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.	§	

LEAD PLAINTIFF'S MEMORANDUM IN RESPONSE TO OBJECTIONS TO THE PLAN OF ALLOCATION (DOCKET NOS. 5840, 5859, 5860, 5868, 5869, 5873, 5874, 5884, 5886)

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I. INTRODUCTION

Lead Plaintiff, The Regents of the University of California ("The Regents"), submits this Memorandum in response to the few objections that have been made to the proposed Plan of Allocation (the "Plan") of settlement proceeds. These few objections can be boiled down to the following:

- recipients of gifts of Enron securities should be compensated under the Plan;
- holders (as opposed to purchasers or acquirers) of Enron securities should be compensated under the Plan;
- so-called "Section 11" settlement funds should be segregated from other settlement funds;
- "bond-like" preferred stock should have the benefit of the same price inflation percentages as common stock; and
- all gains in any Enron security should be offset against any losses regardless of the Enron security involved.

None of these objections have merit; all should be rejected.

To merit approval, a plan of allocation must be fair, reasonable and adequate. *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982). As this standard makes clear, a plan of allocation need not be "perfect"[1] and approval will not be overturned absent an abuse of discretion. *Chicken Antitrust*, 669 F.2d at 238. As discussed in earlier briefing, this Plan is unprecedented in terms of the effort and transparency that led to its creation. It is based on both the principles and specifics of The Regents' damage experts' Fed. R. Civ. P. 26 reports, and since it is grounded in the damage theories that Lead Plaintiff would have presented at trial to establish the damages of class members, is unarguably a fair way to divide the settlement proceeds among what

[1] In the words of Lead Plaintiff's Plan expert, Roman L.Weil: "No plan of allocation can be uniquely FRA [fair, reasonable and adequate] – that is, the given plan is FRA and no others can be. Fair stems from underlying assumptions and choices." Declaration of Roman L. Weil (Docket No. 5794) ("Weil Decl.") at 3.

are, after all, competing claimants for limited dollars. The Plan's substantive terms were well thought out and were the result of countless hours of work and consultation with the damage experts and representatives of The Regents. Thus, for example, claims calculations are based on the inflation in the price of Enron and Enron-related securities due to the fraud alleged. To the extent it could be done, extraneous, non-fraud market, economic or industry factors were eliminated from the Plan. Securities whose price movement was not due to the alleged fraud at Enron, were eliminated from distributions from the settlement fund because these purchasers suffered no legally cognizable damages. Where pricing or other relevant data for a particular security was simply not available, eligible claimants were not eliminated from the Plan, but given the opportunity to provide information from which a claim can be calculated. *See* Declaration of Carole K. Sylvester Re A) Mailing of the Notice of Hearing for Final Approval of: Plan of Allocation of Settlement Proceeds; and Plaintiffs' Counsel's Application for an Award of an Attorney Fee and Lead Plaintiff's and Certain Other Persons' Application for Reimbursement of Expenses and the Proof of Claim and Release Form, and B) Publication of the Summary Notice ("Sylvester Decl."), Ex. A, §V.B(1)(b). Other examples of The Regents' commitment to a plan with fair terms abound.

The very process by which the Plan was developed provides further indicia of fairness. At a point when the Plan was well developed, but before The Regents ever sought this Court's preliminary approval of it, the Plan's existence was publicized through a press release issued by The Regents, and the Plan itself was posted on Lead Counsel's web site. It was circulated to class members who had expressed interest in the terms of the Plan, objectors who had previously appeared in the litigation in connection with the prior settlements (Hodges Supp. Decl., ¶21(g))[2] and financial

[2] "Hodges Supp. Decl." refers to the Supplemental Declaration of Helen J. Hodges in Support of Lead Counsel's Motion for an Award of Attorney Fees filed herewith.

institutions who were expected to file claims either on their own behalf or on behalf of their customers. Declaration of Dennis A. Gilardi Re: Claims Administration Process ("Gilardi Decl."), ¶19. The Regents considered the comments received and, where appropriate, changed the Plan. Declaration of Helen J. Hodges in Support of Lead Counsel's Motion for an Award of Attorney Fees (Docket No. 5818) ("Hodges Decl."), ¶¶286-287. The preliminary approval hearing itself was contested by several objectors who raised issues either with the Plan's terms or the Notice's language describing it, and Lead Counsel worked further with these objectors to try to resolve their concerns. In several instances, these efforts met with success (*i.e.*, Mr. Pulsifer and Mr. Dabrowski); in one other (Mr. Ruben and his related entities) they did not, but that does not make the Plan unfair. In sum, every effort was made to consider the views of affected class members even before the Plan was formally disseminated to eligible claimants.

Despite all of these efforts, a few objections to the Plan have been made, but it is important to note that, while these objections are largely couched in terms of "fairness," the real import of all of them is to change the Plan so that the objectors get more. Necessarily, that means that another eligible claimant will get less and a scenario where new objectors are simply substituted for those objecting now should be avoided. In other words, because the dollars available are limited, it is simply not possible in this case to satisfy every competing claimant; but that is not the point of this exercise. While the Plan may not satisfy every potential claimant, that does not mean that it is unfair. To the contrary, the Plan is the product of serious, informed choices, is fair, reasonable and adequate and should be finally approved.

II. THE OBJECTION BY MR. RUBEN SHOULD BE OVERRULED

A. The Plan Does Not Discriminate Against Persons Who Acquired Rather than Purchased Eligible Securities

Richard Ruben (and related entities) (collectively the "Ruben Parties") reassert their objection that the Plan unfairly discriminates against Eligible Claimants who "acquired," rather than

purchased, Eligible Securities. Objection by the Ruben Parties to Lead Plaintiff's Proposed Plan of Allocation of Settlement Proceeds (Docket No. 5860) ("Ruben Objection") at 7-9. They repeat the claim that the Plan places an unfair burden on acquirers to establish the value of the consideration they exchanged for Enron and Enron-Related Securities. In contrast, the Ruben Parties charge, purchasers of Enron securities are permitted to rely alone on the "market price." *Id*. at 8. To the contrary, the Plan is fair and treats purchasers and acquirers the same, for each must establish the amount of consideration exchanged for the Eligible Securities and the economic reality of the transaction.

Repeating their prior objection, the Ruben Parties say:

> [T]he mechanics of the Plan overtly discriminate against acquired Eligible Securities. The Plan provides, on the one hand, that a Purchaser's Recognized Claim can be calculated based simply on the ***market price*** of the Purchaser's Eligible Securities; on the other hand, an Acquirer's Recognized Claim cannot – even where the ***market price*** of the acquired security is readily ascertainable . . . . Instead, the Plan calculates the value of acquired securities not based on ***market price*** at the time of the acquisition, but instead based upon the "value of the consideration given for each unit of the security."

