



appointment to act as representative for this subclass; and (3) for appointment of American National's attorneys to act as counsel for this subclass.

### RESPONSE TO THE CAYMAN MOTION

American National supports separate scheduling orders for certain groups of plaintiffs but concludes that the particular preliminary scheduling order sought by Cayman, applicable to all plaintiffs that are “not ultimately represented by the Court-appointed Lead Plaintiff” (the “Class Plaintiffs”), is unnecessary. *See Cayman Motion* at 2, ¶¶ 1 and 2. There is no need for entering an order at this time which will impact only parties that cannot, at present, be identified. Cayman's request concerns amendments to complaints (and responses to amendments) which will occur after determination of class certification. *Cayman Motion* at 3, ¶ 2. Deadlines for filing such amendments (and responses), however, can be specified at the time of class certification (or denial of certification). The causes of action filed by the various plaintiffs are not “extinguished” by consolidation except to the extent state law claims may be preempted by federal law. Further, any plaintiff may move for leave to amend its own pleading at any time. To the extent that the non-Class plaintiffs may seek amendment of their pleadings to add claims within the scope of the Class Plaintiffs' complaint, the statutes of limitations on these causes of action are tolled pending determination of class certification pursuant to *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

There are, however, two groups of plaintiffs that may, during the course of consolidated pretrial proceedings, appropriately request separate scheduling orders. One group comprises those “tag-along” cases joined subsequent to the initiation of discovery in

the consolidated action. The other group consists of actions (the “Texas Cases”), such as American National’s, brought solely under Texas state law that (1) neither have fifty or more plaintiffs nor are styled as class actions and (2) have been removed from Texas state courts based upon federal-question subject matter jurisdiction.

THE COURT SHOULD CREATE A “TEXAS CASES” SUBCLASS

American National requests that a group of cases asserting only Texas state law causes of action be granted “subclass” status because of the unique circumstances and claims of these plaintiffs. Specifically, American National asks for the creation of a subclass of those actions filed in Texas state courts which assert only state law causes of action and (1) have less than fifty plaintiffs and are not styled as class actions and (2) have been removed from Texas state courts based upon federal-question subject matter jurisdiction.<sup>1</sup>

Rule 23(c) (4) of the Federal Rules of Civil Procedure provides that a class may be divided into subclasses. It is well established that the district court has discretion to determine if subclasses are appropriate and to appoint counsel to represent the subclasses. *See, e.g., Amchem v. Windsor*, 521 U.S. 591, 605 (1997) (quoting the district court, “the Court may in the future appoint additional counsel if it is deemed necessary and advisable”); *Cullen v. New York State Civil Service Commission*, 566 F.2d 846, 849 (2d Cir. 1977) (“the court may also find it necessary to appoint additional counsel to protect the interests of the subclasses”) (citations omitted). *See also In re Cendant Corp. Litig.*, 264 F.3d 201 (3d Cir.

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1. The resolution of whether certain counsel inappropriately filed a multitude of separate suits in an attempt to circumvent the preemptive effect of SLUSA is not relevant to, and thus need not be addressed in, determining whether a subclass should be created.

2001); *Amos v. Board of Directors of City of Milwaukee*, 408 F.Supp. 765 (E.D. Wisc.), *aff'd*, 539 F.2d 625 (7<sup>th</sup> Cir. 1976).

Subclasses under Rule 23(c)(4) are appropriate for a pending putative class action “whenever a distinct segment of the class presents special factual circumstances, *United States ex rel. Sero v. Preiser*, 372 F.Supp. 660, 662 (S.D.N.Y. 1974); different causes of action, *Monroe v. Bombard*, 422 F.Supp. 211, 218 (S.D. N.Y. 1976); or special legal or equitable prayers for relief. *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200-01 (6<sup>th</sup> Cir. 1974).” *Heit v. Corsetti*, 2001 U.S. Dist. Lexis 532 at \*5 (W.D. Mich. 2001) (quoting *Glover v. Johnson*, 85 F.R.D. 1, 7 (E.D. Mich. 1977)). In the instant case, all three factors -- special circumstances, different claims, and unique prayers for relief -- characterize the Texas Cases and distinguish them from the consolidated putative Class action.

That the Texas Cases plaintiffs are seeking remand based upon lack of federal-question subject matter jurisdiction is a circumstance special to the Texas Cases and the motions to remand seek a type of relief unique to the Texas Cases. The differences between the Texas Cases and the putative Class action support creation of a subclass and appointment of counsel to represent the Texas Cases plaintiffs. The Court has postponed ruling on the remand motions filed in the Texas Cases, effectively denying the motions at least on a temporary basis. On the other hand, another federal district court recently concluded that an action, with remand issues similar to those presented in the actions brought by American National and other Texas Cases plaintiffs, should be remanded to state court. *Bullock v. Arthur Andersen, L.L.P.*, A-02-CA-070-H (W.D. Tex. 2002). Plaintiffs in the Texas Cases,

accordingly, find themselves in something of a legal limbo. Due process concerns associated with the Court's decision not to rule on the remand motions may be diminished by appointment of subclass counsel.

The Texas Cases, moreover, present causes of action distinguishable from the Class claims; the Texas law claims are far from identical to federal securities law causes of action. For example, scienter is not an element of statutory fraud under section 27.01 of the Texas Business and Commerce Code. *See Brush v. Reata Oil and Gas Corp.*, 984 S.W.2d 720, 726 (Tex. App. – Waco 1998, writ denied) (citing *Swanson v. Schlumberger Technology Corp.*, 985 S.W.2d 719, 732 (Tex. App. – Texarkana 1994), *rev'd on other grounds*, 959 S.W.2d 171 (Tex. 1997); *Diversified, Inc. v. Walker*, 702 S.W.2d 717, 723 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1985, writ *ref'd n.r.e.*)). The Texas Cases plaintiffs, accordingly, will not want to concentrate discovery efforts on the scienter element required for proof of the federal securities claims; rather they will concentrate their statutory fraud claim inquiries on the Defendants' intent that others act upon the misrepresentation and upon materiality as defined by Texas law.

It is not improbable that the Fifth Circuit Court of Appeals will be called upon to determine the disputed contours of the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78, 105 P.L. 353, 112 Stat. 3227. In the event of a mandamus proceeding or interlocutory appeal concerning remand, appointed subclass counsel can work with the Court, liaison with Class counsel, and tender proposed scheduling orders when appropriate to protect the rights and interests of the subclass parties. Further, in the event the cases are

remanded during pretrial proceedings or at some later date, involvement by subclass counsel in the consolidated discovery will significantly reduce costs to the parties and promote judicial economy because the state court cases will not have to start, again, from “square one.”

AMERICAN NATIONAL SHOULD BE APPOINTED LEAD PLAINTIFF FOR  
THE TEXAS CASES SUBCLASS

An order creating a Texas Cases subclass would mitigate due process concerns and promote judicial economy in the event of ultimate remand of the cases. The order establishing the subclass and appointing subclass counsel could recognize that the Texas Cases plaintiffs have not waived their request for remand<sup>2</sup> and allow for a coordinated approach to scheduling events affecting the Texas state law claims. In the immediate future, the Texas Cases subclass can proceed under the current scheduling order with counsel for the Texas Cases allowed to participate in discovery to the extent necessary to obtain information uniquely impacting the state law claims of the subclass plaintiffs.

American National and its counsel are ideally suited to represent the Texas Cases in the consolidated action now before this Court. American National’s counsel, Greer, Herz & Adams L.L.P., is well-qualified and has substantial experience in prosecuting consolidated securities cases.

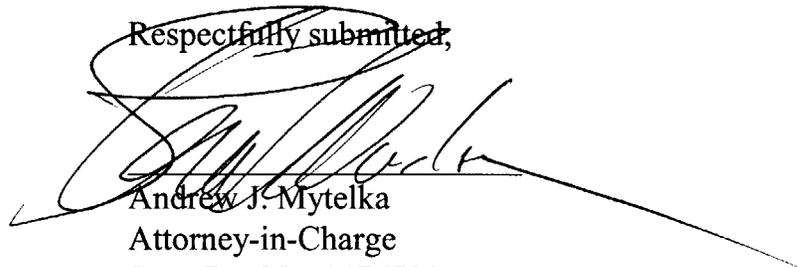
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2. Although lack subject matter jurisdiction cannot be waived, American National, and probably other Texas cases plaintiffs, fear that full and active participation in the consolidated action might be deemed by the Court as “joining” the SLUSA class. American National has hesitantly been involved in the consolidated pretrial proceedings. By entering an order specifying that the Texas cases plaintiffs may proceed subject to their requests for remand, and by tailoring the order establishing a subclass to promote judicial economy in the event ultimate remand, both due process concerns and manageability concerns can be addressed.

PRAYER

American National prays that a subclass be created, such subclass comprising actions, like American National's, brought solely under Texas state law that (1) neither have fifty or more plaintiffs nor are styled as class actions and (2) have been removed from Texas state courts based upon federal-question subject matter jurisdiction. American National further prays that it be appointed lead subclass plaintiff and that its counsel, Greer, Herz & Adams, L.L.P., be appointed to represent the subclass.

~~Respectfully submitted,~~



Andrew J. Mytelka  
Attorney-in-Charge

State Bar No. 1476700

S.D. Tex. I.D. No. 11084

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

One Moody Plaza, 18th Floor

Galveston, Texas 77550

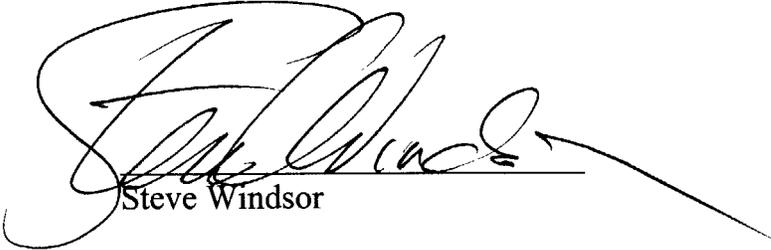
(409) 797-3200

(409) 766-6424 (FAX)

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that a copy of this motion was served on counsel for each party via email on May 16, 2002.



Steve Windsor