Date Filed: 12/9/2022

Case No. 22-10575

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.

NexPoint Advisors, L.P.,
Appellant,

v.

FTI Consulting, Incorporated,
Appellee.

Appeal from the United States District Court,
Northern District of Texas, Hon. Ed Kinkeade
Case No. 3:21-cv-3086-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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I. INTRODUCTION AND ARGUMENT OVERVIEW

The Retained Professionals'[1] answering brief (the "**Answering Brief**") labors under several misapprehensions and, likewise, advances several mischaracterizations with respect to the governing law and facts relevant to these appeals, all to no avail. The Retained Professionals' efforts aim to defend what NexPoint respectfully submits is indefensible: the District Court's Dismissal Order was entered under an erroneous and incomplete formulation of the person aggrieved test advanced by the Retained Professionals before, and that was ultimately adopted and applied in error by, the District Court below. NexPoint clearly, unequivocally, and indeed axiomatically qualifies as a person aggrieved by the Bankruptcy Court's entry of final orders approving each of the Retained Professionals' Final Applications for awards of compensation and reimbursement of expenses under 11 U.S.C. § 330 (each a "**Final Fee Order**" and, collectively, the "**Final Fee Orders**") under the governing test for satisfying the person aggrieved prudential limitation on appellate standing in this Circuit.

A. *Cajun Electric* Sets Forth The Governing Legal Standard

In that vein and to be clear at the outset, the governing formulation of the "person aggrieved" test for prudential appellate standing under the Bankruptcy Code

[1] All capitalized terms not otherwise defined herein shall have the meaning(s) ascribed to such terms in NexPoint's opening brief (the "**Opening Brief**").

in this Circuit comes from 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)).[2] The Retained

[2] The Answering Brief makes the following puzzling claim: "This Court's person aggrieved standard was *announced* in [*Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy, Inc.)*, 395 F.3d 198 (5th Cir. 2004)] nearly 20 years ago, in this century." (*Answering Brief* at 18; ECF pg. 29) (emphasis added). *Coho Energy cites*, among other authorities, *Cajun Electric* for its recitation of the person aggrieved standard, albeit in truncated form. *In re Coho Energy*, 395 F.3d at 203 ("Thomas fails to demonstrate standing because Thomas is not 'directly and adversely affected pecuniarily by' the order. *In re Cajun Elec. Power Co-op.*, 69 F.3d 746, 749 (5th Cir. 1995); *see also Rohm*, 32 F.3d at 210 n. 18."). Since both *Cajun Electric* and *Coho Energy* were decided by 3-judge panels, *Cajun Electric* is the controlling decision in the event of a conflict as it is the earliest decided conflicting panel decision. *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). If anything, the Retained Professionals' decision to couch their discussion of *Coho Energy* as "announcing" the person aggrieved test is misleading as *Cajun Electric* is the first-decided panel decision under the Bankruptcy Code.

Professionals' Answering Brief does not contend that either the Retained Professionals' motion to dismiss NexPoint's appeals in the District Court below (the "**Retained Professionals' MTD**") or the Dismissal Order itself were predicated upon the governing legal standard set forth in *Cajun Electric*. (*See Answering Brief*). Nor have the Retained Professionals in the Answering Brief identified any earlier panel decisions from this Court that support the unduly narrow and truncated version of the person aggrieved test they advanced before the District Court. (*See id.*).

B. NexPoint's Role As Adversary Defendant Makes It A Person Aggrieved

NexPoint, among others, is currently being sued in the Adversary Proceeding for, among other forms of relief, recovery of the awards of professional fees and expense reimbursements to the Retained Professionals embodied in the Final Fee Orders. (ROA.15737, 15779). This Circuit has recognized that res judicata effect can attach to the final awards of fees and expense reimbursements under 11 U.S.C. § 330, assuming the other requirements of res judicata are otherwise satisfied. *See, e.g., Osherow v. Ernst & Young LLP (In re Intelogic Trace)*, 200 F.3d 382, 389-391 (5th Cir. 2000). NexPoint's burdens in defending itself from claims for recovery of the Retained Professionals' fees and expense reimbursements in the Adversary Proceeding have increased, and NexPoint's rights to defend itself in the Adversary Proceeding are clearly impaired by the Final Fee Orders. NexPoint must now overcome arguments that the reasonableness of the professional fees and expense

reimbursements as to the Retained Professionals has conclusively been established by the Bankruptcy Court's entry of the Final Fee Orders. Again, under *Cajun Electric*, NexPoint's status as a person aggrieved by the Final Fee Orders is axiomatic. And the Dismissal Order should be reversed on this basis alone.

C. Application Of The Person Aggrieved Test Here Violates *Lexmark*

With respect to NexPoint's arguments under *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the Retained Professionals' Answering Brief provides no answer at all. The most the Retained Professionals can muster on this front to is to assert blithely that *Lexmark* simply has no application to bankruptcy cases, generally, and more specifically, to the issue of the application of the person aggrieved standard in the context of bankruptcy appeals. "Perhaps this is so because the 'person aggrieved' standard is specifically tailored to bankruptcy appeals, while *Lexmark* has nothing to do with bankruptcy." (*Answering Brief* at 6; ECF pg. 17). An observation from the United States Court of Appeals for the Sixth Circuit should be sufficient to lay this line of argument advanced by the Retained Professionals to rest. In *Zipkin Whiting Co., LPA v. Barr (In re Felix*), the Sixth Circuit noted *Lexmark*'s potentially problematic impact on the continued viability of the person aggrieved prudential limitation on appellate standing in bankruptcy cases, "This appeal does not implicate *the more problematic question of whether bankruptcy appellate standing may be more limited than Article III standing given*

the Supreme Court's rejection of the term 'prudential standing' in [Lexmark]." 825 Fed. Appx. 365, 366 (6th Cir. Oct. 6, 2020) (emphasis added).

NexPoint respectfully submits that the Answering Brief's self-serving dismissal of *Lexmark*'s impact on the person aggrieved prudential limitation on appellate standing must be assessed, not just against the backdrop of the Sixth Circuit's observation cited above, but also against the collective failure of the Retained Professionals to offer any meaningful explanation or argument on how application of the person aggrieved standard can be reconciled with the Supreme Court's holding in *Lexmark* that, "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). As set forth in its Opening Brief, NexPoint has satisfied the statutory requirements for standing under 11 U.S.C. §§ 330(a)(2) and 1109, as well as the standard for appellate review by the District Court under 28 U.S.C. § 158(a)(1).

Indeed, this is a particularly apt case for assessing *Lexmark*'s impact on the person aggrieved standard. NexPoint is being sued in the Adversary Proceeding for recovery of the very fees and expense reimbursements embodied in the Final Fee Orders. This establishes the requirements for standing under Article III. NexPoint also satisfied all applicable statutory requirements and rules-based predicates to

proceed with its appeal. No more was necessary under *Lexmark*. And yet, NexPoint was denied the ability to proceed with its consolidated appeals before the District Court based on the District Court's application of the person aggrieved standard, albeit in an unduly narrow and truncated form that runs afoul of this Court's governing decision in *Cajun Electric*. Again, the Retained Professionals have not offered any meaningful answer, on the facts of these consolidated appeals, as to how this does not constitute the limitation of a Congressionally created cause of action by the federal judiciary solely in the name of prudence. And, as this Court recognized in *Coho Energy*, "Congress did not include [the statutory version of the person aggrieved test under the Bankruptcy Act] when the code was revamped in 1978. *Notwithstanding its repeal, bankruptcy courts still limit appellate standing to those 'aggrieved.*'" 395 F.3d at 202 (emphasis added). Congress' decision to repeal the statutory person aggrieved standard as part of the Bankruptcy Code makes application of the current iteration of the person aggrieved prudential limitation on appellate standing that much more violative of NexPoint's rights and the Supreme Court's decision in *Lexmark*. The Dismissal Order should be reversed on this basis, as well.

D. Bankruptcy Act And Other Circuit Cases Are Instructive, Not Peculiar

Contrary to the Retained Professionals' contentions in their Answering Brief, there is nothing peculiar about noting the symmetry between this Circuit's

formulation of the person aggrieved test for prudential standing in *Cajun Electric* and explications of that same test from other Circuit Courts of Appeals on which this Court relied – in addition to its prior decision in *Cajun Electric – Coho Energy*. (*See Opening Brief* at 61-62). Indeed, the Retained Professionals advance a similar argument in the Answering Brief, "This Circuit joins essentially all others throughout the nation in recognizing a party's prudential appellate standing in bankruptcy cases only when that party can demonstrate that the outcome of the appeal will affect the party directly, predictably, and pecuniarily." (*Answering Brief* at 3-4, ECF pgs. 14-15). What is peculiar about the Retained Professionals' recitation of the person aggrieved test from other Circuits is that it, once again, unduly truncates the test to omit the second half of the disjunctive test set forth in *Cajun Electric*, namely "that the order diminished [an appellant's] property, increased its burdens, or impaired its rights." 69 F.3d at 748-749. The Retained Professionals' arguments to the contrary are, therefore, unavailing.

In addition, there is nothing peculiar about calling this Court's attention to cases decided under the Bankruptcy Act. "Although the applicable statute has since been repealed, bankruptcy courts still limit appellate standing to those aggrieved." *In re Coho Energy*, 395 F.3d at 202. Indeed, the Retained Professionals advance the very same mode of argument in their Answering Brief, "Although this Court has over the course of nearly 20 years articulated the "person aggrieved" standard for

prudential appellate standing in slightly varying ways … *it has never wavered from a* ***strict application*** *of the "person aggrieved" standard* ***first announced in 1977*****, a year before the current Bankruptcy Code became effective.**" (*See Answering Brief* at 4; ECF pg. 15) (emphasis added).[3] NexPoint was well within its rights to call attention to this Court's precedents under the Bankruptcy Act relaxing the application of the person aggrieved standard under the Bankruptcy Act on matters, like those presented by the consolidated appeals here, of professional compensation.

E. *Mnuchin*, 11 U.S.C. §§ 330(a)(2) and 1109(b) Override Prudential Limits

The Retained Professionals' efforts to mischaracterize and impoverish NexPoint's arguments based on 11 U.S.C. §§ 330(a)(2) and 1109, as well as this

[3] The Retained Professionals' reference to the year 1977 appears to be a reference to this Court's decision under the Bankruptcy Act in *In re First Colonial Corp.*, 544 F.2d 1291 (5th Cir. 1977). If this reference is correct, another peculiarity arises. In *First Colonial*, this Court *relaxed* its application of the person aggrieved standard under the Bankruptcy Act where estate professionals, like the Retained Professionals here, possessed a direct, personal stake in the matter being appealed – essentially refusing to allow the fox to guard the henhouse – to allow others, like NexPoint here, as part of the "whole community of interests of the bankrupt" to raise issues of professional compensation before the bankruptcy courts, including on appeal. *See id.* at 1297. It is difficult to understand how *First Colonial* supports the proposition that the person aggrieved standard has been strictly applied by this Court since the decision of that particular case. Indeed, the *First Colonial* Court *reversed* the District Court's order below holding that the appellant and cross appellant lacked standing to appeal. *See id.* at 1301. Unless the Retained Professionals' reference in the Answering Brief to the year 1977 was in error, or if a case decided in that year was inadvertently excised during the drafting and editing process of the Answering Brief, it is not clear how this Court's decision in *First Colonial* can be read to support the line of argument for which it is cited here by the Retained Professionals.

Court's decision in *Collins v. Mnuchin*, 938 F.3d 553 (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). Sections 330(a)(2) and 1109 of the Bankruptcy Code create broad statutory rights, like those advanced here and in the Bankruptcy and District Courts below by NexPoint. The Bankruptcy Court's entry of the Final Fee Orders over NexPoint's objections, as well as their potential res judicata effect(s) in the Adversary Proceeding under this Court's decision in *In re Intelogic Trace*, 200 F.3d at 389-391, establish an injury in fact on the part of NexPoint. NexPoint's status as a defendant in the Adversary Proceeding from whom the very professional fees and expense reimbursements embodied in the Final Fee Orders are sought to be recovered, along with NexPoint's clearly established status before the Bankruptcy Court as a party in interest under 11 U.S.C. §§ 330(a)(2) and 1109(b) are sufficient to overcome the application of the person aggrieved test here, even if this Court is not inclined to eschew the application of that test consistent with the requirements and teachings of the Supreme Court's decision in *Lexmark*.

NexPoint respectfully submits that the Retained Professionals' reduction of this line of argument advanced by NexPoint to the proposition that 11 U.S.C. §

1109(b) has nothing to do with appellate standing is a gross and disingenuous mischaracterization of NexPoint's arguments. NexPoint's argument is clear: the collective force of NexPoint's injury in fact through the entry of the Final Fee Orders and by virtue of being sued for the same professional fees and expense reimbursements embodied in those orders, combined with broad statutory rights under 11 U.S.C. §§ 330(a)(2) and 1109(b) *collectively* allow and call for the person aggrieved test to be overridden in a manner consistent with this Court's decision in *Mnunchin*. And such an override of the person aggrieved standard is warranted here. In addition to the reasons cited above and in the Opening Brief, the Dismissal Order should be dismissed on this basis, as well.

F. NexPoint's Due Process Arguments Provide Crucial Context Here

Finally, NexPoint understands that there may well be limitations on what this Court can do in connection with NexPoint's arguments based on the Due Process Clause of the Fifth Amendment, and whether NexPoint has had a full and fair opportunity to litigate with respect to the Final Fee Orders here. *See, e.g., Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480-483 n. 22 and 24 (1982). But NexPoint respectfully submits that its hand has been forced in this regard.

NexPoint was not surprised when the Retained Professionals complained in their Answering Brief about the amount of time and pages of the Opening Brief that

were devoted to bringing this Court up to speed on what transpired in the courts below. (*See Answering Brief* at 1-2; ECF pgs. 12-13). To be clear, by the Retained Professionals' lights, what transpired in these consolidated appeals in point of fact is somehow irrelevant to the matter at hand. But the Retained Professionals make multiple references in the Answering Brief to *collateral litigation*, the number of appeals undertaken by Mr. Dondero and related entities, both in the District Court below, as well as before this Court, *ad hominem* attacks on NexPoint and Mr. Dondero, and so forth. (*See Answering Brief* at 2-3, ECF pgs. 13-14 n. 5; *see also* 15-17, ECF pgs. 26-28 n. 39). This is quite a double standard.

It goes without saying that the Retained Professionals would rather not have NexPoint call this Court's attention to the fact that NexPoint was denied the expressly guaranteed protections of the Interim Compensation Procedures Order: that any decision to refrain from objecting to interim applications for compensation brought by, among others, the Retained Professionals, would be without prejudice to NexPoint's to object to the Retained Professionals' Final Fee Applications. (ROA.1156, ROA.21410:14-17, ROA.21421:13 – 21422:5). But NexPoint was prejudiced in precisely this manner when the Bankruptcy Court accepted in error the Retained Professionals arguments that NexPoint had simply waited too long to object. (*See id.*).

The Retained Professionals would also rather not have this Court learn that, notwithstanding the requirements of Bankruptcy Rules 3007 and 9014(c), as well as this Court's governing precedents, NexPoint was denied the opportunity to conduct the minimal discovery it requested by the Bankruptcy Court. *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)); *see also* (ROA.15547, 15565, 15570, 15576-77, 15572-73, 15582-83, 15589-90, 15593, 15675-90, 15692-98, 21403:5-21404:11, 21421:13-21422:5).

The Retained Professionals also accuse NexPoint of "misstat[ing] the record of this Appeal" when NexPoint calls attention to the *fact* that the Retained Professionals' MTD itself – not the reply submitted by the Retained Professionals in support of the same – did not address NexPoint's standing based on the Adversary

Proceeding, nor make any meaningful arguments based on the Adversary Proceeding or NexPoint's status as a defendant therein, for that matter. (ROA.102-120). The Retained Professionals citation at footnote 36 of the Answering Brief is to the reply in support of the Retained Professionals' MTD, and not to the MTD itself. (ROA.247-262, 102-120); *see also Answering Brief* at 15 n. 36). Quite plainly, NexPoint has not misstated anything in this regard.

The distinction between the Retained Professionals' MTD and the reply in support of the same is important. The Retained Professionals now argue in their Answering Brief that NexPoint's arguments based on *Cajun Electric* and the Adversary Proceeding were waived due to an alleged failure to present them below. (*See Answering Brief* at 20-22). The Retained Professionals never explain, however, how NexPoint could have raised these arguments before the District Court when the Retained Professionals did not address the Adversary Proceeding and NexPoint's role as a named defendant therein until *the reply* in support of the Retained Professionals' MTD. (ROA.102-120, 247-262). Simply put, NexPoint cannot be said to have waived arguments it never had the opportunity to present to the District Court below in the first place.

As the Court can see, the Retained Professionals seek to place the issues before this Court in isolation, and they would much rather have them reviewed without the benefit of the context provided by NexPoint in its Opening Brief. From

NexPoint's perspective, however, the reversible error the Retained Professionals induced the District Court to commit below rests on a continuum and is only the latest chapter in the volume of express protections under law of which NexPoint has clearly been deprived. As the Court has probably surmised by this point, what has transpired below *in this litigation* has been viewed by NexPoint as a bridge too far for some time. With the benefit of the context NexPoint provided both here and in its Opening Brief, NexPoint respectfully calls upon the Court to recognize what has happened to NexPoint *here, in this litigation*, as exactly that: a bridge too far. If the Retained Professionals are correct that this Court cannot fashion any meaningful relief in the current procedural posture of the consolidated appeals to address NexPoint's due process arguments in the Opening Brief, then NexPoint reserves its rights to raise these issues to the extent otherwise necessary in and through the Adversary Proceeding, as well as before any other appropriate forum or tribunal.

For the foregoing reasons, as well as those set forth in its Opening Brief and those that follow, NexPoint respectfully submits that the Dismissal Order should be reversed and remanded by this Court to the District Court for further proceedings consistent with this Court's order(s).

II. ARGUMENT

A. NexPoint Qualifies As A Person Aggrieved Under *Cajun Electric*

i. NexPoint Has Not Waived Its Rights To Argue *Cajun Electric* Here

The Retained Professionals' MTD did not advance any arguments under the person aggrieved test addressed specifically to the Adversary Proceeding, NexPoint's role as a named defendant therein, and the efforts of the plaintiff in that litigation to recover from, among other entities, NexPoint, awards of professional fees and expense reimbursements under 11 U.S.C. § 330 to, among other bankruptcy professionals, the Retained Professionals. (ROA.102-120). The first time that the Retained Professionals addressed the Adversary Proceeding and NexPoint's role as a named defendant therein under the person aggrieved test for appellate standing was in their reply. (ROA.247-262). Indeed, the Answering Brief admits as much when it cites the reply in support of the Retained Professionals' MTD as the basis in the record on appeal in which the Retained Professionals addressed these matters before the District Court. (*See Answering Brief* at 15 n. 36). The Retained Professionals' MTD, rather, was addressed to NexPoint's prepetition general unsecured claims and the NexPoint Administrative Expense Claim. (ROA.102-120).

Because the Retained Professionals waited until their reply in support of the Retained Professionals' MTD to address the Adversary Proceeding issues under the person aggrieved standard, NexPoint was, thereby, deprived of the opportunity to advance its arguments under *Cajun Electric*'s disjunctive test for determining whether an entity qualifies as a person aggrieved for appellate standing purposes. Simply put, NexPoint cannot and should not be deemed to have waived its arguments

under *Cajun Electric* because it did not raise this line of argument in the District Court when NexPoint did not have any meaningful opportunity to present these arguments to the District Court for its review and consideration in the first place. The Retained Professionals' arguments to the contrary in the Answering Brief are either advanced without support in, or are contradicted entirely, by the record on appeal and facts here.

For instance, the Retained Professionals argue that NexPoint did not advance arguments under *Cajun Electric* before the District Court "because [NexPoint] had already conceded that *Technicool* is the controlling test." (*Answering Brief* at 21 n. 49). This assertion, however, is unaccompanied by any citation to the record on appeal where NexPoint allegedly made such a concession. (*See id.*). Moreover, because the Retained Professionals' MTD was addressed to the NexPoint Administrative Expense Claim,[4] as well as NexPoint's previously asserted general unsecured claims (which were subsequently withdrawn pursuant to stipulation),

[4] The Retained Professionals are correct that the Bankruptcy Court ultimately disallowed the NexPoint Administrative Expense Claim, but the Bankruptcy Court's judgment to that effect was not entered until September 14, 2022, while NexPoint's notice of appeal of that decision was filed on September 20, 2022, the day after NexPoint submitted its Opening Brief to this Court. Although the Retained Professionals attempt to make a mountain out of molehill based on this relatively minor discrepancy, (*Answering Brief* at 2 n. 5 and 8 n. 14), it is difficult to understand why the Retained Professionals devote such attention to an issue and line of argument based on the NexPoint Administrative Expense Claim that NexPoint did not press in its Opening Brief. (*Answering Brief* at 8 n. 14).

NexPoint's pecuniary interests were already clearly established even under the narrower version of the test advanced by the Retained Professionals. There simply was no need for NexPoint to argue over the applicable legal standard when, in NexPoint's view, the line of argument advanced by the Retained Professionals failed on its face because NexPoint's interests clearly satisfied even the narrowest version of the person aggrieved test advanced by the Retained Professionals.

The Retained Professionals also argue in error that "[NexPoint] does not even attempt in its brief to address the problem of raising a new argument on appeal or to demonstrate any "exceptional circumstances" that warrant this Court's addressing [NexPoint's] new legal theory." (*Answering Brief* at 22 n. 51). First, as NexPoint has already demonstrated above, NexPoint cannot and should not be deemed to have waived arguments under *Cajun Electric* that it never had a chance to advance before the District Court in the first place. At a minimum, NexPoint respectfully submits that the Retained Professionals' delay in raising arguments addressed to the Adversary Proceeding and NexPoint's status as a named defendant therein and from whom professional fees and expense reimbursements awarded to the Retained Professionals are among the recoveries sought by the plaintiff in that matter until the Retained Professionals' reply qualifies as an "exceptional circumstance" under the authorities relied upon by the Retained Professionals. (*See Answering Brief* at 22 n. 51).

Second, the Retained Professionals' argument in this regard flies in the face of the arguments NexPoint advanced in its Opening Brief. (*Opening Brief* at 48).

The Retained Professionals' arguments in this regard are contradicted by both the record on appeal and NexPoint's arguments in its Opening Brief that squarely address these issues. NexPoint respectfully submits, therefore, that no such waiver has occurred here, and NexPoint should be permitted to advance its arguments under *Cajun Electric* here as NexPoint was deprived of any opportunity – certainly any meaningful opportunity – to advance such arguments before the District Court in the first place. At bottom, no waiver occurred, and NexPoint respectfully submits that no waiver should be found to have occurred here.

ii. ***Cajun Electric*** **Controls As The First-Decided Conflicting Panel Decision**

As this Court is already aware, only this Court seated *en banc* can overrule its prior decision in *Cajun Electric*, "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 if this Court's decision in *Cajun Electric* is deemed to conflict with the later panel decisions in cited in the District Court's Dismissal Order, *Cajun Electric* controls as it is the earliest of the

conflicting panel decisions. *See, e.g., Camacho*, 445 F.3d at 410 ("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).

Indeed, the Retained Professionals concede as much in their Answering Brief as they did not identify any panel opinions of this Court decided under the Bankruptcy Code before this Court's decision in *Cajun Electric*. (*See Answering Brief*). The Retained Professionals, indeed, tacitly concede that *Cajun Electric* set forth the governing legal test, "Even if this *alternative test for appellate standing were still viable – and there is serious reason to doubt that it is* – it is not inconsistent with the 'direct and adverse pecuniary affect' test repeatedly articulated by this Court in the nearly 30 years since *Cajun Electric*." (*Answering Brief* at 22) (emphasis added). The serious doubt that Retained Professionals reference stems from an unreported decision from a district court in this Circuit, not a panel decision nor an *en banc* decision from this Court. The Retained Professionals' inability to go any further than alleging that *Cajun Electric*'s governing formulation of the person aggrieved test is somehow in serious doubt should demonstrate to this Court's satisfaction that *Cajun Electric*, indeed, sets forth the governing legal standard.

And as NexPoint has already demonstrated above, although the Retained Professionals argue in error that this Court's decision in *Coho Energy* "announced" the legal test for the person aggrieved prudential limitation on appellate standing in bankruptcy matters, (*Answering Brief* at 18), *Coho Energy* cites *Cajun Electric*. *In re Coho Energy, Inc.*), 395 F.3d at 203. The governing legal test for the person aggrieved prudential limitation on appellate standing in bankruptcy matters, therefore, is as follows, "*To have standing to appeal a bankruptcy court 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*." *Cajun Electric*, 69 F.3d at 748-749 (emphasis added).

NexPoint clearly qualifies as a person aggrieved under the governing test in *Cajun Electric.*

iii. NexPoint Is A Person Aggrieved Within The Meaning Of *Cajun Electric*

As set forth above and in its Opening Brief, NexPoint is a named defendant in the Adversary Proceeding. Among other forms of relief and recovery sought by the plaintiff therein are professional fees and expense reimbursements awarded to the Retained Professionals pursuant to the Final Fee Orders. This Court's decision in *In re Intelogic Trace* establishes that final fee awards under 11 U.S.C. § 330 carry

with them res judicata effect (assuming, of course, that the other requirements of the doctrine are otherwise satisfied). 200 F.3d at 389-391. The res judicata effect of the Final Fee Orders reverberates throughout the Adversary Proceeding to increase NexPoint's burdens and impair NexPoint's rights therein. For instance, the Final Fee Orders will, at a minimum, increase NexPoint's burdens in the Adversary Proceeding in terms of contesting the reasonableness of the compensation awarded to the Retained Professionals under the Final Fee Orders. The plaintiff will be permitted to argue that the reasonableness of the professional fees and expense reimbursements they seek to recover as to the Retained Professionals is conclusively established by the Final Fee Orders. That the Final Fee Orders increase NexPoint's burdens and impair NexPoint's rights in the Adversary Proceeding (again, the amount at issue here is in the tens of millions of dollars) is self-evident. And NexPoint's established status as a person aggrieved by the Final Fee Orders is, therefore, equally axiomatic. The District Court's Dismissal Order should be reversed on this basis, alone.

iv. The Retained Professionals' Efforts To Narrow *Cajun Electric* Fail

In their Answering Brief, the Retained Professionals attempt unconvincingly to narrow and reformulate the governing test set forth in *Cajun Electric* into a reiteration of the unduly narrow and truncated version of the person aggrieved test under which they prevailed in the District Court below. (*Answering Brief* at 22-23).

"A debtor's inability to operate its business would necessarily directly and adversely affect its ability to generate revenue." (*Id.*). The Retained Professionals' effort to limit *Cajun Electric* falls flat and fails on its own terms.

In *Cajun Electric*, the party challenging the debtor in possession's standing to appeal an order directing the appointment of a chapter 11 trustee and, thereby, ousting the debtor from possession of its bankruptcy estate, argued that, "…Cajun lacks standing because it is *hopelessly insolvent*…CLECO argues that Cajun is so insolvent *that it lacks any hope of return under any reorganization and is thus not adversely affected by the appointment of a trustee.*" *Cajun Electric*, 69 F.3d at 748-749. This Court was not detained long in finding that the ousted debtor in *Cajun Electric* satisfied the disjunctive elements of the person aggrieved test announced in that case. "CLECO's argument is without merit. 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***." *Id.* at 749 (emphasis added).

The loss of the *right* to run its business, as well as all of the other *rights* that inured to its benefit as a debtor in possession, which qualified the ousted debtor in *Cajun Electric* as a person aggrieved for appellate standing purposes, *not* the revenue it may have generated by doing so. Moreover, given the ousted debtor's seemingly admitted status as hopelessly insolvent, any revenue generated by the debtor from

business operations would have inured to the benefit of its bankruptcy estate and creditors – i.e., it would not have amounted to a *direct* injury to the ousted debtor's wallet.

NexPoint respectfully submits that faithful application of *Cajun Electric* yields NexPoint's status as a person aggrieved by the Final Fee Orders. The District Court's Dismissal Order should, therefore, be reversed and remanded.

v. Any Alleged Waiver Of *Cajun Electric* Should Be Excused

Generally, whether matters may be considered for the first time on appeal is a matter left to the discretion of the appellate courts. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Examples of appropriate instances for doing so include "where the proper resolution is beyond any doubt" or the matter involves a pure question of law. *Id.* (citations omitted); *see also Texas v. United States*, 730 F.2d 339, 358 n. 35 (5th Cir. 1984) ("It may be appropriate to address the issue if it concerns a pure question of law … or if the proper resolution of the issue is beyond doubt." (citations omitted). Another appropriate instance for doing so is where "injustice might otherwise result." *Singleton*, 428 U.S. at 121; *Hormel v. Helvering*, 312 U.S. 556, 557 (1941). Exceptional circumstances, as the Retained Professionals point out, may also warrant consideration of such arguments. *See ASARCO, Inc. v.*

Elliott Mgmt. (In re Asarco, L.L.C.), 650 F.3d 593, 600 (5th Cir. 2011). These exceptions are satisfied here.

First, standing is a question of law that is subject to de novo review by the Court. *Furlough v. Cage (In re Technicool Sys.)*, 896 F.3d 382, 385 (5th Cir. 2018). So this element is satisfied. The resolution of this issue in NexPoint's favor is clearly beyond doubt for the reasons set forth in Parts II.B. and II.C, so this factor is also satisfied. Consideration of NexPoint's arguments under *Cajun Electric* is also necessary to prevent a miscarriage of justice and exceptional circumstances for this Court's review of NexPoint's arguments under *Cajun Electric* are satisfied for the reasons set forth in Parts I.F and II.A. Even if this Court determines that NexPoint should have raised its arguments under *Cajun Electric* in the District Court below, the various legal tests for this Court's consideration of such arguments here are satisfied. The Dismissal Order should be reversed for these reasons, as well.

B. The Person Aggrieved Limitation Violates *Lexmark*

In addition to the reasons set forth in Part I.C. above, NexPoint calls this Court's attention to the following language from *Lexmark*, "We have since made clear, however that [the zone of interests test] applies to all statutorily created causes of action; that it is a 'requirement of general application': *and that Congress is presumed to 'legislate against the background of' the zone-of-interests limitation,*

'which applies unless expressly negated." 572 U.S. at 129 (emphasis added) (citations omitted). *Lexmark*'s general application demonstrates why the Retained Professionals' efforts to limit *Lexmark* to trademark cases is entirely unconvincing. It also explains with the Sixth Circuit in *Zipkin* was so troubled by the continued application of the person aggrieved standard following *Lexmark*. 825 Fed. Appx. at 366 n.1.

It is beyond dispute that NexPoint falls squarely within the zones of interests created by 11 U.S.C. §§ 330(a)(2) and 1109(b) and satisfied the requirements for appellate standing under 28 U.S.C. § 158(a)(1). The person aggrieved standard was applied here, therefore, to limit NexPoint's rights and causes of action under 11 U.S.C. § 330(a)(2) to serve a judicially crafted, prudential limitation the bankruptcy courts have carried forward notwithstanding that Congress had previously repealed by statute the prior iteration of the statutory person aggrieved standard as part of the Bankruptcy Code. *In re Coho Energy, Inc.*, 395 F.3d at 202. And all of this has taken place against the "virtually unflagging" obligation of the federal courts to exercise the jurisdiction which Congress has conferred upon them. *See, e.g., Sprint Communs., Inc. v. Jacobs,* 571 U.S. 69, 77 (2013). Application of the person aggrieved standard to limit NexPoint's causes of action under 11 U.S.C. §§ 330(a)(2) and 1109(b) on appeal violate *Lexmark* and, therefore, the District Court's Dismissal Order should be reversed on this basis, as well.

Contrary to the Answering Brief, this Court's decision in *Superior MRI Servs. v. All. HealthCare Servs.,* 778 F.3d 502, 505-06 (5th Cir. 2015) does not change this result. At issue in *Superior MRI* was whether *Lexmark* limited the application of the prudential doctrine that parties may generally assert only their own rights, and not those of third parties. *See id.* That prudential doctrine has absolutely no bearing on what is at issue here and what falls squarely within the ambit of *Lexmark*: whether the federal courts can limit Congressionally created causes of action because prudence so dictates. Clearly, the federal courts cannot do so. And since that is the effect of the person aggrieved test here, *Superior MRI* does nothing to aid the Retained Professionals. Again, the Dismissal Order should be reversed and remanded for these reasons, as well.

C. Cause Exists To Override The Person Aggrieved Standard Here

In addition to the arguments set forth in Part I.E., NexPoint notes that this Court has already acknowledged that prudential limitations on appellate standing can and should be relaxed on matters of professional compensation. *In re First Colonial Corp.*, 544 F.2d at 1297 (allowing the "whole community of interests of the bankrupt" to raise issues of professional compensation before the bankruptcy courts, including on appeal). The Dismissal Order should be reversed and remanded on this basis, as well.

In closing, NexPoint reasserts its arguments set forth in Parts I.D. and I.F. above.

III. CONCLUSION

For the reasons set forth herein, as well as in its Opening Brief, NexPoint respectfully calls upon this Court and prays for entry of an order reversing and remanding the Dismissal Order.

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Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure (FRAP) 32(a)(4) – (6). The brief is typeset on 8.5" x 11" size paper with one-inch margins on all sides, double-spaced (except for quotations exceeding two lines, headings, and footnotes), in 14-point Times New Roman font (a plain, roman, proportional font with serifs), and all case names are italicized. This brief complies with the limits set forth in FRAP 32(a)(7) insofar as it comprises 27 pages and contains 6,491 words, not including the parts of the brief excluded under FRAP 32(f).

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CERTIFICATE OF SERVICE

The undersigned herby certify that on December 9, 2022, a true and correct copy of the foregoing *Appellant NexPoint Advisors, L.P.'s Reply 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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