United States Court
Southern District of Texas
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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' FIFTH CIRCUIT SUPPLEMENT TO THEIR MOTION TO REMAND AND THEIR RESPONSE TO DEFENDANTS'/JOINT MOTION TO AMEND AND JOINT STATEMENT OF UNANIMOUS CONSENT

"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) Because this case has been transferred by the Judicial Panel on Multidistrict Litigation from the Middle District of Tennessee to the Southern District of Texas, Fifth Circuit precedent now applies; therefore, the Plaintiffs file this supplement. The Plaintiffs fully incorporate by reference the

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facts, law, and argument contained in their Motion to Remand and in their Response to the Defendants' attempted amendment

I. 28 U.S.C. § 1441 Removals

Fifth Circuit precedent makes clear that when multiple defendants are involved in a case, all served defendants must join in the petition for removal within 30 days of service on the first defendant. Getty Oil Corp v. Ins Co. of North Amer., 841 F.2d 1254, 1262-63 (5th Cir. 1988) ("The provisions of section 1446(b) make it clear that a petition for removal must be filed within thirty days after service of summons upon the defendant. In cases involving multiple defendants, the thirty-day period begins to run as soon as the first defendant is served...It follows that since all served defendants must join in the petition, and since the petition must be submitted within thirty days of service on the first defendant, all served defendants must join in the petition no later than thirty days from the day on which the first defendant was served." (citations omitted)). The Defendants' claim that "all defendants consent to the removal of this action" (Notice of Removal at ¶ 8) is insufficient "[W]hile it may be true that consent to removal is all that is required under section 1446, a defendant must do so itself This does not mean that each defendant must sign the original petition for removal, but there must be some timely filed written indication from each served defendant, or from some person or entity purporting to act on its behalf in this respect and to have authority to do so, that it has actually consented to such action." Getty, 841 F.2d at 1262, n. 11. The Defendants' bare assertion of consent is insufficient to effectuate a removal.

As made clear by the facts in the Plaintiffs' Motion to Remand, the Defendants' failure to deny those facts, and the Defendants' belated attempt to amend the petition, several of the served Defendants failed to file the petition for removal or to file some timely written indication of

consent within 30 days of service on the first Defendant. Because of this failure on the part of the Defendants, their attempted § 1441[1] removal is defective. Because the Plaintiffs made a timely objection to this defect and moved to remand the action pursuant to § 1447, remand of this action is required

II. 28 U.S.C. § 1452 Removals

The Defendants suggest that § 1452 removals are not governed by § 1446, despite its requirement that the "***defendant or defendants*** desiring to remove ***any civil action*** .from a State Court ***shall file***...a notice of removal signed pursuant to Rule 11... " (emphasis added) The Defendants mainly rely upon Creasy v. Coleman Furniture Corp., 763 F.2d 656 (4th Cir. 1985) and Doe v. Kerwood, 969 F.2d 165 (5th Cir. 1992). However, Creasy[2] is not a Fifth Circuit decision, and Kerwood involves a § 1441 removal and has nothing to do with § 1452. The Plaintiffs submit that these opinions are inapposite and that the mandatory language of §§ 1446 and 1447, combined with Fifth Circuit authority establishing the relationship between § 1441 and § 1452 removals, mandate that unanimity is required for § 1452 removals. Because the Defendants have failed this requirement, remand is required

Two Fifth Circuit decisions, while not discussing the procedural requirements for removal, do discuss the interaction of §§ 1441 and 1452 removals regarding textual differences[3] between the two statutes in the realm of appellate jurisdiction of district court decisions to

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[1] All citations such as this only to a section number are taken from the United States Code. Title 28.

[2] The Fifth Circuit's rule in Getty, *supra*, that the 30-day limit for filing a removal notice runs from the service date of the first-served defendant is in conflict with the Fourth Circuit's rule in the same situation. The Fourth Circuit allows each defendant 30 days from his or her individual service date to file or join a notice of removal, expressly rejecting the Getty rule. McKinney v. Board of Trustees of Maryland Comm. College, 955 F.2d 924 (4th Cir. 1992). This explicit conflict regarding the proper procedure for removal between the Fifth and Fourth Circuits demonstrates that Creasy's persuasive worth is questionable at best, at least regarding removal and remand procedure.

[3] The textual difference was actually between § 1447, which states the general rule regarding appellate review of remand decisions applicable to § 1441 removals, and § 1452, which contains slightly different language regarding remand decisions under that statute.

remand or not to remand. In rejecting a distinction between the two types of removals made by the Third Circuit based on this textual difference, the Fifth Circuit stated that

> [b]oth § 1441 and § 1452 literally apply to every case removed from state court by the defendant because of a related bankruptcy; what we may term "direct" removal jurisdiction exists under § 1452 and its companion jurisdictional bankruptcy statute § 1334, and "indirect" bankruptcy removal jurisdiction exists under § 1441 which permits removal of any civil action of which the federal district courts would have original jurisdiction, including bankruptcy actions under § 1334. In other words, there is in every bankruptcy case the potential for both "direct" § 1452/§ 1334 removal and "indirect" § 1441/§ 1334 removal

Sykes v. Texas Air Corp., 834 F.2d 488, 491 (5th Cir 1987) The Sykes Court further questioned the propriety of allowing the label given a removal to control what is basically the same process under either statute:

> What of bankruptcy cases where there is both "direct" § 1452/§ 1334 bankruptcy removal and "direct" § 1441/§ 1331 "federal question" jurisdiction removal; for example, a suit under federal securities law brought in state court against the parent corporation of a debtor...Can the defendant choose which "direct" removal route to take, thus controlling the possible grounds for remand and the kind of appellate review of the remand orders?

Id. Based on this analysis, and despite the textual differences in the statutes, the Court declined to adopt a different rule as to appellate review of § 1452 removals as opposed to § 1441 removals. Id. at 492.

The Fifth Circuit again encountered the same question under a slightly different factual permutation in In re Bissonet Investments, LLC, 320 F.3d 520 (5th Cir. 2003). The Court stated that "this Court's ability to review decisions regarding remand decisions in bankruptcy cases is governed by both § 1447 and § 1452(b), ***just as removal of bankruptcy cases is governed by both § 1441 and § 1452(a).***" Id at 523 (emphasis added) This decision was based in part on a United States Supreme Court decision reaching the same issue in which the Court held that:

> [t]here is no express indication in § 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy. Nor is there any reason to infer from § 1447(d) that Congress intended to exclude bankruptcy cases from

> its coverage. The fact that § 1452 contains its own provision governing certain types of remands in bankruptcy, see § 1452(b) (authorizing remand on "any equitable ground" and precluding appellate review of any decision to remand or not to remand on this basis), does not change our conclusion. There is no reason §§ 1447(d) and 1452 cannot comfortably coexist in the bankruptcy context. We must, therefore, give effect to both.

Things Remembered, Inc. v Petrarca, 516 U.S. 124, 129 (1995).

While those decisions do not deal with the precise issue in this case, the combined message of those cases is clear. § 1441 and § 1452 removals are, in reality, the same thing and the statutes must be read as a whole and applied accordingly. Just as the Sykes Court would not allow that defendant to control the availability of appellate review by "choosing" which type of removal it used, the Defendants (assuming their argument that the plain language of § 1446 does not require all Defendants to file a removal notice within 30 days of service) in this case should not be allowed to choose one statute over the other to escape their failure to obey the rule of unanimity. The common sense underlying the Sykes and Bissonet rule should fully apply here. Because this case involves both "direct" § 1452/§ 1334 removal and "direct" § 1441/§ 1332 removal, the same procedural rules should apply. If the Defendants cannot choose which statute they are using at the appellate, or tail end, of the removal process, then no logical reason exists why they should be able to choose which statute they are using at the removal, or front end, of the process The simple answers are that the Defendants simply failed to comply with the clearly set forth statutory requirements and that this case should be remanded to State Court.

Indeed, the Supreme Court's Petrarca decision has recently led a district court, in two related cases, to question the Creasy holding Retirement Systems of Alabama v. Merrill Lynch & Co., 209 F. Supp. 2d 1257, 1264 n 13 (M.D. Ala 2002) ("This concern [over whether unanimity is required under § 1452 removals] is deepened by the Supreme Court's decision in *Things Remembered, Inc. v. Petrarca*...Accordingly, there is a substantial possibility that the

unanimity requirement of § 1441 is also applicable to removals under § 1452, at least where a group of defendants seeks to remove an entire case or 'civil action.'"). *See also* Retirement Systems of Alabama v. J P Morgan Chase & Co., 285 B R 519, 525 (M.D. Ala. 2002) ("Following the reasoning in *Things Remembered*, the proper analysis of a removal taken under § 1452 may very well include asking whether the removal is unanimous as is required by § 1441. Where doubts exist about the district court's jurisdiction in a removed action, the Eleventh Circuit counsels the district courts to remand.")

The Alabama district court's decision in J.P Morgan was based in part on two unreported[4] decisions from within the Fifth Circuit. "In the instant case, the Court finds no indication that [two defendants have] joined in or consented to removal [of the case under § 1452]. Therefore, even assuming that [one of the defendants] remains a party, the Court must grant plaintiffs' Motion for Remand. Hills v. Hernandez, 1998 WL 241518 at *2 (E.D. La. May 12, 1998). *See also* Whitney Natl Bank v Bunch, 2001 WL 87443 at *2, n 9 (E.D La. Jan. 30, 2001) ("Although WNB did not raise the point, the Court also notes that the non-removing defendants have not consented to the removal 28 U.S.C. § 1446 (b) requires that all defendants either join in the notice of removal or file some type of written document indicating consent. The rule also applies to 'related to' removals pursuant to 28 U S.C. § 1452 " (citations omitted))

District courts from other Circuits have also reached the same result.

> Section 1446(a) also states '[a] defendant' can file a notice of removal, yet there is no question that the unanimity rule applies. The fact that 'a defendant' or 'a party' may file the notice of removal, based on federal question jurisdiction or related-to-bankruptcy jurisdiction, does nothing to dilute the unanimity rule when multiple defendants seek to remove a case to federal court. Under either scenario, if one properly served defendant does not join in removal and is not excused from joinder by one of the three exceptions,[5] the case is not properly removed and should be remanded.

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[4] Any unreported decisions cited in this memorandum are attached as Exhibits.

[5] The three exceptions are: "1.) when a co-defendant has not been served at the time the removal petition is filed; 2) when a co-defendant is only a nominal defendant; and 3) when the removed claim is separate and independent

Ross v. Thousand Adventures of Iowa, Inc., 178 F Supp. 2d 996, 1002 (S D. Iowa 2001) The Plaintiffs submit that these decisions indicate that the unanimity rule clearly applies to § 1452 removals. However, even if these decisions make the propriety of a non-unanimous § 1452 removal only questionable instead of clearly improper, then remand is still the proper result In discussing the 30 day time limit for filing a removal petition, the Getty Court noted that "by restricting removal to instances where the statute clearly permits it, the rule is consistent with the trend to limit removal jurisdiction and with the axiom that the removal statutes are to be strictly construed against removal " Getty, 841 F 2d at 1263, n.13 The propriety of the Defendants non-unanimous removal is ***questionable at best*** Due to the required strict construction against removal, remand is the only proper action

The Plaintiffs therefore submit that based upon the plain language of § 1446, the combined teachings of Petrarca, Sykes, and Bissonet, and the recent interpretations of § 1452 by several district courts that unanimity is required for such removals Although Petrarca, Sykes, and Bissonet are not perfectly on point, all notions of logic and symmetry require that if slight textual differences among the removal statutes do not create varied or special rules in the appellate process, then similar textual variations should not create special rules in the removal process Additionally, the Defendants are attempting to manipulate the statutory language to rectify their failure to comply with removal procedure. The clear message of Sykes is that such manipulation is not allowed Based on the foregoing, § 1452 removals require unanimous written, signed consent by the Defendants, which they failed to provide Because the Plaintiffs timely objected pursuant to § 1447, remand of this action is the only proper course.

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under 28 U S.C. § 1441(c)." Ross, 178 F. Supp. 2d at 1000 Clearly, none of these exceptions apply in the instant case.

Based upon the foregoing, the Plaintiffs respectfully request the Court to remand this action to the State Court in which it was originally filed. The Plaintiffs request a hearing on this issue The Plaintiffs further request that the Defendants be required to pay "just costs and...actual expenses, including attorney fees, incurred as a result of the removal" pursuant to 28 U.S.C. § 1447(c).

III. Injunctive Relief

The Plaintiffs also respectfully request that the Court enjoin the Defendants from attempting to remove this action again when the two unserved Defendants are later served [6] When these Defendants are served, any attempted removal would suffer from the same infirmities that make this current removal improper. Because these infirmities result from the inaction of properly served Defendants, these infirmities cannot be corrected to conform with Getty and other preceding authority regardless of the actions of any later-served Defendants The Plaintiffs fear that the Defendants, however, will attempt to remove this action once again when Defendants Andersen and Fastow are served with process.

"For injunctions... Plaintiffs [must] show that they are likely to suffer future injury by the defendant and that the sought-after relief will prevent that future injury." James v. City of Dallas, 254 F.3d 551, 563 (5th Cir. 2001). In this action, the Plaintiffs would most certainly suffer from the additional delay that another attempted removal would create; such a delay in time could never be compensated or replaced. Due to the Defendants extreme tenacity in attempting to amend the original removal notice and find some way around their procedural failure, the Plaintiffs wholeheartedly believe that the Defendants would use the service of any

[6] Two Defendants, Arthur Andersen, LLP and Andrew S. Fastow, were not served with process at the time of the other Defendants, nor have they made an appearance in this action

remaining Defendants or similar factual development as an excuse to "try again" and delay progress of this case. The requested injunction would prevent this feared injury

Because the procedural failures of the served Defendants cannot be cured, the removal of this action is and will always remain improper. Therefore, the Plaintiffs respectfully request the Court to enjoin all the Defendants from filing, consenting to, or in any other way from joining in any future attempt to remove this action from State Court.[7]

Respectfully submitted this 5th day of August, 2003.

LEE, LEE & LEE

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[7] Because the Plaintiffs believe that the Defendants will not incur costs and/or damages if this injunction should issue, the Plaintiffs have not given security as required by F.R.C.P. 65(c) If the Defendants did somehow incur any costs or damages due to the inability to remove this action to federal court, those damages would be a result of the Defendants' procedural failures and not due to the issuance of the requested injunction.

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

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Only the Westlaw citation is currently available

United States District Court, E D Louisiana

Judy Roby HILLS, et al,
v
Ruben HERNANDEZ, et al

No. Civ.A. 98-1108.

May 12, 1998

ORDER AND REASONS

CLEMENT, J

***1** Before the Court is a Motion to Remand brought by Plaintiffs Judy Roby Hills and Melvin Hills For the following reasons, plaintiffs' motion is **GRANTED.**

A. BACKGROUND

On January 19, 1996, plaintiffs filed suit against defendants in state court. Plaintiffs claimed damages stemming from an automobile accident on October 27, 1995 Plaintiffs named Ruben Hernandez ("Hernandez"), State and County Mutual Insurance Company ("S & C"), and Allstate Insurance Company ("Allstate") as defendants. In a supplemental petition filed on October 25, 1996, plaintiffs added Heldt Brothers Tracks, Inc ("Heldt") as a defendant under the doctrine of *respondeat superior* Heldt was the employer of Hernandez, the driver of the other vehicle in the October 27, 1995 accident S & C was the insurer of Heldt and Hernandez

On February 28, 1997, S & C improperly removed this matter to this Court By order and reasons entered on April 30, 1997, the Court granted a Motion to Remand brought by plaintiffs The Court reasoned that S & C failed to file its notice of removal within thirty days of receipt of the filed state court petition as required by 28 U S.C. § 1446(b)

Subsequently, the state court set this matter for trial on April 13, 1998 On April 9, 1998, S & C removed this matter to this Court for a second time As grounds for this Court's jurisdiction, S & C cited 28 U.S.C §§ 1334 and 1452 Both these statutes relate to this Court's jurisdiction over bankruptcy cases The sole bankrupt defendant is Heldt Approximately two years ago, Heldt filed for protection under Chapter 11 in the United States Bankruptcy Court for the Southern District of Texas, Corpus Cristi Division S & C claims that it did not learn of Heldt's bankruptcy filing until after March 9, 1998

Plaintiffs argue for remand on four grounds (1) the state court judge dismissed the sole bankrupt defendant, Heldt; (2) contrary to the requirements of 28 U.S.C § 1446(b) all defendants have not joined in or consented to the removal petition; (3) 28 U S C § 1334(c)(1) and 28 U S.C § 1452(b) require permissive abstention and equitable remand, and (4) under 28 U.S.C § 1446(b) S & C's notice of removal was untimely Plaintiffs request attorney fees and costs incurred as a result of the removal

On the other hand, S & C contends that the state court judge did not validly dismiss Heldt. S & C does not address plaintiffs' argument that all defendants failed to join in or Consent to the removal While acknowledging that an order of remand is within this Court's discretion, S & C argues that this Court should retain jurisdiction Lastly, S & C asserts that the Notice of Removal was timely filed within thirty days of learning of Heldt's bankruptcy.

B. ANALYSIS

1 Dismissal of Heldt Prior to Removal

Since the only alleged ground for this Court's jurisdiction pertains to the bankruptcy of Heldt as a codefendant, Heldt's dismissal prior to removal would deprive this Court of jurisdiction Plaintiffs argue that Heldt was in fact dismissed By order entered on April 13, 1998, the state court judge purportedly dismissed Heldt S & C contends, however, that Heldt's dismissal was "without effect since the court granting that dismissal lacked jurisdiction . at the time that order was entered " S & C points to the fact that it filed the Notice of Removal on April 9, 1998--four days prior to Heldt's dismissal In resolving plaintiffs' Motion for Remand, it is unnecessary to assess the validity and timing of Heldt's dismissal Even assuming the

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correctness of S & C's argument, i e. that Heldt remains a party in this litigation, the Court concludes that remand would still be required because of a second argument raised by plaintiffs, namely that all defendants have not joined in or consented to removal

2 Rule of Unanimity

***2** "28 U S.C. § 1446(b) requires that all defendants join in the removal petition " *Johnson v Helmerich & Payne, Inc*, 892 F 2d 422, 423 (5th Cir 1990). Under this "rule of unanimity," all defendants must join in the Notice of Removal or otherwise consent to the removal within Section 1446(b)'s thirty day period *Getty Oil, Division of Texaco, Inc. v. Insurance Co. of North America,* 841 F.2d 1254, 1262-63 (5th Cir 1988) While each defendant need not actually sign the Notice of Removal, there must be some timely filed written document from each defendant, or its official representative, indicating that it has consented. *Id.* at 1262, n. 11, *Jones v. Scogin,* 929 F Supp 987, 988 (W D.La.1996) In the instant case, the Court finds no indication that either Hernandez or Heldt has joined in or consented to removal Therefore, even assuming that Heldt remains a party, the Court must grant plaintiffs' Motion for Remand

3 Permissive Abstention and Equitable Remand

Even if this case did not have to be remanded owing to the role of unanimity, the Court would nonetheless remand this case on grounds of permissive abstention and equitable remand, [FN1] As mentioned earlier, S & C invokes this Court's jurisdiction pursuant to 28 U S.C § 1334 and 28 U S C. § 1452 In pertinent part, 28 U S.C § 1334 confers on district courts "original but not exclusive jurisdiction of all civil proceedings arising under rifle 11, or arising in or related to cases under title 11 " 28 U S C § 1452 provides for removal of cases "if such district court has jurisdiction of such claim or cause of action under section 1334 of this title "

FN1 In addition to permissive abstention under 28 U S.C § 1334(c)(1) and equitable remand under 28 U S.C. § 1452(b), plaintiffs might also have argued for mandatory abstention under 28 U S C § 1334(c)(2) As neither party raises this issue and the Court orders remand based on the rule of unanimity, permissive abstention, and equitable remand, the Court will not address mandatory abstention.

28 U S C § 1334(c)(1) authorizes permissive abstention Specifically, 28 U S.C § 1334(c)(1) states that "[n]othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11 " Under the permissive abstention doctrine, district courts have broad discretion to abstain from hearing state law claims in the interest of justice, comity with state courts, or respect for state law *In the Matter of Gober*, 100 F 3d 1195, 1206 (5th Cir.1996)

28 U.S C. § 1452(b) provides for remand "on any equitable ground " Factors relevant to equitable remand include: (1) forum non conveniens; (2) that the entire action of a bifurcated matter should be tried in the same court. (3) that a state court is better able to resolve state law questions, (4) expertise of the particular court; (5) duplicative and uneconomic effort of judicial resources, (6) prejudice to the involuntarily removed parties; (7) comity considerations, and (8) a lessened possibility of an inconsistent result *Browning v. Navarro,* 743 F.2d 1069, 1076 n 21 (5th Cir 1984); *Massey v. Genco,* 1997 WL 61449, *2 (E D.La) (J Vance) The Court should also consider the effect of remand on the administration of the bankruptcy estate *Drexel Burnham lambert Group, Inc. v. Vigilant Ins. Co*, 130 B.R 405, 407 (S.D N.Y 1991), *Allen County Bank & Trust Co., Valvmatic Int. Corp.* , 51 B.R 578, 582 (N D Ind 1985)

***3** 28 U S C § 1334(c) and 28 U.S.C § 1452(b) are "kindred statutes " [FN2] *Rodham v. Metro Loans, Inc.,* 193 B.R 971, 976 (N D Ala 1996) Both statutes evince a congressional policy to allow state court trials involving state law to proceed absent countervailing circumstances, at least where Section 1334 is the only basis for federal jurisdiction and the litigation can be timely completed in state court *Id* Thus, the same factors that support abstention also support equitable remand *Massey,* 1997 WL 61449, at *2. (citations

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omitted) "Because the statutes are similar in purpose and spirit, circumstances which weigh in favor of discretionary abstention or dictate mandatory abstention under the subsections of section 1334(c), likewise weigh in favor of or constrain remand under section 1452(b)" *Roddham,* 193 B.R at 976 (citations omitted), *Massey,* 1997 WL 61449, at *3 (citations omitted)

FN2 Courts have debated whether abstention applies to removed proceedings However, the majority of courts find abstention applicable to removed cases "These courts find that two proceedings are not necessary for abstention to apply and abstention, or abstention coupled with remand, transfers a removed proceeding to state court" *Midgard Corp. v. Kennedy,* 204 B R 764, 773 (Bankr , 10th Cir 1997)

In the instant case, remand is appropriate *See Allen County,* 51 B.R at 582-83 (remanding analogous case); *O'Rourke v Cairns,* 129 B R. 87 (E D La 1991) (J Feldman) (same) The state court can timely adjudicate this action If not for S & C's Notice of Removal, this case would have been tried on April 13, 1998 Furthermore, the state court judge has indicated that this case will be tried on June 1, 1998 if remanded [FN3] To retain this case would cause duplicative and uneconomical use of scarce judicial resources The state court has more expertise in resolving cases such as this one, presenting state law issues. By delaying the resolution of this case, retaining jurisdiction could prejudice both the involuntarily removed parties, namely Hernandez and Heldt, and the bankruptcy estate's administration. Because the state court has been grappling with this case for over two years, the state court is more likely to reach a consistent resolution Finally, general comity considerations weigh in favor of permissive abstention and/or equitable remand

FN3. Plaintiffs' Memorandum in Support of Motion to Remand, p 3

S & C raises only two reasons for this Court to retain jurisdiction First, because "the issue concerning the alleged service of Rueben Hernandez [has] only recently been raised," S & C argues that "[i]t is unknown what if any cross claims or other demands Hernandez may have which he may wish to assert against Heldt Brothers" [FN4] This reason is speculative and hardly counters the above considerations weighing in favor of remand Second, S & C states that "prior to removal, defendant received a settlement demand from plaintiffs" [FN5] Since the parties may just as easily reach a settlement in state court as in federal court, the Court views this second reason as irrelevant to the issue of jurisdiction The Court finds that both permissive abstention and equitable remand are appropriate

FN4 Memorandum in Opposition to Motion to Remand, p 5

FN5 *Id.*

4 Timeliness of Removal

As a fourth ground for remand, plaintiffs argue that S & C failed to remove within thirty days from receipt of a copy of the initial pleading as required by 28 U.S.C § 1446(b). On the other hand, S & C points to the second paragraph in Section 1446(b), which provides that a case may be removed "within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable" S & C alleges that it removed this case "within thirty days of . becoming aware of the fact that [Heldt] was in bankruptcy" Having anticipated this allegation, plaintiffs describe it as "difficult to believe" Plaintiffs emphasize the fact that Heldt filed for bankruptcy approximately two years ago In light of the Court's above analysis, it is unnecessary for the Court to determine exactly when S & C became aware of Heldt's bankruptcy Irrespective of the timeliness of S & C's removal, the Court orders that this case be remanded.

5 Attorney Fees and Costs

***4** Plaintiffs request attorney fees and costs incurred as a result of the removal. 28 U S C § 1447(c) provides that an order or remand "may

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require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal " In light of the impropriety of S & C's removal under 28 U S C § 1446(b), taken together with the overwhelming considerations of comity weighing against removal, the Court grants plaintiffs' request for attorney fees and costs In reaching this determination, the Court places especial emphasis on the fact that after two years of trial preparation S & C filed its second Notice of Removal on Friday, April 9, 1998-- the eve of trial. The fact that S & C allegedly did not learn of Heldt's bankruptcy until after March 9, 1998 does not affect this Court's determination. Having defended Heldt for over two years, S & C should have learned of Heldt's bankruptcy filing sooner

IT IS ORDERED that plaintiffs' Motion for Remand is GRANTED, thereby remanding this case to state court

IT IS FURTHER ORDERED that plaintiffs' request for attorney fees and costs incurred as a result of S & C's removal is GRANTED

1998 WL 241518, 1998 WL 241518 (E D La)

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United States District Court, E D Louisiana

WHITNEY NATIONAL BANK
v
Mary G BUNCH, et al

No. CIV.A. 00-2859.

Jan 30, 2001.

BARBIER, J

***1** Before the Court is Whitney National Bank's ("WNB") Motion to Remand (Rec Doc 5), set for hearing on November 8, 2000, and opposed by the trustee for the bankruptcy estates of defendants Mary G Bunch and BLT Farms, Inc Also before the Court is the bankruptcy trustee's Motion to Transfer Venue (Rec Doc 7) which was set for hearing on November 22, 2000 WNB opposes the motion Both motions are before the Court on briefs without oral argument

This suit arises out of an alleged check kiting scheme involving ten defendants [FN1] Three of the defendants have bankruptcies pending in the Bankruptcy Court for the Southern District of Mississippi [FN2] Three defendants have bankruptcies pending in the Bankruptcy Court for the Eastern District of Louisiana [FN3] After WNB filed this suit in Louisiana state court, the trustee for two of the Mississippi bankruptcies ("the Trustee") [FN4] removed the case to this Court seeking to have it transferred to the Southern District of Mississippi for consolidation with the Mississippi bankruptcies [FN5] WNB wants the case remanded to state court on equitable grounds pursuant to 28 U S C § 1452(b).

FN1 The following individuals and entities were named as defendants in this suit Mary G Bunch, Mary G Bunch Coffee, Miles G Bunch, Lloyd N Nicaud, Kent G Nicaud, BLT Farms, Inc , L & M Distributors, Inc , Ralph C Richards, Inc , Mark P Lemonier, and Susan Laraja Lemonier (collectively "Defendants")

FN2. Mary G Bunch d/b/a Mary Bunch Coffee, BLT Farms, and L & M Distributors, Inc

FN3 Ralph C Richards, Inc , Mark Lemonier, and Susan Laraja Lemonier.

FN4 Although multiple bankruptcies are involved in this case, the Trustee referred to throughout this order is involved only in two of the three Mississippi bankruptcies--the two trustees for the Louisiana bankruptcies and the third Mississippi trustee made no appearance with respect to the pending motions

FN5 The Court will assume throughout this order that if the case were transferred to the Southern District of Mississippi, it would in fact be referred to the bankruptcy court That decision would be left for the district court in Mississippi. *See* 28 U.S C § 157(a).

As an initial matter, WNB does not argue that removal was improper Both sides agree [FN6] that the instant suit is at the very least "related to" the pending bankruptcies making the case removable pursuant to 28 U S C sections 1334(b) and 1452(a) [FN7] The parties are at odds, however, as to which court, the Louisiana state court or the Mississippi bankruptcy court, is better suited to hear this case. Neither party argues that this Court should hear the case, or that the Court should refer it to the bankruptcy court in this district, and given that removal was permissible only by virtue of the fact that the case is "related to" the bankruptcies, the Court would indeed be disinclined to deprive WNB of its chosen forum if the case was not in fact transferred to the bankruptcy court Thus, the real issue before the Court is whether this case could best be decided in the Mississippi bankruptcy court

FN6 Although the parties agree as such,

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the "related to" status of this case is a requisite to subject matter jurisdiction in a federal court *In re Cannon,* 196 F 3d 579, 584-85 (5th Cir 1999) Accordingly, the parties agreement on this issue is not controlling as they cannot confer subject matter jurisdiction by consent. *Id.* at 585 The Court will assume, for purposes of the instant motions, without deciding, that the suit is in fact "related to" the bankruptcies

FN7 "Related to" is a term of art *In re Cannon,* 196 F 3d at 585 "A proceeding is 'related to' a bankruptcy 'if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy " ' *Id.* (quoting *Bass v Denny,* 171 F 3d 1016 (5th Cir 1999))
In his Removal Filing Pursuant to Fed R Br Proc 9027(e)(3), the Trustee averred that this suit was a "core proceeding " Rec. Doc 6 However, the memoranda submitted in conjunction with the motions at issue indicate that he has since retreated from that position

WNB argues that it would be a waste of judicial resources to transfer this case to the Mississippi bankruptcy court. In particular, WNB asserts that transferring the case to Mississippi will necessitate trying WNB's fraud claims multiple times given that bankruptcies are pending in Mississippi and Louisiana, and given that three of the defendants are not even in bankruptcy However, if WNB were allowed to proceed in state court, a single court, with jurisdiction as to all defendants, would determine the liability of all ten defendants in a single proceeding [FN8] Then under principles of collateral estoppel and res judicata both bankruptcy courts (in the dischargeability proceedings) would be bound by the same determinations as to the fraud issue

FN8 Naturally, this argument does not weigh heavily in favor of remand because this Court also has jurisdiction to render a judgment against all ten defendants in a single proceeding Given that the suit is merely "related to" the pending bankruptcies, the parties would have to consent to having the bankruptcy court decide the merits 28 U S C § 157(c)

The Trustee, on the other hand, argues that remanding the case to state court would be an inefficient use of the bankruptcy estate funds because he would have to defend the suit in state court as well present the same set of facts in other proceedings before the Mississippi bankruptcy court. He also argues that the Mississippi bankruptcy court would be a more efficient forum due to the bankruptcy judge's knowledge of matters relating to allowability of proofs of claims and exceptions to discharge

***2** After reviewing the complaint and considering the arguments of counsel, the Court concludes that this case should be remanded to state court on equitable grounds Factors to be considered in conjunction with a request for equitable remand include: forum non conveniens, the expertise of the particular courts involved, duplicative and uneconomic effort of judicial resources, and a lessened possibility of an inconsistent result. *Hills v. Hernandez,* 1998 WL 241518 (E D La May 12, 1998) (citing *Browning v Navarro,* 743 F 2d 1069 n 21 (5th Cir 1984; *Massey v. Genco,* 1997 WL 61449 (E.D.La. Feb 6, 1997)).

Considering the factors listed above, the Court finds the Trustee's arguments unpersuasive for several reasons Of most significance is that three of the defendants have bankruptcies pending in the Eastern District of Louisiana In fact, five of the six counts alleged in WNB's state court petition involve defendants whose bankruptcies are pending in Louisiana whereas only three of the six involve a defendant with a bankruptcy pending in Mississippi The Trustee avoided this issue altogether, making no attempt in his memoranda to explain how his arguments could have merit when the Louisiana bankruptcies are taken into consideration, and the Louisiana defendants did not join in the Trustee's motion [FN9] Without such an explanation from the Trustee, the Court is left assuming, as WNB contends, that this case is no more related to the Mississippi bankruptcies than to those pending in Louisiana

FN9 Although WNB did not raise the point, the Court also notes that the

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> non-removing defendants have not consented on the record to the removal 28 U S C § 1446(b) requires that all defendants either join in the notice of removal or file some type of written document indicating consent. *Hills v Hernandez*, 1998 WL 241518 (E D La May 12, 1998) (citing *Getty Oil v Insurance Co. of N Am.*, 841 F.2d 1254 (5th Cir 1988)). The rule also applies to "related to" removals pursuant to 28 U.S C § 1452 *See id.*

Likewise, the Court is also unpersuaded that the bankruptcy court, whether in Mississippi or Louisiana, would be superior to the Louisiana state court Given that this suit is a non-core proceeding, all parties would have to consent to having the bankruptcy court make a determination on the merits 28 U S C § 157 At least one party, WNB, has already filed notice that it would not consent Rec Doc 3 And while the Trustee gives WNB's strategy of invoking collateral estoppel a somewhat nefarious characterization, judicial economy would be better served by having one court, in which consent is not a concern, determine the fraud issue as to all ten defendants

While the bankruptcy judge surely has superior knowledge of matters relating to allowability of claims and exceptions to discharge, the claims at issue here are state law claims based on fraud and several continuing guarantees executed by Defendants. Although WNB strangely did not raise this point, the Trustee indicated that the claims are to be decided under Louisiana law. *See* Memorandum in Support of Motion to Transfer Venue, at 11 Surely the Louisiana state court judge is better situated to decide issues of Louisiana state law

Finally, although the Trustee's argues that the bankruptcy estate assets would be used more efficiently if the case were transferred to Mississippi, the Court notes that the bankruptcy judges involved in this case have yet to lift the automatic stays against the bankrupt defendants. Thus, even if the case is remanded to state court, the suit could not proceed against the defendants for whose estates the Trustee is responsible anyway If WNB moves to lift the stays, the Trustee can reurge his arguments, to the appropriate bankruptcy judge, as to why allowing the state court action to proceed would waste estate assets.

***3** In sum, the fact that this case is related to bankruptcies pending in more than one district and involves other defendants not involved in any type of bankruptcy, militates strongly in favor of remanding this case back to state court Given that the sole purpose in removing the case to this Court was to effectuate a change of venue, and given that the Court is denying that motion, the Court remands this case to state court pursuant to 28 U S C § 1452(b) Accordingly,

IT IS ORDERED that the Trustee's Motion to Transfer Venue should be and is hereby DENIED,

IT IS FURTHER ORDERED that WNB's Motion to Remand should be and is hereby GRANTED

2001 WL 87443, 2001 WL 87443 (E D La.)

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