No. 26-10012

In the United States Court of Appeals for the Fifth Circuit

THE DUGABOY INVESTMENT TRUST,

Appellant,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee.

On Appeal from the United States District Court
for the Northern District of Texas
Case No. 3:25-cv-02579-B

OPPOSED MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME

JONATHAN F. MITCHELL
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

MICHAEL J. EDNEY
Morgan Lewis Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000 (phone)
(202) 739-3001 (fax)
michael.edney@morganlewis.com

Counsel for Appellant

Appellant Dugaboy Investment Trust respectfully moves for leave to file its appellant's brief out of time. The brief was due on Tuesday, May 26, 2026, but Dugaboy's counsel was unable to finish the brief on time due to, among other things, their engagement in trial before Judge Brad W. Odell in the underlying bankruptcy, *In re Highland Capital Management, L.P.*, Case No. 3:19br-34054-sgj, related to Dugaboy's Motion to Vacate under Fed. R. Civ. P. 60(b). The evidentiary hearing on Dugaboy's Motion to Vacate was initially set for May 11, 2026 and continued intermittently until the parties presented closing arguments on May 21, 2026. The continual trial proceedings in the underlying bankruptcy made it very challenging for Dugaboy's counsel to prepare the opening brief in this matter.

Dugaboy moved for a seven-day Level 2 extension of time on Tuesday, May 26, 2026. Before requesting this extension, Dugaboy's counsel contacted the clerk's office twice on May 26, 2026, to ask whether a request for an extension would be viewed favorably under these circumstances or would likely be denied. In both conversations, the clerk's office informed Dugaboy's counsel that the motion for extension of time would likely be granted so long as it was filed before close of business on May 26, 2026. The clerk's office also assured Dugaboy's counsel that it could request leave to file its brief out of time in the event the requested extension was denied. Dugaboy filed its motion for extension at 2:53 P.M. on May 26, 2026, but the Court denied the motion at the close of business the next day, on May 27, 2026.

The appeal also involves a serious matter—the recusal of the bankruptcy judge previously assigned to the underlying case—that has received extensive attention from this Court and from its Judicial Council. *See In re Complaint of Judicial Misconduct Under the Judicial Improvements Act of 2002*, No. 05-26-90042 (Dec. 29, 2025), available at https://tinyurl.com/yynh3u67; *In re Complaint of Judicial Misconduct Under the Judicial Improvements Act of 2002*, No. 05-26-90044 (Dec. 29, 2025), available at https://tinyurl.com/3vym9yu4; *In re Complaint of Judicial Misconduct Under the Judicial Improvements Act of 2002*, No. 05-26-90045 (Dec. 29, 2025), available at https://tinyurl.com/2vka5dn6. As set forth in the attached proposed brief, the question presented in this appeal is a jurisdiction one and involves application of the bankruptcy merger doctrine for final orders. Dugaboy is arguing for a narrow exception to the prevailing rule regarding the timing of orders that may merge into a final order, and time was required to ensure that these arguments were well founded.

Dugaboy's counsel has prepared its opening appellant's brief and attached it as an exhibit to this motion, which it is filing three business days after the deadline of May 26, 2026. Dugaboy respectfully asks for leave to file out of time on account of the aforementioned extensive trial proceedings. We have conferred with counsel for Highland and they oppose the motion.

Respectfully submitted.

/s/ Jonathan F. Mitchell

Michael J. Edney
Morgan Lewis Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000 (phone)
(202) 739-3001 (fax)
michael.edney@morganlewis.com

Jonathan F. Mitchell
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Counsel for Appellant

Dated: June 1, 2026

CERTIFICATE OF CONFERENCE

I certify that we have conferred with counsel for Highland Capital Management, L.P., and they oppose the motion.

/s/ Michael J. Edney
MICHAEL J. EDNEY
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2). The motion was prepared in 14-point Equity font, and it contains 489 words.

/s/ Michael J. Edney
MICHAEL J. EDNEY
Counsel for Appellant

Certificate Of Service

I certify that on June 1, 2026, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Fifth Circuit and served through CM/ECF upon all counsel of record in this case.

/s/ Michael J. Edney
Michael J. Edney
Counsel for Appellant

Case No. 26-10012

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Dugaboy Investment Trust,
Appellant,
v.
Highland Capital Management, L.P.,
Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the
Northern District of Texas, Dallas Division, the Honorable Jane J. Boyle
Case No. 3:25-cv-02579-B

Michael J. Edney
MORGAN LEWIS BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: (202) 739-3000
Facsimile: (202) 739-3001

Jonathan F. Mitchell
MITCHELL LAW PLLC
111 Congress Avenue, Suite 400
Austin, TX 78701
Telephone: (512) 686-3940
Facsimile: (512) 686-3941

ATTORNEYS FOR APPELLANT
THE DUGABOY INVESTMENT TRUST

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully submit that oral argument would assist the Court in this matter. Appellants are arguing for this Court to recognize, for the first time, a special appellate merger rule for recusal-related orders. Oral argument would assist the Court in exploring whether this special rule is warranted, and how to handle a matter that has garnered extensive attention from this Court through a prior panel decision and resolutions of its Judicial Council.

TABLE OF CONTENTS

Statement regarding oral argument 2
Table of contents 3
Table of authorities 4
Statement regarding jurisdiction 6
Introduction 6
Statement of the issue 9
Statement of the case 9
I. Highland Capital Management enters bankruptcy for a short-term restructuring in Delaware, and the case is transferred to Texas 9
II. Chief Judge Jernigan's novel writing about litigants in her court form the basis of Dondero's recusal requests 11
III. The Supreme Court and Fifth Circuit Judicial Council proceedings regarding recusal 18
Summary of argument 20
Standard of review 22
I. Judges have a continuous duty to evaluate their ability to preside over a case 22
II. The district court had appellate jurisdiction over the recusal order because it merged with the recent and prior final order approving a settlement between Highland and the entity holding most of the Highland equity interest 25
Conclusion 30
Certificate of word compliance 31
Certificate of electronic compliance 32
Certificate of compliance with type-volume requirements, etc. 33
Certificate of service 34

TABLE OF AUTHORITIES

Cases

Aronson v. Brown, 14 F.3d 1578 (Fed. Cir. 1994) 23

Christiansen v. Nat'l Sav. & Trust Co., 683 F.2d 520 (D.C. Cir. 1982) 23

Dondero v. Jernigan, No. 24-10287, 2025 WL 1122466 (5th Cir. Apr. 16, 2025) 7, 8, 10, 12, 13, 14, 24, 25, 30

Health Servs. Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986) 22

Hill v. Schilling, 593 Fed. Appx. 330 (5th Cir. 2014) 23

Home Depot U.S.A., Inc. v. Jackson, 587 U.S. 435 (2019) 24

In re Acis Capital Mgmt., L.P., No. 18-30264-SGJ-7 (N.D. Tex. Bankr. Jan 30, 2018) 10

In re ASARCO, LLC, 650 F.3d 593 (5th Cir. 2011) 22

In re Bartee, 212 F.3d 277 (5th Cir. 2000) 26

In re Complaint of Judicial Misconduct Under the Judicial Improvements Act of 2002, No. 05-26-90042 (Dec. 29, 2025) 8

In re Complaint of Judicial Misconduct Under the Judicial Improvements Act of 2002, No. 05-26-90044 (Dec. 29, 2025) 8

In re Complaint of Judicial Misconduct Under the Judicial Improvements Act of 2002, No. 05-26-90045 (Dec. 29, 2025) 8

In re Kizzee–Jordan, 626 F.3d 239 (5th Cir. 2010) 21, 27

In re Tullius, 500 Fed. Appx. 286 (5th Cir. 2012) 17

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988) 22

McCuin v. Tex. Power & Light Co., 714 F.2d 1255 (5th Cir. 1983) 23

Meadaa v. K.A.P. Enters., L.L.C., 756 F.3d 875 (5th Cir. 2014) 28

Potashinick v. Port City Constr. Co., 809 F.2d 1101 (5th Cir. 1980) 23

Ritzen Group, Inc. v. Jackson Masonry, LLC, 589 U.S. 35 (2020) 26

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) 24

Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) 23

Tramonte v. Chrysler Corp., 136 F.3d 1025 (5th Cir. 1998) 16, 20, 23

U.S. v. Snyder, 235 F.3d 42 (1st Cir. 2000) 23
United States v. Jordan, 49 F.3d 152 (5th Cir. 1995) 22
United States v. Story, 716 F.2d 1088 (6th Cir. 1983) 23

Statutes

28 U.S.C. § 158(a)(1) 25
28 U.S.C. § 158(d) 6
28 U.S.C. § 455(a).....16, 22, 28
28 U.S.C. § 455(e).....24
28 U.S.C. § 1291 25

Rules

Canon 3(C)(1), Code of Conduct for United States Judges, March 12, 2019.....22
Fed. R. Bankr. P. 8003(4).....26
Fed. R. Bankr. P. 8003(a)(4 .....8, 20

Other Authorities

Wright & Miller, 16 Fed. Prac. & Proc. Juris. (3d ed.) 21, 27

STATEMENT REGARDING JURISDICTION

The Dugaboy Investment Trust ("Dugaboy") is a family trust holding James Dondero's remaining equity interest in Highland Capital Management. Dugaboy appeals from the Memorandum Opinion and Order of the United States District Court for the Northern District of Texas entered on December 3, 2025 (ROA.561-570) (the "Order") granting a motion to dismiss the appeal and denying Dugaboy's Motion for Leave to Appeal (ROA.143-265) and dismissing the case. Dugaboy filed a timely notice of appeal of the District Court's order on January 2, 2026. ROA.571-574.

Pursuant to 28 U.S.C. § 158(d) and Federal Rule of Appellate Procedure 6(b), this Court has jurisdiction to review the District Court's dismissal of Dugaboy's appeal.

INTRODUCTION

This appeal presents a remarkable set of circumstances. A federal bankruptcy judge wrote novels with a negatively portrayed character difficult to distinguish from a principal litigant before her in one of the most significant bankruptcy cases in her district. That character was pitted against a bankruptcy judge protagonist character who closely resembles the bankruptcy judge author.

When confronted with the novels in the middle of the bankruptcy case and without immediately surrounding final orders, she declined to recuse herself.

Mandamus was sought. This Court observed that, "due to the similarities" between the litigant and the negatively portrayed character in the judge's novels, "a strong argument could be made that she had a duty to recuse." *Dondero v. Jernigan*, No. 24-10287, 2025 WL 1122466, at *7 (5th Cir. Apr. 16, 2025). This Court, however, noted that the issue was not yet being presented on direct appeal. The Court held that mandamus could not issue absent a "clear and indisputable [showing] that [a judge] is required to recuse," a decision that is itself "reviewed for abuse of discretion." *Id.* at *4. The "strong argument" for recusal did not meet that demanding standard for mandamus relief. *Id.* *7.

The Court denied a petition for rehearing *en banc* on May 23, 2025, finalizing its opinion. The bankruptcy judge did not recuse on her own in response. She instead issued momentous and ultimately final orders in June and July 2025. When the judge still had not recused, Dugaboy moved for recusal in August 2025, citing the Fifth Circuit's acknowledgment of the "strong argument" that could be made for recusal. She immediately declined that request.

This Court through its Judicial Council subsequently resolved long-pending judicial-misconduct complaints regarding the bankruptcy judge's novel writing and presiding over the Highland case, and the recusal of the judge was effected through those resolutions in late December 2025. *See*, *e.g.*, *In re Complaint of Judicial Misconduct Under the Judicial Improvements Act of 2002,* No. 05-26-90042 (Dec. 29,

2025), at 7, attached as Ex. A.[1] Thereby this Court ultimately ensured that its message regarding the "duty to recuse"—stated through its May 2025 final decision—was received and acted upon.

The question in this appeal is not the merits of the bankruptcy judge declining to recuse in August 2025, but whether the District Court had appellate jurisdiction to review it. The declination is an interlocutory order. *Dondero*, 2025 WL 1122466 at *2. But bankruptcy-court interlocutory orders can become appealable by "merging" with final appealable orders adjacent to them. Fed. R. Bankr. P. 8003(a)(4). And generally, the ability to appeal a final order includes the ability to assign error to prior interlocutory orders leading to it.

In this case, the circumstances providing grounds to recuse—in particular, this Court's reasoning in its mandamus opinion—were extant in the days before a final appealable order. But the bankruptcy judge did not act on them, even though she had a duty to do so. When a litigant reminded her of that duty, she declined to follow it. Recusal questions are not just about litigants making arguments; they are about judges constantly ensuring the absence of circumstances that would lead reasonable

[1] The Fifth Circuit Judicial Council issued two additional judicial-misconduct complaint resolutions on the same day, each with substantially identical discussion of Jernigan's novels and the corrective action of recusal. *In re Complaint of Judicial Misconduct Under the Judicial Improvements Act of 2002*, No. 05-26-90044 (Dec. 29, 2025), at 3, available at https://tinyurl.com/3vym9yu4; *In re Complaint of Judicial Misconduct Under the Judicial Improvements Act of 2002*, No. 05-26-90045 (Dec. 29, 2025), at 3, available at https://tinyurl.com/2vka5dn6.

people to question their impartiality. In these limited circumstances, when it was error for the judge to continue to sit even without prompting, her later declination of recusal should merge into the prior final order that was pending appeal. The District Court therefore erred by dismissing the appeal for lack of appellate jurisdiction.

STATEMENT OF THE ISSUE

In a limited exception to the prevailing rule, should a bankruptcy court's interlocutory order declining recusal merge into a recent prior final order and thereby become appealable, when the circumstances creating a judge's duty to recuse on her own were extant at the time of entry of the preceding final order?

STATEMENT OF THE CASE

I. Highland Capital Management Enters Bankruptcy for a Short-Term Restructuring in Delaware, and the Case is Transferred to Texas

In 1996, James Dondero founded a hedge fund initially called Ranger Capital, and later renamed Highland Capital Management. It managed billions of dollars in alternative investments, principally collateralized loan obligations, real estate, life settlements, real estate investment trusts, collateralized debt obligations, and private equity funds.

In 2019, Highland was confronted with an unexpected judgment in the amount of approximately $100 million. Highland needed time to convert a handful of not immediately liquid assets into cash, pay the judgment, and then resume normal

operations. To do so, Highland sought bankruptcy protection in the form of a Chapter 11 reorganization in the United States Bankruptcy Court for the District of Delaware.

Prior to Highland's bankruptcy filing, Judge Stacey Jernigan of the United States Bankruptcy Court for the Northern District of Texas had presided over a bankruptcy matter involving another entity associated with Mr. Dondero. *In re Acis Capital Mgmt., L.P.*, No. 18-30264-SGJ-7 (N.D. Tex. Bankr. Jan 30, 2018). Certain creditors in the Highland bankruptcy moved to transfer it to Judge Jernigan, alleging that she was "intimately familiar with [Highland's] principals and complex organizational structure." *Dondero*, 2025 WL 1122466, at *1. But as Debtor's counsel then admitted, "they [Acis, a litigation creditor] have not told you the real reason that they want the case before Judge Jernigan … and it's not because she's familiar with the debtor's business, this debtor's assets, or this debtor's liabilities, because generally she is not. It is because she has formed negative views regarding certain members of the Debtor's management that the committee and Acis hope will carry over into this case." Dec. 2, 2019 Hr'g Tr., *In re Highland Capital Management, L.P.*, No. 19-12239-CSS, Dkt. 181 at 77:18–78:8 (D. Del. Bankr. Dec. 3, 2019). Debtor's counsel concluded that "transferring the case to Judge Jernigan, when the real motivation is because of how she has dealt with the prior case … would be

unduly prejudicial to the debtor." *Id.* at 97:10–17. Nonetheless, the District of Delaware granted that transfer request.

Once in Judge Jernigan's court, the bankruptcy took a sudden turn—*from* an orderly and short reorganization while incumbent management ran the company *into* the ouster of owners and a wholesale liquidation. In the first hearing before her, Judge Jernigan suggested removing Mr. Dondero from managing the company. New bankruptcy-approved management was installed, and a fire sale of assets ensued. Bankruptcy professionals—including the new manager—were collectively paid hundreds of millions of dollars. And it has since become apparent that no liquidation was ever necessary, as tens if not hundreds of millions remained after all creditors (and all these bankruptcy professionals) were paid.

II. Chief Judge Jernigan's Novel Writing About Litigants in Her Court Form the Basis of Dondero's Recusal Requests

While Judge Jernigan was presiding over the Acis and then the Highland bankruptcies, she wrote two novels: *He Follows All My Paths* and *Hedging Death.* The first was self-published in 2019.[2] The second was published through a third party in 2022.[3] Both novels have as their protagonist a female bankruptcy judge named Avery Lassiter. The fictional judge Lassiter, like the real Judge Jernigan, had

[2] *He Watches All My Paths* is available for purchase at https://www.amazon.com/He-Watches-All-My-Paths/dp/1794067078.
[3] *Hedging Death* is available for purchase at https://www.amazon.com/Hedging-Death-Stacey-Jernigan/dp/1633635813.

King Cavalier dogs, wrote memoirs of her world travels, and was married to a police officer.

In the books, Judge Lassiter ravages hedge funds as "drawn to distressed companies like sharks are drawn to blood" and their managers as "imbued with an outrageous amount of hubris" and "greedy sociopaths." Stacey G. Jernigan, *He Watches All My Paths*, SJ Novels (self-published) at 78, 166 (Jan. 16, 2019). In *Hedging Death*, Judge Lassiter interacts with a hedge fund manager named Cade Graham. The similarities between Mr. Graham and Mr. Dondero are manifold. Mr. Graham runs a hedge fund named Ranger Capital, exactly what Mr. Dondero's hedge fund was originally called.[4] The fictional hedge fund has the same mix of alternative investments as Mr. Dondero's fund: private equity funds, CDOs, CLOs, REITs, and life settlements. Mr. Graham and Mr. Dondero have the same hair color, height, and charitable interests. *See* Stacey G. Jernigan, *Hedging Death*, White Bird Publications (Mar. 22, 2022) at 22, 107; *see also* Petition for Certiorari, *Dondero v. Jernigan*, No. 25-355 at 117a, 133a (Sept. 22, 2025).

Judge Jernigan was asked to recuse on the basis of the novels, but she declined. *Dondero*, 2025 WL 1122466 at *3. She insisted that she had no particular

[4] The record showed that Judge Jernigan was abundantly aware of the Mr. Dondero's former Ranger Capital brand. *See* Bankr. Dkt. Dkt. 247 at 59–60; Dkt. 400 at 6; Dkt. 675 at 23; Dkt. 883 at 57; Dkt. 1719 at 7; Dkt. 1761 at 33; Dkt. 1810 1 at 8; Dkt. 1811 at 6; Dkt. 1875 5 at 6; Dkt. 1895 1 at 46; Dkt. 1895 6 at 60–61; Dkt. 1943 at 159.

hedge fund manager in mind when writing her books. *Id.* And she noted that Mr. Graham had faked his own suicide and disappeared from Dallas, while Mr. Dondero had not, so that they must be different people. *Id.* at *7.

Mr. Dondero and others sought review of that interlocutory decision on mandamus. The District Court denied mandamus relief. In an amended opinion, the panel expanded its discussion of the books and the grounds for recusal. *See Dondero v. Jernigan*, No. 24-10287, 2025 WL 1122466 (5th Cir. Apr. 16, 2025). The Court explained that the standard of review applicable when seeking mandamus against a refusal to recuse was particularly demanding. Those seeking mandamus must show that it is "clear and indisputable that [a judge] is required to recuse," a decision "reviewed for abuse of discretion." *Dondero*, 2025 WL 1122466 at *4. The Court then observed that writing the novels and continuing on the case was a serious problem: "Due to similarities between the characters in Chief Judge Jernigan's novel and the litigants currently before her court, a strong argument could be made that she had a duty to recuse." *Dondero*, 2025 WL 1122466 at *7. That strong argument, however, did not rise to the very high threshold of a clear and indisputable abuse of discretion required for mandamus relief. *Id*. The Court distinguished the less demanding standard of review that would apply if and when Chief Judge Jerningan's failure to recuse might be reviewed on appeal in connection with a final order. *Id.*

After the *en banc* court declined to take up the panel's amended decision, this Court's decision was finalized on May 23, 2025. *Dondero v. Jernigan*, No. 24-10287, Dkt. 152 (5th Cir. May 23, 2025). Thereby, the bankruptcy judge was formally informed of this Court's view that due to the novels, "a strong argument could be made that she had duty to recuse." *Dondero*, 2025 WL 1122466 at *7.

In the immediate wake of the finalized decision from this Court, Judge Jernigan did not recuse herself. Instead, on June 25, 2025, she issued an order approving a settlement between the bankruptcy-court-appointed managers of Highland and the charitable trust to which Mr. Dondero had given most of his equity in Highland. *In re Highland Capital Mgmt., L.P.*, No. 3:19-34054-sgj-11, Dkt. 4297 (N.D. Tex. Bankr. June 30, 2025) ("Bankr. Dkt. 4297").[5] The rest of Mr. Dondero's ownership interest in Highland was held by a family trust called the Dugaboy Investment Trust (the Appellant in this matter).

In a scandalous scheme the details of which were until recently unknown beyond its perpetrators, the Administrator of that charitable structure had reorganized it to steal it from the Dallas Foundation—a century-old Dallas charity for whose benefit Mr. Dondero created the structure—and had put eight figures of proceeds into his own pocket through the restructuring process. When some early indicators

[5] Hereinafter, citations to the docket in the main bankruptcy case, *In re Highland Capital Mgmt., L.P.*, 3:19-34054-sgj-11, not included in the Record on Appeal will be denominated "Bankr. Dkt."

of possible misconduct were presented to Judge Jernigan, she pressed down on the accelerator and quickly approved the settlement, stating that it would substantially resolve the bankruptcy. Bankr. Dkt. 4297. Substantially resolving the bankruptcy also likely would dampen questions into her own extrajudicial conduct with respect to her two books.

When receivers appointed by the Cayman Island court system to look into the conduct of the charitable administrator issued a complaint alleging details regarding that administrator's misconduct, the Dugaboy Investment Trust asked the bankruptcy court to stay her order approving the settlement on July 17, 2025. Bankr. Dkt. 4326.[6] The bankruptcy court promptly declined on July 21. Bankr. Dkt. 4334. The trust appealed both orders, which were indisputably final and appealable.

On August 15, 2025, Mr. Dondero's family trust (Dugaboy) filed another motion for the bankruptcy judge to recuse herself. Bankr. Dkt. 4372. The motion noted that, even through the Fifth Circuit's mandate had issued suggesting that there was a "strong argument" that she had a duty to recuse, the bankruptcy judge still had not recused. The motion reminded her of her duty to do so, in light of this Court's observations. *Id.* at 4–5.

[6] Subsequently, hard evidence of this misconduct was uncovered by the Cayman Islands receivers. A motion to vacate the 9019 settlement approval order was filed in February 2026. *See* Bankr. Dkt. 4513. A bench trial to consider this new evidence, occurring on three days over two weeks, was held in May 2026. A decision on that motion remains pending.

Chief Judge Jernigan, on September 2, 2025, declined. RE 38. Without meaningfully engaging with the content of the Fifth Circuit's intervening opinion, the bankruptcy court stated in italics that the recusal issue was *res judicata*, because she had previously declined to recuse. RE 41 ("Two words: *res judicata*. The matter has been decided."). This order showed that she was not continually evaluating the appearance or reality of her impartiality based on intervening circumstances, as Congress requires. 28 U.S.C. § 455(a); *see Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1031 (5th Cir. 1998).

Mr. Dondero and others appealed. RE 52.

Subsequently, on September 22, 2025, the bankruptcy court fixed the amount of the interests in the estate of the equity position that Mr. Dondero and others had retained and not given to the charitable structure. Bankr. Dkt. 4401. That order was a final order, and Mr. Dondero and others appealed it.

By then, four appeals were pending before four different judges of the United States District Court for the Northern District of Texas: the appeals of the settlement approval order, the denial of a stay of that order, the recusal order, and the order setting the claim amount of residual equity. *See The Dugaboy Investment Trust v. Highland Capital Mgmt., L.P.*, No. 3:25-cv-01876-K (N.D. Tex.) (9019 Settlement Order); *The Dugaboy Investment Trust v. Highland Capital Mgmt., L.P.*, No. 3:25-cv-02072-S (N.D. Tex.) (denial of stay request); *The Dugaboy Investment Trust v.*

Highland Capital Mgmt., L.P., No. 3:25-cv-02579-L (N.D. Tex.) (recusal motion); *The Dugaboy Investment Trust v. Highland Claimant Trust*, No. 3:25-cv-02724-L (N.D. Tex.) (order setting claim amount). Mr. Dondero moved to consolidate those appeals before Judge Kinkeade of the Northern District of Texas, to whom the first-in-time appeal was assigned. Judge Kinkeade denied the consolidation request, and the appeals proceeded before four separate judges. Order Denying Motion to Consolidate, *The Dugaboy Investment Trust v. Highland Capital Mgmt., L.P.*, No. 3:25-cv-01876-K, Dkt. 48 (N.D. Tex. Nov. 18, 2025).

The recusal-order appeal was assigned to Judge Boyle of the Northern District of Texas, who ordered Dugaboy to address whether the Court had appellate jurisdiction over it or file a motion for leave to appeal the recusal order. RE 9. Highland argued that the appeal should be dismissed for lack of jurisdiction. Dugaboy argued that the recusal order merged into final orders that were entered surrounding the time of the recusal order, such that there was appellate jurisdiction over the recusal order and leave to appeal was not necessary. *See* RE 11 – RE 36.[7]

[7] Mr. Dondero also sought leave for the District Court to consider the appeal of the recusal order, if it were deemed not to be a final order or merged into one. The District Court denied that leave, and Appellants are not seeking review of that aspect of the District Court's decision here. *In re Tullius*, 500 Fed. Appx. 286, 291 (5th Cir. 2012) (denials of leave to appeal interlocutory bankruptcy court orders to the District Court are not appealable to this Court).

The District Court dismissed the appeal for lack of jurisdiction. The District Court explained that bankruptcy court interlocutory orders can be appealed to the district courts if they "merge" with another final order. RE 42. The District Court determined, however, that the recusal denial could not be merged with the 9019 settlement and stay orders (both of which are final) because they preceded the recusal-denial order in time. RE 48. The District Court observed that the September 2025 claim-setting order could be a candidate for merger, because it came later in time. RE 48 – RE 49. But the District Court was satisfied that the recusal issue was directly presented in pending briefing in the claim setting order appeal, so that merging the appeal focused on recusal order into it was not necessary. RE 48.

The three other appeals—regarding the claim setting order, the settlement approval order, and the order denying stay thereof—remain pending before other district court judges. They are fully briefed but have not been called for hearing yet.

III. The Supreme Court and Fifth Circuit Judicial Council Proceedings Regarding Recusal

After the Fifth Circuit issued its mandate denying mandamus relief while acknowledging that "a strong argument could be made" that Chief Judge Jernigan "had a duty to recuse" due to her book writing, Mr. Dondero petitioned for certiorari in the Supreme Court of the United States. Petition for Certiorari, *Dondero v. Jernigan*, No. 25-355 (Sept. 22, 2025). That petition was scheduled for conference on January

9, 2026. Conference Distribution Notice, *Dondero v. Jernigan*, No. 25-355 (Dec. 10, 2025).

On December 29, 2025—less than two weeks before the Supreme Court's conference—the Judicial Council of this Court resolved multiple judicial-misconduct complaints regarding Chief Judge Jernigan's book-writing activities. *See* Ex. A. The complaints had been pending without action for more than two and a half years. The Chief Judge of this Court resolved the book-related complaints on the basis of corrective action, in lieu of referral to broader council for coercive discipline. The corrective measures included Judge Jernigan recusing herself from the Highland case going forward. *Id.* at 6. The Chief Judge of this Court noted that this corrective action was prospective only, as the Judicial Council lacks authority to correct or undo previously issued orders. *Id.* at 6 n.3. As part of the corrective action, Judge Jernigan promised not to write further novels touching on her judicial role, agreed to take judicial-ethics classes on the importance of avoiding extrajudicial activities that raise the appearance of partiality, and committed to seek real-time advice from judicial-ethics resources on extrajudicial activities in the future. *Id.* at 6.

These resolutions were unusually serious. Only three other of the more than 400 Fifth Circuit judicial complaints resolved since December 2019 have been addressed through corrective action, rather than a finding of insubstantiality. The Fifth

Circuit's Chief Judge has not referred a complaint to a special committee for imposition of sanctions since 2015.

SUMMARY OF ARGUMENT

The District Court should not have dismissed the appeal of the recusal order for lack of jurisdiction. A bankruptcy court's order denying recusal—standing alone—is interlocutory and not appealable. The Federal Rules of Bankruptcy Procedure, however, allow litigants to appeal interlocutory orders when they "merge" into adjacent final orders. Fed. R. Bankr. P. 8003(a)(4). The District Court held that interlocutory orders merge into final orders only when the final appealable order postdates the interlocutory order in question. RE 41.

The rule articulated by the District Court is generally correct in the mine run of cases. But interlocutory orders concerning recusal should be a recognized exception to that generalization. Judges themselves have an obligation to evaluate—continually—whether their extrajudicial conduct would lead a reasonable person to question their impartiality and thus whether they may continue to sit on a case. The first line of defense for Congress's mandate for judges to maintain the appearance and reality of impartiality is for judges to recuse themselves, *sua sponte*, without being asked. *See, e.g., Tramonte*, 136 F.3d at 1031. Parties may ask for their recusal, but these motions are only a failsafe against judges not policing themselves. Such motions are a reminder of what is supposed to be self-executing judicial duty.

When the basis for the duty to recuse—most recently, this Court's May 2025 finalized opinion analyzing the novels' consequences regarding the duty to recuse—was extant prior to a final order and that final order was entered shortly before the recusal order at issue, the recusal order should merge into that previous final order. And the District Court should have appellate jurisdiction over both.

This result is consistent with the admonition of courts and commentators that the merger doctrine for bankruptcy appellate jurisdiction is "flexible" and not subject to rigid rules. Wright & Miller, 16 Fed. Prac. & Proc. Juris. § 3937 (3d ed.); *see also In re Kizzee–Jordan*, 626 F.3d 239, 242 (5th Cir. 2010).

Whether the recusal order can merge with final orders both before and after it is presented here because the District Court appeals were not consolidated. The bankruptcy judge's denial of the recusal motion will be addressed on appeal to another District Court judge in the appeal of the subsequent final order setting Class 11 claim amounts. *The Dugaboy Investment Trust v. Highland Claimant Trust*, No. 3:25-cv-02724-L (N.D. Tex.) (order setting claim amount). The District Court in the order being appealed here pointed this out. RE 48–49. The order also should merge for purposes of appeal retrospectively, into the recent prior 9019 settlement and stay orders. If this most recent recusal order is error, at least each of the three final orders proximate in time to that recusal order should also fall. This Court should reverse the District Court's jurisdictional dismissal and remand with

instructions to consider the appeal of the recusal order on the merits or consolidate it into the pending appeals of the June and July 2025 settlement approval and stay orders.

STANDARD OF REVIEW

Whether a district court possesses jurisdiction over an appeal of a bankruptcy court's order is a question of law that is reviewed *de novo*. *E.g., In re ASARCO, LLC*, 650 F.3d 593, 599 (5th Cir. 2011).

I. Judges Have a Continuous Duty to Evaluate Their Ability to Preside Over a Case

28 U.S.C. § 455(a) states that a judge "shall disqualify himself in any proceeding where his impartiality might reasonably be questioned." This imposes a "mandatory and self-executing" duty on judges to remove themselves "where there is an appearance of partiality." *Health Servs. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986), *aff'd* 486 U.S. 847 (1988). The test is whether a reasonable and objective person, knowing all the facts, would harbor doubts concerning the judge's impartiality. *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995) (*citing Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860–61 (1988)) *see also* Canon 3(C)(1), Code of Conduct for United States Judges, March 12, 2019. "The goal of section 455(a) is to avoid even the appearance of partiality" because of the erosion in public confidence in the judicial system that could arise should the partiality appear to be unchecked. *Liljeberg*, 486 U.S. at 860 (quotation

omitted). Part of the judge's consideration must be how their participation in a given case "looks to the average person on the street," requiring the judge to lean in favor of disqualification "if he has any question about the propriety of his sitting in a particular case." *Potashinick v. Port City Constr. Co.*, 809 F.2d 1101, 1111–12 (5th Cir. 1980).

The importance of preserving impartiality and refusing to allow even an appearance of impartiality requires judges to "police [their own] disqualification status" throughout a case. *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1031 (5th Cir. 1998). The Fifth Circuit requires judges to maintain their "duty to be watchful of such disqualifying circumstances," whether or not a motion to recuse has been presented. *Id.* Judges are mandated to recuse *sua sponte* if they determine some reason for disqualification arises. *See e.g., U.S. v. Snyder*, 235 F.3d 42, 46 (1st Cir. 2000); Hill v. Schilling, 593 Fed. Appx. 330, 333 (5th Cir. 2014); *United States v. Story*, 716 F.2d 1088, 1091 (6th Cir. 1983); *Taylor v. O'Grady*, 888 F.2d 1189, 1200 (7th Cir. 1989); *Christiansen v. Nat'l Sav. & Trust Co.*, 683 F.2d 520, 524 (D.C. Cir. 1982); *Aronson v. Brown*, 14 F.3d 1578, 1582 (Fed. Cir. 1994). With regard to § 455, "Congress' purpose was to adopt a categorical rule that would be self-enforcing" by judges themselves when disqualifying circumstances arise, even in the absence of a motion to recuse. *McCuin v. Tex. Power & Light Co.*, 714 F.2d 1255, 1259 (5th Cir. 1983).

At a minimum, this Court's clarifying commentary in May 2025 regarding the bankruptcy judge's duty to recuse was final and apparent in the weeks prior to the June 25, 2025, settlement approval order. *Dondero v. Jernigan*, No. 24-10287, 2025 WL 1122466, at *7 (5th Cir. Apr. 16, 2025). Judge Jernigan had a continuous duty to police herself for the potential appearance of disqualifying partiality.

By the terms of 28 U.S.C. § 455, recusal is non-waivable, much like subject-matter jurisdiction. As opposed to waivable personal jurisdiction, subject-matter jurisdiction is "non-waivable and delimits the power of federal courts." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Federal courts are courts of limited subject-matter jurisdiction that, absent statutory grants of jurisdiction, are unable to entertain particular disputes. *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435, 437 (2019). The contours of subject-matter jurisdiction and Congress' grants of limited authority determine not what the decision will be, but who is empowered to decide. Disqualification is a similar safeguard to ensure that the "who" making the decision does so impartially and maintaining public confidence in the judicial system. Waiver of grounds for recusal is permitted under § 455(a) only after "full disclosure on the record of the basis for disqualification" is made and parties are provided an opportunity to refuse waiver. 28 U.S.C. § 455(e).

Dugaboy's Motion to Recuse, Bankr. Dkt. 4372, sought to provide Judge Jernigan with a reminder of this continuous duty, especially following this Court's May

2025 finalized opinion upon rehearing analyzing the issue and observing that "a strong argument could be made that she had a duty to recuse" because of the novels. *Dondero*, 2025 WL 1122466, at *7. She declined to recuse herself at that time. She was recused later as "corrective action" for ethics complaints based on her novel writing. *See* Bankr. Dkt. 4297; *see also* Bankr. Dkt. 4334 (denying Dugaboy's request for a stay).

II. The District Court Had Appellate Jurisdiction Over the Recusal Order Because It Merged with the Recent and Prior Final Order Approving a Settlement Between Highland and the Entity Holding Most of the Highland Equity Interest

District-court jurisdiction over bankruptcy appeals extends to both "cases and proceedings" in bankruptcy court, 28 U.S.C. § 158(a). One way to trigger appellate jurisdiction in bankruptcy cases (as for cases initiated in the district courts) is the presence of a final order. *Compare* 28 U.S.C. § 158(a)(1) (providing district court appellate jurisdiction over the "final judgments, orders, and decrees" of bankruptcy courts) *with* 28 U.S.C. § 1291 ("The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States."). For cases initiated in district courts, final orders are generally the "final judgment" completely ending a case, with a handful of other exceptions. The concept of what constitutes a "final order" in bankruptcy court, however, is more capacious than for cases initiated in district court. Because a bankruptcy case "embraces an aggregation of individual

controversies, orders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case." *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 37 (2020). Thus, this Court "has long rejected adoption of a rigid rule that a bankruptcy case can only be appealed as a single judicial unit at the end of the entire bankruptcy proceeding." *In re Bartee*, 212 F.3d 277, 282 (5th Cir. 2000) (internal quotation marks omitted).

Along with finality, the "merger rule" helps define the scope of appealable bankruptcy orders. When a party appeals a bankruptcy-court order, the "notice of appeal encompasses all orders that, for purposes of appeal, merge into the identified judgment or appealable order or decree." Fed. R. Bankr. P. 8003(4). In the end, when a party appeals an order that merges with a final order, that so-called "merged order" becomes final and appealable by virtue of the appealability of the final judgment.

As the District Court below correctly recognized, the merger rule generally applies to "rulings that led up to the judgment, order, or decree"—*i.e.*, that came before the final judgment. RE 48; *see also* Advisory Committee Notes to the 2023 Amendments to Fed. R. Bankr. P. 8003 ("The *general* merger rule can be stated simply: an appeal from a final judgment or appealable order or decree permits review of all rulings that led up to the judgment, order, or decree.") (emphasis added). The Advisory Committee for the Bankruptcy Rules also made clear that the merger rule

is not rigid: "Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law." *Id*.

Wright and Miller have similarly recognized that "the flexibility shown in meeting the needs of bankruptcy administration virtually invites adoption of an equally flexible approach to the scope of the appeal" Wright & Miller, 16 Fed. Prac. & Proc. Juris. § 3937 (3d ed.). And this Court has implemented this flexible approach in determining the finality of orders in bankruptcy appeals. *See Kizzee–Jordan*, 626 F.3d at 242 (stating that the Court's "approach to determining whether an order is . . . appealable in a bankruptcy case is flexible," and views "finality in bankruptcy proceedings . . . in a practical, less technical light.").

In light of this flexible approach to appellate jurisdiction in bankruptcy cases (both with respect to what constitutes an appealable final order and to what other orders merge into it), this Court should recognize a limited exception to the general principle that looks to interlocutory orders occurred *before* a final order for merger. That exception should reach order declining recusal entered after recent final orders. That is because recusal orders are different. Recusal orders are not about giving parties an opportunity to make arguments and have them considered. They are about the more fundamental question of *who decides* a case—as opposed to *what is* decided. And when they are in response to a party's motion, they arise from a party

reminding a judge of what she should be doing without prompting: Constantly evaluating whether her conduct is consistent with maintaining the appearance of impartiality and whether she should continue to preside over a case.

Allowing an order postdating a final order to merge into it would not be unprecedented. For example, this Court has maintained appellate jurisdiction over the denial of a Rule 59 motion that "came after" the final judgment because "[a]n order affirming a prior judgment is just as much an integral part of that judgment as the evidentiary rulings that paved the way to the judgment." *Meadaa v. K.A.P. Enters., L.L.C.*, 756 F.3d 875, 879–80 (5th Cir. 2014).

This is not to suggest that interlocutory orders of bankruptcy courts can merge into previously issued final orders as a routine matter, and the district court was correct to observe that as a general matter interlocutory orders can merge only into later-issued final orders of a bankruptcy court. It is only in the unique circumstances of an order denying recusal that merger into a previously issued final order is warranted, because a bankruptcy judge who declines to recuse is making continuous and ongoing decisions each day to not recuse despite the statutory obligation to recuse *sua sponte* when the criteria of 28 U.S.C. § 455(a) are satisfied. These repeated (though unannounced) decisions not to recuse will both predate and postdate the formal denial of a recusal motion, in the same way that a district court's unwillingness to dismiss a case for lack of subject-matter jurisdiction predates and postdates

its formal order denying a litigant's Rule 12(b)(1) motion. Judges have an ongoing and never-ending duty to police the jurisdictional boundaries of the federal judiciary, as well as their own suitability to judge a case under the federal recusal statutes. So merging a formal order denying recusal into a previously issued appealable order of the bankruptcy court serves as nothing more than a recognition that a judge's decision not to recuse is being made every day that the judge presides over the case, so there is nothing untoward about allowing the formal order denying recusal to run both forward and backward in search of an appealable final order into which it can merge. It is not a license to allow every interlocutory order in bankruptcy to latch on to previously issued appealable orders, rather than await the issuance of subsequent final order from which an appeal can be taken.

If this limited exception to the timing aspect of the merger principle were adopted, it would make sense to apply it in this case to merge the bankruptcy judge's declination of the August 2025 motion to recuse into the June and July 2025 final orders approving the settlement between certain equity holders and Highland and declining to stay that order. Those June and July 2025 orders are final, and no party has contended otherwise. The recusal order and the settlement approval and stay orders are proximate in time. And the June and July final orders occurred quickly after this Court in May 2025 provided its final opinion analyzing the recusal question, explaining that "a strong argument could be made that" the bankruptcy judge

"had a duty to recuse" due to the novel writing. *Dondero*, 2025 WL 1122466, at *7. That incremental event should have triggered a recusal *sua sponte.* When the judge did not do so on her own, two things happened. First, Dugaboy moved for recusal again reminding her. And then on December 29, 2025, her recusal was effected through the extraordinary corrective action resolutions of judicial complaints of this Court's Judicial Council.

These are exceptional circumstances. And, here, the recusal declination should merge backwards in time to the June and July 2025 settlement approval and stay orders and be deemed appealable with them.

CONCLUSION

The Court should reverse the dismissal of Dugaboy's appeal and remand with instructions for the District Court to either resolve the merits of Dugaboy's appeal of the recusal order, or order its consolidation into the appeals regarding the June and July 2025 settlement approval and stay orders.

Dated: June 1, 2026

By: */s/ Michael J. Edney*

Michael J. Edney
Morgan Lewis Bockius LLP
1111 Pennsylvania Avenue NW
Washington, DC 20004
T: 202.739.3000
F: 202.739.3001
michael.edney@morganlewis.com

Jonathan F. Mitchell
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, TX 78701
T: 512.686.3940
F: 512.686.3941
jonathan@mitchell.law

CERTIFICATE OF WORD COMPLIANCE

Pursuant to the Court's Procedural Rule 32.3, I certify that this document has been prepared in 14-point font and contains 6,086 words as measured by the word-processing system used to prepare this motion.

/s/ Michael J. Edney
Michael J. Edney

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel certifies that on June 1, 2026, the foregoing document was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses and has been found to be free of viruses.

/s/ Michael J. Edney
Michael J. Edney

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

This motion complies with the type-volume requirements of Fed. R. App. P. 27(d)(2) because excluding the exempted portions, it contains 6,086 words.

This motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and Fed. R. App. P. 32(a)(6) because it uses size 14, proportionately spaced typeface (Times New Roman) throughout.

/s/ Michael J. Edney
Michael J. Edney

CERTIFICATE OF SERVICE

I certify that on June 1, 2026, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Fifth Circuit and served through CM/ECF upon all counsel of record in this case.

/s/ Michael J. Edney
Michael J. Edney