

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

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

§
§ CLASS ACTION

This Document Relates To:

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al., Individually and On Behalf
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

**MEMORANDUM IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR
PRELIMINARY APPROVAL OF PLAN OF ALLOCATION OF SETTLEMENT
PROCEEDS AND APPROVAL OF FORM AND MANNER OF NOTICE**

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I. INTRODUCTION

This memorandum is submitted in support of Lead Plaintiff, The Regents of the University of California's ("The Regents") motion for preliminary approval of the proposed allocation of the proceeds obtained in prior settlements entered into with certain defendants ("Settling Defendants") in this action.¹

Beginning in 2003, nine partial settlements have been presented to the Court for final approval. The proceeds from these settlements (plus the resolution of the LJM2 bankruptcy claim) total \$7,227,390,000, the largest result ever obtained in a securities class action. In the earlier notices sent to class members in connection with these settlements, class members were advised that, at a later date, they would be notified of the terms of a plan of allocation of these settlements proceeds which would govern how claims will be calculated and, ultimately, how settlement proceeds will be distributed. Class members were also advised that they would be given an opportunity to comment on, or object to, any proposed plan. That day has now arrived. Submitted with this memorandum are a preliminary approval order ("Order"), a form of notice to be mailed to class members which describes the proposed plan of allocation (Exhibit 1 to the Order), a summary notice to be published (Exhibit 3 to the Order) and a proof of claim form (Exhibit 2 to the Order).

The proposed plan of allocation is the culmination of an enormous effort involving hundreds of attorney and economic expert hours. The goal has always been to create a plan that is fair to all class members, regardless of the amount or type of Enron or Enron-related security they purchased. Lead Plaintiff and its counsel firmly believe that they have succeeded in that effort. An earlier

¹ These defendants are Andersen Worldwide Societe' Cooperative, Bank of America, Lehman Brothers, the Enron Outside Directors and Ken Harrison, Citigroup, JPMorgan Chase, Canadian Imperial Bank of Commerce, Arthur Andersen and Kirkland & Ellis. In addition, a bankruptcy claim against LJM2 was resolved.

version of this plan was published for public comment and was sent directly to prior objectors, other named or representative plaintiffs and others who have expressed interest in the plan. Lead Counsel and Lead Plaintiff considered these comments and incorporated some of the suggestions into this plan. This early dissemination and the solicitation of input is unprecedented in any securities class action case that we know of. While some class members will undoubtedly wish to be treated differently (*i.e.*, more favorably), the issue is not whether a different plan could have been created, but whether this plan is fair, reasonable and adequate to all class members. We submit that it is.

II. ARGUMENT

A. Preliminary Approval of the Proposed Allocation Is Appropriate

Applying the same standards to the proposed allocation as those for preliminary approval of a settlement demonstrates that preliminary approval is appropriate. Rule 23(e) of the Federal Rules of Civil Procedure provides that before a class action may be dismissed or compromised, notice of the proposed dismissal or compromise must be given in the manner directed by the court, and judicial approval must be obtained. That is also the procedure (notice and an opportunity to be heard regarding the allocation prior to final approval) to be employed here. “Preliminary approval of a proposed settlement is the first in a two-step process required before a class action may be settled.” *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citing *Manual for Complex Litigation (Third)* §30.41, at 237 (3d ed. 1995)). First, counsel submit the proposed terms of settlement and the court makes a preliminary evaluation of the fairness of the settlement, prior to notice. *Id.* This initial assessment can be made on the basis of information already known to the court which, if necessary, may be supplemented by briefs, motions or an informal presentation from the settling parties. *Id.* Second, the court must finally approve the settlement after notice to the class and an opportunity to be heard has been given. “Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not

improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.” *NASDAQ*, 176 F.R.D. at 102; *see also Manual for Complex Litigation (Third)*, *supra*, §30.41. As discussed briefly below, the proposed allocation now before this Court was created through serious, informed efforts. Given the unique circumstances of this case, it is squarely within the range of reasonableness warranting notice apprising class members of the proposed allocation.

B. Consideration of Final Approval Criteria Supports Preliminary Approval

Assessment of an allocation of settlement proceeds in a class action under Rule 23 of the Federal Rules of Civil Procedure is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair, reasonable and adequate. *See In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992), *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982) (standard of review “applies with as much force to the review of the allocation agreement as it does to the review of the overall settlement between plaintiffs and defendants”). District courts enjoy “broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably.” *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *accord Chicken Antitrust*, 669 F.2d at 238. An allocation formula need only have a reasonable, rational basis, particularly if recommended by “experienced and competent” class counsel. *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992). The allocation proposed here meets this criteria.

In arriving at the plan proposed, The Regents was faced with a number of issues that it considered and, ultimately, resolved. First, the Enron case was somewhat unique in terms of the number of securities that were impacted by the prior settlements. In all, the settlements covered approximately 195 Enron or Enron-related securities. Some of the securities (“Category 1”

securities) were issued by Enron itself, certain of its predecessor firms or trusts or other entities created by Enron for the purpose of issuing a particular security, or were derivatives of those securities. The price or value of Category 1 securities also had to be primarily dependent on Enron's credit, financial condition, or ability to pay and movement in the price of the securities had to be impacted by disclosure of the alleged fraud at Enron.² These securities were viewed as being the primary focus of the litigation and, thus, the plan is structured to distribute the bulk of the settlement proceeds (95%) to them. Certain other securities ("Category 2" securities) presented additional issues. These were securities issued by Enron-related entities, but the prices of certain of them did not decline due to the disclosure of the alleged fraud at Enron, *i.e.*, they were unaffected by the alleged fraud. The plan excludes these securities from participation in the settlement funds. Certain other Category 2 securities were determined to have been affected by the alleged fraud and they will share. Still other Category 2 securities are in an "unknown" category because pricing data for these securities is simply not available despite the best efforts of Lead Plaintiff's counsel and our damage expert to obtain it. These Category 2 securities might share in the distributions from the settlement funds, but only if the claimant presents sufficient evidence of both the price or value of the security and the fact that the price or value declined because of the disclosure of the alleged Enron fraud. Claims for eligible Category 2 securities were determined to be weaker than Category 1 claims and, thus, the plan limits distributions based on those claims to 5% of the settlement proceeds.

In addition, The Regents was sensitive to the fact that it acted as the Court-appointed Lead Plaintiff on behalf of purchasers of many different types of Enron or Enron-related securities and

² One potential claimant has raised an issue with respect to the way the Plan establishes the value of a security that was "acquired" (as opposed, for example, to a traditional purchase on the open market). This individual has also questioned the treatment or valuation of securities received by gift, inheritance or otherwise by operation of law. Suffice it to say that the Plan deals with these issues in a way that is typical of many other plans of allocation.

that under no circumstances did it want to be perceived as favoring one type of security over another. To ensure fairness to all eligible claimants, Lead Plaintiff decided to put the settlement funds into one pool rather than segregate the settlement funds into separate allocations with the distribution from these separate allocations dependent on the particular claims asserted against a particular defendant. There were at least two reasons for this. First, the fact that a settlement was achieved against a particular defendant at a time when only one type of claim (*e.g.*, a §11 claim) was pending against it would have ignored the facts that, (i) in certain instances, other types of claims (*e.g.*, §10(b) claims) had been asserted but had been dismissed (leaving appellate exposure remaining against that defendant) and that (ii) these “§11-only” defendants insisted on a class definition for settlement purposes that included these other claims and also sought to bar claims based on other Enron or Enron related securities and other provisions of the securities laws. Second, The Regents believed that it was potentially unfair to have the ultimate distribution to a particular claimant determined, in major part, by the (wholly unpredictable) claim rate for that particular security. In other words, if a specific amount was allocated to cover only a particular security and the number of claims submitted based on that security was significantly lower than that for other eligible securities, a windfall would result for those claimants. Thus, to ensure fairness to all, the single pool of funds structure³ was decided upon. However, The Regents also thought it appropriate for the plan to take into account that certain claims (again, §11 claims) drove certain settlements with certain defendants. To acknowledge this, The Regents, with the help of our economic/damage expert, created “multipliers” for these claims to put those claimants in the same economic position as if separate

³ We alert the Court to the fact that one named plaintiff has disagreed with this structure and may ultimately object to it.

pools of money had been allocated. In other words, the Plan attempts to put these claimants in no worse position than if separate pools had been allocated.

Finally, the formulae for calculating claims were derived from the Federal Rule of Civil Procedure 26 reports that were prepared by our economic/damage experts. In other words, these formulae were largely driven by our view of what the damages to class members were and what we thought we could prove at trial.

In short, the Plan is the result of an unprecedented effort to seek the input of potentially affected individuals and entities, is fair to all, and reflects The Regents' view of what would have been recovered for class members as damages had the case gone to trial. This Plan deserves the Court's approval.

III. CONCLUSION

For all of the foregoing reasons, the Court should preliminarily approve the allocation and set a schedule for notice and a final approval hearing.⁴

DATED: November 20, 2007

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⁴ At the preliminary approval hearing Lead Counsel will propose specific dates for a schedule of events leading up to final approval.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS AND APPROVAL OF FORM AND MANNER OF NOTICE document has been served by sending a copy via electronic mail to serve@ESL3624.com on November 20, 2007.

I further certify that a copy of the foregoing document has been served via overnight mail on the following parties, who do not accept service by electronic mail on November 20, 2007.

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I also certify that a copy of the above-mentioned document has been served via UPS Next Day Air on the parties listed on the attached "Additional Service List" on this November 20, 2007.



MO MALONEY

A copy of the foregoing document has also been served via UPS NEXT DAY AIR on the following parties:

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