United States Courts
Southern District of Texas
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION	MDL-1446
This Document Relates To: MARK NEWBY, ET AL., PLAINTIFFS, VS. ENRON CORPORATION, ET AL., DEFENDANTS.	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
SAMSON INVESTMENT COMPANY, PLAINTIFF, VS. ARTHUR ANDERSEN L.L.P., DEFENDANT.	CIVIL ACTION NO. H-03-2264
AND ARTHUR ANDERSEN L.L.P., DEFENDANT/THIRD-PARTY PLAINTIFF, VS. ANDREW FASTOW, ET AL., THIRD-PARTY DEFENDANTS	

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U.S. COURTS
SOUTHERN DISTRICT
OF TEXAS

BANK DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTIONS TO REMAND CONCERNING THE EFFECT OF THE COURT'S SEPTEMBER 15, 2003 DECISION IN *AMERICAN NATIONAL, ET AL. V. ARTHUR ANDERSEN, ET AL.*

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RICHARD CHOUCROUN, ET AL., PLAINTIFFS, VS. ARTHUR ANDERSEN L.L.P., ET AL., DEFENDANTS. AND ARTHUR ANDERSEN L.L.P., DEFENDANT/THIRD-PARTY PLAINTIFF, VS. JP MORGAN CHASE & CO. ET AL., THIRD-PARTY DEFENDANTS.	:	CIVIL ACTION NO. H-03-3320
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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, PLAINTIFF, VS. BANC OF AMERICA SECURITIES LLC, ET AL., DEFENDANTS.	:	CIVIL ACTION NO. H-03-3481

PAUL OKOMO, PLAINTIFF, VS. BANC OF AMERICA SECURITIES LLC, ET AL., DEFENDANTS.	:	CIVIL ACTION NO. H-03-3508
RETIREMENT SYSTEMS OF ALABAMA, ET AL., PLAINTIFFS, VS. MERRILL LYNCH & CO., ET AL., DEFENDANTS.	:	CIVIL ACTION NO. H-03-2308

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Defendants J.P. Morgan Chase & Co., J.P. Morgan Securities Inc., JPMorgan Chase Bank, Citigroup Inc., Citibank N.A., Salomon Smith Barney Inc., Salomon Brothers International, Credit Suisse First Boston LLC (formerly known as Credit Suisse First Boston Corporation), Credit Suisse First Boston (USA), Inc., Credit Suisse First Boston Inc., Pershing LLC, Canadian Imperial Bank of Commerce, CIBC World Markets Corp., fka CIBC Oppenheimer Corp., Bank of America Corporation, Banc of America Securities LLC, Bank of America, N.A., Merrill Lynch & Co., Inc., Merrill Lynch, Pierce Fenner & Smith, Incorporated, Deutsche Bank AG, Goldman, Sachs & Co., Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Lehman Brothers Inc., and Lehman Brothers Holdings Inc. (collectively, "Bank Defendants") respectfully submit this Supplemental Response concerning the potential effect of the Court's September 15, 2003 Order in *American National et al. v. Arthur Andersen et al.*, CA No. 02-00585 (the "September 15 Decision"), a case in which the Bank Defendants are not parties, on the several pending remand motions filed in cases in which the Bank Defendants are parties.

PRELIMINARY STATEMENT

The September 15 Decision, which granted Plaintiffs' motion to remand in large part on the ground that defendant Rebecca Mark-Jusbasche's notice of removal was procedurally defective, addressed significant issues that the Bank Defendants have not had an opportunity to brief or argue before this Court. Resolution of these legal issues may affect pending and future remand motions before this Court in Enron-related litigations. The Bank Defendants therefore respectfully request that the Court consider this filing prior to ruling on the remaining pending remand motions, which should all be denied.[1]

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[1] The cases that involve the Bank Defendants in which remand motions are pending are set forth on page 3-4.

First, the Bank Defendants respectfully submit that the September 15 Decision is contrary to controlling precedent and urge the Court to reconsider that decision before it is applied to other cases. Remand of these several cases would splinter the Enron civil litigations, further complicate discovery and undercut the mediation process and should not be ordered where bankruptcy "related to" jurisdiction is present. Reconsideration of this Court's September 15 Decision is particularly appropriate now in light of the holding in this Court's September 30 Memorandum and Order in *American Nat'l Ins. Co. v. Lehman Brothers Holdings Inc., et al.*, No. G-02-463; *American Nat'l Ins. Co. v. Citigroup, et al.*, No. G-02-723; *American Nat'l Ins. Co. v. J.P. Morgan Chase and Company, et al.*, No. G-02-0299 (the "September 30 Decision") that Second Circuit, not Fifth Circuit law governs the pending remand motions.[2] September 30 Decision, at 22. Second Circuit law does not support the procedural rules announced through the September 15 Decision.

In the September 15 Decision, this Court applied two judicial rules created in the context of 28 U.S.C. § 1441 to "related to bankruptcy" removal authorized under 28 U.S.C. § 1452. However, these two rules —the "unanimity rule" and the "first-served defendant rule"— should not be applied to § 1452 removal. In its ruling, this Court rejected numerous cases, including, as the September 15 Decision acknowledges, prior decisions made by this Court that have held squarely to the contrary. Respectfully, the Court's holding is contrary to both the plain language of § 1452 and caselaw, including caselaw cited in the September 15 Decision. Neither the Supreme Court case of *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), nor the

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[2] This Court's September 30 Decision also confirmed that where the Bank Defendants have rights to contribution or are creditors in the Enron bankruptcy, a suit against the Bank Defendants is "related to" the Enron bankruptcy and federal jurisdiction is present. *Id.* at 37-38. The Court's holding in the September 30 Decision is equally applicable to the other *Newby* consolidated and coordinated cases in which defendants have asserted "related to" bankruptcy jurisdiction and remand motions are still pending.

other cases relied upon by the Court require the application of either the unanimity rule or the first-served defendant rule in the context of § 1452. Indeed, well-accepted rules of statutory construction as well as the legislative history of § 1452 confirm that the terms of § 1452, including its very specific statement that removal may be accomplished by "a party," should be accorded their full and complete reading.

The application of the unanimity rule and the first-served defendant rule to § 1452 removals creates an unworkable system that contravenes Congressional intent. The September 15 Decision cites no case, and the Bank Defendants are not aware of any, in which a court has applied both these rules to find a removal made pursuant to § 1452 improper. Under this Court's holding, a bankruptcy debtor itself would be unable to remove an action to federal court if it could not gain the consent of its co-defendants. Certainly, such a result was not the intention of the drafters of the removal statutes and, in fact, would directly contravene Congress' desire to have all matters relating to a bankruptcy decided in one federal forum. *See, e.g., Matter of Wood*, 825 F.2d 90, 92 (5th Cir. 1987) ("Congress was concerned with the inefficiencies of piecemeal adjudication of matters affecting the administration of bankruptcies and intended to give federal courts the power to adjudicate all matters having an effect on the bankruptcy.") (citing S.Rep. No. 989, 95th Cong., 2d Sess., 153-54 (1978)), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5939-40).

Second, the remaining remand motions pending in cases that involve the Bank Defendants—including *Samson Inv. Co. v. Arthur Andersen LLP* ("*Samson*"), No. H-03-2264; *Choucroun v. Arthur Andersen LLP* ("*Choucroun*"), No. H-03-3320; *Al Rajhi Inv. Corp. v. Arthur Andersen LLP* ("*Al Rajhi*"), No. H-03-1219; *CalPERS v. Banc of America Securities LLC, et al.* ("*CalPERS*"), No. H-03-3481; *Okomo v. Banc of America Securities LLC, et al.* ("*Okomo*"), No. H-03-3508; and *Retirement Systems of Alabama v. Merrill Lynch & Co., et al.*

("*RSA*"), No. H-03-2308[3]—must be denied even if this Court declines to reconsider the September 15 Decision. In most of these cases, the Plaintiffs have waived any right they might have had to challenge alleged procedural defects in the Bank Defendants' removal papers because they did not advance such arguments within 30 days of the removal as required by § 1447(c). In the others at issue, a careful analysis reveals that the removals were not procedurally defective even under the analysis applied by the Court in the September 15 Decision.

ARGUMENT

I. The Unanimity Rule And The First-Served Defendant Rule Should Not Be Applied To "Related To Bankruptcy" Removal Under 28 U.S.C. § 1452.

The application of § 1441's unanimity rule and first-served defendant rule to "related to bankruptcy" removal under § 1452 conflicts with the plain statutory language, legislative history and precedent.

A. The Plain Terms Of Section 1452 Permit "A Party" To Remove Without The Consent Of The Other Defendants.

28 U.S.C. § 1452 plainly provides: "*A party* may remove any claim or cause of action in a civil action . . . if [the] district court has jurisdiction of such claim or cause of action under section 1334 of this title [providing for bankruptcy jurisdiction]." 28 U.S.C. § 1452(a) (2003) (emphasis added). By its express terms § 1452 allows a single party to remove a claim or cause of action related to a bankruptcy case. There is no requirement in the statute that all defendants so remove. In contrast to this clear language, 28 U.S.C. § 1441, the more general

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[3] Since the Court has already denied Plaintiffs' remand motions in *American Nat'l Ins. Co. v. Lehman Brothers Holdings Inc., et al.*, No. G-02-463; *American Nat'l Ins. Co. v. Citigroup*, et al., No. G-02-723; and *American Nat'l Ins. Co. v. J.P. Morgan Chase & Co.*, No. G-02-0299 and there are no remand motions currently pending in *Public Employees Retirement System of Ohio v. Fastow, et al.*, H-02-4788 (no remand motion filed), or *Connecticut Resources Recovery Authority v. Lay*, No. H-03-1558 (remand motion denied prior to MDL transfer), these cases are not discussed in this submission.

removal provision, provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed *by the defendant or the defendants*, to the district court of the United States . . . ." 28 U.S.C. § 1441 (2003) (emphasis added). By specifying that removal must be performed by either "*the* defendant or *the* defendants," § 1441 leaves no doubt that removal may either be accomplished by a single defendant where there is no other defendant or by all of the defendants where multiple parties have been served. Such language could easily have been included in § 1452, but was not. *See Beasley v. Personal Finance Corporation*, 279 B.R. 523, 529 (S.D. Miss. 2002) ("by its plain language, section 28 U.S.C. § 1452 differs from 28 U.S.C. § 1441(a) in that the former permits 'a party' to remove a lawsuit to federal court while the latter permits removal by the 'defendant or defendants' in the case").

The legislative history of § 1452 indicates that its drafters used § 1441 as a model in drafting § 1452, but deliberately changed the language to effectuate § 1452's purpose of consolidating all claims "related to bankruptcy" in one forum.[4] Section 1452's predecessor, 28 U.S.C. § 1478, was adopted by Congress as part of the Bankruptcy Reform Act of 1978.[5] A draft of § 1478 was originally submitted to Congress by the Commission on Bankruptcy Laws (the "Commission"), a joint Congressional committee convened in 1970 to improve the then-

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[4] Section 1452 was adopted in 1984, as a modification of former 28 U.S.C. § 1478, which was adopted in 1978. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 103(a), 98 Stat. 333, 335 (Jan. 23, 1984); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2670 (Nov. 6, 1978). Section 1441, however, was adopted in its present form almost forty years earlier in 1948 as part of the comprehensive re-codification of the Judiciary and Judicial Code, Act of June 25, 1948, ch. 646, 62 Stat. 937.

[5] Section 1478 contained substantially similar language to current § 1452 specifically authorizing "a party" to remove "any claim or cause of action in a civil action" if bankruptcy jurisdiction was present. 28 U.S.C. § 1478, Pub. L. No. 95-958, 92 Stat. 2549 (1978).

existing Bankruptcy Act.[6] In crafting the provision that became § 1478, the Commission made it clear that it was using § 1441 as a model. *See* Commission Report, H.R. Doc. No. 137 Part II, Cong. 1st Sess. at § 2-202 n.2, *reprinted in* Resnick & Wypyski, doc. 22 at 35, n.2 ("[the bankruptcy removal provision] is patterned on 28 U.S.C. § 1441(a) and (c)"). The Commission deliberately changed the language of § 1441, however, with the clear intent that § 1478 would override § 1441 for removals related to bankruptcy. *Id.* ("This section is exclusive and supersedes the applicability of 28 U.S.C. § 1441 to actions that fall within the jurisdiction of the bankruptcy court.").

Based on the plain text of § 1452 and the clear legislative history, it is no surprise, as this Court acknowledges, that the vast majority of courts have held that the unanimity rule is not applicable to § 1452. September 15 Decision, at 10. *Creasy v. Coleman Furniture Co.*, 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 parties."); *Mid-Atlantic Res. Corp. v. Mate Creek Loading*, 283 B.R. 176, 183 (S.D.W.V. 2002) ("consent of all the parties is not needed under § 1452(a) for removal of a case to bankruptcy court"); *Plowman v. Bedford Fin. Corp.*, 218 B.R. 607, 616 (N.D. Ala. 1998) ("When a case is removed under 28 U.S.C. § 1452, one defendant may remove a case without the consent of the other defendants."); *Joe Conte Toyota, Inc. v. Howell*, No. Civ. A. 97-0686, 1997 WL 222410, at *1 (E.D. La. Apr. 30, 1997) ("Regarding consent, removals of claims related to bankruptcy cases are governed by 28 U.S.C. § 1452, under which any one defendant has the right to remove without the consent of other defendants."); *Sommers v. Abshire*, 186 B.R. 407, 409 (E. D. Tex. 1995) (holding "[u]nder section 1452, any defendant has the right to remove a state court action without the consent of

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[6] The Commission numbered its proposed provision § 2-202(a), which Congress enacted in substantially similar form as § 1478. Commission Report, 137 Part II, 93d Cong. 1st Sess. § 2-202(a), *reprinted in* 2 Resnick & Wypyski doc. 22 at 33.

the other parties"). Even the law review article cited by the Court as containing "an excellent discussion of the [unanimity] issue and its origins" concludes that "any one defendant may utilize § 1452 without the joinder of all other defendants." September 15 Decision, at 10; Thomas B. Bennett, *Removal, Remand, and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire*, 27 Cumb. L. Rev. 1037, 1052 (1996-97); *See also* 16 James Wm. Moore et. al., Moore's Federal Practice § 107.15 [8][b] (3d ed. 2003) and cases cited.

Significantly, Southern District of New York Courts that have addressed this issue have concluded that unanimity is not a requirement of § 1452. *See Mt. McKinley Ins. Co. v. Corning, Inc.*, No. 02-Civ.-5835, 2003 WL 1482786, *6 (S.D.N.Y. Mar. 21, 2003) ("The plain language of Section 1452 indicates that a single party may remove the action without obtaining consent from any other party.") (citing *Creasy*, 763 F.2d at 660-61); *In re WorldCom, Inc. Securities Litigation*, No. 02-Civ.-3288, 2003 WL 716243, *17 (S.D.N.Y. 2003) ("It seems clear that Section 1452(a) does not require the defendants' unanimous consent to removal.") (citing *Creasy*). According to the decision issued by this Court on September 30, 2003, two weeks after the September 15 Decision, it is Second Circuit, not Fifth Circuit, law that applies to the Enron civil cases removed pursuant to "related to bankruptcy" jurisdiction. *See* September 30 Decision, at 22. In that decision, this Court stated that "where 'related to' bankruptcy jurisdiction is the sole basis of [the Court's] jurisdiction" the Court "follows the controlling law in the Second Circuit." *Id.* The *McKinley* and *Worldcom* cases should, therefore, guide the unanimity inquiry.

1. Rules Of Statutory Construction Confirm That Section 1452 Permits Removal By A Single Defendant.

Rules of statutory construction also confirm that § 1452 permits removal by a single defendant. First, it is a "cardinal canon" of statutory interpretation that a court must give effect to every term of a statute. *Texaco Inc. v. Duhe*, 274 F.3d 911, 920 (5th Cir. 2001) ("the

cardinal rule of statutory construction [is] that every word has some operative effect") (internal quotation omitted). This rule is particularly relevant where, as here, the drafters have used one statute as a model for another but conspicuously worded the two statutes differently. *Russell v. Law Enforcement Assistance Admin. of U.S.*, 637 F.2d 354, 356 (5th Cir. 1981) ("There is . . . a well settled rule of statutory construction that where different language is used in the same connection in different parts of a statute it is presumed that the Legislature intended a different meaning and effect.") (internal quotation omitted). Under this rule, this Court must give effect to the difference between the "a party" language in § 1452 and "the defendant or the defendants" language in § 1441.

Second, courts have acknowledged that to the extent two statutes conflict, the "latter law" controls the earlier enacted law. *U.S. v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 1996) ("in case of an irreconcilable inconsistency between [two statutes] the later and more specific statute usually controls the earlier and more general one") (internal quotation omitted); *Cheffer v. Reno*, 55 F.3d 1517, 1522 n.10 (11th Cir. 1995); ("Normally, where there is a conflict between an earlier statute and a later enactment, the later statute governs."); *Evangeline Tel. Co., Inc. v. AT & T Communications, Inc.,* 916 F. Supp. 598, 599 (W.D. La. 1995) ("When provisions of the two acts can not have 'concurrent operation' the terms of the later act control."); *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Comm'n*, 626 F.2d 1020, 1022 (D.C. Cir. 1980) (finding that "to the extent of any inconsistency between [] two statutes [a latter law] implicitly restricts" an earlier law); *In re San Pedro*, 15 U.S. 132, 141 (1817); Norman Singer, 1A, 2B Sutherland Statutory Construction § 23.09 (West 2000). Under this rule, this Court must apply the terms of § 1452 to bankruptcy removals, because it was enacted after § 1441 and therefore overwrote § 1441 to the extent of any inconsistency between the two sections. This rule is particularly relevant where, as here, the legislative history confirms that Congress intended § 1452 to "supersede[] the applicability of 28 U.S.C. § 1441 to actions

that fall within the jurisdiction of the bankruptcy court." Commission Report, H.R. Doc. No. 137 Part II, Cong. 1st Sess. at § 2-202 n.2, *reprinted in* Resnick & Wypyski, doc. 22 at 35, n.2.

Third, courts have acknowledged that where two statutes or portions of a statute conflict, the specific provision controls the more general. *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003) ("specific provisions trump general provisions"); *In re Nobelman*, 968 F.2d 483, 488 (5th Cir. 1992) ("If two statutes conflict, a generally accepted tenet of statutory construction is that the general language of a statute does not prevail over matters specifically dealt with in another part of the same enactment.") (internal quotation omitted); *See also D. Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204, 208 (1932) ("General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."). In *In re Nobleman*, for example, the Fifth Circuit determined that specific provisions governing Chapter 13 creditors' rights superseded general conflicting provisions found elsewhere in the Bankruptcy Code. The court recognized the conflict between the two statutes, but relied on the specific provision to the exclusion of the more general provision. *In re Nobleman*, 968 F.2d at 483.

Sections 1441 and 1446, which this Court in the September 15 Decision respectively termed the "general removal statute" and "general removal procedures [statute]," *see* September 15 Decision at 3, n.3, grant defendants the general right to remove both diversity and federal question cases. Were there no § 1452, "arising under," "arising in," and "related to" cases, as bankruptcy cases involving federal questions, could be removed under § 1441 alone. *See In re Bissonnet Inv. LLC*, 320 F.3d 520, 524 (5th Cir. 2003) ("Both 1441 and 1452 literally apply to every case removed from state court by the defendant because of a related bankruptcy … In other words, there is in every bankruptcy case the potential for both 'direct' § 1452/ 1334 removal and 'indirect' § 1441/1334 removal."). Section 1452 is a more specific statute, applying only to bankruptcy removal cases. Unless § 1452 is read to require different or alternate rules or

procedures, it would be superfluous. Under the statutory construction rule embodied in *Navarro-Miranda*, the terms of § 1452 trump the far more general provisions of §§ 1441 and 1446. One of these different rules or procedures is the rejection of the unanimity requirement.[7] Such departures from the general removal scheme are expressly anticipated by § 1441, which applies only to the extent that other removal statutes are not "otherwise [] provided by . . . Congress." 28 U.S.C. § 1441. Thus, when Congress chose to provide "otherwise" for related to bankruptcy removals, it deliberately changed the language of the model general removal statute to reflect its policy choice that unanimity was not required. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("courts should disfavor interpretations of statutes that render language superfluous").

2. The Cases Cited By This Court, Including *Things Remembered*, Do Not Support The September 15 Decision.

Contrary to the Court's suggestion, the Supreme Court's decision in *Things Remembered* does not support the September 15 Decision. In that case, the Supreme Court held no more than: where two terms of a statute can "comfortably coexist," a court must give effect to both. *Things Remembered,* 516 U.S. at 129. The *Things Remembered* Court compared the reviewability provision of § 1452 with the reviewability provisions of § 1447(d). The Court determined that because § 1452 was silent regarding the reviewability of remands made on non-equitable grounds, the reviewability provisions of § 1447(d) would apply to those remands in the § 1452 context. The Court stated "[t]here is no reason §§ 1447 and 1452 cannot comfortably coexist in the bankruptcy context. We must, therefore, give effect to both." *Id.* Had there been

[7] Other differences include: (1) a provision barring the removal of proceedings before the United States Tax Court; (2) a provision barring the removal of civil actions brought by governmental units to enforce such unit's police or regulatory power; and (3) a provision declaring remands based on equitable grounds unreviewable. *See* 28 U.S.C. § 1452.

a conflict between § 1447 and § 1452, the more specific and later enacted § 1452 would have controlled.

Therefore, *Things Remembered* does not support the proposition that "the federal removal statute 28 U.S.C. §§ 1441-52, must be read as a whole and [] its procedural provisions, including § 1446, apply to bankruptcy removals under § 1452." September 15 Decision at 12. Unlike the appellate review context in *Things Remembered*, § 1452 and § 1441 cannot "comfortably coexist" in the unanimity context here because § 1452 is not silent regarding whether "[a] party" may remove. There is a conflict between the removal provisions of § 1452 and those of § 1441. The more specific § 1452 must and does control.

Reliance on *Things Remembered* stems in part from the Court's apparent suggestion that § 1441's unanimity requirement is authorized, at least in part, by § 1446 as opposed to § 1441 itself.[8] In fact, only the text of § 1441 provides support for unanimity for § 1441 removals through its "the defendant or the defendants" language. In *Doe v. Kerwood*, the Fifth Circuit stated, "[the unanimity] rule is based on § 1441(a) which provides that 'the defendant or the defendants' may remove the case." 969 F.2d 165, 167 (5th Cir. 1992). The Fifth Circuit explained that "courts have read these words to mean that, if there is only one defendant then that defendant may remove the case; however, if there is more than one defendant, then the defendants must act collectively to remove the case." *Id.* By contrast, § 1446(a) refers to "a defendant or defendants desiring to remove" indicating that "a" single defendant may remove regardless of whether or not the other defendants consent. Accordingly, even if the "procedural provisions" of § 1446 generally apply to § 1452, as the Court concludes

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[8] The September 15 Decision appears to rely alternatively upon both § 1441 and § 1446 as the source for the unanimity requirement. *Compare* September 15 Decision at 11 (stating "the unanimity rule of §§ 1441 and 1446 also controls removals under § 1452") *with* September 15 Decision at 12 (suggesting that reading "procedural provisions" of § 1446 into §1452 creates unanimity requirement).

from *Things Remembered*, this conclusion does not read a unanimity requirement into § 1452. To superimpose a unanimity requirement on § 1452, the Court would have to read § 1441 into § 1452, which, the Bank Defendants respectfully submit, is not supported by any rule of statutory construction.

The Court also cites three district court opinions, none issued by a Judge in this District, in support of reading the unanimity rule into § 1452: *Ross v. Thousand Adventures of Iowa*, 178 F. Supp. 2d 996, 1001-02 (S.D. Iowa 2001); *Hills v. Hernandez*, No . CIV. A. 98-1108, 1998 WL 241518, at *2 (E.D. La. May 1, 1998); *Whitney Nat'l Bank v. Bunch*, No. Civ. A. 00-2859, 2001 WL 87443 at *2 n. 9 (E.D. La. Jan. 30, 2001). September 15 Decision at 11. None of these cases supports departing from the plain meaning of § 1452 and the well-established canons of statutory construction discussed above.

First, *Ross* is justly criticized by another case extensively relied upon by the Court, *Retirement Systems of Alabama v. Merrill Lynch & Co.*, 209 F. Supp. 2d 1257 (M.D. Ala. 2002), for misreading the relevant provisions of §§ 1441, 1446 and 1452 and incorrectly identifying § 1446(a) as the source of the unanimity rule in the § 1441 context. As the *Retirement* court stated, "the *Ross* court's comparison of the language of § 1452(a) to that of § 1446(a) may be unavailing as § 1446 provides the *procedure* for removal, whereas § 1441 *authorizes* removal based on federal question or diversity jurisdiction. Similarly § 1452(a) *authorizes* bankruptcy jurisdiction removal." 209 F. Supp. 2d at 1263-64.[9] Second, the *Hills* court explicitly stated that it did not rely on plaintiffs' unanimity or timeliness argument at all, finding remand proper on another ground. *Hills*, 1998 WL 241518, at *2-3 (ordering remand "[i]rrespective of the timeliness of [defendant's] removal"). Finally, the *Whitney National Bank*

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[9] Moreover, this Court itself declined to follow *Ross* to the extent the *Ross* court specifically rejected the application of the first-served defendant rule to removals under § 1452.

decision addressed the unanimity rule only as pure dicta in a three sentence footnote. *Whitney,* 2001 WL 87443 at *2 n. 9.

By its terms, § 1452 allows "a party" to remove a claim or cause of action related to a bankruptcy case without requiring the consent of the other defendants. The Court should give effect to this express statutory mandate.

B. The First-Served Defendant Rule Compounds The Difficulties Raised By Applying The Unanimity Rule to § 1452.

Respectfully, the mistake of applying § 1441's unanimity rule to Mark-Jusbasche's notice of removal under § 1452 was compounded by also applying the first-served defendant rule sometimes applied to § 1441 cases. The September 15 Decision provides that "the Fifth Circuit's first-served rule binds this Court," but relies only on a § 1441 case based on diversity jurisdiction, *Brown v. Demco, Inc.*, 792 F.2d 478, 480-482 (5th Cir. 1986). September 15 Decision at 20. There is no Fifth Circuit case that in any way suggests that the first-served defendant rule is applicable to removal under § 1452. Moreover, as the September 30 Decision makes clear, it is Second Circuit, not Fifth Circuit, law that governs the pending remand motions. *Demco* is, therefore, not controlling. Accordingly, even if the Court decides to apply § 1441's unanimity rule to Mark-Jusbasche's notice of removal under § 1452, it should not apply § 1441's first-served defendant rule given the practical differences between §§ 1441 and 1452 and the specific rationale of the *Demco* decision.

Under the first-served defendant rule, the 30-day time period for filing a notice of removal begins to run when the first defendant is served with process. In contrast, the last-served defendant rule states that each defendant has 30 days from being served with process to file a notice of removal. As this Court acknowledges, a significant number of courts apply the last-served defendant rule, even when applying the unanimity rule in the § 1441 context. *Id.*, at 18-19 (citing precedent from the 4th, 6th and 8th Circuits).

For example, the *Ross* court, cited prominently by this Court in its September 15 Decision, specifically rejected the first-served defendant rule, finding it inapplicable under § 1452:

> Plaintiffs argue that each defendant must join within thirty days of the first served defendant. This rule was rejected in *Marano,* 254 F.3d at 757. The exact holding of *Marano* is that all defendants have "thirty days from the date of service on them to file a notice of removal with the unanimous consent of their co-defendants," even if the first served-defendant does not file for removal within thirty days. *Id.* . . . This Court believes this conclusion respects both the unanimity requirement and the *Marano* holding which gives later-served defendants a fair opportunity for removal.

Ross, 178 F. Supp. 2d at 1000 n.4. The *Ross* court reasoned that the unfairness of applying the unanimity requirement to a § 1452 removal was tempered by the application of the last-served defendant rule. For example, in response to defendants' arguments that plaintiffs' piecemeal service of the complaint was unfair if unanimity was required, the court stated that since each defendant had thirty days to remove from their time of service, there was no unfairness. *Ross*, 178 F. Supp. at 1001, n.11.

An analysis of the Fifth Circuit's reasoning in *Demco* also illustrates the special problems created by applying the first-served defendant rule to § 1452. In *Demco,* the plaintiff initially sued five defendants. The action was removable when filed, based on diversity jurisdiction, but the original defendants did not remove it. Four years later, the plaintiff added a new defendant, also diverse from the plaintiff, who sought to remove. Meanwhile, the original defendants had vigorously defended the action in state court, filing answers, various motions and third party claims. *Demco,* 792 F.2d at 480. The Fifth Circuit, finding the new defendant's notice of removal untimely under the first-served defendant rule, reversed the district court's denial of plaintiff's remand motion.

The *Demco* court reasoned that the first-served defendant rule does not adversely affect later-served defendants in the diversity context because, "[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 ... were domiciled in the same state as the plaintiff." *Demco,* 792 F.2d at 482. In the "related to bankruptcy" context under § 1452, however, whether the action can be removed does not depend on the status of other defendants. Rather, § 1452 removability is determined by asking whether the "outcome of [a] proceeding could conceivably have any effect on the estate being administered in bankruptcy." *In re Canion*, 196 F.3d 579, 585 (5th Cir. 1999). Denying a party removal pursuant to § 1452 denies the party a separate right conferred by statute, and not simply a right created by the happenstance arrangement of the defendants in any given action as is the case with diversity jurisdiction.

Moreover, diversity jurisdiction and "related to bankruptcy" jurisdiction differ because while adding parties can only destroy diversity jurisdiction, adding parties can actually create bankruptcy jurisdiction if a new party and the new claims against it bear a relationship to the bankruptcy not present in the original action. Thus, new and different grounds for removal that were not present at the time the case was initiated might exist later when a new defendant is added to the case. In such a circumstance, all parties should have a renewed right to remove.

Accordingly, the practical differences inherent in removal under § 1452, as opposed to § 1441, militate in favor of applying the last-served defendant rule to removals under § 1452.

II. The Court Should Deny The Remand Motions Currently Pending In The Consolidated And Coordinated Cases Even Under The Section 1441 Analysis Applied In The September 15 Decision.

As this Court has recognized in its September 30 Decision, the suits against the Bank Defendants are "related to" the Enron bankruptcy because of those Defendants' contribution rights, and federal jurisdiction is present. Thus, all the pending remand motions, to the extent they argue lack of jurisdiction should be denied. Moreover, to the extent those

motions purport to rely on the "unanimity rule" or the "first-served defendant rule," those rules are inapplicable to § 1452 for the reasons set forth in Section I above.

In addition, even under the § 1441 analysis applied by the Court in the September 15 Decision, the motions to remand currently before the Court in the cases involving the Bank Defendants should be denied.[10] First, the procedural issues at stake in the September 15 Decision are not relevant to most of the remaining remand motions because, under well-established Fifth Circuit case law, the Plaintiffs in most of these cases have waived the right to seek remand for non-jurisdictional defects in the notice of removal, such as unanimity or timeliness, by not raising these procedural issues within 30 days of removal as required by § 1447(c). Second, in those remaining cases where Plaintiffs have raised non-jurisdictional defects, a careful analysis demonstrates that the terms of the September 15 Decision were actually met.

A. The Plaintiffs In The *Samson*, *Al Rajhi*, *CalPERS* And *Okomo* Cases Have Waived Any Right To Remand For Non-Jurisdictional Defects.

The procedural issues at issue in the September 15 Decision are not relevant to the remand motions pending in at least the *Samson*, *Al Rajhi*, *CalPERS* and *Okomo* cases for the simple reason that they have been waived by the plaintiffs in those cases.

28 U.S.C. § 1447(c) plainly states: "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)." 28 U.S.C. § 1447 (2003). Accordingly, a plaintiff waives the right to remand for a non-jurisdictional defect in the notice of removal unless plaintiff raises the non-jurisdictional defect within 30 days. *Williams v. AC Spark Plugs, Div. of*

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[10] As stated in note 3, *supra*, the remand motions that were once at issue in *American Nat'l Ins. Co. v. Lehman Brothers Holdings Inc., et al.*, No. G-02-463; *American Nat'l Ins. Co. v. Citigroup, et al.*, No. G-02-723 ; *American Nat'l Ins. Co. v. J.P. Morgan Chase & Co.*, No. G-02-0299; and *Connecticut Resources Recovery Authority v. Lay*, No. H-03-1558, have already been decided so these cases are not discussed.

Gen. Motors Corp., 985 F.2d 783, 786 (5th Cir. 1993). In *Williams*, the court affirmed the denial of remand where the plaintiff failed to object to improper removal within 30 days. The court so held even though a federal statute prohibited removal of the particular type of action, finding that the statutory restriction against removal was a procedural defect that the plaintiff had waived. The court stated that "[Section 1447(c)] makes a distinction between procedural defects in removal and lack of subject matter jurisdiction. If a plaintiff finds fault with a procedural element in removal, he has only 30 days in which to make a motion to remand." 985 F.2d at 786. Similarly, in *In re Shell Oil Co.*, 932 F. 2d 1518, 1523 (5th Cir. 1991), the Fifth Circuit determined that the presence of Texas defendants, not allowed under § 1441(b), was not a problem of subject matter jurisdiction, and that "plaintiffs have waived any non-jurisdictional grounds for remand existing at the time of removal by not moving to remand within 30 days of the notice of removal." *See also In re Digicon Marine, Inc.*, 966 F.2d 158, 160 (5th Cir. 1992) ("all removal defects are waivable except for lack of original subject matter jurisdiction . . . . "); *Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 516 (5th Cir. 1992).[11] The rule is the same in the Second Circuit. *Hamilton v. Aetna Life and Cas. Co.*, 5 F.3d 642, 643 (2d Cir. 1993) ("Under [§ 1447(c)] all motions for remand--except those based on lack of subject matter jurisdiction--must be made within 30 days after removal or they are waived.").

Such waiver is absolute and both the Fifth and Second Circuits have held that a district court may not remand *sua sponte* based on a non-jurisdictional defect not raised by the plaintiff within the 30 day time period. *F.D.I.C. v. Loyd*, 955 F.2d 316 (5th Cir. 1992); *In re*

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[11] Not only must a plaintiff file a motion to remand within 30 days, the plaintiff must also raise the specific non-jurisdictional defect in its motion to remand or waive any right to do so. *Denman v. Snapper Division*, 131 F.3d 546, 548 (5th Cir. 1998); *Lee v. Pineapple Mgmt. Serv.'s*, 241 F. Supp. 2d 690, 695 (S.D. Miss. 2002) ("plaintiff did not seek timely remand on the basis of this prohibition and has thus waived this as a basis for seeking remand"); *Tunica-Biloxi Indians of LA v. Pecot*, 248 F. Supp. 2d 576, 581 (W.D. La. 2003).

Allstate Ins. Co., 8 F.3d 219, 223 (5th Cir. 1993) (holding that there is no "discretion in the district court to remand for procedural defects on its own motion."); *Hamilton,* 5 F.3d at 643. In *Loyd,* the Fifth Circuit held that a *sua sponte* remand for non-jurisdictional defects exceeds the statutory remand authority granted to district courts in § 1447(c): "the district court, when it remanded the case on procedural grounds ... after the thirty day remand period had expired, exceeded its statutorily defined authority under § 1447(c)." *Loyd*, 955 F.2d at 321. The Fifth Circuit found that the 30 day limit in § 1447(c) for asserting non-jurisdictional defects applies to district courts as well as to parties:

> We [] refuse to read § 1447(c) so narrowly as to prohibit the *parties* from raising procedural defects after thirty days, but not to prohibit the district court from raising such defects on its own initiative. Instead, we interpret the first sentence of § 1447(c) as precluding all remands for procedural defects after the expiration of the thirty-day remand period specified by § 1447(c).

Id. at 322. The Fifth Circuit also found that because the district court exceeded its statutory authority under § 1447(c), the appellate court had jurisdiction to review the remand. *Id.* at a 320.[12]

Any defect based on unanimity or timeliness, the two grounds at issue in the September 15 Decision, is plainly a non-jurisdictional defect. *Baris v. Sulpicio Lines Inc.*, 932 F. 2d 1540, 1544 (5th Cir. 1991) (a procedural defect within the meaning of § 1447(c) refers to "any defect that does not go to the question of whether the case originally could have been brought in federal district court . . . ."); *Loyd*, 955 F.2d at 320-1 ("Failure to remove within the thirty-day time limit set forth in § 1446(b) constitutes a 'defect in removal procedure' within the meaning of § 1447(c)."); *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 423 (5th Cir. 1990)

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[12] The Fifth Circuit found that by changing § 1447(c) in 1988 to replace the "improvident removal" language with "any defect in removal procedure" and subjecting the latter to a 30 day limit, Congress indicated an "intent to delete improvident removal as an unreviewable basis for remand" at least where the 30 day limit had been exceeded. *Loyd*, 955 F.2d at 321 (quotation and citation omitted).

("The failure of all the defendants to join in the removal petition is not a jurisdictional defect."); *Amteco, Inc. v. Bway Corp.*, 241 F. Supp. 2d 1028, 1030 (E.D. Mo. 2003) ("The requirement that all defendants join is procedural, and may be waived if a party does not timely seek remand"); *Miller v. Principal Life Ins. Co.*, 189 F. Supp. 2d 254, 258 n.4 (E.D. Pa. 2002) ("The failure of all defendants to consent to removal is a waivable defect . . . ."); *Belser v. St. Paul Fire and Marine Ins. Co.* 965 F.2d 5, 8 (5th Cir. 1992) ("Because the untimely removal is not a jurisdictional defect, the procedural imperfection is waived if not raised in a timely motion to remand.").

Accordingly, this Court may not remand on the basis of its September 15 Decision any of the remaining cases in which a remand motion is pending unless the plaintiffs asserted these specific defects in their motions to remand within the 30 day period provided by § 1447(c). In the Fifth Circuit, even a procedurally defective removal ripens into a proper removal where plaintiffs do not move to remand based on that defect within 30 days. This waiver argument precludes further review of the *Samson*, *Al Rajhi*, *CalPERS* and *Okomo* cases on the basis of the September 15 Decision.

B. None Of The Consolidated And Coordinated Cases Should Be Remanded.

As discussed case-by-case below, all remand motions pending in cases involving the Bank Defendants should be denied.

1. Samson Investment Co. v. Arthur Andersen LLP v. J.P. Morgan Chase & Co., H-03-2264 (S.D. Tex.)

Plaintiff's motion to remand in *Samson Investment Co. v. Arthur Andersen LLP v. J.P. Morgan Chase & Co.*, H-03-2264 (S.D. Tex.), should be denied because Plaintiff failed to challenge the unanimity or timeliness of the removal in its motion to remand filed on February 28, 2003, and because removal was procedurally proper even under this Court's § 1441 analysis.

Samson was initially brought in Oklahoma state court on January 15, 2002 by an institutional investor against Andersen (but not any of the Bank Defendants) for negligence, gross negligence, fraud and conspiracy in connection with Andersen's auditing of Enron's financial statements. *Samson,* No. 02-00277, Pl's Orig. Pet. (Dist. Ct., Tulsa County January 15, 2002). On February 8, 2002, a first amended petition was filed; on March 1, 2002, a second amended petition was filed; on May 13, 2002, a third amended petition was filed. *Samson*, No. 02-00277, Pl.'s 1st, 2d, & 3d Am. Pets. (Feb. 8, Mar. 1, May 13, 2002). Andersen, as Third-Party Plaintiff, filed a third-party complaint on December 19, 2002, for contribution against certain of the Bank Defendants and their affiliates and two individuals, Michael Kopper and Andrew Fastow. *Samson*, No. 02-00277, 3d Party Pet. (Dec. 19, 2002). On January 2, 2003, two of the Bank Defendants, Donaldson, Lufkin & Jenrette Securities Corporation ("DLJ") and Lehman Brothers Inc. ("Lehman") were served with the third-party petition. On January 31, 2003, those Third-Party Defendants removed the case to the U.S. District Court for the Northern District of Oklahoma under § 1452. *Samson*, No. 03-CV-086, 3d Party Defs.' Notice of Removal (Jan. 31, 2003). As of that time, no other Third-Party Defendants had been served.

Plaintiff's motion to remand did not argue lack of unanimity or timeliness and the Court may therefore not remand on either of these procedural grounds as discussed in Section II. A., *supra*. *Samson*, No. 03-86-EA, Pl.'s Mot. For Abstention & Remand Br. In Supp. (N.D. Ok. Feb. 28, 2003). In addition, the removal in *Samson* satisfies the Court's § 1441 analysis. First, the *Samson* case was unanimously removed by all properly served Third-Party Defendants. At the time of the removal, the only Third-Party Defendants known to have been served were DLJ and Lehman—the two parties who filed the removal. Moreover, the only Third-Party Defendant known to have been served subsequently, Merrill Lynch & Co., Inc., has consented to the

removal. Second, the *Samson* case was timely removed on January 31, 2003—within thirty days of the first third-party defendant being served on January 2, 2003.[13]

2. Choucroun, et al., v. Arthur Andersen LLP, et al., H-03-3320 (S.D. Tex.).

Plaintiffs' motion to remand *Choucroun, et al., v. Arthur Andersen LLP, et al.*, H-03-3320 (S.D. Tex.) should be denied because the removal of that case was also procedurally proper even under the Court's § 1441 analysis.

Choucroun, in its original form, was initially brought in Texas state court on January 24, 2002 by Jane Bullock against several former directors and officers of Enron Corporation, Arthur Andersen, and a number of former Andersen Partners. *Bullock*, No. 2002-32,716, Pl.'s Orig. Pet. (21st Dist., Washington County Jan. 24, 2002). In two amended complaints, filed on April 11, 2002 and December 20, 2002, additional plaintiffs were added, including Richard Choucroun. *Bullock*, No. 2002-32,716, Pl.'s 1st & 2d Am. Pets. (21st Dist., Washington County Apr. 11, 2002 and Dec. 20, 2002). Andersen, as Third-Party Plaintiff, filed a third-party complaint on January 13, 2003, for contribution against certain of the Bank Defendants and their affiliates and Michael Kopper. *Bullock*, No. 2002-32,716, 3d Party Pet. (21st Dist., Washington County Jan. 13, 2003). None of the Bank Defendants or their affiliates was served until January 30, 2003. Third-Party Defendant Michael Kopper was not served until March 7, 2003.

On February 14, 2003, the Texas state court *sua sponte* severed *Choucroun* from the *Bullock* action. *Choucroun*, No. 2002-32,716; 32,926, Severance Order (21st Dist.,

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[13] The fact that Andersen neither removed the case itself nor joined the removal of the third-party defendants is not relevant since it is the third-party claim—not the first-party claim—that gave rise to bankruptcy removal. Recognizing this, the third-party defendants have suggested that the first-party claims could be severed and remanded to state court. *See* Certain Third-Party Defendants' Brief In Opposition to Plaintiff's Motion for Abstension or Remand, or in the Alternative, for Support of Motion to Sever Third-Party Claims, filed Mar. 17, 2003, at 22-25.

Washington County Feb. 14, 2003). On February 27, 2003, within 30 days of the first Third-Party Defendant having been served, all served Third-Party Defendants removed the case to United States District Court for the Western District of Texas.[14] *Choucroun*, No. A03-CA-114H, 3d Party Defs.' Notice of Removal (W.D. Tex. Feb. 27, 2003). Since the removal was both timely and unanimous, the case should not be remanded even under the Court's September 15 Decision analysis. In addition, Plaintiffs have consented to severance and removal of Andersen's third-party claims against the Bank Defendants. *See Choucroun*, No. A03-CA-114H, Pl.'s Mem. in Supp. of Pl.'s Reply to Certain Third-Party Defs.' Opp'n to Remand at 5 (W.D. Tex. Apr. 17, 2003).

3. Al Rajhi Inv. Corp. BV v. Arthur Andersen LLP, No. H-03-1219 (S.D. Tex.)

Plaintiff's motion to remand in *Al Rajhi Inv. Corp. BV v. Arthur Andersen LLP*, No. H-03-1219 (S.D. Tex.), should be denied because Plaintiff failed to challenge the unanimity or timeliness of the removal in its motion to remand filed on April 30, 2003, and because removal was procedurally proper even under the Court's § 1441 analysis.

Plaintiff initially filed *Al Rajhi* in the 11th Judicial District Court of Harris County, Texas on May 7, 2002. *Al Rajhi*, No. 23,320, Pl.'s Orig. Pet. (May 7, 2002). As in the

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[14] In their motion to remand, Plaintiffs argue that the unanimity rule was not satisfied because Third-Party Defendants Michael Kopper and Lehman Brothers Holding Incorporated ("LBHI") did not consent to removal. *Choucroun*, No. A03-CA-114H, Mem. in Supp. of Pls.' Mot. to Remand (W.D. Tex. Mar. 27, 2003). In their reply to Defendants' Opposition, however, Plaintiffs only argue that Kopper did not consent. See *Choucroun*, No. A03-CA-114H, Mem. in Supp. of Pls.' Reply to Certain Third-Party Defendants' Opp'n to Remand at 2 (W.D. Tex. Apr. 17, 2003). But Kopper was not served until March 7, 2003 almost two weeks *after* the notice of removal was filed. Because he had not been served at the time the notice was filed, he did not need to consent to removal. *See Gillis v. Louisiana*, 294 F.3d 755, 759 (5th Cir. 2002); *Miranti v. Lee*, 3 F.3d 925, 929 (5th Cir. 1993); *Milstead Supply Co. v. Casualty Ins. Co.*, 797 F. Supp. 569, 573 (W.D. Tex. 1992). To the extent Plaintiffs still argue that LBHI did not consent, they ignore that Lehman Brothers Incorporated signed the notice of removal and that LBHI joined Defendants' opposition to Plaintiffs' remand motion.

Samson and *Choucroun* actions, Andersen, as Third-Party Plaintiff, filed a third-party complaint on February 25, 2003 for contribution against certain of the Bank Defendants and their affiliates and two individuals, Michael Kopper and Andrew Fastow. *Al Rajhi*, No. 23,320, 3d Party Pet. (11th Dist., Harris County Feb. 25, 2003). Third-Party Bank Defendants consented to service on March 12, 2003 and filed a notice of removal, within 30 days, on April 10, 2003. *Al Rajhi*, No. H-03-1219, 3d Party Defs.' Notice of Removal (S.D. Tex. Apr. 10, 2003). Plaintiff filed a motion to remand on April 30, 2003. *Al Rajhi*, No. H-03-1219, Pl.'s Mot. to Remand or Abstain (S.D. Tex. Apr. 30, 2003). In its motion to remand, Plaintiff did not challenge the unanimity or timeliness of the removal. *Id.* Since Plaintiff did not argue unanimity or timeliness, the Court may not remand on either of those bases as discussed in Section II. A., *supra*. In addition, since all Third-Party Defendants that had been served joined in the timely notice of removal, the case should not be remanded even under the Court's § 1441 analysis.[15]

4. CalPERS v. Banc of America Securities, LLC, et al., H-03-3481 (S.D. Tex.)

Plaintiff's motion to remand in *CalPERS v. Banc of America Securities, LLC, et al.*, No. H-03-3481 (S.D. Tex.), should be denied because Plaintiff failed to challenge the unanimity or timeliness of Defendants' removal in its motion to remand filed on March 26, 2003.

Plaintiff filed a complaint on November 7, 2002 and an amended complaint on February 4, 2003 in the Superior Court of the State of California. *CalPERS*, No. CGC-02-

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[15] Third-Party Defendants Michael Kopper and Andrew Fastow had not been served when the notice of removal was filed and were therefore not required to consent. *See supra* note 14. In addition, Deutsche Bank AG London ("DBAGL"), a London branch of Deutsche Bank AG, had also not been served in *Al Rajhi*. At the time the notice of removal was filed, only the Secretary of State had been served on DBAGL's behalf. Such service, by itself, was insufficient to render DBAGL "served" for removal consent purposes. *See Monterey Mushrooms, Inc., v. Hall*, 14 F. Supp. 2d 988, 991 (S.D. Tex. 1998) ("When service is effected on a statutory agent, the removal period begins when the defendant actually receives the process, not when the statutory agent receives process."); *McCrary v. Kansas City So. RR*, 121 F. Supp. 2d 566, 570 (E.D. Tex. 2000) (same).

414500, Pl.'s 1st & 2d Pet. (Sup. Ct. San Francisco County Nov. 7, 2002, Feb. 4, 2003). The first Defendant was served on February 7, 2003 and Defendants filed a notice to remove on March 6, 2003. *CalPERS*, Bk. No. 01-16034, Def.'s Notice of Removal (Bankr. N.D. Cal. March 6, 2003). Plaintiff filed a motion to remand on March 26, 2003. *CalPERS*, Bk. No. 01-16034, Adv. Pro. No. 03-3274, Pl.'s Notice of Mot. & Mot. to Remand (Bankr. N.D. Cal. March 26, 2003). Plaintiff did not object to unanimity or timeliness in its motion to remand. *See id.* Instead, Plaintiff objected to removal solely on jurisdictional grounds. *See id.* Since Plaintiff did not argue unanimity or timeliness, the Court may not remand on either of those bases as discussed in Section II. A., *supra*.

5. Okomo v. Banc of America Securities LLC, et al., H-03-3508 (S.D. Tex.)

Plaintiff's motion to remand *Okomo v. Banc of America Securities LLC, et al.*, H-03-3508 (S.D. Tex.), should be denied because the parties to the *Okomo* action have stipulated that remand of their action will be governed by the Court's decision in the *CalPERS* action. *See Okomo*, Bk. No. 01-16034, Adv. Pro. No. 03-90155-LA, Notice of Entry of Order (Bankr. S.D. Cal. June 16, 2003), Exh. A at ¶ ¶ 3-6. As discussed above, this Court should not remand the *CalPERS* action and the Court's decision in *CalPERS* would automatically apply to the *Okomo* action by stipulation. In addition, Plaintiff did not file a motion to remand within 30 days and has therefore waived any procedural defects in the notice of removal as discussed in Section II. A., *supra*.

6. Retirement Systems of Alabama, et al. v. Merrill Lynch & Co., et al. H-03-2308 (S.D. Tex.)

Plaintiffs' motion to remand *Retirement Systems of Alabama v. Merrill Lynch & Co., et al.*, No. H-03-2308 (S.D. Tex.), should be denied because removal was procedurally proper even under this Court's § 1441 analysis.

Plaintiffs initially commenced *RSA* in Alabama state court on March 15, 2002 against certain Bank Defendants, Andersen, Kenneth Lay, Jeffrey Skilling and Andrew Fastow. The Bank Defendants were served on March 23, 2002 and removed the case on April 22, 2002 pursuant to § 1452, but it was equitably remanded to state court on May 31, 2002. On December 20, 2002, Plaintiffs filed a Fourth Amended Complaint naming twenty-six new individual Defendants. The individual Defendants timely removed the case on January 21, 2003 (the "January 21 Removal"), within 30 days of service on the first-served defendant, pursuant to § 1452 and Plaintiffs filed a motion to remand on February 12, 2003. *RSA*, No. CV-03-F-69-N Defs.' Notice of Removal (M.D. Ala. Jan. 21, 2003).

Contrary to Plaintiffs' suggestion, all served individual Defendants consented to the January 21 Removal, as did Anderson.[16] Plaintiffs suggest that some individual Defendants did not "join" in the notice of removal, because they manifested their consent by filing individual letters of consent with the notice of removal. *RSA*, No. CV-03-F-69-N, Pls.' Mot. to Remand or Abstain, at 2 n.2 (M.D. Ala. Feb. 12, 2003). This argument is without merit, however, as *any* written manifestation of consent is sufficient for unanimity purposes. *Gillis*, 294 F.3d at 759 ("[The unanimity] rule simply requires that there be some timely filed written indication from each served defendant, or from some person or entity purporting to formally act on its behalf in this respect."); *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988) ("[Consent] does not mean that each defendant must sign the original petition for removal.").

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[16] At the time the notice of removal was filed on January 21, 2003, individual defendants Rebecca Mark-Jusbasche and John Urquhart had not yet been served. In addition, Judge Hardwick of the Alabama Circuit Court had stayed the case in its entirety against Kenneth Lay, Jeffrey Skilling and Andrew Fastow pending the resolution of the criminal charges pending against them. *RSA*, No. CV-2002-738-H, Order on Motions to Stay (Cir. Ct. Ala. Jan. 7, 2003) Accordingly, these Defendants were not required to consent to the notice of removal. *See supra* note 14.

Plaintiffs' suggestion that the Bank Defendants did not consent to the January 21 Removal is also meritless. The Bank Defendants had already submitted a notice of removal asserting "related to bankruptcy" jurisdiction and making arguments substantially similar to those advanced by the individual Defendants. Where two parties each file a notice of removal, there is a legal presumption that both parties consent to removal of the action to federal court. *See Sullivan v. Leaf River Forest Prod.*, 791 F. Supp. 627, 629-30 (S.D. Miss. 1991) (consent achieved by separate notices of removal).

The notice of removal was also timely. Plaintiffs added the individual Defendants on December 20, 2002. The individual Defendants removed on January 21, 2003, within 30 days of the date the first defendant was served. Even under the Court's analysis, where a "different set of facts" establishes a right to removal, the 30 day period in which to file a notice of removal is renewed. September 15 Order at 20, *citing, S.W.S. Erectors, Inc. v. Infax*, 72 F.3d 489, 494 (5th Cir. 1996) ("defendant has 30 days after it receives a copy of other paper from which it may first be ascertained that the case is or has become removable") (internal quotations omitted). Accordingly, since the removal was both timely and unanimous, *RSA* should not be remanded even under the Court's § 1441 analysis.[17]

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[17] On March 5, 2003, Plaintiff voluntarily dismissed all twenty-six of the newly added individual Defendants. *RSA*, No. CV-03-F-69N, Pls.' Notice of Voluntary Dismissal (M.D. Ala. Mar. 5, 2003). On March 6, 2003, Plaintiff issued a document styled "Notice of Mootness of Defendants' Position" arguing that the Plaintiff's voluntary dismissal had mooted Defendants' removal. *RSA*, CV-03-F-69N, Pls.' Notice of Mootness of Defs.' Position (M.D. Ala. Mar. 5, 2003). By attempting to "undo" the federal jurisdiction it established by joining the officers and directors of Enron, Plaintiff necessarily conceded the existence of this jurisdiction.

CONCLUSION

For the additional reasons stated herein, the pending remand motions in the cases involving the Bank Defendants should all be denied.

Dated: October 8, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon all known counsel of record by electronic mail to the esl3624.com website on this 8th day of October, 2003.

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