UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
JUN 24 2002
Michael N. Milby, Clerk

In re ENRON CORPORATION SECURITIES LITIGATION	§ §	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, - against - ENRON CORP., et al., Defendants,	§ § § § § § § § § § § § § § §	Civil Action No. H-01-3624 (Consolidated) CLASS ACTION
This Document Relates To: RALPH A. WILT, JR., Plaintiff, - against - ANDREW S. FASTOW, et al., Defendants.	§ § § § § § § § § § § § § § §	Cause No. H-02-0576

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION OF DEFENDANTS C.E. ANDREWS, DORSEY L. BASKIN, JR., JOSEPH F. BERARDINO, GREGORY J. JONAS, ROBERT KUTSENDA, STEVE M. SAMEK, JOHN E. STEWART, AND NANCY A. TEMPLE TO DISMISS THE *WILT* COMPLAINT AS AGAINST EACH ONE OF THEM FOR LACK OF PERSONAL JURISDICTION

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Defendants C.E. Andrews, Dorsey L. Baskin, Jr., Joseph F. Berardino, Gregory J. Jonas, Robert Kutsenda, Steven A. Samek, John E. Stewart and Nancy A. Temple (the "Moving Defendants") respectfully submit this reply memorandum of law in further support of their motion to dismiss the Wilt complaint as against each one of them for want of personal jurisdiction (the "Motion"). As has been previously explained, the Complaint fails to set forth any basis for the assertion of personal jurisdiction over any of the Moving Defendants, and the Moving Defendants' affidavits demonstrate that there are no such bases.

Plaintiffs' response to the motion (the "Response") concedes by its silence that there is no basis for the assertion of general jurisdiction over the Moving Defendants. It also confirms that there is no basis for the Court's exercise of specific personal jurisdiction over any one of the Moving Defendants. With respect to defendants Messrs Andrews, Baskin, Berardino, Stewart and Ms. Temple, plaintiffs' Response recites nothing more that the very same inadequate allegations contained in the Complaint. Plaintiffs offer no allegations that might provide a proper basis for the exercise of jurisdiction. With respect to Messrs Jonas, Kutsenda, and Samek, plaintiffs merely repeat the same inadequate allegations, previously asserted as to Mr. Stewart, relating to a single February 5, 2001 meeting in which these defendants participated by phone. Indeed, the inadequacy of these allegations is conceded by plaintiffs' almost exclusive reliance on the "conspiracy theory" of jurisdiction – a theory that has previously expressly been rejected by the Texas Supreme Court. See National Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 773 (Tex. 1995).

Finally, plaintiffs do not present any argument to support their request for discovery. The Court should therefore exercise its discretion to deny their request for discovery and dismiss this action as against the Moving Defendants.

ARGUMENT

I. PLAINTIFFS HAVE NOT ESTABLISHED A BASIS FOR PERSONAL JURISDICTION OVER ANY OF THE MOVING DEFENDANTS

A. Plaintiffs May Not Assert Jurisdiction over Any Moving Defendant Without a Specific Showing of That Defendant's Personal Contacts With the Forum State

As set forth in the Motion, plaintiffs are required, but have completely failed, to show a basis for the assertion of personal jurisdiction over each defendant independently. Purporting to contest this point, plaintiffs quote from Guidry v. United States Tobacco Co., 188 F.3d 619, 625 (5th Cir. 1999), the correct but entirely irrelevant proposition that a party responding to a motion to dismiss for want of personal jurisdiction need make only a prima facie showing of jurisdiction to survive that motion. Of course, the fact that a prima facie showing of jurisdiction will suffice with respect to any specific defendant does not mean that a prima facie showing with respect to one defendant provides jurisdiction over another. See Rush v. Savchuk, 444 U.S. 320, 332 (1980) ("The requirements of International Shoe . . . must be met as to each defendant . . . ." Assertion of jurisdiction over one defendant based solely on the activities of another is "plainly unconstitutional") (emphasis added); Calder v. Jones, 465 U.S. 783, 790 (1984). With its sweeping, conclusory allegations against all the individuals and entities denominated by plaintiffs as the "Accountant Defendants," most of whom, including Arthur Andersen LLP ("Andersen"), are residents of the State of Texas, the Complaint ignores the constitutional requirement that personal jurisdiction of non-resident defendants be based on the contacts of each individual defendant, not on the contacts of a class or group of defendants, as that group is defined in a complaint. Accordingly, to the extent that plaintiffs attempt to assert jurisdiction over the Moving Defendants by sweeping and conclusory allegations against Andersen and Texas resident

individual defendants or some defined group of plaintiffs' own making, their arguments should be rejected.

B. The Conspiracy Theory of Jurisdiction Has Been Rejected in Texas and Cannot Be Used As a Basis of Personal Jurisdiction Over Non-Resident Defendants

The Moving Defendants have already shown in their Motion that an allegation of conspiracy between two defendants may not be used as a device to attribute the jurisdictional contacts of one defendant to another. Motion at 7-9. Rather, the plaintiff must show that each alleged "conspirator" had the requisite purposeful contacts with the forum state sufficient to subject him to jurisdiction there.

Plaintiffs cite the Seventh Circuit case of Textor v. Board of Regents, 711 F.2d 1387 (7th Cir. 1983), in arguing for their conspiracy theory, and they note that the Fifth Circuit has never rejected that case. Response at 12. In fact, neither the Fifth Circuit nor any district court within this Circuit has ever mentioned Textor on this point; but more importantly, in National Industrial Sand Ass'n v. Gibson, 897 S.W.2d 769, 773 (Tex. 1995), the Texas Supreme Court discussed Textor and expressly repudiated the conspiracy theory of jurisdiction:[1]

> "[W]e decline to recognize the assertion of personal jurisdiction over a nonresident defendant based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state. Instead, we restrict our inquiry to whether [the defendant] itself purposefully established minimum contacts such as would satisfy due process, and hold that it did not."

[1] In a diversity case, a federal court has personal jurisdiction over a nonresident defendant only if (1) the nonresident defendant would be subject to jurisdiction under the state's long-arm statute, and (2) the exercise of jurisdiction under that statute is consistent with due process. See Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Fed. R. Civ. P. 4(k). In determining the application of the state's long-arm statute, the federal court must construe that state statute as would the state's highest court. Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1264 n.3 (5th Cir. 1981) (citing Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1232 (5th Cir. 1973). Thus, the Texas Supreme Court's view of the reach of the Texas long-arm statute and its holding that jurisdiction does not reach non-resident alleged co-conspirators on the basis of an alleged conspiracy is controlling. See National Indus. Sand Ass'n, 897 S.W.2d at 773.

897 S.W.2d 769, 773. See also Ginder v. Dolton, No. 01-00-01413-CV 2001, 2001 Tex. App. LEXIS 4661 (Tex. App. July 12, 2001) ("[A]llegations that appellees conspired with others who allegedly committed acts harmful to appellants are not sufficient, standing alone, to establish jurisdiction."). Thus, plaintiffs cannot simply rely upon their claims of an alleged "conspiracy" as a basis for the assertion of personal jurisdiction over any one of the Moving Defendants.

C. Plaintiffs Have Not Established Jurisdiction Over Any of the Moving Defendants Based on a Tortious Act Directed into Texas

Plaintiffs' cannot establish jurisdiction over the Moving Defendants based on alleged tortious acts directed into Texas because neither the complaint nor plaintiffs' response to the Motion attributes to any of the Moving Defendants any tortious conduct in or directed into Texas from which plaintiffs' supposed injuries could be said to arise. As already discussed in the Motion, random, fortuitous, or attenuated contacts that do not directly give rise to the cause of action do not provide a basis for jurisdiction. Motion at 6-10.

First, as to Messrs. Andrews, Baskin, and Berardino, plaintiffs offer no allegation of specific conduct whatsoever, but rather rely entirely on the claim that they were "co-conspirators." Because, as noted in Point I.B., such allegations are entirely deficient under National Industrial Sand Assoc., this complaint must be dismissed as to them.[2]

[2] Plaintiffs also argue that Mr. Berardino's and Mr. Samek's alleged roles in Andersen's alleged transition from a traditional accounting and auditing firm into what plaintiff's characterize as an "aggressive, pro-active, proclient advisory firm committed to promoting client success through value creation" as measured by "increased market capitalization" and to "fostering inventiveness" is a hallmark of fraud. Response at 6-7. Plaintiffs may well believe that pro-activity, promoting inventiveness and promoting client success are badges of fraud, but such conlcusory pronouncements are totally insufficient to create personal jurisdiction. See Panda Brandywine Corp. v. Potomac Elec. Power Co., 253 F.3d 865, 868-69 (5th Cir. 2001) (District court need not credit even uncontroverted conclusory allegations when considering a motion to dismiss for lack of personal jurisdiction.) (citing Felch v. Transportes Lar-Mex S.A. de C.V., 92 F.3d 320, 326 n.16 (5th Cir. 1996)); see also Woodson v. Copeland Trucking, No. 3:01-CV-2216-H, 2002 U.S. Dist. LEXIS 853, at *8 (N.D. Tex. Jan. 17, 2002) (conclusory allegations of general jurisdiction insufficient to support jurisdiction).

Plaintiffs' argument with respect to Messrs. Jonas, Kutsenda, and Samek is precisely the same as the inadequate allegation previously alleged with respect to Mr. Stewart and is limited to their participation in a February 5, 2001 phone call. But, just as set forth previously in the Moving Defendants' Motion with respect to Mr. Stewart, plaintiffs cannot and do not demonstrate that these defendants' participation in that phone call was purposefully directed toward Texas. See Marathon Oil Co. v. Ruhrgas, 182 F.3d 291, 295 (5th Cir. 1999) (In a fraud action, defendant's presence at three meetings in Houston and participation in correspondence and phone calls was not sufficient to establish minimum contacts because there was no evidence that the "false statements at the meetings or that the alleged tortious conduct was aimed at activities in Texas."). And the phone call itself is merely an isolated act, greatly attenuated from plaintiffs' alleged causes of action. See Smirch v. Allied Shipyard, Inc., 164 F. Supp. 2d 903, 907, 908 (S.D. Tex. 2001) (no specific jurisdiction where defendant contracted with Texas residents, sent repair bills to Texas, placed phone calls to plaintiffs in Texas, and faxed invoice reports to plaintiffs in Texas). As discussed at length in the Motion, this contact is as insufficient to support jurisdiction over Messrs. Jonas, Kutsenda and Samek as it is with respect to Mr. Stewart. Motion at 10-11 (discussing the insufficiency of this allegation).

Similarly, with respect to Ms. Temple, plaintiffs' Response adds nothing to the deficient allegations set forth in their complaint. Plaintiffs simply repeat their reliance on the discredited conspiracy theory of jurisdiction. They do not and cannot demonstrate how any of the allegations against Ms. Temple, all of which refer to a period after the alleged events that purportedly gave rise to plaintiffs' claims, could give rise to their alleged causes of action. Thus these allegations

are also insufficient for the assertion of personal jurisdiction over Ms. Temple.[3] Motion at 11-13 (discussing the insufficiency of the allegations against Ms. Temple).

D. Plaintiffs Have Not Established Jurisdiction Based on the Effects of Alleged Conduct

Plaintiffs separately argue that jurisdiction exists because defendants allegedly committed tortious acts that had effects in Texas. Response at 14. If plaintiffs mean to contend that such effects (even where foreseeable) can by themselves support the exercise of jurisdiction, they misstate the law. "Foreseeable injury alone is not sufficient to confer specific jurisdiction, absent the direction of specific acts toward the forum. Panda Brandywine, 253 F.3d at 869 (quoting Air Alaska Inc. v. Brandt, 195 F.3d 208, 212 (5th Cir. 1999)). "[T]he "'effects test' is not a substitute for . . . minimum contacts that demonstrate purposeful availment of the benefits of the forum state." Panda Brandywine, 253 F.3d at 869 (quoting Allred v. Moore & Peterson, 117 F.3d 278, 286 (5th Cir. 1997)). Thus, any argument based on the "effects" of any alleged conduct must be rejected.

Moreover, plaintiffs have not alleged any specific harmful effects in Texas: the plaintiffs are residents of Missouri and Florida. The complaint contains no allegations that any part of the transactions in which they purchased Enron securities took place in Texas. Presumably the losses they sustained, if any, were sustained, if anywhere, in their home states. There is no indication they were sustained in Texas.[4]

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[3] Plaintiffs contend that the Court has already decided the issue of its personal jurisdiction over Ms. Temple. Response at 8 (citing PACER Nos. 382 and 383). But the filings they cite reflect only a determination that Ms. Temple was a named party to the Wilt action and had been properly served. The larger issue of whether the exercise of jurisdiction over Ms. Temple is consistent with the Texas long arm statute and constitutional due process was not addressed by the Court.

[4] Cases in which jurisdiction is sought on the basis of the effects test appear invariably to involve plaintiffs injured in the states (usually their home states) in which they seek to establish jurisdiction. See, e.g., Calder, 465

(continued...)

II. PLAINTIFFS' REQUEST FOR DISCOVERY ON THE ISSUE OF PERSONAL JURISDICTION SHOULD BE DENIED

Plaintiffs suggest that they are entitled to discovery on the issue of jurisdiction. But the very case on which they rely, Wyatt v. Kaplan, 686 F.2d 276 (5th Cir. 1982), makes it clear that decisions on such discovery requests are within the discretion of the court and that they should be denied where there is no issue of material fact, "[w]hen the lack of personal jurisdiction is clear," and where discovery "could not [add] any significant facts." Id. at 284. As the Motion and the above discussion make clear, plaintiffs have not offered specific allegations of contacts sufficient to support jurisdiction with respect to any of the Moving Defendants. With respect to Messrs. Andrews, Baskin, and Berardino, plaintiffs allege no specific instances of conduct at all. With respect to Messrs. Jonas, Kutsenda, Samek, Stewart, and Temple they point only to limited conduct that did not give rise to plaintiffs' purported claims.

The Moving Defendants have provided affidavits detailing their contacts with Texas. Plaintiffs do not contend that these contacts support jurisdiction or that they could with further exploration in discovery.

Where, as here, plaintiffs do not present a viable theory of jurisdiction, no amount of information can provide facts to support its exercise, and discovery should not be permitted. See Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 856 (5th Cir. 2000) (noting that no amount of information on contacts could justify the assertion of specific jurisdiction where claims were not alleged to have arisen from those contacts).

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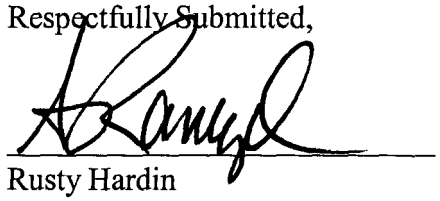
[4] (...continued)
U.S. 783. In National Industrial Sand Ass'n, 897 S.W.2d at 776, the court, in emphasizing that injury to a plaintiff in the forum state did not by itself provide jurisdiction, observed that "[j]urisdiction based upon the effects of extra-territorial conduct within a particular forum is proper only when the extra-territorial conduct focuses upon a plaintiff residing in that forum."

CONCLUSION

For the foregoing reasons, the court should grant the motion of the Moving Defendants to dismiss the Wilt complaint as against each one of them for lack of personal jurisdiction.

Dated: Houston, Texas
June 24, 2002

Respectfully Submitted,



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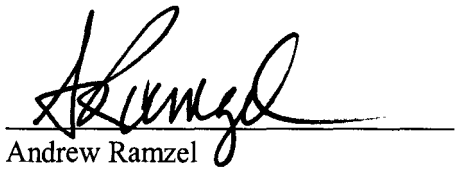
CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of June, 2002, the forgoing pleading was served pursuant to the Court's April 5, 2002 Order.



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