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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.	§	**Case No. 19-34054**
	§	
Debtor.	§	**Chapter 11**
	§	
In re James Dondero	§	
	§	
James Dondero,	§	**Adversary No. 21-03051**
	§	*Removed from the 95th Judicial District*
Petitioner,	§	*Court of Dallas County, Texas*
	§	*Cause No. DC-21-09534*
v.	§	
	§	
Alvarez & Marsal CRF Management, LLC and Farallon Capital Management, L.L.C.,	§	
	§	
Respondents.	§	
	§	

PETITIONER'S REPLY TO RESPONSE TO MOTION TO REMAND

The instant motion boils down to a single discrete legal inquiry: "Is a Rule 202 petition a civil action over which the Court has removal jurisdiction under 28 U.S.C § 1452?" As the overwhelming weight of authority holds, the simple answer is: "No." Binding precedent from both the Fifth Circuit and the Northern District of Texas hold that a federal court has no jurisdiction over a Rule 202 petition, and a Rule 202 petition is not a 'civil action' subject to removal.

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INTRODUCTION

In their response, Respondents attempt to distract the Court from the futility of their argument and weakness of their position by focusing on irrelevant details about James Dondero's ("Petitioner") alleged conduct during this case. But the law is plain:

First, the overwhelming case law—including from the Fifth Circuit—holds that a federal court must remand a Rule 202 petition that was removed. These cases cite either the fact that a Rule 202 Petition is not a "civil action" subject to removal, or analogously, directly hold that there is no subject matter jurisdiction over a Rule 202 petition. Respondents cite four outlier decisions that are easily dispatched. For one, the lone Northern District decision they cite, rendered by Judge McBryde in 2006, does not stand given his decision in 2016 holding that a Rule 202 petition is *not* a "civil action." Next, *In re Texas,* was reversed by the Fifth Circuit, which ordered remand (as discussed). Another decision*, Advanced Orthopedics*, rested on removal under § 1442, which only applies to suits against federal officers and thus has its own definition of a "civil action." And the decision in *Cong* is inapposite because remand was filed late (so the rest is dictum), and the Rule 202 petition was part of a larger case over which the court had proper diversity jurisdiction.

Second, Respondents' attempt to shoehorn their removal into a tortured statutory construction. overlooks the language in § 1452(a), which permits removal of "a claim or cause of action in a civil action[.]" The Northern District has previously explained that a Rule 202 petition is not a "claim" or a "cause of action." Therefore, removal of the Rule 202 petition was wrongful.

Finally, nothing Respondents presented to this Court triggers "related to" jurisdiction as argued in the opening brief. Neither the debtor or its agents are being pursued here for discovery, the debtor's administration will not be affected, and the Code does not supply the basis for relief.

Try as they might, Respondents' attempts to change the subject fail. Remand is mandatory.

ARGUMENT

A. The Majority of the Courts in Texas Have Held that a Federal Court Must Remand a Removed Rule 202 Petition

The overwhelming weight of legal authority holds that a Rule 202 petition that was removed from state court has to be remanded. While ostensibly the same question, some courts have focused on the fact that a Rule 202 petition is not a "civil action" under the removal statutes, and others have held that the nature of a Rule 202 petition is essentially one that deprives the court of subject matter jurisdiction because it is not a case or controversy.

The Fifth Circuit in *Texas v. Real Parties in Interest*, reversed the district court's denial of remand, holding that the district court lacked subject matter jurisdiction over a Rule 202 petition, and that the district court's authority under the All Writs Act did not provide it with jurisdiction it did not otherwise possess. 259 F.3d 387, 394 (5th Cir. 2001). This result is not remarkable given the bulwark of case law remanding Rule 202 petitions. *See In re Enable Commerce, Inc.*, 256 F.R.D. 527, 533 (N.D. Tex. 2009) ("The majority of Texas courts that have considered whether a Rule 202 proceeding is removable have held that it is not.") (Fitzwater, CJ); *see also In re Valerus Compression Servs., LP*, No. 14-14-00019-CV, 2015 Tex. App. LEXIS 4647, at *4 (Tex. App.—Houston [14th Dist.] May 7, 2015, not pet.) ("A Rule 202 petition for pre-suit discovery is so distinct from a traditional lawsuit that the majority of Texas courts to consider the question hold that a Rule 202 proceeding may not be removed to a federal court."); *see also e.g., Kingman Holdings, L.L.C. v. Wells Fargo Bank, N.A.*, No. 4:15-CV-812-A, 2015 U.S. Dist. LEXIS 182515, at *4 (N.D. Tex. 2015) (McBryde, J.); *Mayfield-George v. Texas Rehab. Comm'n*, 197 F.R.D. 280, 282 (N.D. Tex. 2000) (Kendall, J.); *Linzy v. Cedar Hill Indep. Sch. Dist*., 2001 U.S. Dist. LEXIS 11845, at *5 (N.D. Tex. Aug. 8, 2001) (Sanderson, MJ); *Sawyer v. E.I. du Pont de Nemours & Co*., No. CIV.A. 06-1420, 2006 WL 1804614, at *2 (S.D. Tex. June 28, 2006); *Davidson v. S.*

Farm Bureau Cas. Ins. Co., No. H-05-03607, 2006 U.S. Dist. LEXIS 40654, at *10 (S.D. Tex. 2006); *McCrary v. Kansas City S. R.R.*, 121 F. Supp. 2d 566, 569 (E.D. Tex. 2000).

Rather than address the law head on, Respondents lob volleys of ad hominem attacks on Petitioner and his counsel. They then cite a grand total of four easily distinguishable cases:

First, they cite the decision by Judge McBryde in *Page v. Liberty Life Assur. Co.* No. 4:06-CV-572A, 2006 LEXIS 73745, 2006 WL 2828820 (N.D. Tex. 2006). In this case, Judge McBryde, in 2006, did indeed state that Rule 202 petitions are civil actions capable of being removed. *Id*. at *11. However, there are a number of problems with giving any weight to this outlier opinion. For one thing, this opinion relies upon *In re Texas*, 110 F. Supp. 2d 514 (E.D. Tex. 2000), which was reversed by the Fifth Circuit in 2001, *Texas v. Real Parties*, 259 F.3d 387 (5th Cir. 2001). Second, Judge Fitzwater, the then-sitting Chief Judge of the Northern District, undertook an exhaustive analysis of this very issue, and while acknowledging the *Page* case, noted that Judge McBryde remanded the case for lack of subject matter jurisdiction. *In re Enable*, 256 F.R.D. 527, 533. Perhaps even more importantly, in 2015, Judge McBryde adopted the position of the overwhelming majority of cases that Rule 202 actions are **not** civil actions capable of being removed. *See Kingman Holdings, L.L.C., v. Wells Fargo Bank, N.A.,* 2105 LEXIS 182515 (N.D. Tex.2015) ("the court is persuaded that a Rule 202 investigatory proceeding standing alone is not a 'civil action' see 11 U.S.C. 1441(a), that is removable."). Thus, there is **zero** precedent within the Northern District of Texas for the extreme position advocated by the Respondents and, accordingly, fees should be awarded to the Petitioner for having to bring the Motion to Remand.

Second, Respondents rely heavily on *In re Texas*, 110 F. Supp. 2d 514 (E.D. Tex. 2000). However, that case is factually distinguishable from this case in obvious ways—namely, there, a federal court settlement reserved to the federal court the jurisdiction to enforce the settlement

agreement. Here, no such reservation is made. Perhaps more importantly, that decision was reversed by the Fifth Circuit in 2001 in *Texas v. Real Parties*, 259 F.3d 387 (5th Cir. 2001). Although the Fifth Circuit reserved the question of whether a Rule 202 petition was a "civil action" under the removal statute, § 1441, (*see id*., n.14) it nonetheless found no basis for federal court jurisdiction over the Rule 202 petition and remanded to state court. Moreover, a close inspection of the opinion *In re Texas*, shows that the Fifth Circuit **did** overturn that case on the **very issue** now before this Court. *See Texas v. Real Parties*, 259 F.3d at 394-95. The Fifth Circuit stated:

> …, **the Rule 202 proceeding in this case clearly does not present such facts or circumstances. The proceeding is only an investigatory tool.** Both the State and Private Counsel can only speculate as to the eventual outcome of the probe. This pending state court action … ultimately may or may not pose an actual threat to the federal tobacco settlement. **The investigation could lead to no further action, or it could result in a cause of action not contemplated or covered by the settlement agreement; or, indeed, it may lead to the institution of a cause of action….** In any event, the federal courts cannot preclude the State of Texas from *investigating* potential claims in the milieu of the Texas courts--pursuant to Texas law….

Id. (bolded emphasis added, not italics). However, equally importantly is the fact that the Northern District of Texas recognized *In re Texas* as an outlier. *See In re Enable,* 256 F.R.D. 527, 533 (N.D. Tex. 2009) (stating that "the majority of Texas courts" have held that a Rule 202 proceeding is not removable, while noting that only "one district court", the court in *In re Texas*, has held a Rule 202 proceeding is removable). Accordingly, Respondents' surprising reliance on a reversed decision fails to support their proposition.

Third, Respondents surprisingly rely on *Advanced Orthopedic Designs, L.L.C. v. Shinseki*, 886 F. Supp. 2d 546 (W.D. Tex. 2012). That case involved removal under § 1442 which only applies to suits against a federal official or agency. That statute has its own definition of "civil action" in § 1442(d) which was amended in 2011, that definition is broader than those in the other

removal statutes, and expressly only applies to § 1442 removal (namely, because federal courts have jurisdiction over any action implicating the federal government its agencies or agents).

Finally, Respondents rely on *Peiqing Cong v. ConocoPhillips Co.*, 250 F. Supp. 3d 229 (S.D. Tex. 2016) ("*Cong*"). There, the Southern District denied remand because the remand motion was filed after the thirty-day deadline in § 1447. *Id.* at *3. Therefore, any further explication is dicta. Furthermore, that Court noted that the Rule 202 was really part of an existing lawsuit with live claims between diverse parties. *Id.* at *3-4. Highlighting the fact that this is an outlier is the multiple cases already cited toeing the line that Rule 202 petitions are not removable. *See, e.g., Sawyer*., 2006 WL 1804614, at *2; *Davidson*, 2006 U.S. Dist. LEXIS 40654, at *10.

Thus, while Respondents hang their proverbial hat on the notion that four courts have held that a lawsuit that includes a Rule 202 petition is a "civil action," they ignore the language of the removal statute they invoked: Section 1452(a). That statute states that one may only remove a "claim or a cause of action in a civil action."

However, the courts to have addressed the question have held that a Rule 202 petition is not a "claim" or a "civil action." *In re Enable Commerce, Inc.*, 256 F.R.D. 527, 531 (N.D. Tex. 2009) ("As several courts have explained, "a Rule 202 petition does not assert any claim or cause of action upon which a court could grant relief."") (citations omitted); *RJ Mach. Co. v. Can. Pipeline Access. Co.*, No. A-13-CA-579-SS, 2015 U.S. Dist. LEXIS 115992, at *13-14 (W.D. Tex. 2015) ("Courts hold consistently that a Rule 202 petition is a request for discovery, not a claim, demand, or cause of action.") (citing *Texas v. Real Parties in Interest*, 259 F.3d 387, 394 (5th Cir. 2001) (describing a Rule 202 proceeding as "only an investigatory tool" for potential claims that may or may not ultimately result in a cause of action)). The Texas Supreme Court has likewise held that a Rule 202 petition is not a claim or cause of action—it is ancillary to a such a proceeding.

See In re Enable Commerce, Inc., 256 F.R.D. at 531 ("The Supreme Court of Texas has in fact characterized such a petition as an ancillary proceeding, not a separate lawsuit. *See Office Employees Int'l Union v. Sw. Drug Corp*., 391 S.W.2d 404, 406 (Tex. 1965) (holding that petition filed under former Rule 187 (the predecessor to Rule 202) 'is not of itself an independent suit, but is in aid of and incident to an anticipated suit . . . [and] is purely an ancillary matter.').").

Therefore, the Rule 202 petition is not removable; should not have been removed, and should be remanded.

B. THE COURT STILL LACKS SUBJECT MATTER JURISDICTION

Respondents fail to squarely address the fact that there is no "related to" bankruptcy court jurisdiction under this Rule 202 petition for the reasons outlined in the opening brief. Rather, Respondents take it upon themselves to pontificate and speculate about where the Rule 202 petition *could lead*. But such speculation is not, and has never been, sufficient for "related to" jurisdiction under § 1334. They do not show how the Rule 202 petition is against the debtor, arises under the bankruptcy code, or will affect the administration of this bankruptcy.

Nor can they. The Debtor recently filed a motion in the Appeal of this Court's final plan approval, stating that because the administration of the estate is so far along, the appeal should be dismissed for "equitable mootness". *See In re Highland; NexPoint Advisors et al. v. Highland Capital Management*, Fifth Circuit, Case No. 21-10449, Document # 00516045149, filed on October 6, 2021.

CONCLUSION

For the foregoing reasons, this proceeding should be remanded to state court from whence it came and the Respondents should be forced to pay the Petitioner's fees and costs upon submission of its invoices on this matter to the Respondents' counsel and, if necessary, a hearing

before the Court on the matter if the Petitioner and Respondents' counsel cannot agree on what fees and costs are reasonable, necessary and customary for this type of proceeding for this type of case.

Dated: October 9, 2021

Respectfully submitted,

/s/ Clay M. Taylor

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on October 9, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for respondents Alvarez & Marsal CRF Management, LLC, Farallon Capital Management, L.L.C., and Reorganized Debtor Highland Capital Management, L.P., and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
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