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Michael N. Milby, Clerk

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

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MARK NEWBY, et al.,

*Plaintiffs,*

v.

ENRON CORPORATION, et al.,

*Defendants,*

CIVIL ACTION NO: H-01-3624 ✓  
AND CONSOLIDATED CASES

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AMERICAN NATIONAL INSURANCE CO.,  
et al,

*Plaintiffs,*

v.

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

*Defendants.*

CIVIL ACTION NO: G-02-0084

----- X

ARTHUR ANDERSEN LLP'S SUPPLEMENTAL RESPONSE TO LEAD  
PLAINTIFF'S EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING  
ORDER AND ORDER TO SHOW CAUSE AND AMERICAN NATIONAL  
INSURANCE CO. 'S MOTION FOR TEMPORARY INJUNCTION

1. Arthur Andersen LLP ("Andersen") respectfully submits this Supplemental Response to Lead Plaintiff's Application for a Temporary Restraining Order and Order to Show Cause and American Nation Insurance Co.'s Motion for Temporary Injunction (collectively, the "Applications") in

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order to inform the Court of the results of a hearing conducted on May 3, 2002, in a matter captioned Bryce, et al. v. Arthur Andersen, LLP, et al., No. 02 C 2125, in the United States District Court for the Northern District of Illinois, denying a request for the same type of relief sought here.

2. In Bryce, the plaintiffs, retired Andersen partners, sought an injunction to freeze for a period of 14 days Andersen's release of any of its partners from their non-compete agreements. The plaintiffs' claims were brought under ERISA<sup>1</sup>, and while the Court found that the plaintiffs had not met their burden of showing a likelihood of success on the merits, the transcript reveals that the focus of the Court's decision was on the balance of the equities. See Transcript ("Tr.") at p. 33, attached as Exhibit A to the Affidavit of Sharon Katz ("Katz Aff.").

3. The Court found that the most valuable assets of the LLP are the partners and other personnel who provide the professional services offered by Andersen.<sup>2</sup> However, as in this case, no evidence was presented that Andersen intended to squander or dissipate these assets.

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<sup>1</sup>Because the Bryce plaintiffs asserted their claims under ERISA against alleged fiduciaries, the claims sounded in equity. As a result, there was no discussion at the oral argument regarding Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999). In the instant Applications, by contrast, the requirement of Grupo Mexicano, that the plaintiff's request for temporary injunctive relief be tied to an underlying claim for final equitable relief, creates an absolute bar to the injunctions being sought by Lead Plaintiff and by American National. This point has been briefed fully in the memoranda filed by Andersen in opposition to the Applications and is not repeated here.

<sup>2</sup>The Court stated: "I frankly think if the plaintiffs were right on everything else here, there would be irreparable harm. What they're saying is, in fact, not even just what they're saying, it's what your own affidavit says, Mr. Marsal's affidavit says, . . . he says the most valuable assets of the LLP are the partners and other personnel who provide these services." Tr. p. 32.

The Court went on to conclude however, that even though the plaintiffs would be harmed if all they claimed was true, the harm to Andersen in being enjoined from closing transactions far outweighed the potential harm to plaintiffs. the Court stated:

“But the final issue, and then I think I will just tell you what you know I am going to say anyway, but the final issue is the balance of harms, which you always get to in any of these cases. And here the balance of ham, even though I understand exactly where the plaintiffs are coming from and the frustration and anxiety that they must feel seeing the company that they helped build in this type of distress and believing that some of these assets or revenues streams may be jeopardized and looking forward to individual arbitrations perhaps of all their grievances, but to stop the process that apparently is in effect of negotiating the release of these non-competes for arm’s-length bargained compensation to Arthur Andersen to me could be totally destructive of not only the interest of Arthur Andersen but maybe even of the plaintiffs themselves and certainly all of the probably hundreds or maybe even thousands of people who would be affected if those deals were killed at this point.

I think to inject the court into that type of business decision making is inappropriate and could lead to disastrous results far greater than those that are feared by the plaintiffs in this case.”

Tr. p. 33.

Thus, in a case brought by parties who arguably have a far more sympathetic claim to specific Andersen assets than does either the Lead Plaintiff or American National, the Court recognized that notwithstanding the fact that plaintiffs would be injured by the loss of assets, the harm to Andersen – and indeed the harm to the plaintiffs themselves– undoubtedly would be far greater if Andersen could not undertake and consummate its efforts to transfer assets while they still have value. Tr. at 33.<sup>3</sup>

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<sup>3</sup>Although there is no reference in the transcript, and no indication that it influenced the Court’s decision, Andersen submitted an additional affidavit under seal addressing these issues. Andersen is happy to provide a copy of this affidavit under seal to this Court. However, Andersen notes that plaintiffs have yet to provide even a single scrap of admissible evidence in support of their applications.

The harm to all parties in this matter is the result of the fact that Andersen has been compelled to undertake the sudden and vast restructuring effort that it is now undergoing at all. No one is better off because of these events; but as Mr. Marsal's affidavit makes clear, everyone will be far worse off if Andersen is compelled to maintain the unsettled situation that constitutes the "status quo." Maintaining the "status quo" in these circumstances means doing nothing while the value of the remaining assets deteriorates, the liabilities increase (or at least are not reduced), and revenues continue to be lost. In order to obtain value, Andersen must be permitted with the assistance of the professionals it has retained, to try to consummate transactions, without the time delay, interference and second guessing that Plaintiffs seek to inject into that process.

For these reasons, as well as for all the other reasons set forth in Andersen's prior responses, the Applications should be denied.

Dated: Houston, Texas  
May 8, 2002

Respectfully Submitted,



Rusty Hardin  
State Bar No. 08972800  
S.D. Tex. I.D. No. 19424

Attorney-in-Charge for  
Defendant Arthur Andersen LLP

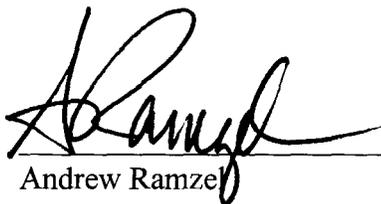
OF COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of May, 2002, the forgoing pleading was served pursuant to the Court's April 5, 2002 Order.

  
\_\_\_\_\_  
Andrew Ramzel

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

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MARK NEWBY, et al.,

*Plaintiffs,*

v.

ENRON CORPORATION, et al.,

*Defendants,*

CIVIL ACTION NO: H-01-3624  
AND CONSOLIDATED CASES

-----

AMERICAN NATIONAL INSURANCE CO.,  
et al,

*Plaintiffs,*

v.

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

*Defendants.*

CIVIL ACTION NO: G-02-0084  
AFFIDAVIT OF SHARON KATZ  
IN OPPOSITION TO LEAD  
PLAINTIFF'S EX PARTE  
APPLICATION FOR A TEMPORARY  
RESTRAINING ORDER AND  
AMERICAN NATIONAL'S MOTION  
FOR A TEMPORARY INJUNCTION

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STATE OF NEW YORK     )  
                                  ) ss.:  
COUNTY OF NEW YORK    )

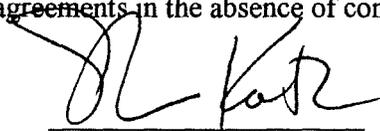
Sharon Katz, being duly sworn, deposes and says:

1. I am a member of the firm of Davis Polk & Wardwell, counsel for Arthur Andersen LLP, and of the bar of the State of New York. I have been admitted pro hac vice in this matter.

2. Attached hereto as Exhibit A is a copy of the transcript of the hearing held on May 3, 2002, in the matter captioned Bryce, et al. v. Arthur Andersen LLP, et al., No. 02 C 2125.

3. Attached hereto as Exhibit B is a copy of the transcript of Bryan R. Marsal, dated May 2, 2002, submitted in connection with the Bryce matter.

4. Attached hereto as Exhibit C is a copy of the affidavit of Larry Gorrell, dated May 2, 2002, submitted in connection with the Bryce matter, in which Mr. Gorrell explains that as of that date only one Andersen partner had been released from a non-compete agreement, such release had been in exchange for consideration, and that Andersen has no present intention to release partners from their non-compete agreements in the absence of compensation.



SHARON KATZ

Sworn to before me this  
8<sup>th</sup> day of May, 2002



Notary Public  
**PIA CHARLENE CHAOZON**  
Notary Public, State of New York  
No. 01CH6061333  
Qualified in New York County  
Commission Expires July 16, 2003

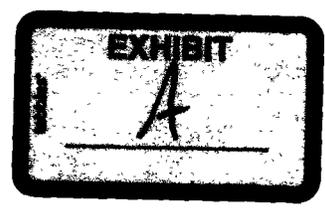
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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

RONALD A. BRYCE, HUGH A. GOWER,	)	
and JAMES L. NACE, on behalf of	)	
themselves and all others	)	
similarly situation,	)	No. 02 C 2125
	)	Chicago, Illinois
Plaintiffs,	)	May 3, 2002
	)	1:30 p.m.
vs.	)	
	)	
ARTHUR ANDERSEN, LLP, ANDERSEN	)	
WORLDWIDE SC, and	)	
DOES 1 THROUGH 12,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS - MOTION  
BEFORE THE HONORABLE ROBERT W. GETTLEMAN

For the Plaintiffs:	MULROY SCANDAGLIA MARRINSON RYAN 55 East Monroe Street Suite 3930 Chicago, Illinois 60603 BY: MR. THOMAS R. MULROY MR. THOMAS A. MARRINSON MR. MATTHEW T. HURST
	MC GUIRE WOODS LLP 77 West Wacker Drive Suite 4400 Chicago, Illinois 60601 BY: MR. BRENT STRATTON
For Defendant Arthur Andersen LLP:	MAYER, BROWN, ROWE & MAV 190 South LaSalle Street Chicago, Illinois 60603 BY: MR. STANLEY J. PARZEN MR. JOHN M. TOUHY
Official Court Reporter:	JENNIFER S. COSTALES, CUR, RMR 219 South Dearborn Street Room 1706 Chicago, Illinois 60604 (312) 427-5351



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APPEARANCES: (Continued)

For Defendant Andersen  
Worldwide, SC:

SIDLEY AUSTIN BROWN & WOOD  
Bank One Plaza  
10 South Dearborn Street  
Chicago, Illinois 60603  
BY: MR. JEFFREY A. TONE  
MR. DAVID A. GORDON

1 (Proceedings in open court.)

2 THE CLERK: 01 C 2125, Ronald Bryce versus Arthur  
3 Andersen.

4 MR. STRATTON: Your Honor, Brent Stratton from McGuire  
5 Woods.

6 We had filed a motion to withdraw on behalf of the  
7 plaintiff class. We've heard no objection.

8 THE COURT: All right. That will be granted then.

9 MR. STRATTON: Thank you, Your Honor.

10 THE COURT: All right. Have a nice day.

11 MR. TOUHY: Good afternoon, Your Honor.

12 John Touhy and Stanley Parzen on behalf of Arthur  
13 Andersen, LLP.

14 MR. MULROY: Tom Mulroy and Tom Marrinson on behalf of  
15 plaintiffs, Your Honor.

16 MR. TONE: Jeff Tone and Dave Gordon on behalf of  
17 Andersen Worldwide Societe Cooperative.

18 THE COURT: Okay. We are here as we all know on the  
19 motion for a preliminary injunction or temporary restraining  
20 order. And I've read the submissions that I got from the two  
21 defendants as well as the other submissions from the plaintiff  
22 earlier.

23 Mr. Mulroy, you were going to respond orally?

24 MR. MULROY: Thank you very much, Your Honor. I never  
25 fail to be impressed by your recollection. I do have just a few

1 comments.

2 THE COURT: Do you want to sit down?

3 MR. PARZEN: I'll be glad to stand up or --

4 THE COURT: You can stand or sit. It's up to you.

5 MR. PARZEN: Okay.

6 MR. MULROY: They make me nervous if they stand next to  
7 me, Judge.

8 I just have a few remarks to respond to the 150 pages  
9 of paper that they were able to put together under hurried  
10 circumstances.

11 I think that one of the problems that I'm having  
12 communicating in this case is because of the emotion surrounding  
13 the Arthur Andersen situation. I would like to say this in  
14 response to what they filed. Arthur Andersen to everybody's  
15 knowledge is not in liquidation and it's not in bankruptcy.  
16 It's going through a downsizing, which many firms in the United  
17 States have had to go through over the last several years.  
18 They're cutting costs.

19 One way to cut costs, as you know, Judge, is to get rid  
20 of your valuable assets. And in this case, the valuable assets  
21 are the partners and the clients of the firm. Some of those  
22 clients are leaving voluntarily, but none of the partners can  
23 leave voluntarily unless this non-compete covenant is  
24 extinguished by the existing partners. So the valuable assets  
25 that we're talking about here and that were spoken about in the

1 affidavits that were filed by the defendants are the partners  
2 and their clients.

3           Now, Judge, you know, because you've read the papers,  
4 that the group, individuals, class, people that I represent are  
5 all the retired partners from Arthur Andersen. It's between 5  
6 and 700 people. And they are owed hundreds of millions of  
7 dollars in retirement benefits. These retirement benefits and  
8 my partners', my clients' rights to them are outlined and are  
9 set forward in the partnership agreement, which I know you've  
10 also read.

11           That partnership agreement is what causes us to be here  
12 today, Judge. Now, it says, for instance, that our clients'  
13 retirement benefits are not to constitute an interest in Arthur  
14 Andersen, in the firm; do not constitute an interest in Arthur  
15 Andersen's assets; do not constitute a liability of Arthur  
16 Andersen; and are not to be considered creditors' claims against  
17 the firm.

18           The partnership agreement is very clear that the only  
19 place from which we can get our guaranteed pension benefits,  
20 retirement benefits are from the net income of the firm.

21           I said to you before that downsizing big companies is a  
22 good thing to do in bad times. But it's not a good thing to do  
23 if it's not done legally. It's not a good thing to do if it's  
24 done in breach of contract. It's not a good thing if you are  
25 downsizing in a specific way and that way breaches contracts of

1 people who have them with the firm.

2           It also says in our partnership agreement, Judge  
3 Gettleman, that we cannot go to Federal court to litigate our  
4 benefit rights. We can't go to State court to argue our benefit  
5 rights to get rulings on our benefit rights, to ask you or the  
6 state court judge whether ERISA applies or whether a breach of  
7 contract is occurring in connection with this downsizing.

8           The partnership agreement says that the only thing, our  
9 only remedy is arbitration. If we wait until this fire sale is  
10 over, if we wait until this net income and these valuable assets  
11 have all been transferred out of Arthur Andersen before we do  
12 anything, our arbitration, our rights may be gone.

13           Judge, I have read time and time again that when they  
14 sell these valuable assets, they're receiving goodwill payments  
15 or money in return. That's good. We're in favor of that. We  
16 want Arthur Andersen to continue. We built Arthur Andersen. We  
17 have a great deal of loyalty towards Arthur Andersen. And in  
18 some instances and for some period of time, we had a fiduciary  
19 duty with Arthur Andersen after we were retired.

20           We need to know whether we will have some rights in the  
21 replacement funds that are now replacing what used to be called  
22 net income, or is this merely a way to extinguish the liability  
23 to the retired partners by transferring an asset called net  
24 income for an asset called a one time payment of goodwill, and  
25 that one time payment of goodwill, let's say it's 20 million,

1 will go to pay real estate taxes, will go to pay the current  
2 partner, will go to pay the bank debt, and next year there won't  
3 be any net income.

4           That's what we need to know. Are we going to be able  
5 to participate in that, because we think if we're not allowed to  
6 participate in it, they have breached our contract. We can't  
7 litigate that in front of you. We can't litigate that in state  
8 court. We can only present it to an arbitrator.

9           And the second question, which we discussed so much the  
10 last time we were before you and which is one of the reasons why  
11 we have jurisdiction with you, one of the reasons that I know  
12 you're so pleased to be hearing this today, is because it arises  
13 under ERISA, we claim.

14           We think that we have rights under ERISA. And if we  
15 do, Judge, they may have to set aside some of this money, some  
16 of these goodwill payments for us and for our retirement  
17 benefits rather than extinguishing our benefits all together. I  
18 can't litigate that in front of you, and I can't litigate that  
19 in state court. I have to have it arbitrated.

20           Everybody agrees, Judge, that we want a speedy  
21 resolution to this hearing today. I don't think they agree that  
22 they want a speedy resolution to the issues I've just raised in  
23 arbitration. If I take this case to arbitration --

24           THE COURT: Who is the "they"?

25           MR. MULROY: Arthur Andersen, Judge.

1 THE COURT: Is it the SC or the LLP?

2 MR. MULROY: We've sued them both, Judge. And that's  
3 an issue that I can't wait to talk to you about. Each partner  
4 of LLP is also a partner of Andersen Worldwide, but --

5 THE COURT: All right. I don't want to interrupt your  
6 flow.

7 MR. MULROY: Thank you very much.

8 THE COURT: So go ahead.

9 MR. MULROY: We're the ones who desperately need a  
10 speedy resolution of this arbitration. If they do not agree to  
11 arbitrate this as a class action, if they, Arthur Andersen, if  
12 Arthur Andersen does not agree to let us join all the claims  
13 together, let's say, and argue ERISA, then we have to file 600  
14 or 500 or 400 individual claims in front of an arbitrator and  
15 take each one of these claims through with the same brief, the  
16 same defendants, the same lawyer and hopefully the same  
17 arbitrator, and maybe in nine months from now all those claims  
18 will be resolved.

19 In the meantime, the goodwill payments that they have  
20 received for the net income is gone. The net income that we're  
21 relying on now to pay our benefits is gone. And they have, in  
22 effect, eliminated a liability that they have to the retired  
23 partners.

24 THE COURT: Let me stop you for a moment. What you're  
25 really seeking then is the creation of some sort of fund, is

1 that right? Is that what you are saying?

2 MR. MULROY: Judge --

3 THE COURT: Not just the enforcement of the  
4 non-competes or the settlement of non-competes for the exchange  
5 of cash, but you actually want this cash to be segregated in  
6 some manner. Is that what you are saying?

7 MR. MULROY: Leading questions always make me nervous,  
8 because they sound like you should say yes, but --

9 THE COURT: No, I'm not leading you at all. I'm trying  
10 to tell you what is on my mind.

11 MR. MULROY: Here is my answer to that. What I am  
12 asking from you is to say: Wait 14 days before you close these  
13 fire sale give-aways. Let us expedite arbitration and present  
14 these issues to the arbitrator, one of which is: Do we qualify  
15 under ERISA, and if we do, does there need to be a fund, a  
16 set-aside fund for the retired partners? Are they transferring  
17 this net income into goodwill payments in breach of contract,  
18 and if so, will the arbitrator order them to stop it?

19 I am not asking you, frankly, because I can't ask you  
20 anything substantive under the partnership agreement, to do  
21 anything other than ask Arthur Andersen not to release any more  
22 partners from their non-compete agreement for, let's say, 14  
23 days while we go and have this emergency arbitrator.

24 We come into Federal court and file a class action and  
25 ask you to decide the ERISA issues. If we did that, they'd move

1 to dismiss, they'd say you have to go to arbitration.

2 We file in arbitration, and they say: Well, we move to  
3 dismiss that, because you're asking for a class action. And  
4 anyway, that's not allowed in arbitration. And anyway, you  
5 can't litigate ERISA in an arbitration, that's a Federal  
6 question. So my remedy is gone.

7 We believe that if something -- we have no other remedy  
8 here, Judge, than to find out where our retirement benefits are  
9 going. Are they intentionally dissipating, selling,  
10 transferring these assets in return for goodwill payments, but  
11 on the other side to eliminate a liability, which would give you  
12 two hits on one pitch.

13 We have to have this resolved. They will not agree to  
14 an expedited arbitration. They will not agree to set aside  
15 money from the transfer of assets. We have no alternative but  
16 to come in here and ask you not to run the company, God forbid,  
17 not to stop the sales.

18 That would not be good for us, Judge. We want them to  
19 realize as much money from these sales as possible, because we  
20 think we're entitled to some of it. We don't want to stop  
21 Arthur Andersen from continuing in existence. We're the people  
22 who built it up before Enron, and we didn't have anything to do  
23 with Enron. And I think -- and I'm not allowed to say that, so  
24 let me rephrase it.

25 I submit that they want us to pay a share for the

1 mistakes they made after we retired. And what easier group to  
2 get it from than the old guys, the people who aren't around any  
3 more, the people who worked there for 30 years, the people who  
4 signed and relied on the partnership agreement, the people who  
5 have, as I told you before, no interest in the firm, the benefit  
6 is not an interest in the assets of the firm, the benefits they  
7 get are not a liability to the firm and they're not creditors'  
8 claims, and the only way we can determine what they have now is  
9 through an arbitration.

10           If they force us into arbitration without any kind of a  
11 stop order in place, without any kind of a can't you just wait  
12 for two weeks until we've decided these issues, then by the time  
13 we're done, the assets, the only pool of assets that we can  
14 collect our benefits from will be gone.

15           THE COURT: So the relief you're asking for is a  
16 two-week injunction from closing any of these deals? Is that  
17 what you are saying?

18           MR. MULROY: I said a two-week injunction from  
19 releasing any partner, any more partners from their non-compete  
20 covenants. And you have read the affidavits and you see Bryan  
21 Marsal and his testimony about how important these non-compete  
22 affidavits are to the stability of the firm, and they're also  
23 extraordinarily important to the stability of us receiving  
24 benefits.

25           THE COURT: I guess that means it's your turn.

1 MR. PARZEN: May it please the Court.

2 The relief that the plaintiffs in this case are seeking  
3 is extraordinary. To be sure, this is an extraordinary time for  
4 Arthur Andersen. Obviously what's happened is a terrible thing.

5 We submitted to the Court a list of the clients  
6 according to Forbes that have left Arthur Andersen. This  
7 morning in the paper, you probably saw it, front page, United  
8 Air Lines leaves Arthur Andersen. There is a criminal trial  
9 that's supposed to start on May 6th. As the Wall Street Journal  
10 pointed out today, if Arthur Andersen is adjudged guilty in that  
11 case, the licenses that it has in various states will be subject  
12 to dispute, because that's the basis for license revocation.

13 The clients have left, a large number of clients have  
14 left. There are people there who do not have things to do.  
15 Arthur Andersen has been forced to lay off between 6 and 7,000  
16 workers.

17 What Arthur Andersen has not done, contrary to the  
18 allegations in this complaint, is wholeheartedly release  
19 partners from their covenants. That is not what Arthur Andersen  
20 has done.

21 What Arthur Andersen has done and what it's attempting  
22 to do is to maximize value for Arthur Andersen and also,  
23 candidly, permit employees to have jobs. When Arthur Andersen  
24 has been negotiating with other companies which partners would  
25 go, it has been done on a pyramid basis so that 8 to 10

1 employees also get jobs.

2           As Mr. Marsal has said, has said in his affidavit, the  
3 process that Arthur Andersen is using is a process which has  
4 been conducted, implemented, and planned with professionals,  
5 including Marsal & Company, which is a restructuring company,  
6 including investment bankers, Gleacher. And as Mr. Marsal says  
7 in his affidavit, a delay of any time at all will destroy these  
8 types of transactions.

9           And one thing we have to understand, there is nothing  
10 in the covenant, and this is what it says, that prevents a  
11 partner from leaving at any time whatsoever to go anywhere the  
12 partner wishes to go. That can happen today.

13           What the covenant precludes is a partner from leaving  
14 and then going to another firm and working. What Arthur  
15 Andersen needs to do is to downsize given the reality that  
16 hundreds of its clients, many of its largest clients as set  
17 forth in that Forbes article -- in fact, what is sad is if you  
18 look at that article, you see Northern Trust, you see United,  
19 you see big companies in Chicago that have left Arthur Andersen.

20           Now, those employees can be forced to stay there or  
21 they can get jobs someplace else. This is an extraordinary  
22 situation. The evidence before Your Honor refutes, however, I  
23 should say, the papers that the Court first received when we  
24 came in here, those papers said that Arthur Andersen is just  
25 releasing partners, partners are just getting huge compensation.

1 The record now is clear that is not what is occurring.

2           What's happening is there is a prudent process which  
3 the administrative board, elected by the partners, is undergoing  
4 in order to ensure that there is value for everybody involved,  
5 that's the current partners, who are going to lose their  
6 capital; it's the employees, who are going to lose their jobs;  
7 it's the retired partners, it's the creditors. There is a huge  
8 constituency that is at issue here.

9           And for the Court to enjoin for a moment this process  
10 will put, as the evidence undisputed before this Court and Mr.  
11 Marsal's affidavit states, will irrevocably hurt those  
12 transactions. So there is no -- in terms of the equities of  
13 what is going on, the relief here is not only extraordinary, but  
14 it is deadly.

15           Now, that's the equities here, but I'd like to go back  
16 to the merits, the basis on which this Court is being asked to  
17 enter such relief. If the Court hasn't had an opportunity to  
18 read the Bane decision from the Seventh Circuit, the Court,  
19 Judge Posner clearly held, citing the regulation promulgated  
20 implementing ERISA that a partner is not an employee under the  
21 act.

22           And actually, that case was quite fascinating, because  
23 the partner in that case claimed that the company really wasn't  
24 doing a good job, and by going out of business, which I'm not  
25 suggesting is the case here, but even going out of business was

1 not a claim for the partner that: Gee, by going out of business  
2 and doing a bad job of managing the company, you deprived me of  
3 my pension. That was a lawyer, and this is an accountant, but  
4 the principle still stands true.

5           When one looks at these three plaintiffs, and this is  
6 not a class action, it cannot be a class action, these were all  
7 unit partners, their termination statements reflected that at  
8 the time they left they made between 470,000 and over \$800,000 a  
9 year.

10           When one talks about, for instance, "top hat" plans,  
11 highly compensated individuals, there were 900 unit partners,  
12 and today there are over 20,000 people. Unfortunately, five  
13 months ago there were over 25,000 people. That's less than 5  
14 percent. That strikes me as being a highly compensated subgroup  
15 of the people who work at the company, even assuming that every  
16 single person who is a retired partner were an employee, which  
17 isn't even the case. This is clearly a "top hat" plan.

18           Further, there is a specific exception in this statute  
19 when you have a plan which is governed by 736. On the plain  
20 face of it, the affidavit of Mr. Cole states that it's covered  
21 by 736. There simply is no obligation. But to be straight with  
22 the Court, we're getting beyond the issue of jurisdiction.  
23 These people cannot be partners, because if they're partners,  
24 there is no jurisdiction.

25           Let's talk about these people as partners. What could

1 they do? Well, first of all, they share in the profits or loss  
2 of the firm. Second of all, they signed a partnership  
3 agreement. Third of all, the administrator of the firm as well  
4 as the administrator board were appointed subject to election by  
5 the partners. Not one partner for reasons of cause or without  
6 cause can be terminated from the firm without a vote of  
7 two-thirds of the partners. So no partner can be terminated  
8 from the firm without a two-thirds vote.

9           The partners decide the allocations of net income from  
10 the firm as set forth in paragraph 5 of the partnership  
11 agreement. All rights not specifically given to the  
12 administrator are retained in the partners, and the partners can  
13 change the partnership agreement at any time by a two-thirds  
14 vote.

15           I mean, what is a partner if it's not an individual who  
16 shares in the profits and losses of the company, of the  
17 partnership, a person who holds themselves out as a partner, a  
18 person who votes for the board, who is running the partnership,  
19 a person who can never be fired without a two-thirds vote of all  
20 the partners according to the partnership agreement. And I  
21 think Your Honor would understand how infrequently that would  
22 occur in a partnership.

23           These individuals simply are not partners. Under  
24 Seventh Circuit law in Bane, they're plainly not partners under  
25 the regulation. And if one were to go to the one case they cite

1 from the Sixth Circuit, all the factors that I just gave to the  
2 Court were not present in that case: Did not share in the  
3 profits, did not have the ability to vote for the management  
4 board, could be fired at any time. I mean, this is a classic  
5 partnership. And because it is and because these are classic  
6 partners, this Court lacks jurisdiction to go forward.

7           So I do believe that this Court can take action, and  
8 what the Court should do is dismiss the ERISA claims for lack of  
9 jurisdiction, because these individuals based upon the  
10 partnership agreement and other documents which they agree they  
11 signed, based upon the fact that they admit in their affidavits  
12 that they shared in the profits and losses of the firms are  
13 partners; and, therefore, this Court lacks jurisdiction to  
14 proceed.

15           Now, let me say a word about arbitration. It is true,  
16 I don't believe -- excuse me. The law is that you cannot have a  
17 class action in arbitration. The law also in the Seventh  
18 Circuit is you cannot have a class action in this court once you  
19 have an arbitration agreement.

20           The law, however, is that the arbitrators under this  
21 arbitration clause get to decide what is within the scope of  
22 arbitration. I have not said that I believe that ERISA claims  
23 are not subject to arbitration. I believe that ERISA claims  
24 could be arbitrable.

25           But what needs to occur for these individuals is to

1 make an arbitration demand, an arbitrator will be selected. But  
2 this simply cannot happen in two weeks, because basically what  
3 they're doing if you read the affidavits is they're arguing that  
4 based upon these facts, I'm not a partner. That same  
5 determination, even if one accepted that as being enough not to  
6 make one a partner, which is I believe totally without basis in  
7 the law, you've got to make that determination on a  
8 partner-by-partner basis. That's the way it has to work. And  
9 the partnership agreement does clearly make it clear that these  
10 individuals are, in fact, not creditors of the firm.

11 So, Your Honor, I think where we are is it's a  
12 difficult situation. Arthur Andersen is responding to it as  
13 best as it can. Just as the retired partners are claiming that  
14 they have rights that they want vindicated, the Enron  
15 plaintiffs, they have rights that they want vindicated. And  
16 what must be done in this situation is to consider all the  
17 rights of all the individuals and for the board in its informed  
18 decision with the advice of the professionals is determine what  
19 is the best course of action, and that's what has occurred.

20 And if these sales, if they do not take place, to give  
21 the Court one example, if the sale cannot take place and the  
22 people don't have work to do, what do you do with the people?  
23 Either you have to let them go or you pay them a salary where  
24 they're not providing in return productive work. The problem  
25 with that is you're basically depleting the assets which you'd

1 have available to the firm to either, one, continue or, two, to  
2 pay all claims including the claims of the plaintiffs in this  
3 case should they have one.

4 THE COURT: Well, the affidavit of Larry Gorrell says  
5 there is no intention to release, present intention to release  
6 any of the partners from the covenants, and that to his  
7 knowledge they have released only one partner and were paid for  
8 it. Is that the current state of the facts?

9 MR. PARZEN: The current state of the facts is there  
10 are a number of transactions that are about to close, including  
11 Monday. And that as of the moment today, there was only one  
12 transaction closed, or that one transaction, only one partner  
13 has left.

14 What I think the other part of the affidavit states is  
15 there is no intention to say to the partners: Hey, we're  
16 releasing -- what we're not going to do is to say to the  
17 partners "You can just go," because that's the value. But the  
18 problem is if you don't take advantage of that value soon, will  
19 you have value to take advantage of?

20 And I guess Mr. Touhy pointed out to me also that the  
21 affidavit says "has no present intention to release any of its  
22 partners" --

23 THE COURT: Without consideration.

24 MR. PARZEN: -- "without consideration."

25 THE COURT: Yes, I know.

1 MR. PARZEN: I guess that is certainly true.

2 I will also represent to the Court that the  
3 requirements being imposed upon partners who would even be part  
4 of these transactions is onerous in terms of what the partners  
5 are being asked to do before they can leave the firm. And one  
6 of the things is you want to get the receivables collected,  
7 because that's the value. There is value there. So you want to  
8 get receivables.

9 So this is a complicated process which has been  
10 undertaken. And what's now happening is the plaintiffs are  
11 coming in here and saying: Your Honor, well, maybe it's not so  
12 critical that this take place now. Maybe we can have some kind  
13 of expedited process.

14 I mean, I will commit to the Court that there is an  
15 arbitration clause these three partners are involved in. We  
16 will agree to arbitrate. We've also, my client has also gotten  
17 phone calls from other retired partners saying they don't want  
18 any part of this. So I don't even know how many people we're  
19 even talking about. I have had no such phone calls, but I've  
20 been told by my client that they have had such phone calls. So  
21 I don't know how many partners truly are part of this. I mean,  
22 maybe it is 400, 500. I just don't know. But that's an  
23 individual basis.

24 Given the clear harm that will occur to my client  
25 should this order be granted, I'd ask the Court to deny the

1 order.

2           What I'm also troubled by, though, as I've heard the  
3 plaintiffs' counsel, it's getting more unclear to me exactly  
4 what it is that they want. They seem to recognize if  
5 transactions don't take place, then value may well be lost. But  
6 without releasing partners from the bonding agreements, the  
7 transactions can't take place. For these transactions to take  
8 place, there must be a release of the bonding agreement,  
9 otherwise you can't close the transaction.

10           So, Your Honor, I would ask the Court to deny the  
11 motion.

12           THE COURT: All right. Mr. Tone, do you want to  
13 address your part of this?

14           MR. TONE: Very briefly, Your Honor.

15           We join in the arguments that are made by Arthur  
16 Andersen, LLP in connection with jurisdiction and whether there  
17 is truly an ERISA plan here.

18           I just want to comment on the things that make us, make  
19 the SC, the Societe Cooperative different.

20           Injunctive relief that would purport to bind the SC  
21 would be particularly extraordinary here given that the  
22 complaint makes no allegation whatsoever that the SC has done  
23 anything wrong. It doesn't allege that the plaintiffs are  
24 entitled to any relief from the SC. The arbitration that  
25 they're seeking is grounded in the LLP partnership agreement

1 that SC is not a party to.

2           And for all those reasons, the SC has filed a motion to  
3 dismiss the complaint for failure to state a claim. But those  
4 same reasons make it clear that the plaintiffs haven't  
5 demonstrated any likelihood of success on the merits for  
6 injunctive relief.

7           I also would like to say a few words about the balance  
8 of hardships here as it relates to the SC. The SC is the  
9 coordinating body for the member firms around the world. There  
10 are scores of such firms, all of whom were dependent upon a  
11 worldwide organization. And the SC's relationship with the  
12 member firms is governed by a contractual -- on a contractual  
13 basis through member firm interfirm agreements executed by the  
14 SC with the various member firms.

15           And because of what's happened in the United States  
16 involving the collapse of Enron, the member firms outside the  
17 United States to save their jobs, incomes, benefits of their  
18 partners and employees have had to enter into agreements with  
19 networks of other accounting firms and have executed  
20 transactions to find a home for the members of these the  
21 partners and employees of these other non-U.S. firms

22           And if the plaintiffs were to get the injunction that  
23 they seek against the SC, and if it were enforceable outside the  
24 United States and purported to bind the members firms, the  
25 incomes and professional futures of member firms' partners in

1 those member firms would be placed at grave risk for the very  
2 same reason that an injunction would harm the Andersen, LLP,  
3 because the member firms have to do something to find a new  
4 home, and time is of the essence.

5 Things are happening every day, and this would be a  
6 severe hardship for any of the member firms were they to be  
7 enjoined and an injunction were effected.

8 Thank you, Your Honor.

9 THE COURT: Thank you.

10 Mr. Mulroy, would you address first that last argument.

11 MR. MULROY: I will in spirit, Judge.

12 MR. HURST: Good morning, Your Honor -- good afternoon  
13 at this point. I'm Matt Hurst. I'm for the plaintiffs in this  
14 case.

15 Just to quickly address the SC argument, we'd like to  
16 point out that we believe under the agreement, the Worldwide  
17 agreement, which all of the Andersen partners have signed and  
18 all of our retirees have signed, there are certain guarantee  
19 provisions of member firms which SC provides. There is a  
20 certain amount of revenue over a 12-month period.

21 Our point in naming SC is to simply put them on notice  
22 that should Arthur Andersen fail, we will eventually be seeking  
23 the guarantees that are articulated under the Worldwide  
24 agreement. This is no more and no less to that end.

25 THE COURT: Well, do you think that that's an

1 appropriate reason to have them as a named defendant in this  
2 case if you're really not seeking any relief in the amended  
3 complaint against them?

4 MR. HURST: We think that notice is appropriate to  
5 prevent dissipation of assets to the four winds, which we would  
6 not --

7 THE COURT: I think a strong letter might have done  
8 that perhaps.

9 MR. HURST: True, that's possible, Your Honor. But we  
10 just certainly felt that this was one of the ways to make our  
11 point most clear.

12 THE COURT: Okay.

13 All right. Anything else anybody wants to say? No?  
14 Okay. Let's take the procedural matter first that we were  
15 discussing the last time we were together, I'll call it the Rule  
16 15 matter. I take it that there is no objection to these  
17 plaintiffs substituting in and the filing of the amended  
18 complaint from the defendants, is that correct?

19 MR. PARZEN: That's correct, Your Honor.

20 THE COURT: Is that correct, Mr. Touhy?

21 MR. TOUHY: That's correct.

22 MR. TONE: That's correct.

23 THE COURT: I mean Mr. Tone, I'm sorry. Okay.

24 MR. TONE: That's correct.

25 THE COURT: All right. So even though I don't think

1 Mr. Mulroy and company have actually so much as articulated the  
2 request to file the amended complaint, I will give them leave to  
3 do so and to substitute these plaintiffs so we can get by that.

4 We're dealing here today with the request for an  
5 emergency relief. As we all know, there are a number of factors  
6 that are required before any such emergency relief could be  
7 granted.

8 And I want to go back to the actual complaint itself,  
9 because we really haven't talked about that much today. But the  
10 amended complaint is the pleading before me here. There is an  
11 objection by the defendants that this amended complaint was not  
12 verified and, therefore, I can't even think about any type of  
13 temporary preliminary relief based upon it.

14 There are affidavits attached to the amended complaint  
15 that deal primarily with the issue of whether these gentlemen  
16 are partners or employees. But the actual factual allegations  
17 beyond that in the pleading are not verified, and I think that  
18 the defendants have a pretty good argument on that.

19 There is a basic thread running through the amended  
20 complaint that begins with the allegation on information and  
21 belief that Andersen has released or is planning to release all  
22 of its current partners from their non-compete agreements, and  
23 implicit within that was with no or inadequate compensation for  
24 such releases. And it was that belief, I think, that led the  
25 plaintiffs to come into court as quickly as they did.

1           The gravamen of this complaint when I first read it was  
2 that, well, maybe the current partners of Andersen are allowing  
3 the partners who are leaving off the hook, because they maybe  
4 want to do it for themselves one day. It was sort of an  
5 implicit theme, although not explicitly alleged. But why else  
6 would anybody let somebody off the hook if they had a covenant  
7 not to compete without getting something back for it?

8           Now I think the plaintiffs have changed their position  
9 somewhat faced with what is now an uncontested series of  
10 affidavits saying that they are not releasing current partners  
11 from non-competes without compensation. So now I believe the  
12 plaintiffs, as we talked about with Mr. Mulroy, are asking in  
13 effect for a segregation of funds.

14           Now, the complaint does allege that Arthur Andersen,  
15 LLP, was not segregating funds, and that's why they were in  
16 jeopardy of losing their retirement benefits. So this isn't a  
17 total about-face or anything like that, but it is maybe what I  
18 should call a refinement. So I just wanted to start from that  
19 premise about what we're really talking about here.

20           Getting back to the requirements for a preliminary  
21 injunction, the first thing we always have to look at is subject  
22 matter jurisdiction. And even though a court may issue  
23 preliminary relief to maintain the status quo while it can  
24 determine subject matter jurisdiction, there has before, before  
25 such extraordinary relief is granted as is requested in this

1 case, the Court would have to be satisfied that there at least  
2 is a strong case for subject matter jurisdiction.

3           And we start, we go back then to: Does ERISA apply  
4 here? And that also runs to the merits of this whole dispute as  
5 well, because if ERISA doesn't apply here, there would be no  
6 hook that this Court would have on this case, because there is  
7 clearly no diversity jurisdiction.

8           And that in turn leads us to the question of whether  
9 these plaintiffs are, in fact, employees or partners. The  
10 defendants would have the Court think, well, this is an easy  
11 issue, they're called partners, they sign a partnership  
12 agreement, and that's the end of it.

13           I would just point out that until this case came along,  
14 the most recent case on point on this issue was a decision  
15 issued by Judge Pallmeyer recently in a case, I believe the  
16 title is EEOC versus Sidley & Austin in which the EEOC is at  
17 least taking the preliminary position that partners, I guess  
18 partners or former partners of Sidley & Austin were, in fact,  
19 employees. So this isn't such an outlandish position to take.

20           And I'm not comparing those two cases. That's an  
21 employment discrimination case, I believe an ADA case, and this  
22 is something quite -- this is an ERISA case.

23           But the fact that partners who are otherwise designated  
24 as such in large professional organizations may claim to be  
25 employees and make a colorable claim to that effect is not

1 something that's so out in left field.

2 But there is a very serious factual dispute about that,  
3 and I could not conclude from the record that I've been given  
4 even with the affidavits that I've seen that there is a  
5 likelihood of success on that. It's really a horse race at this  
6 point as to whether these people are really employees or  
7 partners. It's a very fact-intensive inquiry.

8 And that is one of the issues that Judge Pallmeyer  
9 dealt with in the Sidley & Austin case. And I believe it came  
10 up before her on the enforcement of some subpoenas. And she  
11 said this is a close enough case that we're going to go ahead  
12 with the discovery.

13 So I'm just not prepared to say that the plaintiffs  
14 have met their burden of convincing me that there is a  
15 likelihood of success on that issue. And it goes to both  
16 subject matter jurisdiction and the merits of the case.

17 There is also maybe not a fact -- I was going to say a  
18 factual dispute as to whether they're enforcing these covenants.  
19 Arthur Andersen has told me that they are not releasing their  
20 current partners without compensation. That sounds to me like  
21 something that's done in the ordinary course of a business of  
22 this type and this size as partners come and go.

23 You know, I was in the practice of law for many, many  
24 years, and we all know that partners come and go in professional  
25 organizations. And to inject the court into that decision

1 making as to what those covenants are worth and the conditions  
2 under which a partner may leave, particularly when I think I can  
3 take judicial notice of the fact that a large number of very  
4 important Arthur Andersen clients have left Arthur Andersen,  
5 including today's announcement of United Air Lines leaving  
6 Arthur Andersen.

7           If a big client leaves, and there is nobody, there is  
8 no work for the current people to work on because there are no  
9 clients, it seems to me something has got to give. And if you  
10 hold them to their non-competes, it might be a net loss to  
11 Arthur Andersen or somebody in that position rather than cutting  
12 their losses and not having to carry a bunch of employees or  
13 partners that don't have the work to do. Again, it's nothing  
14 that I'm going to get into now, and it certainly doesn't allow  
15 me to conclude that there is a likelihood of success on the  
16 merits of that as well.

17           Of course, there is this whole issue of arbitrability,  
18 of whether this is arbitrable as a class action or not. If it's  
19 not arbitrable as a class, I guess the defendants are saying  
20 each of these partners have to go to the arbitrator and  
21 arbitrate their individual case from scratch. It doesn't sound  
22 like a very good way to do it, but the arbitration clause is  
23 what it is, and it may preclude the class treatment that the  
24 plaintiffs are seeking, which really underlies the type of  
25 relief they're seeking from me today. And, again, I just don't

1 see that there is any likelihood of success on that. And,  
2 obviously, we'd have to take a much closer look at it.

3 The defendants have raised a lot of other issues, of  
4 course. The 736 plan, "top hat" plan issue as taking it outside  
5 of the funding and fiduciary requirements of ERISA is a very  
6 serious matter. Mr. Mulroy hasn't responded to that. It seems  
7 to me a 736 plan, and that alone would ordinarily take it out of  
8 that --

9 MR. MARRINSON: Your Honor, if you want a response on  
10 that, I'm happy to respond on behalf of the plaintiffs.

11 THE COURT: Sure, go ahead. I mean, I think you should  
12 make your record here, because you see where I am going on this,  
13 and if you want a record to take up, you certainly want all the  
14 issues addressed.

15 MR. MARRINSON: Well, getting back again to the issue  
16 of whether these are plans that are subject to Title 1 of ERISA,  
17 and, first of all, whether these people are partners or not, I  
18 know you've already spoken to that, would you like any further  
19 input on that or --

20 THE COURT: I think I've got enough on that

21 MR. MARRINSON: Okay. On the issue of whether these  
22 are really "top hat" plans or not, there is both a quantitative  
23 and a qualitative analysis that goes into that.

24 THE COURT: I'm looking more at the 736 as being the  
25 easier of the two issues.

1           MR. MARRINSON: Okay. Well, I think the 736 issue is  
2 one that on the surface seems simple, because it only deals with  
3 the question of whether these were payments to a partner. But I  
4 think it takes you right back to the same question you had on  
5 the employee versus partner issue, and that is, who is and who  
6 is not a partner.

7           And if you look at some of the tax cases, the tax under  
8 the Internal Revenue Code, they still look behind the label  
9 that's applied to any particular, whether it be a business form,  
10 if they're claiming that they're a partnership and filing  
11 partnership tax forms, the Internal Revenue Code doesn't simply  
12 accept that, they go behind the label to see whether the  
13 business entity has the attributes of a partnership. And they  
14 apply the common law rules for determining whether someone is a  
15 partner or the business entity in which they are engaged is a  
16 partnership.

17           So I don't think it's as straightforward as they have  
18 made it in their papers in terms of as long as, as long as our  
19 clients, the plaintiffs, were given the label "partner" and the  
20 payments were to them, therefore, it's a payment to a partner  
21 under Section 736.

22           THE COURT: But it has been so reported apparently.

23           MR. MARRINSON: Well, it has been so reported according  
24 to their affidavit. But at the same time the Internal Revenue  
25 Service itself doesn't accept the status of the filings itself

1 as being determinative of whether there is really a partnership  
2 or not.

3 THE COURT: All right. So what you are saying is that  
4 if ultimately you were to prevail on your position that these  
5 were actually employees, all these other issues would fall --

6 MR. MARRINSON: That's correct.

7 THE COURT: -- in your favor as well? Okay.

8 But again, as I say, I'm not prepared to conclude and I  
9 cannot conclude that there is a likelihood of success on that,  
10 on those issues. But I thank you for your input.

11 MR. MARRINSON: Thank you.

12 THE COURT: The other issue, irreparable harm, I  
13 frankly think if the plaintiffs were right on everything else  
14 here, there would be irreparable harm. What they're saying is,  
15 in fact, not even just what they're saying, it's what your own  
16 affidavit says, Mr. Marsal's affidavit says, let's see if I can  
17 find this, he says the most valuable assets of the LLP are the  
18 partners and other personnel who provide these services.

19 That's the target that Mr. Mulroy and company have in  
20 sight here, is the preservation of those partners and those  
21 services and the relationships that they have with the clients.  
22 So I could see that if the plaintiffs were otherwise successful  
23 here, they could show irreparable harm.

24 The public interest is sort of a coin toss, because the  
25 public interest in protecting retirement benefits is no less

1 important than the public interest in having the freedom to run  
2 one's business and make the type of decisions that we're talking  
3 about today. So those two issues don't particularly weigh in  
4 favor of the defendants.

5           But the final issue, and then I think I will just tell  
6 you what you know I am going to say anyway, but the final issue  
7 is the balance of harms, which you always get to in any of these  
8 cases. And here the balance of harm, even though I understand  
9 exactly where the plaintiffs are coming from and the frustration  
10 and anxiety that they must feel seeing the company that they  
11 helped build in this type of distress and believing that some of  
12 these assets or revenue streams may be jeopardized and looking  
13 forward to individual arbitrations perhaps of all their  
14 grievances, but to stop the process that apparently is in effect  
15 of negotiating the release of these non-competes for  
16 arm's-length bargained compensation to Arthur Andersen to me  
17 could be totally destructive of not only the interests of Arthur  
18 Andersen, but maybe even of the plaintiffs themselves and  
19 certainly all of the probably hundreds or maybe even thousands  
20 of people who would be affected if those deals were killed at  
21 this point.

22           I think to inject the court into that type of business  
23 decision making is inappropriate and could lead to disastrous  
24 results far greater than those that are feared by the plaintiffs  
25 in this case.

1 I haven't even mentioned the word "bond" again, because  
2 if I were to get there, we would have to seriously consider a  
3 very high bond that would protect Arthur Andersen and these  
4 other interests in case I were to issue such an injunction. If  
5 it were improvidently issued, we would have to have, I'm sure,  
6 an evidentiary hearing about how much of a bond it would be.  
7 But it would be big. I think we could all agree on that.

8 But for all those reasons, the motion for temporary  
9 restraining order and preliminary injunction will be denied.

10 There is a motion to dismiss pending by the SC. And  
11 from what I just heard from the plaintiffs, I think there is no  
12 reason not to grant it.

13 Do I hear any objection to that?

14 MR. MULROY: Sure. Your Honor --

15 THE COURT: Well, I mean --

16 MR. MULROY: Your Honor, you know, we have said what  
17 our position is on that. As I told you --

18 THE COURT: But there is no relief, there is no relief  
19 being sought against them. There is no accusation against them.  
20 You are putting them on notice if Arthur Andersen goes down, you  
21 may hold them responsible for some guarantee that's not exactly  
22 what I would call a case or controversy.

23 MR. MULROY: Judge, and this is not -- each partner of  
24 Arthur Andersen Limited in my understanding is also a partner of  
25 Arthur Andersen, SC. We joined them because we think the two

1 entities are joined together. We also joined them because if we  
2 did not join them, I'm sure that that would have been raised as  
3 a technicality.

4 THE COURT: We've been pretty light on technicalities.

5 MR. MULROY: Well, you know, Judge, here is the thing,  
6 technicalities are about to deprive 500 people of their pension  
7 benefits. Now, I know that the law recognizes technicalities,  
8 and it's good that they do, it's good that it does. But the law  
9 also recognizes the equities. And these people, you know, this  
10 was our one chance to present this issue in Federal court.  
11 You've ruled. Now we have to go to arbitration.

12 And speaking of arbitration, we do have a request, a  
13 declaratory judgment request that asks you to make a ruling that  
14 ERISA, the ERISA issues are arbitrable.

15 THE COURT: On an emergency basis? I think you have to  
16 file your notice, you have to file your demand for arbitration,  
17 and the arbitrator gets the first crack at that. I think I've  
18 even heard you say that, Mr. Mulroy. And I don't think it would  
19 be -- you know, I could take briefs on it, but I've got enough  
20 briefs here, but I don't see where I would get the first crack  
21 at that. That's --

22 MR. MULROY: The reason you --

23 THE COURT: I guess if you want my ruling now, that  
24 would be it. I think you have to file your demand for --

25 MR. MULROY: Well, then I certainly don't want your

1 ruling.

2 THE COURT: But that wasn't part of your emergency  
3 motion.

4 Do you want to respond to Andersen Worldwide's motion  
5 to dismiss then? I'm happy to give you time to do so. No?

6 MR. MULROY: Not any further than we have, Judge.

7 THE COURT: Well, all right then. Based on what I've  
8 heard, I'm granting it.

9 I assumed from everything that's happened today that  
10 the defendants have accepted service at least. I know there is  
11 a jurisdictional objection, but that's moot now because I'm  
12 granting your motion.

13 MR. TONE: Yes. We accepted service and, you're right,  
14 the jurisdictional issue is now moot.

15 THE COURT: Okay. So now we need, I suppose, either a  
16 responsive pleading from Arthur Andersen, correct?

17 MR. PARZEN: Yes, Your Honor.

18 THE COURT: All right. And you can have 21 days to  
19 file your responsive pleading. You've been served. You've  
20 accepted service, too?

21 MR. PARZEN: I'm sorry. I guess I was thinking that --

22 THE COURT: You haven't actually responded to the  
23 amended complaint.

24 MR. PARZEN: That's correct. 21 days would be fine,  
25 Your Honor.

1 THE COURT: I'm doing some housekeeping here as they  
2 say.

3 MR. MARRINSON: Your Honor, excuse me.

4 THE COURT: Yes.

5 MR. MARRINSON: May we have leave to amend our  
6 complaint as against SC?

7 THE COURT: You can always ask for that, sure. Is that  
8 what you are asking?

9 MR. MARRINSON: Would you like us to do it by formal  
10 motion?

11 THE COURT: No. I'll do it. Let's save a couple of  
12 trees here, okay. Are you asking for leave to file an amended  
13 complaint?

14 MR. MARRINSON: Yes.

15 THE COURT: Okay. How long would you like?

16 MR. MARRINSON: Seven days.

17 THE COURT: Okay. And you may want to actually -- I'm  
18 just going to give you leave to file an amended complaint  
19 generally, and if you want to file any, if you want to address  
20 any other issues that we've discussed or even haven't discussed,  
21 I'm just granting you leave to file an amended pleading. All  
22 right. That's May 10th.

23 And 21 days from there is May 31.

24 And why don't I see you back here on June 4th at 9:00  
25 o'clock for a status, and we'll see where we go from there.

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MR. MULROY: Thank you for your time.

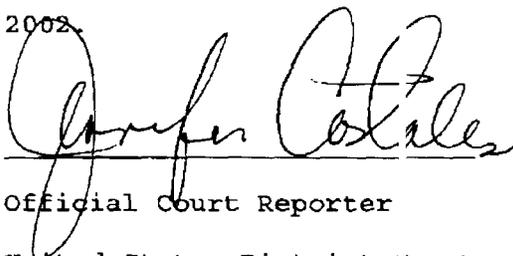
THE COURT: All right. Well, thank you all

MR. TOUHY: Thank you, Your Honor.

(Proceedings concluded.)

C E R T I F I C A T E

I, Jennifer S. Costales, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable ROBERT W. GETTLEMAN, one of the judges of said Court, at Chicago, Illinois, on May 3, 2002.



Official Court Reporter  
United States District Court  
Northern District of Illinois  
Eastern Division

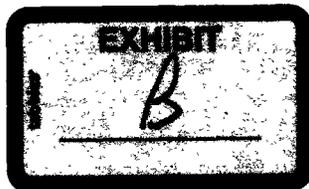
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

RONALD A. BRYCE, HUGH A GOWER )  
and JAMES L. NACE, on behalf of )  
themselves and all others similarly situated, )  
 )  
Plaintiffs, ) Case No. 02-C-2125  
 )  
v. )  
 )  
ARTHUR ANDERSEN LLP, )  
ANDERSEN WORLDWIDE, S.C., and )  
DOES 1 THROUGH 12 )  
 )  
Defendants )

AFFIDAVIT OF BRYAN R. MARSAL IN OPPOSITION TO EMERGENCY MOTION FOR  
TEMPORARY RESTRAINING ORDER

Bryan P. Marsal, being duly sworn, deposes and says:

1. I, Bryan Marsal, make this Affidavit in opposition to the Emergency Motion For Temporary Restraining Order filed by Ronald A. Bryce, Hugh A. Gower, and James L. Nace.
2. I am a founding partner of the firm of Alvarez & Marsal, Inc., 599 Lexington Ave. #2700, New York, New York 10022 ("A&M"). A&M was formed in 1983 to provide financial and operational services to financially troubled companies. We have provided advice in this area to numerous businesses in a wide array of industries. A copy of my firm's brochure is attached hereto as Exhibit A. A description of my background and work experience is attached hereto as Exhibit B.
3. My firm has been retained by Arthur Andersen LLP ("Andersen LLP") to provide advice with respect to various issues surrounding the loss of business that Andersen LLP has recently experienced following the collapse of Enron Corporation ("Enron"). Specifically, my firm has been asked to advise Andersen LLP on the most effective ways to address the rapidly



changing business of Andersen LLP, in light of the precipitous loss of clients and business revenues which has and is continuing to occur since the government's indictment of the firm. The assignment requires intensive examination of the new and evolving cost structure of Andersen LLP's business, the most effective ways in which it can be restructured, and ultimately the most beneficial ways in which Andersen LLP can downsize its firm in line with its expected ongoing professional activities. It is a multifaceted and complicated task, the goals of which are to maximize the asset values associated with the firm as it has existed, in order to benefit the interests of all the firm's constituencies—creditors, clients, current and former partners and employees – while providing an efficient structure for the firm to continue to serve the clients it has and can attract.

4. Andersen LLP is a professional services firm, the most valuable assets of which are the partners and other personnel who provide those services. As with any professional services firm, Andersen LLP relies on individuals, the work that they do, and the relationships they maintain with their clients to stay in business.

5. Since Enron's collapse, and especially since it was indicted in mid-March of this year, Andersen LLP has lost a substantial number of public company clients and the majority of its largest public clients. This has caused a significant drop in Andersen LLP's business activity, which means that a large number of employees do not have any expectation of continued work.

6. The precipitous decline in business has resulted in Andersen LLP having a cost structure that is incommensurate with its current volume of business. For example, Andersen LLP is still obliged to pay salaries and related benefits, even though many of the personnel entitled to these payments are not engaged in activities generating any substantial revenue.

7. As partial solution to this situation, and as reported throughout the court try, Andersen LLP has had to lay off six thousand employees. Further, an extensive effort is being made to realize a fair value for those parts of the business that may not be part of Andersen LLP going forward. Negotiations have and will occur in connection with the sale or transfer of lines of Andersen LLP's business, as well as groups of Andersen LLP's professional and non-professional personnel. All of these transactions must be evaluated in terms of the fairness of any consideration that may provide and also the impact they will have on the firm's realization of value for other assets like receivables and work in progress, as well as, the impact on expenses and liabilities like lease expenses, severance costs and the like.

8. In many of these potential transactions, our approach would require an / buyer to acquire some or all of the partners from a specific local office, or the partners engaged in a particular line of business, as well as the related group of employees who provide support for the professional personnel. (These groups, generally numbering six to eleven employees, are referred to as "pyramids.") Further, Andersen LLP is seeking to ensure that potential buyers will purchase the furniture, fixtures and equipment and assume leases relating to locations that may be acquired. These and similar terms will help to relieve Andersen LLP of the ongoing employee compensation and benefit costs and potential severance obligations it for those personnel transferred in any transaction, and bring value into the firm. Andersen LLP has also engaged the services of Gleacher & Co., investment bankers, to evaluate the fairness of certain proposed transactions and to assist in the overall effort to negotiate and execute transactions that will benefit Andersen LLP to the greatest extent possible.

9. I cannot emphasize too strongly that time is of the essence in the efforts to sell or transfer lines of business or groups of personnel. The longer the process takes, the greater the

cash drain and loss of overall value. As even more clients leave, receivables and work in progress will not be realized and Andersen LLP's business activity and prospects will decline even further.

10. Moreover, the longer Andersen LLP takes to complete the necessary transactions, the greater the possibility that its partners and other employees could decide to leave the firm or find new employment outside of the structure of our process. Andersen LLP partners are subject to non-compete covenants that are intended to prevent them from leaving the firm and taking their clients with them or otherwise providing services for their clients. (It does not, though, prevent partners from leaving the firm and going to a competitor.) If managed effectively, these obligations can be utilized in connection with our own downsizing efforts to make sure the firm receives fair value from acquiring parties. Andersen LLP has not and will not consider a blanket waiver of covenants for all of its partners. It will seek, on a particularized basis, to achieve a fair value from buyers in return for waivers of the covenants for departing partners. Importantly, however, these waivers in many cases could not permit partners to take clients from Andersen LLP because many of these clients have already left. This is central to our effort to manage the assets of the firm and to achieve value for them as Andersen LLP restructures its business. Time is of the essence in the restructuring efforts.

11. I understand that the Bryce plaintiffs are seeking a temporary restraining order enjoining Andersen LLP from waiving non-compete agreements and requiring Andersen LLP to enforce the non-competition clauses. I understand that the intent of this request is to preclude Andersen LLP from the release of non-compete agreements in connection with transactions in which Andersen is receiving value from purchasers and is eliminating substantial costs as part of

its restructuring. I further understand that the purpose of this order is to preserve the "status quo" of Andersen.

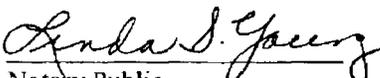
12. If granted, this relief would delay, forestall, or preclude Andersen LLP's execution of transactions such as those described above and would have a potentially devastating effect on Andersen LLP's ability to derive value from its assets, to the detriment of all its constituencies. The delay would put at risk the value coming to Andersen LLP from these transactions, which is anticipated to be in excess of \$200,000,000, if these transactions are consummated. Even a short delay in the execution of transactions would have such an effect and would likely impact the willingness of potential buyers to consummate any such transactions. Such delay would also place at risk the placement of thousands upon thousands of employees in new jobs.

Dated. May 1, 2002

Chicago, IL



Sworn before me this  
1<sup>st</sup> day of May 2002.

  
Notary Public





Andersen expected all partners to comply fully with their bonding obligations and that Arthur Andersen will take appropriate actions to insure such compliance. I also informed the partners that the Administrative Board reiterated its belief that the firm should carry on as a stand alone audit firm, albeit on a necessarily reduced scale, and that vision would involve disposition of various practices from the firm, including at least a portion of the tax practice, for fair value to the firm. This communication was a follow-up to a voicemail to the partners that was sent out about a week earlier reminding the partners of the bonding requirements set forth in Article 26 of the Partnership Agreement.

4. To my knowledge, Arthur Andersen has released only one partner from his non-compete agreement to date. Arthur Andersen is receiving cash for this release.

5. Arthur Andersen is currently paying BRB and ERB to retired partners. Arthur Andersen is also continuing to provide medical insurance through the firm.

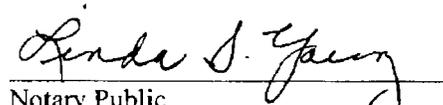
6. Retired partners make annual elections regarding ERB payments. Arthur Andersen is not agreeing to mid-year requests from retired partners to change the annual elections they previously made and requesting that the ERB be paid in a lump sum rather than in installment payments as requested during the annual election period. This conclusion was reached by the Administrative Board, with appropriate advice, considering the facts and circumstances.

7. Arthur Andersen has offices in Miami, Fort Lauderdale, West Palm Beach, Tampa, and Orlando. Accordingly, Arthur Andersen has many partners that work and reside in the State of Florida and are citizens of that State.

FURTHER AFFIANT SAYETH NOT.

  
LARRY GORRELL

SUBSCRIBED AND SWORN TO  
before me this 2nd day  
of May, 2002

  
Notary Public

