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

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

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

Reorganized Debtor.

NEXPOINT ADVISORS L.P.,

Appellant

v.

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

Appellees

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

APPELLEES' JOINT MOTION TO DISMISS APPEALS AS CONSTITUTIONALLY MOOT

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Appellees Pachulski Stang Ziehl & Jones LLP, Wilmer Cutler Pickering Hale and Dorr LLP, Sidley Austin LLP, FTI Consulting, Inc., and Teneo Capital, LLC (each an "**Appellee**" and collectively, the "**Appellees**") respectfully move this Court, in accordance with Federal Rule of Bankruptcy Procedure 8013(a), for an order dismissing these consolidated appeals as constitutionally moot.[1] NexPoint Advisors, L.P. ("**NexPoint**" or "**Appellant**") does not possess any claim against the bankruptcy estate of Highland Capital Management, L.P. ("**Highland**") that would confer constitutional standing to appeal a bankruptcy court order. NexPoint is not an adverse party with sufficient legal interest to maintain these appeals. These appeals are now moot, presenting no Article III case or controversy and leaving this Court with no constitutional jurisdiction to hear the appeals.[2]

Procedural Posture

These consolidated appeals are presently before this Court pursuant to its *Order of Consolidation* entered on January 11, 2022 [Docket No. 8] (the

[1] *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994).

[2] This motion cites several documents appearing on the docket of the bankruptcy case below, *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj11, U.S. Bankruptcy Court, Northern District of Texas (the "**Bankruptcy Docket**"). Appellees respectfully request that this Court take judicial notice of the Bankruptcy Docket and its contents, **not** as an attempt to supplement the record on appeal but to provide this Court with "information 'capable of accurate and ready determination by resort to a source whose accuracy on the matter cannot reasonably be questioned.'" *Halo Wireless, Inc. v. Alenco Commc'ns Inc. (In re Halo Wireless, Inc.)*, 684 F.3d 581, 597 (5th Cir. 2012) (quoting *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005)) (noting that "it is within our discretion to take judicial notice" of proceedings in other courts). "Thus, this court may review evidence as to subsequent events … which bears upon the issue of mootness." *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1041 (5th Cir. 1994) (finding appeal moot).

"**Consolidation Order**"). The Consolidation Order consolidated five separate appeals[3] filed by NexPoint of the five underlying orders entered by the bankruptcy court approving final applications for compensation of fees and reimbursement of expenses of various estate professionals (collectively, the "**Fee Application Orders**").[4]

On January 7, 2022, the bankruptcy court entered an order approving a stipulation between Highland and NexPoint withdrawing with prejudice the prepetition general unsecured claims against the estate transferred to NexPoint by certain former Highland employees, which claims served as NexPoint's purported basis for standing to appeal. And on January 13, 2022, the bankruptcy court entered an order disallowing and expunging the claim of a former employee purportedly transferred to NexPoint. As a result, NexPoint does not have any prepetition general unsecured claims against Highland's bankruptcy estate. NexPoint has also asserted an administrative claim against Highland for approximately $14 million,[5] but as explained below, that claim has not been allowed. Even to the extent this disputed

[3] The Consolidation Order consolidated the following appeals under case number 3:21-CV-3086-K: Case Nos. 3:21-CV-3086-K, 3:21-CV-3088-X, 3:21-CV-3094-E, 3:21-CV-3096-L, and 3:21-CV-3104-G.

[4] The five Fee Application Orders appealed by NexPoint and pending before this Court pursuant to the Consolidation Order are located at Bankruptcy Court Docket Nos. 3047 (Pachulski Stang Ziehl & Jones LLP); 3048 (Wilmer Cutler Pickering Hale and Dorr LLP); 3056 (Teneo Capital, LLC); 3057 (Sidley Austin LLP); and 3058 (FTI Consulting, Inc.).

[5] Bankruptcy Docket No. 1826.

claim is allowed (which Highland believes will not happen), Highland's confirmed chapter 11 plan provides for payment in full of allowed administrative claims, which means that payment of any unsatisfied administrative claims will not be affected by the Fee Application Orders nor the professionals' fees, which have already been fully paid by Highland to the affected professionals who are the subject of such orders. As such, NexPoint does not have standing to pursue these appeals, because NexPoint's asserted administrative claim would not be pecuniarily affected by the outcome of these appeals. NexPoint is simply not a "person aggrieved" entitled to prosecute these bankruptcy appeals under applicable Fifth Circuit precedent.[6] Therefore, the appeals should be dismissed as constitutionally moot.[7]

Because this motion is brought under Bankruptcy Rule 8013(a), NexPoint's response is due within seven days, and Appellees' reply is due within seven days after that.

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[6] As discussed below, NexPoint also asserts a disputed administrative expense claim against the Highland estate. However, for the reasons discussed below, this asserted administrative claim does not confer appellate standing on NexPoint.

[7] *Manges*, 29 F.3d at 1041:

> Mootness is evaluated by the reviewing court, which may take notice of facts not available to the trial court if they go to the heart of the court's ability to review. *See Board of License Comm'rs v. Pastore,* 469 U.S. 238, 240, 105 S. Ct. 685, 686, 83 L. Ed. 2d 618 (1985) ('When a [post-appeal] development … could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that development should be called to the attention of the Court **without delay**."); … Thus, this court may review evidence as to subsequent events not before the courts below which bears upon the issue of mootness.

(Emphasis in original).

NexPoint Has No General Unsecured Claims Conferring Standing

NexPoint filed two prepetition claims in the bankruptcy case below [Claim Nos. 104, 108]. After Highland objected to the claims, NexPoint agreed to have the claims expunged in July 2020.[8] Following the expungement of its asserted prepetition claims, NexPoint then acquired five prepetition claims filed by five former Highland employees (the "**Employee Claims**").[9] It was on the basis of the Employee Claims that NexPoint objected to the bankruptcy court's approval of the five professional fee applications and subsequently appealed the bankruptcy court's entry of the Fee Application Orders. On January 7, 2022, the bankruptcy court entered an order approving a stipulation[10] under which NexPoint withdrew all of the Employee Claims with prejudice.[11] On January 3, 2022, less than one month after NexPoint commenced the appeals – and four days before NexPoint voluntarily withdrew the Employee Claims – NexPoint filed another notice of claim transfer, purporting to reflect that it had acquired the disputed claim of Hunter Covitz, a former Highland employee (the "**Covitz Claim**").[12] However, on January 13, 2022,

[8] Bankruptcy Docket No. 1155.

[9] *See* Bankruptcy Docket Nos. 2044, 2045, 2046, 2047, and 2266, which are notices of claim transfer.

[10] Bankruptcy Docket No. 3160.

[11] *See Stipulation and Agreed Order Authorizing Withdrawal of Claims Transferred to NexPoint Advisors, L.P.* at Bankruptcy Docket No. 3166.

[12] Bankruptcy Docket No. 3146.

the bankruptcy court entered an order disallowing and expunging the Covitz Claim.[13] Thus, as a result of the entry of these orders, *all of NexPoint's purported prepetition claims against the Highland bankruptcy estate have been either withdrawn or disallowed*.

NexPoint no longer possesses any prepetition claims against the Highland estate that can confer standing on NexPoint to prosecute the appeals nor, as explained below, can NexPoint's asserted administrative claim confer standing.

Summary of Appellant's Claims			
Appellant	**Claims at Time of Appeal**	**Disposition**	**Result**
NexPoint	Claim No. 104	Expunged	No standing
	Claim No. 108	Expunged	No standing
	Employee Claims	Withdrawn / disallowed	No standing
	Covitz Claim	Expunged	No standing
	Administrative Claim	Pending Objection	No standing; Administrative Claim unaffected by appeal

Appellant Lacks Standing; the Appeals Are Now Constitutionally Moot

Standing to appeal a bankruptcy court decision is a question of law.[14] The standard for determining appellate standing in the bankruptcy context is governed by the "person aggrieved" test, which requires a showing that the appellant was aggrieved by the order being challenged,[15] which is an even more exacting standard

[13] *See Order Sustaining the Litigation Trustee's Objection to Proof of Claim Filed by Hunter Covitz (Claim 186)* at Bankruptcy Docket No. 3180.

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

[15] *Id.*

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] NexPoint "must show that [it] was 'directly and adversely affected pecuniarily by the order of the bankruptcy court.'"[18] NexPoint bears the burden of alleging facts sufficient to demonstrate that it has standing to appeal.[19] NexPoint's only interest in the estate is its disputed administrative claim, which is insufficient to confer standing to prosecute these appeals as explained below.

The Fifth Circuit has strictly limited appellant standing in bankruptcy cases:

> Bankruptcy courts are not Article III creatures bound by traditional standing requirements. But that does not mean disgruntled litigants may appeal every bankruptcy court order willy-nilly. Quite the contrary. Bankruptcy cases often involve numerous parties with conflicting and overlapping interests. Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, quite limited.[20]

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

[17] *Id.*

[18] *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).

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

[20] *Technicool*, 896 F.3d at 385 (citations omitted).

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 the Fifth Circuit.[21] The Fifth Circuit 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 because it could reduce recoveries by creditors, whose claims had priority over equity.

Significantly, the Fifth Circuit further held that some theoretical possibility relating to 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.*"[22] The Fifth Circuit 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 interests. In other words, just because Furlough "feels grieved by [the professional's] appointment does not make him a 'person aggrieved' for purposes of bankruptcy standing."[23]

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[21] *Id.* at 384–85.
[22] *Id.* (emphasis added).
[23] *Id.*

The Fifth Circuit's reason for adopting the "pecuniary interest" test for bankruptcy appeals speaks directly to the circumstances under which the Appellant now before this Court has burdened 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.*[24]

The Fifth Circuit again strongly reiterated this approach just one month ago in *Dean v. Seidel (In re Dean)*,[25] 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."[26] The Fifth Circuit stated simply, "Appellants cannot demonstrate bankruptcy standing when the court order to which they are objecting does not directly affect their wallets."[27]

Here, the Fee Application Orders and the outcome of these appeals do not and cannot directly affect NexPoint's wallet. NexPoint does not hold any prepetition claims against Highland's bankruptcy estate, and any possible recovery by NexPoint

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

[25] No. 21-10468, 2021 U.S. App. LEXIS 36022 (5th Cir. Dec. 7, 2021) (a reported decision that has not yet been included in the Fed.4th reporter).

[26] 2021 U.S. App. LEXIS 36022 at *3 (quoting *Fortune Natural Res. Corp. v. United States DOI*, 806 F.3d 363, 367 (5th Cir. 2015)) (emphasis in original).

[27] *Id.* at *4.

on account of its disputed administrative claim is entirely unrelated to and unaffected by the outcome of these appeals because the administrative claim, if allowed, will be paid in full in accordance with Highland's confirmed plan of reorganization and the Bankruptcy Code.[28] Unlike prepetition claims, which are paid *pro rata* pursuant to the terms of a debtor's plan in accordance with the Bankruptcy Code's priority scheme, allowed administrative claims must be paid *in full*, unless otherwise agreed by the holder of an administrative claim. Even in the hypothetical situation in which Highland's objection to the disputed administrative claim is not sustained, such allowed claim would be fully paid independent of the outcome of these appeals and the Fee Application Orders. Moreover, all of the professional fees and expenses authorized under the Fee Application Orders that are the subject of these appeals

[28] *See* 11 U.S. § 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 title 11 of the United States Code (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)* [Bankruptcy Docket No. 1943 at page 113] (the "**Plan**").

have already been paid by Highland to the respective professionals.[29] As such, any potential payment to NexPoint on account of its disputed administrative claim cannot be "directly, adversely, and financially impacted" by the Fee Application Orders or these appeals. Appellant lacks standing because even a reversal of the Fee Application Orders would not "put any money in [Appellant's] pocket,"[30] as required by the Fifth Circuit, because both the Bankruptcy Code and the Debtor's plan of reorganization already mandate the full payment of allowed administrative claims.

The Appeals Are Constitutionally Moot

These appeals have been rendered moot—*i.e.*, non-justiciable under the "Cases and Controversies" Clause of Article III of the U.S. Constitution—because NexPoint lost its purported standing during the pendency of these appeals. The Supreme Court has described mootness as "the doctrine of standing set in a time

[29] Appellees anticipate that Appellant will argue that it is potentially financially impacted by these appeals to the extent there are insufficient funds to satisfy its asserted $14 million administrative claim. This is false. In addition to the fact that Highland has already paid 100% of the amounts owed to the professionals under the Fee Application Orders, Highland's projections filed in connection with the confirmation of the Plan projected payment of approximately 71% of the estimated $273 million of general unsecured claims, which would result in an aggregate distribution of approximately $194 million to general unsecured creditors. *See* Bankruptcy Docket No. 1875-1. Because holders of administrative claims must be fully paid prior to any distributions to unsecured creditors and all professional fee claims have already been paid, there can be no credible argument that Highland would not be able to pay NexPoint's $14 million administrative claim (to the extent it is even allowed) given the substantial projected distribution to the junior unsecured claims.

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

frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)."[31]

The Fifth Circuit Court of Appeals, in addressing a bankruptcy appeal in which the appellant lost standing after the appeal began, held thus: "A controversy is mooted when there are no longer adverse parties with sufficient legal interests to maintain the litigation."[32] A mooted appeal must be dismissed because a "moot case presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents."[33]

Conclusion

As all of NexPoint's asserted general unsecured claims against the Highland estate have either been withdrawn with prejudice or disallowed by the bankruptcy court, NexPoint lost whatever standing it had when it filed its appeals. And the disposition of the appeals would not cause NexPoint any injury on account of its unrelated asserted administrative claim because it is already statutorily entitled to

[31] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (2001) (quoting *Geraghty,* 445 U.S. at 397).

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

[33] *Goldin,* 166 F.3d at 717–18 (citing *Hogan v. Miss. Univ. for Women,* 646 F.2d 1116, 1117 n.1 (5th Cir. 1981)). Mootness in this sense is distinct from the concept of "equitable mootness," which usually pertains to appeals of orders confirming a fully consummated plan of reorganization. Constitutional mootness is a matter of Article III jurisdiction, whereas "equitable mootness" addresses the concern that an appellate court with jurisdiction can only render relief that could inequitably harm third parties not before the court. *See, e.g.*, *Manges*, 29 F.3d at 1039 (comparing constitutional mootness with equitable mootness).

receive full payment for the allowed amount of such claim by operation of the Bankruptcy Code and Highland's confirmed plan. In the words of *Goldin*, these appeals no longer have an appellant with sufficient legal interest to maintain them. The Court should therefore dismiss the appeals as moot.

[Remainder of Page Intentionally Blank]

Dated: January 17, 2022

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CERTIFICATE OF COMPLIANCE WITH RULE 8013

The undersigned hereby certifies that this Motion complies with the type-volume limitation set by Rule 8013(f)(3) of the Federal Rules of Bankruptcy Procedure. This Motion contains 2,986 words.

/s/ Zachery Z. Annable
Zachery Z. Annable

CERTIFICATE OF SERVICE

I hereby certify that, on January 17, 2022, a true and correct copy of the foregoing Motion was served electronically upon all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

/s/ Zachery Z. Annable
Zachery Z. Annable