APPENDIX

CHART 1
DEFENDANTS' BRADY REQUESTS

Filing/Docket/Date	Brady Requests & Misconduct Allegations	Disposition
Motion by William R. Fuhs for Rule 16 discovery, Dkt. 85, 2/9/04 (joined at Dkt. 86, 89, 90; supplemented at Dkt. 94).	Request for preliminary declaration that SEC and DOJ are one entity for purposes of Rule 16 and *Brady*; Supplement (Dkt. 94) by Brown alleges failures of government to meet Rule 16 discovery obligations (comparison between NBT and EBS discovery).	Denied without prejudice at Dkt. 145 (2/26/04); Supplement denied w/prejudice at Dkt. 145.
Furst Motion for Leave to Issue Subpoenas, Dkt. 88 (and 102), 2/11/04.	Request to get access to all records and documents from accountants and attorneys. Referencing Weissmann statement in response to request that "We are not the SEC. Accordingly, documents that are exclusively in [the SEC's] possession, custody or control are not discoverable from the [ETF]." (p. 5)	Taken under advisement at Dkt. 145; Granted at Dkt 146 (3/1/04); Dkt. 102 denied at Dkt. 146
Furst Motion for Brady Materials, Dkt. 113, 3/1/04.	Enumerating sixteen categories of evidence constituting *Brady* material.	Denied at Dkt. 177 (as to *Brady*) on 4/21/04.
Furst Omnibus Pre-trial Memorandum, Dkt. 117, 3/1/04, Supplemented by Brown, Dkt. 138, 3/1/04.	Detailed request for all *Brady* material, specifically witness statements (302, Grand Jury testimony, SEC statements) all evidence from outside and inside counsel and accountants. "The [ETF] has informed several of these entities and individuals … that they are 'targets' or 'subjects' of the government's investigation. The government's 'chilling' of witnesses helpful to the defense … raises questions about whether the government is impermissibly attempting to 'chill' Defendant's ability to prepare for trial." (pp.31-32)	Denied at Dkt. 177 (as to *Brady*) on 4/21/04.
Bayly Request for *Brady*/*Giglio* Materials, Dkt.125, 3/1/04 (Reply in Support filed as Dkt. 166, 4/5/04)	Comprehensive request for all testimony from exculpatory witnesses (Fastow, Zrike, Hoffman, etc.).Government has not even attempted to meets its *Brady* obligations. Government "has even gone so far as to express a view of its obligations under *Brady* and/or *Giglio* that is inconsistent with the law of this Circuit."	Denied at Dkt. 177 on 4/21/04.
Furst Omnibus Pre-trial Reply Memorandum, Dkt. 158, 4/5/04.	Detailed request for all *Brady* material, specifically Zrike Grand Jury, witness statements (302, Grand Jury testimony, SEC statements) all evidence from outside and inside counsel and accountants. "While the defense may know of a potential exculpatory witness, that does not mean that they are 'available.' Zrike's attorney, for example, has repeatedly notified defense counsel that he will not permit defense counsel to speak with her client and, if called to testify, she will invoke her Fifth Amendment privilege against self incrimination." (p.11) "Invariably, individuals desired as potential witnesses refuse to speak with defense counsel in light of conversations with the [ETF] informing such possible witnesses that they are 'targets' or 'subjects' of the	Denied at Dkt. 177 (as to *Brady*) on 4/21/04.

CHART 1
DEFENDANTS' BRADY REQUESTS

	Government's investigation. The Government's actions have frustrated and, in some cases, thwarted, the defense's ability adequately to prepare for trial." (p.11)"The government cannot have it both ways. It cannot claim that critical elements of this case are 'intent' and 'defendants' understanding' of the [transaction] and, at the same time, 'target' a number of potential defense witnesses, all of whom played a role in evaluating the legal and accounting ramifications of the transaction. Simply put, if the government is not 'chilling' these potential defense witnesses but claims that such witnesses do not wish to incriminate themselves, then the Government should produce interview notes, 302 Reports, SEC and grand jury testimony, and testimony before the Bankruptcy Examiner." (p.12) "Specifically, during the past two months alone, we have ascertained that a number of former [ML] employees, Enron accountants, and in-house counsel directly involved with the [NBT] desire to discuss the transaction with defense counsel and, in fact, have indicated the usefulness, even potentially exculpatory nature, of the information they wish to provide. Upon further inquiry, however, the individuals have decided to forgo speaking with defense counsel, despite the usefulness of the information and desire to assist, because of the aggressive [ETF] tactics of 'targeting' or 'subjecting]' any potential exculpatory witness." (p.12) See also page 15 (Zrike grand jury testimony).	
Bayly's Motion to Dismiss or for an order requiring government to withdraw request to attend witness interviews, Dkt. 180, 4/26/04.	Filed with accompanying declaration of Richard Schaeffer as to government obstruction. (1) References to government's request as "chilling" obligation – pp.4-5 (2) Reference to ML plea agreement ("heavy hammer to wield over ML and its employees" – p.2) which, by its plain terms, makes such requests, in actuality, obligations (3) "government has pointedly refused to state that ML will suffer no consequences if it declines the government's request." – p.2 (4) Charging violations of Fifth and Sixth Amendments and attorney work product doctrine.	Unknown – no evidence in Docket that it was ever ruled on.

CHART 1
DEFENDANTS' BRADY REQUESTS

Furst Motion to Reconsider *Brady*/*Giglio* Ruling, Dkt. 182, 4/27/04. (refiled as Dkt. 219) Reply in support, Dkt. 197, 5/5/04 – all under seal (joined at Dkt. 216, 221)	Renew request for exculpatory information. "The Government's attempts to define the defense strategy and, accordingly, limit its *Brady* obligation, have placed numerous obstacles before defense counsel attempting to prepare properly for an impending trial." (p.6) "Defense counsel has also been hampered by the Government's designation of witnesses as 'targets' or 'subjects.' As we argued earlier, this conduct had 'chilled' and continues to 'chill' such witnesses from testifying or even speaking with defense counsel. Moreover, we believe that the government has designated a number of individuals as 'targets' or 'subjects' simply because these individuals disagreed, and continue to disagree, with the Government's theory of the case. Defense counsel, through its own due diligence, has ascertained that numerous individuals have exculpatory information. Such witnesses, however, will not provide this information to defense counsel for fear of retribution by the Government." (p.6)	Granted in part in sealed Order, Dkt. 223, 5/26/04 (Triggered Brady letter of 6/1/04), but then denied at Dkt.228, 6/1/04.
Emergency Motion and Request for Immediate disclosure and/or hearing on government's *Brady* violations as to Fastow & Other Witnesses, Dkt. 236, 6/3/04. *supplemented by Dkt.237 (6/3/04); joined by all at Dkt.238, 244, 245 (6/3/04)	Request based on 6/2/04 revelatory disclosure of material from edited Fastow 302. "Obviously, the concern at this stage is that the government has not merely 'missed' or 'omitted' *Brady* material concerning Mr. Fastow [which is obstruction of justice]. Indeed, the conduct demonstrated by this belated 'compliance' by the government leads to the inescapable conclusion that similar exculpatory material has not been provided for others as well. How can the defendant-or this Court- take comfort that brady obligations have been fulfilled where the government has so blatantly failed, and chosen to fail, to comply with a player so central to the case as Mr. Fastow." (p.3) "*Brady* is, after all, designed to assist defendants in maintaining their innocence and in preparing to defend against allegations of wrongdoing. In this case, in its conduct as to Rule 16, Jencks, Giglio, and, above all, Brady, the government has twisted its discovery obligations almost beyond recognition and, by doing so, hindered the defendants' right to prepare a defense and to due process." (p.4).	Dkt. 283 (6/25/04) does not rule but states "As previously stated, the Court expects the Govt to furnish Brady material to counsel for the defts in accordance with the law." Dkt. 290, 7/14/04 granting and denying in part. States only that The Court has stated its expectation that the gov't will comply with Brady & Giglio. By 7/30/04 the gov't should provide to the defendants summaries of the exculpatory information that lead to the gov't identifying Kathy Zrike & other witnesses as having exculpatory testimony.
Bayly Motion to Compel Disclosure	Request for all Zrike/*Brady* material.	Denied, Dkt. 290

CHART 1
DEFENDANTS' BRADY REQUESTS

of Zrike, 237, 6/3/04.		
Furst Motion to Adopt and Join Bayly Motion to Compel Disclosure of Fastow materials, Dkt. 244, 6/3/04 – formerly filed as Dkt. 197	Request to Compel Production of all *Brady* material as to Fastow and/or preclude "handshake deal." "Finally, and perhaps most significantly, the latest revelation by the Government related primarily to a single witness, Andrew Fastow, who naturally does not appear on the witness list. Questions remain. What else is out there? What other exculpatory information does the government continue to hold back under the arbitrary designation that it is '*Jencks* or *Giglio*-not *Brady*?' How much information does it intend to keep concealed simply by not calling a witness altogether? How much information do they hope is not available to the jury because it is provided so late [or not at all] that it cannot be incorporated into defensive theories? We fear that the government in this case is perilously close to traveling the path of contrivance and avoidance of it's constitutional obligations pursuant to *Brady* and its progeny so well document in this very courthouse and outlined in *United States v. Rammning*, 915 F.Supp. 854 (S.D.Tex. 1996). (p.3)	Denied, Dkt. 290
Furst's Motion (276) & Amended Motion (282) to Dismiss or to Bar testimony of Glisan and Toone. 6/29/04.	Improper use of Grand Jury to gather evidence.	Denied at Dkt 392, 9/2/04.
MOTION by Daniel Bayly for Disclosure of Grand Jury colloquy and instructions, Dkt. 302, 7/20/04, joined at Dkt.321 (reply at 336, 8/10/04)	Improper use or misconduct before Grand Jury.	Denied at Dkt 397, 9/13/04.
Bayly Request for *Brady*/*Giglio* Materials, Dkt. 305 (refiling of Dkt.125, 3/1/04).	Comprehensive request for all testimony from exculpatory witnesses (Fastow, Zrike, Hoffman, etc.). Government has not even attempted to meets its *Brady* obligations. Government "has even gone so far as to express a view of its obligations under *Brady* and/or *Giglio* that is inconsistent with the law of this Circuit."	Denied at Dkt. 397 on 9/13/04.
Furst Motion in Limine to Introduce Prior Testimony of Unavailable Witness, Dkt. 348,	Request to admit various prior sworn exculpatory statements (withheld) of unavailable witnesses. "These *Brady* witnesses … are unavailable to testify as defense witnesses because the [ETF] has also deemed them 'unindicted co-conspirators,' and the *Brady* witnesses will likely assert their Fifth	Denied at Dkt. 397, 9/13/04. Denied again at trial. Tr. 4863-66

CHART 1
DEFENDANTS' BRADY REQUESTS

8/13/04 (probably Dkt. 347 also)	Amendment privileges if called to testify at trial." (1) The ETF simultaneously alerted the defense to the existence of witness who possessed arguably exculpatory testimony at the same time they designated those same Brady witnesses as "unindicted co-conspirators."	
Bayly's Motion for Disclosure of Prior Testimony of Kathy Zrike, Dkt. 494, 10/8/04.	*See* Dkt. 230.	No docket ruling. See Dkt. 290.
Furst's Motion to Admit prior statements of witnesses under Rule 806, Dkt. 528, 10/12/04.	Request to admit various prior sworn exculpatory statements (withheld) of unavailable witnesses.	Denied at trial. Tr. 4863-66
Bayly's Notice of prosecutorial duty to correct demonstrably false testimony and request for a hearing, Dkt. 541, 10/14/04.	Motion concerning failure of government to correct Trinkle's misrepresentation of the date of the so-called "Trinkle call" which the government knew was wrong from discovery materials in its possession and failed to disclose until after Trinkle had testified and returned to London. "Notwithstanding their knowledge of this fact, the government has refused to correct the false testimony of Ms. Trinkle despite repeated requests by counsel for Mr. Bayly." Dkt. 541, at 1.	No docket ruling.
ON APPEAL TO FIFTH CIRCUIT	Multiple Claims of Brady Error by all Defendants, mostly as to Andrew Fastow.	No *Brady* Relief – issues not reached.
ON REMAND		Third Superseding Indictment Filed, Dkt. 937, April 5, 2007.
Status Conference Hearing, Dkt. 925, February 16, 2007.	Request for production of exculpatory materials from Fastow generated in the discovery in the *Newby* civil litigation.	No docket ruling. No production of any materials from Government.

CHART 1
DEFENDANTS' BRADY REQUESTS

Status Conference Hearing, Dkt. 939, April 4, 2007.	Defendants concerned that there were not full disclosures made in the first litigation, there are "significant concerns that full discovery had not been given either in terms of Brady or possible other relevant material." "We need all of Fastow's material. We never got Fastow's 302's in the first case. I understand that there are multiple volumes of Fastow's 302's." Dkt. 939, at 21. We repeatedly asked for Brady material from Mr. Fastow, particularly in the first trial. And that was never fully produced. We understand from Fastow's testimony in the Lay/Skilling trial, part of which I have seen, that there were multiple volumes of Fastow's 302's. And we don't know how many of those pertained to the barge trial because we still haven't been given those." *Id*. at 24. "And we don't know the full extent of all Fastow's possibly Brady material because it's never been provided." *Id*. Request for production of exculpatory materials from Fastow specifically generated in the discovery in the *Newby* civil litigation. (AUSA Spencer's Response: "I understand that all of the Enron documents and all of the Merrill Lynch documents were produced as part of the first litigation. And while I will go back and see … what new documents have been produced in that third category of unknowns, I, again, think that it's reasonable to say that it's going to be a nominal amount of documents." *Id*. at 22.)	**No docket ruling. No production of any materials from Government**. AUSA Spencer response: (1) Well, I'll commit to the Court that I personally will go back over the discovery that was made, as well as any documents the Government has received in the interim from the time the discovery was produced in the first trial until today; and we will make subsequent supplemental production, Dkt. 939, at 15; (2) Well, that's obviously going to require quite a bit of work on my part to fulfill the Government's obligation. It's my understanding that Newby is an extremely broad, wide ranging petition, *Id*.; (3) "my agents inform me that we believe that we have produced most of the documents," *Id*. at 16; (4) "As I said, your Honor, I think the discovery -- additional discovery is going to be a nominal amount." *Id*. at 20.

CHART 1
DEFENDANTS' BRADY REQUESTS

Brown's Motion to Compel Production of Documents and *Brady* Material, Dkt. 948, 8/15/07.	Requests for production of exculpatory materials, including, for example, (1) Fastow raw notes and any other record evidence (existence of which was clearly evidenced by interim proceedings in *Newby* and *Skilling*); (2) evidentiary materials from Merrill's inside and outside counsel and Enron's inside and outside counsel; (3) agreements, understandings made by or between the ETF and Glisan; (4) evidence from individuals who participated in and regarding the Fastow/Bayly Phone call; and (5) recorded evidence, in any form, supporting Defendants' theory that Fastow and Enron only agreed to use best efforts to re-market Merrill's interest in the Barges.	No docket ruling. No production of any materials from Government.
Brown's Motion for Order Granting Motion to Compel Production of Documents and *Brady* Material, Dkt. 974, 9/18/07.	Renewing requests for production of exculpatory materials, including, for example, (1) Fastow raw notes and any other record evidence; (2) evidentiary materials from Merrill's inside and outside counsel and Enron's inside and outside counsel; (3) greements, understandings made by or between the ETF and Glisan; (4) evidence from individuals who participated in and regarding the Fastow/Bayly Phone call; and (5) recorded evidence, in any form, supporting Defendants' theory that Fastow and Enron only agreed to use best efforts to re-market Merrill's interest in the Barges.	No docket ruling. Government produces two "composite" 302s of Fastow on 9/28/07.
Bayly and Furst's Motion to Compel the Production of Specific Brady Material, Dkt. 979, 9/28/07	Request for exculpatory information from the following individuals (and noting that the prior "summaries" from Barge 1 are insufficient): Kelly Boots, Kathy Zrike, Mark McAndrews, Kevin Cox, Paul Wood, Vince DiMassimo, Jeff McMahon, Andrew Fastow, Schuyler Tilney, Gary Dolan, Alan Hoffman, Tina Trinkle, Brad Bynum, Bowen Diehl, and Ace Roman.	No docket ruling. No production of any materials from Government.
Brown's Reply in Support of Motion to Compel Production of Documents and *Brady* Material, Dkt. 993, 10/10/07.	Renewing requests for production of exculpatory materials, including, for example, (1) Fastow raw notes and any other record evidence, especially in light of the redacted, composite 302s just produced (after 5 years) by government; (2) evidentiary materials from Merrill's inside and outside counsel and Enron's inside and outside counsel; (3) agreements, understandings made by or between the ETF and Glisan; (4) evidence from individuals who participated in and regarding the Fastow/Bayly Phone call; and (5) recorded evidence, in any form, supporting Defendants' theory that Fastow and Enron only agreed to use best efforts to re-market Merrill's interest in the Barges.	No docket ruling. No production of any materials from Government.

CHART 1
DEFENDANTS' BRADY REQUESTS

Reply in Support of Bayly and Furst's Motion to Compel the Production of Specific Brady Material, Dkt. 1003, 10/26//07	Renewing request for exculpatory information from the following individuals (and noting that the prior "summaries" from Barge 1 are insufficient): Kelly Boots, Kathy Zrike, Mark McAndrews, Kevin Cox, Paul Wood, Vince DiMassimo, Jeff McMahon, Andrew Fastow, Schuyler Tilney, Gary Dolan, Alan Hoffman, Tina Trinkle, Brad Bynum, Bowen Diehl, and Ace Roman.	No docket ruling. No production of any materials from Government.
Pre-Trial Conference Motion Hearing, Dkt. 1010, 11/16/07.	"Judge, we really can't work [Brady] out. I don't know if you want to hear argument right now, but, with all respect, we tried to work it out with Mr. Spencer. He keeps saying, "I am going to comply with *Brady*. … [W]e are asking the Court to do -- We need your help on this one." Dkt. 1010, at 78. Specific requests, as enumerated in Motions to Compel, for evidence regarding Fastow, Zrike ("Ms. Zrike's grand jury testimony, Ms. Zrike's SEC testimony and on and on – it's all listed there -- these are things we do not have. I believe I just demonstrated to you they have to be *Brady*. They are *Brady*. We're not speculating. And, yet, Mr. Spencer steps up and says, 'We'll comply with *Brady*. But Zrike's grand jury and SEC? Huh-uh. You can't have that at all.'" *Id*. at 83. "Mr. Spencer's view of *Brady* to date discloses nothing other than the fact he cannot define what it is and it includes exculpatory and impeaching information. The Supreme Court in *Strickler vs. Greene* held that Mr. Spencer has a duty to learn of and to disclose all exculpatory information or impeaching information. On April 4th Mr. Spencer committed to this court that he would personally review all the documents that the Government had reviewed the first time, the additional documents, even though we were talking at that point about the Newby discovery, we were talking at that point about the volumes of Fastow's 302s that are still out there. He has not done that. He said he would produce supplemental discovery by August 1. We got nothing. Only recently we received from him a few meager pages of additional Fastow 302 material that is actually the composite Fastow 302 that Agent Bhatia did after a number of revisions and consultation with other people. It's not even the original 302s. And we still don't have any material underlying Fastow's 302s, which I am sure is equally *Brady* material. The Fifth Circuit just recently over the Government's objection has ordered the Government to produce all the material underlying Fastow's 302s in the Skilling case. We want that material as well to the extent it applies to the	**No docket ruling. No production of any materials from Government**. AUSA Spencer response: "And, Your Honor, I have not reviewed all of the decisions that were made by the Task Force the first time. I have consulted with them. I believe that they acted in good faith the first time." Dkt. 1010, at 83-84. "So, there are different incidents that they're using to say, 'Ah ha! We discovered this piece of information. This is critical to our defense' -- which I don't think it is – 'It must be in the 302 or it must be in the grand jury testimony' -- which it's not. And it's frustrating for me." *Id*. at 85.

CHART 1
DEFENDANTS' BRADY REQUESTS

	Nigerian Barge case, Merrill Lynch and any LJM2 transactions. We have no doubt that anything Mr. Fastow said in that regard that the Government has any sort of recording or knowledge of will constitute exculpatory information and/or impeaching information as to these defendants." *Id*. at 88.	
Motion for leave to issue Rule 17(c) subpoenas, Dkt. 1013, 12/7/07	Request to obtain access to internal government documents concerning Brown's outstanding conviction, and sentence.	No docket ruling. Government produces exculpatory evidence, withheld for five years in violation of Brady, on December 13, 2007, including Grand Jury testimony and 302s from Merrill inside and outside counsel.
Pre-Trial Conference Motion Hearing, Dkt. 1034, 12/21/07.	Request renewed for all Fastow materials (raw notes, original 302s, Binders, etc.). Possibility of Motion to Dismiss based on outrageous prosecutorial misconduct in light of Brady production of 12/13/07, demonstrating that critically exculpatory materials were withheld for 4+ years and the prosecutor's purposefully misrepresented facts to the jury and the Court as evidenced by that new discovery.	No docket ruling. No production of any materials from Government.
Brown's Supplemental Motion to Compel Production of Documents and *Brady* Material, Dkt. 1029, 1030 1/7/08.	In light of (1) the government's recent, and still incomplete production of *Brady* material, which has clarified the existence of additional, significant exculpatory material; and (2) the discovery of critical exculpatory evidence from an Enron executive, withheld from Defendants in this case in violation of *Brady* and its progeny, and which also demonstrates that additional exculpatory materials are likely being withheld, Defendant Brown files this Supplemental Motion to Compel Production. Specific and renewed request for all previously requested and still undisclosed materials; specifically (1) the complete Andrew Fastow File, including all raw interview notes, 302s, composite 302s, as well as the so -called Fastow Binders, and any material in the possession of the S.E.C., including raw notes from interviews; (2) any material, exculpatory letter(s) or submissions, written by any attorney for a material witness to and/or participant in the Barge transaction to the Enron Task Force or Department of	No docket ruling. No production of any materials from Government.

CHART 1
DEFENDANTS' BRADY REQUESTS

	Justice, the Assistant Attorney General for the Criminal Division and/or her deputy on or around April 25, 2005, and to the SEC, on or around July 28, 2006, providing a first-hand account of the Barge transaction by a significant participant in it, and all attachments/exhibits to those letters and submissions, including e-mails written within Enron, evidencing that there was no buyback agreement or promise to buyback or guarantee a buyout of Merrill's equity (including copies from the files of named ETF members); and (3) in light of still deficient production, renewed and specific requests for additional evidence (clearly in existence) from Kathy Zrike, Kevin Cox, Gary Dolan, and Alan Hoffman.	
Motion to Compel Production of Fastow Binders, Dkt. 1039, 1/1508.	Request for all materials, evidence, raw interview notes, 302s, draft 302s, composite 302s, interview memoranda, and any other communications by, regarding, from, and to Andrew Fastow by the Department of Justice, Enron Task Force, IRS, and SEC (all cooperating agencies in the Task Force investigation)–as the government has been ordered to produce them in *United States v. Skilling*.	No docket ruling. No production of any materials from Government.
Brown's Second Supplemental Motion to Compel Production of Documents and *Brady* Material, Dkt. 1041, 1/16/08.	Specific and renewed request in light of external discovery, for (1) any material, exculpatory letter(s) or submissions, written by any attorney for a material witness to and/or participant in the Barge transaction to the Enron Task Force or Department of Justice, the Assistant Attorney General for the Criminal Division and/or her deputy on or around April 25, 2005, and to the SEC, on or around July 28, 2006, providing a first-hand account of the Barge transaction by a significant participant in it; and (2) all materials, evidence, raw interview notes, 302s, draft 302s, composite 302s, interview memoranda, and any other communications by, regarding, from, and to Andrew Fastow by the Department of Justice, Enron Task Force, IRS, and SEC (all cooperating agencies in the Task Force investigation)–as the government has been ordered to produce them in *United States v. Skilling*.	No docket ruling. No production of any materials from Government.
Brown's Motion to Compel Production of Documents and *Brady* Material *Instanter*, Dkt. 1063, 3/17/08.	Specific and renewed request for (1) Fastow materials; (2) McMahon materials; (3) Zrike, Dolan, and Hoffman materials; and (4) exculpatory evidence from Barry Schnapper.	No docket ruling. No production of any materials from Government.

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

Filing/Docket/Date	Government Representation On Existence of *Brady* Material	Resolution
Original Indictment issued 9/16/03 Dkt. 1		
Phone call of 1/27/04, referenced in Defendants' Brady letter of 2/3/04, at 4.	*Brady* obligation does not extend to the production of actual testimony that includes exculpatory information from a grand jury witness.	No underlying grand jury testimony of witnesses identified as possessing exculpatory information was turned over to Defendants until December 2007.
Government Response to Defendants' Motions for Brady Material. Dkt. 154 3/22/04	"The government has ... far exceeded the discovery requirements of applicable law." Dkt. 154, at 78. The government respectfully submits that the discovery afforded to date has been timely and in excess of that required by law." *Id*. at 79.	**Court denied all *Brady* Motions** at Dkt. 177, 4/21/04.
Government letter naming individuals who "arguably" possess exculpatory information 4/5/04. Ex. P.	"For the record, our position is that you are already aware of the identity, and potentially exculpatory nature, of all these witnesses, but we provide them to you out of an abundance of caution." Ex. Y, at 3. Naming Kelly Boots, Eric Boyt, Gary Carlin, Kevin Cox, Mike DeBellis, Mark Devito, Bowen Diehl, Gary Dolan, Gerald Haugh, James Hughes, Mark McAndrews, Jeff McMahon, Ace Roman, Barry Schnapper, Scott Sefton, Schuyler Tilney, Kira Toone-Mertens, Paul Wood, Joseph Valenti, Kathy Zrike	No underlying grand jury testimony of witnesses, identified as possessing exculpatory information was turned over to Defendants until December 2007. Redacted FBI 302s of Kelly Boots were turned over on eve of trial, as Boots was listed as a government witness.
Government letter with list of "unindicted co-conspirators" in Barge transaction 4/22/04. Ex. V.	Naming: Eduardo Andrade, Eric Boyt, Richard Causey, Kevin Cox, Mike DeBellis, Mark Devito, Gary Dolan, Rodney Faldyn, Andrew Fastow, John Garrett, Steve Hirsch, Alan Hoffman, James Hughes, Ben Glisan. Michael Kopper, Sean Long, Mark McAndrews, Rebecca McDonald, Jeff McMahon, Alan Quaintance, Ace Roman, Barry Schnapper, Cassandra Schultz, Jeffrey Skilling, Keith Sparks, Schuyler Tilney, Paul Wood, Joseph Valenti, Kathy Zrike.	No underlying grand jury testimony of witnesses, identified as possessing exculpatory information was turned over to Defendants until December 2007. Only Fastow evidence turned over prior to

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

		Barge trial was 4-page "summary" of his 1,000+ hours of interviews with government agents.
Transcript 4/15/04, pre-trial conf. Dkt. 175	Friedrich: "This is a situation in which this person, Ms. Zrike, participated with the defendants in the offense itself. That alone would be sufficient to remove the Grand Jury transcript from the rubric of *Brady*." Dkt. 175, at 16. "What is -- the reason that the information is being sought, your Honor, we submit, is for a non Brady purpose; and that is not something that the Court should be sympathetic to." *Id*. at 19. "We've provided a list of names of potentially exculpatory individuals. Our belief is many of these individuals are in the same category as Ms. Zrike. Most of them -- the majority of the people in that -- on that list are current or former employees of Merrill Lynch. Many of them will be designated as unindicted co-conspirators, as well. And, again, the issue is: Does the defense have access to the gist of the information that these people could provide." *Id*. at 20-21. "We see this as the same situation, your Honor, where the defense lawyers already know to a substantial extent what the nature of the exculpatory information is that these witnesses would offer. We provided them a list. We've invited them to go and talk to these witnesses." *Id*. at 21. "But we think that the -- we provided the Court with what we believe that -- is clear authority that providing those names is sufficient for *Brady* purposes." *Id*. at 22. "These names are not unfamiliar to the defense, your Honor. We believe they are very familiar with these witnesses, they are very familiar with what they might say, and they want the information from the Government not for *Brady* purposes, but to be able to prep these people. And that, we think, is a non *Brady* purpose to which the Court should not be sympathetic." *Id*. at 23.	No underlying grand jury testimony of witnesses, identified as possessing exculpatory information was turned over to Defendants until December 2007.
Government Response to Furst's Motion for Reconsideration of Brady Motion 5/704, Dkt. 189	"Furst does nothing to rebut the authority cited by the government establishing that (1) *Brady* is satisfied where the government provides a list of potentially exculpatory witnesses; and (2) information know to the defense is not *Brady*." Dkt. 189, at 2.	**Court denied all *Brady* Motions** at Dkt. 228, 6/1/04.
Transcript 5/27/004 pre-trial conf. Dkt. 234	"I think that in our consolidated response, your Honor, what we tried to do is inform the Court of a procedure which we followed in this Court which complied with	Court ordered *in camera* review of some government

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

	Brady. And that procedure is providing the defense with a list of potentially exculpatory witnesses complies with *Brady*." Dkt. 234, at 23-24.	material – which production to the Court was government selected, and the Court never ordered any of that material turned over to the Defendants. Dkt. 285, at 34-35.
Government "Brady" letter, 6/1/04. Ex. K.	"This letter also provides you Jencks Act material for some witnesses the government expects to call in this case, and with information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *United States v. Agurs*, 427 U.S. 97 (1976) and *United States v. Bagley*, 473 U.S. 667 (1985)." Ex. C, at 2. Highly-redacted summaries of information from Kira Toone-Meertens, Michael Kopper, Ben Glisan, Andy Fastow, and Ramon Rodriguez.	No underlying grand jury testimony of witnesses,identified as possessing exculpatory information was turned over to Defendants until December 2007.
Government Response to Defense Brady Motions 6/3/04 Dkt. 248	"Information regarding Fastow is not only not *Brady*, because of its substance and disclosure ... but also because the defendants [a]re aware of Fastow's identity and his role as a coconspirator." Dkt. 248, at 2. "Ironically, Fastow's mere assertion (that his testimony would incriminate him) would belie the suggestion that his testimony is exculpatory in this case." *Id*. at 3.	No further production of Fastow evidence (even summaries of summaries of interviews) was produced by the government until September 2007.
Transcript 6/25/04 pre-trial conf. Dkt. 285	"We provided a list of names. And the defendants still continue to play this cat and mouse game of not telling the Court who they've talked to, not telling the Court who they've interviewed, not telling the Court what interviews they have gotten pursuant to joint defense agreements, all because, you know, as we said before, this is standing *Brady* on its head. What many of these folks that we have turned over testimony from to the Court are people that the defendants may intend to call. What they desperately fear is that the government has a record from these folks of what they said and for that reason they want to get that testimony. As we've previously argued to the Court, that's not the purpose of *Brady*. There's well established authority that -- which expressly adopts and approves of the procedures that we've gone through in letting them know the names of those people so they can choose to interview, if they wish. What they are doing now is saying, we don't have to do any of that, just give us the stuff, which is plainly against the law." Dkt. 285, at 36-37. "And it complies with *Brady* by making the names of	**Court finds that government has met its *Brady* obligations**. Dkt. 282, at 92-93. July 14, 2004 Court orders government to provide summaries.

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

	witnesses available. That is a process that complies with *Brady*, period." *Id*. at 44.	
Government "Brady" letter, July 30, 2004. Ex. Q.	"The following summary is provided to you in compliance with the Court's Order of July 14th, 2004.... As you know, in April of 2004, the Enron Task Force provided you with the names of certain witnesses who possessed exculpatory and even arguably exculpatory information, many of whom you have already interviewed or had access to their information, and all of whom you can subpoena to testify at tria1. [FN: "*Brady* requires no more."] As the Court noted, this summary may provide you with even more than is required to be disclosed pursuant to Brady. The information that follows is not a substantially verbatim recitation of the witnesses' statements. While the information contained below may be similar to information contained within FBI form 302s, notes, and grand jury transcripts, it is intended only as a summary of information. We note that many of the witness names provided to you in April 2004 were listed out of an abundance of caution. Indeed, some of the witnesses believed there was no agreement by Enron to take out Merrill Lynch ("Merrill") from the Nigerian barge deal (the "NBD") or a set rate of return simply because they were not present for inculpatory conversations. Other witnesses are unindicted conspirators who denied knowledge that could render them guilty. . . . The summary, for instance, does not include the instances in which the witnesses below later recanted exculpatory information or admitted lying to the government about their knowledge of the deal. Finally, we have not set forth all of the information that would impeach any statements below or statements by the witnesses themselves that are inconsistent with the information set forth below." Ex. F, at 1-2.	Newly produced evidence shows: Summaries, now known to be substantially false or incomplete of information possessed by Bradley Bynum, Kevin Cox, Bowen Diehl, Vince DiMassimo, Gary Dolan, Alan Hoffman, Mark McAndrews, Jeff McMahon, Ace Roman, Joseph Valenti, Paul Wood, Kathy Zrike
8/1/04 through 9/07.	Not a single *Brady* production. In the interim, Defendants are convicted, sentenced, and sent to prison. The Fifth Circuit reviews cases on appeal and reverses 12 out of 14 convictions, for fatally flawed indictment. One Defendant is acquitted after spending 8 months in prison.	
Brief of Appellee United States, *U.S. v. Brown*, No. 05-20319 (5th Cir.) 12/12/05.	Brief for United States: "**The prosecution met its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by providing a letter that informed the defendants precisely what Fastow told FBI agents about what he said during the December 23 conference call**. The prosecution was not required to disclose the FBI Form 302 memorializing Fastow's interview with the	Fifth Circuit did not reach any *Brady* issues on appeal.

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

	agents, because the letter already provided the relevant information. In any event, as the letter reflects, nothing in the Form 302 can plausibly be deemed exculpatory under *Brady*, because Fastow's statements only underscore that he provided an oral guarantee that "Enron or an affiliate" would buy Merrill's interest in the barges even if no industry purchaser could be found. Fastow FBI Letter, Furst RE8 at 3-5. Because the defendants have not made a "plausible showing" that the Form 302 contains "material" exculpatory evidence, the district court properly declined to conduct an *in camera* inspection of the form." *Id*. at 58.	
Transcript 4/4/07 pre-trial conf. Dkt. 939	AUSA Spencer "commit[ed] to the Court that [he would] personally [] go back over the discovery that was made, as well as any documents the government has received in the interim from the time the discovery was produced in the first trial until today; and [that the prosecution] will make subsequent supplemental production." Dkt. 939, at 15. Indeed, the government agreed to turn over this production by August 1, 2007, if not earlier. *Id*. at 10, 11, 15-20.	AUSA Spencer makes limited production of highly-redacted Fastow 302s in September 2007. No Court disposition on this or any other Brady matter as of 3/20/08.
Government's Opposition to Brown's Request for Production of Brady Materials 10/1/07 Dkt. 986	"Defendant's requests are moot and beyond the scope of *Brady*, *Giglio*, and Rule 16 of the Federal Rules of Criminal Procedure." Dkt. 986, at 1. Based on the record of production, the **Government asserts that "it has fulfilled its obligations under <u>Brady</u>."** *Id*. at 2. "**The government is not aware of any documents that have been created since the first trial that would constitute Brady materials." *Id*.** The government also asserts that "it does not agree that the Fastow 302[s] constitute[] <u>Brady</u> materials." *Id*. at 7. In another utterly unfathomable claim, the government asserts that "it is curious that none of the Defendants in the first trial . . . used the summary of [Fastow's] statements to impeach other witnesses." *Id*. at 9.	No ruling as of 3/20/08. Defendants tried repeatedly to use the Fastow summary at trial to impeach witnesses. The government vehemently objected. District Court did not allow use of evidence.
Government's Opp. to Bayly and First's Request for Production of Brady Materials 10/12/07 Dkt. 1001	"Based upon this record of production, **the government believes it has fulfilled its obligations under Brady**." Dkt. 1001, at 2. "The Defendants repeatedly speculate that the requested materials contain *Brady*. Using speculative phrases such as 'likely to contain' and 'it is highly unlikely that,' the Defendants presume to know the contents of documents. Of course, the Defendants are not aware of contents, but they are not entitled under the applicable rules and procedures to discover this information, unless it is material information that is either exculpatory or impeaching. 'Mere speculation that a government file may	No ruling as of 3/20/08.

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

	contain *Brady* material is not sufficient to require a remand for in *camera* review, much less reversal for a new trial.' United States v. Morris, 957 F.2d 1391, 1403 (7th Cir.1992)." *Id*. at 3-4. "Finally, Defendants seek discovery of information which is inculpatory, even though such information is not discoverable under *Brady*. For example, the Defendant's request evidence that a number of lawyers believed that there was no oral side deal between Enron and Merrill Lynch. .... **It is undisputed that these lawyers were not fully informed of the terms of the transactions, or even involved in the negotiations**." *Id*. at 6. "The Defendants' requests for materials related to Katherine Zrike are illustrative. The Defendants called Ms. Zrike, a sympathetic colleague of the Defendants, at the first trial, and the Defendants elicited information they believe was exculpatory. Clearly, they were able to obtain this information 'through . . . other means.' Having obtained her testimony, the Defendants are hardpressed to argue that they did not have an opportunity to discover additional, exculpatory testimony, and therefore are entitled to discovery of the Form 302s, grand jury testimony, or other testimony." *Id*. at 7.	Newly disclosed Zrike testimony reveals startling exculpatory information the government withheld. Government still withholding Zrike SEC testimony.
Transcript 11/16/07, pre-trial conf. Dkt. 1010	"And, Your Honor, I have not reviewed the decisions that were made by the Task Force the first time. I have consulted with them. I believe that they acted in good faith the first time. I have reviewed a number of pieces of evidence. They've asked me to review a number of specific pieces of evidence, particularly those documents and testimony that's been taken since the first *Barge* trial has ended, and what I have identified as *Brady* in those or when I just even thought it wasn't *Brady* but it was going to be argued as some sort of extreme theory, I produced those also." Dkt. 1010, at 83-84. "I am happy to submit any piece in-camera. I am happy to review the former Task Force's decisions." Id. at 85. "The Government understands its *Brady* obligations as being fulfilled by disclosing exculpatory information without necessarily disclosing the 302, without necessarily disclosing the grand jury testimony, and the Task Force did that in advance of Barge I. There were no issues that came out of that on appeal. There were no decisions that were made. There were no sanctions that were issued. There was no finding that we didn't submit all the *Brady*. They now believe that we have this Fastow evidence and they keep repeating that. And, suffice it to say, the Government	AUSA Spencer makes limited production of additional 302s and Grand Jury testimony of Merrill employees on December 12, 2007.

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

	takes a very different view." *Id*. at 86-87.	
Transcript 12/21/07, pre-trial conf. Dkt. 1034	AUSA Spencer: "[W]ith regard to the *Brady* materials, there are several points to be made there. First of all, the defense is taking the position this is the first time that any of this [the production of December 2007] has been disclosed, and that's simply not the case. **The Court is aware the government made extensive disclosures about the testimony, and *Brady testimony* prior to the first trial."** Dkt. 1034, at 21. (emphasis added). AUSA Spencer: "I have not [had] a chance since Mr. Hagemann filed the motion to sit down and compare what was disclosed in the summaries to - - -." *Id*. at 22. "THE COURT: Well, then how can I accept what you are saying to me that it was all disclosed and it wasn't a *Brady* violation if you haven't examined the letters yourself in order to make those comparisons? AUSA SPENCER: If the question is whether or not there is a *Brady* violation, that needs to be seriously briefed and considered." *Id*. at 22. "AUSA SPENCER: With regard to the Fastow notes, I don't think those will be – it sounds like we are going to make, come to a resolution on that relatively quickly, and again -- THE COURT: When do you expect that will be resolved? AUSA SPENCER: Well, I have not even seen the order yet on it, Your Honor. Nobody has seen the order. THE COURT: Is it your understanding, though, that the Fifth Circuit has ordered the disclosure of those notes? AUSA SPENCER: I have heard that representation from the defense attorneys this morning. It's the first I heard about it, when I walked in the courtroom today. **** THE COURT: How long would it take you to come up, I No. 1, determine whether you are going to make the same disclosure on Mr. Fastow in this case since the Fifth Circuit now has ordered in the other, in the case that I gather that it has before it on appeal, and how long would it take you to review all those notes and disclose the portions of it that, or at least, I guess, No. 1, reach agreement with the defendants on what portions should be. Mr. Hagemann is wanting something dealing with those LJMs, or whatever they were, in addition to just what had to do with the barge transaction? AUSA SPENCER: I understand the Court implicitly to be saying that you would urge us to conduct ourselves, the government, to the extent the government --	The "Fastow Binders" remain concealed from the Barge Defendants as of 3/20/08. No additional production has been made pursuant to multiple

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

	THE COURT: I am just asking how long will it take to work through all of that, because if this is a precedent that would indicate these defendants ought to have the same kind of information or basic notes of what Mr. Fastow said, since he was pretty critical to this barge transaction. AUSA SPENCER: I guess the answer to my question, is the Court looking at the Fifth Circuit ruling as precedential? To the extent that it is, I would answer the question that we would anticipate producing the notes within the -- assuming the order says what it says, assuming there are no other significant issues, I would be in a position to produce these notes by the end of next week." *Id*. at 25-27	requests, and specifically for additional materials underlying the 302s produced in December 2007. There has been no Court disposition or intervention as to this or any other Brady matter as of 3/20/08.
Government's Response to Defendants' Motions to Compel Production of Fastow Binders and Related Materials 2/19/08. Dkt. 1059	"These Motions should be denied because the Defendants have no right under Federal Rule of Criminal Procedure 16 or *Brady* to review any and all notes of federal law enforcement agents. The Defendant's Motion to compel production based upon *Brady* is not timely, given the absence of a current trial setting." Dkt. 1059, at 1. "[T]he government is not obligated to produce the notes under *Brady* and its progeny." *Id*. at 5. "There has been no finding that these raw notes contain such *Brady* information - not by several different teams of government lawyers, not by any District Court, and not by the Fifth Circuit. But at this time, there is no ground on which to order the government to produce the raw notes." *Id*. at 6.	No additional production has been made pursuant to multiple requests, and specifically for additional materials underlying the 302s produced in December 2007. There has been no Court disposition or intervention as to this or any other Brady matter as of 3/19/08. The government has advised on 3/20/08 that we will receive them next week.

CHART 3
FASTOW'S NOTES DIRECTLY PROVE BROWN'S TESTIMONY TRUE

Defendant James Brown's Grand Jury Testimony From Which The Government Erroneously Procured Convictions For Perjury And Obstruction.	**Andrew Fastow's Newly Discovered Evidence From Raw Notes Concealed By The Enron Task Force For Five Years.**
"Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th? A: It's inconsistent with my understanding of what the transaction was. (Tr. at 80, lines 6-11.) Q: ....Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000? A: In - - no, I don't - - the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though. Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] [sic (it was not an ML document)] to a promise that Merrill would be taken out by a sale to another investor by June of 2000? A: No. (Tr. at 88, lines 13-23)" (Dkt. 311; RE2). **** A: No. *I thought* we had received comfort from Enron that we would be taken out of the transaction within 6 months or we would get that *comfort*. If *assurance* is synonymous with guarantee, then that is not *my understanding.* If *assurance* is interpreted to be more along the lines of strong comfort or use best efforts, that is *my understanding.* (BrownX980, 980B: 76, 77, 81, 82, 88, 91, 92; 19:3238-41).	Fastow: "*W/ Subordinates* 1) Probably used a shorthand word like promise or guarantee 2) *Internally at Enron. AF, JM + BG would tell Enron people this was a guarantee so to light a fire with Int'l people* - so it should be in paperwork. 3) *On phone call, didn't say EN would buy-back* - Rep of 3rd party. Explicit. *Internally said Enron would buy back. Unit less motivated if know of LJM*." Ex. A, at 63. Fastow: "Summary" of transaction was "not consistent" with his understanding because it included the word, "promise." Ex. A, at 63. Fastow: "Phone call did not obligate [Enron] to buy out. Did not intend to bind [Enron]." Ex. A, at 63. Fastow: "Object[ed] to word obligate" in internal Enron e-mail as inconsistent with transaction. Ex. A, at 63. Fastow: "It was [Enron's] obligation to use 'best efforts' to get third party takeout." Ex. A, at 47. Fastow: "Best efforts different from guarantee [because] still obligated to perform. Best efforts would be to find 3rd party to accomplish buyout." Ex. A, at 47.

