Date Filed: 5/9/2022

Case No. 22-10189

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In the Matter of: Highland Capital Management, L.P.,

Debtor.

Highland Capital Management Fund Advisors, L.P.; NexPoint Advisors, L.P.; The Dugaboy Investment Trust,

Appellants,

v.

Highland Capital Management, L.P.,

Appellee.

OPENING BRIEF OF APPELLANT THE DUGABOY INVESTMENT TRUST

Appeal from the United States District Court for
the Northern District of Texas, the Honorable Sidney A. Fitzwater

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. **Appellant filing this brief:**

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2. Other Appellants:

NexPoint Advisors, L.P.
Owned by:
The Dugaboy Investment Trust
NexPoint Advisors GP, LLC
Owned by:
James Dondero

Highland Capital Management Fund Advisors, L.P.
Owned by:
Highland Capital Management Services, Inc.
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4. Other Interested Parties:

Official Committee of Unsecured Creditors (dissolved)

Members:

Redeemer Committee of Highland Crusader Fund
Meta-e Discovery
UBS Securities LLC
UBS AG London Branch
Acis Capital Management, L.P.
Acis Capital Management GP, LLC
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All parties in interest in Highland Capital Management, L.P. bankruptcy

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

STATEMENT REGARDING ORAL ARGUMENT

Dugaboy believes oral argument would be of benefit to the Court. The issue as to the standing of Dugaboy is based upon *Coho Energy* which was decided by this Court. The standing test set forth in *Coho* is not based on the Constitution or the present statute. It is based upon a repealed section of the Bankruptcy Act. This case provides an opportunity for the Court to address the contours of *Coho* and whether the test set out in *Coho* applies to the loss of substantive rights or a reduction in a party's chances of recovery and opposed a defined calculable sum.

The appeal also raises the issue as to how and when a Court should determine whether an Appellant is an aggrieved party if the assets at issue fluctuate in value.

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OPENING BRIEF OF APPELLANT THE DUGABOY INVESTMENT TRUST

The Dugaboy Investment Trust (the "Appellant" or "Dugaboy"), hereby submits this *Opening Brief of Appellant The Dugaboy Investment Trust* in support of which it respectfully states as follows:

I. STATEMENT OF JURISDICTION

On July 21, 2021, the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, (the "Bankruptcy Court") entered its *Order Approving Debtor's Motion for Entry of an Order (I) Authorizing the (a) Creation of an Indemnity Subtrust and (b) Entry Into an Indemnity Trust Agreement and (II) Granting Related Relief* (the "Indemnity Trust Order"). ROA.18-20.

II. STATEMENT OF ISSUES

The Dugaboy brief will solely address the portion of the District Court Opinion holding that Dugaboy lacked "standing" to prosecute the appeal of the Bankruptcy Court's Order approving the Indemnity Trust. Dugaboy adopts the brief submitted by Nexpoint Advisors L.P. and Highland Capital Management Fund Advisors, L.P. (the "Advisors") as to why the Bankruptcy Court should have denied the Indemnity Trust Motion filed by Highland Capital Management, L.P. ("Debtor").

Dugaboy is not asking this Court to reverse its opinion in *In re Coho Energy,* 395 F. 3d 198, 202–03 (5th Cir. 2004), rather, Dugaboy is seeking a determination

by this Court as to the contours of the term "person aggrieved". Dugaboy would note, as set forth below, the application of the "aggrieved party test" is not supported by the Bankruptcy Code or the Constitution. As Justice Scalia wrote in his *Hen House* opinion, "[a]chieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not the courts." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A. (In re Hen House Interstate, Inc.)*, 530 U.S. 1, 13, 120 S. Ct. 1942, 1951, 147 L. Ed. 2d 1 (2000). Whether to limit litigants' right to judicial oversight of a bankruptcy court decision is the sole province of Congress.

III. INTRODUCTION

Contrary to the District Court's decision, Appellant Dugaboy is a "person aggrieved" by the Bankruptcy Court's Indemnity Trust Order. So long as the party seeking to overturn the order of the Bankruptcy Court has any expectancy of a recovery and the opinion being appealed will in some fashion impact that expectancy, that party qualifies as a person aggrieved. The size of the economic interest do not factor in the determination nor do the chances of the party's expected recovery. In addition, where an Appellant's substantive rights are impacted by the decision, the application of the aggrieved party doctrine should not be applied, and the sole test should be that of Constitutional mootness.

IV. STATEMENT OF THE CASE

The facts relating to Dugaboy's standing to prosecute the appeal are not in dispute. The facts are as follows:

a) Highland Capital Management filed for relief pursuant to Chapter 11 of the Bankruptcy Code. (ROA 548–49).

b) Dugaboy filed a series of "proofs of claim" (Claim Nos. 113, 131, and 177) (ROA 748).

c) The Debtor filed objections to the Dugaboy proofs of claim (ROA 748).

d) The Debtor filed a Plan of Reorganization (ROA 477) that was confirmed by the Bankruptcy Court on February 22, 2021 (ROA 543). For purposes of this Appeal, the Plan contained the following provisions: Releases; Exculpations; and "Gate Keeper" provisions (ROA 530–34).

e) Pursuant to the Debtor's confirmed Plan, had the proofs of claim filed by Dugaboy been allowed the claims would have been placed in Class 8 (ROA 504–05) and would have received a distribution with all other allowed creditors in Class 8 (ROA 507–10). Under the terms of the confirmed Plan, the interests held by Dugaboy were cancelled and, in exchange (as an owner of the Debtor), Dugaboy was given a contingent interest in the Claimant Trust (ROA 587) and is to receive payment after all creditors were paid in full and all senior equity interests were paid in full (ROA 505-06).

f) The testimony of Jim Seery at the confirmation hearing did not rule out the possibility that Dugaboy would receive some recovery pursuant to its contingent beneficiary status under the Plan (ROA 2395–96).

g) The Plan provided, as a condition of its going effective, that either the Debtor had to obtain D&O insurance or have the condition to effectiveness waived (ROA 529).

h) The Plan confirmed by the Bankruptcy Court contained a third-party release (ROA 491, 496, and 530–32), a post-confirmation injunction prohibiting claims from being asserted against the Debtor and third parties, and a gatekeeper provision requiring prohibiting any claimant or beneficiary of an investment managed by the Debtor from filing suit without first convincing the Bankruptcy Court that the party had a colorable claim (ROA 533–34).

i) On September 17, 2021, a full seven months after the Plan was confirmed but prior to the time it went effective, the Debtor filed the Motion that is the subject of this appeal (ROA 704). The Motion created a new Indemnity Trust (different from the one specifically identified in the Plan) that provided a funded trust in lieu of the D&O insurance that was required under the Plan (ROA 705). Pursuant to the Motion, the parties to be covered by the Indemnity Trust were enlarged from "the Claimant Trustee, Litigation Trustee, and the Claimant Trust Oversight Committee" to the Claimant Trust, the Litigation Sub-Trust, and *the Reorganized Debtor* (ROA 710 and 722).

j) Absent the Plan going effective, the gatekeeper and third-party releases for post confirmation claims would not have applied to Dugaboy. The third-party

releases, injunctions and gatekeeper provision have been appealed to this Court and we are awaiting a ruling.

k) The Plan would not have gone effective absent the Bankruptcy Court's Order approving the Indemnity Trust (ROA 713–14).

l) Dugaboy filed an objection to the Indemnity Trust Moton (ROA 730) that was overruled by the Bankruptcy Court (ROA 18).

m) At the time of the hearing in the Bankruptcy Court on the Indemnity Trust Motion (July 19, 2021), the Dugaboy claims had not been disallowed.

n) Dugaboy and the Advisors filed an appeal of the Bankruptcy Court Order approving the Indemnity Trust (ROA 13).

o) All parties to the appeal submitted briefs to the District Court. The Appellee's brief was submitted on November 17, 2021. The brief did not raise the issue of "constitutional mootness."

p) Dugaboy consented to the disallowance of its claims and the Dugaboy proofs of claim were denied by order of the Bankruptcy Court, dated October 27, 2021, and November 10, 2021 (ROA 4507).

q) Appellee filed a Motion to Dismiss the Dugaboy appeal of the Bankruptcy Court Order approving the Indemnity Trust as constitutionally moot on January 10, 2022 (ROA 4499). The Motion was filed a full two months after the

Court disallowed the Dugaboy proofs of claim and merely eighteen days prior to the oral argument on the Indemnity Trust Appeal.

r) On January 28, 2022, Judge Fitzwater dismissed the Dugaboy appeal on the basis that Dugaboy lacked "constitutional standing." In the opinion supporting the dismissal, Judge Fitzwater held:

> Dugaboy has a contingent interest that will only be paid if all other creditors were paid in full. … Dugaboy's expected return is therefore $0 both before and after entry of the Order.

(ROA 4648).

s) In footnote 6 to the Opinion, Judge Fitzwater wrote:

> "Appellants cannot rely on the possibility that the Litigation Sub-Trust might secure sufficient funds to pay contingent interests. This is speculative at best; Dugaboy will suffer an injury if and only if the Litigation Sub-Trust obtains a windfall. *See* R 2270-80 ("Theoretically, there's a circumstance, and that is if every other creditor in the case were to be paid in full … theoretically the junior interest holders could receive a distribution. However, based upon our projections, that would be wholly dependent on a significant recovery in the Litigation – by the Litigation Trustee")."

(ROA 4648).

t) Judge Fitzwater based his ruling upon the opinion rendered by the Fifth Circuit in *In re Coho Energy, Inc,* 395 F.3d 198 (5th Cir. 2004).

u) The opinion rendered by Judge Fitzwater recognized that Dugaboy could recover under the Plan. He merely felt that the recovery was speculative.

v) The Court relied on projections that existed as of February of 2021 and calculations based upon a February 2021 set of facts and assumptions. Significantly, no evidentiary hearing was held as to whether the projections had changed in the course of the year. In fact the filing of the Motion to Dismiss a mere 17 days prior to oral argument on the appeal ensured that no new projections could be provided to rebut the contentions made in the Motion to Dismiss.

V. SUMMARY OF THE ARGUMENT

The District Court erred in dismissing the Dugaboy appeal on the basis of standing. Dugaboy believes that it possesses constitutional standing and the application of the stricter standard based *Coho* is not warranted. The *Coho* decision is based on a repealed section of the Bankruptcy Act and, if applicable at all, should be limited to cases where an appellant has no interest in the estate at all or where the appealed decision will not adversely impact the appellant's expectancy of recovery. *Coho* should not apply in cases where the appellants' expectancy of recovery is adversely affected or where the appellants' substantive rights are diminished or released.

Dugaboy adopts the Summary of Argument stated by the Advisors as to why the decision of the Bankruptcy Court approving the Indemnity Trust Agreement, and the District Court affirming the Bankruptcy Court's order should be reversed.

VI. ARGUMENT AND AUTHORITIES

A. Standard of Review

This Court reviews the Bankruptcy Court's findings of fact for "clear error," while conclusions of law are reviewed *de novo*. *See Electric Reliability Council of Tex. Inc. v. May (In the Matter of Texas Comm. Energy)*, 607 F.3d 153, 158 (5th Cir. 2010). "A finding is clearly erroneous if a review of the record leaves a definite and firm conviction that a mistake has been committed." *Boudreaux v. U.S.*, 280 F.3d 461, 466 (5th Cir. 2002) (internal quotation omitted). But this Appeal raises an issue of law only—*i.e.* whether the Indemnity Trust Order represents an impermissible plan modification. As the District Court appropriately observed, "[t]his court applies a *de novo* standard of review when deciding whether the bankruptcy court's order is a plan modification." ROA.4649 (citing *In re ASARCO, L.L.C.*, 650 F.3d 593, 601 (5th Cir. 2011)).

Put differently, this Court must determine what standard the Bankruptcy Court should have applied to the Motion to Dismiss as Constitutionally Moot. Should it have applied the narrower standard in *Coho*? Or should it have found that Dugaboy meets the standard for "person aggrieved" on account of having a contingent payment under the Plan? The Court reviews this question *de novo*. *See Wells Fargo Bank of Tex. N.A. v. Sommers (In re Amco Ins.)*, 444 F.3d 690, 694 (5th Cir. 2006) ("The determination of which standard to apply … is a question of law reviewed de novo.").

B. The Person Aggrieved Test

In *Coho Energy Inc*., 395 F.3d 198, 202 (5th Cir. 2004), the Fifth Circuit adopted the "person aggrieved test". Specifically, the Court held:

> Bankruptcy courts are not authorized by Article III of the Constitution and as such are not presumptively bound by traditional rules of judicial standing. *Rohm*, 32 F.3d at 210 n18. Instead, standing in bankruptcy court originally was governed by the statutory "person aggrieved" test. 11 U.S.C. §67(c) (1976). Congress did not include this provision when the Code was revamped in 1978. Notwithstanding its repeal, courts subsequently have found that this test continues to govern standing. *Rohm* 32 F.3d at 210 n18 ("Although the applicable statute has been repealed bankruptcy courts still limit appellate standing to those aggrieved) …"
>
> The "person aggrieved" standard is even more exacting standard than the traditional constitutional standing. *See e.g.*, PRTC 177 F.3d at 777 (to prevent unreasonable delay, courts have created an additional prudential standing requirement in bankruptcy cases. The appellant must be a person aggrieved "by the bankruptcy court's order" (emphasis added) …. Because bankruptcy cases typically affect numerous parties, the "person aggrieved test demands a higher causal nexus between an act and injury, appellant must show that he was "directly and adversely affected pecuniarily by the order of the Bankruptcy Court" in order to have standing to appeal. *In re Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983).

While Dugaboy is not requesting the Court to overturn *Coho* in its entirety, the statutory underpinnings of *Coho* are suspect. 11 U.S.C. § 1109 represents an enlargement from the parties entitled to be heard in a case than was present under the Bankruptcy Act. The section enlarges the parties that can be heard in a bankruptcy case to parties in interest that include the debtor, the trustee, a creditors' committee, an equity security holder committee, a creditor, an equity security holder

(*i.e.* Dugaboy) to "raise and appear" and be heard on any issue in a case under this Chapter.

The concept behind the more exacting standard as the Court noted in *Coho* was to prevent "unreasonable delay." While the goal may be laudable, the rule has no basis either in the Bankruptcy Code or the Constitution of the United States and represents "judicial legislation." In *Hen House*, Justice Scalia admonished judicial legislation when he wrote "[a]chieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not the courts." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A. (In re Hen House Interstate, Inc.)*, 530 U.S. 1, 13, 120 S. Ct. 1942, 1951, 147 L. Ed. 2d 1 (2000). If Congress wanted to impose a standard to govern Bankruptcy appeals that was more than any Constitutional limitation, it would have included the more exacting standard in either the Bankruptcy Code or the Federal Rules. The resort to a repealed statute and policy to support the more exacting standard is misplaced and amounts to "judicial legislation."

Inasmuch as the "person aggrieved" standard is one that has been created by "judicial legislation" its application should be narrow and limited. Dugaboy recognizes that in certain instances the Court has the ability to dismiss an appeal or even a lawsuit based on the Constitutional limitation of "case or controversy" but no statutory or constitutional support exists for the "more exacting standard." The case

or controversy limitation contained in the Constitution bars unwarranted access to federal courts and the limitation should be applicable whether a case is directly filed in the District Court, or the District Court is exercising its appellate authority. If Congress intended for District Courts to employ a more exacting standard for bankruptcy Court appeals, the standard could have been included in 28 U.S.C. § 158. The fact that it was not signifies that Congress did not intend that District Courts apply a more exacting standard to Bankruptcy Court Appeals than is required under the Constitution.

B. The Dugaboy Appeal Is Not Constitutionally Moot

A case is constitutionally "moot" "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "A case is no longer 'live' if the reviewing court is incapable of rendering effective relief or restoring the parties to their original position." *Williams v. Citifinancial Mortgage Co.* (*In re Williams*), 256 B.R. 885, 895 (B.A.P 8th Cir. 2001), citing *Mills v. Green*, 159 U.S. 651, 653 (1895). See also *Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1086 (11th Cir. 2004). A justiciable claim is one that "(1) present[s] a real legal controversy, (2) genuinely affect[s] an individual, and (3) [has] sufficiently adverse parties." *Cinicola v. Scharffenberger*, 248 F.3d 118, 118-19 (3rd Cir. 2001). An appeal "is moot in the constitutional sense only if events have taken place that make it

impossible for the court to grant any effectual relief whatever." *United Artists Theater Co. v. Walton*, 315 F.3d 217, 226 (3rd Cir. 2003). (Emphasis added; citations and quotations omitted). See also *Cook v. Bennet,* 792 F.3d 1294, 1299 (11th Cir. 2015). "Íf…there is a possibility of recovery to which an appellant might be entitled or some measure of effective relief that can be fashioned, then the appeal is not moot." *Williams*, 256 B.R. at 895. (Citation omitted). See also *Southwestern Bell Telephone Company v. Long Shot Drilling, Inc*. (*In re Long Shot Drilling, Inc*.), 224 B.R. 473, 478 (10th Cir. 1998).

A legal claim may become moot while awaiting appellate review due to a change in the status of the parties, as was the case in De Funis, *supra*. There a law student challenged the constitutionality of a law school's admissions policy and was admitted to the law school when the district court found in his favor. The decision was reversed on appeal, but the law student was in his second year of law school by that time. He then applied for a writ of certiorari to the United States Supreme Court, which was granted, but the student was in his last year of law school and would graduate "regardless of any decision [the] Court [would] reach on the merits." 416 U.S. at 319.

A claim may also be rendered moot as a result of a change in the law during the pendency of the action, such as occurred in *Richardson v. Wright*, 405 U.S. 208 (1972), where a litigant raised a constitutional due process challenge to the process

by which his Social Security disability benefits were suspended and terminated. Prior to oral argument, the government adopted new regulations adopting procedures that would address the concerns of the applicant and the case was declared constitutionally moot as a result. 405 U.S. at 209. See also *Lewis v. Continental Bank Corp,* 494 U.S. 472, 474 (1990) (appeal rendered constitutionally moot due to changes in the law).

Yet another situation in which a claim may become moot during the pendency of an action is where some action on the part of the claimant or the defendant effectively serves to dissolve the controversy; for example, in *Preiser v. Newkirk,* 422 U.S. 395 (1975), an inmate filed suit challenging his transfer from a medium security prison to a maximum-security prison, which he claimed violated his Fourteenth Amendment rights. While his appeal was pending, he was transferred back to the medium security prison and then to a minimum-security prison. Under the circumstances, the inmate's suit had become constitutionally moot because it no longer presented a live case or controversy. See also *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 281-84 (2001) (appeal of a business's challenge to the denial of a business license became constitutionally moot when the business ceased operations during the pendency of the appeal); *Camreta v. Green*, 563 U.S. 692, 698 (2011) (appeal was rendered constitutionally moot when a student who was

challenging methods of interviewing students moved to another state and would no longer be subject to the challenged interviewing practices).

The burden of proof is on the party alleging constitutional mootness. Because the threshold for declaring an appeal to be constitutionally moot is exceptionally high, the burden is a heavy one. *United Artists Theater Co*., 315 F.3d at 226; *In re Thorp Insulation Co*., 677 F.3d 869, 880 (9th Cir. 2012). See also *Cardinal Chemical Company v. Morton International, Inc*., 508 U.S. 83, 98 (1993). The determination of whether an appeal is constitutionally moot will turn on the facts of each case. If all or a part of the requested relief remains available to the appellant, then the appeal is not moot and the motion to dismiss should be denied. *Id.* In the bankruptcy context, the fact that a plan has been confirmed and becomes effective does not necessarily mean that the appellate court is incapable of granting relief. *See 455 CPW Associates, supra.* Where, as here, the appeal seeks to have the Court reverse an order that would modify the confirmed Plan by creating and funding a third trust and expanding the universe of those covered by that Trust from those who would be covered by the Plan D&O coverage, there should be no finding of constitutional mootness.

As stated above, so long as the Court retains the ability to "fashion some form of meaningful relief," the appeal is not constitutionally moot. *Church of Scientology*, 506 U.S. at 12-13. This is true even if the Court would be able to award only partial

relief or even if the decision may ultimately have no "practical impact" on the plaintiff. *Chafin v. Chafin*, 568 U.S. 165, 175, 177 (2013). Accordingly, because the Dugaboy, in this case, possesses a residual interest in the Claimant Trust, there is at least a "chance of money changing hands," and the appeal is not constitutionally moot. See *Mission Products Holdings, Inc. v. Tempnology, LLC*, 139 S.Ct. 1652, 1660 (2019).

In *Mission Holdings*, the appellee claimed that the case was moot. The Court said that "[u]nder settled law, we may dismiss the case for that reason only if "it is impossible for a court to grant any effectual relief whatever" to *Mission* assuming it prevails." 139 S.Ct. at 1660, citing *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) [(a case also cited in the last paragraph of the memo] (*Emphasis added*). *Mission* had made a claim for lost profits arising from its inability to use certain trademarks licensed to it by the debtor, which had rejected the trademark license in its bankruptcy proceeding, between the date of rejection and the expiration date of the licensing agreement. The appellee made several arguments as to why *Mission* would not be entitled to any lost profits in any event and also argued that even if it were to obtain a judgment, it would not be able to convert the judgment to cash because the bankruptcy estate had already distributed all of its assets. *Id.* at 1660-61. The Supreme Court found those arguments unavailing, stating, "For better or for worse, nothing so shows a continuing stake in a dispute's outcome as a demand for dollars

and cents…[A] case is not moot so long as a claim for monetary relief survives." *Id.* at 1660, citing *13C C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure*, § 3533.3, p. 2 (3d Ed. 2008) (Internal quotation marks omitted). "If there is any chance of money changing hands, *Mission's* suit remains live." *Id.* (Emphasis added), citing *Chafin*, 568 U.S. at 172. "Ultimate recovery…may be uncertain or even unlikely for any number of reasons…[b]ut that is of no moment." *Id*. "[C]ourts often adjudicate disputes whose 'practical impact' is unsure at best, as when 'a defendant is insolvent.'" *Id*. at 1661, citing *Chafin*, 568 U.S. at 175. Further, *Mission* argued that if it were to prevail, it "could seek the unwinding of prior distributions to get its fair share of the estate." *Id*. Accordingly, "although this suit 'may not make [*Missio*n] rich,' or even better off, it remains a live controversy – allowing us to proceed." *Id.*, citing *Chafin*, 568 U.S. at 176.

Chafin involved a parental child abduction in violation of the International Child Abduction Remedies Act, implementing the Hague Convention on the Civil Aspects of International Child Abduction (the "ICARA"). The ICARA requires one who wrongfully removes or retains a child to return the child and to pay the plaintiffs' costs and expenses in obtaining the child's return, such as court costs, legal fees and transportation costs for the return of the child. There the husband ("H") was in active-duty military. While stationed in Germany, he married wife ("W"), a citizen of the United Kingdom. They had a daughter. When H was

deployed to Afghanistan, W moved with the daughter to Scotland. Ultimately, H transferred to Huntsville, Alabama and brought the child with him. Once in Alabama, he filed for divorce and sought custody of the child. W, who was also in Alabama, was ultimately deported back to Scotland, without the child. Thereafter, she filed suit seeking the child's return to Scotland under the ICARA. The district court ruled in her favor and H requested a stay pending appeal, which was denied. W then left the United States and took the child with her back to Scotland. The Eleventh Circuit dismissed H's ensuing appeal as being constitutionally moot because the child had been returned to the foreign country and it could not grant any relief. The appeals court remanded the matter to the district court with instructions to dismiss the suit and vacate its order. 568 U.S. at 168-171. The district court did as instructed but ordered H to pay W over $94,000 in costs, attorney's fees and travel expenses. *Id*. at 171.

The Supreme Court found that the suit remained live because there was still a dispute over the child's country of habitual residence and found that H was "asking for typical appellate relief: that the Court of Appeals reverse the District Court and that the District Court undo what it has done." *Id*. at 17. (Citations omitted). The Court cited *Northwestern Fuel Co. v. Brock*, 139 U.S. 216, 219 (1891) for the proposition that "[j]urisdiction to correct what has been wrongfully done must remain with the court so long as the parties and the case are properly before it, either

in the first instance or when remanded to it by an appellate tribunal." *Id*. at 173-74. W argued, however, that any relief in favor of H would be ineffectual because the ICARA does not permit the court to order the "re-return" of the child. The Court found, however, that even of the enforcement of the requested order were uncertain, "such uncertainty does not typically render cases moot." *Id*. at 175. The Court went on to state that:

> A re-return order may not result in the return of [the child] to the United States, just as an order than an insolvent defendant pay $100 million may not make the plaintiff rich. But it cannot be said that the parties here have no 'concrete interest' in whether [H] secures a re-return order…[H]owever small that concrete interest may be due to potential difficulties in enforcement, it is not simply a matter of academic debate and is enough to save this case from mootness.

Id. at 176. (Emphasis added: citation and internal quotation marks omitted).

Further, H sought to have the monetary judgment that had been rendered against him vacated. W argued that because he did not appeal the money judgment, which was a separate judgment, he had no interest to assert, and this claim was moot. The Court again, disagreed, stating that "this is another argument on the merits. [H]'s requested relief is not so implausible that it may be disregarded on the question of jurisdiction…[E]ven the availability of a partial remedy is sufficient to prevent a case from being moot." (Citations and internal quotation marks omitted.

C. Dugaboy Was Economically Affected By The Decision

Judge Fitzwater, in his decision, recognized that Dugaboy was a contingent beneficiary under the trust created by the confirmed Debtor Plan and that Dugaboy may receive a recovery dependent upon the outcome of the litigation pursued under the Plan.

Where the Court went awry is in failing to recognize any increase in the costs (due to the substitution of insurance for an indemnity trust covering more people than the original parties covered by insurance) incurred in carrying out the Plan adversely impacted the chances that Dugaboy would recover under the Plan. While the Dugaboy chances of recovery were greater if it had retained its Class 8 creditor status, the fact that the Debtor's Plan provided a contingent recovery for Dugaboy if all creditors were paid in full is a recognition by the Debtor that a possibility existed that Dugaboy would get a recovery under the Plan. If Dugaboy did not possess its "contingent beneficiary" status, the argument that Dugaboy was not a person aggrieved would be credible.

D. Cases Relied Upon By The Court To Support The Finding That Dugaboy Was Not A Person Aggrieved Are All Distinguishable

In his opinion, Judge Fitzwater relied upon cases that are factually distinguishable from the present case. Each case relied upon by Judge Fitzwater involved a party asserting a claim that was possessed by a third party, where the party asserting the claim had asserted no interest in the money subject to the

litigation or where the appealing party had not filed a proof of claim or even appeared at the hearing.

In *Rohm and Hass Texas Inc. vs. Ortiz Brothers Insulation Inc.,* 32 F.3d 205 (5th Circuit 1994), the Court dismissed an appeal. In *Rohm,* the party appealing the lower court decision conceded "it claims no interest in the fund" *Id.* at 209. In that case, Ortiz was asserting rights possessed by some third party.

In this case, under 11 U.S.C. § 1109, whether Dugaboy was a creditor or merely an equity security holder or a contingent beneficiary of the Claimant Trust it was asserting its own right and the amount of money paid to it from the Claimant Trust is affected by the costs and expenses incurred by the Claimant Trust of which it is a contingent beneficiary.

In addition to the economic interest, the rights of Dugaboy were adversely impacted by the Court granting the Indemnity Trust Motion. The record is clear that the Plan would not have gone effective without the Court's approval of the Indemnity Motion and, absent the Plan's going effective, the Plan provisions relating to releases, third party injunctions and the channeling injunction would not have been binding on Dugaboy. *Coho* cannot be read so narrowly as to require economic damage for standing, and deny standing if a party faces the loss of substantive rights against third parties as a result of the decision. If the loss of substantive rights was not a basis for standing then a party impacted by impermissible third party releases

could not appeal the decision of a Bankruptcy Court granting the impermissible third party releases. The loss of being able to sue a Highland Managed Fund for mismanagement post confirmation without having to pass through a bankruptcy court filter (that has questionable judicial underpinnings) is direct injury, though not economic at this point.

In *Coho,* the Court reviewed the case of *Ergo Science v Martin,* 73 F.3d 595, 595 (5th Cir. 1996) and cited the case as controlling authority for dismissal even though the Court wrote that the party appealing in *Ergo* was "not faced with a hypothetical or indirect injury as in *Rohm* but a real immediate injury." *Coho*, 395 F.3d 198, 203. The application of *Ergo* in support of the proposition is inaccurate based upon the facts of the case. In *Ergo*, the party appealing the decision had given up all interest in the fund and the opinion in the case merely enforced the relinquishment of an interest in the fund by the Appellant. The case is really the appeals court enforcing the appellant's prior decision to not claim money in a fund, as opposed to a *Coho* standing case.

E. Other Fifth Circuit Cases Are All Factually Distinguishable

Matter of Technicool, 896 F.3d 382 (5th Cir. 2018), involved an appeal of an order by a debtor in a case where a trustee had been appointed. The Court in that case held that the order that was being appealed had no relationship to any discharge complaint that may exist against the Appellant. *Id.* at 386. In addition, no argument

was made in the case that the debtor had any possibility (no matter how remote) of any recovery.

In *Fortune vs. Department of the Interior*, 806 F.3d 363, 366 (5th Cir. 2015), the Court held that to have standing the order subject to the appeal must have a direct impact on the Appellant's pocketbook.

Dugaboy would note that the Fifth Circuit cases use the term "immediate" however, the use of the term as a test for standing is misplaced and would yield a result where the impact of the decision may not be immediate but, rather, may be significant and impact the expectant recovery of a creditor.

For example, if a Plan were an asset monetization plan and spanned three years for distribution to creditors based upon pure priority waterfall, a creditor who would only be paid in year three would not be a party aggrieved if he objected to the claim of a creditor who would be paid in year two. In that case, the impact of the Court's decision would not be immediate and may only result in the creditor's being paid in a shorter period of time.

F. A Party Appealing A Decision May Be Directly Impacted By A Court's Decision By Losing Future Rights, As Opposed To Having Its Pocketbook Immediately Effected By The Loss Of Rights

The imposition of a mechanical test for standing, based solely on immediate economic impact, fails to take into account that the entry of an order by a Court may cause a party to lose rights in the future as a result of the decision. The economic impact of the loss of the rights may not be known at the time of the decision but the

rights lost are capable of being identified and articulated and can have a future economic effect.

The Indemnity Trust Order allowed the Debtor's Plan to become effective which had the effect of limiting the rights of Dugaboy that it would otherwise have possessed absent the terms of the Debtor's Plan.

The fact that without the granting of the Indemnity Trust Motion the Plan would not have gone effective is evidenced by the following:

1. The Plan, as a condition to going effective, required that "the Debtor shall have obtained appliable directors and officers insurance coverage that is acceptable to each of the Debtor, the Committee, the Claimant Trust oversight Committee, the Claimant Trustee and the Litigation Trust. See ROA 529.
2. The Indemnity Trust Motion, if the Court approved the Motion, would allow the Confirmation Order to become a Final Order and thereby paving the way for the Plan to become Effective. (ROA 529).
3. The testimony of James Seery in support of the Indemnity Trust Motion when asked "So, stated another way, is it fair to say that the agreement on the waiver is conditioned on the approval of this motion?

   "Yes" (ROA 3823).

As a result of the Court's Order approving the Indemnity Trust Motion, the

Plan provisions relating to exculpation, releases, gatekeeper and injunction were made binding on Dugaboy.

The impact of these provisions reduced the ability of Dugaboy to file suit and recover for future actions that may be taken by the "reorganized debtor." While it is not possible to quantify the loss that Dugaboy has suffered at this time, the loss of rights is immediate and real.

The application of a judicially imposed standing rule limiting standing to only matters of economic loss is not supported by either any law passed by Congress or the United States Constitution.

G. Policy Issues Raised By The Economic Interest Test

One of the issues that this appeal addresses is how to apply the aggrieved party test and how an appellant can produce an evidentiary record that it does in fact possess an economic interest in the outcome of the appeal. The application of the test in some cases is dependent on the date and time of the hearing and the type of asset that gives rise to an appellant's economic interest. The challenge and the unfairness of the test can best be illustrated by the following example:

1. An appellant is a subordinated creditor in an oil and gas Chapter 11. The appellant objects to the claim of one creditor in a multi-member senior class. At the time of the hearing on the claim objection, oil is $70.00 per barrel and the appellant would receive a distribution of $260,000 if the claim of a creditor in the senior class is disallowed. If

however oil drops to $50.00 a barrel prior to the time the appeal is heard and decided based upon the person aggrieved test, the appeal should be dismissed if the appellant will not receive a distribution even if the claim objection is overturned on appeal.

2. If three months after the Appeals Court dismisses the appeal and oil prices rise to $100.00 a barrel, the appellant, after his appeal has been dismissed, will now possess an economic interest dependent upon the outcome of the claim objection. The problem, however, is the appeal of the Court's Order has been dismissed. The substantive rights of a party to have a Court oversee a Bankruptcy Court opinion should not be dependent upon the fluctuation in price of a commodity or timing.

The dismissal of the Dugaboy appeal in this case, due to its not being a person aggrieved, was based upon a determination (without a hearing) of economic interest in assets that vary at any given point in time. While the Dugaboy proof of claim may have been disallowed, Dugaboy still retained a contingent interest in the Claimant Trust which provided it a recovery if the Claimant Trust assets increased significantly in value and the expenses of the Claimant Trust were less than projected. The use by the District Court of the projections that were introduced at the Confirmation Hearing functionally denies Dugaboy due process and ignores the economic reality that the value of assets is not static and the pro=forma was merely

a guess as to future recovery and costs. Had the Debtor's Plan not provided Dugaboy a residual interest in the Claimant Trust, the question as to Dugaboy's being a party aggrieved by the decision of the Bankruptcy Court would be cleaner. With Dugaboy's contingent interest in the Claimant Trust, as opposed to being paid as a creditor, Dugaboy did in fact have an economic interest. The only difference was that its expectation of recovery was diminished when its status as a creditor was dismissed. Its potential recovery was not reduced to zero when its Class 8 proofs of claim were dismissed.

The process as to how and when the "economic interest" test is raised and applied is fundamentally unfair and denies the party that is facing dismissal based upon a judicially created bar to appellate review meaningful due process. At the time the Indemnity Trust hearing was heard by Judge Jernigan, Dugaboy did possess standing as a creditor. It was only after the appeal was lodged by Dugaboy and within 17 days of the oral argument on the appeal that the matter of mootness was asserted. The Motion to Dismiss the appeal was filed a full two months after the Dugaboy proofs of claim were disallowed. No opportunity or mechanism existed for Dugaboy to conduct an evidentiary hearing on the chances of its recovery under the confirmed Plan based upon events that have taken place in the year. Judge Fitzwater did not find that the Dugaboy recovery was impossible. He merely found

that recovery was dependent on future litigation (he did not address increase in value of the assets).

VII. CONCLUSION

This appeal represents an opportunity for the Court to bring greater clarity to its *Coho* decision so that a creditor who possesses an interest in the outcome of an appeal does not lose its right to appellate review of a Bankruptcy Court decision. The test embodied in the Constitution contains a workable limitation such that only appeals that impact an appellant's expectancy or rights will be heard. Adding to the test a monetary threshold and a required immediacy has the effect of denying litigants protections afforded by the Constitution. Incorporating a statute's requirement that has been repealed is improper as a matter of statutory construction and interpretation.

For the reasons set forth in the Advisors' brief and the standing issue addressed in this brief, the Court should reverse the decision made by Judge Fitzwater and Judge Jernigan.

RESPECTFULLY SUBMITTED this 9th day of May, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 9th day of May, 2022, a true and a correct copy of the foregoing document was served on the counsel of record listed below via electronic service.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6434 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 9, 2022.

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