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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

**DEFENDANT ANDERSEN WORLDWIDE
SOCIETE COOPERATIVE'S REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS THE CONSOLIDATED COMPLAINT**

Defendant Andersen Worldwide Societe Cooperative ("AWSC"), by its attorneys, respectfully submits this reply memorandum in support of its motion to dismiss the Consolidated Complaint ("the Complaint").

INTRODUCTION

Plaintiffs concede that AWSC, a Swiss cooperative entity, cannot be held directly liable for violations of any securities laws in connection with Enron. Instead, plaintiffs seek to hold AWSC liable for the actions of Arthur Andersen LLP ("Andersen LLP"), a United States accounting firm, which plaintiffs concede to be a separate legal entity, under a theory of "global partnership." The allegations of the Complaint, however, do not and cannot support liability against AWSC pursuant to such a theory.

As AWSC demonstrated in its opening brief, it cannot be a partnership under Texas law, and plaintiffs' allegations are wholly insufficient to demonstrate that it is part of some "Andersen Worldwide Organization" that could be found to be a partnership under Texas law. Indeed, plaintiffs have no answer for the many cases that have rejected the very theory upon which they base their Complaint, finding that a network of accounting firms is not the equivalent of a global partnership. Recognizing this deficiency, plaintiffs have belatedly attempted to develop an argument – nowhere asserted in the Complaint – that Andersen LLP conducted the

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Enron audit as the “agent” of AWSC. The Complaint does not contain any allegations that even suggest an agency theory, much less facts that would support such a theory. Similarly, the Complaint does not contain any fact – other than the most conclusory allegations – to support the notion of a global partnership on the rationale that certain individual partners of Andersen LLP were “partners” of AWSC. In the absence of such facts (and in the absence of facts sufficient to demonstrate even the existence of such a partnership) the Complaint should be dismissed for failure to state a claim upon which relief can be granted. The Complaint should be dismissed for lack of personal jurisdiction, also, for reasons of Swiss law that plaintiffs do not even address in their response brief.

ARGUMENT

I. This Court Lacks Personal Jurisdiction Over AWSC.

In its opening brief, AWSC suggested that this Court should decline to exercise personal jurisdiction over AWSC because Swiss law would not recognize any such attempted exercise of jurisdiction. (See AWSC Br. at 4-6.) Plaintiffs limit their response to AWSC’s Swiss law argument to two sentences that lack any analysis: “AWSC’s argument is based on the assertion that Swiss law would not recognize the Court’s assertion of jurisdiction over it, and therefore, this Court may not assert jurisdiction over it. AWSC is wrong.” (Pl. Br. at 7 (citation omitted).) Although plaintiffs purport to address particular contacts that AWSC is alleged to have made with the United States by virtue of its relationship with Andersen LLP, they make no effort to address the Swiss law provisions or the arguments of comity advanced by AWSC. Accordingly, for the reasons stated in AWSC’s opening brief, this Court should dismiss this case on jurisdictional grounds.

II. Plaintiffs Have Failed To State A Claim Against AWSC.

Plaintiffs' arguments defending their failure to state a claim fare no better. In AWSC's opening brief, it demonstrated that plaintiffs failed to state a direct claim against AWSC because they had not pleaded, *inter alia*, that AWSC itself had made any material misstatement or omission. (AWSC Br. at 6-7.) Plaintiffs have no answer to this failure.¹ Similarly, AWSC demonstrated that plaintiffs cannot cure their failure to develop any factual allegations that AWSC engaged in any wrongful conduct by resorting to "group pleading," *i.e.*, by lumping AWSC in with Andersen LLP and others and calling them "Andersen." (AWSC Br. at 8-9.) Again, plaintiffs have no response.

Having conceded these points, plaintiffs rely entirely on the notion that AWSC is somehow liable for the acts of Andersen LLP. In so doing, plaintiffs set forth three alternative theories of liability in their response brief: (1) that "Andersen" operates as a "single firm," (2) that Andersen LLP is AWSC's "agent," and (3) that AWSC is liable for securities fraud violations alleged against its "partners." None of these three theories is supported by the allegations of the Complaint.

