

50-275/323

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12 PACIFIC GAS and ELECTRIC COMPANY

13 UNITED STATES BANKRUPTCY COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 In re
17 PACIFIC GAS and ELECTRIC
18 COMPANY, a California corporation,
19 Debtor.
20 Federal I.D. No. 94-0742640

21 Case No. 01-30923 DM
22 Chapter 11 Case
23 Date: January 3, 2002
24 Time: 1:30 p.m.
25 Place: 235 Pine Street, 22nd Floor
26 San Francisco, California
27 Judge: Hon. Dennis Montali

HOWARD
RICE
NEMEROVSKI
CANADY
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28 NOTICE OF MOTION AND MOTION OF PACIFIC GAS AND ELECTRIC COMPANY
FOR ORDER AUTHORIZING USE OF ESTATE FUNDS TO HIRE MEDIATORS;
SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

[SUPPORTING DECLARATION OF
MAUREEN L. FRIES FILED SEPARATELY]

A001 Add: Rids Oge Mail Center

1 NOTICE OF MOTION AND MOTION

2 PLEASE TAKE NOTICE that on January 3, 2002, at 1:30 p.m., or as soon
3 thereafter as the matter may be heard, in the Courtroom of the Honorable Dennis Montali,
4 located at 235 Pine Street, 22nd Floor, San Francisco, California, Pacific Gas and Electric
5 Company, the debtor and debtor in possession in the above-captioned Chapter 11 case
6 ("PG&E" or the "Debtor"), will and hereby does move the Court for entry of an order
7 authorizing PG&E to use estate funds to hire and pay mediators to assist in the compromise
8 of claims related to pre-petition litigation.

9 This Motion is made pursuant to 11 U.S.C. Sections 363 and 105(a) of the United
10 States Bankruptcy Code (11 U.S.C. §§363, 105(a)) and is based on the facts and law set
11 forth herein (including the following Memorandum of Points And Authorities), the
12 Declaration of Maureen L. Fries filed concurrently herewith, the record of this case and any
13 evidence presented at or prior to the hearing on this Motion.

14 PLEASE TAKE FURTHER NOTICE that pursuant to Rule 9014-1(c)(2) of the
15 Bankruptcy Local Rules for the Northern District of California, any written opposition to the
16 Motion and the relief requested therein must be filed with the Bankruptcy Court and served
17 upon appropriate parties (including counsel for PG&E, the Office of the United States
18 Trustee and the Official Committee of Unsecured Creditors) at least five (5) days prior to the
19 scheduled hearing date. If there is no timely objection to the requested relief, the Court may
20 enter an order granting such relief without further hearing.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 INTRODUCTION

4 Pacific Gas and Electric Company, the debtor and debtor in possession in the
5 above-captioned Chapter 11 case (the "Debtor" or "PG&E"), submits this Memorandum Of
6 Points And Authorities in support of its Motion For Order Authorizing Use Of Estate Funds
7 To Hire Mediators. By this Motion, PG&E seeks this Court's approval to use estate funds to
8 hire and pay mediators to assist in the compromise of certain disputed claims arising out of
9 pre-petition litigation filed against the Debtor. By this Motion, PG&E does not seek
10 authority to pay any monies in settlement of such claims.

11 The authority to use estate assets to pay for mediators to assist in the compromise
12 of claims related to pre-petition litigation will benefit the estate, the estate's creditors and the
13 Court, by conserving the monetary and non-monetary resources associated with protracted
14 litigation. Thus, a small expenditure now will preserve more estate funds for creditors and
15 other necessary estate expenditures. Indeed, the Official Committee of Unsecured Creditors
16 (the "Committee") has reviewed this Motion and its signature below evidences that it has no
17 objection to the granting of the relief sought herein. Finally, any settlement or compromise
18 reached through mediation will preserve judicial resources in that this Court will not have to
19 adjudicate those claims resolved through mediation.

20
21 II.

22 FACTUAL BACKGROUND

23 PG&E is currently a party in approximately 200 lawsuits filed in state and federal
24 courts which involve events that occurred prior to the filing of the petition in this case; and
25 which are stayed the automatic stay provisions of 11 U.S.C. Section 362(a). See Declaration
26 of Maureen L. Fries In Support Of Pacific Gas And Electric Company's Motion For An
27 Order Authorizing Use Of Estate Funds To Hire Mediators To Assist In Compromising
28 Claims Related To Pre-Petition Litigation ("Fries Decl.") ¶2. These lawsuits involve, inter

1 alia, environmental and land use matters, contract and other commercial disputes, business
2 practices, personal injury and property damage, employment discrimination, wrongful
3 termination and other employment related matters.¹ Id. All but a small number of the
4 plaintiffs in the approximately 200 cases pending at the time of PG&E's bankruptcy filing
5 have filed claims in the bankruptcy case on the basis of their pending litigation. Id. ¶3.

6 Prior to the filing of the Chapter 11 petition, it had been PG&E's policy and
7 practice to attempt to resolve as many lawsuits as possible through mediation. Id. ¶4. It is
8 PG&E's experience that resolution of amenable cases through mediation is far more cost-
9 effective than trial or protracted litigation. Id.

10 PG&E has typically engaged mediators from the American Arbitration
11 Association (AAA), the Judicial Arbitration and Mediation Services (JAMS) and individual
12 attorneys and firms specializing in mediation. Id. ¶5. In the nine (9) months preceding the
13 filing of its Chapter 11 petition, PG&E's costs for mediation services to resolve pending
14 lawsuits ranged from approximately \$1,500 to \$7,500 per case. Id. ¶6. The average cost
15 was approximately \$2,500.² Id.

16 Based on its review of the factual and legal issues involved in the approximately
17 200 cases pending at the time of the Chapter 11 petition, it is PG&E's estimate that almost
18 80 percent of those cases are candidates for mediation. Id. ¶7. Based on its prior average
19 expenditures for mediators, PG&E estimates that it would cost approximately \$400,000 to
20 hire mediators to assist in compromising 80 percent or more of the pending cases. Id. ¶8. In
21 the event PG&E is unable to settle such litigation, it will be compelled to raise any and all
22 available legal and factual defenses thereto in the appropriate forum. Id. ¶9.

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26 ¹The number does not, however, include asbestos or chromium-related personal injury
litigation, which is not included in this Motion. Fries Decl. ¶2.

27 ²These mediation costs generally represent one-half of the total cost of mediating the
28 dispute since the parties to a dispute usually bear such costs equally, giving each party a
financial incentive to settle the dispute.

1 III.

2 THE COURT SHOULD AUTHORIZE THE REQUESTED
3 EXPENDITURES PURSUANT TO SECTIONS 363 AND 105(A)
4 OF THE BANKRUPTCY CODE.

5 Generally, a debtor in possession may compromise claims contingent on
6 bankruptcy court approval thereof. See Fed. R. Bankr. P. 9019 (“On motion by the trustee
7 and after notice and a hearing, the court may approve a compromise or settlement”).³
8 Indeed, Bankruptcy law favors compromises which are considered “a normal part of the
9 process of reorganization.” Protective Comm. for Indep. Stockholders of TMT Trailer Ferry
10 Inc. v. Anderson, 390 U.S. 414, 424 (1968); See also Woodson v. Firemen’s Fund Ins. Co.
11 (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988) (bankruptcy courts have “great latitude”
12 in approving compromise agreements that are “fair and equitable”); Martin v. Kane (In re
13 A&C Props.), 784 F.2d 1377, 1381 (9th Cir. 1986) (“The law favors compromise and not
14 litigation for its own sake”). There is a dearth of case law, however, with respect to a debtor
15 in possession’s authority to use estate assets to hire and pay mediators to assist in the
16 negotiation of such compromises.

17 PG&E believes that the payment of mediators to assist in the compromise of
18 pending litigation would arguably be within the ordinary course of its business, since
19 companies of PG&E’s size routinely attempt to mediate pending litigation, and it was
20 PG&E’s policy and practice to do so prior to the filing of the Chapter 11 petition. See 11
21 U.S.C. §363(c)(1); In the Matter of D’Lites of America, Inc., 108 B.R. 352, 355 (Bankr.
22 N.D. Ga. 1989) (to be in the “ordinary course,” a “transaction in question need not be
23 common, but must only be ordinary, and one must look both at the industry-wide practices
24 and at the prior practices of the company itself”). Accordingly, expenditures for mediators

25 ³Although Rule 9019 specifies the “trustee,” it is clear it also encompasses
26 compromises entered into by debtors in possession. See 11 U.S.C. §1107; Wells Fargo
27 Bank, N.A. v. Guy F. Atkinson Co. (In re Guy F. Atkinson Co.), 242 B.R. 497, 501 (B.A.P.
28 9th Cir. 1999) (“Thus, the rule, read in combination with [11 U.S.C.] §1107, allows either
the trustee or the debtor in possession to propose settlements to the court for approval or,
with prior court authorization, to settle and compromise classes of claims”).

1 could be permitted without notice or hearing or any Bankruptcy Court approval pursuant to
2 11 U.S.C. Section 363(c) as a use, sale or lease of estate property in the ordinary course of
3 business.

4 However, in this context, the use of estate assets in attempting to settle pending
5 litigation also constitutes the use of estate assets in an attempt to compromise a claim.
6 Accordingly, the use of estate assets here to hire mediators implicates the claims resolution
7 process and the administration of the estate, which has been held to not be in the ordinary
8 course of business. See, e.g., United States ex rel. Harrison v. Estate of Deutscher (In re
9 H&S Transp. Co.), 115 B.R. 592, 600 (M.D. Tenn. 1990) (holding that actions that are part
10 of the “administration,” and not the “operation” of the estate are not in the ordinary course of
11 business, including the defense or compromise of pending litigation).⁴ In addition, seeking a
12 court order provides assurance to both PG&E and any plaintiff/claimant with whom it
13 reaches a compromise that the compromise will not be jeopardized after the fact by PG&E’s
14 having failed to provide other creditors with notice that it intended to use estate assets to
15 mediate the dispute. See 3 Lawrence P. King, Collier on Bankruptcy ¶363.03[1], at 363-24
16 (15th ed. rev. 2000) (“in any case in which the parties are unsure about whether their
17 transaction is in the ordinary course of business, it is advisable to comply with the notice and
18 hearing requirement of section 363(b) rather than to rely on the ordinary course of business
19 authorization under section 363(c”).

20 PG&E believes this Court can utilize its authority under Section 363 of the
21 Bankruptcy Code to approve the expenditure of estate assets for the purpose of hiring
22 mediators to assist in the compromise of claims related to pre-petition litigation.⁵ See 11

23
24 ⁴In addition, courts have generally been protective of the use of estate funds in the
25 compromising of claims. See, e.g., Woodmar Realty Co. v. McLean (In re Woodmar Realty
26 Co.), 306 F.2d 479, 479 (7th Cir. 1962) (revoking authority of debtor to participate in
27 compromise negotiations with claimants that would result in the settling of claims with
28 funds of the estate).

⁵As noted above, this Motion does not seek authority to actually pay any potential
compromises with estate funds. Rather, it only seeks authority to use estate assets to attempt
to settle certain disputed claims related to pending pre-petition litigation with the assistance
of a non-binding mediator. PG&E recognizes that in the event it reaches a settlement with
(continued . . .)

1 U.S.C. §363(b)(1) (“The trustee, after notice and a hearing, may use, sell or lease, other than
2 in the ordinary course of business, property of the estate”).

3 Additionally, Section 105(a) of the Bankruptcy Code authorizes this Court to
4 “issue any order, process, or judgment that is necessary or appropriate to carry out the
5 provisions” of this title. The purpose of Section 105 is “to assure the bankruptcy courts’
6 power to take whatever action is appropriate or necessary in aid of the exercise of their
7 jurisdiction.” 2 Lawrence P. King, Collier on Bankruptcy ¶105.01[1], at 105-6 (15th ed. rev.
8 2000).

9 The use of estate assets to hire mediators plainly will facilitate the efficient
10 compromise of claims, and accordingly serve the best interests of the estate, its creditors and
11 this Court alike, and will not violate any principle or precept of the Bankruptcy Code.⁶ To
12 begin with, PG&E wishes to reduce the amount of estate funds spent on attorneys’ fees and
13 other expenses related to the continued litigation of many of these claims. Many of the
14 claims are disputed, and PG&E believes it has legitimate defenses to some or all of the relief
15 requested. In asserting such defenses, however, PG&E would necessarily spend significant
16 amounts of money and resources. Accordingly, mediation will not only likely result in the
17 compromise of many of the pending claims related to pre-petition litigation, it will do so
18 while preserving estate assets. In addition, avoidance of unnecessary litigation will also
19 benefit PG&E’s creditors by preserving estate assets in the long-term.⁷ In fact, the

20 (. . . continued)

21 any particular litigant, that settlement will require Bankruptcy Court approval pursuant to
22 Federal Rule of Bankruptcy Procedure 9019, and relief from stay pursuant to Bankruptcy
Code Section 362 to allow the dismissal of the underlying action.

23 ⁶PG&E could find no authority for the proposition that consensual non-binding
24 mediations for the purpose of reaching a compromise are barred by the automatic stay. To
25 the extent, however, that stay relief is necessary to participate in non-binding mediation for
the purposes of trying to compromise claims, PG&E hereby requests that such limited relief
be granted “for cause” under Section 362(d)(1) of the Bankruptcy Code. More specifically,
PG&E believes that a combination of judicial economy and the preservation of estate assets
provides such cause.

26 ⁷Moreover, even if relatively few of the pending claims were successfully
27 compromised with the assistance of mediators, the amount of estate money to be used for
28 such mediators is relatively small in the context of this bankruptcy case and should not affect
any of PG&E’s creditors’ rights under the proposed plan of reorganization.

1 Committee has countersigned this Motion, affirming that it does not object to the Court's
2 granting of the relief requested herein.

3 Accordingly, pursuant to the Court's authority and discretion under Sections
4 363(b)(1) and 105(a) of the Bankruptcy Code, the Court can and should grant the Motion.

6 CONCLUSION

7 For the foregoing reasons, PG&E respectfully requests that the Court enter an
8 order authorizing PG&E to use estate assets to hire mediators to assist in the compromise of
9 claims related to pre-petition litigation.

10 DATED: December 13, 2001.

11 Respectfully,

12 HOWARD, RICE, NEMEROVSKI, CANADY,
13 FALK & RABKIN
14 A Professional Corporation

14 HOWARD
15 RICE
16 NEMEROVSKI
17 CANADY
18 FALK
19 & RABKIN
20 A Professional Corporation

15 By: Janet A. Nexon
16 JANET A. NEXON

17 Attorneys for Debtor and Debtor in Possession
18 PACIFIC GAS AND ELECTRIC COMPANY

19 THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS DOES NOT OBJECT TO
20 THE FOREGOING MOTION OR THE RELIEF REQUESTED THEREIN:

21 DATED: December 13, 2001.

22 MILBANK, TWEED, HADLEY & McCLOY

23 By: [Signature]

24 Attorneys for OFFICIAL COMMITTEE OF
25 UNSECURED CREDITORS

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