United States Courts
Southern District of Texas
ENTERED

SEP 15 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.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
ENRON CORPORATION, ET AL., Defendants	§	
AMERICAN NATIONAL INSURANCE COMPANY, AMERICAN NATIONAL INVESTMENT ACCOUNTS, INC., SM&R INVESTMENTS, INC., AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY, FARM FAMILY LIFE INSURANCE COMPANY, FARM FAMILY CASUALTY INSURANCE COMPANY, AND NATIONAL WESTERN LIFE INSURANCE COMPANY, Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. G-02-585
ARTHUR ANDERSEN LLP, D. STEPHEN GODDARD, JR., DAVID T. DUNCAN, KENNETH L. LAY, JEFFREY K. SKILLING, ANDREW FASTOW, RICHARD B. CAUSEY, RICHARD B. BUY, MICHAEL J. KOPPER, ROBERT K. JAEDICKE, RONNIE C. CHAN, JOE C. FOY, JOHN WAKEMAN, WENDY L. GRAMM, BRUCE G. WILSON, JOHN MENDELSON, PAULO V. FERRAZ PEREIRA, ROBERT A. BELFER, NORMAN P. BLAKE, JR., JOHN H. DUNCAN, CHARLES LE MAISTRE, FRANK SAVAGE, HERBERT S. WINOKUR, JR., KEN L. HARRISON, REBECCA MARK JUSBASCHE, JEROME J. MEYER, JOHN A. URQUHART, AND CHARLES E. WALKER, Defendants.	§	

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MEMORANDUM AND ORDER OF REMAND

The above referenced action, arising from the same nucleus of facts as *Newby*, but asserting only state-law claims, was removed for a second time by Defendant Rebecca Mark-Jusbasche[2] on the grounds that this Court has jurisdiction "related to" Enron's bankruptcy pursuant to 28 U.S.C. § 1452(a). Pending before the Court are the following motions: (1) Plaintiffs American National Insurance Company *et al.*'s motion for clarification *re* motion to remand and to extend time to respond (#6 in G-02-585); (2) Plaintiffs' motion for remand or abstention (#7 in G-02-585); and (3) Defendant Rebecca Mark Jusbasche's motion to strike certain arguments in Plaintiffs' reply to #7 (#1193 in *Newby*, #13 in G-02-585).

Plaintiffs' motion for clarification and extension relates to two of the criteria required in a notice or removal by Bankruptcy Rule 9027, which is identified as one basis for removal

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[1] Violations of the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 582-2 *et seq.*, of Tex. Bus. & Comm. Code Ann. § 27.01 (fraud), common law fraud, and negligence and professional malpractice.

[2] Enron filed for bankruptcy on December 2, 2001. This action, filed in state court on December 27, 2001, was first removed on February 1, 2002 by Arthur Andersen. Mark-Jusbasche was not served until April 10, 2002 and never joined in the first removal. This action was subsequently remanded by this Court for lack of subject matter jurisdiction because SLUSA was inapplicable.

removal in Mark-Jusbasche's notice of removal.[3] Rule 9027(a)(1) provides in relevant part,

> The notice [of removal] shall be signed pursuant to Rule 9011 and contain a short statement of the facts which entitled the party filing the notice to remove contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge. . . .

Plaintiffs contend that Mark-Jusbasche's notice or removal is defective because it fails to state whether Defendants assert that this is a core or non-core action and whether removing defendant consents or does not consent to entry of final orders or judgment by the bankruptcy court. Furthermore Plaintiffs are uncertain how to satisfy their own responsive obligation under Rule 9027(e)(3):

> Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgments by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than

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[3] Mark-Jusbasche cites as the other bases a number of provisions comprising the federal removal statute, 28 U.S.C. §§ 1441-52: specifically she identifies 28 U.S.C. §§ 1334 ("the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in, or related to cases under title 11"), 1367 (supplemental jurisdiction), 1441 (general removal statute), 1446 (general removal procedures), and 1452 (removal of claims related to bankruptcy cases).

> ten days after the filing of the notice of removal.

Since Mark-Jusbasche's notice of removal was filed on August 19, 2002, Plaintiffs' response date would have been September 3, 2002, since September 2, 2002 was a legal holiday.

This Court notes that a procedural defect under Rule 9027 generally does not constitute grounds for remand of a proceeding to state court. *See, e.g., In re Chapman*, 132 B.R. 153, 156 (Bankr. N.D. Ill. 1991), *citing In re Hudson Oil Co., Inc.*, 68 B.R. 735 (D. Kan. 1986), and *In re Princess Louise Corp.*, 77 B.R. 766 (Bankr. C.D. Cal. 1987); *In re Dreis & Krump Mfg. Co.*, No. 94 C4281, 1995 WL 41416 *1 (N.D. Ill. Jan. 31, 1995)("procedural defects in a removal petition are not ordinarily cause for remand and therefore are not cause to find the removal a nullity"); *In re Mid-Atlantic Resources Corp.*, 283 B.R. 176, 165 (S.D. W. Va. 2002)(holding that failure of several defendants to comply with Rule 9029 "is not fatal to removal"); *Federal Deposit Ins. Corp. v. Loyd*, 955 F.2d 316, 321-23 (5th Cir. 1992)("Congress concluded that procedural defects in removal should not be grounds for shuffling cases between state and federal courts after the first thirty days."). "[A]n assertion that the action is a core or non-core proceeding is not an allegation of federal jurisdiction; rather it relates to the power of the bankruptcy court to resolve issues brought before it after jurisdiction is established." *In re Mid-Atlantic Resources Corp.*, 283 B.R. at 165. At most, if the parties do not consent to final orders entered by the bankruptcy court, the result would be that the

bankruptcy court would submit proposed findings of fact and conclusions of law to the district court, which would then be responsible for final orders and judgments. *Id.* at 186 & nn. 17, 18, *citing* 28 U.S.C. § 157(c).

Second, there is no serious disagreement here that the claims in this suit are non-core.

Third, because of the unusual situation with MDL 1446, comprised of the Enron civil litigation, and the Enron bankruptcy in the Southern District of New York, the issue is irrelevant because the removal was to this district court, which does not need consent of the parties to enter final judgments in non-core suits as long as it has subject matter jurisdiction over the suit.

Fourth, removing Defendants have subsequently filed a late statement of clarification (#8) indicating that this proceeding is non-core and that they do not consent to entry of final orders or judgment by a bankruptcy judge. Plaintiffs then filed their statement (#9) with identical responses.

For these reasons, the Court finds that the motion for clarification and extension of time is MOOT.

More relevant is Plaintiffs' motion to remand. As a threshold matter, the Court agrees with Plaintiffs for the reasons they have stated that Mark Jusbasche's motion to strike certain arguments is meritless and accordingly denies it. After disposing of the dross in the opposing pleadings, the Court finds the critical issue here is whether Mark Jusbasche timely and properly filed a second notice of removal.

The original petition in this action was filed on December 27, 2001 in the 56th Judicial District Court of Harris County. It was timely removed on February 1, 2002 by Arthur Andersen, which was served on January 3, 2002, to the federal district court in the Galveston Division of the Southern District of Texas and subsequently transferred to this Court pursuant to Judge Rosenthal's order of consolidation in *Newby*. This Court remanded the action on July 19, 2002 for improper removal under SLUSA and lack of federal subject matter jurisdiction. Mark-Jusbasche concedes that she was first served with a copy of the original petition on April 10, 2002, after the first removal of the case to federal court. She argues that until this Court remanded the suit on July 19, 2002, she was unable to remove it on related to bankruptcy jurisdiction grounds because it was already pending in federal court, and that she therefore timely filed the removal notice on August 19, 2002, within thirty days of the remand, based on a new and different theory of federal jurisdiction.

There are no time limits delineated in § 1452 for filing a notice of removal based on "related to" bankruptcy jurisdiction. There is currently a division among courts as to whether Bankruptcy Rule 9027[4] or the relevant portion of the

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[4] Under Rule 9027, the time period for filing a notice or removal depends upon whether the case was pending when the bankruptcy proceeding was filed or whether the bankruptcy proceeding was filed before the civil action. If the case was filed before the bankruptcy, the notice of removal may only be filed in whichever of following three periods is the longest: (1) ninety days after the order for relief is entered in the bankruptcy case; (2) thirty days after entry of an order

statute generally governing removal procedures, 28 U.S.C. § 1446(b), controls the time period for filing a notice of removal in actions asserting "related to" bankruptcy jurisdiction. For an excellent discussion of the issue and its origins *see* Thomas B. Bennett, *Removal, Remand, and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire!*, 27 Cumb. L. Rev. 1037, 1057-62 (1996-97). Nevertheless, because G-02-585 was filed after the bankruptcy proceeding was commenced, the result under the Rule and the statute in this case is the same.[5] Rule 9027 permits the notice of removal to be filed within the shorter period of "(A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with summons." Fed. R. Bankr. P. 9027(a)(3). The statute provides that the notice "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, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter." 28 U.S.C. § 1446(b).

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terminating a stay under § 362; or (3) thirty days after the trustee qualifies in a chapter 11 reorganization case, but not later than 180 days after the order for relief.

[5] Thus the Court does not address the question of whether Rule 9027 is still viable and controlling.

Nevertheless, the inquiry does not end here. There is a split of opinion regarding whether, in cases with multiple defendants where all are properly joined and served, unanimity is required for "related to" bankruptcy removal under the language of § 1452 ("*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 [emphasis added]"), as has always been required[6] under § 1441(a),[7] which is read in conjunction with § 1446(a)[8] and

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[6] The rule of unanimity has been universally applied to removal under § 1441. *See, e.g., Chicago R.I. & P.R. Co. v. Martin*, 178 U.S. 245, 248 (1900); *Russell Corp. v. American Home Assurance Co.*, 264 F.3d 1040, 1044 (11th Cir. 2001)("The unanimity requirement mandates that in cases involving multiple defendants, all defendants must consent to removal."); *Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998); *Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P.*, 254 F.3d 753, 754 n.2 (8th Cir. 2001); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 n.3 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000); *Lewis v. Rego*, 757 F.2d 66, 68 (3d Cir. 1985). The Fifth Circuit has long held that, with a few narrow exceptions not applicable here (co-defendant not yet served, a co-defendant only a nominal defendant, and the removed claim is a separate and independent cause of action), § 1446 requires that all properly served and joined defendants must consent to a removal petition. *Getty Oil Corp. v. Ins. Co. of North America*, 841 F.2d 1254, 1261 & n.9 (5th Cir. 1988), *citing Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen and Assistants' Local 3349*, 427 F.2d 325, 327[-27] (5th Cir. 1970). The rule of unanimity is a procedural, not a jurisdictional requirement; if not all defendants join in a removal petition, there is a defect in the removal procedure. *See, e.g., Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 423 (5th Cir. 1990)("the failure to join all defendants in a removal petition is not a jurisdictional defect"); *In re Bethesda Mem'l Hosp., Inc.*, 123 F.3d 1407, 1410 & n.2 (11th Cir. 1997)(same); *Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1994)(same).

[7] Section 1441(a) provides,

. . . [A]ny civil action brought in a State

§ 1446(b)[9]. The issue involves construing the interrelationship of the general procedural removal statutes and § 1452. Intricately related to this issue, and the crux of Plaintiffs' motion to remand here, is the question when the "thirty days" permitted for filing a petition for removal is triggered for each defendant.

A number of district and bankruptcy courts, led by the Fourth Circuit's influential pronouncement in *Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 660-61 (4th Cir. 1985)("Under the bankruptcy removal statute . . . any one party has the right to remove the state court action without the consent of the other

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> 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.

[8] Section 1446(a) recites in relevant part,

> 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 which such action is pending a verified petition . . . .

[9] Section 1446(b) reads,

> The petition for removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant through service or otherwise, or a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter."

parties."), have concluded that unanimity is not required for a "related to" bankruptcy removal, that each defendant has a separate right to remove the suit under § 1452, and that removal is proper and timely as long as one defendant files a notice of removal within thirty days of receiving its own state court summons. *See, e.g.*, *Garside v. Osco Drug, Inc.*, 702 F. Supp. 19 (D. Mass. 1988); *Plowman v. Bedford Fin. Corp.*, 218 B.R. 607, 616 (Bankr. N.D. Ala. 1998). Several lower courts within the Fifth Circuit have concurred. *Sommers v. Abshire*, 186 B.R. 407, 408-09 (E.D. Tex. 1995); *Joe Conte Toyota, Inc. v. Howell*, No. CIV A.97-0686, 1997 WL 222410 (E.D. La. Apr. 30, 1997); *In re Eagle Bend Dev.*, 61 B.R. 451, 456-57 (Bankr. W.D. La. 1986). *In accord*, 16 James William Moore, et al., *Moore's Federal Practice* § 107.15[8][b] (3d ed. 2000)("unlike the general removal statute [§ 1441], which authorizes only defendants to remove, the bankruptcy removal statute authorizes any party to remove."). *Creasy* has been justly criticized for failing to cite any authority for its interpretation of § 1452 and for failing to analyze the language of the statute, although it does explain that without its construction, "the policy of having all related bankruptcy matters litigated in one forum would unnecessarily restricted." *Retirement Systems of Alabama v. Merrill Lynch & Co.*, 209 F. Supp.2d 1257 (M.D. Ala. 2002), *citing Creasy*, 763 F.2d at 661. In *Sommers*, 186 B.R. at 408-09, the court did base its conclusion on the language of the statute, comparing "a party" from § 1452 to "the defendants" in § 1441. *Moore's Federal Practice* §

107.15[8][b] did the same. Until recently, this Court followed suit.

Other courts have held that the unanimity rule of §§ 1441 and 1446 also controls removals under § 1452. *Ross v. Thousand Adventures of Iowa*, 178 F. Supp.2d 996, 1001-02 (S.D. Iowa 2001)(rejecting *Sommers'* focus on "a party" as overweighted because § 1446 also allows "a defendant" to file a notice of removal and holding that such misplaced emphasis "does nothing to dilute the unanimity rule when multiple defendants seek to remove a case to federal court"); *Hills v. Hernandez*, No. CIV. A. 98-1108, 1998 WL 241518, *2 (E.D. La. May 12, 1998)(applying rule of unanimity under § 1446(b) to removal pursuant to 28 U.S.C. § 1452 and remanding where defendants did not all join in notice of removal); *Whitney National Bank v. Bunch*, No. CIV. A. 00-2859, 2001 WL 87443, *2 n.9 (E.D. La. Jan, 30, 2001)(unanimity rule of § 1446 also "applies to 'related to' removals pursuant to 28 U.S.C. § 1452," relying on *Hills v. Hernandez* and *Getty Oil*, 841 F.2d 1254). For another view, *see Retirement Systems of Alabama v. Merrill Lynch & Co.*, 209 F. Supp.2d 1257, 1264 (M.D. Ala. 2002)("The more sensible reading seems to be that § 1452 authorizes a party to remove a particular 'claim or cause of action' that touches on the administration of a bankruptcy estate, but not an entire 'action' involving claims and other parties that may have nothing to do with the bankruptcy. Section 1452 does refer to '*any* claim or cause of action,' but interpreting this phrase as allowing a defendant to remove a claim against another

defendant, over that defendant's and plaintiff's objections, would raise serious due process questions.").

After carefully researching the issue and the conflicting views, this Court is of the opinion that the federal removal statute, 28 U.S.C. §§ 1441-52, must be read as a whole and that its procedural provisions, including §1446, apply to bankruptcy removals under § 1452; moreover, because of disagreement among courts, that the law of the governing Circuit, here the Fifth Circuit Court of Appeals, regarding the rule of unanimity and the running of the thirty-day clock for filing notice of removal, in particular, applies to the § 1452 bankruptcy removal in G-02-585. The Court is persuaded in large part by the reasoning and implication of a Supreme Court case, *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

Thomas Bennett in *Removal, Remand, and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire!*, 27 Cumb. L. Rev. at 1058, in the context of discussing the original role of Federal Rule of Bankruptcy 9027, discussed *supra*, summarily explains the development of the law leading to the enactment of § 1452 and its role in the scheme of the removal statute:

> Prior to the 1978 Act, 28 U.S.C. §§ 1441 et seq., the federal removal statute governed removal in both nonbankruptcy and bankruptcy situations. . . . After the passage of the [Bankruptcy and Reform Act of 1978], Congress enacted 28 U.S.C. § 1478, a removal provision specifically designed to provide for removal of proceedings connected to bankruptcy. . . . Section 1478 was not placed with the other removal sections set forth in 28 U.S.C. §§ 1441-1451. Because § 1478 did not set forth

> removal procedural requirements and because 28 U.S.C. § 1446, which did provide removal procedure, was part of the general federal removal scheme set forth in 28 U.S.C. § 1441-1451, interim Bankruptcy Rule 7004 was promulgated to provide a framework of procedure for bankruptcy removals. Fed. R. Bankr. 9027 [which set removal deadlines and procedure that recognized unique concerns and policies embodied in the Bankruptcy Code] subsequently replaced this interim rule. . . . One result of the Bankruptcy Amendments and Federal Judgeship Act of 1984 was the repeal of 28 U.S.C. § 1478 and the enactment of 28 U.S.C. § 1452 as the bankruptcy removal section. . . . Unlike its predecessor, when § 1452 was enacted, it was included within the federal removal statute of title 28, now 28 U.S.C. §§ 1441-1452.

As part of the removal statute, the unanimity rule of § 1441 and of the removal procedure provision of § 1446 should apply to removals based on "related to" bankruptcy jurisdiction under § 1452.

In *Things Remembered* (holding that the rule under § 1447(d) that an appellate court lacks jurisdiction to review a remand order based on a defect in removal procedure or lack of subject matter jurisdiction, grounds for remand recognized under § 1447(c), also applies to bankruptcy remands under § 1452(b)),[10]

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[10] Section 1452(b) provides,

> The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals . . . . or by the Supreme Court . . . .

The Supreme Court has explained that the "or otherwise" *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 (1999) refers to procedure in states allowing suits to be

Justice Thomas, writing for a unanimous court, pronounced, "We reach the same conclusion regardless of whether removal was effected pursuant to § 1441(a) or § 1452(a)." 516 U.S. at 128. Moreover, he reasoned,

> There 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 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.

Id. at 129. By analogy, this Court concludes that the provisions of § 1446(a) and (b), setting forth general removal procedure, which have the same characteristics noted by the Supreme Court in *Things Remembered* with respect to § 1447(d), by the same reasoning should apply to removals under § 1452(a) and (b).

The district court in *Retirement Systems of Alabama v. Merrill Lynch & Co.*, 209 F. Supp.2d at 1264 n. 13, *quoting Things Remembered*, 516 U.S. at 129, suggested in a footnote the basic approach that this Court is taking, and concluded, "[T]here 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

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commenced by the service of summons without complaints after complaints have been filed.

action.'" In addition, in *In re Asbestos Litigation*, no. CV 01-1790-PA, 2002 WL 649400, *3 (D. Or. Feb. 1, 2002), like this Court the district judge also opined, "The same logic [applied in *Things Remembered*] applies here. Just as the procedural requirements of § 1447 apply to bankruptcy removals under § 1452, so do the deadlines set in § 1446(c). There is no conflict between § 1446 and § 1452." Moreover, in *State of Lombard v. Chart House, Inc.*, 46 B.R. 468, 472-72 (N.D. Ill. 1985), the court concluded that "§ 1446's time limitation applies to cases removed under § 1452 because *inter alia* § 1452 is silent about time limitations and § 1446 governs procedure for removal generally and because defendant cites no authority for the argument § 1452 was passed to circumvent § 1446's limitations."

Adding further confusion and controversy in the next step to resolving the issue, once the Court has determined that § 1446 applies to removals under § 1452, is the fact that there is disagreement among the Circuit Courts of Appeals in construing exactly what the removal procedures are under § 1446 regarding the thirty-day time period to file a petition for removal.

In *Brown v. Demco, Inc.*, 792 F.2d 478, 480-82 (5th Cir. 1986) and *Getty Oil*, 841 F.2d 1254, the Fifth Circuit adopted the "first-served" defendant rule,[11] which the appellate court viewed

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[11] The Supreme Court has made clear that for the purpose of § 1446(b), only actual service of process officially triggers the thirty-day period for removal. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 356 (1999). In *Murphy*, the defendant received a copy of the complaint by facsimile two weeks before he was officially served. The Court concluded that formal process, not mere notice, is required before the clock begins to run on the defendant's thirty-day period to remove.

as grounded in the rule of unanimity as well as in equitable concerns. In *Brown*, after the case had been in pending for four years in state court against several corporate defendants that initially could have removed the suit based on diversity jurisdiction but waived that right, another corporate defendant was added and removed the case within thirty days of service on it; the Fifth Circuit found the removal to be improper based on the first-served defendant rule, which strictly construes the thirty-day period as beginning to run when the first defendant is served. Because under the rule of unanimity in § 1446(c), all served defendants must join in the removal petition, "if the first served defendant abstains from seeking removal or does not effect a timely removal, subsequently served defendants cannot remove . . . ." *Brown*, 792 F.2d at 481. Observing that the "rule follows logically from the unanimity requirement, the thirty-day time limit, and the fact that a defendant may waive removal by proceeding in state court," the Fifth Circuit also noted that "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." *Id.* at 484. The Fifth Circuit also responded to criticism that the first-served defendant rule was unfair:

> [W]e do not perceive the suggested unfairness to the subsequently added defendant who is merely not granted an opportunity that might have been available to others. A defendant who is added to a case in which a co-defendant has failed to seek removal is in no worse position than it would have been in if the co-defendant had opposed removal or were domiciled in the same state as the plaintiff.

> To permit the defendants in this case to obtain removal after they have tested state-court waters for four years would give them a second opportunity to forum-shop and further delay the progress of the suit. The unfairness of this to the plaintiff outweighs the unfairness, if any, to the last-joined defendant. The forum for a suit ought to be settled at some time early in the litigation.

Id. Furthermore, the panel did leave some leeway by rejecting an "inexorable time limit. Exceptional circumstances might permit removal even when a later-joined defendant petitions more than precisely thirty days after the first defendant is served." *Id.* at 482. *See Doe v. Kerwood*, 969 F.2d 165, 169 (5th Cir. 1992)(noting the equitable power of a court to consider on a case-by-case basis exceptions to 30-day restriction on removal). This Court observes that in neither *Brown* nor *Kerwood* did the Fifth Circuit find any exceptional circumstances to justify an equitable extension of the thirty-day period.

In *Getty Oil*, three defendants were named and served at different times; the third joined the removal petition within thirty days of service on it, but fifty-one days after the first defendant was served. The Fifth Circuit concluded that where there were multiple defendants named and served, removal must occur within thirty days of service on the first-served defendant; it justified that rule by emphasizing that all served defendants must join in the removal petition anyway. 841 F.2d at 1262-63 ("In cases involving multiple defendants, the thirty-day period begins to run [for all defendants] as soon as the first defendant is served (provided the case is removable."). Moreover, "all defendants who are properly joined and served must join in the

removal petition, . . . and failure to do so renders the petition defective [citations omitted." *Id.* at 1262.

In contrast, illustrating the "later-" or "last-served" rule, the Eighth Circuit construed § 1446(b) to mean that each defendant has thirty days to remove a suit from the time he is served, no matter at what point in the litigation he is served. *Brown v. Tokio Marine and Fire Ins. Co. Ltd.*, 284 F.3d 871, 873 (8th Cir. 2002)("The law is settled in this Circuit that the thirty-day period to file a notice of removal runs from that time that a defendant is served with the complaint, even when the defendant is a later-served defendant and does not receive service until the time limit during which the first-served defendant could have removed the case has expired,")(*citing Marano Enters. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 756-57 (8th Cir. 2001)), *cert. denied*, 537 U.S. 826 (2002).

Earlier the Sixth Circuit had similarly concluded that each later-served defendant has the right to remove a case from state court within thirty days of service on him and that all the other defendants can still consent to removal even if their own thirty-day periods have expired. *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 and n.3 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000). In denying a motion to remand a case removed for the second time by a newly served defendant, with the consent of the first served defendant whose own thirty-day period had expired long before, the Sixth Circuit explained its interpretation of § 1446:

> [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 the statute. We are naturally reluctant to read additional words into the statute, however. If Congress had intended the 30-day removal period to commence upon service of the first defendant, it could easily have so provided. For that reason, and as a matter of fairness to later-served defendants, we hold 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. [citations omitted]

Id. at 533. Thus it allowed the later-served defendant to remove the case "despite having already failed in its own efforts to remove." *Id.* at 533 n.3. The panel explained, "Given the rule of unanimity, holding otherwise would vitiate the removal application of the later-served defendants and thereby nullify our holding that later-served defendants are entitled to 30 days to remove to district court." *Id.*

The Fourth Circuit not only held in *Creasy* that unanimity is not required for removal under § 1452, but also construed § 1446(b) in *McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924, 926 n.3, 928 (4th Cir. 1992). Noting that the statute "only contemplates one defendant" and "does not address multiple defendants," the Fourth Circuit held that if a defendant is served within the thirty-day period of the first-served defendant, he has thirty days to join in the first-served defendant's petition for removal, but a defendant served after the expiration of the thirty-day removal period of the first-served defendant has no right to remove. Thus the panel

construed § 1446(b) to give "individual defendants . . . thirty days from the time they are served with process or with a complaint to join in an otherwise valid removal petition." *Id.* at 926, 928.

The Fifth Circuit's first-served rule binds this Court. Under that rule Mark-Jusbasche, though joined and served after the suit had already been removed the first time, was never entitled to thirty more days to remove and did not properly remove this action to federal court the second time. The Court finds no exceptional circumstances alleged here that would justify an equitable extension of time for Mark-Jusbasche.

Furthermore, although the Fifth Circuit recognizes a right to remove a case more than once, it permits a second removal only when it is based on a different ground arising in subsequent pleadings or when events reveal a new ground, in other words, a different set of facts establishing a new ground for removal, than those asserted in the first removal even though the theory of federal jurisdiction might be the same. *S.W.S. Erectors, Inc. v. Infax*, 72 F.3d 489, 492-93 (5th Cir. 1996). In the instant case, "related to" bankruptcy jurisdiction was an available ground for removal when Arthur Andersen initially removed the case, even though the accounting firm did not assert it. Mark Jusbasche's untimely assertion of that basis for the second removal is not based on a revelation of new facts.

Accordingly, for the reasons indicated above, the Court

ORDERS that Plaintiffs' motion for clarification *re* motion to remand and to extend time (#6 in G-02-585) is MOOT;

Mark Jusbache's motion to strike (#1193 in *Newby*, #13 in G-02-585) is DENIED; and Plaintiffs' motion to remand to the 56th Judicial District Court in Galveston County, Texas (#7 in G-02-585) is GRANTED.[12]

SIGNED at Houston, Texas, this 13th day of September, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

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[12] Because the removal by Mark-Jusbasche was procedurally defective, the Court remands it on that basis and does not reach Plaintiffs' substantive challenge of lack of bankruptcy jurisdiction.