BTXN 138 (rev. 03/15)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

In Re: Highland Capital Management, L.P.		§	
		§	Case No.: 19−34054−sgj11
	Debtor(s)	§	Chapter No.: 11
Marc Kirschner et al.		§	
	Plaintiff(s)	§	Adversary No.: 21−03076−sgj
vs.		§	
James D. Dondero et al.		§	Civil Case No.:
	Defendant(s)	§	
		§	
Marc Kirschner et al.		§	
	Plaintiff(s)	§	
vs.		§	
James D. Dondero et al.		§	
	Defendant(s)	§	
		§	
		§	

NOTICE OF TRANSMITTAL REGARDING WITHDRAWAL OF REFERENCE

I am transmitting:

- ☑ One copy of the Motion to Withdraw Reference (USDC Civil Action No. − DNC Case) **NOTE**: A Status Conference has been set for 03/17/2022 at 9:30am, in via Webex: https://us−courts.webex.com/meet/jerniga. before U.S. Bankruptcy Judge Jernigan . The movant/plaintiff, respondent/defendant or other affected parties are required to attend the Status Conference.
- ☐ One copy of: _.

TO ALL ATTORNEYS: Fed.R.Bankr.P. 5011(a) A motion for withdrawal of a case or proceeding shall be heard by a district judge, [*implied*] that any responses or related papers be filed likewise.

DATED: 2/1/22

FOR THE COURT:
Robert P. Colwell, Clerk of Court

by: /s/Sheniqua Whitaker, Deputy Clerk

BTXN 116 (rev. 07/08)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

WITHDRAWAL OF REFERENCE SERVICE LIST

Transmission of the Record

BK Case No.: 19−34054−sgj11

Adversary No.: 21−03076−sgj

Received in District Court by: _____

Date: _____

Volume Number(s): _____

cc: Stacey G. Jernigan
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Nathan (Nate) Elner
Attorney(s) for Appellant
US Trustee

Plaintiff Marc Kirschner

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No Address

Defendant MASSAND CAPITAL, INC. (Pro Se)

No Address

Defendant SAS ASSET RECOVERY, LTD (Pro Se)

No Address

BTXN 150 (rev. 11/10)

In Re: Highland Capital Management, L.P.		§	
		§	Case No.: 19−34054−sgj11
	Debtor(s)	§	Chapter No.: 11
Marc Kirschner et al.		§	
	Plaintiff(s)	§	Adversary No.: 21−03076−sgj
vs.		§	
James D. Dondero et al.		§	
	Defendant(s)	§	

CIVIL CASE COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet.

I. (a) **PLAINTIFF**
Marc Kirschner

DEFENDANT
Mark Okada, et al.

(b) County of Residence of First Listed Party:
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Party:
(IN U.S. PLAINTIFF CASES ONLY)

(c) Attorney's (Firm Name, Address, and Telephone Number)
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Sidley Austin LLP
2021 McKinney Avenue, Suite 2000
Dallas, TX 75201
(214) 981−3300

Attorney's (If Known)
See Service List for representatives

II. BASIS OF JURISDICTION

○	1	U.S. Government Plaintiff	○	2	U.S. Government Defendant	◉	3	Federal Question (U.S. Government Not a Party)	○	4	Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

Citizen of This State	○ 1	○ 1	Incorporated *or* Principal Place of Business In This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated *and* Principal Place of Business In Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. NATURE OF SUIT

○ 422 Appeal 28 USC 158 ◉ 423 Withdrawal 28 USC 157 ○ 890 Other Statutory Actions

V. ORIGIN

◉	1	Original Proceeding	○	2	Removed from State Court	○ 3	Remanded from Appellate Court	○	4	Reinstated or Reopened
○	5	Transferred from another district	○	6	Multidistrict Litigation	○ 7	Appeal to District Judge from Magistrate Judgment			

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing **(Do not cite jurisdictional statutes unless diversity):**
423 Withdrawal 28 USC 157

Brief description of cause:
Motion for withdrawal of reference

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23 DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY
Judge: Docket Number: 3:22-cv-00203-S

DATED: 1/28/22

FOR THE COURT:
Robert P. Colwell, Clerk of Court
by: /s/Sheniqua Whitaker, Deputy Clerk

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Counsel for Mark Okada and Affiliated Parties

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	:	Case No. 19-34054-sgj11
Reorganized Debtor.	:	
MARC S. KIRSCHNER, AS LITIGATION TRUSTEE OF THE LITIGATION SUB-TRUST,	:	
Plaintiff,	:	Adv. Pro. No. 21-03076-sgj
v.	:	
JAMES D. DONDERO; MARK A. OKADA; SCOTT ELLINGTON; ISAAC LEVENTON; GRANT	:	

[1] The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

JAMES SCOTT III; FRANK WATERHOUSE; STRAND ADVISORS, INC.; NEXPOINT ADVISORS, L.P.; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; DUGABOY INVESTMENT TRUST AND NANCY DONDERO, AS TRUSTEE OF DUGABOY INVESTMENT TRUST; GET GOOD TRUST AND GRANT JAMES SCOTT III, AS TRUSTEE OF GET GOOD TRUST; HUNTER MOUNTAIN INVESTMENT TRUST; MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1 AND LAWRENCE TONOMURA AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1; MARK & PAMELA OKADA FAMILY TRUST–EXEMPT TRUST#2 AND LAWRENCE TONOMURA IN HIS CAPACITY AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST–EXEMPT TRUST #2; CLO HOLDCO, LTD.; CHARITABLE DAF HOLDCO, LTD.; CHARITABLE DAF FUND, LP.; HIGHLAND DALLAS FOUNDATION; RAND PE FUND I, LP, SERIES 1; MASSAND CAPITAL, LLC; MASSAND CAPITAL, INC.; SAS ASSET RECOVERY, LTD.; AND CPCM, LLC,

Defendants.

