Docket #0040 Date Filed: 1/21/2022

Case No. 3:21-cv-01895-D

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

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

Reorganized Debtor.

HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS LP, NEXPOINT ADVISORS LP, and THE DUGABOY INVESTMENT TRUST,

Appellants

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee

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

APPELLEE'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL AS CONSTITUTIONALLY MOOT

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

HAYWARD PLLC
Melissa S. Hayward (Texas Bar No. 24044908)
Zachery Z. Annable (Texas Bar No. 24053075)
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Telephone: (972) 755-7100
Facsimile: (972) 755-7110

Counsel for Appellee

1934054220121000000000033

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Appellee replies in further support of its motion for an order dismissing this appeal as constitutionally moot [Doc. #33] (the "**Motion**").[1] Appellants' attempts to confuse the issues of constitutional and prudential standing serve only to demonstrate that no Appellant has standing under any applicable standard. No general unsecured claim, no administrative claim, and no interest in another appeal confers standing on any of these Appellants under the Fifth Circuit's "person aggrieved" standard. Because Appellants have lost whatever standing they may have once had, the appeal is constitutionally moot and should be dismissed.

Standing and Mootness, Re-Clarified

Appellants spill considerable ink attempting to obfuscate concepts of standing and mootness that the Supreme Court and the Fifth Circuit have already clarified. Despite Appellants' presuming to correct Appellee about what the issue "really" is, this Court, respectfully, must begin with a constitutional and jurisdictional inquiry. The Motion presents a critical threshold issue of whether this appeal has been rendered moot—non-justiciable under Article III's "Cases and Controversies" clause—because Appellants have lost their standing during the pendency of this appeal. This *is* the proper first inquiry, says the Supreme Court: mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its

[1] Capitalized terms not defined in this Reply retain the meanings given to them in the Motion.

existence (mootness)."[2] *Chevron* explains why the Appellants' loss of standing renders this appeal constitutionally moot: a "controversy can also *become* moot when the parties lack a legally cognizable interest in the outcome."[3]

Goldin agrees. In that Fifth Circuit case, the bankruptcy appellant lost standing after the appeal began: "A controversy is mooted when there are no longer adverse parties with sufficient legal interests to maintain the litigation." A "moot case presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents." [4]

Appellants try to convince this Court that there are two types of standing—constitutional standing and prudential standing—and that neither has anything to do with constitutional mootness. Not so. *Constitutional mootness arises when standing is lost,* irrespective of the "type" of standing. In bankruptcy appeals, the Fifth Circuit has repeatedly held that standing is judged on an even more stringent standard than in other types of appeals. Appellants seem to argue in their Response that the "prudential" standing is somehow *less* stringent or "permissive." Not so. "The 'person aggrieved' test is an even more exacting standard than traditional constitutional standing …. the 'person aggrieved' test demands a higher causal nexus

[2] *Arizonans for Official English v. Arizona,* 520 U.S. 43, 68 n.22 (1997).
[3] *Chevron, U.S.A. v. Traillour Oil Co.,* 987 F.2d 1138, 1153 (5th Cir. 1993) (emphasis added).
[4] *Goldin v. Bartholow,* 166 F.3d 710, 717 (5th Cir. 1999).

between act and injury ….” Appellants “must show that [they] were ‘directly and adversely affected pecuniarily by the order of the bankruptcy court.’” [5]

The Fifth Circuit’s approach to bankruptcy appellate standing—which leads ineluctably to constitutional mootness because *a loss of standing renders a bankruptcy appeal constitutionally moot*—remains as Appellee described it in the Motion. As *Coho Energy* unequivocally instructs, when an appellant loses its status as a “person aggrieved” after the appeal commences, the appeal becomes constitutionally moot. Prudential standing and constitutional mootness are elements of the same concept leading to a determination of constitutional mootness, not “different doctrines.”[6]

Standing Can Be Lost and Appellants Have Lost Theirs

Appellants fail to address the cases cited in the Motion holding that an appellant can lose its standing by events that occur after the appeal begins.[7] Rather,

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

[6] Appellants’ argument that vacatur is only one remedy for a dismissal on constitutional mootness grounds is wrong. The Supreme Court has overruled that earlier “rule.” *See, e.g., Staley v. Harris Cty., Tex.*, 485 F.3d 305, 310 (5th Cir. 2007) (*en banc*) (“the Supreme Court has since articulated that vacatur is not automatic but is instead an ‘extraordinary’ remedy warranted when … the equities indicate[] that it is appropriate”), citing *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship,* 513 U.S. 18, 23–26 (1994).

