MS. DEITSCH-PEREZ: Your Honor, --

THE COURT: -- a month from now, a year from now.

MS. DEITSCH-PEREZ: Your Honor, it's not an impossibility. That, one, we would endeavor to do this really quickly and efficiently so that the cost of this is not material to what's in the estate.

But secondly, these kinds of exercises are done all the time in litigation. You estimate the future values. You -- an expert can assist Your Honor in determining what is a reasonable indemnification reserve. These are things that can be done. This is what lawyers and judges do.

THE COURT: This is off the chart. This is not like any other situation I can think of. This is off the chart with the amount of post-confirmation litigation. I mean, if you can point me to something analogous out there, I'd love to

see it.

MS. DEITSCH-PEREZ: The fact that there isn't a case exactly like this doesn't change the fact that there are professionals who can look at this, can look at what has been spent so far, can look at whether hearings could have two or three lawyers instead of ten, and make an estimate of the amount that's appropriate for an indemnity reserve. That's something that's susceptible of proof and determination.

It's not impossible for Your Honor to decide that, and it's not fruitless. Someone can say, hey, wait a minute, every hearing you had, you know, ten people from Pachulski and ten people from Quinn, even though they're no longer really involved, and ten people from Willkie. And so if you can rein that in, the Court can say, this is what a reasonable indemnification would be and this is what's left. And so, yes, it will finally create a path for us to resolve this estate.

But without this information, we're left with suspicion and uncertainty. How do you resolve something when you don't even know what's left? We don't -- because the reporting is quarterly, we've heard rumors in the marketplace that Class 8 has been paid in full. So I would ask Mr. Morris, is that correct? Has Class 8 already been paid in full? We don't know. I mean, can you tell us, what's the amount of the estate right now? We don't know. Because we don't know what

those notes mean. And Your Honor isn't -- and Your Honor doesn't know and can't know without shedding a light on this what that balance sheet really means.

And Mr. Morris makes a big deal about, oh, there are admissions in the complaint then they don't know if they're in the money. Your Honor, the complaint was filed before the balance sheet. So when in the last proceeding HMIT said it's in the money, that's because it knew from the balance sheet it's in the money. So you know now, you can look at that balance sheet and say on the face of it, okay, there is more -- there are more assets than liabilities. In order to determine that that wouldn't be the case, you'd need a lot more information about what those notes that you point to in the denial of reconsideration actually mean.

But here, the estate is trying to say no, not only do the Plaintiffs not get to know that information, we're not telling Your Honor, either. We're just putting a lid on it. And so we can all go on fighting because we don't have the disinfectant of information.

And so -- and now we'll get into more of the law. Your Honor asked, how can I do this? Delaware law requires this Court to afford standing to all beneficiaries, including contingent ones. And especially when it's alleged that vested status is being withheld in contravention of the duty of good faith and fair dealing.

So let's go to Slide 3.

Okay. Let's take a look at where we started and why, why we're so upset about this. If you look at the value of the estate as of June of '22, there was somewhere in the mid-$600 million in assets. And at the start, there was something under $400 million in claims. And so now, as of the end of '23 -- go back a second, go back, Mike, one more -- as of the end of '23, there was about $120 million of Class 8 and 9 remaining. But remember, there was -- you know, if you subtract 400 from 650, you've got $250 million. That's a pretty big cushion.

So let's go forward and look at what we know from the balance sheet. So, if we -- and we've put references there. But if we go through -- you can see from the face of the balance sheet there is a net value -- that's after everybody, 8 and 9 have been paid off -- of $122 million. So, in order to get rid of that, you have to assume the indemnification is going to eat up all of that.

Now, think about what the indemnification means. If in fact there was no wrongdoing, well, there'll be no judgment to indemnify.

THE COURT: But what about the --

MS. DEITSCH-PEREZ: If in fact --

THE COURT: What about the professional fees?

MS. DEITSCH-PEREZ: $122 million, Your Honor?

THE COURT: Well, we're three years post-confirmation, with no end in sight to these appeals.

MS. DEITSCH-PEREZ: Your Honor, I think it defies belief that they could reasonably spend $122 million. And the point is, if we can get this information and really have satisfaction that maybe there's really nothing bad that's happened and there are no -- there's no hidden money anywhere, and we know what's there, this can end. This can end.

THE COURT: Do you --

MS. DEITSCH-PEREZ: We can finally see the light at the end of the tunnel.

THE COURT: I mean, again, we're here for legal argument, but you're saying this could end. This is never going to end. This is never going to end. I stayed things in 2023, at your client's request, to take another crack at mediation. Okay? Even though we did mediation, even though I stayed everything in 2020 before confirmation and ordered global mediation and things didn't work out, your clients and Mr. Dondero convinced me, two years post-confirmation, stay everything again, because we don't think we got attention or respect from the mediators. The Debtor was focused on other people, like UBS and the Redeemer Committee and Joshua Terry.

So I don't know what happened, and I don't want to know what happened. It's not my role to know what happened in the most recent mediation exercise. But I do know that it's

enough to convince me this will never end. When things were stayed --

MS. DEITSCH-PEREZ: And Your Honor, --

THE COURT: When things were stayed and the legal fees weren't -- well, they were probably continuing to accrue because there were still appeal deadlines out there right and left that had to be addressed. But it's not going to settle. It's going to go on forever whether you get this information or not.

MS. DEITSCH-PEREZ: Your Honor, I'm telling you, and I represent the Plaintiffs, that the only thing that can enable this to end is to have sufficient information to be able to say, okay, I know what this all means, I know what we'll get, I know what we're foregoing.

How can anything ever settle if you don't know what you're giving up and you don't know what you're getting? How would that be possible? How would that be fair to parties to say, you should settle but you don't know what you're giving up and you don't know what you're getting? We're trying to get to the point where we could end this.

Shall I go on, Your Honor?

THE COURT: Yes, please.

MS. DEITSCH-PEREZ: Okay. Mike, next slide.

Okay. This is just a quick summary of the Defendants' arguments. Mootness, collateral estoppel, advisory opinion,

standing, failure to state a claim, and unclean hands.

Let's go to the next.

Okay. So, ironically, the Defendants argue that the balance sheet filed on July 6th eliminates the controversy among the party, parties, mooting the claims. But that can't be true, and Defendants won't provide the information to fill out the notes on the balance sheet and when -- when the balance sheet on its face shows assets exceed liabilities but the Defendants continue to maintain that they don't but without any analysis of why that's so.

Let's go on to the next.

But the Defendants shouldn't be able to have it both ways. If the balance sheet and financial statements are insufficient to determine whether assets exceed liabilities, as they claim, then the claims can't be moot. And, of course, a claim can't be dismissed simply because a defendant says in a pleading that a particular document shows that plaintiffs lack standing when the document itself does no such thing.

On its face, the balance sheet shows assets exceed liabilities. But if there's any doubt or ambiguity, that means discovery is needed, not that claims should be dismissed. This is a fact issue on which Plaintiffs are entitled to discovery and trial.

The next slide.

So, I mean, in response to the mootness arguments,

Plaintiffs cite cases that -- uncontroversial cases that say, when there's still a controversy, that claims are not moot. And if you'll look at Defendants' reply, they don't address any of that.

The Defendants also rely on the Court's order denying reconsideration of the HMIT gatekeeper regarding insider trading to say that it either moots Count Three or is the basis to collaterally estop Plaintiffs from proceeding. And there are numerous reasons that that's wrong.

So, one, the Court's dicta -- and it was dicta, because the Court had a lot of other reasons that it disposed of the matter -- is based on information that the Defendants now refuse to stand behind. And the Court's order doesn't address whether HMIT is in the money now or when the complaint was filed or whether it will ever. And it certainly doesn't exclude the potential that Plaintiffs would certainly be in the money but for Claimant Trustee's alleged breaches of good faith and fair dealing. So there's nothing about the Court's original or reconsideration order that precludes standing here.

Moreover, the order is obviously one that's on appeal and may be overturned.

Next slide.

If we look more closely at the requirements of collateral estoppel, Defendants are ignoring the basic elements of the

doctrine. So, one, the question is, are the claims identical? And they're not, for the reasons that I mentioned. The issues were obviously not necessary to the reconsideration decision since the Court stated it had several grounds for its decision.

More importantly, the Court's decision was made on a summary record in a gatekeeper proceeding. The -- so there was no discovery on that issue. And the Defendants have never fully detailed to the Plaintiff or the Court what's in the Claimant Trust, what's in the Indemnity Subtrust. We don't know.

So the balance sheet is summary information. The notes are not explained. And no one, not the Plaintiffs, not the Court, has had an opportunity to test the data and assumptions there, including undisclosed contingent liabilities and $198 million in off-balance-sheet adjustments.

So let's go to the next slide.

So I just urge the Court to go back and look at the balance sheet. And we have a picture of it up here. But if you look at it, you'll see notes. For example, Note 3. Value reflected herein consists primarily of ownership in private funds and subsidiaries. What funds? What are their assets? How liquid? Have they been sold? For a loss or gain? What's the resulting change in cash balance?

There's another note for other liabilities. To whom are

they owed? Note 5. The amount of further incremental indemnification reserves are currently expected to exceed $90 million and may be greater. $50 million? $90 million? $125 million? What's the math? What's the math behind that and how much has been used? What's been put aside? Who is getting it?

It says $35 million has been funded into the Indemnity Trust. What's the balance now? Did the additional funds reduce the value of the Claimant Trust? Did the money come out of current earnings, so maybe it hasn't reduced it?

Incremental springing contingent liabilities that range from $5 to $15 million. What are they? How much? When are they likely to crystallize?

These are among the questions that are unanswered from that balance sheet.

And let's go to Slide 12.

And so while -- Your Honor has pointed out many times that the August 25, 2023 opinion is very long, over a hundred pages, very detailed. And I concede: It is over a hundred pages. It is long. It has many sentences in it, and it has a lot of discussion. But there's no analysis about the value of the assets and liabilities or the net value of the Claimant Trust or what has been moved into the Indemnity Subtrust or why and was it justified. None of that is addressed.

The Court's October 6th opinion is short and it's cursory,

because it also doesn't analyze the value of the assets or liabilities or the net value of the Claimant Trust or what has been moved into the Indemnity Subtrust or why and whether it's justified. It simply states HMIT does not give proper attention to the voluminous supplemental notes in the balance sheet that were allegedly, this is a quote, "integral to understanding the numbers therein."

But what do those supplemental notes mean? The Debtor is vigorously shielding any scrutiny, while at the same time arguing that this Court's nonsubstantive reference to those notes collaterally estops Plaintiffs from bringing this action. But without access to information with which to challenge the other side, a party doesn't have a full and fair opportunity to be heard, and therefore any ruling based on that kind of proceeding can't have collateral estoppel effect.

Okay. So, again, this is just a summary. No full and fair opportunity prevents collateral estoppel, and the fact that there were numerous other grounds and a lack of reasoning to the issue that's being asserted here should serve collateral estoppel makes collateral estoppel inappropriate.

Okay. The Debtor also -- the Defendants argue that Count Three seeks an advisory opinion. It doesn't. It seeks a declaration concerning Plaintiffs' status that could be based on simple math from the face of the balance sheet that presently, presently there's enough money to pay everybody.

And so there would be a -- need to be a whole lot more explanation for the Defendants justifying why that's not the case.

So let's look at a hypothetical to see if Defendants' assertions about standing make sense. So let's say in a breach of contract case a broker fails to sell the plaintiff a million dollars' worth of shares that are at that time selling for a dollar each. Can the defendant move to dismiss, saying that plaintiff has no standing because the shares might go down in value, eliminating any damages? I'm sure Your Honor would say obviously not. But isn't that what the Defendants here are saying? It's -- they're saying it's possible they'll spend enough money to prevent the former equity from getting anything. But that doesn't mean that Plaintiffs lack standing now.

The Claimant Trust had sufficient assets to pay unsecured creditors in Class 8 and 9 in full, with interest, at least as early as mid-2023, maybe as early as September '22. Had Mr. Seery fulfilled his mandate, he should have distributed that and made the GUC certification. So Plaintiffs' contingent interests should have officially vested many months ago. And because of the duty of good faith and fair dealing, the Court --

THE COURT: What about Section 6.1 of the credit trust agreement?

MS. DEITSCH-PEREZ: You have to imply -- you have to add into that a duty of good faith and fair dealing. And so if Mr. -- if the Claimant Trustee has not taken those actions for the express purpose of making sure to silence -- trying to silence Class 10 and 11 and prevent them from getting money and being able to spend it all, you know, paying -- holding back enough to eventually pay a dollar -- a dollar less to Class 9, and using the rest of the money. So, Your Honor, because of the duty of good faith and fair dealing, 6.1 does not tie Your Honor's hands.

And let's look at the Slide 16.

THE COURT: The Trustee is required to reserve amounts necessary for indemnification obligations and the administration expenses of the trust are entitled to payment ahead of any classes under the plan. Class 8, Class 9, as well as --

MS. DEITSCH-PEREZ: Uh-huh.

THE COURT: -- 10, 11.

MS. DEITSCH-PEREZ: Your Honor, but is not -- is there not any limit on how much can be set aside? Let's say there were -- there was $300 million left over.

THE COURT: This is where I go back --

MS. DEITSCH-PEREZ: Could a Claimant --

THE COURT: -- to your client is in control of its own destiny here. This --

MS. DEITSCH-PEREZ: Well, basically, is Your Honor saying --

THE COURT: This should all be over. This should all be over, three years post-confirmation. It should all be over.

MS. DEITSCH-PEREZ: Yes. And --

THE COURT: They stayed --

MS. DEITSCH-PEREZ: Yes. And if we --

THE COURT: They stayed the mega-lawsuit. They stayed the mega-lawsuit for the reasons you are suggesting.

MS. DEITSCH-PEREZ: The unjustified mega-lawsuit that shouldn't have been brought in the first place. They stayed it. Very nice. They stayed it because they didn't -- they knew they didn't need that money. They knew it was unjustified. So they stayed it.

THE COURT: So that would suggest to me proper exercise of business judgment, litigation judgment. But they have no control over all of these appeals and all of the --

MS. DEITSCH-PEREZ: But --

THE COURT: -- litigation that your clients pursue.

MS. DEITSCH-PEREZ: Your Honor, my clients pursue litigation because they don't have the information to know whether they're -- wrongdoing is occurring. And the hallmark of this bankruptcy --

THE COURT: That doesn't apply with regard to the

appeals. And, again, --

MS. DEITSCH-PEREZ: Yes. And the appeals --

THE COURT: -- if your client wants to appeal, that is what's beautiful about our system. You can appeal and maybe get judgments overturned. But --

MS. DEITSCH-PEREZ: That's right.

THE COURT: -- it's a strategy here. Right? As long as you keep doing that, --

MS. DEITSCH-PEREZ: No, it's --

THE COURT: As long as you keep doing that, HMIT and Dugaboy's contingent interests, any recovery on them is going to continue to become less and less likely.

MS. DEITSCH-PEREZ: But so Your Honor, is Your Honor actually suggesting that they should lie down and not challenge anything to save a buck, and so if things have happened --

THE COURT: No. You heard what I said. Appeal away. Appeal away. No trial judge, no bankruptcy judge gets things right a hundred percent of the time. So appeal away. But don't complain about maybe not being in the money, when the greatest risk, it sounds like, to your client not being in the money is the professional fees continuing to impair value. And we could never get to a point in time where we could -- you know, again, my words earlier, meaningless exercise. How could I ever make a declaratory judgment about value or the

likelihood of your client recovering as long as there are dozens of appeals continuing to cause the liabilities to increase, the expenses to increase?

MS. DEITSCH-PEREZ: Your Honor, that's, I mean, --

THE COURT: You're asking the Court to do something impossible.

MS. DEITSCH-PEREZ: It's not impossible, because these appeals -- appeals like this happen all the time, and there are certainly professionals who are involved --

THE COURT: Name one bankruptcy case in history where there have been this many appeals.

MS. DEITSCH-PEREZ: It -- there don't -- there doesn't have to be another one with this many appeals. You just look at the cost of an appeal in any case and figure out whether, with what's going on here, what is the appropriate amount to set aside for that cost. It's eminently doable. It doesn't -- we don't have to have an exact case to match it to. We just need to have -- are there ever appeals of whether a release is overbroad? Sure. Are there ever appeals about whether a gatekeeper is appropriate? Sure. Are there ever appeals about whether the dismissal of a claim is appropriate? Sure. Those are all things that someone can look at and say, well, this is an appropriate amount to be spent on that, and so this is an appropriate amount to hold aside for resolving it.

But what we're saying is if we can get sufficient disclosure, we can figure out whether or not there -- it ought to be ended. But without that, we're left saying, what's being hidden here? What's actually left? What's been done? And so that's why -- and this is a problem that comes up in trusts all the time when there's not sufficient disclosure of what's in the trust. So that's why, under the *Restatement of Trusts*, --

THE COURT: Wait, wait, wait. This is what happens all the time? I don't know what kind of --

MS. DEITSCH-PEREZ: Yeah. In other words, that --

THE COURT: What post-confirmation trust agreement that's been approved as part of a plan does this happen all the time?

MS. DEITSCH-PEREZ: I'm not talking about -- about trusts in bankruptcies in particular. I'm talking about --

THE COURT: That's what we're dealing with here.

MS. DEITSCH-PEREZ: Well, --

THE COURT: And I'm just telling you: One time, I've wracked my brains, and one time since I've been on the bench -- I'm coming up on my 18-year anniversary.

MS. DEITSCH-PEREZ: Uh-huh.

THE COURT: I'm old. But one time I have had litigation about what the heck is going on with the post-confirmation creditor trust.

MS. DEITSCH-PEREZ: Uh-huh.

THE COURT: The facts were so very different. It was a creditor trust agreement, and I think it had a three-year term on it. The trust was going to be wrapped up in three years. And Year 3 came along and there was a motion to extend it. We're not done, we want to expand it, I don't know, six months, maybe a year. And then that time frame went by and there was another motion to extend it. So it was extended another year. And then it happened again.

And a creditor objected, saying, I want to know what the heck is going on. And I looked at the docket sheet and I'm like, gosh, there aren't any appeals out there, there's hardly any activity that's going on. And so we had a hearing. And the trustee was getting a flat fee that was rather large for the size of that estate, where unsecured creditors were probably going to get less than ten cents on the dollar. And we ended up having another hearing where we find out that the oversight committee hadn't met in like three years and these creditors who are likely to get five cents on the dollar, they had just mentally checked out a long time ago.

And even in that situation, I was struggling with my power, my jurisdiction, to put any equitable oversight mechanisms in place when the creditors had voted on this, when the creditors got to see the creditor trust agreement before the confirmation hearing and no one complained. And luckily,

that situation was resolved. The creditor trustee said, we're going to wrap it up in six months. I'm no longer going to take my compensation. And it was some tax issue that no one had been focusing on properly, like I think maybe the company hadn't done tax returns in a gazillion years before confirmation.

But the point I'm getting at is, again, many, many legal issues out there, but the overarching issue I keep coming back to is there's a creditor trust agreement that everyone got notice of and the Court approved. And contractual terms are something I'm supposed to respect. And you're asking me, on an equitable basis, to overrule this. This has maybe far-reaching effects for everyone who strikes a bargain in Chapter 11 with, Here's our plan, here's what the liquidating trust is going to be governed by, here's the hearing, speak now or forever hold your peace, I approve it. And --

MS. DEITSCH-PEREZ: You're right, Your Honor, that it has far-reaching effects. And if you don't do something to shine a light on this and enable the disclosure and the hearing, you will embolden claimant trustees to do exactly what's happening here, maybe in even worse circumstances. And the difference between the case you mention and the case here is -- actually weighs in favor of intercession sooner here because there is so much money involved.

So there's -- it's not a piddling amount that, you know,

where creditors are only getting a couple cents on the dollar anyway, so, you know, they're going to get three cents or two cents. It's of less magnitude. Here, there is an enormous amount of money that may be squandered. And so it's more important to look hard at this and impose the covenant of good faith and fair dealing.

And that's why the *Restatement of Trusts* says that beneficiaries of a trust are -- include contingent beneficiaries. And then if you take --

Let's go to the next slide, Mike.

Okay. Delaware courts also look to *Black's Law Dictionary*. And that's important here, because it actually includes contingent beneficiaries and direct beneficiaries within the definition, without any qualification, but expressly distinguishes an incidental beneficiary or someone who's going to be a beneficiary by virtue of a separate contract. And nothing in the Claimant Trust agreement indicates that Plaintiffs are merely incidental beneficiaries. And that's important because in that *Paul* case that Defendants rely on so heavily, they were incidental beneficiaries. It was a separate document, not the trust agreement itself, that would give rise to the status of the plaintiffs.

And so Delaware -- go to 18 -- Delaware courts make a point of not -- of not reading statutory language restrictively to exclude classes of beneficiaries. And so

while they are not absolutely on point, they are thematically on point, and to say that if someone is even a contingent beneficiary, they ought to have the rights that one has under the Delaware law.

And so -- go to -- move -- next slide.

And the duty of good faith and fair dealing is not disclaimed in the Claimant Trust agreement, and moreover, it cannot be disclaimed. So that's something Your Honor has to take into account. And the impact of a duty of good faith and fair dealing is that a party is basically estopped from raising a provision that they are using in conjunction with their own wrongdoing.

So if the Claimant Trustee is deliberately not paying out $8 million in full in order to keep an unreasonable amount in reserve and be able to be employed at $150,000 a month, you know, being paid the same thing now, when most of the liquidation has already been done, as, you know, when there were a million things going on and a lot of management. So it does seem unreasonable, and the Claimant Trustee has the power to keep that going basically forever.

Next slide.

And so -- and when I said earlier, you know, this is a common thing, what I meant was cases like *Estate of Cornell* and *Edwards*. It's just a -- it's a universal problem that you can prevent or postpone vesting unreasonably and prevent

distribution by your own acts.

And if you look at the Defendants' reply, there is not one word about these concepts, about whether or not the Court has the power and, really, must stop a trustee from raising their own interest over the interests of the beneficiaries, including the contingent beneficiaries.

Next slide.

So, and I really covered this to some degree, but Defendants' reliance on *Paul Capital*, which is an unpublished case, is misplaced. The interests here are not incidental. They're not derived from an outside contract. The court in *Paul Capital* also relied on the fact that the trust agreement -- agreements in that case were fully integrated, which was a reason they didn't look to that outside contract. But in fact, there's no merger clause in the CTA, so that's another difference.

Next.

Defendants' entire argument that Plaintiffs are not entitled to an accounting turns on its erroneous conclusion that Plaintiffs are not beneficiaries under the CTA. And now they also point to -- which I don't believe they did in their papers -- they also point to the general rule that an accounting is not done as a matter of course. But this Court has the power under Texas law to impose an accounting when there are questions, as there are here, that need to be

answered in order for the parties to make sensible decisions about what ought to be done going forward.

Then, unclean hands, it's a one-sentence argument in the Defendants' brief referring to the Kirschner litigation, which it doesn't actually identify by name and doesn't say anything about the fact that it was voluntarily stayed. And the claim against HMIT, and it is breach of contract, so it's really hard to understand how being a defendant in a breach of contract action is unclean hands. And the Plaintiffs made these points in response to Defendants' motion, and Defendants' reply brief is conspicuously silent of any rebuttal.

Okay. So, Defendants' motion to dismiss needs to be denied so that Plaintiffs finally have a full and fair opportunity to challenge Defendants' assertion.

Even if this Court disdains Plaintiffs and sympathizes with the Claimant Trustee, the Court is making law here. And as we've pointed out, the law would create this platform for claimant trustees to enshrine themselves and to do things under a veil of secrecy. And that's not something that I would think this Court would want to do.

If there's enough money to pay all of Classes 8 and 9, the remainder belongs to Classes 10 and 11, not the estate professionals. Money left over after --

THE COURT: Let me ask you.

MS. DEITSCH-PEREZ: -- Class 8 and 9 are paid --

THE COURT: Again, that's just not entirely correct, because of 6.1. It is in there that indemnification obligations must be reserved for. And let me ask you: How many times have your clients tried to sue Mr. Seery?

MS. DEITSCH-PEREZ: I -- a couple. And the point is if he --

THE COURT: Only a couple?

MS. DEITSCH-PEREZ: Yes.

THE COURT: Only a couple? So, --

MS. DEITSCH-PEREZ: Yes. But --

THE COURT: So they're required to reserve amounts necessary. How much is your client or your clients seeking to recover from Mr. Seery in those couple of lawsuits? I think there have been more than two attempts.

MS. DEITSCH-PEREZ: I don't think it's -- I don't think the -- I don't think the amounts sought are the issue. It's -- it's there's -- and I'm not counsel of record in the insider trading case, but I don't remember a large amount. The -- in the case we're bringing to --

THE COURT: The insider trading case? The insider trading case? Are you talking about the Stonehill/Farallon thing?

MS. DEITSCH-PEREZ: Yeah. Yes. I don't -- that -- you asked about every case where Mr. Seery is mentioned. So I

don't think there's a big number there. And the case --

THE COURT: Wait, wait, wait.

MS. DEITSCH-PEREZ: -- that I have --

THE COURT: You don't think there is a big number there? You don't remember the prayer for relief in that?

MS. DEITSCH-PEREZ: I don't, Your Honor. It's not -- I'm not the lawyer of record in the case.

THE COURT: Okay.

MS. DEITSCH-PEREZ: But let me point out, if --

THE COURT: I think it was rather open-ended and large. Okay? But, and then there's the professional fees and expenses that have priority.

MS. DEITSCH-PEREZ: Your Honor, --

THE COURT: I mean, I just, I want to hear: Are you asking me to disregard Section 6.1 on equitable grounds? I think at bottom you are, and I just want to hear you answer that question.

MS. DEITSCH-PEREZ: Your Honor, I'm going to answer that question, but I'm also going to point out that the indemnification, if in fact there is intentional wrongdoing that occurred, the estate is not obligated to indemnify. If in fact the Claimant Trustee prevails in a claim or Mr. Seery prevails in a claim, there is no judgment to indemnify. So we're only talking about professional fees.

And yes, Your Honor, you don't ignore 6.1. You read it

with a duty of good faith and fair dealing applied in it, and that enables you to allow this case to proceed, which is necessary if we are ever going to end this matter.

And I will tell you, you asked about what's being sought from Mr. Seery.

THE COURT: Can someone on your team -- can someone on your team tell me how many pending appeals there are right now? Because the chart that I asked my law clerk to pull is several months old.

MS. DEITSCH-PEREZ: We can -- I'm -- we can submit it after the fact, Your Honor.

THE COURT: Okay. I wanted to know right now, but --

MS. DEITSCH-PEREZ: We'll send something.

THE COURT: I wanted to know right now, when I'm --

MS. DEITSCH-PEREZ: I mean, I don't know right now how many there are.

THE COURT: Is -- are there a dozen?

MS. DEITSCH-PEREZ: And I wouldn't want to try and count while I'm sitting here.

THE COURT: Are there a dozen? Can you say, are there more than a dozen?

MS. DEITSCH-PEREZ: I don't know, Your Honor. I think many of them have wound down, and so the only -- we're awaiting decision. So I don't know.

But appeals, of their nature, are generally not that

expensive. There's no discovery. You write a brief. You go and argue it.

THE COURT: That is not my recollection whatsoever from reviewing fee apps for 18 years or for practicing law 17 years. You know. If --

MS. DEITSCH-PEREZ: Your Honor, I agree, if there were not -- if the Defendants didn't bring six or seven people to New Orleans or Houston when there is an appeal, I would think that it would cost less. There's no reason, in this day and age, where you can -- if you're only listening, you can -- you can do that from your office, because the Court provides an audio link. There's no reason to have that many people travel clear across the country to go sit and listen to arguments. So, is there a reason things cost more than they should? Absolutely. But that's not the Plaintiffs.

THE COURT: Okay.

MS. DEITSCH-PEREZ: This Court could look at what is left and say, you know what, in my experience, taking into account your 18 years, this is -- this is what this many proceedings should cost. That's the amount of -- and even if you add a little cushion -- that's the appropriate amount of indemnity, and everything else can be distributed. You can do that, Your Honor. You have the -- there are professionals who could give expert testimony, and with that, between that and Your Honor's experience, you can figure that out. It's not a

black box.

THE COURT: All right. Mr. Morris, your rebuttal, please.

MR. MORRIS: Thank you, Your Honor.

If nothing else, counsel's presentation proved one thing, and that is this proceeding should be dismissed. She insists -- she had her presentation up on the board -- that they're in the money. We disagree. We disagree both with the analysis and with its legal significance.

But just as HMIT contended last summer that they were in the money, counsel today is ratifying that and saying they're in the money. If they're in the money, why do they need this information? They don't.

Let me just start with the rebuttal, because it's going to be some random points just because I'm -- I've taken some notes.

The concept that three-plus years ago Heller Draper, Munsch Hardt, Bonds Ellis couldn't foresee that we would be here is mind-boggling, and, then, legally irrelevant. You know who had the foresight to see that we might be here? The Creditors' Committee. They're actually the ones who drove this process on the Claimant Trust agreement. It's why the agreement says exactly what it says. It's an agreement between parties that defines the beneficial owners' rights and the limitations on those rights.

There is a reason that contingent trust beneficiaries are not owed any duty whatsoever until their claims vest and that they have no rights under the Claimant Trust agreement or the plan, at least as it pertains to the Claimant Trust agreement, until their rights vest. The vesting process was not an accident. It was intended to make sure that Mr. Dondero could not do exactly what counsel is making plain she wants to do today, and that is get information in order to second-guess every decision that Mr. Seery has made. Okay?

Everybody on our side of the table knew, based on Mr. Dondero's very long history of litigation, that this was a possible end result, and they prepared for it. That Mr. Dondero's lawyers did not is on them. The Court should not be rewriting the agreement today.

Ms. Deitsch-Perez contends that somehow we have obscured resources. No such thing has ever occurred. Okay? The plan and the Claimant Trust agreement provide very specific rules on what must be disclosed. There are other rules that require disclosures. There is no allegation whatsoever that the Claimant Trustee or the Claimant Trust has failed to meet its obligations to make the disclosures required under the Claimant Trust agreement and under the law.

And in fact -- this is another point that just gets obscured in all of this, like a suggestion that somehow Mr. Seery is some rogue guy doing stuff all by himself. That's

false. It's baseless. There is a Claimant Oversight Board with an independent member and with two members who have a substantial stake in the Claimant Trust. And there are many Claimant Trust beneficiaries, not one of whom is here to complain, not one of whom is concerned about the lack of disclosure, not one of whom is concerned about the reserves that have been made in this case.

There's really nothing more to talk about, but I have to respond to certain of the other points. This notion that somehow assets that exceed liabilities are the property of HMIT is legally incorrect. That's as polite as I can say it. Your Honor focused on it. 6.1. It is what it is. But I do need to make the point that there is no way that anybody could make a reasonable estimate of indemnification claims. It's not just appeals, Your Honor. That's one aspect, and I appreciate Your Honor focusing on it. But we have litigation in Guernsey. We have litigation in the Southern District of New York. We have, you know, these suits. He doesn't want -- he is just looking for information.

He tried to sue my firm on this ridiculous theory that we were actually his lawyer way back in September 2019. Like, really? It was withdrawn in the face of a Rule 11 motion. But you know what? My firm incurred expenses defending itself.

These things don't stop. There is another lawsuit to

remove Mr. Seery. That's been stayed pending the outcome here, because just like they have no legal right or equitable claim to obtain any information from the trust, they have no legal right or equitable claim to remove Mr. Seery. But we're going to have to do that.

The money in the trust is not HMIT's. They have no legal or equitable claim to that money unless and until all senior claims and expenses are satisfied. And that will not happen as long as there's pending litigation.

You know, you're encouraged to make an estimate. What happens if your estimate is wrong, Your Honor? What happens if you come up with a ruling and say the estimate is $50 million and that's what Mr. Seery reserves, because he's going to comply with any order this Court issues, and at the end of $50 million there's still litigation and he or other indemnified parties have been sued? And now what? Now what happens then?

That's why this is completely untenable and it has no basis in law, fact, or equity.

Dicta? Your Honor's decision that HMIT was not in the money was dicta? That was the whole basis for the motion. The motion sought reconsideration on the basis that they were in the money and therefore had standing. It's not dicta. It's the holding, after an analysis of the balance sheet, after showing the faulty logic in HMIT's presentation. That

it's a balance sheet, Your Honor. It's not cash. You don't spend what's on a balance sheet, you can't buy anything with what's on the balance sheet, because what's on the balance sheet is a bunch of contingent stuff. Like the Notes Litigation. $70 million. They're here telling you they're in the money, and they treat that $70 million as being in the Claimant Trust's pocket. It's not. Not only is it not in the Claimant Trust's pocket, Mr. Dondero is doing everything he can to make sure it never gets in the Claimant Trust's pocket.

This is their disingenuous theory of what the balance sheet means.

Again, apologies for the somewhat disparate nature of the rebuttal.

Duty of good faith and fair dealing. You've heard that a lot. Where is it in the complaint? What cause of action here is dependent on duty of good faith and fair dealing? Nothing. You won't find it. The words aren't there. This is a request for information and two requests for declaratory judgment that assets exceed liabilities and that they may vest someday in the future. Their complaint, the only thing that's the subject of this motion, has nothing to do with the duty of good faith and fair dealing.

The Kirschner action. It was stayed. But you know what, Your Honor? It wasn't dismissed. It was stayed because responsible parties like Mr. Kirschner and Mr. Seery said,

let's pause and see what happens. There may come a time when we start that litigation. There may come a time. Right? It wasn't dismissed.

So the notion that we've made a decision that it's not necessary is wrong. The decision was made that we don't have to spend that money today. Let's keep it on ice and let's see if we need to in the future.

Willkie. We heard some disparaging remarks about Willkie's participation in these proceedings. Well, you know what, Your Honor? Mr. Seery, God bless him, never retained personal counsel in this case until HMIT sought leave to sue him. Willkie is in this case only because Mr. Dondero made the decision to go after Mr. Seery. Mr. Seery is entitled to indemnification, he has indemnification, and I'm delighted that the Willkie firm is by my side.

If Mr. Seery -- if Mr. Dondero has regrets about Willkie's participation, he shouldn't sue Mr. Seery anymore. Maybe they wouldn't have such a role.

Listen to what they're saying, Your Honor. Listen to Ms. Deitsch-Perez's hypotheticals. What if they find out that there's overpayments to professionals? What if there's payments to phantom vendors? What if they learn someday that Mr. Dondero -- Mr. Seery has engaged in wrongdoing? If this is what they want to hold out for, if this is what they want to continue to litigate for, because they think one day maybe

they might have something, somebody did something wrong, it's Mr. Dondero's prerogative. But this is not a vehicle to give him information to pursue those claims. It's just not.

Standing. There's no standing motion here. We're not saying dismiss this because they don't have standing to spring the claims. We're saying that they don't have any legal right to seek information because of the plain terms of the Claimant Trust agreement and the plan. It's not a standing question, it's about whether they have a legal right, and the plain terms of the operative documents state definitively that they do not.

They can't settle without the information.

(Pause.)

THE COURT: Whoops. We just lost you, Mr. Morris. We just lost your sound.

MR. MORRIS: Okay. Am I back?

THE COURT: You're back.

MR. MORRIS: Okay. People settle claims, known and unknown, all the time. Okay? Mr. Dondero should look at his success rate in litigation in this case and decide what he's really holding out for. He should look at the success in bringing the suit against my firm. He should look at what happened when we had the evidentiary hearing in Hunter Mountain and it was revealed that he was actually the party who engaged in inside information. He was actually the person

who lied to Mr. Seery about what was happening with MGM. He should think about his lack of success, the lack of merit, what happened in the Notes Litigation, how ridiculous the supposed oral agreement defense was. He should ask Mr. Rukavina how the hearing went in front of Judge Scholer last week on the appeal.

And he's holding out for more claims? This is what he wants to do for his life? God bless him. We will reserve everything.

Mr. Dondero is not the principal. He doesn't get some final say over the propriety of the actions of the Claimant Trustee or my firm. He doesn't have that right. That's what the Claimant Trust agreement was intended to do. It reflects the settlor's intent. And the settlor's intent was that Mr. Dondero or Hunter Mountain or Dugaboy would get a check at the end of the day if and when all senior claims and expenses were paid and satisfied. That has not happened, so they don't get a check. It's really that simple. It may be hard for him to take, and I appreciate that, but he should have thought about these issues three-plus years ago when all of this was proposed, because other people thought about it, and here we are.

And the Court has, I respectfully say, no authority, no jurisdiction to override the plain terms of an agreement that has been affirmed by this Court and has been affirmed by the

Fifth Circuit Court of Appeals. There has never been a challenge to these provisions that they just want you to completely ignore.

Just one moment, Your Honor.

(Pause.)

MR. MORRIS: Your Honor, I actually have nothing further unless the Court has any questions.

THE COURT: Okay. I only have one question. And let me preface it by saying that I don't pay much attention to appeals and satellite litigation unless something is brought to me. I mean, there just are not enough hours in the day for me. Plus it's just, it's not of my concern. Right? An appellate court is going to do what it's going to do and issue a mandate to me at some point, if appropriate. And the same with satellite litigation. It's either going to somehow be brought before me or not.

So you may think that I'm aware, lawyers, parties may think that I'm aware at all times of different things going on out there, but I'm really only sort of aware. I don't know how many pending appeals there are right now. But I do know that someone who seemed to know what he was talking about, another judge in Texas, not here, told me that Highland has spawned more appeals at the Fifth Circuit than any other -- I don't know if he said bankruptcy case in history or Chapter 11. And he said, are you proud of that? Hahaha. And I said

no. I'm not even remotely proud of that. And I haven't double-checked his figures, but he's kind of a numbers wonky lovable geek, so I think he probably knew what he was talking about.

But finally getting to my question, Mr. Morris: You alluded to there's a vexatious litigant motion pending, and you reminded me I heard about that at a hearing many months ago. I think you said it was before Judge Brantley Starr, a district judge here in this district. Is that correct?

MR. MORRIS: It is correct, Your Honor. And we filed our reply papers last Friday, so it's been fully briefed.

THE COURT: Okay. Well, even though I don't closely monitor appeals, satellite litigation, I may be monitoring that.

MS. DEITSCH-PEREZ: Your Honor, may I make one rebuttal, by the way, to Mr. Morris's presentation? I just have one comment.

THE COURT: If it's 30 seconds. But this is out of order. Usually, Movant goes last. I assume this is going to be hugely important.

MS. DEITSCH-PEREZ: It is important. It's something Your Honor raised and Mr. Morris raised, so I want to point something out so there is no misunderstanding. There was a lot of talk about, well, the Plaintiff should have done something about this at the time of the plan. If Your Honor

recalls, at the time of the plan the projections were that Classes 8 and 9 would recover a fraction of their value. So there was no reason Classes 10 and 11 should be -- should have anticipated the issues that have arisen now. And I just want to remind everybody of that.