MOTION OF THE OKADA PARTIES TO WITHDRAW THE REFERENCE

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Mark A. Okada ("Okada"), The Mark & Pamela Okada Family Trust – Exempt Trust #1 ("MPO Trust 1") and Lawrence Tonomura in his Capacity as Trustee, and The Mark & Pamela Okada Family Trust – Exempt Trust #2 ("MPO Trust 2") and Lawrence Tonomura in his Capacity as Trustee (collectively, the "Okada Parties"), defendants in the above captioned and numbered adversary proceeding (the "Adversary Proceeding"), hereby submit this *Motion of the Okada Parties to Withdraw the Reference* (the "Motion"), respectfully stating as follows:

Pursuant to 28 U.S.C. § 157(d), and for the reasons set forth in the accompanying *Memorandum of Law in Support of the Okada Parties' Motion to Withdraw the Reference*,[2] filed contemporaneously herewith and all of which is incorporated herein by reference, the Okada Parties request that the United States District Court for the Northern District of Texas, Dallas Division (the "District Court") withdraw the reference to the Bankruptcy Court with respect to the causes of action set forth in the Complaint against the Okada Parties (the "Claims"):

- Count I (against Okada, MPO Trust 1 and MPO Trust 2) – Avoidance and Recovery of HCMLP Distributions as Constructive Fraudulent Transfers.
- Count II (against Okada, MPO Trust 1 and MPO Trust 2) – Avoidance and Recovery of HCMLP Distributions as Intentional Fraudulent Transfers.
- Count XIV (against Okada) – Breach of Fiduciary Duty in Connection with Fraudulent Transfers and Schemes.[3]

WHEREFORE, the Okada Parties respectfully request that the District Court enter an order, substantially in the form attached hereto as Exhibit A, (i) granting the Motion;

---

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the *Memorandum of Law in Support of the Okada Parties' Motion to Withdraw the Reference*.

[3] Count XXXV (against Okada, MPO Trust 1 and MPO Trust 2) is moot by virtue of the Bankruptcy Court's entry of its *Order Authorizing Withdrawal of Proofs of Claim Nos. 135, 137 and 139* [Bankr. Dkt. No. 3163], permitting the consensual withdrawal of the claims at issue.

(ii) withdrawing the reference to the Bankruptcy Court with respect to the Claims; (iii) granting the Okada Parties such other and further relief as is just and proper.

Dated: January 21, 2022

/s/ Brian D. Glueckstein

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Counsel for Defendants Mark Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1 and Lawrence Tonomura as Trustee, and The Mark and Pamela Okada Family Trust – Exempt Trust #2 and Lawrence Tonomura as Trustee

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that on January 19, 2022, he corresponded regarding the relief requested herein with Quinn Emanuel Urquhart & Sullivan, LLP, counsel of record for the Plaintiff, who informed the undersigned that the Plaintiff opposes said relief.

/s/ Brian D. Glueckstein
Brian D. Glueckstein

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 21, 2022, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on the Plaintiff through its counsel of record. Hard copies were also served on the Plaintiff through its counsel of record via overnight courier.

/s/ Brian D. Glueckstein
Brian D. Glueckstein

EXHIBIT A

Proposed Order

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	Case No. 19-34054-sgj11
Reorganized Debtor.	
MARC S. KIRSCHNER, AS LITIGATION TRUSTEE OF THE LITIGATION SUB-TRUST,	
Plaintiff,	Adv. Pro. No. 21-03076-sgj
v.	Civil Action No. _____
JAMES D. DONDERO; MARK A. OKADA; SCOTT ELLINGTON; ISAAC LEVENTON; GRANT JAMES SCOTT III; FRANK WATERHOUSE; STRAND ADVISORS, INC.; NEXPOINT ADVISORS, L.P.; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; DUGABOY INVESTMENT TRUST AND NANCY DONDERO, AS TRUSTEE OF DUGABOY INVESTMENT TRUST; GET GOOD TRUST AND GRANT JAMES SCOTT III, AS TRUSTEE OF GET GOOD TRUST; HUNTER MOUNTAIN INVESTMENT TRUST; MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1 AND LAWRENCE TONOMURA AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1; MARK & PAMELA OKADA FAMILY TRUST–EXEMPT TRUST#2 AND LAWRENCE TONOMURA IN HIS CAPACITY AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST–EXEMPT TRUST #2; CLO HOLDCO, LTD.; CHARITABLE DAF HOLDCO, LTD.; CHARITABLE DAF FUND, LP.; HIGHLAND DALLAS FOUNDATION; RAND PE FUND I, LP,	

[1] The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

SERIES 1; MASSAND CAPITAL, LLC; MASSAND CAPITAL, INC.; SAS ASSET RECOVERY, LTD.; AND CPCM, LLC,

Defendants.

ORDER GRANTING MOTION OF THE OKADA PARTIES TO WITHDRAW THE REFERENCE

Upon consideration of the *Motion of the Okada Parties to Withdraw the Reference* [Adv. Docket No. __] (the "Motion") and the *Memorandum of Law in Support of the Okada Parties' Motion to Withdraw the Reference* [Adv. Docket No. __] (the "Memorandum of Law"), any response thereto, the pleadings, and the arguments presented by the parties before this Court, the Court hereby orders that the Motion is GRANTED.

The Court finds that resolution of Counts I and II requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce and therefore reference of such Claims to the Bankruptcy Court is mandatorily withdrawn pursuant to 28 U.S.C. § 157(d).

The Court further finds that cause exists under 28 U.S.C. § 157(d) for withdrawal of the reference of all of the Claims asserted against the Okada Parties (in Counts I, II, and XIV). In the interest of judicial efficiency, the Court also finds that cause exists for withdrawal of the reference of the Adversary Proceeding in its entirety.

SO ORDERED.

Dated: _____, 2022

_____
UNITED STATES DISTRICT JUDGE

 # # # End of Order # # #

Proposed form of order prepared by:

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Counsel for Mark Okada and Affiliated Parties

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	Case No. 19-34054-sgj11
Reorganized Debtor.	
MARC S. KIRSCHNER, AS LITIGATION TRUSTEE OF THE LITIGATION SUB-TRUST,	
Plaintiff,	Adv. Pro. No. 21-03076-sgj
v.	
JAMES D. DONDERO; MARK A. OKADA; SCOTT ELLINGTON; ISAAC LEVENTON; GRANT	

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Defendants.

MEMORANDUM OF LAW IN SUPPORT OF THE OKADA PARTIES' MOTION TO WITHDRAW THE REFERENCE

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Page(s)

Cases

Statutes

Other Authorities

Defendants Mark A. Okada, The Mark & Pamela Okada Family Trust – Exempt Trust #1 ("MPO Trust 1") and Lawrence Tonomura in his Capacity as Trustee, and The Mark & Pamela Okada Family Trust – Exempt Trust #2 ("MPO Trust 2") and Lawrence Tonomura in his Capacity as Trustee (collectively, the "Okada Parties"), respectfully submit this memorandum of law in support of their motion (the "Motion") requesting that the United States District Court for the Northern District of Texas, Dallas Division (the "District Court") withdraw the reference to the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") with respect to the causes of action asserted against the Okada Parties in the Complaint (the "Claims"). To minimize duplication of arguments common to or asserted by other Defendants in their motions to withdraw the reference, the Okada Parties are incorporating by reference and joining arguments set forth in the *Brief in Support of Motion to Withdraw the Reference for the Causes of Action in the Complaint Asserted Against the Former Employee Defendants* [Adv. Pro. Dkt. No. 28] (the "Former Employee Defendants' Motion"). In support of their Motion, the Okada Parties respectfully state as follows:

PRELIMINARY STATEMENT

1. The Claims asserted against the Okada Parties do not belong in the Bankruptcy Court. The Okada Parties did not participate in the underlying bankruptcy proceedings, and this Adversary Proceeding was commenced after the Debtor's plan of reorganization had already gone effective. The Litigation Trustee's reliance on Section 6502 of the Internal Revenue Code to seek recovery under Counts I and II against the Okada Parties raises substantial and material questions of federal tax law for which withdrawal of the reference is mandated by 28 U.S.C. § 157(d). Moreover, the Claims asserted against the Okada Parties are a mix of core and non-core Claims that support withdrawal of the reference by the District Court.

2. If the Bankruptcy Court has subject matter jurisdiction over the non-core breach of fiduciary duty claim at all, and Mr. Okada submits it does not, that jurisdiction is limited insofar as Mr. Okada does not consent to the Bankruptcy Court's entry of a final order with respect to that Claim. Furthermore, the Okada Parties are entitled to a jury trial on *all* of the Claims—jury trial rights they are exercising—and do not consent to the Bankruptcy Court holding such a trial.

3. As a result, the operative question is when, not if, the reference should be withdrawn. The Okada Parties submit that that the District Court should withdraw the reference with respect to the Claims immediately because they include a state law cause of action over which the Bankruptcy Court has *no* post-confirmation jurisdiction at all. Therefore, the Bankruptcy Court cannot preside over the non-core breach of fiduciary duty claim even for pre-trial purposes. Judicial economy and fairness support immediate withdrawal of the reference.

RELEVANT BACKGROUND

4. Mr. Okada was a co-founder of Highland Capital Management, L.P. ("HCMLP") and served as HCMLP's Chief Investment Officer ("CIO") for more than 25 years. As CIO, Mr. Okada oversaw a wide range of investments managed by HCMLP, including investments in leveraged loans, real estate, structured credit, public equities, and other investments. Mr. Okada was a pioneer in alternative credit investing and helped to build HCMLP into a leading investment firm with responsibility for managing billions of dollars in assets. Mr. Okada announced his retirement from HCMLP in September 2019, prior to the commencement of HCMLP's bankruptcy proceedings.

5. On October 16, 2019, HCMLP filed a voluntary petition pursuant to chapter 11 of the Bankruptcy Code. On November 24, 2020, HCMLP filed the Fifth Amended Plan of

Reorganization [Bankr. Dkt. No. 1472, *as modified by* Bankr. Dkt. No. 1808] (the "Plan"), which was confirmed by the Bankruptcy Court. 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") [Bankr. Dkt. No. 1943]. The Plan went effective and HCMLP emerged from bankruptcy on August 11, 2021 (the "Plan Effective Date") [Bankr. Dkt. No. 2700]. Pursuant to the Plan, certain potential litigation claims previously held by HCMLP were transferred to a newly created Litigation Sub-Trust. (*See* Conf. Order ¶ M; Plan Art. IV.B.)

