

forum and of the causes of action which American National has asserted against it and the other defendants when it sued in Texas state court. American National's rights at the very least to have a court address the relief it requests was truncated when it was improvidently removed from state court.

Without addressing the fact that American National served identical scope subpoenas on Andersen's counsel for the original hearing, Andersen now files a motion to quash subpoenas for the continued hearing on April 17, 2002. A brief recap of the timeline concerning the issuance of the subpoenas for the injunction hearing is appropriate. On April 5, 2002 the day after American National learned that the court was setting its motion for hearing, American National served four subpoenas on Andersen's counsel for representatives to appear at the April 8, 2002 hearing. At the April 8, 2002 hearing Andersen informed American National that it did not intend on complying with the subpoenas by bringing any representatives to the hearing. However, neither before nor during the brief hearing on April 8, 2002 did Andersen announce to the court, either in writing or through its opening statement, any objection to the subpoenas or the evidence proffered to the Court. On April 9th and 10th counsel for American National wrote to counsel for Andersen to determine the rationale for the failure to have anyone appear pursuant to the subpoenas. On the afternoon of April 12, Andersen informed American National that it would require service directly on Andersen of any subpoenas and that it believed that the scope of the subpoenas were improper. On April 15, 2002 American National again served identical subpoenas directly on Andersen, which precipitated the filing of Andersen's Motion to Quash.

Andersen failed to object to the original subpoenas for the April 8, 2002 hearing and waived any right to object to any perceived irregularities in the subpoenas. *See Hecht v. Don Mowry Flexo Parts, Inc.*, 11 F.R.D. 6, 13 (N.D. Ill. 1986) (in civil contempt proceeding the

failure to make objections to service of a subpoena in first response waived objections); *see also Pusey v. Dallas Corp.*, 938 F2d. 498, 501 (4th Cir. 1991) (failure to raise defense of improper service in timely manner resulted in waiver). Thus, the court can deny the relief which Andersen now seeks on the basis that it is untimely and now moot, as Andersen has been served with subpoena and is under an obligation to comply.

American National requested individuals including the managing partner of the Houston office of Andersen, the partner with knowledge concerning the Arthur Andersen arrangement with Deloitte & Touche' concerning "sale" of Arthur Andersen's tax business, a representative with knowledge concerning the organization of Arthur Andersen's worldwide operations and affiliations, and a representative with knowledge concerning the non-compete agreements between Arthur Andersen and its partners and employees. In order to be reasonable, American National purposely attempted to give Andersen the flexibility to determine who it wished to present for testimony concerning these matters. American National did not require, for instance, that Mr. Berardino or Mr. Cardoso, the former and current Chief Executive Officer of Andersen Worldwide, be present for the hearing. If Andersen and the Court prefer that American National name specific individuals to testify on the requested topics, then American National, will issue subpoenas directed at the current and former CEOs of Andersen, assuming that Andersen does not suddenly have such individuals out of the country. Of course, the service of such specific subpoenas will likely result in a motion complaining about "apex" type designations.

The crux of Andersen's complaint is that it does not want to share the terms of any proposed agreements it has concerning the assets of the firm. Andersen wants to argue out of both sides of its mouth- that American National has no evidence concerning its motion and that American National is not entitled to present evidence at the hearing. Andersen can not have it

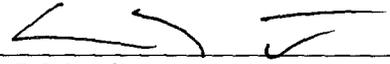
both ways, Andersen is the central and only repository of any knowledge concerning the terms of any agreements regarding the sale of its assets. Thus, Andersen representatives are likely the only ones who can testify concerning these matters. Andersen apparently finds comfort in an argument taken out of context at the April 8 2002 hearing, that American National does not know what the subpoenaed witness will say. Indeed, how can American National understand what the witness will say when there has been no discovery of these matters. American National is not required to waive attorney work product privileges and lay out its evidence prior to the hearing. If such was the true purpose of this latest “emergency motion”, it was filed for an improper purpose. As to Andersen’s argument concerning a stay of discovery under the PSLRA, once the Court set this matter for hearing, the Court invited American National and all parties to present evidence on the requested relief. Accordingly, American National was abiding with the Court’s direction.

Moreover, Andersen’s counsel has now conceded one of the pivotal issues to be proven: that is, that the non-compete agreements exist, are valid, and are extremely valuable. Instead of the common practice of calling to discuss a narrowing of the scope of the subpoenas Andersen filed the instant motion. Andersen would have this court believe that it is impotent to receive any evidence in this case on any matter prior to the courts ruling on motions to dismiss. Such a notion strains credulity and would allow anything tangentially affecting the merits of the underlying litigation to be cloaked in secrecy, much like the clandestine criminal shredding of documents which an Andersen partner has already admitted and plead guilty to and to which Andersen, as a firm, has capitulated. Due to the extraordinary nature of this case, the court

should deny the relief requested by Andersen in its Emergency Motion to Quash Subpoenas or for such other and further relief to which American National may be entitled in law or equity.

Respectfully submitted,

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

By: 

Andrew J. Mytelka
Attorney in Charge
State Bar No. 14767700
One Moody Plaza, 18th Floor
Galveston, Texas 77550
(409) 797-3200;
(409) 766-6424 (telecopier)

ATTORNEY FOR AMERICAN NATIONAL

OF COUNSEL:

John S. McEldowney
State Bar No. 13580000
Joe A.C. Fulcher
State Bar No. 07509320
M. David Le Blanc
State Bar No. 00791090
Steve Windsor
State Bar No. 21760650
Greer, Herz & Adams, L.L.P.
One Moody Plaza, 18th Floor
Galveston, Texas 77550
(409) 797-3200
(409) 766-6424 (FAX)

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

