IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES NELSON, on behalf of himself and a class of persons similarly situated, Plaintiff, v. UBS GLOBAL ASSET MANAGEMENT (AMERICAS), INC., f/k/a UBS Partners, Inc., Defendant.	Case No. 03 CV 6446 Hon. Charles P. Kocoras

JAMES NELSON, on behalf of himself and a class of persons similarly situated, Plaintiff, v. BP CORPORATION NORTH AMERICA INC., MARVIN DAMSMA, BYRON GROTE, COLIN MALTBY, JAMES NEMETH, ANTHONY NOCCHIERO, DONALD PACKHAM and IAN SPRINGETT, Defendants.	No. 04 CV 7660 Judge Charles P. Kocoras

MEMORANDUM IN SUPPORT OF
FINAL APPROVAL OF THE PROPOSED SETTLEMENTS

I. INTRODUCTION

Plaintiff James Nelson submits this memorandum in support of final approval of the proposed settlements of both of the captioned cases pursuant to Fed. R. Civ. P. 23(e). As set forth herein, the settlements satisfy all of the relevant criteria and should be approved.[1]

Achieved after more than three years of persistent effort by Co-Lead Class Counsel, which consumed over $200,000 in expenses and several thousand hours of professional work, these $7 million settlements – among the first related to Enron – are eminently worthy of the Court's imprimatur.[2] They ensure substantial relief to some 20,000 members of the classes and eliminate the delay, risk, and expense inherent in further litigation. They are fair, adequate and reasonable, as required by Rule 23(e)(1)(C), Fed. R. Civ. P., and Plaintiff and Co-Lead Class Counsel recommend without hesitation that the Court enter the Orders of Final Judgment and Dismissal, attached hereto as Exhibits 1 and 2, granting final approval to the settlements and concluding this litigation.

II. THIS WAS A HARD-FOUGHT, FULLY LITIGATED CASE

Because the Court is familiar with the nature and progress of these cases, and because the activity they generated is set forth in more detail in Co-Lead Class Counsel's Memorandum in Support of Petition For an Award of Attorneys' Fees and Reimbursement of Expenses and Incentive Award to Plaintiff, which is incorporated by reference, this discussion will be brief.

[1] Although the two cases at issue were filed at different times, against different defendants, they are substantially related both factually and legally, and the settlements are expected to be presented and administered jointly. Accordingly, unless distinguishing between the two is needed for clarity, they will be discussed together, as one case. There is no discussion of *Pruden v. UBS AG, et al.*, No. 04 C 7633 (N.D. Ill.), which, as the Court was advised previously, was settled on an individual basis pursuant to Rule 23(e)(1)(A), Fed. R. Civ. P.

[2] Settlement proceeds at the time of expected distribution, with interest, are expected to slightly exceed $7 million.

A. The Nature of the Case

These actions were brought in 2003 on behalf of a class of participants in the BP Employee Savings Plan ("Plan") and on behalf of the Plan itself pursuant to 29 U.S.C. §1132(a)(2). The Plaintiff is James Nelson, a Plan participant. The Defendants are UBS Global Asset Management (Americas), Inc. ("UBS"), in what we refer to as the "UBS Action," and BP Corporation North American Inc. ("BP") and several of its current/former employees ("BP Defendants") in what we refer to as the "BP Action." In bringing these cases, Plaintiff sought to recover from the responsible Plan fiduciaries losses sustained when the Plan's Money Market Fund core investment option ("MMF") invested in two Enron Corporation ("Enron")–related debt instruments which defaulted in November of 2001, causing principal losses to the Plan and the class's Plan retirement accounts totaling some $17 million. Plaintiffs' claims arose under the Employment Retirement Security Act of 1974, "ERISA," 29 U.S.C. § 1001, *et seq*., and were premised on, *inter alia*, alleged breaches of fiduciary duty of care and loyalty pursuant to 29 U.S.C. §§ 1104(a)(1)(A), (B) and (D), and 1109(a) in connection with the ill-fated Enron investments. Defendants maintained throughout the litigation, and still maintain, that they were without fault and engaged in no wrongdoing.

