UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
MAY 8 2002
MICHAEL N. MILBY, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

DEFENDANT ANDERSEN WORLDWIDE SOCIETE COOPERATIVE'S MEMORANDUM IN OPPOSITION TO LEAD PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

Defendant Andersen Worldwide Societe Cooperative ("AWSC"), by its attorneys, respectfully submits this memorandum in opposition to Lead Plaintiff's emergency motion for a temporary restraining order.

INTRODUCTION

AWSC is a Swiss Societe Cooperative formed under the Swiss Code of Obligations and domiciled in Geneva, Switzerland. AWSC coordinates the activities of the distinct legal entities around the world, including Arthur Andersen LLP ("Andersen LLP") in the United States, that have contracted to participate in the Andersen network. (These legal entities are termed "member firms"; the contracts are all member firm agreements.) This coordination is accomplished pursuant to separate contracts between AWSC and each of these legal entities. AWSC itself is a cooperative organization whose members consist of some of the individuals who are partners in member firms.

Although AWSC and its member firms are entities separate from Arthur Andersen LLP and have not been charged with any specific wrongdoing in this case, Lead Plaintiff seeks the extraordinary relief of enjoining AWSC from consummating "any sale, transfer or other disposition of any business unit, division, affiliate or member firm" without court approval. Such an injunction would cause severe hardship to AWSC and its member firms,

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yet Lead Plaintiff lacks the most fundamental bases to justify that drastic result. Because Lead Plaintiff seeks that result solely in order to protect any money judgment that it might obtain against AWSC, the relief sought is barred by the Supreme Court's decision in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999). Moreover, Lead Plaintiff has failed to satisfy any of the prerequisites for preliminary injunctive relief. It has failed to state a claim against AWSC; therefore, it plainly has not demonstrated a likelihood of success on the merits as to AWSC. Nor has it demonstrated irreparable harm, that an injunction would be in the public interest, or that the balance of hardships favors Lead Plaintiff. Indeed, in a holding that applies with equal force here, a district court in Chicago just last week denied a similar request for injunctive relief on the grounds that the harm to Andersen LLP and AWSC would be substantial and would outweigh the harm to the plaintiffs there, Andersen LLP's retired partners. Finally, Lead Plaintiff has not suggested that it could post the substantial bond required to support an injunction against AWSC. That failure alone warrants denial of Lead Plaintiff's motion.

ARGUMENT

I. Lead Plaintiff Is Not Entitled to Preliminary Injunctive Relief Under the Supreme Court's Grupo Mexicano Decision.

The Supreme Court's holding in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999), bars Lead Plaintiff's claim for preliminary injunctive relief. Grupo Mexicano provides that a federal court lacks the power to grant pre-judgment injunctive relief unless the underlying complaint states a cognizable equitable claim having some nexus to the preliminary relief sought. Lead Plaintiff's complaint does not seek any equitable relief whatsoever against AWSC or Andersen LLP. The only relief sought is for money damages. Indeed, because the only theory of liability asserted against AWSC is that allegedly it

is part of a "global partnership" that includes Andersen LLP, the Complaint does not seek any relief against AWSC that is not also sought against Andersen LLP. Accordingly, all of the arguments asserted by Andersen LLP with respect to the Grupo Mexicano decision and its progeny apply with equal force to AWSC, and AWSC incorporates such arguments herein by reference.

II. Lead Plaintiff Has Failed To Demonstrate That It Is Entitled To A TRO.

A preliminary injunction "is an extraordinary equitable remedy." Sugar Busters LLC v. Brennan, 177 F.3d 258, 265 (5th Cir. 1999). To obtain such extraordinary relief, Lead Plaintiff must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury should the relief be denied; (3) that the threatened injury outweighs damage that granting the relief might cause the defendant; and (4) that granting the relief will not harm the public interest. See Women's Med. Ctr. v. Bell, 248 F.3d 411, 419 n.15 (5th Cir. 2001); Enrique Bernat F., S.A. v. Guadalajara, Inc., 210 F.3d 439, 442 (5th Cir. 2000). The movant bears the "heavy burden of persuading the district court that all four elements are satisfied." Hardin v. Houston Chronicle Publ'g, Co., 572 F.2d 1106, 1107 (5th Cir. 1978) (affirming denial of preliminary injunction). Lead Plaintiff fails to discharge that burden with respect to any of the four elements.

