UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 21 2002 JS
MICHAEL N. MILBY, CLERK OF COURT

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

IN RE ENRON CORP. SECURITIES, DERIVATIVE & "ERISA" LITIGATION	§	MDL DOCKET NO. 1446
MARK NEWBY, ET AL., Plaintiff, v. ENRON CORP., ET AL., Defendants.	§	CONSOLIDATED LEAD NO. H-01-3624
This pleading concerns: MARY BAIN PEARSON AND JOHN MASON, Plaintiffs, v. ANDREW S. FASTOW, ET AL., Defendants.	§	CIVIL ACTION NO. H-02-0670

SUPPLEMENT TO
<u>*PEARSON* PLAINTIFFS' MOTION TO REMAND</u>

TO THE HONORABLE COURT:

1. On or about March 12, 2002, Plaintiffs Mary Bain Pearson and John Mason moved to remand this action to the 164th Judicial District Court of Harris County, Texas.

2. On March 5, 2002, Hon. Harry Lee Hudspeth, Senior U.S. District Judge for the Western District of Texas, ordered a similar action remanded to the 21st District Court of

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Washington County, Texas for lack of subject matter jurisdiction. Plaintiffs received a copy of the order on March 8, 2002. *See Bullock, et al. v. Arthur Andersen, L.L.P., et al.*, No. A-02-CA-070-H, in the U.S. District Court for the Western District of Texas. A copy of the order was previously submitted to this Court on or around March 8, 2002.

3. Shortly after remand, Defendants removed the *Bullock* case to federal court a second time. And again, the case was remanded. Plaintiffs have attached a copy of Judge Hudspeth's June 17, 2002 order remanding *Bullock*.

4. Plaintiffs wish to apprise the Court of the *Bullock* decision because Andersen removed *Bullock* on the same grounds it advanced in this case.

Respectfully submitted,

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By: Sylvia Davidow (by permission Akwaya)
Sylvia Davidow

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing Supplement to *Pearson* Plaintiffs' Motion to Remand was served on the 21st day of June, 2002 on the counsel of record listed in the attached Service List in accordance with the Court's orders regarding service in this action.

Sylvia Davidow (by permission AKaway)
Sylvia Davidow

The Service List

Attached

to this document

may be viewed at

the

Clerk's Office

FILED
AUSTIN DIVISION
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WESTERN DISTRICT OF TEXAS
U.S. CLERK'S OFFICE
BY: _____ DEPUTY

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

JANE BULLOCK, JOHN & JANE BARNHILL, DON REILAND, SCOTT BORCHART, MICHAEL MIES, VIRGINIA ACOSTA, JIM HEVELY, MIKE BAUBY, ROBERT MORAN, JACK & MARILYN TURNER, HAL MOORMAN & MILTON TATE, CO-TRUSTEES FOR MOORMAN, TATE, MOORMAN & URQUHART MONEY PURCHASE PLAN AND TRUST, DR. ROBERT STARK, SUDIE STARK, DELBERT H. STARK, JR., HENRY BOEHM, M.D., VIRGINIA LAKE, ROBERT ARDERBURN, LEON TOUBIN ZHONG LIN, ROBIN T. STERN and JANE BARNHILL-NEWMAN,	§	
Plaintiffs,	§	
v.	§	NO. A-02-CA-278-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,	§	
Defendants.	§	

ORDER OF REMAND

Factual and Procedural History

This case was originally filed in the 21st Judicial District Court of Washington County, Texas, on January 24, 2002. The Plaintiffs are citizens of the State of Texas who were induced to buy shares of stock in the Houston-based Enron Corporation at various times before it filed for bankruptcy. 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., and several partners at Andersen's Houston office.

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On January 30, 2002, Defendant Arthur Andersen filed a notice of removal with this Court purporting to remove the case on the basis of federal question jurisdiction.[1] In connection with that removal attempt, Andersen maintained that the Plaintiffs had brought claims under the Securities Litigation Uniform Standards Act of 1998 (SLUSA) and that they had otherwise made allegations of federal securities law violations. On March 5, the Court remanded the case for lack of subject matter jurisdiction, explaining that the Plaintiffs did not meet SLUSA's definition of a "covered class action" and that mere allegations without a claim based on federal law will not support federal jurisdiction. **See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.**, __ U.S. __, 122 S.Ct. 1889 (2002). The Court noted further that it would have been obligated to remand the case even if a federal question had appeared on the face of the Plaintiffs' state court petition because not all of the Defendants had demonstrated unambiguous consent to removal.

Slightly less than two months later, Defendant Andrew Fastow filed a second notice of removal in which he now suggests that jurisdiction lies with the Court based on the fact that the Plaintiffs' claims are "related to" Enron's bankruptcy and, thus, may be removed pursuant to 28 U.S.C. §§ 1334(b) and 1452.[2] At

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[1] The previous removal was docketed under Cause No. A-02-CA-70.

[2] Fastow acknowledges that this lawsuit has been removed and remanded previously, yet he explains that Enron's April 22, 2002 filing of a motion for a global order in bankruptcy court triggered a new and independent ground for removal as well as a

the same time, Fastow also filed a motion requesting that the case be transferred to the Southern District of New York where Enron's bankruptcy case is pending. **See In re Enron Corp.**, No. 01-CA-16034 (Bankr. S.D.N.Y. filed Dec. 2, 2001). Unwilling to accept the Court's rejection of Andersen's arguments in its first order of remand, Fastow stubbornly argues in the alternative that the case remains removable under SLUSA. He suggests that the Court failed to consider whether the Plaintiffs in this case were "prospective class members" in the Enron securities actions now pending in the United States District Court for the Southern District of Texas and contends accordingly that the case still may be removed pursuant to 28 U.S.C. §§ 1331, 1441 and 1446. In their motion to remand, the Plaintiffs again counter that SLUSA does not apply because they still do not fit its definition of a "covered class." They also contend that their claims are unrelated to Enron's bankruptcy. After carefully considering Fastow's notice of removal, the Plaintiffs' motion to remand, the filings of various other Defendants in opposition to remand, and the Plaintiffs' responses to those filings, the Court is of the opinion that this case should be remanded for lack of subject matter jurisdiction.

Discussion

On May 3, 2002, Andersen filed a separate motion requesting that the Court stay all proceedings in this case until it either has been transferred to the United States Bankruptcy Court for

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new 30-day removal period.

the Southern District of New York or the Judicial Panel on Multidistrict Litigation has issued a conditional order transferring it to the United States District Court for the Southern District of Texas. As Andersen is aware, a pending transfer motion before the MDL Panel does not affect the jurisdiction of this Court. **See** R. Pro. Jud. Panel Multidist. Litig. 1.5. The Supreme Court held long ago that "the power of this Court to stay proceedings is incidental in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for the litigants." **Landis v. N. Am. Co.**, 299 U.S. 248, 254 (1936). Noting that the Court has already stayed one Enron-related action, **see Rogers v. Duncan**, No. A-02-CA-131 (W.D. Tex. filed Feb. 26, 2002), Andersen invites it to stay this case as well rather than to immediately determine whether it has been properly removed. The Court will decline that invitation.

In *Rogers*, the plaintiffs brought suit under the Securities Exchange Acts of 1933 and 1934. **See** 15 U.S.C. § 77a et **seq.** (1933 Act); 15 U.S.C. § 78a et seq. (1934 Act). As a federal question clearly lay on the face of their state court petition, the plaintiffs in that case did not contest the propriety of removal. Such is not the situation here. Indeed, this lawsuit has been remanded once previously, and for a number of reasons--both substantive and procedural--the Court is convinced that it must be remanded again, if not by this Court then by another following its eventual transfer. Judicial economy would thus be

best effected if this case were immediately remanded to state court. As the Seventh Circuit has stated, "If the limited review reveals that the case is a sure loser in the court that has jurisdiction (in the conventional sense) over it, then the [transferor] court . . . should dismiss the case." **Meyers v. Bayer AG**, 143 F.Supp.2d 1044, 1048 (E.D. Wis. 2001) (alterations in original) (quoting *Phillips v. Seiter*, 173 F.3d 609, 611 (7th Cir. 1999). Furthermore, even if judicial economy were not a concern, 28 U.S.C. § 1447(c) requires that "[i]f at any time before judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." In short, there will be no stay; the Court will consider Fastow's arguments for federal removal jurisdiction directly.

In his first argument for removal, Fastow contends that this case is properly heard in federal court because it is "related to" a bankruptcy proceeding. Although he acknowledges that the Plaintiffs have not pled their case as a derivative suit, Fastow notes that they seek to recover for the devaluation of stock which they held in Enron at the time of its collapse. Thus, he counters that the Plaintiffs bring derivative claims even though they assert in their amended state court petition that their claims are direct and have further waived their right to bring derivative claims. Because Fastow believes that the Plaintiffs' claims are derivative, he concludes that they must be brought on behalf of Enron. As a result, he asserts that those claims are "related to" Enron's bankruptcy and are removable under 28 U.S.C.

§§ 1334(b) and 1452.[3]

That this case be characterized as derivative rather than direct is pivotal to Fastow's argument. If the Plaintiffs' claims are nonderivative, then his argument must falter. Whether or not a shareholder can bring a nonderivative lawsuit is determined by state law. **Crocker v. Fed. Deposit Ins. Corp.**, 826 F.2d 347, 349-50 (5th Cir. 1987). Although the events culminating in this lawsuit took place in Texas and Enron is an Oregon corporation, neither the Plaintiffs nor Fastow discuss which state's law should govern with any great thoroughness.[4] It is well established that courts must apply the choice of law rules of the states in which they sit. **Klaxon v. Stentor Elec. Mfg. Co.**, 313 U.S. 487, 496 (1941). In the state of Texas, the "most significant relationship" test is used in tort cases such as this one. **See Jackson v. West Telemarketing Corp. Outbound**, 245 F.3d 518, 523 (5th Cir. 2001). That test requires the Court

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[3] Section 1334(b) explains in pertinent part that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Section 1452 provides that "[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title."

[4] Citing section (K) to article 5.14 of the Texas Business Corporation Act, Fastow asserts that Oregon law governs. That section presumes that the case is derivative, however. To treat this case as a derivative suit so that the Court might then use article 5.14(K)'s choice of law provision in order that it might in turn decide which state's law should be used to determine whether the case must be brought derivatively or directly would be the judicial equivalent of chasing one's tail.

to consider: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship between the parties, if any, is centered. **Access Telecom, Inc. v. MCI Telecomms. Corp.**, 197 F.3d 694, 705 (5th Cir. 1999). By these factors, the laws of Texas govern.[5]

The general rule in Texas--and Oregon, for that matter--is that shareholders cannot recover for wrongs done to a corporation which affect the value of their stock unless they bring their suit derivatively in the name of that corporation. **Wingate v. Hajdik**, 795 S.W.2d 717, 719 (Tex. 1990); **Weiss v. Northwest Acceptance Corp.**, 546 P.2d 1065, 1069 (Or. 1976). Yet even though shareholders hoping to recover for wrongs done to a company must bring those claims derivatively, they still can bring direct claims for wrongs done to them individually. **Wingate**, 795 S.W.2d at 719; **see also Weiss**, 546 P.2d at 1069.

> A corporate shareholder may have an individual action for wrongs done to him where the wrongdoer violates a duty arising from a contract or otherwise and owing directly by him to the shareholder. This principle is not an exception to the general rule, but is only a recognition that a shareholder may sue for violation of his individual rights, regardless of whether the corporation also has a cause of action.

Faour v. Faour, 789 S.W.2d 620, 622 (Tex. App.--Texarkana 1990,

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[5] This fact is of little consequence ultimately as the Court is convinced that the outcome of this suit would be the same under both Texas and Oregon law. Presented with the facts of this case, that is, both Texas and Oregon would allow the Plaintiffs to bring their suit directly.

writ denied) (internal citation omitted).

As proof that the Plaintiffs have brought a derivative suit, Fastow cites *Crocker v. Federal Deposit Insurance Corp.*, 826 F.2d 347, 350 (5th Cir. 1987), a case that he suggests raises claims "nearly identical" to the Plaintiffs' own. In *Crocker*, the plaintiffs sought to recover for the diminution in value of a certain bank's stock, claiming that the defendant majority shareholders had "pursued a scheme to defraud the minority shareholders by misrepresenting as sound the financial condition of the Bank."[6] **Crocker v. Fed. Deposit Ins. Corp.**, 826 F.2d 347, 350 (5th Cir. 1987). The plaintiffs alleged that they suffered more than simply their stock's devaluation; they argued that they missed out on a "lost profit opportunity" when the defendants convinced them not to sell their stock at what turned out to be an artificially inflated price. **Id.** Significantly, the plaintiffs did not claim that they had planned to sell their stock, only that they likely would have sold it at the inflated price had they known its real value. **Id.** at 351. Ultimately, the Fifth Circuit Court of Appeals characterized the case as derivative because the only damage the plaintiffs suffered was the devaluation of stock that they claimed they might have sold had they been made aware of the bank's true financial condition.

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[6] The Honorable William Henry Barbour, sitting in the United States District Court for the Southern District of Mississippi, originally heard the case. Thus, in order to determine whether the plaintiffs could bring a nonderivative lawsuit, Judge Barbour applied Mississippi law. Like Texas and Oregon, Mississippi abides by the general rule that shareholders cannot bring a direct action unless they have suffered a personal injury.

Id. at 350-51. Any personal injuries that they might have suffered as a result of the defendants' actions were too speculative to be distinguished from the injury to the bank itself. **Id.** at 350.

At least two points distinguish *Crocker* from the present case. First, the majority of the Plaintiffs in this case seek damages not because they held onto stock but, rather, because they decided to purchase it only after hearing Defendant Lay speak in Washington County. These claims are not holding claims and may be brought directly as "the law treats a person who buys stock in reliance on false information from a director as personally injured by the director's conduct." **Leach v. Fed. Deposit Ins. Corp.**, 860 F.2d 1266, 1272 (5th Cir. 1988). Second, The Fifth Circuit carefully noted in *Crocker* that the plaintiffs did not claim that they "desired specifically to sell their stock at a given point, but were deterred from effectuating a sale because of the [defendants'] misrepresentations." **Crocker**, 826 F.2d at 351. This language implies that the apparent holding claims of two others, Robert and Sudie Stark, are also directly actionable under *Crocker* as these Plaintiffs suggest that they were in fact prepared to sell their stock but choose not to do so after hearing Lay speak. Because the Plaintiff's claims are not derivative, Fastow's "related to" arguments must therefore fail.

Since Fastow contends alternatively that this case falls within SLUSA's preemptive scope, the Court will revisit the

language of that statute.[7] As the Court explained in its last order of remand, 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). Fastow deems this case to fall under SLUSA because the Plaintiffs are "'prospective class members' in the consolidated multidistrict Enron securities actions now pending in the United States District Court for the

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[7] Whether this case remains removable as raising a federal question under SLUSA is dubious. All properly joined and served Defendants must agree to removal within 30 days of the date on which they receive notice that the case is removable. 28 U.S.C. 1446(b). In its motion to stay, Andersen suggests that Fastow should still be allowed to remove the case under SLUSA at this late date because he had not been served when it was initially removed. Andersen is seemingly unaware that in this circuit "the thirty-day period begins to run as soon as the first defendant is served (provided the case is then removable)." **Getty Oil Corp., a Div. of Texaco, Inc. v. Insurance Co. of North America**, 841 F.2d 1254, 1263 (5th Cir. 1988); **contra Marano Enter. v. Z-Teca Rest.**, 254 F.3d 753, 756 (8th Cir. 2001). That 30-day period has long since expired. The existence of a handful of Eighth Circuit decisions holding otherwise is entirely irrelevant as this Court remains bound by the decisions of the Fifth Circuit.

Southern District of Texas." He explains that "[w]hen the plaintiffs in this action are properly aligned and counted with . . . similarly-situated clients in other cases, they constitute a 'covered class action' for purposes of SLUSA." Although Fastow's idea of the covered class plainly encompasses litigants in a number of different lawsuits filed in at least two districts, he nevertheless attempts to use the "prospective class members" language of the definition's initial "any single lawsuit" prong to demonstrate that the Plaintiffs are part of a "covered class action." Counted as prospective class members in another lawsuit in another district, the Plaintiffs might allow that lawsuit to satisfy the "any single lawsuit" prong's 50-person requirement. That they might be counted as members of another lawsuit, however, is not enough to pull their own case out of state court and into federal as removable under SLUSA, at least not in the way that Fastow or Andersen have envisioned.

Finally, for the sake of thoroughness, the Court notes that it would remand this case just as it did before even if the Plaintiffs were to have brought claims under SLUSA. Again, all defendants who have been properly joined and served must consent to removal within 30 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) (quoting section 1446(b)). Failure to join all properly joined and served defendants within that time period renders the notice of removal defective. **Getty Oil**, 841 F.2d at 1262. Where there

are multiple defendants, it is not enough that the removing party merely state that the other properly joined and served defendants agree to removal. **Moody v. Commercial Ins. Co. of Newark**, 753 F.Supp. 198, 200 (N.D. Tex. 1990). The Fifth Circuit has explained that "there must be some timely filed written indication from each served defendant, or from some person or entity purporting to formally act on its behalf in this respect and to have authority to do so, that it has actually consented to such action." **Getty Oil**, 841 F.2d at 1262 n.11. In the case at bar, Fastow claims to have served all counsel of record with his notice of removal on or about May 1, 2002. None of his co-defendants signed the notice of removal, however, and Fastow neglected to offer any reason for their failure to do so. His declaration in the notice that they have consented to removal is insufficient because the notice did not indicate that Fastow had the authority to act on their behalf. The notice, in a word, failed to "bind" his co-defendants. **Id.** Because Fastow's co-defendants did not unambiguously consent to removal within 30 days of the date on which they received notice that the case had been removed, the Court has no choice but to remand this case once more to state court.

In addition to remand, the Plaintiffs move for attorneys' fees and costs incurred as a result of improper removal. Under 28 U.S.C. § 1447(c), the decision whether to award attorneys' fees and costs for improper removal is committed to the sound discretion of the district court. **Avitts v. Amoco Prod. Co.**, 111

F.3d 30, 32 (5th Cir. 1997). The Court finds that the motion should be denied. In light of the circumstances presented by this case and the fact that the case law interpreting SLUSA is not well developed, the Court declines to award attorneys' fees or costs on this occasion.

It is therefore ORDERED that the motion of Defendant Arthur Andersen, L.L.P. to stay all pretrial proceedings in the above-styled and numbered cause be, and it is hereby, DENIED.

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

It is further ORDERED that the motion of Defendant Andrew Fastow to transfer the above-styled and numbered cause to the United States District Court for the Southern District of New York be, and it is hereby, DENIED as moot.

It is further ORDERED that the Plaintiffs' motion for attorneys' fees and costs in the above-styled and numbered cause be, and it is hereby, DENIED.

SIGNED AND ENTERED this 17th day of June, 2002.

HARRY LEE HUDSPETH
SENIOR UNITED STATES DISTRICT JUDGE