UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA M. TITTLE, et al., Plaintiffs, vs. ENRON CORP., et al., Defendants.	No. H 01-CV-3913
ELAINE L. CHAO, Secretary of the United States Department of Labor, Plaintiff, vs. ENRON CORPORATION, et al., Defendants.	No. H-03-2257 Consolidated with H-01-3913

SECRETARY OF LABOR'S MOTION FOR AN ORDER TO SHOW CAUSE WHY HEWITT SHOULD NOT BE HELD IN CIVIL CONTEMPT

Elaine L. Chao, Secretary of the United States Department of Labor ("the Secretary"), respectfully requests that the Court issue an order requiring the initial Fund Administrator, Hewitt Associates, L.L.C. ("Hewitt"), to show cause why it should not be held in civil contempt for its failure to properly allocate funds held within the Settlement Trust as Ordered by the Court.

Introduction

On July 24, 2006, this Court approved the Second Supplemental Amended Plan of Allocation ("the Allocation Plan") which required Hewitt, with Enron's assistance, "if necessary," to determine the approximate loss to each member of the settlement class and to allocate the settlement funds accordingly. The Allocation Plan mandated the use of a simple formula based on the dollar value of Enron stock held in each plan participant's account on the first day of the class period, the value of any subsequent stock purchases and sales, and the value of the stock on the last day of the class period. Accordingly, under the terms of the court-approved formula, each class member who was a plan participant on January 1, 1998 (the first day of the class period) should have received an allocation that reflected an opening account balance determined using Enron's share price of $41.56 as of that date.[1]

Hewitt did not comply with the Allocation Plan. In particular, it did not calculate or allocate all of the settlement funds based on "the dollar value, if any, of the account's investment in Enron stock valued on the first day of the Settlement Class Period," but instead allocated Settlement Trust funds based on an arbitrary starting price of $100 per share for the ESOP's holdings on January 1, 1998 – an inflated number that did not correspond to Enron's stock price on that date or on any other date in the Company's entire history.

As a result of Hewitt's failure to adhere to the terms of the Allocation Plan, the initial settlement distribution to plan participants misallocated approximately $22 million of the available settlement funds. Virtually every class member received an erroneous initial distribution, and the Settlement Fund now has insufficient funds to pay correct amounts to participants who received less than they should have received. According to Enron's estimates,

[1] A copy of the Allocation Plan is attached hereto as Exhibit A.

even after various recoupment and offset measures, the Settlement Fund will have $9.15 million less than it needs to pay Enron's workers, retirees, and beneficiaries the amounts to which they are entitled under the court-approved settlements and Allocation Plan.[2]

Hewitt's violation of the Allocation Plan did not stem from any misunderstanding of its terms or of the actual price of Enron stock. Hewitt understood the terms of the court-approved plan, knew the correct stock price, and specifically agreed to tell participants that it was allocating funds in accordance with that stock price ($41.56). Its understanding was reflected in a document entitled "Settlement Allocation(s) Plan Provision and Requirements, Enron Corp." ("Implementation Agreement"), which Enron and Hewitt executed just a few days after the Court approved the Allocation Plan. The Implementation Agreement included a draft explanatory letter and "Question and Answer document" for plan participants that advised them on how their allocations would be calculated and told them that "the January 1, 1998 Enron stock price is based on the December 31, 1997 closing price of $41.56 per share." This same language, asserting that Hewitt used a January 1, 1998 Enron stock price of $41.56, was included in the final letter which went out to participants in 2006. Thus Hewitt's use of a $100 stock price was wholly inconsistent with the terms of the Allocation Plan, the Implementation Agreement, and Hewitt's representations to plan participants.

