

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

APR 25 2002

BC

Michael H. Milby, Clerk

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON, TEXAS
APR 25 PM 1:39

01-3624

JACOB BLAZ, On Behalf of
Himself and All Others Similarly
Situating,

Plaintiff,

v.

ROBERT A. BELFER, NORMAN P.
BLAKE, JR., RICHARD B. BUY,
RICHARD A. CAUSEY, RONNIE C.
CHAN, JOHN H. DUNCAN, ANDREW
S. FASTOW, JOE H. FOY, WENDY L.
GRAMM, KEN L. HARRISON, ROBERT
K. JAEDICKE, KENNETH L. LAY,
CHARLES A. LEMAISTRE, JEROME
J. MEYER, JEFFREY S. SKILLING,
JOHN A. URQUHART, JOHN
WAKEHAM, CHARLES E. WALKER,
BRUCE G. WILLISON, HERBERT S.
WINOKUR, JR., and ARTHUR
ANDERSEN, LLP,

Defendants.

CIVIL ACTION NO. H-02-1150
(Removed from District Court of Harris
County, Texas)

JURY TRIAL DEMANDED

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR REMAND**

I. INTRODUCTION

Plaintiff and the members of the Class identified herein are among the millions of victims of the now infamous fraud perpetrated by Enron Corporation, its most senior officers and directors, and its outside auditor Arthur Andersen, LLP. Like the other victims, Plaintiff commenced an action seeking to redress the fraud that caused him and the other members of the

Class to suffer billions of dollars in damages. Unlike all the other victims, however, a statutory anomaly threatens to deprive Plaintiff and the members of the Class of their day in court and leave them with no opportunity to seek recompense for Defendants' massive fraud.

As discussed herein, Defendants successfully concealed their fraud for more than three years, leaving Plaintiff unable to commence a federal securities fraud action within the applicable three-year statute of repose. Accordingly, Plaintiff commenced this action in state court and asserted causes of action under state law because that was the only avenue of relief open to the Class. Defendants removed the case to this Court based on the purported operation of the Securities Litigation Uniform Standards Act ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227 (1998). As discussed herein, SLUSA does not, and cannot, apply retroactively to this action.

All of the conduct on which this action is based occurred prior to November 3, 1998, the date Congress enacted SLUSA. Pursuant to almost 200 years of unbroken United States Supreme Court case law, SLUSA cannot be applied retroactively to the conduct on which this action is based because: (i) Congress did not expressly provide for retroactive application; and (ii) SLUSA would impermissibly impair the rights of Plaintiff and the members of the Class. Indeed, under circumstances virtually identical to those present here, Judge Acker of the Northern District of Alabama held in W.R. Huff Asset Management Co., LLC v. BT Securities Corp., 2001 U.S. Dist. LEXIS 22144 (N.D. Ala. May 2, 2001), that retroactive application of SLUSA would "*shock[] the conscience of [the] court.*" Huff, 2001 U.S. Dist. LEXIS 22144 at *23. In the instant case, as well, retroactive application of SLUSA would result in a grave miscarriage of justice. If it were applied retroactively, SLUSA would not only make the action removable, it would compel dismissal of the action, and thereby deny the Class any opportunity to seek redress for Defendants' massive fraud. Accordingly, this Court must remand this case to the District Court of Harris County.

II. FACTUAL AND PROCEDURAL BACKGROUND

This is a class action brought by plaintiff Jacob Blaz ("Plaintiff") on behalf of himself and all purchasers of the publicly traded securities of Enron Corporation ("Enron") during the period from April 11, 1997 to October 15, 1998, inclusive (the "Class Period") who suffered damages

(the “Class” or “Class Members”). Plaintiff’s Original Petition (“Pet.”), ¶ I. Plaintiff asserts causes of action against the Defendants named herein for: (i) fraud in stock transactions under Tex. Bus. & Com. Code §27.01; (ii) common law fraudulent misrepresentation; (iii) common law negligent misrepresentation; and (iv) civil conspiracy. Pet., ¶ 1.

Plaintiff alleges that during the Class Period, Enron and its officers and directors (the “Individual Defendants”), with the knowing assistance of Enron’s auditor Arthur Andersen, LLP (“Arthur Andersen”), perpetrated one of the largest, longest-lasting, and most damaging frauds in American corporate history. Pet., ¶ XXXVII. Beginning as early as the first quarter of 1997, the Individual Defendants, with the knowing assistance of Arthur Andersen, established a series of complex off-balance-sheet entities which were created to engage in hedging, trading, and other transactions for the benefit of Enron while keeping massive debts and liabilities off Enron’s balance sheet. Id. These off-balance-sheet entities were improperly created to defraud the investing public, including Plaintiff and the members of the Class, while enriching Enron insiders, including the Individual Defendants, many of whom had ownership and/or managerial positions in the entities. Id. Through its off-balance-sheet entities and transactions, Enron improperly concealed from the public its true debt load, which had the effect of artificially inflating its revenues, earnings, and stock price throughout the Class Period. Id.

The Individual Defendants, with the knowing assistance of Arthur Andersen, perpetrated this massive fraud and successfully concealed it from the Class and the market continuously for a period of more than four years. Pet., ¶ XXXVIII. Once the truth regarding Defendants’ fraud began to emerge on October 16, 2001, Enron was forced to admit that it had reported materially false and misleading financial results for every quarterly and yearly period since the first quarter

of 1997. Id. On November 8, 2001, Enron announced that it would restate its financial results for all of 1997, 1998, 1999, 2000, and the first two quarters of 2001, thereby admitting that it had consistently reported materially false and misleading financial results for more than four years. Pet., ¶ V. As the resulting scandal mounted, the value of Enron common stock plummeted to pennies, and Enron ultimately filed for bankruptcy on December 2, 2002, leaving Plaintiff and the Class Members with worthless Enron securities. Id.

On January 30, 2002, Plaintiff commenced the instant action by filing his Original Petition in the District Court of Harris County. Plaintiff subsequently served Defendants with citation. Defendant Lay subsequently filed a Notice of Removal, asserting that this action was removable pursuant to SLUSA. Plaintiff now moves this Court to remand this action to state court on the grounds that SLUSA, the sole alleged basis for this Court's removal jurisdiction, does not apply retroactively to this case.

III. ARGUMENT

A. Standards Applicable To Plaintiff's Motion For Remand

In evaluating a motion to remand following removal, this Court has applied the following standards:

Removal is construed restrictively so as to limit federal subject matter jurisdiction. [Citing Willy v. Coastal Corp., 855 F.2d 1160, 1164 (5th Cir. 1988), aff'd per curiam, 503 U.S. 131 (1992)]. Removal statutes are to be strictly construed against removal. [Citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941); Lozano v. GPE Controls, 859 F. Supp. 1036, 1037 (S.D. Tex. 1994)]. The removing defendant bears the burden of demonstrating that removal was proper and that federal subject matter jurisdiction exists.

[Citing Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921); Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 365 (5th Cir. 1995)]. Any doubts concerning the propriety of removal should be resolved in favor of remand. [Citing York v. Horizon Fed. Sav. & Loan Ass'n., 712 F. Supp. 85, 87 (E.D. La. 1989)].

Walters v. Grow Group, Inc., 907 F. Supp. 1030, 1032 (S.D. Tex. 1995) (Harmon, J.). Applying these standards here, this Court must remand this action to state court. The sole basis for the removal of this action, the operation of SLUSA, is invalid because SLUSA does not apply retroactively to the conduct alleged herein. Accordingly, this Court lacks jurisdiction and therefore must remand this action to the District Court of Harris County.

B. SLUSA Is Presumed Not To Apply Retroactively

1. The Presumption Against Retroactivity

In Landgraf v. USI Film Products, 511 U.S. 244 (1994), the Supreme Court, affirming the decision of the Fifth Circuit Court of Appeals, discussed the long-standing judicial presumption against retroactive application of newly enacted statutes:

[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." [Quoting Kaiser Aluminum and Chemical Corp. v. Bonjorno, 494 U.S. 827, 955 (1990) (Scalia, J., concurring)]. . . .

The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsiveness to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. . . .

Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent. . . . The presumption

against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact. . . .

Landgraf, 511 U.S. at 265-270. See also Immigration and Naturalization Service v. St. Cyr, 533 U.S. 289, 315-16 (2001). The Landgraf Court noted that “[b]ecause it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations.” Id., at 271-72.

2. The Presumption Against Retroactivity Applies To Pre-Enactment Conduct Regardless Of When The Action Was Commenced

Landgraf and its progeny hold that the presumption against retroactivity applies “[w]hen a case implicates a federal statute enacted after the *events* in suit.” Landgraf, 511 U.S. at 280 (emphasis added). In other words, statutes are presumed not to apply retroactively to pre-enactment *conduct* regardless of whether the *action* was commenced pre- or post-enactment. For example, in Hughes Aircraft Company v. United States, 520 U.S. 939 (1997), the Supreme Court considered whether a 1986 amendment to the False Claims Act applied to an action commenced in 1989 based on conduct that took place between 1982 and 1984. Hughes, 520 U.S. at 945-46. The respondent argued that the 1986 amendment did apply because the amendment became effective before the suit was commenced. Id., at 946. A unanimous Supreme Court disagreed, holding:

We have frequently noted, and just recently reaffirmed, that there is a “presumption against retroactive legislation [that] is deeply rooted in our jurisprudence.” [Quoting Landgraf, 511 U.S. at 265]. “The ‘principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.’” [Id.] Accordingly, we apply this time-honored presumption unless Congress has clearly manifested its intent to the contrary.

Hughes, 520 U.S. at 946. Hence, notwithstanding that the action was commenced several years

after the 1986 amendment was enacted, the unanimous Supreme Court in Hughes nonetheless applied the presumption against retroactivity because all of the conduct underlying the action occurred pre-enactment.

The Supreme Court recently undertook a similar analysis and reached the same result in St. Cyr, supra, in which the Court considered the impact of the 1996 amendments to the Immigration and Nationality Act “on conduct that occurred before their enactment.” St. Cyr, 533 U.S. at 292-93. The Court summarized the pertinent facts as follows:

[O]n March 8, 1996, [St. Cyr] pled guilty in a state court to a charge of selling a controlled substance in violation of Connecticut law. That conviction made him deportable. Under pre-[amendment] law applicable at the time of his conviction, St. Cyr would have been eligible for a waiver of deportation at the discretion of the Attorney General. However, removal proceedings against him were not commenced until April 10, 1997, after [the 1996 amendments] became effective, and, as the Attorney General interprets those statutes, he no longer has discretion to grant such a waiver. In his habeas corpus petition, respondent has alleged that the restrictions on discretionary relief from deportation contained in the 1996 statutes do not apply to removal proceedings brought against an alien who pled guilty to a deportable crime before their enactment.

Id., at 293. The Court agreed with St. Cyr and applied the presumption against retroactivity regardless of the fact that St. Cyr’s deportation proceedings had commenced after the enactment of the 1996 amendments. Id., at 315-19. Thus, as in Hughes, the Supreme Court in St. Cyr reaffirmed the holding of Landgraf that the presumption against retroactivity is triggered where the events giving rise to the action occurred pre-enactment, notwithstanding that the action may have been commenced post-enactment.

3. SLUSA Is Presumed Not To Apply Retroactively To This Action

In accordance with the foregoing Supreme Court decisions, the court in Huff applied the presumption against retroactivity and held that SLUSA could not be applied retroactively to conduct predating its enactment. Huff, 2001 U.S. Dist. LEXIS 22144 at *6-*8. In Huff, the

plaintiff commenced an action in April 2000 in Alabama state court asserting claims for securities fraud under various state law theories. Id., at *2-*6. All of the conduct on which the plaintiff's complaint was based occurred prior to the enactment of SLUSA. Id. The defendants removed the case to federal court pursuant to SLUSA, and the plaintiff moved to remand on the grounds that SLUSA did not apply retroactively. Id. Although the Huff action was commenced after SLUSA was enacted, the court specifically held that the presumption against retroactivity was applicable because the action was based solely on pre-enactment conduct:

On the basis of references to "pending cases" in Landgraf and some of its progeny [citations omitted], the argument is made that the protection recognized by Landgraf against unfair retrospective application should be limited to those actions in which the complaint was filed prior to enactment of the law proscribing the conduct. However, upon reflection, the court concludes that the Landgraf limitation cannot be reconciled with Hughes Aircraft, in which the plaintiff filed suit in 1989, but premised liability on a 1986 amendment to the Fair Claims Act, saying that it should be applied to the defendant's pre-1986 conduct. [Citing Hughes, 520 U.S. at 941-45]. Even though the Landgraf complaint was pending at the time of the statutory enactment at issue there, the unanimous Hughes Aircraft Court employed the Landgraf analysis, without commenting on the obvious feature that distinguishes the two cases, and concluded that the 1986 amendment could not be applied retroactively. [Citing Hughes, 520 U.S. at 945-51]. In so doing, the Supreme Court reaffirmed the fact that Landgraf focuses on *conduct* as the central fact for determining retroactivity. [Citing Landgraf, 511 U.S. at 250]. Moreover, given the purpose for a presumption against retroactivity, as discussed in Landgraf, 511 U.S. at 265-73, there is nothing within the logic of Landgraf that can explain why a court should not apply that presumption equally to a case *pending* as to a case *not pending* on the date of a statute's enactment, as long as pre-enactment *conduct* forms the basis for liability. No matter which comes first, the enactment or the filing, the application of a statute may be precluded on the basis of impermissible retroactivity, either as a matter of statutory construction or as a matter of the constitutional guarantee of "due process." Huff's complaint raises the overarching concern over SLUSA retroactivity when it relies upon defendants' actionable *conduct* that occurred prior to SLUSA's enactment.

Id. (emphasis original).

The circumstances of the case at bar are identical to those in Huff. Like the plaintiff in Huff, Plaintiff commenced this action after the enactment of SLUSA based entirely on

Defendants' pre-enactment fraudulent conduct. Accordingly, as in Huff, the presumption against retroactivity precludes the application of SLUSA to this action unless the presumption is rebutted pursuant to the analysis set forth in Landgraf. As discussed below, in the case at bar, as in Huff, the presumption in fact cannot be rebutted. Consequently, SLUSA cannot be applied retroactively, and therefore this case must be remanded to state court.

C. The Landgraf Retroactivity Analysis

In Landgraf, the Supreme Court established a two-part analysis for determining whether the presumption against retroactivity is rebutted:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280. Applying the Landgraf analysis to the case at bar, the presumption against retroactivity is not rebutted because: (i) Congress did not expressly provide for retroactive application of SLUSA; and (ii) retroactive application of SLUSA would impermissibly impair the rights of the Class. Consequently, the presumption against retroactivity precludes SLUSA from being applied retroactively to the pre-enactment conduct at issue in this case. The sole basis for Defendants' removal of this case is therefore invalid, and therefore this case must be remanded to state court.

1. SLUSA Contains No Express Congressional Command Permitting Retroactive Application

a. What Constitutes An "Express Command" of Congressional Intent

The first step in the Landgraf analysis is to determine whether the language of SLUSA

contains an “express command” that Congress intended the statute to apply retroactively to pre-enactment conduct. Landgraf, 511 U.S. at 280. See also St. Cyr, 533 U.S. at 316. “A requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.” Landgraf, 511 U.S. at 268. See also St. Cyr, 533 U.S. at 316. “The standard for finding such unambiguous direction is a demanding one. ‘Cases where [the Supreme] Court has found truly ‘retroactive’ effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation.’” St. Cyr, 533 U.S. at 316-17 (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)). In Landgraf, for example, the Supreme Court suggested that statutory language which provided that an act “shall apply to all proceedings pending on or commenced after the date of enactment of [the act]” would constitute a sufficiently clear expression Congress’ intent for the act to apply to all actions filed post-enactment, including those based on pre-enactment conduct. Landgraf, 511 U.S. at 260.

In keeping with Landgraf’s requirement of an “express command” authorizing retroactive application, Landgraf and its progeny hold that a negative inference drawn from statutory language cannot constitute a sufficiently clear expression of Congressional intent to apply a statute retroactively. Landgraf, 511 U.S. at 259. While a negative inference may be sufficient to indicate that a statute is intended to apply *only prospectively*, such an inference cannot constitute a sufficient expression of Congressional intent to apply a statute retroactively. See Scott v. Boos, 215 F.3d 940, 947-48 (9th Cir. 2000) (holding that § 107 of the Private Securities Litigation Reform Act of 1995 (“PSLRA”), which eliminated securities fraud as a predicate for a civil RICO claim, could not be applied retroactively based solely on a negative inference drawn from the statutory

language); Mathews v. Kidder, Peabody & Co., Inc., 161 F.3d 156, 167 (3d Cir. 1998) (same).¹

Thus, the court in Huff held:

Because prospective application does not carry the long-recognized, powerful potential for unfairness that is inherent in retrospective application, [citing Landgraf, 511 U.S. at 265-73], the Supreme Court does not require that Congress be express in manifesting its intention that a statute apply prospectively only. Negative inference, therefore, can be an appropriate means for determining congressional intent for *prospective* application; however, this does not mean that negative inference provides a backdoor way around the need for an express legislative command in order to acquire *retrospective* application. [Citing Lindh, 521 U.S. at 325-29].

Huff, 2001 U.S. Dist. LEXIS 22144 at *12-*13 (emphasis original). In short, “a court must not find clear intent to apply a statute with retroactive effect by using nothing more than a negative inference.” Morton International, Inc. v. A.E. Staley Mfg. Co., 106 F. Supp.2d 737, 752 (D. N.J. 2000) (citing Mathews, 161 F.3d at 167)).

b. The Language Of SLUSA’s Applicability Provision Does Not Authorize Retroactive Application

¹ See also In re Minarik, 166 F.3d 591, 598 (3d Cir. 1999) (“[W]hile [a negative] inference is sufficient to eliminate the possibility of a retroactivity problem, it is not the kind of unambiguous statement that will justify overriding the judicial presumption against retroactivity in a case where a retroactivity problem exists.”); In re MTC Electronic Technologies Shareholder Litigation, 74 F. Supp.2d 276, 279 (E.D. N.Y. 1999) (“A negative inference . . . is an ambiguous directive, if that.”); Baker v. Pfeifer, 940 F. Supp. 1168, 1177 (S.D. Ohio 1996) (“[G]iven the default rule in favor of prospective application, it strains logic that this ‘negative inference’ creates the necessary express statement in favor of retroactivity. This Court will not presume to eviscerate the presumption against retroactive application of statutes by inferring Congress’ intentions based on such tenuous evidence.”).

§ 101(c) of SLUSA provides that “[t]he amendments made by this section [amending certain sections of the PSLRA] shall not affect or apply to any action commenced before and pending on the date of enactment of this Act.” Pursuant to Landgraf and the other cases cited *supra* and *infra*, the language of § 101(c) is not an unambiguous expression of Congress’ intent that SLUSA apply retroactively to pre-enactment conduct.

The plain language of § 101(c) is silent with regard to SLUSA’s application to a case (like the one at bar) filed post-enactment based solely on conduct that occurred pre-enactment. By its terms, § 101(c) provides only that SLUSA does not apply retrospectively to cases “commenced before and pending on” November 3, 1998, SLUSA’s date of enactment. As the Huff court held, § 101(c) “is certainly not express except as to pending cases. . . . Because it cannot be said that § 101(c) expressly prescribes the temporal reach of SLUSA, it falls short of the standard established by the Supreme Court for accomplishing retroactivity as to pre-enactment conduct by unequivocal statutory language.” Huff, 2001 U.S. Dist. LEXIS 22144 at *9. Accordingly, in light of the absence of specific language addressing SLUSA’s applicability to actions filed post-enactment based on pre-enactment conduct, there is no way to determine from the language of § 101(c) whether “Congress itself has affirmatively considered the potential unfairness of retroactive application [to pre-enactment conduct] and determined that it is an acceptable price to pay for the countervailing benefits.” Landgraf, 511 U.S. at 272-73.

In Landgraf, the Supreme Court made a point of “giving legislators a predictable background rule against which to legislate,” signaling to the legislative branch that in drafting statutes, Congress should heed the requirement of an unambiguous statement of Congressional intent regarding retroactive application. Id. Indeed, the Supreme Court went so far as to suggest

particular language that would satisfy the requirement: the act “shall apply to all proceedings pending on or commenced after the date of enactment of [the act].” *Id.*, at 260. Hence, it is notable that in enacting SLUSA more than four years after *Landgraf* was decided, Congress “[did] not come close to taking the Supreme Court’s advice on draftsmanship.” *Huff*, 2001 U.S. Dist. LEXIS 22144 at *11. As the *Huff* court held,

The Supreme Court’s discussion of what the “clear statement rule” means in practice leaves no doubt that § 101(c) fails as a purported manifestation of congressional intent for retrospective application in this case. The potential for elementary unfairness that plagues retrospective application has long justified the Supreme Court’s stance that Congress, if retroactivity is to be achieved, must show that it “has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness” by providing a loud and clear signal that a statute takes effect from a time anterior to its passage. [Citing *Landgraf*, 511 U.S. at 268; *Lindh*, 521 U.S. at 325-26]. The *Landgraf* Court cited an example of a congressional expression that would have passed retroactive muster: “The new provisions *shall* apply to all proceedings pending on *or commenced after the date of enactment of this Act.*” [Quoting *Landgraf*, 511 U.S. at 260]. The words of § 101(c), namely, “The amendments made by this section *shall not* affect or apply to any action commenced before and pending on the date of enactment of this Act”, do not come close to taking the Supreme Court’s advice on draftsmanship. Assuming that *Landgraf*’s hypothetical provision would suffice, the absence of similarly absolute language *for* retrospective application in § 101(c) distinguishes SLUSA’s applicability provision. [Citing *Lindh*, 521 U.S. at 328 n.4]. Moreover, the suppositional example provided in *Landgraf* shows that express language for a retrospective application of SLUSA to actions filed post-enactment could have effortlessly been added to § 101(c). Therefore, § 101(c) fails as an expression of legislative intent to override the presumption against retrospective application.

Id., at *10-*11 (emphasis original).²

² Notably, the pertinent language of § 108 of the PSLRA, which provides that “the amendments made by this title *shall not affect or apply to any private action* arising under title I of the Securities and Exchange Act of 1934 or title I of the Securities Act of 1933, *commenced before and pending on the date of enactment of this Act,*” is identical to the pertinent language of § 101(c) of SLUSA. Both *Mathews*, *supra*, and *Scott*, *supra*, held that this language was insufficient to constitute an “express provision for the temporal reach” of § 107 of the PSLRA because “there is no express prescription in the statute directing application of [§ 107] prospectively or retrospectively.” *Mathews*, 161 F.3d at 162; *Scott*, 215 F.3d at 944. *Accord MTC Electronic Technologies*, 74 F. Supp.2d at 279 (“the PSLRA provides no explicit or (sufficiently clear) implicit indication of Congressional intent to apply [§ 107] to actions involving pre-enactment events.”); *In re Prudential Securities Incorporated Limited Partnerships Litigation*, 930 F. Supp.

Because SLUSA does not contain an express command that Congress intended the statute to apply retroactively to pre-enactment conduct, the Court must proceed to the second step of the Landgraf analysis - whether the application SLUSA to pre-enactment conduct would have an impermissible retroactive effect. Landgraf, 511 U.S. at 280.

2. SLUSA Would Have An Impermissible Retroactive Effect On The Class

a. What Constitutes Impermissible Retroactive Effect

The second step in the Landgraf analysis is to “determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.” Landgraf, 511 U.S. at 280. According to Landgraf,

A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instinct[s]," and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Id., at 269-70 (citations omitted).

By way of example, the Landgraf Court cited Justice Story's holding in Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (Cir. Ct. N.H. 1814), that “every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation,

68, 81 (S.D. N.Y. 1996) (“Whatever the reason, the statute does not include the type of clear expression that [§ 107] is to apply retroactively required under the Landgraf decision.”).

imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective” Landgraf, 511 U.S. at 269. In Hughes, the Supreme Court cautioned that Justice Story’s description was by no means “the exclusive definition of presumptively impermissible retroactive legislation.” Hughes, 520 U.S. at 947. “Rather, [the Court’s] opinion in Landgraf, like that of Justice Story, merely described that any such effect constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity. Indeed, [Landgraf] recognized that the Court has used various formulations to describe the ‘functional conception of legislative ‘retroactivity. . . .’” Id. Thus, in Landgraf the Court commented, “[t]hrough the formulas have varied, similar functional conceptions of legislative ‘retroactivity’ have found voice in this Court’s decisions and elsewhere.” Landgraf, 511 U.S. at 269 (citing Miller v. Florida, 482 U.S. 423, 430 (1987) (“A law is retrospective if it ‘changes the legal consequences of acts completed before its effective date.’”) (quoting Weaver v. Graham, 450 U.S. 24, 31 (1981)); Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) (retroactive statute gives “a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed”)). In short,

The inquiry into whether a statute operates retroactively demands a common sense, functional judgment about “whether the new provision attaches new legal consequences to events completed before its enactment.” This judgment should be informed and guided by “familiar considerations of fair notice, reasonable reliance, and settled expectations.”

Martin v. Hadix, 527 U.S. 343, 357-58 (1999) (quoting Landgraf, 511 U.S. at 270). See also Huff, 2001 U.S. Dist. LEXIS 22144 at *14.

b. The Class’ Right To Relief Prior To SLUSA

Prior to Congress’ enactment of SLUSA on November 3, 1998, the Class had the right to avail themselves of the entire body of Texas statutory and common law to seek redress for

Defendants' egregious fraudulent conduct. Absent SLUSA, the Class would be entitled to bring, *inter alia*, a cause of action to recover both compensatory and exemplary damages under Tex. Bus. & Com. Code § 27.01, the substance of which has been part of Texas statutory law for nearly a century. See former Article 4004, Revised Statutes 1925 (enacted 1919). The Class' common law claims for fraudulent misrepresentation, negligent misrepresentation, and civil conspiracy are even more ancient, dating back to English common law. See, e.g., Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1365 (2d Cir. 1993). Certainly, during the Class Period when Defendants were committing their fraud, no one could have anticipated that all of this well-settled Texas law would be overthrown by SLUSA. Rather, Defendants could have (and perhaps should have) anticipated that when their fraud was revealed, the legal consequences of their actions would include liability under both federal and Texas law. Likewise, prior to the enactment of SLUSA, Class Members rightly expected that Texas law would afford them an opportunity to seek redress for Defendants' fraud. As discussed *infra*, if SLUSA were applied retroactively, it would totally thwart these "settled expectations."

c. The Class' Texas Law Claims Are The Only Claims Available

Under the unique circumstances of this case, the Class' right to relief under Texas law is crucial because it constitutes the Class' only opportunity to remedy Defendants' rampant fraud. As discussed in Huff, absent Defendants' fraudulent concealment the facts alleged by Plaintiff might have supported claims under the Securities Act and/or the Exchange Act, e.g., § 10(b) of the Exchange Act and Rule 10b-5. Huff, 2001 U.S. Dist. LEXIS 22144 at *21-*23. However, as Huff recognizes, such claims are subject to a statute of limitations of one year after the fraudulent conduct was discovered and a statute of repose of three years after the fraudulent conduct occurred. Id. See also 15 U.S.C. § 78i(e) ("No action shall be maintained to enforce any liability

created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.”); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991). In the case at bar, Plaintiff alleges, and the Court must accept as true, that Defendants: (i) committed pervasive fraudulent conduct throughout the Class Period, April 11, 1997 through October 15, 1998 (Pet., ¶¶ II, XXXVII-LIV); and (ii) successfully concealed their fraud until October 16, 2001, more than three years after the end of the Class Period (Pet., ¶ LV). Unfortunately, there is no fraudulent concealment exception to the three-year statute of repose applicable to federal securities law claims. See, e.g., Caviness v. DeRand Resources Corp., 983 F.2d 1295, 1302 (4th Cir. 1993) (“fraudulent concealment based on a continuing violation of the securities laws does not apply to toll the three-year period of repose specified in § 13 of the Securities Act of 1933”). Consequently, notwithstanding Defendants’ fraudulent concealment, any claims the Class could bring under the Securities Act and/or the Exchange Act would be time-barred by the three-year statute of repose.³ See Huff, 2001 U.S. Dist. LEXIS 22144 at *22-23. Thus, the only avenue of relief open to the Class is to bring their claims under Texas law as they have done in this action.⁴

d. The Dual Effect Of SLUSA: Removal And Dismissal

On November 3, 1998, Congress enacted SLUSA, which amended the Securities Act and the Exchange Act by adding 15 U.S.C. §§ 77p and 78bb(f), respectively. SLUSA provides, *inter alia*, as follows:

(b) Class action limitations. No covered class action based upon the statutory or common

³ Neither the PSLRA nor SLUSA has any effect on the three-year statute of repose.

⁴ The Class’ Texas law claims are timely, having been commenced within the applicable statutes of limitation.

law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging— (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security. (c) Removal of covered class actions. Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

15 U.S.C. § 77p.⁵ Thus, SLUSA has two effects on “covered class actions” filed in state court: (i) it permits removal to federal court pursuant to § 77p(c) and/or § 78bb(f)(2); and (ii) it compels dismissal pursuant to § 77p(b) and/or § 78bb(f)(1). As the Huff court explained, the two effects of SLUSA are intended to (and do) operate in tandem:

[§ 77p(b)] compels a dismissal of actions based on state law if they allege fraud, deception, or misrepresentation regarding the purchase or sale of securities traded, or authorized to be traded, nationally. [Citing § 77p(b)]. If applicable, §§ 77p(c) does two things, 1) permits removal of a state action, and 2) sinks the state ship once in the federal harbor. This is the classic sequence of events in ERISA preemption removals. The first consequence, if severed from the second, usually does not raise concerns because a removal opportunity achieved retroactively is not so shocking. [Citing Hughes, 520 U.S. at 950-51]. Whether § 77p(c) does or does not raise such concerns need not be decided, because SLUSA dictates that each of the two consequences *not* be looked at in isolation from the other. The plain language of SLUSA shows that Congress contemplated that removal would be obtainable only if subsequent dismissal follows. Thus, the two steps were clearly intended to operate in tandem. SLUSA makes ERISA look like a good friend to those who want to pursue their state law remedies in state court.

Huff, 2001 U.S. Dist. LEXIS 22144 at *15-*16 (emphasis original). See also In re Waste Management, Inc. Securities Litigation, 2002 U.S. Dist. LEXIS 3461, *10 (S.D. Tex. Feb. 5, 2002) (Harmon, J.) (“SLUSA authorizes the removal of all private actions that are actually traditional securities fraud claims that fall within its ambit to be removable to federal court and makes the

⁵ Except for the numbering of the subsections, the text of 15 U.S.C. § 78bb(f) is identical to that of 15 U.S.C. § 77p.

state law claims subject to dismissal.”)⁶ There is no dispute that the case at bar is a “covered class action” as defined by SLUSA. Hence, if SLUSA were applied retroactively to the instant case, this action would be subject to removal and automatic dismissal.

e. Applying SLUSA Retroactively Would Impermissibly Rob The Class Of Any Remedy For Defendants’ Fraud

If applied retroactively, SLUSA would unquestionably effect a sea change in the rights of the Class and the legal consequences of Defendants’ conduct. Indeed, the Class’ well-established rights under Texas law to seek redress for Defendants’ fraud would not only be “impaired,” they would be extinguished altogether. If applied retroactively, SLUSA would suddenly abolish the Class’ Texas law claims – the only claims available to Class – and leave the Class with no claims at all. Because the three-year statute of repose would bar any claims brought under the Securities Act or the Exchange Act, the Class would thus be precluded from seeking any relief in any forum. Consequently, instead of being subject to billions of dollars in liability for their colossal fraud, Defendants would walk away scot-free. In effect, retroactive application of SLUSA would have the perverse result of rewarding Defendants for successfully concealing their fraud for more than three

⁶ Accord Korsinsky v. Salomon Smith Barney, Inc., 2002 U.S. Dist. LEXIS 259, *8 (S.D. N.Y. Jan. 10, 2002) (“SLUSA provides that all cases falling within its purview are both removable to federal court and subject to automatic dismissal.”); Prager v. Knight/Trimark Group, Inc., 124 F. Supp.2d 229, 231 (D. N.J. 2000) (“if a case is properly removed to federal court under SLUSA, it naturally follows that the case must also be dismissed”).

years.

There can be no doubt that such unjust consequences are precisely the kind of impermissible retroactive effects contemplated by Landgraf. By absolving Defendants of any and all liability for their fraudulent conduct, retroactive application of SLUSA would indisputably “attach new legal consequences” to such conduct and would totally overthrow the “familiar considerations of fair notice, reasonable reliance, and settled expectations” that are at the heart of the Class’ right to due process. Landgraf, 511 U.S. at 269-70.⁷ Clearly, if the concept of impermissible retroactive effect has any meaning at all, SLUSA’s absolute eradication of the Class’ right to relief must constitute such an effect.⁸ Indeed, addressing circumstances identical to those in the case at bar, the Huff court held in no uncertain terms that applying SLUSA retroactively would be impermissible:

[Due to the operation of the limitations periods applicable to claims under the Securities Act and the Exchange Act,] the practical effect of a retrospective application of SLUSA would be to trim down Huff’s case to a virtual nothing. Not taking this eventuality into account when measuring the impact of retrospective application in this case would be holding Huff accountable for its “failure” to bring its state law claims within the periods of

⁷ Although SLUSA would not bar Class Members from bringing individual actions in state court, it would nonetheless have an impermissible retroactive effect because it would deny the Class “the efficient resolution of claims naturally suited to group action and will expose them to the shortcomings inherent in separate actions. Such exposure runs counter to the concepts of fair notice, reasonable reliance, and settled expectations and would attach new legal consequences to completed events that form the factual basis for [the Class’] complaint.” Huff, 2001 U.S. Dist. LEXIS 22144 at *19-*20. Moreover, in light of the plethora of claims pending against the Defendants in this and other courts by a multitude of aggrieved investors, creditors, and former Enron employees, Class members’ pursuit of individual actions against the Defendants would be so burdensome and impracticable as to be worthless.

⁸ In an analogous context, a number of courts have refused to countenance retroactive application of § 107 of the PSLRA (which eliminated securities fraud as a predicate act for a cause of action under RICO) due to the injustice that would result where, as here, any potential claims the plaintiffs could have brought under the Securities Act and/or the Exchange Act are time-barred. See, e.g., Baker, 940 F. Supp. at 1179; District 65, 925 F. Supp. at 1570.

repose and limitation applicable to federal claims that are preemptive only if retroactive.
This proposition shocks the conscience of this court.

Huff, 2001 U.S. Dist. LEXIS 22144 at *22-*23.

As in Huff, the operation of SLUSA in the instant case would clearly have an impermissible retroactive effect. Accordingly, pursuant to Landgraf, the Court may not apply SLUSA retroactively, but rather must adhere to the presumption against retroactivity. Hence, this Court lacks removal jurisdiction, and therefore must remand this case to state court.

E. SLUSA Was Not Intended To Preclude This Case

The legislative history of SLUSA, while not instructive concerning the temporal scope of the statute, clearly demonstrates that SLUSA was never intended to preclude an action arising under the circumstances of this case. In Waste Management, *supra*, this Court recently held that Congress' purpose in enacting SLUSA was to close a perceived "loophole" in the PSLRA:

Congress passed SLUSA in 1998 to close the loophole. [Citing 144 Cong. Rec. H10771 (daily ed. Oct. 13, 1998, 1998 WL 712049)]. . . . Congress' purpose in enacting the statute was to "prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State court, rather than Federal court." [Citing Korsinsky, 2002 U.S. Dist. LEXIS 259 at *6-*7 (quoting H.R. Conf. Rep. No. 105-803 (1998))]. Moreover, the Court observes that the same report indicates that in SLUSA Congress did not evidence an intent to occupy the entire field of securities regulation, but expressly delineated the scope of preemption. . . . [Citing H.R. Conf. Rep. 105-803, *2].

The instant action, however, clearly does not fit through the perceived “loophole” that SLUSA was intended to close. Indeed, the rigors of the PSLRA’s pleading requirements played no part in Plaintiff’s decision to bring this action under state law. Rather, as discussed *supra*, the Class was compelled to bring this action under state law because the three-year statute of repose under the federal securities statutes (which pre-dates and remains unaffected by the PSLRA) made state law the only avenue of relief available to the Class. While it is likely that Congress never contemplated the effect of SLUSA on an action like the one at bar, it is certain that Congress did not specifically intend SLUSA to preclude such an action. Hence, in the absence of clear Congressional intent to the contrary, the presumption against retroactivity controls and prevents this Court from applying SLUSA retroactively to this case. Accordingly, the Court must remand this case to state court.

F. Retroactive Application Of SLUSA Would Violate The Class’ Constitutional Right To Due Process

Applying SLUSA to eliminate the Class’ only opportunity to seek redress for Defendants’ fraud would not only be improper under the Landgraf retroactivity analysis, it would be

⁹ See also S. Conf. Rep. 105-182 (“This legislation is designed to address an unforeseen ‘loophole’ in the [PSLRA]. . . .”); Korsinsky, 2002 U.S. Dist. LEXIS 259 at *6 (“SLUSA closes a loophole in the [PSLRA]. . . .”); Hardy v. Merrill Lynch, Inc., 2001 U.S. Dist. LEXIS 19748, *4 (S.D. N.Y. Nov. 30, 2001) (“Congress passed SLUSA in 1998 in order to close a loophole in the [PSLRA]. . . .”).

unconstitutional. Under the Constitution, the Class is entitled to the basic protections of procedural due process – notice and an opportunity to be heard. See, e.g., Matsushita Electrical Industrial Co., Ltd. v. Epstein, 516 U.S. 367 (1996). The Supreme Court has held that as a matter of due process, “a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.” Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 682 (1930). Pursuant to Brinkerhoff, retroactive application of SLUSA in the case at bar would violate the Class’ constitutional right to due process. As discussed herein, if SLUSA were applied retroactively, the Class would be deprived of all pre-existing remedies without having received any opportunity to assert their right to seek recompense for Defendants’ fraud. Accordingly, the Class’ right to due process necessarily precludes retroactive application of SLUSA in this case, and therefore the Court must remand this case to state court.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court enter an Order in the form annexed hereto granting his Motion for Remand and remanding this case to the District Court of Harris County.¹⁰

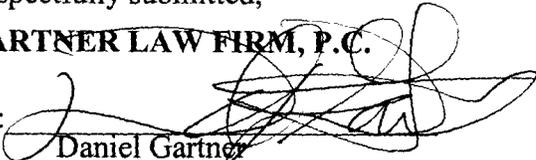
¹⁰ If Plaintiff’s Motion for Remand is granted, Plaintiff’s counsel will, to the fullest extent practicable, endeavor to coordinate the prosecution of this action with the Enron

DATED: 4-25-02

Respectfully submitted,

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Corporation Securities Litigation pending in this Court.