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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Reorganized Debtor.	Chapter 11 Case No. 19-34054-sgj11
NEXPOINT ADVISORS, L.P., Appellant.	Case No. 3:21-cv-03086-K *consolidated with:*

[1] The Reorganized Debtor's last four digits of its taxpayer identification number are 6725. The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850; Dallas, Texas 75201.

v. PACHULSKI STANG ZIEHL & JONES LLP, Appellee.	Case No. 3:21-cv-03088-K Case No. 3:21-cv-03094-K Case No. 3:21-cv-03096-K Case No. 3:21-cv-03104-K

APPELLANT NEXPOINT ADVISORS, L.P.'S OPPOSITION TO APPELLEES' JOINT MOTION TO DISMISS APPEALS AS CONSTITUTIONALLY MOOT

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OPPOSITION TO MOTION TO DISMISS

Appellant NexPoint Advisors, L.P. (the "**Appellant**" or "**NexPoint**"), by and through its counsel of record, the law firms of Schwartz Law, PLLC and Jain Law & Associates PLLC, pursuant to Rule 8013 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), hereby files its Opposition (the "**Opposition**") to Appellees Pachulski Stang Ziehl & Jones LLP ("**PSZ&J**"), Wilmer Cutler Pickering Hale and Dorr LLP ("**Wilmer Cutler**"), Sidley Austin LLP ("**Sidley**"), FTI Consulting, Inc. ("**FTI**"), and Teneo Capital, LLC's ("**Teneo**," and collectively with PSZ&J, Wilmer Cutler, Sidley, and FTI, the "**Appellees**") *Joint Motion to Dismiss Appeals as Constitutionally Moot* [ECF No. 14][2] (the "**Motion**").

This Opposition is made and based on the accompanying Memorandum of Points and Authorities, all pleadings and papers on file with the Clerk of the Court in the above-captioned bankruptcy case (Case No. 19-34054-sgj11) (the "**Bankruptcy Case**") in the United States Bankruptcy Court for the Northern District of Texas (the "**Bankruptcy Court**") and consolidated appellate cases (Lead Case No. 3:21-cv-03086-K, *consolidated with* Case Nos. 3:21-cv-03088-K, 3:21-cv-03094-K, 3:21-cv-03096-K, and 3:21-cv-03104-K) (each an "**Appeal**," and collectively, the "**Appeals**") in the United States District Court for the Northern District of Texas (the "**District Court**"), judicial notice of which is respectfully requested pursuant to Rules 201 and 1101 of the Federal Rules of Evidence and Rule 9017 of the Federal Rules of Bankruptcy Procedure, and any arguments of counsel entertained by the Court at the time of any hearing on the Motion.

[2] All citations to BK ECF No. shall refer to docket entries in Case No. 19-34054-sgj11 in the United States Bankruptcy Court for the Northern District of Texas. All citations to ECF No. shall refer to docket entries in the lead case of the consolidated appeals — Lead Case No. 3:21-cv-03086-K, *consolidated with* Case Nos. 3:21-cv-03088-K, 3:21-cv-03094-K, 3:21-cv-03096-K, and 3:21-cv-03104-K — in the United States District Court for the Northern District of Texas.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

These appeals concern NexPoint's objections to over $45 million in fees and expenses of the Appellees arising out of the bankruptcy estate of Highland Capital Management, L.P. ("**Highland**"). These appeals also implicate a parallel proceeding pending before the Bankruptcy Court. NexPoint is a defendant in an adversary proceeding in the Bankruptcy Court which seeks to hold NexPoint liable for hundreds of millions of dollars of Highland debt, including "in excess of $40 million in professional fees. The existence of this adversary proceeding, and the specific and germane relief sought against NexPoint based, in part, on the very professional fees at issue here is rendered all the more conspicuous by its complete absence from Appellees' Motion.

