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

REPLY 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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INTRODUCTION

Federal Rule of Bankruptcy Procedure 2015.3 is a mandatory rule of law that aims "to inform creditors and *other interested parties* of the debtor's financial affairs."[1] As the Executive Office of the United States Trustee ("EOUST") has explained, the whole point of the rule is to ensure "uniformity and transparency regarding a debtor's financial condition and business activities."[2] And there is nothing ambiguous about the language of the rule. In every chapter 11 case, the "debtor in possession *shall* file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest."[3] Moreover, while a bankruptcy court may "vary" the Rule 2015.3 reporting requirements, a court may do so only where there the debtor demonstrates sufficient "cause" for the modification.[4]

It is undisputed that Highland Capital Management, L.P. ("Highland"), the debtor in possession in the underlying bankruptcy proceeding, did not file *any* of the required Rule 2015.3 reports during the nearly two years prior to confirmation of its chapter 11 plan. It is also undisputed that Highland neither sought nor did the

[1] 85 Fed. Reg. 82906 (emphasis added).

[2] *Id.*

[3] Fed. R. Bankr. P. 2015.3(a) (emphasis added).

[4] Fed. R. Bankr. P. 2015.3(d).

Bankruptcy Court find that there was "cause" to modify Highland's reporting requirement. Finally, it is undisputed that, *to this day*, Highland has not publicly disclosed hardly any information regarding transactions entered into by the company (or its subsidiaries or managed entities) during bankruptcy, its cash flow, its liabilities, or the mix of assets held by Highland, its subsidiaries, and its managed entities. The result is that the bankruptcy of an SEC-regulated entity with a large volume of assets under management has been a black box, allowing Highland and its professionals to pilfer the estate for tens of millions of dollars while hiding behind the protection of the courts that have done nothing to ensure basic compliance with the bankruptcy rules.

Nothing in the Answering Brief filed by Highland changes these facts. Like the District Court, Highland merely regurgitates an erroneous interpretation of the law on standing, one that should be corrected to protect Dugaboy, as well as other creditors and other parties-in-interest in the bankruptcy process. Nor should this Court should not tolerate Highland's blatant disregard of Rule 2015.3. Indeed, allowing this appeal to proceed on the merits is necessary to ensure that the reporting requirements, which are fundamental to transparency the bankruptcy process, are enforced. This Court has an opportunity to do so now. It should reverse the District Court's order dismissing the appeal filed by The Dugaboy Investment Trust ("Dugaboy") and allow the appeal to be decided on the merits.

ARGUMENT

A. Highland's Arguments Regarding The "Person Aggrieved" Test For Standing Are Wrong

Relying almost entirely on the Fifth Circuit's opinion in *In re Technicool Systems*, Highland initially argues that Dugaboy is not a "person aggrieved" because the Bankruptcy Court's failure to require Highland to file Rule 2015.3 reports has no effect on Dugaboy's pecuniary interests.[5] But *Technicool* is distinguishable from the facts of this case in one important respect. The appellant in *Technicool* was requesting relief that affected his pecuniary interest in only the most speculative sense. Here, Dugaboy is requesting information directly tied to its pecuniary interest, without which, Dugaboy will suffer tangible harm.

In *Technicool*, the appellant filed an objection to the trustee's simultaneous representation of an entity with a claim against the debtor, NOV, and the debtor.[6] The appellant was concerned that the trustee would not disclose issues with NOV's claim and without NOV's claim the assets of the estate would be greater than its debts.[7] Because the appellant had no pecuniary interest in the outcome of his objection, the Court explained that the claim was speculative and did not confer

[5] Answering Brief of Appellee ("Ans. Br.") at 9-14.

[6] *Furlough v. Cage (In re Technicool Sys.)*, 896 F.3d 382, 384 (5th Cir. 2018).

[7] *Id.* at 385.

appellate standing: "Because the court does not reach his wallet, he cannot reach the court."[8]

Technicool is easily distinguishable from this case. Here, unlike there, Dugaboy has an *ownership* interest in several of the entities whose financials should have been disclosed in the Rule 2015.3 reports. But because Highland never filed the required reports, Dugaboy had (and still has) no information about the entities in which it has or had an ownership interest. That is problematic even today: if Highland or any of its professionals acted in a manner detrimental to Dugaboy's ownership interest, Dugaboy's pecuniary interests have been negatively affected. In addition, Dugaboy may have legitimate, post-petition claims involving those assets.

Highland's other argument—that Dugaboy cannot be a person aggrieved because Rule 2015.3 was only designed to protect creditors of the estate[9]—is contrary to the Rule's language, its legislative history, and recent interpretations of the Rule by the EOUST.[10] Notably, nothing in the actual Rule states that its sole purpose is to assist creditors of the estate. Nor is that the interpretation given to the rule by the EOUST, which has commented extensively that the Rule's purpose is to

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[8] *Id.*

[9] Ans. Br. at 20-21.

[10] The "parties in interest" language from the legislative history mirrors the language of Bankruptcy Code § 1109, which gives all "parties in interest"—including equity holders—the right to appear and be heard on issues of importance in the bankruptcy case. 11 U.S.C. § 1109(b). Dugaboy held an equity interest in Highland until the Plan went effective, and is therefore allowed to enforce the protection afforded by the rule.

ensure transparency and accountability in chapter 11 proceedings and to assist *all* "other interested parties" in understanding the debtor's financial condition.[11] In any event, the very legislative history quoted by Highland belies its argument. In the section of that history labeled "**PURPOSE**," it states that "the purpose of the rules and reports under [subsection 2015.3(a)] shall be ***to assist parties in interest*** taking steps to ensure that the debtor's interest . . . is used for the payment of allowed claims against the debtor."[12] Consistent with this purpose, Dugaboy's motion seeking to require Highland to file mandatory Rule 2015.3 reports would have assisted it and would still assist it (and all other interested parties) in ensuring that assets of the estate and the Claimant Trust are used for the payment of creditors of the estate, rather than to line the pockets of Highland's professionals.

B. Dugaboy Continues To Suffer Pecuniary Injury Because Of Highland's Failure To File Rule 2015.3 Reports

Highland also argues that Dugaboy lacks standing to pursue its appeal because any order requiring Highland to retroactively file Rule 2015.3 reports would have no conceivable pecuniary effect on Dugaboy.[13] This is not true.

Dugaboy, along with numerous other defendants, is currently being sued by Marc S. Kirschner ("Kirschner"), in his capacity as Trustee of the Litigation Sub-

[11] 85 Fed. Reg. 82906 (emphasis added).

[12] Pub. L. No. 109-8 § 409(b), 119 Stat. 23, 109 (2005) (emphasis added).

[13] Ans. Br. at 13-14.

Trust, in large part based on Kirschner's assertion that Highland was at all relevant times insolvent. Timely Rule 2015.3 reports could have and still can disprove this allegation.

Indeed, Dugaboy is continuing to suffer substantial pecuniary harm because Highland has never made the required financial reports. Notably, it is axiomatic that creditors of a chapter 11 estate are entitled to be paid no more than 100% of their allowed claims.[14] Had it been apparent from Rule 2015.3 reports that the estate was solvent and capable of paying creditors in full, there would have been no need to appoint a Litigation Trustee in the first place. But because the Bankruptcy Court failed to require that reporting, the Kirschner litigation continues to this day to erode the value of the estate, which most significantly impacts the Contingent Beneficiaries' pecuniary interests. Indeed, it is entirely possible (and at this point likely, based on recent distributions to creditors) that the creditors *can* be paid in full, and that Dugaboy is actually helping fund the multi-million dollar litigation against it, because the only value being eroded at this point is the value due to Contingent Beneficiaries like Dugaboy.

Under these circumstances, Dugaboy has a very significant pecuniary interest in seeing the Rule 2015.3 reports that should have been filed periodically and long ago.

[14] See 11 U.S.C. § 1129(a)(9).

CONCLUSION

For all of the reasons set forth herein, Appellant Dugaboy respectfully requests that the Court reverse the District Court's order dismissing the appeal filed by Dugaboy and allow the appeal to be decided on the merits.

RESPECTFULLY SUBMITTED this 14h day of December 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this, the 14th day of December 2022, a true and correct copy of the foregoing document was served on the counsel of record below via electronic service.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) in that this brief contains 1,432 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point type for text and Times New Roman 12-point type for footnotes.

Dated: December 14, 2022.

By: */s/ Douglas S. Draper*
Douglas S. Draper, Esq.