

CASE NO. 3:21-02268-S

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

HIGHLAND CAPITAL MANAGEMENT LP

(Debtor)

THE DUGABOY INVESTMENT TRUST AND
GET GOOD TRUST

(Appellants)

v.

HIGHLAND CAPITAL MANAGEMENT LP

(Appellee)

On appeal from the United States Bankruptcy Court for the Northern District of
Texas, Dallas Division

**APPELLANTS' MOTION FOR LEAVE TO FILE SUR REPLY TO
APPELLEE'S MOTION TO DISMISS APPEAL AS MOOT AND
INCORPORATED MEMORANDUM IN SUPPORT**

Filed by Heller, Draper & Horn, LLC

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NOW INTO COURT, through undersigned counsel, comes Appellant, Dugaboy Investment Trust (“Dugaboy”), who moves this Court for leave (the “Motion”) to file its *Sur Reply to Appellee’s Reply in Support of Appellee’s Motion to Dismiss Appeal as Moot* (the “Sur Reply”), a copy of which is attached hereto. Dugaboy respectfully represents as follows:

1. On December 15, 2021, Appellee, Highland Capital Management, L.P. (“Highland”) filed a Motion to Dismiss Appeal as Moot [Dkt. No. 12] (the “Motion”), arguing that Appellants, Dugaboy and the Get Good Trust (“Get Good”) lost their constitutional standing to appeal the Bankruptcy Court’s order denying the Appellants’ Motion to Compel Compliance with Rule 2015.3 as moot.

2. On January 5, 2022, Appellant Dugaboy filed a Response to the Motion [Dkt. No. 15], asserting that it, in fact, did have standing on account of its potential recovery under the Plan as a former equity holder in the Debtor and its ownership interest in several of the Debtor’s non-debtor affiliates for whom no Rule 2015.3 Reports were filed.

3. On January 12, 2022, Appellee filed its Reply [Dkt. No. 16], asserting (among other things) that Dugaboy’s Response was untimely and that it had waived its right to defend its standing on account of it not raising the arguments in the Response at the Bankruptcy Court.

4. Appellant's standing was never challenged at the Bankruptcy Court and only for the first time in the Appellee's Reply.

5. In order to reply only to the assertions that Dugaboy's Response was untimely and that it had waived its right to defend its standing, while relying on its arguments in the Response for all other substantive issues, Appellant Dugaboy seeks this Court's authority for leave to file its Sur Reply. Dugaboy asserts that the facts, law, and arguments set forth in the attached Sur Reply will further aid the Court in its determination of the pending Motion to Dismiss. Dugaboy further submits that no parties will be prejudiced by the granting of this motion as it is limited in scope to only address issues raised for the first time in the Appellee's Reply.

CERTIFICATE OF CONFERENCE

In accordance with Local Rule 7.1(b), undersigned counsel hereby certifies that on January 18, 2022, he conferred with counsel for Appellee and requested consent to file the Sur Reply as requested in this Motion for Leave pursuant to Local Rule 7.1. Counsel for Appellee insisted that Local Rule 7.1 does not apply and insisted that Appellant proceed under Bankruptcy Rule 8013. Given that the difference in opinion is at the very heart of the Appellee's Reply and the proposed Sur Reply, undersigned has assumed that counsel for Appellee opposes the filing of the Sur Reply.

Dated January 18, 2022:

/s/Douglas S. Draper

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Attorneys for Appellants

The Dugaboy Investment Trust and

The Get Good Nonexempt Trust

CERTIFICATE OF SERVICE

I, Douglas S. Draper, hereby certify that on January 18, 2022, this Motion was served electronically upon all parties registered to receive service in this case via the Court's CM/ECF system.

/s/ Douglas S. Draper

Douglas S. Draper

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Appellant, Dugaboy Investment Trust (“Dugaboy”),¹ submits this *Sur Reply* in response to the Appellee’s *Reply in Support of Appellee’s Motion to Dismiss Appeal as Moot* [Dkt. No. 16] (the “Reply”) to make the following very brief, but important points and to correct certain inadequacies in the Appellee’s Reply.

The Response Is Timely Under the Bankruptcy Rules and the Local Rules. As the Appellee is eager to point out, Rule 8013(a)(3)(A) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) states that a response to a motion is due within 7 days “*unless the district court . . . orders otherwise.*” (emphasis added). In this case, the Appellee apparently has no regard for the Local Rules of this District Court. If it did, the Appellee would have noted that Local Rule 7.1(e) (also cited in the Appellant’s Response) states that a response to a motion must be filed within 21 days. Local Rule 7.1 applies unless “another *local rule*” (emphasis added) applies. Notably, the Bankruptcy Rule includes an exception for when the district court where the appeal is pending has a conflicting rule and the Local Rule does not have such an exception (other than for another Local Rule). Local Rule 7.1 provides that “motion practice is controlled by subsection (h) of this rule.” While the Local Rules exempt at least one rule from “bankruptcy appeals,” Local Rule 16.1(e), there is no such exemption from Local

¹ As the Appellee pointed out, Appellants consented to the dismissal of the appeal as to appellant, Get Good Trust, and, like Appellee, will make reference only to the Dugaboy Trust as “Appellant.”

Rule 7.1. Hence, Local Rule 7.1 applies and controls over Bankruptcy Rule 8013(a)(3)(A).

Further, this Court's most recent order adopting amendments to Local Rule 7.1 as of September 1, 2020, (see Special Order No. 2-91) provides that:

Amended local civil rules LR 7.1, LR 7.2(c), and LR 7.3(b) and amended local criminal rule LCrR 55.3(b) take effect on September 1, 2020 and *apply to all proceedings in civil and criminal actions thereafter commenced* and, insofar as just and practicable, all proceedings in civil and criminal actions then pending.

(emphasis added). “[A]ll proceedings” applies to bankruptcy appeals as well, which are civil proceedings.

In sum, the Appellant submits that the Debtor is wrong that the 7-day deadline in Bankruptcy Rule 8013 applies and that, instead, this Court's standard 21-day rule applies.

Appellant Takes a Selective View of What Constitutes a “Pecuniary Interest.” In the Appellee's Motion to Dismiss, it states that in order for a party to have standing on appeal, it must still have a pecuniary interest that is directly affected by the order being appealed. When Dugaboy pointed out that pecuniary interest (i.e. ownership interest in the non-debtor affiliates and a potential recovery under the Plan as a former equity holder in the Debtor), Appellee shifted its view so that now only *prepetition creditors* with a pecuniary interest can have standing.

This is despite the fact that Appellee recognizes that Appellant has stated that it may have a pecuniary interest in an administrative claim against the Debtor.

But that gets at the very problem. The Bankruptcy Court's Order denying the motion to compel compliance with Rule 2015.3 as moot deprived all parties from ever investigating these possible claims. There is no way that Appellant can state that Appellee's pecuniary interest is "too speculative" because there has been no investigation and any such investigation was foreclosed by the Bankruptcy Court's ruling. To say that a party being denied the right to even investigate a possible claim does not constitute substantive harm to that party flies in the face of the entire bankruptcy process.

Appellee's Arguments Were Not Raised Because This Issue Did Not Exist At the Bankruptcy Court. At the confirmation hearing and at the hearing on the Appellant's motion to compel, the Appellants (both Dugaboy and Get Good) had standing, so there was no controversy regarding its standing. As the Appellant points out, Appellee lost its claim after the Bankruptcy Court issued its ruling and never faced a challenge to its standing. The challenge to its standing did not come until the present Motion to Dismiss was filed.

Conclusion

As stated in Dugaboy's Response, the Bankruptcy Court's Order denying the Motion to Compel as moot directly harmed Dugaboy by taking away its right to

even examine whether there exists a post-petition claim against the estate by the non-debtor affiliates. The propriety of that order is what is on appeal to this Court. The harm complained of is the deprivation to examine the disclosures that would have been provided by the Rule 2015.3 Reports had they been filed. The Appellee's arguments that the Response was untimely and that Dugaboy waived its right to defend its standing before its standing was even challenged in the first place is pure nonsense and should be ignored by this Court.

As such, Dugaboy respectfully requests that this Court deny the Motion to Dismiss Appeal as Moot as to Dugaboy and move forward with a determination of whether the Bankruptcy Court's Order was proper in the first place.

CERTIFICATE OF COMPLIANCE

In compliance with Rules 8013(f), I hereby certify that this document complies with the type-volume limit of Fed. R. Bankr. P. 8013(f)(3) because this document contains 851 words.

Dated January 18, 2022:

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/s/ Douglas S. Draper

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**ORDER GRANTING APPELLANTS'
MOTION FOR LEAVE TO FILE SUR REPLY TO
APPELLEE'S MOTION TO DISMISS APPEAL AS MOOT**

Considering the *Appellant's Ex Parte Motion for Leave to File Sur Reply to
Appellee's Motion to Dismiss Appeal as Moot*,

IT IS ORDERED that the Motion is **GRANTED**;

IT IS FURTHER ORDERED that Dugaboy Investment Trust is hereby granted leave to file its Sur Reply to Appellee's Motion to Dismiss Appeal as Moot.

This _____ day of January, 2022.

UNITED STATES DISTRICT JUDGE

NOW INTO COURT, through undersigned counsel, comes Appellant, Dugaboy Investment Trust (“Dugaboy”), who moves this Court for leave (the “Motion”) to file its *Sur Reply to Appellee’s Reply in Support of Appellee’s Motion to Dismiss Appeal as Moot* (the “Sur Reply”), a copy of which is attached hereto. Dugaboy respectfully represents as follows:

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