When the parties brought the misallocation issue before the Court on July 27, 2007, the Court ordered Hewitt to provide corrected calculations within thirty days and established a framework for notifying participants of the corrected amounts and for contesting those amounts. The Court's Order additionally provided that "[n]one of the expense involved in determining the

[2] The longer it takes to make the next distribution the larger this number becomes, as additional interest accrues on the principal amount of the shortfall. The Secretary seeks to require Hewitt to pay the amount necessary to fully fund the allocation - an amount that may already be in excess of $9.15 million.

defective calculations and the extent thereof or the correction of such defective calculations, including the expense of implementing the processes outlined in this Order, shall be paid out of any of the ESOP or Savings Plan assets, by any Plan participant, or out of any of the Settlement Funds obtained in the above-captioned action."

It has been more than a year since Hewitt violated the Allocation Plan and caused the misallocation of $22 million, and more than six months since the Court issued its Order requiring corrected allocation calculations. Even so, Hewitt has yet to make appropriate arrangements to ensure that every Enron plan participant receives the full benefit of the Enron settlements as contemplated by the Allocation Plan. At the July 27, 2007 hearing on Enron's *Motion for Approval of Modification to Second Supplemental Amended Plan of Allocation,* Hewitt acknowledged, with considerable understatement, that it had made a "mistake" as a result of a "defect in the system," and asserted that "we accept responsibility for that." The acceptance of responsibility to date, however, has been more rhetorical than real.

In fact, Hewitt has not "accepted responsibility" or stood behind its work in the sense that really counts – cleaning up the mess it has created and contributing the funds necessary to make underpaid participants whole for the injury it has caused. Although Hewitt has finally made the corrected calculations, the Settlement Fund still does not have the funds necessary to comply with the Allocation Plan or to avoid saddling the Enron pension plans or their participants with the expense of making underpaid participants whole. Absent a real commitment from Hewitt to fix the problem it created, or a quick judicial resolution, the plans' participants face the prospect of continued delay and injury, while they await the outcome of protracted litigation between

Hewitt and others.[3] They have already waited long enough. The participants' interest in the prompt payment of their retirement funds – and this Court's interest in compliance with its orders – should not take a back seat to Hewitt's interest in continued delay.

This Court has ample authority to ensure compliance with its orders and the Plan of Allocation, including the power to order Hewitt to make participants whole for the losses caused by Hewitt's non-compliance. Now that the corrected calculations are finally complete, Hewitt should be ordered to ensure that participants receive all of the funds that are due to them with interest. Hewitt failed to abide by the court-approved Allocation Plan, that failure has not been corrected, and, therefore, a remedy for civil contempt of court is appropriate.

Accordingly, the Secretary asks the Court to find Hewitt in contempt and to order Hewitt to deposit immediately a sufficient sum in the Settlement Trust to ensure that all Enron employees, retirees and their beneficiaries will promptly receive all of the funds due to them.[4]

Hewitt's Failure to Comply with the Court-Approved Allocation Plan

Between 2004 and 2006, the class action plaintiffs in Tittle (the "Plaintiffs") and the Secretary negotiated court-approved settlements, resulting in the recovery of hundreds of

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[3] On November 30, 2007, the Savings Plan and its Administrative Committee filed suit against Hewitt seeking to hold it liable for its admitted errors. Case No. 04-04081, Docket No. 1 (S.D. Tex).

[4] In addition to filing this Motion, the Department is conducting an investigation under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., to determine whether Enron, Hewitt, and the Administrative Committee for the Enron Corp. Savings Plan (Robert Jones, Wade Cline, and Robert Bingham) breached their fiduciary duties under ERISA, or knowingly participated in such breaches, with respect to the misallocation of settlement funds. Nothing herein should be read to suggest that the Secretary has concluded that the contempt remedy is the sole possible remedy against any of these parties or that they have otherwise complied with their obligations under ERISA.

millions of dollars for the participants and beneficiaries of Enron's pension plans.[5] Under the terms of the settlements, the parties placed the recoveries in a Settlement Trust for the benefit of injured class members. The Court retained jurisdiction over the administration, implementation, and enforcement of the settlements and the administration of the Settlement Trust:

> Without affecting the finality of this Order of Final Judgment and Dismissal in any way, this Court retains continuing jurisdiction over: (a) implementation of the Settlement; (b) any award or distribution of the Settlement Trust, including interest earned thereon; and (c) all other proceedings related to the implementation and enforcement of the Agreement.

See Case No. 01-3913, Docket Nos. 987 at 7 ¶ 28; 1075 at 8 ¶ 30; 1132 at 7 ¶ 25; 1219 at 7 ¶ 25.

Accordingly, the Plaintiffs obtained court approval for the disposition of the settlement funds in a series of orders providing for the payment of the funds to Claimants pursuant to specific plans of allocations. See Case No. 01-3913, Docket Nos. 987 at 3 ¶ 10; 1075 at 4 ¶ 11; 1132 at 3 ¶ 10; 1219 at 4 ¶ 10 (each referring to an "allocation plan"). These court-approved plans established the precise distribution amounts to which class members were entitled. The currently operative plan of allocation is the Second Supplemental Amended Plan of Allocation ("the Allocation Plan"), which the Court approved on July 24, 2006, as "fair, reasonable, and adequate."[6] Case No. 01-3913, Docket No. 1219, p 4, ¶ 10.

The Allocation Plan gave the Enron pension plans authority to appoint a "Fund Administrator" who was required to "administer the Plan of Allocation and the distribution of the fund within the Plans" in accordance with the court-approved methodology. Allocation Plan,

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[5] See, Case No. 03-2257, Docket Nos. 19, 20, 21, 34, 59, 60 (Consent Decrees entered in Secretary's action). Case No. 01-3913, Docket Nos. 987, 1075, 1132, and 1219 (settlements filed in the Tittle class action).

[6] Plaintiffs filed the Allocation Plan with the Court on July 17, 2006. *See* Case No. 01-3913, Docket No. 1213. Eight days later, on July 25, 2006, Plaintiffs filed a second copy of the Allocation Plan. *See* Case No. 01-3913, Docket No. 1220.

Definitions, 19 (Case No. 01-3913, Docket No. 1213, p. 4). As this Court has already concluded, Hewitt was the Fund Administrator within the meaning of the Allocation Plan. See *Order Granting Motion for Approval of Modifications to Second Supplemental Amended Plan of Allocation,* Case No. 01-3913, Docket No. 1334, p 2 ("Hewitt Associates, LLC ("Hewitt") acted as Fund Administrator pursuant to, and as defined in, the Allocation Plan").

On July 31, 2006, Enron and Hewitt executed the Implementation Agreement which authorized:

> Hewitt to proceed as planned with the first Tittle Settlement allocation of proceeds in accordance with the document entitled "Settlement Allocation(s) Plan Provisions and Requirements, Enron Corp.", dated July 31, 2006 and the terms of said Second Supplemental Amended Plan of Allocation.

A copy of the Implementation Agreement executed by Hewitt and Enron is attached hereto as Exhibit B (and was also filed by Hewitt in 2007, *see* Case No. 01-3913, Docket No. 1316, Ex. B).

The Implementation Agreement memorialized Hewitt's agreement to perform specific calculations including a determination of "settlement allocation amounts." Implementation Agreement, Ex. B, p 1.11.[7] In strict conformity with the Allocation Plan, the Implementation Agreement required Hewitt, as the Fund Administrator, to calculate a "Loss" amount for each current and former plan participant ("Claimant") based on a specific "Court approved methodology" which considered the dollar value of Enron stock held in each participant's plan account on the first day of the class period, the value of any subsequent stock purchases and

[7] The Implementation Agreement also required oversight by Enron and others over Hewitt's work, including that they: "sign-off" on Hewitt's work at specific steps, "confirm . . . data elements," "confirm the final amount to be used in the Claimant allocation calculation" and other actions. Implementation Agreement, Ex. B, pp 1.5-1.9, 1.11, 1.12. Whether Enron and the Administrative Committee performed these tasks is one subject of the Department's current investigation.

sales, and the value of the stock on the last day of the class period. See Exhibit A, Sections III.A.1 and III.B.1. Each claimant was entitled to an allocation of the recoveries in proportion to the amount of the Claimant's individual losses. Exhibit A, Section III.D.

It is undisputed that Hewitt failed to use the court-approved methodology in calculating the Claimant's allocations in the First Allocation (involving approximately $89 million). Rather than use "the dollar value, if any, of the account's investment in Enron stock valued on the first day of the Settlement Class Period" as required by the Allocation Plan (Exhibit A, p 11), Hewitt used an opening value of $100 for the ESOP's stock holdings, more than twice the actual value of Enron stock on that date, January 1, 1998 ($41.56).[8]

Hewitt's use of an arbitrary $100 value was inconsistent with the express terms of the Allocation Plan, the Implementation Agreement, and Hewitt's representations to Claimants. Indeed, the Implementation Agreement, which was executed immediately after the Court approved the Allocation Plan, specifically recited a $41.56 share price, and included a form letter to participants reciting that their allocations were calculated with reference to the $41.56 share price ("your loss was calculated by taking the dollar value of Enron stock in your account on January 1, 1998 . . . the January 1, 1998 Enron stock price is based on the December 31, 1997 closing price of $41.56 per share . . . "). Exhibit B, Appx. D, ¶ 7. This same language was included in a letter sent to all participants in the summer of 2006.

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[8] Hewitt also appears to have erred by failing to comply with its obligations under the Implementation Agreement to: "ensure data integrity," "confirm allocation calculations are correct for sample example populations of Claimants," and use accurate historical net asset values. Implementation Agreement, Exhibit B, pp 1.5, 1.11, 1.21. All of these quality checks, if actually performed, should have immediately revealed the "mistake," since the $100 share value assigned to 7,700 participants was not the correct value on January 1, 1998 or on any other date (Enron's stock peaked at less than $91 in the summer of 2000). The Secretary understands that Hewitt's mistakes were ultimately discovered by participants who themselves compared Hewitt's calculations with the historical price of Enron stock.

As a result of Hewitt's failure to comply with the Allocation Plan, Hewitt caused the Settlement Trust to misallocate $22 million of the Settlement Trust's assets. Approximately 7,700 Claimants received over-allocations, while more than 12,600 Claimants received $22 million less than they were entitled to under the Allocation Plan. It may be possible to recover some of these overpayments through recoupment and offsets from funds which have not yet been distributed to overpaid plan participants, as Enron suggests. However, it is clear that such efforts will be insufficient to recapture enough money to make underpaid Claimants whole.[9]

On July 27, 2007, the Court issued an order requiring Hewitt to give corrected calculations to Enron within thirty days, and created a framework for notifying Claimants of the revised calculations and disputing them. *See* Case No. 01-3913, Docket No. 1334. The July 2007 Order found that Hewitt "acted as the Fund Administrator" with respect to the Allocation Plan (*Id.* at ¶ 5), and reaffirmed that the Court had jurisdiction over the matter. Additionally, the Order stated that "that [n]one of the expense involved in determining the defective calculations and the extent thereof or the correction of such defective calculations, including the expense of implementing the processes outlined in this Order, shall be paid out of any of the ESOP or Savings Plan assets, by any Plan participant, or out of any of the Settlement Funds obtained in the above-captioned action." *Id.* at ¶ 19.

At the July 27, 2007 hearing, Hewitt acknowledged that "[w]e're here because of a Hewitt mistake," and expressed Hewitt's concern for the "friends and relatives who worked at Enron" that had been injured by the miscalculation.[10] Exhibit C, pp. 18 -20. Similarly, Hewitt

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[9] Even after such recoupment actions, Enron estimates that there will be a $9.15 million shortfall. *Enron's Motion to Extend the Claimant Allocation Review Process to the Pending Second Allocation,* Case No. 01-3913, Docket No. 1346.

[10] In this same vein, at the July 27 hearing, Hewitt stated that "A mistake was made. It was our mistake. We should do the work to fix the mistake." Transcript of 7/27/07 Proceedings, p. 19

indicated its willingness to "work to fix the mistake." *Id.* Despite such expressions of concern for the underpaid participants, however, Hewitt has failed to deposit or otherwise provide the funds necessary to ensure that Claimants will receive what they would have received if Hewitt had complied with the Allocation Plan. The Settlement Fund does not now have sufficient funds to correct the initial misallocation or to make the Second Allocation in the manner contemplated by the Court's orders.

More than a year has gone by since Hewitt first violated the Allocation Plan and caused the misallocation of $22 million, and more than six months have elapsed since the Court issued its Order requiring corrected allocations. Hewitt, while conceding that it caused the shortfall, has declined to stand behind its work and contribute the requisite funds. It should now be compelled to deposit sufficient funds to permit payment of the corrected allocations. As Enron noted in its *Motion to Require Initial Fund Administrator to Provide Funding for Upcoming Corrected Allocation*, "absent the proposed funding, the Plan and the Administrative Committee lack the financial resources to carry out the allocations provided for under the Allocation Plan or to fulfill this Court's Order of July 27, 2007." Case No. 01-3913, Docket No. 1346, p 7. As Enron also observed in its Motion, this Court has the inherent authority to enforce its orders and to ensure that the Settlement Fund is distributed in accordance with the provisions of the Allocation Plan. Accordingly, before the parties send Revised Allocation Statements to participants with the

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(excerpts of which are attached hereto as Exhibit C). Hewitt explained the "mistake" this way: "What happened was that Hewitt's computer system – there was a flaw in old software; and rather than using the actual market price on January 1, 1998, the defect in the system took that price to what computer people call a default price, Your Honor. It's not the actual price. It goes to – in this case I think it was $100 price, which is a plug figure. Defect in the system. Our mistake. We accept the responsibility for that." Exhibit C, pp 19-20. Hewitt's acceptance of responsibility has not extended, however, to actually redressing the injury caused by its failure to comply with the Allocation Plan.

correct allocation amounts, Hewitt should provide the funds necessary to pay the correct amounts.

Enron's employees, retirees and beneficiaries have waited too long for their full recovery in this action. After Hewitt deposits the appropriate funds in the Settlement Fund for distribution to the Claimants it has injured, Hewitt remains free to fight with Enron over relative fault and its entitlement, if any, to indemnification from Enron for the funds deposited. These fights, however, should come only after all the Claimants get the full recovery which is past due to them. Accordingly, the Secretary asks the Court to Order Hewitt to Show Cause why it should not be held in contempt of this Court and ordered immediately to pay the amounts necessary to remedy the shortfall caused by its misconduct.

Enforcement of the Court's Orders Through Civil Contempt

It is well-settled that "[i]f a federal court enters an order and it is disobeyed, to preserve the authority of the judicial branch of government, the court must compel obedience within the bounds of the law." *Am. Airlines, Inc. v. Allied Pilots Ass'n*, No. 7:99-CV-025-X, 1999 WL 66188, at *1 (N.D. Tex. Feb. 13, 1999). Broadly speaking, "[a] party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995) (citations omitted).

Under Fifth Circuit law, "[a] movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence 1) that a court order was in effect, 2) that the order required certain conduct by the respondent, and 3) that the respondent failed to comply with the court's order." *Martin v. Trinity Industr., Inc.*, 959 F.2d 45, 47 (5th Cir. 1992); *Petroleos*

Mexicanos v. Crawford Enters., Inc., 826 F.2d 392, 401 (5th Cir. 1987) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S. Ct. 497, 499, 93 L. Ed. 599 (1949)). "The movant must establish the elements by evidence 'so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.'" *See Travelhost, Inc.*, 68 F.3d at 961 (internal quotations and citations omitted).

Where a movant establishes by clear and convincing evidence that the respondent has failed to comply with a court order, a finding of civil contempt is appropriate. *See, e.g., F.D.I.C. v. LeGrand*, 43 F.3d 163, 170-71 (5th Cir. 1995) (affirming lower court's finding of civil contempt based on defendant's violation of court's order); *see also Chao v. Transocean Offshore, Inc.*, 276 F.3d 725, 726-728 (5th Cir. 2002) (affirming judgment of civil contempt and award of attorneys fees and costs founded on defendant's refusal to honor a court issued warrant).

In civil contempt proceedings, the only issue is the respondent's actual compliance with the court's order; neither intent nor willfulness is relevant. *N.L.R.B. v. Trailways, Inc.*, 729 F.2d 1013, 1017 (5th Cir. 1984) (citing *McComb*, 336 U.S. at 191); *see also Whitfield v. Pennington*, 832 F.2d 909, 913 (5th Cir. 1987) (where consent order clearly and unambiguously required trustees to make restitution to plan, and they failed to do so on required dates, burden then fell on trustees to show either mitigating circumstances that might cause the district court to withhold the exercise of its contempt power, or substantial compliance with the consent order, and intent was irrelevant); *Transocean Offshore, Inc.*, 276 F.3d at 728 (good faith of employer who refused to honor an OSHA warrant to inspect workplace was not a defense to civil contempt); *Jim Walter Res. v. Int'l Union, United Mine Workers of Am.*, 609 F.2d 165, 168 (5th

Cir. 1980); *Am. Airlines, Inc. v. Allied Pilots Ass'n.*, 228 F.3d 574, 581 (5th Cir. 2000) ("The contemptuous actions need not be willful so long as the contemnor actually failed to comply with the court's order."); *Petroleos Mexicanos*, 862 F.2d at 401; *McComb*, 336 U.S. at 191("An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.").

Hewitt has already admitted that it failed to comply with the Allocation Plan and distributed funds out of the Settlement Trust in a manner that did not comply with the court-approved methodology, which was the sole lawful basis for allocating settlement funds under this Court's orders. *See* Exhibit C, p 19 ("A mistake was made. It was our mistake. We should do the work to fix the mistake."). Even after coming before the Court last summer and admitting its mistake, Hewitt has still failed to substantially comply with the Allocation Plan or the court orders implementing its provisions. Additionally, despite the clarity of the July 27, 2007 Order, another six months have elapsed and participants have yet to receive Revised Allocation Statements; indeed, the Secretary understands that Enron has only recently received accurate calculations from Hewitt.

Hewitt has not agreed to make up the shortfall caused by its violation of the Allocation Plan and the Settlement Trust has not received the funds necessary to make the corrected distributions contemplated by the Court's orders. While the Settlement Trust is finally (more than eighteen months after the Court first approved the Allocation Plan) in a position to send statements to class members that correctly describe the amount of each Claimant's entitlement, the Trust does not have the funds necessary to pay those corrected amounts. In light of Hewitt's failure to voluntarily remedy the shortfall, this Court should now compel Hewitt to remedy the

shortfall. Only in this manner can the Court vindicate its authority and protect the participants' interest in receiving the past-due amounts to which they are entitled.

Upon a finding of civil contempt, the court has complete discretion in assessing sanctions to protect the sanctity of its decrees and the legal process. *See Am. Airlines, Inc.*, 228 F.3d at 585 (5th Cir. 2000). "Civil contempt is remedial in nature and its purpose is to benefit the complainant." *Assoc. Bldrs. and Contractors of La., Inc. (Bayou Chapter) v. Sewerage & Water Bd. of New Orleans*, No. 95-3699, 1996 WL 117528, at *7 (E.D. La.); *see Star Brite Distrib. Inc. v. Ocean Bio-Chem, Inc.*, 746 F. Supp. 633, 643 (E.D. Miss. 1990) (citing *Whitfield*, 832 F.2d 909). "In a contempt proceeding, the need to ensure that the plaintiff is fully compensated and that the defendant is deterred, is acute." *Brine, Inc. v. STX, L.L.C.*, 367 F. Supp. 2d 61, 71 (D. Mass. 2005).

"The proper aim of judicial sanctions for civil contempt is full remedial relief, that such sanctions should be adapted to the particular circumstances of each case and that the only limitation upon the sanctions imposed is that they be remedial or coercive but not penal." *Florida Steel Corp. v. N.L.R.B.*, 648 F.2d 233, 239 (5th Cir. 1981) (internal quotations and citations omitted); *cf. R.A.J. v. Miller*, 590 F. Supp. 1310, 1319 (N.D. Tex. 1984) ("A federal court possesses a broad range of equitable powers available to enforce and effectuate its orders and judgments."); *South Suburban Hous. Ctr. v. Berry*, 186 F.3d 851, 854 (7th Cir. 1999). "Compensatory civil contempt reimburses the injured party for the losses and expenses incurred because of his adversary's noncompliance." *Am. Airlines, Inc*, 228 F.3d at 585-586 (holding that district court did not abuse discretion in ordering approximately $45.5 million in compensatory damages for losses during two days of work stoppage caused by union's civil contempt in violating TRO ordering that they take all reasonable steps within their power to end a "sick-

out"); *cf. also Vanderburg v. Nocona Gen. Hosp.*, Nos. 7:03-CV-008-KA, 7:02-CV-291-KA, 2008 WL 114846, at *1-7 (N.D. Tex. Jan. 10, 2008) (court orders attorneys who distributed settlement funds in an illegal manner and failed to inform the court of that distribution to pay damages measured by estimated harm to innocent parties).

Here, the record supports a finding of contempt, and an award of the relief sought by the Secretary: that Hewitt be ordered to pay immediately, in the form of an unsecured, non-interest bearing, non-recourse loan, an amount sufficient to make up the shortfall in the Settlement Trust so that all Claimants will receive the amount to which they are entitled. [11] Enron's injured employees and retirees should not be asked to wait still longer to receive the full benefit of the settlements approved by this Court, and Hewitt should not be permitted to violate this Court's orders without consequence.

Protections for Participants

Enron estimates that there will be a $9.15 million shortfall. See Enron's *Motion to Require Initial Fund Administrator to Provide Funding for Upcoming Corrected Allocation*, Case No. 01-3913, Docket No. 1346. Enron arrives at this number based on its estimate that it can recover all but $7.7 million of the overpayments by reducing allocations to overpaid Claimants in the Second Allocation and by recovering money mistakenly allocated to Claimants who "(i) made no distribution election, and for whom no IRA was established, (ii) made a

[11] In its *Motion to Require Initial Fund Administrator to Provide Funding for Upcoming Corrected Allocation*, Enron suggests that the loan it contemplates may be "secured by any future recoveries from over-allocated Claimants." See Case 01-3913, Docket No. 1346, p 5. Such a loan would be inconsistent with the requirements of Prohibited Transaction Exemption ("PTE") 80-26, 45 Fed. Reg. 2845 (corrected at 45 Fed. Reg. 35040) (May 23, 1990) (requiring, among other things, that "[t]he loan or extension of credit be unsecured"). The Department has already proposed language to the parties consistent with the requirements of PTE 80-26.

distribution election however no IRA was established, or (iii) did not cash an issued check containing the mistaken allocation" (these efforts are referred to below as "initial recoupment efforts"). *Enron's Motion to Extend the Claimant Allocation Review Process to the Pending Second Allocation*, Case No. 01-3913, Docket No. 1345, ¶¶ 9-10. The Secretary agrees that these initial recoupment efforts are appropriate. Even after taking such actions, however, the resulting shortfall (plus interest on the entire misallocated amount) will be approximately $9.15 million. *Id.*

While the Secretary generally endorses Enron's proposal to allow such offsets as set forth in its Motions, the Secretary requests that any additional actions involving overpaid participants and any communications calling upon them to return any overpayments be made with care. Many participants may have reasonably relied upon representations that their allocations had been calculated correctly and, in particular, based upon a January 1, 1998 opening stock value of $41.56 per share.[12] Many are likely to have spent this money already (including any overpayments) and may now lack ready funds to repay the overpayment they innocently and unknowingly received.

Any steps taken to recover overpayments from participants must be conducted with caution. Collection actions against innocently overpaid participants could damage their credit ratings. Well-meaning participants could take out loans to repay the overpayments and suffer additional costs. Some participants may already have rolled over the money they received into tax deferred accounts, such as IRAs. If asked to return overpayments, these participants may expose themselves to the risk of additional taxes and penalties by withdrawing the money from

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[12] "Tittle/DOL Settlement Allocation - Questions and Answers", No. 7: "your loss was calculated by taking the dollar value of Enron stock in your account on January 1, 1998 . . . the January 1, 1998 Enron stock price is based on the December 31, 1997 closing price of $41.56 per share . . . ". Exhibit B, Appx. D, ¶ 7

the IRAs. While it may be appropriate to hold participants responsible for returning overpayments to which they are not entitled, Enron participants may also have legitimate defenses or arguments against returning the entire amount of the overpayment they have received. They should not be asked or required to waive those defenses and arguments or otherwise incur additional expense or additional harm due to another entity's misconduct involving their pension funds.

Consequently, the Secretary asks the Court to include in any Order the requirement that no collection or repayment action (other than the initial recoupment efforts described above) be taken against any overpaid participant except as specifically permitted by later Court order.

WHEREFORE, the Secretary prays that this Court enter an Order requiring Hewitt to appear on a date certain to Show Cause why it should not be held in contempt and that:

1. Hewitt be held in civil contempt for violating the Second Supplemental Amended Plan of Allocation and the Orders of the Court approving that Plan;

2. Hewitt be held in civil contempt for violating this Court's Order of July 27, 2007;

3. In the event Hewitt fails to show cause on the aforementioned date certain why it should not be held in contempt or has also not purged itself of its contempt of the aforesaid Orders, hold Hewitt subject to daily penalties of $10,000 for each day until it purges itself of contempt by:

   A. Restoring to the Settlement Trust and the Enron Corp. Savings Plan sufficient funds, in the form of an unsecured, non-interest bearing, non-recourse loan ("Plan Loan"), to allow the Settlement Trust to make full allocations to all Claimants of the amounts they would have received but for Hewitt's errors plus interest from the date that amount was determined,

subject to offsets resulting from deducting allocations to overpaid Claimants in the Second Allocation and by recovering money mistakenly allocated to Claimants who (i) made no distribution election and for whom no IRA was established, (ii) made a distribution election, however no IRA was established, or (iii) did not cash an issued check containing the mistaken allocation;

B. Restoring to the Settlement Trust and the Enron Corp. Savings Plan all of the expenses and costs they incur in connection with the Plan Loan and compliance with any Order of the Court relating to Hewitt's contempt; and

C. Restoring all expenses incurred by the Settlement Trust and the Enron Corp. Savings Plan in determining the defective calculations and the extent thereof, correcting the defective calculations, and implementing the processes outlined in the Allocation Plan and the July 27 Order and any further Orders of this Court relating to the defective calculations;

4. Hewitt, Enron, and the Enron Plans be barred from all collection, repayment and other actions against any overpaid Claimant of the Settlement Fund, their dependents and their beneficiaries, the Settlement Fund, and the Enron Corp. Savings Plan except as specifically permitted by the Court;

5. Hewitt be ordered to take any other and further steps adjudged as necessary by this Court to ensure that all the Claimants receive all of the funds that are due to them under the Settlement Fund, with interest; and

6. Hewitt be subject to such further relief as this Court finds necessary and appropriate until such time as Hewitt purges itself of its contempt of this Court by fully complying with the July 27 Order of and the Allocation Plan.

Dated this 7th day of February 2008.

Respectfully submitted:

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