

United States Court
Southern District of Texas
FILED

AUG 06 2003

Michael N. Milby, Clerk

C.H.

**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.

CIVIL ACTION NO. H-01-3624
AND CONSOLIDATED
CASES

ENRON CORPORATION, ET AL.,

Defendants

JOE H WALKER, et. al.,

Plaintiffs

v

CIVIL ACTION NO. H-03-2345

ARTHUR ANDERSEN, LLP, et. al.,

Defendants

**PLAINTIFFS' MOTION TO RECONSIDER/ALTER OR AMEND JUDGMENT
DENYING THE PLAINTIFFS' MOTION TO REMAND**

The Plaintiffs, pursuant to the Federal Rules of Civil Procedure, respectfully request the Court to reconsider its denial of the Plaintiffs' Motion to Remand and Plaintiffs' Response to the Defendants' attempted amendments. The Plaintiffs were waiting to file the accompanying Supplement apply Fifth Circuit Precedent to the Motion to Remand until this case was numbered and identified pursuant to the Southern District of Houston's identification system. The Plaintiffs' regularly checked the Pacer system to discover the number assigned to this case, however, the first entry regarding this case was the Order of Consolidation that denied the Motion to Remand. This Order was entered on July 23, 2003 and was not received by the

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Plaintiffs until July 28, 2003. Accordingly, the Plaintiffs never had the opportunity to state their arguments that Fifth Circuit precedent should apply to the Remand Motion, nor did the Plaintiffs have the opportunity to support their claims under Sixth Circuit authority in a hearing on this issue. Therefore, the Plaintiffs respectfully file this request along with the Plaintiff's Memorandum setting forth Fifth Circuit authority.

I. Fifth Circuit Authority Applies

“When a case is transferred from a district in another circuit, *the precedent of the circuit court encompassing the transferee district court applies to the case on matters of federal law.*” Tel-Phonic Servs., Inc. v. TBS Inter., Inc., 975 F.2d 1134, 1138 (5th Cir. 1992) (emphasis added). *See also* In re Amino Acid Lysine Antitrust Litigation, 927 F. Supp. 273, 275 n.5 (N.D. Ill. 1996); Newton v. Thomason, 22 F.3d 1455, 1460 (9th Cir. 1994); Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993); Wegbreit v. Marley Orchards Corp., 793 F. Supp. 965, 968-69 (E.D. Wash. 1992); Center Cadillac, Inc. v. Bank Leumi Trust Co. of New York, 808 F. Supp. 213, 222-23 (S.D.N.Y. 1992); In re Pan American Corp., 950 F.2d 839, 847 (2d Cir. 1991); Isaac v. Life Investors Inc. of America, 749 F. Supp. 855, 863 (E.D. Tenn. 1990); In re Korean Air Lines Disaster, 829 F.2d 1171, _____ (D.C. Cir. 1987) *aff'd sub nom. on other grounds* Chan v. Korean Air Lines, 490 U.S. 122 (1989).

The Fifth Circuit, as well as several others, have clearly stated that the precedent of the *transferee* district apply to questions of federal law. Because the procedural requirements of removal are governed by federal law, Fifth Circuit precedent is the proper body of law to apply to this Motion to Remand. As set forth in the accompanying supplement and as explained by the Court (Order of Consolidation, p. 8, n.2), application of Fifth Circuit precedent to the Plaintiffs' Motion requires remand of this action, even in light of the related-to-bankruptcy removal

grounds. Therefore, the Plaintiffs respectfully request that the Court reconsider its decision in light of Fifth Circuit precedent and accordingly remand this action.

II. Remand is Also Proper Under Sixth Circuit Precedent

Assuming *arguendo* that Sixth Circuit precedent governs the disposition of the Plaintiffs' motion, remand is still proper. The Plaintiffs demonstrate in their Response to the Defendants' attempted amendments that the cases on which the Defendants rely only allowed technical amendments to removal petitions timely filed within the thirty-day period. However the Plaintiffs did not address the Brierly case or fully account for the holding in Jordan.

Brierly

Brierly is inapposite in this situation because it deals with a defect in subject matter jurisdiction, not a defect in removal procedure. The procedural history is as follows:

Brierly's administrator filed this tort action on his behalf in the Shelby County Circuit Court on May 12, 1994, naming Alusuisse and David Ellison as defendants. On June 8, 1994, *within 30 days of being served with the complaint*, Alusuisse removed the state court action to federal district court on the basis of diversity jurisdiction. On March 30, 1995, the district court remanded the action to the Shelby Circuit Court on Brierly's motion, *because Alusuisse had failed to introduce evidence to establish complete diversity by showing the Ellison was no longer a citizen of Kentucky*

Brierly v. Alusuisse Flexible Packaging, Inc., 184 F 3d 527, 530 (6th Cir 1999) (emphasis added). The problem in proving jurisdiction was because Ellison, the other defendant, could not be located:

Ellison did not consent to either of Alusuisse's notices of removal or the motion to reconsider *because he had not yet been served at the time Alusuisse filed these papers*. Brierly had attempted to serve Ellison in Shelby County early in the proceedings but had been unsuccessful because Ellison had already left the state for Wisconsin. The district court noted that Brierly had obtained the new business address of Ellison from Alusuisse in August 1994, but could not effect service upon him until late October 1995 because the district court had ordered a stay of proceedings in the case until it resolved the motion to remand. On November 10, 1995, Brierly filed an amended complaint and effected service upon Ellison. On November 30, 1995, *within 30 days of being served*, Ellison filed a notice of removal on the basis of diversity, and Alusuisse filed a notice of its

consent to Ellison's removal on the same day. On January 30, 1996, the district court denied Brierly's motion to remand

Id. at 530-31 (emphasis added) In Brierly, the district court was never faced with a procedural defect in the removal process. Both defendants filed their petitions for removal within thirty days of being served with the complaint. The first-served defendant did not succeed because it could not prove diversity of the parties, not because its removal notice was filed too late. Alusuisse fully satisfied the procedural requirements of 28 U.S.C. § 1446. Because both defendants satisfied the procedural requirements of the statute, remand was improper once those defendants could prove diversity of the parties.

In the instant action, however, several of the first-served Defendants did not comply with § 1446. They simply did not file any notice of removal within the mandatory thirty-day period, therefore they never satisfied the procedural requirements to effectuate a removal. The distinction is crucial: both of the Brierly defendants complied with § 1446; several of the Defendants in this action did not. While Alusuisse could not remove that action without Ellison's consent, it at least filed its petition in the allotted time providing that court and that Plaintiff timely notice of its consent to removal. The instant Defendants are not in the position of the Brierly defendants. The Defendants in this action are attempting to file their notice of removal outside the statutory period, not to reiterate an already timely filed petition.

The Brierly court in no way allowed any defendant to file its petition after the thirty-day time limit. The issue, as framed by that court, was "whether, in cases with multiple defendants served at different times, the last-served defendant is allowed a full 30 days after being served to remove or, instead, only has 30 days from time [sic] the first defendant is served." Brierly, 184 F.3d at 532. In answering that question, that court held that "a later-served defendant has 30 days from the date of service to remove a case to federal district court, with the consent of the

remaining defendants.” Id. at 533. Again, both Brierly defendants filed the proper notice within the thirty-day limit. Because Alusuisse had already timely filed its petition, its later consent to Ellison’s removal only reiterated its earlier filed consent and therefore did not violate the requirements of 28 U.S.C. § 1446. Alusuisse’s timely filing is the crucial factor that allowed its later consent to be valid. That crucial factor is missing in the instant action, and therefore, the first-served Defendants who failed to file within the allotted thirty days can never give valid consent.

Jordan

The Jordan case is also inapposite to the facts of this action. The Jordan court based its decision on various Sixth Circuit decisions. As discussed in the Plaintiffs’ Response to the Defendants’ attempted amendments, these Sixth Circuit decisions “allowed defendants to cure jurisdictional defects in their removal petitions *after* the tie for removal had expired.” Jordan v. Murphy, 111 F. Supp. 2d 1151, 1152 (N.D. Ohio 2000). However, as the Plaintiffs explained in their previous filings, these decisions allowed amendments to *existing filings*. When no filings exist, as is the case with the present Defendants, there is nothing to amend. Additionally, the Jordan court based its decision on its reading of those decisions “coupled with the lack of Plaintiffs’ opposition to the Defendants’ Joint Motion to Amend to Notice of Removal.” Id. at 1153. The crucial, distinguishing factor in the instant case is that the Plaintiffs have fully opposed the Defendants’ removal and the attempted amendments. The instant Plaintiffs were not complacent in the face of such amendments as the Jordan plaintiff was, therefore Jordan’s persuasive authority is limited at best and not applicable to this case.

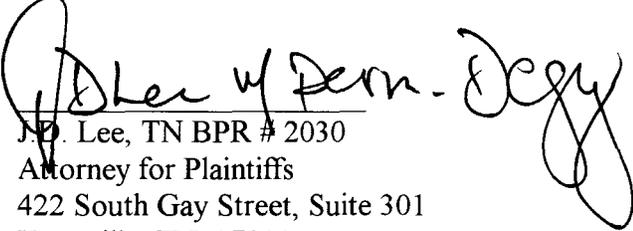
III. Conclusion

Based upon the foregoing, the Plaintiffs respectfully request that the Court reconsider its denial of the Plaintiffs' Motion to Remand under precedent established by the Fifth Circuit. The precedent of the transferee district court should control as to matters of federal law, so Fifth Circuit authority is the proper body to determine whether the Defendants' removal is proper. As the accompanying Fifth Circuit Supplement sets forth, remand is the required result. The Plaintiffs also respectfully request that the Court reconsider its decision regarding this matter under Sixth Circuit authority, if the Court finds that Fifth Circuit authority does not apply. Because the facts of each of these Sixth Circuit decisions are distinguishable on crucial factual issues, the rationales of those cases do not allow the Defendants to make their attempted amendments and do not make the removal of this action proper. Because remand is proper under either body of law, the Plaintiffs respectfully request the reconsideration of these issues and further request a hearing upon these issues in order to fully answer any questions the Court may have regarding these issues.

The Order of Consolidation (at pp 10-11) also raises the question of the propriety of the claimed subject matter jurisdiction based upon "related to" bankruptcy jurisdiction. While the Plaintiffs do not waive any objections to the propriety of such jurisdiction, they have not had adequate opportunity to fully research and brief any deficiencies in such jurisdiction. However, the Plaintiffs would like to point out that, according to recent news regarding the subject, the Enron bankruptcy is in its final stages and almost complete. If this is truly the case, then the rationale supporting "related to" bankruptcy jurisdiction (seeking uniform results by placing bankruptcy and related cases in the control of the federal courts) would be non-existent and "related to" jurisdiction devoid of its purpose, providing an additional basis for remand.

Respectfully submitted this 5th day of August, 2003

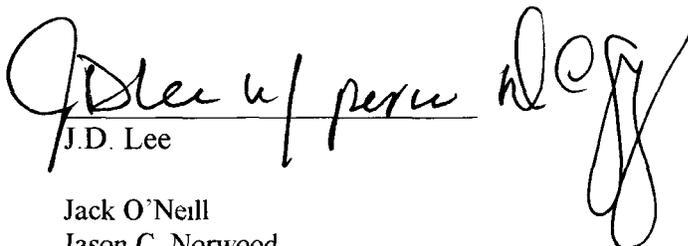
LEE, LEE & LEE


J.P. Lee, TN BPR # 2030
Attorney for Plaintiffs
422 South Gay Street, Suite 301
Knoxville, TN 37902
865-544-0101

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this document has been sent to the below-listed parties by way of the U.S. Mail.

This 5th day of August, 2003


J.D. Lee

Robin C. Gibbs
Kathy D. Partick
Gibbs & Bruns, L.L.P.
1100 Louisiana, Suite 5300
Houston, TX 77002
Attorneys for Defendants Belfer, Blake,
Duncan, Foy, Gramm, Jaedicke,
LeMaistre, Mendelsohn, Meyer,
Savage, Walker, and Winokur

H. Bruce Golden
Randall C. Owens
Golden & Owens, L.L.P.
1221 McKinney Street, Suite 3150
Houston, TX 77010
Attorneys for Defendant Urquhart

John J. McKetta, III
Helen Currie Foster
Eric G. Behrens
Graves, Dougherty, Hearon & Moody
515 Congress Avenue, Suite 2300
P.O. Box 98
Austin, TX 78767
Attorneys for Defendant Mark-Jusbasche

James E. Coleman, Jr
Diane Sumoski
Carrington, Coleman, Sloman & Blumenthal, LLP
200 Crescent Court, Suite 1500
Dallas, TX 75201-1848
Attorneys for Defendant Lay

Jack O'Neill
Jason C. Norwood
Clements, O'Neill, Pierce, Wilson
& Fulkerson, L.L.P.
Wells Fargo Plaza
1000 Louisiana Street, Suite 1800
Houston, TX 77002-5009
Attorneys for Defendant Sutton

Jacks C. Nickens
Paul D. Flack
Nickens, Keeton, Lawless, Farrell
& Flack, L.L.P.
600 Travis, Suite 7500
Houston, TX 77002
Attorneys for Defendants Causey, Frevert,
Hannon, Horton, Kean, Rice, Whalley,
Buy, Koenig, McConnell, Olson and
McMahon

Jeffrey W. Kilduff
Bruce A. Hiler
Robert M. Stern
O'Melveny & Myers, LLP
1650 Tysons Boulevard
McLean, Virginia 22102
Attorneys for Defendant Skilling

Roger E. Zuckerman
Deborah J. Jeffrey
Norman L. Eisen
James A. Wolf
Zuckerman Spaeder LLP
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Defendant Pa

Zachary W L. Wright
Tonkon Torp LLP
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204
Attorney for Defendant Harrison

Gayle A. Boone
Clifford J. Gunter, III
Bracewell & Patterson, L.L.P.
500 N. Akard Street, Suite 4000
Dallas, TX 75201-3387
Attorneys for Defendant Derrick, Jr

Kenneth E McKay
Locke Liddel & Sapp LLP
3400 Chase Tower
600 Travis Street
Houston, TX 77002-3095
Attorney for Defendant Delainey

Robert J. Walker
Joseph F. Welborn, III
Walker, Bryant, Tipps & Malone
2300 One Nashville Place
150 Fourth Ave., North
Nashville, TN 37219-2415
~~Attorneys for Defendants Lay and Derrick~~

Steven A. Riley
Salvador M. Hernandez
Bowen, Riley, Warnock & Jacobson, PLC
1906 West End Ave
Nashville, TN 37203
Attorneys for Defendants Skilling, Causey, Frevert, Hannon, Horton, Kean, Pai, Rice, Whalley, Buy,
Koenig, McConnell, McMahon, and Olson

Brigid M. Carpenter
Thomas O Helton
Baker, Donelson, Baerman & Caldwell
211 Commerce St, Suite 1000
Nashville, TN 37201
Attorneys for Defendants Belfer, Blake, Duncan, Foy, Gramm, Jaedicke, LeMaistre, Mendelsohn, Meyer,
Savage, Walker, and Winokur

Michael L. Dagley
Bass, Berry & Sims, PLC
315 Deaderick St., Suite 2700
Nashville, TN 37238-0002
Attorney for Defendant Delainey