

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

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
MAY 02 2002

MICHAEL N. MILBY, CLERK OF COURT

In Re ENRON CORP.	§	
SECURITIES LITIGATION	§	
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MARK NEWBY,	§	
Plaintiff,	§	
	§	
	§	
	§	Consolidated Lead No. H-01-3624
	§	
ENRON CORPORATION, et al.,	§	
Defendants.	§	
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HENRY P. BLASKIE, JR.,	§	
Individually and For All Other Persons	§	
Similarly Situated,	§	
Plaintiff,	§	
	§	
	§	
	§	Civil Action No. H-02-1108
	§	
	§	
KENNETH L. LAY, et al.,	§	
Defendants.	§	

**DEFENDANT ARTHUR ANDERSEN LLP'S MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND**

Defendant Arthur Andersen LLP ("Andersen") respectfully submits this memorandum of law in opposition to plaintiff's motion to remand.

INTRODUCTION

As this Court is well aware, the collapse of Enron Corporation ("Enron") has sparked a large amount of litigation in multiple federal and state courts. Most of these claims were filed in this District and are consolidated before this Court, while other federal claims, filed in other districts, should soon arrive under the Transfer Order and subsequent orders soon to be issued by the Judicial Panel on

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Multidistrict Litigation. A number of complaints, however, have been framed in an attempt to evade transfer and/or consolidation here under the provisions of the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (“SLUSA”). These evasions threaten the orderly progress of the actions before this Court, and violate SLUSA. In a strikingly similar case, Coy v. Arthur Andersen LLP, No. 01-4248, mem. op. (S.D. Tex. Feb. 6, 2002), this Court denied remand to state court. As in Coy, plaintiff Blaskie’s claims are removable under SLUSA and should remain before this Court, where they should be dismissed.

PROCEDURAL BACKGROUND

Plaintiff Henry B. Blaskie, Jr., filed this purported class action on January 25, 2002, in the 281st Judicial District of the District Court of Harris County, Texas. His original petition seeks relief on behalf of “all persons who purchased securities of Enron prior to October 16, 1998 and held Enron securities through October 16, 2001, and were damaged thereby.” Pet. ¶ 10. On March 20, 2002, Andersen removed this action to this Court pursuant to SLUSA. On April 12, 2002, plaintiff moved to remand. In his motion, plaintiff argues that his complaint evades SLUSA’s purchase or sale element through the artifice of defining his class as commencing after the purchases, even though the complaint shows that they were made in reliance on alleged fraudulent misstatements. For the reasons set forth below, the Court should reject this artificial construct and deny remand.

ARGUMENT

After Congress enacted the Private Securities Litigation Reform Act of 1995 (“PSLRA”), Pub. L. No. 104-67, 109 Stat. 737, plaintiffs in purported securities class actions sought to evade the PSLRA’s heightened pleading standards and regulation of discovery by filing actions in state court. In

1998, three years after it enacted the PSLRA, Congress determined that state-court actions often involved federal securities claims disguised as state-law claims, and enacted SLUSA to close this loophole. See, e.g., Wald v. C.M. Life Ins. Co., No. 3:00-CV-2520-H [2001 WL 256179 at *4] (N.D. Tex. Mar. 8, 2001) (“Congress enacted SLUSA with the intent of making the federal court the primary venue for the litigation of class action security claims.”).

SLUSA precludes plaintiffs from maintaining certain state law claims for losses suffered “in connection with the purchase or sale of” covered securities. 15 U.S.C. § 78bb(f)(1). Significantly, Congress did not leave it to state courts to dismiss these state-law class actions extinguished by SLUSA. Instead, Congress expressly granted defendants access to a federal forum to decide this question, 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).¹

A case is removable under SLUSA if it brings one or more state-law claims and meets a five-element test: (1) it is a “covered class action” as defined by SLUSA; (2) it involves a “covered security” under SLUSA; (3) it alleges that defendants have “misrepresented or omitted material facts”; and (4) it alleges material misstatements or omissions, and (5) that those misrepresentations were made in connection with the purchase or sale of the covered security. Coy v. Arthur Andersen LLP, No. 01-4248, mem. op. at 14 (S.D. Tex. Feb. 6, 2002); see also Green v. Ameritrade, Inc., 279 F.3d 590,

¹ In doing so, Congress placed these state-law class actions beyond the ambit of the well-pleaded complaint rule. See, e.g., Verlinden B.V. v. Central Bank of Nigeria, 461 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); Aaron v. National Union Fire Ins. Co., 876 F.2d 1157, 1160-62 (5th Cir. 1989), SLUSA does not allow a plaintiff to avoid removal simply by cloaking federal claims in state law.

596 (8th Cir. 2002). Moreover, a case removable under these criteria is dismissible by the federal court under the same criteria.

A. Plaintiffs' Claims Satisfy the
Criteria for Removal under SLUSA

Plaintiff cannot, and does not, dispute four of the five elements of SLUSA removal jurisdiction. See, e.g., PI's Mem. at 3. Plaintiff brings his case expressly as a purported class action, see Petn. ¶ 10, and thus automatically meets the "covered class action" prong of SLUSA. See 15 U.S.C. §§ 77p(f)(2)(A)(i), 78bb(f)(5)(B)(i). Plaintiff's claims concern Enron common stock which, as plaintiff admits, was at all relevant times traded on the New York Stock Exchange and is thus necessarily covered by SLUSA. See Petn. ¶¶ 6, 10-11; 15 U.S.C. §§ 77p(f)(3), 78bb(f)(5)(E) (referring in part to 15 U.S.C. § 77r(b)). Finally, plaintiff alleges damages resulting from material misrepresentations made by defendants, and seeks redress through state law. See Petn. ¶¶ 16-35, 47-57; 15 U.S.C. §§ 77p(b), 78bb(f)(1). The only question, therefore, is whether the Petition claims that defendants' alleged misrepresentations were "in connection with" plaintiff's "purchase or sale" of Enron stock. 15 U.S.C. §§ 77p(b), 78bb(f)(1). For two separate and independent reasons, plaintiff's claims indeed allege misrepresentations in connection with purchases or sales, and therefore fall squarely within the SLUSA removal and preemption criteria.

B. Plaintiff's Petition Includes Claims on
Behalf of Investors Who Purchased or
Sold Enron Shares During the Class Period

Plaintiff's Petition includes on its face purchase and sale claims. Although plaintiff insists that his Petition "does not allege that [defendants'] misrepresentations were in connection with the purchase or sale of a security, but in connection with holding securities," PI's Mem. at 2 (emphasis in original), the

language of the Petition itself belies this argument.² First, just as in Coy, Plaintiff's class definition includes purchasers and sellers of Enron securities, and nothing in the Petition embodies the limitations plaintiff attempts to imply through his brief. In his Petition, plaintiff defines his purported class as follows:

The Class includes all persons who purchased securities of Enron prior to October 16, 1998 and held Enron securities through October 16, 2001, and were damaged thereby.

Petn. ¶ 10. While plaintiff now claims this language includes only holders of Enron shares, in fact, a plain reading shows it comprises purchasers and sellers as well. Tellingly, plaintiff does not limit his class to include only those investors who purchased securities prior to October 16, 1998 and held all of those same securities, without any sales or any additional purchases through October 16, 2001. As a result, the purported class includes putative class members who purchased some Enron shares prior to October 16, 1998, and subsequently sold some of or all of those shares, and/or purchased additional shares between 1998 and 2001. The only requirement for this oddly constructed class is that the plaintiff show a purchase of at least some shares prior to October 16, 1998, and show he held at least some shares on October 16, 2001. Therefore, the Petition on its face includes "class members who purchased their stock on or before [October 16, 1998] and sold it or class members who purchased

² On February 27, 2002, Enron filed a Notice of Automatic Stay in the Harris County court. See Exhibit A to Declaration of Andrew Ramzel. Enron has also filed a motion in Bankruptcy Court arguing that plaintiff's claims are actually derivative claims that belong to Enron and are therefore subject to the automatic stay provision of the Bankruptcy Code. See Motion of Debtors for a Global Order, Pursuant to Section 362(a) of the Bankruptcy Code, to Enforce the Automatic Stay and Prevent Plaintiffs From Prosecuting Derivative Claims in Violation Thereof, In re Enron Corp., No. 01-16034 [AJG] (Bankr. S.D.N.Y. April 22, 2002) (Schedule A), attached as Exhibit B to the Declaration of Andrew Ramzel. Enron's motion is scheduled for hearing on May 30, 2002 in the Bankruptcy Court for the Southern District of New York. Andersen's filing of this memorandum of law is not intended to be in derogation of the automatic stay, but is filed in the event the stay is lifted or is otherwise determined not to be in effect by this Court or the Bankruptcy Court.

Enron stock since that date in reliance on” defendants’ alleged misrepresentations. Coy, supra, at 22.

These claims “fall within the ambit of SLUSA and should be dismissed with prejudice.” Id.

B. Plaintiff’s Petition Alleges Detrimental Reliance on Misrepresentations Made Before the “Holding Period” Began

Plaintiff’s attempt to evade SLUSA fails on a separate and independent ground: he bases his claims in substantial part on misrepresentations made before his purported “holding period” commenced, and explicitly alleges reliance on those alleged misrepresentations in the purchase of Enron securities. The first paragraph under “Substantive Allegations” in Plaintiff’s Original Petition states: “On March 31, 1998, the Individual Defendants caused Enron to file its 1997 Annual Report [i]ncluded in this Annual Report were materially false and misleading financial statements upon which many of the members of the Class relied to their own detriment.” Petn. ¶ 16. Similarly, plaintiff alleges, “[w]ithin the 1997 Annual Report was an opinion letter of Andersen This opinion letter was materially false and misleading, and many members of the Class relied upon this opinion letter to their own detriment.” Petn. ¶ 17. Thus, in his own Petition, plaintiff explicitly alleges not only material misrepresentations, but also detrimental reliance on these misrepresentations, during a period in which he himself asserts that putative class members purchased securities and still remain part of his purported ‘holding’ class.

Such alleged detrimental reliance is the touchstone of “in connection with” liability. See Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 475 (1977) (quoting Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12-13 (1971)); see also Brown v. Ivie, 661 F.2d 62, 65 (5th Cir. 1981)

Like plaintiff here, the plaintiffs in Hardy v. Merrill Lynch sought remand by arguing that their “claim does not deal with the purchase or sale of Internet Capital stock, but only with decisions to hold the stock.” 2001 WL 1524471, at *3. The court disagreed, concluding that the plaintiff “makes no effort to distinguish between customers who purchased before and after” Merrill Lynch’s alleged misrepresentations. Id. at *4. One court has acknowledged the import of the Hardy holding: “In Hardy, the only potential class members who could maintain a suit that would not be removable under SLUSA would be those members who purchased before any allegedly misleading rating and continued to hold their shares after the allegedly misleading rating was issued.” Korsinsky v. Solomon Smith Barney Inc., No. 01 Civ. 6085 (SWK), 2002 WL 27775, at *6 (S.D.N.Y. Jan. 10, 2002) (emphasis added). More recently, in Coy v. Arthur Andersen LLP, Case No. 01-4248 (S.D. Tex. Feb. 6, 2002), this Court applied Hardy to dismiss similar allegations in one of the Enron-related cases.

Moreover, plaintiff’s reliance on Gordon v. Buntrock, 200 U.S. Dist. LEXIS 5977 (N.D. Ill. Apr. 28, 2000) is unavailing – and indeed illustrates the failing of plaintiff’s Petition. In Gordon, plaintiffs argued that they were “fraudulently induced to hold Waste Management stock” as a result of defendants’ alleged misstatements. In that case, as here, plaintiffs alleged that defendants made misrepresentations and omissions that pre-dated the putative class period. Gordon is different from this case, however, in that the Gordon plaintiffs specifically alleged that their Waste Management stock was fairly valued at the beginning of the putative class period. Id. Because none of the putative class members alleged a purchase of Waste Management stock at an artificially inflated price, defendants’ misstatements could not have been made “in connection with” the purchase or sale of a covered security.

In this case, by contrast, plaintiff has alleged that defendants made misrepresentations or omissions regarding Enron stock well before the putative class period on which class members allegedly relied in purchasing their stock. Plaintiff simply artificially labels his class as commencing after the date of those alleged misrepresentations and purchases: a blatant case of artful pleading for the sole purpose of avoiding SLUSA.

Other cases relied upon by plaintiff are similarly unavailing. Gutierrez v. Deloitte & Touche, 147 F. Supp. 2d 584 (W.D. Tex. 2001), which excluded claims by purchasers or sellers of “covered” securities, involved a state court class action against Deloitte & Touche, which allegedly had committed malpractice in auditing the issuers of securities held by the investor plaintiff. Deloitte removed the action to federal court and plaintiff moved for remand. The operative petition asserted claims on behalf of three subclasses of plaintiffs, but two of these subclasses did not hold “covered” securities under SLUSA. Thus, the court focused on the third subclass, defined as: “All persons or entities that held any ‘covered security’ as that term is defined in the [Reform Act] at all relevant times through 1993 through present and did not sell or otherwise dispose of said products prior to June 1999.” Id. at 592. This limiting language, which excluded from the class persons who traded in covered securities during the class period, is absent here.³ In contrast, in this case, plaintiff’s Petition, as noted above, indicates that his purported class clearly includes claims on behalf of those who bought or sold securities during the class period. Plaintiff’s decision to include purchasers and sellers brings the petition squarely within SLUSA’s ambit.

³ Moreover, the Gutierrez plaintiffs “expressly carved out and excluded [purchasers] when they elected to allege only claims for holding covered securities, not the purchase or sale of covered securities.” Id. at 593 (brackets and emphasis in original). Here, in contrast, plaintiff admits that he is bringing claims on behalf of persons who purchased and sold, while attempting to deny that their claims relate to purchases or sales. (Pl. Mem. at 4).

Similarly, Shaev v. Claflin, 2001 WL 548567 (N.D. Cal. May 17, 2001), is entirely inapposite to plaintiff's claims. Shaev concerned allegations of unfairness in a restructuring of stock options. See id. at *4. Before they could be restructured, the options were necessarily granted or available to owners already holding stock. See id. Thus, purchases and sales were not implicated, and SLUSA did not apply. See id. Finally, Lalondriz v. USA Networks, 54 F. Supp. 2d 352 (S.D.N.Y.), adhered to on recons., 68 F. Supp. 2d 285 (S.D.N.Y. 1999), does not aid plaintiff's attempt to evade SLUSA. The Lalondriz court held that plaintiff there had correctly defined a holding class not within the ambit of SLUSA. See 54 F. Supp. 2d at 353-354. In this case, of course, plaintiffs' artfully pled complaint comprises purchase and sale claims as well.

In this case, in contrast the above cases, plaintiff effectively admits his improper attempt at artful pleading. He acknowledges that he is bringing claims on behalf of persons who have federal securities claims for alleged misrepresentations "in connection with the purchase or sale" of Enron stock, but, he argues he is simply declining to assert these federal claims simply by defining his class as commencing after the purchases that he argues violate federal law. See Pl.'s Mem. at 4. He then argues that he is asserting claims on behalf of these very purchasers for "holding" the stock they just purchased while it allegedly declined in value. But this is mere slight of hand, meant to hide the facts that (i) for purchasers, the purchase of a stock and the onset of holding the stock are simultaneous, and (ii) for sellers, the sale of the stock and the point when the seller ceases to hold the stock are likewise concurrent. Moreover, the price at which an investor purchases stock is the price at which she begins to hold the stock, and the price at which an investor sells stock is the same price at which she ceases to hold stock. Thus, the difference between the purchase price and the sales price is equivalent to the

change in the value of the holding. Finally, the supposedly distinct claims depend on the same alleged reliance on the same alleged misrepresentations. In these circumstances, the proposition that a “holding” claim asserted by a purchaser or seller is distinct from a claim “in connection with a purchase or sale” is pure semantics.

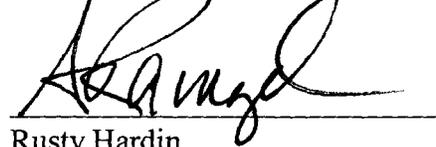
While such a transparent effort to keep patently federal claims in state court might have succeeded before SLUSA, Congress has clearly closed the door on such self-serving semantics. Simply put, plaintiff cannot avoid SLUSA’s strictures simply by stating his subjective belief that he has not implicated federal law. When – as here – an objective review of the facts and circumstances alleged in the complaint indicates that the claims relate to alleged misrepresentations in connection with purchases and sales of a covered security, the complaint is subject to removal under SLUSA.

CONCLUSION

For these reasons, Andersen respectfully requests that this Court deny plaintiff's motion to remand and grant such other relief as the Court may deem just and proper.

Dated: Houston, Texas
May 2, 2002

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 2^d day of May, 2002, I served the foregoing pleading on all parties pursuant to the Court's April 5, 2002 Order.

A handwritten signature in black ink, appearing to read "Andrew Ramzel", written over a horizontal line.

Andrew Ramzel