United States Courts
Southern District of Texas
ENTERED
AUG 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.	§	

MEMORANDUM AND ORDER AWARDING LEAD PLAINTIFF'S COUNSEL

PARTIAL REIMBURSEMENT OF EXPENSES

Pending before the Court in the above referenced cause with supporting declarations is Lead Counsel's application for partial reimbursement of expenses (instrument #1847), originally in the amount of $4,841,820.56[1] for Lead Counsel and, for firms working with Milberg Weiss Bershad Hynes & Lerach LLP ("Milberg Weiss"), $128,129.58, $28 for Genovese Joblove & Battista PA

[1] As will be explained, Lead Plaintiff subsequently reduced this amount by $18,259.04, to $4,823,561.52.

2312

("GJB"),[2] $28,093.26 for Cuneo Waldman & Gilbert, LLP,[3] and $10,521.99 for Schwartz, Junell, Greenberg & Oathout, LLP ("SJGO"), for a total of $5,008,565.39. These funds are to be paid from the $15 million Expense Fund[4] (approved #1835) established pursuant to the Stipulation of Partial Settlement (approved #1834), dated August 29, 2002, between Representative Plaintiffs and certain Arthur Andersen entities (Andersen Worldwide Societe Cooperative, Arthur Andersen (United Kingdom), Arthur Andersen-Brazil, and Andersen Co. (India)). Lead Plaintiff represents that before the application for partial reimbursement was originally filed, Lead Plaintiff the Regents reviewed the repayment requests and approved them; such oversight by the Regents is intended to be another procedural safeguard for the class.

On May 3, 2004 Lead Counsel filed a Notice of Change of Firm Affiliation (#2119) and is now a partner in Lerach Coughlin

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[2] The declaration of Craig P. Riders of GJB (#1847) recites that the firm aided Milberg Weiss "regarding matters in the Enron bankruptcy proceeding and the potential impact of the bankruptcy proceedings on the litigation pending before the Court."

[3] Cuneo Waldman & Gilbert, LLP is the successor firm to The Cuneo Law Group, PC. According to the declaration of Jonathan W. Cuneo (#1851), in addition to aiding in drafting pleadings and portions of the opposition to motions to dismiss, the "firm was involved in the passage of the Private Securities Litigation Reform Act of 1995" and has "special expertise in Congressional developments that led to the passage of that Act." The firm also "monitored all Congressional hearings dealing with Enron" and obtained all materials relevant to them that have been released.

[4] Pursuant to the Stipulation, the Fund was allocated as follows: 80.5% is allocated to *Newby* and to *Washington State Investment Board* (H-02-3401) actions; and 19.5% to the *Tittle* action.

Stoia & Robins LLP ("Lerach Coughlin"). #2289. A written agreement between Milberg Weiss and Lerach Coughlin will govern the partial reimbursement of any fees from the Expense Fund, but for purposes of Lead Plaintiff's application, its revised proposed order awards such reimbursement to Lerach Coughlin. *Id.* However, to conform to the pleadings here, the Court will refer to Movant as Milberg Weiss.

Lead Counsel has arranged its expenditures in categories and requests reimbursement in the following amounts for the following expenses, which it deems "reasonable and necessary" and "of the type typically billed by attorneys to paying clients in the marketplace" (#1847 at 2).[5] First Milberg Weiss seeks reimbursement of $1,696,097.74 for Experts', Consultants', and Investigators' fees, broken down as follows: (a) $808,573.57 for financial consultants that aided it in drafting allegations and in discovery relating to the financial institution defendants; (b) $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; (c) $731,308.04 for investigators identifying, locating, and interviewing witnesses; (d) $20,212.00 for accounting consultants to review Enron's accounting and auditing; (e) $11,200.00 for consultants that aided

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[5] Citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994), and *In re Media Vision Technology Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996).

Milberg Weiss in developing allegations about defendant law firms' duties and obligations; (f) $11,200.00 for energy consultants to help Milberg Weiss understand the dynamics and practices of the energy industry; and (g) $55,363.08 for *Newby*'s share of the court-ordered mediation. As for class action notices, Lead Plaintiff's counsel applies for reimbursement for $3,581.00 expended in complying with the PSLRA's notice requirements, 15 U.S.C. § 78u-4(a)(3)(A)(i). In addition, it requests repayment of $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 meals, hotels, and transportation; $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 for 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. *See* #1848, Declaration of Helen J. Hodges in support of partial reimbursement of expenses to Milberg Weiss.

The law firms that have aided Milberg Weiss in prosecuting this litigation have also broken down their smaller

reimbursement requests into similar categories. #1847 at 7-8; #1849,[6] 1850,[7] 1851.[8]

Only Milberg Weiss' reimbursement requests have been challenged by Plaintiff class member Brian Dabrowski through his attorney, Lawrence W. Schonbrun, although the Court has reviewed all of the requests and supplemental documentation. Furthermore, the objections were not directed to the amounts in the partial reimbursement application, but to the fact that there was no underlying documentation to support or gauge the expenditures.

After objections were lodged regarding the lack of evidentiary support in the record for the reimbursement requests, e.g., invoices, logs, bills, cancelled checks, etc., this Court noted its obligation to protect the class members and the common

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[6] #1849, the declaration of Roger Greenberg of SJGO seeks compensation for $600 of expenses for filing, service or process and witness fees; $927 for transcripts of case proceedings from a court reporter; $6,647.38 for courthouse messenger and overnight delivery services (Federal Express and UPS); $318.02 for computerized legal research; $52.43 for court record searches; $226.38 for travel expenses; $566.29 for outside copy services; $931.20 for telephone and facsimile charges; and $253.28 for postage, mainly before the website was established.

[7] #1850, Reiders' declaration for GJB, seeks repayment of the following expenses incurred by the firm: $69,500.87 for travel expenses; $3,218.27 for photocopies; $4,113.41 for telephone and facsimile charges; $3,860.40 for Messenger and Federal Express costs; $195.20 for postage; $525 for filing, witness and other fees; $1,259.54 for court reporter services; $5,660.22 for computerized legal research; and $39,796.67 for the document depository.

[8] Cuneo on behalf of Cuneo Waldman & Gilbert, LLP declares his firm has expended $8,665.96 for travel; $8,682.46 for photocopies; $463.84 for telephone and facsimile; $8,906.55 for messenger and Federal Express services; $43.17 for computerized legal research; $0.68 for postage; and $1,330.60 for miscellaneous costs.

fund by careful scrutiny, especially relating to two concerns voiced about the Stipulation during the fairness hearing: (1) the unspecified amount of attorney's fees to be requested in the future by counsel and (2) the possibility that monies reimbursed from the Expense Fund for expenses might be used to pay for expenses incurred by others not part of the class. The instant application for partial reimbursement does not include attorney's fees. In response to the objections, but also to protect Lead Counsel from having to reveal privileged work product in this on-going litigation, the Court ordered Lead Counsel to submit the documentation to support its requests under seal for *in camera* inspection by the Court.

Milberg Weiss has provided a lengthy printout of the firm's "Enron: Expense Report from Inception through June 30, 2003," composed of individually itemized and dated expenses generated by the firm's accounting record-keeping system, based on different source documents including individual invoices, travel-related expense reports, internally-generated reports of in-house expenses, etc. In a letter accompanying the new submission, Lead Plaintiff states that it has discovered that it claimed $18,259.04 too much in transportation expenses and, after deducting that amount, it now seeks a reduced total reimbursement of $4,823,561.52. The Cuneo Law Group has provided an "Account Quick Report" as of May 27, 2003, itemizing each expense for Enron with date and amount; GJB has provided similar materials; and SJGO has provided copies of invoices and receipts as well as a computer-

generated itemized list like the others. The Court has since examined these documents.

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 attorneys' 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 rationale for allowing attorneys compensation for expenses and fees from a common fund "is that unless the costs of litigation are spread to the beneficiaries of the fund, they will be unjustly enriched by the attorney's efforts." *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993); *Manual for Complex Litigation (Third)* § 14.12 at 186-87 (2004)("The common-fund exception to the American Rule is grounded in the equitable powers of the courts under the doctrines of *quantum meruit* and unjust enrichment. The exception applies where a common fund has been created by the efforts of a plaintiff's attorney and rests on the principle that 'persons who benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense [footnotes omitted].'"); *Acosta v. Master Maintenance*, 192 F. Supp. 2d 577, 582 (M.D. La. 2001)("[T]he

common fund doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."), *aff'd*, 69 Fed. Appx. 659, No. 02-30655, 1003 WL 21356040 (5th Cir. May 29, 2003).

Moreover, as expressed by the district court in *Acosta v. Master Maintenance*, 192 F. Supp. 2d 577, 581-82 (M.D. La. 2001), *aff'd*, 69 Fed. Appx. 659, No. 02-30655, 1003 WL 21356040 (5th Cir. May 29, 2003):

> "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). Thus counsel should maintain their records so as to be able to "explain the expenditures at the time they were incurred." *Acosta*, 192 F. Supp. 2d at 583.

The Court does not question the nature (categories) of all of the requested expense reimbursements and agrees that these kinds of expenditures are necessary costs, "of the type typically billed by attorneys to paying clients in the marketplace" or obviously justified in light of the size, geographical spread, and complexity of this litigation with frequently "cutting-edge" legal issues. With respect to all categories except the travel expenses (including hotels and airfare) for which Milberg Weiss seeks reimbursement, the amounts sought in each category appear to the Court to be reasonable in light of the circumstances, and the Court finds that those expenditures were for the common benefit of all the plaintiffs, including payments for experts, investigative expenses, court costs, photocopying, postage, accounting costs, court reporter services, etc. *See generally Acosta v. Master Maintenance*, 192 F. Supp. 2d 577.

Nevertheless, the Court is disturbed by request for reimbursement of some of Milberg Weiss' expenditures on hotel rooms and airfare, which appear not only luxurious, but extravagant, and should not have to be born by the plaintiff class through the Expense Fund. Certain members of Milberg Weiss have standardly traveled first or business class and stayed in very expensive hotels. Even within these parameters, however, certain items are "buried" within the columns of itemized expenses, and there is no explanation by Lead Plaintiff for the extraordinary amounts or how they are related to the litigation. For example, several times members of the firm have chartered private jets; the

Court finds no reason why the Expense Fund should subsidize such travel. For instance, on January 26, 2003 Mr. Lerach chartered a jet for $6,563.78; on May 16, 2003 he chartered another for $12,355.50; and on June 6, 2003, he chartered another for $6,258.67. There are numerous planes from Houston, the major hub of Continental Airlines and host to numerous others to major east and west coast cities every day; there should be no reason why firm members need to pay exorbitant plane fares. This Court questions a number of such items. For example, on May 17, 2002 one woman paid $3,469 to fly on American Airlines from J.F.K. airport in New York to San Diego and back to Newark. On June 11, 2002 three first class tickets were purchased on Elite Jet for $9,223.50. On May 22, 2003 one attorney paid $1,059.50 to fly from San Diego to Dallas, and then $1,061.00 to fly back the next day. The Court believes that counsel have a responsibility to find reasonable airfares or to fund the extra costs themselves.

Similarly there are some extravagant hotel bills for which Milberg Weiss seeks reimbursement. The most noticeable is a $25,584.33 tab for a night at the Ritz Carlton in Laguna Niguel. Mr. Lerach has a documented preference for $1000 plus per night hotel rooms. Other examples of excessive reimbursement requests include hotel stays by Darnell Donahue ($1,315.87), Rick Nelson ($899.46) and Christine Sanders ($1451.88) on December 2, 2001.

These extravagant sums are unreasonable, unnecessary, and clearly not for the benefit of all the plaintiffs. If members of the firm choose to stay in high-end lodgings or purchase

extraordinarily expensive airplanes, it should be at their expense, not that of the expense fund. For these reasons the Court is reducing the amount of reimbursement for "Meals, Hotel and Transportation by 20%, or $169,579.54, from $847,897.72 to $678,318.18.[9] Moreover it admonishes Lead Counsel that it will require for future requests for reimbursement in this category not only a record of the cost, but an explanation if it appears excessive.

Accordingly, for the reasons indicated herein, it is hereby **ORDERED, ADJUDGED, AND DECREED** that

1. All of the capitalized terms used herein shall have the same meanings as set forth in the Stipulation of Partial Settlement dated as of August 29, 2002 ("Stipulation").

2. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all Members of the Settlement Class.

3. The Court hereby awards the following counsel firms partial reimbursement of litigation expenses in the amounts shown :

a. Lerach Coughlin Stoia & Robbins LLP $4,653,982.00

b. Genovese Joblove & Battista PA $128,129.58

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[9] The Court has reached the figure it will award by taking 20% (or $169,579.54) of Lead Plaintiff's reduced request for this category, $847,897.72, and subtracting that amount from Lead Plaintiff's total reimbursement request, $4,823,561.52, to obtain the amount the Court approves, $4,653,982.00.

c. Cuneo Waldman & Filbert, LLP $28,093.26

d. Schwartz, Junell, Greenberg & Oathout, LLP . . $10,521.99

4. The awarded expenses shall be paid immediately after the date this Order is executed, subject to the terms, conditions and obligations of the Stipulation, which terms, conditions and obligations are incorporated herein.

IT IS SO ORDERED.

SIGNED at Houston, Texas, this 5th day of August, 2004.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE