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

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§ § §	MDL 1446
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§ § § § § § § § §	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
SARA J. MCMURRAY, Individually and on Behalf of All Others Similarly Situated, Plaintiff, VS. ROBERT A. BELFER, et al., Defendants.	§ § § § § § § § §	CIVIL ACTION NO. H-03-5542 CONSOLIDATED ACTION

ORDER

Pending before the Court in the above referenced action to recover damages incurred by holders of Enron stock throughout a proposed Class Period in reliance on Defendants' participation in the making and issuing of false and misleading statements about Enron's financial status is a motion to remand or for abstention (instrument #38), filed by Plaintiff Sara J. McMurray, Individually and on Behalf of All Others Similarly situated. Plaintiff's memorandum in support of her motion (#39) was amended by instrument #69.

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This putative class action suit, brought under Illinois state law on behalf of those who purchased common stock of Enron prior to October 16, 1998 and held that stock at least until November 27, 2001, against Enron's former officers, directors, outside auditing firm, and bankers based on Defendants' alleged negligent misrepresentation, common law fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, was initially filed in the Circuit Court of Cook County, Illinois, Chancery Division. It was timely removed to the United States Bankruptcy Court for the Northern District of Illinois by Defendants J.P. Morgan Chase & Co., Citigroup, Inc., Canadian Imperial Bank of Commerce, Bank of America Corp., Merrill Lynch & Co., Barclays PLC, Deutsche Bank AG, and Lehman Bothers Holdings, Inc. (collectively, the "Bank Defendants"), on two grounds: (1) that the suit was preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §77p(c) and 78bb(f)(2); and (2) on "related to" bankruptcy jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 1452 and Federal Rule of Bankruptcy Procedure 9027. It was subsequently transferred to the undersigned judge for inclusion in MDL 1446 by the Judicial Panel on Multidistrict Litigation (#64).

Plaintiff's motion for remand insists there is no federal jurisdiction over her claims. First, she maintains, there is no preemption by SLUSA because there is no requisite "in connection with" a **purchase or sale** of a covered security by the putative investor class, which consists only of "holders," during

the Class Period.[1] Second, she argues that there is no "related to" bankruptcy jurisdiction here. Enron is not named as a Defendant and the claims for possible claims for indemnity and contribution are too contingent or hypothetical to sustain such jurisdiction, she urges. Furthermore, even if the Court finds there is "related to" bankruptcy jurisdiction, mandatory abstention pursuant to 28 U.S.C. § 1224(c)(2) and/or equitable remand is appropriate here. Last, Plaintiff contends that the removal is defective because there was not unanimous consent or joinder by all other Defendants, specifically Arthur Andersen.[2]

This Court has already ruled in other *Newby*-related cases on the arguments raised here and accordingly hereby incorporates those memoranda and orders in this order.

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[1] McMurray argues,

> The Plaintiff's state law claims . . . are based on the defendants' conduct in inducing Plaintiff and class members to *hold* their securities, rather than sell. Compl. at ¶¶ 1, 2, 350, 351. The Plaintiff's state law *holder* claims are well-recognized as distinct from the type of federal securities claims pending in the Enron shareholders class action lawsuit, and are not preempted by SLUSA.

#39 at 2. *See also* #69 at 1. *See also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 738 n.9 (1975)(recognizing viability of state law remedies for holding claims).

[2] In response to the motion to remand, Defendants have provided evidence that Arthur Andersen timely joined in the notice of removal on September 29, 2001. #71, Ex. A.

First, the Court agrees with Plaintiff that generally holding claims, by themselves, will not support SLUSA preemption.[3] *See, e.g., Green v. Ameritrade, Inc.*, 279 F.3d 590, 597-99 (8th Cir. 2002); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1342-43 (11th Cir. 2002), *cert. denied*, 537 U.S. 950 (2002); *Gutierrez v. Deloitte & Touche, L.L.P.*, 147 F. Supp. 2d 584, 595 (W.D. Tex. 2001).

Nevertheless, here it is not completely clear whether McMurray asserts solely holding claims. The complaint (Ex. A to #1) is ambiguous. In ¶ 1, the complaint states that this suit "is a class action on behalf of [Plaintiff] and all other persons who purchased common stock of Enron prior to October 16, 1998, and held such stock through and including November 27, 2001 . . . ." Paragraph 2 provides, "Plaintiff and the class all held their stock during this entire time period." In ¶ 6, however, the complaint recites that McMurray "held at least some portion of such shares beyond November 27, 2001 . . . ," suggesting that she sold or gave away some of her Enron stock during the Class Period.

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[3] Because SLUSA does not define the phrase, "in connection with the purchase or sale" of a covered security, a number of courts have it in accordance with case-law constructions of the identical phrase in section 10(b) of the Securities Exchange Act of 1934 Rule 10b-5. *See, e.g., Green v. Ameritrade, Inc.*, 279 F.3d 590, 597-98 (8th Cir. 2002); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1093 (11th Cir. 2002), *cert. denied*, 539 U.S. 927 (2003). Where a plaintiff has not purchased or sold the securities at issue, the "in connection with" requirement is not met; therefore claims relating *solely* to the "retention of securities, rather than the purchase or sale" of them, are not subject to SLUSA preemption. *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1345 (11th Cir. 2002)(emphasis in the original), *cert. denied*, 537 U.S. 950 (2002).

Although the complaint refers to the "Class Period," in her amended memorandum (#69), filed after the case was removed in part based on SLUSA, which requires the "purchase or sale of a covered security" for jurisdiction, Plaintiff restyled that term to "Holder Class Period" and asserts that "the Class claims are expressly limited to *holders*, claims based on the purchase or sale of securities are *ipso facto* excluded from the class." #69 at 4. Of course this Court must determine its subject matter jurisdiction based on the pleadings at the time of removal, not on any subsequent amended petition or other pleadings. *Maguno v. Prudential Property and Casualty Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002), *citing Cavallini v. State Farm Mutual Ins. Co.*, 44 F.3d 256, 264 (5th Cir. 1995). The removing Defendants have the burden of demonstrating that the removal was proper and that federal jurisdiction exists. *Maguno*, 276 F.3d at 723. Where any doubt exists over whether the removal was proper, the court must construe any ambiguities against removal because removal statutes should be strictly construed in favor of remand. *Shamrock Oil & Gas Corp. v.* Sheets, 313 U.S. 100, 104 (1941); *Maguno*, 276 F.3d at 723, *citing Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000), *cert. denied*, 530 U.S. 1229 (2000).

Because this Court finds that Plaintiff's complaint predominantly supports Plaintiff's insistence that she brings a class action comprised only of retention claims, the Court construes the lone ambiguity in ¶ 6, which constitutes the removing Defendants' only evidence of "in connection with the sale

or purchase of a covered security," against removal and determines that this Court does not have subject matter jurisdiction over McMurray's claims under SLUSA. *See, e.g., Gutierrez v. Deloitte & Touche, L.L.P.*, 147 F. Supp. 2d 584, 592-94 (W.D. Tex. 2001)("Given plaintiffs' characterization of the first amended petition, and the fact that they do not expressly state a cause of action for misrepresentation made to purchasers of covered securities, this Court declines to conclude plaintiffs' petition states a cause of action for misrepresentations made in connection with purchases of covered securities. Because plaintiffs have not alleged that defendants' misconduct occurred in connection with the purchase (or sale) of covered securities, the first amended petition was not properly removed under the SLUSA and this matter must be remanded for lack of subject matter jurisdiction to state court."); *Meyer v. Putnam International Voyager Fund*, 220 F.R.D. 127, 129 (D. Mass. 2004)("[N]otwithstanding her use of the term 'holders,' Meyer's class definition might, when considered in isolation, be construed to include plaintiffs with 'claims based on the purchase or sale of securities.' . . . Yet when considered in context--including the relevant case law, which clearly distinguishes between the claims of purchasers and sellers on the one hand and those of holders on the other, the remainder of Meyer's complaint, which does not allege purchase or sale or seek relief on these bases, and Meyer's Memorandum, which explicitly disavows any allegation 'that plaintiff bought or sold covered securities in reliance on defendants' alleged misrepresentations,'

. . . Meyer's proposed class is better construed to exclude those asserting claims 'in connection with the purchase or sale' of shares of the Funds.") (*citing Gutierrez*, 147 F. Supp. 2d at 594).[4]

Nevertheless, the Court concludes that it does have "related to" bankruptcy jurisdiction over this suit. The rule of unanimity does not apply to removals pursuant to §§ 1334(b) and 1452. *See, e.g.*, #2143 at 38-50 in H-01-3624. Nor does the debtor need to be a named defendant for such jurisdiction. #995 at 19-22 in H-01-3624; #2143 at 38 in H-01-3624. Moreover, this Court has held that, under Second Circuit law, applicable to those suits over which it exercises "related to" bankruptcy jurisdiction because this Court's jurisdiction derives from that of the Enron bankruptcy proceedings in the Southern District of New York, the breadth of the grant of "related to" jurisdiction encompasses potential claims for contribution and indemnity that may affect the debtor's estate. Here "related to" bankruptcy jurisdiction is further supported by the "unity of identity of interest" of the Defendants with the debtor, with the alleged liability arising

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[4] Defendants have also argued that where plaintiffs alleged a "unitary scheme of fraud" that began before "the purchase or sale" of securities and continued after, the allegations satisfy the "in connection with" requirement. Because few courts have embraced this theory and because it appears to be contrary to the established narrow construction of removal statutes, this Court is unwilling to adopt it. *See, e.g., Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1046 (11th Cir. 1986) (notably a pre-SLUSA decision), *cert. denied*, 480 U.S. 946 (1987); *Zoren v. Genesis Energy*, 195 F. Supp. 2d 598 (D. Del. 2002); *Shaev v. Claflin*, No. C 01-0009 MJJ, 2001 WL 548567 (N.D. Cal. May 17, 2001); *Gordon v. Buntrock*, No. 00 CV 303, 2000 WL 556763 (N.D. Ill. Apr. 28, 2000); *Praeger v. Knight/Trimark Group, Inc.*, 124 F. Supp. 2d 229, 231-33 (D.N.J. 2000).

from the same nucleus of purported wrongdoing, as well as the fact that a number of Bank Defendants have filed proofs of claim in the Enron bankruptcy proceedings asserting contractual,[5] statutory[6] and common law rights of indemnification and contribution against Enron. #1714 at 8-37 in H-01-3624; #71 in H-03-5542.

As for mandatory abstention, as with a number of other Enron-related cases, Plaintiff has failed to show that the state court can timely adjudicate this complex action. Moreover equitable remand is inappropriate. *See, e.g.*, #995 at 16-21 in H-01-3624.

For these reasons the Court

ORDERS that Plaintiff's motion for remand or abstention is DENIED.

SIGNED at Houston, Texas, this 15th day of June, 2004.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

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[5] Based on Article VII(B) of Enron's articles of incorporation and/or Enron's Directors and Officers Liability Insurance Policies, which are assets of the debtor's estate.

[6] The laws of Oregon, Enron's state of incorporation, provide that the estate may be obligated to indemnify Enron's former directors and officers if they prevail here. Or. Rev. Stat. § 60.394