A. Plaintiffs Have Not Alleged That AWSC Is A "Global Partnership."

Plaintiffs' assertion that AWSC is a "global partnership" forms the core of their claim against AWSC. (Pl. Br. at 13-18.) As an initial matter, plaintiffs attempt to confuse the

¹ Plaintiffs' rejoinder that "it is not necessary to make a statement for §10(b) and Rule 10b-5 liability to attach" (Pl. Br. at 17) is flatly wrong in this context. Neither the United States Supreme Court's decision in *S.E.C. v. Zandford*, 122 S. Ct. 1899 (2002), which involved a broker who misappropriated client funds, nor this Court's decision in *In re Landry's Seafood Restaurants, Inc. Securities Litigation*, No. H-99-1948 (S.D. Tex. Feb. 20, 2001), which involved allegations of insider trading, in any way alters the well-settled rule that a misstatement or omission remains an essential element of any Section 10(b) claim brought by shareholders on the basis of purportedly false public filings. See, e.g., *Mercury Air Group, Inc. v. Mansour*, 237 F.3d 542, 546 (5th Cir. 2001). There are no allegations of misappropriation or insider trading against AWSC here; plaintiffs' cases on this point are wholly inapposite. (See AWSC Br. at 6-7.)

issue by defining AWSC itself as an “Andersen Worldwide Organization” rather than the Swiss Cooperative it is (even according to plaintiffs’ other allegations). (Cmplt. ¶ 92(a).) Plaintiffs cannot decide whether they believe AWSC to be a partnership or whether AWSC is a component of a partnership. But plaintiffs’ vague allegations cannot disguise the clear mandate of Texas law that AWSC can not be a partnership. The Texas Revised Partnership Act excludes from its definition entities organized as non-partnerships under foreign law. (See AWSC Br. at 9-10.) Plaintiffs do not and cannot dispute this conclusion.²

Plaintiffs also suggest that AWSC is a part of a partnership, but they do not allege how such a partnership is constituted. They plainly do not allege that AWSC is a partner in an “Andersen Worldwide” partnership, because they do not allege that AWSC actually shares in any profits, but rather that AWSC only “coordinates the sharing of costs and allocation of revenues.” (Cmplt. ¶ 973(b).)³ This distinction has critical importance. Although plaintiffs’ response brief asserts that the “Andersen Worldwide Organization” engages in profit-sharing (see, e.g., Pl. Br. at 15, 17), plaintiffs cannot assert that AWSC itself takes part in any such sharing arrangement. At best, plaintiffs can allege only that “profits were shared globally.” (Pl. Br. at 17 (citing Cmplt. ¶ 973(b).) This allegation in the passive voice cannot suffice to make AWSC a partner of anything. AWSC pointed out this distinction in its opening brief, but plaintiffs fail even to address it.

Similarly, plaintiffs do not allege, except in the most conclusory fashion, that AWSC has any “control,” as that term is understood under Texas partnership law, over Andersen LLP or any other entity. Plaintiffs point to a single case on this point, Ballard v. United States,

² Plaintiffs do refer to an outdated version of the Texas Partnership Act (Pl. Br. at 15), but they make no effort to answer the clear language of the current statute, nor do they provide any reason why the superseded statute should apply here.

17 F.3d 116 (5th Cir. 1994), but that case does not support their position. In Ballard, the Fifth Circuit found such control to reside in a person who “actively manage[d] real estate projects,” who “personally guaranteed millions of dollars of real estate loans,” who knew that the partnership “filed a partnership tax return that listed [him] as a partner,” and who even “thought of himself as a partner.” Id. at 117, 119. Allegations of such direct control are not present here. Instead, plaintiffs allege only that AWSC authored certain professional standards, coordinated the sharing of profits, and performed other administrative functions. (Cmplt. ¶¶ 973.) Moreover, in the Ballard case, no one contested whether a partnership existed, as AWSC does here, so the Fifth Circuit did not address the requirements for a finding of a partnership. Its inquiry was limited to whether a particular person was deemed to be a partner of a conceded partnership. Accordingly, plaintiffs’ reliance on Ballard is misplaced.

Plaintiffs’ brief is replete with quotations of the allegations of their Complaint and statements that the actions of partners are imputed to a partnership. (Pl. Br. at 13-15, 17.) But those allegations get plaintiffs nowhere unless there is a partnership in the first place. Plaintiffs’ discussion of the consequences of a finding of partnership cannot serve to demonstrate why this Court should find that the allegations could demonstrate the existence of a partnership.⁴

Finally, whatever theory plaintiffs are advancing, it relies on allegations that have been rejected as insufficient by other courts.⁵ Plaintiffs attempt to distinguish the numerous

³ AWSC does not, of course, concede the truth of the Complaint’s allegations.

⁴ Plaintiffs also quote the testimony of Michael Jones from the recent trial against Andersen LLP, but this testimony is not only irrelevant to the question of “global partnership,” but also cannot even be considered because it falls outside the allegations actually contained in the Complaint. (See Pl. Br. at 14-15.) If anything, plaintiffs’ reliance on this testimony shows that they cannot be content to rest on the allegations they have made against AWSC.

⁵ Although plaintiffs assert that the issue of partnership is a question of fact (Pl. Br. at 16), courts are hardly reluctant to dismiss global partnership claims on the basis of insufficient allegations, as the cases discussed below (and in AWSC’s opening brief) demonstrate.

cases that have rejected the precise theory advanced by plaintiffs and have found that worldwide networks of large accounting firms should not be treated as worldwide partnerships. For example, plaintiffs admit that the United States District Court for the Southern District of New York has twice held that “general public statements suggesting an international network of firms alone are insufficient to justify the finding of partnership.” (Pl. Br. at 16-17 (citing Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654 (S.D.N.Y. 1997), and Reingold v. Deloitte Haskins & Sells, 599 F. Supp. 1241 (S.D.N.Y. 1984).) Plaintiffs suggest that their allegations are somehow different. Even plaintiffs’ response brief, however, which purports to repeat the allegations plaintiffs believe could demonstrate the existence of a global partnership, relies almost exclusively on how “AWO and its member firms hold themselves out,” on statements made in “AWO’s Web site,” and on statements made in “Arthur Andersen’s recruiting brochures.” (PL. Br. at 13-14.) These are exactly the kind of statements which the Howard and Reingold courts found to be insufficient. See Howard, 977 F. Supp. at 662-63 (allegations relating to “public relation materials”); Reingold, 599 F. Supp. at 1254 n. 10 (allegations relating to “brochures and pamphlets”). Similarly, plaintiffs’ attempts to distinguish Cromer Finance Ltd. v. Berger, 137 F. Supp. 2d 452 (S.D.N.Y. 2001), are entirely unavailing. (See Pl. Br. at 17.) In Cromer, the Court dismissed global partnership claims made against Ernst & Young International, an entity similar to AWSC. Id. at 485. Instead of disputing the reasonableness of this result, plaintiffs suggest that they “proceed with agency theories of liability,” rather than a global partnership theory. (Pl. Br. at 17.) Plaintiffs virtually concede that Cromer squarely rejects their global partnership theory.

Plaintiffs have been unable to find a single case that has found a network of accounting firms to be subject to a “global partnership” theory, and their attempts to distract this

Court with distinctions regarding the type of case, see Jeffries v. Deloitte Touche Tohmatsu International, 893 F. Supp. 455 (E.D. Pa. 1995) (summary judgment granted for defendant in employment discrimination case), or the type of allegations at issue, see In re A.M. Int'l, Inc. Sec. Litig., 606 F. Supp. 600, 607 (S.D.N.Y. 1985) (motion to dismiss granted “on the theory that all the Price Waterhouse firms world-wide are in fact one entity”), are simply unavailing. Plaintiffs’ attempts to distinguish yet three more cases that reject their worldwide partnership theory, the Baldor case, the Citric Acid case, and the DeLorean case (cited and discussed in AWSC Br. at 13 n.14), on the basis of profit-sharing allegations, only underscore the fact that plaintiffs have not alleged that AWSC shares in Andersen’s LLP profits, nor can they, because AWSC only coordinates payments made between affiliated entities. (See Pl. Br. at 18 n.7.) Contractual relationships – even those in which money regularly changes hands – are not equivalent to partnerships. The allegations of this Complaint amount to nothing more.

B. Plaintiffs Have Not Alleged That Andersen LLP Is An “Agent” Of AWSC.

Plaintiffs attempt to rehabilitate their Complaint by claiming that they have alleged agency liability. (Pl. Br. at 18-19.) Plaintiffs point to five paragraphs in the Complaint to support this notion (¶¶ 971, 973-77), but none of those paragraphs even mentions the words “agent” or “agency,” much less contains any allegations to support such a theory. Plaintiffs cannot use their response brief to manufacture a theory, agency liability, that is simply not present in the Complaint.

Plaintiffs apparently recognize that the first Cromer decision, which was discussed at length in AWSC’s brief, suggests that there can be no “global partnership” liability on the basis of allegations such as those contained in the Complaint. Thus, plaintiffs have attempted to capitalize on the Cromer II decision, which recently held that the plaintiffs in that case had stated a claim against Deloitte Touche Tohmatsu under an agency theory on the basis of

alleged conduct by Deloitte & Touche (Bermuda). See Cromer Fin. Ltd. v. Berger, No. 00 Civ. 2284, 2002 U.S. Dist. LEXIS 7782 (S.D.N.Y. May 2, 2002). But that decision is inapplicable, because the Complaint here does not even attempt to allege facts to support an agency theory of liability. This Court should not address a theory of agency liability in the complete absence of such allegations.

Moreover, plaintiffs would not be able to rely on Cromer II to suggest an agency theory in any event. Contrary to plaintiffs' assertions, the allegations in the complaint at issue in Cromer II were quite different than the allegations here. For example, as AWSC pointed out in its opening brief, the alleged principal in Cromer II was alleged to have allowed its name to appear on the audit report, whereas in this case the audit report very clearly stated that it was issued by Andersen LLP, not AWSC. See Cromer II, 2002 U.S. Dist. LEXIS at *8.⁶ Similarly, the Cromer II court relied on allegations that the audit proposal itself had described the purported agent, Deloitte & Touche (Bermuda), as a "part of Deloitte Touche Tohmatsu International," the purported principal. Id. Plaintiffs make no such allegations in this case. Rather, plaintiffs rely entirely on allegations concerning marketing, whereas the Cromer II decision explicitly relied on the fact that the amended complaint pointed to "a variety of sources of information and not just

⁶ Plaintiffs assert that "AWSC misreads the holding in Cromer II as relying on the fact that the audit report was signed 'Deloitte & Touche'" (Pl. Br. at 19.) Plaintiffs are mistaken. Throughout Cromer II, the court expressly (and repeatedly) relied upon the fact that Deloitte's logo and signature appeared on the audit report. See, e.g., Cromer II, 2002 U.S. Dist. LEXIS at *8 ("Deloitte required that its name and logo be affixed to the Fund audit reports"), *10 (distinguishing first Complaint, which did "not allege that [Deloitte] was even aware of the reports, much less aware that its name and logo were included on the audit reports"), *24 ("plaintiffs have alleged that Deloitte required the use of its name and logo on Deloitte audits"), *25 ("plaintiffs allege that [the audit reports] were signed by 'Deloitte & Touche' and contained the Deloitte logo, yet omitted the fact that Deloitte would not be liable for any errors or omissions in the event of an audit failure").

marketing materials.” *Id.* at *14-15 (emphasis added). In all of these ways, plaintiffs’ attempts to plead an agency theory – even if they had chosen to do so – would be deficient.

C. Plaintiffs Have Not Alleged That Any Of The Other Defendants Were “Partners” Of AWSC.

Finally, plaintiffs baldly assert that “AWSC also is liable for the securities fraud its partners committed as part of the Enron audits.” (Pl. Br. at 19-21.) Although it is true as a general matter that partnerships are liable for the acts of their partners (committed within the scope of their partnership), plaintiffs have not alleged any facts to support the allegation that any of the individual “partners” they have named – Bauer, Berardino, Dreyfus, Duncan, Friedlieb, Goddard, Lowther, Odom, Stewart, or Swanson – actually were partners of AWSC.⁷ Nor do plaintiffs make any attempt to support that assertion here. Moreover, plaintiffs’ theory would fail for the additional reason that they have not alleged in their Complaint (nor could they) that any of these individuals’ conduct – as it related to the Enron audit – was within the scope of his supposed partnership in AWSC, rather than in connection with their work at Andersen LLP.⁸

Moreover, plaintiffs ignore AWSC’s lengthy explanation that AWSC is not a partnership and, therefore, can have no partners. In its opening brief, AWSC demonstrated that plaintiffs’ own allegations precluded a finding that AWSC was a partnership. Under the Swiss Code, AWSC is a “societe cooperative,” not a partnership, and therefore the named individuals cannot be partners of it. (AWSC Br. at 9-10.) There can be no liability on the basis of a non-

⁷ Moreover, for the reasons explained in the briefs filed by these individuals and by Andersen LLP, plaintiffs have not stated a claim against these individuals or against Andersen LLP itself.

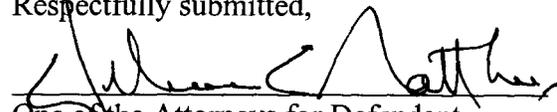
⁸ Indeed, it would be impossible for these individuals to have performed accounting services in the United States on behalf of AWSC, because AWSC – unlike Andersen LLP – is not even licensed to provide accounting services in the United States. The allegations that do not involve the provision of accounting services – e.g., allegations that Berardino “knew of massive document destruction” (Pl. Br. at 21) – do not involve any misstatement or omission and, accordingly, cannot support a securities fraud claim.

existent partnership. Plaintiffs' response simply does not respond to these arguments. Their lengthy recitation of purported wrongdoing by certain individuals therefore cannot give rise to liability under the theory that they were "partners" of AWSC.

CONCLUSION

For the foregoing reasons, Defendant Andersen Worldwide Societe Cooperative respectfully requests that this Court grant its motion to dismiss and enter an order dismissing the Consolidated Complaint with prejudice.

Respectfully submitted,



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Dated: June 24, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing ANDERSEN WORLDWIDE SOCIETE COOPERATIVE'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST CONSOLIDATED AND AMENDED COMPLAINT was served on all counsel of record pursuant to the Court Order dated April 10, 2002 on this 24th day of June, 2002.


William E. Matthews