

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Court
Southern District of Texas
FILED
DEC 19 2002
Michael N. Milby, Clerk

MARK NEWBY, §
Plaintiff, §

vs. §

ENRON CORP., et al., §
Defendants. §

Consolidated Lead No. H-01-3624 ✓

AMERICAN NATIONAL INSURANCE §
COMPANY; et al., §
Plaintiffs, §

vs. §

ARTHUR ANDERSEN, L.L.P., et al., §
Defendants. §

Civil Action No. G-02-585

**REBECCA MARK-JUSBASCHE'S MOTION TO STRIKE CERTAIN ARGUMENTS IN
PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO
MOTION FOR REMAND OR ABSTENTION**

TO THE HONORABLE MELINDA F. HARMON:

Rebecca Mark-Jusbasche, one of the Removing Defendants in the above-styled action, respectfully moves to strike certain arguments made for the first time in Plaintiffs' Reply to Defendants' Opposition to Motion for Remand, or, alternatively, for leave to file a sur-reply. As grounds, Mark-Jusbasche would show the Court that Plaintiffs' argument that removal was improper because Mark-Jusbasche "failed to file a responsive pleading" under Rule 81(c) disregards and contradicts Plaintiffs' letter agreement with counsel for Mark-Jusbasche on this very subject, as follows:

1157 *

1193

1. Plaintiffs' Reply to Defendants' Opposition to Motion for Remand or Abstention ("Reply") for the first time asserts that Mark-Jusbasche's removal was procedurally defective because she "failed to file a responsive pleading within 20 days as required by Federal Rule of Civil Procedure 81(c)." Reply at 4; *see also id.* at 1, 7. This argument was not made in Plaintiffs' Motion for Remand and is improper in a reply brief.

2. Furthermore, Plaintiffs fail to inform the Court that **their counsel expressly agreed** with counsel for Mark-Jusbasche that she could answer, move, or otherwise respond to their petition "up to and including March 8, 2002, **unless the case remains in Federal court and is subject to the later deadlines in the consolidated cases in Judge Harmon's court**" (emphasis added). *See* letter of February 19, 2002, from John J. McKetta, III (counsel for Mark-Jusbasche) to David LeBlanc, counsel for Plaintiffs, attaching Mr. LeBlanc's letter of February 15, 2002, incorporating the language quoted above, and agreeing to accept service subject to this specific agreement (both letters are attached as composite **Exhibit A** hereto).¹ At the time of this agreement, the case had already been removed to federal court,² where it remained until this Court's remand order of July 19, 2002. Thus Mark-Jusbasche's duty to respond was at all times "subject to the later deadlines in the consolidated cases in Judge Harmon's court," and Plaintiffs' argument is both incorrect and in derogation of their own agreement.

¹Mark-Jusbasche's counsel agreed on February 19, 2002, to accept service. Plaintiffs' counsel forwarded the Original Petition on April 9, 2002, to counsel for Defendant who received it on April 10, 2002.

²Arthur Andersen LLP removed the case to federal court on February 1, 2002.

3. Either the sole purpose of Plaintiffs' new argument is to bias or persuade the Court that Mark-Jusbasche acted inequitably,³ or Plaintiffs have overlooked their express agreement that the time for response would be "subject to the later deadlines in the consolidated cases in Judge Harmon's court."⁴ In either case, this argument should not be considered by the Court. Mark-Jusbasche asks the Court to disregard or strike all references and argument in Plaintiffs' Reply which fail to acknowledge the letter agreement between counsel attached as Exhibit A, including argument based on any purported "failure to file a responsive pleading." This includes at a minimum all such references and argument in the section at pages 1-2 entitled "Procedural Background"(including the full paragraph on 1 beginning "By letter dated February 19, 2002"), and in the section at pages 4-14 entitled "The Procedurally Defective Removal Requires Remand" (including at a minimum the first two sentences of the paragraph on p. 4 beginning "After being served" and n.1; and the first full paragraph on page 7).

³For instance, Plaintiffs allege on page 4 that:

After being served, Mark-Jusbasche simply ignored this lawsuit. She failed to file a responsive pleading as required by Federal Rule of Civil Procedure 81(c). More important, she did not within thirty days after service of process object to Arthur Andersen's removal grounds, withhold consent to Arthur Andersen's removal, specify additional grounds for removal, or seek remand.

Mark-Jusbasche did not "ignore" the lawsuit. Instead, her counsel extended the courtesy of accepting service while relying on the agreement reached with Plaintiffs' counsel as to time for response. Plaintiffs should not be permitted to use such an agreement as a cudgel.

⁴Plaintiffs cannot actually have overlooked their February 19, 2002 agreement, since they expressly reference it in the Reply at 1.

4. Plaintiffs' new argument should additionally be stricken or disregarded because it is made for the first time on reply. *In re Liljeberg Enterprises, Inc.*, 2002 WL 1980447, *43 (5th Cir. 2002) ("A reply brief is like rebuttal – an opportunity for the appellant to 'reply' to arguments of the appellee, not to raise a new issue at a time when the appellee cannot respond. That is unfair."). Alternatively, Defendants should be permitted a sur-reply to address newly-raised issues. *Christantielli v. Kaiser Foundation Health Plan of Texas*, 113 F.Supp.2d 1055, 1058 (N.D. Tex. 2000)(removing defendant should be afforded the opportunity to address new arguments made on remand issue).

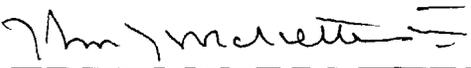
5. Mark-Jusbasche further requests that the Court strike or disregard Plaintiffs' new and completely unfounded assertion at p. 4 that "Defendant Mark-Jusbasche successfully evaded service of process while this action was pending in state court prior to Arthur Andersen's removal, from December 21, 2001 to February 1, 2002." Plaintiffs provide no foundation whatsoever for this allegation which can have no basis other than an effort to bias the Court or suggest inequitable conduct by Mark-Jusbasche. To the contrary, as shown by **Exhibit A**, when contacted by Plaintiffs' counsel, counsel for Mark-Jusbasche agreed to accept service for Mark-Jusbasche subject to the terms set forth in the letter agreement.

WHEREFORE, Mark-Jusbasche respectfully requests that this Court enter an order striking all references and argument in Plaintiffs' Reply which fail to acknowledge and take account of their agreement with counsel for Mark-Jusbasche attached as Exhibit A, including the assertion that Mark-Jusbasche "successfully evaded service" prior to Arthur Andersen's removal on February 1, 2002 and any argument that removal was improper based on purported "failure to file a responsive

pleading.” or, alternatively, granting Mark-Jusbasche leave to file a sur-reply. A proposed form of order is attached.

Respectfully submitted,

GRAVES, DOUGHERTY, HEARON & MOODY
A Professional Corporation

By 

John J. McKetta, III
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Federal ID No. 29895
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(512) 480-5600
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ATTORNEYS FOR DEFENDANT REBECCA MARK-
JUSBASCHE

CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the above and foregoing document has been served upon counsel by placing the same in the United States mail, certified and return receipt requested, on plaintiffs' counsel; on all other counsel by placing the same in the United States mail, addressed and postage prepaid; and further by posting the same to the website pursuant to the order entered by United States District Judge Melinda Harmon, Southern District of Texas, Houston Division, in Civil Action No. H-01-3624 (Consolidated Cases) (Instrument # 819), on this the 18th day of December, 2002:

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Charles Lemaistre, John Mendelsohn,
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Helen Currie Foster
Helen Currie Foster

EXHIBIT A

2-19-02

GRAVES, DOUGHERTY, HEARON & MOODY

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(512) 480-5600 FAX (512) 480-5816

FAX TRANSMITTAL

TO: David Le Blanc, Esq. FAX: 409-766-6424
FROM: John J. McKetta
RE: Rebecca Mark-Jusbasche

Notes, comments, special instructions:

PLEASE NOTE

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February 19, 2002

David Le Blanc, Esq.
Greer, Herz & Adams, L.L.P.
One Moody Plaza, 18th Floor
Galveston, Texas 77550-7998

By Facsimile: 409-766-6424

Re: No. 01-CV-1218
American National Insurance Company, et al. vs. Arthur Anderson, et al.
56th Judicial District Court of Galveston County, Texas

Civil Action No. G-02-0084
American National Insurance Company, et al. vs. Arthur Andersen, et al.
United States District Court, Southern District, Galveston Division

Dear David:

Attached is a signed copy of your letter of February 15, 2002, regarding service on my client Rebecca Mark-Jubasche in the above-referenced cases. As we discussed by telephone, I have added the following language at the end of the last sentence of the first paragraph of your letter: "... , unless the case remains in Federal court and is subject to the later deadlines in the consolidated cases in Judge Harmon's court."

Best wishes.

Sincerely,



John J. McKetta, III

JJM:sm
Attachment

cc: Helen C. Foster, Esq. (w/Attachment)

GREER, HERZ & ADAMS, L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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DEBRA G. JAMES
JOHN A. BUCKLEY, JR., P.C.
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JANET L. RUSHING
MARILYN L. SOLOWAY
GREGORY S. GARRISON
SCOTT D. DANIEL
JAMES M. ITIN
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PLEASE REPLY TO:
David Le Blanc
GALVESTON

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S. TIM YUSUF

OF COUNSEL
JOHN S. MEADOWNEY
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DIRECT DIAL: (409) 797-3241

February 15, 2002

Mr. John J. McKetta, III
Graves, Dougherty, Hearon & Moody
515 Congress Ave., Suite 2300
Austin, Texas 78701

Via Facsimile (512) 480-5816

Re: *American National Insurance Company, et al. vs. Arthur Andersen, et al.*; No. 01-CV-1218; In the 56th Judicial District Court of Galveston County, Texas.

American National Insurance Company, et al. vs. Arthur Andersen, et al.; C.A. No. G-02-0084; In the United States District Court for the Southern District of Texas, Galveston Division

Dear Mr. McKetta:

I am writing to confirm our agreement in the above-captioned lawsuit. You have agreed to accept service of the petition for this matter on behalf of Rebecca Mark-Jusbasche. Further, on behalf of Ms. Mark-Jusbasche you have agreed to answer, move, or otherwise respond to the petition up to and including March 8, 2002,

unless the case remains in Federal court and is subject to the later deadlines in the consolidated cases in Judge Harmon's court.

This letter shall not be construed as a waiver by either party as to the status and/or jurisdiction of the lawsuit in the United States District Court for the Southern District of Texas, Galveston Division, in which the Plaintiffs have filed a motion to remand.

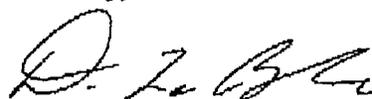
Mr. John J. McKetta, III
February 14, 2002
Page 2

Re: *American National Insurance Company, et al. vs. Arthur Andersen, et al.*; No. 01-CV-1218; In the
56th Judicial District Court of Galveston County, Texas.

American National Insurance Company, et al. vs. Arthur Andersen, et al.; C.A. No. G-02-0084; In
the United States District Court for the Southern District of Texas, Galveston Division

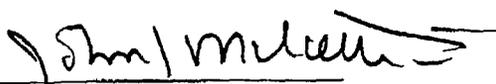
If this letter accurately reflects our agreement, please sign below and return a copy to me.
Upon receipt of your signature I will forward the Original Petition.

Sincerely,



David Le Blanc

GRAVES, DOUGHERTY, HEARON & MOODY

By: 
John J. McKetta, III
515 Congress Ave., Suite 2300
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ATTORNEYS FOR REBECCA MARK-JUSBASCHE

MDL/jb



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FACSIMILE COVER SHEET

Recipient(s)	Firm	Facsimile:	Telephone:
John McKetta, III	Graves Dougherty Hearon & Moody	(512) 480-5816	
<i>Re: American National Insurance Company vs. Arthur Andersen, et al.</i>			

Sender: David Le Blanc

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

MARK NEWBY,	§	
Plaintiff,	§	
	§	
vs.	§	Consolidated Lead No. H-01-3624
	§	
ENRON CORP., <i>et al.</i> ,	§	
Defendants.	§	
<hr style="border: 0.5px solid black;"/>		
	§	
AMERICAN NATIONAL INSURANCE	§	
COMPANY, <i>et al.</i> ,	§	
Plaintiffs,	§	
	§	
vs.	§	Civil Action No. G-02-585
	§	
ARTHUR ANDERSEN, L.L.P., <i>et al.</i> ,	§	
Defendants.	§	

ORDER

Before the Court is Defendant Rebecca Mark-Jusbasche’s Motion to Strike Certain Arguments in Plaintiffs’ Reply to Defendants’ Opposition to Motion for Remand or Abstention. The Court, having considered the Motion and any opposition thereto, finds that the Motion should be granted. It is therefore

ORDERED that the following language be stricken from Plaintiffs’ Reply to Defendants’ Opposition to Motion for Remand or Abstention: all references and argument in Plaintiffs’ Reply which fail to acknowledge and take account of Plaintiffs’ agreement with counsel for Mark-Jusbasche in the letters attached to Mark-Jusbasche’s Motion as Exhibit A, including any argument that removal was improper based on purported “failure to file a responsive pleading,” and all such

references and argument in the section at pages 1-2 entitled "Procedural Background" (including the full paragraph on 1 beginning "By letter dated February 19, 2002"), and in the section at pages 4-14 entitled "The Procedurally Defective Removal Requires Remand" (including at a minimum the first two sentences of the paragraph on p. 4 beginning "After being served" and n.1; and the first full paragraph on page 7). The Court further ORDERS that the assertion that Mark-Jusbasche "successfully evaded service" prior to Arthur Andersen's removal on February 1, 2002 be stricken from Plaintiffs' Reply.

SIGNED this _____ day of _____, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE