

1 JAMES L. LOPES (No. 63678)
2 JANET A. NEXON (No. 104747)
3 HOWARD, RICE, NEMEROVSKI, CANADY,
4 FALK & RABKIN
5 A Professional Corporation
6 Three Embarcadero Center, 7th Floor
7 San Francisco, California 94111-4065
8 Telephone: 415/434-1600
9 Facsimile: 415/217-5910

50-275/323

6 Attorneys for Debtor and Debtor in Possession
7 PACIFIC GAS AND ELECTRIC COMPANY

8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

12 In re
13 PACIFIC GAS AND ELECTRIC
14 COMPANY, a California corporation,
15 Debtor.
16 Federal I.D. No. 94-0742640

Case No. 01-30923 DM
Chapter 11 Case
Date: October 29, 2002
Time: 1:30 p.m.
Place: 235 Pine Street, 22nd Floor
San Francisco, California
Judge: Hon. Dennis Montali

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

17 NOTICE OF MOTION AND MOTION FOR ORDER AUTHORIZING ASSUMPTION OF
18 CERTAIN PRE-PETITION SETTLEMENT AGREEMENTS
19
20
21
22
23
24

25 Acol Add: Rids Ogc Mail Center
26
27
28

1 **NOTICE OF MOTION**

2 **PLEASE TAKE NOTICE THAT** on October 29, 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, the above-captioned
5 Bankruptcy Court will hold a hearing on the Motion for Order Authorizing Assumption of
6 Certain Pre-Petition Settlement Agreements filed herein by Pacific Gas and Electric
7 Company, the debtor and debtor in possession in the above-captioned Chapter 11 case
8 (“PG&E” or the “Debtor”). The Motion seeks entry of an order by the Bankruptcy Court
9 authorizing PG&E to assume certain pre-petition settlement agreements and pay amounts
10 owed thereunder, and is made pursuant to Sections 365 and 105(a) of the United States
11 Bankruptcy Code (11 U.S.C. §§105(a) and 365), and is based on the facts and law set forth
12 herein (including the accompanying Memorandum of Points and Authorities beginning on the
13 next page), the Declaration of Barbara J. Damlos filed concurrently herewith (hereinafter
14 referred to as the “Damlos Declaration”), the record of this case and any evidence presented
15 at or prior to the hearing on this Motion.

HOWARD
RICE
NEMEROVSKI
CANADY
BLK
& RAIBON

A Professional Corporation

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

1 INTRODUCTION¹

2 Pacific Gas and Electric Company ("PG&E"), debtor and debtor in possession
3 herein, commenced this Chapter 11 case by filing a voluntary petition on April 6, 2001.
4 PG&E continues to manage and operate its property as a debtor in possession pursuant to
5 Sections 1107 and 1108 of the Bankruptcy Code.

6 PG&E hereby seeks an order of this Court pursuant to Bankruptcy Code Sections
7 365 and/or 105 approving the assumption of nineteen (19) settlement agreements entered into
8 by PG&E, as defendant in various personal injury actions, as listed on Exhibit A hereto (the
9 "Settlement Agreements"), and payments of amounts owed thereunder. Each of the
10 Settlement Agreements resolves a personal injury action against PG&E, and the amounts
11 owed thereunder are payable to individual plaintiffs and their respective counsel. The
12 Settlement Agreements were entered into pre-petition, and in each case, there are material
13 unperformed obligations thereunder on the part of both parties. In each case, the plaintiff has
14 the obligation, so far unperformed, to execute a release and/or file a dismissal of the action,
15 while PG&E has the obligation to make a one-time payment. The lawsuits have not been
16 dismissed as of the date hereof.

17 As noted on Exhibit A hereto, the amount of the settlement payments to be made
18 by PG&E range from \$6,000 to \$200,000, with the average payment being approximately
19 \$37,000.

20 PG&E seeks this relief on the grounds that payment of the amounts owed under
21 the Settlement Agreements represents a minimal cost to the estate, while PG&E's continued
22 failure to make such payments may impose a serious hardship on the individual plaintiffs who
23 are parties to the Settlement Agreements.

24
25
26
27 ¹ The evidentiary basis and support for the facts set forth in this Application are
28 contained in the Damlos Declaration filed concurrently herewith.

HOWARD
RICE
NEMEROVSKI
CANADY
BAIK
& RAIKIN
A Professional Corporation

1 DISCUSSION

2 Section 365 of the Bankruptcy Code governs the treatment of executory
3 agreements following the filing of a bankruptcy petition. Section 365 provides that “the
4 trustee [or debtor in possession], subject to the court’s approval, may assume or reject any
5 executory contract or unexpired lease of the debtor.” 11 U.S.C. §365(a). By this Motion,
6 PG&E asks the Court to enter an order pursuant to Section 365(a) of the Bankruptcy Code,
7 authorizing PG&E to assume the Settlement Agreements or, to the extent the Settlement
8 Agreements are not “executory contracts” within the meaning of Section 365, to enter an
9 order pursuant to Section 105(a) of the Bankruptcy Code permitting payment of the amounts
10 owed under the Settlement Agreements, in accordance with the terms thereof.

11
12 A. The Settlement Agreements May Be Considered Executory Contracts.

13 For purposes of the Bankruptcy Code, the Supreme Court has defined “executory
14 contract” as a contract on which “performance remains due to some extent on both sides.”
15 NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522 n.6 (1984) (citation omitted). Similarly, the
16 Ninth Circuit has held that Section 365 refers to those contracts in which the obligations of
17 both parties “are so far unperformed that the failure of either party to complete performance
18 would constitute a material breach and thus excuse the performance of the other.”
19 Commercial Union Ins. Co. v. Texscan Corp. (In re Texscan Corp.), 976 F.2d 1269, 1272
20 (9th Cir. 1992).

21 The Settlement Agreements are executory in nature. Pursuant to the Settlement
22 Agreements, the plaintiffs have the obligation to execute releases and to dismiss their actions
23 with prejudice, while PG&E has the obligation to make certain payments to the plaintiffs.
24 The Settlement Agreements thus constitute executory contracts that may be assumed pursuant
25 to Section 365(a) of the Bankruptcy Code.

26 Courts have consistently recognized that settlement agreements are contracts for
27 purposes of Section 365. See Enterprise Energy Corp. v. United States ex rel. IRS (In re
28 Columbia Gas Systems, Inc.), 50 F.3d 233, 238 (3d Cir. 1995). Whether a settlement

HOWARD
RICE
NEMEROVSKI
CANADY
PAIK
& RAEBIN
A Professional Corporation

1 agreement is “executory” within the meaning of Section 365 is determined on a case-by-case
2 basis in light of the terms of the contract at issue. See, e.g., Shoppers World Cmty. Ctr. v.
3 Bradlees Stores, Inc. (In re Bradlees Stores, Inc.), 47 Lawrence P. King, Collier Bankruptcy
4 Cas. 2d (MB) 23, 34 (S.D.N.Y. 2001)(holding that a settlement agreement regarding a lease
5 was an executory contract where both sides had continuing obligations, including the
6 landlord’s obligation not to disturb the tenant’s use, enjoyment and possession of the property
7 and the tenant’s obligation to execute a direct lease).

8 Although one noted case has held that a settlement agreement was not executory
9 where the only remaining obligations of the plaintiff class members were to execute releases
10 and complete supplemental contracts with the debtor (In re Columbia Gas Systems, Inc., 50
11 F.3d 233 (3d Cir. 1995)), the settlement agreement at issue in that case is distinguishable
12 from the Settlement Agreements the Debtor wishes to assume. In Columbia Gas, the Court
13 relied heavily on the fact that the court order approving the settlement provided that the cause
14 of action against the debtor was extinguished regardless of whether the plaintiff executed a
15 release. “A class member who failed to execute a release would not get its share of the
16 settlement fund, but [the debtor] would still get the benefit of the class member’s inability to
17 sustain a cause of action.” Id. at 242. Therefore, the court reasoned, the requirement of the
18 plaintiff’s execution of a release was merely a condition to payment of the settlement amount,
19 and did not render the settlement agreement executory.

20 In this case, unlike in Columbia Gas, the plaintiff’s release and dismissal of the
21 action is a necessary component of each Settlement Agreement. If the plaintiff fails to sign
22 the release and to dismiss the action, the cause of action is not extinguished, and the
23 obligation of the Debtor to pay the settlement amount would be excused. Accordingly, there
24 are material obligations to be performed on both sides of the Settlement Agreements, and
25 they can be deemed to be executory contracts within the meaning of Section 365.

26 **B. PG&E’s Assumption of the Settlement Agreements Should Be Permitted**
27 **Under the Business Judgment Test.**

28 The widely accepted test for determining whether a debtor in possession should be

1 authorized to assume or reject an executory contract is the business judgment test. See, e.g.,
2 Robertson v. Pierce (In re Chi-Feng Huang), 23 B.R. 798, 800 (B.A.P. 9th Cir. 1982)
3 (citations omitted). PG&E's decision to assume the Settlement Agreements constitutes the
4 exercise of sound business judgment, and should be approved by this Court. As discussed
5 below, the total amount of money the Debtor requests to pay (\$697,499) represents a very
6 small percentage of the Debtor's total assets, with the average amount owed to each plaintiff
7 under the Settlement Agreements being approximately \$37,000, while the Debtor's continued
8 inability to make payments under the Settlement Agreements may impose hardships on the
9 plaintiffs party to the Settlement Agreements.

10 **C. PG&E Has the Ability to Cure Arrearages Under the Settlement Agreements**
11 **In Compliance with Section 365(b) of the Bankruptcy Code.**

12 Section 365(b)(1) of the Bankruptcy Code provides that, in order to assume an
13 executory contract, the debtor in possession must provide adequate assurance that it promptly
14 will cure any defaults and that the contract will be performed in the future. 11 U.S.C.
15 §365(b)(1)(A)-(C). The amount necessary to cure the amounts owed under the Settlement
16 Agreements is \$697,499 in the aggregate.

17 PG&E has substantial cash reserves and ongoing revenues, as demonstrated in
18 numerous filings before this Court, and is clearly capable of curing arrearages and completing
19 its future performance under the Settlement Agreements.

20 **D. This Court Should Authorize Payment Of Amounts Owed Under the**
21 **Settlement Agreements Pursuant To Section 105(a) And The Court's**
22 **Inherent Powers.**

23 Even if this Court determines that the Settlement Agreements are not executory
24 contracts that may be assumed pursuant to Section 365, PG&E requests that this Court
25 authorize the payment of amounts outstanding under the Settlement Agreements pursuant
26 Section 105(a) of the Bankruptcy Code and the Court's inherent powers. Section 105
27 authorizes this Court to "issue any order, process, or judgment that is necessary or appropriate
28 to carry out the provisions of this title." The purpose of Section 105 is "to assure the
bankruptcy court's power to take whatever action is appropriate or necessary in aid of the

1 exercise of their jurisdiction.” 2 Lawrence P. King, Collier on Bankruptcy, §105.01 at 105-
2 06 (15th ed. rev. 2000).

3 Although payment of pre-petition claims prior to confirmation of a plan in a
4 chapter 11 case is generally not allowed, Section 105(a) confers the power to authorize
5 payments irrespective of priorities where circumstances so warrant. See, e.g., Crafts
6 Precision Indus. v. U. S. Healthcare, Inc. (In re Crafts Precision Indus., Inc.), 244 B.R. 178,
7 183 (1st Cir. B.A.P. 2000) (affirming authorization of vacation payments “pursuant to Section
8 105, irrespective of them being non-priority obligations”); In re Equalnet Communications
9 Corp., 258 B.R. 368, 369 (Bankr. S.D. Tex. 2000) (exceptions to general rule against pre-
10 confirmation payment of pre-petition claims “arise primarily out of common sense and the
11 presence of a legal or factual inevitability of payment.”).

12 The reasoning of these cases applies to the Debtor’s request for authority to make
13 the payments provided under the Settlement Agreements. The Debtor’s continued inability to
14 make payments under the Settlement Agreements may impose hardships on the plaintiffs
15 party to the Settlement Agreements, who are involuntary creditors of the Debtor.

16 Additionally, the total amount of money the Debtor requests to pay (\$697,499) represents a
17 very small percentage of the Debtor’s total assets, with the average amount owed to each
18 plaintiff under the Settlement Agreements being approximately \$37,000.

19 In sum, equitable considerations mitigate in favor of authorizing the Debtor to pay
20 amounts owed under and in accordance with the terms of the Settlement Agreements.

HOWARD
RICE
NEMEROVSKI
CANADY
BALK
& RAEGIN
A Professional Corporation

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the foregoing reasons, PG&E respectfully requests that the Court enter an order approving PG&E's assumption of and payment of amounts owed under the Settlement Agreements pursuant to Sections 365(a) and/or 105 of the Bankruptcy Code.

DATED: October 7, 2002.

Respectfully,

HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN
A Professional Corporation

By: Janet Nexon
JANET A. NEXON

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

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN

A Professional Corporation

Exhibit A

Litigation Executory Contracts

Creditor Name	Amount
Carranza, Reyna as Guardian Ad Litem for Antonio H. Carranza, a minor and Juan J. Vera, Inc., his attorneys	\$7,500
Correia, Manuel [Brayton, Purcell as Trustees for]	\$8,500
Dajani, Majed [Khalidoun Baghdadi, attorney for]	\$11,000
Figueroa, John [Bennett Johnson & Galler, attorneys for]	\$10,000
Gallegos, Angelina [David Allen & Associates, attorneys of record for]	\$7,500
Gilmore, Cindy and Pederson, Marvin	\$6,000
Guill, James [Chain, Younger, Cohn & Stiles, attorneys for]	\$135,000
Holman, Odell & Betty [Paul & Hanley as Trustees for]	\$20,000
Johnson, Curtis L. in Trust for Douglas, Pamela and Melissa Cunningham	\$200,000
Kale, Donna [Brayton, Purcell as Trustees for]	\$30,000
Mauroni, Adele	\$15,000
Murphy, Timothy [Brayton, Purcell as Trustees for]	\$9,999
Murray, Everett & Oneta [Paul Hanley as Trustees for]	\$65,000
Pittson, Norma [Brayton, Purcell as Trustees for]	\$30,000
Pollington, William [Brayton, Purcell as Trustees for]	\$50,000
Rogers & Miller [In Trust for Fire Insurance Exchange (Hiatt/Patton)]	\$27,000
Samford, Joe & Freddie [Paul & Hanley as Trustees for]	\$15,000

HOWARD
RICE
NEMEROVSKI
CANADY
PAIK
& RAEBIN
A Professional Corporation

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Story, Diane [Brayton, Purcell as Trustees for]	\$15,000
Terry, Flossie [c/o Wartnick]	\$35,000
Total	\$697,499.00

HOWARD
RICE
NEMEROVSKI
CANADY
BAK
& RAICIN
A Professional Corporation

WD 100402/2-1419905/Y12/1017635/v2