United States Courts
Southern District of Texas
FILED
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Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY ET AL., Plaintiffs, v. ENRON CORP. ET AL. Defendants.	§	CONSOLIDATED LEAD NO. H-01-3624
This pleading concerns:	§	
MARY BAIN PEARSON AND JOHN MASON Plaintiffs, v. ANDREW S. FASTOW, ET AL. Defendants.	§	CIVIL ACTION NO. H-02-3786
FRED ROSEN, ET AL., Plaintiffs, v. ANDREW S. FASTOW, ET AL. Defendants.	§	CIVIL ACTION NO. H-02-3787
HAROLD AHLICH, ET AL., Plaintiffs, v. ANDREW S. FASTOW, ET AL. Defendants.	§	CIVIL ACTION NO. H-02-3794
RUBEN AND IRENE DELGADO AND PRESTON CLAYTON Plaintiffs, v. ANDREW S. FASTOW, ET AL. Defendants.	§	CIVIL ACTION NO. H-02-3795

1158

OUTSIDE DIRECTORS' RESPONSE IN OPPOSITION TO THE SECOND MOTIONS TO REMAND OF THE PEARSON PLAINTIFFS, THE ROSEN PLAINTIFFS, THE AHLICH PLAINTIFFS, AND THE DELGADO PLAINTIFFS

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome J. Meyer, Frank Savage, John Wakeham, Charls E. Walker and Herbert S. Winokur, Jr., (collectively, the "Outside Directors") file this Response in Opposition to the Pearson Plaintiffs', Rosen Plaintiffs', Ahlich Plaintiffs', and Delgado Plaintiffs' (collectively, the "Plaintiffs") Second Motion[s] to remand.[1]

I. INTRODUCTION

The Plaintiffs concede, as they must, that this case is "related to" Enron's bankruptcy and is removable under 28 U.S.C. § 1452(a). That this Court may properly exercise subject matter jurisdiction over this lawsuit is therefore not in dispute. Instead, Plaintiffs seek remand based on a single alleged procedural defect in the Notice of Removal. Plaintiffs are wrong.

In acknowledgment of the fact that all of the substantive and procedural requisites to removal of this action have been and are satisfied, Plaintiffs assert as their sole objection to removal the argument that the Outside Directors' Notice of Removal is procedurally defective for lack of unanimous consent by all defendants. As set forth below, however, the so-called "unanimity rule" is not applicable to the removal of claims related to bankruptcy cases pursuant to § 1452.

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[1]Although not required, Defendants Jeffrey J. Skilling, Richard B. Buy, Richard Causey, Ken L. Harrison and Rebecca Mark-Jusbasche consented to and joined in the Outside Directors' Notice of Removal.

Accordingly, Plaintiffs motion to remand should be denied.

II. THE MAJORITY VIEW, AND MORE WELL-REASONED VIEW, IS THAT § 1452 REMOVALS NEED NOT BE CONSENTED TO OR JOINED BY ALL DEFENDANTS

A. The Removal Statutes

Removal of a state court lawsuit related to a federal bankruptcy may be accomplished either through the general removal statute, 28 U.S.C. § 1441(a), or through the bankruptcy removal statute, 28 U.S.C. § 1452(a). *Cycion Negro, Inc. v. RCA*, 260 B.R. 32, 35 (Bankr. S.D. Tex. 2001). These sections provide as follows:

> § 1441. Actions removable generally
>
> (a) Except as otherwise expressly provided by act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under ficticious names shall be disregarded. (Emphasis added).
>
> § 1452. Removal of claims related to bankruptcy cases
>
> (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such government unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title. (Emphasis added).

Section 1446, which has been interpreted in conjunction with § 1441 as the source of the "unanimity rule" that governs § 1441 removals, states as follows:

> § 1446. Procedure for removal
>
> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within with such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short

> and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action. (Emphasis added).

B. The Majority View, and the More Well-Reasoned View, is that Removal Pursuant to § 1452 is Not Subject to the "Unanimity Rule"

A majority of the courts that have addressed the issue of whether a § 1452 removal must satisfy the "unanimity rule" have concluded that unanimity is <u>not</u> required. While the *Creasy* and *Sommers* opinions are two of the most oft-cited cases on that point, they are by no means the only cases, and Plaintiffs' claim that these cases are "legally flawed and highly criticized" is patently false.

Creasy v. Coleman Furniture Corp., 763 F.2d 656, 660 (4th Cir. 1985), appears to have been the first case to address the applicability of the "unanimity rule" to § 1452 removals. The *Creasy* Court definitively concluded that unanimous consent is not required. *Id.* The Court stated that "in a § 1441 case involving multiple defendants, all of the defendants must agree to the removal of the state action. . . . <u>Under the bankruptcy removal statute, however, any one party has the right to remove the state court action without the consent of the other parties</u>." (Citation omitted; emphasis added).

Sommers v. Abshire, 186 B.R. 407, 408-409 (E.D. Tex. 1995), subsequently addressed the issue in more detail, reaching the same conclusion based on the following analysis:

> Generally, the removal procedure under 28 U.S.C. section 1446 requires all defendants to join or consent in the removal for this court to properly entertain the case. This procedural requirement is based on this circuit's interpretation of 28 U.S.C. section 1441(a). *See, e.g., Doe v. Kerwood*, 969 F.2d 165, 167 & n. 5 (5th Cir. 1992). Section 1441(a) states that:
>
>> any civil action brought in a State court of which the district courts of the United States have original jurisdiction, *may be removed by the defendant or the defendants*, to the district court of the United States

> for the district and division embracing the place where such action is pending. 28 U.S.C. § 1441(a) (emphasis added). . . .
>
> Section 1452 states, in relevant part, that "*[a] party may remove* any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." 28 U.S.C. § 1452 (emphasis added). Under section 1452, any defendant has the right to remove a state court action without the consent of the other parties. *Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 660 (4th Cir. 1985); *In re Eagle Bend Development*, 61 B.R. 451, 457 (Bankr. W.D. La. 1986).
>
> The plain language of section 1452 differs from the language of 28 U.S.C. section 1441(a) in that section 1452 permits "a party" to remove an action from state court. In *Creasy*, the court refused to interpret section 1452 the same way as section 1441(a) and held that, in bankruptcy related matters, any one party may remove the state court action without the consent of the other parties. *Creasy*, 763 F.2d at 660; *see also In re Eagle Bend Development*, 61 B.R. at 456-57 (adopting *Creasy* and holding same).
>
> This court also refuses to afford similar interpretations to section 1441(a) and section 1452.

Id. (Emphasis in original).

Since *Creasy* and *Sommers*, many other courts have likewise held that any single defendant may unilaterally remove an action pursuant to § 1452. *E.g., Joe Conte Toyota, Inc. v. Howell*, 1997 WL 222410, *1 (E.D. La. 1997); *Plowman v. Plowman*, 218 B.R. 607, 616 (Bankr. N.D. Ala. 1998); *In re Asbestos Litigation*, 271 B.R. 118, 120, n. 2 (S.D. W.Va. 2001); *Beasley v. Personal Finance Corp.*, 279 B.R. 523, 529 (S.D. Miss. 2002); *Mid-Atlantic Res. Corp. v. Mate Creek Loading, Inc.*, 283 B.R. 176, 183-84 (S.D. W.Va. 2002).[2] Also, many other courts, while not making a ruling on the "unanimity rule" issue, have nonetheless recognized the fact that § 1452 creates an individual

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[2]Some of these opinions simply cited *Creasy* and/or *Sommers* as the basis of their holding, *e.g., Joe Conte Toyota*, 1997 WL 22241 at *1, *Plowman*, 218 B.R. 607 at 616, and *In re Asbestos Litigation*, 231 B.R. 118 at 120 n. 2, while others both cited *Creasy* and/or *Sommers* and engaged in their own analysis of the various statutory provisions in reaching their decisions, *e.g., Beasley*, 272 B.R. at 529, and *In re Mid-Atlantic Res.*, 283 B.R. at 183-184.

right of removal. *E.g., Ownby v. Cohen*, 2002 WL 1877519, *2 (W.D. W.Va. 2002); *Funquest Vacations, Inc.*, 1998 WL 124222, *1, n. 5 (Bankr. E.D. Pa. 1984); *In re Eagle Bend Dev.*, 61 B.R. 451, 456-57 (Bankr. W.D. La. 1986); *see also generally Daleske v. Fairfield Communications, Inc.*, 17 F.3d 321, 323 (10th Cir. 1976), *cert. denied*, 114 S.Ct. 1832 (1994) (emphasizing that § 1441 is a general removal statute permitting removal by "defendants," while § 1452 permits removal by any "party"); *Roper v. American Health & Fire Ins. Co.*, 203 B.R. 326, 331 n. 3 (Bankr. N.D. Ala. 1996) (noting that § 1452(a) allows "any party" to remove); *In re Lazan*, 237 F.3d 967, 973, n. 2 (9th Cir. 2001), *cert. denied*, 122 S.Ct. 458 (2001) (same). Moreover, the principle that § 1452 allows one party to remove without the consent of the other parties has been recognized in several secondary sources. *E.g.*, 8A C.J.S. Bankruptcy § 24 (2002) (citing *Creasy*); 9 AM. JUR. 2d Bankruptcy § 664 (2002) (citing *Creasy*); 6A Bankr. Service L.Ed. § 59.795 (2002) (citing *In re Asbestos Litigation*); 5 Fed. Proc., L.Ed. § 9:424 (2002) (citing *Sommers*).