B. The Proceedings In The Case

- The Complaint: After extensive pre-suit investigation, Plaintiff filed the Complaint in the UBS Action on September 11, 2003, naming as its sole defendant UBS, which was the investment manager for the MMF under the terms of an Investment Manager Agreement, or "IMA." In 2004, after discovery revealed a potentially viable claim against the BP Defendants, the BP Action was filed. BP was the Plan sponsor and administrator, and the

individual Defendants were members of the Plan's Investment Committee. Despite the fact that the Enron losses affected some 20,000 BP employees, these were the only lawsuits filed.

- Motions to Dismiss: Defendants in both cases moved to dismiss the complaints against them under Rule 12(b)(6), Fed. R. Civ. P. On November 12, 2003, Defendant UBS filed its motion, and on January 15, 2004, after full briefing, the Court denied it. *Nelson v. UBS Partners, Inc.*, 2004 WL 178180 (N.D. Ill. 2004). UBS then answered, maintaining then, as it did throughout the litigation, that it engaged in no wrongdoing, denying that it violated ERISA, and denying that Plaintiff had set forth a valid claim. UBS also asserted affirmative defenses, including that any injury suffered was not caused by UBS but by a massive, unforeseeable fraud at Enron, *i.e.*, a "loss causation" defense. On November 12, 2004, Plaintiff filed a motion for leave to file an Amended Complaint against UBS. After full briefing, the Court granted this motion in part and denied it in part, in an opinion found at *Nelson v. UBS Global Asset Management (Americas), Inc*., 2005 WL 327034 (N.D. Ill. 2005). A 20-page Amended Complaint conforming to the Court's Order was filed on February 23, 2005.

The BP Defendants likewise moved to dismiss the case against them on February 28, 2005, which motion, also after full briefing, was denied by the Court in an order entered on June 1, 2005. The BP Action was then effectively stayed pursuant to a Court Order.

- Fact Discovery: Both before and after the Amended Complaint in the UBS Action, extensive discovery occurred, during which Co-Lead Class Counsel served two sets of interrogatories, six sets of document requests and two sets of requests to admit. Co-Lead Class Counsel reviewed and analyzed tens of thousands of pages of documents obtained from Defendants and non-parties Co-Lead Class Counsel had subpoenaed, as well as documents secured from publicly available sources. Co-Lead Class Counsel also conducted depositions of

17 fact witnesses over 21 separate sessions, in four different cities throughout the country. The parties' extensive discovery, and UBS's assertion of objections and the attorney-client and work-product privileges/protections, gave rise to numerous disputes, two of which ripened into motions that were required to be briefed and argued in Court (these were handled by Magistrate Judge Mason). Defendants also served extensive written discovery to which Co-Lead Class Counsel was required to respond, and took Plaintiff's deposition.

- Class Certification: On August 20, 2004, this Court entered its order certifying a class of Plan participants in the UBS Action. An identical class was certified for settlement purposes in the BP Action in 2006.

- Expert Discovery: The prosecution and defense of the case entailed heavy reliance on experts. Before filing suit, Co-Lead Class Counsel retained a consulting expert in the money market field. Later they retained two testifying expert witnesses who prepared detailed initial and rebuttal reports. Defendants, for their part, retained three expert witnesses who prepared reports disagreeing with Plaintiff's expert reports and supporting Defendants' affirmative defenses. Four of the five experts were deposed.

- Summary Judgment: On October 12, 2005, UBS moved for summary judgment, submitting an extensively documented and researched memorandum, and voluminous exhibits. In its motion, UBS asserted no less than seven separate grounds for the dismissal of Plaintiff's case in its entirety, as well as other arguments directed at specific parts of Plaintiff's suit. Co-Lead Class Counsel responded with extensive briefs of their own. As trial approached, the Court announced that it would defer ruling on this motion until trial. Plaintiff also moved for summary judgment, and ruling on that fully briefed motion was deferred as well.

- Full Trial Preparation: Following the Court's deferment of the summary judgment motions, the parties completed their trial preparations in December 2005 and January 2006, including extensive pre-trial submissions conforming to the Court's direction. The parties also filed and briefed, and the Court ruled on, numerous motions in limine, including *Daubert* motions directed at proffered expert testimony. On January 23, 2006, at 10:00 a.m., the parties appeared in Court, ready for a trial that was expected to last two weeks.

C. The Proposed Settlements

Throughout the litigation, Co-Lead Class Counsel and counsel for Defendants engaged in numerous formal and informal settlement discussions. All were adversarial and hard-fought. These included a meeting with UBS's counsel shortly after the suit was filed, pre-suit meetings with the BP Defendants' counsel, informal discussions during discovery, and a series of more formal meetings late in 2005 and continuing into 2006 with counsel for both sets of Defendants. In addition, at the parties' request, this Court convened three separate facilitative mediation sessions in the UBS Action, the last of which occurred on January 23, 2006, the day trial was to begin, which ultimately resulted in the settlement of the UBS Action (the BP Action had been settled in principle approximately two weeks earlier, without direct Court involvement).

Following the settlements in principle, several weeks of negotiations were required to properly document them.

On March 14, 2006, pursuant to the parties' joint motion, the Court granted preliminary approval of the settlements and directed that notice be provided to the identical classes of Plan participants certified in the two cases. Thereafter, pursuant to the Court's order, notice was provided to the classes pursuant to Rule 23 (e), Fed. R. Civ. P., via email and regular mail.

D. Conclusion

The proposed settlements are the fruition of substantial effort, wide-ranging investigation, fact and expert discovery, and full trial preparation in the UBS Action. Co-Lead Class Counsel were, and are, in a strong position to know the strengths and weaknesses of both Plaintiff's and the Defendants' cases. Viewed from that vantage point, these $7 million settlements represent an excellent result. Co-Lead Class Counsel wholeheartedly recommend them to the Court for final approval.

III. THE TERMS OF THE PROPOSED SETTLEMENTS

The specific terms of the settlements are contained in the settlement agreements attached hereto as Exhibit 3 (UBS Action) and Exhibit 4 (BP Action). The following is a summary of the significant terms.

A. **Settlement Consideration**: The settlements require Defendant UBS to pay $5,493,000, plus interest from January 23, 2006, to the deposit of the funds into escrow on March 21, 2006. (Funds in this amount were wired into an escrow at PNC Bank, N.A. on March 21, 2006, and since then invested in the BlackRock Liquidity Fund FedFund.) The BP Defendants are to pay $1.45 million. The total settlement, with interest, is slightly in excess of $7 million. In addition, BP will undertake to distribute the settlement proceeds to some 20,000 current and former BP employees who comprise the classes.

B. Scope of the Settlements: The proposed settlements will resolve all claims in the UBS and BP Actions against all of the Defendants arising from the MMF's losses upon Enron's default in November of 2001, and result in dismissal of both cases.

C. Distribution: The settlement funds, with accrued earnings, are to be applied toward payment of:

(1) a portion of the notice costs, and certain escrow agent fees and expenses;

(2) attorneys' fees, costs, and expenses of Co-Lead Class Counsel, as approved by the Court, and an incentive award to Mr. Nelson; and

(3) distribution first to the Plan and then to participant class members in proportion to the losses suffered in their MMF accounts upon the Enron defaults.[3]

Importantly, settlement funds will be automatically, at BP's expense, credited to class members' Short Term Investment Fund or "STIF" accounts in the BP Plan by the Plan's record keeper, Fidelity Investments Institutional Services Company, Inc. No class member needs to do anything in order to receive funds. No claim form needs to be completed and returned, and no "proof of loss" is required, thus ensuring maximum participation in the settlements by the classes.

D. Settled Claims: The settlements provide for releases and dismissal with prejudice of the lawsuits. With regard to UBS, the settlement of the UBS Action provides for the Plaintiff and Class members to:

> forever release, acquit, satisfy, and discharge the Defendant Released Parties from any and all manner of claims, causes of action, rights, actions, suits, obligations, debts, demands, judgments, agreements, promises, liabilities, damages, losses, controversies, costs, expenses or attorneys' fees, of every nature and description whatsoever that have been or could have been asserted in the Lawsuit and whether direct or indirect, now known or unknown, suspected or unsuspected, accrued or unaccrued, in law or in equity, whether having arisen or yet to arise, including without limitation, any claims for violations of ERISA, federal or state securities laws, and any federal or state claims of fraud, intentional misrepresentation, negligent misrepresentation, negligence, gross negligence, breach of duty of care and/or breach of duty of loyalty, breach of fiduciary duty, or violations of any state or federal statues, rules or regulations that have been or could have been alleged or asserted now or in the future by the Plaintiff or any Class Member against the Defendant Released Parties in this Lawsuit or in any other court action or before any administrative body, tribunal, arbitration panel, or

[3] The Court has wide equitable discretion with respect to the allocation of a class action settlement. *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171 (7th Cir. 1982), and an allocation such as this – in proportion to class members' losses – is plainly appropriate. *In re Lucent Tech. Sec. Lit.*, 307 F. Supp. 2d 633, 649 (D.N.J. 2004); *In re Agent Orange Prod. Lbl. Lit.*, MDL No. 381, 818 F.2d 179, 181 (2d Cir. 1987).

> other adjudicatory body, arising out of, relating to, or in connection with (i) Defendant's purchase of Enron-related debt for the BP Plan Money Market Fund; (ii) the appropriateness of the name "Money Market Fund" for the BP Plan option invested in the Cash Management Fund; and (iii) the facts, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act that were alleged or could have been alleged in the Lawsuit. (*See* Exhibit 3 ¶ 2.4.)

With regard to the BP Defendants, the settlement of the BP Action provides for the Plaintiff and the Settlement Class Members to:

> forever release, acquit, satisfy, and discharge the Defendants Released Parties from any and all manner of actions, or causes of action, accounts, agreements, bills, bonds, claims, contracts, controversies, covenants, damages, debts, demands, dues, executions, judgments, liability, liens, promises, reckonings, specialties, suits, sums of money, trepasses, and variances whatsoever and any equitable, legal and administrative relief, whether based on federal, state or local law, statute or ordinance, regulation, contract, common law, or any other source, whether known or unknown, actual or contingent, liquidated or otherwise, including without limitation claims for attorneys' fees, litigation costs, injunction, contribution, indemnification or any other type of legal or equitable relief, that arise out of or are in any way based upon, connected with, or related to any facts giving rise or allegedly giving rise to the Lawsuit, including claims which relate to the establishment, description, oversight, management or administration of the Money Market Fund option of the BP Plan or, as applicable, any of the BP Plan's investment options or investment managers or advisors, or and including the method or manner of the allocation of any settlement proceeds, including but not limited to those claims that could have been brought, raised or asserted in the Lawsuit, or in any similar litigation in this or any other court, jurisdiction, or any administrative or governmental body or agency (including any federal or state regulatory commission), tribunal, arbitration panel or self-regulatory organization.
>
> Plaintiff and Settlement Class Members shall have and be deemed to have waived and relinquished, to the fullest extent permitted by law, any and all provisions, rights and benefits conferred by Section 1542 of the California Civil Code or any federal, state, or foreign law, rule, regulation or common law doctrine that is similar, comparable, equivalent, or identical to, or which has the effect of, Section 1542 of the California Civil Code.
>
> Notwithstanding the provisions of Section 1542 and any similar provisions, rights and benefits conferred by any law, rule, regulation or common law doctrine of California or in any federal, state or foreign jurisdiction, the Plaintiff and the Settlement Class understand and agree that the releases to be given pursuant to this Agreement shall include claims that are not known or suspected to exist at the time such releases are given.

> Plaintiff and the Settlement Class Members expressly agree that they, acting individually or together, shall not and shall not seek to institute, maintain, prosecute, sue or assert in any action or proceeding, any action or actions, cause or causes of action, or claim on the basis of, connected with, arising out of, or substantially related to, any of the claims released in this Paragraph 2.6, including, without limitation, any or all of the acts, omissions, facts, matters, transactions or occurrences that were directly or indirectly alleged, asserted described, set forth or referred to in, or related to, the Lawsuit, including without limitation, the facts, events, and circumstances that are the basis of the allegations raised in the Lawsuit. (*See* Exhibit 4 ¶ 2.6.)

The settlements also contain detailed provisions relating to when, and the precise means by which, BP will allocate funds to class member Plan accounts, as well as provisions requiring BP to report on the progress of the distributions.

IV. RULE 23(e) STANDARDS FOR APPROVAL OF THE SETTLEMENTS

The Court of Appeals for the Seventh Circuit has stated that "there is an overriding public interest in favor of settlement." *Armstrong v. Board of School Directors*, 616 F.2d 305, 312-13 (7th Cir. 1980), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *see also Isby v. Bayh*, 75 F.3d 1196 (7th Cir. 1996) ("Federal Courts naturally favor the settlement of class action litigation"). This Court has wide discretion in deciding whether to grant final approval of the settlements. *Armstrong*, 616 F.2d at 313.

The Supreme Court has noted that in deciding whether to approve a settlement, a court should "not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981); *see also E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985), *cert. denied*, 478 U.S. 1004 (1986); *Isby*, 75 F.3d at 1196-97. This is because the object of settlement is to avoid, not confront, the costly and time-consuming determination of contested issues. Thus, the approval process should not be converted into an abbreviated trial on the merits. *Mars Steel Corp. v. Continental Illinois Nat. Bank and*

Trust Co. of Chicago, 834 F.2d 677, 684 (7th Cir. 1987) ("The temptation to convert a settlement hearing into a full trial on the merits must be resisted."). Instead, the Court should limit its inquiry "to the consideration of whether the proposed settlement is lawful, fair, reasonable and adequate." *Isby*, 75 F.3d at 1196.

The Seventh Circuit directs courts to analyze six factors in deciding whether to approve a class action settlement as "fair, reasonable and adequate" under Rule 23, Fed. R. Civ. P.:

(a) the relative strength of the plaintiff's case on the merits weighed against the value of the settlement achieved;

(b) the complexity, length and expense of continued litigation;

(c) the degree of opposition expressed by those affected by the settlement;

(d) the presence of collusion in achieving the settlement;

(e) the stage of the proceedings and amount of discovery completed; and

(f) the opinion of competent counsel.

EEOC v. Hiram Walker & Sons, Inc., 768 F.2d at 889; *General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 (7th Cir. 1997). The first factor – the balance between the relief obtained and the likelihood of success on the merits – is usually regarded as the most important. *In re Mexican Money Transfer Litigation*, 267 F.3d 743, 748 (7th Cir. 2001), *reh. denied; Isby*, 75 F.3d at 1199; *Armstrong*, 616 F.2d at 314.

This Court has preliminarily approved the settlements. This being so, the Court has already found the settlements to be at least within the range of reasonableness. *Armstrong*, 616 F.2d at 314. Application of the foregoing factors shows that the Court's initial assessment was correct and that the Court should thus have no hesitation in finally approving the settlements as well.

V. THE PROPOSED SETTLEMENTS MEET THE ESTABLISHED JUDICIAL STANDARDS FOR APPROVAL UNDER RULE 23(e)

The proposed settlements are the product of more than three years of hard and skillfully conducted litigation, which ended only when UBS, on the very day of trial, after three separate in-chambers facilitative mediations, finally came to an agreement in principle. The BP settlement, reached after two years of pre-suit investigation and discussions and a year of contested litigation, was similarly hard-fought, and was reached, in principle, only two weeks before the start of the trial of the UBS Action. The proposed settlements are preferable to continuation of this litigation considering the risks and inherent delays of further proceedings.

A. The Strength Of Plaintiff's Case Measured Against The Value Of The Settlements

Together, the settlements represent recovery of approximately 40% of the Plan's and the classes' out-of-pocket losses. The settlements properly balance the strengths of the case against the disadvantages of continued litigation, including the risk either of recovering less than $7 million, or of recovering nothing at all.

Plaintiff's case had many positive features. It survived motions to dismiss brought by both UBS and the BP Defendants, class certification had been granted in the UBS Action, and fact discovery in the UBS Action was finished, forming the basis for expert reports on both liability and damages. Co-Lead Class Counsel had thoroughly analyzed the facts of the case, and helpful documents had been located and authenticated for use at trial. Deposition testimony that Plaintiff deemed favorable had also been elicited. Plaintiff accordingly was optimistic about the ultimate success of this litigation, as evidenced by the vigor with which he prosecuted it and the amount of time and money counsel expended on a contingent basis toward that end.

There were, however, many countervailing risks to consider. All litigation, no matter how far advanced, and particularly class action litigation, is fraught with uncertainty. The case can be

lost on a Rule 12(b)(6) motion, at summary judgment, at the close of Plaintiff's evidence, on post-trial motion, or on appeal. There is no way to predict whether a case will succeed, or when, or at what cost, or to predict the amount of damages that might ultimately be recovered. The risks of this case, most of which persisted at the time of settlement, are more fully discussed in Co-Lead Class Counsel's fee petition. While Co-Lead Class Counsel incorporate that discussion in its entirety, and invite the Court to review it, some of the salient risks specific to this case will be briefly mentioned, to illustrate in concrete terms the challenges that confronted Plaintiff in proving Defendants' liability:

- ERISA is a complex, rapidly-changing area of the law. Many ERISA cases have had the legal rug pulled out from under them by court decisions rendered while the case was pending. New cases come down frequently. For example, there is a split of authority with respect to who has the burden of proof regarding damages in a breach of fiduciary duty case, which was briefed in connection with one of Plaintiff's motions in limine.

- Few cases similar to this one have been tried, making it difficult, unlike a personal injury case, to establish a "benchmark" value for this case.

- Establishing liability would have required careful, painstaking presentation of evidence dependent on witness credibility and complex Plan provisions.

- Defendants maintained a well-funded, vigorous defense of the cases.

- Even though trial was at hand in the UBS Action, delay was nonetheless a factor considering the possibility of post-trial motions and appeals; and the BP Action was far from being ready for trial.

- Defendants asserted numerous affirmative defenses, and a loss on any one of them could have been fatal. It is a unique feature of a plaintiff's case that he must prevail in essentially every issue to win; a defendant usually need prevail on only one.

In addition, Plaintiff had a challenge in this case to prove not only that Enron was a bad investment in October 2001 but that UBS should have known that the Enron investments did not fit the MMF investment profile ***at the time they made the investments***. UBS is a reputable bank

with a worldwide asset management business that invests billions of pension plan assets every year. BP, one of the world's largest corporations, investigated this suit, and determined that UBS had not failed to prudently invest the Plan's assets. UBS maintained in addition that it had managed the MMF in 2001 in the same careful way it had always been managed, and that the risks of its investment strategy had not only been fully disclosed, but had generated an excellent rate of return from which Plaintiff and the Plan had benefited. UBS also contended that Plaintiff's case was entirely based on "20-20 hindsight" and that the losses the Plan suffered were attributable not to any misconduct by its research analysts or portfolio managers, as Plaintiff alleged, but to an intervening "massive and unforeseeable" fraud by top Enron executives, who concealed Enron's dire financial straits from the public by means of false SEC filings and accounting reports. UBS claimed that no one foresaw, or could have foreseen, Enron's sudden collapse until shortly beforehand, by which time it was too late, as a practical matter, to undo the Enron investments.

Furthermore, UBS argued that the Enron investments were affirmatively permitted by its contract with BP and that all applicable internal procedures and investment guidelines had been substantially complied with. Finally, UBS put forth legal arguments, claiming, *inter alia*, that Plaintiff had failed to exhaust pre-suit administrative avenues and that he was barred from suit because the losses affected less than all of the Plan's participants.

The BP Action was not as far advanced on the Court's docket as was the UBS Action, but it, too, presented substantial risks. The BP Defendants were committed to a vigorous defense, adopting many of the same positions UBS adopted – for example, that all risks of the MMF were fully disclosed, and that the MMF had been prudently managed – and making several arguments unique to them. For example, BP maintained that Plaintiff, due to the more advanced progress of

the UBS Action, was in a "catch-22" with respect to the claims against the BP Defendants. They argued that if Plaintiff won the UBS Action, there would be no damages left for him to recover against the BP Defendants; if Plaintiff lost the UBS Action, this would "prove" that no one, including BP, had done anything wrong.

While Co-Lead Class Counsel disagree with Defendants' positions, they recognize the risk that all of the Defendants could prevail at any of the numerous junctures in the road ahead, and that continued litigation would be time-consuming and expensive. The settlements provide a safe, certain, swift recovery of a significant part of the Plan's and the classes' losses, and eliminate entirely the risks and delay associated with further proceedings, which are discussed next.

B. Further Litigation Would Have Been Lengthy, Complicated and Expensive

These cases had been complicated and expensive up until the date of settlement, and would have continued to be so if they had not been settled. Complexity is inherent in ERISA class actions. Proving an investment was imprudent, in the face of Defendants' claim that Enron's top management was really at fault, was a daunting, time-consuming prospect. The complexity of the UBS Action manifested itself in a variety of ways here. The Court's docket in these cases already contains more than 288 entries. The cases consumed thousands of hours of professional effort, over $200,000 in expenses and more than three years of time. Hundreds of thousands of pages of documents were inspected. Twenty-two witnesses were deposed, five experts wrote eight reports, and four experts were deposed. On the day of trial, the courtroom was literally filled with boxes and binders of exhibits, which took a medium-sized truck to transport.

In sum, had the UBS Action proceeded, it would have continued to be complex, time-consuming and extremely expensive. Co-Lead Class Counsel would have had to conduct a

lengthy trial, with probably a dozen witnesses, not including experts, and myriad exhibits. It is likely that at the close of Plaintiff's case and again at the close of all the evidence there would have been motions, and even a favorable finding for Plaintiff and the class would have resulted in submission and briefing of motions for a new trial and related relief, followed by an appeal, and possibly a *certiorari* petition. These proceedings likely would have consumed years.

The complexity, delay, and expense factor tilts equally heavily towards settlement in the BP Action, which also would have been complex and time-consuming to discover, prepare, and try. Although Plaintiff had defeated the BP Defendants' motion to dismiss, most of the discovery that would be needed on issues specific to BP had yet to be completed. In addition, proving the claims against the BP Defendants would have involved in-depth investigation of their supervision and monitoring of UBS. And, unlike the UBS Action, trial of the BP Action was at least a year or two in the future.

The settlements obviate all of this protracted, uncertain, and complex litigation, and significantly advance the date upon which the BP Plan participants will receive compensation for their retirement plan losses. The classes' ability to avoid this risk, delay and expense, and to reap the certain benefits of the settlements, weighs heavily in their favor. *See Protective Committee for Independent Stockholders of TMT Trailer Ferry Inc. v. Anderson*, 390 U.S. 414, 424 (1968).

C. The Affected Class Members Support The Settlements

As the Court directed in its Preliminary Approval Orders, proper notice of the settlements has been provided to the classes, including first class mailing of the Notice in the form approved by this Court to most class members, and email notice to the approximately 25% of the classes who are still employed at BP. Watkins Aff. ¶ 24. The Court-approved written Notice told class members about the cases in detail, and advised how they could register an objection to the

settlements if they so desired. The deadline to file an objection, as set forth in the Court's Order and the Notice, was April 20, 2006. To date, there have been no objections to the actual settlements by any class members. To the contrary, a number of class members have contacted Co-Lead Class Counsel to express their pleasure, and surprise, at the recovery represented by the settlements.[4]

A settlement may be approved even where a large number of class members object. *Elliot v. Sperry Rand Corp*., 680 F.2d 1225, 1227 (8th Cir. 1982); *EEOC v. Hiram Walker & Sons, Inc.,* 768 F.2d at 889. The classes here include approximately 20,000 people. The lack of objections – especially in a pension case where class members retirement benefits have been affected is conclusive in demonstrating the classes' satisfaction with the proposed settlements. *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982).

D. There Was No Hint Of Collusion In The Settlement Negotiations

In examining the fairness of a proposed settlement, the Court should scrutinize the record for evidence of collusion. *Mars Steel*, 834 F.2d at 681-82; *Armstrong,* 616 F.2d at 325; *Cotton*, 559 F.2d at 1330. The conduct of this litigation and the negotiations leading to these settlements withstand the closest of scrutiny. The litigation was hard fought; negotiations were lengthy, well-informed, adversarial, and, in the case of UBS, conducted under the supervision of the Court. There was no hint of collusion in this case.

[4] Attached as Exhibit 5 is a letter received on April 10, 2006 from Richard Miller containing one paragraph styled as an "objection." The letter, however, appears not to be an objection; Mr. Miller simply states that in his opinion, these cases should remain open on the Court's docket so that the Defendants, if they should happen in the future to benefit from unspecified litigation against Enron, could share some unspecified portion of the proceeds with the classes. It is not entirely clear what Mr. Miller means. But, if his concern is that if a class action lawsuit against Enron should prove successful, the Plan, and hence the class members, should be entitled to participate in it, then we believe his concern is moot, for there is nothing in the settlements that would foreclose such participation, or prevent the Plan from distributing recoveries to participants.

E. The Settlements Have The Support Of Co-Lead Class Counsel

The view of experienced counsel favoring a settlement is given "great weight" in evaluating its fairness and adequacy. *Armstrong*, 616 F.2d at 325. A settlement enjoys a presumption of regularity if it results from informed, arms-length negotiations by competent counsel. *Retsky Family Limited Partnership v. Price Waterhouse LLP*, No. 97C7694, 2001 WL 1568856, *3 (N.D. Ill. Dec. 10, 2001); *see also* 2 H. Newberg & A. Conte, *Class Actions* § 11.41, p. 1188 (3d ed. 1992).

Co-Lead Class Counsel have extensive experience in handling class action ERISA cases and other complex litigation. They have successfully prosecuted, and defended, dozens of securities, ERISA, antitrust, environmental, and other class actions in this District and in state and federal courts throughout the nation. *See* Resumes of Susman, Watkins & Wylie, LLP, and The Collins Law Firm, attached to the affidavits of Messrs. Watkins and Collins in support of Memorandum in Support of Petition For an Award of Attorneys' Fees and Reimbursement of Expenses and Incentive Award to Plaintiff. Co-Lead Class Counsel were, by virtue of three years and thousands of hours of effort, including full trial preparation in the UBS Action, fully informed of the issues in the case, of the facts bearing on them, and of the benefits and risks of continued litigation. Negotiations were conducted under Court supervision, and were in all respects at arms'-length. Co-Lead Class Counsel endorse the settlements, and their opinion is entitled to great weight.

F. The Settlements Were Only Reached At A Time When Co-Lead Class Counsel Could Fully Evaluate The Litigation: After Extensive Discovery And, In The Case Of The UBS Action, On The Day Of Trial

The stage of proceedings at the time of settlement is a reliable indicator of whether a settlement should be approved because it is correlated with counsel's ability to evaluate the

merits of the plaintiffs' case. *Armstrong*, 616 F.2d at 325; *Holden v. Burlington Northern, Inc.,* 665 F. Supp. 1398, 1423 (D. Minn. 1987). A settlement made after full development of the record is entitled to an even stronger than usual presumption of reasonableness. *In re Cendant Corp. Litigation*, 264 F.3d 201, 235-36 (3d Cir. 2001).

The settlements here were reached after three years of heavily contested litigation, during which factual and legal nuances of the cases were probed and analyzed. Fact and expert discovery had been completed in the UBS Case, the parties had exchanged initial and rebuttal reports of five different expert witnesses, and Plaintiff was ready for trial. Plainly, Co-Lead Class Counsel knew the strengths and weaknesses of both cases and were in an ideal position to evaluate their merits. Co-Lead Class Counsel could not have been better prepared to negotiate a settlement than they were in January of 2006, which is evidenced by the excellent result obtained.

VI. THE CLASS HAS BEEN PROVIDED WITH PROPER NOTICE OF THE SETTLEMENTS

In its March 14, 2006 Preliminary Approval Orders, this Court described the notice of settlement that was to be provided to absent class members. The Court's Order has been fully carried out. The requirements of due process and Rule 23(e)(1)(B), Fed. R. Civ. P., have been met in notifying the classes of the settlements.

Some 20,000 Notices were mailed and emailed to class members. The email addresses used were the active work emails for current BP employees. The mailed Notices, after they were first updated using the National Change of Address ("NCOA") registry to verify their accuracy, were sent first class mail to the most current addresses available for the rest of the class members.

Rule 23(e)(1)(B) requires that the Court "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement." The notice provided here more than meets that standard. It informed class members of the nature of the pending action, the terms of the settlement, that complete and detailed information is available from the Court files, and that any class member may appear and be heard at the hearing. No more is required. *Miller v. Republic Nat. Life Ins. Co*., 559 F.2d 426 (5th Cir. 1977); A. Conte & H. Newberg, *Newberg on Class Actions*, § 8.32.

VII. CONCLUSION

These hard-won settlements represent an outstanding result for the Class. They are fully supported by experienced counsel and are much preferable to the continued delay, expense, and risk of continued litigation. Accordingly the Court should grant final approval to the settlements.

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Respectfully submitted,

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