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

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	
	§	
v.	§	**CR. NO. H-03-363-2 (Werlein, J.)**
	§	
JAMES A. BROWN,	§	
Defendant.	§	

DEFENDANT JAMES A. BROWN'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL ON COUNTS IV AND V

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DEFENDANT JAMES A. BROWN'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL ON COUNTS IV AND V

Brown stands convicted on Counts IV and V for perjury and obstruction for explaining to the grand jury his personal understanding of Andrew Fastow's representations in a telephone call to which Brown was not a party. After Brown's trial and appeal, a new prosecutor finally produced the government's notes of multiple conversations with Fastow, the grand jury testimony of Merrill counsel, and other *Brady* material–all of which proves Brown's innocence on all charges. This information had been denied all defendants before and throughout their trial. These were egregious *Brady* violations and mandate a new trial.

The Fifth Circuit reviews claims for new trial based on a *Brady* violation (as opposed to a pure claim of newly discovered evidence) using a three-part test, under which the Defendant must show that: "(1) the evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and, (3) the suppressed evidence was material either to guilt or punishment." *United States v. Runyan*, 290 F.3d 223, 248 (5th Cir. 2002), *cert. denied*, 537 U.S. 888, 123 S. Ct. 137 (2002). *Cf. United States v. Severns*, 559 F.3d 274, 278 (5th Cir. 2009); *United States v. Sipe*, 388 F.3d 471, 477 (5th Cir. 2004); *see also United States v. Conley*, 249 F.3d 38, 45 (1st Cir. 2001) (noting that the three-part *Brady* test–rather than the five-part test governing motions for new trial–is applicable "where a defendant claims that the newly-discovered evidence should have been produced under *Brady*"); *United States v. Quintanilla*, 193 F.3d 1139, 1149 n.10 (10th Cir. 1999), *cert. denied*, 529 U.S. 1029, 120 S. Ct. 1442 (2000) (same).[1] Further, the Fifth Circuit requires a reviewing court to

[1] *And see* Brown's Supplemental Memorandum in Support of Motion For New Trial, Dkt. 1020, at pp. 10-11; Brown's Reply in Support of Motion For New Trial, Dkt. 1061, at pp. 34-36.

assess all *Brady* violations, if necessary, together, to "analyze whether the cumulative effect of all such" violations supports grant of a new trial. *Sipe*, 388 F.3d at 478.[2]

I. THE ENRON TASK FORCE DELIBERATELY WITHHELD EXCULPATORY EVIDENCE IN THE FASTOW RAW NOTES, WHICH EXONERATE BROWN AND EVISCERATES THE GOVERNMENT'S CASE.

Long-withheld evidence from Andrew Fastow–in the form of the government's raw notes–demonstrates the following *Brady* violations and warrants an immediate grant of Brown's Motion for New Trial[3]:

(1) the government selectively and disingenuously crafted the case against these Defendants, while in possession of, and with knowledge that the Fastow raw notes proved that Enron never made a buy-back guarantee;

(2) the government systematically violated Brown's Constitutional rights by failing to turn over exculpatory evidence in its possession;

(3) the government, while withholding definitive exculpatory evidence, affirmatively misrepresented the facts to the Courts and the jury by failing to disclose: (a) that Enron never guaranteed to buy-back Merrill's barge interest; and, (b) that Fastow misled his subordinates regarding the existence of a buy-back to motivate them to find a third-party buyer for Merrill's equity interest.

A. The Government's Pre-Trial Disclosure Regarding Andrew Fastow Was Deceptive And Legally Insufficient Under *Brady*.

For almost five years, Defendant-Appellant James Brown unsuccessfully sought access to exculpatory *Brady* evidence in the possession of the Enron Task Force (ETF), to wit, the raw notes of the government's hundreds of hours of interviews with Andrew Fastow–the alleged provider of Enron's unlawful guarantee. Only after the Fifth Circuit repeatedly ordered the government to

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[2] *See also* Dkt.1004, at p.7 n.10 (enunciating standard for new trial where government sponsored false testimony at trial). *See id*. at pp.12 n.19, 16 n.26.

[3] Relevant portions of the Fastow Raw Notes are attached hereto as Exhibit **A**.

disclose these materials to Jeffrey Skilling did the government finally produce the raw notes to the Defendants in this case–almost three and a half years after they illegally obtained Brown's convictions and after he had served a year in prison.

The Task Force repeatedly rejected Defendants' requests for the Fastow materials. The ETF assured this Court that it would "honor" *Brady* and disclose all information to which Defendants were legally and ethically entitled. *See* Brown's Motion To Dismiss for Egregious Prosecutorial Misconduct, *Brady* Violations and Double Jeopardy [hereinafter "Brown's Motion to Dismiss"], filed contemporaneously, at Charts 1 and 2, Appendix, *infra,* (cataloging Defendants' discovery efforts and the Task Force's responses). However, and only upon order of this Court, the government produced a single pre-Barge document regarding Fastow–a four-page *summary* of the government's highly irregular composite 302[4]–this, despite the fact that we now know that Fastow was interviewed on literally hundreds of occasions prior to the Barge prosecution.[5] The raw notes demonstrate that the prior production was carefully modified to misrepresent Fastow's testimony and to deceive the Defendants. *See* Dkt. 223; Excerpts of Deposition of Andrew Fastow, *Newby v. Enron*, No. H-01-3624 (S.D. Tex.), attached hereto as Exhibit **C**, *infra*.[6] The government's original Fastow production is most remarkable for what it does not contain. **First, the letter states nothing**

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[4] Government *Brady* Letter, June 1, 2004, attached hereto as Exhibit **B**.

[5] Ex. B, at pp. 3-6; *see* John C. Hueston, *Behind the Scenes of the Enron Trial: Creating the Decisive Moments*, 44 AM. CRIM. L. REV. 197, 199-200 (2007) (No cooperator in the history of federal white-collar crime investigations was debriefed more thoroughly and extensively than Mr. Fastow. Government prosecutors and investigators collectively spent well in excess of 1,000 hours working with Mr. Fastow.) (quoting ETF prosecutors).

[6] In fact, even the 302 was a summary of a summary–an unorthodox FBI "composite" 302 that admittedly was edited by multiple parties. Contrary to FBI policy, the FBI destroyed original 302s and drafts of the composite (Dkts. 948, 974, 993, 1029, 1039, 1041,1054, 1059).

about Enron's agreement to use its "best efforts" to locate a third-party purchaser for Merrill Lynch's equity interest in the Nigerian barges–the heart of Brown's defense and a transaction which the government long ago conceded was perfectly lawful.

Second, the letter says nothing about Fastow's or others' internal representations at Enron which expressly contradict the existence or representation of a "guarantee"–evidence which undermines, if not establishes perjury of, government witnesses at the first barge trial.

Third, the letter fails to state that Jeffrey McMahon, Enron Treasurer, categorically refuted the government's representations of Fastow's testimony. Instead, McMahon specifically represented that Enron made no buy-back guarantee and only ever committed to use its "best efforts" to locate a third-party buyer for Merrill's equity interest.

B. The Fastow Raw Notes Destroy The Government's Theory Of Criminality And Evidence Multiple Egregious Constitutional And Ethical Violations.

The raw notes from the government's hundreds of hours of interviews with Fastow contain dozens of exculpatory statements never disclosed. The government never had probable cause to indict, much less prosecute Brown for what was a lawful transaction.

1. The Fastow Raw Notes Contain Never-Disclosed Evidence Demonstrating That Fastow Himself Only Committed To Using "Best Efforts" To Locate A Third-Party Buyer For Merrill's Equity Interest.

With respect to Merrill's re-marketing and best efforts defense, the Enron Task Force 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. To the contrary, however, *Brady* disclosure made in December 2007 prove the intense and continued participation in negotiations and documentation by Merrill's lawyers (Zrike, Dolan, and Hoffman)–long after and

to the exclusion of the Merrill Defendants. *See* Brown's Motion to Dismiss. From these wrongly withheld documents, it is now beyond controversy that Merrill counsel conducted serious negotiations to include a "re-marketing" and/or "best efforts" clause in the contract documents–as all Merrill employees understood the deal.[7] Now, the Fastow raw notes (and Zrike's grand jury testimony) confirm this understanding. The belated *Brady* material documents that the transaction was understood, by Enron as well, to include only a best-efforts, re-marketing assurance, and that all parties knew and accepted that Enron did not and could not guarantee a "buy-back" of Merrill's interest. In fact, Enron was adamant that it must transfer all its risk–and retain none–to the point that its lawyers refused even the "best efforts" language Merrill counsel Zrike tried to include.

First, the Fastow raw notes contain multiple references to what the Task Force has always conceded is a perfectly legal transaction–an equity sale coupled with an assurance that the seller would use its "best efforts" to re-market the equity interest to a third-party purchaser.[8] Fastow stated that "it was [Enron's] obligation to [use its] 'best efforts' to find [a third] party [to] takeout" Merrill's equity interest. Fastow Raw Notes Bates #000263. This is precisely what he conveyed to Merrill Lynch. *Id*. at #000348 (Enron committed only "best efforts to get [Merrill Lynch] out"). Fastow was well aware of the nature of such a transaction and that it was completely different from

[7] *See also* Furst's Motion To Dismiss Indictment For Prosecutorial Misconduct, Dkt.1109 (detailing new evidence in the form of Zrike's SEC testimony–never disclosed to any defendant).

[8] 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*. *See also* 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. 6486 (Friedrich: "[T]here 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.").

a guaranteed "buy back." Fastow told the Task Force specifically that (1) "'best efforts'" means that a party "must do everything that a reasonable businessman would do to achieve result," and (2) a "best efforts [arrangement was] different from [a] guarantee" because "best efforts would be to find [a third] party to accomplish buyout." *Id*. at #000263. Therefore, and knowing this critical distinction (that he could not make a verbal or written guarantee), when Fastow spoke with Bayly he "did not obligate [Enron] to buy out" Merrill's equity interest. *Id*. #000263. Any contrary description of the transaction and/or Fastow's representations was "not consistent" with Fastow's understanding and what he intended to convey to Merrill. *Id*. *Accord id*. at #000264 (Fastow "objected to word obligated" in emails.). The government's pre-trial disclosure as to Fastow–four pages in all–failed to include *any* reference to Fastow's statements regarding a "best efforts" agreement. This alone was a critical omission of exculpatory evidence that vindicates Brown.

Second, the Fastow notes are explicit–contrary to the selectively edited four-page summary provided to the Defendants before the first barge trial–that Enron "could not buy back [the barge equity interest] [because] it would [have to] reverse the earnings." *Id*. at #000178. Indeed, "everyone involved considered this [a] bridge equity transaction." *Id*. at #000176. This is why Fastow stated that he "never used the word promise," *Id*. at #00084A, couldn't "give a verbal or written guarantee," *Id*. at #000262, and knew there could be no repurchase obligation. *Id*. ("There could not be a guaranteed put back to [Enron] [because they] would not get sale treatment."). As such, Fastow confirmed long ago that there was "every intention that Enron would find a [third-party] buyer" for Merrill's equity interest. *Id*. at #00084A.

Third, Fastow himself, and in evidence that was never disclosed, confirmed what we now know from the recently produced materials from Zrike and other Merrill counsel: that the deal

documents went through multiple iterations, back and forth between Merrill and Enron, and that it is likely Arthur Andersen reviewed the transaction to confirm its legality (as did Merrill counsel). Specifically, Fastow told the Task Force five years ago that:

> [He] believes [Arthur Andersen] knew of the deal [because] all deals went through multiple iterations.... [D]ocuments would have gone back [and] forth [between] [Enron and Merrill Lynch]. Since it went through the multiple iterations, very possible that [Arthur Andersen] would review at some point.

Id. at #000178. This withheld evidence matches additional newly-disclosed evidence that Merrill counsel continued to negotiate, document, confirm the legality of the transaction–and attempted to include an integration clause–long after Brown had any involvement.

Fourth, language in Fastow's raw notes regarding Fastow's reference to the need to get Merrill out of the transaction in six months as some sort of moral imperative does not detract from the probative and exculpatory value of the evidence withheld. Indeed, whether Enron and/or Fastow (and/or even McMahon) "wanted," desired," or felt morally compelled to get Merrill out of the deal within six months does not transmogrify a perfectly legal transaction–with no guaranteed take out–into a nefarious or criminal enterprise. To the contrary, these representations confirm Merrill's belief that the only commitment made by Enron was to assist in the identification and participation of a third-party buyer for Merrill's equity interest. As such, references in the Fastow raw notes to these moral or ethical imperatives are exculpatory and should have been disclosed to Brown four years ago.

For example, Fastow told the Task Force that Enron "*wanted* to get [Merrill Lynch] out [within] the [six] month period." *Id*. at #00033 (emphasis added). *See Id*. at #00073 ("Enron "want[ed] to see [Merrill Lynch] [be] successful."). Further, Fastow stated that "Enron would not

want to blow up [its] relationship" with Merrill Lynch, and its reputation with other Banks, over a $7 million deal. *Id*. *Cf*. *id*. at #000177, #000261. *See id*. at #00034 ("This was an important deal for [Enron] [and] they will need capital in [the] future."). In other words, Enron knew that if they did not find a third-party purchaser for Merrill's interest, it would have negative impact on both its relationship with Merrill and with its reputation vis-a-vis other investment banks. *See id*. at #00073. But nothing about that equates to an illegal guarantee of a buy-back.

Finally, even if Enron had bought back (on a moral imperative) the barges and been forced to unwind earnings, the transaction remained, and was properly accounted for in the first instance as a true sale. Neither Fastow, nor McMahon, nor Enron provided such a guarantee to Merrill. The transaction was therefore perfectly legal. This new evidence proves the truth of Brown's grand jury testimony. It undermines his convictions, and it requires grant of a new trial.

2. The Fastow Raw Notes Contain Never-Disclosed Evidence Stating That Fastow Misrepresented The Existence Of An Enron Buy Back Guarantee Within Enron To Light A Fire Under His Subordinates And Expedite Their Efforts To Locate A Third Party Purchaser.

A remarkable omission from the government's pre-trial disclosures is the statement by Fastow that he purposefully *misled* his subordinates at Enron when he told them that Enron had guaranteed Merrill's equity interest in the barges and would have to buy back that interest if Enron was unable to find a third-party purchaser within six months. Fastow deliberately created this false understanding to "light a fire under" his subordinates to remarket the barges–not because there was an unlawful deal with Merrill. This revelation invalidates–if not demonstrates the abject perjury

of–the testimony of all of the primary government witnesses, including Glisan, Kopper, Long, Lawrence, and Boyt.[9]

Fastow informed the Task Force over four years ago that he had used entirely different language in discussing the deal with his subordinates at Enron than he had used in the actual telephone conference with Bayly and Merrill. Fastow had deliberately misled his "'subordinates' by 'tell[ing] Enron people' this was a 'guarantee' to 'motivate' and 'light a fire' within Enron to remarket the barges to a third-party." *Id*. at #000349. Further, Fastow confirmed to the Task Force that this misrepresentation explained why some Enron documents contained language of a "guarantee" or "promise." *Id*. *See supra* note 9 and accompanying text. **The Task Force knew from Fastow that Fastow had made no illegal promise or guarantee to Merrill Lynch**. This revelation undermines the entire premise of the prosecution, renders the government's so-called *Brady* production a sham,[10] and entitles Brown to a new trial on Counts IV and V.

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[9] These individuals were the only prosecution witnesses who testified to an alleged guarantee – and we now know they were either misled by Fastow or perjured themselves. *See* 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/non-prosecution agreement: unknown levels of hearsay about alleged guarantee made by some, unknown "senior person at Enron."); Tr. 2601 (Eric Boyt/non-prosecution 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 raw notes demonstrate that Glisan knew that Fastow had misled his subordinates (and likely participated in this falsehood) at Enron by falsely telling them that Enron had guaranteed Merrill's equity interest. Glisan's testimony, therefore, and as McMahon confirmed, was perjured and knowingly sponsored by the government. For example, Fastow told the Task Force that Glisan, as well as Fastow, was "trying to scare [Enron people]" because he "want[ed] them to find [a] [third] party purchaser." *Id*. at #000265. The fact that Glisan participated in this falsehood also explains and renders innocent his internal email, so heavily relied upon by the Task Force at the first Barge trial, which stated that Enron has "no ability to roll the structure." *Id*. at #000264. Clearly, this email, in addition to all the internal Enron representations made by Fastow, was simply part of a falsehood they engendered among Enron subordinates to motivate them to re-market Merrill's equity interest to a third-party purchaser.

[10] Because this revelation modifies every single representation made by Fastow, the government's minuscule pre-trial production regarding McMahon could only have been intended to mislead Brown, as it

3. The Fastow Raw Notes Contain Never-Disclosed Evidence Regarding The Central Role Of Jeffrey McMahon And Confirms That Brown's Testimony Was True.

The entire pre-trial *Brady* production, as to Fastow and regarding Jeffrey McMahon, devolves to a single proposition: that McMahon or Dan Boyle asked Fastow to make a phone call to Merrill Lynch, and briefed or prepared Fastow for the call. *See* Ex. B.[11] Contrary to *Brady*, the prosecutors failed to disclose that Fastow confirmed McMahon's role and his story: Enron made only best-efforts assurances to Merrill to assist in locating a third-party purchaser for Merrill's equity interest in the Nigerian barges. This previously concealed evidence also invalidates Brown's convictions.

The raw notes confirm that the government withheld evidence that Fastow told them that "McMahon was [the] person who lead the deal." *Id*. at #00033, #000176. Furthermore, there was no equivocation regarding who asked Fastow to contact Merrill–it was McMahon, and not Boyle. *Id*. at #00033, #000176, #000267, #000347. In any case, Fastow told the government that it was "McMahon [who] did [the] deal." *Id*. at #000176. *Cf. id*. at #000260 (The barge transaction "was a Jeff McMahon deal."). *See id*. at #000267. And when Fastow wanted information related to the deal "he looked for [McMahon] to keep [him] appraised." *Id*. at #000177. Of course, the government did not prosecute McMahon but kept the threat of prosecution over him throughout Brown's trial so McMahon was unavailable to the defense. In light of this never-disclosed evidence, any statement or representation by McMahon of the terms of the deal was vital to Brown's defense

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failed to state McMahon's understanding of the transaction as a true sale.

[11] Even these statements are compromised by the later statement in the pre-trial Fastow disclosure, which states that, "Fastow did not recall that Boyle was on the barge deal and had always associated the barges with McMahon." Ex. B, at p.6.

against the perjury and obstruction charges. But, as detailed in Brown's Motion for New Trial, the prosecutors withheld exculpatory evidence of McMahon, who confirmed the defense as well.

4. The Fastow Raw Notes Contain Multiple, Additional, Never-Disclosed Evidentiary Details Which Establish Brown's Innocence.

In addition to the significant omissions outlined above, the government withheld other *Brady* materials and/or made inaccurate or misleading representations to obtain Brown's conviction:

* *Brady* violation: The raw notes state that the equity interest was sold to LJM2 because "3rd party that eventually [purchased the interest] [was] not ready." *Id*. at #00033. This supports Brown's argument that a third-party equity purchase was always contemplated by all parties.

* *Brady* violation: The raw notes state:"Normal for AF to get on phone w/senior banker, tell him it's a great deal, critical to Enron (big relationship dea[l][)]." *Id*. at #00073. This evidence supports defendants' position that nothing extraordinary or unusual occurred during the phone call.

* *Brady* violation: The raw notes state that Fastow "believe[d] [Arthur Andersen] knew of the deal [because] all deals went through multiple iterations. [The transaction] would have gone back [and] forth [between] E[nron] [and] [Merrill Lynch." *Id*. at #000178. This evidence confirms recently discovered evidence from Merrill attorneys, that the government failed to disclose, and which supported Brown's reliance on counsel and knowledge of all deal terms.

* *Brady* violation: The raw notes state: Fastow objected to word "obligation" in Glisan email. *Id*. at #000264. *See id*. at #000263. This admission directly contradicts the material disclosed by the government before trial. *See* Ex. B, at p.5 ("Fastow was not bothered by Glisan's use of the word 'obligated' to describe Fastow's representation of Enron's agreement to get Merrill out of the barge deal.").

* *Brady* violation: The raw notes state: "If E[nron] put text of [Fastow's] call statements in letter [and] sent to M[errill Lynch], [Fastow] would not have been concerned" about the legality or accounting implications of the transaction. *Id.* at #000262. This admission directly contradicts the material disclosed by the government before trial. *See* Ex. B, at p.5 ("If the telephone call had been transcribed, it would have sounded like a guarantee and blown the accounting treatment of the deal.").

* Sponsoring possibly false testimony. The raw notes suggest that Ben Glisan may have been complicit in Fastow's actions in "lighting a fire" under internal Enron people. *See id*. at #000265 (By representing that Enron might have to repurchase the asset, Glisan was "trying to get int[ernational] asset people [at Enron] to sell the [barges]. [Glisan was] trying to scare them."). This statement suggests that Glisan falsely testified about the alleged agreement at the first barge trial. At a minimum, it directly contradicts Glisan's testimony.

These direct contradictions went to the heart of Brown's defense, were wrongly withheld, and Brown is entitled to a new trial on the perjury and obstruction charges.

II. THE NEWLY DISCOVERED FASTOW EVIDENCE DEMONSTRATES AN EGREGIOUS *BRADY* VIOLATION; STANDING ALONE OR IN COMBINATION WITH THE McMAHON AND MERRILL WITNESS EVIDENCE WITHHELD, MANDATES A NEW TRIAL.[12]

A. The Fastow Raw Notes Were Suppressed By The Enron Task Force.

There can be no doubt that the raw notes were suppressed by the Enron Task Force. The government fought vehemently against producing the notes–even in rehearing to the Fifth Circuit. Indeed, the Fifth Circuit recognized the importance on this information. *United States v. Skilling*, 554 F.3d 529, 573-75, 580, 90-91 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (U.S. October 13, 2009 No. 08-1394) (e.g., district court "did not assess the materiality of this statement [regarding Global Galactic document] or determine *whether its suppression* violated *Brady*") (emphasis added). *See supra* note 10 and accompanying text; Government's Motion For Scheduling Order, Dkt.1053, at p. 3. *See also* Brown's Motion For New Trial, Dkt. 1004, at pp. 1-5, 20 n.30; Brown's Motion To

[12] Without waiving the blatant violation of the Speedy Trial Act from the government's and court's inaction as to Brown in the 242 non-excludable days since mandate issued, Brown hereby incorporates by reference all previously filed motions regarding (1) a new trial on his perjury and obstruction charges, Dkts.1004,1020,1030,1061; (2) Brown's request to compel production of various *Brady* materials, Dkts.236,248,290,528,948,993,1029,1041; Tr. 1611-12, 2651-53, 2772-73, 3289, 3413, 4863, and (3) the egregious misconduct of the prosecution in this case. *See* Brown's Motion to Dismiss.

Dismiss, Charts 1 and 2, Appendix. *And see supra* Section I.[13] This evidence is even more relevant and crucial to Brown than it was to Skilling.

B. Evidence In The Fastow Raw Notes Is Favorable To The Defense.

As described in detail above, Section I, *supra*, the Fastow Raw Notes contain evidence that undermines the entire prosecution and proves Brown's innocence. The notes prove that all Enron (Fastow or McMahon) promised was to use its *best efforts* to find a third party to purchase Merrill's equity interest–exactly as Brown said. Fastow Raw Notes Bates #000263, #000348. The government never *disclosed that Fastow gave a "best efforts"* assurance in its minuscule pre-trial *Brady* production. Brown's Motion To Dismiss, at pp. 10-26 (documenting government representations at trial which are contradicted by evidence in the Fastow notes). While the government represented at trial that Fastow had guaranteed an Enron buyback on the phone call with Bayly and others, the Fastow notes refute that proposition and state specifically that Fastow gave, instead, a best-efforts representation. Fastow Raw Notes Bates #00084A, #000176, #000178, #000262. *See supra* pp.7-12.

C. The Fastow Raw Notes, Standing Alone Or In Combination With Other Evidence Withheld Are Material To Brown's Innocence.

Evidence is material under *Brady* when there is a "reasonable probability" that the outcome of the trial would have been different if the evidence had been disclosed to the defendant. *See United*

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[13] *See United States v. Jackson*, 345 F.3d 59, 70 (2d Cir. 2003), *cert. denied*, *Mazyck v. United States*, 540 U.S. 1157, 124 S. Ct. 1165, *and cert. denied*, 541 U.S. 956, 124 S. Ct. 1705 (2004) ("The fact that [Fastow] did not testify at the defendants' trial presents no obstacle to application of *Brady* and its progeny. Although we have never expressly stated that the government must disclose exculpatory and impeachment materials pertaining to non-testifying witnesses, that conclusion flows ineluctably from our prior cases."); *id*. at 71 ("A contrary conclusion would permit the government to avoid disclosure of exculpatory or impeachment material simply by not calling the relevant witness to testify."). In other words, evidence impeaching a hearsay declarant is material for purposes of *Brady* and its progeny.

States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985). A "reasonable probability" is established when the failure to disclose the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566 (1995). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but **whether in its absence he received a fair trial, understood as a trial resulting in a verdict worth of confidence.**" *Strickler v. Greene*, 527 U.S. 263, 289-90, 119 S. Ct. 1936, 1952 (1999) (citation omitted). *Accord United States v. Miller*, 520 F.3d 504, 514 (5th Cir.), *cert. denied*, — U.S. —, 129 S. Ct. 185 (2008).

The Fastow notes affirm the truth of Brown's grand jury testimony: **an understanding that Enron had no obligation to buyback the barges, but had represented only that it would use its "best efforts" to find a third-party purchaser** for Merrill's equity interest. *See* Brown's Supplemental Memorandum In Support Of Motion For New Trial, Dkt.1020, at p.12 n.11. There was never a promise by Fastow to buy back the barges "no matter what" or to buy back the barges at all. The only issue as to Brown's perjury and obstruction convictions is whether his grand jury testimony–as specified in Counts IV and V of the indictment–was a literally true statement of verifiable fact. *Bronston v. United States*, 409 U.S. 352, 360, 93 S. Ct. 595, 602 (1973). *See United States v. Abroms*, 947 F.2d 1241, 1245 (5th Cir. 1991), *cert. denied*, 505 U.S. 1204, 112 S. Ct. 2992 (1992) (perjury requires the government to prove that defendant lied about a material fact and knew that he was doing so). The government must prove that the defendant made a declaration under oath, that was (1) false, (2) material to the crime being investigated, and (3) not believed by the defendant to be true. 18 U.S.C. § 1623; *Abroms*, 947 F.2d at 1245. The perjury statute may not be loosely construed, and if a witness is telling the literal truth to the question as asked, then he has not

committed perjury. *United States v. Shotts*, 145 F.3d 1289, 1298 (11th Cir. 1998), *cert. denied*, 525 U.S. 1177, 119 S. Ct. 1111 (1999); *United States v. Dean*, 55 F.3d 640, 662 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1184, 116 S. Ct. 1288 (1996); *United States v. Crippen*, 570 F.2d 535, 537 (5th Cir. 1978), *cert. denied*, 439 U.S. 1069, 99 S. Ct. 837 (1978). The Fastow notes, either standing alone or in combination with all of the withheld evidence documented by Brown, verify that what Brown said was literally true. *See supra* pp.7-12. *See also* Dkt.1004, at pp.4 n.6, 9, 11 n.16. Under any standard, this evidence is material to Brown's innocence.[14]

III. THE NEWLY DISCOVERED FASTOW EVIDENCE SATISFIES ALL FIVE *BERRY* FACTORS AND, STANDING ALONE OR IN COMBINATION WITH OTHER EVIDENCE WITHHELD, MANDATES A NEW TRIAL ON COUNTS IV AND V.[15]

Even assuming *arguendo* that any court could find that the government's repeated and egregious withholdings of exonerating evidence did not constitute *Brady* violations, Brown is still

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[14] Notably, in *United States v. Pelullo*, 105 F.3d 117, 118-19 (3d Cir. 1997), the court reversed a CEO's wire-fraud conviction on a much less direct showing of suppression. There, the key disputed factual issue was whether Pelullo used company funds *improperly* to pay a loan shark or *properly* to repay an intercompany debt. *Id.* at 119. FBI Agent Wolverton testified that, before trial, he interviewed Pelullo and Pelullo admitted using the money to pay the loan shark. *Id.* After the jury convicted, Pelullo obtained Wolverton's raw interview notes. As here, the notes contradicted his testimony, stating that Pellulo's reason for the payment was "repaying intercompany debt." *Id*. at 120. As here, this critical exculpatory statement appeared only in the raw interview notes, and "did not appear[] in the FBI 302 report." *Id*. The notes, thus, constituted "valuable *Brady* material" that the government had a duty to disclose. *Id.* at 122. *Accord United States v. Brown*, 303 F.3d 582, 593 (5th Cir. 2002) (FBI agent's notes can contain *Brady*); *Williams v. Whitley*, 940 F.2d 132, 133 (5th Cir. 1991) ("We have recognized that information contained in police reports may be *Brady* material."); *Conley v. United States*, 415 F.3d 183, 188-89 (1st Cir. 2005) (reversing conviction where undisclosed FBI memorandum contained information not reflected in witness's grand jury testimony); *United States v. Harrison*, 524 F.2d 421, 427 (D.C. Cir. 1975) ("too plain for argument" that notes can contain *Brady*: "Whether or not the prosecution uses the witness at trial, the notes could contain substantive information or leads which would be of use to the defendants on the merits of the case. … The possible importance of the notes for these purposes is not diminished in cases where the prosecutor turns over to the defense the 302 reports.").

[15] For a more thorough discussion of the legal standards regarding the *Berry* factors, see Brown's Motion For New Trial, Dkt. 1004, at pp.6-9. Further, because Brown long ago briefed the first two *Berry* factors as to Fastow, the discussion, *see infra*, of those factors is summary and refers to the prior briefing.

entitled to a new trial under Rule 33. *See* Brown's Motion For New Trial, Dkt. 1004; Brown's Supplemental Memorandum In Support Of Motion For New Trial, Dkt. 1020; Brown's Reply in Support of Motion For New Trial, Dkt.1061. The Fifth Circuit applies the five *Berry* factors to assess Motions for New Trial based on newly discovered evidence. *Berry v. State*, 10 Ga. 511, 1851 WL 1405, *12 (Ga. 1851); *cf. United States v. Wall*, 389 F.3d 457, 467 (5th Cir. 2004), *cert. denied*, 544 U.S. 978, 125 S. Ct. 1874 (2005). The *Berry* test requires the Defendant to show that: (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the defendant's failure to detect this evidence was not due to a lack of diligence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and, (5) the evidence would probably produce an acquittal at a new trial. *Id*. *Accord United States v. Infante*, 404 F.3d 376, 387 (5th Cir. 2005). Where the newly discovered evidence demonstrates that the government, at the first barge trial, sponsored false testimony, the *Berry* test is satisfied where "there is *any reasonable likelihood* that the false testimony affected the judgment of the jury." *Wall*, 389 F.3d at 473 (emphasis in original). *See* Brown's Motion for New Trial, Dkt. 1004 at p. 7 n.10.

A. The Evidence Regarding Fastow's Firsthand Account Of The Phone Conversation Is Newly Discovered And Was Unknown To Brown At The Time Of Trial.[16]

As the Fifth Circuit has held, the first *Berry* factor, whether the evidence was unknown at the time of trial, is simply a test of mere possession: the hurdle is passed if the defendant "did not have [the evidence] in his possession prior to or during trial." *Wall*, 389 F.3d at 469. The government's pre-trial Fastow disclosure was radically deficient and contained none of the startling evidence

[16] *See* Brown's Motion For New Trial, Dkt. 1004, at pp.16-17; Brown's Supplemental Memorandum In Support Of Motion For New Trial, Dkt. 1020, at p.6 ; Brown's Reply in Support of Motion For New Trial, Dkt. 1061, at pp. 17-20.

documented herein. Brown, despite efforts to pry Fastow materials from the government, *see*, *e.g.*, Brown's Motion for New Trial, Dkt.1004, at pp.18 (documenting defendants' attempts), was not in possession of the raw notes at the time of trial. The first *Berry* factor is easily satisfied.

B. Brown's Failure To Pry Loose This Evidence Was Not Due To A Lack Of Diligence, And The Government Must Answer For Its Misconduct.[17]

Under the second *Berry* factor the defendant must show that the "failure to detect the evidence was not due to a lack of diligence by the defendant." *United States v. Franklin*, 561 F.3d 398, 405 (5th Cir.) (citation omitted), *cert. denied*, *Alejandro-Gonzalez v. United States*, — U.S. —, 129 S. Ct. 2848, *and cert. denied*, *Salazar-Ramirez v. United States*, — U.S. —, 129 S. Ct. 2882 (2009). Brown repeatedly attempted to force the government to turn over Fastow materials, including but not limited to the original 302s and the raw notes of the Fastow interviews. Dkt.1004, at pp.18-20 (documenting defendants' attempts); Dkt. 1061, at pp. 21-25 (same). Second, Fastow himself was unavailable to the defense. At the same time it argued that it would advise Fastow to testify if the defendants' requested,[18] the government was filing motions for stays of depositions and

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[17] *See* Brown's Motion For New Trial, Dkt. 1004, at pp.18-23; Brown's Supplemental Memorandum In Support Of Motion For New Trial, Dkt. 1020, at p.6-7; Brown's Reply in Support of Motion For New Trial, Dkt. 1061, at pp. 21-25. As to the second *Berry* factor, Defendants' only burden is to "demonstrate[e] that the failure to procure [the absent witness'] testimony at trial was not the result of his own lack of diligence." *United States v. Lowder*, 148 F.3d 548, 551 (5th Cir. 1998) (emphasis added). *Accord United States v. Blackthorne*, 378 F.3d 449, 452 (5th Cir. 2004) (Defendant must show that failure was not due to lack of diligence); *United States v. Gutierrez*, 2007 WL 3026609, *5-7 (W.D. Tex. 2007) (same); *Berry v. State*, 10 Ga. 511, 1851 WL 1405, *12 (Ga. 1851) (Defendant must ordinarily show "[t]hat it was not owing to the want of due diligence that [the evidence] did not come sooner."). As such, "[d]ue diligence requires [only] that a defendant exert some effort to discover the evidence." *United States v. Jaramillo*, 42 F.3d 920, 925 (5th Cir.), *cert. denied*, 514 U.S. 1134, 115 S. Ct.. 2014 (1995).

[18] *See Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001) ("The opportunity for use under Brady is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought. A responsible lawyer could not put [Fastow] on the stand without essential groundwork [which was made impossible by the prosecution's tactics]." And "without substantive disclosure by the prosecution, the supposed failure by the defense to petition for leave to seek out [witness] cannot fairly be seen as a

discovery as to Fastow in parallel civil litigation. Dkt.1061, at p.21-22.[19] At the same time it argued that Fastow was otherwise available to the defense, the government illegally rendered Fastow unavailable by requiring that a prosecutor be present at any interview by the defense. Dkt.1061, at pp.21-25. Moreover, the defense was not required to call Fastow. *Cf. United States v. Fisher*, 106 F.3d 622, 634-35 (5th Cir. 1997) (New trial ordered for *Brady* error, where Defendant did not attempt to call witness nor to take a deposition for use at trial; withheld testimony contradicted critical witness against defendant and it was government's failure to produce evidence which was directly responsible for defendant's trial/evidentiary decisions.), *abrogated on other grounds by Ohler v. United States*, 529 U.S. 753, 120 S. Ct. 1851 (2000). *See also Carmichael*, 269 F. Supp. 2d at 597 (Diligence standard satisfied where Defendant did not call witness at trial, where "[n]o reasonable defense attorney [in light of witness' unknown, negative, and/or equivocal testimony] would have seen calling him as a witness as a wise trial strategy.").

A decision from the Western District of Texas is directly on point. In *United States v. Gutierrez*, 2007 WL 3026609, *6 (W.D. Tex. 2007), the court found, in similar circumstances, that "defendant's inability to learn what the Government intentionally withheld did not result from a lack

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default or neglect, or even as an election.... to call a witness cold, [] would be suicidal."). *Accord United States v. Carmichael*, 269 F. Supp. 2d 588, 597 (D.N.J. 2003) (new trial ordered; evidence from "known" witness was newly discovered and "[n]o reasonable defense attorney, upon reading [the witness's] grand jury testimony, would have seen calling him as a witness as a wise strategy.").

[19] *See* Memorandum of Law in Support Of Government's Application to Maintain Stay as to Certain Criminal Trial Witnesses, November 3, 2004, *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, (No. MDL-1446, CIV.A. H-01-3624), attached hereto as Exhibit **D**. Indeed, the government attempted as late as March 11, 2008, to limit access to Fastow regarding the barge transaction. Stipulation as to Limitation on Subject Matter of Examination of Andrew Fastow, *Enron Creditors Recovery Corp. v. St. Paul and Marine Ins. Co.*, No. 4:06-CV-03905 (S.D. Tex. March 11, 2008), attached hereto as Exhibit **E** (government stipulation with parties that Fastow may not be questioned about any matters concerning the Nigerian Barge transaction).

of reasonably diligent investigation on his part. Rather, it resulted from the failure of the prosecution to carry out its constitutional duties to disclose information required by *Brady*."[20] Further, "for the Government to now say they had no duty to disclose because, . . . , the defendant, by merely exercising reasonable diligence, could have tracked down [the witness] and obtained all the same information as the Government possessed conflicts with the purpose of *Brady* and is an unreasonable extension of the meaning of reasonable diligence." *Id*. Under those circumstances, the court determined the defendant was entitled to a new trial under both *Brady* and the *Berry* factors for newly discovered evidence. *Id*. at *1, 13. Brown is entitled to the same result.

C. Fastow's Newly-Discovered Sworn Testimony Is Not Merely Cumulative Or Impeaching: Fastow's Testimony Was Crucial, First-Hand, Exculpatory Testimony Which Exonerates Brown.[21]

With the new disclosures and discovery of what Fastow and McMahon said on the crucial phone call, Brown's understanding as he testified to the grand jury is proved to be undisputably true. *Id*. at 3 n.5. The recently-disclosed evidence from Fastow himself (and McMahon), casts doubt on the veracity of all the government's witnesses (who all testified on the basis of second and third-hand hearsay) in the first Barge trial. *See* Dkt.1004 at p.13 n.19.

To take one striking example, the prosecution repeatedly represented to the jury at the first trial that Enron had not made a "best efforts" representation to Merrill. *See*, *e.g.*, Tr. 6151-52

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[20] The opinion in *Gutierrez* is also prescient in regards to the Fastow raw notes specifically. The court, in a discussion about the suppression of witness statements recorded by an attorney stated that "[j]ust because information is written by an attorney [or case agent] or kept in his file does not necessarily make it privileged." *Id*. at *4. Indeed, a holding that such notes are discoverable "is particularly applicable when the information does not pertain to attorney opinions or legal theories, but merely recounts such factual information as what a potential witness said during the course of a pre-trial interview." *Id*. *Cf*. *United States v. Sipe*, 388 F.3d 471, 481 (5th Cir. 2004). Further, "the statement by [the witness] need not have been admissible to be discoverable." *Gutierrez*, 2007 WL 3026609 at *5. *Cf*. *Sipe*, 388 F.3d at 485.

[21] *See* Dkt. 1004, at pp.23-25; Dkt.1020, at p.7-8; Dkt. 1061, at pp. 25-26.

(Kathryn Ruemmler) ("Ladies and gentlemen, nowhere in the deal documents that you'll see, which are in evidence -- you can look through there. 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 in there."); Tr. 1652-53 (eliciting testimony from Glisan that there was no "best efforts" representation). At the same time these representations were made, the government was in possession of evidence from Fastow which confirmed that *he made a "best efforts" representation*. Compounding this misrepresentation, the ETF withheld evidence establishing that the reason such a provision was not in the documents was because outside counsel for Enron refused to put it in, despite the efforts of Merrill counsel to include it. *See* Brown's Motion to Dismiss, at pp. 36-54.

This new evidence, coupled with the government's repeated admission that a "best efforts" deal is perfectly legal, mandate that Brown receive a new trial on Counts IV and V. *See Conley v. United States*, 415 F.3d 183, 193-94 (1st Cir. 2005) (new trial ordered for perjury and obstruction where government withheld memorandum from key witness indicating support for defense); *United States v. Garland*, 991 F.2d 328, 330 (6th Cir. 1993) (new trial ordered where suppressed testimony was "obviously material," and "corroborated [defendant's] story"). All of the witnesses, including the two alleged speakers themselves (Fastow and McMahon), whose testimony was suppressed prove that Brown's grand jury testimony was literally true.[22] That is the only standard for evaluating the

[22] Tr.80 (an obligation to get Merrill out of the deal was "inconsistent with my understanding of what the transaction was." **** "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 also stated: "**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 (emphasis added).

charges of perjury and obstruction. *See Bronston*, 409 U.S. at 360, 93 S. Ct. at 602; *Abroms*, 947 F.2d at1245. The newly discovered evidence confirms the literal truth of Brown's testimony.

D. The Newly Discovered Evidence Is Material To Brown's Defense For Perjury And Obstruction.[23]

The prosecutors said the perjury was as "black and white" as "promise" versus "no promise." Tr. 6274. However, the raw notes make clear that Fastow did not say or make a "promise," and what he did say was that Enron would find a third party to buy the barges–which is not unlawful. Fastow's testimony proves that what Brown told the grand jury was literally true.[24] It cannot be reasonably disputed that Fastow's own words are material (indeed crucial) to any disposition of this case, and this fourth *Berry* factor is easily satisfied. The entire prosecution depended on hearsay evidence of representations as recited by the deliberately mislead (or complicit, in the case of Glisan) Fastow subordinates (Kopper, Long, Boyt, *et al*.). Each word and phrase was crucial, and a distinction in any of the above would have meant the difference between guilt or innocence. *See Gutierrez*, 2007 WL 3026609, *8 ("The FBI 302 report and [Fastow raw] notes, when considered cumulatively with all the evidence derived therefrom, seriously discredit .., the prosecution's essential key witness[es] [e.g. Glisan and Kopper], and undermine confidence in the trial verdict."). As the following chart juxtaposing Brown's testimony with the evidence in Fastow's raw notes demonstrates, Brown has easily satisfied this *Berry* factor.

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[23] *See* Brown's Motion For New Trial, Dkt. 1004, at p.25; Brown's Supplemental Memorandum In Support Of Motion For New Trial, Dkt. 1020, at p.8-9; Brown's Reply in Support of Motion For New Trial, Dkt. 1061, at pp. 26-31.

[24] It renders the 15-month later, off-hand, casual email legally irrelevant–precisely because the sworn testimony was literally true.

Defendant James Brown's Grand Jury Testimony From Which The Government Erroneously Procured Convictions For Perjury And Obstruction.	**Newly Discovered Evidence From The Raw Notes Of The Government's Interviews With Andrew Fastow.**
"Q: Do you have any understanding of *why Enron would believe* it was obligated to Merrill to get them out of the deal on or before June 30th A: It's inconsistent with my understanding of what the transaction was. (Tr. at 80, lines 6-11.) Q: ....Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000? A: In - - no, I don't - - the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though. Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] [sic (it was an Enron document)] to a promise that Merrill would be taken out by a sale to another investor by June of 2000? A: No. (Tr. at 88, lines 13-23)" (Dkt. 311; RE2). A: *No, but it was our understanding that - - or my understanding* that we had told Enron *or that Enron understood* that we didn't want to own this after June 30. A: No. ***I thought* we had received comfort from Enron that we would be taken out of the transaction within 6 months or we would get that *comfort*. If *assurance* is synonymous with guarantee, then that is not *my understanding*. If *assurance* is interpreted to be more along the lines of strong comfort or use best efforts, that is *my understanding*.** (BrownX980, 980B: 76, 77, 81, 82, 88, 91, 92; 19:3238-41) (emphasis added).	Fastow objected to word "obligation" in Glisan email. #000264. *See* #000263. Fastow deliberately misled his "'subordinates' by 'tell[ing] Enron people' this was a 'guarantee' in order to 'motivate' and 'light a fire' within Enron to remarket the barges to a third-party." #000349. Fastow stated that he "never used the word promise," #00084A; couldn't "give a verbal or written guarantee," #000262; and knew there could be no repurchase obligation. #000262 ("There could not be a guaranteed put back to [Enron] [because they] would not get sale treatment."). when Fastow spoke with Bayly he "did not obligate [Enron] to buy out" Merrill's equity interest. #000263. Fastow stated unequivocally that "it was [Enron's] obligation to [use its] '**best efforts**' to find [a third] party [to] takeout" Merrill's equity interest. #000263. Enron would "us[e] [its] **best effort** [to find an industry buyer] but LJM will be [prepared to purchase Merrill's interest if no such purchaser can be located within six months]." #000177. Fastow told the Task Force specifically that (1) "'**best efforts**'" means that a party "must do everything that a reasonable businessman would do to achieve result," and (2) a "**best efforts** [arrangement was] different from [a] guarantee" because "**best efforts** would be to find [a third] party to accomplish buyout." #000263.

E. The Fastow Raw Notes, And/Or The Evidence Of Katherine Zrike, Regarding "Best Efforts" If Introduced At A New Trial, Cumulatively Or Standing Alone, Would Produce An Acquittal.[25]

Further, the dual impact of Fastow's representations, suppressed by the government, that (1) he misled subordinates and told inside-Enron employees that there was a "guarantee" simply to light a fire under them and motivate them to find a third-party purchaser, and (2) he only ever obligated Enron to use its "best efforts" to find a third-party purchaser for Merrill's equity interest, would have produced an acquittal. Indeed, even without this evidence, Brown was only one vote short of acquittal on appeal. *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 550 U.S. 933, 127 S. Ct. 2249 (2007).[26] In sum, "[i]t is likely that [Fastow's] testimony would have had seismic impact, both because of what he would have said and because his testimony would have furnished the defense with promising lines of inquiry for the cross-examination of [Glisan, Kopper, and others]." *Leka v. Portuondo*, 257 F.3d 89, 106 (2d Cir. 2001). The same is true for the withheld evidence of Merrill Counsel Katherine Zrike who had told the grand jury that she tried to negotiate the best efforts language into the deal documents–rendering the repeated arguments and statements of the Task Force lawyers, patently false. *See* Brown's Motion to Dismiss, at pp. 36-54.

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[25] *See* Dkt. 1004, at p.26; Dkt. 1020, at p.9-10; Dkt. 1061, at pp. 31-34.

[26] As Judge DeMoss explained: "the Government's own evidence supports a conclusion that the only comfort offered to Merrill was that Enron would use its best efforts to sell to a third party. A reasonable jury could not convict Brown of perjury [nor by extension, of obstruction] where the Government speaks out of both sides of its mouth with respect to the allegedly perjurious testimony. The Government simultaneously proffers the identical words as both evidence of Brown's guilt of perjury when the words are spoken by Brown and as evidence of the nature of the Enron transaction when offered by the Government's own witnesses. ... I conclude, therefore, that no reasonable jury could conclude that Brown's testimony before the Grand Jury was false. Accordingly, I must conclude that no reasonable jury could convict Brown of perjury [nor by extension, of obstruction]." *Brown*, 459 F.3d at 537 (DeMoss, J., concurring in part and dissenting in part).

Here, as in *United States v. Garland*, 991 F.2d 328, 330 (6th Cir. 1993), the dearth of corroborative evidence of Brown's grand jury testimony flowed directly from the government's concealment of exculpatory evidence, and its manufactured theory "that the [] deal was a complete fabrication." *Id*. at 331. But the "new evidence [before this Court] now corroborates [Brown's] story," and renders *the government's criminal case* the complete fabrication, prosecuted in violation of Brown's right to due process. *Id*. at 330. As in *Garland*, the Fastow, Zrike and other belatedly-produced evidence "is dramatic and probative newly discovered evidence that demonstrates that Brown's grand jury testimony was literally true. *Id*. at 335. There can be no confidence in the jury's verdict in light of the evidence of Fastow and Zrike–each of whom directly belied testimony of government witnesses and statements by the prosecutors.

Here, as in *Garland*, the prosecutor brought forward an indictment diametrically opposed to the Defendant's contention that a legitimate deal had been consummated. The government willfully refused to investigate or objectively consider defendant's theory. In the period after the verdict, the discovery of suppressed evidence completely corroborated the defendant's position. A new trial is mandated. First, the Court found that "although the defense knew of [the witness'] *existence* before and during the trial," they did not have *access* to the witness "until after the trial." *Garland*, 991 F.2d at 335 (emphasis added). Second, the defendant, as here, made repeated attempts to gain access to the witness, but was unable to do so; in such a case, the requirement of due diligence was satisfied. *Id*. Third, the "[witness'] testimony [wa]s obviously material" as "[i]t corroborate[d] [defendant's] story and thus helps establish his defense." *Id*. at 336. Finally, the "[witness'] testimony will likely result in an acquittal since it verifies [the defendant's] defense." *Id*. The same result is required here.

CONCLUSION

The government suppressed key evidence that proves Brown's grand jury testimony was literally true and that the hearsay of its witnesses was false or wrong. Brown is entitled to a new trial on Counts IV and V.

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Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that the parties have conferred on the above and foregoing and that counsel for the United States opposes this Motion.

/s/ Sidney Powell
Sidney Powell

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon Patrick F. Stokes, counsel for the United States, via the ECF system on May 14, 2010, and on all counsel of record.

/s/ Sidney Powell
Sidney Powell