

STINSON LLP

Deborah Deitsch-Perez
Michael P. Aigen
2200 Ross Avenue, Suite 2900
Dallas, Texas 75201
Telephone: (214) 560-2201
Facsimile: (214) 560-2203
Email: deborah.deitschperez@stinson.com
Email: michael.aigen@stinson.com

Counsel for Hunter Mountain Investment Trust

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

	§	
In re	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
Reorganized Debtor.	§	
HUNTER MOUNTAIN INVESTMENT TRUST,	§	
Appellant,	§	Civil Case No.
v.	§	3:24-cv-01787-L
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	
and JAMES P. SEERY, JR.,	§	
Appellees.	§	
	§	
	§	

**REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE
AN INTERLOCUTORY APPEAL**



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I. PRELIMINARY STATEMENT

The Motion for Leave to File Interlocutory Appeal (“Motion”) filed by Hunter Mountain Investment Trust (“HMIT”) carefully explained why an interlocutory appeal is appropriate under the circumstances of this case. First, there is a controlling issue of law to be decided (*i.e.*, whether binding Fifth Circuit precedent precluded the Bankruptcy Court’s entry of an indefinite stay). Second, there is room for substantial difference of opinion regarding the Bankruptcy Court’s order because it conflicts with the overwhelming weight of precedent. And finally, an interlocutory appeal will materially advance the termination of this litigation because it will force immediate resolution of the core underlying issue – namely, whether the failure of Claimant Trustee James P. Seery, Jr. (“Seery”) to certify that HMIT is a vested beneficiary under the Claimant Trust violates his fiduciary duties under applicable Delaware law. *See* Motion at pp. 8-17. In the Joint Opposition, Highland Capital Management, L.P., the Highland Claimant Trust, and Seery (collectively, “Highland”) argue that HMIT fails to meet any prong of the three-part test for interlocutory appeal, but as explained below, Highland’s arguments either miss the point or are legally or factually wrong. The Court should grant HMIT’s Motion.

II. ARGUMENT

A. Highland Misapprehends the “Controlling Question of Law” Prong of the Test for Interlocutory Appeal

Highland initially erroneously argues that HMIT has failed to identify a “controlling question of law” that could be resolved by interlocutory appeal. As stated in HMIT’s Motion, the controlling question is whether the Bankruptcy Court’s indefinite stay of the proceedings defies binding Fifth Circuit and federal court precedent. Motion at pp. 8-11. In arguing that this question is not appropriate for interlocutory appeal, Highland seeks to characterize the Bankruptcy Court’s stay as a garden variety, short-term stay that has little impact beyond this case and these parties. *See* Response at pp. 15-16. Highland’s argument is flawed for several reasons.

First, Highland simply ignores the litany of cases holding that a stay pending resolution of related appeals is the equivalent of an impermissible indefinite stay. *See* Motion at pp. 11-12 (citing cases).

Second, Highland does not even address HMIT’s argument that the Bankruptcy Court failed to “carefully consider the time reasonably expected for resolution of the other case, in light of the principle that ‘stay orders will be reversed when they are found to be immoderate or of an indefinite duration.’”¹ As HMIT

¹ *Wedgeworth v. Fireboard Corp.*, 706 F.2 541, 545 (5th Cir. 1983) (quoting *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982)).

explained in its Motion, a stay must be “so framed in its inception that its force will be spent within reasonable limits[.]”² But here, the Bankruptcy Court failed to consider either the actual amount of time the stay would be in effect or the hardship imposed on HMIT because of the indefiniteness of the Court’s order. As demonstrated by the below charts, it will take several years for the adversary proceedings at issue and their appeals to be finally resolved.

Chart A-1: Demonstrating Actual Timing from Appeal of Bankruptcy Court Order to Fifth Circuit Judgment

District Court Appeal (N.D. Tex.) Case No.	Notice of Appeal of Bankruptcy Court Decision (“NOA”) Date	District Court Judgment (“DCJ”) Date	Duration: NOA to DCJ (Days)	Fifth Circuit Case No.	Fifth Circuit Judgment Date	Duration: DCJ to Fifth Circuit Judgment (Days)	Total Duration: NOA to Fifth Circuit Judgment (Days/Years)
3:21-cv-00261-L	2/3/2021	9/26/2022	600	22-10960	7/31/2023	308	908/2.49
3:21-cv-01295-X	5/27/2021	9/22/2022	483	22-10983	7/28/2023	309	792/2.17
3:21-cv-01590-N	6/15/2021	8/17/2022	428	22-10889	7/1/2024	684	1,112/3.05
3:21-cv-01895-D	8/4/2021	1/28/2022	177	22-10189	1/11/2023	348	525/1.44
3:23-cv-02071-E	8/16/2021	9/28/2022	408	22-11036	4/26/2024	576	984/2.70³

² *Landis v. North Am. Co.*, 299 U.S. 248, 254-55 (1936).

³ Remanded to District Court; resolved by stipulation approved July 3, 2024, not court decision.

Chart A-2: Demonstrating Actual Timing of Appeals Still Pending

District Court Appeal (N.D. Tex.) Case No.	Notice of Appeal of Bankruptcy Court Decision (“NOA”) Date	District Court Judgment (“DCJ”) Date	Duration: NOA to DCJ (Days)	Fifth Circuit Case No.	Days Pending as of this filing, continuing to accrue
3:21-cv-00881-x	4/13/2021 ⁴	7/6/2023	814	23-10911	1,198 ⁵
3:22-cv-02170-S	9/20/2022	2/28/2024	526	24-10267	673 ⁶
3:23-cv-00573-E	3/13/2023			23-10534	499 ⁷
3:23-CV-1503-B	6/27/2023				393 ⁸
3:23-cv-02071-E	9/8/2023				320 ⁹

Under these circumstances, the stay imposed by the Bankruptcy Court is much longer and more indefinite than the garden-variety stays at issue in the cases cited by Highland. It certainly is not, as Highland argues, a “limited [s]tay.”¹⁰

Highland also fails to rebut (or even address) HMIT’s argument that the Bankruptcy Court’s Stay Order is an effective dismissal. As HMIT explained in its Motion, given that the appeals will take several years, by the time the Bankruptcy Court hears its underlying motion for leave, the Claimant Trust will likely be dissolved. Motion at pp. 9-10. As a result, the Court’s stay amounts to a denial of the Motion and a dismissal of HMIT’s proposed Delaware complaint seeking removal of the Claimant Trustee for fiduciary breaches. The Bankruptcy Court failed

⁴ Withdrawal of Reference filed April 13, 2021; Bankruptcy court did not submit its Report and Recommendation until December 6, 2022 (602 days later), supplementing on January 17, 2023.

⁵ Oral argument scheduled for August 2024.

⁶ Highland under extension for response brief until August 2024.

⁷ Direct appeal to Fifth Circuit filed in District Court; Oral argument heard in Fifth Circuit on February 8, 2024; no decision yet.

⁸ Briefing complete January 12, 2024, oral argument not yet set.

⁹ Briefing complete April 3, 2024, oral argument not yet set.

¹⁰ Response at p. 16.

to address this hardship in issuing the stay, which was required. *Wedgeworth*, 706 F.2d at 545. Highland's only response to this argument is to attempt to distinguish the Fifth Circuit's opinion in *In re Davis*, 730 F.2d 176, 178-79 (5th Cir. 1984) by arguing that, in that case, unlike here, the stay was indefinite because it would have persisted until the "completion of all bankruptcy proceedings." Response at p. 16 (quoting *Davis*). This is a distinction without a difference. If all creditors in the Highland bankruptcy are paid and the Claimant Trust dissolves, that effectively ends the bankruptcy and robs HMIT of its day in court. That is precisely the type of indefinite stay prohibited by the Fifth Circuit.¹¹

In short, the Bankruptcy Court's departure from well-settled Fifth Circuit precedent precluding stays without consideration of their duration or the balance of hardships on the parties is a problem that should be corrected by interlocutory appeal. Highland's arguments to the contrary lack merit.

B. Highland's Argument that Interlocutory Appeal Will Not Advance Termination of this Litigation Is Wrong

Highland next argues that an interlocutory appeal will not advance termination of this litigation because the standing issue here and in the pending appeals is "the very same dispositive issue," such that it would be more expedient to

¹¹ Highland also tries to distinguish *Coastal (Berm.) Ltd. v. E.W. Saybolt & Co.*, by arguing that because the stay in that case was "pending arbitration," the concern expressed by the Fifth Circuit over indefinite stays does not apply to this case. Response at 16; 761 F.2d 198, 203-04 (5th Cir. 1983). To the contrary, in *Saybolt*, the Fifth Circuit clearly reiterated that "granting indefinite stays should not be a quotidian exercise," and that the district court was "properly" concerned that the claim "might be tabled indefinitely." *Id.* at 203-04, n.6.

await resolution of those appeals.¹² In making this argument (which echoes the Bankruptcy Court), Highland fails to address the inherent differences between the standing issues in this proceeding and in the pending appeals. Indeed, Highland’s argument that courts “routinely” grant prolonged stays during pending appeals is dependent on the false premise that the issues on appeal and in the case being stayed are identical.¹³

As discussed in HMIT’s Motion, however, the standing issues in the Delaware Complaint and in the Valuation Proceeding are not identical because the two proceedings assert different bases for the claims asserted in each proceeding.¹⁴ In the Delaware Complaint, HMIT seeks to have Seery removed as Trustee specifically because he has breached his fiduciary duties and the duty of good faith and fair dealing. Unlike in the separate Valuation Proceeding seeking disclosure of assets, HMIT alleges that its standing to bring the Delaware Complaint is based on HMIT’s status as a beneficiary under Delaware law—which specifically dictates that even contingent beneficiaries must be treated as “beneficiaries,” particularly where a statutory trustee’s actions in breach of his fiduciary duties and the duty of good faith and fair dealing are the only reason that the beneficiaries’ interests have not vested.¹⁵ In particular, HMIT argues in the Delaware Complaint that its contingent status is

¹² Response at p. 18.

¹³ *Id.* at p. 16.

¹⁴ Motion at p. 5.

¹⁵ Motion at pp. 19-20.

solely the result of Seery's failure to file a GUC Certification confirming that HMIT is "in the money" and is manipulating HMIT's "beneficiary" status to argue, among other self-serving things, that HMIT lacks standing. In other words, the claims that HMIT asserts in the Delaware Complaint specifically turn on an analysis of Seery's conflicts and conduct, none of which is at issue in the Valuation proceeding.¹⁶

By contrast, the claims asserted by HMIT in the Valuation Proceeding are not premised on Seery's breaches and failure to allow HMIT's interest to vest. Instead, that suit largely seeks information to enable the proposed plaintiffs to protect their interests. In other words, although similar, the asserted bases for HMIT's standing are not identical in the two proceedings, and thus a decision on HMIT's standing in the Valuation Proceeding is not dispositive of the separate issue framed in the Motion. Indeed, because of the multiple arguments made by the parties in the two cases (just as Highland suggested would be the case with the Claims Trading Proceeding),¹⁷ the Valuation Proceeding decision may not address the issues in the Motion for Leave to file the Delaware Complaint at all, much less the issues intended to be decided by the Delaware court. And, if any court does make a ruling on

¹⁶ *Id.* at pp. 23-29.

¹⁷ As explained in the Motion, the Bankruptcy Court concluded that the stay should extend until the resolution of the appeal of the Claims Trading Proceeding, without any hint of, much less formal request for, this relief by Highland. To the contrary, in its Motion for Stay, Highland explicitly recognized that with respect to the Order Denying Leave: "Given the scope of the appeal, it is unclear whether the District Court will address the Bankruptcy Court's determination that HMIT is not a beneficiary under the Claimant Trust." Highland's Motion for Stay ¶ 4, n 4. In other words, it is unnecessary that the District Court even reach the issue of HMIT's beneficiary status in the context of the Claims Trading Proceeding. Therefore, it was improper for the Bankruptcy Court to issue a stay pending conclusion of the appeal in that proceeding.

standing in the Valuation Proceeding that Highland wishes to rely on in this proceeding, it could attempt to make its argument at that time, as discussed in the Motion for Leave.¹⁸ Therefore, a stay of the proceedings related to the Motion for Leave is inappropriate. Highland ignores this in its Response.

The Delaware Supreme Court also addressed this situation in *Morris v. Spectra Energy Partners (DE) GP, LP*, 246 A.3d 121, 136 (Del. 2021), which Highland fails to address. In *Morris*, the Delaware Supreme Court held that a standing analysis should be more flexible when a defendant controls the facts giving rise to standing.¹⁹ As an example, although standing to assert derivative claims in the context of mergers typically requires equity ownership, there are exceptions. One of these exceptions, described in *Morris*, includes when “the merger itself is the subject to a fraud claim, perpetrated to deprive shareholders of their standing to bring or maintain a derivative action.”²⁰ *Morris* holds that strict adherence to formulaic standing on a motion to dismiss must yield when the defendant’s allegedly unfair conduct destroys the standing necessary to pursue the claim against the defendant.

Morris applies to the present issue of standing because Seery’s conflicted position has allowed him to unilaterally deprive HMIT of its status as a vested beneficiary, and as a result, its standing to pursue this claim. Thus, the Bankruptcy

¹⁸ Motion at pp. 12, 14.

¹⁹ *Morris*, 246 A.3d at 136.

²⁰ *Id.* at 129.

Court erred by determining that standing issues were identical in the Valuation Proceeding and the Delaware Complaint, as well as additional error in grouping in the Claims Trading Proceeding without any request by Highland to do so. An interlocutory appeal will force a decision on the unique standing issue in this proceeding and thus facilitate the resolution of this and potentially other litigations.

Respectfully submitted,

STINSON LLP

/s/ Deborah Deitsch-Perez

Deborah Deitsch-Perez

Texas Bar No. 24036072

Michael P. Aigen

Texas Bar No. 24012196

2200 Ross Avenue, Suite 2900

Dallas, Texas 75201

Telephone: (214) 560-2201

Facsimile: (214) 560-2203

Email: deborah.deitschperez@stinson.com

Email: michael.aigen@stinson.com

*Counsel for Hunter Mountain Investment
Trust*

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2024, a copy of the foregoing document was served on all parties of record via the Court's electronic filing system.

/s/ Deborah Deitsch-Perez
