

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

HAROLD and FRANCES AHLICH; §
IRVING BABSON; JOHN AND IDA BANKS; §
HOWARD and NANCY BELL; BILL and §
RHONDA BRAGDON; SIDNEY BROWN; §
BRUCE and JANET CAMPBELL; PATRICK §
CARNEY; GREGG CAR; VINCENT and §
MARIANNE CARRELLA; LOUIS CARUCCI; §
PATRICK CUNNINGHAM; JAMES and §
KAREN DAVIDSON; JOHN DAVIS; PETER §
DORFLINGER; JANE GAUCHER; DONALD §
GAUCHER; RONALD GISH; JOHANNE §
GRAHAM; JOHN GUTMAN; RICHARD §
HAYHOE; DAVID HUCKIN; EDWARD §
JAPHE; MICHAEL KREHEL; PAUL LUTZ; §
JOHN and JEAN NEIGHBORS; WILLIAM §
POWELL; SAMUEL and LILLIAN REINER; §
CHRISTOPHER and HENRITTA ROWE; §
RALPH and JEAN SHAPIRO; CONSTANCE §
THEODORE; GEORGE and NICKYE §
VENTERS; and PETER VERUKI, §

Plaintiffs, §

v. §

ARTHUR ANDERSEN, L.L.P.; §
D. STEPHEN GODDARD, JR.; §
DAVID B. DUNCAN; DEBRA A. CASH; §
ROGER WILLARD; THOMAS H. BAUER; §
ANDREW S. FASTOW; KENNETH L. LAY; §
JEFFREY J. SKILLING; ROBERT A. §
BELFER; NORMAN P. BLAKE, JR.; §
RICHARD B. BUY; RICHARD CAUSEY; §
RONNIE C. CHAN; JOHN H. DUNCAN; §
JOE H. FOY; WENDY L. GRAMM; KEN L. §
HARRISON; ROBERT K. JAEDICKE; §
MICHAEL J. KOPPER; CHARLES A. §
LEMAISTRE; REBECCA §
MARK-JUSBASCHE; JOHN MENDELSON; §
JEROME J. MEYER; LOU PAI; PAUL V. §
FERRAZ PEREIRA; FRANK SAVAGE; §
JOHN A. URQUHART; JOHN WAKEHAM; §
CHARLES E. WALKER; BRUCE WILLISON; §

United States Courts
Southern District of Texas
FILED

FEB 08 2002

C.H.

Michael N. Milby, Clerk

CIVIL ACTION NO. H-02-0347
CONSOLIDATED LEAD H-01-3624

HERBERT S. WINOKUR, JR.; BEN GLISAN; §
KRISTINA MORDAUNT; MICHAEL C. §
ODOM; GARY B. GOOLSBY; AND §
MICHAEL M. LOWTHER, §
§
§
Defendants. §

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION TO REMAND**

TO THE HONORABLE COURT:

Plaintiffs Harold and Frances Ahlich; Irving Babson; John and Ida Banks; Howard and Nancy Bell; Bill and Rhonda Bragdon; Sidney Brown; Bruce and Janet Campbell; Patrick Carney; Greg Carr; Vincent and Marianne Carrella; Louis Carucci; Patrick Cunningham; James and Karen Davidson; John Davis; Peter Dorflinger; Jane Gaucher; Donald Gaucher; Ronald Gish; Johanne Graham; John Gutman; Richard Hayhoe; David Huckin; Edward Japhe; Michael Krehel; Paul Lutz; John and Jean Neighbors; William Powell; Samuel and Lillian Reiner; Christopher and Henritta Rowe; Ralph and Jean Shapiro; Constance Theodore; George and Nickye Venters; and Peter Veruki (the Ahlich Plaintiffs), file this memorandum in support of their motion to remand the present action to the 272nd Judicial District Court of Brazos County, Texas.¹

In support of remand, the *Ahlich* Plaintiffs show the Court the following:

¹ The individuals listed above are the only Plaintiffs in this case. On removal, Andersen incorrectly added twelve plaintiffs to the style of the case, beginning with Jane Bullock. The additional parties are plaintiffs in the *Bullock* action only.

I. INTRODUCTION

Andersen removed this action based solely on the Securities Litigation Uniform Standards Act of 1998, known as “SLUSA.”² For removal to be proper under SLUSA, Andersen must meet all statutory elements, including the threshold requirement that a case be a “covered class action.” For a case to qualify as a covered class action, there must be more than fifty plaintiffs.

To reach the jurisdictional minimum here, Andersen improperly aggregated the *Ahlich* Plaintiffs with plaintiffs in other pending cases. It also speculated that clients represented by the *Ahlich* Plaintiffs’ counsel may become plaintiffs in possible future filings. The plain language of SLUSA and standards of review applied to removal cases do not permit Andersen to create jurisdiction in that manner.

Therefore, because removal was improper the Court lacks subject matter jurisdiction. It should remand the action.

II. PROCEDURAL BACKGROUND

On January 29, 2002, the *Ahlich* Plaintiffs filed suit in the 272nd Judicial District Court of Brazos County, Texas, against Defendants Arthur Andersen, L.L.P. (Andersen) and former Enron Corporation CEO Kenneth L. Lay, as well as against other individual Defendants. They also sought a temporary restraining order against Andersen and Lay to prevent them from destroying documents relating generally to Enron and Andersen’s audit of Enron. The Brazos County court had no opportunity to act on the application before the *Ahlich* action was removed.

² Andersen also includes as an afterthought in its notice of removal a one-sentence final paragraph contending that this Court has exclusive jurisdiction because of factual background allegations made of insider trading. Since factual allegations do not transform this action into a securities fraud case, the *Ahlich* Plaintiffs do not address ¶ 16.

Two TROs have already been granted in other cases; and Andersen removed both actions as a result of the TROs. The first TRO had been entered against Andersen (but not against Lay) in a case pending in Harris County. *See Rosen, et al. v. Fastow, et al.*; No. 2001-57517; in the 333rd Judicial District Court of Harris County, Texas. Andersen removed *Rosen* within minutes of the entry of the order granting a TRO against it. *Rosen* (No. H-02-CV-0199) is presently pending along with a number of other cases that have been consolidated in this Court under the lead case, *Newby, et al. v. Enron Corp., et al.*; No. H-01-3624.

On January 24, 2002, another lawsuit had been filed in Washington County, Texas. *See Bullock, et al. v. Andersen, et al.*; No. 32716; in the 21st Judicial District Court of Washington County, Texas. On January 28, as a result of the TRO entered against him and Andersen in the Washington County action, Lay filed an emergency motion to be heard by this Court. He requested that the Bullock plaintiffs and their counsel be enjoined from proceeding in the Washington County court. The hearing on Lay's motion was set for January 30, 2002.

A couple of hours before the hearing, however, Andersen removed the Washington County action to this Court. Given its removal, the Court denied Lay's motion. *Bullock* is now pending in the U.S. District Court for the Western District of Texas; No. A 02 CA 070.

Andersen founded its removals in *Rosen* and *Bullock* on jurisdiction under SLUSA. Because both removals were improper motions to remand are now on file.

Andersen premised this removal on SLUSA as well. In fact, the notice of removal in *Ahlich* is substantively identical to that in *Bullock*. For reasons shown below, this action has also been removed improperly.

III. ARGUMENT

A. Andersen Does Not Satisfy Stringent Removal Standards

1. Doubts Must be Resolved in Favor of Remand

Federal courts generally construe removal statutes strictly to prevent encroachment on state courts' jurisdiction and to preserve comity, as well as to protect plaintiff's rights to fair treatment. *See, e.g., Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994). Thus, because federal courts are courts of limited jurisdiction, only those cases that could have been brought originally in federal court are removable. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). A case should be remanded if a court has any doubts about the existence of federal jurisdiction. *See, e.g., Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 694 (5th Cir. 1995); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988), *aff'd*, 503 U.S. 131 (1992).

2. A Question of Federal Law Must Appear on the Face of the Complaint

A case will arise under federal law under two situations: first, if the complaint establishes that federal law creates the cause of action; or, second, if the right to relief necessarily depends on the resolution of substantial questions of federal law. *See Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983). But because plaintiffs are masters of their complaints they may decline to litigate in federal court, choosing instead to proceed in state court "on the exclusive basis of state law." Therefore, "[a] determination that a cause of action presents a federal question depends on the allegations of the plaintiffs' well-pleaded complaint." *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995). In other words, under the "well-pleaded complaint" doctrine, a substantial and disputed question of federal law must appear on the face of the complaint. *Id.*

3. Andersen Cannot Meet its Jurisdictional Burden

Given the above, a removing defendant bears a heavy burden of establishing the jurisdictional prerequisites. *See, e.g., Frank v. Bear Stearns & Co.*, 128 F.3d 919, 921-22 (5th Cir. 1997), *modified*, 1997 U.S. App. LEXIS 36785 (5th Cir. Dec. 19, 1997); *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995); *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d at 365; *Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir. 1993), *cert. denied*, 510 U.S. 868 (1993).

As shown below, Andersen cannot meet its burden of establishing that jurisdiction is proper in this Court. The case should be remanded.

B. Andersen Does Not Satisfy SLUSA's Requirements for Removal

1. Removal Under the Securities Litigation Uniform Standards Act

Andersen based its removal of this action on the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227. Under SLUSA, certain securities cases are removable if they meet statutory requirements. Therefore, an action brought by a private party will be removed if a defendant is able to prove the following:

1. The action is a "covered class action" under SLUSA;
2. the action purports to be based upon state law;
3. the action involves a "covered security" under SLUSA;
4. the defendant is alleged to have misrepresented or omitted a material fact; and
5. the alleged misrepresentation or omission was made "in connection with" the purchase or sale of the covered security.

15 U.S.C. §§ 77p, 78bb (f)(1-2). SLUSA continues by defining a "covered class action"

as:

- (i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class . . . predominate . . . ; or

(II) one or more named parties seek to recover damages on a representative basis . . . and questions of law or fact common to those persons or members of the prospective class predominate . . . ; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purposes.

15 U.S.C. § 77 p(f)(2)(A).

2. The Plain Language of SLUSA Defeats Removal

The *Ahlich* removal turns on the threshold issue of whether the case qualifies as a “covered class action” under SLUSA. For *Ahlich* to fall within the ambit of the securities statute, Andersen must establish that it satisfies all elements of SLUSA, beginning with its jurisdictional minimum requiring more than fifty plaintiffs. Andersen cannot do so under the statutory provision.

The plain language of SLUSA states unambiguously that a “single lawsuit” must have more than fifty plaintiffs to be a covered class action. Alternatively, a “group of lawsuits filed in or pending in the same court” may qualify under SLUSA if the plaintiffs total more than fifty, and the lawsuits are “joined, consolidated or otherwise proceed as a single action.” *See* 15 U.S.C. §77p(f)(2)(A).

An analysis by this Court should begin “by examining the plain language of the relevant statute.” *See Matter of Pro-Snax Distribs., Inc.*, 157 F.3d 414, 425 (5th Cir. 1998) (citations

omitted). If a statute's language is plain, a court must "presume that a legislature says in the statute what it means and means in the statute what it says." *Id.*, citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (other citations omitted); see also *Matter of Greenway*, 71 F.3d 1177, 1180 (5th Cir. 1996), *cert denied*, 517 U.S. 1244 (1996) "[W]here the statutory language is plain, the sole function of the court is to enforce it according to its terms." (internal quotation omitted). Because of the wording of SLUSA's class action provision, the Court's inquiry need go no further.

As Anderson concedes, the *Ahlich* action is brought on behalf of forty-five Plaintiffs. Therefore, it does not attempt to fit *Ahlich* into the "single lawsuit" prong. Anderson also avoids quoting the "group of lawsuits" prong of the statute because the case does not fit there either. As show below, the fact that *Ahlich* has now been consolidated in this Court does not cure its jurisdictional infirmity. See *McKenzie v. United States*, 678 F.2d 571, 574 (5th Cir 1982) (consolidation of jurisdictionally deficient claim with jurisdictionally proper claim does not cure jurisdictional defects) (citations omitted). Therefore, removal under SLUSA is improper.

3. Speculation About Future Filings Cannot Support Removal

Since Andersen cannot overcome SLUSA's requirements for removal, it tries another tack. Admitting, as it must, that no separate case can meet the fifty or more person jurisdictional minimum, Andersen contends that the *Ahlich* Plaintiffs' counsel "represents hundreds (and maybe thousands) of persons." See notice at ¶ 10. Andersen continues at ¶ 13 by stating that counsel "represents over 750 individuals in connection with potential claims." From that premise, it concludes that the Court should consider unknown clients in nonexistent cases as a basis for its subject matter jurisdiction.

Andersen violates fundamental tenets of removal jurisdiction in expecting the Court to speculate about future unknown filings for its jurisdiction. First, the *Ahlich* Plaintiffs are masters

of their pleadings. *See, e.g., Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d at 366. Therefore, they are permitted to advance only state claims on behalf of a limited number of plaintiffs should they so choose. Second, the Court's role is not to engage in speculation about uncertain events such as possible filings, which may occur at some uncertain future date or, alternatively, may never occur. Rather, for purposes of determining its jurisdiction the Court should review the Ahlich Plaintiffs' pleading as it existed at the time of removal. *See, e.g., Lindsey v. Alabama Tel. Co.*, 576 F.2d 593, 595 (5th Cir. 1978) ("Since the 'status of the cases as disclosed by the plaintiff's complaint is controlling in the case of a removal,' . . . it was not open for defendants to attempt to show [diversity jurisdiction]. Nor was it open to the district court to speculate that such was in fact the case.") (internal citation omitted); *Bristol-Myers Squibb Co. v. Safety Nat'l Cas. Corp.*, 43 F. Supp. 2d 734, 742 (E.D. Tex. 1999) ("[T]he motion to remand cannot be decided on the basis of what may happen following a remand. Federal district courts must judge their jurisdiction on the status of cases at the time of removal.") (citation omitted).

The removal record establishes that the Ahlich Plaintiffs' original petition brought only state causes of action against Andersen and a number of individual Defendants. Any conjecture beyond the face of their pleading is too remote to support subject matter jurisdiction.

C. Consolidation of This Case with *Newby* Presents No Impediment to Remand

On December 12, 2001, an Order was entered consolidating a group of cases pending in the Southern District of Texas. This Court ordered the *Ahlich* action consolidated with the lead case, *Newby, et al. v. Enron, et al.*, on February 1, 2002.

In addressing the effect of consolidation, the U.S. Supreme Court has held that:

[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single case, or change the rights of the parties, or make those who are parties in one-suit parties in another.

See Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496 (1933). Following that principle, the Fifth Circuit directs a court to “view each consolidated case separately to determine the jurisdictional premise upon which each stands.” *See Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 287 (5th Cir. 1989) (citations omitted); *see also In re Excel Corp.*, 106 F.3d 1197, 1201 (5th Cir. 1997), *cert. denied*, 522 U.S. 859 (1997) (“instruct[ing] the district court to consider each plaintiff’s motion to remand on a case by case basis”) (citations omitted); *Bristol-Myers Squibb Co. v. Safety Nat’l Cas. Co.*, 43 F.Supp.2d at 745 (recommending remand of one of two cases).

In short, *Ahlich’s* status as a consolidated case does not cure its jurisdictional defect and thus does not preclude remand. Therefore, because removal was improper, the Court should remand the action for lack of subject matter jurisdiction.

IV. CONCLUSION

For all reasons above, this Court lacks subject matter jurisdiction under the Securities Litigation Uniform Standards Act 1998. Therefore, it should order the action remanded to the 272nd Judicial District Court of Brazos County, Texas, where it was filed originally.

Respectfully submitted,

FLEMING & ASSOCIATES, L.L.P.

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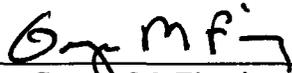
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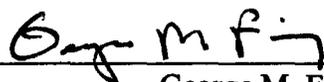
By: 
George M. Fleming

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing Memorandum in Support of Plaintiffs' Motion to Remand has been provided to all parties as indicated below on this the 8th day of February, 2002 by First Class United States Mail, postage prepaid, or by facsimile:

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