Date Filed: 11/23/2022

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS, HON. KAREN GREN SCHOLER
CASE NO. 3:21-CV-2268-S

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that:

(a) There are no other debtors associated with this bankruptcy case other than Highland Capital Management L.P., and there are no publicly-held corporations that own 10% or more of Appellee Highland Capital Management L.P., which is not a corporation and which is not a parent corporation;

(b) 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

Appellee respectfully submits that oral argument is unwarranted and should not be permitted in the interest of preserving judicial resources and reducing the costs to the Debtor's economic constituents. This appeal seeks this Court's review of the District Court Order dismissing Appellant's appeal from the Bankruptcy Court on the basis that Appellant lacks appellate standing under this Court's long-standing "person aggrieved" standard. This sole dispositive legal issue has already been authoritatively decided by this Court countless times, including at least twice in published opinions in the last three years. Whatever legal arguments bear on this single issue are more than adequately presented in the briefs. This Court's decision process would not be aided by oral argument.

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I. STATEMENT OF ISSUES[1]

Appellee generally agrees with Appellant's statement of the issue in this appeal. The sole issue on appeal is whether the District Court[2] properly dismissed Appellant's appeal of the Bankruptcy Court's order denying the Motion to Compel on the basis that Appellant is not a "person aggrieved" and is without standing to prosecute this appeal.

This appeal pertains solely to whether the District Court properly (a) used the "person aggrieved" standard for appellate standing that this Court has relied on for decades and (b) appropriately applied that standard to Appellant. The District Court Order should be affirmed if this Court once again confirms that the "person aggrieved" standard is the appropriate standard for bankruptcy appellate standing in this Circuit and that the District Court properly ruled that Appellant was not a "person aggrieved" under the long-standing applicable precedent in this Circuit. For the reasons set forth below, Appellant's legal arguments to evade the application of the "person aggrieved" standard are devoid of merit and not supported by applicable case law.

[1] Unless otherwise defined, all capitalized terms used in this Opposition have the meanings ascribed in the *Opening Brief of Appellant the Dugaboy Investment Trust* (the "Opening Brief") [Document 00516519791]. Citations to "ROA" are to the Record on Appeal.

[2] "District Court" means the United States District Court for the Northern District of Texas, Dallas Division (Hon. Karen Gren Scholer), sitting as a bankruptcy appellate court pursuant to 28 U.S.C. § 158(a).

II. STATEMENT OF THE CASE

Appellee also agrees with the recitation of background facts set forth in the District Court Order and repeated in Appellant's Opening Brief,[3] but adds the following additional factual summary to provide a clearer background and context for the nature and reasons for this appeal.

Appellant is a family "trust" controlled by James Dondero (Highland's founder and ousted former CEO) and is one of many entities under Dondero's control.[4] The Dondero entities, including this Appellant, have appealed more than 20 Bankruptcy Court orders plus one direct appeal of the Bankruptcy Court's Confirmation Order from the Bankruptcy Court to this Court. Of those, the reviewing district court judges have ruled on or dismissed (for lack of standing) 11 of them, with the Dondero entities losing each time (save one that was remanded to the Bankruptcy Court for further application of one of the prongs required for collateral estoppel). Dondero and his entities have appealed eight of those appellate losses to this Court including this appeal, meaning that these entities are appellants

[3] *See* Opening Brief at 6-8.

[4] *NexPoint Advisors v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 48 F.4th 419, 424-25 (5th Cir. 2022).

in **eight** appeals presently pending in this Court[5] and one this Court has already ruled on—the Plan confirmation appeal,[6] which these entities have now expressly indicated will soon become the subject of a petition to the Supreme Court for writ of *certiorari*.

Dondero owns no equity in the Debtor directly but owns its former general partner, Strand Advisors Inc., which owned 0.25% of the total prebankruptcy equity in the Debtor.[7] Appellant owned a 0.1866% prebankruptcy limited partnership interest in the Debtor before those interests were cancelled under the terms of the Debtor's Plan leaving Appellant with a contingent interest in the claimant trust established under the Plan.[8] Appellant, along with Dondero entities under his control, collectively filed several objections to confirmation of the Plan. As recently summarized by this Court; "In [the former chief restructuring officer's] words, Dondero wanted to 'burn the place down' because he did not get his way." [9]

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[5] *NexPoint Advisors, L.P. et al. v. Highland Cap. Mgmt., L.P.*, Case No. 21-90011; *Highland Cap. Mgmt. Fund Advs., L.P. et al. v. Highland Cap. Mgmt., L.P.*, Case No. 22-10189; *NexPoint Advisors, L.P. v. Pachulski Stang Ziehl & Jones LLP, et al.*, Case No. 22-10575; *The Dugaboy Inv. Tr. v. Highland Cap. Mgmt., L.P.*, Case No. 22-10831; *James Dondero v. Highland Cap. Mgmt., L.P.*, Case No. 22-10889; *The Dugaboy Inv. Tr. et al. v. Highland Cap. Mgmt., L.P.*, Case No. 22-10960; *The Dugaboy Inv. Tr. et al. v. Highland Cap. Mgmt., L.P.*, Case No. 22-10983; and *The Charitable DAF Fund, L.P. et al. v. Highland Cap. Mgmt., L.P.*, Case No. 22-11036.

[6] This decision was recently published as *In re Highland Cap. Mgmt*., 48 F.4th 419 with respect to the order confirming the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the "Plan").

[7] *Id*. at 425.

[8] *Id.* and ROA.1780.

[9] *Id*. at 426.

Notwithstanding these objections, the Plan was confirmed by the Confirmation Order in February 2021 and became effective on August 11, 2021.[10] On direct appeal from the Bankruptcy Court, this Court affirmed the Confirmation Order, except for the Plan's exculpation of certain non-debtor parties.[11] Similar to this appeal, the Debtor's lack of filing Bankruptcy Rule 2015.3 reports was one of the "blunderbuss" of Plan confirmation objections filed by certain of the Dondero entities that this Court identified and overruled.[12] In its opinion, this Court concluded that the Debtor's failure to file reports due under Bankruptcy Rule 2015.3 was not a basis to deny confirmation of the Plan and that the "attempt to tether [Bankruptcy Rule 2015.3] to the bankruptcy trustee's general duties lacks any legal basis."[13]

Notwithstanding this rebuke and the fact that the Plan has been effective for well over a year, Appellant appealed the Bankruptcy Court's order denying the Motion to Compel (the "Bankruptcy Court Order") in order to require the Debtor to

[10] 48 F.4th at 427-28; ROA.1777.

[11] 48 F.4th at 439.

[12] *Id.* at 432.

[13] *Id*. at 434.

retroactively file Bankruptcy Rule 2015.3 reports—even though the Plan has now been effective for over fifteen months.[14]

III. SUMMARY OF ARGUMENT

Appellant ignores this Court's long-standing jurisprudence governing the appeal of bankruptcy court orders. This Circuit has repeatedly held that unlike traditional Article III standing, "'standing to appeal a bankruptcy court order is, of necessity, quite limited.'"[15] Consistent with the standard applied in other circuits nationwide, the Fifth Circuit applies the "person aggrieved" standard, which requires a higher causal nexus between act and injury and requires an appellant to show that it is "'directly and adversely affected pecuniarily by the order of the bankruptcy court.'"[16] Appellant cannot demonstrate that it was directly and adversely affected pecuniarily by the Bankruptcy Court Order. Appellant's speculative theories of recovery premised on its former equity interest and its asserted ownership interest in certain non-debtor subsidiaries resulting from the Bankruptcy Court Order is exactly the type of "hypothetical and indirect" injury that the Fifth Circuit has repeatedly

[14] ROA.1777. As succinctly noted by the District Court, Bankruptcy Rule 2015.3(a) required debtors to file "periodic financial reports of the value, operations, and profitability" of each non-debtor entity in which the debtor "holds a substantial and controlling interest." ROA.1777 and FED. R. BANKR. P. 2015.3(a). However, this requirement ceases after "the effective date of a plan or the case is dismissed or converted." *Id.*

[15] *Dean v. Seidel (In re Dean)*, 18 F.4th 842, 844 (5th Cir. 2021) (quoting *Furlough v. Cage (In re Technicool Sys.)*, 896 F.3d 382, 385 (5th Cir. 2018)).

[16] *Gibbs & Bruns LLP v. Coho Energy* (*In re Coho Energy)*, 395 F.3d 198, 202-03 (5th Cir. 2004) (quoting *In re Cajun Elec. Power Co-op*, 69 F.3d 746, 749 (5th Cir. 1995)).

found insufficient to confer bankruptcy standing.[17] The Bankruptcy Court Order denying the Motion to Compel did not "directly affect [Appellant's] wallets,"[18] despite Appellant's hypothetical conjecture of the potential consequences of that order on it.

Appellant offers three arguments to convince the Court that it has standing to appeal the Bankruptcy Court Order to the District Court.

First, Appellant argues (for the very first time in this appeal) that being a "party in interest" to *appear* in matters pending in the bankruptcy court in chapter 11 cases provided under Bankruptcy Code section 1109(b) provides Appellant with statutory *standing* to appeal orders. However, Bankruptcy Code section 1109(b) provides no such thing. The litany of reported decisions examining the lack of interplay between Bankruptcy Code section 1109(b) and the "person aggrieved" standard have concluded that section 1109(b) does not provide an independent basis to confer appellate standing. The several district courts in the Northern District of Texas that have considered this issue in the appeals of other Bankruptcy Court orders

[17] Appellant seems to argue—without authority—that the "person aggrieved" standard applied by this Court for several decades is not applicable as "Dugaboy does not concede that this test remains applicable under the Bankruptcy Code." Opening Brief at 11. This bizarre argument flies in the face of binding Circuit precedent published on this issue both before and after the enactment of the Bankruptcy Code.

[18] *Dean*, 18 F.4th at 844.

filed by Appellant and other Dondero entities have concluded the same thing.[19] However, Appellant—for whatever tactical reason—chose *not* to argue that Bankruptcy Code section 1109(b) provided it with statutory standing in its pleadings filed in the District Court. Unsurprisingly, the District Court neither addressed nor considered this argument. Appellant should not be allowed to assert this brand-new argument for the very first time in this current appeal after having already waived it by not raising it in the District Court in the first instance.

Second, Appellant argues that Bankruptcy Rule 2015.3 provides it with standing to appeal because that rule was designed to protect Appellant, who asserts ownership interests in certain non-debtor entities. This is nonsense. Bankruptcy Rule 2015.3 was specifically promulgated to assist holders of *allowed claims* against the reporting debtor during the time period prior to the confirmation and effectiveness of a debtor's chapter 11 plan. Appellant holds no claims, allowed or otherwise, against the Debtor and is not the intended beneficiary of Bankruptcy Rule

[19] *See NexPoint Advisors v. Pachulski Stang Ziehl & Jones LLP (In re Highland Cap. Mgmt., L.P.)*, No. 3:21-cv-03086 (N.D. Tex. May 9, 2022) at 9-10 (Kinkeade, J.) (reasoning that Bankruptcy Code section 1109(b) does not confer appellate standing and "even if Appellant is a 'party in interest' that can 'appear and be heard' on its objections to professional fees per § 330, that still does mean it has standing as a person aggrieved."); *Dugaboy Inv. Tr. v. Highland Cap. Mgmt., L.P.*, No. 3:21-cv-00261 (N.D. Tex. Sept. 26, 2022) (Lindsay, J.) (refusing to find statutory appellate standing pursuant to Bankruptcy Code section 1109(b)). *See also Highland Cap. Mgmt. Fund Advisors v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, No. 3:21-cv-01895 at 4-5 (N.D. Tex. Jan. 28, 2022) (Fitzwater, J.) (Not examining or addressing the applicability of Bankruptcy Code section 1109(b), but holding the Appellant had no standing to appeal bankruptcy court order authorizing and creating indemnity subtrust and entering into related agreement because it was not a "person aggrieved").

2015.3. Moreover, Bankruptcy Rule 2015.3 by its terms does not apply after the effective date of the Plan. As the District Court correctly concluded, Appellant is not pecuniarily affected by the Bankruptcy Court Order because it was unclear how requiring the Debtor to retroactively file these "post-dated reports disclosing years-old facts" occurring prior to the Plan effective date would "lead to any direct recovery by a creditor, let alone recovery by a non-creditor with a purported ownership in non-debtor affiliates."[20]

Third, Appellant alternatively argues that it is a "person aggrieved" because it had pending disputed claims against the Debtor when it filed the Motion to Compel and, as such, can continue to pursue its appeal notwithstanding the subsequent dismissal of all such claims. This is also incorrect. As a preliminary matter and as the District Court found, Appellant would not have standing even if its claims had not been disallowed because the attenuated interest between Appellant's interest in the Debtor and the Bankruptcy Court Order is insufficient to make it a "person aggrieved" under Circuit law.[21] And even if Appellant's former claims were hypothetically sufficient to make it a "person aggrieved", the subsequent loss of those claims makes this appeal constitutionally moot. While bankruptcy standing may be determined at the time the litigation begins, constitutional mootness and the

[20] ROA.1780. *See also Technicool*, 896 F.3d at 386.

[21] ROA.1780.

Constitution's justiciability requirement (which is the basis for the Circuit's decisions limiting the ambit of bankruptcy appeals) may moot an appeal even if standing existed at an earlier point in time. Thus, the District Court Order correctly held that (1) with the subsequent dismissal of Appellant's prepetition claims after the commencement of this appeal, Appellant is not a "person aggrieved" by the Bankruptcy Court Order; and (2) even if Appellant theoretically held a pending claim against the Debtor, it would still not have standing to appeal the Bankruptcy Court Order because its "attenuated interest in a potential future outcome" in the appeal is not sufficient to confer bankruptcy appellate standing.[22]

IV. ARGUMENT

A. Appellant Is Not a "Person Aggrieved" Under This Circuit's Long-Standing Rules Governing Bankruptcy Appeals

Appellant essentially ignores the rich case law in this Circuit governing standing to appeal bankruptcy court orders applied in the Fifth Circuit that goes back decades. Standing to appeal a bankruptcy court decision is a question of law governed by the "person aggrieved" test, which requires a showing that the appellant was aggrieved by the order being challenged,[23] and is an "even more exacting standard than traditional constitutional standing."[24] In other words, "[b]ecause

[22] ROA.1780. *See Coho*, 395 F.3d at 203 ("A remote possibility does not constitute injury under *Rohm's* "person aggrieved" test).

[23] *Technicool*, 896 F.3d at 385.

[24] *Coho*, 395 F.3d at 202.

bankruptcy cases typically affect numerous parties, the 'person aggrieved' test demands a higher causal nexus between act and injury . . . ."[25]

This Court has repeatedly held that appellate standing in bankruptcy cases is necessarily limited because the proceedings held in the context of a single bankruptcy case make them particularly susceptible to an avalanche of appeals by an array of parties:

> Bankruptcy courts are not Article III creatures bound by traditional standing requirements. But that does not mean disgruntled litigants may appeal every bankruptcy court order willy-nilly. Quite the contrary. Bankruptcy cases often involve numerous parties with conflicting and overlapping interests. Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, quite limited.[26]

In *Technicool*, the debtor's equity holder, Robert Furlough, opposed the debtor's employment of special counsel to pursue litigation. After the bankruptcy court overruled his objection, Furlough appealed, first to the district court and, when he did not prevail there, to this Court.[27] This Court also affirmed the bankruptcy court's decision, explicitly rejecting Furlough's argument that additional administrative expenses for special counsel would make a recovery on his equity less likely. Significantly, this Court further held that some theoretical possibility

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[25] *Id.*

[26] *Technicool*, 896 F.3d at 385 (citation omitted).

[27] *Id.* at 384-85.

relating to an equity interest did not accord him standing to appeal: "This speculative prospect of harm is far from a direct, adverse, pecuniary hit. Furlough must clear a higher standing hurdle: *The order must burden his pocket before he burdens a docket.*"[28] This Court reasoned that the bankruptcy court order that was the subject of Furlough's appeal—the appointment of a professional under Bankruptcy Code § 327(a)—did not *directly* affect Furlough's pecuniary interests, despite his equity interest. In other words, just because Furlough "feels grieved by [the professional's] appointment does not make him a 'person aggrieved' for purposes of bankruptcy standing."[29]

The Court's reason for adopting the "pecuniary interest" test for bankruptcy appeals speaks directly to the circumstances under which this Appellant—who along with the Dondero entities has already appealed over 20 orders entered by the Bankruptcy Court—now burdens this Court's docket:

> In bankruptcy litigation, the mishmash of multiple parties and multiple claims can render things labyrinthine, to say the least. *To dissuade umpteen appeals raising umpteen issues*, courts impose a stringent-yet-prudent standing requirement: *Only those directly, adversely, and financially impacted by a bankruptcy order* may appeal it.[30]

[28] *Id.* at 386 (emphasis added).

[29] *Id.*

[30] *Id.* at 384 (emphasis added).

This Court again strongly reiterated this approach last year in *In re Dean*,[31] explaining that the "person aggrieved test . . . is 'an even more exacting standard than traditional constitutional standing'" and requires "'that the *order* of the bankruptcy court must directly and adversely affect the appellant pecuniarily.'"[32] This Court stated simply, "Appellants cannot demonstrate bankruptcy standing when the court order to which they are objecting does not directly affect their wallets."[33]

As was the case in *Technicool*, Appellant is a former equity holder appealing a bankruptcy court order on the grounds that it "might have used the information in [the Bankruptcy Rule 2015.3 reports] to investigate whether any post-petition claims exist against the Debtor's estate by any non-debtor affiliates."[34] As was the case in *Technicool*, Appellant cannot demonstrate that it was directly and adversely affected pecuniarily by the Bankruptcy Court Order.[35] Appellant's speculative and prognosticative theories of recovery tenuously premised on its former equity

[31] 18 F.4th 842.

[32] *Id.* at 844 (quoting *Fortune Nat'l Res. Corp. v. United States DOI*, 806 F.3d 363, 366, 367 (5th Cir. 2015) (emphasis in original)).

[33] *Id.*

[34] ROA.1780.

[35] ROA.1779-80.

interest[36] and asserted ownership interests in certain non-debtor subsidiaries is exactly the type of "hypothetical and indirect" injury that the Fifth Circuit has repeatedly found insufficient to confer standing. The District Court similarly rejected these arguments and concluded that, even if Appellant's claims against the Debtor had not been disallowed, Appellant would *still* not have standing because the attenuated interest in requiring the Debtor to file retroactive Bankruptcy Rule 2015.3 reports that was the subject of the Bankruptcy Court Order would not constitute any realistic likelihood of injury on Appellant:

> Further, even if Dugaboy did still have some claim to the estate, "[e]ven a claimant to a fund must show a realistic likelihood of injury in order to have standing." *Id*. There is no such likelihood here. Were the Court to reverse the Order, the effect of the bankruptcy court granting the Motion to Compel is simply that Debtor would be required to file retroactive reports regarding its ownership interests in non-debtor subsidiaries. It is unclear how post-dated reports disclosing years-old facts could lead to any direct recovery by a creditor, let alone recovery by a non-creditor with a purported ownership in non-debtor affiliates. This attenuated interest in a potential future outcome is not sufficient: "the order must burden [Dugaboy's] pocket before [it] burdens the docket." *Technicool*, 896 F.3d at 386.[37]

Finally, the substantive relief requested by Appellant in the Motion to Compel—to retroactively require the Debtor to file Bankruptcy Rule 2015.3 reports

[36] The District Court also addressed the cancellation of Appellant's equity interest and Appellant's contingent beneficiary interest under the Plan and reasoned that Appellant "still does not demonstrate the requisite 'causal nexus' between the actual Order being appealed and its purported interest in potential future recovery under the Plan. *Coho*, 395 F.3d at 202. But in any event, such a 'speculative prospect of harm is far from a direct, adverse, pecuniary hit' as required to confer standing. *Technicool*, 896 F.3d at 386." ROA.1781.

[37] ROA.1780.

back to October 2019 when the chapter 11 case was initially filed—would also not have any direct and adverse pecuniary effect on the Appellant because the Plan has been effective since August 2021 and has been substantially consummated.[38] Filing old and out-of-date reports would not affect the treatment of Appellant's miniscule, attenuated economic interest in the Debtor that is now controlled by the Plan.[39] The Plan is the governing instrument that dictates, among other things, the treatment of all claims against and equity interests in the Debtor. Filing retroactive reports will

[38] As the District Court explained:

> Dugaboy's primary contention is that, but for the bankruptcy court's failure to compel Debtor to file retroactive reports regarding its ownership interests in non-debtor subsidiaries as the bankruptcy petition date, Dugaboy might have used the information in those reports to investigate whether any post-petition claims exist against Debtor's estate by any non-debtor affiliates. But such an injury is precisely the type of "hypothetical or indirect injury" that the Fifth Circuit has consistently found insufficient to confer standing. *Coho*, 395 F.3d at 203 (quoting *Ergo Science v. Martin*, 73 F.3d 595, 597 (5th Cir. 1996)).

ROA.1780.

[39] Appellant's reliance on *Ergo Science v. Martin*, 73 F.3d 595 (5th Cir. 1996), to show that it is a "person aggrieved" is similarly misplaced. *Ergo* is factually inapposite. That case dealt with an actual creditor who asserted a claim in a fund and "the very issue on appeal is whether [the claimant] has waived its interest in the interpleaded funds or not." 73 F.3d at 597. Appellant has no claims against the Debtor, either prepetition or post-petition. Appellant's baseless assertion that "[b]y 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" is factually incorrect. Opening Brief at 25. Appellant was not "denied" the right to assert a post-petition claim against the Debtor, and the Bankruptcy Court Order provides no such thing. Rather, Appellant elected not to file any post-petition claims against the Debtor, and is now precluded from doing so because the bar date to assert post-petition claims expired over a year ago. Appellant could have either filed a protective post-petition claim if it believed it had one before the expiration of the bar date or could have taken discovery even after entry of the Bankruptcy Court Order to liquidate the amount of any post-petition claim. It chose to do neither.

not have any impact on the Plan or its prescribed treatment of claims and equity interests.

B. Appellant's Legal Theory on Bankruptcy Code Section 1109(b) Raised for the Very First Time in this Appeal Should Not Be Considered

Appellant's newly articulated argument raised for the first time in this Appeal is that section 1109(b) of the Bankruptcy Code confers standing on it because it is a "party in interest" permitted to appear and be heard in chapter 11 cases. This is simply a belated attempted end-run around the "person aggrieved" standard articulated by this Circuit—a standard that Appellant cannot meet.[40] In addition to being procedurally incorrect, Appellant's argument is substantively wrong.

Appellant is improperly attempting to raise a new argument in this appeal that it did not raise in the District Court—namely, that Bankruptcy Code section 1109(b) provides it with statutory standing to appeal bankruptcy court orders (which it does not for the reasons set forth below). This Circuit has consistently held that litigants

[40] *Coho*, 395 F.3d at 203; *Technicool*, 896 F.3d at 385; *Dean*, 18 F.4th at 844.

cannot raise brand-new arguments on appeal that were not raised in the prior proceeding that is now being appealed.[41]

Appellant never raised this argument or even cited to section 1109(b) in the proceedings before the District Court.[42] Unsurprisingly, the District Court neither addressed nor ruled on the applicability of Bankruptcy Code section 1109(b) to appellate standing. Appellant should not be allowed to litigate this new legal theory for the first time in these proceedings after tactically electing not to raise it with the District Court in the first instance, as it should have done. In order to "preserve an argument, it 'must be raised to such a degree that the trial court may rule on it.' As [Appellant] failed to raise this argument in the district court, he has waived it."[43]

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[41] *See HSBC Bank USA v. Crum*, 907 F.3d 199, 207 (5th Cir. 2018) ("'An argument not raised before the district court cannot be asserted for the first time on appeal") (quoting *XL Specialty Ins. Co. v. Kiewit Offshore Servs.*, 513 F.3d 146, 153 (5th Cir. 2008));; *Ries v. Paige (In re Paige*), 610 F.3d 865, 871 (5th Cir. 2010) ("As we generally do not consider arguments raised for the first time on appeal [Appellant's] argument is waived"); *Crosby v. OrthAlliance New Image (In re OCA, Inc.)*, 552 F.3d 413, 424 (5th Cir. 2008) ("A thorough review of the record confirms that [Appellant] did *not* raise the issue of assignment in the bankruptcy court. At oral argument, [Appellant] also admitted that it had not raised the assignment issue below. Since this issue was not properly presented to the bankruptcy court, it cannot be raised now for the first time on appeal").

[42] Appellant will invariably argue that it has raised (completely unsuccessfully to date) the argument of whether Bankruptcy Code section 1109(b) constitutes a basis to confer it with standing in other matters that it has appealed. That is irrelevant. Appellant was obligated to raise this argument to the presiding District Court under existing case law rather than asserting it for the first time here. Appellant should not be allowed to have another bite at the apple simply because it voluntarily chose not to litigate this issue in prior proceedings. *See HSBC Bank*, 907 F.3d at 207.

[43] *Id.* (quoting *XL Specialty Ins. Co.*, 513 F.3d at 153).

C. Even If Appellant Had Timely Raised Its New Legal Argument, Section 1109(b) Does Not Provide It with Statutory Standing

Even if the Court were to consider Appellant's new argument, section 1109(b) of the Bankruptcy Code does not provide Appellant with the "statutory standing" it now asserts. While Bankruptcy Code section 1109(b) allows a "party in interest" to appear on bankruptcy matters, it does *not* make it a person aggrieved for appellate standing purposes in accordance with Circuit precedent on this issue. Section 1109(b) gives certain parties the right "to appear and to be heard on any issue in a case" under the Bankruptcy Code. It does not confer statutory appellate standing to appeal bankruptcy court orders and says nothing about whether an entity is a "person aggrieved."

Appellant conflates the concept of this Court's "person aggrieved" requirement with the ability for certain parties "to appear and to be heard" on bankruptcy matters in the trial court.[44] As courts considering this same argument

[44] "A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holder's committee, a creditor, an equity security holder, or an any indenture trustee may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C § 1109(b).

have concluded, these are distinct and separate legal constructs that Appellant has fused together to concoct a basis for standing where none otherwise exists.[45]

Although this Circuit has apparently not squarely addressed the applicability of Bankruptcy Code section 1109(b) to appellate standing, other courts have consistently held that being a "party in interest" to appear in certain bankruptcy proceedings is completely distinct from whether a party is a "person aggrieved and, consequently, does not provide any basis for statutory appellate standing."[46] The

[45] Although Bankruptcy Code section 1109 speaks broadly of the right of a party in interest to raise and to appear and be heard on any issue in a chapter 11 case, *the section is silent on the subject of a party's ability to take an appeal from an adverse decision, other than to expressly prohibit the Securities and Exchange Commission from taking an appeal.* In general, in order for a person to be a proper party to take an appeal, one must be a "person aggrieved" by the outcome of a particular proceeding." 5 COLLIER ON BANKRUPTCY ¶ 1109.08 (16th ed. 2022) (emphasis added).

[46] *See Lopez v. Behles (In re Am. Ready Mix)*, 14 F.3d 1497, 1502 (10th Cir. 1994) ("[Section] 1109(b) 'expands the right to be heard [in a Chapter 11 proceeding] to be a wider class than those who qualify under the 'person aggrieved' standard." Section 1109b) says nothing about a party's standing to appeal.") (quoting *Int'l Trade Admin. v. Rennselaer Polytechnic Inst*., 936 F.2d, 744, 747 (2d Cir. 1991)); *Sears v. Badami (In re AFY, Inc.)*, 2011 U.S. Dist. LEXIS 50742, at *8 (D. Neb. May 11, 2011) ("Section 1109(b), which provides that '[a] party in interest . . . may raise and may appear and may be heard on any issue in a case under [Chapter 11],' does not confer standing to appeal."); *Greater Se. Cmty. Hosp. Found. v. Potter*, 586 F.3d 1, 6 (D.C. Cir. 2009) ("On its face, however, [section 1109(b)] applies only to 'a case under this chapter,' that is, under Chapter 11 of the Bankruptcy Code, and Chapter 11 governs only proceedings in the bankruptcy court, not appeals therefrom. Consequently [appellant's] standing in district court is governed by the rule . . . limiting bankruptcy appeals to 'persons aggrieved . . .'"); *In re PWS Holding Corp*., 228 F.3d 224, 248-49 (3d Cir. 2000) ("[Bankruptcy Code section 1109(b)] confers broad standing at the trial level. However, "courts do not extend that provision to appellate standing . . . .") (citing *Kane v Johns-Manville Corp*., 843 F.2d 636, 641-42 (2d Cir. 1988)); *Cousins Int'l Food Corp. v. Vidal*, 565 B.R. 450, 459 (BAP 1st Cir. 2017)("Qualifying as an interested party with standing to participate in bankruptcy court proceedings is not necessarily synonymous with being a being a 'person aggrieved' for appellate standing purposes"); *In re Salant Corp.*, 176 B.R. 131, 134 (S.D.N.Y. 1994) ("[A]lthough the Equity Committee is clearly a party in interest under section 1109(b) of the Bankruptcy Code, merely being a party in interest is insufficient to confer appellate standing").

only case cited by Appellant to support its argument that Bankruptcy Code section 1109(b) confers standing to pursue this Appeal is the 24 year-old district court case of *Southern Pacific Transport Co. v. Voluntary Purchasing Group*.[47] But *Southern Pacific* does not stand for the proposition argued by Appellant. The two separate issues decided in *Southern Pacific* were first, whether a statutory creditors' committee was a "person aggrieved" with standing to oppose the appeal (even though it was not a named appellee); and second, after concluding that the committee was a "person aggrieved," whether section 1109(b) *prevented* the committee from appearing and being heard as an *appellee*[48] despite being a party in interest in the bankruptcy case below. The *Southern Pacific* court still applied the Fifth Circuit's "person aggrieved" test by *first* ruling the creditors' committee had standing because the "pecuniary interests of the creditors' committee's members are adversely affected by entry of the order confirming [the plan]."[49] The court did not, as Appellant argues, conclude that section 1109(b) independently confers appellate

[47] *S. Pac. Trans. Co. v. Voluntary Purchasing Grp.*, 227 B.R. 788 (E.D. Tex. 1998).

[48] *Id.* at 790. Unlike this Appeal, the debtor in *Southern Pacific* was the appellee defending the appeal and it was not clear to the *Southern Pacific* court whether appellant's threshold argument of appellee standing was even the proper inquiry under those circumstances. "Although the issue of standing is 'the threshold question in every federal case,'" it is not clear that appellant standing is the proper inquiry for the court in this case. Such issues typically arise only in the context of a party's standing to *take* an appeal (*i.e.* the right to be an appellant), not one's standing to oppose an appeal (*i.e.* the right to be an appellee). Indeed, courts are rarely (if ever) called upon to decide whether a party has standing to be an appellee." *Id.* (citation omitted).

[49] *Id.* at 791.

standing. Bankruptcy Code section 1109(b) does not provide Appellant any basis for bankruptcy appellate standing, statutory or otherwise.

D. Bankruptcy Rule 2015.3 Also Does Not Provide Appellant with an Independent Basis for Standing to Appeal the Bankruptcy Court Order

Appellant also argues that it is a "person aggrieved" because the non-filing of Bankruptcy Rule 2015.3 reports "deprived Dugaboy of the right to assert any claim arising out of the transactions between the Debtor and its non-debtor affiliates."[50] As a preliminary matter, the District Court concluded that this "is precisely the type of 'hypothetical or indirect injury' that the Fifth Circuit has consistently found insufficient to confer standing."[51]

Appellant also erroneously asserts that Bankruptcy Rule 2015.3 provides it with standing because that rule was promulgated to assist entities such as the Appellant, even though it has no claims against the Debtor. Not surprisingly, Appellant cites no case law for this false proposition. On the contrary, Appellant explicitly does *not* fall within the category of parties that Bankruptcy Rule 2015.3 was promulgated to assist because Appellant does not hold any allowed claims against the Debtor. As section 419 of the Bankruptcy Abuse Prevention & Consumer Protection Act explains:

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[50] Opening Brief at 23.

[51] ROA.1780. *See Coho*, 395 F.3d at 203 (quoting *Ergo*, 73 F.3d at 597).

> (b) **PURPOSE** – the purpose of the rules and reports under [subsection 2015.3(a)] shall be to assist parties in interest taking steps to ensure that the debtor's interest in any interest referred to in subsection (a)(2) ***is used for the payment of allowed claims against the debtor***.[52]

Appellant does not hold any claims (allowed or otherwise) against the Debtor, and cannot look to Bankruptcy Rule 2015.3 to provide it with "Bankruptcy Rule" standing as Appellant suggests.[53] And even if Appellant had been a holder of an allowed claim against the Debtor, the now-effective Plan is the applicable instrument that dictates the terms of payment of allowed claims, not Bankruptcy Rule 2015.3. This is precisely why the reporting requirements under Bankruptcy Rule 2015.3(a) cease upon the effective date of a plan.[54] Thus, there is nothing left to "assist parties" in ensuring that the Debtor's interests are "used for the payment of allowed claims," because the treatment and payment of claims is now governed by the Plan.

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[52] Pub L. No. 109-8 § 409(b) 119 Stat. 23, 109 (2005) (emphasis added).

[53] Moreover, Appellant offers no case law as to how Bankruptcy Rule 2015.3 provides it with any substantive basis for standing where none otherwise exists. While the Supreme Court promulgates the Bankruptcy Rules, federal law provides that "such rules shall not abridge, enlarge, or modify any substantive right." 28 U.S.C § 2075. *In re Hipp, Inc*., 895 F.2d 1503, 1519 (5th Cir. 1990) (quoting 28 U.S.C § 2075); *Phillips v. First City, Texas (In re Phillips)*, 966 F.2d 926, 933-34 (5th Cir. 1992) ("[W]hen Congress accorded the Supreme Court authority to promulgate the Bankruptcy Rules, it stated, "'such rules shall not abridge, enlarge, or modify *any* substantive right'")(emphasis added); *see also* FED. R. BANKR. P. 1001 (Bankruptcy Rules "govern *procedure* in United States Bankruptcy Courts") (emphasis added); *Hanover Indust. Mach. Co. v. Am. Can Co. (In re Hanover Indus. Mach. Co.)*, 61 B.R. 551, 552 (Bankr. E.D. Pa. 1986) ("the [Bankruptcy] Code defines the creation, alteration or elimination of substantive rights but the Bankruptcy Rules define the process by which these privileges may be effected").

[54] FED. R. BANKR. P. 2015.3(a).

E. Appellant No Longer Holds Any Claims Against the Debtor and Cannot Rely on the Former Existence of Disallowed Claims as a Basis for Bankruptcy Standing

Appellant's final argument is that because it held disputed claims against the Debtor prior to the appeal of the Bankruptcy Court Order, Appellant is still entitled to argue its appeal despite having lost all its claims.[55] This argument is also incorrect. First, as explained above, even if Appellant had any claim against the Debtor, the District Court correctly concluded that Appellant would still not have standing because there is no realistic likelihood of injury as to how retroactive reports disclosing years-old facts could lead to any direct recovery by creditors.[56]

Second, even if the existence of Appellant's prior claims made it a "person aggrieved", the disallowance of those claims means they are no longer relevant to determining whether or not Appellant has standing to appeal the Bankruptcy Court Order. While it is true that standing is determined as of the time litigation begins, constitutional mootness and Article III's justiciability requirement place standing in a time frame, such that "[e]ven when an action presents a live case or controversy at

[55] As noted above and by the District Court, Appellant's former equity interest in the Debtor does not constitute the necessary "causal nexus" to the Bankruptcy Court Order required to be a "person aggrieved." ROA.1781. Moreover, Appellant's then-existing former equity interests in the Debtor at the time of the appeal of the Bankruptcy Court Order were cancelled under the Plan and "cease to exist." *Highland Cap. Mgmt.*, 419 F.4th at 430.

[56] ROA.1780

the time of filing, subsequent developments . . . may moot the case."[57] The U.S. Supreme Court has described mootness as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'"[58]

This Circuit, in addressing a bankruptcy appeal in which the appellant lost standing after the appeal began, held thus: "A controversy is mooted when there are no longer adverse parties with sufficient legal interests to maintain the litigation."[59] A mooted appeal must be dismissed because a "moot case presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents."[60] As the District Court reasoned:

> Standing must exist both at the commencement of the litigation and throughout its existence, *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir. 1999) (quoting *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (internal alterations and quotation marks omitted)). A case becomes moot when a party loses standing, as "there are no longer adverse parties with sufficient legal interests to maintain the litigation." *Id*. (citation omitted). And when a case becomes moot, the court loses its "constitutional jurisdiction to resolve the issues it presents." *Id*.

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[57] *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456, 460 (6th Cir. 2007) (citing *Hall v. Beals*, 396 U.S. 45, 48 (1969)).

[58] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1996) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)).

[59] *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir. 1999) (citing *Chevron, U.S.A. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993)).

[60] *Id.* at 717-18 (citing *Hogan v. Miss. Univ. for Women*, 646 F.2d 1116, 1117 n.1 (5th Cir. 1981)).

(citing *Hogan v. Miss. Univ. for Women*, 646 F.2d 1116, 1117 n.1 (5th Cir. 1981).[61]

All the claims Appellant possessed at the time this appeal began have been withdrawn with prejudice and its former equity interest has been cancelled. Appellant's former claims cannot be used as a basis to argue that it has bankruptcy standing because standing must exist at the commencement of litigation and throughout its existence.[62] Appellant is therefore only left to argue that its contingent trust interest in the Plan and to speculate that the Bankruptcy Court Order did not allow it "to investigate whether any post-petition claims exist against the Debtor's estate by any non-debtor affiliates"[63] as the basis for being a "person aggrieved." This is exactly the type of "hypothetical or indirect injury" that this Court has consistently found insufficient to confer standing.[64]

V. CONCLUSION

The District Court Order dismissing the appeal of the Bankruptcy Court Order should be affirmed.

[61] ROA.1779.

[62] ROA.1779.

[63] ROA.1780.

[64] *Coho*, 395 F.3d. at 203 (quoting *Ergo*, 73 F.3d at 595).

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I hereby certify that on November 23, 2022, the foregoing Brief of Appellee was electronically filed using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

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