A. Lead Plaintiff Has Not Demonstrated That It Has A Reasonable Likelihood Of Success.

1. This Court Lacks Jurisdiction Over AWSC.

Lead Plaintiff has not established a likelihood of success on the merits as to AWSC. First, this Court does not even have personal jurisdiction over AWSC. AWSC is a Swiss cooperative formed under the Swiss Code of Obligations, and as such is domiciled and has its residence in Switzerland. Pursuant to Articles 26, 149, and 165 II of the Swiss Federal Act on

International Private Law, a Swiss court would not recognize this Court's exercise of jurisdiction over AWSC.[1] Because a Swiss court would not recognize this Court's exercise of jurisdiction over AWSC, this Court should decline to exercise personal jurisdiction over AWSC out of respect to the foreign law that created AWSC.[2] (See Defendant Andersen Worldwide Societe Cooperative's Memorandum in Support of Its Motion to Dismiss the Consolidated Complaint ("AWSC Mem.") at 4-6, attached as Exhibit A.)

2. Lead Plaintiff Has Not Demonstrated a Likelihood of Success on the Merits of Its Complaint Against AWSC.

To prevail on its Section 10(b) or Rule 10b-5 claim, Lead Plaintiff would need to demonstrate, in connection with the purchase or sale of securities, a misleading statement or

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[1] Article 26 provides that:

> Foreign authorities have jurisdiction:
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> (a) if jurisdiction derives from a provision of this Act or, failing such a provision, if the defendant was domiciled in the state in which the decision was rendered;
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> (b) if, in matters involving an economic interest, the parties submitted to the jurisdiction of the authority that rendered the decision by means of an agreement valid under this Act;
>
> (c) if, in matters involving an economic interest, the defendant proceeded on the merits without reservation; or
>
> (d) if, in the case of a counterclaim, the authority that rendered the decision had jurisdiction to entertain the main claim and if there is a nexus between the claim and the counterclaim.

[2] The Supreme Court has noted that courts should exercise "[g]reat care and reserve ... when extending our notions of personal jurisdiction into the international field." Asahi Metal Indus. Co., Inc. v. Superior Court of California, 480 U.S. 102, 115 (1987). For when United States courts seek to exercise personal jurisdiction over foreign entities, the courts inject themselves into the sensitive area of federal foreign relations policy. Thus, "careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum" is necessary. These considerations point toward according due respect to the law of Switzerland, the jurisdictional law that created AWSC and that is its home.

omission of material fact, made with scienter, upon which plaintiff relied, that proximately caused injury to the plaintiff. See Nathenson v. Zonagen Inc., 267 F.3d 400, 406-07 (5th Cir. 2001). Scienter requires "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). To have the requisite scienter, a defendant must have known that the misstatements were false at the time they were made. San Leandro Emergency Med. Plan v. Philip Morris Cos., 75 F.3d 801, 812-13 (2d Cir. 1996).

Lead Plaintiff cannot possibly demonstrate a likelihood of success on the merits of its claims as to AWSC, given that the Complaint does not allege that AWSC, which is an entity separate from Andersen LLP, provided any professional services to Enron, let alone provided services that were deficient in any way. Indeed, the Complaint does not allege that AWSC made any representation whatsoever regarding Enron, let alone a representation that was false or misleading. Thus, even apart from the arguments asserted by Andersen LLP regarding the likelihood of success on the merits, Lead Plaintiff's application for injunctive relief as to AWSC suffers from the additional defect that the Complaint makes no allegations of wrongdoing on the part of AWSC. The Complaint's only theory of liability against AWSC is one that seeks to hold AWSC liable for the actions of Andersen LLP because, according to Lead Plaintiff, AWSC and Andersen LLP are part of one "global partnership."[3] The fact that various entities share a common name and operate under common standards and policies is not sufficient to ignore their separate legal status. (See AWSC Mem. at 9-14.). Not only is that theory not adequately alleged, but such a theory has never been successfully asserted against any "Big Five" accounting firm. (See id. at 12-13.) For that reason, and given the Complaint's complete

[3] Lead Plaintiff's application for injunctive relief follows the Complaint's practice of defining "Andersen" to include both Andersen LLP and AWSC and then making assertions about "Andersen" without differentiating between the two. (See Lead Plaintiff's App. at 1.)

silence as to any actionable conduct on the part of AWSC, Lead Plaintiff could not possibly satisfy the requirement of demonstrating that it is likely that it would prevail on the merits of its claim against AWSC and that that likelihood supports the extreme remedy that Lead Plaintiff seeks.

B. Lead Plaintiff Has Not Demonstrated That It Will Suffer Irreparable Harm.

Lead Plaintiff has not demonstrated that it will suffer irreparable harm if the injunction is not granted. Lead plaintiff asserts no more than that "Andersen" (defined to include AWSC) may not be able to satisfy a judgment against it. Such an assertion, even if Lead Plaintiff established that it were true, would not justify the relief that it seeks, particularly in light of the absence of any evidence whatsoever that Andersen LLP or AWSC is trying to hide or dissipate assets in order to prevent collection of a future judgment against them. There is no evidence of any such conduct, and for all of the reasons stated in Andersen LLP's memorandum in response to Lead Plaintiff's request for injunctive relief, which are incorporated herein by reference, Lead Plaintiff has not demonstrated that it will suffer irreparable harm.

C. Lead Plaintiff Has Not Demonstrated That The Balance Of Hardships Are In Its Favor.

Lead Plaintiff also cannot demonstrate that the balance of hardships favors the entry of injunctive relief. Lead Plaintiff fails to acknowledge in any way the substantial hardships that would be suffered by AWSC and Andersen LLP if the injunctive relief Lead Plaintiff seek were granted. But these hardships are both very real and very substantial. As a result of recent events in the United States arising out of the collapse of Enron, the pressures currently facing these firms are severe. In order to save the jobs, income, and even benefits of all of the partners and employees of these firms, it has become necessary for member firms outside the United States to enter into agreements with the international networks of other accounting

firms. (Declaration of Andrew Pincus ("Pincus Decl.") (attached as Exhibit B) ¶ 2.) If Lead Plaintiff obtains the injunctive relief it seeks, and if that injunction were enforceable outside the United States, the incomes and professional futures of such firms and the individual partners of such firms would be placed at grave risk. (Pincus Decl. ¶ 3.) In that case, far more individuals would face far more severe financial hardship than the number of putative class members that would supposedly be harmed in the absence of an injunction. In Bryce v. Arthur Andersen LLP, No. 02 C 2125 (N.D. Ill.), a putative class of retired Andersen LLP partners sought the same injunctive relief as Lead Plaintiff here from both Andersen LLP and AWSC. At a hearing on May 3, 2002, Judge Gettleman denied the motion for such relief in an oral ruling. One of the bases for that ruling was that the balance of harm factor clearly favored defendants:

> [T]he final issue is the balance of harms, which you always get to in any of these cases. And here the balance of harm, even though I understand exactly where the plaintiffs are coming from and the frustration and anxiety that they must feel seeing the company that they helped build in this type of distress and believing that some of these assets or revenue streams may be jeopardized and looking forward to individual arbitrations perhaps of all their grievances, but to stop the process that apparently is in effect of negotiating the release of these non-competes for arm's-length bargained compensation to Arthur Andersen to me could be totally destructive of not only the interests of Arthur Andersen, but maybe even of the plaintiffs themselves and certainly all of the probably hundreds or maybe even thousand of people who would be affected if those deals were killed at this point.
>
> I think to inject the court into that type of business decision making is inappropriate and could lead to disastrous results far greater than those that are feared by the plaintiffs in this case.

(May 3, 2002 Transcript at 33, attached as Exhibit C.) Thus, not only would AWSC face substantial hardship if this Court were to grant Lead Plaintiff's motion, but such hardship would be far more substantial than any hardship faced by Lead Plaintiff.

D. Lead Plaintiff Have Not Demonstrated That The TRO Will Not Harm The Public Interest.

Essentially, Lead Plaintiff has cast its monetary concerns – fear that a judgment would not be collectible – as being somehow more important than the monetary concerns of AWSC's various constituents. Denying Lead Plaintiff's motion, however, would serve substantial public interests. AWSC and its member firms have many current employees and outside creditors, whose interests are as important, if not more important, than Lead Plaintiff's interests in some future judgment. Such interests would be thwarted by Lead Plaintiff's proposed injunction. (Pincus Decl. ¶ 3.) Moreover, the general public has a substantial interest in the continuing access to the benefits of the public accounting services provided by the member firms, especially to clients that are multinational corporations that require the coordination of services in different countries. These services likely would cease to be provided if an effective temporary restraining order were put in place. (Pincus Decl. ¶ 3.)

For good reason, Lead Plaintiff does not even attempt to argue that the public interest would not be harmed by an injunction, because the relief Lead Plaintiff seeks would do nothing to advance the public interest. Lead Plaintiff is simply advancing its own self interest of recovering its own damages to the detriment of all creditors of Andersen LLP or AWSC. Thus, Lead Plaintiff cannot demonstrate that the public interest favors an injunction.

III. Lead Plaintiff Cannot Meet The Requirements Of Rule 65.

Lead Plaintiff's motion also fails for the independent reason that it has failed to post a bond. Federal Rule of Civil Procedure 65(c) states, in relevant part:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(c) (emphasis added). This is no mere technicality. Although the amount of the bond rests within the sound discretion of the court, the posting of the bond is mandatory.

Contrary to Lead Plaintiff's unsupported assertions that "no bond is required," Ex Parte App. at 16-17, the posting of a bond is mandatory, and the failure to require a bond or other security in ordering an injunction constitutes grounds for reversal. Phillips v. Chas.Schreiner Bank, 894 F.2d 127, 131 (5th Cir.1990) (holding that party is not entitled to a preliminary injunction without posting security to indemnify defendant against potential financial loss due to wrongful injunction). See also Gateway E. Rwy. Co. v. Terminal R.R. Ass'n, 35 F.3d 1134, 1141 (7th Cir. 1994). Moreover, "[a] party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." W.R. Grace and Co. v. Local Union 759, 461 U.S. 757, 770 n.14 (1983) (citing Russell v. Farley, 105 U.S. 433 (1882)). AWSC therefore seeks a bond now to ensure it has some protection against the significant harm it will suffer if an injunction is issued.

Although the exact amount of the bond is within the Court's discretion, Phillips v. Chas. Schreiner Bank, 894 F.2d at 131 (remanding to district court to set amount of bond), the bond required in this case would be quite substantial. Judge Gettleman in Bryce v. Arthur Andersen recognized as much:

> I haven't even mentioned the word "bond" again, because if I were to get there, we would have to seriously consider a very high bond that would protect Arthur Andersen and these other interests in case I were to issue such an injunction. If it were improvidently issued, we would have to have, I'm sure, an evidentiary hearing about how much of a bond it would be. But it would be big. I think that we could all agree on that.

(May 3, 2002 Tr. at 34.) Even apart from the bond Lead Plaintiff would have to post to secure Arthur Andersen LLP's interests, AWSC has unique reasons why it requires independent, substantial security. For example, as discussed above, issuance of an injunction could undermine the efforts of non-U.S. member firms to enter into agreements that would allow those firms to survive and the partners of those firms to maintain their livelihoods. (Pincus Decl. ¶ 3.) AWSC

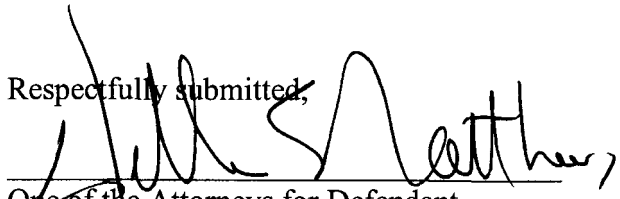
will face many choices in the short term, and it should be free to evaluate those choices to maximize the benefits to itself and its member firms and their employees, clients, and creditors. The potential damages suffered by improperly restricting AWSC's ability to do so would be enormous. (Pincus Decl. ¶ 3.)

Lead Plaintiff's inability to post a bond would be fatal to their motion. Last year, the non-U.S. member firms of AWSC had revenues of approximately $5 billion. In light of this figure, Lead Plaintiff should be required, at a minimum, to post a bond in the amount of $1 billion. (Pincus Decl. ¶ 4.) Unless it demonstrates that it can post such a bond to secure AWSC's interests, Lead Plaintiff's motion for a temporary restraining order should be denied.

CONCLUSION

For the foregoing reasons, defendant Andersen Worldwide Societe Cooperative respectfully suggests that this Court should deny Lead Plaintiff's motion for a temporary restraining order in its entirety.

Respectfully submitted,



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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

The Exhibit(s) May

Be Viewed in the

Office of the Clerk