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17 UNITED STATES BANKRUPTCY COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION

20 In re
21 PACIFIC GAS AND ELECTRIC COMPANY,
22 a California Corporation,
23 Debtor.
24 Federal I.D. No. 94-074260
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Case No. 01-30923 DM
Chapter 11 Case
NOTICE OF MOTION AND MOTION OF
DEBTOR TO AUTHORIZE THE RETENTION
OF EXPERTS WITHOUT FURTHER ORDER
OF THE COURT
Date: May 30, 2002
Time: 1:30 p.m.
Place: 235 Pine Street, 22nd Floor
San Francisco, California
Judge: Hon. Dennis Montali

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The above-captioned debtor hereby moves this Court for the entry of an order authorizing
3 the retention of certain experts without further order of the Court on the basis that such experts
4 are not "professionals" under section 327 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

5 **I. INTRODUCTION.**

6 In connection with the upcoming confirmation hearing on its plan of reorganization, the
7 Debtor anticipates that upon the advice of its counsel it will need to retain certain experts,
8 primarily with regard to regulatory, feasibility, and financial issues raised by its plan of
9 reorganization (the "Experts"). Initially, the Experts are expected to act solely in a consulting
10 capacity. At some point, however, certain of the Experts may offer opinion testimony in
11 proceedings before this Court, at which time their identities will be disclosed in accordance with
12 this Court's procedure. The great weight of authority holds that persons hired as experts in
13 litigation are not "professionals" whose retention must be approved by order of the Court. Out of
14 an abundance of caution, however, the Debtor requests that the Court specifically authorize the
15 Debtor to retain the Experts without requiring a separate application for each such Expert.

16 **II. DISCUSSION.**

17 **A. The Experts Are Not "Professionals" Under Section 327 of the Bankruptcy**
18 **Code.**

19 Section 327 states:

20 The trustee, with the court's approval, may employ one or more attorneys,
21 accountants, appraisers, auctioneers, or other professional persons . . . to
represent or assist the trustee in carrying out the trustee's duties under this title.

22 It is well established that persons hired to provide expert opinion and/or testimony are not
23 "professionals" under section 327. *See, e.g., In re That's Entertainment Marketing Group, Inc.,*
24 *168 B.R. 226, 229-231; In re Babcock Dairy Co. of Ohio, Inc., 70 B.R. 691, 692-94.* If an
25 individual is determined to be a "professional" within the meaning of section 327, the individual
26 may not be hired until application is made to this Court demonstrating, among other things, that
27 his or her employment is necessary to the estate. *See id.* at 229. In determining whether an
28 individual is a "professional" and thus is subject to these requirements, courts generally employ

1 either a “quantitative” or “qualitative” test to determine whether a prospective employee in a
2 bankruptcy case is a “professional” within the meaning of section 327.

3 Under the quantitative test, an individual must play a “central role” in the administration
4 of the estate to be a professional under section 327. *See, e.g., In re That’s Entertainment*, 168
5 B.R. at 230 (only the retention of professionals whose duties are central to the administration of
6 the estate require prior court approval under section 327); *In re Sieling Assoc. Ltd. Partnership*,
7 128 B.R. 721, 723 (Bankr. E.D. Va. 1991) (same); *In re Johns-Manville Corp.*, 60 B.R. 612, 620
8 (Bankr. S.D.N.Y. 1986) (same). Similarly, under the qualitative test, an individual is considered
9 professional only if he or she is permitted to exercise discretion and autonomy in addressing the
10 administration of the estate. *See, e.g., In re Fretheim*, 102 B.R. 298, 299 (Bankr. D. Conn. 1989).
11 Under either test, courts uniformly hold that experts hired to assist in litigation are not
12 professionals within the meaning of section 327.

13 **1. The Experts Are Not “Professionals” Under Section 327 Because They**
14 **Do Not Play a Central Role in the Administration of the Estate.**

15 In this case, the Debtor is not seeking to retain experts who will play a
16 central role in the administration of the estate. Instead, the Experts will be retained for the limited
17 purpose of consulting with the Debtor regarding discrete topics relating to financial and/or
18 regulatory issues. If necessary, some of the Experts may be asked to provide opinion testimony
19 regarding these topics in a proceeding before this Court. As such, the Experts are not
20 “professionals” under section 327.

21 The case law is in accord. In *In re That’s Entertainment*, the court determined that an
22 accountant hired as an expert witness was not a “professional” within the meaning of section 327.
23 In reaching that conclusion, the court analyzed the following factors:

24 (1) Whether “the duties involved are central to the administration of the estate;”

25 (2) Whether the expert would be “in a position to formulate strategy or to manage the
26 estate and the liabilities of the estate; and

27 (3) Whether the expert’s duties would include any of the following:

28 (a) Assisting in the negotiation of the debtor’s plan;

- (b) Assisting in the adjustment of the debtor/creditor relationship;
- (c) Disposing of the assets of the estate; or
- (e) Acquiring assets on behalf of the estate.

In re That's Entertainment, 168 B.R. at 230 (citing *Matter of D'Lites of America, Inc.*, 108 B.R. 352 (Bankr. N.D. Ga. 1989); *In re Sieling Associates*, 128 B.R. at 723.

Applying the same analysis, the Experts are not "professionals" under section 327. Although the Experts will play a tangential role in proceedings to *evaluate* the plan of reorganization, they will not play any role whatsoever in the *administration* or *management* of the estate; in fact, they will not be involved in any such administration or management at all. Moreover, the Experts will be in no position to formulate strategy regarding the reorganization plan. Finally, the duties of the Experts will not even remotely include the type of professionals' duties listed above, such as plan negotiations, acquiring and disposing assets, or adjusting creditor relationships.

2. The Experts Are Not Professionals Under Section 327 Because They Do Not Exercise Autonomy or Independent Discretion.

Courts that employ a *qualitative* analysis focus on whether the individual "is to be given discretion or autonomy in some part of the administration of the debtor's estate." *In re Fretheim*, 102 B.R. 298, 299 (Bankr. D. Conn. 1989). In *In re Fretheim*, the court noted that the purpose of section 327 is to "prevent conflicts which 'erode the confidence of other parties in the administration of . . . [the] estate to say nothing of public confidence in the administration of justice in bankruptcy courts.'" *Id.* (citing *In re Intech Capital Corp*, 87 B.R. 232, 236 (Bankr. D. Conn. 1988). Accordingly, because experts do not act with autonomy or discretion, they are not subject to the types of conflicts that might result in an unjust situation. *Id.*

Likewise, here, the Experts will exercise no autonomy or independent discretion regarding the administration of PG&E's estate. In fact, courts have held that because the attorneys who employ experts are themselves subject to approval under section 327, requiring further approval of experts would unnecessarily and impermissibly meddle in those attorneys' strategy considerations. As the court stated in *In re Argus Group 1700, Inc.*:

1 This Court should not and will not impose its judgment on the strategy and
2 tactics to be employed to defend the Debtors They are determined by
3 counsel who has been approved by the Court as disinterested and free of conflict
and whose compensation and cost reimbursements are tied to its proper exercise
of discretion and responsibility in managing that litigation.

4 199 B.R. 525, 533 n. 17 (Bankr. E.D. Penn. 1996) (accord *In re Babcock*, 70 B.R. at 693 (“The
5 trustee and the attorney for the trustee are in a better position” to evaluate the hiring of experts).
6 Accordingly, because the attorneys – and not the Experts themselves – will exercise discretion
7 and autonomy in the conduct of these proceedings, the Experts are not professionals within the
8 meaning of section 327.

9 Moreover, other courts examining this issue have concluded that experts are not
10 professionals under section 327. *See, e.g., In re Ponce Marine Farm, Inc.*, 259 B.R. 484, 494
11 (Bankr. D.P.R. 2001) (wetlands expert not a professional); *In re Napoleon*, 233 B.R. 910, 913
12 (Bankr. D.N.J. 1999) (experts used in malpractice litigation not professionals); *In re First*
13 *American Health Care of Georgia, Inc.*, 208 B.R. 996, 998 (Bankr. S.D. Ga. 1996) (accountant
14 retained as expert witness); *In re Sieling*, 128 B.R. at 723 (toxicology consultant); *In re Babcock*,
15 70 B.R. at 691 (Bankr. N.D. Ohio 1987) (expert witnesses are tangential to the administration of
16 the estate).

17 Although the cases cited above involved experts hired for litigation collateral to the
18 reorganization proceedings, the result should be no different here.¹ The policies expressed in
19 those cases apply with as much force to experts hired for the purpose of providing testimony
20 during the reorganization proceedings as those whose testimony is limited to collateral
21 proceedings. Whether retained for collateral litigation or for the reorganization proceeding itself,
22 an expert witness “is not in the position to formulate strategy or to manage the estate and the
23 liabilities of the estate.” *In re That’s Entertainment*, 168 B.R. at 230.² Moreover, this Court has
24 already approved the retention of the debtor’s attorneys, and those attorneys must be allowed to
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26 ¹ Research has uncovered no cases in which, like here, the expert to be retained was offering opinion
27 testimony in connection with a contested plan of reorganization.

28 ² *In re That’s Entertainment* states that an expert “who is retained solely to testify as an expert witness in
collateral litigation” does not qualify as a “professional” under 327. Nothing in the case, however,
indicates that its holding or logic are limited to experts retained for collateral litigation.

1 exercise their best judgment by retaining the experts they believe best represent the debtor. This
2 district has stated:

3 Although the litigation itself could be considered central to the administration of
4 the estate, the attorney controls the litigation – the expert witness merely offers
5 evidence in that case. Further, the attorneys are required to be approved by the
6 court under § 327. Such approval is required in part because the position carries
with it responsibility and discretion to effectively carry out the necessary
litigation. These responsibilities include engaging necessary expert witnesses for
the litigation.

7 *Id.* at 230 n.4. In sum, the Experts' roles could not be more clear or more limited: they will be
8 retained for the purpose of offering opinion testimony on discrete topics into evidence. The
9 Experts will have no autonomy, discretion, or responsibility with regard to the administration of
10 the estate.³

11 III. CONCLUSION.

12 The great weight of authority dictates that persons hired as experts in litigation are not
13 “professionals” under section 327 of the Bankruptcy Code. Accordingly, the Debtor respectfully
14 requests that this Court issue an order authorizing the retention of experts without further order of
15 the Court.

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23 ³ If this Court determines that the Debtor must seek advance approval of its experts, it should, at a
24 minimum, exercise its discretion under section 105 and allow the Debtor to file the identities of
25 those experts under seal. Otherwise, the Debtor will be forced to reveal the identities of its
26 experts even if they are not selected to testify at trial. This would be prejudicial, as the identities
27 of a party's non-testifying expert consultants are protected under the work product doctrine. *See*
28 *8 Charles Alan Wright, et al., Federal Practice and Procedure § 2032 (Civil 2d 1994)* (the
“prevailing view” is that the identity of consulting experts is protected); *Ager v. Jane C. Stormont
Hosp. & Training School for Nurses*, 622 F.2d 496, 503 (10th Cir. 1980); *United States v. Bell*,
1994 WL 665295 at *4 (N.D. Cal. 1994); *In re Pizza Time Theatre Securities Litigation*, 113
F.R.D. 94 (N.D. Cal. 1986) (“a lawyer's decision about which experts to consult, but not to call as
a witness, also is a matter that implicates values that the work product doctrine was designed to
protect.”).

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Dated: May __, 2002

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