

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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: IN RE MERRILL LYNCH & CO., INC. :  
: RESEARCH REPORTS SECURITIES LITIGATION : 02 MDL 1484 (MP)  
: :  
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DAVID C. KIRKPATRICK, Individually and :  
on behalf of all others similarly situated, :  
: Plaintiff, :  
v. : 03 CV 1428 (MP)  
MERRILL LYNCH & CO., INC., and :  
MERRILL LYNCH, PIERCE, FENNER & :  
SMITH, INC., :  
: Defendants. :  
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WILLIAM H. DURHAM, M.D., :  
: Plaintiff, :  
v. : 03 CV 1429 (MP)  
MERRILL LYNCH & CO., INC., ET AL., :  
: Defendants. :  
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TOM LESTER, WILLIAM B. DURHAM, :  
ET AL., :  
: Plaintiff, :  
v. : 03 CV 1430 (MP)  
MERRILL LYNCH & CO., INC., ET AL., :  
: Defendants. :  
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WILLIAM H. DURHAM, M.D.,	:	
	:	
Plaintiff,	:	
v.	:	03 CV 2851 (MP)
	:	
MERRILL LYNCH & CO., INC., <u>ET AL.</u> ,	:	
	:	
Defendants.	:	
	:	
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**OPINION AND DECISION**

Defendants have moved to dismiss the complaints pursuant to Fed. R. Civ. P. 12(b)(6) as preempted by the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (“SLUSA”) (codified as 15 U.S.C. §§ 77p & 78bb(f)).

The four actions that are the subject of the instant motion purport to eschew federal claims and instead, assert “state law” claims based on the very same alleged series of transactions and occurrences asserted in the federal securities actions currently being coordinated before this Court.

SLUSA provides that preempted causes of action may not be maintained in any state or federal court. See 15 U.S.C. §§ 77p(b) & 78bb(f)(1). SLUSA expressly preempts, and provides for the removal and dismissal of, any private class action seeking damages based on state statutory or common law that alleges misrepresentations or omissions of material facts or any manipulative or deceptive device or contrivance in connection with the purchase or sale of a nationally traded security.

The claims alleged in the four actions fall squarely within SLUSA’s ambit. The three claims of Lester, Durham, and Durham II are class claims banned by federal statute from maintenance in state court. They thus were removable to federal court and are by statute dismissable here. In dismissing such claims there is no reason for substituting by amendment a presumed by them non-dismissable state class claim or to pre-date its inception to an earlier date

of inception of the improper claim. Parenthetically none of these claims show any transaction which occurred between plaintiffs or any member of the class.

The fourth claim likewise is devoid of any transaction between the parties and consequently is not cognizable in any Court. The transfer order of the Judicial Panel on Multidistrict Litigation sent the case to this federal Court—it does not state a federal claim or a state cause of action.

Accordingly, the motions to dismiss all of the complaints are hereby granted and the motions to amend the complaints in Durham I (03 CV 1429), Lester (03 CV 1430), and Durham II (03 CV 2851) are denied.

So ordered.

May 6, 2003

MILTON POLLACK  
SENIOR UNITED STATES DISTRICT JUDGE