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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
Highland Capital Management, L.P.[1]	§	Chapter 11
	§	
Debtor.	§	Case No. 19-34054 (SGJ)
	§	
	§	
In re James Dondero	§	Adversary No. 21-03051
James Dondero,	§	
Petitioner,	§	
	§	
v.	§	
	§	
Alvarez & Marsal CRF Management, LLC, and Farallon Capital Management, L.L.C.,	§	
	§	
Respondents.	§	

RESPONDENTS' RESPONSE TO DONDERO'S MOTION TO REMAND

[1] The last four digits of Debtor's taxpayer identification number are (6725). The headquarters and service address for Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

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INTRODUCTION

The "serial litigator" James Dondero is trying to avoid this Court's control of the Highland bankruptcy case—and this Court's injunction forbidding further proceedings by Dondero—in order to continue his attempt to "burn down the place" after losing control of Highland Capital Management, L.P., the Debtor in this action. *See* Findings of Fact and Conclusions of Law, Order Confirming 5th Am. Plan of Reorg. of Highland Capital Mgmt., L.P., No. 19-34054, Dkt. 1943 at 9, 56 (Bankr. N.D. Tex. Feb. 22, 2021) ("Confirmation Order").

This adversary proceeding began with a petition Dondero filed in Texas state court by which he seeks discovery concerning, among other things, alleged misconduct by the Debtor's current CEO, James Seery. Ex. 1 to Notice of Removal at 5–6, Dkt. 2696-1 ("Dondero's Action"). The two direct targets of Dondero's Action are (i) Alvarez & Marsal CRF Management, LLC ("A&M"), the current investment manager of the Crusader Funds, which held claims against the Debtor; and (ii) Farallon Capital Management, L.L.C. ("Farallon"), whose affiliate Muck Holdings LLC purchased claims (from third parties unrelated to A&M) against the Debtor. *See* Notice of Removal ¶¶ 2–3, Dkt. 2696. Although A&M and Farallon are the formal targets, Dondero's Action expressly mentions the Debtor's CEO Seery nine times, alleges Seery violated the Investment Advisers Act, and seeks multiple categories of documents and deposition testimony about Seery to support allegations against him. Ex. 1 to Notice of Removal at 5–6.

As this Court foresaw, "without appropriate protections in place . . . Mr. Dondero and his related entities will likely commence litigation against the Protected Parties . . . and do so in jurisdictions other than the Bankruptcy Court in an effort to obtain a forum which Mr. Dondero perceives will be more hospitable to his claims." Confirmation Order at 56. That is precisely what Dondero was aiming to do by filing this action in state court.

However, this Court installed protections against just this sort of conduct, finding it "necessary and appropriate in light of the history of the continued litigiousness of Mr. Dondero." *Id.* at 56. Specifically, in the confirmed plan of reorganization, the Court "permanently enjoined" Dondero from "commencing, conducting, or continuing in any manner, any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor." *Id.* at 76.

Dondero is trying to avoid the injunction by seeking remand. But his grounds are illusory.

As an initial matter, Dondero does not dispute that his action relates to this bankruptcy case. Nor does he argue that the Court should abstain from deciding this action, either mandatorily or permissively. Indeed, Dondero could not plausibly make any such arguments. Instead, he argues that this Court lacks jurisdiction on two bases: (i) removal is not available for a Rule 202 petition, and (ii) his Rule 202 petition is not a ripe controversy. Neither basis is valid.

First, Rule 202 petitions are removable "civil actions" under the federal removal statutes, as courts in every federal district court in Texas have recognized. Dondero relies on caselaw that misunderstands the nature of a Rule 202 petition and imposes an unjustified and unsupportable limitation on the plain text of the federal removal statutes.

Second, Dondero's removable Rule 202 petition is ripe. He *currently* seeks the relief of an order mandating certain discovery related to this bankruptcy case, and Respondents *currently* oppose the request for such discovery. As Texas courts hold, Rule 202 petitions are ripe because "once [petitioner] filed the 202 Action, the controversy involved a genuine conflict of tangible interests." *Bennett v. Zucker*, No. 05-20-00488-CV, 2021 WL 3701374, at *3 (Tex. App.—Dallas Aug. 20, 2021) (cleaned up, citation omitted).

Because removal was proper and this Court has subject matter jurisdiction, this Court should deny Dondero's motion to remand.

LEGAL STANDARD

According to the bankruptcy removal statute, "[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[.]" 28 U.S.C. § 1452. Under § 1334(b) and the Northern District of Texas's Standing Order of Reference of Bankruptcy Cases and Proceedings (Aug. 3, 1984), this Court has "jurisdiction of all civil proceedings . . . related to cases under title 11." A matter is "'related to' bankruptcy if the outcome could alter, positively or negatively, the debtor's rights, liabilities, options, or freedom of action or could influence the administration of the bankrupt estate." *In re TXNB Internal Case*, 483 F.3d 292, 298 (5th Cir. 2007); *In re REPH Acquisition Co.*, 134 B.R. 194, 203 (N.D. Tex. 1991).

ARGUMENT

Dondero initiated a civil proceeding in Texas state court by filing a "Verified Petition" under Texas Rule of Civil Procedure 202, seeking a court order mandating Respondents to produce documents and witnesses for deposition. Ex. 1 to Notice of Removal at 1, 6–7. The stated basis for the requested discovery is "to investigate any potential claims by [Dondero] arising out of the highly irregular manner in which the Claim[s] were marketed (if at all) and sold," referring to "Farallon's purchase of certain bankruptcy claims in the Highland Bankruptcy Case, pending in the Northern District of Texas bankruptcy court, from three sources: HarbourVest, Acis Capital Management, LP, and the Crusader Funds." *Id.* at 3, 6.

Respondents oppose the requested discovery order and Dondero's continued litigiousness related to the Highland bankruptcy case. Respondents timely removed Dondero's Action to this

Court based on its "jurisdiction of all civil proceedings . . . related to cases under title 11." 28 U.S.C. §§ 1334(b) & 1452.

In his motion to remand, Dondero does not dispute that his action "relates to" this bankruptcy case, nor could he given the multiple connections explained in Respondents' Notice of Removal. *See* Notice of Removal ¶¶ 8–9, Dkt. 2696. Nor does Dondero argue that the Court should abstain from deciding this action under 28 U.S.C. § 1334(c), which it should not because of how core and interrelated this action is with the Highland bankruptcy case.[2] Instead, Dondero seeks remand on two bases: that removal is not available for a Rule 202 petition, and that the Rule 202 petition is not a ripe controversy. Neither basis is valid, as explained below.

I. Dondero's Action Is a Removable Civil Action Because It Is a Standalone Civil Proceeding Seeking a Court Order Mandating Action by the Opposing Parties.

Dondero mistakenly contends that his Rule 202 petition is a not a "civil action" under the federal removal statutes because the order it seeks is for pre-suit discovery to investigate potential claims in an anticipated suit. Mot. at 5. Although some courts have agreed, the proper understanding of the removal statutes and a Rule 202 petition shows that Dondero's petition is a removable civil action because it is a standalone civil proceeding seeking a court order mandating action by the opposing parties.

Respondents removed pursuant to 28 U.S.C. § 1452, which provides that "[a] party may remove any claim or cause of action in a civil action . . . if such district court has jurisdiction of such claim or cause of action under section 1334[.]" There is no dispute that Dondero's claims are related to the Highland bankruptcy case under 28 U.S.C. § 1334(b).

[2] Dondero has not made a "timely motion" for abstention under 28 U.S.C. § 1334(c). He merely mentions abstention in a footnote, and only to "reserve[] his rights" to assert the argument "over any . . . *future* state court civil action." Mot. at 9 n.6 (emphasis added).

The removal statutes do not formally define the term "civil action," and the statutes' use of that term indicates it is meant simply "to distinguish civil proceedings from criminal ones." *In re Texas*, 110 F. Supp. 2d 514, 519 (E.D. Tex. 2000), *rev'd on other grounds*, 259 F.3d 387 (5th Cir. 2001). The variety of terms used in the removal statutes to refer to civil actions defies defining it as a civil proceeding having some particular set of requests for relief. For instance, section 1441(a) refers to "*any* civil action." Section 1446(b) refers to "[t]he notice of removal of a civil action *or proceeding*." Section 1452(a) refers to "*any claim or cause of action* in a civil action." The only clarity the removal statutes provide is to distinguish a civil action from a criminal action. Section 1442 refers to "[a] civil action or criminal prosecution" and section 1446(g) refers to "the civil action or criminal prosecution that is removable."

