UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

APR 0 8 2003

Michael N. Milby, Clerk

MARK NEWBY, et al.	§	
	§	
Plaintiffs,	§	**No. H-01-CV-3624**
	§	
vs.	§	**(Consolidated Action)**
	§	
ENRON CORP., et al.	§	
	§	
Defendants.	§	

DEFENDANT ANDREW FASTOW'S MOTION TO POSTPONE ANSWER

Defendant Andrew Fastow ("Fastow") seeks a postponement or stay of his answer in order to protect his constitutional rights:

This Court granted a postponement of discovery as to Fastow on March 24, 2003. (Memorandum and Order Re Motions Filed By Enron Insider Defendant Andrew S. Fastow).[1] The Court also denied Fastow's Motion to Dismiss in that Order, which ordinarily gives rise to an obligation to answer under Rule 12. Fastow has not previously moved to stay his obligation to answer because that obligation did not arise until after the Court ruled on his Motion to Dismiss.

The same Fifth Amendment privilege considerations that led the Court to postpone discovery apply equally to Fastow's obligation to answer, because answering the Complaint paragraph by paragraph would put Fastow to the same Hobson's choice between assertion of his Fifth Amendment privilege and defense of his civil case. Therefore, Fastow requests that the Court postpone Fastow's obligation to answer until the criminal proceedings against him are concluded.

[1] A courtesy copy is attached as Exhibit A for the Court's convenience.

#1322

1. Fifth Amendment privilege applies at every stage of the proceeding.

The Fifth Amendment privilege applies at every stage of a civil proceeding, including the pleading stage. *North River Insurance Co., Inc. v. Stefanou*, 831 F.2d 484, 486 (4th Cir. 1987); *Rogers v. Webster*, 776 F.2d 607, 611 (6th Cir. 1985); *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983); *Nutramax Laboratories, Inc. v. Twin Laboratories, Inc.*, 32 F.Supp.2d 331, 333 (D. Md. 1999). The privilege "protects an individual not only from involuntarily becoming a witness against himself in a criminal proceeding but also from answering specific allegations in a civil complaint where the answers might incriminate him in future criminal actions." *North River Insurance Co., Inc.*, 831 F.2d at 486-87. A paragraph-by-paragraph answer to the Consolidated Complaint, as required under Rule 8, compels Fastow to make judicial admissions or denials that might later be used against him in the criminal proceeding. *Id.; see also National Acceptance Co.*, 705 F.2d at 927 n.5. Thus, when a civil defendant faces parallel criminal charges, as this Court has determined Fastow does, he may invoke the Fifth Amendment in lieu of admitting or denying the allegations of the complaint, just as he may invoke the Fifth Amendment in response to discovery requests. *Id.*[2]

2. A Stay of Fastow's Answer is Appropriate

Whether to answer allegations or plead the Fifth Amendment in a civil suit raises the same constitutional dilemma as responding to civil discovery. *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979)(litigant not forced to choose between Fifth Amendment privilege and prejudice to civil lawsuit); *Kmart Corp. v. Aronds et al.*, Civ. No. H-96-1212 (S.D.Tex. Dec. 11, 1996)(civil and criminal defendants should not have to choose

[2] The Criminal Complaint filed against Fastow in Case No. H-02-889-M is attached as Exhibit B and the Indictment against Fastow in Case No. H-02-0665 is attached as Exhibit C. Because of its volume, Fastow has not attached a copy of the Consolidated Complaint.

between making potentially incriminating statements in civil case or asserting Fifth Amendment privilege); *see also Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976)(when litigant chooses to invoke the Fifth Amendment privilege in a civil suit, an adverse inference can be drawn by the trier of fact). Because of the potential prejudice, the choice between answering allegations and invoking the Fifth Amendment presents the same dilemma that was before this Court and the Fifth Circuit in *Kmart Corp.* and *Wehling*, respectively.

This Court acknowledged the constitutional dilemma and stayed discovery as to Fastow pending the outcome of his criminal trial.[3] The same reasoning applies with equal force to Fastow's obligation to answer: The Complaint is so detailed that admitting or denying each allegation in the 500-page, 1030-paragraph, Consolidated Complaint puts Fastow in the same position as responding to discovery. Therefore, to protect the same constitutional rights that this Court sought to protect by staying discovery, Fastow requests a postponement of his obligation to answer in the *Newby* case pending the outcome of his criminal trial.

3. Conclusion

For all of the foregoing reasons, Fastow respectfully requests that this Court postpone Fastow's answer in this case and all cases that have been consolidated into MDL No. 1446. The legal and factual bases for a postponement will be the same in each case and therefore need not be brought to the Court's attention each time an answer date draws near in a consolidated case. In the event this Court denies Fastow's Motion, Fastow respectfully requests that this Court provide additional time to answer or seek other appropriate relief.

[3] Rather than set them out in full in this motion, Fastow hereby incorporates his arguments stated in the prior motion to postpone, which is attached as Exhibit D (without exhibits). (Defendant Andrew S. Fastow's Motion to Postpone Discovery During Pendency of Criminal Proceedings)

Respectfully submitted,

KEKER & VAN NEST, LLP

By: John Keker w/p AB

John Keker
710 Sansome Street
San Francisco, California 94111
Telephone (415) 391-5400
Facsimile (415) 397-7188

ATTORNEY-IN-CHARGE FOR
DEFENDANT ANDREW FASTOW

OF COUNSEL:

SMYSER KAPLAN & VESELKA, L.L.P.

Craig Smyser
State Bar No. 18777575
Asim Bhansali
State Bar No. 90001290
700 Louisiana, Suite 2300
Houston, Texas 77002
(713) 221-2300
(713) 221-2320 - Facsimile

CERTIFICATE OF SERVICE

This is to certify that on **April 8, 2003**, a true and correct copy of the above and foregoing instrument was served on all counsel of record via electronic transmission, in accordance with the Order(s) of this Court.

SEE ATTACHED SERVICE LIST

Asim Bhansali

EXHIBIT "A"
SERVICE LIST

Linda L. Addison
Fulbright & Jaworski, L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Phone: 713.651.5628
Fax: 713.651.5246
E-mail: laddison@fulbright.com
Attorney for the Northern Trust Company And Northern Trust Retirement Consulting LLC

Steve W. Berman
Hagens Berman, LLP
1301 Fifth Avenue, Suite 2900
Seattle, Washington 98101
Phone: 206.623.7292
Fax: 206.623.0594
E-mail steve@hagens-berman.com
Co-Lead counsel for the *Tittle* plaintiffs

Robert Hayden Burns
Burns Wooley & Marseglia
1415 Louisiana, Suite 3300
Houston, Texas 77002
Phone: 713.651.0422
Fax: 713.651.0817
E-mail: hburns@bwmzlaw.com
Attorneys for Defendant Kristina Mordaunt

James E. Coleman, Jr.
Carrington, Coleman, Sloman & Blumenthal, LLP
200 Crescent Court, Suite 1500
Dallas, Texas 75201
Phone: 214.855.3000
Fax: 214.855.1333
E-mail: deakin@ccsb.com
Attorney for Kenneth Lay

Thomas E. Bilek
Hoeffner & Bilek LLP
440 Louisiana, Suite 720
Houston, Texas 77002
Phone: 713.227.7720
Fax: 713.227.9404
E-mail: tbilek722@aol.com
Local Counsel for Newby Plaintiffs

Jeremy L. Doyle
Gibbs & Bruns, L.L.P.
1100 Louisiana, Suite 5300
Houston, Texas 77002
Phone: 713.650.8805
Fax: 713.750.0903
E-mail: jdoyle@gibbs-bruns.com
Attorney for Robert Belfer, Norman Blake, Ronnie Chan, John Duncan, Joe Foy, Wendy Gramm, Robert Jaedicke, Charles LeMaistre John Mendelsohn, Jerome Meyer, Paulo Ferraz Pereira, Frank Savage, Charles Walker, John Wakeham, Herbert Winokur

Anthony C. Epstein
Paul J. Ondrasik, Jr.
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Phone: 202.429.3000
Fax: 202.429.3902
E-mail: aepstein@steptoe.com
Attorney for Philip J. Bazelides, Mary K. Joyce and James S. Prentice James G. Barnhart, Keith Crane, William Gulyassy, Roderick Hayslett, Sheila Knudsen, Tod A. Lindholm, Mikie Rath and David Shields

G. Sean Jez
Fleming & Associates
1330 Post Oak Blvd., Suite 3030
Houston, Texas 77056
Phone: 713.621.7944
Fax: 713.621.9638
E-mail: enron@fleming-law.com
Attorney for Individual Plaintiffs

Barry G. Flynn
Law Offices of Barry G. Flynn, P.C.
1300 Post Oak Blvd., Suite 750
Houston, Texas 77056
Phone: 713.840.7474
Fax: 713.840.0311
E-mail: bgflaw@mywavenet.com
Attorney for David Duncan

EXHIBIT "A"
SERVICE LIST

Mark A. Glasser
King & Spalding
1100 Louisiana, Suite 4000
Houston, Texas 77002
Phone: 713.751.3200
Fax: 713.751.3290
E-mail: mkglasser@kslaw.com
Attorney for LJM II Co-Investment

H. Bruce Golden
Golden & Owens, LLP
1221 McKinney Street, Suite 3600
Houston, Texas 77010
Phone: 713.223.2600
Fax: 713.223.5002
E-mail: golden@goldenowens.com
Attorney for John A. Urquhart

Roger B. Greenberg
Schwartz, Junell, Campbell & Oathout
2000 Two Houston Center
909 Fannin
Houston, Texas 77010
Phone: 713.752.0017
Fax: 713.752.0327
E-mail: rgreenberg@schwartz-junell.com
Attorney for the Regents of the University of California

Mark C. Hansen
Reid M. Figel
Kellogg, Huber Hansen, Todd & Evans PLLC
1615 M. Street, N.W., Suite 400
Washington, D.C. 20036
Phone: 202.326.7900
Fax: 202.326.7999
E-mail: mhansen@khhte.com
rfigel@khhte.com
Attorney for Nancy Temple

Rusty Hardin, Jr.
Andrew Ramzel
Rusty Hardin & Associates, P.C.
1201 Louisiana, Suite 3300
Houston, Texas 77002
Phone: 713.652.9000
Fax: 713.652.9800
E-mail: aramzel@rustyhardin.com
Attorney for Arthur Andersen LLP

Robin Harrison
Campbell, Harrison & Dagley LLP
4000 Two Houston Center
909 Fannin Street
Houston, Texas 77010
Phone: 713.752.2332
Fax: 713.752.2330
E-mail: rharrison@chd-law.com
Liaison counsel for the *Tittle* plaintiffs

Sharon Katz
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
Phone: 212.450.4000
Fax: 212.450.3633
E-mail: andersen.courtpapers@dpw.com
Attorney for Arthur Andersen

Charles G. King
King & Pennington, LLP
1100 Louisiana Street, Suite 5055
Houston, Texas 77002
Phone: 713.225.8400
Fax: 713.225.8488
E-mail: cking@kandplaw.com
bofa@brobeck.com
Attorney for Goldman Sachs, Salomon Smith Barney, Banc of America Securities

EXHIBIT "A"
SERVICE LIST

Jeffrey C. King
Hughes & Luce, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201
Phone: 214.939.5900
Fax: 214.939.6100
E-mail: kingj@hughesluce.com
Attorney for Bruce Willison

Bernard V. Preziosi, Jr.
Curtis, Mallet-Prevost, Colt & Mosle, LLP
101 Park Avenue
New York, NY 10178-0061
Phone: 212.696.6000
Fax: 212.697.1559
E-mail: bpreziosi@cm-p.com
Attorney for Michael C. Odom

William S. Lerach
G. Paul Howes
Helen J. Hodges
Milberg Weiss Bershad Hynes & Lerach LLP
410 B. Street, Suite 1700
San Diego, CA 92101-5050
Phone: 619.231.1058
Fax: 619.231.7423
E-mail: enron@milberg.com

Melvyn I. Weiss
Milberg Weiss Bershad Hynes & Lerach
One Pennsylvania Plaza
New York, NY 10119-0165
Phone: 212.594.5300
Fax: 212.868.1229
E-mail: enron@milberg.com
Attorneys for the Regents of the University of California and Lead Counsel for the *Newby* Plaintiffs

Dr. Bonnee Linden, *Pro Se*
Linden Collins Associates
1226 West Broadway, P.O. Box 114
Hewlett, New York 11557
Phone: 516.295.7906
Fax:
E-mail:
[SEND VIA FEDEX PER DR. LINDEN]

Kenneth S. Marks
Susman Godfrey, L.L.P.
1000 Louisiana, Suite 5100
Houston, TX 77002-5096
Phone: 713.651.9366
Fax: 713.654.6666
E-mail: kmarks@susmangodfrey.com
Attorney for Enron Corporation

James Marshall
2540 Huntington Drive, Suite 201
San Marino, CA 91108-2601
Phone: 626.287.4540
Fax: 626.237.2003
E-mail: marshall@attglobal.net
Attorney for *Wilt* Plaintiffs

William F. Martson, Jr.
Tonkon Torp LLP
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2099
Phone: 503.802.2005
Fax: 503.972.7407
E-mail: enronservice@tonkon.com
Attorney for Ken L. Harrison

John J. McKetta, III
Graves, Dougherty, Hearon & Moody, P.C.
515 Congress Avenue, Suite 2300
Austin, Texas 78701
Phone: 512.480.5600
Fax: 512.478.1976
E-mail: mmcketta@gdhm.com
Attorney for Rebecca Mark-Jusbasche

Richard Mithoff
Mithoff & Jacks
One Allen Center, Penthouse
500 Dallas
Houston, TX 77002
Phone: 713.654.1122
Fax: 713.739.8085
E-mail: enronlitigation@mithoff-jacks.com
Attorneys for J.P.Morgan & Chase Co.

Chuck A. Gall
James W. Bowen
Jenkens & Gilchrist
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202-2799
Phone: 214.855.4338
Fax: 214.855.4300
E-mail: cgall@jenkens.com
jbowen@jenkens.com
Attorneys for J.P. Morgan & Chase Co.

EXHIBIT "A"
SERVICE LIST

Bruce D. Angiolillo
Thomas C. Rice
Jonathan K. Youngwood
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, NY 10017-3954
Phone: 212.455-2000
Fax: 212.455-2502
E-mail: bangiolillo@stblaw.com
trice@stblaw.com
jyoungwood@stblaw.com
Attorneys for J.P. Morgan & Chase Co.

Andrew J. Mytelka
David Le Blanc
Greer, Herz & Adams, L.L.P.
One Moody Plaza, 18th Fl.
Galveston, Texas 77550
Phone: 409.797.3200
Fax: 409.766.6424
E-mail: dleblanc@greerherz.com
bnew@greerherz.com
amytelka@greerherz.com
swindsor@greerherz.com
Attorney for *American National* Plaintiffs

John L. Murchison, Jr.
Vinson & Elkins, L.L.P.
2300 First City Tower, 1001 Fannin
Houston, Texas 77002-6760
Phone: 713.758-2222
Fax: 713.758-2346
E-mail: jmurchison@velaw.com
Attorney for

Eric J.R. Nichols
Beck, Redden & Secrest
1221 McKinney, Suite 4500
Houston, Texas 77010-2010
Phone: 713.951.3700
Fax: 713.951.3720
E-mail: enichols@brsfirm.com
Attorney for Michael J. Kopper, Chewco Investments, L.P. and LJM Cayman, L.P.

Jack C. Nickens
Nickens, Keeton, Lawless, Farrell & Flack, LLP
600 Travis Street, Suite 7500
Houston, Texas 77002
Phone: 713.571.9191
Fax: 713.571.9652
E-mail: trichardson@nlf-law.com
Attorney for The Estate of J. Clifford Baxter, Deceased, Richard B. Buy, Richard A. Causey, Mark A. Frevert, Joseph M. Hirko, Stanley C. Horton, Steven J. Kean, Mark E. Koenig, Michael S. McConnell, Jeffrey McMahon, J. Mark Metts, Cindy K. Olson, Kenneth D. Rice, Lawrence Greg Whalley, Kevin Hannon and Paula Rieker

Gary A. Orseck
Robbins, Russell, Englert Orseck & Untereiner LLP
1801 K. Street, N.W. Suite 411
Washington, D.C. 20006
Phone: 202.775.4500
Fax: 202.775.4510
E-mail: gorseck@robbinsrussell.com
Attorney for Michael Lowther

Lynn Lincoln Sarko
Keller Rohrback LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
Phone: 206.623.1900
Fax: 206.623.3384
E-mail: lsarko@kellerrohrback.com
Co-lead counsel for the *Tittle* plaintiffs

Scott B. Schreiber
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
Phone: 202.942.5000
Fax: 202.942.5999
E-mail: enroncourtpapers@aporter.com
Attorney for Thomas Bauer

Henry F. Schuelke, III
Robert Sutton
Janis, Schuelke & Wechsler
1728 Massachusetts Ave., N.W.
Washington, D.C. 20036
Phone: 202.861.0600
Fax: 202.223-7230
E-mail: hsschuelke@janisschuelke.com
rsutton@janisschuelke.com
Attorney for Ben Glisan

Tom P. Allen
McDaniel & Allen
1001 McKinney Street, 21st Floor
Houston, Texas
Phone: 713.227.5001
Fax: 713.227.8750
E-mail: tallen@mcdanielallen.com
Lead Attorney for Ben Glisan, Jr.

EXHIBIT "A"
SERVICE LIST

Billy Shepherd
Cruse, Scott, Henderson & Allen, LLP
2777 Allen Parkway, 7th Floor
Houston, Texas 77019-2133
Phone: 713.650-6600
Fax: 713.650-1720
E-mail: bshepherd@crusescott.com
Attorney for D. Stephen Goddard, Jr. and Debra A. Cash

Craig Smyser
Smyser Kaplan & Veselka, LLP
2300 Bank of America Center
700 Louisiana
Houston, Texas 77002
Phone: 713.221.2330
Fax: 713.221.2320
E-mail: enronservice@skv.com
Attorney for Andrew Fastow

Robert M. Stern
O'Melveny & Myers, LLP
555 13th Street, NW, Suite 500W
Washington, D.C. 20004-1109
Phone: 202.383.5328
Fax: 202.383.5414
E-mail: rstern@omm.com
Attorney for Jeffrey K. Skilling

Thomas Hetherington
Abigail Sullivan
Bracewell & Patterson LLP
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
Phone: 713.223.2900
Fax: 713.221.1212
E-mail: thetherington@bracepatt.com
Attorney for James V. Derrick

Jacalyn Scott
Wilshire Scott & Dyer P.C.
1221 McKinney, Suite 3000
Houston, Texas 77010
Phone: 713.651.1221
Fax: 713.651.0020
E-mail: jscott@wsd-law.com
Attorney for Citigroup and Salomon Smith Barney

John K. Villa
Williams & Connolly, L.L.P.
725 Twelfth Street, NW
Washington, D.C. 20005
Phone: 202.434.5000
Fax: 202.434.5029
E-mail: jvilla@wc.com or ggreenman@wc.com
Attorney for Vinson & Elkins, L.L.P. Ronald T. Astin, Joseph Dilg, Michael P. Finch and Max Hendrick III

Paul Vizcarrondo, Jr.
Wachtell, Lipton, Rosen Katz
51 West 52nd Street
New York, NY 10019
Phone: 212.403.1000
Fax: 212.403.2000
E-mail: pvizcarrondo@wlrk.com
Attorney for Goldman Sachs, Salomon Smith Barney, Banc of America Securities

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, Twenty-first Floor
New York, NY 10004
Phone: 212.510.0500
Fax: 212.668.2255
Service by fax – no e-mail

Taylor M. Hicks
Hicks Thomas & Lilienstern LLP
700 Louisiana, Suite 2000
Houston, Texas 77002
Phone: 713.547.9100
Fax: 713.547.9150
E-mail: Thicks@hicks-thomas.com
sloftin@hicks-thomas.com
Attorney for Merrill Lynch & Co., Inc.

David H. Braff
Sullivan & Cromwell
125 Broad Street
New York, New York 10004
Phone: 212.558.4000
Fax: 212.558.3588
E-mail: enronpapers@sullcrom.com
Attorney for Barclays PLC

EXHIBIT "A"
SERVICE LIST

Don Stenberg
Fredrick F. Neid
Office of the Attorney General
2115 State Capitol
Lincoln, Nebraska 68509-8920
Phone: 402.471.2682
Fax: 402.471.3835
E-mail:
Attorney for Nebraska Investment Council and the Public Employees Retirement Systems

Brad S. Karp
Mark F. Pomerantz
Richard A. Rosen
Michael E. Gertzman
Claudia L. Hammerman
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064
Phone: 212.373.3000
Fax: 212.373.757.3990
E-mail: grp-citi-service@paulweiss.com
Attorneys for Citigroup

Gregory A. Markel
Nancy I. Ruskin
Ronit Setton
Brobeck, Phleger & Harrison LLP
1633 Broadway, 47th Floor
New York, NY 10019
Phone: 212.581.1600
Fax:
E-mail:
Attorneys for Bank of America Corporation

Ronald E. Cook
Cook & Roach, L.L.P.
Chevron Texaco Heritage Plaza
1111 Bagby, Suite 2650
Houston, Texas 77002
Phone: 713.652.2800
Fax: 713.652.2029
E-mail: rcook@cookroach.com
Attorneys for Alliance Capital Management

James N. Benedict
Mark A. Kirsch
Clifford Chance US LLP
200 Park Avenue, Suite 5200
New York, NY 10166-0153
Phone: 212.878.8000
Fax: 212.878.8375
E-mail: james.benedict@cliffordchance.com
Attorneys for Alliance Capital Management

Michael D. Warden
Sidley Austin Brown & Wood, LLP
1501 K. Street, N.W.
Washington, D.C. 20005
Phone: 202.736.8000
Fax: 202.736.8711
E-mail: mwarden@sidley.com
Attorney for D. Stephen Goddard, Jr.

John W. Spiegel
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
Phone: 213.683.9100
Fax: 213.683.5146
E-mail: **enron@mto.com**
Attorney for Kirkland & Ellis

Alan N. Salpeter
Michele Odorizzi
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, Illinois 60603
Phone: 312.782.0600
Fax: 312.701.7711
William H. Knull, III
Mayer, Brown, Rowe & Maw
700 Houston Street
Suite 3600
Houston, Texas 77002-2730
Phone: 713.221-1651
Fax: 713.224.6410
E-mail: **cibc-newby@mayerbrownrowe.com**
Attorneys for Canadian Imperial Bank of Commerce

R. Paul Yetter
Yetter & Warden, L.L.P.
909 Fannin, Suite 3600
Houston, Texas 77010
Phone: 713.632.8000
Fax: 713.632.8002
E-mail:
Attorneys for FSBA and NYC Pension Funds

EXHIBIT "A"
SERVICE LIST

Roger E. Zuckerman
Deborah J. Jeffrey
Steven M. Salky
Zuckerman Spaeder LLP
1201 Connecticut, N.W.
Washington, D.C. 20026-2638
Phone: 202.778.1800
Fax: 202.822.8106
E-mail: enron@zuckerman.com
rzuckerman@zuckerman.com

Murray Fogler
McDade Fogler Maines, L.L.P.
Two Houston Center
909 Fannin, Suite 1200
Houston, Texas 77010-1006
Phone: 713.654.4300
Fax: 713.654.4343
E-mail: mfogler@mfml.com
Attorneys for Lou Pai

William Edward Matthews
Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, Texas 77002
Phone: 713.276.5500
Fax: 713.276.5555
E-mail: wmatthews@gardere.com
Attorneys for Andersen Worldwide, S.C.
Roman McAlindan and Philip Randall

Roman W. McAlindan
The Sharrow
34 Lickey Square
Barnt Green, Rednal,
Birmingham, B45 8HB
Great Britain

Service by Federal Express

Philip A. Randall
Michael D. Jones
Andersen United Kingdom
180 Strand
London WC2R 1BL
England
Phone: 44 20 7438 3000
Fax: 44 20 7831 1133

Service by fax

Michael Connelly
Kent Altsuler
Connelly, Baker, Wotring & Jackson LLP
700 Louisiana, Suite 1850
Houston, Texas 77002
Phone: 713.980.1710
Fax: 713.980.1731
E-mail: mconnelly@connellybaker.com
kaltsuler@connellybaker.com
Attorney for Kirkland & Ellis

Lawrence Byrne
Owen C. Pell
White & Case, LLP
1155 Avenue of the Americas
New York, New York 10036-2787
Phone: 212.819.8200
Fax:
E-mail: lbyrne@whitecase.com
Attorneys for Deutsche Bank

Andersen Co. (Andersen-India)
33 W. Monroe Street
Chicago, IL 60603

Service by Federal Express

Andersen LLP (Andersen-Cayman Islands)
33 W. Monroe Street
Chicago, IL 60603

Service by Federal Express

Barry Abrams
Abrams Scott & Bickley, LLP
Bank of America Center
700 Louisiana, Suite 1800
Houston, TX 77002
Phone: 713.228.6601
Fax: 713.228.6605
E-mail: babrams@asbtexas.com
Attorneys for Barclays Bank PLC

Amelia Toy Rudolph
Sutherland Asbill & Brennan
999 Peachtree Street, NE, Suite 2300
Atlanta, GA 30309
Phone: 404.853.8000
Fax: 404.853.8806
Attorney for Roger Willard

EXHIBIT "A"
SERVICE LIST

Dennis H. Tracey, III
David F. Wertheimer
Hogan & Hartson, LLP
875 Third Avenue
New York, New York 10022
Phone: 212.918.3000
Fax: 212.918.3100
E-mail: dfwertheimer@hhlaw.com
Attorneys for Debra A. Cash

Jack O'Neill
Jason Norwood
Clements, O'Neill, Pierce, Wilson & Fulkerson
1000 Louisiana, Suite 1800
Houston, Texas 77002
Phone: 713.654.7600
Fax: 713.654.7690
E-mail: sutton@copwf.com
Attorneys for Joseph Sutton

Arthur Andersen-Puerto Rico
33 W. Monroe Street
Chicago, IL 60603

Service by Federal Express

Barnes H. Ellis
David H. Angeli
Stoel Rives LLP
900 SW 5th Avenue, Suite 2600
Portland, Oregon 97204
Phone: 503.224.3380
Fax: 503.220.2480
E-mail: dhangeli@stoel.com
Additional Counsel for Joseph Hirko

Arthur Andersen-Brazil
33 W. Monroe Street
Chicago, IL 60603

Service by Federal Express

Stephen J. Crimmins
Pepper Hamilton LLP
Hamilton Square
600 Fourteenth Street, N.W.
Washington, D.C. 20005
Phone:
Fax: 202.220.1665
E-mail: crimminss@pepperlaw.com
Attorney for Kevin P. Hannon

Elizabeth T. Parker
Pepper Hamilton, LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
Phone:
Fax: 215.981.4756
E-mail: parkere@pepperlaw.com
Attorney for Kevin P. Hannon

Mr. Steven M. Bierman
Sidley Austin Brown & Wood LLP
787 Seventh Avenue
New York, NY 10019-6018
Phone: 212 839-5300
Fax: 212 839-5599
E-mail:

Jayne A. Goldstein
Mager White & Goldstein, LLP
165 Township Line Road
Suite 2400
Jenkintown, PA 19046
Phone:
Fax:
E-mail:
Attorney for

Jay W. Eisenhofer
Grant & Eisenhofer, P.A.
1201 North Market Street
Suite 2100
Wilmington, DE 19801
Phone:
Fax:
E-mail:
Attorneys for Plaintiffs
Employees Retirement System of Ohio and
Teachers Retirement System of Ohio

Robert I. Harwood
Wechsler Harwood LLP
488 Madison Avenue
New York, New York 10022
Phone: 212.935.7400
Fax: 212.753.3630
E-mail:
Attorneys for Plaintiff
James Brill

EXHIBIT "A"
SERVICE LIST

W. D. Masterson
Theodore C. Anderson
John H. Crouch
D. Elizabeth Masterson Mattei
Kilgore & Kilgore, PLLC
3109 Carlisle
Dallas, Texas 75204
Phone: 214.969.9099
Fax: 214.953.0133
E-mail:
Attorney for

Martin D. Chitwood
Chitwood & Harley
1230 Peachtree Street, NE
Promenade II, Suite 2300
Atlanta, GA 30309
Phone: 404.873.3900
Fax: 404.876.4476
Attorney for The State Retirement Systems Group

Lee Squitieri
Squitieri & Fearon, LLP
420 Fifth Avenue
18th Floor
New York, NY 10018
Phone: 212.575.2092
Fax: 212.575.2184
Attorney for

George W. Bramblett, Jr.
Haynes and Boone LLP
901 Main Street, Suite 3100
Dallas, TX 75202
Phone: 214.651.5574
Fax: 214.200.0374
Attorney for Credit Suisse First Boston Corp.

Richard W. Clary
Cravath, Swaine & Moore
Worldwide Plaza
New York, NY 10019
Phone: 212.474.1000
Fax: 212.474.3700
E-mail: rclary@cravath.com
Attorney for Credit Suisse First Boston Corp.

Joel M. Androphy
Berg & Androphy
3704 Travis
Houston, Texas 77002-9550
Phone: 713.529.5622
Fax: 713.529.3785
E-mail: androphy@bahou.com
Attorney for Deutsche Bank AG

Robert C. Micheletto
Jones, Day, Reavis & Pogue
222 East 41st Street
New York, NY 10017-6702
Phone: 212.326.3939
Fax: 212.755.7306
E-mail: rmicheletto@jonesday.com
Attorney for Lehman Brothers

Mitchell A. Karlan
Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, NY 10166-0193
Phone: 212.351.4000
Fax: 212.351.4035
E-mail: mkarlan@gibsondunn.com
Attorney for Merrill Lynch & Co., Inc.

Herbert Washer
Clifford Chance Rogers & Wells
200 Park Avenue, Suite 5200
New York, NY 10166-0153
Phone: 212.878.8000
Fax: 212.878.8375
E-mail: herbert.washer@cliffordchance.com
Attorney for Merrill Lynch & Co., Inc.

Michael G. Davies
Hoguet Newman & Regal, LLP
10 East 40th Street
New York, NY 10016
Phone: 212.689.8808
Fax: 212.689.5101
E-mail: mdavies@hnrlaw.com
Attorney for Arthur Andersen & Co., India

Harvey G. Brown
Orgain Bell & Tucker LLP
2700 Post Oak Blvd., Suite 1410
Houston, Texas 77056
Phone: 713.572.8772
Fax: 713.572.8766
Attorneys for Andersen-United Kingdom and Andersen-Brazil

Jeffrey S. Boyd
Deputy Attorney General for Litigation
P.O. Box 12548
Austin, TX
Attorney in Charge for proposed amici State Attorneys General

EXHIBIT "A"
SERVICE LIST

Securities and Exchange Commission
Burnet Plaza, Suite 1900
801 Cherry Street, Unit #18, 19th Floor
Fort Worth, TX 76102-6882
Attorney in Charge for proposed amicus
Securities and Exchange Commission

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al.	§	
	§	
Plaintiffs,	§	**No. H-01-CV-3624**
	§	
vs.	§	**(Consolidated Action)**
	§	
ENRON CORP., et al.	§	
	§	
Defendants.	§	

ORDER

The Court, having considered Defendant Andrew S. Fastow's Motion to Postpone Answer, the Opposition thereto, if any, the pleadings, the evidence, and all other relevant matter, determines that the Motion should be GRANTED.

It is therefore ORDERED that Defendant Andrew S. Fastow's obligation to answer in the consolidated *Newby* case is stayed pending conclusion of the criminal case pending against him, H-02-0665. In addition, to the extent Fastow becomes obligated to answer in the consolidated *Tittle* case, H-01-CV-3913 or in any actions made a part of MDL No. 1446, that obligation is stayed pending conclusion of the criminal case pending against him, H-02-0665.

SIGNED this ____ day of _____, 2003.

_____
Hon. Melinda Harmon

United States Courts
Southern District of Texas
ENTERED
MAR 2 5 2003
Michael N. Milby, Clerk of Court

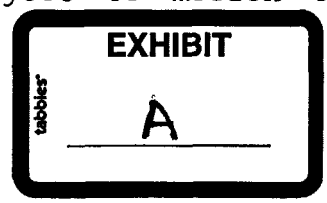
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§ § §	MDL 1446
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§ § § § § § § § §	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, ET AL., Plaintiffs VS. ENRON CORP., an Oregon Corporation, ET AL., Defendants.	§ § § § § § § § § § § §	CIVIL ACTION NO. H-01-3913 AND CONSOLIDATED CASES

MEMORANDUM AND ORDER RE

MOTIONS FILED BY ENRON INSIDER DEFENDANT ANDREW S. FASTOW

Pending before the Court are the following motions filed by Enron Insider Defendant Andrew S. Fastow ("Fastow"), Enron's Chief Financial Officer during the Class Period until he was terminated in October 2001: (1) motion to dismiss (#670 in *Newby*) pursuant to Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6) and the PSLRA, 15 U.S.C. § 78u-4(b)(1)&(2); (2) motion to postpone discovery during pendency of criminal proceedings (instrument #478 in *Newby*, #552 in *Tittle*); (3) motion for protection from document request of *Tittle* Plaintiffs, subject to motion to postpone



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discovery (#476 in *Newby;* #564 in *Tittle*); and (4) motion for leave of court to file reply in support of his motion for postponement of discovery (#794 in *Newby*; # 565 in *Tittle*).

FASTOW'S MOTION TO DISMISS *NEWBY* COMPLAINT

Lead Plaintiff has sued Fastow under §§ 10(b), §20(a), and 20A of the Exchange Act, and 20A of the Securities Exchange Act of 1934 ("Exchange Act" or "the 1934 Act"), 15 U.S.C. §§ 78j(b), 78t(a), and 78t-1, and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5; under §§ 11 and 15 of the Securities Act of 1933 ("the 1933 Act"), 15 U.S.C. §§ 77k and 77o; and under the Texas Securities Act ("TSA"), Tex. Rev. Civ. Stat. Ann., article 581-33 (Vernon's Supp. 2002).

The Court hereby incorporates its summaries of the alleged facts and applicable law in its previous memoranda and orders of December 20, 2002 (#1194), of January 28, 2003 (#1241), and of March 12, 2003 (#1269).

The Court has previously indicted that Lead Plaintiff will have to amend/supplement its complaint to replead claims under the TSA, and that modification should include claims against Fastow. Having reviewed all pleadings relating to Fastow's motion to dismiss, without summarizing the arguments made by the parties the Court directly addresses the pleading sufficiency of the complaint with respect to Fastow.

A. Section 10(b) of the Exchange Act

Lead Plaintiff has stated claims against Fastow under § 10(b). Fastow, before and after the waiver of his conflict of interest as an officer of Enron and a control person of LJM partnerships, participated in establishing, obtaining board approval of, and managing numerous "deceptive devices," the special entities and the transactions among them and Enron used to perpetrate the alleged fraud, in essence charging that Fastow indeed not only had actual knowledge of, but masterminded the scheme. The complaint also identifies numerous "misstatements" made by Fastow, both in signing financial and registration statements filed with the SEC and in direct statements to the public in conference calls, analyst conferences, investors' conferences. Lead Plaintiff has also stated a claim against Fastow for a primary violation of § 10(b) through insider trading, i.e., selling Enron securities while in possession of material, nonpublic information known to him by his direct participation in the alleged fraudulent scheme and in violation of his duty to disclose such information to the public.

B. Control Person Liability Under § 20(a) of the Exchange Act

Lead Plaintiff has stated a claim for controlling person liability under § 20(a). It is clear from the minutes of the board meetings and committee meetings that he had the power to control what happened at Enron. Lead Plaintiff has also pleaded that he controlled numerous specified SPEs and transactions involved in them.

C. Section 20A of the Exchange Act

Should Lead Plaintiff fail to prevail on his claim of insider trading as a primary violation of § 10(b), he has stated a claim against Fastow based on § 20A.

D. Section 11 of the 1933 Act

Lead Plaintiff has pleaded § 11 violations against Fastow in identifying a number of allegedly false and misleading registration statements signed by Fastow.

E. Section 15 of the 1933 Act

Lead Plaintiff has alleged facts demonstrating that Fastow had the power to control the actions of other individuals in signing allegedly misleading registration statements for Enron securities.

FASTOW'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF HIS MOTION FOR POSTPONEMENT OF DISCOVERY

To ensure that Fastow has a full opportunity to present his arguments, in the interests of justice the Court grants his motion for leave to file a reply and has considered that reply in reviewing the issue of postponing discovery.

FASTOW'S MOTION TO POSTPONE DISCOVERY

Since the pending motions related to discovery were filed, Fastow has been indicted on matters central to this civil litigation.[1] In that criminal proceeding, pending before the Honorable Kenneth Hoyt, H-02-CR-665, commenced on October 1, 2002,

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[1] The Court accordingly does not address the arguments based on the lack of an indictment.

Fastow has moved to designate the case as complex and has waived his right to a speedy trial. Currently there is no trial setting, although the next status conference is set on May 19, 2003.

Fastow moves for postponement of discovery in the Tittle consolidated ERISA cases, in which he is being sued for violations of RICO and civil conspiracy, to protect his constitutional rights in light of the United States' criminal investigation of him relating to the same events, i.e., his role at Enron and regarding partnerships that dealt with Enron. He argues that if he responds to discovery requests in the civil action, he risks his Fifth Amendment privilege against self-incrimination and his answers might be used to prosecute him. Alternatively, if he invokes his Fifth Amendment privilege, he risks severe prejudice in *Tittle* that might result in essence in a forfeiture of his due process right to defend himself.[2] He characterizes his dilemma as a "Hobson's choice, in which either alternative will damage a constitutional right." #478 at 2. In such a circumstance as here, where "the civil and criminal proceedings cover the same subject matter, thus creating an irreconcilable conflict between Fastow's Fifth Amendment privilege and his defense of the civil suit," the *Tittle* [and *Newby*] Plaintiffs' interest in pursuing their civil damages claim should be balanced against protection of Fastow's rights. *See, e.g., Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1087-88 (5th Cir. 1979)(holding that a

[2] The same will be true in the Newby consolidated action once the stay under the PSLRA no longer applies.

district court should abate discovery in a civil action when proceeding with discovery would compel a litigant to choose between responding to the request and exercising his Fifth Amendment privilege); *Brumfield v. Shelton*, 727 F. Supp. 282, 284 (E.D. La. 1989); *Kmart Corp. v. Aronds et al.*, Civ. Action No. H-96-1212, sl. op. (S.D. Tex. Dec. 11, 1996)(Ex. 1 to #478). *See also SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir.)(*en banc*)("[T]he strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter."), *cert. denied*, 449 U.S. 993 (1980). Fastow contends that the nexus between the civil allegations and the pending criminal investigation, based on the same underlying transactions, requires postponement of discovery. Civil Plaintiffs' interest in a speedy resolution of their cases and discovery from all defendants during prosecution of their suits is not sufficient to warrant eviscerating Fastow's constitutional rights. Mere inconvenience and delay do not constitute undue burden and substantial prejudice warranting a denial of a stay of discovery. *Volmar Distrib., Inc. v. New York Post Co.*, 152 F.R.D. 36, 40 (S.D.N.Y. 1993); *Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc.*, 886 F. Supp. 1134, 1140 (S.D.N.Y. 1995).[3]

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[3] Lead Plaintiff distinguishes the facts here from those in cases relied upon by Fastow.

It notes that neither *Wehling* nor *Kmart* involved complex

OPPOSITION

Opposition to Fastow's motion has been filed by Newby Lead Plaintiff (#599), *Tittle* Plaintiffs (#600), and Defendant Ken L. Harrison (#611 in *Newby*, #213 in *Tittle*).

A. Lead Plaintiff

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litigations and neither involved substantial public interests calling for expeditious resolution or multiple claimants competing for potentially limited funds.

Furthermore, in *Wehling* the Fifth Circuit was reviewing the district court's dismissal with prejudice after the plaintiff refused to answer specific deposition questions "related to the subject matter of [a] pending grand jury" investigating his conduct and before which he had appeared five times. 608 F.2d at 1086. At issue was "whether, under the circumstances of this case, plaintiff should have been required to forego a valid cause of action in order to exercise his constitutional right to avoid self-incrimination." *Id.* at 1087. The Fifth Circuit concluded, "When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome remedies would be an ineffective means of preventing unfairness to defendant." *Id.* at 1088. In contrast, in the instant action Fastow is not a plaintiff being forced to forego a valid cause of action if he asserts his Fifth Amendment privilege.

Also inapposite Lead Plaintiff asserts, in *Kmart* the four defendants had already been indicted on multiple counts and the SEC had filed suit for illegal insider trading when the defendants requested a discovery stay. The court stayed the discovery only because "postponing discovery with regard to those Defendants whose Fifth Amendment privilege against self incrimination have been implicated by the pending criminal indictments" would have "presented] the Court with numerous occasions to determine the scope of the stay." Sl. Op. at 6. Moreover many of the "corporate defendants in the civil action were formed and . . . controlled by" one of the indicted defendants, raising the specter that "some of these corporate defendants may not be able to provide an agent who could give the information likely to be demanded by the Plaintiffs without fear of self incrimination." *Id.* at 5-6. Lead Plaintiff argues that the court concluded that a complete stay was warranted in light of the potential for judicial waste and unnecessary litigation costs under the circumstances. Here, Lead Plaintiff notes, Fastow controls none of the corporate defendants. Instead, the burden on judicial and litigant resources and public interest in expeditious resolution outweigh Fastow's "purported inconvenience here."

Lead Plaintiff insists that an indefinite stay, without limits to its scope and duration, is an extraordinary remedy, one disfavored by the majority of courts that have addressed the issue. *Sterling National Bank v. A-1 Hotels Int'l, Inc.*, 175 F. Supp.2d 573, 576 (S.D.N.Y. 2001); *IBM v. Brown*, 857 F. Supp. 1384, 1387 (C.D. Cal. 1994)(state that it "is the rule, rather than the exception" that civil and criminal cases proceed together). Lead Plaintiff emphasizes the strong public interest in efficient prosecution of these class actions in view of the catastrophic loss by individuals and institutions in securities investments, retirement funds, pension funds, and confidence in our markets and in the efficient and fair operation of our legal system.[4] Lead

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[4] Lead Plaintiff notes that "the public interest in the integrity of securities markets militates in favor of the efficient and expeditious prosecution of these civil litigations." *Boesky*, 660 F. Supp. at 1500. The *Newby* private action is an essential weapon in the enforcement of securities laws. *Bateman Eichler, Hill Richards, Inc.* v. Berner, 472 U.S. 299, 310 (1985). The Fifth Circuit has written, "Protection of the efficient operation of the securities markets . . . from fraudulent . . . practices may require prompt civil enforcement which can not await the outcome of a criminal investigation." *First Fin.*, 659 F.2d at 667.

Moreover Lead Plaintiff argues that "Mr. Fastow's predicament is one of his own making." It points to Judge Pollack's response to a similar stay request in *Arden Way Assocs. v. Boesky*, 660 F. Supp. 1494, 1497 (S.D.N.Y. 1987):

> It is plainly ludicrous for Mr. Boesky to argue that it is "unfair" to compel him to face the civil lawsuits against him which are the creations of his own misconduct. The plight which he imagines that he is in stems solely from his own activities. Surely it would be anomalous to suspend plaintiffs' rights in these civil litigations because they will deal with Mr. Boesky's misconduct.

See also Paine, Webber, Jackson & Curtis, Inc. v. Malon S. Andrus, Inc., 486 F. Supp. 1118, 1119 (S.D.N.Y. 1980).

Plaintiff maintains that delay of discovery against Fastow would cause severe prejudice to Plaintiffs [and absent class members] in these consolidated actions because there is a limited fund to satisfy their numerous claims.[5] Speedy and efficient discovery is especially important in complex litigation. *Digital Equip. Corp. v. Currie Enterprises*, 142 F.R.D. 8, 12 (D. Mass. 1991). Moreover, Fastow's evidence is especially important because of the documents destroyed at Enron and Anderson. Granting Fastow's stay until criminal proceedings are finished would prolong this case possibly for years and make it difficult, if not impossible to meet the scheduled trial date in December 2003, especially in view of the complexity of Enron's business dealings and collapse and of the government's open-ended investigation. Moreover, granting the motion might encourage other Defendants to file similar requests, multiplying delays in these proceedings. Fastow's request also raises the specter of multiple adjudications of the merits of this case if the criminal proceedings against him are not completed prior to trial.

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[5] Lead Plaintiff quotes Judge Pollack's opinion in *Boesky*, 660 F. Supp. at 1497:

> Stalling the case for a defendant who has ample means to protect himself otherwise, or fragmenting Mr. Boesky's participation would be counter-productive and prejudicial to plaintiffs, especially where there are so many claimants to the potentially limited funds for satisfaction of the potential damages in this and related litigation in which Mr. Boesky is involved.

Lead Plaintiff highlights the fact that Fastow has no constitutional right to stay civil proceedings pending the outcome of related criminal proceedings. *United States v. Kordel*, 397 U.S.1, 11 (1970); *SEC v. First Fin. Group of Texas, Inc.*, 659 F.2d 660, 666-67 (5th Cir. 1981); *Hilliard v. Black*, No. 1:00CV80 MMP, 2000 U.S. Dist. LEXIS 20329, at *10 (N.D. Fla. Nov. 9, 2000)("Forcing an individual to risk non-criminal disadvantage by remaining silent for fear of self-incrimination in a parallel criminal proceeding does not rise to the level of an unconstitutional infringement."). Therefore, to obtain a stay, Fastow must demonstrate that any inconvenience to him from having to choose whether to assert his Fifth Amendment privilege here outweighs the prejudice from the inevitable delay to the Plaintiff class of investors in Enron securities. "In the absence of substantial prejudice to the rights of the parties involved, parallel proceedings are unobjectionable under our jurisprudence." *SEC v. Dresser*, 628 F.2d at 1374.

Lead Plaintiff urges that Fastow's "generalized" claims of prejudice if he is forced to assert his Fifth Amendment privilege in the civil actions "ring hollow" because Fastow has already asserted his Fifth Amendment privilege to remain silent at a hearing of the House Energy and Commerce Oversight and Investigations Subcommittee to avoid Congressional investigations. Furthermore, Fastow has shown that he has more than sufficient means to protect himself and avoid prejudice. Fastow's "conjecture" that allowing discovery against him to go forward

would give the criminal prosecution an unfair advantage is insufficient to warrant a stay because the government is not a party to these civil actions, and Fastow has offered no evidence that Lead Plaintiff would share the discovery with the government.[6]

Although the Constitution generally does not mandate that civil proceedings be stayed, pending the outcome of criminal proceedings against a defendant, a court in its discretion may stay civil proceedings "when the interests of justice seem[] to require such action." *Kashi* v. Gratsos, 790 F.2d 1050, 1057 (2d Cir. 1986); *Kordel*, 397 U.S. at 12 n.27. *See also Kmart*, sl. op. at 4. The decision to stay should be made "in light of the particular circumstances and competing interests involved in the case." *Fed. Savings & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989). *Accord Kmart*, sl. op. at 4-6. Factors to be considered include (1) Lead Plaintiff's [and absent class members'] interests in proceeding expeditiously and the potential prejudice that might result from a delay; (2) the extent to which Fastow's Fifth Amendment privilege is implicated; (3) the burden of any particular aspect of any proceeding on Fastow; (4) the

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[6] Lead Plaintiff suggests that a more limited remedy here that the "draconian remedy of a discovery stay against Mr. Fastow" would suffice to prevent the prejudice Fastow claims, e.g., a protective order entered by the Court prohibiting the use of Fastow's deposition answers, interrogatory responses, and answers to requests for admission in any criminal proceeding brought against him by the government, except in connection with perjury charges or for impeachment. *See United States v. Parcels of Land*, 903 F.2d 36, 44-45 (1st Cir. 1990). Fastow responds that unless he is given use immunity by the government, this Court may not have the power to order such protection.

convenience of the Court in the management of its cases and the efficient use of judicial resources; (5) the interest of absent class members and other persons not parties to the Enron litigation; and (6) the interest of the public in the pending civil and criminal litigations, if any. *Kmart*, sl. op at 4-5; *Mollinaro*, 889 F.2d at 902-03; *Arden Way Assocs. v. Boesky*, 660 F. Supp. 1494, 1497 (S.D.N.Y. 1987). Lead Plaintiff insists that the balance of interests here weighs heavily against staying discovery against Fastow. *Kmart*, sl. op. at 4; *Wehling*, 608 F.2d at 1089.

According to Lead Plaintiff, Fastow's evidence is central to allegations in the Consolidated Complaint relating to the creation, funding and function of the alleged bogus "special purpose entities" used to conceal billion of dollars in debt and losses on Enron's financial statements. Fastow participated with the bank defendants and lawyer defendants in creating these entities and partnerships, which were also utilized to defraud Enron's public investors. Lead Plaintiff urges that even if Fastow intends to assert his Fifth Amendment privilege in response to possibly incriminating questions, he can provide information, such as knowledge about the relationships of defendant banks to LJM2, that will not implicate Fastow, but will be crucial to Lead Plaintiff's development of the class action. Since many events involving material facts occurred more than four years ago, if discovery is postponed Fastow's memory and that of any witnesses that Fastow may disclose will continue to fade and documents known solely to Fastow may be relocated or lost.

Also relevant, Lead Plaintiff underlines, in view of the document destruction already accomplished by Anderson and Enron employees to impede investigation, it will take longer to identify knowledgeable non-parties. That delay increases the danger of further spoliation of evidence. Plaintiffs' need to proceed expeditiously out weighs Fastow's claims of inconvenience.

Furthermore a stay would hinder Lead Plaintiff's ability to identify other culpable parties through discovery from Fastow before claims against them would become time-barred. The Supreme Court has held that litigation under § 10(b) and Rule 10b-5 must be filed within a year after a plaintiff discovers facts constituting a securities violation and within three years of that violation. *Lampf, Pleva, Lipkin, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991). A number of events giving rise to Lead Plaintiff's securities fraud claims, i.e., acts relating to the formation, operations and disclosures relating to LJM-1 and LJM-2 and other SPEs designed by Fastow, occurred in 1999-early 2000. Viable claims may be lost if Lead Plaintiff cannot identify and locate other wrongdoers because "tolling principles do not apply to [the three-year limitations] period." *Lampf*, 501 U.S. at 363. A stay would increase the likelihood that other offenders may escape liability.

B. *Tittle* Plaintiffs

The *Tittle* Plaintiffs, describing Fastow as "at the very heart of the Enron meltdown," also oppose Fastow's motion to stay discovery. They, too, highlight the fact that Fastow has already

made his "Hobson's choice" and invoked the Fifth Amendment--any further harm would be incremental at most. Moreover, his choice is one that he can and should be required to make because the invocation of the Fifth Amendment can be used against Defendants in civil litigation and, they maintain, since Fastow has already invoked the Fifth Amendment, that adverse inference will be utilized in *Tittle*. *Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1976)(Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them); *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 674 (5th Cir. 1999)(holding that the "district court . . . abused its discretion in excluding the evidence of [defendant's] invocation of his Fifth Amendment privilege.").

The *Tittle* Plaintiffs further argue that the law is clear that Fastow can be compelled to produce responsive documents in his possession or control regardless of the Fifth Amendment since he was not compelled to create the documents within the meaning of the Constitution. *United States v. Hubell*, 530 U.S. 27, 35-36 (2000)(Fifth Amendment privilege restricted to testimonial communications and protects against being compelled to be a witness against oneself in a criminal proceeding). In their suit the discovery promulgated to date by the *Tittle* plaintiffs

consists of requests for production of documents, which do not trigger Fifth Amendment protection.[7]

If the Court should grant the stay, the *Tittle* Plaintiffs argue, other defendants who potentially face criminal liability and some of whom have already taken the Fifth Amendment, would file copycat motions. The *Tittle* Plaintiffs note that Fastow is the only one of many defendants who have already asserted the Fifth Amendment with respect to the Enron collapse that has requested a stay of discovery.[8] Some have even been deposed. To grant a stay to Fastow would be inequitable. They additionally point out that while an indefinite postponement of discovery would provide a refuge for these defendants, it would be a disaster for Plaintiffs and the public with their strong interest in efficient resolution of this case.

Finally, the Tittle Plaintiffs also maintain that a balancing of the interests here weighs strongly in favor of denying Fastow a stay of discovery. Since Fastow has already invoked the Fifth Amendment and remains subject to the broad subpoena powers of the Grand Jury investigating Enron, any benefit of a stay to Fastow is *de minimis*. Judicial efficiency supports denying the stay to allow Plaintiffs' case to proceed against all the defendants instead of waiting around for final results of

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[7] The Court observes that this argument also supports imposing a stay on discovery from Fastow.

[8] Nevertheless, the Court notes that no other defendant has filed a motion for stay or for protection, even though Fastow's have been pending for nearly a year.

multiple investigations. Delay will only harm the public interest in prompt and efficient redress from Defendants in the greatest business scandal of our era. Proceeding forthwith with both civil and criminal proceedings will aid public faith in our legal and financial systems.

C. Defendant Ken Harrison

Defendant Ken Harrison adds another perspective. He contends that staying discovery as to Fastow while requiring other Defendants to participate in discovery and proceed to trial would prejudice those other Defendants and waste scarce judicial resources. He complains that Fastow has not considered the interests of the other Defendants, which weigh strongly against Fastow's proposal for piecemeal discovery. In determining whether to grant a discovery stay because of parallel criminal proceedings, "the relative weights of the parties' competing interests" must be considered and the rights of all parties "are taken into consideration before the court decides whose rights predominate." *Wehling*, 608 F.2d at 1088. Courts may also consider their own interests in efficient administration and judicial economy. *Trustees of the Plumbers & Pipefitters*, 886 F. Supp. at 1135; *Volmar*, 152 F.R.D. at 39. Harrison argues that when faced with a motion for stay by a central figure in a case, courts either routinely grant the stay as to all defendants, *see e.g., Trustees of the Plumbers & Pipefitters*, 886 F. Supp. at 1141, or deny it as to all defendants, *see e.g., Fidelity Bankers*

Life Ins. Co. v. Wedco, Inc., 586 F. Supp. 1123, 1127 (D. Nev. 1984). Not only has Fastow failed to cite a single multi-defendant case in which the court followed his piecemeal approach; instead in those multi-defendant cases he has cited, the court has granted a stay as to all defendants. Harrison asks the Court to deny Fastow's motion.

FASTOW'S REPLY

First, Fastow contends that the *Tittle* Plaintiffs have misrepresented the law. First he disagrees with their argument that because courts have sometimes permitted adverse inferences to be drawn against civil defendants who asserted the Fifth Amendment privilege, that the drawing of that inference "is of no constitutional moment." *Tittle* Plaintiffs have also incorrectly claimed that the Supreme Court and the Fifth Circuit have rejected the central premise of Fastow's argument, i.e., that he should not be forced to choose between (1) responding to discovery requests invoking the Fifth Amendment and (2) facing an adverse inference in *Tittle*. It is that potential that presents Fastow with the dilemma of either losing his due process right to present his defense or his right not to testify if the evidence might be used to incriminate him. Neither *Baxter* nor *Curtis* held that a civil plaintiff may go forward with discovery during a criminal investigation and obtain a series of Fifth Amendment invocations that the plaintiffs may subsequently use to their advantage in the lawsuit. The Fifth Circuit's only review of the issue in *Wehling*

resulted in its holding that a stay of the civil proceedings for as long as three years during a pending criminal investigation was proper. This Court applied that ruling in granting a stay in *Kmart*.

Fastow next contends that Plaintiffs have not cited any authority for the proposition that his invocation of the Fifth Amendment before the U.S. Congress would permit the court in this lawsuit, from a coordinate branch of government, to draw such an inference. Instead he insists that the law allows an adverse inference only when a defendant invoked his Fifth Amendment privilege in a *civil proceeding*. *Curtis*, 173 F.3d at 673-74 (holding that it was permissible to allow an adverse inference when a corporate executive invoked the Fifth Amendment in a deposition in the same proceeding).[9] He emphasizes that until he asserts the Fifth Amendment in this suit, no adverse proceeding is permissible. He asks for a stay pending conclusion of the criminal investigation to avoid the Hobson's choice between his constitutional right against self incrimination and his right to defend this lawsuit, which an adverse inference would, in effect, eviscerate.

Fastow also contends that the Fifth Amendment privilege extends to the production of documents under the well established "act of production" doctrine because of the inherently testimonial nature of document production. *Hubell*, 530 U.S. at 37-38; *Ohio v.*

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[9] This Court agrees. *See, e.g., In re Worldcom, Inc. Sec. Litig.*, No. 02 CIV. 3288, 2002 WL 31729501, *6, 7 (S.D.N.Y. Dec. 5, 2002).

Reiner, 532 U.S. 17 (2001)(Fifth Amendment protection applies to any response that would provide a "link in the chain of evidence" needed to prosecute).

Fastow disagrees with both the *Newby* and *Tittle* Plaintiffs about the results of the balancing test to determine whether this litigation should be stayed. In *Kmart* this Court weighed the interests of a party before indictment against the interests of the civil litigants in continuing their case and concluded that the balance favored staying the civil proceedings until the criminal proceeding was resolved. Similarly in *Wehling* the Fifth Circuit addressed a stay of discovery against an unindicted civil defendant subject to criminal investigation.

Fastow first rejects *Newby* Lead Plaintiff's contention that Fastow can provide evidence that will not implicate himself but which is critical to Lead Plaintiff's case before Fastow's recollection fades and any witnesses or documents known solely to Fastow may be relocated or be lost. Fastow contends that the discovery sought by Lead Plaintiff concerns the transactions not only at the core of this case, but also at the core of the government's criminal investigation, and thus discovery propounded against Fastow is unlikely to lead to relevant information because he will need to assert his Fifth Amendment privilege. That in turn would undermine his ability to defend himself at trial. He points out that an innocent person may assert the privilege against self incrimination where a witness' answers could reasonably furnish a link in the chain of evidence against him.

Second there is no reason why Fastow's memory should fade during the stay. Moreover, in *Trustees of the Plumbers & Pipefitters*, 886 F. Supp. at 1140, the court found that even though plaintiffs may have a legitimate interest in speedy resolutions of matters and avoiding possible loss of evidence during the stay, "[t]hese interests are trumped by defendants' interests in avoiding the quandary of choosing between waiving their Fifth Amendment privilege or effectively forfeiting the civil case." *See also Wehling*, 608 F.2d at 1088 ("[T]he [Supreme] Court has emphasized that a party claiming the Fifth Amendment privilege should suffer no penalty for his silence.").

Third, the Lead Plaintiff errs in arguing that witnesses and documents known only to Fastow may be relocated or be lost. With such complex transactions and so many parties involved, he conclusorily insists it is improbable that there are any witnesses known only to Fastow or that any witnesses or documents are likely to relocate. He calls Lead Plaintiff's supposition "speculation." Fastow also asserts that the only evidence that Fastow controls that is unavailable elsewhere would still not be available if he asserts his Fifth Amendment privilege. Moreover, Fastow claims that documents central to Lead Plaintiff's claims will be in the possession of the relevant business entities, not the individuals. He additionally argues that just because Arthur Andersen shredded documents does not mean others are likely to or to attempt to obstruct justice in other ways. As for the argument that discovery from Fastow will aid in identifying other culpable

parties, Fastow responds that Plaintiffs "have sued virtually anyone who ever came in contact with Enron during the relevant time period" and that it is difficult to believe there could be any additional defendants to sue. Even if such a party existed, it is unlikely that Fastow would be the only source of its identity.

Fastow also argues that neither he nor Plaintiffs have any idea how long the government's criminal investigation will take. He asserts that because he is not requesting an extension of the trial date, and because the Court can address the matter later should a problem arise, there is no reason to wonder how the stay would impact Plaintiffs' cases. Fastow also argues that there is no reason to assume that a stay would lead to multiple adjudications and objects to such speculative harm that cannot outweigh the immediate and serious harm that Fastow would suffer if the stay were denied. Fastow maintains that there is no sign that any other Defendant will change position regarding assertion of the Fifth Amendment protection in response to discovery requests. Lead Plaintiff also provides no reason to believe that the funds available to pay any judgment obtained will be taken by others because of the delay that would result from a stay. Fastow argues that there is no reason to assume that the stay requested would result in any delay, no less one that would undermine public confidence in the judicial system, as Lead Plaintiff asserts. Just as important to the public, Fastow contends, is giving Defendants a fair opportunity to exercise their constitutional due

process rights and not be prejudiced in exercising their Fifth Amendment privilege.

COURT'S DECISION

After examining the briefs and the applicable law, the Court finds that a stay is necessary in light of Fastow's indictment and of the clear overlap of issues in the criminal and civil cases, making the potential for self-incrimination more likely. Moreover, the stay should not be long. Although Fastow's trial date has not been set, it is likely that he will be tried this year. Should he be convicted, the right against self-incrimination usually survives only until sentencing. *Mitchell v. United States*, 526 U.S. 314, 325-26 (1999). If he is found not guilty or pleads guilty, the stay will be lifted even earlier. Furthermore, while Plaintiff's and the public's interest in proceeding expeditiously in the civil actions is substantial, much of the information to be gleaned from Fastow can be obtained through other witnesses and through corporate documents produced by such witnesses and by Enron, Arthur Andersen, and Vinson & Elkins, not to mention investigations by Congress and by the Enron bankruptcy examiner, Neal Batson. The Court sees no reason to stay proceedings against any other defendant who has not been indicted.

Accordingly, for the reasons stated above, the Court

ORDERS that Fastow's motion to dismiss is DENIED. Lead Plaintiff shall amend/supplement its claims against Fastow based on the TSA. The Court further

ORDERS that Fastow's motion for leave to file a reply (#794) is GRANTED. Finally, the Court further

ORDERS that Fastow's motion to postpone discovery from him in *Tittle* and motion for protection are GRANTED.

SIGNED at Houston, Texas, this 24th day of March, 2003.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

AO91 (Rev. 8/01) Criminal Complaint

Sealed
Public and unofficial staff access to this instrument are prohibited by court order.

COPY

United States Bankruptcy Court
Southern District of Texas
FILED

OCT 01 2002

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT

Southern DISTRICT OF Texas

UNITED STATES OF AMERICA
V.
ANDREW S. FASTOW
1831 Wroxton Road
Houston, Texas 77005

(Name and Address of Defendant)

CRIMINAL COMPLAINT

Case Number: H-02-889-M

I, the undersigned complainant state that the following is true and correct to the best of my knowledge and belief. On or about 1/97 to 10/24/01 (Date) in Harris County, in the Southern District of Texas defendant(s) did,

(Track Statutory Language of Offense)

See attachment "A."

in violation of Title 18 United States Code, Sections 1341, 1343, 1344, 1956(h), 1957, 371, and 2; and

in violation of Title 15 United States Code, Section(s) 78j(b) and 78ff.

I further state that I am a(n) FBI Special Agent (Official Title) and that this complaint is based on the following facts:

See attachment "B."

TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY, CLERK
By M. Lerma
Deputy Clerk

Continued on the attached sheet and made a part of this complaint: X Yes ☐ No

Omer J. Meisel
Signature of Complainant

Omer J. Meisel
Printed Name of Complainant

Sworn to before me and signed in my presence,

October 1, 2002 (Date) at Houston, Texas (City and State)

Nancy A. Cerne U.S. Magistrate Judge
Name and Title of Judicial Officer

Nancy A. Cerne
Signature of Judicial Officer

EXHIBIT
B

ATTACHMENT A

On or about or between January 1997 through October 24, 2001, both dates being approximate and inclusive, withing the Southern District of Texas and elsewhere, the defendant, ANDREW S. FASTOW:

(a) knowingly and willfully used and employed manipulative and deceptive devices and contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the Securities and Exchange Commission (Title 17, Code of Federal Regulations, Section 240.10b-5), in that FASTOW engaged in acts, practices, and courses of business which would operate as a fraud and deceit upon members of the investigating public in connection with the purchase and sale of securities, in violation of 15 U.S.C. §§ 78j (b) and 78ff;

(b) wire fraud, in violation of 18 U.S.C. §1343, namely unlawfully to devise a scheme and artifice to defraud and to obtain money or property by means of false or fraudulent pretenses, representations and promises, and to use and cause to be used interstate wire communications for the purpose of executing said scheme and artifice;

(c) mail fraud, in violation of 18 U.S.C. § 1341, namely unlawfully to devise a scheme or artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and to use and cause to be used the U.S. mail for the purpose of executing said scheme and artifice;

(d) Laundering of proceeds generated by fraud in connection with the purchase and sale of securities, in violation of 18 U.S.C. §§ 1956 (h) and 1957;

(e) Conspiracy to commit, and aiding and abetting the commission of, the foregoing offenses, in violation of 18 U.S.C. 371 and 2.

ATTACHMENT B

AFFIDAVIT

I, OMER J. MEISEL, being duly sworn, state:

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI") and have been so employed since 1999. In January 2002, I was assigned to the Enron Task Force in Washington, D.C. and have participated since then in an investigation into the circumstances surrounding the financial collapse of the Enron Corp. ("Enron"). Prior to that, I was assigned to the San Francisco Field Division of the FBI, where I conducted numerous investigations into various types of fraud, including insider trading, market manipulation, money laundering, mail and wire fraud, and bank fraud. In addition, I had extensive experience in the investigation of securities fraud prior to joining the FBI. From 1995 through 1997, I worked in the Enforcement Division of the Denver, Colorado office of the United States Securities and Exchange Commission ("SEC"), and conducted investigations into various types of securities fraud, including insider trading, market manipulation, and offering fraud. From 1997 through 1999, I worked at the National Association of Securities Dealers ("NASD"), where I was responsible for investigating violations of federal securities laws and NASD rules and regulations. As a result of my experience, I am familiar with the securities laws and various types of securities fraud, as well as mail and wire fraud, and money laundering schemes.

2. To date, the Enron investigation has resulted in several prosecutions and convictions in the United States District Court for the Southern District of Texas. In April 2002, David Duncan, the lead Arthur Andersen LLP ("Andersen") audit partner assigned to the Enron engagement, pled guilty to obstructing an SEC investigation relating to Enron. In June

2002, Andersen itself was convicted at a jury trial of obstructing that SEC investigation. In August 2002, former Enron Managing Director Michael Kopper pled guilty to two counts of conspiracy to commit wire fraud and money laundering, pursuant to a cooperation agreement, and agreed to forfeit $12 million in criminal proceeds. In September 2002, a grand jury charged three bankers formerly employed by National Westminster Bank ("NatWest") with seven counts of wire fraud in connection with a scheme involving Enron employees. Investigation into numerous other matters remains ongoing.

Sources of Information

3. The information used to support this Affidavit was derived from, among other sources: Special Agents of the FBI and the Internal Revenue Service ("IRS"), Criminal Investigation Division; statements of confidential sources and witnesses; documents obtained pursuant to a Department of Justice access request made to the SEC; SEC depositions and interviews; federal grand jury subpoenas; government requests to third parties; public records searches; an FBI search at Enron's corporate headquarters in Houston, Texas; and the Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron, William Powers, Chairman, February 1, 2002 and its supporting documents.[1]

Confidential Sources

4. During the course of this investigation, numerous confidential sources have been debriefed, who corroborate each other and are also corroborated by documents and other

[1] I have included in this Affidavit only those facts that I believe are relevant to the determination of probable cause to believe that the criminal offenses described here were committed by ANDREW S. FASTOW. I have not included all of the facts known to me concerning criminal activity involving FASTOW or others. Moreover, to the extent that this Affidavit contains statements by confidential sources and others, those statements are set forth only in part and in substance and are not intended to be verbatim.

evidence. CS-1 is a former Enron and LJM employee. CS-2 is a former Enron executive. CS-3 and CS-5 are former Enron employees who worked on the Nigerian Barge transaction. CS-4 is an employee of a leading financial institution (the "Financial Institution") who was involved in the Nigerian Barge transaction. CS-6 is a former Enron employee who worked on the Cuiaba project. CS-7 is an Enron employee who worked on the Cuiaba project. CS-8 is a former employee of the Financial Institution who was involved in the Nigerian Barge transaction. CS-9 was a nominee investor for FASTOW. CS-10 and CS-11 are former Enron employees who were also nominee investors for FASTOW.

INTRODUCTION

5. At all times relevant to this Affidavit, Enron was a publicly-traded Oregon corporation with its headquarters in Houston, Texas. Enron's stock was traded on the New York Stock Exchange, and Enron filed quarterly and annual financial statements with the SEC. Among other operations, Enron was the nation's largest natural gas and electricity marketer with reported annual revenue of more than $150 billion. Enron became number seven on the list of *Fortune 500* companies. By December 2, 2001, when it filed for bankruptcy, Enron's stock price had dropped in less than a year from more than $80 per share to less than $1.

6. The defendant ANDREW S. FASTOW is a resident of Houston, Texas. FASTOW was Enron's Chief Financial Officer ("CFO") from March 1998 until October 24, 2001. As CFO, FASTOW was responsible for overseeing many of Enron's financial activities. FASTOW reported directly to Enron's Chief Executive Officer ("CEO").

7. At times relevant to this Affidavit, Kopper reported directly to FASTOW. Kopper held various executive positions at Enron and also served in executive positions at

certain special purpose entities ("SPEs") created by Enron. As noted, Kopper has pled guilty and admitted liability in connection with crimes committed while at Enron and the SPEs. Kopper is cooperating in this investigation.

8. Enron, like many other corporations, required its employees to sign a confidentiality agreement and acknowledge compliance with the company's code of ethics. Enron's confidentiality agreement required employees to disclose business activities outside Enron that could be considered a conflict of interest, among other things. Similarly, Enron's code of ethics prohibited employees from engaging in, among other activities, investments that could be considered to conflict with Enron's interests, without obtaining a waiver from Enron. FASTOW signed the confidentiality agreement and the certificate of compliance with Enron's code of ethics. As an Enron employee and executive officer, FASTOW owed a duty to Enron and its shareholders to provide the company with his honest services.

Enron's Use of Special Purpose Entities

9. Since at least the early 1990's according to Enron's own records, Enron engaged in transactions with other entities that were designed to improve Enron's balance sheet. Enron's treatment of these entities for financial statement purposes was subject to accounting rules that governed whether an entity should be consolidated onto Enron's balance sheet, or treated as an investment by Enron in a separate entity not under Enron's control. Enron management preferred the latter result, known as "off-balance-sheet," because it enabled Enron to present itself more attractively as measured by criteria favored by Wall Street investment analysts, credit rating agencies, and others.

10. Enron engaged in a myriad of transactions that were structured to achieve off-

balance-sheet treatment. Many of those transactions were structured using SPEs. Under applicable accounting rules, an SPE could receive off-balance-sheet treatment only if independent third-party investors contributed at least three-percent of the SPE's capital, and the third-party investment was genuinely at risk, among other requirements. If the third party was not truly independent, or its investment not truly at risk, consolidation of the SPE onto Enron's balance sheet was required.

11. Kopper has admitted through his guilty plea and otherwise that starting in at least early 1997, he, FASTOW, and others devised a scheme to defraud Enron and its shareholders through transactions with certain Enron SPEs. Enron employees, including FASTOW, willingly engaged in these transactions in order to achieve accounting goals and to circumvent regulatory requirements by having an SPE do what Enron itself could not. As FASTOW and others knew, some of these SPEs were not eligible for off-balance-sheet treatment because the supposedly independent third party investors were controlled by FASTOW, Kopper, and others, because the three percent outside equity requirement was not satisfied, and because the third party investment was not truly at risk. Thus, these SPEs should have been consolidated onto Enron's balance sheet. Further, FASTOW, Kopper, and others took advantage of their simultaneous influence over Enron's business operations and the SPEs as a means secretly and unlawfully to generate millions of dollars for themselves and others.

FASTOW'S AND OTHERS' SELF-DEALING TRANSACTIONS

SPEs Involving "Friends of Enron"

12. According to Kopper and others, in early 1997 FASTOW devised a means to enrich himself and others while enabling Enron to maintain secret control over assets that it had

"sold" to supposedly independent SPEs. These transactions became known within Enron as "Friends of Enron" deals because the purportedly independent investors in the SPE actually were friends or family members of Enron executives, and served as nominees under the executives' control. According to Kopper, FASTOW told him that he and Enron's other top management liked "Friends of Enron" deals because they enabled Enron to retain control over assets while shedding the burdens of legal ownership, including required public disclosure in Enron's financial statements. Another benefit to FASTOW of the "Friends of Enron" structure was that he, Kopper, and others used their control over the investors to siphon off secretly for themselves proceeds of the SPE transactions, in violation of their duties to Enron and its shareholders.

Alpine and RADR

13. One "Friends of Enron" transaction disguised Enron's interest in certain wind farms in California, so that the wind farms could continue to receive beneficial regulatory treatment while they secretly remained under Enron's control. Under applicable federal and state regulations, the wind farms qualified for financial benefits conferred on alternative energy sources known as "qualifying facilities" ("QF"). Wind farms that were more than fifty percent owned by an electric utility holding company, however, were ineligible for QF status. In early 1997, FASTOW knew that Enron's wind farms would soon lose their QF status because Enron was in the process of acquiring Portland General Electric, and would become an electric utility holding company.

14. According to KOPPER, CS-9, CS-10, and documents obtained during the course of the investigation, in approximately March 1997 FASTOW devised a scheme whereby Enron

could "sell" a portion of its interest in the wind farms to a partnership comprised of "Friends of Enron." According to documents that I have reviewed, FASTOW initially proposed the formation of a partnership SPE to be known as Alpine Investors ("Alpine"), which would buy Enron's interest in the wind farms. The proposed investors in Alpine were all "Friends of Enron," including relatives of FASTOW's wife, CS-9, and CS-10. Alpine did not complete the proposed transaction with Enron. Rather, according to Kopper and others, in May 1997, FASTOW and Kopper created two SPEs known as "RADR ZWS LLC" and "RADR ZWS MM, LLC" (collectively, "RADR"), which purchased a portion of Enron's interest in the wind farms. Because FASTOW knew that his participation as an equity investor in RADR would require Enron to make public disclosure, he and Kopper enlisted "Friends of Enron" to serve as the supposedly independent third party investors. Those "investors" included CS-9, CS-10, and CS-11.

15. CS-9 and CS-11 have admitted in FBI interviews that they were Kopper's nominees and lacked sufficient funds to invest in RADR. Indeed, bank and other documents reflect that their investments were funded by FASTOW, in the form of a $419,000 loan to Kopper, who in turn lent it to CS-9 and CS-11.[2] CS-9, who never worked for Enron, received an additional $62,820 wire transfer from Enron, which CS-9 used as part of his RADR investment. According to Kopper, CS-9 and CS-11, it was understood from the outset that the loan to them would be repaid from RADR proceeds, and that Kopper would control any other RADR funds they received. Kopper in turn would use RADR funds to repay FASTOW.

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[2] Bank records show that FASTOW's loan to Kopper originated from a joint account he shared with his wife.

RADR purchased the necessary percentage of Enron's interest in the wind farms for $17 million. Transaction records reflect that Enron funded 97% of the purchase with a $16.49 million loan to RADR. The "Friends of Enron" contributed a total of $510,000, broken down as follows: CS-11 provided $224,400 to become a 44 percent limited partner in RADR; CS-9 provided $234,600 to become a 46 percent limited partner; and CS-10 provided $51,000 to become a 10 percent owner and RADR's general partner.

16. Because the RADR investors were under the control of FASTOW and Kopper, and the supposed investments by CS-9 and CS-11 were funded by a loan from FASTOW, RADR failed to qualify for off-balance sheet treatment and should have been consolidated onto Enron's books. Also, according to Kopper, CS-9, CS-10, and CS-11, RADR was supposed to exist for only a few months. Instead, Enron extended the life of the RADR SPE for nearly three years, enabling the wind farms unlawfully to reap the financial benefits of QF status during that time.

17. On July 1, 1997, RADR began making distributions to CS-9, CS-10, and CS-11. Bank records show that on or about August 25, 1997, CS-9 and CS-11 repaid their loans by wiring Kopper $255,500, including $51,500 in interest, and $242,568, including $17,968 in interest, respectively. The next day, Kopper wired $481,850 to FASTOW, which included the original loan amount from FASTOW plus $62,850 in interest.

18. According to Kopper, CS-9, and CS-11, RADR proved to be far more lucrative than initially expected, generating a windfall to the "investors." According to Kopper and corroborated by bank records, FASTOW, who was aware of the windfall, obtained a share in the form of kickbacks from Kopper, CS-9, and CS-11. To disguise the nature of the payments,

FASTOW instructed Kopper to establish a "gifting program," whereby Kopper and CS-9 made annual "gifts" of $10,000 to individual FASTOW family members. The $10,000 amount was chosen because IRS rules exclude from taxable income and do not require reporting of gifts of $10,000 or less made to any one person in one year. FASTOW instructed Kopper that he and CS-9 should write checks not only to FASTOW but also to FASTOW's wife and two children. FASTOW cautioned that no "gifts" should come directly to him from CS-11 or RADR, as FASTOW wanted to conceal his link to the RADR deal and could think of no legitimate explanation why he would receive checks directly from CS-11. FASTOW told Kopper that, if ever asked, they could explain the checks from Kopper by saying that he and FASTOW were close friends and the checks were gifts. In all, records reflect that Kopper arranged "gift" payments totaling approximately $125,000 to FASTOW and his family between December 1997 and February 2000.[3]

19. By establishing RADR in a way that clearly violated SPE accounting rules, FASTOW enabled Enron improperly to keep its RADR investment off its books, in violation of the securities laws. In addition, by using RADR to hide Enron's continued control over the wind farms from federal and state regulators, FASTOW enabled the wind farms wrongly to continue receiving the financial benefits of QF status. Finally, by using RADR to enrich himself and others, FASTOW unlawfully deprived Enron and its shareholders to their right to FASTOW's honest services.

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[3] As part of his plea and a simultaneous SEC settlement, Kopper agreed to forfeit RADR funds under his control. CS-9 and CS-11 also have agreed not to contest forfeiture of their RADR proceeds.

SPEs Controlled Directly by Enron Executives

20. By late 1997, Enron began creating SPEs that were under the direct control of Enron executives. The first such SPE was Chewco Investments, L.P. ("Chewco").

Formation of Chewco

21. In 1993, Enron and the California Public Employees Retirement System ("CALPERS") entered into a joint venture investment partnership known as Joint Energy Development Investments ("JEDI"). According to JEDI documents, JEDI's strategy was to make natural gas-related investments in the United States and Canada. Enron was JEDI's general partner and contributed $250 million in Enron stock; CALPERS was JEDI's limited partner and invested $250 million in cash. Given CALPERS' large equity investment and other factors, Enron was able to treat JEDI for accounting purposes as an equity investment in an unconsolidated affiliate (i.e, an off-balance-sheet investment vehicle).

22. In approximately the summer of 1997, Enron sought to have CALPERS invest in an even larger new partnership to be called JEDI II. At the same time, CALPERS decided to liquidate its investment in JEDI, and Enron began to seek a third party that would buy CALPERS' interest for $383 million. CALPERS agreed to the $383 million price if its interest was sold by November 6, 1997.

23. According to Kopper and others, FASTOW proposed that Chewco be created to buy CALPERS' interest in JEDI. Initially, FASTOW planned to serve as Chewco's outside equity investor and general partner. When he was advised that his direct involvement would require disclosure in Enron's financial statements, FASTOW proposed that Kopper assume that role. FASTOW explained to Kopper that his involvement would not trigger disclosure by

Enron, as Kopper was not considered an executive officer of Enron for financial reporting purposes.

24. According to Kopper and others, Enron was unable to meet the November 6, 1997, deadline imposed by CALPERS. Indeed, Chewco had no equity, much less the $383 million required to buy CALPERS' interest in JEDI. To meet CALPERS' deadline, FASTOW, Kopper, and others at Enron arranged to fund Chewco temporarily through $383 million in bridge loans from Barclays Bank PLC ("Barclays") and Chase Manhattan Bank ("Chase"). Repayment of the loans was guaranteed by Enron.[4]

25. According to public admissions by Enron and Andersen in the fall of 2001, Chewco's structure at the end of 1997 again violated SPE requirements. Its purported outside "equity" investment consisted of $11.49 million from Barclays. However, Enron structured the transaction so that more than $11 million of that supposed equity investment actually was a loan from Barclays to entities controlled by Kopper. Moreover, that loan was partially secured by Enron's interest in assets recently sold by JEDI, so that Barclays was not fully at risk. The only other "equity" investment consisted of $125,138 provided by entities under the control of Kopper, SONR#1 LP and SONR#1 LLC (collectively, "SONR"). Of that "investment," $100,100 represented proceeds of the RADR scheme. Thus, as Enron and Andersen admitted in the fall of 2001, Chewco failed for several reasons to qualify as an SPE that could receive

[4] According to Kopper and others, this transaction was referred to as a "dirty close," because participants knew that the Chewco structure failed to comply with SPE rules, as Chewco had made no true equity investment and Enron had guaranteed the banks against risk of loss on the loans. Enron thus planned for financial reporting purposes to replace the structure before year end with one that would qualify Chewco as an off-balance-sheet SPE.

off-balance-sheet treatment.[5]

Kickbacks of Chewco Proceeds from Kopper to FASTOW

26. As noted, FASTOW chose Kopper to serve as Chewco's managing partner only because FASTOW himself was told he could not do so without triggering disclosure on Enron's books. FASTOW's inability to serve in a formal role at Chewco, however, posed no impediment to his greed: he demanded a share of Chewco's profits, in violation of his duty to provide honest services to Enron and its shareholders.

27. According to Kopper, at the closing of the Chewco transaction in December 1997, he chose $500,000 as an amount for his annual fee as Chewco's manager. Bank records confirm that SONR, the entity controlled by Kopper, thereafter received quarterly wire transfers in the amount of $125,000 each, for a total of $1.5 million. At FASTOW's direction, Kopper transferred $54,000 of his management fees to FASTOW's wife. Bank records reflect that between April 30, 1998 and August 3, 1999, FASTOW's wife received six checks from SONR which totaled $54,000.

28. FASTOW and his family members also received kickbacks from other money that Kopper obtained in connection with Chewco. For example, in December 1998, Kopper asked that Enron pay a $400,000 fee to Chewco to obtain its consent to an amendment of the JEDI partnership agreement. According to Kopper , although the amendment benefitted Chewco rather than Enron, FASTOW nevertheless authorized Enron to pay the fee, which was referred to

[5] In November 2001, in part because Chewco and JEDI should have been consolidated from the outset into Enron's financial statements, Enron announced that it would restate its financial results from 1997 through 2001 by hundreds of millions of dollars.

within Enron as a "nuisance/arrangement fee."[6] According to Kopper, at FASTOW's direction, he subsequently transferred $67,224 of the "nuisance/arrangement fee" to FASTOW and members of FASTOW's family. A review of bank records revealed the following transfers by Kopper:

Date	Amount	Type	Account From/To	Purpose
12/31/1998	$10,000.00	Check #1182	Bank One Chase	Kopper to FASTOW's son
12/31/1998	$10,000.00	Check #1183	Bank One Chase	Kopper to FASTOW's son
12/31/1998	$19,724.00	Check #1181	Bank One Chase	Kopper to FASTOW's wife
01/05/1999	$27,500.00	Check #1180	Bank One Chase	Kopper to FASTOW
Total	$67,224.00			

FASTOW Approves "Tax Indemnity Payment" from Enron to Chewco

29. On March 26, 2001, Enron repurchased Chewco's limited partnership interest in JEDI for $35 million. As a result of the buyout, Kopper and CS-9 received approximately $3 million in cash at closing. Kopper requested an additional payment from Enron to Chewco of $2.625 million under a purported tax indemnity agreement executed in 1997. Although both inside and outside counsel at Enron advised FASTOW that the payment was not contractually required and should not be made, FASTOW approved the payment to Chewco. Kopper subsequently transferred the $2.625 million to himself.

[6] The $400,000 was received by SONR on December 23, 1998, and $241,600 thereafter was transferred to Kopper's account at Bank One.

The LJM Entities

Overview

30. By 1999, Enron was increasingly dependent on transactions with SPEs to meet its financial reporting goals. By June 1999, in order to have an off-balance-sheet SPE to which Enron could readily turn, Enron's Board of Directors (the "Board") agreed to permit FASTOW to create and serve as the managing partner of a new SPE named LJM1.[7] The Board later approved FASTOW's participation in another even larger SPE, LJM2 (the LJM entities hereafter collectively will be referred to as "LJM" unless otherwise noted). LJM's business activity principally involved transactions with Enron and Enron affiliates.

31. From approximately July 1999 through October 2001, Enron entered into transactions with LJM that defrauded Enron, its shareholders, the SEC, and others. The transactions with LJM enabled Enron to: (1) manipulate its balance sheet by moving poorly performing assets off balance sheet, when in fact such off-balance-sheet treatment was illegal; (2) manufacture earnings through sham transactions with LJM when Enron was having trouble otherwise meeting its goals for a quarter; and (3) improperly inflate the value of Enron's investments by backdating transaction documents to dates advantageous to Enron.

32. From FASTOW's perspective, Enron's dealings with LJM ensured that: (1) as CFO, FASTOW readily could rid Enron of poorly performing assets and thereby improve Enron's reported financial results, which in turn would enable FASTOW to earn continued prestige, salary, bonuses, and other benefits from Enron; (2) LJM would make money on all its dealings with Enron, since Enron management illegally and secretly guaranteed that LJM would

[7] LJM stands for the first initials of the names of FASTOW's wife and sons.

not lose money and, if it did, would be made whole in future transactions; and (3) FASTOW and others at LJM personally reaped huge sums of money from such transactions, both in the form of management fees and skimmed deal profits.

False Representations to Enron's Board

33. According to interviews of Board members, and review of Board minutes and Board members' contemporaneous notes, in approving FASTOW's role at LJM the Board relied on false representations by FASTOW, Enron's Chief Executive Officer ("CEO"), Chief Accounting Officer ("CAO"), Treasurer, and others. Specifically, the Board understood that: (1) Enron's CAO and Chief Risk Officer would review transactions with LJM to ensure their fairness to Enron; (2) the Board would be informed of all Enron transactions with LJM; (3) the purpose of LJM was to buy assets from Enron; (4) Board approval would be required for any Enron employee to work at LJM; and (5) although FASTOW would be compensated by LJM, he would not be permitted to profit from any appreciation in the value of Enron stock held by LJM or its affiliates.

34. According to Kopper and CS-1, far from reviewing transactions with LJM to ensure their fairness to Enron, Enron's CAO had an undisclosed agreement with FASTOW, which was referred to at LJM and Enron as the "Global Galactic" agreement. Under this agreement, LJM would not lose money in its dealings with Enron. Any Enron-LJM transaction that resulted in a loss to LJM would be made up later.

35. Further, according to interviews of several Board members, the Board was led to believe by FASTOW, Enron's CEO, and others that LJM was a vehicle for Enron to sell assets, and did not contemplate that Enron would buy back assets from LJM. Board members described

such buy-back transactions as antithetical to the business purpose for LJM that was presented to the Board at the time it approved FASTOW's involvement in LJM. Failing to inform the Board of such transactions hid the Enron-LJM fraudulent buy back activity.

36. Nor was the Board informed that FASTOW had arranged to have Kopper, while still Enron's Managing Director of Global Finance, serve as a managing director at LJM, or that FASTOW had staffed LJM with several other Enron employees. In late 2001, Board members confronted FASTOW and asked whether any current or former Enron employees other than FASTOW and Kopper had received remuneration from LJM. According to interviews of Board members and a review of contemporaneous notes, FASTOW responded by saying "no." In fact, as FASTOW knew at the time, among other things, he personally had authorized several million dollars in LJM-derived payments to various Enron employees.

37. Finally, as described more fully below in connection with the a transaction known as Southampton, FASTOW also violated his own representation to the Board that he would not personally profit from any appreciation in the value of Enron shares held by LJM.

Use of the LJM Partnerships to Manipulate Enron's Financial Results

"Parking" Enron Assets with LJM

38. According to Kopper and CS-1, various transactions between Enron and LJM were mere "warehousing" deals in which there was an understanding that LJM would hold Enron assets only for a short time, with Enron agreeing that LJM would make a profit on those assets. FASTOW and others caused LJM to "purchase" under-performing assets from Enron for prices that often bore no relation to the assets' true value. These assets were referred to as Enron's "nuclear waste." In undocumented side deals, Enron agreed that LJM would not lose

money even if the market value of an asset declined, because Enron would attempt to arrange a sale of the asset to a third party at a profit to LJM or, if no such third party could be found, Enron itself would repurchase the asset. According to Kopper and CS-1, LJM would not have "purchased" Enron's impaired assets but for the secret buy-back guarantee from Enron.

The Cuiaba Transaction

The Cuiaba Project Problem

39. Enron, through a wholly-owned subsidiary, held approximately 65% of the equity in a company that was building a power plant in Cuiaba, Brazil (the "Cuiaba project"). The Cuiaba project was troubled from its inception.[8] According to CS-6, an Enron employee who worked on the project, the Cuiaba project caused Enron to incur significant unexpected costs. By 2000, the Cuiaba project was approximately $120 million over budget. According to LJM documents, Enron sought to avoid consolidation of the project's debt on its balance sheet by selling its interest in the project. However, according to CS-7, the Cuiaba project was so problematic that no buyer would be interested in purchasing the project from Enron because there were too many serious risks and impediments to its being profitable in the time projected in the financial models.

FASTOW's Solution to the Cuiaba Problem

40. Enron employees and FASTOW solved the Cuiaba project problem by "selling" the project to LJM. Documents reflect that on September 30, 1999, Enron "sold" LJM a 13-percent interest in the project for $11.3 million. As a result of its supposed decreased ownership,

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[8] Enron's problems with Cuiaba were well known at Enron. Indeed, in December 2000, Enron's CEO made a presentation to the Board detailing significant cost overruns and other troubled aspects of the Cuiaba project.

Enron did not have to consolidate the project on its balance sheet. Furthermore, this purported sale enabled Enron to recognize a total of approximately $65 million of income in the third and fourth quarter of 1999, when it was struggling to meet its projected financial results.

41. LJM agreed to "buy" Enron's interest in the Cuiaba project despite its problems only because Enron agreed in an undisclosed side deal to buy back the interest if necessary so that LJM would not lose money. According to CS-1, there was an unwritten buyback agreement between FASTOW and Enron whereby if Enron could not find another purchaser for LJM's Cuiaba interest, Enron would buy back LJM's interest and guarantee LJM a profit. CS-1 stated that the original deal documents for Cuiaba made reference to such an agreement between LJM and Enron. Those documents were revised to remove such language out of concern that Andersen would not approve the transaction as a sale with such a provision in the transaction. Kopper also stated that reference to the buyback agreement between LJM and Enron was deleted because it would prohibit Enron from recognizing the sale to LJM and, therefore, Enron would have to consolidate Cuiaba. The parties circumvented these rules by orally agreeing to the buyback and entering into a written agreement that omitted the buyback language that would have alerted third parties to the scheme.

Enron Buys Back the Cuiaba Project

42. After the LJM "purchase," the Cuiaba project continued to encounter serious problems. According to an E-mail from an LJM employee to FASTOW dated October 16, 2000: the Cuiaba plant was experiencing "operational problems," did not have long term gas supply arrangements, and "[c]onditions precedent for the permanent financing have not been satisfied, which is impairing returns. . . [t]he project has experienced cost overruns due to the delayed start

and change orders of $148.4 MM on an original budget of $519 MM, which is impairing returns." Kopper, for instance, discovered that the rotors in the Cuiaba plant were cracking and that there were construction delays because the Brazilian government would not grant a permit for a pipeline to traverse a protected rainforest.

43. Despite these problems, despite the fact that LJM was represented to the Board to be a means to buy assets from Enron rather than the other way around, and despite the existence of more promising assets for repurchase by Enron, in August 2001, Enron bought back LJM's Cuiaba interest for $13,752,000. This purchase price was pre-arranged so that Enron provided LJM with a significant profit even though the true market value for Cuiaba had decreased. Kopper stated that to effect the buyback, in August 2001 he simply had Enron informed that it repurchase LJM's interest in Cuiaba.[9]

The Nigerian Barge Transaction: Enron Manufactures Earnings and Cash Flow

44. Another example of asset parking involved Enron's interest in electricity-generating power barges moored off the coast of Nigeria, which were to supply electricity pursuant to an agreement with the Nigerian government. According to several witnesses, in 1999, Enron made unsuccessful efforts to sell an interest in the barges. When Enron failed to sell the project by December 1999, Enron through FASTOW and its then Treasurer contacted, among other entities, the Financial Institution to pressure it to buy a $28 million interest in the project, with 75% of its purchase to be financed by Enron, so that Enron could book the sale by year end. Such a sale would allow Enron to record $12 million of earnings, and $28 million in funds flow,

[9] As FASTOW and Kopper planned, the proceeds of the repurchase of the Cuiaba project were used by Kopper to enable him to purchase FASTOW's partnership interest in LJM.

in the fourth quarter of 1999, which according to CS-3 was needed to meet Enron's earnings goals.

45. In spite of some internal dissension, including a document expressing concern that it would be viewed as "aiding and abetting" Enron's fraudulent manipulation of its income statement, the Financial Institution ultimately agreed that it would "invest" $7 million in the project. Enron financed the remainder of the deal with a loan that was interest-free to the Financial Institution, and paid all other expenses on the deal.

46. Based on my investigation, I believe that Enron, through FASTOW, agreed with the Financial Institution that it would have a set rate of return and would be taken out of the deal within six months. Witness interviews and documents from the Financial Institution, Enron, and LJM, evidence that FASTOW gave the Financial Institution an express, but deliberately unwritten, commitment that Enron would arrange for a buyer to purchase the Financial Institution's interest within six months for a fixed rate of return.[10] According to the Financial Institution's own internal documents, it had a strong incentive to accommodate Enron because, "Enron has paid [the Financial Institution] approximately $40 million in fees in 1999 and is expected to do so again in 2000," and it hoped to generate more Enron business. According to Kopper and others, FASTOW was also close personal friends with the Financial Institution's supervisory Enron relationship partner, who championed the deal within the Financial Institution.

47. Indeed, according to Kopper, FASTOW told him that he had an undisclosed oral agreement with the Financial Institution whereby Enron promised to take the Financial Institution

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[10] Such side agreements would result in Enron not properly accounting for the transaction as a sale or recording a gain on the transaction.

out of the deal within six months. FASTOW told Kopper that this agreement could not be put in writing because if the oral promise was memorialized Enron would not be able to recognize needed earnings on its fourth quarter 1999 financial statements. FASTOW also told Kopper that this transaction involved putting a lot of pressure on the Financial Institution, which FASTOW referred to as "bear-hugging." Kopper said that FASTOW informed him that Enron's then Treasurer had asked FASTOW to contact the Financial Institution at the end of 1999 in order to pressure it to participate in the deal.

48. Kopper is corroborated by other witnesses and documents. According to CS-1, CS-2, and CS-3, Enron promised the Financial Institution that it would be taken out of the deal within six months. CS- 3 said that this was the first time he/she had been exposed to "manufactured earnings." According to CS-2, who participated in the transaction for Enron, the purpose of the barge transaction was to allow Enron to recognize the sale on its balance sheet. CS-5 also knew that FASTOW put considerable pressure on the Financial Institution to complete the deal, assured it that it would not lose money on the transaction, and promised that its interest would be bought out within six months. According to CS-8, a Financial Institution employee, the Financial Institution was not in the business of owning barges but wanted to accommodate Enron, an important client. CS-4, another Financial Institution employee, stated that it did no due diligence on the transaction, either before entering into the deal or afterward to monitor the supposed investment.

49. Documents also confirm that the "sale" of the Nigerian barges to the Financial Institution was a sham transaction. For example:

- Financial Institution documents reflect that its Chairman of Investment Banking

scheduled a conference call with senior management of Enron to confirm Enron's "commitment to guaranty the [Financial Institution] takeout within six month," and that the deal needed to close by December 31, 1999.

- According to an internal LJM document, Enron sold the barges to the Financial Institution, "promising" that the firm would be "taken out by sale" by June 2000.
- A December 23, 1999, draft engagement letter between Enron and the Financial Institution stated that the transaction would have a yield of approximately 15% and that the Financial Institution's interest would be sold to a third party or purchased by Enron.
- An e-mail dated May 11, 2000 from an Enron employee[11] confirms that, "ENE is obligated to get [the Financial Institution] out of the deal on or before June 30...."
- Internal Financial Institution documents described the transaction as a "'relationship' loan" and reflected periodic "interest" calculations on the investment at a rate of 15%.
- With the end of June 2000, approaching without a buyer having been located by Enron, the Financial Institution drafted a letter to Enron dated June 14, 2000, which reiterated that Enron "agreed" to sell the Financial Institution's interest in the deal by June 30, 2000 and demanded payment from Enron of $7,510,976.65 [a figure that was the agreed-upon rate of return]. The letter was never sent because Enron arranged to park the barges with LJM.

Enron Re-Parks the Financial Institution's Interest with LJM

50. With no true third-party purchaser available to buy the Financial Institution's

[11] This employee later was promoted to Treasurer of Enron.

interest, on June 29, 2000 - the day before Enron had promised to "take out" the Financial Institution - FASTOW arranged for LJM to purchase the Financial Institution's interest. Kopper stated that in May 2000 FASTOW instructed him to have LJM prepare to purchase the Financial Institution's interest, and that FASTOW agreed that Enron in turn would "take out" LJM by locating a third party buyer who would buy LJM's interest at a profit to LJM. CS-1 said he/she was told by a person who worked on the transaction that LJM purchased the Financial Institution's interest to fulfill Enron's commitment to the Financial Institution and because if Enron itself repurchased the interest it would have been required to reverse the earlier "sale" on its books.

51. Documents confirm that Enron used LJM to fulfill its commitment to the Financial Institution while keeping the barge interest off Enron's own balance sheet. LJM paid $7,525,000 for the Financial Institution's interest, which represented a $525,000 premium over the Financial Institution's original investment to account for the rate of return promised by Enron. Further, LJM and the Financial Institution did not perform internal valuations of the deal or negotiate over price. Enron also provided financing to LJM for a transaction that purported to be between two third parties and Enron paid LJM a substantial fee for entering into the deal with the Financial Institution. According to an Enron employee's "2000 Deals and Accomplishment"[12] assessment, the employee claimed that he/she successfully closed a $28 million sale by the Financial Institution:

"[The Financial Institution's] stated intention (with ENE's commitment) to sell the

[12]These documents, which were prepared annually by many Enron employees to support their requests for increased salary and bonuses, were referred to within Enron as "brag sheets."

equity position by 6/30/00 but [Enron] business unit not in a position to market [Financial Institution] equity to third party investor by deadline. Negotiated and executed the sale of the [Financial Institution's] equity to LJM, fulfilling obligation to [the Financial Institution]."

The Raptor I Fraud Scheme

52. Investigation has revealed that beginning in the spring of 2000, Enron and LJM engaged in a series of complex financial transactions with an SPE called Raptor I. FASTOW, Enron's CAO, and others used Raptor I to manipulate artificially Enron's balance sheet and to manufacture profits for LJM and FASTOW at Enron's expense. Specifically, they conspired to engage in illegal transactions involving the Raptor, namely: (1) the use of Raptor as an off balance sheet vehicle that they knew in fact did not qualify for such treatment and should have been included on Enron's books; (2) the backdating of documents to generate profits for Enron; and (3) the manufacturing of guaranteed earnings for LJM.

The Enron Balance Sheet Problem

53. Enron invested in other companies, including start-up ventures that later did initial public offerings ("IPO") of their shares. At the time of an IPO, Enron often owned substantial shares of the company. Following the IPO, Enron was at risk for market price fluctuations in the shares. The value of such stock was required to be recorded in Enron's financial statements at the end of each quarter. Because Enron was restricted by "lock up" agreements from selling its shares until some future date, it sought to reduce the impact on its financial results of a possible dramatic decline in the share price.

The Raptor I Solution

54. Enron's own documents reflect that Raptor I was designed to protect Enron's balance sheet from decreases in value of certain of these investments. Enron sought to use Raptor I to lock in the value of Enron's investments in stock, without actually selling its shares. Raptor I was created in April of 2000 through an off-balance-sheet SPE called Talon LLC ("Talon"). Talon would enter into "hedging" transactions with an Enron subsidiary that would lock in the value of Enron's stock portfolio: if the price of Enron's stock increased, Talon would reap the upside gain, and if the stock declined, Talon would pay the Enron subsidiary the amount of the loss. The parties to such transactions are thus predicting the future value of a stock.

55. Talon was funded mainly by Enron through a promissory note and Enron's own stock. The remainder of Talon's funding came from $30 million from LJM. This alleged third party funding served as the necessary three percent outside equity required for Talon not to be reflected on Enron's balance sheet.

FASTOW's Side Deal

56. Talon, however, was not properly off balance sheet. In an undisclosed side deal with FASTOW, LJM was to receive its initial investment plus a substantial profit from Enron, all prior to Talon being allowed to engage in the hedging transactions for which it was created. Such a side deal, if disclosed, would have "broken" the SPE, that is, it would have required Talon to be consolidated on Enron's financial statements because the outside three percent equity was not at risk. Indeed, with the return of LJM's capital by Talon, there was no outside equity at risk. Yet, Enron's filed financial statements did not consolidate Talon. In exchange for this side agreement, FASTOW allowed Enron employees to use Talon to manipulate Enron's balance sheet.

57. According to Kopper and CS-1, there was an unwritten side-deal between Enron and FASTOW that stock hedges would not be entered into by Talon until LJM received $41 million, constituting a $30 million return of its investment and an $11 million profit.

58. In fact, records reflect that on September 7, 2000, LJM received $41 million from Talon. And, in an April 2001 report to LJM investors, FASTOW stated that the return of LJM's investment resulted in an absence of risk to LJM in the Raptor transactions:

> After the settlement of the puts, Enron and the Raptor vehicles began entering into derivative transactions designed to hedge the volatility of a number of equity investments held by Enron. LJM2's return on these investments was not at risk to the performance of the derivatives in the vehicles given that LJM2 had already received its return of and on capital. (Emphasis added).

In an E-mail by a senior LJM employee to one of LJM's limited partners in August 31, 2000, the LJM employee stated that:

> The original Raptor is being settled early by Enron so that they [sic] can begin writing derivatives against the structure. LJM2 will receive its return on capital of $11 million and return of capital of $30 million this week. (Emphasis added).

Disguising Enron's $41 Million Payment To LJM

59. In order to mask the side deal, FASTOW, Enron's CAO and others devised a scheme to manufacture a $41 million payment to LJM. To do so, Enron and Talon entered into a "put," that is, a transaction that ostensibly served to hedge Enron against a decline in its own stock value. That "put" option was purchased by Enron for $41 million. The $41 million was paid to Talon and then transferred to LJM. Both Kopper and CS-1 said that the true purpose for the put

option was to generate income to satisfy Enron's obligation to LJM under the undisclosed side agreement entered into by FASTOW.

Back-Dating Documents In Order to Manipulate Enron's Financial Statements

60. After satisfying the conditions of the side deal, Enron began to use the Raptor to hedge Enron's investments. Enron documents that I have reviewed note August 3, 2000, as the purported date of the Raptor hedges. At the close of business on that day, the price of the principal stock that Enron sought to hedge, approximately 1.09 million shares of AVICI, was at an all time high of $163.50. By entering into a hedge on that date Enron would have been able to lock in a substantial gain in the stock and avoid the risk of the stock declining. In fact, records reflect that within a month, AVICI stock had significantly declined.

61. Witnesses and documents evidence that FASTOW and Enron backdated the AVICI hedge to August 3, 2000, in order to take advantage of its price on that day. Such backdating served to manipulate Enron's financial statements. CS-1 explained that the reason for back-dating the AVICI transaction to August 3, 2000, was that FASTOW and others knew that was the date on which the stock of AVICI traded at its all time highest closing price of $163.50. By back-dating the agreement to August 3, 2000, Enron was able to lock in the value of AVICI at a significant profit and not incur the subsequent loss from the stock declining.

62. CS-1 and Kopper explained that there would not be a reason for a true third-party to engage in such a transaction, which was to Talon's detriment since the supposed future risks in the hedge were already known at the time the deal was in fact consummated, i.e., the price of AVICI stock already had fallen. Because the transaction made no economic sense from Talon's perspective if it were a legitimate transaction, when CS-1 learned of it, CS-1 questioned

FASTOW about it. FASTOW told CS-1 that since LJM had already received its money and its profit from Enron, namely the $41 million discussed above, LJM was to "accommodate" Enron. FASTOW told CS-1 to have a hands-off approach with Enron in relation to future stock hedges entered into by Talon. According to CS-1, people at LJM and Enron were aware of the back-dating and referred to it as the "Enron time machine."

63. Documents I have reviewed corroborate the above, including the following:

- According to LJM documents, the $41 million was not transferred to LJM until September 7, 2000, rather than on or about August 3, 2000, when the put was allegedly settled.
- An internal LJM document, describing an Enron-LJM deal, listed as a benefit to Enron of engaging in the transaction as follows:

  <u>LJM has been accommodating and has back-dated documents as necessary</u> (Emphasis added).
- An internal LJM document, describing another Enron-LJM deal involving AVICI, listed as a benefit to Enron of engaging in the transaction as follows:

  [LJM] Provided equity when other traditional equity providers would not.

<u>FASTOW's Use of LJM to Enrich Himself and Others</u>

64. As discussed above, Enron invested in other companies. Records reflect that one such investment was in Rhythms NetConnections, Inc. ("Rhythms Net"), an internet company. In approximately April 1999, Rhythms Net conducted an IPO of its shares. At the time of the IPO, records reflect that Enron owned approximately 5.4 million Rhythms Net shares. Following the IPO, Enron was at risk for market price fluctuations in Rhythms Net shares.

Because Enron was restricted from selling its shares until November 1999, it sought to reduce the impact on its financial results of a possible dramatic decline in the share price of Rhythms Net stock.

65. According to numerous witnesses and corroborated by records, in approximately June 1999 Enron devised a means to reduce the risk of its investment in Rhythms Net through a "hedge." Records reflect that, as part of this hedging effort, an LJM entity created a subsidiary known as LJM Swap Sub, L.P ("Swap Sub"), which was funded with cash and Enron shares.[13] According to transaction documents and witnesses, Swap Sub thereafter entered into a series of transactions with Enron known as "derivatives." These derivatives transactions included a "put," which gave Enron the right to sell its Rhythms Net shares to Swap Sub for a set price on certain future dates even if the market value of the Rhythms Net shares was below the set price.

66. According to public records, Enron shares held by Swap Sub increased by 58% in January. Meanwhile, Swap Sub's only liability, the Rhythms Net put option, decreased because Rhythms Net shares climbed from $27.50 at the end of 1999 to reach high of $47.50 on February 17, 2000.[14]

67. FASTOW was prohibited by the Enron Board from having any direct pecuniary interest in Enron's stock held by LJM. Indeed, in his own presentation made to Enron's Board on June 28, 1999, FASTOW emphasized that he would not receive any current or future appreciated value of Enron's stock. Nevertheless, according to Kopper and various e-mail and

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[13] This LJM entity had two limited partners, Cayman Islands investment entities owned by NatWest, and Credit Suisse First Boston ("CSFB"). Each also invested in Swap Sub.

[14] As the price of the underlying shares being covered by a put option increases, the value of the put option decreases.

other documents that I have reviewed, FASTOW decided that he, Kopper and three bankers employed by NatWest would defraud Enron and NatWest by capturing the increase in Swap Sub's value for themselves and others.

Southampton

68. Through the Southampton transaction, FASTOW and others defrauded both Enron and NatWest. The scheme also enabled FASTOW personally to profit at the expense of Enron and NatWest.

69. According to publicly available documents and numerous witnesses interviewed by the FBI, in the fall of 1999, the Bank of Scotland launched a hostile takeover bid for NatWest. Shortly thereafter, Royal Bank of Scotland launched a competing hostile bid for NatWest, which ultimately succeeded.

70. NatWest E-mails reflect that by at least early 2000, three NatWest bankers working on matters relating to Enron and LJM, Gary Mulgrew, Giles Darby, and David Bermingham believed that the NatWest division where they worked was likely to be sold, affecting the security of their employment. E-mails reflect that around the same time, the bankers also became aware that while NatWest internally valued its Swap Sub interest at zero, it actually had significant value.

71. According to Kopper, as well as documents and travel records reviewed by the FBI, on February 22, 2000, the NatWest bankers traveled to Houston, Texas, to meet with FASTOW and others. During that meeting the bankers, purportedly representing NatWest, made a slide show presentation outlining their ideas for the restructuring of Swap Sub.

72. Thereafter, according to Kopper and relevant documents, FASTOW, Kopper and

the bankers agreed on a way to carry out the scheme. Kopper prepared a letter in which he proposed that a company under his control purchase NatWest's interest in Swap Sub for $1 million. Mulgrew and Darby, in violation of their duties to NatWest, recommended that it accept the $1 million offer. Subsequently, in violation of his duty to NatWest, Bermingham recommended to the Board of Directors of NatWest's Cayman Islands investment entity that it accept the offer.

