Case No. 3:20-cv-03390-X

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

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

Reorganized Debtor.

JAMES DONDERO,

Appellant

v.

HIGHLAND CAPITAL MANAGEMENT, L.P., *et al.*,

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 MOTION TO DISMISS APPEAL AS CONSTITUTIONALLY MOOT

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Appellee Highland Capital Management, L.P. ("**Highland**") respectfully moves this Court, in accordance with Federal Rule of Bankruptcy Procedure 8013(a), for an order dismissing this appeal as constitutionally moot.[1] Appellant possesses no claim against Highland's bankruptcy estate that confers constitutional standing to appeal a bankruptcy court order approving the settlement of a claim. Having withdrawn all claims against Highland's estate, Appellant is no longer a "person aggrieved" with sufficient legal interest to maintain this appeal. This appeal is now moot, presenting no Article III case or controversy and leaving this Court with no constitutional jurisdiction to hear this appeal.

Background to the Motion and Procedural Posture

Appellant James Dondero commenced the above-captioned appeal of an order of the bankruptcy court approving a settlement between Highland, on the one hand, and Acis Capital Management GP LLC, Joshua and Jennifer Terry, and Acis Capital Management, L.P., on the other (the "**Acis Settlement**"). Briefing on this appeal is complete. In the appeal Appellant claims the Acis Settlement harmed the estate because Acis received too large a claim.

On January 21, 2022, Appellant agreed to withdraw the remainder of the claims he had asserted against Highland's estate pursuant to that certain *Stipulation*

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

and Agreed Order Authorizing Withdrawal of Proofs of Claim Nos. 141, 142, and 145[2] (the "Stipulation").[3] Consequently, Appellant no longer has any claims against the estate, and Appellant is not a "person aggrieved" entitled to prosecute this bankruptcy appeal under Fifth Circuit precedent.

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

Mr. Dondero Has No Claims Conferring Standing

On April 8, 2020, Appellant filed proof of claim nos. 138, 141, 142, 145,[4] and 188. On December 4, 2020, the bankruptcy court entered an order approving the *Stipulation and Agreed Order Authorizing Withdrawal of Proofs of Claim 138 and 188 Filed by James Dondero* and withdrawing claim nos. 138 and 188 with

[2] Bankruptcy Docket No. 3190. 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**"). Appellee respectfully requests 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 Communs. 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),* 29 F.3d at 1041 (finding appeal moot).

[3] *Manges v. Seattle First Nat'l Bank (In re Manges),* 29 F.3d 1034, 1041 (5th Cir. 1994) (authorizing appellate court to review evidence of "subsequent events not before the courts below" when determining whether an appeal is moot).

[4] Appellant filed proof of claim no. 145 as the purported successor in interest to the Canis Major Trust.

prejudice.[5] On February 1, 2022, the bankruptcy court entered order approving the Stipulation between Highland and Appellant withdrawing claim nos. 141, 142, and 145 with prejudice.[6] *Consequently, Mr. Dondero has no pecuniary interest in Highland or the bankruptcy estate.*[7]

The following summarizes Appellant's asserted claims against Highland's estate and their resolution:

Summary of Appellant's Claims		
Claims at Time of Appeal	**Disposition**	**Result**
Claim No. 138	Withdrawn / disallowed	No standing
Claim No. 141	Withdrawn / disallowed	No standing
Claim No. 142	Withdrawn / disallowed	No standing
Claim No. 145	Withdrawn / disallowed	No standing
Claim No. 188	Withdrawn / disallowed	No standing

Appellant Lacks Standing; Appeal Is Now Constitutionally Moot

Standing to appeal a bankruptcy court decision is a question of law.[8] 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.[9] "The 'person aggrieved' test is an even

[5] Bankruptcy Docket Nos. 1502 and 1510.

[6] Bankruptcy Docket No. 3218.

[7] Mr. Dondero is the sole owner of Highland's former general partner, Strand Advisors, Inc. ("**Strand**"). Strand held a pre-bankruptcy 0.25% limited partnership interest in Highland, which was canceled under the confirmed Plan. Strand did not assert any claims against Highland's estate.

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

[9] *Id.*

more exacting standard than traditional constitutional standing."[10] In other words, "[b]ecause bankruptcy cases typically affect numerous parties, the 'person aggrieved' test demands a higher causal nexus between act and injury …."[11] Appellant "must show that [he was] 'directly and adversely affected pecuniarily by the order of the bankruptcy court.'"[12] Appellant bears the burden of alleging facts sufficient to demonstrate that they have standing to appeal.[13] Appellant has no interest in the estate that he had when he began this appeal.

The Fifth Circuit Court of Appeals 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.[14]

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

[11] *Id.*

[12] *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).

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

[14] *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 Court of Appeals.[15] The Circuit Court also affirmed, 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 court 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.*"[16] 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."[17]

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[15] *Id.* at 384–85.
[16] *Id.* (emphasis added).
[17] *Id.*

The Fifth Circuit's reason for adopting the "pecuniary interest" test for bankruptcy appeals speaks directly to the circumstances under which Appellant now before this Court have 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.*[18]

The Fifth Circuit again strongly reiterated this approach just one month ago in *Dean v. Seidel (In re Dean),*[19] 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."[20] The Circuit Court stated simply: Appellant cannot demonstrate bankruptcy standing when the court order to which they are objecting does not directly affect their wallets."[21]

Here, Appellant appeals the bankruptcy court order approving the Acis Settlement and contends that too much in consideration was paid thereby removing value from the bankruptcy estate otherwise available for general unsecured creditors.

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

[19] 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).

[20] 2021 U.S. App. LEXIS 36022 at *3 (quoting *Fortune Nat. Res. Corp. v. United States DOI,* 806 F.3d 363, 367 (5th Cir. 2015)) (emphasis in original).

[21] *Id.* at *4.

While Appellant asserted general unsecured claims at the time of the Acis Settlement, he no longer does having agreed to have his claims expunged. Without any remaining claims, the outcome of this appeal does not and cannot directly affect Appellant's wallet.[22] With no pecuniary interest in the bankruptcy estate, Appellant lacks standing under Fifth Circuit law. Even a reversal of the bankruptcy court's order approving the Acis Settlement would not "put any money in [Appellant's] pocket," as required by the Fifth Circuit.[23]

This Appeal Is Constitutionally Moot

This appeal has been rendered moot—non-justiciable under the "Cases and Controversies" Clause of Article III of the U.S. Constitution—because Appellant has lost his standing during the pendency of this appeal. The U.S. Supreme Court has described mootness as "the doctrine of standing set in a time frame: The requisite

[22] Even assuming Mr. Dondero can assert standing through Strand's infinitesimal pre-bankruptcy equity interest, Strand's equity interest has been canceled, and had it not be canceled, it would still be insufficient to confer standing under the case law. *Technicool*, 896 F.3d at 384-85. Moreover, Strand did not appeal any of the orders of the bankruptcy court.

Admittedly, among more than a dozen appeals Dondero and his entities are currently prosecuting from this one bankruptcy case alone is an appeal of the bankruptcy court's confirmation of the Plan, and it is, of course, theoretically possible that the appeal is upheld, technically reinstating pre-bankruptcy equity interests in Highland. But even if so, there is no nexus between the Acis Settlement and Strand's (not Mr. Dondero's) miniscule limited partnership interests because all creditors would have to be paid in full with interest before such equity interests would ever be entitled to a recovery. *See* 11 U.S.C. §1129(b)(2)(C) (frequently referred to as the "absolute priority rule").

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

personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)."[24]

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."[25] 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."[26]

As all of Appellant's claims possessed at the time this appeal began have been withdrawn with prejudice or expunged, Appellant lost whatever standing he had when he commenced this appeal. This appeal, in the words of *Goldin,* no longer has an appellant with sufficient legal interest to maintain it.

Conclusion

The Court should dismiss this appeal as moot.

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

[25] *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).

[26] *Goldin,* 166 F.3d at 717–18, citing *Hogan v. Mississippi University 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).

Dated: February 3, 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 2,144 words.

/s/ Zachery Z. Annable
Zachery Z. Annable

CERTIFICATE OF SERVICE

I hereby certify that, on February 3, 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