Interpreting "civil action" as *any* civil proceeding is consistent with the history of federal removal statutes. As *In re Texas* catalogues, the Supreme Court repeatedly interpreted prior versions of the removal statutes to apply to any dispute subjecting a party to a court order, and the current version was merely "intended to 'consolidate' its predecessors." 110 F. Supp. 2d at 518–21 (quoting 62 Stat. 937 (June 25, 1948) (reviser's notes)). The preeminent treatise Federal Practice & Procedure agrees that "the federal courts have broadly construed the term 'civil action'" and that the "limitation to civil actions" excludes from removal "some state administrative proceedings[,] criminal, and perhaps penalty[] actions." 14C FED. PRAC. & PROC. JURIS. § 3721.1 (Rev. 4th ed. Apr. 2021). "At its essence, a civil action is one person asking a court to do something about another person." Op. on Remand at 2, *Cong v. ConocoPhillips Co.*, No. 12-CV-1976, Dkt. 62 (S.D. Tex. Nov. 8, 2016) (denying remand of Rule 202 petition) (attached at App'x 8).

Following the better reasoned interpretation of "civil action," federal courts in each Texas federal district have held that a Rule 202 petition is a removable civil action. *See Cong*, No. 12-

CV-1976, Dkt. 62 at 2 (S.D. Tex.); *In re Texas*, 110 F. Supp. 2d at 518–22 (E.D. Tex.); *Page v. Liberty Life Assur. Co. of Bos.*, No. 4:06-CV-572, 2006 WL 2828820, at *1–3 (N.D. Tex. Oct. 3, 2006); *Advanced Orthopedic Designs, L.L.C. v. Shinseki*, 886 F. Supp. 2d 546, 552–53 (W.D. Tex. 2012). This is proper because a Rule 202 petition "possesses all the elements of a judicial proceeding: there is a controversy between parties; there are pleadings (the plaintiff's petition); relief is sought (the plaintiff has prayed for a court order authorizing the taking of depositions); and a judicial determination is required." *Page*, 2006 WL 2828820, at *1–3 (citing *In re Texas*, 110 F. Supp. 2d at 521–22) (cleaned up).

The caselaw on which Dondero relies is both flawed and mischaracterized. He cites eight cases for the proposition that "[c]ourts considering the issue of removal universally hold that Rule 202 petitions may not be removed under 28 U.S.C. § 1452 because Rule 202 petitions are not 'civil actions.'" Mot. at 5. Only one of those eight cited opinion refers to § 1452 at all, and that opinion concerned a motion to consolidate, not a motion to remand.[3] Moreover, courts have not, as claimed by Dondero, "universally" held that Rule 202 petitions may not be removed. At least four courts have accepted removal by denying motions to remand, as catalogued above. In another mischaracterization, Dondero describes *Linzy v. Cedar Hill Independent School District* as "remanding for lack of subject matter jurisdiction"—but that opinion concerns summary judgment; it did not deal with a motion to remand. 2001 WL 912649, at *1, 4–5 (N.D. Tex. Aug. 8, 2001).

[3] The *Enron* case, which the Motion quoted but did not properly cite, denied a motion to consolidate a removed Rule 202 petition with a securities lawsuit pending in that court. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. 01-cv-3624, Dkt. 1106 (S.D. Tex. Oct. 24, 2002) (attached at App'x 11). The court held that it lacked subject matter jurisdiction because the Rule 202 petition at issue was "too inchoate, premature, and attenuated to . . . provide the court with 'related to' jurisdiction." *Id.* at App'x 16. Such is not the case here. Dondero does not dispute that his Rule 202 petition sufficiently "relates to" the Highland bankruptcy case.

The cases Dondero cites that actually decide the removability of Rule 202 petitions rely on a mistaken understanding of Rule 202 petitions as merely "'ancillary proceedings in anticipation of suits, not separate suits.'" Mot. at 5 (quoting *McCrary v. Kansas City S. R.R.*, 121 F. Supp. 2d 566, 569 (E.D. Tex. 2000)). *McCrary*, like other cases Dondero cites, relied on a 1965 Texas Supreme Court decision that described the predecessor rule to Rule 202 as "not of itself an independent suit, but is in aid of and incident to an anticipated suit . . . . [It] is purely an ancillary matter." *Off. Emp. Int'l Union Loc. 277, AFL-CIO v. Sw. Drug Corp.*, 391 S.W.2d 404, 406 (Tex. 1965). But the Texas Supreme Court has since clarified that a pre-suit discovery order is not "ancillary," and actually "is an end within itself" when the petition "seeks to discover who its potential defendants are and whether it has one or more causes of action against them." *Ross Stores, Inc. v. Redken Labs., Inc.*, 810 S.W.2d 741, 742 (Tex. 1991) (*per curiam*). That is what Dondero seeks here: "discovery to evaluate whether state law claims exist against Farallon and A&M that may give rise to the filing of a future civil action." Mot. at 8. Accordingly, Dondero's Rule 202 petition is not ancillary.

Dondero is left with no valid basis to argue that his Rule 202 petition is not a removable civil action.

II. Dondero's Action is Ripe Because He Seeks Discovery Now.

Dondero also mistakenly believes that, because he has not yet filed claims for damages against A&M or Farallon, that means his Rule 202 petition seeking discovery from A&M and Farallon is not ripe. Mot. at 8–9. That argument ignores the fact that a dispute is currently before the Court for determination: Dondero currently requests relief from A&M and Farallon in the form of a burdensome order to provide documents and deposition testimony; and Respondents

currently dispute that request. Whether Dondero is entitled to that relief is unquestionably a ripe dispute.

A dispute is ripe where it "would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now." *DM Arbor Ct., Ltd. v. City of Houston*, 988 F.3d 215, 218 (5th Cir. 2021) (citation omitted). The ripeness doctrine simply "ensures that federal courts do not decide disputes that are premature or speculative." *Id.* (citation omitted).

The Rule 202 petition is a ripe dispute because the dispute is not premature (Dondero seeks the discovery now) and not speculative (Dondero's requested discovery order is specific, and Respondents' opposition is clear). There *currently* exists an actual controversy between the parties as to whether Dondero is entitled to the expansive discovery he seeks. And Dondero does not argue that further factual development is needed for a court to rule on his Rule 202 petition, nor does he offer any reason why a court should wait to rule on his Rule 202 petition.

Dondero's inability to explain the alleged unripeness of his petition is no surprise because courts regularly consider Rule 202 petitions to be ripe. As the Dallas Court of Appeals recently held, a Rule 202 petition was ripe because "once [petitioner] filed the 202 Action, the controversy involved a genuine conflict of tangible interests." *Bennett*, 2021 WL 3701374, at *3 (cleaned up, citation omitted).

Dondero argues that because he has not filed a substantive claim for damages against Respondents, his current requests for orders compelling discovery are not ripe. Mot. at 8–9. He cites no authority for this argument, nor could he. Texas courts distinguish the ripeness of a Rule 202 petition from the ripeness of the potential claims that may be filed later, in fact dismissing Rule 202 petitions where the substantive claims for which discovery is sought are not ripe. *See*,

e.g., *In re DePinho*, 505 S.W.3d 621, 624–25 (Tex. 2016) (issuing decision to vacate Rule 202 petition after finding that the claims on which the petition sought discovery were not ripe).

Because Dondero currently seeks a court order compelling discovery, and Respondents oppose such an order and believe Dondero is not entitled to such discovery, the dispute is ripe.[4] If Dondero's reasoning were to succeed, and this action were remanded to state court, that would allow Dondero to incessantly pester entities related to the Highland bankruptcy case with attempts to obtain discovery through Rule 202 petitions, in violation of this Court's injunction forbidding Dondero from pursuing any proceedings affecting the Debtor. Confirmation Order at 76.

III. There Is No Basis for Awarding Dondero Attorney's Fees.

In a transparent ploy to optically strengthen his illusory arguments, Dondero claims that Respondents' removal was so baseless that he is entitled to attorney's fees. Even if this Court finds remand appropriate, it should not award Dondero attorney's fees under 28 U.S.C. § 1447(c).

"[C]ourts may award attorney's fees under § 1447(c) *only* where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005) (emphasis added). "Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.* "[U]nsettled law can provide an objectively reasonable basis for removal," as Dondero's cited authority recognizes. *Renegade Swish, L.L.C. v. Wright*, 857 F.3d 692, 699 (5th Cir. 2017).

