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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
:
In re : **Chapter 11**
:
ENRON CORP., et al., : **Case No. 01-16034 (AJG)**
:
: **Jointly Administered**
:
Debtors. :
----- X

**NOTICE OF PRESENTMENT OF ORDER
AUTHORIZING AND APPROVING DIRECT PAYMENT
AND/OR ADVANCEMENT OF DEFENSE COSTS TO
INDIVIDUAL DEFENDANTS IN SECURITIES AND
ERISA LAWSUITS UNDER THE DEBTORS' DIRECTORS
AND OFFICERS LIABILITY INSURANCE AND ERISA FIDUCIARY
LIABILITY INSURANCE POLICIES AND OPPORTUNITY FOR HEARING**

PLEASE TAKE NOTICE, upon the annexed motion (the "Motion") filed by Enron Corp. and certain of its affiliated entities (collectively, the "Debtors"), for an Order Authorizing and Approving Direct Payment and/or Advancement of Defense Costs to Individual Defendants in Securities and ERISA Lawsuits Under the Debtors' Directors and Officers Liability Insurance and ERISA Fiduciary Liability Insurance Policies, the undersigned will present the attached proposed order granting the Motion to the Honorable Arthur J. Gonzalez, United States Bankruptcy Judge, for signature on February 5, 2002 at 10:00 a.m. (New York City Time).

PLEASE TAKE FURTHER NOTICE that unless a written objection to the Motion is filed with the Bankruptcy Court electronically in accordance with General Order M-242 (General Order M-242 and the User's Manual for the Electronic Case Filing System can be found at www.nysb.uscourts.gov, the official website for the Bankruptcy Court), by registered users of the Bankruptcy Court's case filing system and, by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), Wordperfect or any other Windows-based word processing format (with a hard-copy delivered directly to Chambers), and served in accordance with General Order M-242, and shall be served upon (a) Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153, Attention: Martin J. Bienenstock Esq. and Brian S. Rosen, Esq. (Facsimile: 212-310-8007), Attorneys for the Debtors; (b) Milbank, Tweed, Hadley and McCloy LLP, 1 Chase Manhattan Plaza, New York, New York, 10005, Attention: Luc A. Despina, Esq. and (c) the Office of the United States Trustee for the Southern District of New York, and shall be filed with the Clerk of the United States Bankruptcy Court, Southern District of New York, in each case to allow actual receipt by the foregoing no later than February 4, 2001 at 5:00 p.m. (New York City Time), there will not be a hearing and the order may be signed.

PLEASE TAKE FURTHER NOTICE that if a written objection is timely filed and served in accordance with the previous paragraph, the Court will notify the Debtors and the objecting parties of the date and time of the hearing and of the Debtors' obligation to notify all other parties entitled to receive notice.

Dated: New York, New York
January 18, 2002

By: /s/ Richard L. Levine
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ATTORNEYS FOR DEBTORS
AND DEBTORS IN POSSESSION

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

----- X
In re : **Chapter 11**
:
ENRON CORP., *et al.*, : **Case No. 01-16034 (AJG)**
:
: **Jointly Administered**
Debtors. :
----- X

**ORDER AUTHORIZING AND APPROVING DIRECT PAYMENT AND/OR
ADVANCEMENT OF DEFENSE COSTS TO INDIVIDUAL
DEFENDANTS IN SECURITIES AND ERISA LAWSUITS
UNDER THE DEBTORS' DIRECTORS AND OFFICERS LIABILITY
INSURANCE AND ERISA FIDUCIARY LIABILITY INSURANCE POLICIES**

Upon the motion, dated January 18, 2002 (the "Motion"), filed by Enron Corp. and certain of its affiliated debtor entities (collectively, the "Debtors"), as debtors and debtors in possession, for an order authorizing and approving the direct payment and/or advancement by the issuer of certain insurance policies of covered legal fees and related expenses incurred with respect to certain lawsuits and governmental investigations by certain of the Debtors' present and former officers and directors (the "D&O Defense Costs") and certain of the Debtors' present and former officers, directors, Employee Benefit Plan committee members, trustees, and fiduciaries, and other employees in their capacities as ERISA fiduciaries or plan administrators (the "ERISA Fiduciary Defense Costs", collectively with the D&O Defense Costs, the "Defense Costs") against whom "Claims" (as defined in the applicable insurance policies) have been or will be made or who are involved in governmental investigations to the extent the primary insurer, Associated Electric & Gas Insurance Services Limited ("AEGIS"),

determines amounts claimed are covered or owing pursuant to the terms of the respective insurance policies (collectively, the “Policies”), subject to the execution of a written undertaking by each insured to repay any monies if it ultimately is determined that the individual is not entitled to coverage, all as more fully set forth in the accompanying Motion; and it appearing that the Court has jurisdiction to consider the Motion; and it appearing that the relief requested in the Motion is in the best interest of the Debtors, their estates and creditors; and it appearing that due notice of the Motion has been given and no further notice need be given; and upon the proceedings before the Court; and good and sufficient cause appearing;

IT IS HEREBY ORDERED THAT:

1. The Motion is granted.
2. Upon notice of entry of this Order, AEGIS hereby is authorized and permitted to pay and/or advance under the AEGIS D&O Policy and the ERISA Fiduciary Policy -- both as defined in the Motion -- legal fees and related expenses (including fees and costs of experts) which AEGIS determines are covered or owing under the respective policies or, subject to a full reservation of rights and other standard conditions including an “Undertaking” (as defined in the Motion), to be potentially covered or owing under the respective policies, up to an aggregate of \$20 million under the AEGIS D&O Policy and \$10 million under the ERISA Fiduciary Policy for one lead law firm and any reasonably necessary local or special counsel for each subset of the covered individuals who are among the Individual Defendants or whom require counsel with respect to government investigations, who reasonably require separate counsel.

3. This Order is without prejudice to the Debtors' right to file motions for additional authorizations in the future and to any party's right to oppose any such motions.

4. Any amounts advanced or paid pursuant to this Order will deplete the applicable limits of liability of the respective insurance policies as provided in such policies unless, and to the extent, such amounts are repaid or refunded.

Dated: New York, New York
February __, 2002

HONORABLE ARTHUR J. GONZALEZ,
UNITED STATES BANKRUPTCY JUDGE

WEIL, GOTSHAL & MANGES LLP
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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

----- X
In re : Chapter 11
ENRON CORP., *et al.*, : Case No. 01-16034 (AJG)
: Jointly Administered
Debtors. :
----- X

**MOTION OF DEBTORS FOR AN ORDER AUTHORIZING AND
APPROVING DIRECT PAYMENT AND/OR ADVANCEMENT
OF DEFENSE COSTS TO INDIVIDUAL DEFENDANTS IN
SECURITIES AND ERISA LAWSUITS UNDER THE DEBTORS'
DIRECTORS AND OFFICERS LIABILITY INSURANCE
AND ERISA FIDUCIARY LIABILITY INSURANCE POLICIES**

TO THE HONORABLE ARTHUR J. GONZALEZ,
UNITED STATES BANKRUPTCY JUDGE:

Enron Corp. and certain of its affiliated entities (collectively, the “Debtors”), as debtors and debtors in possession, file this Motion seeking authorization for advancement or payment by third-party insurance companies of covered defense costs being incurred in pending lawsuits and investigations by present and former officers, directors, Employee Benefit Plan committee members, trustees, and other fiduciaries and administrators, and other employees of the Debtors, subject to the execution of a written

undertaking by each covered individual to repay any amounts advanced if it ultimately is determined that they are not entitled to coverage, and respectfully submit as follows:

JURISDICTION

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

2. Commencing on December 2, 2001 (the “Petition Date”) and, in some instances, periodically thereafter, the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Pursuant to its authority under section 1102 of the Bankruptcy Code, on December 12, 2001, the United States Trustee for the Southern District of New York appointed an official committee of unsecured creditors.

3. The Debtors and their approximately 3,500 other direct and indirect subsidiaries (collectively, the “Enron Companies”), building upon knowledge gained in over 70 years of experience in the energy business, have grown into a worldwide leader in products and services related to the sale and delivery of natural gas, electricity and communications to wholesale and retail customers. As of the Petition Date, the Enron Companies employed approximately 25,000 individuals throughout the world and were recently ranked seventh on the Fortune 500 list of the largest U.S. corporations.

4. The Enron Companies divide their business operations into four primary business units: Enron Wholesale Services, Enron Retail Services, Enron Transportation Services, and Enron Global Services. The units comprise wholesale and retail commodities trading, gas pipeline businesses, and other global services, including engineering, operation, and construction of power facilities.

5. For the fiscal year ended December 31, 2000, the Enron Companies generated \$101 billion in annual revenues on a consolidated basis. Based on information set forth in the Form 10-Q filed on October 31, 2001 (the "10-Q") for the quarter ending on September 30, 2001, the Enron Companies' consolidated books and records reflected assets totaling approximately \$61 billion and liabilities totaling approximately \$49 billion.¹

**DIRECTORS AND OFFICERS LIABILITY INSURANCE
AND ERISA FIDUCIARY LIABILITY INSURANCE**

6. In 1998, Enron Corp. purchased a Directors and Officers Liability Insurance Policy from Associated Electric & Gas Insurance Services Limited ("AEGIS"), Policy No. D0079A1A98, a copy of which is annexed hereto as Exhibit "A". This policy (the "AEGIS D&O Policy"), subject to its terms, conditions and exclusions, provides \$35 million of insurance coverage, including coverage for legal fees and associated expenses (including expert fees) incurred in defending covered "Claims" (the "D&O Defense Costs"). This coverage is provided directly to or on behalf of present and former officers and directors of the Debtors and of certain affiliates if such D&O Defense Costs are not reimbursed by Enron Corp. through indemnification payments. See AEGIS D&O Policy

¹ As indicated in the 10-Q, the numbers set forth above are unaudited.

at I (“Insuring Agreement”), section (A)(1). The AEGIS D&O Policy also provides for reimbursement of the Debtors for indemnification payments (including for D&O Defense Costs) made to, or on behalf of, present and former officers and directors under Insuring Agreement, section (A)(2), and “entity” coverage for the Debtors under Endorsements 6 and 7.

7. The AEGIS D&O Policy originally applied to covered Claims first asserted during the period from September 1, 1998 through September 1, 2001. The policy has been renewed and its current expiration date is September 1, 2002.

8. Enron Corp. supplemented the coverage provided under the AEGIS D&O Policy with a number of excess policies (collectively, with the AEGIS D&O Policy, the “D&O Policies”) from a number of different insurance carriers (with AEGIS, the “D&O Insurers”). Total insurance coverage under all of the D&O Policies is \$350 million.²

9. In 1999, Enron Corp. purchased a Fiduciary And Employee Benefit Liability Insurance Policy from AEGIS, Policy No. F0079A1A99 (the “ERISA Fiduciary Policy”), a copy of which is annexed hereto as Exhibit “B.” The ERISA Fiduciary Policy, subject to its terms, conditions and exclusions, provides coverage to

² Excess Insurers: Energy Insurance Mutual (“EIM”), policy no. 900630-00D0, \$65 million in excess of \$35 million; Federal Insurance Company, policy no. 8142-05-47, \$25 million in excess of \$100 million; Twin City Fire Insurance Company, policy no. NDA 0131301-98H, \$25 million in excess of \$125 million; Executive Liability Underwriters (“ELU”), policy no. ELU 82248-01, \$25 million in excess of \$150 million; Lloyd’s of London, policy no. 901/LK9802531, \$25 million in excess of \$175 million; St. Paul Fire and Marine Insurance Company, policy no. 568CM0934, \$25 million in excess of \$200 million; Federal Insurance Company, policy no. 8181-4314, \$25 million in excess of \$225 million; Royal & SunAlliance, policy no. PSF000633, \$25 million in excess of \$250 million; ACE, policy no. ENE-9459D, \$25 million in excess of \$275 million; Federal Insurance Company, et al, policy no. 8179-41-03, \$50 million in excess of \$300 million. Total coverage: \$350 million.

Enron Corp., its Employee Benefit Plans, the Employee Benefit Plans of its debtor and non-debtor affiliates, and their respective past, present or future trustees, officers, directors and/or employees, and any other natural person who was, is now, or shall be acting as a fiduciary, or performing administration, of any Employee Benefit Plan. The ERISA Fiduciary Policy provides insurance, including for legal fees and related expenses (including expert fees) incurred in defending covered “Claims,” for the covered insureds (the “ERISA Fiduciary Defense Costs”, and collectively with the D&O Defense Costs, the “Defense Costs”). The ERISA Fiduciary Policy provides \$35 million of insurance coverage for covered loss, plus an additional \$10 million of insurance coverage for ERISA Fiduciary Defense Costs.

10. The ERISA Fiduciary Policy applies to covered Claims first asserted during the period from May 5, 1999 to May 5, 2002.

11. Enron Corp. supplemented the coverage provided to the entities and persons covered by the ERISA Fiduciary Policy with excess policy No. 8146-41-84A, issued by Federal Insurance Company (collectively with the D&O Insurers, the “Insurers”). This supplemental insurance provides an additional \$50 million of coverage (collectively with the ERISA Fiduciary Policy, the “ERISA Policies,” and with the D&O Policies and the ERISA Fiduciary Policy, the “Policies”).

12. As noted, the Policies generally provide that, subject to certain conditions and other terms, the Insurers will pay, among other things, the legal fees and related expenses of the Debtors’ covered directors, officers, plan committee members, other fiduciaries and administrators, and other employees incurred in the defense or appeal of a covered Claim. In addition, the Policies provide that, in case of the

bankruptcy or insolvency of Enron Corp., the Insurers shall not be relieved of any of their obligations and, in fact, shall directly pay or advance the Defense Costs (which are defined as a component of “Ultimate Net Loss”).³

13. Under the terms of the AEGIS D&O Policy, present and former directors and officers are entitled to payment of “Ultimate Net Loss” under Insuring Agreement (A)(1) before payments are made to the Debtors under Insuring Agreement (A)(2) or the entity coverage endorsements. (By definition, Ultimate Net Loss amounts include D&O Defense Costs.) Specifically, Endorsement 13 of the AEGIS D&O Policy, entitled “Priority of Payments Endorsement,” adds an additional subparagraph to Section I(B) (“Insuring Agreement -- Limits of Liability”) of the AEGIS D&O Policy, which endorsement provides as follows:

³ For example, Section IV(G) of the AEGIS D&O Policy, entitled “Bankruptcy or Insolvency,” provides that:

Bankruptcy or insolvency of the COMPANY shall not relieve the INSURER of any of its obligations hereunder.

In the event of bankruptcy or insolvency of the COMPANY, subject to all the terms of this POLICY, the INSURER shall pay on behalf of the DIRECTORS and OFFICERS under Insuring Agreement I(A)(1) (in excess of the UNDERLYING LIMITS, if any, applicable to Insuring Agreement I(A)(1)) for ULTIMATE NET LOSS they shall become legally obligated to pay which would have been indemnified by the COMPANY and reimbursable by the INSURER under Insuring Agreement I(A)(2) but for such bankruptcy or insolvency; provided, however, that the INSURER shall be subrogated, to the extent of any payment, to the rights of the DIRECTORS and OFFICERS to receive indemnification from the COMPANY but only up to the amount of the UNDERLYING LIMITS applicable to Insuring Agreement I(A)(2) less the amount of the UNDERLYING LIMITS, if any, applicable to Insuring Agreement I(A)(1).

(The latter paragraph does not apply to certain entity coverage).

Similarly, Section (IV)(I) of the ERISA Fiduciary Policy states “Bankruptcy or insolvency of an INSURED shall not relieve the COMPANY of any of its obligations hereunder.”

(Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed to such terms in the Policies.)

(7) With respect to the ULTIMATE NET LOSS for which payment is due the INSURER shall: first, pay such CLAIM which is covered by Insuring Agreement (A)(1), and then with respects [sic] to any remaining Limits of Liability after the payment of any CLAIM made under Insuring Agreement (A)(1), at the written request of the chief executive officer of the COMPANY, either pay or withhold payment of such other remaining portion of the ULTIMATE NET LOSS for which coverage is provided under this POLICY.

14. Numerous lawsuits against the Debtors and/or against their present and former officers, directors, Employee Benefit Plan committee members and other fiduciaries and administrators, and other employees (collectively, the “Individual Defendants”) have been commenced, and additional lawsuits may be commenced involving similar claims (collectively, the “Lawsuits”). Moreover, numerous governmental investigations relating to essentially the same factual matters (the “Investigations”) are underway. For purposes of this Motion, the Lawsuits can be separated into two general categories: (i) class action lawsuits by Enron Corp. shareholders alleging, among other things, violations of the federal securities laws; and (ii) class action lawsuits by Enron Employee Benefit Plan participants alleging, among other things, violations of ERISA. In addition, numerous derivative actions were filed but such actions have been stayed pursuant to § 362(a)(3) of the Bankruptcy Code as a result of Enron Corp.'s filing of its chapter 11 petition.

15. Prior to the Petition Date, the Debtors requested AEGIS to provide interim payment of covered Defense Costs incurred and to be incurred in connection with the Lawsuits and the Investigations.

16. Subsequent to the Petition Date, notwithstanding the automatic stay as to private lawsuits against the Debtors as a result of their chapter 11 filings, Enron Corp. and the Individual Defendants -- against whom certain actions have proceeded -- have incurred, and likely will continue to incur, significant Defense Costs. Thus, the Individual Defendants are seeking interim payment or advancement of Defense Costs by Enron Corp., pursuant to its advancement and indemnification obligations, or by AEGIS pursuant to the Policies.

17. AEGIS has agreed to pay and/or advance Defense Costs to the covered Individual Defendants upon this Court's approval, subject to: (a) AEGIS reserving its rights and defenses with respect to its coverage obligations; and (b) other standard conditions, such as the execution by each covered Individual Defendant of a binding written undertaking (an "Undertaking") to repay all monies advanced if it ultimately is determined that the individual is not entitled to insurance coverage -- such as if: (i) the officer or director "gained any personal profit" to which he or she was not entitled (AEGIS D&O Policy (III)(B)(1)); or (ii) his or her liability is "brought about or contributed to by the dishonest, fraudulent, criminal or malicious act or omission of such director or officer if a final adjudication establishes that acts of active and deliberate dishonesty were committed or attempted with actual dishonest purpose and intent and were material to the cause of action so adjudicated" (AEGIS D&O Policy (III) (B)(3); see ERISA Fiduciary Policy III(A), as amended by Endorsement 11). To secure interim payment or advancement of Defense Costs by AEGIS, the Debtors hereby are requesting, pursuant to section 105(a) of the Bankruptcy Code, that the Court enter an Order authorizing and approving the direct payment or advancement of Defense Costs to or for

the benefit of the covered Individual Defendants in accordance with the Policies subject to the execution of an appropriate Undertaking.

18. This initial application is for this Court's authorization of the interim payment or advancement of Defense Costs to, or on behalf of, the Individual Defendants in an amount up to an aggregate of \$20 million under the AEGIS D&O Policy and in an amount up to an aggregate of \$10 million under the ERISA Fiduciary Policy. Payment or advancement will be limited to the covered Defense Costs charged by one "lead" law firm and any reasonably necessary local or other special counsel for each subset of the Individual Defendants who reasonably require separate counsel.

19. The Debtors note that at the present time there is no basis for distinguishing among and between present and former officers, directors and employees in terms of coverage rights under the Policies. To the extent that there is concern that wrongdoers may benefit, the Debtors believe that the Undertakings will insure that any such individual will be required to repay any amounts advanced if a court ultimately determines their behavior was such that they are not entitled to coverage.

20. The limitations on the amount of Defense Costs as to which authorization is sought herein is neither a representation that such amounts will be sufficient to pay all covered Defense Costs of the Individual Defendants nor an attempt to estimate total necessary Defense Costs for such defendants. Therefore, the Debtors specifically reserve the right to seek the authorization of additional amounts in the future and the limitations set forth herein do not constitute an admission that such amounts are an appropriate cap on Defense Costs.

RELIEF REQUESTED

21. By this Motion, the Debtors seek an Order by the Court, pursuant to section 105(a) of the Bankruptcy Code, which: (i) authorizes AEGIS to pay and/or advance Defense Costs (including the fees and costs of experts), to or for the benefit of the covered Individual Defendants, up to an aggregate of \$20 million under the AEGIS D&O Policy and \$10 million under the ERISA Fiduciary Policy, for one lead law firm and any reasonably necessary local or other special counsel for each subset of such Individual Defendants who reasonably require separate counsel, which Defense Costs AEGIS determines are covered or owing under the AEGIS D&O Policy or the ERISA Fiduciary Policy, or which (subject to a full reservation of rights and other standard conditions, including the execution of an Undertaking) AEGIS determines to be potentially covered or owing under the respective Policies; and (ii) declares that any such amounts paid or advanced will deplete the applicable limits of liability under the respective Policies (unless repaid or refunded). Any such Order would be without prejudice to the Debtors' right to file future motions for approval of additional amounts to be paid or advanced to or for the benefit of covered Individual Defendants under the Policies.

GROUND FOR RELIEF

22. The Court's general equitable powers are codified in section 105(a) of the Bankruptcy Code. Section 105(a) empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." As described below, in addition to rights which arise under the plain terms of the Policies, sound business reasons exist to justify the direct payment or

advancement by AEGIS of Defense Costs and for the removal of obstacles to such payment or advancement.

23. It is well-settled that an insurance policy issued to a debtor is “property of the estate.” Numerous cases, however, have distinguished between ownership of the policy and ownership of the proceeds of a policy (i.e., the payments made by the insurer pursuant to the insurance contract), paid pursuant to provisions that provide liability coverage only to a third-party -- such as insurance protecting individual directors, officers, plan committee members, and employees -- and held that the latter are not property of the estate. See, e.g., In re Louisiana World Expo., Inc., 832 F.2d 1391, 1401 (5th Cir. 1987) (distinguishing between ownership of a D&O policy and ownership of the proceeds of the policy and holding that “the liability proceeds, which belong only to the directors and officers, are not part of the estate”) (emph. omitted); In re First Cent. Fin. Corp., 238 B.R. 9, 15-18 (Bankr. E.D.N.Y. 1999) (same); In re Imperial Corp. of Am., 144 B.R. 115, 118-119 (Bankr. S.D. Cal. 1992) (same); In re Daisy Sys. Sec. Litig., 132 B.R. 752, 755 (Bankr. N.D. Cal. 1991) (same).⁴ See also In re Edgeworth, 993 F.2d 51, 55-56 (5th Cir. 1993) (“When a payment by the insurer cannot inure to the debtor’s pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy

⁴ The term “proceeds,” often used to refer to payments made by an insurer under an insurance policy, is used differently in the Bankruptcy Code. In the Bankruptcy Code, the term “proceeds” refers to a new asset which is derived as income from or payment for a pre-existing asset. Entitlement to such proceeds inures to the benefit of the owner of the pre-existing asset, absent a contract which assigns the right to receive them to another. Payments made under a liability insurance policy do not fit this paradigm; rather, monies paid under a liability policy are so payable because the insured person or entity has become liable (or incurred defense costs) and is obligated to pay an amount equal to such monies. The insurance contract merely relieves the insured of the obligation to pay such sums. Accordingly, Bankruptcy Code provisions that purport to define the estate’s interest in “proceeds” have no bearing on whether the “proceeds” of an insurance policy constitute property of the estate.

estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate”) (footnotes omitted).⁵

24. Thus, for example, payments by insurers pursuant to property or casualty insurance policies which cover the risk of damage to assets that are, or would have been, property of the estate are property of the estate. Similarly, payments made by insurers to reimburse indemnification payments by the debtor or pursuant to entity coverage provisions are property of the estate. See generally Bankruptcy Code § 541(a). In contrast, payments pursuant to an insurance policy which protects an estate against liability to a third party, and which proceeds are payable only to the third party, have been held not to be property of the estate. See, e.g., In re Circle K Corp., 121 B.R. 257, 259-61 (Bankr. D. Ariz. 1990) (distinguishing individual liability coverage from indemnification reimbursement coverage and holding that only the latter was property of the estate).

25. As the Court held in In re First Cent. Fin. Corp. concerning a policy that included (as here) indemnification and entity coverage for claims alleging violations of the securities laws:

D&O policies are obtained for the protection of individual directors and officers. Indemnification coverage does not change this fundamental purpose. There is an important distinction between the individual liability and the reimbursement portions of a D&O policy. The liability portion of the policy provides coverage directly to officers and directors, insuring the individuals from personal loss

⁵ The fact that monies paid pursuant to liability insurance coverage may relieve the estate of a liability -- here, to indemnify the Individual Defendants -- does not create any legal or equitable right of the estate in the monies which may be paid. See Landry v. Exxon Pipeline Co., 260 B.R. 769, 783-794 (Bankr. M.D. La. 2001).

for claims that are not indemnified by the corporation. Unlike an ordinary liability insurance policy, in which a corporate purchaser obtains primary protection from lawsuits, a corporation does not enjoy direct coverage under a D&O policy. It is insured indirectly for its indemnification obligations. In essence and at its core, a D&O policy remains a safeguard of officer and director interests and not a vehicle for corporate protection.

238 B.R. at 16.⁶

26. Here, while Enron Corp. owns the Policies, at least in the case of the D&O Policies, because of the Priority of Payments endorsement, Enron Corp.'s right to proceeds of the policy pursuant to the indemnification or entity coverage provisions -- which may be considered estate assets -- is subordinate to the payment rights of the Individual Defendants. See generally In re Jones, 179 B.R. 450, 455 (Bankr. E.D. Pa. 1995) (respective rights of debtors and non-debtors to insurance proceeds "must be ascertained by reference to the parties' contractual rights pursuant to the interpretation of the pertinent contractual provisions under applicable state law").

27. As noted, there are sound business reasons for allowing the direct payment or advancement of Defense Costs to, or on behalf of, the covered Individual Defendants. In addition to the numerous and overlapping Congressional, Executive Branch and agency Investigations, as to which it is very much in the Debtors' interest that the Individual Defendants have adequate legal representation for obvious reasons, numerous Lawsuits currently are being pursued against the Individual Defendants asserting claims identical to the claims that have been asserted against the Debtors and

⁶ The Debtors respectfully suggest that the Court need not reach the issue of whether the proceeds are or are not property of the estate to approve this Motion because the payments or advancements at issue herein are clearly in the best interests of the Debtors' estates for the reasons discussed below.

would be proceeding against the Debtors were such claims not subject to the automatic stay. Indeed, it is possible that a plaintiff will argue that findings made against Individual Defendants give rise to vicarious liability on the part of Enron Corp. Thus, it is important to the bankruptcy estate for the Individual Defendants to have adequate representation, including access to experts, in the Lawsuits.

28. Whether or not the Lawsuits proceed or are stayed in their entirety, Enron faces the likelihood of substantial claims for indemnification from the Individual Defendants based just on Defense Costs already incurred. Moreover, in the future, Enron Corp. may well receive indemnification claims for additional Defense Costs and for judgments or settlement payments given the terms of the Oregon Business Corporation Act (under which Enron is incorporated),⁷ Enron Corp.'s Amended and Restated Articles of Incorporation (the "Articles"),⁸ and the Debtors' 401(k) Plan -- under which the

⁷ The Oregon Business Corporation Act provides for mandatory indemnification under certain circumstances (Secs. 60.394 and 60.407), permits the advancement of expenses under specified conditions (60.397, 60.407), and permits a corporation's articles of incorporation or by laws (or other mechanisms) to provide for broader indemnification and advancement than that specified by the statute (60.414(a)). Further, Section 60.414 of the Act provides:

The indemnification and provisions for advancement of expenses provided by [this Act] . . . shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

⁸ The Articles provide that, subject to certain conditions, all employees of Enron Corp.:

shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the Oregon Business Corporation Act, as the same exists or may hereafter be amended . . . against all expense, liability and loss (including attorneys' fees, judgments, fines, ERISA excise taxes or penalties and amounts paid or to be paid in settlement) reasonably incurred or suffered by such person in connection therewith, and such indemnification shall continue as to a person who has ceased to serve in a capacity to which the above indemnification applies and shall inure to the benefit of his or her heirs, executors and administrators. . . .

ERISA actions arise.⁹ Thus, to the extent there is an entitlement to indemnification, Enron Corp. ultimately may be liable to the Individual Defendants if the amounts at issue are not paid by the Insurers.

29. Further, the relief requested by this Motion is vitally important to the Debtors' reorganization efforts. Unless persons serving as directors, officers, plan committee members, ERISA fiduciaries, plan administrators, and employees of the Debtors are assured that the insurance policies put in place to protect them will be available for the intended purpose, qualified and knowledgeable individuals may not be willing to continue to serve in such capacities and/or may be unnecessarily distracted from their essential functions on behalf of the Debtors.

30. Finally, with respect to the ERISA Policies, while there is both entity coverage for the Debtors and their Employee Benefit Plans and individual coverage under such policies, there is an endorsement to the ERISA Fiduciary Policy providing a separate \$10 million "pool" for Defense Costs. As such, payment or advancement of

⁹ Under the terms of the 401(k) plan, Enron Corp. is obligated to indemnify officers and directors as well as other individuals associated with the plan. Specifically, Enron Corp.:

shall indemnify and hold harmless each member of the [Administrative] Committee and each Employee who is a delegate of the Committee against any and all expenses and liabilities arising out of his administrative functions or fiduciary responsibilities, including any expenses and liabilities that are caused by or result from an act or omission constituting the negligence of such individual in the performance of such functions or responsibilities, but excluding expenses and liabilities that are caused by or result from such individual's own gross negligence or willful misconduct. Expenses against which such individual shall be indemnified hereunder shall include without limitation, the amounts of any settlement or judgment, costs, counsel fees, and related charges reasonably incurred in connection with a claim asserted or a proceeding brought or settlement thereof.

Defense Costs will not reduce the \$85 million limits of liability under the ERISA Policies.

31. Accordingly, the Debtors respectfully submit that there are no legal barriers to the direct payment or advancement by AEGIS of the Defense Costs of the covered Individual Defendants, and it is very much in the interests of the Debtors and their creditors that this motion be granted.

NOTICE

32. As of the filing of this Motion, no trustee or examiner has been appointed in these chapter 11 cases. Notice of this Motion has been given via United States first class mail, postage pre-paid, to the parties listed on the Master Service List and all parties who have filed a notice of appearance in these cases pursuant to Rule 2002. Because of the exigencies of the circumstances and the irreparable harm to the Debtors, their estates, and all parties in interest that will ensue if the relief requested herein is not granted, the Debtors submit that no other notice need be given.

33. Pursuant to Local Bankruptcy Rule for the Southern District of New York 9013-1(b), because there are no novel issues of law presented herein, the Debtors respectfully request that the Court waive the requirement that the Debtors file a memorandum of law in support of this Motion.

34. No previous motion for the relief sought herein has been made to this or any other Court.

WHEREFORE, the Debtors respectfully request that the Court enter an order granting the relief requested herein, and such other and further relief as may be just.

Dated: New York, New York
January 18, 2002

By: /s/ Richard L. Levine
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