

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES  
AND ERISA LITIGATIONS

Civil Action No. H-01-3624  
(Consolidated)

This Document Relates To:

CLASS ACTION

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 L. LAY, et al.,

Defendants.

PAMELA M. TITTLE, et al.,

Plaintiffs,

vs.

ENRON CORP., an Oregon corporation, et al.,

Defendants.

United States Courts  
Southern District of Texas  
FILED

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Michael N. Milby, Clerk

MEMORANDUM IN SUPPORT OF REPRESENTATIVE PLAINTIFFS' MOTION FOR  
FINAL APPROVAL OF PARTIAL SETTLEMENT

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## I. INTRODUCTION

Representative Plaintiffs,<sup>1</sup> in the actions entitled *Newby, et al. v. Enron Corp., et al.*, No. H-01-CV-3624 (S.D. Tex.); *The Regents of the University of California, et al. v. Kenneth L. Lay, et al.*, No. H-01-3624 (S.D. Tex.); *Washington State Investment Board, et al. v. Kenneth L. Lay, et al.*, No. H-02-CV-3401 (S.D. Tex.); and *Tittle, et al. v. Enron Corp., et al.*, No. H-01-CV-3913 (S.D. Tex.), consolidated in *In re Enron Corporation Securities and ERISA Litigations*, Civil Action No. H-01-3624, by their undersigned counsel, respectfully submit this memorandum in support of their motion for a First Amended Order of Final Judgment and Dismissal (the "Order"), contemporaneously submitted herewith: granting final approval of the proposed partial settlement of the Actions with Andersen Worldwide Societe Cooperative ("AWSC"), Arthur Andersen (United Kingdom), Arthur Andersen-Brazil, and Anderson Co. (India) (the "Defendant Member Firms"), on the terms set forth in the Stipulation.

The Actions have been settled with respect to AWSC and the Defendant Member Firms for \$40 million. In addition, as discussed in more detail below, AWSC and certain of its Member Firms have agreed voluntarily to produce documents relating to the Actions and to use their best efforts to identify and make available witnesses for interviews by Representative Plaintiffs' counsel. The settlement does *not* release Arthur Andersen LLP and the Actions will continue against Arthur Andersen LLP and the other defendants named in the complaints filed in the Actions.

Representative Plaintiffs request that the motion be granted not only because public policy favors the settlement of complex class actions such as these, but, as demonstrated herein, the settlement has achieved a very good result for the Settlement Class under the difficult circumstances

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<sup>1</sup> Capitalized terms used herein and not otherwise defined in this Memorandum have the same meaning as set forth in the Stipulation of Partial Settlement dated as of August 29, 2002 (the "Stipulation").

present here with respect to AWSC and the Defendant Member Firms. The Settlement is fair, reasonable and adequate under the governing standards in this Circuit and deserves the approval of this Court.

## II. FACTUAL BACKGROUND OF THIS LITIGATION

This Court has already demonstrated its familiarity with Representative Plaintiffs' allegations regarding the facts and circumstances surrounding the collapse of Enron. *See, e.g., In re Enron Corp. Securities, Derivative and ERISA Litigations*, 235 F. Supp. 2d 549 (S.D. Tex. 2002). For the sake of brevity, those allegations will not be repeated here.

This partial settlement resolves the Actions with respect to AWSC and the Defendant Member Firms.<sup>2</sup> It does not resolve claims asserted against Arthur Andersen LLP or the other defendants named in the complaints in the Actions.

AWSC, now in liquidation, is a Cooperative formed under the Swiss Code of Obligations and is domiciled at Meyrin, Geneva, Switzerland. The Cooperative is a limited liability entity under Swiss law. AWSC served as the coordinating entity of the Andersen network, which had Member Firms in countries throughout the world. Each Member Firm was formed under the laws of the country in which it was located. The relationship between each Member Firm and AWSC was a contractual one, governed by a separate Member Firm Interfirm Agreement between each Member Firm and AWSC. AWSC does not provide professional services to any client and does not earn a profit. The Defendant Member Firms are Andersen Co. (India), Arthur Andersen-Brazil, and Arthur Andersen (United Kingdom).

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<sup>2</sup> Although the settlement is with AWSC and the Defendant Member Firms, the release agreed to by the Representative Plaintiffs includes any AWSC Entity and encompasses, *inter alia*, all current and former firms worldwide that have entered into a "Member Firm Interfirm Agreement" with AWSC, with the exception of Arthur Andersen LLP.

The complaints in the Actions allege that the Defendant Member Firms all participated, to one degree or another, in audits of Enron for the years 1997-2000 or rendered other services to Enron subsidiaries or related entities. Representative Plaintiffs contend that AWSC and the Defendant Member Firms participated in the scheme alleged.

AWSC and the Defendant Member Firms vigorously contested jurisdiction in each of their motions to dismiss. On the merits of the claims asserted against them, AWSC contended that the complaints did not allege that it performed any services at all for Enron or any of its ERISA plans. It also contended that it had no relationship with Arthur Andersen LLP, contractual or otherwise, that could give rise to any relief. The Defendant Member Firms each asserted that the complaints did not allege that the services performed by them were deficient in any way, and did not allege wrongful conduct or knowing participation in the alleged Enron scheme.

In addition, because of the impact on AWSC and its Member Firms occasioned by the civil allegations against, and the criminal indictment and subsequent conviction of, Arthur Andersen LLP, AWSC is in the process of winding up its affairs<sup>3</sup> and most of the former Member Firms have meanwhile entered into arrangements with other accounting firms if they are not on the brink of bankruptcy or have already been dissolved. Thus, even if AWSC's and the Defendant Member Firms' jurisdictional arguments were rejected by the Court and liability established, the collectibility of any resulting judgment would be in serious doubt.

These three issues – jurisdiction, liability and collectibility – presented daunting obstacles to any recovery. Nonetheless Representative Plaintiffs' counsel were able to negotiate a multi-million dollar recovery for the Settlement Class as well as substantial cooperation in prosecuting the claims asserted against the remaining defendants.

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<sup>3</sup> AWSC is now known as AWSC Societe Cooperative, en liquidation.

### III. THE SETTLEMENT

The settlement provides for the establishment of a settlement fund in the amount of \$40 million (the "Settlement Amount") for the benefit of the Settlement Class. This Settlement Amount was deposited on August 30, 2002 and has been earning interest since that time.<sup>4</sup>

In recognition of the massive and ongoing expenditures required to prosecute the Actions, the Stipulation provides that \$15 million of the Settlement Amount shall be set aside to pay for litigation expenses (the "Expense Fund"), subject to the Court's approval. Other courts have recognized the appropriateness of such a provision. *See* Exhibits 1 and 2 to the Declaration of Helen J. Hodges ("Hodges Decl.") submitted herewith. The Representative Plaintiffs have agreed, subject to the approval of the Court, to allocate the Expense Fund 80.5% to the *Newby* and *WSIB* Actions on the one hand and 19.5% to the *Tittle* Action on the other.

The Stipulation also provides that the Representative Plaintiffs have agreed that the remainder of the Settlement Amount will be allocated between the *Newby* and *WSIB* Actions, on the one hand, and the *Tittle* Action, on the other, by confidential, binding and non-appealable arbitration. The arbitration was to have been conducted by Layn Phillips promptly after the Court decided the pending motion to dismiss in the *Tittle* Action. However, that motion to dismiss has now been decided and, despite their prior inability to agree (after numerous attempts to do so), the Representative Plaintiffs have now agreed that the remainder of the Settlement Amount shall be allocated 85% to the *Newby* and *WSIB* Actions on the one hand and 15% to the *Tittle* Action on the other. This allocation is subject to the Court's approval after further notice to the Settlement Class and an opportunity for Class members to be heard on this issue.

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<sup>4</sup> The Settlement Amount has earned about \$335,000 in interest.

In addition, to the extent permitted by the laws, regulations, and professional standards of their respective countries and subject to certain limitations set forth in the Stipulation, AWSC and the Defendant Member Firms will make available to the Representative Plaintiffs, the Enron-related documents in their possession, custody, or control.

The Defendant Member Firms will also use their best efforts to identify and make available witnesses from such Defendant Member Firms, to the extent they are in the Member Firms' control, for interview by counsel to the Representative Plaintiffs at a mutually convenient time and place concerning Enron's financial statements and other Enron-related matters.

If Representative Plaintiffs determine that they need similar information from an AWSC Entity other than the Defendant Member Firms, AWSC will undertake to use its best efforts to determine whether the AWSC Entity is in possession or control of such information and, if so, (i) to assist Representative Plaintiffs in obtaining such information on a voluntary basis, and (ii) to obtain waivers of the attorney-client (or any other) privilege and the work product (or any similar) doctrine by that AWSC Entity with respect to any document otherwise called for that was created during the class period encompassed in the Actions. Finally, the Defendant Member Firms will waive the attorney-client (or any other) privilege and the work product (or any similar) doctrine with respect to any document described above that was created during the class period asserted in the Actions.

#### **IV. ARGUMENT**

##### **A. The Settlement Merits Final Approval by the Court**

The general standard for final approval of a proposed settlement of a class action, as repeatedly enunciated by the Fifth Circuit, is whether the proposed settlement is "fair, adequate and reasonable" and has been entered into without collusion between the parties. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *see also Ruiz v. McKaskle*, 724 F.2d 1149, 1152 (5th Cir. 1984) (*per curiam*). In applying this standard, the Court must determine whether, in light of the claims and

defenses asserted by the parties, the proposed compromise represents a “reasonable evaluation of the risks of litigation.” *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960).

It has long been settled that compromises of disputed claims are favored by the courts. *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). The Fifth Circuit has consistently held that, as a result of their highly-favored status, settlements “will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.” *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977) (citing *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 176 (5th Cir. 1975)).

Settlements of class actions and shareholder litigation are “particularly favored” and are not to be lightly rejected. *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983); *see also Cotton*, 559 F.2d at 1331. In the case of class actions, the Fifth Circuit has held that “there is an overriding public interest in favor of settlement,” because such suits “have a well deserved reputation as being most complex.” *Cotton*, 559 F.2d at 1331; *accord Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Thus, in determining whether to approve the settlement, the trial judge is not required to decide the merits of the action or substitute a different view of the merits for that of the parties or counsel. *Maher*, 714 F.2d at 455.

In weighing the benefits obtained by settlement against benefits dependent on the likelihood of recovery on the merits, the courts are not expected to balance the scales perfectly. The “trial court should not make a proponent of a proposed settlement ‘justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.’” *Cotton*, 559 F.2d at 1330 (citations omitted). The very object of a compromise “is to avoid the determination of sharply contested and dubious issues.” *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971) (citations omitted).

Where, as here, experienced counsel have negotiated settlements at arm's length, a strong initial presumption is created that the compromise is fair and reasonable. *United States v. Texas Educ. Agency*, 679 F.2d 1104, 1108 (5th Cir. 1982). The Fifth Circuit has recognized that courts must rely to a large degree on the judgment of competent counsel, terming such counsel the "linchpin" of an adequate settlement. *Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983). Thus, if experienced counsel determine that a settlement is in the class's best interests, "the attorney's views must be accorded great weight." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978).

When examined under the applicable criteria, this partial settlement is a very good result for the class. It is Representative Plaintiffs' counsel's judgment that there is a serious question as to whether a more favorable monetary result against the Settling Defendants would be attained by a judgment after trial and the inevitable post-trial motions and appeals, or if, obtained, would be collectible given the jurisdictional issues and the economic circumstances present here, particularly with respect to AWSC. The settlement achieves a relatively prompt recovery, provides for the payment of certain of the massive litigation expenses being incurred on an ongoing basis, and is unquestionably superior to another possibility that unmistakably exists if the litigation continued with respect to the Settling Defendants: no recovery at all.

#### **B. The Fifth Circuit's Six-Pronged Test of Fairness**

Once satisfied that counsel adequately represented the class and has bargained for the proposed settlement in good faith, the "only question" for the Court to determine "is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval." *McNary v. American Sav. & Loan Ass'n*, 76 F.R.D. 644, 649 (N.D. Tex. 1977) (citations omitted). The Fifth Circuit has established a six-pronged test to be applied to proposed settlements:

1. The assurance that there is no fraud or collusion behind the settlement;

2. The stage of the proceedings and the amount of discovery completed;
3. The probability of plaintiff's success on the merits;
4. The range of possible recovery;
5. The complexity, expense and likely duration of the litigation; and
6. The opinions of class counsel, class representatives and absent class members.

*Reed*, 703 F.2d at 172; *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982); *see also Salinas v. Roadway Express, Inc.*, 802 F.2d 787, 789 (5th Cir. 1986). This settlement easily passes muster when examined in light of these six criteria.

#### **1. There Is No Fraud or Collusion Behind the Settlement**

There is no collusion in the settlement of these Actions. The negotiations themselves were an outgrowth of the mediation proceedings ordered by the Court with respect to a possible global Andersen settlement. Representative Plaintiffs' counsel have many years of experience in litigating securities and ERISA class actions and have negotiated numerous other class settlements which have been approved by courts throughout the country. AWSC was represented by Sidley Austin Brown & Wood, a firm with a national reputation for the tenacious defense of class actions and other complex civil matters. The settlement was negotiated at arms length by very senior members of these firms who are knowledgeable about the strengths and weaknesses of the claims made and the potential defenses to them. Moreover, there were frank discussions of the economic realities surrounding a potential settlement given the circumstances faced by AWSC and the Defendant Member Firms. Thus, even if the claims against AWSC and the Defendant Member Firms were strong (and their counsel were by no means prepared to concede that they were), there were practical limitations on the amounts that could be obtained for the Class. Conversely, given the risks presented by the pending motions to dismiss on both pleading and jurisdictional grounds and the virtual disbanding of the Andersen organization, there was a very real likelihood that the Class would obtain nothing from

these defendants absent a timely settlement. The existence of these dynamics and the fact that a multi-million dollar result was reached despite them is a credit to the efforts of plaintiffs' counsel. There can be no question that the class was fairly and adequately represented in the course of these proceedings.

**2. The Stage of the Proceedings and the Amount of Discovery Completed**

Representative Plaintiffs' counsel have enough knowledge to intelligently evaluate the role of AWSC and the Defendant Member Firms in these cases and the propriety of the Settlement. Counsel for the Representative Plaintiffs conducted and are continuing to conduct a thorough investigation of the salient facts regarding the Actions. Plaintiffs' counsel reviewed and analyzed voluminous publicly available documents relating to Enron's collapse. They also interviewed key witnesses and industry sources and consulted with experts. This document review and interview process made it clear that the way in which key issues in the Actions with respect to AWSC and the Defendant Member Firms would be resolved was by no means free from doubt. Suffice it to say, the parties reached agreements to settle with a "full understanding of the legal and factual issues surrounding this case." *Manchaca v. Chater*, 927 F. Supp. 962, 967 (E.D. Tex. 1996). Nothing more is required. In fact, courts have held that a great amount of formal discovery is not a "necessary ticket to the bargaining table." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981) (citing *Cotton*, 559 F.2d at 1332).

**3. The Probability of Success on the Merits**

If the Settling Defendants' motions to dismiss on jurisdictional and other grounds had been granted (and there was a significant risk that they would have been given the Court's rulings made after the MOU was entered into with the Settling Defendants, with respect to certain other defendants' motions), it is highly likely that the Settlement Class would have recovered much less than this settlement or nothing at all. Even if Representative Plaintiffs had been given the

opportunity to replead (and, again, there was no guarantee that they would have been, given the Court's rulings with respect to certain other defendants), it is unlikely that the Settling Defendants would have been motivated to settle the litigation at the same level achieved here, if at all. It was Representative Plaintiffs' perception that one of the reasons the Settling Defendants were prepared to settle for \$40 million at the time they did was the desire to structure an agreement that cut off potential successor liability if a Member Firm was acquired by another entity. It is entirely possible that if the motions had been granted, the Member Firms would have decided to take the risk of that liability if they perceived Representative Plaintiffs as unable to establish jurisdiction or otherwise satisfy the pleading standards established by the Court.<sup>5</sup> Even if the motions to dismiss based on lack of jurisdiction and other grounds had been denied, plaintiffs still faced formidable obstacles to recovery at trial, both with respect to liability and damages. The principal claims in the *Newby* litigation are based upon §10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, and §11 of the 1933 Act. The principal claims in the *Tittle* case arise under ERISA, §1964 of RICO, and the Texas common law of negligence.

In order to prevail in the litigation, Representative Plaintiffs in the *Newby* litigation would have the burden of proving, *inter alia*, that AWSC and/or the Defendant Member Firms participated either in the alleged Enron scheme or in the public dissemination of misleading information, that the information was material to investors in determining whether to invest in Enron securities, that the information impacted the market price of the stock and caused damage to the Class and that, with

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<sup>5</sup> Indeed, after the Court ruled on the other motions to dismiss and with the passage of time it took to document the Settlement, Plaintiffs' Settlement Counsel have reason to believe that certain of the Member Firms who had contributed major portions of the Settlement Amount were having second thoughts about the Settlement.

respect to the §10(b) claims, AWSC and/or the Defendant Member Firms acted with scienter. *See generally Cyrak v. Lemon*, 919 F.2d 320, 325 (5th Cir. 1990).

For the *Tittle* plaintiffs to prevail on their claims, they would be required to prove that the Settling Defendants: were fiduciaries under ERISA and breached their duties to plaintiffs; constituted a RICO enterprise and engaged in a pattern of racketeering activity constituting multiple acts of various criminal offenses; and owed a duty of care to plaintiffs under Texas common law and breached that duty. At the time the *Tittle* plaintiffs agreed to settle, there was a substantial risk that a jury would have found that the Settling Defendants did not participate in any of the audit work at issue and were too far removed from the locus of activity and knowledge at Enron to be liable under any of the *Tittle* plaintiffs' claims.<sup>6</sup>

Given AWSC's and the Defendant Member Firms' arguments that they did not participate in the alleged scheme and that no allegations were made claiming that the services they provided were deficient in any way, establishing liability was simply not a given.

#### **4. The Range of Possible Recovery and the Difficulties in Proving Damages**

##### **a. Risks in Proving Damages**

Even if Representative Plaintiffs were successful in establishing liability on the part of AWSC and/or the Defendant Member Firms at trial, they would face substantial risks in proving the amount of damages caused by these defendants.

With respect to the *Newby* and *WSIB* Actions, given the presence of many, arguably more culpable, defendants and the proportionate liability provisions of the Private Securities Litigation Reform Act of 1995, there was a substantial risk that a jury would find that AWSC and/or the

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<sup>6</sup> Subsequent to that agreement and the Court's preliminary approval of this settlement, the risk inherent in the *Tittle* plaintiffs' claims was realized when the Court dismissed the RICO and civil conspiracy claims against Arthur Andersen LLP.

Defendant Member Firms were liable, if at all, for minuscule damages. With respect to the *Title ERISA* case, there were similar concerns about the degree of fault that would be assigned to the Settling Defendants on certain claims, particularly the negligence claim under Texas common law.

In sum, Representative Plaintiffs recognize that, had these cases proceeded to trial, it may have been very difficult to recover all or even most of the damages claimed as against AWSC or the Defendant Member Firms. Therefore, Representative Plaintiffs' counsel believe that the Settlement represents a very good result for the class.

**b. The Settlement Falls Within the Range of Reasonableness**

Courts agree that determination of a "reasonable" settlement is not susceptible to a single mathematical equation yielding a particularized sum. Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622, 630 (E.D. Pa. 1986). In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery. *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974); *Parker*, 667 F.2d at 1210 n.6; *McNary*, 76 F.R.D. at 650. Similarly, as the court stated in *Karasik v. Pacific Eastern Corp.*, 180 A. 604, 609 (Del. Ch. 1935):

[T]he amount claimed is one hundred million dollars and the amount received in settlement is a minimum of three hundred and eighty-five thousand dollars. Now that is a wide disparity. But it is one thing to assert a claim and another thing to prove the claim to judgment. Furthermore, it is one thing to obtain a judgment, and quite another thing to collect it. Figures, however imposing, should not compel practical considerations to yield place to visions.

Here, the total damages claimed are in the billions of dollars. However, given the issues with respect to jurisdiction, liability, damages and the collectibility of any judgment, the Settlement Amount is quite reasonable and the cooperation provisions provide additional value for the benefit of the Settlement Class.

## 5. The Complexity, Expense and Likely Duration of This Litigation

Another reason for counsel to recommend, and the courts to approve, a settlement is the complexity, duration and risks of further litigation. *Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424 (1968) (court must consider, *inter alia*, “the complexity, expense, and likely duration of such litigation”); *Manchaca*, 927 F. Supp. at 966.<sup>7</sup> Here, several factors are present which make it more likely that, without the settlement, these cases would require additional large expenditures and years of litigation as against the Settling Defendants and there would be a significant risk that the class would obtain results far less beneficial than the ones provided by the Settlement.

(a) AWSC and the Defendant Member Firms are represented by extremely capable counsel who are familiar with the defense of complex securities class actions such as these Actions. Since the inception of the litigation, AWSC and the Defendant Member Firms have denied liability and asserted facially reasonable explanations in response to plaintiffs’ allegations.

(b) Trials of these Actions against AWSC and the Defendant Member Firms would unquestionably entail months and involve the introduction of hundreds of exhibits dealing with dry financial and accounting matters, vigorously contested motions and the expenditure of millions of dollars in additional out-of-pocket expenses.

(c) Trials would necessarily involve complex issues resulting in conflicting expert testimony, the outcome of which is by no means certain. Thus, if there were further litigation, with respect to these defendants, and trial, there is a risk that the plaintiffs might fail to convince the trier

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<sup>7</sup> Courts have frequently recognized, in evaluating a proposed settlement of a securities class action, that such litigation “is notably difficult and notoriously uncertain.” *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973) (citing *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971)). Accordingly, compromises of securities class actions are particularly appropriate.

of fact of the merits of their cases and that AWSC or the Defendant Member Firms could obtain judgment in their favor.

(d) Even if the class could eventually recover a larger judgment after trial, the collectibility of such a judgment against AWSC and the Defendant Member Firms was in serious doubt. Moreover, any future trial judgment would still be subject to the continuing risks and vicissitudes of litigation, through possible appeals. Experience shows that even very large judgments, recovered after lengthy litigation and trial, can be completely lost on appeal.<sup>8</sup>

Thus, counsel believe that were these Actions tried through to conclusion rather than settled, there was a real risk of not obtaining a larger recovery against AWSC or the Defendant Member Firms, particularly since any securities case such as this, "by its very nature, is a complex animal." *Clark v. Lomas & Nettleton Financial Corp.*, 79 F.R.D. 641, 654 (N.D. Tex. 1978), *vacated on other grounds*, 625 F.2d 49 (5th Cir. 1980).

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<sup>8</sup> As the court noted in *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971):

It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

*See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (reversing \$87 million judgment after trial); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973) (reversing treble damage judgment for over \$145,000,000 – in action begun in 1961); *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977) (reversing Second Circuit's award of damages under Williams Act in amount of \$25,793,365 – after eight years litigation); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (reversing jury verdict on appeal); *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997) (reversing \$81 million jury verdict).

**6. The Opinion of Representative Plaintiffs' Counsel, the Representative Plaintiffs and Class Members Favor Approval of this Settlement**

As noted above, experienced Representative Plaintiffs' counsel, after substantial arm's-length negotiations with senior defense counsel, have concluded that the settlement is fair, reasonable and adequate. Here, Representative Plaintiffs' counsel have acquired an early but thorough understanding of the Actions and submit that the settlement is appropriate and should be approved. The view of plaintiffs' counsel, while not conclusive, is "entitled to significant weight." *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985); *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 528 (E.D. Tex. 1995).

The Lead Plaintiff in the *Newby* and *WSIB* Actions, The Regents of the University of California, and the *Tittle* plaintiffs also support the settlement. The Regents were appointed Lead Plaintiff pursuant to the provisions of the Private Securities Litigation Reform Act of 1995. They have been actively involved in all aspects of the prosecution of the litigation. Their support of the Settlement is entitled to significant weight by the Court.

Moreover, the support from the members of the Class is significant. Very few objections to the Settlement (discussed below) have been submitted by Class Members, and the date for serving and filing objections has expired. The small number of objections strongly supports approval of the Settlement. *Maher v. Zapata Corp.*, 714 F.2d at 456 n.35; *Detroit v. Grinnell Corp.*, 495 F.2d at 463.

As shown by the Affidavit of Cheryl Washington, filed concurrently herewith, notice of this settlement has been mailed to over *1.1 million* class members and a summary notice was published as ordered by this Court. In response, a statistically insignificant number of objections have been received. Those five objections on behalf of 18 shareholders with de minimus interests, are all without merit as discussed below.

### C. The Yoes Objection

The Yoes Law Firm, L.L.P., heads up a group of five law firms (the “Yoes Group”) who represent a travel agency and its apparent owner who purchased a total of 159 shares of Enron stock late in the Class Period.<sup>9</sup>

The objections of the Yoes Group must fail for several reasons. First, they do not appear to recognize that this is a partial settlement with defendants who can fairly be characterized as peripheral.

Second, the Yoes Group claims the notice is infirm because it does not inform class members of the “approximate amount of total damages sustained by the class as a result of defendant’s [sic] conduct.” The notice fully complies with the requirements of the PSLRA. The PSLRA requires a statement of total damages only when the parties agree on the damages suffered. *See* 15 U.S.C. §78u-4(a)(7)(B). Here, most assuredly, the parties do not. All that is required under the circumstances is a statement of the issues on which the parties disagree. *Id.* The notice sets forth these issues. Moreover, given the relative fault provisions of the PSLRA, a statement of the total amount of damages suffered by the class in a notice that describes a settlement with defendants who can fairly be characterized as having peripheral responsibility, if at all, would be misleading at best.<sup>10</sup>

Third, the Yoes Group complains that the notice is inadequate because the amount of attorneys’ fees to be sought is not disclosed. What the Yoes Group ignores is that no attorneys’ fees

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<sup>9</sup> One can fairly wonder why five law firms chose to represent an objector with a 159 share stake in this multi-billion dollar litigation. Suffice it to say that the other four firms have appeared as counsel representing objectors with similar, minimal interests in a number of other cases.

<sup>10</sup> Apart from the clear adequacy of the notice under the PSLRA, there is no requirement for the *Tittle* plaintiffs to project total damages in the notice because their claims are not subject to the PSLRA notice provisions.

are being sought at this time and the notice clearly so states. When attorneys' fees are sought, the amounts will be disclosed to the class and an opportunity for class members to be heard on the issue will be provided. *See* Notice of Pendency and Partial Settlement of Class Action, §XIV.

Finally, the Yoes Group objects to the settlement's provision for a set-aside for reimbursement of "future" expenses. The expenses already incurred are substantial and should be reimbursed. Moreover, no reimbursement will occur unless the Court allows it, contrary to the Yoes Group's suggestion, and any funds that are not ultimately disbursed under Court order will be distributed to the Settlement Class.

The Yoes Group concludes by requesting that approval of the settlement be denied and that it be granted the "following expedited discovery" (the nature of which is not set forth in its pleadings) and the entry of orders "that will place this litigation in a posture for vigorous and good-faith prosecution ...." From its own familiarity with the proceedings to date, the Court knows that, in fact, a vigorous good faith prosecution is ongoing and can fairly conclude that the Yoes Group has filed uninformed, boilerplate objections which should be overruled.

#### **D. The Schonbrun Objection**

Lawrence Schonbrun objects on behalf of Brian Dabrowski who bought 75 shares of Enron common stock in August of 2001. Mr. Schonbrun is another repeat objector (most frequently to class plaintiffs' attorneys' fees and expenses) to class action settlements. Here, Schonbrun objects to the \$15 million expense allocation unless counsel file a declaration describing the basis for that allocation. The allocation was based on Representative Plaintiffs' Counsel's judgment and experience in other major cases and that judgment is being borne out by the enormous expenditures that in fact are being made on a daily basis in vigorously prosecuting this litigation. Moreover, that decision was initially reached with the assistance of the Court-appointed mediator during the global settlement negotiations with the Arthur Andersen entities that led to this settlement with AWSC.

Next, Schonbrun objects to the use of the Expense Fund without any oversight and proposes that “someone with knowledge, background and experience to oversee payments” be appointed. The additional expense of any such second-guessing is unnecessary and unjustified. The Stipulation requires Court approval of any expense reimbursement and, in any event, Lead Plaintiff, The Regents of the University of California<sup>11</sup> in the *Newby* and *WSIB* Actions and the lead plaintiffs in the *Tittle* Action will review the expenses and approve them.

Schonbrun next objects to the Expense Fund unless “class counsel agree on the record that any future attorneys’ fee award in the case will be reduced as a result of the class’s agreement to finance the continued litigation of this case through a \$15 million payment from the class’s recovery.” Presumably Schonbrun’s argument is that Representative Plaintiffs’ counsel’s risk of recovery of a reasonable attorneys’ fee has somehow been reduced by their current recovery of a portion of their expenses incurred in pursuing a lawsuit of extraordinary complexity, duration and expense. This is nothing more than a comparison of apples to oranges. Moreover, there is already in place a fee agreement with The Regents and any fee to be received by Lead Plaintiff’s counsel will be awarded by the Court.<sup>12</sup>

Schonbrun next objects to the arbitration provision of the Stipulation unless an “arbitration budget” is disclosed. This is now irrelevant since the Representative Plaintiffs have agreed to the allocation, subject to the Court’s approval.

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<sup>11</sup> It is worth noting that The Regents are experienced, sophisticated individuals who have the qualifications Schonbrun seeks.

<sup>12</sup> There is no such agreement in the *Tittle* litigation, but consistent with Rule 23, any application for fees will be reviewed by the Court in light of any objections to the application.

Finally, Schonbrun objects to the Settlement unless the amount of aggregate damages claimed is disclosed. For the reasons discussed above in connection with the Yoes Group's objection on the same point, this objection should be overruled.

**E. The Fensterstock Objection**

Fensterstock & Partners LLP ("Fensterstock") objects on behalf of 13 class members (the "Fensterstock Group"). These objectors either bought *de minimus* shares of Enron or purchased shares within a week of the end of the class period when Enron stock traded in the \$5 per share range. The Fensterstock Group argues that the settlement is collusive, the value of the settlement cannot be ascertained and hence cannot be approved and that the settlement is based on erroneous assumptions regarding the role of AWSC and/or the Defendant Member Firms in the collapse of Enron. These objections are without merit.<sup>13</sup>

First, the notion that this Settlement is the result of collusion is ludicrous. As discussed above, the settlement was the result of arm's-length negotiations between respected counsel on both sides of the litigation. Moreover, the Settlement has the approval of the Court-appointed Lead Plaintiff in the *Newby/WSIB* Actions, The Regents of the University of California, and is also supported by the *Tittle* plaintiffs. The timing of the preliminary/final approval process was not driven by AWSC's impending liquidation; rather, it was the result of the complexities which arose in

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<sup>13</sup> More troubling than its objections is the apparent conflict of interest of Fensterstock. Here, Fensterstock represents Enron class members who object to this settlement. In other pending or threatened litigation, Fensterstock represents a number of retired Arthur Andersen LLP partners involved in a dispute over their retirement benefits and in that context at one point threatened to undo this settlement as the Swiss equivalent of a bankruptcy preference payment. See letter from Blair Fensterstock to Thomas Rufer, AWSC's liquidator, attached as Exhibit 3 to the Declaration of Helen J. Hodges. It is hard to fathom how Fensterstock can implicitly argue here that the settlement is too small and on behalf of another group of clients argue to the liquidator that no payment should be made at all.

connection with the documentation of the settlement. To think that these lawyers overseen by these plaintiffs would engage in collusion should be given no credence at all by the Court.

Second, the amount of the settlement is clear; it is \$40 million. Of that amount, \$15 million is to be allocated to expenses, subject to the approval of the Court. Contrary to the suggestion of the Fensterstock Group, the remainder of the settlement fund is not somehow dedicated to the benefit of plaintiffs' counsel. No attorneys' fee are currently being sought and none will be sought without notice to the class and an opportunity to be heard. The allocation of the remainder of the settlement fund between the *Newby* and *WSIB* class on the one hand and the *Tittle* class on the other was to be the subject of an arbitration (binding only on the Representative Plaintiffs). That arbitration is now not necessary since the Representative Plaintiffs have agreed on an allocation. However, that allocation is also subject to court approval after further notice to the class and an opportunity to be heard.

Finally, the notion that the Representative Plaintiffs simply overlooked AWSC's or the Defendant Member Firms' role in the conduct complained of is just wrong. As discussed at length above, while it is Representative Plaintiffs' belief that the settling defendants did have a role in the Enron debacle, that role pales by comparison to that of other defendants and is less meaningful in light of the other defenses that could well preclude any liability on AWSC's part. Thus, the settlement was driven by other dynamics, such as AWSC's financial condition, jurisdictional issues and the collectability of any judgment, as discussed above. The Fensterstock Group's objection should be rejected.

#### **F. The Gregg and Bauerle Objections**

The two remaining objections are from individuals, Arnold Gregg and Richard Bauerle appearing *pro se*. Mr. Gregg appears to believe that this is a settlement with all of the defendants and for that reason is inadequate. Obviously that is not the case. The litigation continues to be

vigorously prosecuted against the remaining defendants. Mr. Bauerle believes that the settlement is inadequate because of the wealth of AWSC and the potential recovery. As discussed above, AWSC is currently in liquidation and the amount of any potential recovery against the settling defendants was subject to substantial questions regarding proportionate fault, jurisdictional issues and the like.

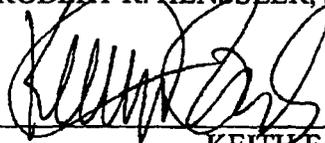
All of the objections should be overruled.

**V. CONCLUSION**

For all the foregoing reasons, Representative Plaintiffs respectfully request that the Court grant the motion for final approval of the proposed settlement.

DATED: October 16, 2003

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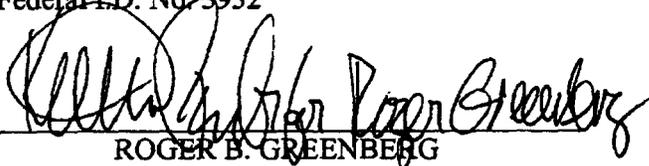
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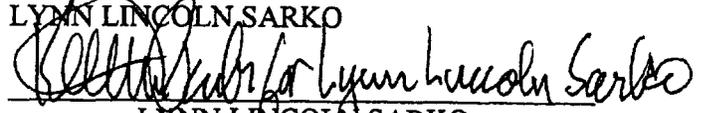


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document entitled, MEMORANDUM IN SUPPORT OF REPRESENTATIVE PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PARTIAL SETTLEMENT has been served by sending a copy via electronic mail to serve@ESL3624.com on this 16th day of October, 2003.

I further certify that a copy of the above-mentioned document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 16th day of October, 2003.

Carolyn S. Schwartz  
United States Trustee, Region 2  
33 Whitehall Street, 21st Floor  
New York, NY 10004

I also certify that a copy of the above-mentioned document has been served via overnight mail on the parties listed on the attached "Objector Service List" on this 16th day of October, 2003.

*Deborah S. Granger*

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DEBORAH S. GRANGER

## OBJECTOR SERVICE LIST

October 16, 2003

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