

Case No. 22-10831

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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

The Dugaboy Investment Trust,
Appellant

v.

Highland Capital Management, L.P.,
Appellee

**RECORD EXCERPTS TO THE OPENING BRIEF OF
APPELLANT, THE DUGABOY INVESTMENT TRUST**

Appeal from the United States District Court for
The Northern District of Texas, Dallas Division,
Honorable Karen Gren Scholer; USDC No. 3:21-CV-2268

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TABLE OF CONTENTS

| <u>TAB #</u> | | <u>ROA</u> |
|---------------------|-------------------------------|--------------------------|
| 1 | Docket Sheet | ROA.10831.1-7 |
| 2 | Notice of Appeal | ROA.10831.1782-85 |
| 3 | Order Appealed | ROA.10831.1776-81 |
| 4 | Certificate of Service | |

TAB 1

APPEAL,BKAPP,CLOSED,TOLIVER

**U.S. District Court
Northern District of Texas (Dallas)
CIVIL DOCKET FOR CASE #: 3:21-cv-02268-S**

The Dugaboy Investment Trust et al v. Highland Capital
Management LP
Assigned to: Judge Karen Gren Scholer
Case in other court: BK Court, 19-34054-sgj11
USCA5, 22-10831
Cause: 28:0158 Notice of Appeal re Bankruptcy Matter (BA

Date Filed: 09/22/2021
Date Terminated: 08/08/2022
Jury Demand: None
Nature of Suit: 422 Bankruptcy: Appeal 28
USC 158
Jurisdiction: Federal Question

Debtor

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| Date Filed | # | Docket Text |
|------------|----------------|--|
| 09/22/2021 | <u>1 (p.8)</u> | Pursuant to Fed. R. Bankr. P. 8003(d), the bankruptcy clerk has transmitted the notice of appeal filed in <u>bankruptcy case</u> number 19-34054 and the notice of appeal has now been docketed in the district court in case 3:21-cv-2268. (The filing fee has been paid in the Bankruptcy Court.) Pursuant to <u>Fed. R. Bankr. P.</u> 8009, before the record on appeal can be assembled and filed in the district court, designations of |

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| | | <p>items to be included in the record on appeal and statements of issues must be filed in the bankruptcy case. If a sealed document is designated, the designating party must file a motion in the district court case for the document to be accepted under seal. See also <u>District Court Local Bankruptcy Rule</u> 8012.1. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms and Instructions found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Attachments: # <u>1 (p.8)</u> Notice of appeal and supporting documents) (Whitaker - TXNB, Sheniqua) (Entered: 09/22/2021)</p> |
| 09/22/2021 | | New Case Notes: A filing fee has been paid. (axm) (Entered: 09/23/2021) |
| 09/24/2021 | <u>2 (p.55)</u> | Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-12250391) filed by Highland Capital Management LP (Attachments: # <u>1 (p.8)</u> Certificate of Good Standing) Attorney Jeffrey N Pomerantz added to party Highland Capital Management LP(pty:dbpos) (Pomerantz, Jeffrey) (Entered: 09/24/2021) |
| 09/24/2021 | <u>3 (p.61)</u> | Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-12250399) filed by Highland Capital Management LP (Attachments: # <u>1 (p.8)</u> Certificate of Good Standing) Attorney Gregory V Demo added to party Highland Capital Management LP(pty:dbpos) (Demo, Gregory) (Entered: 09/24/2021) |
| 09/27/2021 | 4 | ELECTRONIC ORDER granting <u>2 (p.55)</u> Application for Admission Pro Hac Vice of Jeffrey N. Pomerantz. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Karen Gren Scholer on 9/27/2021) (chmb) (Entered: 09/27/2021) |
| 09/27/2021 | 5 | ELECTRONIC ORDER granting <u>3 (p.61)</u> Application for Admission Pro Hac Vice of Gregory V. Demo. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Karen Gren Scholer on 9/27/2021) (chmb) (Entered: 09/27/2021) |
| 09/28/2021 | <u>6 (p.67)</u> | Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-12258006) filed by The Dugaboy Investment Trust and Get Good Trust (Attachments: # <u>1 (p.8)</u> Certificate of Good Standing) (Draper, Douglas) (Entered: 09/28/2021) |
| 09/30/2021 | 7 | ELECTRONIC ORDER granting <u>6 (p.67)</u> Application for Admission Pro Hac Vice of Douglas S. Draper. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Karen Gren Scholer on 9/30/2021) (chmb) (Entered: 09/30/2021) |
| 10/14/2021 | <u>8 (p.71)</u> | Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-12301484) filed by Highland Capital Management LP (Attachments: # <u>1 (p.8)</u> Certificate of Good Standing) (Morris, John) (Entered: 10/14/2021) |
| 10/15/2021 | <u>9 (p.77)</u> | Notice Transmitting COMPLETE BK Record on Appeal re <u>1 (p.8)</u> Notice Transmitting BK Appeal or Withdrawal of Reference (Attachments: # <u>1 (p.8)</u> Mini Record Vol. 1, # <u>2 (p.55)</u> Appellant Record Vol. 2, # <u>3 (p.61)</u> Appellant Record Vol. |

| | | |
|------------|-----------------------|---|
| | | 3, # <u>4</u> Appellant Record Vol. 4, # <u>5</u> Appellant Record Vol. 5, # <u>6</u> (p.67) Appellee Record Vol. 6, # <u>7</u> Appellee Record Vol. 7) (Blanco - TXNB, Juan) (Entered: 10/15/2021) |
| 10/22/2021 | 10 | ELECTRONIC ORDER granting <u>8</u> (p.71) Application for Admission Pro Hac Vice of John A. Morris. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Karen Gren Scholer on 10/22/2021) (chmb) (Entered: 10/22/2021) |
| 11/15/2021 | <u>11</u> (p.1667) | Appellant's BRIEF by The Dugaboy Investment Trust and Get Good Trust. (Draper, Douglas) (Entered: 11/15/2021) |
| 12/15/2021 | <u>12</u> (p.1683) | MOTION to Dismiss Appeal as Moot filed by Highland Capital Management LP. (Attachments: # <u>1</u> (p.8) Proposed Order) (Annable, Zachery) Modified text on 12/16/2021 (mjr). (Entered: 12/15/2021) |
| 12/15/2021 | <u>13</u> (p.1697) | Appellee's BRIEF by Highland Capital Management LP. (Annable, Zachery) (Entered: 12/15/2021) |
| 12/21/2021 | <u>14</u> (p.1720) | CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>13</u> (p.1697) Appellee's Brief, <u>12</u> (p.1683) MOTION to Dismiss Appeal as Moot (Annable, Zachery) (Entered: 12/21/2021) |
| 01/05/2022 | <u>15</u> (p.1726) | RESPONSE filed by The Dugaboy Investment Trust and Get Good Trust re: <u>12</u> (p.1683) MOTION to Dismiss Appeal as Moot (Draper, Douglas) (Entered: 01/05/2022) |
| 01/12/2022 | <u>16</u> (p.1736) | REPLY filed by Highland Capital Management LP re: <u>12</u> (p.1683) MOTION to Dismiss Appeal as Moot (Annable, Zachery) (Entered: 01/12/2022) |
| 01/15/2022 | <u>17</u> (p.1745) | CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>16</u> (p.1736) Reply (Annable, Zachery) (Entered: 01/15/2022) |
| 01/18/2022 | <u>18</u> (p.1751) | MOTION for Leave to File Sur Reply to Appellee's Motion to Dismiss Appeal As Moot filed by The Dugaboy Investment Trust and Get Good Trust (Attachments: # <u>1</u> (p.8) Exhibit(s), # <u>2</u> (p.55) Proposed Order) (Draper, Douglas) (Entered: 01/18/2022) |
| 01/19/2022 | 19 | ELECTRONIC ORDER: The Court GRANTS <u>18</u> (p.1751) Appellants' Motion for Leave to File Sur Reply to Appellee's Motion to Dismiss Appeal as Moot and Incorporated Memorandum in Support. The Clerk is instructed to receive and file Appellants' Sur Reply in the form as received with the Motion. See ECF No. 18-1. (Ordered by Judge Karen Gren Scholer on 1/19/2022) (chmb) (Entered: 01/19/2022) |
| 01/19/2022 | <u>20</u> (p.1769) | Sur-reply filed by The Dugaboy Investment Trust and Get Good Trust re: <u>12</u> (p.1683) MOTION to Dismiss Appeal as Moot. (ygl) (Entered: 01/19/2022) |
| 08/08/2022 | <u>21</u> (p.1776) | ORDER granting <u>12</u> (p.1683) Motion to Dismiss Appeal as Moot. This appeal is DISMISSED for lack of jurisdiction. (Ordered by Judge Karen Gren Scholer on 8/8/2022) (axm) (Entered: 08/08/2022) |
| 08/24/2022 | <u>22</u> (p.1782) | NOTICE OF APPEAL as to <u>21</u> (p.1776) Order on Motion to Dismiss to the Fifth Circuit by The Dugaboy Investment Trust. Filing fee \$505, receipt number 0539-13060921. T.O. form to appellant electronically at <u>Transcript Order Form</u> or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic |

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| | | <p>copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Draper, Douglas) Modified filer on 8/30/2022 (svc). (Entered: 08/24/2022)</p> |
| 08/30/2022 | | <p>USCA Case Number 22-10831 in USCA5 for 22 (p.1782) Notice of Appeal filed by The Dugaboy Investment Trust. (svc) (Entered: 08/30/2022)</p> |
| 08/30/2022 | <p>23 (p.1786)</p> | <p>Transcript Order Form: transcript not requested Reminder: If the transcript is ordered for an appeal, Appellant must also file a copy of the order form with the appeals court. (Draper, Douglas) (Entered: 08/30/2022)</p> |

TAB 2

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

| | |
|--|---------------------------------|
| THE DUGABOY INVESTMENT TRUST and GET GOOD TRUST Appellants, v. HIGHLAND CAPITAL MANAGEMENT, L.P., Appellee | CIVIL ACTION NO. 3:21-cv-2268-S |
| In re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor | CASE NO. 19-34054-sgj11 |

COME NOW, the Dugaboy Investment Trust (“Appellant”), creditor and party in interest in the above-captioned bankruptcy case and appellant in the above-captioned bankruptcy appeal, and, pursuant to [28 U.S.C. § 158\(d\)](#), hereby appeal to the United States Court of Appeals for the Fifth Circuit that certain *Order* (the “Order”) entered by the District Court on August 8, 2022, at ECF [Docket No. 21](#) dismissing the Appeal to the District Court from the Bankruptcy Court as moot.

The names of the parties to the Order and the contact information for their attorneys are as follows:

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Respectfully Submitted this 24th day of August, 2022.

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ATTORNEYS FOR THE DUGABOY
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 24th day of August, 2022, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on counsel for the Appellee.

/s/ Douglas S. Draper _____
Douglas S. Draper

TAB 3

“Debtor”) initiated the underlying Chapter 11 bankruptcy proceeding in October 2019. Dugaboy subsequently filed three proofs of claim in April 2020, including a proof of claim as a purported “successor in interest” to Canis Major Trust. Around the same time, Get Good also filed three proofs of claim, including two as a purported “successor in interest” to Canis Major Trust.

In the meantime, Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the “Plan”) in January 2021, and the bankruptcy court held a Plan confirmation hearing in February 2021. R. vol. 1 at 290. At the hearing, Appellants raised the issue of Debtor’s failure to file any reports as required under Bankruptcy Rule 2015.3, which requires debtors to file “periodic financial reports of the value, operations, and profitability” of each non-debtor entity in which the debtor “holds a substantial or controlling interest.” FED. R. BANKR. P. 2015.3(a). The bankruptcy court confirmed the Plan over Appellants’ objections and entered the Confirmation Order on February 22, 2021. R. vol. 1 at 290.

Three months later, Appellants filed the Motion to Compel. R. vol. 2 at 421. Debtor filed its opposition, and the bankruptcy court conducted a hearing on the Motion to Compel on June 10, 2021. R. vol 1. at 356. Following the hearing, the bankruptcy court issued a minute order providing that (1) the hearing on the Motion to Compel would be continued to September 2021; (2) if the Plan effective date occurred before the hearing, the matter would become moot; and (3) if the Plan effective date had not occurred by the hearing, the court would consider the Motion to Compel further. *Id.* at 357. However, the Plan became effective on August 11, 2021, and the bankruptcy court therefore issued its Order Denying Motion to Compel Compliance with Bankruptcy Rule 2015.3 (“Order”) on September 6, 2021. R. vol. 1 at 10. Appellants filed their notice of appeal of the Order on September 22, 2021. *See* Notice of Appeal [ECF No. 1].

After this appeal was filed, however, all of the proofs of claim filed by Dugaboy and Get Good were withdrawn with prejudice. Specifically, on October 27, 2021, with Dugaboy's consent, the bankruptcy court entered orders withdrawing two of the Dugaboy claims with prejudice, and on November 10, 2021, the bankruptcy court entered an order approving a stipulation between Dugaboy and Debtor withdrawing the third Dugaboy claim with prejudice. *See In re Highland Capital Management, L.P.*, (Bankr. N.D. Tex. Oct. 16, 2019), ECF Nos. 2965, 2966, 3007. Similarly, on November 10, 2021, all three of the Get Good claims were withdrawn with prejudice either by consent or pursuant to stipulation by Get Good. *Id.*, ECF Nos. 3008, 3009, 3010.

Shortly after all of Appellants' claims were withdrawn, Appellee filed its Motion to Dismiss, asserting that this appeal is constitutionally moot for lack of standing.

II. LEGAL STANDARD

Standing to appeal a bankruptcy court decision is a question of law. *In re Technicool Sys., Inc.*, 896 F.3d 382, 385 (5th Cir. 2018). Compared to traditional Article III standing, "standing to appeal a bankruptcy court order is, of necessity, quite limited." *In re Dean*, 18 F.4th 842, 844 (5th Cir. 2021). The Fifth Circuit applies the "person aggrieved" test, which imposes a "more exacting standard than traditional constitutional standing." *Id.* The "person aggrieved" test "demands a higher causal nexus between act and injury," and requires an appellant to show that she is "directly and adversely affected pecuniarily by the order of the bankruptcy court." *In re Coho Energy Inc.*, 395 F.3d 198, 202-03 (5th Cir. 2004) (citations omitted). It is not enough that an appellant is directly impacted by "the proceedings more generally." *In re Dean*, 18 F.4th at 844. Rather, to have standing, the exact order being appealed must "directly affect [appellants'] wallets." *Id.* Such a narrow standing inquiry "ensur[es] that only those with a direct, financial stake in a given order can appeal it." *Technicool*, 896 F.3d at 386. As the Fifth Circuit has observed, "in bankruptcy

litigation, as in life, ‘the more money we come across, the more problems we see.’” *Id.* (quoting NOTORIOUS B.I.G., *Mo Money Mo Problems*, on LIFE AFTER DEATH (Bad Boy/Arista 1997)).

Standing must exist both at the commencement of the litigation and throughout its existence. *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir. 1999) (quoting *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (internal alterations and quotation marks omitted)). A case becomes moot when a party loses standing, as “there are no longer adverse parties with sufficient legal interests to maintain the litigation.” *Id.* (citation omitted). And when a case becomes moot, the court loses its “constitutional jurisdiction to resolve the issues it presents.” *Id.* (citing *Hogan v. Miss. Univ. for Women*, 646 F.2d 1116, 1117 n.1 (5th Cir. 1981)).

III. ANALYSIS

Appellee asserts that while Appellants had standing at the commencement of the appeal, they lost that standing when all of their claims were withdrawn on November 10, 2021, because at that point they were no longer creditors. Appellants concede that Get Good has lost standing to pursue the appeal,¹ but contend that Dugaboy still has standing because it owns an interest in some of the entities for which Rule 2015.3 reports would have been required. Dugaboy claims that because the purpose of requiring reports under Rule 2015.3 is to “provide a complete accounting of all transactions involving non-debtor affiliates of the Debtor to determine any post-petition claims that may exist,” Dugaboy still has a pecuniary interest in the production of the 2015.3 reports themselves. Resp. 2.

The Court finds that Dugaboy is not “directly and adversely affected pecuniarily” by the Order as required to establish standing. *Coho*, 395 F.3d at 203. By withdrawing its remaining

¹ See Resp. 2 n.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.”).

claims against Debtor, Dugaboy no longer has any pecuniary interest in the bankruptcy estate and therefore is not a “person aggrieved” by the Order. *Id.* While Dugaboy does not dispute that it is no longer a creditor of the estate, it asserts that its pecuniary interest is its ownership interest in the non-debtor affiliates and a potential recovery under the Plan as one of Debtor’s former equity holders. In other words, Dugaboy’s primary contention is that, but for the bankruptcy court’s failure to compel Debtor to file retroactive reports regarding its ownership interests in non-debtor subsidiaries as of the bankruptcy petition date, Dugaboy might have used the information in those reports to investigate whether any post-petition claims exist against Debtor’s estate by any non-debtor affiliates. But such an injury is precisely the type of “hypothetical or indirect injury” that the Fifth Circuit has consistently found insufficient to confer standing. *Coho*, 395 F.3d at 203 (quoting *Ergo Science v. Martin*, 73 F.3d 595, 597 (5th Cir. 1996)).

Further, even if Dugaboy did still have some claim to the estate, “[e]ven a claimant to a fund must show a realistic likelihood of injury in order to have standing.” *Id.* There is no such likelihood here. Were the Court to reverse the Order, the effect of the bankruptcy court granting the Motion to Compel is simply that Debtor would be required to file retroactive reports regarding its ownership interests in non-debtor subsidiaries. It is unclear how post-dated reports disclosing years-old facts could lead to any direct recovery by a creditor, let alone recovery by a non-creditor with a purported ownership in non-debtor affiliates. This attenuated interest in a potential future outcome is not sufficient: “the order must burden [Dugaboy’s] pocket before [it] burdens the docket.” *Technicool*, 896 F.3d at 386.

Dugaboy also argues that it has standing as a “contingent beneficiary” under the Plan, or a beneficiary who will be entitled to payment after all creditors are paid in full. Resp. 7. This assertion is premised on the assumption that Dugaboy’s 0.1866% pre-bankruptcy limited

partnership interest in Debtor—which was extinguished under the Plan—makes it a contingent beneficiary of the creditor trust created under the Plan. As an initial matter, Dugaboy still does not demonstrate the requisite “causal nexus” between the actual Order being appealed and its purported interest in potential future recovery under the Plan. *Coho*, 395 F.3d at 202. But in any event, such a “speculative prospect of harm is far from a direct, adverse, pecuniary hit” as required to confer standing. *Technicool*, 896 F.3d at 386.

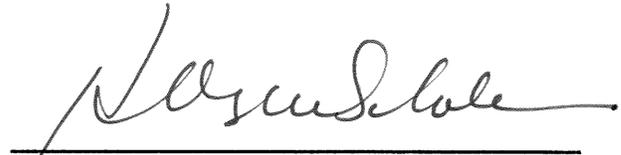
While Dugaboy may have a direct interest in the “proceedings more generally,” bankruptcy standing requires that there is a direct, adverse, and pecuniary effect on the appellant, and that the effect is tied to the specific order being appealed. In the absence of any claim to Debtor’s estate or direct financial injury flowing from the Order, Dugaboy simply cannot be a “person aggrieved” by the Order. Accordingly, the Court finds that Appellants lack standing and, as a result, this appeal is constitutionally moot.

IV. CONCLUSION

For the reasons set forth above, Appellee’s Motion to Dismiss Appeal as Moot [ECF No. 12] is **GRANTED**, and this appeal is **DISMISSED** for lack of jurisdiction.

SO ORDERED.

SIGNED August 8, 2022.



KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE

TAB 4

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

There are no participants in the case who are not registered CM/ECF users.

Dated: October 24, 2022
New Orleans, Louisiana

/s/ Douglas S. Draper
Douglas S. Draper

Attorney for Appellant,
The Dugaboy Investment Trust