

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

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 RE: HIGHLAND CAPITAL MANAGEMENT, L.P.,
Reorganized Debtor.

NEXPOINT ADVISORS, L.P.,
Appellant,

v.

PACHULSKI STANG ZIEHL & JONES LLP,
Appellee.

On Appeal from the United States Bankruptcy Court
for the Northern District of Texas, Dallas Division
Before the Honorable Stacey G. C. Jernigan
[Bankruptcy Case No. 19-34054-sgj11]

APPELLANT NEXPOINT ADVISORS, L.P.'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT (FRBP 8012, 8014, AND 9001)

Pursuant to Rules 8012, 8014(a)(1), and 9001 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**” or the “**FRBP**”), NexPoint discloses that it is a nongovernmental corporate party. NexPoint Advisors GP, LLC is a nongovernmental corporate entity which serves as General Partner for NexPoint. No publicly held corporation owns ten percent (10%) or more of the equity interests in either NexPoint or NexPoint Advisors GP, LLC.

Pursuant to Bankruptcy Rules 8012(b)(1) and 8014(a)(1), NexPoint further discloses that it is unaware of either the existence or identity of any debtor entity not named in the caption. NexPoint acknowledges that Bankruptcy Rule 8012(c)(3) requires supplemental disclosures whenever the information required by Bankruptcy Rule 8012 changes.

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JURISDICTIONAL STATEMENT UNDER FRBP 8014(a)(4)(A)-(D)

The United States Bankruptcy Court for the Northern District of Texas (the “**Bankruptcy Court**”) had both original and exclusive jurisdiction of the chapter 11 bankruptcy case (the “**Bankruptcy Case**”) commenced by the captioned chapter 11 debtor Highland Capital Management, L.P. (the “**Debtor**” or the “**Reorganized Debtor**”) by virtue of the venue transfer order entered by the United States Bankruptcy Court for the District of Delaware (the “**Delaware Bankruptcy Court**”) under 28 U.S.C. §§ 1334(a), 1408, and 1412, as well as this Court’s Congressionally authorized reference of bankruptcy cases to the Bankruptcy Court pursuant to 28 U.S.C. § 157(a) and the *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc*, *Miscellaneous Rule 33*, Appendix A to the N.D. Tex. L.B.R.

Briefly, Debtor commenced the Bankruptcy Case by filing a voluntary petition for relief under 11 U.S.C. § 301 on October 16, 2019 with the Delaware Bankruptcy Court. [R. Vol. 3, p. 000902]. On December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of Debtor’s Bankruptcy Case to the Bankruptcy Court pursuant to 28 U.S.C. §§ 1408 and 1412. [R. Vol. 3, p. 000904]. The Bankruptcy Court was vested with subject matter jurisdiction over all matters arising under, arising in, or related to Debtor’s Bankruptcy Case under 28 U.S.C. § 1334(b).

Each of the final fee applications (each a “**Final Application**” and,

collectively, the “**Final Applications**”) submitted by Appellees (i) Pachulski Stang Ziehl & Jones, LLP (Debtor’s general bankruptcy counsel) (“**PSZJ**”), (ii) Wilmer Cutler Pickering Hale & Dorr (Debtor’s Regulatory and Compliance Counsel) (“**WilmerHale**” and, together with PSZJ, the “**Debtor’s Professionals**”), (iii) Sidley Austin, LLP (“**Sidley**”) (Counsel to the Official Committee of Unsecured Creditors in Debtor’s Bankruptcy Case (the “**Committee**”)), (iv) FTI Consulting, Inc. (The Committee’s Financial Advisor) (“**FTI**”), and (v) Teneo Capital, LLC (the Committee’s Litigation Advisor) (“**Teneo**” and, with FTI and Sidley, the “**Committee Professionals**” and, with the Debtor’s Professionals, the “**Retained Professionals**”) arose under Title 11, giving the Bankruptcy Court core jurisdiction to enter final orders approving the Retained Professionals’ requests for an award of professional fees and reimbursement of actual and necessary expenses under 11 U.S.C. § 330(a) (each a “**Final Order**” and, collectively, the “**Final Orders**”) under 28 U.S.C. §§ 157(b)(2)(A) and 1334(b) that are each appealable as final orders to this Court. 28 U.S.C. §§ 158(a)(1) and (a)(3) (authorizing appeals to the district courts of the United States “from final judgments, *orders*, and decrees” entered in both “cases and *proceedings*”) (emphasis added); *see Ritzen Grp. Inc. v. Jackson Masonry, LLC*, ___ U.S. ___, 140 S. Ct. 582, 587 and 592 (2020) (recognizing that, for purposes of 28 U.S.C. § 158(a)’s finality requirement in bankruptcy cases, the operative judicial unit is “[often] the *proceeding*” and recognizing that finality for

bankruptcy purposes attaches when a bankruptcy court order ends the litigation and leaves nothing else to be done in that *proceeding*) (emphasis added); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277, 282 (5th Cir. 2000) (defining a final bankruptcy court order for purposes of an appeal as of right 28 U.S.C. § 158 as “either a final determination of the rights the parties to secure the relief they seek, or of a final disposition of a discrete dispute within the larger bankruptcy case...”) (internal quotation marks and citations omitted); *Demery v. Johns*, 570 B.R. 44, 48 (W.D. La. 2017) (characterizing as final for appellate purposes a bankruptcy court order denying an applicant’s fee application under 11 U.S.C. § 330); *see also* FED. R. BANKR. P. 8014(a)(4)(A).

As set forth above, this Court has jurisdiction to entertain these consolidated appeals pursuant to 28 U.S.C. §§ 158(a)(1) and (a)(3). *See* FED. R. BANKR. P. 8014(a)(4)(B). The Bankruptcy Court entered the Final Orders approving each of the Final Applications (defined below) of the Retained Professionals that are the subjects of this consolidated appeal on November 22, 2021 and November 29, 2021, respectively. *See id.*; [R. Vol. 1, pp. 000040 - 000042; 000043 - 000045; 000046 - 000047; 000048 - 000049; 000050 - 000051]. On December 3, 2021, NexPoint promptly and timely filed a notice of appeal under Bankruptcy Rules 8002 and 8003 with respect to each Final Order granting each Retained Professional’s Final Application over NexPoint’s timely opposition(s) thereto before the Bankruptcy

Court. *See* FED. R. BANKR. P. 8014(a)(4)(C); [R. Vol. 1, pp. 000001 - 000007; 000008 - 000015; 000016 - 000023; 000024 - 000031; 000032 - 000039]. NexPoint's appeals of each of Retained Professional's challenged Final Order is, therefore, timely under Bankruptcy Rule 8002(a)(1).

Also as set forth above, each of these consolidated appeals of the Final Orders brought by NexPoint before this Court are from the final orders of the Bankruptcy Court under 28 U.S.C. § 158(a)(1). *See, e.g., Osherow v. Ernst & Young, LLP (In re Intelogic Trace, Inc.)*, 200 F.3d 382, 389-391 (5th Cir. 2000) (recognizing that *res judicata* effect can attached to final fee orders in instances where the other elements of the doctrine are otherwise satisfied); *Demery*, 570 B.R. at 48; *see also* FED. R. BANKR. P. 8014(a)(4)(D).

STATEMENT OF ISSUES PRESENTED UNDER FRBP 8014(a)(5)

1. Whether the Bankruptcy Court erred as a matter of law by awarding the professional fees and expense reimbursements through the challenged Final Orders without first requiring each of the Retained Professionals to establish through sufficient admissible evidence the reasonableness of the professional, paraprofessional, and other compensation rates — which, for some estate professionals approximated \$1,000.00 per hour of compensation time, regardless of the particular professional or paraprofessional at issue — as required by, among other sources of law, 11 U.S.C. § 330(a)(3)(B), as an indispensable component of a

lodestar fee analysis?

Because each of the Final Orders granting each Retained Professional's Final Application concerns the Bankruptcy Court's award of professional fees under 11 U.S.C. § 330, each Final Order is subject to review under the abuse of discretion standard. *Sylvester v. Chaffe McCall, L.L.P. (In re Sylvester)*, 23 F.4th 543, 2022 U.S. App. LEXIS 1141, *4 (5th Cir. Jan. 14, 2022); *Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (In re Woerner)*, 783 F.3d 266, 270-271 (5th Cir. 2015) (*en banc*). "An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal standard, reviewed *de novo*, or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous." *In re Woerner*, 783 F.3d at 270-271 (citation omitted).

2. Whether the Bankruptcy Court erred as a matter of law by awarding the professional fees and expense reimbursements through the challenged Final Orders without first requiring each of the Retained Professionals to establish through sufficient admissible evidence the reasonableness of the professional, paraprofessional, and other compensation rates — which, for some estate professionals approximated \$1,000.00 per hour of compensation time, regardless of the particular professional or paraprofessional at issue — as required by, among other sources of law, 11 U.S.C. § 330(a)(3)(F), as an indispensable component of a lodestar fee analysis?

Because each of the Final Orders granting each Retained Professional's Final Application concerns the Bankruptcy Court's award of professional fees under 11 U.S.C. § 330, each Final Order is subject to review under the abuse of discretion standard. *In re Sylvester*, 23 F.4th 543, 2022 U.S. App. LEXIS 1141, at *4; *In re Woerner*, 783 F.3d at 270-271. "An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal standard, reviewed *de novo*, or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous." *In re Woerner*, 783 F.3d at 270-271 (citation omitted).

3. Whether the Bankruptcy Court clearly erred in finding the amount of compensation and expense reimbursements it awarded through each of the challenged Final Orders was reasonable, in fact, 11 U.S.C. § 330 given the dearth of evidence offered specifically on the issue of whether the professional and paraprofessional compensation rates were reasonable within the meaning 11 U.S.C. § 330 and the governing and persuasive caselaw construing the same?

Because each of the Final Orders granting each Retained Professional's Final Application concerns the Bankruptcy Court's award of professional fees under 11 U.S.C. § 330, each Final Order is subject to review under the abuse of discretion standard. *In re Sylvester*, 23 F.4th 543, 2022 U.S. App. LEXIS 1141, at *4; *In re Woerner*, 783 F.3d at 270-271. "An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal standard, reviewed *de novo*, or follows improper

procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous.” *In re Woerner*, 783 F.3d at 270-271 (citation omitted).

4. Whether the Bankruptcy Court abused its discretion in awarding the professional compensation and expense reimbursements through each of the challenged Final Orders based on the record either presented by or advanced through each of the Final Applications submitted on behalf of each Retained Professional?

Because each of the Final Orders granting each Retained Professional’s Final Application concerns the Bankruptcy Court’s award of professional fees under 11 U.S.C. § 330, each Final Order is subject to review under the abuse of discretion standard. *In re Sylvester*, 23 F.4th 543, 2022 U.S. App. LEXIS 1141, at *4; *In re Woerner*, 783 F.3d at 270-271. “An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal standard, reviewed *de novo*, or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous.” *In re Woerner*, 783 F.3d at 270-271 (citation omitted).

With respect to each of the above-listed issues, this Court, much in the same vein as a Court of Appeals, reviews the Bankruptcy Court’s conclusions of law *de novo*. See, e.g., *BNF Operations, LLC v. PLT Constr. Co.*, 616 B.R. 683, 687 (N.D. Tex. 2020) (Kinkeade, J.). “This Court reviews the bankruptcy court’s factual findings for clear error, with proper deference to the bankruptcy court’s opportunity to make credibility determinations...A finding of fact is clearly erroneous only if on

the entire evidence, the court is left with the definite and firm conviction that a mistake has been committed.” *Id.* (internal quotation marks and citations omitted). The Bankruptcy Court’s evidentiary determinations are subject to review for an abuse of discretion. *Id.*

STATEMENT OF THE CASE UNDER FRBP 8014(a)(6)

I. General Case Background

On October 16, 2019 (the “**Petition Date**”), Debtor commenced its Bankruptcy Case by filing a voluntary petition for reorganization relief, pursuant to 11 U.S.C. § 301, under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 – 1532 (as amended, the “**Bankruptcy Code**”) with the Delaware Bankruptcy Court. [R. Vol. 3, p. 000902]. Shortly after the Petition Date, the United States Trustee for Region 3 formed the Committee on October 29, 2019. [R. Vol. 3, p. 000903]. On December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of Debtor’s Bankruptcy Case to the Bankruptcy Court. [R. Vol. 3, p. 000904].

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* (the “**Confirmation Order**”). [R. Vol. 33, pp. 007353 - 007513]. Attached as Exhibit A to the Confirmation Order was 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. [R. Vol. 33, pp. 007413 - 007414]. On August 11, 2021 and pursuant to the Confirmation Order and the Confirmed Plan, Debtor filed a notice of the effective date of the Confirmed Plan identifying August 11, 2021 as the effective date of the Confirmed Plan (the “**Effective Date**”). [R. Vol. 46, pp. 010378 - 010381].

Under the Confirmed Plan and Confirmation Order, the Final Applications constitute “Professional Fee Claims.” [R. Vol. 33, p. 007466]. Relatedly, Debtor’s Confirmed Plan and Confirmation Order established a Professional Fee Claims Bar Date of sixty (60) days after the Effective Date. [R. Vol. 33, p. 007461]. Debtor’s Confirmed Plan defines the “Professional Fee Claims Objection Deadline” to mean “with respect to any Professional Fee Claim, thirty (30) days after the timely Filing of the applicable request for payment of such Professional Fee Claim.” [R. Vol. 33, p. 007461]. Each of the Retained Professionals filed their respective Final Applications on or about October 8, 2021. [R. Vol. 46, pp. 010532 - 010579; Vol. 47, pp. 010580 - 010647; Vol. 47, pp. 010648 - 010766; Vol. 48, p. 010767 - Vol. 49, p. 011223; Vol. 50, pp. 011224 - 011422]. Under Debtor’s Confirmed Plan and Confirmation Order, the earliest date on which the applicable Professional Fee Claims Objection Deadline could have been set was thirty (30) days after the filing of each Retained Professional’s Final Application. [R. Vol. 33, p. 007461]. By

operation of Bankruptcy Rule 9006(a)(1)(C), the earliest objection deadline for the Final Applications was Monday, November 8, 2021. Debtor's omnibus notice of hearing on the Final Applications designated in error Tuesday, November 2, 2021 as the applicable objection/response deadline for each of the Final Applications. [R. Vol. 51, pp. 011423 - 011430].

NexPoint timely opposed the Final Applications of the Retained Professionals on November 2, 2021 notwithstanding the due process, notice, and service defects identified above (the "**Initial Opposition**"). [R. Vol. 51, pp. 011569 - 011587]. As each of the Final Applications constituted a request for payment of expenses of administration from Debtor's bankruptcy estate under 11 U.S.C. § 503(b), NexPoint's Initial Opposition thereto gave rise to a contested matter under Bankruptcy Rule 9014. *See In re Intelogic Trace*, 200 F.3d at 389; *In re TransAmerican Natural Gas Corp.*, 978 F.2d 1409, 1416 (5th Cir. 1992) ("As the district court correctly noted, TransAmerican's objection to Toma's administrative expense claim gave rise to a 'contested matter' governed by Bankruptcy Rule 9014." *In re Texas Extrusion, Corp.*, 836 F.2d 217, 220 (5th Cir. 1988) ("In the case at bar, the fee application of Palmer, Palmer & Coffee was a 'contested matter' because there were objections filed to the application."); FED. R. BANKR. P. 3007, Advisory Committee Note (1983) (recognizing that an objection to a claim gives rise to a contested matter under Bankruptcy Rule 9014, with the corresponding availability

of discovery thereunder pursuant to Bankruptcy Rule 9014(c)).

NexPoint's Initial Opposition brought to the Bankruptcy Court's attention the failure of the Retained Professionals to provide required notice of each of their respective Final Applications in accordance with the standards set forth in, and within the timeframes established by, Bankruptcy Rule 2002, N.D. Tex. L.B.R. 2002-1, the Confirmed Plan, and the Confirmation Order. [R. Vol. 51, pp. 011569 - 011587]. In response to NexPoint's Initial Opposition, and to address the service, notice, due process, timing, and other procedural defects stemming from the Final Applications not having been noticed and served in accordance with the Confirmed Plan and Confirmation Order, the Bankruptcy Court continued the originally scheduled hearing on the Final Applications, November 9, 2021, until the date of the Final Fee Hearing (again, November 17, 2021). [R. Vol. 52, pp. 011626 - 011627]. The Bankruptcy Court's order of continuation established a supplemental opposition deadline with respect to each of the Final Applications of November 12, 2021. [R. Vol. 52, pp. 011626 - 011627]. NexPoint timely supplemented its Initial Opposition to the Final Applications on November 12, 2021 (the "**Supplemental Opposition**" and, together with the Initial Opposition, the "**NexPoint Oppositions**"). [R. Vol. 51, pp. 011606 - 011625]. The Retained Professionals, in turn, were given until November 16, 2021 to reply to NexPoint's Supplemental Opposition. [R. Vol. 52, pp. 011626 - 011627]. The Retained Professionals timely replied to NexPoint's

Supplemental Opposition in accordance with the Bankruptcy Court's order continuing the originally scheduled hearing on the Final Applications. [R. Vol. 52, pp. 011628 - 011633; 011645 - 011651].

Prior to discussing further the Bankruptcy Court's hearing on the Final Applications, NexPoint's Oppositions thereto, as well as the November 17, 2021 hearing on the Final Fee Applications, itself, (collectively the "**Final Fee Hearing**"), NexPoint respectfully submits that it will be helpful for this Court's review of the matters presented in these consolidated appeals for NexPoint to address what issues presented live controversies and issues on which the Retained Professionals were assigned the applicable burdens of proof and persuasion under applicable law at the hearing on the Final Applications, including required statutory elements like 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). *See In re Sylvester*, 23 F.4th 543, 2022 U.S. App. LEXIS 1141, at ** 10-11 ("[A]ll applicants for awards of professional compensation under 11 U.S.C. § 330 bear the burden of proof on the elements of reasonable compensation.") (internal quotation marks and citations omitted).

As NexPoint will demonstrate below, none of the Retained Professionals entered the Final Fee Hearing with the benefit of the Bankruptcy Court's prior approval of the respective hourly rates or rate structures pursuant to 11 U.S.C. § 328(a). *See, e.g., Daniels v. Barron (In re Barron)*, 325 F.3d 690, 692 (5th Cir. 2003) ("Under 11 U.S.C. § 330, attorneys' fees are reviewed for their reasonableness

after representation has concluded. In contrast, Section 328 of the Bankruptcy Code allows an attorney seeking to represent a bankruptcy estate to obtain prior court approval of her compensation plan.”); *see also Asarco, L.L.C. v. Barclays Capital, Inc. (In re Asarco, L.L.C.)*, 702 F.3d 250, 261 n. 10 (5th Cir. 2012) (“We note ... when a court approves a specific hourly rate (e.g. \$200 per hour) pursuant to § 328(a) but fails to pre-approve the specific number of hours the will be billed at that pre-approved hourly rate, the court may review the hours billed for reasonableness in accordance with § 330(a).”) (citation omitted). The absence of the Bankruptcy Court’s prior approval of the hourly rates and rate structures of the Retained Professionals presented for the Bankruptcy Court’s approval through the Final Applications at the Final Fee Hearing under 11 U.S.C. § 330, the Fifth Circuit’s decision in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), and the lodestar is of foundational importance to the outcome of these consolidated appeals.

In short compass, without the benefit of the Bankruptcy Court’s prior approval under 11 U.S.C. § 328(a) of the Retained Professionals’ requested hourly rates and rate structures in the Final Applications, the Retained Professionals continued to bear the applicable burdens of proof and persuasion with respect to these matters at the Final Fee Hearing. NexPoint’s Oppositions objected to the Final Applications on these bases, noting specifically that, in the absence of prior approval of the Retained

Professionals' requested hourly rates and rate structures, the Final Applications necessarily had to be accompanied by admissible evidence demonstrating that the requirements the Bankruptcy Court was required to examine and address with respect to the Final Applications and the hourly rates set forth therein, specifically 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F), had been satisfied. [R. Vol. 51, pp. 011577 - 011578; 011614 - 011617]. NexPoint respectfully submits that the Retained Professionals failed to carry their assigned burdens under these statutory provisions and, therefore, the Bankruptcy Court, as a result, unfortunately erred and abused its discretion when it approved the Final Applications and entered the Final Orders.

II. None of the Retained Professionals Benefit from 11 U.S.C. § 328(a)

A. PSZJ's Rates and Rate Structure Were Not Approved Under § 328(a).

On October 29, 2019, Debtor filed the *Debtor's Application Pursuant to Section 327(a) of the Bankruptcy Code, Rule 2014 of the Federal Rules of Bankruptcy Procedure and Local Rule 2014-1 for Authorization to Employ and Retain Pachulski Stang Ziehl & Jones LLP as Counsel for the Debtors [sic] and Debtors [sic] Nunc Pro Tunc to the Petition Date* (the "**PSZJ Employment Application**") with the Delaware Bankruptcy Court. [R. Vol. 2, pp. 000567 - 000601]. The PSZJ Employment Application was supported by (i) the *Declaration of Jeffrey N. Pomerantz in Support of Application Pursuant to Section 327(a) of the*

Bankruptcy Code, Rule 2014 of the Federal Rules of Bankruptcy Procedure and Local Rule 2014-1 for Authorization to Employ and Retain Pachulski Stang Ziehl & Jones LLP as Counsel for the Debtor and Debtor in Possession Nunc Pro Tunc to the Petition Date (the “Pomerantz Declaration”) and (ii) Debtor’s *Statement Under Rule 2016 of the Federal Rules of Bankruptcy Procedure (the “2016 Statement”)* [R. Vol. 2, pp. 000578 - 000580; 000581 - 000586].

PSZJ did not seek the Court’s prior approval at the outset of Debtor’s Bankruptcy Case of PSZJ’s identified hourly rates or rate structure pursuant to 11 U.S.C. § 328(a), nor did the Pomerantz Declaration provide support for such relief. [R. Vol. 2, pp. 000567 - 000601]. To the contrary, PSZJ’s 2016 Statement expressly stipulates that, “PSZ&J will seeks [*sic*] approval for payment of compensation by filing appropriate applications for allowance of interim or final compensation pursuant to sections 330 and 331 of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules of the United States Bankruptcy Court for the District of Delaware, and order of this Court.” [R. Vol. 2, p. 000579] (emphasis added). On December 2, 2019, the Delaware Bankruptcy entered its *Order Pursuant to Section 327(a) of the Bankruptcy Code, Rule 2014 of the Federal Rules of Bankruptcy Procedure and Local Rule 2014-1 Authorizing the Employment and Retention of Pachulski Stang Ziehl & Jones, LLP as Counsel for the Debtor and Debtor in Possession Nunc Pro Tunc to the Petition Date (the “PSZJ Employment Order”)*. [R. Vol. 3, pp. 000812

- 000814]. By its terms and echoing the PSZJ’s 2016 Statement, the Delaware Bankruptcy Court’s PSZJ Employment Order mandated that “PSZ&J shall apply for compensation for professional services rendered and reimbursement of expenses incurred ... in compliance with sections 330 and 331 of the Bankruptcy Code, and the applicable provisions of the Bankruptcy Rules, Local Bankruptcy Rules, and any other applicable procedures and orders of the Court.” [R. Vol. 3, p. 000814].

Again, PSZJ did not obtain prior approval of either the Delaware Bankruptcy Court or the Bankruptcy Court of its hourly rates and rate structure pursuant to 11 U.S.C. § 328(a). PSZJ’s Employment Application, the Pomerantz Declaration in support thereof, as well as PSZJ’s 2016 Statement and the PSZJ Employment Order all either expressly or implicitly subjected PSZJ’s requests for an award of professional fees and reimbursement of actual and necessary expenses to the strictures of 11 U.S.C. § 330 and the coalesced lodestar standard and factors under this Circuit’s governing law. *See In re Pilgrim’s Pride Corp.*, 690 F.3d 650, 656 (5th Cir. 2012) (“Following the Bankruptcy Code’s enactment, we made clear that the lodestar, *Johnson* factors, and § 330 coalesced to form the framework that regulates compensation of professionals employed by the bankruptcy estate.”) (*citing Johnson*, 488 F.2d at 717-719). More specifically, going into the Final Fee Hearing PSZJ was obliged to carry the burdens of proof and persuasion with respect to the entirety of the analysis under the lodestar, *Johnson*, and 11 U.S.C. § 330

factors, including as to the reasonableness of its hourly rates and rate structure under 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). Again, NexPoint respectfully submits that PSZJ failed to carry these assigned burdens with respect to expressly enumerated and, indeed, indispensable factors the Bankruptcy Court was required to factor into its analysis, especially as to 11 U.S.C. § 330(a)(3)(F). *See, e.g., In re Pilgrims Pride Corp.*, 690 F.3d at 664 (recognizing that the 1994 amendments to 11 U.S.C. § 330, adding what was then codified as 11 U.S.C. § 330(a)(3)(E) and what is currently codified as 11 U.S.C. § 330(a)(3)(F), as a primary and mandatory factor that could drive an upward or downward adjustment of an initial lodestar fee calculation); *Caplin & Drysdale Chartered v. Babcock & Wilcox Co. (In re Babcock & Wilcox Co.)*, 526 F.3d 824, 828 (5th Cir. 2008) (upholding a bankruptcy court’s reduction of the hourly rate charged by attorneys for non-working travel time to 50% of their hourly rates and stating, “Here, Caplin & Drysdale did not carry the burden of demonstrating that ‘comparably skilled practitioners’ charged the full hourly rate for travel time.”).

B. WilmerHale’s Rates Were Not Approved Under § 328(a).

On April 28, 2020, Debtor filed the *Debtor’s Application Pursuant to Sections 327(e) and 328(a) of the Bankruptcy Code and Bankruptcy Rules 2014(a) and 2016 for an Order Authorizing the Employment of Wilmer Cutler Pickering Hale and Dorr LLP as Regulatory and Compliance Counsel Nunc Pro Tunc to the Petition Date*

(the “**WilmerHale Employment Application**”). [R. Vol. 10, pp. 002457 - 002479]. In support of the WilmerHale Employment Application, Debtor submitted the *Declaration of Timothy L. Silva in Support of Debtor’s Application Pursuant to Sections 327(e) and 328(a) of the Bankruptcy Code and Bankruptcy Rules 2014(a) and 2016 for an Order Authorizing the Employment of Wilmer Cutler Pickering Hale and Dorr LLP as Regulatory and Compliance Counsel Nunc Pro Tunc to the Petition Date* (the “**Silva Declaration**”). [R. Vol. 10, pp. 002468 - 002475]. On May 26, 2020, the Bankruptcy Court entered its *Order Authorizing and Approving Debtor’s Application Pursuant to Sections 327(e) and 328(a) of the Bankruptcy Code and Bankruptcy Rules 2014(a) and 2016 for an Order Authorizing the Employment of Wilmer Cutler Pickering Hale and Dorr LLP as Regulatory and Compliance Counsel Nunc Pro Tunc to the Petition Date* (the “**WilmerHale Employment Order**”). [R. Vol. 14, pp. 003334 - 003336].

For its part, the WilmerHale Employment Application cites 11 U.S.C. § 328(a) as one of the statutory bases upon which Debtor sought approval of the WilmerHale Application. [R. Vol. 10, pp. 002458; 002459; 002461; 002464; 002468]. The WilmerHale Employment Application did not, however, establish that WilmerHale’s hourly rates and proposed rate structure were reasonable within the meaning of either 11 U.S.C. §§ 328(a) or 330(a). [R. Vol. 10, pp. 002457 - 002479]. Indeed, the statutory term “reasonable” found in both 11 U.S.C. §§ 328(a) and 330(a)

is not even mentioned in connection with WilmerHale's listed hourly rates and rate structure in the WilmerHale Employment Application. [R. Vol. 10, pp. 002457 - 002479]. The Silva Declaration in support of the WilmerHale Employment Application is to the same effect.

The Silva Declaration uses the term "reasonable" on three (3) separate occasions, but that term is not used to lay an evidentiary foundation for a finding of reasonableness under 11 U.S.C. § 328(a). [R. Vol. 10, pp. 002468 - 002475]. Instead, the Silva Declaration refers to the efforts he represented that WilmerHale would undertake to meet its duties of continuing disclosures of connections under Bankruptcy Rule 2014(a), and not in connection with WilmerHale's listed hourly rates and rate structure under 11 U.S.C. § 328(a). [R. Vol. 10, p. 002471]. The closest the Silva Declaration comes to the mark under 11 U.S.C. § 328(a) is when it represents, "WilmerHale's rate structure for the matters on which it seeks to represent the Debtor is not significantly different from (a) the rates that WilmerHale charges for other non-bankruptcy representations generally, or (b) to the best of [Silva's] knowledge, the rates of other comparably skilled professionals." [R. Vol. 10, pp. 002473 - 002474]. The Silva Declaration does not disclose the basis or lay any foundation regarding the declarant's knowledge of what hourly rates "comparably skilled professionals" charge. *See Caplin & Drysdale*, 526 F.3d at 826 (assessing as insufficient for purposes of 11 U.S.C. § 330(a)(3)(E) and (F) the

testimony of an attorney witness regarding his alleged “general understanding based on conversations he had with other lawyers in New York as that law firms create their billing rates on the assumption that they will bill clients for travel time at full rates and be paid for them” in opposition to a bankruptcy court’s reduction of requested hourly rates associated with attorney travel time by 50%) (internal quotation marks and citations omitted).

Finally, the WilmerHale Employment Order provides that WilmerHale’s retention and employment were approved by the Bankruptcy Court under, among other provisions of the Bankruptcy Code and Bankruptcy Rules, 11 U.S.C. §§ 327(e) and 328(a). [R. Vol. 14, p. 003335]. The WilmerHale Employment Order does not, by its terms, expressly approve the hourly rates and rate structure listed in the WilmerHale Employment Application. [R. Vol. 14, pp. 003334 - 003336]. Nor does the WilmerHale Employment Order specify the number of hours WilmerHale was authorized to bill at the hourly rates and under the rate structure set forth in the WilmerHale Employment Application. [R. Vol. 14, pp. 003334 - 003336]. Absent express authorization regarding the number of hours WilmerHale was authorized to bill, even at the hourly rates and under the rate structure set forth in the WilmerHale Employment Application, WilmerHale’s Final Application seeking an award of professional fees and reimbursement of actual and necessary expenses under 11 U.S.C. § 330 remained subject to the Bankruptcy Court’s consideration under, and

approval pursuant to, the lodestar analysis, the *Johnson* factors, and the statutory requirements set forth in 11 U.S.C. § 330(a). *See In re Asarco, L.L.C.*, 702 F.3d at 261 n. 10.

Indeed, the WilmerHale Employment Order expressly provided that WilmerHale's Final Application would remain subject to, among other strictures, the *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals* [Docket No. 141] (the "**Interim Compensation Procedures Order**"). [R. Vol. 14, pp. 003335 - 003336]. The Interim Compensation Procedures Order provides in relevant part as follows:

In each Interim Fee Application and Final Fee Application, *all attorneys* (collectively, the "Attorneys") who have been or are hereafter retained pursuant to sections 327 [including Wilmer's retention under 11 U.S.C. § 327(e)], 363, or 1103 of the Bankruptcy Code, unless such an attorney is an ordinary course professional, shall apply for compensation for professional services rendered and reimbursement of expenses incurred in connection with the Debtor's Chapter 11 case in compliance with sections 330 and 331 of the Bankruptcy Code and applicable provisions of the Bankruptcy Rules, Local Rules, and any other applicable procedures and orders of the Court.

[R. Vol. 2, p. 000710] (emphasis added).

Based on the Interim Compensation Procedures Order, as well as the background principles of law governing requests for preapproval of hourly rates and rate structures under 11 U.S.C. § 328(a) discussed in *In re Asarco, L.L.C.*,

WilmerHale’s Final Applications remained subject to review under the lodestar, the *Johnson* factors, and 11 U.S.C. § 330(a), including as to the reasonableness of WilmerHale’s hourly rates and rate structure under 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F).

Thus far, NexPoint respectfully submits it has established that neither of the Debtor’s Professionals entered the Final Fee Hearing with the benefit of their hourly rates or rate structure having been effectively preapproved under 11 U.S.C. § 328(a). Debtor’s Professionals, therefore, were assigned and continued to carry the burdens of proof and persuasion under applicable law, including 11 U.S.C. § 330(a), of establishing the reasonableness of their requested hourly rates and rate structures under 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). As NexPoint will demonstrate below, neither of Debtor’s Professionals carried these burdens at the Final Fee Hearing.

C. Sidley’s Rates and Rate Structure Were Not Approved Under § 328(a).

On December 6, 2019, the Committee filed the *Application of the Official Committee of Unsecured Creditors, Pursuant to Sections 328 and 1103 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2014, for an Order Approving the Retention and Employment of Sidley Austin LLP as Counsel to the Official Committee of Unsecured Creditors Nunc Pro Tunc to October 29, 2019* (the “**Sidley Employment Application**”) with the Bankruptcy Court. [R. Vol. 3, pp.

000852 - 000895]. The Sidley Employment Application was supported by (i) the *Declaration of Bojan Guzina in Support of Application of the Official Committee of Unsecured Creditors, Pursuant to Sections 328 and 1103 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2014, for an Order Approving the Retention and Employment of Sidley Austin LLP as Counsel to the Official Committee of Unsecured Creditors* (the “**Guzina Declaration**”) and (ii) the *Declaration of Eric A. Felton in Support of Application of the Official Committee of Unsecured Creditors, Pursuant to Sections 328 and 1103 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2014, for an Order Approving the Retention and Employment of Sidley Austin LLP as Counsel to the Official Committee of Unsecured Creditors* (the “**Felton Declaration**”). [R. Vol. 3, pp. 000868 - 000890; 000892 - 000895].

To begin, the Sidley Employment Application only cites 11 U.S.C. § 328(a) as a statutory basis upon which Sidley’s employment by the Committee is authorized under the Bankruptcy Code. [R. Vol. 3, pp. 000853; 000860]. Sidley does not, however, cite – let alone establish though admissible evidence – 11 U.S.C. § 328(a) for the proposition that the hourly rates and rate structure set forth in the Sidley Employment Application were reasonable under that statutory provision, such that preapproval of Sidley’s listed hourly rates and rate structure would have been justified at the outset of Debtor’s Bankruptcy Case. [R. Vol. 3, pp. 000852 -

000895]. The Guzina and Felton Declarations in support of the Sidley Employment Application are collectively to the same effect. [R. Vol. 3, pp. 000868 - 000890; 000892 - 000895]. None of Sidley's application materials, therefore, provided an evidentiary foundation or predicate for relief under 11 U.S.C. § 328(a) or established the requisite and indispensable lodestar, *Johnson*, and statutory factors under 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F).

On January 9, 2020, the Bankruptcy Court entered its *Order Authorizing the Retention and Employment of Sidley Austin LLP as Counsel to the Official Committee of Unsecured Creditors Nunc Pro Tunc to October 29, 2019* (the “**Sidley Employment Order**”). [R. Vol. 4, pp. 001119 - 001121]. The Sidley Employment Order expressly provides, “Sidley shall apply for compensation earned for professional services rendered and reimbursement of expenses incurred ... in compliance with sections 330 and 331 of the Bankruptcy Code and the applicable provisions of the Bankruptcy Rules, the Local Rules and any other applicable procedures and orders of the Court.” [R. Vol. 4, p. 001120] (emphasis added).

Thus far, NexPoint respectfully submits it has established that Sidley entered the Final Fee Hearing without the benefit of having its hourly rates or rate structure preapproved under 11 U.S.C. § 328(a). Sidley, therefore, was assigned the burdens of proof and persuasion under applicable law, including 11 U.S.C. § 330(a), of establishing the reasonableness of its requested hourly rates and rate structures

within the meanings of 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). As NexPoint will demonstrate below, Sidley did not carry these burdens at the Final Fee Hearing.

D. FTI's Rates and Rate Structure Were Not Approved Under § 328(a).

On December 6, 2019, the Committee filed its *Application Pursuant to FED. R. BANKR. P. 2014(a) for Order Under Section 1103 of the Bankruptcy Code Authorizing the Employment and Retention of FTI Consulting, Inc. as Financial Advisor to the Official Committee of Unsecured Creditors Nunc Pro Tunc to November 6, 2019* (the “**FTI Employment Application**”). [R. Vol. 3, pp. 000815 - 000851]. The FTI Employment Application was supported by the *Declaration in Support of the Application for an Order Authorizing Employment and Retention of FTI Consulting, Inc. as Financial Advisor for the Official Committee of Unsecured Creditors* by Conor P. Tully (the “**Tully Declaration**”). [R. Vol. 3, pp. 000828 - 000851]. Although the FTI Employment Application lists hourly rates and a rate structure for FTI’s professionals, FTI does not tie any citations of 11 U.S.C. § 328(a) to any request for preapproval of FTI’s listed hourly rates and rate structure as reasonable terms at the outset of FTI’s engagement by the Committee. [R. Vol. 3, pp. 000815 - 000851]. For its part, the Tully Declaration stipulates:

Subject to Court approval and in accordance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, applicable U.S. Trustee guidelines, and local rules, FTI will seek payment for compensation on an hourly basis, plus reimbursement of actual and necessary expenses incurred by FTI, including legal fees related to

its retention application and future fee applications as approved by the Court.

[R. Vol. 3, p. 000834].

The Tully Declaration does not mention 11 U.S.C. § 328(a) in connection with FTI's requests for compensation, either as contemplated in the FTI Employment Application or prospectively. [R. Vol. 3, pp. 000828 - 000851].

On January 9, 2020, the Bankruptcy Court entered its *Order Authorizing Retention and Employment of FTI Consulting, Inc. as Financial Advisor for the Official Committee of Unsecured Creditors* (the "**FTI Employment Order**"). [R. Vol. 4, pp. 001122 - 001125]. The FTI Employment Order specifically provides that, "FTI shall be compensated in accordance with the procedures set forth in sections 330 and 331 of the Bankruptcy Code and such Bankruptcy Rules as may then be applicable, from time to time, and such procedures as may be fixed by order of the Court..." [R. Vol. 4, p. 001123] (emphasis added).

Thus far, NexPoint respectfully submits it has established that FTI entered the Final Fee Hearing without the benefit of having its hourly rates or rate structure preapproved under 11 U.S.C. § 328(a). FTI, therefore, was assigned the burdens of proof and persuasion under applicable law, including 11 U.S.C. § 330(a), of establishing the reasonableness of its requested hourly rates and rate structures under 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). As NexPoint will demonstrate below, FTI did not carry these burdens at the Final Fee Hearing.

E. Teneo's Rates and Rate Structure Were Not Approved Under § 328(a).

On May 14, 2021 the Committee filed its *Application for Order Pursuant to Section 1103 of the Bankruptcy Code Authorizing the Employment and Retention of Teneo Capital, LLC as Litigation Advisor to the Official Committee of Unsecured Creditors Effective April 15, 2021* (the “**Teneo Employment Application**” and, together with the PSZJ Employment Application, the WilmerHale Employment Application, the Sidley Employment Application, and the FTI Employment Application, the “**Retained Professional Employment Applications**”). [R. Vol. 37, pp. 008555 - 008594]. The Teneo Employment Application was supported by the *Declaration of Marc S. Kirschner in Support of the Application for Order Pursuant to Section 1103 of the Bankruptcy Code Authorizing the Employment and Retention of Teneo Capital, LLC as Litigation Advisor to the Official Committee of Unsecured Creditors Effective April 15, 2021* (the “**Kirschner Declaration**” and, together with the Pomerantz Declaration, the Silva Declaration, the Guzina Declaration, the Felton Declaration, and the Tully Declaration, the “**Retained Professional Employment Declarations**”). [R. Vol. 37, pp. 008573 - 008594]. Although the Teneo Employment Application lists Teneo's hourly rates and rate structure, Teneo does not tie any citations of 11 U.S.C. § 328(a) to any request for preapproval of Teneo's listed hourly rates and rate structure as reasonable terms at the outset of Teneo's engagement by the Committee in Debtor's Bankruptcy Case.

[R. Vol. 37, pp. 008555 - 008594]. For its part, the Kirschner Declaration stipulates:

Subject to Court approval and in accordance with the applicable provisions of Bankruptcy Code, the Bankruptcy Rules, applicable U.S. Trustee guidelines and local rules, Teneo will seek payment for its fixed and hourly basis compensation, plus reimbursement of actual and necessary expenses incurred by Teneo, including legal fees related to its retention application and future fee applications as approved by the Court. Teneo's customary hourly rate as charged in bankruptcy and non-bankruptcy matters of this type by the professionals assigned to this engagement are outlined in the Application for the employment of Teneo. These hourly rates are adjusted periodically.

[R. Vol. 37, pp. 008576 - 008577].

The Kirschner Declaration does not mention 11 U.S.C. § 328(a) in connection with Teneo's requests for compensation, either as contemplated in the Teneo Employment Application or prospectively. [R. Vol. 37, pp. 008573 - 008594].

On June 11, 2021, the Bankruptcy Court entered its *Order Pursuant to Section 1103 of the Bankruptcy Code Authorizing the Employment and Retention of Teneo Capital, LLC as Litigation Advisor to the Official Committee of Unsecured Creditors Effective April 15, 2021* (the "**Teneo Employment Order**" and, together with the PSZJ Employment Order, the Wilmer Employment Order, the Sidley Employment Order, and the FTI Employment Order (the "**Retained Professional Employment Orders**"). [R. Vol. 39, pp. 008900 - 008902]. The Teneo Employment Order specifically provides that, "Teneo shall be compensated in accordance with the

procedures set forth in sections 330 and 331 of the Bankruptcy Code and such Bankruptcy Rules as may then be applicable, from time to time, and such procedures as may be fixed by order of this Court...” [R. Vol. 39, p. 008901] (emphasis added).

Thus far, NexPoint respectfully submits it has established that Teneo entered the Final Fee Hearing without the benefit of having its hourly rates or rate structure preapproved under 11 U.S.C. § 328(a). Teneo, therefore, was assigned the burdens of proof and persuasion under applicable law, including 11 U.S.C. § 330(a), of establishing the reasonableness of its requested hourly rates and rate structures under 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). As NexPoint will demonstrate below, Teneo did not carry these burdens at the Final Fee Hearing.

III. Interim Fee Awards Did Not Prejudice Final Application Objections.

Pursuant to 11 U.S.C. § 331 and absent the Bankruptcy Court’s entry of the Interim Compensation Procedures Order, the most frequently the Retained Professionals would have been permitted to apply to the Bankruptcy Court for interim awards of professional compensation and reimbursement of actual and necessary expenses under 11 U.S.C. § 330 was every 120-days during Debtor’s Bankruptcy Case. *See, e.g.*, 11 U.S.C. § 331. To enable, among others, the Retained Professionals to be paid in more frequent intervals, Debtor filed the *Debtor’s Motion Pursuant to Sections 105(a), 330 and 331 of the Bankruptcy Code for Administrative Order Establishing Procedures for Interim Compensation and Reimbursement of*

Expenses of Professionals (the “**Interim Compensation Procedures Motion**”). [R. Vol. 2, pp. 000602 - 000629]. Debtor’s Interim Compensation Procedures Motion set up elaborate and time-consuming procedures that actively discouraged creditors and other parties in interest, like NexPoint, from objecting to the monthly and interim applications for awards of professional compensation and reimbursement of actual and necessary expenses from Debtor’s bankruptcy estate.

In the first instance, the Interim Compensation Procedures Motion included a request to restrict the universe of creditors and parties in interest who were entitled to receive “notice of interim and final fee application requests to (i) the Notice Parties [as defined in the Interim Compensation Procedures Motion] and (ii) parties that have filed with the Clerk of this Court a request for special notice pursuant to Bankruptcy Rule 2002.” [R. Vol. 2, p. 000608]. More difficult still was the Debtor’s requested procedure whereby any party in interest or creditor who timely opposed a monthly fee statement was required to meet-and-confer and, effectively, mediate the disputed *interim* request, “If a Notice of Objection is timely served in response to a Monthly Fee Application, the objecting party and the Professional shall attempt to resolve the objection on a consensual basis.” [R. Vol. 2, p. 000606]. Importantly, the Interim Compensation Procedures Motion represented that the Bankruptcy Court’s grant of interim monthly payment requests and interim fee applications was without prejudice to the ability of creditors and other parties in interest to object to

final allowance and payment of any and all prior monthly and interim awards of professional compensation and reimbursement of actual and necessary expenses. [R. Vol. 2, p. 000607].

On November 14, 2019, the Delaware Bankruptcy Court granted the Interim Compensation Procedures Motion and entered the Interim Compensation Procedures Order. [R. Vol. 2, pp. 000706 - 000711]. Significantly, the Interim Compensation Procedures Order expressly barred any creditor or party in interest from being prejudiced in their efforts to oppose, among other matters, the Final Applications by virtue of having foregone opportunities to oppose monthly or interim applications for professional compensation and reimbursement of actual and necessary expenses under 11 U.S.C. § 330 by, among others, the Retained Professionals:

Neither (i) the payment of or the failure to pay, in whole or in part, interim compensation and/or reimbursement of or the failure to reimburse, in whole or in part, expenses under the Interim Compensation Procedures nor (ii) the filing *or failure to file an Objection will bind any party in interest or the Court with respect to the final allowance of applications for payment of compensation and reimbursement of expenses of Professionals. All fees and expenses paid to Professionals under the Interim Compensation Procedures are subject to disgorgement until final allowance by the Court.*

[R. Vol. 2, p. 000709].

Under this provision of the Interim Compensation Procedures Order,

NexPoint was entitled to rely on its ability to object to the Retained Professionals' Final Applications. This provision of the Interim Compensation Procedures Order was effectively a failsafe against any prejudice being visited upon any creditor or party in interest, like NexPoint, who made the understandable and economically rational decision not to waste its time and resources, to say nothing of the resources of Debtor's bankruptcy estate and the Bankruptcy Court, objecting to the entry of what are otherwise, at best, interlocutory orders under 11 U.S.C. § 331. *See, e.g., Kingdom Fresh Produce, Inc. v. Stokes Law Office, L.L.P. (In re Delta Produce, L.P.)*, 845 F.3d 609, 617 (5th Cir. 2016) ("Yet even under this 'flexible' approach, *In re ASARCO, L.L.C.*, 650 F.3d 600, we have held that interim fee awards are interlocutory orders – the very term interim denotes that such an award is not the end of the fee dispute – and thus not subject to automatic review."); *Cluck v. Osherow (In re Cluck)*, 101 F.3d 1081, 1082 (5th Cir. 1996) ("Every circuit which has addressed this issue has concluded that an interim award of compensation granted by a bankruptcy court in an ongoing bankruptcy proceeding is generally an interlocutory order which is not subject to review.") (citations omitted).

But, instead of NexPoint's efforts to conserve its own resources through its reliance on the Interim Compensation Procedures Order, as well as those of Debtor's bankruptcy estate from which NexPoint seeks to be paid on its claim for expenses of administration and those of the Bankruptcy Court and the judicial system more

generally, being viewed as consistent with both the letter and spirit of the Interim Compensation Procedures Order, the Retained Professionals convinced the Bankruptcy Court below to err and hold that NexPoint was effectively barred from objecting to the Final Applications and insisting on NexPoint's rights under the Bankruptcy Rules and the Interim Compensation Procedures Order by virtue of having failed to object to earlier payment requests and applications of the Retained Professionals. This outcome was manifestly unfair to NexPoint, especially when viewed against the backdrop of the Interim Compensation Procedures Order's guarantee that no prejudice would befall NexPoint under the circumstances that ultimately came to pass at the Final Fee Hearing.

IV. The Final Applications Do Not Satisfy 11 U.S.C. §§ 330(a)(3)(B) & (F).

A. PSZJ's Final Application Was Submitted Without Evidentiary Support Addressed To The Statutory Factors Set Forth In 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F).

On October 8, 2021, PSZJ filed its Final Application. [R. Vol. 48, p. 010767 - Vol. 49, p. 011223]. Through its Final Application, PSZJ requested a final award of \$23,978,627.25 in professional fees and \$334,232.95 in reimbursements of actual and necessary expenses under 11 U.S.C. § 330. [R. Vol. 48, p. 010768]. The blended hourly rate for all PSZJ attorneys in the Final Application was \$998.05/hr. [R. Vol. 48, p. 010768]. The blended hourly rate for all PSZJ timekeepers, regardless of attorney or non-attorney status, was \$952.45/hr. [R. Vol. 48, p.

010768].

NexPoint respectfully submits that the significance of these blended rates cannot be overstated. At bottom, each and every time a PSZJ attorney-timekeeper acted in Debtor's Bankruptcy Case, regardless of that particular attorney-timekeeper's level(s) of experience, the matter(s) upon which they were working, and so forth resulted in an hourly charge for attorney time, on average, of \$998.05/hr. – nearly a thousand dollars an hour – for PSZJ's attorneys. NexPoint respectfully submits that the blended rate for PSZJ's timekeepers, including non-attorneys, of \$952.45/hr. is sufficiently close to PSZJ's blended attorney time to merit the same types of quantitative and qualitative review and scrutiny by this Court, as well as by the Bankruptcy Court for the same reasons. Simply put, each time a PSZJ timekeeper acted in Debtor's bankruptcy, an average of \$952.45/hr. was being charged.

Exhibit F to PSZJ's Final Application reveals some reasons why PSZJ's blended rates for attorneys and non-attorneys alike approximated \$1,000.00/hr. [R. Vol. 49, p. 011219]. PSZJ's staffing plan disclosed that timekeepers at the experience/seniority levels of "Sr./Equity Partner/Shareholder" numbering nineteen (19), with an average hourly rate of \$1,119.87/hr. [R. Vol. 49, p. 011219]. Nearly forty-percent (40%) of PSZJ's timekeepers (19 out of 49) were categorized at this level of experience and hourly billing rate(s). Following that, the next 15 PSZJ

timekeepers were categorized as “Of Counsel.” [R. Vol. 49, p. 011219]. The average hourly rate for PSZJ attorney time falling into the “Of Counsel” category was \$943.61/hr. [R. Vol. 49, p. 011219]. Thus, nearly seventy-percent (70%) of PSZJ’s overall timekeepers were categorized as either “Sr./Equity Partner/Shareholder” or “Of Counsel” levels of experience. [R. Vol. 49, p. 011219].

By way of contrast, PSZJ’s Exhibit F staffing plan categorized only two (2) attorneys at the associate-level of experience. [R. Vol. 49, p. 011219]. Expressed as a percentage of the PSZJ attorney-labor pool, only approximately five percent (5% or 2/36) was comprised of associate attorneys. The disclosed average hourly rate for associate attorney time was \$678.21/hr. [R. Vol. 49, p. 011219]. Finally, the PSZJ staffing plan referenced thirteen (13) non-attorney timekeepers with average hourly billing rates spanning the range of \$362.53/hr. to \$462.47/hr. [R. Vol. 49, p. 011219]. Once the Court assimilates the significance of these figures, it will become readily apparent why the average hourly rates for PSZJ attorneys and non-attorney timekeepers, alike, approximated nearly \$1,000.00/hr. It also explains why NexPoint, having had its request to treat the Final Hearing as a scheduling conference to permit NexPoint to engage in limited discovery (as discussed in greater detail below), focused the NexPoint Oppositions on the issues of hourly rates and concentrated the NexPoint Oppositions on 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). [R. Vol. 51, pp. 011569 - 011587; 011606 - 011625].

Turning to the discussion of the legal standard in the PSZJ Final Application, PSZJ focused its analysis exclusively on the *Johnson* factors. [R. Vol. 48, pp. 010803 - 010804]. PSZJ’s analysis in the Final Application did not mention or provide legal argument in the form of the application of the statutory factors set forth in 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F) to any supporting facts. [R. Vol. 48, p. 010767 - Vol. 49, p. 011223]. The PSZJ Application does not, for example, cite *Pilgrim’s Pride* and its observation that the lodestar and *Johnson* factors have coalesced with 11 U.S.C. § 330 to *collectively* form the governing analytical framework. [R. Vol. 48, p. 010767 - Vol. 49, p. 011223]. *See In re Pilgrim’s Pride Corp.*, 690 F.3d at 656 (“Following the Bankruptcy Code’s enactment, we made clear that the lodestar, *Johnson* factors, and § 330 coalesced to form the framework that regulates compensation of professionals employed by the bankruptcy estate.”) (emphasis added).

The apparent absence of authorities like *Pilgrim’s Pride* and *Caplin & Drysdale* from PSZJ’s Final Application helps to explain, for example, why a comparative analysis contemplated by 11 U.S.C. § 330(a)(3)(F) and its express reference to “comparably skilled practitioners” in other areas of law is not discretely set forth and addressed in the PSZJ Final Application. To be clear, this Circuit’s authoritative construction of the predecessor provision in 11 U.S.C. § 330(a)(3)(E) (post-2005 § 330(a)(3)(F)) made clear that this analysis necessarily entails

examination of practitioners not involved in Debtor’s Bankruptcy Case below and certainly not within PSZJ. *See Caplin & Drysdale*, 526 F.3d 828 n. 1 (“We reject out of hand Caplin & Drysdale’s contention that, by proving other lawyers in its own firm billed the full rate for non-working travel time, it satisfied **the burden of demonstrating** what ‘comparably skilled practitioners’ would bill pursuant to § 330.”) (emphasis added) (citation omitted). As *Caplin & Drysdale* teaches, application of the statutory factors set forth in 11 U.S.C. § 330(a)(3), in addition to the lodestar and *Johnson* factors, does not operate as a one-way ratchet, elevating professional fees progressively upward; rather, the application of 11 U.S.C. § 330(a)(3)(F) can be used as NexPoint argued below and as demonstrated by *Caplin & Drysdale* to adjust fees downward from an initial lodestar calculation, along with any other adjustments stemming from the application of the *Johnson* factors.

But, in whichever direction the analysis leads under 11 U.S.C. § 330(a)(3)(F), its express consideration by the Bankruptcy Court below was mandated both by the express terms of 11 U.S.C. § 330(a)(3) and its use of the mandatory auxiliary verb “shall,” as well as by this Circuit’s most recent authoritative construction of 11 U.S.C. § 330 in *Sylvester*. 23 F.4th 543, 2022 U.S. App. LEXIS 1141, *5 (“stressing that § 330(a) does not authorize courts to award reasonable compensation simpliciter, but reasonable compensation for actual and necessary expenses rendered by a § 327(a) professional”) (internal quotation marks and citation

omitted); *see also Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 131 (2015) (“Section 330(a)(1) does not authorize courts to award ‘reasonable compensation’ *simpliciter*, but ‘reasonable compensation for actual and necessary services rendered by’ the § 327(a) professional. § 330(a)(1)(A).”) And, as the case law is clear that the burdens of proof and persuasion to justify a final award of fees and reimbursement of expenses under 11 U.S.C. § 330 rest with the fee applicant, PSZJ was required to address all of the statutory factors in 11 U.S.C. § 330 sufficiently, including 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). PSZJ did not do so. Thus, NexPoint contends that PSZJ convinced the Bankruptcy Court to commit reversible error and abuse its discretion in granting the PSZJ Final Application.

B. WilmerHale’s Final Application Was Submitted Without Evidentiary Support Addressed To The Statutory Factors Set Forth In 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F).

WilmerHale’s Final Application sought the Bankruptcy Court’s final approval of \$2,645,729.72 in professional fees and \$5,207.53 in reimbursement of actual and necessary expenses incurred by WilmerHale. [R. Vol. 50, p. 011225]. In addition to an agreed-upon reduction in WilmerHale’s professional fees of \$239,941.28, as well as \$3,717.00 in non-working travel charges, WilmerHale’s Final Application sought direct payment from Debtor’s bankruptcy estate of \$1,327,899.18. [R. Vol. 50, p. 011225]. The difference was to be paid to WilmerHale from certain non-debtor funds for which WilmerHale continued to perform work during the pendency

of Debtor's Bankruptcy Case as authorized by 11 U.S.C. § 327(e). [R. Vol. 50, p. 011224]. WilmerHale had formerly been employed as an ordinary course professional by Debtor's bankruptcy estate. [R. Vol. 2, pp. 000670 - 000671]. WilmerHale then sought approval of its employment under 11 U.S.C. § 327(e) through the WilmerHale Employment Application and the Bankruptcy Court's entry of the WilmerHale Employment Order. [R. Vol. 10, pp. 002457 - 002479; Vol. 14, pp. 003334 - 003336].

WilmerHale's blended hourly rate for all WilmerHale timekeepers during the time period for which WilmerHale sought the Bankruptcy Court's final approval of WilmerHale's requested professional fees and reimbursement of actual and necessary expenses was \$1,166.20/hr. [R. Vol. 50, p. 011225]. The aggregate number of hours billed across all WilmerHale timekeepers during the application period covered by the WilmerHale Final Application was 2,477.60. [R. Vol. 50, p. 011232]. Of that aggregate total, only 156.20 hours of time were recorded by WilmerHale's paraprofessionals, and WilmerHale's associates logged only 67.90 hours from October 16, 2019 through August 11, 2021. [R. Vol. 50, p. 011232]. WilmerHale's timekeepers at the level of "Partner" billed 1,157.90 hours at a blended rate of \$1,320.84/hr. [R. Vol. 50, p. 011232]. WilmerHale's Counsel attorneys billed 1,095.60 hours at a blended hourly rate of \$1,103.99/hr. [R. Vol. 50, p. 011232]. This hourly rate structure helps explain why WilmerHale's Final

Application includes a blended hourly rate of \$1,166.20/hr. across all categories of timekeepers. [R. Vol. 50, p. 011232].

WilmerHale's efforts to address the statutory requirements set forth in 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F) did not markedly exceed those of PSZJ. Included as Exhibit A to WilmerHale's Final Application is a chart bearing the heading "Customary and Comparable Compensation Disclosures with Fee Applications." [R. Vol. 50, p. 011254]. There, WilmerHale represents the following:

WilmerHale's hourly rates for services rendered in this chapter 11 case are comparable to the hourly rates charged in complex chapter 11 cases by comparably skilled attorneys. In addition, WilmerHale's hourly rates for services rendered in this chapter 11 case are comparable to the rates charged by the firm and by comparably skilled practitioners in other firms, for complex regulatory and compliance matters, whether in court or otherwise, regardless of whether a fee application is required. WilmerHale's blended hourly rates for attorneys and paraprofessionals for the 12-month period preceding the end of the Application Period are set forth below:¹

[R. Vol. 50, p. 011254].

According to WilmerHale's chart, the firmwide blended billing rate for the 12-month period preceding the application period featured (i) Partners with blended hourly billing rates at \$1,136.00/hr., (ii) Counsel with blended hourly billing rates at

¹ NexPoint has omitted inclusion of WilmerHale's corresponding chart. The chart can be found at [R. Vol. 50, p. 011254].

\$935.00/hr., (iii) Associates with blended hourly billing rates at \$625.00/hr., and (iv) Paraprofessionals with blended hourly billing rates at \$423.00/hr. [R. Vol. 50, p. 011254]. The corresponding categories of WilmerHale timekeepers during the period covered by the WilmerHale Final Application feature (i) Partners with blended hourly billing rates at \$1,320.84/hr., (ii) Counsel with blended hourly billing rates at \$1,103.99/hr., (iii) Associates with blended hourly billing rates at \$796.57/hr., and (iv) Paraprofessionals at \$616.98/hr. [R. Vol. 50, p. 011254]. The bottom-line comparison of the blended hourly rate for all WilmerHale timekeepers during the 12-month period immediately preceding the time-period encompassed by Wilmer's Final Application of \$802.00/hr. increased to blended rate of \$1,166.20/hr. in the Final Application. [R. Vol. 50, p. 011254].

In candor to the Court, NexPoint acknowledges that there may be rational, good, or even laudable factors that may help explain some of these disparities. For example, WilmerHale's *pro bono* efforts in the legal communities where its attorneys are resident, are generally known throughout the legal community, and the Silva Declaration in support of the Wilmer Employment Application briefly alludes to some of WilmerHale's efforts in this regard. To the extent that WilmerHale's *pro bono* efforts or reduced fee arrangements aimed at underserved communities or those in need of WilmerHale's services but cannot afford to pay its rates, NexPoint does not mean to suggest that WilmerHale should be prejudiced in any way by such

efforts. NexPoint here only notes that it has been left to guess as to the basis for, what appears on initial review, to be quite an extraordinary increase in the WilmerHale firm's blended hourly rate over a very brief period of time.

The is why NexPoint's arguments are aimed at the absence of an adequate showing under 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F), and not whether WilmerHale or, for that matter, any of the Retained Professionals will ultimately be able to make the requisite statutory showings. Returning to WilmerHale, NexPoint also understands that, although the lapse of a roughly 3- to 4-year period between the aggregate blended hourly rates at issue may seem relatively brief, inflationary pressures have hit nearly every sector of the U.S. economy, and NexPoint imagines that WilmerHale (and the rest of the Retained Professionals, for that matter) is unlikely to be entirely immune from such pressures. But, what NexPoint may imagine and what WilmerHale is required to demonstrate under the lodestar, the *Johnson* factors, and 11 U.S.C. § 330(a)(3) are not one and the same. An increase in the blended hourly rate from \$802.00/hr. to \$1,166.20/hr. (approximately a 45% increase over the \$802.00/hr. blended hourly rate for the 12-month period immediately preceding the time period covered by WilmerHale's Final Application) and the governing legal standard under 11 U.S.C. § 330(a) require more. NexPoint respectfully submits that WilmerHale did not make the requisite showing before the Bankruptcy Court. Thus, NexPoint contends that WilmerHale convinced the

Bankruptcy Court to commit reversible error and abuse its discretion in granting the Wilmer Final Application on the record WilmerHale placed before the Bankruptcy Court.

C. Sidley’s Final Application, Likewise, Was Submitted Without Sufficient Competent Evidentiary Support Addressed To The Statutory Factors Set Forth In 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F).

Sidley’s Final Application sought the Bankruptcy Court’s approval of professional fees totaling \$13,134,805.20 and reimbursement of \$211,841.25. [R. Vol. 47, p. 010649]. According to the Sidley Final Application, Sidley’s blended hourly rate, less a 10% discount, amounted to \$866.48/hr. across all Sidley timekeepers. [R. Vol. 47, p. 010766]. Other than merely reciting the statutory standard set forth in 11 U.S.C. § 330(a)(3) and the required factors set forth therein, the Sidley Final Application was not accompanied by sufficient admissible evidence addressing 11 U.S.C. § 330(a)(3)(B) and, absent passing references to the concept of comparability, was submitted without any competent evidentiary support addressing 11 U.S.C. § 330(a)(3)(F).

For instance, the Sidley Final Application references the concept of comparability as part of Exhibit F to the Sidley Final Application, entitled, “Customary and Comparable Compensation Disclosure.” [R. Vol. 47, pp. 010765 - 010766]. The Sidley Final Application references a category entitled the “Non-Bankruptcy Blended Rate.” [R. Vol. 47, p. 010766]. There, in a related footnote,

the Sidley Final Application explains:

Sidley calculated the Non-Bankruptcy Blended Rate by dividing the total amount of fees billed to clients **by Sidley's domestic, non-bankruptcy timekeepers** during the Comparable Period by the total number of chargeable hours worked on behalf of clients by such timekeepers during the Comparable Period. The Non-Bankruptcy Blended Rate does not include fees and corresponding chargeable hours voluntarily reduced by Sidley prior to submission of the relevant invoice to Sidley's clients. For the avoidance of doubt, the Non-Bankruptcy Blended Hourly Rates reflect Firm-wide increases that took effect across all of the Firm's practice groups on January 1, 2021.

[R. Vol. 47, p. 010766]. (emphasis added).

But, as NexPoint has already explained above, self-referential or intra-firm comparisons of this very nature have been rejected “out of hand” by this Circuit for purposes of establishing the mandatory statutory requirement of 11 U.S.C. § 330(a)(3)(F). *See Caplin & Drysdale*, 526 F.3d 828 n. 1 (“We reject out of hand Caplin & Drysdale’s contention that, by proving other lawyers in its own firm billed the full rate for non-working travel time, it satisfied **the burden of demonstrating** what ‘comparably skilled practitioners’ would bill pursuant to § 330.”) (emphasis added) (citation omitted). This establishes that Sidley’s Final Application was submitted without evidentiary support under a statutory element under 11 U.S.C. § 330(a)(3) that the Bankruptcy Court was required to consider in connection with the Sidley Final Application, both by Congressional directive in 11 U.S.C. § 330(a)(3) and under this Circuit’s governing law. *See, e.g., In re Pilgrims Pride Corp.*, 690

F.3d at 664 (recognizing that the 1994 amendments to 11 U.S.C. § 330, adding what was then codified as 11 U.S.C. § 330(a)(3)(E) and what is currently codified as 11 U.S.C. § 330(a)(3)(F), as a primary and mandatory factor that could drive, along with other *Johnson* factors and those set forth in 11 U.S.C. § 330(a), an upward or downward adjustment of an initial lodestar fee calculation). NexPoint respectfully submits that Sidley did not make the requisite showing before the Bankruptcy Court. Thus, NexPoint contends that Sidley convinced the Bankruptcy Court to commit reversible error and abuse its discretion in granting the Sidley Final Application.

D. FTI’s Final Application Was Also Submitted Without Sufficient Competent Evidentiary Support Addressed To The Statutory Factors Set Forth In 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F).

The FTI Final Application set forth FTI’s request for final Bankruptcy Court approval of \$5,717,625.52 in professional fees and \$39,122.91 in reimbursement or actual and necessary expenses pursuant to 11 U.S.C. § 330. [R. Vol. 46, p. 010533]. The blended hourly rate across all FTI timekeepers throughout the duration of Debtor’s Bankruptcy Case was \$657.36/hr. [R. Vol. 46, p. 010537]. In a vein similar to the PSZJ, WilmerHale, and Sidley Final Applications, the FTI Final Application does not appear to discuss the mandatory statutory factors set forth in 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F) – certainly not at any length – let alone offer sufficient evidentiary support for the proposition that FTI’s requested blended hourly rate “is reasonable based on the customary compensation charged by

comparably skilled practitioners in cases other than cases under this title.” 11 U.S.C. § 330(a)(3)(F). NexPoint respectfully submits that FTI did not make the requisite showing before the Bankruptcy Court. Thus, NexPoint contends that FTI convinced the Bankruptcy Court to commit reversible error and abuse its discretion in granting the FTI Final Application.

E. Teneo’s Final Application Was Also Submitted Without Sufficient Competent Evidentiary Support Addressed To The Statutory Factors Set Forth In 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F).

Teneo’s Final Application sought the Bankruptcy Court’s final approval of professional fees totaling \$1,221,468.75 generated by 2,334.90 total hours billed by Teneo timekeepers, yielding a blended rate of \$523.14. [R. Vol. 47, p. 010583]. Teneo also sought final Bankruptcy Court approval for reimbursement of \$6,257.07 in actual and necessary expenses. [R. Vol. 47, p. 010581]. Teneo also sought approval of \$137,096.77 for professional fees incurred by Marc Kirschner, yielding an aggregate amount of \$1,358,565.52 in professional fees for which Teneo sought approval through the Teneo Final Application. [R. Vol. 47, p. 010581].

Other than a brief recitation of the statutory factors set forth in 11 U.S.C. § 330(a)(3), the Teneo Final Application was submitted without the benefit of competent, admissible evidence addressing 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). NexPoint respectfully submits that Teneo did not make the requisite showing before the Bankruptcy Court. Thus, NexPoint contends that Teneo

convinced the Bankruptcy Court to commit reversible error and abuse its discretion in granting the Teneo Final Application.

V. The Bankruptcy Court Erred In Overruling NexPoint's Oppositions.

A. NexPoint's Oppositions Alerted The Bankruptcy Court And The Retained Professionals To The Evidentiary Problems Presented By The Final Applications Under 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F).

i. The Retained Professionals Opposed NexPoint's Discovery Request.

To begin, NexPoint's Initial Opposition extended an olive branch to the Retained Professionals and offered them an opportunity to recognize and address the evidentiary deficiencies in the Final Applications. NexPoint respectfully submits that this was a reasonable offer in light of the procedural, notice, and service deficiencies with respect to the Final Applications stemming from the Retained Professionals' collective failure to properly serve the Final Applications and provide notice of the applicable objection deadline(s) thereto established under the Confirmed Plan and Confirmation Order. [R. Vol. 51, pp. 011571 - 011574]. NexPoint requested that the initially scheduled hearing of November 9, 2021 on the Final Applications be treated as a scheduling conference to permit NexPoint to conduct discovery with respect to the Final Applications. [R. Vol. 51, p. 011572].

Additionally and although NexPoint mistakenly referred to Professor Markell's proposed role as that of a fee examiner, as opposed to the correct designation of Professor Markell as an expert witness, NexPoint offered to pay (at

its own expense) for Professor Markell and Legal Decoder to review the Final Applications for the benefit of the Bankruptcy Court, the United States Trustee, and all creditors and parties in interest in Debtor's Bankruptcy Case. [R. Vol. 51, p. 011572]. According to Professor Markell's declaration in support of the Initial Opposition, Professor Markell informed the Bankruptcy Court and the Retained Professionals that he and Legal Decoder would need approximately sixty (60) days to review the Final Applications. [R. Vol. 51, pp. 011586 - 011587]. And, contrary to the contentions of various Retained Professionals, Professor Markell was not in any way, shape, or form a "hired gun" of any kind for NexPoint. Quite the contrary, Professor Markell's declaration and the Initial Opposition made it emphatically clear that Professor Markell had not yet agreed to serve as an expert witness with respect to the Final Applications. [R. Vol. 51, pp. 011572 - 011573; 011587].

NexPoint further proposed in the Initial Opposition that, in the event Professor Markell and Legal Decoder identified problems with any of the Final Applications and Professor Markell agreed to serve as an expert witness at that point, NexPoint be given the opportunity to supplement the record on the Final Applications with Professor Markell's findings. [R. Vol. 51, p. 011572]. The Retained Professionals, in turn, would be provided with as much time as they believed they needed to reply to the findings of Professor Markell and Legal Decoder, as well as to respond to any supplemental objections from NexPoint. [R. Vol. 51, p. 011572].

On November 5, 2021, both PSZJ (on behalf of the Debtor’s professionals) and Sidley (on behalf of the Committee’s professionals) filed their respective replies to NexPoint’s Initial Opposition. [R. Vol. 51, pp. 011588 - 011599; 011600 - 011605]. Both PSZJ’s and Sidley’s replies sought to cast doubt on NexPoint’s motives in pursuing the Initial Opposition, characterizing NexPoint, essentially, as part of an overly litigious “cabal.” [R. Vol. 51, pp. 011589 - 011590; 011601]. Astoundingly, and in direct contravention of the guarantees set forth in the Interim Compensation Procedures Order that NexPoint would not be subjected to any prejudice by virtue of having refrained from interposing any objection(s) to the Retained Professionals’ interim and monthly fee applications, both PSZJ and Sidley argued that NexPoint’s request for a discovery period should be denied because, allegedly, NexPoint “failed” to raise any such issues as part of the interim compensation process. [R. Vol. 51, pp. 011590; 011595; 011601 - 011602]. Neither PSZJ nor Sidley explained, or even attempted to explain, how such arguments could be reconciled with the language NexPoint has placed directly before this Court, taken directly from the Interim Compensation Procedures Order. Instead, PSZJ and Sidley simply contended that the combination of NexPoint’s allegedly illicit motives in pursuing its rights under the Bankruptcy Code and Bankruptcy Rules, as well as the illusory opportunity to object to the entry of interlocutory interim compensation orders, notwithstanding the express protection from any prejudice expressly set forth

in the Bankruptcy Court's own Interim Compensation Procedures Order itself, combined to serve as a basis for denying NexPoint its requested discovery period. PSZJ's reply to the Initial Opposition also continued to argue in error that the *Johnson* factors comprised the entirety of the governing legal test applicable to the Bankruptcy Court's consideration of the Final Applications. [R. Vol. 51, pp. 011597 - 011598].

To be clear, NexPoint was entitled to discovery under both the Interim Compensation Procedure Order's guarantee that interim grants of compensation would be entered without prejudice to non-objecting parties, like NexPoint, as well as under Bankruptcy Rule 9014. *See In re Intelogic Trace*, 200 F.3d at 389; *In re TransAmerican Natural Gas Corp.*, 978 F.2d at 1416 ("As the district court correctly noted, TransAmerican's objection to Toma's administrative expense claim gave rise to a 'contested matter' governed by Bankruptcy Rule 9014." *In re Texas Extrusion, Corp.*, 836 F.2d at 220 ("In the case at bar, the fee application of Palmer, Palmer & Coffee was a 'contested matter' because there were objections filed to the application."); FED. R. BANKR. P. 3007, Advisory Committee Note (1983) (recognizing that an objection to a claim gives rise to a contested matter under Bankruptcy Rule 9014). It was not until NexPoint filed the Initial Opposition to the Final Applications that a contested matter governed by Bankruptcy Rule 9014, with the corresponding availability of discovery under Bankruptcy Rule 9014(c), arose

before the Bankruptcy Court. To put this into perspective, the Final Fee Hearing (November 17, 2021) postdated NexPoint's initiation of a contested matter under Bankruptcy Rule 9014 through the Initial Opposition by a period of merely 15 calendar days. Entry of the Final Orders stemmed directly from these improper procedures.

To address the procedural, notice, service and due process problems presented by the collective failure of the Retained Professionals to notice and serve their respective Final Applications in accordance with the Confirmed Plan and Confirmation Order, the Bankruptcy Court continued the hearing on the Final Applications until the date of the Final Fee Hearing (again, November 17, 2021). [R. Vol. 52, pp. 011626 - 011627]. NexPoint was given until Friday, November 12, 2021 to supplement its Initial Opposition. [R. Vol. 52, p. 011627]. The Bankruptcy Court, in turn, provided the Retained Professionals until Monday, November 16, 2021 to reply to any supplemental opposition from NexPoint. [R. Vol. 52, p. 011627].

ii. *The Supplemental Opposition Flagged §§ 330(a)(3)(B) and (F) Issues*

On November 12, 2021, NexPoint timely filed the Supplemental Opposition. [R. Vol. 51, pp. 011606 - 011625]. In its Supplemental Opposition, NexPoint renewed its request to continue the Final Fee Hearing, provide an opportunity for NexPoint to conduct reasonable, limited discovery, including a review of the

Retained Professional Final Applications by Professor Markell and Legal Decoder. [R. Vol. 51, pp. 011607 - 011608]. NexPoint's Supplemental Opposition also alerted the Bankruptcy Court to NexPoint's position that the continued refrain of the Debtor's and Committee's professionals, through PSZJ and Sidley, respectively, was inappropriate in light of the express guarantees set forth in the Interim Compensation Procedures Order that the Bankruptcy Court's approval of interim and monthly compensation requests would be without prejudice to the rights of any creditors and parties in interest to object to any requests for final compensation awards, including those advanced by the Retained Professionals through the Final Applications. [R. Vol. 51, p. 011608].

But NexPoint went one step further in its Supplemental Opposition. NexPoint submitted that if, upon the conclusion of Professor Markell's and Legal Decoder's collective review of the Final Applications Professor Markell declined to serve as an expert witness before the Bankruptcy Court in Debtor's Bankruptcy Case, then NexPoint's objections to the Final Applications would be deemed withdrawn. [R. Vol. 51, pp. 011608 - 011609]. From NexPoint's perspective, the Retained Professionals stood nothing to lose by accepting this offer because the Retained Professionals could have used the additional time to address the deficiencies in their respective Final Applications NexPoint identified in the Supplemental Opposition under 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F).

NexPoint's Supplemental Opposition then turned to the meritless attacks by PSZJ and Sidley on behalf of the Debtor's and Committee's professionals challenging NexPoint's standing as, of all things, a party in interest under 11 U.S.C. § 1109(b). [R. Vol. 51, pp. 011611 - 011614]. Questioning NexPoint's standing to advance the NexPoint Oppositions as a party in interest under 11 U.S.C. § 1109(b) laid bare the Retained Professional's eagerness – perhaps desperation – to have the Final Applications approved without NexPoint being given the opportunity to conduct discovery or for Professor Markell and Legal Decoder to independently examine the Final Applications. NexPoint's Supplemental Opposition also called attention to the fact that none of the Retained Professionals had obtained the Bankruptcy Court's prior approval of their hourly rates or rate structures under 11 U.S.C. § 328(a). [R. Vol. 51, pp. 011614 - 011615].

Perhaps most importantly, the NexPoint Supplemental Opposition specifically identified the Retained Professionals' collective failure to address through the submission of competent and otherwise admissible evidence that each respective Final Application satisfied the requirements of 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). [R. Vol. 51, pp. 011615 - 011617]. Here again, NexPoint proposed that the Retained Professionals be provided with an opportunity to supplement what NexPoint contended were the Retained Professionals' fatally deficient submissions to the Bankruptcy Court while, at the same time, NexPoint

would be permitted to enlist the services of Professor Markell and Legal Decoder, as well as conducting limited related discovery, to review the Final Applications. [R. Vol. 51, p. 011618].

In response, both PSZJ and Sidley both replied to the NexPoint Supplemental Opposition. [R. Vol. 52, pp. 011628 - 011633; 011645 - 011651]. Rather than joining issue directly and explaining where in the record the Retained Professionals addressed the requirements of 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F), both PSZJ and Sidley continued to direct their oppositions to NexPoint's alleged motives in bringing the NexPoint Oppositions, questioned NexPoint's standing, and mischaracterized NexPoint's offer to conduct discovery with further review by Professor Markell and Legal Decoder as, essentially, a waste of time. [R. Vol. 52, pp. 011628 - 011633; 011645 - 011651].

iii. *The Absence Of Prior Interim Fee Objections By NexPoint Prejudices NexPoint at the Final Fee Hearing Despite The Interim Compensation Procedures Order.*

At the Final Fee Hearing, PSZJ continued to argue that NexPoint had effectively been prejudiced by virtue of NexPoint's prior decisions to refrain from objecting to monthly and interim requests for payment of professional compensation. PSZJ argued:

Now that Mr. Schwartz has clarified in their latest pleading that they are not seeking to have this Court approve a fee examiner, which, of course, was not appropriate for the reasons Your Honor indicated in the

email sent to us and we talk in our briefing, but rather the question I'm sure the Court has, and I'm not sure Mr. Schwartz will have the answer for, is **why only now**, at this stage of the case, when we're here at the final fee hearing, is NexPoint coming in and asking for 60 more days? NexPoint received copies of every monthly fee application that was filed in this case. NexPoint was aware that the fee applications, final fee applications, would be filed 60 days after the effective date and that it would have 30 days thereafter to file objections. Ninety days. So even if their argument that they didn't want to have a fee fight during the case and that's the reason they didn't object was a genuine argument -- which, of course, it's not -- they should have retained their experts to conduct their fee review so that they would be ready to present to Your Honor at this hearing what their objections are, as opposed to sit here and ask Your Honor to continue the hearing for 60 days. **They have not made any showing in their papers why they failed to do that and why they should be granted an additional 60 days, again, to conduct what they indicated is discovery.** Each of the quarterly fee applications is a part of this Court's record, which contains all the bills for the professionals. Accordingly, the Court does have the evidentiary basis to support the granting of the fee applications, and that each of the quarterly applications, as well as in the final application, there has been extensive analysis and argument and evidence on what the fees were in these cases, how they were reasonable and necessary.

[R. Vol. 73, pp. 015844 - 015845] (emphasis added).

The arguments advanced by Sidley on behalf of the Committee professionals were largely to the same effect:

First, obviously, Your Honor, each Committee professional painstakingly complied with the detailed timekeeping and reporting requirements necessary to demonstrate the reasonableness of the fees and the

necessity of the fees. As Mr. Pomerantz alluded to, this is evidenced by the voluminous fee applications that have been filed in this case. In fact, Your Honor, FTI and Sidley each have filed 21 monthly fee applications and six interim fee applications, and Teneo has filed two monthly and obviously the final fee application that is before Your Honor this morning.

[R. Vol. 73, p. 015846].

Unfortunately and notwithstanding the Bankruptcy Court's prior entry of the Interim Compensation Procedures Order, the Bankruptcy Court took the bait set by PSZJ and Sidley on behalf of the Debtor's and Committee's professionals, respectively:

All right. Well, Mr. Schwartz, you have heard and read the arguments about NexPoint's standing *and why so late in the game is NexPoint suddenly wanting more time*, a fee examiner, a fee expert, whatever you're calling it. So I'll hear your response to that and how you wanted to proceed today if I find standing.

[R. Vol. 73, p. 015848]. (emphasis added).

In response, NexPoint alluded to several reasons why NexPoint exercised its discretion and restraint and refrained from objecting to the Retained Professionals' monthly and interim compensation requests, including on the basis of the Interim Compensation Procedures Order, "And I think, Your Honor, *the interim compensation order that was entered in the case contemplated exactly that process*, that all rights of parties to object to fees will be preserved for the final applications."

[R. Vol. 73, p. 015851]. (emphasis added). Notwithstanding NexPoint's argument,

the Bankruptcy Court, unfortunately, agreed with PSZJ and Sidley and determined that NexPoint's request for discovery was too late:

But as far as the renewed request for a fee examiner or a fee expert and a request for a delay, I am denying NexPoint's request. I agree with the argument of the Debtor and the Committee that this is very late for such a request to be made. While I totally agree with the argument that no one is bound by an interim fee approval order, and just because you don't object at the interim fee app stage, you know, that doesn't mean you can't object at the final stage, it's one thing to acknowledge that, but it's quite another, at the end of the case, to say, okay, now we need much more time because there's so much to review and we want a fee examiner. You know, you still, in my view, have an obligation to review interim fee apps and -- well, you can raise what you want to raise at the end of the case, but I don't think it's a fair argument that, well, we didn't want to bog down the case with litigation over interim fee apps, or we decided not to worry because we knew at the end of the day we could object. That's just -- that just doesn't carry weight.

[R. Vol. 73, pp. 015862 - 015863].

After overruling the NexPoint Oppositions based on the Interim Compensation Procedures Order and NexPoint's requests for discovery and for the opportunity to have Professor Markell and Legal Decoder review the Final Applications, the Final Fee Hearing then turned to individual Final Applications. At that point, NexPoint's counsel expressly called to the Court's attention the lack of a prior approval by the Bankruptcy Court of any Retained Professional's hourly rates or rate structures and asked that the evidence supporting the necessary findings under

11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F) be identified. [R. Vol. 73, p. 015876].

With respect to PSZJ, the only evidence identified in response to NexPoint's request was a reference to the discussion of the *Johnson* factors in the paragraph 53 of the PSZJ Final Application. [R. Vol. 73, pp. 015876 - 015877]. NexPoint's counsel would continue to raise issues with the evidentiary records submitted with respect to the Final Applications throughout the Final Fee Hearing. [R. Vol. 73, pp. 015884; 015893 - 015894]. The Bankruptcy Court granted each of the Final Applications over NexPoint's Oppositions, as well as NexPoint's objections at the Final Fee Hearing. [R. Vol. 73, pp. 015879 - 015880; 015884 - 015885; 015894 - 015895; 015899 - 015901]. The Bankruptcy Court then entered the Final Orders on November 22, 2021 and November 29, 2021, respectively. [R. Vol. 1, pp. 000040 - 000042; 000043 - 000045; 000046 - 000047; 000048 - 000049; 000050 - 000051].

VI. The Procedural Posture Of These Consolidated Appeals

On December 3, 2021, NexPoint promptly and timely filed a notice of appeal under Bankruptcy Rules 8002 and 8003 with respect to each Final Order granting each Retained Professional's Final Application over NexPoint's Oppositions that were timely filed with the Bankruptcy Court. [R. Vol. 1, pp. 000001 - 000007; 000008 - 000015; 000016 - 000023; 000024 - 000031; 000032 - 000039]. NexPoint's notices of appeal gave rise to the following five appeals before this Court:

- *NexPoint Advisors, L.P. v. Pachulski Stang Ziehl & Jones LLP*, Case No. 3:21-cv-03086-K
- *NexPoint Advisors, L.P. v. Wilmer Cutler Pickering Hale & Dorr, LLP*, Case No. 3:21-cv-03088-K
- *NexPoint Advisors, L.P. v. Teneo Capital LLC*, Case No. 3:21-cv-03094-K
- *NexPoint Advisors, L.P. v. Sidley Austin*, Case No. 3:21-cv-03096-K
- *NexPoint Advisors, L.P. v. FTI Consulting, Inc.* Case No. 3:21-cv-03104-K

On January 11, 2022, this Court entered its order granting NexPoint's unopposed motion to consolidate the above-listed appeals into a single proceeding. (ECF No. 8). On January 17, 2022, the Retained Professionals filed the *Appellees' Joint Motion to Dismiss Appeals as Constitutionally Moot* (the "**MTD**"). (ECF No. 14). On January 24, 2022, NexPoint timely opposed Appellees' MTD through its filing of *Appellant NexPoint Advisors, L.P.'s Opposition to Appellees' Joint Motion to Dismiss Appeals as Constitutionally Moot* (the "**MTD Opposition**") (ECF No. 24). On January 31, 2022, the Retained Professionals timely filed the *Appellee's Joint Reply to Appellant's Opposition to Motion to Dismiss Appeals as Constitutionally Moot* (the "**Reply**"). (ECF No. 26). At this point, the matters presented through the MTD, the MTD Opposition, and the Reply remain under submission and pending before this Court. On February 10, 2022, NexPoint filed its unopposed motion to exceed the page and type-volume limitations of Bankruptcy Rule 8015(a)(7). (ECF No. 30). The Court entered its order granting that motion

on March 24, 2022. (ECF No. 32). Finally, the Clerk of the Bankruptcy Court transmitted the record on appeal on March 15, 2022. (ECF No. 31).

NexPoint now respectfully submits its opening brief on the merits for this Court's review and consideration.

ARGUMENT SUMMARY UNDER FRBP 8014(a)(7)

Approval of professional fee and expense reimbursement requests collectively exceeding \$40 million should issue, if at all, only after faithful and strict compliance with the governing legal framework for approval of such compensation and expense reimbursement requests under 11 U.S.C. § 330. Two indispensable and mandatory components of that analysis are 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). The Retained Professionals were assigned the burdens of proof and persuasion with respect to the Final Applications under the mandatory statutory elements of 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F) into the Final Fee Hearing. And the Retained Professionals had not been relieved of those burdens through prior approval of their requested hourly rates and rate structures at the outset of their respective engagements in Debtor's Bankruptcy Case under 11 U.S.C. § 328(a). NexPoint respectfully submits that the Retained Professionals failed to make the requisite showings under 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F) to justify entry of Final Orders authorizing in excess of \$40 million in professional fees and expense reimbursements. The fact that some or all of the Retained Professionals agreed to

voluntary discounts or reductions did not, thereby, relieve them of their obligation to meet the requisite legal standard under the lodestar, the *Johnson* factors, and 11 U.S.C. § 330 for the fees and expense reimbursements for which they sought approval.

NexPoint respectfully submits that the Bankruptcy Court committed reversible error and abused its discretion when it entered the Final Orders. By granting the Final Applications without requiring the Retained Professionals to comply with the requirements of 11 U.S.C. §§ 330(a)(3)(B) and, especially, 330(a)(3)(F), the Bankruptcy Court's applied legal standard deviated from the governing law under 11 U.S.C. § 330. These constitute legal errors subject to *de novo* review here. *In re Woerner*, 783 F.3d at 270-271. In addition, given the absence of the Bankruptcy Court's prior approval of the hourly rates and rate structures sought by the Retained Professionals in the Final Applications under 11 U.S.C. § 328, combined with the insufficiency of the evidence offered by the Retained Professionals under 11 U.S.C. §§ 330(a)(3)(B) and especially on 330(a)(3)(F) in the Final Applications, the Bankruptcy Court's Final Orders are based on findings of fact that are clearly erroneous. *See id.* NexPoint respectfully submits that, given the absence of any meaningful discussion of 11 U.S.C. § 330(a)(3)(F), an express statutory factor the Bankruptcy Court was required to consider and weigh in its analysis and review of the Final Applications by

Congressional directive and this Circuit’s law, let alone competent evidence on this point, this Court will be left with the firm and definite conviction that the Bankruptcy Court committed a mistake in granting the Final Applications and finding – at least implicitly – that 11 U.S.C. § 330(a)(3)(F) was somehow satisfied when it was never really discussed across the entirety of the Final Applications.

Finally, NexPoint respectfully submits that the Bankruptcy Court’s grant of the Final Applications stemmed from its application of improper procedures at the Final Fee Hearing. First, NexPoint was entitled to discovery pursuant to Bankruptcy Rule 9014(c) by virtue of filing its Initial and Supplemental Oppositions to the Final Applications. *See In re Intelogic Trace*, 200 F.3d at 389; *In re TransAmerican Natural Gas Corp.*, 978 F.2d at 1416 (“As the district court correctly noted, TransAmerican’s objection to Toma’s administrative expense claim gave rise to a ‘contested matter’ governed by Bankruptcy Rule 9014.” *In re Texas Extrusion, Corp.*, 836 F.2d at 220 (“In the case at bar, the fee application of Palmer, Palmer & Coffee was a ‘contested matter’ because there were objections filed to the application.”); FED. R. BANKR.P. 3007, Advisory Committee Note (1983) (recognizing that an objection to a claim gives rise to a contested matter under Bankruptcy Rule 9014). NexPoint’s Initial Opposition expressly requested that the originally scheduled hearing on the Final Applications be treated as a scheduling conference so that the discovery contemplated by Bankruptcy Rule 9014(c) could

unfold in an orderly manner. NexPoint's efforts to apprise the Court of NexPoint's intentions to enlist Professor Markell and Legal Decoder to assist in reviewing the Final Applications gave the Bankruptcy Court a preview of what NexPoint's discovery efforts would look like, at least in part, and to give the Bankruptcy Court reassurance that NexPoint was not seeking to delay matters solely for the sake of delay. Regardless, the Final Fee Hearing went forward on the merits of the Final Applications and NexPoint's Oppositions thereto.

More problematic still was the prejudice that befell NexPoint at the Final Fee Hearing notwithstanding the protections afforded to it by the Interim Compensation Procedures Order. The Bankruptcy Court effectively found that NexPoint's requests for discovery, the opportunity to enlist Professor Markell's assistance to review monthly and interim requests for compensation, and similar considerations rendered NexPoint's requests for additional time to conduct discovery and seek the assistance of Professor Markell and Legal Decoder as efforts that were, effectively, too little too late. Unfortunately, the Retained Professionals convinced the Bankruptcy Court to approve the Final Applications through the use of these improper procedures and, therefore, it was an abuse of discretion for the Bankruptcy Court to enter the Final Orders on the record before it – especially given the protections that were supposed to be provided to objecting creditors and parties in interest, like NexPoint, under the Interim Compensation Procedures Order.

ARGUMENT UNDER FRBP 8014(a)(8)

I. SECTION 330(a)(3) MAKES CONSIDERATION OF 11 U.S.C. §§ 330(a)(3)(B) AND 330(a)(3)(F) MANDATORY AS PART OF ANY AWARD OF FEES AND EXPENSE REIMBURSEMENTS.

A. The Statutory Framework of 11 U.S.C. § 330(a)(3)

Section 330(a)(3) of the Bankruptcy Code provides in relevant part as follows:

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, ***the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-***

- (A) the time spent on such services;
- (B) *the rates charged for such services;*
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
- (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
- (F) *whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.*

11 U.S.C. § 330(a)(3)(A)-(F) (emphasis added).

“The term ‘shall’ is usually regarded as making a provision mandatory, and the rules of statutory construction presume the term is used in its ordinary sense unless there is clear evidence to the contrary.” *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 573-574 (9th Cir. 2000); *see also In re Rowe*, 750 F.3d 392, (4th Cir. 2014) (“Shall, by contrast [to may], is more sternly mandatory. And whatever the merits of believing ‘may’ means ‘shall,’ they do not apply when Congress has employed the two different verbs in neighboring statutory passages.”) (citation omitted); *Compare* 11 U.S.C. § 330(a)(2) (using the permissive verb “may”) *with* 11 U.S.C. § 330(a)(3) (using the mandatory auxiliary verb “shall”).

Thus, under ordinary rules of statutory construction, Congress’ inclusion of the mandatory auxiliary verb “shall” in 11 U.S.C. § 330(a)(3) constitutes a Congressional directive to the federal courts that the Congressionally enumerated factors set forth in the statute must be factored in to any review and analysis of request for awards of fees and reimbursements of actual and necessary expenses under 11 U.S.C. § 330, including 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). By its express terms, therefore, 11 U.S.C. § 330(a)(3) placed the Retained Professionals on notice that their Final Applications were required to address both 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). NexPoint respectfully submits that the evidentiary record submitted by the Retained Professionals with respect to both factors was

simply inadequate, and in the case of 11 U.S.C. § 330(a)(3)(F), virtually non-existent.

B. Even The Successful Outcome Of A Case Or Representation Does Not Nullify Or Negate 11 U.S.C. § 330(a)(3) Or Excuse Professionals From Satisfying Their Assigned Burdens Under That Statute.

It is worth noting at the outset that courts, including the Bankruptcy Court below, have broad discretion in awarding professional compensation. *See, e.g., Caplin & Drysdale*, 526 F.3d at 828. But, as the Fifth Circuit’s recent decision in *Sylvester* makes clear, the exercise of any such discretion by the federal courts does not, thereby, authorize them to award compensation they determine to be “reasonable” in a manner that is unmoored from the express statutory requirements set forth in 11 U.S.C. § 330(a)(3). 23 F.4th 543, 2022 U.S. App. LEXIS 1141, at *5 (*citing ASARCO* and stating, “§ 330(a) does not authorize courts to award compensation *simpliciter*, but reasonable compensation for services rendered by the § 327(a) professional.”) (internal quotation marks and citations omitted).

In *Sylvester*, the Fifth Circuit was called upon to determine whether a bankruptcy court had improperly awarded a law firm professional compensation for performing services that, at least in the view of the Fifth Circuit, the bankruptcy trustee in that case should have performed and for which the bankruptcy trustee should have been compensated through the commission structure set forth in 11 U.S.C. §§ 326(a) and 330(a)(7). *See id.* at *9. The Fifth Circuit held that a law firm

may not be compensated for such services and reversed the bankruptcy court's award of attorney compensation. "Accordingly, we hold that a court may compensate an attorney under § 330(a) only for services requiring legal expertise that a trustee would not generally be expected to perform without an attorney's assistance." *Id.* In reaching these determinations, the *Sylvester* Court provided several insights and authoritative pronouncements that are immediately applicable to the instant consolidated appeals.

First, the Fifth Circuit looked askance upon what it viewed as the bankruptcy court's undue emphasis on the perceived successful outcome of the representation by the bankruptcy court as a kind of substitute for performing the statutory analysis required by 11 U.S.C. § 330. *Id.* at **9-10. "First, the bankruptcy court appeared to permit Chaffe to recover for the performance of ordinary trustee duties because of the successful result of the bankruptcy proceeding." *Id.* The *Sylvester* Court was not detained long in rejecting the bankruptcy court short-circuiting the operation of 11 U.S.C. § 330 in such a manner:

*But under § 330(a), a court cannot simply decline to make the required determination because the line is murky. Nor can it permit an attorney to bill the estate for nonlegal services because the bankruptcy proceeding was successful. Cf. *Baker Botts*, 576 U.S. at 131 (refusing to "excise the phrase 'for actual, necessary services rendered' from the statute" – even when the firm seeking fees had obtained a multibillion-dollar fraudulent transfer judgment for the debtor and allowed the debtor to emerge solvent from bankruptcy proceedings; *ASARCO* 751 F.3d*

at 301-02 (similar).

Id. at *10 (emphasis added); *see also ASARCO LLC*, 576 U.S. at 131.

The collective teaching of the Supreme Court’s decision in *ASARCO* and the Fifth Circuit’s decision in *Sylvester* is that equitable considerations, such as the actual or perceived successful outcome of a case or representation, do not and cannot override Congress’ express statutory directives set forth in 11 U.S.C. § 330(a)(3). Relatedly, such considerations cannot relieve a professional fee applicant under 11 U.S.C. § 330, like the Retained Professionals here, from carrying their assigned burden of proof with respect to each of the elements of 11 U.S.C. § 330(a)(3). Again, from *Sylvester*:

*Second and relatedly, the bankruptcy court ignored that the burden rests on the attorney requesting compensation under § 330(a) to justify the services rendered. In light of the successful outcome of the bankruptcy proceeding, the court chose to “allow Chaffe and the Trustee some leeway and ... assume the tasks performed by Chaffe required legal expertise.” But it is well established that “it is [the] applicant’s burden to demonstrate that services for which professional compensation is sought involve legal service beyond the scope of the trustee’s statutory duties... “[A]ll applicants for awards of professional compensation under 11 U.S.C. § 330 bear the burden of proof **on the elements of reasonable compensation**... “**The burden of proof is upon the applicant to justify the requested fees**...Accordingly, it was improper for the bankruptcy court to assume that Chaffe’s services required legal expertise than requiring Chaffe to meet its burden.”*

Id. at *11 (emphasis added) (citations omitted).

At bottom, the broad discretion enjoyed by courts under 11 U.S.C. § 330(a) is not limitless and cannot be used to shield from a more searching review on appeal of awards of professional compensation and reimbursement of actual and necessary expenses made without engaging in the review and analysis dictated by the Congressional directives expressly set forth in 11 U.S.C. § 330(a)(3). With these background legal principles in mind, it becomes clear that any award of professional compensation and reimbursement of actual and necessary expenses without the Retained Professionals addressing and satisfying both 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F), leaves the Final Orders issued under an erroneous legal standard, giving rise to an abuse of discretion by the Bankruptcy Court. As NexPoint will now demonstrate, that is precisely what transpired before the Bankruptcy Court when the Retained Professionals convinced the Bankruptcy Court to, unfortunately, commit reversible error.

C. The Bankruptcy Court's Entry Of The Final Orders Should Be Reversed Because They Were Entered Without Requiring The Retained Professionals To Satisfy The Requirements Set Forth In 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F), Thereby Amounting To An Abuse Of Discretion By The Bankruptcy Court.

- i. *Calculation Of The Lodestar And Johnson Factors Represents The End Of The Beginning Of The Analysis Under 11 U.S.C. § 330(a)(3), Not The Beginning Of The End Of The Analysis As Contended In Error Below.*

This is the insight provided by the Fifth Circuit's foundationally important decision in *Pilgrim's Pride*. There, the Fifth Circuit was called upon to determine

whether the prior decision of the Supreme Court in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), had overruled *sub silentio* the Fifth Circuit’s prior cases decided under 11 U.S.C. § 330 that authorized the award of success fees in accordance with 11 U.S.C. § 330(a)(3)(F). 690 F.3d at 653. In the process of rejecting the argument that the Supreme Court’s decision in *Perdue* achieved such an outcome, the Fifth Circuit carefully traced this Circuit’s jurisprudence on 11 U.S.C. § 330 through the date of that decision.

As NexPoint will explain in greater detail below, the key insight for purposes of this Court’s task in these consolidated appeals concerns the relationship between the statutory provision upon which NexPoint, admittedly, places a great deal of weight in these appeals, 11 U.S.C. § 330(a)(3)(F), and its relationship to bankruptcy law’s former internal directive under the Bankruptcy Act of 1898 and former Bankruptcy Rule 219(c)(1), sometimes referred to as the principle of the “economy of the estate,” that “instructed bankruptcy courts to give due consideration to the *nature, extent, and value* of the services rendered as well as to the *conservation of the estate* and the interests of creditors.” *Pilgrim’s Pride*, 690 F.3d at 658 (italics in original) (citation omitted); *see also Caplin & Drysdale*, 526 F.3d at 827 (“Prior to being amended in 1978, this statute favored economy of the estate over competitive compensation to attorneys for the debtors.”).

The Court began its analysis by noting that lodestar was only beginning of the

analysis required under 11 U.S.C. § 330(a):

Following the Bankruptcy Code’s enactment, we made clear that *the lodestar, Johnson factors, and § 330 coalesced to form the framework that regulates the compensation of professionals employed by the bankruptcy estate...Under this framework, bankruptcy courts must first calculate the amount of the lodestar. After doing so, bankruptcy courts “then may adjust the lodestar up or down based on the factors contained in § 330 and [their] consideration of the twelve factors listed in Johnson.”*... We also have emphasized that bankruptcy courts have “considerable discretion” when determining whether an upward or downward adjustment of the lodestar is warranted.

Pilgrim’s Pride, 690 F.3d at 656 (emphasis added) (citations omitted).

Following the Supreme Court’s decision in *ASARCO* and this Circuit’s most recent decision in this area *Sylvester*, NexPoint respectfully submits, again, that the discretion vested in the federal courts under this Circuit’s case law and under 11 U.S.C. § 330 cannot be used to excuse compliance with the requirements set forth in, and the showings that must be made under, 11 U.S.C. § 330(a)(3). *In re Sylvester*, 23 F.4th 543, 2022 U.S. App. LEXIS 1141, at *10 (emphasis added); *see also ASARCO LLC*, 576 U.S. at 131; *Pilgrim’s Pride*, 690 F.3d at 660 (“However, this discretion is far from limitless.”) (emphasis added). Given the expressly recognized relationship between 11 U.S.C. § 330(a)(3)(F) and the former governing regime under the Bankruptcy Act of 1898, the spirit of economy of administration, the failure to address this factor sufficiently is both particularly unfortunate and also

serves as a powerful reason for this Court to reverse the Final Orders and remand this matter back to the Bankruptcy Court in accordance with NexPoint's prayer for relief set forth in the conclusion to this brief. And, as the Fifth Circuit made clear in *Pilgrim's Pride*, the application of the factors set forth in 11 U.S.C. § 330(a)(3) can be used to justify the lodestar amount either upward (in the case, for example, of a fee enhancement or success fee) or downward in the form of a reduction in the amount of requested fees. *Pilgrim's Pride*, 690 F.3d at 660. Again from *Pilgrim's Pride*:

Conversely, we have never treated the lodestar and *Johnson* factors as mutually exclusive methods for determining reasonable compensation under either the Bankruptcy Act or the Bankruptcy Code. Instead, we have consistently viewed them as complementary methodologies using the lodestar as the starting point that yields a presumptively reasonable fee, and then permitting upward or downward adjustments based on the factors set forth in *Johnson* and the 1994 amendment.

690 F.3d at 664 (emphasis added) (citations omitted).

The 1994 amendment referred to by the *Pilgrim's Pride* Court as, effectively, the *sine qua non* of upward or downward adjustments of the lodestar based on the *Johnson* and statutory factors set forth in 11 U.S.C. § 330(a)(3), codified the statutory predecessor to 11 U.S.C. § 330(a)(3)(F) (then codified as 11 U.S.C. § 330(a)(3)(E)). Thus, this Circuit's case law has effectively identified 11 U.S.C. § 330(a)(3)(F) as the indispensable statutory factor that must be analyzed by reviewing

courts and, relatedly, must be satisfied and proved by professional fee applicants, like the Retained Professionals, in connection with requests for awards of professional compensation and reimbursement of actual and necessary expenses under 11 U.S.C. § 330. And yet, as NexPoint established in its detailed discussion of the record in the Statement of the Case above, there is barely any discussion of 11 U.S.C. § 330(a)(3)(F) by the Retained Professionals in any of their respective Employment or Final Applications, let alone competent, admissible evidence establishing that this factor was satisfied. NexPoint respectfully submits that the present status of the record as to 11 U.S.C. § 330(a)(3)(F), standing alone, should prove dispositive of these appeals in NexPoint's favor.

ii. *Section 330(a)(3)(F) Of The Bankruptcy Code Does Not Function As A One-Way Ratchet, Increasing Fee Awards Ever Upward; Rather, It Also Supports Downward Adjustments To Lodestar/Johnson Calculations.*

The key case for the Court's consideration here is the Fifth Circuit's decision in *Caplin & Drysdale*. 526 F.3d at 828. There, the Fifth Circuit was called upon to review a bankruptcy court's 50% reduction in a law firm's requested fees for non-working travel time. *Id.* at 826. The Fifth Circuit ultimately upheld the bankruptcy court's downward reduction of the law firm's requested fees through the application of 11 U.S.C. § 330(a)(3)(E) (now codified at 11 U.S.C. § 330(a)(3)(F)). *Id.*

The United States Trustee in that case objected to the law firm billing its full hourly rate for travel time not spent working. *Id.* In response, the bankruptcy court

there held an evidentiary hearing at which one of the law firm's partners was called to testify. *Id.* He testified that it was the law firm's practice to bill for non-working travel time in the same way that the law firm's lawyers would charge for any other time spent working. *Id.* The law firm partner then testified that it was also the practice at his prior firm to bill the full hourly rate for non-working travel time. *Id.* Finally, and with respect to what the actual practice was among other comparably skilled practitioners practicing in non-bankruptcy areas, the law firm's partner testified that (i) based upon his conversations with other lawyers, his understanding was that such unnamed firms set their respective hourly billing rates with the expectation that they would be able to charge 100% for non-working attorney travel time, and (ii) other attorneys within the partner's law firm, albeit in other, non-bankruptcy practice areas, also charged their full rates for non-working travel time. *Id.* at n.1.

The Fifth Circuit was not detained long in rejecting these arguments out of hand – literally. As to the partner's contention that his law firm should be permitted to charge its full rate for non-working travel time for its attorneys in bankruptcy based upon the practice of other non-bankruptcy attorneys within that same firm doing so, the Fifth Circuit responded that, “We reject *out of hand* Caplin & Drysdale's contention that, by proving other lawyers in its own firm billed the full rate for non-working travel time, it satisfied *its burden of demonstrating what*

“comparably skilled practitioners” would bill pursuant to § 330.” *Id.* at 828 n.1.

(emphasis added) (citation omitted).

As to the partner’s testimony regarding the alleged practices of other law firms in New York City, generally, the Fifth Circuit was equally unmoved:

Here, the district court found that during the hearing Caplin & Drysdale “did not even identify any other comparable firms, much less produce evidence of what they billed for nonproductive travel time.” We agree that Caplin & Drysdale did not make a sufficient showing with respect to how other comparable firms billed non-working travel time.

Id. at 827 (emphasis added).

Read together, *Pilgrim’s Pride* and *Caplin & Drysdale* demonstrate that the requirements of 11 U.S.C. § 330(a)(3)(F) constitutes an indispensable part of a professional fee applicant’s *prima facie* case for relief under 11 U.S.C. § 330. Failure to address this factor should result in the denial of a fee applicant’s request without prejudice to the applicant’s ability to resubmit its application for compensation once the professional fee applicant is in a position to make the showing required under the lodestar, *Johnson*, and 11 U.S.C. § 330(a)(3). These cases also make clear that 11 U.S.C. § 330(a)(3)(F) is capable of serving as a means by which a professional fee applicant’s requested compensation can be reduced.

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iii. *Faithful And Consistent Application Of 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F) Ensures That Bankruptcy Compensation Is And Remains Oriented Toward The Broader Market For Comparably Skilled Legal Services As Congress Has Expressly Intended.*

The Supreme Court has recognized that, in the case of bankruptcy law, Congress does not write on a clean slate. *See, e.g., Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (“When Congress amends the bankruptcy laws, it does not write on a clean slate.”) (citation omitted). The Fifth Circuit echoes that sentiment in *Pilgrim’s Pride* when it frequently couples its discussion of 11 U.S.C. § 330(a)(3)(F) with the former emphasis on economy in the administration of a bankruptcy estate by estate professionals, generally, and in particular with respect to their fees. *See, e.g.*, 690 F.3d at 658 -659 (“[T]he only significant shift in the law was that Congress removed the ‘conservation of the estate’ consideration – [requiring] courts to award fees ‘at the lower end of the spectrum of reasonableness’ – so that bankruptcy professionals could be paid fees comparable to those earned for similar services in the non-bankruptcy arena.”). Simply put, the rule of economy gave way to a rule of parity.

The reorientation of bankruptcy billing rates envisioned by Congress in enacting 11 U.S.C. § 330(a)(3)(F) was to calibrate them by reference to the market for comparable non-bankruptcy services. The lodestar of the analysis, therefore, is the general market for comparable legal services. Just as it was an error, in Congress’ judgment, to include as part of the Bankruptcy Act of 1898 an internal directive mandating that bankruptcy professionals be compensated on the lower end

of the range of reasonableness regardless of whether market forces for comparably skilled professionals might dictate otherwise, 11 U.S.C. § 330(a)(3)(F) helps ensure that bankruptcy compensation rates do not rise in a manner that is foreign to, or unmoored from, the market-based legal rates for comparably skilled practitioners practicing in non-bankruptcy areas.

Congress' implicit concern, perhaps fear, is that quantitative differences in compensation rates between bankruptcy and non-bankruptcy professionals may, in turn and over time, make the bankruptcy practice qualitatively different from then-formerly comparable areas of practice, and misalign incentives to the potential collective injury to the markets for bankruptcy and non-bankruptcy services, alike. As this Court is in a much better position to appreciate than most others, with its jurisdiction spanning the United States Code, diversity jurisdiction, and so forth, Congress' concerns extend far beyond the bankruptcy realm. The Congressional directive to contextualize the reasonableness of bankruptcy billing rates by reference to the broader market for comparable non-bankruptcy legal services, therefore, serves important functions that should not remain unaddressed as they are in the record before the Court in these consolidated appeals. The Retained Professionals' collective failure to address adequately the requirements set forth in 11 U.S.C. § 330(a)(3)(B), and the near-complete absence of any discussion - let alone competent evidence - on the issue of 11 U.S.C. § 330(a)(3)(F) should result in this Court's

reversal and remand of the Final Orders to the Bankruptcy Court for further proceedings consistent with this Court's instructions on remand.

iv. *The Bankruptcy Court's Application Of An Incorrect Legal Standard To The Final Applications And Its Entry Of The Final Orders Under That Erroneous Standard Constitutes A Reversible Abuse Of Discretion.*

NexPoint will not belabor the points it has already made. The statutory factors expressly enumerated by Congress in 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F) were required factors the Retained Professionals were required to address and satisfy through the presentation of competent, admissible evidence. NexPoint respectfully submits that the record on the issue of 11 U.S.C. § 330(a)(3)(B) presented by the Retained Professionals in the Final Applications fell well short of the mark. But the clearer case mandating reversal comes through the Court's consideration of NexPoint's challenges to the Final Orders under 11 U.S.C. § 330(a)(3)(F). NexPoint respectfully submits that it is not hyperbolic to state that the record before the Court in these consolidated appeals is nearly bereft of *any mention* of the requirements of 11 U.S.C. § 330(a)(3)(F) by the Retained Professionals in the Final Applications, let alone admissible evidence to that effect. The record demonstrates that the Retained Professionals convinced the Bankruptcy Court to commit reversible error when it entered the Final Order without addressing 11 U.S.C. § 330(a)(3)(F). As a result, the Bankruptcy Court applied an incorrect legal standard in granting the Final Applications, overruling NexPoint's Oppositions thereto, and entering the Final

Orders. The Bankruptcy Court's entry of the Final Orders should be reversed and remanded on this basis alone.

D. The Bankruptcy Court's Entry Of The Final Orders Should Be Reversed Because They Were Based On Findings Of Fact That Are Clearly Erroneous.

The Bankruptcy Court's entry of the Final Orders should be reversed because they are based upon findings of fact that are clearly erroneous. "A finding of fact is clearly erroneous only if on the entire evidence, the court is left with the definite and firm conviction that a mistake has been committed." *See, e.g., BNF Operations, LLC* 616 B.R. at 687. The collective failure of the Retained Professionals to address the mandatory requirements set forth in 11 U.S.C. § 330(a)(3)(F) demonstrated by NexPoint's discussion of the record in these consolidated appeals in the Statement of the Case above demonstrates the Final Orders are based on clearly erroneous findings under that statute. Again, the Retained Professionals barely mentioned that statutory factor throughout the relevant proceedings below – whether that be as part of the Retained Professionals' Employment Applications, the Retained Professionals' Employment Declarations, or the Final Applications. NexPoint respectfully submits that an objective view of the record on the discrete issue of 11 U.S.C. § 330(a)(3)(F) cannot leave the Court with anything other than a definite and firm conviction that the Bankruptcy Court's findings under that statutory provision, if any, were reached in error. This further demonstrates why the Bankruptcy Court

abused its discretion in granting the Final Applications, overruling NexPoint's Oppositions thereto, and entering the Final Orders. The Bankruptcy Court's entry of the Final Orders should be reversed and remanded on this basis alone.

E. The Bankruptcy Court Followed Improper Procedures In Entering The Final Orders And, Thereby, Abused Its Discretion.

As NexPoint has already demonstrated and discussed at length in the Statement of the Case above, NexPoint was entitled to rely on the guarantees set forth in the Interim Compensation Procedures Order that NexPoint would not be prejudiced or penalized in any way by virtue of electing not to object to interim and monthly fee applications. Unfortunately, the Retained Professionals were able to convince the Bankruptcy Court to deviate from its previously established procedures to NexPoint's detriment and prejudice.

Furthermore, NexPoint's Initial and Supplemental Oppositions gave rise to contested matters governed by Bankruptcy Rule 9014 which, in turn, made discovery available to NexPoint under Bankruptcy Rule 9014(c). *See In re Intelogic Trace*, 200 F.3d at 389; *In re TransAmerican Natural Gas Corp.*, 978 F.2d 1409, 1416 (5th Cir. 1992) ("As the district court correctly noted, TransAmerican's objection to Toma's administrative expense claim gave rise to a 'contested matter' governed by Bankruptcy Rule 9014." *In re Texas Extrusion, Corp.*, 836 F.2d 217, 220 (5th Cir. 1988) ("In the case at bar, the fee application of Palmer, Palmer & Coffee was a 'contested matter' because there were objections filed to the

application.”); FED. R. BANKR. P. 3007, Advisory Committee Note (1983) (recognizing that an objection to a claim gives rise to a contested matter under Bankruptcy Rule 9014, with the corresponding availability of discovery thereunder pursuant to Bankruptcy Rule 9014(c)).

Indeed, NexPoint’s requests in this regard were also consistent with the Bankruptcy Court’s *Guidelines for Compensation and Expense Reimbursement of Professionals*, attached as Exhibit F to the N.D. Tex. L.B.R. (the “**Local Fee Guidelines**”). The Bankruptcy Court’s Local Fee Guidelines show an extraordinary level of attention and concern to the hourly rates and rate structures charged by professionals, especially in instances where preapproval of such matters is requested by professionals pursuant to 11 U.S.C. § 328(a) is sought. The Bankruptcy Court’s Local Fee Guidelines are preceded by a notice specifically addressed to preapproval requests under 11 U.S.C. § 328(a):

If, in a chapter 11 case, a professional to be employed pursuant to section 327 or 1103 of the Bankruptcy Code desires to have the terms of its compensation approved pursuant to section 328(a) of the Bankruptcy Code at the time of such professional’s retention, then the application seeking such approval should so indicate and the Court will consider such request after an evidentiary hearing on notice to be held after the United States trustee has had an opportunity to form a statutory committee of creditors pursuant to section 1102 of the Bankruptcy Code and the debtor and such committee have had an opportunity to review and comment on such application. At a hearing to consider whether a professional’s compensation arrangement should be approved pursuant to section

328(a), *such professional should be prepared to produce evidence that the terms of compensation for which approval under section 328(a) is sought comply with the certification requirements of section I.G(3) of these guidelines.*

N.D. Tex. L.B.R. Local Fee Guidelines (Appendix F, pg. 68 of 87) (emphasis added).

The foregoing demonstrates that approval of such matters as a professional's hourly rates and rate structures, especially as set forth above in the context of 11 U.S.C. § 328(a) at the outset of a bankruptcy case, are ordinarily the subject of evidentiary hearings which must, in turn, be advanced through the submission of competent and otherwise admissible evidence on these points. Simply put, by virtue of the statutory scheme under 11 U.S.C. § 330, the applicable Bankruptcy Rules such as Bankruptcy Rule 9014 and, at least implicitly, by the Local Fee Guidelines, the approval of hourly billing rates and rate structures are ordinarily the subject of evidentiary hearings and, concomitantly, discovery.

NexPoint's request to treat both the initially scheduled hearing on the Final Applications of November 9, 2021, as well as the Final Fee Hearing as scheduling conferences, was entirely appropriate and kept with the letter and spirit of both the Interim Compensation Procedures Order, Bankruptcy Rule 9014, and the Local Fee Guidelines. Unfortunately, the Retained Professionals managed to convince the Bankruptcy Court to deviate from the Interim Compensation Procedure Order's guarantee of the absence of prejudice to non-objecting parties, like NexPoint with

respect to interim and monthly fee applications, as well as to deny NexPoint the brief discovery it requested in accordance with Bankruptcy Rule 9014(c). NexPoint's reasonable request to enlist Professor Markell's and Legal Decoder's review of the Final Applications was also in keeping with NexPoint's rights under Bankruptcy Rule 9014(c) and the Interim Compensation Procedures Order and was similarly refused.

Viewed as a totality, NexPoint respectfully submits that the Bankruptcy Court followed improper procedures and abused its discretion in granting the Final Applications, overruling NexPoint's Oppositions thereto, and entering the Final Orders on the record made before the Bankruptcy Court at the Final Fee Hearing. The Bankruptcy Court's entry of the Final Orders should be reversed and remanded on this basis alone.

CONCLUSION

NexPoint respectfully submits it has established that the Bankruptcy Court's entry of the Final Orders resulted from, and amounts here to, an abuse of discretion. Given that is the case, NexPoint respectfully prays for entry of an order of this Court: (i) reversing each of the Final Orders; (ii) remanding these matters back to the Bankruptcy Court with instructions to reopen the record on each of the respective Final Applications to permit each Retained Professional an opportunity to supplement the record with admissible evidence addressed to 11 U.S.C. §§

330(a)(3)(B) and 330(a)(3)(F); (iii) permitting NexPoint the opportunity to engage in discovery along the lines previously outlined by NexPoint before the Bankruptcy Court and as contemplated by the Interim Compensation Procedures Order and Bankruptcy Rule 9014(c); (iv) instructing the Bankruptcy Court to then hold a hearing on the Final Applications upon completion of discovery and related briefing only in the event that Professor Markell and Legal Decoder agree that the properly supplemented Final Applications remain objectionable; and (v) for such other and further relief as this Court determines to be just in the premises of these consolidated appeals.

NexPoint stands by the commitment it made to the Bankruptcy Court. If the Final Applications, as properly supplemented to address 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F), are determined to be unobjectionable after Professor Markell's and Legal Decoder's collective assessment and review of the supplemented Final Applications, the NexPoint Oppositions thereto shall be deemed withdrawn, and the Bankruptcy Court can proceed to grant the supplemented Final Applications forthwith. NexPoint's aim is not to delay these proceedings. To be clear, NexPoint's Oppositions shall be supplemented only if Professor Markell and Legal Decoder determine the supplemented Final Applications remain objectionable. In candor to the Court, NexPoint has never contended that the Retained Professionals will be unable, under any circumstances, to justify the awards of fees and reimbursements

of expenses sought in the Final Applications; rather, NexPoint contended below and continues to maintain here that the Final Applications simply do not pass muster under 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). In light of presently deficient nature of the Final Applications under the governing legal standard, NexPoint respectfully submits that the Final Orders of the Bankruptcy Court should be reversed and remanded as NexPoint requests herein.

[Signature Page to Follow]

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
BANKRUPTCY PROCEDURE 8015(a)(7)**

The undersigned hereby certifies that the foregoing *Appellant NexPoint Advisors, L.P.'s Opening Brief* complies with the type-volume limitation of Fed. R. Bankr. P. 8015(a)(7)(B), as modified by the Electronic Order (ECF No. 32) entered by the Court on March 24, 2022, which granted Appellant leave to exceed the page and type-volume limitations of Fed. R. Bankr. P. 8015(a)(7) and file an Opening Brief limited in size to no more than sixty (60) pages or twenty-six thousand (26,000) words, because, excluding the parts of the document exempted by Fed. R. Bankr. P. 8015(g), this document contains 20,354 words.

[Signature Page to Follow]

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 14, 2022, a true and correct copy of the foregoing *Appellant NexPoint Advisors, L.P.'s Opening Brief* 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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