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

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§ § §	MDL 1446
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
ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES LIMITED, and FEDERAL INSURANCE COMPANY, Interpleader Plaintiffs, VS. ENRON CORPORATION, et al., Interpleader Defendants.	§ § § § § § § § § § §	

MEMORANDUM AND ORDER

The above referenced class action, grounded in the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001, et seq., alleges breach of fiduciary duty against fiduciaries of three Enron Corporation ERISA plans.

Pending before the Court, raising a threshold issue that must be decided before the Court may reach the interpleader action and address objections to final approval of a proposed amended partial

class action settlement, are Defendant Jeffrey K. Skilling's motion to compel arbitration and to stay interpleader action (#863) and motion for joinder in #863 by Defendant Kenneth L. Lay (#864).

The Court grants Lay's motion for joinder (#864), to which no opposition has been filed.

Motion to Compel and to Stay

Skilling and Lay seek an order under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3 and 4,[1] compelling arbitration of any

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[1] Section 3, "Stay of proceedings where issuer therein referable to arbitration," provides in relevant part,

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (2005).

Section 4 reads in relevant part,

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition . . . [a] district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court . . . upon being satisfied that the making of the agreement for arbitration or the failure to comply

claims for coverage (1) under the Fiduciary and Employee Benefit Liability Insurance Policy, Policy No. F0079A1A99 (the "Primary Policy"), issued by Associated Electric & Gas Insurance Services Limited ("AEGIS"), and (2) under the Excess Fiduciary Policy, Policy No. 8146-41-84A BHM (the "Excess Policy"), issued by the Federal Insurance Company ("Federal").[2] Skilling and Lay also desire an order under Section 3 of the FAA staying, during the arbitration, the interpleader action filed by Interpleader Plaintiffs AEGIS and Federal. Insurers AEGIS and Federal with leave of Court filed the Complaint in the Nature of Interpleader[3]

> therewith is not in issue, . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . .

9 U.S.C. § 4 (2005).

[2] The Primary and Excess Policies are attached as Exhibits A and B, respectively, to the Complaint in the Nature of Interpleader, which was filed as #861 once the Interpleader Plaintiffs' motion to intervene was granted.

The Primary Policy has an aggregate limit of liability of $35 million, while the Excess Policy has an aggregate limit of liability of $50 million in excess of that of the Primary Policy.

[3] Traditionally a "true" interpleader suit was

> an equitable action available to a plaintiff-stakeholder who is, or may be, exposed to multiple liability or multiple litigation, usually when two or more claims are brought that are mutually inconsistent. The purpose of interpleader is to enable the plaintiff-stakeholder to avoid "the burden of unnecessary litigation or the risk of loss by the establishment of multiple liability when

(#861), seeking to discharge themselves from any additional liability under the policies because competing and conflicting claims against all the potential insureds exceed the collective limits of liability ($85 million) under the two policies.

Skilling and Lay first contend that the preamble to the Primary Policy demonstrates that the policy "is expressly structured as an agreement between AEGIS and the insureds": "in consideration of the payment of the premium . . ., the COMPANY

> only a single obligation is owing." Thus traditionally the claims of the defendant claimants must be mutually exclusive and adverse to one another such that one claimant's gain in the stake would be another claimant's loss.

Hussain v. Boston Old Colony Ins. Co., 311 F.3d 623, 631 (5th Cir. 2002), *quoting Texas v. Florida*, 306 U.S. 398, 412 (1939)(distinguishing "strict" or "true" interpleader actions and actions in the nature of interpleader).

In contrast, an "'action in the nature of interpleader' is a term of art that refers to those actions in which an interpleading plaintiff asserts an interest in the subject matter of the dispute. In all other respects, actions in the nature of interpleader are identical to traditional interpleader suits." *Id.* The Federal Rules of Civil Procedure have since eliminated the distinction, as did Rule 43 of the Texas Rules of Civil Procedure, patterned on its federal counterpart. Advisory Committee's Note to Fed. R. Civ. P. 22(1)("The first paragraph . . . avoids the confusion and restrictions that developed around actions of strict interpleader and actions in the nature of interpleader"); *Argonaut Ins. Co. v. Barron*, No. 05-96-00488, 1998 WL 32710, *6 (Tex. App.-Dallas Jan. 30, 1998). In the instant Complaint in the Nature of Interpleader, AEGIS and Federal identify their interest in the fund as follows: "To the extent that future developments result in Ultimate Net Loss less than the policy limits, however, plaintiffs expressly reserve their contingent interest in seeking the return of any unused funds." #861 at 3.

[AEGIS] agrees with the INSURED as follows . . . ." They maintain it delineates duties imposed on the insureds to provide specific representations and acknowledgments and the retention of the risk of uncollectibility (§ IV(O); the same in the Excess Policy ¶ 3). It also provides that Enron, as the "Sponsor Organization," shall act as the "agent of each INSURED" in performing certain obligations listed under the Primary Policy (§ IV(R)[4]; Excess Policy ¶ 10 ("Insureds agree that the Parent Organization shall act on their behalf.").

Furthermore Skilling and Lay point to § IV(T)(3) in the Primary Policy to argue that its plain terms require that any disputes relating to the policy must be resolved through binding arbitration. They insist that courts have routinely interpreted "arising out of or relating to" language as used in arbitration clauses as especially broad in scope, with expansive reach. *Prima*

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[4] Section IV(R), entitled "Sole Agent," states,

> The SPONSOR ORGANIZATION first named in Item 1 of the Declarations shall be deemed the sole agent of each insured hereunder for the purpose of issuing instructions for any alteration of this POLICY, making premium payments and adjustments, receipting payments of indemnity or receiving notices including notice of cancellation from the COMPANY.

Although Skilling contends that this provision demonstrates the insureds are parties to the policy agreements.

Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967)(classifying as "broad" a clause requiring arbitration of '[a]ny controversy or claim arising out of or relating to this Agreement'")[5]; *American Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88, 93 (4th Cir. 1996). They quote the first sentence of the arbitration provision, including such language, in the Primary Policy:

> Any controversy or dispute arising out of or relating to this POLICY, or the breach, termination or validity thereof, which has not been resolved by non-binding means as provided herein within ninety (90) days of the initiation of such procedure, shall be settled by binding arbitration in accordance with the CPR Institute Rules for Non-Administered Arbitration of Business Disputes (the "CPR Rules") by three (3) independent and impartial arbitrators.

Skilling and Lay emphasize that the provision does not identify any exceptions to its mandatory arbitration and contains no language limiting it to particular types of disputes.

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[5] The Court notes that the Fifth Circuit has concluded that when parties agree to an arbitration clause governing "[a]ny dispute . . . arising out of or in connection with this Agreement," they "intend the clause to reach all aspects of the relationship."). *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164-65 (5th Cir. 1998), *cited for that proposition in Pennzoil Exploration and Production Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998)("Furthermore, courts distinguish 'narrow' arbitration clauses that only require arbitration of disputes 'arising out of' the contract from broad arbitration clauses governing disputes that 'relate to' or are 'connected with' the contract.").

Although the Excess Policy does not contain a twin provision, it has an endorsement stating that "Coverage hereunder shall then apply in conformance with the terms and conditions of the Primary Policy, except as otherwise provided herein." Excess Policy, Endorsement No. 1. Skilling and Lay maintain that because the Excess Policy contains no provisions directly or indirectly in conflict with the Primary Policy's arbitration provision, the Excess Policy's endorsement incorporates the arbitration provision. They contend that the insurers failed to comply with the terms of the arbitration provision and the incorporating language of the endorsement when they filed the interpleader without submitting the coverage questions to binding arbitration. The partial settlement will exhaust the $85 million of proceeds of the Primary and Excess Policies and would release the liability of some, but not of all, the insureds named as Defendants in *Tittle*, leaving the nonsettling Defendants uninsured for any liability they might incur in the litigation.

Skilling and Lay therefore argue that under Section 4 of the FAA, 9 U.S.C. § 4, they are entitled to an order compelling binding arbitration of the disputes raised in the Interpleader Complaint. In addition under Section 3 of the FAA, 9 U.S.C. § 3, the Court should stay the interpleader action to permit arbitration to go forward.

Interpleader Plaintiffs' Opposition

The Interpleader Plaintiffs respond that Skilling and Lay are "misapplying" the arbitration provision, which "provides for arbitration of coverage disputes between the insurer and the insured--not disputes between and among the insureds themselves." #873 at 2. They point out that Skilling and Lay failed to quote the remainder of the arbitration provision, § T(3) of the Primary Policy at 11, which demonstrates that it contemplates arbitration of disputes between Enron and AEGIS:

> Arbitration. Any controversy or dispute arising out of or relating to this POLICY, or the breach, termination or validity thereof, which has not been resolved by non-binding means as provided herein within ninety (90) days of the initiation of such procedure, shall be settled by binding arbitration in accordance with the CPR Institute Rules for Non-Administered Arbitration of Business Disputes (the "CPR Rules") by three (3) independent and impartial arbitrators. The SPONSOR ORGANIZATION [Enron] and the COMPANY [AEGIS] shall each appoint one arbitrator; the third arbitrator, who shall serve as the chair of the arbitration panel, shall be appointed in accordance with the CPR Rules. If either the SPONSOR ORGANIZATION or the COMPANY has requested the other to participate in a non-binding procedure and the other has failed to participate, the requesting party may initiate arbitration before the expiration of the above period. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. §§ 1 et seq., and judgment upon the award rendered by the arbitrators may be entered by any court having jurisdiction thereof. The terms of this POLICY are to be construed in an evenhanded fashion as between the SPONSOR ORGANIZATION and the COMPANY in accordance with the laws of the jurisdiction in which the situation forming the basis for the controversy arose. Where the language of this POLICY is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in a manner consistent with the relevant terms

> of this POLICY without regard to the authorship of the language and without any presumption or arbitrary interpretation or construction in favor of either the SPONSOR ORGANIZATION or the COMPANY. In reaching any decision the arbitrators shall give due consideration for the customs and usages of the insurance industry. The arbitrators are not empowered to award damages in excess of compensatory damages and each party hereby irrevocably waives any such damages.
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> In the event of a judgment entered against the COMPANY on an arbitration award, the COMPANY[,] at the request of the SPONSOR ORGANIZATION, shall submit to the jurisdiction of any court of competent jurisdiction within the United States of America, and shall comply with all requirements necessary to give such court jurisdiction and all matters relating to such judgment and its enforcement shall be determined in accordance with the law and practice of such court.

The Interpleader Plaintiffs insist that there is no dispute between the insureds and the Interpleader Plaintiff Insurers about coverage here because the insurers have conceded that the policy proceeds should go to cover the claims against the insureds and the Interpleader Plaintiffs have tendered the proceeds to the Court.[6] Thus the only dispute here is one among the insureds relating to how the proceeds should be allocated: some seek to have the proceeds used to settle the *Tittle* litigation while other non-settling defendants do not because the such allocation would exhaust the policies and leave them uninsured for any losses they

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[6] This Court observes there is no disagreement that both settling and non-settling Defendants are insureds covered by the policies in dispute and that the policies cover the claims asserted against these Defendants.

incur in *Tittle* and other suits. Procedurally, the filing of an interpleader action and the tendering of the policies' proceeds to the Court registry have eliminated any potential dispute between AEGIS or Federal and their insureds and the insurers now "stand neutral with respect to the appropriate allocation of the proceeds" by the Court. *Id.* A dispute among the insureds is not within the scope of the arbitration provision in the Primary Policy. "[T]here is no right in the policies for one insured to compel another insured to arbitrate, the arbitration provision is not triggered, and this interpleader should proceed." *Id.* at 3. *Mayflower Ins. Co. v. Pellegrino*, 212 Cal. App. 3d 1326 (1989)(concluding that the relevant statute and the arbitration clause contemplated arbitration for disagreements only between the insurer and the insured).

