

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

United States Courts
Southern District of Texas
ENTERED

OCT 14 2003

In Re ENRON CORPORATION §
SECURITIES, DERIVATIVE & §
"ERISA" LITIGATION, §

Michael N. Milby, Clerk of Court
MDL 1446

THIS MEMORANDUM AND ORDER §
RELATES TO: H-02-3939 §

MARK NEWBY, ET AL., §

Plaintiffs §

VS. §

ENRON CORPORATION, ET AL., §

Defendants. §

CIVIL ACTION NO. H-01-3624
CONSOLIDATED CASES

PAMELA M. TITTLE, on behalf of §
herself and a class of persons §
similarly situated, ET AL., §

Plaintiffs §

VS. §

ENRON CORP., an Oregon §
Corporation, ET AL., §

Defendants. §

CIVIL ACTION NO. H-01-3913
CONSOLIDATED CASES

PIRELLI ARMSTRONG TIRE CORP. §
RETIREE MEDICAL BENEFITS TRUST, §
Derivatively On Behalf of Enron Corporation, §
et al., §

Plaintiffs §

VS. §

KENNETH LAY, et al., §

Defendants. §

CIVIL ACTION NO. H-01-3645
CONSOLIDATED CASES

1747

OFFICIAL COMMITTEE OF UNSECURED	§	
CREDITORS OF ENRON CORP.,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-02-3939
	§	
ANDREW S. FASTOW, ET AL.,	§	
	§	
Defendants	§	

MEMORANDUM AND ORDER OF REMAND

Pending before the Court in H-02-3939 is Plaintiff the Official Committee of Unsecured Creditors of Enron Corporation’s motion to abstain and remand and objection to consolidation (instrument #9). Defendant Kenneth L. Lay removed this action before any other defendants were served.

As a threshold matter, Plaintiff’s objection to consolidation is based on the Notice of Consolidation (#5) filed by Defendant Kenneth Lay, who asserts that as a derivative action it should be consolidated with the administratively closed *Pirelli* action. Because only this Court can order consolidation of an action into the Enron Corporation (“Enron”) litigation pending before it, Lay’s notice is of no import. Moreover for reasons stated below, this Court finds that H-02-3939 should not be consolidated with the Enron litigation pending before this Court, but should be remanded.

Plaintiff explains that after Enron filed for relief under Chapter 11 of the Bankruptcy Code, on December 12, 2001 the United States Trustee appointed the Official Committee of Unsecured Creditors and it began investigating potential claims against current and former officers, directors, and employees of the debtor corporation for the benefit of the debtor’s estate. On August

29, 2002, United States Bankruptcy Judge Arthur J. Gonzales, who presides over the Enron Chapter 11 bankruptcy proceedings, assigned to Plaintiff all claims of Enron arising on or before December 2, 2001 against such individuals. Subsequently Plaintiff filed a motion requesting permission to proceed against some of the Enron employees. After hearing the matter, Judge Gonzales granted the motion and authorized Plaintiff to file suit asserting state-law claims against these Enron employees “in a Texas state court of competent jurisdiction.” Plaintiff then filed this action in the 9th Judicial District Court, Montgomery County, Texas, asserting causes of action against Defendants Andrew S. Fastow, Ben Glisan, Jr., Richard B. Buy, Richard A. Causey, Jeffrey K. Skilling, Kenneth L. Lay, Kristina M. Mordaunt, Kathy Lynn, and Anne Yaeger-Patel under state law for breach of fiduciary duty, fraud, civil conspiracy, aiding and abetting breaches of fiduciary duty, gross negligence, money had and received, request for an accounting, constructive trust, breach of duty of care, and claim for exemplary damages. See Exhibits 1 at page 3 and 4 at page 3, to instrument #9. There was and is no diversity jurisdiction in H-02-3939 because the principal place of business of Enron, the real party-plaintiff in interest, is Texas, and many, if not all, of the Defendants are residents of the same state. The suit was subsequently removed from state court by Kenneth Lay on the grounds that this case was “related to” the Enron bankruptcy estate under 28 U.S.C. §§ 1334 and 1452(a).

Plaintiff seeks remand of this action on four grounds: under the mandatory abstention doctrine or, if that does not apply, the discretionary abstention doctrine of § 1334(c) (2)¹ or §

¹ Section 1334(c)(2), the mandatory provision, states,

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an

1334(c)(1),² respectively ; under the equitable remand doctrine of § 1452(b)³; and/or because the removal was defective for failure to have all Defendants join in or consent to the removal.

The Court hereby incorporates and refers the parties to, its memorandum and order of September 15, 2003 (#1661 at 8-15 in *Newby*) regarding the unanimity rule in “related to” bankruptcy jurisdiction removals and to its memorandum and order of September 30, 2003 (#1714 in *Newby*) regarding “related to” bankruptcy jurisdiction.

Under the Court’s analysis in #1661, the removal by Lay was procedurally defective because he failed to obtain the consent of the other Defendants, and thus remand is appropriate. Moreover, under the analysis in #1714, for the reasons discussed the Court would normally find it had “related to” bankruptcy jurisdiction over H-02-3939 because “the outcome of that proceeding could conceivably have [an] effect on the estate being administered in bankruptcy.” *In re Canion*, 196 F.3d 579, 585 (5th Cir. 1999). Indeed Plaintiff has stated that it seeks to recover damages for the benefit of the debtor’s bankruptcy estate. Moreover, for the reasons unique to this Enron litigation indicated in earlier opinions, this Court would reject requests for remand based on mandatory, discretionary and equitable grounds. Nevertheless, as the Court has stated, where “related to”

action is commenced and can be timely adjudicated, in a state forum of appropriate jurisdiction.

Mandatory abstention applies to cases removed on “related to” bankruptcy jurisdiction grounds. *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 929 (5th Cir. 1999), *cert. denied*, 527 U.S. 1004 (1999).

² Title 28 U.S.C. § 1334(c)(1) provides, “Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.”

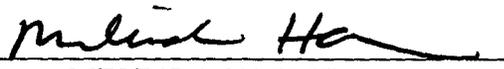
³ Section 1452(b) states in relevant part, “The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. . . .”

bankruptcy jurisdiction is the sole basis of this Court's jurisdiction, it sits in bankruptcy derived from Judge Gonzales' bankruptcy court in the Southern District of New York. Judge Gonzales reviewed the Official Committee of Unsecured Creditors' motion to commence litigation against the current Defendants, gave notice to and allowed time for objections by Defendants, though none were filed, held a hearing on the matter, and clearly authorized the Official Committee of Unsecured Creditors of Enron suit to go forward in a Texas state court of competent jurisdiction. The Court recognizes his authority and defers to that decision.

Accordingly, for these reasons, the Court

ORDERS that Plaintiff's motion to remand is GRANTED, its motion to abstain is MOOT, and this case is REMANDED to the 9th Judicial District Court, Montgomery County, Texas.

SIGNED at Houston, Texas, this 10th day of October, 2003.


MELINDA HARMON
UNITED STATES DISTRICT JUDGE