United States Courts
Southern District of Texas
ENTERED

APR - 8 2004

Michael N. Milby, Clerk of Court

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.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
ENRON CORPORATION, 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.	§	

ORDER RE PARTIAL REIMBURSEMENT OF EXPENSES

Pending before the Court in the above referenced cause is Lead Counsel's application for partial reimbursement of expenses (in a total amount of $5,008,565.39) and request for hearing (instrument #1847 in *Newby*), to be paid out of the Expense Fund of $15,000,000 established pursuant to the Stipulation of Partial Settlement ("Stipulation")(#1834, 1835 respectively) between Representative Plaintiffs, on the one hand, and Andersen Worldwide Societe Cooperative, Arthur Andersen (United Kingdom), Arthur Andersen-Brazil, and Andersen Co. (India) on the other,

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which has been approved by this Court.[1] According to the terms of the Stipulation, the Expense Fund is allocated 80.5% to the *Newby* and *Washington State Investment Board* actions and 19.5% to the *Tittle* action.

With supporting declarations, Milberg Weiss Bershad Hynes & Lerach LLP, counsel for Lead Plaintiff The Regents of the University of California in the *Newby* and *WSIB* actions, seeks partial reimbursement of its expenses in the amount of $4,841,820.56, while three firms working with it, Genovese Joblove & Battista PA, Cuneo Waldman & Gilbert LLP, and Schwartz, Junell, Greenberg & Oathout, LLP seek reimbursement of $128,129.58, $28,093.26, and $10,521.99, respectively. Lead Plaintiff the Regents has reviewed the reimbursement requests and approved them.

Movants break the fees down in categories. Milberg Weiss requests reimbursement in the following amount for the following expenses: $808,573.57 for financial consultants that aided it in drafting allegations and in discovery relating to the financial institution defendants; $58,241.05 for computer consultants employed after this Court ordered Arthur Andersen, which was alleged to have destroyed or deleted physical and electronic files, to make its expert available to Lead Counsel's expert to preserve what documents it could and identify what had been destroyed; $731,308.04 for investigators identifying, locating, and interviewing witnesses; $20,212.00 for accounting

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[1] The approval of the Stipulation is currently on appeal to the Fifth Circuit Court of Appeals. #1863, 1892.

consultants to review Enron's accounting and auditing; $11,200.00 for consultants that aided Milberg Weiss in developing allegations about defendant law firms' duties and obligations; $11,200.00 for energy consultants to help Milberg Weiss understand the dynamics and practices of the energy industry; $55,363.08 for *Newby*'s share of the court-ordered mediation; $3,581.00 expended in complying with the PSLRA's notice requirements, 15 U.S.C. § 78u-4(a)(3)(A)(i); $78,826.55 for filing and witness fees; $354,534.90 for computerized legal research, which amount represents actual charges of the vendors; $866,156.76 for travel expenses including $866,156.76; $65,419.43 for overnight delivery of pleadings prior to establishment of the website service and for communications with clients, delivery of documents for depositions, etc.; $1,489,483.53 of actual out-of-house costs for photocopying; $57,566.34 for telephone and telecopier expenses; $164,798.29 for court reporter services; and $64,356.03 for miscellaneous items, specifically $7,860.70 for various publications and $56,495.33 for computer equipment for its Houston-based Enron trial office.

The law firms break down their smaller reimbursement requests into similar categories.

An objection to the reimbursement requests has been filed by Plaintiff/intervenor Brian Dabrowski. In essence he objects to the lack of evidentiary support in the record for the requests and wants the Court to order Movants to provide invoices, logs, bills, cancelled checks, etc. to prove their expenses. *See, e.g., Bowling V. Pfizer, Inc.*, 132 F.3d 1147, 1152 (6th Cir. 1998).

He reminds the Court that it functions as a quasi-fiduciary in safeguarding the common fund for the benefit of the class. *See, e.g., In re Fidelity/Micron Securities*, 167 F.3d 735, 736 (1st Cir. 1999), *citing Cook v. Niedert*, 142 F.3d 1004, 1011 (7th Cir. 1998).

In reply, Lead Plaintiff insists that its request is reasonable, emphasizes that the Regents have already reviewed and approved it, argues that the case law does not require, but merely gives the court discretion, to examine evidentiary support, and, contends that because this is only a partial settlement and the litigation is ongoing, requiring Movants to submit such back-up materials would reveal to the remaining defendants the identities and activities of individuals and firms as well as Lead Plaintiff's litigation strategies.

This case involves a common fund and expenditures are justified by the common fund doctrine established in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980):

> This Court has recognized consistently that a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. Jurisdiction over the fund involved in the litigation allows a court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those who benefitted by the suit.

Id.

The Court does not question the nature (categories) of the requested expense reimbursements, where they are reasonable and the benefit was to all the plaintiffs, such as reimbursement

for experts, travel and related expenses, investigative expenses, court costs, photocopying, postage, accounting costs, court reporter services, etc. *See generally Acosta v. Master Maintenance*, 192 F. Supp. 2d 577 (M.D. La. 2001), *aff'd*, 69 Fed. Appx. 659, No. 02-30655, 1003 WL 21356040 (5th Cir. May 29, 2003)

At the time the Stipulation was presented for this Court's approval, there was justifiable concern about the unknown amount of attorney's fees that would be requested by counsel subsequently and that expenses reimbursed from the Expense Fund might be used to pay for expenses incurred by others not part of the class. Moreover, counsel urged the court to establish the Expense Fund "upfront" to avoid having to bear the expense of noticing the class each time they sought reimbursement. #1826 at 22. While the Fund may benefit class members by this saving, it also removes another layer of review and potential challenges to reimbursement requests. Given the structure of the Stipulation and the Expense Fund, in addition to relying on review by the Regents, this Court indicated at the time it approved the Stipulation that it took its role in protecting class members very seriously:

> . . . [A]s 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 [be] scrutinized under the *Johnson v. Georgia Highway* factors, will be subject to this Court's review, control, and approval.

#1826 at 23. Moreover, the Court concurs with the district court in *Acosta v. Master Maintenance*, 192 F. Supp. 2d at 581-82:

> "When a common fund is available, attorneys for the successful parties may petition for a portion of the fund as compensations for their efforts. Once an attorney files such a petition, his role changes from one of fiduciary for his clients to that of a claimant against the fund created for the clients' benefit. Defendants, having made their contribution to the settlement, are uninterested in the distribution, so (as in this case) they typically do not offer any opposition to the fee petition. It is therefore incumbent upon the trial court to become the fiduciary for the fund's beneficiaries and to act with 'moderation and a jealous regard to the rights of those who are interested in the fund' in determining what is a reasonable fee to be paid to class counsel for their efforts in settling the litigation and creating the fund." . . . The same reasoning applies to the application for costs in the present case . . . . [citations omitted]

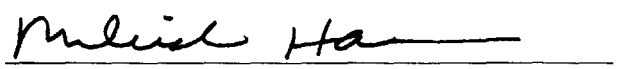
Id., quoting Purdy v. Security Savings & Loan Assoc., 727 F. Supp. 1366, 1268 (E.D. Wis. 1989).

The Court finds that it has an obligation to review evidentiary support for the reimbursement requests. To avoid revealing any privileged work product, however, the Court

ORDERS that Lead Counsel shall provide, as soon as possible, the documentation to support its requests under seal for *in camera* inspection by the Court only. Because the Court finds that a "paper hearing" should be adequate, it will rule on the

motion after reviewing the evidence.

SIGNED at Houston, Texas, this 6th day of April, 2004.



MELINDA HARMON
UNITED STATES DISTRICT JUDGE