MR. MORRIS: And just one sentence, Your Honor. Mr. Dondero acquired every single asset that Highland has. He was in Highland's offices with full access to all information through October. He had Mr. Waterhouse, the CFO, onsite until just before the confirmation hearing, and there was no objection to those projections.

What happened is Mr. Seery and his team did a great job and benefited from a rising market, and yet here we're going to be subjected to more litigation. It's brilliant.

THE COURT: All right. Well, I am finished hearing everything. And with respect to that comment for the Plaintiffs, I continue to think this is a very important issue, of the many issues, of the many jurisdictional issues here. And there are so many issues, I'm not sure, if you prioritize the issues, where this one falls on the list. And yet as a bankruptcy judge I am obsessed a bit with the issue of the impact on the Chapter 11 world.

We have liquidating Chapter 11s with -- or even if they're not liquidating, we have Chapter 11s where there's a litigation trust like this one where there is sometimes a

discussion, when are you going to get the creditor trust agreement on file? Oh, it's going to be part of a plan supplement, and the plan supplement will be filed, you know, ten days before the confirmation hearing. Whatever. I'm just giving you a typical fact pattern. And it's part of the evidence. It's part of the information. It's not just evidence at the confirmation hearing. It's usually on file several days before the confirmation hearing, where it's out there for consumption, for people to complain about if they think there are objectionable terms. And we just have this in dozens and dozens of cases.

And I can even go further back in my brain here. I mean, Chapter 11, very soon after the case was filed, we had a U.S. Trustee saying conversion to Chapter 7 or appointment of a Chapter 11 trustee. You know, we can't have Mr. Dondero as the manager of this Debtor anymore. And despite that argument, we put in place a corporate governance mechanism that Mr. Dondero agreed to. And my point is there's always been a huge amount of oversight by what we considered the fulcrum security here, the unsecured creditors. A huge amount of oversight. A huge amount of oversight in this case that was negotiated in response to a very active Creditors' Committee and a U.S. Trustee saying can't have a debtor-in-possession here.

So why do I go back? I mean, it's really troublesome for

any judge to hear, We have suspicion. We are worried about a breach of good faith and fair dealing. What if there are fictional vendors?

I mean, this case has been full of extensive oversight. And not only could the Plaintiffs here have complained about the terms of the creditor trust agreement, heck, they could have said convert this sucker to Chapter 7, because a Chapter 7 trustee will have -- there will be a lot of transparency for everything that happens in winding down this estate.

So, rambling, yes, I'm rambling. I do that. But the philosophical issue here, I just, it's hard for me to ignore, because, looming, we have the jurisdictional issues, but what you're asking me to do is something that it's just a fact pattern we see all the time of plans with litigation trust agreements. And we all know what the terms are going to be, and we can all argue about those terms if we don't think they're appropriate, and we all know that the future is uncertain and things could change, and that's just the way it is. Here it is. Live with it or not.

Anyway, but so that's a big deal, the contractual rights here.

And as I said earlier, another kind of overarching issue is it feels like kind of a meaningless exercise when we have the asset side of the balance sheet but the liabilities just grow unlike any other case. It's fair to say unlike any case.

There have been more appeals generated at the Fifth Circuit from this case than any Chapter 11 ever, and maybe any bankruptcy ever.

There was a reference to, well, yeah, there are lots of appeals, but you don't need to send six lawyers to New Orleans or have people. But I was just writing down as I was thinking through this, and Mr. Morris alluded to some of it, we've had at least the following law firms involved for either Mr. Dondero or entities he controls: Munsch Hardt; Bonds Ellis; Heller Draper; Louis Phillips' firm, I think that's Kelly Hart; the Stinson law firm; Sawnie McEntire's law firm; Ms. Ruhland, Amy Ruhland; Lang Winshew; and I forget the name of the lawyers who represented the Charitable Trusts.

MR. MORRIS: Mazin Sbaiti.

THE COURT: The Sbaiti law firm.

So I've just rattled off from memory nine law firms, okay? I'm not even sure I've captured them all. Probably not. So it's, on all sides of this, I can't remember if I've said this in court or I've just maybe said it back in chambers, but I'll say it: This feels like the Disneyland case. Have I ever said that in court yet? Do you know what I mean by that? I probably haven't.

The famous quote of Walt Disney, when someone asked him about the theme park and when it would be finished, and he said, Disneyland will never be finished as long as there are

creative people with imaginations. I mean, this is like the Disneyland case. It will never be finished as long as there are certain parties and lawyers who have imagination and keep filing stuff. I don't mean to be flippant, but I really am trying to emphasize what I said. Sure, people are entitled to appeal, but how can you complain about 'I don't know if I'm in the money or not' when there's just no end in sight?

So I'm going to obviously take this under advisement, and we will carefully look at every argument and every case, because that's what we do. That's what we're duty-bound to do. We don't knee-jerk anything around here. But I am very, very troubled by some of the arguments. And it's what made me ask about the vexatious litigant motion and its status, because it just feels so beyond the pale to make accusations of some sort of breach of good faith and fair dealing and raise the specter of lack of transparency and something untoward may be going on, when these were the terms negotiated as far as post-confirmation oversight, we have an Oversight Committee, and I think every rational person knows that the professional fees and the indemnification obligations and the appeals and the satellite litigation are why we can't wrap this up. Okay?

So let that soak in. And we will get an opinion out as soon as we can make it happen.

All right. We're adjourned.

THE CLERK: All rise.

(Proceedings concluded at 11:28 a.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **02/20/2024**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX