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

In re:

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

Reorganized Debtor.

Chapter 11

Case No. 19-34054-sgj11

**HUNTER MOUNTAIN
INVESTMENT TRUST,**

Appellant,

v.

**HIGHLAND CAPITAL
MANAGEMENT, L.P.; THE
HIGHLAND CLAIMANT TRUST;
and JAMES P. SEERY, JR.**

Appellees.

Civil Case No. 3:24-cv-01786-BW

**APPELLANT’S RESPONSE TO APPELLEES’
MOTION TO TEMPORARILY SUSPEND BRIEFING**



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Appellant Hunter Mountain Investment Trust (“**HMIT**”) opposes the Motion to Temporarily Suspend Briefing (“**Motion**”) filed by Appellees Highland Capital Management, L.P. (“**HCMLP**”), the Highland Claimant Trust (“**Claimant Trust**”),¹ and James P. Seery, Jr. (“**Seery**”) [Dkt. 18] (HMIT, Claimant Trust, and Seery are collectively the “**Highland Parties**”). The Motion is yet another attempt by the Highland Parties to evade consideration of the merits of HMIT’s motion for leave to seek Seery’s removal as trustee of the Claimant Trust. Granting the Motion will only cause more delay and compound the prejudice already suffered by HMIT. The Motion lacks merit and should be denied because HMIT’s appeal is proper, and the parties should proceed to promptly brief the appeal.

I. INTRODUCTION

This appeal arises from the bankruptcy court’s order indefinitely staying proceedings initiated by HMIT to remove Seery as the trustee of the Claimant Trust. Seery has breached his fiduciary duties and created numerous conflicts of interest that harm all beneficiaries of the Claimant Trust. Seery has, among other things, used an exorbitant portion of Claimant Trust assets to fund a separate indemnity sub-trust (created to pay his own legal expenses), and is still holding other funds in reserve, rather than using those funds to pay the claims of Claimant Trust beneficiaries. To

¹ The Claimant Trust is an Appellee in this proceeding because it participated in the Motion to Stay. But the Claimant Trust is also a victim because Seery’s actions are injurious to the best interests of the Claimant Trust. There is a substantial conflict of interest.

remedy these breaches, and pursuant to the bankruptcy court’s gatekeeping function under the Fifth Amended Plan of Highland Capital Management, L.P. (as modified), HMIT sought leave from the bankruptcy court to bring suit in Delaware to remove Seery as trustee (“**Delaware Complaint**”).

Rather than substantively responding to HMIT’s Motion for Leave, HCMLP and the Claimant Trust filed a motion to stay in an effort to delay proceedings despite the irreparable harm to HMIT from doing so (“**Motion to Stay**”).² Seery joined the Motion to Stay.³ On June 24, 2024, the bankruptcy court granted the Motion to Stay, which order is the subject of this appeal (“**Order**”). In the Order, the bankruptcy court indefinitely stayed resolution of HMIT’s Motion for Leave to file the Delaware Complaint “until a court of competent jurisdiction enters final, non-appealable orders resolving” two other proceedings, which went beyond the relief that even HCMLP had requested.

HMIT timely appealed the Order to this Court. HMIT also filed two appeals—one as of right, and the other interlocutory—and a petition for writ of mandamus in light of the unclear state of the law with respect to obtaining appellate review of a stay order. HMIT maintains, for the reasons in HMIT’s response to the Highland Parties’ motion to dismiss, that the Order is a directly appealable order. As a result,

² See generally App. 001630-1637.

³ App. 001638-1639.

the parties' briefing deadlines have been triggered, and HMIT properly filed an opening brief on appeal on September 16, 2024. There is no reason to stay briefing of this appeal as now urged by the Highland Parties, and HMIT will be prejudiced by further delay. The Motion should be denied.

II. BACKGROUND

On January 1, 2024, HMIT filed its Motion for Leave,⁴ seeking to file the Delaware Complaint⁵ under the gatekeeping provision of the Fifth Amended Plan of Highland Capital Management, L.P. (as modified). As set forth in HMIT's Motion for Leave, HMIT has standing to pursue Seery's removal because HMIT is actually "in the money" or, alternatively, should be deemed "in the money" with the rights of a vested beneficiary because Seery's failure to declare HMIT's status as such breaches his duty of good faith and fair dealing.⁶ HMIT also has standing as an intended contingent beneficiary under Delaware law.⁷ However, it is Seery's actions as a fiduciary, not the valuation of HCMLP's estate itself, that is the core of HMIT's claims in the Motion for Leave.

⁴ Motion for Leave to File a Delaware Complaint, Dkt. 4000, dated January 1, 2024, App. 001468-1605.

⁵ *Id.* at Dkt. 4000-1 (App. 001507-1523).

⁶ *Id.* ¶¶ 30-46 (App. 001487-1494); Pursuant to the Claimant Trust Agreement, upon paying all Class 8 and Class 9 unsecured creditors in full with interest, Seery is bound to file a "GUC Payment Certification" declaring that the holders of Contingent Interests (including HMIT) are vested beneficiaries. Claimant Trust Agreement § 5.1(c) (App. 001551).

⁷ App. 001487-1494 at ¶¶ 30-46.

In response, HCMLP and the Claimant Trust filed the Motion to Stay,⁸ in which the Highland Parties argue that all proceedings related to the Motion for Leave should be indefinitely stayed until entry of a final, non-appealable order in a separately filed adversary proceeding commenced by The Dugaboy Investment Trust (“**Dugaboy**”) and HMIT (“**Valuation Proceeding**”).⁹ In the Valuation Proceeding, Dugaboy and HMIT sought a determination by the bankruptcy court of the value of the estate and an accounting of the assets held by the Claimant Trust. HCMLP and the Claimant Trust moved to dismiss the Valuation Proceeding, arguing, among other things, that both Dugaboy and HMIT lacked standing because they are purportedly not beneficiaries of the Claimant Trust.¹⁰ HCMLP and the Claimant Trust alternatively argued that the claims in the Valuation Proceeding should be dismissed because: (1) the Court lacks subject matter jurisdiction, (2) HMIT improperly seeks an advisory opinion, (3) the claims are barred by collateral

⁸ App. 001630-1637.

⁹ *Dugaboy Inv. Trust, et al v. Highland Capital Mgmt., L.P., et al.*, Adv. Proc. No. 23-03038-sgj (Bankr. N.D. Tex.), Complaint to (I) Compel Disclosures about the Assets of the Highland Claimant Trust and (II) Determine (A) Relativity Value of those Assets, and (B) Nature of Plaintiffs’ Interests in the Claimant Trust, Dkt. 1, dated May 10, 2023 (“**Valuation Complaint**”) (App. 001744-1771).

¹⁰ Memorandum of Law in Support of Highland Capital Management L.P. and the Highland Claimant Trust’s Motion to Dismiss Complaint, Adv. Proc. 23-03038, Dkt. 14, dated November 22, 2023 (“**Motion to Dismiss**”) at ¶ 10 (App. 001787-1788).

estoppel, and (4) the claims fail as a matter of law.¹¹ Dugaboy and HMIT opposed the motion to dismiss.¹²

HCMLP and the Claimant Trust argued in their Motion to Stay that whether HMIT is a beneficiary of the Claimant Trust in the Valuation Proceeding will “necessarily dispose” of the Motion for Leave.¹³ However, the bankruptcy court’s decision to issue a stay on this flawed premise is incorrect for two reasons. First, HMIT has been and will continue to be prejudiced by an indefinite stay of the Motion for Leave, and HCMLP would not have suffered any harm by a denial of the requested stay. Second, the issues in the Delaware Complaint and the Valuation Proceeding are not identical because the two proceedings assert different bases for the claims alleged in each proceeding. On May 24, 2024, the bankruptcy court granted the motion to dismiss the Valuation Proceeding under Rule 12(b)(6) based on its finding that Dugaboy and HMIT had not plausibly alleged they had a right to the information sought in the Valuation Proceeding.¹⁴ The Court’s order did not address the issue of HMIT’s standing.

¹¹ *See id* at App. 001793-1807, ¶¶ 22-48.

¹² The Dugaboy Investment Trust and Hunter Mountain Investment Trust’s Response to the Highland Parties’ Motion to Dismiss Complaint, Adv. Proc. 23-03038, Dkt. 17, dated December 29, 2023 (App. 001809-1838).

¹³ App. 001631 at ¶ 2.

¹⁴ Memorandum Opinion and Order Granting Motion to Dismiss Adversary Proceeding in which Contingent Interest Holders in Chapter 11 Plan Trust Seek a Post-Confirmation Valuation of Trust Assets, Adv. Proc. 23-03038, Dkt. 26, dated May 24, 2024 (App. 001875-1910), at p. 32 (App. 001906).

Then, on June 24, 2024, the bankruptcy court issued its Order granting HCMLP's Motion to Stay "until a court of competent jurisdiction enters final, non-appealable orders resolving" the Valuation Proceeding.¹⁵ The bankruptcy court went further, however, and stayed the proceeding not just until the resolution of the Valuation Proceeding, as HCMLP requested, but also until the resolution of a second proceeding currently on appeal. Specifically, the bankruptcy court stayed HMIT's Motion for Leave until resolution of HMIT's pending appeal of the Court's Memorandum Opinion and Order Pursuant to Plan "Gatekeeper Provision" and Pre-Confirmation "Gatekeeper Orders": Denying Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding [Docket No. 3903] ("**Claims Trading Proceeding**") (App. 001363-1467).¹⁶

On July 8, 2024, HMIT timely filed two notices of appeal from the Order staying these underlying proceedings. In the first, HMIT asserted that the Order is appealable as of right because it functions as a dismissal on the merits of HMIT's Motion for Leave ("**Appeal as of Right**"). On September 16, 2024, HMIT filed its opening brief on appeal in this proceeding. HMIT alternatively filed the second notice of appeal in the event the Order is construed as interlocutory ("**Interlocutory**

¹⁵ Order Extending Stay of Contested Matter [Docket No. 4000], Dkt. 4104, dated June 24, 2024 (App. 001693-1695) ("**Stay Order**"), at p. 3 (App. 001695).

¹⁶ *Id.* at p. 2 (App. 001694). The bankruptcy court refers to this order as the "Order Denying Leave" in the Stay Order.

Appeal”). As the Highland Parties concede, HMIT properly and timely filed a motion for leave to appeal the Order with that notice of appeal.¹⁷ Third, on July 25, 2024, HMIT filed a petition for writ of mandamus seeking an order directing that the Order be reversed with remand instructions to allow the matter to proceed (“**Writ Petition**”).¹⁸ Like the Interlocutory Appeal, HMIT expressly filed the Writ Petition “in the alternative” in light of “the lack of clarity in the law about the appropriate mechanism for obtaining review” of the Order.¹⁹ As such, HMIT has never “acknowledge[d] that the [Order] is interlocutory and cannot be appealed ‘as of right,’” as the Highland Parties contend.²⁰ Instead, because of the murky state of the law for challenging an indefinite stay order, HMIT filed such notices of appeal and petitions as it considers necessary to ensure that the Order receives appellate review.²¹

¹⁷ Mot. to Dismiss, ECF Doc. No. 17, at ¶ 8.

¹⁸ *Hunter Mountain Inv. Trust v. Highland Capital Mgmt., L.P., et al.*, Case No. 24-cv-01912-E (N.D. Tex.), at Dkt 1, of which the Court can take judicial notice.

¹⁹ *Id.*, p. 10, fn. 30; *Id.* p. 11, fn. 35.

²⁰ Mot. to Dismiss, p. 5 ¶ 9.

²¹ While orders on motions to stay are typically not appealable collateral orders, as the Fifth Circuit explained in *Grace v. Vannoy*, appellate jurisdiction is properly exercised over “‘a ‘small class’ of collateral orders [that] ‘are too important to be denied immediate review.’” *Grace v. Vannoy*, 826 F.3d 813, 815-16 (5th Cir. 2016). A stay that has “the practical effect” of a dismissal falls into this small class. *Id.* at 817.

III. ARGUMENT

A. The Motion Should Be Denied Because the Order Is a Final Appealable Order, which HMIT Timely Appealed, and Further Delay Will Compound the Prejudice HMIT Is Suffering.

The Motion is yet another attempt by the Highland Parties to delay proceedings, in the hopes that with the passage of time, HMIT's claims will become equitably moot. Indeed, this appeal arises from the Highland Parties' attempt to evade consideration of the merits of HMIT's Motion for Leave pending before the bankruptcy court. There, the Highland Parties successfully avoided any substantive briefing on the Motion for Leave by successfully requesting an indefinite stay. The Highland Parties are now using the same playbook by asking this Court to indefinitely suspend briefing of this appeal.

For the reasons given in HMIT's response to the Motion to Dismiss, which are incorporated here, the Order should be treated as final and appealable. HMIT timely appealed the Order on July 8, 2024, and filed its opening brief on September 16, 2024. Accordingly, the Highland Parties' response brief is due on October 16, 2024. There is no just reason to delay this briefing schedule, and certainly no grounds to indefinitely suspend briefing as the Highland Parties seek. The sole grounds the Highland Parties offer for suspending briefing is that HMIT also filed the Interlocutory Appeal and motion for interlocutory review of the Order. However, the Interlocutory Appeal (as well as the Writ Petition) were filed in the alternative

in the event the Order was not deemed final and appealable. In any event, because the Order is final and appealable, briefing should continue consistent with the Federal Rules of Bankruptcy Procedure.

The Highland Parties will not suffer any harm from having to timely file a response brief. On the other hand, HMIT continues to be prejudiced by the Highland Parties' delay tactics. The Order that HMIT appeals requires entry of a final, non-appealable order in two separate matters (the Valuation Proceeding and the Claims Trading Proceeding) before the indefinite stay is lifted. Once the pending appeals of these matters wind their way through the appellate courts (and potentially beyond, if any proceedings are necessary on remand),²² the Claimant Trust will, by its terms, be dissolved and Seery's duties as Claimant Trustee complete.²³ This means there will be no merits in the Delaware Complaint left to litigate by the time the bankruptcy court addresses the merits of HMIT's Motion for Leave. The longer the

²² See Case No. 24-cv-01912-E, Dkt. 1, at p. 20, Chart A-1: Demonstrating Actual Timing from Appeal of Bankruptcy Court Order to Fifth Circuit Judgment, of which the Court can take judicial notice.

²³ Under the Claimant Trust Agreement, the Claimant Trust is to be dissolved no "later than three years from the Effective Date unless the Bankruptcy Court, upon motion made within the six-month period before such third anniversary . . . determines that a fixed period extension (not to exceed two years, together with any prior extensions) is necessary[.]" The Court entered an order confirming this provision of the Claimant Trust Agreement. See Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief ("**Plan Confirmation**") § IV.B.14 (App. 000713-714). The three-year period expired on August 11, 2024. On July 1, 2024, Highland moved to extend the term of the Claimant Trust until August 11, 2025. See Amended Motion for an Order Extending Duration of Trusts, in Bankr. Case No. 19-34054, at Dkt. 4109, of which the Court can take judicial notice, and the bankruptcy court granted the motion at Dkt. 4144.

Highland Parties delay resolution of this appeal, the more likely this highly prejudicial outcome will come to pass. Additionally, if the Highland Parties continue to delay resolution of this appeal, assets of the Claimant Trust will continue to be dissipated to the detriment of HMIT. Therefore, the Court should deny the Motion and compel the Highland Parties to file a response brief on the schedule required by the Federal Rules of Bankruptcy Procedure.

IV. CONCLUSION

The Order is final and directly reviewable by this Court. HMIT timely filed its opening brief on appeal, and the Highland Parties should timely file their response brief. The Highland Parties established no cause to indefinitely suspend briefing of the appeal, and their Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 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

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. Bank. P. 8013(f)(3)(A) because this document contains 2,502 words.
2. This document complies with the typeface requirements of Fed. R. Bank. P. 8015(a)(5) and the type-style requirements of Fed. R. Bankr. P. 8015 (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word, typeface Times New Roman, 14-point type (footnotes in 12-point type).

/s/ Deborah Deitsch-Perez