United States Courts
Southern District of Texas
FILED
MAY 09 2002
Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES LITIGATION

No. H-01-3624

Hon. Melinda Harmon

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE CONSOLIDATED COMPLAINT BY DEFENDANTS PHILIP RANDALL AND ROMAN McALINDON

Defendants Roman McAlindon and Philip Randall, by their attorneys, respectfully submit this memorandum in support of their motion to dismiss the Consolidated Complaint ("the Complaint").

INTRODUCTION

Plaintiffs' Complaint names as defendants two partners of Andersen-United Kingdom, Philip Randall and Roman McAlindon. Andersen-United Kingdom, in turn, is an accounting firm that has entered into a member firm agreement with Andersen Worldwide Societe Cooperative ("AWSC"), a Swiss Societe Cooperative formed under the Swiss Code of Obligations and domiciled in Geneva, Switzerland. AWSC coordinates the activities of various distinct legal entities around the world, including Arthur Andersen LLP ("Andersen LLP"), that have contracted to participate in the Andersen network. Although Andersen LLP contracted with and signed audit opinions for Enron, and it is Andersen LLP's work that the Complaint attacks, plaintiffs have nevertheless named Messrs. Randall and McAlindon as defendants, seeking to hold them liable under Sections 11 and 15 of the Securities Act of 1933 and under Sections 10(b) and 20 of the Securities Exchange Act of 1934. Plaintiffs have named Messrs. Randall and McAlindon as defendants even though plaintiffs do not allege that either of them performed any services whatsoever for Enron, directly made or participated in any alleged misrepresentation relating to Enron, or was a partner of Andersen LLP.

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The Complaint's allegations regarding both Mr. McAlindon and Mr. Randall are extremely limited. The Complaint first states that plaintiffs are not suing either individual for fraud, that "no allegations of fraud are made against these defendants," and that both are sued only under the non-fraud provisions of the 1933 and 1934 Acts. (Cmplt. n.1.) As for Mr. Randall, the Complaint alleges that he was

> Andersen's Country Managing Partner of Arthur Andersen-United Kingdom throughout the Class Period until 1/10/01, when he became Managing Partner-Global Operations.

(Cmplt. ¶ 93(u).) The Complaint alleges that Mr. McAlindon was

> Arthur Andersen's Regional Managing Partner for the Nordic Countries, Southern and Western Africa, Ireland, India and Israel until 3/15/01, when he was appointed to the CEEMEIA – ("Central and Eastern Europe, Middle East, India and Africa") on 3/01.

(Cmplt. ¶ 93(v).) The Complaint then asserts that both individuals are "named as control persons of Andersen pursuant to §20(a) of the 1934 Act and §15 of the 1933 Act." (Cmplt. ¶ 96.) The Complaint makes no other allegations whatsoever against either Mr. Randall or Mr. McAlindon.

This Court need not review the sufficiency of plaintiffs' sparse allegations against Mr. Randall and Mr. McAlindon, however, for two reasons. First, they have not been properly served, and second, this Court lacks personal jurisdiction over them. The limited contacts that the two individuals had with the United States, and the almost non-existent contacts with Texas, coupled with the fact that neither partner of the United Kingdom firm did any work for Enron or related entities dictates that this Court lacks personal jurisdiction.

ARGUMENT

I. Mr. Randall and Mr. McAlindon Were Not Properly Served With the Complaint.

Plaintiffs have yet to properly serve Mr. Randall or Mr. McAlindon. Neither has received summons as required by Federal Rule of Civil Procedure 4(c)(1).[1] (See Affidavit of Mr. Philip Randall ("Randall Aff.") (attached as Exhibit A) ¶ 11; Affidavit of Mr. Roman McAlindon ("McAlindon Aff.") (attached as Exhibit B) ¶ 11.) The Supreme Court has found that lack of service of a summons is not a mere technical defect, but rather a necessary component of procedure, without which an entity or individual cannot be brought before a court. "[T]he summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action. . . ." Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 351 (1999). Without the service of the summons, Messrs. Randall and McAlindon are not parties to this case. "[O]ne becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend. . . . ." Id. at 350. Thus, plaintiffs have failed to make any gesture toward Mr. Randall or Mr. McAlindon that could constitute an initiation of action.[2] Thus, lack of service alone provides an independent basis for dismissal.[3]

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[1] Plaintiffs also have failed to serve Mr. Randall and Mr. McAlindon in accordance with "any internationally agreed means reasonably calculated to give notice." Fed. R. Civ. P. 4(f)(1). Service on Mr. Randall and Mr. McAlindon must abide by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, to which the United Kingdom is a signatory.

