

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

**In re:** § **Case No. 19-34054-sgj11**  
§  
**HIGHLAND CAPITAL MANAGEMENT,** §  
**L.P.,** § **Chapter 11**  
§  
**Debtor** §

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**OFFICIAL COMMITTEE OF** §  
**UNSECURED CREDITORS,** §  
§  
**Plaintiff,** §  
§ **Adversary No. 20-03195**  
**vs.** §  
§  
**CLO HOLDCO, LTD., CHARITABLE** §  
**DAF HOLDCO, LTD., CHARITABLE** §  
**DAF FUND, LP, HIGHLAND DALLAS** §  
**FOUNDATION, INC., THE DUGABOY** §  
**INVESTMENT TRUST, GRANT JAMES** §  
**SCOTT III IN HIS INDIVIDUAL** §  
**CAPACITY, AS TRUSTEE OF THE** §  
**DUGABOY INVESTMENT TRUST, AND** §  
**AS TRUSTEE OF THE GET GOOD** §  
**NONEXEMPT TRUST, AND JAMES D.** §  
**DONDERO,** §  
§  
**Defendants.** §

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**JURY TRIAL DEMANDED**

**MOTION TO DISMISS, OR IN THE ALTERNATIVE,  
MOTION FOR MORE DEFINITE STATEMENT**

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Defendant Dugaboy Investment Trust (“Dugaboy” or “Defendant”) in the above-captioned adversary proceeding (the “Adversary Proceeding”) files this *Motion to Dismiss, or in the alternative, Motion for More Definite Statement* (the “Motion”) pursuant to Federal Rule of Bankruptcy Procedure 7012(b)(6), and, for the reasons set forth in the accompanying Brief in



Support, respectfully moves the Court to dismiss the Amended Complaint (“Complaint”) (Dkt. No. 6) filed by the Plaintiff Official Committee of Unsecured Creditors (“Plaintiff” or the “Committee”) as to Dugaboy or in the alternative, require a more definite statement, and grant such other relief, at law or in equity, to which it may be entitled.<sup>1</sup>

Respectfully submitted,

**HELLER, DRAPER, & HORN, LLC**

*/s/ Douglas S. Draper*

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**COUNSEL FOR THE DUGABOY  
INVESTMENT TRUST**

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<sup>1</sup> Nothing herein shall be deemed a waiver of any right to a jury trial by the Defendant or Defendant’s consent to the Bankruptcy Court entering final orders or judgments in this Adversary Proceeding.

**CERTIFICATE OF SERVICE**

I, undersigned counsel, hereby certify that a true and correct copy of the above and foregoing document and all attachments thereto were sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case on this April 30, 2021.

**/s/ Douglas S. Draper**



filed by the Plaintiff Official Committee of Unsecured Creditors (“Plaintiff” or the “Committee”). In support of the Motion, Defendant respectfully represents as follows:

### **I. MOTION TO WITHDRAW REFERENCE**

1. Contemporaneously herewith, the Defendant along with co-defendant Get Good Nonexempt Trust, has filed a *Motion to Withdraw the Reference* (the “Motion to Withdraw Reference”) requesting that the District Court withdraw the reference as to this Adversary Proceeding from the Bankruptcy Court.

2. Dugaboy expressly reserves its right to a jury trial on all causes of action alleged in the Complaint. Defendant also states, under Federal Rule of Bankruptcy Procedure<sup>1</sup> 7012(b), that it does not consent to the entry of final orders or judgment by the Bankruptcy Court.

3. Nothing herein shall be deemed a waiver of any right to a jury trial by the Defendant nor shall it be deemed as consent to the Bankruptcy Court entering final orders or judgments in this Adversary Proceeding.

### **II. FACTUAL OVERVIEW**

4. The Committee’s Complaint alleges that, along with the other named defendants, Dugaboy engaged in a conspiracy to unlawfully and nefariously move the Debtor’s assets through a complicated series of transactions, ultimately placing the assets in the hands of CLO Holdco, Ltd. (“CLO Holdco”), in order to hide assets from the Debtor’s creditors. Specifically, the Complaint alleges that in late 2016, the Debtor along with all defendants engaged in a “swap” transaction (the “CLO Transaction”) between the Debtor and the Get Good Nonexempt Trust (“Get Good”) resulting in the Debtor receiving a 97.6835% interest in a promissory note (the “Dugaboy Note”) issued by Dugaboy and held by Get Good. Accepting the facts, as

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<sup>1</sup> The Federal Rules of Bankruptcy Procedure shall hereafter be referred to as the “Bankruptcy Rules” and each a “Bankruptcy Rule.”

pleaded in the Complaint, the Dugaboy Note (as restructured) is in the principal amount of \$23,817,639.58. The gist of the Committee's complaint is that the Dugaboy Note was overvalued and that the Debtor did not receive equivalent value in exchange for the transfer of its assets.

5. There is no dispute that since the CLO Transaction, Dugaboy has been making (and continues to make) payments on the Dugaboy Note and that there is little risk of Dugaboy defaulting on the Dugaboy Note. In fact, the only allegation specifically made against Dugaboy—aside from issuing and making payments on the Dugaboy Note—is a vague reference that it was involved in the alleged conspiracy of the CLO Transaction, presumably because of the fact that Grant James Scott, III (“Scott”) was both the “family trustee” and the “independent trustee” of Dugaboy at the time of the CLO Transaction.

6. The Complaint states that the transferred assets that ultimately went to CLO Holdco are valued at approximately \$24 million,<sup>2</sup> which is also approximately the principal amount of the Dugaboy Note. The Complaint also states without any factual support whatsoever that the Dugaboy Note should have been valued at least \$15.9 million less than the transferred assets, or \$8.1 million.<sup>3</sup>

7. Because the Complaint fails to make any factual allegations against Dugaboy to support its vague and conclusory claim that Dugaboy was engaged in any sort of conspiracy, it is deficient in that it fails to meet the standard under Rule 12(b)(6) or the heightened pleading requirements applicable to a claim sounding in fraud and provides no legal precedent to support a conspiracy claim. As such, the Committee's Complaint must be dismissed against Dugaboy.

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<sup>2</sup> Complaint at ¶ 62.

<sup>3</sup> *Id.* at ¶ 42.

### III. THE COMMITTEE'S CLAIM AGAINST DUGABOY

8. The sole cause of action that the Committee asserts against Dugaboy is that Dugaboy was involved in the alleged conspiracy along with the Debtor and the other named defendants. There is no underlying claim of wrongdoing or unlawful act against Dugaboy as it relates to the alleged conspiracy.

9. The Committee has failed to meet any of the requisite elements for a claim of conspiracy as against Dugaboy.

### IV. ARGUMENTS & AUTHORITIES SUPPORTING DISMISSAL

#### A. Applicable Standard – 12(b)(6) Motion to Dismiss

10. To survive a Rule 12(b)(6) motion to dismiss, the Plaintiff's Complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Federal Rule of Civil Procedure<sup>4</sup> 8(a)(2) "requires a showing, rather than a blanket assertion, of entitlement to relief." *Id.* at 556 n.3. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, [the complaint] 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) After all, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—the pleader is entitled to relief." *Id.* at 679 (emphasis added, internal quotations removed).

11. The Supreme Court's interpretation of Rule 8, incorporated here pursuant to Bankruptcy Rule 7008(a), requires pleadings that demonstrate "facially plausible claims," a standard satisfied when "the pleaded factual content allows the court to draw the reasonable

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<sup>4</sup> Federal Rules of Civil Procedure shall be hereafter referred to as the "Rules" and each a "Rule".

inference that the defendant is liable for the misconduct alleged.” *Id.* Courts should not strain to find inferences favorable to the plaintiff or accept “conclusory allegations, unwarranted deductions, or legal conclusions.” *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005) (citations omitted).

12. Although the Committee did not assert claims of an actual or constructively fraudulent transfer against Dugaboy (presumably because Dugaboy had nothing to do with any of the individual transfers that occurred within the broader CLO Transaction), the conspiracy claim that is asserted against Dugaboy presumably arises out of the alleged fraudulent transfer claims that are asserted against all the other named defendants. Otherwise, there would be no unlawful act or purpose that could be attributable to the conspiracy claim.<sup>5</sup> As such, the enhanced pleading requirements of Rule 9(b) should apply<sup>6</sup> and the Committee is required to state with particularity facts supporting each element of fraud and the particulars of time, place, and contents of the false or fraudulent conduct, as well as the identity of the person(s) acting fraudulently and what each actor thereby obtained—i.e. the “who, what, when, where, and how” of the fraud.<sup>7</sup>

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<sup>5</sup> This is the entire point of Dugaboy’s Motion to Dismiss; i.e. that there is no unlawful act or purpose alleged against Dugaboy to support the claim that it was involved in any conspiracy.

<sup>6</sup> *Clapper v. Am. Realty Inv'rs, Inc.*, No. 3:14-CV-2970-D, 2018 WL 3868703, at \*8 (N.D. Tex. Aug. 14, 2018) (citing *In re: Brown Med. Ctr., Inc.*, 552 B.R. 165, 168 (S.D. Tex. 2016) (applying Rule 9(b) to fraudulent transfer claim based on actual fraudulent intent) and *E. Poultry Distributors, Inc. v. Yarto Puez*, 2001 WL 34664163, at \*2 (N.D. Tex. Dec. 3, 2001) (Lynn, J.) (“If the fraudulent transfer statute Plaintiffs want the Court to apply requires intent to defraud, the enhanced pleading requirements of Rule 9(b) apply; if the statute allows for fraudulent transfer without intent to defraud, however, only the general pleading rules of Rule 8(a) must be satisfied.”)).

<sup>7</sup> *Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, No. 3:17-CV-1147-D, 2019 WL 329545, at \*5 (N.D. Tex. Jan. 25, 2019) (citing *Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 453 (5th Cir. 2005)).



**B. Plaintiff has failed to state a claim for conspiracy against Dugaboy**

13. To prove civil conspiracy under Texas common law, a plaintiff must show “(1) a combination of two or more persons; (2) an object to be accomplished (an unlawful purpose or a lawful purpose by unlawful means); (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result.”<sup>8</sup>

14. Civil conspiracy is not an independent cause of action, but rather a derivative claim dependent on an underlying tort.<sup>9</sup> Accordingly, because the Committee's allegations of conspiracy to commit a fraudulent transfer are derivative of its TUFTA claims, its failure to plead any claim of fraudulent transfer against Dugaboy is necessarily fatal to the claims for conspiracy to commit a fraudulent transfer.<sup>10</sup>

15. The Committee does not allege (a) that Dugaboy had an unlawful purpose or sought a lawful purpose through unlawful means; (b) that there was a meeting of minds between Dugaboy and the other defendants; (c) that Dugaboy took any unlawful act whatsoever; or (d) that the Debtor or its creditors suffered damages as a result of the only acts that Dugaboy has taken (executing the Dugaboy Note and payment on the same).

16. While the Committee alleged that all named defendants have conspired together, it has not stated how or why Dugaboy would seek to accomplish the alleged removal of assets from the Debtor's creditors. From the perspective of Dugaboy it still had to make payments on the note. The only thing that the transaction at issue did was change the party receiving the payment. The consent of Dugaboy or the participation of Dugaboy was irrelevant to the transfer

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<sup>8</sup> *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56, 80 (Tex. App. 2004).

<sup>9</sup> *Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, No. 3:17-CV-1147-D, 2019 WL 329545, at \*7 (N.D. Tex. Jan. 25, 2019) (granting motion to dismiss fraudulent transfer claim as well as conspiracy claim).

<sup>10</sup> *ClaimHub, Inc. v. Universal Risk Ins. Servs., Inc.*, No. H-10-2841, 2011 WL 13247456, at \*7 (S.D. Tex. July 25, 2011).

and under applicable law the consent of Dugaboy was not required for the Note to be transferred. The Complaint does not allege that Dugaboy took *any* action whatsoever other than executing the Dugaboy Note and making payments in compliance with the terms of the note. In fact, Dugaboy's actions have *benefited* the Debtor by providing the Debtor with its share of the cash payments under the Dugaboy Note.

17. The only connection that the Complaint draws between Dugaboy and the Debtor is the fact that at the time of the CLO Transaction, Scott (who happened to have been friends with Dondero) was acting as both the family trustee and the independent trustee.

18. Further, the Complaint does not allege that any creditor of the Debtor is more than general creditor as to the Transferred Assets at issue in the CLO Holdco Transaction, and therefore its conspiracy claim fails for this additional reason. A “mere general creditor may take advantage of the Texas fraudulent conveyance statute, but may not recover damages for conspiracy to commit a fraudulent conveyance.” Where, as here, because “a mere general creditor without a lien has no interest in the Debtor’s property, and hence is not legally injured by any conspiracy with the Debtor to aid him in disposing of his property in order to evade the payment of his financial obligations,” the Plaintiff cannot plausibly maintain its claim of conspiracy.<sup>11</sup>

**C. The Committee is requesting a windfall**

19. The Complaint seeks a monetary judgment “for the value of the Transferred Assets.” The Complaint also states that the current outstanding principal on the Dugaboy Note is approximately \$18.3 million,<sup>12</sup> meaning that Dugaboy has paid down the principal by

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<sup>11</sup> *Basic Capital Mgmt., Inc.*, 2019 WL 329545, at \*7.

<sup>12</sup> Complaint at ¶ 66.

approximately \$5.5 million, plus interest. The Debtor also keeps the Dugaboy Note, meaning that the Committee is asking for the Court to award essentially twice the value of the Dugaboy Note (the payments on the Dugaboy Note with a principal amount of approximately \$23.8 million and interest plus the alleged \$24 million in assets that were transferred as part of the CLO Transaction.

20. A debtor's estate—only upon proving successful in an avoidance action—is only entitled to recover the amount of the debtor's interest in the transferred property as of the petition date.<sup>13</sup> Any transferee of an avoidable transfer is entitled to credit for any value recovered by the debtor following the initial transfer.<sup>14</sup> In this case, as conceded in the Complaint, Dugaboy has continued to make payments on the Dugaboy Note and has not shown any unwillingness or inability to continue to do so. In other words, because of Dugaboy's payments on the Dugaboy Note, the Debtor is already receiving the very thing the Committee is asking the Court to award. The Committee is asking the Court to award the estate double recovery in the form of continued payments on the Dugaboy Note (totaling approximately \$23.8 million plus interest) and the purported \$24 million value of the transferred assets. Such a result would be absurd and it also supports a finding by this Court that no cause of action has been stated against Dugaboy because the Complaint fails to state how the estate is actually damaged.

#### V. MOTION FOR MORE DEFINITE STATEMENT

21. As set forth herein, the Complaint is devoid of many of the necessary elements of the Committee's claims. While Dugaboy believes that dismissal is the appropriate remedy, in the alternative, Defendant moves for a more definite statement under Rule 12(e).

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<sup>13</sup> See, *In re Bean*, 252 F.3d 113, 117 (2d Cir. 2001).

<sup>14</sup> *Id.* See also, *In re Cybridge Corp.*, 304 B.R. 681, 691–92 (Bankr. D. N.J. 2004).

22. “If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding.”<sup>15</sup> A Rule 12(e) motion requires a court to determine whether the complaint is “so vague or ambiguous that the party cannot reasonably prepare a response.”<sup>16</sup>

23. As sated above, the only cause of action the Complaint states against Dugaboy is Conspiracy. As also stated above, for a claim of conspiracy, a complainant must state, among other things, the specific unlawful purpose or unlawful means used by the alleged conspirators and what unlawful, overt act(s) were taken by the individual conspirators. As to Dugaboy, the Complaint only makes a blanket and unsupported statement that Dugaboy acted in combination with the other defendants to effect the CLO Transaction and that it “took overt steps,” but it never states what these overt steps actually were. Without more, Dugaboy has no notice of precisely what acts it is defending.

## VI. CONCLUSION

**WHEREFORE**, Defendant Grant James Scott, III, as Trustee for The Dugaboy Investment Trust respectfully prays that the Court grant the Motion in its entirety, dismiss the Complaint as to Dugaboy, or in the alternative, require a more definite statement, and grant such other relief, at law or in equity, to which he may be entitled.

Respectfully submitted,

**HELLER, DRAPER, & HORN, LLC**

*/s/ Douglas S. Draper*

Douglas S. Draper, La. Bar No. 5073

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<sup>15</sup> *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *see Jones v. Gee*, No. CV 18-5977, 2020 WL 564956, at \*8 (E.D. La. Feb. 5, 2020) (“When evaluating a motion for a more definite statement, courts must look to Federal Rule of Civil Procedure 8 for the minimal pleading requirements when analyzing the complaint.”).

<sup>16</sup> FED. R. CIV. P. 12(e).

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**COUNSEL FOR THE DUGABOY  
INVESTMENT TRUST**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
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<b>In re:</b>	§	<b>Case No. 19-34054-sgj11</b>
	§	
<b>HIGHLAND CAPITAL MANAGEMENT, L.P.,</b>	§	
	§	<b>Chapter 11</b>
	§	
<b>Debtor</b>	§	

<b>OFFICIAL COMMITTEE OF UNSECURED CREDITORS,</b>	§	
	§	
	§	
<b>Plaintiff,</b>	§	
	§	<b>Adversary No. 20-03195</b>
<b>vs.</b>	§	
	§	
<b>CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,</b>	§	
	§	
	§	
<b>Defendants.</b>	§	

**ORDER GRANTING MOTION TO DISMISS**

Having considered Defendant Dugaboy Investment Trust's ("Dugaboy" or "Defendant") *Motion to Dismiss, or in the alternative, Motion for More Definite Statement* (the "Motion to Dismiss"), it is hereby **ORDERED** that :

1. The Motion to Dismiss is **GRANTED**.
2. The Causes of Action in the Complaint (Dkt. No. 6) are dismissed, with prejudice, as to the Dugaboy Investment Trust.

### END OF ORDER ###

Order Submitted and Prepared By:

**HELLER, DRAPER, & HORN, LLC**

/s/ Douglas S. Draper

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