Ruben Objection at 8. The central premise of this argument – that purchasers' claims are based on the "market price" of securities at the time they acquired rather than what purchaser actually paid – is simply wrong. As The Regents have pointed out before, the phrase "market price" appears nowhere in the section of the Notice the Ruben Parties cite or in the definition on which they purport to rely. The Plan defines "Purchase Price Paid" as "the amount paid or value of the consideration given for each unit of the security." *See* Notice of Hearing for Final Approval of: (A) Plan of Allocation of Settlement Proceeds; and (B) Plaintiffs' Counsel Application for an Award of an Attorney Fee and Lead Plaintiff's and Certain Other Persons' Application for Reimbursement of Expenses ("Notice"), §V(D). This definition never mentions "market price." The Plan requires purchasers of Enron and Enron-Related Securities to establish the actual price paid for their securities, be it market or some other price. Acquirers also must establish the value of the

consideration they exchanged for their Eligible Securities, which comports with the Plan's fundamental goals of distributing proceeds from the settlement fund based on the economic realities of the claimants' securities transactions and compensating Eligible Claimants for fraud-based damages, not inactionable or even fictional losses. The Plan is "based on the nature and extent of class members' provable damages." *In re Luxottica Group S.p.A. Sec. Litig.*, 233 F.R.D. 306, 317 (E.D.N.Y. 2006). Nothing could be more fair. *Id.*

The Ruben Parties again criticize the Plan for "provid[ing] no definition whatsoever of what constitutes 'consideration' or how such 'consideration' will be valued," and, instead leaving it up to the discretion of the Claims Administrator (Gilardi & Co.) to determine the amount of a claim. Ruben Objection at 8-9. Their objection misses the mark. Under the Plan, "the amount paid or value of the consideration given for each unit of the security" is the "Purchase Price Paid." *See* Notice, §V(D). Claimants should have little difficulty, if any, in establishing the Purchase Price Paid for their Enron acquisitions, even if the consideration involved the exchange of tangible or nontangible assets as opposed to a cash price.

Nor should Claimants encounter difficulties with the claims administrator, Gilardi & Co., which has administered claims in hundreds of other securities class actions. *See* www.gilardi.com. On numerous occasions, Gilardi has been charged with the responsibility of processing class claims, including ones not based on cash consideration. And Gilardi does not possess, as the Ruben Parties' contend, ultimate authority in determining each claimant's respective portion of the settlement fund. *See* Ruben Objection at 8-9. A claimant whose claim is rejected can always turn to the Court and ask it to review his claim, though lead counsel expects Gilardi and the claimants will resolve most disputes among themselves. *See* Notice, §V(E)(5); *see also* Lead Plaintiff's Response to Richard Ruben's Opposition (Docket No. 5765) to Lead Plaintiff's Motion for Preliminary Approval of Plan

of Allocation (Docket Nos. 5755 and 5756) (Docket No. 5775) ("Lead Plaintiff's Response") at 13-14; Gilardi Decl., ¶¶5, 7, 9-12.

The Ruben Parties also repeat their argument that because an Eligible Claimant could have immediately sold his/her/its security at the market price upon receipt – even if the price was inflated by the fraud – that price should be used under the Plan to calculate a Recognized Claim. *See* Ruben Objection at 11. Having the opportunity to sell Enron or Enron-Related Securities at a fraud-inflated price simply does not mean that a claimant incurred ***damages*** as a result of the alleged fraud, only that (s)he/it could have profited from defendants' alleged malfeasance. The Plan is properly designed to compensate Eligible Claimants for damages caused by inflation due to fraud, not missed opportunities to profit from it.

The Ruben Parties also argue that the settling defendants never would have agreed to a settlement without the assurance of total peace from ***all*** acquirers of Enron and Enron-Related Securities during the relevant time period and appear to conclude that because they "acquired" during the relevant period, they must be compensated in some manner. *See* Ruben Objection at 7-8. But the second concept – that class members' recovery from the settlement will be proportionate to their actual legally cognizable damages – is in no way inconsistent with the first. Although defendants may have, as the Ruben Parties claim, "wanted as broad a definition of 'Settlement Class' as possible, so that they would receive as much insulation from future litigation as possible," (Ruben Objection at 8), the Court cannot permit persons "without any colorable legal claims against defendants . . . to share in the settlement fund" without abusing its discretion. *See Chicken Antitrust*, 669 F.2d at 238.

Not all acquirers of Eligible Securities have "colorable legal claims" against the settling defendants. *See id*. "Only purchasers or sellers of the securities in dispute have standing to bring claims under Section 10(b)." *In re Enron Corp. Sec. Litig.*, No. H-01-3624, 2004 U.S. Dist. LEXIS

8158, at *30 n.23 (S.D. Tex. Feb. 24, 2004); *accord Krim v. BancTexas Group*, 989 F.2d 1435, 1443 (5th Cir. 1993). "Holders of securities received as gifts are neither sellers or purchasers." *McFeeley v. Florig*, 966 F. Supp. 378, 382 (E.D. Pa. 1997); *see also Rose v. Ark. Valley Envtl. & Util. Auth.*, 562 F. Supp. 1180, 1189 n.8 (W.D. Mo. 1983) (court was "unaware . . . of any case which would support the proposition that one who ***receives*** a security, but who parts with no consideration and incurs no liabilities in connection therewith, can be considered a 'purchaser' of the security or otherwise entitled to maintain a 10b-5 cause of action in connection with its earlier sale to his or her donor") (emphasis in original). The Ruben Parties' objection that the Plan should compensate persons who acquired Eligible Securities without parting with consideration, incurring any liability, or showing any evidence of a functional purchase of securities is contrary to Fifth Circuit precedent. *See Chicken Antitrust*, 669 F.2d at 238; *Rathborne v. Rathborne*, 683 F.2d 914, 920 (5th Cir. 1982); *see also Rose*, 562 F. Supp. at 1189 n.8.

Citing provisions in the Notice that define "Eligible Claimants," the Ruben Parties contend the "Plan itself recognizes . . . that the settlements applied both to Eligible Securities that were 'purchased' or 'acquired': "Eligible Claimants' means all Persons (and their beneficiaries) who purchased or acquired any Enron Securities or Enron-Related Securities by any method . . . ." Ruben Objection at 7 (quoting Notice, §V(A)(1)) (original emphasis omitted). However, paragraph 2 of the Eligible Claimants section, the same section on which the Ruben Parties rely, makes clear that "[t]o share in the distribution of the Net Settlement Fund, an Eligible Claimant must have purchased or otherwise acquired an Enron or Enron-Related Security in the Eligible Period and must have suffered a loss resulting from the alleged Enron fraud by December 3, 2001, on his/her/its investments in that security." Notice, §V(A)(2). The Plan is unequivocal: Each Claimant, purchaser and acquirer alike, "must have suffered a loss resulting from the alleged Enron fraud" to recover from the settlement fund. *See In re Veeco Instruments Sec. Litig.*, No. 05 MDL 01695 (CM),

2007 U.S. Dist. LEXIS 85629, at *38 (S.D.N.Y. Nov. 7, 2007) (finding that "[t]he plan of allocation follows the Supreme Court's decision in *Dura Pharmaceuticals*, and requires that the claimant must have purchased the security during the Class Period and held it on the day of corrective disclosure, recognizing that Class Members suffered an economic loss only if they bought shares during the Class Period and sold them after the Class Period ended on February 10, 2005"); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 169-70 (S.D.N.Y. 2007) (rejecting objections to a settlement by objectors who suffered no recognized loss under the approved plan of allocation).

The Ruben Parties again rely on *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166 (E.D. Pa. 2000) to support their claim "that market value, whether as expressly agreed in writing, or as determined by the market pricing at around the time of the transaction, is the best indication of the value exchanged." Ruben Objection at 15. The cited portion of the Ikon plan of allocation describes the valuation of shares in the context of business acquisitions, *i.e.*, a true exchange of value. *Ikon*, 194 F.R.D. at 199. Yet what the Ikon plan (and the court) said about share valuation in these "value-for-value" exchanges eviscerates the Ruben Parties' argument:

> For purposes of this calculation the purchase ***price per share shall be the price or value stated to be the price of the IKON Securities in the contract of sale, or if the contract does not specify such price, then*** the average market price for the IKON Securities for the ten (10) business days preceding the closing date of the sale.

Id. at 199. This is a far cry from the Rubens' suggestion that the consideration for "acquired" shares should always and automatically be the market price without reference to the economic reality of the particular transaction.

B. The Plan Does Not Discriminate Against Persons Who Acquired Eligible Securities by Gift or Inheritance

The Ruben Parties assert the "Plan burdens class members who acquired Eligible Securities by means of gift our [sic] inheritance to determine and report the tax treatment of those acquisitions, but imposes no such burden on class members who purchased or acquired securities by other

means." Ruben Objection at 9. To the contrary, the Plan simply requires persons who acquired Eligible Securities by whatever means to establish they have standing to assert a claim and suffered compensable damage.

Again, as this Court held earlier in the Enron litigation: "Only purchasers or sellers of the securities in dispute have standing to bring claims under Section 10(b)." *Enron*, 2004 U.S. Dist. LEXIS 8158, at *30 n.23. "The absence of consideration is . . . fatal to a donee's Section 10(b) claim." *Berk v. Md. Publick Banks*, 6 F. Supp. 2d 472, 474 n.4 (D. Md. 1998). Requiring some sort of exchanged consideration, such as a step-up in tax basis, simply ensures valid claims are being paid. For the case law does not "support the proposition that one who receives a security, but who parts with no consideration and incurs no liabilities in connection therewith, can be considered a 'purchaser' of the security or otherwise entitled to maintain a 10b-5 cause of action in connection with its earlier sale to his or her donor." *Rose*, 562 F. Supp. at 1189 n.8. Nothing is unfair in ensuring the standing rules for a securities fraud claim apply in the administration process. *See also* Lead Plaintiff's Response at 7-12.

"A class member that on a given day acquired securities by means of a gift or inheritance, and then chose based on Enron representations not to sell the securities," the Ruben Parties contend, "would have suffered the exact same loss in value as a class member that purchased the same securities on the same date." Ruben Objection at 10. The donee may have experienced the same diminution in value as the purchaser or acquirer for value of the Eligible Securities, but he has suffered no compensable loss. A person who received Enron securities as a gift or through an inheritance (and suffered no tax consequences) does not compare with one who bought or acquired Enron securities by exchanging consideration. Unlike the purchaser, the donee invested nothing. Moreover, he has no securities fraud claim. "It is well established that mere retention of securities in

reliance on material misrepresentations or omissions does not form the basis for a §10(b) or Rule 10b-5 claim." *Krim*, 989 F.2d at 1443 n.7.

The Ruben Parties also claim their acquisitions in Enron and Enron-Related Securities are compensable under §10(b) and Rule 10b-5. *See* Ruben Objection at 3-4. They contend they "had several types of acquisitions, in which consideration was exchanged and the acquired securities were contemporaneously valued at readily ascertainable market value." *Id*. In contrast to their characterization of these transactions as involving exchanges of consideration, based on their description or the information they have supplied to Lead Counsel to date, the "economic reality" of many of these transactions suggests that they are gifts. *See Rathborne*, 683 F.2d at 920. "Holders of securities received as gifts are neither sellers nor purchasers." *McFeeley*, 966 F. Supp. at 382; *accord Berk*, 6 F. Supp. 2d at 474 n.4 (finding "[t]he absence of consideration is . . . fatal to a donee's section 10(b) claim").

The Ruben Parties assert that "on October 31, 2001, Richard Ruben as grantor entered a trust agreement, pursuant to which the Trust acquired 131,689 shares of Enron Common stock and 1,500 shares of preferred stock to be held in trust for Mr. Ruben's children." Ruben Objection at 4. This is a gift transaction, which even objectors admit. *See id.* ("The acquisition of Eligible Securities to satisfy a commitment ***to provide a gift***.") (original emphasis omitted). Simply calling this transaction "a commitment to provide a gift" does not change its nature and economic reality. *Id*.

The objectors describe another gift as the "acquisition of Eligible Securities in satisfaction of a pledge to make a charitable contribution." Ruben Objection at 3. The "pledge" was a gift from Selma Ruben to the Selma Ruben Foundation, nothing more. *See id.* And the "acquisition of Eligible Securities in satisfaction of a preexisting obligation, such as payment of principal or interest under a debt obligation, or payment of an annuity obligation" is simply payment to a beneficiary

under the terms of a trust – and again a gift.[3] *Id*. (original emphasis omitted). Any statements by Lead Counsel that certain Ruben transactions may be compensable have always been qualified by the requirement that appropriate documentation regarding these transactions be provided. To date, in the main, such documentation has not been provided.

C. The Plan Does Not Discriminate Against Persons Who Purchased or Acquired Eligible Securities Between September 9, 1997 and August 16, 1998

The Plan does not discriminate against claimants who purchased Eligible Securities between September 9, 1997 and August 16, 1998, as the Ruben Parties allege. *See* Ruben Objection at 12. The Plan is inflation, not market-loss based, and is designed to compensate Eligible Claimants for actual damages incurred due to the fraud-based price inflation in an Enron security, not for changes in market prices unrelated to fraud. As the misrepresentations about Enron's financial statements and financial condition became more egregious, the inflation in the trading price of Enron securities, in particular the common stock and "stock-like" preferred, surged. For the early period of September 9, 1997 through August 16, 1998, Stanford Consulting, one of The Regents' economic experts, calculated the estimated inflation at the time of purchase or sale for Enron common stock and "stock-like" preferred securities at 1%. *See* Notice at 7. In calculating the inflation attributable to fraud, Stanford relied on the same value-line methodology Dr. Nye employed in his damages report submitted in the *Newby* litigation. Roman Weil, who is, among other things, the V. Duane Roth Professor of Accounting at the University of Chicago's Graduate School of Business and has previously testified regarding the plan of allocation in *Cendant*, has reviewed the assumptions and judgments underlying the Plan's inflation analysis, and finds them fair, reasonable, and adequate.

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[3] The Rubens' final transaction, described in the middle of page three of their objection, may qualify, but transactional paperwork must be supplied and the specifics of the transaction reviewed as to its economic reality.

See Weil Decl. at 1-2, 9-10. According to Professor Weil, "evidence and logic undergird each of the Plan's components and the overall Plan. I find each of the components of the algorithm FRA [fair, reasonable, and adequate], so I cannot judge the outcome other than FRA [fair, reasonable, and adequate]." Weil Decl. at 3, 10.

The Ruben Parties object that "Professor Weil never provides an affirmative justification for the specific 'inflation' rates used in the proposed Plan of Allocation." Ruben Objection at 13. Their objection misses the mark. It was not Professor Weil's assignment to justify specific inflation percentages. Rather, he reviewed the methodology and the choices made in formulating the Plan. The Plan as a whole must be "fair, adequate and reasonable," (*Chicken Antitrust*, 669 F.2d at 238) and this is the precise question on which Professor Weil opined. *See* Weil Decl. at 1. Lead Plaintiff and Lead Counsel committed extraordinary time and resources to do what is fair and reasonable for individual claimants and the class as a whole. Lead Plaintiff's experts, Dr. Blaine Nye, Ph.D. and Stanford Consulting, calculated the different inflation values in Enron securities at different points in the class period. Were class members who purchased between September 9, 1997 and August 16, 1998 to receive compensation in excess of the amount calculated by Lead Plaintiff's experts, those who purchased in later periods would – without any justification – necessarily have to receive ***less*** than the experts calculate they are due. The Ruben Parties simply disagree with Stanford's conclusion regarding the percentage of inflation in Enron securities purchased during the period from September 9, 1997 through August 16, 1998. *See* Ruben Objection at 12-13. But that disagreement in no way demonstrates that the Plan is anything but fair, reasonable, and adequate. As Professor Weil reminds us, the "fallacy of composition teaches that what's true of each element in a set is not necessarily true of the entire set." Weil Decl. at 10. Looking at the Plan as a whole, it is fair, reasonable, and adequate. *See id*. at 1, 10.

The Plan is not designed "to virtually eliminate the value of any purchases or acquisitions prior to August 16, 1998," as the Ruben Parties claim. *See* Ruben Objection at 12. The Plan's inflation formula reflects the observations and calculations of The Regents' damages experts. While parts of the Enron fraud, Chewco in particular, occurred before August 17, 1998, the existence of instances of fraud in this timeframe does not mean that the price of the Eligible Securities were necessarily inflated by amounts greater than those determined by Stanford. For this reason, Lead Plaintiff turned to damages experts to calculate the actual levels of fraud-based inflation.[4]

D. The Prior Notices Were Clear and Made No Representation Regarding How Settlement Funds Would Be distributed

The Ruben Parties again charge that previous notices disseminated in connection with prior settlements were inadequate in advising them as to how their claims would be treated. *See, e.g.*, Ruben Objection at 13. Each of the notices disclosed that after further notice and an opportunity to be heard, lead counsel would seek Court approval for a plan of allocation that would govern the calculation of Eligible Claimants' claims. *See* Declaration of Keith F. Park in Support of Lead Plaintiff's Response to Richard Ruben's Opposition (Docket No. 5765) to Lead Plaintiff's Motion for Preliminary Approval of Plan of Allocation (Docket Nos. 5755 and 5766) (Docket No. 5776). No one, including the Ruben Parties, objected to this procedure. Moreover, none of the prior notices promised that potential claims would be treated in any particular way or would be included or excluded from the ultimate Plan of Allocation.

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[4] The Ruben Parties point to the October 19, 1998 start date of the *Newby* class period as evidence "Lead Plaintiff never believed that claims should be made with respect to earlier periods." Ruben Objection at 12. But that commencement date of the class period was based on the statute of limitations existing at the time. The Court found the Sarbanes-Oxley statute of limitations period did not apply to the *Newby* litigation. *See* 2/18/05 Memorandum and Order of Partial Dismissal (Docket No. 146 in Case No. 02-3401).

The prior notices were directed to those "who purchased or acquired" Enron securities. The definition of "purchase" under the securities laws includes "any contract to buy, purchase, or otherwise acquire." 15 U.S.C. §78c(a)(13). Case law requires that in order to have a compensable claim, one must sustain economic loss (*see Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005)) and be a qualified "purchaser or seller" of securities. *See Enron*, 2004 U.S. Dist. LEXIS 8158, at *30 n.23. Thus, the Plan is completely consistent with prior notices to the class and with the law governing securities claims. The Ruben Parties' objections to the notices are unwarranted, and, contrary to their contentions, notice and an opportunity to be heard were given to them as well as other absent class members. *See* Ruben Objection at 14.

III. THE SILVERCREEK OBJECTIONS SHOULD BE OVERRULED

On December 4, 2007, Silvercreek[5] joined in the Opposition of Subclass Representative Nathaniel Pulsifer to Lead Plaintiff's Motion for Preliminary Approval of Plan of Allocation of Settlement Proceeds and Approval of Form and Manner of Notice (Docket No. 5764) ("Pulsifer Opposition"). Nathaniel Pulsifer, as Trustee of the Shooter's Hill Revocable Trust ("Pulsifer"), objected to the Plan because it did not "segregate" what he characterized as "separate" §11 settlement funds from §10(b) settlement funds and argued §11 claimants should have sole access to these separate pools. Pulsifer Opposition at 1. Pulsifer and Lead Plaintiff resolved Pulsifer's objections by changing the Plan with respect to the 7% Exchangeable Notes. *See* Status Report in Response to the Court's December 14, 2007 Order (Docket No. 5782) (Docket No. 5783). Silvercreek has now filed its own objection to the Plan. It essentially repeats Pulsifer's arguments with one addition: that the Plan offers no clarity on the distribution of settlement funds to those (like

[5] Plaintiffs Silvercreek Management, Inc., Silvercreek Limited Partnership, Silvercreek II Limited, OIP Limited, and Pebble Limited Partnership are referred to collectively as "Silvercreek."

Silvercreek) who opted out of some, but not all settlement classes. *See* Objection of Silvercreek Management, Inc., Silvercreek Limited Partnership, Silvercreek II Limited, OIP Limited, and Pebble Limited Partnership to the Enron Plan of Allocation ("Silvercreek Objection") (Docket No. 5874) at 10.

Silvercreek's objections repeat Pulsifer's. Silvercreek argues it "is improper to commingle the pure Section 11 settlements (Bank of America, Outside Directors and Lehman Brothers) with the overall Enron settlements" because the "Section 11 settlements were solely for the benefit of owners of certain Enron debt securities" and commingling the settlements would "improperly benefit[]" those who have no legal right to the settlement dollars. Silvercreek Objection at 4. Silvercreek concedes The Regents increased the size of the multiplier on the 7% Exchangeable Notes in response to Pulsifer's objection, yet argues this fails to cure the problem it perceives – that class members with §11 claims are having their claims diminished in favor of class members with §10(b) claims. Silvercreek Objection at 5. But monies obtained to settle the 7% Note claims were obtained not only in exchange for the extinguishment of §11 claims, but also §10(b) claims. For this reason alone, these monies should not be segregated from other §10(b) recoveries.[6] *See* Response to Pulsifer at 1. Setting aside separate pools of money for the §11 purchasers, moreover, could result in unfair and disparate recovery percentages per dollar of loss among claimants. *See* Supplemental Declaration of Roman L. Weil ("Weil Supp. Decl."), ¶4.

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[6] The Regents hereby incorporates all arguments previously set forth in Lead Plaintiff's Response to Nathaniel Pulsifer's Opposition (Docket No. 5764) to Lead Plaintiff's Motion for Preliminary Approval of Plan of Allocation (Docket Nos. 5755 and 5756) (Docket No. 5774) ("Response to Pulsifer").

A. The Plan Increases Recoveries on Section 11 Losses Through the Application of Multipliers

The Regents initially brought §10(b) and §11 claims against Bank of America ("BofA") and the Outside Directors. As a condition of settlement, BofA insisted upon and received both a broad settlement class definition and releases of §10(b) claims relating to a host of Enron or Enron-Related Securities, though the §10(b) claims had been dismissed.

The Plan properly takes into account that at the time of settlement with BofA and the Outside Directors, only §11 claims remained against them. But that does not mandate a "segregation" of those settlement funds. A proper choice was the use of multipliers designed to put the §11 Note purchasers in the same economic position as if segregation had occurred and, by using only one pool of money, eliminate the risk of an unfair distribution because of disparate claim rates. In other words, a choice was made between two alternatives, and the chosen course of action was not unfair. Based on these and other considerations, the Note purchasers received multipliers on their §11 losses. In addition, if they paid more than the offering price, they will have an additional Recognized Claim amount (based on an inflation measure) on top of the multiplied §11 amount. *See* Ex. A to the Sylvester Decl.; Notice, §V(D)(3).

Citing the Declaration of Helen J. Hodges in Support of Final Approval of Partial Settlements with Bank of America, Lehman Brothers, the Outside Directors and Ken Harrison (Docket No. 3309) ("Hodges Settlement Decl."), Silvercreek argues Lead Plaintiff "specifically stated that the dismissed Section 10(b) claims had no value." *See* Silvercreek Objection at 7. Nowhere in the Hodges Settlement Decl. do The Regents state the claims have no value. The declaration is a factual recitation of what had occurred in the case with respect to these defendants – that the Court dismissed the §10(b) claims against BofA and the Outside Directors, leaving the §11 claims. But there was still the potential for an appeal of this decision and that was a legitimate factor to consider in reaching those settlements.

B. Setting Aside Specific Pools of Money for Section 11 Note Purchasers Could Lead to Inequitable Results

Silvercreek acknowledges "it is certainly a possibility" that it would be unfair to other Enron investors if the funds were segregated due to the possibility of different claims rates across different securities. Silvercreek Objection at 8. In his Supplemental Declaration, Professor Roman Weil states, "If one were to set separate pools for each of the §11 claims . . . the eventual outcomes to participants could be so disparate as to violate the principle underlying the Plan that all authorized claimants be treated in a way so as to nullify the effect of differential claims rates." Weil Supp. Decl., ¶4. It appears that Lead Plaintiff and Silvercreek agree that setting aside specific pools of money for §11 Note purchasers could lead to an inequitable result.[7] Silvercreek's argument that the effect of disparate claims rates does not justify commingling is made purely out of economic self interest.[8] And, if the Plan were written as Silvercreek wants, it is entirely possible that the end result would be another group of claimants would object that the segregation of funds treats ***them*** unfairly. While the Plan will not and need not make every claimant happy, Lead Plaintiff and Lead Counsel have sought to avoid disadvantages and unfairness that might result from segregating specific pools of money. This choice is fair, and the vast majority of potential claimants have not objected to a single pool of money.

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[7] Notably, that the Plan protects ***both*** note and stock purchasers against potential inequities. If the Plan segregated recovery pools as Silvercreek proposes, a low claim rate among note purchasers relative to the claim rate of stock purchasers would unfairly benefit those note purchasers who do file claims; conversely, a relatively low claim rate among stock purchasers would unfairly benefit stock claimants. By ensuring that the relative recoveries of note and stock purchasers are unaffected by the claim rates of the two groups, the Plan prevents either of these unfair scenarios from occurring.

[8] Silvercreek is apparently betting that the first scenario discussed in the preceding footnote is more likely than the second.

C. Distribution Amounts Will Be Equitably Adjusted to Reflect the Decision Not to Participate in the Recovery Obtained by Some Settlements

Silvercreek objects to the Plan because it "does not explain the manner in which their distribution amount will be reduced due to the fact that they opted out of some settlements but not others." Silvercreek Objection at 11. In response to questions about the Plan from Silvercreek's Counsel, Lead Counsel explained the manner in which Silvercreek's distribution amount would be reduced due to the fact that they opted out of some settlements and not others:

> The Recognized Claims of those who opted out of some, but not all, settlements will be reduced by the amount of those settlements opted out of divided by the total amount of all the settlements.

Letter from Helen J. Hodges to Steven N. Williams, dated September 10, 2007 (Supplemental Compendium, Ex. 20).[9]

If Silvercreek did not understand how its claim would be calculated after receiving the Helen Hodges September 10, 2007 letter, then it could have and should have followed up with Lead Counsel or objected at the preliminary approval stage in December on that point. Instead it only joined in Pulsifer's objection and never raised the purported problem with the Notice it now is asserting. Moreover, a pro rata adjustment that reflects which settlements Silvercreek decided to participate in is equitable and Silvercreek suggests no alternative to the one already explained to it.

IV. THE CORMAN PARTNERSHIP'S OBJECTIONS TO THE PLAN SHOULD BE OVERRULED

The Corman Partnership contends "there is no logical, financial, legal, or other basis for the Plan of Allocation's disparate treatment of 'Bond-Like' Preferred Securities (including the TOPRS),

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[9] "Supplemental Compendium, Ex. __" refers to Lead Counsel's Supplemental Compendium of Exhibits in Support of Lead Counsel's Reply in Support of Motion for Award of Attorney Fees and Reimbursement of Plaintiffs' Expenses and Lead Plaintiff's Memorandum in Response to Objections to the Plan of Allocation filed herewith.

on the one hand, and Enron common stock and 'Stock-Like' Preferred Securities, on the other hand." *See* J. Corman Family Limited Partnership #3's Objection to the Plan of Allocation of Settlement Proceeds (Docket No. 5859) ("Corman Objection") at 3. The Regents' damages expert, Dr. Nye, disagrees. The price of the $10.50 Convertible Preferreds, unlike the trading price of other Enron preferred securities, fluctuated with the price of Enron common stock. "The $10.50 Convertible Preferred was convertible into 27.304 post-split shares of Enron at any time at the option of the holder; therefore this security's value," declared Dr. Nye, "was dependent upon the value of Enron common stock." *See* Declaration of Blaine F. Nye in Support of Lead Plaintiff's Amended Motion for Class Certification (Docket No. 1445) (Docket No. 4390) ("Nye Decl.") at 77. The price chart for the $10.50 Convertible Preferred shows that its price tracked Enron common (Supplemental Compendium, Exs. 21 and 22).

The other preferred securities, including the TOPRS, traded like Enron's fixed income securities. "The four bond-like securities were issued by limited partnerships that existed only to sell each class of securities, invest the proceeds in Enron and its affiliates, and make the interest and principal payments to the holders of the preferred securities." Nye Decl. at 76. As the beneficiary of the sales proceeds, Enron guaranteed the stated interest payments and return of principal for these securities. *Id*. Dr. Nye found "these preferred securities were bond-like in that investors looked to the Company's ability to pay the scheduled distributions monthly or quarterly, and eventually to repay the principal amount." *Id*. The prices of these bond-like preferreds tracked the Enron Notes, not Enron common stock. *See* Supplemental Compendium, Exs. 23-24. The Plan is thus based on Dr. Nye's observations and expert opinions about the price inflation in each of the classes of Enron preferred securities. There is nothing unfair with this approach and, contrary to the Corman Partnership's contentions, the Plan ***is*** properly founded in logic, finance and applicable law.

The Corman Partnership argues that by filing a claim form it may unintentionally waive its objection. This objection is unfounded as a practical matter. The Corman Partnership's objection to the treatment of TOPRS is before the Court right now, and the hearing on final approval is set for the end of February, two full months before the proof of claim is due. Lead Plaintiff cannot imagine how the Corman Partnership's objection will not be resolved before the April 30, 2008 deadline to submit a claim form. And even if the objection was not resolved by then, the Notice (and the law) provides that the Court can "modify, amend or alter the Plan of Allocation without further notice or to allow, disallow or adjust any Authorized Claimant's claim, to ensure a fair and equitable distribution of funds." Notice, §V(E)(5).

The Partnership also objects to lead counsel representing class members who purchased TOPRS and "'stock-like'" preferred stock. Corman Objection at 4. "Objectors have failed to present any specific evidence that their interests were unfairly compromised apart from their general complaint that their share of the rewards was unsatisfactory." *Chicken Antitrust*, 669 F.2d at 237. The Corman Partnership cannot show its rights were unfairly compromised due to any alleged conflict of interest, for the Plan distributes proceeds of the settlement fund, including to Eligible Claimants who bought preferred securities, based on the observed impact the Enron fraud had on each particular security, not because of any intent to benefit one group of class members over another.

V. FIDUCIARY COUNSELORS' OBJECTIONS TO THE PLAN SHOULD BE OVERRULED

Fiduciary Counselors criticize the Plan because Eligible Claimants' "'gains and losses will not be netted or aggregated across different Eligible Securities.'" Objection of the Enron Savings Plan and the Enron Stock Ownership Plan (Docket No. 5869) ("Fiduciary Objection") at 18 (quoting Notice, §V(C)(1)(j)). Although the Plan already provides that in "the case of Enron common stock and options on that stock, gains and losses on both the stock and options will be combined and

thereafter netted against each other" (*see* Notice, §V(C)(1)(j)), Fiduciary Counselors demands more. They insist the Plan cannot be fair unless the gains and losses from a claimant's transactions in all Eligible Securities are netted against each other. *See* Fiduciary Objection at 20-21. However, the Plan, as it exists, is fair and need not be changed.

The Plan recognizes the different investment objectives of persons who bought debt securities and those who purchased common stock and takes into account hedging techniques commonly applied during the class period. For Enron's fixed income securities, the principal source of returns for investors was the regular interest payments due under the notes. Investors in Enron common stock, on the other hand, looked to capital appreciation as the principal source of returns for these assets, and some, at times, hedged their purchases of Enron common stock with options on Enron equities. Because hedging of equity securities with options was a well-established investment technique during the class period, the Plan directs that in "the case of Enron common stock and options on that stock, gains and losses on both the stock and options will be combined and thereafter netted against each other." *See* Notice, §V(C)(1)(j).

Fiduciary Counselors complains that "an investor who sold short an Enron bond and profited from the company's collapse would not have the profits from such an investment offset against that investor's losses incurred from stock purchases." Fiduciary Objection at 20. Citing press reports about one investor, Wilbur Ross,[10] Fiduciary Counselors claims its objection is not merely hypothetical. *See* Fiduciary Objection at 20 n.24. Capital-structure arbitrage surfaced as an accepted investment technique in late 2001; *i.e.*, at the end of the Enron debacle. The Wall Street Journal

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[10] *See* Adam Bradbery, *Hedge Funds Take to Capital-Structure Arbitrage*, Wall St. J., Aug. 19, 2003 (Supplemental Compendium, Ex. 25); *see also* Robert Clow, *Global Investing – Vultures Scour the Horizon for New Prey*, Fin. Times, Oct. 22, 2001 at 25 (Supplemental Compendium, Ex. 26) ("The hedge fund managed by his W L Ross normally engages in capital structure arbitrage, shorting the equities of distressed companies, which could easily prove worthless, and buying their bonds.").

reported in 2003 that "hedge-fund managers and the investment banks servicing them suggest that funds dedicated to capital-structure arbitrage really started to emerge only in late 2001." *See* Bradbery, *supra* n.10, at 281 (Supplemental Compendium, Ex. 25). In July 2004, The Financial Times stated that capital-structure arbitrage "burst on to the scene two years ago," well after the class period closed. *See* Alex Skorecki, *Hedge Funds Fill a Strategy Gap*, Fin. Times, July 20, 2004 (Supplemental Compendium, Ex. 27). Since this arbitrage strategy does not appear to have had much sway during the Eligible Period, the fact that one identified investor employed it does not make the Plan unfair.

Fiduciary Counselors argues even ordinary investors who traded in different bond classes could "reap windfalls from the Plan of Allocation at the expense of Plan Participants and other ordinary investors." Fiduciary Objection at 21. But profits from any such bond transactions could have resulted from changes in interest rates or other factors unrelated to fraud. The Regents does not believe it is fair to presume such profits were the direct result of the Enron fraud and does not agree that these purchasers should automatically be penalized. As for Eligible Claimants who bought Enron stock and particular bonds and then sold some of these securities at a profit, the Plan takes into account the differing motivations for investing in the different classes or types of securities. Lead Plaintiff believes this is a fair method to distribute the settlement proceeds.

Lastly, in formulating the Plan, The Regents believed the balance of fairness militated against offsetting gains and losses across all classes of Eligible Securities. Lead plaintiff also concluded it was fair not to offset recoveries Eligible Claimants received in other legal proceedings against distributions in this case. Accordingly, for example, the Plan does not offset distributions Claimants received in the Enron bankruptcy proceedings. Nor does the Plan offset recoveries Eligible Claimants received in the *Tittle* action. If the Court determines, as Fiduciary Counselors advocates, to net gains and losses of a Claimant across all classes of Enron securities, then in fairness, it should

also examine whether gains from recoveries in other Enron-related litigations should also be offset against recoveries in this litigation.

VI. MR. CAUTHEN'S OBJECTIONS TO THE PLAN SHOULD BE OVERRULED

Wiley M. Cauthen has submitted two objections to the Plan.[11] *See* Wiley M. Cauthen Objection Letter Regarding Objection to Rationale of Distribution Qualification Limits (Docket No. 5884) ("Cauthen Objection") at 1; Corrected Order Approving Form and Manner of Notice (Docket No. 5789) ("Order"), ¶¶5-7; Notice, §VIII. Cauthen requests that ***holders*** of Enron securities during the class period be allowed to participate in the settlement fund. He explains:

> Their decisions were to hold (or not sell) Enron securities which they had previously purchased. Their decisions to ***hold*** are just as valid and meaningful actions as decisions to ***acquire*** in the context of this proceeding and the distribution of the settlement funds. The resulting impact and loss of these parties who decided to ***hold*** their Enron securities due to relying on the inflated incorrect financial markets information which the Alleged Fraudulent Action caused are just as real and meaningful as those experienced by parties who made the ***acquire*** decisions allowed by the Notice.

Cauthen Objection at 2 (emphasis in original). But, "[i]t is well established that mere retention of securities in reliance on material misrepresentations or omissions does not form the basis for a §10(b) or Rule 10b-5 claim." *Krim*, 989 F.2d at 1443 n.7. Sustaining Cauthen's first objection therefore would constitute an abuse of discretion. *See Chicken Antitrust*, 669 F.2d at 238.

Cauthen's other challenge to the Plan – that the Court "remove the exclusion of parties who acquired Enron securities during or prior to the Eligible Period by means of a gift, inheritance or operation of law" – fares no better. *See* Cauthen Objection at 2. Again, there are no holder claims under §10(b) and Rule 10b-5. *See Krim*, 989 F.2d at 1443 n.7. Moreover, "[h]olders of securities received as gifts are neither sellers or purchasers." *McFeeley*, 966 F. Supp. at 382; *see also Rose*,

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[11] These objections are late. They were submitted on February 3, 2008 after the Court's deadline of February 1, 2008. Nonetheless, we respond to them here.

562 F. Supp. at 1189 n.8 (court was "unaware . . . of any case which would support the proposition that one who ***receives*** a security, but who parts with no consideration and incurs no liabilities in connection therewith, can be considered a 'purchaser' of the security or otherwise entitled to maintain a 10b-5 cause of action in connection with its earlier sale to his or her donor"). *See also In re Firstplus Fin. Group, Inc. Sec. Litig.*, No. 3:98-CV-2551-M, 2002 U.S. Dist. LEXIS 20446, at *6 n.1 (N.D. Tex. Oct. 23, 2002). Cauthen's objections should be overruled.

VII. FENSTAD'S AND MCCOPPIN'S OBJECTIONS TO THE PLAN SHOULD BE OVERRULED

A. The Notice of Hearing for Final Approval Is Neither Unclear, Confusing, Nor Misleading

Larry Fenstad and Dorothy Lancaster McCoppin claim the Notice of Hearing for Final Approval is unclear, confusing, and misleading.[12] Fenstad/McCoppin Objection at 3. Their characterization of the Notice is wrong, as the Court itself has concluded by approving the form and matter of notice for this case. *See* Order, ¶1. By necessity the Notice contains much information. Some Eligible Claimants may find the Notice complicated, but this is due to the complexity of the case, the number of securities covered, and the Plan's precision. Lead Counsel worked long and hard on the Notice to make it as clear and understandable as possible, and it was carefully scrutinized by those who objected to preliminary approval. One thing is certain: The Notice is not misleading. Moreover, the Notice invites class members to contact Lead Counsel by writing with their questions about the Plan. *See* Notice, §X. Neither Fenstad nor McCoppin, however, indicate they ever requested Lead Counsel's assistance in clarifying any part of the Notice. *See* Fenstad/McCoppin Objection at 3.

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[12] Both Mr. Fenstad and Ms. McCoppin are former Enron employees who participate in various Enron employee securities plans. *See* Objections to (A) Plan of Allocation of Settlement Proceeds; and (B) Plaintiffs' Counsel's Application for Attorney Fees (Docket No. 5868) ("Fenstad/McCoppin Objection") at 2. They have been joined in their objection by other former Enron employees.

Fenstad and McCoppin complain that two web sites referenced in the Notice, www.gilardi.com and www.enronfraud.com, fail to provide "any further explanation or detailed information regarding the proposed Distribution Plan or the proposed management thereof." Fenstad/McCoppin Objection at 3. Both web sites contain Lead Plaintiff's Motion for Final Approval of Plan of Allocation of Settlement Proceeds (Docket No. 5793), which identifies by docket number court documents that support the motion. Both web sites contain a copy of the declaration Roman Weil filed in support of the Plan. This is important additional information. And §X of the Notice invites persons, in the very next sentence following identification of the two web sites, to contact counsel with their questions: "If you have any questions about the Plan of Allocation or the application for an attorney fee, you may contact Plaintiffs' Lead Counsel by writing," followed by counsel's mailing address. Notice, §X.

Fenstad and McCoppin surmise that because the mailing of Notice occurred during the holidays, some Eligible Claimants may not have received adequate time to file any objection. Claims administrator Gilardi has mailed notice to the same class on some six prior occasions. Therefore, notice of the final approval hearing should not have been delayed by reason of nominee interaction in reaching prospective Eligible Claimants.[13] Sylvester Decl., ¶¶3-5, 7. Fenstad's and McCoppin's own objection evidences this fact. Notice also was published twice in *The Houston Chronicle* and twice in *Investor's Business Daily* and "constitutes the best notice practicable under the circumstances." Order, ¶3; Sylvester Decl., ¶9. In contrast, Fenstad and McCoppin merely speculate that other class members never received sufficient time to object to the Plan.

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[13] In other words, the process by which brokers and other nominees are asked to search their records for Eligible Claimants and forward names and addresses to the Claims Administrator, was largely completed in connection with the earlier notices.

B. The Proposed Revisions to the Claim Administration Process Are Unnecessary

Fenstad and McCoppin object that there is no timetable for Gilardi, the claims administrator, to complete the claims process. Fenstad/McCoppin Objection at 4. Gilardi is committed to a prompt review of all claim forms and swift distribution of payment to Eligible Claimants. Gilardi Decl., ¶13. That said, certain circumstances are beyond Gilardi's control. A timetable for distribution cannot be set without first knowing, among other things, whether the Plan of Allocation approved by the Court is appealed, the completeness, accuracy and type of documentation Eligible Claimants are submitting to support their claims, the number of Eligible Claimants who require assistance from Gilardi and Lead Counsel's shareholder relations department in preparing a valid proof of claim, and the number, if any, of claimants who will ask the Court to review a claims determination by the claims administrator. Although these variables create difficulties in establishing a timetable for completing the administration, Gilardi is committed to making distributions as soon as practicable. *Id*.

Objectors suggest Gilardi should be paid in stages based on the work the administrator completes. *See* Fenstad/McCoppin Objection at 4. Gilardi is committed to a prompt administration and does not require incentives to expedite its duties. Gilardi Decl., ¶13. Other than urging that 30% of the administration fees be withheld until all distributions are made and the Court approves completion of the claims review process, Fenstad and McCoppin assert no factual basis for the need for these "progress payments," offer no guidance on what benchmarks the Court should adopt for paying Gilardi or how the Court should determine when specific benchmarks are met. Much of Gilardi's work in the claims process involves answering claimants' questions and assisting them in submitting a proper claim form. Gilardi Decl., ¶¶6-12. Fenstad and McCoppin never suggest how or when Gilardi should be paid for this work. Progress payments are not a good idea in this case.

Gilardi is an experienced claims administrator and is subject to the jurisdiction of the Court to answer any questions it may have about the administration process.

It is also unnecessary to require that the claims administrator be ordered to report to the Court every 90 days. *See* Fenstad/McCoppin Objection at 4. Reporting to the Court every three months is unnecessary and requires Gilardi to divert resources away from processing Enron claims. Nevertheless, were the Court to want periodic reports from the claims administrator, Gilardi will submit them.

Fenstad and McCoppin charge no "information is available to individual class members regarding what options are available for claimants who disagree with the decision of the Claims Administrator regarding recognition or payment of claims." Fenstad/McCoppin Objection at 4. As discussed above and in the accompanying Gilardi Decl., ¶¶9-12, failing a resolution of issues with a claimant, the claimant always is advised of the right to seek the Court's review of a determination regarding a claim. Moreover, the Notice itself states that the "Court reserves jurisdiction to modify, amend or alter the Plan of Allocation without further notice or to allow, disallow or adjust any Authorized Claimant's claim, to ensure a fair and equitable distribution of funds." Notice, §V(E)(5). The Notice thus informs Eligible Claimants of their right to dispute any decision by the claim administrator with the Court. *See id*.

Gilardi goes to great lengths to ensure the accuracy and validity of claims, and where issues arise, a dialogue is established with the claimant in order to arrive at a fair and correct result. Gilardi does not look for ways to reject a claim, but instead makes every effort to assist a claimant in submitting a valid claim. Gilardi Decl., ¶¶5-12. Lead Counsel will also commit the requisite time to resolve disputed claims in a just fashion.

In addition, the objectors claim the "Proof of Claim Form is contrary to instructions being given by the Plan Administrator to former Enron employees." Fenstad/McCoppin Objection at 6.

Gilardi employees are not providing Eligible Claimants with information that conflicts with the Notice or Plan. Further, the Declaration of Larry Fenstad, memorializing a purported conversation with Gilardi,[14] demonstrates the lengths the claims administration is going to assist former Enron employees along with all other Eligible Claimants in submitting a valid Proof of Claim. This and other information is available to class members by just writing to Lead Counsel. *See* Notice, §X.

C. The Proof of Claim Is Not Confusing or Inconsistent

Fenstad and McCoppin find the proof of claim form confusing and inconsistent and claim they cannot determine if they need to submit supporting documentation with their claims. *See* Fenstad/McCoppin Objection at 4-5. Like everyone else, they must submit supporting documentation. Lead Plaintiff is sympathetic to the plight of former Enron employees and has tried to provide as much information as possible to them through www.enronfraud.com and through counsel's shareholder relations department. That said, notices of the partial settlements have been mailed on multiple prior occasions, and former Enron employees could have requested their trading records from UBS, or any other brokerage house, long ago. In addition, Lead Counsel and Gilardi have repeatedly communicated with Fiduciary Counselors, the independent fiduciary assisting former Enron employees, to gain information and coordinate responses to questions from the former employees. Gilardi Decl., ¶¶14-17. We also understand Fiduciary Counselors is sending a letter to former Enron employees about making claims in this case, and Gilardi is continuing to respond to their questions as well. While The Regents disagrees that the claim form is confusing, due to the complexity of the litigation, extraordinary efforts are being made to ensure all Eligible Claimants have the assistance to submit a proper proof of claim.

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[14] *See* ¶18 of the Gilardi Decl. for a response to this assertion.

D. The April 30, 2008 Deadline for Filing Claims Should Not Be Extended

Fenstad and McCoppin urge the Court to extend the deadline for filing proofs of claims because Fiduciary Counselors, who is filing claims on behalf of certain former Enron employees, allegedly has yet to receive information necessary to submit the claims from Mercer, the records keeper for the Enron employee Plan. Fenstad/McCoppin Objection at 6. Based on this information, the objectors argue "there is serious doubt regarding [Fiduciary Counselors'] ability to file all related claims before April 30, 2008." *Id*. Even by Fenstad's and McCoppin's own account, Fiduciary Counselors' attorneys "'are hopeful that [they] can meet the deadline.'" *See id*. With the deadline more than two months away and lawyers for Fiduciary Counselors optimistic about meeting the deadline, it would be premature to extend the claims period at this time. Lead Counsel, moreover, has no control over Mercer, but are working with Fiduciary Counselors and Gilardi to ensure that the Plans' claims and the claims of former Enron employees are processed promptly upon receipt. Gilardi Decl., ¶¶14-15. Toward this end, the Court has empowered Lead Counsel, "in their discretion, [to] accept for processing late claims so long as the distribution of the Net Settlement Fund to Authorized Claimants is not materially delayed thereby." Order, ¶5.

E. Fees for the Objectors and Their Counsel Are Unwarranted

Lead Plaintiff opposes paying an "incentive award" to Fenstad and McCoppin as compensation for objecting to the Plan. *See* Fenstad/McCoppin Objection at 15-16.[15] As purported class members, Fenstad and McCoppin already are set to collect their pro rata share under the Plan, and additional compensation is undeserved. Were the Court inclined to grant the requested incentive award, Lead Plaintiff suggests that the Court order Fenstad and McCoppin to demonstrate the

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[15] Among other things, an "incentive" award may contravene the Private Securities Litigation Reform Act of 1995. *See* 15 U.S.C. §78u-4(a)(4).

tangible benefits, if any, Eligible Claimants have derived from their objections as well as to submit an affidavit or declaration detailing the work and time they expended in objecting to the Plan.

Fenstad and McCoppin indicate their counsel will also request compensation from the Court. *See* Fenstad/McCoppin Objection at 15. The Regents opposes any request from objectors' counsel for attorneys' fees at this time. At this point, Fenstad and McCoppin are "reserve[ing] the right to apply for reasonable and appropriate compensation" for counsel. *See* Fenstad/McCoppin Objection at 15. Lead Plaintiff, in turn, reserves its right to respond to any specific request for attorneys' fees submitted by objectors' counsel.

VIII. THE OBJECTION OF JEANNETTE DREISBACH SHOULD BE OVERRULED

Ms. Dreisbach urges the Court to "[a]llow individual investors/shareholders to recover full amount of loss then whatever amount remains in the Allocation Fund be split fairly among the other plaintiffs who were acting as money managers for other people's money and did not suffer personal loss." Statement of Jeannette Dreisbach in Opposition to the Proposed Plan of Allocation, But in Support of a Fair, Reasonable and Adequate Compensation for Shareholders (Docket No. 5873) ("Dreisbach Objection") at 5. Lead Plaintiff disagrees that individual investors should receive preferential treatment to institutional investors, and the Plan is designed neither to favor nor penalize any class of claimants.

IX. THE OBJECTION OF STANLEY MAJORS SHOULD BE OVERRULED

Stanley Majors purchased Enron common stock after the end of the Eligible Period and has objected because, among other things, he will not be included in any distribution under the Plan. Objection and Declaration of Stanley Majors (Docket No. 5840) ("Majors Objection"). Mr. Majors previously objected to the Arthur Andersen and Kirkland & Ellis settlements on the same grounds. (Docket No. 5315). As the Court has done in these two prior instances, his objections should be overruled.

Mr. Majors appears to have bought his Enron stock in 2003 at a cost of about $0.08/share and more than a year after the Enron fraud was revealed and Enron's bankruptcy. Majors Objection, ¶¶3, 5. The Eligible Period for distributions under the Plan ends on December 2, 2001, and The Regents have never asserted a basis or sought to bring the period forward. Mr. Majors bought stock because he believed Enron would successfully emerge from bankruptcy (Majors Objection, ¶6), but this is an investment decision based on very different facts and circumstances than those asserted in this case. While The Regents are sympathetic to his situation, Mr. Major's objection is without merit and should be overruled.

DATED: February 22, 2008

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S MEMORANDUM IN RESPONSE TO OBJECTIONS TO THE PLAN OF ALLOCATION (DOCKET NOS. 5840, 5859, 5860, 5868, 5869, 5873, 5874, 5884, 5886) has been served by sending a copy via electronic mail to serve@ESL3624.com on February 22, 2008.

I also certify that a copy of the above-mentioned document has been served via overnight mail on the parties listed on the attached "Additional Service List" on this 22nd day of February, 2008.

Deborah S. Granger

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