

United States Courts
Southern District of Texas
FILED
MAR 13 2002
Michael N. Milby, Clerk

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 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, §

Plaintiffs, §

v. §

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

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; §

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

**PLAINTIFFS' REPLY TO KOPPER'S RESPONSE TO
MOTION TO REMAND**

TO THE HONORABLE COURT:

COME NOW 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; Gregg 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, and reply to the response to their motion to remand filed by Defendant Michael J. Kopper (Kopper).

This reply incorporates Plaintiffs' motion and supplemental motion to remand and supporting memorandum. In addition to their earlier submissions, Plaintiffs now show the Court the following:

1. SLUSA Allows for Individual Actions to be Maintained in State Court

Defendant Arthur Andersen, L.L.P. (Andersen) removed this case, as well as others, under the Securities Litigation Uniform Standards Act of 1998 (SLUSA). An analysis of SLUSA under statutory construction principles establishes that removal is improper.

One district court (Hon. Harry Lee Hudspeth), when faced with an identical removal by Andersen, has already remanded another action under SLUSA. *See 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; remanded to the 21st Judicial District Court of Washington County, Texas; No. 32,716. A copy of the order of remand, signed March 5, 2002, has been submitted to the Court.

Kopper opposes remand of the present case, claiming SLUSA demands that it remain in federal court. But to support the propriety of removal, Kopper must ignore even the most fundamental principles of statutory construction. Although he takes issue with the filing of individual securities-related actions in state court, the language of SLUSA unambiguously permits those filings.

Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *see also United States v. Hernandez-Avalos*, 251 F.3d 505, 510 (5th Cir. 2001) (“more important to our decision [to affirm] is that the statutory language is clear”). Therefore, if a statute’s language is plain, a court must “presume that Congress said what it meant and meant what it said.” *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (citation omitted). In such cases, the sole function of the court is to enforce the statute according to its terms. *See Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (if statute is unambiguous, judicial inquiry is complete). The fact that SLUSA specifies that a “covered class action” must have fifty or more persons is more than sufficient for the terms of the statute to be enforced. SLUSA need not go on to state the obvious—that more than fifty does **not** mean less than fifty. *Cf. Burns v. United States*,

501 U.S. 129, 136 (1991) (“Congress’ silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective.”).

SLUSA is unambiguous; its meaning is plain and clear on its face. The only reasonable interpretation of the statute is that certain class actions related to the sale of securities are “covered class actions” subject to SLUSA. Individual actions, filed in state court and brought on behalf of fewer than fifty plaintiffs, are not.

Nowhere in SLUSA is any provision made for the aggregation of discrete individuals in separate cases (or in unfiled, hypothetical cases, as Kopper argues) to form one class, nor does Kopper even attempt to provide support for his position. Kopper cites no law—SLUSA or otherwise—permitting the transformation of individual actions to class actions. Further, because SLUSA speaks for itself, not one opinion Kopper does cite stands for the proposition that the statute reaches or is meant to reach individual securities-related actions.

Plaintiffs are aware of case law holding the exact opposite, however. *See In re Transcrypt Int’l Secs. Litig.*, 57 F. Supp. 2d 836, 842 (D. Neb. 1999) (“the scope of the statute does not purport to reach private, individual actions in state court”; relying on “Findings” section of SLUSA). Another district court reached the same conclusion: SLUSA does not encompass individual actions. Relying on a House Report concerning the congressional intent behind SLUSA, the court quoted the following language from the report:

[I]n order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it 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.**

See Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 168 F. Supp. 2d 1352, 1355 (M.D. Fla. 2001) (citation omitted) (emphasis supplied). The court continued by stressing the obvious:

As is clear by the language of the House Report, SLUSA does not attempt to preempt all state law in the field of securities Rather, SLUSA bars a specific form of action based on a specific set of facts, namely a class action arising under the enumerated circumstances described in SLUSA. . . . The operative language in SLUSA poses no bar to pursuit of individual actions regarding securities in state courts, or to class actions which fall outside of the limitations of 15 U.S.C.A. § 78bb(f).

Id. (citations omitted) (emphasis supplied).

In short, SLUSA can have only one interpretation: it entitles this lawsuit to be maintained in state court. And nothing Kopper presents in opposition allows the Court to deviate from that interpretation. The action should be remanded.

2. Kopper's Authority Does Not Support Removal

Kopper cites a few cases that he contends support the removal of this case. Not one does. First, relying on *Gibson v. PS Group Holdings, Inc.*, 2000 WL 777818 (S.D. Cal. June 4, 2000), Kopper asserts that another court “faced a similar attempt by a plaintiff to undermine the effectiveness of the securities law through procedural manipulation of pleadings.” *See* response at 5. *Gibson* is clearly distinguishable from the present action.

At the outset — and dispositive — *Gibson* was brought as a class action on behalf of shareholders and investors. Plaintiffs did not bring a class action here. Second, the “procedural manipulation” faulted in *Gibson* does not apply here. The plaintiff in *Gibson* omitted a claim for damages in an amended complaint, in an attempt to keep a class action outside SLUSA’s parameters.¹ Moreover, the plaintiff offered no explanation for the omission of damages, which had been included in the original pleading. Third, the *Gibson* court stated that under SLUSA a court should “look beyond the face of the Plaintiff’s pleadings to discern whether [an] action is a

¹ SLUSA’s threshold requirement is that a case be a “covered class action,” which has more than 50 persons and seeks “to recover damages on a representative basis.” *See* 15 U.S.C. §§ 77p(f)(2)(A) & 77bb(f)(5)(b)(I)(II).

‘covered class action.’” But the court only addressed the particular lawsuit before it. *Id.* at *4. It did not, as Kopper urges, look at **other** lawsuits filed in **other** courts, much less at lawsuits that may or may not be filed in the future by other potential plaintiffs. Finally, the court’s discussion of the absence of a prayer for damages was dicta. The case was, in fact, remanded on other grounds.

In short, *Gibson* does not change the fact that individual securities cases may be brought in state court under SLUSA. If Congress had intended to preempt all state court securities-related litigation, it could have done so.

In addition, Kopper cites a few other opinions, none of which provides support for removal either. For example, he relies on *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), for the proposition that a court may consider a plaintiff’s “manipulative tactics” in deciding whether to remand. *Carnegie-Mellon* does not apply to the situation in this case. Rather, it addressed the issue of whether a court may remand a case in which only pendent state claims remain. In holding that it could, the Supreme Court noted the petitioners’ concern that removed cases would be remanded by the deletion of federal claims. In such cases, the Court stated, a district court could consider the “manipulative tactics” as one factor in determining remand. *Id.* at 357. In no way can *Carnegie-Mellon* be said to be authority in the present case.

Finally, Kopper cites *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 105 F.Supp. 2d 1037 (D. Minn. 2000). Not only does *In re Lutheran Bhd.* not support removal, it reinforces Plaintiffs’ position. The opinion, dealing with several consolidated class actions,² focused on the issue of whether certain types of life insurance policies were “covered securities” under SLUSA. In concluding that they were, the court rejected the plaintiffs’ contention that it

² See *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 201 F.R.D. 456 (D. Minn. 2001).

should “dig through . . . intricate legislative history . . .” It continued by stressing that “the [Supreme] Court has been . . . resolute that when a statute’s language is clear, the language should be taken literally without probing legislative intent.” *Id.* at 1040 (citation omitted). That is the precise situation in this case.

In summary, not one case upon which Kopper relies deals with the precise issue at hand: whether individual securities-related actions may be filed in state court. Further, none even implies that they may not. By contrast, Plaintiffs have already cited the only opinions on point, with each one supporting their position. *See Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 168 F. Supp. 2d 1352, 1355 (M.D. Fla. 2001); *In re Transcript Int’l Secs. Litig.*, 57 F. Supp. 2d 836, 842 (D. Neb. 1999); and *Bullock v. Arthur Andersen, L.L.P.*

CONCLUSION

For the reasons stated above and in Plaintiffs’ motion to remand and supplemental motion, this Court lacks subject matter jurisdiction under the Securities Litigation Uniform Standards Act. Therefore, it should order the action remanded to the 272nd Judicial District Court of Brazos County, Texas, where it was originally filed.

Respectfully submitted,

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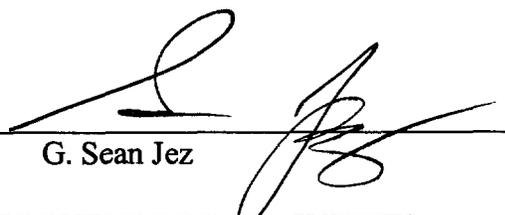
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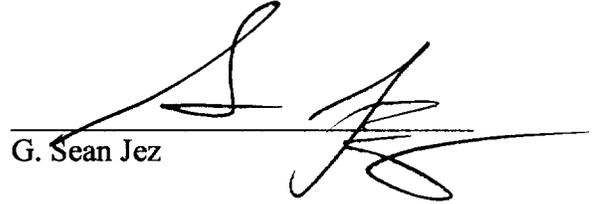
By: 
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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing Plaintiffs' Reply to Kopper's Response to Motion to Remand has been provided to all parties as indicated on attached list on this the 13th day of March, 2002 by First Class United States Mail, postage prepaid.

G. Sean Jez

A handwritten signature in black ink, appearing to read 'G. Sean Jez', is written over a horizontal line. The signature is stylized and cursive.

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