



UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**WITHDRAWAL OF REFERENCE SERVICE LIST**

**Transmission of the Record**

BK Case No.: 19-34054-sgj11

Received in District Court by: \_\_\_\_\_

Date: \_\_\_\_\_

Volume Number(s): \_\_\_\_\_

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**Appellant** Hunter Mountain Investment Trust

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**Appellee** Muck Holdings, LLC, Jessup Holdings, LLC, Farallon Capital Management, LLC, Stonehill Capital Management, LLC

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**Appellee** Highland Capital Management, L.P., the Highland Claimant Trust, and James P. Seery, Jr., solely in his capacity as Chief Executive Officer of Highland Capital Management, L.P.

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

<b>In re:</b>	§	
	§	
<b>HIGHLAND CAPITAL MANAGEMENT, L.P.</b>	§	<b>Chapter 11</b>
	§	
<b>Debtor.</b>	§	<b>Case No. 19-34054-sgj11</b>
	§	

**HUNTER MOUNTAIN INVESTMENT TRUST’S EMERGENCY MOTION FOR  
LEAVE TO FILE INTERLOCUTORY APPEAL**

Hunter Mountain Investment Trust (“HMIT” or “Movant”) files this Emergency Motion for Leave to File Interlocutory Appeal (“Emergency Motion”) of this Court’s orders: (1) denying Hunter Mountain Investment Trust’s Opposed Application for Expedited Hearing on its Emergency Motion for Leave to File Verified Adversary

Proceeding (**Doc. 3700**)<sup>1</sup> (“Expedited Hearing Request”), and (2) requiring HMIT to contact the Court’s clerk to set a hearing no sooner than April 19, 2023, both of which are contained in the “Order Denying Application for Expedited Hearing [DE #3700]” (**Doc. 3713**) (“Order”) entered in this matter on March 31, 2023,<sup>2</sup> and respectfully shows as follows:

### **BACKGROUND**

1. Under the Fifth Amended Plan of Reorganization of Highland Capital Management, the Bankruptcy Court holds a gatekeeping role with exclusive authority to predetermine the colorability of any civil action to be brought against “Protected Parties” (as defined in the confirmed Plan) before such an action can be filed (“Gatekeeping Order”).<sup>3</sup> The gatekeeping protocol requires the Bankruptcy Court, after notice, to conduct a hearing upon a motion for leave to file an action, if there is a dispute.<sup>4</sup>

2. After first attempting to conduct related discovery on an expedited basis in Texas state court, which was denied, on March 8, 2023, HMIT filed its Emergency Motion for Leave to File Verified Adversary Proceeding (**Doc. 3699**) (“Emergency Motion For

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<sup>1</sup> Unless otherwise referenced, all references to evidence involving documents filed in the Debtor’s bankruptcy proceedings (Case No. 19-34054-sgj11 (Bankr. N.D. Tex.)) are cited by “Doc.” reference. HMIT asks the Court to take judicial notice of the documents identified by such entries.

<sup>2</sup> A copy of the Order is attached hereto as an exhibit to the Notice of Appeal attached hereto as Exhibit 1.

<sup>3</sup> Fifth Amended Plan of Reorganization of Highland Capital Management (**Doc. 1808**) at Article IX(F), pp. 51-52.

<sup>4</sup> *Id.*

Leave”), attaching thereto the proposed Verified Adversary Proceeding as Exhibit 1 (Doc. 3699-1) (the “Adversary Proceeding”).<sup>5</sup> The Emergency Motion For Leave and proposed Adversary Proceeding included lengthy and detailed allegations and evidence supporting HMIT’s proposed claims. In the proposed Adversary Proceeding, HMIT seeks to sue in its individual capacity and in a derivative capacity on behalf of the Reorganized Debtor, Highland Capital Management, L.P. (“HCM” or “Reorganized Debtor”) and the Highland Claimant Trust (“Claimant Trust”) against Muck Holdings, LLC (“Muck”), Jessup Holdings, LLC (“Jessup”), Farallon Capital Management, LLC (“Farallon”), Stonehill Capital Management, LLC (“Stonehill”), James P. Seery, Jr. (“Seery”) and John Doe Defendant Nos. 1-10 (Muck, Jessup, Stonehill, Farallon, Seery and the John Doe Defendant Nos. 1-10 (collectively, “Proposed Defendants”)) asserting, *inter alia*, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, and fraud.<sup>6</sup>

3. On March 28, 2023, HMIT filed its Application for Expedited Hearing on the Emergency Motion for Leave to File Verified Adversary Proceeding (Doc. 3700) (“Application”). The principal justification for the emergency hearing requested in the Application was because of a fast-approaching date (April 16, 2023) that one or more of

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<sup>5</sup> HMIT’s Emergency Motion for Leave to File Verified Adversary Proceeding (Doc. 3699), including the proposed Verified Adversary Proceeding attached as Exhibit 1 (Doc. 3699-1) to that motion, are on file in this matter and are incorporated herein by reference.

<sup>6</sup> See the proposed Adversary Proceeding.

the Proposed Defendants will argue constitutes the expiration of the statute of limitations concerning some of the common law claims available to Movant. Although HMIT previously offered to enter into tolling agreements with each of the Proposed Defendants with whom they have successfully contacted, this offer was either rejected or HMIT did not receive an affirmative agreement to do so. While conferring regarding this Emergency Motion and HMIT's related application for expedited hearing on Monday, April 3, 2023, HMIT reiterated its request for a tolling agreement – but the Proposed Defendants have either rejected this request or not responded (and are presumed to have rejected it per the related correspondence) as of the filing of this Emergency Motion. *See* e-mail correspondence from Mr. John Morris dated April 2, 2023, with included e-mail chain, a true and correct copy of which is attached to and incorporated in this Emergency Motion as Exhibit 2;<sup>7</sup> *see also* e-mail correspondence from HMIT counsel Roger McCleary to counsel for Farallon, Stonehill, Muck, and Jessup, dated April 2, 2023, with included e-mail chain, a true and correct copy of which is attached to and incorporated in this Emergency Motion as Exhibit 3.

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<sup>7</sup> In light of the nature of the proposed proceedings, whereby HMIT proposes to represent the Reorganized Debtor or the Highland Claimant Trust derivatively, HMIT does not agree with (and does not admit) the propriety of, the substantive content of, or any procedural need for Mr. Morris's request to be identified as counsel for the Reorganized Debtor and Highland Claimant Trust in the certificate of conference related to this Emergency Motion. Exhibit 2 is attached for the limited purposes of this Emergency Motion and HMIT makes no admission of any kind in this regard to Exhibit 2.



4. Accordingly, this Emergency Motion has become necessary. Because the Emergency Motion For Leave is necessary, given the Bankruptcy Court's Gatekeeping Order and the injunction provisions of the Plan, emergency leave is required. Expedited consideration of the Emergency Motion For Leave and of this Emergency Motion seeking interlocutory appeal is necessary and appropriate to protect and preserve the rights of the Reorganized Debtor, the Highland Claimant Trust, and HMIT.<sup>8</sup>

5. On March 30, 2023, Muck, Jessup, Farallon, and Stonehill filed objections claiming they needed time to evaluate the claims. The Objection filed on behalf of Mr. Seery argued that the Court should not grant the Application or agree to an expedited hearing on the Emergency Motion for Leave, and invited the Court to allow an argument that limitations bars some of HMIT's claims without considering the merits (together, "Objections").<sup>9</sup>

6. On March 31, 2023, HMIT filed its Reply In Support of Its Opposed Application for Expedited Hearing and Response to Objections Filed by Respondents

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<sup>8</sup> HMIT respectfully requests that this Emergency Motion be addressed and decided on an expedited basis that provides HMIT sufficient time to bring the proposed action or to seek review/relief timely. In the event the Court denies the requested relief, HMIT respectfully requests prompt notice of the Court's ruling to allow HMIT sufficient time to seek, if necessary, appropriate review/relief. In order to have a fair opportunity to seek such relief on a timely basis and protect HMIT's rights and the rights of the Reorganized Debtor, HMIT anticipates it will need to seek review/relief as soon as possible in the event HMIT's application for expedited hearing on this Emergency Motion is not granted on or before April 5, 2023, or in the event this Emergency Motion has not been or cannot be resolved by on or before Monday, April 10, 2023. However, HMIT reserves its rights to pursue appropriate review/relief at any time.

<sup>9</sup> As stated, despite claiming that they needed more time to evaluate the claims, the Proposed Defendants refused to enter into a tolling agreement.

(Doc. 3712) (“Reply”), stating in reply to the Objections that the Proposed Defendants had ample notice of the proposed claims because they were the subject of pre-litigation discovery requests and that the Proposed Defendants should not be allowed to weaponize the Gatekeeping Order and gatekeeping protocol to fashion a possible limitations defense (as an attempt to avoid a merits-based consideration of the claims).<sup>10</sup>

7. Within an hour after HMIT filed its Reply, the Bankruptcy Court entered the Order denying HMIT’s emergency request and *sua sponte* ordering HMIT to contact the Court’s clerk to schedule the hearing no sooner than April 19, 2023.<sup>11</sup>

#### **PRELIMINARY STATEMENT**

8. Since the filing of the Emergency Motion for Leave, HMIT has become aware of authority holding that the filing of the Emergency Motion for Leave, with the attached proposed Adversary Proceeding, likely tolls the applicable statutes of limitations as to at least one of the Proposed Defendants, so that the hearing date set by the Bankruptcy Court may be irrelevant as to that Proposed Defendant. However, it is also clear that at least one of the Proposed Defendants does not agree. HMIT still has a valid concern about the need for an expedited hearing because counsel for Mr. Seery is aggressively arguing that all Proposed Defendants should be given the advantage of an

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<sup>10</sup> HMIT’s Reply is incorporated herein by reference in its entirety.

<sup>11</sup> As stated, one or more of the Proposed Defendants will argue that HMIT’s claims will be barred by limitations as of April 16, 2023.

opportunity to argue the running of the applicable statute of limitations.<sup>12</sup> It is also clear that all of the Proposed Defendants have refused HMIT's request for a tolling agreement or refused to respond to the request to do so.

9. HMIT therefore finds itself in an incongruous situation. On the one hand, the filing of the Emergency Motion for Leave likely tolls the running of any applicable limitations periods as to at least one of the Proposed Defendants. On the other hand, HMIT's concerns about the limitations defense are clearly well founded, as Proposed Defendants' counsel is otherwise arguing that the Bankruptcy Court should provide all Proposed Defendants the affirmative defense of limitations by scheduling the gatekeeping hearing on a date that they claim constitutes the expiration of the limitations period on various common law claims.

#### **QUESTIONS PRESENTED**

10. Does the threat of a potential limitations defense potentially barring some of HMIT's proposed Adversary Proceeding claims justify an interlocutory appeal of the Order denying an expedited hearing upon the HMIT Motion for Leave?

11. Does the threat of a potential limitations defense potentially barring some of HMIT's proposed Adversary Proceeding claims justify an interlocutory appeal of the Bankruptcy Court's Order requiring that a hearing be set no sooner than April 19, 2023,

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<sup>12</sup> This argument could be extended, of course, to include the assertion that the Bankruptcy Court should withhold ruling on the Emergency Motion for Leave until all applicable limitations periods have run, and then deny leave to file the proposed Adversary Proceeding due to the running of the limitations period.

when it is clear that the Proposed Defendants will argue that at least certain of the claims in the proposed Adversary Proceeding must be dismissed because of the running of applicable statutes of limitations as of April 16, 2023 (three days before the Bankruptcy Court's scheduled hearing date)?

12. Does *Newby v. Enron Corp.*, 542 F.3d 463, 470 (5th Cir. 2008) require a finding by the Honorable District Court that the filing of the Motion for Leave tolled the applicable statutes of limitations so that (i) the date of the Bankruptcy Court's scheduled hearing on the Emergency Motion for Leave is irrelevant and (ii) therefore, this Emergency Motion for leave to appeal should be denied?

#### STANDARD

13. An appeal from an interlocutory order or decree of a bankruptcy court is governed by 28 U.S.C. §158(a)(3). Section 158(a)(3) does not articulate the standard a district court must use in deciding whether to grant leave in its discretion, but "[c]ourts in the Fifth Circuit ... have applied 28 U.S.C. § 1292(b), the standard governing interlocutory appeals generally." *In re Hallwood Energy, L.P.*, Civ. Action No. 3:12-CV-1902-G, 2013 WL 524418, at \*2 (N.D. Tex. Feb. 11, 2013)(citing *In re Ichinose*, 946 F.2d 1169, 1177 (5th Cir. 1991)). The decision whether to grant an interlocutory appeal is firmly within the district court's discretion. *Id.*; *Ryan v. Flowserve Corp.*, 444 F.Supp.2d 718, 723-24 (N.D. Tex. 2006) (internal citation omitted).

14. “Section 1292(b) expressly permits a district court to certify an order for interlocutory appeal only if it ‘involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.’ 28 U.S.C.A. § 1292(b) (1994 & Supp. 2005). This terminology was intended to restrict the category of cases suitable for permissive appeal, but courts have not always agreed on the contours of the stated limitations. See 16 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3929 at 366–67 (2d ed.1996). See generally *Ahrenholz v. Bd. of Trustees of the Univ. of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000) (“The [§ 1292(b)] criteria, unfortunately, are not as crystalline as they might be....”). For example, at times, courts including the Fifth Circuit have held that § 1292(b) appeals are appropriate under only “exceptional” circumstances or in “big” cases. *Clark–Dietz and Associates-Engineers v. Basic Constr. Co.*, 702 F.2d 67, 69 (5th Cir.1983) (explaining that interlocutory appeals are permitted only under “exceptional” circumstances); see *Gottesman v. Gen. Motors Corp.*, 268 F.2d 194, 196 (2d Cir.1959) (clarifying that certification should be “strictly limited to the precise conditions stated in the law”); WRIGHT & MILLER, *supra*, § 3929 at 365 & n. 10 (internal citations omitted) (collecting cases holding interlocutory appeal appropriate only in “big” or “exceptional” cases). Conversely, at other times courts—the Fifth Circuit included—have employed a more flexible approach to § 1292(b) appeals.” *Ryan*, 444 F. Supp. at 721.

15. For more clarification, courts have found substantial ground for difference of opinion (justifying an interlocutory appeal) where a court order determines a matter which appears contrary to the rulings of 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 yet spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented. *Id.* at 723-24 (internal citation omitted). Here, in a case substantially similar to this case, the Fifth Circuit has found that a court order which requires a proposed claim to be filed more than 21-days in advance of the limitations date is improper. *See, e.g., Newby v. Enron Corp.*, 542 F.3d 463, 470 (5th Cir. 2008).

**RIGHT TO INTERLOCUTORY APPEAL SHOULD BE GRANTED, OR,  
ALTERNATIVELY, SHOULD BE DENIED BASED UPON  
NEWBY v. ENRON CORP., 542 F.3d 463, 470 (5th Cir. 2008)**

16. The controlling issue of law is whether good cause exists to require an emergency hearing on HMIT's proposed Adversary Proceeding. Fed. R. Bank P. 9006 (c)(1) authorizes a shortened time for a response and hearing for good cause. As set forth in its Application seeking an expedited hearing upon its Emergency Motion For Leave, in addition to a potential limitations consideration, good cause exists and separately justifies expedited action on the Emergency Motion For Leave, to hasten HMIT's right to

pursue prompt relevant discovery (which the Proposed Defendants refused in pre-litigation), and reduce the threat of loss of potentially key evidence.<sup>13</sup>

17. The proposed Adversary Proceeding alleges claims which are substantially more than “colorable” based upon plausible allegations that the Proposed Defendants, acting in concert, perpetrated a fraud, including a fraud upon innocent stakeholders, as well as breaches of fiduciary duties and knowing participation in (or aiding and abetting) breaches of fiduciary duty. The proposed Adversary Proceeding also alleges that the Proposed Defendants did so collectively by falsely representing the value of the Debtor’s Estate, failing to timely disclose accurate values of the Debtor’s Estate, and trading on material non-public information regarding such values. HMIT also alleges that the Proposed Defendants colluded to manipulate the Debtor’s Estate—providing Seery the opportunity to plant close business allies into positions of control to approve Seery’s compensation demands following the Effective Date.

18. Relief upon this Emergency Motion is justified because it is now clear that one or more of the Proposed Defendants will argue, depending upon choice of law, that the statute of limitations may bar some of the common law claims, and further that the Bankruptcy Court should act to assist them in creating a statute of limitations defenses.<sup>14</sup>

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<sup>13</sup> Upon information and belief, Proposed Defendant Seery has been deleting text messages on his personal iPhone via a rolling, automatic deletion setting.

<sup>14</sup> The first insider trade at issue involved the sale and transfer of Claim 23 in the amount of \$23 million held by ACMLD Claim, LLC to Muck on April 16, 2021 ([Doc. 2215](#)).

The proposed Adversary Proceeding seeks to benefit all innocent stakeholders while working within the terms and provisions of the Plan. Allowing any potential limitations to bar any of the claims would result in a substantial injustice which far outweighs any potential harm to the Proposed Defendants.<sup>15</sup> See *Newby*, 542 F.3d at 470.

19. *Newby v. Enron* held that the district court erred when finding it would not adjudicate a motion for leave before the applicable statute of limitations ran. In other words, as shown below, *Newby v. Enron* held that a motion for leave should be heard prior to any applicable limitations deadline. While HMIT is under no illusion that the Bankruptcy Court grounded its ruling in *Newby*, it is the position of HMIT that perhaps, in fact, the scheduled hearing date is irrelevant. Counsel for Proposed Defendants has clearly threatened (i) that the running of the limitations periods continues and (ii) that Proposed Defendants should be given access to the affirmative defenses through scheduling (which as stated could easily extend to date of ruling).<sup>16</sup>

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<sup>15</sup>As of December 31, 2022, the Claimant Trust has distributed \$255,201,228.<sup>15</sup> On a *pro rata* basis, that means that innocent creditors have received approximately \$22,373,000 in distributions against the stated value of their allowed claims. That leaves a remaining unpaid balance of approximately \$9,627,000. Muck and Jessup already have received approximately \$232.8 million on their Claims. Assuming an original investment of approximately \$160 million, this represents over \$72 million in ill-gotten profits that, if disgorged, would be far more than what is required to fully pay all other innocent creditors - immediately placing HMIT in the status of a vested Claimant Trust Beneficiary. The benefits to the Reorganized Debtor, the Claimant Trust and innocent stakeholders are undeniable. Further, under the present circumstances and time constraints, an interlocutory appeal should be granted to avoid the prospect of the loss of some of HMIT's and the Claimant Trust's claims and denial of due process.

<sup>16</sup> See Highland Parties' Objection to Expedited Hearing on the Emergency Motion for Leave ([Doc. 3707](#)).



20. Therefore, HMIT briefs the issue of whether the Bankruptcy Court could facilitate a defendant's affirmative defense of statute of limitations by delaying adjudication of HMIT's motion.

21. In *Newby v. Enron*, a district court enjoined a law firm from filing any new actions related to a Chapter 11 debtor without leave of court. The law firm then moved to file 34 lawsuits in state court. There, the motion for leave was filed on October 14, 2005 and the statute of limitations of some of the claims expired on October 17, 2005. The district court denied the motion, in part finding that these claims would be barred by the applicable statute of limitations by the time the motion was considered on November 3, 2005. The law firm appealed. The Fifth Circuit explained that:

The district court was incorrect, however, in denying the motion for leave to file suit for the claims that have a four-year statute of limitations. The court did not cite any authority for using its own local rules to dictate the state's filing date for purposes of Texas's relation-back principle. In effect, the district court was requiring the Fleming Firm either to file a motion for leave at least twenty days before the statute of limitations expired—or perhaps even earlier if the district court did not rule on the motion in time—or to violate the injunction by filing in state court within the limitations period. *Cf. Schillinger v. Union Pac. R.R. Co.*, 425 F.3d 330, 334 (7th Cir. 2005) (“The logic underlying [using the date of filing for limitations purposes as opposed to the date the court rules on the motion] is that defendants are on notice of the amendment when the motion is filed and it would be unfair to plaintiffs if a trial court waited months or years to rule.”). Thus, the district court should have allowed the Texas state courts to decide whether the filing of the state petitions relates back to the filing of the motion for leave to file suit (for the claims that have a four-year statute of limitations), meaning that these claims might not be futile. Because the Fleming Firm sought to file these claims before the statute of limitations expired, it is up to the state court to determine how to proceed. In sum, the district court improperly denied the motion for leave to file the claims involving common

law fraud and fraud-on-the-market (Count I), statutory fraud (Count III), and aiding and abetting common law fraud (Count VI), because these claims all have a four-year statute of limitations, and the Fleming Firm submitted its motion for leave to file suit before that limitations period expired.

*Newby v. Enron Corp.*, 542 F.3d at 470.

24. Despite binding precedent that precludes a Bankruptcy Court from effectively shortening a state law statute of limitations based on its local practice for setting motions, this is exactly what the Proposed Defendants have asked the Bankruptcy Court to do (in fact, arguing that if the Bankruptcy Court did not do so, it would fundamentally prejudice the Proposed Defendants). The Bankruptcy Court did what the Proposed Defendants asked of it, and therefore, this raises the issue of whether an interlocutory appeal should be granted to correct any assertion that the Bankruptcy Court could provide an affirmative defense of statute of limitations through its local motion practice, or, should be denied on the basis that the Fifth Circuit has already instructed that it cannot.

#### **PRAYER**

WHEREFORE, PREMISES CONSIDERED, Hunter Mountain Investment Trust respectfully requests this Court grant HMIT leave to file an interlocutory appeal of the Order, and all such other and further relief to which HMIT may be justly entitled.

Dated: April 4, 2023.

Respectfully Submitted,

**PARSONS MCENTIRE MCCLEARY  
PLLC**

By: /s/ Sawnie A. McEntire

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*Attorneys for Hunter Mountain  
Investment Trust*

**CERTIFICATE OF CONFERENCE**

Counsel for Mr. Seery, who also claims to represent the Reorganized Debtor and the Highland Claimant Trust in these instant proceedings, states that he is opposed to this Emergency Motion. In light of the nature of the proposed proceedings, whereby HMIT proposes to represent the Reorganized Debtor and the Highland Claimant Trust derivatively, HMIT does not agree with (and does not admit) the propriety of or the substantive content of Mr. Mr. Morris's requested identification as counsel for the Reorganized Debtor and the Highland Claimant Trust, but HMIT is filing this certificate in this manner solely to accommodate Mr. Morris's request.

Although we conferred with counsel for the other respondents on April 3, 2023, we were told they would try to respond by the afternoon of April 3, 2023, but they have not done so. We, therefore, assume they are opposed to this Emergency Motion.

/s/ Sawnie A. McEntire

Sawnie A. McEntire

**CERTIFICATE OF SERVICE**

I certify that on the 4<sup>th</sup> day of April 2023, a true and correct copy of the foregoing motion was served on all counsel of record or, as appropriate, on the Respondents directly.

/s/ Sawnie A. McEntire

Sawnie A. McEntire

# Exhibit 1

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

**In re:** §  
§  
**HIGHLAND CAPITAL** § **Chapter 11**  
**MANAGEMENT, L.P.** §  
§ **Case No. 19-34054-sgj11**  
**Debtor.** §

**HUNTER MOUNTAIN INVESTMENT TRUST’S NOTICE OF APPEAL**

**TO THE HONORABLE COURT:**

**NOTICE IS HEREBY GIVEN** that, pursuant to **28 U.S.C. § 158(a)** and Rules 8002 and 8003 of the Federal Rules of Bankruptcy Procedure, Hunter Mountain Investment Trust (“HMIT”) hereby appeals to the United States District for the Northern District of Texas from the *Order Denying Opposed Application for Expedited Hearing on its Emergency Motion for Leave to File Verified Adversary Proceeding [DE #3700] (Doc. 3713)* (the “Order”), entered by the United States Bankruptcy Court for the Northern District on March 31, 2023. A true and correct copy of the Order is attached hereto as **Exhibit A**.

To comply with Official Form 417A, HMIT submits the following:

**Part 1: Identify the appellant(s)**

1. Name(s) of appellants:

**Hunter Mountain Investment Trust**

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

**HMIT is a former equity owner in Debtor and a contingent Claimant Trust Interest holder.**

**Part 2: Identify the subject of this appeal**

1. Describe the judgment, order, or decree appealed from:

***Order Denying Opposed Application for Expedited Hearing on its Emergency Motion for Leave to File Verified Adversary Proceeding [DE #3700] (Doc. 3713)***

2. State the date on which the judgment, order, or decree was entered:

**March 31, 2023**

**Part 3: Identify the other parties to the appeal**

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: Attorney:

**APPELLEES**

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Highland Capital Management,  
L.P., the Highland Claimant  
Trust, and James P. Seery, Jr.,  
solely in his capacity as Chief  
Executive Officer of Highland  
Capital Management, L.P.<sup>1</sup>

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**Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)**

**Not applicable**

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<sup>1</sup> The law firm of Pachulski Stang Ziehl & Jones LLP claims to represent Highland Capital Management, LP and Highland Claimant Trust. However, given the nature of the proceedings at issue, Appellant disagrees and does not admit that any such representation is substantively or procedurally appropriate in this appeal.



**Part 5: Sign below**

/s/ Sawnie A. McEntyre

Sawnie A. McEntire

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*Attorneys for Hunter Mountain Investment Trust*

**CERTIFICATE OF SERVICE**

I, undersigned counsel, hereby certify that a true and correct copy of the above and foregoing document and all attachments thereto were sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case on this April 4, 2023.

/s/ Sawnie A. McEntyre

Sawnie A. McEntyre

# Exhibit A




CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**ENTERED**

THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed March 31, 2023

  
United States Bankruptcy Judge

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

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In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Reorganized Debtor.  
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Chapter 11

Case No. 19-34054-sgj11

**ORDER DENYING APPLICATION FOR EXPEDITED HEARING [DE # 3700]**

This Order is issued in response to the *Application for Expedited Hearing on Emergency Motion for Leave to File Verified Adversary Proceeding* (“Expedited Haring Request”) [DE # 3700] filed by Hunter Mountain Investment Trust (“HMIT” or “Movant”) on March 28, 2023, at 4:09 p.m. C.D.T. The Expedited Hearing Request seeks a hearing within three days, or as soon thereafter as counsel can be heard, on HMIT’s *Emergency Motion for Leave to File Verified Adversary Proceeding* (“Motion for Leave”) which was filed on March 28, 2023, at 4:02 p.m. C.D.T.

The court has concluded that no emergency or other good cause exists, pursuant to **Fed. R. Bankr. Proc. 9006**, and the *Expedited Hearing Request* will be denied. The *Motion for Leave* will be set in the ordinary course (after 21 days’ notice to affected parties)—i.e., after April 18, 2023.

The *Motion for Leave* is 37 pages in length and contains 350 pages of attachments. It seeks leave from the bankruptcy court—pursuant to the bankruptcy court’s “gatekeeping” role<sup>1</sup> under the confirmed Chapter 11 plan of Highland Capital Management, L.P. (“Highland” or “Reorganized Debtor”)—to sue at least the following parties: Muck Holdings, LLC (“Muck”); Jessup Holdings, LLC (“Jessup”); Farallon Capital Management, LLC (“Farallon”); Stonehill Capital Management, LLC (“Stonehill”); James P. Seery, Jr. (“Seery”); and John Doe Defendant Nos. 1-10 (collectively, the “Affected Parties”). The conduct that is described as a basis for the desired lawsuit is certain trading of unsecured claims that occurred in 2021 during the Highland bankruptcy case.<sup>2</sup> It appears that millions of dollars of damages are sought by Movant, who was formerly the largest indirect (ultimate) equity holder of Highland. The legal theories (e.g., breaches of fiduciary duties; fraud; conspiracy; equitable disallowance) are novel in the bankruptcy claims trading context. The bankruptcy court, pursuant to the Highland plan, will need to analyze whether such claims are “colorable” such that leave to sue should be granted.

The Affected Parties—and other parties in interest in the underlying bankruptcy case, for that matter—should be afforded a reasonable opportunity to respond to the *Motion for Leave*.

While Movant, HMIT, has alleged that it may be facing a statute of limitations defense as to

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<sup>1</sup> The bankruptcy court’s “gatekeeping” role was recently affirmed by the Fifth Circuit in *In re Highland Capital Management, L.P.*, **48 F.4th 419, 438** (5th Cir. 2022).

<sup>2</sup> Notice of the claims trading was provided in filings in Highland bankruptcy case, as follows: Claim No. 23 (DE ## 2211, 2212, and 2215), Claim Nos. 190 and 191 (DE ## 2697 and 2698), Claim Nos. 143, 147, 149, 150, 153 and 154 (DE # 2263), Claim No. 81 (DE # 2262), Claim No. 72 (DE # 2261).

some claims after April 16, 2023, it appears that Movant has known about the conduct underlying the desired lawsuit for well over a year, based on activity that has occurred in the bankruptcy court. *See, e.g., Memorandum Opinion and Order Granting James Dondero's Motion to Remand Adversary Proceeding to State Court, Denying Fee Reimbursement Request, and Related Rulings, Dondero v. Alvarez & Marsal CRF Management, LLC and Farallon Capital Management LLC* [DE # 22], in Adv. Proc. # 21-03051 (January 4, 2022). Thus, the need for an emergency hearing is dubious. Accordingly

IT IS ORDERED that the Expedited Hearing Request is denied.

Counsel shall contact the Courtroom Deputy for a setting on the *Motion for Leave*, which setting shall be no sooner than April 19, 2023.

\* \* \* END OF ORDER \* \* \*

# Exhibit 2

**From:** [John A. Morris](#)  
**To:** [Roger L. McCleary](#)  
**Cc:** [Jeff Pomerantz](#); [Gregory V. Demo](#); [Sawnie A. McEntire](#)  
**Subject:** [EXTERNAL] RE: Meet and Confer on HMIT Emergency Motion/Application and follow-up request for tolling agreement  
**Date:** Monday, April 3, 2023 12:54:54 PM  
**Attachments:** [image002.png](#)

---

Roger,

Highland Capital Management, L.P. ("[HCMLP](#)"), the Highland Claimant Trust (the "[Trust](#)"), and Mr. Seery, in his capacity as CEO of Highland and Claimant Trustee (together, the "[Highland Parties](#)"), all oppose the relief requested in item 1 below.

To eliminate any question, HCMLP and the Trust (like all parties in interest) had the right to be heard on the underlying Emergency Motion pursuant to 11 U.S.C. §1109(b), and have the right to be heard on the matters referenced below. We therefore request that you inform the Court in your certificate of conference that HCMLP and the Trust are opposed to the relief to be requested.

Finally, the Highland Parties decline to agree to toll any statutes of limitation.

Regards,

John

**John A. Morris**

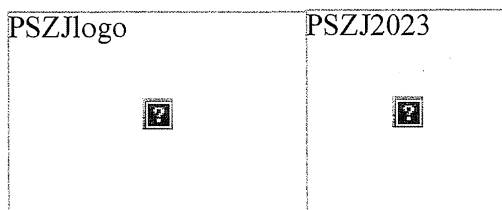
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[vCard](#) | [Bio](#) | [LinkedIn](#)



Los Angeles | San Francisco | Wilmington, DE | New York | Houston

**From:** Roger L. McCleary [mailto:[rmccleary@pmmlaw.com](mailto:rmccleary@pmmlaw.com)]

**Sent:** Monday, April 3, 2023 1:19 PM

**To:** John A. Morris <[jmorris@pszjlaw.com](mailto:jmorris@pszjlaw.com)>

**Cc:** Jeff Pomerantz <[jpomerantz@pszjlaw.com](mailto:jpomerantz@pszjlaw.com)>; Gregory V. Demo <[GDemo@pszjlaw.com](mailto:GDemo@pszjlaw.com)>; Sawnie A. McEntire <[smcentire@pmmlaw.com](mailto:smcentire@pmmlaw.com)>

**Subject:** Meet and Confer on HMIT Emergency Motion/Application and follow-up request for tolling agreement

John,

In follow-up to our phone call and conference this morning, we look forward to hearing from you regarding:

1. Whether Mr. Seery is opposed, regarding Judge Jernigan's Order Denying Application for Expedited Hearing (Doc. 3713) late Friday afternoon, to (a) an emergency motion for expedited leave for interlocutory appeal; and, (b) a related emergency application for expedited hearing on the same (collectively "Emergency Motion/Application");
2. Whether Mr. Seery will agree to a tolling agreement regarding all claims and causes of action asserted in or related to the claims, causes of action, and matters that are the subject of the proposed adversary complaint (Doc. 3699-1), attached as Exhibit 1 to Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding (Doc. 3699) ("Motion for Leave to File Adversary Proceeding"), until 14 days (we propose) after a final ruling on the Motion for Leave to File Adversary Proceeding and exhaustion of all related appeal(s) and/or mandamus(es).

We understand you are attempting to contact Mr. Seery regarding the above and to respond by mid-afternoon today, if possible. If we have not heard from you before we file the Emergency Motion/Application, we will note in the certificate of conference that we reached out to you; we have not heard back from you; and we presume Mr. Seery is opposed - as you suggested.

Thank you, Roger.

Roger L. McCleary  
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# Exhibit 3

**From:** Roger L. McCleary  
**To:** McIlwain, Brent R. (DAL - X59481); Schulte, David C. (DAL - X59419)  
**Cc:** Sawnie A. McEntire  
**Subject:** Meet and Confer on HMIT Emergency Motion/Application and follow-up request for tolling agreement and information  
**Date:** Monday, April 3, 2023 2:44:09 PM

---

Brent and David,

This follows our conversation this morning and addresses some of the topics we addressed. We request that you respond as soon as possible today regarding the following:

1. Please let us know if your clients will voluntarily identify and provide service of process information for any and all affiliates, if any, of Farallon Capital Management, LLC ("Farallon"), Stonehill Capital Management, LLC ("Stonehill"), Muck Holdings, LLC ("Muck"); and/or Jessup Holdings, LLC ("Jessup"), in the chain of sale or other transfer of one or more of the Claims that are the subject of and described in Hunter Mountain Investment Trust's proposed adversary complaint (Doc. 3699-1), attached as Exhibit 1 to Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding (Doc. 3699) ("Motion for Leave to File Adversary Proceeding"). If so, we request that easily provided information be provided to us by return e-mail as soon as possible. If there are none, we request that you confirm this on behalf of your clients by return e-mail as soon as possible;
2. Whether Farallon, Stonehill, Muck, Jessup, and/or John Does 1 – 10 (to the extent they exist and may be applicable) are opposed, regarding Judge Jernigan's Order Denying Application for Expedited Hearing (Doc. 3713) late Friday afternoon, to (a) an emergency motion for expedited leave for interlocutory appeal; and, (b) a related emergency application for expedited hearing on the same (collectively "Emergency Motion/Application");
3. Whether Farallon, Stonehill, Muck, Jessup, and/or John Does 1 – 10 (to the extent they exist and may be applicable) will agree to a tolling agreement regarding all claims and causes of action asserted in or related to the claims, causes of action, and matters that are the subject of the proposed adversary complaint (Doc. 3699-1), attached as Exhibit 1 to the Motion for Leave to File Adversary Proceeding, until 14 days (we propose) after a final ruling on the Motion for Leave to File Adversary Proceeding and exhaustion of all related appeal(s) and/or mandamus(es).

We understand you will attempt to respond by this afternoon today, if possible. If we have not heard from you before we file the Emergency Motion/Application, we will note in the certificate of conference that we reached out to you; we have not heard back from you; and

we presume your clients are opposed to the Emergency Motion/Application; that they do not agree to a tolling agreement of any kind regarding item 3 above, and that they do not agree to provide the information requested in item 1 above.

Thank you, Roger.

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

**In re:**

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

**Debtor.**

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**Chapter 11**

**Case No. 19-34054-sgj11**

**ORDER GRANTING HUNTER MOUNTAIN INVESTMENT TRUST’S EMERGENCY  
MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL**

Upon consideration of the Emergency Motion for Leave to File Interlocutory Appeal (“Motion”), filed by Hunter Mountain Investment Trust (“HMIT”), and the Court’s Order Denying Application for Expedited Hearing [DE #3700] (**Doc. 3713**) (“Order”) and the specific orders: (1) denying Hunter Mountain Investment Trust’s Opposed Application for Expedited Hearing on its Emergency Motion for Leave to File Verified Adversary Proceeding (**Doc. 3700**), and (2) requiring HMIT to contact the Court’s clerk to set a hearing no sooner than April 19, 2023, both of which

orders are contained in the Order, and having considered any responses thereto, the Court finds that Motion should be granted. It is therefore:

**ORDERED** that the Motion is **GRANTED**; and

**IT IS FURTHER ORDERED** that HMIT is granted leave to file an interlocutory appeal of the Order and the included orders: (1) denying Hunter Mountain Investment Trust's Opposed Application for Expedited Hearing on its Emergency Motion for Leave to File Verified Adversary Proceeding (**Doc. 3700**), and (2) requiring HMIT to contact the Court's clerk to set a hearing no sooner than April 19, 2023.

**### End of Order ###**

Submitted by:  
PARSONS MCENTIRE MCCLEARY PLLC

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*Counsel for Hunter Mountain Investment Trust*  
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*Attorneys for Petitioner Hunter Mountain Investment Trust*

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

<b>In re:</b>	§	
	§	
<b>HIGHLAND CAPITAL MANAGEMENT, L.P.</b>	§	<b>Chapter 11</b>
	§	
<b>Debtor.</b>	§	<b>Case No. 19-34054-sgj11</b>
	§	

**HUNTER MOUNTAIN INVESTMENT TRUST’S OPPOSED APPLICATION FOR  
EXPEDITED HEARING ON EMERGENCY MOTION FOR LEAVE  
TO FILE INTERLOCUTORY APPEAL**

Hunter Mountain Investment Trust (“HMIT” or “Movant”), submits this Application for an Expedited Hearing (“Application for Expedited Hearing”) on its Emergency Motion for Leave to File Interlocutory Appeal (“Emergency Motion”). In support of this Application, Movant states the following:

1. All respondents have received notice of this Application. This Application for Expedited Hearing and the Emergency Motion are opposed.

2. The Emergency Motion seeks leave to file an appeal from an interlocutory order or decree of a bankruptcy court under **28 U.S.C. §158(a)(3)** and pursuant to the Court's "gatekeeping" orders, as well as the injunction and exculpation provisions in the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (**Doc. 1943**), as modified (the "Plan").

3. An expedited hearing is permitted under Fed. R. Bank P. 9006 (c)(1), which authorizes a shortened time for a response and hearing for good cause. For the reasons set forth fully in the Emergency Motion, and as set forth herein, Movant has shown good cause and requests that the Court schedule a hearing on the Emergency Motion on three (3) days' notice, and that any responses be filed no later than twenty-four hours before the scheduled hearing.

4. Good cause exists because of a fast-approaching date (April 16, 2023) that at least one of the Proposed Defendants will argue, depending upon choice of law, that the statute of limitations may bar some of the common law claims. Although HMIT offered to enter tolling agreements with each of the Proposed Defendants with whom they have successfully contacted, this offer was either rejected or HMIT did not receive an affirmative agreement to do so. Accordingly, this Application for Expedited Hearing has become necessary. Expedited consideration of the Emergency Motion is necessary

and appropriate to protect and preserve the rights of the Reorganized Debtor, the Highland Claimant Trust, and HMIT.

5. Movant requests that the Emergency Motion be scheduled for an expedited hearing within (3) days of the filing of this Application for Expedited Hearing. Alternatively, if such a setting is not possible, Movant requests that the Emergency Motion be scheduled for an expedited hearing on the Court's earliest available date, and that any responses be filed no later than twenty-four hours before the scheduled hearing. Movant requests a 30-minute hearing.

WHEREFORE, Hunter Mountain Investment Trust, as Movant, respectfully requests this Court (i) grant this Application for Expedited Hearing, (ii) set an expedited hearing on the Emergency Motion within three (3) days of the filing of this Application for Expedited Hearing and set a response and objection deadline no later than twenty-four hours before the scheduled hearing or as set by the Court; (iii) in the event such a setting is not possible, and in the alternative, set an expedited hearing on the Emergency Motion on the Court's earliest available date and time thereafter, and that any responses be filed no later than twenty-four hours before the scheduled hearing, and (iv) grant such other and further relief as is just and proper.

DATED: April 4, 2023



Respectfully Submitted,

**PARSONS MCENTIRE MCCLEARY  
PLLC**

By: /s/ Sawnie A. McEntire

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*Attorneys for Hunter Mountain  
Investment Trust*

**CERTIFICATE OF CONFERENCE**

Counsel for Mr. Seery, who also claims to represent the Reorganized Debtor, and the Highland Claimant Trust (together, the 'Highland Defendants'), states that he is opposed to this Application. In light of the nature of the proposed proceedings, whereby HMIT proposes to represent the Reorganized Debtor and the Highland Claimant Trust derivatively, HMIT does not agree with (and does not admit) the propriety of, the substantive content of, or any procedural need for Mr. Morris's request to be identified as counsel for the Reorganized Debtor and the Highland Capital Trust, but HMIT is filing this certificate solely to accommodate Mr. Morris's request. Although we specifically conferred with counsel for all other respondents on April 3, 2023, they have not confirmed

their position related to this Application. We, therefore, assume they are opposed to the Application.

/s/ Sawnie A. McEntire

Sawnie A. McEntire

**CERTIFICATE OF SERVICE**

I certify that on the 4th day of April 2023, a true and correct copy of the foregoing Motion was served on all counsel of record or, as appropriate, on the Respondents directly.

/s/ Sawnie A. McEntire

Sawnie A. McEntire

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

**In re:**

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

**Debtor.**

§  
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**Chapter 11**

**Case No. 19-34054-sgj11**

**ORDER GRANTING APPLICATION FOR EXPEDITED HEARING  
ON EMERGENCY MOTION FOR LEAVE  
TO FILE INTERLOCUTORY APPEAL**

Upon the Application for Expedited Hearing on Emergency Motion for Leave to File Verified Adversary Proceeding (“Application for Expedited Hearing”), filed by Hunter Mountain Investment Trust (“HMIT”), requesting expedited and emergency consideration of the Emergency Motion for Leave to File Interlocutory Appeal (“Emergency Motion”), and the Court, having

reviewed the Application for Expedited Hearing, finds that proper notice was given and that good cause exists for entry of this Order. It is therefore:

**ORDERED** that the Application for Expedited Hearing is **GRANTED**; and

**IT IS FURTHER ORDERED** that the hearing on the Emergency Motion shall be held on \_\_\_\_\_, 2023, at \_\_\_\_\_ .m. (Central Time) before the Honorable Stacey G. C. Jernigan. Any responses to the Emergency Motion shall be filed by \_\_\_\_\_, at \_\_\_\_\_.

**### End of Order ###**

Submitted by:  
PARSONS MCENTIRE MCCLEARY PLLC

/s/ Sawnie A. McEntire  
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*Counsel for Hunter Mountain Investment Trust*