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Case No. 22-10831

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Debtor

The Dugaboy Investment Trust,

Appellant

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, Dallas Division,
Honorable Karen Gren Scholer; USDC No. 3:21-CV-2268

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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:

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STATEMENT REGARDING ORAL ARGUMENT

Appellant, The Dugaboy Investment Trust ("Dugaboy") believes that oral argument would be of benefit to the Court. This appeal presents the issue of whether 11 U.S.C. § 1109(b) confers bankruptcy appellate standing on the persons-in-interest identified therein, which has not been previously considered by this Court. Additionally, in this appeal, The Dugaboy Investment Trust, appellant herein, seeks to have this Court revisit its holdings that bankruptcy standing is determined under the "person aggrieved" test that prevailed under the former Bankruptcy Act, but which was not carried through to the Bankruptcy Code.

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OPENING BRIEF OF APPELLANT,

THE DUGABOY INVESTMENT TRUST

The Dugaboy Investment Trust (the "Appellant" or "Dugaboy"),[1] hereby submits this *Opening Brief of Appellant The Dugaboy Investment Trust* in support of which it respectfully states as follows:

STATEMENT OF JURISDICTION

This Court has jurisdiction of this matter under 28 U.S.C. § 1291, as this is an appeal from a final judgment of the United States District Court for the Northern District of Texas, Dallas Division, sitting as a bankruptcy appellate court pursuant to 28 U.S.C. § 158(d). On August 8, 2022, the district court entered an *Order* (the "District Court Order")[2] granting *Appellee's Motion to Dismiss Appeal as Moot*[3] (the "Motion to Dismiss") on the grounds that Dugaboy lacks standing to appeal the bankruptcy court's order (the "Order") of September 6, 2021,[4] which dismissed

[1] Get Good Trust ("Get Good") was a mover, together with Dugaboy, in the *Motion to Compel Compliance with Rule 2015.3* (the "Motion to Compel"), filed in the bankruptcy court, and was also initially an appellant in the appeal of the bankruptcy court's dismissal of the Motion to Compel as moot to the district court (the "Appeal," Case No. 3:21-02268-S). Get Good was dismissed from the Appeal by consent and is not an appellant in the this appeal.
[2] ROA.1776. (RE Tab 3).
[3] ROA.1683.
[4] ROA.569.

Dugaboy's *Motion to Compel Compliance with Bankruptcy Rule 2015.3* (the "Motion to Compel").[5]

STATEMENT OF ISSUE

The sole issue presented in this appeal is whether the district court, sitting as a bankruptcy appellate court, correctly ruled that Appellant, Dugaboy lacks standing in this appeal from the bankruptcy court's Order dismissing Dugaboy's Motion to Compel Compliance with Rule 2015.3, filed against the appellee, Highland Capital Management, L.P., Debtor and debtor-in-possession ("Debtor" or "Appellee") in the underlying bankruptcy proceeding because Dugaboy withdrew its prepetition and administrative claims during the pendency of the Appeal, leaving it with no direct pecuniary interest in the litigation, and that, as a result the Appeal is rendered moot.

STATEMENT OF THE CASE

The district court succinctly summarized the actions leading up to the Appeal as follows:

> This bankruptcy appeal arises from the bankruptcy court's denial of the Motion to Compel Compliance with Bankruptcy Rule 2015.3 (the "Motion to Compel") filed by Appellants The Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good") (collectively, "Appellants")…Appellee Highland Capital Management, L.P. ("Appellee" or "Debtor") initiated the underlying Chapter 11 bankruptcy proceeding in October 2019. Dugaboy subsequently filed

[5] ROA.509.

> three proofs of claim in April, 2020…Get Good also filed three proofs of claim….
>
> In the meantime, Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "Plan") in January 2021, and the bankruptcy court held a Plan confirmation hearing in February 2021[6]…At the hearing, Appellants raised the issue of Debtor's failure to file any reports as required under Bankruptcy Rule 2015.3, which requires debtors to file "periodic financial reports of the value, operations, and profitability" of each non-debtor entity in which the debtor "holds a substantial or controlling interest"[7]…The bankruptcy court confirmed the Plan over Appellants' objections and entered the Confirmation Order on February 22, 2021….
>
> Three months later, Appellants filed the Motion to Compel.[8]…Debtor filed its opposition[9] and the bankruptcy court conducted a hearing on the Motion to Compel on June 10, 2021.[10] Following the hearing, the bankruptcy court issued a minute order providing that (1) the hearing on the Motion to Compel would be continued to September 2021; (2) if the Plan effective date occurred before the hearing, the matter would become moot; and (3) if the Plan effective date had not occurred by the hearing, the court would consider the Motion to Compel further…However, the Plan became effective on August 11, 2021, and the bankruptcy court therefore issued its Order Denying Motion to Compel Compliance with Bankruptcy Rule 2015.3 ("Order") on

[6] ROA.609-903, 905-1253.
[7] ROA.952.
[8] ROA.509.
[9] ROA.524. Although not referenced in the District Court's Order, the Official Committee of Unsecured Creditors joined in Debtor's *Opposition to Motion to Compel Compliance with Bankruptcy Rule 2015.3* ROA.534. and Dugaboy and Get Good also filed a *Reply to Debtor's Opposition to Motion to Compel Compliance with Bankruptcy Rule 2015.3*. ROA.537.
[10] ROA.1254.

> September 6, 2021[11]…Appellants filed their notice of appeal of the Order on September 22, 2021[12]….
>
> After this appeal was filed, however, all of the proofs of claim filed by Dugaboy and Get Good were withdrawn with prejudice. Specifically, on October 27, 2021, with Dugaboy's consent, the bankruptcy court entered orders withdrawing two of the Dugaboy claims with prejudice and on November 10, 2021, the bankruptcy court entered an order approving a stipulation between Dugaboy and Debtor withdrawing the third Dugaboy claim with prejudice. *See In re Highland Capital Management, L.P.* (Bankr. N.D. Tex. Oct. 16, 2019), ECF Nos. 2965, 2966, 3007. Similarly, on November 10, 2021, all three of the Get Good claims were withdrawn with prejudice either by consent or pursuant to stipulation by Get Good. *Id.*, ECF Nos. 3008, 3009, 3010.
>
> Shortly after all of Appellants' claims were withdrawn, Appellee filed its Motion to Dismiss, asserting that this appeal is constitutionally moot for lack of standing.[13]

In opposition to the Motion to Dismiss, Dugaboy argued that even though it has withdrawn its prepetition proofs of claim, it nevertheless continues to possess a pecuniary interest in the estate by virtue of its significant ownership interest in several of the non-debtor affiliates that would have been the subject of Rule 2015.3 reports and/or its status as a prepetition equity owner of the Debtor, entitled to payment of its interest after all creditors are paid in full.[14] Dugaboy contends that the bankruptcy court's Order forecloses any opportunity for Dugaboy to discover claims that it has as a result of post-petition transactions between the Debtor and the

[11] ROA.569,574,576.
[12] ROA.571.
[13] ROA.1778.
[14] ROA.1727.

non-debtor affiliates, thereby depriving it of substantive pecuniary rights. That being the case, Dugaboy submits that it has standing to seek the requested relief.[15] The district court disagreed.[16]

The district court found that although Dugaboy had standing when the Motion to Compel was filed and when the Appeal was filed, it lost that standing when the last of its proofs of claim was withdrawn on November 10, 2021. The Court noted that "[s]tanding must exist both at the commencement of the litigation and throughout its existence…[a] case becomes moot when a party loses standing…[a]nd when a case becomes moot, the court loses its 'constitutional jurisdiction to resolve the issues it presents.'"[17] The district court found that once Dugaboy withdrew its proofs of claim, it "no longer [had] any pecuniary interest in the bankruptcy estate and therefore is not a 'person aggrieved' by [the bankruptcy court's] Order [dismissing the Motion to Compel as Moot.]"[18]

The district court characterized Dugaboy's pecuniary injury arising from its ownership interest in the non-debtor affiliates as "hypothetical or indirect."[19] It also found that, Dugaboy's contingent beneficiary interest in the Claimant Trust lacks a sufficient '"causal nexus' between the Order being appealed and its purported

[15] ROA.1727-28, 1732.
[16] ROA.1780-82.
[17] ROA.1779. (Citations omitted).
[18] ROA.1780. The District Court based its holdings on *In re Coho Energy, Inc.*, 395 F.3d 198 (5th Cir. 2004) and its progeny.
[19] ROA.1780. Citing *Coho*, 395 F.3d at 203.

interest in potential future recovery under the Plan"[20] and that "such a 'speculative prospect of harm is far from a direct, adverse, pecuniary hit' as required to confer standing."[21]

In sum, the district court held that:

> While Dugaboy may have a direct interest in the 'proceedings more generally,' bankruptcy standing requires that there is a direct, adverse, and pecuniary effect on the appellant, and that the effect is tied to the specific order being appealed. In the absence of any claim to Debtor's estate or direct financial injury flowing from the order, Dugaboy simply cannot be a 'person aggrieved' by the Order. Accordingly, the Court finds that Appellants lack standing and, as a result, this appeal is constitutionally moot.[22]

Dugaboy timely filed its notice of appeal.[23] For the reasons that follow, this Court should reverse the district court's ruling that Dugaboy lacks standing to pursue this bankruptcy appeal and remand the matter back to the district court for consideration of the merits of Dugaboy's Appeal.

SUMMARY OF THE ARGUMENT

Appellate courts in this circuit grant standing to an appellant seeking to appeal a bankruptcy court's order where the appellant is a "person aggrieved" by the decision of the bankruptcy court, *i.e.*, where the appellant was "directly and

[20] ROA.1781. Citing *Coho*, 395 F.3d at 202.
[21] ROA.1781. Citing *In re Technicool Systems, Inc.*, 896 F.3d 382, 386 (5th Cir. 2018).
[22] ROA.1781.
[23] ROA.1782.

adversely affected pecuniarily by the order of the bankruptcy court."[24] The "person aggrieved" test is a *prudential* doctrine designed to curb the potential for a multitude of appeals of questionable interest that would "clog up the system and bog down the courts" given the potentially large number of parties in a bankruptcy proceeding.[25]

The "person aggrieved" test was expressly incorporated into the former Bankruptcy Act but was repealed and is not included in the Bankruptcy Code. Although Dugaboy concedes that courts in this circuit (and others) continue to nevertheless apply the "person aggrieved" test, Dugaboy does not concede that this test remains applicable under the Bankruptcy Code. Not only was the "person aggrieved" test not carried through from the former Bankruptcy Act into the Bankruptcy Code, Congress enacted 11 U.S.C. § 1109(b), which confers statutory standing on the parties-in-interest listed in that section. Dugaboy is such a party-in-interest by virtue of its equity ownership in the Debtor. Nothing in § 1109(b) provides that its grant of standing does not extend to appeals.

Under the circumstances, Dugaboy contends that the "person aggrieved" test has been supplanted in the context of Chapter 11 proceedings by § 1109(b). Dugaboy therefore requests herein that this Court revisit its decisions applying the

[24] See *In re Coho Energy, Inc.*, 395 F.3d 198, 202-03 (5th Cir. 2004).
[25] *Coho*, 395 F.3d at 202, (citing *In re P.R.T.C.*, 177 F.3d 777 (9th Cir. 1999); *Technicool*, 896 F.3d at 385.

"person aggrieved" test to determine standing in appeals arising in Chapter 11 cases and, instead, hold that standing in bankruptcy appeals is determined under § 1109(b).

Even if this Court decides that the "person aggrieved" test remains applicable despite its elimination from the Bankruptcy Code and the inclusion § 1109(b), because the "person aggrieved" test is a *prudential* rule, the test is not absolute, but is "flexible."[26] As stated by the *Coho* court, the test to assess the actuality of the harm alleged by the appellant is a permissive one.[27] This is true because the federal courts are obligated to "exercise the jurisdiction given to them."[28] Further, Dugaboy meets the "person aggrieved" test in any event.

Although Dugaboy dismissed its direct prepetition claims against the Debtor, Dugaboy holds a pecuniary interest in the Debtor's bankruptcy through its significant ownership interests in several of the entities that would have been the subject of the Rule 2015.3 reports (the "Rule 2015.3 Reports") of which Dugaboy seeks to compel the filing. One of the purposes of requiring bankruptcy debtors to file Rule 2015.3 Reports is to provide a complete accounting of all transactions involving non-debtor affiliates of the debtor to determine whether any post-petition claims exist. By not requiring the Debtor to file the Rule 2015.3 Reports, the bankruptcy court's decision foreclosed Dugaboy's ability to determine what claims

[26] *United States v. Windsor*,570 U.S. 744, 757 (2013).
[27] 395 F.3d at 202.
[28] *Colorado River Water Conservation Dist. V. United States*, 424 U.S. 800, 817 (1976).

against the estate exist which arose from transactions between the Debtor and the non-debtor affiliates.

Dugaboy had no idea what the status of the non-debtor affiliates was during the pendency of the bankruptcy and surely lost claims against them. The Orders of the bankruptcy court and the district court would make it incumbent on Dugaboy to place into the bankruptcy record every conceivable economic interest that Dugaboy has or had against the Debtor and any of the entities subject to the Rule 2015.3 reporting requirements. Due to the failure to file the Rule 2015.3 Reports, Dugaboy had no information available to it to enable it to do this and, at the time, there was no issue as to Dugaboy's standing. Dugaboy should not be required to anticipate the loss of standing and be required to place into evidence alternative economic interests.

Dugaboy has an additional economic interest in the bankruptcy as a result of its equity interest in the pre-confirmation Debtor and its interest in the Claimant Trust formed under the Debtor's Plan. Accordingly, Dugaboy continues to have a sufficiently substantial and pecuniary interest in the production of the Rule 2015.3 Reports to confer standing in this appeal.

STANDARD OF REVIEW

The sole issue presented in the Instant Appeal is whether Dugaboy has standing to appeal the bankruptcy court's Order dismissing Dugaboy's Motion to

Compel as moot. The standing of a party is a legal issue that this Court reviews *de novo.*[29] '"In ruling on a motion to dismiss for want of standing…the…reviewing court[] must accept as true all material facts of the complaint and must construe the complaint in favor of the complaining party."'[30] This Court employs "a permissive standard to assess the actuality of harm alleged by appellant for the purposes of standing."[31]

ARGUMENT

A. The "Person Aggrieved" Test Versus Statutory Standing Under 11 U.S.C. §1109(b)

Considering that there is the potential for a large number of parties to be involved in a bankruptcy proceeding, this Court has endorsed the "person aggrieved" test to determine standing to appeal a bankruptcy court's decisions. The "person aggrieved" test is a *prudential* one, which is designed to curb the potential for a multitude of appeals of questionable interest that would "clog up the system and bog down the courts."[32]

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[29] *Matter of Technicool Systems, Inc.,*
[30] *In re: Coho Energy, Inc.,* 395 F.3d 198, 202 (5th Cir. 2004) (quoting *Rohm & Hass Tex. Inc. v. Ortiz Bros. Insulation, Inc.,* 32 F.3d 205, 207 (5th Cir. 1994) (quoting *Warth v. Seldin,* 442 U.S. 490 (1975).
[31] *Coho,* 395 F.3d at 202.
[32] *Technicool,* 896 F.3d at 385; *Coho,* 395 F.3d at 202, (citing *In re P.R.T.C.,* 177 F.3d 777 (9th Cir. 1999).

> The 'person aggrieved' test is an even more exacting standard than traditional constitutional standing…The 'case or controversy' limitation of Article III dictates that the alleged harm is 'fairly traceable' to the act complained of…[T]he 'person aggrieved' test demands a higher causal nexus between act and injury; appellant must show that he was 'directly and adversely affected pecuniarily by the coder of the bankruptcy court' in order to have standing to appeal. [33]

As noted in *Coho*:

> Bankruptcy courts are not authorized by Article III of the Constitution, and as such are not presumptively bound by traditional rules of standing…Instead, standing in bankruptcy court originally was governed by the statutory 'person aggrieved' test. 11 U.S.C. § 67(c)(1976) ('A person aggrieved by an order of a referee may…file with the referee a petition for review…') (repealed 1978).[34]

The *Coho* court recognized that the "person aggrieved" test was repealed and is not included in the Bankruptcy Code.[35] Nevertheless, this Court has continued to impose the repealed "person aggrieved" test to determine standing in bankruptcy appeals in this circuit.[36] This, despite the fact that the Supreme Court has not endorsed the "person aggrieved" test in the context of bankruptcy appellate standing and despite the fact that Congress enacted § 1109(b), which confers standing on the

[33] 395 F.3d at 202-03. (Citations omitted). See also, *Technicool*, 896 F.3d at 385-86; *In re Dean*, 18 F.4th 842, 844 (5th Cir. 2021). *Technicool* and *Dean* were Chapter 7 cases in which the debtor or the owner of the debtor was the appellant, which is a different situation than the one presented here in that a debtor-out-of possession "has no concrete interest in how the bankruptcy court divides up the estate.' Once a trustee is appointed, 'the trustee, not the debtor or the debtor's principal, has the capacity to represent the estate and to sue and be sued.'" *Dean*, 18 F.4th at 844.
[34] 395 F.3d at 202.
[35] 395 F.2d at 202.
[36] See *e.g., Rohm & Hass; Coho; Technicool; Dean.*

parties-in-interest listed in that section. Indeed, the cases that have held that the "person aggrieved" test remains viable to determine standing to appeal an order of the bankruptcy court have done so without any analysis of § 1109(b).[37]

Section 1109(b) provides that "[a] party in interest, including the debtor, the trustee, a creditor's committee, an equity security holders' committee, ***a creditor, an equity security holder*** or any indenture trustee may raise and may appear and be heard on ***any issue in a case under this chapter.***" (Emphasis added).[38] This statute contains a broad grant of standing, as this Court so found in *Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*[39] In enacting § 1109(b), Congress did not carve out appeals from its grant of standing and it is submitted that it is inappropriate for the courts to do so.

At least one court in this circuit has found that § 1109(b) confers standing on the parties-in-interest listed therein both as to orders in an underlying bankruptcy

[37] See *e.g., Coho; Technicool; In re Goodwins Discount Furniture, Inc.,* 16 B.R. 885 (1st Cir. BAP 1982); *Matter of Fondilier,* 707 F.2d 441 (9th Cir. 1988); *In re El San Juan Hotel,* 809 F.2d 151 (1st Cir. 1987); *In re Hipp, Inc.,* 859 F.2d 374 (5th Cir. 1988); *In re Westwood Cmty. Two Ass'n,* 293 F.3d 1332 (11th Cir. 2002).

[38] This is the same language that appears in § 307, which confers on the United States trustee, standing to "raise and…appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c)." No one would contend that this statute does not confer standing on the U.S. Trustee to both seek an order compelling the Debtor to file Rule 2015.3 Reports or to file an appeal, in the event the relief was denied. Section 1109(b) confers the same standing on Dugaboy as a party in interest in the bankruptcy.

[39] 762 F.2d 1283, 1286 (5th Cir. 1985).

case *and* on appeal.[40] In *Southern Pacific Transportation,* the district court found that:

> Although the Bankruptcy Code does not expressly address the issue of appellate 'standing,' § 1109(b) does provide some guidance. That provision…governs the right to be heard in bankruptcy cases arising under Chapter 11…[T]he plain language of [§ 1109(b)] gives the [Creditor's] Committee an expansive right of participation in the resolution of issues arising in bankruptcy cases. Because the questions raised in this appeal obviously qualify as 'issues' in this case, and because this case does not cease being a 'case under Chapter 11' merely because appellate jurisdiction has been invoked, there is no apparent reason why the Committee should not be 'heard' in this appeal under § 1109(b). ***Nothing in that provision…suggests that its broad right to appear and be heard is inapplicable to proceedings held before an appellate court.***
>
> This point is particularly significant when one notes that [§ 1109(a)] does expressly restrict a party's appellate rights…Given that Congress proved itself capable of limiting a party's appellate rights under § 1109(a), one might reasonably conclude that the absence of such a limitation in § 1109(b) reflects an intent not to proscribe the appellate rights of parties in interest***…[H]ad the drafters of § 1109(b) intended to prohibit parties in interest from appearing and being heard at the appellate stage of a Chapter 11 case, they very easily could have said so explicitly. Indeed, it is difficult to believe that Congress intended to invoke by omission in § 1109(b) what it had included by express language in § 1109(a). That would be inconsistent with the rule that '[w]hen the legislature has carefully employed a term in one section of a statute and has excluded it in another, <u>it should not be implied where excluded.</u>'…The absence of qualifying language in § 1109(b), therefore, suggests that the right to appear and be heard in bankruptcy cases extends to both trial and appellate court***

[40] See *Southern Pac. Transp. Co. v. Voluntary Purchasing Groups,* 227 B.R. 788 (E.D. Tex. 1998).

proceedings.[41] .

Section 1109(b) is clear and unambiguous. It does not say that the interested persons listed therein may appear and be heard on any issue *other than an appeal* or that only "persons aggrieved" may appear and be heard on appeal. That being the case, it is submitted that it is inappropriate to apply the more stringent "person aggrieved" test to determine standing in bankruptcy appeals, particularly when Congress could have but did not provide an exception in § 1109(b) for bankruptcy appeals, as it did in § 1109(a).

Even if applicable, however, the "person aggrieved" test is not absolute. Rules of prudential standing are "flexible."[42] Indeed, the *Coho* court endorsed the use of a "permissive standard to assess the actuality of the harm alleged by appellant for the purpose of standing."[43] This is because federal courts have the obligation to "exercise the jurisdiction given them."[44] While it is important, as noted by the *Coho* and *Technicool,* not to clutter appellate court dockets with appeals of orders under which a party may have only a tangential interest, it is also important not to close the doors of appellate courts to legitimate appeals. Application of the statutory

[41] 227 B.R. at 793. (Internal citations and footnotes omitted; emphasis added).
[42] *United States v. Windsor,* 570 U.S. 744, 757 (2013).
[43] 395 F.3d at 202, citing *Rohm & Hass,* 32 F.3d at 207 (5th Cir. 1994).
[44] *Colorado River,* 424 U.S. at 817.

standing rule of § 1109(b), rather than the more stringent "person aggrieved" test, adequately balances these interests, as Congress, obviously intended.

B. Dugaboy has Standing Under Both § 1109(b) and the "Person Aggrieved" Tests

1. Standing under § 1109(b)

Dugaboy's standing was not at issue in the bankruptcy court proceedings. Dugaboy filed its Motion to Compel and participated in a hearing on the motion and the bankruptcy court did not address standing in its Order. Nor was Dugaboy's standing at issue when it filed the Appeal to the district court. Standing was only implicated after Dugaboy withdrew the last of its proofs of claim on November 10, 2022.

Dugaboy, as an equity security holder in the Debtor, is a party in interest under §1109(b) with the right to appear and be heard on ***any issue*** in the Chapter 11 case, including the appeal of an adverse ruling by the bankruptcy court on a motion filed by Dugaboy. Although the Debtor has argued that Dugaboy's equity interest in the Debtor was small, § 1109(b) does not specify any level of equity security interest that is necessary to confer standing thereunder.

This Court has not decided the issue of whether § 1109(b) confers appellate standing, but the clear language of §§ 1109(a) and (b), taken together, indicates that Congress intended that it does. Further, it is illogical that Congress would grant

standing to participate in the bankruptcy process but then withhold the standing to appeal the result.

Section 1107(a) of the Bankruptcy Code binds the Debtor, as the debtor-in-possession in a Chapter 11 case, to comply with the trustee's duties under § 704(a)(8), including the filing of reports required by the rules. The Rule 2015.3 Reports are reports required to be filed by the debtor-in-possession. The reporting provisions of Rule 2015.3 are mandatory:

> (a) In a chapter 11 case, the trustee or debtor in possession ***shall file*** periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest. The reports shall be prepared as prescribed by the appropriate Official Form, and shall be based upon the most recent information reasonably available to the trustee or debtor in possession.
>
> (b) The first report required by this rule ***shall be filed*** no later than seven days before the first date set for the meeting of creditors under § 341 of the Code. Subsequent reports shall be filed no less frequently than every six months thereafter, until the effective date of a plan or the case is dismissed or converted….
>
> (c) For purposes of this rule, an entity of which the estate controls or owns at least a 20 percent interest, shall be presumed to be an entity in which the estate has a substantial or controlling interest…
>
> (d) The court may, after notice and a hearing, vary the reporting requirement established by subdivision (a) of this rule for cause, including that the trustee or debtor in possession is not able, after a good faith effort, to comply with those reporting requirements, or that the information required by subdivision (a) is publicly available.

***

(Emphasis added).

It is undisputed that the Debtor failed to file ***any*** Rule 2015.3 Reports prior to the effective date of the Plan and never requested any extensions to file the Rule 2015.3 Reports; nor, prior to the filing of the Motion to Compel, did the Debtor seek to otherwise vary the reporting requirements. It is further undisputed that the Debtor did not even make an effort to comply with Rule 2015.3 and that the information required by the Rule 2015.3 Reports is not publicly available. The only justification offered by the Debtor for its failure to file the Rule 2015.3 Reports is that "it just fell between the cracks."[45]

Dugaboy's goal in this matter is to have the courts require the Debtor to comply with the bankruptcy court's rules and file the required Rule 2015.3 Reports so that Dugaboy can evaluate any post-petition claims. Dugaboy submits that it has standing under § 1109(b) to seek the relief that it has requested and to appeal the bankruptcy court's order denying that relief.

2. Standing Under the "Person Aggrieved" Test

Even if the "person aggrieved" test is applied, Dugaboy meets that test in that it seeks to protect a substantive pecuniary interest in the bankruptcy estate. Although

[45] ROA.952-54.

Dugaboy withdrew its prepetition and administrative claims, it continues to own significant interests in several of the entities that would have been the subject of the Rule 2015.3 Reports. As a result of these ownership interests, any causes of action that arose post-petition as a result of dealings between the Debtor and any non-debtor affiliate in which Dugaboy owns an interest has a direct pecuniary effect on Dugaboy.

By not requiring the Debtor to file the Rule 2015.3 Reports, the bankruptcy court's decision foreclosed Dugaboy's ability to determine exactly what its claims against the estate are. Dugaboy remained in the dark relative to the status of the non-debtor affiliates during the pendency of the bankruptcy and surely lost claims against them. The Orders of the bankruptcy court and the district court would apparently require Dugaboy to place into the bankruptcy record every possible economic interest that Dugaboy has or had against the Debtor and any of the non-debtor entities subject to the Rule 2015.3 reporting requirements. Due to the failure to file the Rule 2015.3 Reports, Dugaboy had no information available to it to enable it to do this and, furthermore, at the time, there was no issue as to Dugaboy's standing. Dugaboy is not clairvoyant and should not be required to anticipate the loss of standing and be required to place into evidence alternative economic interests.

The purposes of the Rule 2015.3 Reports are both to assist prepetition creditors and to provide a complete accounting of transactions between the debtor and its non-

debtor affiliates so that parties in interest, such as Dugaboy here, have the necessary information to determine any post-petition claims that may exist. The Debtor's failure to file the Rule 2015.3 Reports and the Order of the bankruptcy court refusing to compel the Debtor to file the reports at a time when the Plan had not become effective, has deprived Dugaboy of the right to assert any claim arising out of the transactions between the Debtor and its non-debtor affiliates.

Dugaboy has been an active participant in the Debtor's bankruptcy case. It objected to the Debtor's Plan and raised the issue of the Debtor's failure to file any Rule 2015.3 Reports, both at the confirmation hearing and in the Motion to Compel that was filed once it became apparent that the Debtor did not even intend to file the Rule 2015.3 Reports after having put on notice of the issue at the confirmation hearing. Dugaboy had standing to take these actions at the time.

As this Court stated in *Technicool,* "[s]tanding is determined as of the commencement of the suit."[46] Debtor's arguments and the district court's decision that Dugaboy lacks standing hinge on events that occurred after the filing of the Appeal. At the time of the filing of the Appeal, Dugaboy had claims against the estate and an equity interest in the Debtor. These interests were direct pecuniary interests sufficient to confer standing on Dugaboy at the time the Appeal was filed and Dugaboy continues to have direct pecuniary interests in the Appeal as a result

[46] 896 F.3d at 386, quoting *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 458 (5th Cir. 2005).

of its on-going ownership in non-debtor affiliates and its contingent interest in the Claimant Trust.

Accordingly, the bankruptcy court's Order has ***actually,*** not theoretically or hypothetically, divested Dugaboy of the opportunity to determine its rights in the bankruptcy estate, thereby realistically burdening Dugaboy's "pocket."[47] In that sense, this case is more akin to *Ergo Science, Inc. v. Martin*,[48] than to *Coho, Technicool* or *Dean.*

In *Ergo,* an appellant, ETI, was a claimant to a fund interpleaded into the registry of the court. The district court held that ETI (and other claimants) had waived all claims against the fund. ETI appealed. In this Court, it was asserted by appellee that ETI's interest in the fund was merely speculative and that, as a result, ETI lacked standing. This Court found, however, that because ETI had been ***denied the right to assert its interest in the first place***, it had standing whether or not its interest was contingent or speculative.

> This dispute involves a potential claimant to the fund, not the stakeholder, and the very issue on appeal is whether ETI has waived its interest in the interpleaded funds or not. The district court's judgment decrees that ETI has no interest or right to the interpleaded funds. ETI, therefore, has standing to challenge this order because it is not faced

[47] See *Technicool,* 896 F.3d at 386 ("The [bankruptcy court's] order must burden [appellant's] pocket before he burdens a docket.")
[48] 73 F.3d 595 (5th Cir. 1996).

> with a hypothetical or indirect injury…but a real and immediate injury.[49]

That is the precise scenario at issue in this appeal. By not requiring the Debtor to make the Rule 2015.3 disclosures, the Bankruptcy Court denied Dugaboy the right to assert a post-petition claim against the estate. Like ETI in *Ergo,* Dugaboy's injury is not hypothetical or indirect, but is real and immediate.

C. Because Dugaboy has Standing, the Appeal is not Moot

Based on its finding that Dugaboy's standing evaporated as of November 10, 2021, when it withdrew the last of its proofs of claim, the district court also found that the Appeal was moot. While mootness is related to standing in that it originates in Article III's case or controversy requirement, they are not the same.

> A case becomes moot…only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.[50]

Dugaboy had a concrete interest in the litigation at the time it filed the Motion to Compel and this appeal. Dugaboy's prepetition ownership interest in the Debtor and its contingent beneficiary interest in the Claimant Trust created under the Plan may be small but Dugaboy's interest is nevertheless, concrete and there exists both a

[49] 73 F.3d at 597.
[50] *Jamison v. Esurance Ins. Servs., Inc.,* No. 3:15-CV-2484-B, 2016 WL 320646, at *2 (N.D. Tex. Jan. 27, 2016) (internal quotation marks omitted) (quoting *Campbell-Ewald Co. v. Gomez,* 577 U.S. 153 (2016).

controversy and an available remedy – *i.e.*, the courts below can compel the Debtor to file the required Rule 2015.3 Reports. Accordingly, Dugaboy's interests are sufficient to confer standing on Dugaboy to pursue the filing of the Rule 2015.3 Reports. Should this Court find that they are not, however, this Court may not simply affirm the district court's opinion, but is required to vacate the judgment of the district court finding that Dugaboy does not have standing, and remand the matter to the bankruptcy court for further proceedings.[51]

CONCLUSION

For all of the reasons stated above, appellant, The Dugaboy Investment Trust, has standing both under 11 U.S.C. § 1109(b) and under the "person aggrieved" test. Moreover, the Appeal presents an actual case or controversy, which can be remedied by the district court. Accordingly, The Dugaboy Investment Trust requests that this Court reverse the district court's Order granting the Motion to Dismiss Appeal as Moot, filed by the Debtor, Highland Capital Management, L.P. Appellant further requests all general relief.

RESPECTFULLY SUBMITTED this 24th day of October 2022.

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

[51] *Goldin v. Bartholow,* 166 F.3d 710, 718 (5th Cir. 1999).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this, the 24th day of October 2022, a true and correct copy of the foregoing document was served on the counsel of record below via electronic service.

October 24, 2022

/s/ Douglas S. Draper

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) in that this brief contains 5560 words, excluding 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 Word in Times New Roman, 14 point type for text and Times New Roman 12 point type for footnotes.

Dated: October 24, 2022.

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