Finally AEGIS and Federal point out that the purpose of an interpleader is to protect an insurer from multiple litigation when it is subject to multiple claims on a limited fund and allow the insurer to fulfill its duties and obligations under a policy by tendering the funds to the court. *Rhoades v. Casey*, 196 F.3d 592, 600 n. 8 (5th Cir. 1999)("The legislative purpose of an interpleader action is to remedy the problems posed by multiple claimants to a single fund and to protect a stakeholder from the possibility of multiple claims on a singe fund."), *cert. denied*, 591 U.S. 924

(2000); *Metropolitan Life Ins. Co. v. Baretto*, 178 F. Supp. 2d 745, 748 (S.D. Tex. 2001)("An interpleader suit serves to shield an uninterested stakeholder from the costs of unnecessary multiple litigation."). If the insureds here are allowed to stay the interpleader and to compel AEGIS and Federal to arbitrate where no arbitrable dispute exists, that purpose would be defeated.

Tittle Plaintiffs' Opposition

Tittle Plaintiffs argue that Skilling and Lay have no legal right to compel them to arbitrate any aspect of the partial settlement,[7] and that any stay would "have a unduly disruptive

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[7] The *Tittle* Plaintiffs' conclusory assertion is incorrect. The general rule is that "'one who signs or accepts a written instrument will normally be bound by its written terms.'" *American Heritage Life Ins.*, 321 F.3d at 538, *citing inter alia St. Petersburg Bank*, 445 F.2d 1028, 1032 (5th Cir. 1971). Nevertheless, although Skilling (and Lay) did not sign the policies, they are both "insureds" as defined by the policies and they can assert any rights they have under the terms of the policies. Section II(J) of the Primary Policy defines "INSURED" as including "any past, present or future trustee, officer, director or employee" of Enron; ¶ 14 of the Excess Policy defines "Insureds" to include the persons and organizations insured under the Primary Policy. Both definitions include Skilling and Lay. Moreover under ordinary contract principles, alternatively as intended beneficiaries of the policies' liability coverage, they can enforce their rights under the terms of the policies. *See also Reynolds v. York*, No. Civ. A. H-03-1108, 2003 WL 22880945, at *2 (S.D. Tex. Nov. 21, 1003)(holding that non-signatories may enforce an arbitration clause if they were intended beneficiaries of the agreement containing the clause.), *citing E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194 (3d Cir. 2001).

The specific issue here is not whether Skilling and Lay have any rights under the policies, but whether they have the right under the arbitration agreement in the Primary Policy, and

effect on the payment of the $85 million partial settlement pending before the Court."[8]

Skilling correctly points out that the *Tittle* Plaintiffs are not parties to the interpleader action, have no rights under either the Primary or Excess Policy, and thus have no standing here. Nevertheless, because the question whether the arbitration provision covers the dispute here is one of law, the Court finds there is no error in examining their brief.

Settling Defendants' Opposition

Like the Interpleader Plaintiffs, highlighting that the dispute here is over allocation, not coverage, Settling Defendants[9] maintain that the filing of the interpleader and the tendering of the policy limits to the registry of the Court demonstrate that there is no dispute regarding coverage for arbitration. The insurers have no interest in the dispute regarding allocation of the policy proceeds that is before this Court; instead the dispute is between Skilling and Lay and the Settling Defendants. Settling

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to the extent it is incorporated under the Excess Policy, to move the Court to compel their Settling Co-Defendants to go to arbitration over a proposed settlement.

[8] While the latter argument may be pragmatic, the *Tittle* Plaintiffs fail to cite any authority to support it.

[9] Settling Defendants that filed this opposition are Defendants Belfer, Blake, Chan, Duncan, Gramm, Jaedicke, LeMaistre, Foy, Bazelides, Barnhart, Crane, Gulyassy, Hayslett, Joyce, Knudsen, Lindholm, Prentice, Rath, and Shields.

Defendants insist that Skilling and Lay cannot compel arbitration of this dispute because the arbitration provision only requires arbitration of disputes between Enron and AEGIS or Federal[10] and because the Settling Defendants never signed the insurance policies nor any other agreement requiring them to arbitrate. Furthermore the arbitration provision does not cover the allocation issue, which is not a dispute "arising out of or relating to" the insurance policies because (1) there is no coverage issue here, (2) the limits of the policies have been tendered to the Court, and (3) the settling defendants did not sign the policies, while the parties that did have no interest in the outcome of the allocation dispute.

Settling Defendants widen the focus from the arbitration provision (§ T(3) of the Primary Policy) to the entire § T, "Dispute Resolution and Service of Suit" to demonstrate that in the delineated procedures for resolution of disputes, each and every reference identifies the disputes as between the "SPONSOR ORGANIZATION," previously identified as Enron, and the "COMPANY," previously identified as AEGIS or the insurer. Declarations, item 1, and Definitions, § II(E) & (P) of the Primary Policy (Definitions).

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[10] Like the Interpleader Plaintiffs, the Settling Defendants note the repeated references, but in more places, to disputes between the "SPONSOR ORGANIZATION," defined as Enron, and the "COMPANY," defined as AEGIS.

Court's Ruling

"Arbitration is a matter of contract between the parties, and a court cannot compel a party to arbitrate a dispute unless the court determines the parties agreed to arbitrate the dispute in question." *Pennzoil Exploration and Production Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998); *see also American Heritage Life Insurance Co. v. Lang*, 321 F.3d 533, 537 (5th Cir. 2003)(Under the FAA, a district court must initially determine "whether the parties agreed to arbitrate the dispute in question."). That determination involves two considerations: is there a valid agreement to arbitrate between the parties and does the dispute in question fall within the scope of the arbitration agreement. *Id. See generally Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *Allen v. Apollo Group, Inc.*, No. Civ. A. H-04-3041, 2004 WL 3119918, *4 (S.D. Tex. Nov. 9, 2004). Whether an agreement to arbitrate covers the issue and/or the parties before the court is a question of law for the courts to decide. *Green Tree Financial Corporation v. Bazzle*, 529 U.S. 444, 452 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). *See also Pennzoil Exploration*, 139 F.3d at 1066("the question of whether a party can be compelled to arbitrate, as well as the question of what issues a party can be compelled to arbitrate, is an issue for the court rather than the arbitrator to

decide"), *citing Executone Information Systems v. Davis*, 26 F.3d 1314, 1321 (5th Cir. 1994).

The issue here is whether Skilling and Lay's objections to proposed settlements within policy limits that will exhaust those limits are arbitrable "disputes or controversies" under the policy.

A court must construe an arbitration agreement according to "ordinary state law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)(in determining whether parties agreed to arbitrate, "courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."). In their briefs, different parties here have focused on different discrete parts of the agreement. The rule of construction for arbitration agreements, as for all contracts, is to read the contract as a whole, considering all the provisions together. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223 (Tex. 2003)(the court must "consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. . . . No single provision taken alone will be given controlling effect."); *Shell Oil Co. v. Khan*, 138 S.W.3d, 288m 292 & n.12 (Tex. 2004); *Apollo Group*, 2004 WL 3119918, *5.

Skilling and Lay have urged that the broad language of the arbitration clause ("arising out of or relating to" the insurance

policies) and the strong federal policy in favor of arbitration, as well as the fact that Skilling and Lay are both parties to and the intended beneficiaries of the policies/contracts, which reference them according to their role and function as "insureds," support this Court's compelling arbitration of the proposed partial settlements that would leave Skilling and Lay without insurance coverage.

The Court finds, in a careful reading of the contract, that all its provisions can be given effect without nullifying any of them because there is no ambiguity or contradiction among them[11] as they apply here. Neither the insurers nor Enron denies that Defendants are insureds and the claims against them are covered under the policies.

As an initial matter, the Court observes that § IV(G) of the Primary Policy provides, "When there is a CLAIM which may involve this POLICY, the SPONSOR ORGANIZATION may, without prejudice as to liability, proceed immediately with settlements which in their

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[11] The Court agrees with Skilling and Lay that in deciding whether a dispute falls within the scope of the arbitration agreement, in accordance with the federal policy favoring arbitration ambiguities in the agreement are resolved in favor of arbitration. *Fleetwood Entrprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002)(*citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989)), *suppl. on other grounds on denial of rehearing*, 303 F.3d 570 (5th Cir. 2002). Nevertheless, the Court does not find ambiguity with regard to the provision relating to amicable settlements within policy limits and the arbitration agreement for disputes and controversies.

aggregate do not exceed the UNDERLYING LIMITS." There is no mention of required binding arbitration when there is a settlement, or settlements, proposed within the policy limits. The Court would emphasize that under the plain, ordinary meaning of the words, where there is a **settlement** within the policy limits, there is **no controversy or dispute**; thus the Court concludes that the broad language of the preamble, "[a]ny **controversy or dispute** arising out of or relating to this POLICY, or the breach, termination or validity thereof [emphasis added by the Court]" shall be resolved by arbitration, does not apply to the insurer's amicable settlements for its insureds. AEGIS and Federal, having satisfied their *Stowers* duty to settle claims against the settling Defendants that an ordinarily prudent insurer would accept as a reasonable amount given the likelihood and degree of their exposure to a greater judgment, no longer has an interest in the $85 million nor a dispute with the settling Defendants. Therefore the arbitration clause, which requires that the insurers be participants in an arbitrable dispute, does not control here. The contention that the insureds did not sign the policy and did not authorize Enron to do so on their behalf, and therefore the arbitration clause cannot bind them, is thus irrelevant.

Furthermore, this construction finding the absence of a controversy or dispute is in complete accord with Texas law, and

indeed the majority rule. Under Texas law, an insurer's *Stowers* duty to settle a claim against its insured is triggered by a settlement demand if the claim against the insured is within the policy's scope of coverage, if the demand is within the limits of the policy, and if the terms of the demand are such that an ordinarily prudent insurer would accept it considering the likelihood and extent of the insured's potential exposure to an excess judgment. *State Farm Lloyds Ins. Co. v. Maldonado*, 963 S.w.2d 38, 41 (Tex. 1998). Moreover, an insurer does not have to provide funds for all its insureds before exhausting policy limits. *See, e.g., Travelers Indemnity Co. v. Citgo Petroleum Corp.*, 166 F.3d 761 (5th Cir. 1999)(allowing a reasonable settlement that exhausts the policy and leaves a co-insured without coverage); *American States Ins. Co. of Tex. v. Arnold*, 930 S.W.2d 196 (Tex. App. 1996)(insurer is allowed to settle for policy limits on behalf of a named insured even where that settlement leaves an additional insured without coverage); *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994)("[W]hen faced with a settlement demand arising out of multiple claims and inadequate proceeds an insurer may enter into a reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims."); *Vitek, Inc. v. Floyd*, 51 F.2d 530 (5th Cir. 1995)(under Texas law)(rejecting the

contention that an insurer cannot favor one insured over another by making a settlement for one that exhausts the policy limits). The rationale for such a rule is that it promotes the settlement of lawsuits and encourages early assertion of claims. *Soriano*, 881 S.W.2d at 315. *See also Mid-Century Ins. Co. of Texas v. Childs*, 15 S.W.3d 187 (Tex. App.-Texarkana 2000)(insurer's duty to defend ends when the policy limits have been paid by the insurer). Texas law governs the Court's consideration of the reach of the arbitration clause in the policies for the proposed settlement in *Tittle*. Moreover and significantly, the Fifth Circuit has recognized, "While several out-of-state courts have found that there is a general duty not to favor one insured over another, the weight of contemporary authority is in line with" the holding in *American States Insurance of Texas v. Arnold*, 930 S.W.2d at 202-02, that the insurer "breached no duty in obtaining the settlement [up to the policy limits for one insured without considering the other possible claims against co-insureds affecting the same policy limits and subsequently refusing to defend these other insureds], and its duties to the additional insured terminated when the settlement exhausted the policy limits." *Travelers Indemnity Co.*

v. Citgo Petroleum Corp., 166 F.3d at 766 (and cases cited therein) and 765.[12]

Logically the whole purpose of the *Soriano* [and the majority] rule encouraging partial settlements within policy limits would be defeated by characterizing the allocation of a settlement amount within a policy's limits as a "dispute" that must be arbitrated with opposing nonsettling Defendants.

Furthermore under § IV(R) of the Primary Policy Enron, which unlike the insureds is a signatory on the policy, is "deemed the sole agent of each INSURED hereunder for the purpose of issuing instructions for any alteration of this POLICY, making premium payments and adjustments, receipting payments of indemnity, or receiving notices including notice fo cancellation from the COMPANY." Some insureds have pointed out that the list of acts identified in the provision does not include arbitration. Even if it did and if the arbitration clause were applicable to allocation questions regarding amicable partial settlements that left some insureds without protection, Enron would be in the untenable position of having to represent the conflicting claims of opposed co-insureds, another illogical contention.

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[12] The Court finds that the settlement amount of $85 million here, the policy limits, is clearly reasonable in light of the potential exposure these Defendants would otherwise face if there were no settlement.

There is division among courts as to whether an insurer can abandon its obligation to a nonsettling insured to defend and/or indemnify that insured against potential liability by tendering its policy limits into the court in an interpleader action. *See, e.g.*, T. Scott Belden, Annotation, *Liability Insurer's Duty to Defend Action Against Insured After Insurer's Full Performance of its Payment Obligations Under Policy Expressly Providing that Duty to Defend Ends on Payment of Policy Limits* §§ 4-6, 2000 WL 1879819, 2000 A.L.R.5th 15 (2000). Nevertheless, Texas law clearly permits the insurer to pursue prudent settlements on behalf of and favoring some insures that may exhaust the policy limits, without regard to the rights of non-settling insureds and ends its obligations to other insureds upon exhaustion of those limits. *See, e.g., Carter v. State Farm Mutual Auto Ins. Co.*, 33 S.W.3d 369, 373 (Tex. App.--Fort Worth 2002)("It is clear that when an insurer can demonstrate that its settlement in one of several competing claims was reasonable, there is no violation even if the settlement exhausts the policy proceeds for other insureds.), *citing Soriano*, 881 S.W.2d at 315, and *Lane v. State Farm Mutual Auto Ins. Co.*, 992 S.W.2d 545, 552 (Tex. App.--Texarkana 1999)("*Soriano* held that insurers will not be liable in bad faith claims for settling reasonable claims with one of several claimants under a liability policy, thereby reducing or exhausting proceeds available to the

remaining claimants."). For a general summary and analysis of Texas law on the question *see Travelers Indemnity Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 764-68 (5th Cir. 1999)(concluding, "[W]e follow *Arnold* and hold that under Texas law an insurer is not subject to liability for proceeding, on behalf of a sued insured, with a reasonable settlement, as defined in *Soriano* . . ., once a settlement demand is made, even if the settlement eliminates (or reduces to a level insufficient for further settlement) coverage for a co-insured as to whom no *Stowers* demand has been made.") An interpleader under such circumstances is redundant protection for the insurer.

For the reasons indicated above, the Court

ORDERS that Lay's motion to join #863 (#864) is GRANTED and Skilling's and Lay's motion to compel arbitration and to stay interpleader action (#863) is DENIED.

SIGNED at Houston, Texas, this 14th day of March, 2005.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE