United States Courts
Southern District of Texas
ENTERED

JUL 23 2003

Michael N. Milby, Clerk

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

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§ § §	MDL 1446
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§ § § § § § § § §	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
JOE H. WALKER, ET AL., Plaintiffs, VS. ARTHUR ANDERSEN, L.L.P., ET AL. Defendants.	§ § § § § § § § §	CIVIL ACTION NO. H-03-2345

ORDER OF CONSOLIDATION

Pursuant to the order of transfer by the Judicial Panel on Multidistrict Litigation and the order of consolidation entered in lead case H-01-3624, *Newby v. Enron Corp. et al.*, on December 12, 2001, the above referenced case, H-03-2345, *Walker, et al. v. Arthur Andersen L.L.P., et al.*, is hereby CONSOLIDATED into H-01-3624.

Pending before the Court in member case number H-03-2345, which was brought by Enron bond purchasers asserting claims for common law fraud, conspiracy, intentional infliction of emotional distress, and negligent misrepresentation under Tennessee state law against current and former officers and members of the board of directors of Enron Corporation and Enron's

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auditor, are Plaintiffs' motion to remand (instrument #9) on the grounds that not all served Defendants timely filed a separate notice of consent to the removal and (2) Defendants' joint motion to amend the notice of removal by way of supplementation and joint statement of unanimous consent (#16).

Walker et al. v. Arthur Andersen LLP et al., filed on November 6, 2002, was removed from the Circuit Court for Davidson County, Tennessee of the United States District Court for the Middle District of Tennessee, by Outside Directors Robert A. Belfer, Norman P. Blake, Jr., John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome J. Meyer, Frank Savage, Charles E. Walker, and Herbert S. Winokur on December 5, 2002, less than thirty days after service of process on them, as required by 28 U.S.C. § 1446.[1] The notice of removal states that diversity jurisdiction, "related to" bankruptcy jurisdiction, and supplemental jurisdiction exist here, none of which is contested by Defendants. It also states that the Outside Directors began receiving their copies of the initial pleading on November 8, 2002. Certified mail receipts reflect that service was also effected on Defendants Kevin P. Hannon, Joseph W. Sutton, and Rebecaa Mark-Jusbasche on November 12, 2002; on Defendants David W. Delainey, Stanley C. Horton, and Steven J. Kean on November 13, 2002; on Defendants Mark A. Frevert and Richard B. Buy on November 14, 2002; on Defendants Kenneth L. Lay

[1] Plaintiffs incorrectly compute the 30 days from the date the complaint was filed, rather than the date when service was first effected.

and Jeffrey K. Skilling on November 15, 2002; on Defendant Richard A. Causey on November 18, 2002; on Defendant Lou L. Pai on December 3, 2002; and on Defendant Ken L. Harrison on December 5, 2002. The notice further states that Defendants Lay, Skilling, Pai, Causey, Frevert, Hannon, Horton, Kean, Rice, Whalley, Buy. Koenig, McConnell, McMahon, Olson, Sutton, Mark-Jusbasche, and Delainey requested extensions of time to respond, thereby demonstrating that they had been served or otherwise received a copy of the initial pleading.

Plaintiffs Joe H. Walker, Andrew H. Walker, and Deborah C. Walker moved for remand on December 31, 2002 on the sole grounds that no Defendants other than the Outside Directors have filed a notice to remove or any type of writing consenting to the removal or joining in the notice filed by the Outside Directors within the thirty-day period permitted for such filing under 28 U.S.C. § 1446(b)("The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . ."), a procedural defect in violation of the rule of unanimity. Plaintiffs argue that therefore the case must be remanded under 28 U.S.C. § 1447(c). Plaintiffs maintain that once the thirty-day period for removal expires, Defendants may not amend to cure the defect. Moreover, as is the case with their motion to remand, "when a party timely presents a motion to remand complaining of a procedural defect,

remand is required." *Thompson v. Louisville Ladder Corp.*, 835 F. Supp. 336, 340 (E.D. Tex. 1993).

Defendants subsequently filed their joint motion to amend the notice of removal by way of supplementation and joint statement of unanimous consent on January 10, 2003 to cure the defect and point out that under a recent line of cases in the Sixth Circuit, technical defects in a notice of removal are curable even after the thirty-day period for removal, especially when the facts of federal jurisdiction exist, as here. *Jordan v. Murphy*, 111 F. Supp. 2d 1151, 1152 (N.D. Ohio 2000), *citing Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co.*, F.3d 963, 969 (6th Cir. 1993)(permitting amendment after removal papers failed to state the citizenship of the removing defendant partnership), and *Gafford v. General Elec. Co.*, 997 F.2d 150, 164 (6th Cir. 1993)(permitting amendment after removal papers failed to state removing defendant's principal place of business).

In *Jordan*, the first served Defendant timely removed the case from state court and stated in its notice of removal that the other defendants had consented to the removal. The other defendants, however, failed to file written consents to the removal until more than thirty days after all of the defendants had been served. The district court, relying on *Tech Hills* and *Gafford*, found the rule of unanimity had been satisfied and allowed the defendants to cure the procedural defect by filing an amended statement indicating again the consent of all defendants to the removal. 111 F. Supp.2d 1152-53.

Defendants also cite *Klein v. Manor Healthcare Corp.*, 19 F.3d 1433 (Table), Nos. 92-4328 and 92-4347, 1994 WL 91786 (6th Cir. Mar. 22, 1994), in which the panel, noting the recent trend "express[ing] a reluctance to interpret statutory removal provisions in a grudging and rigid manner, preferring instead to read them in a light more consonant with a modern understanding of pleading practices," held that where "jurisdictional facts do indeed exist," "a petition for removal may be amended under the same considerations governing the amendment of any other pleading containing jurisdictional allegations." *Id.* at *4. In *Klein* the defendants removed a disability discrimination case to federal court, without joining one defendant who had not yet been served, but the removal petition did not explain the reason why that party had not joined the consent. The district court allowed the defendants to amend to explain the non-joinder. On appeal, the panel commented,

> Here, the parties did not dispute that the district court could, pursuant to a properly-drafted removal petition, exercise federal question jurisdiction over plaintiff's action; the only question was whether the failure to strictly comply initially with the niceties of the removal procedures court prevent the court from doing so. To preclude federal jurisdiction in this instance, we feel, would contravene the spirit of the more recent case law on the subject. We decline to so hold, and accordingly, we reject plaintiff's argument founded on defendant's failure to initially explain Vadis's failure to join his co-defendants' removal petition.

Id. at *5. *See also Greenwood v. Delphi Automotive Systems, Inc.*, 197 F.R.D. 597, 599-600 (S.D. Ohio 2000)(holding that defect in

notice of removal signed by licensed attorneys who were not members of the bar of the district court was curable by their subsequent timely admission *pro hac vice*).

In opposition Plaintiffs argue that in these cases, the particular defect which amendment was permitted to cure was a minor, technical one (e.g., in *Gafford*, the notice of removal was timely, but merely failed to identify the principal place of the business except as "other than Kentucky"; in *Tech Hills*, the notice again was timely, but failed to identify the citizenship of the sole defendant; and in *Klein*, the notice failed to explain that Vadis did not join in the removal because he had not yet been served) and that otherwise amendment would be contrary to the clear language with the 30-day deadline of the statute.

This Court disagrees. First Defendants' explanation fails to account for the facts and holding in *Jordan*. Second, the language in these opinions about the new trend is expansive and makes no express limitation such as that proposed by Plaintiffs. Third, in *Klein*, 1994 WL 91786 at *5, the Sixth Circuit stated,

> "Although *Gafford* and [*Stanley Elec. Contractors Inc. v. Darin & Armstrong Co.*, 997 F.2d 150 (6th Cir. 1993)] both involved a jurisdictional deficiency (*i.e.*, failure to adequately state grounds for diversity jurisdiction) in a defendant's removal petition, we think the reasoning of both courts is equally relevant in the context of an alleged procedural deficiency (*i.e.*, failure to include all defendants in a removal petition). Here, the parties did not dispute that the district court could, pursuant to a properly drafted removal petition, exercise federal question jurisdiction over plaintiff's action; the only question was whether the failure to

> strictly comply initially with the niceties of the removal procedures could prevent the court from doing so. To preclude federal jurisdiction in this instance, we feel would contravene the spirit of the more recent case law on the subject.

Fourth, the Sixth Circuit's expansive amendment policy is consistent with and in *Walker, et al. v. Arthur Andersen L.L.P., et al.* would lead to the same result as the Sixth's Circuit's "last-filed" rule, an issue raised by the fact that Defendants Kenneth D. Rice, Lawrence G. Whalley, Mark E. Koenig, Michael S. McConnell, Jeffery McMahon and Cindy K. Olson (collectively, "Certain Officer Defendants") filed their notice of removal (#21 and 22) on January 17, 2003, a week later than the other non-Outside Director Defendants. Certain Officer Defendants explain in their notice that they still had not been served at the time they filed their notice, acknowledged that they had consented to removal when asked by the first removing Defendants, acknowledged that on December 20, 2002 they had filed an agreed order for extension of time to respond to the complaint even though they had not been served, and then filed their notice of removal within thirty days of filing that agreed order for extension of time. They maintain that their notice is therefore timely under 28 U.S.C. § 1446(b), *citing Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354-56 (1999)(30-day period for removal begins to run only when a defendant is formally served with process).

This Court agrees that their notice is timely. More important, the Sixth Circuit follows the "last filed" rule[2] in multi-defendant cases where defendants are served at different times in determining when and whether a defendant can remove a case, and in the instant case would lead to the same result as the Sixth Circuit's liberal curative amendment policy. Under the Sixth Circuit's approach, each later-served defendant has thirty days from the time he is served with process to remove a case to federal court if the other defendants consent, even if the case has previously been remanded for a procedural defect in a prior removal by an earlier served defendant. *Brierly v. Alsuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000).[3] In *Brierly*, following the first removal, the district court remanded the case to state court because the removing defendant failed to meet his burden to demonstrate that there was diversity among all parties. *Id.* at 530. When a second defendant was served more than eighteen months

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[2] In contrast, in multi-defendant cases the Fifth Circuit follows the first-served rule, which mandates that removal by any defendant must occur within thirty days of service of process on the first defendant, with the consent of all served defendants. *Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986); *Getty Oil Corp. v. Ins. Co. of North America*, 841 F.2d 1254 (5th Cir. 1998). The majority of courts apply the first-served rule.

[3] The Sixth Circuit noted that even the two leading treatises support different rules: Wright & Miller allows the later-served defendant 30 days to remove, while Moore's Federal Practice observes the first-filed rule. 184 F.3d at 532 n.2, *citing* 14C Charles A Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction section 3739 at 336-39 (3d ed. 1998), and Moore's Federal Practice section 107-30[3][a] (3d ed. 1997).

later, again on diversity grounds, he was permitted to remove within thirty days of formal service on him. The Sixth Circuit explained,

> [A]s a matter of statutory construction, holding that the time for removal commences for all purposes upon service of the first defendant would require us to insert "first" before "defendant" into the language of [Section 1446]. We are naturally reluctant to add additional words into the statute. If Congress had intended the 30-day removal period to commence upon service of the first defendant, it could have easily provided so. For that reason, and as a matter of fairness to later-served defendants, we hold that a later-served defendant has 30 days form the date of service to remove a case to federal district court, with the consent of the remaining defendants. [citations omitted]

Id. at 533. It went further and held that "the one-year limitation on removal of diversity cases applies only to those that were not initially removable . . . ." *Id.* at 534. Moreover, the Sixth Circuit ruled that the first-served defendant could consent to the later-served defendant's removal even though the first-served defendant had "already failed in its own efforts to remove." *Id.* at 533 n.3. The appellate court observed, "Given the rule of unanimity, holding otherwise would vitiate the removal application of the later-served defendants and thereby nullify [its] holding that later-served defendants are entitled to 30 days to remove the case to district court." *Id.*

Pursuant to the *Brierly* ruling, even if this Court were to grant Plaintiffs' motion to remand based on a defective removal by the Outside Directors because of failure to join (i.e., obtain written consent) of all served Defendants, the subsequent notice

of removal filed by Certain Defendants would be timely and proper to remove the whole case again.

Although the Sixth Circuit's view is clearly at odds with the strict construction approach of the majority of courts, nevertheless, this case was properly removed under its law. The original notice of removal stated that all defendants consented to the removal, and all have either signed the proposed amended notice or, in the case of the Certain Officer Defendants, filed their own timely notice of removal. No one has challenged the assertion of diversity, "related to" bankruptcy jurisdiction, and supplemental jurisdiction.

In addition, although there is a split of authority, the majority of courts addressing the issue have concluded that the unanimity rule does not apply to removal based on "related to" bankruptcy jurisdiction, and that one party may remove a case from state court under 28 U.S.C. 1452 without the consent of other parties. *See, e.g., Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 660 (4th Cir. 1985); *Daleske v. Fairfield Communities, Inc.*, 17 F.3d 321, 323 (10th Cir.), *cert. denied*, 511 U.S. 1082 (1994); *In re Lazar*, 237 F.3d 967, 973 n. 2 (9th Cir.), *cert. denied sub nom. California v. Schulman*, 534 U.S. 992 (2001); *Sommers v. Abshire*, 186 B.R. 407, 408-09 (E.D. Tex. 1995). While this Court will be examining "related to" bankruptcy jurisdiction with respect to a number of motions filed in other member cases, and will also review this action to determine whether it exists here,

Plaintiffs have not thus far contested Defendants' claim that it does.

Accordingly the Court

ORDERS that Defendants' joint motion to amend is GRANTED and Plaintiffs' motion to remand is DENIED.

SIGNED at Houston, Texas, this 22nd day of July, 2003.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE