PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717) (*admitted pro hac vice*)
John A. Morris (NY Bar No. 2405397) *(admitted pro hac vice)*
Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)
Hayley R. Winograd (NY Bar No. 5612569) (*admitted pro hac vice*)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760

HAYWARD PLLC
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.
and the Highland Claimant Trust

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	Case No. 19-34054-sgj11
Reorganized Debtor.	
DUGABOY INVESTMENT TRUST and HUNTER MOUNTAIN INVESTMENT TRUST,	Adv. Pro. No. 23-03038-sgj
Plaintiffs,	
vs.	
HIGHLAND CAPITAL MANAGEMENT, L.P. and HIGHLAND CLAIMANT TRUST,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF HIGHLAND CAPITAL MANAGEMENT L.P. AND THE HIGHLAND CLAIMANT TRUST'S MOTION TO DISMISS COMPLAINT

[1] The Reorganized Debtor's last four digits of its taxpayer identification service address for the Reorganized Debtor is 100 Crescent Court, Suite 18

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TABLE OF CONTENTS

Page

I. PRELIMINARY STATEMENT 1

II. RELEVANT BACKGROUND 3

A. The Bankruptcy Case 3

B. The Plan 3

C. Information Rights Under the CTA 4

D. Dugaboy Files the Valuation Motion 6

E. Plaintiffs File the Complaint 7

F. The Court Denies HMIT Leave to File Adversary Proceeding 8

G. Highland Files the Pro Forma Adjusted Balance Sheet Ahead of Mediation in July 2023 9

H. HMIT Seeks Reconsideration of Order Denying Leave Based on the Pro Forma Adjusted Balance Sheet 10

III. ARGUMENT 11

A. The Court Does Not Have Subject Matter Jurisdiction Over Counts One and Three 11

1. Legal Standard 11

2. Counts One and Three are Moot 12

i. Count One is Moot in Light of the Pro Forma Adjusted Balance Sheet 12

ii. Count Three is Moot Because the Court has Already Held that Contingent Claimant Interests are Not "In the Money" 13

3. Count Three Improperly Seeks an Advisory Opinion 14

B. Count Three is Barred by Collateral Estoppel 16

C. Plaintiffs' Claims Fail as a Matter of Law 18

1. Plaintiffs' Equitable Accounting Claim Fails as a Matter of Law 19

i. Plaintiffs Have No Rights to Financial Information Because They are Not Claimant Trust Beneficiaries 19

ii. Any Claim for an Equitable Accounting Fails Under Delaware Law 22

2. Plaintiffs' Claims for Declaratory Relief Fail as a Matter of Law 24

IV. CONCLUSION 25

TABLE OF AUTHORITIES

Page No

CASES

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 18
Bazzrea v. Mayorkas, 3:22-CV-265, 2023 WL 3958912 (S.D. Tex. June 12, 2023) 12, 13
Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 18, 19
Bus. Funding Group, Inc. v. Architectural Renovators, Inc., C.A. 12655, 1993 WL 104611 (Del. Ch. Mar. 31, 1993) 22, 23
C.C. Port, Ltd. v. Davis-Penn Mortg. Co., 61 F.3d 288 (5th Cir. 1995) 19
Grunstein v. Silva, CIV.A. 3932-VCN, 2009 WL 4698541 (Del. Ch. Dec. 8, 2009) 20, 22
Henry v. CitiMortgage, Inc., 4:11-CV-83, 2011 WL 2261166 (E.D. Tex. May 10, 2011) 23, 24, 25
Hodgson v. H. Morgan Daniel Seafoods, Inc., 433 F.2d 918 (5th Cir. 1970) 15
Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Miss., 143 F.3d 1006 (5th Cir. 1998) 11
Houston Professional Towing Ass'n v. City of Houston, 812 F.3d 443 (5th Cir. 2016) 16
In re Am. Home Mortg. Holdings, Inc., 386 Fed. Appx. 209 (3d Cir. 2010) 20
In re Derosa-Grund, 567 B.R. 773 (Bankr. S.D. Tex. 2017) 18
In re Highland Cap. Mgt., L.P., 19-34054-SGJ-11, 2023 WL 5523949 (Bankr. N.D. Tex. Aug. 25, 2023) 5, 6, 9
In re Natl. Coll. Student Loan Trusts Litig., 251 A.3d 116 (Del. Ch. 2020) 21, 23
In re Reddy Ice Holdings, Inc., 611 B.R. 802 (Bankr. N.D. Tex. 2020) 16, 17
In the Matter of Highland Cap. Mgt., L.P., 57 F4th 494 (5th Cir 2023) 6
Johnson v. Wells Fargo Bank, NA, 999 F. Supp 2d 919 (N.D. Tex. 2014) 19, 23, 25
JPay LLC v. Burton, 3:22-CV-1492-E, 2023 WL 5253041 (N.D. Tex. Aug. 15, 2023) 16
McMahon v. New Castle Assoc., 532 A2d 601 (Del. Ch. 1987) 22
Meador v. Oryx Energy Co., 87 F. Supp. 2d 658 (E.D. Tex. 2000) 18
Moran v. Kingdom of Saudi Arabia, 27 F.3d 169 (5th Cir. 1994) 11
Paragon Asset Co. Ltd v. Gulf Copper & Mfg. Corp., 1:17-CV-00203, 2020 WL 1892953 (S.D. Tex. Feb. 11, 2020) 14
Ramming v. United States, 281 F.3d 158 (5th Cir. 2001) 11

Sivertson v. Citibank, N.A. as Tr. for Registered Holders of WAMU Asset-Back Certificates WAMU Series No. 2007-HE2 Tr., 390 F. Supp. 3d 769 (E.D. Tex. 2019) 24

Terrell v. DeConna, 877 F.2d 1267 (5th Cir. 1989) 18

Texas v. Travis County, Texas, 910 F.3d 809 (5th Cir 2018) 15

Texas v. Travis County, 272 F. Supp. 3d 973 (W.D. Tex. 2017) 14

Wallace v. U.S. Bank, N.A., No. 4:17-CV-437, 2018 WL 1224508 (E.D. Tex. Mar. 9, 2018) 24

Washington v. JP Morgan Chase Bank, N.A., 3:18-CV-1870-K-BN, 2019 WL 587289 (N.D. Tex. Jan. 18, 2019) 25

Williams v. Lester, 2023-0042-SG, 2023 WL 4883610 (Del. Ch. Aug. 1, 2023) 22

Yarls v. Bunton, 905 F.3d 905 (5th Cir. 2018) 12

STATUTES

11 U.S.C. § 1109(b) 6

OTHER AUTHORITIES

12 Del. C. § 3806(c) 21, 22

Section 3819(a) of the Delaware Statutory Trust Act 21

12 Del. C. § 3801 22

United States Constitution 6

RULES

Federal Rule of Civil Procedure 12(b)(6) 1, 2, 18, 19, 24

Federal Rule of Civil Procedure 12(b)(1) ..... passim

Highland Capital Management, L.P. ("Highland" or the "Debtor," as applicable), and the Highland Claimant Trust (the "Claimant Trust," and together with Highland, the "Highland Parties"), the defendants in the above-captioned adversary proceeding, hereby submit this memorandum of law in support of their *Motion to Dismiss 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' Interest in the Claimant Trust* (the "Motion") seeking to dismiss the above-captioned action (the "Action").

I. PRELIMINARY STATEMENT[2]

1. The Complaint should be dismissed in its entirety. Pursuant to Rule 12(b)(1), this Court lacks subject matter jurisdiction over the Action because the Claims are either moot or seek impermissible advisory opinions. Even if the Court had jurisdiction (and it does not), the Claims should be dismissed under Rule 12(b)(6) because they fail to state claims as a matter of law.

2. Under the express terms of the CTA and the Plan, holders of Contingent Trust Interests are not "Claimant Trust Beneficiaries" and have no rights, including information rights, unless and until their contingent, inchoate interests vest. Despite holding only unvested Contingent Trust Interests with no rights in the Claimant Trust, Plaintiffs stubbornly seek "financial information" regarding the Claimant Trust Assets and specifically request: (a) an accounting of the Claimant Trust Assets, (b) a determination as to the value of those assets compared to liabilities, and (c) a determination whether Plaintiffs' Contingent Trust Interests "will vest."

3. Count One, which seeks an accounting of the assets and liabilities of the Claimant Trust, has been rendered moot by the Pro Forma Adjusted Balance Sheet filed in July 2023 and other publicly-available information, which discloses the very information demanded. The relief

[2] Capitalized terms not defined in this Preliminary Statement shall have the meanings ascribed to them below.

sought in Count Three, namely, a determination as to whether Plaintiffs' Contingent Trust Interests are "likely to vest," is moot, seeks an impermissible advisory opinion, and is barred by collateral estoppel. In September 2023, four months after the Complaint was filed, this Court found that whether the Contingent Trust Interests might someday vest is dependent on a multitude of unknown and unknowable factors, for example, the amount of senior indemnification expenses that must be reserved for and ultimately paid by the Claimant Trust. Based, in part on those unknown senior expenses, this Court determined that the Contingent Trust Interests were "not in the money." This Court lacks jurisdiction to render an opinion on Count Three and, to the extent that it could, it already has and Plaintiffs are collaterally estopped from re-litigating this issue. For the same reasons, there is no declaratory relief available to Plaintiffs that has not already been addressed in the Court's prior ruling.

4. Even if the Court had subject matter jurisdiction over the Claims, the Complaint fails as a matter of law under Rule 12(b)(6). Plaintiffs' equitable claim (Count One) is foreclosed by the plain and unambiguous terms of the CTA, the Plan, and this Court's prior orders. Plaintiffs, as holders of Contingent Trust Interests, have no rights—including information rights—under the CTA. Under the circumstances, equity cannot abrogate the terms of that agreement or be used to create non-existent rights or extra-contractual duties, such as those relating to the disclosure of financial information or an accounting. This is especially so when Plaintiffs and their affiliates have unclean hands as vexatious adversaries to the entity against who they claim to seek equity.[3] Plaintiffs' claims for declaratory relief (Counts Two and Three) also fail as a matter of law because

[3] In addition to the numerous actions in which the Plaintiffs and their affiliates have attacked the Highland Parties or failed to honor their obligations to the Highland Parties, plaintiff HMIT is a defendant in an action on a note owed to Highland with current principal and interest owed in excess of $98 million, discussed *infra*.

there is no cognizable underlying claim. For the reasons herein and discussed further below, the Complaint should be dismissed.

II. RELEVANT BACKGROUND

A. The Bankruptcy Case

5. On October 16, 2019 (the "Petition Date"), Highland filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Case"). As of the Petition Date, Highland had three classes of limited partnership interests (Class A, Class B, and Class C). *See* Disclosure Statement [Docket No. 1473], ¶ F(4). The Class A interests were held by The Dugaboy Investment Trust ("Dugaboy"),[4] Mark Okada's family trusts, and Strand Advisors, Inc. The Class B and C interests were held by Hunter Mountain Investment Trust ("HMIT"). *Id.* On January 9, 2020, an independent board of directors, which included James P. Seery, Jr., was appointed to manage Highland's Bankruptcy Case and estate. [Docket No. 339]. Mr. Seery was appointed Highland's Chief Executive Officer and Chief Restructuring Officer in July 2020. [Docket No. 854].

B. The Plan

6. On February 22, 2021, the Court entered the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* [Bankr. Docket No. 1943] (the "Confirmation Order"), which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Bankr. Docket No. 1943-1] (the "Plan"). The Plan became effective on August 11, 2021 [Docket No. 2700] (the "Effective Date"). Pursuant to the Plan:

- General Unsecured Claims were classified as Class 8 and Subordinated Claims were classified as Class 9.

[4] Dugaboy is James Dondero's family trust.

- HMIT's Class B Limited Partnership Interest and Class C Limited Partnership Interest were classified as Class 10.

- Class A Limited Partnership Interests, including Dugaboy's, were classified as Class 11.

- The Claimant Trust, a Delaware statutory trust, was established pursuant to that certain *Claimant Trust Agreement*, effective as of August 11, 2021 (the "CTA"),[5] for the benefit of "Claimant Trust Beneficiaries;"[6]

- Holders of allowed general and subordinated unsecured Claims (*i.e.*, Class 8 and 9) received beneficial interests in the Claimant Trust (collectively, the "Trust Interests") and became "Claimant Trust Beneficiaries;" and

    - Holders of the Debtor's prepetition partnership interests (*i.e.*, Class 10 and 11) were allocated unvested contingent interests (the "Contingent Trust Interests") in the Claimant Trust that would vest if, and only if, the Claimant Trustee certifies that all Claimant Trust Beneficiaries (*i.e.*, Class 8 and 9) have been paid in full, Class 8 has received post-petition interest, and all disputed claims in Class 8 and 9 have been resolved.

(*See generally* Plan Art. III, IV.)

C. Information Rights Under the CTA

7. By design, the clear terms of the CTA limit information rights. Section 3.12(a) of the CTA provides that the Claimant Trustee has no duty to provide an accounting of the Claimant Trust Assets to any party, including Claimant Trust Beneficiaries. CTA, § 3.12(a) ("Except as otherwise provided herein, nothing in this Agreement requires the Claimant Trustee to file any accounting ....").

8. Section 3.12(b) of the CTA provides limited information rights solely to "Claimant Trust Beneficiaries":

> The Claimant Trustee shall provide quarterly reporting to the Oversight Board and Claimant Trust Beneficiaries of (i) the status of the Claimant Trust Assets, (ii) the balance of Cash held by the Claimant Trust (including in each of the Claimant Trust Expense Reserve and Disputed Claim Reserve), (iii) the determination and any re-

[5] All capitalized terms used but not defined herein have the meanings given to them in the CTA.

[6] The CTA was expressly incorporated into and is a part of the Plan. Confirmation Order ¶ 25; Plan Art. IV, § J. The final form of the CTA was filed with the Court as Docket No. 1811-2 as modified by Docket No. 1875-4.

> determination, as applicable, of the total amount allocated to the Disputed Claim Reserve, (iv) the status of Disputed Claims and any resolutions thereof, (v) the status of any litigation, including the pursuit of the Causes of Action, (vi) the Reorganized Debtor's performance, and (vii) operating expenses; provided, however, that the Claimant Trustee may, with respect to any Member of the Oversight Board or Claimant Trust Beneficiary, redact any portion of such reports that relate to such Entity's Claim or Equity Interest, as applicable and any reporting provided to Claimant Trust Beneficiaries may be subject to such Claimant Trust Beneficiary's agreement to maintain confidentiality with respect to any non-public information.

CTA, § 3.12(b).

9. Nothing in the CTA or the Plan grants any other information rights, and, in fact, the CTA is clear that there are no information rights outside those in Section 3.12(b). *See* CTA, § 5.10(a) ("The Claimant Trust Beneficiaries shall have no rights other than those set forth in this Agreement, the Confirmation Order, or the Plan (including any Plan Supplement documents incorporated therein)"). Thus, the only entities with information rights under the Plan are "Claimant Trust Beneficiaries," and those rights (a) are limited, (b) do not include rights to asset or subsidiary level information, and (c) can be further limited by the Claimant Trustee as appropriate to "maintain confidentiality."

10. Under the express terms of the Plan, the CTA, and this Court's prior orders, the "Claimant Trust Beneficiaries"[7] are the holders of Allowed Claims in Class 8 and Class 9. *See* CTA, § 1.1(h); Plan Art. I.B.27.[8] HMIT holds Class 10 interests and Dugaboy holds Class 11 interests, and therefore, neither Plaintiff is a "Claimant Trust Beneficiary." Instead, Plaintiffs hold

[7] "Claimant Trust Beneficiaries" are defined as:

> the Holders of Allowed General Unsecured Claims, Holders of Allowed Subordinated Claims, and, only upon certification by the Claimant Trustee that the Holders of such Claims have been paid indefeasibly in full plus, to the extent applicable, post-petition interest at the federal judgment rate in accordance with the terms and conditions set forth herein, Holders of Allowed Class B/C Limited Partnership Interests, and Holders of Allowed Class A Limited Partnership Interests.

See, e.g., CTA, § 1.1(h).

[8] *See also In re Highland Cap. Mgt., L.P.*, 19-34054-SGJ-11, 2023 WL 5523949, at *35 (Bankr. N.D. Tex. Aug. 25, 2023), discussed further *infra*.

unvested "Contingent Trust Interests." *See, e.g.*, Plan, Art. I.B.44; CTA, §§ 1.1(h), 5.1(c). Contingent Trust Interests "shall not have any rights under" the CTA, and holders of such interests will not "be deemed 'Beneficiaries'" "unless and until" they vest in accordance with the Plan and CTA. *Id.* Specifically, under the CTA, Plaintiffs' Contingent Trust Interests in the Claimant Trust will *not* vest and Plaintiffs will have *no* rights under the CTA unless and until (a) all Class 8 and Class 9 Claims are paid indefeasibly in full with interest, (b) all disputed claims are resolved, and (c) the Claimant Trustee certifies as much to this Court. *Id*. Class 8 and Class 9 Claims cannot be paid until indemnification claims are satisfied.[9] It is indisputable that Plaintiffs' Contingent Trust Interests have not vested under the terms of the Plan and the CTA. *See Highland Cap.*, 2023 WL 5523949, at *35. Plaintiffs are not "Claimant Trust Beneficiaries" and have no information rights.

D. Dugaboy Files the Valuation Motion

11. On June 30, 2022, Dugaboy filed its *Motion for Determination of the Value of the Estate and Assets Held by the Claimant Trust* [Docket No. 3382] (the "Initial Valuation Motion"), seeking "a determination by this Court of the current value of the estate and an accounting of the assets currently held by the Claimant Trust and available for distribution to creditors." Thereafter, on September 21, 2022, Dugaboy filed a supplemental motion [Docket No. 3533] (the "Supp. Valuation Motion" and, together with the Original Valuation Motion, the "Valuation Motion"). Therein, Dugaboy requested that the Court enter "an order: (i) finding that Dugaboy has standing in these bankruptcy proceedings under 11 U.S.C. § 1109(b), Delaware trust law, and Article III of the United States Constitution; and (ii) setting an evidentiary hearing to ascertain the assets

[9] *See, e.g.*, CTA Art. 6.1 (providing that distributions to Claimant Trust Beneficiaries are junior to the Claimant Trust's expenses, including, among other things, amounts "necessary to pay or reserve for reasonably incurred or anticipated Claimant Trust Expenses," which include indemnification costs). This priority of payment under the Plan and CTA was upheld by the Fifth Circuit when affirming this Court's order authorizing the creation of the indemnity sub-trust, the purpose of which was to reserve or retain any cash reasonably necessary to satisfy contingent liabilities. *See In the Matter of Highland Cap. Mgt., L.P.*, 57 F4th 494, 502 (5th Cir 2023).

currently available for distribution to allowed claimants, to determine the current value of those assets, and to determine whether there is a potential for settling the estate now ...." The Valuation Motion was supported by HMIT. [Docket No. 3467]. Highland objected to the Valuation Motion. [Docket No. 3465].

12. On November 15, 2022, the Court held a status conference, during which the Court expressed concerns about whether the Valuation Motion should be filed as an adversary proceeding since it sought equitable relief. On December 7, 2022, after the parties submitted briefing on this issue, [*see* Docket Nos. 3637, 3638, 3639], the Court issued its order [Docket No. 3645] (the "Valuation Order"), in which it found that an adversary proceeding was necessary with regard to the relief sought in the Valuation Motion. The Court explained that "the essence of the Dugaboy Value Motions is a request for an accounting," which constitutes "equitable relief that does not appear to be provided for in the confirmed chapter 11 plan." *Id.* at 4. The Court further found that "Dugaboy and HMIT have not pointed to any provision of the CTA that establishes a right to an accounting," and "[i]t would appear that Dugaboy and HMIT may be frustrated that they did not negotiate or obtain the same oversight rights as the actual Claimant Trust Beneficiaries in the Plan and CTA." Valuation Order at 5 (quoting CTA §§ 3.12(a), (b)).

E. Plaintiffs File the Complaint

13. On May 10, 2023, Plaintiffs commenced this Action against Highland and the Claimant Trust by filing their complaint [Adv. Pro. No. 23-03038, Docket No. 1] (the "Complaint"). In their Complaint, Plaintiffs seek an equitable accounting of the Claimant Trust Assets so they can determine if their Contingent Claimant Trust Interests "are likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries."

14. In their first count ("Count One"), Plaintiffs request an accounting "regarding the Claimant Trust Assets, including the amount of cash and the remaining non-cash assets, and details

of all transactions that have occurred since the wall of silence was erected, and all liabilities." Plaintiffs maintain, *inter alia*, that "[d]ue to the lack of transparency into the assets of the Claimant Trust, Plaintiffs are unable to determine whether their Contingent Claimant Trust Interests may vest into Claimant Trust Interests." Compl. ¶¶ 82-88.[10]

15. In their second count ("Count Two"), Plaintiffs seek a declaratory judgment regarding the value of the Claimant Trust Assets. Plaintiffs specifically maintain that "[o]nce Defendants are compelled to provide information about the Claimant Trust Assets, Plaintiffs seek a determination from the Court of the relative value of the Claimant Trust Assets compared to the bankruptcy estate obligations." Compl. ¶ 90.

16. In their third count ("Count Three," and collectively with Count One and Count Two, the "Claims"), Plaintiffs seek a declaration and determination that "[i]n the event that the Court determines that the Claimant Trust assets exceed the obligations of the bankruptcy estate in an amount sufficient so that all Allowable Claims may be indefeasibly paid … the conditions are such that their Contingent Claimant Trust Interests are likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries." Compl. ¶ 94.

F. The Court Denies HMIT Leave to File Adversary Proceeding

17. Around the same time, HMIT separately filed its *Emergency Motion for Leave to File Verified Adversary Proceeding* [Docket No. 3699], which was later supplemented and

[10] Plaintiffs allege that Highland "failed and refused to file quarterly 2015.3 reports, leaving stakeholders, including Plaintiffs, in the dark about the value of the estate and the mix of assets it held, bought or sold." Compl. ¶ 41. Plaintiffs' allegations about the lack of transparency in the Bankruptcy Case is tired and purposefully misleading. ***Highland has complied with every single pre- and post-Effective Date disclosure obligation***—except for the Rule 2015.3 disclosure. The Fifth Circuit has denied Dugaboy's appeal of the denial of its post-confirmation motion to compel compliance with Rule 2015.3, (*see* Case No. 22-10831, Document No. 46), and this Court has found that "it is not as though the Claimant Trustee is operating 'under the radar'" (Valuation Order at 5). Moreover, as previously disclosed in this Court, the failure to file the 2015.3 reports during the case was a direct result of actions of persons who work for Plaintiffs and their affiliates, and in any event, at all time Plaintiffs' control person had full access to the information they cry about. Nevertheless, Plaintiffs continue with their baseless allegations about the lack of transparency in this case.

modified [Docket Nos. 3760, 3815, and 3816] (collectively, the "Motion for Leave").[11] In the Motion for Leave, HMIT sought leave to sue Highland, Mr. Seery, Stonehill, and Farallon[12] falsely alleging both direct and derivative claims for "insider trading" and breach of fiduciary duty (the "Proposed Claims").

18. On August 25, 2023, this Court issued its order denying the Motion for Leave on multiple grounds. *See Highland Cap.*, 2023 WL 5523949 (the "Order Denying Leave"). In the Order Denying Leave, the Court found that, *inter alia*: (a) HMIT was not a "Claimant Trust Beneficiary" and not a "beneficial owner" of the Claimant Trust; (b) HMIT should not be treated as a "Claimant Trust Beneficiary" after "considering the current value of the Claimant Trust Assets …."; (c) HMIT held "only an ***unvested*** contingent interest in the Claimant Trust," and "HMIT's status as a 'beneficiary' of the Claimant Trust is defined by the CTA itself, pure and simple;" and (d) the Court "does not have the power to equitably deem HMIT's Contingent Trust Interest to be vested ...." *Id.* at 35.

G. Highland Files the Pro Forma Adjusted Balance Sheet Ahead of Mediation in July 2023

19. On April 20, 2023, James Dondero and certain of his controlled affiliates (collectively, the "Dondero Parties") filed their *Motion to Stay and to Compel Mediation* [Docket No. 3752] (the "Mediation Motion"), which was granted, in part, on August 2, 2023, [Docket No. 3897].[13] On July 6, 2023, in furtherance of mediation and in compliance with an agreed-upon Court order [Docket 3870], Highland filed a *pro forma* adjusted balance sheet [Docket No. 3872] (the "Pro Forma Adjusted Balance Sheet"). The Pro Forma Adjusted Balance Sheet disclosed a

[11] Each version of the Motion for Leave attached a proposed complaint [Docket Nos. 3699-1, 3760-1, 3815-1, 3816-1] (the last version, the "Proposed Complaint").

[12] Stonehill and Farallon refer to, respectively, Stonehill Capital Management, LLC and Farallon Capital Management, LLC.

[13] The mediation did not result in a settlement. *See* Docket No. 3964.

point-in-time $152 million in assets (of which only $37 million was cash or restricted cash) and $130 million in liabilities for a total equity value of $22 million, which, even assuming the equity value could be distributed (and it cannot be), is well short of the $126 million needed to pay Allowed Class 8 and Class 9 claims (exclusive of interest).

20. The information disclosed on the Pro Forma Adjusted Balance Sheet was consistent with information that had already been disclosed in the Bankruptcy Case as of April 2023, [*see* Bankr. Docket Nos. 3756 and 3757] (the "Post-Confirmation Reports"), and through these disclosures should have resolved any good faith dispute around receiving sufficient information with which to make a global settlement offer. These enhanced Post-Confirmation Reports were publicly filed to provide interested parties substantially more information than was required. *See, e.g.*, Docket No. 3757 at 13-15 (Addendum showing (i) "Quarter-ending cash, Disputed Claims Reserve, and Indemnity Trust summary;" (ii) liabilities, including remaining disputed/expunged or pending claims, (iii) disbursements to Classes 8 and 9, and (iv) "Remaining investments, notes, and other assets").

H. HMIT Seeks Reconsideration of Order Denying Leave Based on the Pro Forma Adjusted Balance Sheet

21. On September 8, 2023, HMIT filed its motion for reconsideration of the Order Denying Leave [Docket No. 3905] (the "Motion to Reconsider"), falsely and misleadingly contending that the Pro Forma Adjusted Balance Sheet (a) provided an accounting of the Claimant Trust Assets and (b) proved that (i) the value of the Claimant Trust Assets exceeded liabilities and (ii) HMIT was "in the money" and (c) its interests were likely to vest and that HMIT therefore had standing as a "Claimant Trust Beneficiary." On October 6, 2023, the Court denied the Motion to Reconsider [Docket No. 3936] (the "Order Denying Reconsideration"). The Court found that, in pertinent part, the Balance Sheet did not "demonstrate that HMIT's contingent interest is 'in the

money,'" noting that "HMIT does not give proper attention to the voluminous supplemental notes" in the Balance Sheet that are "integral to understanding the numbers therein." *Id.* at 3 (citing Notes 5 and 6 of the Balance Sheet which show that Highland will operate at an "operating loss prospectively," and that the administrative expenses and legal fees continue to deplete assets, among other things). The Court also found that the Balance Sheet did not constitute "newly discovered evidence" because it did not contain information that was materially different from the information disclosed on the Post-Confirmation Reports, filed three months earlier. *Id.* at 2-3.

III. ARGUMENT

A. The Court Does Not Have Subject Matter Jurisdiction Over Counts One and Three

22. The Court does not have subject matter jurisdiction to adjudicate Counts One and Three. Counts One and Three are moot, and Count Three impermissibly seeks an advisory opinion.

1. Legal Standard

23. A motion under Rule 12(b)(1) must be considered before any motion on the merits because subject matter jurisdiction is required to determine the validity of any claim. *See Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994). "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Id.* "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998) (internal quotations omitted).

2. Counts One and Three are Moot

i. Count One is Moot in Light of the Pro Forma Adjusted Balance Sheet

24. Count One is moot in light of the Pro Forma Adjusted Balance Sheet and must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). For a court to have subject matter jurisdiction over a suit, a "controversy must remain live throughout the suit's existence." *Bazzrea v. Mayorkas*, 3:22-CV-265, 2023 WL 3958912, at *3 (S.D. Tex. June 12, 2023). "A case becomes moot—and therefore no longer a 'Case' or 'Controversary' for purpose of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Yarls v. Bunton*, 905 F.3d 905, 909 (5th Cir. 2018) (internal quotations omitted).

25. Here, the issue presented in Count One is no longer "live." In Count One, Plaintiffs seek (a) "information regarding the Claimant Trust assets," including the amount of assets and liabilities, so that (b) Plaintiffs can "determine whether their Contingent Claimant Trust Interests may vest into Claimant Trust Interests." Compl. ¶¶ 82-88. As discussed *supra*, the Pro Forma Adjusted Balance Sheet provides this very information. It shows the value of the Claimant Trust Assets, the Claimant Trust's liabilities, and the potential equity value available for Claimant Trust Beneficiaries (assuming all Claimant Trust Assets are liquidated at current valuations and liabilities are fixed). HMIT admitted as much in its Motion to Reconsider when it specifically (but incorrectly) maintained that, based on the assets and liabilities shown on the Pro Forma Adjusted Balance Sheet, "***[HMIT's] Contingent Claimant Trust Interest will vest, or put colloquially, [HMIT] is 'in the money.'"*** Motion to Reconsider ¶¶ 5-8 (emphasis added).[14] The Post-

[14] Although Plaintiffs have effectively admitted the Pro Forma Adjusted Balance Sheet moots their requested relief, as this Court is aware, the current value of the Claimant Trust Assets does not dictate when or if Plaintiffs' Contingent Trust Interests will ever vest. Whether and when Contingent Trust Interests may someday vest depends upon the satisfaction of the conditions set forth in the CTA and the Plan, and this Court "does not have the power to equitably deem HMIT's Contingent Trust Interest to be vested ..." regardless of whether the value of the pro forma assets exceeds the pro forma value of the liabilities on a particular date. Order Denying Leave at *35.

Confirmation Reports, filed prior to the Complaint in filed in April 2023, similarly disclose the financial information requested in Count One, including, *inter alia*, the cash and the identification of remaining assets.

26. The Pro Forma Adjusted Balance Sheet and Post-Confirmation Reports have thus eliminated the "actual controversary" at the core of Count One, and there is no conceivable relief available to Plaintiffs through this claim that has not already been provided. Count One is therefore moot. *See Bazzrea*, 2023 WL 3958912, at *4 (finding plaintiffs' claims moot where events that occurred after the complaint was filed "eliminated the actual controversy—the court cannot provide effectual relief and thus the plaintiffs' claims are moot.") Accordingly, Plaintiffs have not met their burden to establish that the Court has subject matter jurisdiction over Count One, and it should be dismissed under Rule 12(b)(1).

ii. Count Three is Moot Because the Court has Already Held that Contingent Claimant Interests are Not "In the Money"

27. Count Three, seeking a declaration regarding whether Plaintiffs' Contingent Trust Interests "are likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries," Compl. ¶ 94, is moot because the Court already decided this issue. As discussed above, in its Motion to Reconsider, HMIT incorrectly argued that the Pro Forma Adjusted Balance Sheet showed that HMIT's Contingent Trust Interests were "in the money" and likely to vest, rendering HMIT a "Claimant Trust Beneficiary." In its Order Denying Reconsideration, the Court found that Contingent Trust Interests are not "in the money,"[15] and that HMIT is, therefore, not a Claimant Trust Beneficiary. As the Court explained, Plaintiffs' reliance on the assets and liabilities disclosed on the Pro Forma Adjusted Balance Sheet in support of its argument that its interests

[15] Although the Court's finding related to HMIT's Contingent Trust Interest, this ruling applies equally to Dugaboy, because both Plaintiffs both hold Contingent Trust Interests.

were "likely to vest" demonstrated a fundamental misunderstanding of the Pro Forma Adjusted Balance Sheet and the vesting mechanics in the CTA. Again, under the CTA, Contingent Trust Interests vest only if, among other things, Class 8 and Class 9 are paid in full. And as the Court further stated, the Claimant Trust Assets at any point in time will only be available for distribution to those classes after they are monetized and all fees and expenses, including indemnification obligations, are satisfied. *See* Order Denying Reconsideration at 3. In other words, as this Court found, unless and until such contingent obligations are *known and satisfied* and all Class 8 and Class 9 Claims have been actually paid in full, Contingent Trust Interests are not "in the money" and will not "vest."

28. The Court's finding in its Order Denying Reconsideration, in which the Court determined that Contingent Trust Interests are not "in the money," has thus eliminated any "live" controversy presented by the relief sought in Count Three, namely, a determination whether Plaintiffs' Contingent Trust Interests "are likely to vest into Claimant Trust Interests." For the foregoing reasons, Counts One and Three are moot. The Court does not have subject matter jurisdiction over Counts One and Three under Rule 12(b)(1), and such claims should be dismissed.

3. <u>Count Three Improperly Seeks an Advisory Opinion</u>

29. The Court also does not have subject matter jurisdiction to rule on Count Three because it impermissibly seeks an advisory opinion. Under Article III of the Constitution, "no justiciable controversy is presented when ... the parties are asking for an advisory opinion." *Paragon Asset Co. Ltd v. Gulf Copper & Mfg. Corp.*, 1:17-CV-00203, 2020 WL 1892953, at *1 (S.D. Tex. Feb. 11, 2020) (internal quotations omitted). The "well-established constitutional ban on advisory opinions" seeks to ensure that federal courts determine "specific disputes between parties, rather than hypothetical legal questions, and in doing so, conserve judicial resources." *Texas v. Travis County*, 272 F. Supp. 3d 973, 980 (W.D. Tex. 2017), *aff'd sub nom. Texas v. Travis*

County, Texas, 910 F.3d 809 (5th Cir 2018); *see also Hodgson v. H. Morgan Daniel Seafoods, Inc.*, 433 F.2d 918, 920 (5th Cir. 1970) ("We cannot render an advisory opinion on hypothetical or abstract facts.")

30. In Count Three, Plaintiffs impermissibly ask the Court to determine whether (a) current Claimant Trust Beneficiaries "***may be*** indefeasibly paid" and (b) "Contingent Claimant Trust Interests ***are likely*** to vest." Compl. ¶ 94 (emphasis added). Any such determination is dependent upon several hypothetical future events concerning, among other things, asset values and recoveries (*e.g.*, whether the Fifth Circuit sustains the Dondero Parties' appeal in the Notes Litigation, and the Claimant Trust actually recovers the bonded amounts), actual future Claimant Trust expenses, and the nature and extent of indemnification obligations.[16] As discussed *supra*, indemnification expenses are senior to distributions to the Claimant Trust Beneficiaries, and Claimant Trust Beneficiaries cannot be paid in full unless and until such indemnification expenses are liquidated and satisfied. Contingent Trust Interests therefore cannot vest unless and until indemnification claims are known and paid (and all Class 8 and Class 9 Claims are thereafter paid).

31. In light of the widespread litigation, additional threatened litigation, and continued accrual of related legal fees and expenses, the amount of indemnification obligations remains unknown. Thus, any determination as to whether Plaintiffs' Contingent Trust Interests "are likely to vest" is contingent upon a number of unknown and contingent variables, including (a) the amount of indemnification obligations and (b) and whether sufficient cash remains to pay Classes 8 and 9 in full after those indemnification obligations (and other expenses) are satisfied. Such an abstract determination is precisely the type of relief precluded by the constitutional ban on advisory

[16] The Highland Parties request that the Court take judicial notice of the active litigation in the Bankruptcy Case, as reflected in the *Amended Notice of Filing of Active Litigation Involve and/or Affecting the Highland Parties* [Docket No. 3880].

opinions. *See JPay LLC v. Burton*, 3:22-CV-1492-E, 2023 WL 5253041, at *10 (N.D. Tex. Aug. 15, 2023) (dismissing case for lack of subject matter jurisdiction and declining "to render an advisory opinion on the value of the aggregated claims of a contingent, theoretical class" where such determination is contingent on a "hypothetical facts"). Accordingly, Plaintiffs have failed to show that the Court has subject matter jurisdiction to adjudicate Count Three, and it should be dismissed under Rule 12(b)(1).

B. Count Three is Barred by Collateral Estoppel

32. Count Three is also barred by the doctrine of collateral estoppel. Collateral estoppel is referred to as "issue preclusion" and prevents relitigating the same issues or facts decided in a prior proceeding. Collateral estoppel precludes the re-litigation of issues or facts actually litigated in the original action, whether or not the second suit is based on the same cause of action. *See Houston Professional Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016). "By precluding parties from contesting matters that they have had a full and fair opportunity to litigate, [collateral estoppel] protect[s] against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions." *In re Reddy Ice Holdings, Inc.*, 611 B.R. 802, 808 (Bankr. N.D. Tex. 2020) (internal quotations omitted). Collateral estoppel applies when: "(1) the issue at stake is identical to the one involved in the earlier action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a necessary part of the judgment in that action." *Oyekwe v. Research Now Group, Inc.*, 542 F. Supp. 3d 496, 506 (N.D. Tex. 2021), appeal dismissed, 21-10580, 2021 WL 8776378 (5th Cir Dec. 28, 2021). These elements are easily met here.

33. The issue presented by Count Three—whether Plaintiffs' "Contingent Claimant Trust Interests are likely to vest into Claimant Trust Interests" (Compl. ¶ 94)—is the same as the

issue at stake, and actually litigated, in connection with the Motion for Leave. In support of its Motion to Reconsider, HMIT argued that it had standing to assert its Proposed Claims because HMIT was "in the money" and its Contingent Trust Interests "will vest." *See* Motion to Reconsider. In adjudicating the Motion to Reconsider, the Court determined that HMIT did not have standing to bring the Proposed Claims because its Contingent Trust Interests were not "in the money." *See* Order Denying Reconsideration at 3. The issue of whether Contingent Trust Interests were "in the money" for purposes of the Motion to Reconsider, and whether Contingent Trust Interests are "likely to vest," for purposes of this Complaint, are one and the same. This issue was, without question, litigated in connection with the Motion for Leave. The issue was raised by HMIT in its Motion to Reconsider, contested by the Highland Parties, submitted to this Court for adjudication, and expressly determined. *See Reddy*, 611 B.R. at 810 ("The requirement that an issue be 'actually litigated' for collateral estoppel purposes simply requires that the issue is raised, contested by the parties, submitted for determination by the court, and determined.") (internal quotations omitted). The first and second elements of collateral estoppel are thus met.

34. The third prong of collateral estoppel—whether the Court's prior ruling on this same issue was necessary or essential to the Order Denying Reconsideration—is likewise satisfied. The Court's finding that Contingent Trust Interests were not "in the money" was necessary to the Court's ultimate determination that HMIT did not have standing to assert the Proposed Claims. In other words, to determine whether HMIT could file the Motion for Leave, and later whether to grant the Motion to Reconsider, the Court was required to consider whether Contingent Trust Interests have vested. This was the only issue underlying the Motion to Reconsider, and it was necessary to the Order Denying Reconsideration. Plaintiffs are therefore collaterally estopped from re-litigating this same issue of whether their Contingent Trust Interests will vest. *See In re*

Derosa-Grund, 567 B.R. 773, 798 (Bankr. S.D. Tex. 2017) (debtor collaterally estopped from re-litigating issue of whether debtor owned film treatment where this same issue "was necessary" to determination on motion to reopen; was determined; and "Debtor cannot now relitigate this issue in an effort to prove that EMG owns the Treatment").[17] Accordingly, Count Three is barred by collateral estoppel, and for this additional reason, this claim should be dismissed.

C. Plaintiffs' Claims Fail as a Matter of Law

35. Even if the Court had subject matter jurisdiction over Counts Two and Three, the Complaint fails to state plausible claims upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6) as to all Counts. To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550

[17] Although Dugaboy was not a party in the Motion for Leave, literal identity of the parties is not required as part of the collateral estoppel analysis so long as the party against whom enforcement is sought was in privity with a party involved in the initial decision. Privity exists where a non-party's interests were adequately represented in the first suit. *See Derosa-Grund*, 567 B.R. at 798 n. 21 (Bankr S.D. Tex. 2017) (noting "federal courts will bind a nonparty whose interests were represented adequately by a party in the original suit," and "[t]he Fifth Circuit has found that adequate representation exists between a party and a non-party 'where a party to the original suit is so closely aligned to the non-party's interests as to be his virtual representative.'") (quoting *Terrell v. DeConna*, 877 F.2d 1267, 1270 (5th Cir. 1989)). Here, there can be no question that Dugaboy's interests were sufficiently aligned as to the issue of whether Contingent Trust Interests have vested, where both Dugaboy and HMIT hold those interests and Dugaboy was funding HMIT's litigation. *See Meador v. Oryx Energy Co.*, 87 F. Supp. 2d 658, 665 (E.D. Tex. 2000) (non-party's interests were "sufficiently aligned" with party in previous suit for purposes of claim preclusion where, in both cases, "the plaintiffs' claims derive solely from rights" alleging arising from the same conveyance that was interpreted conclusively in prior suit).

U.S. at 557). "When well-pleaded facts fail to meet th[e] [*Twombly*] standard, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679. Dismissal is proper under Rule 12(b)(6) when, taking the facts alleged in the complaint as true, it appears that the plaintiff "cannot prove any set of facts that would entitle it to the relief it seeks." *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995). "[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." *Johnson v. Wells Fargo Bank, NA*, 999 F. Supp. 2d 919, 926 (N.D. Tex. 2014) (internal quotations omitted). Courts have "complete discretion" to either accept or exclude such evidence for purposes of the motion to dismiss. *Id*.

1. Plaintiffs' Equitable Accounting Claim Fails as a Matter of Law

36. Count One, which seeks an accounting of the Claimant Trust Assets, fails to state a claim upon which relief can be granted under Rule 12(b)(6).

i. Plaintiffs Have No Rights to Financial Information Because They are Not Claimant Trust Beneficiaries

37. Plaintiffs have no rights to information regarding the Claimant Trust Assets.

38. ***First***, as discussed above and as this Court has found, it is indisputable that Plaintiffs, holding only "Contingent Trust Interests," are not "Beneficiaries" under the CTA.[18] *See* Order Denying Leave at *35. As such, Plaintiffs have *no rights* under the CTA. *See id.* (quoting CTA, § 5.1(c)). Plaintiffs ignore this language and fail to offer any support for their broad request for financial information, other than vaguely asserting that they "are unable to determine whether their Contingent Claimant Trust Interests may vest into Claimant Trust Interests." Compl. ¶ 83. As this Court found, while Plaintiffs may be "frustrated" that they did not negotiate the same rights

[18] As discussed above, the Court may take judicial notice of the CTA. *See Johnson*, 999 F. Supp. 2d at 926 (taking judicial notice of document that is a matter of public record when considering Rule 12(b)(6) motion).

as the "actual Claimant Trust Beneficiaries," (Valuation Order at 5), there is simply no foundation—in law, equity, or otherwise—for Plaintiffs' request for financial information. Plaintiffs acknowledge that they are not "Claimant Trust Beneficiaries" but nevertheless imply, without any supporting facts or authority, that they should not only be treated as such, but should receive information not otherwise available to Claimant Trust Beneficiaries. In so arguing, Plaintiffs blatantly disregard the plain terms of the CTA, the Plan, and this Court's prior orders, which expressly foreclose the relief sought in their Claims.

39. ***Second***, and for largely these same reasons, equitable relief is not available where, as here, the parties' rights and obligations at issue are set forth in the agreement. *See In re Am. Home Mortg. Holdings, Inc.*, 386 Fed. Appx. 209, 212-13 (3d Cir. 2010) (affirming bankruptcy court's denial of equitable relief to distributions under trust documents where, among other things, the trust documents controlled distribution of monthly payments, and the Trust Certificate "cannot be rewritten on equitable grounds," and noting "[i]n interpreting the provisions of the Trust Documents, we apply Delaware law, which instructs that a party is bound by the plain meaning of clear and unequivocal contract terms."); *Grunstein v. Silva*, CIV.A. 3932-VCN, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009) ("Where those [fiduciary] rights arise from a contract that specifically addresses the matter at issue, the court evaluates the parties' conduct within the framework they themselves crafted, instead of imposing more broadly defined equitable duties.").

40. Here, the CTA expressly provides that (a) Plaintiffs are not Beneficiaries of the Claimant Trust, and, therefore, (b) Plaintiffs have no rights under the CTA. *See supra* ¶¶ 10-13. *supra*. Accordingly, the plain language of the CTA forecloses the notion that Plaintiffs have any right—equitable or otherwise—to financial information on the Claimant Trust Assets. Plaintiffs'

attempt to re-write the CTA on equitable grounds in order to grant non-beneficiaries information rights is entirely without merit.

41. ***Third***, even if Plaintiffs were Claimant Trust Beneficiaries, any information rights would still be limited. Section 3819(a) of the Delaware Statutory Trust Act (the "Trust Act") governs information rights for beneficiaries of Delaware statutory trusts and ascribes primacy to the trust's agreement:

> ***Except to the extent otherwise provided in the governing instrument of a statutory trust***, each beneficial owner of a statutory trust ... has the right, ***subject to such reasonable standards ... as may be established by the trustees or other persons who have authority to manage the business and affairs of the statutory trust***, to obtain from the statutory trust from time to time upon reasonable demand for any purpose reasonably related to the beneficial owner's interest as a beneficial owner of the statutory trust ....

12 Del. C. § 3819(a) (emphasis added); *see also In re Natl. Coll. Student Loan Trusts Litig.*, 251 A.3d 116, 150 (Del. Ch. 2020) (Trust Agreements "are the governing instruments of the Trusts under the DST Act.") Here, the CTA *does* "otherwise provide." As discussed *supra*, pursuant to the CTA and the Plan, only "Claimant Trust Beneficiaries," by design, have information rights, which are set forth in section 3.12(b) of the CTA. *See* CTA § 3.12(b) (providing that the **only** entities with information rights under the Plan are "Claimant Trust Beneficiaries.") And the Claimant Trust Beneficiaries' rights (a) are limited, (b) do not include rights to asset or subsidiary level information, and (c) can be further limited by the Claimant Trustee as appropriate to "maintain confidentiality."

42. Any duties running from the Claimant Trustee to actual Beneficiaries of the Claimant Trust relating to the disclosure of information are expressly limited by the CTA. 12 Del. C. § 3806(c) ("To the extent that … a trustee … has duties (including fiduciary duties) to a … beneficial owner or to another person that is a party to or is otherwise bound by a governing instrument, the trustee's … duties may be … restricted or eliminated by provisions in the governing

instrument ….") Thus, even the actual Claimant Trust Beneficiaries would not have the broad information rights that Plaintiffs (who, again, are not even Claimant Trust Beneficiaries) seek here. This further undermines Plaintiffs' unsupported allegations that they have any equitable rights to information on the Claimant Trust Assets.

ii. Any Claim for an Equitable Accounting Fails Under Delaware Law

43. To the extent Count One is treated as one for an accounting cognizable in equity, it likewise fails. Under Delaware law,[19] an accounting is not a cause of action sounding in equity. *Williams v. Lester*, 2023-0042-SG, 2023 WL 4883610, at *3 (Del. Ch. Aug. 1, 2023). It is an equitable remedy by which a fiduciary may be caused to account for property subject to trust. *Id.* A claim for an accounting lies only where "(i) there are mutual accounts between parties, (ii) a fiduciary relationship exists and the defendant has a duty to account, or (iii) the accounts are all on one side but there are circumstances of great complication." *Bus. Funding Group, Inc. v. Architectural Renovators, Inc.*, C.A. 12655, 1993 WL 104611, at *2 (Del. Ch. Mar. 31, 1993); *see also McMahon v. New Castle Assoc.*, 532 A2d 601, 605 (Del. Ch. 1987) ("[A] request for an accounting by a *fiduciary* is a recognized basis for chancery jurisdiction," noting "equity shall rarely, if ever, have to be resorted to in order to determine the state of accounts in a purely commercial relationship."); 12 Del. C. § 3806(c). Where, as here, an agreement sets forth the fiduciary relationship between the parties, an extra-contractual relationship cannot be created. *See Grunstein v. Silva*, CIV.A. 3932-VCN, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009) ("Where those [fiduciary] rights arise from a contract that specifically addresses the matter at issue, the court evaluates the parties' conduct within the framework they themselves crafted, instead of imposing more broadly defined equitable duties.")

[19] There can be no dispute that Delaware law applies to Plaintiffs' Claims. The Claimant Trust is a statutory trust formed under the laws of Delaware and governed by the Trust Act. Trust Act, 12 Del. C. § 3801 *et seq.*

44. The CTA governs the parties' rights and obligations. Pursuant to the CTA, Plaintiffs, as holders of Contingent Trust Interests, "***shall have no rights***" thereunder, and there is no underlying fiduciary relationship between the Claimant Trustee and Plaintiffs. Plaintiffs do not allege as such, nor could they. The Court cannot impose any duties of disclosure other than what is set forth in the CTA. Plaintiffs' equitable accounting claim fails as a matter of law. *See Bus. Funding Group*, 1993 WL 104611, at *2 (denying claim for equitable accounting where "the parties' relationship, which is defined exclusively by the purchase and sale agreements, involves an arm's-length commercial dealing and bears none of the earmarks of a fiduciary relationship," noting the "plaintiff negotiated the protection it needed in the [] agreements," which "does not create a fiduciary relationship"); *Natl. Coll.*, 251 A.3d at 150 ("[T]he plain language of the Trust Agreement forecloses any notion that the Owner Trustee owes any extra-contractual duties (fiduciary or otherwise)" to non-owner deal parties, noting "[i]f the drafters of the Trust Agreement … had intended the Owner Trustee to administer the Trusts in the interests of another deal party, the Trust Agreements would have said so.").[20]

45. Under these circumstances, Plaintiffs fail to show why equity should abrogate the terms of the CTA agreement to create extra-contractual rights relating to the disclosure of financial information or an accounting. This is especially true in light of Plaintiff HMIT's "unclean hands." HMIT is a defendant in an action on a note owed to Highland with current principal and interest owed in excess of $98 million. *See* Adv. Pro. No. 21-03076-sgj, Docket No. 1, Count 24 (breach of contract claim arising out of HMIT note). HMIT cannot seek equitable relief relating to the

[20] *See also Henry v. CitiMortgage, Inc.*, 4:11-CV-83, 2011 WL 2261166, at *8 (E.D. Tex. May 10, 2011), *report and recommendation adopted*, 2011 WL 2214007 (E.D. Tex. June 7, 2011) (dismissing claim for equitable accounting where "Plaintiff does not explain why she is entitled to an accounting, let alone allege any facts to support her requests," noting "an accounting is an equitable remedy and not an independent cause of action."); *Johnson v. Wells Fargo Bank, NA*, 999 F. Supp 2d 919, 935 (N.D. Tex. 2014) (dismissing plaintiff's request for equitable relief because there is a contract between the parties that governs the dispute.")

disclosure of assets of the Claimant Trust when HMIT's own behavior has violated principles of equity and righteous dealing on issues relevant to the instant Action. Plaintiffs' equitable claim for financial information on the Claimant Trust is without foundation or support, blatantly disregards the CTA and other applicable documents, and fails to allege a cognizable claim. For this additional reason, Count One should be dismissed.

2. Plaintiffs' Claims for Declaratory Relief Fail as a Matter of Law

46. Plaintiffs' claims for declaratory relief—Counts Two and Three—also fail to state claims under Rule 12(b)(6). To sustain a claim for declaratory or injunctive relief, a plaintiff must first plead a viable underlying cause of action. *See Collin County, Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods*, 915 F.2d 167, 170-71 (5th Cir. 1990)) (the "federal declaratory judgment act is remedial only … it is the defendant's underlying cause of action against the plaintiff that is litigated in a suit under the act"); *see also Henry*, 2011 WL 2261166, at *8 ("The Declaratory Judgment Act is a procedural device that creates no substantive rights and requires the existence of a justiciable controversy."); *Sivertson v. Citibank, N.A. as Tr. for Registered Holders of WAMU Asset-Back Certificates WAMU Series No. 2007-HE2 Tr.*, 390 F. Supp. 3d 769, 794 (E.D. Tex. 2019) (same). "Where all the substantive, underlying claims are subject to dismissal, a claim for declaratory relief cannot survive." *Wallace v. U.S. Bank, N.A.*, No. 4:17-CV-437, 2018 WL 1224508, at *2 (E.D. Tex. Mar. 9, 2018).

47. Plaintiffs' Claims for declaratory relief in Counts Two and Three fail to state plausible claims because there is no underlying controversy. They are premised on Count One, which, as discussed, is not a cognizable claim. *See* Compl. ¶¶ 90 ***("[o]nce Defendants are compelled to provide information about the Claimant Trust Assets***, Plaintiffs seek a determination from the Court of the relative value of the Claimant Trust Assets compared to the bankruptcy estate obligations," and a declaration that "the conditions are such that their Contingent

Claimant Trust Interests are likely to vest into Claimant Trust Interests") (emphasis added). Since there is no basis to "compel" the disclosure of financial information and Count One fails as a matter of law, Plaintiffs' claims for declaratory relief, which are dependent upon such disclosure, likewise fail as a matter of law. *See Johnson*, 999 F. Supp. 2d at 935 ("Because the undersigned has determined that none of Plaintiffs claims can withstand dismissal at this time, Plaintiff's requests for declaratory and injunctive relief as well as an accounting cannot survive.")[21]

48. The value of the Claimant Trust Assets and liabilities at any given point is irrelevant to a determination whether Plaintiffs' Contingent Trust Interests "are likely to vest." Contingent Trust Interests cannot vest until (a) all Claimant Trust Assets are liquidated, (b) all expenses, including indemnification expenses, are known and have been satisfied, and (c) Claimant Trust Beneficiaries are thereafter paid in full. Until these and other critical variables are known, the financial information Plaintiffs seek in their Complaint is meaningless for purposes of determining "vesting." *See supra* ¶¶ 36-27. There is no justiciable controversy underlying Plaintiffs' claims for declaratory relief. Counts Two and Three should be dismissed. The Claims fail as a matter of law, and the Complaint should be dismissed in its entirety.

IV. CONCLUSION

WHEREFORE, Highland respectfully requests that the Court grant the Motion and enter an order in the form annexed to the Motion as **Exhibit A**, and grant such further relief as the Court deems just and proper.

[21] *See also Washington v. JP Morgan Chase Bank, N.A.*, 3:18-CV-1870-K-BN, 2019 WL 587289, at *8 (N.D. Tex. Jan. 18, 2019), *report and recommendation adopted*, 2019 WL 586048 (N.D. Tex. Feb. 12, 2019) ("Because Plaintiff has failed to state a plausible underlying claim, Plaintiff's claims for injunctive and declaratory relief should also be dismissed."); *Henry*, 2011 WL 2261166, at *9 ("As Plaintiff has alleged no facts that would lead to the conclusion that a present controversy exists between her and Defendants, Plaintiff does not have a right to relief under the Declaratory Judgment Act.")

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PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717)
John A. Morris (NY Bar No. 2405397)
Gregory V. Demo (NY Bar No. 5371992)
Hayley R. Winograd (NY Bar No. 5612569)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
Email: jpomerantz@pszjlaw.com
jmorris@pszjlaw.com
gdemo@pszjlaw.com
hwinograd@pszjlaw.com

-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P., and the Highland Claimant Trust