Case No. 3:21-cv-3086-K

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

In re: Highland Capital Management, L.P.,

Reorganized Debtor.

NEXPOINT ADVISORS L.P.,

Appellant

v.

PACHULSKI STANG ZIEHL & JONES LLP, WILMER CUTLER PICKERING HALE AND DORR LLP, SIDLEY AUSTIN LLP, FTI CONSULTING, INC., AND TENEO CAPITAL, LLC,

Appellees

On Appeal from the
United States Bankruptcy Court, Northern District of Texas, Dallas Division
Case No. 19-34054-sgj11 (Hon. Stacey G.C. Jernigan)

APPELLEES' JOINT REPLY TO APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEALS AS CONSTITUTIONALLY MOOT

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717)
John A. Morris (NY Bar No. 266326)
Jordan A. Kroop (NY Bar No. 2680882)
Gregory V. Demo (NY Bar No. 5371992)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
Counsel for Appellee Pachulski Stang Ziehl & Jones LLP

SIDLEY AUSTIN LLP
Penny P. Reid
Matthew A. Clemente
Paige Holden Montgomery
Juliana L. Hoffman
Sidley Austin LLP 2021 McKinney Ave., Ste 2000
Dallas, Texas 75201
Telephone: (214) 981-3300
Facsimile: (214) 981-3400
Counsel for Appellees Sidley Austin LLP, FTI Consulting, Inc. and Teneo Capital, Inc.

WILMER CUTLER PICKERING
HALE AND DORR LLP
Timothy F. Silva (MA Bar No. 637407)
Benjamin W. Loveland (MA Bar No. 669445)
60 State Street Boston, MA 02109
Telephone: (617) 526-6641
Counsel for Appellee Wilmer Cutler Pickering Hale and Dorr LLP

HAYWARD PLLC
Melissa S. Hayward (Texas Bar No. 24044908)
Zachery Z. Annable (Texas Bar No. 24053075)
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Telephone: (972) 755-7100
Local Counsel for Appellees Pachulski Stang Ziehl & Jones LLP and Wilmer Cutler Pickering Hale and Dorr LLP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

The above-captioned appellees (each an "**Appellee**" and, collectively, the "**Appellees**") jointly reply to the response filed by Appellant (the "**Response**") and in further support of its motion under Federal Rule of Bankruptcy Procedure 8013(a) for an order dismissing these appeals as constitutionally moot (the "**Motion**").[1]

NexPoint Is Not a "Person Aggrieved"

The Motion presents a straightforward legal issue: Is NexPoint a "person aggrieved" because it is "directly and adversely affected pecuniarily" by the orders approving the Final Fee Applications under controlling Fifth Circuit law? The answer is "no," despite the labyrinthine arguments set forth in the Response designed to distract the Court from this basic threshold issue. The Response fails to substantively address limited standing of parties to appeal bankruptcy court orders articulated by the Fifth Circuit. NexPoint incorrectly asserts that it is a "person aggrieved" because of (1) the speculative outcome of the Adversary Proceeding in which NexPoint may potentially be liable to pay Highland damages for its conduct, including professional fees that Highland has already paid; and (2) NexPoint's disputed administrative expense claim that, to the extent allowed, will be fully paid regardless of the outcome of these appeals. Neither contention meaningfully addresses, much less satisfies, the "stringent-yet-prudent standing requirement" consistently articulated by the Fifth Circuit with respect to bankruptcy appeals,

[1] Capitalized but undefined terms have the meanings given to them in the Motion.

which is more limited than appeals of orders made by Article III courts.[2] NexPoint's argument that the "person aggrieved" standing requirement is inconsistent with the Supreme Court's holding in *Lexmark International, Inc. v. Static Control Components, Inc.*,[3] is also wrong because the Fifth Circuit has explicitly reiterated the viability of this requirement in decisions published subsequent to that case. Finally, the ability of "parties in interest" to appear in certain matters pursuant to Bankruptcy Code section 1109(b) does not confer appellate standing on NexPoint and does not make it a "person aggrieved."

