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' SUR REPLY TO APPELLEE'S MOTION TO DISMISS APPEAL AS MOOT

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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 79.3(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 is 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:

/s/Douglas S. Draper

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CERTIFICATE OF SERVICE

I, Douglas S. Draper, hereby certify that on January 18, 2022, this Sur Reply 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