Docket #0025 Date Filed: 2/20/2024

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

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

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

APPEARANCES:

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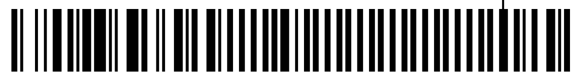

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25 Proceedings recorded by electronic sound recording; transcript produced by transcription service.

1 DALLAS, TEXAS - FEBRUARY 14, 2024 - 9:33 A.M.
2 THE CLERK: All rise. The United States Bankruptcy
3 Court for the Northern District of Texas, Dallas Division, is
4 now in session, The Honorable Stacey Jernigan presiding.
5 THE COURT: Good morning. Please be seated. All
6 right. We have a setting this morning in the adversary styled
7 Dugaboy Investment Trust and Hunter Mountain Investment Trust
8 versus Highland, Adversary 23-3038.
9 We have the Highland Parties' motion to dismiss the
10 adversary.
11 Who is appearing for the Movant, Highland?
12 MR. MORRIS: Good morning, Your Honor. It's John
13 Morris from Pachulski Stang Ziehl & Jones for the Movant.
14 THE COURT: All right. Thank you. And who do we
15 have appearing for Plaintiffs/Respondents?
16 MS. DEITSCH-PEREZ: Good morning, Your Honor. It's
17 Deborah Deitsch-Perez from Stinson.
18 THE COURT: All right.
19 MS. DEITSCH-PEREZ: And I would ask: Is anybody else
20 having a little trouble hearing? The volume seems lower than
21 usual here.
22 THE COURT: All right. It's loud and clear for the
23 Court. What about you, Mr. Morris?
24 MR. MORRIS: It's no problem for me, Your Honor.
25 THE COURT: Okay.

1 MS. DEITSCH-PEREZ: Okay. I'll just listen hard.
2 THE COURT: All right. Well, I assume these are the
3 only appearances we have.
4 As a reminder to folks on the WebEx, if you're a party in
5 interest, fine, you can use both video and audio. But if you
6 are not a case party in interest, the rules from Washington
7 say it's supposed to be only an audio listen-in format for
8 you.
9 All right. So let me quickly talk about our time issues.
10 I have to give a CLE presentation on the other side of
11 downtown at 12:00 noon today, so I really need to stop at
12 about 11:30 or 11:35. You all have given a two-hour time
13 estimate, so do you all think that is what you're going to
14 need, an hour each?
15 MR. MORRIS: I do, Your Honor. I don't know that
16 I'll need all that time, but I'll try and limit my opening
17 remarks to 45 minutes and save 15 for rebuttal.
18 THE COURT: All right. What about you, Ms. Deitsch-
19 Perez? Any issues there?
20 MS. DEITSCH-PEREZ: I would say the same.
21 THE COURT: Okay. Very good. Well, with that, Mr.
22 Morris, I'll hear from you.
23 OPENING STATEMENT ON BEHALF OF THE MOVANTS
24 MR. MORRIS: Thank you, Your Honor. John Morris;
25 Pachulski Stang Ziehl & Jones; for the Movant, Highland

1 Capital.

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

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

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

1 they're likely to vest. We'll talk about that more in a
2 minute.
3 We need clear rulings on each of these matters, on each of
4 the bases for which Highland moves to dismiss this complaint,
5 because, you know, obviously, saying it once or twice hasn't
6 been enough, so we need to say it one more time, loudly and
7 clearly.
8 I've got a deck that I'll ask Andrea Bates to put up on
9 the screen. I hope to go through it fairly quickly.
10 THE COURT: Okay.
11 MR. MORRIS: Ms. Bates, if you can put our deck up,
12 please.
13 And I'd like to begin, once it's on the screen, just going
14 through the three counts of the complaint. These are the
15 counts that we're seeking to dismiss. They're -- they are,
16 frankly, fairly straightforward.
17 (Pause.)
18 MS. BATES: Apologies. I got kicked out of the
19 WebEx.
20 MR. MORRIS: Okay. (Pause.) Okay, great. If we can
21 go to the next slide, please.
22 So, the first count, Your Honor, the first count of the
23 complaint seeks the disclosure of trust assets and accounting,
24 and an accounting. In Paragraph 83, they make it clear, they
25 say, due to the lack of transparency into the assets of the

1 Claimant Trust, Plaintiffs are unable to determine whether the
2 contingent Claimant Trust interests may vest into Claimant
3 Trust interests. That's really an important allegation,
4 because it's a concession. And there are other concessions.
5 If you look at Paragraph 66, for example, it's a concession
6 that they're not Claimant Trust beneficiaries. They know
7 that. Right? No dispute. But they're seeking information to
8 determine whether they may vest. That's what they're asking
9 for.
10 And the next piece of this slide is also important because
11 they're not just asking for information about assets and
12 liabilities. They're asking for "details of all transactions
13 that have occurred." Even under their theory of trying to
14 figure out if they're in the money, why could that possibly be
15 relevant? Details of transactions that have occurred. You
16 know, Your Honor, we were here before the Court last spring on
17 the mediation motion, and I recall Your Honor specifically
18 asking Ms. Ruhland, what information? Because they were
19 seeking information then for the mediation. What information
20 could you possibly need other than assets and liabilities?
21 And she didn't really have an answer.
22 Your Honor asked us -- and ordered us, frankly -- to
23 produce that information, and we did. And that's the
24 information that we'll talk about in a moment that HMIT relied
25 upon to represent to the Court that it believed that the

1 entity was in the money.

2 But the important point here is why are they asking for

3 details about transactions that have occurred? It's just a --

4 it's just -- when we talk about the equities at the end, I'm

5 going to come back to that.

6 The important point here for Count One, Your Honor, they

7 don't cite to or rely on any provision of the plan. They

8 don't cite to or rely upon any provision of the Claimant Trust

9 agreement. They don't cite to or rely upon any statute. This

10 is a purely equitable claim.

11 If we can go to the next slide, please.

12 Count Two seeks a declaratory judgment concerning the

13 value of the assets relative to the liabilities, but it's a

14 conditional request. It requires that the Defendants be

15 compelled to provide the information. And that's what it says

16 in Paragraph 90. And it flows from that, according to them,

17 that if assets exceed liabilities, all kinds of great things

18 are going to happen. All affirmative proceedings can be

19 deemed unnecessary. The bankruptcy court -- case can be

20 brought to a close, and the bloodshed will stop.

21 But what's really interesting about this, and it portrays

22 the intent of Hunter Mountain in this proceeding, is that they

23 only want the affirmative proceeding to stop. If you look at

24 Paragraph 91, and it's quoted there in the footnote, they only

25 want pending adversary proceedings and get recovering value of

1 the HCMF -- HC -- the Highland estate.
2 So, presumably, they'll be allowed, right, they'll get
3 paid. All creditors, according to them, if assets exceed
4 liabilities, they get paid. And then all of the indemnified
5 parties have nothing to use to defend themselves under the
6 indemnities. That's what they're looking to do. It's really
7 clear. And the Court should understand that they're not
8 really ambiguous here. They want to look at all of the
9 transactions. They want to, even under their theory that
10 Class 8 and Class 9 should get paid, they should get
11 everything else, there should be nothing left, and they should
12 be able to continue to sue Mr. Seery and the Reorganized
13 Debtor and the Claimant Trust and my firm from now until the
14 end of time. That's the motivation here.
15 Let's look at Count Three. Count Three, they want a
16 declaratory judgment regarding the nature of their interests
17 in the Claimant Trust. But not really. But not really. What
18 they want is a declaration and a determination that there are
19 conditions, that the conditions are such that the contingent
20 interests are "likely to vest." Again, if you look at the
21 footnote, and we'll look at it in detail, they're again not
22 asking the Court, because they know what the answer is going
23 to be, they're not asking the Court to find that they are
24 Claimant Trust beneficiaries, just that they are likely to
25 vest at some point in the future.

1 They don't cite to or rely upon any provision of the plan.
2 Again, they don't cite to or rely upon any provision in the
3 Claimant Trust agreement or in any statute. It's a purely
4 equitable claim.
5 If we can go to the next slide.
6 The terms of the Claimant Trust agreement determine when
7 and if Plaintiffs are Claimant Trust beneficiaries, full stop.
8 Under the Delaware Statutory Trust Act, whether a party is a
9 beneficiary here, a Claimant Trust beneficiary, is determined
10 by the plain language of the governing instrument -- here, the
11 Claimant Trust agreement. And the plan, frankly, because the
12 plan provisions matter in Articles III and IV. They also
13 provide the same conditions for vesting.
14 We cited in our papers a case called *Paul Capital*
15 *Advisors*. *Paul Capital Advisors* is from the Delaware Chancery
16 Court. And what's really interesting about that case, Your
17 Honor, is in that case the plaintiff was seeking to remove a
18 trustee. A lawyer by the name of Michael Hurst defended that
19 case, and Mr. Hurst -- who's a -- Mr. Ellington's counsel
20 today; he was before Your Honor in December on the Ellington
21 stalking matter; he's a longtime lawyer for Mr. Dondero -- Mr.
22 Hurst actually urged the court to dismiss the case on the
23 grounds that the plaintiff wasn't a beneficiary under the
24 plain terms of that trust agreement. And the court granted
25 the motion to dismiss, just like the Court should grant the

1 motion to dismiss today.
2 So one of Mr. Dondero's own lawyers was in the Delaware
3 Chancery Court making the exact same argument that we're
4 making today, and that is, even referring to the *Restatement*,
5 a trust's beneficiaries are the people who are defined as
6 beneficiaries in the trust governing documents or that are
7 otherwise reflective of the settlor's intent. That's what
8 *Paul Capital Advisors* holds.
9 Here, the settlor specifically decided to exclude HMIT and
10 Dugaboy as holders of the Class 10 and 11 claims from the
11 definition of Claimant Trust beneficiaries. We know that.
12 We're going to look at that language in a moment.
13 The Claimant Trust agreement includes very specific
14 provisions concerning vesting, none of which refer to,
15 concern, or are dependent on the value of the trust assets and
16 liabilities at any moment in time.
17 Being in the money is legally irrelevant under the plain
18 terms of the plan and under the plain terms of the Claimant
19 Trust agreement and on the plain terms of the case that Mr.
20 Hurst successfully argued in the Delaware Chancery Court known
21 as *Paul Capital Advisors*.
22 If we can go to the next slide.
23 Let's look at the provisions. Let's see. Right? Because
24 one of the bases for the motion to dismiss is that they have
25 no rights under the plan. Neither Hunter Mountain nor Dugaboy

1 have any rights under the plan. And, you know, if you follow
2 *Capital Advisors*, and, really, just as the Court did last
3 summer when it decided, I think properly and appropriately,
4 that Hunter Mountain and Dugaboy's rights are determined
5 solely under the provisions of the plan, let's just look at
6 those provisions.
7 The Claimant Trust agreement, in Section 3.12,
8 specifically says that the agreement doesn't require the
9 Claimant Trustee to file any accounting. That's the reasoning
10 sought in Count One. Can't do it. No. Right? There's no
11 obligation to do it.
12 If we can go to the next slide.
13 Section 3.12(b) provides -- requires the Claimant Trustee
14 to provide quarterly reporting to Oversight Board and Claimant
15 Trust beneficiaries. Again, no allegation that Hunter
16 Mountain or Dugaboy is an Oversight Board member. No
17 allegation that they're Claimant Trust beneficiaries. In
18 fact, the whole purpose of the complaint, supposedly, is to
19 get information so that they can determine whether or not
20 they're likely to vest.
21 So, there's a concession that they're not Claimant Trust
22 beneficiaries. And so only those two groups of people,
23 Oversight Board members and Claimant Trust beneficiaries, are
24 entitled to receive these quarterly reports. And because
25 Hunter Mountain and Dugaboy don't fall into either group, they

1 have no rights under Section 3.12(b).
2 Just to make it abundantly clear -- if we go to the next
3 slide -- let's look at the definition of Claimant Trust
4 beneficiary. Again, this is right out of the Claimant Trust
5 agreement, Section 1.1(h). And it says, holders of allowed
6 general unsecured claims or allowed subordinated claims, and
7 only upon the certification of the Claimant Trustee that all
8 holders of claims have been paid indefeasibly in full. That's
9 a reference to Class 10 and 11 with the holders of the former
10 limited partnership interests. Only then do they vest.
11 That's how they vest. You've got to file this certification
12 saying that everybody has been paid in full.
13 And they say, oh, gee, well, if assets exceed liabilities,
14 that must mean they're in the money and the Trustee should
15 just pay them in full.
16 But that's not what that trust agreement says. And let's
17 be clear. The trust agreement and the plan were adopted and
18 confirmed by this Court more than three years ago now. It was
19 the first week of February 2021. Those documents were subject
20 to appeal, but nothing we're talking about today is -- was
21 ever the subject of appeals. Right? So these are the
22 agreements. They're sacrosanct. The Delaware Chancery Court
23 says you've got to follow the agreement. So let's do that.
24 If we can go to the next slide.
25 Distributions. So, right, the Claimant Trustee has to

1 certify that everybody has been paid in full. But what about
2 distributions? When are they going to get paid in full?
3 According to the plain and unambiguous terms of the Claimant
4 Trust agreement, the Claimant Trust agreement shall distribute
5 to holders of trust interests at least annually the cash on
6 hand -- here's the important word: net -- net of any amounts
7 that, among other things, if you go down to (d), are necessary
8 to satisfy or reserve for other liabilities incurred or
9 anticipated by the Claimant Trustee, in accordance with the
10 plan and this agreement, including but not limited to
11 indemnification obligations.
12 So it doesn't matter if assets exceed liabilities. We
13 don't believe that they do. We don't believe that there is
14 any reason to even engage in the debate. And the reason for
15 that is because we've got substantial indemnification
16 obligations that must be reserved for. And if -- and -- and
17 -- we'll talk about that more in a moment.
18 But that's the key. That's the key here. They don't
19 vest. Right? Class 10 and 11 does not vest until the
20 Claimant Trustee certifies that everybody has been paid in
21 full. And nobody is going to be paid in full as long as the
22 Claimant Trust has indemnification obligations that must be
23 satisfied. The Claimant Trustee is a fiduciary. He owes the
24 beneficiaries of indemnification rights the duty to make sure
25 that the Claimant Trust has sufficient assets to satisfy the

1 indemnification obligations.
2 And do you know who's not here today, Your Honor? Any
3 Claimant Trust beneficiary. Any Claimant Trust beneficiary
4 who would -- there is nobody here complaining that Mr. Seery
5 is abusing his rights. There's no -- nobody is complaining
6 that he should be distributing the cash. Nobody is
7 complaining that, you know, he's overwithholding. And we'll
8 talk more about why, actually, what he's doing is proper,
9 although that's not an issue before the Court today. The only
10 issue before the Court, frankly, is Section 6.1. And it says
11 the trust must reserve amounts necessary or deemed necessary
12 to satisfy indemnity obligations.
13 If we can go to the next slide, please.
14 So now let's get to the motion to dismiss itself now that
15 we have an understanding of exactly what the Claimant Trust
16 agreement and the plan provide. Let's look back at what the
17 Court did. The Court issued two very important rulings last
18 year on these very issues. And in the Court's lengthy
19 decision on the Hunter Mountain motion for leave, the Court
20 concluded, quote, HMIT's status as a beneficiary of the
21 Claimant Trust was designed by the Claimant Trust agreement
22 itself, pure and simple. The Court was right then, and the
23 Court will be right today when presumably it stands by its
24 prior ruling.
25 Under the Claimant Trust agreement, contingent trust

1 interests have no rights until they vest. And there's no
2 dispute that they have not vested because the Claimant Trustee
3 has not filed a certification that everybody is getting paid
4 in full. That's what the language of the document says. We
5 really are done here.
6 But there's more, because after that hearing Hunter
7 Mountain made another motion and said, wait, Your Honor, those
8 disclosures that you required Highland to make in support of
9 mediation, they show we're in the money. They've already
10 swung and they've missed at this. They said, oh, we're in the
11 money. And Your Honor, unlike HMIT, actually read the
12 disclosures and actually saw all of the contingencies in
13 there.
14 It's ironic that HMIT, of all people, would be telling the
15 Court that they're in the money when their beneficial owners
16 are actually appealing the $70 million Notes Litigation, when
17 their beneficial owners are playing fast and loose with the
18 value of assets that they control, such as HCRE. Right? But
19 they're still here with the same tired story, maybe we're in
20 the money.
21 Your Honor, you've ruled on this and we're done, as far as
22 I'm concerned. You found, among other things, that they
23 failed to give proper attention to the notes to the financial
24 statements that were integral to understanding the numbers. I
25 hope that they've done that now.

1 Your Honor ruled that they failed to take into account the
2 widespread litigation that's caused massive indemnification
3 claims and legal fees, all of which must be satisfied.
4 Based on this Court's decision less than five months ago
5 -- I think it was actually eight months ago -- Counts One and
6 Three are moot and they're otherwise barred by collateral
7 estoppel.
8 If we can go to the next slide, please.
9 Count Two must also be dismissed because it depends on
10 Highland being "compelled to provide information about the
11 Claimant Trust assets." That's in Paragraph 90. So if the
12 Court doesn't compel Highland, the Court has no ability to
13 make the declaration that's sought.
14 But even if you could, right, there's -- Plaintiffs have
15 no legally cognizable right. They don't cite to anything.
16 They don't have an equitable claim to compel Highland to
17 provide trust -- the information. There is no underlying
18 controversy to be resolved. They have no right to this
19 information. They have no equitable claim to this
20 information.
21 As we set forth in Paragraph 39 of our moving brief, they
22 can't come here seeking equity that's barred by the plain
23 terms of the trust agreement. The trust agreement, again,
24 reflects the settlor's intent. The settlor intended that he
25 would provide or that the Claimant Trustee would provide

1 limited information to the claimant board members and Claimant
2 Trust beneficiaries, of which neither Hunter Mountain nor
3 Dugaboy are one. They can't use equity to just override the
4 very plain meaning of the operative documents and the intent
5 of the settlor.
6 The Claimant Trust agreement is determinative. Since the
7 value of the trust assets and liabilities at any moment in
8 time is irrelevant to the question of vesting, there is no
9 justiciable controversy to resolve.
10 So, two reasons. I don't think the Court can order
11 Highland to produce any information, so it fails for that
12 reason. And even if it did, the whole issue is completely
13 irrelevant, given the plain terms of the trust agreement and
14 the plan, so there is no justiciable controversy.
15 If we can go to the next slide.
16 Some other grounds to dismiss Count One. Right? Again,
17 no legal right to the information or an accounting. Again,
18 the request for equitable relief is barred by the plain terms
19 of the trust agreement since they're not Claimant Trust
20 beneficiaries.
21 And it's worth noting, as I mentioned earlier when we saw
22 the very provision in the trust agreement, even Claimant Trust
23 beneficiaries have no right to an accounting, or any right to
24 any information beyond that provided in Section 3.12. But,
25 again, I don't want to suggest that Hunter Mountain or Dugaboy

1 have any entitlement. It's just to contrast where actual
2 trust beneficiaries lie vis-à-vis Hunter Mountain and Dugaboy.
3 If we can go to the next slide.
4 Other grounds to dismiss Count Three. Again, in Count
5 Three, Plaintiffs seek a declaration as to whether or not the
6 Claimant Trust beneficiaries may be indefeasibly paid and
7 whether the conditions are such that their claimant -- you
8 know, contingent Claimant Trust interests are likely to vest
9 into Claimant Trust interests, making them Claimant Trust
10 beneficiaries, yet another admission that they're not Claimant
11 Trust beneficiaries today.
12 These are inquiries that would require the Court to, among
13 other things, handicap the likelihood of Mr. Dondero's appeal
14 in the Notes Litigation and the amount that is going to be
15 needed to satisfy future indemnity obligations.
16 I have a reference in this bullet to Docket No. 3880.
17 Your Honor, that's the other piece of information that I think
18 the Court required Highland to produce in connection with the
19 mediation, where we identified all of the outstanding
20 litigation that we have. You know, we are here today. I was
21 in Dallas two weeks ago before Judge Scholer to have oral
22 argument on the Advisors' appeal of the judgment that was
23 entered in favor of Highland and against them a couple of
24 years ago.
25 We obviously had a lot of paperwork to deal with on the

1 motion for leave, you know, to sue my firm that was withdrawn
2 in the face of a Rule 11 motion.
3 You know, these are all things that weren't even on that
4 list. We've got the appeal now of the original Hunter
5 Mountain decision. Again, with so many issues on appeal, I
6 don't even know if the District Court will ever get to the
7 standing question, because there's like literally dozens of
8 issues on appeal.
9 We were in Houston last week for a Fifth Circuit argument
10 on Your Honor's order conforming the plan to the original
11 Fifth Circuit decision on confirmation.
12 All of these things are expensive. Mr. Dondero is famous
13 for complaining about how expensive this is, and yet he
14 continues to drive these costs. This hearing is making it
15 much less -- it's making it less likely that he's ever going
16 to be in the money. Every time we have another court
17 appearance, every time he files another complaint, every time
18 he, you know, does things to cause us to spend money, his
19 being in the money -- not that it's legally relevant; I don't
20 want to make any suggestion that it is -- but that's why we
21 need these indemnification reserves, because there is no end
22 in sight.
23 We do have a vexatious litigant motion, Your Honor.
24 Hopefully, that will be successful. Hopefully, that will
25 curtail things in the future. But, you know, remains to be

1 seen. That's just something that we feel we need to do.
2 The Plaintiffs tacitly admit that these requests are for
3 impermissible advisory opinions. Obviously, they are. Any
4 time you're asking the Court to make a determination about
5 what's likely to happen in the future that has no legal
6 significance whatsoever, it's an advisory opinion.
7 And, again, this is what I referred to earlier. If you
8 look at Footnote 6 to Paragraph 94 of the complaint, oddly,
9 they don't ask the Court to determine that they're Claimant
10 Trust beneficiaries. Maybe it's because they've already
11 admitted that they're not. I don't know. They're not asking
12 the Court to convert their contingent interests into
13 noncontingent interests. Again, maybe because they're -- it's
14 an acknowledgement and an admission that that can't happen.
15 But here's the tell, because those issues must be done in
16 accordance with the plan and the CTA. We agreed. There's no
17 dispute. There is no judiciable, justiciable dispute here.
18 We agreed that all of these issues are decided by the plain
19 terms of the plan.
20 I think that's my last slide, so you can take this down.
21 I just briefly want to finish up with just some
22 observations about equities. As a matter of law, equity can't
23 trump contractual terms. But if for some reason the Court
24 even wanted to consider the question, I would ask the Court to
25 take very seriously Hunter Mountain and Dugaboy's pleadings

1 where they're asking not for information regarding assets and
2 liabilities, but they want a review of all of the prior
3 transactions. They want to second-guess everything the
4 Claimant Trustee has done to date. That smells. Right? And
5 it's not the first time we've dealt with this issue. You
6 know, Your Honor can take judicial notice of their pleadings
7 in the Fifth Circuit when they were appealing that 2015.3
8 ruling. They explicitly told the Fifth Circuit they want
9 information so that they can bring more claims. Right?
10 So there's not a good faith basis for this. There's not a
11 legal basis for it. There's not an equitable basis for it.
12 The Court has ruled on these issues multiple times already.
13 There is no judiciable controversy before the Court. And for
14 all of those reasons, the Court should just dismiss this
15 complaint.
16 I have nothing further, Your Honor.
17 THE COURT: All right. Mr. Morris, you referred to
18 the list of pending matters. And last night at 10:00 o'clock
19 in bed, I meant to pull this up because it was referred to in
20 one of the pleadings as well, and I didn't do it. Could you
21 tell me the docket entry that appears at?
22 MR. MORRIS: Yeah, I think it's 3880. I apologize.
23 I'm actually looking at my phone. I wouldn't typically do
24 this, but I'm going to see if I can quickly find that. But I
25 believe it's 3880.

1 THE COURT: Okay.
2 (Court confers with Clerk.)
3 THE COURT: Okay. All right. Ms. Deitsch-Perez?
4 OPENING STATEMENT ON BEHALF OF RESPONDENTS
5 MS. DEITSCH-PEREZ: Thank you. This adversary
6 proceeding actually has deep roots. It was started by motion
7 a long time ago, long before that balance sheet was filed.
8 And it was done because the Claimant Trustee and the estate
9 have consistently obscured the available resources in order to
10 make it harder for the residual equity holders to investigate
11 whether the estate has been mismanaged, to their detriment.
12 THE COURT: Did you say --
13 MS. DEITSCH-PEREZ: Mr. Morris talked --
14 THE COURT: Can I -- you said they've obscured the
15 resources?
16 MS. DEITSCH-PEREZ: Yes. They've obscured what's in
17 the estate. If you -- we'll look more closely at that balance
18 sheet, Your Honor. In addition to not having filed the 2015
19 reports, the balance sheet, you're right, has a number of
20 notes on it. But the notes -- and we'll look at those and go
21 through them -- don't -- don't -- aren't illuminating. If you
22 look at the face of the balance sheet, there is enough money
23 to pay everybody and have money left over.
24 You have to rely on obscure, undetailed notes and
25 assertions and assumptions to say maybe, maybe there won't be

1 money left over. But on the face of the balance sheet, there
2 is enough money to pay everybody.
3 And if there's enough money to pay everybody, the leftover
4 money is HMIT's. It's not -- it's not the professionals'.
5 It's not the Claimant Trustee's. What's being used now is the
6 residual -- old residual equity's money.
7 So Mr. Morris brought up mediation, and that was an
8 interesting point, because in the papers, arguing about
9 whether or not Your Honor should grant mediation, the estate
10 and Mr. Seery made it very clear there would only be a
11 resolution if there were complete and total releases given and
12 all litigation stopped. So that was clear. We understood
13 that. And what was at stake, obviously, in any mediation is
14 what's left. So, what are the residual -- what's the
15 residual?
16 But if we can't find out what the residual is and we can't
17 find out what actually is being released, this estate can't
18 ever end. It's not the Plaintiffs here who are keeping the
19 engine going. It's the Defendants, because they know exactly
20 how to push the buttons to raise suspicions about whether
21 something untoward has gone on.
22 And so let me test the premise of the Defendants here with
23 a hypothetical. Because, remember, Defendants arguments for
24 dismissal turn on the contention that the Claimant Trust
25 agreement prevents Plaintiffs from being considered

1 beneficiaries, no matter how much money the Claimant Trust has
2 -- or squandered, for that matter -- if Mr. Seery doesn't
3 authorize payment of Class 8 and 9 creditors in full and
4 affirmatively certify that Classes 10 and 11 are
5 beneficiaries. So, unless he does that, it's the Defendants'
6 position Plaintiffs have no means of redress.
7 So let's test that with a hypothetical. Let's say that
8 Mr. Seery, let's say that the Claimant Trustee, to keep
9 earning his $150,000 a month indefinitely, massively
10 overspends professional fees to justify an objectively
11 unreasonable indemnity reserve of $125 million. And let's say
12 he deliberately dribbles out payments to Class 8 and 9 so that
13 eventually the combination of interest, administration, and
14 professional fees is sufficient to eliminate the amounts that
15 would otherwise be payable to the last dollar of 8 and 9, much
16 less Classes 10 and 11.
17 And let's make the hypothetical even more extreme. What
18 if Mr. Seery moved money into the Indemnity Subtrust and paid
19 it to phantom vendors? I'm not saying he did that. I don't
20 want stories about how we're accusing him of something. This
21 is a hypothetical. But let's say he did that. He put it in
22 the subtrust, paid it to phantom vendors, who kicked it back
23 to him, in order to keep the amount low enough to pay the last
24 dollar to Classes 8 and 9.
25 Under the Defendants' theory here, that can't ever be

1 discovered, much less remedied. And so that's why, that's why
2 there is an equitable argument here, and a practical argument,
3 Your Honor.
4 Because Your Honor has said you want this to end. This
5 has to end. Well, the only way it can end is if there's
6 sunshine, if there's enough disclosure and investigation so
7 everybody can get comfortable that releases are appropriate
8 and the money that could be left is left there, and then
9 everybody can go home. Because we are all really tired of
10 this. But it's the Defendants that are keeping it going.
11 THE COURT: Let me interrupt you. There are many
12 jurisdictional arguments, as you all know. Many issues for
13 this Court, legal issues here. But here are two things that
14 stand out above all. And one is do the Plaintiffs have a
15 contractual right to the information they seek or not. Why
16 should the Court look beyond the Creditor Trust agreement, the
17 plan, the confirmation order, which are final? These issues
18 were never complained about. There's not enough transparency
19 in the trust agreement language: No one ever made that
20 argument. It's not on appeal.
21 So, again, many jurisdictional arguments here, but why
22 should I ignore clear contractual terms here? It almost feels
23 like modifying the plan three years down the road. So --
24 MS. DEITSCH-PEREZ: It's not --
25 THE COURT: So, --

1 MS. DEITSCH-PEREZ: I'll say it's not, Your Honor.
2 It's not, Your Honor, because under Delaware law and under the
3 good faith and fair dealing, every contract in Delaware --
4 we're not in -- it's not a Texas contract -- in Delaware,
5 there's a covenant of good faith and fair dealing. And when a
6 party to a contract actually does things that prevent someone
7 else from obtaining the benefits under the contract, then you
8 don't read the contract literally, you read it to prevent the
9 wrongdoer from getting the benefit of their wrongdoing. And
10 that's --
11 THE COURT: Okay.
12 MS. DEITSCH-PEREZ: That's the reason Your Honor can
13 and must allow this case to go forward. Because, otherwise,
14 there is a terrible, terrible law that's being created. It
15 enables somebody to --
16 THE COURT: Well, you say it's terrible law, but,
17 again, the trust agreement was out there for consumption
18 before the confirmation hearing. And your clients --
19 MS. DEITSCH-PEREZ: Well, --
20 THE COURT: -- or others could have come in and said,
21 this just doesn't work, this lack of transparency, this lack
22 of oversight, this lack of access to information. And you
23 didn't.
24 MS. DEITSCH-PEREZ: Your Honor, who would have
25 thought that the --

1 THE COURT: And not only that, but this is not -- I
2 have no reason to believe this is atypical language. In the
3 dozens if not hundreds of post-confirmation liquidating trust
4 agreements I've seen, it looks like standard fare.
5 MS. DEITSCH-PEREZ: Your Honor, there is no -- no one
6 could have contemplated at the time that we would be in the
7 situation that we are now, with information not having been
8 provided. Many Chapter 11s are much more cooperative.
9 They're not liquidations. They're reorganizations. They're
10 -- people are trying to end the estate, so they're sharing
11 information. This is not a circumstance that could have been
12 contemplated. And Your Honor can do something about it now.
13 THE COURT: Well, which brings me to my second sort
14 of overarching issue that stands out, of all the different
15 issues. And these are my own words more than anything I think
16 I've read. It feels like what you're asking for, if there's a
17 jurisdictional way to get there, if there's a legal way to get
18 there, it feels like it would be a meaningless exercise,
19 because the value in the trust is going down daily. It's
20 going down hourly, as we speak. The value I could determine,
21 if this goes to trial, would be completely meaningless a
22 month, two months, five months, three years later, because of
23 all the litiga...
24 MS. DEITSCH-PEREZ: Your Honor, but on that theory --
25 THE COURT: Please don't interrupt until I finish. I

1 want to make sure my point is clear. My law clerk --
2 MS. DEITSCH-PEREZ: Okay.
3 THE COURT: -- did bring in to me the list --
4 MS. DEITSCH-PEREZ: I understand.
5 THE COURT: -- the list of litigation. And even
6 this, if we pulled up the right one, it's several months old,
7 so even this is very dated.
8 But let me put it in very plain terms. It kind of feels
9 like your client is its worst enemy in getting this relief,
10 because your client, because of the fifty-something appeals
11 and because of the motions for leave to bring litigation, is
12 causing the value of this trust to plummet. And we're never
13 -- it seems like a meaningless exercise. I'll never be able
14 to make a declaratory judgment as your client wants me to, if
15 I can get there legally and jurisdictionally. How could I get
16 to a point of being able to value the trust and value the
17 likelihood, determine the likelihood that your client is in
18 the money when the legal fees are going up hourly because of
19 all of these appeals?
20 I'm not saying your client isn't entitled to appeal, but
21 I'm just saying he may be his own worst enemy. That strategy
22 means he's probably never going to be in the money.
23 So these are my -- I just, I'm wanting you hopefully to
24 focus on these two biggest overarching issues in my brain.
25 The trust agreement --

1 MS. DEITSCH-PEREZ: Okay.
2 THE COURT: -- says what it says.
3 MS. DEITSCH-PEREZ: And I can do that, Your Honor.
4 THE COURT: I'm supposed to respect contractual
5 terms. So that's overarching issue number one in my mind.
6 But second, again, I don't know what the legal term would
7 be for meaningless exercise, but it's just, it's almost like
8 an impossibility thing to ever declare a value that means
9 anything when it's going to be different two weeks from now,
10 --
11 MS. DEITSCH-PEREZ: Your Honor, --
12 THE COURT: -- a month from now, a year from now.
13 MS. DEITSCH-PEREZ: Your Honor, it's not an
14 impossibility. That, one, we would endeavor to do this really
15 quickly and efficiently so that the cost of this is not
16 material to what's in the estate.
17 But secondly, these kinds of exercises are done all the
18 time in litigation. You estimate the future values. You --
19 an expert can assist Your Honor in determining what is a
20 reasonable indemnification reserve. These are things that can
21 be done. This is what lawyers and judges do.
22 THE COURT: This is off the chart. This is not like
23 any other situation I can think of. This is off the chart
24 with the amount of post-confirmation litigation. I mean, if
25 you can point me to something analogous out there, I'd love to

1 see it.
2 MS. DEITSCH-PEREZ: The fact that there isn't a case
3 exactly like this doesn't change the fact that there are
4 professionals who can look at this, can look at what has been
5 spent so far, can look at whether hearings could have two or
6 three lawyers instead of ten, and make an estimate of the
7 amount that's appropriate for an indemnity reserve. That's
8 something that's susceptible of proof and determination.
9 It's not impossible for Your Honor to decide that, and
10 it's not fruitless. Someone can say, hey, wait a minute,
11 every hearing you had, you know, ten people from Pachulski and
12 ten people from Quinn, even though they're no longer really
13 involved, and ten people from Willkie. And so if you can rein
14 that in, the Court can say, this is what a reasonable
15 indemnification would be and this is what's left. And so,
16 yes, it will finally create a path for us to resolve this
17 estate.
18 But without this information, we're left with suspicion
19 and uncertainty. How do you resolve something when you don't
20 even know what's left? We don't -- because the reporting is
21 quarterly, we've heard rumors in the marketplace that Class 8
22 has been paid in full. So I would ask Mr. Morris, is that
23 correct? Has Class 8 already been paid in full? We don't
24 know. I mean, can you tell us, what's the amount of the
25 estate right now? We don't know. Because we don't know what

1 those notes mean. And Your Honor isn't -- and Your Honor
2 doesn't know and can't know without shedding a light on this
3 what that balance sheet really means.
4 And Mr. Morris makes a big deal about, oh, there are
5 admissions in the complaint then they don't know if they're in
6 the money. Your Honor, the complaint was filed before the
7 balance sheet. So when in the last proceeding HMIT said it's
8 in the money, that's because it knew from the balance sheet
9 it's in the money. So you know now, you can look at that
10 balance sheet and say on the face of it, okay, there is more
11 -- there are more assets than liabilities. In order to
12 determine that that wouldn't be the case, you'd need a lot
13 more information about what those notes that you point to in
14 the denial of reconsideration actually mean.
15 But here, the estate is trying to say no, not only do the
16 Plaintiffs not get to know that information, we're not telling
17 Your Honor, either. We're just putting a lid on it. And so
18 we can all go on fighting because we don't have the
19 disinfectant of information.
20 And so -- and now we'll get into more of the law. Your
21 Honor asked, how can I do this? Delaware law requires this
22 Court to afford standing to all beneficiaries, including
23 contingent ones. And especially when it's alleged that vested
24 status is being withheld in contravention of the duty of good
25 faith and fair dealing.

1 So let's go to Slide 3.
2 Okay. Let's take a look at where we started and why, why
3 we're so upset about this. If you look at the value of the
4 estate as of June of '22, there was somewhere in the mid-$600
5 million in assets. And at the start, there was something
6 under $400 million in claims. And so now, as of the end of
7 '23 -- go back a second, go back, Mike, one more -- as of the
8 end of '23, there was about $120 million of Class 8 and 9
9 remaining. But remember, there was -- you know, if you
10 subtract 400 from 650, you've got $250 million. That's a
11 pretty big cushion.
12 So let's go forward and look at what we know from the
13 balance sheet. So, if we -- and we've put references there.
14 But if we go through -- you can see from the face of the
15 balance sheet there is a net value -- that's after everybody,
16 8 and 9 have been paid off -- of $122 million. So, in order
17 to get rid of that, you have to assume the indemnification is
18 going to eat up all of that.
19 Now, think about what the indemnification means. If in
20 fact there was no wrongdoing, well, there'll be no judgment to
21 indemnify.
22 THE COURT: But what about the --
23 MS. DEITSCH-PEREZ: If in fact --
24 THE COURT: What about the professional fees?
25 MS. DEITSCH-PEREZ: $122 million, Your Honor?

1 THE COURT: Well, we're three years post-
2 confirmation, with no end in sight to these appeals.
3 MS. DEITSCH-PEREZ: Your Honor, I think it defies
4 belief that they could reasonably spend $122 million. And the
5 point is, if we can get this information and really have
6 satisfaction that maybe there's really nothing bad that's
7 happened and there are no -- there's no hidden money anywhere,
8 and we know what's there, this can end. This can end.
9 THE COURT: Do you --
10 MS. DEITSCH-PEREZ: We can finally see the light at
11 the end of the tunnel.
12 THE COURT: I mean, again, we're here for legal
13 argument, but you're saying this could end. This is never
14 going to end. This is never going to end. I stayed things in
15 2023, at your client's request, to take another crack at
16 mediation. Okay? Even though we did mediation, even though I
17 stayed everything in 2020 before confirmation and ordered
18 global mediation and things didn't work out, your clients and
19 Mr. Dondero convinced me, two years post-confirmation, stay
20 everything again, because we don't think we got attention or
21 respect from the mediators. The Debtor was focused on other
22 people, like UBS and the Redeemer Committee and Joshua Terry.
23 So I don't know what happened, and I don't want to know
24 what happened. It's not my role to know what happened in the
25 most recent mediation exercise. But I do know that it's

1 enough to convince me this will never end. When things were
2 stayed --
3 MS. DEITSCH-PEREZ: And Your Honor, --
4 THE COURT: When things were stayed and the legal
5 fees weren't -- well, they were probably continuing to accrue
6 because there were still appeal deadlines out there right and
7 left that had to be addressed. But it's not going to settle.
8 It's going to go on forever whether you get this information
9 or not.
10 MS. DEITSCH-PEREZ: Your Honor, I'm telling you, and
11 I represent the Plaintiffs, that the only thing that can
12 enable this to end is to have sufficient information to be
13 able to say, okay, I know what this all means, I know what
14 we'll get, I know what we're foregoing.
15 How can anything ever settle if you don't know what you're
16 giving up and you don't know what you're getting? How would
17 that be possible? How would that be fair to parties to say,
18 you should settle but you don't know what you're giving up and
19 you don't know what you're getting? We're trying to get to
20 the point where we could end this.
21 Shall I go on, Your Honor?
22 THE COURT: Yes, please.
23 MS. DEITSCH-PEREZ: Okay. Mike, next slide.
24 Okay. This is just a quick summary of the Defendants'
25 arguments. Mootness, collateral estoppel, advisory opinion,

1 standing, failure to state a claim, and unclean hands.
2 Let's go to the next.
3 Okay. So, ironically, the Defendants argue that the
4 balance sheet filed on July 6th eliminates the controversy
5 among the party, parties, mooting the claims. But that can't
6 be true, and Defendants won't provide the information to fill
7 out the notes on the balance sheet and when -- when the
8 balance sheet on its face shows assets exceed liabilities but
9 the Defendants continue to maintain that they don't but
10 without any analysis of why that's so.
11 Let's go on to the next.
12 But the Defendants shouldn't be able to have it both ways.
13 If the balance sheet and financial statements are insufficient
14 to determine whether assets exceed liabilities, as they claim,
15 then the claims can't be moot. And, of course, a claim can't
16 be dismissed simply because a defendant says in a pleading
17 that a particular document shows that plaintiffs lack standing
18 when the document itself does no such thing.
19 On its face, the balance sheet shows assets exceed
20 liabilities. But if there's any doubt or ambiguity, that
21 means discovery is needed, not that claims should be
22 dismissed. This is a fact issue on which Plaintiffs are
23 entitled to discovery and trial.
24 The next slide.
25 So, I mean, in response to the mootness arguments,

1 Plaintiffs cite cases that -- uncontroversial cases that say,
2 when there's still a controversy, that claims are not moot.
3 And if you'll look at Defendants' reply, they don't address
4 any of that.
5 The Defendants also rely on the Court's order denying
6 reconsideration of the HMIT gatekeeper regarding insider
7 trading to say that it either moots Count Three or is the
8 basis to collaterally estop Plaintiffs from proceeding. And
9 there are numerous reasons that that's wrong.
10 So, one, the Court's dicta -- and it was dicta, because
11 the Court had a lot of other reasons that it disposed of the
12 matter -- is based on information that the Defendants now
13 refuse to stand behind. And the Court's order doesn't address
14 whether HMIT is in the money now or when the complaint was
15 filed or whether it will ever. And it certainly doesn't
16 exclude the potential that Plaintiffs would certainly be in
17 the money but for Claimant Trustee's alleged breaches of good
18 faith and fair dealing. So there's nothing about the Court's
19 original or reconsideration order that precludes standing
20 here.
21 Moreover, the order is obviously one that's on appeal and
22 may be overturned.
23 Next slide.
24 If we look more closely at the requirements of collateral
25 estoppel, Defendants are ignoring the basic elements of the

1 doctrine. So, one, the question is, are the claims identical?
2 And they're not, for the reasons that I mentioned. The issues
3 were obviously not necessary to the reconsideration decision
4 since the Court stated it had several grounds for its
5 decision.
6 More importantly, the Court's decision was made on a
7 summary record in a gatekeeper proceeding. The -- so there
8 was no discovery on that issue. And the Defendants have never
9 fully detailed to the Plaintiff or the Court what's in the
10 Claimant Trust, what's in the Indemnity Subtrust. We don't
11 know.
12 So the balance sheet is summary information. The notes
13 are not explained. And no one, not the Plaintiffs, not the
14 Court, has had an opportunity to test the data and assumptions
15 there, including undisclosed contingent liabilities and $198
16 million in off-balance-sheet adjustments.
17 So let's go to the next slide.
18 So I just urge the Court to go back and look at the
19 balance sheet. And we have a picture of it up here. But if
20 you look at it, you'll see notes. For example, Note 3. Value
21 reflected herein consists primarily of ownership in private
22 funds and subsidiaries. What funds? What are their assets?
23 How liquid? Have they been sold? For a loss or gain? What's
24 the resulting change in cash balance?
25 There's another note for other liabilities. To whom are

1 they owed? Note 5. The amount of further incremental
2 indemnification reserves are currently expected to exceed $90
3 million and may be greater. $50 million? $90 million? $125
4 million? What's the math? What's the math behind that and
5 how much has been used? What's been put aside? Who is
6 getting it?
7 It says $35 million has been funded into the Indemnity
8 Trust. What's the balance now? Did the additional funds
9 reduce the value of the Claimant Trust? Did the money come
10 out of current earnings, so maybe it hasn't reduced it?
11 Incremental springing contingent liabilities that range
12 from $5 to $15 million. What are they? How much? When are
13 they likely to crystallize?
14 These are among the questions that are unanswered from
15 that balance sheet.
16 And let's go to Slide 12.
17 And so while -- Your Honor has pointed out many times that
18 the August 25, 2023 opinion is very long, over a hundred
19 pages, very detailed. And I concede: It is over a hundred
20 pages. It is long. It has many sentences in it, and it has a
21 lot of discussion. But there's no analysis about the value of
22 the assets and liabilities or the net value of the Claimant
23 Trust or what has been moved into the Indemnity Subtrust or
24 why and was it justified. None of that is addressed.
25 The Court's October 6th opinion is short and it's cursory,

1 because it also doesn't analyze the value of the assets or
2 liabilities or the net value of the Claimant Trust or what has
3 been moved into the Indemnity Subtrust or why and whether it's
4 justified. It simply states HMIT does not give proper
5 attention to the voluminous supplemental notes in the balance
6 sheet that were allegedly, this is a quote, "integral to
7 understanding the numbers therein."
8 But what do those supplemental notes mean? The Debtor is
9 vigorously shielding any scrutiny, while at the same time
10 arguing that this Court's nonsubstantive reference to those
11 notes collaterally estops Plaintiffs from bringing this
12 action. But without access to information with which to
13 challenge the other side, a party doesn't have a full and fair
14 opportunity to be heard, and therefore any ruling based on
15 that kind of proceeding can't have collateral estoppel effect.
16 Okay. So, again, this is just a summary. No full and
17 fair opportunity prevents collateral estoppel, and the fact
18 that there were numerous other grounds and a lack of reasoning
19 to the issue that's being asserted here should serve
20 collateral estoppel makes collateral estoppel inappropriate.
21 Okay. The Debtor also -- the Defendants argue that Count
22 Three seeks an advisory opinion. It doesn't. It seeks a
23 declaration concerning Plaintiffs' status that could be based
24 on simple math from the face of the balance sheet that
25 presently, presently there's enough money to pay everybody.

1 And so there would be a -- need to be a whole lot more
2 explanation for the Defendants justifying why that's not the
3 case.
4 So let's look at a hypothetical to see if Defendants'
5 assertions about standing make sense. So let's say in a
6 breach of contract case a broker fails to sell the plaintiff a
7 million dollars' worth of shares that are at that time selling
8 for a dollar each. Can the defendant move to dismiss, saying
9 that plaintiff has no standing because the shares might go
10 down in value, eliminating any damages? I'm sure Your Honor
11 would say obviously not. But isn't that what the Defendants
12 here are saying? It's -- they're saying it's possible they'll
13 spend enough money to prevent the former equity from getting
14 anything. But that doesn't mean that Plaintiffs lack standing
15 now.
16 The Claimant Trust had sufficient assets to pay unsecured
17 creditors in Class 8 and 9 in full, with interest, at least as
18 early as mid-2023, maybe as early as September '22. Had Mr.
19 Seery fulfilled his mandate, he should have distributed that
20 and made the GUC certification. So Plaintiffs' contingent
21 interests should have officially vested many months ago. And
22 because of the duty of good faith and fair dealing, the Court
23 --
24 THE COURT: What about Section 6.1 of the credit
25 trust agreement?

1 MS. DEITSCH-PEREZ: You have to imply -- you have to
2 add into that a duty of good faith and fair dealing. And so
3 if Mr. -- if the Claimant Trustee has not taken those actions
4 for the express purpose of making sure to silence -- trying to
5 silence Class 10 and 11 and prevent them from getting money
6 and being able to spend it all, you know, paying -- holding
7 back enough to eventually pay a dollar -- a dollar less to
8 Class 9, and using the rest of the money. So, Your Honor,
9 because of the duty of good faith and fair dealing, 6.1 does
10 not tie Your Honor's hands.
11 And let's look at the Slide 16.
12 THE COURT: The Trustee is required to reserve
13 amounts necessary for indemnification obligations and the
14 administration expenses of the trust are entitled to payment
15 ahead of any classes under the plan. Class 8, Class 9, as
16 well as --
17 MS. DEITSCH-PEREZ: Uh-huh.
18 THE COURT: -- 10, 11.
19 MS. DEITSCH-PEREZ: Your Honor, but is not -- is
20 there not any limit on how much can be set aside? Let's say
21 there were -- there was $300 million left over.
22 THE COURT: This is where I go back --
23 MS. DEITSCH-PEREZ: Could a Claimant --
24 THE COURT: -- to your client is in control of its
25 own destiny here. This --

1 MS. DEITSCH-PEREZ: Well, basically, is Your Honor
2 saying --
3 THE COURT: This should all be over. This should all
4 be over, three years post-confirmation. It should all be
5 over.
6 MS. DEITSCH-PEREZ: Yes. And --
7 THE COURT: They stayed --
8 MS. DEITSCH-PEREZ: Yes. And if we --
9 THE COURT: They stayed the mega-lawsuit. They
10 stayed the mega-lawsuit for the reasons you are suggesting.
11 MS. DEITSCH-PEREZ: The unjustified mega-lawsuit that
12 shouldn't have been brought in the first place. They stayed
13 it. Very nice. They stayed it because they didn't -- they
14 knew they didn't need that money. They knew it was
15 unjustified. So they stayed it.
16 THE COURT: So that would suggest to me proper
17 exercise of business judgment, litigation judgment. But they
18 have no control over all of these appeals and all of the --
19 MS. DEITSCH-PEREZ: But --
20 THE COURT: -- litigation that your clients pursue.
21 MS. DEITSCH-PEREZ: Your Honor, my clients pursue
22 litigation because they don't have the information to know
23 whether they're -- wrongdoing is occurring. And the hallmark
24 of this bankruptcy --
25 THE COURT: That doesn't apply with regard to the

1 appeals. And, again, --
2 MS. DEITSCH-PEREZ: Yes. And the appeals --
3 THE COURT: -- if your client wants to appeal, that
4 is what's beautiful about our system. You can appeal and
5 maybe get judgments overturned. But --
6 MS. DEITSCH-PEREZ: That's right.
7 THE COURT: -- it's a strategy here. Right? As long
8 as you keep doing that, --
9 MS. DEITSCH-PEREZ: No, it's --
10 THE COURT: As long as you keep doing that, HMIT and
11 Dugaboy's contingent interests, any recovery on them is going
12 to continue to become less and less likely.
13 MS. DEITSCH-PEREZ: But so Your Honor, is Your Honor
14 actually suggesting that they should lie down and not
15 challenge anything to save a buck, and so if things have
16 happened --
17 THE COURT: No. You heard what I said. Appeal away.
18 Appeal away. No trial judge, no bankruptcy judge gets things
19 right a hundred percent of the time. So appeal away. But
20 don't complain about maybe not being in the money, when the
21 greatest risk, it sounds like, to your client not being in the
22 money is the professional fees continuing to impair value.
23 And we could never get to a point in time where we could --
24 you know, again, my words earlier, meaningless exercise. How
25 could I ever make a declaratory judgment about value or the

1 likelihood of your client recovering as long as there are
2 dozens of appeals continuing to cause the liabilities to
3 increase, the expenses to increase?
4 MS. DEITSCH-PEREZ: Your Honor, that's, I mean, --
5 THE COURT: You're asking the Court to do something
6 impossible.
7 MS. DEITSCH-PEREZ: It's not impossible, because
8 these appeals -- appeals like this happen all the time, and
9 there are certainly professionals who are involved --
10 THE COURT: Name one bankruptcy case in history where
11 there have been this many appeals.
12 MS. DEITSCH-PEREZ: It -- there don't -- there
13 doesn't have to be another one with this many appeals. You
14 just look at the cost of an appeal in any case and figure out
15 whether, with what's going on here, what is the appropriate
16 amount to set aside for that cost. It's eminently doable. It
17 doesn't -- we don't have to have an exact case to match it to.
18 We just need to have -- are there ever appeals of whether a
19 release is overbroad? Sure. Are there ever appeals about
20 whether a gatekeeper is appropriate? Sure. Are there ever
21 appeals about whether the dismissal of a claim is appropriate?
22 Sure. Those are all things that someone can look at and say,
23 well, this is an appropriate amount to be spent on that, and
24 so this is an appropriate amount to hold aside for resolving
25 it.

1 But what we're saying is if we can get sufficient
2 disclosure, we can figure out whether or not there -- it ought
3 to be ended. But without that, we're left saying, what's
4 being hidden here? What's actually left? What's been done?
5 And so that's why -- and this is a problem that comes up in
6 trusts all the time when there's not sufficient disclosure of
7 what's in the trust. So that's why, under the *Restatement of*
8 *Trusts*, --
9 THE COURT: Wait, wait, wait. This is what happens
10 all the time? I don't know what kind of --
11 MS. DEITSCH-PEREZ: Yeah. In other words, that --
12 THE COURT: What post-confirmation trust agreement
13 that's been approved as part of a plan does this happen all
14 the time?
15 MS. DEITSCH-PEREZ: I'm not talking about -- about
16 trusts in bankruptcies in particular. I'm talking about --
17 THE COURT: That's what we're dealing with here.
18 MS. DEITSCH-PEREZ: Well, --
19 THE COURT: And I'm just telling you: One time, I've
20 wracked my brains, and one time since I've been on the bench
21 -- I'm coming up on my 18-year anniversary.
22 MS. DEITSCH-PEREZ: Uh-huh.
23 THE COURT: I'm old. But one time I have had
24 litigation about what the heck is going on with the post-
25 confirmation creditor trust.

1 MS. DEITSCH-PEREZ: Uh-huh.
2 THE COURT: The facts were so very different. It was
3 a creditor trust agreement, and I think it had a three-year
4 term on it. The trust was going to be wrapped up in three
5 years. And Year 3 came along and there was a motion to extend
6 it. We're not done, we want to expand it, I don't know, six
7 months, maybe a year. And then that time frame went by and
8 there was another motion to extend it. So it was extended
9 another year. And then it happened again.
10 And a creditor objected, saying, I want to know what the
11 heck is going on. And I looked at the docket sheet and I'm
12 like, gosh, there aren't any appeals out there, there's hardly
13 any activity that's going on. And so we had a hearing. And
14 the trustee was getting a flat fee that was rather large for
15 the size of that estate, where unsecured creditors were
16 probably going to get less than ten cents on the dollar. And
17 we ended up having another hearing where we find out that the
18 oversight committee hadn't met in like three years and these
19 creditors who are likely to get five cents on the dollar, they
20 had just mentally checked out a long time ago.
21 And even in that situation, I was struggling with my
22 power, my jurisdiction, to put any equitable oversight
23 mechanisms in place when the creditors had voted on this, when
24 the creditors got to see the creditor trust agreement before
25 the confirmation hearing and no one complained. And luckily,

1 that situation was resolved. The creditor trustee said, we're
2 going to wrap it up in six months. I'm no longer going to
3 take my compensation. And it was some tax issue that no one
4 had been focusing on properly, like I think maybe the company
5 hadn't done tax returns in a gazillion years before
6 confirmation.
7 But the point I'm getting at is, again, many, many legal
8 issues out there, but the overarching issue I keep coming back
9 to is there's a creditor trust agreement that everyone got
10 notice of and the Court approved. And contractual terms are
11 something I'm supposed to respect. And you're asking me, on
12 an equitable basis, to overrule this. This has maybe far-
13 reaching effects for everyone who strikes a bargain in Chapter
14 11 with, Here's our plan, here's what the liquidating trust is
15 going to be governed by, here's the hearing, speak now or
16 forever hold your peace, I approve it. And --
17 MS. DEITSCH-PEREZ: You're right, Your Honor, that it
18 has far-reaching effects. And if you don't do something to
19 shine a light on this and enable the disclosure and the
20 hearing, you will embolden claimant trustees to do exactly
21 what's happening here, maybe in even worse circumstances. And
22 the difference between the case you mention and the case here
23 is -- actually weighs in favor of intercession sooner here
24 because there is so much money involved.
25 So there's -- it's not a piddling amount that, you know,

1 where creditors are only getting a couple cents on the dollar
2 anyway, so, you know, they're going to get three cents or two
3 cents. It's of less magnitude. Here, there is an enormous
4 amount of money that may be squandered. And so it's more
5 important to look hard at this and impose the covenant of good
6 faith and fair dealing.
7 And that's why the *Restatement of Trusts* says that
8 beneficiaries of a trust are -- include contingent
9 beneficiaries. And then if you take --
10 Let's go to the next slide, Mike.
11 Okay. Delaware courts also look to *Black's Law*
12 *Dictionary*. And that's important here, because it actually
13 includes contingent beneficiaries and direct beneficiaries
14 within the definition, without any qualification, but
15 expressly distinguishes an incidental beneficiary or someone
16 who's going to be a beneficiary by virtue of a separate
17 contract. And nothing in the Claimant Trust agreement
18 indicates that Plaintiffs are merely incidental beneficiaries.
19 And that's important because in that *Paul* case that Defendants
20 rely on so heavily, they were incidental beneficiaries. It
21 was a separate document, not the trust agreement itself, that
22 would give rise to the status of the plaintiffs.
23 And so Delaware -- go to 18 -- Delaware courts make a
24 point of not -- of not reading statutory language
25 restrictively to exclude classes of beneficiaries. And so

1 while they are not absolutely on point, they are thematically
2 on point, and to say that if someone is even a contingent
3 beneficiary, they ought to have the rights that one has under
4 the Delaware law.
5 And so -- go to -- move -- next slide.
6 And the duty of good faith and fair dealing is not
7 disclaimed in the Claimant Trust agreement, and moreover, it
8 cannot be disclaimed. So that's something Your Honor has to
9 take into account. And the impact of a duty of good faith and
10 fair dealing is that a party is basically estopped from
11 raising a provision that they are using in conjunction with
12 their own wrongdoing.
13 So if the Claimant Trustee is deliberately not paying out
14 $8 million in full in order to keep an unreasonable amount in
15 reserve and be able to be employed at $150,000 a month, you
16 know, being paid the same thing now, when most of the
17 liquidation has already been done, as, you know, when there
18 were a million things going on and a lot of management. So it
19 does seem unreasonable, and the Claimant Trustee has the power
20 to keep that going basically forever.
21 Next slide.
22 And so -- and when I said earlier, you know, this is a
23 common thing, what I meant was cases like *Estate of Cornell*
24 and *Edwards*. It's just a -- it's a universal problem that you
25 can prevent or postpone vesting unreasonably and prevent

1 distribution by your own acts.

2 And if you look at the Defendants' reply, there is not one

3 word about these concepts, about whether or not the Court has

4 the power and, really, must stop a trustee from raising their

5 own interest over the interests of the beneficiaries,

6 including the contingent beneficiaries.

7 Next slide.

8 So, and I really covered this to some degree, but

9 Defendants' reliance on *Paul Capital*, which is an unpublished

10 case, is misplaced. The interests here are not incidental.

11 They're not derived from an outside contract. The court in

12 *Paul Capital* also relied on the fact that the trust agreement

13 -- agreements in that case were fully integrated, which was a

14 reason they didn't look to that outside contract. But in

15 fact, there's no merger clause in the CTA, so that's another

16 difference.

17 Next.

18 Defendants' entire argument that Plaintiffs are not

19 entitled to an accounting turns on its erroneous conclusion

20 that Plaintiffs are not beneficiaries under the CTA. And now

21 they also point to -- which I don't believe they did in their

22 papers -- they also point to the general rule that an

23 accounting is not done as a matter of course. But this Court

24 has the power under Texas law to impose an accounting when

25 there are questions, as there are here, that need to be

1 answered in order for the parties to make sensible decisions
2 about what ought to be done going forward.
3 Then, unclean hands, it's a one-sentence argument in the
4 Defendants' brief referring to the Kirschner litigation, which
5 it doesn't actually identify by name and doesn't say anything
6 about the fact that it was voluntarily stayed. And the claim
7 against HMIT, and it is breach of contract, so it's really
8 hard to understand how being a defendant in a breach of
9 contract action is unclean hands. And the Plaintiffs made
10 these points in response to Defendants' motion, and
11 Defendants' reply brief is conspicuously silent of any
12 rebuttal.
13 Okay. So, Defendants' motion to dismiss needs to be
14 denied so that Plaintiffs finally have a full and fair
15 opportunity to challenge Defendants' assertion.
16 Even if this Court disdains Plaintiffs and sympathizes
17 with the Claimant Trustee, the Court is making law here. And
18 as we've pointed out, the law would create this platform for
19 claimant trustees to enshrine themselves and to do things
20 under a veil of secrecy. And that's not something that I
21 would think this Court would want to do.
22 If there's enough money to pay all of Classes 8 and 9, the
23 remainder belongs to Classes 10 and 11, not the estate
24 professionals. Money left over after --
25 THE COURT: Let me ask you.

1 MS. DEITSCH-PEREZ: -- Class 8 and 9 are paid --
2 THE COURT: Again, that's just not entirely correct,
3 because of 6.1. It is in there that indemnification
4 obligations must be reserved for. And let me ask you: How
5 many times have your clients tried to sue Mr. Seery?
6 MS. DEITSCH-PEREZ: I -- a couple. And the point is
7 if he --
8 THE COURT: Only a couple?
9 MS. DEITSCH-PEREZ: Yes.
10 THE COURT: Only a couple? So, --
11 MS. DEITSCH-PEREZ: Yes. But --
12 THE COURT: So they're required to reserve amounts
13 necessary. How much is your client or your clients seeking to
14 recover from Mr. Seery in those couple of lawsuits? I think
15 there have been more than two attempts.
16 MS. DEITSCH-PEREZ: I don't think it's -- I don't
17 think the -- I don't think the amounts sought are the issue.
18 It's -- it's there's -- and I'm not counsel of record in the
19 insider trading case, but I don't remember a large amount.
20 The -- in the case we're bringing to --
21 THE COURT: The insider trading case? The insider
22 trading case? Are you talking about the Stonehill/Farallon
23 thing?
24 MS. DEITSCH-PEREZ: Yeah. Yes. I don't -- that --
25 you asked about every case where Mr. Seery is mentioned. So I

1 don't think there's a big number there. And the case --
2 THE COURT: Wait, wait, wait.
3 MS. DEITSCH-PEREZ: -- that I have --
4 THE COURT: You don't think there is a big number
5 there? You don't remember the prayer for relief in that?
6 MS. DEITSCH-PEREZ: I don't, Your Honor. It's not --
7 I'm not the lawyer of record in the case.
8 THE COURT: Okay.
9 MS. DEITSCH-PEREZ: But let me point out, if --
10 THE COURT: I think it was rather open-ended and
11 large. Okay? But, and then there's the professional fees and
12 expenses that have priority.
13 MS. DEITSCH-PEREZ: Your Honor, --
14 THE COURT: I mean, I just, I want to hear: Are you
15 asking me to disregard Section 6.1 on equitable grounds? I
16 think at bottom you are, and I just want to hear you answer
17 that question.
18 MS. DEITSCH-PEREZ: Your Honor, I'm going to answer
19 that question, but I'm also going to point out that the
20 indemnification, if in fact there is intentional wrongdoing
21 that occurred, the estate is not obligated to indemnify. If
22 in fact the Claimant Trustee prevails in a claim or Mr. Seery
23 prevails in a claim, there is no judgment to indemnify. So
24 we're only talking about professional fees.
25 And yes, Your Honor, you don't ignore 6.1. You read it

1 with a duty of good faith and fair dealing applied in it, and
2 that enables you to allow this case to proceed, which is
3 necessary if we are ever going to end this matter.
4 And I will tell you, you asked about what's being sought
5 from Mr. Seery.
6 THE COURT: Can someone on your team -- can someone
7 on your team tell me how many pending appeals there are right
8 now? Because the chart that I asked my law clerk to pull is
9 several months old.
10 MS. DEITSCH-PEREZ: We can -- I'm -- we can submit it
11 after the fact, Your Honor.
12 THE COURT: Okay. I wanted to know right now, but --
13 MS. DEITSCH-PEREZ: We'll send something.
14 THE COURT: I wanted to know right now, when I'm --
15 MS. DEITSCH-PEREZ: I mean, I don't know right now
16 how many there are.
17 THE COURT: Is -- are there a dozen?
18 MS. DEITSCH-PEREZ: And I wouldn't want to try and
19 count while I'm sitting here.
20 THE COURT: Are there a dozen? Can you say, are
21 there more than a dozen?
22 MS. DEITSCH-PEREZ: I don't know, Your Honor. I
23 think many of them have wound down, and so the only -- we're
24 awaiting decision. So I don't know.
25 But appeals, of their nature, are generally not that

1 expensive. There's no discovery. You write a brief. You go
2 and argue it.
3 THE COURT: That is not my recollection whatsoever
4 from reviewing fee apps for 18 years or for practicing law 17
5 years. You know. If --
6 MS. DEITSCH-PEREZ: Your Honor, I agree, if there
7 were not -- if the Defendants didn't bring six or seven people
8 to New Orleans or Houston when there is an appeal, I would
9 think that it would cost less. There's no reason, in this day
10 and age, where you can -- if you're only listening, you can --
11 you can do that from your office, because the Court provides
12 an audio link. There's no reason to have that many people
13 travel clear across the country to go sit and listen to
14 arguments. So, is there a reason things cost more than they
15 should? Absolutely. But that's not the Plaintiffs.
16 THE COURT: Okay.
17 MS. DEITSCH-PEREZ: This Court could look at what is
18 left and say, you know what, in my experience, taking into
19 account your 18 years, this is -- this is what this many
20 proceedings should cost. That's the amount of -- and even if
21 you add a little cushion -- that's the appropriate amount of
22 indemnity, and everything else can be distributed. You can do
23 that, Your Honor. You have the -- there are professionals who
24 could give expert testimony, and with that, between that and
25 Your Honor's experience, you can figure that out. It's not a

1 black box.

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

3 please.

4 MR. MORRIS: Thank you, Your Honor.

5 If nothing else, counsel's presentation proved one thing,

6 and that is this proceeding should be dismissed. She insists

7 -- she had her presentation up on the board -- that they're in

8 the money. We disagree. We disagree both with the analysis

9 and with its legal significance.

10 But just as HMIT contended last summer that they were in

11 the money, counsel today is ratifying that and saying they're

12 in the money. If they're in the money, why do they need this

13 information? They don't.

14 Let me just start with the rebuttal, because it's going to

15 be some random points just because I'm -- I've taken some

16 notes.

17 The concept that three-plus years ago Heller Draper,

18 Munsch Hardt, Bonds Ellis couldn't foresee that we would be

19 here is mind-boggling, and, then, legally irrelevant. You

20 know who had the foresight to see that we might be here? The

21 Creditors' Committee. They're actually the ones who drove

22 this process on the Claimant Trust agreement. It's why the

23 agreement says exactly what it says. It's an agreement

24 between parties that defines the beneficial owners' rights and

25 the limitations on those rights.

1 There is a reason that contingent trust beneficiaries are
2 not owed any duty whatsoever until their claims vest and that
3 they have no rights under the Claimant Trust agreement or the
4 plan, at least as it pertains to the Claimant Trust agreement,
5 until their rights vest. The vesting process was not an
6 accident. It was intended to make sure that Mr. Dondero could
7 not do exactly what counsel is making plain she wants to do
8 today, and that is get information in order to second-guess
9 every decision that Mr. Seery has made. Okay?
10 Everybody on our side of the table knew, based on Mr.
11 Dondero's very long history of litigation, that this was a
12 possible end result, and they prepared for it. That Mr.
13 Dondero's lawyers did not is on them. The Court should not be
14 rewriting the agreement today.
15 Ms. Deitsch-Perez contends that somehow we have obscured
16 resources. No such thing has ever occurred. Okay? The plan
17 and the Claimant Trust agreement provide very specific rules
18 on what must be disclosed. There are other rules that require
19 disclosures. There is no allegation whatsoever that the
20 Claimant Trustee or the Claimant Trust has failed to meet its
21 obligations to make the disclosures required under the
22 Claimant Trust agreement and under the law.
23 And in fact -- this is another point that just gets
24 obscured in all of this, like a suggestion that somehow Mr.
25 Seery is some rogue guy doing stuff all by himself. That's

1 false. It's baseless. There is a Claimant Oversight Board
2 with an independent member and with two members who have a
3 substantial stake in the Claimant Trust. And there are many
4 Claimant Trust beneficiaries, not one of whom is here to
5 complain, not one of whom is concerned about the lack of
6 disclosure, not one of whom is concerned about the reserves
7 that have been made in this case.
8 There's really nothing more to talk about, but I have to
9 respond to certain of the other points. This notion that
10 somehow assets that exceed liabilities are the property of
11 HMIT is legally incorrect. That's as polite as I can say it.
12 Your Honor focused on it. 6.1. It is what it is. But I do
13 need to make the point that there is no way that anybody could
14 make a reasonable estimate of indemnification claims. It's
15 not just appeals, Your Honor. That's one aspect, and I
16 appreciate Your Honor focusing on it. But we have litigation
17 in Guernsey. We have litigation in the Southern District of
18 New York. We have, you know, these suits. He doesn't want --
19 he is just looking for information.
20 He tried to sue my firm on this ridiculous theory that we
21 were actually his lawyer way back in September 2019. Like,
22 really? It was withdrawn in the face of a Rule 11 motion.
23 But you know what? My firm incurred expenses defending
24 itself.
25 These things don't stop. There is another lawsuit to

1 remove Mr. Seery. That's been stayed pending the outcome
2 here, because just like they have no legal right or equitable
3 claim to obtain any information from the trust, they have no
4 legal right or equitable claim to remove Mr. Seery. But we're
5 going to have to do that.
6 The money in the trust is not HMIT's. They have no legal
7 or equitable claim to that money unless and until all senior
8 claims and expenses are satisfied. And that will not happen
9 as long as there's pending litigation.
10 You know, you're encouraged to make an estimate. What
11 happens if your estimate is wrong, Your Honor? What happens
12 if you come up with a ruling and say the estimate is $50
13 million and that's what Mr. Seery reserves, because he's going
14 to comply with any order this Court issues, and at the end of
15 $50 million there's still litigation and he or other
16 indemnified parties have been sued? And now what? Now what
17 happens then?
18 That's why this is completely untenable and it has no
19 basis in law, fact, or equity.
20 Dicta? Your Honor's decision that HMIT was not in the
21 money was dicta? That was the whole basis for the motion.
22 The motion sought reconsideration on the basis that they were
23 in the money and therefore had standing. It's not dicta.
24 It's the holding, after an analysis of the balance sheet,
25 after showing the faulty logic in HMIT's presentation. That

1 it's a balance sheet, Your Honor. It's not cash. You don't
2 spend what's on a balance sheet, you can't buy anything with
3 what's on the balance sheet, because what's on the balance
4 sheet is a bunch of contingent stuff. Like the Notes
5 Litigation. $70 million. They're here telling you they're in
6 the money, and they treat that $70 million as being in the
7 Claimant Trust's pocket. It's not. Not only is it not in the
8 Claimant Trust's pocket, Mr. Dondero is doing everything he
9 can to make sure it never gets in the Claimant Trust's pocket.
10 This is their disingenuous theory of what the balance
11 sheet means.
12 Again, apologies for the somewhat disparate nature of the
13 rebuttal.
14 Duty of good faith and fair dealing. You've heard that a
15 lot. Where is it in the complaint? What cause of action here
16 is dependent on duty of good faith and fair dealing? Nothing.
17 You won't find it. The words aren't there. This is a request
18 for information and two requests for declaratory judgment that
19 assets exceed liabilities and that they may vest someday in
20 the future. Their complaint, the only thing that's the
21 subject of this motion, has nothing to do with the duty of
22 good faith and fair dealing.
23 The Kirschner action. It was stayed. But you know what,
24 Your Honor? It wasn't dismissed. It was stayed because
25 responsible parties like Mr. Kirschner and Mr. Seery said,

1 let's pause and see what happens. There may come a time when
2 we start that litigation. There may come a time. Right? It
3 wasn't dismissed.
4 So the notion that we've made a decision that it's not
5 necessary is wrong. The decision was made that we don't have
6 to spend that money today. Let's keep it on ice and let's see
7 if we need to in the future.
8 Willkie. We heard some disparaging remarks about
9 Willkie's participation in these proceedings. Well, you know
10 what, Your Honor? Mr. Seery, God bless him, never retained
11 personal counsel in this case until HMIT sought leave to sue
12 him. Willkie is in this case only because Mr. Dondero made
13 the decision to go after Mr. Seery. Mr. Seery is entitled to
14 indemnification, he has indemnification, and I'm delighted
15 that the Willkie firm is by my side.
16 If Mr. Seery -- if Mr. Dondero has regrets about Willkie's
17 participation, he shouldn't sue Mr. Seery anymore. Maybe they
18 wouldn't have such a role.
19 Listen to what they're saying, Your Honor. Listen to Ms.
20 Deitsch-Perez's hypotheticals. What if they find out that
21 there's overpayments to professionals? What if there's
22 payments to phantom vendors? What if they learn someday that
23 Mr. Dondero -- Mr. Seery has engaged in wrongdoing? If this
24 is what they want to hold out for, if this is what they want
25 to continue to litigate for, because they think one day maybe

1 they might have something, somebody did something wrong, it's
2 Mr. Dondero's prerogative. But this is not a vehicle to give
3 him information to pursue those claims. It's just not.
4 Standing. There's no standing motion here. We're not
5 saying dismiss this because they don't have standing to spring
6 the claims. We're saying that they don't have any legal right
7 to seek information because of the plain terms of the Claimant
8 Trust agreement and the plan. It's not a standing question,
9 it's about whether they have a legal right, and the plain
10 terms of the operative documents state definitively that they
11 do not.
12 They can't settle without the information.
13 (Pause.)
14 THE COURT: Whoops. We just lost you, Mr. Morris.
15 We just lost your sound.
16 MR. MORRIS: Okay. Am I back?
17 THE COURT: You're back.
18 MR. MORRIS: Okay. People settle claims, known and
19 unknown, all the time. Okay? Mr. Dondero should look at his
20 success rate in litigation in this case and decide what he's
21 really holding out for. He should look at the success in
22 bringing the suit against my firm. He should look at what
23 happened when we had the evidentiary hearing in Hunter
24 Mountain and it was revealed that he was actually the party
25 who engaged in inside information. He was actually the person

1 who lied to Mr. Seery about what was happening with MGM. He
2 should think about his lack of success, the lack of merit,
3 what happened in the Notes Litigation, how ridiculous the
4 supposed oral agreement defense was. He should ask Mr.
5 Rukavina how the hearing went in front of Judge Scholer last
6 week on the appeal.
7 And he's holding out for more claims? This is what he
8 wants to do for his life? God bless him. We will reserve
9 everything.
10 Mr. Dondero is not the principal. He doesn't get some
11 final say over the propriety of the actions of the Claimant
12 Trustee or my firm. He doesn't have that right. That's what
13 the Claimant Trust agreement was intended to do. It reflects
14 the settlor's intent. And the settlor's intent was that Mr.
15 Dondero or Hunter Mountain or Dugaboy would get a check at the
16 end of the day if and when all senior claims and expenses were
17 paid and satisfied. That has not happened, so they don't get
18 a check. It's really that simple. It may be hard for him to
19 take, and I appreciate that, but he should have thought about
20 these issues three-plus years ago when all of this was
21 proposed, because other people thought about it, and here we
22 are.
23 And the Court has, I respectfully say, no authority, no
24 jurisdiction to override the plain terms of an agreement that
25 has been affirmed by this Court and has been affirmed by the

1 Fifth Circuit Court of Appeals. There has never been a
2 challenge to these provisions that they just want you to
3 completely ignore.
4 Just one moment, Your Honor.
5 (Pause.)
6 MR. MORRIS: Your Honor, I actually have nothing
7 further unless the Court has any questions.
8 THE COURT: Okay. I only have one question. And let
9 me preface it by saying that I don't pay much attention to
10 appeals and satellite litigation unless something is brought
11 to me. I mean, there just are not enough hours in the day for
12 me. Plus it's just, it's not of my concern. Right? An
13 appellate court is going to do what it's going to do and issue
14 a mandate to me at some point, if appropriate. And the same
15 with satellite litigation. It's either going to somehow be
16 brought before me or not.
17 So you may think that I'm aware, lawyers, parties may
18 think that I'm aware at all times of different things going on
19 out there, but I'm really only sort of aware. I don't know
20 how many pending appeals there are right now. But I do know
21 that someone who seemed to know what he was talking about,
22 another judge in Texas, not here, told me that Highland has
23 spawned more appeals at the Fifth Circuit than any other -- I
24 don't know if he said bankruptcy case in history or Chapter
25 11. And he said, are you proud of that? Hahaha. And I said

1 no. I'm not even remotely proud of that. And I haven't
2 double-checked his figures, but he's kind of a numbers wonky
3 lovable geek, so I think he probably knew what he was talking
4 about.
5 But finally getting to my question, Mr. Morris: You
6 alluded to there's a vexatious litigant motion pending, and
7 you reminded me I heard about that at a hearing many months
8 ago. I think you said it was before Judge Brantley Starr, a
9 district judge here in this district. Is that correct?
10 MR. MORRIS: It is correct, Your Honor. And we filed
11 our reply papers last Friday, so it's been fully briefed.
12 THE COURT: Okay. Well, even though I don't closely
13 monitor appeals, satellite litigation, I may be monitoring
14 that.
15 MS. DEITSCH-PEREZ: Your Honor, may I make one
16 rebuttal, by the way, to Mr. Morris's presentation? I just
17 have one comment.
18 THE COURT: If it's 30 seconds. But this is out of
19 order. Usually, Movant goes last. I assume this is going to
20 be hugely important.
21 MS. DEITSCH-PEREZ: It is important. It's something
22 Your Honor raised and Mr. Morris raised, so I want to point
23 something out so there is no misunderstanding. There was a
24 lot of talk about, well, the Plaintiff should have done
25 something about this at the time of the plan. If Your Honor

1 recalls, at the time of the plan the projections were that
2 Classes 8 and 9 would recover a fraction of their value. So
3 there was no reason Classes 10 and 11 should be -- should have
4 anticipated the issues that have arisen now. And I just want
5 to remind everybody of that.
6 MR. MORRIS: And just one sentence, Your Honor. Mr.
7 Dondero acquired every single asset that Highland has. He was
8 in Highland's offices with full access to all information
9 through October. He had Mr. Waterhouse, the CFO, onsite until
10 just before the confirmation hearing, and there was no
11 objection to those projections.
12 What happened is Mr. Seery and his team did a great job
13 and benefited from a rising market, and yet here we're going
14 to be subjected to more litigation. It's brilliant.
15 THE COURT: All right. Well, I am finished hearing
16 everything. And with respect to that comment for the
17 Plaintiffs, I continue to think this is a very important
18 issue, of the many issues, of the many jurisdictional issues
19 here. And there are so many issues, I'm not sure, if you
20 prioritize the issues, where this one falls on the list. And
21 yet as a bankruptcy judge I am obsessed a bit with the issue
22 of the impact on the Chapter 11 world.
23 We have liquidating Chapter 11s with -- or even if they're
24 not liquidating, we have Chapter 11s where there's a
25 litigation trust like this one where there is sometimes a

1 discussion, when are you going to get the creditor trust
2 agreement on file? Oh, it's going to be part of a plan
3 supplement, and the plan supplement will be filed, you know,
4 ten days before the confirmation hearing. Whatever. I'm just
5 giving you a typical fact pattern. And it's part of the
6 evidence. It's part of the information. It's not just
7 evidence at the confirmation hearing. It's usually on file
8 several days before the confirmation hearing, where it's out
9 there for consumption, for people to complain about if they
10 think there are objectionable terms. And we just have this in
11 dozens and dozens of cases.
12 And I can even go further back in my brain here. I mean,
13 Chapter 11, very soon after the case was filed, we had a U.S.
14 Trustee saying conversion to Chapter 7 or appointment of a
15 Chapter 11 trustee. You know, we can't have Mr. Dondero as
16 the manager of this Debtor anymore. And despite that
17 argument, we put in place a corporate governance mechanism
18 that Mr. Dondero agreed to. And my point is there's always
19 been a huge amount of oversight by what we considered the
20 fulcrum security here, the unsecured creditors. A huge amount
21 of oversight. A huge amount of oversight in this case that
22 was negotiated in response to a very active Creditors'
23 Committee and a U.S. Trustee saying can't have a debtor-in-
24 possession here.
25 So why do I go back? I mean, it's really troublesome for

1 any judge to hear, We have suspicion. We are worried about a
2 breach of good faith and fair dealing. What if there are
3 fictional vendors?
4 I mean, this case has been full of extensive oversight.
5 And not only could the Plaintiffs here have complained about
6 the terms of the creditor trust agreement, heck, they could
7 have said convert this sucker to Chapter 7, because a Chapter
8 7 trustee will have -- there will be a lot of transparency for
9 everything that happens in winding down this estate.
10 So, rambling, yes, I'm rambling. I do that. But the
11 philosophical issue here, I just, it's hard for me to ignore,
12 because, looming, we have the jurisdictional issues, but what
13 you're asking me to do is something that it's just a fact
14 pattern we see all the time of plans with litigation trust
15 agreements. And we all know what the terms are going to be,
16 and we can all argue about those terms if we don't think
17 they're appropriate, and we all know that the future is
18 uncertain and things could change, and that's just the way it
19 is. Here it is. Live with it or not.
20 Anyway, but so that's a big deal, the contractual rights
21 here.
22 And as I said earlier, another kind of overarching issue
23 is it feels like kind of a meaningless exercise when we have
24 the asset side of the balance sheet but the liabilities just
25 grow unlike any other case. It's fair to say unlike any case.

1 There have been more appeals generated at the Fifth Circuit
2 from this case than any Chapter 11 ever, and maybe any
3 bankruptcy ever.
4 There was a reference to, well, yeah, there are lots of
5 appeals, but you don't need to send six lawyers to New Orleans
6 or have people. But I was just writing down as I was thinking
7 through this, and Mr. Morris alluded to some of it, we've had
8 at least the following law firms involved for either Mr.
9 Dondero or entities he controls: Munsch Hardt; Bonds Ellis;
10 Heller Draper; Louis Phillips' firm, I think that's Kelly
11 Hart; the Stinson law firm; Sawnie McEntire's law firm; Ms.
12 Ruhland, Amy Ruhland; Lang Winshew; and I forget the name of
13 the lawyers who represented the Charitable Trusts.
14 MR. MORRIS: Mazin Sbaiti.
15 THE COURT: The Sbaiti law firm.
16 So I've just rattled off from memory nine law firms, okay?
17 I'm not even sure I've captured them all. Probably not. So
18 it's, on all sides of this, I can't remember if I've said this
19 in court or I've just maybe said it back in chambers, but I'll
20 say it: This feels like the Disneyland case. Have I ever
21 said that in court yet? Do you know what I mean by that? I
22 probably haven't.
23 The famous quote of Walt Disney, when someone asked him
24 about the theme park and when it would be finished, and he
25 said, Disneyland will never be finished as long as there are

1 creative people with imaginations. I mean, this is like the
2 Disneyland case. It will never be finished as long as there
3 are certain parties and lawyers who have imagination and keep
4 filing stuff. I don't mean to be flippant, but I really am
5 trying to emphasize what I said. Sure, people are entitled to
6 appeal, but how can you complain about 'I don't know if I'm in
7 the money or not' when there's just no end in sight?
8 So I'm going to obviously take this under advisement, and
9 we will carefully look at every argument and every case,
10 because that's what we do. That's what we're duty-bound to
11 do. We don't knee-jerk anything around here. But I am very,
12 very troubled by some of the arguments. And it's what made me
13 ask about the vexatious litigant motion and its status,
14 because it just feels so beyond the pale to make accusations
15 of some sort of breach of good faith and fair dealing and
16 raise the specter of lack of transparency and something
17 untoward may be going on, when these were the terms negotiated
18 as far as post-confirmation oversight, we have an Oversight
19 Committee, and I think every rational person knows that the
20 professional fees and the indemnification obligations and the
21 appeals and the satellite litigation are why we can't wrap
22 this up. Okay?
23 So let that soak in. And we will get an opinion out as
24 soon as we can make it happen.
25 All right. We're adjourned.

1 THE CLERK: All rise.

2 (Proceedings concluded at 11:28 a.m.)

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20 CERTIFICATE

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

23 **/s/ Kathy Rehling** **02/20/2024**

24 ____ ________________

25 Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX

PROCEEDINGS	3
OPENING STATEMENTS	
By Mr. Morris	4
By Ms. Deitsch-Perez	23
WITNESSES	
-none-	
EXHIBITS	
-none-	
RULINGS	
The Highland Parties' 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 [13] - *Taken Under Advisement*	67
END OF PROCEEDINGS	72
INDEX	73

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25