[2] Nor can service of process on AWSC be imputed to Mr. Randall or Mr. McAlindon. As individuals separately named in the complaint, Mr. Randall and Mr. McAlindon are separate and distinct entities from AWSC, thus mandating service upon each foreign firm. See Allan v. Brown & Root, Inc., 491 F. Supp. 398, 403 (S.D. Tex. 1980) ("the relationship of a parent corporation and a subsidiary corporation is not of itself a sufficient basis for subjecting a foreign corporation to domestic jurisdiction, nor does such a relationship create the necessary agency for making service on one through the other").

[3] Insufficiency of process justifies dismissal of the action where a party has also raised an alternate valid defense provided by Rule 12(b). See Fed. R. Civ. P. 12(b)(5). Put another way,

II. This Court Lacks Personal Jurisdiction Over Defendants Phillip Randall And Roman McAlindon.

The Due Process Clause prevents plaintiffs from dragging parties into far-away courts. An individual has a "liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (citation omitted). This general principle is applied through a two-part test. See Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102, 108-116 (1987). First, a court may not exercise jurisdiction over the person unless that party has had sufficient "minimum contacts" with the form state such that "he reasonably should anticipate being haled into court there." Marathon Oil Co. v. A.G. Ruhrgas, 182 F.3d 291, 295 (5th Cir. 1999). Second, the exercise of personal jurisdiction "cannot offend 'traditional notions of fair play and substantial justice." Id., quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

The first part of the test, "minimum contacts," can be satisfied in two different ways. A court may exercise "specific jurisdiction" when the defendant has "purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." Burger King, 471 U.S. at 472 (internal quotation marks and citations omitted); Marathon Oil Co., 182 F.3d at 295. If a court lacks "specific

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"dismissal without opportunity to cure is appropriate where proper service would be futile. Proper service would be futile, for instance, where this court would not have personal jurisdiction over the defendant." Rhodes v. J.P. Sauer & Sohn, Inc., 98 F. Supp. 2d 746, 750 (W.D. La. 2000); see also Bacino v. American Federation of Musicians, 407 F. Supp. 548 (N.D. Ill. 1976) (granting Rule 12(b)(5) motion to dismiss without leave to cure service of process where court determined venue would be improper in its district); Gregory v. United States, 942 F.2d 1498 (10th Cir. 1991) (affirming district court dismissal pursuant to Rule 12(b)(5) because curing service deficiency would be futile). As demonstrated infra, this court lacks personal jurisdiction over Mr. Randall and Mr. McAlindon, thereby undermining any justification for an attempt to serve them properly.

jurisdiction," it may nonetheless exercise "general jurisdiction" if a defendant's contacts with the forum are "continuous, systematic and substantial." Marathon Oil Co., 182 F.3d at 295; Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415-416 (1984). In the absence of either specific or general jurisdiction, the case must be dismissed for lack of personal jurisdiction. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) ("Personal jurisdiction ... is an essential element of the jurisdiction of a district court, without which the court is powerless to proceed to an adjudication.") (citations omitted).

As discussed below, the Supreme Court has never ruled on how to define the "forum" for purposes of the "minimum contacts" inquiry. Specifically, where, as here, a suit is brought pursuant to a federal statute that provides for nationwide service of process, a court might examine whether the defendant has had "minimum contacts" with the United States, or it might examine whether the defendant has had "minimum contacts" with the state in which the federal district court is sitting. Defendants Messrs. Randall and McAlindon assert that the latter position is correct.

But with respect to defendants Randall and McAlindon, whether the proper "forum" is the United States or Texas, this Court lacks personal jurisdiction. As the attached affidavits make clear, this Court may exercise neither specific nor general jurisdiction over these individual defendants. This Court lacks specific jurisdiction over Messrs. Randall and McAlindon because neither individual has engaged in any activities in either Texas or the United States, or directed toward Texas or the United States, out of which the plaintiffs' claims may be said to arise. Likewise, this Court may not exercise general jurisdiction over Messrs. Randall or McAlindon because neither individual has had "continuous, systematic and substantial" contacts with either the state of Texas or the United States. These defendants should be dismissed.

A. The State Of Texas Is The Relevant Forum For Jurisdictional Purposes.

In the typical case, a federal district court inquiring into personal jurisdiction examines the defendant's contacts with the state in which the federal district court is sitting. This case is, however, atypical in one respect: the Complaint alleges, inter alia, violations of the Securities Exchange Act of 1934. (Cmplt. ¶ 75.) That Act provides for service of process in the district in which the suit is brought or "in any other district of which the defendant is an inhabitant or wherever the defendant may be found." 15 U.S.C. § 78aa. Thus, this case is brought pursuant to a federal statute providing for nationwide service of process. The Supreme Court has yet to rule on whether a federal statute authorizing nationwide service of process transforms the traditional personal jurisdiction analysis into an analysis of the defendants' contacts with the United States. Asahi Metal Indus. Co., 480 U.S. at 113 n.* (refusing to discuss whether Congress may "authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits").

The Fifth Circuit has held that "when a federal court is attempting to exercise personal jurisdiction over a defendant in a suit based upon a federal statute providing for nationwide service of process, the relevant inquiry [for personal jurisdiction purposes] is whether the defendant has had minimum contacts with the United States." Busch v. Buchman, Buchman & O'Brien Law Firm, 11 F.3d 1255, 1258 (5th Cir. 1994). The Fifth Circuit has since expressed doubt whether the holding of Busch is correct. Specifically, a subsequent panel of the Fifth Circuit has continued to "dutifully apply Busch," while "emphasiz[ing its] disagreement with it...." Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Michigan, 97 F.3d 822, 826 (5th Cir. 1996). The latter panel has noted that personal jurisdiction and service of process are "distinct issues." Id. Further, the latter panel reasoned that merging the two issues permits Congress to

override by statute the individual liberty interest that lies at the heart of the Due Process Clause and protects defendants against being forced to litigate in a distant forum. Id. For these reasons, that panel expressed "grave misgivings regarding the authority" of Busch. Id.

For the reasons expressed in Bellaire, Defendants Randall and McAlindon respectfully assert that the proper personal jurisdictional analysis requires this Court to establish that the defendants have had sufficient contacts with the State of Texas.

B. Whether The Proper Analysis Focuses On Texas Or The United States, This Court Lacks Personal Jurisdiction Over Defendants Randall And McAlindon.

Even if this Court concludes that it may exercise jurisdiction over any defendant who has had sufficient contacts with the United States, this Court still lacks personal jurisdiction over Defendants Randall and McAlindon. As the attached affidavits make clear, these individual defendants do not have sufficient contacts with either the State of Texas or the United States to confer personal jurisdiction upon this Court.

This Court lacks specific jurisdiction over both individual defendants because neither individual is alleged to have done anything at all, much less alleged to have engaged in acts within Texas or the United States, or which were directed toward Texas or the United States, out of which plaintiffs claims arise. Calder v. Jones, 465 U.S. 783, 789-790 (1984) (requiring tortious acts "expressly aimed" at the forum jurisdiction to establish specific jurisdiction); Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 212 (5th Cir. 1999) (same); Collins v. Gospocentric Records, No. 3:00-CV-1813, 2001 WL 194985, at *2 (N.D. Tex. Feb. 22, 2001) ("In cases involving torts, specific jurisdiction may be supported by a single tortious act in the forum state."). Defendants Randall and McAlindon are alleged simply to have had authority over certain alleged Andersen entities. (Cmplt. ¶¶ 93(u), (v), 96.) Indeed, the Complaint actually alleges more about what Defendants Randall and McAlindon did not do than about what they

have done. (Cmplt. ¶ 2 n. 1 (indicating that Defendants Randall and McAlindon are not alleged to have engaged in any fraudulent acts).) And as the attached affidavits make clear, these individual defendants have not performed any professional services for Enron, nor have they had any connection with any audits of Enron's financial statements. (Randall Aff. ¶ 10; McAlindon Aff. ¶ 10.) In the absence of any allegation of any tortious act committed or directed toward Texas, this Court may not assert specific jurisdiction over these defendants.

This Court also lacks general jurisdiction over these individual defendants because neither one has had sufficiently systematic, consistent, and substantial contacts with either Texas or the United States. Mr. Randall and Mr. McAlindon are citizens and residents of the United Kingdom, where they are partners in Andersen-U.K.[4] (Randall Aff. ¶¶ 1,2; McAlindon Aff. ¶¶ 1,2.) Neither Mr. Randall nor Mr. McAlindon owns, possesses, or has any interest in real property or any other assets in either the United States or Texas. (Randall Aff. ¶ 3; McAlindon Aff. ¶ 3.) Neither Mr. Randall nor Mr. McAlindon is registered to do business in either the United States or Texas, nor do they perform their services in either Texas or the United States. (Randall Aff. ¶¶ 5, 6; McAlindon Aff. ¶¶ 5, 6.) Neither Mr. Randall nor Mr. McAlindon pays any taxes in Texas or the United States. (Randall Aff. ¶ 4; McAlindon Aff. ¶ 4.) Neither performs services for United States clients and neither has had an audit report filed with the SEC.[5] (Randall Aff. ¶ 7; McAlindon Aff. ¶ 7.) These facts warrant this dismissal of this action against Mr. Randall and Mr. McAlindon. See Nicholas v. Saul Stone & Co. LLC, 224 F.3d 179, 184 (3d Cir. 2000), cert. denied, 531 U.S. 1076 (2001) (holding no general personal jurisdiction

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[4] They are not partners of Andersen LLP, nor have they performed any professional services on behalf of Andersen LLP. (Randall Aff. ¶ 8; McAlindon Aff. ¶ 8.)

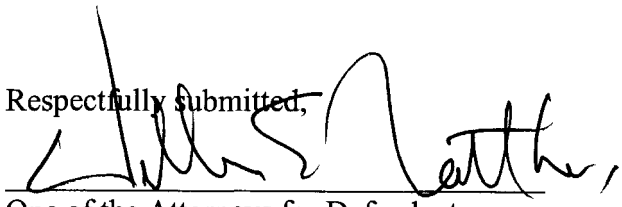
[5] Indeed, Mr. McAlindon has not performed – and cannot perform – any audit work at all. (McAlindon Aff. ¶ 7.)

where defendant lacks systematic contacts with forum such as ownership of property or residence); Salem Radio Representatives, Inc. v. Can Tel Market Support Group, 114 F. Supp. 2d 553, 556 (N.D. Tex. 2000) (no personal jurisdiction over individual partners who have no connection with forum even though personal jurisdiction exists over partnership entity). Although Messrs. Randall and McAlindon have both occasionally traveled to the United States in connection with their roles within certain Andersen entities, (Randall Aff. ¶ 9; McAlindon Aff. ¶ 9), these contacts with the United States are not sufficient to give rise to personal jurisdiction. Helicopteros, 466 U.S. at 418 (holding that court lacks personal jurisdiction over corporation even though corporation regularly "sent personnel into Texas for training in connection with the purchase of helicopters and equipment in that State"); Management Insights Inc. v. CIC Enters., Inc., No. 3:00-CV-2597, 2001 WL 1829539, at *6 (N.D. Tex. Nov. 19, 2001) (periodic visit by corporation's agent to customers based in forum is insufficient to establish general jurisdiction); Black v. U.S.A. Travel Auth., Inc., No. 99 CIV 11278, 2001 WL 761070 (S.D.N.Y. July 6, 2001) (holding that nonresident defendant's business travel to forum state in capacity as corporate officer of resident corporation was insufficient to establish general jurisdiction); CCS Int'l, Ltd. v. ECI Telesystems, Ltd., No. 97 CIV 4646, 1998 WL 512951 (S.D.N.Y. Aug. 18, 1998) (same). Thus, this Court should dismiss the Complaint as to Mr. Randall and Mr. McAlindon for lack of personal jurisdiction.

CONCLUSION

For the foregoing reasons, Defendants Philip Randall and Roman McAlindon respectfully request that this Court grant its motion to dismiss and enter an order dismissing the Consolidated Complaint with prejudice.

Respectfully submitted,



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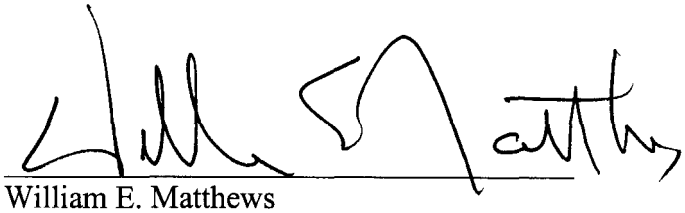
Counsel for Defendant Andersen Worldwide
Societe Cooperative

Dated: May 8, 2002

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been forwarded to all interested parties on this 8th day of May, 2002.



William E. Matthews

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES LITIGATION	)))	No. H-01-3624 Hon. Melinda Harmon

AFFIDAVIT OF MR. PHILIP RANDALL

The undersigned, being first duly sworn, deposes and states as follows:

1. My name is Philip Randall, and I am a partner in Andersen-UK.

2. I am a citizen and resident of the United Kingdom.

3. I do not own, possess or have any interest in any real property or any other assets in Texas or the United States.

4. I do not pay any taxes in either Texas or the United States.

5. I am not registered to do business in either Texas or the United States.

6. I neither sell nor perform my services in either Texas or the United States.

7. I do not perform any professional services for United States clients. I am not aware that any audit report of mine has ever been filed with the United States Securities and Exchange Commission.

8. I am not a partner of Andersen LLP. I have not performed any professional services on behalf of Andersen LLP.

9. I have traveled to the United States on occasion because I am a member of Andersen Worldwide's global operations team. Only rarely have I traveled to Texas. My visits to the United States did not involve the rendering of professional services.

10. I have never performed any services of any nature for Enron Corp. and I have never participated in any way with the preparation of any audits of financial statements of any Enron related entity.

11. I have not been served with a complaint with summons attached in In re Enron Securities Litigation, No. H-01-3624.

Further affiant says not.

Philip Randall

Philip Randall

Sworn and subscribed to
before me this 7th day of
MAY, 2002.

WBKennair

Not Pub.

WILLIAM B. KENNAIR
Scrivener Notary
London, England

My commission is for life

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES LITIGATION	)))	No. H-01-3624 Hon. Melinda Harmon

AFFIDAVIT OF MR. ROMAN McALINDON

The undersigned, being first duly sworn, deposes and states as follows:

1. My name is Roman McAlindon, and I am a partner in Andersen-UK.

2. I am a citizen and resident of the United Kingdom.

3. I do not own, possess or have any interest in any real property or any other assets in Texas or the United States.

4. I do not pay any taxes in either Texas or the United States.

5. I am not registered to do business in either Texas or the United States.

6. I neither sell nor perform my services in either Texas or the United States.

7. I do not perform any professional services for United States clients. I am not aware that any audit report of mine has ever been filed with the United States Securities and Exchange Commission. I do not perform audit work and I am not qualified to do so.

8. I am not a partner of Andersen LLP. I have not performed any professional services on behalf of Andersen LLP.

9. I have traveled to the United States on occasion because I am a member of Andersen Worldwide's global operations team. Only rarely have I traveled to Texas. My visits to the United States did not involve the rendering of professional services.

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Further affiant says not.

Roman McAlindon

Sworn and subscribed to
before me this 7th day of
MAY, 2002.

WB Kennair
Not Pub

WILLIAM B. KENNAIR
Scrivener Notary
London, England

My commission is for life