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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

**REPLY 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 reply memorandum in support of their motion to dismiss the Consolidated Complaint (“the Complaint”).

ARGUMENT

This case has nothing to do with Mr. Randall or Mr. McAlindon. As an initial matter, plaintiffs concede that neither defendant has received any service of process. This failure alone requires dismissal.

Moreover, this Court lacks personal jurisdiction over Mr. Randall and Mr. McAlindon. Plaintiffs’ lone argument in support of personal jurisdiction rests on the notion that Mr. Randall and Mr. McAlindon have titles in a purported global partnership, that those titles confer “control person” status on them for purposes of the alleged violations of securities laws by one United-States based member of that purported global partnership, Arthur Andersen LLP (“Andersen LLP”), and that, because they are alleged to be such “control persons,” Mr. Randall and Mr. McAlindon need not have had any actual contact with this forum before this Court reaches out and exerts jurisdiction over them. Plaintiffs’ allegations fail to support their theory, and their approach violates the most fundamental precepts of due process. For these reasons, the Complaint should be dismissed against Mr. Randall and Mr. McAlindon.

940

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

Plaintiffs concede that neither Mr. Randall nor Mr. McAlindon have received any service of process, much less service of process that meets the requirements of foreign law. The Supreme Court has found that lack of service of a summons is not a mere technical defect, but rather is 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 a summons, these defendants are not parties to the instant action. “[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. Plaintiffs’ position that they are in the process of serving Mr. Randall and Mr. McAlindon cannot cure this patent defect. Mr. Randall and Mr. McAlindon thus should be dismissed from this case pursuant to Rule 12(b)(5). See Rhodes v. J.P. Sauer & Sohn, Inc., 98 F.Supp.2d 746, 748 (W.D. La 2000) (“In order to achieve proper service of process for purposes of Rule 12(b)(5), a party must follow the requirements of Rule 4. . .”).

In their response brief, plaintiffs argue against dismissal because they “are in the process of serving defendants Randall and McAlindon. . . .” (Pl. Br. at 3.) This point is an admission that they have not yet served these individuals. But contemplation of service at some unspecified time in the future is not a substitute for the completion of service upon these individuals, as mandated by Rule 4. In Oil Express National, Inc. v. Burgstone, 1996 WL 666698 (N.D. Ill. Nov. 14, 1996), the court addressed this very question, dismissing the complaint for insufficient process despite the plaintiff’s protestations that it was sending waivers of service by Federal Express to the individual defendants who had not been properly served. Id.

Without proof that the waivers were actually received and signed, the court held that service remained defective and dismissal was warranted. Id. Mr. Randall and Mr. McAlindon have challenged the sufficiency of process, so plaintiffs bear the burden to show adequacy of service. Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 657 (S.D.N.Y. 1997). They simply cannot do so.¹

II. This Court Lacks Personal Jurisdiction Over Mr. Randall And Mr. McAlindon.

This Court also lacks personal jurisdiction over Mr. Randall and Mr. McAlindon. Plaintiffs do not deny that both Mr. Randall and Mr. McAlindon lack sufficient contacts with the United States as individuals to support an assertion of personal jurisdiction over them.² Instead, plaintiffs seek to assert jurisdiction over Mr. Randall and Mr. McAlindon based on their alleged status as “control persons” under the Securities Exchange Act of 1934. (Pl. Br. at 11-13; Cmplt. ¶ 96.) But personal jurisdiction pursuant to the control person theory is not (and cannot be) broader than the constitutional limits proscribed by the Supreme Court. Plaintiffs’ allegations with respect to Mr. Randall and Mr. McAlindon are woefully deficient under those constitutional standards. And even under plaintiffs’ expanded (and constitutionally unpersuasive) view of

¹ Plaintiffs attempt to garner the Court’s sympathy by suggesting that their efforts to effectuate service have been thwarted in some way by the refusal of counsel for Mr. Randall and Mr. McAlindon to accept service on their behalf. That attempt should be rejected; courts routinely recognize that “an attorney is not authorized to receive service of process solely by reason of the attorney’s status as counsel.” United States v. Ziegler Bolt & Parts Co., 883 F.Supp. 740, 749 (Ct. Int’l Trade 1995); United States ex rel. Wilkins v. North American Constr. Corp., 173 F. Supp. 2d 601, 642 (S.D. Tex. 2001) (citing Ransom v. Brennan, 437 F.2d 513, 518 (5th Cir. 1971)). Mr. Randall and Mr. McAlindon are under no obligation to waive their rights under Rule 4.

² Plaintiffs make no effort to support their assertion of personal jurisdiction based on any systematic and continuous contacts that would establish general jurisdiction. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 415 (1984). Therefore, plaintiffs must meet the standards of specific jurisdiction set forth in Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (requiring plaintiffs to allege that defendants “‘purposefully directed’ [their] activities at residents of the forum”).

personal jurisdiction pursuant to a control person theory, plaintiffs' Complaint fails. In short, plaintiffs' allegations as to Mr. Randall and Mr. McAlindon are so meager that exercising personal jurisdiction would be both unprecedented and unconstitutional.

It is important to be clear about the nature of the allegations against Mr. Randall and Mr. McAlindon. They are not alleged to have participated in any activity related to Enron. Indeed, their uncontroverted affidavits assert that they did not do any work on any Enron-related matter. (Randall Aff. ¶ 10; McAlindon Aff. ¶ 10.) They are alleged merely to have held certain management titles of certain entities that had contractual relationships with Andersen Worldwide Societe Cooperative, which itself had a contractual relationship with Arthur Andersen LLP, which performed audit work related to Enron Corp. in Texas. (Cmplt. ¶ 93(u), (v).) Nothing more is said about them in the Complaint. As plaintiffs would have it, these allegations are sufficient to establish personal jurisdiction over Mr. Randall and Mr. McAlindon as control persons of entities that are alleged (insufficiently) to have committed violations of the Exchange Act. No case so holds.

There are, of course, cases which have found personal jurisdiction over foreign individuals pursuant to a control person theory. But courts consistently require that a plaintiff allege facts showing the defendant's actual participation in the alleged fraud before exercising personal jurisdiction over the defendant under a control person theory. See, e.g., Landry v. Price Waterhouse, 715 F. Supp. 98, 102 (S.D.N.Y. 1989) (finding personal jurisdiction over foreign defendant pursuant to allegations that defendant "was a behind the scenes player in the [allegedly fraudulent transaction and,] [a]s a result, he must have possessed knowledge that the transaction ... would have an impact on ... stock trading both within and without the United States"); Derensis v. Coopers & Lybrand, 930 F. Supp. 1003, 1014 (D.N.J. 1996) (finding personal

jurisdiction pursuant to control person theory because individual defendants “allegedly approved and disseminated financial statements that they knew would influence the price of . . . securities”).³ To the extent that the control person rule rests on allegations that the individual defendant actually participated in the alleged fraud, they are but a specific example of the general rule that a court has personal jurisdiction over a foreign defendant who actually engages in tortious acts he knows will produce effects in the forum jurisdiction. Calder v. Jones, 4656 U.S. 783, 789-90 (1984).

Plaintiffs contend that McNamara v. Bre-X Minerals, Ltd., 46 F. Supp. 2d 628 (E.D. Tex. 1999), extends the reach of personal jurisdiction under a control person theory slightly beyond the Calder rule, but even this case does not provide support for exercising personal jurisdiction over Mr. Randall and Mr. McAlindon. In McNamara, the United States District Court for the Eastern District of Texas concluded that an individual may be liable under a control person theory if that person had the “power (whether exercised or not) to control the transactions in question and to control the operations of [the defendant-corporation] in general. In other words, it is enough if the Defendant simply had the abstract power to control. Actual exercise of that power is not required.” Id. at 638.⁴ It further concluded that “the Court has personal jurisdiction over any Defendant as to which the Plaintiffs make a prima facie showing of control person liability.” Id. at 636. Because the plaintiff in that case had made a “prima facie showing that the Defendant in question had the power (whether exercised or not) to control the

³ Here, of course, the Complaint concedes that “[n]o allegations of fraud are made against or directed at” either Mr. Randall or Mr. McAlindon. (Cmplt. ¶ 2 n.1.)

⁴ This is a debatable theory of control person liability, a theory which, contrary to plaintiffs’ assertion (Pl. Br. at 11), the Fifth Circuit has refused to approve. Abbott v. Equity Group, Inc., 2 F.3d 613, 620 (5th Cir. 1993) (declining to rule on the debate because the answer would not affect the outcome of the case).

transactions in question and to control the operations of [the defendant corporation] in general,” the Court concluded that it could exercise personal jurisdiction. Id. at 638.

Here, however, plaintiffs have made no such showing. They have not alleged that either Mr. Randall or Mr. McAlindon even had the power to control any act by any defendant that is alleged to be the basis of liability under the Exchange Act. There is no reason to believe that Mr. Randall, who is alleged to have been “Andersen’s Country Managing Partner for Andersen-United Kingdom” had any control over any particular act alleged in the Complaint. Likewise, there is no reason to believe that Mr. McAlindon, who is alleged to have been “Andersen’s Regional Managing Partner for the Nordic Countries, Southern and Western Africa, Ireland, India, and Israel” had any control over any particular act alleged in the Complaint. These two defendants held certain titles. They are not alleged to have done anything. They are not even alleged to have been able to do anything. There is thus no basis for an assertion of personal jurisdiction.

Finally, even if the plaintiffs had made a prima facie showing that Messrs. Randall and McAlindon had the power to direct any action relevant to this case, this Court would still lack personal jurisdiction. McNamara is unpersuasive to the extent it holds that an individual defendant can be subject to personal jurisdiction based on his ability to control a defendant corporation, even if he did not exercise that power. Such a rule asserts personal jurisdiction over the control person defendant based solely on the Court’s jurisdiction over the controlled entity. “Such a result is plainly unconstitutional. Naturally, the parties’ relationship with each other may be significant in evaluating their ties to the forum. The requirements of International Shoe [minimum contacts analysis], however, must be met as to each defendant over whom a ... court exercises jurisdiction.” Rush v. Savchuk, 444 U.S. 320, 332 (1980).

McNamara's theory extends personal jurisdiction to defendants who lack minimum contacts with the forum, as illustrated by this case. Even assuming that both Mr. Randall and Mr. McAlindon could have controlled any event relevant to this case, there is no allegation – nor could there be – that they did so. Without any such an allegation, there is nothing upon which to base a finding that either Mr. Randall or Mr. McAlindon “‘purposefully directed’ [their] activities at residents of the forum.” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). To the contrary, the control theory basis of personal jurisdiction embraced by the McNamara court rests on the view that the defendant chose not to direct his activities toward the forum, even though he might have. There is no authority for that proposition.⁵

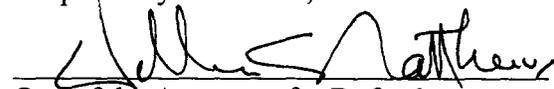
Indeed, there is contrary authority. Courts have recognized personal “jurisdiction over a corporate officer cannot be predicated merely upon jurisdiction over the corporation.” Balance Dynamics Corp. v. Schmitt Indus., Inc., 204 F.3d 683, 697 (6th Cir. 2000). Instead, a court should “apply essentially the same minimum contacts analysis” to the corporate officers as to the corporation itself. SEC v. Carrillo, 115 F.3d 1540, 1548 (11th Cir. 1997). Put another way, “the exercise of jurisdiction over the [officer] depends on the extent of that agent’s personal involvement in the conduct.” Balance Dynamics Corp., 204 F.3d at 697. Congress cannot change this constitutional standard of personal jurisdiction by merely adopting a less exacting standard of control person liability in the Exchange Act.

⁵ Contrary to plaintiffs’ suggestion, the Ninth Circuit has not so held. San Mateo County Transit District v. Dearman, Fitzgerald and Roberts, Inc., 979 F.2d 1356 (9th Cir. 1992), holds only that a defendant residing in the United States is subject to personal jurisdiction if he is alleged to be a control person. Id. at 1358 (stating that “[i]f the suit is to enforce a liability created by the Securities Act, the court has jurisdiction of the defendant wherever he may be found”). That is, San Mateo stands for the proposition that the Exchange Act provides for personal jurisdiction over anyone with minimum contacts with the United States. That is obviously irrelevant to defendants Randall and McAlindon.

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 Complaint with prejudice.

Respectfully submitted,



One of the Attorneys for Defendants
Philip Randall and Roman McAlindon

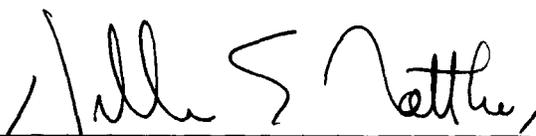
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Dated: June 24, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE CONSOLIDATED COMPLAINT BY DEFENDANTS PHILIP RANDALL AND ROMAN MCALINDON 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