CHART 4
MCMAHON'S EVIDENCE VERIFIES BROWN'S GRAND JURY TESTIMONY

Defendant James Brown's Grand Jury Testimony From Which The Government Erroneously Procured Convictions For Perjury And Obstruction.	**Jeffrey McMahon's Newly Discovered Evidence From Settlement Memorandum With Securities & Exchange Commission and Letter to Department of Justice.**
"Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th? A: It's inconsistent with my understanding of what the transaction was. (Tr. at 80, lines 6-11.) Q: ....Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000? A: In - - no, I don't - - the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though. Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] [sic (it was not an ML document)] to a promise that Merrill would be taken out by a sale to another investor by June of 2000? A: No. (Tr. at 88, lines 13-23)" (Dkt. 311; RE2). A: I did not understand - - you know, *my understanding* of the transaction was that they were not required to get us out of the transaction, but we made it clear to them that we wanted to be out of it by June 30th. **** A: No. *I thought* we had received comfort from Enron that we would be taken out of the transaction within 6 months or we would get that *comfort*. If *assurance* is synonymous with guarantee, then that is not *my understanding*. If *assurance* is interpreted to be more along the lines of strong comfort or use best efforts, that is *my understanding*. (BrownX980, 980B: 76, 77, 81, 82, 88, 91, 92; Tr. 3238-41) (emphasis added).	"Mr. McMahon did not make any commitment to Merrill Lynch or to any other organization that Enron or any of its affiliated entities would repurchase Merrill Lynch's equity position..." Ex. B, at 6. "None of th[e] language [used on the phone call], by which Mr. Fastow communicated anything with respect to Enron's position regarding the Nigerian barge equity, translated ... as a commitment for Enron or any of its affiliated entities to repurchase Merrill Lynch's interests." *Id*. at 9. "[A]t no time did Mr. McMahon say anything during this call [his original contact with Merrill Lynch on the barge transaction] (or at any other time, for that matter) regarding any alleged commitment by Enron or any of its affiliates to repurchase, or guaranty a rate of return on, the equity interest to be sold to Merrill Lynch in the transaction." Ex. C, at 4. After the phone call, "[t]he transaction was closed and contained the usual contractual provisions that rendered void any prior oral promise between the parties," and Enron had no continuing legal obligation regarding the equity interest sold to Merrill Lynch." Ex. C, at 6. "Mr. McMahon did not make any commitment to Merrill Lynch or to any other entity, at any time, that Enron or any of its affiliated entities would purchase Merrill Lynch's equity position within six months, nor was he part of, directly or indirectly, anyone else making such a commitment." *Id*. at 9, 12. "[A]t no time during the call [with Merrill Lynch] did Mr. Fastow ever suggest that Enron would 'repurchase' the interest from Merrill Lynch or 'guarantee' that Merrill Lynch would not incur risk of loss associated with the [Barge equity] investment." *Id*. at 6.

CHART 5
ZRIKE'S GRAND JURY TESTIMONY VERIFIES BROWN'S

Defendant James Brown's Grand Jury Testimony From Which The Government Erroneously Procured Convictions For Perjury And Obstruction.	**Kathy Zrike's Newly Discovered Grand Jury Testimony and 302 Memoranda Produced by Government in December 2007.**
"Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th? A: It's inconsistent with my understanding of what the transaction was. (Tr. at 80, lines 6-11.) Q: ....Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000? A: In - - no, I don't - - the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though. Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] [sic (it was not an ML document)] to a promise that Merrill would be taken out by a sale to another investor by June of 2000? A: No. (Tr. at 88, lines 13-23)" (Dkt. 311; RE2).	"[O]ur perspective as Merrill Lynch lawyers [was] that [Enron representation as to Merrill's equity interest] . . . was not a guarantee, it was not an absolute." Ex. E, at p. 63. "[Enron] was not committing to do whatever it took. They were committing to take–and the business ended up being a, you know, oral business understanding as, 'Look. We understand you're not only going to hold this and that we have to find another buyer if Marubeni does not come through, does not happen. . . .' *Id*. at 73. "The fact that [Enron and Vinson & Elkins] would not put in writing an obligation to buy it back, to indemnify is, all those things were consistent with the business deal and were not things that I felt were nefarious and were problematic." *Id*. at 75. While Zrike was "sure there were representations that were made that aren't on the purchase agreement, [] whether or not they are representations that we can bring an action against, the answer is no." *Id*. at 82.

CHART 5
ZRIKE'S GRAND JURY TESTIMONY VERIFIES BROWN'S

A: No, but it was our understanding that - - or my understanding that we had told Enron *or that Enron understood* that we didn't want to own this after June 30.	Zrike understood "there was a verbal businessman's agreement that Enron would do what it took to get Merrill out of the barge deal." Ex. D, at 10. She "thought it was Jeff McMahon who made the agreement but she knew it was one of the senior employees at Enron." *Id*. However, "Everyone knew that Merrill had to buy into the barge project as a bridge with no recourse, but that Enron would work to sell the deal and get Merrill out." *Id*. Enron would have no obligation. *Id*. at 8, 10.
A: I did not understand - - you know, my understanding of the transaction was that they were not required to get us out of the transaction, but we made it clear to them that we wanted to be out of it by June 30th. ****	
A: No. I thought we had received comfort from Enron that we would be taken out of the transaction within 6 months or we would get that comfort. If assurance is synonymous with guarantee, then that is not my understanding. If assurance is interpreted to be more along the lines of strong comfort or use best efforts, that is my understanding. (BrownX980, 980B: 76, 77, 81, 82, 88, 91, 92; Tr. 3238-41)	"The focus [of the negotiation] I remember is that they will use their best efforts to find a purchaser to close the transaction with a third party." Ex. E, at 70. "Merrill was putting in real equity with only Enron to remarket its position." Ex. D, at 10. Zrike saw nothing "improper or illegal in the barge deal." If she had told Merrill employees that the deal was illegal, it would have been cancelled. *Id.* at 19.

CHART 6
MCMAHON'S EVIDENCE DIRECTLY CONTRADICTS PROSECUTORS' REPRESENTATIONS

Government Misrepresentations That Jeffrey McMahon Gave Merrill Lynch A Guarantee Which Fastow Later Ratified.	Jeffrey McMahon's Newly Discovered Evidence From Documents Sent to the Government.
John Hemann: "McMahon called Merrill Lynch and he cut a deal …. and what was the deal? …. that was the guarantee that Merrill Lynch got from [] McMahon." Tr. 402-404. **Hemann**: "The purpose of the handshake … was to confirm the deal that had been cut by Mr. McMahon." Tr. 404. *See* Tr. 6527-28 (Friedrich: same). **Kathryn Ruemmler**: "You know that Enron, through its treasurer [McMahon] and chief financial officer [Fastow], made an oral guarantee to these Merrill Lynch defendants, that they would be taken out of the barge deal by June 30th, 2000, at a guaranteed rate of return." Tr. 6144. **Ruemmler**: "And during that conversation [between Glisan and McMahon], Mr. McMahon confirmed to Mr. Glisan that he had, in fact, given an oral guarantee to Merrill Lynch." Tr. 6159. *See* Tr.6157-58 (same). **Ruemmler**: "So the key, . . . was Jeff McMahon. …. Trinkle told you …. and Glisan told you that Jeff McMahon confirmed to him that he gave that exact guarantee." Tr. 6159-60. *See* Tr. 6218-19 (same). **Ruemmler**: "It was [Bayly's] job … to get on the phone with Mr. Fastow … and make sure that Mr. Fastow ratified the oral guarantee that Mr. McMahon had already given to Mr. Furst." Tr. 6168. **Ruemmler**: "Why is the [Fastow/Bayly call] an important thing to do...? ...if the two main guys talk to each other and Mr. Fastow confirms the [McMahon buyback] commitment, Merrill Lynch knows it's a commitment they can take to the bank." Tr. 6216. **Matthew Friedrich**: "[Y]ou know from the email, you know from the Tina Trinkle conversation [that McMahon made a guarantee] … that there was an agreement, there was a promise, and that Mr. Brown lied when he went into the Grand Jury." Tr. 6510-11.	"Mr. McMahon did not make any commitment to Merrill Lynch or to any other organization that Enron or any of its affiliated entities would repurchase Merrill Lynch's equity position..." Ex. B, at 6. "None of th[e] language [used on the phone call], by which Mr. Fastow communicated anything with respect to Enron's position regarding the Nigerian barge equity, translated ... as a commitment for Enron or any of its affiliated entities to repurchase Merrill Lynch's interests." *Id*. at 9. "Mr. McMahon did not make any commitment to Merrill Lynch or to any other entity, at any time, that Enron or any of its affiliated entities would purchase Merrill Lynch's equity position within six months, nor was he part of, directly or indirectly, anyone else making such a commitment." *Id*. at 9, 12. After the phone call, "[t]he transaction was closed and contained the usual contractual provisions that rendered void any prior oral promise between the parties," and Enron had no continuing legal obligation regarding the equity interest sold to Merrill Lynch." Ex. C, at 6. "[A]t no time did Mr. McMahon say anything during this call [his original contact with Merrill Lynch on the barge transaction] (or at any other time, for that matter) regarding any alleged commitment by Enron or any of its affiliates to repurchase, or guaranty a rate of return on, the equity interest to be sold to Merrill Lynch in the transaction." Ex. C, at 4. "[A]t no time during the call [with Merrill Lynch] did Mr. Fastow ever suggest that Enron would 'repurchase' the interest from Merrill Lynch or 'guarantee' that Merrill Lynch would not incur risk of loss associated with the [Barge equity] investment." *Id*. at 6.

CHART 7
ACTUAL CALL PARTICIPANTS VERIFY NO GUARANTEE

Matthew Friedrich: "The people who testified there was a buyback agreement were many, many witnesses. ... The people who told you, among others, that there was an oral side deal and a buyback agreement were Eric Boyt, John Garrett, Ben Glisan, Michael Kopper, Tina Trinkle. And they're all telling you the same thing, that there's a buy-back agreement." (Tr. 6524).

ENRON	STATUS
Jeff McMahon: "at no time did Mr. McMahon say anything during [his original telephone conversation with Merrill Lynch on the barge transaction] (or at any other time, for that matter) regarding any alleged commitment by Enron or any of its affiliates to repurchase, or guaranty a rate of return on, the equity interest to be sold to Merrill Lynch in the transaction"; and "at no time during the [Fastow/Bayly] call did Mr. Fastow ever suggest that Enron would 'repurchase' the interest from Merrill Lynch or 'guarantee' that Merrill Lynch would not incur risk of loss associated with the [Barge equity] investment." Ex. B, at 4-6.	Enron Treasurer, CFO, President: Never indicted
Andrew Fastow: I recall using the phrase 'extraordinary best efforts,' a phrase like 'extraordinarily high level of confidence' with regard to there being a purchaser for Merrill Lynch's interest within 6 months." Ex. L, at 1882. "My recollection is that I did not use the word 'guarantee' in the Dan Bayly phone call." *Id*. at 1518-19. **"**Fastow cannot recall anyone ever asking why Enron was handling the sale of an asset that was owned by Merrill Lynch and later by LJM2. Part of this may have been because the sale from Enron to Merrill Lynch had a marketing agreement concerning the vehicle."Ex. O, at 46. Fastow Notes: "Summary not consistent w/AF's memory b/c not word 'promise.' ... "Phone call did not obligate ENE to buy-out." Ex. A, at 46, 63. "On phone call, didn't say EN would buy-back – Rep. of 3rd party. Explicit. *Id*.	Enron CFO; Indicted on 100+ counts; plead to 2 counts; cooperating with ETF in hundreds of hours of interviews. Govt. still withholding raw notes.
Kelly Boots: Boots was "aware that Merrill Lynch's equity ha[d] to be at risk in order for the transaction to be approved." She "felt that the equity was at risk." Ex. W, at 4. "In [her] mind, after the telephone call, Merrill Lynch was still at risk in the [transaction]." She "did not think that there was an enforceable guarantee giv[en] to Merrill Lynch in the [Barge deal]." Boots "d[id] not think that Fastow used the word guarantee on the telephone call with Merrill Lynch." *Id*.	Enron Employee Never indicted
Dan Boyle: Enron did not give Merrill a "promise" or "guarantee," but merely provided assurances "that Enron was going to stick with this project ... [to] make sure that they continued to develop it so that it could generate cash flows and everybody could be repaid or the project sold." Tr. 4962-63.	Convicted; did not appeal.

CHART 7
ACTUAL CALL PARTICIPANTS VERIFY NO GUARANTEE

MERRILL LYNCH	STATUS
Daniel Bayly: "I considered [Fastow's] statements the equivalent of a best-efforts statement that they were going to facilitate our exit." Ex. U, at 50. "[W]e engage in best-efforts transactions frequently." *Id*. at 67. "Best-efforts transaction after a conversation with a company, that's very different than a firm commitment." *Id*.	Convictions reversed
OTHER NEW EVIDENCE	
Katherine Zrike: "[O]ur perspective as Merrill Lynch lawyers [was] that [Enron representation as to Merrill's equity interest] ...was not a guarantee, it was not an absolute." "[Enron] was not committing to do whatever it took." Ex. E, at 63, 73. "The focus [of the negotiations] I remember is that they will use their best efforts to find a purchaser to close the transaction with a third party." Ex. E, at 70. Zrike stated that "[e]veryone knew that Merrill had to buy into the barge project as a bridge with no recourse, but that Enron would work to sell the deal and get Merrill out." *Id*. Merrill had to be at risk, and Enron would have no obligation. *Id*. at 8, 10, 11.	Merrill Counsel: Never indicted
Gary Dolan: "Dolan's understanding was that ML purchased an interest in the Nigerian Barges with the expectation that Enron would help ML find a buyer for ML's interest in the Nigerian Barges." Ex. F, at 6.	Merrill Counsel: Never Indicted
Alan Hoffman: "Enron did not have an obligation to find a buyer of Merrill Lynch's interest, but Fuhs did state that Enron would try to help Merrill Lynch find a buyer for their interest." Ex. G, at 5.	Merrill Counsel: Never Indicted
Kevin Cox,: "Finally, we [the committee vetting the Barge transaction] concluded ... that the only way for this transaction to meet the client's [Enron's] needs would be if it was an actual sale or a true sale and that in order to have a true sale, Merrill Lynch would have to be at risk and that there wasn't any way that the company [Enron] could do anything to make us whole or – or buy it back or do anything that would take it back into its possession at any point in the future and that for us the exit would be to sell it to a third party." Ex. S, at 30.	Merrill Executive: Never Indicted
Paul Wood: Wood confirmed that the transaction was "an equity-like investment," which did not contain "an Enron Corp. Guarantee." Ex. T, at 39-40.	Merrill Executive: Never Indicted

CHART 8
GOOD FAITH AND RELIANCE ON COUNSEL

GOVERNMENT'S MISREPRESENTATIONS REGARDING LACK OF GOOD FAITH AND RELIANCE ON COUNSEL	CONCEALED EVIDENCE DEMONSTRATING GOOD FAITH AND MEANINGFUL RELIANCE ON COUNSEL
"And I'm going to say this as clearly as I can: There will not be evidence in this case that any lawyer was asked if it was all right for Enron to count this deal as income." Tr. 419 (Hemann). "Let's move on to the so-called 'advice of counsel' defense and Kathy Zrike. Kathy Zrike was called as a defense witness. She was completely devastating to the defense. **** This was a case, not about reliance on counsel; this was a case about defiance of counsel." Tr. 6500 (Friedrich). "They never talked to her about [the buyback agreement]. She never knows about it. But you know that. That's what the deal was. [Zrike] didn't know. She tells you, had she known that, the deal never would have been approved." Tr. 6502. "Mr. Schaeffer said that nothing was hidden from Kathy Zrike, and that's just not true. Things were hidden from her time and time again." Tr. 6503. "The key thing, the key thing in a reliance [on counsel] defense is they have to be in the loop. They have to know what's going on. You have to disclose all the material information to them … The lawyer has to know. They have to make a judgment. They have to render advice. That didn't happen here. The opposite thing happened. They were told you couldn't do it and they did it anyway. And, from that, you can infer bad intent on all their parts." Tr. 6504 (Friedrich). "What else do you know about that call at 8:30 am? Well, you know something pretty important. Kathy Zrike, Bayly's lawyer … she was cut out of the call. She didn't know anything about that call, wasn't asked to be on it." Tr. 6206 (Ruemmler).	Zrike: "**With the discussions we had with my staff, who I believe were reflecting Alan[] [Hoffman's] discussions with the other law firm and Alan's, you know, acquiescence in that position or at least understanding where they were coming from, in that a re-marketing agreement or approach to use best efforts to find another purchaser could be problematic for the accounting, there couldn't be any contractual obligations in that regard.**" Ex. E, at 67. "The fact that they are assisting in re-marketing their business -- they're agreeing to sell and close the deal with Marubeni, to take action to participate to re-market if the Marubeni sale did not go forward and go out and find another buyer. That was all discussed. It was never raised as being a problem." Ex. E, at 72. "**The fact that [Enron and Vinson & Elkins] would not put in writing an obligation to buy it back, to indemnify us, all those things were consistent with the business deal and were not things that I felt were nefarious and were problematic.**" Ex. E, at 75. "ZRIKE made the decision to take the deal to the DMCC." "ZRIKE wanted the more experienced group of MERRILL employees of the DMCC to review it. The APR was not as good of a review for the deal. ZRIKE thought that the DMCC wou1d allow the deal to be fully vetted. The APR process was a slower process and ZRIKE believed that it was more like a rubber stamp. She wanted the deal looked at it in detail." Ex. D, at 8. Zrike said the transaction was lawful. Ex. D, at 19. "ZRIKE did point out risks to the DMCC, DAVIS and BAYLY. There was no contractual obligation to get MERRILL out of the deal." Ex. D, at 8. If Zrike had told Merrill employees that the deal was illegal, it would have been cancelled. Ex. D, at 19. Wood: Zrike was on the Trinkle call and his notes reflect that. Ex. T, at 37-40, 69, 74-76.

CHART 9
INFORMED MERRILL COUNSEL ACTIVELY NEGOTIATED TRANSACTION

THE GOVERNMENT FALSELY REPRESENTED THAT THERE WERE NO NEGOTIATIONS BETWEEN THE PARTIES	CONCEALED EVIDENCE DEMONSTRATING MERRILL COUNSEL ACTIVELY NEGOTIATED DEAL
"There is a suggestion in some of the testimony is that what's going on is sort of a good-faith exchange between two parties as they try to negotiate different legal documents that sort of come back and forth, and sometimes language comes in, sometimes its taken out, that kind of thing. This is not the average business case. This is not a case where people are trying to put documents – put language into documents as some sort of good-faith negotiating process. They know they are taking the language out, because, if it remains in, it will blow the accounting for the deal." Tr. 6493-94 (Friedrich).	**Zrike**: **Merrill Lynch lawyers themselves sought two key provisions** from Enron in the deal documents during their negotiations: "One would be to indemnify us or hold us harmless if there was any sort of liability like a barge explosion or environmental spill, loss of life, . . . or a disaster scenario; and that was the first thing we talked to them about. . . . **The other thing that we marked up and we wanted to add to it was a best efforts clause, what's called a best efforts clause,** that they would use their best efforts to find a purchaser . . . realizing that from our perspective as Merrill Lynch lawyers this was not. . . a guarantee, it was not an absolute, but that at least it would give us an angle, it would give us a legal angle to get them to focus on that obligation if, in fact, we saw them not paying attention to what was the business deal." Ex. E, at 63. (emphasis added).
"It's not like there was some subsequent negotiation to that [meaning after the Trinkle call], where somebody said, 'We can't do this.'" Tr. 6497 (Friedrich).	**Zrike** testified that she, two attorneys on her staff and outside counsel Alan Hoffman tried to negotiate these terms with Enron, but **"we were not successful in negotiating that [in] with Vinson & Elkins."** Ex. E, at 67-69. Both provisions were rejected by counsel for Enron because, as everyone knew, the transaction was a true sale in which Enron unloaded all its risks. *Id*. at 64-69. Indeed, Zrike said, the very basis for Merrill's involvement "was that there was going to be a sale to a third party and that sale would have to be done with Enron's involvement and participation." *Id*. at 71. (emphasis added).
"There's no negotiations over price whatsoever between Enron and Merrill and between Merrill and LJM." Tr. 6486 (Friedrich).	**Hoffman**: "HOFFMAN's prime contacts at ML were FUHS and WILSON. FUHS explained that ML wanted to create a bridge to permanent equity financing for ENRON for the deal. ENRON's in-house counsel and Vinson & Elkin's (E&E) London office was responsible for drafting the loan agreement, and interaction with them occurred via phone calls." Ex. G, at 2. Enron did not have an obligation to find a buyer of Merrill Lynch's interest, but Fuhs did state that Enron would try to help Merrill Lynch find a buyer for their interest. Ex. G, at 5.

CHART 9
INFORMED MERRILL COUNSEL ACTIVELY NEGOTIATED TRANSACTION

	"[Merrill's outside counsel] also filed the incorporation documents for EBARGE, LLC in Delaware. ENRON wanted the entity to be incorporated in the Cayman Islands, but [Merrill's counsel] did not have experience in incorporating in the Caymans and had little time to make an assessment. ENRON later wanted [Merrill's counsel] to reassess moving the business from Delaware to the Caymans, and after the research was performed, [Merrill's outside counsel] okayed the change in location." Ex. G, at 3. **Hoffman** "negotiated the loan agreement between [Merrill Lynch] and Enron with Boyle at Enron." Ex. G, at 6. **Dolan**: "DOLAN did receive handwritten comments from someone from Enron. Enron did not object to the language in the original draft of the engagement letter which stated that 'Enron will buy or find affiliate to buy.' However, DOLAN did object to this language and made the necessary changes." Ex. F, at 6. Zrike specifically told Weissmann that the APR form, on which the ETF so heavily relied, was simply incorrect. Ex. D, at 14; Ex. E, at 108-10. It was a draft that was never used, nothing was decided on it, and it did not accurately reflect the ultimate terms of the transaction–at least not the way the government read it. The Fastow call was on December 23. The Barge deal actually closed in January 2000, and Zrike told the finance department that they need not complete the APR. Ex. D, at 16; Ex E, at 108-10.

CHART 10
THE DRAFT ENGAGEMENT LETTER

GOVERNMENT'S MISREPRESENTATIONS REGARDING DRAFT ENGAGEMENT LETTER	CONCEALED EVIDENCE OF MERRILL COUNSEL PROVING THAT COUNSEL CORRECTED DRAFT ENGAGEMENT LETTER
"Mr. Fuhs – there's no evidence that Mr. Fuhs made any effort to talk to a lawyer or had any reliance on a lawyer about what was going on." Tr. 6539 (Friedrich). "The fact that Fuhs is sending lawyers documents with the bad language deleted out of the engagement letter doesn't prove anything about his intent. . . . 'reliance on advice of counsel' doesn't mean just some random attorney someplace getting a document that has strike-out language. . . . The lawyer has to know what's going on; they have to know all the facts. . . . there's no evidence that Mr. Fuhs made any efforts to talk to a lawyer or had any reliance on a lawyer about what was going on. . . . [Fuhs] gets copies, for example, of the engagement letter that had the offending language included, and that shows you what he knew at the time the deal was." Tr. 6538-39. "The engagement letter is addressed to Mr. McMahon, again, consistent with the evidence that Mr. McMahon is the person who makes the original guarantee. … And Mr. Fuhs says -- who we know has already had a conversation with Mr. Brown … -- told you he has no idea why that language is in the letter and that is totally inconsistent with his understanding of the deal. That's just not credible on its face, ladies and gentlemen." Tr. 6222 (Ruemmler). *See also* Tr. 412, 6143, 6212, 6220-21, 6223, 6230-31, 6266, 6534, 6538. "[Y]ou [the jury] have to disbelieve the documents [referring to engagement letter] that are written at the time when nobody has any motive to make anything up." Tr. 6221 (Ruemmler). The prosecutors relied on this same language (in the draft engagement letter) to shore-up Boyt's third-hand hearsay testimony about believing that Enron had guaranteed Merrill a "buyback." Tr. 2888-89, 6223-24, 6229-30.	"DOLAN was shown a copy of an E-mail from WILSON to DOLAN dated 12/23/1999 (bate stamped ML034707). This E-mail contained a copy of the proposed changes to the engagement letter made by DOLAN. DOLAN acknowledged that the handwriting on the page is his. DOLAN does not remember talking to anyone at Enron about the changes he made to the engagement letter. However, DOLAN did receive handwritten comments from someone from Enron. Enron did not object to the language in the original draft of the engagement letter which stated that "Enron will buy or find affiliate to buy . . ." However, "DOLAN did object to this language and made the necessary changes." Ex. F, at 5. Dolan discussed the engagement letter with Merrill employee Geoff Wilson, who helped draft it. *Id*. at 3-6. **Dolan himself deleted the "buy-back" language from the letter**. *Id*. at 5. House counsel Gary Dolan knew an Enron buy-back was mentioned and appeared in the engagement letter, but he did not allow that to be part of the deal because it could have been viewed as an improper "parking transaction," and that was not the ultimate agreement between the parties. Ex. F, at 3-6. Hoffman had also seen the buy-back language in the engagement letter, discussed it with Dolan, and knew that it was deleted. Ex. G, at 4-5. Hoffman also had the fax from Geoff Wilson at Merrill referring to a take-out in six months. *Id*. at 4. Hoffman said that he probably talked with Fuhs and knew Merrill wanted to be out in six months. *Id*. "Fuhs did tell Hoffman that Enron did not have an obligation to find someone to purchase Merrill Lynch's interest in the Nigerian Barges. However, Fuhs did state that Enron would try to help find a buyer for their interest in the Nigerian Barge." Ex. G, at 5. "All the documents prepared by [Hoffman] were sent to [Merrill Lynch's] attorneys for review." *Id*. at 1 Hoffman said: "It was [my] understanding that there was an unwritten understanding that Enron would help ML find purchaser for their interest in the Nigerian Barge." *Id*.