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15 [additional parties and counsel on following pages]

16 SUPERIOR COURT OF CALIFORNIA
 17 COUNTY OF LOS ANGELES

18 Coordination Proceeding
 19 Special Title (Rule 1550(b))

ASSIGNED FOR ALL PURPOSES TO
 THE HONORABLE VICTORIA
 CHANEY, DEPARTMENT 324, CCW

OPPOSITION TO MOTIONS FOR
 STAY BY CROSS-DEFENDANTS
 ANDREW S. FASTOW AND
 MICHAEL J. KOPPER

20 THE ENRON SECURITIES CASES

JUDICIAL COUNCIL
 COORDINATION PROCEEDING
 No. 4306

21 Included actions:

22 OCM Opportunities Fund III, L.P. v.
 23 Citigroup, Inc.

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF LOS ANGELES
 No. BC 283342

24 Pacific Investment Management
 25 Company, LLC v. Citigroup, Inc.

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF ORANGE
 No. 02CC00300

26 _____
 27 and related cross-actions.

Date: June 21, 2004
 Time: 2:00 p.m.

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1 **I. INTRODUCTION**

2 Cross-Defendants Andrew S. Fastow and Michael J. Kopper ask this Court to stay
 3 their obligations to respond to the cross-complaint and to respond to discovery. Kopper
 4 requests that such stay remain in place until October 15, 2004, and his request at least
 5 implicitly encompasses jurisdictional discovery. See Memorandum of Points and
 6 Authorities filed by Cross-Defendant Michael J. Kopper on April 23, 2004 ("Kopper Br.")
 7 at 1, 8. Fastow's request is indefinite in duration, and does not specify whether it
 8 encompasses jurisdictional discovery. See Memorandum of Points and Authorities filed by
 9 Cross-Defendant Andrew S. Fastow on April 30, 2004 ("Fastow Br.") at 6.

10 Fastow's and Kopper's motions are based primarily on two California cases that
 11 suggest stays should be granted upon request by parties in criminal jeopardy, *if and only if*
 12 such stays will impose no prejudice on other parties or the judicial system. The cases
 13 require a careful balancing of interests, and both make clear that any stay must be fashioned
 14 so as to avoid any prejudice to other parties. Cross-Complainants¹ do not oppose the
 15 limited stays requested by Fastow and Kopper, provided that they are so fashioned. This
 16 means that (1) neither Fastow nor Kopper should be excused from participating in discovery
 17 directed to others; and (2) this Court should not proceed to determine its personal
 18 jurisdiction over Fastow or Kopper without affording Cross-Complainants an opportunity to
 19 take jurisdictional discovery from them. In addition, because Fastow and Kopper will need
 20 to give evidence (or invoke the Fifth Amendment) at some point in order for these cases to
 21 be brought to trial, this Court should re-evaluate the propriety of any limited stays, at a
 22 minimum, at each quarterly status conference called for in the Case Management Order.

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 24 ¹ Cross-Complainants in the OCM action are Citigroup, Inc., Citicorp, Citibank,
 25 N.A., Citicorp North America, Inc., Citigroup Global Markets Inc., Credit Suisse First
 26 Boston LLC, Deutsche Bank Securities Inc., J.P. Morgan Chase & Co., JPMorgan Chase
 27 Bank, J.P. Morgan Securities Inc., Lehman Brothers Holdings Inc., Lehman Brothers Inc.,
 28 Bear Stearns Companies Inc., Bear, Stearns & Co. Inc., and UBS Securities LLC. Cross-
 Complainants in the PIMCO action are Citigroup, Inc., Citicorp, Citibank, N.A., Citicorp
 North America, Inc., Citigroup Global Markets Inc., Credit Suisse First Boston LLC,
 Deutsche Bank Securities Inc., Bear Stearns Companies Inc., and Bear, Stearns & Co. Inc.



1 **II. Neither Fastow Nor Kopper Should Be Excused From Participating In**
2 **Discovery Directed To Others**

3 Both Fastow and Kopper represent to this Court that they seek stays like those
4 previously ordered by Judge Melinda Harmon in the MDL proceeding in the U.S. District
5 Court for the Southern District of Texas, In re Enron Corp. Securities Litigation (MDL
6 1446). See Fastow Br. at 1; Kopper Br. at 2. Importantly, while the stays ordered by Judge
7 Harmon recognize Fastow's and Kopper's Fifth Amendment interests by shielding them
8 from having to *respond* to discovery, they do not excuse Fastow or Kopper from
9 participating in discovery *directed to others*. For obvious reasons of judicial economy and
10 efficiency, neither Fastow nor Kopper will be permitted, at some later stage in the litigation,
11 to retake or reopen other witnesses' depositions on the ground that they did not have an
12 opportunity to participate.

13 It is critical to the efficient management of these cases – and of the MDL proceeding,
14 because depositions are being coordinated – that the same rule apply here. Cross-
15 Complainants do not understand Fastow or Kopper to be asking this Court to excuse them
16 from participating in discovery. However, to avoid any possible confusion, Cross-
17 Complainants respectfully request that this Court specify in any stay order that Fastow and
18 Kopper are not excused from *participating* in discovery *directed to others* during such time
19 as they may be excused from *responding* to some or all discovery directed to them.

20 **III. This Court Should Not Decide Motions To Quash By Fastow Or Kopper**
21 **Without Allowing Cross-Complainants To Take Jurisdictional Discovery**

22 Along with his motion for stay, Fastow filed a motion to quash service of summons
23 on the cross-complaint for lack of personal jurisdiction. Kopper has not filed such a
24 motion, but the brief in support of his motion for stay suggests that he may intend to do so
25 in the future. See Kopper Br. at 1 n.1.

26 For the reasons set forth in their accompanying brief opposing Cross-Defendants'
27 motions to quash, Cross-Complainants are entitled to take jurisdictional discovery before
28 this Court decides any such motions. The Court indicated at the status conference



1 conducted on April 29, 2004 that it does not want to defer ruling on motions to quash until
2 Fastow and Kopper are no longer in criminal jeopardy. If this remains the Court's view, the
3 Court should carve out jurisdictional discovery from the requested stays. See Forbes v.
4 Eagleson, No. CIV. A. 95-7021, 1996 WL 420829, *7 (E.D. Pa. July 23, 1996) (staying
5 action pending disposition of criminal indictment but excepting jurisdictional discovery).

6 Fastow and Kopper may argue that they cannot respond even to jurisdictional
7 discovery without touching on issues relevant to the criminal proceedings against them, and
8 might therefore be "forced" to invoke the Fifth Amendment. So be it. A litigant's interest
9 in avoiding what Fastow and Kopper describe as a "Hobson's choice" between self-
10 incrimination and the purely civil consequences that flow from "taking the Fifth" is not of
11 constitutional dimension. See, e.g., United States v. Kordel, 397 U.S. 1, 11 (1970); SEC v.
12 First Fin. Group, Inc., 659 F.2d 660, 666-67 (5th Cir. 1981); SEC v. Dresser Indus., 628
13 F.2d 1368, 1375 (D.C. Cir. 1980). The California cases on which Fastow and Kopper base
14 their stay motions, Pacers, Inc. v. Superior Court, 162 Cal. App. 3d 686 (1984) and Avant!
15 Corp. v. Superior Court, 79 Cal. App. 4th 876 (2000), expressly require a movant's interest
16 to be balanced against all interests of other litigants and all interests of the Court. Pacers,
17 162 Cal. App. 3d at 690; Avant!, 79 Cal. App. 4th at 510. It would be extremely prejudicial
18 for this Court to allow Fastow and/or Kopper to use their Fifth Amendment rights as
19 swords, filing motions to quash and at the same time barring Cross-Complainants from
20 taking the jurisdictional discovery they need to defeat such motions. In this situation, the
21 balancing of interests required by Pacers and Avant! will require Fastow (and Kopper, if
22 and when he files a motion to quash) to respond to jurisdictional discovery – by giving
23 evidence, by invoking the Fifth Amendment, or by doing some of each, as they see fit.

24 IV. CONCLUSION

25 For the foregoing reasons, if this Court determines that a balancing of all relevant
26 interests warrants an order staying Fastow's and/or Kopper's obligations to respond to the
27 cross-complaint and to discovery, such order should (1) specify that neither Fastow nor
28 Kopper is excused from participating in discovery directed to others; and (2) provide in



1 some manner that this Court will not grant motions to quash by Fastow or Kopper before
2 Cross-Complainants have had an opportunity to take jurisdictional discovery from them.

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DATED: May 21, 2004

Respectfully submitted,

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[By permission and on behalf of all Cross-Complainants]

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