Dondero cannot credibly dispute that the removability of a Rule 202 petition is at least unsettled. One of the cases he cites recognizes as much. *In re Enable Commerce, Inc.* explained

[4] Of course, the lack of available relief for Dondero's Action in this court would not weigh against finding jurisdiction because "whether a federal court has jurisdiction to decide an issue is a distinct question from how to decide that issue correctly." *Beiser v. Weyler*, 284 F.3d 665, 670 & n.6 (5th Cir. 2002) (warning about "confusing the lack of merit in a federal claim with a lack of jurisdiction" (citing *Montana–Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 249 (1951)).

that "[t]he Fifth Circuit has not decided whether a Rule 202 petition is removable" and identified two district courts that had held a Rule 202 petition was removable. 256 F.R.D. 527, 530 (N.D. Tex. 2009). In this Response, Respondents have identified authority from all four federal districts in Texas that held a Rule 202 petition was removable, and Respondents have explained why that is the better reasoned approach based on the plain text of the removal statutes and the proper understanding of the purpose and function of a Rule 202 petition. *See supra* § I. Dondero argues that Respondents "apparent[ly] fail[ed] to consider the black letter law." Mot. at 9. But, as shown above, it is Dondero who overlooked the authorities supporting removal.

Dondero is simply overreaching in asking for attorney's fees. It is further evidence of the scorched-earth litigiousness of which this Court is all too aware. For the reasons discussed, Respondents had an objectively reasonable basis for removing this action. If this Court remands the action for some reason, Respondents respectfully request that the Court decline to award attorney's fees to Dondero.

CONCLUSION

For the reasons explained above, the Court should deny Dondero's motion to remand.

Dated: September 29, 2021

Respectfully submitted,

By: */s/ Michael Rosenthal*

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2021, the foregoing document was filed through the ECF portal of the Bankruptcy Court for the U.S. District Court for the Northern District of Texas.

/s/ Michael Rosenthal
Michael Rosenthal

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APPENDIX OF EXHIBITS IN SUPPORT OF RESPONDENTS' RESPONSE TO DONDERO'S MOTION TO REMAND

[1] The last four digits of Debtor's taxpayer identification number are (6725). The headquarters and service address for Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

Respondents submit this Appendix of the following exhibits in support of their Response to Dondero's Motion to Remand, which is filed concurrently with this Appendix.

Ex.	Description	App'x Page
1	Declaration of Bennett Rawicki in Support of Respondents' Response to Dondero's Motion to Remand	App'x 3
2	Op. on Remand & Deposition, *Cong v. ConocoPhillips Co.*, No. 12-CV-1976, Dkt. 62 (S.D. Tex. Nov. 8, 2016)	App'x 6
3	Order, *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. 01-cv-3624, Dkt. 1106 (S.D. Tex. Oct. 24, 2002)	App'x 11

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2021, this Appendix was filed through the ECF portal of the Bankruptcy Court for the U.S. District Court for the Northern District of Texas.

/s/ Michael Rosenthal
Michael Rosenthal

Exhibit 1

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v.	§	
	§	
Alvarez & Marsal CRF Management, LLC, and Farallon Capital Management, L.L.C.,	§	
	§	
Respondents.	§	

DECLARATION OF BENNETT RAWICKI IN SUPPORT OF RESPONDENTS' RESPONSE TO DONDERO'S MOTION TO REMAND

I, Bennett Rawicki, declare as follows:

1. I am attorney with Gibson, Dunn & Crutcher, LLP and represent Respondent Alvarez & Marsal CRF Management, LLC in this action. My work address is 2001 Ross Avenue, Suite 2100, Dallas, Texas 75201. I am over the age of 18 years. I have personal knowledge of the facts stated in this Declaration and, if called as a witness, could and would testify competently to those facts.

2. Included in this Appendix as Exhibit 2 is a true and correct copy of the publicly filed document Opinion on Remand and Deposition, *Cong v. ConocoPhillips Co.*, No. 12-CV-1976, Dkt. 62 (S.D. Tex. Nov. 8, 2016).

3. Included in this Appendix as Exhibit 3 is a true and correct copy of the publicly filed document Order, *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. 01-cv-3624, Dkt. 1106 (S.D. Tex. Oct. 24, 2002).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 28, 2021 /s/ *Bennett Rawicki*
Bennett Rawicki

Exhibit 2

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

Peiqing Cong, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
versus	§	Civil Action H-12-1976
	§	
ConocoPhillips Company,	§	
	§	
Defendant.	§	

Opinion on Remand and Deposition

1. *Introduction.*

One hundred sixty-seven fishermen in China want to depose ConocoPhillips Company before suit to investigate potential claims from an oil spill in China. They filed in Texas court; ConocoPhillips Company removed. The fishermen say the petition cannot be removed because it is not a civil action. This case will remain in this national court.

2. *Background.*

In June 2011, oil seeped from the seabed in the Penglai 19-3 oil field in China's Bohai Bay. The oil field is jointly developed by China National Offshore Oil Corporation, an oil company of the People's Republic of China, and ConocoPhillips China, a Liberian company. It is a subsidiary of ConocoPhillips Company. After an investigation, ConocoPhillips China contributed more than $350 million to the State Oceanic Administration of China and the Ministry of Agriculture for the damage.

On July 2, 2012, thirty fishermen from Shandong Province – Cong plaintiffs – sued ConocoPhillips Company in Houston for damage to sea cucumbers and scallops. It pends in this court.

On October 16, 2012, one hundred sixty-seven fishermen from Hebei Province – Li plaintiffs – with the same counsel filed a petition in Texas court to depose executives from ConocoPhillips Company. They argue that the pre-suit deposition is necessary to "investigate a potential claim."

3. *Timing.*

The Li plaintiffs' motion to remand is too late – they did not file it within thirty days of removal.[1] The court addresses the substantive defects secondarily.

4. *Civil Action.*

Even if the Li plaintiffs had met the 30-day deadline, their petition would not be remanded. They say that their petition is not a civil action that can be removed because it is not a complaint, but it is merely a discovery tool that might lead to the filing of one. Their petition directly relates to claims they have already asserted before this court and in China.

A removable civil action is (a) a controversy between parties (b) with pleadings (c) seeking relief (d) that requires a judicial determination (e) resulting in an enforceable, appealable order. The term applies to a wide range of activity that may be brought before a court irrespective of how the parties may characterize it at common law, equity, or admiralty.[2] At its essence, a civil action is one person asking a court to do something about another person.[3]

The Li plaintiffs want the court to order ConocoPhillips Company to deliver its executives to be questioned under oath about an incident in China for which the Li plaintiffs claim ConocoPhillips Company is responsible. It is not ancillary to a potential action – one that may never be brought; this is their third lawsuit on the same factual and legal predicate.

The Li plaintiffs admit that (a) they have already sued in China and (b) their petition parallels the Cong plaintiffs' lawsuit pending before this court. They are not confused about the claims, parties, or damages. The same data are available in the Cong lawsuit already filed by these same lawyers. Their petition is hostile and adversarial. It is the opening salvo of the fishermen's third action – the start of a new American lawsuit. It may be removed to federal court.

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[1] 28 U.S.C. § 1446.

[2] Fed. R. Civ. P. 2 ("One Form of Action: There is one form of action – the civil action."); Fed. R. Civ. P. 3 ("Commencing an action: A civil action is commenced by filing a complaint with the court.").

[3] 14B Charles A. Wright et al., Federal Practice and Procedure § 3721 (4th ed. 2009).

Also illustrating the contrived character of this action as a petition for simple, readily available information, the Li plaintiffs have not met the requirements of Texas Rule 202.[4] No witness is dying, no third-party information is needed to know whom to sue, and no other reasonable use of this petition has been offered.

A pre-suit deposition may not be used to circumvent the Li plaintiffs' responsibility to review the facts they possess and plead properly – a short statement of the cause of action to give notice of the claim.[5] ConocoPhillips Company is entitled to know the charges against it. The Li plaintiffs may not keep their information private and seek extensive discovery from the actual and "potential" defendants through a separate proceeding.[6]

The same attorneys who filed the Cong lawsuit six months before have now expressly represented to the court that they do not have enough information to file an identical suit. They may not depose ConocoPhillips Company.

5. *Jurisdiction.*

The court has jurisdiction over any claim the Li plaintiffs might bring against ConocoPhillips Company. Their petition – which incorporates as an attachment the complaint filed by the Cong plaintiffs – asserts (a) state law claims, and (b) federal claims under the Alien Tort Claims Act.[7]

Common-law claims based on the release of oil in foreign navigable waters – such as a claim for negligence – would be preempted by federal maritime law; federal district courts have original jurisdiction over federal maritime claims.[8] Of course, a common-law claim would need to be a Chinese one, and they do not exist. For this court to address an injury in claims by Chinese fishermen against a Liberian company and a Chinese agency, it would have to arise under the Constitution, laws, or treaties of the United States and would present a federal question.[9]

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[4] Tex. R. Civ. P. 202.

[5] Tex. R. Civ. P. 47.

[6] Texas Rice Land Co. v. Langham, 193 S.W. 473, 489 (Tex. Civ. App. 1917).

[7] 28 U.S.C. § 1350.

[8] 28 U.S.C. § 1333.

[9] 28 U.S.C. § 1331.

This court also has diversity jurisdiction. The Li plaintiffs say that their damages are the same as the Cong plaintiffs' damages. They claimed:

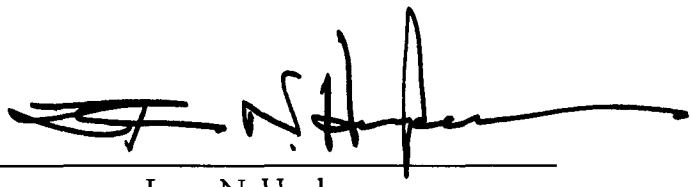
- economic losses;
- property damages;
- restoration of fish stock and the environment;
- damages to natural resources;
- damages from the loss of use and enjoyment of property;
- loss of quality of life;
- compensation for unjust enrichment;
- punitive and exemplary damages;
- the cost to conduct an environmental assessment; and
- other incidental damages.

Given the extent of the damages sought, the amount in controversy for each of the Li plaintiffs would exceed $75,000. The Li plaintiffs are Chinese; ConocoPhillips Company is a Delaware corporation with a principal place of business in Texas. Complete diversity exists.[10]

6. *Conclusion.*

The Li plaintiffs filed a petition for pre-suit deposition, but they are not confused about an element of their claims. Their petition is disingenuous and manipulative. It is a lawsuit against ConocoPhillips Company calculated to impose costs on the defendant without meeting the preparation and disclosure requirements of a properly pleaded action and attempting to avoid federal court. Remand will be denied. They may not depose ConocoPhillips Company.

Signed on November 8, 2016, at Houston, Texas.



Lynn N. Hughes
United States District Judge

[10] 28 U.S.C. § 1332.

Exhibit 3

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	§	
JEFF ADER, MARK BERNSTEIN, AND BRIAN BURNETT, Petitioners,	§	
VS.	§	CIVIL ACTION NO. H-02-3193
J.P. MORGAN CHASE & CO., ET AL. Respondents.	§	

ORDER

Pending before the Court in the above referenced Verified Petition for Pre-Suit Discovery pursuant to Texas Rule of Civil Procedure 202, removed from the 80th Judicial District Court of Harris County, Texas and currently assigned to the Honorable Sim Lake, is Respondent Lehman Brothers, Inc.'s motion to consolidate (instrument #5) this proceeding with *In re Enron Corporation Securities, Derivative & "ERISA" Litigation*, MDL-1446, and *Newby et al. v. Enron Corporation, et al.*, H-01-3624.

Texas Rule of Civil Procedure 202.1 permits a petitioner to seek a state court order permitting it to conduct pre-litigation depositions to investigate potential claims. Rule 202 provides,

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> A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:
> (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or
> (b) to investigate a potential claim or suit.

The Verified Petition in the instant proceeding states that Petitioners were employed by Enron Corporation through some of Enron's wholly owned subsidiaries, including Enron Broadband Services and Enron Energy Services. It suggests that starting around 1997 Respondents began creating special purpose entities ("SPEs") to do business with Enron and to falsely inflate its profits and hide its debt. Once uncovered, this misconduct ended in Enron's bankruptcy and "Petitioners suffered significant financial loss as a result of Enron's financial disaster." Petitioners seek an order permitting them to conduct pre-suit discovery to investigate potential claims against Respondents J.P. Morgan Chase & Company, CitiGroup, Inc., Credit Suisse First Boston, Canadian Imperial Bank of Commerce, Bank of America Corporation, Merrill Lynch & Company, Barclays PLC, Deutsche Bank A.G., Lehman Brothers Holding, Inc., Arthur Andersen, L.L.P., Andersen Worldwide S.C., Jeff Skilling, Andrew Fastow, Richard Causey, David Duncan, and Debra Cash to "determine what role Respondents played in structuring, financing, auditing, and execution of the complex SPE business transactions so that Petitioners may ascertain whether there exist facts sufficient to warrant litigation against Respondents."

Although the Verified Petition is vague with respect to the precise legal basis for the claims and the standing of Petitioners, there is no question that Respondents are all named as Defendants in Lead Plaintiff's Consolidated Complaint in *Newby* and that the role of the SPEs in the alleged securities fraud constitutes a large part of that suit. Thus it appears that the instant action may overlap with and petitioners may be members of the proposed class(es) in *Newby* or in *Tittle et al. v. Enron Corp. et al*. Moreover, if this proceeding were consolidated into *Newby*, this Court observes it would in essence be currently mooted by the discovery stay imposed by the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(3)(B).

There is a substantial threshold question, however, regarding the propriety of the removal and of the Court's subject matter jurisdiction over this proceeding. The notice of removal states that the Rule 202 proceeding was removed pursuant to 28 U.S.C. §§ 1331, 1334, 1441, 1446, 1452 and 1651 and 15 U.S.C. §§ 77p(c), 78(u)-4(b)(3)(B) and 78bb(f)(2).

Both Texas and federal district courts have held that a Rule 202 request is an ancillary proceeding, not a separate civil suit, and not appropriate for removal. See, e.g., *Linzy v. Cedar Hill Independent School Dist.*, No. CIV. A. 3:00CV1864-AH. 2001 WL 912649 (N.D. Tex. Aug. 8, 2001)(Sanderson, Magistrate Judge)(concluding that under Texas state law the Rule 202 proceeding in dispute did not constitute a civil action and dismissing claim for malicious prosecution based on it), *aff'd*, 37

Fed. Appx. 90, 2002 WL 1021883 (5th Cir. May 9, 2002)[1]; *Mayfield-George v. Texas Rehabilitation Commission*, 197 F.R.D. 280, 283 (N.D. Tex.)(Rule 202 proceedings are not "civil actions" for purposes of removal because they do not allege a claim or cause of action upon which relief can be granted); *McCrary v. Kansas City Southern Railroad*, 121 F. Supp.2d 566, 569 (E.D. Tex. 2000)("Rule 202 Request is merely a *pre-suit* request for depositions to investigate a potential claim or suit"); *Office Employees Int'l Union v. Southwestern Drug Corp.*, 391 S.W.2d 404, 406 (Tex. 1965); *Texacadian Energy, Inc. v. Lone Star Energy Storage*, 829 S.W.2d 369, 372 (Tex. App.-Corpus Christi 1992, no writ). In opposing the motion to remand, Respondents rely on Judge David Folsom's opinion in *In re Texas*, 110 F. Supp.2d 514, 518 (E.D. Tex. 2000)(holding that a Rule 202 proceeding was a "civil action" for purposes of removal under § 1441), which the Fifth Circuit characterized as "very thorough and well-considered" in *Real Parties in Interest*, 259 F.3d at 391. Nevertheless, in *Real Parties in Interest* the Fifth Circuit reversed Judge Folsom's ruling that he had removal jurisdiction under the All Writs Act and remanded the action to the state court from which it was removed. Furthermore, the Fifth Circuit's affirmance of *Linzy*, on May 9, 2002, came after the issuance of *Real Parties in Interest* on July 23, 2001.

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[1] The magistrate judge in *Linzy* relied on the two cases cited after *Linzy*, i.e., *Mayfield-George* and *McCrary*.

Furthermore, the Fifth Circuit has held that the All Writs Act, 28 U.S.C. § 1651, does not provide an independent basis for jurisdiction. *Texas v. Real Parties in Interest*, 259 F.3d 387, 392 (5th Cir. 2001), *cert. denied sub nom. Umphrey v. Texas*, 534 U.S. 1115 (2002); *In re McBryde*, 17 F.3d 208, 220 (5th Cir. 1997).

Furthermore because Petitioners seek pre-suit depositions only to determine whether they may have any claims against Respondents prior to consideration of whether to file a civil action, this Court finds that this proceeding is too inchoate, premature, and attenuated to "conceiveably affect" Enron Corporation's bankruptcy and thus provide the court with "related to" jurisdiction, although if it leads to a civil suit that may be "related to" Enron's bankruptcy, the issue may be raised in that action.

Because this Court concludes that it does not have subject matter jurisdiction over this proceeding, it

ORDERS that the motion to consolidate is DENIED.

This suit, however, is not on the undersigned judge's docket and it is authorized only to rule on the motion to consolidate even though the content overlaps with that in the motion to remand. In his order of October 21, 2002, Judge Lake indicated that he would rule on the motion to remand if the undersigned judge denied the motion to consolidate. Thus this action is returned to Judge Lake. Should he conclude that subject

matter jurisdiction exists and the removal is proper, this Court will reconsider the motion to consolidate.

SIGNED at Houston, Texas, this 23rd day of October, 2002.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE