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

United States Courts
Southern District of Texas
FILED
MAR 1 2 2002
Michael N. Milby, Clerk

RUBEN and IRENE DELGADO, and PRESTON CLAYTON,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-02-0673
	§	CONSOLIDATED LEAD H-01-3624
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 MENDELSOHN, JEROME J. MEYER, PAUL V. FERRAZ PEREIRA, FRANK SAVAGE, JOHN A. URQUHART, JOHN WAKEHAM, CHARLES E. WALKER, BRUCE WILLISON, HERBERT S. WINOKUR, JR., BEN GLISAN, KRISTINA MORDAUNT, D. STEPHEN GODDARD, JR., DAVID DUNCAN, and ARTHUR ANDERSEN, L.L.P.	§	
Defendants.	§	

MOTION TO REMAND

TO THE HONORABLE COURT:

COME NOW Plaintiffs Ruben and Irene Delgado and Preston Clayton and file their Motion to Remand the present action to the 55th Judicial District Court of Harris County, Texas. In support of remand, Plaintiffs show the Court the following:

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1. Plaintiffs filed their original petition on or about January 4, 2002 in the 55th Judicial District Court of Harris County, Texas, Cause No. 2002-00569. Suit was brought against Andrew S. Fastow and a number of other Defendants, including Arthur Andersen, L.L.P. (Andersen).

2. Andersen the action on February 25, 2002. The case is now consolidated with other Enron-related cases either originally filed in the Southern District of Texas, or removed to the District, under the order of consolidation issued December 12, 2001. *See Newby, et al. v. Enron Corp., et al.*, No. H-01-3624.

3. Andersen based removal on its assertion that jurisdiction is proper under the Securities Litigation Uniform Standards Act of 1998 (SLUSA).

4. Under SLUSA, certain securities class action are to be removed if all statutory requirements are met. The first is SLUSA's threshold requirement that any removed action must be a "covered class action," which requires more than fifty plaintiffs.

5. Andersen has removed five other cases, both to this Court and to the Western District of Texas. Those removals were also founded on SLUSA.

6. One of the removed cases has already been remanded. Plaintiffs wish to apprise the Court that Hon. Harry Lee Hudspeth has very recently signed an order in *Bullock, et al. v. Arthur Andersen, L.L.P., et al.*, No. A-02-CA-070-H; in the United States District Court for the Western District of Texas, Austin Division. The order, signed March 5, 2002, directed that the action be remanded to the 21st Judicial District Court of Washington County, Texas, No. 32,716, where it was filed originally. A copy of the order of remand is appended at Tab 1.

7. To reach SLUSA's jurisdictional minimum in this case, which was filed on behalf of three Plaintiffs, Andersen aggregates them with plaintiffs in other cases filed in other Texas

state district courts, claiming they should be "properly aligned and counted" with the other plaintiffs. It also appears to count other clients represented by Plaintiffs' counsel, who are not plaintiffs in any case. Removal is proper, Andersen asserts, because those clients may become plaintiffs in cases that may possibly be filed at some unknown future date.

7. The plain and unambiguous language of SLUSA requires remand of this action. The statute does not reach a securities-related case brought by two individuals.

8. Further, no law dealing with removal under SLUSA allows for aggregation of cases that are neither consolidated nor joined in one court. And no law allows for speculation on unknown future filings to satisfy a jurisdictional minimum.

9. Finally, each consolidated case must rest on its own separate jurisdictional basis. Therefore, the consolidation of the present action with *Newby* in the Southern District presents no impediment to remand.

10. Since this case does not fall within SLUSA's requirements it must be remanded for lack of subject matter jurisdiction to the 55th Judicial District Court of Harris County, Texas, where it was filed originally.

12. A supporting memorandum, setting forth argument and authorities upon which Plaintiffs rely, is filed concurrently with this motion to remand.

WHEREFORE, Plaintiffs Ruben and Irene Delgado and Preston Clayton respectfully request that this action be ordered remanded to the 55th Judicial District Court of Harris County, Texas.

Respectfully submitted,

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By_____
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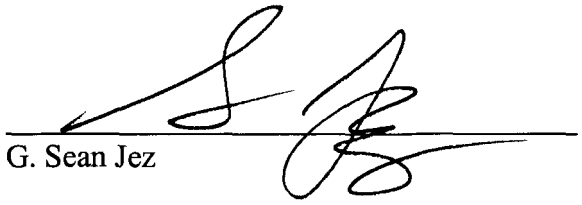
CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing Motion to Remand has been provided to all parties as indicated on the attached Service List on this the 12th day of March, 2002 by First Class United States Mail, postage prepaid.



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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

JANE BULLOCK, JOHN BARNHILL, DON REILAND, SCOTT BORCHART, MICHAEL MIES, VIRGINIA ACOSTA, JIM HEVELY, MIKE BAUBY, ROBERT MORAN, JACK & MARILYN TURNER, and HAL MOORMAN & MILTON TATE, CO-TRUSTEES FOR MOORMAN, TATE, MOORMAN & URQUHART MONEY PURCHASE PLAN AND TRUST,	§	
Plaintiffs,	§	
v.	§	NO. A-02-CA-070-H
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, AND JEFFREY J. SKILLING,	§	Reference Washington Co: 32,716
Defendants.	§	

ORDER OF REMAND

Factual and Procedural History

On this day came on to be considered the above-styled and numbered cause which derives from the recent collapse of the Houston-based Enron Corporation. The Plaintiffs are citizens of the state of Texas and owners of Enron stock. They bring claims for fraud, negligence, and civil conspiracy against three of Enron's directors and/or officers, Enron's independent auditor, Arthur Andersen, L.L.P. ("Andersen"), and several partners at Andersen's Houston office.

This case was originally filed in the 21st Judicial District Court of Washington County, Texas, on January 24, 2002. Six days later, Defendant Andersen filed a notice of removal explaining that jurisdiction lies with this Court based on (1) the

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Securities Litigation Uniform Standards Act ("SLUSA") of 1998, and (2) allegations of federal securities law violations within the complaint. In their motion to remand, the Plaintiffs counter that SLUSA does not apply because they do not fit its definition of a "covered class" and that mere allegations will not give rise to federal question jurisdiction. After carefully considering Defendant Andersen's notice of removal, the Plaintiffs' motion to remand and Defendant Andersen's response thereto, the Court is of the opinion that this case should be remanded to state court for lack of subject matter jurisdiction.

Discussion

In its first argument, Defendant Andersen argues that Congress has expressly preempted state law class actions alleging fraud in connection with the purchase or sale of covered securities. SLUSA, it says, requires that this case be removed from state court. As such, the Court will begin its analysis with a brief examination of the influences and motivations behind SLUSA and its statutory precursors.

Responding to the reluctance of investors to reenter the securities markets following the 1929 crash of the stock market, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934. **See** 15 U.S.C. § 77a et seq. (1933 Act); 15 U.S.C. § 78a et seq. (1934 Act); **see also Ernst & Ernst v. Hochfelder**, 425 U.S. 185, 194-95 (1976) (detailing the purposes and influences of the Acts). The aim of the 1933 Act, as the Supreme Court has explained, was "to provide investors with full

disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing." **Id.** at 195; **see** 15 U.S.C. § 78b (Necessity for regulation); H.R. Rep. No. 73-85 (1st Sess. 1933). The 1934 Act, on the other hand, imposed reporting requirements on companies whose stock was listed on national securities exchanges and was further designed to ward against manipulation of stock prices through regulation of the securities exchanges and over-the-counter markets. **See** 15 U.S.C. § 78b; **Ernst & Ernst**, 425 U.S. at 195. In the wake of the 1933 and 1934 Acts, various states also enacted laws which similarly aimed to protect investors from fraud in connection with the sale of securities. **See Gutierrez v. Deloitte & Touche, L.L.P.**, 147 F.Supp.2d 584, 588 (W.D. Tex. 2001).

Although the 1933 and 1934 Acts were intended to protect investors from corporate insiders, Congress has more recently become concerned with protecting corporations from the claims and causes of overly litigious investors. **Id.** at 588-89. The Private Securities Litigation Reform Act ("PSLRA") of 1995 was enacted as a result. **Id.** at 589. At the time, it was thought that PSLRA's heightened pleading requirements would make it more difficult for investors to bring securities fraud class actions against corporate issuers. Yet the subsequent decline in filings of securities fraud class actions in federal courts was roughly equivalent to the increased number of filings in state courts.

See H.R. Conf. Rep. No. 105-803 (1998); **see also Lander v. Hartford Life & Annuity Ins. Co.**, 251 F.3d 1 ., 108 (2d Cir. 2001). Accordingly, SLUSA was signed into law in 1998. Congress hoped that SLUSA would finally set uniform standards for the filing of class actions based on fraud against companies issuing certain covered securities by dictating that such actions be governed exclusively by federal law. **See Lander**, 251 F.3d at 108; **see also** 15 U.S.C. §§ 77p(b)-(c) and 78bb(f)(1)-(2). SLUSA does not preempt all state actions against the issuers of securities, however. **See Gutierres**, 147 F.Supp.2d at 590; 2 Thomas Lee Hazen, Securities Regulation § 12.15 (4th ed. 2002) ("[T]he Uniform Standards Act applies only to class actions and thus not to individual or derivative suits."). It provides unique definitions of "covered class" and "covered securities," for example, and will not apply to actions whose terms land them outside those definitions. **See** 15 U.S.C. §§ 77p(f) and 78bb(f); **see also** Pub. L. No. 105-353, § 2, 112 Stat. 3227 ("[I]t is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.")

In order to establish the claim in this case as falling within SLUSA's preemptive scope, the Defendants must demonstrate that (1) the action is a "covered class action," (2) the action is based on state law, (3) they are alleged to have

misrepresented or omitted a material fact (or to have used or employ a any manipulative or deceptive device or contrivance), and (4) their misrepresentation or omission of that material fact (or their use or employment of a manipulative or deceptive device or contrivance) came "in connection with" the purchase or sale of a "covered security." **See** 15 U.S.C. §§ 77p(b)-(c) and 78bb(f)(1)-(2); **see also Green v. Ameritrade, Inc.**, 2002 WL 126170, at *4 (8th Cir. Feb. 1, 2002). The Plaintiffs have based the present case on state law, and they contend that the Defendants made "untrue and deceptive statements of material fact" and "omitted to state material facts" which induced them "to purchase and/or retain Enron common stock at artificially inflated prices." The only question to be resolved then is whether the case is a class action by SLUSA's definition. The Court finds that it is not.

SLUSA 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 or members of the prospective class, 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) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class 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) and 78bb(f)(5)(B). The Plaintiffs do not seek damages on a representative basis or on behalf of fifty or more persons. And while a number of lawsuits involving common questions of law or fact have been filed, these suits have not been joined or consolidated, and they do not proceed as a single action. The Court disagrees with Defendant Andersen's assertion that the act of consolidating similar cases would be an "empty formality" and that because various cases could be consolidated, they should be viewed as having been consolidated. The issue before the Court is whether this case is removable, not whether it might be consolidated with other cases.

Nor is the Court persuaded by Defendant Andersen's objection that plaintiffs' counsel "[ha]s s[ought] to avoid the creation of a 'covered class action'" by bringing a number of separate lawsuits arising from identical alleged facts and making identical claims. The Court reminds the Defendants that the Plaintiffs are the masters of their complaint. **See Louisville & Nashville R.R., v. Mottley**, 211 U.S. 149, 153 (1908). It notes too that the courts must "presume that a legislature says in a statute what it means and means in a statute what it says[.]" **Connecticut Nat'l Bank v. Germain**, 503 U.S. 249, 253-54 (1992). Where a "statute's language is plain, the sole function of the courts is to enforce it according to its terms." **United States v. Ron Pair Enters., Inc.**, 489 U.S. 235, 241 (1989) (quoting **Caminetti v. United States**, 242 U.S. 470, 485 (1917)). Moreover,

"removal statutes are to be strictly construed against removal." **Getty Oil Corp. v. Ins. Co. of N. Am.**, 841 F.2d 1254, 1263 n.13 (5th Cir. 1988). Thus, the Court will decline the Defendants' invitation to count persons in separate lawsuits in different courts as members of a "covered class" in order that SLUSA's 50-person requirement be satisfied.

The Defendants request alternatively that the case be removed because the Plaintiffs allege in the complaint that several of the Defendants engaged in insider trading. In other words, they suggest that the case is removable because the Plaintiffs refer to federal crimes in their factual allegations. This claim fails as well, however, because plaintiffs alleging facts sufficient to invoke either federal or state jurisdiction may limit their claim so that it is based solely on state law. **See Oklahoma Tax Comm'n v. Graham**, 489 U.S. 838, 839-41 (1989). As the Fifth Circuit Court of Appeals recognized long ago, "[a] question of federal law is often lurking in the background of every case. In order to invoke the jurisdiction of a federal court there must be a substantial claim founded directly upon federal law." **Johnston v. Byrd**, 354 F.2d 982, 984 (5th Cir. 1965) (internal quotation marks omitted).

Finally, even if the case were to meet SLUSA's requirements or were to appear to be otherwise removable, the Court would still be obliged to remand it to state court. All defendants who are properly joined and served must join in the notice of removal within thirty days of the date on which they receive notice that

the case is removable. **See** 28 U.S.C. 1446(b); **Jernigan v. Ashland Oil Inc.**, 989 F.2d 812, 815 (5th Cir. 1993). None of Defendant Andersen's Co-Defendants have filed written consent that the case be removed. As the case was originally filed in state court on January 24, 2002 and as Defendant Andersen's Co-Defendants received notice of the fact on January 30 at the very latest, the time period to join in the removal has now expired.

It is therefore ORDERED that the above cause be, and it is hereby, REMANDED to the 21st District Court of Washington County, Texas. The District Clerk is directed to transmit the file to the District Clerk of Washington County, Texas.

SIGNED AND ENTERED this 5th day of March, 2002.

HARRY LEE HUDSPETH
SENIOR UNITED STATES DISTRICT JUDGE

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

RUBEN and IRENE DELGADO, and PRESTON CLAYTON,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-02-0673
	§	CONSOLIDATED LEAD H-01-3624
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 MENDELSOHN, JEROME J. MEYER, PAUL V. FERRAZ PEREIRA, FRANK SAVAGE, JOHN A. URQUHART, JOHN WAKEHAM, CHARLES E. WALKER, BRUCE WILLISON, HERBERT S. WINOKUR, JR., BEN GLISAN, KRISTINA MORDAUNT, D. STEPHEN GODDARD, JR., DAVID DUNCAN, and ARTHUR ANDERSEN, L.L.P.	§	
Defendants.	§	

ORDER OF REMAND

Before the Court is Plaintiffs' motion to remand the present action to the 55th Judicial District Court of Harris County, Texas, filed by Plaintiffs Ruben and Irene Delgado and Preston Clayton. Having considered the motion to remand and the opposition filed by Defendant Arthur Andersen, L.L.P., the Court is of the opinion that the action was improperly removed and must be remanded.

IT IS THEREFORE ORDERED that Plaintiffs' motion to remand is GRANTED.

IT IS FURTHER ORDERED that the present action shall be remanded to the 55th Judicial District Court of Harris County, Texas, where it was filed originally.

SIGNED this _____ day of _____, 2002.

_____
HON. MELINDA HARMON
UNITED STATES DISTRICT JUDGE