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

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624 (Consolidated)
	§	CLASS ACTION
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
vs.	§	
ENRON CORP., et al., Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
vs.	§	
KENNETH LAY, et al., Defendants.	§	
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, et al. Plaintiffs,	§	Civil Action No. H-01-3913 (Consolidated Action)
vs.	§	
ENRON CORP., et al. Defendants	§	

United States Courts
Southern District of Texas
FILED
JUL 24 2003
Michael N. Milby, Clerk of Court

OUTSIDE DIRECTOR DEFENDANTS' REQUEST FOR CLARIFICATION REGARDING SCOPE OF PROPOSED SETTLEMENT BAR ORDER

TO THE HONORABLE MELINDA HARMON:

The language of the proposed bar order submitted in the Andersen Worldwide settlement

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documents contains ambiguous language that must be clarified in order to ensure that the non-settling defendants' legal rights are not impaired. The specific language in question is as follows:

> Upon the Effective Date, all **obligations of the Released Entities to the Representative Plaintiffs** and the Settlement Class Members arising out of, based upon or otherwise related to the transactions and occurrences that were alleged, or could have been alleged, on behalf of the Representative Plaintiffs and the Settlement Class Members in the complaints in the Actions shall be fully, finally, and forever discharged, and all Persons shall be permanently barred and enjoined from instituting, prosecuting, pursuing or litigating in any manner (regardless of whether such Persons purport to act individually, representatively, or in any other capacity and regardless of whether such Persons purport to allege **direct claims, claims for contribution, indemnification, or reimbursement, or any other claims**) any such obligations.

Exhibit B, Proposed Order of Final Judgment of Dismissal, ¶ 7 (emphasis added).

First, the proposed order is ambiguous concerning the Defendants' rights to a comparative fault judgment reduction for the fault, if any, if the settling defendants. Under the Private Securities Litigation Reform Act, 15 U.S.C. §78u-4, the non-settling defendants are entitled to a reduction in the amount of any judgment against them to the extent the jury finds that the fault of Andersen Worldwide contributed to cause Plaintiffs' injury. Similarly, by virtue of the common and state law claims asserted against the non-settling defendants in both *Newby* and *Tittle*, these defendants are entitled to either a dollar credit for the amount of the Andersen Worldwide settlement, *see Bradshaw v. Baylor Univ.*, 126 Tex. 99 (Tex. Comm. App.1935) and *Buccaneer Homes of Alabama, Inc. v. Pelis*, 43 S.W.3d 586 (Tex. App.--Houston 2001 [1st Dist.], no writ)("One Satisfaction Rule is designed to prevent a windfall to the plaintiff, and dictates that when a plaintiff files a suit against multiple defendants for a single injury, any settlements will be credited against the amount for which the non-settling defendants are found liable."), a pro tanto or "head count" reduction under Chapter 32 of the Civil Practice and Remedies Code, *see* Tex. Civ. Prac. & Rem. Code §32.001, or a

proportionate fault reduction under Chapter 33 of the Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code §§33.012 and 33.014.

Federal courts considering the issue since the enactment of the PSRLA have made clear that any bar order must contain appropriate language preserving the rights of the non-settling defendants to obtain a judgment reduction that takes into account the settlement proceeds already received by the plaintiffs. *See In re Sterling Foster Secs. Litig.*, 238 F. Supp. 2d 480 (E.D.N.Y. 2002) ("Under the PSLRA, a bar order against future contribution or similar offsets must be accompanied by "equitable standards" for non-settling defendants in the form of a proportionate reduction in the ultimate judgment. *Lucas*, 18 F. Supp. 2d at 535; see *In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 492 (11th Cir.1992); *Neuberger v. Shapiro*, 110 F. Supp. 2d 373, 382 (E.D. Pa. 2000)) (upholding a proposed settlement agreement containing provisions that "if there is a final verdict or judgment against any Non Settling Defendant in this action, the verdict or judgment shall be reduced by the greater of: (a) an amount that corresponds to the percentage of responsibility of the Settling Defendants; or (b) the amount paid to the plaintiff by the Setting defendants"). Under Texas common law, the right to an appropriate judgment reduction is embodied in a statute and cannot be divested by a court order.

In order to resolve the ambiguity in the Order, we suggest that proposed Bar Order be amended to include the following language:

> Nothing in the Proposed Bar Order shall be construed to divest the Non-Settling Defendants of their right to obtain an appropriate judgment reduction or settlement credit, under any applicable statutory or common law rule, for the amount of plaintiffs damages attributed to the fault of the settling defendant or for the dollar amount of the settlement payments made by the settling defendant.

The Bar Order should also be made reciprocal, in that it should bar contribution claims by the settling parties against the non-settling parties. *See In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 726 (E.D. Pa. 2001) ("[The PSLRA] by its plain language . . . supports, and indeed *requires*, our entry of an order barring contribution claims both by and against "settling covered persons" . . . [The bar order at issue] explicitly achieves this end, as it bars contribution claims by the Non-Setting Defendants or the Settling Defendants against the Released Parties, and also bars contribution claims by the Released Parties against the non-settling defendants.").

The second clarification concerns the language in the order that purports to bar the non-settling defendants from asserting claims against Andersen Worldwide "in any manner and regardless of whether such Persons purport to allege direct claims . . . or any other claims." It may be that this is intended to limit only claims that are "based upon or . . . were alleged or could have been alleged on behalf of the Representative Plaintiffs and the Settlement Class Members," but a number of the non-settling defendants may have direct and <u>personal</u> claims (for example, for professional malpractice) that are related to injuries they may have sustained as a result of the settling defendants' wrongful actions. Those claims, moreover, may well be "related to the transactions and occurrences that were alleged on behalf of the Representative Plaintiffs." Those claims, however, do not sound in contribution or indemnity and they cannot be barred by the settlement between the Plaintiffs and Andersen Worldwide.

We suggest, therefore, that the language of the Bar Order should be amended to make clear that:

> Nothing in this Bar Order shall prohibit any Non-Settling Defendant from asserting against any settling defendant a personal claim for individual injuries that the non-settling defendant may have sustained as a result of any action by a settling

defendant, including personal claims that arise out of the transactions or occurrences that were alleged, or could have been alleged, on behalf of the representative Plaintiffs and the Settlement Class Members, so long as such personal claim is not one that sounds in contribution, indemnity or reimbursement.

Dated: July 24, 2003.

Respectfully submitted,

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By: Robin C Gibbs KP by permission

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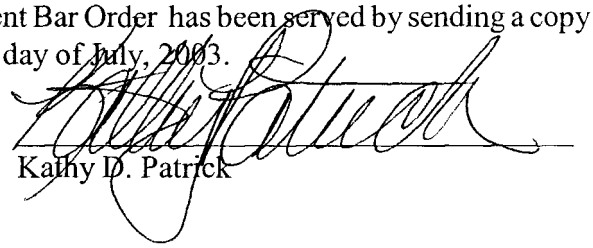
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Outside Director Defendants' Request For Clarification Regarding Scope of Proposed Settlement Bar Order has been served by sending a copy via posting to www.ESL3624.com on this the 24th day of July, 2003.



Kathy D. Patrick