As these cases exemplify, Plaintiffs' assertion that *Creasy* and *Sommers* have not been widely accepted in other jurisdictions is false. Moreover, it is clear that *Creasy* and *Sommers* reached the correct decision. "The language of the specific statutory authority for removal is the controlling factor in determining whether a defendant must obtain the consent of co-defendants." *Doe v. Kerwood*, D.O., 969 F.2d 165, 168 (5th Cir. 1992). As discussed in *Sommers*, *Beasley* and *In re Mid-Atlantic*, Congress' decision to allow removal pursuant to § 1441 only by "the defendant or the defendants," but pursuant to § 1452 by any "party" should properly be interpreted as intending to require unanimous action by multiple defendants pursuant to § 1441, but to allow unilateral action by a defendant pursuant to § 1452. *See generally, In re Pacor, Inc.*, 72 B.R. 927, 931 (Bankr. E.D. Pa. 1987), *aff'd*, 86 B.R. 808 (E.D. Pa. 1987) (noting that it is error to "neglect[] to take into account

the significant differences between removal under § 1452 and § 1441, the bankruptcy policies implicit in those differences and the purpose behind the passage of [§ 1452's predecessor]"). This conclusion is consistent with the conclusion in *Doe* that the language of § 1442 governing the removal of cases against federal officers or agencies allows unilateral removal by defendants in those cases:

> [F]ederal officers . . . have their own specific removal statute. The fact that these parties may remove without the consent of co-defendants is based on the language of those statutes. For example, the ability of federal officers to remove cases is set forth in 28 U.S.C. § 1442. The language of that section does not refer to 'the defendant or the defendants.' Instead it states that '[a] civil action . . . commenced in a State court against any of the following persons may be removed *by them* . . .' As Judge Friendly succinctly stated, 'even the most literal reading would permit the federal officer alone to remove . . . 'by them' means 'by any of the following persons' and the defendants who are not federal officers are not such persons.' Thus, the ability of federal officers to remove without the consent of co-defendants is based on the language of the statute that gives them the right to remove.

Id. at 16. (Footnotes omitted). Just as *Doe* concluded that § 1442's authorization of removal "by them" allowed unilateral removal, § 1452's authorization of removal by "a party" likewise should be interpreted as allowing unilateral removal.

Plaintiffs' suggestion that the Supreme Court's opinion in *Things Remembered v. Petrarca*, 116 S.Ct. 494 (1995), implies that § 1446's unanimity requirement is applicable to § 1452 removals, is erroneous. *Things Remembered* merely found that under the particular facts at issue in that case, the remand appealability provisions of §§ 1447(d) and 1452(b) could "comfortably coexist in the bankruptcy context" and therefore both be given effect. It simply affirmed a Sixth Circuit decision that § 1447(d) and § 1452(b) barred appellate review of a district court's remand order based on untimely removal. Courts in the Fifth Circuit and elsewhere have rebuffed arguments that *Things Remembered* made § 1452 removals subject to all of the general removal procedural dictates in

§§ 1446 and 1447. In the context of competing remand statutes, for example, *In re Reliance Group Holdings, Inc.*, 273 B.R. 374, 389 n. 24 (Bankr. E.D. Pa. 2002), summarized the reaction of bankruptcy courts to *Things Remembered* as follows:

> [B]ankruptcy courts that have considered the U.S. Supreme Court's decision in *Things Remembered* and the relationship between the general remand statute (28 U.S.C. § 1447(c)) and the more specific bankruptcy remand statute (28 U.S.C. § 1452(b)) have said:
>
> > [*Things Remembered*] which holds that § 1447(c) and § 1452(b) can 'comfortably coexist in the bankruptcy context,' means that § 1447(c) can be applied to bankruptcy removals and remands instead of (or to fill gaps in) § 1452(b) and its implementing rules when: (1) the preconditions of § 1447 are satisfied; and (2) doing so could not be inconsistent with § 1452(b). *Things Remembered*, 516 U.S. at 127, 116 S.Ct. at 497.
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> *In re Hotel Mt. Lassen, Inc.*, 207 B.R. 935, 939 (Bankr. E.D. Ca. 1997). *See also In re Cicion Negro, Inc.*, 260 B.R. 832, 836 (Bankr. S.D. Tex. 2001).

Texas bankruptcy courts, in the post-*Things Remembered* era, have held both that § 1447(c)'s grant of discretion for allowing an award of costs and expenses incurred in opposing an improper removal applies only to § 1441 removals, not § 1452 removals, *In re Hofmann*, 248 B.R. 90, 93 (Bankr. W.D. Tex. 2000), and that § 1447(c)'s 30-day time limit for motions to remand applies only to § 1441 removals, not § 1452 removals, *In re Cicion Negro, Inc.*, 260 B.R. 832, 835 (Bankr. S.D. Tex. 2001). Because applying § 1446's "unanimity rule" would be inconsistent with § 1452's unilateral removal provision, *Things Remembered* should likewise not be interpreted as making § 1446's "unanimity rule" applicable to § 1452 removals. *See generally, Hofman*, 248 B.R. at 93 ("Section 1447(c) does not apply to removals under § 1452. Bankruptcy removal has its own independent scheme--its own standard for accomplishing removal, its own procedural rules, its own removal mechanism. *See* 28 U.S.C. § 1452; Fed. R. Bankr. P. 9027. The general removal statute

and its processes, while well-suited for discrete litigation, are not designed to handle the unique demands of the bankruptcy process."); *Cicion Negro*, 260 B.R. at 835 ("The statutory provision relied upon to remove the state court lawsuit determines which scheme is substantively applied when deciding whether to remand the case. Section 1447 governs remand of cases previously removed under § 1441(a), whereas § 1452(b) was enacted to govern remand of bankruptcy related claims or causes of action removed under § 1452(a)."). Based on this precedent and the fact that applying § 1446's procedural "unanimity rule" would be inconsistent with § 1452's substantive grant of authority for any "party" to remove, § 1446's "unanimity rule" is not applicable to § 1452 removals.

C. The Cases Cited by Plaintiffs in Support of Their "Unanimity Rule" Assertion are not Persuasive

The cases cited by Plaintiffs in favor of the application of the "unanimity rule" should not be considered persuasive authority by this Court. Plaintiffs cite five cases from three jurisdictions (the Middle District of Alabama, the Southern District of Iowa and the Eastern District of Louisiana) which addressed the applicability of §1446's "unanimity rule" to §1452 removals. The first Louisiana case, *Hills v. Hernandez*, 1998 WL 241518, 1-2 (E.D. La. 1998), simply cited a §1446 "rule of unanimity" case without even acknowledging the issue of whether that rule is applicable in a § 1452 case, or the fact that two other Fifth Circuit cases – *Sommers* and the *Joe Conte Toyota* case from the Eastern District of Louisiana itself – had already held that unanimity is not required under §1452. The second case, *Whitney Nat'l Bank v. Bunch*, 2001 WL 87443, *2 (E.D. La. 2001), simply cited *Hills*' holding in *dicta* in a footnote. The *Hills* and *Whitney* holdings are simply erroneous conclusions made wholly without independent analysis or reference to precedent. In contrast, the language of the removal statutes themselves and the more well-reasoned authorities and analysis discussed above makes clear that the "unanimity rule" of § 1446 does not apply to § 1452.

The case cited by Plaintiffs from the Southern District of Iowa, *Ross v. Thousand Adventures of Iowa, Inc.*, 178 F. Supp. 2d 996, 1002 (S.D. Iowa 2001), is also an erroneous and/or distinguishable one. *Ross*'s conclusion that unanimity was required was based on its decision that it could not adopt the "*Sommers* rule." The Court identified three reasons for its decision not to follow *Sommers*. The first reason was its belief that *Sommers* did not represent the majority rule, in support of which it cited *Hills* and *Intra Muros Trust v. Truck Top Scale Co.*, 163 B.R. 344 (N.D. Ind. 1994), which, as discussed below, in fact dealt with applying §1446's time limitations to §1452 removals, not with applying the unanimity rule; and which itself is in the minority view. As set forth in this response, the *Ross* court was in error on this point -- *Sommers* is in fact consistent with the majority view. The second reason was its concern that the *Sommers* court placed too much emphasis on the term "a party" in §1452, noting that §1446(a) also states that "a defendant" can file a notice of removal, yet there is no question that the unanimity rule applies there. This reasoning is flawed as well, however, because as pointed out in one of the very Alabama cases relied on by Plaintiffs, "the *Ross* court's comparison of the language of §1452(a) to that of §1446(a) may be unavailing, as §1446 provides the <u>procedure</u> for removal, whereas §1441 <u>authorizes</u> removal based on federal question of diversity jurisdiction [and] §1452(a) <u>authorizes</u> bankruptcy jurisdiction removal." *Retirement Sys. Of Ala. v. Merrill Lynch & Co.*, 209 F. Supp. 2d 1257, 1263-64 (M.D. Ala. 2002) (emphasis in original). The third and final reason that the *Ross* court declined to adopt the "*Sommers* rule," and the most important in terms of distinguishing it, was the Court's acknowledgment that *Sommers* was controlled by Fifth Circuit law, and that Fifth Circuit law "substantially diverges from that of the Eight Circuit with respect to removal." *Ross*, in short, should not be persuasive as precedent in this case because its reasons for rejecting the "*Sommers* rule" were erroneous and/or

distinguishable.

As regards the two Alabama cases, *Retirement Sys. of Ala. v. Merrill Lynch*, 209 F.Supp.2d at 1261-64 and *Retirement Sys. of Ala. v. J. P. Morgan Chase*, 2002 WL 31202455*4-5 (M.D. Ala. 2002), in both cases Judge Albritton declined to order a remand on the ground that the defendants' non-unanimous removal was procedurally defective. Those cases therefore did not in fact hold that the "rule of unanimity" necessarily governs §1452 removals, nor would they in any event be governing Fifth Circuit precedent.

Finally, Plaintiffs cite three additional cases which do not hold that § 1446's "unanimity rule" governs § 1452 removals, but only that §1446's 30 day limitations period governs §1452 removals as well. *See Intra Muros*, 163 B.R. at 345, *State Bank of Lombard v. Chart House, Inc.*, 46 B.R. 468, 472-73 (N.D. Ill. 1985), and *Allen County Bank & Trust Co. v. Valvmatic Int'l Corp.*, 51 B.R. 578, 581 (N.D. Ind. 1985). These cases are not persuasive on the issue of the applicability of the "unanimity rule" to § 1452 removals. Indeed, they do not even address the "unanimity rule" issue. The issue addressed in these three cases was whether Congress' repeal of § 1478 (§ 1452's predecessor, which provided for removal to the "bankruptcy court" instead of to the "district court" as in § 1452) and enactment of § 1452 meant that Rule 9027 of the Bankruptcy Code, which set forth the time deadlines governing removals to the "bankruptcy court," no longer applied, and that § 1446's time limitations therefore governed § 1452 removals. While the *Chart House, Valvmatic* and *Intra Muros* cases held that § 1446's 30 day limitations period governed § 1452 removals, these holding are not relevant to the "unanimity rule" issue. Moreover, these opinions have been criticized and expressly rejected by the more numerous courts that have concluded that § 9027, <u>not</u> § 1446, governs § 1452 removals, and they have been widely identified as being the minority view

on that issue. *E.g.*, *In re Eagle Bend*, 61 B.R. at 458; *In re Pacor*, 72 B.R. at 930-31; *Aztec Indus., Inc. v. Standard Oil Co.*, 84 B.R. 464, 469 (Bankr. N.D. Ohio 1987); *In re Revco D.S., Inc.*, 99 B.R. 768, 771-72 (N.D. Ohio 1989); *Donington, Karcher, Salmond, Ronan & Rainone, P.A.*, 194 B.R. 750, 755-76, n. 3 (D.N.J. 1996); *Textron Inv. Mgmt. Co. v. Struthers Thermo-Flood Corp.*, 169 B.R. 206 (D. Kan. 1994). As succinctly summarized in *In re Pacor*:

> *Chart House*, whose reasoning was largely followed in the *Valvmatic* [and *Intra Muros*] decision[s], simply neglects to take into account the significant differences between removal under § 1452 and 1441, the bankruptcy policies implicit in those differences and the purpose behind the passage of § 1478.

In re Pacor, 72 B.R. at 931. These three cases, then, not only fail to address the relevant issue of the "unanimity rule" to § 1452 removals, but have been widely criticized for their resolution of the issue they did address. They should certainly have no impact on the Court's decision in this case.

CONCLUSION

For the reasons set forth herein, the Outside Directors request that Plaintiffs' Second Motion to Remand be denied.

Respectfully submitted,

GIBBS & BRUNS, L.L.P.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this pleading was served on the ESL website, as well as all counsel on the attached Service List of record on November 22, 2002 via certified mail, return receipt requested.

Robin C. Gibbs / by BTR w/ permission
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The Service List

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