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

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§ § §	MDL 1446
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants.	§ § § § § § § § §	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., Plaintiffs, VS. KENNETH L. LAY, ET AL., Defendants	§ § § § § § § § §	
WASHINGTON STATE INVESTMENT BOARD and EMPLOYER-TEAMSTERS LOCAL NOS. 175 and 505 PENSION TRUST FUND, ET AL., Plaintiffs, VS. KENNETH L. LAY, ET AL., Defendants	§ § § § § § § § § § §	
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, ET AL., Plaintiffs VS. ENRON CORP., an Oregon Corporation, ET AL., Defendants.	§ § § § § § § § § § § §	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES

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MEMORANDUM, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

A Stipulation of Partial Settlement (#1554, Addendum #1587 in *Newby*), establishing a settlement fund in the amount of $40,000,000 in return for release of all claims arising out of the same transactions, between Representative Plaintiffs in the above referenced actions and Arthur Andersen Worldwide Societe Cooperative ("AWSC") and three Defendant Member Firms, i.e., Arthur Andersen (United Kingdom), Arthur Andersen-Brazil, and Andersen Co.(India),[1] was filed on July 9, 2003 and preliminarily approved by the Court (#1583 in *Newby*) at a hearing on July 24, 2003. The final Fairness Hearing was held on October 23, 2003 at 10:00 a.m.

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[1] As Representative Plaintiffs represent to the Court,

> 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.
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> . . . .
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> 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 world wide that have entered into a "Member Firm Interfirm Agreement" with AWSC, with the exception of Arthur Andersen LLP.

Memorandum in Support of Representative Plaintiffs' Motion for Final Approval of Partial Settlement (#1761) at 2 & n.2.

The proposed partial settlement arose out of a mediation before Professor Eric Green, ordered by the Court in hopes of reaching a global Andersen settlement. According to the terms of the proposed partial settlement, of the $40 million settlement fund, which was deposited on August 30, 2002 with the law firms of the Representative Plaintiffs and has been earning interest since, $15 million (or 37.5%) is to be allocated to an Expense Fund for past and future litigation expenses excluding attorney's fees, subject to the Court's approval. Furthermore, the Representative Plaintiffs have agreed that the *Tittle* case is to be allocated 19.5% of that Expense Fund, while 80.5% is to go to the *Newby* and *Washington State Board* cases collectively.[2] The remainder of the $40 million ($25 million) will be placed in a settlement fund, which is to be divided between the *Newby* and *Washington State Board* actions collectively and the *Tittle* action. Originally that allocation was to have been determined through confidential, binding and non-appealable arbitration conducted by Layn Phillips after the Court resolved motions to dismiss in the *Tittle* action. After the Court ruled on the motions, Representative Plaintiffs agreed to allocate 85% of the remaining settlement fund to *Newby* and *Washington State Board* and 15% to *Tittle*, subject to the

[2] This 80.5%/19.5% allocation of the settlement fund agreed to by the Representative Plaintiffs is not before the Court for its approval today, but will be presented to the Court subsequently after future notice to the class.

Court's approval.[3] Counsel have not requested fees for their work to date but, according to the Stipulation, "may" in the future, along with reimbursement for any additional uncovered expenses; any fee award and or reimbursement of expenses approved by the Court would be paid from the gross settlement fund remaining after allocation of the $15 million to the Expense Fund.

Also part of the settlement is Defendants' agreement to cooperate in the Representative Plaintiffs' continued prosecution of the above referenced cases by agreeing, to the extent allowed by laws, regulations and professional standards of their respective countries, to provide Representative Plaintiffs with access to Enron-related documents in their possession, custody or control, waiving all attorney-client and work product privileges, and to use their best efforts to identify and make available any witnesses in their control for interviews by counsel for Representative Plaintiffs. Defendants will also use best efforts to help Representative Plaintiffs obtain the same from any other AWSC entities.

CONCLUSIONS OF LAW

The district court must approve a proposed settlement before a class action may be dismissed or compromised. Fed. R. Civ. Proc. 23(e). Nevertheless Rule 23 fails to provide the court with any standard by which to measure a proposed class action

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[3] Thus the Court does not address objections to the arbitration plan.

settlement, so the district court must turn to the case law for guidance. *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 207 (5th Cir. 1981).

A district court's approval of a class settlement may only be overturned on appeal for abuse of discretion. *Reed, v. General Motors Corp.*, 703 F.3d 170, 172 (5th Cir. 1982). The district court must independently review the facts, the law, and the terms of the settlement to "ensure that the settlement is in the interest of the class, does not unfairly impinge on the rights and interests of dissenters, and does not merely mantle oppression." *Id., quoting Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1214 (5th Cir. 1878); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)("A threshold requirement is that the trial judge undertake an analysis of the facts and the law relevant to the proposed compromise. A 'mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law' will not suffice. . . . [I]t is essential that the trial judge support his conclusions by memorandum, opinion or otherwise in the record.").

The "cardinal rule" for the court's exercising its discretion is that class action settlement should only be approved by the district court if it finds that the settlement is "fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *In re Corrugated Container Antitrust Litigation*, 643 F.2d

195, 207 (5th Cir. 1981); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982). The Fifth Circuit has identified six factors to help courts determine whether a proposed settlement is "fair, adequate, and reasonable": (1) evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the stage of the litigation and the amount of discovery completed; (4) the probability of plaintiffs' prevailing on the merits; (5) the range of possible recovery and the certainty of damages; and (6) the opinions of class counsel, class representatives, and absent class members. *Reed*, 703 F.2d at 172; *Parker*, 667 F.2d at 1209. *See also Manual For Complex Litigation (Third)* § 30.42 (1995). The Court examines each factor individually.

The first, evidence of fraud or collusion, speaks for itself. "Evidence" may be the critical term with respect to this factor. Here the Arthur Andersen LLP objectors[4] have suggested that the timing of the request for preliminary approval, a year after the settlement fund was deposited and only when AWSC went into liquidation, raises the specter that the settlement "may be the product of collusion and fraud."

Regarding the second factor, the complexity, expense and

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[4] These objectors are James H. Allen, Jr., Burton W. Carlson, Jr., Michael De Freece, Marcia A. De Freece, Andrew E. Krinock, Phyllis Krinock, Partcom Limited Partnership, Reed Partners, L.P. (formerly known as Reed Family Ltd. Partnership), F. Walker Tucei, Jr., June P. Tucei, Roman Uhing, Alvera A. Uhing, and Viets Family Associates, LLP.

likely duration of the litigation, the Fifth Circuit has observed,

> While the prospect of a long, complex and expensive trial militates in favor of settlement, virtually all class actions will result in long, complex and expensive trials. The question is whether the likelihood of any especially long and complex trial is enough in a particular case to warrant a substantial reduction in what the class might otherwise receive in settlement.

In re Corrugated Container, 643 F. 3d at 217.

As for the third factor, the stage of the litigation and the amount of discovery completed, where challenges to the adequacy of formal discovery (and resulting inequality in the positions of negotiators for plaintiffs and defendants) have been raised by dissenters to a proposed settlement, the Fifth Circuit has observed that such objections do not necessarily mean that the compromise is not fair or adequate. Noting that extensive discovery often wastes the time of the judge, the parties, and counsel, "adds unnecessarily to the financial burden of litigation and may often serve as a vehicle to harass a party," the appellate court considers such factors as the amount of informal discovery that has been accomplished, the opinion of experienced counsel regarding the extent and sufficiency of the information that they have obtained, and the adequacy of the terms of the proposed settlement, since "[i]f the terms are fair, the court may reasonably conclude that counsel did perform adequately." *Cotton*, 559 F.2d at 1332; *In re Corrugated Container*, 643 F.2d at 211 ("Even assuming there was an imbalance of information between the defendants and the plaintiffs

at the bargaining table, this would not in itself invalidate the settlements. . . . [T]he trial court may legitimately presume that counsel's judgment 'that they had achieved the desired quantum of information necessary to achieve a settlement' . . . is reliable."). The Fifth Circuit has opined,

> In general, we think a settlement should stand or fall on the adequacy of its terms. In a very real sense, a review of the terms provides a check on counsel's evaluation of the sufficiency of his working knowledge. If the terms are fair, the court may reasonably conclude that counsel did perform adequately.

In re Corrugated Container, 643 F.2d at 211.[5] Nevertheless, "if the record points unmistakably toward the conclusion that the settlement was the product of uneducated guesswork, a court may be acting in its discretion in disapproving the agreement without ever considering whether the agreement's terms are adequate." *In re*

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[5] In *Reed*, 703 F.2d at 175, the Fifth Circuit recognized,

> In reviewing proposed class settlements, a trial judge is dependent upon a match of adversary talent because he cannot obtain the ultimate answers without trying the case. Indeed, that uncertainty is a catalyst of settlement. Because the trial judge must predict, the value of the assessment of able counsel negotiating at arm's length cannot been gainsaid. Lawyers know their strengths and they know where the bones are buried. The analytical construct [of the six factors] . . . recognizes the crystal ball dimension of the trial judge's task and channels his predictive inquiries in a way believed best for accuracy. . . . We reaffirm the [six] inquiries, emphasizing that the linchpin of an adequate settlement is adequacy of representation.

Corrugated Container, 643 F.2d at 211.

Regarding the fourth factor, the probability of plaintiffs' prevailing on the merits, in *Reed*, the Fifth Circuit noted the existence of an "internal tension" in this factor, since the court must compare the terms of the proposed settlement with the recovery that plaintiffs might likely obtain from trial, yet not "try the case in settlement hearings because '[t]he very purpose of the compromise is to avoid the delay and expense of such a trial.'" 703 F.2d at 172 (citation omitted). In such an examination, the court may review the pre-settlement record, conduct full hearings, and consider any evidence or factual support produced by the parties and the objectors. The court should be mindful that "[p]articularly in class action suits there is an overriding public interest in favor of settlement." *Cotton*, 559 F.2d at 1331, *citing United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975).

Regarding the fifth factor (the range of possible recovery and the certainty of damages), "[t]he relief sought in the complaint may be helpful to establish a benchmark by which to compare the settlement terms." *Cotton*, 559 F.2d at 1330. The Fifth Circuit provides advice about the fourth and fifth factors, which tend to overlap, in *In re Corrugated Container* (remanding case to district court "to prepare new findings; if necessary, to take new evidence; and if compelled to do so, to reach new conclusions"), 643 F.2d at 213:

> [T]he district court must establish the range of possible damages that could be recovered at trial, and, then, by evaluating the likelihood of prevailing at trial and other relevant factors, determine whether the settlement is pegged at a point in the range that is fair to the plaintiff settlors. In a case such as this, where there are objectors, the court is aided in its task; the proponents can be expect to present evidence and arguments suggesting that the settlements are within a "range of reasonableness" and the objectors will do the same for the contrary position. By weighing the competing evidence and evaluating the legal arguments, we think the court should be able to reach a just conclusion. It is for this reason that the court can generally fulfill its responsibilities by "examin(ing) the settlement(s) in light of the objections raised and (by) set(ting) forth on the record a reasoned response to the objections including findings of fact and conclusions of law necessary to support the response.

Id., quoting and citing Cotton, 559 F.2d at 1331.

Finally, the sixth factor, the opinions of class counsel, class representatives, and absent class members, may be complicated. If a judge learns that some of the class objects to a proposed settlement, he "must assume additional responsibilities":

> The trial court must extend to the objectors leave to be heard. . . . However, this is not to say that the trial judge is required to open to question and debate every provision of the proposed compromise.
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> The growing rule is that the trial court may limit its proceeding to whatever is necessary to aid it in reaching an informed, just and reasoned decision. . . .
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> The Court should examine the settlement in light of the objections raised and set forth on the record a reasoned response to the

> objections including findings of fact and conclusions of law necessary to support the response.
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> In assessing the fairness of the proposed compromise, the number of objectors is a factor to be considered but is not controlling. A settlement can be fair notwithstanding a large number of class members who oppose it. [citations omitted]

Cotton v. Hinton, 559 F.2d at 1331.

Nevertheless, the Fifth Circuit has admonished, "At the same time the number of objectors must be carefully considered." *Reed*, 703 F.2d at 174, *citing Pettway*, 576 F.2d at 1212-19 (finding "that a vast class dissatisfaction with the settlement [all the named plaintiffs and over seventy percent of the class] required the district court to withhold approval"). The Fifth Circuit has pointed out additional considerations:

> [A] low level of vociferous objections is not necessarily synonymous with jubilant support [for the proposed settlement]. In many class actions, the vast majority of class members lack the resources either to object to the settlement or to opt out of the class and litigate their individual cases. The Corrugated Container Litigation, however, includes many large corporations who were sufficiently endowed to opt out or object to the settlement if they chose to do so. If the numerically small group of objectors was comprised largely of such corporations, perhaps the court's finding of support was improperly predicated. Based on what the court has told us, however, we cannot say.

In re Corrugated Container, 643 F.3d at 217-18.

When a class representative objects, "he may be entitled to special weight because the representatives may have a better

understanding of the case than most members of the class." *Manual for Complex Litigation (Third)* § 30.44 at 242 (Federal Judicial Center 1995). Nevertheless, if the court approves the settlement, the class representative may not veto it. *Id.* at 243.

In sum, the Fifth Circuit has stated,

> [T]he district court's most important function in reviewing the compromises of class actions is its consideration of the settlement terms. It is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

In re Corrugated Container, 643 F.2d at 212.

The district court must view the proposed settlement as a whole and may not "delete, modify or substitute certain provisions of the settlement. The settlement must stand or fall as a whole." *Cotton*, 559 F.3d at 1331-32.

Furthermore, even where the parties have agreed about attorney's fees and the fees are not to be deducted from the common settlement fund, the district court has an obligation to review requests for attorney's fees to determine whether they are reasonable in order not only to protect absent class members' rights, but to minimize conflicts between named plaintiffs and absentee class members and between counsel and the class. *Strong*

v. BellSouth Telecommunications, Inc., 137 F.3d 844, 849 (5th Cir. 1998). Such court review also "guards against public perception that attorneys exploit the class action device to obtain large fees at the expense of the class." *Id.* The court must "scrutinize [even] agreed-to fees under the standards set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1994)." *Id., citing Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1989)("holding that by summarily approving attorney's fees presented in an unopposed settlement agreement, the district court 'abdicated its responsibility to assess the reasonableness of the attorney's fees proposed under a settlement of a class action and its approval of the settlement must be reversed on this ground alone'").[6] Because of "the economic reality that a settling defendant is concerned only with its total liability" and is thus not concerned about the

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[6] The Fifth Circuit has embraced the lodestar method of calculating attorney's fees rather than the percentage method. *Longden v. Sunderman*, 979 F.2d 1095, 1099-1100 & n. 9 (5th Cir. 1992)(noting, "Although the prevailing trend in other circuits and district courts has been towards awarding fees and expenses in common fund cases based on percentage amounts, the Fifth Circuit has yet to adopt this method."). The lodestar is calculated by "multiplying the number of hours reasonably expended by the prevailing hourly rate in the community for similar work." *Id.* The court then adjusts the lodestar up or down according to twelve factors set out in *Johnson v. Georgia Highway*, 488 F.2d at 717-19, with specific explanations of the relevance of each factor: time and labor involved; novelty and difficulty of issues; skill required to perform adequately the requisite legal services; loss of other employment; customary fee; whether the fee is fixed or contingent; time limitations; sum of money involved and the results achieved; experience, reputation and ability of the attorney; undesirability of the suit; and awards in similar cases. *Id.* at 1099-1100 & n.10.

allocation of funds paid to the class, the court "must strive to minimize the conflict of interest between the class and its attorney inherent in such as arrangement" because the possibility of a higher fee may have "indirect or subliminal effects on the negotiations" of a settlement. *Id.* at 849-50.

The *Manual for Complex Litigation (Third)* § 3042 at 240, states,

> Class members should be advised of the potential impact of the fee determination on the amount available to satisfy the class claim. Unless an upper limit is set, class members will not be adequately advised of what they can expect from the proposed settlement. Courts sometimes require that fee applications be submitted before notice of the proposed settlement is sent to the class so that the notice can contain full information about the fee requests.

COURT'S FINDINGS

As a threshold matter, the Court notes that as with any partial settlement, and especially in the context of a litigation as enormous as this, some inequities are inevitable. "Fair, adequate, and reasonable" are not absolute standards, but are criteria measured in light of the circumstances and of legal, equitable and pragmatic considerations. Having carefully reviewed the Stipulation, the briefing, and the objections either filed with the Court or presented at the fairness hearing, the Court finds for the following reasons that the stipulated partial settlement should be approved. The Court first addresses general points about the stipulation and then applies the six-factor test to demonstrate the

basis for its decision that the proposed partial settlement is fair, adequate and reasonable.

Among the general issues raised is the adequacy, and in particular the timeliness, of the notice to the class. The Court has received a handful of letters from class members indicating that they received their notices after the deadline to object or opt out of the class. Counsel have explained that some of the notices were sent to brokerage firms which were requested either to provide a list of their clients who were within the class or to request additional notices from the Gilardi law firm to send directly to their clients. Apparently some of brokerage houses did not send in their client lists until quite late in the opt-out period, and these individuals did not receive timely notice. Objections have been raised that Plaintiffs' counsel has no way of knowing how many people did not receive timely notices and that many may not have objected to the settlement because the deadline for doing so had already passed.

During the hearing, the Court noted that unlike many class actions, with media coverage of the massive losses resulting from the collapse of Enron, a notice regarding this Enron litigation and a partial settlement is likely to draw the attention of any recipient who received a late notice and those who care would be likely to contact counsel or write a letter to the Court. In its discretion, the Court chooses to send copies of the letters it has received complaining of late notice to counsel for

Representative Plaintiffs and to order them to insure that the time is enlarged and that these individuals have an opportunity to voice objections and/or exclude themselves from the class. *In re Cendant Corp. Prides Litig.*, 133 F.3d 188, 192-96 (3d Cir. 2000)(court has discretion to find excusable neglect to enlarge time for filing claims and joining class after the expiration of claim period); *In re Orthodpedic Bone Screw Products Liability Litigation*, 246 F.3d 315, 320-22)(citing *Pioneer Inv. Servs. v. Brunswick Assoc. Ltd.*, 507 U.S. 380 (1993) for rule that excusable neglect standard applies to court's consideration of untimely claims). Clearly the late notice was not within class members' control, and the Court finds excusable neglect in their failure to timely object and/or exclude themselves from the litigation.

Cheryl Washington's affidavit plus attachments (#1762) attests to the propriety of the methods used to notice the class, individually by first-class mail and by publication. Counsel stated at the hearing that notice was sent to approximately 1.1 million individuals or entities at a cost of approximately 3/4 of a million dollars. Counsel provided an appendix of those who have requested exclusion from the class and have promised to supplement it. It appears that objections to the proposed settlement are a relatively small percentage of those noticed. Lead Plaintiff's counsel represented that a small number of class members have opted out and that most of a rather substantial group of institutional investors or individual groups of investors or major players in

Enron securities have not objected to the settlement, but chosen to pursue their claims through independent suits. Thus only a "modest" number have raised objections to the settlement.

Counsel for the *Tittle* Plaintiffs have stated that they know of no objections from any *Tittle* class members to the terms of the proposed settlement or to the allocation of the settlement proceeds for the Expense Fund or to the apportionment of the Expense Fund to the *Tittle* case.

Although the desired global agreement was not reached during the court-ordered mediation with all the Arthur Andersen entities, the Court finds that the partial settlement reflects counsel's considered judgment of the relative strengths and, in especially of the weaknesses of the Representative Plaintiffs' claims against the settling Defendants. Moreover the Court finds that the substantial impediments, i.e., the risks, that Representative Plaintiffs were facing support the settlement as a fair, adequate and reasonable decision.

As emphasized by Representative Plaintiffs, three substantial obstacles threatened to preclude any recovery by them from the foreign settling Defendants: (1) whether the Court had personal jurisdiction over these foreign entities; (2) whether there was any liability, given the uncertainty of these Defendants' involvement, the organizational structure of these Andersen-related entities, their attenuated, if any, relationship to Enron, and

their proportionate wrongdoing, if any[7]; and (3) collectability of any judgment obtained against the settling Defendants, especially in light of their financial instability in the wake of Arthur Andersen LLP's demise and because their home countries might well not recognize a United States Court's jurisdiction or enforce its judgment.

At the time of the settlement the Court had not yet ruled on the pending motion to dismiss in *Tittle*, which raised these defensive issues *inter alia*. In hindsight, in light of the Court's subsequent rulings dismissing claims against a number of deep pockets, the *Tittle* class undeniably would benefit from having agreed to settle their action against these Defendants.[8] The indictment and conviction of Arthur Andersen LLP resulted in the dispersion of these Member Firms, making substantially more difficult (in terms of time, expense, and laws and regulations of other countries) prosecution of the claims against them and any successor companies and discovery in the absence of cooperation in document production and access to witnesses abroad. Furthermore

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[7] The Court points out the complaints provided minimal detail in somewhat conclusory allegations against these Defendants and none against a number of other, unnamed Member Firms that would be released by the partial settlement, if approved.

[8] The *Tittle* Plaintiffs' counsel emphasized that the Court recently dismissed the legal claims that the *Tittle* Plaintiffs were alleging against these Defendants, evidencing that "at the time we compromised the claims for $40 million, it was inherently reasonable to do so."

AWSC is now in liquidation in Switzerland.

Also of relevance to potential liability here is information about the organization of the AWSC and related entities.[9] Counsel Plaintiffs and AWSC have stated to the Court that AWSC is a Swiss cooperative formed under Swiss law, with no equivalent to any legal organization under American law (described as somewhere between "a partnership and a farmer's cooperative"). It is a limited liability company that coordinated the global Andersen network and acted to protect the individual "Member Firms" in different countries, with each of which AWSC has a separate contract, i.e. a "Member Firm Interfirm Agreement." AWSC maintains that it did not provide any professional services and that it is a nonprofit organization.

The allegations against AWSC are vague. Representative Plaintiffs have alleged that the Member Firms participated in the Ponzi scheme, in particular the Enron audits during the Class Period or rendered other services to Enron subsidiaries and related entities. They charge AWSC with participating in the scheme. The Anderson Objectors have relied on conclusory charges in two affidavits of Burton Carlson and Gilbert Viets that AWSC "was the entity in charge of establishing and enforcing accounting and professional standards as well as quality control techniques and

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[9] *Tittle* counsel made special note of the fact that the settlement negotiations uncovered the organization and business relationship between AWSC and Arthur Andersen LLP, permitting Plaintiffs to better assess the risks of continued litigation.

procedures of, education and training personnel of, and coordinating client services on a worldwide basis for, all of its member firms, including Arthur Andersen LLP and any other affiliated entities that may have provided professional services to Enron." #1759 at 6. Moreover Plaintiffs contend that the Andersen global network is essentially a single entity speaking with one voice.

AWSC in turn argues that its organizing documents do not allow it to perform audits or professional services of any kind or to make a profit. Instead its role was to coordinate the Member Firms worldwide and aid them in assisting each other, and to allocate costs of each assistance to the appropriate firms at the end of the year. It also participated in common training programs. It insists that it did not monitor, conduct or direct the conduct of individual audits, such as the Enron audit. Instead, that role with regard to Enron fell to the United States' Arthur Andersen LLP, its Professional Services Group, and its partners in the United States; Plaintiffs' claims against these Defendants are released by the proposed settlement. Cited in and attached to AWSC's memorandum (#175), moreover, are a number of judicial opinions in cases in which the courts determined that the same kinds of claims against AWSC or Andersen as a single, worldwide organization should be rejected. Plaintiffs have not cited any contrary authority. Counsel for AWSC further argued that Plaintiffs have not cited any authority demonstrating that any

overseas acquirer of or successor to these overseas Member Firms would be liable. Moreover, emphasizing that AWSC has not settled similar claims against it in any other litigation arising from the Arthur Andersen LLP debacle, counsel explained that this litigation was treated differently despite the fact that he believed the settling Defendants had the above mentioned strong defenses to any allegations of liability because Enron's and Arthur Andersen LLP's collapse "poisoned" the business climate around the world outside of the United States. The Member Firms needed a strong affiliate in the United States that could do the work of a multi-national business, so at first they offered the United States Member Firm money to help resolve its liability problems, but Arthur Andersen LLP did not settle and was destroyed. To survive without a strong United States affiliate the Member Firms then sought to be acquired, taken over or merged; in other words they needed resolution of the Enron issue in order "to find new homes" and "to get on with their lives." He highlighted the fact that this need to survive and move on was a critical "bargaining chip" on the table that motivated Defendants to settle even though they were convinced that this Court had no jurisdiction over them and there was no legal or factual basis to impose liability on them. Therefore, since AWSC is a nonprofit organization, the Member Firms decided to enter into a settlement and contribute the funds that make up the settlement in this litigation only. Indeed, these Defendants have already settled with the Enron estate in bankruptcy

court with Judge Gonzales' approval.

There have been objections to the creation of the Expense Fund. Not only did counsel explain that the concept of an "upfront" establishment of the Expense Fund arose in the court-ordered mediation presided over by highly respected Professor Eric Green, but counsel have presented, as a persuasive economic justification benefitting the class, the avoidance of the enormous costs of having to notice the class each time they need to seek reimbursement. They pointed out that the notice of this partial settlement alone cost 3/4 of a million dollars. Furthermore, they have cited authority, with copies submitted as exhibits, two orders issued in other class actions in which courts have approved the use of a portion of the settlement proceeds of a partial settlement for past and future expenses in the litigation. Attachments 1 and 1 to Declaration of Helen Hodges (#1763).

Complaints have been asserted that there is no assurance that any of the gross settlement fund will be distributed to class members, as opposed to counsel, that the settlement stipulation does not restrict use of even a portion of the fund to the benefit of the class members, and that the Expense Fund will be used to pay for expenses incurred by others than members of the settlement class since the Expense Fund can be used for future expenses and no class has been certified in the on-going litigation against remaining defendants. The Court would point out that only the structure of the Settlement Fund and Expense Fund are before it

today. Furthermore, as a first protection for class members, any expenditures in the future would have to be approved by Lead Plaintiff the Regents of the University of California. Moreover, while the Court has some concern regarding the unknown amounts of attorney's fee awards that may be sought, it emphasizes that requests for expenses and attorney's fee applications, which will scrutinized under the *Johnson v. Georgia Highway* factors, will be subject to this Court's review, control, and approval. Furthermore it is significant here the same persons or entities that comprise the class for settlement purposes here also constitute the potential class members in *Newby* and *Tittle*. Should there be any overlap in expenses, it benefits the same people. Finally, counsel have explained that the settlement funds, which have been deposited with them and are earning interest, will be held only until a more substantial recovery is gained through resolution of the claims and will then be distributed to the class members.

As for the six-factor test, the Court finds no concrete evidence of collusion. That charge by the Arthur Andersen Objectors was vociferously challenged by counsel for the settling parties, who justifiably complained that the conclusory allegation was based on pure speculation and the mere coincidence in the timing of the request for preliminary approval of the settlement and the entry into liquidation by AWSC. Moreover, this Court notes that the proposed settlement at issue arose during court-ordered mediation with an experienced and renowned court-appointed

mediator, Professor Eric Green, who held four separate meetings with the participants and aided in suggesting the structuring of the Expense Fund. Moreover, with the exception of the plan to arbitrate the allocation issue, there were no changes in the terms of the original settlement from the time it was executed until the preliminary approval by the Court. Furthermore, the court-selected Lead Plaintiff in *Newby*, the Regents of the University of California, a public body that disclosed the settlement, is experienced and has demonstrated highly professional administration of the litigation, as have counsel for the *Tittle* action.

Second, also supporting this early settlement as fair, adequate and reasonable compromise are the obvious complexity, expected lengthy duration, and expense of this enormous litigation for all parties still involved.

Third, this settlement comes at an early stage of the litigation and the parties concede that the discovery has been informal. Nevertheless, the risks of no recovery are great for reasons cited above, and the fact that other courts have examined similar allegations against these same settling Defendants in other cases and rejected them (with no controverting authority cited by Representative Plaintiffs) makes the decision to settle pragmatically sound. Moreover, discovery against entities abroad operating under the laws of different countries would be highly expensive without a clear, reasonable or strong basis for the success of such an endeavor. The importance of this fact is

reflected in the settlement agreement in the provision for cooperation in future discovery relating to the remaining litigation.

Fourth, the same reasons cited above inform the Court's finding that Plaintiff's probability of prevailing on the merits against Defendants over whom the Court may not even have jurisdiction, is not propitious. The Court admits that it is difficult to establish a range of reasonableness for measuring the proposed settlement here, but a number of facts and the Court's response to objections cited above suggest that Plaintiffs may be fortunate in obtaining a $40 million settlement from these Defendants.

Fifth, again there is such uncertainty and there are so many obstacles impeding recovery here that the settlement appears to this Court to be fair, adequate, and reasonable.

Sixth, the Court has addressed *supra* objections to the proposed settlement.

In sum the Court finds that the proposed settlement is fair, adequate and reasonable under the circumstances and accordingly approves it.

SIGNED at Houston, Texas, this 5th day of November, 2003.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE