Date Filed: 11/18/2022

Case No. 22-10575

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

DEBTOR

NEXPOINT ADVISORS, L.P. APPELLANT/
CREDITOR/PARTY IN INTEREST 11 U.S.C. 1109(B),

APPELLANT

v.

PACHULSKI STANG ZIEHL & JONES L.L.P., APPELLEE/RETAINED PROFESSIONAL; WILMER CUTLER PICKERING HALE AND DORR L.L.P., FTI CONSULTING, INCORPORATED; TENEO CAPITAL, L.L.C.; SIDLEY AUSTIN, L.L.P.,

APPELLEES

NEXPOINT ADVISORS, L.P.,

APPELLANT

v.

WILMER CUTLER PICKERING HALE AND DORR L.L.P.,

APPELLEE

NEXPOINT ADVISORS, L.P.,

APPELLANT

v.

TENEO CAPITAL, L.L.C.,

APPELLEE

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NEXPOINT ADVISORS, L.P.,

APPELLANT

v.

SIDLEY AUSTIN, L.L.P.,

APPELLEE

NEXPOINT ADVISORS, L.P.,

APPELLANT

v.

FTI CONSULTING, INCORPORATED,

APPELLEE.

Appeal from the United States District Court,
Northern District of Texas, Hon. Ed Kinkeade
Case No. 3:21-cv-03086-K

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that:

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

(b) In accordance with the certificate contained in its opening brief, Appellant NexPoint Advisors, L.P. is a private, non-governmental party, whose general partner, NexPoint Advisors GP, LLC, is also a private, non-governmental party; no publicly-held corporation owns 10% or more of the equity interests in either NexPoint entity;

(c) Appellee Pachulski Stang Ziehl & Jones LLP is a private, non-governmental party, is not a corporation, and does not have a parent corporation, publicly-held or otherwise;

(d) Appellee Wilmer Cutler Pickering Hale and Dorr LLP is a private, non-governmental party, is not a corporation, and does not have a parent corporation, publicly-held or otherwise;

(e) Appellee FTI Consulting, Inc. is a private, non-governmental party, and, although it is a corporation, it does not have a parent corporation, publicly-held or otherwise;

(f) Appellee Teneo Capital, LLC is a private, non-governmental party, is not a corporation, and does not have a parent corporation, publicly-held or otherwise;

(g) Appellee Sidley Austin LLP is a private, non-governmental party, is not a corporation, and does not have a parent corporation, publicly-held or otherwise;

(h) The following listed persons and entities, as described in the fourth sentence of 5th Cir. R. 28.2.1, have an interest in the outcome of this case:

(i) Highland Capital Management, L.P.
Reorganized Debtor
Counsel: Pachulski Stang Ziehl & Jones LLP
Hayward PLLC

(ii) The Highland Claimant Trust, a Delaware trust, the beneficiaries of which comprise the creditors of Highland Capital Management, L.P.
Indirectly interested party
Counsel: Pachulski Stang Ziehl & Jones LLP

(iii) NexPoint Advisors L.P.
Appellant
Counsel: Schwartz Law, PLLC
Jain Law & Associates PLLC

(iv) Pachulski Stang Ziehl & Jones LLP
Appellee
Counsel: Pachulski Stang Ziehl & Jones LLP
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(v) Wilmer Cutler Pickering Hale and Dorr LLP
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(vi) FTI Consulting, Inc.
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(vii) Teneo Capital, LLC
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STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully submit that oral argument is unwarranted and should not be permitted in the interests of preserving judicial resources and reducing the costs to the Highland Claimant Trust, whose beneficiaries include Reorganized Debtor Highland Capital Management's many creditors *but not Appellant*. This appeal seeks this Court's review of the District Court's order dismissing Appellant's appeal from the bankruptcy court on the basis that Appellant lacks appellate standing under this Circuit's long-standing "person aggrieved" standard. This sole dispositive legal issue has already been authoritatively decided by this Court countless times, including at least twice in published opinions in the last three years. Whatever legal arguments bear on this single issue are more than adequately presented in the briefs. This Court's consideration of this straightforward, dispositive issue would not be aided by oral argument.

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I. STATEMENT OF ISSUES[1]

Appellees agree with Appellant's statement of issues inasmuch as the sole issue in this appeal is whether the District Court properly dismissed Appellant's appeal of the Fee Orders[2] for lack of appellate standing under this Court's long-standing "person aggrieved" standard. Appellees do not agree with Appellant's characterizations of the reasons for the District Court's reliance on the "person aggrieved" standard or that the "person aggrieved" standard, which this Court has applied at least twice following the Supreme Court's *Lexmark* decision,[3] is somehow "in contravention of" *Lexmark.*

II. STATEMENT OF THE CASE

Appellant spends an astonishing 30 pages of its brief purporting to provide what Federal Rule of Appellate Procedure 28(a)(6) requires: "a **concise** statement of the case setting out the facts **relevant** to the issues submitted for review, describing the **relevant** procedural history, and identifying the ruling presented for review …" (emphasis added). Appellant deluges this Court with some 25 pages of gratuitously detailed factual and procedural history rehashing: (a) the administrative history of the Debtor's Chapter 11 case and its Confirmed Plan; (b) the procedural history,

[1] All capitalized terms used but not defined in this brief have the meanings given to them in Appellant's brief ("**Appelant Br.**").

[2] Appellees will use this term in favor of "Final Orders" as used in Appellant's brief to more accurately characterize the nature of the orders Appellant appealed to the District Court.

[3] *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118 (2014).

timeliness, burdens of proof, briefing, and hearings concerning Appellant's opposition in the Bankruptcy Court to the Final Applications; (c) a detailed procedural history of the Bankruptcy Court's interim approval of the Appellees' interim fee applications during the Debtor's Chapter 11 case; and (d) some 20 pages of legal argument previously presented to both the Bankruptcy Court and the District Court regarding all of Appellant's factual and legal arguments under the Bankruptcy Code as to why the Bankruptcy Court should not have approved Appellees' Final Applications on their merits.[4]

None of these issues is relevant to the issues in this appeal—whether the District Court properly: (a) used the "person aggrieved" standard for appellate standing that this Court has relied on for decades; (b) applied that standard to Appellant, who, as the record of this appeal reflects, is not a creditor, not a beneficiary of the Highland Creditor Trust, does not hold any claim against the Debtor's estate (an administrative expense claim it held when the District Court ruled that has since been disallowed[5]), and has no connection with the Debtor's

[4] The District Court did not consider the merits of Appellant's appeal of the Fee Orders and, instead, dismissed that appeal because Appellant lacked (and still lacks) standing. None of Appellant's merit-based arguments are properly before this Court.

[5] Appellant erroneously asserts that the NexPoint Administrative Expense Claim "is still pending before the Bankruptcy Court …" Appellant Br. at 48. It is not. The Bankruptcy Court disallowed the NexPoint Administrative Expense Claim on August 30, 2022. *In re Highland Cap. Mgmt.,* Adv. Proc. No. 21-03010-sgj (Bankr. N.D. Tex.) at Doc. No. 124. Appellant is one of several entities owned and controlled by James Dondero, Highland's former president, who vowed to "burn the place down" after his ouster. In this case alone, Mr. Dondero and his entities presently have eight appeals pending before this Court (this Court has already ruled on a ninth, their appeal of the Confirmation Order), and have,

estate other than as a defendant in an adversary proceeding the Highland Creditor Trust has brought against it (and other defendants) in the Bankruptcy Court; and (c) dismissed the District Court appeal because Appellant failed to meet the "person aggrieved" standard for appellate standing.

This Court must affirm the District Court's Dismissal Order if this Court determines that: (a) the "person aggrieved" standard remains the appropriate standard for appellate standing in this Circuit; and (b) the District Court properly ruled that Appellant was not a person aggrieved despite that: (i) Appellant is a defendant in the Adversary Proceeding; (ii) Appellant had asserted a now-disallowed administrative expense claim against the Debtor's estate; and (iii) Appellant may have had party-in-interest standing in the *Bankruptcy Court* under Bankruptcy Code § 1109 (which the District Court has repeatedly and correctly held to be inapplicable and irrelevant to appellate standing in several of the appeals Appellant and its affiliates have lost so far).

III. SUMMARY OF THE ARGUMENT

Appellant asks this Court to cast aside its own decades-old standard for prudential appellate standing in bankruptcy cases. This Circuit joins essentially all others throughout the nation in recognizing a party's prudential appellate standing

to date, brought more than 20 appeals in the District Court, many of which have been dismissed for lack of standing.

in bankruptcy cases only when that party can demonstrate that the outcome of the appeal will affect the party directly, predictably, and pecuniarily. Although this Court has over the course of nearly 20 years articulated the "person aggrieved" standard for prudential appellate standing in slightly varying ways and in varying circumstances, it has never wavered from a strict application of the "person aggrieved" standard first announced in 1977, a year before the current Bankruptcy Code became effective. In upwards of a dozen published cases, this Court has enforced the "person aggrieved" standard to bar appeals from appellants who simply cannot show that the appeal will affect them directly and pecuniarily. When this Court looks for the direct, financial impact the appeal would have on the appellant's wallet and finds none, this Court does not hesitate to affirm the District Court's dismissal for lack of prudential standing.

The appeal now before this Court is no different. Because Appellant cannot satisfy the "person aggrieved" standard, Appellant must resort to asking this Court for extraordinary, unwarranted relief: to jettison decades of jurisprudence adopting and re-adopting the "person aggrieved" standard—a standard universally accepted in this Circuit and throughout the United States—in favor of some liberalized yet undescribed standard that Appellant, with its tenuous, attenuated, and speculative connection to a Chapter 11 case, could possibly satisfy. This Court should do nothing of the sort, and not just because Appellant gives this Court no good reason to vary

from its own precedent. Appellant epitomizes exactly the type of litigant the "person aggrieved" standard is meant to restrain, a litigant that would misuse the scarce and valuable resources of a Court of Appeals in the furtherance of a ceaseless campaign of vindictive, vituperative, and vexatious litigation against the fiduciary for genuine creditors of a Chapter 11 estate and, in this instance, its professionals.[6]

Appellant lacks standing. This Court should not vary from its own longstanding precedent as Appellant requests. Instead, this Court should affirm the District Court's Dismissal Order.

IV. ARGUMENT

A. The "Person Aggrieved" Standard Is and Should Remain Good Law

Appellant asks this Court to reverse the District Court by casting aside this Court's own decades-old standard for prudential standing expressly adopted in *Coho Energy* almost 20 years ago and followed and reaffirmed many times by this Court.[7]

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[6] The District Court said as much in referring to the avalanche of litigation wrought by Appellant and its many affiliates: "A cursory glance at the bankruptcy court's docket for this case offers an apt example of the [person aggrieved] doctrine's continued necessity." ROA.22883.

[7] *Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy, Inc.),* 395 F.3d 198 (5th Cir. 2004), 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., Dean v. Seidel (In re Dean),* 18 F.4th 842 (5th Cir. 2021); *Furlough v. Cage (In re Technicool Sys.),* 896 F.3d 382 (5th Cir. 2018); *Lejeune v. JFK Cap. Holdings, L.L.C. (In re JFK Cap. Holdings, L.L.C.),* 880 F.3d 747 (5th Cir. 2018); *In re Mar. Commun./Land Mobile L.L.C.,* 745 Fed. Appx. 561 (5th Cir. 2018); *Kingdom Fresh Produce, Inc. v. Stokes Law Office, L.L.P. (In re Delta Produce, L.P.),* 845 F.3d 609 (5th Cir. 2016); *Fortune Natural Res. Corp. v. United States DOI,* 806 F.3d 363 (5th Cir. 2015); *Di Ferrante v. Young (In re Young),* 416 Fed. Appx. 392 (5th Cir. 2011); *Schum v. Zwirn Special Opportunities Fund LP (In re Watch Ltd.),* 257 Fed. Appx. 748 (5th Cir. 2007).

Each time, this Court has done so without once calling into question the "person aggrieved" standard this Circuit has used for decades.

This is true notwithstanding one of Appellant's oft-repeated but never successful arguments that this Circuit's "person aggrieved" standing requirement is somehow inconsistent with the Supreme Court's holding in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*[8] This Court has explicitly reiterated the viability of the "person aggrieved" standard in at least seven reported decisions rendered **after** *Lexmark*.[9] Perhaps this is so because the "person aggrieved" standard is specifically tailored to bankruptcy appeals, while *Lexmark* has nothing to do with bankruptcy. *Lexmark* addressed standing under the Lanham Act and "whether [an appellant] falls within the class of plaintiffs authorized to sue under [15 U.S.C. §1125(a)]."[10] *Lexmark* does not even mention the limits of the "person aggrieved" test for appellate standing of bankruptcy court orders, nor would anyone rationally expect it to do so in a case that has literally nothing to do with bankruptcy, bankruptcy appeals,

[8] 572 U.S. 118 (2014).

[9] *See, e.g., Dean v. Seidel (In re Dean),* 18 F.4th 842 (5th Cir. 2021); *Furlough v. Cage (In re Technicool Sys.),* 896 F.3d 382 (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); *In re Mar. Commun./Land Mobile L.L.C.,* 745 Fed. Appx. 561 (5th Cir. 2018); *Kingdom Fresh Produce, Inc. v. Stokes Law Office, L.L.P. (In re Delta Produce, L.P.),* 845 F.3d 609 (5th Cir. 2016); *Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc.*, 778 F.3d 502, 506 (5th Cir. 2015); *Fortune Natural Res. Corp. v. United States DOI,* 806 F.3d 363 (5th Cir. 2015). The District Courts within this Circuit have noted that this Court has applied the "person aggrieved" standard repeatedly following *Lexmark*. *See, e.g., Neutra, Ltd. v. Terry (In re Acis Cap. Mgmt., L.P.)*, 604 B.R. 484, 508 (N.D. Tex. 2019) (Fitzwater, J.) ("The [personal aggrieved] doctrine therefore remains binding in this circuit").

[10] 572 U.S. at 128.

standing in a bankruptcy case, or standing in a bankruptcy-related appeal and cannot possibly have addressed the unique multi-party dynamic that typifies bankruptcy cases, especially complex Chapter 11 cases such as this one.[11]

Whatever *Lexmark* may have to say about a plaintiff's standing to bring suit under the Lanham Act, it has no effect on the "person aggrieved" standard for evaluating prudential standing in bankruptcy appeals—a standard that remains,[12] and should remain, the law in this Circuit.[13]

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[11] This Court addressed *Lexmark* directly in its bankruptcy-related opinion in *Superior:*

> Superior also argues that the recent Supreme Court case of *Lexmark* ... prevents this court form [*sic*] applying the prudential standing doctrine as a jurisdictional bar. In *Lexmark*, the Supreme Court addressed a different type of prudential standing requirement than that at issue here: "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." [T]he *Lexmark* Court clarified that the zone-of-interests inquiry is properly viewed as one of statutory interpretation … *Lexmark* does not control here. To be sure, *Lexmark* does note that prudential standing doctrine as a whole "is in some tension with … the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." … However, we have long applied the prudential requirement that a party must assert its own rights … and we are bound to follow our precedent until the Supreme Court squarely holds to the contrary….

Superior MRI Servs. v. All. HealthCare Servs., 778 F.3d 502, 505-06 (5th Cir. 2015). The Supreme Court has not held to the contrary.

[12] Said the District Court: "although some circuits have modified their approaches to the [person aggrieved] doctrine in the wake of *Lexmark,* that does not appear to be the case in this circuit." ROA.22884, citing Peterson and Esses, *The Future of Bankruptcy Appeals: Appellate Standing After Lexmark Considered,* 37 Emory Bankr. Dev. J. 285, 309 (2021). Appellant fails to cite a single circuit-level case from outside this Circuit that "modified" the person aggrieved standard following *Lexmark,* nor did the District Court identify any.

[13] Appellant relies on *Kipp Flores Architects, L.L.C. v. Mid-Continent Casualty. Co.*, 852 F.3d 405, 410 (5th Cir. 2017), for the proposition that because "party in interest" as referred to in Bankruptcy Code § 1109 should be interpreted broadly, that the "person aggrieved" standard is too narrow or too restrictive. As discussed more fully below, Bankruptcy Code § 1109 has nothing to do with prudential standing in a bankruptcy appeal. *Kipp* does not help Appellant, anyway, inasmuch as that case 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.

B. The District Court Correctly Concluded that Appellant Lacks Standing Under Controlling Fifth Circuit Precedent

Appellant cited only two connections with the bankruptcy estate in its unsuccessful attempt to persuade the District Court that Appellant had standing to appeal the Fee Orders: (1) the NexPoint Administrative Expense Claim[14] and (2) the pending Adversary Proceeding. As the District Court correctly concluded, neither of these satisfies the "person aggrieved" test.

Standing to appeal a bankruptcy court decision is a question of law, governed by the "person aggrieved" test, which requires a showing that the appellant was aggrieved by the order being challenged,[15] an "even more exacting standard than traditional constitutional standing."[16] In other words, "[b]ecause bankruptcy cases typically affect numerous parties, the 'person aggrieved' test demands a higher causal nexus between act and injury …."[17]

This Court has prudently limited appellant standing in bankruptcy cases, which are particularly susceptible to an avalanche of appeals by an array of parties:

> Bankruptcy courts are not Article III creatures bound by traditional standing requirements. But that does not mean disgruntled litigants may appeal every bankruptcy court order willy-nilly. Quite the contrary.

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[14] Appellant chose not to argue that the NexPoint Administrative Expense Claim provides a basis for standing. Appellant Br. at 51. It was a prudent choice. Despite Appellant's grossly mischaracterizing the procedural status of the NexPoint Administrative Expense Claim as "still pending before the Bankruptcy Court" [Appellant Br. at 48], the Bankruptcy Court disallowed that claim. *See* n.5 above.

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

[16] *Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy Inc.)*, 395 F.3d 198, 202 (5th Cir. 2004).

[17] *Id.*

> Bankruptcy cases often involve numerous parties with conflicting and overlapping interests. Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, quite limited.[18]

In *Technicool*, the debtor's equity holder, Robert Furlough, opposed the debtor's employment of special counsel to pursue litigation. After the bankruptcy court overruled his objection, Furlough appealed, first to the district court and, when he did not prevail there, to this Court.[19] This Court also affirmed the bankruptcy court's decision, explicitly rejecting Furlough's argument that additional administrative expenses for special counsel would make a recovery on his equity less likely. Significantly, this Court further held that some theoretical possibility relating to an out-of-the-money equity interest did not accord him standing to appeal: "This speculative prospect of harm is far from a direct, adverse, pecuniary hit. Furlough must clear a higher standing hurdle: *The order must burden his pocket before he burdens a docket.*"[20] This Court reasoned that the bankruptcy court order that was the subject of Furlough's appeal—the appointment of a professional under Bankruptcy Code § 327(a)—did not *directly* affect Furlough's pecuniary interests, despite his out-of-the-money equity interest. In other words, just because Furlough

[18] *Technicool*, 896 F.3d at 385 (citations omitted).
[19] *Id.* at 384-85.
[20] *Id.* (emphasis added).

"feels grieved by [the professional's] appointment does not make him a 'person aggrieved' for purposes of bankruptcy standing."[21]

The Court's reason for adopting the "pecuniary interest" test for bankruptcy appeals speaks directly to the circumstances under which this Appellant now burdens this Court's docket:

> In bankruptcy litigation, the mishmash of multiple parties and multiple claims can render things labyrinthine, to say the least. To dissuade umpteen appeals raising umpteen issues, courts impose a stringent-yet-prudent standing requirement: *Only those directly, adversely, and financially impacted by a bankruptcy order may appeal it.*[22]

This Court again strongly reiterated this approach last year in *Dean v. Seidel (In re Dean)*,[23] explaining that the "person aggrieved test … an even more exacting standard than traditional constitutional standing," requires "that the order of the bankruptcy court must directly and adversely affect the appellant pecuniarily."[24] The Court stated simply, "Appellants cannot demonstrate bankruptcy standing when the court order to which they are objecting does not directly affect their wallets."[25]

[21] *Id.*
[22] *Id.* at 384 (emphasis added).
[23] 18 F.4th 842 (5th Cir. 2021).
[24] *Id.* at 844.
[25] *Id.*

Accordingly, this Appellant "must show that [it] was 'directly and adversely affected pecuniarily by the order of the bankruptcy court.'"[26] Appellant, of course, bears the burden of alleging facts sufficient to demonstrate that it has standing to appeal.[27] Again, the only two facts Appellant offered the District Court below was that it possessed the (now disallowed) NexPoint Administrative Expense Claim and that it was a defendant in the Adversary Proceeding. The District Court properly found that neither is sufficient to confer standing to prosecute this appeal.

C. The Disallowed NexPoint Administrative Expense Claim Does Not Confer Standing

As the District Court correctly concluded, the Fee Orders and the outcome of Appellant's appeal of them do not and cannot directly affect Appellant's wallet. Appellant does not hold a prepetition claim against Highland's bankruptcy estate, and any possible recovery on account of its disallowed NexPoint Administrative Expense Claim is entirely unrelated to and unaffected by the outcome of these appeals. First, since the time of its decision on Appellees' fee applications, the bankruptcy court has disallowed the NexPoint Administrative Expense Claim, meaning that it is entitled to no recovery from Highland's bankruptcy estate.

[26] *Id*. (quoting *In re Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983)); *see also Dish Network Corp. v. DBSD N. Am. (In re DBSD N. Am.)*, 634 F.3d 79, 88-89 (2d Cir. 2010) ("an appellant must be 'a person aggrieved' …. An appellant … must show not only 'injury in fact' under Article III but also that the injury is 'direct[]' and 'financial'") (quoting *Kane v. Johns Manville Corp*., 843 F.3d 636, 642 & n.2 (2d Cir. 1988)); *see also Edwards Family P'ship v. Johnson (In re Cmty. Home Fin. Servs.)*, 990 F.3d 422, 426 (5th Cir. 2021) (same).

[27] *See Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation*, 32 F.3d 205, 208 (5th Cir. 1994).

Second, even if the NexPoint Administrative Expense Claim were not disallowed, it would have been fully paid in accordance with Highland's confirmed plan of reorganization and the Bankruptcy Code.[28] That is true irrespective of the outcome of this appeal and the Fee Orders because all the professional fees and expenses authorized under the Fee Orders *have already been* paid, and Highland's estate nevertheless retains sufficient funds to pay all allowed administrative claims in full. Thus, any potential payment to Appellant on account of its administrative claim, even if it were allowed, cannot be "directly, adversely, and financially impacted" by the Fee Orders or this appeal. The District Court easily recognized that Appellant lacks standing on this basis because even a reversal of the Fee Orders would not "put any money in [Appellant's] pocket"[29]—both the Bankruptcy Code and the Plan already mandate the full payment of all allowed administrative claims:

> Regardless of whether the Bankruptcy Code and/or Confirmed Plan absolutely guarantee payment of the administrative claim, Appellant fails to meaningfully rebut Appellees' argument that the chances of Appellant's administrative claim not being paid (assuming it is allowed) are extremely remote. For that reason, Appellant fails to persuasively argue that it has been directly and adversely impacted by the Fee Application Orders. As the Fifth Circuit stated in *In re Coho Energy Inc.*, "A remote possibility does not constitute injury under

[28] *See* 11 U.S.C. § 1129(a)(9)(A) (one the requirements to confirm a chapter 11 plan is that "with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive an account of such claim cash equal to the allowed amount of such claim"). 11 U.S.C. § 507(a)(2) and 507(a)(3) address the treatment of administrative claims within the priority payment scheme of claims under the Bankruptcy Code. This requirement is also incorporated in Section II.A of the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the "**Plan**"). ROA.10144.

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

> *Rohm's* 'person aggrieved' test." 395 F.3d at 202 (citing *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205 (5th Cir. 1994)). Accordingly, Appellant's administrative expense claim does not afford it standing to appeal the Fee Application Orders.[30]

Appellant seems to concede the propriety of the District Court's ruling in this regard because it expressly declines to argue in its brief to this Court that the NexPoint Administrative Expense Claim provides a basis for standing under the "person aggrieved" standard.[31]

D. The Adversary Proceeding Also Fails to Confer Standing

Having abandoned its disallowed administrative claim as a basis for standing, Appellant focuses entirely on the second argument that failed to persuade the District Court: that because it is a defendant in the Adversary Proceeding and potentially, at some point in the future, may possibly become liable for professional fees awarded to Appellees, that is sufficient to satisfy the "person aggrieved" standard.

The District Court flatly rejected this argument:

> At most, Appellant *could* be *indirectly* impacted by the Fee Application Orders, but only if Appellant was to be found liable in the Adversary Proceeding. Any future liability from the Adversary Proceeding is speculative and, in this Court's opinion, not sufficient to confer standing on Appellant to appeal the Fee Application Order under the person aggrieved standard.[32]

[30] ROA.22886.

[31] Appellant Br. at 51.

[32] ROA.22887 (emphasis in original).

The District Court correctly saw Appellant's argument for what it is—essentially the same argument Furlough made in *Technicool*—that the effect of the bankruptcy court order *could* prejudice Furlough's recovery *indirectly* because the resulting increase in administrative claims *could* theoretically reduce distributions on account of Furlough's junior equity interests.

This Court has, at least twice in recent years, rejected the argument that potential or speculative harm confers standing to appeal bankruptcy court orders because "the speculative prospect of harm is far from a direct, adverse, pecuniary hit."[33] There is no judgment or order requiring Appellant to pay any of Highland's professional fees and there may never be one. In fact, the potential outcome of the entire Adversary Proceeding is wholly speculative and unknown. Whatever may happen well down the road of complex litigation, the Adversary Proceeding and Appellant's role in it cannot confer appellate standing.[34]

Appellant mistakenly alleges in its brief that "Appellees' MTD did not address … [Appellant's] status as a defendant in the Adversary Proceeding, even though these arguments were squarely presented to the Bankruptcy Court."[35] This simply

[33] *Technicool*, 896 F.3d at 386. *See also Coho Energy,* 395 F.3d at 203 (remote possibility of injury does not constitute injury under person aggrieved test).

[34] Highland's Litigation Trustee commenced the Adversary Proceeding against Appellant and other Dondero-owned and -controlled entities for various causes of action, alleging tens of millions of dollars in damages, associated with those entities' responsibility for Highland's financial distress and ultimate failure and bankruptcy filing. The Adversary Proceeding has only just begun and remains at the pleading stage, with currently-pending motions to dismiss.

[35] Appellant Br. at 47.

misstates the record of this Appeal. Not only did Appellees explicitly address these arguments,[36] the District Court referred to the "number of cases" that Appellees cited in their response in support of their motion to dismiss "that generally hold that 'potential litigation in another proceeding does not make an appellant a "person aggrieved" for standing purposes.'"[37]

In a vain attempt to bolster its unpersuasive argument that its position as a defendant in the Adversary Proceeding somehow confers standing under the person aggrieved standard, Appellant presumes to remind this Court of the "policies" behind the person aggrieved standard—among them, overburdening the docket with

[36] *See* ROA.252-255.

[37] ROA.22887. Many other courts have applied the reasoning articulated in *Technicool* to hold that a litigant's status as a defendant in a separate adversary proceeding does not confer standing to appeal a bankruptcy court order in the administrative case. *Moran v. LTV Steel Co. (In re LTV Steel Co.)*, 560 F.3d 449, 453 (6th Cir. 2009) (holding that defendants sued as a result of an order granting a committee standing to prosecute the estate's claims against them were not aggrieved persons and lacked standing to appeal; "we are aware of no court that has held that the burden of defending a lawsuit, however onerous or unpleasant, is the sort of direct and immediate harm that makes a party 'aggrieved' so as to confer standing in a bankruptcy appeal"); *In re El San Juan Hotel*, 809 F.2d 151, 155 (1st Cir. 1987) (holding that an appellant "whose only interest is as a party defendant [] has no standing [to appeal]" because an order authorizing a suit to move forward against an adversary defendant "has no direct and immediate impact on appellant's pecuniary interests," and did not "diminish her property, increase her burdens, or detrimentally affect her rights;" quotations omitted); *Travelers Ins. Co. v. H.K. Porter Co.*, 45 F.3d 737, 743 (3d Cir. 1995) ("courts have recognized that an order which simply allows a lawsuit to go forward does not necessarily aggrieve the potential defendant for purposes of appellate standing") (citation and internal quotation marks omitted); *Fid. Bank, Nat'l Ass'n v. M.M. Grp.*, 77 F.3d 880, 883 (6th Cir. 1996) (being "subject[ed] to the possibility of future litigation" by a bankruptcy court order is "insufficient to confer standing"); *Travelers Cas. & Sur. v. Corbin (In re First Cincinnati, Inc.)*, 286 B.R. 49, 53 (6th Cir. BAP 2002) ("most, if not all, of the courts that have considered this question have held that a bankruptcy court's order does not produce the direct and adverse pecuniary impact necessary to bestow standing on an appellant if the order's effect on the appellant is merely to expose it to the risks of litigation."); *Opportunity Fin., LLC v. Kelley*, 822 F.3d 451, 458 (8th Cir. 2016) ("Generally, a bankruptcy court order allowing litigation to proceed against an adversary defendant does not make that defendant a party aggrieved") (following *In re LTV Steel Co.*); *Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.)*, 764 F.3d 1321, 1325-26 (11th Cir. 2014) ("Orders allowing litigation to go forward do not burden a party's ability to defend against liability; they simply require parties to exercise that ability. Such an effect does not constitute the direct harm necessary to satisfy our person aggrieved standard").

meritless litigation[38]—without so much as a nod to the irony of it all. This Appellant, along with several other affiliated entities all owned and controlled by James Dondero, demonstrates the propriety of the person aggrieved standard in bankruptcy appeals to prevent "overburdening the docket with meritless litigation." The Dondero entities, including this Appellant, have appealed more than 20 Bankruptcy Court orders to the District Court plus one direct appeal (of the Bankruptcy Court's Confirmation Order) from the Bankruptcy Court to this Court. Of those, the District Court has ruled on or dismissed (for lack of standing) 11 of them, with the Dondero entities losing each time (save one that was remanded so that the Bankruptcy Court could address an additional element of collateral estoppel). Dondero and his entities have appealed eight of those appellate losses to this Court (including this appeal), meaning that these entities are appellants in **eight** appeals presently pending in this Court[39] and one this Court has already ruled on—the Plan confirmation appeal, which these entities have now expressly indicated will soon become the subject of a petition to the Supreme Court for writ of *certiorari*. Without the person aggrieved standard to bring some semblance of order to chaos, Appellant, James Dondero, and

[38] Appellant Br. at 64.

[39] (1) *NexPoint Advisors, L.P. et al. v. Highland Cap. Mgmt., L.P.,* Case No. 21-90011;
(2) *Highland Cap. Mgmt. Fund Advs., L.P. et al. v. Highland Cap. Mgmt., L.P.,* Case No. 22-10189;
(3) *NexPoint Advisors, L.P. v. Pachulski Stang Ziehl & Jones LLP, et al.,* Case No. 22-10575;
(4) *The Dugaboy Inv. Trust v. Highland Cap. Mgmt., L.P.,* Case No. 22-10831;
(5) *James Dondero v. Highland Cap. Mgmt., L.P.,* Case No. 22-10889;
(6) *The Dugaboy Investment Trust et al. v. Highland Cap. Mgmt., L.P.,* Case No. 22-10960;
(7) *The Dugaboy Investment Trust et al. v. Highland Cap. Mgmt., L.P.,* Case No. 22-10983; and
(8) *The Charitable DAF Fund, L.P. et al. v. Highland Cap. Mgmt., L.P.,* Case No. 22-11036.

their affiliates will continue to abuse their access to this Court as part of their years-long effort to "burn the place down."[40]

The person aggrieved rule effects the salutary purpose of preserving this Court's resources and those of bankruptcy estates from the indiscriminate attacks of disgruntled litigants like Appellant. The standard is flexible enough to permit an appeal by a litigant who can demonstrate an appeal's direct, non-speculative, pecuniary effect on that litigant but rigid enough to save the strained appellate system from a would-be appellant who, like this Appellant, can point only to the possibility of an adverse ruling in an Adversary Proceeding sometime in the indeterminate future as a basis for appellate standing. This Appellant is not a "person aggrieved" and this Court should affirm the District Court's ruling that held as such.

E. Appellant's More Peculiar Arguments Are Equally Unavailing

In an unusual section of its brief, Appellant argues that the District Court's "narrow" focus on the person aggrieved standard is "At Odds [*sic*] Authorities From Other Circuits On Which *Coho Energy* And *Rohm* Are Based." Appellant leaves unsaid how other circuits' formulations of essentially the same standard for prudential standing are at all relevant to this Court's application of this Court's

[40] *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.),* 48 F.4th 419, 426 (5th Cir. 2022). This Court is already familiar with these parties' unrestrained tactics, noting in its recent opinion in the Plan confirmation appeal that "Appellants fire a bankruptcy-law blunderbuss." *Id.* at 432. U.S. District Judge Brantley Starr, in ruling against several Dondero entities on another appeal in this bankruptcy case, noted those appellants' "zeal to bamboozle this Court" by omitting a "crucial fact …" *Memorandum Opinion and Order, The Dugaboy Inv. Tr., et al. v. Highland Cap. Mgmt., L.P.,* Case No. 3:21-cv-01295-X (N.D. Tex. September 22, 2022), Doc. No. 34.

formulation of this Court's standard. And what, precisely, would Appellant have the District Court do? Given this Court's rich body of controlling case law on this issue, should the District Court have ignored this Circuit's binding precedent in favor of jurisprudence from other circuits? In any case, had the District Court looked at other circuits' versions of the person aggrieved standard, it would have discovered dozens of circuit-level decisions from all over the country reaching the same conclusion as this Court has, repeatedly, on the application of the "person aggrieved" standard to an appellant whose singular claim to standing is that it is a defendant in an adversary proceeding.[41]

It's similarly peculiar when Appellant asserts that the person aggrieved standard may have differed under the Bankruptcy Act of 1898 and before the 1978 enactment of the Bankruptcy Code. This Court's person aggrieved standard was announced in *Coho Energy* nearly 20 years ago, in this century. Whatever may have pertained to this question in generations long past and long gone, under a different statutory regime implemented by a vastly different court system with different Constitutional implications, is wholly irrelevant to this appeal, today, before this Court.

[41] *See* n.37.

F. Bankruptcy Code § 1109(b) Has Nothing to Do with Appellate Standing

Appellant argues that because it qualifies as a party in interest under Bankruptcy Code § 1109(b)—and, therefore, may appear and be heard on matters in the Bankruptcy Court—it *also* has appellate standing to appeal anything and everything emanating from the Bankruptcy Court, irrespective of any prudential standing requirements imposed by the appellate courts. Appellant did not prevail in the District Court below on this argument and it should not prevail in this Court. Appellant's sole support for this argument is a citation to *Collins v. Mnuchin,*[42] a case involving shareholder claims against the Federal Housing Finance Agency under the Administrative Procedure Act. That case is not a bankruptcy case, says nothing about Bankruptcy Code § 1109, the person aggrieved standard, or anything else even tangentially related to the issues in this appeal. Needless to say, Appellant cites no Fifth Circuit precedent—and no bankruptcy case support at all—for this argument. There is none.

In fact, cases say exactly the opposite.[43] Bankruptcy Code § 1109(b) gives certain parties the right "to appear and to be heard on any issue in a case." It says

[42] 938 F.3d 553, 575 (5th Cir. 2019), *reversed and vacated in part, Collins v. Yellen,* 141 S. Ct. 1761 (2021).

[43] *Advantage Healthplan, Inc. v. Potter*, 391 B.R. 521, 541 (D.D.C. 2008) ("'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'").

nothing about appellate standing[44] and nothing about whether an entity is a "person aggrieved."[45]

The District Court recognized the important distinction between being a party in interest in a bankruptcy court proceeding and being a person aggrieved with valid standing in a bankruptcy appeal: "Broadly conferring appellate standing to any potential party in interest to a bankruptcy court order would likely result in exactly the type of 'sclerotic litigation' this circuit seeks to avoid with its additional prudential standing requirement; a party in interest cannot also necessarily be a person aggrieved."[46]

G. The Court Should Disregard Appellant's New Legal Theory, Raised for the First Time Here

Appellant argues for the very first time in this Court something Appellant did not argue at the District Court: that this Court's person aggrieved test somehow conflicts with this Court's holding in *Cajun Elec. Power Coop. v. Central La. Elec.*

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[44] Similarly, Appellant's argument that Bankruptcy Code § 330(a) confers standing to prosecute this appeal 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, not in bankruptcy appeals.

[45] Section 1109 "is silent on the subject of a party's standing to take an appeal from an adverse decision, other than to expressly prohibit the Securities and Exchange Commission from taking an appeal." 7 *Collier on Bankruptcy* ¶ 1109.08 (16th ed. 2022). *See also In re Long*, 2015 Bankr. 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").

[46] ROA.22889, quoting the *Collier on Bankruptcy* excerpt quoted in n.45 above.

Co. (In re Cajun Elec. Power Coop.).[47] Appellant argues that this Court has effectively misapplied its own test for prudential standing for the past 27 years because it is inconsistent with the way this Court articulated the test in *Cajun Electric*. Appellant asserts that, in addition to the "direct and adverse pecuniary interest" test this Court follows for decades, *Cajun Electric* provides an "alternative" basis for Appellant to have standing if "the order diminished its property, increased its burdens or impaired its rights."[48] This argument fails for several reasons.

Despite never having raised this argument in the District Court, Appellant now argues that "the District Court applied the incorrect legal standard in dismissing [Appellant's] appeals of the Final Orders" in failing to address *Cajun Electric.*[49] But this Court has repeatedly held that litigants cannot raise brand new arguments on appeal that were not raised in the prior proceeding.[50] Appellant should not be

[47] 69 F.3d 746 (5th Cir. 1995).

[48] *Id.* at 749.

[49] Appellant never presented this argument to the District Court for consideration because Appellant had already conceded that *Technicool* is the controlling test.

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

permitted to devise a new legal theory for the first time in this Court. The Court should disregard it.[51]

H. *Cajun Electric* Does Not Provide Appellant with Prudential Standing, Anyway

Even had Appellant timely raised its *Cajun Electric* argument with the District Court, Appellant cannot satisfy the "disjunctive" test articulated in that case. *Cajun Electric* involved a Chapter 11 debtor's appeal of a bankruptcy court order appointing a chapter 11 trustee and held that "when the trustee was appointed, Cajun lost all of the rights it had as a debtor in possession, including the right to operate its business. Clearly it was aggrieved by losing the right to run itself."[52] Even if this alternative test for appellate standing were still viable—and there is serious reason to doubt that it is[53]—it is not inconsistent with the "direct and adverse pecuniary affect" test repeatedly articulated by this Court in the nearly 30 years since *Cajun Electric*. A debtor's inability to operate its business would necessarily directly and

[51] Appellant does not even attempt in its brief to address the problem with raising a new argument on appeal or to demonstrate any "exceptional circumstances" that warrant this Court's addressing Appellant's new legal theory. *See ASARCO, Inc. v. Elliott Mgmt. (In re Asarco, L.L.C.)*, 650 F.3d 593, 600 (5th Cir. 2011) ("Appellants did not raise this argument before the district court, however, and have not shown any exceptional circumstance that warrants our addressing this waived issue"); *In re Bradley*, 501 F.3d 421, 433 (5th Cir. 2007) ("Even if an issue is raised and considered in the bankruptcy court, this court will deem the issue waived if the party seeking review failed to raise it in the district court").

[52] *Cajun. Elec*., 69 F.3d at 749.

[53] *See In re Roman Catholic Church of the Archdiocese*, 2022 U.S. Dist. LEXIS 151083, *5 (E.D. La. August 11, 2022) ("While some courts have also considered whether an 'order diminished [a party's] property, increased its burden or impaired its rights,' the Fifth Circuit recently made clear that the 'person aggrieved test' acts to 'narrow[] the playing field' on appeal by 'ensuring that only those with a direct, financial stake in a given order can appeal it'") (quoting *Technicool*, 896 F.3d at 386).

adversely affect its ability to generate revenue. In other words, the facts present in *Cajun Electric* would compel the same result if the "direct and adverse pecuniary affect" test were applied in that case.

Cajun Electric does not help Appellant because Appellant still cannot show any *actual* diminishment of its property, increased burdens, or any impairment of its rights resulting from the Fee Orders. Appellant's only articulated "harm" here is its *potential* financial exposure in the Adversary Proceeding sometime in the future. No matter how one frames the "person aggrieved" test in this Circuit—using *Coho Energy, Technicool, Cajun Electric, Dean v. Siedel*—Appellant does not satisfy it. Because Appellant cannot demonstrate a direct or adverse impact (either pecuniary or otherwise) of an appeal of the Fee Orders, Appellant is not a "person aggrieved" and lacks standing to appeal the Fee Orders.[54]

[54] The final section of Appellant's argument (Appellant Br. at 67-69) appears to ask this Court to do several things the Court, respectfully, cannot do in the present procedural posture. Appellant asks this Court to rule that: (1) Appellant was not given a fair opportunity to contest the Fee Orders in the Bankruptcy Court; (2) that Appellant will not be precluded from opposing an award of fees in the Adversary Proceeding; and (3) Appellant should be entitled to some type of discovery. None of these issues is properly before this Court. Accordingly, Appellees will not waste this Court's time further by responding to that section in Appellant's brief.

V. CONCLUSION

For the reasons stated above, this Court should affirm the order of the District Court dismissing Appellant's appeal of the Fee Orders.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure (FRAP) 32(a)(4) – (6). 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 Appellees to deviate from FRAP 32(a)(7), expanding the permitted length of Appellees' brief. This brief complies with those limits, as well as the original limits set forth in FRAP 32(a)(7), insofar as it comprises 24 pages and contains 7,159 words, not including the parts of the brief excluded under FRAP 32(f).

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CERTIFICATE OF SERVICE

I certify that, on November 18, 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.

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