Case No. 22-10960

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 Sam A. Lindsey; USDC No. 3:21-CV-261

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CERTIFICATE OF INTERESTED PERSONS

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

1. **<u>Appellant filing this brief</u>:**

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4. **Interested Parties:**

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HarbourVest 2017 Global AIF, L.P.
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STATEMENT REGARDING ORAL ARGUMENT

Appellant, The Dugaboy Investment Trust ("Appellant" or "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. Dugaboy also 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.[1]

Additionally, Dugaboy contends that because the sole basis of the District Court's affirmation of the Settlement Approval Order, as hereafter defined, was its finding that Dugaboy lacks bankruptcy and appellate standing to appeal the Settlement Approval Order, in the event that this Court determines that Dugaboy does have standing, the matter should be remanded to the District Court with instructions to consider and opine on the merits of Dugaboy's appeal.

Dugaboy also contends that it was inappropriate for the Bankruptcy Court to separately rule that the Debtor and HarbourVest should be permitted to place the proceeds of the Settlement in an entity that is not the Debtor. A non-debtor affiliate

[1] These issues are also raised in Docket No. 22-10831, on the docket of this Court, which is currently pending between these same parties.

of the Debtor is not the Debtor, even if wholly owned. Such an entity is beyond the reach of the Bankruptcy Court, is not subject to any requirements to report or account to anyone involved in the bankruptcy for its activities and the disposition of its assets. Accordingly, it was inappropriate for the District Court to affirm a scheme that takes settlement proceeds paid to the Debtor outside the bankruptcy proceeding. Dugaboy believes that oral argument on these issues will be beneficial to the Court.

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OPENING BRIEF OF APPELLANT, THE DUGABOY INVESTMENT TRUST

Dugaboy[2] 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 September 26, 2022, the District Court entered an *Order* (the "District Court Order"):[3] (1) dismissing by agreement, the appeal as to Get Good; (2) dismissing for lack of standing the appeal by Dugaboy; and (3) affirming the bankruptcy court's *Order Approving Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154)*

[2] The Get Good Nonexempt Trust ("Get Good") was an appellant, together with Dugaboy, in the underlying appeal in the district court (Civil Action No. 3:21-CV-261-L) (the "Underlying Appeal"). After the Underlying Appeal was filed, the claims that had been filed in the bankruptcy case by Get Good (*i.e.,* Claims No. 120, 128, and 129) were withdrawn, with prejudice and in conjunction with the Debtor's *Motion to Dismiss Appeal as Constitutionally Moot* [ROA.3813] ("Debtor's Motion"). Appellants consented to the dismissal of the Underlying Appeal with respect to Get Good only. Thus, as found by the District Court, the Underlying Appeal, as to Get Good, was dismissed by consent. As a result, Get Good is not an Appellant in the instant appeal (this "Appeal").

[3] ROA.3875 (RE Tab 3).

and Authorizing Actions Consistent Therewith, (the "Settlement Approval Order")[4] which was the subject of the Underlying Appeal.[5]

STATEMENT OF ISSUES

ISSUE NO. 1:

Whether the District Court, sitting as a bankruptcy appellate court, correctly ruled that Appellant, Dugaboy, lacks standing to appeal the Bankruptcy Court's Settlement Approval Order.

ISSUE NO. 2:

Whether, if Dugaboy is found to have standing to appeal the Settlement Approval Order, the District Court's affirmance of the Settlement Approval Order should be reversed, and the case remanded to the District Court with instructions to consider and opine on the merits of Dugaboy's appeal.

ISSUE NO. 3:

Whether the Bankruptcy Court correctly separately ruled that under the Transfer Agreement, the Debtor is entitled to place the proceeds of the HarbourVest settlement (the "Settlement") in a non-debtor affiliate that is not subject to the

[4] ROA.21. *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* (the "Debtor's Motion") appears at ROA.712.

[5] The district court's *Order* (the "District Court's Order") and *Judgment* were entered on September 26, 2022. ROA.3875 and ROA.3879, respectively.

jurisdiction of the Bankruptcy Court and whether the District Court's affirmation of that ruling was correct.

STATEMENT OF THE CASE

The following facts are undisputed.[6] The Debtor, Highland Capital Management, L.P. (the "Debtor," "Highland," or "Appellee") originally filed a bankruptcy petition under chapter 11 of the Bankruptcy Code (the "Code") on October 16, 2019, in the United States Bankruptcy Court for the District of Delaware (Case No. 19-12239 (CSS)). Venue of the case was transferred to the Bankruptcy Court for the Northern District of Texas, Dallas Division (Case No. 19-34054-sgj11) on December 4, 2019.[7] Shortly after the case was transferred, the Debtor and the Official Unsecured Creditors' Committee entered into a settlement agreement, which was approved by the Bankruptcy Court, pursuant to which an independent board of directors was installed within the Debtor's general partner and certain operating protocols were put into place.[8] The Bankruptcy Court ultimately appointed James P. Seery, one of the newly appointed Board members, as the Debtor's Chief

[6] Some of the background facts and the facts describing HarbourVest's Claims that are stated in this Section are adopted from facts stated in the Debtor's Motion (the "Debtor's Motion"), ROA.712, which to the extent included herein, Dugaboy does not contest, and the *Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* (the "Dugaboy Objection"), filed by Dugaboy and Get Good, ROA.845.

[7] See the Debtor's Motion ROA.714, 3-9; the Dugaboy Objection, ROA.846, 2-5.

[8] ROA.714.

Executive Officer and Chief Restructuring Officer. With those measures in place, the Debtor remained as a debtor-in-possession throughout the bankruptcy case through confirmation of the *Fifth Amended and Restated Plan of Organization* (the "Plan") on February 22, 2021, and retained control of the bankruptcy estate under Sections 1107(a) and 1108 of the Code.[9]

During the pendency of the bankruptcy, Dugaboy and Get Good each filed three (3) proofs of claim.[10] HarbourVest entities[11] filed six (6) proofs of claim (the "HarbourVest Claims") for damages allegedly sustained by HarbourVest in conjunction with an investment that it made in Highland CLO Funding, L.P. f/k/a Acis Loan Funding, Ltd. ("HCLOF"), an affiliate of the Debtor.[12]

Prior to the bankruptcy filing, HarbourVest had invested approximately $80 million in HCLOF, in exchange for an approximately 49% limited partnership interest therein (the "Investment").[13] HarbourVest contended that it was fraudulently induced into making the Investment by Debtor's misrepresentations and omissions

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[9] ROA.714.

[10] See District Court's Order, ROA.3880, which lists the claims filed by Dugaboy and Get Good. At the time of the hearing on the Debtor's Motion on January 14, 2021, objections to the claims of Dugaboy and Get Good were filed but had not been heard. See Transcript ("Tr.") of January 14, 2021, ROA.2463-2635, at ROA.2485-2486.

[11] The HarbourVest entities are HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P. Harbour Vest Skew Base AIF, L.P., and Harbourvest Partners, L.P. (collectively, "HarbourVest").

[12] Debtor's Motion, ROA.718, 22-24 and Exhibits 2-7 to *Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154 and Authorizing Actions Consistent Therewith* (the "Morris Declaration"). See also the Dugaboy Objection, ROA.847, 6.

[13] See Exhibits 2-7 to the Morris Declaration, ROA.728, at ROA.750-809; ROA.715.

of certain material facts bearing on the Investment, particularly in relation to the impact and effect of an arbitration award (the "Arbitration Award") in the amount of approximately $8 million in favor of Joshua Terry, a former employee of the Debtor and limited partner in Acis Capital Management, L.P. ("Acis LP").[14] Through Acis LP, Mr. Terry had managed the Debtor's CLO business, including CLO investments held by Acis Loan Funding, Ltd. ("Acis Funding").[15] The Debtor terminated Mr. Terry's employment in 2016 and filed suit against him in Texas state court. Mr. Terry counterclaimed, alleging wrongful termination and wrongful taking of his limited partnership interest. Certain of Mr. Terry's claims were submitted to arbitration, which resulted in the aforementioned Arbitration Award.[16]

HarbourVest contended that the Debtor had responded to the Arbitration Award by engaging in a series of fraudulent transfers and corporate restructurings designed to prevent Mr. Terry from ever collecting on the Arbitration Award by stripping the Acis entities of assets, including profitable portfolio management contracts, and transferring them to non-Acis, Debtor-controlled entities.[17] At the same time Debtor was allegedly engaging in these improper activities, it was negotiating the HarbourVest Investment and allegedly misrepresenting the nature of

[14] Debtor's Motion, ROA.716, 14-15.
[15] ROA.716, 14.
[16] ROA.716, 15.
[17] ROA.716, 16-18; ROA.717, 19.

the Arbitration Award and the reasons behind the changes that it was making to the Acis entities.[18] HarbourVest, allegedly ignorant of the Debtor's misrepresentations, concealments and omissions went forward with its Investment, but alleged that it would not have done so had it known the true purpose behind the Debtor's actions.[19]

In the bankruptcy proceeding, HarbourVest sought to rescind the Investment and claimed approximately $300 million based on theories of fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duties (under Gurnsey law), and on alleged violations of state securities laws and the Racketeer Influenced Corrupt Organizations Act ("RICO").[20] The Debtor initially objected to the HarbourVest Claims on the grounds that they were "no-liability" claims.[21] HarbourVest then filed a lengthy response to the Omnibus Objection as it related to HarbourVest's Claims, which the Debtor asserts spurred the Debtor to engage in a thorough investigation of the HarbourVest Claims.[22]

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[18] ROA.716-717.
[19] ROA.717.
[20] See Exhibits 2-7 to the Morris Declaration, ROA.728, at ROA.750-809. Most of the claimed damages were under statutes that provide treble damages.
[21] *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient Documentation Claims* (the "Omnibus Objection"), ROA.2696-2717.
[22] *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient Documentation Claims* (the "HarbourVest Response"), ROA.2719-2747 and the Appendix thereto; Tr. ROA.2463-2635, at ROA.2505-2506

In its *Disclosure Statement for the Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* (the "Disclosure Statement"), the Debtor represented that it intended to "vigorously oppose the HarbourVest Claims on various grounds…."[23] Nevertheless, within weeks of filing the Disclosure Statement, the Debtor filed the Debtor's Motion seeking approval of its Settlement with HarbourVest.[24]

Under the terms of the *Settlement Agreement,*[25] HarbourVest was to receive, in "full and complete satisfaction" of its claims, (i) an allowed, nonpriority general unsecured claim in the aggregate amount of $45 million (the "Allowed GUC Claim") and (ii) an allowed subordinated claim in the aggregate amount of $35 million (the "Allowed Subordinated Claim"). On the Effective Date of the Settlement Agreement, HarbourVest was to; "transfer all of its rights, title, and interest in [HCLOF] to the Debtor **or its nominee** pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.,* attached [to the Settlement Agreement] hereto as Exhibit A (the "Transfer Agreements") and the Debtor **or its nominee** will become a shareholder of HCLOF with respect to the HarbourVest Interests."[26] Additionally, the parties agreed to execute mutual releases

[23] ROA.847, 9 (Dugaboy's Objection); ROA.3377-3477 (Disclosure Statement).
[24] ROA.712.
[25] Exhibit A to Morris Declaration, ROA.731-739.
[26] Settlement Agreement, §§ 1(a) and (b), ROA.732; Settlement Agreement, §§ 2, 5, ROA 732-733 and ROA.734-735. At the time of the Hearing, it was estimated that these interests were worth approximately $22.5 million.

and HarbourVest agreed to vote the HarbourVest Claims in favor of the Debtor's *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* (the "Plan").[27]

Dugaboy (and Get Good) objected to the Debtor's Motion.[28] The Debtor filed the *Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* (the "Omnibus Reply")[29] and HarbourVest filed the *HarbourVest Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith* (the "HarbourVest Reply").[30]

Following the Hearing, at which the Bankruptcy Court received testimony and evidence from Mr. Seery, on behalf of the Debtor and Mr. Michael Pugatach, on behalf of HarbourVest, the Bankruptcy Court ruled from the bench that it was granting the Debtor's Motion and approving the Settlement.[31] The Settlement

[27] The Plan is attached as Exhibit A to the Disclosure Statement (ROA.3377-3477) and appears in the record at ROA.3479-3554.
[28] ROA.845-854. The Dugaboy Objection was filed January 8, 2021. Other objections were filed by James Dondero (ROA.830-844) and CLO Holdco, Ltd. (ROA.855-864). CLO Holdco, Ltd. withdrew its objection at the hearing on Debtor's Motion which was conducted on January 14, 2021 (the "Hearing"), the transcript of which appears in the record at ROA.2463-2635. See ROA.2469-2470 for CLO Holdco, Ltd.'s withdrawal of its objection.
[29] ROA.870-891, filed January 13, 2021.
[30] ROA.901-926, filed January 13, 2021.
[31] ROA.2612-2618.

Approval Order was entered in the Bankruptcy Court on January 21, 2021.[32] The Settlement Approval Order recites that the Bankruptcy Court, having considered the Debtor's Motion, the Morris Declaration and exhibits attached thereto, the Settlement Agreement, the Objections, the Omnibus Reply, the HarbourVest Reply, the testimony, evidence and arguments of counsel introduced at the Hearing, and having also considered "(1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the produce of arms-length bargaining, and not of fraud of collusion,"[33] found that:

- The relief requested in the Debtor's Motion is in the best interest of the estate, the creditors and other parties in interest;
- The Settlement Agreement is fair and equitable; and
- The legal and factual bases set forth in the Debtor's Motion establish good cause for the relief requested therein.

[32] ROA.21-44.
[33] ROA.21-23.

Accordingly, the Bankruptcy Court (1) granted the Debtor's Motion, (2) overruled all Objections to the Debtor's Motion, (3) approved the Settlement Agreement pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure; (4) overruled as moot all objections to the HarbourVest Claims; (5) authorized the Debtor, HarbourVest and all other parties to take any actions necessary and desirable to implement the Settlement Agreement, without further approval or notice; (6) authorized HarbourVest to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor pursuant to the terms of the Transfer Agreement; and (7) retained jurisdiction to hear and determine all matters arising from the implementation of the Settlement Approval Order.[34]

Dugaboy (and Get Good) appealed to the District Court from the Settlement Approval Order.[35] In their appeal brief, filed on May 13, 2021,[36] Appellants raised four (4) issues relative to the Bankruptcy Court's approval of the Settlement. The Debtor filed its *Answering brief of Appellee Highland Capital Management, L.P.* on June 14, 2021.[37] Appellants filed a *Reply Brief* on June 28, 2021.[38] Dugaboy admits

[34] ROA.23-24. On February 22, 2021, following the entry of the Settlement Approval Order, Debtor's Plan was confirmed, over Dugaboy's objection. The confirmation order is the subject of a separate appeal.
[35] See Notice of Appeal and Statement of Election, filed February 1, 2021 (ROA.355-368) and Amended Notice of Appeal and Statement of Election, filed February 3, 2021 (ROA.369-366).
[36] *Original Appellant Brief Filed on Behalf of The Dugaboy Investment Trust and the Get Good Nonexempt Trust,* Case No. 3:21-00261-L, ROA.3674-3697.
[37] ROA.3725-3761.
[38] ROA.3769-3785.

that after the Underlying Appeal was fully briefed, Dugaboy and Get Good withdrew all of their claims with prejudice.[39] Nevertheless, the Underlying Appeal should have gone forward because Dugaboy is a party in interest under § 1109(b) of the Code and because Dugaboy continues to retain an interest in the estate as a result of its equity interest in the pre-confirmation Debtor and its interest in the Claimant Trust formed under the Plan and the outcome of the Underlying Appeal stands to have a direct, pecuniary effect on Dugaboy.[40]

On January 13, 2022, Debtor filed the Motion to Dismiss. On January 20, 2022, Dugaboy and Get Good filed *Appellants' Response to Appellee's Motion to Dismiss Appeal as Moot* ("Opposition to Motion to Dismiss").[41] On January 27, 2022, Debtor filed *Appellee's Reply in Support of Motion to Dismiss Appeal as Constitutionally Moot*.[42]

On September 26, 2022, the District Court issued its Order granting the Debtor's Motion to Dismiss as to Get Good on agreement of the Appellants, and

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[39] 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. See discussion at ROA.3817-3819 (*Appellee's Motion to Dismiss Appeal as Constitutionally Moot* (the "Motion to Dismiss"). Additionally, Dugaboy is a residual beneficiary of the Claimant Trust, as discussed, *infra.*

[40] The Debtor admits that Dugaboy held a pre-bankruptcy limited partnership interest in the Debtor of 0.1866%. ROA.3819.

[41] ROA.3834-3854.

[42] ROA.3855-3862.

granting the dismissal of the Underlying Appeal as to Dugaboy based on its finding that under *In re Technicool Systems, Incorporated,* 896 F.3d 382 (5th Cir. 2018)[43] Dugaboy's "indirect interest" in the Settlement Approval Order and prospect of harm is "speculative and insufficient to meet the strict requirements for bankruptcy standing."[44] The District Court further held that Dugaboy lacks standing under § 1109(b) of the Code because the Fifth Circuit has not decided whether that section confers appellate standing. Additionally, although the District Court did not discuss the merits of the Underlying Appeal, it nevertheless affirmed the Settlement Approval Order.[45] Dugaboy now appeals from the District Court's Order.

SUMMARY OF THE ARGUMENT

A. Standing

The courts of this circuit have adopted the "person aggrieved" test to determine whether an appellant has standing to appeal a bankruptcy court's order. Under this test, the appellant is a "person aggrieved" by the decision of the bankruptcy court where the appellant was "directly and adversely affected pecuniarily by the order of the bankruptcy court."[46] The "person aggrieved" test is a *prudential* doctrine designed to curb the potential for a multitude of appeals of

[43] 896 F.3d 382 (5th Cir. 2018). See ROA.3876-3877.
[44] ROA.3878.
[45] ROA.3875-3879 (RE Tab. 3).
[46] See *In re Coho Energy, Inc.,* 395 F.3d 198, 202-03 (5th Cir. 2004).

questionable interest that would "clog up the system and bog down the courts" given the potentially large number of parties in a bankruptcy proceeding.[47]

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 the "person aggrieved" test continues to be applied by courts sitting in this circuit (and others), 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, but Congress enacted 11 U.S.C. § 1109(b), which specifically confers statutory standing on parties-in-interest. Dugaboy is 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 "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).

[47] *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.

Even if this Court decides that the "person aggrieved" test remains applicable notwithstanding that it has been eliminated from the Bankruptcy Code, the "person aggrieved" test is a *prudential* rule that is not absolute but is "flexible."[48] As stated by the *Coho* court, the test to assess the actuality of the harm alleged by the appellant is a permissive one.[49] This is true because the federal courts are obligated to "exercise the jurisdiction given to them."[50]

Although Dugaboy dismissed its direct prepetition claims against the Debtor, Dugaboy still holds a pecuniary interest in this matter through its equity interest in the pre-confirmation Debtor and its interest in the Claimant Trust formed under the Plan. Dugaboy's contingent interest in the subject matter of the litigation is such that if HarbourVest's Claims were reduced to zero – as the Debtor initially claimed before reversing its position in the Settlement – that result would increase the funds available for payments to pay Dugaboy's residual interest under the Plan. Simply because Dugaboy's interest is residual does not mean that it is nonexistent.

Dugaboy had standing when it perfected the Underlying Appeal and continues to have a sufficiently substantial and pecuniary interest in the HarbourVest Settlement to confer standing in this appeal, despite having dismissed its prepetition

[48] *In re Coho Energy, Inc.,*395F.3d 198, 202 (5th Cir. 2004).
[49] 395 F.3d at 202.
[50] *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976).

claims. Accordingly, Dugaboy is a "person aggrieved" and has standing to pursue its appeal in any event.

B. The Affirmation of the Approval Order

The District Court affirmed the Settlement Approval Order without any discussion whatsoever of the merits of Dugaboy's appeal. The only issue addressed and discussed by the District Court was the Debtor's contention that Dugaboy lost its standing to appeal during the pendency of the Underlying Appeal. Thus, the District Court's Order was based entirely on its granting of the Debtor's Motion to Dismiss, and it can only be assumed that the District Court's affirmation of the Settlement Approval Order was based solely on its finding that Dugaboy lacks standing. Accordingly, should this Court find that Dugaboy does have standing, the matter should be remanded to the District Court for a ruling on the merits of Dugaboy's Underlying Appeal.

After granting the Debtor's Motion to enter into the HarbourVest Settlement and denying and dismissing the Objections, including the Dugaboy Objection, the Bankruptcy Court, in the Settlement Approval Order, separately authorized HarbourVest to transfer its interests in HCLOF to a wholly owned and controlled subsidiary of the Debtor pursuant to the terms of the Transfer Agreement. The Bankruptcy Court did not provide any reasons why it granted this authorization, either in its bench ruling on January 14, 2021, or in the Settlement Approval Order.

Dugaboy asserts, however, that the fact that the Transfer Agreement provided that the interests in HCLOF being returned to the Debtor by HarbourVest would not go into the estate, but into a separate, wholly owned subsidiary of the Debtor which was not a party to the bankruptcy or subject to the bankruptcy court's jurisdiction is a clear indication that the Settlement provides no material value to the estate. This issue should have been addressed by the Bankruptcy Court. Dugaboy submits that it was wrong for the Bankruptcy Court to grant the Debtor the right to direct the Settlement proceeds to a non-debtor entity and the District Court should not have affirmed such a ruling.

STANDARD OF REVIEW

The issue of Dugaboy's standing to appeal the Bankruptcy Court's Settlement Approval Order is a legal issue that this Court reviews *de novo*.[51] '"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."'[52] This Court employs "a permissive standard to assess the actuality of harm alleged by appellant for the purposes of standing."[53]

[51] *Matter of Technicool Systems, Inc.* 896 F.3d 382, 385 (5th Cir. 2018),
[52] *Coho,* 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).
[53] *Coho,* 395 F.3d at 202.

The issue of whether the Bankruptcy Court should have approved the Settlement under Bankruptcy Rule 9019 where the Settlement does not provide a material benefit to the estate as a result of the Settlement proceeds being funneled into a non-debtor entity is reviewed for an abuse of discretion.[54] In *Foster Mortgage,* this Court stated:

> This Court should review the bankruptcy Court's approval of the compromise settlement for an abuse of discretion…The Bankruptcy Court's conclusions of law are subject to *de novo* review, but its findings of fact may not be set aside by the reviewing court unless 'clearly erroneous.'…An appellate court may reverse a fact finding of the lower court only if left with 'a firm and definite conviction that a mistake has been committed….'
>
> A bankruptcy court may approve a compromise settlement of a debtor's claim pursuant to Bankruptcy Rule 9019(a). However, the Court should approve the settlement only when the settlement is fair and equitable and in the best interests of the estate…The judge must compare the 'terms of the compromise with the likely regards of litigation….'
>
> …This circuit has applied a three-part test [to ensure that the settlement is fair, equitable and in the interest of the estate and creditors]. In specific, the bankruptcy court must consider:
>
> (1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law,
>
> (2) the complexity and likely duration of the litigation, and any attendant expense, inconvenience and delay, and
>
> (3) all other factors bearing on the wisdom of the compromise. [55]

[54] *Matter of Foster Mortgage Corporation,* 69 F.3d 914 (5th Cir. 1995).
[55] 69 F.3d at 917. (Citations and footnote omitted).

ARGUMENT

A. Standing

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

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."[56]

> 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. [57]

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)

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[56] *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).

[57] 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.

(1976) ('A person aggrieved by an order of a referee may…file with the referee a petition for review…') (repealed 1978).[58]

The *Coho* court recognized that the "person aggrieved" test was repealed and is not included in the Bankruptcy Code,[59] but nevertheless found it to remain viable and has continued to impose the repealed "person aggrieved" test to determine standing in bankruptcy appeals in this circuit.[60] The Constitution, as noted by the *Coho* court, only requires a 'case or controversy' which, for appellate purposes, requires only that the alleged harm be 'fairly traceable' to the act complained of.[61] Thus, the "person aggrieved test is not a Constitutional test or limitation, and a dismissal for lack of Constitutional standing is, accordingly, inappropriate.

Indeed, the Supreme Court has not endorsed the "person aggrieved" test in the context of bankruptcy appellate standing and Congress removed the "person aggrieved" requirement when it enacted § 1109(b), which confers standing on parties-in-interest. Yet, the cases that have held that the "person aggrieved" test remains viable to determine standing to appeal an order of the bankruptcy court following the enactment of the Bankruptcy Code have done so without any analysis of § 1109(b), just as the district court did in this case.[62]

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[58] 395 F.3d at 202.
[59] 395 F.2d at 202.
[60] See *e.g., Rohm & Hass Tex. Inc. v. Ortiz Bros. Insulation, Inc.* 32 F.3d 205 (5th Cir 1994)*; Coho; Technicool; Dean.*
[61] *Coho,* 395 F.3d at 202.
[62] 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

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).[63] This statute contains a broad grant of standing, as this Court so found in *Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*[64] 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 case *and* on appeal.[65] 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

(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).

[63] 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 object to a proposed settlement or to file an appeal, in the event the objection was overruled. Section 1109(b) confers the same standing on Dugaboy as a party in interest in the bankruptcy.

[64] 762 F.2d 1283, 1286 (5th Cir. 1985).

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

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, it should not be implied where excluded.'…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 proceedings***.[66]

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[66] 227 B.R. at 793. (Internal citations and footnotes omitted; emphasis added); see also, *Casco Bay Lines, Inc.,* 12 B.R. 18, 20 n.2 (B.A.P. 1st Cir. 1981). While not binding on courts in this circuit, that court's concluded that the fact that in § 1109(a), pertaining to standing of the Securities Exchange, specifically limits appellate standing, but § 1109(b) does not, confirms that § 1109(b) standing extends to appeals.

Section 1109(b) is clear and unambiguous. It does not say that parties in interest 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 continue 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."[67] 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."[68] This is because federal courts have the obligation to "exercise the jurisdiction given them."[69] 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 standing rule of § 1109(b), rather than the more stringent "person aggrieved" test, adequately balances these interests, as Congress, obviously intended.

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[67] *United States v. Windsor,* 570 U.S. 744, 757 (2013).
[68] 395 F.3d at 202, citing *Rohm & Hass,* 32 F.3d at 207 (5th Cir. 1994).
[69] *Colorado River,* 424 U.S. at 817.

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

a. Standing under § 1109(b)

Dugaboy's standing was not at issue in the bankruptcy court proceedings. At the time of the Hearing, Dugaboy had filed three (3) proofs of claim in the bankruptcy proceeding. Even though the Debtor had objected to Dugaboy's claims, they had not been denied. Dugaboy filed its Objection and participated in the Hearing on the Debtor's Motion. The Bankruptcy Court did not address standing in its Approval Order. Likewise, Dugaboy's standing was not at issue when it filed the Underlying 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 an objection 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 and, as a result, the District Court did not consider whether Dugaboy has standing under that Section. Dugaboy submits, however that the clear language of

§§ 1109(a) and (b), taken together, indicates that Congress intended § 1109(b) to confer standing for all purposes, including appeals. It is illogical that Congress would grant standing to participate in the bankruptcy process but then withhold the standing to appeal the result.

b. Standing Under the "Person Aggrieved" Test

In its Order denying standing to Dugaboy, the District Court relied on *Technicool,* a case in which it was held that the debtor's owner lacked standing in a matter in which his complained grievance was that the same firm who represented one of the estate's creditors also represented the estate's chapter 7 trustee in its effort to consolidate claims and pierce the corporate veil against several of the owner's other non-debtor companies. The complainant argued that the dual representation might possibly cause the law firm to fail to disclose problems with the creditors' claims against the estate, which would harm any potential recovery to him as an equity holder.[70] This Court found the claimant's interest to be too tenuous to confer standing.[71]

The same is not true in this case. Even if the "person aggrieved" test, as enunciated in *Technicool,* is applied here, Dugaboy meets that test in that it seeks to protect a substantive pecuniary interest in the bankruptcy estate. Although Dugaboy

[70] *Technicool,* 896 F.3d at 386.
[71] 896 F.3d at 386.

withdrew its prepetition and administrative claims, it continues to hold a pecuniary interest in this matter through its equity interest in the pre-confirmation Debtor and its residual interest in the Claimant Trust created under the Plan.

The Plan expressly contemplates potential payment to Dugaboy and other residual equity holders by including them in the definition of "Claimant Trust Beneficiaries," as follows:

> '*Claimant Trust Beneficiaries'* means the Holders of Allowed General Unsecured Claims, Holders of Allowed Subordinated Claims, including, upon Allowance, Disputed General Unsecured Claims and Disputed Subordinated Claims that become Allowed following the Effective Date, and, only upon certification by the Claimant Trustee that the Holders of such Claims have been paid indefeasibly in full plus, to the extent all Allowed Unsecured Claims, excluding Subordinated Claims, have been paid in full, post-petition interest from the Petition Date at the Federal Judgment Rate in accordance with the terms and conditions set forth in the Claimant Trust Agreement and all Disputed Claims in Class 8 and Class 9 have been resolved, **Holders of Allowed Class B/C Limited Partnership Interests, and Holders of Allowed Class A Limited Partnership Interests.**[72]

The Plan further makes clear that Dugaboy is a holder of Class A Limited Partnership Interests. Section B, ¶ 33 of the Plan identifies "*Class A Limited Partnership Interest"* as "the Class A Limited Partnership Interests, as defined in the Limited Partnership Agreement held by The Dugaboy Investment Trust…."[73]

[72] Plan, § B, ¶ 27 (ROA.3488-3489) (emphasis added).
[73] ROA.3490.

Thus, Dugaboy clearly has an interest in the Claimant Trust, which should be sufficient to confer standing on Dugaboy, particularly in light of the fact that the HarbourVest Settlement directly affects the ability of Dugaboy to realize any recovery on account of its interest.

Dugaboy's interests are directly and pecuniarily affected by the approval of the HarbourVest Settlement, which has already decreased the funds available for payments under the Plan, including to former equity holders. Dugaboy has been an active participant in the Debtor's bankruptcy case and had standing to file the Dugaboy Objection, to be present and be heard at the Hearing and to appeal the bankruptcy court's Settlement Approval Order. As this Court stated in *Technicool,* "[s]tanding is determined as of the commencement of the suit."[74]

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 of its Class A Limited Partnership Interests and its residual interest in the Claimant Trust.

The amount available to be paid to Dugaboy has been *actually* reduced through

[74] 896 F.3d at 386, quoting *Kitty Hawk Aircargo, Inc. v. Chao,* 418 F.3d 453, 458 (5th Cir. 2005).

the HarbourVest Settlement. The HarbourVest Settlement allowed HarbourVest some $80 million in allowed claims, although a portion of those claims is subordinated. Absent the Settlement, it is likely that Dugaboy would realize a recovery – potentially hundreds of thousands of dollars -- on its residual claims because there would be $80 million more that would be available to satisfy creditors. The harm visited upon Dugaboy as the holder of Class A Limited Partnership Interests is direct and pecuniary. Accordingly, Dugaboy is a "person aggrieved" for purposes of appellate standing.

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

The District Court did not expressly address the Debtor's claim that Dugaboy's appeal is rendered constitutionally moot due to a lack of standing, but such a holding is implicit in its Order granting the Debtor's Motion, as that was the Debtor's contention. As such, Dugaboy will briefly address the issue.

"Standing is determined as of the commencement of the suit."[75] 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

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

> parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot.[76]

At the time of the HarbourVest Settlement, Dugaboy's claims against and equity interests in the Debtor gave it a concrete interest in the litigation and thus, a justiciable interest in the HarbourVest Settlement. The HarbourVest Settlement's award of $80 million in claims to HarbourVest ahead of Dugaboy has a concrete effect on Dugaboy's ability to realize any recovery. The Debtor has characterized Dugaboy's equity interest as "infinitesimal," but that is not the standard. The standard is whether the interest is concrete, *however small*.

Further, Dugaboy's contingent interest in the Claimant Trust by virtue of its Class A Limited Partnership Interests confers a concrete interest in the outcome of this litigation, even though conttingent. There exists both a controversy and an available remedy. If this Court were to reverse the Approval Order, the HarbourVest Settlement would be undone, and the parties would be returned to their previous positions. There would then be $80 million less in allowed claims (a benefit to Dugaboy) and HarbourVest and the Debtor would resolve the underlying claims, potentially resulting in less (or no) liability for the Debtor.

Should this Court find that the Instant Appeal became moot *after* the

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[76] *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; emphasis added) (quoting *Campbell-Ewald Co. v. Gomez,* 577 U.S. 153 (2016).

Settlement Approval Order was entered, "the general rule is…to vacate the judgment of the lower court and remand with instructions to dismiss the case as moot."[77] If the underlying controversy is moot, that would require vacating the Settlement Approval Order, an outcome that surely is not desired by the Debtor.

The current circumstances did not exist at the time of the Dugaboy Objection or at the Hearing and thus, neither Dugaboy's standing nor alleged mootness resulting from a lack of standing were addressed by the Bankruptcy Court. Dugaboy cannot have been expected to anticipate what would happen during the pendency of its appeal. As a result, Dugaboy was deprived of introducing evidence to demonstrate its standing and suggests that, if this Court is inclined to find a lack of standing or constitutional mootness, it remand the case back to the Bankruptcy Court to give Dugaboy the opportunity to put on evidence as to its standing.

B. Affirmation of the Approval Order

The District Court, without any discussion whatsoever of the merits of Dugaboy's appeal, affirmed the Settlement Approval Order. The District Court only discussed the issue of standing in the context of the Debtor's Motion to Dismiss If, as it must be assumed under the circumstances, the Settlement Approval Order was affirmed solely due to the District Court's finding that Dugaboy lacks standing, then should this Court find that Dugaboy does have standing, the matter should be

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

remanded to the District Court for a ruling on the merits of Dugaboy's appeal.

Further, after granting the Debtor's Motion to enter into the HarbourVest Settlement and denying and dismissing the Objections, including the Dugaboy Objection, the Bankruptcy Court, in the Settlement Approval Order separately authorized HarbourVest to transfer its interests in HCLOF to a wholly owned and controlled non-debtor subsidiary of the Debtor pursuant to the terms of the Transfer Agreement. The Bankruptcy Court did not provide any reasons why it granted this authorization either in its bench ruling on January 14, 2021, or in the Settlement Approval Order.

"The material value provided to the estate is an important factor to consider when evaluating a compromise."[78] The Bankruptcy Court's ruling on this issue is concerning because the HCLOF interest is held by a non-debtor entity, outside the Bankruptcy Court's jurisdiction and free from scrutiny. Without the oversight of the Bankruptcy Court, the United States Trustee, and all other interested parties, the return of the HCLOF interest can be subverted from providing any actual benefit to the estate, making any claimed benefit to the estate purely "illusory."[79]

The non-debtor affiliate of the Debtor, even if wholly owned, is not the Debtor. This non-debtor affiliate is not subject to the jurisdiction of the Bankruptcy

[78] *In re Roqumore,* 393 B.R. 474, 482 (Bankr. S.D. Tex. 2008).
[79] 393 B.R. 481.

Court nor to any reporting and accounting requirements imposed in the bankruptcy proceedings. The non-debtor affiliate is getting all of the proceeds of the Settlement and can utilize them as it sees fit, as it is the owner of them, depriving the bankruptcy estate of the benefit of such proceeds, to the detriment of the creditors and equity security holders.

Accordingly, Dugaboy contends that, at the very least, the Settlement Approval Order and the District Court's affirmation of it should be reversed as to this issue.

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 Constitutionally Moot,* filed by the Debtor, Highland Capital Management, L.P.

Appellant further requests that, if this Court determines that Appellant has bankruptcy and appellate standing, it remands the matter back to the District Court for consideration of and a ruling on the merits of Appellant's appeal. Appellant, The Dugaboy Investment Trust, further requests that, should this

Court, find that Appellant has bankruptcy and appellate standing, it reverses the Bankruptcy Court's Settlement Approval Order to the extent that it grants the Debtor the right, under the Transfer Agreement, to place the proceeds of the Settlement into a non-debtor affiliate entity that is not subject to the jurisdiction of the Bankruptcy Court.

Finally, Appellant, The Dugaboy Investment Trust requests all general relief.

RESPECTFULLY SUBMITTED this 6th day of December 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this, the 6th day of December 2022, a true and correct copy of the foregoing document was served on the counsel of record below via electronic service.

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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 7,782 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: December 6, 2022.

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