

Case No. \_\_\_\_\_

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**In re: HIGHLAND CAPITAL MANAGEMENT, L.P.**

**Proposed Appeal of The Dugaboy Investment Trust  
And Get Good Trust**

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On Appeal from the United States Bankruptcy Court for  
the Northern District of Texas, Dallas Division  
Bankruptcy Case No. 19-34054 (SGJ11)

Appeal Pending as Civil Action No. 3:21-cv-00550-N in the United States District  
Court for the Northern District of Texas, Dallas Division

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**PETITION FOR DIRECT APPEAL UNDER 28 U.S.C. § 158(d)**

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**ATTORNEY FOR PETITIONERS THE DUGABOY  
INVESTMENT TRUST AND GET GOOD TRUST**



## CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel 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 so that the judges of this Court may evaluate possible disqualification or recusal:

1. Appellants

**The Dugaboy Investment Trust  
Get Good Trust**

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/s/ Douglas S. Draper  
Douglas S. Draper  
Counsel for The Dugaboy Investment  
Trust and Get Good Trust

## INTRODUCTION

The Dubagoy Investment Trust and Get Good Trust (the “Trusts”) respectfully request that the Court grant them permission to appeal, pursuant to Federal Rule of Appellate Procedure 5 and 28 U.S.C. § 158(d)(2)(A), the *Order (i) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified); and (ii) Granting Related Relief* (the “Confirmation Order”)<sup>1</sup> directly to this Court from the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Bankruptcy Court”).

A direct appeal from the Bankruptcy Court to the District Court is authorized pursuant to § 158(d)(2) provided that four conditions are satisfied. It is the position of the Trusts that the conditions for direct appeal are satisfied for the reason set forth herein and in the Petitions filed by Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, Nexpoint Capital Inc., James Dondero, NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P. each of which has filed a Petition for Direct Appeal with this Court.

The Trusts, in support of this Petition, note the following:

- a) The Bankruptcy Court affirmatively held that the direct appeal of the Confirmation Order to this Court will “materially advance the progress of the case”;
- b) The Confirmed Plan contains broad exculpation, release and channeling injunctions (called gatekeeper provisions under the Plan) that are contrary to established precedent in this Court. See *In re Pacific Lumber*, 584 F.3d 220 (5<sup>th</sup> Circuit) and *SEC vs Stanford Bank*, 17-10663 (5<sup>th</sup> Cir. 2019). It is interesting to note that the *In Pacific Lumber* case involved a direct appeal to this Court; and
- c) The Plan that was confirmed by the Court granted protection by analogy to third parties and by analogy applied the Barton Doctrine without any precedent supporting the opinion.

The direct appeal of the Confirmation Order meets the statutory requirements for a direct appeal of the Confirmation Order to this Court.

The Confirmation Order raises questions of law as to the use and effect of exculpation and release provisions and the imposition of a gatekeeper injunction in a bankruptcy plan where there is no controlling precedent from this Court or the Supreme Court.

## BACKGROUND

The Bankruptcy Court on February 21, 2021 entered the Confirmation Order confirming the *Debtor's Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the "Plan"). The Plan, in essence, is a liquidation Plan notwithstanding the fact that Highland Capital Management, L.P. ("Debtor") refers to it as a monetization Plan. The Debtor projects it will operate certain assets over a projected two year liquidation period.

The Plan exculpates and releases the Debtor and its independent directors, employees, officers, and their retained professionals. The Plan further protects the same group from pre and post confirmation claims by imposing a gatekeeper injunction that bars parties from bringing a claim or causes of action against the released and exculpated parties for their activities related to the Debtor or reorganized Debtor without first seeking approval from the Bankruptcy Court that the claim is "colorable."

On March 4, 2021, the Trusts timely filed a *Notice of Appeal* of the Confirmation Order to the United States District Court for the Northern District of Texas (the "District Court"). Ex. A. The Trusts' appeal is pending as Civil Action No. 3:21-cv-00550-N (the "Appeal").

Similar appeals to the Confirmation Order were filed as follows:

Civil Action No.: 3:21-cv-00539-N by Highland Global Allocation Fund, Highland Income Fund, NexPoint Capital, Inc., and NexPoint Strategic Opportunities Fund.

Civil Action No.: 3:21-cv-00546-L by James Dondero.

Civil Action No.: 3:21-cv-00538-N by Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P.

(collectively “Related Parties” or “Related Appeals”). These appeals have been consolidated in the District Court for the purpose of deciding issues on a stay pending appeal. It is anticipated that these Related Appeals will also be consolidated by the District Court or this Court on a final basis sometime in the near future.

On March 16, 2021, the Trusts, the Related Parties and the Debtor jointly moved for the Bankruptcy Court to certify their collective appeals for direct appeal to this Court. The Parties agreed that direct appeals would materially advance the progress of the case. The same day, the Bankruptcy Court granted the joint motion and entered its *Order Certifying Appeals of the Confirmation Order for Direct Appeal to the United States Court of Appeals for the Fifth Circuit* (“Certification Order”) per 28 U.S.C. § 158(d)(2)(A)(iii).

All Parties have filed Petitions for Direct Appeal to this Court.

## ISSUES ON APPEAL

1. Whether the U.S. Bankruptcy Court for the Northern District of Texas (the “*Bankruptcy Court*”) erred in confirming the Debtor’s Fifth Amended



Plan of Reorganization of Highland Capital Management, L.P. (as Modified) (the “*Plan*”).<sup>2</sup>

2. Whether the Bankruptcy Court erred as a matter of law in confirming the Plan and entering the Confirmation Order because the exculpation provisions of the Plan, contained in Article IX of the Plan, effectuated third party releases (i.e. releasing a claim of a non-debtor against a non-debtor) prohibited by the Bankruptcy Court and over which the Bankruptcy Court had no jurisdiction, in direct violation of Fifth Circuit Court of Appeal (“*Fifth Circuit*”) case law (see, e.g., *In re Pacific Lumber Co.*, 584 F.3d 229, 253 (5th Cir. 2009) and *Securities and Exchange Commission vs Stanford International Bank, Ltd.* No. 17-10663 (5th Cir. 2019)). The third party releases and exculpations in the confirmed Plan provide releases and exculpations for business decisions and operational decisions as opposed to case administration matters. The releases and exculpations are also in favor of non-debtor entities and their managers and professionals, as opposed to estate managers and professionals, and post-confirmation claims against entities, their officers, managers and professionals, for entities that are to be formed pursuant to the confirmed Plan.

3. Whether the Bankruptcy Court erred as a matter of law in confirming the Plan and entering the Confirmation Order because the permanent injunction contained in Article IX of the Plan, which prohibits “taking any actions to interfere with the implementation or consummation of the Plan,” is overly broad and impermissibly vague.

4. Whether the Bankruptcy Court erred as a matter of law in confirming the Plan and entering the Confirmation Order because the “gatekeeper” injunction contained in Article IX of the Plan is a disguised grant of jurisdiction to the Bankruptcy Court to enter final orders on matters upon which it would not possess jurisdiction.

5. Whether the Bankruptcy Court erred as a matter of fact in confirming the Plan and entering the Confirmation Order because the “gatekeeper” injunction contained in Article IX of the Plan, which requires leave of the Bankruptcy Court upon a showing of a “colorable” claim or cause of action, is based on the Bankruptcy Court’s finding of vexatious litigation on the part of the Appellants and the need for a form of pre-filing injunction, when there was no evidence to support such findings.

6. Whether the Bankruptcy Court erred as a matter of law in confirming the Plan and entering the Confirmation Order because the Debtor failed to satisfy the 11 U.S.C. § 1129(a)(2) element for confirmation requiring the Debtor to have complied with all applicable provisions of the Bankruptcy Code, which the

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<sup>2</sup> Capitalized terms used but not otherwise defined have the meanings set forth in the Plan.

Debtor admittedly failed to do because it utterly failed to comply with Bankruptcy Rule 2015.3.

7. Whether the Bankruptcy Court erred as a matter of law in confirming the Plan and entering the Confirmation Order because the Plan violates 11 U.S.C. §1107(a)(7).

8. Whether the Bankruptcy Court erred as a matter of law in confirming the Plan and entering the Confirmation Order because the Plan does not meet the requirements of 11 U.S.C. §1129(b), unfairly discriminates and is not fair and equitable.

### **REASONS FOR DIRECT APPEAL**

The Trusts' reasons for direct appeal mirror those asserted by the Related Parties and adopts the assertions made by such parties.

### **RELIEF REQUESTED**

The Trusts respectfully request, pursuant to 28 U.S.C. § 158(d)(2), that this Court grant permission for the instant appeal, and all those Related Appeals, to bypass the District Court and be heard directly by this Court because (i) as certified by the Bankruptcy Court, a direct appeal will materially advance the progress of the case and (ii) the underlying judgment involves questions of law without controlling precedent.

April 15, 2021

Respectfully Submitted,

/s/ Douglas S. Draper

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**CERTIFICATE OF SERVICE**

Undersigned counsel hereby certifies that, on this 15th day of April 2021, he caused a true and correct copies of this Petition to be served via e-mail on the following parties through their counsel of record:

Highland Capital Management, L.P.:

Jeffrey Pomerantz ([jpomerantz@pszjlaw.com](mailto:jpomerantz@pszjlaw.com))

John A. Morris ([jmorris@pszjlaw.com](mailto:jmorris@pszjlaw.com))

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Highland Capital Management Fund Advisors, L.P.

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/s/ Douglas S. Draper

Douglas S. Draper

**CERTIFICATION OF WORD COUNT**

Pursuant to Federal Rule of Appellate Procedure 32(g), undersigned counsel certifies that this Petition complies with Rule 5(c) because it contains 2044 words, excepting those portions that may be excepted, and complies with the typeface and type-style requirements of Rule 32 because it has been prepared using Microsoft Office Word 2010 and set in Times New Roman font in a size equivalent to 14 points or larger.

*/s/ Douglas S. Draper*

\_\_\_\_\_   
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**“TAB” - A**

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

IN RE: \* Chapter 11  
\*  
\* Case No. 19-34054sgj11  
HIGHLAND CAPITAL MANAGEMENT, L.P. \*  
\*  
Debtor \*

**AMENDED NOTICE OF APPEAL AND STATEMENT OF ELECTION**

**Part 1: Identify the appellant(s)**

1. Name(s) of appellant(s): \_\_\_\_

*The Dugaboy Investment Trust and Get Good Trust*

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- Plaintiff
- Defendant
- Other (describe)

\_\_\_\_\_

For appeals in a bankruptcy case and not in an adversary proceeding.

- Debtor
- Creditor
- Trustee
- Other (describe)

\_\_\_\_\_

**Part 2: Identify the subject of this appeal**

1. Describe the judgment, order, or decree appealed from: *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified) and (II) Granting Related Relief [Dkt. # 1943]*

2. State the date on which the judgment, order, or decree was entered: February 22, 2021

**Part 3: Identify the other parties to the appeal**

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. **Party/Appellee:** Debtor: Highland Capital Management, L.P.

Attorney:

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**Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)**

**Not applicable.**

March 11, 2021

Respectfully submitted,

*/s/Douglas S. Draper.*

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