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Michael M. Wilby, Clerk

U.S. COURT'S  
SOUTHERN DISTRICT  
OF TEXAS

2002 FEB 19 PM 5:30

FILED

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

MARK NEWBY, ET AL.,  
  
Plaintiff,  
  
vs.  
  
ENRON CORPORATION, ET AL.,  
  
Defendants.

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CIVIL ACTION NO. H-01-3624  
AND CONSOLIDATED CASES

**RESPONSE OF DEFENDANT MICHAEL J. KOPPER TO  
MOTION TO REMAND BY ROSEN PLAINTIFFS**

THE HONORABLE JUDGE OF THIS COURT:

NOW COMES Defendant Michael J. Kopper ("Kopper") and files this response in opposition to the motion to remand filed by the plaintiffs in *Rosen, et al. v. Fastow, et al.*, Civil Action No. H-02-0199.<sup>1</sup> *Rosen* is consolidated into the above-captioned case number, after having been originally filed under Cause No. 2001-57517 in Harris County District Court and removed to this Court on January 18, 2002. In support of his opposition to the motion to remand, Kopper would respectfully show the Court as follows:

**I. Lawsuits Filed by Fleming & Associates Seek to Circumvent Federal Securities Laws**

1. Fred A. Rosen and Marian Rosen originally filed a derivative action in state court in Harris County, Texas in November 2001 (Cause No. 2001-57517, filed in the 333rd Judicial

<sup>1</sup>Kopper is listed as a defendant in the most recently amended petition in *Rosen*. As part of the consolidated *Newby* proceedings, *Rosen* is subject to the Court's previous orders applicable to the *Newby* cases, including but not limited to the Court's placement of a hold on the filing of responsive pleadings pending the Court's entry of a scheduling order for the consolidated cases. Accordingly, Kopper's response to this motion to remand is filed without prejudice to his ability to file any necessary responsive pleadings, including but not limited to a motion to dismiss under FED. R. CIV. P. 12(b), once the Court enters a scheduling order and lifts the hold on responsive pleadings.

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District Court of Harris County, Texas). Enron Corporation was nonsuited from that case after it filed bankruptcy in December 2001. On January 17, 2002, the *Rosen* petition was amended to transform the lawsuit from a derivative action to a securities fraud case allegedly based in state law causes of action. New plaintiffs and defendants, including Kopper, were also added. Additionally, the *Rosen* Plaintiffs sought a temporary restraining order against newly named defendant Arthur Anderson, L.L.P.

2. The *Rosen* Plaintiffs are represented by Fleming & Associates, L.L.P. (“Fleming”). Fleming has filed at least four additional Enron-related lawsuits<sup>2</sup> (“the Fleming lawsuits”) in four different forums. The factual allegations in each Fleming lawsuit are virtually identical. Additionally, there is an overlap among the plaintiffs in the Fleming lawsuits. All of the *Bullock* Plaintiffs are included as plaintiffs in the *Ahlich* lawsuit. The lead plaintiffs in the *Rosen* litigation are also named in *Odam*. Finally, Hal Moorman and Milton Tate, identified as co-trustees for Moorman, Tate, Moorman & Urquhart Money Purchase Plan and Trust, are plaintiffs in *Odam*, *Ahlich*, and *Bullock*. Kopper is named as a defendant in at least three of these lawsuits, including *Rosen*.

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<sup>2</sup>*Odam v. Enron Corporation*, Civil Action No. H-01-3914, filed in the United States District Court for the Southern District of Texas, Houston Division; *Ahlich v. Arthur Andersen, L.L.P.*, Cause No. 02-000073-CV-272, originally filed in 272nd Judicial District Court for Brazos County, Texas; *Bullock v. Arthur Anderson, L.L.P.*, Cause No. 32716, originally filed in the 21st Judicial District Court of Washington County, Texas; and *Jose v. Arthur Andersen, L.L.P.*; Cause No. 2002-CI-01906, pending in the 57th Judicial District Court of Bexar County, Texas. Counsel for Kopper have been informed that more Enron-related cases have been filed by the Fleming firm on behalf of other plaintiffs, but as of the time of this filing had not seen the petitions in any such additional cases.

3. Sean Jez, a partner at Fleming, has represented to this Court that Fleming represents over 750 individuals. Transcript of January 30, 2002 hearing at 17-18. During a January 30 hearing before this Court, Mr. Jez acknowledged that Fleming might well continue to file additional Enron-related lawsuits. *Id.* at 50-51. Approximately one week later, Fleming filed the *Jose* lawsuit in Bexar County and successfully sought an *ex parte* temporary restraining order against selected defendants. It appears that approximately 80 of Fleming's claimed 750 clients have had a suit filed under their name to date.