The endgame envisioned by NexPoint's opponents and in the adversary proceeding is clear: preclude NexPoint from defending itself in the adversary proceeding with respect to the fees. *See, e.g., Osherow v. Ernst & Young, LLP (In re Intelogic Trace, Inc.)*, 200 F.3d 382, 389-391 (5th Cir. 2000) (finding that prior award of professional fees to accounting firm under 11 U.S.C. § 330 was *res judicata* of a bankruptcy trustee's litigation claims brought later against that same firm). The injury visited on NexPoint by the Bankruptcy Court's fee award orders in favor of the Appellees continues to recur in the adversary proceeding. Appellees are familiar with the adversary proceeding (appellee and joint movant Sidley is co-counsel for the plaintiff in that action). Yet, Appellees argue to this Court that NexPoint does not have a "sufficient legal interest" to maintain these appeals, and that the appeals should therefore be dismissed as constitutionally moot. To the contrary, NexPoint has a very real and immediate interest as to whether the payment of over $45 million in fees and expenses out of the Highland bankruptcy estate was appropriate, given that NexPoint is currently being sued for those fees in the adversary proceeding, with joint

movant Sidley helping lead the charge.

In addition, NexPoint has a claim pending against the Highland bankruptcy estate for over $14 million in expenses of administration that must be allowed under 11 U.S.C. § 503(b) and are entitled to the same distribution priority accorded to the professional fees at issue here under 11 U.S.C. § 507(a)(2). *See* 11 U.S.C. § 503(b)(3) (allowing awards of professional fees as expenses of administration); *see also* 11 U.S.C. § 507(a)(2) (assigning second distribution priority to expenses of administration allowed pursuant to 11 U.S.C. § 503(b)). This claim independently provides NexPoint with a sufficient legal interest and standing to maintain these appeals. As NexPoint will demonstrate below, when the actual language of Highland's plan governing the issues surrounding payment of expenses of administration is examined, as well as the relevant case law, the Court will see that the Appellees' overtures fall far short of meeting the formidable burden of demonstrating that Highland's failure to pay NexPoint will not recur. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 97 (2013) (mandating that litigants seeking to moot a case through voluntary compliance measures bear the "formidable burden" of establishing that it is absolutely clear that the challenged conduct cannot reasonably be expected to recur); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("The 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.") (citation omitted).

Finally, it bears noting that the Motion makes no reference to the statutory text. *See* 11 U.S.C. §§ 330(a) (identifying "parties in interest" as the class of persons to which notices of applications seeking awards of professional compensation must be directed), 330(a)(2) (including within the class of persons who may move the Bankruptcy Court for an order reducing professional compensation "parties in interest"), and 1109(b) (providing an illustrative, not

exhaustive, list of entities that qualify as parties in interest in a chapter 11 case pursuant to 11 U.S.C. § 103(g)). Congress's decision to categorize the list of entities that may object to applications seeking an award of professional fees broadly through its use of the statutory term "parties in interest" in both 11 U.S.C. §§ 330(a) and 330(a)(2) cannot and should not be restricted to a narrower category of persons on appeal based on judicial conceptions of prudence. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied … it cannot limit a cause of action Congress has created merely because 'prudence' dictates." (quotation marks in original) (citation omitted); *see also Excel Willowbrook, LLC v. JP Morgan Chase Bank, N.A.*, 758 F.3d 592, 603 n. 34 (5th Cir. 2014) (observing that *Lexmark*'s impact on prudential standing doctrines is generally an open issue in the Fifth Circuit). Denying standing to appeal in the name of prudence impermissibly limits a cause of action in violation of *Lexmark*.

For the foregoing reasons and based on the arguments that follow, NexPoint has standing and these appeals are not moot.

I. BACKGROUND AND RELEVANT FACTS

On October 16, 2019, Highland commenced a voluntary case under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. By order entered on December 4, 2019, venue of Highland's bankruptcy case was transferred from the Delaware Court to the Bankruptcy Court for the Northern District of Texas, See BK ECF No. 1. On February 22, 2021, the Bankruptcy Court entered its *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified) and (II) Granting Related Relief*. BK ECF No. 1943. Attached as **Exhibit A** to the Confirmation Order is the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified)* (the

"**Confirmed Plan**"). By its terms, the Confirmation Order confirmed the Confirmed Plan. BK ECF No. 1943, pgs. 61-62 of 162, ¶ A n. 11).

Appellees were retained professionals in the Bankruptcy Case. Appellees filed their Final Applications for Compensation and Reimbursement of Expenses (**"Final Fee Applications"**) on October 8, 2021. See BK ECF Nos. 2902, 2903, 2904, 2906 and 2907. NexPoint timely filed its Omnibus Objection to the Final Fee Applications. BK ECF No. 2977. NexPoint requested more time for its fee expert, aided by "Legal Decoder" software, to review the Final Fee Applications but also made specific objections as to billings in the Final Fee Applications which appeared to be unnecessary, excessive in amount and/or redundant. BK ECF No. 2977, pgs. 12-14.

On October 15, 2021, Marc S. Kirschner, as Litigation Trustee of the Litigation Sub-Trust formed under the Confirmed Plan, filed suit against NexPoint and a number of other defendants (the **"Adversary Proceeding"**). BK ECF 2934. The complaint in the Adversary Proceeding seeks to hold NexPoint liable for hundreds of millions of dollars of Highland debt, including "in excess of $40 million in professional fees in connection with the bankruptcy." BK ECF 2934, pgs. 39, 77, 86-88.

On November 17, 2021, the Bankruptcy Court held a hearing concerning the Final Fee Applications. See BK ECF Nos. 3045 & 3072. NexPoint argued during the hearing that the filing of the complaint in the Adversary Proceeding against NexPoint (in addition to the claims filed by NexPoint against the Highland bankruptcy estate) conferred standing on NexPoint to challenge the Final Fee Applications:

> So I think there are two aspects to standing. One, there are claims that have been filed by NexPoint… Two, NexPoint now, since the filing of the final applications, is being sued and is being asked to pay all unpaid claims of this estate. And how the final fee applications are ultimately resolved I think directly affects the amount of damages that NexPoint may be liable for under that complaint. And of course, Your Honor, NexPoint disclaims any liability under that complaint. Nevertheless,

> I think that's a second aspect of standing, in addition to NexPoint's claims. And I think it's an important one, Your Honor, because I would highlight that if Mr. Kirschner is going to bring the costs and damages related to this bankruptcy, if any, against NexPoint, including legal fees incurred, either now or somewhere down the road the professionals' legal fees in this case will need to be vetted, especially if NexPoint is going to be asked to pay them. (See Appendix, Exhibit A, Transcript of November 17, 2021 hearing, App. 14; See also App. 19)

II. STANDARD OF REVIEW

Appellees argue that NexPoint does not have standing to pursue these appeals and that, therefore, the appeals are constitutionally moot. When ruling on a motion to dismiss for want of standing, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy, Inc.)*, 395 F.3d 198, 202 (5th Cir. 2004) (internal quotations omitted). The Fifth Circuit uses a "permissive standard to assess the actuality of the harm alleged by appellant for the purpose of standing." *Id.*

III. LEGAL ARGUMENT

A. NexPoint's Status As A Defendant In The Adversary Proceeding Establishes That It Has Article III Standing And That NexPoint Is A "Person Aggrieved" By The Bankruptcy Court Order

Article III (or constitutional) standing "implicates the federal judiciary's power to adjudicate disputes." *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation*, 32 F.3d 205, 207 (5th Cir. 1994) "An indirect financial stake in another party's claims is insufficient to create [Article III] standing on appeal" and "the injury or threat of injury must be both real and immediate not conjectural or hypothetical." *Id.* at 208. In addition to constitutional limitations to standing on appeal there are also prudential limitations on its exercise. *Id.* (internal citations and quotations omitted). The Fifth Circuit applies the "person aggrieved" test to appellants as a prudential standing requirement in bankruptcy matters. *In re Coho Energy, supra* at 202-203. Under the

"person aggrieved" test, an appellant must show that it was "directly and adversely affected pecuniarily by the order of the bankruptcy court in order to have standing to appeal." *Id*. at 203 (internal quotations omitted).

In this case, all the elements of Article III standing are present, and Appellees' position on prudential standing is untenable.

1. **NexPoint has Article III standing**

The "threat of injury" to NexPoint is "real and immediate" as opposed to merely "conjectural or hypothetical": NexPoint is a defendant in the Adversary Proceeding in which the Litigation Trustee seeks to hold it liable for the professional fees in excess of $45 million. BK ECF 2934, pgs. 39, 77, 86-88. That injury is directly and immediately traceable to the Appellees' conduct in securing awards of professional fees and expense reimbursements under 11 U.S.C. § 330. By securing an order reversing the Bankruptcy Court's fee award orders to Appellees, NexPoint will be entitled to challenge its alleged liability exposure in the Adversary Proceeding. This Court on appeal, and the Bankruptcy Court on remand, can fashion relief that will remedy NexPoint's injury. This case is not constitutionally moot. Rather, Appellees' primary arguments appear to rest on prudential, rather than constitutional considerations and are addressed below.

2. NexPoint must be considered a "person aggrieved" under the circumstances

Appellees' position on prudential standing is untenable due to the exclusive jurisdiction conferred by Congress to the Bankruptcy Court, both with respect to the appointment of officers of the estate or estate professionals, as well as the authority to award those same professionals fees under 11 U.S.C. § 330 from property of the bankruptcy estate. To begin, subchapter II of Chapter 3 of the Bankruptcy Code, entitled "Officers" delineates the officers of the bankruptcy estate. *See* 11 U.S.C. §§ 321 – 333. As a general matter, the bankruptcy trustee is the representative of the

bankruptcy estate. 11 U.S.C. § 323. Officers of the estate and estate professionals are appointed by court order upon application under 11 U.S.C. §§ 327 and 1103. Congress has vested exclusive jurisdiction over all matters concerning 11 U.S.C. § 327 (and, presumably by necessary implication) 11 U.S.C. § 1103 in the bankruptcy court. *See* 28 U.S.C. § 1334(e)(2). Also vested in the exclusive jurisdiction of the bankruptcy court is property of a debtor's bankruptcy estate. *See* 28 U.S.C. § 1334(e)(1). It is from the *res* of the bankruptcy estate that professionals draw when being paid professional fees awarded under 11 U.S.C. § 330. There simply is no enforceable claim for compensation absent an award of professional compensation under 11 U.S.C. § 330 by the very bankruptcy court under whose auspices those same professionals are appointed and under whose supervision they serve. *See, e.g. Dery v. Cumberland Cas. & Sur. Co. (In re 5900 Assocs.)*, 468 F.3d 326, 328 (6th Cir. 2006) ("We agree that 11 U.S.C. § 330 establishes *the exclusive means* of allowing a claim for professional fees in a bankruptcy proceeding."); *see also In re On-Site Fuel Serv.,* 627 B.R. 644, 654 (Bankr. S.D. Miss. 2021) (citing *Dery* and observing that "the award of professional fees in bankruptcy is governed by federal, not state law) (citations omitted). This also explains why claim preclusive or *res judicata* effect(s) can flow from a bankruptcy court's award of professional compensation under 11 U.S.C. § 330. *See In re Intelogic Trace, Inc.*, 200 F.3d at 389-391. It also demonstrates why Appellees' legal position here is untenable.

As a defendant in the Adversary Proceeding, NexPoint is potentially on the hook for professional fees awarded to the Appellees. The only court with jurisdiction over the professionals and statutory officers of Highland's bankruptcy estate and estate property is the Bankruptcy Court. *See* 28 U.S.C. §§ 1334(e)(1) and 1334(e)(2). The Bankruptcy Court is, likewise, vested with the exclusive authority to award those same professionals fees and expense reimbursements under 11 U.S.C. § 330. *In re 5900 Assocs.*, 468 F.3d at 328. Once Appellees' fee award orders become

final on direct review, they are entitled to preclusive effect – that is, assuming the elements of *res judicata* are otherwise satisfied. *See In re Intelogic Trace, Inc.*, 200 F.3d at 389-391. If NexPoint did not object to Appellees' respective requests for an award of professional fees and expense reimbursements under 11 U.S.C. § 330 and simply defended the matter in the Adversary Proceeding, Appellees and the Litigation Trust could argue that NexPoint is estopped from contesting the final fee orders of the Bankruptcy Court. This places NexPoint in a Catch-22. NexPoint cannot be subject, on the one hand, to the claim preclusive effect(s) of Appellees' fee award orders but, at the same time, fail to meet the "person aggrieved" standard for appellate standing. Appellees cannot and should not be allowed by this Court to have it both ways. The prospect of the *res judicata* effect of Appellees' fee award orders necessarily renders NexPoint a "person aggrieved" by those orders.

To hold otherwise, this Court would have to construe the statutory and jurisdictional principles discussed above to mean that: (a) notwithstanding 11 U.S.C. § 330's multiple uses of the term "parties in interest" to define the class of persons who may seek a reduction in an award of professional fees; (b) the offensive assertion of the very same professional fees as damage claims against NexPoint in the Adversary Proceeding; and (c) the specter of claim preclusive or *res judicata* effect of the fee orders at issue here, NexPoint somehow does not have a sufficient pecuniary interest in the matter to qualify as a "person aggrieved" and is prevented from seeking appellate review of the Bankruptcy Court orders. This cannot be the case. Rather, NexPoint is the paradigmatic example of a "person aggrieved" by the Bankruptcy Court's professional fee awards to Appellees – after all, NexPoint is being sued for the payment of those same fees.

Indeed, on nearly identical facts, the United States Bankruptcy Panel for the Ninth Circuit (in an unpublished decision) reversed and remanded a bankruptcy court's order denying a party

objecting to professional fees standing where the objecting party's standing was predicated upon her liability to pay any amounts awarded pursuant to 11 U.S.C. § 330 that were not paid by the bankruptcy estate. *See, e.g., Castellucci v. Hinds (In re Castellucci)*, 2007 Bankr. LEXIS 4874, **19-20 (B.A.P. 9th Cir. (July 26, 2007). NexPoint respectfully offers the *Castellucci* Court's opinion and reasoning as highly persuasive authority, asks that this Court adopt its reasoning, and find that NexPoint has standing on appeal to challenge the orders at issue here.

a. In addition, NexPoint must be considered a "person aggrieved" because the interest at issue in these appeals, whether or not the professional fees paid out of the bankruptcy estate are actual, reasonable and necessary, is an interest protected by the Bankruptcy Code

A defendant in an adversary proceeding may satisfy the "person aggrieved" standard if its "appeal attempts to defend an interest that is protected by the Bankruptcy Code." *Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.)*, 764 F.3d 1321, n. 4 (11th Cir. 2014) (citing *Kabro Assocs., LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.*), 111 F.3d 269, 273 (2nd Cir. 1997) for allowing an unsuccessful auction bidder to challenge the bankruptcy court's approval of a transaction because the appeal protected the "inherent fairness of a bankruptcy proceeding."); see also *Consol Energy, Inc. v. Murray Energy Holdings Co. (In re Murray Energy Holdings Co.)* 624 B.R. 606, 614 (B.A.P. 6th Cir. 2021) ("To be a "person aggrieved" the bankruptcy court's order must impede the person's interests in other litigation, and those interests must be interests the Bankruptcy Code intends to protect.")

The interest at issue in these appeals, ensuring that professional fees paid by the bankruptcy estate are actual, reasonable and necessary, is an important interest under the Bankruptcy Code. 11 U.S.C. § 330 allows for an award of "reasonable compensation" only for those services which are "actual" and "necessary". Accordingly, an application for compensation and reimbursement of expenses must demonstrate that the professional's services were necessary and conferred a

benefit to the estate or its creditors. *In re Engel*, 124 F.3d 567, 573 (3d Cir. 1997) (citing *In re Arkansas Co., Inc.* 798 F.2d 645, 650 (3d Cir. 1986) (other citation omitted)). Proper review of fee applications and, where necessary, modifications under 11 U.S.C. §330 is critical "because realistically speaking, the legal market functions imperfectly in bankruptcy, as the debtor 'client' and other interested parties are often unable or unwilling to contest the fees charged." *In re Busy Beaver Bldg. Ctrs.*, 19 F.3d 833, 848 (3rd Cir. 1994).

Because the interest at issue in these appeals, whether or not the professional fees awarded were actual, reasonable and necessary, is an interest protected by the Bankruptcy Code and the pending Adversary Proceeding seeks to hold NexPoint liable for those fees, NexPoint has standing to challenge the fee award. *In re Murray Energy Holdings Co., supra.*

B. Appellees' Arguments Against NexPoint's Standing Based On Its Extant Administrative Expense Claim Are Bereft Of Any Support In The Law And Are Otherwise Without Merit.

The crux of Appellees' argument with respect to NexPoint's extant administrative expense claim is as follows:

> Appellant lacks standing because even a reversal of the Fee Application Orders would not "put any money in [Appellant's] pocket," 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 expense claims*.

Motion at pg. 14 of 19 (emphasis added) (citation omitted).

Appellees' presentation of what may appear to be an ironclad guaranteed payment is misleading. First, Highland's bankruptcy estate and/or the Litigation Trust continues to contest liability on NexPoint's administrative expense claim. So, this is not a case involving a plaintiff who, notwithstanding a defendant's offer of complete relief sought in the litigation, simply will not take "yes" for an answer. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 184 (2016)

(Roberts, C.J.) (dissenting).

More problematic, however, is the language of Highland's Confirmed Plan. Since the Appellees' argument on this point hinges largely on the Plan, it is important to place the Plan's actual language before the Court:

> On the later of the Effective Date or the date on which an Administrative Expense Claim becomes an Allowed Administrative Expense Claim, or, in each such case, as soon as practicable thereafter, each Holder of an Allowed Administrative Expense Claim (other than Professional Fee Claims) will receive, in full satisfaction, settlement, discharge and release of, and in exchange for such Allowed Administrative Expense Claim **either** (i) payment in full in Available Cash for the unpaid portion of such Allowed Administrative Expense Claim; **or (ii) such other less favorable treatment as agreed to in writing by the Debtor or the Reorganized Debtor, as applicable, and such Holder…**

(Confirmed Plan; BK ECF No. 1943, pg. 113 of 161, Art. II, ¶ A) (emphasis added).

Appellees contend the language recited above is sufficient to moot NexPoint's appeal to the extent NexPoint's standing is predicated upon its administrative expense claims. But as the Court can plainly see from the highlighted language, the Confirmed Plan (written as it is in the disjunctive) merely contemplates an agreement to reach an agreement, and nothing more. This falls far short of meeting the "formidable burden" of demonstrating with absolute clarity that Highland's failure to pay NexPoint will not recur, as demanded by the Supreme Court in *Already, LLC, supra* and, therefore, fails as a basis to moot NexPoint's standing here.

As for what the Bankruptcy Code commands, Appellees' optimism outpaces Congress's expressed skepticism as to promises made in confirmed plans. For instance, under 11 U.S.C. § 1112(b)(4)(N), a material default (such as not paying an allowed administrative expense claim) under a confirmed plan constitutes an enumerated instance of cause for dismissal or conversion of a bankruptcy case. If confirmation of a plan made the prospect of plan payments absolutely clear

and certain within the meaning of the Supreme Court's decision in *Already, LLC*, it is not clear what purpose this statutory provision serves. Congress, rather, understood that chapter 11 cases often fail to reach plan confirmation, and those that do often feature debtors who often fail to honor the promises made in confirmed plans. Section 1112(b)(4)(N) was included in the Bankruptcy Code with these realities in mind. By its terms, therefore, the Bankruptcy Code does not, as Appellees contend in error, guarantee payment. Appellees' arguments, therefore, find no support in either the Confirmed Plan or the Bankruptcy Code and fall far short of meeting the heavy and formidable requirement of demonstrating that the conduct of which NexPoint complains in its administrative expense claim is not likely to recur.

Furthermore, Appellees' arguments are based on "projections" of expected recoveries under the Confirmed Plan, the description of which is buried in a footnote in the Motion. *See Motion* at pg. 14 of 19 n. 29, citing the financial projections set forth at BK ECF No. 1875-1. The Court may be interested to learn that those projections are qualified by the following disclaimers:

> These estimates and forecasts contain significant elements of subjective judgment and analysis that may or may not prove to be accurate or correct. **There can be no assurance that these statements, estimates and forecasts will be attained and actual outcomes and results may differ materially from what is estimated or forecast herein. These Projections should not be regarded as a representation of [Development Specialists, Inc.] that the projected results will be achieved.**

(BK ECF No. 1875-1, pg. 2 of 8) (emphasis added).

Appellees have not explained how projections, the accuracy of which is expressly disclaimed by the professional firm that prepared them (DSI), can somehow serve as a basis for guaranteed payment of NexPoint's administrative expense claim. The fact that the Appellees have already been paid enhances, rather than detracts from NexPoint's standing. If NexPoint's administrative expense claim is allowed, then that claim would have the same distribution priority

under 11 U.S.C. § 507(a)(2) as the Appellees' awards of professional fees and expense reimbursements from the Bankruptcy Court. In a zero-sum scenario in which there are insufficient funds to pay all administrative expense claims in full, reduction and disgorgement of professional fees and expense reimbursements already paid to Appellees would inure to the direct benefit of NexPoint. Again, Appellees' arguments fall far short of carrying the formidable burden that Appellees must establish to moot NexPoint's appellate standing based on its administrative expense claim. NexPoint's appeal, therefore, is not moot. NexPoint qualifies both as a party in interest under 11 U.S.C. § 1109(b) due to its creditor status on account of its administrative expense claim and is a party aggrieved by the fee award orders at issue in these appeals.

C. Appellees' Arguments Based On the Person-Aggrieved Standard Cannot Be Squared With The Text Of 11 U.S.C. §§ 330 and 1109(b) And The Supreme Court's Decision In *Lexmark*.

Both 11 U.S.C. §§ 330(a) and 330(a)(2) delineate the zone of interests to include as eligible movants and objecting parties authorized to seek reductions of requests for awards of professional fees and expense reimbursements from the Bankruptcy Court as "parties in interest." The statutory term, "party in interest", in turn is defined for purposes of chapter 11 in 11 U.S.C. § 1109(b). Contrary to Appellees' argument, this Circuit has expressly recognized that the filing of a proof of claim is not necessary for an entity to qualify as either a creditor or party in interest under the Bankruptcy Code. *See Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405, 410 (5th Cir. 2017). Nevertheless, NexPoint qualifies as a creditor and party in interest by virtue of its request for payment of expenses of administration under 11 U.S.C. § 503(b)(1), as well as a party in interest under 11 U.S.C. § 1109(b) by virtue of its status as a defendant in the Adversary Proceeding in which the damages claim is based, in part, on the professional fees at issue in these appeals. Nowhere in their Motion do the Appellees even mention the concept of "party in interest"

or cite 11 U.S.C. § 1109(b). Their entire argument, instead, rests on the notion the prudential doctrine of the "person/party aggrieved" can somehow restrict the ability of parties in interest to appeal from adverse judgment under 11 U.S.C. § 330 separately and independently from, and in addition to, statutory eligibility requirements to pursue and maintain an appeal and related constitutional concerns. This line of argument cannot and should not be accepted because it plainly contradicts the Supreme Court's ruling in *Lexmark*. *Lexmark,* 572 U.S. at 128. Restricting the ability of parties in interest to appeal adverse judgments based on judicially created prudential tests and criteria notwithstanding Congress's express delineation of the class of persons encompassed by 11 U.S.C. § 330's zone of interests to include the broad statutory term "parties in interest" under 11 U.S.C. § 1109(b) is the very type of limitation in the name of prudence that the Supreme Court struck down in *Lexmark*. As discussed above, *Lexmark*'s application remains an open issue. NexPoint respectfully requests that this Court follow the teachings of *Lexmark* and assess NexPoint's standing on appeal by the yardsticks crafted by Congress and the Constitution, and no more. Under those metrics, NexPoint clearly qualifies as a party in interest, with a live case and controversy, concrete and immediate injury in fact, directly caused by Appellees, that can be remedied by a favorable resolution of these appeals and on remand by the Bankruptcy Court.

Simply put, these appeals should be allowed to proceed as NexPoint clearly has the requisite standing as a party in interest under 11 U.S.C. §§ 330(a), 330(a)(2), and 1109(b), as well as under Article III.

CONCLUSION

WHEREFORE, NexPoint respectfully prays for entry of an order denying Appellees' Motion for the reasons set forth herein, as well as based on any oral argument the Court may entertain with respect to this matter.

Dated: January 24, 2022.

By: */s/ Kristin H. Jain*

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF BANKRUPTCY PROCEDURE 8013(f)(3)(A)

The undersigned hereby certifies that the foregoing *Appellant NexPoint Advisors, L.P.'s Opposition to Appellees' Joint Motion to Dismiss Appeals as Constitutionally Moot* complies with the type-volume limit of Fed. R. Bankr. P. 8013(f)(3)(A) because, excluding the parts of the document exempted by Fed. R. Bankr. P. 8015(g), this document contains 5,054 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 24, 2022, a true and correct copy of the foregoing *Appellant NexPoint Advisors, L.P.'s Opposition to Appellees' Joint Motion to Dismiss Appeals as Constitutionally Moot* was served electronically via the Court's ECF system upon all parties of interest requesting or consenting to such service in this case.

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