The Adversary Proceeding's Potential Outcome Does Not Confer Standing on NexPoint

NexPoint's primary argument is that "as a defendant in the Adversary Proceeding, NexPoint is *potentially* on the hook for professional fees awarded to the Appellees."[4] But, as the Motion explains, the Fifth Circuit has consistently **rejected** this argument that potential or speculative harm may confer standing to appeal bankruptcy court orders because "the speculative prospect of harm is far from a direct, adverse, pecuniary hit."[5] There is no judgment or order requiring NexPoint to pay any of Highland's professional fees and there may never be one. In fact, the

[2] *Furlough v Cage (In re Technicool Sys.)*, 896 F.3d 382, 385 (5th Cir. 2018).

[3] 572 U.S. 118 (2014).

[4] Response at 8 (emphasis added).

[5] *Technicool*, 896 F.3d at 386. *See also Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy, Inc.),* 395 F.3d 198, 203 (5th Cir. 2004) (remote possibility of injury does not constitute injury under person-aggrieved test).

potential outcome of the entire Adversary Proceeding is entirely speculative and unknown; it cannot confer standing.[6]

And even if dismissing these appeals affected NexPoint's potential liability in the Adversary Proceeding, NexPoint would still lack standing because courts have consistently held that potential litigation in another proceeding does not make an appellant a "person aggrieved" for standing purposes.[7] Even the cases NexPoint cites in its Response support this proposition. *Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.)*[8] addressed a creditor's appeal of a plan confirmation order modifying a litigation deadline to allow an adversary proceeding to proceed against that creditor. The Eleventh Circuit held that the creditor was not a "person aggrieved" with standing to appeal the confirmation order, reasoning that, even

[6] NexPoint's reliance on *Castellucci v. Hinds (In re Castellucci),* 2007 Bankr. LEXIS 4874 (BAP 9th Cir. Mar. 22, 2007), to support its standing argument is misplaced. That case dealt with a fee agreement in which a husband and wife contractually agreed to be jointly and severally liable for attorneys' fees. *Castellucci* did not apply the Fifth Circuit's test of bankruptcy appellate standing, and it addressed starkly different facts. NexPoint obviously did not contractually agree to be jointly and severally liable for the professional fees it now appeals.

[7] *See Advantage Healthplan, Inc. v. Potter*, 391 B.R. 521, 540 (D.D.C. 2008) ("courts have repeatedly held 'that standing is precluded if the only interest in the bankruptcy court's order that can be demonstrated is an interest as a potential defendant in [future litigation]. As such, the Court rejects [appellant's] argument that the specter of possible litigation makes him a "person aggrieved" by the Settlement Approval Order'") (quoting *Travelers Ins. Co. v. Porter,* 45 F.3d 737, 740 (3d Cir. 1995)), *aff'd*, 586 F.3d 1 (D.C. Cir. 2009). *See also Fondiller v. Robertson (In re Fondiller),* 707 F.2d. 441, 443 (9th Cir. 1983) (dismissing appeal for lack of standing where "appellant's only demonstrable interest in the order is as a potential party defendant in an adversary proceeding"); *In re San Juan Hotel*, 809 F.2d 151, 155 (1st Cir. 1987) (affirming dismissal of appeal; appellant, "whose only interest or burden is as a future party defendant, does not qualify as an 'aggrieved person'").

[8] 764 F.3d 1321, 1325-26 (11th Cir. 2014).

assuming the creditor suffered a direct injury from the modification, the creditor's interest was insufficient because the creditor "comes to us merely as an adversary defendant with an interest in avoiding liability.... [A] party is not aggrieved, for the purposes of appealing from a bankruptcy court order, when the *only interest allegedly harmed by that order is the interest in avoiding liability from an adversary proceeding* …."[9] NexPoint's only "interest" here is avoiding liability to reimburse Highland for professionals' fees caused by NexPoint's conduct alleged in the Adversary Proceeding. That's not an interest protected by the Bankruptcy Code, and it does not confer standing to appeal here.[10]

Consol Energy, Inc. v. Murray Energy Holdings (In re Murray Energy Holdings),[11] also does not help NexPoint establish standing. In that case, a former owner of the debtor appealed a settlement order because the former owner could potentially have been liable for retiree benefits under applicable law. Like here, the *Consol* bankruptcy court noted that the appealing creditor was "'acting not as a concerned creditor of the chapter 11 estates, but as a party who will potentially be

[9] *Id.* at 1326–27 (emphasis added).

[10] NexPoint's argument that the "bankruptcy interest" is ensuring fees are actual and necessary is incorrect. NexPoint has no prepetition claims against Highland that could be affected by the Professional Fee Applications. As explained below, NexPoint's disputed administrative claim, which would be paid in full to the extent allowed, is also not affected.

[11] 624 B.R. 606 (BAP 6th Cir. 2021).

held liable for retiree benefits at some point in the future.'"[12] The Sixth Circuit Bankruptcy Appellate Panel agreed that the Bankruptcy Code did not protect the appealing creditor's interest in avoiding liability and that "entry of an order that impedes a party's defenses in separate litigation does not bring about 'person aggrieved' standing if that defense is not one that the Bankruptcy Code protects."[13] NexPoint's only "interest" in these appeals is avoiding its own potential liability under the pending Adversary Proceeding.[14]

NexPoint's Disputed Administrative Claim Does Not Confer Standing

NexPoint argues its disputed administrative claim confers standing. But allowed administrative claims must be fully paid under Highland's plan and the Bankruptcy Code. NexPoint cannot be a "person aggrieved" because NexPoint's administrative claim will be fully paid, to the extent allowed, irrespective of the outcome of these appeals.[15]

---

[12] *Id*. at 611, quoting the bankruptcy court below, *In re Murray Energy Holdings Co.,* 615 B.R. 461, 464 (Bankr. S.D. Ohio 2020).

[13] *Id.* at 613.

[14] Other courts and circuits have adopted this same reasoning. *See Stark v. Moran (In re Moran*), 566 F.3d 676, 681 (6th Cir. 2009) (shareholder's status "as a state-court defendant in a suit brought by a bankruptcy debtor is also not sufficient for standing. The interest [the appealing shareholder] has in avoiding a state-court lawsuit, or even in affecting who has the right to bring that suit, is not the sort of interest that bankruptcy law in general is designed to protect"); *Opportunity Fin. v. Kelley,* 822 F.3d 451, 459 (8th Cir. 2016) ("even if a bankruptcy order deprived a party of 'a defense that would otherwise been available to him,' it did not render the party aggrieved") (quoting *Ernie Haire Ford*, 764 F.3d at 1326-27).

[15] *See, e.g.*, *Moran v. LTV Steel Co. (In re LTV Steel Co.),* 560 F.3d 449, 545 (6th Cir. 2009) (administrative creditor not "person aggrieved" with standing to appeal order authorizing pursuit of litigation against debtor directors and officers); *Ezra Brutzkus Gubner LLP v. Integrated Knowledge Mktg. (In re Integrated Knowledge Mktg.),* Bankr. LEXIS 4845, at *11-12 (BAP 9th

Acknowledging that fact, NexPoint still argues that Highland's plan does not "guarantee payment" of its administrative claim, which somehow makes it a party aggrieved to prosecute the appeals. The Fifth Circuit has squarely rejected exactly this argument. In *Coho Energy*, a creditor argued that it could appeal a settlement order because the creditor's ultimate claim could conceivably exceed the finite amount of cash in a fund allocated to pay his claim, along with the claims of other parties. The Fifth Circuit held that the "remote possibility" of the appealing creditors' claim not being paid did "not constitute injury under" the "person aggrieved test" and "[e]ven a claimant to a fund must show a realistic likelihood of injury in order to have standing." [16]

Here, NexPoint provides no evidence of any realistic likelihood that its administrative claim (if allowed) will not be paid.[17] On the other hand, Highland provided evidence to the bankruptcy court in connection with plan confirmation projecting distributions of approximately $195 million to unsecured creditors *after*

Cir. Nov. 6, 2007) ("Appellants lack standing to appeal the Dismissal Order. Under that order, Appellants' allowed administrative claims for fees and costs will be paid in full").

[16] *Coho Energy*, 395 F.3d at 203.

[17] NexPoint also argues that the plan only "contemplates an agreement to reach an agreement" to pay NexPoint's alleged administrative expense. This misstates the plan, the order confirming the plan, and Bankruptcy Code § 1129(a)(9), which requires administrative expense claims to be paid in full. The plan simply incorporates that required treatment, and NexPoint is not obligated to "agree" to anything other than payment in full. The Bankruptcy Code does not require a "guarantee"; it requires the bankruptcy court to find that the plan provides for full payment. Highland's plan does. *See Order Confirming the Fifth Amended Plan of Reorganization, et seq.* [Bankruptcy Docket 1943]

full cash payment of allowed administrative and other senior claims.[18] With almost $200 million in assets available to pay administrative claims before general unsecured claims, and NexPoint's disputed administrative claim allowable at a maximum of $14 million, those projections would have to prove wrong to an almost inconceivable extent to imperil the full payment of NexPoint's administrative claim (if allowed). NexPoint has offered nothing to demonstrate this possibility is anything other than theoretical and remote. NexPoint's "conjectural injury" is "too tenuous" to support "aggrieved person" standing.[19]

Fifth Circuit's "Person Aggrieved" Standard Still Applies

NexPoint suggests the Fifth Circuit's "person aggrieved" standing requirement is inconsistent with the Supreme Court's holding in *Lexmark*. The Fifth Circuit has explicitly reiterated the viability of the "person aggrieved" standard in decisions rendered after *Lexmark*.[20] Perhaps this is so because *Lexmark* has nothing to do with bankruptcy appeals. *Lexmark* addressed standing under the Lanham Act and "whether [an appellant] falls within the class of plaintiffs authorized to sue under

[18] *See Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Bankruptcy Docket 1473].

[19] *Coho Energy*, 395 F.3d at 203.

[20] *See Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc.*, 778 F.3d 502, 506 (5th Cir. 2015); *Neutra, Ltd. v. Terry (In re Acis Capital Mgmt., L.P.)*, 604 B.R. 484, 508 (N.D. Tex. 2019) (Fitzwater, J.) ("The [personal aggrieved] doctrine therefore remains binding in this circuit"); *see, e.g., Dean v. Seidel (In re Dean*), 2021 U.S. App. LEXIS 36022 (5th Cir. December 7, 2021, not yet reported in F.4th); *Technicool* (issued July 16, 2018).

[15 U.S.C. §1125(a)]."[21] *Lexmark* does not even mention the limits of the "person aggrieved" test for appellate standing of bankruptcy court order, which remains the law in the Fifth Circuit.[22]

Bankruptcy Code § 1109(b) Does Not Confer Appellate Standing

NexPoint has also not satisfied its burden to prove that Bankruptcy Code § 1109(b) somehow confers it with appellate standing. NexPoint fails to cite any cases that say so. In fact, cases say the opposite.[23] NexPoint confuses appellate standing with the ability of certain parties to appear in certain bankruptcy court proceedings under Bankruptcy Code § 1109(b). Section 1109(b) gives certain parties the right "to appear and to be heard on any issue in a case." It says nothing about appellate standing[24] and nothing about whether an entity is a "person aggrieved."[25]

---

[21] 572 U.S. at 128.

[22] NexPoint's reliance on *Kipp Flores Architects, L.L.C. v. Mid-Continent Casualty. Co.*, 852 F.3d 405, 410 (5th Cir. 2017), is misplaced. *Kipp* addressed whether a proof of claim in a no-asset bankruptcy case constituted an allowed claim and was *res judicata* as to the debtor's insurer. *Kipp* does not address, and has nothing to do with, appellate bankruptcy standing or the "person aggrieved" standard.

[23] *Advantage Healthplan*, 391 B.R. at 541 ("'1109(b) does not confer appellate standing'") (quoting *In re Victory Markets, Inc*. 195 B.R. 9, 15 (N.D.N.Y. 1994)). "[M]erely being a party in interest is insufficient to confer appellate standing." *In re Salant Corp*., 176 B.R. 131, 134 (S.D.N.Y. 1994); *see also Puerto Rico Asphalt, LLC v. Betterroads Asphalt, LLC*, 2020 U.S. Dist. LEXIS 94701, at *15 (D.P.R. May 29, 2020) ("it is important to keep in mind that the 'person aggrieved' standard is separate and distinct from the 'party in interest standard'").

[24] Similarly, NexPoint's argument that Bankruptcy Code § 330(a) confers standing to prosecute these appeals fails for the same reason. The reference to "party in interest" in § 330(a) and throughout the Bankruptcy Code comes from § 1109(b), which sets forth the rights of parties to be heard and appear on issues in chapter 11 bankruptcy cases.

[25] Section 1109 "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." 5 *Collier on Bankruptcy* ¶ 1109.08 (16th ed. 2021). *See also In re Long*, 2015 Bankr.

Conclusion

NexPoint cannot satisfy the Fifth Circuit's "person aggrieved" standard required for standing in order to prosecute these appeals. These appeals are constitutionally moot and should be dismissed.

[Remainder of Page Intentionally Blank]

LEXIS 2952, at *1 (Bankr. N.D. Ind. Aug. 7, 2015) ("Standing to object to a proposed course of action in a bankruptcy case requires a party to have a pecuniary interest which will be directly and adversely affected by the order the court is asked to issue. Simply being a party to a bankruptcy case (or aware of it) is not enough to give one standing to appear in every aspect of the proceeding or to seek relief on every issue that might arise") (citation omitted); *Still v. Fundsnet Inc. (In re Southwest Equip. Rental),* 152 B.R. 207, 209 (Bankr. E.D. Tenn. 1992) ("[section 1109(b)] does not necessarily mean that every party in interest can obtain relief on every issue. In other words, the right to raise an issue and appear and be heard is not the same as standing").

Dated: January 31, 2022

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717)
John A. Morris (NY Bar No. 266326)
Jordan A. Kroop (NY Bar No. 2680882)
Gregory V. Demo (NY Bar No. 5371992)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
Email: jpomerantz@pszjlaw.com
jmorris@pszjlaw.com
jkroop@pszjlaw.com
gdemo@pszjlaw.com

Counsel for Appellee Pachulski Stang Ziehl & Jones LLP

-and-

WILMER CUTLER PICKERING HALE AND DORR LLP
Timothy F. Silva (MA Bar No. 637407)
Benjamin W. Loveland (MA Bar No. 669445)
60 State Street
Boston, MA 02109
Telephone: (617) 526-6641
Email: timothy.silva@wilmerhale.com
benjamin.loveland@wilmerhale.com

Counsel for Appellee Wilmer Cutler Pickering Hale and Dorr LLP

-and-

HAYWARD PLLC

/s/ Zachery Z. Annable
Melissa S. Hayward (Texas Bar No. 24044908)
Zachery Z. Annable (Texas Bar No. 24053075)
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Telephone: (972) 755-7100
Facsimile: (972) 755-7110
Email: MHayward@HaywardFirm.com
ZAnnable@HaywardFirm.com

Local Counsel for Appellees Pachulski Stang Ziehl & Jones LLP and Wilmer Cutler Pickering Hale and Dorr LLP

-and-

SIDLEY AUSTIN LLP

/s/ Matthew A. Clemente
Penny P. Reid
Matthew A. Clemente
Paige Holden Montgomery
Juliana L. Hoffman
2021 McKinney Ave., Suite 2000
Dallas, Texas 75201
Telephone: (214) 981-3300
Facsimile: (214) 981-3400

Counsel for Appellees Sidley Austin LLP, FTI Consulting, Inc. and Teneo Capital, Inc.

CERTIFICATE OF COMPLIANCE WITH RULE 8013

The undersigned hereby certifies that this Reply complies with the type-volume limitation set by Rule 8013(f)(3) of the Federal Rules of Bankruptcy Procedure because, excluding the parts of the document exempted by Rule 8015(g), this Reply contains 2,579 words.

/s/ Zachery Z. Annable
Zachery Z. Annable

CERTIFICATE OF SERVICE

I hereby certify that, on January 31, 2022, a true and correct copy of the foregoing Reply was served electronically upon all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

/s/ Zachery Z. Annable
Zachery Z. Annable