

Case No. 3:20-cv-03390-X

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

In re: Highland Capital Management, L.P.,
Reorganized Debtor.

JAMES DONDERO,

Appellant

v.

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

Appellees

On Appeal from the
United States Bankruptcy Court, Northern District of Texas, Dallas Division
Case No. 19-34054-sgj11 (Hon. Stacey G.C. Jernigan)

**APPELLEE'S REPLY TO APPELLANT'S OPPOSITION TO MOTION
TO DISMISS APPEAL AS CONSTITUTIONALLY MOOT**

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The above-captioned Appellee files this reply to the response filed by Appellant James Dondero (the “**Response**”) and in further support of its motion under Federal Rule of Bankruptcy Procedure 8013(a) for an order dismissing this appeal as constitutionally moot (the “**Motion**”).¹

James Dondero Is Not a “Person Aggrieved”

The Motion presents a straightforward legal issue: Is Mr. Dondero a “person aggrieved” because he is “directly and adversely affected pecuniarily” by the order approving the Acis Settlement under controlling Fifth Circuit law? The answer is “no,” despite the arguments set forth in the Response designed to distract the Court from this basic threshold issue. The Response fails to substantively address the limited standing of parties to appeal bankruptcy court orders articulated by the Fifth Circuit. Mr. Dondero incorrectly asserts that he is a “person aggrieved” solely because of the speculative outcome of the Adversary Proceeding (defined below) in which Mr. Dondero may potentially be liable to Highland for damages caused by his conduct. This argument does not meaningfully address, much less satisfy, the “stringent-yet-prudent standing requirement” consistently articulated by the Fifth Circuit with respect to bankruptcy appeals, which is more limited than appeals of orders made by Article III courts.²

¹ Capitalized but undefined terms have the meanings given to them in the Motion.

² *Furlough v. Cage (In re Technicool Sys.)*, 896 F.3d 382, 385 (5th Cir. 2018).

The Adversary Proceeding’s Potential Outcome Does Not Confer Standing on James Dondero

Mr. Dondero’s sole argument is that, as a defendant in the adversary proceeding commenced by Marc Kirschner, the Litigation Trustee of the Litigation Sub-Trust established under Appellee’s confirmed plan of reorganization (the “**Adversary Proceeding**”),³ Mr. Dondero is *potentially* on the hook for the amounts paid by Appellee in the Acis Settlement, among other things.⁴ But, as the Motion explains, the Fifth Circuit has consistently **rejected** the argument that potential or speculative harm may confer standing to appeal bankruptcy court orders, because “the speculative prospect of harm is far from a direct, adverse, pecuniary hit.”⁵ There is no judgment or order requiring Mr. Dondero to pay any amounts to Highland or holding Mr. Dondero liable for his misconduct, and there may never be one. In fact, the potential outcome of the entire Adversary Proceeding is entirely speculative and unknown; it cannot confer standing.

And even if dismissing Mr. Dondero’s appeal of the Acis Settlement affected his potential liability in the Adversary Proceeding, Mr. Dondero would still lack

³ See Bankr. Dkt. No. 2934, Adv. Dkt. No. 1 in Adv. Proc. No. 21-03076.

⁴ Response at 3-4.

⁵ *Technicool*, 896 F.3d at 386. See also *Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy, Inc.)*, 395 F.3d 198, 203 (5th Cir. 2004) (remote possibility of injury does not constitute injury under person-aggrieved test).

standing because courts have consistently held that potential litigation in another proceeding does not make an appellant a “person aggrieved” for standing purposes.⁶

Mr. Dondero’s only “interest” here is avoiding liability to Highland arising from his conduct with respect to Acis, among others, as alleged in the Adversary Proceeding. That’s not an interest protected by the Bankruptcy Code, and it does not confer standing to appeal here.

In re Gulf States Long Term Acute Care of Covington, L.L.C.,⁷ also does not help Mr. Dondero establish standing. In *Gulf States*, various parties appealed an order clarifying certain provisions in a chapter 11 plan that allowed the plan’s disbursing agent to sue certain entities. The plan precluded suits directly against appellants but allowed the disbursing agent to pursue actions against them indirectly

⁶ See *Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.)*, 764 F.3d 1321, 1326-27 (11th Cir. 2014) (holding a creditor’s interest was insufficient to confer standing when the creditor “comes to us merely as an adversary defendant with an interest in avoiding liability.... [A] party is not aggrieved, for the purposes of appealing from a bankruptcy court order, when the *only interest allegedly harmed by that order is the interest in avoiding liability from an adversary proceeding*”); *Advantage Healthplan, Inc. v. Potter*, 391 B.R. 521, 540 (D. D.C. 2008) (“courts have repeatedly held ‘that standing is precluded if the only interest in the bankruptcy court’s order that can be demonstrated is an interest as a potential defendant in [future litigation]. As such, the Court rejects [appellant’s] argument that the specter of possible litigation makes him a “person aggrieved” by the Settlement Approval Order’”) (quoting *Travelers Ins. Co. v. Porter*, 45 F.3d 737, 740 (3d Cir. 1995)), *aff’d*, 586 F.3d 1 (D.C. Cir. 2009); *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d. 441, 443 (9th Cir. 1983) (dismissing appeal for lack of standing where “appellant’s only demonstrable interest in the order is as a potential party defendant in an adversary proceeding”); *In re San Juan Hotel*, 809 F.2d 151, 155 (1st Cir. 1987) (affirming dismissal of appeal; appellant, “whose only interest or burden is as a future party defendant, does not qualify as an ‘aggrieved person’”).

⁷ 2014 U.S. Dist. LEXIS 13719 (E.D. La. 2014).

under theories of veil piercing and alter ego.⁸ The disbursing agent challenged appellants' standing on appeal arguing that their interests were too remote to confer standing because they could not be sued directly.⁹ The court disagreed, holding that appellants could be liable indirectly *because of the appealed order*.¹⁰ In other words, the appealed order *directly* affected their rights. That is not the case here. There is nothing in the order approving the Acis Settlement that affects Mr. Dondero's rights at all. Mr. Dondero's only "interest" in these appeals is avoiding his own potential liability under the pending Adversary Proceeding.¹¹

Conclusion

Mr. Dondero cannot satisfy the Fifth Circuit's "person aggrieved" standard required for standing in order to prosecute these appeals. This appeal is constitutionally moot and should be dismissed.

⁸ *Id.* at * 6-7.

⁹ *Id.* at *10.

¹⁰ *Id.* at *10-11.

¹¹ Other courts and circuits have adopted this same reasoning. *See Stark v. Moran (In re Moran)*, 566 F.3d 676, 681 (6th Cir. 2009) (shareholder's status "as a state-court defendant in a suit brought by a bankruptcy debtor is also not sufficient for standing. The interest [the appealing shareholder] has in avoiding a state-court lawsuit, or even in affecting who has the right to bring that suit, is not the sort of interest that bankruptcy law in general is designed to protect"); *Opportunity Fin. v. Kelley*, 822 F.3d 451, 459 (8th Cir. 2016) ("even if a bankruptcy order deprived a party of 'a defense that would otherwise been available to him,' it did not render the party aggrieved") (quoting *Ernie Haire Ford*, 764 F.3d at 1326-27).

Dated: February 18, 2022

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CERTIFICATE OF COMPLIANCE WITH RULE 8013

The undersigned hereby certifies that this Reply complies with the type-volume limitation set by Rule 8013(f)(3) of the Federal Rules of Bankruptcy Procedure because, excluding the parts of the document exempted by Rule 8015(g), this Reply contains 1,100 words.

/s/ Zachery Z. Annable

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CERTIFICATE OF SERVICE

I hereby certify that, on February 18, 2022, a true and correct copy of the foregoing Reply was served electronically upon all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

/s/ Zachery Z. Annable

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