4. On January 18, 2002, Arthur Anderson removed the *Rosen* case to this Court pursuant to the Securities Litigation Uniform Standards Act ("SLUSA"). Pub. L. 105-353, 112 STAT. 3227 (1998).

## II. Relevant Statutory Provisions

5. SLUSA was passed in 1998 in an attempt to strengthen the reforms begun by Congress in 1995 with the passage of the Private Securities Litigation Reform Act ("PSLRA"). Pub. L. 104-67, 109 STAT. 737 (1995). PLSRA attempted to reduce the number and expense of frivolous security fraud class action lawsuits by establishing heightened pleading requirements, imposing an automatic stay on discovery until the pleadings comport to the pleading requirements, and, *inter alia*, providing a safe harbor for certain forward-looking statements. SLUSA was passed in 1998 "to prevent certain State private securities class action lawsuits alleging fraud . . . from being used to frustrate the objectives of [PSLRA]." SLUSA, Pub. L. 105-353, at § 2(5).

6. To this end, SLUSA requires the removal to federal court of "[a]ny covered class action brought in any State court involving a covered security" and the dismissal of "covered

class action[s] based upon the statutory or common law of any State [that] alleg[es] a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security.” 15 U.S.C. §§ 77p(b) & (c); 78bb(f)(1)(A) & (2). The statute defines 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..., without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; 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 purpose.

15 U.S.C. §§ 77p(f)(2)(A); 78bb(f)(5)(B). As noted by this Court, Congress, through the passage of PSLRA and SLUSA, has preempted all state law security actions falling within these parameters. Memorandum and Order, entered February 6, 2002 at 12. In fact, the Senate Banking Committee explained:

[W]hile the Committee believes it has effectively reached those [State] actions that could be used to circumvent the reforms enacted by Congress in 1995 as part of [PLSRA], *it remains the Committee’s intent that the bill be interpreted broadly to reach mass actions and all other procedural devices that might be used to circumvent the class action definition.*

S. Rep. No. 105-182, at 8 (1998) (emphasis added).

### III. *Rosen* Case was Properly Removed to Federal Court

7. The *Rosen* Plaintiffs argue that the removal of their case was improper under the SLUSA and should, therefore, be remanded to the state court. The *Rosen* Plaintiffs claim that

their lawsuit does not qualify as a “covered class action.” They have not challenged (and cannot challenge) the remaining requirements for removal under SLUSA.

**A. More Than 50 Plaintiffs Are Included In The *Rosen* Lawsuit**

8. The *Rosen* lawsuit seeks to recover damages on behalf of 14 individual plaintiffs and *the members* of the Houston Federation of Teachers (“HFT”). According to their First Amended Petition, HFT<sup>3</sup> has not joined the lawsuit to recover for itself; instead it “files on behalf of its members who are teachers in the State of Texas.” *Rosen* Plaintiffs’ First Amended Petition, Application for Temporary Restraining Order and Temporary Injunction, ¶ 3, at p.3. According to Fleming, HFT has 675 members. *See* Tab B, Jo Ann Zuniga et al., *Teachers Group Joins Legal Fray over Enron*, HOUS. CHRON., Jan. 17, 2002, at C.1. Because HFT is suing only for its members (and not for itself), the total number of plaintiffs in the *Rosen* lawsuit is well over 50. As a result, the Fleming lawsuits fit within the statutory definition of a “covered class action.”

9. Because SLUSA provides that a pension plan shall be treated as one person in connection with the determination under SLUSA of the number of plaintiffs included in a covered class action, 15 U.S.C. §§ 77p(f)(2)(C); 78bb(f)(5)(D), the *Rosen* Plaintiffs also argue, in the alternative, that HFT “functions as a pension plan” based on their allegations that HFT members contribute to the Teacher Retirement System of Texas (“TRS”). “Functioning” as a pension plan is simply not the same thing as being a pension plan. According to Plaintiffs, TRS,

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<sup>3</sup>The *Rosen* pleadings also claim that HFT “is organized as a non-profit corporation.” It is not clear whether plaintiffs are claiming that HFT *is* a corporation or merely organized in the same manner as a corporation. According to the records of the Texas Secretary of State, it does not appear that HFT is a Texas non-profit corporation. *See* Tab A.

not HFT, is the pension plan to which the members of HFT contribute. Therefore, the *Rosen* Plaintiffs' alternative argument also fails. This lawsuit fits within the parameters of a "covered class action."

**B. Alternatively, This Court Should Disregard The Fleming Plaintiffs' Procedural Maneuvers That Seek to Eviscerate the Protections of SLUSA**

10. HFT should be counted for removal purposes as 675 persons, based on HFT's allegation that it is suing on behalf of its members for the damages they allegedly suffered. However, even if HFT were to be counted for removal purposes as *one* plaintiff, denial of the remand motion would still be appropriate. To remand the case would permit Fleming and its plaintiffs to circumvent the protections provided by PLSRA and SLUSA to the nation's securities market by employing the procedural device of filing numerous lawsuits (using identical allegations) in numerous courts, each with only an allegedly small number of named plaintiffs.<sup>4</sup> The Court should not permit this abuse to continue unchecked.

11. A California federal district court recently faced a similar attempt by a plaintiff to undermine the effectiveness of the security laws through procedural manipulation of pleadings. *Gibson v. PS Group Holdings, Inc.*, Fed. Sec. L. Rep. ¶ 90,921, 2000 WL 777818 (S.D. Cal. 2000) (a copy of this case is attached at Tab C for the Court's convenience). In that case, "[t]he procedural history of th[e] case suggests that Plaintiff selectively omitted the damages prayer from his Amended Complaint to defeat removal under [SLUSA]." *Id.* at \*3. When the plaintiff then sought to remand the case to state court, alleging that it fell outside the definition of a

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<sup>4</sup>The Court also discussed these concerns in its Memorandum and Order, entered on February 15, 2002.

“covered class action,” the court refused to remand the case as doing so “would eviscerate”

SLUSA. *Id.*

A rule that allows a plaintiff to defeat a defendant’s right to remove a class action through ... a hollow procedural maneuver would surrender [SLUSA’s] application to the class action plaintiffs the statute seeks to keep at bay. [*SLUSA*] demands that the Court look beyond the face of the [plaintiff’s] pleadings to discern whether this action is a “covered class action.” Because Plaintiff has offered no explanation [for his procedural actions], the Court finds no reason why this action should not qualify as a “covered class action” under [SLUSA.]

*Id.* at \*4 (emphasis added).

12. The procedural history and arbitrary number of plaintiffs assigned to each of the Fleming lawsuits suggest that Fleming is attempting to circumvent the class action definition through the mechanism of filing numerous lawsuits in numerous counties with arbitrary division of plaintiffs among the lawsuits. As this Court noted in its Memorandum and Order, entered February 6, 2002, this artful pleading doctrine applies where federal law preempts the field and prevents plaintiffs from precluding removal by failing to plead necessary federal questions. Memorandum and Order, entered February 6, 2002 at 9. Because Congress has preempted securities fraud actions such as those pled in the Fleming Lawsuits, the artful pleading doctrine applies and prohibits subsets of the alleged 750 Fleming clients from precluding removal of their claims. Allowing Fleming to avoid the provisions of SLUSA and PLSRA through such creative pleadings would eviscerate the protections provided by those laws. As a result, Kopper respectively requests that this Court deny the *Rosen* Plaintiffs’ motion to remand.

13. Federal courts have traditionally scrutinized the structure of plaintiffs’ lawsuits to ensure that plaintiffs do not thwart federal jurisdiction through the use of procedural maneuvers. According to the Supreme Court, “[a] district court can consider whether the plaintiff has

engaged in any manipulative tactics when it decides whether to remand a case.” *Carnegie-Mellon Univ. v. Cohill*, 108 S. Ct. 614, 622 (1988) (question of whether to remand pendant state-law claims). For example, the federal courts have ruled that the fraudulent joinder of a nondiverse defendant will not stymie the removal of the case to federal court or the federal court’s exercise of jurisdiction. *See, e.g., Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998) (“Fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity.”) It is appropriate under the circumstances of this case for the Court to retain jurisdiction and deny Plaintiffs’ motion to remand.<sup>5</sup>

#### **IV. Procedure Following Removal**

14. The Court has previously enforced the SLUSA provision requiring dismissal of a “covered class action based upon the statutory or common law of any state ... [brought] by any private party alleging ... (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.” 15 U.S.C. § 78bb(f)(1)(A) & (B). The claims raised by the *Rosen* Plaintiffs clearly fall within this definition. As this Court noted in its Memorandum and Order, entered on February 6, 2002, “dismissal with prejudice of claims within [the] ambit [of SLUSA] is in keeping with the language of 15 U.S.C. § 78bb(f).” Memorandum and Order, entered on Feb. 6, 2002 at 21-22.

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<sup>5</sup>Furthermore, as a practical matter, even if a particular suit filed by Fleming has technically fewer than 50 named plaintiffs, the artifice of the Fleming approach would eventually be exposed in state court through consolidation under the application of the Texas Rules of Judicial Administration. Kopper understands that other defendants are addressing the potential application of these rules, and joins in that briefing.

15. To the extent this Court determines that any of the claims raised by the *Rosen* plaintiffs fall outside of this group, the Court has recognized that it may exercise supplemental jurisdiction over such claims pursuant to 28 U.S.C. § 1367. The analysis used by this Court in connection with the motion to remand filed by plaintiffs William Coy and Candy Mounter is equally applicable to the *Rosen* lawsuit. This Court held that

[a]ll related Enron cases currently consolidated before this Court basically allege a fraudulent scheme by Enron, aided by Arthur Andersen, L.L.P., with claims based on the same conduct, arising from the same nucleus of operative fact, resulting in a strong nexus between federal and state claims that supports federal jurisdiction here.

Memorandum and Order, entered on Feb. 6, 2002 at 23. This Court recognized that a remand of the claims raised by Coy and Mounter could lead to “unwieldy problems regarding coordination of discovery between the federal and state cases.” *Id.* (quoting *In re Lutheran Brotherhood Variable Insurance Products Co. Sales Practices Litigation*, 105 F. Supp.2d 1036, 1042 (D. Minn. 2000)). The same dangers are present in the *Rosen* lawsuit.

### **Conclusion**

WHEREFORE, PREMISES CONSIDERED, Defendant Michael J. Kopper respectfully requests that this Court deny the Fleming Plaintiffs’ motion to remand.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This pleading was served in compliance with the Rules 5b of the Federal Rules of Civil Procedure on February 19, 2002, by certified mail, return receipt requested or U.S. Mail to all counsel on the attached Service List.



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IN THE UNITED STATES DISTRICT COURT  
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 HOUSTON DIVISION

MARK NEWBY, ET AL.,

Plaintiff,

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ENRON CORPORATION, ET AL.,

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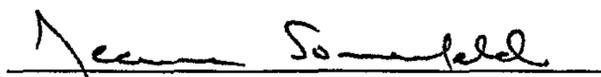
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 OF TEXAS

AFFIDAVIT IN SUPPORT OF  
 RESPONSE TO MOTION TO REMAND

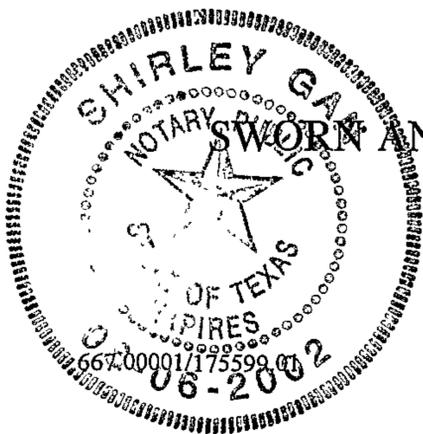
Before me, the undersigned authority, personally appeared Jeanne Sommerfeld, who being by me duly sworn, deposed as follows:

1. "My name is Jeanne Sommerfeld. I am over 21 years of age and am competent to make this statement. I am an attorney with the law firm of Beck, Redden & Secrest that represents Defendant Michael J. Kopper in *Rosen, et al. v. Fastow, et al.*, Civil Action No. H-02-0199, consolidated into Civil Action No. H-01-3624 and pending in the United States District Court for the Southern District of Texas, Houston Division. *Rosen* was originally filed under Cause No. 2001-57517 in Harris County District Court and removed to this Court on January 18, 2002. I have personal knowledge of the facts set forth in this Affidavit and certify that the statements contained herein are true and correct.
2. I undertook a search for the Houston Federation of Teachers on the Westlaw database for public records regarding corporations in Texas. The search did not locate any Texas corporations under that name.
3. At my request, a paralegal contacted the Office of the Secretary of State of Texas and requested verification of the results of my Westlaw search. Attached hereto is a true and correct copy of the certification received from the Office of the Secretary of State of Texas confirming that it has no record of any corporation with the name Houston Federation of Teachers.

  
 Jeanne Sommerfeld

SWORN AND SUBSCRIBED to before me on this 19<sup>th</sup> day of February 2002.

  
 Notary Public in and for the State of Texas



# The State of Texas



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The undersigned, as Secretary of State of Texas, does hereby certify that a diligent search of the records of this office reveals no record of a domestic or foreign corporation, professional corporation, professional association, limited partnership, or limited liability company on file in this office with the name Houston Federation of Teachers.

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on February 14, 2002.



Gwyn Shea  
Secretary of State

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