Date Filed: 9/19/2022

Case No. 22-10575

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In the Matter of Highland Capital Management, L.P.,
Debtor.

NexPoint Advisors, L.P., Appellant/Creditor/Party in Interest 11 U.S.C. § 1109(b),
Appellant,

v.

Pachulski Stang Ziehl & Jones, L.L.P., Appellee/Retained Professional; Wilmer Cutler Pickering Hale and Dorr, L.L.P.; FTI Consulting, Incorporated; Teneo Capital, L.L.C.; Sidley Austin, L.L.P.,
Appellees.

NexPoint Advisors, L.P.,
Appellant,

v.

Wilmer Cutler Pickering Hale and Dorr, L.L.P.,
Appellee.

NexPoint Advisors, L.P.,
Appellant,

v.

Teneo Capital, L.L.C.,
Appellee.

NexPoint Advisors, L.P.,
Appellant,

v.

Sidley Austin, L.L.P.,
Appellee.

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NexPoint Advisors, L.P.,
Appellant,

v.

FTI Consulting, Incorporated,
Appellee.

Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
Before the Honorable James E. Kinkeade
[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]

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CERTIFICATE OF INTERESTED PERSONS 5TH CIR. R. 28.2.1

Pursuant to Federal Rule of Appellate Procedure ("**FRAP**") 26.1, NexPoint Advisors, L.P. ("**NexPoint**") discloses that it is a nongovernmental corporate party. NexPoint Advisors GP, LLC is a nongovernmental corporate entity which serves as the 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.

In compliance with the requirements set forth in FRAP 26.1(c)(1), NexPoint is unaware of any other debtor entity not included in case caption. The only debtor entity in the bankruptcy proceedings below was Highland Capital Management, L.P. (the "**Debtor**" or the "**Reorganized Debtor**"). Debtor was organized as a limited partnership, not a corporation. Therefore, no further disclosures are required under FRAP 26.1(c)(2).

NexPoint further acknowledges that FRAP 26.1(d)(3) requires supplemental disclosures whenever the information required by FRAP 26.1 changes.

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of 5th Cir. R. 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT 5TH CIR. R. 28.2.3

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and 5th Cir. R. 28.2.3, Appellant NexPoint Advisors, L.P. believes oral argument should be permitted because this appeal involves: (1) potentially conflicting case authorities issued by this Court discussing the "person aggrieved" prudential limitation on appellate standing in bankruptcy matters; (2) the impact of the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); and (3) serious procedural due process issues.

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JURISDICTIONAL STATEMENT

The United States Bankruptcy Court for the Northern District of Texas (the "**Bankruptcy Court**") had both original and exclusive jurisdiction of Debtor's chapter 11 bankruptcy case (the "**Bankruptcy Case**") 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 the Congressionally authorized reference of bankruptcy cases to the Bankruptcy Court by the United States District Court for the Northern District of Texas (the "**District 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. (ROA.432). 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. (ROA.452). 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). The Bankruptcy Court also had exclusive jurisdiction to award the professional fees and expense reimbursements at issue here pursuant to 28 U.S.C. § 1334(e)(2).

Each of the final fee applications (each a "**Final Application**" and, collectively, the "**Final Applications**") submitted by captioned 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**" or "**Appellees**") 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 were each appealable as final orders to the District Court below. 28 U.S.C. § 158(a)(1) (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 under 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).

As set forth above, the District Court had jurisdiction to entertain the consolidated appeals pursuant to 28 U.S.C. § 158(a)(1). *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. (ROA.415-17, 418-20, 421-22, 423-24, 425-26). 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); (ROA.376-82, 383-90, 391-98, 399-406, 407-14). NexPoint's appeal of each of Retained Professional's challenged Final Order to the District Court was, 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 the District Court were 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).

On May 9, 2022, the District Court entered its *Memorandum Opinion and Order*, as well as its *Judgment* (collectively the "**Dismissal Order**"), dismissing NexPoint's consolidated appeals below under this Court's prudential "person aggrieved" test. (ROA.22881-90, 22891-92). On June 7, 2022, NexPoint timely filed its notice of appeal of the Dismissal Order. (ROA.22893-916). This Court has jurisdiction to review the Dismissal Order under 28 U.S.C. § 158(d)(1) as the Dismissal Order constitutes the District Court's final order and judgment dismissing NexPoint's consolidated appeals and expressly terminating any remaining motion practice before the District Court. *See, e.g., Gibbs & Bruns LLP v. Coho Energy,*

Inc. (In re Coho Energy, Inc.), 395 F.3d 198, 202 (5th Cir. 2004) (reviewing on appeal lower court order granting motion to dismiss for lack of standing under the "person aggrieved" prudential standard).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred as a matter of law by dismissing NexPoint's appeal of the Fee Application Orders for lack of standing under the "person aggrieved" prudential limitation on appellate standing in bankruptcy matters and determining that NexPoint does not qualify as a "person aggrieved" by the Final Orders in an instance where (i) NexPoint argued, and no party below disputed, that NexPoint was being sued for, among other forms of relief, the very professional fees embodied in the Final Orders in an adversary proceeding initiated against it and (ii) in the absence of NexPoint's ability to appeal the Final Orders, the finality of the Final Orders on direct review would give rise to claims of *res judicata* effect that would allow the Final Orders to be asserted offensively against NexPoint in the underlying adversary proceeding and, thereby, deprive NexPoint of one of its defenses thereto and the ability to contest the reasonableness of the underlying fees?

2. Whether the District Court erred as a matter of law by dismissing NexPoint's appeal of the Final Orders for lack of standing under the "person aggrieved" prudential limitation on appellate standing in bankruptcy matters and determining that NexPoint does not qualify as a "person aggrieved" by the Final

Orders in an instance wherein NexPoint predicated its standing before the District Court as that of a creditor and party in interest based on an unpaid administrative claim entitled to second distribution priority under 11 U.S.C. §§ 503(b)(1) and 507(a)(2) of approximately $14 million currently pending before the Bankruptcy Court based on the District Court's determination that NexPoint's prospects of not being paid on its administrative claim was too remote for NexPoint to qualify as a "person aggrieved" for purposes of appellate standing under that standard?

3. Whether the District Court erred in applying the "person aggrieved" standard to dismiss NexPoint's appeals of the Final Orders in contravention of the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), and limiting a Congressionally created cause of action to object to professional fee requests under 11 U.S.C. §§ 330(a) and 1109(b) by rejecting NexPoint's appellate standing under the heightened prudential bar of the "person aggrieved" standard, rather than measuring NexPoint's appellate standing under Article III and the aforementioned statutes, which standards NexPoint clearly satisfies, as the Bankruptcy Court recognized below, under 11 U.S.C. § 1109(b)?

4. Whether subjecting NexPoint to claims of *res judicata* effect(s) of the of the Final Orders while, at the same time, barring NexPoint's ability to challenge the Final Orders on the basis of the "person aggrieved" prudential limitation on appellate standing — thereby allowing Appellees to essentially have it both ways —

amounts to an impermissible violation of NexPoint's rights to due process under the Fifth Amendment to the United States Constitution?

STATEMENT OF THE CASE

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. (ROA.432). Shortly after the Petition Date, the United States Trustee for Region 3 formed the Committee on October 29, 2019. (ROA.439). On December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of Debtor's Bankruptcy Case to the Bankruptcy Court. (ROA.452).

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**"). (ROA.10032-10192). 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. (ROA.10092-93). 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**"). (ROA.13993-96).

Under the Confirmed Plan and Confirmation Order, the Final Applications constitute "Professional Fee Claims." (ROA.10145). Relatedly, Debtor's Confirmed Plan and Confirmation Order established a Professional Fee Claims Bar Date of sixty (60) days after the Effective Date. (ROA.10140). 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." (ROA.10140). Each of the Retained Professionals filed their respective Final Applications on or about October 8, 2021. (ROA.14147-94, 14267-334, 14335-453, 14526-5054, 15127-325). 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. (ROA.10140). 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. (ROA.15398-405).

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**"). (ROA.15544-62). 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. (ROA.15544-62). 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). (ROA.15673-74). The Bankruptcy Court's order of continuation established a supplemental opposition deadline with respect to each of the Final Applications of November 12, 2021. (ROA.15673-74). 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**"). (ROA.15581-600). The Retained Professionals, in turn, were given until November 16, 2021 to reply to NexPoint's Supplemental Opposition. (ROA.15673-74). 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. (ROA.15675-80, 15692-98).

At the November 17, 2021 hearing on the Final Fee Applications (collectively the "**Final Fee Hearing**"), the Retained Professionals were assigned the applicable burdens of proof and persuasion on 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, 549 (5th Cir. 2022).

Briefly, none of the Retained Professionals entered the Final Fee Hearing with the benefit of the Bankruptcy Court's prior approval of their 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); *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). 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 was of foundational importance to the outcome of the consolidated appeals in the District Court below.

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, 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F), had not been satisfied. (ROA.15552-53, 15589-92). NexPoint respectfully submits that the Retained Professionals failed to carry their assigned burdens under these statutory provisions and, therefore, the Bankruptcy Courtunfortunately erred and abused its discretion when it approved the Final Applications and entered the Final Orders.

As NexPoint's opening brief on the merits before the District Court below

amply demonstrates, the record before the Bankruptcy Court approximated the zero bound when it came to the mandatory statutory element the Bankruptcy Court was required to consider under 11 U.S.C. § 330(a)(3)(F) – "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." *See, e.g.*, *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 664 (5th Cir. 2012) (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 the initial lodestar fee calculation); *see also 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."); (ROA.22768-864). NexPoint respectfully submits that its arguments below have exceptionally strong merit, and the invocation of the prudential standing limitation embodied in the "person aggrieved" standard was applied, necessitating NexPoint's pursuit of the instant appeal of the Dismissal Order before this Court.

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II. Interim Fee Awards Did Not Prejudice NexPoint's Oppositions

The Bankruptcy Court entered the *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals* (the "**Interim Compensation Procedures Order**") at the outset for Debtor's Bankruptcy Case. (ROA.1153-58). The Interim Compensation Procedures Order provides:

> 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.

Pursuant to 11 U.S.C. § 331 and absent the Bankruptcy Court's entry of the *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals* (the "**Interim Compensation Procedures Order**"), (ROA.1153-58), 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**"). (ROA.1049-59). 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." (ROA.1055). 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." (ROA.1053). 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 allowance and payment of any and all prior monthly and interim awards of professional compensation and reimbursement of actual and necessary expenses. (ROA.1054).

On November 14, 2019, the Delaware Bankruptcy Court granted the Interim Compensation Procedures Motion and entered the Interim Compensation Procedures Order. (ROA.1153-58). 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.***

(ROA.1156).

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 from insisting on NexPoint's rights to engage in contested matter discovery under Bankruptcy Rules 7026-7037 and 9014(c) 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.

III. The Final Applications Fail Under 11 U.S.C. §§ 330(a)(3)(B) & (F)

For the reasons set forth in *Appellant NexPoint Advisors, L.P.'s Opening Brief* (the "**NexPoint District Court Brief**"), none of the Final Applications satisfied the requirements of 11 U.S.C. §§ 330(a)(3)(B) and 330(a)(3)(F). (ROA.22768-864). Indeed, as set forth more fully in the NexPoint District Court Brief, the record before the Bankruptcy Court was practically barren on the issue of "whether the [Retained Professionals'] compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this

title." *See, e.g.,* 11 U.S.C. § 330(a)(3)(F); *see also In re Pilgrim's 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 the initial lodestar fee calculation); *In re Babcock & Wilcox Co.*, 526 F.3d at 828 (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."); (ROA.22768-864).

NexPoint's arguments on the merits before the District Court for overturning the Bankruptcy Court's Final Orders were well supported in both law and fact. As NexPoint will further demonstrate below, this Court has identified two primary purposes served by the "person aggrieved" prudential limitation on appellate standing in bankruptcy matters, neither of which is served here – namely, the avoidance of (i) unreasonable delay in the administration of bankruptcy cases and (ii) overburdening appellate court dockets with what is otherwise meritless litigation. *See, e.g., In re Coho Energy, Inc.*, 395 F.3d at 202 (*citing Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.)*, 177 F.3d 774, 777 (9th Cir. 1999) ("To prevent unreasonable delay, courts have created an *additional* prudential standing

requirement in bankruptcy cases: The appellant must be a 'person aggrieved' by the bankruptcy court's order.")) (italics in original); *see also Furlough v. Cage (In re Technicool Sys.)*, 896 F.3d 382, 385 (5th Cir. 2018) ("Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, quite limited.").

In the *Appellees' Joint Motion to Dismiss Appeals as Constitutionally Moot* brought before the District Court (the "**Appellees' MTD**"), Appellees did not even *allege* that NexPoint's pursuit of its appeals of the Bankruptcy Court's Final Orders would result in *any* delay in the proceedings before the Bankruptcy Court, let alone an unreasonable delay. (ROA.102-20). The same holds true for the *Appellees' Joint Reply To Appellant's Opposition To Motion To Dismiss Appeals As Constitutionally Moot* (the "**Appellees' Reply**"). (ROA.247-62). After all, NexPoint is being sued over the very professional fees and expense reimbursements awarded by the Bankruptcy Court to Appellees through the Final Orders. (ROA.15737, 15779). And NexPoint's status as a defendant in an adversary proceeding currently pending before the Bankruptcy Court styled *Kirschner, As Litigation Trustee of the Litigation Sub-Trust v. Dondero et al.* (the "**Adversary Proceeding**"), defending itself from the very fees and expense reimbursements at issue in these appeals removes NexPoint from the concerns expressed by this Court in *Technicool* regarding the

fallout of allowing any party to a bankruptcy proceeding to appeal any order willy-nilly due to their status as mere disgruntled litigants. NexPoint has a very real, palpable, and concrete interest in both this appeal and the consolidated appeals that were dismissed by the District Court's Dismissal Order below. Simply put, NexPoint is a person aggrieved by the Final Orders under this Court's governing precedents. The District Court's Dismissal Order should, therefore, be reversed, and this matter should be remanded to the District Court so NexPoint's consolidated appeals on the merits can proceed.

IV. 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 Request For Discovery

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. (ROA.15546-49). 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. (ROA.15547).

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. (ROA.15547). 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. (ROA.15561-62). 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. (ROA.15547-48, 15562).

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. (ROA.15547). 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. (ROA.15547).

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. (ROA.15563-74, 15575-80). 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." (ROA.15564-65, 15576). 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. (ROA.15565, 15570, 15576-77). 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. (ROA.15572-73).

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). (ROA.15673-74). NexPoint was given until Friday, November 12, 2021 to supplement its Initial Opposition. (ROA.15674). The Bankruptcy Court, in turn, provided the Retained Professionals until Monday, November 16, 2021 to reply to any supplemental opposition from NexPoint. (ROA.15674).

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

On November 12, 2021, NexPoint timely filed the Supplemental Opposition. (ROA.15581-600). 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. (ROA.15582-83). 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. (ROA.15583).

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. (ROA.15583-84). 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). (ROA.15586-89). 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). (ROA.15589-90).

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). (ROA.15590-92). 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. (ROA.15593).

In response, both PSZJ and Sidley both replied to the NexPoint Supplemental Opposition. (ROA.15675-90, 15692-98). 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. (ROA.15675-90, 15692-98).

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.*

(ROA.21403:5-21404:11) (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.

(ROA.21405:7-16).

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.

(ROA.21407:11-16). (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." (ROA.21410:14-17). (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.*

(ROA.21421:13-21422:5).

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. (ROA.21435). 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. (ROA.21435-36). NexPoint's counsel would continue to raise issues with the evidentiary records submitted with respect to the Final Applications throughout the Final Fee Hearing. (ROA.21443, 21452-53). The Bankruptcy Court granted each of the Final Applications over NexPoint's Oppositions, as well as NexPoint's objections at the Final Fee Hearing. (ROA.21438-39, 21443-44, 21453-54, 21458-60). The Bankruptcy Court then entered the Final Orders on November 22, 2021 and November 29, 2021, respectively. (ROA.415-17, 418-20, 421-22, 423-24, 425-26).

What was particularly important from NexPoint's perspective with respect to the Bankruptcy Court's entry of the Final Orders over NexPoint's Oppositions is that the litigation initiated before the Bankruptcy Court to recover the professional fees and expense reimbursements awarded to the Retained Professionals through the Final Orders was undertaken and timed with an eye towards asserting any *res judicata* effect(s) of the Final Orders offensively against NexPoint in the Adversary Proceeding. *See In re Intelogic Trace, Inc.*, 200 F.3d at 389 (observing in connection

with this Court's consideration of the *res judicata* issues in *Intelogic* "In reaching our determination, we consider whether and to what extent IT *had actual or imputed awareness* prior to the fee hearing of a real potential for claims against Ernst & Young … and whether the bankruptcy court possessed procedural mechanisms that would have allowed IT to assert such claims."). (emphasis added). The commencement of the Adversary Proceeding against NexPoint to run on a parallel track contemporaneously with the Bankruptcy Court's consideration of the Final Applications was not just some bizarre coincidence – it was planned, orchestrated, and executed in a manner designed specifically to prejudice NexPoint's ability to contest the professional fees and expense reimbursements at issue in the Adversary Proceeding. With the appropriate procedural context firmly in the Court's grasp, the invocation of the "person aggrieved" prudential limitation on appellate standing served as a sword to prejudice NexPoint, not as a shield to cutoff litigation resulting in unreasonable delay (which Appellees could not even bring themselves to *allege* before the District Court) or that this was done to avoid any alleged unnecessary collateral litigation undertaken by a purportedly disgruntled litigant that bogs down the federal appellate courts. Simply put, all of this was done to wrongfoot NexPoint in the Adversary Proceeding, crystallizing and establishing NexPoint's status as a person aggrieved by the Final Orders under this Court's governing precedents.

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V. The District Court Dismisses In Error NexPoint's Appeals Of The Final Orders Under The "Person Aggrieved" Prudential Limitation On Appellate Standing In Bankruptcy Matters

On May 9, 2022, the District Court entered the Dismissal Order. (ROA.22881-90, 22891-92). Appellees' MTD was brought on January 17, 2022 pursuant to Bankruptcy Rule 8013(a), giving NexPoint only seven (7) days to oppose the Appellees' MTD. (ROA.102-20). On January 24, 2022, NexPoint timely filed the *Appellant NexPoint Advisors, L.P.'s Opposition to Appellees' Joint Motion to Dismiss Appeals as Constitutionally Moot* (the "**NexPoint MTD Opposition**"). (ROA.153-73). On January 31, 2022, Appellees timely filed the *Appellees' Joint Reply To Appellant's Opposition to Motion to Dismiss Appeals as Constitutionally Moot* (the "**Appellees' MTD Reply**"). (ROA.247-62).

In its Dismissal Order, the District Court began by recharacterizing the arguments advanced in Appellees' MTD, "Appellees characterize the issue as one of constitutional standing and mootness, though they cite case law and precedent primarily about the prudential standing requirement of the 'person aggrieved' test." (ROA.22882). What the District Court's recharacterization of the Appellees' MTD overlooked is that the Appellees' MTD did not address NexPoint's arguments against the person aggrieved standard based upon NexPoint's status as a defendant in the Adversary Proceeding, even though those arguments were squarely presented to the Bankruptcy Court. (ROA.102-20). Indeed, the Appellees' MTD does not

discuss the adversary proceeding at all. (ROA.102-20). Instead, the Appellees' MTD was focused on NexPoint's administrative expense claim of approximately $14 million (the "**NexPoint Administrative Expense Claim**") (which is still pending before the Bankruptcy Court) and proofs of claim that were withdrawn by NexPoint. (ROA.102-20).

It was only in the Appellees' MTD Reply that Appellees squarely addressed the NexPoint's standing arguments based on the Adversary Proceeding. (ROA.247-62). NexPoint never had the chance to join issue with Appellees' arguments on the merits of NexPoint's standing under the "person aggrieved" test based on the Adversary Proceeding and having to defend itself therein from arguments that the Final Orders precluded NexPoint from contesting the reasonableness of over $40 million in professional fees and expense reimbursements at issue here.

Therefore, Appellees should not be heard to complain before this Court when NexPoint actually joins issue with Appellees' arguments under the "person aggrieved" standard based on the Adversary Proceeding and points out Appellees' failure to discuss binding authority from this Court that predates the principal authorities upon which the District Court's Dismissal Order is predicated, namely this Court's decision in *Cajun Elec. Power Coop. v. Central La. Elec. Coop. (In re Cajun Elec. Power Coop.)*, 69 F.3d 746, 748-749 (5th Cir. 1995), *opinion withdrawn in other part on reh'g*, 74 F.3d 599 (5th Cir. 1995), *cert. denied*, 519 U.S. 808, 117

S. Ct. 51, 136 L. Ed. 2d 15 (1996) ("***To have standing to appeal a bankruptcy order, a party must show that it was 'directly and adversely affected pecuniarily by' the order OR that the order diminished its property, increased its burdens, or impaired its rights***.") (emphasis added) (*citing Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 208 n. 18 (5th Cir. 1994); *In re El San Juan Hotel*, 809 F.2d 151, 154 (1st Cir. 1987)). Briefly, this Court was not detained long in holding that a debtor in possession alleged to be hopelessly insolvent qualified as a "person aggrieved" by an order appointing a bankruptcy trustee to displace the debtor from possession of its bankruptcy estate. *In re Cajun Elec. Power Coop.*, 69 F.3d at 748 ("When the trustee was appointed, Cajun lost all the rights it had as a debtor-in-possession, *including the right to operate its business. Clearly it was aggrieved by losing the right to run itself*. Accordingly, we hold that Cajun has standing to prosecute this appeal.") (emphasis added). As this Court is already aware, only this Court seated *en banc* can overrule its prior decision in *Cajun Elec. Power Coop.*, "or in light of 'an overriding Supreme Court decision or a change in statutory law[.]'" *United States v. Zuniga-Salinas*, 952 F.2d 876, 877 (5th Cir. 1992) (citations omitted). And that simply has not happened. Moreover, under this Court's governing precedents, even in this Court's decision in *Cajun Elec. Power Coop.* is deemed to conflict with the later panel decisions in cited in the District Court's Dismissal Order, *Cajun Elec. Power Coop.* controls as it is the earliest of the conflicting panel

decisions. *See, e.g., Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 410 (5th Cir. 2006) ("Neither of these decisions affects the precedential value of *Utica* because the earliest of the conflicting panel decisions controls." (citations omitted); *see also Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) ("In this circuit one panel may not overrule the decision, right or wrong, of a prior panel.") (internal quotation marks and citations omitted).

After recharacterizing the Appellees' arguments in the Appellees' MTD, the District Court then set forth its formulation of the "person aggrieved" test as follows: "Thus, the Court is bound by the doctrine; Appellant has standing to appeal the Fee Application Orders only if it can demonstrate that it is 'directly, adversely, and financially impacted' by them." (ROA.22884) (citation omitted). The additional factors identified by this Court in *Cajun Elec. Power Coop.*, namely the diminishment of NexPoint's property, the increase in NexPoint's burdens, and the impairment of NexPoint's rights are not identified in the Dismissal Order as potential bases upon which the "person aggrieved" test can be satisfied. (ROA.22881-90); *see In re Cajun Elec. Power Coop.*, 69 F.3d at 748.

With this incorrect standard in mind, the District Court addressed the NexPoint's argument that it qualifies as a "person aggrieved" by the Final Orders based on the NexPoint Administrative Expense Claim. Distilled to its essence, the Dismissal Order holds that the prospect of nonpayment on account of the NexPoint

Administrative Expense Claim is too remote to satisfy the "person aggrieved" test. (ROA.22885-86). With respect to NexPoint's standing arguments predicated upon the Adversary Proceeding, the District Court's Dismissal Order viewed the prospect of potential liability on NexPoint's part as simply too attenuated and remote to satisfy the District Court's formulation of the "person aggrieved" standard. (ROA.22886-87). Although both holdings are incorrect, NexPoint's arguments here will focus principally on the Adversary Proceeding.

Based on the foregoing, and for the reasons that follow, NexPoint respectfully submits that the District Court erred in entering the Dismissal Order. This Court should reverse the Dismissal Order for the reasons set forth herein and remand the matter to the District Court for further proceedings consistent with this opinion.

ARGUMENT SUMMARY

NexPoint respectfully submits that the District Court erred in entering the Dismissal Order dismissing NexPoint's consolidated appeals of the Final Orders below under the "person aggrieved" prudential, judge-made limitation on appellate standing in bankruptcy matters for several reasons. First, the District Court applied the incorrect legal standard in dismissing NexPoint's appeals of the Final Orders. Rather than the narrow iteration of the "person aggrieved" test set forth in the Dismissal Order, the governing test enunciated in *Cajun Elec. Power Coop.* provides as follows, "To have standing to appeal a bankruptcy order, a party must show that

it was 'directly and adversely affected pecuniarily by the order **or** that the order diminished its property, increased its burdens, or impaired its rights." *In re Cajun Elec. Power Coop.*, 69 F.3d at 749 (internal quotation marks and citation omitted) (emphasis added). The test is clearly phrased in the disjunctive; however, at Appellees' behest, the District Court applied a much narrower iteration of the "person aggrieved" test and, thereby, committed reversible error in entering the Dismissal Order.

Second, the unduly narrow version of the "person aggrieved" test found in the Dismissal Order is out of step with the various iterations of the "person aggrieved" test from other circuits on which this Court's decision in *In re Coho Energy, Inc.*, 395 F.3d at 202, is predicated. *See, e.g, Westwood Cmty Two Ass'n. v. Barbee (In re Westwood Cmty. Two Ass'n)*, 293 F.3d 1332, 1335 (11th Cir. 2002); *see also In re P.R.T.C., Inc.*, 177 F.3d at 777. The same holds true for this Court's decision in *Rohm*. 32 F.3d at 210 n. 18 (*citing El San Juan Hotel*, 809 F.2d at 154). Each of these circuit decisions formulate the "person aggrieved" test for appellate standing in a form reflective of that found in this Court's decision in *In re Cajun Elec. Power Coop.* and not *In re Coho Energy, Inc.* Indeed, *In re Coho Energy, Inc.* cites *In re Cajun Elec. Power Coop.* with approval. 395 F.3d at 203.

Third, the District Court's formulation of the "person aggrieved" test is also inconsistent with the formulations of that same test as it was enunciated and applied

by this Court under the Bankruptcy Act of 1898 and prior to its repeal of the statutory person aggrieved test found under the Bankruptcy Act through the passage of the Bankruptcy Code of 1978. *See, e.g., In re First Colonial Corp.*, 544 F.2d 1291, 1296 (5th Cir. 1977) (recognizing that the statutory term "person aggrieved" under Section 39(c) is less restrictive than that of an aggrieved party under Section 25(a) of the Bankruptcy Act and stating, "The rule in this circuit is that only those who have a direct and substantial interest in question appealed from are aggrieved within the meaning of Section 25(a)."") (internal quotation marks and citations omitted); *See also In re American Bonded Mortgage Co.*, 453 F.2d 528, 530 (5th Cir. 1971) (exercising its *discretion* not to dispose of the appeal at issue there solely on standing grounds and stating, "The general rule in this circuit is that an aggrieved party under § 25 of the Bankruptcy Act is only one who has a direct and substantial interest in the question appealed from.") (citations omitted). NexPoint would clearly have qualified as a person aggrieved under Pre-Code practice given NexPoint's direct and substantial interest in the questions presented for the District Court's consideration of NexPoint's appeals from the Final Orders, especially in light of NexPoint's status as a defendant in the Adversary Proceeding being sued for the very professional fees and expense reimbursements at issue here.

Fourth, neither the purpose of preventing unreasonable delay in the administration of the Reorganized Debtor's bankruptcy case below nor the fear of

overburdening the federal appellate courts with unnecessary and unwarranted litigation from disgruntled litigants, "willy-nilly," was served by entry of the Dismissal Order. Appellees did not even allege any kind of delay would result from NexPoint's pursuit of its appeals of the Final Orders on the merits – let alone an unreasonable delay. And NexPoint's direct and substantial interest in lessening its burdens and avoiding impairment of its rights to defend itself in the Adversary Proceeding from the very professional fees and expense reimbursements here place this appeal safely beyond the category of meritless and sclerotic litigation undertaken by disgruntled litigants.

The District Court also overruled the arguments based on the Supreme Court's decision in *Lexmark* in the NexPoint MTD Opposition in error. As a litigation defendant being sued for the very professional fees and expense reimbursements awarded to the Retained Professionals through the Final Orders, NexPoint qualifies as a party in interest under 11 U.S.C. § 1109(b) and, therefore, falls within the statutory zone of interests created and protected by 11 U.S.C. § 330(a)(2). This Court has defined a party in interest under 11 U.S.C. § 1109(b) as a term of broad inclusion. *See Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405, 413 (5th Cir. 2017) (characterizing "parties in interest" as a statutory term of broad inclusion).

The issue under *Lexmark*, therefore, is straightforward: Does NexPoint

qualify as a party in interest under 11 U.S.C. §§ 330(a)(2) and 1109(b) in an instance where it sought to reduce the awards of professional fees and expense reimbursements included in the Final Orders to (i) reduce NexPoint's potential damage exposure on account of those same fees and expenses in the Adversary Proceeding and (ii) avoid subjecting itself to claims of *res judicata* flowing from the challenged Final Orders in the Adversary Proceeding? The answer is clearly, "Yes." NexPoint sought to challenge those aspects of the Final Applications before the Bankruptcy Court that directly and immediately impacted its rights as a defendant in the Adversary Proceeding. *See In re Quigley,* 391 B.R. 695, 706 (Bankr. S.D.N.Y. 2008) (holding that an insurance company defendant in civil litigation qualified as a party in interest under § 1109(b) to contest chapter 11 plan provisions impacting the insurer's consent-to-assignment rights under various insurance contracts). The invocation of the prudential "person aggrieved" standard has the unwarranted and unauthorized effect of cutting off a cause of action Congress expressly authorized parties in interest like NexPoint to bring simply because judicially conceived notions of prudence so dictate.

Even if this Court is not inclined to follow *Lexmark* and eschew the "person aggrieved" judge-made limitation on appellate standing in bankruptcy matters, this Court has recognized in other contexts that the combination of broad statutory rights, an injury in fact and inclusion in the zone of interests can override prudential

standing limits. *See Collins v. Mnuchin*, 938 F.3d 553, 575 (5th Cir. 2019), *reversed and vacated in part on other grounds*, *Collins v. Yellen*, ___ U.S. ___, 141 S. Ct. 1761 (2021) ("The Supreme Court decisions *City of Miami* and *Lexmark* also support this point: For very broad statutory rights like the APA, an injury in fact and inclusion in the zone of interests can add up to a right of action, *even if prudential standing limits would have blocked it*.") (emphasis added). NexPoint respectfully submits that its status as a defendant in the Adversary Proceeding seeking recovery of the very professional fees and expense reimbursements at issue here, along with its established status as a party in interest under 11 U.S.C. §§ 330(a)(2) and 1109(b) are, likewise, sufficient to overcome prudential standing limitations here under the "person aggrieved" test.

Finally, NexPoint respectfully submits that it should not be subjected to any potential preclusive effect – whether asserted in the form of *res judicata*, collateral estoppel, or otherwise – on account of the Final Orders in the Adversary Proceeding because NexPoint was not given a full and fair opportunity to contest the entry of those orders before the Bankruptcy Court. *See, e.g., Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480-483 n. 22 and 24 (1982). Here, NexPoint was denied the protections of the Interim Compensation Procedures Order at the Final Fee Hearing. NexPoint's request for discovery to which it was entitled under Bankruptcy Rule 9014(c) upon the filing of the NexPoint Oppositions to the Final Applications was

similarly denied by the Bankruptcy Court. Worse yet, the District Court determined that NexPoint does not qualify as a person aggrieved by the Final Orders – effectively denying NexPoint's statutory right to seek appellate review of the Final Orders on the basis of a judge-made doctrine that is far narrower than the requirements of Article III and the applicable bankruptcy statutes at issue here. NexPoint respectfully submits that the Appellees and their allies in the Adversary Proceeding should not be allowed to have it both ways. If NexPoint does not qualify as a "person aggrieved" by the Final Orders, then NexPoint respectfully calls upon this Court to issue as part of any ruling affirming the District Court's Dismissal Order an express statement that NexPoint is free to contest the Appellees' professional fees and expense reimbursements in the Adversary Proceeding without any preclusive effect(s) of any kind flowing from the Final Orders to NexPoint's detriment, including the ability to challenge the Final Applications under 11 U.S.C. § 330. Absent that relief, NexPoint respectfully submits that its due process rights under the Fifth Amendment will have been, and remain, violated, with such violations becoming orders of magnitude far worse if Appellees' cohorts in the Adversary Proceeding are permitted to assert the Final Orders offensively against NexPoint through the use any or multiple preclusion doctrine(s).

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ARGUMENT

I. Standard Of Review

When ruling on a motion to dismiss for want of standing, "both the trial and reviewing court must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *In re Coho Energy, Inc.*, 395 F.3d at 202 (internal quotations omitted). This Court uses a "permissive standard to assess the actuality of harm alleged by appellant for the purpose of standing." *Id.* "Standing is a question of law that we review de novo." *In re Technicool Sys.*, 896 F.3d at 385.

II. The District Court Applied An Unduly Narrow And Incomplete Version Of The Person Aggrieved Test That Is Inconsistent With And Contradicts The Governing Standard Set Forth In *Cajun Elec. Power Coop*

The governing legal standard announced by this Court for the "person aggrieved test provides as follows, "To have standing to appeal a bankruptcy order, a party must show that it was 'directly and adversely affected pecuniarily by' the order or that the order diminished its property, increased its burdens, or impaired its rights." *In re Cajun Elec. Power Coop.*, 69 F.3d at 749. As *Cajun Elec. Power Coop.*, appears to be the first published decision from this Court to set forth the legal standard governing the "person aggrieved" test for appellate standing in bankruptcy matters following Congress's statutory repeal of the "person aggrieved" test in 1978, this case controls any subsequent panel decisions from this Court that are

inconsistent with the holding of *Cajun Elec. Power Coop. See, e.g., Camacho* 445 F.3d at 410; *see also Pruitt*, 932 F.2d at 465. Only an *en banc* decision of this Court, the issuance of an overriding decision by the Supreme Court, or a change in statutory law can overrule *Cajun Elec. Power Coop. See Zuniga-Salinas*, 952 F.2d at 877.

The full recitation of the "person aggrieved" test from *Cajun Elec. Power Coop.* captures both of its disjunctive elements, including the recognition that a diminishment of an appellant's property, an increase in an appellant's burdens, or an impairment of an appellant's rights qualifies appellants, like NexPoint here, as aggrieved parties with prudential standing to appeal adverse bankruptcy orders and judgments. *See In re Cajun Elec. Power Coop.*, 69 F.3d at 749. As stated above, this Court was not detained long in holding that a debtor in possession alleged to be hopelessly insolvent qualified as a "person aggrieved" by an order appointing a bankruptcy trustee to displace the debtor from possession of its bankruptcy estate. *In re Cajun Elec. Power Coop.*, 69 F.3d at 749 ("When the trustee was appointed, Cajun lost all the rights it had as a debtor-in-possession, *including the right to operate its business*. *Clearly it was aggrieved by losing the right to run itself*. Accordingly, we hold that Cajun has standing to prosecute this appeal.") (emphasis added).

Here, NexPoint's burdens in the Adversary Proceeding have been increased and its rights to defend itself therein are impaired by the Final Orders. As explained

above, the entry of the Final Orders adds another arrow in the quiver of the Appellees and their allies in the Adversary Proceeding, namely the prospect of having preclusion doctrines like *res judicata* and collateral estoppel invoked against it in NexPoint's efforts to contest the reasonableness of the fees and expense reimbursements for which NexPoint is being sued. By placing NexPoint in the position of having to counter such arguments, NexPoint's right to contest the reasonableness of the fees and expense reimbursements approved by the Final Orders has clearly been impaired, and NexPoint's burden in doing so has also been increased. Moreover, NexPoint's increased litigation and transactional costs associated with contesting the reasonableness of the professional fees and expense reimbursements embodied in the Final Orders plainly satisfies even narrower iterations of the "person aggrieved" test, such as that reflected in the Dismissal Order. The focus on the potential harm to NexPoint based on the potential harm(s) flowing from the *outcome* of the Adversary Proceeding overlooks the increased litigation and transactional costs and burdens, as well as the impairment of NexPoint's rights, *within the Adversary Proceeding*.

NexPoint, therefore, clearly qualifies as a "person aggrieved" under the governing test set forth in *Cajun Elec. Power Coop.*, and the District Court's Dismissal Order should be reversed on this basis, alone.

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III. The District Court's Unduly Narrow Formulation Of The "Person Aggrieved" Test Is At Odds Authorities From Other Circuits On Which *Coho Energy* And *Rohm* Are Based

The out-of-circuit authorities on which this Court's decisions in *In re Coho Energy, Inc.* and *Rohm* (decided on Article III standing grounds) are based also recognize that the diminishment of an appellant's property, an increase in an appellant's burdens, or an impairment of an appellant's rights also give rise to "person-aggrieved" status for purposes of pursuing bankruptcy appeals. *See, e.g., In re Westwood Cmty. Two Ass'n*, 293 F.3d at 1335 (defining the "person aggrieved" test as having a sufficient financial stake in a challenged bankruptcy court order and stating, "A person has a financial stake in the order when that order diminishes their property, increases their burdens or impairs their rights.") (internal quotation marks and citations omitted); *In re P.R.T.C., Inc.* 177 F.3d at 777 ("An appellant is aggrieved if 'directly and adversely affected pecuniarily by an order of the bankruptcy court'; in other words, the order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights.") (*citing Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442 (9th Cir. 1983)); *In re El San Juan Hotel*, 809 F.2d at 154 ("A litigant qualifies as a person aggrieved if the order diminishes his property, increases his burdens, or impairs his rights.") (cited by *Rohm*) (internal quotation marks and citation omitted).

The nuances between the various other circuit authorities and this Court's

governing decision in *Cajun Elec. Power Coop.* are neither here nor there for present purposes. The important point is that they all recognize that the diminishment of an appellant's property, increase in an appellant's burdens, or impairment of an appellant's rights qualifies an appellant as a "person aggrieved" for purposes of being able to pursue an appeal of an adverse bankruptcy court order or judgment. Neither *Coho Energy* nor *Rohm* criticize or purport to distinguish or curtail the aforementioned authorities; rather, as has already been discussed, they are cited with approval in both *Coho Energy* and *Rohm*.

Since Appellees cannot credibly argue that the existence of the Final Orders does not increase NexPoint's burdens or impair NexPoint's rights in defending the Adversary Proceeding, the Dismissal Order should be reversed on this basis, as well.

IV. The District Court's Application Of The "Person Aggrieved" Test Is Inconsistent With Authorities From This Court Decided Under Bankruptcy Act

The most important aspect of the "person aggrieved" test for this Court to recall from practice under the Bankruptcy Act was that the application of the doctrine, much like that of any prudential limitation, rested in the discretion of the reviewing court. *In re American Bonded Mortgage Co.*, 453 F.2d at 530 (exercising its *discretion* not to dispose of the appeal at issue there solely on standing grounds and stating, "The general rule in this circuit is that an aggrieved part under § 25 of the Bankruptcy Act is only one who has a direct and substantial interest in the

question appealed from."). The "person aggrieved" test for appellate standing was not applied by rote or mechanically under the Bankruptcy Act as if it rose to the level of Article III's Constitutional limitation on federal court jurisdiction to actual cases and controversies. Again, its application was discretionary.

And one of the Bankruptcy Act authorities that illuminates when the application of the "person aggrieved" test could be relaxed is cited in *Coho Energy*: this Court's decision in *In re First Colonial Corp.*, 544 F.2d at 1296 ("The rule in this circuit is that only those who have a direct and substantial interest in the question appealed from are aggrieved within the meaning of Section 25(a)") (internal quotation marks and citation omitted). Put simply, this Court in *First Colonial* refused to put the fox in charge of guarding the henhouse by noting that appellate standing in that case was predicated upon the personal financial stakes of estate professionals, like the bankruptcy trustee, "in the disposition of a substantial portion of the controversy which is adverse to that of the bankrupt." *Id.* at 1297. Where estate professionals, like the Appellees here, have direct personal and substantial stakes in the controversy underlying the Final Orders, application of the "person aggrieved" standard could be relaxed allow others in the "whole community of interests of the bankrupt" to bring matters of professional compensation before the court, including through appeal. *See id.*

The District Court's application of the "person aggrieved" standard in the

Dismissal Order is, therefore, inconsistent with the Pre-Code practice that *Cajun Elec. Power Coop.* has carried over (albeit with its governing explication of the test) from the Bankruptcy Act to practice under the Bankruptcy Code. The Dismissal Order should, therefore, be reversed on this basis, as well.

V. Neither Of The Identified Purposes Served By The "Person Aggrieved" Test Was Served Through Entry Of The Dismissal Order

This Court has identified two primary purposes served by the "person aggrieved" prudential limitation on appellate standing in bankruptcy matters, neither of which is served here – namely, the avoidance of (i) unreasonable delay in the administration of bankruptcy cases and (ii) overburdening appellate court dockets with what is otherwise meritless litigation. *See, e.g.*, *In re Coho Energy, Inc.*, 395 F.3d at 202; *see also In re Technicool Sys.*, 896 F.3d at 385. The Dismissal Order was not animated by any concerns regarding delay of the proceedings before the Bankruptcy Court – unreasonable or otherwise. And, far from being a disgruntled litigant, NexPoint was forced to bring the NexPoint Oppositions to the Final Applications because of the potential preclusive effect(s) of the Final Orders flowing from any failure on NexPoint's part to object to the Final Applications after it had been placed on notice of the claims asserted in the Adversary Proceeding. *See In re Intelogic Trace, Inc.*, 200 F.3d at 389. Since neither of these purposes are served by entry of the Dismissal Order, the District Court's decision should be reversed on this basis, as well.

VI. Dismissal Of NexPoint's Appeal Under The "Person Aggrieved" Test Violates *Lexmark*

"Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (*citing Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). "The one or the other would be treason to the Constitution." *Cohens*, 19 U.S. at 404. As the Supreme Court has recognized for over two centuries, acts of judicial over reach can take the form of acts of omission, as well as commission. Thus, "[j]urisdiction existing, [the Supreme Court] has cautioned, a federal court's 'obligation' to hear and decide cases is 'virtually unflagging.'" *Sprint Communs., Inc.*, 571 U.S. at 77 (*citing Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). These principles informed the portion of the Supreme Court's decision in *Lexmark* on which NexPoint predicates its appeal here, "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied…***it cannot limit a cause of action that Congress has created merely because prudence dictates***." *Lexmark*, 572 U.S. at 128 (emphasis added).

The District Court's Dismissal Order had this precise effect: it *limited* NexPoint's rights as a party in interest under 11 U.S.C. §§ 330(a)(2) and 1109(b) to oppose the Final Applications of the Retained Professionals. By denying NexPoint's standing to appeal based on the prudential limitation on standing embodied in the

"person aggrieved" test, NexPoint's Congressionally conferred statutory rights under 11 U.S.C. §§ 330(a)(2) and 1109(b) have, axiomatically, been limited. Jurisdiction to proceed on appeal before the District Court had clearly been established under 28 U.S.C. § 158(a)(1). The only bar interposed to NexPoint's rights to proceed with its consolidated appeals before the District Court was the application of the "person aggrieved" test. Continued application of the "person aggrieved" test to bar appellate standing to aggrieved appellants, like NexPoint, is deeply problematic, especially given that this Court has recognized that the "person aggrieved" test was *expressly* repealed by the passage of the Bankruptcy Code of 1978. *See In re Coho Energy, Inc.*, 395 F.3d at 202. This case does not concern arguments of a statutory repeal by implication; Congressional intent to repeal the test was clear and has been recognized as such by this Court.

The application of the "person aggrieved" test to limit NexPoint's rights to pursue its Congressionally conferred cause of action under 11 U.S.C. §§ 330(a)(2) and 1109(b) cannot be reconciled with either the statutory test of these provisions or the Supreme Court's decision in *Lexmark*. The District Court's Dismissal Order should be reversed on this basis, as well.

VII. Application Of The Person Aggrieved Standard, In The Alternative, Must Be Tempered Given The Breadth Of 11 U.S.C. §§ 330(a)(2) And 1109(b), NexPoint's Injury In Fact Under The Final Orders, To Satisfy *Lexmark*

Even if this Court is not inclined to follow *Lexmark* and eschew the "person

aggrieved" prudential, judge-made limitation on appellate standing in bankruptcy matters, this Court has recognized in other context that the combination of broad statutory rights, an injury in fact and inclusion in the zone of interests can override prudential standing limits. *See Mnuchin*, 938 F.3d at 575 ("The Supreme Court decisions *City of Miami* and *Lexmark* also support this point: For very broad statutory rights like the APA, an injury in fact and inclusion in the zone of interests can add up to a right of action, *even if prudential standing limits would have blocked it*.") (emphasis added). NexPoint respectfully submits that its status as a defendant in the Adversary Proceeding seeking recovery of the very professional fees and expense reimbursements at issue here, along with its established status as a party in interest under 11 U.S.C. §§ 330(a)(2) and 1109(b) are, likewise, sufficient to overcome prudential standing limitations here under the "person aggrieved" test. The District Court's Dismissal Order should be reversed on this basis, as well.

VIII. Appellees And Their Allies In The Adversary Proceeding Should Not Be Permitted To Have It Both Ways By Denying NexPoint's Rights To Fully And Fairly Litigate Its Claims While Subjecting NexPoint To Preclusion Doctrine Arguments In The Adversary Proceeding

NexPoint respectfully submits that it should not be subjected to any potential preclusive effect – whether asserted in the form of *res judicata*, collateral estoppel, or otherwise – on account of the Final Orders in the Adversary Proceeding because NexPoint was not given a full and fair opportunity to contest the entry of those orders before the Bankruptcy Court. *See, e.g., Kremer* 456 U.S. at 480-483 n. 22 and 24.

Here, NexPoint was denied the protections of the Interim Compensation Procedures Order at the Final Fee Hearing. NexPoint's request for discovery to which it was entitled under Bankruptcy Rule 9014(c) upon the filing of the NexPoint Oppositions to the Final Applications was similarly denied by the Bankruptcy Court. Worse yet, the District Court determined that NexPoint does not qualify as a person aggrieved by the Final Orders – effectively denying NexPoint's statutory right to seek appellate review of the Final Orders on the basis of a judge-made prudential doctrine that is far narrower than the requirements of Article III and the applicable bankruptcy statutes at issue here. NexPoint respectfully submits that the Appellees and their allies in the Adversary Proceeding should not be allowed to have it both ways. If NexPoint does not qualify as a "person aggrieved" by the Final Orders, then NexPoint respectfully calls upon this Court to issue as part of any ruling affirming the District Court's Dismissal Order an express statement that NexPoint is free to contest the Appellees' professional fees and expense reimbursements in the Adversary Proceeding without any preclusive effect(s) of any kind flowing from the Final Orders to NexPoint's detriment, including the ability to challenge the Final Applications under 11 U.S.C. § 330. Absent that relief, NexPoint respectfully submits that its due process rights under the Fifth Amendment will have been, and remain, violated, with such violations becoming orders of magnitude far worse if Appellees' cohorts in the Adversary Proceeding are permitted to assert the Final

Orders offensively against NexPoint through the use any or multiple preclusion doctrine(s).

CONCLUSION

Based upon the foregoing, NexPoint respectfully calls upon this Court to reverse the District Court's Dismissal Order and for all other relief as is just and equitable.

[Signature Page to Follow]

Dated: September 19, 2022.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(g)(1)

The undersigned hereby certify that the foregoing *Appellant NexPoint Advisors, L.P.'s Opening Brief* complies with the type-volume limit of Appellate Rule 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Appellate Rule 32(f), this document contains 12,995 words.

The undersigned hereby further certify that the foregoing *Appellant NexPoint Advisors, L.P.'s Opening Brief* complies with the typeface requirements of Appellate Rule 32(a)(5) and the type-style requirements of Appellate Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

[Signature Page to Follow]

Dated: September 19, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certify that on September 19, 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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