6. The Okada Parties did not actively participate in the chapter 11 proceedings prior to the Plan Effective Date. Counsel for the Okada Parties first appeared in HCMLP's chapter 11 case on August 16, 2021 (*see* Bankr. Dkt. Nos. 2719, 2720), in response to a July 29, 2021 motion filed by the official committee of unsecured creditors for examination pursuant to rule 2004 of the Federal Rules of Bankruptcy Procedure [Bankr. Dkt. No. 2620] (the "Rule 2004 Motion").[2] The Rule 2004 Motion, which was filed more than five months after confirmation of the Plan and less than two weeks before it went effective, first sought documents and information from the Okada Parties and others as part of the Litigation Sub-Trust's "investigation" of "potential causes of action." (*See* Rule 2004 Motion ¶¶ 4-5.) The Bankruptcy Court granted the Rule 2004 Motion on August 20, 2021, pursuant to an agreed order [Bankr. Dkt. No. 2750].

7. On October 15, 2021, the Litigation Trustee filed the Complaint commencing this adversary proceeding (the "Adversary Proceeding"). The Complaint names 23 defendants and includes 36 counts. (*See* Adv. Pro. Dkt. No. 1.) Only three counts are directly asserted against

[2] The Okada Parties filed protective contingent and unliquidated proofs of claim in the bankruptcy proceedings related to the indemnification of certain potential tax liabilities. With the consent of the Litigation Trustee, the Bankruptcy Court entered an order permitting the Okada Parties to withdraw those proofs of claim, with prejudice. [*See* Bankr. Dkt. No. 3163.]

any of the Okada Parties: claims alleging each of the Okada Parties received purported fraudulent transfers from HCMLP (Counts I and II, Compl. ¶¶ 168-80), and, in a single paragraph, that Mr. Okada breached an unspecified fiduciary duty in connection with those distributions (Count XIV, Compl. ¶ 263).[3]

ARGUMENT

8. Section 157(d) of title 28 of the United States Code provides for both mandatory and permissive withdrawal of the reference of claims asserted in an adversary proceeding that has been referred to the Bankruptcy Court. Specifically, Congress has provided that the District Court shall withdraw a proceeding "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d).

9. In addition, the District Court has discretion and "may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown." *Id.* The Fifth Circuit Court of Appeals has set forth factors for courts to consider when determining if withdrawal for cause is appropriate, including whether (i) the proceeding involves core or non-core issues, (ii) a party has demanded a jury trial, (iii) the withdrawal reduces forum shopping, (iv) the withdrawal would foster the economical use of the debtors' and creditors' resources while reducing confusion, (v) the withdrawal would expedite the bankruptcy process, and (vi) the withdrawal would further uniformity in bankruptcy administration. *See Holland Am. Ins. Co.* v. *Succession of Roy*, 777 F.2d 992, 998-99 (5th Cir. 1985). Not all factors must be met and, in fact, courts have withdrawn the reference based on only a small number of the *Holland* factors. *See, e.g.*, *GenOn Mid-Atl. Dev., LLC* v. *Natixis*

[3] In addition, Claim XXXV sought disallowance or subordination of the Okada Parties' bankruptcy claims that have been withdrawn, and is thus moot. (*See* Compl. ¶¶ 392-96.)

Funding Corp., 2020 WL 429880, at *4 (S.D. Tex. Jan. 28, 2020) (withdrawing the reference where causes of action were non-core even though other factors weighed against withdrawal); *Yaquinto* v. *Mid-Continent Cas. Co.* (*In re Bella Vita Custom Homes*), 2018 WL 2966838, at *2 (N.D. Tex. May 29, 2018) (recommending withdrawal of the reference where four of the *Holland* factors favored withdrawal and the others were neutral), *report and recommendation adopted*, 2018 WL 2926149 (N.D. Tex. June 8, 2018).

10. Here, there are threshold federal questions under the Internal Revenue Code, specifically with respect to the availability of 26 U.S.C. § 6502, that themselves mandate withdrawal of the reference. In addition, the *Holland* factors weigh in favor of the District Court immediately withdrawing the reference because: (i) not only is at least one non-core Claim asserted for which the Okada Parties do not consent to entry of a final order by the Bankruptcy Court, but the Bankruptcy Court has no jurisdiction over such non-core Claim at all under Fifth Circuit precedent; (ii) the Okada Parties are entitled to a jury trial under the Seventh Amendment to the United States Constitution (the "Seventh Amendment") for *all of the Claims*; and (iii) judicial economy and the other *Holland* factors support withdrawal of the reference.

I. THE DISTRICT COURT MUST WITHDRAW THE REFERENCE OF COUNT I AND COUNT II

11. District courts are mandated to withdraw the reference where resolution of the claims asserted in an adversary proceeding requires "substantial and material" consideration of non-Bankruptcy Code federal laws. *See*, *e.g.*, *U.S. Gypsum Co.* v. *Nat'l Gypsum Co. (In re Nat'l Gypsum Co.)*, 145 B.R. 539, 541 (N.D. Tex. 1992). It has long been recognized that the consideration of non-Bankruptcy Code law must "materially affect the disposition of the case." *Great W. Sugar Co.* v. *Interfirst Bank, Dallas, N.A.*, 1985 WL 17671, at *1 (N.D. Tex. Nov. 7, 1985). The Litigation Trustee purports to avail himself of the rights provided to the Internal

Revenue Service ("IRS") in 26 U.S.C. § 6502, in order to extend the lookback period for the distributions put at issue in the fraudulent transfer claims asserted in Counts I and II.

12. Before a court can consider the disputed issue of whether the Litigation Trustee can avail himself of the IRS collection statute, there will first need to be a determination as to whether the IRS itself, under the Internal Revenue Code, IRS policies and related guidance, could have utilized the ten-year collection statute of limitations to reach those transfers at all. *See Luria* v. *Thunderflower, LLC (In re Taylor, Bean & Whitaker Mortg. Corp.)*, 2018 WL 6721987, at *4 (Bankr. M.D. Fla. Sept. 28, 2018) (noting "the determinative question" is whether the IRS "could avoid the transfers that occurred more than four years before the Petition Date"). This issue, arising under federal tax law, is plainly material to the resolution of Counts I and II against the Okada Parties given that more than 99% of the distributions to the Okada Parties at issue occurred prior to the four-year state law statute of limitations provided by the Texas Uniform Fraudulent Transfer Act ("TUFTA"), and well in excess of 50% pre-date the first possible IRS claim asserted in its proofs of claim against HCMLP.

13. HCMLP is a limited partnership that was treated as a pass-through entity for federal tax purposes, and the proofs of claim filed by the IRS in the bankruptcy proceedings do not establish that HCMLP is in fact liable for or was ever assessed the claimed excise taxes. While these issues are for another day, it is clear that the court will need to determine, as a matter of federal tax law, whether the IRS would have been permitted to seek to avoid transfers dating back to April 2010 in order to satisfy HCMLP taxes that allegedly arose in December 2013 and thereafter, and for which the IRS either never assessed or did not assess tax until many years later (including, with respect to certain taxes, after the filing of the bankruptcy case). *See Luria*, 2018 WL 6721987, at *6 (noting transfers at issue occurred before the IRS assessed taxpayer

liability and that "[t]he Court is unaware of case law permitting the IRS to avoid transfers made prior to the original taxpayer assessment (or, alternatively, prior to accrual of the tax liability)"). As a result, withdrawal of the reference as to Counts I and II is mandatory. *See*, *e.g.*, *IRS* v. *CM Holdings, Inc. (In re CM Holdings, Inc.)*, 221 B.R. 715, 724 (D. Del. 1998) (holding withdrawal of the reference was mandatory under 28 U.S.C. § 157(d) to permit a district court to resolve issues requiring substantial and material consideration of federal tax law).

II. THE BANKRUPTCY COURT LACKS JURISDICTION TO ADJUDICATE THE NON-CORE BREACH OF FIDUCIARY DUTY CLAIM

14. The Complaint asserts a state-law claim for breach of fiduciary duties against Mr. Okada (Count XIV), which is a non-core claim arising under state law (the "Non-Core Claim"). Claims that do "not invoke a substantive right created by the federal bankruptcy law and [] could exist outside of bankruptcy" are non-core. *Wood* v. *Wood* (*In re Wood*), 825 F.2d 90, 97 (5th Cir. 1987); *see also WRT Creditors Liquidation Tr.* v. *C.I.B.C. Oppenheimer Corp.*, 75 F. Supp. 2d 596, 609 (S.D. Tex. 1999) ("[A] state law contract or tort action that is not based on any right created by the federal bankruptcy law, and that could arise outside the context of bankruptcy, is not a core proceeding."). Since a claim of breach of fiduciary duty arises under state law and could be raised and adjudicated outside of a bankruptcy proceeding, it is a non-core claim.

15. Furthermore, courts within the Fifth Circuit have long held that claims of breach of fiduciary duties are non-core. *See, e.g.*, *Tow* v. *Speer* (*In re Royce Homes, L.P.*), 2011 WL 13340482, at *2 (Bankr. S.D. Tex. Oct. 13, 2011) (stating "claims based upon breach of fiduciary duty . . . are also non-core proceedings"); *Morrison* v. *Amway Corp.* (*In re Morrison*), 409 B.R. 384, 390 (S.D. Tex. 2009) (finding breach of fiduciary duty claims to be non-core); *Mirant Corp.* v. *The S. Co.*, 337 B.R. 107, 118 (N.D. Tex. 2006) ("[T]he claim of a corporation

or its creditors for breach of fiduciary duty against the corporation's officers and directors is solely a creature of state law, and it can in no manner . . . permit this Court's assertion of core jurisdiction.").[4] Thus, because the Bankruptcy Court has limited jurisdiction to hear non-core claims, courts "place paramount importance" on whether the claims at issue are in fact core or non-core when considering whether to withdraw the reference. *GenOn Mid-Atl. Dev.*, 2020 WL 429880, at *4.

16. The issue here is broader, however, because the Bankruptcy Court does not have any subject matter jurisdiction with respect to the Non-Core Claim against Mr. Okada and, as the Former Employee Defendants' Motion details, many other non-core claims asserted in the Complaint. Indeed, the Fifth Circuit Court of Appeals has made clear that the Bankruptcy Court's post-confirmation jurisdiction is limited and would not extend to the Non-Core Claim. This jurisdictional defect cannot be cured by withdrawal of the reference just prior to trial, but rather can only be cured by an immediate withdrawal of the reference on the basis of diversity jurisdiction.

17. Prior to the confirmation of a debtor's reorganization plan, bankruptcy courts have broad authority to preside over non-core claims that are "related to" the bankruptcy proceedings even though they cannot issue final orders with respect to such claims. *See, e.g.*, *In re Wood*, 825 F.2d at 93 (citing 28 U.S.C. § 1334(b)); *Beitel* v. *OCA, Inc.* (*In re OCA, Inc.*), 551

[4] The Okada Parties also join and incorporate by reference Section II of the Former Employee Defendants' Motion. In addition, the Complaint asserts constructive and actual fraudulent transfer claims against the Okada Parties (Counts I and II). Those claims are asserted in part under Texas state law and invoke TUFTA. *See* TEX. BUS. & COM. CODE § 24.005(a)(1-2). The Fifth Circuit has not decided whether TUFTA claims brought in connection with section 544 of the Bankruptcy Code are properly categorized as core or non-core. While some lower courts have held that they are core, *see, e.g.*, *Yaquinto* v. *JGB Collateral, LLC*, 2021 WL 2386143 (N.D. Tex. Jan. 26, 2021) (affirming R&R of Jernigan, J.), at least one court in this circuit has considered the issue and determined that "a fraudulent transfer claim under state law, even though brought pursuant to § 544, is nevertheless a 'related to' proceeding, not a core proceeding." *Guffy* v. *Brown* (*In re Brown Med. Ctr., Inc.*), 578 B.R. 590, 597 (Bankr. S.D. Tex. 2016). Thus it is possible that there are ultimately additional non-core claims asserted against the Okada Parties, which would further support withdrawal of the reference.

F.3d 359, 367 (5th Cir. 2008) ("Bankruptcy courts have full adjudicative power over core proceedings; in non-core proceedings they are restricted to issuing proposed findings of fact and conclusions of law, which the district court may adopt or reject.").

18. "After a debtor's reorganization plan has been confirmed," however, the Firth Circuit has determined that the scope of a bankruptcy court's subject matter jurisdiction is far more limited because "the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan." *Bank of La.* v. *Craig's Stores of Tex., Inc.* (*In re Craig's Stores of Tex., Inc.*), 266 F.3d 388, 390 (5th Cir. 2001). In *Craig's Stores*, a former debtor brought state law breach of contract allegations against a contractor in bankruptcy court 18 months after the reorganization plan was confirmed. *See id.* at 389-90. When assessing whether the bankruptcy court had jurisdiction over such claim, the Fifth Circuit identified the following factors that supported denying bankruptcy jurisdiction: (1) the claims at issue "principally dealt with post-confirmation relations between the parties"; (2) "[t]here was no antagonism or claim pending between the parties as of the date of the reorganization"; and (3) "no facts or law deriving from the reorganization or the plan [were] necessary to the claim." *Id.* at 391. Accordingly, the court held that there was no post-confirmation bankruptcy court jurisdiction over the breach of contract claims, and it affirmed dismissal of the action. *See id.*

19. The Fifth Circuit has since refined the boundaries of this "exacting theory of post-confirmation bankruptcy jurisdiction" set forth in *Craig's Stores*. *Id.* at 391. For example, the court has held that bankruptcy courts are not divested of jurisdiction over non-core claims when those claims were filed pre-confirmation and the court previously exerted "related to" jurisdiction over those claims. *See, e.g.*, *Newby* v. *Enron Corp.* (*In re Enron Corp. Sec.*), 535

F.3d 325, 335 n.9 (5th Cir. 2008) (noting that although the *Craig's Stores* decision held that there was no jurisdiction over similar claims raised post-confirmation, it did not bar the bankruptcy court from "maintain[ing] jurisdiction over the very same claims if they had been raised pre-confirmation"). Likewise, the court has held that bankruptcy courts have jurisdiction over post-confirmation claims that specifically concern the terms and execution of the reorganization plan. *See, e.g.*, *U.S. Brass Corp.* v. *Travelers Ins. Grp., Inc.* (*In re U.S. Brass Corp.*), 301 F.3d 296, 305 (5th Cir. 2002) (finding that the bankruptcy court had jurisdiction over the approval of a post-confirmation settlement agreement because it would be interpreting bankruptcy law, would affect parties' rights and responsibilities under the plan, and would "impact compliance with or completion of the reorganization plan"). The specific facts presented by *Enron* and *Brass* reinforce the core holding of *Craig's Stores*: that the Bankruptcy Court does not retain broad jurisdiction to preside over non-core claims after confirmation of a reorganization plan.[5]

20. The Non-Core Claim against Mr. Okada was first filed almost eight months after the Confirmation Order was entered and more than two months after the Plan Effective Date. The first time the Okada Parties were contacted with respect to any of the matters referenced in the Complaint was in connection with the Rule 2004 Motion in August 2021—less than two months prior to the Complaint being filed and long after the Plan was confirmed by the Bankruptcy Court. The Non-Core Claim against Mr. Okada—a claim for breach of fiduciary duty—arises under state law and is not in any way derived from the Plan, nor is the Plan necessary to the existence of the claim. *Craig's Stores*, 266 F.3d at 390-31.[6] Finally, while the

[5] As explained in the Former Employee Defendants' Motion, a minority of lower court decisions have deviated from the *Craig's Stores* framework. (*See* Fmr. Emp. Defs. Mot. ¶¶ 28-29.) Such decisions are at odds with binding Fifth Circuit law and not controlling here.

[6] The Plan's explicit statement (Plan Art. XI) that a bankruptcy court retains jurisdiction over certain post-confirmation matters does not change the jurisdictional analysis. *See Enterprise Fin. Grp., Inc.* v. *Curtis Mathes Corp.*, 197 B.R. 40, 46 (E.D. Tex. 1996) ("A bankruptcy court 'cannot write its own jurisdictional ticket' by

Non-Core Claim is not based on post-confirmation activities, that the disputed facts at issue in the Complaint occurred pre-confirmation is not by itself sufficient to confer jurisdiction upon the Bankruptcy Court over non-core, post-confirmation claims unrelated to the reorganization plan. *See Enron Corp.*, 535 F.3d at 336 (considering only two of the three *Craig's Stores* factors to reach a decision on jurisdiction because "two *Craig's Stores* factors weigh heavily"). The Bankruptcy Court lacks subject matter jurisdiction over the Non-Core Claim and the District Court should immediately withdraw the reference.

