Keith S. Dubanevich, OSB No. 975200
Special Counsel, Office of the Attorney General
Email: keith.dubanevich@doj.state.or.us
Frederick M. Boss, OSB No. 911424
Division Administrator, Civil Enforcement
Email: fred.boss@doj.state.or.us
Simon Whang, OSB No. 035282
Assistant Attorney General
Email: simon.c.whang@doj.state.or.us
JOHN R. KROGER, Attorney General
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Telephone: (503) 934-4400
Facsimile: (503) 373-7067

Keith A. Ketterling, OSB No. 913368
Email: kketterling@stollberne.com
Scott A. Shorr, OSB No. 961873
Email: sshorr@stollberne.com
Jennifer S. Wagner, OSB No. 024470
Email: jwagner@stollberne.com
STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. Oak Street, Fifth Floor
Portland, Oregon 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

THE STATE OF OREGON, by and through OREGON 529 COLLEGE SAVINGS BOARD AND THE OREGON STATE TREASURER on behalf of the OREGON COLLEGE SAVINGS PLAN TRUST,

Plaintiff,

v.

OPPENHEIMERFUNDS, INC., a Colorado corporation; et al.,

Defendants.

Case No. 09-CV-06135-HO

PLAINTIFF THE STATE OF OREGON'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REMAND

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

PROCEDURAL POSTURE 2

FACTUAL BACKGROUND 3

ARGUMENT 5

I. STANDARD OF REVIEW. 5

II. THE STATE OF OREGON'S ACTION IS NOT REMOVABLE UNDER SLUSA. 6

  A. The State of Oregon's Action Is Not a Covered Class Action. 6

    1. The Oregon Trust Is a Single Person under SLUSA. 7

    2. The Claims Asserted in This Action Belong to the Oregon Trust and Do Not Involve Questions of Law or Fact Common to Participants or Designated Beneficiaries. 10

    3. No Participant or Designated Beneficiary Could Bring the Claims Asserted in the Complaint in an Individual Action. 14

  B. The State of Oregon's Action Is Exempt from SLUSA. 15

    1. The Oregon Board Is an Agency of the State of Oregon. 15

    2. The Oregon Board Would Be Entitled to Eleventh Amendment Immunity and Thus Is Exempt from SLUSA as a State Agency 17

III. DEFENDANTS WAIVED THEIR RIGHT TO REMOVE THIS ACTION. 20

  A. The Program Management Agreement Contains an Enforceable Forum Selection Clause. 20

  B. Even if OFI Private Has Not Waived Its Right to Remove, OFI and OFDI May Not Join in the Removal Petition and this Action Cannot Be Removed. 21

IV. THE COURT SHOULD AWARD PLAINTIFF ITS COSTS AND EXPENSES INCURRED AS A RESULT OF THE REMOVAL. 22

CONCLUSION 24

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

TABLE OF AUTHORITIES

CASES

Arora v. Hartford Life and Annuity Ins. Co.,
519 F. Supp. 2d 1021 (N.D. Cal. 2007) 3

Auchinleck v. Town of LaGrange,
167 F. Supp. 2d 1066 (E.D. Wis. 2001) 22

Babe Winkelman Productions, Inc. v. Sports Design and Development, Inc.,
2006 WL 980821, *vacated in part on reconsideration*, 2006 WL 2590635 (D. Minn. 2006) 23

Beentjes v. Placer County Air Pollution Control Dist.,
397 F.3d 775 (9th Cir. 2005) 18

Brown v. Demco, Inc.,
792 F.2d 478 (5th Cir. 1986) 22

Cape Ann Investors LLC v. Lepone,
296 F. Supp. 2d 4 (D. Mass. 2003) 7

Cohn v. Petsmart, Inc.,
281 F.3d 837 (9th Cir. 2002) 5

Docksider, Ltd. v. Sea Technology, Ltd.,
875 F.2d 762 (9th Cir. 1989) 20

Doe 1 v. AOL LLC,
552 F.3d 1077 (9th Cir. 2009) 20

Excell, Inc. v. Sterling Boiler & Mechanical, Inc.,
106 F.3d 318 (10th Cir. 1997) 22

Fisher v. Kanas,
288 Fed. App'x 721 (2d Cir. 2008) 14

Hewitt v. City of Stanton,
798 F.2d 1230 (9th Cir. 1986) 21

Kircher v. Putnam Funds Trust,
547 U.S. 633 (2006) 3, 5, 6

LaSala v. Bordier et Cie,
519 F.3d 121 (3d Cir. 2008) 7, 10, 11

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

M/S Bremen v. Zapata Off-Shore Co.,
407 U.S. 1 (1972) 20

Martin v. Franklin Capital Corp.,
546 U.S. 132 (2005) 22

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 14

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006) 6, 14, 15

Mitchell v. Los Angeles Community College District,
861 F.2d 198 (9th Cir. 1988) 17

Oregon v. American Int'l Group, Inc., Civ.
No. 08-6110 (Aug. 20, 2008) (Order) 17

Oregon v. Marsh & McLennan Cos.,
No. 05-1434 (Jan. 10, 2006) (Findings and Recommendation), *adopted by* No. 05-1463 (Jan. 27, 2006) (Opinion and Order) 18

Oregon v. Merck & Co., No. 05-1463 (Jan. 6, 2006) (Findings and Recommendation), *adopted by* No. 05-1463 (Jan. 25, 2006) (Opinion and Order) 18

Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.,
741 F.2d 273 (9th Cir. 1984) 6, 20

Phillips v. Audio Active Ltd.,
494 F.3d 378 (2d Cir. 2007) 20

RGH Liquidating Trust ex rel. Reliance Group Holdings, Inc. v. Deloitte & Touche LLP,
2007 WL 4097413 (N.Y. Sup. Ct. 2007) 8

Russell Corp. v. Am. Home Assur. Co.,
264 F.3d 1040 (11th Cir. 2001) 22

Salverson v. Western States Bankcard Ass'n,
731 F.2d 1423 (9th Cir. 1984) 5

Smith v. Arthur Andersen LLP,
421 F.3d 989 (9th Cir. 2005) 6, 7

Univ. of S. Alabama v. Am. Tobacco Co.,
168 F.3d 405 (11th Cir. 1999) 2

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

Vasquez v. N. County Transit Dist.,
292 F.3d 1049 (9th Cir. 2002) 21

STATUTES

15 U.S.C. § 78bb(f)(1) 6

15 U.S.C. § 78bb(f)(2) 6, 21

15 U.S.C. § 78bb(f)(3)(B)(i) 2, 15

15 U.S.C. § 78bb(f)(5)(B)(i)(I) 1, 7, 10

15 U.S.C. § 78bb(f)(5)(D) 1, 7

26 USC § 529(b)(1) 16, 18

28 U.S.C. § 1447(c) 22

O.R.S. 348.841 to 348.873 .... 3, 15

O.R.S. 348.841(2) 4

O.R.S. 348.844 .... 3, 19

O.R.S. 348.849 19

O.R.S. 348.853 .... 3, 16, 19

O.R.S. 348.853(1) 16

O.R.S. 348.857(1) 4

OTHER AUTHORITIES

Practice Guide: Federal Civil Procedure Before Trial § 2:889 (Nat'l Ed. 2008) 22

Report of The Senate Banking, Housing, and Urban Affairs Committee,
S. Rep. 105-182, 1998 WL 226714 (May 4, 1998 8

144 Cong. Rec. S4811, 1998 WL 243654 (May 13, 1998) 17

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

PRELIMINARY STATEMENT

On April 13, 2009, the State of Oregon, by and through the Oregon 529 College Savings Board ("Oregon Board") and the Oregon State Treasurer on behalf of the Oregon College Savings Plan Trust ("Oregon Trust" or "Plaintiff"), filed suit against Defendants OppenheimerFunds, Inc. ("OFI"), OppenheimerFunds Distributor, Inc ("OFDI"), and OFI Private Investments, Inc. ("OFI Private") (collectively, "Defendants") in the Circuit Court of the State of Oregon for the County of Marion. The State of Oregon's complaint asserts only state law claims against Defendants based on violations of the Oregon Securities Law, breach of contract, breach of fiduciary duty, negligence, and negligent misrepresentation. As the complaint alleges, Defendants' actions resulted in significant damages to the Oregon Trust. As is its legal and contractual right, the State of Oregon intends to pursue its claims in state court.

On May 15, 2009, Defendants filed a Notice of Removal removing this action to this Court. Defendants assert that this action is removable pursuant to the Securities Litigation Uniform Standards Act ("SLUSA").[1] This action, however, is not removable under SLUSA. First, the case is not a "covered class action," as that term is defined in SLUSA, because it does not seek damages on behalf of more than 50 persons. 15 U.S.C. § 78bb(f)(5)(B)(i)(I). The claims in this action are asserted on behalf of and belong to the Oregon Trust. SLUSA provides that "a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person . . . ." 15 U.S.C. § 78bb(f)(5)(D). The Oregon Trust constitutes an "other entity" under this provision and must be treated as one person.

[1] SLUSA amended both the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act"). The 1933 Act amendments are codified at 15 U.S.C. § 77p. The 1934 Act amendments, which are functionally identical, are codified at 15 U.S.C. § 78bb(f). Plaintiff cites only to the 1934 Act in this brief.

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL (503) 934-4400 FAX (503) 373-7067

Second, even if this action were a covered class action, SLUSA does not preclude, and therefore does not permit removal of, actions brought by a state. 15 U.S.C. § 78bb(f)(3)(B)(i). Because this action is brought by and through the Oregon Board, an agency of the State of Oregon, on behalf of the Oregon Trust, a trust established to hold funds contributed to a state-created college savings plan, the action is brought by a state and is not precluded by or removable under SLUSA.

Finally, even if this action were removable, Defendants have waived their right to remove. The Program Management Agreement between the Oregon Board, on the one hand, and OFI and OFDI, on the other, provides for exclusive jurisdiction over the claims asserted in Plaintiff's complaint in Marion County state court. *See* Program Management Agreement (hereinafter, "PMA") § 18.9 (Declaration of Scott A. Shorr in Support of the State of Oregon's Motion to Remand and in Response to Defendants' Motion to Dismiss (hereinafter, "Shorr Decl."), Ex. 1). An exclusive forum selection clause providing for jurisdiction in state court operates as a waiver of the parties' right to remove to federal court any action brought in the designated state forum.

PROCEDURAL POSTURE

After removing this action to this Court, Defendants filed a motion to dismiss. Plaintiff's motion to remand is being filed on the same day as Plaintiff's response to Defendants' motion to dismiss. The Court must decide whether this action should be remanded before considering Defendants' motion to dismiss. *Univ. of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) ("[W]hen an action is removed from state court, the district court first must determine whether it has original jurisdiction over the plaintiff's claims."); *see also Arora v.*

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

Hartford Life and Annuity Ins. Co., 519 F. Supp. 2d 1021, 1024 (N.D. Cal. 2007) (granting motion to remand and therefore declining to rule on motions to dismiss).

As noted above, Plaintiff argues that this action is not removable under SLUSA and, even if it were removable, Defendants waived their right to remove. Because a motion to remand asserting that an action is not removable under SLUSA presents a jurisdictional issue, *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 644 (2006), this Court first must determine whether this action is removable, which it is not. If the Court determines that this action is removable, the Court next should consider whether Defendants have waived their right to remove, which they have. If the Court determines that this action is not removable or that Defendants have waived their right to remove, then the Court must remand this action to Marion County state court. The Marion County court may then consider the substantive issue of whether some or all of Plaintiff's claims are precluded by SLUSA. The Court should consider Defendants' motion to dismiss only if it concludes both that this action is removable under SLUSA and that Defendants have not waived their right to remove.

FACTUAL BACKGROUND

The Oregon 529 College Savings Network ("OCS Network") is a qualified college savings program created by the Oregon Legislature. *See* O.R.S. 348.841 to 348.873. In creating the OCS Network, the Legislature intended to "increase[] the ability of families and individuals to save for higher education" and to allow them to take advantage of federal and state tax incentives while doing so. O.R.S. 348.844.

The Oregon Board is an agency of the State of Oregon tasked with "establish[ing], develop[ing], implement[ing] and maintain[ing]" the OCS Network and "ensuring the [N]etwork's compliance with section 529 of the Internal Revenue Code." O.R.S. 348.853; *see*

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

also Declaration of Michael Parker in Support of the State of Oregon's Motion to Remand ("Parker Decl.") ¶ 2. Pursuant to its statutorily granted authority, the Board established the Oregon College Savings Plan ("OCS Plan"), a qualified college savings plan, and the Oregon Trust to hold funds contributed to the OCS Plan. Plan Description and Account Agreement (Shorr Decl., Ex. 2); Second Amended and Restated Declaration of Trust Establishing Oregon College Savings Plan Trust ("Declaration of Trust") (Shorr Decl., Ex. 3).

Oregonians who wish to save for a child's college education by participating in the OCS Plan may open an account by making an initial contribution in the name of the child on whose behalf they wish to save (the "Designated Beneficiary"). O.R.S. 348.857(1). Those who open an account with the OCS Plan, or who subsequently assume ownership of an account, are referred to as Account Owners or Participants. O.R.S. 348.841(2); Declaration of Trust § 1.4(h) (Shorr Decl., Ex. 3). Each account must be invested in one or more of the Investment Portfolios offered by the Trust. PMA § 4.2 (Shorr Decl., Ex. 1). The Portfolios, in turn, are invested in one or more Underlying Funds. *Id.* § 4.4.

"Once a contribution is made it becomes part of the [N]etwork and [is] subject to the provisions of ORS 348.841 to 348.873." O.R.S. 348.857(1). Contributions to the Plan and earnings generated by the investment of these contributions are held in the Oregon Trust. Participants and Designated Beneficiaries have no "individual ownership or interests in any asset of the Trust." Declaration of Trust § 3.2 (Shorr Decl., Ex. 3). Title to all assets held in the Trust is vested solely in the Oregon Board. *Id.*

In 2004, the Oregon Board retained OFI and OFDI to manage the OCS Network and the OCS Plan. Pursuant to the Program Management Agreement, OFI and OFDI agreed, among other things:

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

(1) to invest and to manage assets held in the Oregon Trust, *id.* § 4.1;

(2) to invest the assets in each Investment Portfolio in accordance with allocation guidelines approved by the Oregon Board, *id.* § 5.2(a);

(3) to determine that the investment objectives, policies, and practices of the Underlying Funds are consistent with the Oregon Board's investment policy, *id.* § 5.2(b); and

(4) to review the Investment Portfolios and Underlying Funds to insure that they remain in accordance with the investment policy and allocation guidelines, and to propose changes thereto as necessary, *id.* §§ 4.1, 5.3(a).[2]

This action arises out of Defendants' breaches of their contractual duties under the Program Management Agreement, their violations of the Oregon Securities Law, and their violation of other legal duties owed to the Oregon Trust.

ARGUMENT

I. STANDARD OF REVIEW.

In considering this motion to remand, the Court must determine whether the case properly was removed to federal court. *Salverson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1426 (9th Cir. 1984). The burden of proving that removal is appropriate rests with Defendants. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002).

This motion presents the Court with two issues: (1) whether this action is removable under SLUSA; and, (2) if the action is removable, whether Defendants waived their right to remove. A motion to remand asserting that an action is not removable under SLUSA presents a jurisdictional issue. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 644 (2006). Subject matter jurisdiction over cases removed to federal court under SLUSA "is restricted to precluded actions

[2] OFI later attempted to delegate, or did delegate, certain of its duties and responsibilities under the Program Management Agreement to OFI Private. Compl. ¶ 32. OFI failed to notify the Board of this delegation as required by the Agreement. *Id.*

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

defined by [15 U.S.C. § 78bb(f)(1)]." *Id.* at 643. "If the action is not precluded, the federal court . . . has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court . . . ." *Id.* at 644. Therefore, the Court should decide whether Defendants waived their right to remove only if it first determines that this action is removable. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 278 (9th Cir. 1984) (before reaching the substantive contract law issue of whether defendant waived its right to remove by agreeing to a forum selection clause, the district court first should have determined whether it had subject matter jurisdiction under the removal statute).

II. THE STATE OF OREGON'S ACTION IS NOT REMOVABLE UNDER SLUSA.

SLUSA provides that "[a]ny covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending . . . ." 15 U.S.C. § 78bb(f)(2). The Supreme Court has held that "as set forth in paragraph (1)" means that an action is removable to federal court under SLUSA only if it is the type of action that SLUSA precludes. *Kircher*, 547 U.S. at 642-43. Thus, an action is removable under SLUSA only if it is (1) a covered class action (2) of the type precluded by SLUSA. This action is not removable because it is not a covered class action and, even if it were, it is not the type of action precluded by SLUSA.

A. The State of Oregon's Action Is Not a Covered Class Action.

SLUSA does not preempt all state-law claims relating to the purchase or sale of securities. Rather, because it applies only to covered class actions, SLUSA "simply denies plaintiffs the right to use the class-action device to vindicate certain claims. The Act does not deny any individual plaintiff . . . the right to enforce any state-law cause of action that may exist." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 87 (2006).

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

1. The Oregon Trust Is a Single Person under SLUSA.

SLUSA defines "covered class action," in relevant part, as "any single lawsuit in which 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 . . . predominate over any questions affecting only individual persons or members." 15 U.S.C. § 78bb(f)(5)(B)(i)(I). In determining the number of persons or prospective class members on whose behalf damages are sought, "a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action." 15 U.S.C. § 78bb(f)(5)(D). "This means that the court is to follow the usual rule of not looking through an entity to its constituents unless the entity was established for the purpose of bringing the action, *i.e.*, to circumvent SLUSA." *LaSala v. Bordier et Cie*, 519 F.3d 121, 132-33 (3d Cir. 2008). Here, the Oregon Trust is a single entity that was established to hold the OCS Plan assets, not to bring this action.

Courts that have considered this provision have held uniformly that an entity not established primarily for the purpose of bringing litigation must be treated as one person under SLUSA. In *Cape Ann Investors LLC v. Lepone*, 296 F. Supp. 2d 4 (D. Mass. 2003), the court held that, under SLUSA's definition of "person," an entity is not one person if its "primary purpose" is to pursue causes of action. 296 F. Supp. 2d at 10. The Ninth Circuit adopted this "sensible definition" in *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1007 (9th Cir. 2005). *Smith* held that a bankruptcy trustee whose appointment provided that he was to "'act as the Estates' representative for all purposes,' and not just for the purpose of pursuing causes of

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

action," was one person and that the action brought by the trustee therefore was not a covered class action under SLUSA. *Id.* at 1008.

Similarly, in *RGH Liquidating Trust ex rel. Reliance Group Holdings, Inc. v. Deloitte & Touche LLP*, 2007 WL 4097413, *2-*3 (N.Y. Sup. Ct. 2007), the court found that a trust established to oversee the liquidation of an estate in bankruptcy was not established primarily to pursue litigation. The court therefore held that the trust constituted a "single entity under SLUSA and its claims are not preempted." *Id.*

SLUSA's legislative history supports this interpretation of "covered class action." The Senate Banking, Housing, and Urban Affairs Committee Report reported that, in the final version of the SLUSA bill:

> The class action definition has been changed from the original text of S. 1260 to ensure that the legislation does not cover instances in which a person or entity is duly authorized by law, other than a provision of state or federal law governing class action procedures, to seek damages on behalf of another person or entity. Thus, a trustee in bankruptcy, a guardian, a receiver, and other persons or entities duly authorized by law (other than by a provision of state or federal law governing class action procedures) to seek damages on behalf of another person or entity would not be covered by this provision.

S. Rep. 105-182, 1998 WL 226714, at *7 (May 4, 1998) (emphasis added). In short, SLUSA was not intended to preclude or make removable actions brought by a single entity that is legally authorized to bring suit on behalf of another person unless the entity's power to bring suit stems from laws governing class action procedures.

Here, the Oregon Trust was not established for the purpose of bringing this – or any other – litigation. Rather, the Oregon Board, pursuant to its statutorily granted authority to establish and administer the OCS Network and the OCS Plan, established the Oregon Trust "to carry out, promote and operate the OCS Plan . . . ." Declaration of Trust § 1.2 (Shorr Decl., Ex. 3). Nor is

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL (503) 934-4400 FAX (503) 373-7067

the Oregon Board authorized to bring this action on behalf of the Oregon Trust by a provision of state or federal law governing class action procedures. The Declaration of Trust provides:

> In any judicial proceeding affecting any property or security constituting, in whole or in part, a Portfolio, each Participant and Designated Beneficiary shall be deemed to be fully represented by the Trustees for all purposes if the Trustees shall be parties to such proceeding, and as such, duly before the tribunal in which such proceeding shall be pending.

Id. § 12.5. In other words, the Oregon Board, on behalf of the Oregon Trust, is duly authorized to assert claims relating to securities held in the Trust. Therefore, the Oregon Trust constitutes a single person for purposes of SLUSA and, as a result, this action is not a covered class action and is not precluded by or removable under SLUSA.

The fact that "each Participant and Designated Beneficiary shall be deemed to be fully represented by the Trustees" does not transform an action brought by the Oregon Board into an action by more than 50 persons or prospective class members. This action is not a class action. The Participants and Designated Beneficiaries are not prospective class members. Indeed, neither the Participants nor the Designated Beneficiaries have the right to bring the claims asserted in the complaint either on their own behalf or as representatives of a class. Nor is this action some other form of representative action intended to circumvent SLUSA's definition of covered class action. Instead, this action is brought by the Oregon Board, which is duly authorized by law – other than by a provision of state or federal law governing class action procedures – to bring such actions. As such, this is an action by an entity that is a single person under SLUSA's definition of covered class action and it is neither precluded nor removable.

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

2. The Claims Asserted in This Action Belong to the Oregon Trust and Do Not Involve Questions of Law or Fact Common to Participants or Designated Beneficiaries.

In addition to defining covered class action as an action where damages are sought on behalf of more than 50 persons, SLUSA also requires that "questions of law or fact common to *those persons*" must predominate. 15 U.S.C. § 78bb(f)(5)(B)(i)(I) (emphasis added); *see also LaSala*, 519 F.3d at 133. In *LaSala*, plaintiffs – trustees of a trust created to take title to and prosecute the claims of a bankrupt corporation on behalf of purchasers of the corporation's stock – asserted, among other things, breach of fiduciary duty claims against two banks that allegedly assisted the corporation's directors in concealing insider trading. 519 F.3d at 126-27. The district court dismissed these claims on the ground that the claims were brought on behalf of the 6,000 beneficiaries of the trust and therefore were precluded by SLUSA. *Id.* at 133. On appeal, the Third Circuit stated that, in determining whether a trust should be counted as a single person under SLUSA or, instead, whether each beneficiary of the trust should be counted as a separate person, "it is first necessary to recall the nature and ownership of the[] claims." *Id.* The court noted that the breach of fiduciary duty claims originally belonged to the corporation, but passed to the corporation's bankruptcy estate when the corporation entered bankruptcy. *Id.* The bankruptcy estate, in turn, assigned the claims to the trust. *Id.* While the court admitted that, "[a]t first glance, one might think that the claims are brought 'on behalf of' the [p]urchasers," it found that a closer examination of SLUSA's language demonstrated that this initial impression was incorrect. *Id.* at 133-34.

First, the court noted that "[t]here are no questions of law or fact that involve [the purchasers], much less common ones that predominate over individual ones." *Id.* at 133. Instead, the relevant facts were whether the directors owed fiduciary duties to the corporation,

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

whether the directors violated those fiduciary duties, whether the banks aided and abetted the directors' violations of their fiduciary duties, and whether the corporation has thereby been damaged. *Id.* at 133-34. As the court stated, "[t]he Purchasers need not prove anything regarding themselves in order to succeed; indeed, they need not even prove that they were injured . . . ." *Id.* at 134.

Second, the court found that SLUSA "seems to use the terms 'persons' and 'members of the prospective class' to refer to the original owners of the claim – those injured by the complained-of conduct, as *those are the persons who might have common questions of law or fact* related to the claim that predominate over individual questions of law or fact." *Id.* (emphasis added). The corporation, not the purchasers, was the party damaged by the alleged breaches of fiduciary duty. The court therefore concluded that the breach of fiduciary duty claims were brought – for purposes of SLUSA – on behalf of the corporation, rather than on behalf of the purchasers. *Id.* The court further found that this understanding of SLUSA is supported by the section of SLUSA providing that an entity counts as one person unless established for the purpose of litigation and by SLUSA's legislative history. *Id.* at 134-36. Therefore, the court held that SLUSA did not preclude the breach of fiduciary duty claims. *Id.* at 137.

The *LaSala* Court understood that SLUSA was not intended to preclude or make removable actions involving claims that belong to a single entity. Rather, it was intended to preclude actions by an entity only where that entity was created for the purpose of bringing litigation.

Here, the claims asserted in Plaintiff's complaint are brought on behalf of the Oregon Trust. Moreover, the questions of law and fact with respect to each claim do not involve

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

Participants or Designated Beneficiaries. The claims belong to the Oregon Trust, and it is the Oregon Trust that was damaged by Defendants' conduct.[3]

Plaintiff's complaint alleges violations of the Oregon Securities Law with respect to the sale of securities to the *Oregon Trust*, not to the Participants or Designated Beneficiaries. Compl. ¶¶ 105-22. This is because the securities at issue were purchased by the Trust and title to those securities is vested solely in the Oregon Board. Declaration of Trust § 3.2 (Shorr Decl., Ex. 3). The rights of Participants and Designated Beneficiaries with regard to Trust assets – such as the securities at issue - are set forth in the Declaration of Trust, which states that "[n]o Participant or . . . Designated Beneficiary shall be deemed to have individual ownership or interests in any asset of the Trust . . . ." *Id.* In addition, the Oregon Board is "granted full power and authority to invest and reinvest Trust assets." *Id.* § 3.3. Neither Participants nor Designated Beneficiaries "have right to any title in or to the whole or any part of the Trust property." *Id.* § 4.1. Therefore, any claim of securities law violations with regard to the purchase or sale of these securities belongs to the Trust.

No question of law or fact relevant to the Oregon Securities Law claims involves the Participants or Designated Beneficiaries. The relevant questions involve only the Oregon Trust and the Oregon Board. For instance, one relevant question is whether Defendants sold securities to the Trust, *not to the Participants or Designated Beneficiaries*, in violation of the Oregon

[3] Of course, any recovery ultimately will be credited in some manner to the accounts of certain Designated Beneficiaries *following*, not as part of, this action. *See, e.g.*, Compl. ¶ 10 ("[T]he Oregon Board, on behalf of the Oregon Trust, seeks to recover damages suffered by the Oregon Trust and the many Oregon families who lost substantial amounts of their college savings as the result of Defendants' wrongdoing."). This does not mean, however, that this action is a representative action. Regardless of how amounts recovered by the Trust ultimately will be distributed, the claims asserted in this action belong to the Trust.

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

Securities Law. Another relevant question is whether Defendants made material representations or omissions to the Oregon Board.

The complaint also alleges that Defendants breached contractual duties owed to the Oregon Trust and the Oregon Board. Compl. ¶¶ 123-29. The Program Management Agreement, on which the breach of contract claim is based, provides that "[t]he provisions of this Agreement are solely for the benefit of OFI, OFDI and the Board, as well as the Trust." PMA § 18.8 (Shorr Decl., Ex. 1). It further provides that no Participant or Designated Beneficiary has "any legal or equitable right, remedy or claim under or in respect of this Agreement." *Id.* In other words, Participants and Designated Beneficiaries are not third party beneficiaries of the Program Management Agreement. Thus, no Participant or Designated Beneficiary could bring an individual action for breach of contract against Defendants.

Again, no question of law or fact relevant to this claim involves the Participants or Designated Beneficiaries. Rather, the relevant questions include whether a contract existed between Defendants and the Oregon Board, whether Defendants owed duties to the Board and the Oregon Trust pursuant to that contract, whether Defendants breached those duties, and whether the Trust was thereby damaged.

Finally, the complaint alleges breach of fiduciary duty, negligence and negligent misrepresentation claims, each of which asserts that Defendants breached duties owed to the Oregon Trust – not to the Participants or Designated Beneficiaries. Compl. ¶¶ 130-46. The relevant questions of law and fact with regard to these claims are whether Defendants owed the alleged duties to the Oregon Trust, whether Defendants breached these duties, and whether the Trust was thereby damaged. None of these questions involve the Participants or Designated Beneficiaries.

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

In sum, the claims asserted in Plaintiff's complaint all belong to the Oregon Trust. Therefore, for purposes of SLUSA, these claims are asserted on behalf of the Trust, not on behalf of Participants or Designated Beneficiaries and, thus, the claims are not precluded by or removable under SLUSA.

3. No Participant or Designated Beneficiary Could Bring the Claims Asserted in the Complaint in an Individual Action.

The fact that SLUSA does not completely pre-empt plaintiffs from bringing any state-law securities claim is central to understanding the statute. As the Supreme Court stated in *Dabit*:

> In concluding that SLUSA pre-empts state-law holder class-action claims of the kind alleged in [plaintiff's] complaint, we do not lose sight of the general 'presum[ption] that Congress does not cavalierly pre-empt state-law causes of action.' But that presumption carries less force here than in other contexts because SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class-action device to vindicate certain claims.

Dabit, 547 U.S. at 87 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Other courts also have recognized the importance of the distinction between precluding a plaintiff from bringing an action as a class action, on the one hand, and completely pre-empting state law claims, on the other hand. For instance, in *Fisher v. Kanas*, 288 Fed. App'x 721, 723 (2d Cir. 2008), the court stated that "neither SLUSA nor *Dabit* has deprived [plaintiff] or others similarly situated of a state law cause of action for securities fraud, or breach of fiduciary duty." The *Fisher* Court further stated that plaintiff "was free to bring her state law claim as an individual (or on behalf of fewer than 50 others). Because she did not, however, her state law claim – as framed – falls within SLUSA's scope." *Id.*

The claims asserted in the Oregon Trust's complaint belong to the Trust, not to the Participants or the Designated Beneficiaries. If SLUSA precludes the Trust's claims, no

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

Participant or Designated Beneficiary will be able to bring these claims as an individual. SLUSA preclusion would effectively eliminate any possibility of holding Defendants accountable for their actions. No court, including the Supreme Court in *Dabit*, has suggested that this was Congress's intent when it enacted SLUSA.

B. The State of Oregon's Action Is Exempt from SLUSA.

Even if this action were a covered class action, it is not the type of action that SLUSA precludes. While SLUSA precludes private parties from maintaining certain state-law securities claims, SLUSA permits states to maintain claims that otherwise would be precluded. Specifically, SLUSA contains a state action exception, which provides that, "[n]otwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf. . . ." 15 U.S.C. § 78bb(f)(3)(B)(i). The Supreme Court has recognized that, by means of this provision, SLUSA "carefully exempts from its operation . . . actions brought by a state agency." *Dabit*, 547 U.S. at 87.

As discussed above, this action is brought by and through the Oregon Board on behalf of the Oregon Trust, and the claims asserted belong to the Oregon Trust. The Board is an agency of the State of Oregon. Parker Decl. ¶ 2. The Board created the Trust to hold funds contributed to the Network. As such, the Trust also is part of the State of Oregon. Therefore, this action is exempt from SLUSA.

1. The Oregon Board Is an Agency of the State of Oregon.

The OCS Network is a college savings plan created by the Oregon Legislature and its purpose, powers and duties are dictated by statute. *See* O.R.S 348.841 to 348.873. The Legislature created the Oregon Board "[t]o establish, develop, implement and maintain the [OCS

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

Network] in a manner consistent with . . . section 529 of the Internal Revenue Code." O.R.S. 348.853(1). Section 529 provides that a college savings plan qualifies for preferential tax treatment if it is "a program established and maintained by a State or agency or instrumentality thereof or by 1 or more eligible educational institutions." 26 USC § 529(b)(1). The OCS Network qualifies for such preferential tax treatment because it was established and is maintained by the Oregon Board. Thus, the only logical conclusion is that the Board is a state agency. Indeed, the Program Management Agreement entered into by OFI and OFDI is with *the State of Oregon* acting by and through the Oregon Board, not with the Oregon Board or the OCS Network as an entity separate from the State. Defendants therefore knew that they were dealing with the State, and that any breach of their duties and obligations under the Agreement would result in action against them by the State. The Declaration of Trust also refers to the OCS Network as "an instrumentality of the State of Oregon." Declaration of Trust, Introduction (Shorr Decl., Ex. 3). In short, the Oregon Board is an agency of the State of Oregon and this action, which is brought by the Board on behalf of the Oregon Trust, is exempt from SLUSA.

SLUSA's legislative history supports the conclusion that SLUSA was not intended to preclude claims brought by state agencies, such as the Oregon Board, that administer state-created college savings plans. The state action exception was proposed and agreed to in the Senate as an amendment to the SLUSA bill. In proposing the amendment, Senator Sarbanes, the amendment's sponsor, stated:

> This amendment preserves the right of State and local governments and their pension plans to bring securities fraud suits under State law. They have never been professional plaintiffs. They have never abused the system. They have to go through an elaborate process to even bring suit. They obviously are concerned with protecting the public and the taxpayers, and it seems to me a reasonable exemption from the provisions of this bill as it applies to these governmental units.

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

144 Cong. Rec. S4811, 1998 WL 243654, *S4811 (May 13, 1998). Each reason offered by Senator Sarbanes for including a state action exception in SLUSA applies fully to the Oregon Board and similar agencies that administer college savings plans in other states. Agencies that administer college savings plans never have been professional plaintiffs; they never have abused the class action system; they must go through an elaborate process to bring suit; and they are concerned with public welfare. *See* Parker Decl. ¶ 5.

The comments of Senator D'Amato, the SLUSA bill's sponsor, are even more instructive. Senator D'Amato stated that the "classes [of plaintiff excluded by this amendment] are comprised solely of States, counties, and other public entities. There is no record of such class-action suits being brought. . . . We accept the amendment." 144 Cong. Rec. at S4811 (statement of Sen. D'Amato). In short, even the sponsors of this legislation were not concerned about actions brought by state agencies such as the Oregon Board.

2. The Oregon Board Would Be Entitled to Eleventh Amendment Immunity and Thus Is Exempt from SLUSA as a State Agency.

The conclusion that the Oregon Board is a state agency is further supported by the fact that, under the Eleventh Amendment, both the Board and the Oregon Trust would be immune from suit in federal court. To determine whether an entity is entitled to Eleventh Amendment immunity, courts must consider whether the entity is an arm of the state. *Mitchell v. Los Angeles Community College District*, 861 F.2d 198, 201 (9th Cir. 1988). This Court, as well as two other District of Oregon judges, previously have determined that the Oregon Public Employees Retirement Fund, a fund quite similar to the Oregon Trust, is an arm of the State of Oregon. *Oregon v. American Int'l Group, Inc.*, Civ. No. 08-6110 (Aug. 20, 2008) (Order) (hereinafter, "*American Int'l Group*") (Attached to State of Oregon's Appendix of Unpublished Authorities in

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

Support of Motion to Remand and in Response to Defendants' Motion to Dismiss (hereinafter, "Appendix"), Tab 1); *Oregon v. Merck & Co.*, No. 05-1463 (Jan. 6, 2006) (Findings and Recommendation), *adopted by* No. 05-1463 (Jan. 25, 2006) (Opinion and Order) (hereinafter, "*Merck & Co.*") (Appendix, Tab 2); *Oregon v. Marsh & McLennan Cos.*, No. 05-1434 (Jan. 10, 2006) (Findings and Recommendation), *adopted by* No. 05-1463 (Jan. 27, 2006) (Opinion and Order) (Appendix, Tab 3). Under the same analysis, the Oregon Trust and the Oregon Board also would be entitled to immunity under Eleventh Amendment.

First, as with any agency of the State of Oregon, a tort or property claim against the Oregon Trust or Oregon Board would be handled – and any judgment arising out of such a claim would be paid – by the Risk Management Division of the Oregon Department of Administrative Services, which is the State of Oregon's manager for self-insurance, insurance and risk control. Parker Decl. ¶¶ 3-5.

Second, the Oregon Trust and the Oregon Board perform a central governmental function. Both the Trust and the Board address "a matter of statewide rather than local or municipal concern" and "the State exercises centralized governmental control over" the Trust and the Board. *See Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775, 782 (9th Cir. 2005) (citations omitted). Section 529 of the Internal Revenue Code reserves the right to maintain qualified college savings plans to "State[s] or agenc[ies] or instrumentalit[ies] thereof," rather than to municipal or regional governmental entities. 26 USC § 529(b)(1). This supports the conclusion that the Trust and the Board address a matter of statewide rather than local or municipal concern. Moreover, when it created the Oregon Board to administer the OCS Network, the Oregon Legislature acknowledged that the Network serves a statewide purpose: "It is the intent of the Legislative Assembly . . . to create a higher education qualified tuition savings

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

program . . . [t]hat increases the ability of families and individuals to save for higher education." O.R.S. 348.844(1). In addition, the Board is entirely a creation of statute and the State of Oregon exercises extensive control over the Board. The Board is composed of the publicly elected State Treasurer and, with the exception of one member appointed by the elected members of State Board of Higher Education, appointees of the State Treasurer who serve at his pleasure. O.R.S. 348.849. The Board's powers and duties are enumerated by statute, *see* O.R.S. 348.853, as is participation in the OCS Network, *see* O.R.S. 348.857. Finally, the Board is required to "publish a biennial report to the Governor and the Legislative Assembly detailing the board's activities." O.R.S. 348.873.

Third, the Board does not take property in its own name. While the title to property held in the Oregon Trust is vested in the Oregon Board, it is vested in the Board only as a fiduciary. *See* Declaration of Trust § 3.2 (Shorr Decl., Ex. 3). The Board may use or dispose of Trust property only in accordance with Oregon law and the terms of the Declaration of Trust. In particular, the Board must "maintain, invest and reinvest the funds" in the manner set forth by statute. *See* O.R.S. 348.853(3). Thus, to the limited extent that the Board "takes property," it does so only as a fiduciary.

Finally, the Oregon Trust and the Oregon Board are not separately incorporated and neither operates like a separate corporation. To the extent that the Board is tasked with managing the OCS Network, its role is dictated by statute and it exercises those powers under a cloak of extensive state control.

Based on these considerations, the Board would be entitled to Eleventh Amendment immunity. Therefore, the Board also falls within the broader SLUSA state action exception.

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

III. DEFENDANTS WAIVED THEIR RIGHT TO REMOVE THIS ACTION.

A defendant who is party to a valid and enforceable forum selection clause providing for jurisdiction in state court waives its right to remove an action to federal court. *See Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 279-81 (9th Cir. 1984) (affirming remand order where defendant was party to an enforceable forum selection clause). "A forum selection clause is presumptively valid; the party seeking to avoid a forum selection clause bears a 'heavy burden' to establish a ground upon which we will conclude the clause is unenforceable." *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972)). Furthermore, a forum selection clause is mandatory, and therefore enforceable, if it provides for exclusive jurisdiction in the selected forum, as opposed to a permissive forum selection clause that simply provides that the selected forum or venue is among those where an action may be brought. *See, e.g.*, *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 386-87 (2d Cir. 2007) ("The parties' use of the phrase 'are to be brought' establishes England as an obligatory venue for proceedings within the scope of the clause."); *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 763-64 (9th Cir. 1989).

A. The Program Management Agreement Contains an Enforceable Forum Selection Clause.

Defendants OFI and OFDI are parties to the Program Management Agreement. The Agreement contains the following forum selection clause:

> Any claim, action, suit or proceeding (collectively, 'Claim') . . . that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the Circuit Court of Marion County for the State of Oregon; provided, however, if a Claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon.

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

PMA § 18.9 (Shorr Decl., Ex. 1). Plaintiff's claims plainly arise from or relate to the Program Management Agreement. The forum selection clause therefore applies to these claims. Moreover, because it provides for jurisdiction "solely and exclusively" in Marion County state court, the forum selection clause is a mandatory clause and therefore is enforceable. Plaintiff's claims all are state law claims and therefore can be brought in state court. Even if these claims are removable under SLUSA, that does not mean that they must be brought in federal court. SLUSA does not provide for exclusive federal jurisdiction over state law securities claims. In jurisdictional terms, SLUSA provides only that precluded state claims "shall be removable." 15 U.S.C. § 78bb(f)(2). It does not provide that precluded state law claims *must* be removed, or that state courts are divested of jurisdiction to determine whether claims are precluded. SLUSA also provides no basis for concluding that a defendant cannot waive its right to remove an action asserting precluded claims. Thus, Marion County state court is a proper forum for Plaintiff's action, and that court properly may decide whether SLUSA precludes Plaintiff's claims. Because the Program Management Agreement provides for exclusive jurisdiction in Marion County state court, Defendants have waived their right to remove this action to federal court.

B. Even if OFI Private Has Not Waived Its Right to Remove, OFI and OFDI May Not Join in the Removal Petition and this Action Cannot Be Removed.

Even if OFI Private is not bound by the forum selection clause, Defendants' are barred from seeking removal. It is well established that all defendants must join in a removal petition. *Vasquez v. N. County Transit Dist.*, 292 F.3d 1049, 1060 n.5 (9th Cir. 2002) (citations omitted); *Hewitt v. City of Stanton*, 798 F.2d 1230, 1232 (9th Cir. 1986) (citations omitted). If one or more defendant has waived its right to remove, that defendant may not join in the removal petition and the action therefore cannot be removed. *Russell Corp. v. Am. Home Assur. Co.*, 264 F.3d 1040,

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

1048-49 (11th Cir. 2001); *Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986); *Auchinleck v. Town of LaGrange*, 167 F. Supp. 2d 1066, 1068 (E.D. Wis. 2001); William W. Schwarzer, et al., *Practice Guide: Federal Civil Procedure Before Trial* § 2:889 (Nat'l Ed. 2008) ("Because all defendants must join in removal, a valid waiver of the right to remove obtained from one defendant cuts off the removal rights of the others as well.") (citations omitted). Because OFI and OFDI waived their right to remove by agreeing to the Program Management Agreement's exclusive forum selection clause, this action cannot be removed.

IV. THE COURT SHOULD AWARD PLAINTIFF ITS COSTS AND EXPENSES INCURRED AS A RESULT OF THE REMOVAL.

An order remanding a removed case to state court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). In *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005), the Supreme Court held that "courts may award attorney's fees under § 1447(c) . . . where the removing party lacked an objectively reasonable basis for seeking removal." 546 U.S. at 141.

As noted above, it is well established within the Ninth Circuit that an exclusive forum selection clause operates as a waiver of the right to remove.[4] Defendants knew full well that the Program Management Agreement provides for exclusive jurisdiction in Marion County state court and knew or should have known that they had no right to remove this action. Therefore, Defendants had no objectively reasonable basis for seeking removal. *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 321-22 (10th Cir. 1997) (where defendant was party to a "clear and mandatory" forum selection clause requiring that the action be brought in state

[4] While the Court may not reach the forum selection clause issue if it finds that this action is not removable under SLUSA, the Court still should consider the forum selection clause in determining whether Defendants had an objectively reasonable basis for removal.

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

court, defendant "had little or no basis for seeking removal" and the district court properly awarded plaintiff its costs and expenses); *Babe Winkelman Productions, Inc. v. Sports Design and Development, Inc.*, 2006 WL 980821 at *4-*5, *vacated in part on reconsideration*, 2006 WL 2590635 (D. Minn. 2006). Nonetheless, Defendants refused to withdraw their Notice of Removal even after Plaintiff's counsel reminded Defendants' counsel of the forum selection clause. Letter from Scott Shorr to Barnes Ellis and Brad Daniels (May 29, 2009) (Shorr Decl., Ex. 4); Letter from Barnes Ellis to Scott Shorr (June 2, 2009) (Shorr Decl., Ex. 5). Plaintiff should not be made to bear the costs and expenses it has incurred and continues to incur as a result of Defendants ignoring their contractual obligation to litigate this action in Marion County.

Even if Defendants had not waived their right to remove, Plaintiff still would be entitled to an award of its fees and expenses because Defendants had no objectively reasonable basis for seeking removal under SLUSA. As discussed above, SLUSA applies only to actions brought on behalf of 50 or more persons. As parties to the Program Management Agreement, Defendants knew that they owed obligations under that Agreement only to the Oregon Trust and the Oregon Board and that an action arising under that Agreement could only be brought on behalf of the Trust. Defendants also knew that title to the investments that are the subject of Plaintiff's Oregon Securities Laws claims was held solely by the Trust. Defendants' decision to seek removal despite these facts can only be seen as a tactical maneuver to delay Plaintiff's prosecution of its claims. While Defendants already have achieved their objective of delaying this action, they at least should be made to bear the costs and expenses incurred by Plaintiff as a result of removal.

Department of Justice
1162 Court Street, NE
SALEM, OREGON 97301-4096
TEL. (503) 934-4400 FAX (503) 373-7067

CONCLUSION

For all of the reasons stated above, the State of Oregon respectfully requests that the Court grant its Motion to Remand and award Plaintiff its costs and expenses, including attorneys' fees, incurred as a result of the removal.

DATED this 9th day of June, 2009.

Keith S. Dubanevich, OSB No. 975200
Special Counsel, Office of the Attorney General
Email: keith.dubanevich@doj.state.or.us
Frederick M. Boss, OSB No. 911424
Division Administrator, Civil Enforcement
Email: fred.boss@doj.state.or.us
Simon Whang, OSB No. 035282
Assistant Attorney General
Email: simon.c.whang@doj.state.or.us
JOHN R. KROGER, Attorney General
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Telephone: (503) 934-4400
Facsimile: (503) 373-7067

and

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

By: /s/ Keith A. Ketterling
Keith A. Ketterling, OSB No. 91336
Scott A. Shorr, OSB No. 961873
Jennifer S. Wagner, OSB No. 024470

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 SW Oak Street, 5th Floor
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: kketterling@stollberne.com
sshorr@stollberne.com
jwagner@stollberne.com

Attorneys for Plaintiff

Trial Attorneys: Keith S. Dubanevich, OSB No. 975200
Keith A. Ketterling, OSB No. 913368