73. According to Kopper and corroborated by documents, Kopper created several layers of partnerships that would buy Swap Sub in order to conceal from Enron and NatWest the true structure of the Swap Sub transaction and the roles played by FASTOW, Kopper, and the bankers. The partnership created to buy NatWest's interest in Swap Sub was Southampton, L.P., in which FASTOW, Kopper, and certain other Enron and LJM employees had a financial interest. Southampton K Co. was a limited partner in and owned 50% of Southampton, L.P. Thus, after Southampton, L.P., purchased NatWest's interest in Swap Sub, Southampton K Co. would own 50% of that interest.

74. Kopper provided the bankers with an option to buy Southampton K Co. for $250,000. Upon exercising that option, the bankers would own 50% of NatWest's interest in Swap Sub, an ownership interest that FASTOW and Kopper knew Enron was prepared to purchase for millions of dollars.

75. According to Kopper and other witnesses, and corroborated by records, on or about March 22, 2000, FASTOW finalized an agreement with Enron to pay Swap Sub $30 million, which would enable Enron to sell its Rhythms Net shares and recover the Enron shares used to fund Swap Sub. FASTOW reported to Kopper that, to obtain Enron's agreement, he represented

to Enron that CSFB would receive $10 million, and falsely represented that NatWest would receive $20 million.

76. As Kopper acknowledged in his plea, and corroborated by bank and other records, the British bankers received approximately $7.3 million from this scheme. The remaining balance of the funds went to investors in the Kopper-created entity Southampton Place. These investors included: Kopper, who contributed $25,000 of his own money and directed Chewco to loan $680,000; the FASTOW Family Foundation, a purported charitable foundation created by FASTOW for the purpose of receiving Southampton proceeds, which contributed $25,000; and five Enron and LJM employees, chosen by FASTOW and Kopper, who contributed a total of less than $20,000.

77. On approximately May 1, 2000, the investors in Southampton Place received the following payout: the FASTOW Family Foundation $4.5 million; Kopper $4.5 million; and the five Enron and LJM employees received a total of approximately $3.3 million.[15]

Sale of the LJM Entities

78. According to Kopper and other sources, in June 2001 Enron became concerned, in part because of criticism in the press, about FASTOW's continued role in the LJM entities. In July 2001, at the urging of FASTOW and Enron's CAO, Kopper purchased FASTOW's interest in LJM for more than $[16 million].[5] The CAO explained that while FASTOW's continued

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[15] Documents that I have reviewed include an internal CSFB memo dated March 20, 2000, memorializing a conversation between a CSFB attorney and Enron's CAO. According to the memo, the CAO represented that Enron's CEO were aware of and had approved the sale of equity interests in Swap Sub to entities that were affiliated with employees of Enron.

[16] To pay FASTOW, Kopper wire transferred $15.5 million to FASTOW's account at JP Morgan, and transferred to FASTOW a home worth approximately $800,000. As FASTOW, Kopper, and others planned, the proceeds of Enron's repurchase of the Cuiaba project were used to repay Kopper.

involvement in LJM would require disclosure on Enron's financial statements, Kopper's would not. The CAO assured Kopper that LJM would be lucrative to Kopper because Enron would conduct significant future business with LJM to help Enron achieve its quarterly financial reporting goals.[17] That Enron intended to continue its relationship with LJM also was reflected in a memorandum from Citigroup recommending that a loan to Kopper be approved because, among other things, "many [Enron] transactions will continue to flow through LJM."

CONCLUSION

79. Based upon the foregoing, there is probable cause to believe that criminal conduct by FASTOW and unnamed co-conspirators has included the probable commission of the following violations:

(a) securities fraud, in that FASTOW knowingly and willfully used and employed manipulative and deceptive devices and contrivances, buy use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the SEC (Title 17, Code of Federal Regulations, Section 240.10b-5), in that FASTOW engaged in acts, practices, and courses of business which would operate as a fraud and deceit upon members of the investigating public in connection with the purchase or sale of securities, in violation of 15 U.S.C. §§ 78j (b) and 78ff;

(b) wire fraud, in violation of 18 U.S.C. §1343, namely to unlawfully devise a scheme or artifice to defraud and to obtain money or property by means of false or fraudulent pretenses, representations or promises, and to use and cause to be used interstate wire communications for

[17] During FASTOW's tenure as general partner at LJM, he personally received compensation and other distributions totaling more than $20 million.

the purpose of executing a scheme or artifice to defraud;

(c) mail fraud, in violation of 18 U.S.C. § 1341, namely to unlawfully devise a scheme or artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and to use and cause to be used the U.S. Mail for the purpose of executing said scheme or artifice to defraud;

(d) Laundering of proceeds generated by fraud in connection with the offer, purchase and sale of securities, in violation of 18 U.S.C. §§ 1956 (h), 1957;

(e) Conspiracy to commit, and aiding and abetting the commission of the foregoing offenses, in violation of 18 U.S.C. 371 and 2.

80. All in violation of 18 U.S.C. §§ 1341, 1343, 1344, 1956 (h), 1957, 371 and 2; 15 U.S.C. §§ 78j (b) and 78ff; and 17 C.F.R. § 240.10b-5.

NOTICE OF FORFEITURE

(18 U.S.C. Section 981, 982, 1956 and 28 U.S.C. Section 2461)

81. As a result of the fraud offenses alleged in the criminal complaint, herein alleged and incorporated by reference for the purpose of alleging forfeitures to the United States of America pursuant to the provisions of Title 18, United States Code, Section 981, and Title 28, United States Code, Section 2461, the defendant ANDREW FASTOW shall, upon conviction of each such offense alleged in the criminal complaint, forfeit to the United States all property, real and personal, which constitutes or is derived from proceeds traceable to the alleged fraud offenses, wherever located, and in whatever name held.

82. As a result of the money laundering offenses alleged in the criminal complaint, herein alleged and incorporated by reference for the purpose of alleging forfeiture to the United

States of America pursuant to the provisions of Title 18, United States Code, Section 982, the defendant ANDREW FASTOW shall, upon conviction of each such offense alleged in the criminal complaint, forfeit to the United States all property, real and personal, involved in such offenses, and all property traceable to such property, wherever located, and in whatever name held.

83. In the event that any property described above as being subject to forfeiture, as a result of any act or omission by the defendant:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to or deposited with a third person;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 18 United States Code, Section 982 (b) (1), to seek forfeiture of any other property of ANDREW FASTOW up to the value of the above described property.

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

OCT 3 1 2002

MICHAEL N. MILBY, CLERK OF COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	H- 02-0665
	§	
v.	§	Cr. No. H-02-
	§	
ANDREW S. FASTOW	§	Violations: 18 U.S.C. §§ 1343 (Wire Fraud); 1956(a), 1956(h), 1957 (Money Laundering); 1512 (Obstruction of Justice); 371 (Conspiracy); and 2 (Aiding and Abetting).

INDICTMENT

The Grand Jury charges:

1. At all times relevant to this Indictment, Enron Corp. ("Enron") was an Oregon corporation with its headquarters in Houston, Texas. Among other businesses, Enron was engaged in the purchase and sale of natural gas, construction and ownership of pipelines and power facilities, provision of telecommunication services, and trading in contracts to buy and sell various commodities. Before it filed for bankruptcy on December 2, 2001, Enron was the seventh largest corporation in the United States.

2. Enron was a publicly traded company whose shares were listed on the New York Stock Exchange. As a public company, Enron was required to comply with regulations of the United States Securities and Exchange Commission ("SEC"). Those regulations protect members of the investing public by, among other things, ensuring that a company's financial information is accurately recorded and disclosed to the public.

3. Under SEC regulations, Enron and its officers had a duty to make and keep books, records and accounts that fairly and accurately reflected Enron's business transactions, and file

EXHIBIT
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with the SEC reliable quarterly and annual reports.

4. The defendant ANDREW S. FASTOW, a resident of Houston, Texas, was Enron's Chief Financial Officer ("CFO") from March 1998 to October 24, 2001. Prior to serving as CFO, FASTOW served as a Managing Director at Enron. As CFO, FASTOW had oversight over many of Enron's financial activities. FASTOW reported directly to Enron's Chief Executive Officer ("CEO"). During the time that he served as Enron's CFO, FASTOW also served as the general partner and otherwise was in control of certain special purpose entities ("SPEs") with which Enron did business.

5. FASTOW as an Enron employee and executive officer owed a duty to Enron and its shareholders to provide the company with his honest services.

THE SCHEMES TO DEFRAUD

6. Between at least 1997 and October 24, 2001, FASTOW and others devised schemes to defraud Enron and its shareholders, the investing public, the SEC, and others. The goals of the schemes included:

(a) falsification of Enron's reported financial results so that Enron would appear more successful than it was;

(b) artificial manipulation of the share price of Enron stock;

(c) circumvention of federal regulations so that Enron could obtain benefits to which it was not entitled;

(d) illusion of business skill and success on the part of FASTOW and other Enron senior management; and

(e) personal enrichment of FASTOW and others at the expense of Enron, its

shareholders, and others to whom they owed a duty of honest services.

7. The means by which FASTOW and others achieved, and conspired and attempted to achieve, the goals of the schemes included:

(a) Enron's engaging in fraudulent transactions with SPEs;

(b) Enron's filing materially false and misleading financial statements with the SEC;

(c) Enron's making false and misleading public statements about Enron's financial performance; and

(d) FASTOW's and others' taking advantage of their simultaneous control over SPEs and Enron's business operations.

Enron's Use of Special Purpose Entities

8. Since at least the early 1990's, Enron engaged in transactions with SPEs that were designed to improve Enron's reported financial results. Enron's treatment of its transactions with these SPEs for financial statement purposes was subject to accounting rules that governed whether an SPE should be consolidated onto Enron's balance sheet, or treated as a separate entity not under Enron's control. Enron's management, including FASTOW, preferred the latter result, known as "off-balance-sheet," because it enabled Enron to (a) book earnings and record cash flow and (b) avoid inclusion of unfavorable information in its reported financial statements, thereby presenting itself more attractively to Wall Street investment analysts, credit rating agencies, the investing public, and others.

9. Under applicable accounting rules, an SPE properly could receive off-balance-sheet treatment only if independent third-party equity investors contributed at least 3% of the SPE's capital, and the third-party investment was genuinely at risk, among other requirements. If

the third party was not truly independent, or its equity not truly at risk, consolidation of the SPE onto Enron's balance sheet was required.

The RADR Transaction

10. In early 1997, Enron owned interests in certain California wind farms which qualified for government financial benefits conferred on alternative energy sources. Such energy facilities were known as "qualifying facilities" or "QFs." Under applicable federal regulations, wind farms that were more than fifty percent owned by an electric utility holding company were ineligible for QF status, and accordingly were not entitled to the associated financial benefits. By at least early 1997, FASTOW knew that Enron's wind farms were about to lose their QF status because Enron was in the process of acquiring Portland General Electric, and as a consequence Enron would become an electric utility holding company.

11. In approximately March 1997, FASTOW and others devised a scheme enabling them to reap the proceeds from the wind farms, without the farms losing their valuable QF status. As part of the scheme, Enron appeared to partially divest itself of its interest in the wind farms through a sale to an SPE known as RADR. In reality, Enron illegally and secretly retained control over the farms and the purported independent 3% equity in the SPE. Although FASTOW at first planned to serve as the SPE's outside equity investor and general partner, nominees were substituted after FASTOW learned that his own involvement or that of his relatives would have prevented the desired QF status. FASTOW provided funding for the nominees' "investment" in RADR through a loan from his personal checking account. The nominees remained under the concealed control of FASTOW and another Enron finance executive, Michael Kopper.

12. On approximately May 31, 1997, RADR purchased Enron's interest in the wind

farms for $17 million.[1] Enron funded 97% of the purchase price with a $16.49 million loan to RADR. The supposedly independent 3% equity investors in RADR contributed the remaining $510,000. FASTOW contributed $419,000 of that sum through concealed loans.

13. Although he did not appear as a partner or investor in RADR, FASTOW directed the distribution of RADR proceeds. Indeed, FASTOW personally benefitted from the RADR transaction, in violation of FASTOW's duty to provide Enron with his honest services. For instance, RADR began making distributions to the nominees on July 1, 1997. On or about August 26, 1997, at FASTOW's direction, FASTOW received from the nominees $481,850 in RADR proceeds, which represented $62,850 more than the sum he had fronted the nominees. And between approximately December 1997 and February 2000, FASTOW received an additional $126,000 in RADR proceeds. So that his concealed interest in RADR would not be revealed, at FASTOW's direction the payments were disguised as "gifts" from Kopper and others to FASTOW, his wife and two children.

The Chewco Transaction

14. In 1993 Enron and the California Public Employees Retirement System ("CALPERS") entered into a $500 million joint venture known as Joint Energy Development Investments ("JEDI"), which made various energy investments. Given CALPERS' 50% equity investment and other factors, Enron was able to treat JEDI for accounting purposes as an equity investment in an off-balance-sheet entity.

15. In approximately the summer of 1997, CALPERS decided to liquidate its investment in JEDI, and later agreed to do so for $383 million. FASTOW proposed the creation

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1/ Numbers referred to herein are approximate.

of an SPE known as Chewco to buy CALPERS' interest in JEDI. Although FASTOW at first planned to serve as Chewco's outside equity investor and general partner, Kopper was substituted when FASTOW learned that his own involvement would trigger financial disclosure obligations for Enron.

16. While FASTOW was precluded from serving in an official role at Chewco, he nevertheless directed that he receive a portion of Chewco's proceeds from Kopper, in violation of FASTOW's duty to provide honest services to Enron and its shareholders. For example, in December 1998, FASTOW improperly authorized Enron to pay a $400,000 "nuisance/arrangement fee" to Chewco to obtain its consent to amend the JEDI partnership agreement, even though the amendment was for the benefit of Chewco, not Enron. In December 1998 and January 1999, FASTOW received kickbacks from that payment totaling $67,224, in the form of checks from Kopper to FASTOW and FASTOW's family.

17. FASTOW authorized other payments from Enron to Chewco that were against Enron's interest. For example, on March 26, 2001, Enron repurchased Chewco's limited partnership interest in JEDI for $35 million. On behalf of Chewco, Kopper requested an additional payment from Enron to Chewco of $2.625 million under a purported tax indemnity agreement executed in 1997. Against the advice of both inside and outside counsel at Enron, FASTOW approved the payment to Chewco.

The LJM Entities

Overview

18. By 1999, Enron was increasingly dependent on transactions with SPEs to meet its financial reporting goals. By June 1999, in order to have an off-balance-sheet SPE to which Enron regularly could turn, Enron's Board agreed to permit FASTOW to create and serve as the managing partner of a new SPE known as LJM1. The Board later approved FASTOW's participation in another SPE, known as LJM2 (the LJM entities hereafter collectively will be referred to as "LJM" unless otherwise noted). The vast majority of LJM's business involved transactions with Enron and its affiliates.

19. From approximately July 1999 through October 2001, Enron entered into transactions with LJM that defrauded Enron, its shareholders, the SEC, and others. The transactions with LJM enabled Enron to: (a) manipulate its reported financial results by moving poorly performing assets off balance sheet, when in fact such off-balance-sheet treatment was improper; (b) manufacture earnings through sham transactions with LJM when Enron was having trouble otherwise meeting its goals for a quarter; and (c) improperly inflate the value of Enron's investments by backdating transaction documents to dates advantageous to Enron.

20. Enron's dealings with LJM also ensured that: (a) as CFO, FASTOW readily could rid Enron of poorly performing assets and thereby improve Enron's reported financial results, which in turn would enable FASTOW to earn continued prestige, salary, bonuses, and other benefits from Enron; (b) LJM would meet its predicted rate of return, as Enron management secretly agreed that LJM losses would be made up in future deals; and (c) FASTOW and others at LJM personally reaped huge sums of money from such transactions, both in the form of

management fees and skimmed deal profits.

False Representations to Enron's Board

21. FASTOW and others made various false representations to Enron's Board of Directors (the "Board") to obtain its approval for FASTOW's participation in LJM. Specifically, the Board was assured that: (a) Enron's Chief Accounting Officer ("CAO") and Chief Risk Officer would review transactions with LJM to ensure their fairness to Enron; (b) the Board would be informed of all Enron transactions with LJM; (c) the purpose of LJM was to buy assets from Enron; and (d) although FASTOW would be compensated by LJM, he would not profit from any appreciation in the value of Enron stock held by LJM or its affiliates.

22. In fact, as FASTOW knew, far from reviewing transactions with LJM to ensure their fairness to Enron, Enron's CAO and others had an undisclosed agreement with FASTOW that ensured that, over time, LJM would not lose money in its dealings with Enron.

23. As FASTOW further knew, although the Board was told that LJM was a vehicle to which Enron could sell assets, and that it would be informed of all transactions with LJM, the Board was not informed that Enron would from time to time repurchase assets from LJM, or find another buyer, so as to provide a profit to LJM.

24. Finally, as described more fully below in connection with a transaction known as Southampton, FASTOW violated his own representation to the Board that he would not personally profit from any appreciation in the value of Enron shares held by LJM.

Use of LJM to Manipulate Enron's Financial Results

25. Several transactions between Enron and LJM were mere "parking" or "warehousing" deals in which Enron "sold" assets to LJM so that it could book earnings and

record cash flows. Enron secretly agreed that LJM would hold the asset only for a short time, after which Enron would arrange a repurchase of the assets at a profit to LJM.

The Cuiaba Transaction

26. One parking transaction involved LJM 's "purchase" of part of Enron's interest in a company that was building a power plant in Cuiaba, Brazil (the "Cuiaba project"). The Cuiaba project had caused Enron to incur significant costs and by 2000 was approximately $120 million over budget.

27. When no true third-party buyer could be found, FASTOW and others arranged on September 30, 1999 to "sell" a portion of Enron's interest in the Cuiaba project to LJM for $11.3 million. This purported sale enabled Enron to recognize a total of approximately $65 million of income in the third and fourth quarter of 1999, when it was struggling to meet its projected financial results.

28. LJM agreed to "buy" Enron's interest in the Cuiaba project despite its problems only because Enron and FASTOW in an undisclosed oral side deal agreed that Enron would buy back the interest if necessary at a profit to LJM. That secret buy-back agreement was concealed from Enron's outside auditors and Enron's Board by FASTOW and others.

29. After the LJM "purchase," the Cuiaba project continued to encounter serious problems. Despite these problems, in August 2001 FASTOW caused Enron to buy back LJM's Cuiaba interest at a considerable profit to LJM.

The Nigerian Barge Transaction

30. Another example of asset parking involved Enron's interest in electricity-generating power barges moored off the coast of Nigeria. In 1999, Enron made unsuccessful

efforts to sell an interest in the barges to a third party. When Enron failed to sell the project by December 1999, Enron through FASTOW and others arranged for a major financial institution (the "Financial Institution") to "buy" a $28 million interest in the project. The Financial Institution agreed to "purchase" the interest only because: (a) FASTOW promised in an oral "handshake" deal that the Financial Institution would receive a fixed 15% interest rate and would not have to hold the barge interest for more than six months and (b) Enron would finance 75% of the purchase price and only require the Financial Institution to put up $7 million. The Financial Institution's "purchase" allowed Enron to record improperly $12 million in earnings and $28 million in funds flow in the fourth quarter of 1999.

31. With no true third-party purchaser available to buy the Financial Institution's interest as the six-month deadline loomed, on June 29, 2000, FASTOW had LJM purchase the Financial Institution's interest. LJM paid $7,525,000 for the Financial Institution's interest, which represented a $525,000 premium over the Financial Institution's original investment to account for the rate of return promised by Enron. FASTOW caused Enron to provide financing for LJM's purchase, and for Enron to pay LJM a substantial undisclosed fee for entering into the deal with the Financial Institution. Enron subsequently arranged for a third party to purchase LJM's interest in the barges, again at a profit to LJM.

Manipulation of Enron's Books Through Hedging Transactions

Talon

32. Beginning in the spring of 2000, Enron and LJM engaged in a complex scheme to manipulate artificially Enron's financial statements. LJM enabled Enron to falsify its financial picture; in return, LJM profited handsomely. Specifically, FASTOW, Enron's CAO, Enron's

Treasurer, and others used an SPE known as Talon to engage in illegal transactions, namely: (1) the use of Talon as an off-balance-sheet vehicle that FASTOW and others knew in fact did not qualify for such treatment and should have been included on Enron's books; (2) the backdating of documents to manipulate Enron's financial statements; and (3) the manufacture of guaranteed earnings for LJM.

33. Enron invested in other companies, including start-up ventures that later did initial public offerings ("IPO") of their shares. At the time of an IPO, Enron often owned substantial shares of the company. The value of such stock was required to be recorded at the prevailing market price in Enron's financial statements at the end of each quarter. Following an IPO, Enron was at risk for market price fluctuations in the shares, many of which were extremely volatile. Because Enron was restricted by "lock up" agreements from selling these shares until some future date, it sought to reduce the impact on its financial results of a possible dramatic decline in the share price.

34. Talon, which was created in April 2000, was designed by FASTOW and others to protect Enron's balance sheet from decreases in value of certain of these investments. Talon would enter into "hedging" transactions with an Enron subsidiary that would lock in the value of Enron's stock portfolio: if the price of Enron's stock increased, Talon would reap the upside gain, and if the stock declined, Talon would pay the Enron subsidiary the amount of the loss.

35. Talon was funded mainly by Enron through a promissory note and Enron's own stock. The remainder of Talon's funding came from a $30 million investment from LJM. This alleged third party funding served as the supposed 3% outside equity required for Talon not to be reflected in Enron's financial statements.

36. As FASTOW and others knew, however, Talon was not properly off balance sheet. Enron and FASTOW entered into a side agreement whereby Enron guaranteed that it would pay $41 million to LJM before Talon would be allowed to engage in the hedging transactions for which it was created. In exchange, FASTOW allowed Enron to use Talon to manipulate Enron's balance sheet. As a result of this secret side deal, LJM's investment was never truly at risk.

37. In order to mask the side deal, FASTOW, Enron's CAO, and others devised a scheme to manufacture a $41 million payment from Enron to LJM. To do so, Enron and Talon entered into a "put," that is, a transaction that ostensibly served to hedge Enron against a decline in its own stock value. That "put" option was purchased by Enron for $41 million. The $41 million was paid to Talon and then transferred to LJM on September 7, 2000.

Back-Dating Documents In Order to Manipulate Enron's Financial Statements

38. After agreeing to make the $41 million payment to LJM, Enron began to use Talon to hedge Enron's investments. FASTOW and others allowed Enron to record inflated values for its investment portfolio by back-dating Talon hedge documents to dates when Enron's stocks were trading at prices higher than those in effect on the date the hedge was actually entered into. Specifically, Enron used back-dating to inflate the value of its investment in 1.09 million shares of AVICI stock. While Enron hedged its AVICI investment through Talon in late August 2000, FASTOW and others caused documents related to the hedge to be backdated to August 3, 2000. At the close of business on that day, the price of AVICI was at an all time high of $163.50, while the share price by the actual date of the hedge had declined significantly. By backdating the hedge transaction to August 3, 2000, Enron avoided having to report the decline

in value that actually had occurred by the true date of the hedge.

FASTOW's Use of LJM to Enrich Himself and Others

39. Enron owned approximately 5.4 million shares of Rhythms NetConnections, Inc. ("Rhythms Net"), an internet company. In approximately April 1999, Rhythms Net conducted an IPO of its shares. Following the IPO, Enron was at risk for market price fluctuations in Rhythms Net shares. Because Enron was restricted from selling its shares until November 1999, it sought to reduce the impact on its financial results of a possible dramatic decline in the share price of Rhythms Net stock.

40. In approximately June 1999, FASTOW devised a means for Enron to reduce the risk of its investment in Rhythms Net through a hedge. As part of this hedging effort, FASTOW and others caused the creation of an LJM subsidiary known as LJM Swap Sub, L.P ("Swap Sub"). Credit Suisse First Boston ("CSFB") and National Westminster Bank ("NatWest") invested and became limited partners in Swap Sub, which held both Enron shares and cash. Swap Sub thereafter entered into a series of transactions with Enron, including a "put" that gave Enron the right to sell its Rhythms Net shares to Swap Sub for a set price on certain future dates even if the market value of the Rhythms Net shares was below the set price.

41. By early 2000, Enron's and Rhythms Net's share prices had increased; consequently, so had the value of Swap Sub. Even though FASTOW was prohibited by Enron's Board from having any direct pecuniary interest in Enron's stock held by LJM, FASTOW, Kopper, and three bankers employed by NatWest devised a scheme to defraud Enron and NatWest by capturing a substantial portion of the increased value of Swap Sub's Enron shares for themselves and others.

42. It was part of the scheme that FASTOW, Kopper, and the NatWest bankers fraudulently induced NatWest to sell its interest in Swap Sub for $1 million, at a time when they knew the interest was worth millions more. Indeed, on or about March 22, 2000, FASTOW finalized an agreement with Enron to pay Swap Sub $30 million to unwind Enron's transactions with Swap Sub. FASTOW represented to Enron that CSFB would receive $10 million, and falsely represented that NatWest would receive $20 million. In fact, as FASTOW and his co-conspirators knew, NatWest received only $1 million.

43. The $19 million of illegal proceeds was divided among the conspirators. The NatWest bankers received approximately $7.3 million. The remaining balance of the funds went to "investors" in a partnership known as Southampton. These "investors" included FASTOW, Kopper, Enron's Treasurer, various LJM employees, and an Enron in-house attorney. Specifically, on approximately May 1, 2000, the "investors" in Southampton received the following payout: the FASTOW Family Foundation $4.5 million; Kopper $4.5 million; and the five Enron and LJM employees received a total of approximately $3.3 million.

Sale of the LJM Entities

44. In July 2001, Enron determined that FASTOW's continued role in LJM would require disclosure in Enron's financial statements. To avoid such disclosure while keeping LJM available for use by Enron, FASTOW sold his interest in LJM to Kopper.

COUNT ONE
(Conspiracy to Commit Wire Fraud: Self-Dealing by FASTOW)

45. The allegations of paragraphs 1 through 17 and 39 through 44 are realleged as if fully set forth here.

46. In or about and between at least 1997 and October 2001, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendant ANDREW S. FASTOW and others conspired to devise a scheme and artifice to defraud, including to deprive Enron and its shareholders and NatWest of their intangible right of honest services, and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice would transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, all in violation of Title 18, United States Code, Section 1343.

OVERT ACTS

47. In furtherance of the conspiracy and to effect the objects thereof, within the Southern District of Texas and elsewhere, the defendant ANDREW S. FASTOW and others did commit and cause to be committed the following overt acts, among others:

RADR

a. In or about May 1997, FASTOW wired $419,000 to Kopper.

b. In or about August 1997, FASTOW received a $481,850 wire transfer from Kopper.

c. In or about December 1997 through February 2000, FASTOW and Kopper directed the payment of RADR proceeds to FASTOW, his wife and two children.

Chewco

d. In or about December 1998, FASTOW caused Enron to pay $400,000 to Chewco as a "nuisance/arrangement fee."

e. On or about and between December 31, 1998 and January, 1999, FASTOW, his wife

and children received checks from Kopper totaling $67, 224.

Southampton

f. On or about March 4, 2000, FASTOW met with a NatWest banker in the Cayman Islands.

g. On or about March 10, 2000, a NatWest banker faxed a letter from London, England to Houston, Texas stating that NatWest would sell its interest in Swap Sub for $1 million.

h. On or about April 25, 2000, a NatWest banker caused a wire transfer of $251,993 from an account in England to an account in Houston, Texas.

i. On or about May 1, 2000, $7,352,626 was wire transferred from Houston, Texas to an account in the Cayman Islands controlled by one of the NatWest bankers.

j. On or about May 1, 2000, $1,040,744 was wire transferred to an account controlled by an Enron employee.

k. On or about May 1, 2000, $4,466,189 was wire transferred to an account in the name of the FASTOW Family Foundation.

(Title 18, United States Code, Sections 371 and 3551 et seq.)

COUNT TWO
(Conspiracy to Commit Wire Fraud -- Nigerian Barges)

48. The allegations of paragraphs 1 through 9, 18 through 25, and 30 and 31 are realleged as if fully set forth here.

49. In or about and between December 1999 and December 2000, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendant ANDREW S. FASTOW and others conspired to devise a scheme and artifice to defraud,

including to deprive Enron and its shareholders of their intangible right of honest services, and to obtain money and property by means of materially false and fraudulent pretenses and representations, and for the purpose of executing such scheme and artifice would transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, all in violation of Title 18, United States Code, Section 1343.

OVERT ACTS

50. In furtherance of the conspiracy and to effect the objects thereof, within the Southern District of Texas and elsewhere, the defendant ANDREW S. FASTOW and others did commit and cause to be committed the following overt acts, among others:

a. In or about December 1999, FASTOW spoke with representatives of the Financial Institution regarding its investing in the barges.

b. In or about December 1999, FASTOW committed to the Financial Institution that Enron would take the Financial Institution out of the barge transaction within six months.

c. In or about December 1999, Enron made false representations to its outside auditors regarding the agreement between the Financial Institution and Enron.

d. In or about June 2000, FASTOW caused LJM to purchase the Financial Institution's interest in the barges.

e. In or about June 2000, FASTOW caused Enron to pay LJM a fee for purchasing the Financial Institution's interest in the barges.

f. In or about June 2000, Enron made false representations to its outside auditors

regarding the agreement between the Financial Institution, Enron and LJM.

(Title 18, United States Code, Sections 371 and 3551 et seq.)

COUNT THREE

(Conspiracy to Commit Wire and Securities Fraud -- Talon Off-Balance-Sheet Conspiracy)

51. The allegations of paragraphs 1 through 9, 18 through 25, and 32 through 38 are realleged as if fully set forth here.

52. In or about and between spring 2000 and December 2000, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendant ANDREW S. FASTOW and others did knowingly and intentionally conspire (a) willfully and unlawfully to use and employ manipulative and deceptive devices and contrivances and directly and indirectly (i) to employ devices, schemes and artifices to defraud; (ii) to make untrue statements of material facts and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) to engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with purchases and sales of Enron stock and by the use of the instruments of communication in interstate commerce and the mails, in violation of Title 15, United States Code, Section 78j(b) and Rule 10b-5 of the SEC, Title 17, Code of Federal Regulations, Section 240.10b-5, and (b) to devise a scheme and artifice to defraud, including to deprive Enron and its shareholders of their intangible right of honest services, and to obtain money and property by means of materially false and fraudulent pretenses, representations, promises, and, for the purpose of executing such scheme and artifice, to cause interstate wire communications in violation of Title 18, United States Code, Section 1343.

OVERT ACTS

53. In furtherance of the conspiracy and to effect the objects thereof, within the Southern District of Texas and elsewhere, the defendant ANDREW S. FASTOW and others did commit and cause to be committed the following overt acts, among others:

a. In or about April 2000, FASTOW caused Enron to enter into a put with Talon.

b. On or about September 2000, FASTOW caused LJM to obtain $41 million from Enron.

(Title 18, United States Code, Sections 371 and 3551 et seq.)

COUNT FOUR

(Conspiracy to Commit Wire and Securities Fraud -- AVICI Hedge Conspiracy)

54. The allegations of paragraphs 1 through 9, 18 through 25, and 32 through 38 are realleged as if fully set forth here.

55. In or about and between August 2000 and September 2000, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendant ANDREW S. FASTOW and others did knowingly and intentionally conspire (a) willfully and unlawfully to use and employ manipulative and deceptive devices and contrivances and directly and indirectly (i) to employ devices, schemes and artifices to defraud; (ii) to make untrue statements of material facts and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) to engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with purchases and sales of Enron stock and by the use of the instruments of communication in interstate commerce and the mails,

in violation of Title 15, United States Code, Section 78j(b) and Rule 10b-5 of the SEC, Title 17, Code of Federal Regulations, Section 240.10b-5, and (b) to devise a scheme and artifice to defraud, including to deprive Enron and its shareholders of their intangible right of honest services, and to obtain money and property by means of materially false and fraudulent pretenses, representations, promises, and, for the purpose of executing such scheme and artifice, to cause interstate wire communications in violation of Title 18, United States Code, Section 1343.

OVERT ACTS

56. In furtherance of the conspiracy and to effect the objects thereof, within the Southern District of Texas and elsewhere, the defendant ANDREW S. FASTOW and others did commit and cause to be committed the following overt act, among others:

a. In or about late August 2000, FASTOW met with an LJM employee and instructed the employee to permit Enron to enter into a back-dated hedge of the AVICI stock.

b. In or about late August 2000, LJM caused Talon to enter into a hedge with Enron of its AVICI stock, back-dated to August 3, 2000.

(Title 18, United States Code, Sections 371 and 3551 et seq.)

COUNTS FIVE THROUGH THIRTY-THREE
(Wire Fraud –RADR)

57. The allegations of paragraphs 1 through 13 are realleged as if fully set forth here.

58. On or about the dates specified below, within the Southern District of Texas and elsewhere, the defendant ANDREW S. FASTOW and others did devise a scheme and artifice to defraud, including to deprive Enron and its shareholders of their intangible right of honest services, and to obtain money and property by means of materially false and fraudulent pretenses,

representations and promises, and for the purpose of executing such scheme and artifice did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, as follows:

Count	Date	From	To	Description
5	12/23/97	New York, NY	Houston, TX	wire transfer: $55,820.04
6	12/23/97	New York, NY	Houston, TX	wire transfer: $65,835.62
7	2/4/98	New York, NY	Houston, TX	wire transfer: $75,091.94
8	2/4/98	New York, NY	Houston, TX	wire transfer: $31,808.22
9	3/31/98	New York, NY	Houston, TX	wire transfer: $40,684.93
10	4/13/98	New York, NY	Houston, TX	wire transfer: $9,292.00
11	6/25/98	New York, NY	Houston, TX	wire transfer: $19,733.78
12	6/25/98	New York, NY	Houston, TX	wire transfer: $63,616.44
13	8/5/98	New York, NY	Houston, TX	wire transfer: $94,780.06
14	8/5/98	New York, NY	Houston, TX	wire transfer: $30,328.77
15	9/30/98	New York, NY	Houston, TX	wire transfer: $10,178.77
16	9/30/98	New York, NY	Houston, TX	wire transfer: $41,424.66
17	12/23/98	New York, NY	Houston, TX	wire transfer: $42,740.07
18	12/23/98	New York, NY	Houston, TX	wire transfer: $62,136.99
19	2/4/99	New York, NY	Houston, TX	wire transfer: $18,665.99
20	2/4/99	New York, NY	Houston, TX	wire transfer: $31,808.22
21	7/1/99	New York, NY	Houston, TX	wire transfer: $32,669.59
22	7/1/99	New York, NY	Houston, TX	wire transfer: $108,000.00
23	8/6/99	New York, NY	Houston, TX	wire transfer: $45,357.84
24	8/6/99	New York, NY	Houston, TX	wire transfer: $27,369.86
25	10/19/99	New York, NY	Houston, TX	wire transfer: $12,263.01
26	10/29/99	New York, NY	Houston, TX	wire transfer: $54,739.73

27	12/23/99	New York, NY	Houston, TX	wire transfer: $18,217.07
28	12/23/99	New York, NY	Houston, TX	wire transfer: $48,082.19
29	2/15/00	New York, NY	Houston, TX	wire transfer: $845,241.59
30	2/15/00	New York, NY	Houston, TX	wire transfer: $39,945.21
31	3/27/00	New York, NY	Houston, TX	wire transfer: $98,383.56
32	6/27/00	New York, NY	Houston, TX	wire transfer: $256,616.47
33	7/24/00	New York, NY	Houston, TX	wire transfer: $2,000,000.00

(Title 18, United States Code, Sections 1343, 2 and 3551 et seq.)

COUNTS THIRTY-FOUR THROUGH FORTY
(Wire Fraud –Southampton)

59. The allegations of paragraphs 1 through 9 and 39 through 44 are realleged as if fully set forth here.

60. On or about the dates set forth below, within the Southern District of Texas and elsewhere, the defendant ANDREW S. FASTOW and others did devise a scheme and artifice to defraud, including to deprive Enron and its shareholders of their intangible right of honest services, and to obtain money and property by means of false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, as follows:

Count	Date	From/To	Description
34	3/6/00	Houston/London	Fax: offer to purchase Swap Sub interest
35	3/10/00	London/Houston	Fax: re sale of Swap Sub interest
36	3/16/00	London/Houston	Email: signature needed for Swap Sub sale documents

Count	Date	From/To	Description
37	3/17/00	London/Houston	Email: final Swap Sub sale documents
38	4/21/00	London/Houston	Fax: signed notice of option exercise
39	4/26/00	England/Houston	Wire transfer of $251,993 to exercise option
40	5/1/00	Houston/Cayman Islands	Wire transfer of $7,352,626

(Title 18, United States Code, Sections 1343, 2 and 3551 et seq.)

COUNT FORTY-ONE
(Obstruction of Justice)

61. The allegations in paragraphs 1 through 9 and 39 through 44 are realleged as if fully set forth here.

62. In or about August and September 2001, within the Southern District of Texas, the defendant ANDREW S. FASTOW did knowingly, intentionally and corruptly persuade and attempt to persuade another person, namely, Michael J. Kopper, with intent to cause and induce Kopper to (a) withhold records, documents and other objects from official proceedings, namely: governmental proceedings and investigations, and (b) alter, destroy, mutilate and conceal objects, namely, laptop and desktop computers and information contained therein, with intent to impair the objects' integrity and availability for use in such official proceedings.

(Title 18, United States Code, Sections 1512(b)(2)(A) and (B) and 3551 et seq.)

COUNT FORTY-TWO
(Money Laundering Conspiracy)

63. The allegations in paragraphs 1 through 44 are realleged as if fully set forth here.

64. From in or about July, 1997 through December 2001, in the Southern District of

Texas and elsewhere, the defendant ANDREW S. FASTOW and others did knowingly conspire:

(a) knowingly to conduct and attempt to conduct financial transactions affecting interstate commerce and foreign commerce, which transactions involved the proceeds of specified unlawful activity, that is, wire fraud, in violation of Title 18, United States Code, Section 1343, and securities fraud, in violation of Title 15, United States Code, Sections 78j(b), 78ff and 17 C.F.R. 240.10b-5, knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of specified unlawful activity, and that while conducting and attempting to conduct such financial transactions, knew that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i); and

(b) knowingly to engage and attempt to engage, in monetary transactions by, through or to a financial institution, affecting interstate and foreign commerce, in criminally derived property of a value greater than $10,000, that is the deposit, withdrawal, or transfer of funds, such property having been derived from a specified unlawful activity, that is, wire fraud and securities fraud, in violation of the provisions of Title 18, United States Code, Section 1957.

OVERT ACTS

65. In furtherance of the conspiracy and to effect the objects thereof, within the Southern District of Texas and elsewhere, the defendant ANDREW S. FASTOW and others did commit and cause to be committed the following overt acts, among others:

Overt Act	Date	Transaction
a	08/27/1997	Transfer of $481,850 from Bank One account number 1883757583 in the name of Michael Kopper to JP Morgan Chase account number 054-06029219 in the name of Lea and Andrew Fastow
b	5/2/2002	Transfer of $6,500,000 from FASTOW JP Morgan Chase Account 054-05023866 to Capital Growth Holding, LP account number 0159006885 at Sterling Bank

(Title 18, United States Code, Sections 1956(h) and 3551 et seq.)

COUNTS FORTY-THREE THROUGH FORTY-NINE
(Money Laundering)

66. The allegations in paragraphs 1 through 13 are realleged as if fully set forth here.

67. On or about the dates listed in the chart below, in the Southern District of Texas and elsewhere, defendant ANDREW S. FASTOW, knowing that the property involved in the financial transaction represented the proceeds of some form of unlawful activity, did knowingly conduct and attempt to conduct, such a financial transaction affecting interstate and foreign commerce which in fact involved the proceeds of specified unlawful activity, that is, wire fraud, in violation of Title 18, United States Code, Section 1343, and securities fraud, in violation of Title 15, United States Code, Sections 78j(b), 78ff and 17 C.F.R. 240.10b-5, knowing that the transaction was designed in whole or in part to conceal and disguise the source, ownership, and control of the proceeds of specified unlawful activity, to wit:

Count	Date	Transaction
43	08/27/1997	Transfer of $481,850 from Bank One account number 1883757583 in the name of Michael Kopper to JP Morgan Chase account number 054-06029219 in the name of Lea and Andrew Fastow

44	12/30/1998	Transfer of $10,000 from Charles Schwab account number 2883-7706 in the name of William Dodson to JP Morgan Chase account number 766-09061417 in the name of Jeffrey T. Fastow, UGTA
45	12/30/1998	Transfer of $10,000 from Charles Schwab account number 2883-7706 in the name of William Dodson to JP Morgan Chase account number 766-09061227 in the name of Matthew Fastow, UTMA
46	12/30/1998	Transfer of $6,535.10 from Charles Schwab account number 2883-7706 in the name of William Dodson to JP Morgan Chase account number 054-05023866 in the name of Lea and Andrew Fastow
47	3/16/2000	Transfer of $10,000 from Charles Schwab account number 2883-7706 in the name of William Dodson to JP Morgan Chase account number 766-09061227 in the name of Matthew Fastow, UTMA
48	3/16/2000	Transfer of $10,000 from Charles Schwab account number 2883-7706 in the name of William Dodson to JP Morgan Chase account number 054-05023866 in the name of Lea and Andrew Fastow
49	3/16/2000	Transfer of $10,000 from Charles Schwab account number 2883-7706 in the name of William Dodson to JP Morgan Chase account number 054-05023866 in the name of Lea and Andrew Fastow

(Title 18, United States Code, Sections 1956(a)(1)(B)(i), 2 and 3551 et seq.)

COUNTS FIFTY THROUGH SEVENTY-EIGHT
(Money Laundering)

68. The allegations in paragraphs 1 through 9, 18 through 25, and 39 through 44 are realleged as if fully set forth here.

69. On or about the dates listed in the chart below, in the Southern District of Texas, and elsewhere, defendant FASTOW did knowingly engage and attempt to engage, and did aid, abet, counsel, command, induce, procure and cause the engaging and attempting to engage in the following monetary transaction by, through or to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, which funds were derived from a specified unlawful activity, that is, wire fraud in violation of Title 18, United

State Code, Section 1343, and securities fraud in violation of Title 15, United State Code, Sections 78j(b), 78ff and 17 C.F.R. 240.10b-5, to wit:

Count	Date	Transaction
50	5/1/2000	Transfer of $1,040,744 from Southampton Place, LP's Chase Bank account number 323-905781 to Ben Glisan's Charles Schwab account number 3714-9242
51	5/1/2000	Transfer of $416,298 from Southampton Place, LP's Chase Bank account number 323-905781 to Kathy Lynn's Bank One account number 1883761874
52	5/1/2000	Transfer of $1,040,744 from Southampton Place, LP's Chase Bank account number 323-905781 to Kristina Mordaunt's UBS Paine Webber account number HS 75406 EJ
53	5/1/2000	Transfer of $520,372 from Southampton Place, LP's Chase Bank account number 323-905781 to Anne Yaeger Patel's Enron Credit Union share account number 618571
54	5/1/2000	Transfer of $416,298 from Southampton Place, LP's Chase Bank account number 323-905781 to Michael Hinds' Merrill Lynch account number 728-17J39
55	10/13/2000	Purchase of 1,000,000 shares of City of Austin Imp municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
56	7/2/2001	Transfer of $750,000 from a Salomon Smith Barney, account number 719-02668-12-125 to Kristina Mordaunt's UBS Paine Webber account number HS 75406 EJ
57	8/06/2001	Purchase of 500,000 shares of Texas A & M Univ Revs Financing municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
58	8/07/2001	Purchase of 500,000 shares of Katy Independent School District Tex Perm Sch Fund municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
59	8/30/2001	Purchase of 1,050,000 shares of San Antonio Independent School District municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8

60	9/13/2001	Purchase of 1,000,000 shares of Irving Independent School district municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
61	9/18/2001	Purchase of 500,000 shares of Hays County Tax Genl Purpose Fund municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
62	9/24/2001	Purchase of 1,000,000 shares of Comal Independent School District municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
63	10/02/2001	Purchase of 500,000 shares of University of Texas Univ Rev Financing Sys municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
64	10/02/2001	Purchase of 500,000 shares of University of Texas Univ Rev Financing Sys municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
65	10/02/2001	Purchase of 500,000 shares of University of Texas Univ Rev Financing Sys municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
66	11/01/2001	Purchase of 1,110,000 shares of Carrolton Farmers Branch Independent School District municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
67	11/29/2001	Purchase of 500,000 shares of Port of Houston Auth Tex Harris County Port municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
68	11/29/2001	Purchase of 1,000,000 shares of Port of Houston Auth Tex Harris County Port municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
69	11/29/2001	Purchase of 500,000 shares of Port of Houston Auth Tex Harris County Port municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
70	12/20/01	Purchase of 1,000,000 shares of City of Austin Tex Wtr & Water Sys Revs Ref municipal bonds with funds from FASTOW JP Morgan Chase Account Q62603-00-8
71	9/13/2001	Transfer of $60,000 from FASTOW JP Morgan Chase Account Q62603-00-8 to FASTOW JP Morgan Chase Account 054-05023866

72	9/21/200	Transfer of $1,020,000 from FASTOW JP Morgan Chase Account Q62603-00-8 to FASTOW JP Morgan Chase Account 054-05023866
73	12/19/2001	Transfer of $5,000,000 from FASTOW JP Morgan Chase Account Q62603-00-8 to FASTOW JP Morgan Chase Account 054-05023866
74	2/22/2002	Transfer of $1,000,000 from FASTOW JP Morgan Chase Account Q62603-00-8 to FASTOW JP Morgan Chase Account 054-05023866
75	4/9/2002	Transfer of $1,000,000 from FASTOW JP Morgan Chase Account Q62603-00-8 to FASTOW JP Morgan Chase Account 054-05023866
76	4/16/2002	Transfer of $2,000,000 from FASTOW JP Morgan Chase Account Q62603-00-8 to FASTOW JP Morgan Chase Account 054-05023866
77	5/2/2002	Transfer of $4,000,000 from FASTOW JP Morgan Chase Account Q62603-00-8 to FASTOW JP Morgan Chase Account 054-05023866
78	5/2/2002	Transfer of $6,500,000 from FASTOW JP Morgan Chase Account 054-05023866 to Capital Growth Holding, LP account number 0159006885 at Sterling Bank

(Title 18, United States Code, Sections 1957, 2 and 3551 et seq.)

FORFEITURE ALLEGATIONS

70. Upon conviction of one or more of the offenses alleged in Counts 1 through 40, FASTOW shall forfeit to the United States pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c) any property constituting or derived from proceeds obtained directly or indirectly as a result of the said violations, including but not limited to the properties listed in paragraph 72 below.

71. Upon conviction of one or more of the offenses alleged in Counts 42 through 78, FASTOW shall forfeit to the United States pursuant to 18 U.S.C. § 982(a)(1) the following

property:

(a) all right, title, and interest in any and all property involved in each offense in violation of 18 U.S.C. §§ 1956 and 1957, or conspiracy to commit such offense, for which the defendant is convicted, and all property traceable to such property, including the following: 1) all money or other property that was the subject of each transaction, transportation, transmission, or transfer in violation of Sections 1956 and 1957, including but not limited to the properties listed in paragraph 72 below; 2) all commissions, fees and other property constituting proceeds obtained as a result of those violations; and 3) all property used in any manner or part to commit or to facilitate the commission of those violations.

(b) A sum of money equal to the total amount of money involved in each offense, or conspiracy to commit such offense, for which the defendant is convicted. If more than one defendant is convicted of an offense, the defendants so convicted are jointly and severally liable for the amount involved in such offense.

72. The United States intends to forfeit property of the defendant including, but not limited to, the following:

(a) the contents of JP Morgan Chase account no. 054-05023866, in the name of Lea and Andrew Fastow;

(b) the contents of JP Morgan Chase account no. Q62603-00-8, in the name of Andrew S. and Lea W. Fastow;

(c) the contents of JP Morgan Chase account no. 340160, in the name of Lea and Andrew Fastow;

(d) the contents of J.P. Morgan Chase account no. Q65183-00-8, in the name of the Fastow Family Foundation;

(e) real property known as 3005 Del Monte Dr., Houston, Texas.

73. Pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b), the defendant shall forfeit substitute property if, by any act or omission of the defendant, the property described above:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred, sold to or deposited with a third party;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

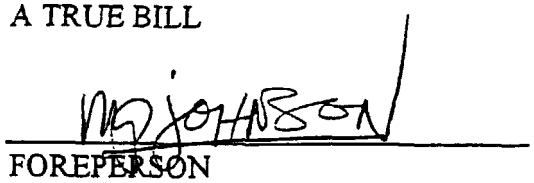
(e) has been commingled with other property which cannot be divided without difficulty;

up to the value of the amount described in subparagraphs 73(a)-(e).

(Title 18, United States Code, Sections 981 and 982; Title 28, United States Code, Section 2461; Rule 32.2(a) of the Federal Rules of Criminal Procedure)

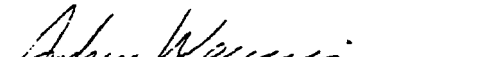
Dated: Houston, Texas
October 31, 2002

A TRUE BILL



FOREPERSON

LESLIE R. CALDWELL
Director, Enron Task Force

By: 
ANDREW WEISSMANN
Deputy Director, Enron Task Force

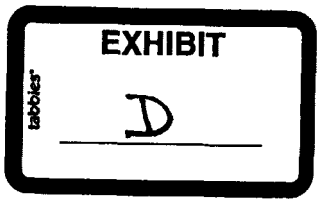
LAUREL LOOMIS
Trial Attorney, Enron Task Force

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al.	§	
	§	
Plaintiffs,	§	No. H-01-CV-3624
	§	
vs.	§	(Consolidated Action)
	§	
ENRON CORP., et al.	§	
	§	
Defendants.	§	
	§	
PIRELLI ARMSTRONG TIRE CORPORATION RETIREE MEDICAL BENEFITS TRUST, Derivatively On Behalf of ENRON CORPORATION, et al.,	§	No. H-01-CV-3645
Plaintiffs,	§	(Consolidated Action)
	§	
vs.	§	
	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	
	§	
TITTLE, et al.,	§	
	§	
Plaintiffs,	§	No. H-01-CV-3913
	§	
vs.	§	(Consolidated Action)
	§	
ENRON CORP., et al.	§	
	§	
Defendants.	§	

DEFENDANT ANDREW S. FASTOW'S MOTION TO POSTPONE DISCOVERY DURING PENDENCY OF CRIMINAL PROCEEDINGS

Defendant Andrew S. Fastow seeks a postponement of discovery from him only in order to protect his constitutional rights:



Plaintiffs in the *Tittle consolidated* ERISA cases seek discovery from Fastow regarding his role at Enron and with various partnerships that dealt with Enron. At the same time, the United States Government has instituted a criminal investigation of Fastow concerning the same events. If Fastow responds to the civil discovery, he jeopardizes his Fifth Amendment privilege against self-incrimination by creating the possibility his answers will aid the prosecution of him. If Fastow invokes his Fifth Amendment privilege, he risks severe prejudice in this civil action that could amount to a forfeiture of his due process right to defend this case. Fastow thus faces an impossible choice, a so-called Hobson's choice, where selection of either alternative will damage a constitutional right.

When confronted with a party facing this impossible choice, both this Court and the Fifth Circuit have fashioned a remedy that balances the interests of litigants in pursing their civil damages claim while still protecting the rights of a individual subject to criminal investigation. *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979); *Kmart Corp. v. Aronds et al.*, Civ. No. H-96-1212 (S.D.Tex. Dec. 11, 1996) (Ex. 1). That remedy postpones discovery (and, if necessary, trial) until after conclusion of all criminal proceedings. Fastow asks for precisely that remedy.

1. PROCEDURAL BACKGROUND

The collapse of Enron Corporation ("Enron") has given rise to raft of civil lawsuits and a federal criminal investigation. The civil and criminal proceedings cover the same subject matter, thus creating creating an irreconcilable conflict between Fastow's Fifth Amendment privilege and his defense of the civil case.

1.1 The Civil Cases

Many of Plaintiffs' allegations in these consolidated civil actions relate to partnerships connected to Fastow and other dealings regarding Enron. *See, e.g.*, *Newby* First Amended Complaint (*Newby*), ¶¶ 23-29; *Tittle* First Amended Complaint (*Tittle*), ¶¶301-349. Even though Plaintiffs brought these cases under a wide spectrum of legal theories, including securities fraud, RICO, and conspiracy, the core factual allegations, at least as to Fastow, do not vary from case to case regardless of the legal theory. All of the plaintiffs allege that Fastow, Enron officials, Arthur Andersen, and other defendants failed to make proper disclosure regarding certain partnerships connected to Fastow and that they used those partnerships to facilitate the issuance of misleading financial results for Enron. *See, e.g.*, *id.* They assert Fastow and others used various partnerships, including LJM-Cayman, LJM-2, Raptor, and Southampton as part of a fraudulent scheme to deceive Plaintiffs and to enrich themselves. The complaints in the consolidated civil cases quote liberally from press accounts regarding Enron, most of which have not expanded their coverage beyond these partnerships.

1.2 The Criminal Investigation(s)

Since January, a special government task force has been investigating possible criminal activity in connection with the Enron collapse. Ex. 2.[1] Shortly after announcement of the task force, "Experts in securities law said the findings in the 218-page [Enron Special Committee] report suggest that former Enron chief financial officer Andrew Fastow . . . is most vulnerable to possible criminal charges." Ex. 3.[2] Recent reports state that "[p]rosecutors have opened a new phase in their investigation of the

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[1] *U.S. Opens Criminal Inquiry Into Enron*, Houston Chronicle, January 10, 2002, at A01.
[2] *Ex-Chairman Of Enron Cancels Hill Testimony*, The Washington Post, February 4, 2002, at A01.

collapse of Enron Corporation . . . to focus on executives of Enron and their activities . . . ." Ex. 4;[3] *see* Ex. 5.[4] Moreover, "prosecutors in Houston [have] convened a special grand jury, charged solely with investigating possible crimes relating to Enron's collapse, and new subpoenas have already been issued." *Id.* Fastow has become one of the primary targets of that investigation. *Id.*

The criminal investigation focuses on the same underlying facts as the consolidated civil actions -- the partnerships with alleged connections to Fastow:

> The government is devoting the closest attention to specific transactions involving a series of partnerships controlled by the company's former chief financial officer, Andrew S. Fastow. In particular, the focus is on deals involving a quartet of partnerships known as the Raptors, as well as another partnership known as Southampton Place, which a number of Enron insiders used to enrich themselves.

Id. The very day of this filing, *The New York Times* featured a front-page story detailing the government's investigation of insiders at Enron. The story, which included a picture of Fastow, said:

> The government is focusing on a series of individual transactions involving partnerships controlled by the company's former chief financial officer, Andrew S. Fastow. . . .
>
> . . .
>
> . . . Investigators are now studying those deals to see if they were part of a massive securities fraud scheme designed to misrepresent the company's true performance.

Ex. 6.[5]

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[3] *Special Grand Jury Zeroes In On Enron Executives*, The New York Times, April 1, 2002, at B01.
[4] *Panel Sets Its Sights On Raptor Ventures*, Houston Chronicle, April 2, 2002, at B01.
[5] *U.S. Inquiry Tracks Insiders At Enron*, The New York Times, April 15, 2002, at A01.

Due to the crossover between the criminal and civil cases, Fastow cannot respond to discovery in the consolidated civil actions without providing a steady stream of information to the government for use in its criminal investigation. To avoid providing direct assistance to the criminal investigation, Fastow must invoke his Fifth Amendment privilege in response to civil discovery. However, even if Fastow were to exercise his Fifth Amendment privilege in response to discovery, his invocation of that privilege on a question-by-question basis will provide clues for the government to use in its investigation and prosecution of him, and he would face the possibility of a negative inference being drawn in the civil case from that invocation of the Fifth Amendment.

2. ARGUMENT & AUTHORITIES

2.1 The interests of justice require a postponement of discovery from Fastow until resolution of all criminal proceedings.

2.1.1 Fifth Circuit law requires a postponement of discovery to protect the constitutional rights of litigants subject to criminal proceedings.

In *Kmart*, this Court wrote: "Courts have the inherent authority to stay civil proceedings during the pendency of parallel criminal prosecutions when required by the interests of justice." Ex. 1, at 4. Since 1979, the Fifth Circuit has held that a district court should abate discovery in a civil action when proceeding with that discovery would force a litigant to choose between responding to the request and exercising the Fifth Amendment privilege. *Wehling*, 608 F.2d at 1087-88; *see Brumfield v. Shelton*, 727 F.Supp. 282, 284 (E.D. La. 1989).

An individual party to a civil action has, "in addition to his Fifth Amendment right to silence, a due process right to a judicial determination of his civil action." *Id.* "The [Supreme] Court has emphasized that a party claiming the Fifth Amendment

privilege should suffer no penalty for his silence . . . ." *Id.* (citing *Spevack v. Klein*, 385 U.S. 511, 515 (1967)). A district court may not follow any procedure that "require[s] a party to surrender one constitutional right in order to assert another." *Id.* Forcing a litigant to invoke the Fifth Amendment in the course of civil litigation amounts to a forfeiture of the due process right to a judicial determination of the civil action. *Id.*; *see SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980); *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1207 (Fed. Cir. 1987); *Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc.*, 886 F.Supp. 1134, 1138-39 (S.D.N.Y. 1995); *Volmar Distrib., Inc. v. New York Post Co.*, 152 F.R.D. 36, 40-42 (S.D.N.Y. 1993).

On the basis of *Wehling*, this Court decided to stay civil proceedings as to all defendants in the *Kmart* action, where there were some civil defendants "facing criminal indictments and many of the others involved in the alleged scheme to defraud Kmart face[d] a real risk of self-incrimination." Ex. 1, at 6. In *Wehling* itself, the Fifth Circuit held that the district court should have postponed the civil action for *three years*, rather than placing one of the parties in the position of having to invoke the Fifth Amendment in response to discovery. *See* 608 F.2d at 1088.

In both the *Plumbers & Pipefitters* and *Volmar* actions, the plaintiffs had asserted civil claims under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §1961 et seq. ("RICO") against various defendants: the very same types of claims the *Tittle* plaintiffs have asserted against Fastow and in support of which they seek discovery in this case. *Compare* 886 F.Supp. at 1138; 152 F.R.D. at 38 *with Tittle*, ¶¶ 784-806. The factual identity between the criminal and civil actions led to stays of the civil case in

Pipefitters & Plumbers and *Volmar*. "The inconvenience and delay to plaintiffs that will unfortunately be caused by a stay are outweighed by the defendants' significant Fifth Amendment concerns . . . ." *Plumbers & Pipefitters*, 886 F.Supp. at 1140.

2.1.2 The pending criminal investigation regarding Fastow requires a stay of any discovery sought from him in the civil action.

"The first question to be resolved is the extent to which the issues in the criminal case overlap with the those present in the civil case, since self-incrimination is more likely if there is a significant overlap." *See Plumbers & Pipefitters*, 886 F.Supp. at 139. There cannot be more overlap between the criminal prosecution and the civil case than exists here. Prosecutors have targeted Fastow in a criminal investigation involving Enron that focuses on the LJM-Cayman, LJM-2, Raptor, and Southampton partnerships, among other matters. Ex. 4. Thus, the government's criminal investigation, Plaintiffs in this case, and the Enron Special Committee investigating Fastow's dealings with the company and those partnerships have made allegations of improper conduct against Fastow. In what is now commonly referred to as the "Powers Report" the Enron Special Committee took particular aim at Fastow and the various partnerships. Ex. 7.[6] Fastow's dealings with Enron and the partnerships also form the basis for allegations made against him in the consolidated civil cases.

The nexus between the civil allegations and criminal investigation in this case satisfies the requirements for postponement of discovery. Just as this Court did in *Kmart*, the Fifth Circuit found the factual nexus between civil and criminal proceedings sufficient when where both sets of proceedings involved the same underlying transactions, which, in *Wehling*, pertained to schools that allegedly defrauded their

[6] *Top Executives Blamed In Enron's Fall*, The Washington Post, February 3, 2002, at A01.

students and the federal government. *See* 608 F.2d at 1086. Similarly, although the government has not yet filed any charges, the criminal investigation(s) of Fastow "involve a number of the same transactions and are essentially identical to the civil actions filed in this Court." Ex. 1, *Kmart*, at 5.[7] In the absence of a discovery postponement, Fastow would face the Hobson's choice described earlier: sacrificing his Fifth Amendment privilege or invoking that privilege and risking severe prejudice in the defense of this civil action.

The balancing of interests in this case favors a postponement of discovery as to Fastow. The interest Plaintiffs assert is the right to a speedy resolution of their case and discovery from all defendants during the prosecution of the case. Preventing plaintiffs from taking discovery of Fastow during the pendency of a criminal investigation would not so prejudice them so as to warrant eviscerating Fastow's constitutional rights. Mere "inconvenience and delay to plaintiffs" does not provide a sufficient basis to make the showing of undue burden required for denial of a stay. *See Volmar*, 152 F.R.D. at 40. "[U]nder settled authority the Fifth Amendment is the more important consideration." *Id.*

In this case, a postponement of discovery may cause some delay in Plaintiffs' prosecution of claims against Fastow, but it would not otherwise prejudice their claims. Fastow actually seeks less relief in this case than what this Court granted in *Kmart*. There, the Court stayed the civil actions altogether. Ex. 1, at 6. Here, Plaintiffs in the consolidated cases may still proceed against other defendants and obtain discovery from

[7] The absence of an indictment or formal charges has no bearing on Fastow's right to a stay, so long as he "reasonably apprehends a risk of self-incrimination," "even if the risk of prosecution is remote." *Wehling*, 608 F.2d at 1087 n.5. In *Kmart*, this Court ordered a stay to protect the rights of all defendants facing the possibility of self-incrimination, not just those who had already been charged. Ex. 1, *Kmart*, at 6. The individuals the Fifth Circuit found to be entitled to a stay in *Wehling* also had not yet been charged. *See* 608 F.2d at 1086.

them in this action regardless of any postponement as to Fastow. Fastow does not, at this time, seek a stay of the entire civil action during the pendency of the criminal investigation. Rather, he seeks only a postponement of discovery that Plaintiffs might seek to take from him.[8] Plaintiffs may still proceed with discovery from the many other individual defendants they have named in this case, as well as the numerous entity defendants. Given the likely volume of products of discovery, temporarily postponing Plaintiffs' ability to pursue discovery from a single individual defendant will impose little inconvenience or delay upon Plaintiffs. Thus, the balance of interests favors a postponement of discovery from Fastow.

2.2 A postponement will avoid improper sharing of discovery between the criminal investigations and civil lawsuits.

"Parallel proceedings may result in the abuse of discovery." *Afro-Lecon*, 820 F.2d at 1203. The broad scope of civil discovery, as compared to the narrow scope of criminal discovery, may present the prosecution with "an irresistible temptation to use that discovery to one's advantage in the criminal case." *Id.* "Given the much more restrictive discovery provisions available in criminal cases as opposed to those in civil actions, the Court must be particularly sensitive of demands imposed on a defendant faced with parallel criminal and civil actions." Ex. 1, *Kmart*, at 4.

The complexity of issues raised by the Enron collapse will only add to the temptation for abuse of civil discovery. The multifaceted nature of events apparently led prosecutors to abandon the search for an "overarching criminal theory to explain Enron's collapse last fall." Ex. 4. Rather, the "strategy is to seek out small, well-defined parts of

[8] In the event it appears criminal proceedings will not be resolved prior to the anticipated December 1, 2003 trial date in this action, Fastow will apply to the court for a stay of the trial against him in this case pursuant to the authority of *Wehling*.

the case." *Id.* Prosecutors could use civil discovery to choose the "well-defined portions of the case" in which they wish to bring charges. Such actions would undermine the fundamental separateness of the criminal and civil proceedings, and amount to a *de facto* unconstitutional expansion of discovery in the criminal proceedings. *See Afro-Lecon*, 820 F.2d at 1203.

Civil discovery provides prosecutors with an unfair advantage. Sitting on the sidelines, watching the prospective defendants' testify to protect themselves, prosecutors can endlessly refine their attack, indicting, superseding indictments, and waiting for the best evidence before proceeding. This Court can avoid that inevitable yet improper sharing of criminal and civil discovery only by ordering a postponement of discovery sought from Defendant Fastow.

3. CONCLUSION

For all of the foregoing reasons, Fastow respectfully requests that this Court grant his Motion to Postpone Discovery During Pendency of Criminal Proceedings.

Respectfully submitted,

KEKER & VAN NEST, LLP

By: _____

John Keker
710 Sansome Street
San Francisco, California 94111
Telephone (415) 391-5400
Facsimile (415) 397-7188

ATTORNEY-IN-CHARGE FOR DEFENDANT ANDREW FASTOW

OF COUNSEL:

SMYSER KAPLAN & VESELKA, L.L.P.

Craig Smyser
State Bar No. 18777575
Asim Bhansali
State Bar No. 90001290
700 Louisiana, Suite 2300
Houston, Texas 77002
(713) 221-2300
(713) 221-2320 - Facsimile

CERTIFICATE OF SERVICE

This is to certify that on **April 15, 2002** a true and correct copy of the above and foregoing instrument was served on counsel listed below by facsimile transmission or certified mail, return receipt requested, in accordance with the Order(s) of this Court.

SEE ATTACHED SERVICE LIST

Craig Smyser

Craig Smyser