Case No. 22-10189

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE MATTER OF: HIGHLAND CAPITAL MANAGEMENT, L.P.,

DEBTOR.

HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., NEXPOINT ADVISORS, L.P., THE DUGABOY INVESTMENT TRUST

APPELLANTS

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.

APPELLEE

Appeal from the United States District Court,
Northern District of Texas, Hon. Sidney A. Fitzwater
Case No. 3:21-cv-01895-D

APPELLEE'S BRIEF

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz
10100 Santa Monica Blvd., 13th Fl.
Los Angeles, CA 90067
Telephone: (310) 277-6910

John A. Morris
Gregory V. Demo
Jordan A. Kroop
780 Third Avenue, 34th Fl.
New York NY 10017-2024
Telephone: (212) 561-7700

HAYWARD PLLC
Melissa S. Hayward
Zachery Z. Annable
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Telephone: (972) 755-7100

Counsel for Appellee Highland Capital Management, L.P.

Case No. 22-10189

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE MATTER OF: HIGHLAND CAPITAL MANAGEMENT, L.P.
DEBTOR

HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., NEXPOINT ADVISORS, L.P., THE DUGABOY INVESTMENT TRUST

APPELLANTS

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that:

(a) There are no other debtors associated with this bankruptcy case other than Appellee 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 does not have a parent corporation;

(b) 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. The representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

(i) Highland Capital Management, L.P., Appellee

(ii) Counsel to Appellee:

Pachulski Stang Ziehl & Jones, LLP

Jeffrey N. Pomerantz
10100 Santa Monica Blvd., 13th Fl.
Los Angeles, CA 90067

John A. Morris
Gregory V. Demo
Jordan A. Kroop
780 Third Avenue, 34th Fl.
New York NY 10017-2024

Hayward PLLC
Melissa S. Hayward
Zachery Z. Annable
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231

(iii) NexPoint Advisors, L.P., Appellant
Owned by The Dugaboy Investment Trust, Appellant and NexPoint Advisors GP, LLC (owned by James Dondero)

(iv) Highland Capital Management Fund Advisors, L.P., Appellant
Owned by Highland Capital Management Services, Inc., Strand Advisors XVI, Inc., and Okada Family Revocable Trust

(v) Counsel to NexPoint and HCMFA
Munsch Hardt Kopf & Harr, P.C.
Davor Rukavina
Julian P. Vasek
500 N. Akard Street, #3800
Dallas, Texas 75201-6659

(vi) The Dugaboy Investment Trust, Appellant

(vii) Counsel to Dugaboy
Heller, Draper & Horn, LLC
Douglas Scott Draper
650 Poydras Street, Suite 2500
New Orleans, Louisiana 70130

/s/ Zachery Z. Annable
Zachery Z. Annable
Attorney of record for Appellee Highland Capital Management, LP

STATEMENT REGARDING ORAL ARGUMENT

Appellee does not believe the issues presented in this appeal are novel or complicated and does not believe oral argument is required.

TABLE OF CONTENTS

Page

I. STATEMENT OF ISSUES 1
II. STATEMENT OF THE CASE 2
III. SUMMARY OF THE ARGUMENT 4
IV. ARGUMENT 9
A. The Indemnity Sub-Trust Does Not Modify the Plan 9
B. The Indemnity Sub-Trust Simply Implements the Plan Structure 11
C. Indemnity Sub-Trust and Claimant Trust Reserves Do For the Plan Structure What D&O Insurance Would Have Done—"Nothing Has Changed" 19
D. Appellants Wrongly Criticize the District Court's Holding 23
E. This Case Is Starkly Different from *U.S. Brass* and *Asbestos* 24
F. Appellants' "Suffrage" Argument Ignores Reality 27
G. HCMFA and Dugaboy Lack Standing 30
V. CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Dean v. Seidel (In re Dean), 18 F.4th 842 (5th Cir. 2021) 32

Di Ferrante v. Young (In re Young), 416 Fed. Appx. 392 (5th Cir. 2011) 31

Dondero v. Highland Cap. Mgmt. LP, 2022 U.S. Dist. LEXIS 49351 (N.D. Tex. March 18, 2022) 32

Doral Ctr. v. Ionosphere Clubs (In re Ionosphere Clubs), 208 B.R. 812 (S.D.N.Y. 1997) 9

Fortune Natural Res. Corp. v. United States DOI, 806 F.3d 363 (5th Cir. 2015) 31

Furlough v. Cage (In re Technicool Sys.), 896 F.3d 382 (5th Cir. 2018) 31

Galaz v. Katona (In Matter of Galaz), 841 F.3d 316, 324 (5th Cir. 2016) 30

Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy, Inc.), 395 F.3d 198 (5th Cir. 2004) 31

In re First Colonial Corp., 544 F.2d 1291 (5th Cir. 1977) 31

In re GGM, P.C., 165 F.3d 1026, 1031–32 (5th Cir. 1999) 30

In re Johns-Manville Corp., 920 F.2d 121 (2d Cir. 1990) 9

In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992) 9, 26

In re Mar. Commun./Land Mobile L.L.C., 745 Fed. Appx. 561 (5th Cir. 2018) 31

Kingdom Fresh Produce, Inc. v. Stokes Law Office, L.L.P. (In re Delta Produce, L.P.), 845 F.3d 609 (5th Cir. 2016) 31

Lejeune v. JFK Capital Holdings, L.L.C. (In re JFK Capital Holdings, L.L.C.), 880 F.3d 747 (5th Cir. 2018) 31

Maxwell v. Orwig (In re FirstPlus Fin. Grp., Inc.), 2010 WL 2927325, 2010 U.S. Dist. LEXIS 75224, at *2 (N.D. Tex. July 23, 2010) 30

Schum v. Zwirn Special Opportunities Fund LP (In re Watch Ltd.), 257 Fed. Appx. 748 (5th Cir. 2007) 31

United States Brass Corp. v. Travelers Ins. Group, Inc. (In re United States Brass Corp.), 301 F.3d 296 (5th Cir. 2002) 9, 25, 27

STATUTES

11 U.S.C. § 1127(b) ..... passim

11 U.S.C. § 1142(b) 25

11 U.S.C. § 363(b) 7, 32

I. STATEMENT OF ISSUES

Appellee agrees that the central issue in this appeal is whether the Indemnity Trust Order[1] was a Plan modification requiring compliance with Bankruptcy Code § 1127. As discussed below, Appellants failed to preserve for appellate review the District Court's ruling that HCMFA and Dugaboy lacked standing to appeal the Indemnity Trust Order. This Court need not address that standing issue for an additional reason: the District Court ruled that Appellant NexPoint did have standing to appeal the Indemnity Trust Order under this Court's "person aggrieved" standard. Because Appellee did not cross-appeal the District Court's ruling on NexPoint's standing, this Court will address the merits of this appeal despite the District Court's finding that HCMFA and Dugaboy lack the required standing to appeal the Indemnity Trust Order.

[1] For the Court's convenience, unless otherwise indicated, this brief uses the capitalized defined terms Appellants use in their briefs. But Appellants use "Indemnity Trust" to describe the sub-trust created by the Bankruptcy Court's order being appealed here. Appellee has described that sub-trust as the "Indemnity Sub-Trust" in its pleadings in the Bankruptcy Court and the District Court and will do so in this brief. The distinction is significant, particularly because Appellants attempt to persuade this Court that the Bankruptcy Court created something it didn't. The Indemnity Sub-Trust, like the Litigation Sub-Trust, is a sub-trust of the Claimant Trust created to carry out an obligation and function of the Post-Effective Date Entities. Appellants recognize this structure in their brief but attempt a rhetorical mischaracterization unsupported by the record.

II. STATEMENT OF THE CASE[2]

Appellants' recitation of the facts relevant to the issues submitted for review—those facts required to be identified in Federal Rule of Appellate Procedure 28—is incomplete or inaccurate in certain critical elements.

The Indemnity Sub-Trust did not create new indemnification obligations nor did it expand the scope of existing indemnification obligations or the people to be indemnified. The confirmed Plan—approved by more than 99% in dollar amount of creditors—established all indemnification obligations undertaken by the post-Effective Date entities (*i.e.*, the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor) and established the identities of all post-Effective Date personnel entitled to indemnification. Contrary to Appellants' misrepresentations, and fatal to their Appeal, **the Indemnity Sub-Trust merely established the means by which the Plan-created indemnification obligations were secured**.

A key question lies at the heart of whether the Indemnity Sub-Trust constitutes a Plan modification: whether the Plan authorized the Claimant Trust to reserve and otherwise secure sufficient assets to support the indemnification obligations of the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor. The answer to the questions is yes, and the answer dispenses with any concern regarding whether

[2] All capitalized terms used but not defined in this section have the meanings given to them below.

the Indemnity Sub-Trust was some sort of Plan modification. It wasn't. Several provisions of the Plan Implementation Documents authorize the creation of reserves to satisfy expenses that may be incurred in connection with the wind-down, including those related to all indemnification obligations (and, to the extent applicable, allow the Claimant Trust to incur debt to pay or secure such obligations). For this reason, because the Indemnity Sub-Trust *is* a type of reserve authorized and contemplated by the Plan, the Indemnity Sub-Trust does not constitute a plan modification.

Appellants' recitation of the facts is hardly "undisputed."[3] Appellants omit from their statement what the Plan and its supporting documents, all adopted by the Bankruptcy Court's order confirming the Plan, make clear: (a) *all* the individuals that the Indemnity Sub-Trust covers, not just the Claimant Trustee, the Litigation Trustee, and the Claimant Trust Oversight Board, are entitled to indemnification under the Plan Implementation Documents; (b) the expenses associated with the wind-down, including any indemnification claims, are senior in priority to the payment of the Claimant Trust's beneficiaries; and (c) the Claimant Trustee, in his discretion, may determine the amount, timing, and funding of reserves, including reserves to satisfy indemnification claims left unpaid by the Reorganized Debtor or the Litigation Sub-Trust. None of this changed with the adoption of the Indemnity

[3] *Opening Brief of Appellants NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P.* [Doc. 00516312435] ("**Main Aplt Br.**") at 5.

Sub-Trust, which was created and exists solely as a security mechanism to ensure performance of indemnification obligations created months earlier in the Plan.[4]

Appellants also mischaracterize why "the Debtor abandoned its efforts to procure D&O insurance …."[5] Uncontroverted testimony established that D&O Insurance was cost prohibitive because of the well-known litigiousness of Appellants' principal and Appellee's ousted founder, James Dondero—litigiousness that has caused the insurance industry to adopt the "Dondero Exclusion" when writing policies in which he might be involved. Specifically, because of the risk that Mr. Dondero would continue his litigation onslaught against the Reorganized Debtor, the Claimant Trust, and their respective management personnel, D&O Insurance was not economically viable. The Indemnity Sub-Trust was created as an alternative means to effectuate the Plan's original intent.

III. SUMMARY OF THE ARGUMENT

The Indemnity Trust Order did not modify the Plan in any way that required the Bankruptcy Court to have engaged in the type of creditor approval process required under Bankruptcy Code § 1127(b).

[4] Appellants' assertion that "the Claimant Trust *irrevocably* contributes $2.5 million in cash …" (*Id.* at 5, italics in original) is disingenuously misleading. If funds at the Indemnity Sub-Trust are not used to satisfy indemnification claims, they are returned to the Claimant Trust and made available for distributions to the Claimant Trust's beneficiaries.

[5] *Id.* at 6.

The confirmed Plan, under its express terms and those in the Plan Implementation Documents (expressly incorporated into the Plan), established a carefully-constructed post-bankruptcy structure to monetize the Appellee's assets and distribute the proceeds, net of costs and required reserves, to the Claimant Trust's beneficiaries. The Plan, which garnered the nearly unanimous support of all Appellee's creditors, split post-bankruptcy liquidation of Appellee's assets into two main entities: (1) the Reorganized Debtor, which was required to monetize, among other things, ongoing investment assets because of its status as a registered investment advisor with the Securities and Exchange Commission; and (2) the Claimant Trust, vested with the bankruptcy estate's other assets, including litigation claims, which were assigned to the Litigation Sub-Trust for prosecution and monetization.

The Claimant Trust is the ultimate parent of both the Reorganized Debtor and the Litigation Sub-Trust,[6] and the Plan provided that net recoveries from the monetization of assets (regardless of which entity held the assets) would flow up to the Claimant Trust and then ultimately to the Claimant Trust's beneficiaries. As each entity would have its own obligations and operating expenses—including the indemnification of its management and agents—the Claimant Trust would provide a backstop if the Reorganized Debtor or the Litigation Sub-Trust were unable to satisfy

[6] The Claimant Trust is the Reorganized Debtor's sole limited partner and is the sole member of its general partner. The Claimant Trust is the Litigation Sub-Trust's sole parent.

those obligations and expenses. The Plan explicitly provided that the Claimant Trust's obligation to provide that backup funding was senior to the interests of the Claimant Trust's beneficiaries and that the Claimant Trustee was specifically authorized to establish sufficient cash reserves to meet backup funding requirements.

Well aware of Mr. Dondero's penchant for unscrupulous and unrelenting litigation, the individuals identified to operate the Post-Effective Date Entities required a mechanism to secure the indemnification rights under the Plan. When D&O Insurance proved prohibitively expensive (precisely because of Mr. Dondero's profligate litigiousness), the Indemnity Sub-Trust was proposed as a functional equivalent to operating reserves and traditional D&O Insurance to secure all Plan-created indemnification rights.

Appellants' principal assertion—that the Indemnity Sub-Trust expanded the people to be indemnified by the Claimant Trust, creating new obligations for the Claimant Trust to its beneficiaries' detriment—is false. As discussed in detail below, the indemnification obligations were created by the Plan and the Plan Implementation Documents (the terms of which were expressly incorporated into the Plan). The Indemnity Sub-Trust (a sub-trust of the Claimant Trust, like the Litigation Sub-Trust) simply provides a mechanism under which a reserve fund is created to satisfy indemnification obligations, a reserve fund already recognized and provided for un-

der the Plan and the Plan Implementation Documents.[7] The creation of such an economic mechanism to ensure the satisfaction of indemnification obligations of the Post-Effective Entities and the applicable indemnified individuals is consistent with the Plan and all parties' expectations.[8] The Indemnity Sub-Trust does not alter the Plan or creditors' treatment under the Plan, in any way. Despite Appellants' protestations to the contrary, the Indemnity Sub-Trust does not create indemnification obligations nor does it "expand the universe" of indemnified parties under the Plan.

The Bankruptcy Court did not err when it approved the Indemnity Sub-Trust under Bankruptcy Code § 363(b) as opposed to Bankruptcy Code § 1127(b), and the District Court did not err when it affirmed the Bankruptcy Court's order. Appellants' argument that the Indemnity Sub-Trust effected a material modification of the Plan

[7] Obtaining D&O Insurance was a condition to the effectiveness of the Plan, which the Debtor and the Official Committee of Unsecured Creditors (the "**Committee**") could waive. The Debtor and the Committee agreed to waive that condition if the functionally-equivalent Indemnity Sub-Trust were approved. The Committee represented the interests of all unsecured creditors of the bankruptcy estate, literally hundreds of millions of dollars' worth of claims. The Appellants—all controlled by Mr. Dondero—were the only parties opposing the Indemnity Sub-Trust. The Debtor's inability to obtain traditional D&O Insurance under feasible terms was because the market of insurers knew of Mr. Dondero's history of unscrupulous litigiousness. *See, e.g., Transcript of Proceedings Before the Honorable Stacey G.C. Jernigan, United States Bankruptcy Judge,* Monday, July 19, 2021 [ROA.22-10189.4265.] ("**Transcript**") at 35:16-20 (testimony concerning the extreme challenges faced in obtaining D&O Insurance because of what the insurance market refers to as the "Dondero Exclusion"). The insurance market's fears proved justified. Presently, Mr. Dondero and his controlled entities have: (a) prosecuted **36** appeals of Bankruptcy Court and District Court orders in this one bankruptcy case alone; (b) initiated approximately 18 lawsuits, adversary proceedings, and contested matters against the Reorganized Debtor, the Claimant Trust, and their respective management; and (c) have been held in contempt twice for conduct that violated one or more court orders.

[8] The Committee supported Appellee's motion to approve the Indemnity Sub-Trust and urged the Bankruptcy Court to approve it. *See, generally,* ROA.22-10189.4265. (Transcript).

or any change in the legal relationship between the Debtor and its creditors misconstrues the Indemnity Sub-Trust's provisions and mischaracterizes the cases cited in their brief. The District Court correctly noted the stark difference between the plan modifications in the Appellants' cited cases and the Indemnity Sub-Trust here. The District Court's reasoning was sound. Its ruling affirming the Bankruptcy Court was well-founded. This Court should affirm it.

Additionally, although Appellants HCMFA and Dugaboy have both challenged, in two separate briefs, the District Court's ruling that they lack prudential standing, neither HCMFA nor Dugaboy preserved that issue for this Court's review because neither raised that issue in their notice of appeal or their statement of issues on appeal. Even if they had, they essentially concede that the District Court correctly ruled that neither of them possessed prudential standing under the Fifth Circuit's "person aggrieved" standard and, instead, ask this Court to dispense with that decades-old standard in favor of a far more permissive standard that they ostensibly could satisfy despite not having any direct pecuniary interest in this appeal.

Not only has neither HCMFA nor Dugaboy offered this Court anything that would justify a sea change in prudential standing jurisprudence in this Circuit, but this Court need not consider their extraordinary request. This appeal will proceed on its merits despite the District Court's ruling that neither HCMFA nor Dugaboy has

standing because the District Court ruled that Appellant NexPoint *does* have prudential standing and Appellee did not cross-appeal that ruling. Thus, even had HCMFA and Dugaboy preserved this issue on appeal—they didn't—their standing doesn't matter. HCMFA and Dugaboy have given this Court no reason to disturb the District Court's dismissal of them from the appellate process and certainly no reason to discard a prudential standard this Circuit has followed for decades.

IV. ARGUMENT

A. The Indemnity Sub-Trust Does Not Modify the Plan

Courts determine whether a settlement or a new transaction constitutes a plan modification that must satisfy the substantive and procedural requirements in Bankruptcy Code § 1127(b) on a case-by-case basis after reviewing the plan's express terms.[9] A plan modification is something that alters the "legal relationships among the debtor and its creditors and other parties in interest" or otherwise affects the legal relationship among them or the right to payment.[10] As this Court has held, a plan modification "alter[s] the parties' rights … and expectations."[11] The Indemnity Sub-Trust does none of these things. It doesn't alter the legal relationship between the

[9] *United States Brass Corp. v. Travelers Ins. Group, Inc. (In re United States Brass Corp.),*301 F.3d 296 (5th Cir. 2002); *In re Johns-Manville Corp.*, 920 F.2d 121, 128 (2d Cir. 1990).

[10] *U.S. Brass*, 301 F.3d at 308; *Doral Ctr. v. Ionosphere Clubs (In re Ionosphere Clubs),* 208 B.R. 812, 816 (S.D.N.Y. 1997); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 747-48 (2d Cir. 1992). *U.S. Brass* is the principal case Appellants rely on in their main argument. Appellee certainly agrees—as did the District Court—that *U.S. Brass* expresses the correct rubric for whether something constitutes a plan modification. It just doesn't help Appellants.

[11] *U.S. Brass,* 301 F.3d at 309.

Debtor and its creditors. It doesn't affect creditors' right to payment or expected returns. It doesn't change anything about the package of rights and obligations creditors are given under the Plan. And it doesn't change the scope of the indemnity obligations or the persons granted indemnification rights.

Quite the opposite. What parties expected and voted for—almost unanimously—in the Plan was that post-bankruptcy operations would be guided by the Claimant Trust (and its subsidiaries, the Reorganized Debtor and the Litigation Sub-Trust—collectively with the Claimant Trust, the "**Post-Effective Date Entities**"), which would incur and satisfy operating expenses (including indemnification obligations) from cash on hand or through reserves. Only after all expenses, including indemnification expenses, were satisfied or reserved for would the remaining proceeds be distributed to the Claimant Trust's beneficiaries. All parties at Plan confirmation understood and expected that the lynchpin of all the bankruptcy estate's post-Effective Date operations was the willingness of qualified individuals to run the Post-Effective Date Entities, protected by the indemnification rights clearly established in the Plan, and that their willingness to serve depended directly on the securing of those indemnification rights—especially under circumstances where Mr. Dondero was almost certain to sue everyone for everything they did or didn't do.

The Indemnity Sub-Trust gave creditors the benefit of this bargain. Because traditional D&O Insurance was cost prohibitive, the Indemnity Sub-Trust (a) enabled the Plan to become effective, (b) granted the qualified individuals identified in the Plan the economically-secured indemnification rights they needed to serve, and (c) cleared the path toward the monetization of assets and distributions of net proceeds to the Claimant Trust's beneficiaries. Far from modifying the Plan, the Indemnity Sub-Trust is entirely *consistent* with the Plan, the parties' rights and obligations established in the Plan, and the parties' expectations about how the Plan would function.

B. The Indemnity Sub-Trust Simply Implements the Plan Structure

Appellants incorrectly argue that the Indemnity Sub-Trust created or expanded indemnification obligations or the individuals that would benefit from those obligations. Appellee clarified this point to the Bankruptcy Court at the outset:

> The Indemnity [Sub-]Trust is based on the fundamental premise, as set forth under the Plan and consistent with the Claimant Trust Agreement and related documents, that the indemnification rights under the Claimant Trust are senior priority obligations of the Claimant Trust, … and that adequate provision for such indemnification needs to be funded, notwithstanding the timing pursuant to which assets are realized by the Claimant Trust …. This Term Sheet assumes that **the Indemnity [Sub-]Trust is intended solely as a collateral mechanism, to fund indemnification claims that were tendered to but not paid** by the Claimant Trust, Litigation Sub-Trust or the Reorganized Debtor.[12]

[12] ROA.22-10189.722.,Term Sheet, Exhibit B to *Debtor's Motion for Entry of an Order (I) Authorizing the (A) Creation of an Indemnity Subtrust and (B) Entry into an Indemnity Trust Agreement and (II) Granting Related Relief* (the "**Term Sheet**") (emphasis added).

The unambiguous provisions of the Claimant Trust Agreement,[13] the Litigation Trust Agreement,[14] and the Reorganized LP Agreement[15] (collectively, the "**Plan Implementation Documents**"), which were expressly incorporated into the Plan,[16] establish who is entitled to be indemnified under the Plan and how the indemnification obligations will be satisfied.

The Plan Implementation Documents provide for the indemnification of the various parties—the same parties that are the beneficiaries of the Indemnity Sub-Trust, despite Appellants' oft-repeated mischaracterizations to the contrary—tasked with implementing the Plan after the Effective Date (collectively, the "**Indemnified Parties**").

Specifically, the Claimant Trust Agreement provides indemnification thus:

> The Claimant Trustee (including each former Claimant Trustee), Delaware Trustee, Oversight Board, and all past and present Members (collectively, in their capacities as such, the "Indemnified Parties") shall be indemnified by the Claimant Trust against and held harmless by the Claimant Trust from any losses, claims, damages, liabilities or expenses (including, without limitation, attorneys' fees, disbursements, and related expenses) to which the Indemnified Parties may become subject in connection with any action, suit, proceeding or investigation brought or threatened against any of the Indemnified Parties in their capacity as Claimant Trustee, Delaware Trustee, Oversight Board, or Member, or

[13] ROA.22-10189.998.

[14] ROA.22-10189.1036.

[15] ROA.22-10189.1059.

[16] The final versions of the Plan Implementation Documents were filed with the Bankruptcy Court on January 22, 2021, were expressly incorporated by reference into the Plan (Plan, Art. IV.J) [ROA.22-10189.518.], and expressly incorporated into the order confirming the Plan that the Bankruptcy Court entered on February 22, 2021 [ROA.22-10189.603–04.].

> in connection with any matter arising out of or related to the Plan, this Agreement, or the affairs of the Claimant Trust, unless it is ultimately determined by order of the Bankruptcy Court or other court of competent jurisdiction that the Indemnified Party's acts or omissions constituted willful fraud, willful misconduct, or gross negligence….The Claimant Trust shall indemnify and hold harmless the employees, agents and professionals of the Claimant Trust and Indemnified Parties to the same extent as provided in this Section 8.2 for the Indemnified Parties.[17]

The Litigation Trust Agreement has an indemnification provision nearly identical to that found in the Claimant Trust Agreement.[18] Similarly, the Reorganized LP Agreement provides for the Reorganized Debtor's broad indemnification of, among others, the Reorganized Debtor's general partner and its members, partners, directors, officers, and agents, as well as any officers of the partnership.[19]

The Plan and the Plan Implementation Documents expressly provide and account for the cost of indemnifying the Indemnified Parties (the "**Indemnification Costs**") by the respective Post-Effective Date Entity. The Indemnification Costs are expenses that **are senior in priority to, and therefore must be paid before, any distributions to the Claimant Trust's beneficiaries**:

> The Claimant Trust shall pay, advance or otherwise reimburse on demand of an Indemnified Party the Indemnified Party's reasonable legal and other defense expenses (including, without limitation, the cost of any investigation and preparation and attorney fees, disbursements, and other expenses related to any claim that has been brought or threatened to be brought) incurred in connection therewith or in connection with

[17] ROA.22-10189.1029. (Claimant Trust Agmt., § 8.2)

[18] ROA.22-10189.1052. (Litigation Trust Agmt., § 8.2)

[19] ROA.22-10189.1065–66. (Reorganized LP Agmt., § 10(b), (c))

> enforcing his or her rights under this Section 8.2 **as a Claimant Trust Expense ….**[20]

Again, substantially similar language exists in the Litigation Trust Agreement and the Reorganized LP Agreement.[21]

Each of the Plan Implementation Documents (executed months before the Indemnity Sub-Trust was ever proposed) grants the Claimant Trustee the discretion to create cash reserves that he reasonably believes are necessary or advisable to ensure the Indemnification Costs of the Post-Effective Date Entities are satisfied:

> … Claimant Trustee shall distribute to holders of Trust Interests at least annually the Cash on hand **net of any amounts that** (a) are reasonably necessary to maintain the value of the Claimant Trust Assets pending their monetization or other disposition during the term of the Claimant Trust, (b) are necessary to pay or reserve for reasonably incurred or anticipated Claimant Trust Expenses and any other expenses incurred by the Claimant Trust (including, but not limited to, any taxes imposed on or payable by the Claimant Trustee with respect to the Claimant Trust Assets), (c) **are necessary to pay or *reserve* for the anticipated costs and expenses of the Litigation Sub-Trust**, (d) **are necessary to satisfy or *reserve* for other liabilities incurred or anticipated by the Claimant Trustee in accordance with the Plan and this Agreement (including, but not limited to, indemnification obligations** and similar expenses in such amounts and for such period of time as the Claimant Trustee determines, in good faith, may be necessary and appropriate, which determination shall not be subject to consent of the

[20] ROA.22-10189.1029. Claimant Trust Agmt., § 8.2 (emphasis added). The Claimant Trust Agreement defines "Claimant Trust Expenses" as "costs, expenses, liabilities and obligations incurred by the Claimant Trust and/or the Claimant Trustee in administering and conducting the affairs of the Claimant Trust, and otherwise carrying out the terms of the Claimant Trust and the Plan on behalf of the Claimant Trust, including without any limitation, any taxes owed by the Claimant Trust, and the fees and expenses of the Claimant Trustee and professional persons retained by the Claimant Trust or Claimant Trustee in accordance with this Agreement." ROA.22-10189.1000. Claimant Trust Agmt. at 3.

[21] ROA.22-10189.1052.; ROA.22-10189.1065–66.

> Oversight Board, may not be modified without the express written consent of the Claimant Trustee, and shall survive termination of the Claimant Trustee) …[22]

Both the Litigation Trust Agreement and the Reorganized LP Agreement contain substantially similar language.[23]

The Plan Implementation Documents—which, again, were approved by the Bankruptcy Court after disclosure to all creditors months before the Indemnity Sub-Trust was even conceived—also authorize each Post-Effective Date Entity to retain whatever professionals or third-party servicers it believes necessary to implement the Plan, each of which is entitled to indemnification under the Plan Implementation Documents. The fees and expenses associated with doing so are expenses of the Post-Effective Date Entities and represent **senior priority obligations to be satisfied before distributions to the Claimant Trust's beneficiaries**.[24] The Indemnity Sub-Trust is administered by a third-party corporate trustee—a regulated depository institution or an affiliate of such an institution. The fees associated with retaining that trustee are precisely the type of senior-priority expenses contemplated in the Claimant Trust Agreement adopted as part of the Plan.

---

[22] ROA.22-10189.1026. Claimant Trust Agmt., § 6.1(a) (bold and italic emphasis added).

[23] ROA.22-10189.1050. Litigation Trust Agmt., § 6.1; ROA.22-10189.1063. Reorganized LP Agreement § 5(b), which provides that the Claimant Trust, as limited partner, may make additional capital contributions to the Reorganized Debtor at the request of its general partner to pay, among other things, Indemnification Costs.

[24] *See* ROA.22-10189.1010. Claimant Trust Agmt., § 3.2(c)(x); ROA.22-10189.1043. Litigation Trust Agmt., § 3.2(c)(xii); ROA.22-10189.1062–63. Reorganized LP Agmt., § 5(a), (b).

If the Reorganized Debtor or the Litigation Sub-Trust lacks funds to satisfy indemnification claims, the Plan (through provisions of the Claimant Trust Agreement) requires the Claimant Trust to pay those claims using funds the Claimant Trustee, in his discretion, has reserved for the payment of such claims along with many other categories of operating expenses the Reorganized Debtor or the Litigation Sub-Trust incurs: "Claimant Trustee shall distribute … Cash … net of any amounts that … are necessary to pay or reserve for reasonably incurred or anticipated Claimant Trust Expenses … including, but not limited to, indemnification obligations …"[25]

Claimant Trust Expenses expressly and specifically include the obligation to preserve the value of the Reorganized Debtor and the Litigation Sub-Trust's assets through capital contributions and by creating cash reserves to backstop shortfalls in available cash to pay expenses, including indemnification claims, at the Reorganized Debtor and Litigation Sub-Trust levels. The Claimant Trust must "upon the direction of the Oversight Board, fund the Litigation Sub-Trust on the Effective Date and as necessary thereafter …."[26]

Further, the Reorganized Debtor may call capital from the Claimant Trust to fund the Reorganized Debtor's operating expenses: "The Partners [*i.e.* the Claimant Trust as sole limited partner, and the Reorganized Debtor's general partner, which

[25] ROA.22-10189.1026. Claimant Trust Agmt., § 6.1(a) (full provision quoted at fn. 20 above, which includes the definition of Claimant Trust Expenses).

[26] ROA.22-10189.1009. (Claimant Trust Agmt., § 3.2(c)(vi))

is wholly-owned by the Claimant Trust] may, in their sole discretion, make additional capital contribution to the Partnership if requested by the General Partner."[27] The Claimant Trust is required to protect its assets, including the Reorganized Debtor.[28] Failing to contribute capital to fund operating expenses at the Reorganized Debtor would shirk that obligation.

In arguing that the Indemnity Sub-Trust somehow expanded the people indemnified from those indemnified under the Plan, Appellants reintroduce an argument so without merit that they essentially conceded to the District Court that it was baseless: "Appellants argument is not that more parties are being indemnified—they appear to concede this point in their reply brief."[29] Yet Appellants persist, again asking this Court to believe something manifestly untrue (and found to be untrue by the Bankruptcy Court and the District Court). In so doing, Appellants ignore the Plan Implementation Documents, which were expressly incorporated into the Plan:

- The Indemnified Parties under the Claimant Trust are (1) the Claimant Trustee, (2) the Delaware Trustee, (3) the Oversight Board, (4) all past and present Members of the Oversight Board, and (5) the employees, agents, and professionals of each of the foregoing.[30]

[27] ROA.22-10189.1063. (Reorganized LP Agmt., § 5(b))
[28] ROA.22-10189.1009. (Claimant Trust Agmt., §§ 3.2(c)(vii), (viii))
[29] ROA.22-10189.4650. (Memorandum Opinion at 6, n.8)
[30] ROA.22-10189.1029. (Claimant Trust Agmt., § 8.2)

- The Indemnified Parties under the Litigation Trust are (1) the Litigation Trustee, (2) the Oversight Board, (3) all past and present Members of the Oversight Board, and (4) the employees, agents, and professionals of each of the foregoing.[31]

- The Reorganized Debtor's Indemnified Parties are (1) New GP LLC (as the Reorganized Debtor's general partner) and each of its members, partners, directors, officers, and agents, (2) each person who is or becomes an officer of the Reorganized Debtor, and (3) each person who is or becomes an employee or agent of the Reorganized Debtor if New GP LLC determines in its sole discretion that such employee or agent should be indemnified.[32]

Appellants' argument that the Indemnified Parties include people under the Indemnity Sub-Trust not already listed in the Plan Implementation Documents is plainly wrong. In fact, the Indemnity Sub-Trust did not create *any* obligation to indemnify *anyone.*[33] The Plan Implementation Documents established who would be indemnified. The Plan Implementation Documents have existed and have remained unchanged since Plan confirmation, months before the Indemnity Trust Motion was ever filed. The Indemnity Sub-Trust exists solely to provide a *mechanism to satisfy*

[31] ROA.22-10189.1052. (Litigation Trust Agmt., § 8.2)

[32] ROA.22-10189.1065–66. (Limited Partnership Agmt., §§ 10(b)–(c))

[33] *See* Term Sheet, which clarifies that the entire purpose of the Indemnity Sub-Trust is to "provide collateral security supporting the indemnification obligations created under the Claimant Trust Agreement, the Litigation Sub-Trust Agreement, and the Reorganized Debtor Limited Partnership Agreement."

indemnification claims that are not satisfied by the Post-Effective Date Entities. The Indemnity Sub-Trust creates no new indemnification obligations nor expands the parties to be indemnified.[34]

Appellants' argument regarding the Indemnity Sub-Trust's putative expansion of the people indemnified—never raised with the Bankruptcy Court and disregarded by the District Court—is, on its own, without merit. As part of a larger attempt to persuade this Court that the Indemnity Sub-Trust modified the Plan in a way that implicates Bankruptcy Code § 1127(b), this argument belies facts clearly in the record demonstrating that the Indemnity Sub-Trust changed nothing material in the Plan or the Plan Implementation Documents. The Indemnity Sub-Trust was not a Plan modification for purposes of Bankruptcy Code § 1127(b).

C. Indemnity Sub-Trust and Claimant Trust Reserves Do For the Plan Structure What D&O Insurance Would Have Done—"Nothing Has Changed"

The District Court understood and concluded that each of the indemnification-related obligations of the Post-Effective Date Entities are met, without material alteration, by the Indemnity Sub-Trust.

- The Post-Effective Date Entities must indemnify the Indemnified Parties. The Indemnity Sub-Trust ensures satisfaction of that obligation.

[34] Even the Indemnity Sub-Trustee's entitlement to indemnification is not new. Because the Indemnity Sub-Trust is a sub-trust of the Claimant Trust, the Indemnity Sub-Trustee is an agent of the Claimant Trustee and was already included as an Indemnified Person under the original provision of the Claimant Trust Agreement.

- The Post-Effective Date Entities must pay costs associated with indemnifications as a senior-priority expense. The Indemnity Sub-Trust reserves up to $25 million in cash to pay such expenses.[35]

The Indemnity Sub-Trust does not alter the Post-Effective Date Entities' rights and obligations to pay indemnification claims and associated costs as senior-priority expenses before distributions to the Claimant Trust's beneficiaries nor does it alter the timing of distributions to those beneficiaries. Indeed, the Indemnity Sub-Trust does not alter the relationship between the Debtor and its creditors in any respect because the Indemnity Sub-Trust is the functional, practical, and economic equivalent—at least vis-à-vis the Debtor's creditors—of the D&O Insurance the Plan originally contemplated (but which couldn't be effectively procured because of the "Dondero Exclusion").

As the District Court pointed out, "the Indemnify [*sic*] Sub-Trust, which as an economic mechanism functions as a reserve for payment of indemnity claims, is

[35] At least with respect to this component, the Indemnity Sub-Trust is, from creditors' perspective, superior to D&O Insurance. D&O Insurance premiums require cash, and they would likely far exceed $2.5 million (the initial funding amount for the Indemnity Sub-Trust) over the life of the Claimant Trust. Once paid, the premiums are never recoverable. Conversely, any unspent cash in the Indemnity Sub-Trust will be returned to the Claimant Trust for distribution to the Claimant Trust's beneficiaries. *See* ROA.22-10189.704. *et seq.,* the Motion and its exhibits for the Bankruptcy Court-approved description and term sheet pertaining to the Indemnity Sub-Trust's trust agreement and promissory note.

likely at least 'specifically contemplated' by the plan."[36] Appellants' "main point" is no point at all. The District Court noted:

> The plan provides, however, that the Claimant Trust may take money otherwise earmarked for creditors and set up a reserve. This movement of funds under the [Indemnity Trust] Order therefore does not violate the creditors' expectations of what will occur under the plan—indeed, it is specifically contemplated by the Plan.[37]

D&O Insurance and the Indemnity Sub-Trust accomplish exactly the same thing: each collateralizes and ensures payment of indemnification claims made against the Post-Effective Date Entities that constitute senior-priority obligations of the Claimant Trust. If this Court were to read Appellants' briefs in a vacuum, the Court might think that the Indemnity Sub-Trust increased the Claimant Trust's obligations, raised indemnification claims to a higher priority than they occupied under the Plan, and expanded the Claimant Trust's obligations to indemnify more people than were to be indemnified under the Plan. **None of these things is true.**

The Indemnity Sub-Trust implements what is already authorized under the Plan—reserving and securing sufficient assets to ensure payment of indemnification claims. In the District Court's words, "**nothing has changed**."[38] There is no difference, for example, between setting a $25 million indemnification reserve or entering

[36] ROA.22-10189.4650. Opinion at 6.

[37] *Id.*

[38] ROA.22-10189.4651. Opinion at 7 (emphasis added).

into a letter of credit to ensure payment of such expenses (both of which are expressly allowed by the Plan), on the one hand, and establishing the Indemnity Sub-Trust then funding it with $25 million (comprising $2.5 million in cash and a $22.5 million note),[39] on the other. Appellants fail to identify **any** provision of the Plan or the Plan Implementation Documents that could have reasonably led (a) parties to believe that they would receive payment on account of their claims before payment of administrative and indemnification-related expenses or (b) anyone to believe that reserves could not be established to satisfy the costs, including the Indemnification Costs, of the Post-Effective Date Entities.

Ensuring indemnification obligations could be paid was always an integral part of the Plan structure and necessary to maximize the proceeds available for distribution to the Claimant Trust's beneficiaries. The Debtor's creditors always expected that the Claimant Trust would backstop the expense of operating the Litigation Sub-Trust and the Reorganized Debtor, including indemnification expenses, all of which would be paid *before any distributions would be made to the Claimant Trust's beneficiaries*.

[39] Again, amounts paid into the Indemnity Sub-Trust are not "sidelined" and made unavailable to pay creditors (Main Aplt. Br. at 19) nor does the creation of the funding obligation to the Indemnity Sub-Trust "represent[] a new, senior obligation of the Claimant Trust" (Main Aplt. Br. at 19). As discussed above, like any reserved amount, assets at the Indemnity Sub-Trust will be available to pay creditors if not used to satisfy indemnification obligations. And, each of the Plan Implementation Documents expressly allows for the incurrence of debt to fund operating expenses at each relevant Post-Effective Date Entity, which debt would expressly senior to creditor claims. ROA.22-10189.1012. Claimant Trust Agmt., § 3.3(b)(vii); ROA.22-10189.1044. Litigation Trust Agmt, § 3.3(b)(iv); ROA.22-10189.1061. Reorganized LP Agmt., § 3.

The Indemnity Sub-Trust changed nothing. Creditor recoveries, rights, and expectations are unaffected. Creditor relationships with each other, with the Debtor, and with the Post-Effective Date Entities are unaffected. Since the Indemnity Sub-Trust affected none of these things, the Indemnity Sub-Trust cannot constitute a Plan modification.

D. Appellants Wrongly Criticize the District Court's Holding

Appellants posit four "problems" with the District Court's ruling. First, Appellants claim that the Indemnity Sub-Trust creates new liability. As fully explained above and in the District Court's Opinion, it doesn't.

Second, Appellants characterize the initial funding of $2.5 million cash as "irrevocable." As noted above, that, too, is false. Any funds not ultimately used to satisfy indemnification claims will be returned to the Claimant Trust for distribution to the Claimant Trust's beneficiaries.

Third, Appellants characterize the $22.5 million note as a "new" obligation that diverts money that would otherwise go to creditors. Again, false. As demonstrated above, no money is "diverted" because the note represents not a permanent transfer of cash, but collateral. It ensures that sufficient reserves, consisting of either cash or senior obligations, are available to pay indemnification obligations, which are senior in priority to the claims of creditors under all circumstances. Like the initial $2.5 million payment, any amounts paid on the note that are not used will be

returned to the Claimant Trust and distributed to the Claimant Trust's beneficiaries. The District Court recognized that the Indemnity Sub-Trust is a functional equivalent of a reserve and that the Indemnity Sub-Trust doesn't create obligations but, rather, simply secures them.

Fourth, Appellants argue that "creditors reasonably expected the Reorganized Debtor to purchase D&O insurance …." Of course, Appellants grudgingly acknowledge that the Plan itself provided that "the Debtor could technically waive that protection." There was nothing "technical" about it. When Appellee and the Committee learned that D&O Insurance was cost prohibitive because of the "Dondero Exclusion," the Committee (representing hundreds of millions of dollars of unsecured claims) joined with Appellee to construct the Indemnity Sub-Trust, to waive the D&O Insurance condition to Plan effectiveness, and to implement the Indemnity Sub-Trust as a mechanism to secure payment of indemnification claims.

E. This Case Is Starkly Different from *U.S. Brass* and *Asbestos*

Appellants' attempts to equate the *U.S. Brass* case with the Indemnity Trust Order presently before this Court lack all merit. In that case, this Court held that when the debtor attempted (1) to fundamentally alter the legal relationship between itself and its creditors by (2) supplanting a judicial claims-resolution process with mandatory arbitration (that created a greater "risk of collusion") (3) as a purported

"aid" to implementing the plan under Bankruptcy Code § 1142(b), that series of fundamental alterations constituted an impermissible plan modification.[40] Only by grossly misconstruing what this Court said in that case can Appellants believe that type of massive alteration to a key component of a plan equates to the Indemnity Sub-Trust. Such a major modification of a plan provision—a provision whose negotiated insertion into the plan had directly caused a creditor constituency to withdraw its plan confirmation objection—doesn't equate in any way to the creation of the Indemnity Sub-Trust, which doesn't change creditors' legal relationships or rights and which garnered the Committee's full-throated support. The stark differences between the *U.S. Brass* case and this case are as numerous as they are obvious. Under a different legal procedure, which occurred at a different procedural point in that case, under radically different circumstances where once-opposing creditors withdrew their opposition to plan confirmation on the expectation that the *precise change in that plan would not be made,* the debtor in that case altered a fundamental right and component of creditors' legal relationship with the debtor. *That's* a plan modification. Here, both the Bankruptcy Court and the District Court rejected Appellants' attempt to analogize that situation to the Indemnity Sub-Trust.

Appellants attempt to create an even more unwarranted connection between the facts of the *Asbestos* case and the case now before this Court. There, the deeply

[40] *U.S. Brass,* 301 F.3d at 307–08.

insolvent asbestos claimant trust amended its governing documents to separate once-*pari passu* asbestos claims into different strata of recovery entitlement, recovery priority, recovery timing, and recovery amount, as well as the means by which claims would be administered and adjudicated.[41] How more materially could the asbestos claimants trust attempt to alter creditors' legal rights, recoveries, and relationship with the trust itself? How more clearly could a case of impermissible plan modification be made than in that case? And how can Appellants here believe that any of what happened there equates to the creation of the Indemnity Sub-Trust? The Indemnity Sub-Trust *doesn't* alter any creditors' legal rights or recoveries. It *doesn't* alter any creditor's relationship with the Claimant Trust. It *doesn't* change anything about the way or when creditors' claims are administered and adjudicated.

Rather, it's entirely consistent with creditor expectations that: (a) the bankruptcy estate's assets would be liquidated through different entities, each monetizing different assets; (b) proceeds of the monetization (net of expenses, including indemnification costs) would be distributed to creditors; and (c) managers had to be engaged to do all this work and required protection against vituperative, frivolous litigation from Mr. Dondero, whom all parties knew only too well. The Bankruptcy Court and the District Court both realized that the Indemnity Sub-Trust merely provided a mechanism to secure indemnification obligations already provided for in the

[41] *Asbestos Litig.,* 982 F.2d at 747–48.

Plan—a functional equivalent of a reserve. Those courts both recognized that the Indemnity Sub-Trust was entirely *consistent* with the Plan and wasn't modifying anything.

U.S. Brass and *Asbestos* stand as polar opposites of the type of insignificant, form-over-substance, hyper-technical change brought about here by adopting the Indemnity Sub-Trust as a functional equivalent to an operating expense reserve.[42]

The Indemnity Sub-Trust, particularly when viewed through the lens of the cases Appellants rely on, cannot be regarded as a plan modification.

F. Appellants' "Suffrage" Argument Ignores Reality

Appellants spend three pages in their brief complaining that creditors have been "deprived" of the "chance to cast their votes" about the Indemnity Sub-Trust. The argument rather obviously assumes something that Appellants have not persuaded any court to believe—that the Indemnity Sub-Trust constituted a plan modification requiring plan disclosure, creditor solicitation, and "informed suffrage." But no injustice has been done here.

---

[42] The Appellants' "numerous other cases" (three) **support** the District Court's ruling that the Indemnity Sub-Trust did not modify the Plan. In *SCH Corp.,* extending the plan's repayment period for allowed claims constituted a plan modification. That's unsurprising, since *U.S. Brass* establishes that such a change "alter[s] the parties' rights … and expectations." 301 F.3d at 309. *Enters. Fin. Grp.* also dealt with an alteration that squarely changed the parties' rights and expectations by giving the debtor claims that the plan required to be vested in a liquidating trust. In *Ampace,* the debtor extended a critical claim objection deadline the plan explicitly did not permit to be extended, bluntly changing creditors' rights and expectations. None of these three examples resembles the Indemnity Sub-Trust, which did not change any party's rights, obligations, or expectations. Said the District Court, "nothing has changed." ROA.22-10189.4651. Opinion at 7.

All creditors and equity holders—including Appellant Dugaboy[43]—were solicited to vote on the Plan and Plan Implementation Documents that contemplated a multi-entity structure that distributed net proceeds to unsecured creditors, provided for indemnification of all the Indemnified Parties, and ensured that funds could be set aside for all costs of administration, including indemnification claims. Adopting the Indemnity Sub-Trust left these provisions unchanged. The result of that vote should leave no doubt as to creditors' wishes. A full 99.8% of all voting general unsecured creditors (in claim amount) voted to accept the Plan.[44] Although 27 of the 44 general unsecured creditors voted to reject the Plan, 22 of those 27 rejecting creditors were former employees of Appellee whose claims were all either disallowed or withdrawn following Plan confirmation.[45] Appellants presume to defend the suffrage rights of Appellee's *actual* creditors nearly all of whom voted for something that Appellants would now like to dismantle.

[43] Appellants NexPoint and HCMFA filed prepetition claims with the Bankruptcy Court (Proof of Claim Nos. 95, 104, 108, 119) but consented to the disallowance of those claims before solicitation on the Plan [Doc. No. 1233, Docket of *In re Highland Capital Management, L.P.,* Case No. 19-34054-sgj-11 (Bankr. N.D. Tex.) ("**Bankr. Docket**")]. Consequently, as they had no interest the Debtor, their votes on the Plan were not solicited. NexPoint and HCMFA subsequently acquired prepetition claims (attempting to regain their lost standing) or filed administrative expense claims.

[44] Bankr. Docket, Doc. No. 1887. 100% of unsecured creditors in the convenience class and 100% of unsecured creditors in the subordinated class voted to accept the Plan.

[45] *Id.* With the exception of Appellant NexPoint's "Covitz claim," no Appellant has a prepetition claim against the Debtor. The "Covitz claim" is for "not less than $250,000" (*i.e.* less than 0.01% of all allowed claims) and was voted to reject the Plan. The "Covitz claim" was allegedly acquired by Appellant NexPoint and, as the District Court pointed out, was disallowed by the Bankruptcy Court—NexPoint is currently appealing.

Further, all creditors received written notice and an opportunity to object to, and be heard regarding, the proposed entry of the Indemnity Trust Order. Yet, other than Appellants, not a one single creditor or party-in-interest objected to the Indemnity Trust Order. Indeed, the Committee, which represented the interests of creditors holding allowed claims worth hundreds of millions of dollars, enthusiastically urged the Bankruptcy Court to grant the Debtor's motion and enter the Indemnity Trust Order. The Bankruptcy Court heard loud and clear the wishes of creditors—real creditors who, unlike these Appellants, have real claims against the estate.

Appellants, too, have had their say and can't claim disenfranchisement. They exploited every opportunity in the Bankruptcy Court to extensively brief and argue their objections to the Indemnity Trust Order. After an hours-long evidentiary hearing at which Appellants examined and cross-examined witnesses and made oral argument, the Bankruptcy Court overruled Appellants' objections. They appealed to the District Court where, again, Appellants filed two briefs with the District Court and engaged in oral argument.

Appellants' complaint about the supposedly "denied" suffrage of creditors they do not represent, creditors they oppose at every juncture, is baseless. Appellants' complaint to now a third court—this Court—that Appellants have been denied the right to be heard is cynical and without any factual basis in the record.

G. HCMFA and Dugaboy Lack Standing

Neither Dugaboy (whose brief (the "**Dugaboy Brief**") is entirely devoted to Dugaboy's standing) nor HCMFA preserved the issue of their prudential standing for this Court's appellate review. Appellants' *Statement of the Issues on Appeal*[46] never even mentions the District Court's granting of Appellee's motion to dismiss the first appeal as to Dugaboy and HCMFA for lack of standing. An issue must be specifically articulated to be preserved for appeal.[47] The issue of HCMFA's and Dugaboy's standing was not only not specifically articulated but cannot even be inferred from the four issues Appellants do identify.[48]

Insofar as the issue of standing is not properly before this Court, the Dugaboy Brief, which addresses *only* the issue of Dugaboy's standing, should be disregarded. Dugaboy is not a proper appellant because it was dismissed as lacking standing by a judgment of the District Court that Dugaboy has not properly or timely appealed.[49]

---

[46] Doc. No. 50, Docket of *Highland Capital Mgmt. Fund Advisors, L.P., et al. v. Highland Capital Mgmt., L.P. (In re Highland Capital Management, L.P.),* Case No. 3:21-cv-01895-D (N.D. Tex.).

[47] *See, e.g., Maxwell v. Orwig (In re FirstPlus Fin. Grp., Inc.)*, 2010 WL 2927325, 2010 U.S. Dist. LEXIS 75224, at *2 (N.D. Tex. July 23, 2010) (failure to include issue on statement of issues on appeal results in waiver); *In re GGM, P.C.,* 165 F.3d 1026, 1031–32 (5th Cir. 1999) (issue not preserved for appeal unless included in statement of issues on appeal).

[48] Even a "catch-all" statement—which Appellants did not include—is insufficient to preserve an issue for appeal. *Galaz v. Katona (In Matter of Galaz)*, 841 F.3d 316, 324 (5th Cir. 2016).

[49] HCMFA not only did not appeal the District Court's ruling that it, too, lacked standing by failing to preserve that issue for this appeal, but HCMFA acknowledged that the portion of its brief addressing its own standing was "academic." HCMFA's use of several pages in its brief to argue about its standing in a separate appeal of a separate order of the Bankruptcy Court—something Highland has not contested—is peculiar, to say the least. Anyway, HCMFA is not a proper Appellant and should be dismissed from this appeal.

Despite that neither HCMFA nor Dugaboy is validly before this Court, and despite that the issue of their prudential standing was not preserved for this Court's review, Dugaboy and HCMFA (which joined the Dugaboy Brief) would have this Court reverse decades of its own jurisprudence by adopting some new standard for prudential standing. It's a futile request. Whether Dugaboy and HCMFA are held to have standing or not, the District Court ruled that NexPoint has prudential standing under this Court's long-held and oft-repeated "person aggrieved" standard, and Appellee has not cross-appealed that holding. This Court will reach the merits of this appeal whether Dugaboy or HCMFA is an appellant or not.

Thus, this Court need not consider Dugaboy's and HCMFA's standing. The entire argument—asking this Court to reverse the District Court by casting aside this Court's own decades-old standard for prudential standing—lacks merit.[50] *Coho Energy* has been followed and reaffirmed several times by this Court.[51] Each time, this

[50] Dugaboy accuses this Court of having engaged in "judicial legislation" in articulating the "person aggrieved" standard in *Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy, Inc.),* 395 F.3d 198 (5th Cir. 2004). Leaving aside the contempt contained in that accusation, Dugaboy places the phrase in quotations as though it came from the Supreme Court's *Hen House* decision. It didn't. Dugaboy has coined a novel phrase to challenge the legitimacy of *Coho Energy*.

[51] *Coho Energy* expressly adopted the "person aggrieved" prudential standard that had existed from before Congress' enactment of the Bankruptcy Code in 1978 and used in this Circuit. *See, e.g., In re First Colonial Corp.,* 544 F.2d 1291 (5th Cir. 1977). Since this Court's adoption in *Coho Energy* of the "personal aggrieved" standard for prudential standing in post-1978 Bankruptcy Code cases, this Court has reaffirmed the standard for nearly two decades. *See, e.g., Schum v. Zwirn Special Opportunities Fund LP (In re Watch Ltd.),* 257 Fed. Appx. 748 (5th Cir. 2007); *Di Ferrante v. Young (In re Young),* 416 Fed. Appx. 392 (5th Cir. 2011); *Fortune Natural Res. Corp. v. United States DOI,* 806 F.3d 363 (5th Cir. 2015); *Kingdom Fresh Produce, Inc. v. Stokes Law Office, L.L.P. (In re Delta Produce, L.P.),* 845 F.3d 609 (5th Cir. 2016); *In re Mar. Commun./Land Mobile L.L.C.,* 745 Fed. Appx. 561 (5th Cir. 2018); *Lejeune v. JFK Capital Holdings, L.L.C. (In re JFK Capital Holdings, L.L.C.),* 880 F.3d 747 (5th Cir. 2018); *Furlough v. Cage (In re Technicool Sys.),* 896 F.3d 382 (5th Cir. 2018); *Dean v. Seidel (In re Dean),* 18 F.4th 842 (5th Cir.

Court has done so without once calling into question the "person aggrieved" standard this circuit has used for decades.[52]

Dugaboy lacks standing under *Coho Energy*, under *Fortune*, under *Technicool*. The standard that makes this true—the standard the District Court relied on—is not "old." It is the current, frequently- and recently-reaffirmed standard this Circuit follows time and again. There is no basis to revisit that standard now, and certainly not at the behest of a party not properly before this Court, a party who failed even to preserve the issue for this Court's review.

V. CONCLUSION

For the reasons stated above, the Indemnity Sub-Trust did not modify the Plan such that it would need to have been approved under the procedures required in Bankruptcy Code § 1127(b). The ruling of the District Court, which affirmed the Bankruptcy Court's approval of the Indemnity Sub-Trust under Bankruptcy Code § 363(b), should be affirmed.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

2021). *See also Dondero v. Highland Cap. Mgmt. LP,* 2022 U.S. Dist. LEXIS 49351 (N.D. Tex. March 18, 2022) (dismissing one of Mr. Dondero's many appeals against Appellee for lack of standing under "person aggrieved" standard).

[52] Dugaboy spends a good deal of its brief [pp. 24–27] arguing that the "person aggrieved" standard "in some cases" may be "unfair" and concocts a hypothetical set of facts that have nothing to do with the appeal actually before this Court. Appellee declines to engage in hypothetical discussions, and trusts this Court will, too.

July 8, 2022

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717)
John A. Morris (NY Bar No. 266326)
Gregory V. Demo (NY Bar No. 5371992)
Jordan A. Kroop (NY Bar No. 2680882)

10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910

780 Third Avenue, 34th Floor
New York, NY 10017-2024
Telephone: (212) 561-7700

Email: jpomerantz@pszjlaw.com
jmorris@pszjlaw.com
gdemo@pszjlaw.com
jkroop@pszjlaw.com

-and-

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

Counsel for Appellee
Highland Capital Management, L.P.

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(4)–(6), insofar as the brief is typeset on 8.5" × 11" size paper with one-inch margins on all sides, double-spaced (except for quotations exceeding two lines, headings, and footnotes), in 14-point Times New Roman font (a plain, roman, proportional font with serifs), and all case names are italicized. By stipulated order, this Court permitted Appellee to deviate from Federal Rule of Appellate Procedure 32(a)(7), expanding the permitted length of Appellee's brief to no more than 45 pages and 21,000 words. This brief complies with those limits (and the original word limit of Federal Rule of Appellate Procedure 32(a)(7)), insofar as it comprises 32 pages and contains 8,381 words, not including the parts of the brief excluded under Federal Rule of Appellate Procedure 32(f).

/s/ Zachery Z. Annable
Zachery Z. Annable

CERTIFICATE OF SERVICE

I certify that, on July 8, 2022, a complete copy of the foregoing brief was served electronically on all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

/s/ Zachery Z. Annable
Zachery Z. Annable