21. Moreover, even if it is determined that the Bankruptcy Court does have subject matter jurisdiction over the Non-Core Claim, the Bankruptcy Court is nevertheless prohibited from entering final judgment on that claim absent Mr. Okada's consent. Pursuant to section 157(c) of title 28 of the United States Code:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such a proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
>
> Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments . . . .

28 U.S.C. § 157(c)(1), (2). The Okada Parties do not consent to the Bankruptcy Court issuing any final judgments with respect to any non-core claims. Thus, if the Bankruptcy Court does

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including such a provision in a confirmed plan of reorganization."); *United States* v. *Bond*, 762 F.3d 255, 261 (2d Cir. 2014) ("A bankruptcy court cannot, through confirmation of a reorganization plan, expand its own jurisdiction."); *In re Resorts Int'l, Inc.*, 372 F.3d 154, 161 (3d Cir. 2004) ("[I]f a court lacks jurisdiction over a dispute, it cannot create that jurisdiction by simply stating that it has jurisdiction in a confirmation or other order.").

have subject matter jurisdiction over the Non-Core Claim, that jurisdiction is still limited to submitting proposed findings of fact and conclusions of law to the District Court to be reviewed de novo. As a result, in that scenario there is still cause to withdraw the reference and the first *Holland* factor supports doing so.

III. THE REFERENCE SHOULD BE WITHDRAWN BECAUSE THE OKADA PARTIES ARE ENTITLED TO A JURY TRIAL ON ALL CLAIMS

22. A bankruptcy judge lacks the authority to conduct a jury trial without the consent of the parties, and the Okada Parties respectfully do not consent to a jury trial before the Bankruptcy Court. *See, e.g.*, *In re Clay*, 35 F.3d 190, 196-97 (5th Cir. 1994). Thus where a jury trial right exists, the second *Holland* factor requires withdrawal of the reference. *Id.* at 198 (withdrawing the reference to "honor the [party's] demand for trial by jury before an appropriate United States District Court"); *see also Levine* v. *M&A Custom Home Builder & Dev., LLC*, 400 B.R. 200, 205 (S.D. Tex. 2008) (noting that if the movant is entitled to a jury trial, the reference must be withdrawn). Here, the Okada Parties have a right to a jury trial on all of the Claims.[7]

23. *First*, the Okada Parties are entitled to a jury trial on the fraudulent transfer claims asserted against them (Counts I and II). The Seventh Amendment provides the right to a jury trial in cases where the amount in controversy exceeds twenty dollars and the cause of action was brought to determine legal rights, as opposed to equitable rights. *See Granfinanciera, S.A.* v. *Norberg*, 492 U.S. 33, 41 (1989); *In re Jensen*, 946 F.2d 369, 371 (5th Cir. 1991). To determine whether a claim is legal or equitable, the courts (i) "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" and

[7] The Okada Parties have not yet been required to respond to the Complaint, and therefore, without waiving their right to compel arbitration of all issues raised in the Adversary Proceeding, hereby provide notice pursuant to Fed. R. Civ. P. 38 and Fed. R. Bank. P. 9015 of their demand for a jury trial on all the issues so triable. The Okada Parties respectfully do not consent to a jury trial before the Bankruptcy Court.

(ii) "examine the remedy sought and determine whether it is legal or equitable in nature." *Granfinanciera*, 492 U.S. at 42. "The second stage of this analysis is more important than the first." *Id.*

24. Applying this test, courts consistently hold that a jury trial right applies to fraudulent transfer claims. *See, e.g.*, *Exec. Benefits Ins. Agency* v. *Arkison*, 573 U.S. 25, 30 n.3 (2014) ("*Granfinanciera* held that a fraudulent conveyance claim under Title 11 is not a matter of 'public right' for purposes of Article III, and that the defendant to such a claim is entitled to a jury demand under the Seventh Amendment"); *Granfinanciera*, 492 U.S. at 64 (holding that petitioner entitled to jury trial for fraudulent transfer claim under Bankruptcy Code); *see also McFarland* v. *Leyh* (*In re Tex. Gen. Petroleum Corp.*), 52 F.3d 1330 (5th Cir. 1995) ("[L]itigants in a fraudulent conveyance action have a Seventh Amendment right to a jury trial.") (citing *Granfinanciera*, 492 U.S. at 64); *Levine*, 400 B.R. at 205 (finding that claims under section 548 of the Bankruptcy Code "are suits at law for which the 7th Amendment right to a jury trial applies"). Courts in this circuit have also upheld jury demands with respect to TUFTA claims. *See In re Brown*, 578 B.R. at 600 (finding jury demands with respect to TUFTA claims "wholly legitimate"); *see also Katchadurian* v. *NGP Energy Cap. Mgmt.* (*In re Northstar Offshore Grp., LLC*), 616 B.R. 695, 709 (Bankr. S.D. Tex. 2020) (noting that the bankruptcy court found a jury demand with respect to TUFTA claims "appropriate").

25. *Second*, under the same framework, Mr. Okada is entitled to a jury trial with respect to the breach of fiduciary duty claim (Count XIV), through which the Complaint seeks monetary damages—a legal remedy. *See, e.g.*, *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 476 (1962) (noting that "insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal"). While "[g]enerally, claims for breach of fiduciary duty are

within the exclusive jurisdiction of courts of equity[,] . . . when a legal remedy, such as monetary relief, is sought for breach of a fiduciary duty, the action assumes legal attributes." *Mirant Corp.*, 337 B.R. at 120. Here, the Litigation Trustee's request for monetary relief entitles the Okada Parties to a jury trial. Because the Okada Parties have a jury trial right with respect to all of the Claims, the reference should therefore be withdrawn under the second *Holland* factor.

IV. JUDICIAL ECONOMY AND THE REMAINING *HOLLAND* FACTORS FAVOR WITHDRAWAL OF THE REFERENCE

26. Judicial economy further favors withdrawing the reference. "Where an adversary proceeding encompasses both core and non-core claims," as here, "withdrawal of the reference is appropriate because it promotes judicial efficiency." *Byman* v. *Horwood Marcus & Berk Charteres* (*In re Align Strategic Partners LLC*), 2019 WL 2527221, at *2 (Bankr. S.D. Tex. Mar. 5, 2019). To the extent the Bankruptcy Court lacks jurisdiction over the Non-Core Claim or the non-core claims of other defendants, multiple proceedings would be needed to adjudicate all of the claims alleged in the Complaint. Courts are clear that "the creation of two sets of proceedings . . . should be avoided" and the need to split claims between courts "weighs in favor of withdrawal *in whole*." *Id.*; *see also Mirant Corp.*, 337 B.R. at 122-23 (ordering withdrawal of both core and non-core claims). Moreover, even if the Bankruptcy Court does have "related-to" jurisdiction over the Non-Core Claim, "[k]eeping the [a]dversary [p]roceeding in the Bankruptcy Court would add an unnecessary, costly, and duplicative layer to the proceedings as any ruling made by the Bankruptcy Court on the non-core [] claim is subject to de novo review by the District Court." *Yaquinto*, 2018 WL 2966838, at *2 (finding that judicial economy "weigh[ed] heavily in favor of an immediate withdrawal of the reference"), *report and recommendation adopted*, 2018 WL 2926149.

27. The efficiencies to be gained from withdrawal of the reference if the Bankruptcy Court lacks jurisdiction over the Non-Core Claim are significant in this case since the Litigation Trustee asserts a litany of non-core, state law claims against more than 20 defendants. With respect to the Okada Parties, it would result in substantial inefficiency to split the claims against them, and require them to defend against those claims before two different courts, particularly due to the significant factual overlap of the claims. (*See* Compl. ¶¶ 263 (predicating non-core fiduciary duty claims on allegations regarding fraudulent transfers).) This inefficiency is compounded when considered in the context of the claims against other defendants, many of whom must defend against even more non-core claims. "Because splitting the [claims] into two proceedings would be judicially inefficient," as long as there is a basis to withdraw the reference as to any one defendant, "this factor favors withdrawal of the reference." *Align Strategic Partners*, 2019 WL 2527221, at *3; *see also Mirant Corp.*, 337 B.R. at 122 ("[W]ithdrawal of the reference will foster the economical use of the resources of the litigants.").

28. The remaining *Holland* factors similarly support withdrawal of the reference of the Adversary Proceeding. *First*, "withdrawal of the reference will have no impact at all on the goal of expediting the bankruptcy process, since the bankruptcy process completely concluded quite some time ago"—indeed, more than five months ago. *Jenkins* v. *Heritage Org., L.L.C.* (*In re Heritage Org., L.L.C.*), 2008 Bankr. LEXIS 2071, at *16 (Bankr. N.D. Tex. July 23, 2008); *see also Mirant Corp.*, 337 B.R. at 123 ("[T]he expediting-the-bankruptcy-process factor is not relevant . . . now that [the bankruptcy judge] has confirmed the plan."); *Mobley* v. *Quality Lease & Rental Holdings, LLC* (*In re Quality Lease & Rental Holdings, LLC*), 2016 WL 416961, at *6 (Bankr. S.D. Tex. Feb. 1, 2016) (withdrawal appropriate, in part, because the debtor had

confirmed a liquidating chapter 11 plan), *report and recommendation adopted*, 2016 WL 11644051 (S.D. Tex. Feb. 29, 2016).

29. *Second*, withdrawing the reference will cause "no disruption in the uniformity of the bankruptcy administration" because the Okada Parties are timely moving to withdraw the reference shortly after the Adversary Proceeding was filed and before any substantive issues have been addressed. *Waldron* v. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.* (*In re EbaseOne Corp.*), 2006 WL 2405732, at *4 (Bankr. S.D. Tex. June 14, 2006) (finding that withdrawal was appropriate where the "[c]ourt has not focused on any procedural or substantive issues in this [a]dversary [p]roceeding other than" the motion to withdraw the reference); *see also Johnson* v. *Williamson* (*In re Brit. Am. Props. III, Ltd.*), 369 B.R. 322, 327 (Bankr. S.D. Tex. 2007) (favoring withdrawal because the "[c]ourt ha[d] not spent any significant time becoming familiar with the facts of the underlying complaint" and only two motions had been filed).

30. *Finally*, for the same reasons, the Okada Parties did not file their Motion to engage in forum shopping. *See In re Align Strategic Partners*, 2019 WL 2527221, at *4 (finding that the movant was not forum shopping where "the [d]efendant moved very quickly to seek a withdrawal of the reference" and "the undersigned judge issued no rulings against the [d]efendant that would lead it to forum shop"). In addition, it "does not constitute forum shopping" where, in a case such as this involving non-core claims, "[the Bankruptcy] Court would simply submit recommended findings of fact and conclusions of law to the District Court, and the District Court would then enter its final judgment after a *de novo* review." *In re EbaseOne Corp.*, 2006 WL 2405732, at *4.

CONCLUSION

31. For the foregoing reasons, the Okada Parties respectfully request that the District Court withdraw the reference to the Bankruptcy Court with respect to the Claims asserted against the Okada Parties, and grant such other relief as appropriate.

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