Docket #0025 Date Filed: 5/4/2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Reorganized Debtor.	Chapter 11 Case No. 19-34054-sgj11
MARC S. KIRSCHNER, AS LITIGATION TRUSTEE OF THE LITIGATION SUB-TRUST, Plaintiff, v. 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, SERIES 1; MASSAND CAPITAL, LLC; MASSAND CAPITAL, INC.; SAS ASSET RECOVERY, LTD.; AND CPCM, LLC, Defendants.	Adv. Pro. No. 21-03076-sgj Civil Action No. 3:22-CV-203-S *Consolidated with:* Case No. 3:22-cv-229 Case No. 3:22-cv-253 Case No. 3:22-cv-367 Case No. 3:22-cv-369 Case No. 3:22-cv-370

THE LITIGATION TRUSTEE'S RESPONSE IN SUPPORT OF
THE BANKRUPTCY COURT'S REPORT AND RECOMMENDATION

[1] The last four digits of the Reorganized Debtor's taxpayer identification number are (8357). The Reorganized Debtor is a Delaware limited partnership. The Reorganized Debtor's headquarters and service address are 100 Crescent Court, Suite 1850, Dallas, TX 75201.

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Marc S. Kirschner, the above-captioned Plaintiff (the "Litigation Trustee"), through his undersigned counsel, hereby files this response (the "Response") in support of the *Report and Recommendation to the District Court Proposing That it: (A) Grant Defendants' Motions to Withdraw the Reference at Such Time as the Bankruptcy Court Certifies That Action is Trial Ready; But (B) Defer Pre-Trial Matters to the Bankruptcy Court* [Dkt. No. 14] (the "Report and Recommendation" or "R&R") of the United States Bankruptcy Court for the North District of Texas (the "Bankruptcy Court").[2] In support of this Response, the Litigation Trustee respectfully states as follows:

I. PRELIMINARY STATEMENT

1. The Bankruptcy Court's recommendation that it continue to preside over this adversary proceeding until it is certified to be trial-ready is well-supported by the law and practice in this Circuit. In response, Defendants—desperate for an escape hatch from the court most familiar with the parties and issues at hand, and thus most well-suited to oversee this dispute in the first instance—attempt to manufacture bases for immediate withdrawal, conjuring arguments that the Bankruptcy Court lacks subject matter jurisdiction, and that certain of the claims are subject to mandatory withdrawal. These strained arguments cannot survive even the barest of scrutiny, however, and should be rejected.

2. As the Bankruptcy Court found, "[t]his Adversary Proceeding is a typical post-confirmation lawsuit being waged by a liquidating trustee, who was appointed pursuant to a Chapter 11 bankruptcy plan to pursue pre-confirmation causes of action that were owned by the bankruptcy estate, for the benefit of creditors." R&R at 3-4. For over a decade, "courts within the

[2] Capitalized terms not defined here or in the Preliminary Statement are defined later in this brief. As used herein, the term "Defendants" refers to all of the defendants that have moved to withdraw the reference.

Fifth Circuit have consistently held that bankruptcy jurisdiction continues to exist" where, as here, "post-confirmation [] suits based on pre-confirmation claims and activities [are] brought by a plan trustee appointed under a bankruptcy plan." *Dune Operating Co. v. Watt (In re Dune Energy, Inc.)*, 575 B.R. 716, 725 (Bankr. W.D. Tex. 2017) (collecting cases). Indeed, litigation trusts "established pursuant to a confirmed plan," such as the trust for which the Litigation Trustee acts here, "by their nature maintain a connection to the bankruptcy even after the plan has been confirmed because they often play a central role in the implementation of the plan." *Ogle v. Comcast Corp. (In re Houston Reg'l Sports Network, L.P.)*, 547 B.R. 717, 736 (Bankr. S.D. Tex. 2016) (internal quotations omitted). Thus, courts in this Circuit hold, without exception, that post-confirmation bankruptcy jurisdiction is warranted under the circumstances presented here.

3. Unable to contend with the substance of this extensive collection of precedent, Defendants instead argue that the decisions are simply wrongly decided, and that the Fifth Circuit's holdings establish a bright line rule that effectively prohibits the litigation of any state law claims brought by a trustee post-confirmation before a bankruptcy court. Defendants' position, however, cannot be reconciled with the decisions of the Fifth Circuit—which has held expressly that bankruptcy court jurisdiction is appropriate where litigation recoveries have been assigned to a "liquidating trust . . . for the benefit of unsecured creditors"—or the numerous district and bankruptcy court decisions in accord, and must be rejected. *First Am. Title Ins. Co. v. First Tr. Nat'l Ass'n (In Re Biloxi Casino Belle Inc.)*, 368 F.3d 491, 496 n.4 (5th Cir. 2004).

4. Defendants' alternative argument for immediate withdrawal, that certain of the claims are subject to mandatory withdrawal, also fails. Defendants contend that this case will entail substantial consideration of federal non-bankruptcy law—specifically, tax law and securities law. But the issues that Defendants characterize as a basis for mandatory withdrawal are either

wholly irrelevant to this case or, contrary to Defendants' contentions, grounded in bankruptcy law and state fraudulent transfer law. And, as Defendants' own cited cases demonstrate, Defendants fail to identify a single pertinent issue that is not regularly adjudicated by bankruptcy courts. Accordingly, the Bankruptcy Court's conclusion that "[t]he 'other federal law' issues that may be involved in this Adversary Proceeding are not pervasive or particularly complicated," R&R at 19, was correct and should be adopted by this Court as well.

II. BACKGROUND

A. THE COURT CONFIRMS HCMLP'S PLAN, A KEY COMPONENT OF WHICH IS THE CREATION OF THE LITIGATION SUB-TRUST TO PURSUE CAUSES OF ACTION BASED ON PRE-CONFIRMATION CONDUCT

5. On October 16, 2019, Highland Capital Management L.P. ("HCMLP" or the "Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

6. From its very inception, the Debtor's bankruptcy case was plagued by adversity between the Debtor's creditors, on the one hand, and the Debtor's founder and former Chief Executive Officer, James Dondero, and entities and individuals affiliated with and/or controlled by him, on the other. To cite but a few examples:

- Almost immediately after the case was filed, the Official Committee of Unsecured Creditors appointed by the U.S. Trustee in the Debtor's case (the "Committee") successfully moved for venue to be transferred from Dondero's chosen venue of Delaware to the Bankruptcy Court. [Bankr. Dkt. No. 186]. In support of that motion, the Committee cited, among other things, the Bankruptcy Court's intimate familiarity with Dondero, with the complex corporate structure of the Debtor and its affiliates that he had created, and with individual Defendants Okada, Ellington, and Leventon, as a result of their participation in

the involuntary bankruptcy of another entity affiliated with the Debtor that was filed before the Bankruptcy Court.[3] [Bankr. Dkt. No. 85, ¶ 2]

- On November 12, 2019, the Committee filed an objection to various motions filed by the Debtor, explaining that "[a] variety of courts, arbitration panels, and administrative tribunals have made troubling findings in recent years that the Debtor and its principals have, among other things, (i) breached their fiduciary duties to investors, (ii) engaged in intentional fraudulent transfers (many times moving assets offshore into judgment-proof entities), willful misconduct, and self-dealing, and (iii) siphoned-off assets of the Debtor." [Bankr. Dkt. No. 130, ¶ 1]. The Committee expressed its "extreme[] concern[] that the Debtor and Mr. Dondero [we]re likely to continue such questionable conduct," and that "[r]igorous oversight of the Debtor and its assets and operations and, in particular, its transactions with other entities that may be controlled by Mr. Dondero or individuals who may be acting in concert with him, [was] needed to ensure that the rights of the Debtor's creditors [we]re protected . . . ." *Id.*
- On January 9, 2020, the Debtor and the Committee entered into a stipulation that, among other things, granted the Committee standing to investigate and pursue estate causes of action against Dondero, Okada, Scott, and other former insiders of the Debtor and related

[3] Okada founded the Debtor along with Dondero and served as its Chief Investment Officer until shortly before its bankruptcy case was filed, and also owns other entities, directly or indirectly, jointly with Dondero. Okada Defs. Obj. ¶ 7; *see also* Response Of The Advisors (NexPoint and HCMFA) To Order Requiring Disclosures, [Bankr. Dkt. No. 2543] at 6–7. Ellington and Leventon served as the Debtor's general counsel and assistant general counsel, respectively, until their termination on January 5, 2021, and currently perform substantially similar work for other entities affiliated with Dondero. Debtor's Motion for Entry of an Order Approving Settlement with UBS Securities LLC, [Bankr. Dkt. No. 2199] at ¶ 9; HCMLP's Reply In Further Support of Debtor's Third Omnibus Objection, [Bankr. Dkt. No. 3230] at ¶ 5 ("Skyview is wholly-owned by Scott Ellington, Highland's former General Counsel," "is largely funded by payments from Dondero controlled entities," and has senior management that includes Ellington and Waterhouse). Okada, Ellington and Leventon argue in their respective objections that the Bankruptcy Court erroneously found that they are related to Dondero. *See* Former Employee Defs. Obj. ¶ 28 n.9; Okada Defs. Obj. ¶ 5. The record is plainly to the contrary.

entities. [Bankr. Dkt. No. 338]; *see also* [Bankr. Dkt. No. 281-1] (Term Sheet); [Bankr. Dkt. No. 339] (order approving Stipulation). On December 30, 2020, the Committee filed a complaint against Dondero, Dugaboy, Scott (as Trustee of Dugaboy and of the Get Good Trust), and all of the CLO Holdco-related Defendants, alleging that Dondero, with assistance from Scott, caused HCMLP to transfer approximately $24 million in assets to CLO Holdco in order to defraud the Debtor's creditors and for less than reasonably equivalent value. *See Official Comm. of Unsecured Creditors v. CLO Holdco, Ltd.*, Adv. Proc. No. 20-03195, Dkt. No. 6, ¶¶ 1–5 (Bankr. N.D. Tex. Dec. 3, 2020).[4]

- In or about the fall of 2020, following Dondero's pursuit of various positions determined by the Debtor to be adverse to its interests, the Debtor concluded that it was untenable for Dondero to continue to be employed by the Debtor. *See Highland Capital Management, LP v. Dondero*, Adv. Pro. No. 20-03190, Dkt. No. 1, ¶¶ 22–23. Thus, on October 2, 2020, the Debtor demanded Dondero's resignation from his positions at the Debtor, and he resigned on October 9, 2020. *Id.* ¶¶ 24–5. After Dondero resigned, the Debtor filed an adversary proceeding against him alleging that he had interfered with the Debtor's operations and the management of the assets under its control, and otherwise acted directly and through entities he controls to improperly exert pressure on certain of the Debtor's employees, and seeking to enjoin him from taking further actions contrary to the Debtor's interests.[5] *Id.* at ¶ 4.

[4] On October 15, 2021, this complaint was voluntarily dismissed without prejudice, *see* Adv. Proc. No. 20-03195, Dkt. No. 96 (Notice of Dismissal), and the claims re-asserted in the Litigation Trustee's Complaint, *see* Compl. ¶¶ 125–130 (Counts XIV, XV, XVI, XVIII, XIX, XXX).

[5] A temporary restraining order granting this relief was entered on December 10, 2020. *See* Order Granting Debtor's Motion for a Temporary Restraining Order Against James Dondero, *Highland Capital Mgmt. L.P. v. Dondero (In re Highland Capital Management L.P.*), Adv. Proc. No. 20-03190, Dkt. No. 10 (Bankr. N.D. Tex. Dec. 10, 2020).

- On April 15, 2021, the Debtor filed a motion alleging that, shortly after a New York state court presiding over claims brought by UBS against the Debtor and certain of its affiliates ruled that the claims could proceed to trial, Dondero and Ellington moved assets with a face value of $300 million out of the reach of creditors by transferring the assets to an off-shore entity indirectly owned by them. *See* Debtor's Motion for Entry of an Order Approving Settlement with UBS Securities LLC, [Bankr. Dkt. No. 2199] at ¶¶ 5–10. The Debtor alleged further that during the Debtor's bankruptcy, Ellington and Leventon concealed the transfer from the Debtor, causing it to make factually inaccurate statements to UBS and the Bankruptcy Court and to incur millions of dollars in additional litigation fees. *Id*. ¶¶ 10–11.

7. The Debtor's plan of reorganization (the "Plan") was confirmed on February 22, 2021. [Bankr. Dkt. No. 1943] (the "Confirmation Order"). In light of the foregoing, a key component of the Plan was the preservation and pursuit of causes of action arising from prepetition conduct perpetrated by Dondero and entities and individuals affiliated with and/or controlled by him for the benefit of the Debtor's unsecured creditors. To that end, the Plan provided for the creation of the Claimant Trust for the benefit of holders of Allowed General Unsecured Claims and Allowed Subordinated Claims, which was vested with assets including substantially "all Causes of Action" and "any proceeds realized or received from such Assets." Plan §§ I.B.24, I.B.26, I.B.27. The Plan also provided for the creation of the Litigation Sub-Trust, as a "sub-trust established within the Claimant Trust or as a wholly-owned subsidiary of the Claimant Trust," for the purpose of "investigating, prosecuting, settling, or otherwise resolving the Estate Claims" transferred to it by the Claimant Trust pursuant to the Plan. Plan §§ I.B.81, IV.B.1 ("[T]he Claimant Trust shall irrevocably transfer and assign to the Litigation Sub-Trust the Estate

Claims."), IV.B.4. The Plan defines "Estate Claims as "any and all estate claims and causes of action against Mr. Dondero, Mr. Okada, other insiders of the Debtor, and each of the Related Entities, including any promissory notes held by any of the foregoing." Plan § 1.B.61. The Plan expressly identified Defendants Dondero, Okada, Scott, the Dugaboy Investment Trust, Charitable DAF Holdco, Ltd, Hunter Mountain Investment Trust, NexPoint Advisors, L.P., Strand Advisors XVI, Inc., Highland Capital Management Fund Advisors, L.P., SAS Asset Recovery Ltd., and any current or former insider of the Debtor, as potential targets of Estate Causes of Action. *See* Plan Supplement, Exhibit DD (Retained Causes of Action), [Bankr. Dkt. No. 1875].

8. The Plan stated that it would "be implemented through . . . the Litigation Sub-Trust," among other entities created by the Plan. Plan § IV. A. Under the Plan, the Litigation Trustee of the Sub-Trust is "responsible for investigating, litigating, and settling the Estate Claims for the benefit of the Claimant Trust[.]" Plan § I.B.83. Proceeds from the Litigation Trust's pursuit of claims "shall be distributed . . . to the Claimant Trust for distribution to the Claimant Trust Beneficiaries[.]" Plan § IV.B.4 (explaining that the Litigation Sub-Trust was "established for the purpose of investigating, prosecuting, settling, or otherwise resolving the Estate Claims").

B. THE LITIGATION SUB-TRUST BRINGS CLAIMS BASED ON PRE-CONFIRMATION CONDUCT FOR THE BENEFIT OF CREDITORS

9. On August 11, 2021, the Plan became effective, the Claimant Trust and Litigation Sub Trusts were created, and Marc Kirschner became the Trustee of the Litigation Sub-Trust. [Bankr. Dkt. No. 2700]. On October 15, 2021, the Litigation Trustee commenced this Adversary Proceeding [Adv. Proc. Dkt. No. 1 (the "Complaint")], asserting claims for the avoidance and recovery of intentional and constructive fraudulent transfers and obligations under sections 544, 548, and 550 of the Bankruptcy Code, illegal distributions under Delaware partnership law, breach of fiduciary duty, declaratory judgment that certain entities are liable for the debts of others under

an alter ego theory, successor liability, aiding and abetting or knowing participation in breach of fiduciary duty, civil conspiracy, tortious interference with prospective business relations, breach of contract, conversion, unjust enrichment, and the disallowance or subordination of claims under sections 502 and 510 of the Bankruptcy Code against Dondero and individuals and entities affiliated with and/or controlled by him (collectively, the "Claims"). All of the Claims arise from pre-confirmation conduct. *See* Compl. ¶¶ 1–10.

C. DEFENDANTS MOVE TO WITHDRAW THE REFERENCE

10. Motions to withdraw the reference for this adversary proceeding (collectively, the "Motions to Withdraw") were subsequently filed by the Defendants.[6] The Motions to Withdraw argued that certain of the claims in the Complaint are subject to mandatory withdrawal, and that the Court lacks subject matter jurisdiction over the claims predicated on state law, and requested that the adversary proceeding be immediately withdrawn to the District Court.

11. Following oral argument on the Motions to Withdraw, on April 6, 2022, the Bankruptcy Court issued its Report and Recommendation. [Adv. Proc. Dkt. No. 151]; transmitted

[6] On January 18, 2022, Defendants Scott Ellington, Isaac Leventon, Frank Waterhouse, and CPCM, LLC (collectively, the "Former Employee Defendants") filed the *Motion to Withdraw the Reference for Causes of Action in the Complaint Asserted Against the Former Employee Defendants* [Adv. Proc. Dkt. No. 27] and their *Brief In Support* [Adv. Proc. Dkt. No. 28]. On January 21, 2022, Defendants Mark A. Okada, The Mark & Pamela Okada Family Trust – Exempt Trust #1, Lawrence Tonomura in his Capacity as Trustee, The Mark & Pamela Okada Family Trust – Exempt Trust #2, and Lawrence Tonomura in his Capacity as Trustee (the "Okada Defendants") filed the *Motion of the Okada Parties to Withdraw the Reference* [Adv. Proc. Dkt. No. 36] and their *Memorandum Of Law In Support* [Adv. Proc. Dkt. No. 37]. On January 21, 2022, Defendants NexPoint Advisors L.P ("NexPoint") and Highland Capital Management Fund Advisors L.P. ("HCMFA") filed the *Motion to Withdraw the Reference for the Causes of Action in the Complaint Asserted Against Defendants* [Adv. Proc. Dkt. No. 39] and their *Memorandum Of Law In Support* [Adv. Proc. Dkt. No. 40]. On January 25, 2022, Defendants James Dondero, Dugaboy Investment Trust, Get Good Trust, and Strand Advisors, Inc. (the "Dondero Defendants") filed *Defendants James D. Dondero, Dugaboy Investment Trust, Get Good Trust, and Strand Advisors, Inc.'s Motion to Withdraw the Reference* [Adv. Proc. Dkt. No. 45] and their *Memorandum Of Law In Support* [Adv. Proc. Dkt. No. 46]. On January 26, 2022, Defendant Grant James Scott III filed his *Motion to Withdraw the Reference* [Adv. Proc. Dkt. No. 50] and his *Memorandum Of Law In Support* [Adv. Proc. Dkt. No. 41]. On January 26, 2022, CLO Holdco, Ltd., Highland Dallas Foundation, Inc., Charitable DAF Fund, LP, and Charitable DAF Holdco, Ltd. (the "CLO Holdco-Related Defendants") filed their *Motion to Withdraw the Reference* [Adv. Proc. Dkt. No. 59] and their *Brief In Support* [Adv. Proc. Dkt. No. 59]. On February 1, 2022, Defendants Hunter Mountain Investment Trust ("HMIT") and Rand PE Fund I, LP, Series 1 ("Rand" and together with HMIT, the "HMIT Defendants") filed a nominal joinder to the Motions to Withdraw. [Adv. Proc. Dkt. No. 70].

to this Court at Dkt. No. 14. The Bankruptcy Court rejected Defendants' argument that the Bankruptcy Court lacks subject matter jurisdiction, holding that post-confirmation jurisdiction exists because "the 36 counts in the Adversary Proceeding '[w]ithout doubt . . . pertain[] to implementation and execution' of the plan" and that "Defendants' arguments to the contrary have no merit." R&R at 17 (citation omitted). The Bankruptcy Court also held that there is no basis for mandatory withdrawal because in adjudicating this action "there will be no substantial or material consideration of 'other laws of the United States regulating organizations or activities affecting interstate commerce.'" R&R at 4 (citation omitted). As such, the Bankruptcy Court recommended that the District Court "refer all pre-trial matters to the Bankruptcy Court, and grant the Motions to Withdraw upon certification by the Bankruptcy Court that the parties are trial-ready." R&R at 20.

12. On April 15, 2022, the Former Employee Defendants, the Okada Defendants, the CLO Holdco-Related Defendants, and NexPoint and HCMFA filed four separate objections to the Report and Recommendation. *See* Dkt. Nos. 16 (the "Former Employee Defs. Obj."); 17 (the "Okada Defs. Obj."); 19 (the "CLO Holdco-Related Defs. Obj."), 20 (the "NexPoint and HCMFA Obj."). The Dondero Defendants filed another objection to the Report and Recommendation on April 20, 2022. *See* Dkt. No. 22 (the "Dondero Defs. Obj.").[7]

III. ARGUMENT

A. THE BANKRUPTCY COURT CORRECTLY CONCLUDED THAT IT HAS SUBJECT MATTER JURISDICTION OVER THIS PROCEEDING

13. Pursuant to 28 U.S.C. § 1334(b), district courts shall have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases

[7] On April 25, 2022, this Court approved the Litigation Trustee's request to file a consolidated brief in response to all of Defendants' Objections and in support of the Report and Recommendation. (Dkt. No. 24.)

under title 11." Under 28 U.S.C. § 157(a) and (b), a district court may refer to the bankruptcy judges in the district "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11."[8] The Northern District of Texas's standing order dated August 3, 1984 refers all "cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 . . . to the Bankruptcy Judges of this district for consideration and resolution consistent with law." Miscellaneous Order No. 33 (Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc), *available at* https://www.txnd.uscourts.gov/sites/default/files/orders/misc/MiscOrder33_80384BK.pdf.

14. Defendants' attempt to fashion a rule prohibiting a bankruptcy court's exercise of jurisdiction over claims asserted by a litigation trust formed under a confirmed plan out of the Fifth Circuit's rulings in *Craig's Stores of Texas v. Bank of Louisiana (In re Craig's Stores of Texas)*, 266 F.3d 388 (5th Cir. 2001) and *Newby v. Enron (In re Enron Corp. Securities)*, 535 F.3d 325 (5th Cir. 2008) fails.[9] In *Craig's Stores*, the Fifth Circuit found that a bankruptcy court could not exercise jurisdiction over a post-confirmation breach of contract claim asserted by a reorganized debtor against its bank in connection with an alleged post-confirmation breach. The Fifth Circuit held that because "expansive bankruptcy court jurisdiction" is no longer "required to facilitate 'administration' of the debtor's estate" following confirmation of a plan, "[a]fter a debtor's

[8] 28 U.S.C. § 157(b) also provides that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title." Defendants concede that the Bankruptcy Court has subject matter jurisdiction over the core claims asserted by the Litigation Trustee. *See* Former Employee Defs. Obj. n.2; Okada Defs. Obj. ¶ 21.

[9] Defendants also argue that the Fifth Circuit's decision in *U.S. Brass Corp. v. Travelers Insurance Corporation Group (In re U.S. Brass Corp.)*, 301 F.3d 296 (5th Cir. 2002) somehow supports their assertion that the Bankruptcy Court lacks subject matter jurisdiction here. *See, e.g.*, Former Employee Defs. Obj. ¶¶ 15–16. However, *In re U.S. Brass* simply acknowledged the standard articulated in *Craig's Stores* that bankruptcy jurisdiction ceases to exist following confirmation "other than for matters pertaining to the implementation or execution of the plan," and found that the bankruptcy court maintained post-confirmation jurisdiction over an objection that a proposed settlement constituted an impermissible plan modification. 301 F.3d at 304–5.

reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan." *Craig's Stores*, 266 F.3d at 390.

15. The Fifth Circuit elaborated on this holding in *Newby v. Enron*, where it held that confirmation of a plan does not divest a bankruptcy court of jurisdiction over an action commenced prior to confirmation. 535 F.3d at 335. Noting that "Section 1334 does not expressly limit bankruptcy jurisdiction upon plan confirmation," the Fifth Circuit explained that "[t]hree factors were critical to its decision" that post-confirmation jurisdiction was lacking in *Craig's Stores*:

> [F]irst, the claims at issue "principally dealt with post-confirmation relations between the parties;" second, "[t]here was no antagonism or claim pending between the parties as of the date of the reorganization;" and third, "no facts or law deriving from the reorganization or the plan [were] necessary to the claim."

Id. (quoting *Craig's Stores*, 266 F.3d at 391) (second and third alteration in original). Notably—and contrary to Defendants' contentions—the *Newby* court did not articulate these factors as necessary elements that must be present in order for post-confirmation bankruptcy court jurisdiction to exist, but instead explained that the absence of each of these elements was "critical" to its determination that bankruptcy court jurisdiction was lacking in *Craig's Stores*. *Id.* Additionally, the Fifth Circuit clarified that, notwithstanding its statement in *Craig's Stores* that post-confirmation bankruptcy court jurisdiction exists only "for matters pertaining to the implementation or execution of the plan," the facts in *Craig's Stores* were narrow, and involved post-confirmation claims based on post-confirmation activities. *Id.* (quoting *Craig's Stores*, 266 F.3d at 389-91).[10]

[10] Defendants' reliance on a footnote in *Newby v. Enron* is misplaced. Former Employee Defs. Obj. ¶ 17 (citing *Newby*, 535 F.3d at 335 n.9, which summarizes *In re Enron Corp. Sec., Derivative & ERISA Litig.,* No. G-05-0012, H-01-3624, 2005 WL 1745471 (S.D. Tex. July 25, 2005) ("*Enron Corp.*"). *Enron Corp.* is wholly inapposite. First, *Enron Corp.* involved claims commenced by third party investors—not a litigation trust created under a plan to pursue claims for the benefit of creditors. 2005 WL 1745471, at *1. Second, the only alleged basis for bankruptcy court

16. As the Bankruptcy Court explained in its Report and Recommendation, "numerous courts within the Fifth Circuit" have subsequently held that "the exception to jurisdiction at issue in *Craig's Stores* does not arise where, as here, a trustee of a litigation trust created under a confirmed plan of reorganization for the benefit of creditors pursues post-confirmation causes of action, predicated on pre-confirmation conduct, for the creditors' benefit." R&R at 15 (citing *Faulkner v. Lane Gorman Trubitt, LLC) (In re Reagor-Dykes Motors, LP)*, 2021 WL 4823525, at *2–4 (Bankr. N.D. Tex. Oct. 14, 2021) (bankruptcy court had post-confirmation subject matter jurisdiction over a litigation trustee's state law claims "based on pre-petition conduct," the recoveries of which would "affect distributions to creditors under the confirmed plan"); *Dune Energy*, 575 B.R. at 725–26 (bankruptcy court had post-confirmation subject matter jurisdiction over lawsuit asserting state law claims brought by liquidating trustee established under Chapter 11 plan); *Brickley for Cryptometrics, Inc. Creditors' Tr. v. ScanTech Identification Beams Sys., LLC*, 566 B.R. 815, 830–32 (W.D. Tex. 2017) (holding that post-confirmation "related to" subject matter jurisdiction existed over creditors' trust's post-confirmation suit asserting pre-confirmation Chapter 5 claims and non-core state law claims where the plan vested the claims in the trust); *Schmidt v. Nordlicht*, 2017 WL 526017, at *2–3 (S.D. Tex. Feb. 9, 2017) (holding that post-confirmation "related to" subject matter jurisdiction existed over state law claims aimed at pre-confirmation conduct brought by a litigation trustee established by a confirmed plan); *Houston Reg'l*, 547 B.R. at 736 (bankruptcy court had post-confirmation subject matter jurisdiction over lawsuit brought by litigation trustee established under confirmed Chapter 11 plan that asserted state law claims); *Kaye v. Dupree (In re Avado Brands, Inc.)*, 358 B.R. 868, 878–79 (Bankr. N.D.

jurisdiction in *Enron Corp.* was that the claims, if successful, could impact creditor recoveries by giving rise to indemnity and contribution claims. The district court found, however, that any such indemnity or contribution claims had been discharged under the plan. *Id*. at *8.

Tex. 2006) (bankruptcy court had post-confirmation jurisdiction over litigation trustee's pre-confirmation core and non-core claims that were transferred to the trustee for prosecution under the plan, where proceeds were to be distributed to creditors); *Coho Oil & Gas, Inc. v. Finley Res., Inc. (In re Coho Energy, Inc.)*, 309 B.R. 217, 221 (Bankr. N.D. Tex. 2004) (bankruptcy court had post-confirmation jurisdiction over claims preserved under Chapter 11 plan and assigned to the creditor's trust for prosecution with recovery to be distributed to creditors)). Such claims, the Bankruptcy Court explained, "[w]ithout doubt . . . 'pertain[] to implementation and execution'" of the plan, and thus fall squarely within the bankruptcy courts' post-confirmation subject matter jurisdiction as enunciated by the Fifth Circuit. R&R at 17 (quoting *Dune Energy*, 575 B.R. at 725–26).

17. Defendants fail to cite to a single case holding to the contrary. And Defendants' characterization of each of these cases—and the Bankruptcy Court's Report and Recommendation—as wrongly decided and inconsistent with Fifth Circuit precedent simply cannot be squared with the Fifth Circuit cases on which Defendants purportedly rely. For example, Defendants argue that the decisions run afoul of *Craig's Stores* because they rely on the possibility that prosecution of the claims at issue could impact creditor recoveries as the justification for bankruptcy court jurisdiction. Okada Defs. Obj. ¶ 25; Former Employee Defs. Obj. ¶ 24. In *Craig's Stores*, however, the claim did not accrue until after confirmation, creditors had no expectation of receiving recoveries from such a claim, and the sole connection between the claim and creditor recoveries was that successful prosecution could increase the value of the reorganized debtor stock creditors received under the plan, as would be the case with any post-confirmation claim pursued by a reorganized debtor. *Craig's Stores*, 266 F.3d at 390–91. By sharp contrast, here, the Litigation Trustee's pursuit of the Claims is an essential component of creditors' expected

recoveries under the Plan, and all claims being litigated here arose prior to confirmation. *See* R&R at 16–17 ("[T]he order confirming the Highland Plan expressly stated that 'Implementation of the Plan' shall include the 'establishment of' and 'transfer of Estate Causes of Action' to 'the Litigation Sub-Trust,' the Trustee of which is charged with 'investigating, pursuing, and otherwise resolving any Estate Claims.'") (quoting Confirmation Order at ¶ 42(b)); *see also* Plan § IV.A ("the Plan will be implemented through . . . the Litigation Sub-Trust"); *id*. at § I.B.4 ("The Litigation Sub-Trust shall be established for the purpose of investigating, prosecuting, settling, or otherwise resolving the Estate Claims," the proceeds of which "shall be distributed . . . to the Claimant Trust for distribution to the Claimant Trust Beneficiaries . . . ."). Pursuit of such claims, therefore, "pertain[s] to the implementation or execution of the plan," and falls squarely within bankruptcy court subject matter jurisdiction under the framework articulated in *Craig's Stores*. *Craig's Stores*, 266 F.3d at 390.

18. Indeed, the Fifth Circuit stated *expressly* in *Biloxi Casino* that where litigation recoveries have been assigned to a "liquidating trust . . . for the benefit of unsecured creditors," the claims "*thus pertain[] to the implementation or execution of the plan*," thereby warranting bankruptcy court jurisdiction under *Craig's Stores*. 368 F.3d at 496 n.4 (citing *Craig's Stores*) (emphasis added); *see also Ernst & Young LLP v. Pritchard (In re Daisytek, Inc.)*, 323 B.R. 180, 185–86 (N.D. Tex. 2005) (where a plan "contemplates the prosecution of the claims and the distribution of . . . recovery to creditors under the Plan, and the prosecution of the claims will thus impact compliance with, or completion of, the Plan, the *Craig's Stores* test for post-confirmation jurisdiction is satisfied").[11] While Defendants seek to distinguish *Biloxi Casino* on the ground that

[11] The CLO Holdco Defendants assert two separate arguments why the Plan's transfer of estate causes of action to the Litigation Trust, to be prosecuted for the benefit of creditors, does not confer post-confirmation bankruptcy court jurisdiction over those claims. CLO Holdco-Related Defs. Obj. ¶¶ 21, 25. Both arguments miss the point. First, they argue, based on *Craig's Stores*, that assumption of contracts by the debtor "is of no special significance." In other

the claims there were commenced prior to confirmation, the decision is clear that the jurisdictional finding was predicated on the assignment of claims to a liquidating trust for the benefit of unsecured creditors, and not on the timing of the litigation. *See Biloxi Casino*, 368 F.3d at 496 n.4 ("Bankruptcy jurisdiction exists under 28 U.S.C. § 1334(b) in this case because White Construction settled its lien priority litigation against First Trust in exchange for First Trust's assignment of any recovery in this case to the BCI/BCBI liquidating trust (of which First Trust is liquidating trustee) for the benefit of unsecured creditors.").[12]

19. Additionally, while not necessary to a finding of subject matter jurisdiction here, as the Bankruptcy Court correctly explained, consideration of the factors identified in *Newby* as critical to the *Craig's Stores* holding further supports a finding of bankruptcy court jurisdiction. R&R at 16. First, unlike the post-confirmation contract dispute at issue in *Craig's Stores*, it is undisputed that the Claims here all arise from pre-confirmation conduct. *See Craig's Stores*, 266 F.3d at 391 ("[I]t is clear that Craig's claim against the Bank principally dealt with post-confirmation relations between the parties.").

20. Second, as the Bankruptcy Court also correctly concluded, antagonism existed between the parties at the date of the reorganization. R&R at 16. As the Bankruptcy Court stated, "courts in the Fifth Circuit consistently hold that 'where the claims are based on pre-petition

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words, a debtor's assumption of a pre-existing contract does not create bankruptcy court jurisdiction over all disputes relating to that contract. But that has no bearing on the situation here—the placement of claims into a litigation trust to assert on behalf of all creditors is nothing like a debtor's choice to assume a pre-existing contract. Second, the argument from *U.S. Brass* that parties cannot confer jurisdiction through the terms of a plan is equally misplaced. *U.S. Brass* refers to a "retention of jurisdiction" provision in the plan at issue, *U.S. Brass*, 301 F.3d at 303, not—as here—substantive provisions of the Plan providing for the creation of a trust, and assignment of claims to that trust, to pursue claims to effectuate distributions to creditors. In all events, the CLO HoldCo Defendants' implausible interpretation of *Craig's Stores* and *U.S. Brass* cannot be reconciled with *Biloxi Casino*, which was subsequently decided.

[12] Notably, *Biloxi Casino* was decided before the Fifth Circuit ruled in *Enron v. Newby* that the narrowed post-confirmation bankruptcy court jurisdiction addressed in *Craig's Stores* does not apply to claims commenced prior to confirmation. *Compare Newby*, 535 F.3d 325 to *Biloxi Casino*, 368 F.3d 491.

conduct and the cause of action appears to have accrued before the bankruptcy, the antagonism factor is satisfied.'" R&R at 16 (quoting *Faulkner*, 2021 WL 4823525, at *3 and citing *Schmidt*, 2017 WL 526017, at *3 (while "no claim was pending before the bankruptcy," "antagonism existed in the relevant sense; the defendant's alleged wrongdoing harmed the company prior to the bankruptcy, and the company's cause of action appears to have accrued before the bankruptcy"); *Brickley*, 566 B.R. at 831 (confirming that "actual litigation is not necessary to find the existence of antagonism"); *Coho Oil*, 309 B.R. at 221 (finding this factor satisfied where "claims were preserved under the Plan and assigned to the creditor's trust for prosecution")).

21. While Defendants argue that these cases apply too broad an interpretation of "antagonism," they fail to cite to a single case holding to the contrary. Rather, the only cases on which Defendants rely for this point involved instances where the causes of action, though predicated principally on pre-confirmation conduct, did not accrue until after confirmation. *See* Okada Defs. Obj. ¶ 24 (citing *McVey v. Johnson (In re SBMC Healthcare, LLC)*, 519 B.R. 172, 187 (Bankr. S.D. Tex. 2014) and *Segner v. Admiral Ins. Co. (In re Palmaz Sci., Inc.)*, 2018 WL 661409, at *7 (Bankr. W.D. Tex. Jan. 31, 2018)). In *McVey*, the debtor's former president and sole shareholder sued his attorneys for advising him to commence the debtor's Chapter 11 proceeding, after the debtor's creditors sued him for amounts that they were unable to collect under the debtor's plan of reorganization. *McVey*, 519 B.R. at 176, 183. While the malpractice claim was predicated primarily on pre-confirmation advice, it did not accrue until after confirmation, when the debtor's creditors were unable to collect the full amounts of their debts from the debtor, and commenced an action seeking the shortfall against the plaintiff. *Id*. at 187. Likewise, *Palmaz* centered on a trustee's action for declaratory judgment that the insurer defendants were obligated to provide coverage for a lawsuit the trustee commenced against the debtor's former officers and

directors, and the officers' and directors' complaint in intervention seeking reformation of the D&O policies or, in the alternative, damages for negligent misrepresentation or fraud in the brokering of the policies. *Palmaz*, 2018 WL 661409, at *1. Review of the underlying complaint reveals that the insurers did not deny coverage until *after* confirmation, and thus the claims also did not accrue until then. *See* Adv. Proc. Case. No. 17-05027, Dkt. No. 1, at ¶¶ 18–19 (Bankr. W.D. Tex. Mar. 23. 2017) (alleging that on July 27, 2016, after plan confirmation on July 15, 2016, the trustee sent notice to the debtor's former officers and directors about potential causes of action, and in October 2016, the insurer sent the former officers and directors a "reservation of rights letter, which claimed *for the first time* that no coverage would exist under the insurance policies for the claims pursued by [the trustee]") (emphasis added). Thus, Defendants' assertion that the myriad decisions equating antagonism with the accrual of claims renders irrelevant the first *Craig's Stores* factor—whether the claims at issue deal principally with pre- or post-confirmation relations—misses the mark. As *McVey* and *Palmaz* demonstrate, a claim predicated principally on pre-confirmation conduct may nevertheless accrue post confirmation. Here, however, all of the Claims are predicated on pre-confirmation conduct, and all of the Claims accrued prior to confirmation.

22. Moreover, even if the court were to accept Defendants' erroneous assertion that pre-confirmation accrual of the Claims is insufficient to establish antagonism, the facts here easily show that pre-confirmation antagonism among the parties existed nevertheless. As described in greater detail, *see supra* ¶ 6, the Debtor's bankruptcy proceeding was pervaded by the possibility of potential claims against Defendants, with the Debtor and Committee repeatedly notifying creditors and the Court that such claims may exist, and the Plan expressly preserving such claims for pursuit by the Litigation Sub-Trust for creditors' benefit. Defendants' contentions to the contrary cannot withstand even the barest of scrutiny of the Bankruptcy Court docket. *See, e.g.*,

[Bankr. Dkt. No. 130, ¶ 1] (Committee objection alleging that "[r]igorous oversight of the Debtor and its assets and operations and, in particular, its transactions with other entities that may be controlled by Mr. Dondero or individuals who may be acting in concert with him, [was] needed to ensure that the rights of the Debtor's creditors [we]re protected"); [Bankr. Dkt. No. 281-1] (Term Sheet granting the Committee standing to investigate and pursue estate causes of action against Dondero, Okada, Scott, and other former insiders of the Debtor and related entities); [Bankr. Dkt. No. 2199, ¶ 6] (motion by Debtor alleging that Dondero and Ellington moved assets with a face value of $300 million out of the reach of creditors by transferring the assets to an off-shore entity indirectly owned by them); *see also Official Comm. of Unsecured Creditors v. CLO Holdco, Ltd.*, Adv. Proc. No. 20-03195, Dkt. No. 6 (Bankr. N.D. Tex. Dec. 3, 2020) (alleging that Dondero, with assistance from Scott, caused the Debtor to transfer approximately $24 million in assets to CLO Holdco in order to defraud the Debtor's creditors).

23. Thus, to the extent the factors articulated in *Newby v. Enron* need be considered at all, the first two factors warrant Bankruptcy Court jurisdiction. Courts within this Circuit routinely hold that subject matter jurisdiction exists over a litigation trustee's post-confirmation pursuit of claims based on these two factors alone. *See Brickley*, 566 B.R. at 831-32 ("Because two of the three *Craig's* factors weigh in *favor* of jurisdiction, the Court finds that it has subject matter jurisdiction . . . ."); *Schmidt*, 2017 WL 526017, at *3 (finding post-confirmation subject matter jurisdiction even though "[t]he third factor does not weigh meaningfully in either direction"); *Dune Energy*, 575 B.R. at 726 (finding jurisdiction exists because, "while limited facts and law deriving from the bankruptcy may be examined with respect to some of the claims, any net recoveries made by Plaintiff on these claims will affect distributions to creditors under the confirmed Plan"); *see also Newby*, 535 F. 3d at 336 (holding that the third factor is "of no

consequence because the first two *Craig's Stores* factors weigh heavily in favor of federal jurisdiction").[13] As the Bankruptcy Court concluded, Defendants' unsupported assertion that Bankruptcy Court jurisdiction is lacking should be rejected.

B. THERE IS NO BASIS FOR MANDATORY WITHDRAWAL OF THE REFERENCE

24. Adjudication of the Litigation Trustee's claims will not require substantial consideration of either federal tax law or federal securities law. Accordingly, the Bankruptcy Court correctly rejected Defendants' arguments that certain of the claims are subject to mandatory withdrawal, and this Court should do the same.

25. Defendants bear the burden of demonstrating that the Court is required to withdraw the reference on the basis of federal tax or securities law. *See Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 2009 WL 10714861, at *10 (Bankr. S.D. Tex. Mar. 6, 2009), *report and rec. adopted*, 421 B.R. 341 (S.D. Tex. 2009). And, as the Bankruptcy Court explained, "[i]t has been well established that 'mandatory withdrawal is to be applied narrowly'" in order to prevent the governing provision, 28 U.S.C. Section 157(d), "from becoming an escape hatch." R&R at 18 (quoting *Manila Indus. Inc. v. Ondova Ltd. Co. (In re Ondova Ltd. Co.)*, 2009 WL 3681905, at *2 (Bankr. N.D. Tex. Oct. 2, 2009), *report and rec. adopted*, 2009 WL 3673026 (N.D. Tex. Nov. 3, 2009)). "Unsubstantiated assertions that non-bankruptcy federal law issues are substantial and material to an adversary proceeding are insufficient to warrant mandatory

[13] As the Bankruptcy Court noted, the Bankruptcy Court's jurisdiction is further bolstered by the fact that "although the Plan is one of reorganization, it is 'an asset monetization plan' providing for the orderly wind-down of the Debtor's estate, including the sale of assets and certain of its funds over time, with the Reorganized Debtor continuing to manage certain other funds." R&R n.7 (quoting Confirmation Order at ¶ 2). While Defendants focus on the fact that the Plan was one of reorganization rather than liquidation, *see* Former Employee Defs. Obj. ¶ 25, the relevant point is that unlike *Craig's Stores*, where "a reorganized debtor's confirmed plan marked the end of the bankruptcy and the emergence of a new reorganized business entity not dependent on the bankruptcy court's protection," the primary purpose of the Claimant Trust, Litigation Sub-Trust, and Reorganized Debtor here "is nothing more or less than maximizing the pot of money for distribution to creditors." *Schmidt*, 2017 WL 526017, at *3.

withdrawal." R&R at 18–19 (citing *Keach v. World Fuel Servs. Corp. (In re Montreal Me. & Atl. Ry.)*, 2015 WL 3604335, at *21-*23 (D. Me. June 8, 2015) (A party may not merely "tr[y] to kick up some dust to make the relevant analysis seem complicated.")). Cases that require a "straightforward application of a federal statute to a particular set of facts" do not mandate withdrawal; rather, "[b]efore withdrawing the reference, the district court must make an affirmative determination that the relevant non-code legal issues will require substantial and material consideration." *In re Electro-Mech. Indus., Inc.*, 2018 WL 6587299, at *3 (Bankr. S.D. Tex. Feb. 10, 2018).

26. As the Bankruptcy Court concluded, and as explained below, the claims do not require substantial consideration of federal non-bankruptcy law, nor do they vary in any way from claims typically and repeatedly considered by bankruptcy courts. Thus, Defendants have not met, and cannot meet, the necessary burden to justify mandatory withdrawal of any Claim in this action.

1. Federal Securities Law Issues Do Not Necessitate Withdrawal

27. HCMFA and NexPoint argue that withdrawal of all of the counts against them is mandatory because consideration of these counts implicates federal securities law. The Bankruptcy Court rejected HCMFA's and NexPoint's "mere[] . . . barebones references to potential defenses that might implicate federal securities laws," R&R at 19–20, and this Court should as well.

28. First, Defendants attempt to rely upon precedent requiring withdrawal of claims asserted under federal securities statutes, *see, e.g.*, NexPoint and HCMFA Obj. ¶ 4 (relying on *In re Am. Solar King Corp.*, 92 B.R. 207, 210–11 (W.D. Tex. 1988)), even though the Litigation Trustee does not assert a single claim based on those statutes. To be clear, *none* of the claims against either HCMFA or NexPoint—or, for that matter, against any Defendant in this action—is

brought under federal securities law.[14] In contrast, in *American Solar King*, on which Defendants nevertheless rely, the plaintiff brought Rule 10b-5 claims against a company and, after that company filed for bankruptcy, sought removal back to the district court—where the claims originally were filed—to adjudicate the securities action. *Am. Solar King*, 92 B.R. at 208. *American Solar King* was a securities law action, and thus—wholly unlike here—there was no question that interpretation of securities law would be central to the case. Plaintiffs in *Contemporary Lithographers v. Hibbert*, 127 B.R. 122, 123 (M.D.N.C. 1991) and *Price v. Craddock*, 85 B.R. 570, 572 (D. Colo. 1988), also relied on by Defendants, similarly asserted securities claims. *See* NexPoint and HCMFA Obj. ¶ 9.

29. Second, unable to identify a securities law claim brought by the Litigation Trustee, NexPoint and HCMFA suggest that their status as "registered investment advisors" means that their conduct will necessarily "implicate significant, complex, and novel questions of federal securities laws." NexPoint and HCMFA Obj. ¶ 1. That sweeping assertion is incorrect. "If a party to a case is federally regulated, such as a bank or securities brokerage, but no federal regulation applies to the dispute at hand, the court need not withdraw the proceeding because no federal regulation will have to be considered." *Contemp. Lithographers*, 127 B.R. at 125. Being subject to federal regulation does not immunize NexPoint and HCMFA from liability for state law torts and fraudulent transfers that harmed HCMLP's creditors. The Bankruptcy Court correctly concluded that the "rule advanced by HCMFA and [NexPoint] would mean that bankruptcy courts would be unable to hear virtually any claims against any investment advisor or other financial

[14] Defendants baselessly accuse the Litigation Trustee of making an "inartful attempt[] to disguise federal securities law issues as state law claims," merely because the state law claims involve a party "conceal[ing]" its plan to "favor its own interest," which Defendants assert is "a staple of federal securities law." NexPoint and HCMFA Obj. ¶ 11. There is zero basis for this contention; the state law claims asserted here are classic state law claims that do not, in any way, depend on the existence or involvement of securities. Defendants' accusation is nothing more than a transparent and fruitless attempt to somehow link this case to the interpretation of federal non-bankruptcy law.

entity regulated under the federal securities laws." R&R at 20. The scores of bankruptcy cases involving financial institutions and investment entities—regularly involving claims just like those asserted here—belie HCMFA and NexPoint's argument that they can evade bankruptcy court jurisdiction based on their status as regulated entities.

30. Third, HCMFA and NexPoint resort to speculation that their defenses to the claims will require consideration of securities law issues, contending that the court that adjudicates this case will have to answer "some or all" of a laundry list of issues they have assembled. *See* NexPoint and HCMFA Obj. ¶ 8. But none of the listed issues is central to the case, and to the extent that the Bankruptcy Court need reach any of them at all, it certainly will not need to do so in a way that would constitute "substantial consideration" of non-bankruptcy federal law. Specifically, HCMFA and NexPoint contend that in order to address their defenses, the Court will have to answer: (i) whether the transactions were subject to or exempt from the requirements of sections 17 and 18 of the Investment Company Act (the "ICA"); (ii) whether the creation of NexPoint and HCMFA were motivated by compliance with securities laws; and (iii) whether the claims are preempted by securities laws. But the question of whether the transactions at issue were subject to or exempted from (or have anything at all to do with) the ICA is beside the point. A transaction that complies with the ICA may of course nevertheless give rise to tort liability if it is otherwise violative of state or common law.[15] At most, the question of ICA compliance, and the issue of whether the transactions were motivated by a desire to comply with federal securities law, bear only on questions of intent that may be raised by certain of the Litigation Trustee's claims.

[15] For example, Defendants argue that an entity purportedly formed in compliance with applicable federal securities laws could not also be fraudulently used as the alter ego of another entity, NexPoint and HCMFA Obj. ¶ 5, and that SEC approval of transactions between related parties could itself defeat claims that such transactions were intended to defraud creditors, NexPoint and HCMFA Obj. ¶¶ 6–7, 10. Defendants simply declare these theories as "novel," and fail to cite a single case even considering such purported defenses.

Bankruptcy courts routinely adjudicate such issues of intent, and the need to do so does not even come close to forming a basis for mandatory withdrawal.[16] Additionally, HCMFA and NexPoint fail to provide any explanation as to why federal preemption would apply here, and do not (and could not) cite any law suggesting that compliance with securities laws preempts the Litigation Trustee's claims against them.

31. Finally, Defendants point to *Picard v. Flinn Investments,* 463 B.R. 280 (S.D.N.Y. 2011), and *Picard v. Avellino*, 469 B.R. 408 (S.D.N.Y. 2012), two Securities Investor Protection Act ("SIPA") cases[17] related to the Madoff scandal. *See* NexPoint and HCMFA Obj. ¶ 4. In *Flinn* and *Avellino*, the district court ordered partial withdrawal of specific issues (which arose across a swathe of Madoff cases) to be adjudicated by the district court, so that the bankruptcy court could then adjudicate the various SIPA cases in a manner consistent with those holdings. *Flinn*, 463 B.R. at 285–88; *Avellino,* 469 B.R. at 411–14. The securities law issues raised in those cases—for example, whether transfers to securities customers would satisfy antecedent debts when the underlying account statements were entirely fictitious (*Flinn*) and whether SIPA's incorporation of securities law concepts altered the standard for determining good faith for brokerage customers that received transfers from Madoff (*Avellino*)—were novel and complex. And those issues were essential to the determination of the claims.

[16] Intent is an issue of bankruptcy law, *see, e.g.*, 11 USC § 548(a)(1)(A), and corresponding state fraudulent transfer laws. HCMFA and NexPoint further suggest that Defendants undertook these transactions "on advice of counsel, to comply with securities law." NexPoint and HCMFA Obj. ¶ 7. Their brief is wholly devoid of any detail as to why securities law required these transactions. Again, this issue simply goes to Defendants' intent, a factor bankruptcy courts regularly consider in adjudicating actual fraudulent transfer claims.

[17] The SIPA itself is an amendment to the Securities Exchange Act of 1934. *See* Section 2 of the SIPA, 15 USC § 78bbb ("Except as otherwise provided in this Act, the provisions of the Securities Exchange Act of 1934 (15 U.S.C., sec. 78a and fol.; hereinafter referred to as the ''1934 Act'') apply as if this Act constituted an amendment to, and was included as a section of, such Act.").

32. In contrast, HCMFA and NexPoint's speculation that their defenses to the Claims will require consideration of securities law issues rests on their assertions that (a) their status as "registered investment advisors" means that their conduct will necessarily implicate "broad questions" of federal securities law, and (b) transactions approved by the SEC cannot be challenged on bases that have nothing to do with SEC approval. As already explained, neither contention even suggests, let alone demonstrates, that consideration of federal securities law will play any material role in this case. Thus, neither is sufficient to mandate withdrawal of the reference. *See Lifemark Hosps. of La., Inc. v. Liljeberg Enters., Inc.*, 161 B.R. 21, 24 (E.D. La. 1993) ("Where application of non-bankruptcy federal law is merely speculative, mandatory withdrawal is not necessary.").

2. Federal Tax Law Issues Do Not Necessitate Withdrawal

33. The Bankruptcy Court correctly rejected "Defendants' attempts to characterize what appear to be commonplace tax law issues" as a basis for mandatory withdrawal of the Litigation Trustee's avoidance claims under section 544(b) of the Bankruptcy Code. R&R at 19. Defendants argued to the Bankruptcy Court, as they do again here, that the Litigation Trustee's invocation of the statute addressing the IRS's time to pursue the collection of tax claims, 26 U.S.C. § 6502, necessitates consideration of federal tax law sufficient to mandate withdrawal of the reference. As the Bankruptcy Court determined, that contention is without basis.

34. As an initial matter, Defendants have abandoned one meritless argument they made to the Bankruptcy Court on this issue; namely, they now concede that the Bankruptcy Court may determine whether the Litigation Trustee can invoke 26 U.S.C. § 6502 as applicable law under section 544(b). *See* Okada Defs. Obj. ¶ 18. Defendants still maintain, however, that whether the statute affords the IRS a ten-year lookback period, such that the IRS (and thus the Litigation Trustee) may use section 6502 "to avoid transfers that predate any assessment or even the date that

tax liability first accrued," is an unsettled issue that requires material and substantial consideration of federal tax law.[18] Okada Defs. Obj. ¶ 17.

35. Defendants are wrong. The issue they raise is one of state fraudulent transfer law, not tax law. Numerous cases have held that a trustee standing in the shoes of the IRS may avoid transfers made even before the IRS became a creditor, and have done so on the basis of *state fraudulent conveyance laws* providing that *future* creditors may avoid a transfer (as incorporated through section 544(b) of the Bankruptcy Code), not federal tax law. As one such court explained, "whether a transfer is fraudulent as to, and therefore recoverable on behalf of, only existing creditors," as opposed to future creditors as well, "depends on the statute invoked by the trustee to support the avoidance claim." *See Hillen v. City of Many Trees, LLC (In re CVAH, Inc.)*, 570 B.R. 816, 841–42 (Bankr. D. Idaho 2017) (The IRS "need not have been a creditor at the time of the transfers under some of the statutes invoked by Trustee" because the relevant *state fraudulent transfer statute* provides that transfers "may be avoided by either creditors that existed at the time of the subject transfer, and those transfers that may be avoided by existing *and future* creditors.") (first emphasis added, second in original);[19] *see also Gordon v. Webster (In re Webster)*, 629 B.R. 654, 674 (Bankr. N.D. Ga. 2021) ("Some courts have found that § 6502 is a lookback period and that a trustee may avoid transfers that occur even prior to tax liability because *the 'applicable law' provides that certain transfers may be avoided even though they occurred before the creditor's claim arose*.") (emphasis added); *Shearer v. Tepsic (In re Emergency Monitoring Techs., Inc.)*, 347 B.R. 17, 18–19 (Bankr. W.D. Pa. 2006) ("[T]he Court cannot dismiss, at the present stage of

[18] Defendants acknowledge that the IRS' proofs of claim show that it has now assessed taxes for the tax period June 30, 2015, making this argument applicable only to claims to avoid transfers prior to that date. Okada Defs. Obj. ¶ 17.

[19] Texas' fraudulent transfer law provides for avoidance of transfers fraudulent as to future creditors. See Tex. Bus. & Com. Code. Ann. s 24.005(a) ("Transfers Fraudulent as to Present and Future Creditors").

the instant litigation, the chance that the I.R.S. could have avoided the aforesaid 1999 transfer *pursuant to 12 Pa.C.S.A. § 5104(a)(2)*, which statutory provision allows a 'future creditor' to avoid a transfer under certain circumstances.") (emphasis added); *DCHC Liquidating Tr. v. HCA Inc. (In re Greater Se. Cmty. Hosp. Corp. I)*, 365 B.R. 293, 305–06 (Bankr. D.D.C. 2006) ("The *IUFTA* allows future creditors to utilize its remedies. There is no great injustice in allowing HHS or the IRS to have a fraudulent transfer claim *under the IUFTA* without a set statute of limitations.") (emphasis added). Indeed, even the Fifth Circuit has acknowledged the ability of the IRS, as a "future creditor," to challenge transfers made prior to accrual of the IRS's claim. *United States v. Fernon*, 640 F.2d 609, 611 (5th Cir. 1981) ("On October 12, 1965, when his parents were liable to the Government as a present creditor for tax deficiencies in 1962, 1963, and 1964 *and as a future creditor for tax year 1965*, Fernon, Jr.'s father and mother transferred an ocean front lot and house to him individually.") (emphasis added).[20]

36. Courts' repeated reliance on state law fraudulent transfer statutes to determine the applicable limitations period for fraudulent transfer claims grounded in the IRS's creditor status does not involve substantial and material consideration of federal tax law. To the contrary, the interpretation of state fraudulent transfer laws is an exercise that is at the heart of bankruptcy court expertise. Indeed, the District Court for the Central District of California rejected a similar argument in *Marshack v. Cavanaugh (In re Ruby's Diner, Inc.)*, 2021 WL 4572001 (C.D. Cal. June 2, 2021), where it held that "whether the trustee can stand in the shoes of the IRS for purposes 11 U.S.C. § 544(b) *as to unassessed claims*" does not involve interpretation of the Internal

[20] The Okada Defendants contend that the Fifth Circuit's decision in *Remington v. United States*, 210 F.3d 281(5th Cir. 2000), is relevant, in that it notes that the IRS can commence collection efforts within 10 years of a tax assessment. Okada Defs. Obj. ¶ 19. But the decision is neither controversial nor relevant here. The Fifth Circuit did not address, let alone limit, the IRS's rights to collect taxes when due, even if prior to an assessment, and does not in any way suggest that the IRS, unlike other creditors, is not permitted to avoid transfers under state law that were fraudulent as to future creditors.

Revenue Code, but rather only "the trustee's powers under section 544(b)." *Id.* at *2 (emphasis added). The same is true here.

37. Additionally, the cases cited by Defendants demonstrate that the very issue Defendants invoke is universally addressed by bankruptcy courts, wholly undermining any suggestion that such courts are ill-equipped or unauthorized to make that determination. *Every* case cited by Defendants addressing the question of whether a trustee standing in the IRS's shoes may avoid a transfer predating assessment or accrual of the IRS's claim was decided by a *bankruptcy court*—not a district court—and not one of them even considered mandatory withdrawal on this basis. *See* Okada Defs. Obj. ¶ 20 and Former Employee Defs. Obj. n.9 (citing *Webster*, 629 B.R. at 674; *Luria v. Thunderflower, LLC (In re Taylor, Bean & Whitaker Mortg. Corp.)*, 2018 WL 6721987, at *6 (Bankr. M.D. Fla. Sept. 28, 2018); *Shearer*, 347 B.R. at 18–19; *Finkel v. Polichuk (In re Polichuk)*, 506 B.R. 405, 428 (Bankr. E.D. Pa. 2014); *In re Musselwhite*, 2021 WL 4342902, at *8-9 (Banrk. E.D.N.C. Sept. 23, 2021)). Defendants argue that these cases reveal a split among bankruptcy courts over whether a trustee may avoid a transfer predating accrual of the IRS's claim. Okada Defs. Obj. ¶ 19 (relying on *Webster* to argue the cases are "unsettled"). But Defendants do not cite to a single case *dismissing* an avoidance claim brought by a trustee standing in the IRS's shoes on the ground that the transfer pre-dated accrual of the claim. In *Webster*, the court *denied* a motion to dismiss a trustee's avoidance claims because "it is not apparent from the face of the Complaint that the claim is time-barred, and it does not appear beyond a doubt that Trustee can prove no set of facts that toll the statute." 629 B.R. at 674. Similarly, in *Taylor, Bean & Whitaker*, the court denied plaintiff's summary judgment motion as to transfers that occurred more than four years before the Petition Date. 2018 WL 6721987, at *6.

38. At bottom, Defendants cannot identify a single court that has withdrawn the reference because of this issue. Defendants' argument—which merely raises questions about the application of section 6502 to the facts alleged in this case—is precisely the type of attempt "to kick up some dust" that is insufficient to warrant mandatory withdrawal. *See Keach*, 2015 WL 3604335, at *7. Defendants' attempt to characterize the issue as sufficient to mandate withdrawal of the reference runs directly counter to the myriad bankruptcy decisions addressing just such issues without any need for the District Court's involvement.

C. THE BANKRUPTCY COURT'S RECOMMENDATION THAT IT SHOULD CONSIDER ALL PRETRIAL MATTERS CONFORMS WITH PRECEDENT AND PRACTICE, AND SHOULD BE ADOPTED BY THIS COURT

39. At the end of their respective objections, Defendants include half-hearted arguments as to why this action should be withdrawn to the District Court immediately, rather than upon certification that the claims are trial-ready. While the arguments are consistent with Defendants' repeated attempts to escape the jurisdiction of the court most familiar with their antics, *see* supra ¶ 6, they fall flat and should be rejected. Having presided over years of proceedings involving Defendants, the Bankruptcy Court is thoroughly familiar with Defendants' conduct and the extraordinarily complex structure of HCMLP and its myriad related entities, much of which is directly at issue in this adversary proceeding. Accordingly, the Bankruptcy Court's recommendation that it should handle all pre-trial matters—a common approach in this District that is expressly permitted by the local rules—will promote efficiency, and should be adopted by this Court, as well. *See* R&R at 20.

40. First, there can be no question that the Bankruptcy Court's recommendation that the action be withdrawn only when it is trial-ready is consistent with standard practice within the Northern District of Texas. Indeed, the Bankruptcy Court's Local Rule 5011-1 expressly provides

that a motion to withdraw the reference may "be granted upon certification by the bankruptcy judge that the parties are ready for trial" or that "the motion be granted but that pre-trial matters be referred to the bankruptcy judge." N. D. Tex. Bankr. Local R. 5011-1(a)(8)(B)–(C). Many cases have followed this very route, holding that withdrawal to the district court is proper only once the claims are certified as trial-ready.[21]

41. The existence of jury rights as to certain of the claims is not cause to vary from this standard practice. Bankruptcy courts routinely oversee pretrial matters until the case is trial-ready in actions that involve non-core claims and jury rights. *See Kaye*, 2006 WL 8437389, at *5 (stating "[t]he right to a jury does not require immediate withdrawal of the reference," and recommending withdrawal only when claims trial-ready); *see also Katchadurian v. NGP Energy Capital Mgmt., LLC (In re Northstar Offshore Grp., LLC)*, Adv. Proc. No. 18-03079, at 10–17 (Bankr. S.D. Tex. Sept. 25, 2019) (Dkt. No. 71) (recommending withdrawal only after pretrial matters where mix of core and non-core claims and valid jury demand), *report and rec. adopted*, Case No. 19-03740 (S.D. Tex. Nov. 4, 2019) (Dkt. No. 7); *Gregory Power Partners, LLC v. Reynolds Metals Co.*,

[21] *See Kaye v. Dupree (In re Avado Brands, Inc.)*, 2006 WL 8437389, at *4–5 (Bankr. N.D. Tex. Apr. 21, 2006) (recommending all pretrial matters be retained in the bankruptcy court, in case with multiple adversaries and overlapping legal issues), *report and rec. adopted*, 2006 WL 8436979 (N.D. Tex. July 3, 2006); *Highland Capital Mgmt.*, 2021 WL 2850562, at *7 (recommending that the reference be withdrawn in light of the movant's jury trial right, but only when the parties were ready for trial), *report and rec. adopted*, No. 3:21-CV-00881-X (N.D. Tex. Sept. 14, 2021) (Dkt. No. 14); *Baron v. Sherman (In re Ondova Ltd. Co.)*, Adv. Proc. No. 14-03121, at 20–21 (Bankr. N.D. Tex. June 29, 2016) (Docket No. 58) (recommending that the reference be withdrawn in light of the movant's jury trial right, but only when the parties were ready for trial), *report and rec. adopted*, No. 3:16-CV-0947-M (N.D. Tex. Aug. 12, 2016) (Dkt. No. 5); *Sherman v. Emke (In re Ondova Ltd. Co.)*, 2011 WL 3734479, at *3 (Bankr. N.D. Tex. Aug. 22, 2011) (recommending bifurcation of the core and non-core claims, retaining the former through a bench trial, retaining the latter for all pretrial matters), *report and rec. adopted*, 2011 WL 3739553 (N.D. Tex. Aug. 23, 2011); *Carpenter v. Holmes (In re TOCFHBI, Inc.)*, Adv. Proc. No. 07-3292, at 3 (Bankr. N.D. Tex. Jan. 25, 2008) (Dkt. No. 36) (recommending that the reference be withdrawn in light of the movant's jury trial right, but only when the parties were ready for trial), *report and rec. adopted*, No. 3:07-CV-2142-N (N.D. Tex. Feb. 7, 2008) (Dkt. No. 7).

Indeed, consistent with this standard approach, the Bankruptcy Court has consistently retained its administration over pretrial matters in adversary proceedings involving this Debtor or Reorganized Debtor. *See*, *e.g.*, Order Adopting Bankruptcy Court Report and Rec., *Highland Capital Mgmt. LP, et al. v. Highland Capital Mgmt. Servs., Inc.*, No. 21-01378 (N.D. Tex. July 26, 2021) (Dkt. No. 5); Order Adopting Bankruptcy Court Report and Rec., *Highland Capital Mgmt. LP, et al. v. NexPoint Advisors LP*, No. 21-00880 (N.D. Tex. July 28, 2021) (Dkt. No. 10).

2017 WL 3033424, at *2 (S.D. Tex. July 18, 2017) (adopting report and recommendation to withdraw reference only when trial-ready, noting that jury trial right does not require immediate withdrawal); *Miller v. Boutwell, Owens & Co., Inc. (In re Guynes Printing Co. of Tex., Inc.*), 2015 WL 3824070, at *3–5 (W.D. Tex. June 19, 2015) (denying motion to withdraw reference, notwithstanding potential right to a jury trial, without prejudice to renewing motion at conclusion of pre-trial proceedings). This is particularly true where, as here, a proceeding is in its early stages. *See Kaye*, 2006 WL 8437389, at *5 ("A District Court may consider a demand for a jury trial insufficient cause for discretionary withdrawal if the motion is made at an early stage of the proceedings and dispositive motions may resolve the matter.").

42. Second, under the circumstances of this case, "the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economical use of the debtors' and creditors' resources, and expediting the bankruptcy process," *Holland America Insurance v. Succession of Roy*, 777 F.2d 992, 999 (5th Cir. 1985), are all served by continued litigation in the Bankruptcy Court until the claims are ready for trial. The Bankruptcy Court is best suited to preside over this action, and to do so most efficiently, because of its knowledge of the Debtor's complex background, its familiarity with the Defendants and their conduct (both pre- and post-filing of the bankruptcy petition), and its adjudication of disputes that arose during the bankruptcy case, many of which involved facts directly germane to this action.

43. Additionally, the Bankruptcy Court has overseen the Debtor's bankruptcy case since December 2019, and also presided over the related Acis involuntary bankruptcy case; all Defendants objecting to the R&R testified and/or appeared in one or both of these proceedings.[22]

[22] *See*, *e.g.* [Bankr. Dkt. No. 505] (Notice of Appearance of James Dondero's counsel); [Bankr. Dkt. No. 2719] (Notice of Appearance of counsel for Mark Okada, Mark & Pamela Okada Family Trust – Exempt Trust #1 and Lawrence Tonomura as Trustee, and Mark & Pamela Okada Family Trust – Exempt Trust #2 and Lawrence Tonomura as Trustee); [Bankr. Dkt. No. 702] (Notice of Appearance of counsel for Scott Ellington, Isaac Leventon, and Frank

The Bankruptcy Court's familiarity with the parties and the issues, as well as its expertise in fraudulent transfer law, strongly favor continued litigation in that court. *See, e.g.*, *Tow v. Park Lake Cmtys., LP (In re Royce Homes)*, 578 B.R. 748, 762 (Bankr. S.D. Tex. 2017) (when "the bankruptcy court is familiar with the parties, the factual background, and the legal issues involved, the goals of judicial efficiency and economical use of the estate's resources are best met by allowing the suit to remain in the bankruptcy court"); *Veldekens v. GE HFS Holdings Inc.* (*In re Doctors Hosp. 1997, L.P.)*, 351 B.R. 813, 869 (Bankr. S.D. Tex. 2006) (given the court's familiarity with the parties, issues, and lengthy prior briefing, withdrawal would incur attorneys' fees and delays); *GenOn Mid-Atl. Dev., LLC v. Natixis Funding Corp.*, 2020 WL 429880, at *4 (S.D. Tex. Jan. 28, 2020) (the bankruptcy court's experience with the transactions and the impact of the litigation on current and future bankruptcy filings weighs in favor of the bankruptcy court hearing all pretrial matters).

44. Defendants' arguments that adjudication by the District Court would be more efficient are without merit, as they rely on inapposite cases where the bankruptcy judge had no familiarity with the matter, there was no evidence of forum shopping, or the case was predominated by non-core claims. *See, e.g.*, Okada Defs. Obj. ¶ 26 (citing *Yaquinto v. Mid-Continent Cas. Co. (In re Bella Vita Custom Homes)*, 2018 WL 2966838, at *2 (Bankr. N.D. Tex. 2018), *report and rec. adopted*, 2018 WL 2926149 (N.D. Tex. June 8, 2018) (case did not involve a *single* core claim); Dondero Defs. Obj. at 7 (citing *In re Quality Lease & Rental Holdings, LLC*, 2016 WL

Waterhouse); [Bankr. Dkt. No. 338] (Stipulation between HCMLP and Strand Advisors, Inc.); [Bankr. Dkt. No. 835] (Motion to Appear Pro Hac Vice for counsel of NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P.); [Bankr. Dkt. No. 1154] (Motion for Leave to Amend Proofs of Claim by Dugaboy Investment Trust); [Bankr. Dkt. No. 1595] (Notice of Appearance of counsel for Get Good Trust); [Bankr. Dkt. No. 77] (Notice of Appearance of counsel for Hunter Mountain Investment Trust); [Bankr. Dkt. No. 152] (Notice of Appearance of counsel for CLO Holdco, Ltd.); [Bankr. Dkt. No. 2718] (Objection to 2004 Examination by Charitable DAF Holdco, Ltd.); [Bankr. Dkt. No. 2248] (Motion to Reconsider by Charitable DAF Fund, L.P.); [Bankr. Dkt. No. 2547] (Notice of Response and Disclosures by Highland Dallas Foundation).

416961, at *6 (Bankr. S.D. Tex. Feb. 1, 2016), *report and rec. adopted*, 2016 WL 11644051 (S.D. Tex. Feb. 29, 2016)) (forum shopping ruled out because federal courts had exclusive jurisdiction over certain claims). Here, in contrast, withdrawing the reference would promote and reward forum shopping by diverting this action—which involves a mix of core, partly-core, and non-core claims—away from the court most familiar with the facts and parties involved. And, to the extent any inefficiency might result from the Bankruptcy Court overseeing this case until it is trial-ready, the Bankruptcy Court's extensive knowledge of the parties and the conduct at issue will lead to far greater efficiency gains all the way up to trial. In all events, there can be no question that the Bankruptcy Court could handle pre-trial oversight far more efficiently than a magistrate judge unfamiliar with the matter. *See* Hearing Tr. [Dkt. No. 18 at App. 5], 73:19-74:7 ("[I]t's been the typical practice of . . . bankruptcy judges in our district to usually recommend that the District Court only withdraw the reference upon certification by the Bankruptcy Court that the matter is trial-ready, and therefore defer to the bankruptcy judge the handling of pretrial matters, essentially acting as a magistrate. . . . Otherwise . . . [the District Court is] just going to have to get a magistrate to help . . . .").[23]

45. Defendants repeatedly ask why the Litigation Trustee seeks to litigate before the Bankruptcy Court, despite the obvious efficiencies of doing so. The more illuminating question is just the opposite: why are Defendants so eager to escape the court most familiar with their conduct? The answer is simple: they want a clean slate. But the Bankruptcy Court's familiarity with Defendants' conduct in connection with the HCMLP bankruptcy—including behavior that led the court to issue a temporary restraining order restricting Dondero from communicating with

[23] *See also Holland Am.*, 777 F.2d 992 at 999 (holding that the Bankruptcy Amendments Act authorizes bankruptcy courts "to function much like magistrates as adjuncts to the district court on matters that are merely 'related to' a bankruptcy").

Debtor employees, interfering with the Debtor's business, or causing or encouraging any entity under his control to interfere with Debtor's business[24]—weighs heavily in the other direction; it is a reason to keep the case before the Bankruptcy Court until it must be withdrawn, should the case ever reach that stage. *See Panda Energy Int'l, Inc. v. Factory Mut. Ins.*, 2011 WL 610016, at *7 (N.D. Tex. Feb. 14, 2011) (forum shopping reduced by keeping the action in front of the judge, where the "dispute" was filed almost two years ago); *Faulkner v. Berg, (In re Heritage Org LLC)*, Adv. Proc. No. 06-3401, Dkt. No. 76 at 9 (Bankr. N.D. Tex. Dec. 15, 2006) (recommending denying motion to withdraw where granting would encourage forum shopping); *Veldekens*, 351 B.R. at 869, 875–76 (finding "blatant forum shopping" most important *Holland* factor where movants feared adverse rulings).

IV. CONCLUSION

46. For the foregoing reasons, the Litigation Trustee respectfully requests that the Court affirm the Bankruptcy Court's *Report and Recommendation to the District Court Proposing That it: (A) Grant Defendants' Motions to Withdraw the Reference at Such Time as the Bankruptcy Court Certifies That Action is Trial Ready; But (B) Defer Pre-Trial Matters to the Bankruptcy Court*, and refer all pre-trial matters to the Bankruptcy Court unless and until non-core claims are trial ready.

[24] *See* Order Granting Debtor's Motion for a Temporary Restraining Order Against James Dondero, *Highland Capital Mgmt. L.P. v. Dondero (In re Highland Capital Management L.P.*), Adv. Proc. No. 20-03190 (Bankr. N.D. Tex. Dec. 10, 2020) (Dkt.. No. 10). Incredibly, Dondero violated the TRO, resulting in an order of contempt and a damages award of $450,000 to compensate for the concomitant harm caused to the estate. *See* Memorandum Opinion and Order Granting in Part Plaintiff's Motion to Hold James Dondero in Civil Contempt of Court for Alleged Violation of TRO, *Highland Capital Mgmt. L.P. v. Dondero (In re Highland Capital Management L.P.*), Adv. Proc. No. 20-03190 (Bankr. N.D. Tex. June 7, 2021) (Dkt. No. 191). This was the first of two times Dondero was held in contempt by the Bankruptcy Court. *See* Memorandum Opinion and Order Holding Certain Parties and Their Attorneys in Civil Contempt of Court for Violation of Bankruptcy Court Orders, [Bankr. Dkt. No. 2660] (Bankr. N.D. Tex. August 3, 2021).

Dated: May 4, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies, that on this 4th day of May, 2022, the undersigned caused to be served a true and correct copy of the *Litigation Trustee's Response in Support of the Bankruptcy Court's Report and Recommendation*, by electronically filing it with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

/s/ Paige Holden Montgomery
Paige Holden Montgomery