

STINSON LLP

Deborah Deitsch-Perez

Michael P. Aigen

2200 Ross Avenue, Suite 2900

Dallas, Texas 75201

Telephone: (214) 560-2201

Facsimile: (214) 560-2203

Email: deborah.deitschperez@stinson.com

Email: michael.aigen@stinson.com

Counsel for Hunter Mountain Investment Trust

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

In re

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Reorganized Debtor.

§
§
§
§
§
§
§

Chapter 11

Case No. 19-34054-sgj11

MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL



Table of Contents

I.	PRELIMINARY STATEMENT	1
II.	STATEMENT OF FACTS	2
III.	ARGUMENT	7
A.	Standard of Review.....	7
B.	Arguments for Granting the Motion for Leave to Appeal.....	8
1.	<i>The Bankruptcy Court’s Order Ruled on Controlling Questions of Law</i>	8
2.	<i>There Are Substantial Grounds for Difference of Opinion on the Issue Decided by the Bankruptcy Court Stay Order</i>	11
3.	<i>An Appeal of the Bankruptcy Court’s Order Materially Advances the Termination of Litigation</i>	16
IV.	CONCLUSION.....	17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alexander v. Navient Sols., Inc.</i> , No. 5:15-CV-00837-RP, 2016 WL 11588317 (W.D. Tex. Feb. 19, 2016)	10, 14
<i>Arparicio v. Swan Lake</i> , 643 F.2d 1109 (5th Cir. 1981)	8
<i>In re Central Louisiana Grain Co-op., Inc.</i> 489 B.R. 403, 411-12 (W.D. La. 2013)	10
<i>Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co., Inc.</i> , 761 F.2d 198 (5th Cir. 1983)	9
<i>CTF Hotel Holdings, Inc. v. Marriot Intern., Inc.</i> , 381 F.3d 131 (3rd Cir. 2004)	9
<i>In re Davis</i> , 730 F.2d 176 (5th Cir. 1984)	9
<i>In re Hallwood Energy, L.P.</i> , 2013 WL 524418 (N.D. Tex. 2013)	11
<i>In re Highland Capital Management, L.P.</i> , Civil Action No. 3:21-CV-0132-E, 2021 WL 3772690, at *1 (N.D. Tex. 2021)	7
<i>In the Matter of Highland Capital Management, L.P.</i> , Case No. 23-10911 (5th Cir.)	15
<i>Matter of Highland Capital Management, L.P.</i> , No. 22-10960, 2023 WL 4861770 (5th Cir. July 31, 2023)	15
<i>Matter of Highland Capital Mgmt., L.P.</i> , 57 F.4th 494 (5th Cir. 2023)	16

In re Highland Capital Mgmt., L.P.,
No. 19-34054-SGJ11, 2022 WL 3959550 (Bankr. N.D. Tex. Aug.
30, 2022)16

Matter of Highland Capital Mgmt., L.P.,
No. 22-10983, 2023 WL 4842320 (5th Cir. July 28, 2023)16

Highland Capital Mgmt., L.P. v. Dondero, et al.,
Consol. Case No. 3:21-cv-00881-x (N. D. Tex.).....15

Hilton v. Braunskill,
481 U.S. 770 (1987).....11

Ichinose v. Homer Nat’l Bank,
946 F.2d 1169 (5th Cir.1991)17

Jamison v. Esurance Ins. Servs., Inc.,
No. 3:15-CV-2484-B, 2016 WL 320646 (N.D. Tex. Jan. 27, 2016).....12, 14

Landis v. N. Am. Co.,
299 U.S. 248 (1936).....12, 14, 15

McCoy v. SC Tiger Manor, LLC,
No. CV 19-723-JWD-SDJ, 2022 WL 164537 (M.D. La. Jan. 18,
2022)12

Morris v. Spectra Energy Partners (DE) GP, LP, 246 A.3d 121 (Del.
2021)12

Panda Energy Int’l, Inc. v. Factory Mut. Ins.,
2011 WL 610016 (N.D. Tex. Feb. 14, 2011)11, 16

Ryan v. Flowsolve Corp.,
444 F. Supp. 2d 718 (N.D. Tex. 2006)8, 11, 16

Strougo v. Scudder, Stevens & Clark, Inc.,
No. 96 CIV 2136 (RWS), 1997 WL 473566, at *6 (S.D.N.Y. 1997)16

Texas v. United States,
40 F.4th 205 (5th Cir. 2022)12

In re West Delta Oil Co., Inc.,
2023 WL 21016578 (5th Cir. 2003)13

Wheeling-Pittsburgh Steel Corp v. McCune,
836 F.2d 153 (3rd Cir. 1987).....9

Statutes

28 U.S.C. § 158.....7
28 U.S.C. § 158(a)(3).....7
28 U.S.C. § 1292.....7
28 U.S.C. § 1292(b).....8, 16

Other Authorities

Fed. R. Bankr. P. 8004(a)7
Fed. R. Civ. P. 12(b)(6).....5

I. PRELIMINARY STATEMENT

To avoid consideration on the merits of Hunter Mountain Investment Trust’s (“HMIT’s”) well-founded motion for leave (“Motion for Leave”) to bring suit in Delaware (“Delaware Complaint”) to remove James P. Seery, Jr. (“Seery”) as Trustee of the Highland Capital Management, L.P. Claimant Trust (“Claimant Trust”), the reorganized debtor in this chapter 11 case (“HCMLP”), and the Claimant Trust (collectively, “Highland”) filed a motion (“Motion to Stay”) requesting the Court to indefinitely stay all proceedings in connection with HMIT’s Motion for Leave.¹ In short, Highland is attempting to insulate Seery from having to justify his misconduct as Trustee to the Delaware court tasked with protecting Delaware trusts from conflicted and hostile trustees. The Bankruptcy Court granted Highland’s motion for an indefinite stay pending appeal despite Highland’s failure to meet the requisite standard (“Bankruptcy Court Stay Order”). As explained below, the Bankruptcy Court Stay Order constitutes a ruling on controlling questions of law on which there is substantial ground for difference of opinion, and an immediate appeal of the order will materially advance the ultimate termination of the litigation. Thus,

¹ Highland’s Motion to Stay Contested Matter [Dk No. 4000] or for Alternative Relief, Dkt. 4013, dated January 16, 2024, annexed hereto as **Exhibit 7**, at ¶ 13 (App. 382). Additionally, Seery filed a Joinder to Highland Capital Management, L.P.’s Motion to Stay Contested Matter [Dkt. No 4000] or for Alternative Relief and Emergency Motion to Expedite Hearing on Motion for Stay (“Seery Joinder”), Dkt. 4019, dated January 22, 2024, annexed hereto as **Exhibit 8** (App. 385-387).

this Court should grant this motion for leave seeking permission to file an interlocutory appeal to review the decision of the Bankruptcy Court Stay Order.

II. STATEMENT OF FACTS

On January 1, 2024, HMIT filed its Motion for Leave,² seeking to file the Delaware Complaint³ under the gatekeeping provision of the Fifth Amended Plan of Highland Capital Management, L.P. (as modified). The Delaware Complaint seeks to remove Seery because he has breached his fiduciary duties, including his duty of loyalty, by, among other things, using an exorbitant portion of Claimant Trust assets to fund a separate indemnity sub-trust (set up to pay his own legal expenses), and hold still other funds in reserve, rather than using those funds to pay the claims of Claimant Trust beneficiaries. The only plausible explanation for Seery’s refusal to pay the Class 8 and 9 creditors (comprising holders of unsecured claims) in full is an effort to prevent the holders of contingent interests (former equity holders in HCMLP) (the “Contingent Interest Holders”)—including HMIT—from being recognized as vested beneficiaries under terms of the Claimant Trust Agreement (“CTA”), an action that is clearly not in the best interests of the unsecured creditors or equity (*i.e.*, Classes 8, 9, 10, and 11).⁴

² Motion for Leave to File a Delaware Complaint, Dkt. 4000, dated January 1, 2024, annexed hereto as **Exhibit 6** (App. 237-375).

³ *Id.* at Dkt. 4000-1 (App. 277-293).

⁴ *Id.* at pp. 23-29 (App. 265-271).

As set forth in HMIT’s Motion for Leave, HMIT has standing to pursue Seery’s removal because it is actually “in the money” or, alternatively, should be recognized as being “in the money” with the rights of a vested beneficiary because Seery’s failure to declare HMIT’s status as such breaches his duty of good faith and fair dealing.⁵ HMIT also has standing as an intended contingent beneficiary under Delaware law.⁶ However, it is Seery’s actions as a fiduciary, not the valuation of estate itself, that is the core of the claim to be asserted under the Motion for Leave.

Rather than substantively responding to HMIT’s Motion for Leave, Highland filed a motion to stay the contested matter in an effort to delay proceedings despite the clear potential for irreparable harm to HMIT (“Motion to Stay”).⁷ Seery joined Highland’s motion to stay.⁸ Highland argued in its Motion to Stay that all proceedings related to the Motion for Leave should be indefinitely stayed until entry of a final, non-appealable order in a separately filed adversary proceeding commenced by The Dugaboy Investment Trust (“Dugaboy”) and HMIT (the “Valuation Proceeding”).⁹

⁵ *Id.* at pp. 18-19 (App. 260-261). Pursuant to the Claimant Trust Agreement, upon paying all Class 8 and Class 9 unsecured creditors in full with interest, Seery is bound to file a “GUC Certification” declaring that the Contingent Interest Holders’ claims are vested. *Id.*

⁶ *Id.* at pp. 16-22 (App. 258-264).

⁷ *See generally* **Exhibit 7** (App. 376-384).

⁸ **Exhibit 8** (App. 385-387).

⁹ *Dugaboy Investment Trust, et al v. Highland Capital Management, L.P., et al*, Adv. Proc. No. 23-03038-sgj (Bankr. N.D. Tex.), Complaint to (I) Compel Disclosures about the Assets of the Highland Claimant Trust and (II) Determine (A) Relativity Value of those Assets, and (B) Nature of Plaintiffs’ Interests in the Claimant Trust, Dkt. 1, dated May 10, 2023, annexed hereto as **Exhibit 2** (the “Valuation Complaint”) (App. 040-068).

In the Valuation Proceeding, Dugaboy and HMIT seek a determination by the Bankruptcy Court of the value of the estate and an accounting of the assets held by the Claimant Trust. Highland moved to dismiss the Valuation Proceeding, arguing, among other things, that both Dugaboy and HMIT lack standing because they are purportedly not beneficiaries of the Claimant Trust.¹⁰ Highland alternatively argued that the claims in the Valuation Proceeding should be dismissed because: (1) the Court lacks subject matter jurisdiction, (2) HMIT improperly seeks an advisory opinion, (3) the claims are barred by collateral estoppel, and (4) the claims fail as a matter of law.¹¹ Dugaboy and HMIT opposed the motion to dismiss.¹²

Highland argued in its Motion to Stay that the Motion for Leave should be indefinitely stayed until the Valuation Proceeding is finally concluded, including appeals, because a ruling on whether HMIT is a beneficiary of the Claimant Trust in the Valuation Proceeding will “necessarily dispose” of the Motion for Leave. Highland also argued that a stay will not harm HMIT because a stay will not force HMIT to “wait any time for that issue to be litigated.”¹³ Highland’s argument is incorrect for two primary reasons. First, HMIT will be prejudiced by an indefinite

¹⁰ Memorandum of Law in Support of Highland Capital Management L.P. and the Highland Claimant Trust’s Motion to Dismiss Complaint, Adv. Proc. 23-03038, Dkt. 14, dated November 22, 2023 (“Motion to Dismiss”), annexed hereto as **Exhibit 4**, at p. 3 (App. 182).

¹¹ *See id.*

¹² The Dugaboy Investment Trust and Hunter Mountain Investment Trust’s Response to the Highland Parties’ Motion to Dismiss Complaint, Adv. Proc. 23-03038, Dkt. 17, dated December 29, 2023, annexed hereto as **Exhibit 5** (App. 206-236).

¹³ **Exhibit 7** at pp. 5-6 (App. 381-382).

stay of the Motion for Leave, and Highland will not be harmed by a denial of the requested stay. Second, the standing issues in the Delaware Complaint and the Valuation Proceeding are not identical because the two proceedings assert different bases for the claims asserted in each proceeding.

On January 31, 2024, the Bankruptcy Court ordered that all proceedings in connection with the Motion for Leave be temporarily stayed pending its ruling on Highland's Motion to Dismiss the Valuation Proceeding and a status conference in connection with the Motion to Stay. On May 24, 2024, the Court issued its Memorandum Opinion and Order granting the motion to dismiss the Valuation Proceeding.¹⁴ In that order, the Bankruptcy Court dismissed the Valuation Complaint under Rule 12(b)(6) based on its finding that Dugaboy could not prove any set of facts that would demonstrate that it had a right to the information it sought in the Valuation Proceeding.¹⁵ On June 12, 2024, the Court held a status conference to hear arguments related to the stay requested by Highland.

In its June 24, 2024 order (which was signed on June 22, 2024), the subject of this motion for leave to appeal, the Bankruptcy Court granted Highland's Motion to Stay "until a court of competent jurisdiction enters final, non-appealable orders

¹⁴ Memorandum Opinion and Order Granting Motion to Dismiss Adversary Proceeding in which Contingent Interest Holders in Chapter 11 Plan Trust Seek a Post-Confirmation Valuation of Trust Assets, Adv. Proc. 23-03038, Dkt. 26, dated May 24, 2024, annexed hereto as **Exhibit 9** (App. 388-424).

