

Case No. 22-10189

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

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

Debtor.

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

Appellants,

v.

Highland Capital Management, L.P.,

Appellee.

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**REPLY BRIEF OF APPELLANT  
THE DUGABOY INVESTMENT TRUST**

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

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**REPLY BRIEF OF APPELLANT  
THE DUGABOY INVESTMENT TRUST**

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

**I. THE ORDER ON APPEAL INCLUDES THE DUGABOY  
DISMISSAL**

The Appellee in this case misstates the basis of this appeal when it says that the District Court’s dismissal of Dugaboy was not stated as an issue on appeal. The Notice of Appeal [Document 516312453, ROA 22-10189.4661] filed in this Appeal states that the Appellants appealed “that certain *Judgment* (the “Judgment”) entered by the District Court on January 28, 2022 at ECF Docket No. 45 (including, to the extent necessary, the memorandum opinion entered the same date at ECF Docket No. 44).”

The Judgment states “this appeal is DISMISSED in part, and the bankruptcy court’s July 21, 2021 [Order] ... is AFFIRMED” [ROA 22-10189.4653]. The “DISMISSED in part” refers to the dismissal of Dugaboy and Highland Capital Management Fund Advisors, L.P. (“HCMFA”). Furthermore, the Memorandum Opinion [ROA 22-10189.4645], which was also included in the Notice of Appeal, specifically addresses whether Dugaboy has standing under the “person aggrieved”

test as articulated in *In re Coho Energy, Inc.*, 395 F.3d 198, 202 (5th Cir. 2004)<sup>1</sup> [ROA 22-10189.4648]. It goes without saying that the issue was “specifically articulated” in the District Court’s Order and Memorandum Opinion. For the Appellee to argue that that part of the order is somehow not on appeal is disingenuous.

**II. DUGABOY IS NOT ARGUING THAT *COHO* SHOULD BE OVERTURNED, JUST REVISITED**

Whether the substantive issues will be heard on appeal because of NexPoint Advisors remaining as appellants misses the point of standing. The question is not solely whether the substantive issues will ultimately be heard, one of the issues on this appeal is whether *Coho* needs to be revisited by this Court on the grounds that it improperly restricts standing in the context of a party losing substantive rights and reduced chances of recovery.

The Fifth Circuit adopted the “person aggrieved test” in *Coho*, 395 F.3d at 202. The Court made reference to 11 U.S.C. § 67(c) (1976), a provision from the Bankruptcy Act that was not included in the current Bankruptcy Code when it was drafted in 1978. As Dugaboy pointed out in its Original Brief, Dugaboy is not asking that the Court completely throw out *Coho*; rather, Dugaboy is requesting a more exacting examination at the statutory underpinnings of *Coho* given its heavy reliance

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<sup>1</sup> The main basis for Dugaboy’s appeal is that this Court should revisit its *Coho* opinion and determine its current status in light of the fact that the code article upon which it is based was repealed.

on a repealed section of the Bankruptcy Act. See Dugaboy Original Brief at p. 9 [Document: 516312456] (“While Dugaboy is not requesting the Court to overturn *Coho* in its entirety, the statutory underpinnings of *Coho* are suspect.”). Just because a test has lasted for decades does not mean that it cannot be revisited and adjusted. That is, in fact, one of the very reasons we have appellate review in our judicial system. The Appellee’s Brief offers no reasons as to why *Coho* is sound law other than to say that “It’s been around for a while, so why change it?”

### **III. CONCLUSION**

The assertion that Dugaboy’s dismissal was not preserved for appeal is absurd. The entire basis of the Order appealed from as far as it addressed Dugaboy’s interest is the dismissal itself. As stated in Dugaboy’s Original Brief, Dugaboy is simply asking 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 fact that NexPoint was not dismissed is irrelevant. Dugaboy has an interest in the outcome of this appeal and its dismissal by the District Court can and should be reviewed.

The Court should reverse the decision made by Judge Fitzwater and Judge Jernigan.

**RESPECTFULLY SUBMITTED** this 28th day of July, 2022.

**HELLER, DRAPER & HORN, L.L.C.**

By: /s/ Douglas S. Draper

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on this the 28th day of July, 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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**CERTIFICATE OF COMPLIANCE WITH RULE  
32(a)'s TYPE-VOLUME LIMITATION, TYPEFACE  
LIMITATION, AND TYPE-STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 674 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman, 14 pt. font.

Dated: July 28, 2022.

*By: /s/ Douglas S. Draper*

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