United States Courts
Southern District of Texas
FILED
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Michael N. Milby, Clerk

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

AMERICAN NATIONAL INSURANCE COMPANY, et al., Plaintiffs,	§	
	§	Civil Action No. G-02-0084
vs.	§	Consolidated Lead H-01-3624
ARTHUR ANDERSEN, L.L.P., et al., Defendants.	§	

DEFENDANT ARTHUR ANDERSEN LLP'S
RESPONSE TO PLAINTIFFS' MOTION TO REMAND

Defendant Arthur Andersen L.L.P. ("Andersen") respectfully submits this response to the motion to remand filed by plaintiffs American National Insurance Company, American National Investment Accounts, Inc., SM&R Investments, Inc., American National Property and Casualty Company, Standard Life and Accident Insurance Company, Farm Family Life Insurance Company, Farm Family Casualty Insurance Company, and National Western Life Insurance Company (together "the American National Companies").

A. INTRODUCTION

1. In this action, the American National Companies brought state law claims against Andersen and numerous other defendants alleging liability arising from the financial difficulties of Enron Corporation. The American National Companies' claims arise from the same nucleus of operative facts as the consolidated securities claims in *Newby v. Enron Corp.*, C.A. No. H-01-3624, and are so related to the claims in the *Newby* action that they form part of the same case or controversy under Article III of the United States Constitution. Therefore, Arthur Andersen L.L.P. ("Andersen") removed this action to federal court because this Court has supplemental jurisdiction over this removed action pursuant to 28 U.S.C. §§ 1367 and 1441. Additionally,

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Andersen removed this action from state court because the American National Companies' claims are preempted and made removable under the authority of the Security Litigation Uniform Standards Act of 1998 ("SLUSA").

2. In response to Andersen's removal, the American National Companies filed a motion to remand. In their remand motion, they argue that (1) supplemental jurisdiction pursuant to 28 U.S.C. § 1367 cannot serve as the basis for federal court removal jurisdiction, and (2) American National Companies' claims are not preempted and made removable by SLUSA because this action is not a "covered class action" for purposes of SLUSA. As will be demonstrated, American National Companies' arguments are flawed on both fronts, and their motion to remand should be denied.

B. Removal Was Proper Pursuant to 28 U.S.C. §§ 1367 and 1441

3. As this Court knows, there is currently pending before this Court a consolidated group of more than 70 lawsuits arising out of the financial difficulties of Enron Corp. known as *Newby v. Enron Corp.*, Cause No. H-01-3624. *Newby* is a civil action over which the United States district courts have original federal question jurisdiction. The claims in this removed action arise from the same common nucleus of operative facts common to all of the *Newby* claims. Thus, they are so related to the claims in the *Newby* action that they form part of the same case or controversy under Article III of the United States Constitution. Therefore, this Court has supplemental jurisdiction over this removed action pursuant to 28 U.S.C. §§ 1367 and 1441.

i. Scope of Federal Court Supplemental Jurisdiction Extends to the Limits of "One Constitutional Case"

4. The federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that "derive from a common nucleus of operative fact," such

that "the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *United Mine Workers v. Gibbs*, 86 S. Ct. 1130, 1138 (1966); *see Hurn v. Oursler*, 53 S. Ct. 586 (1933); *Siler v. Louisville & Nashville R. Co.*, 29 S. Ct. 451 (1909). In 1990, Congress codified those principles in the supplemental jurisdiction statute, which combined the doctrines of pendent and ancillary jurisdiction under a common heading. *See* 28 U.S.C. § 1367. The statute provides, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *Id.* § 1367(a). That provision applies with equal force to cases removed to federal court as to cases initially filed there; a removed case is necessarily one "of which the district courts ... have original jurisdiction." *Chicago v. International College of Surgeons*, 118 S. Ct. 523, 529-30 (1997); *see* § 1441(a).

ii. American National's Claims are Part of "One Constitutional Case"

5. Even a cursory comparison of American National Companies' claims demonstrates that they derive from the same "common nucleus of operative fact" as the claims in all of the currently pending consolidated lawsuits in the *Newby* proposed securities class action. Indeed, American National's motion to remand implicitly concedes that its claims are no different than the other *Newby* securities actions in that it only argues that it does not meet the technical definition of "covered class action" for purposes of SLUSA removal. *See* Remand Motion at 4, 7-9.

6. This Court recently decided a similar matter. In *Newby v. Enron Corp.*, No. H-01-3624 (S.D. Tex., Feb. 6, 2002) (denying motion to remand in consolidated action styled *Coy v. Arthur Andersen L.L.P.*, No. 01-CV-4248) (emphasis added), this Court found that:

> [I]n this case the federal and state claims are not truly separate and distinct, but involve the same case or controversy over those in the consolidated class action. Indeed, all 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.

Id. at 23.

7. The American National Companies' claims are no different than the *Coy* plaintiffs' claims. The American National Companies' claims basically allege a fraudulent scheme by Enron, aided by Arthur Andersen, L.L.P. and others, with its claims based on the same conduct—misrepresentations and/or omissions of material facts in connection with the purchase or sale of Enron securities—arising from the same nucleus of operative fact, as all of the other *Newby* plaintiffs' claims. Except for changing the names of the plaintiffs, the claims are virtually identical. For this reason, the American National Companies' claims are "so related to claims in the [*Newby*] action within such original jurisdiction that [the American National Companies' claims] form part of the same case or controversy under Article III of the United States Constitution."

iii. Because the American National Companies' Claims are Part of "One Constitutional Case" and Because They "Originally Could Have Been Filed in Federal Court" Under Supplemental Jurisdiction, They are Removable.

8. The determination that the American National Companies' claims form part of the same case or controversy as the *Newby* claims does not end the inquiry. "The propriety of removal ... depends on whether the case originally could have been filed in federal court." *Chicago v. International College of Surgeons*, 118 S. Ct. 523, 529 (1997). The American

National Companies recognize this test for removal jurisdiction: "Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2429 (1987). The issue becomes whether American National Companies' claims "originally could have been filed in federal court."

9. Other federal courts have found that supplemental jurisdiction supplies the necessary grant of federal court jurisdiction over nonfederal claims asserted by parties who do not meet complete diversity requirements. For example, in *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996) (Easterbrook, J.) two construction sub-contractors brought claims in federal court against the general contractor for underpayment. Both sub-contractors had diverse citizenship from the general contractor. However, only one sub-contractor, Stromberg, had a claim exceeding the requisite amount in controversy. The claim of the second plaintiff / sub-contractor, Comfort Control, did not exceed $50,000. Therefore, Comfort Control did not independently satisfy federal court diversity jurisdiction. Nevertheless, the Seventh Circuit Court found that Comfort Control could join with Stromberg and bring its claim in federal court pursuant to the federal court's supplemental jurisdiction. *See id.* at 932. "[I]f it is possible for the principal action to be in federal court without jurisdictional qualms then § 1367(b) does not block adding an additional plaintiff with a closely related claim against the defendant who is already in the federal forum." *Id.* "This strikes us as exactly the sort of case for which pendent-party jurisdiction is appropriate. It is two for the price of one: to decide either plaintiff's claim is to decide both, and neither private interests nor judicial economy would be promoted by resolving Stromberg's claim in federal court while trundling Comfort Control off to state court to get a second opinion." *Id.*

10. In *Stromberg Metal Works*, Comfort Control was allowed to originally file its claims in federal court only because of supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Like the Stromberg plaintiffs, the Newby plaintiffs have a proper basis for federal court jurisdiction; like the Comfort Control plaintiffs, the American National Companies could have brought their state law claims against Andersen originally in federal court as supplemental to the *Newby* federal claims. Once this relationship is understood, the appropriateness of Andersen's removal becomes evident.

11. There are other instances where federal courts have retained jurisdiction over non-diverse parties asserting state law claims over which there is no independent basis for federal court jurisdiction. In *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 929 (8th Cir. 1999), three plaintiffs filed suit against their former employer for violations of two benefit plans. One was a benefits plan governed by ERISA; the other was a phantom stock plan regulated solely by state law. One plaintiff raised only state law claims. On appeal, the Eighth Circuit Court "advised" the district court that on remand it could exercise supplemental jurisdiction over the state-law claims—even though the district court had thus rendered a proper "final adjudication" on all federal claims. *See id.* at 936. As in the present case, a non-diverse individual plaintiff was allowed to bring his sole claims—state law claims—into federal court under the court's supplemental jurisdiction.

12. A case similar to our case, *In re Lutheran Brotherhood Variable Insurance Products Co. Sales Practices Litigation*, 105 F. Supp. 1037 (D. Minn. 2000), involved consolidated cases over which SLUSA had some preemptive effect. The defendants removed both (1) claims that were removable under SLUSA, and (2) similar kinds of claims but about which "there is unquestionably no federal question jurisdiction as to these Plaintiffs." *Id.* at

1042. On appeal, the plaintiffs in the second group argued their claims should be remanded to state court—just as the American National Companies now argue. In denying the motion to remand, the *Lutheran Brotherhood* Court found "[t]his Court is authorized to hear claims based solely on state law when those claims are 'so related to claims in the action [over which the court enjoys] original jurisdiction that they form part of the same case or controversy under Article III." *Id.* For the same reasons, this Court should deny the American National Companies' motion to remand.

iv. The Fifth Circuit Court Mandates that its Courts Rely on the Plain, Unambiguous Text of 28 U.S.C. § 1367

13. In addition to the cases cited above, the text of the supplemental jurisdiction statute supports this Court's jurisdiction in this instance:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367. The supplemental jurisdiction statute extends the jurisdiction of the federal district court to all claims sufficiently related to the claim on which its original jurisdiction is based to be part of the same case or controversy within the meaning of Article III of the Constitution. If a claim is close enough to the federal (or other) claim that confers federal jurisdiction to be part of the same case, there is no constitutional bar to the assumption of federal jurisdiction over the claim, because Article III confers federal jurisdiction over cases or controversies rather than over claims; and the new statute goes to the constitutional limit.

14. In *Free v. Abbott Laboratories (In re Abbott Laboratories)*, 51 F.3d 524 (5th Cir. 1995), the Fifth Circuit Court adopted a textualist approach to interpreting the supplemental

jurisdiction statute, 28 U.S.C. § 1367. The Fifth Circuit Court found that Congress, in enacting the supplemental jurisdiction statute, overruled *Zahn v. International Paper Co.*, 94 S. Ct. 505 (1973). Performing a textual examination of section 1367, the Fifth Circuit Court determined that "[t]he statute's first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute's second section. Class actions are not among the enumerated exceptions." *Abbott Laboratories*, 51 F.3d at 528. While acknowledging that the omission of certain groups of cases, like class actions, from § 1367(b)'s exceptions "may have been a clerical error," the Fifth Circuit Court nonetheless held that "the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result." *Id.* at 528-29. After concluding that overruling *Zahn* "is not an absurd result," the Court held that § 1367 permitted the district court to exercise supplemental jurisdiction over class action class members who did not meet the amount in controversy requirement. *Id.* at 529.

15. Similarly, a textual examination of the supplemental jurisdiction statute supports the conclusion here that section 1367 can serve as the jurisdictional basis for removal of state court claims asserted by non-diverse parties in a separate lawsuit. On its face, the statute was intended to stretch federal court jurisdiction to its constitutional limits. There can be no credible argument that the American National Companies' claims do not constitute part of "one constitutional case" along with the *Newby* claims. The test for whether two claims constitute "one constitutional case" is whether they "derive from a common nucleus of operative fact," such that "the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *United Mine Workers v. Gibbs*, 86 S. Ct. 1130, 1138 (1966). This Court has already found that all "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." *Newby v. Enron Corp.*, No. H-01-3624, slip op. at 23 (S.D. Tex., Feb. 6, 2002) (emphasis added). As described earlier, American National Companies' claims are no different.

16. The text of the statute focuses only on the relationship of the claims as triggering supplemental jurisdiction, *i.e.*, whether the "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction." There is no textual support that these claims must initially begin in the same lawsuit. To borrow from *Abbott Laboratories*, "[t]he statute's first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute's second section. [A requirement that the claims be initially asserted in the same lawsuit is] not among the enumerated exceptions." *See Abbott Laboratories*, 51 F.3d at 528. For this reason also, the Court should find that it has supplemental jurisdiction and deny the American National Companies' remand motion.

C. Removal Was Proper Pursuant to SLUSA

17. Andersen also removed this action pursuant to SLUSA. In 1995, Congress passed the Private Securities Litigation Reform Act (the "PSLRA") to provide uniform standards for class actions and other proceedings alleging violations of the federal securities laws. Among other things, the PSLRA imposed heightened pleading requirements in securities fraud actions. Seeking to avoid this hurdle, as well as other features of the PSLRA, plaintiffs in securities class actions began to bring suit in state courts. Because Congress perceived that suits being brought

in state court often involved federal securities claims in the guise of state law claims, Congress in 1998 moved to close this loophole by enacting SLUSA. *See* SLUSA, Pub. L. No. 105-353, § 2, 112 Stat. 3227 (1998) (codified as a note to 15 U.S.C. § 78a); *Coy v. Arthur Andersen L.L.P.*, No. 01-CV-4248, slip op. at 11 (S.D. Tex., Feb. 6, 2002) ("When, as a result, plaintiffs began filing in state rather than federal court, asserting claims under state statutory or common law to avoid the PSLRA's stringent procedural pleading hoops, Congress passed SLUSA in order to close the loophole."); *Wald v. C.M. Life Ins. Co.*, No. Civ. 3:00-CV-2520-H, 2001 WL 256179, at *4 (N.D. Tex. Mar. 8, 2001).

18. SLUSA precludes plaintiffs from maintaining "covered class actions" alleging state law claims for losses suffered due to material misrepresentations made in connection with the purchase or sale of certain securities. 15 U.S.C. § 78bb(f)(1).[1] Significantly, Congress did not leave it to state courts to dismiss these state-law claims; rather, Congress expressly granted defendants access to a federal forum for this purpose, providing that these class actions "shall be removable to the Federal district court for the district in which the action is pending." 15 U.S.C. § 78bb(f)(2).[2]

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[1]This provision states:

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court 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.

[2] In doing so, Congress placed these state-law class actions beyond the ambit of the well-pleaded complaint rule relied on by plaintiffs. *See, e.g.*, *Verlinden B.V. v. Central Bank of Nigeria*, 461

i. The Petition Plainly Alleges State Law Claims In Connection With Purchases of a Covered Security

19. A suit is removable under SLUSA if

(1) the action is a "covered class action" under SLUSA;
(2) the causes of action on their face are based on state statutory or common law;
(3) it involves a "covered security" under SLUSA;
(4) it alleges Defendants have misrepresented or omitted material facts; and
(5) the alleged misstatement or omission was made "in connection with" the purchase or sale of the covered security.

Coy v. Arthur Andersen LLP, No. 01-CV-4248, mem. op. at 14 (S.D. Tex., Feb. 6, 2002); *see also Hardy v. Merrill Lynch, Pierce, Fenner & Smith*, No. 01 Civ. 5973 (NRB), 2001 WL 1524471, at *3 (S.D.N.Y. Nov. 30, 2001); *Green v. Ameritrade, Inc.*, No. 01-1251, 2002 WL 126170, at *4 (8th Cir. Feb. 1, 2002).

20. There is no dispute that the four latter requirements are satisfied here. The claims are all brought under Texas statutes or the common law. *See* Pet. ¶¶ 76-100. The Petition alleges that Enron stock "was traded on the New York Stock Exchange," Pet. ¶¶ 44, 46, 50, 61. which makes it a "covered security" under SLUSA. *See* 15 U.S.C. §§ 78bb(f)(5)(E), 77r(b)(1)(A). The complaint alleges that Arthur Andersen misrepresented material facts, omitted material facts, and employed manipulative or deceptive devices or contrivances in connection with plaintiffs' decisions to purchase or sell Enron stock. Pet. ¶¶ 62-88; *see* 15 U.S.C. §§ 77p(b), 78bb(f)(1). The American National Companies only dispute whether their claims are a "covered class action" for purposes of SLUSA.

ii. Plaintiffs' Claims are Part of a "Covered Class Action"

21. The American National Companies' claims are part of a "covered class action" for purposes of SLUSA. "The term "covered class action" means any group of lawsuits filed in or

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U.S. 480, 494 (1983). Indeed, one of the requirements for removal under SLUSA is that the action be "based upon the statutory or common law of any State." 15 U.S.C. § 77bb(f)(1) (emphasis added). Thus, like the artful pleading doctrine, *see Terrebonne Homecare, Inc. v. SMA Health Plan, Inc.*, 271 F.3d 186, 188 (5th Cir. 2001), SLUSA does not allow a plaintiff to avoid removal simply by cloaking federal claims in state law.

pending in the same court and involving common questions of law or fact, in which damages are sought on behalf of more than 50 persons; and the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose." 15 U.S.C. § 78bb(f)(5)(B)(ii).

22. The American National Companies have failed to take issue with the following statements in Andersen's removal petition:

a. Defendants have a right under Texas law to consolidate all of these actions before a single state court judge. *See* Tex. R. Jud. Admin. 11.4(h).

b. This rule provides that on a motion for consolidation:

> The presiding judge must grant the motion or request if the judge determines that: (1) the case involves material questions of fact and law common to a case in another court and county; and (2) assignment of a pretrial judge would promote the just and efficient conduct of the cases. Otherwise, the presiding judge must deny the motion or request.

c. Moreover, a refusal to grant a consolidation motion is subject to mandamus review by the Texas Supreme Court. See Tex. R. Jud. Admin. 11.5.

d. The actions subject to this right of consolidation are, for all practical purposes, "pending in the same court" for purposes of the above SLUSA definition.

e. This case would have been consolidated with other Enron-related cases pending in Harris and surrounding counties in the Second Administrative Judicial Region of Texas. See Tex. Gov't Code § 74.042(c) ("The Second Administrative Judicial Region is composed of the counties of Angelina, Bastrop, Brazoria, Brazos, Burleson, Chambers, Fort Bend, Freestone, Galveston, Grimes, Hardin, Harris, Jasper, Jefferson, Lee, Leon, Liberty, Limestone, Madison, Matagorda, Montgomery, Newton, Orange, Polk, Robertson, Sabine, San Augustine, San Jacinto, Trinity, Tyler, Walker, Waller, Washington, and Wharton.").

f. Any ruling otherwise by this Court would require defendants to go through the empty formality of consolidating the cases in state court, unnecessarily delaying the removal permitted by Congress.

g. There are numerous state court cases that were filed in local state courts arising from Enron financial difficulties in which more than 50 plaintiffs seek damages.[3]

h. The defendant has a right under State law to consolidate the American National Companies' claims in the same state court with the other numerous Enron claims.

i. The American National Companies claims should be treated as having been "consolidated ... for any purpose" with the other Enron-related cases that were filed in state courts, recognize that more than 50 persons have sought damages in these consolidated actions, and that all of the cases are controlled by common questions of fact and law.

j. Forcing the defendants to return to state court to consolidate actions arising from Enron's financial difficulties would be an empty formality because defendants have a right to consolidate under Texas law.

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[3] *See, e.g., Delgado v. Fastow, et al.*, Cause No. 2002-00569, in the 55th Judicial District Court of Harris Co., Texas; *removed to* the U.S. District Court for the Southern District of Texas, Houston Division, consolidated under C.A. H-01-3624; *Pearson v. Fastow, et al.*, Cause No. 2002-00609, in the 164th Judicial District Court of Harris Co., Texas, *removed to* the U.S. District Court for the Southern District of Texas, Houston Division, consolidated under C.A. H-01-3624; *Rosen v. Fastow, et al.*, Cause No. 2001-57517, in the 333rd Judicial District Court of Harris Co. Texas, *removed to* the U.S. District Court for the Southern District of Texas, Houston Division, consolidated under C.A. H-01-3624; *Jane Bullock et al. v. Arthur Andersen, L.L.P., et al.*, Cause No. 32,716, in the 21st Judicial District of the District Court of Washington County, Texas, *removed to* the U.S. District Court for the Western District of Texas, Austin Division, C.A. A 02 CA 070; *Ahlich, et al. v. Arthur Andersen, L.L.P., et al.*, Cause No. 02-000073-CV-272, in the 272nd Judicial District Court of Brazos County, Texas, *removed to* the U.S. District Court for the Southern District of Texas, Houston Division, C.A. H-02-0347; *Jose v. Arthur Andersen, L.L.P., et al.*, in the 57th Judicial District Court of Bexar County, Texas, *removed to* the U.S. District Court for the Western District of Texas, San Antonio Division, C.A. SA-02-CA-01870G.

Because American National Companies have failed to dispute these points in their motion to remand, they have conceded the truthfulness of each of these statements. *See Wilson v. Republic Iron & Steel Co.*, 42 S. Ct. 35, 37 (1921) ("But if the plaintiff does not take issue with what is stated in the [removal] petition, he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it."). Thus, for purposes of the Court's consideration of the remand motion, these statements must be taken as true.

23. Instead of challenging these facts, the American National Companies' response to Andersen's consolidated basis for determining "covered class action" has been to claim that "[s]uch 'alignment' and 'counting' for the purposes of consolidating various state actions by a federal court, however, is expressly prohibited by SLUSA." Remand Motion at 8-9. American National then recites 15 U.S.C. § 78bb(f)(5)(F) as its sole support for the alleged prohibition on consolidation. Section 78bb(f)(5)(F) called "Rule of construction," states, "Nothing in this paragraph shall be construed to affect the <u>discretion</u> of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action." (Emphasis added).

24. The American National Companies' argument fails to recognize, however, that section 78bb(f)(5)(F) is not triggered because Texas state court judges have no discretion under these facts, especially the facts as the American National Companies have admitted them. The use of the term "must" in Tex. R. Jud. Admin. 11.4(h), accompanied by the express availability of mandamus, makes it clear that a determination under this Rule is not discretionary. Moreover, American National Companies, by their silence, have admitted the factual triggers that remove any discretion in this instance. Therefore, 15 U.S.C. § 78bb(f)(5)(B) is not implicated here.

25. Because the American National Companies find no solace in the only response they raised to Andersen's SLUSA basis for removal, the Court should sustain removal on this basis also.

D. The Consents to Removal Were Proper

26. The American National Companies incorrectly assert that Andersen's removal was procedurally defective. *See* Remand Motion at 9. The American National Companies begin their argument by misstating Andersen's representations concerning consent to the Court. The American National Companies state, "Andersen states that its counsel spoke with and obtained the consent of 'all defendants who have been served in this action.'" *Id.* This quote omits a critical portions of Andersen's counsel's statement, which was: "The undersigned counsel has personally spoken with counsel for all defendants who have been served in this action. Counsel for all defendants who have been served in this action have authorized the undersigned to declare their consent to this removal. By his signature, the undersigned hereby consents to removal on behalf of all served defendants." Andersen's counsel's statement goes much farther than merely "obtaining consent"; it affirmatively demonstrates that Andersen's counsel was authorized to provide consent on behalf of all served defendants and did so consent on their behalf.

27. Andersen's counsel's unchallenged factual statements completely satisfy the Fifth Circuit standard for consents to removal, which the American National Companies never mention. "[T]here must be some timely filed written indication from each served defendant, or for some person or entity purporting to formally act on its behalf in this respect and having authority to do so, that it has actually consented to such action." *Getty Oil Corp. v. Ins. Co. of North America*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988). Moreover, American National

Companies have failed to dispute Andersen's counsel's factual allegations concerning consent set forth above. Thus, American National Companies have conceded the truthfulness of each of these statements. *See Wilson v. Republic Iron & Steel Co.*, 42 S. Ct. 35, 37 (1921) ("But if the plaintiff does not take issue with what is stated in the [removal] petition, he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it."). For purposes of the Court's consideration of the remand motion, Andersen's counsel's statements concerning Andersen's co-defendants' consent must be taken as true.

28. The remainder of the American National Companies' argument raises a red herring that Andersen "implicitly concedes that some defendants (the "non-served" ones) did not consent to removal." See Remand Motion at 10. American National Companies go on to cite non-Fifth Circuit decisions for a proposition that simply is not the law in the Fifth Circuit (if it is really the law of these other jurisdictions). In the Fifth Circuit, consent is only necessary from those defendants who have been properly served. *See Getty Oil Corp.*, 841 F.2d at 1262 n.11 ("there must be some timely filed written indication from each <u>served</u> defendant") (emphasis added); McCrary v. Kansas City Southern R.R. , 121 F. Supp. 2d 566, 570 (E.D. Tex. 2000) ("*Simply put, a defendant who has not been properly served need not consent to the notice of removal.*") (italics in original). The American National Companies' argument concerning "non-served" defendants is simply irrelevant in Fifth Circuit courts.

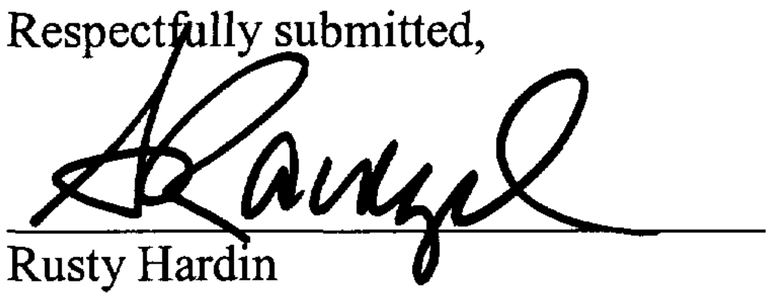
29. Because there is no factual dispute, because the facts demonstrate that Andersen's counsel's statements comply completely with the requirements of *Getty Oil Corp.*, and because the American National Companies' other arguments are irrelevant, remand on this basis is improper. *See Getty Oil Corp.*, 841 F.2d at 1262 n.11.

E. Prayer

For the foregoing reasons, Defendant Arthur Andersen LLP respectfully requests that the American National Companies' motion to remand this action to Texas state court be denied, and such other relief as this Court may deem just and proper.

Dated: Houston, Texas
February 28, 2002

Respectfully submitted,



Rusty Hardin
State Bar No. 08972800
RUSTY HARDIN & ASSOCIATES, P.C.
1201 Louisiana, Suite 3300
Houston, Texas 77002
(713) 652-9000
(713) 652-9800 (fax)

Attorney-in-Charge for
Defendant Arthur Andersen, L.L.P.

OF COUNSEL
Andrew Ramzel
State Bar No. 00784814
RUSTY HARDIN & ASSOCIATES, P.C.
1201 Louisiana, Suite 3300
Houston, Texas 77002
(713) 652-9000
(713) 652-9800 (fax)

Michael Carroll
Daniel Kolb
Sharon Katz
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
(212) 450-3633 facsimile

CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of February, 2002, the foregoing pleading was served on the following counsel of record by certified mail, return receipt requested:

Mr. Andrew J. Mytelka
Greer, Herz &Adams, L.L.P.
One Moody Plaza, 18th Floor
Galveston, Texas 77550

Mr. William Lerach
Milberg Weiss Bershad Hynes & Lerach, L.L.P.
401 B Street, Suite 1700
San Diego, CA 921010-4297

and was served on defense counsel by first class mail.

Andrew Ramzel