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

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	
	§	
v.	§	**CR. NO. H-03-363 (Werlein, J.)**
	§	
DANIEL BAYLY,	§	
JAMES A. BROWN, and	§	
ROBERT S. FURST,	§	
Defendants	§	

DEFENDANT JAMES A. BROWN'S MOTION TO DISMISS INDICTMENT FOR EGREGIOUS PROSECUTORIAL MISCONDUCT, *BRADY* VIOLATIONS AND DOUBLE JEOPARDY

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BROWN'S MOTION TO DISMISS INDICTMENT

More than sixty years ago, then Attorney General, later United States Supreme Court Justice, Robert H. Jackson, set the standard and tone for the United States Department of Justice. In his famous speech to the national meeting of United States Attorneys, he declared:

> "The prosecutor has more control of life, liberty and reputation than any other person in America. His discretion is tremendous."
>
> * * *
>
> He has "immense power to strike at citizens, not with mere individual strength, but with all the force of the government itself. . . ."
>
> * * *
>
> The prosecutor "can choose his defendants. Therein is the most dangerous power [ ]: that he will pick the people he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."

Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18, 19 (1940). Citing Justice Jackson, Justice Scalia observed, in the case of a "special prosecutor," extraordinary and particular dangers of abuse inhere:

> In [such cases], it is not a question of discovering the commission of a crime and then looking for the man who committed it, it is a question of picking the man and then searching the law books, of putting investigators to work, to pin some offense on him.
>
> * ** *
>
> It is in this realm–in which the prosecutor selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.

Morrison v. Olson, 487 U.S. 654, 727-32, 108 S.Ct. 2597, 2638-40 (1988) (Scalia, J., dissenting)

It is the abuse of this "immense power" of the "special prosecutor" that we raise in this motion–to protect our clients, our system of justice, the laws we have sworn to uphold, and the integrity of this Court.

I. INTRODUCTION

A. Background and Summary

On December 2, 2001, the global, multi-billion-dollar corporate icon, Enron, declared bankruptcy. Fueled by public outrage, political pressure, and cries for vindication of Enron shareholders in the wake of Enron's collapse,[1] the government created the Enron Task Force–a joint effort of the Department of Justice, SEC and IRS. The Task Force prosecutors first indicted Arthur Andersen, needlessly destroying one of this country's most venerable accounting firms.[2] After 85,000 people lost their jobs,[3] the United States Supreme Court reversed the firm's conviction 9-0,

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[1] *Prosecutors Far From Finished*, USA TODAY, October 3, 2002, at D1; Edward Iwata, *Has The Hunt For Corporate Criminals Gone Too Far?*, USA TODAY, July 21, 2003, at D1; Tom Fowler, *Verdict from Houston Residents Polled: Guilty*, HOUS. CHRON., July 19, 2004, at B1; Press Release, Federal Bureau of Investigation, Assistant Director Press Conference With Attorney General, September 17, 2003, *available at* http://www.fbi.gov/pressrel/pressrel03/enronashley.htm. (last visited March 5, 2008).

[2] Andrew Weissmann, the "driving force" behind the investigation of Merrill Lynch, was assigned to the Enron Task Force before the *Arthur Andersen* case, which he also tried. Mary Flood, *Changing of Guard for Enron Task Force*, HOUS. CHRON., March 2, 2004, at B1. Weissmann became Director of the ETF in March 2004 upon Leslie Caldwell's resignation. *Id*. Weissmann resigned from the ETF in mid-July 2005 to enter private practice with Jenner & Block–in the middle of jury deliberations in the *Broadband* trial, another case brought by the ETF. The Broadband trial ended in acquittals amid allegations of prosecutorial misconduct. Mary Flood, *Task Force Gets New Chief*, HOUS. CHRON., July 19, 2005, at B1. Sean Berkowitz, who was assigned to the ETF in December 2003, became Director when Weissmann stepped down. *Id*. Berkowitz left in early November 2006, to enter private practice with Latham & Watkins. Kristen Hays, *Task Force Prosecutors are Prospering*, HOUS. CHRON., November 2, 2006, at B1. Kathryn Ruemmler was assigned to the Task Force in September 2003, and became Deputy Director when Weissmann left. Carrie Johnson, *Taking Enron to Task*, WASH. POST, January 18, 2006, at D1. Ruemmler left on February 2, 2007 to enter private practice with Latham & Watkins. Carrie Johnson, *Enron Trial Prosecutor Joins Latham*, WASH. POST, February 5, 2007, at D5. John Hemann was assigned to the ETF in September 2003. Mary Flood, *Prosecution Beefs Up Its Team*, HOUS. CHRON., September 26, 2003, at B1. Hemann left on Jan. 26, 2005 to join Leslie Caldwell at Morgan Lewis. *Morgan Lewis Collars Top Prosecutor*, LAW.COM, January 28, 2005, available at http://www.law.com/jsp/article.jsp (last visited, March 5, 2008). Friedrich joined the ETF in time for the Andersen prosecution. Friedrich still works at the DOJ and is now an assistant to the Attorney General, having received several promotions after obtaining these convictions. *Task Force Prosecutors are Prospering*, *supra*.

[3] Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 (2006).

because the jury instructions the ETF proposed and obtained failed to include the requisite criminal intent.[4] "Indeed, it is striking how little culpability the instructions required." *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 706, 125 S.Ct. 2129, 2136 (2005).

The prosecutors on the special Enron Task Force were "operating in an area where so little is law and so much is discretion, [] intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide." *Morrison*, 487 U.S. at 732, 108 S.Ct. at 2640 (Scalia, J., dissenting). Emboldened by their *Andersen* "victory," and untethered from the Justice Department, the same prosecutors who wrongly destroyed Arthur Andersen turned their sights to Merrill Lynch,[5] and, further engaged in "the special and particular dangers of abuse" about which Justice Scalia warned.[6] Here, the Enron Task Force "picked the men," then "went to work to pin something on them." *Morrison*, 487 U.S. at 730.

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[4] *Indicting Corporations Revisited*, supra note 3, at 123. Weissmann's and Friedrich's prosecution tactics were reversed too late to remedy the destruction of the Andersen firm. *See* Charles Lane, *Justices Overturn Andersen Conviction*, WASH. POST, June 1, 2005, at A1("Although a rebuke to the government, the court's decision is little comfort for Andersen and its former employees. The Chicago-based firm has a staff of only 200 left out of the 28,000 people who once worked there."). After reversal by the Supreme Court, the Task Force abandoned its prosecution of Andersen in November 2005. Carrie Johnson, *U.S. Ends Prosecution of Arthur Andersen*, WASH. POST, November 23, 2005, at D1; John Roper, *Government Won't Retry Andersen Case*, HOUS. CHRON., December 21, 2005, at B1.

[5] This decision is itself inexplicable. Numerous other banks conducted far more lucrative, informed, and significant deals with Enron than did Merrill–and with far greater financial ramifications at Enron and greater profits for the other banks. Brown's Motion to Dismiss Indictment, Dkt. 952. Here, Merrill itself made only $775,000. Enron profited $53 million. No one lost money, and none of the Merrill Defendants ever personally profited.

[6] Weissmann, Ruemmler and Friedrich bragged to the press after obtaining these convictions, describing the experience as "priceless." Mary Flood, *All-star Team of Federal Prosecutors Says Merits of Cases Outweighs Hardships*, HOUS. CHRON., December 19, 2004, at B1.

These prosecutors singled out four Merrill executives: Bayly, Brown, Furst and Fuhs, "to send a message to Wall Street."[7] Simultaneously, in the wake of the demise of Arthur Andersen, Weissmann extracted an unconstitutional agreement from Merrill, in lieu of an indictment of the company itself, that denied these Defendants any access to their colleagues as witnesses.[8] These Defendants, not one of whom profited from this transaction, have been prosecuted and harassed now for five-and-a-half years. Each served almost a year in prison, having been denied bail pending appeal of their convictions on an indictment that, as the Fifth Circuit held, was "fatally flawed." *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert denied*, 127 S.Ct. 2249 (2007) (reversing 12 out of 14 counts of conviction). Prosecutors Weissmann, Ruemmler, Hemann, and Berkowitz are now prospering as partners at international law firms. Matthew Friedrich is special counsel to the Attorney General in the United States Department of Justice.[9]

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[7] Tr. 390 (Hemann: "And it is about Enron's Wall Street investment bankers that helped them do it."); Tr. 6142 (Ruemmler: "You have seen first hand how these Wall Street bankers were all too happy to participate in that deception."). *See* Kurt Eichenwald, *2 Banks Settle Accusations They Aided In Enron Fraud*, N.Y. TIMES, July 29, 2003, at B1; Jonathan D. Glater, *Deterrence Strategy. Prosecutors Send a Message. Are Executives Listening?*, N.Y. TIMES, March 14, 2004, at B1; Landon Thomas, *A Bankers "Nightmare" After Enron Deal*, INT'L HERALD TRIB., November 21, 2005, at A1.

[8] *See* Andrew Weissmann, *Heading to Jenner, Not Looking Back at Enron*, 20 CORPORATE CRIME REPORTER 9(10), February 23, 2006, *available at* http://www.corporatecrimereporter.com/weissmann022306.htm (last visited, March 17, 2008) (reporting on Weissmann's arrogant response to a concern about the loss of tens of thousands of jobs in the United States as a result of his indictment of Andersen). "People need to remember that Andersen had been offered a deferred prosecution agreement and rejected it." Weissmann also declared: "What major corporation is now going to gamble that the Justice Department is going to go away and issue a declination? That's one of the reasons you are seeing a dramatic rise in deferred prosecution agreements and non-prosecution agreements." *Id.*

[9] *See Task Force Prosecutors are Prospering*, *supra*, n. 2.

B. Summary of the Facts.

In this relatively modest business transaction, Merrill paid, and Enron received, $7 million for minority shares of stock in a company that owned tangible property–power barges.[10] In late December 1999, Enron Treasurer Jeff McMahon phoned Rob Furst at Merrill to solicit Merrill's equity participation in the barge venture. Furst contacted others at Merrill who initiated review procedures, led by Merrill in-house counsel, Katherine Zrike. A few days later there was a second phone conversation with McMahon and others at Enron, and Dan Bayly and others at Merrill. In that second phone conversation, Enron CFO Andrew Fastow personally assured Bayly that Enron would use its "best efforts" to help find another buyer for the barges. A Japanese company, Marubeni, was expected to purchase them within weeks. After the brief telephone conversation with Fastow, Merrill lawyers proceeded to negotiate and document the transaction with counsel for Enron.

In June 2000, LJM2, a legally separate accounting entity, purchased the barges from Merrill.[11] Within three months of that transaction, LJM2 sold the barges, packaged with six others from Enron,

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[10] This was a $7.8 million after-tax deal for a corporation valued at $400 billion (Tr. 3620, 3712-13, 3716, 3718, 3721, 3769-70). This transaction was not material as a matter of law, which explains why the ETF could not and did not indict it under the Securities Fraud statutes. *See* Brown's Motion To Dismiss Indictment, Dkt. 952.

[11] In December 1999, LJM2 had only recently been formed and capitalized with $400 million after Merrill and many sophisticated investors had done substantial due diligence. Enron owned none of LJM2. LJM2 had separate legal counsel, auditors, and tax accountants. Enron's inside and outside counsel, board of directors, and Arthur Andersen had approved the formation of LJM2–including Fastow's dual roles (Tr.1284, 1286-88, 1522-24, 3713, 3796-3802). At the same time as this transaction, auditors had approved LJM2's purchase of more than $300 million of Enron's assets–with *Enron* booking gains (Tr. 1471-75, 1685-88, 3254, 3753-54, 3800-02; GX806:105). Even Fastow said that LJM2's purchase of Merrill's interest was a third-party buy-out. Supplemental Brief of Appellant Jeffrey Skilling, *United States v. Skilling*, No. 06-20885 (5th Cir.), attached hereto as Exhibit **A**, at 63, Appendix 2, at 4: *see infra* note 29 and accompanying text.

to AES for a total real profit to Enron of $53 million. Merrill made $775,000. Enron correctly reported its total gain of $53 million. The Merrill Defendants did not make "a dime."

The central disputed issue in this case was whether McMahon and Fastow secretly promised that Enron would guarantee Merrill against risk of loss and would repurchase the barges in six months. The entire prosecution was premised on the ETF's contention that Enron had given Merrill a secret, illegal side-deal, guaranteeing to buy back the barges (Third Superseding Indictment, Dkt. 311, at ¶¶ 11-14). According to the Task Force, Merrill's investment was not at risk, which rendered false Enron's 1999 accounting for the transaction as a sale.[12] Furthermore, the ETF contended that Merrill executives made this secret side-deal without informing their lawyers, and were therefore precluded from claiming they relied on their lawyers' advice (Tr. 419, 6143, 6148, 6151, 6206-07, 6214, 6493, 6500, 6502-04, 6506, 6526, 6539).

The Defendants steadfastly maintained that: (1) the only oral agreement Merrill received was a lawful one: Fastow's personal assurance that Enron would use its "best efforts" to re-market the barges to a third party; and, (2) these Merrill executives relied on counsel throughout the process to negotiate and document the transaction lawfully (Tr. 1003, 1010-11, 4101, 4103, 4106, 4108-13, 4115-16, 4118, 4136-38, 4238-39, 4241). As the Task Force conceded at trial, and as the accounting

[12] The only relevant accounting inquiry is whether Enron *retained* risk. Merrill's risk is simply circumstantial evidence that Enron shifted its risks to Merrill. *See* Statement of Financial Accounting Standards No. 57 ¶ 24(f) (March 1982), *available at* http://www.fasb.org/st/; Statement of Financial Accounting Standards No. 125 (June 1996), *available at* http://www.fasb.org/st/; *see also Triton Energy Ltd. Sec. Litig.*, 2001 WL 872019, *4 (E.D. Tex. 2001) ("[W]hether a transaction constitutes a sale depends in part on whether the putative seller relinquished control over the asset and on whether the seller is subject to post-transaction price risk"); *In re Bristol Myers Squibb Sec. Litig.*, 312 F .Supp. 2d 549, 563 (S.D.N.Y. 2004) ("Under GAAP, revenue is recognized when substantially all the risks and rewards of ownership have transferred . . ."); SEC Financial Reporting Release 23, 17 C.F.R. Part 211, 50 F.R. 51671 (1985) (requiring disclosure only when seller makes "material commitment which is in substance a guarantee"). *See also* Reply Brief of Appellant Daniel Bayly at 15-23; Reply Brief of Appellant James Brown at 15-23, *United States v. Brown*, No. 05-20319 (5th Cir. Nov. 15, 2005).

rules make clear, "best efforts" and re-marketing agreements are lawful and would not invalidate Enron's accounting for this transaction (Tr. 4520, 4528).

C. Summary of Egregious Prosecutorial Misconduct.

In their zeal to convict, the ETF prosecutors engaged in illegal and unethical misconduct that foreclosed Defendants from mounting a meaningful defense and violated Defendants' Constitutional rights. They have withheld hundreds of pages of notes of Fastow's statements to the Task Force, which, we just learned on March 14, prove that Fastow only made a personal assurance of "best efforts" to "re-market" the barges and that he deliberately created a false understanding of a "guarantee" within Enron to "light a fire" with his subordinates to sell the barges to a third party. Ex. A at 5-6, 9-10, 34-49, 63, Appendix 2, at 4. Instead of dismissing the indictment, the ETF carefully selected multi-level hearsay from the same deceived Enron employees, to whom the prosecution had offered lenient deals. When they sponsored the testimony of these Enron witnesses in the Barge trial, the ETF already knew, from Fastow himself, that he had *lied* to these Enron subordinates about the nature of the Barge deal and that the understandings of each of these witnesses was false. *Id*. at 48. Nevertheless, determined to ensure convictions, foreclose a defense, and avoid an acquittal, these prosecutors:

- Failed to dismiss this indictment–even when Enron CFO Andrew Fastow, and others, informed the Task Force, long before this trial, that no illegal guarantee had been made.
- Knowingly and deliberately sponsored testimony of witnesses and obtained convictions based on hearsay evidence they knew to be false or perjurious–premised on a deliberately fostered false understanding created by Fastow.
- Failed to turn over material exculpatory evidence despite repeated, relentless, timely, and specific requests from the Defense. (Chart 1, Appendix).

- Wrongly and deliberately asserted that no additional *Brady* material existed, and that the government had "fulfilled its *Brady* obligations." (Chart 2, Appendix).

- Named as unindicted co-conspirators virtually every businessperson who touched this transaction, thereby intimidating and silencing exculpatory witnesses.

- Extorted an unconstitutional agreement, prohibiting any Merrill employee from testifying in any manner that was inconsistent with the ETF's theory of this case, regardless of the truth.

- Insisted that a prosecutor be present at any witness interview and foreclosed the Defendants' ability to interview potential witnesses and present exculpatory evidence at trial.

- Carefully redacted and parsed from the ETF's meager *Brady* productions material words, phrases and admissions of Merrill counsel and others that exculpate these Defendants and demonstrate the truthfulness of their assertions of reliance on counsel.

- Made prejudicial misrepresentations to the court and to the jury in the trial of this case that they knew were directly refuted by evidence they withheld from the Defense.

- Knowingly and willfully sent four men to prison while concealing, in violation of *Brady,* a letter written directly to the Department of Justice and containing extraordinary exculpatory evidence of former Enron Treasurer Jeff McMahon–who was never indicted–that there was no unlawful guarantee.[13]

- Knowingly and willfully withheld from the Defendants and the Fifth Circuit specific evidence that a key Barge witness had lied.

- Have persisted, even through the time of this filing, in withholding additional material exculpatory evidence that Defendants have been requesting for five years. (Chart 1, Appendix).

Each of these acts of misconduct deprived Defendants of their Constitutional rights to Due Process and a Fair Trial. Collectively, they establish a pattern and practice of egregious misconduct–and a

[13] See Jeffrey McMahon letter to the Department of Justice, April 25, 2005, attached hereto as Exhibit **B**; Jeffrey McMahon extensive memorandum to the SEC, July 28, 2006, filed separately Under Seal as Exhibit **C**.

resulting injustice of Constitutional magnitude–for which the only remedy is dismissal of the indictment in its entirety. Double Jeopardy bars retrial.

D. Summary Of Recently Disclosed And Discovered Exculpatory Evidence.

The government has long withheld the Fastow notes that we now know to contain definitive, exculpatory evidence that guts this prosecution. From the Supplemental Brief of Jeffrey Skilling, which the Fifth Circuit just unsealed, the ETF's raw notes of Fastow's statements confirm that no illegal guarantee was ever made. Just as the Defendants claimed "from day one," Fastow only provided Merrill with a "best efforts" assurance that Enron would find a third party to buy the barges and that the "phone call did not obligate ENE to buy out." Ex. A, at 46.

Even more shocking is the long-concealed evidence that Fastow told the Task Force that he lied to subordinates and "told Enron people this was a guarantee" to "motivate" them and "light a fire" within Enron to re-market the barges to a third-party. Ex. A, at 48. This revelation establishes that these prosecutors obtained the convictions of the Merrill Defendants by using testimony that was based entirely on what they had been told was a false understanding deliberately engendered by Fastow. The prosecutorial misconduct arising from this evidence alone mandates dismissal of this indictment in its entirety.

In addition, beginning in late 2007, AUSA Spencer finally produced a portion of the exculpatory material Defendants have requested for five years, including the crucial testimony and statements of three Merrill counsel.[14] This evidence shows that the Task Force was on notice five

[14] FBI 302 of Kathy Zrike, October 8, 2002, attached hereto as Exhibit **D**; Grand Jury Testimony of Kathy Zrike, April 15, 2003, attached hereto as Exhibit **E**; FBI 302 of Gary Dolan, October 24, 2005, attached hereto as Exhibit **F**. These documents were finally produced in December 2007.

years ago that Merrill counsel was fully informed and personally negotiated and documented the transaction–well after the Defendants played any role.[15]

Only recently, and with *no* assistance from the government, Defendant Brown has been able to obtain two extraordinary pieces of evidence. In fact, the government still refuses to produce these documents. The first piece of evidence Brown independently obtained is an extensive, exculpatory letter written on behalf of Jeff McMahon, former Treasurer of Enron, faxed directly to the Department of Justice on April 25, 2005, with copies to ETF Directors Weissmann and Berkowitz. This 40-page letter, with exhibits, declares that neither McMahon nor Fastow made a guarantee. It was received by the ETF *before* this Court entered the judgment and commitment orders in this case. Ex. B. The second piece of evidence is similar, but with additional exculpatory material provided to the SEC by McMahon a year later, while Brown was still in prison and the Fifth Circuit was considering the Defendants' appeals. McMahon's declaration to the SEC states that key Barge witness Ben Glisan committed perjury. Ex. C. On the basis of McMahon's exculpatory statements and submissions, the Department of Justice decided not to prosecute the former Enron Treasurer for making the very guarantee that the Merrill Defendants were convicted for receiving, and for which Brown still stands wrongly convicted of perjury and obstruction.

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[15] The government's recent post-trial production from December 2007 includes: grand jury testimony of: Bradley Bynum (March 19, 2003); Kevin Cox (May 13, 2003 and June 17, 2005); Bowen Diehl (March 25. 2003); Vince DiMassimo (June 21, 2005); Paul Wood (June 9, 2005); and Katherine Zrike (April 15, 2003). It also includes FBI Form 302s from interviews of: Gary Dolan; Alan Hoffman; Vince DiMassimo; Mark McAndrews; Ace Roman; Paul Wood; and, Katherine Zrike. Defendants are entitled to the raw notes of these witnesses. As the Fastow notes make clear, these composite "summaries" may be materially different and altered from the raw notes. On March 20 at 1:26 p.m., the government advised that the Fastow notes would be forthcoming. If necessary, we will file a supplemental brief.

The government withheld its vast store of exculpatory evidence, especially that of Fastow, Merrill counsel, and McMahon. This coupled with the fact that every material witness with first-hand knowledge of the negotiations between Merrill and Enron was either controlled by the plea agreement with Merrill or intimidated from testifying, literally shut down the Defendants' ability to prepare and present a defense. These prosecution tactics left the Defendants impotent to refute these prosecutors' repeated misrepresentations. Although Merrill in-house counsel Katherine Zrike testified for the Defendants at trial, she was bound by the Merrill-ETF agreement.[16] Pursuant to that agreement, Zrike could not testify to anything that would contradict the "acceptance of responsibility" that Merrill had made to avoid indictment. Ex. H, at ¶¶ 3-7. Zrike was required, like all Merrill employees, to speak publicly only in support of the ETF's theory of the case–regardless of the truth. At the same time, the Defendants had no access to Zrike before trial, and they did not know what evidence she possessed (since her significant role in the transaction continued after and apart from theirs). Zrike's newly-produced grand jury testimony and FBI 302 establish government misconduct so egregious as to alone require dismissal of this indictment.

This exculpatory evidence confirms that the Defendants (and Judge DeMoss) were correct,[17] and that these prosecutors were on notice–well before trial–that their theory of the case and their contentions were as fatally flawed as the indictment they drafted. The newly produced and

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[16] Merrill Lynch Cooperation Agreement, September 17, 2003, attached hereto as Exhibit **G.**

[17] To quote Judge DeMoss, "Merrill's $7 million was absolutely at risk." *Brown*, 459 F.3d at 536 ("Here, [preliminary] negotiations are no evidence of the actual nature of the deal because there was no legally enforceable take-out promise in the final written agreement. . . . The Government mischaracterizes the transaction evidenced by the Engagement Letter when it labels the agreement a 'sham,' and asserts that Merrill was never 'at risk' during the transaction.") (DeMoss, J., concurring in part and dissenting in part). The panel majority in *Brown* did not reach the issue of the release of risk from Enron.

discovered exculpatory evidence proves that neither Fastow nor McMahon made any guarantee; counsel personally deleted the "buy-back" language from the engagement letter; and, counsel personally tried to write a "best efforts" and "re-marketing agreement" in the final documents. Long after the brief telephone call with Fastow,[18] the Merrill lawyers, Zrike and Dolan in particular continued to negotiate and document the transaction, with the full understanding that Merrill was at risk, and Enron would retain none. This withheld evidence, shocking in its substance, volume and magnitude, leads to the inescapable conclusion that this indictment must be dismissed. There is no innocent explanation for this egregious and reprehensible prosecutorial misconduct.

II. THE PROSECUTORS HAD LEGAL AND ETHICAL DUTIES TO DISCLOSE ALL EVIDENCE FAVORABLE TO THE DEFENSE AND TO BE TRUTHFUL TO THE COURT.

A. These Prosecutors Had A Constitutional Duty To Disclose Exculpatory Evidence.

"[T]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97 (1963). Suppressed evidence is "material" if there is a reasonable probability that had the evidence been disclosed to the Defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct., 3375, 3383-84 (1985). This standard does not require the defendant to establish that he would have been acquitted had the evidence been disclosed,

[18] This phone call was Defendant Bayly's last and virtually only involvement in the transaction. Reply Brief of Appellant Daniel Bayly, *United States v. Brown*, No. 05-20319 (5th Cir. Nov. 15, 2005) at 2-3. Brown, who did not even participate in the call, left for vacation that day and did not return from out of state until January. Brown's Motion to Compel Production of Documents and *Brady* Material, Dkt. 948, at 16-17.

but rather, that the suppression of exculpatory evidence by the government "undermines confidence in the outcome of the trial." *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 1566 (1995) (internal citations omitted). Moreover, it is well settled that the individual prosecutor has an affirmative duty to learn of any favorable evidence known to others acting on the government's behalf in the case. *Kyles,* 514 U.S. at 437, 115 S.Ct. at 1567. The government's *Brady* obligation continues throughout the post-trial setting and until the exhaustion of collateral remedies. *Monroe v. Butler*, 690 F. Supp. 521, 525 (E.D. La 1988), *aff'd*, 883 F.2d 331 (5th Cir. 1988).

B. The Prosecutors Had An Ethical Obligation To Disclose Exculpatory Evidence.

The ethical standards governing a prosecutor's duty to disclose favorable evidence are even more strict than *Brady*. Specifically, the ABA Standards for Criminal Justice, § 3-3.11.1, provides:

> (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused as to the offense charged or mitigate the offense charged or would tend to reduce the punishment of the accused.
>
> (b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.
>
> (c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD § 3-3.11 ("Disclosure of Evidence by Prosecutor") (1993). Longstanding Canon 5 of the ABA Canons of Professional Ethics states: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." ABA CANONS OF PROFESSIONAL ETHICS Canon 5 ("The Defense or Prosecution of Those Accused of Crime").

In outlining the "Special Responsibilities of a Prosecutor," the ABA Model Rules of Professional Conduct, Rule 3.8, makes the prosecutor's obligations clear:

> The prosecutor in a criminal case shall:
>
> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 ("Special Responsibilities of a Prosecutor") (2008).[19] *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 97 (mirroring the requirements in the ABA model rules, canons, and standards.).

Therefore, a prosecutor is subject to disciplinary sanctions for misconduct in failing to disclose, or in concealing, favorable evidence. ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.1 (1993).[20] Likewise, he or she can be sanctioned for "engag[ing] in conduct that is prejudicial to the administration of justice." ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 8.4 (2004). *Cf.* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 5.2 ("Failure to Maintain the Public Trust"). These ethical standards indicate that every *Brady* violation represents a severe ethical violation,

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[19] The most recent amendment to Rule 3.8, adding paragraphs "(g)" and "(h)," was completed in February 2008. Paragraph "(g)" has particular relevance here with regard to the new evidence from Jeff McMahon: "When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority." ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8.

[20] Indeed, this was one of the grounds for the recent disbarment of former Durham, North Carolina, District Attorney Michael Nifong in the Duke lacrosse rape case. Nifong withheld material exculpatory evidence that defense attorneys discovered pretrial, and the case was dismissed. Nonetheless, Nifong was disbarred for these egregious ethical violations. *The North Carolina State Bar v. Michael B. Nifong*, Case No. 06 DHC 35 (July 31, 2007), attached hereto as Exhibit **H** . Unlike the Merrill Defendants, the Duke lacrosse players did not have to go to trial, so they were never convicted or imprisoned. *See* Lara Setrakian, *Charges Dropped in Duke Lacrosse Case*, ABCnews.com, April 11, 2007, attached hereto as Exhibit **I**.

warranting imposition of sanctions up to and including disbarment. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Section 6.11 (2005) ("Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceedings.").

C. The Prosecutors Had An Ethical Duty Of Candor To The Tribunal.

Likewise, a prosecutor owes a duty of candor to the tribunal. The Model Rules provide that:

> A lawyer shall not knowingly … make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; … or … offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

MODEL RULES OF PROFESSIONAL CONDUCT R. 3.3(a)(1) and (3) (2007) ("Candor to the Tribunal"). "A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity." AMERICAN BAR ASSOCIATION'S STANDARDS FOR CRIMINAL JUSTICE § 3-5.6(a) (3d. ed. 1996). *Accord* RESTATEMENT (THIRD) LAW GOVERNING LAWYERS § 120 (false testimony or evidence), ABA CANONS OF PROFESSIONAL ETHICS Canons 22 and 41 (1963).

This duty of candor to the tribunal is especially important for those entrusted with the honor, privilege, and responsibility of representing the United States of America.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win the case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). As the Department of Justice has recognized: "[T]he success of [the federal prosecution] system must rely on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the Federal criminal justice process." Principles of Federal Prosecution, United States Attorneys Criminal Resource Manual (2008), § 9-27.001. *See* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Section 5.21 (2005) ("Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.").

D. These Prosecutors Had An Ethical Duty To Refrain From Interfering With Defendants' Access to Witnesses.

The governing ethical standards are clear that a party may not interfere with an opposing party's access to witnesses. Canon 39 of the ABA CANONS OF PROFESSIONAL ETHICS is explicit "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party." The ethical rules are in accord. Specifically, "[a] lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(f). *Accord* RESTATEMENT (THIRD) OF THE LAW GOVERNMENT LAWYERS § 116(4). Section 116(2) of the Restatement also provides that "a lawyer may not unlawfully obstruct another party's access to a witness." *Id*. at § 116(2). These provisions make clear that, like any other lawyer, the prosecutor may not unjustifiably or for improper purpose interfere with a defendant's access to witnesses.

The ethical standards for prosecutorial conduct similarly provide: "A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give the defense information which such person has the right to give." AMERICAN BAR ASSOCIATION'S STANDARDS FOR CRIMINAL JUSTICE § 3-3.1(d) (3d. ed. 1996); commentary to § 3-3.1, at 50 ("Prospective witnesses should not be treated as partisans . . . . It is improper for a prosecutor . . . or anyone acting for [his] side to suggest to a witness that the witness not submit to an interview by opposing counsel").

III. TASK FORCE ATTORNEYS WEISSMANN, RUEMMLER, FRIEDRICH AND HEMANN CONVICTED DEFENDANTS BY MAKING MATERIAL MISREPRESENTATIONS ABOUT FACTS THAT WERE CONTRADICTED IN EXCULPATORY EVIDENCE THEY POSSESSED BUT CONCEALED.

The newly disclosed *Brady* material contains stunning exculpatory evidence that guts the Task Force's case, proves the Defendants engaged in no criminal conduct, and establishes egregious prosecutorial misconduct. It demonstrates that Weissmann, Ruemmler, Friedrich, and Hemann excerpted highly selective comments from FBI 302s to make the most meager of *Brady* disclosures. They liberally parsed sentences, deleted specific words, and omitted adjoining passages of dramatic and definitive evidence that exculpates the Defendants. The conclusion is inescapable that they purposely skewed the fact-finding process. *Cf. United States v. Fisher*, 106 F.3d 622, 634-35 (5th Cir. 1997), *abrogated on other grounds*, *Ohler v. United States*, 529 U.S. 753, 120 S.Ct. 1851 (2000) (withheld testimony completely contradicted critical witnesses against defendant, and it was government's failure, alone, to produce evidence which was directly responsible for defendant's trial strategy and evidentiary decisions).

Ruemmler, Friedrich, and Hemann, with Weissmann often in the courtroom supervising, repeatedly argued in court that: (1) McMahon and Fastow made an illegal guarantee; (2) there was no re-marketing agreement; (3) there was no "best efforts" agreement; (4) the Defendants reached a "secret oral side deal" that was hidden from the lawyers; and, (5) the Defendants were not entitled to the defense of reliance on counsel. The government vigorously opposed the Defendants' requested jury instructions on good faith, reliance on counsel, and on the re-marketing agreement.[21] Sustaining the prosecution's objections, this Court refused to give these instructions (Tr. 6032-52, 6091, 6135).

Ruemmler, Friedrich, and Hemann made intentional, affirmative misrepresentations to this Court and the jury–while they and Weissmann concealed extraordinary exculpatory evidence that directly contradicted their witnesses, their own statements, and their entire theory of prosecution:

- **The Buy-back Guarantee**: The prosecutors theorized, argued and convinced the jury that Enron, through McMahon and Fastow, secretly agreed to buyback the barges and guaranteed Merrill's investment. At the same time, these prosecutors suppressed evidence proving exactly the opposite: no buyback guarantee was ever made.
    - **The Fastow Guarantee: The Fastow notes** prove that the ETF selected hearsay witnesses to give testimony that these prosecutors knew was false. Fastow told the ETF that he lied to his subordinates to motivate them, and in fact, there was no guarantee.

[21] The Defendants repeatedly attempted to obtain jury instructions on both the "good faith defense" and a meaningful "reliance on counsel" defense, which instructions were erroneously denied. (Tr. 6032-52, 6091, 6135). The Defendants also repeatedly attempted to submit a jury instruction on the "re-marketing defense," which instruction was erroneously denied upon the ETF's vigorous opposition. *See*, *e.g.,* Dkt. 415, 416, 439; Tr. 4520, 6037, 6050-51, 6092; Dkt.571:5. In relevant part, the instruction read: "agreement by one business to do it's best to re-market or assist in finding an independent third party to buy an interest such as Merrill's interest in the Nigerian Barge transaction is not improper or illegal." (Dkt. 571:5). The Fifth Circuit did not reach any of the instruction issues on appeal because it reversed on the fatally flawed indictment. *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S.Ct. 2249 (2007).

- **"The McMahon Guarantee"**: The ETF convicted Defendants for accepting a guarantee that McMahon simply did not make, and Fastow never ratified. Stunning evidence newly discovered by the Defense indicates that McMahon clearly informed the ETF that neither he nor Fastow made any guarantee. This evidence was sent directly to ETF Directors Weissmann and Berkowitz, and the Deputy Attorney General, *before* the judgment and commitment orders were entered against any of these Defendants.

- **Good Faith**: The prosecutors redacted from their meager *Brady* disclosures the facts which proved that counsel for both Enron and Merrill were fully informed, "took the lead" in negotiations, and made the critical decisions themselves. In doing so, the ETF deprived the Defendants of the good faith and reliance on counsel defenses.

- **The Re-marketing Agreement:** Contrary to the government's arguments that there was no re-marketing agreement, Merrill counsel Zrike, Dolan, and Hoffman knew there was an oral understanding to re-market the barges and tried to formalize this agreement during counsel's negotiations after the Fastow call. Enron counsel, however, would not allow Merrill to insert this informal understanding into the contract.

- **"No 'Best Efforts'"**: The government asserted there was no lawful "best-efforts" agreement–while it concealed Fastow's and Zrike's (and later McMahon's) evidence that a lawful best efforts assurance was the only agreement ever reached. Indeed, in an extraordinary recent development, the Defense has now learned that the raw notes of the Fastow interviews prove that Fastow made only a best efforts assurance, and had informed the government of this fact for years.

- **The Draft Engagement Letter**: The government blamed the deletion of "the buyback language" in the engagement letter on the Merrill Defendants, while concealing conclusive evidence that Merrill counsel Dolan personally deleted this language from the engagement letter.

A. THERE WAS NO BUY-BACK GUARANTEE: The ETF Has Deliberately Withheld Definitive Exculpatory Evidence That Neither Fastow Nor McMahon Guaranteed Merrill Anything.

Long-withheld evidence from Fastow and McMahon–the only two individuals the government claimed made an illegal guarantee to Merrill–destroys the government's case. Charts 3 and 4, Appendix.

1. The Task Force Withheld The Raw Notes Concerning Andrew Fastow, Which Exculpate All Defendants On All Charges and Demonstrate That The Government's Case Was Deliberately Fabricated.

For almost five years, Defendant-Appellant James Brown has unsuccessfully sought access to exculpatory *Brady* evidence in the possession of the Enron Task Force concerning the raw notes of the government's hundreds of hours of interviews with Andrew Fastow, the alleged provider of Enron's unlawful guarantee. During the time this evidence was withheld, Brown was convicted and served a year in prison. He and his family have been harassed, humiliated, and persecuted. He lost his career, his reputation, his licenses, his livelihood, and his liberty. Beginning in August 2007 (on the first anniversary of Brown's release from prison), and until January 2008, AUSA Spencer even sought to re-incarcerate Brown for perjury and obstruction convictions that were premised entirely on Brown's testimony expressing his understanding of Fastow's representations as a "best efforts" assurance. Astonishingly, all of what befell Brown was a result of government misconduct and deceit.

The Task Force repeatedly rejected Defendants' requests for the Fastow materials. The ETF assured Defendants and this Court that it would "honor" *Brady* and disclose all information to which Defendants were legally and ethically entitled. *See* Charts 1 and 2, Appendix, *infra,* (cataloging Defendants' efforts and the Task Force's responses). However, the government produced only a single pre-Barge production from Fastow–a four-page summary of the government's composite 302.[22] The ETF's *Brady* submission on Fastow–extracted from the government only with a court order–was remarkably insufficient (Dkt. 223; Ex. K). In fact, it is a summary of a summary–an unorthodox FBI "composite" 302 that admittedly was edited by multiple parties. Contrary to FBI

[22] Government *Brady* Letter, June 1, 2004, attached hereto as Exhibit **J**.

policy, the FBI apparently destroyed original 302s and drafts of the composite (Dkt. 948, 974, 993, 1029, 1039, 1041,1054, 1059).

Without any assistance or disclosures from the Task Force, the Defense has now learned that "*shocking*" revelations contained in the raw notes of Fastow's interviews render the government's prosecution of the Barge transaction a gross injustice. The 420 pages of contemporaneous notes of Fastow's interviews were released to Jeffrey Skilling, *United States v. Skilling*, No. 06-20885 (5th Cir.), by Order of the Fifth Circuit. The notes are summarized in relevant part in Jeffrey Skilling's Supplemental Brief on Appeal, unsealed by the Fifth Circuit on March 14, 2008. *Id*. Relevant portions are attached hereto as Exhibit A.

a. The raw notes demonstrate that Fastow made no guarantees. He explicitly informed the Task Force that Enron was not obligated to take out Merrill's equity interest.

On the most crucial issue in the Barge case, the suppressed evidence from the raw notes directly refutes the Task Force's pivotal contention that Fastow orally "guaranteed" (or ratified McMahon's alleged guarantee) to buy back Merrill's equity interest if a third-party buyer could not be found within six months, thereby rendering Enron's accounting a fraud.[23] According to the Skilling brief, not a single note from the 420 handwritten pages indicates that Fastow told the Task Force that Enron guaranteed Merrill against risk of loss. To the contrary, the notes reveal, explicitly, that Fastow told the Task Force he "did not obligate" and "did not intend to bind" Enron to buy back

[23] The ETF's summary of its composite 302 included statements about a "guarantee" or "promise" made by Fastow during the phone call with Merrill. It said specifically, that while he did not use the word, "guarantee," "[i]t was reasonable for anyone listening to the call to think that it was Enron that was going to buy them out"; and "[i]f the telephone call had been transcribed, it would have sounded like a guarantee and blown the accounting treatment of the deal." Ex. J, at 4-5. At trial, the prosecutors argued, and Glisan testified, that McMahon made the illegal guarantee which Fastow ratified (Tr. 3600-03).

Merrill's interest. Ex. A, at 5-6, 9-10, 44-49, 63. These raw notes reveal that Enron was committed to avoiding anything that would implicate or affect Enron's accounting for the Barge equity transaction or might otherwise undermine its proper accounting as a true sale. This evidence demonstrates, as Defendants have always contended, that, at most, Fastow committed Enron to use its "best efforts" to re-market the barges. *Id*. at 46. The Task Force has conceded that such a re-marketing agreement would be legitimate. No innocent explanation exists for the suppression of this evidence.

The following summary from Jeffrey Skilling's Supplemental Brief on Appeal, *United States v. Skilling*, N0. 06-20885 (5th Cir.), exposes the government's falsehoods and the depths of its misconduct in withholding this exculpatory evidence:

> After LJM2 declined to acquire the barges at the end of 1999, Enron sold an interest in the barges to Merrill Lynch. According to the Task Force, Merrill Lynch agreed to purchase the interest only because during a December 23, 1999 telephone call, Fastow 'promise[d]' that if Enron were not able to find a third party buyer for the barges within six months, it would buy back Merrill Lynch's interest at an agreed-upon profit. This alleged secret side-deal is the basis of the Task Force's ongoing prosecution in *U.S. v. Brown*, 459 F.3d 509 (5th Cir. 2006).

Ex. A, at 44-45. As in the Skilling trial, the government in the Barge trial offered exhibits, during the testimony of Ben Glisan, which they argued corroborated this illegal guarantee.[24]

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[24] Specifically:

> "(1) [GX 532 at Barge Trial]: "is a May 11, 2000 email from Glisan to employees in Enron's accounting department. It says: 'To be clear, Enron is obligated to get Merrill out of the deal on or before June 30. We have no ability to roll the structure' and 'as we have discussed, should a strategic buyer not materialize by June 30, 2000, APACHI [Enron] will have to take out Merrill Lynch, and the investment in the barges will be placed on the balance sheet."
>
> (2) [GX 507 from Barge Trial]: "is an internal LJM document—titled 'Benefits to Enron Summary'—concerning the barges transaction. It includes the statement: 'Enron sold barges to Merrill Lynch in December 1999, promising that Merrill would be taken out by sale to another investor by June 2000.'" Ex. A, at 45-46.

At Brown's trial, Glisan, a Fastow subordinate, testified that both documents reflected Fastow's guarantee to Merrill that Enron would take them out of the transaction by June 30. The raw notes of Fastow's interviews, available for the first time as quoted in Skilling's Brief, demonstrate the absolute falsity of this theory and of Glisan's sworn testimony. Skilling's Brief describes the content of Fastow's raw notes:

> However, before trial, when Task Force agents showed Fastow the same two documents, he said they were "not consistent" with what he said to Merrill because he did not remember using the "word 'promise.'" [ ]. Moreover, Fastow explained he "did not obligate [Enron] to buy out" Merrill and he "did not intend to bind [Enron]." In this interview, Fastow also drew an important distinction between guarantees to repurchase an asset from a buyer (Merrill) and assurances that the seller (Enron) would use its "best efforts" to help re-market the asset to a third-party buyer (*e.g.*, LJM). As Fastow and the Task Force conceded—and as the SEC and accounting rules on side deals confirm—formal, risk-eliminating guarantees might affect the accounting for a sales transaction, but general assurances and best efforts agreements to re-market a purchased asset *do not*.

Ex. A, at 46 (citations omitted). The Task Force did not disclose this information to Defendants. The Fastow notes exonerate the Merrill Defendants on all charges.

b. The raw notes demonstrate that the ETF obtained Brown's convictions by testimony it knew was based on deliberately created false understandings or perjury: Fastow lied to his subordinates, claiming there was a guarantee to "motivate" them to re-market the barges to a third-party.

In an even more shocking revelation, the raw notes also disclose that Fastow told the Task Force that he *lied* to his "subordinates" when he told them that Enron was obligated to buy back Merrill's interest or that he had made a guarantee. As recited in the Skilling brief, Fastow " *lied* to 'subordinates' by 'tell[ing] Enron people this was a guarantee' in order to 'motivate' and 'light a fire' within Enron to re-market the Barges to a third-party." Ex. A, at 48. Fastow explained to the

ETF that he made this misrepresentation deliberately. The Task Force suppressed this key exculpatory fact from its minuscule four-page Fastow summary. Ex. J.

Even more troubling, these prosecutors introduced testimony and documents from those exact same, deceived, "subordinates" to prove that Enron was obligated to repurchase Merrill's interest in the barges. The prosecutors called Glisan and Kopper as witnesses to the "guarantee." Even if Fastow's subordinates genuinely believed in the existence of a buy-back guarantee, the government knew that Fastow had deliberately imbued them with this false understanding. In what could only have been bad faith, these prosecutors possessed and concealed specific, conclusive information that eviscerated their case. This evidence, alone, demonstrates that the second and third-hand hearsay testimony of Long, Boyt, Glisan, Kopper, and Lawrence–in other words, the government's entire case–was purposely founded on a false premise–the misunderstanding that the Task Force knew Fastow had deliberately created in his subordinates to "light a fire under" the re-marketing initiative within Enron.

c. Fastow's notes exonerate Brown of perjury and obstruction.

In light of the exonerating material in the Fastow raw notes, the McMahon documents, and the other evidence wrongfully withheld, Brown's perjury and obstruction convictions, affirmed by the Fifth Circuit on the bases of false testimony and argument presented by the Task Force, must also be vacated.

The Fastow raw notes completely validate Brown's testimony – which we now know was literally true. *Bronston v. United States*, 409 U.S. 352, 362, 93 S.Ct. 595, 602 (1973) (testimony that is literally true cannot support a perjury conviction; nor by extension, an obstruction conviction.). *Accord United States v. McAfee*, 8 F.3d 1010, 1014-15 (5th Cir. 1993); *United States v. Crippen*, 573

F.2d 535, 539 (5th Cir. 1978), *cert. denied*, 439 U.S. 1069, 99 S.Ct. 837 (1978). *See also* Charts 3-6, Appendix (Comparing with McMahon and others). The notes also prove that the answer to Weissmann's question: the reason that "Enron would believe it was obligated to Merrill to get them out of the deal by June 30," is because Fastow deliberately created that false understanding in his subordinates at Enron to motivate them to re-market the barges. Significantly more troubling is the fact that these prosecutors proceeded to trial, to sponsor testimony, and to convict Brown on evidence it knew was premised on a falsehood Fastow deliberately created and was belied by the notes the ETF concealed. Brown had no way of knowing any of this until this past Friday, March 14, 2008. This injustice, too, must be remedied. Brown's convictions must be vacated (Dkt. 1004, 1006, 1020, 1061).

The government based Count IV, perjury, on the following Grand Jury questions and answers only; it based Count V, obstruction, on the three underlined portions of those answers only, as shown on the following chart:

BROWN'S GRAND JURY	FASTOW RAW NOTES
"Weissmann: 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? Brown: It's inconsistent with my understanding of what the transaction was. (Tr. at 80, lines 6-11.) Weissmann: ....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? Brown: 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. Brown: 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) (Tr. 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*." Fastow: "Summary" of transaction was "not consistent" with his understanding because it included the word, "promise." "Object[ed] to word obligate" in internal Enron e-mail as inconsistent with transaction. 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: "It was [Enron's] obligation to use 'best efforts' to get third party takeout." Ex. A, at 47. Fastow: "Best efforts" - must do everything possible that a reasonable businessman would do to achieve result. 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. (emphasis added in all).

d. The concealment of the exculpatory Fastow notes, alone, requires immediate dismissal with prejudice.

The outrageous misconduct evidenced in the newly-disclosed material, which Brown does not yet have, mandates dismissal of the entire indictment with prejudice.[25] The Task Force must be held accountable for its systematic suppression of substantial, crucial, and exculpatory evidence. These prosecutors misled the Defendants, the jury, the District Court, and the Fifth Circuit in repeatedly representing that the government had complied with its *Brady* and ethical obligations. As with the belatedly disclosed evidence from Fastow, Zrike, Dolan, Hoffman, and others, *see infra* Section III., the Task Force either withheld exculpatory evidence altogether or produced carefully and cleverly- scripted, composite summaries which smoothed out inconsistencies and omitted the specific words and evidence which would have exonerated all the Defendants. *Cf. United States v. Ramming*, 915 F. Supp. 854, 868 (S.D. Tex. 1996) (dismissal where, as here, among other evidence of misconduct, the court "determined that . . . a comparison of the 302 statements of witnesses to the same witnesses' grand jury testimony is revealing. The FBI agent took extensive liberties, choosing conclusionary words that caused the statements to fit within the government's theory of the case").

[25] Defendants collectively and repeatedly sought to pry loose the government's information regarding Fastow via *Brady* requests. *See*, *e.g.* Dkt. 236; Dkt. 248; Dkt. 290; Dkt. 528. Defendants also repeatedly attempted to introduce the (minuscule) summary of Fastow's statements they had been given in a woefully incomplete *Brady* disclosure, (Dkt. 236, Dkt. 241, Dkt. 528 (via written motions); Tr. 1611-12, 2651-53 (via oral motions); Tr. 2772-73 (via Boyt); Tr. 3289, 3413, 4863 (via Bhatia)), to impeach government witnesses second and third-hand hearsay, if not completely disembowel their testimony. The government strenuously and repeatedly objected, and the Defense was never allowed to use this evidence (Tr. 4863-66).

2. Fastow Never Testified At Brown's Trial, And The ETF Deliberately Misled The Court And Jury About Fastow's Representations.

The Barge I jury never heard the actual truth–Fastow's own words to Bayly. Instead the government presented second- and third-hand hearsay testimony (from only Enron employees) about what Fastow supposedly said on the telephone conversation.[26] All the while, the government was withholding the most original and direct evidence from Fastow that he did not tell Bayly he would "promise" or "guarantee" anything; that he intended a conversation that would *not* adversely affect Enron's accounting; and, that instead, he had provided "assurances" that Enron would use its "best efforts" to find a third-party buyer.

Most importantly, the ETF withheld the fact that any understanding of a buy-back guarantee within Enron had been deliberately and falsely created by Fastow. Fastow lied to his subordinates to "motivate" them to re-market the barges. In truth, there simply was no unlawful guarantee to Merrill, and these prosecutors knew it. Ex. A, *infra*. Deposition of Andrew Fastow, *Newby v. Enron*, No. 4-01-3624 (S.D. Tex.), attached hereto as Exhibit **K**, at 259-62; Testimony of Andrew Fastow, *United States v. Skilling*, No. H-04-025 (S.D. Tex.), attached hereto as Exhibit **L**, at 6493. The omission of this evidence could not have been inadvertent or innocent, and at trial, the prosecution fought vigorously and successfully to keep from the jury the little Fastow evidence the Defendants did have.

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[26] Tr.1339-40, 1529, 1558-59 (Michael Kopper/convicted felon: third-hand hearsay regarding alleged guarantee); Tr. 1775 (Fred Lawrence (testimony subsequently struck over Task Force objection, Tr. 1777): unknown layers of hearsay in that "I don't remember [who told me that Enron made a guarantee]."); Tr. 2102-04 (Sean Long/nonprosecution agreement: unknown levels of hearsay about alleged guarantee made by some, unknown "senior person at Enron."); Tr. 2601 (Eric Boyt/nonprosecution agreement: possible third- or fourth-hand, likely unknown levels of hearsay about alleged guarantee made by Fastow); Tr. 3692-3702 (Ben Glisan/convicted felon: second- or third-hand hearsay regarding alleged guarantee).

The government also knew that "there was every intention that Enron would find a buyer for Merrill Lynch." Fastow FBI 302, December 18, 2003, attached hereto as Exhibit **M**, at 23 (produced September 2007). Indeed, Fastow had told the ETF that he thought "the sale from Enron to Merrill Lynch had a marketing agreement concerning the vehicle." Fastow/FBI 302, January 20, 2004 - January 6, 2005, attached hereto as Exhibit **N**, at 46 (produced September 2007). Fastow's statements to the Task Force confirm the veracity of Brown's grand jury testimony. The precise words used by Fastow, and any other participant in the Nigerian barge transaction, were crucial.[27] The distinction between a "guarantee" of an Enron "buy-back" and the perfectly legal expression of "extreme confidence" or "best efforts" that a third-party buyer would be found were the difference between guilt and innocence.

Under oath, since the Barge trial, Fastow has given sworn testimony twice–in the *Skilling* trial and in the *Newby* class action litigation. This testimony also corroborates Brown and the Defendants' understanding of the transaction:

- "My recollection is that I did not use the word 'guarantee' in the Dan Bayly phone call." Ex. K, at 1518-19.
- "I recall using the phrase 'extraordinary best efforts,'[28] a phrase like 'extraordinarily high level of confidence' with regard to there being a purchaser for Merrill Lynch's interest within 6 months." *Id*. at 1882.

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[27] Kelly Boots, a junior Enron employee on the call, also told the ETF five years ago that Fastow made no guarantee. When called at trial, she advised that she would assert her Fifth Amendment right to remain silent, and the Defense could do nothing but stipulate that she was unavailable (Tr.4336). *See also* Section IV.C..

[28] This "magic language" for the defense was not included in the government's *Brady* disclosure in Barge I. *Cf.* Ex. J; Government *Brady* Letter, April 5, 2004, attached hereto as Exhibit **O**; Government *Brady* letter, July 30, 2004, attached hereto as Exhibit **P**. *See* Dkt. 1004, 1020, 1061.

- Fastow thought the conversation did not adversely affect Enron's sale treatment of the transaction. *Id*. at 1520-22.

- Enron had every intention of finding a third party buyer. Ex. L, at 7209-10; Ex. M, at 23; Ex. N, at 41-42.

- Fastow testified that LJM2's purchase of Merrill's equity interest was not a "reacquisition" or "buy-back" of the equity interest, but a new acquisition or "buy-out" by a third-party investor. Ex. L, at 7190.[29]

3. The ETF Has Long Concealed Evidence That McMahon Made No Guarantee And Verified That Fastow Did Not Make One Either.

Since shortly after the Barge trial, McMahon has made two lengthy statements to the Department of Justice, ETF and the SEC, each containing definitive, specific and exculpatory evidence that guts the Barge prosecution. Chart 6, Appendix. Despite Defendants' repeated and specific requests to the government for this information, the government has never produced it. Just recently, Brown has been able to obtain it independently–with no assistance from the government or even acknowledgment of its existence.

Well before the Barge trial, the Task Force already knew from its hundreds of interviews with Fastow that he did not make a guarantee to Merrill, and that he imbued his Enron subordinates with the false notion there was a guarantee.[30] Accordingly then, the underpinning of the Barge

[29] Moreover, at the trial of Kenneth Lay and Jeffrey Skilling, Fastow repeatedly testified that LJM2's outside investors, including Merrill and its senior employees, were categorically "kept in the dark" regarding any alleged sham transactions with Enron. Ex. L, at 6485-86, 6573, 6596-97. Furthermore, Enron's and LJM2's accountants both confirmed the legality of LJM2 as a valid third-party entity. *Id*. at 6897-98, 7218-29, 7234. Again, Fastow's sworn testimony is diametrically opposed to the government's innuendo in Barge I that Merrill knew of any impropriety of LJM2, if there were any.

[30] Ex. N, at 46 ("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."); *Id*. at 41 (Fastow "didn't say Enron would buy the barges back and instead represented that a third party would."); Ex. M, at 23 (Fastow was confident "there was every intention that Enron would find a [third-party] buyer for Merrill Lynch."); Ex. K, at 259-62 (Q: And did you have a response to those comments from Mr. Bayly? A: Yeah. I was very

prosecution became the guarantee that Enron Treasurer Jeff McMahon made to Merrill, and Fastow "ratified" (Tr. 402-04, 6144, 6157-60, 6168, 6216-19, 6510-11, 6527-28). Jeff McMahon was a key player. He was Treasurer of Enron at the time of the Barge deal, later CFO, and then President. According to the government, McMahon first made the guarantee the Defendants were convicted of secretly receiving. Despite multiple requests, including for specific disclosures regarding McMahon, to date, the government has produced no more than its original 5-line *Brady* "summary."[31] McMahon was not available to the Defense before, during or after the trial, because until recently, he was under constant threat of indictment.[32] However, the ETF never found probable cause to indict McMahon for having made the guarantee that these Merrill executives were convicted of receiving.[33]

The ETF and AUSA Spencer have repeatedly asserted that "Enron Executive, Jeff McMahon, gave Merrill Lynch executives an oral guarantee that Enron would buy the barges back." Dkt. 1018 (Opposition to Brown's Motion for New Trial). The record contains at least twenty (20)

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appreciative of it. I told him that, as CFO of Enron, I would – that I would use my best efforts to get him out of the deal. Q: Did you ever say to Mr. Bayly, I guarantee you we'll take you out in six months? A: No, I didn't.) (Emphasis added); Ex. L, at 6493 (Q: Did you use the actual word "guaranty"? A: No.).

[31] The government's entire *Brady* production regarding McMahon consists of: "McMahon did not recall any definite push to get the NBD done by year end. Merrill wanted Enron/Fastow's assurance that Enron would use best efforts to syndicate or find a buyer for these assets. It was not unusual for this type of agreement not to be in writing. McMahon does not recall any guaranteed take out at the end of the 6 month remarketing period." Ex. P, at 7.

[32] McMahon was instructed by his attorneys to take the Fifth Amendment in response to any questions, and he refused to talk with anyone. Indeed, the Task Force stipulated in the Barge trial that McMahon was unavailable (Tr. 4926). *See also* Affidavit of William Dolan, December 19, 2007, attached hereto as Exhibit **Q**.

[33] McMahon recently resolved his civil issues with the SEC for $300,000, without any admission of wrongdoing. *SEC v. McMahon*, No. H-07-2051 (S.D.Tex. July 5, 2007).

representations by the Task Force in opening and closing arguments–alone–portraying the crime that McMahon gave Merrill a guarantee which Fastow then ratified (Tr. 6157-59, 6216-17, 6527-28). For example:

> **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).
>
> **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**: "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).
>
> **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**: "Remember again what Mr. Glisan told you, that ... Andy Fastow was the one who ratified the comments that had already been made by Mr. McMahon" (Tr. 6218-19).
>
> **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).

a. McMahon wrote to the Department of Justice on April 25, 2005, and informed them that neither he nor Fastow made any guarantee.

In compelling exculpatory statements the government has withheld since before this Court entered the judgment and commitment orders against these Defendants, counsel for Jeff McMahon confirmed to the government in writing:[34]

[34] Since January 2008, when we first heard of the possible existence of this evidence, we made very specific requests for its production (Dkt. 979, 1003). To date, the government still has not produced either

(1) "Mr. McMahon did not make any commitment to Merrill Lynch or 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." Ex. B, at 9, 12.

(2) "Any language used by Mr. McMahon [to Merrill representatives] would have been designed to encourage interest in the transaction but never intended to convey a proposal which would conflict with his clearly established position against repurchases." *Id*. at 6.

(3) Mr. McMahon repeatedly dictated to his subordinates that "there could be no financial obligation or risk [for Enron] associated with the transaction, and that a sale must be a sale." *Id*.

b. Before the Fifth Circuit decided the appeal, the government was concealing even more exculpatory evidence from McMahon, specifically stating that Glisan committed perjury in his Barge trial testimony.

Fifteen months later, McMahon wrote the government again. Chart 6, Appendix. McMahon, through counsel, specifically informed the government that its star witness in the Barge trial lied.[35]

McMahon's letter to the Department of Justice (copied to the Task Force Directors), or his extensive memorandum to the SEC. To fully evaluate the depth and breadth of the government's misconduct here, the letter to DOJ and the SEC submission must be produced from the file of each Department of Justice lawyer in which each is found. *See* Dkt. 979, 1003. Furthermore, the SEC, IRS and DOJ were parties in the Task Force operations, interviewed witnesses jointly, and this Court has determined that the government's *Brady* obligations extend to SEC materials and are ongoing. *United States v. Causey*, 356 F. Supp.2d 681, 691 (S.D.Tex. 2005). Both the ETF and AUSA Spencer have repeatedly represented to Defense counsel and to this Court that there is no (additional) *Brady* material and that all of the government's *Brady* obligations have been satisfied. Transcript of Hearing, April 15, 2004, Dkt. 176, at pp. 15-20, 23; Transcript of Hearing, May 27, 2004, Dkt. 228, at pp. 9-16, 19-26, 34, 36-37, 47; Transcript of Hearing, June 25, 2004, Dkt. 283, at pp. 38-43, 91-92; Transcript of Hearing, April 4, 2007, Dkt. 939, at pp. 10, 11, 15-20; Dkt. 986, 1001 (Oppositions to Motions to Compel Production of *Brady* Material); Transcript of Hearing, November 16, 2007, Dkt. 1010, at pp. 83-88. *See* Chart 2, Appendix. Further, Spencer assured this Court that he would personally review the prior production *and* everything the government had received *since* Barge I. Dkt. 939, at pp. 10, 11, 15-20. Despite the Defendants' repeated and specific requests for any statements made by the actual participants in the Fastow-Bayly call, and for information about McMahon, and for this letter specifically, and despite Mr. Spencer's claim that he has satisfied his ethical obligations, Mr. Spencer's recent production did not include this completely exculpatory statement by McMahon, and he has consistently refused to make any further production.

[35] Tr. 3692-3702 (Glisan testimony on purported McMahon guarantee). Another self-serving witness, Michael Kopper (convicted felon; involved with Fastow and Glisan in Southampton scam on Enron), also repeatedly lied before the petit jury. *See*, e.g., Tr. 1339-40 (McMahon made a guarantee to Merrill); Tr. 1529

Ex. C, at 6. On July 28, 2006, the Fifth Circuit was still considering Brown's appeal. *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006). McMahon submitted an extensive memorandum to the Securities and Exchange Commission.[36] In his statement to the SEC, which Brown independently obtained, McMahon flatly states, *inter alia*:

(1) "[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."

(2) "[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."

(3) "Mr. Fastow attempted to assure the Merrill Lynch executives that the risk was reasonable and that, if Merrill Lynch desired to unload the investment, that Enron would be in a position to help Merrill Lynch sell the interest to a third party at some future date."

(4) Mr. McMahon "never heard of any continuing 'oral' company obligation regarding the equity interest sold to Merrill Lynch and would have objected to it if he had."

(5) Mr. McMahon "reviewed the transcript of Mr. Fastow and former Enron treasurer Ben Glisan's testimony in the Lay-Skilling trial, Mr. Glisan's testimony in the trial of the Nigerian Barge case, and the FBI's Form 302 of Mr. Fastow's statements regarding the transaction. Based on that review and his knowledge of what actually occurred, [he] concluded that both men testified falsely." Ex. C, at 4-6.

(same); Tr. 1558-59 (same); Tr. 1702 ("[I]t was McMahon's responsibility to make sure the [Barge] deal got closed."). *See also* Ex. L, at 7189 (Fastow also testified in *Newby* that testimony of Glisan and Kopper is "largely contradictory to my recollection of events."); Ex. K, at 1532-33 (Fastow testifying that Kopper's testimony at the barge trial was contrary to his own "in many respects.").

[36] Ex. C, at 6. This, too, the government has never produced to the Merrill Defendants, despite the entirely exculpatory and specific information it contains, and Brown's specific requests for it (Dkt. 948, 974, 993, 1006, 1029, 1030, 1041).

McMahon is unambiguous: Neither he nor Fastow gave Merrill a guarantee. The only agreement was that Enron would use its best efforts to re-market the barges to a third party–just as the Defense said. The ETF obviously accepted McMahon's representations. He was never charged with a crime, and he recently resolved all Enron matters with the SEC with no admission of any wrongdoing. *Cf. supra* note 33, and accompanying text. This evidence, standing alone, even if the government had not engaged in such outrageous misconduct by withholding it, prohibits any further prosecution of these Defendants. They cannot be prosecuted for accepting a guarantee that McMahon did not make.

This long withheld evidence of McMahon's statements to the government proves that the factual premise upon which the Merrill Defendants were convicted was utterly false, and the government has long been on notice of its falsity. Instead of meeting their Constitutional and ethical obligations to disclose this important exculpatory material, Weissmann, Berkowitz, Ruemmler and Friedrich, and the Task Force "writ large," vehemently opposed bail pending appeal, sent the Defendants to prison, and insisted to the district court and then the Fifth Circuit that there "was no substantial issue for appeal."[37]

Compounding these violations, on reversal and remand, AUSA Spencer endeavored to coerce a guilty plea from Brown, asserting that Brown had a four-year sentence to serve–on a sentence that had been calculated on three counts of conviction that were reversed. When Spencer's use of his self-avowed "tremendous leverage" to force a guilty plea failed, Spencer moved to revoke Brown's

[37] *See*, *e.g.,* Government's Revised Opposition to Brown's Expedited Application for Release Pending Appeal, May 9, 2005, *United States v. Brown*, No. 05-20319 (5th Cir.), at p. 4 (Citing to Tr. 3602-02: "[O]ral guarantee was initially provided by Enron's then-treasurer, Jeff McMahon." Citing to GX203 "Conference call between Bayly and Fastow was merely a ratification of the prior, agreed upon deal [which McMahon guaranteed].").

bond to send him back to prison–in the face of clear, contradictory, controlling precedent, *and* while concealing this extraordinary exculpatory evidence. *See* Dkt. 946, 950, 953, 1013, 1024, 1027, 1031.

4. The ETF Has Concealed Evidence That Other Merrill Witnesses Told Friedrich In June 2005, Before Defendants Were Imprisoned, That There Was No Guarantee–Only An Agreement To Re-Market The Barges.

Shortly after the Barge trial, but before Brown went to prison and appealed, Friedrich summoned Merrill executives before the grand jury again. Cox and Wood testified before the grand jury, now almost three years ago, in June 2005. AUSA Spencer only recently produced this exculpatory evidence.

Kevin Cox, a Merrill executive who attended the DMCC [Debt Market Commitment Committee] told the grand jury:

> 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.

Grand Jury Testimony of Kevin Cox , June 17, 2005, excerpts attached hereto as Exhibit **R**, at 30.

Wood, who supervised Tina Trinkle, took notes of the so-called "Trinkle call." This was a preliminary discussion within Merrill, which, unbeknownst to Trinkle, preceded the DMCC meeting and even further vetting. Trinkle was the government's only Merrill witness who testified about this preliminary, internal Merrill call, and swore that no attorney was on the call. Directly contradicting the Task Force's assertion, Wood's testimony and notes reflect that Merrill Counsel Zrike and Mr. Peacock from accounting participated in the so-called "Trinkle" call. Grand Jury Testimony

of Paul Wood, excerpts attached hereto as Exhibit **S**, at 37-39, 69, 74-76.[38] Based on Wood's participation on this call, Wood confirmed that the transaction was "an equity-like investment," which did not contain "an Enron Corp. Guarantee." *Id*. at 39-40. Significantly, according to Wood, and contrary to Friedrich (Tr. 6214), Zrike was not "cut out" of this conversation.

The Trinkle call was the same conversation which the government cited as evidence that Brown joined the conspiracy and which supposedly showed that Merrill agreed to a buy-back (the one that McMahon did not make). *Cf.* Tr. 6192-99, 6274, 6540 (arguing that Brown's silence on the Trinkle call is sufficient evidence to show his guilty knowledge and to convict); *see* Tr. 6154 ("devastating proof"); *see also* Tr. 6159, 6161, 6163-64, 6202-03, 6215, 6219, 6495-98 (highlighting importance of Trinkle call in "proving" conspiracy and fraud).[39] Wood's newly disclosed testimony also directly contradicts Trinkle, who swore that no attorney was on the call (Tr. 1049).[40] On summation the government ran wild with this "fact": Tr. 6206-07 ("[Zrike] wasn't going to go along with the deal [if there was a buy-back guarantee]. And so what did they do, Ladies and Gentlemen? They cut her out. They cut her out of th[e] [Trinkle call]."); Tr. 6214 (same); Tr. 6502 (same). The government repeatedly "bolstered" Trinkle, herself, as well. Ruemmler stated: (1) "[Trinkle] told the truth about what they were doing," Tr. 6153; (2) "She remembered exactly who was on this call,"

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[38] Friedrich repeatedly tried to "refresh" Wood's recollection as to the various meetings and to change his mind. Ex. S, at 35.

[39] Indeed, remarkably, Ruemmler stated in summation that "[b]ased solely on the ... [erroneous facts debunked, *supra*], and the testimony of Tina Trinkle, you could conclude beyond a reasonable doubt, ladies and gentlemen, that Enron gave Merrill Lynch executives a guarantee ... and Dan Bayly, Rob Furst, Jim Brown knew the verbal guarantee made the deal a fraud. That alone proves their participation in this conspiracy." (Tr. 6164).

[40] It is undisputed now that Trinkle had the date of the call completely wrong, and it occurred *before* the DMCC. (Tr. 3257-59, 3261, 6201).

Tr. 6157; and, (3) "what Ms. Trinkle heard on the call is uncontroverted." Tr. 6203. This new evidence, which should have been turned over to the Defense years ago, belies these misrepresentations.

B. "GOOD FAITH": The ETF Deliberately Mislead The Jury And Concealed Crucial Exculpatory Evidence That Proved That Defendants Acted In Good Faith And Relied On Fully Informed Counsel.

The prosecutors repeatedly misled the jury, arguing that no negotiations transpired and that attorneys were not involved in the deal.[41] The prosecutors were able to do this only because they had carefully and deliberately deleted from their *Brady* disclosures the facts establishing the Defendants' good faith and reliance on counsel defenses. Chart 8, Appendix.

Ruemmler's *Brady* disclosure as to Zrike fails to mention the following exculpatory information: Zrike (1) called upon Brown to assist her in understanding the transaction and discussed everything with him; (2) believed that Merrill would be bought out by another buyer within three weeks to three months; (3) had considered and specifically discussed "income statement manipulation" and questioned whether this was a "sham transaction"; (4) knew of a representation made by a senior Enron official; (5) attempted to get the "best efforts" agreement included in the final deal documents but Enron's counsel, Vinson & Elkins, would not agree to it; (6) reviewed the purchase agreement; (7) attempted to obtain an indemnification agreement to cover the additional

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[41] *See*, *e.g.,* Tr. 6500 (Friedrich: "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. 419 (Hemann: "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. 6539 (Friedrich: "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."). These statements were premised on the withholding of exculpatory evidence of which the government precluded any access and were demonstrably false in light of Merrill counsels' statements. *See also* Tr. 409, 6143, 6148, 6151, 6206-07, 6214, 6493, 6500, 6502-04, 6527.

risk and liabilities Merrill assumed with this purchase; (8) assigned Merrill counsel Gary Dolan and Frank Marinaro to work with outside counsel, Alan Hoffman, to negotiate and document the deal; and, (9) discussed all the risks, including *her concerns* of Enron's "income statement manipulation" with her boss, Carlos Morales, who told Zrike she was proceeding properly. *Compare* Ex. P (Zrike *Brady* production) *with* Ex. D, at 1-19, *and* Ex. E, at 62-75, 108-10, 124 (December 2007 production).

Zrike's newly-disclosed grand jury testimony and 302 demonstrate she was involved in negotiating and documenting this transaction far above and beyond any knowledge of the Defendants. Five years ago, Zrike told Weissmann that she learned about the Barge deal from Gary Dolan, an attorney in her group. Ex. D, at 4. She and Dolan requested Brown's assistance to explain the deal, even though he was not the banker on the transaction. Zrike informed Brown of "her concerns regarding timing of the deal, the accounting, and having an investment in Nigeria." *Id.* at 4. Zrike told Weissmann that she "was concerned that the deal was being done for 'earnings management gain.'" She questioned whether Merrill was helping Enron hit an earnings target, whether there would be improper accounting treatment, and expressed concern that Merrill avoid a sham transaction, or merely "parking" of an asset. "She wanted to know if Enron's accountants were aware of the temporary nature of the deal and that Enron was going to sell the project to another party, Marubeni." *Id.* at 3-4.

Zrike received the papers on the deal, and she and Dolan talked with Furst, and later to Tilney. Zrike knew Enron wanted to book a sale and that Merrill would be an equity bridge for a short term–she believed three weeks. "She focused on whether it would be a true sale." Zrike wanted to know if there was "a real buyer or if the buyer was a sham." Ex. D, at 5. She was

concerned that the transaction could be fraudulent, and wanted to make sure it was not. *Id*. at 5, 14.[42]

Zrike selected the internal approval process to review the transaction. Zrike, in consultation with Marinaro and Dolan, decided to use the DMCC. Ex. D, at 8. She skipped the APR process, because the DMCC would give her the expertise for the more thorough vetting she wanted and would be more expeditious.[43] *Id*. at 5, 8. Zrike "told Brown to attend the DMCC," and "Zrike took the lead in the meeting because it was an equity deal in the DMCC and she had to present the deal to Tom Davis [President of Merrill's Corporate and Institutional Client Group]." *Id*. at 9. She knew, and told the DMCC participants, that Merrill was helping Enron. *Id*. at 10.[44] "Zrike did point out the risks to the DMCC, Davis and Bayly. There was no contractual obligation to get Merrill out of the deal." *Id*. at 8. Arthur Andersen knew Merrill's role and it had to be a true sale with transfer of risk. *Id*. at 9.

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

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[42] "Zrike believed that Merrill was chosen by Enron because Merrill was an investment bank for Enron. Merrill had turned down other off-balance sheet deals with Enron and did not take part in those deals. This deal was small and short-lived and Merrill thought of the deal as a relationship builder." Ex. D, at 5. She thought Merrill would be bought out in January. *Id*.

[43] 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 and did not accurately reflect the ultimate terms of the transaction. The Fastow call occurred on December 23. Zrike said the Barge deal actually closed in January 2000, and she told the finance department that they need not complete the APR. Ex. D, at 16; Ex. E, at 108-10.

[44] Moreover, Zrike affirmed that "Merrill did not enter into the Nigerian Barge deal for the rate of return." The deal was supposed to be a short term deal to help Enron. Zrike also said, as she did at trial, that the DMCC evaluated the materiality of this transaction, looked at Enron's numbers, and decided that it was not material to analysts or Enron. Ex. D, at 14. Enron was a $400 billion corporation. *See supra* note 10 and accompanying text. Merrill's compensation was "secondary to helping Enron." Ex. D, at13. She also knew the rate of return was projected at 22% , but "there was no discussion that Merrill would not lose money on the deal." *Id*.

made the agreement but she knew it was one of the senior employees at Enron." *Id*. However, "[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. Zrike said that "[d]uring the DMCC meeting, there was an agreement to remarket Merrill's position." *Id*. at 10.

After the DMCC agreed on the approach, Zrike met with, and pointed out the risks to Bayly and to Tom Davis. Davis instructed Bayly to call a senior Enron official, "to make it known to Enron that Merrill did not normally make this kind of deal, Merrill had accommodated Enron, and Merrill was relying on Enron to follow through on its assurances." Ex. D, at 15. When she returned from Christmas holidays, Zrike confirmed that Bayly had spoken with the bankers and Enron's CFO. *Id*. She assigned the transaction to Dolan as "the day-to-day monitor" of the deal, but she asked Marinaro to stay in the loop.[45] *Id*.

In one of the ETF's most serious redactions, Zrike revealed that she reviewed the purchase agreement for the deal and discussed the environmental risks and other problems with the attorneys. "Zrike also wanted a 'hold harmless' clause for Merrill but Enron rejected that because Merrill had to be at risk." Ex. D., at 11; *accord* Ex. E, at 63. Zrike proposed an indemnification clause in the documents, but that, too, was rejected by Enron. Ex. D, at 15; *accord* Ex. E, at 63. Finally, Zrike wanted a pure "best efforts" clause in the documents–that, too, was rejected by Enron. Ex. D, at 15; *accord* Ex. E, at 63-64, 66-67. Enron's counsel, Vinson & Elkins, sent the agreement back informing Merrill that it would accept no indemnification clause or "hold harmless" provision. As

[45] In the entire period since the indictment, the government has never disclosed any testimony, summary, or other discovery material from Marinaro, who we now know, would also have significant exculpatory evidence.

for the "best efforts" clause Zrike requested, it could have been "too much of an obligation and they could not have this clause in the agreement." Ex. D at 15. "Merrill was putting in real equity with only Enron to remarket its position." *Id*. at 10. Any provision that might arguably be construed to retain risk to Enron was rejected.

Zrike's statements unambiguously demonstrate that she knew all the terms, parameters, goals and reasons for the transaction. "Enron buying back Merrill's position was not the deal with Enron. All of the terms of the deal between the parties were not in the documents and this happens all the time." Ex. D, at 11; *accord* Ex. E, at 72-73. Zrike "was told that Arthur Andersen was familiar with Merrill's role in the Barge deal and was okay with it." She talked to fellow counsel Frank Marinaro about Merrill *not* getting a guarantee. Ex. D, at 12.

When Zrike learned that LJM2 had purchased Merrill's interest in the barges, she again was involved. She knew that LJM2 paid Merrill what Marubeni would have paid, but it was not the party she thought would buy the barges. Ex. D, at 17. She discussed it with fellow counsel Marinaro. *Id*. at 17-18. She satisfied herself that although it was not the purchaser she expected, it was a separate entity, fully disclosed to Enron; this was within its purview, and she "got comfortable" with LJM2, who she believed, "for better or worse," "was specifically set up to operate this way with Enron properties," and "had gone all the way up to the [Enron] board level." She "got [her] arms around it." Ex. E, at 194-95. *Accord supra* notes 11 and 29 and accompanying text.

Zrike's statements demonstrate that the deal negotiations continued well beyond the participation of Bayly, Brown and Furst, and that these Defendants were not informed of the ways the negotiations developed. Understandably, once the deal was approved, these businessmen handed it off to the lawyers to handle. "Zrike's job was to advise Merrill on anything improper or illegal."

She 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. *See* Charts 8-9, Appendix.

Zrike's evidence belies the ETF's assertions that the Fastow call and the oral agreement were hidden from the lawyers, and that Defendants purposely circumvented counsel. The conclusion is inescapable that the ETF was able to make misrepresentations about Defendants' reliance on counsel only because they concealed material exculpatory evidence in violation of *Brady*, and their ethical obligations to counsel and to this Court. Zrike's evidence alone justifies the dismissal of this indictment.

C. THE RE-MARKETING OR "BEST EFFORTS" AGREEMENT: Ruemmler, Friedrich And Hemann Knowingly Misled The Court And Jury About The Absence Of The "Best Efforts" Or Re-marketing Language From the Deal Documents. Along With Weissmann, They Concealed Exculpatory Evidence That Merrill Counsel Conducted Serious Negotiations To Obtain Such Language In The Deal Documents But Enron's Counsel Refused.

With respect to Merrill's re-marketing defense, these prosecutors made three very specific arguments: (1) there was no re-marketing agreement; (2) there was no "best efforts" agreement; and, (3) no good faith negotiations transpired. All three arguments were directly contradicted by evidence that these prosecutors withheld from the Defendants in violation of *Brady* and their ethical obligations.

1. Contrary To The Prosecutors' Assertions, There Was A Re-marketing Agreement And Merrill Counsel Negotiated To Document It.

In Weissmann's presence, Katherine Ruemmler mocked the existence of a re-marketing agreement and implied to the jury that the Defendants were lying about it:

> the written agreement between Enron and Merrill Lynch had no re-marketing or best efforts provision. You heard testimony . . . that there was some suggestion, made primarily through Ms. Zrike, . . . that the Merrill Lynch defendants believed that all

> that Enron had committed to do was to re-market . . . Merrill Lynch's interest in the barges; . . . You can spend as many hours as you would like. You will nowhere in those documents ever find a reference to a re-marketing agreement or a best-efforts provision. It's not there. (Tr. 6151-52).

Ruemmler made these remarks with Andrew Weissmann sitting in the courtroom. Weissmann sat directly facing Zrike, with his notepad in hand, throughout her trial testimony. All the while, Weissmann, Ruemmler, Hemann, and Friedrich possessed, and withheld from the Defense, Zrike's grand jury testimony and lengthy 302 containing definitive exculpatory evidence that Zrike, and other Merrill counsel, had discussed and sought a re-marketing agreement or "best efforts" agreement documented in the final papers. Ex. D at 1-19; Charts 5, 8, 9, Appendix.

Compounding the injustice, Friedrich repeatedly asserted that the absence of a written record undermined the defense. Friedrich said:

> The Merrill Lynch Defendants take the uniform approach . . . that all that was going on was just that it was a remarketing agreement. That's all it was. There was no buyback. It's just a remarketing agreement. But ask yourselves this simple question: *If* it's a remarketing agreement, if that's all it is, *why was it not put in writing*? Kathy Zrike, all the witnesses who testified, tell you there is nothing wrong with remarketing. There's nothing wrong with that. They could have gotten sale and a gain treatment on this. If it was a remarketing agreement, there wouldn't have been a problem with that. If that's all it was, *why wasn't it put in writing*? During the time the Merrill lawyers spoke to you for almost four hours, no one even addressed that question once. They don't have an explanation. (Tr. 6486) (emphasis added).

The only reason the Defendants had no answer to Friedrich's disingenuous "question" is because Friedrich and the Task Force had suppressed the exculpatory evidence. Zrike had tried to negotiate for these provisions in the final documents, but these prosecutors withheld this evidence from the Defense. Zrike had already told them: "[W]e were trying to do what we could to get [a re-marketing provision] – consistent with what the business deal was to get some protection, and we

were not successful in negotiating that [] with Vinson & Elkins." Ex. E, at 69. Instead of meeting their *Brady* and ethical obligations, these prosecutors impermissibly shifted the burden of proof to the Defense to explain the absence of evidence that the prosecution concealed.

2. Contrary To The Prosecutors' Assertions, There Was A "Best Efforts" Agreement, And Merrill Counsel Negotiated To Document It.

According to the Defendants, Fastow or Enron merely agreed to use their *best efforts* to find another buyer for the barges. "Best efforts" is a term of art in the banking industry for a non-binding, good faith understanding among businessmen.[46] Brown explained to the grand jury that the only side deal in this transaction was this assurance of "best efforts." (Tr. 3239-40). Fastow and McMahon have both confirmed this, unequivocally. Exs. A-C. The government conceded at trial that a "best efforts" agreement was lawful.[47] It is beyond dispute that the government *knew* this was "magic language," indeed, exonerating language for the Defense *and* that any evidence of "best efforts" completely contradicted their case.

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[46] The Fastow raw notes confirm that Fastow had the same understanding of this term. Ex. A, at 44-49, 63. The Defendants have long and consistently said that they understood that Enron agreed to use its "best efforts" to find a third-party purchaser for Merrill's equity interest in the barges, but that it had no obligation to do so. *See also* Congressional Deposition of Daniel H. Bayly, July 30, 2002, portions of which are attached hereto as Exhibit **T**, at p. 50. "I considered his statements the equivalent of a best-efforts statement that they were going to facilitate our exit." *Id.* "[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*. It is the explanation Brown gave the grand jury. "If assurances is interpreted to be more along the lines of strong comfort or used best efforts, that is my understanding." (Tr. 3239-40). This assertion formed a basis for the entire defense at trial (Tr. 1506-08, 1695-96, 2830-31, 3044-45, 3168, 3238-41, 3410-11, 3521-22, 3962, 4488-89, 4515-18, 4525-26, 4530-36, 4844-65, 5701-07).

[47] Tr. 4528 (Matthew Friedrich: "If it's just 'best efforts,' then it would have been okay."); Tr. 4520 (Friedrich: "We don't dispute that [a gain was appropriate if it was a best efforts agreement] either."); Tr. 6485 (Friedrich: "[T]here is nothing wrong with remarketing. There's nothing wrong with that. They could have gotten a sale and a gain treatment on this. If it was a remarketing agreement, there wouldn't have been a problem with that."); *Accord* Government's Opposition to Furst's Corrected Motion for Release on Conditions Pending Appeal, *United States v. Brown*, No. 05-20319 (5th Cir.), at 3 n.1, 17; Government's Brief on Appeal, *United States v. Brown*, No. 05-20319 (5th Cir.), at 234.

Accordingly, these prosecutors could only have made a calculated decision to both conceal the best efforts evidence and maintain that Defendants were lying about "best efforts." Indeed, they contended that the entire "best efforts" defense was a fabrication (Tr. 3950, 3962).[48] The fact that the ETF knew a "best efforts" agreement was lawful explains why the prosecutors fought to keep the explicit language, "best efforts," out of the case. First, they surgically redacted it from their most crucial *Brady* disclosures (Tr. 3950, 3961, 4167-70, 4518-21, 4527-30, 5413-14). Second, they did everything possible to keep this evidence away from the jury (Tr. 1650-53, 3090, 3167-68, 3239-40). The "success" of these prosecutors depended on the jury not hearing the truth: that a "best efforts" assurance was all that was ever provided by Enron to Merrill. Had the jury heard this evidence, and also the plethora of concealed testimony which now confirms that Enron merely provided "best efforts" assurances, the jury would have been forced to conclude, as Judge DeMoss did, that "[n]o legally enforceable promise was ever made to take Merrill out of the Enron deal." *United States v. Brown*, 459 F.3d 509, 537 (5th Cir. 2006) ("[T]he only comfort offered to Merrill was that Enron would use its best efforts to sell to a third party.") (DeMoss, J., concurring and dissenting in part). *See* Charts 3-10, Appendix.

The prosecutors (1) deliberately elicited hearsay-based testimony from their cooperating witness and an FBI agent, that this "was *not* a best efforts agreement," and, (2) told the jury this was *not* a "best efforts" agreement. At the same time, the Task Force was deliberately withholding its notes of multiple interviews of Fastow which establish that a "best efforts" agreement is all that the parties ever agreed to, and that Kopper, Glisan and others' misunderstandings of any kind of

[48] *See also* Tr. 3090, 3168, 3239-40 (arguing that Defendants lied when they explained their understandings that it was a "best efforts" agreement).

guarantee had been deliberately and falsely created by Fastow–simply to motivate them. Ex. A, at 48.

Hemann specifically elicited from Kopper what could only have been perjured testimony, given Kopper's prior statement in the FBI 302:

> Hemann: Based on your understanding Mr. Kopper, was this a best efforts deal?
> Kopper: No, not on my understanding. (Tr. 1652-1653).

In fact, Kopper flat *denied* at trial that he told FBI Agent Bhatia and the SEC back in October 2002, as recorded in a 302, that "what was told to [Merrill Lynch] was that Enron would do their best to get ML out in six months." (Tr. 1508).

Ruemmler then elicited from star witness Glisan:

> Glisan: I felt that we were obligated.
> Ruemmler: And when you say "you felt," why did you feel that way?
> Glisan: Based upon Mr. McMahon's oral guarantee, which, as I understood it, was ratified by Mr. Fastow as well. (Tr. 3608).
> ***
> Ruemmler: Did the term 'best efforts' ever come up in your conversation with Mr. Furst?
> Glisan: No. (Tr. 3618).

When Defendants tried to elicit from Herb Washer, former attorney for Merrill Lynch, that Fuhs told him on October 6, 2003, that "Merrill Lynch had been told by Enron that they would use their best efforts to find a third party buyer to take out Merrill Lynch's interest," Hemann objected, and the evidence was excluded (Tr. 5661, 5702-07). In her closing, Ruemmler told the jury: "Finally, the written agreement between Enron and Merrill Lynch had no remarketing or best-efforts provision." *** "You will nowhere in these documents ever find a reference to ... a best efforts provision. It's not in there." (Tr. 6151-52). *Accord* Tr. at 6486 (Friedrich).

Notably, the *Brady* disclosures the ETF made for Zrike and Fastow failed to include *any* mention of their numerous references to "best efforts." Zrike's 302 and grand jury testimony prove that these prosecutors deliberately concealed the truth–and specifically the best efforts defense. Six months before her grand jury testimony, Zrike told Weissmann that "[she] tried to insert a 'best efforts' clause but Enron said that it was too much of an obligation and that they could not have this clause in the agreement." Ex. D, at 15. Zrike had told Weissman and the grand jury, on April 15, 2003: "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. In the grand jury, Zrike also reaffirmed and further explained her earlier statements: "The other thing we marked up and we wanted to add was a best efforts clause, what's called a best efforts clause that they would use their best efforts to find a purchaser . . ." Ex. E, at 63. "[T]he other part of this was the best efforts clause, the concern that that could be used again to require them to buy it back; and that would not be – was not the deal, ... that would not be consistent with the business deal that's being a true sale." *Id*. at 64-65. Similarly, we now know that Fastow gave Merrill only verbal "assurances" to create a high level of confidence that Enron would use its "best efforts" to find a third-party buyer. Ex. A, at 5-6, 9-10, 39-49, 63. Fastow did not make an oral guarantee, and he did not intend or think he had "blown" the accounting for the sale. *Id*. at 63; Ex. K, at 1315, 1521. Most notably, any understanding within Enron of a guarantee was deliberately and falsely created by Fastow. Ex. A.

In *United States v. Ramming*, 915 F. Supp. 854 (S.D. Tex.1996), the prosecution provided the defense with edited 302s that differed substantially from grand jury testimony. The court concluded: the government "took extensive liberties, choosing words [] that caused the statements to fit within the government's theory of the case." *Id*. at 868. Here as in *Ramming*, the prosecutors

took extensive, unconstitutional liberties in omitting the first-hand exculpatory evidence. The evidence these prosecutors concealed simply destroys their case. The ETF manufactured this prosecution, with full knowledge it was based entirely on the deliberately created false understandings of their witnesses, all of whom were Fastow's subordinates.

3. Contrary To The Prosecutors' Assertions, Merrill Lawyers Conducted Serious And Fully Informed Negotiations With Counsel For Enron.

In summation, Matthew Friedrich referred to the deal documents and the negotiations[49]:

> There is a suggestion . . . 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 it's taken out, that kind of thing. This is not the average business case. This is not a case where people are trying to . . . put language into documents as some sort of good-faith negotiating process. Tr. 6493-94.
>
> ***
>
> 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.[50]

However, Weissmann, Friedrich, Ruemmler and Hemann knew exactly why the re-marketing agreement and the "best efforts" language was not in the documents. *See supra* Sections III.C.1.-2..

Evidence they deliberately withheld from the Defense establishes:

(1) The lawyers conducted serious negotiations over the contents of the documents and there occurred the very "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

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[49] *See* Tr. 1506-08, 1695-96, 2830-31, 3044-45, 3168, 3238-41, 3410-11, 3521-22, 3962, 4044-130, 4488-89, 4515-18, 4525-26, 4530-36, 4844-65, 5701-07, 6283, 6285-86, 6292, 6295-96, 6309, 6318, 6327-28, 6349, 6374, 6376, 6381, 6428-29.

[50] Friedrich was concealing evidence from Zrike that contradicted everything he said. Documents went back and forth between all counsel, and Zrike tried to put language in herself that was rejected, Ex. D, at 15. And of course, he was concealing the directly contradictory testimony of Zrike that the lawyers negotiated the transaction long after the "Trinkle call," the Fastow call, and specifically for a written 'best efforts' or re-marketing agreement. Vinson & Elkins said Enron "can't do this." *Id*. at 11, 15.

sometimes language comes in, sometimes it's taken out, that kind of thing" that Friedrich told the jury did not transpire. (Tr. 6493-94).

(2) Merrill counsel had negotiated for a commitment in writing to re-market the barges, and a pure "best efforts" provision but Enron's counsel, Vinson & Elkins, would not allow it. Exs. D, E.

Everyone, including counsel, understood that various possibilities had been considered and discussed, but that ultimately, all agreed that the transaction could only and would be a true sale with no provision or agreement that might be construed to attribute any retention of risk to Enron, and that is all that McMahon or Fastow offered. *See* Chart 9, Appendix.

Zrike's grand jury testimony, withheld by the ETF for five years, proves that Merrill lawyers themselves actively sought several key provisions from Enron during 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.[51]

Zrike's recently disclosed grand jury material also proves that she, two attorneys on her staff, and outside counsel, Alan Hoffman, tried to negotiate these terms, but "we were not successful in negotiating that [] 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

[51] The previously concealed Fastow material proves this as well, Ex. A, at 5-6, 9-10, 44-49, 63; Ex. K, at 260, 1315, 1320, 1519, 1521, 1882; Ex. L, at 6493; Ex. N, at 42, as does Zrike's 302 from five years ago. Ex. D.

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.

Thus, Friedrich and Ruemmler told the jury that the Defense lied about the existence of a re-marketing agreement, or a "best efforts" understanding, that there were no negotiations, and Friedrich explicitly and wrongly shifted the burden of proof to the Defendants to explain the absence of these terms from the deal documents (Tr. 6486). All the while, the Task Force was concealing definitive evidence from Zrike (and Fastow) that a "best efforts" agreement is all there ever was, *and* Merrill lawyers negotiated to include it in the deal documents. *See* Charts 3, 5, 7-9, Appendix.

D. THE DRAFT ENGAGEMENT LETTER: The ETF Deliberately Misrepresented That Brown's Subordinate, Fuhs, Altered The Engagement Letter, Deleting The "Buy-Back Language" To Hide It From The Lawyers. In Fact, The ETF Possessed Exculpatory Evidence That Merrill Counsel, Dolan, Himself Deleted The Language.

At trial, AUSA Hemann contended that Bill Fuhs, who worked with Jim Brown,[52] was responsible for the draft engagement letter and deleted language evidencing the "secret side-deal" that Enron would repurchase the barges (Tr. 4660-79). Hemann argued that Fuhs made this deletion

[52] The government made the relationship between Brown and Fuhs very explicit: "Mr. Brown's group was tasked with getting the deal done, with actually getting the deal closed. Mr. Bill Fuhs worked for Mr. Brown. His job was to make sure that the deal actually got executed. Mr. Fuhs, when it came down to actually getting the stuff put together, was the guy who dealt with Mr. Boyle at Enron." (Tr. 6167). As to the "risks" in the deal, the government contended that "Mr. Brown and Mr. Fuhs were discussing these various [risks] of the deal." (Tr. 6200). Even more explicit and misleading is Ruemmler's argument in summation: "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). *See also* Tr. 412, 6143, 6212, 6220-21, 6223, 6230-31, 6266, 6534, 6538.

so that Defendants could hide the terms of the deal from the lawyers[53] and auditors.[54] The prosecutors repeatedly relied on the draft engagement letter and showed it to the jury to prove that all of the Defendants knew about the illegality of the buy-back and participated in the alleged underlying conspiracy (Tr. 420, 422, 424, 6220-22).

Hemann portrayed Fuhs as a liar when Fuhs tried to explain that he was not the person who was responsible for the documents or for negotiations with Enron. Instead, Fuhs said that Geoff Wilson, a younger and less experienced Merrill employee, had worked with in-house counsel Dolan to draft the engagement letter.[55] This explanation has now been proven correct by the very evidence the government unlawfully withheld. Ex. F, at 5 (confirming that Dolan received the draft directly from Wilson and personally made the changes to the letter which deleted any reference to a "guarantee" because it "was contrary to [his] understanding of the transaction"). *See* Chart 10, Appendix.

For example, Fuhs testified that he "had given Alan [Hoffman] instructions to make sure he should try and limit our liability as best as possible to our investment." (Tr. 4678). He also testified: "He [Wilson] drafted the engagement letter, which he worked on with our in-house counsel. The other documents had already been drafted by Enron's outside counsel and were being

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[53] Tr. 6346, 6500, 6504, 6539.

[54] Tr. 6143-44, 6147-48, 6229. Alternately, 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 "buy-back" (Tr. 2888-89, 6223-24, 6229-30). Fastow's raw notes demonstrate the absolute falsity of this third-hand hearsay. Ex. A, at 48 (Fastow *lied* to "'subordinates' by 'tell[ing] Enron people this was a guarantee' in order to 'motivate' and 'light a fire' within Enron to re-market the Barges to a third-party.") (emphasis in original).

[55] Fuhs even explained explicitly: "I don't know if he [Boyle at Enron] heard anything back. I told you I don't know if anyone had any conversations. And maybe Geoff Wilson did and maybe Gary Dolan talked to their attorneys. I don't know. They were part of the deal team." (Tr. 4672).

reviewed and worked on by our counsel." In response, Hemann sneered: "That you *suppose* he worked on with your in-house counsel, correct?" (Tr. 4678-79) (emphasis added).

In a blatant misrepresentation on rebuttal argument, Friedrich told the jury:

> 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).

We now know, however, from recent *Brady* disclosures of Zrike, Dolan and Hoffman, that counsel was involved at every stage of this transaction, including personal negotiation, oversight, editing, and control of the engagement letter and all documents. The concealed evidence demonstrates that Fuhs' and Brown's subordinate, Wilson, worked directly with Dolan, who maintained control of the ultimate content of the engagement letter. *Cf.* Ex. F, at 5. This new exculpatory material belies the ETF's entire use of the draft engagement letter. *Cf.* Ex. F, at 3-6. *See also supra* Sections I. and III.A..[56]

[56] Further, at the same time Ruemmler informed the jury that "[t]he documents are the best evidence of what was going on at this time," (Tr. 6221-22), Ruemmler knew that *the best evidence* was the withheld testimony of Dolan completely debunking the government's theory regarding the draft engagement letter. *Cf.* Ex. F, at 5. *See also* Tr. 6143 (Ruemmler: "The defendants put together written documents to conceal the true deal."); Tr. 6147 (Ruemmler: "Because, if its verbal and its not in writing, you can always deny it later."). This last statement, of course, ignores that all the Defendants admitted an oral understanding that Enron would use its best efforts to re-market the barges–the very understanding possessed by everyone who was actually on the telephone call and by counsel who conducted further negotiations. Chart 7, Appendix.

1. Merrill Counsel Dolan–Not Fuhs–Edited The Draft Engagement Letter.

The long-concealed evidence proves that Merrill Counsel Katherine Zrike also assigned the Barge deal to fellow counsel Gary Dolan and Frank Marinaro to work with outside counsel, Alan Hoffman, on negotiations and documentation. Ex. E, at 66. In evidence that Weissmann, Ruemmler, Friedrich, and Hemann had back in October 24, 2002, but AUSA Spencer only produced on December 12, 2007, the ETF knew:

> "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 . . ."[57] However, "DOLAN did object to this language and made the necessary changes."

Ex. F, at 5.

In two further vitally important sentences that the ETF carved out of its *Brady* disclosure on July 30, 2004,[58] Dolan referred specifically to the original draft of the engagement letter that

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[57] This quote is directly from the FBI 302. The actual language in the government's pre-trial *Brady* disclosure read: "The [Barge] engagement letter was too specific and Dolan wanted the letter to be more general. As to the draft engagement letter in his files, Dolan made changes to some of the engagement letter terms related to the deal because Dolan did not believe that those were the actual terms. Dolan stated that the original draft of the engagement letter obligated Enron to take Merrill out of the [Barge deal] eventually. This was contrary to Dolan's understanding of the transaction." Ex. F, at 5. Moreover, Boyle and Eric Boyt of Enron both testified that the same language was deleted on the Enron side of the deal by Boyt (Tr. 2888-89, 4968-71).

[58] The government's meager *Brady* disclosure did not reveal *any* of these crucial facts: that Dolan worked with Wilson on the letter; that Dolan himself rejected the language because Merrill would not engage in a parking transaction; or, that "Dolan requested that Wilson delete some of the language in the engagement letter." Ex. F, at 5. Dolan further explained that, "generally, Merrill Lynch engagement letters use general terms to describe a deal because the deal terms can subsequently change." *Id*. Indeed, none of the government's *Brady* "disclosures" even mention Wilson, Hoffman, or Frank Marinaro–all of whom were working on the negotiations and documents long after our Defendants left for Christmas vacation.

"obligated Enron to eventually take Merrill Lynch out of the Nigerian Barge transaction." Dolan "believed that such an agreement would be improper because such a transaction could be viewed as a 'parking' transaction." Dolan's understanding was that Merrill was purchasing equity in the Nigerian Barge company with the expectation that Enron would help Merrill find a buyer for Merrill's interest in the barges. Ex. F, at 5-6. This evidence, alone, guts the government's case.

While the government blamed Brown's group for deleting the buy-back language from the engagement letter, Hemann, Friedrich, Weissmann, and Ruemmler concealed evidence that proved that it was counsel himself who deleted the language–just as he should have done to insure that Merrill's agreement was proper. *Cf.* Ex. F, at 5. Dolan told Weissmann five years ago that he personally deleted the buy-back language from the engagement letter. *Id*. The ETF prosecutors were constitutionally and ethically compelled to provide this exculpatory evidence to the Defense. There is no innocent explanation for the prosecutor's failure to do so–much less for their insistence that Fuhs and Brown were responsible for an edit that they knew Dolan had made.

2. The ETF Concealed All Exculpatory Evidence Of Outside Counsel Alan Hoffman Who Represented Merrill And Also Understood There Was An Unwritten Re-marketing Agreement.

Amazingly, the ETF made no *Brady* disclosure whatsoever as to Merrill outside counsel Alan Hoffman. *See*, *e.g.,* Exs. J, O, P. They did not even list him. *Id*. The newly-disclosed *Brady* material shows that Hoffman had also seen the buy-back language in the draft engagement letter, discussed it with Dolan, and knew that it was deleted. Hoffman 302, at 4-5.[59] ("Hoffman had oral conversations with Dolan about th[e] draft engagement letter."). *See also id*. at 1 ("All the documents prepared by [Hoffman] were sent to [Merrill] attorneys for review.").

[59] Hoffman gave all this information to Andrew Weissmann in October 2002.

Hoffman also received the fax from Geoff Wilson at Merrill referring to a take-out in six months. *Id*. at 4. Hoffman said that he "had a discussion with Fuhs in which he mentioned that Merrill Lynch hoped to be out of the deal in a few weeks or months." *Id*. at 3. Consistent with the defense, Hoffman said: "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." *Id*. at 5. Further, Hoffman knew there was an undocumented oral agreement to assist: "It was [my] understanding that there was an unwritten understanding that Enron would help ML find a purchaser for their interest in the Nigerian Barge." *Id*.

More specifically as to Jim Brown, the ETF concealed the following exculpatory evidence: Brown called Hoffman about the deal a few days before Christmas. "Brown wanted him to focus on three areas; the non-recourse loan, the indemnification agreement, and any potential adverse tax consequences." *Id*. at 1. Moreover, Hoffman verified that Dolan was responsible for the engagement letter, and that Hoffman's "prim[ary] contacts at Merrill were Fuhs and Wilson." *Id*. at 2-3. Finally, Hoffman's testimony also confirms, directly contradicting the government's theories, that upon receipt of the draft documents, the following transpired: Hoffman "determined the indemnification agreement needed more work"; his partner researched tax issues; he retained a Nigerian firm to research issues of Nigeria law relevant to Merrill ownership of an interest in barges operating there; and, Hoffman rejected Enron's request to domicile the new company in the Caymans. *Id*. at 2-3. Hoffman believed that Arthur Andersen, not Vinson & Elkins, had refused to allow the incorporation of an indemnification agreement in the deal documents. *Id*. at 3. When

Hoffman learned later that Nigeria might repudiate the power purchase agreement, he believed Merrill would lose $7 million or have to relocate the barges and "cut its losses." *Id*.

Outside counsel Hoffman specifically praised Brown and Fuhs–to Weissmann– for their ethics and integrity: "Hoffman held a very high opinion of Brown and Fuhs and felt that they were ethical. He felt that they were excellent bankers who would point out any problematic accounting issues, and they were very vigilant about pointing out accounting issues." *Id.* at 4.

If the Barge jury had heard that: (1) neither Fastow nor McMahon ever gave Merrill a guarantee, but instead *assured* Merrill that Enron would use its *best efforts* to find a third party buyer; (2) there was no "best efforts" clause in the documents because Vinson & Elkins rejected it; (3) counsel knew a buy-back had been discussed, that assurances had been made, but that Enron could not, and absolutely would not, retain any risk in this deal; (4) Merrill Counsel Gary Dolan deleted the buy-back language from the engagement letter; and, (5) everyone knew and agreed this had to be a completely unencumbered sale, Defendants would necessarily have been acquitted of all charges. There was no crime. Charts 3-10, Appendix.

All or any of this evidence establishes that Merrill counsel was fully informed and properly handled the transaction to make certain that it complied with the law and the business transaction to which the parties actually and ultimately agreed. There was no "secret" to the oral agreement–it was a "best efforts" agreement to re-market the barges with no obligation on Enron–and Defendants relied entirely on counsel, who performed their jobs also.

IV. THE ETF EXTORTED AN UNCONSTITUTIONAL AGREEMENT FROM MERRILL LYNCH THAT EFFECTIVELY DENIED DEFENDANTS ACCESS TO EXCULPATORY WITNESSES.

The ETF foreclosed the Merrill Defendants from presenting any significant factual defense by obstructing access to key witnesses. By doing so, the ETF deprived the Merrill Defendants of their Sixth Amendment rights to compulsory process, confrontation, and effective assistance of counsel, and their Fifth Amendment rights to due process and exculpatory evidence in the government's possession. *Cf. United States v. Vavages*, 151 F.3d 1185, 1191 (9th Cir. 1998) (Sixth Amendment violated); *United States v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1997) (Fifth Amendment violated).

"Witnesses ... are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them." *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966), *cert. denied* 396 U.S. 865, 90 S. Ct. 143 (1969). The free choice of a potential witness to talk to defense counsel must remain unconstrained, and the prosecution improperly interferes with a defendant's right of access if it imposes unjustified limitations. *United States v. Gonzales*, 164 F.3d 1285, 1292 (10th Cir. 1999) (Defendants have "a right to be free from prosecution interference with a witness' freedom of choice about whether to talk to the defense."). As one court has said, "as to interviewing a prospective prosecution witness, our constitutional notions of fair play and due process dictate that defense counsel be free from obstruction, whether it come from the prosecutor in the case or from a state official . . . acting under color of law." *Coppolino v. Helpern*, 266 F. Supp. 930, 935 (S.D.N.Y. 1967).

Justification for any interference with this right of access can only be demonstrated by the clearest and most compelling considerations–none of which are applicable to this case. *See Dennis*

v. United States, 384 U.S. 855, 873-74, 86 S. Ct. 1840, 1851 (1966) ("In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts."). Similarly, "substantial government interference with a defense witness' free and unhampered choice to testify violates due process." *Henricksen*, 564 F.2d at 198 (improper to contractually forbid witnesses from giving exculpatory testimony for defendants).[60] When there are multiple incidents of such interference, a Court must assess the cumulative effect to determine whether a due process violation occurred. *United States v. Hammond,* 598 F.2d 1008, 1014 (5th Cir. 1979).

In *United States v. Scroggins*, 379 F.3d 233, 239 (5th Cir. 2004), the Fifth Circuit explained that the "Sixth Amendment guarantees a defendant the right to present witnesses . . . without fear of retaliation against the witness by the government." Similarly, in *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980), the Fifth Circuit stated that "[t]hreats against witnesses are intolerable [] [and] [s]ubstantial government interference with a defense witness' free and unhampered choice to testify violates due process rights."[61] *Cf. United States v. Morrison*, 535 F.2d 223, 226-29 (3d Cir. 1976) (government threats and intimidation to witness if she testified violated defendant's right to compulsory process); *United States v. Smith*, 478 F.2d 976, 977-79 (D.C. Cir.

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[60] While prosecutorial misconduct in witness interference has led to *per se* reversal, *United States v. Goodwin*, 625 F.2d 683, 703 (5th Cir. 1980), such claims, at least in this Circuit, are currently subject to harmless error analysis. *United States v. Weddell*, 800 F.2d 1404, 1410-11 (5th Cir. 1986). Because that analysis "would be a speculative inquiry into what might have occurred in an alternative universe," and given the "structural" unfairness resulting from the Task Force's widespread abuses, the Supreme Court's recent decision in *United States v. Gonzalez-Lopez,* 548 U.S. 140, 126 S. Ct. 2557, 2565 (2005), casts doubt on the applicability of the harmless error doctrine in this case. The Court need not resolve that issue here, however, since prejudice is plain.

[61] The Task Force is fully aware of these rules. Ironically, it cited and attached them as an exhibit to a brief in the Barge case. *See* Government's Opposition to Bayly's Motion to Dismiss or For an Order Directing the Government to Withdraw a Witness Request, May 7, 2004, Dkt. 191, at Ex. 16, p. 5.

1973) (reversal where government intimidated critical exculpatory witness with indictment and prosecution if he testified for the defense).

"To make [due process protection] fully meaningful, it has been extended to proscribe the government's making a witness unavailable and thereby preventing a defendant from interviewing the witness. . . ." *United States v. Henao,* 652 F.2d 591, 592 (5th Cir. 1981); *see also United States v. Opager,* 589 F.2d 799, 804 (5th Cir. 1979) ("The importance to a litigant of interviewing potential witnesses is undeniable."). In judging the "coercive impact" of the government's alleged instructions or warnings to witnesses not to cooperate with defendants, courts consider (1) the timing and manner in which the government communicates with the witness; (2) the language of the instruction, warning, or statement; and, (3) whether the prosecutor has a legitimate "basis in the record" for instructing the witness not to meet with or testify for defendants. *United States v. Vavages,* 151 F.3d 1185, 1190 (9th Cir. 1998); *see also Hammond,* 598 F.2d at 1012 (reversing conviction where law enforcement agent told witness if he testified for defense, he would have "nothing but trouble" in unrelated criminal investigation); *United States v. Foster,* 128 F.3d 949, 954 (6th Cir. 1997) ("[T]he government's 'warning' to [the witness'] attorney, a few days before Foster's trial, was at best ill-advised and at worst a possible attempt to intimidate [the witness].").

In this case, "[a] preponderance of the evidence" establishes that the Task Force's actions "interfered substantially" with witnesses' "free and unhampered" choice to meet with defendants or testify on their behalf. *Scroggins,* 379 F.3d at 239; *accord Vavages,* 151 F.3d at 1188 ("substantial government interference with a defense witness's free and unhampered choice to

testify amounts to a violation of due process")[62]; *see United States v. Bieganowski,* 313 F.3d 264, 291 (5th Cir. 2002) ("substantial governmental interference with a defense witness' choice to testify may violate the due process rights of the defendant") (citations omitted); *Hammond,* 598 F.2d at 1012-14 (reversal for due process violation where defense witnesses refused to testify after government threatened that if witnesses testified they would have "nothing but trouble"). These multiple constitutional violations, and in consideration of the totality of misconduct documented herein, require dismissal with prejudice. *United States v. Leung*, 351 F. Supp. 2d 992, 997 (C.D. Cal. 2005) (dismissal where witnesses understood what prosecutors "expected," and the possibility that witnesses "felt free" to provide material exculpatory evidence to the Defendants was "ephemeral at best").

A. By Threatening Merrill And Its Employees With Indictment If They Contradicted The Governments' Theory Of The Case, The Prosecution Unconstitutionally Foreclosed Defendants' Presentation Of Their Defense.

In *United States v. Stein*, 435 F. Supp. 2d 330, 345-46, 349 (S.D.N.Y. 2006), the Government, with the assistance of a financial services firm, conspired to deprive executives of legal fees unless they "cooperated with the government" and/or did not "invoke[] [the] privilege against self-incrimination under the Fifth Amendment." According to the agreement between the government and the firm in *Stein,* in all cases, payment of legal fees would cease if the individual were "charged by the government with criminal wrongdoing." *Id.* at 403-04. In addition, the agreement "effectively compelled the firm to make its personnel available for interviews by the government." *Id* at 413. The agreement in *Stein* provided that if the firm did not comply, it would

[62] *See also Vavages*, 151 F.3d at 1188 ("Unnecessarily strong admonitions ... aimed at discouraging defense witnesses from testifying have been held to deprive a criminal defendant of his Sixth Amendment right to compulsory process for obtaining witnesses in his favor.").

"be open to the risk" that the government would declare that the firm breached the deferred prosecution agreement. Anything the government regarded as a failure to cooperate "almost certainly will result in the criminal conviction." *Id.* at 350.[63] The Court explained that:

> The Supreme Court long has protected a defendant's right to fairness in the criminal process. It has grounded this protection primarily in the Due Process Clause as well as more specific provisions of the Bill of Rights, including the Confrontation Clause and Assistance of Counsel Clause of the Sixth Amendment. Whatever the textual source, however, the Court consistently has held that criminal defendants are entitled to be treated fairly throughout the process. In everyday language, they are entitled to a fair shake.

Id. at 357.

As in *Stein,* the prosecution deliberately and effectively deprived the Merrill Defendants of a "fair shake."[64] The ETF extorted from Merrill a plea agreement that is unconstitutional on its face. *See* Merrill Lynch Agreement, executed September 17, 2003, attached hereto as Exhibit H. The ETF, through the unlawful plea agreement and other tactics:

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[63] No major financial services firm has ever survived a criminal indictment. *See* Ken Brown, *Called to Account: Indictment of Andersen in Shredding Case Puts Its Future In Question*, WALL ST. J., March 15, 2002, at A1. *Cf. United States v. Stein*, 495 F.Supp.2d 390, 393 (S.D.N.Y. 2007), *appeal pending*, No. 0607-3042 (2d Cir.) ("Stein II") ("The government threatened to indict, and thus to destroy, the giant [financial services] firm."). Because of this fact, it is self-evident that Merrill Lynch had infinite incentive to agree to the terms the ETF put forth, however draconian and unconstitutional. *See Stein*, 435 F.Supp.2d at 341 (quoting KPMG counsel: "the object was to save KPMG, not to protect individuals."); *see also* Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1; *Stein*, 435 F.Supp.2d at 345 ("cooperation may have been the best way for [the financial services firm] to proceed, but it was not necessarily best for its employees.").

[64] *See Stein*, 495 F. Supp. 2d 390 ("Stein II") (on remand, dismissing indictment where government misconduct prevented individuals from presenting a defense). The basis for the government's appeal in *Stein* is that the Sixth Amendment violation was cured by (1) the government's statement that the firm's provision of counsel fees would not now impact the deferred prosecution agreement, and, (2) the firm's statement that denial of fees was not triggered by government threats. Brief of Appellant United States, *United States v. Stein*, No. 07-3042-cr (2d Cir.). Notwithstanding the merits of those arguments, and the different procedural posture here, and no matter what the outcome of appeal, the misconduct in *Stein* pales in comparison to the egregious misconduct in this case in terms of bath faith, incremental effect, and prejudice.

- compelled Merrill to make its personnel available for interviews by the government while simultaneously withholding the exculpatory evidence produced during those interviews. Ex. H, at 2 ¶ 4 ("This obligation of truthful disclosure includes an obligation to provide to the Department access to Merrill Lynch's facilities, documents and employees.").

- foreclosed Merrill employees from providing the Defendants any information "contradicting" Merrill's "admissions." *See supra* Section IV.B. The witnesses with knowledge could not "make any public statement, in litigation or otherwise, contradicting Merrill Lynch's acceptance of responsibility." Ex. H, at 3 ¶ 7.

- threatened Merrill and its employees with indictment and ruination, from disputing (legitimately or not) the government's theory of the case. "Any such contradictory statement," by any Merrill Lynch employee, "shall constitute a breach of this Agreement" and would subject Merrill to prosecution. All of these determinations rested "in the sole discretion" of the government. *Id*.

- prevented access to other Merrill executives and attorneys (whom we now know possessed exculpatory evidence) and who confirmed Brown's understanding of the barge transaction.

- allowed the government to be informed of any inquiries to Merrill by the Defendants and to be present at a defense interview of any Merrill witness.

- named 29 persons as unindicted co-conspirators–virtually every Merrill employee who "materially" worked on this transaction.

- changed Merrill counsel's Katherine Zrike's status from a "subject" to a "target" after she testified before the grand jury–then withheld her exculpatory testimony from the Defense.

- indicted or threatened to indict for perjury several persons who gave statements inconsistent with the ETF's theory of the case.

As in *Stein*, the government "let its zeal get in the way if its judgment." 435 F. Supp.2d at 336. As in *Stein*, such unlawful provisions "demonstrate a willingness by the prosecutors to use their life and death power" over Merrill to induce Merrill "to coerce its personnel to bend to the government's wishes notwithstanding the fact that the Constitution bar[s] the government from doing directly what it forced [Merrill] to do for it." 495 F. Supp.2d at 414 (Stein II). As in *Stein*,

these provisions violated the basic Constitutional principle that "the government may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case." 435 F. Supp.2d at 357. *See California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528 (1984) (Due Process "require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense."); *see also Crane v. Kentucky*, 476 U.S. 683, 690-91, 106 S. Ct. 2142 (1986) ("In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testimony."). As in *Stein*, the government here "deliberately [and] recklessly tilt[ed] the playing field against [these] criminal defendant[s]." *Stein*, 435 F. Supp.2d at 362 n.159. By denying Defendants effective access to witnesses, "[t]he government here acted with the purpose of minimizing these defendants' access to the resources necessary to mount their defenses or, at least, in reckless disregard that this would be the likely result of its actions. It is not unfair to hold it accountable." *Stein*, 435 F. Supp.2d at 366-67.

Although *Stein* involved the payment of legal fees, and this case involved access to witnesses, the result here was functionally the same–if not worse. The government created an uneven playing field where the Defendants did not have access to basic information. Without counsel of choice, but *with* access to material exculpatory witnesses, a Defendant might have a chance of disproving the government's case. However, without the basic exculpatory information (withheld by the government and known only to witnesses who were functionally unavailable), the Defendants in this case were even more stymied than those in *Stein.* As in *Stein*, the prosecutors' inexorable demands made it possible, and perhaps even necessary, that Merrill itself obstruct

Defendant's access to Merrill employees who possessed exculpatory information. *See id*. at 352; *see also supra* note 63 and accompanying text.

A careful examination of the evidentiary record establishes that the government used a combination of plea agreements and threats (in the form of "targeting," "subjecting," and in the creation of a list of "unindicted co-conspirators") to shut down this avenue of the defense. *See Scroggins,* 379 F.3d at 239; *Bieganowski,* 313 F.3d at 291; *Vavages,* 151 F.3d at 1190. The government simultaneously provided the Defendants with a list of twenty witnesses (ten of whom were Merrill employees), who "arguably" possessed exculpatory information, at the same time the government named almost all of those witnesses (in addition to Merrill's outside counsel on the transaction) in another letter identifying a list of twenty-nine "unindicted co-conspirators."[65] By identifying these individuals as "unindicted co-conspirators," the ETF effectively warned these individuals–under threat of prosecution–to refrain from contradicting the government's erroneous theory of the case. *See*, *e.g.* Dkt. 347 (outlining for district court the effect these tactics were having vis-á-vis witness access).

"[P]roper respect for the individual prevents the government from interfering with the manner in which the individual wishes to present a defense. The underlying theme [of the Constitutional pronouncements] is that the government may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case." *Stein*, 435 F. Supp.2d at 358.[66]

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[65] *Compare* Government Letter, April 5, 2004, attached hereto as Exhibit **O**, *and* Government Letter, July 30, 2004, attached hereto as Exhibit **P**, *with* Government letter, April 22, 2004, attached hereto as Exhibit **U**. *See* Dkt. 139, 158, 180.

[66] "[F]airness in criminal proceedings requires that the defendant be firmly in the driver's seat, and that the prosecution not be a backseat driver." *Stein*, 435 F. Supp.2d at 358.

United States v. Leung, 351 F. Supp.2d 992, 993-98 (C.D. Cal 2005) (constitutional rights violated and dismissal with prejudice required where government prohibits witnesses from sharing information with defendants). "Justice is not done when the government uses the threat of indictment–a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees–to coerce companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law." *Stein*, 435 F. Supp.2d at 381.

The "government held the proverbial gun to [Merrill's] head." *Stein*, 435 F. Supp.2d at 336. The provisions of this outrageous agreement with Merrill are abhorrent and inimical to a search for the truth. No matter what Merrill and its agents and employees believed to be true, they were bound, under threat of prosecution, to support the Task Force's case. Ex. G, at 4 ¶¶ 10-12. Like the Thompson Memorandum in *Stein*, and with similar government interference, this agreement prevented Merrill from providing employees with the means "to exercise their constitutional rights to defend themselves." *Stein*, 435 F. Supp.2d at 368. In short, the government dictated the terms of its erroneous theory while at the same time forbidding Merrill and its employees from speaking the truth–upon threat of personal prosecution for perjury and the indictment and destruction of Merrill Lynch. *See Stein*, 495 F. Supp.2d at 410.

Such provisions, as well as threats to declare a witness in breach of his or her cooperation agreement if he assists the defense, are so inimical to due process that courts *and* the Department of Justice do not hesitate to reverse convictions and dismiss cases where such plea terms have been misused. *See Henricksen,* 564 F.2d at 198 (reversing conviction where plea agreement, on its face, prevented witness from providing exculpatory testimony for defendant); *Vavages,* 151 F.3d at 1191

(reversing conviction where prosecutor threatened to declare witness in breach of plea agreement if she provided alibi testimony for defendant); *Leung,* 351 F. Supp. 2d at 993-98 (dismissing prosecution where plea agreement, as drafted and as applied, prevented witness from assisting defendant in preparing her defense).

Courts like *Vavages* have rightly reversed convictions where witnesses are prevented from testifying for the defense because of onerous and abusive plea agreements. In *Henricksen,* 564 F.2d at 198, in a one page, *per curiam* opinion, the Fifth Circuit reversed defendant's conviction where her co-defendant had signed a plea agreement with the government, pursuant to which he agreed not to give testimony exonerating the defendant. If the co-defendant breached this agreement by testifying, his plea agreement would be void and he would be prosecuted. Such plea terms so obviously "violate due process" that even the government lawyers on appeal, with the full backing of the Justice Department, confessed error and requested defendant's conviction be reversed. The Department of Justice should follow the same course here.

To take one remarkable example in the instant case, a few months before the Task Force entered into this unlawful agreement with Merrill, Zrike, Chief Attorney for Merrill's Investment Banking Division, and lead counsel for Merrill on the Barge transaction, testified at the Enron Grand Jury that the absence of a re-marketing agreement from the final documents resulted directly from decisions made by Enron's counsel and to which Merrill counsel agreed. Yet, remarkably, and while in possession of that testimony, AUSA Friedrich told the jury in rebuttal summation that the absence of a re-marketing provision from the documents demonstrated Defendants' criminal intent, and the existence of an illegal side-deal (Tr.6485-86).

Just as in *United States v. Golding*, 168 F.3d 700, 702-05 (4th Cir. 1999), "[t]he government did not stop with the threat. Instead, the prosecutor further abused [his] power by using the very situation [he] had created against the defendant in closing argument." Indeed, for Zrike to have publicly voiced these facts, she, and Merrill itself, would have been subject to criminal prosecution for disclosing evidence that flatly contradicted the government's case. Because of the unconstitutional Merrill agreement, when Zrike did testify at the Barge trial, she literally carried the fate of Merrill upon her shoulders and was forbidden from saying anything that contradicted the ETF's case–even if what she wanted to say was the truth. Ex. G, at 4 ¶¶ 10-12. The ETF unconstitutionally usurped to *its* "sole discretion" the role of judge and jury.[67]

B. In Violation Of Defendants' Constitutional Rights, The Task Force Interfered Substantially With The Defendants' Access To Witnesses By Insisting That ETF Members Attend Defense Witness Interviews.

It "is well established that a defendant is normally entitled, without government interference, to access to prospective witnesses. ... Moreover, the suppression of witnesses by the government violates the due process clause." *United States v. Pepe*, 747 F.2d 632, 654 (11th Cir. 1984); *accord Hammond,* 598 F.2d at 1014; *Henricksen*, 564 F.2d at 198. The prosecution "has no right to interfere with or prevent a defendant's access to a witness" absent an overriding interest in safety or national security. *United States v. Scott*, 518 F.2d 261, 288 (6th Cir. 1975). "[B]oth sides have the right to interview witnesses before trial." *United States v. Black*, 767 F.2d 1334, 1337 (9th Cir. 1985), *cert. denied*, 474 U.S. 1022, 106 S. Ct. 574 (1985).

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[67] "The trial is a search for the truth; it is up to the jury, not the government, to decide the facts, weighing the credibility of the witnesses. By allowing only one side of the story to be presented, the government unfairly tipped the scales in its favor." *United States v. Paris*, 827 F.2d 395, 406 (9th Cir. 1987) (Kozinski, J., dissenting).

"[W]hen the free choice of a potential witness to talk to defense counsel is constrained by the prosecution without justification, this constitutes interference with a defendant's right of access to the witness." *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981), *cert. denied*, 456 U.S. 980, 102 S. Ct. 2250 (1982). Exceptions to this rule are justifiable only under the "clearest and most compelling circumstances." *Dennis v. United States*, 384 U.S. 855, 873-74, 86 S. Ct. 1840, 1851 (1966). "[W]itnesses ... are the property of neither the prosecution, or the defense. Both sides have an equal right, and should have an equal opportunity, to interview them." *United States v. Soape*, 169 F.3d 257, 270 (5th Cir. 1999) (quoting *Gregory v. United States*, 369 F.2d 185, 1888 (D.C. Cir. 1966), *cert. denied* 396 U.S. 865, 90 S. Ct. 143 (1969)); *see United States v. Hernandez*, 347 F. Supp.2d 375 (S.D. Tex. 2004) (indictment dismissed, where government and Defendant offered two substantially different versions of events and absence/unavailability of critical exculpatory witness was the result of government's bad-faith actions).

Further, well-settled law prohibits the prosecutor from intruding on Defendant's right to conduct private interviews. In *Gregory*, the court observed that "the prosecutor embarrassed and confounded the accused in the preparation of his defense by advising the witnesses [] not to speak to anyone unless he were present." *Gregory*, 369 F.2d at 187. In that case, after crucial witnesses declined to talk to defense counsel unless the prosecutor was present, the trial court declined to intervene and provide assistance in accessing and interviewing the witnesses. *Id*. The Court of Appeals reversed based on the trial court's refusal to remedy the prosecutor's advisement. "Here the defendant was denied that opportunity which, not only [] statute, but elemental fairness and due process required that he have." *Id*. at 188. In such situations, as here, "there was unquestionably a suppression of the means by which the defense could obtain evidence." *Id*. at 189. And, "we know

of nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his presence." *Id*. at 188. *Accord International Business Machines Corp. v. Edelstein*, 526 F.2d 37, 42 (2d Cir. 1975) (Similar restrictions were improper: "They not only impair the constitutional right to effective assistance of counsel but are contrary to time-honored and decision-honored principles, namely, that counsel for all parties have a right to interview ... witnesses [] in private, without the presence or consent of opposing counsel and without a transcript being made.").

The Enron Task Force predicated any potential interview with Merrill employees on the presence of Task Force members. Dkt. 180 (with attorney declaration). After receiving the government's so-called *Brady* letter of April 5, 2004–identifying twenty witnesses, ten of them Merrill employees, who "arguably" possessed exculpatory information–Defendants contacted Merrill to request that interviews be arranged with five of the individuals named in the letter who were currently employed by Merrill. *Id*. In response to that request, Merrill's counsel stated that the ETF had **"**requested" that an ETF representative be present during any interviews of potential Merrill witnesses conducted by the Defendants' attorneys. *Id*. In turn, Defendants contacted Matthew Friedrich, who confirmed that request and refused to withdraw the request without judicial intervention granting such relief. *Id*. Merrill refused to respond to any further inquiries, or to even respond to the question whether Merrill intended to accede to the ETF's "requests." *Id*. Apparently, the Court did not intervene, or even rule on Defendants' request for relief.

Here, as in *Gregory*, the Task Force's deliberate and unlawful interference denied Defendants access to the witnesses in violation of Defendants rights to due process, exculpatory evidence, and to mount a defense. In addition, where, as here, the prosecutor commits affirmative

misconduct in denying defendants access to exculpatory witnesses, a violation of the Defendants' Sixth Amendment rights also occurs. *United States v. Henao*, 652 F.2d 591, 592-93 (5th Cir. 1981); *accord United States v. Morrison*, 535 F.2d 223, 226-29 (3d Cir. 1976) (government threats and intimidation to witness if she testified violated defendant's right to compulsory process; judgment of acquittal to be entered on remand unless government offered witness "use immunity"); *United States v. Smith*, 478 F.2d 976, 977-79 (D.C. Cir.1973) (reversal where government intimidated critical exculpatory witness with indictment and prosecution if he testified for the defense).

The government's inherently coercive attempt to intrude upon defense counsel's private interviews is unconstitutional, and, standing alone, would require dismissal with prejudice. The necessity for dismissal is even more compelling when the multiple infractions documented here are considered. In light of these unlawful actions, no remedy but dismissal is sufficient to cure the injustice. *Leung,* 351 F. Supp. 2d at 997; *United States v. Hernandez,* 347 F. Supp. 2d 375 (S.D.Tex. 2004).

C. The Task Force Explicitly Or Implicitly Discouraged Witnesses Other Than Merrill Lynch Employees From Meeting With Defendants Or Their Counsel.

In *United States v. Peter Kiewit Sons' Co.,* 655 F. Supp. 73 (D. Colo. 1986), *aff'd, United States v. Carrigan,* 804 F.2d 599 (10th Cir. 1986), three material witnesses, who had "given multiple interviews to the government," refused to meet with the defense. When asked why they would not meet with the defense, the witnesses reported that even though no one said "not to talk to the defense," the government did tell them they "probably shouldn't." *Id.* at 75. Likewise, the witnesses' attorney said the government never expressly instructed the witnesses not to speak with the defense, but they made it "obvious . . . they would prefer . . . the witnesses not be interviewed."

Id. at 76. The witnesses were "bright people," and their attorney felt "they too had drawn this clear inference from the prosecutors' statements and conduct." *Id.*

The district court in *Peter Kiewit* held that the government's statements infringed defendants' due process rights. "[The witnesses got the clear mental impression or message that the prosecutors preferred that these witnesses not talk to defense representatives. . . . [T]his prosecutorial attitude was communicated to the witnesses by words, implication, or non-verbal conduct." *Id.* at 77. These witnesses "were particularly vulnerable to suggestion and anxious not to offend the prosecutors," given that their former business associates and friends had been indicted on six white-collar felony charges "not through action of any local official or familiar United States Attorney in Colorado or New Mexico, but by the Justice Department itself reaching from Washington D.C. into their lives." *Id.*

That the witnesses' counsel advised his clients not to meet with the defense did not undo or cure the government's misconduct. "[I]n advising his clients not to speak with defense representatives, attorney Thompson was strongly influenced by the inference he had drawn from the prosecutors' words and conduct that the government did not want these witnesses, Thompson's clients, talking to the defense." *Id*.

> [The witnesses] apparently were concerned that if defendants could be indicted so could they be. . . . [W]hen [the defense] asked them for interviews, and when they testified on these motions, they were anxious to please the government because, in their minds at least, they were walking the tightrope of prosecutorial discretion from the threat of imprisonment to the hope of freedom. *Id*.

Beyond the unconstitutional pressure brought to bear on Merrill and its employees, it is apparent that the government pressured other exculpatory witnesses not to testify by suggesting to them that speaking with Defendants or their counsel was dangerous and could result in criminal

indictment.[68] *See supra* Section IV.B. (detailing ETF's use of monikers, "target," "subject," and/or "unindicted co-conspirator"–the same chilling tactics that were employed on non-Merrill witnesses); Exs. O, U; *see also* Brief of Appellant Jeffrey Skilling, *United States v. Skilling*, 178–81 No. 06-20885 (5th Cir.) (outlining various threats to counsel and witnesses in Skilling trial and noting that the Task Force provided a list of 114 unindicted co-conspirators in the case); Mary Flood, *For 114, A Time To Watch And Wait*, HOUS. CHRON., December 2, 2004, at B1. As a result, nine witnesses' felt compelled to rely on the Fifth Amendment out of fear of Task Force reprisals.[69] Neither the government nor the court provided these exculpatory witnesses (Boots, Cox, DeVito, Dolan, Hughes, McAndrews, McMahon, Zrike) with immunity.[70] Finally, the Task Force publically

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[68] For example, Merrill Defendant Bill Fuhs made a truthful proffer to the ETF, but it was contrary to the ETF's theory of the case. The ETF then indicted Fuhs for perjury and obstruction. (Dkt. 281). The trial court severed those counts (Dkt. 392), and after convicting him (improperly) on Counts I-III, the Task Force dismissed those two charges (Dkt. 687). Fuhs, of course, was acquitted by the Fifth Circuit after he spent eight months in a maximum security prison. *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S.Ct. 2249 (2007). The Task Force engaged in the same abuses of power with several Broadband defendants, *see* Mary Flood, *Enron Prosecutors Showed Jurors Wrong Tape*, HOUS. CHRON., May 2, 2005, at A1; Mary Flood, *Witness Takes Stand Despite Being Target*, HOUS. CHRON., June 9, 2005, at B1, and it was more than liberal with its use of the phrase "perjury."

[69] The following individuals pled or made unequivocal representations that they would plead the Fifth Amendment in the Barge trial: Tom Davis, Jeff McMahon, Mark DeVito, Gary Dolan, James Hughes, Mark McAndrews, Schuyler Tilney, Kelly Boots, Cassandra Schultz. (Tr. 3992, 4145-47, 4161-62, 4336-38, 4911, 4924-26, 5260-61; Dkt. 348). The Defendants alternately attempted to (1) introduce the limited and inadequate summarized testimony the government had produced, Dkt. 348, 536, 537; (2) procure, for one witness, an immunity order from the Court, Dkt. 536; and/or, (3) procure a jury instruction on "missing witnesses." Dkt. 415, 416. All such attempts were rejected by the court (Tr. 6053).

[70] *See, e.g.* Transcript of Hearing, April 25, 2004, at 7-9, 11-12, 14-15, 18, 22-24, 26-30; Transcript of Hearing, May 27, 2004, Dkt. 228, at 9-16, 18, 21-23, 29-30, 33, 37, 41; Transcript of Hearing, June 25, 2004, Dkt. 283, at 36-37, 42, 65, 92. *See also Morrison*, 535 F.2d at 226-29 (government threats and intimidation to witness if she testified violated defendant's right to compulsory process; judgment of acquittal to be entered on remand unless government offered witness "use immunity"). Additionally, the Court refused to admit the prior sworn testimony of these witnesses under Federal Rules of Evidence Rule 804 and/or Rule 807. *See* Dkt. 392, 397. *But see* Dkt. 347 (outlining governing law on introduction of prior sworn testimony); *United States v. Young Bros., Inc.*, 728 F.2d 682, 691 (5th Cir. 1978) (concluding that in determining whether grand jury witnesses are unavailable at trial, it was unnecessary and "a mere

fostered an atmosphere of fear against which all its actions must be judged.[71] Defendants were deprived of access to exculpatory witnesses who would have confirmed the validity of this transaction in all material respects.

As a prime example in the Barge case, Kelly Boots, one of four Enron employees who was actually on the Bayly/Fastow phone call, told Weissmann on February 23, 2004, that Enron had not provided Merrill with any guarantee which would affect "true sale" accounting treatment of the barge transaction. Kelly Boots 302, at 2-4. *Cf.* Tr. 443. Ms. Boots was included on the government's list of individuals who "arguably" possess exculpatory information. Ex. O. Ms. Boots was not included on the government's list of so-called "unindicted co-conspirators." Ex. U. Apparently, the ETF itself was going to call Boots to testify, but decided not to do so–or "cautioned" her–after hearing defense counsel in his opening statement say:

> And we're looking forward to the fact, that Ms. Kelly Boots is on the government's witness list . . . because Ms. Boots was on that one conference call with Mr. Fastow and Mr. Bayly. *** And we expect that you will hear from her . . . that no guarantee was given . . . and that based on her years of experience in banking, it was absolutely clear to her that Merrill Lynch's equity was at risk. (Tr.443).

The Task Force did not call her as a witness, and when Boots did appear, she felt compelled to assert her Fifth Amendment privilege (Tr. 4336). The ETF did not grant her immunity–possibly

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'formalism'" for the district court to have specifically ruled on grand jury witnesses' assertion of privilege at trial.); FED. R. EVID. 804(a)(1) Advisory Committee's Note ("Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability.").

[71] *See, e.g.*, *Statement of Linda Chatman Thomsen*, Deputy Director, Division of Enforcement U.S. Securities and Exchange Commission, July 8, 2004 ("Just the mention of the name Enron evokes images of duplicity and greed. ... And finally–lest there be any doubt–I will repeat what we've said before: Our investigation is continuing."), *available at* http:www.sec.gov/news/speech/spch0708041ct.htm (last visited March 18, 2008).

because her first-hand testimony corroborated the entire defense.[72] As she clearly possessed critical exculpatory evidence, the defense would have called Boots as a witness at trial, but ultimately could only stipulate that she was unavailable (Tr. 4336).

The parallels between *Peter Kiewit* and this case are compelling. In both cases, (1) the prosecutors were not local authorities but rather members of a special Task Force dispatched by the Department of Justice; (2) the prosecutors, in a highly public manner, indicted the witnesses' former co-workers and friends on serious federal charges and warned that other indictments might follow; (3) the witnesses in question were "bright" individuals represented by capable counsel who, based on conversations and interactions with the government, advised their clients not to meet with the defense, or else risk angering the government; and, (4) the witnesses did not meet with the defense, even after the defense informed them it was their right to do so.

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[72] The ETF did not hesitate, however, to grant immunity to Ben Glisan, a Fastow subordinate, whose testimony, in the Barge trial–not surprisingly–tracked the Task Force theory. When Glisan pled guilty, he refused to "cooperate" with the Task Force and was deemed "not credible." When the young, former Treasurer of Enron reported to prison, he was put straight into solitary confinement, which he later euphemistically described as "a shock." He then spent five months at a prison facility far more dangerous and oppressive than what he had been promised. He endured this treatment until the Task Force brought him to the Houston grand jury to see if he was ready to be more "credible." Obviously, he was. In the Barge trial, the Task Force portrayed him as a reluctant witness, granted him immunity and "compelled" him to testify. He unequivocally denied that he was receiving any benefits from the government (Tr. 3551-55). From Glisan's later testimony in *Skilling*; Testimony of Ben Glisan, *United States v. Skilling*, No. 06-20885 (5th Cir.), portions attached hereto as Exhibit **V**, at 9593-9610, however, it appears that Glisan was working fervently to curry Task Force favor to improve his conditions of confinement and reduce his sentence. Once Glisan cooperated with the Task Force, he began seeing his family, receiving furloughs home, was moved to a prison camp in Beaumont, and was allowed to shave another year from his sentence by participating in the drug and alcohol rehabilitation program. Assuming, *arguendo*, that Glisan had even a tacit understanding with the government at the time of the Barge trial–the concealment of this material provides an additional basis supporting dismissal of the indictment. *United States v. Bagley*, 473 U.S. 667, 683, 105 S.Ct. 3375, 3384 (1985) ("This possibility of a reward gave the witnesses a direct, personal stake in [defendant's] conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction."); *accord Tassin v. Cain*, — F. 3d —, 2008 WL 384578, *5 (5th Cir. 2008).

The message that the witnesses "probably shouldn't" meet with the prosecutors in *Peter Kiewit* was disturbingly similar to the not-so-subtle implied message the Task Force delivered to Jeff McMahon, Kelly Boots, Enron Executive Barry Schnapper, and others–that it was their decision whether to talk to the defense, but that the ETF didn't think it was a "good idea." *See*, *e.g.* Transcript of Hearing, April 15, 2004, Dkt. 176, at 9 (Defense proffer to provide affidavits and letters from witnesses' counsel as to "chilling" effects and intent of witnesses to invoke the Fifth Amendment in all cases.). As in *Peter Kiewit*, the prosecution's actions "strongly implied that the witnesses should decline the requested defense interviews" and, by itself, constituted substantial interference with defendants' constitutional rights. 655 F. Supp. at 78. And, these witnesses did decline interviews. *See*, *e.g.* Transcript of Hearing, May 27, 2004, Dkt. 228, at 21-23. Indeed, Schnapper's counsel "literally laughed at [Defendants]. He said: You must be kidding. I'm not about to let my client be interviewed by you." *Id*. at 23.

D. In Violation Of Defendants' Constitutional Rights, The Task Force Prohibited Defendants' Access To Andrew Fastow–A Key Exculpatory Witness.

Andrew Fastow was a key witness in possession of crucial exculpatory evidence for the Defense. *Cf*. Ex. A, at 5-6, 9-10, 44-49, 63. As the alleged maker of an Enron "guarantee," which he categorically denied in the withheld materials, Fastow's testimony was "favorable, material, and irreplaceable." *United States v. Fischel*, 686 F.2d 1082, 1093 (5th Cir. 1982). The ETF resisted Defendants' attempts to (1) pry loose the government's evidence regarding Fastow (interview notes, 302s, testimony, etc.); and, (2) introduce even the heavily-redacted and minuscule portion of exculpatory testimony the government produced. *See* e.g. Dkt. 88, 102, 139, 158, 182, 197, 219, 236, 244, 248, 290, 528, 948, 993, 1006, 1029, 1041. For the purposes of this motion, those

arguments and motions are incorporated herein. However, one particular instance of misconduct deserves special mention because it confirms similar misconduct perpetrated in regard to the Merrill witnesses. According to the Task Force, "no cooperator in the history of federal white-collar crime investigations was debriefed more thoroughly and extensively than Mr. Fastow," as "well in excess of 1,000 hours" were spent interviewing him. Carrie Johnson, *Enron's Fastow Gets 6 Years*, WASH. POST., September 27, 2006, at D1. From this amazing documentary record, and before the first Barge trial, Defendants received only the ETF's highly-edited four-page "summary" of a summary of Fastow's statements to Task Force agents.

Upon learning of the exculpatory evidence Fastow provided (albeit via the inadequate agent-created summary of highly-edited and redacted "composite" 302s), Defendants attempted to interview Fastow to determine if he could be a witness at the first Barge trial. Affidavit of Ira Sorkin, February 25, 2008, attached hereto as Exhibit **W**. In response, the government unequivocally informed counsel for Defendants that they were free to attempt to contact Fastow's attorney for an interview, but that any interview thereafter, if permitted at all, would have to be conducted in the presence of Task Force members. *Id*.

In this case, Andrew Fastow was the government's prize possession, under the Task Force's complete dominion and control, and inaccessible to anyone other than the ETF prior to his testimony in the trial of Jeffrey Skilling and Ken Lay.[73] *See*, *e.g.* Memorandum of Law in Support Of Government's Application to Maintain Stay as to Certain Criminal Trial Witnesses,

[73] *See* John C. Hueston, *Behind the Scenes of the Enron Trial: Creating the Decisive Moments*, 44 AM. CRIM. L. REV. 197, 199-200 (2007) ("Fastow's guilty plea provided the Task Force with a 'seat on the 50th floor,' or executive suite, of Enron. ... [and] a global perspective of Skilling and Lay's knowledge of earnings manipulation schemes.").

November 3, 2004, *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, (No. M.L.-1446, CIV.A. H-01-3624), copy attached hereto as Exhibit **X**. Indeed, the government even now seeks to foreclose any access to Fastow. Stipulation as to Limitation on Subject Matter of Examination of Andrew S. Fastow, *Enron Creditors Recovery Corp. v. St. Paul and Marine Ins. Co.*, No. 4:06-CV-03905 (S.D.Tex. March 1, 2008) (Government stipulation with parties that Fastow may not be questioned about any matters concerning Nigerian Barge Transaction), attached hereto as Exhibit **Y**.

The government's affirmative, outrageous, and unethical misconduct in (1) withholding Fastow's material exculpatory evidence (Fifth Amendment violation)[74]; (2) predicating any potential, albeit ephemeral opportunity for an interview on government presence (Fifth and Sixth Amendment violations)[75]; and, (3) presenting wrong or perjured testimony contradicted by evidence

[74] This Constitutional violation, *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963); *United States v. Agurs*, 427 U.S. 97, 106, 96 S.Ct. 2392, 2398 (1976); *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997); *Williams v. Dutton*, 400 F.2d 797, 799-800 (5th Cir. 1968), is also a violation of professional ethics. *Berger v. United States*, 295 U.S. 78, 86, 55 S.Ct. 629 (1935); AMERICAN BAR ASSOCIATION'S STANDARDS FOR CRIMINAL JUSTICE § 3-3.11(3d. ed. 1996) ("Disclosure of Evidence By The Prosecutor").

[75] This Constitutional violation, *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920 (1967); *Gregory*, 369 F.2d at 188*; Soape*, 169 F.3d at 270, is also a violation of professional ethics. *Berger*, 295 U.S. at 86; AMERICAN BAR ASSOCIATION'S STANDARDS FOR CRIMINAL JUSTICE § 3-3.1(d) (3d. ed. 1996) ("A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give the defense information which such person has the right to give."); CANONS OF PROFESSIONAL ETHICS, Canon 39 (1963) ("A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party."); ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4(f) (Improper to "request a person other than a client to refrain from voluntarily giving relevant information to another party.").

in the government's possession from Fastow, Zrike, and others (Fifth Amendment violation),[76] requires dismissal with prejudice.

V. GOVERNING LAW REQUIRES DISMISSAL OF THE INDICTMENT WITH PREJUDICE FOR EGREGIOUS PROSECUTORIAL MISCONDUCT. THE PROSECUTORS CONCEALED EXCULPATORY EVIDENCE AND MADE REPRESENTATIONS TO THE COURT AND JURY THAT WERE BELIED BY THE WITHHELD EVIDENCE.

In violation of *Brady* and its progeny, the Fifth Amendment right to a fair trial, and fundamental ethical rules, the government deliberately withheld evidence which directly and materially contradicted key government witnesses. This withheld material not only corroborated, but factually and legally established the Defense. Exculpatory evidence has been withheld for years. Defendants are still awaiting full *Brady* disclosures. Meanwhile, the ETF foreclosed access to key witnesses with material exculpatory evidence. Finally, the ETF made material misrepresentations to the court and jury in calculated disregard of Defendants' right to a fair trial. *See United States v. Hogan*, 712 F.2d 757, 762 (2d Cir. 1983) (Dismissal for "flagrant and unconscionable" acts of prosecutorial misconduct); *and see United States v. Strouse*, 286 F.3d 767, 771-76 (5th Cir. 2002) (dismissal appropriate where government misconduct, in knowingly sponsoring false testimony, corrupts process, and prejudices the Defendant); *United States v. Fullmer*, 722 F.2d 1192, 1195 (5th

[76] This Constitutional violation, *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763 (1972); *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173 (1959); *Alcorta v. Texas,* 355 U.S. 28, 78 S.Ct. 103 (1957); *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935), is also a violation of professional ethics. *Berger*, 295 U.S. at 86; AMERICAN BAR ASSOCIATION'S STANDARDS FOR CRIMINAL JUSTICE § 3-5.6(a) (3d. ed. 1996) ("A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity."). This is in addition to the false testimony or misrepresentations presented in contradiction to the exonerating testimony of other Merrill and Enron witnesses which the government also possessed. *See supra* Section III.

Cir. 1983) (same); *United States v. Martin*, 480 F. Supp. 880, 886 (S.D.Tex. 1979) ("totality of circumstances" involving prosecutorial misconduct warranted dismissal).

Each of the instances of misconduct documented here warrants the remedy of dismissal with prejudice. The authority for *Brady* violations vitiating conviction is well settled. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197 (1963); *United States v. Sipe*, 388 F.3d 471, 477-78, 491-92 (5th Cir. 2004). The same is true for prosecutorial misconduct in contrivance of a conviction through deception of the court and jury by the use of false testimony or misrepresentations. *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 766 (1972); *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935); *see also Tassin v. Cain*, — F.3d —, 2008 WL 384578, *5 (5th Cir. 2008). Similarly, "substantial interference with a witness' free and unhampered choice to testify" warrants the same remedy. *United States v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1977); *see supra* Section IV. Here, multiple egregious violations of Constitutional provisions (e.g., Due Process, pure *Brady*, Compulsory Process, etc.) require dismissal with prejudice. *See infra* Sections II.-IV..

Of course, where violations evidence multiple, distinct constitutional violations depriving defendant of any semblance of "fairness," it is settled that federal courts are entitled to exercise their supervisory power to dismiss the indictment. *United States v. Shaffer Equipment Co.*, 11 F.3d 450, 462 (4th Cir. 1993) ("[T]he inherent power to dismiss a case for the misconduct of counsel is undoubtedly clear."); *United States v. Kojayan*, 8 F.3d 1315, 1324-25 (9th Cir. 1993) (remanding to district court to determine whether "to dismiss indictment with prejudice as a sanction for the government's misbehavior," which prejudiced the defendants) (Kozinski, J.). *See*, *e.g. United States v. Martin*, 480 F. Supp. 880, 882, 885 (S.D.Tex. 1979) ("totality of circumstances" involving

prosecutorial misconduct, and in Court's exercise of "supervisory function," warranted extreme remedy of dismissal); *see also United States v. Russell*, 411 U.S.423, 431-32, 93 S.Ct. 1637, 1643 (1973) (outrageous prosecutorial misconduct in violation of due process may operate to "bar the government from invoking judicial processes to obtain a conviction").

A. Dismissal Is Required Because ETF Attorneys Weissmann, Friedrich, Ruemmler and Hemann Withheld Material Exculpatory Evidence Prior To And Throughout The Barge I Prosecution, In Violation Of *Brady*, Rule 16, And Their Ethical Obligations.

"Fairness is a founding principle of our criminal justice system. Consistent with that principle, it has been a longstanding rule, established some 35 years ago, that the prosecution must produce to a defendant any evidence that is favorable to the defense. Suppression of evidence material to either guilt or innocence of a defendant violates due process. *See Brady* [*v. Maryland*], 373 U.S. 83, 87, 83 S.Ct. 1194, 1197 (1963)." *United States v. Dollar*, 25 F. Supp. 2d 1320, 1331 (N.D. Ala. 1998). In the words of the Supreme Court: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1197. In *Dollar*, the court held that dismissal with prejudice was the appropriate remedy where the government "flagrantly [] breach[es] its unquestioned [Constitutional] obligation to produce exculpatory and impeachment materials." *Dollar*, 25 F. Supp. 2d at 1322. Here, as in *Dollar*, "the United States has defaulted on its fairness obligation in this case. In its determined effort to convict the defendants, the United States has trampled on their constitutional right to *Brady* materials. ... the United States has disregarded its constitutional and statutory obligations to the defendant and its ethical obligation to the court." *Id*. at 1332. The *Dollar* court went on,

> From the outset of this case, defense counsel have been unrelenting in their effort to obtain *Brady* materials. The United States' general response has been to disclose as little as possible, and as late as possible-even to the point of a post-trial *Brady* disclosure. That the *Brady* materials are highly probative cannot be gainsaid; the United States has not questioned the probity of these materials.**** The United States has also breached the duty of professionalism and candor owed to the court .... Even [] after having assured the court that it had produced all *Brady* materials, the United States continued to withhold materials which clearly and directly contradicted the direct testimony of several of its most important witnesses.

Id. The same is true in this case. Charts 1-10, Appendix.

The facts of this case are remarkably similar to those in *Dollar*, where the district court dismissed the indictment with prejudice for *Brady* violations and breaches of the government's duties of "professionalism and candor owed to the Court." *Dollar*, 25 F. Supp.2d at 1332. Here, as in *Dollar*, the Defendants "have been unrelenting in their efforts to obtain *Brady* material. *Id*. *See infra* Chart 1. In the face of these efforts, the government has "continued to withhold materials which clearly and directly contradicted" its case. *Dollar*, 25 F. Supp.2d at 1332; Charts 1-10, Appendix. "Moreover, several of the documents filed by the United States call into question whether it has proceeded in this case in good faith." *Id*. For example, the government sponsored testimony (Glisan, Kopper, Long, Boyt, Lawrence, Colpean) in the district court at the same time these prosecutors had in their possession the Fastow raw notes demonstrating exactly the contrary proposition and informing them that the testimony they were sponsoring was based on a deliberate untruth. *Id*. And, "due to the prejudice that the defendant [] has suffered as a result of the United States' transgressions in this case, the [] charge[s] against him [must] be dismissed, with prejudice." *Id*.

Similarly, in *United States v. Ramming*, 915 F. Supp. 854, 867-69 (S.D.Tex. 1996), as here, "the government failed in its duty to be forthright in the disclosure of *Brady* materials," prejudicing

the defendant's right to a fair trial. *Id*. at 867-68. There, too, government agents "took extensive liberties" in drafting the 302s–which were disclosed to the Defense and differed in material ways from later-disclosed grand jury testimony–"choosing conclusionary words that caused the statements to fit within the government's theory of the case." *Id*. at 867.

Dismissal with prejudice is required when, as here, there is egregious and systematic prosecutorial misconduct in withholding and manipulating *Brady* material (either standing alone or coupled with other misconduct), in an attempt to avoid an acquittal. *Ramming*, 915 F. Supp. at 869; *Dollar*, 25 F. Supp. 2nd at 1332. *See also Gov't of the Virgin Islands v. Fahie*, 419 F.3d 249, 255 (3d Cir. 2005) (Dismissal with prejudice for prosecutorial misconduct in the withholding of *Brady* material appropriate where "a defendant can show both willful misconduct by the government, and prejudice"); *United States v. Johnson*, 26 F.3d 669, 683 (7th Cir. 1994) (Dismissal appropriate where the conviction could not have been obtained but for the failure to disclose the exculpatory evidence); *United States v. National Medical Enterprises, Inc.*, 792 F.2d 906, 912 (9th Cir. 1986) (Dismissal with prejudice is proper where prosecutor's "deceptive conduct is willful, in bad faith, or relates to the matters in controversy in such a way as to interfere with the rightful decision of the case").

B. This Court Should Invoke Its Supervisory Power To Dismiss The Indictment For Outrageous Prosecutorial Misconduct Which Unfairly Prejudiced The Defendants And Willfully Deceived The Court.

The supervisory power of this Court "include[s] the power to impose the sanction of dismissal with prejudice [] in extraordinary situations [] where the government's misconduct has prejudiced the defendant." *United States v. Welborn*, 849 F.2d 980, 985 (5th Cir. 1988). *Cf. Bank of Nova Scotia v. United States*, 487 U.S. 250, 261, 108 S.Ct. 2369 (1988); *United States v.*

Mechanik, 475 U.S. 66, 78, 106 S.Ct. 938, 945-46 (1986) (O'Connor, J., concurring); *United States v. Strouse*, 286 F.3d 767, 772 n.12 (5th Cir. 2002); *United States v. Fulmer*, 722 F.2d 1192, 1195 (5th Cir. 1983). *See also Ramming*, 915 F. Supp. at 869 (dismissing based on prosecutorial misconduct); *United States v. Martin*, 480 F. Supp. 880, 885 (S.D.Tex. 1979) (Dismissal for prosecutorial misconduct; "It is well settled that federal courts have a supervisory function over criminal cases ... to insure that prosecutions are conducted fairly.").[77]

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[77] Further, in the event the Department of Justice fails to take the appropriate course of confessing error, vacating Brown's convictions, and dismissing this indictment in its entirety, Defendants do not waive their rights to disclosure of the complete grand jury proceedings. *Strouse*, 286 F.3d at 773. For example, if the government knowingly sponsored false testimony (or committed other misconduct) before the grand jury, and that misconduct prejudiced the defendant, the remedy of dismissal stands available. *Cf. Strouse*, 286 F.3d at 775-76. *See United States v. Williams*, 504 U.S. 36, 46-47, 112 S.Ct. 1735 (1992) (Supervisory power may be exercised to dismiss indictment where misconduct "amounts to a violation of one of those few, clear rules which were ... [established] to ensure the integrity of the grand jury's functions") (citations omitted). *See also Martin*, 480 F. Supp. at 886 (Dismissal where "indicting grand jury [] was used to rubber stamp the wishes of the prosecutors in derogation of its duty to stand as an independent body placed between the prosecutor and the accused"). Indeed, the evidence of outrageous and unbelievable misconduct before the grand jury is apparent from a speech Weissmann made to the Enron Grand Jury after Zrike's testimony (and while she was out of the room)–which AUSA Spencer produced to Defendants in December 2007. Ex. D, at 195-99. It merits the special attention of this Court, and alone establishes Defendants' right to the complete grand jury proceedings to document the full scope of the misconduct here.

In all cases, Brown has demonstrated sufficient evidence of misconduct warranting full discovery of the grand jury proceedings in this case, and that relief is herein requested. *See United States v. Mays*, 460 F. Supp. 573, 576-582 (E.D.Tex. 1978) (Ordering disclosure of grand jury proceedings after demonstrating of "particularized need"). Brown is entitled to production of the full transcript and notes of the grand jury proceedings to ascertain additional bases for further relief. FED.R.CRIM.P. 6(e)(3)(C)(ii) (disclosure/discovery of grand jury proceedings "when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."); *cf. United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425-26, 103 S.Ct. 3133, 3138-39 (1983); *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 219-20, 99 S.Ct. 1667, 1673 (1979); *Dennis v. United States*, 384 U.S. 855, 872, 86 S.Ct. 1840, 1850 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, 79 S.Ct. 1237, 1241 (1959); *see also United States v. Greer*, 137 F.3d 247 (5th Cir. 1998); *and see United States v. Int'l Paper Co.*, 457 F. Supp. 571, 577 (S.D.Tex. 1978). The grand jury serves the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S. 665, 686-87, 92 S.Ct. 2646, 2659 (1972) (emphasis added). To the extent a theory of criminality presented to the grand jury has been subverted by illegally withheld, and newly discovered evidence, and/or that the government knowingly sponsored false testimony before the grand jury, there would be yet another reason to dismiss the indictment. *United States v. Mechanik*, 475 U.S. 66, 69, 106 S.Ct. 938,

There are at least three grounds for a district court's exercise of its supervisory power, and each applies in this case: [1] "to implement a remedy for the violation of a recognized statutory or constitutional right; [2] to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and [3] to deter future illegal conduct." *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991).[78] Such an exercise of supervisory power "is an appropriate means of policing ethical misconduct by prosecutors." *United States v. Lopez*, 4 F.3d 1455, 1463 (9th Cir. 1993); *cf. National Medical Enters., Inc.,* 792 F.2d at 912 (recognizing the authority of the district court to dismiss actions where government attorneys have "willfully deceived the court," thereby interfering with "the orderly administration of justice)." (citations omitted); *see Williams*, 504 U.S. at 46, 112 S.Ct. at 1742 . *See also Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 1697-98 (1988) ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that

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941 (1986) (dismissal of indictment justified where grand jury violation and actual prejudice to defendants).

[78] The widespread redaction and concealment of exculpatory evidence in this case is in all material respects akin to the effective destruction of evidence. Given that (1) cumulatively, this evidence exonerates the Defendants, and (2) the government is alone responsible for the delay in production and the likely implications to due process and a fair trial therefrom, dismissal with prejudice is the only appropriate and meaningful remedy to address the Constitutional denials affected in this case. *See infra* Section V and VI.. *Accord United States v. Bohl*, 25 F.3d 904, 906, 914 (10th Cir. 1994) (Dismissal with prejudice where "government denied [defendants] a meaningful opportunity to present a defense by intentionally disposing of potentially exculpatory and highly probative evidence in the face of [defendants] repeated requests for pretrial access to that evidence"); *Demjanjuk v. Petrovsky*, 10 F.3d 338, 339, 352-54 (6th Cir. 1993) (prosecutorial misconduct, in the failure to disclose exculpatory evidence, which "seriously misled the court," where government attorneys "acted with reckless disregard for the truth and the government's obligation to take no steps that present an adversary from presenting his case fully and fairly"); *United States v. Cooper*, 983 F.2d 928, 929 (9th Cir. 1993) (dismissal with prejudice where government, in bad faith, destroyed potentially exculpatory evidence; "no alternative [means to support their defense] matches the potentially powerful exculpatory evidence destroyed by the government"); *see also Lockhart v. Nelson*, 488 U.S. 33, 36 n.2,109 S.Ct. 285, 288 n.2 (1988) (bad faith by the prosecutor in the submission and reliance on false (deceptive) evidence may preclude retrial under force of Double Jeopardy Clause); *infra* Section V..

legal proceedings appear fair to all who observe them."); *United States v. Acosta*, 526 F.2d 670, 674 (5th Cir. 1976), *cert. denied*, 426 U.S. 920, 96 S.Ct. 2625 (1976) (Dismissal for prosecutorial misconduct is a viable remedy where actions "redounded to [defendants'] prejudice"); *Lopez*, 4 F.3d at 1464 (same).[79] As demonstrated by the pervasive acts of prosecutorial misconduct documented herein, all three bases for exercise of supervisory powers apply and each requires this Court to dismiss the indictment with prejudice.

First, the multiple and extraordinary instances of *Brady* violations fatally infected the first trial, and continue to this day.[80] They prove unequivocally that Defendants' due process rights have

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[79] *See*, *e.g.* MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.8, 4.4 (2007); MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANONS 1, 6, 7, 9 (1980); Restatement (Third) of the Law Governing Lawyers, §§ 31, 49, 97 (2000); G. Hazard & W. Hodes, The Law of Lawyering § 3.8:101 (2d ed. 1990); C. Wolfram, Modern Legal Ethics § 13.10, at 759-70 (1986). MODEL RULES OF PROFESSIONAL CONDUCT R. 3.3 (2007) ("Candor to the Tribunal").

[80] In light of the obvious discrepancies between the recently disclosed Fastow raw notes and the government's earlier production, Defendants are also entitled to the raw notes underlying the government's interviews with Kathy Zrike, Gary Dolan, and Alan Hoffman, especially. In addition, Defendants are still entitled to any SEC transcripts and notes of those witnesses, and to any grand jury testimony of Dolan and Hoffman, whose evidence has thus far only been produced in summary (302) form. Defendants are also entitled to all recorded material regarding Frank Marinaro, counsel for Merrill Lynch at the time of the Barge trial, whose involvement in this transaction was only revealed in the government's belated *Brady* production of December 2007. In addition, and as requested on multiple occasions, the Defendants are entitled to production of (1) any letter written to the government (DOJ or SEC) on behalf of Jeffrey McMahon, evidencing that there was no buyback agreement or promise to buyback or guarantee a buyout of Merrill's equity interest in the Barges made by anyone at Enron; and, (2) any additional McMahon evidence in whatever form in the government's possession, which bears on any aspect of the Barge transaction, including the material evidence behind or supporting the government's four-line *Brady* summary of McMahon provided on July 30, 2004. To obtain and produce on behalf of the government every copy of these letters and submissions, specifically, the government should be ordered immediately to review all materials, communications or evidence currently or previously contained in the files of the following United States Attorneys and present or former attorneys within the U.S. Department of Justice: Joseph Bianco, Alice Fisher, Sean Berkowitz, Andrew Weissmann, Kathryn Ruemmler, Matthew Friedrich, and John Hemann. This material must be reviewed *and the letters and submissions produced from the file of each of the government attorneys in whose files these documents are found*, because they contain evidence material and exculpatory of Defendant Brown, and because the review and production of these documents will enable the determination of the extent of the government's *Brady* violation and the scope of the prosecutorial misconduct in this case–all of which is material to Brown's defense. Finally, Defendants are also entitled

been violated. Second, these same violations demonstrate that Defendants' convictions, indeed the entire prosecution in this matter, have been premised on a fatally infirm theory of conviction, and, even more troubling, on what the Task Force was informed were numerous false or perjured statements. *See supra* Section III. Finally, the Task Force's pattern and practice, and its multiple past and continued attempts to shirk its clear ethical and legal obligations, mandate that decisive action be taken to deter the government. Prejudice to the Defendants has been pervasive, devastating, unrelenting, and continuing–legally, professionally and personally. No other remedy but dismissal will suffice.

VI. THE DOUBLE JEOPARDY CLAUSE PRECLUDES RETRIAL OF THE DEFENDANTS ON THIS INDICTMENT BECAUSE THE GOVERNMENT'S MISCONDUCT WAS DELIBERATELY CALCULATED TO AVOID AN ACQUITTAL.

In their zeal to convict the Merrill Defendants in the aftermath of Enron, Weissmann, Friedrich, Ruemmler, and Hemann concealed material exculpatory evidence from the Defense. Given the obvious support that this evidence provided to the Defense, the careful way in which it was parsed, and its voluminous and definitive nature, the conclusion is inescapable that the failure to turn over the *Brady* material was willful and intended to cripple the defense. The ETF and Assistant United States Attorneys insist to this day that no *Brady* material existed, and that they produced more than the Defense was entitled to. The prosecution vehemently opposed all of the Defense's efforts to obtain complete, meaningful, or admissible information. *See supra* Section II.;

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to production of all *Giglio* materials concerning Ben Glisan, including any and all correspondence between anyone on behalf of the DOJ, Bureau of Prisons, and Glisan's counsel related to his plea agreement, cooperation, "compelled" testimony, terms, conditions or location of incarceration, furloughs home, entry into RDAP, and release date.

Chart 2, Appendix. Apparently, the prosecution also ignored this Court's order to provide the requested material for *in camera* review four years ago. Transcript of Hearing , May 27, 2004, Dkt. 298, at 29-30, 49-50.

In the words of the Supreme Court, the Task Force assumed the "role of an architect of a proceeding that does not comport with standards of justice." *Brady*, 373 U.S. at 88, 83 S.Ct. at 1197 (1963). Given its unconstitutional, disingenuous, and unethical behavior, the prosecution is not entitled to a second chance. The prosecution sent four men to prison by denying the Defendants evidence that, had it been timely provided, would have led to an acquittal. Defendants and their families are entitled to be free from this harassment.

"Due process is violated where the state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935). *Mooney* observed: "Such a contrivance by [the government] to procure the conviction and imprisonment of a defendant is inconsistent with the rudimentary demands of justice." *Id*. at 112, 55 S. Ct. at 342. Furthermore, the Double Jeopardy Clause bars retrial where "bad-faith conduct by judge or prosecutor threatens the harassment of an accused by successive prosecutions." *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1075, 1081 (1976) (internal citations omitted).

"The underlying idea [of the Double Jeopardy Clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a

continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88, 78 S. Ct. 221, 223 (1957). Fundamentally, then, the Double Jeopardy Clause protects the defendant's Constitutional interest in being tried in a single, fair proceeding before the original tribunal–the right to be free from multiple trials caused by willful prosecutorial misconduct. When the prosecution perverts that proceeding through deliberate acts of misconduct to avoid certain acquittal, the Double Jeopardy Clause bars any further attempt to harass that defendant, and forbids subjecting him to the indignity, expense, anxiety, and humiliation of another trial. *Id*.

To violate the Double Jeopardy Clause the prosecutorial conduct must have resulted from "intent on the part of the prosecutor to subvert the protections afforded by [that] Clause." *Oregon v. Kennedy*, 456 U.S. 667, 675-76, 102 S. Ct. 2083, 2089 (1982); *see United States v. Dollar*, 25 F. Supp. 2d 1320, 1332 (N.D. Ala. 1998) (unlawfully withheld *Brady*, which material directly contradicted witness testimony, coupled with outrageous government conduct, required dismissal with prejudice). In *Kennedy*, the Supreme Court held that if the prosecutor goads the defense into moving for a mistrial, and the mistrial is granted, the Double Jeopardy Clause bars a retrial. 456 U.S. at 675-76, 102 S. Ct. at 2089-90. Such misconduct or overreaching, intended to subvert Defendant's right to be free of harassment from multiple trials, is a Double Jeopardy violation.

In *United States v. Singleterry*, 683 F.2d 122, 123-24 (5th Cir. 1982), the Fifth Circuit recognized the possibility that prosecutorial misconduct may present a bar to retrial in situations beyond those considered in *Oregon v. Kennedy*. Indeed, a number of federal courts have extended the logic of *Kennedy* to apply the "Double Jeopardy Clause to protect a defendant from retrial in some other circumstances where prosecutorial misconduct is undertaken with the intention of

denying the defendant an opportunity to win an acquittal." *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992), *cert. denied*, 508 U.S. 939, 113 S. Ct. 2414 (1993). In *Wallach*, the Second Circuit explained that the Double Jeopardy Clause bars retrial where "misconduct of the prosecutor is undertaken not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct." *Id*. *See United States v. Catton*, 130 F.3d 805, 806-7 (7th Cir. 1997) (citing *Wallach*, and discussing possibility of Double Jeopardy Clause as bar to calculated prosecutorial misconduct); *Jacob v. Clarke*, 52 F.3d 178, 181-82 (8th Cir. 1995) (same); *United States v. Gary*, 74 F.3d 304, 314-15 (1st Cir. 1996) (following *Wallach)*; *see United States v. Morrison*, 449 U.S. 361, 365 n.2, 101 S. Ct. 665 (1981) ("pattern of recurring violations" may warrant imposition of extreme remedy of dismissal "in order to deter further lawlessness"); *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637 (1973) (acknowledging possibility of "situation in which the conduct of law enforcement agencies is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"); *United States v. Singer*, 758 F.2d 228, 239 n. 15 (8th Cir. 1986) (collecting cases). *See also Lockhart v. Nelson*, 488 U.S. 33, 36 n.2,109 S. Ct. 285, 288 n.2 (1988) (bad faith by the prosecutor in the submission and reliance on false (deceptive) evidence may preclude retrial under force of Double Jeopardy Clause); *United States v. Tateo*, 377 U.S. 463, 468 n.3, 84 S. Ct. 1587, 1590 n.3 (1964) (Double Jeopardy may bar retrial where prosecutorial misconduct is motivated by a "fear that the jury was likely to acquit the accused."); *and see Mooney*, 294 U.S. at 112, 55 S. Ct. at 342.

Furthermore, the highest courts of many States have adopted the logic of *Wallach*, albeit, in some instances, by extensions of *Kennedy* drawn on state Double Jeopardy provisions. For

example, the New Hampshire Supreme Court expressly held that Double Jeopardy bars retrial where a "prosecutor engaged in misconduct with the specific intent to avoid an acquittal which the prosecutor believed was likely to occur in the absence of the misconduct." *State v. Marti*, 784 A.2d 1193, 1196-97 (N.H. 2001).[81] Similarly, the Supreme Court of Hawaii held that Double Jeopardy bars retrial following mistrial or reversal based on prosecutorial misconduct where, objectively, that misconduct clearly denied defendant the right to a fair trial.[82] *State v. Rogan*, 984 P.2d 1231, 1249 (Hawaii 1999). *See State v. Breit*, 930 P.2d 792, 795, 803-06 (N.M. 1996) (Double Jeopardy bars retrial based on prosecutorial misconduct where official knows that conduct is improper and prejudicial and either intends to provoke or acts in willful disregard of resulting mistrial, retrial, or reversal).[83]

Many jurisdictions have also extended the logic of *Kennedy* to situations where prosecutorial misconduct is intended to subvert the defendant's Double Jeopardy rights. *State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983) (Double Jeopardy bars retrial "when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal"); *State v. White*, 354 S.E.2d 324, 329 (N.C. App.1987) ("In our

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[81] The Supreme Courts of Maine and Connecticut have held the same. *State v. Chase*, 754 A.2d 961, 964 (Me. 2000); *State v. Colton*, 663 A.2d 339, 347-48 (Conn. 1995). The Wisconsin Supreme Court also adopted the standard enunciated in *Wallach*. *State v. Lettice*, 585 N.W.2d 171, 180-81 (Wisc. 1998).

[82] *See also State v. Baranco*, 884 P.2d 729, 733 (Hawaii 1994) (retrial barred where "prosecutorial misconduct designed to avoid an acquittal") (citations omitted); *State v. Pulawa*, 569 P.2d 900, 905 (Hawaii 1977), *cert. denied*, 436 U.S. 925, 98 S.Ct. 2818 (1978) (same).

[83] *See also State v. Day*, 617 P.2d 142, 146 (N.M. 1980), *cert. denied*, 449 U.S. 860, 101 S.Ct. 163 (1980) (Double Jeopardy bars retrial where "the prosecutor engaged in any misconduct for the purpose of precipitating a motion for mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials").

view, the better reasoned arguments support the broader test that includes bad faith overreaching or harassment aimed at prejudicing the defendant's chances for an acquittal."), *aff'd*, 369 S.E.2d 813 (N.C. 1988); *People v. Dawson*, 397 N.W.2d 277, 282 (Mich. App. 1986) (Double Jeopardy bars retrial where prosecutor engages in misconduct calculated to avoid acquittal), *aff'd*, 427 N.W.2d 886 (Mich. 1988); *Pool v. Superior Court*, 677 P.2d 261, 271-72 (Ariz. 1984) (same; cited by *Dawson*); *see also Ex Parte Masonheimer*, 220 S.W.3d 494, 507 (Tex. Crim. App. 2007) (extending *Kennedy* to instances where prosecutor knowingly commits misconduct to thwart an acquittal); *People v. Batts*, 68 P.3d 357, 375-81 (Cal. 2003) (approving *Wallach*; analyzing cases and secondary sources), *cert. denied*, 540 U.S. 1185, 124 S.Ct. 1432 (2004).

In *Commonwealth v. Simons*, 522 A.2d 537 (Pa. 1987), the Pennsylvania Supreme Court adopted the federal constitutional standard for Double Jeopardy set forth in *Kennedy*. In his concurring opinion, Judge Flaherty advocated applying the Double Jeopardy principle to additional cases, and as a logical extension of *Kennedy*, where the prosecution broadly intended "to subvert the truth determining process." *Id*. at 544 (Flaherty, J., concurring). Specifically, even in cases where there was "no intent to goad the Defendants into moving for a mistrial," the Double Jeopardy Clause should bar retrial where, alternately, the prosecution intended to avoid an acquittal they knew would have resulted, but for the suppression of exculpatory evidence. *Id*. In such situations, the prosecution makes sure that the Defendants "never know how their wrongful convictions were achieved." *Id*.

In *Commonwealth v. Smith*, 591 A.2d 730 (Pa. 1991), the Pennsylvania Supreme Court was presented with the exact scenario predicted by Judge Flaherty. In *Smith*, as here, "the prosecutorial misconduct was unknown to [defendant] during his direct appeal and was not presented to [the

reviewing] court at that time." *Id*. at 322. As here, the Court had previously reversed the first, erroneously procured convictions on other grounds, *Commonwealth v. Smith*, 591 A.2d 730 (Pa. 1991), but the "prior remand did not foreclose the question" now presented in light of the new evidence of egregious prosecutorial misconduct. *Smith*, 615 A.2d at 322. *Accord Commonwealth v. Martorano*, 741 A.2d 1221, 1222-23 (Pa. 1999). After remand, and before Defendant "could be retried, he filed a motion to preclude retrial based on the double jeopardy clause because of after-discovered evidence of prosecutorial misconduct," involving the withholding of material exculpatory evidence and knowing denial of the existence of a favorable plea agreement with the chief witness. *Smith*, 615 A.2d at 322. The Court held that the case presented a question beyond that considered in *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083 (1982), namely whether "the [federal] double jeopardy clause bars retrial following intentional prosecutorial misconduct [not involving mistrial *per se*] designed to secure a conviction through the concealment of exculpatory evidence." *Id*.

In light of this misconduct, and other instances newly discovered,[84] the unanimous *Smith* court, referencing *Dinitz*, 424 U.S. at 611, 424 S.Ct. at 1081, invoked double jeopardy as a bar to retrial. The court observed that the prosecutorial misconduct in *Smith* "signals the breakdown of the integrity of the judicial proceeding, and represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against." *Smith*, 615 A.2d at 324; *accord Martorano*, 741 A.2d at 1223 (egregious prosecutorial misconduct, not involving concealment of exculpatory

[84] Defense witnesses in *Smith*, like Fuhs here, were excoriated for offering what the prosecution termed was false testimony, when, in fact, the prosecutors were in possession of material, definitive, exculpatory evidence which confirmed the witnesses' testimony and, as here, directly contradicted the prosecution's representations. S*ee supra* Section III.D.;Tr. 323-24, 412, 4660-79, 6143, 6212, 6220-23, 6230-31, 6266, 6534, 6538. 6221-22, 6231.

evidence, will bar retrial where conduct intended to deprive defendant of a fair trial). As such, Double Jeopardy barred retrial, where, as here, "the conduct of the prosecutor [was] intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Id*. at 325.

In *State v. Colton*, 663 A.2d 339 (Conn. 1995), defendant's conviction was reversed for trial error in a violation of his confrontation right. 663 A.2d at 341. On remand and before retrial, defendant moved to dismiss based on Double Jeopardy, and in light of evidence, withheld by the prosecutor, that the chief witness perjured herself, and without whose evidence the prosecution would not have had probable cause to indict. *Id*. at 341-44. Following *Wallach*, and as a logical and necessary extension of *Kennedy*, the Court held that Double Jeopardy bars retrial, particularly where the evidence of misconduct was not available at the first trial and where "misconduct of the prosecutor is undertaken not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct." *Id*. at 347-48 (quoting *Wallach*, 979 F.2d at 916).

By withholding material exculpatory evidence during the Barge trial, Weissmann, Ruemmler, Friedrich, and Hemann demonstrated bad faith, and consciously disregarded the substantial risk that a reversal would result–even though they were well aware of the burdens that a second trial would place on these Defendants. Here, the conclusion is inescapable that prosecutors carefully, deliberately, and intentionally withheld material exculpatory evidence from the court and jury so that the government could present only its tendentious evidence–evidence that it knew rested on a false foundation when it allowed its carefully-chosen witnesses to testify. In this case, the illegally withheld evidence–resulting from deliberate prosecutorial misconduct–completely dismantles the government's theory of criminality. The nature of the evidence disclosed and

discovered demonstrates the deliberately selective and pervasive use of wrong, tendentious, false, or perjured testimony. The only basis for withholding this exculpatory material was to avoid an outright acquittal. Therefore, the Double Jeopardy Clause of the Fifth Amendment bars retrial of this case.

The Task Force proceeded to trial, obtained convictions and imprisoned four men throughout their successful appeals. James Brown and his family have been devastated. He spent a year in prison. He still stands convicted even though he testified truthfully as to his personal understanding of Fastow's representations–an understanding the evidence conclusively proves was shared by every actual participant in the phone call, including Fastow and McMahon–the alleged guarantors. After reversal of the convictions, for legal errors these prosecutors also injected into the case, the government seeks to retry the Defendants. The recent discovery and disclosures of material, exculpatory evidence, demonstrates that (1) fundamental *Brady* violations occurred in the first trial; (2) the government's entire theory of conviction in the first trial is fatally infirm; (3) these prosecutors knew at the time that their entire case was completely contradicted by first-hand evidence they concealed; and, (4) the prosecutors continue to ignore their ethical and legal obligations. It is inconceivable that, with the exculpatory material now available, Defendants could be convicted. They have a Constitutional right to be free from a second government attempt. Given the magnitude of the evidence suppressed, the incalculable prejudice to Brown, the irremediable damage to his life, and the government's continuing refusal to acknowledge its undeniable and reprehensible misconduct, the only remedy is dismissal with prejudice.

The facts in our case are more egregious than those in *Simmons* and *Smith*. Brown has acquired evidence in the period after the first trial and appeal which conclusively shows that the

government has withheld evidence, extraordinary in its quality and quantity, which exonerates these Defendants, contradicts the government's entire case, and directly impeaches each of its key witnesses, if not proves that the government sponsored testimony it knew was false.[85] The Task Force's case hung by the most slender of threads: multi-level hearsay about facially innocent business conduct of reputable, highly-regarded businessmen–not one of whom acted for any personal gain. The jury itself acquitted one Defendant; the Fifth Circuit acquitted Fuhs; and Brown was only one vote shy of an acquittal–all without the extraordinary exculpatory evidence these prosecutors withheld and absent access to the witnesses who knew the truth.

This conduct of Weissmann, Ruemmler, Friedrich and Hemann was exactly the type of misconduct that prohibits the prosecution from making a second attempt. Obviously, they intended that the Merrill Defendants "never know how their wrongful convictions were obtained." *Commonwealth v. Simons*, 522 A.2d 537, 544 (Pa. 1987) (Flaherty, J., concurring). To quote Judge Wyzanki, "a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *United States ex. rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975). Stripped of their armor of the truth, these Merrill Defendants were, indeed, sacrificed to gladiators who then publicly described their own experience in sending these Defendants to prison as "priceless."[86]

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[85] If the government does not now confess error, vacate Brown's convictions and dismiss the indictment, then Brown is entitled to a full hearing on these allegations of outrageous prosecutorial misconduct and to production of the *Brady* material that is still being concealed to determine and document the full extent of the misconduct here. *See*, *e.g. United States v. Catton*, 130 F.3d 805, 807-8 (7th Cir. 1997) (review after district court grant of evidentiary hearing on prosecutorial misconduct and double jeopardy challenge) (Posner, J.).

[86] Mary Flood, *All-star Team of Federal Prosecutors Says Merits of Cases Outweighs Hardships*, HOUS. CHRON., December 19, 2004, at B1.

CONCLUSION

Brown's convictions must be vacated, and this indictment must be dismissed because of egregious prosecutorial misconduct. Double jeopardy bars any retrial. There was no unlawful promise or guarantee. Neither McMahon nor Fastow made one to Merrill Lynch. Fastow gave Merrill Lynch nothing more than a personal assurance that Enron would use its "best efforts to re-market the barges"–admittedly lawful conduct. Merrill lawyers fully understood, negotiated and sought to document the entire, lawful transaction. It had to be, and was, a true sale pursuant to which Enron retained no risk.

The ETF, especially Weissmann, Ruemmler, Hemann, and Friedrich, hid material exculpatory evidence. They concocted a case without a crime–from the fatally defective charges they brought, through the deliberately false, hearsay "evidence" they selected, and the arguments they made. They concealed the truth while foreclosing access to witnesses and blatantly misrepresenting the facts to this Court, the jury, the public and the Fifth Circuit. Their misconduct fundamentally altered the structure of the adversary process and was calculated to avoid certain acquittal. While these "All-Star" prosecutors publicly relished their "victory," four innocent men went to prison.

If the Merrill Defendants had been armed with this definitive evidence of the truth, they all would have been acquitted. Double Jeopardy bars the government from being "allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity ..." *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223 (1957). The Merrill

Defendants and their families are entitled to an end to the embarrassment, ordeal, and continuing anxiety that they have been forced to endure for more than five years.

The Department of *Justice* should demonstrate the courage and integrity to confess error, move to vacate Brown's convictions, and dismiss this indictment.[87] If it does not, then this Court must do so. These prosecutors failed in their most fundamental duties. They abused the power of the sovereign, the trust of the people, and the Constitution and laws they swore to uphold and defend.

Dated: March 24, 2008

Respectfully submitted,

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By: /s/ Sidney Powell

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[87] *United States v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1997).

CERTIFICATE OF CONFERENCE

We had not received a reply from the government at the time of filing.

/s/ Sidney Powell
Sidney Powell

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon Arnold Spencer, and Patrick Stokes, counsel for the United States, via the ECF system on March 24, 2008, and on all counsel of record.

/s/ Sidney Powell
Sidney Powell