[7] For example, *Arizonans for Official English,* 520 U.S. at 68, n.22 (“requisite personal interest … must continue throughout [litigation’s] existence”); *Chevron,* 987 F.2d at 1153 (“controversy can also become moot when the parties lack a legally cognizable interest in the outcome”). *See also WildEarth Guardians v. Pub. Serv. Co. of Colorado,* 690 F.3d 1174, 1182 (10th Cir. 2012) (“Mootness usually results when a plaintiff has standing at the beginning of a case, but, due to intervening events, loses one of the elements of standing during litigation”).

Appellants attempt to counter that argument by mischaracterizing *Smith v. Sperling,* a case with no relevance to standing or appeals. That case held that a plaintiff's death does not affect the fixing of diversity jurisdiction when a civil suit is brought.[8] *Freeport-McMoRan* is also a diversity jurisdiction case making essentially the same ruling. The word "standing" never appears in that decision.

While it is true that standing is determined as of the time litigation begins, *constitutional mootness* and Article III's justiciability requirement place standing in a time frame, such that "[e]ven when an action presents a live case or controversy at the time of filing, subsequent developments … may moot the case."[9]

Subsequent events here—the post-appeal withdrawal of all Appellants' general unsecured claims—stripped Appellants of their standing, rendering this appeal constitutionally moot.

The Covitz Claim Neither Preserves Nor Confers Standing

Another of the subsequent events that deprives Appellants of standing is the disallowance of the Covitz Claim. NexPoint's standing dangles from the gossamer-thin strand of that claim, which the bankruptcy court disallowed.[10] Appellants

[8] Appellants pulled a quotation from that case completely out of legal and factual context and represented to this Court that it says something it doesn't say and relates to a legal issue it doesn't mention.

[9] *Hall v. Beals,* 396 U.S. 45, 48 (1969) (election appeal; appellants lost standing by becoming eligible to vote under the Colorado law sued on) and subsequent events (the 1968 election had occurred)).

[10] Bankruptcy Docket No. 3180 (the "**Disallowance**"), in the *Appendix* filed contemporaneously with this Reply ("**Appendix**") at Exhibit 1.

respond in two ways: (1) Appellants claim, for the first time and in direct conflict with written representations to the bankruptcy court months ago, that NexPoint acquired the Covitz Claim in March 2021, despite only filing notice of that purported claim transfer on January 3, 2022; and (2) Appellants note that the bankruptcy court's disallowance of the Covitz Claim is not yet a final order. Neither argument changes the conclusion that the Covitz Claim does not and cannot confer appellate standing.

On June 18, 2021, the bankruptcy court entered a *sua sponte* order[11] (the "**Dondero Disclosure Order**"), requiring "Non-Debtor Dondero-Related Entities" who "seem to have tenuous standing" (including all three Appellants) to "file a Notice in this case disclosing thereon … whether the entity is a creditor of the Debtor (explaining in reasonable detail the amount and substance of its claims)." The bankruptcy court wanted to "fully understand whether such parties … have statutory or constitutional standing with regard to recurring matters on which they frequently file lengthy and contentious pleadings."

In response to the Dondero Disclosure Order, Appellants and their affiliates filed the required notice[12] on July 9, 2021, in which NexPoint specifically listed out, by name and amount, all five Employee Claims it allegedly owned as of the filing

[11] Bankruptcy Docket No. 2460 [Appendix at Exhibit 2].

[12] Bankruptcy Docket No. 2543 (the "**Disclosure Notice**") [Appendix at Exhibit 3].

of the Disclosure Notice, but made no mention of the Covitz Claim. NexPoint then represented to this Court for the first time earlier this week that it has owned the Covitz Claim since March 2021, some four months before filing the Disclosure Notice. How odd.

Whether NexPoint owns the Covitz Claim or not, the Covitz Claim cannot confer standing because it has been disallowed. NexPoint argues that standing is preserved when a claim disallowance is not yet final. Appellants cite no case supporting that argument and, worse, misrepresent the Plan as to whether funds must be reserved for a disallowed claim. The Plan does not require funds to be reserved for *disallowed* claims.[13] The Covitz Claim is no longer "disputed." It is, in the bankruptcy court's words, "disallowed with prejudice and expunged in its entirety."

Bankruptcy Code § 1109 Does Not Confer Appellate Standing

Bankruptcy Code § 1109(b) gives certain parties the right "to appear and to be heard on any issue in a case" under the Bankruptcy Code. It says nothing about appellate standing, nothing about whether an entity is a "person aggrieved," and nothing about the constitutional and jurisdictional implications of a loss of standing and resulting mootness.

Appellants cite *Southern Pacific*, a non-controlling case, for the proposition that Bankruptcy Code § 1109(b) confers appellate standing. *Southern Pacific*

[13] *See* ROA 422 regarding "Disputed Claim Reserve Amount."

doesn't say that. *Southern Pacific* decided: first, whether the statutory creditor committee was a "person aggrieved" with standing to oppose the appeal (even though it was not a named appellee); and second, only *after* concluding that it was a "person aggrieved," whether § 1109(b) *prevented* the committee from being an *appellee* despite being a party-in-interest in the bankruptcy case below.[14]

The *Southern Pacific* court still applied the Fifth Circuit's "person aggrieved" test, ruling the committee had appellate standing because the "pecuniary interests of the Committee's members are adversely affected by entry of the order confirming" the plan.[15] Only *after* concluding that the committee satisfied the "person aggrieved test" did the court address whether § 1109(b) *precluded* the committee's appellate standing. The court did *not* conclude that § 1109(b) independently confers appellate standing. Appellants attempt to use one non-controlling case to confuse appellate standing with whether a party has a right be heard in the bankruptcy court. One standard has nothing to do with the other. Section 1109(b) does not provide Appellants a basis for appellate standing.

[14] *Id.* at 790: "Although the issue of standing is 'the threshold question in every federal case,' it is not clear that appellant standing is the proper inquiry for the court in this case …. [C]ourts are rarely (if ever) called upon to decide whether a party has standing to be an appellee."

[15] *Id.* at 791.

The Administrative Claim Does Not Confer Standing

Appellants quarrel with the procedural posture of the Administrative Claim and complain that they have not been paid on account of that claim (without disputing or acknowledging that the Plan does not require the payment of a disputed claim). Appellants do *not* quarrel with the simple fact that the outcome of this appeal cannot affect the Administrative Claim or payment on it in any pecuniary way.

The Administrative Claim is subject to disallowance at an evidentiary hearing in the near future. But even if the Administrative Claim is allowed, it will be paid in full irrespective of the Indemnity Sub-Trust's existence.[16] Appellants do not dispute that. The outcome of this appeal can have no pecuniary effect on the Administrative Claim,[17] so no appellate standing can be based on it.

Plan Appeal Standing Does Not Confer Standing in This Appeal

Appellants make much of their dissatisfaction with certain Plan provisions. But simply because Appellants feel aggrieved by provisions having nothing to do

[16] *See* Plan, ROA 410 *et seq*. The disclosure statement describing the Plan contained a projection showing that $154 million was available to pay general unsecured claims under the Plan, meaning that all administrative expense claims—which have the highest payment priority of all unsecured claims under Bankruptcy Code §§ 503, 507, and 1129(a)(9)—will receive full payment under any reasonably conceivable circumstance. *See* ROA 1244; *see also* Confirmation Order, ROA 516–518.

[17] "The person aggrieved test does not take into account every injury caused by the bankruptcy case … but instead asks whether 'the *order* of the bankruptcy court … directly and adversely affect[s] the appellant pecuniarily.'" *Neutra Ltd. v. Terry (In re Acis Capital Mgmt. L.P.),* 604 B.R. 484, 510 (N.D. Tex. 2019) (Fitzwater, J., italics in original).

with the Indemnity Sub-Trust does not mean they have appellate standing here. It doesn't, and they don't.

Appellants neglect to even mention to this Court that *they are also Appellants in an appeal of the bankruptcy court's order confirming the Plan* (the "**Confirmation Order**") *now before the Fifth Circuit Court of Appeals*[18] and that these Appellants have made the "sweeping permanent injunctions against the Appellants" they complain about in the Response the subject of the Plan Appeal.

Aside from failing to inform this Court that they are already seeking redress for their Plan-related objections in the Plan Appeal, Appellants have failed to articulate how the Indemnity Sub-Trust "directly" and "pecuniarily" affects Appellants' interests in the Plan's injunctive provisions.

Because the Indemnity Sub-Trust was critical to the Plan's effectiveness, reversing the Indemnity Sub-Trust Order would directly and adversely affect Highland's and the Claimant Trust's management personnel, who rely on the Indemnity Sub-Trust, causing them to resign, immediately jeopardizing the Plan's success. This nexus between the Indemnity Sub-Trust and the Plan is why this appeal is also equitably moot, but it has nothing to do with establishing *standing in this appeal*.

[18] *NexPoint Advisors, L.P., et al. v. Highland Capital Management, L.P.,* U.S. Court of Appeals for the Fifth Circuit, Case No. 21-10449 (the "**Plan Appeal**").

Even this Court's reversal of the Indemnity Sub-Trust Order cannot affect the enforceability of the Plan's provisions, or the Plan's effect on whatever claims Appellants believe they have against non-debtors. While those claims may accord Appellants with standing in the Plan Appeal, neither those third-party claims nor Appellants' participation in the Plan Appeal can confer standing in *this* appeal.

Nothing about the Plan Appeal or Appellants' participation in it changes the simple proposition that must, respectfully, be this Court's singular focus when considering the Motion: whether the Indemnity Sub-Trust Order—not the Confirmation Order, not some other order, but *the Indemnity Sub-Trust Order*—"directly and adversely affect[s] the appellant[s] pecuniarily."[19] *That* is the question Appellants cannot satisfactorily answer. With no claims or economic interests that could be directly affected "pecuniarily" by the outcome of this appeal, Appellants do not have standing.

This appeal is constitutionally moot and should be dismissed.

[19] *Neutra Ltd. v. Terry,* 604 B.R. at 510 (quoting *Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy Inc.))*, 395 F.3d 198, 202 (5th Cir. 2004); *Furlough v. Cage (In re Technicool Sys.)*, 896 F.3d 382, 385 (5th Cir. 2018)), holding that Neutra lacked standing because its "interests"—losing control of its stock and its value by losing control of Acis—were "insufficient to confer standing because losing control over an entity is not, in itself, a *pecuniary* injury." Similarly, here, Appellants' loss of control over its third-party claims against non-debtors because of certain provisions of a Plan that became effective because of an unrelated Indemnity Sub-Trust's creation, is not a "pecuniary injury" created by the Indemnity Sub-Trust Order. Just as this Court found Neutra had no standing, it likewise should find that these Appellants have no standing.

Dated: January 21, 2022

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

HAYWARD PLLC

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

Counsel for Highland Capital Management, L.P.

CERTIFICATE OF COMPLIANCE WITH RULE 8013

The undersigned hereby certifies that this Reply complies with the type-volume limitation set by Rule 8013(f)(3) of the Federal Rules of Bankruptcy Procedure. This Reply contains 2,546 words.

/s/ Zachery Z. Annable
Zachery Z. Annable

CERTIFICATE OF SERVICE

I hereby certify that, on January 21, 2022, a true and correct copy of the foregoing Reply was served electronically upon all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

/s/ Zachery Z. Annable
Zachery Z. Annable