Exhibit E

CASE NO. 04-20001

MARK NEWBY, ET AL.,

PLAINTIFFS,

MARK NEWBY, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

PLAINTIFFS-APPELLEES,

VS.

ENRON CORPORATION, ET AL.,

DEFENDANTS

ANDERSEN-UNITED KINGDOM; ANDERSEN-BRAZIL; ARTHUR ANDERSEN & COMPANY INDIA; ANDERSEN WORLDWIDE SC,

DEFENDANTS-APPELLEES

VS.

RINIS TRAVEL SERVICE, INC. PROFIT SHARING TRUST UA 6-1-1989; MICHAEL J. RINIS, IRRA,

INTERVENOR PLAINTIFFS-APPELLANTS

SETTLEMENT CLASS MEMBERS; JAMES H. ALLEN, JR.; BURTON W. CARLSON, JR.; MICHAEL T. DEFREECE; MARCIA A. DEFREECE; ANDREW E. KRINOCK; PHYLLIS A. KRINOCK; PARTCOM LIMITED PARTNERSHIP; REED PARTNERS, L.P., FORMERLY KNOWN AS REED FAMILY LIMITED PARTNERSHIP; F. WALKER TUCEI; JUNE P. TUCEI; ROMAN H. UHING; ALVERA A. UHING; VIETS FAMILY ASSOCIATES, L.L.P.,

APPELLANTS

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the instant class action, it is necessary and helpful to determine what kinds and amounts of expenses are being awarded in other class actions. Just as when looking at awards of fees to class counsel, it is indispensable to the district court to compare what percentage of the common funds obtained in other class action cases has been awarded to other class counsel for costs and expenses. What measure of litigation costs are considered reasonable is, therefore, illustrated in great measure by what reasonable judges are doing.

The following examples should have led the district court to a different conclusion.

In Bogosian v. Gulf Oil Corporation, 621 F.Supp. 27, 32 (E.D.Pa. 1985), after a proposed class settlement fund of $36 million was approved, plaintiffs counsel moved for fees and costs. The court awarded $7.9 million in fees, or 21.9% of the common fund, and awarded costs of $349,000, or 0.96% of the fund.

The case of Feinberg v. Hibernia Corporation, 966 F.Supp. 442, 443-44 (E.D.La. 1997), involved a settlement fund of $20 million. The district court awarded class counsel fees of $3.41 million, or 17% of the fund, and expenses of $1.14 million, or 5.7% of the common fund.

In re Combustion, Inc., 986 F.Supp. 1116, 1126 (W.D.La. 1997), a resolution gave rise to a proposed settlement fund of $127.39 million. In order to speed up distribution of the settlement to the class members, the court approved the proposed settlement, the terms of which included a maximum cap on the amount allowable for litigation costs of 6%, and a maximum cap on attorneys fees of 36%. Id. Actual payment of fees and expenses would take place upon further hearing, and any residue of the amounts held in reserve would revert to the class. Id. at 1156.

In re PaineWebber Limited Partnerships Litigation, 999 F.Supp. 719, 725 (S.D.N.Y. 1998), concerned a settlement fund of $200 million. Class counsel fees were awarded of $25.9 million (12.9% of the fund) and costs were awarded of $3.68 million (1.8% of the fund).

In Nasdaq Market-Makers Antitrust Litigation, 187 F.R.D. 465 (S.D. N.Y. 1998), a settlement fund of $1.027 billion was approved. Id. at 470. Attorney s fees of $143.7 million, or approximately 14% of the common fund, were awarded to class counsel. Id. This fee award was accompanied by an award of costs of $4.4 million, or approximately 0.4% of the fund. Id. at 489. *Less than half of 1%* of the amount of the settlement fund was applied to litigation costs. By stark contrast, in the instant case, the amount committed to

litigation costs is $15 million of a $40 million common fund, or *37.5% of the only available common fund.* This is an astonishingly high figure when compared to other large class actions, and as such constitutes an abuse of the district court s discretion.

The case of *In re* Lease Oil Antitrust Litigation, 186 F.R.D. 403 (S.D. Tex. 1999), involved fifteen consolidated federal cases, a potential class of over 2.8 million, and 39 defendants. The global settlement in Lease Oil was $164.2 million. Id. at 414. The fees awarded were $46.7 million, or 25% of the common fund. Id. at 448. Costs were awarded of $7.9 million, equal to 4.2% of the common fund. Id.

In re Shell Oil Refinery, 155 F.R.D. 552, 557 (E.D. La. 1993), produced a settlement fund of $170 million. Fees awarded were $31.4 million, or 18.18% of the fund. Costs awarded were $13.8 million, or 8% of the fund.

In Shaw v. Toshiba America Information Systems, Inc., 91 F.Supp.2d 942, 945 (E.D.Tex. 2000), the court approved a settlement fund of $2.1 billion. The class counsel s attorneys fees were approved in the amount of $147.5 million (7% of the settlement fund) and costs were approved in the amount of $3 million (0.14% of the fund). Id. at 973.

In Spark v. MBNA Corporation, 157 F.Supp.2d 330 (D.Del. 2001),

recovery was estimated at $4.5 million. Fees awarded were $566,000 (12.5% of the fund), and costs awarded were $24,000 (0.5% of the fund).

Erie County Retirees Association v. County of Erie, 192 F.Supp.2d 369 (W.D.Pa. 2002), involved a settlement fund of $350,000. Fees awarded were $133,000, or 38% of the fund, while costs awarded were $11,000, or 3% of the fund.

In the case of Vizcaino v. Microsoft Corp., 290 F.3d 1043 (9th Cir. 2002), the court included a table of information, with footnotes, illustrating some recent fee and cost awards in common fund cases of between $50 and 200 million. *In re* Ikon Office Solutions, Inc., Securities Litigation, 194 F.R.D. 166 (E.D. Pa. 2000), provided for a settlement fund of $112 million, fees of $32 million (29% of the fund) and costs of $4 million (3.5% of the fund). Vizcaino, *supra*, Appendix, FN6. *In re* Aetna, Inc. Securities Litigation, 2001 WL 20928 (E.D.Pa. 2001), had a settlement of $83 million, fees of $24 million (29.5% of the fund), and $2 million in costs (2.4% of the fund). Vizcaino, *supra*, Appendix, FN13. *In re* Carbon Dioxide Antitrust Litigation, 1996 WL 523534 (M.D.Fla. July 15, 1996), established a $53 million common fund settlement, a $10 million fee award, 18% of the fund, and an award of costs totaling $1.6 million, or 3% of the fund. Vizcaino, *supra*, Appendix, FN18. *In re* Warfarin

Sodium Antitrust Litigation, 212 F.R.D. 231 (D.Del. 2002), involved a settlement fund of $44.5 million. Attorney fees in the amount of $10 million, or 22.5% of the fund, were awarded. Costs were awarded of $832,000, or 1.8% of the common fund.

In re Cendant Corporation Litigation, 243 F.Supp.2d 166 (D.N.J. 2003) gave rise to a settlement fund of $3.2 billion. Id. at 172. The court awarded $55 million in fees, or 1.7% of the fund. Id. Costs were approved totaling $14.6 million, or 0.45% of the fund. *In re* Cendant Corporation Litigation, 264 F.3d 201, 229 (3rd Cir. 2001).

In re Equimed, Inc. No. Securities Litigation, 2003 WL 735099 (E.D.Pa. 2003), resulted in a settlement fund of $1.8 million. Fees awarded were $475,815, or 26% of the fund, and costs awarded were $124,184, or 6.8% of the fund.

In re Synthroid Marketing Litigation, 325 F.3d 974 (7th Cir. 2003), entailed a settlement fund of $46 million for third-party payor class members, of which $10.12 million was allowed for fees (22% of the fund), and $621,000 was allowed for costs (1.3% of the fund).

In re Rite Aid Corporation Securities Litigation, 269 F.Supp.2d 603 (E.D.Pa. 2003), involved a partial settlement fund of $126.6 million. The sum

of $31.6 million (25% of the fund) was allowed for class counsel s fees, and $290,000 (a scant 0.22% of the fund) was awarded for costs.

In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation, 268 F.Supp.2d 907 (N.D.Oh. 2003), produced a settlement fund of $1.045 billion. Out of that common fund, fees were awarded totaling $31.6 million, or 3% of the fund, and costs of $3.7 million, or 0.35% of the fund, were awarded to class counsel. Further, the settlement agreement had provided that a maximum of $50 million (4.8%) would be reserved for fees, and a maximum of $7.3 million (0.7%) would be reserved for expenses. The court did not award the maximum amounts reserved.

Purdie v. Ace Cash Express, Inc., 2003 WL 22976611 (N.D.Tex. 2003), resulted in a settlement fund of $11 million. The court awarded fees of $2 million (20%) and costs of $63,700 (0.57% of the fund).

In re Visa Check/Mastermoney Antitrust Litigation, __ F.Supp.2d __, 2003 WL 22998851 (E.D.N.Y. Dec. 19, 2003), gave rise to a settlement fund of $3.383 billion. The district court awarded fees of $220.2 million, or 6.5% of the fund. Costs were awarded of $18.7 million, or 0.55% of the fund. Though the court stated [t]here is no need for appointment of a guardian or fee expert for the Class, it went on to say, [a]n independent auditor is another matter,

and if [class counsel] had not retained one to audit the hours billed and the resulting fees, I might have had to appoint one to ensure fairness to the Class. Id. at *13, FN28.

None of these cases involved the advancement of costs to class counsel to pursue other defendants, while nothing was paid to the class members. Apparently, there are **no cases** to support class counsel s effort to empty the entire cookie jar for itself and leave class members nothing but the opportunity to look inside.[2]

In Spicer v. Chicago Board Options Exchange, *supra*, the district court provided an excellent framework for guiding the analysis of cost applications in all class actions, regardless of size. The Spicer action was brought after the October 19, 1987, Black Monday stock market disturbance, a day in which the Dow Jones Industrial Average fell by 22.6% of its value. Spicer,

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[2] The two cases cited by class counsel as precedent for the instant case are off the mark. *In re* M. D. C. Holdings Sec. Litig., in an unpublished magistrate s ORDER AWARDING CLASS ACTION COUNSEL FEES AND EXPENSES, entered on August 29th, 1990, the magistrate did authorize approval of a future expense fund from the settlement fund. However, the expense fund was $1 million, and the attorneys fees were 30% of the Settlement Fund, or $4,980,000 in cash plus interest, which means that the class netted about $9 million.

In re Software Toolworks, Inc. Sec. Litig., in an unpublished district judge s ORDER REIMBURSING EXPENSES, entered on September 10th, 1991, the district judge approved a future expense fund to be paid from the settlement fund. The language of the order capped the amount to be earmarked from the settlement fund for the expense fund, evidently leaving a substantial portion for the class members.

Unlike the instant case, objections were not filed in either of these cases.

supra at 1234. The suit specifically concerned activities on the floor of the Chicago Board Options Exchange. The case resulted in a settlement fund of $10 million. The court allowed fees of $2.9 million (29% of the fund) and costs of $1 million (10% of the fund). Id. at 1266.

In its analysis, the court began with looking at two factors: (1) whether the category of expense should be part of general overhead, or is chargeable to the class in this case, and also [(2)] whether the specific expenditures were reasonably necessary in this case. Id. at 1256. One of the costs requested by class counsel which was disallowed by the court was $33,763 for computer equipment. The court stated this would not be charged against the common fund because [a]s with desks and chairs, legal pads and typewriters used by the firm and its employees, we believe that these costs are part of the overhead for running a firm. Id. at 1259. If they truly believe that they will not be using some of this equipment in the future, they can sell it in the used computer market. Id. Class Counsel in this case has listed under Miscellaneous expenses, the sum of $56,495 for computer equipment acquired in connection with the opening of its Houston-based Enron trial office. *Lead Counsel s Application for Partial Reimbursement of Expenses*, p. 7; *Appellate Record p. 1339.* This is in no way a reasonable cost of

litigation and should not be assessed against the common fund for the very reasons enunciated in Spicer, *supra*.

Most importantly in the context of the instant case, as the court emphasized in Spicer, in all class actions counsel have a duty to the class to do things in an economical, cost-efficient fashion. Spicer, *supra*, at 1262. Appropriately, in accordance with its fiduciary duty, the court denied a request for anticipated future expenses. The court responded, [w]e will not award any future costs without seeing specific documentation. Id. at 1266.

The district court abused its discretion as a matter of law when it abdicated its fiduciary obligation to absent class members, by pre-authorizing $15 million in expenses. As a result of the instant court s ruling, virtually the only remaining discretion needed to disburse these funds is that of the Lead Plaintiff. The Lead Plaintiff, while admittedly having a large stake in the outcome of this case, has no fiduciary duty to the entire class, and as such, cannot properly be put into the shoes of the district court to safeguard the interests of absent class members.

In the case of State of Illinois v. Harper & Row, Publishers, Inc., 55 F.R.D. 221, 226 (N.D. Ill. 1972), class counsel s total reimbursable expenses amounted to less than 1 % of the settlements achieved in contrast to expense

claims made in other cases ranging from 4% to 10% of the settlement amounts. Again, the percentage requested here is 37.5% of the common fund, solely for expenses. Looking at the current case law, the percentage of settlement funds that are typically consumed by litigation expenses averages 2.77%. Class Counsel claims that deferring their fee actually benefits the class members. On the contrary, class members here would be better off, and have more of the common fund available for distribution to them, if Class Counsel simply took its fee and the portion of the litigation expenses attributable to this partial settlement of $40 million now.

The resulting charge to the common fund would, in all likelihood, be less than $15 million. The total litigation expenses thus far incurred in the instant case are approximately $5 million. *Proposed Order Awarding Plaintiffs Counsel Partial Reimbursement of Expenses, p. 1; Appellate Record p. ____.* It was never determined how much of the expenses were attributable to the partial settlement achieved, but it certainly cannot be the entire sum. The district court failed to examine with adequate specificity either the reasonableness of the current expense request itself (as seen in its allowance of sums spent on office equipment, which is clearly overhead), or the detriment to the class inflicted by the court s allocating money for future