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9 **UNITED STATES BANKRUPTCY COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 In re) No. 01-30923 DM
12 PACIFIC GAS AND ELECTRIC) Chapter 11
13 COMPANY,)
14 Debtor.) Date: October 2, 2002
Time: 1:30 p.m.
15) Ctrm: Hon. Dennis Montali
22nd Floor, 235 Pine Street,
16) San Francisco

17 **UNITED STATES TRUSTEE'S**
18 **OPPOSITION TO APPLICATION OF OFFICIAL COMMITTEE OF UNSECURED**
19 **CREDITORS AND CPUC FOR AN ORDER EMPLOYING**
20 **UBS WARBURG LLC**

21 William T. Neary, United States Trustee, respectfully submits this opposition to the
22 *Application of Official Committee of Unsecured Creditors and California Public Utilities*
23 *Commission for an Order Under 11 U.S.C. §§ 1103 and 328 and FRBP 2014 and 2016*
24 *Authorizing Retention and Employment of UBS Warburg LLC as Financing and Capital*
25 *Markets Arranger* (the "UBS Warburg Application"). The terms of the proposed
26 employment should not be approved.

27 The last time UBS Warburg sought compensation from the bankruptcy estate, the
28 United States Trustee argued the fees could range as high as \$176,000,000, a figure no

1 one seemed to contest at the time. By the current Application, the Official Committee of
2 Unsecured Creditors (the "OCC") seeks an order employing UBS Warburg to act as its
3 capital arranger. The Application has improved greatly since its prior incarnation, but
4 several important issues should prevent it from being approved. UBS Warburg fails to
5 identify the basis for calculating its "Commitment Fees," which constituted fully
6 \$166,000,000 of UBS Warburg's fees when the CPUC attempted to employ the firm at the
7 estate's expense. UBS Warburg may be disqualified because it is a creditor of the estate.
8 Even if the firm is suitable for employment, the form of the Application should not be
9 approved because it contains other provisions inconsistent with the Bankruptcy Code, Rules
10 and local practice, such as "releases" of liability, a waiver from complying with local rules
11 and practice in this case on fee applications, and provisions controlling choice of law, venue
12 and jury trials.

13 **I. THE APPLICATION SHOULD NOT BE APPROVED BECAUSE IT IS NOT**
14 **POSSIBLE TO DETERMINE HOW THE MAJORITY OF UBS WARBURG'S FEES**
15 **WILL BE CALCULATED**

16 Attached to the UBS Warburg Application as Exhibit "A" is an Engagement Letter (the
17 "Engagement Letter"). The Engagement Letter obfuscates on a critical point regarding UBS
18 Warburg's compensation: The Engagement Letter says UBS Warburg will be compensated
19 for "Commitment Fees" agreed to by UBS Warburg and the plan proponents (the OCC and
20 the CPUC). The UBS Warburg Application provides no independently-verifiable means of
21 determining what that fee might be.

22 This is not an insignificant point. When the CPUC sought to employ UBS Warburg,
23 the Commitment Fees were set forth in detail by task. The prior agreement set forth each of
24 the particular tranches of debt UBS Warburg might have arranged and the applicable rate of
25 compensation for each type of funding. The current application does not have any specifics.
26 The amount sought by UBS Warburg for this category last time ranged as high as
27 \$166,000,000. Given the enormous size of this category, the compensation should be
28

1 explained carefully. Absent an explanation, the Bankruptcy Court may be giving the firm
2 *carte blanche* to set its own compensation with little or no court review (see below).

3 **II. UBS WARBURG IS NOT QUALIFIED BECAUSE IT IS A CREDITOR OF THE**
4 **ESTATE**

5 Mr. Crews' declaration in support of the UBS Warburg Application says UBS Warburg
6 is a creditor of the estate. Paragraph 15 refers to a long term position on "debtor's debt
7 securities" of \$20.966 million and a short term position of \$6.063 million. Ownership of a
8 claim by a professional seeking to represent an official committee of unsecured creditors s
9 may disqualify the firm. See 11 U.S.C. §§ 1103(b) and 328(c), Fed. R. Bankr. P. 2014.

10 **III. THE APPLICATION SHOULD NOT BE APPROVED BECAUSE IT DOES NOT**
11 **REQUIRE ANY COMPLIANCE WHATSOEVER WITH LOCAL RULES AND**
12 **NATIONAL STANDARDS FOR PERIODIC FEE APPLICATIONS**

13 The Engagement Letter and the application expressly exempt UBS Warburg from
14 filing any interim requests for compensation and severely limit what it will be required to file
15 at the conclusion of the case. Unlike almost every other professional in the case, UBS
16 Warburg will file no interim compensation requests. Its final application for compensation
17 will consist of nothing more than a list of services provided (without narrative or explanation)
18 and the names of parties working on the financing. In a further attempt to constrain the
19 court's review, UBS Warburg's agreement with the OCC says its fees will not be subject to
20 review except under § 328(a). These terms diverge not only from local practice, but from
21 the practice in this complicated case and the law itself.

22 First, local practice requires fee applications from professionals. See *Guidelines for*
23 *Compensation and Expense Reimbursement of Professionals and Trustees* (the
24 "Guidelines"). The Guidelines are the rule in this district and they are followed with
25 regularity. The UBS Warburg proposal violates just about every term of the Guidelines with
26 no explanation for why that is necessary or appropriate.

27 Second, the practice *in this case* has been that professionals seek compensation on
28 an interim basis in a manner that is consistent with the *Second Amended Order Establishing*
Interim Fee Application and Expense Reimbursement Procedures. The interim

1 compensation order is easy to follow and has worked remarkably well given the estimated
2 \$70 million in professional fees incurred to date. Even Rothschild and the OCC's financial
3 counselor Saybrook Capital file interim requests for compensation. Why should UBS
4 Warburg be treated differently?

5 Finally, UBS Warburg's attempt to limit any review of their fees to 11 U.S.C. § 328 is
6 flatly inconsistent with the mechanism of allowing fees Congress created in 11 U.S.C. § 330.
7 UBS Warburg seems to be saying that when the final applications are filed, the only
8 permissible review will be whether the fees are calculated correctly. The United States
9 Trustee does believe it is appropriate to identify a fee in advance subject only to review for
10 proper calculation, especially when the potential value of the fee remains subject to
11 negotiation between the OCC and UBS Warburg, outside of court review (see above).
12 Rather, the court must have the right to review the appropriateness of that fee (even if the
13 review is limited to the limited standard allowable under § 328(a)). *In re Circle K Corp.*, 272
14 F.3d 1150 (9th Cir. 2001). For this reason, the United States Trustee urges the court retain
15 the right to review the fee UBS Warburg is paid to ensure compliance with 11 U.S.C.
16 § 328(a), at a minimum.

17
18 **IV. THE TERMS OF THE PROPOSED EMPLOYMENT SHOULD NOT BE APPROVED**
19 **BECAUSE THEY PROVIDE NO DEMONSTRABLE BENEFIT TO THE ESTATE**
20 **AND DO NOT COMPORT WITH THE OBLIGATIONS OF PROFESSIONAL**
21 **PERSONS**

22 The Engagement Letter attached to the UBS Warburg Motion contains numerous
23 objectionable terms like indemnification, choice of forum and jury trial waivers the Court
24 should not approve.

25 A. The "Release" Provision Should Be Disapproved Because It Is Unjustified and
26 Inappropriate for a Chapter 11 Professional

27 The Engagement Letter contains a release of liability by the OCC and CPUC for most
28 types of misconduct by UBS Warburg. The provision purports to limit the OCC's right to

1 recovery damages resulting from intentional acts or gross negligence by UBS Warburg. The
2 release provision should not be approved because it is unjustified.

3 The great weight of authority rejects indemnity and other liability protections as
4 inappropriate and unacceptable terms of employment for a professional employed by a
5 bankruptcy estate. *In re Metricom, Inc.*, 275 B.R. 364, 369 (Bankr. N.D. Cal. 2002); *In re*
6 *Gillett Holdings, Inc.*, 137 B.R. 452, 458 (Bankr. D. Colo. 1991) (entirely improper and
7 unacceptable); *In re Drexel Burnham Lambert Group*, 133 B.R. 13, 27 (Bankr. S.D.N.Y.
8 1991) (“[s]imply stated, indemnification agreements are inappropriate”); *In re Mortgage &*
9 *Realty Trust*, 123 B.R. 626, 631 (Bankr. C.D. Cal. 1991) (“[i]ndemnification is not consistent
10 with professionalism”); *In re Allegheny Int’l, Inc.*, 100 B.R. 244, 247 (Bankr. W.D. Pa. 1989)
11 (“holding a fiduciary harmless for its own negligence is shockingly inconsistent with the strict
12 standard of conduct for fiduciaries”); *In re United Companies Financial Corp.*, 241 B.R. 521,
13 524 (Bankr. D. Del. 1999) (disapproving financial advisors’ use of indemnification provision
14 and damages cap).

15 Indeed, in this case the Court declined to approve an indemnity agreement sought by
16 an investment banker. In its *Tentative Decision on Debtor’s Application to Employ Dresdner*
17 *Kleinwort Wasserstein, Inc.*, dated July 6, 2001, the Bankruptcy Court disapproved an
18 indemnity agreement for an investment banker (Dresdner Kleinwort Wasserstein, Inc.)
19 debtor sought to employ, stating:

20 This court is of the view that the cases cited by the UST that disapprove of indemnity
21 agreements for investment bankers are well reasoned, both from a point of view of a
22 legal analysis and also from the point of view of fundamental bankruptcy policy.
23 Indemnity is inappropriate for professionals employed by representatives of
24 bankruptcy estates. The court would rather presume that DrKW possesses sufficient
25 expertise and sophistication that it will not be negligent in the performance of its
26 duties . . .

27 Dresdner later withdrew its employment application.

28 Neither UBS Warburg nor the OCC has proven that the services UBS Warburg will
provide to the CPUC are unavailable without the proposed indemnity. It seems unlikely the
requested release reflects a “market practice” at this point. Other investment bankers and

1 underwriters recently have accepted provisions limiting their potential liability to the estate
2 only in cases where they are relying on financial or other information supplied by the estate.

3 B. The Application Includes A Waiver of Jury Trial Rights, Choice of Law
4 Provisions and Venue Provisions, All Of Which Are Inconsistent With The
5 Bankruptcy Court's Supervision of the Estate

6 _____ The Engagement Letter contains a "choice of law provision" (New York) and a
7 provision requiring the use of New York courts. In addition, UBS Warburg requests the
8 OCC waive any right to a jury trial in connection with any dispute over UBS Warburg's
9 professional services. The Bankruptcy Court should reject UBS Warburg's attempt to
10 impose these terms on the estate.

11 Professionals employed under the authority of the Bankruptcy Court must rely on
12 federal law and the Bankruptcy Court for protection in the first instance. Choice of law terms
13 are inconsistent with Bankruptcy Code §§ 327 - 330, which give this court exclusive control
14 of employment terms and fees in bankruptcy cases. See *In re Shirley*, 134 B.R. 940, 943-
15 44 (Bankr. 9th Cir. 1992), ("Bankruptcy Code and Federal Rules of Bankruptcy Procedure
16 operate to preclude fee awards for services performed on behalf of a bankruptcy estate
17 based on state law theories not provided for by the Code"). Accord, *In re Atkins*, 69 F.3d
18 970, 973 (9th Cir. 1995); and *In re Weibel*, 176 B.R. 209, 211 (Bankr. 9th Cir. 1994).

19 In a recent case pending before the San Jose division, *In re Komag, Inc.*, Judge
20 Grube rejected debtor's attempt to employ an accounting firm which sought specific venue
21 provisions, jury trial waivers and a binding arbitration provision. 268 B.R. 566, 568 (Bankr.
22 N.D.Cal 2001). Judge Grube wrote:

23 The rights that Komag has agreed to waive are substantial. The right to trial by
24 jury is viewed as being so fundamental to our system of jurisprudence that it is
25 part of the Bill of Rights, the Seventh Amendment to the United States
26 Constitution. Binding arbitration not only eliminates a trial by jury but any trial at
27 all. The venue provisions, while not as obviously detrimental, certainly limit the
28 right of a potential plaintiff to choose its forum from those legally available.

26 *Id.*

27 Like the accounting firm in Komag, UBS Warburg has not demonstrated its
28 Engagement Letter is appropriate under the facts of the case and current state of the law.

1 The United States Trustee anticipates UBS Warburg and the OCC will argue the
2 terms calling for use of New York Courts and related provisions are intended to bind only the
3 OCC and UBS Warburg. Unfortunately, the structure of the indemnity suggests otherwise.
4 The indemnity broadly refers to a “dispute of any kind or nature whatsoever arising out of or
5 in any way relating to this agreement.” The United States Trustee is concerned this
6 provision would extend to disputes involving parties beyond the OCC, the CPUC and UBS
7 Warburg.

8 **V. CONCLUSION**

9 The United States Trustee objects to the proposed employment for the foregoing
10 reasons and requests no order issue approving the proposed employment.

11 Dated: September 26, 2002

Respectfully submitted,
Patricia A. Cutler
Assistant U.S. Trustee

14 By: _____
15 Stephen L. Johnson
16 Attorneys for U.S. Trustee
17 William T. Neary