

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Reorganized Debtor.

MARC S. KIRSCHNER, AS LITIGATION TRUSTEE
OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

CPCM, LLC, SCOTT ELLINGTON, ISAAC
LEVENTON, AND FRANK WATERHOUSE,

Defendants.

No. 3:22-cv-00203-S

MARC S. KIRSCHNER, AS LITIGATION TRUSTEE
OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

MARK OKADA, 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,

Defendants.

No. 3:22-cv-00229-G

MARC S. KIRSCHNER, AS LITIGATION TRUSTEE
OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

No. 3:22-cv-00253-E



NEXPOINT ADVISORS, L.P., and HIGHLAND
CAPITAL MANAGEMENT FUND ADVISORS, L.P.,

Defendants.

MARC S. KIRSCHNER, AS LITIGATION TRUSTEE
OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

JAMES D. DONDERO, DUGABOY INVESTMENT
TRUST, GET GOOD TRUST, and STRAND
ADVISORS, INC.,

Defendants.

No. 3:22-cv-00367-B

MARC S. KIRSCHNER, AS LITIGATION TRUSTEE
OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

GRANT JAMES SCOTT III,

Defendant.

No. 3:22-cv-00369-L

MARC S. KIRSCHNER, AS LITIGATION TRUSTEE
OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

CLO HOLDCO, LTD.; CHARITABLE DAF HOLDCO,
LTD.; CHARITABLE DAF FUND, LP.; HIGHLAND
DALLAS FOUNDATION,

Defendant.

No. 3:22-cv-00370-D

UNOPPOSED MOTION TO CONSOLIDATE
MOTIONS TO WITHDRAW THE REFERENCE

Pursuant to Rule 42 of the Federal Rules of Civil Procedure, Defendants CPCM, LLC, Scott Ellington, Isaac Leventon, Frank Waterhouse (collectively, the “*Former Employee*”

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 Defendants*”); NexPoint Advisors, L.P. (“*NexPoint*”) and Highland Capital Management Fund Advisors, L.P. (“*HCMFA*”); James Dondero, Dugaboy Investment Trust, Get Good Trust, and Strand Advisors, Inc. (collectively, the “*Dondero Defendants*”); Grant James Scott III (“*Scott*”); CLO HoldCo, Ltd., Charitable DAF HoldCo, Ltd., Charitable DAF Fund, L.P., and Highland Dallas Foundation (collectively, the “*Charitable Defendants*”, and collectively with the Former Employee Defendants, Okada Defendants, NexPoint, HCMFA, Dondero Defendants and Scott, the “*Movants*”), by and through their counsel, hereby file this *Unopposed Motion to Consolidate Motions to Withdraw the Reference* (the “*Motion*”) for entry of an order consolidating the six motions to withdraw the reference that are the subject of the above-captioned actions (the “*Cases*”) with each other so that all such motions are consolidated with *Kirschner v. CPCM, LLC, et al.*, No. 3:22-cv-00203-S, pending before the Honorable Karen Gren Scholer. As detailed below, the Movants respectfully submit that common questions of law and fact, as well as respect for judicial efficiency, make consolidation of these motions appropriate.

I. PROCEDURAL BACKGROUND

1. On October 15, 2021, Plaintiff Mark S. Kirschner (the “*Litigation Trustee*”) commenced an adversary proceeding, styled *Mark S. Kirschner v. Dondero, et al.*, Adv. Pro. No. 21-03076-sgj, which currently is pending in the United States Bankruptcy Court for the Northern District of Texas. (the “*Adversary Proceeding*”), by filing a *Complaint and Objection to Claims*, asserting 36 different counts against 23 different defendants, including the Former Employee

Defendants, the Okada Defendants, NexPoint, HCMFA, the Dondero Defendants, the Charitable Defendants, and Scott.

2. On January 28, 2022, the Former Employee Defendants filed in the Adversary Proceeding their *Motion to Withdraw the Reference for the Causes of Action in the Complaint Asserted Against the Former Employee Defendants* and brief in support [Adv. Proc. Dkts 27, 28] (the “**Former Employee Defendants’ Motion to Withdraw the Reference**”). On January 28, 2022, the Bankruptcy Court transmitted the Former Employee Defendants’ Motion to Withdraw the Reference to the District Court. The Former Employee Defendants’ Motion to Withdraw the Reference is currently pending before the Honorable Karen Gren Scholer as Case Number 3:22-cv-00203-S.

3. On January 21, 2022, the Okada Defendants filed in the Adversary Proceeding a *Motion of the Okada Parties to Withdraw the Reference* and memorandum of law in support [Adv. Proc. Dkts 36, 37] (the “**Okada Defendants’ Motion to Withdraw the Reference**”). The Okada Defendants also incorporated by reference and joined in the arguments asserted in the Former Employee Defendants’ Motion to Withdraw the Reference. On February 1, 2022, the Bankruptcy Court transmitted the Okada Defendants’ Motion to Withdraw the Reference to the District Court. The Okada Defendants’ Motion to Withdraw the Reference is currently pending before the Honorable Sam R. Cummings as Case Number 3:22-cv-00229-C.

4. On January 21, 2022, NexPoint and HCMFA filed in the Adversary Proceeding a *Motion to Withdraw the Reference for the Causes of Action in the Complaint Asserted Against Defendants* and memorandum of law in support [Adv. Proc. Dkts 39, 40] (the “**NexPoint/HCMFA Motion to Withdraw the Reference**”). NexPoint and HCMFA also joined in the Former Employee Defendants’ Motion to Withdraw the Reference, among other motions. On February 1, 2022, the

Bankruptcy Court transmitted the motion to the District Court. The NexPoint/HCMFA Motion to Withdraw the Reference is currently pending before the Honorable Ada Brown as Case Number 3:22-cv-00253-E.

5. On January 25, 2022, the Dondero Defendants filed in the Adversary Proceeding *Defendants James Dondero, Dugaboy Investment Trust, Get Good Trust, and Strand Advisors, Inc.’s Motion to Withdraw the Reference* and memorandum of law in support [Adv. Proc. Dkts 45, 46] (the “**Dondero Defendants’ Motion to Withdraw the Reference**”). The Dondero Defendants also joined in the Former Employee Defendants’ Motion to Withdraw the Reference, among other motions. On February 1, 2022, the Bankruptcy Court transmitted the motion to the District Court. The Dondero Defendants’ Motion to Withdraw the Reference is currently pending before the Honorable Jane J. Boyle as Case Number 3:22-cv-00367-B.

6. On January 26, 2022, Scott filed in the Adversary Proceeding *Defendant Grant James Scott’s Motion to Withdraw Reference* and brief in support [Adv. Proc. Dkts 50, 51] (the “**Scott Motion to Withdraw the Reference**”). Scott also joined in and incorporated by reference certain arguments made in the Former Employee Defendants’ Motion to Withdraw the Reference and the Okada Defendants’ Motion to Withdraw the Reference. On February 1, 2022, the Bankruptcy Court transmitted the Scott Motion to Withdraw the Reference to the District Court. The Scott Motion to Withdraw the Reference is currently pending before the Honorable Sam A. Lindsay as Case Number 3:22-cv-00369-L.

7. On January 26, 2022, the Charitable Defendants filed in the Adversary Proceeding a *Motion to Withdraw the Reference* [Adv. Proc. Dkt 59] (the “**Charitable Defendants’ Motion to Withdraw the Reference**”). The Charitable Defendants also adopted portions of the Former Employee Defendants’ Motion to Withdraw the Reference. On February 1, 2022, the Bankruptcy

Court transmitted the Charitable Defendants' Motion to Withdraw the Reference to the District Court. The Charitable Defendants' motion is currently pending before the Honorable Sidney A. Fitzwater as Case Number 3:22-cv-00370-G.

8. On February 1, 2022, Defendants Hunter Mountain Investment Trust and Rand PE Fund I, LP, Series 1 (collectively, "***HMIT Defendants***") filed in the Adversary Proceeding *Defendant's Hunter Mountain Investment Trust and Rand PE Fund I, LP, Series I's Nominal Joinder in Multiple Pending Motions to Withdraw the Reference* [Adv. Proc. Dkt 70], in which the HMIT Defendants generally joined in the motions to withdraw the reference filed by the other defendants who are the Movants here. The Bankruptcy Court will conduct a status conference on the above-referenced motions to withdraw the reference on March 17, 2022 at 9:30 a.m.

9. On March 4, 2022, the Litigation Trustee filed his *Response in Opposition to Defendants' Motions to Withdraw the Reference* [Adv. Proc. Dkt 95], which responds to all of the Defendants' motions to withdraw the reference in a single response.

10. The Movants seek to have the respective motions to withdraw the reference consolidated before Judge Scholer, who was assigned the first-filed motion in *Kirschner v. CPCM, LLC, et al.*, No. 3:22-cv-00203-S.

II. ARGUMENTS AND AUTHORITY

A. The Standard in the Fifth Circuit for Consolidation of Actions.

11. The Court has "very broad discretion" under Federal Rule of Civil Procedure 42(a) in determining whether to consolidate actions. *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1532 (5th Cir. 1993); Fed. R. Civ. P. 42(a); see *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 432 (5th Cir. 2013) ("The trial court's managerial power is especially strong and flexible in matters of consolidation."); *Am. Can! v. Arch Ins. Co.*, Civil Action No. 3:20-CV-

00850-X, 2020 U.S. Dist. LEXIS 194789, at *2 (N.D. Tex. June 16, 2020) (quoting *Frazier*, 908 F.2d at 1532). Consolidation is warranted when pending actions “involve a common question of law or fact.” Fed. R. Civ. P. 42(a).

12. Although “the purpose of consolidation is to avoid unnecessary costs or delay” (*Frazier*, 980 F.2d at 1532), the Court may consider many factors in determining whether to consolidate actions, including the following:

- (1) whether the cases are pending in the same court,
- (2) whether the cases involve a common party,
- (3) whether the cases involve common issues of law or fact,
- (4) whether consolidation risks the possibility of prejudice or confusion, and if there is such a risk, if the risk of inconsistent adjudications if tried separately outweighs that risk,
- (5) whether consolidation will result in an unfair advantage,
- (6) whether consolidation will conserve judicial resources and increase judicial efficiencies, and
- (7) whether consolidation will reduce the expense of trying the case separately.

Am. Can!, 2020 U.S. Dist. LEXIS 194789, at *2-3 (quoting *Ashford Hosp. Prime Inc. v. Sessa Capital (Master) LP*, 2017 U.S. Dist. LEXIS 227559, at *11 (N.D. Tex. Feb. 17, 2017)). In sum, “the proper solution to the problems created by the existence of two or more cases involving the same parties and issues simultaneously pending in the same court is to consolidate them under Rule 42(a).” *Morrison v. Amway Corp.*, 186 F.R.D. 401, 403 (S.D. Tex. 1998) (citing *Miller v. United States Postal Serv.*, 729 F.2d 1033, 1036 (5th Cir. 1984)).

13. In this case, all the motions to withdraw the reference were filed in a single adversary proceeding. As a result of the routine docketing of these motions, however, a different District Court judge was assigned to each motion. District courts in the Fifth Circuit have routinely consolidated motions to withdraw the reference to avoid unnecessary cost or delay, conserve

judicial resources, and avoid inconsistent rulings in actions that, as this one, share common questions of law or fact. *See, e.g., Kite v. Kite*, No. 2:13-CV-2131, 2014 U.S. Dist. LEXIS 26834, at *17 (W.D. La. Feb. 13, 2014) (granting motions to withdraw reference and consolidating cases that “stemm[ed] from the same event or series of events, predominantly involve[d] the same parties, and contain[ed] many of the same claims and legal theories”); *Mirant Ams. Energy Mktg., L.P. v. Pac. Gas & Elec. Co. (In re Mirant Corp.)*, Nos. 4:04-CV-557-A, 4:04-CV-558-A, 4:04-CV-559-A, 4:04-CV-560-A, 4:04-CV-561-A, 2004 U.S. Dist. LEXIS 27988, at *2 (N.D. Tex. Oct. 22, 2004) (granting multiple motions to withdraw the reference in a single order after having previously consolidated several actions); *Morrison*, 186 F.R.D. at 403 (withdrawing the reference pursuant to 28 U.S.C. § 157(d) and consolidating three cases, noting that “[t]his matter need only be addressed once”).

B. The Factors Weigh Heavily in Favor of Consolidating the Motions to Withdraw the Reference.

14. First, the motions to withdraw the reference are all premised on common questions of law and fact. Further, the motions to withdraw the reference of the Okada Defendants, NexPoint, HCMFA, Dondero Defendants and Scott all join in, adopt, or incorporate by reference the arguments made in the Former Employee Defendants’ Motion to Withdraw the Reference, which was the first-filed motion. The causes of action in the complaint filed in the Adversary Proceeding also overlap among the Defendants, such that many of the motions to withdraw the reference address the same causes of action. These common issues of law and fact need only be addressed once, rather than six separate times by six separate judges in six separate actions.

15. Second, all of the motions to withdraw the reference relate to the same Adversary Proceeding brought by the Litigation Trustee, currently pending in the Bankruptcy Court for the Northern District of Texas. Thus, the Cases all involve a common plaintiff, who has filed a single

response in opposition to all six of the motions to withdraw the reference—further underscoring the commonality of the legal issues involved in each motion.

16. Third, all the Cases currently are assigned to different judges in the Northern District of Texas, yet address the same issues and arguments. Consolidating the Cases will significantly reduce the burden of this action on the District Court by conserving judicial resources and increasing judicial efficiencies by having a single judge address the motions to withdrawal the reference. Here, the Movants agree that it is appropriate, based on the first-to-file rule, that Judge Scholer hear the motions to withdraw on a consolidated basis to avoid “piecemeal resolution of issues that call for a uniform result.” *Save Power v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997) (“The Fifth Circuit adheres to the general rule that the court in which an action is first filed is the appropriate court to determine whether subsequently filed cases involving substantially similar issues should proceed.”) (internal citations omitted).

17. Fourth, consolidation of the Cases would also eliminate the chance of inconsistent adjudications of the motions to withdraw the reference, which could result in confusion should each District Court judge come to a different conclusion on the appropriateness and timing of the withdrawal of the reference. The Litigation Trustee does not oppose the relief requested in this motion and will not be prejudiced by the consolidation, as he already has treated the six motions to withdraw the reference in a singular manner in his Response.

18. Finally, consolidating the motions to withdraw the reference will eliminate any unnecessary costs or delay in deciding the motions separately (and potentially having to try several cases separately in the district court despite the existence of issues of law and fact common in a single complaint).

III. RELIEF REQUESTED

WHEREFORE, the Movants respectfully request that the Court grant the Unopposed Motion to Consolidate Motions to Withdraw the Reference, enter an order consolidating the motions to withdraw the reference that are the subject of the above-captioned actions with each other and with *Kirschner v. CPCM, LLC, et al.*, No. 3:22-cv-00203-S, before the Honorable Karen Gren Scholer, and award such other and further relief as is just.

Dated: March 14, 2022

Respectfully submitted,

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Okada Family Trust Exempt Trust #2 and Lawrence
Tonomura in his capacity as Trustee of Mark &
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Dallas Foundation*

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that on March 9, 2022, counsel for the Former Employee Defendants conferred with counsel for the Litigation Trustee and counsel for the Movants regarding the relief contained in this Unopposed Motion to Consolidate Motions to Withdraw the Reference. On March 9, 2022, Deborah Newman, counsel for the Litigation Trustee, indicated that the Litigation Trustee “supports consolidation of the actions.” Counsel for the Movants also indicated they join in the relief requested in this motion.

/s/ Debra A. Dandeneau

Debra A. Dandeneau

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 14, 2022, a true and correct copy of this document was served via the Court’s CM/ECF system on all counsel of record.

/s/ Debra A. Dandeneau

Debra A. Dandeneau

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Reorganized Debtor.

MARC S. KIRSCHNER, AS LITIGATION TRUSTEE
OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

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LEVENTON, AND FRANK WATERHOUSE,

Defendants.

No. 3:22-cv-00203-S

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OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

Mark Okada, 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,

Defendants.

No. 3:22-cv-00229-G

MARC S. KIRSCHNER, AS LITIGATION TRUSTEE
OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

No. 3:22-cv-00253-E

NEXPOINT ADVISORS, L.P., and HIGHLAND CAPITAL
MANAGEMENT FUND ADVISORS, L.P.,

Defendants.

MARC S. KIRSCHNER, AS LITIGATION TRUSTEE
OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

JAMES D. DONDERO, DUGABOY INVESTMENT
TRUST, GET GOOD TRUST, and STRAND
ADVISORS, INC.,

Defendants.

No. 3:22-cv-00367-B

MARC S. KIRSCHNER, AS LITIGATION TRUSTEE
OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

GRANT JAMES SCOTT III,

Defendant.

No. 3:22-cv-00369-L

MARC S. KIRSCHNER, AS LITIGATION TRUSTEE
OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

CLO HOLDCO, LTD.; CHARITABLE DAF HOLDCO,
LTD.; CHARITABLE DAF FUND, LP.; HIGHLAND
DALLAS FOUNDATION,

Defendant.

No. 3:22-cv-00370-D

ORDER

Having considered the *Unopposed Motion to Consolidate Motions to Withdraw the Reference* (the “*Motion*”), this Court is of the opinion that the requested relief in the Motion should be GRANTED.

Order Granting Unopposed Motion to Consolidate Motions to Withdraw the Reference

Accordingly, it is hereby ORDERED that the above-captioned actions be, and are hereby, consolidated for further proceeding in front of Honorable Karen Gren Scholer, and that they now bear the style “*Marc S. Kirschner, as Litigation Trustee of the Litigation Sub-Trust v. CPCM, LLC et al.*” and “Civil Action No. 3:22-cv-00203-S (Consolidated with Nos. 3:22-cv-00229-C, 3:22-cv-00253-E, 3:22-cv-00367-B, 3:22-cv-00369-L, and 3:22-cv-00370-G).”

IT IS SO ORDERED THIS ____ day of _____, 2022.

UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND SUBSTANCE:

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Lawrence Tonomura in his capacity as Trustee of
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