United States Courts
Southern District of Texas
FILED

APR 1 6 2002 LF

Michael N. Milby, Clerk

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

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| Mark NEWBY,<br>Plaintiff,<br><br>v.<br><br>ENRON CORP., et al.,<br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Consolidated Lead No. H-01-3624 |
| AMERICAN NATIONAL<br>INSURANCE COMPANY, et al.,<br>Plaintiffs,<br><br>vs.<br><br>ARTHUR ANDERSEN, L.L.P., et al.<br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Civil Action No. G-02-0084 |

AMERICAN NATIONAL INSURANCE COMPANY'S
RESPONSE TO ARTHUR ANDERSEN LLP
EMERGENCY MOTION TO CONTINUE HEARING

Plaintiffs, American National, et al. ("American National"), subject to and without waiving their Motion to Remand, file this Response to Arthur Andersen LLP's Emergency Motion to Continue Hearing Currently set for April 17, 2002 and would respectfully show the Court as follows.

Arthur Andersen, L.L.P. ("Andersen") and Lead Plaintiffs, Regents of the University of California, have ostensibly agreed to extend the time for Andersen to respond to Lead Plaintiff's *Ex Parte* Application for Temporary Restraining Order (the "Application") until April 22, 2002 and to postpone the hearing on that Application also until April 22, 2002. In so doing Andersen and Lead Plaintiff argue that American National's Motion for Temporary Injunction (the "Motion"), which has been on file for nearly three weeks, is thereby moot, as the relief requested by American National is substantially similar to the relief later requested by Lead Plaintiff. In

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effect, Andersen asserts that by agreement with the Lead Plaintiff, it can do what only this Court has the power to do, not unlike the path Andersen blazed in catapulting American National into this Court's jurisdiction based upon an original petition which asserts only Texas state law causes of action, providing this court with no subject matter jurisdiction. In typical fashion, Andersen's arguments again put the cart before the horse.

The substance of Andersen's argument is – Andersen, Lead Plaintiff and Lead Plaintiff in the *Tittle* are mediating the case, have been unable to come to settlement and, believing continued discussion to be fruitful, have determined that they do not wish to address the relief requested by American National. Indeed, Andersen will never want to confront the seriousness of the issues raised by American National's Motion and Lead Plaintiff's Application. However, the need for such relief is as necessary today as it was when the Motion and the Application were each filed, if not more necessary. News reports continue to recount that Andersen is in the midst of transferring its assets to other entities and that such continuing action will not stop. (See Exhibit "A" "Andersen Merges With E&Y in Baltics" April 15, 2002, The Wire-News from the AP). While American National has not been present at the mediation, which apparently has been occurring for a few weeks, the Court is of course in a far better position to understand the relief requested by American National and its potential impact, or not, on that court ordered process. It is not apparent that mediation this week will be any more fruitful then mediation for the last several weeks. However, American National believes that the atmosphere and actions by Andersen which necessitated the filing of its Motion have neither dissipated nor have the parties invited to discuss settlement met with ultimate success. The result of these concurrent events is the continued dispersal of Andersen assets without disclosure of the terms of such disposition to the court and other parties to this litigation.

In addition, American National has undertaken to proceed with its burden of establishing a likelihood of success on the merits in order to gain the relief it is requesting in the Motion. Consistent with that burden, American National was and is prepared to present testimonial evidence at the hearing both through its own witness and through Andersen personnel. American National originally served Andersen's counsel with four subpoenas for the appearance of individuals at Andersen to present testimony germane to the relief which American National is seeking.[1] In addition, American National has also served subpoenas identical in scope directly on Andersen for the April 17, 2002, 2:00 p.m. hearing. It is apparent that Andersen wishes to curtail its own costs and not to have to be put to the expense of travel associated with out of state counsel's appearance at the hearing. Notwithstanding Andersen's own design at the eleventh hour to request relief from the pending hearing, American National has undertaken its own expenses in preparation for the hearing, including the of service of witness subpoena's and the appearance of an expert witness from out of state to attend the scheduled hearing. To stall the hearing yet again is not without repercussions to American National and to the extent that the court is willing to entertain the relief requested by Andersen, American National would request the Court order that American National not be required to serve the Anderson witnesses again and that such witnesses be ordered to attend the hearing when set by the Court.[2]

Andersen appears to take issue with the fact that American National has requested relief apart from Lead Plaintiff and that this violates the court's order of February 15, 2002 in which

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[1] American National originally served the four subpoenas directly on Andersen's counsel, what it perceived as a professional courtesy, to appear at the originally scheduled hearing on April 8, 2002. Despite filing no written objection to the subpoenas nor addressing any objections at the hearing,, counsel for Andersen informed counsel for American National that no representatives would be appearing. Ostensibly, Andersen's objection, in part, was that American National should have served Andersen directly with these subpoenas. American National has now acquiesced to this request, although its initial position remains that Andersen's failure to timely object to the subpoenas waived any right to complain now.

[2] As this response is being finalized pursuant to this Court's deadline for response, Anderson has just filed a motion to quash the subpoenas, which American National will respond to in due course. Since Anderson elected not to concede to the likelihood of success element, it apparently now seeks to prevent damning evidence on that issue.

Lead Plaintiff and its law firm were selected. Andersen, in effect, seeks a ruling from this Court which would bar American National from participation in this proceeding, despite the fact that American National did not choose this forum but was improvidently yanked from its home in a state district court in Galveston County. What Andersen appears willingly ignorant of is that American National has asserted state law causes of action, which Lead Plaintiff, in its most recent amended and consolidated complaint, does not assert, at all. Neither are the state law causes of action identical to the federal claims asserted in the consolidated complaint. The filing of the consolidated complaint "did not have the effect of extinguishing the original complaint by [American National]. *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 19 F. Supp. 2d 263, 266 n. 5 (D.N.J. 1988) (overruled on other grounds). Indeed the Supreme Court has clearly announced that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan R. Co.,* 289 U.S. 479496-497, 77 L. Ed. 1331, 53 S. Ct. 721, (1933); *followed Bristol-Myers Squibb Co. v. Safety Nat'l Cas. Corp.,* 43 F. Supp. 2d 734, 745 (E.D. Tex. 1999). In effect, what Andersen requests is that the court 'change' the rights afforded to American National under state law and that it can no longer be the master of its own complaint. It is a matter of established Federal practice that counsel for American National continues to represent the interest of his clients in non-duplicative methods within the confines of a consolidated proceeding. Such representation includes preventing Defendants from illegally and improperly disposing of its assets as well as ultimately, participating in the discovery process if this case stays in this Court.

Andersen in its motion complains that it is unfair and unforeseen that following the order of consolidation that Andersen would be required to "respond to a multiplicity of duplicative

motions filed by any and all of the other plaintiffs' counsel who have appeared in the dozens and dozens of cases that have been consolidated before this Court." Yet any unfairness perceived by Andersen is actually the result, in this case, of its own doing. What was truly unforeseeable, except by Andersen, was that American National's original petition, purposely devoid of any federal causes of action, and by which the Court lacks subject matter jurisdiction, would be removed to, and for the moment remain in, federal court. American National now finds itself in the unenviable position a being procedurally consolidated into a case in which the Lead Plaintiff has chosen not to assert the same causes of action as American National. Yet as argued by Andersen, American National must acquiesce to such a decision and surrender its rights. The court should not let that happen and should deny Andersen the relief requested in its Emergency Motion to postpone the hearing on American National's Motion for Injunction.

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

By: _____

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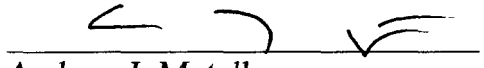
ATTORNEYS FOR AMERICAN NATIONAL

## CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of April 2002, a copy of the forgoing document was served on all counsel listed on Exhibit A of the Court's April 10, 2002 order by e-mail (PDF format).



Andrew J. Mytelka

APRIL 15, 15:23 ET

## Andersen Merges With E&Y in Baltics

RIGA, Latvia (AP) — The Baltic affiliates of Andersen Worldwide have signed a memorandum of understanding with Ernst & Young to merge their operations, the accounting firms said Monday.

The merger follows similar moves in other countries since U.S.-based Arthur Andersen LLP was accused of obstruction of justice relating to the bankrupt energy giant Enron Corp.

``This has everything to do with Enron and the damage it's done to the Andersen name,'' said Per Moller, managing director of Andersen for Lithuania, Latvia and Estonia.

The merged company will keep the Ernst & Young name and will have about 250 employees and annual revenues of approximately $10 million, Moller said. He added that the merger should be completed within a month.

Arthur Andersen has been indicted on a federal charge of obstruction of justice for destroying Enron-related documents after the Securities and Exchange Commission started investigating the company.



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| AMERICAN NATIONAL INSURANCE COMPANY, et al.,<br>Plaintiffs, | § | |
| vs. | § | Civil Action No. G-02-0084 |
| ARTHUR ANDERSEN, L.L.P., et al.<br>Defendants. | § | |

ORDER ON ANDERSEN'S EMERGENCY MOTION

Before the Court is Defendant, Andersen's Emergency Motion to Continue Hearing Currently set for April 17, 2002. The Court has considered the arguments of counsel for Plaintiffs, American National Insurance Company, et. al. ("American National" or "Plaintiffs") and Defendant Arthur Andersen, L.L.P. ("Andersen"), and finds that the Motion has no merit.

It is, therefore, the ORDER of the Court that Andersen's Emergency Motion to Continue Hearing is hereby DENIED.

DONE this _____ day of April, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE