

that Mark-Jusbasche failed to file a responsive pleading within the time frame specified in Federal Rule of Civil Procedure 81(c) (*Motion* at ¶¶ 1 and 4); (2) by failing to discuss a letter agreement between American National and Mark-Jusbasche (*Motion* at ¶¶ 2 and 3) and (3) by pointing out that American National was unsuccessful in its attempts to serve Mark-Jusbasche with a copy of the Original Petition for over a month following the filing of this lawsuit in the 56th Judicial District Court of Galveston County, Texas (*Motion* at ¶ 5). Mark-Jusbasche contends that, by introducing these purportedly “new” arguments in its Reply brief, American National violated a Fifth Circuit rule against raising arguments for the first time in a reply brief (*Motion* at ¶ 4).

All of Mark-Jusbasche’s objections are without merit. First and critically, Mark-Jusbasche does not object to any American National Reply Brief argument – new or otherwise – pertaining to question of whether this Court should grant American National’s Remand Motion. Rather, Mark-Jusbasche merely complains about American National’s choice of terminology in the Reply Brief’s recitation of facts¹ and objects to a discussion explaining that the Fifth Circuit’s construction of the removal statute differs in some respects from the way some other circuits construe the statute. None of the complained-of statements or omissions, even if

¹ The parties do not dispute the actual procedural background facts (e.g., when the American Petition was filed in state court, when the action was removed by Arthur Andersen, when Mark-Jusbasche agreed to accept service of process, when Mark-Jusbasche first received a copy of the Petition, when the action was remanded, and when Mark-Jusbasche and other removing defendants removed the action for the second time). The dates relevant to the issue of the timeliness of Mark-Jusbasche’s removal are: (1) Petition filed, December 27, 2001; (2) Arthur Andersen served, January 3, 2002; (3) Action removed by Arthur Andersen, February 1, 2002; (4) Mark-Jusbasche served, April 10, 2002; and (5) Action removed by Mark-Jusbasche, August 19, 2002.

fully embraced by the Court, comprise “arguments” concerning remand and accordingly none of these statements or omissions are material to the Court’s determination of whether remand is, or is not, appropriate.

Second, the rule prohibiting a party from raising new grounds for the relief in a reply brief is generally applicable only to appellate practice, not to submissions concerning a motion pending in the trial court. As Mark-Jusbasche admits, a party can respond to new arguments by means of a surreply. *Motion* at ¶ 4. Thus, even if American National is deemed to have advanced “new arguments” in support of remand, Mark-Jusbasche’s Motion to Strike should be treated by the Court as a surreply and the request to strike portions of American National’s Reply Brief should be denied.

MARK-JUSBASCHE’S MOTION TO STRIKE IS WITHOUT MERIT

Mark-Jusbasche Creates a “New Argument” Only By Misquoting American National

Mark-Jusbasche alleges that American National’s 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).’” *Motion* at ¶ 1. This allegation purposeful misrepresents American National’s Reply by quoting American National’s statement concerning Rule 81(c) out of context; American National never argues, implies, or raises an inference that Mark-Jusbasche’s removal was untimely or otherwise procedural

defective because of her failure to file an answer within the timeframe specified in Rule 81(c). *See Reply* at 2-8.

The reason Mark-Jusbasche's removal was not timely is simple and straightforward, is clearly set forth in both American National's Remand Motion and Reply Brief, and has nothing to do with Rule 81(c). Removal was not timely as a matter of law because Mark-Jusbasche did not, as required pursuant to the Fifth Circuit's "first served" defendant rule, file a notice of removal within 30 days after service of process upon the defendant first served with process in this action. *See Remand Motion* at 5, 9-12; *Reply* at 4-8 (citing *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, -1261-64 (5th Cir. 1988) (discussing removal and remand under 28 U.S.C. § 1446)). Because Mark-Jusbasche's purported grounds for federal subject matter jurisdiction were ascertainable from American National's Original Petition, the action was removable only during the 30 days immediately following the date the Original Petition was served on the first defendant. *See Id.* *See also Return of Service Upon Defendant Arthur Andersen* (January 3, 2002) (*Exhibit A*).

The Fifth Circuit strictly adheres to and enforces the "first served" defendant rule. *See Remand Motion* at 9-10; *Reply* at 4-6 (citing *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873 (5th Cir. 1998); *Chapman v. Powermatic, Inc.*, 969 F.2d 160 (5th Cir. 1992); *Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986); *Getty Oil, supra*). Although Mark-Jusbasche may complain that she was unfairly denied an opportunity to seek removal, the Fifth Circuit has explained that even if

a latter served or later added defendant is not granted an opportunity that might have been available to the other defendants, the unfairness to the plaintiff of repeated removals and remands [such as here] outweighs any suggested unfairness to the later served defendant. *See Reply* at 6; *Brown*, 792 F.2d at 481.

Mark-Jusbasche's failure to timely file a removal notice in the district court, within the 30-day window after service upon the first defendant, dispositively dictates remand. *See Getty Oil, supra.*; 28 U.S.C. § 1446(a) and (b). American National makes clear in both its Remand Motion and its Reply that Mark-Jusbasche's removal was untimely based upon the remand statute as construed in this circuit -- not upon Rule 81 of the Federal Rules of Civil Procedure.

To avoid being accused of failing to recognize that the "first served" defendant rule has not been adopted by all the federal circuits, American National explained that some circuits use a different standard -- the "later served" defendant rule -- for determining the timeliness of a remand motion filed by a later served defendant.² *See Reply* at 6-7. Under this rule, a later served defendant is allowed 30 days from the date he or she is served (rather than the 30 days from the date the first-served defendant is served under the "first served" rule) to either join in the removal or seek remand. *See Id.* (citations omitted). Mark-Jusbasche's removal

² American National's discussion of the various statutes, case law and rules pertaining to removal was properly included in the Reply. In her Opposition to Remand, Mark-Jusbasche asserted that American National could "point to no statutory basis" demonstrating that she had lost her right to removal. *Removing Defendants' Opposition to Remand* ("Opposition to Remand") at 14.

thus is also untimely under the “later served” rule. Mark-Jusbasche states she was served with a copy of the Original Petition on April 10, 2002 and filed her removal notice on August 19, 2002. *See Removing Defendants’ Opposition to Motion for Remand or Abstention* at 6-7.

American National, in discussing the “first served” and “later served” defendant rules, clearly demonstrates that the “first served” rule is controlling law in the Fifth Circuit. *See Remand Motion* at 9-10; *Reply* at 4-8 (citations omitted). Case law concerning the “later served” rule is cited only for the purpose of explaining that the Fifth Circuit and the courts in some other circuits construe section 1446 differently. American National never argues that this Court should apply the “later served” defendant rule.

American National references Rule 81(c) when reciting the procedural timeline (*Reply* at 4) and following discussion of the “later served” defendant rule (*Reply* at 6-7). American National speculates that, in a jurisdiction applying the “later served” defendant rule, Mark-Jusbasche might have claimed that a responsive pleading containing allegations of “related to” jurisdiction, filed within Rule 81(c)’s 20-day timeframe (and thus within section 1446’s 30-day timeframe), arguably complied with 28 U.S.C. § 1446(b). *Id.* However, because the “first served” rule applies to actions removed to this Court (and, in any event, because Mark-Jusbasche opted not to file an answer or other responsive pleading), the reference to Rule 81 is merely illustrative of the usual procedure required upon an action’s removal to federal court. Mark-Jusbasche cannot legitimately claim that

American National's mere conjecture concerning a rule of law that does not apply in this circuit, based upon circumstances that did not occur in this case, is an objectionable "new argument" that is in any way material to this Court's remand determination.

Mark-Jusbasche seems to complain of American National's comment that Mark-Jusbasche's failure to file a responsive pleading indicated acquiescence to Arthur Andersen's removal. *See Id.* This subjective comment, as discussed, has no implications for this Court's determination of remand. Mark-Jusbasche's failure to file a responsive pleading is not material to the Court's determination of whether her removal was timely because, pursuant to the Fifth Circuit's "first served" defendant rule, the deadline for Mark-Jusbasche to file a notice of removal had passed long before a responsive pleading would have been due under Rule 81(c). American National's comment was made merely to highlight the fact – a fact also emphasized in the Remand Motion and in other sections of the Reply Brief -- that Mark-Jusbasche did nothing after she was served to assert "related to" bankruptcy jurisdiction until she filed her Notice of Removal on August 19, 2002. *See Remand Motion* at 9-11; *Reply* at 4.

To summarize, American National's discussion of the "later served" rule in its Reply Brief serves only to show that, under any interpretation of the removal statute, a party cannot ignore the 30-day window for removal prescribed in section 1446(b). Rule 81, as well as Rules 8 and 12, are cited by American National to point out that the Rules of Civil Procedure also discourage a defendant from

simply ignoring the plaintiff's pleading.³ See Reply at xxxxx. Neither the "later served" rule nor the Rules of Procedure, however, are controlling. Whether Mark-Jusbasche's removal was timely is determined solely under section 1446 as construed by the Fifth Circuit Court of Appeals.

Mark-Jusbasche's contention that American National seeks to assert Rule 81 as a ground for remand is plainly without merit and her request to "strike" any reference to Rule 81(c) should therefore be denied. Further, because Mark-Jusbasche does not contend that American National asserts any "new" ground or argument for relief save for American National's mention of Rule 81, this conclusion is dispositive of Mark-Jusbasche's entire Motion to Strike. Mark-Jusbasche's other objections will nonetheless be addressed because, although not material to this Court's determination of whether remand should be granted, they implicitly accuse American National and its counsel of improper conduct.

American National and Mark-Jusbasche Did Not, and as a Matter of Law Could Not, Agree to Abrogate the Statutory Rules Governing Remand or Agree to Contravene the Federal Rules of Civil Procedure

Mark-Jusbasche complains that American National did not inform the Court of an agreement between American National and Mark-Jusbasche whereby Mark-Jusbasche agreed to accept service of process through her counsel in return for American National's stipulation not to object to an extension of time for the filing of a responsive pleading. *Motion* at ¶¶ 2 and 3. Specifically, American National agreed not object to an extension of time so long as Mark-Jusbasche filed

³ Mark-Jusbasche does not contend that any Court order prohibiting her from filing a responsive pleading.

a responsive pleading “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.” *See Motion*, Exhibit A.

The reason American National did not inform the Court of this agreement is self-evident: the parties’ stipulations have nothing whatsoever to do with the remand issues now pending before the Court. Moreover, the letter agreement was referenced by Mark-Jusbasche in her original removal notice and opposition to remand. Removal and remand are governed by statute and court decisions interpreting the statutes, not by agreements between the parties, not by the Rules of Civil Procedure and not by court order. *See Reply* at 4-5, 7-8; *Getty Oil*, *supra*.

American National’s reference to Rule 81 merely suggests that Mark-Jusbasche *could* have filed a responsive pleading, whether she had an obligation to do so or not.⁴ Any suggestion that counsel for American National is not complying with the terms of the letter agreement is incorrect and should be given no countenance. Interestingly, although vehemently complaining of American National’s failure to “reveal” the letter agreement in its request for remand, Mark-Jusbasche fails to explain exactly how the letter agreement could possibly impact the Court’s determination of American National’s Remand Motion. *See Motion* at ¶¶ 2 and 3. Apparently she complains that the letter agreement with American

⁴ It is interesting to note that the certificate of service for Andersen’s Notice of Removal, the first removal of this action, indicated that Mark-Jusbasche was served with the notice which included, as required, a copy of the original petition naming her as a defendant. The certificate of service indicates that service was made on or about February 1, 2002. Nowhere does Mark-Jusbasche indicate when she received service of this copy of the petition.

National should prevent American National from mentioning that Mark-Jusbasche made a knowing and purposeful choice not to file a responsive pleading. As discussed herein and as American National's Remand Motion and Reply makes clear, however, American National is not asking for remand, or for any type of relief, based upon Mark-Jusbasche's failure to comply with Rule 81(c) or otherwise file a responsive pleading.

American National Did Not Raise New Grounds for Remand in its Reply Brief

Mark-Jusbasche complains that American National's "new argument should additionally be stricken or disregarded because it is made for the first time on reply." *Motion* at ¶ 4. The purportedly objectionable "new argument" is not specified, but presumably Mark-Jusbasche is again referring to American National's mention of Mark-Jusbasche's decision to forego the filing of a responsive pleading. As discussed, Mark-Jusbasche devises her "new argument" theory only by quoting a portion of American National's Reply brief out of context. To reiterate, American National is not claiming that Mark-Jusbasche's failure to file a responsive pleading provides a ground for remand. Under the "first served" defendant rule applicable to cases in the Fifth Circuit, the window for filing motions to remand had passed long before Rule 81(c) could have come into play. There simply is no "new argument" in American National's Reply Brief.

Mark-Jusbasche relies upon *In re Liljeberg Enterprises, Inc.*, 2002 WL 1980447, *43 (5th Cir. 2002), for the proposition that "new arguments" raised in

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American National's reply brief should be stricken. *Motion* at ¶ 4. Even assuming, *arguendo*, that American National had raised new arguments pertaining to remand in its Reply Brief, Mark-Jusbasche's reliance on the appellate rule is misplaced.

The rule that new issues may not be raised in a reply brief is required in the context of an appeal because an appellee has no opportunity to respond to new arguments raised in the appellant's reply brief. *See Cousin v. Trans Union Corp.*, 246 F.3d 359, 373 (5th Cir. 2001); FED. R. APP. P. 28. *But see* Fifth Cir. R. 28.5 (specifying when supplemental briefs will be filed). In the context of a motion before the trial court, on the other hand, a more flexible approach is appropriate. When a motion is pending in the trial court, arguments raised for the first time in a reply brief can be rebutted by submission of a surreply. *See, e.g., Christantielli v. Kaiser Foundation Health Plan of Texas*, 113 F.Supp.2d 1055 (N.D. Tex. 2000); *EEOC v. Gaffney*, 2001 U.S. Dist. Lexis 16795, *10-13 (N.D. Tex 2001) *cf. Lacher v. West*, 147 F.Supp.2d 538, 540 (no surreplies allowed pursuant to local and court rules); *American Telnet, Inc. v. GTE Corp.*, 1999 U.S. Dist. Lexis 9380, *7 n.3 (N.D. Tex. 1999) (to the extent positions in reply brief can be considered new arguments, the court "declines to consider them" for the purpose of the Rule 12(b)(6) motion). Additionally, even after a ruling or judgment, the party claiming to be prejudiced or harmed may seek reconsideration of the court's ruling. *See* FED. R. CIV. P. 59 and 60.

In conclusion, Mark-Jusbasche's citation to Fifth Circuit authority pertaining to appellate reply briefs does not support her request to strike portions of American National's Reply Brief. Further and in any event, there are simply no new issues raised by American National pertinent to the question of remand.

Service of Process is Not a Remand Issue

Mark-Jusbasche also objects to American National's recitation of facts concerning American National's inability to serve process on Mark-Jusbasche for over a month after the lawsuit was filed. *Motion* at ¶ 5. Mark-Jusbasche does not dispute the extended time lag between the filing of the Original Petition and service of process. In both her Notice of Removal and Opposition to Motion for Remand, Mark-Jusbasche states that she was not served until after the case was already removed and pending in federal court. *Notice of Removal* at 3; *Opposition to Remand* at 6, 13.

Mark-Jusbasche apparently only takes issue with American National's use of the phrase "evaded service" to describe her conduct. Mark-Jusbasche's feigned distress concerning American National's terminology is disingenuous in light of her own highly-charged and disparaging accusations that American National "completely mischaracterized" Fifth Circuit precedent (*Opposition to Remand* at 20); engaged in "lengthy and unsubstantiated" argument (*Id.* at 21); and made improper "sweeping" assertions (*Id.* at 25).

American National seeks only to emphasize that it actively attempted to serve Mark-Jusbasche immediately after the Original Petition in this lawsuit was

filed. That Mark-Jusbasche was not served within thirty days after the filing of the Original Petition, and thus barred under the Fifth Circuit's "first served" rule from moving for removal, was not the result of a design to by American National to deprive Mark-Jusbasche of any rights. Mark-Jusbasche has not alleged that American National failed to properly pursue service of process and American National has not alleged that the failure to quickly serve Mark-Jusbasche was the result of wrongdoing on the part of Mark-Jusbasche. Matters relating to service of process, accordingly, are not material to the Court's determination of remand.

The purpose of Mark Jusbasche's Motion to Strike, it becomes evident, is to retaliate against American National for what Mark-Jusbasche perceives as an unfair characterization of her conduct. Even if American National's choice of words was not the best, however, a Motion to Strike is not appropriate because whatever words may have been, the issue of service of process is not pertinent to remand issues. American National's statement that Mark-Jusbasche "evaded" service, moreover, is no more objectionable than Mark-Jusbasche's allegation that American National "completely mischaracterized" Fifth Circuit precedent – an accusation implying a violation of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 11(b)(2) (requiring that legal contentions to be warranted by existing law or reasonable argument for extension of such law).

In short, Mark-Jusbasche's complaint about American National's use of the word "evade" is not worthy of serious consideration by the Court. Mark-

Jusbasche does not demonstrate that any portion of American National's Reply brief should be stricken.

CONCLUSION AND PRAYER

Lacking any legitimate basis in the law for opposing American National's request for remand, Mark-Jusbasche resorts to (1) misquoting American National's Reply Brief as a means of devising grievances about the form and language of American National's argument and (2) lodging attacks upon the integrity of American National's counsel. None of the grievances raised in the Motion to Strike, however, have merit and none are material to the Court's determination of whether this action should be remanded to state court. Mark-Jusbasche's Motion to Strike, accordingly, should be denied.

Respectfully submitted,

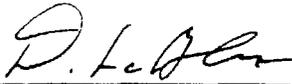
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CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of January 2003, a copy of the forgoing document was served on all counsel of record by by posting in PDF format to www.esl13624.com in compliance with the Court's Order Regarding Service of Papers and Notice of hearings Via Independent Website.



David Le Blanc

EXHIBIT "A"

CITATION
THE STATE OF TEXAS
CASE NO. 01CV1218-56TH.
AMERICAN NATIONAL INSURANCE COMPANY, ET AL
VS.

ARTHUR ANDERSEN, L.L.P., ET AL

ARTHUR ANDERSEN, LLP, Upon whom process of service may be had by REGISTERED AGENT, P. SCOTT OZANUS, 901 MAIN STREET, SUITE 5600, DALLAS, TEXAS 75202-3799 AND/OR ARTHUR ANDERSEN, LLP, TEXAS MANAGING OFFICER PARTNER, D. STEPHEN GODDARD, JR., 711 LOUISIANA STREET, HOUSTON, TEXAS 77002

Defendant Greetings:

NOTICE TO DEFENDANT: You have been sued. You may employ an Attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you. The ORIGINAL petition was filed on the 27TH day of DECEMBER 2001 in cause number 01CV1218 pending before the 56TH District Court of Galveston County, Texas, AMERICAN NATIONAL INSURANCE COMPANY, ET AL Plaintiff(s) VS. ARTHUR ANDERSEN, L.L.P., ET AL (Defendant/s). See attached Petition for named parties to the suit.

The name and address of the attorney ANDREW J. MYTELKA, GREER, HERZ & ADAMS, L.L.P., ONE MOODY PLAZA, 18TH FLOOR, GALVESTON, TEXAS 77550

WITNESS, EVELYN WELLS ROBISON, Clerk of this District Courts of Galveston County, Texas.
Mailing address: 722 Moody Room 404 County Courthouse, Galveston, Texas 77550.

Issued and given under my hand and seal of Court at Office, this the 3RD day of JANUARY 2002.

SEE ATTACHED STATUS CONFERENCE NOTICE

EVELYN WELLS ROBISON
District Clerk - Galveston County, Texas

By Shannon Schulze
SHANNON SCHULZE (Deputy Clerk)



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OFFICER'S RETURN

Came to hand on the 3 day of JANUARY, 2002 at 2:00 o'clock at P M. Executed at 711 LOUISIANA ST.
Within the County of HARRIS, at 4:00 o'clock P M., on the 3 day of

JANUARY, 2001 By delivering to the within the named defendant ARTHUR ANDERSON LLP
By SCOTT A. STEPHEN GODDARD JR.

Each in person a true copy of this citation together with the accompanying copy of the petition, having first attached such copy of such petition to such copy of citation and endorsed on such copy of citation the date of delivery.

Total fee for serving citation \$ 50.00

Michael Letcos
Name of Officer or Authorized & Disinterested Person
Galveston County, Texas

By: Michael Letcos, Signature of Deputy of Authorized & Disinterested Person

Authorized & Disinterested person's Verification:

On this the day personally appeared Michael Letcos, known to me to be the person whose signature appears on the foregoing return. After being duly sworn by me, he/she stated that this citation was executed by him/her in the exact manner recited on the return.

Sworn to and subscribed before me, on this the 4 day of January, 2002

Notary's Name Printed: Hilda J. Daugherty

Notary Public in and for the State of Texas
Commission Expires: 10-3-02

