Case No. 3:21-cv-00261-L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In the Matter of: Highland Capital Management, L.P.,

Debtor.

THE DUGABOY INVESTMENT TRUST AND
GET GOOD TRUST

(Appellants)

v.

HIGHLAND CAPITAL MANAGEMENT LP

(Appellee)

On appeal from the United States Bankruptcy Court for the Northern District of Texas, Dallas Division

APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO DISMISS APPEAL AS MOOT

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Introduction and Background

Appellants, Dugaboy Investment Trust ("Dugaboy") and the Get Good Trust ("Get Good"), in accordance with Federal Rule of Bankruptcy Procedure 8013 and Local Rule 7.1, respectfully file this Response to Appellee's Motion to Dismiss Appeal as Constitutionally Moot. Although Appellants may have dismissed their direct prepetition claims against the Debtor, Highland Capital Management, L.P. (the "Debtor" or "Highland"), Dugaboy still holds a pecuniary interest in this matter through its equity interest in the pre-confirmation Debtor and its interest in the Claimant Trust formed under the Plan of Reorganization.[1] Regardless of the cancellation of the equity in the Debtor as of the effective date of the Plan, Dugaboy still has a contingent interest in that if HarbourVest's claim were to be reduced to zero—as the Debtor initially claimed it should have been before reversing its position in the settlement—that would increase the funds available for payments under the Plan, including to former equity holders. Furthermore, Dugaboy has standing under 11 U.S.C. § 1109(b), which grants the right to be heard on *any* issue in a case under chapter 11 of the Bankruptcy Code to *any* party in interest. Lastly, the approval of the HarbourVest Settlement allowed the confirmation of the Plan of Reorganization as the HarbourVest Settlement specifically provided that one of the conditions in the settlement was that

[1] The Appellants concede that due to the dismissal of Get Good's claim and the lack of an ownership interest in any of the non-debtor affiliates or the Debtor, it has lost standing and consents to the dismissal of Get Good **only**.

HarbourVest would vote in favor of the Plan.[2] Without HarbourVest's vote, the Plan would not have been confirmed.[3]

This Court has the duty to review the HarbourVest Settlement as it has a direct effect on the Plan of Reorganization and, more importantly for Dugaboy's standing, a direct effect on its contingent recovery under the Plan.

A. Dugaboy has a Direct Pecuniary Interest in the HarbourVest Settlement

The Plan, as confirmed, created a Claimant Trust,[4] which created contingent trust interest beneficiaries.[5] The contingent trust beneficiaries consisted of all equity holders in the Debtor, including Dugaboy, and will pay only if the Claimant Trust first pays all creditors in full.[6] As such, Dugaboy has a pecuniary interest in this matter as the HarbourVest Settlement directly affected the amounts payable to creditors ahead of equity holders. Without HarbourVest's $80 million in claims granted under the HarbourVest Settlement, Dugaboy's recovery would be much more likely.

[2] Section 5 of HarbourVest Settlement, ROA, Vol. 1, p. 17.

[3] In fact, one of the bases for the Appellants' objection in the first place was that the HarbourVest Settlement constitutes an impermissible vote buying arrangement.

[4] Section IV.B of the Fifth Amended Plan of Reorganization. [Bankr. Dkt. No. 1472, p. 31].

[5] Claimant Trust Agreement, Exhibit R to Plan of Reorganization, Section 5.1(c). [Bankr. Dkt. No. 1811-2].

[6] *Id.*

B. The HarbourVest Settlement Is Essential to Plan Effectiveness

Under the terms of the HarbourVest Settlement, all HarbourVest entities who were party to the settlement were required to vote their claims in support of the Plan.[7] Under the HarbourVest Settlement, HarbourVest was granted a $45 million general unsecured claim and a $35 million subordinated claim.[8] These amounts constitute a substantial portion of the unsecured and subordinated claims and HarbourVest's required support was essential to approval from those classes.

Law and Argument

A. Person Aggrieved Test

Contrary to the Debtor's assertions, the "person aggrieved" test is a prudential test established to prevent a multitude of appeals of questionable interest given the potentially large number of parties in a bankruptcy proceeding: "courts have created an additional *prudential* standing requirement in bankruptcy cases: The appellant must be a 'person aggrieved' by the bankruptcy court's order." *In re Coho Energy Inc.*, 395 F.3d 198, 202 (5th Cir. 2004) (emphasis added) (*quoting In re P.R.T.C.*, 177 F.3d 774, 777 (9th Cir. 1999)). The Constitution only requires a "case or controversy" which, for appellate purposes, only requires that the alleged harm be "fairly traceable" to the act complained of. *See id*. at 202. In other words,

[7] Section 5 of HarbourVest Settlement, ROA, Vol. 1, p. 17.

[8] Section 1 of HarbourVest Settlement, ROA, Vol. 1, p. 15.

because the "person aggrieved" test is not a Constitutional test or limitation, a dismissal for lack of Constitutional standing is not required.

Like any prudential rule, the test is not absolute: "[r]ules of prudential standing, by contrast, are more flexible." *United States v. Windsor*, 570 U.S. 744, 757 (2013). This is so especially because of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Nor does the Supreme Court appear to have ever endorsed the "person aggrieved" test. Thus, while the Fifth Circuit unquestionably applies the "person aggrieved" standard for bankruptcy appeals, it is not an inflexible doctrine.

Indeed, even in bankruptcy appeals under the "person aggrieved" standard, "[t]his Court uses a permissive standard to assess the actuality of the harm alleged by appellant for the purpose of standing." *In re Coho Energy Inc.*, 395 F.3d at 202. Yes, it is important not to clutter the appellate courts with appeals of orders under which a party may only have a tangential interest, but it is also important not to close the doors of appellate courts to legitimate appeals. After all, Dugaboy clearly had standing below, participated in an evidentiary hearing, had its objections overruled, and now should have the ability to appeal.

This is all the more important when one considers the jurisdictional framework of the Bankruptcy Court. The "person aggrieved" test has its roots in

the Bankruptcy Act, where Congress, in enacting the Act, also specified who had standing to appeal an order of a bankruptcy referee. *See, e.g., Palmaz Sci. Inc. v. Vactronix Sci. Inc.*, 262 F. Supp. 3d 428, 432 (W.D. Tex. 2017). No such provision appears in the Bankruptcy Code; yet the Fifth Circuit continues to apply the test. *See id*. At the same time, however, the Bankruptcy Code greatly expanded bankruptcy jurisdiction from what it was under the Bankruptcy Act and conferred that jurisdiction on the bankruptcy courts. This was the system that the Supreme Court ruled unconstitutional for violating Article III in *Northern Pipeline v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). What followed was a carefully crafted compromise that balanced the interests of Congress under Article I and the interests of the Judiciary under Article III, where bankruptcy jurisdiction is conferred on the district courts and bankruptcy courts exercise that jurisdiction through a reference.

The point is, because the Bankruptcy Court exercises this Court's jurisdiction, this Court must have a significant role in ensuring that the results of the exercise of that jurisdiction are correct; much more so than an appellate court has a mandate to ensure that a trial court did not commit reversible error. The whole reason why the Supreme Court has affirmed the present bankruptcy jurisdictional and judgeship scheme is because "the entire process takes place under the district court's total control and jurisdiction . . . So long as those judges

are subject to control by the Article III courts, their work poses no threat to the separation of powers." *Wellness Int'l Network Ltd. v. Sharif*, 575 U.S. 665, 679 & 681 (2015). As one respected bankruptcy judge wrote in recognizing his jurisdictional and Constitutional limitations:

> If I were to deny access to a district judge for Article III consideration . . . such a ruling would impair Article III judges' ability to exercise the control over the bankruptcy system that was such an important premise in *Wellness*. Depriving an Article III judge of the ability to exercise that control would raise substantial constitutional issues, as 'the power of the federal judiciary to take jurisdiction,' upon which the *Wellness* holding was so heavily based, would no longer remain in place.

In re Motors Liquidation Co., 536 B.R. 54, 60 (Bankr. S.D.N.Y. 2015). *Accord In re City of Detroit*, 838 F.3d 792, 806 (6th Cir. 2016) ("Article III supervision of bankruptcy judges is key to the constitutionality of the bankruptcy-court system").

Indeed, the Supreme Court has held the following with respect to the role that this Court plays:

> Article III judges control and supervise the bankruptcy court's determinations. . . Any party may appeal those determinations to the federal district court, where the federal judge will review all determinations of fact for clear error and will review all determinations of law de novo.

Stern v. Marshall, 564 U.S. 462, 515 (2011). The "person aggrieved" test conflicts with these important Constitutional provisions and protections—under that test, it is not that "[a]ny party may appeal . . . all determinations" of the Bankruptcy Code.

If the rulings of a bankruptcy court were insulated from Article III review, such as what the Debtor seeks to do here, then the whole careful post-*Marathon* structure fails because the bankruptcy courts will be able to effectively insulate their rulings from the Article III judiciary. Or, perhaps it is the circuit courts that should employ the "person aggrieved" test while the district courts have unfettered ability to review bankruptcy orders, since otherwise the Bankruptcy Court would not be under the "district court's total control and jurisdiction."[9]

Thus, as the Court applies the prudential "person aggrieved" test, the Court should do so in the context of this Court's important role to supervise the Bankruptcy Court by ensuring that its orders are properly reviewed and not insulated from that review. For, if this Court is *precluded* from reviewing a final order of its Article I adjunct, then a Constitutional issue will necessarily arise.

B. Dugaboy Meets the Person Aggrieved Test

The "person aggrieved" test requires that the appellant show that it is directly and adversely affected pecuniarily by the order of the bankruptcy court.[10] The Debtor relies, primarily, on *Matter of Technicool Sys., Inc.*, 896 F.3d 382 (5th Cir. 2018), which denied standing to the debtor's owner, Robert Furlough, who's complained grievance was that the same firm who represented one of the estate's

[9] The Appellants therefore challenge the "person aggrieved" test, at least as it applies to this Court. They recognize that the test is presently the law in this District and this Circuit, but they do not concede its correctness and reserve all rights to question the test.

[10] *See, Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy, Inc.)*, 395 F.3d 198, 202–03 (5th Cir. 2004).

creditors was also representing the estate's chapter 7 trustee in its effort to consolidate claims and pierce the corporate veil against several of the owner's other non-debtor companies. The principal argument asserted by Furlough was that the firm may fail to disclose problems with the creditor's claims against the estate on account of its dual representation, which could harm the overall recovery to the unsecured creditors, which, in turn, would harm any potential recovery to him, as an equity holder.[11] The Fifth Circuit found this too tenuous and stated that while that scenario was a possibility, "it would not be a direct result of this appeal."[12]

The same cannot be said in the instant matter. The harm visited upon Dugaboy (as an equity holder) is that its potential for recovery has *actually* been reduced through the HarbourVest Settlement. It is not that there is some possible conflict that may prevent counsel from pursuing the full extent of claims. In this case, there is an actual granting of $80 million in both general unsecured and subordinated claims that actually reduces the amount of cash available to pay equity holders.

[11] *Id.* at 386.

[12] *Id.*

C. Standing Under Section 1109

This is a Chapter 11 case. With respect to Chapter 11 cases, the Bankruptcy Code provides:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b).[13]

These are broad, Congressionally mandated, rules of standing. *See Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1286 (5th Cir. 1985) (construing section 1109(b) to codify "broad rights" to appear and to be heard). As Congress created the Bankruptcy Code, it has the right to limit or grant standing as it decides, consistent with the Constitution. And, as noted above, whereas the Bankruptcy Act imposed the "person aggrieved" test to bankruptcy appeals, the Bankruptcy Code contains no such limitation and, in fact, contains the broad grant of standing in section 1109(b).

The District Court for the Eastern District of Texas reviewed this statute in detail, concluding that it confers standing on parties-in-interest in Chapter 11 cases regarding confirmation orders in the underlying bankruptcy case and on appeal:

[13] Dugaboy, as an equity holder, defendant to multiple actions commenced by the Debtor, and a party enjoined under the Plan is a "party-in-interest."

> The plain language of that provision gives the Committee an expansive right of participation in the resolution of issues arising in bankruptcy cases. Because the questions raised in this appeal obviously qualify as 'issues' in this case, and because this case does not cease being a 'case under Chapter 11' merely because appellate jurisdiction has been invoked, there is no apparent reason why the Committee should not be 'heard' in this appeal under § 1109(b). Nothing in that provision, for example, suggests that its broad right to appear and be heard is inapplicable to proceedings held before an appellate court.
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> * * *
>
> The Committee fully participated in the confirmation hearing before the bankruptcy court and had a clear right to do so under the Bankruptcy Code. The court is aware of no reason why the Committee cannot continue to exercise its right to appear and be heard now that the bankruptcy court's confirmation order is being challenged on appeal. On the contrary, the Committee's attempt to exercise that right by filing an appellee's brief is consistent with § 1109(b).

Southern Pac. Transp. Co. v. Voluntary Purchasing Groups, 227 B.R. 788, 792-93 (E.D. Tex. 1998). *Accord In re Casco Bay Lines Inc.*, 12 B.R. 18, 20 n. 2 (B.A.P. 1st Cir. 1981). Indeed, that court noted that section 1109(a), unlike section 1109(b), limits the right of the SEC to appeal a bankruptcy court order, and concluded that the absence of a similar prohibition in section 1109(b) confirms that standing under section 1109(b) extends to appellate proceedings. *See id*. at 793.

The Fifth Circuit has not decided the issue of whether section 1109(b) confers appellate standing one way or the other.[14] However, it defies logic and due process that Congress would grant standing to participate in the bankruptcy process—and Dugaboy clearly had standing to contest the Debtor's underlying motion—but then to not grant standing to appeal the result. As argued above, this is all the more so because this Article III Court must have the ability to review the orders of the Article I Bankruptcy Court that exercises this Court's original jurisdiction.

D. Standing and Mootness are Not the Same

Appellee confuses standing with mootness of the underlying controversy. While related, they are not the same. As noted above and in Appellee's motion, in the bankruptcy context, standing is determined by the "person aggrieved" standard. Significantly, Appellee's arguments against standing are centered almost entirely around events that occurred *after* the hearing on the motion to compromise and *after* this appeal was filed. However, as the Appellee's own cases point out, "[s]tanding is determined as of the commencement of the suit." *Technicool Sys.*, 896 F.3d at 386, *quoting Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 458

[14] The Fifth Circuit has not limited the "person aggrieved" test to non-Chapter 11 cases. However, a review of the key "person aggrieved" test opinions demonstrate that they arose in Chapter 7 cases. The *Technicool Sys*. case relief on by the Debtor was a Chapter 7 case. *See In re Technicool Sys.*, 896 F.3d 382, 384 (5th Cir. 2018). As was *In re Dean*, also relied on by the Debtor. *See In re Dean*, 18 F.4th 842 (5th Cir. 2021).

(5th Cir. 2005). At the time of the HarbourVest Settlement, Dugaboy both had claims against the estate and had an equity interest in the Debtor. As such, Dugaboy had a justiciable interest in the HarbourVest Settlement.

Mootness, while related to standing in the sense that it also originates in Article III's case or controversy requirement, is slightly different.

> A case becomes moot, however, "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." "As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot."

Jamison v. Esurance Ins. Servs., Inc., No. 3:15-CV-2484-B, 2016 WL 320646, at *2 (N.D. Tex. Jan. 27, 2016) (emphasis added) *quoting Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161, 136 S.Ct. 663, 669 (2016).

In this case, Dugaboy has a concrete interest in the form of it being a contingent beneficiary of the Claimant Trust. The HarbourVest Settlement's award of $80 million in claims to HarbourVest ahead of Dugaboy has a concrete affect on Dugaboy's recovery. Appellee emphasizes that Dugaboy's equity was "infinitesimal" but that is not the standard. The standard is whether the interest is concrete, "however small." In this case, all equity holders in the Debtor, including Dugaboy, are included as contingent beneficiaries under the Claimant Trust. As such, they have a concrete interest in the outcome of this litigation.[15]

[15] Removing the $80 million in claims awarded to HarbourVest is $80 million less that the estate has to pay out before Dugaboy can collect on its equity.

Furthermore, this case cannot possibly be moot. If this Court were to reverse the order of the Bankruptcy Court, the HarbourVest Settlement would be undone and the parties would be returned to their previous positions. Specifically, there would be $80 million less in claims (a benefit to Dugaboy and the other unsecured and subordinated creditors) and HarbourVest and the Debtor would still need to resolve the underlying claims, potentially resulting in less (or no) liability for the Debtor. There is both a controversy and an available remedy.

Trying to draw a causal connection between standing and mootness, Appellee cites to *Goldin v. Bartholow* for support that this appeal is moot.[16] What Appellee fails to note from the *Goldin* case, however, is that when a case becomes moot *after* the judgment of the lower court has been rendered, "the general rule is still to vacate the judgment of the lower court and remand with instructions to dismiss the case as moot." *Goldin v. Bartholow*, 166 F.3d 710, 718 (5th Cir. 1999). If the underlying controversy is moot, that would require vacating the Bankruptcy Court's order confirming the HarbourVest Settlement, an outcome that surely the Appellee does not desire.

Appellee does not challenge that Dugaboy had standing when its objection to the motion to approve the HarbourVest Settlement was filed and when the present appeal was filed. Standing, as *Technicool Sys.* and *Jamison* teach us, is

[16] See Motion to Dismiss [Dkt. No. 33] at 8–9.

determined at the commencement of the proceeding. And to the extent that Appellee wants to declare that the entire controversy is mooted, that would require sending it back to the Bankruptcy Court.

A point that needs to be made with respect to the fact that the current circumstances upon which Appellee is relying did not exist at the time of Dugaboy's objection and, thus, were neither challenged nor considered at the Bankruptcy Court. Dugaboy is not clairvoyant nor omniscient. It cannot have been expected to anticipate what would happen after its objection. Had it known what the future would hold, it would have had the opportunity to argue that issue in front of the Bankruptcy Court. However, because the future had not yet happened, the issues were never raised and now, at the very least, these matters should be referred to the Bankruptcy Court as the court of first impression.

Conclusion

The Bankruptcy Court's Order approving the HarbourVest settlement directly harmed Dugaboy by harming its ability to recover under the Claimant Trust. The propriety of that order is what is on appeal to this Court. This is an actual and direct harm to Dugaboy as a former equity holder in the Debtor.

As such, Dugaboy respectfully requests that this Court deny the Motion to Dismiss Appeal as Constitutionally Moot as to Dugaboy and move forward with a

determination of whether the Bankruptcy Court's Order was proper in the first place.

CERTIFICATE OF COMPLIANCE

In compliance with Rules 8013(f), I hereby certify that this document complies with the type-volume limit of Fed. R. Bankr. P. 8013(f)(3) because this document contains 3451 words.

Dated January 20, 2022:

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CERTIFICATE OF SERVICE

I, Douglas S. Draper, hereby certify that on January 20, 2022, this Response was served electronically upon all parties registered to receive service in this case via the Court's CM/ECF system.

/s/ Douglas S. Draper
Douglas S. Draper