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

In re: **HIGHLAND CAPITAL MANAGEMENT, L.P.** **Debtor.**	§ § § § § § §	**Chapter 11** **Case No. 19-34054-sgj11**
Charitable DAF Fund, L.P. **Plaintiff,** **v.** **Alvarez & Marsal CRF Management, LLC** **Defendant.**	§ § § § § § § § § §	**Adversary Proceeding No. 24-03073**

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RESPONSE TO MOTION TO DISMISS

Plaintiff, Charitable DAF Fund, L.P. ("DAF"), files this Response ("Response") to Defendant Alvarez & Marsal CRF Management, LLC's Motion to Dismiss for Lack of Standing and Judgment on the Pleadings [Doc. 8] and Brief in Support [Doc. 9] ("Motion"), and would respectfully show:

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INTRODUCTION

A&M's Motion to Dismiss to Dismiss for Lack of Standing and Judgment on the Pleadings under Rule 7012 for Failure to State a Claim [Doc. 8] and Brief in Support [Doc. 9] ("**Motion**") is misguided and lacks merit. DAF has asserted a direct breach of informal fiduciary duty claim under Texas law. As a result, neither Bankruptcy Rule 7023.1, nor Federal Rule 23.1, nor Bermuda law applies here. A&M's Motion should be denied.

FACTS & BACKGROUND

On or about June 30, 2016, DAF purchased shares in the Highland Crusader Fund II, Ltd. ("**Crusader Fund II**")[1] from the Promethee T Fund (formerly known as Promethee Tremont Fund) ("**Promethee**") for in excess of $1.0 million ("**DAF's Direct Interest**").[2]

A&M is the investment manager of the Crusader Fund II and has been so at all times relevant to the claims asserted in this lawsuit.[3] As the investment manager, A&M receives payment from the Crusader Fund II for A&M's management services.[4]

On or about July 12, 2021, A&M informed DAF that DAF's Direct Interest "will not exist as of June 30 NAV."[5] A&M then refused to make distributions to DAF and treated DAF's Direct Interest as having been extinguished.[6]

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[1] Crusader Fund II is part of an investment scheme with an "Onshore Fund," an "Offshore Fund" (Crusader Fund II), and a "Master Fund," which is collectively referred to as the "**Crusader Funds**."
[2] Plaintiff's Second Amended Petition [Doc. 1-4, pp. 365-381] ("**SAP**"), ¶ 8.
[3] SAP, ¶ 10.
[4] SAP, ¶ 10.
[5] SAP, ¶ 11. NAV stands for Net Asset Value.
[6] SAP, ¶ 11.

DAF previously made a written demand to A&M, through A&M's legal counsel, for payment to DAF of the full value of DAF's Direct Interest, plus all related distributions and other withholdings owed to DAF in regard to DAF's Direct Interest ("**DAF's Full Direct Interest**").[7] A&M initially refused to comply with this demand and did so wrongfully without legal justification.[8] In doing so, A&M deprived DAF of DAF's access to and right to possess and use DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest.[9] In short, A&M deprived DAF of DAF's property without any legal basis or justification.[10] A&M's refusal to distribute DAF's Direct Interest despite DAF's demand shows that A&M's breach was intentional.

A&M's actions deprived DAF of the use of its funds, including DAF's ability to earn profits on such funds to promote charitable causes, for the time period when A&M improperly exercised control over and withheld distributions—and, upon information and belief, while A&M continued to charge additional fees based on an inflated value of the Crusader Fund II due to A&M's failure to make timely distributions to DAF.[11]

A&M controlled and managed funds in which DAF had a direct interest, and, by doing so, A&M entered into an informal confidential and special relationship with DAF.[12] As the purported "investment manager" of DAF's Direct Interest, DAF placed trust and

[7] SAP, ¶ 12.
[8] SAP, ¶ 12.
[9] SAP, ¶ 12.
[10] SAP, ¶ 12.
[11] SAP, ¶ 13.
[12] SAP, ¶ 15.

confidence in A&M to control, manage, and distribute DAF's Direct Interest.[13] DAF's damages arise out of A&M's refusal to recognize DAF's right to control DAF's Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, and A&M's decision, instead, to unlawfully withhold these funds, and to segregate them from the remainder of the Crusader Fund, even though they should have been distributed to DAF.[14]

Although A&M subsequently made distributions to DAF and has agreed to reinstate DAF as a limited partner, DAF continues to seek an accounting to verify the accuracy of the distributions.[15]

The distribution that A&M originally sought to withhold from DAF—by cancelling DAF's Direct Interest before the distribution could occur—was the monetization of bankruptcy claims held by the Redeemer Committee and the Crusader Funds against Highland Capital Management, L.P.'s estate (Claim Nos. 72 and 81) (the "**Claims**").[16] A motion to approve the settlement Claims was filed in the bankruptcy court by HCM [Dkt. 1089] ("**Settlement Motion**"), which confirms that A&M allowed the Redeemer Committee to control negotiations concerning funds to which the Crusader Funds asserted entitlement.[17]

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[13] SAP, ¶ 15.
[14] SAP, ¶ 15.
[15] *See* SAP, ¶¶ 16, 33.
[16] SAP, ¶¶ 20, 25.
[17] SAP, ¶ 21.

These Claims were based upon the same arbitration award that A&M attempted to use to justify its cancellation of DAF's Direct Interest.[18] It is apparent that throughout these negotiations, A&M was already operating as though DAF's Direct Interest had been cancelled—A&M simply kept DAF in the dark until after the Claims were monetized.[19] A&M's decision to keep DAF in the dark was a deliberate choice designed to prevent DAF from raising any concerns with the way claims were being monetized—to freeze DAF out of the proceeds. There can be no other inference that the Claims were monetized in a manner to harm DAF given the conspicuous timing between the July 6 announcement of the distribution and the July 12 email informing DAF that its Direct Interest "will not exist."[20]

Additionally, A&M's conduct in facilitating the sale of the Claims shows not only that A&M's breaches of duties with respect to DAF's Direct Interest stretch back before DAF was formally notified that its interest had been segregated by A&M from the rest of the Crusader Fund, but also malice warranting exemplary damages.[21]

A&M's conduct demonstrates the deliberate, intentional, and malicious intent to harm DAF. It is undisputed that the distribution of the proceeds from the sale of the Claims was made when DAF's Direct Interest was treated as cancelled. A&M issued a

[18] SAP, ¶¶ 18, 20.
[19] SAP, ¶ 25.
[20] SAP, ¶ 11.
[21] SAP, ¶¶ 32, 34.

letter to investors regarding a major distribution of cash, but did not tell DAF that DAF would not receive a cent until *after* the Claims were monetized and the letter was issued. At the time this lawsuit was filed, DAF was, in A&M's view, not a limited partner—the partnership agreement specifying Bermuda law did not apply. It was not until after suit was filed that A&M changed course and decided to reinstate DAF as a limited partner.[22]

A&M acknowledges DAF "makes no attempt to characterize its claim … as a derivative claim."[23] Indeed, DAF's references to other shareholders in the Crusader Fund are analogies to how DAF should have been treated by A&M as an investment manager holding and managing DAF's Direct Interest.

In sum, under Fifth Circuit precedent—and accepting DAF's allegations as true and drawing all reasonable inferences in favor of DAF—DAF has sufficiently alleged a factually and legally adequate claim for breach of fiduciary duties against investment manager A&M based, without limitation, on A&M's retroactive cancellation of DAF's Direct Interest, abdication of its duties to manage the Crusader Fund II's assets regarding the sale of the Claims, and deprivation by A&M of timely and maximized distributions to which DAF was entitled, which caused DAF to be damaged in manners for which DAF has not been compensated, and DAF has standing to assert its breach of fiduciary duty claims under the applicable law. A&M's Motion falls far short of meeting its burden, and

[22] SAP, ¶ 16.
[23] Motion, at 5.

it should be denied. Alternatively, in the unlikely event the Court concludes A&M's Motion should be granted (which DAF asserts it should not do on this record), DAF requests leave to amend its current pleading to address any related issues.

ARGUMENTS & AUTHORITIES

A. Standard of Review.

12(c) motions are disfavored and rarely granted in the Fifth Circuit. *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. 1981) "The standard for dismissal under Rule 12(c) is the same as that for dismissal for failure to state a claim under Rule 12(b)(6)." *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004). The court must accept the allegations contained in the non-movant's pleading as true and draw all reasonable inferences in favor of the non-moving party. *Id*. "Thus, the 'inquiry focuses on the allegations in the pleadings' and not on whether the 'plaintiff actually has sufficient evidence to succeed on the merits.'" *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 209 (5th Cir. 2009). Rule 8 "requires only a 'short and plain statement of the claim.'" *Johnson*, 385 F.3d at 529.

"Plausibility is not akin to probability, but instead, 'it asks for more than a sheer possibility that a defendant has acted unlawfully.'" *Vardeman v. City of Hous.*, 55 F.4th 1045, 1050 (5th Cir. 2022) (quoting *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019)). "All questions of fact and any ambiguities in the current controlling substantive law ***must*** be resolved in the plaintiff's favor." *Id.* (quoting *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001)). "[A] 'well pleaded complaint may proceed even if it appears

that a recovery is very remote and unlikely.'" *Walker* 938 F.3d at 735 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

B. DAF's breach of informal fiduciary duty claim is a direct claim that arises under Texas common law.

Texas law recognizes the potential for the existence of an informal fiduciary duty between an investor and a fund manager. *See Mary E. Bivins Found. v. Highland Capital Mgmt. L.P.*, 451 S.W.3d 104, 113-14 (Tex. App.—Dallas 2014, no pet.). In *Bivins*, the court expressly distinguished "fiduciary duties [owed directly] to the corporations they serve" from "fiduciary duties to individual shareholders [that do not exist] unless a contract or special relationship exists between them." *Id.* at 113. Although the *Bivins* court ultimately found that an informal fiduciary duty did not exist under the facts of that case, the facts here are significantly different.

The plaintiff in *Bivins* "did not present any evidence that it had an informal trust or confidential relationship with [the fund manager or its] Officers or received direct investment advice from [them] that would give rise to a fiduciary duty." *Id.* at 114. Here, DAF has alleged (and discovery will show)[24] that A&M extricated itself from any existing

[24] A&M's refusal to comply with the state judge's discovery orders has deprived DAF of *all* discovery to this point. Even the Investment Management Agreement for the Crusader Funds was not provided to DAF until A&M attached it as a sealed exhibit to its Motion.

contractual relationship with DAF by holding on to DAF's funds separate and apart from the remainder of the Crusader Fund and, in doing so, "assumed *independent* fiduciary duties to DAF"[25] to manage those funds as a prudent investment manager would.[26]

A&M cherry-picks soundbites from the Second Amended Petition in an effort to mischaracterize DAF's claim into one that A&M deems derivative, However, A&M ignores a gravamen of DAF's claim, which is that that A&M acted expressly to harm *DAF directly and specially—i.e.*, in anticipation of cancelling DAF's interest and while DAF's interest was treated as cancelled. It is undisputed that A&M informed investors of the sale of the Claims on July 6, 2021, and then retroactively cancelled DAF's interest in the Crusader Fund, effective as of June 30, 2021, so that DAF would not participate in the proceeds.[27] A&M segregated DAF's funds from Crusader Fund II, and assumed responsibility for managing DAF's assets. DAF trusted A&M to manage DAF's Direct Interest prudently, not to time the sale of the Claims and related distribution to freeze out DAF (or allow the Redeemer Committee to control negotiations, thereby minimizing DAF's recovery on its Direct Interest). A&M cannot escape liability by ignoring the relationship between the parties, disclaiming any responsibility under tort law, and then attempting use its effective admission of breach of duties by making principal payments long past due (though not making DAF whole by any means) as a defensive matter.

[25] SAP, ¶ 31 (emphasis added).
[26] For this reason, A&M's reliance on the Investment Management Agreement is also inapposite.
[27] SAP, ¶¶ 11, 25.

As A&M's case law acknowledges, "a direct claim must 'allege a "special injury" distinct from that suffered by other shareholders or a wrong involving one of his contractual rights as a shareholder.'"[28] DAF's allegations establish that *both* of these prongs are present here. No other shareholder had its interest wrongfully cancelled. The claims were not monetized when they were or in a manner designed to injure any other shareholder other than DAF.

Rule 23.1 itself reveals why it does not apply to this case. The first allegation required is "that the plaintiff was a shareholder or member *at the time of the transaction complained of*, or that the plaintiff's share or membership *later* devolved on it by operation of law." Fed. R. Civ. P. 23.1(b). That is precisely the opposite of what happened in this case. At the time of the transaction—the announcement of the sale and the distribution of the proceeds—DAF's interest was treated as *cancelled*.

For these reasons alone, but without limitation, A&M's reliance on Rule 7023.1 and Bermuda law is misplaced.

C. DAF has adequately stated a claim for breach of fiduciary duty even if, in the alternative and for the sake of argument only, Bermuda law applies because A&M's alleged conduct rises to the level of bad faith.

Rule 23.1 does not provide the substantive law governing the case as a whole, only "the particularity of [a p]laintiff's pleadings" with respect to *derivative* standing. *Dela Cruz v. Reid-Anderson*, 711 F. Supp. 3d 642, 645-46 (N.D. Tex. 2024); *see also* Tex. Bus. Orgs. Code

[28] Motion, at 3.

§ 1.012 (providing governing law for *internal* disputes; it is undisputed that DAF has no interest in A&M or *vice versa*). A&M has provided no argument or authority for the purported application of Bermuda law to this claim outside the context of the particularized pleading elements under Rule 7023.1. Because this is not a derivative case, Bermuda law has no import.

For the reasons discussed above—namely the fact that DAF seeks to impose liability based on independent duties owed as a result of A&M's cancellation and segregation of DAF's Direct Interest from the remainder of the Crusader Funds—A&M's reliance on the Investment Management Agreement ("**IMA**") in an effort to retroactively justify A&M's wrongful actions is also misplaced.[29]

In any event, in the alternative, and for the sake of argument only while continuing to deny that Bermuda law applies, A&M's intentional decision to withhold a nearly $1

[29] To take it yet a step further, even if the IMA applied, for the sake of argument only and without admitting the same, it contains no provision allowing A&M the ability to "delegate" investment management responsibilities to the Redeemer Committee. § 1(b) is a delegation of authority *from the Crusader Fund to A&M* and solely to the extent necessary to perform *A&M's duties* as investment manager. *See* § 1(c) ("For the avoidance of doubt, all rights, powers and obligations of the Company in its capacity as general partner of the Onshore Fund and the Master Fund that are not delegated to the Investment Manager by the terms of this Agreement shall remain the rights, powers and obligations of the Company."); § 2(a) ("the wind down of the investment program of the [Crusader Funds] *shall* be conducted by the Investment Manager … [which shall] provide qualified individuals to serve as directors, officers and managers …" (emphasis added)); § 2(b) (specifying limited authority of the investment manager); § 2(c) ("The Investment Manager *shall* serve as the investment manager … The power and authority granted to the Investment Manager under this Agreement shall include, but not be limited to, the authority to: … (ix) liquidate any and all of the assets of the Crusader Funds, and provide for distribution of any economic value …" (emphasis added)). While § 2(c)(vii) does grant A&M the authority to "engage *third party* professionals or advisers … to assist the Investment Manager with discharging its responsibilities," this grant of authority is expressly limited by its terms to third parties. To the extent the IMA is relevant at all, it is relevant only to the types of informal fiduciary duties DAF should have expected of A&M when A&M unknowingly segregated DAF's Direct Interest from the remainder of the Crusader Fund.

million distribution (more so considering subsequent distributions A&M has now made) from DAF and no other shareholder constitutes a breach of fiduciary duty under any analysis, including the duty of loyalty, and the decision to single out DAF in such a way constitutes malice supporting an award of exemplary damages. *See McCullough v. Scarbrough, Medlin & Assocs.*, 435 S.W.3d 871, 902, 911 (Tex. App.—Dallas 2014, pet. denied) (failure to properly account for and distribute company's income supported breach of fiduciary duty); *Priority One Title, LLC v. Andrado*, No. 14-21-00379-CV, 2023 Tex. App. LEXIS 1260, at *21 (Tex. App.—Houston [14th Dist.] Feb. 28, 2023, no pet. h.) ("'Malice' means the 'specific intent by the defendant to cause substantial injury or harm to the claimant.'").

Because proof of malice requires meeting a higher standard than would be required for bad faith, Bermuda law's supposed bad faith requirement imposes no greater burden on DAF than Texas law. *See Green Int'l v. Solis*, 951 S.W.2d 384, 391 (Tex. 1997) ("To establish malicious conversion, the plaintiff must show more than bad faith and wrongful conduct; the plaintiff must show that the wrongful act was of a 'wanton and malicious nature.'"). DAF's Second Amended Petition plausibly alleges A&M committed a malicious breach of fiduciary duty by intentionally depriving DAF of millions of dollars;[30] accordingly, A&M's contention that DAF's fiduciary duty claim should be dismissed for failure to rise to the level of bad faith should be rejected.

[30] SAP ¶¶ 11, 19, 25, 30-32, 34.

D. Leave to Replead.

"'[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal.'" *Guardian Flight LLC v. Health Care Serv. Corp.*, 735 F. Supp. 3d 742, 754 (N.D. Tex. 2024) (quoting *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002)). "District courts give plaintiffs leave to amend their complaints 'when justice so requires.'" *Id.* "When deciding whether to grant leave to amend, district courts consider the following factors: 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment.'" *Id.* (quoting *Jacobsen v. Osborne*, 133 F.3d 315, 318 (5th Cir. 1998) (citations and emphasis omitted)).

Here, the only issue raised by A&M is the incorrect claim that DAF's fiduciary duty claim is derivative in nature. As a result, in the alternative, and to the extent it necessary, if at all, DAF requests leave to amend the Second Amended Petition to clarify that DAF alleges a direct claim with direct damages experienced only by DAF (because, as mentioned above, only DAF's interest was cancelled and the claims were monetized in such a way to exclude only DAF) and to otherwise address any issues raised by A&M, in the unlikely event it is determined by the Court to be necessary. Although DAF has

previously amended its petition, the particular allegations challenged in A&M's Motion were raised for the first time in DAF's Second Amended Petition. Thus, DAF has not had the opportunity to amend the allegations at issue. DAF's Second Amended Petition was timely filed in state court,[31] and was filed according to Texas state pleading rules, not federal pleading rules.

Finally, DAF's amendment will not be futile. As shown above, Texas law recognizes informal fiduciary duties including between an investor and an investment manager (which A&M does not dispute). *See Bivens*, 451 S.W.3d at 113-14. DAF should be afforded an opportunity to replead. *See Meyer v. Coffey*, 231 F. Supp. 3d 137, 152 (N.D. Tex. 2017) (granting leave to replead despite prior amendments because the defendants never challenged "whether [the prior] pleadings sufficiently state[d] a claim on which relief [could] be granted"); *Vandelay Hosp. Grp. LP v. Cincinnati Ins. Co.*, Civil Action No. 3:20-CV-1348-D, 2020 U.S. Dist. LEXIS 185581, at *6 (N.D. Tex. 2020) (granting leave to replead under federal pleading standards where the challenged petition was filed "under the Texas pleading rules that applied before the case was removed").

PRAYER

For the foregoing reasons, DAF respectfully requests the Court deny A&M's Motion in full, or, in the alternative, grant DAF leave to replead, and grant DAF all such

[31] Agreed Order Granting Amended Agreed Motion for Continuance and Entry of Amended Scheduling Order [Doc. 1-4, at 331].

other and further relief to which it may be justly entitled, general or special, in law or in equity.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On February 11, 2025, I filed the foregoing document with the clerk of court for the U.S. Bankruptcy Court, Northern District of Texas. I hereby certify that I have served the document on all counsel and/or pro se parties of record by a manner authorized by Federal Rules of Civil Procedure 5 (b)(2).

/s/ Ian B. Salzer
Ian B. Salzer