UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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***In re*:**	**:**	
	:	**Chapter 11**
ENRON CORP., *et al*.,	**:**	**Case No. 01-16034(AJG)**
	:	**Jointly Administered**
	:	
Reorganized Debtors.	**:**	
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ORDER, PURSUANT TO 11 U.S.C. §§ 105(a), 502(c), AND 1142, ESTIMATING CERTAIN CONTINGENT OR UNLIQUIDATED CLAIMS FOR PURPOSES OF ESTABLISHING RESERVES - GRYNBERG CLAIM NO. 383

Upon consideration of the Reorganized Debtors' Thirteenth Omnibus Motion for Order, pursuant to 11 U.S.C. §§ 105(a), 502(c), and 1142, Estimating Certain Contingent or Unliquidated Claims for Purposes of Establishing Reserves, dated December 13, 2005 (the "Motion")[1]**;** and it appearing that the relief requested in the Motion is in the best interests of the Reorganized Debtors**,** their creditors, and all parties in interest; and, pursuant to rule 3007 of the Federal Rules of Bankruptcy Procedure, good and sufficient notice having been provided to the Office of the United States Trustee for the Southern District of New York, the Claimant, and any other parties on the Notice List; and it appearing that no other or further notice need be provided; and an Objection to the Motion being timely filed by the Claimant; and the Court having reviewed the Motion, the evidence adduced in support thereof, the Objection to the Motion, and counsel for the Reorganized Debtors appearing in support of the Motion at a hearing before the Court ("the Hearing"), neither counsel for the Claimant nor the Claimant himself appearing in support of the Objection to the Motion; and the Court having

[1]Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings heard before the Court; and after due deliberation and sufficient cause as set forth by the Court in Exhibit A as read into the record today, it is

ORDERED that, pursuant to sections 105(a), 502(c), and 1142 of the Bankruptcy Code, the Affected Claim shall be estimated, solely for the purposes of establishing an unsecured Reserve Claim Amount, at $0; and it is further

ORDERED that, pursuant to Sections 21.2 and 21.3(a) of the Plan, the Reserve Claim Amount shall constitute and represent the maximum amount in which the Affected Claim may ultimately become an Allowed Claim; and it is further

ORDERED that the relief granted herein with respect to the Affected Claim is without prejudice to the existing rights of the Reorganized Debtors to pursue all pending objections to the Affected Claim, to file new objections to the Affected Claim on any and all grounds, to seek, among other things, estimation or disallowance of the Affected Claim at any time; and it is further

ORDERED that, the Reserve Claim Amount shall (a) not constitute an acknowledgement or admission of liability, amount, or validity with respect to the Affected Claim and (b) not be relevant to the resolution of any issue in any court or tribunal other than to enforce the provisions of Section 21.3 of the Plan before this Court.

Dated: New York, New York
January 6, 2006

s/ Arthur J. Gonzalez
ARTHUR J. GONZALEZ
United States Bankruptcy Judge

Exhibit A

Before the Court is the Reorganized Debtors= (ADebtor@) Thirteenth Omnibus Motion for Order Estimating Certain Contingent or Unliquidated Claims for Purposes of Establishing Reserves (AMotion@), filed on December 13, 2005, seeking estimation of Claim No. 383 (as defined in the Motion, AAffected Claim@) pursuant to 11 U.S.C. '' 105(a), 502(c), and 1142 and Section 21.2 of the Debtors= Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (APlan@). The Debtor argues that this Court should, according to the estimation provisions of the Plan, estimate the Affected Claim to be valued at $0. The claimant, the United States of America ex rel. Jack J. Grynberg (as defined in the Motion, AClaimant@), in turn argues that any estimation is premature at this time due to pending proceedings in the civil action upon which the Affected Claim is based. The Claimant therefore contends that this Court should withhold any ruling on the Motion until the trial court in that litigation rules on the jurisdictional issue currently before it. The Debtor responds that, in light of the recent Special Master=s report commissioned by the trial judge in that litigation, estimation of the Affected Claim is proper to serve the interests of the bankrupt estate and its creditors. *See,* Exhibit B to the Debtors= Motion, AFinal Report and Recommendations of Special Master.@ The Debtor argues that principles of equity support the estimation of the Affected Claim, as the size of the reserve the Affected Claim requires the Debtor to maintain while the civil action proceeds harms the Debtor=s creditors by preventing the efficient and equitable distribution of the Debtor=s estate.

This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. ' 1334, as this matter arises under section 502(c) of chapter 11 of title 11 of the United States Code. This is a Acore@ proceeding pursuant to 28 U.S.C. ' 157(b). This Court has postconfirmation jurisdiction

pursuant to Paragraph 60(e) of this Court=s Order Confirming the Debtors= Plan (AConfirmation Order).

The Affected Claim arises out of *qui tam* litigation on behalf of the federal government seeking damages under the False Claims Act, 31 U.S.C. '' 3729-3733 (AFCA@). *United States of America ex rel. Jack J. Grynberg v. Enron Corp, et al.*, No. 99-MD-1608 (D. Wyo. transferred October 20, 1999) (A*Qui Tam* litigation@). The action against the Debtor originated in the District of Colorado as *United States ex rel. Jack J. Grynberg v. Enron Corp, et al.*, No. 97-1421 (D. Colo.. filed July 2, 1997), but was consolidated by the Judicial Panel on Multidistrict Litigation with sixty-five related actions filed by the Claimant, transferred to the District of Wyoming, and assigned to the Honorable William F. Downes. *In re Natural Gas Royalties Qui Tam Litigation*, No. 99-MD-1293 (D. Wyo. consolidated October 20, 1999) (AConsolidated Litigation@).

Briefly, the Consolidated Litigation unifies the actions brought by the Claimant in various district courts across the country against seventy-three natural gas pipeline companies, their affiliates, parents, and subsidiaries (AConsolidated Defendants@), the Debtor among them. The Claimant alleges that the Consolidated Defendants each engaged in a variety of fraudulent practices in their measurement of the volume and heating content of natural gas produced from federal and Indian lands and transported through their pipelines. This alleged mismeasurement resulted in the underpayment of royalties due the federal government from such production, which is the basis for the Claimant=s action under the FCA.

The Consolidated Litigation was not the first brought by the Claimant against at least some of the Consolidated Defendants, nor is it the only litigation alleging similar complaints against the natural gas industry. On April 17, 1995, the Claimant filed *qui tam* litigation in the

District of Columbia District Court against forty-four defendants, including the Debtor, on substantially similar grounds to those in the Consolidated Litigation (A1995 litigation@). That action was dismissed without prejudice on March 27, 1997 for failure to plead fraud with particularity under Fed. R. Civ. P. 9(b) and for improper joinder of parties under Fed. R. Civ. P. 20(a). In response to that dismissal, the Claimant filed individual actions against the Consolidated Defendants alleging more specific acts of fraud. Additionally, a number of similar cases are being or have been litigated in state and federal courts both *qui tam* and by government agencies, all concerning the same basic allegations of fraudulent underpayment by natural gas producers and pipeline owners. *See e.g., United States ex rel. Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039 (10th Cir. 2004).

Section 502(c) provides: AThere shall be estimated for purpose of allowance under this section ... (1) any contingent or unliquidated claim the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case.@ As has been noted, estimation serves two purposes: first, to Aavoid the need to await the resolution of outside lawsuits to determine issues of liability,@ and second, to Apromote a fair distribution to creditors through a realistic assessment of uncertain claims.@ *Matter of Ford*, 976 F.2d 1047, 1053 (5th Cir. 1992). In determining the estimated value of the claim, the Court is granted wide discretion in the choice of means used. AThe [Bankruptcy] Code and the Federal Rules of Bankruptcy are silent as to an applicable procedures (sic) governing the estimation hearing. In filling the void, courts have determined that judges are to use >... whatever method is best suited to the circumstances.=@ *In re Thomson McKinnon Securities, Inc.*, 191 B.R. 976, 979 (Bankr. S.D.N.Y. 1996) (quoting *Addison v. Langston* (*In re Brints Cotton Marketing, Inc.)*, 737 F.2d 1338, 1341 (5th Cir. 1984)). *See also*, *Bittner v. Borne Chem.* Co., 691 F.2d 134, 135 (3rd Cir. 1982) (the Code is Asilent as to the

manner in which contingent or unliquidated claims are to be estimated@); In *re Ralph Lauren Womenswear, Inc.*, 197 B.R. 771, 775 (Bankr. S.D.N.Y. 1996) (estimation is Acommitted to the reasonable discretion of the court@). The only constraint on the court=s authority, save the general principle of bankruptcy law favoring quick and efficient resolution of the dissolution or reorganization of the bankrupt estate, is that the court is A>bound by the legal rules which may govern the ultimate value of the claim;=@ that is, the court must estimate the claim according to the law upon which it is based. *Thomson McKinnons*, 191 B.R. at 979 (quoting *Bittner*, 691 F.2d at 135).

The threshold question in any estimation hearing is whether the Aliquidation@ of the Affected Claim outside bankruptcy proceedings would unduly delay the administration of justice. *See*, *In re G-I Holdings*, 323 B.R. 583, 598-599 (Bankr. D.N.J. 2005). Section 502(c) is designed to promote the equitable administration of the estate from the perspective of the Debtor and creditors, and thus it is only where such administration would be unduly burdened that estimation is proper. *See* 4 L. King et al., *Collier on Bankruptcy*, paragraph 502.04(1) (15th ed. Rev. 2002). The record before the Court clearly shows that the Affected Claim is a particularly fitting example of the circumstances envisioned by the Code.

The Affected Claim seeks a recovery of approximately $10.5 billion from the Debtors. It is not at all difficult to recognize that the Aliquidation@ of such a large claim outside the bankruptcy proceedings would of necessity unduly delay the administration of the estate. The Debtor must, under Section 21.3(a) of the Plan, maintain a reserved distribution of assets equal to the value of any disputed claims, assets which may not be distributed to allowed unsecured creditors. In regard to the Affected Claim, therefore, *significant* assets must be reserved. To await the resolution of the substantive issues of the Affected Claim while such a reserve must be

set aside clearly prejudices the interests of established, bona-fide creditors and the administration of the estate. *See In the Matter of Genesis Health Ventures, Inc.*, 272 B.R. 558, 562 (Bankr. D.Del. 2002) (estimating *qui tam* litigation where bankrupt estate required to reserve $324 million).

The Claimant nonetheless argues that the Court should postpone any ruling on the estimation motion at least until the issues currently pending in the *Qui Tam* Litigation have been resolved. The Claimant suggests that such a ruling can be expected shortly. The Claimant contends, therefore, that consideration of the interests of the United States in the resolution of the *Qui Tam* Litigation should prompt this Court to stay its own ruling until the District Court has issued its decision. This argument is unpersuasive. As previously noted, the controlling principle of the Bankruptcy Code is the quick and efficient resolution of the bankrupt estate. The Bankruptcy Code=s estimation provision is intended to serve this purpose alone. The only proper inquiry then is whether or not the administration of the bankrupt estate is unduly delayed by awaiting the liquidation of the Affected Claim outside the bankruptcy proceedings. The history of the Consolidated Litigation leaves the Court doubtful that a quick resolution may be expected. Moreover, as the Debtor notes, an appeal will surely follow any decision in favor of either party. Most importantly, though, the Court must recognize that it is unlikely the District Court will liquidate the Affected Claim prior to the Debtor=s next scheduled distribution in April 2006, which fact certainly signifies an undue delay in administration of the estate. The Court thus concludes the Affected Claim is properly the subject of estimation.

Two primary methods of estimation have been developed by courts confronting unliquidated claims that were the subject of litigation. *See*, *Thomson McKinnon*, 191 B.R. at 989-990. Some courts have adopted a probability approach that determines the value of the claim by

reference to the probability that the claimant=s factual assertions will not be accepted by the trier of fact. *See, e.g., Ralph Lauren Womenswear*, 197 B.R. at 775; *Thomson*, 191 B.R. at 989-990; *In re Windsor Plumbing Supply Co., Inc.*, 170 B.R. 503, 521 (Bankr. E.D.N.Y. 1994). This is not a probability analysis of the claimant=s likelihood of success per se. Courts applying this probability approach are careful to note that the analysis applies only to questions of fact. Matters of law are not Aevaluated for the probability that they have merit, but rather for their correctness as a matter of governing law.@ *Ralph Lauren Womenswear*, 197 B.R. at 195 (citing *Thomson McKinnnon*, 191 B.R. at 979). Alternatively, some courts have adopted an all-or-nothing, or Abinary,@ approach. *See, Bittner*, 691 F.2d at 136-139. In applying this method, the court estimates the claim=s value as either 0% or 100%, depending on the likelihood that the claimant will succeed based on the preponderance of the evidence. According to either method, however, the Court must examine the facts asserted in the *Qui Tam* Litigation and apply the governing law to reach its estimate. The Court notes briefly that it will apply the law of the Tenth Circuit in its analysis, as the *Qui Tam* litigation is currently pending in that jurisdiction.

The current issue before the District Court in the *Qui Tam* Litigation concerns whether the Claimant has satisfied the jurisdictional requirements of the FCA as set forth in 31 U.S.C. ' 3730(e)(4). The jurisdictional requirements of the FCA operate as an initial threshold a *qui tam* plaintiff must surmount. Only if those jurisdictional requirements are met may the court then proceed to the substantive issues raised by the plaintiff. As the FCA allows private litigants to stand in for the United States government where fraud against the federal government is alleged and grants the private litigant a portion of any recovery, the jurisdictional provisions of the FCA seek to insure that the courts are not flooded with *qui tam* actions by opportunistic plaintiffs. This jurisdictional question is essentially a two-step inquiry. The first asks whether the allegations set

forth in the action are based upon publicly-disclosed information as defined in ' 3730(e)(4)(A). If they are not, then the plaintiff satisfies the jurisdictional requirements and no further inquiry is required. If, however, the allegations are based upon publicly-disclosed information, the second step of the inquiry asks whether the plaintiff is the Aoriginal source@ of the information upon which the allegation is based. ' 3730(e)(4)(B). If the plaintiff does not satisfy this requirement, the court must then dismiss the action for lack of subject matter jurisdiction. In effect, the FCA permits suits on behalf of the federal government only where the plaintiff is the whistleblower or investigator primarily responsible for discovering and making public the alleged fraud.

All courts that have addressed the issue have clearly held that prior litigation constitutes publicly-disclosed information for the purposes of ' 3730(e)(4)(A). *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271 (10th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002) (prior suit by plaintiff qualifies as public disclosure); *United States ex rel. Northrop Corp.*, 59 F.3d 953, 966 (9th Cir. 1995); *United States ex rel. Kreindler & Kreindler*, 985 F.2d 1148, 1158 (2nd Cir. 1993). Equally clearly, the *Qui Tam* litigation is based upon the information disclosed in the 1995 litigation, as the allegations contained within that litigation are repeated and expanded upon in the *Qui Tam* litigation, and as the Debtor was a defendant in both actions. That the Claimant is not relying on the 1995 litigation as the source of his information is not dispositive here. Rather, the *Qui Tam* litigation is Abased upon@ the 1995 litigation within the meaning of the statute and Tenth Circuit law if it is Asupported by@ that prior litigation, *United States ex rel. Fine v. MK-Ferguson Co.*, 861 F.Supp. 1544, 1545 (D.N.M. 1994), or more specifically, if there is a Asubstantial identity@ between the Complaint and prior litigation. *Hillcrest Healthcare*, 264 F.3d at 1279. The Tenth Circuit has further noted that this standard is to be applied strictly and may even bar *qui tam* actions based only partially on publicly-disclosed information. *See, United*

States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038, 1051 (10th Cir. 2004); *Kennard*, 363 F.3d at 1042. Clearly, there is a Asubstantial identity@ between the two suits where the essential claim of fraud through mismeasurement is repeated here against the same defendants. Similarly, the addition of allegations to the *Qui Tam* litigation does not effect the conclusion that the *Qui Tam* litigation is based upon the 1995 litigation. A[T]he statue applies to a >*qui tam* action... based in any part upon publicly disclosed allegations or transactions.:@ *Kreindler*, 985 F.2d at 1158 (quoting *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552-553 (10th Cir. 1992). *Accord, United States ex rel. Fine v. Advance Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996); *MK-Ferguson Co.*, 99 F.3d at 1546-47 (*qui tam* complaint based upon public disclosure even if additional transactions are referenced that were not mentioned in the public disclosure). Therefore, the District Court will conclude that the Claimant does not satisfy the jurisdictional requirements of ' 3730(e)(4)(A).

The Court must now address whether as a matter of law the Claimant is the Aoriginal source@ of the information upon which the allegations are based. A large portion of the allegations in the Claimant:s complaint are based upon interviews he or his staff conducted with third-parties knowledgeable about the natural gas pipeline industry. The Claimant and his staff interviewed industry insiders, laboratory personnel, manufactures of the measurement instruments used in the industry, government employees, and others. The Claimant also retained consultants familiar with the industry to educate and advise him as to the scientific issues and industry practices involved. From these interviews the Claimant compiled his list of mismeasurement techniques, which are generally alleged to be industry-wide practices. Similarly, a large portion of the Claimant:s allegations are based upon his study of public documents, including government reports, scientific works, industry standards, and equipment

manuals. These documents formed both the basis against which to measure industry practices and a source of information on the mechanics of mismeasurement. Finally, a small portion of the Claimant=s allegations are based upon inspections and tests done at the Claimant=s request. These included inspections of some of the Debtor=s pipeline sites, testing of samples taken from those sites, and comparisons of the results from such tests.

Section 3730(e)(4)(B) defines Aoriginal source@ as Aan individual who has direct and independent knowledge of the information on which the allegations are based ....@ ADirect and independent knowledge@ is Amarked by an absence of an intervening agency... [and] unmediated by anything but the relator=s own labor. *MK-Ferguson,* 99 F.3d at 1547. The essential inquiry is whether the plaintiff discovers the knowledge through his own labor and without deriving that information from others. *United States ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999). *See also, Praxair,* 389 F.3d at 1053. According to that standard, the majority of the information, whether from interviews or from public sources, upon which the Claimant=s allegations are based is not Adirect and independent knowledge.@ Nonetheless, it is true that at least some of that information was obtained by direct and independent means, particularly through the Claimant=s inspections and testing. The question then becomes whether sufficient information, both qualitatively and quantitatively, was direct and independent in order to qualify the Claimant as an original source.

The Tenth Circuit has not established a standard for determining whether the plaintiff=s independent information is substantial enough to satisfy the Aoriginal source@ requirement where the plaintiff also relied upon publicly-disclosed information from other parties. In analyzing a similar situation, however, the court did state that the plaintiff did not qualify as an original source because he was not the source of the Acore information@ contained in the complaint.

Hafter, 190 F.3d at 1163 (favorably citing the Second Circuit=s use of this standard in *Kriendler*, 985 F.2d at 1159). Similarly, the court in *Precision Co.* noted that the plaintiff=s independent knowledge was Ainformal, weak, and strikingly redundant@ compared to the publicly-disclosed information derived from others. 971 F.2d at 554. On the other hand, the Tenth Circuit has recently confronted this issue of the comparative weight of independent and third-party or public information and found in favor of the plaintiff where the plaintiffs Aferreted out@ the fraud and the case Awould not exist but for [plaintiffs] sniffing it out.@ *Kennard*, 363 F.3d at 1045-47. The court reached its conclusion by examining the decisions of other Circuits, including citing and discussing again the Second Circuit=s decision in *Kriendler*. The *Kennard* court reasoned that the plaintiffs did not Amerely label or translate an already publicly disclosed fraud,@ as was the case in *Kriendler* and *United States ex rel. Findley v. FPC-Boron Employee=s Club*, 105 F.3d 675, 688 (D.C. Cir. 1997). *Kennard*, 363 F.3d at 1046. Rather, the court concluded that the plaintiffs Astarted with innocuous public information [and] completed the equation with information independent of any preexisting public disclosure.@ *Id*.

Applying this Tenth Circuit law to the *Qui Tam* Litigation, the District Court will conclude as a matter of law that the Claimant does not qualify as an Aoriginal source@ under ' 3730(e)(4)(B). From a simple quantitative perspective, a large majority of the information upon which the Claimant relied was derived from third-parties and public sources and was not innocuous, but rather detailed the Claimant=s allegations at an industry-wide level. More importantly, from a qualitative perspective, the Claimant=s independent and direct knowledge did not Acomplete the equation.@ At best, the Claimant=s independent and direct knowledge linked the Debtor to a few particular mismeasurement practices out of more than twenty alleged such

practices. This situation is analogous to *Kreindler*, where the plaintiff conducted additional research but relied primarily upon public information. 985 F.2d at 1159. The Claimant admittedly expended significant effort in his investigations, but for the most part the Claimant was Ajust an assembler of information.@ *Kennard*, 363 F.3d at 1046. What independent and direct knowledge the Claimant gained is simply insubstantial enough to qualify as Aferreting out@ the alleged fraud.

Therefore, having examined the questions of law presented in the *Qui Tam* Litigation, this Court concludes that the probability that the Claimant will succeed as against the Debtor in this action is 0%. Applying Tenth Circuit law the District Court will conclude that the Claimant does not satisfy the jurisdictional requirements of the FCA, and this Court is bound to apply that law in reaching its estimate. Moreover, since the issues presented in the *Qui Tam* Litigation are questions of law, under either estimation method the Affected Claim must be valued at $0.

Accordingly, pursuant to 11 U.S.C. '' 105(a), 502(c), and 1142 and Section 21.2 of the Plan, the Debtor's Motion is granted and the Affected Claim is hereby estimated at a value of $0.