

JUN 15 2004

Michael N. Milby, Clerk of Court

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

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|--|-----------------------|----------------------------|
| In Re Enron Corporation<br>Securities, Derivative &<br>"ERISA Litigation | §<br>§<br>§<br>§      | MDL-1446                   |
| MARK NEWBY, ET AL.,  | §<br>§<br>§<br>§<br>§ |                            |
| Plaintiffs   | §<br>§<br>§<br>§<br>§ |                            |
| VS.  | §                     | CIVIL ACTION NO. H-01-3624 |
| ENRON CORPORATION, ET AL.,   | §<br>§<br>§<br>§<br>§ | CONSOLIDATED CASES         |
| Defendants   | §                     |                            |
| MARY BAIN PEARSON AND JOHN<br>MASON,                                     | §<br>§<br>§<br>§<br>§ |                            |
| Plaintiffs,  | §<br>§<br>§<br>§<br>§ |                            |
| VS.  | §                     | CIVIL ACTION NO. H-03-5332 |
| ANDREW S. FASTOW, ET AL.,  | §<br>§<br>§<br>§<br>§ |                            |
| Defendants.  | §                     |                            |
| FRED A. AND MARIAN ROSEN, ET AL.   | §<br>§<br>§<br>§<br>§ |                            |
| Plaintiffs,  | §<br>§<br>§<br>§<br>§ |                            |
| VS.  | §                     | CIVIL ACTION NO. H-03-5333 |
| ANDREW S. FASTOW, ET AL.,  | §<br>§<br>§<br>§<br>§ |                            |
| Defendants.  | §                     |                            |
| HAROLD AND FRANCES ANLICH, ET<br>AL.,                                    | §<br>§<br>§<br>§<br>§ |                            |
| Plaintiffs,  | §<br>§<br>§<br>§<br>§ |                            |
| VS.  | §                     | CIVIL ACTION NO. H-03-5334 |
| ANDREW S. FASTOW, ET AL.,  | §<br>§<br>§<br>§<br>§ |                            |
| Defendants.  | §                     |                            |
| RUBEN AND IRENE DELGADO, ET AL.  | §<br>§<br>§<br>§<br>§ |                            |
| Plaintiffs,  | §<br>§<br>§<br>§<br>§ |                            |
| VS.  | §                     | CIVIL ACTION NO. H-03-5335 |
| ANDREW S. FASTOW, ET AL.,  | §<br>§<br>§<br>§<br>§ |                            |

Defendants.           §  
                          §

**ORDER**

Pending before the Court in H-03-5332, H-03-5333, H-03-5334, and H-03-5335, each of which was previously removed and remanded twice<sup>1</sup> before by this Court, are Plaintiffs' similar, third motions to remand (#8 in H-03-5332; #10 in H-03-5333; # 9 in H-03-5334; and # 10 in H-03-5335) and accompanying motions for emergency hearing and/or ruling (#10 in H-03-5332; #12 in H-03-5333; #10 in H-03-5334; and #12 in H-03-5335).<sup>2</sup>

This time, on November 20, 2003 Third-Party Defendants J.P. Morgan Chase & Co., J.P. Morgan Securities Inc., J.P. Morgan Investment Corp. (n/k/a J.P. Morgan SBIC LLC), JPMorgan Chase Bank, Chase Securities Inc. (n/k/a J.P. Morgan Securities Inc.), Citigroup Inc., Citibank, N.A. Lehman Brothers Holdings Inc., Lehman Brothers Inc., Credit Suisse First Boston Inc., Credit Suisse First Boston (USA), Inc., Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corp.), Pershing LLC (f/k/a

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<sup>1</sup> The cases were first removed by Arthur Andersen LLP under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") and remanded for lack of subject matter jurisdiction under SLUSA. The second set of removals less than a month later were based on "related to" bankruptcy jurisdiction, but the suits were remanded because the removals were untimely, i.e., not within thirty days of service on the first served defendant.

<sup>2</sup> H-03-5332 was filed by attorney G. Sean Jez of Fleming & Associates, L.L.P. in the 164<sup>th</sup> Judicial District Court of Harris County, Texas; H-03-5333, in the 333<sup>rd</sup> Judicial District Court of Harris County, Texas; H-5334, in the 272<sup>nd</sup> Judicial District Court of Brazos County, Texas; and H-03-5335, in the 55<sup>th</sup> Judicial District Court of Harris County, Texas.

Donaldson, Lufkin & Jenrette Securities Corp.), Canadian Imperial Bank of Commerce, CIBC Inc., CIBC World Markets Corp., Barclays PLC, Barclays Bank PLC, and Merrill Lynch, Pierce, Fenner & Smith Incorporated (a/k/a Merrill Lynch & Co.), collectively "the Investment Banking Defendants, who were joined *inter alia* by either Lou Pai, Richard Buy, Jeffrey Skilling, and/or Arthur Andersen's Third-Party Petitions filed after the second remand, removed these cases from their various state courts based on "related to" bankruptcy jurisdiction under 28 U.S.C. § 1334(b) and § 1452. They claims that the factual and legal issues underlying this action are related to those being litigated in Enron's bankruptcy proceedings before the Honorable Arthur Gonzales in the United States Bankruptcy Court for the Southern District of New York; that Article VII(B) of Enron's Articles of Incorporation provides each Enron officer or director named here as a Defendant and/or Cross-Claim Defendant with indemnity rights against Enron; that these individuals have additional indemnity and/or contribution rights against Enron's bankruptcy estate under Oregon, Texas, and New York law; that they have further indemnity and/or contribution contractual rights under Enron's D&O policies; and that some have such rights under provisions of underwriting agreements with Enron, relating to which some have filed proofs of claims in Enron's bankruptcy proceeding.

Plaintiffs move for a third remand in each case on the grounds that (1) the removal was untimely under the "first-served" rule; (2) that there is no new basis to permit a third removal,

because jurisdiction based on indemnity/contribution claims was available when Arthur Andersen first removed the suit even though Defendants failed to assert that ground; and (3) equity and mandatory abstention require that the suits be remanded. Plaintiffs seek an award of costs and expenses, including attorney's fees, under 28 U.S.C. § 1447(c).

After reviewing the briefing, the Court denies all four third motions to remand for the following reasons.

First, the Court has earlier reconsidered and amended its original interpretation of removals based on "related to" bankruptcy jurisdiction under § 1452 and has concluded that neither the unanimity rule nor the "first-served" defendant rule applies in this context. See #225 at 38-50 in MDL 1446; #2143 at 38-50 in *Newby*; #45 at 38-50 in H-03-2345.

Second, regardless, the Third-Party Defendants' removal was timely, i.e., within thirty days of service of the Third-Party Petitions on the first Third-Party Defendant; the service of the original petition on the First-Party Defendants is irrelevant for this third removal. Third-Party Defendants do have the power to remove actions based on "related to" bankruptcy jurisdiction. Thomas B. Bennett, *Removal, Remand, and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire!*, 27 *Cumb. L. Rev.* 1037, 1052-53 (1996-97) ("term 'party' in [section] 1452 is arguably broad enough to encompass actions removed under [section] 1452 by debtor and non-debtor third-party defendants") (noting cases allowing third-party removals); *First Nat'l Bank of Pulaski*

v. Curry, 301 F.3d 456, 463 (6<sup>th</sup> Cir. 2002) ("Title 28 grants removal power in bankruptcy cases to any 'party,' . . . [a] grant of power that courts have interpreted to extend to third-party defendants.") (citing Bennett).

Third, the Court has determined that its "related to" bankruptcy jurisdiction under Second Circuit law, applicable since Enron's bankruptcy proceedings are pending before the United States Bankruptcy Court for the Southern District of New York, is very broad and reaches potential contribution and/or indemnity claims arising out of a number of sources, enumerated earlier. See, e.g., #995, 1714 in *Newby*. Moreover that jurisdiction is further buttressed in these actions by the fact that legal and factual issues in them overlap with those being litigated in the Enron bankruptcy proceedings. The claims against the Third-Party Defendants arise from the same nucleus of facts giving rise to charges of wrongdoing against Enron, its officers and directors, its auditor, etc., indeed Enron has asserted adversary proceedings against some of them in the bankruptcy proceedings, and the Third-Party Defendants have potential claims for indemnity and contribution that could conceivably affect the debtor's estate.

Finally, regarding Plaintiffs' contention that mandatory abstention should apply or equitable remand be ordered, Plaintiffs have not shown, especially in light of the Third-Party Petitions adding even more claims that require extensive discovery, that their respective state court fora could timely and fairly adjudicate these increasingly complex cases, not to mention the

significant concerns in economy, orderly and efficient management, and avoidance of redundant discovery in light of the massive size of the Enron litigation.

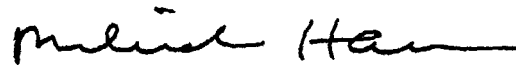
The Court's heavy docket has impeded its ability to reach the motions for emergency hearing or ruling quickly, especially since its initial cursory review indicated there was no urgency.

Thus the Court

ORDERS that the third motions to remand are DENIED. The Court further

ORDERS that motions for emergency hearing are MOOT.

**SIGNED** at Houston, Texas, this 14<sup>th</sup> day of June, 2004.



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MELINDA HARMON  
UNITED STATES DISTRICT JUDGE