¹⁵ *Id.* at p. 32 (App. 420).

resolving” the Valuation Proceeding.¹⁶ The Court determined that “the legal and factual bases set forth in the Motion establish good cause for the relief granted.”¹⁷ However, the Court, without further explanation of “good cause,” issued an indefinite stay of the Motion for Leave and extended the stay “until a court of competent jurisdiction enters final, non-appealable orders resolving the Appeals.”¹⁸

The Bankruptcy Court’s order stayed the proceeding not just until the resolution of the Valuation Proceeding, as Highland requested, but also until the resolution of a second proceeding currently under appeal. Specifically, the Bankruptcy Court stayed proceedings until resolution of HMIT’s pending appeal of the Court’s Memorandum Opinion and Order Pursuant to Plan “Gatekeeper Provision” and Pre-Confirmation “Gatekeeper Orders”: Denying Hunter Mountain Investment Trust’s Emergency Motion for Leave to File Verified Adversary Proceeding [Docket No. 3903].¹⁹ In that separate proceeding, HMIT sought leave from the Bankruptcy Court to file an adversary proceeding against Seery under the gatekeeping provisions of HCMLP’s plan of reorganization for, among other things, breaching his fiduciary duties related to post-confirmation claims trades (“Claims

¹⁶ Order Extending Stay of Contested Matter [Docket No. 4000], Dkt. 4104, dated June 24, 2024, annexed hereto as **Exhibit 12**, at p. 3 (App. 507).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at p. 2 (App. 506). The Bankruptcy Court refers to this order as the “Order Denying Leave” in the stay order.

Trading Proceeding”).²⁰ On August 25, 2023, the Bankruptcy Court issued its Order Denying Leave, finding among other things that HMIT lacked standing to pursue its claims in the Claims Trading Proceeding.²¹ HMIT appealed the Order Denying Leave, and the appeal is pending in the District Court.²²

III. ARGUMENT

A. Standard of Review

Under 28 U.S.C. § 158, a district court may hear appeals from a bankruptcy court’s interlocutory orders.²³ Section 158(a)(3) expressly requires leave of the district court to appeal an interlocutory bankruptcy court order.²⁴ While Section 158(a)(3) does not provide a standard for determining when to grant leave, “[d]istrict courts have generally looked to the standard that applies for circuit court review of interlocutory district court orders” found in 28 U.S.C. § 1292.²⁵

The Court, therefore, must determine whether the Bankruptcy Court Stay Order involves (1) a controlling question of law; (2) to which there is substantial

²⁰ Hunter Mountain Investment Trust’s Emergency Motion for Leave to File Verified Adversary [sic] Proceeding, Dkt. 3699, annexed hereto as **Exhibit 1**, at pp. 3-4 (App. 005-006).

²¹ Memorandum Opinion and Order Pursuant to Plan “Gatekeeper Provision” and Pre-Confirmation “Gatekeeper Orders”: Denying Hunter Mountain Investment Trusts’ Emergency Motion for Leave to File Verified Adversary Proceeding, Dkt. 3903, dated August 25, 2023, annexed hereto as **Exhibit 3**, at p. 104 (App. 173).

²² *Hunter Mountain Investment Trust v. Highland Capital Management, L.P., et al*, Case 3:23-CV-02071-E (N.D. Tex.).

²³ Given the lack of clarity in the law about the appropriate mechanism for obtaining review, HMIT files this motion for leave in the alternative to its notice of appeal by right (filed on the same date as this motion) and its petition for writ of mandamus (which will be filed shortly thereafter).

²⁴ 28 U.S.C. § 158(a)(3); *see* Fed. R. Bankr. P. 8004(a).

²⁵ *In re Highland Capital Management, L.P.*, 2021 WL 3772690, at *1 (N.D. Tex. 2021).

ground for difference of opinion; and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation.²⁶

B. Arguments for Granting the Motion for Leave to Appeal

1. ***The Bankruptcy Court’s Order Ruled on Controlling Questions of Law***

“Whether an issue of law is *controlling* generally hinges upon its potential to have some impact on the course of litigation. At one end of the continuum, courts have found issues to be controlling if reversal of the district court’s opinion would result in dismissal of the action.”²⁷ At the other end, “an issue is not seen as controlling if its resolution on appeal “would have little or no effect on subsequent proceedings.”²⁸ “Between the extremes, courts have found the issue of whether an interlocutory appeal involves a controlling question of law to be ‘closely tied’ to the requirement that the appeal will materially advance the ultimate termination of the litigation.”²⁹

Here, the Bankruptcy Court Stay Order ruled on a question of controlling law when it indefinitely stayed the proceedings. As set forth below in greater detail, under any of the above standards, whether an indefinite stay is proper is a controlling

²⁶ 28 U.S.C. § 1292(b); *Arparicio v. Swan Lake*, 643 F.2d 1109, 1110 n.2 (5th Cir. 1981).

²⁷ *Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 723 (N.D. Tex. 2006) (quotations omitted).

²⁸ *Id.*

²⁹ *Id.*

question of law because reversal will radically affect the progress of the litigation, and reversal is likely.

The Fifth Circuit has cautioned against granting indefinite stays.³⁰ There is ample case law holding that an order granting an indefinite stay is subject to appellate review when it amounts to an effective dismissal of the underlying suit.³¹ In deciding to grant a stay, a “court must also carefully consider the time reasonably expected for the resolution of the other case.”³² The Fifth Circuit has explained that a stay is “manifestly indefinite” where the “stay hinged on completion” of “bankruptcy proceedings [that] are not likely to conclude in the immediate future.”³³

Here, the Bankruptcy Court failed to correctly address (1) the proper standard in considering the pending appeals and (2) whether the relief sought by HMIT would be available after the indefinite stay. Rather than apply an appropriate standard to consider the timing of pending appeals, the Bankruptcy Court seemed to imply that its primary concern was “judicial economy” rather than the potential for an indefinite stay.³⁴ Second, the Bankruptcy Court’s stay effectively amounts to a dismissal

³⁰ *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co., Inc.*, 761 F.2d 198, 204, n. 6 (5th Cir. 1983).

³¹ *See, e.g., In re Davis*, 730 F.2d 176 (5th Cir. 1984) (“[S]tay orders will be reversed when they are found to be immoderate or of an indefinite duration.”); *see also CTF Hotel Holdings, Inc. v. Marriot Intern., Inc.*, 381 F.3d 131, 135 (3rd Cir. 2004) (“[W]hen a stay amounts to an effective dismissal of the underlying suit, it may be subject to appellate review.”); *Wheeling-Pittsburgh Steel Corp v. McCune*, 836 F.2d 153, 158 (3rd Cir. 1987) (“Although stay orders are not usually appealable, there is an exception where an indefinite stay order unreasonably delays a plaintiff’s right to have his case heard.”) (quotations omitted).

³² *Davis*, 730 F.2d at 179.

³³ *Id.*

³⁴ June 12, 2024 Hearing Transcript, Dkt. 4091, annexed hereto as **Exhibit 11**, at 34:15; 42:2-45:7 (App. 489; 497-500).

because in the years it may take to resolve the pending appeals, the relief sought by HMIT in the Delaware Complaint will no longer be available. Once the pending appeals wind their way through the appellate courts (and potentially beyond, if any proceedings are necessary on remand), the Claimant Trust will by its terms be dissolved and Seery's duties as Trustee complete. Moreover, because "standing is jurisdictional" and can be challenged "at any time," an indefinite stay to resolve an issue of standing is inappropriate because if there are dispositive rulings in the other cases, the standing issue in the Motion for Leave can be addressed at that time.³⁵

As in *In re Central Louisiana Grain Co-op., Inc.*, "the reversal of the bankruptcy court's order would (1) terminate the action *or* (2) materially affect the outcome of litigation."³⁶ In that case, the district court determined that the availability of insurance funds materially affected the outcome of the litigation because the availability of those funds was the source of the relief being sought.³⁷ Similarly, the Bankruptcy Court Stay Order granting an indefinite stay has the potential to cause irreparable harm to HMIT by depriving HMIT of the relief sought. The Bankruptcy Court Stay Order is therefore a controlling question of law.

³⁵ See *Jamison v. Esurance Ins. Servs., Inc.*, No. 3:15-CV-2484-B, 2016 WL 320646, at *4 (N.D. Tex. Jan. 27, 2016); see also *Alexander v. Navient Sols., Inc.*, No. 5:15-CV-00837-RP, 2016 WL 11588317, at *2 (W.D. Tex. Feb. 19, 2016).

³⁶ 489 B.R. 403, 411-12 (W.D. La. 2013).

³⁷ *Id.*

In sum, the Bankruptcy Court Stay Order—which is effectively a dismissal of the Motion for Leave—is a controlling issue of law because absent intervention, HMIT will be unable to pursue its requested relief. Thus, this question is “closely tied” to materially advancing the ultimate termination of litigation.³⁸

2. *There Are Substantial Grounds for Difference of Opinion on the Issue Decided by the Bankruptcy Court Stay Order*

“Substantial grounds for difference of opinion have been found where all other courts of appeals have reached results contrary to the decision of the lower court ... or the circuits are in dispute and the circuit in which the lower court sits has not decided the issue[.]”³⁹

Here, the Bankruptcy Court Stay Order is contrary to the rulings of the appellate courts concerning the appropriate standard applied to granting a stay. As established by the Supreme Court of the United States,⁴⁰ and as reiterated by the Fifth Circuit, when asked to consider whether to grant a stay of litigation, a court must determine “(1) whether the applicant has made a strong showing of likelihood to succeed on the merits; (2) whether the movant will be irreparably harmed absent a stay; (3) whether issuance of a stay will substantially injure other interested parties;

³⁸ *Flowserve*, 444 F. Supp. 2d at 723 (quotations omitted).

³⁹ *Panda Energy Int’l, Inc. v. Factory Mut. Ins.*, 2011 WL 610016, at *4 (N.D. Tex. Feb. 14, 2011) (internal citations omitted); see also *In re Hallwood Energy, L.P.*, 2013 WL 524418, at *3 (N.D. Tex. 2013) (noting that there is a substantial ground for difference of opinion if “a trial court rules in a manner which appears contrary to the rulings of all Courts of Appeals which have reached the issue, if the circuits are in dispute on the question and the Court of Appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.”) (internal quotations omitted).

⁴⁰ See *Hilton v. Braunskill*, 481 U.S. 770, 777-78 (1987).

and (4) where the public interest lies.”⁴¹ The applicant’s “burden is a substantial one, as a stay is an ‘extraordinary remedy.’”⁴² “The Supreme Court has characterized the circumstances in which a stay [of litigation] is appropriate as ‘rare.’”⁴³

The Bankruptcy Court erred in determining that Highland met this substantial standard. In addressing the four prong standard, with limited explanation or analysis, the Bankruptcy Court found that “there is a likelihood of success on the merits,” because the Court had “already ruled on this.”⁴⁴ But the court erred in failing to (1) analyze all of the arguments and authority presented by HMIT in its briefing and at the hearing, and (2) hold Highland to its burden on a motion for stay. First, the Bankruptcy Court did not address the authority of *Morris v. Spectra Energy Partners (DE) GP, LP* provided by HMIT demonstrating that standing analysis should be more flexible when a defendant controls the facts giving rise to standing.⁴⁵ In other words, if Seery has acted in a manner to ensure that the Contingent Interest Holders, like HMIT, never become vested beneficiaries under the Claimant Trust Agreement, that is an action that the courts can and should rectify. The Bankruptcy Court did not

⁴¹ *Texas v. United States*, 40 F.4th 205, 215 (5th Cir. 2022) (quoting *Thomas v. Bryant*, 919 F.3d 298, 303 (5th Cir. 2019)); see also *McCoy v. SC Tiger Manor, LLC*, No. CV 19-723-JWD-SDJ, 2022 WL 164537, at *1 (M.D. La. Jan. 18, 2022) (applying these four factors to deny motion to stay pending resolution of related action).

⁴² *Texas v. United States*, 40 F.4th 205, 215 (5th Cir. 2022) (quoting *Thomas v. Bryant*, 919 F.3d 298, 303 (5th Cir. 2019)).

⁴³ *Jamison*, 2016 WL 320646, at *4 (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)).

⁴⁴ June 12, 2024 Hearing Transcript, Dkt 4091, annexed hereto as **Exhibit 11**, at 43:19-25 (App. 498) (referring to **Exhibit 9** (App. 388-424)(Order dismissing the Valuation Proceeding).

⁴⁵ 246 A.3d 121, 136 (Del. 2021); see also Hunter Mountain Investment Trust’s Supplement to Response to Motion to Stay, Dkt. 4087, annexed hereto as **Exhibit 10**, at pp. 2-3 (App. 427-428).

even address this case, much less explain why it does not apply to the circumstances at issue here. “A bankruptcy court abuses its discretion if it fails to apply the proper legal standard.”⁴⁶ In failing to address this authority (and HMIT’s substantive arguments about why it has standing to pursue a Delaware action against Seery), the Bankruptcy Court failed to apply the correct legal standard.

Second, the Bankruptcy Court erred in failing to hold Highland to its “substantial burden.”⁴⁷ In its Stay Order, the Bankruptcy Court determined that “the legal and factual bases set forth in the Motion establish good cause for the relief granted.”⁴⁸ Highland’s Motion to Stay, however, fails to recite any standard at all, nor did Highland attempt to satisfy the prevailing standard other than to recount a superficial and incorrect analysis of the whether HMIT would suffer harm if the stay is granted. These failures alone should have been fatal to the Motion to Stay being granted.

Rather than addressing the appropriate factors to be considered in connection with a motion to stay, Highland cited to one irrelevant criminal case (in which the Fifth Circuit actually declined to stay an appeal) based on a party’s representation that it would eventually dismiss the appeal if a superseding indictment survived

⁴⁶ *In re West Delta Oil Co., Inc.*, 2023 WL 21016578, at *3 (5th Cir. 2003).

⁴⁷ *Texas*, 40 F.4th at 215.

⁴⁸ **Exhibit 12** at p. 3 (App. 507).

dismissal.⁴⁹ In doing so, the Fifth Circuit cited *Landis* for the unremarkable proposition that the “power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”⁵⁰

A stay, however, is not appropriate simply because other pending litigation involves a similar or even the same standing question.⁵¹ For example, in *Jamison*, the defendant requested a stay pending the Supreme Court’s rulings on two separate cases addressing standing and mootness questions that were also present in *Jamison*.⁵² The Northern District of Texas rejected the request, finding that “[b]ecause standing is a subject matter jurisdiction question, it can be raised at any time during the litigation.”⁵³ Accordingly, “[a]llowing the case to proceed inflict[ed] no significant hardship” because the defendant could raise the standing issue after the Supreme Court’s ruling, if applicable. *Id.* Thus, the court denied the defendant’s motion to stay.⁵⁴

Moreover, the Supreme Court has held that “[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles

⁴⁹ Exhibit 7 at ¶ 9, n.8 (App. 381).

⁵⁰ *Id.*

⁵¹ See *Jamison*, 2016 WL 320646, at *4.

⁵² *Id.* at *1.

⁵³ *Id.* at *4.

⁵⁴ *Id.*; see also *Alexander*, 2016 WL 11588317, at *2 (denying motion to stay, which sought to stay proceeding pending resolution of similar standing issue in U.S. Supreme Court case, because “[s]tanding is jurisdictional, and Defendant can reassert at any time that this Court lacks the jurisdiction to hear Plaintiffs’ claim”).

the rule of law that will define the rights of both.”⁵⁵ In *Landis*, respondents sought to enjoin enforcement of the Public Utility Holding Company Act of 1935 by arguing that it was unconstitutional.⁵⁶ After respondents filed suit, several other lawsuits seeking the same relief were filed throughout the country.⁵⁷ The government filed a motion to stay the injunction proceedings to secure an early determination of its rights by proceeding with certain other test cases.⁵⁸ Although the district court initially granted the stay, the Supreme Court granted certiorari and vacated the “unreasonable” stay order because “the proceedings in the District Court have continued more than a year. With the possibility of an intermediate appeal to the Circuit Court of Appeals, a second year or even more may go by before this court will be able to pass upon the Act.”⁵⁹ Similarly here, a cursory examination of the course of various appeals in this bankruptcy case establishes that it will take several years for the adversary proceedings at issue and their later appeals to be finally concluded.⁶⁰

⁵⁵ *Landis*, 299 U.S. at 255.

⁵⁶ *Id.* at 249.

⁵⁷ *Id.* at 250.

⁵⁸ *Id.* at 250-51.

⁵⁹ *Id.* at 256.

⁶⁰ For example, while the Bankruptcy Court issued its final reports recommending summary judgment in the various consolidated proceedings seeking to enforce promissory notes on December 5, 2022, and January 17, 2023, the District Court did not issue its orders adopting the reports until July 6, 2023, and the briefing schedule in the Fifth Circuit has not even been issued yet. *Highland Capital Mgmt., L.P. v. Dondero, et al.*, Consol. Case No. 3:21-cv-00881-x (N. D. Tex.), Dkts. 89, 97, 135; *In the Matter of Highland Capital Management, L.P.*, Case No. 23-10911 (5th Cir.). As another example, with respect to an appeal of the Bankruptcy Court’s order approving a settlement with a group of creditors referred to collectively as “HarbourVest”, the notice of appeal was filed on February 1, 2021, and the Fifth Circuit did not issue its decision until July 31, 2023, 910 days later. Dkt. 1870; *Matter of Highland Capital Management, L.P.*, No. 22-10960, 2023 WL 4861770 (5th Cir. July 31, 2023). With respect to an appeal of another

In sum, the Bankruptcy Court failed to conform to the standards expressed by the Supreme Court and the Courts of Appeals by (1) failing to address the authority cited by HMIT detailing the correct legal standard, and (2) determining that Highland had met its substantial burden despite failing to address or apply the proper standard at all. Because the Bankruptcy Court failed to adhere to the standards set forth from the Courts of Appeals, there is substantial ground for disagreement regarding the controlling issue of law.

3. *An Appeal of the Bankruptcy Court's Order Materially Advances the Termination of Litigation*

“An appeal materially advances the termination of litigation when it accelerates or simplifies trial proceedings.”⁶¹ “The institutional efficiency of the federal court system is among the chief concerns motivating § 1292(b).”⁶² “Stated another way, § 1292(b) is designed to minimize burdens by accelerating or [] simplifying trial court proceedings.”⁶³ This analysis requires the courts to evaluate the stage of litigation and weigh the disruptive effect of an immediate appeal on

Bankruptcy Court order approving a settlement with creditor UBS, the notice of appeal was filed on May 27, 2021, and the Fifth Circuit did not issue its decision until July 28, 2023, 792 days later. Dkt. 2398; *Matter of Highland Capital Mgmt., L.P.*, No. 22-10983, 2023 WL 4842320 (5th Cir. July 28, 2023). With respect to an appeal of the Bankruptcy Court’s order confirming HCMLP’s plan of reorganization, the notice of appeal was filed on March 1, 2021, and the Fifth Circuit did not issue its decision until August 19, 2022, 536 days later. Dkt. 1957; *In re Highland Capital Mgmt., L.P.*, No. 19-34054-SGJ11, 2022 WL 3959550 (Bankr. N.D. Tex. Aug. 30, 2022). With respect to an appeal of the Bankruptcy Court’s order approving formation of the Claimant Trust, the notice of appeal was filed on August 4, 2021, and the Fifth Circuit did not issue its decision until January 11, 2023, 525 days later. Dkt. 2673; *Matter of Highland Capital Mgmt., L.P.*, 57 F.4th 494 (5th Cir. 2023).

⁶¹ *Panda Energy*, 2011 WL 610016, at *4.

⁶² *Strougo v. Scudder, Stevens & Clark, Inc.*, 1997 WL 473566, at *6 (S.D.N.Y. 1997) (citing *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir.1979)).

⁶³ *Flowerserve*, 444 F. Supp. 2d at 723.

the underlying bankruptcy court proceedings against the probability that resources will be wasted in allowing those proceedings to go forward.⁶⁴

As explained above, appellate review of the Bankruptcy Court Stay Order, including its determination that the standing issues raised in the Motion for Leave and the Dugaboy Valuation Proceeding are identical, is closely tied to the termination of this litigation. An appeal will materially advance the termination of the litigation by accelerating resolution of the litigation, unlike the current stay, which only serves to postpone resolution for an indisputably indefinite and lengthy period. Nor would interlocutory appellate review have any disruptive effect on the Valuation Proceeding because that proceeding was indefinitely stayed. There can be no doubt under the circumstances that immediate appellate review will promote, rather than hinder, judicial efficiency and the ultimate resolution of litigation.

IV. CONCLUSION

Whether the Bankruptcy Court erred in ordering an indefinite stay is a controlling issue of law on which there is substantial ground for difference of opinion, and an immediate appeal from the Bankruptcy Court Stay Order will materially advance the termination of the litigation. Accordingly, HMIT requests that this Court grant this motion for leave to file an interlocutory appeal.

⁶⁴ See *Ichinose v. Homer Nat'l Bank*, 946 F.2d 1169, 1177 (5th Cir.1991).

Respectfully submitted,

STINSON LLP

/s/ Deborah Deitsch-Perez

Deborah Deitsch-Perez

Texas Bar No. 24036072

Michael P. Aigen

Texas Bar No. 24012196

2200 Ross Avenue, Suite 2900

Dallas, Texas 75201

Telephone: (214) 560-2201

Facsimile: (214) 560-2203

Email: deborah.deitschperez@stinson.com

Email: michael.aigen@stinson.com

*Counsel for Hunter Mountain Investment
Trust*

CERTIFICATE OF CONFERENCE

While it is not clear whether conferencing is necessary on this motion, I hereby certify that on July 8, 2024, counsel for Hunter Mountain Investment Trust attempted to confer with counsel for Highland Capital regarding the substance of this motion. Counsel for Highland Capital did not respond before this motion was due to be filed. Therefore, counsel for Highland Capital is assumed to be opposed. Counsel will amend this certificate of conference should it be necessary.

/s/ Deborah Deitsch-Perez

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2024, a copy of the foregoing document was served on all parties of record via the Court's electronic filing system.

/s/ Deborah Deitsch-Perez