

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

4679
PAY TO THE ORDER OF ANY
FEDERAL RESERVE BANK OR
GENERAL DEPOSITORY FOR CREDIT
TO THE TREASURER OF THE U.S.

APR 22 2002

U.S. DISTRICT COURT
HOUSTON, TEXAS

Mark NEWBY,
Plaintiff,

v.

ENRON CORP., et al.,
Defendants.

Consolidated Lead No. H-01-3624

SOUTHERN DISTRICT OF TEXAS
APR 23 2002

AMERICAN NATIONAL
INSURANCE COMPANY, et al.,
Plaintiffs,

vs.

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

Civil Action No. G-02-0084

AMERICAN NATIONAL INSURANCE COMPANY'S
RESPONSE TO ARTHUR ANDERSEN LLP
EMERGENCY MOTION TO CONTINUE HEARING FOR APRIL 24 2002

Plaintiffs, American National, et al. ("American National"), subject to and without waiving their Motion to Remand, file this Response to Arthur Andersen LLP's second Emergency Motion to now continue the injunction hearing currently set for April 24, 2002 and would respectfully show the Court as follows:

Arthur Andersen LLP's ("Andersen") argument remains the same – Andersen, Lead Plaintiff and Lead Plaintiff in *Tittle* are mediating the case, are unwilling to settle, believe continued discussion to be merited, and have determined that they want yet another extension of the hearing on the relief requested by American National. The need for a determination remains the same and additional time will serve only Andersen's purpose of continued divestment of its assets. It is not apparent from this Emergency Motion that mediation this week, next week or any other time will result in any meaningful conclusion. Indeed, what is apparent is that the

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proposed new hearing date would be scheduled to take place shortly before the May 6, 2002 trial date for Andersen on its criminal acts related to the shredding of documents.¹ In an effort to forgo the necessity to require the court to react to Andersen's perceived 'emergency', American National suggested that Andersen agree to provide informal temporary relief until the hearing could take place. Andersen rejected this suggestion.

The passage of time favors Andersen's attempt to shed itself of assets, to the detriment of American National. At the beginning of this odyssey, counsel for Andersen argued, in the context of suggesting it was working for everyone's benefit, that Paul Volcker, former Federal Reserve Chairman, "has a proposed plan for streamlining the business in the United States to make it a premiere audit-only firm." As reported in the Wall Street Journal on Monday April 22, 2002 Mr. Volcker's continued role in righting the foundering ship of Andersen was 'pre-conditioned' on certain issues, including "a settlement with federal prosecutors and resolution of the various civil cases against the firm related to the botched audits of Enron Corp." In that same article the Wall Street Journal reported that Mr. Volcker has become frustrated with the leadership at Andersen. In releasing news that Mr. Volcker may now leave his post with Andersen, the Journal reported that his "[a]ggravation has grown, according to people familiar with Mr. Volcker's thinking, as senior partners have appeared more interested in looking for an exit strategy, including jobs elsewhere, than on righting the Andersen ship." Thus, outwardly Andersen embraces the concept of resolving its difficulties, while internally its principals' attempt to jump from a sinking ship, taking with them whatever they may salvage. What they

¹ It would not be unfamiliar to have Andersen once again file another 'emergency' motion on Monday, April 29th asking this court to again extend the hearing date until sometime in the future pending resolution of the criminal case against it.

will leave behind is a derelict vessel with no recourse to those who relied upon their stewardship in acting as watchdogs over Enron's financial statements.

The failure of Andersen to resolve its difficulties with federal prosecutors is an indicator that it will be unwilling or unable to settle this matter expeditiously. Mr. Volcker's pending departure is a telling sign of the firm's inability to settle the *Newby* action, as he conditioned his continued involvement on the resolution of both civil and criminal matters relating to the Enron audits. It is well reported and clear, as of Thursday, April 18, 2002, that Andersen is not going to settle its case with federal prosecutors. It is equally as clear that Andersen has no intention of expeditiously resolving the various civil cases against it and in light of Mr. Volcker's pending departure, Andersen has retained the firm of Alvarez & Marsal to "realize a fair value for those parts of the business that may not be a part of Andersen LLP going forward." Among other roles, Alvarez & Marsal identify themselves as a trustee and examiner for bankruptcy proceedings. Although Andersen denies that it has retained Mr. Marsal to prepare it for bankruptcy, its choice of expertise is fairly transparent. Moreover, Andersen is now using Mr. Marsal as a witness for purposes of this motion, having submitted an Affidavit by Mr. Marsal in connection with its response to American National's request. Accordingly, it is likely that Mr. Marsal will need to be deposed on an expedited basis.

American National respectfully requests that the Court deny in part, the relief requested by Andersen in continuing the injunction hearing on April 24, 2002. As this Court has understandably shown a willingness to allow the mediating parties to continue unfettered in their discussions, American National requests that the Court issue an order identifying a definite date and time for hearing, subject to no further extensions, so that it may make appropriate plans for its witnesses, some of whom need to travel from out-of-state. Moreover, American National

requests this Honorable Court's permission to depose Mr. Marsal prior to the next setting or, alternatively, to strike the Affidavit of Mr. Marsal or use of Mr. Marsal as a witness at the hearing. American National respectfully requests such other and further relief that it may be entitled to in law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd 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).

*A. J. Mytelka**

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** by proc MOL*

EXHIBIT "A"

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It is further ORDERED that Anderson shall make Mr. Bryan Marsal available for deposition at a reasonable period of time prior to the hearing or Mr. Marsal's affidavit, and/or testimony will be stricken.

DONE this _____ day of April, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE