



## INTRODUCTION

On or about March 29, 2002, American National moved for the entry of a temporary injunction that could have disastrous effects on Andersen's ability to restructure itself based upon nothing more than a collection of speculative and conclusory newspaper articles gathered from an apparent worldwide Internet search. American National has shown that it is not entitled to the extraordinary relief it seeks for a number of reasons: it lacks standing to bring this motion; the relief it seeks is barred by the Supreme Court's decision in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S. Ct. 1961, 144 L.Ed. 2d 319 (1999); and even assuming a likelihood of success on the merits of its underlying claim, the harm in granting this injunction to Andersen, Andersen's creditors, employees and clients far exceeds any harm that American National would suffer if the injunction did not issue. In fact, American National will get no benefit whatsoever from this injunction since the injunction will only cause delay that will contribute to the daily decline in the value of Andersen's assets. Such an injunction will preserve nothing and inures to the detriment of everyone – including American National.

At the hearing commenced on April 8, American National's counsel conceded there was no basis for relief. American National admittedly does not meet the threshold requirement of Grupo Mexicano in that it does not assert an equitable claim. Moreover, American National's counsel admitted that it has no knowledge whatsoever about what it was trying to do or what effect such an injunction could possibly have. As Mr. Mytelka said at the April 8, 2002 conference before the Court, “[w]e don't know what the transactions are contemplating entering into the terms are. We don't know if they're fair. We don't know if it would be a benefit to the plaintiffs in this case or a detriment.” Transcript, Apr. 8, 2002 at 3.

Notwithstanding its admittedly baseless application for extraordinary relief, American National now seeks to parlay its motion into a discovery device in contravention of the PSLRA stay of discovery without making any application to the Court and without any showing that it meets the stringent requirements of the PSLRA needed to invoke a discovery stay exception.

On April 15, 2002, American National served upon Andersen in its Houston office four subpoenas seeking the presence of various unidentified individuals ostensibly to provide testimony at a hearing currently scheduled for April 17, 2002.<sup>1</sup> The subpoenas, which are styled in the form of deposition subpoenas issued under Rule 30(b)(6), seek the presence of persons with knowledge covering the following four categories of information:

- “An Arthur Andersen, LLP representative or representatives, with knowledge concerning the organization of Arthur Andersen USA, about organization of Arthur Andersen worldwide operations and affiliations, and about the agreements between Arthur Andersen USA. and the Arthur Andersen worldwide organization.” [sic]

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<sup>1</sup>On April 15, 2002, Andersen and Lead Plaintiff in the Newby case, the Regents of the University of California (the “Regents”) jointly moved to continue the hearing set for April 17, 2002 on the Regents motion for preliminary injunctive relief. Andersen and the Regents advised the Court that this action should be taken in light of developments in the mediation. Because the American National relief is subsumed within the Regent’s request for relief and because the American National hearing will create the very interference the Regents and Andersen seek to avoid, Andersen has requested that the American National motion, scheduled to be heard at the same time, be adjourned so that the motions, which address identical subject matter, can be heard together.

- “The Arthur Andersen partner with the most knowledge of all relevant facts concerning the Arthur Andersen’s arrangement with Deloitte and Touche’ concerning ‘sale’ of Arthur Andersen’s tax business reported in the press on April 5, 2002” [sic]

- “The managing partner or the partner presently charged with the duties of being the manager or managing supervisor of the Houston, Texas office of Arthur Andersen, LLP”

- “A representative or representatives of Arthur Andersen, LLP, with knowledge concerning and the ability to explain any and all non-compete agreements between Arthur Andersen and its partners, and between Arthur Andersen and any of its employees.”

Thus, conceding it has no evidence at all -- and has no idea whatsoever what any employee of Andersen would say in response to any of these subject areas, American National through the device of a hearing regarding extraordinary relief in fact seeks to obtain nothing more than discovery that might or might not be relevant to its application. American National’s unauthorized acts seek to evade the PSLRA’s stay, abuse the Federal Rules of Civil Procedure and the processes of this Court, and should not be permitted. These four subpoenas should be quashed.

## ARGUMENT

### I.

#### AMERICAN NATIONAL'S SUBPOENAS ARE AN IMPROPER ATTEMPT TO OBTAIN DISCOVERY IN VIOLATION OF THE PSLRA STAY

##### A. The Subpoenas Violate the PSLRA.

The PSLRA automatically stays discovery prior to the Court's resolution of any motion to dismiss the complaint. Specifically, the Act provides:

[A]ll discovery and other proceedings shall be stayed during the pendency of any motion to dismiss unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 78u-4(b)(3)(B) (emphasis added).

This provision is intended to stay discovery until after the Court has examined the validity of the complaint. As Judge Rosenthal wrote in an earlier decision in this case, this provision means:

that discovery is stayed from the filing of the complaint *until* the court has determined the sufficiency of the plaintiff's pleading, unless the plaintiff can establish one of the exceptions. See S. Rep. 104-98, at 14 (1995), *reprinted in* 1995 U.S.S.C.A.N. 679, 693 (discovery should "be permitted in securities class actions only after the court has sustained the legal sufficiency of the complaint"); *In re Carnegie Int'l Corp. Sec. Litig.*, 107 F.Supp.2d 676, 681 (D.Md.2000) ("Until the opportunity to test the sufficiency of the complaint has passed, the congressional intent is clear--no discovery should commence.").

Newby v. Enron Corp., 2002 WL 200956 (S.D. Tex. Jan. 9, 2002).

In order to obtain discovery, a party must demonstrate that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party. American National has made no application to the Court seeking leave to take discovery or demonstrating that it meets any exception to

the PSLRA -- and no such relief has been granted. Nevertheless, American National has issued under the guise of Rule 45 subpoenas that are fashioned as only discovery could be and through which they admittedly seek to elicit nothing more than the discovery of entirely unknown information.

#### B. The Subpoenas Violate Rule 45

Moreover, even if plaintiff were to have made a proper application, and even if the Court had found plaintiff entitled to discovery -- which it has not -- plaintiff's Rule 45 subpoenas, to the extent they seek to compel attendance at a hearing, are entirely improper on their face and must be quashed.

A Rule 45 trial subpoena must name the individual whose testimony is being sought. See Donoghue v. County of Orange, 848 F.2d 926, 932 (9<sup>th</sup> Cir. 1987). Rule 30(b)(6), on the other hand, is by its terms a discovery device, designed to aid a party in the discovery process where the identity of a witness is not known and so that the identity of a potential hearing witness can be discovered. Fed. R. Civ. P. 30(b)(6). Nothing in Rule 30 or the accompanying Advisory Committee notes even hints at the possible use of Rule 30 at trial, and the concept is nonsensical.

American National's melding of two rules -- 45 and 30(b)(6) -- is an ill conceived effort at self-help that violates the Federal Rules of Civil Procedure. In Donoghue v. Orange County, the plaintiff served a trial subpoena upon Orange County without naming the individual whose testimony the plaintiff sought, using instead a 30(b)(6)-type designation. The trial court quashed the subpoena precisely because it failed to identify an individual for testimony. Plaintiff argued that the Rule 30(b)(6) mechanism of describing the

types of testimony sought for a deposition witness should apply to trial testimony. The Ninth Circuit Court held, “We have discovered no authority, and Donoghue cites none, for the proposition that the Rule 30 standards should govern Rule 45 subpoenas of [trial] witnesses.” Donoghue, 848 F.2d at 932. See also Hill v. National Railroad Passenger Corp. et. al, 1989 WL 87621 (E.D. La. July 28, 1989). (“There is no provision allowing the use of the 30(b)(6)-type designation of areas of inquiry or allowing service on a corporation through an agent for service of process in order to compel a particular person, who may be a corporate employee outside of the subpoena power of the court, to testify at the trial.”). The subpoenas should therefore be quashed.

## II.

### THE COURT SHOULD EXERCISE THE PROTECTIVE MEASURES OF RULE 45

American National’s subpoenas should also be quashed pursuant to Fed. R. Civ. P. 45(c)(3)(A)(iv) as their enforcement would place a great burden on Andersen and the individuals who would otherwise be compelled to travel to Houston in order to provide, in the context of a hearing, discovery for the plaintiffs - which would ultimately not even prove helpful to their case. The subpoenas as they are drafted call for the testimony of a group of individuals who are at the center of Andersen’s efforts to address the crisis resulting from a large number of sudden actual and threatened client defections and potentially crushing civil and criminal liability. By and large, the individuals whose presence is sought by American National are located in other parts of the country and are critical to the management of the multiple crises that Arthur Andersen is now addressing.

Given that the injunction itself would be harmful to American National, Andersen, its creditors, clients and employees, compelling the attendance in Houston of the very people who are central to the effort of securing value for Andersen's assets at this critical juncture would be foolish. There is no basis whatsoever for American National's suggestion that Andersen may be shedding itself of assets without obtaining value. There is no basis for its suggestion that Andersen is not interested in extracting value for its assets and doing its best to meet its obligations to creditors, employees and clients. American National concedes as much. It concedes that it has no information regarding Andersen that would demonstrate Andersen is acting in a manner harmful to American National.

American National's real complaint is that it is not privy to Andersen's internal affairs and it does not know what Andersen is doing. The reason, of course, is that Andersen is not required to conduct its business negotiations in public and to do so could itself be detrimental to the negotiation process.<sup>2</sup> The testimony American National seeks would reveal Andersen's confidential commercial information. There is nothing in American National's motion or its effort to procure witnesses that will aid American National in its case and no reason it should be allowed to proceed with discovery now. The subpoenas should therefore be quashed. See Rule 45 (c)(3)(B)(i).

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<sup>2</sup>The transactions that American National is interested in - if they are in fact being contemplated by Andersen - involve information that Andersen seeks to keep secret from potential purchasers. If Andersen is trying to sell parts of its business, then sharing information on bids and negotiated terms would hamper its bargaining position in trying to get the best price. The release of this type of confidential commercial information would only reduce the amount Andersen could raise from a sale, and thus reduce the amount available for the payment of claims from the plaintiff class.

### III.

#### AMERICAN NATIONAL DOES NOT HAVE STANDING TO SUBPOENA THE INDIVIDUALS

Pursuant to the Court's order of February 15, 2002, the Regents of the University of California were appointed to be lead plaintiff, represented by the law firm Milberg Weiss Bershad Hynes & Lerach LLP. The Court delegated to this plaintiff and its counsel exclusive standing to pursue the interests of the plaintiff class in the above-captioned action. In the Court's Opinion and Order of February 15, the Court specifically instructed that the Milberg Weiss firm "shall henceforth direct and coordinate the prosecution of this action on behalf of plaintiff's counsel including discovery, pretrial conferences, and settlement negotiations with counsel for Defendants." Newby v. Enron Corp., 2002 WL 530588 \*17 (S.D. Tx. Feb. 15, 2002).

The Court's reasoning supporting the appointment of one law firm to represent all plaintiffs during the initial phase of this litigation is particularly apropos to the American National subpoenas Andersen seeks to quash. As the Court noted in its Opinion and Order of February 15, 2002, "it is centrally important to the litigants on both sides and to this Court, especially because there are so many parties involved and all are entitled to equal access to the evidence, that the discovery process not denigrate into chaos and harassment." Newby v. Enron Corp., 2002 WL 530588 \*17 (S.D. Tex. Feb. 15, 2002). Andersen's exposure to discovery demands from the plaintiffs would open Andersen to exactly the type of harassment the court anticipated in its order and would engender the same type of chaos.

Discovery by American National is also inconsistent with the scheme of the PSLRA. The Private Securities Litigation Reform Act sets up a system to vest a lead plaintiff with responsibility for conducting

the litigation on behalf of the plaintiff class. Congress intended the lead plaintiff in large class actions such as this one to be an institutional investor capable of supervising the litigation. S. Rep 104-98, at 6 (1995) reprinted in 1995 U.S.C.C.A.N. 679, 685. The purpose of this preference for institutional plaintiffs is to avoid lawyer-driven litigation. H.R. Conf. Rep. 104-369, at 32 (1995) reprinted in 1995 U.S.C.C.A.N. 730, 731. American National is not the lead plaintiff in the Newby case, and its counsel has not been chosen by the Court to represent the class. The discovery that American National seeks to take, and the burden it seeks to impose upon Andersen, is exactly the type of lawyer-driven litigation tactic that the PSLRA sought to restrict by vesting discovery duties exclusively with lead counsel.

CONCLUSION

For the foregoing reasons, the Court should grant Andersen's motion and quash American National's subpoenas.

Dated: Houston, Texas  
April 15, 2002

Respectfully Submitted,

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*As Amended  
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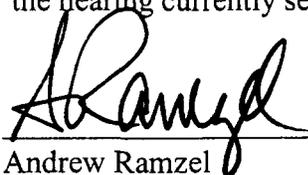
(212) 450-3633 (fax)

CERTIFICATE OF CONFERENCE

I hereby certify that on this 15 day of April, 2002, I conferred with David Le Blanc, counsel

for American National, by telephone. Mr. Le Blanc told me that American National is opposed to

Andersen's efforts to quash its subpoenas for the hearing currently set for April 17, 2002.

  
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Andrew Ramzel

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of April, 2002, the foregoing pleading was served on all

pursuant to the Court's April 10, 2002 Order.

  
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Andrew Ramzel