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EXHIBITS

EXHIBIT A

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

UNITED STATES OF AMERICA	§	
	§	
v.	§	CR. NO. H-03-363
	§	
DANIEL BAYLY	§	
JAMES BROWN	§	
ROBERT FURST	§	
DANIEL BOYLE	§	
WILLIAM FUHS	§	
SHELIA KAHANEK	§	

ORDER ON PENDING MOTIONS

Several pending motions have been argued and may be ruled upon at this time.

Expert Witnesses

Pending is the Government's Motion to Preclude Expert Defense Testimony for Lack of Notice (Document No. 215), to which Defendants James A. Brown and Daniel Bayly have filed oppositions (Document Nos. 273 and 224 respectively). Also pending and related to this subject are Motions in Limine No. 1 and No. 2 in the Government's Motion in Limine to Exclude Certain Defense Arguments and Evidence (Document No. 207), to which Defendant Bayly has filed an opposition (Document No. 255).

In its Motion in Limine No. 1, the Government moves to preclude expert testimony regarding the degree of knowledge and training necessary to understand the Nigerian barge transaction or

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(Document No. 231) is DENIED. Before offering this exhibit in evidence at trial, the Government shall first approach the bench after the jury is excused for an evening recess on the day before any such offer is to be made.

Brady Disclosures

Defendants' Emergency Motion and Request for Immediate Disclosure and/or Hearing Due to Government's Violation of Brady v. Maryland as to Andrew Fastow and Other Exculpatory Witnesses (Document No. 236), Defendant Daniel Bayly's Supplemental Filing to

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Certain Motions Filed by Co-Defendants (Document No. 155), James A. Brown's Motion to Adopt and Join Opposition to Anonymous Jury and Jury Sequestration (Document No. 198), Robert Furst's Motion to Adopt and Join Motions of Co-Defendant Kahanek (Document No. 147), Robert Furst's Motion to Adopt and Join Motions of Co-Defendants (Document No. 148), Robert Furst's Motion to Adopt and Join Motion of Co-Defendant Brown (Document No. 242), Robert Furst's Motion to Adopt and Join Motion of Co-Defendant Brown (Document No. 243), Defendant Boyle's Opposed Motion to Allow Defendant Boyle to Adopt Applicable Motions of Other Co-Defendants (Document No. 143), Daniel O. Boyle's Motion to Adopt and Join Defendant Furst's Motion to Reconsider Brady/Giglio Motion and Reply Brief in Further Support of Defendant Furst's Motion to Reconsider Brady/Giglio Motion (Document No. 216), Defendant William R. Fuhs' Motion to Adopt Motions of Co-Defendants (Document No. 152), William R. Fuhs' Motion to Adopt Arguments Made by Co-Defendants in Opposition to Motion for Anonymous Jury and to Set Early Report Date for Prospective Jurors (Document No. 218), Defendant William R. Fuhs' Motion to Adopt Arguments Made by Co-Defendants in Opposition to the Government's Motion in Limine to Admit an Email Written by Defendant James Brown (Document No. 270), Defendant Sheila K. Kahanek's Motions to Adopt Trial Objections and Jury Instructions of Co-Defendants With Legal Authorities in Support (Document No. 110). These various "motions to adopt" are all GRANTED to the extent they simply adopt others' motions or oppositions, and this is not a separate ruling on the substance of any of the motions or oppositions.

Compel Disclosure (1) of Brady Material Regarding Kathy Zrike and (2) Giglio Material (Document No. 237), Defendant Kahanek's Notice of Joinder of Motions of Co-Defendants Related to Brady v. Maryland Violations and Motion in Further Support (Document No. 238), Defendant Brown's Motion (1) to Adopt and Join Certain Motions Filed by Co-Defendants (2) for Immediate Release of All Brady/Giglio Materials, (3) for a Revised Procedure for In-Camera Review of Brady and Giglio Materials and (4) for Bill of Particulars (Document No. 245), and Defendant Boyle's Motion for Findings of Fact, Motion to Dismiss or Alternatively Continuance and Order Regarding Disclosure of Brady Material as to Andrew Fastow (Document No. 256), to which the Government responded in opposition (Document No. 248), have also been argued. The Court has previously stated and restated its expectation that the Government will comply with Brady and Giglio. The Government has represented that it has provided to Defendants Brady material with respect to Andrew Fastow and, if any Defendant wishes to call Fastow as a witness, the Government will require Fastow to testify at trial pursuant to his cooperation agreement with the Government.

The Government has listed for Defendants a sizeable number of other persons who may have exculpatory testimony to provide for one or more Defendants. Defendants have had these names for a considerable period of time and have indicated that some may be subpoenaed to testify at trial. Some of these persons, however,

have declined to be interviewed by defense counsel. Given the large number of persons identified as possibly having exculpatory testimony to give for one or more Defendants, it is

ORDERED that the Government no later than July 30, 2004, shall provide to Defendants summaries of the exculpatory information that led the Government to identify Kathy Zrike and other witnesses as having exculpatory testimony. Although this may be more than is required by Brady at this juncture, the Court is of the opinion that the requirement is warranted given the extensive investigation that the Government has conducted and the large number of witnesses it has identified who possibly have exculpatory information for these Defendants. To this extent, Defendants' motions are GRANTED in part and otherwise are in all things DENIED. The Government's compliance with this Order, moreover, is required in addition to, and not as an implied fulfillment of, the Government's continuing obligation to disclose to Defendants any Brady material that it may have or acquire.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, on this 14th day of July, 2004.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

EXHIBIT B

U.S. Department of Justice

Enron Task Force

1400 New York Avenue
Washington, D.C. 20530

July 30, 2004

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Re: United States v. Daniel Bayly, et al., Cr. No. H-03-363 (Werlein, J.)

Dear Counsel:

The following summary is provided to you in compliance with the Court's Order of July 14th, 2004.

As you know, in April of 2004, the Enron Task Force provided you with the names of

certain witnesses who possessed exculpatory and even arguably exculpatory information, many of whom you have already interviewed or had access to their information, and all of whom you can subpoena to testify at trial.[1] As the Court noted, this summary may provide you with even more than is required to be disclosed pursuant to Brady.

The information that follows is not a substantially verbatim recitation of the witnesses' statements. While the information contained below may be similar to information contained within FBI form 302s, notes, and grand jury transcripts, it is intended only as a summary of information.

We note that many of the witness names provided to you in April 2004 were listed out of an abundance of caution. Indeed, some of the witnesses believed there was no agreement by Enron to take out Merrill Lynch ("Merrill") from the Nigerian barge deal (the "NBD") or a set rate of return simply because they were not present for inculpatory conversations. Other witnesses are unindicted conspirators who denied knowledge that could render them guilty.

Because this summary is not required to disclose inculpatory evidence, we have not set forth all of the information from these witnesses that inculpates any conspirator. The summary, for instance, does not include the instances in which the witnesses below later recanted exculpatory information or admitted lying to the government about their knowledge of the deal. Finally, we have not set forth all of the information that would impeach any statements below or statements by the witnesses themselves that are inconsistent with the information set forth below.

Kelly Boots

Boots made a telephone call to Furst at Merrill about the NBD. Boots told Furst that Enron needed a financial institution to put in some equity.

Boots participated in a call between Fastow and individuals at Merrill. On the call, Fastow gave his word that Merrill would be taken out by Enron, and he may have used the word promise but Boots does not recall for sure whether he did. Boots does not think that Fastow used the word guarantee. In Boots' mind, Merrill was still at risk in the NBD because it only had Fastow's word on the deal, which was not in writing. Boots' opinion is that if something is not in writing,

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[1] Brady requires no more. See United States v. Pearson, 340 F.3d 459, 470 (7th Cir. 2003) (witness "was available to be called as a witness for the defense" so Brady was satisfied); United States v. Salerno, 868 F.2d 524, 542 (2d Cir. 1989) (Brady does not require government to provide grand jury transcript; government informed defense that it may want to interview the witness at issue); United States v. Hicks, 848 F.2d 1, 4 (1st Cir. 1988) (defense knew of and had access to witness); United States v. Grossman, 843 F.2d 78, 85 (2d Cir. 1988) (citing United States v. LeRoy, 687 F.2d 610, 619 (2d Cir. 1982)); United States v. Ringwalt, 213 F.Supp.2d 499, 518 (E.D. Pa. 2002), affirmed, 2003 WL 21356963 (3d Cir. 2003).

then it is not binding.

Eric Boyt

At his initial interview, Boyt said Merrill was serious about buying its investment in the NBD. Boyt was not aware of any sort of oral agreement or arrangement between Enron and Merrill.

Gary Carlin

Carlin thought the NBD was a risky deal in an emerging market. Carlin did not monitor the NBD, and suggested that as he understood the NBD if the barges sunk, Merrill would have borne the risk. Carlin did not think that the guarantee to take out Merrill was literal. Carlin did not think it was unusual for the NBD to be presented to the DMCC for approval.

Kevin Cox

At the DMCC meeting, Cox believed the Merrill representatives asked themselves what the NBD was and concluded that it was not a loan. There were assurances that Enron would use its best efforts to complete the original sale. Enron did not promise to do anything.

When asked about a handwritten notation by Merrill executive Zrike describing the NBD as a "relationship loan that looks like equity," Cox said he did not recall anyone saying that this was a loan that looks like equity.

Cox did not know what was negotiated as to a rate of return. He did recall that there was a forecast of a sales price that would have produced a return. Cox did not have an understanding that Merrill would be repaid its equity investment as well as the return on its equity within six months. At the time that the deal was presented, there were expectations of the ability to realize value within a six-month period.

Brown can be imprecise in his use of language.

Michael DeBellis

Debellis did not know anything about the Merrill-Enron transaction and Merrill-LJM transaction, including the duration of the investment, any agreement to take Merrill out of the deal, other potential buyers, or a guaranty.

Mark Devito

Furst phoned Devito to say that Enron had an equity opportunity, equity bridge need, regarding a Nigerian electricity barge. Enron was looking to see if Merrill would have an interest in purchasing that equity for $7 million. Devito did not recall the term handshake, as referenced in a Merrill document, and recalls that Enron would assist with finding a third-party equity investor for the NBD. When asked about Bayly confirming with Enron a guaranty, as referenced in another Merrill document, he said he did not recall such a conversation.

Bowen Diehl

Diehl indicated that he was asked by someone whether he recalled Furst saying in 2000, words to the effect: they are not going to get us out of the barges, and that he might have replied affirmatively.

Vincent Dimassimo

Jencks material as to Dimassimo was provided to the defense in early June, 2004, as part of pre-trial discovery of government witnesses.

Gary Dolan

Dolan stated that he understood Enron was providing a moral undertaking to find a buyer for Merrill's interest in the NBD. Dolan stated that the agreement could not be in writing and that he believed it was an oral agreement that had no legal significance. Dolan had a sense that Enron would not give Merrill any assurances in writing and that Merrill would not ask Enron for such a request.

Dolan was asked about a handwritten Merrill document in which he wrote "Dan Bayly & Kevin Cox & Kathy Z [Zrike] & EVP [Executive Vice President] who promises we will be taken out w/in 6 mos." Dolan stated that the word "promises" refers to the assurances made by Enron regarding finding a buyer for Merrill's interest in the NBD. Dolan said that "EVP" refers to Executive Vice President at Enron. Dolan said that promise could mean that the conversation already happened, not that it was going to happen.

Dolan had a conversation with Brown in which Brown conveyed that he was concerned with the commercial risk Merrill was taking on the NBD. Brown wanted to ensure that the deal documents addressed the potential environmental risk associated with owning power plants and Merrill's liability issues.

Brown stated that the NBD was not his transaction and he was being stuck with

handling it because the transaction fit into the type of work his group handled. The NBD was initiated by Merrill's bankers in Texas. Brown also complained because his group was not earning any fees for handling the transaction and that the deal was being consummated close to the end of the year.

The NBD engagement letter was too specific and Dolan wanted the letter to be more general. As to a 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 NBD eventually. This was contrary to Dolan's understanding of the transaction. Dolan stated that he believed there was no obligation or commitment that Enron would find a buyer or that Enron purchase Merrill's interest if a buyer could not be found. Dolan expressed the view that this was merely an oral understanding between Merrill and Enron that if Marubeni did not purchase Merrill's interest then Enron would help Merrill find another buyer.

Dolan did not believe there was a cap on how much money Merrill could make on their investment in the NBD.

Gerald Haugh

There was an expected rate of return of 13% to15% for the NBD. Haugh had no knowledge of an agreement between Enron and any Merrill employees to buy back Merrill's position or of a guaranty given by Enron.

James A. Hughes

Hughes did not remember giving Colpean a bad review. Later in 2000, Colpean's function at Enron International disappeared. Hughes recalled going to lunch with someone from Enron North America and giving that person a good recommendation of Colpean.

Hughes was asked why Enron would "inherit" Merrill's interest in the NBD if a buyer could not be found by Enron for the NBD, as has been written by Hughes to Glisan in an Enron email in May 2000. Hughes stated his group would inherit the barges because of assurances Hughes understood Fastow gave to Merrill. Hughes always understood that Fastow gave assurances to Merrill that they would be out of the Nigerian barge deal by June 30th. Hughes thought that Fastow was telling Merrill that Enron would do everything it could to take Merrill out. Hughes did not understand initially that his group would have to buy the barges back if no buyer was found. When Hughes responded to the Glisan email, Hughes stated that he understood that Fastow made assurances to Merrill. Hughes did not

understand that Merrill was given an assurance about a rate of return.

When asked about an Enron calendar reflecting a scheduled meeting, Hughes said he did not recall a meeting or telephone conversation with Kopper and Boyle about the NBD involving LJM2. Hughes would not be surprised to find out that a meeting did take place. Hughes did not recall discussing the terms and economics of the deal involving LJM2.

Hughes has no knowledge of any lies told to Arthur Andersen. Hughes does not recall worrying about Arthur Andersen in connection the NBD. Hughes is not aware of any discussions in May 2000 about what information Arthur Andersen was told in December 1999 about the NBD. Hughes does not recall anyone telling him to manage the information that was being told to Arthur Andersen.

Hughes recalled an issue surrounding information placed in a draft DASH. Hughes did not recall an issue surrounding Kahanek's being mad about information placed in a DASH.

Mark McAndrews

McAndrews had a conversation about the NBD with Bayly prior to it closing. Bayly was concerned about the economic risk to Merrill. According to Bayly, some of the risks were that the investment was illiquid, the barges were based in a third world country, and that the barges might not be completed. McAndrews stated that he agreed with Bayly's assessment of the NBD and that in spite of the risk, Merrill should enter into the transaction for relationship purposes with Enron and that Merrill would receive a 20% return.

Bayly told McAndrews that he wanted assurances from Enron that Enron would get Merrill out of the transaction because Merrill did not want to hold the NBD investment for a long period of time. Bayly wanted Enron to help Merrill find another buyer for Merrill's interest in the NBD. Bayly was planning to have a conversation with someone at Enron to obtain these assurances. McAndrews did not know who Bayly was going to speak with at Enron. Later, Bayly told McAndrews that he did have a conversation with someone at Enron and that person agreed to help Merrill find a buyer for Merrill's interest in the NBD. Bayly did not tell McAndrews who he spoke to at Enron. Bayly did not mention anything about a "handshake deal," "side-deal," and/or "oral assurances" between Enron and Merrill.

McAndrews did not have an understanding that Merrill was assured by Enron that Merrill would be taken out of its investment in the NBD no later than 6/30/2000 or any other date. McAndrews believed that the only agreement between Merrill

and Enron was that Enron would help Merrill find a subsequent buyer for its interest in the Nigerian Barge investment. McAndrews stated that Tilney and Furst asked Enron if their accountants approved the NBD and Enron stated that its accountants did approve the transaction.

McAndrews stated that it was common for Merrill to have oral agreements in Private Equity Fund deals.

Jeffrey McMahon

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.

Ace Roman

In June of 2000, Roman believed that a deal had been struck with Merrill and Enron six months earlier that Merrill would be out of the NBD. Roman was not present during any conversations with regard to this deal so he does not know of any explicit promise to take Merrill out of the NBD. Roman does not know if there was a verbal promise to Merrill by Enron to take Merrill out of the deal. Roman was not involved in any discussions about what type of return Merrill would get.

Barry Schnapper

Schnapper understood that there was a commitment from Enron to use its best efforts to take Merrill out of the deal. Schnapper assumed that Arthur Andersen knew about the terms of the NBD. Recently, Boots told Schnapper that she had not heard of any commitment made to Merrill by Enron on the NBD.

Scott Sefton

Sefton did not recall any discussions about promises made to Merrill or LJM to take them out of the NBD at a later date.

John Swabda

Swabda had no recollection of anyone raising the issue of whether Enron would buy the barges back at the DMCC meeting or of a side deal. Swabda did not recall any discussion of a time frame by which Merrill would no longer want to be

involved with the NBD.

Kira Toone-Meertens

The FBI Form 302 as to Toone-Meertens was already disclosed to the defense, and this witness has already been deposed by both parties.

Schuyler Tilney

Tilney thought Fastow said on the call that they could not give Merrill assurances in writing because otherwise it would not have been a true sale. Tilney indicated that he believed Merrill was at risk in the NBD at the end of 1999. If Enron were unable to find a home for the barges, Merrill would own the barges. Enron did not represent that if the Marubeni deal fell through and Enron was unable to secure another buyer then they would make it up to Merrill in some other way. Merrill had been informed by Enron that Arthur Andersen had blessed the transaction and its true sale characteristic. Tilney stated that he believed the NBD was proper.

Joseph Valenti

Brown had reservations about the NBD. Brown was concerned about having barges in Nigeria, which was unstable, and the commercial risk associated with the deal. Valenti stated that based on the information he had at the time, the deal seemed fine.

Paul Wood

During the DMCC meeting, someone on the deal team said that, although Enron could not guarantee that it would take the deal off Merrill's hands, the Merrill deal team had assurances that Enron would take the deal off of Merrill's hands. This was what Wood meant when he wrote "handshake deal" in a document. The DMCC did not discuss obtaining a guaranty from Enron and turning the deal into a loan.

Wood was shown a Merrill document, America's Credit Flash Report. Wood thought that the use of the term "relationship loan" in the document was incorrect because Merrill's investment was not a loan.

Wood had no knowledge regarding the handwritten "aid Enron income manipulation" language used in a December 1999 Merrill document in relation to the deal. He did not know that Merrill had requested assurances from Enron regarding the NBD.

Catherine Zrike

Tilney and Furst represented to Zrike that Merrill had a business understanding with Enron that Enron would have to find another buyer of Merrill's interest in the NBD if Marubeni did not come through. Based on the representations that were made to her, Zrike did not feel that there was a commitment by Enron to guarantee Merrill's takeout within 6 months. Zrike believed that there was a business understanding between Enron and Merrill that Enron would remarket the barges. There was no legally binding commitment to do so.

Zrike indicated that she believed Merrill's investment in the NBD was at risk. Furst's perspective was that if the barges could not be sold, Merrill would go out and sell it. Zrike tried to make sure that Davis and Bayly understood that this was a risk and that Merrill could end up owning the barges and could lose its money. Zrike's focus was to ensure that Merrill's management understood that Merrill was the owner of the barges, and could be an owner for longer than it expected because there was no obligation for Enron to buy it back. That was made clear from day one. Zrike said she gave Bayly her views that based on what we know and the information we have this was not illegal. Zrike initially said she gave no legal advice on the NBD.

When asked about Merrill documents indicating that Merrill was internally recording the transaction as debt, Zrike said she had believed that the NBD was recorded in Merrill's books as equity. In connection with documents reflecting Merrill's internal accrual of "interest" daily, at a set rate of return, from the NBD, Zrike indicated that the accrual of interest was not consistent with her understanding of the deal.

Prior to seeing the June 2000 Merrill emails that (a) circulated internally the a draft Merrill demand letter to Enron regarding the NBD (seeking payment of a sum certain by June 30, 2000) and (b) indicated that the demand letter was not sent to Enron because it had been rendered moot when Enron found a buyer for the NBD, Zrike said she understood that the draft Merrill demand letter was not sent to Enron because it was incorrect. Furst or someone may have said around the time that the demand letter was incorrect. She believed Merrill found out that the person who prepared the demand letter had been acting on his own and had not received approval or had it vetted. Zrike believed the demand letter was not a correct representation of the obligations the parties had under the contract.

Zrike was present for discussions with either Tilney or Furst in which it was noted that the NBD added to Enron's earnings but was not being done so that Enron could meet its earnings. Zrike said that we looked at the issues and got satisfactory answers as to whether the NBD was material to Enron.

Zrike recalled a meeting in Davis' office attended by herself, Davis, Bayly, and others. Tilney and Furst joined by phone. The participants in this discussion walked through various risks of owning the NBD. There was a discussion about materiality and the year-end nature of the trade. Zrike said that she was comfortable this was not a made-up transaction. Either Tilney or Furst said that the NBD was not being done to meet earnings expectations. Zrike, when asked about her handwritten notation concerning the NBD to the effect of "relationship loan that looks like equity" initially said it was just her jotting down her internal concerns.

Very truly yours,

ANDREW WEISSMANN
Director, Enron Task Force

By: Kathryn H. Ruemmler

Matthew W. Friedrich
John Hemann
Kathryn H. Ruemmler
Enron Task Force

UNITED STATES DEPARTMENT OF JUSTICE
CRIMINAL DIVISION

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Phone: **(202) 353-3060**

Fax: **(202) 353-3165**

DATE: **July 30, 2004**

SUBJECT:

NUMBER OF PAGES (INCLUDING COVER): 11

MESSAGE:

EXHIBIT C

UNITED STATES GRAND JURY

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

GJ NO. 02-2

RE: INVESTIGATION OF ENRON

BE IT REMEMBERED that on the 25th day of September, 2002, beginning at 9:48 a.m., in the Federal Building, 515 Rusk, Houston, Texas, the United States Grand Jury convened, at which time the following proceedings were had and testimony adduced as hereinafter set forth.

TESTIMONY OF JAMES ARTHUR BROWN

VOLUME I

Q. Do you see where it says, "To be clear, Ene. (Enron) is obligated do get Merrill out of the deal on or about June 30th. We have no ability to roll the structure"?
A. Yes, sir.
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.
Q. Okay. Have you ever seen this additional, the E-mail just above it from a Jim Hughes to Mr. Glisan. Have you ever seen that before?
A. No, sir.
Q. Do you know who Jim Hughes is?
A. No, sir, or not that I can recall.
Q. Okay. Do you see where he says, "We have always understood that is required. If it is non-performing, then no one will take the Merrill position and we will inherit it."
A. Is that a response to the one below it?
Q. Yes, I represent that to you. And just so

Q. Now, do you see in this document where it describes the transaction, and the document is dated June 29th of 2000?

Do you see in the first sentence where it says, "Enron sold barges to Merrill Lynch in December of 1999, promising that Merrill would be taken out by sale to another investor by June 2000."

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 to a promise that Merrill would be taken out by sale to another investor by June of 2000?

A. No.

Do you have any understanding of what a relationship loan is?

A. Yeah. My understanding of a relationship loan is a loan you make to somebody that you would probably not make unless it was because of a corporate relationship with them or the price was of such that it was because they were a relationship.

Q. And let me now direct your attention to the to the paragraph on the Nigerian barge project.

Now, do you see where it says in the second-to-last line, "IBK was supportive based on Enron relationship, approximately $40 million in annual revenues, and assurances from Enron management that we will be taken out of our $7 million investment within the next three to six months."

Does that accord with your understanding of the transaction?

A. No. I thought we had received comfort from Enron that we would be taken out of the transaction within six months or would get that comfort.

If assurance is synonymous with guarantee, 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.

Q. And -- well, we'll get to the facts underlying your understanding when I finish with these documents.

Have you seen the appropriation request coverpage in this transaction?

A. I have only upon preparation work for the SEC and whatnot.

Q. So you didn't see it at the time?

A. Not to my recollection.

[Grand Jury Exhibit No. 7 marked for identification and made a part of the record.]

BY SPECIAL AUSA WEISSMANN:

Q. Okay. This is Grand Jury Exhibit 7, and I'll represent to you that it's the appropriation request in connection with this transaction.

Do you see where it says, "Take out," where it says, "Project start/finish," and it says, "Needs to close by 12/31/99"? And

EXHIBIT D

CHART 1
EXCULPATORY EVIDENCE THAT THE ETF HIGHLIGHTED BUT THEN WITHHELD FROM THE 2004 COURT-ORDERED SUMMARIES

In the following Charts, Yellow highlighting denotes material that the ETF itself highlighted in yellow in 2004 but withheld from the defense.
Material identified in red was other exculpatory evidence that was also withheld.

Specified Documents with ETF Highlighting	**Portions Highlighted by ETF But Deliberately Withheld**
FBI 302 of Gary Dolan	DOLAN had a subsequent conversation with BROWN in which BROWN conveyed that he was concerned with the commercial risk ML was taking on the Nigerian Barge transaction. BROWN was worried about the potential environmental risk associated with owning power plants and ML's liability issues. DOLAN stated that the original draft of the engagement letter obligated Enron to eventually take ML out of the Nigerian Barge transaction. This was contrary to DOLAN's understanding of the transaction and 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 ML purchased an interest in the Nigerian Barges with the expectation that Enron would help ML find a buyer for ML's interest in the Nigerian Barges. DOLAN stated that there was no obligation or commitment that Enron would find a buyer or that Enron purchase ML'S interest if a buyer could not be found.
Raw Notes of Jeff McMahon	**000478**: "Andy agreed E[nron] would help them mkt [market] the equity w/in 6 months after closing. > E[nron] and ML [Merrill Lynch] would work to remarket for the 6 months after." **000494**: "Andy agreed E[nron] would help remarket [the] equity w/in next 6 months–**no further commitment**" **000513**: "Enron would use best efforts to help remarket the equity." **000514**: "A.F. *agreed* that E[nron] would help them remarket in 6 mo[nth]s." **000560**: "Andy said Enron would help remarket in next six months." *Id*. at 000539 - ML had already approved deal internally before "wanting assurances"
Grand Jury Testimony of Kathy Zrike	ETF withheld that Zrike testified: "The fact that they would not put in writing an obligation to buy it back, to indemnify us,all those things were consistent with the business deal and were not things that I felt were nefarious [or] problematic." Dkt.1168, Ex. F, at p. 75.

CHART 2
ETF STATEMENTS AND ARGUMENTS REFUTED
BY EVIDENCE THAT ETF CONCEALED

ETF Statements and Arguments	Evidence Concealed by ETF
Matthew Friedrich: "If its just 'best efforts,' then it would have been okay." Tr. 4528, 4520. "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." Tr. 6485-86.	**Andrew Fastow**: "It was [Enron's] obligation to use 'best efforts' to find 3rd Party takeout. Fastow went on to detail his sophisticated knowledge of a best efforts agreement: 'Best Efforts' - must do everything possible that a reasonable businessman would do to achieve result..... Best effort would be to find a 3rd Party to accomplish buy out." Dkt.1168, Raw Notes, Ex. C, at Bates #000263.
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. **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. **Hemann**: "The purpose of the handshake … was to confirm the deal that had been cut by Mr. McMahon." Tr. 404. *See* Tr. 6527-28 (Friedrich: same). **Ruemmler**: "And during that conversation [between Glisan and McMahon], Mr. McMahon confirmed to Mr. Glisan that he had, in fact, given an oral guarantee to Merrill Lynch." Tr. 6159. *See* Tr.6157-58 (same). **Ruemmler**: "So the key, . . . was Jeff McMahon. …. Trinkle told you …. and Glisan told you that Jeff McMahon confirmed to him that he gave that exact guarantee." Tr. 6159-60. *See* Tr. 6218-19 (same). **Ruemmler**: "It was [Bayly's] job … to get on the phone with Mr. Fastow … and make sure that Mr. Fastow ratified the oral guarantee that Mr. McMahon had already given to Mr. Furst." Tr. 6168. **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.	**Jeffrey McMahon:** "Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. Agreed E[nron] would use best efforts to help them sell assets." Ex. B, Raw Notes, DOJ-ENRONBARGE #000447. "NO - never guaranteed to take out [Merrill Lynch] w/rate of return." *Id*. at 000493. **000494**: "Andy agreed E[nron] would help remarket [the] equity w/in next 6 months–no further commitment" **000513**: "Enron would use best efforts to help remarket the equity." **000514**: "A.F. *agreed* that E[nron] would help them remarket in 6 mo[nth]s." **000560**: "Andy said Enron would help remarket in next six months." "[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." Dkt.1168, McMahon Memorandum to the SEC, Ex. D, at pp. 4-6.

ETF Statements and Arguments	Evidence Concealed by ETF
Kathryn Ruemmler: "[T]he 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. Matthew Friedrich: "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? . . . 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? Tr. 6485. Matthew Friedrich: 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-faithnegotiating process. Tr. 6493-94.	**Katherine Zrike:** "Merrill tried to put the re-marketing agreement in the written agreement but Enron said it was inappropriate and it could not commit to it. The 'best efforts' agreement for selling Merrill's position looked like Enron had to buy back Merrill's interest in the barges. Merrill was putting in real equity with only Enron to re-market its position. Zrike also wanted a 'hold harmless clause for Merrill but Enron rejected that because Merrill had to be at risk.*** Zrike 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." Dkt.1168, FBI 302, Ex. E, at pp. 10-11, 15. "Everyone understood the rules, the accounting rules and the accounting treatment. . . . I was trying to make sure that [senior executives] understood that this was a true risk that we would end up owning this barge and so – and from an exit perspective, we [] had to be willing to own it until the thing got sold or–and keep the risk of what that entails on our balance sheet and–making sure that they are comfortable with that." Dkt.1168, Grand Jury Testimony, Ex. F, at p. 55. **Katherine Zrike:** "Merrill – the Merrill Lynch lawyers in my group and myself did ask that we include a provision that – two types of provisions that we thought would be helpful to us. . . . The [second] thing that we marked up and we wanted to add was a best efforts clause, ...that they would use their best efforts to find a [third-party] purchaser [for Merrill's equity interest.***[T]he response from the Enron legal team was that – both of those provisions would be a problem....[t]hey kept coming back to the fact that it really had to be a true passage of risk.***[W]e were not successful in negotiating that [in] with Vinson & Elkins." *Id*. at pp. 63-64, 69. *See also id*. at 66-70 (same, including Alan Hoffman's involvement negotiating with V & E). "[T]hey were not committing to do whatever it took. They were committing to take – and the business ended up being a, you know, oral business understanding [to assist in locating a third-party]." *Id*. at 73. "The fact that they would not put in writing an obligation to buy it back, to indemnify us, all those things were consistent with the business deal and were not things that I felt were nefarious [or] problematic." *Id.* at p. 75.

ETF Statements and Arguments	Evidence Concealed by ETF
Matthew 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. 6500. **John 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. 419. **Matthew Friedrich:** "The key thing, the key thing in a reliance [on counsel] defense is they have to be in the loop. They have to know what's going on. You have to disclose all the material information to them … The lawyer has to know. They have to make a judgment. They have to render advice. That didn't happen here. The opposite thing happened. They were told you couldn't do it and they did it anyway. And, from that, you can infer bad intent on all their parts." Tr. 6504 (Friedrich). **Matthew Friedrich:** "Mr. Schaeffer said that nothing was hidden from Kathy Zrike, and that's just not true. Things were hidden from her time and time again." Tr. 6503.	**Katherine Zrike:** "Zrike did point out the risks to the DMCC, Davis and Bayly.... Zrike wanted the more experienced group of Merrill employees of the DMCC to review it.... Zrike thought the DMCC would allow the deal to be fully vetted.... [Zrike] wanted the deal looked at in detail. Zrike made the decision to take the deal to the DMCC. ... She told Brown, who was not a member of the DMCC, to attend the DMCC." Dkt.1168, Ex. E, at p. 8. "Zrike took the lead in the [DMCC] meeting because it was an equity deal in the DMCC and she had to present the deal to Tom Davis. Zrike and Brown discussed the deal issues [at the DMCC]." "It went to the DMCC because that's where I decided it would be best to be vetted.***I wanted to get [the transaction] reviewed by people who were familiar with transactions like this -- structured deals, complicated ownership interest -- that had some expertise in the area." Dkt.1168, GJ Testimony, Ex. F, at pp. 123, 128. "We were making it clear to everybody [at DMCC and at Merrill], .., both Jim Brown and I, that this is an equity investment that we will own and that we have to have all the risks associated with that equity investment in order for them to take it as a sale and to book the gain or loss, whatever it happens to be – it happens to be gain in their case, on their financial statements. So for accounting purposes it had to be a true sale. And there could be no mitigation of that status." Dkt.1168, SEC Testimony, Ex. Y, at p. 192.

ETF Statements and Arguments	Evidence Concealed by ETF
Matthew Friedrich: "The fact that he's [Fuhs] 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. *See also* Dkt.1204, at p. 14 n.16 (The government attributed all Fuhs' wrongs to Brown: "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. 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. **Kathryn Ruemmler:** "And so what did they do, ladies and gentlemen? They cut her [Zrike] out. They cut her out of this call on December 22nd, and they cut her out of this call between Mr. Bayly and Mr. Fastow. Ms. Zrike was never present for these conversations in which this verbal guarantee was discussed." Tr.6206.	**Gary Dolan:** "DOLAN was shown a copy of an E-mail from WILSON to DOLAN dated 12/23/1999 (Bate stamped ML034707). This E-mail contained a copy of the proposed changes to the engagement letter made by DOLAN. DOLAN acknowledged that the handwriting on the page is his. DOLAN does not remember talking to anyone at Enron about the changes he made to the engagement letter. However, DOLAN did receive handwritten comments from someone from Enron. Enron did not object to the language in the original draft of the engagement letter which stated that 'Enron will buy or find affiliate to buy . . .'" However, "DOLAN did object to this language and made the necessary changes." Dolan knew "that such an agreement would be improper because such a transaction could be viewed as a 'parking' transaction." Dkt.1168, FBI 302, Ex. G, at pp. 5-6; "DOLAN also had a conversation with JEFF WILSON about the engagement letter. DOLAN believes WILSON helped draft the engagement letter. Dolan requested that Wilson delete some of the language in the engagement letter." *Id*. at p. 5. **Schuyler Tilney:** Tilney believed that Katherine Zrike, in-house counsel for Merrill Lynch was on the Bayly/Fastow phone call. Exhibit B, DOJ-ENRONBARGE-000678. *See id*. at 000677 (listing call participants, including Kathy Zrike); 000726 (same). **Kelly Boots:** "On the telephone call between Enron and Merrill Lynch were: from Merrill Lynch SCHUYLER TILNEY (who was involved as a Relationship Manager), FURST, a Merrill Lynch credit person (BOOTS does not know if this person's name was KEVIN COX), a female who may have been an attorney and a senior person from the Investment Banking side." Boots FBI 302.

CHART 3
JAMES BROWN'S GRAND JURY TESTIMONY CORROBORATED BY JEFFREY McMAHON'S RAW INTERVIEW NOTES

James Brown's Grand Jury Testimony	Brown's Testimony Corroborated by McMahon Raw Interview Notes
"Q: Do you have any understanding of **why Enron would believe it was obligated** to Merrill to get them out of the deal on or before June 30th? A: It's inconsistent with my understanding of what the transaction was. (Tr. at 80, lines 6-11.) Q: ....Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000? A: In - - no, I don't - - the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though. Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] [sic (it was not an ML document)] to a promise that Merrill would be taken out by a sale to another investor by June of 2000? A: No. (Tr. at 88, lines 13-23)" (Dkt. 311; RE2). A: I did not understand - - you know, *my understanding* of the transaction was that they were not required to get us out of the transaction, **but we made it clear to them that we wanted to be out of it by June 30th**. **** A: No. I thought we had received comfort from Enron that we would be taken out of the transaction within 6 months or we would get that comfort. If assurance is synonymous with guarantee, then that is not my understanding. **If assurance is interpreted to be more along the lines of strong comfort or use best efforts, that is my understanding**. (BrownX980, 980B: 76, 77, 81, 82, 88, 91, 92; Tr. 3238-41).	"Context of Call - ML [Merrill Lynch] had approved deal internally." Ex. D:000447. "Never made rep[resentation] to ML [Merrill Lynch] that E[nron] would buy them out at price or @ set rate of return." *Id*. at 000449. "NO - never guaranteed to take out [Merrill Lynch] w/rate of return." *Id*. at 000493. Andy said–Enron help remarket in next six months. *Id*. at 000560. "No recollection of a promise (to re-buy)" *Id*. at 000544. Andy said E would help remarket equity w/in next 6 months. –no further commitment. *Id*. at 000494. "AF [Fastow] agreed that E[nron] would help them [Merrill Lynch] remarket the equity 6 mo[nths] after closing." *Id*. at 000450. "Andy [Fastow] agreed E[nron] would help them mkt [market] the equity w/in 6 months after closing. > E[nron] and ML [Merrill Lynch] would work to remarket for the 6 months after." *Id*. at 000478. "A.F. agreed that E[nron] would help them remarket in 6 mo[nth]s." *Id*. at 000514. "Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. Agreed E[nron] would use best efforts to help them sell assets." *Id*. at 000447.

EXHIBIT E

hear witnesses talk about. So Enron wanted them off.

And the investment banks really didn't want to do that very much, but they needed the fees. And you will hear that Enron set up the play system, "You help us out with the balance sheet. We'll throw off some investment banking business to you."

And Merrill Lynch wanted a piece of this business. In December, 1999, when Mr. Furst was trying to put together this Nigerian barge deal, he told his bosses exactly what this was about. And this is what he said. He said, "First, Enron is a top client for Merrill Lynch" and, second, "Enron views the ability to participate in transactions like this as a way to differentiate Merrill Lynch from the pack and add significant value."

And what was that value? In 1999, a loan. Merrill Lynch got about 40 million dollars' worth of business, investment banking business from Enron, and it wanted more. So it was only natural that the friend of Enron that the APACHI folks were told to come on back for was Merrill Lynch.

In December of 1999, Enron's treasurer, Geoff McMahon, came up with Plan B. "No CDC. So what are we going to do?" He called Merrill Lynch and he cut a deal. Now, not a sale, but a bridge, a bridge to get Enron past the end of the year. And what was the deal? The deal

was very simple. Just had a few elements. And you're going to see a lot of documents, e-mails, things like that, that show the parameters of this deal.

One -- and this is in a document written by Mr. Furst -- Geoff McMahon, EVP, Executive Vice-President and treasurer of Enron Corporation, has asked Merrill Lynch to purchase $7 million of equity to buy these barges -- to buy an interest in these barges.

Two, this transaction must close by December 31st, 1999. Three, Enron is viewing this transaction as a bridge to permanent equity that Merrill Lynch will hold for less than six months. And four, if I have the hand right, the investment would have a 22.5 percent return.

This really is a simple deal. And this is the 21st -- the 20th, 21st of December, 1999. You will see that these elements of the deal never changed throughout the six months that Merrill Lynch owns the barges.

But the Merrill Lynch executives were very worried about being stuck with these barges because Merrill Lynch was not in the business of owning interest like this. They were just doing this to help Enron. So the guarantee, that Enron is viewing this transaction as a bridge and will be out of it in six months, that had to be a guarantee. And that was the guarantee that Merrill Lynch got from

Geoff McMahon.

And in Merrill Lynch's own internal approval sheet, it says this: "Enron will facilitate or exit from the transaction with third-party investors. Dan Bayly will have a conference call to senior management of Enron confirming this commitment to guarantee the Merrill Lynch takeout within six months." A guarantee.

Ladies and gentlemen, the evidence in this case will prove that this guarantee was made and this guarantee would blow the accounting on the deal. And the reason is very simple. We will prove to you with the evidence in this case that Merrill Lynch was not really buying anything. Merrill Lynch was loaning money to Enron and getting interest on that loan within a certain period of time.

But all that was left -- and there was something left here -- was the ceremonial handshake between the people at the top of the pyramid, the assurance from senior Enron executives that Mr. Brown's deal approval sheet mentioned, the handshake that had to be undertaken by Mr. Bayly. And that happened on December 23rd, 1999.

And the purpose of the handshake, the evidence will be, was to confirm the deal that had been cut by Mr. McMahon. The meeting happened on the telephone between Mr. Bayly and Andrew Fastow, the CFO of Enron. And

Q. Have you, sir, assisted in the preparation of a subpoena to require the attendance of Ms. Volcy?

MR. HEMANN: Objection, Your Honor. Relevance.

THE COURT: Sustained.

BY MR. COGDELL:

Q. When you went to Enron to find the -- the e-mail, help me with what your perception was of the e-mail. What is this e-mail -- the e-mail -- we're now using the same term, regrettably -- what did you think the e-mail said or what were you looking for this e-mail to say?

A. Sure. I was going on the description Mr. Lawrence had given during his testimony, that there was an e-mail that said, "Delete the old action plan. Here's the new one."

I didn't expect any particular words or anything like that. I was looking for an e-mail that would basically be somewhere referencing the initial action plan and then the subsequent one that was sent out.

Q. Okay. Were you -- and I'm referring to it as the "hide, secrete, destroy e-mail." Okay?

Were you looking for something like that?

A. I was looking for an e-mail, really, anything around that time, from any of those participants, that identified. And I was looking at everything that was still available that was sent or received on that day.

And I wanted to open it up. I didn't care to me what the subject header said or if it wasn't a subject header. I wasn't looking for a particular word.

I looked at all the e-mail accounts that were still available. And on those days, a few days before, few days after, I looked to see if there was any reference to any e-mail of that nature.

Q. Okay. Would you agree with me, Special Agent Bhatia, that the e-mail that Mr. Lawrence described in his debriefing with Ms. Odom and others was very different than the e-mail he described in front of this jury?

A. I wasn't there when Ms. Odom debriefed him.

Q. Okay. Did you have discussions with Ms. Odom about how it was that Mr. Lawrence described this e-mail back when he was interviewed prior to Mr. Lawrence was interviewed prior to trial?

MR. HEMANN: Objection.

BY MR. COGDELL:

Q. Without going into what was said, did you have discussions with Special Agent Odom about the content or the character of the e-mail as Mr. Lawrence then described it?

MR. HEMANN: Objection. Relevance. The testimony was that Special Agent Bhatia searched based on Mr. Lawrence's description in court.

and compare them to his SEC testimony. From Government's Exhibit 230, in terms of sort of, you know, the day-to-day interaction of what's going on with Enron in terms of the take-out, what the documents show is that Mr. Fuhs is the guy. He is the one who is directly liaisoning with the folks at Enron to find out what's going on. He takes the demand letter from Geoff Wilson -- and the demand letter again is not, "Gee, how is the best efforts going, Enron? Are you guys going to be able to find us a buyer?" It's not, "How are the barges going? Because we are going to have to start to try sell this ourselves in June." It's not any of those things.

It's, "You owe us X amount of money by June 30, period." Entirely consistent with the promise that was reached in December. And once Mr. Fuhs has that letter, that's when he sends the e-mail, saying, "Rob and Geoff, I just had a call with Dan Boyle" -- again this is Exhibit 230 -- "(he preempted our letter about the Nigerian barge transaction). Enron's lined up a new buyer. This new buyer will purchase our ownership interest in the Ebarge with the agreed-upon amount outlined in the previously forwarded memo."

He knows about the agreed-upon amount. He knows that there's a promise.

You also take these e-mails and the other

when you knew in two weeks you were going to announce broadband and the stock price would pop 25 percent.

Mr. Glisan was unequivocal. What he said was missing your earnings by a penny a share is one thing. A restatement is another. So there's no way in the world -- it makes no economic sense that Andy Fastow got on the phone and said, "I guarantee we'll buy those barges back. He couldn't say that because it would have resulted in a restatement. It would have made no economic sense.

Similarly, there's no way in the world that anyone from Merrill Lynch would have believed that to be true. That's why Your Honor has heard cross-examination theories saying what the various defendants on the Merrill Lynch side thought this was going to be some best efforts deal.

Well, the economics of this deal, what common sense dictates, is that the only thing Enron was capable of doing was getting out there and using its best efforts. It couldn't buy it back -- it couldn't buy it back and it couldn't guarantee that it was going to find a third-party buyer.

It makes no economic sense, and I submit that, under Rule 29 and under our motion, the Court -- the power of the economics of that argument outweigh fifth-hand hearsay of what people said that was my understanding,

them to those words and let Mr. Ten Eyck testify.

THE COURT: Mr. Friedrich?

MR. FRIEDRICH: Thank you, Your Honor.

We have always said that the key question is one of accounting, not law. The issue is the accounting issues that are relevant are not disputed. If it's just best efforts, then it would have been okay. They are already free to argue that through the testimony of Cathy Zrike. They can get up there and say: Had it been best efforts, you heard Cathy Zrike, that wouldn't have been a problem. You're free to make that argument.

The Court heard testimony from six different witnesses that said, if there's a guarantee, then there can't be a true sell. And it wasn't -- you know, some of the witnesses said that on their own and other instances they were quoting the defendants or in the case of Cathy Zrike quoting conversations at which the defendants were present.

That's why that testimony was relevant. It should tell the Court something that in all the enormous resources that the Merrill Lynch defendants have, they can't find an accounting expert that will come to Court and say a guarantee would have been okay, a guarantee would have been consistent with sale treatment.

That testimony -- that accounting

Ladies and gentlemen, when is the last time that you made an investment, whatever it might be, and you knew when you made it exactly what you were going to make six months later? It doesn't happen. You don't know what you're going to make. That's the very nature of an investment. It goes up. It goes down. You might lose your 7 million. You might make more than 7.525. This deal, ladies and gentlemen, was not an equity investment.

Finally, the written agreement between Enron and Merrill Lynch had no re-marketing or best-efforts provision. You heard testimony, ladies and gentlemen, that there was some suggestion made primarily through Ms. Zrike, who testified on behalf of Mr. Bayly, that the Merrill Lynch defendants believed that all that Enron had committed to do was to re-market Enron -- excuse me -- Merrill Lynch's interest in the barges; in other words, to say "Hey, look, you bought these barges, but we're the ones with no power. So we'll continue to go out there, and we'll try to sell it for you and try to make a good profit for you."

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.

Ladies and gentlemen, these basic undisputed facts alone prove that this was not a true sale. It was merely a loan that was disguised as a sale. It was a relationship loan Merrill Lynch made to Enron, and it was dressed up to look like equity.

And, again, there's nothing complicated about that. Peel back the mask, and what do you have? You have what's reflected on this chart, ladies and gentlemen. Merrill Lynch gave Enron $7 million on December 29th, 1999; and on June 29th of 2000, six months later, Merrill Lynch was repaid its 7-million-dollar investment plus 15 percent. That's a loan.

So that is our starting place with those undisputed facts, but there's so much more evidence that proves that this is a sham sale and that these six defendants knowingly participated in that sham sale.

Let's start in December of '99. And let's start, ladies and gentlemen, with Ms. Tina Trinkle. You all remember Ms. Trinkle, a young woman. She came here from London, left her small children at home, to testify. She was the third witness in the case after Ms. Amanda Colpean and Mr. John Garrett.

And, ladies and gentlemen, she came here to tell you what she knew. And she took you inside of

It was a -- as we've all seen, a 12 1/2-million-dollar deal, but that Enron needed those earnings, needed that $12 1/2 million so badly at the end of December '99, that they were willing to engage in fraud to get them.

And Glisan was concerned that word would get out on the street, Wall Street, that Enron wasn't doing as well as it wanted everyone to believe. So Glisan says that -- "I'm going to go talk to Jeff McMahon," and he told you that's exactly what he did. And he expressed his concern to him.

And during that conversation, Mr. McMahon confirmed to Mr. Glisan that he had, in fact, given an oral guarantee to Merrill Lynch. And essentially what he did is he shrugged off Mr. Glisan's concern and he said, "I don't have a problem with handshake deals."

And you learned from Glisan that a handshake deal is one that has to be verbal or it will blow the accounting treatment. And, again, your own common sense tells you that, because otherwise you just put it in the contract. It's got to be a handshake deal or else the whole purpose for doing the deal is defeated.

So the key, who Tina Trinkle heard Mr. Furst or Mr. Tilney discussing in that call, was Jeff McMahon. You know that because you are putting the evidence together. You are taking what Ms. Trinkle said

and you're putting the together with Mr. Glisan and you know that it was Jeff McMahon.

Now, Ms. Trinkle and Mr. Glisan don't know each other, never spoken to each other, never met each other, wouldn't know each other if they ran into each other in the street. Yet, Ms. Trinkle and Mr. Glisan totally and completely corroborate each other. Trinkle told you that he -- someone at Enron -- gave Merrill Lynch its word that Merrill Lynch would not own the barges on June 30th. And Glisan told you that Jeff McMahon confirmed to him that he gave that exact guarantee.

And, ladies and gentlemen, there's even more than that, because the very next day, after the phone call that Tina Trinkle told you about, Mr. Furst sends an e-mail to Mr. Boyle.

Can we have Government's 1050, please.

And what does Mr. Furst say to Mr. Boyle? "Thanks for the info. I will say that we have represented to senior management that Enron is viewing our role as an interim bridge to permanent equity, that Merrill Lynch will not own these securities at June 30th. A strong statement from Andy stating that our representation is correct is all we need."

Now, let's look at that e-mail a little bit -- a little bit more closely. "I," Rob Furst, "will

You've heard all the evidence, ladies and gentlemen. That's uncontroverted. If they needed to close it by year-end, why not just wait, wait till March, wait till April, keep trying to sell it, keep working on the negotiations with CDC? There's one reason only to get the deal done by the end of the year. That's so Enron could book those earnings at the end of the year. Every single one of these defendants knew that.

What else do you know about that call, that call at 8:30 in the morning? Well, you know something pretty important. Kathy Zrike, Mr. Bayly's lawyer, the lawyer at investment banking, she was cut out of that call. She didn't know anything about that call, wasn't asked to be on it. She also testified -- and remember, ladies and gentlemen, Ms. Zrike -- she was called by Mr. Bayly. She was one of Mr. Bayly's witnesses.

And what she told you is that, before December 22nd, she had had a conversation with Mr. Furst and that Mr. Furst had actually described the deal at some point during their conversation as a relationship loan that looks like equity. And then Ms. Zrike said, "Well, you can't do that. You can't have a relationship loan that looks like equity. It's either equity or it's not."

And Mr. Furst realized at that point that she was not going to go along with the story. She wasn't

repeatedly told you how this was just a small deal.

Why is he getting involved in this deal? Is it just to make sure that, as Mr. Boyle claims, who was in the call, that Enron would stick through the project because Merrill Lynch wanted to make sure that, you know, Enron was going to keep working on these barges? Of course not. The reason why they got on the call is so that Mr. Bayly could be assured that Enron was going to stick by the promise that it made.

And we see that after Mr. Furst e-mails Mr. Boyle -- can we have -- Government's 503 I think is also in your books, ladies and gentlemen -- Mr. Boyle sends an e-mail to Mr. McMahon. Now, ladies and gentlemen, you can tell from this e-mail, it is clear when he dates it, that Mr. McMahon and Mr. Boyle are talking about this deal.

Remember what Mr. Boyle said to you. "Well, I didn't really know what Mr. McMahon was doing. You know Mr. McMahon, might have been having these conversations behind my back." This document shows, ladies and gentlemen, that they're clearly plugged into what each other are doing. And that makes perfect sense. They are working together. Mr. Boyle is the guy who is on the ground, who is getting the deal done, and he's talking to Mr. McMahon.

If this is the first conversation they'd

ever had, do you think the e-mail would look like this? Of course not. This e-mail implies knowledge that both of them have. And then let's look at the attendees.

Mr. Bayly, Ms. Zrike -- well, you know, guess what? She was cut out of that call, as you later learned. She was upset. She was annoyed that she wasn't put on the call. Why do you think she wasn't on the call? Because they were doing what she told them you couldn't do.

Enron attendees, Mr. Fastow, Mr. McMahon, Mr. Boyle and Mr. Boots -- I mean, Ms. Boots. I'm sorry. Okay.

Then the next morning -- we're going to see the e-mail that we saw earlier. This is the e-mail -- I'm sorry. This is Government's 1050. This is also in evidence as Government's 506, ladies and gentlemen, and that's because there was an issue with respect to the time change, that I'm going to explain in a second.

This is the e-mail that Mr. Furst sends at the end of the day -- or the first thing in the morning on the 23rd, again saying that he had represented to senior management, Mr. Bayly, that Merrill Lynch will not own this security on June 30th, 2000, and that all they need is a strong statement, a ratification from Mr. Fastow. Remember again what Mr. Glisan told you, that Andy was the one -- Andy Fastow was the one who ratified the comments that had

already been made by Mr. McMahon. This document, again, totally corroborates the testimony that you heard in the case.

Now, what did Mr. -- what did Mr. Boyle say about this e-mail? The only thing that he could say, ladies and gentlemen, is something that is just not credible on its face. And what he said is, "I didn't see this e-mail before I got on the call."

Now, why is it that you think that he's saying that? The reason that he's saying that is because he wants to be able to deny that what was said on the call was that Enron was promising to take Merrill Lynch out on June 30th because he was, in fact, on the call. And remember what he told you about the call. Again, just that, you know, Merrill Lynch was wanting these generalized assurances that Enron would stick with the project.

That just defies common sense. The head of investment banking does not get on the phone with the CFO of one of the biggest companies in the country to have that kind of a call over a 7-million-dollar deal. It just doesn't happen.

So you have to -- and, again, the other thing is, ladies and gentlemen, remember -- and we'll get to this -- but remember the e-mails that Mr. Boyle sends in the spring. All of the e-mails that you've seen time and

was going on at the time.

The next is Government's 507, and that is an e-mail from -- Mr. Spears is correct -- from Mr. Wilson and Mr. Boyle, but it's cc'd to Mr. Fuhs. And just read through that, ladies and gentlemen. Note the following things. The engagement letter is addressed to Mr. McMahon, again, consistent with the evidence that Mr. McMahon is the person who makes the original guarantee. The engagement letter comes after the call between Mr. Fastow and Mr. Bayly.

And Mr. Fuhs says -- who we know has already had a conversation with Mr. Brown where they've discussed aiding and abetting Enron income manipulation -- 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.

Again -- and keep in mind the engagement letter. And when we were talking about putting the pieces of evidence together, the engagement letter -- and the language in there is totally consistent with the APR cover page that was saved on Mr. Bayly's computer. So now not only do we have to believe that somehow it magically got saved on his computer, but you also have to believe that he doesn't see the engagement letter which has the exact same

now." They're admitting that.

But the Merrill defendants are still denying that. They're still hanging on to the mask, and they're still saying there's nothing wrong with this deal, nothing wrong with it all, even after one of the Enron folks took the stand and admitted, "Yes, this was a parking deal." He's just disputing what he knew and when he knew it.

So let's deal with the Merrill defendants first and then come back to the Enron folks.

The Merrill defendants take the uniform approach, a fairly uniform approach, that all that was going on was just it was a re-marketing agreement. That's all it was. There's no buyback. It's just a marketing agreement.

But ask yourselves this simple question: If it's a re-marketing agreement, if that's all it is, why was it not put in writing?

Kathy Zrike, all the witnesses who testified, tell you there's nothing wrong with re-marketing. There's nothing wrong with that. They could have gotten a sale and a gain treatment on this. If it was re-marketing 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 that the Merrill lawyers spoke to you for almost four hours, no one even addressed that question once. They don't have an explanation. If there's no agreement -- if there's no buyout agreement, how does that happen? How does it happen? How does it happen that there's this sale in December, and then in June, to the month, to the day, and to the penny, they get bought out. They get their 7 million back, they're paid the $250,000 fee, and they get exactly -- exactly -- the 15 percent return on that very day.

How can that be? How can it be that there's no due diligence done whatsoever, not one time or two times, but three times -- during the initial purchase from Enron to Merrill, during the next purchase from Merrill to LJM, and even the purchase after that -- there's no due diligence done? There's no negotiations over price whatsoever between Enron and Merrill and between Merrill and LJM.

And that's one of those things like the instructions tell you: Use your common sense. What does it tell you that no one is negotiating over price? When you sell your house, when you sell your car, you try to get the highest price you can. When you're buying, you try to pay the lowest price that you can. You don't need any expert to tell you that. That's just what life's about.

are on trial in this case. It's not a trial about other people. It's a trial about them.

Finally, what you've seen from some of the defendants is, when they don't have a defense, what they start to do is, they start to criticize the Government. And there's an old saying that, you know, as a defense lawyer, if you have the facts, you argue the facts. If you have the law, you argue the law. And if you have neither, then you just blame the Government for everything; then you just blast the FBI; then you just blast prosecutors.

We're confident that you can judge those arguments. We're confident that you will scrutinize the way that we've acted in this case, just as you'll scrutinize the way the defense acted in this case, and you'll be fair in what you do.

Let me move, then, to some of the specific arguments of the defense. And I want to make one point before we start, just in terms of this idea of the deal documents that are exchanged back and forth.

There is a suggestion in some of the testimony is that what's going on is sort of a good-faith exchange between two parties as they try to negotiate different legal documents that sort of come back and forth, and sometimes language comes in, sometimes 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 documents -- you know, put language into documents as some sort of good-faith negotiating process. They know that they are taking the language out because, if it remains in, it will blow the accounting for the deal. That's why the language isn't added.

That's the only reason why the language isn't added. It's not a question of somebody can't get something through negotiations, so it's not a part of the deal. You know from the evidence that it was a part of the deal. It just wasn't something that was written down.

Let me move to some of Mr. Bayly's arguments and get one of these charts. This is a piece of Mr. Bayly's testimony that I just sort of want to isolate. This is the beginning talking about this case.

He's asked, before the Senate Permanent Subcommittee, at the top left: "Would you agree that it would have been better to have a guarantee?

"ANSWER: Well, you know, if you're trying to, I suppose, deal with any financial transaction, you have less risk with a guarantee.

"QUESTION: Well, why wouldn't you have at least asked for one with Enron, even though they may have rejected it?

was saying it: "Do you remember what was being said?

"Yes. After Schuyler Tilney and Bob Furst, after they said that, if the third-party buyer wasn't found, that Enron Corporation -- if a third party wasn't found within six months, Enron would just take us out of the investment themselves, Kevin Cox or Dan Bayly asked if that representation, if we can get a written guarantee to support that representation being made by Enron.

"QUESTION: Was the answer given?"

And then there are there are objections.

"ANSWER: No. They said they can't do that because, otherwise, they won't get the right accounting treatment."

Dan Bayly, and everyone else on that call, knows from that moment forward that's exactly why this can't be memorialized. They know from that point forward. It's not like from that point forward that no deal happened. The deal went through, just as she described it on the call. All of those understandings remained in place. It's not like there was some subsequent negotiation to that, where somebody said, "We can't do this." It all of this went forward. All of those understandings in that call continued forward, right up until the takeout in June. That's what the evidence showed you.

Dan Bayly had a profound incentive to lie when he testified before the Permanent Subcommittee. Tina Trinkle had no motive, we submit, to lie when she appeared before you, and we think that you're going to conclude that it was Mr. Bayly who lied. It was between the two of them, and we think you're going to conclude why he lied.

Let's move to the so-called "advice of counsel" defense and Kathy Zrike. Kathy Zrike was called as a defense witness. Kathy Zrike was a completely devastating witness for the defense. Completely devastating to what they said in their opening statements, completely devastating to the claims that they still make to this day.

And if you want one of the defining moments in this trial, it was when Kathy Zrike was on the stand, and she was asked on cross-examination about sort of the character questions that she had been asked by Mr. Schaeffer on direct. And she talked to you about how bothered she was as she compared some of the things that she knew at the time to what she had learned subsequently, and she was about to break up into tears because she was so hurt and so bothered by the difference between what she was told at the time by the bankers and what she learned now.

This was a case, not about reliance on counsel; this was a case about defiance of counsel.

that company had gotten in trouble for parking transactions before. That's why they had the year-end policy. That's why this was on the radar screen of people like Ms. Zrike, very much in the forefront, not a mystery in terms of what a parking transaction could mean and how you protect against it. Read that policy. Read that policy when you go back to the jury room.

There were some questions about -- and I also wanted to say this: That distinction between, does she know it's a buyback? Does she know it's a re-marketing agreement? it's something that Mr. Schaeffer never touched, never touched, when he talked to you.

Mr. Schaeffer said that nothing was hidden from Kathy Zrike, and that's just not true. Things were hidden from her time and time again. The nature of the deal, like we just talked about; her being excluded from phone call with Mr. Fastow. You remember when Mr. Schaeffer talked he said, "Well, she could have called in. There's nothing to be inferred from that."

The onus wasn't on her to call in. She left her phone number, her home and her cell, with Mark McAndrews, who is Dan Bayly's right-hand man. And she's never called.

She tells him, "I'll be at home. Call me." She's never called. She was not included on this call.

She was cut out.

That wasn't the only time that she's cut out. She's also cut out in the June time frame. She's also cut out in June when the sale from Merrill to LJM takes place. And, again, that sale, no negotiation over price, nothing. From the Merrill defendants, no one steps up among the lawyers to say, "This is who made that decision. This is who made the decision to sell it with no negotiation over price. This is the person who, you know, from -- who is responsible for that part of the transaction." That just sort of happened all by itself.

Kathy Zrike is never brought in the loop about that before it happens. She's never told there's no due diligence. She's never told there's no negotiation over price. You can't -- just because a lawyer is around the transaction, lawyers are around transactions as a part of modern business life. But the key thing, the key thing, in a reliance defense is they have to be in the loop. They have to know what's going on. You have to disclose all the material information to them. You can't just come to court and say, "There was a lawyer in the room; and, therefore, I'm not responsible for what happens."

The lawyer has to know. They have to make a judgment. They have to render advice. That didn't happen here. That didn't happen. The opposite thing happened.

They were told you couldn't do it and they did it anyway. And, from that, you can infer bad intent on all their parts.

Mr. Schaeffer also said at one point that people in business live up to commitments that they make, even if they're not legally enforceable.

What Kathy Zrike says is, "You can't make the commitment, period. You can't make the commitment, period, because that's what blows the accounting." And that's what witness after witness after witness after witness in this case have told you.

Mr. Bayly gets into an argument about something called the Parol Evidence Rule, and that sort of enforceability language in the contracts that he talks about. And that came up a couple different times, through different witnesses.

There are a lot of reasons why that argument shouldn't hold any water for you. Number one, you know, this is a case about fraud that occurred aside from the written contract.

And when they wave the written contract before you and say, "There can't be any verbal agreements aside from the contract," it's not like you can go, "Well, that's a relief. That must mean there was no verbal agreement."

no matter what."

When he's in the grand jury, "Promise? What promise? No promise that I know about."

E-mail: "Promise to pay us back, no matter what." Black and white. That's not accidental. That's not inadvertent, and here's why: Jim Brown tells you -- and you can look at that portion -- I believe it's in the bankruptcy testimony -- when he's asked about what he means when he writes those aiding and abetting notes.

What he says was, "I wrote that specifically because I had accounting concerns." And he lists them. There's three. And the last one of them is, "Because if Enron even thought that they had promised to get us out of this or guaranteed to get us out of this" -- you can find the exact language -- "that that would make it not a sale."

So he knows -- again, he's a structured finance guy. This is what he does for a living. He knows that, if he use the word "promise" or "agreement" in the grand jury, that means it puts him in the soup. He knows exactly what the bottom line is. He knows exactly what the line is, which is exactly how he knows exactly how to tell his clients, by putting himself on the right side of the line and not on the wrong side of the line. That's why he says he's not aware of a promise.

But you know from the e-mail, you know from

the Tina Trinkle conversation, you know from the fact the deal gets done just like the way the Government says it was planned all along, that there was an agreement, that there was a promise, and that Mr. Brown lied when he went into the grand jury.

Mr. Zweifach also talked about sort of the idea, as many of the defendants, "Gee, Enron was this snake pit, and we only now are figuring that out," that type of thing.

Jim Brown tells you in the testimony that was admitted that he didn't like Enron, he didn't trust Enron, he thought that they were aggressive in terms of their accounting.

He didn't -- he says he didn't trust them. These aren't folks that had no idea what Enron was back at the time. They knew exactly what Enron was. The public doesn't know. You may not have known what Enron was all about, but the defendants in this case did. They knew exactly what they were all about.

And for the Merrill defendants to come in and suggest that, you know, they had no idea what was going on, "Gee, the Enron mess is terrible," but they had nothing to do with it, is absurd. They are the ones that were helping Enron cook their books on a small deal. They knew exactly how desperate Enron was.

Mr. Spears also raised questions about, you know, if it's -- if there's a guarantee in place, then why is Mr. Brown keeping it on his books? Why is that -- you know, why is he -- why did he want to send it off of his books and back to the equity guys. You know, why wouldn't he just keep it if there's some guaranteed return?

Well, again, this is an investment bank deal to begin with. It belongs with the investment bank folks. What is notable is not the fact that it gets sent over there. What's notable is the fact that Mr. Brown took $250,000 out of it and manipulated, with Mr. Fuhs, when that money was paid to them and made it paid in January to help their bonus pool, and not in December.

Mr. Spears argued that Mr. Fuhs was simply a pipeline to the lawyers; that he's performing a routine role in getting the barge deal executed. Again, this is someone who is vice-president at Merrill Lynch. This is someone who is highly salaried. This is not like the copy kid. He's not just there, like, to fax things back and forth. He's there to supervise the process and make sure the deal gets done, which is exactly what he does.

The fact that he's sending lawyers documents with the bad language deleted out of the engagement letter doesn't prove anything about his intent.

When a lawyer gets that -- again, the Judge

has told you what "reliance on advice of counsel" means. It doesn't mean just some random attorney someplace getting a document that has strike-out language. If you're going to claim advice of counsel, the lawyer has to know what's going on. They have to know all the facts.

Mr. Fuhs -- 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. He 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.

Mr. Fuhs repeated over and over again there's just no evidence that he knew -- Mr. Spears says there's no evidence that Mr. Fuhs knew what was going on, no evidence, no evidence, no evidence. He probably said that 15 times. Are you joking?

He writes, in his own hand, "Aid Enron income statement manipulation." That's all the evidence that you need. That's from his own handwriting that he knows what's going on.

Which do you think is more likely that Mr. Brown said? What's on the left side of that chart, that there's some general Nigeria risk? Or what's on the right side of this chart, and that's that, if there's a guarantee, it's going to blow the accounting.

EXHIBIT F

NO. 05-20319

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE

V.

JAMES A. BROWN, DANIEL BAYLY, ROBERT S. FURST, WILLIAM R. FUHS,
APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

SEAN BERKOWITZ
Assistant United States Attorney
Director, Enron Task Force

ALICE S. FISHER
Assistant Attorney General
Criminal Division

KATHRYN H. RUEMMLER
Assistant United States Attorney
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Enron Task Force

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confusing because it includes vague phrases like "do[ ] it's [sic] best," "for which he is legally responsible," "extent and nature of any assurances," and, indeed, "third party." Furst RE6. If the district court had included the instruction in its charge, the jury could only wonder what these phrases meant in the specific factual context of this case.

Just as significantly, this Court has repeatedly and recently held that "[t]he district court abuses its discretion by refusing to include a requested instruction only if * * * the failure to give it seriously impairs the defendant's ability to present effectively a particular defense." *United States* v. *Simkanin*, 420 F.3d 397, 410 (5th Cir. 2005); *see id*. at 411 (affirming, on this basis, the district court's refusal of a good-faith instruction); *St. Gelais*, 952 F.2d at 94 (same); *Hunt*, 794 F.2d at 1098 (same). The omission of Furst's proposed instruction did not "seriously impair[ ]" the defendants' ability to argue their theory to the jury, because the prosecution never contended that a re-marketing agreement, standing alone, would have been illegal.[90]

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[90] Indeed, as Furst himself emphasizes (Furst Br. 37), the prosecution repeatedly stated that "[i]f it was [a] re-marketing agreement, there wouldn't have been a problem with that." *E.g.*, Tr. 6485; *see also supra* note 87. Though Furst says that the prosecution contradicted itself in its opening statement by asserting that a re-marketing agreement standing alone "would be illegal," Furst Br. 36, the government did not and has never claimed any such thing. The cited page of the transcript reflects the prosecution's statement that "Enron confirm[ed] this commitment to *guarantee* the Merrill Lynch *takeout* within six months," Tr. 404 (quoting the APR cover page) (emphases added), and that "*this* guarantee would blow the accounting on the deal"

EXHIBIT G
APPLICABLE PROVISIONS OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Rule 3.04 Fairness in Adjudicatory Proceedings

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for his loss of time in attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(c) except as stated in paragraph (d), in representing a client before a tribunal:

(1) habitually violate an established rule of procedure or of evidence;

(2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, except that a lawyer may argue on his analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters stated herein;

(4) ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or

(5) engage in conduct intended to disrupt the proceedings.

(d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.

(e) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.09 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;

(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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

Rule 8.04 Misconduct

(a) A lawyer shall not:

(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;

(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(4) engage in conduct constituting obstruction of justice;

(5) state or imply an ability to influence improperly a government agency or official;

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(7) violate any disciplinary or disability order or judgment;

(8) fail to timely furnish to the Chief Disciplinary Counsels office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so;

(9) engage in conduct that constitutes barratry as defined by the law of this state;

(10) fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorneys cessation of practice;

(11) engage in the practice of law when the lawyer is on inactive status or when the lawyers right to practice has been suspended or terminated, including but not limited to situations where a lawyers right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to Mandatory Continuing Legal Education; or

(12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.

(b) As used in subsection (a)(2) of this Rule, serious crime means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

EXHIBIT H

U.S. Department of Justice

Enron Task Force

Washington, D.C. 20530

September 17, 2003

Robert S. Morvillo, Esq.
Morvillo, Abramowitz, Grand, Iason & Silberberg
565 Fifth Avenue
New York, NY 10022

Charles Stillman, Esq.
Stillman & Friedman
425 Park Avenue
New York, NY 10022

Re: Merrill Lynch & Co., Inc.

Dear Messrs. Stillman and Morvillo:

This letter sets forth the agreement between the Department of Justice, by the Enron Task Force (the "Department") and Merrill Lynch & Co., Inc. ("Merrill Lynch").

Introduction

1. The Department is conducting a criminal investigation into matters relating to the collapse of the Enron Corp. ("Enron"). During the course of the investigation, the Department notified Merrill Lynch that, in the Department's view, Merrill Lynch personnel have violated federal criminal law. In particular, the Department notified Merrill Lynch that certain Merrill Lynch employees: a) violated federal criminal law in connection with certain transactions initiated at year-end 1999 (the "Year-End 1999 Transactions");[1] b) aided and abetted Enron's violation of federal criminal law in connection with the same transactions; and c) knowingly made, and caused others to make, false statements before various tribunals, including a federal grand jury, the United States Congress, the United States Securities and Exchange Commission ("SEC") and a court-appointed bankruptcy examiner.

[1] These transactions relate to: a) Merrill's temporary "purchase" from Enron of Nigerian power barges (Enron Nigeria Barge Ltd.) and subsequent sale of the barges; and b) offsetting energy trades involving back-to-back options (the Enron Power Marketing, Inc. energy transactions).

2. Merrill Lynch acknowledges that the Department has developed evidence during its investigation that one or more Merrill Lynch employees may have violated federal criminal law. Merrill Lynch accepts responsibility for the conduct of its employees giving rise to any violation in connection with the Year-End 1999 Transactions. Merrill Lynch does not endorse, ratify or condone criminal conduct and, as set forth below, has taken steps to prevent such conduct from occurring in the future.

Agreement

3. Based upon Merrill Lynch's acceptance of responsibility in the preceding paragraph, its adoption of the measures set forth herein, its commitment to implement and audit such measures and its willingness to continue to cooperate with the Department in its investigation of matters relating to Enron, the Department, on the understandings specified below, agrees that the Department will not prosecute Merrill Lynch for any crimes committed by its employees relating to the Year-End 1999 Transactions. Merrill Lynch understands and agrees that if it violates this Agreement, the Department can prosecute Merrill Lynch for any crimes committed by its employees relating to the Year-End 1999 Transactions. This Agreement does not provide any protection to any individual or any entity other than as set forth above.

The understandings on which this Agreement is premised are:

4. Merrill Lynch shall truthfully disclose all information with respect to the activities of Merrill Lynch, its officers and employees concerning all matters relating to the Year-End 1999 Transactions about which the Department shall inquire, and shall continue to fully cooperate with the Department. This obligation of truthful disclosure includes an obligation upon Merrill Lynch to provide to the Department, on request, any document, record or other tangible evidence relating to the Year-End 1999 Transactions about which the Department shall inquire of Merrill Lynch. This obligation of truthful disclosure includes an obligation to provide to the Department access to Merrill Lynch's facilities, documents and employees. This paragraph does not apply to any information provided to counsel after July 31, 2000 in connection with the provision of legal advice and the legal advice itself.

5. Upon request of the Department, with respect to any issue relevant to its investigation of Enron, Merrill Lynch shall designate knowledgeable employees, agents or attorneys to provide non-privileged information and/or materials on Merrill Lynch's behalf to the Department. It is further understood that Merrill Lynch must at all times give complete, truthful and accurate information.

6. With respect to any information, testimony, document, record or other tangible evidence relating to Enron provided to the Department or a grand jury, Merrill Lynch consents to any and all disclosures to Governmental entities of such materials as the Department, in

its sole discretion, deems appropriate. With respect to any such materials that constitute "matters occurring before the grand jury" within the meaning of Rule 6(e) of the Federal Rules of Criminal Procedure, Merrill Lynch further consents to a) any order sought by the Department permitting such disclosure and b) the Department's ex parte or in camera application for such orders. To the extent that the Department provides material pursuant to this paragraph to non-governmental parties, the Department will provide Merrill Lynch with 10 days advance notice, to the extent practicable, of what materials are to be provided and to whom.

7. Merrill Lynch further agrees that it will not, through its attorneys, board of directors, agents, officers or employees make any public statement, in litigation or otherwise, contradicting Merrill Lynch's acceptance of responsibility set forth above. Any such contradictory statement by Merrill Lynch, its attorneys, board of directors, agents, officers or employees shall constitute a breach of this Agreement, and Merrill Lynch thereafter would be subject to prosecution as set forth in paragraph 3 of this Agreement. Upon the Department's notifying Merrill Lynch of such a contradictory statement, Merrill Lynch may avoid a breach of this Agreement by publicly repudiating such statement within 48 hours after notification by the Department. This paragraph is not intended to apply to any statement made by any Merrill Lynch employee who has been charged with a crime.

8. Merrill Lynch agrees to adopt and implement by December 1, 2003, specific new policies and procedures relating to the integrity of client and counterparty financial statements and year-end transactions (the "Policies and Procedures"). The Policies and Procedures to which Merrill Lynch agrees are described in Exhibit A to this Agreement. Nothing in this Agreement precludes Merrill Lynch from amending or changing its Policies and Procedures in the future so long as said amendments or changes do not diminish the policies and procedures as set forth in Exhibit A. During the 18 month period set forth in paragraph 9 below, no amendments or changes will be made to the Policies and Procedures without the approval of the auditing firm and the individual attorney referred to in paragraph 9 below.

9. Merrill Lynch also agrees that for a period of 18 months, it will retain an independent auditing firm to undertake a special review of the Policies and Procedures set forth in Exhibit A. Merrill Lynch also will retain an individual attorney selected by the Department, who shall be acceptable to Merrill Lynch, to review the work of the auditing firm. The auditing firm and the attorney shall:

    a) ensure that the Policies and Procedures are appropriately designed to accomplish their goals;
    b) monitor Merrill Lynch's implementation of and compliance with the Policies and Procedures; and
    c) report on at least a semi-annual basis to the General Counsel of Merrill Lynch and the Head of Corporate Audit as to the effectiveness of the

Policies and Procedures. The General Counsel shall then present a summary of this report to the Audit Committee of the Board of Directors for its review. Copies of these reports shall be submitted to the Department during this 18 month period.

10. It is further understood that should the Department, in its sole discretion, determine that Merrill Lynch has given deliberately false, incomplete, or misleading information under this Agreement, or has committed any crimes, or that Merrill Lynch otherwise violated any provision of this Agreement, Merrill Lynch shall, in the Department's sole discretion, thereafter be subject to prosecution for any federal criminal violation of which the Department has knowledge. Any such prosecutions may be premised on information provided by Merrill Lynch. Moreover, Merrill Lynch agrees that any prosecutions relating to Enron that are not time-barred by the applicable statue of limitations on the date of this Agreement may be commenced against Merrill Lynch in accordance with this Agreement, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and June 30, 2005. By this Agreement Merrill Lynch expressly intends to and does waive any rights in this respect.

11. It is further agreed that in the event that the Department, in its sole discretion, determines that Merrill Lynch has violated any provision of this Agreement; a) all statements made by or on behalf of Merrill Lynch to the Department, or any testimony given by Merrill Lynch before a grand jury, the United States Congress, the SEC, or elsewhere, whether prior or subsequent to this Agreement, or any leads derived from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings brought by the Department against Merrill Lynch and b) Merrill Lynch shall not assert any claim under the United States Constitution, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements made by or on behalf of Merrill Lynch prior to or subsequent to this Agreement, or any leads therefrom, should be suppressed.

12. The decision whether conduct and/or statements of any individual will be imputed to Merrill Lynch for the purpose of determining whether Merrill Lynch has violated any provision of this Agreement shall be in the sole discretion of the Department.

13. This Agreement expires on June 30, 2005. It is further understood that this Agreement is binding only on the Department and Merrill Lynch.

14. This Agreement may not be modified except in writing signed by all the parties.

Very truly yours,

LESLIE R. CALDWELL
Director, Enron Task Force

Andrew Weissmann
Deputy Director

MERRILL, LYNCH & CO., INC.

_____

_____
Robert Morvillo, Esq.
Counsel to Merrill, Lynch & Co.

_____
Charles Stillman, Esq.
Counsel to Merrill, Lynch & Co.

14. This Agreement may not be modified except in writing signed by all the parties.

Very truly yours,

LESLIE R. CALDWELL
Director, Enron Task Force

Andrew Weissmann
Deputy Director

MERRILL, LYNCH & CO., INC.

by Barry J. Mandel
Barry J. Mandel
SVP and General Counsel, Global Litigation and Employment

Robert Morvillo, Esq.
Counsel to Merrill, Lynch & Co.

Charles Stillman, Esq.
Counsel to Merrill, Lynch & Co.

EXHIBIT A

MERRILL LYNCH POLICIES AND PROCEDURES ON THE INTEGRITY OF CLIENT AND COUNTER-PARTY FINANCIAL STATEMENTS AND YEAR-END TRANSACTIONS

The following sets forth Merrill Lynch & Co. Inc.'s plan for addressing the integrity of client and counterparty ("Third Party") transactions and year-end transactions. All employees must comply with the policies and procedures and violation of these policies and procedures may lead to disciplinary action, including termination.

General Prohibitions and Rules

Misleading Third Party Activities. Merrill Lynch may not engage in any transaction where Merrill Lynch knows or believes that an objective of the Third Party is to achieve a misleading earnings, revenue or balance sheet effect.

- Undocumented Agreements. Merrill Lynch will not engage in any transaction in which any term of the transaction related to risk transfer (whether or not legally enforceable) is not reflected in the written contractual documentation for the transaction.

- Transactions With Agreed-Upon Early Terminations. Merrill Lynch will not engage in any transaction in which there is an agreement between the parties (whether or not legally enforceable) to unwind such transaction prior to its stated maturity at an agreed-upon price unless Merrill Lynch accurately reflects the agreed-upon unwind on its books and records and provides a written summary of such transaction and unwind to the independent auditor of the Third Party.

- Offsetting Transactions. Merrill Lynch will not engage in any transaction having a substantially contemporaneous off-setting "leg" which offsets, in whole or substantially all of, the economics of the other leg of the transaction and is transacted with the same Third Party (or affiliate, related party or special purpose entity of the Third Party), unless such transaction is specifically approved by the Special Structured Products Committee ("SSPC").

Individual Accountability. Each employee responsible for proposing that Merrill Lynch enter into any transaction covered by these policies shall satisfy himself/herself that he/she is fully knowledgeable about all terms and agreements related to such transactions and that all applicable provisions of these policies and procedures and other Merrill Lynch policies and procedures have been fulfilled prior to execution.

Special Restrictions Applicable to Year-End Transactions

In light of the heightened danger of abuse in connection with "Year-End Transactions," the following policies and procedures apply specifically to such transactions:

- Transactions Motivated by Accounting and Balance Sheet Considerations. Merrill Lynch will not engage in any Year-End Transaction where Merrill Lynch knows or believes that the Third Party's primary motivation is to achieve accounting (including off-balance sheet treatment) objectives, unless such transaction is specifically approved by the SSPC.

New Committee and New Committee Approval Process

- Merrill Lynch will create a new committee and new approval process by creating the SSPC.

- The SSPC will review the Year-End Transactions and Offsetting Transactions referred to above.

- The SSPC also will review all complex structured finance transactions effected by a Third Party with Merrill Lynch. A "Complex Structured Finance Transaction" means any structured transaction where:

  (i) a known or believed material objective of such transaction is to achieve a particular accounting or tax treatment, including the objective of transferring assets off-balance sheet ;
  (ii) there is material uncertainty with regard to the legal or regulatory treatment of such transaction; or
  (iii) the transaction provides the Third Party with the economic equivalent of a financing which, if characterized as a financing, would require relevant commitment committee approval.

- The SSPC will also review all early unwinds of any Complex Structured Finance Transaction and any Year End Transaction and any termination of such transaction prior to its originally contemplated maturity.

- The SSPC also will review any transaction, which any member of the SSPC determines is appropriate for SSPC review.

- Merrill Lynch will not engage in any transaction within the purview of the SSPC without the transaction receiving the approval of the SSPC.

- The SSPC will be composed of senior representatives (Head of group or experienced designee) of the various disciplines of the firm including Market Risk, Law and Compliance, Accounting, Finance, Tax and Credit. No transaction will be

deemed approved by the SSPC without the approval of all of the Heads of group (or experienced designee). The Committee will record each decision made in connection with any transaction and keep a record of the participants in any such meetings.

- The SSPC will be responsible for the effective management of all risks associated with transactions within its purview. As a result, the committee will ensure that an assessment of legal and reputational risk is undertaken with respect to each transaction. In this regard, the committee will review a variety of factors, including, without limitation, an assessment of whether financial, accounting, rating agency disclosure or other issues associated with a transaction are likely to create legal or reputational risks.

- To the extent the SSPC determines that any legal or reputational concern is present, it will review the overall customer relationship with the Third Party and shall obtain as a condition precedent to further review and approval, complete and accurate information about the Third Party's proposed accounting treatment of the contemplated transaction and the effect of the transaction on the Third Party's financial disclosure. To the extent the information provided is insufficient or unsatisfactory, the transaction will not be approved by the SSPC or executed by Merrill Lynch. If the SSPC determines that the proposed transaction is suspicious, it will refer the matter to Merrill Lynch's Global Money Laundering Reporting Officer.

- For each transaction considered, the SSPC will require the transaction sponsor to represent that such person is providing complete and accurate information regarding the transaction and the Third Party's purpose(s) for such transaction.

- In addition, a full description of each transaction approved by the SSPC will be communicated in writing to the independent auditor of the applicable Third Party.

Referrals to the SSPC

Merrill Lynch shall communicate to its GMI employees the substance of the following:

To ensure that all transactions that require approval of the SSPC are referred to that committee, these policies and procedures call for a broad category of transactions to be referred to the SSPC so that the SSPC can make the determination whether the transactions need the committee's approval. Accordingly, Merrill Lynch employees shall refer to the SSPC all transactions that

- An employee knows or believes may be motivated in whole or in part by the Third Party's desire to achieve a misleading earnings, revenue or balance sheet effect. Such referrals may be made anonymously, using the Merrill Lynch hotline (discussed below), or by other means.

- An employee knows or believes involve a contemplated agreement or understanding between the parties (whether or not legally enforceable) to unwind such transactions prior to its stated maturity at an agreed-upon price.

- Are Year-End Transactions as to which an employee knows or believes that the Third Party's primary motivation is to achieve accounting (including off-balance sheet treatment) objectives.

- Are transactions having a substantially contemporaneous off-setting "leg" which offsets, in whole or substantial aspects of, the economics of the other leg of the transaction and is transacted with the same Third Party (or affiliate, related party or special purpose entity of the Third Party).

Employees shall err on the side of referral to the SSPC if they have any question as to whether a transaction falls within the SSPC purview. Failure to refer transactions to the SSPC will be grounds for discipline, including dismissal.

- The formation and mandate of the SSPC, as well as the policies and procedures set forth herein, shall be communicated to all GMI employees and the various Product and Regional Chief Operating Officers shall be responsible for ensuring all applicable transactions are referred to the Committee for review. In this connection, Corporate Audit shall periodically monitor the referral process to ensure that it meets the objectives of the SSPC.

New Training Program

- Merrill Lynch will develop a comprehensive training program (to include computer training and formal training sessions) for all GMI personnel and all personnel supporting GMI (including all applicable Finance, Credit, Market Risk, Tax, Law and Compliance and Operations personnel) that will highlight issues/factors which, if present in a transaction, would warrant additional scrutiny. Among the specific issues to be addressed in the training are the new policies set forth above. Other issues/factors which may warrant additional scrutiny of the transaction and which will be included in the training program include but are not limited to the following;

    - Transactions where there is significant uncertainty with regard to the legal or regulatory treatment of the proposed transaction
    - Transactions with pre-agreed profit/loss sharing or return on equity/return on investment arrangements with the counter-party
    - Transactions known to be effected as a result of or in connection with changes to accounting principles or standards
    - Transactions with back-to-back (circular) cash flows between ML and the Third Party or its special purpose entity

Development of a Website

- Merrill Lynch will develop a GMI Policy and Approval Process Website that will articulate Merrill Lynch's applicable policies and the required approval process for the types of transactions described herein. This website will be available to all employees.

Employee Concerns, Ethics Hotline, Confidential Reporting

- The interactive website referenced above will provide opportunities for employees to communicate with the members of the SSPC concerning any reservations any such employee may have with any GMI transaction or the approval process related thereto.

- Additionally, employees will be encouraged to utilize the firm's Ethics Hotline as a mechanism to report inappropriate behavior and/or any failure to properly abide by these policies. Such reports may be made on a confidential and anonymous basis, and Merrill Lynch will not tolerate retaliation against those reporting any suspected violation in good faith. Those found to have retaliated will be subject to immediate dismissal.

Definitions

- "Year-End Transaction" shall mean any transaction effected within twenty-one (21) days of a Third Party's fiscal year-end period where there are continuing obligations between the parties subsequent to the year end period.

- "Third Party", "client" or "counterparty" shall mean any U.S. corporation that is registered under the Securities Exchange Act of 1934, any domestic or foreign affiliate of such corporation, any entity directly or indirectly controlled by such corporation, and any special purpose entity set up by such corporation.

EXHIBIT I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff,	Case No.: H-03-CRIM-363
vs.	Judge Ewing Werlein, Jr.
DANIEL BAYLY, DANIEL O. BOYLE, JAMES A. BROWN, WILLIAM R. FUHS, ROBERT S. FURST, and SHEILA KAHANEK, Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DANIEL BAYLY'S MOTION TO DISMISS, OR ALTERNATIVELY, FOR AN ORDER REQUIRING THE GOVERNMENT TO WITHDRAW ITS "REQUEST" TO MERRILL LYNCH TO ATTEND INTERVIEWS OF ITS EMPLOYEE WITNESSES CONDUCTED BY DEFENSE COUNSEL

PRELIMINARY STATEMENT

Mr. Bayly has brought the present motion due to the harm that has been caused -- and will continue to be caused -- by the government's improper efforts to insinuate itself into the trial preparation activities of his defense counsel. After the government recently provided the defendants in this action with a list of those persons who may possess exculpatory information, including certain current employees of Merrill Lynch & Co. ("Merrill Lynch"), it has -- by the operation of a "request" to and a cooperation agreement with Merrill Lynch -- pressured Merrill

Lynch to permit government representatives to attend any interviews of its employees conducted by defendants' attorneys. Although the government insists that it merely has "requested" to attend defendants' witness interviews, it pointedly has refused to state that Merrill Lynch will suffer no consequences if it declines the government's request. The government has no good reason for its conduct. The government's conduct, in short, violates Mr. Bayly's rights under the Fifth and Sixth Amendments to the Constitution, and improperly invades the confidential work product of his defense counsel.

FACTUAL BACKGROUND

The present posture of this action highlights the coercive nature of the government's conduct. On September 17, 2003, Merrill Lynch and the government entered into a settlement agreement (the "Settlement Agreement", a copy of which is attached as Exhibit A) pursuant to which the government agreed not to prosecute Merrill Lynch with respect to the Nigerian Barge Transaction and certain other transactions, and Merrill Lynch was obligated to cooperate fully with the government in connection with its investigation of Enron matters. The Settlement Agreement also provides the government with a heavy hammer to wield over Merrill Lynch and its employees. According to the Settlement Agreement, Merrill Lynch remains subject to criminal prosecution should the government determine, in its "sole discretion", that Merrill Lynch has violated any provision of the Settlement Agreement.

By letter to defendants' attorneys, dated April 5, 2004 (Exhibit B), the government identified 20 individuals who "arguably possess exculpatory information" in this action. Declaration of Richard Schaeffer ("Schaeffer Decl."). Among those individuals identified by the government are present employees of Merrill Lynch.

As Mr. Schaeffer describes in his Declaration, following receipt of the government's April 5, 2004 letter, Mr. Schaeffer contacted Merrill Lynch's counsel to request that interviews be arranged with five of those individuals named in the government's letter who are currently employed by Merrill Lynch. In response, Merrill Lynch's counsel stated that the Enron Task Force ("ETF") had requested that an ETF representative be present during any interviews of Merrill Lynch employees conducted by defendants' attorneys. Schaeffer Decl., ¶ 4.

Accordingly, on April 9, 2004, Mr. Schaeffer spoke with Matthew Friedrich of the ETF, who confirmed that the ETF had requested Merrill Lynch to allow for its representatives to be present at any interviews of Merrill Lynch employees conducted by defendants' counsel. Despite Mr. Schaeffer's query, Mr. Friedrich declined to cite any legal authority supporting the propriety of the ETF's "request." Mr. Friedrich, instead, advised Mr. Schaeffer that defendants would have to seek judicial intervention in order to obtain relief from the ETF's conduct. Schaeffer Decl., ¶¶ 5 - 6.

Minutes after this telephone conversation, Mr. Friedrich telephoned Mr. Schaeffer, ostensibly to reiterate the ETF's position that it only had made a "request" of Merrill Lynch. Mr. Schaeffer asked "whether Merrill Lynch was free to ignore the request of the ETF without consequence." In response, Mr. Friedrich stated that it was "just a request" and "I'll leave it at that." Schaeffer Decl., ¶ 7. The substance of these two conversations between Messrs. Schaeffer and Friedrich are set forth in a confirmatory letter from Mr. Schaeffer to Mr. Friedrich, dated April 9, 2004 (Exhibit C). No response to this letter was received from Mr. Friedrich purporting to disagree with, or amend, the substance of Mr. Schaeffer's letter. Schaeffer Decl., ¶ 8.

Following these conversations with the ETF, counsel for Mr. Bayly attempted to contact Merrill Lynch's counsel in order to determine if Merrill Lynch intended to accede to the

government's request and permit a government representative to attend interviews of its employees. To date, we have received no response from counsel for Merrill Lynch. Schaeffer Decl., ¶ 9. The trial of this matter is six weeks away.

ARGUMENT

THE GOVERNMENT'S "REQUEST" TO ATTEND WITNESS INTERVIEWS CONDUCTED BY MR. BAYLY'S COUNSEL IS IMPROPER, VIOLATES MR. BAYLY'S CONSTITUTIONAL RIGHTS, AND IRREPARABLY HARMS HIS ABILITY TO PREPARE A DEFENSE.

Defendant submits that the government's inherently coercive attempt to intrude upon defense counsel's private witness interviews is unlawful, both as a Constitutional matter and by virtue of the work product doctrine.

A. The Government's "Request" Is A Chilling Obligation.

As noted above, the government's "request" must be read and construed in the context of the earlier September 17, 2003 Settlement Agreement between the government and Merrill Lynch. That Agreement effectively makes an obligation of the government's "request", and has a severe chilling effect on the willingness of Merrill Lynch employees to speak with Mr. Bayly's counsel.

The Settlement Agreement (Schaeffer Decl., Exh. A) provides, among other things, that Merrill Lynch shall cooperate fully with the government in its investigation of matters relating to Enron, and shall be obliged to provide to the government access to Merrill Lynch's facilities, documents and employees. Under the terms of the Settlement Agreement (at Paragraph 10), Merrill Lynch remains subject to criminal prosecution in the event that the government, in its "sole discretion", determines that Merrill Lynch "has given deliberately false, incomplete or

misleading information under this Agreement, or has committed any crimes, or that Merrill Lynch otherwise violated any provision of this Agreement..."

Certain provisions of the Settlement Agreement pose particular difficulties for Mr. Bayly's counsel in attempting to conduct interviews of Merrill Lynch employees in light of the government's "request." Paragraph 4 of the Settlement Agreement explicitly requires Merrill Lynch, in order to meet its "obligation of truthful disclosure," to comply with certain government "request[s]". Plainly, Merrill Lynch declines a "request" of the government at its peril.

In addition, the Settlement Agreement (at Paragraph 7) provides that Merrill Lynch "will not, through its attorneys, board of directors, agents, officers or employees make any public statement, in litigation or otherwise, contradicting Merrill Lynch's acceptance of responsibility set forth above." Any contradictory statement made by Merrill Lynch, including its officers or employees, "shall constitute a breach of this Agreement, and Merrill Lynch thereafter would be subject to prosecution..." In the face of such vague yet sweeping language, defense counsel's interviews of Merrill Lynch employees could arguably, in the government's "sole discretion", result in criminal prosecution of Merrill Lynch.[1]

B. The Government's "Request" To Attend These Witness Interviews Violates Mr. Bayly's Fifth And Sixth Amendments Rights.

It is "well established that a defendant is normally entitled, without governmental 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); see also United States v. Scott, 518 F.2d 261, 268 (6th Cir. 1975) ("Certainly, the

[1] As discussed below, we regard any witness interviews conducted by Mr. Bayly's defense counsel as private, confidential "work product" protected from disclosure by well-settled legal principles. Nevertheless, the Settlement Agreement's failure to define its prohibition against "public statement[s]" by Merrill Lynch or its officers and employees, illustrates the chilling effect of the government's "request".

prosecution has no right to interfere with or prevent a defendant's access to a witness (absent any overriding interest in security)").

The Fifth Circuit has held that "'substantial government interference with a defense witnesses' free and unhampered choice to testify violates due process' rights of the defendant." United States v. Hammond, 598 F.2d 1008, 1012 (5th Cir. 1979) (quoting United States v. Henrickson, 564 F.2d 197 (5th Cir. 1977)). The Fifth Circuit Court also has held:

> The Sixth Amendment guarantees a criminal defendant the right to present witnesses to "establish his defense without fear of retaliation against the witness by the government." ...In addition, the Fifth Amendment protects the defendant from improper governmental interference with his defense. Thus, "substantial governmental interference with a defense witness' choice to testify may violate the due process rights of the defendant."

United States v. Bieganowski, 313 F.3d 264, 291 (5th Cir. 2002), cert. denied, 123 S.Ct. 1956 (2003) (citations omitted); see also United States v. Munsey, 457 F. Supp. 1, 4 (E.D. Tenn. 1978) ("witnesses are neither the property of the government nor of the defendant,... A defendant is entitled to have access to any prospective witness although such right of access may not lead to an actual interview").

The leading case on the issue involved here -- the government's attempt to intrude upon a defendant's right to conduct private witness interviews -- is Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966). In Gregory, which involved charges of first degree murder and robbery, the court observed that "the prosecutor embarrassed and confounded the accused in the preparation of his defense by advising the witnesses to the robberies and murder not to speak to anyone unless he were present." Id. at 187. After eyewitnesses declined to talk to defense counsel unless the prosecutor was present, the trial court declined defendant's request for assistance in interviewing witnesses. Id.

The appellate court in Gregory reversed the defendant's conviction based on, inter alia, the trial court's refusal to remedy the prosecutor's advice to witnesses not to talk to defense counsel outside of his presence, and held, "Both sides have an equal right, and should have an equal opportunity, to interview [witnesses]. Here the defendant was denied that opportunity which, not only the statute, but elemental fairness and due process required that he have." Id. at 188 (emphasis added).

Of particular significance to this motion, the court held that the government cannot interfere with defense counsel's ability to interview witnesses outside of the government's presence:

> But 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. Presumably the prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to. [Id. at 188.]

In Gregory , the court also stressed that defense counsel should have an equal opportunity to interview witnesses without the kind of "suppression" imposed by the government's presence -- the same kind of suppression that would inflict the Merrill Lynch witness interviews conducted by Mr. Bayly's counsel if this motion were not granted:

> A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined.
>
> * * *
>
> It is not suggested here that there was any direct suppression of evidence. But there was unquestionably a suppression of the means by which the defense could obtain evidence. The defense could not know what the eye witnesses to the events in suit were to

> testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview. In our judgment the prosecutor's advice to these eyewitnesses frustrated that effort and denied appellant a fair trial.

Id. at 188-189 (emphasis added).[2]

In United States v. Dryden, 423 F.2d 1175 (5th Cir.), cert. denied, 398 U.S. 950 (1970), the Court of Appeals for the Fifth Circuit held that there was no constitutional violation where a treasury agent, after being summoned by a witness, told the defendant and his counsel that they could interview the witness only in the presence of the state or federal district attorney. Id. at 1177. The court acknowledged the Gregory holding but found a "fundamental difference" with that case. Id. In Gregory, the prosecution took the initiative in seeking to be present at witness interviews. In Dryden, by contrast, the treasury agent was summoned by a witness who did not wish to be interviewed; the agent acted to "shift the blame for the abortive interview from [the witness] to the district attorneys." Id. at 1178. In the present case, as in Gregory but not Dryden, it is the government that has sought to be present during witness interviews.

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[2] See also International Business Machines Corp. v. Edelstein, 526 F.2d 37 (2nd Cir. 1975), where the trial court had ordered that if counsel for either party interviews a witness in the absence of opposing counsel, the interview must be conducted with a stenographer present so that a transcript can be available to the court. Id. at 41. In granting the defendant's writ of mandamus, the Second Circuit held that the district court's order was improper both as a matter of Constitutional law and the work product doctrine (discussed further below). The court held:

> We believe that the restrictions on interviewing set by the trial judge exceeded his authority. 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 an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made. [Id. at 42; emphasis added.]

DECLARATION OF RICHARD SCHAEFFER

Richard Schaeffer hereby declares as follows:

1. I am a member of the law firm of Dornbush Mensch Mandelstam & Schaeffer, LLP, co-counsel for defendant Daniel Bayly in this matter. I make this declaration in support of Mr. Bayly's motion to dismiss the indictment against him, or alternatively, for an order requiring the Government to withdraw its "request" to Merrill Lynch & Co. ("Merrill Lynch") to attend interviews of its employee witnesses conducted by Mr. Bayly's counsel.

2. I annex to this Declaration as Exhibit A, a copy of the Settlement Agreement between the Government and Merrill Lynch, set forth in a letter dated September 17, 2003, from the ETF to Robert S. Morvillo, Esq. and Charles Stillman, Esq. Reference is made to this Settlement Agreement in our accompanying legal arguments in support of this motion.

3. By letter dated April 5, 2004 from Matthew Friedrich, Esq., to the defendants' attorneys, the Government provided notice of certain witnesses who "may arguably possess exculpatory information" in this action. Among those witnesses listed in the Government's April 5, 2004 letter are persons currently employed by Merrill Lynch. Mr. Friedrich's April 5, 2004 letter also states, "You are free to attempt to interview these witnesses, and/or call them to the stand during the trial." Mr. Friedrich's April 5, 2004 letter is annexed hereto as Exhibit B.

4. Following receipt of this letter, I contacted Richard Weinberg, Esq., counsel for Merrill Lynch, to arrange interviews of those Merrill Lynch employees identified in the Government's April 5, 2004 letter. In response, Mr. Weinberg informed me that the Enron Task Force ("ETF") had requested Merrill Lynch to permit ETF representatives to attend any

interviews of Merrill Lynch employees conducted by counsel for the defendants in this action, including counsel for Mr. Bayly.

5. Thereafter, on April 9, 2004, I, along with my co-counsel, Thomas Hagemann, telephoned Mr. Friedrich. I advised Mr. Friedrich of my conversation with Mr. Weinberg and asked him if the ETF had made such a request to Merrill Lynch. Mr. Friedrich confirmed that the ETF had requested to be present during interviews of Merrill Lynch employees conducted by defendants' attorneys.

6. During this telephone conversation, I advised Mr. Friedrich that I believed the ETF's request to Merrill Lynch to be improper and would have an obvious chilling effect upon the willingness of Merrill Lynch employees to meet or speak with defendants' attorneys. Mr. Hagemann told Mr. Friedrich that he believed the ETF's request raised serious Sixth Amendment, and other, issues for Mr. Bayly. In response, Mr. Friedrich stated that he would not argue the propriety of the ETF's request, except to state that he believed it was proper. Mr. Friedrich also declined my request that he provide us with legal authority supporting the propriety of the ETF's request to Merrill Lynch. Mr. Friedrich stated that we would have to seek judicial intervention to obtain any relief with respect to this issue.

7. Several minutes after this telephone conversation, Mr. Friedrich called me back in order to make sure I understood that the ETF had only made a "request" of Merrill Lynch. I then asked Mr. Friedrich "whether Merrill Lynch was free to ignore the request of the ETF without consequence." Mr. Friedrich stated that it was "just a request" and "I'll leave it at that."

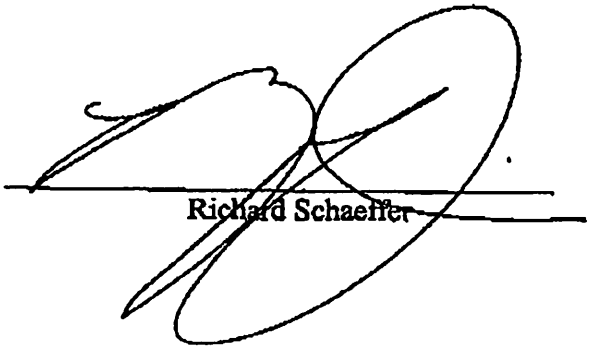
8. I confirmed the substance of these two conversations in my letter to Mr. Friedrich, dated April 9, 2004, which is annexed hereto as Exhibit C. In my April 9 letter, I asked

Mr. Friedrich to contact me if my letter was inaccurate in any way, or omitted any salient point which we had discussed. I have received no response from Mr. Friedrich to my April 9, 2004 letter, either purporting to correct the substance of my letter or otherwise addressing the issues contained therein.

9. Following my conversations with Mr. Friedrich, an attorney from my office attempted to contact counsel for Merrill Lynch to determine if it intended to accede to the Government's request and allow a Government representative to be present during interviews we conducted of Merrill Lynch employees. To date, no response has been received from counsel for Merrill Lynch.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection.

Signed this 26th day of April, 2004



Richard Schaeffer

DORNBUSH MENSCH MANDELSTAM & SCHAEFFER, LLP
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April 9, 2004

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VIA FACSIMILE & FIRST CLASS MAIL

Matthew W. Friedrich, Esq.
United States Department of Justice
Enron Task Force
Criminal Division, Fraud Section
1400 New York Avenue, N.W.
Washington D.C. 20530

Re: United States v. Bayly, et al.
(Cr. No. H-03-363 (S.D.Tex.))

Dear Mr. Friedrich:

I am writing to set forth the substance of the two telephone conversations today between the two of us and Thomas Hagemann. I have tried to be as accurate as I could be, but if you feel I have mischaracterized any portion of our conversations, or failed to include any salient matter discussed, please let me know promptly.

I advised you that I had spoken with Richard Weinberg, counsel for Merrill Lynch, to arrange interviews of Merrill Lynch employees identified in your letter of April 5, 2004 as "arguably possess[ing] exculpatory information." In response to my request, Mr. Weinberg informed me that the Enron Task Force ("ETF") had made a request of Merrill Lynch that representatives of the ETF be present at any interviews of Merrill Lynch employees by counsel for the defendants in the above-captioned indictment, including counsel for Mr. Bayly.

I then asked you if the ETF had made such a request to Merrill Lynch and you confirmed that it had. I told you that it was my belief that the request of the ETF to Merrill Lynch was improper, as it would have an obvious chilling effect upon the willingness of Merrill Lynch employees to meet or speak with defendant's counsel and Mr. Hagemann said that he believed that it raised serious Sixth Amendment, and other, issues for Mr. Bayly.

Exhibit C

DORNBUSH MENSCH MANDELSTAM & SCHAEFFER, LLP

Matthew Friedrich, Esq.
United States Department of Justice
Enron Task Force
Criminal Division, Fraud Section

April 9, 2004

In response, you stated that you would not argue about the propriety of the ETF's request of Merrill Lynch except to state that, in your view, it was a proper request to Merrill Lynch. In an effort to analyze your position and to avoid judicial intervention, I asked you to cite authority that supports the ETF's position that the request to Merrill Lynch was proper. In response, you stated that you would not cite any authority and would not argue the legal propriety of something that the ETF thinks is a proper request. Finally, you stated that we would have to seek judicial intervention to obtain any relief on this issue.

Several minutes after our first conversation, you called me back to make sure I understood that the ETF had only made a "request" of Merrill Lynch. I then asked you "whether Merrill Lynch was free to ignore the request of the ETF without consequence," and in response you stated that it was "just a request" and "I'll leave it at that." At that, our second conversation concluded.

Please contact me if this letter is inaccurate in any regard, or fails to set forth any salient point which we discussed.

Very truly yours,

Richard Schaeffer

cc: Thomas A. Hagemann, Esq.

160569.3

EXHIBIT J

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

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Cr. No. H-03-363 (Werlein, J.)
	)	
DANIEL BAYLY,	)	
DANIEL O. BOYLE,	)	
JAMES A. BROWN,	)	
WILLIAM R. FUHS,	)	
ROBERT S. FURST, and	)	
SHEILA K. KAHANEK,	)	
	)	
Defendants.	)	

GOVERNMENT'S OPPOSITION TO BAYLY'S MOTION TO DISMISS OR FOR AN ORDER DIRECTING THE GOVERNMENT TO WITHDRAW A WITNESS REQUEST

The United States, by and through undersigned counsel, respectfully submits this memorandum and the accompanying affirmation of Assistant U.S. Attorney David Hennessy ("Hennessy Aff.) in opposition to Defendant Daniel Bayly's motion to dismiss the indictment or to direct the government to withdraw a request to Merrill Lynch to attend defense interviews of Merrill Lynch employees. Bayly's motion is untimely, moot, and otherwise without merit. The motion should be denied.

FACTUAL BACKGROUND

On September 17, 2003, in order to avoid criminal prosecution for the acts of its employees relating to certain business transactions conducted with Enron, Merrill Lynch entered into a non-prosecution agreement (the "Agreement") with the government. See Agreement (attached to Bayly's motion as Exhibit A). The transaction relating to Merrill Lynch's temporary "purchase" of Nigerian power barges from Enron is one of the two transactions between Enron

and Merrill Lynch that led to the Agreement. Id. n.1. Under the Agreement, Merrill Lynch has, among other things, agreed to cooperate with the government's ongoing investigation into Enron's collapse. Id. ¶¶ 3-4. After the defendants in this case were indicted, the government asked counsel for Merrill Lynch if it would notify the government if any of the defendants or other third parties attempted to contact Merrill Lynch employees through Merrill Lynch counsel about matters relating to the government's investigation. Hennessy Aff. ¶5.

In or about January 2004, Richard Weinberg, associate counsel for Merrill Lynch, advised the government that counsel for defendant Bayly had requested that Merrill Lynch make a Merrill Lynch employee available for an interview. Hennessy Aff. ¶6 At that time, the government requested that if Merrill Lynch decided to make an employee available for an interview that the government be permitted to attend the interview as well. Hennessy Aff. ¶6 . The government made clear to counsel for Merrill Lynch that this was a request only and that the decision whether to permit Merrill employees to be interviewed by the defense and whether to permit the government's attendance was a decision that resided in the sole discretion of Merrill Lynch and, ultimately, the employee herself. The government also made clear that the request was not made pursuant to the Agreement – that is, the government would not use Merrill Lynch's denial of the government's request as a basis for finding that Merrill Lynch was in breach of the Agreement. Hennessy Aff. ¶7.

Thereafter, Mr. Weinberg informed the government that Merrill Lynch, in its sole discretion, had obtained separate counsel for the employee to advise the employee as to her rights as a potential witness. Hennessy Aff. ¶8. To date, the government is unaware whether this employee, after consultation with her counsel, agreed to be interviewed by defendant Bayly.

Hennessy Aff. ¶9. Indeed, the government has had no conversations with the employee or any representative of the employee about Bayly's request to interview her or the government's request to be present at any such interview. Hennessy Aff. ¶9.

Importantly, Mr. Weinberg advised the government that shortly after Bayly's *initial* request in or about January 2004, Weinberg had informed Bayly of the government's request to be present at interviews of Merrill Lynch employees. Hennessy Aff. ¶8. The government heard no complaints from Bayly about the propriety of its request until counsel for Bayly contacted counsel for the Task Force to complain on April 9, 2004. Hennessy Aff. ¶10.

Mr. Weinberg advised the government on April 28, 2004 that Merrill Lynch had decided to retain separate counsel for any employee with whom Bayly or any other defendant sought interviews. Hennessy Aff. ¶8. Thus, the government understands that if Bayly wishes to interview any current Merrill Lynch employees he will be advised that the employee has separate counsel and will be told to contact the employee's counsel directly.

ARGUMENT

After knowing of the government's request for several months and knowing that Merrill Lynch has obtained or will obtain separate counsel for any employees with whom the defendants would like to speak, Bayly's now moves for an order dismissing the indictment or directing the government to withdraw its request to attend interviews of Merrill Lynch employees. Bayly's motion is untimely and moot. Moreover, the government's request of Merrill Lynch is entirely proper. The decision whether to be interviewed by the defense, with or without government presence, remains and has always remained within the sole discretion of the witness. Bayly's motion should therefore be denied.

A. **Bayly's motion is untimely.**

As noted above, Bayly has been aware of the government's request to Merrill Lynch since at least early February 2004. In violation of the Court's motions' deadline, however, Bayly waited until almost two months after the motions' deadline, to file this motion. Rather than addressing the tardiness of his motion, Bayly suggests that the government did not make its request of Merrill Lynch until after alerting the defense of Merrill Lynch employees who may have exculpatory information. Bayly implies that the government deliberately timed its request to Merrill Lynch strategically to deny Bayly access to exculpatory information. Nothing could be further from the truth.

As noted above, the government made its request of Merrill Lynch at least a month before the motions' deadline, and Bayly was made aware of the government's request at that time. Thus, any intimation that the purpose of the government's request was to deny Bayly access to Brady information is disingenuous at best. Moreover, Bayly has had access to all of the Merrill Lynch employees, including those listed on the government's Brady list, since long before the government began its investigation into the Nigerian Barge deal. Indeed, as we noted in our Brady letter, Bayly already knows the identity of those witnesses and even admits knowing the potentially exculpatory nature of their testimony.

B. **Bayly's motion is moot.**

Notwithstanding the untimeliness of Bayly's motion, it should be denied as moot. Merrill Lynch has made it clear that it has obtained or will obtain separate counsel for any employee with whom Bayly or another defendant wishes to speak. Thus, Bayly's anticipated "chilling" consequences of the government's request will not materialize. The decision to speak

to either party will be made by the witness in consultation with that witness's counsel. If a witness declines to speak with Bayly, that is the witness's choice over which the government has no control. See United States v. Scott, 518 F.2d 261, 268 (6th Cir. 1975) (noting that no right of a defendant is violated when a potential witness chooses freely not to talk; a witness may of his own free will refuse to be interviewed by either the prosecution or the defense). Indeed, this Court recognized this reality in its recent decision denying defendant Kahanek's motion for an order advising witnesses that they are free to speak with either party. Order dated April 21, 2004, at 8 (Werlein, J.) (declining to enter a "tutorial" order where "it would appear that the prospective witnesses are relying upon the advice of their own counsel in deciding whether to submit to interviews").

C. **The government's request is entirely proper.**

Bayly's contention that the government's request to Merrill Lynch somehow denies his constitutional rights and infringes on the work-product doctrine is wrong as a matter of law. It is well established that "[a] prosecutor may request the opportunity to be present during a defense interview of the witness so long as the prosecutor's presence is not a condition of the interview." State v. Musschl, 396 N.W.2d 865, 869 (C.A. Minn. 1987) (citing ABA Standards for Criminal Justice, the Prosecution Function, Standard 3-3.1(c) and Commentary at 3-38 to 3-39 (1980))[1]; see also State v. Simmons, 203 N.W.2d 887 (Wis. 1973) (holding that it would not be improper for a prosecutor to request to attend defense interview of witness as long as the prosecutor did not insist on that condition).

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[1] A copy of the most current version of the ABA Code' relevant provision, dated 1993, is annexed hereto. It contains the same language.

In Mussehl, the defendant moved to dismiss where a prosecutor had written letters to witnesses advising them of their right to accede to or decline requests to be interviewed, but asking, if the witness did agree to an interview, that the witness allow the prosecutor or a law enforcement officer to be present. Mussehl, 396 N.W.2d at 867-88. The Minnesota Court of Appeals upheld the lower court's denial of the motion. Importantly, the Court distinguished Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966), the principal case relied on by Bayly, noting that the letters neither advised the witnesses to decline interviews nor, as in Gregory, instructed witnesses to speak only if a prosecutor was present. Thus, Bayly's reliance on Gregory is missplaced where, as here, the government has merely made a request to a cooperating entity that if it decided to make its employees available to the defendants the government be permitted to attend the interviews. The government did not instruct Merrill Lynch not to make its employees available to Bayly nor did it instruct Merrill Lynch that it could only make its employees available if the government were present. Hennessy Aff. ¶6. Merrill Lynch was under no misconceptions about the government's request and understood full-well that it was not required to accommodate it. Bayly does not and could not argue otherwise.

Bayly's argument that the government's request is coercive to Merrill Lynch because of its obligations under the Agreement is also unpersuasive. As discussed above, the government made clear to counsel for Merrill Lynch that the request was not being made pursuant to the Agreement. Hennessy Aff. ¶7. It is nonsensical to assume that Merrill Lynch – a sophisticated, financial institution with a battery of experienced attorneys – was coerced and unable to reach an independent decision regarding this issue. Indeed, the facts reveal that Merrill Lynch, far from feeling coerced into capitulating to the government's request against its will, made a reasoned

decision to obtain separate counsel for potential witnesses. The factors that may have gone into Merrill Lynch's decision to obtain separate counsel for those individuals were factors considered by Merrill Lynch alone.[2]

Finally, Bayly's contention that the government's request somehow intrudes into his counsel's work-product privilege is similarly unfounded. If Bayly were to interview Merrill Lynch employees without a government representative present, the witness would still be free to talk to whomever he or she saw fit, including government counsel, about what transpired at the interview. Thus, the very presence of the witness himself or herself would pierce any work-product privilege that Bayly might have. The cases cited by Bayly do not hold otherwise.

CONCLUSION

For all the foregoing reasons, Bayly's motion should be denied

Respectfully submitted,

ANDREW WEISSMANN
Director, Enron Task Force

By: Kathryn H. Ruemmler
Matthew W. Friedrich
David Hennessy
Kathryn H. Ruemmler
Assistant United States Attorneys
Enron Task Force

---

[2] A similar argument to the one advanced by Bayly was rejected by the Court of Appeals for the First Circuit. In United States v. Nardi, 633 F.2d 972 (1st Cir. 1980), an accomplice witness refused a defense interview except in the presence of government counsel. The defendant argued that the witness was coerced into this refusal by the government's informal grant of immunity to the accomplice witness, which left the government free to prosecute him if he failed to cooperate in the prosecution. The First Circuit rejected this claim, finding no evidence of coercion in circumstances where a witness may have an incentive to please the government. Id. at 977.

Certificate of Service

I hereby certify that a copy of the foregoing motion was sent to the following counsel by Facsimile on this 7th day of May, 2004:

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fax. 713/276-6064

By: Kathryn H. Ruemmler
Kathryn H. Ruemmler
Enron Task Force

EXHIBIT K

Nigerian Barge

3 Barges assets of Fin'l Division

Her people were pretty tight from to sell

Fin'l grp approached some investors - one of which was M.L.

Resulted in phone call to (E).

F was in, Fastow was in, Boyle,
Belden B Schnapper
Plus litany of M.L. people

Belden R Furst ML Relationship Officer

Context of call - ML had approved deal internally. Would invest

What ass that (E) would assist them in selling w/in 6 months. Whether assume that (E) would make efforts to syndicate it out to them.

Disc. between Andy & ML
Agreed that (E) would use best efforts & help them sell assets

Was there a desire to get sale by end of yr to book assets

This was intl asset

Never made up to ML that we would buy them out at premium or @ rate of rtn.

Why needed someone to step in on short term basis?

Don't know - intl deal

I was involved b/c as treas, I was in charge of bank rels

ML wanted deal thru intl team, me and AF.

Even tho 29mm - not unusual to have all these people involved if one of our fin institutions. Wanted to make sure all our dis contacts of fin inst.
(Knew of)

AF agreed that (E) would help them remarket this equity 6 mo. after Closing

What happened @ end of 6 mnth - Read in the papers that LJM purchased it

Incident after the one phone call? None that I recall

None recall any disc that such a promise was made in phone call

Were likely bx to make sure comfort was supplied @ top level of Co.

Know if LJM was paid a fee to purchase the interest? No idea

Anyone ever call you after conf call to remind you that (E) had made representation?

No. Instead of AES purchase. My knowledge was from the press report. Took place in Nov 2000 - was out of Finance Dept

* doesn't recall any convos. w/ ML or other init. banks

- other prospective buyers

* desire to get done by yr. end? ⇒ doesn't recall

Doesn't know why couldn't close long-term deal

↳ Sep. division – the APACHI group → Dan Boyle & Barry Schnapper worked in that div.

↳ to coordinate all bank relationships; ML asked for him to be on the phone

- Andy agreed E would help them mkt. the equity w/in 6 mos. after closing

↳ E & ML would work to remarket for the 6 mos. after

↳ if

After 6 mos. →

* No involvement in bonus after the phone convo.

* Doesn't recall there being such a verbal assurance to get ML out w/in 6 mos.

- Doesn't know if LJM paid a fee to purchase ML's interest

- Anyone from ML contact him & indicate to him that ML had been promoted to take out w/a part. rate of ret.

↳ after call

↳ Not that he's aware of

WSJ Article
McMahon called Merrill

Recount

3 Barges - Assets of Int'l Division - Rebecca McDonald
Finance folks in Int'l approached several investors
- incl. Merrill
Merrill called E
McMahon, Fastow, Boyle, Schnaeder on call
plus litany of Merrill people
- incl. Rob Furst
N.R. if Tilney
Recollection of call
Merrill had approved purchase of barges
Looking for Fastow's assurance that
E help Merrill syndicate out w/in
6 months
Verbal agreement - best efforts
Not typically put in writing
~~Late~~ Dec. 99 - [illegible] on vacation
Call - purpose was for Merrill to affirm
that resources put behind
Not believe spoke on call
N.R. having prior call / conversation w/ Merrill
- possible - Not uncommon
N.R. - E desire to get done by yearend

NO - Never guaranteed to take out w/ Rate of Return

As treasurer coordinate all banks relations
- so Merrill asked for him to be on phone

Repurchase (equity) not unusual
Boyle & Schmidt [illegible] in ~~[illegible]~~ APACHE
- based in Houston all here were

Andy assured Fz would help monetize equity
w/ in next 6 months.
- no further commitment
take of Treasurer at end of 6 mos
read in papers that LJM [illegible]

No handshake-over phone call

No guaranty/promise ever being discussed

"No idea" LJM could afford to earn
Merrill's interest

No ever recalls call for Merrill interests

No mention/knowledge (except Causey) in AEs reporting

Nigerian barges

WSJ article.

- Says McMahon asked if ML would invest in the deal. Enron wanted to boot $12mm

3 barges were assets of Int'l division
+ then people were selling the barges
+ finance Int'l approached several potential investors incl. ML
+ ML called Enron - A.F., J.M., Dan Boyle, Barry Schnapper and other ML people.

context of call: ML approved the deal internally they wanted ENE to help them resell it w/in the next six months

Enron would use best efforts to help market the equity.

bonds debt
Stocks equity

This was in Dec. 1999 - I recall bc I was @ home on vacation I participated from my home. They wanted to make sure that Enron would help them. Did not speak on that phone call.

happens a lot when Banks would loan us $ Common to cut them in take to collectively market it later.

My recollection was that this was a conference call.

3 prospective buyers

If the buyer would not be a l/t holder it was not unusual to help them market it late

Doesn't recall any other discussions.

This was an int'l asset - something that I didn't know.

Why involved? BC / had the role of coord. all the bank relationships.
They wanted me & A.F.
J.M was trying to coordinate the overall relationship of the bank

M.L. wanted A.F. to be involved

Dan Boyle) finance in Int'l — worked in APACHE
Schnapp)

Transaction support: doesn't know who worked on it

I recall that A.F. agreed that ENE would help them remarket in 6 mos

Powers report said that LJM bought it after phone conv - no more involvement

I don't recall any promise that Enron would get them out.

did not follow what was going on

Doesn't recall LJM being mentioned at all.

[redacted]

Enron Industrial Markets

Fishtail - Bacchus - Sundance

CEO of EI Markets in mid-2000 (pulps paper & steel). My job

Size: 250-300 people

Houston, London, Quebec City

he took over - 100 people.

assets: trading book $10s of millions

total value $200mm (paper value, book value → at end

Fishtail: we were going to buy 50% for cash (of all ENE Ind. Mkts)

Skilling killed deal - 4th Q 2000

- Fishtail was a replacement for that transaction

- Securitized in the industrial mkts.

Governance: BAN wanted features in JV that made sure ENE Ind Mkts was in line but not necessarily in time w/ Enron Corp

Nigerian Barges:

WSJ article: McMahon's version:

3 barges

- Assets of Ind'l Division under Rebecca McDonald
- Dec. Braves people were talking to a # of people about selling, among them ML
- Barry Schnapper, Gary Boyle, ASF, McMahon and others were on the call to discuss ML investing / buying the barges.
- ML wanted ENE/JF confirm's assurance that ENE would use best efforts to "syndicate" or find a buyer for these assets.
- This was a verbal agreement, nothing in writing
- "This was not unusual"
- Can't recall if there was a deadline push to get this done by year-end.

Ltr ← Doc 99

- He was involved b/c as Treasurer he had all the financial institution relationships, and since ML was involved, McMahon joined the call.
- Why was ASF involved on a deal so small? He thinks it was at ML's request.
- He doesn't recall any "guaranteed

McMahon 4

take-outs at the end of the 6 month re-marketing period.

- It turns ~~out~~ at the end of 6 months, LJM bought the barges.
- He was not involved apart from this Dec '99 phone call.
- DK if ML was paid a fee ~~to~~ to purchase the barges.
- Doesn't believe LJM was even mentioned on ~~this~~ call.
- Only knows of AES's subsequent purchase from the Powers Report

~~E~~ Enron Industrial Markets

Fishtail → Bacchus → Sundance . . .

- Made CEO of EIM, mid-2000
- EIM: pulp and paper and steel business. His job was to grow the business
- Size: ≈ 250-300 people
  - Houston, London, Quebec
  - Trading book: 10s of millions when started
  - [illegible] ≈ $200 million when sold in bankruptcy

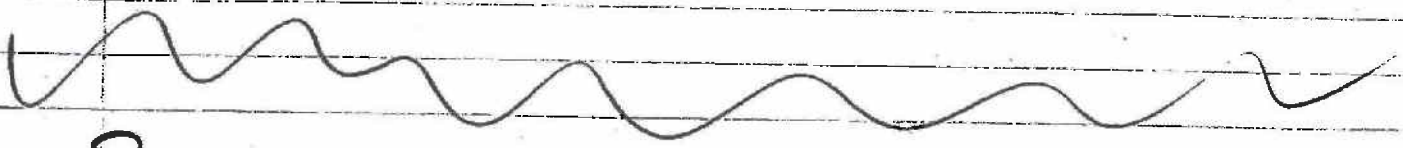
"Fishtail et al."

- 50% of EIM for sale: Bain Capital was looking at it.
- JKS killed the deal in 4Q 2000

(margin: he didn't want a give up control ←: corp governance, compensation)

McMahon - 5

(M) Mahonia: An entity related to Prepays + Chase



Barges WSJ Article →

(B) McMahon calls Merrill Lynch: Can you buy these Barges - we will buy them back later.

(M) 3 Barges: Assets of Int'l Division. They were looking to sell + approached Investors including ML. ML called E. I was on, also Fastow → many ML people.

Dec. 1999 — Call: ML had approved investment in the Barges, + wanted assurance that E would assist in the sale to 3rd parties in the next 6 mos. (verbal agreement) - (typical). Int'l Finance people had already committed to this.

He doesn't recall whether there was a desire to get the deal done by year end.

No Involvement after Phone Conversation

No recollection of a promise (to re-buy) outside Best-Efforts promise in the phone call.

no involvement Andy said – Enron help remarketed in next six months
I recall Jointly market
after What did happen – LJM bought it! Powers Report
that Screwed it out for them – AF verbally agreed
- why not in writing – no – did this all time
– When happened in late Dec 1999 – I was
on vacation – participated from home – conf.
call – ML set up conf. call

w/ knew assets (Bayer) deal They were trying to affirm what int assets are and told them – help sell
– I don't feel I had a speaking part in phone call
– happened all time they'd know we'd help syndicate

That's my recollection
– don't recall any others Rebecca McDonald's Int Group senior ...

ML other calls – don't recall any

Don't recall if year end booking was imp –

Ever make any representation to Merrill – get out w/in 6 mos and return investment w/ profit!

Integrated Why need short term bridge – IDK – Int assets
Dan Boyle Why were you involved? – they asked for me AF +
Schnapper Deal Team – my relationships
T

no Don't recall any promise beyond six months!
VERBAL agreement only
Shortly after phone call I was no longer Treas

EXHIBIT L

VENABLE LLP

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April 25, 2005

VIA FACSIMILE (202) 514-6034
AND HAND-DELIVERY

Subject to F.R.E. Rule 410;
F.R. Crim. Proc. 11(f)

Joseph F. Bianco, Esquire
Deputy Assistant Attorney General
Criminal Division
Department of Justice
950 Constitution Avenue, N.W.
Room 2212
Washington, D.C. 20530

Dear Mr. Bianco:

We are aware that the Enron Task Force has determined to proceed with the prosecution of our client, Jeffrey McMahon, in the Nigerian barges case. We write to appeal this determination and request that you reverse this decision with respect to Mr. McMahon. We set forth below some of the reasons why the United States Government should not indict Mr. McMahon. This letter, however, should not be construed to constitute a comprehensive treatment of all defenses in this case.[1]

I. The Function of the Treasurer's Office within Enron Corporation

A. Overall Responsibilities

In order to properly place Mr. McMahon's limited involvement in the Nigerian barge transaction in context, it is fundamental for the government to understand the role of the Treasurer within Enron Corporation ("Enron") during the time of the events in question. The Enron Treasurer was responsible for managing Enron's liquidity, as explained further below, managing its capital structure, and coordinating Enron's relationships with its banks and credit rating agencies.

Enron consummated over $20 billion per year in financings, or over 100 deals per year, and utilized a group of over 120 banks around the world. In order to ensure that the banks could not selectively pick and choose amongst those deals of interest to them (with the end result that lower-value deals would be ignored), all financings were coordinated through the Treasurer's office.

[1] This memorandum is being offered subject to Federal Rules of Evidence 410 and Federal Rules of Criminal Procedure 11(f) and may not be used for any purpose beyond the appeal of the Enron Task Force's decision to indict Mr. McMahon.

To fulfill this function, Mr. McMahon would place an "introductory" telephone call to an available bank identified by his staff and inform the bank that Enron wanted the bank to review a certain proposed transaction to determine its level of interest. An "available bank" was one of the 120 banks that: (1) were not currently working on another Enron financing; and (2) had the capability to lead and close the transaction. Mr. McMahon would then instruct the bank to communicate directly with the division finance employee responsible for the transaction for additional detail. On some occasions, Mr. McMahon was provided with a cursory overview of the proposed deal from the division finance employee at the outset, which he would communicate to the bank. Unless the deal was sponsored by the Corporate group, Mr. McMahon lacked authority to dictate or negotiate terms of the deal or to bind Enron, as these functions were within the division's responsibility and authority.

To further fulfill this role, Mr. McMahon was also responsible for centrally managing the overall bank relationships at a corporate level.

It was within this context that in mid-December 1999, Mr. McMahon was asked, by APACHI division personnel, to contact a bank or other financial institution with respect to a potential investment in the proposed Nigerian barge transaction.

B. Emphasis on Liquidity

One of Mr. McMahon's principal roles, and one on which he placed the highest priority, was increasing Enron's liquidity. As part of this goal, in 1999, Mr. McMahon established a policy with respect to any transaction which contained continuing obligations and risks.

Specifically, any transaction structure that required Enron to repurchase any portion or portions of any assets, directly and negatively affected Enron's balance sheet and liquidity. Thus, it became well-known throughout the company that Mr. McMahon would not approve any transactions in which Enron, and its related entities, were committed to repurchase assets it sold because of the effect on the company's liquidity and balance sheet.

Consistent with this mandate, Kelly Boots, one of Mr. McMahon's subordinates, circulated an inquiry seeking a list of outstanding FASB 125 deals, which was widely forwarded throughout the company. *See Email from Kelly H. Boots to Mike Jakubik, et al. dated October 20, 1999, attached as Exhibit A; Email from Barry Schnapper to James A. Hughes dated October 26, 1999, attached as Exhibit B.*

The purpose of a FASB 125 transaction is to remove financial assets, including cash, ownership in an unconsolidated entity, or a contract that conveys the contractual right to receive cash or to exchange an asset on potentially favorable terms, from the balance sheet and recognize the corresponding gain or loss when the control of the assets are surrendered and proceeds are received. FASB 125 transactions include sales and securitizations of financial assets, extinguishments of liabilities, and related issues, including securities lending transactions and servicings of financial assets. Enron engaged in numerous FASB 125 transactions in order to monetize a variety of its assets.

A FASB 125 transaction has an expiration, or "unwind," date at which time the asset is sold off at auction. Prior to Mr. McMahon's installation as Treasurer, the divisions who had previously disposed of an asset through a FASB 125 structure frequently requested approval to repurchase the asset at the auction. Mr. McMahon, beginning in late 1999, indicated that it was unacceptable for Enron to repurchase such assets at auction because of its effect on the company's liquidity and balance sheet.

In contrast, certain assets, such as real estate, could not be sold through FASB 125 structures, and thus, the division would seek approval to dispose of the asset through transactions with Special Purpose Vehicles ("SPVs"). As part of the latter transaction, the division permanently surrendered control of the asset, and therefore, unlike with a FASB 125 transaction, there could not be a repurchase. Although the Nigerian barge transaction originally was slated as a FASB 125 transaction, the deal team ultimately changed the structure to one utilizing an SPV. Thus, pursuant to accounting rules, the seller could not incur any significant obligations for future performance which would bring about a repurchase of the asset.

Mr. McMahon demonstrated his disapproval of several proposed FASB 125 repurchases in which the division proposed continuing Enron's obligations and risks with the associated asset, thus affecting Enron's financial statement and liquidity. For example, in January 2000, Mr. McMahon disapproved of the division's plan to repurchase shares for the EcoElectrica interest. The division had monetized 37.5% of EcoElectrica's interest in a FASB 125 transaction in 1998, which was scheduled to unwind in March 2000. The division requested advice from Mr. Fastow, Mr. Causey, Mr. McMahon and others concerning a potential purchaser of the transaction. Mr. McMahon responded that "I do not believe we should buy back the shares and I will not recommend we roll the 125." *See Email from Jeffrey McMahon to Daniel Castagnola, et al. dated January 10, 2000, attached as Exhibit C.* He further stated that Enron must refinance the deal because of the cash impact. *See id.*

In addition, in February 2000, Mr. McMahon objected to a division's proposal to repurchase an interest in a Guam-based asset. In early 1999, Enron International had sold a portion of its investment in Enron Development Piti, LLC, an entity which owned a power plant in Guam. The transaction was accounted for as a sale for financial reporting purposes, pursuant to FASB 125, and was scheduled to unwind on March 1, 2000. In response to inquiries from division personnel, Mr. McMahon clearly indicated that "Enron is NOT to repurchase Guam." He further stated: "I cannot overstate the need to make sure this asset is not put back on the balance sheet." *See Email from Jeffrey McMahon to Jeremy Thirsk dated February 3, 2000, attached as Exhibit D.*

Thus, Mr. McMahon established a pattern of objecting to transactions in which Enron would incur ongoing obligations or risks, as this would affect Enron's capital structure and future liquidity. Notably, this position was one of many that Mr. McMahon held contrary to Mr. Fastow's position. Mr. McMahon was constantly preoccupied about Enron's liquidity position, while Mr. Fastow consistently believed there was no reason for concern about liquidity because there was always sufficient cash available.

C. December 15, 1999 DeSpain Email

It was within this framework, and with this history, that Mr. DeSpain wrote the attached email concerning the proposed repurchase of the Nigerian barges.

When the division first conceptualized of the Nigerian barge transaction, it was presented as a FASB 125 deal. Thus, in December 1999, when the division requested Mr. McMahon to make the initial contact with a bank or other financial institution in his role as Treasurer, Mr. McMahon and his staff believed it was a FASB 125 deal structure. Because of Mr. McMahon's long-standing policy regarding financings which incurred an ongoing obligation or risk, Mr. DeSpain, Assistant Treasurer, wrote to Mr. Boyle, a division finance employee, regarding Mr. McMahon's edict.

As set forth in the email, Mr. DeSpain, consistent with Mr. McMahon's policy, stated that Mr. McMahon "is emphatic that if you choose to stick it in a 125 deal that you commit to sell it off before the end of 2000. **Buying it back next year is not an acceptable answer.**" *See Email from Tim DeSpain to Dan Boyle dated December 15, 1999, attached as Exhibit E (emphasis in original).* Mr. DeSpain copied Mr. McMahon on the email. This email was, in turn, forwarded by Mr. Boyle to Mr. Boyt, a division accounting employee working on the Nigerian barge transaction. *See Email from Dan Boyle to Eric Boyt dated 12/15/99, attached as Exhibit F.* The email was further circulated to other employees working on the transaction,

prompting one employee to comment that "[b]ased on the attached, it appears that Enron will have NO ownership control after selldown." *See Email from Ed Giblin to Larry Reynolds, et al. dated December 16, 1999, attached as Exhibit G (emphasis in original); see also Email from Fred L. Kelly to Mark Kiddle, et al. dated December 27, 1999, attached as Exhibit H.*

Thus, the December 15, 1999 DeSpain email is consistent with the policy instituted and the position taken by Mr. McMahon with respect to sales which incurred ongoing obligations and risks in late 1999 and the first quarter of 2000, as demonstrated through the above examples.

II. The Nigerian Barge Deal

A. Overview

In June 1999, Enron purchased nine power barges for $56.6 million from the Philippine government. Each of the barges, three of which were located in Nigeria ("the Nigerian barges"), operated as floating electricity generators. Enron contributed the Nigerian barges to Enron Nigeria Barge Limited ("ENBL") in exchange for 100% of the company's stock.

The projected cash flow from the barges was to emanate from a contract with the Nigerian government to provide electricity to the country. Enron anticipated a cash flow of $39 million in the first three years of operation. In order to monetize the projected income, APACHI division personnel, which had responsibility for the Nigerian barge assets, sought to sell an equity stake in ENBL before December 31, 1999.

In September 1999, James Hughes, a senior executive in the APACHI division, directed his personnel to determine whether and how the division could monetize and recognize a gain on the barge transaction. Pursuant to this directive, the APACHI division attempted to execute a deal with Marubeni whereby Marubeni would purchase all of the equity in ENBL.

In early December 1999, it was determined that a transaction with Marubeni could not be completed by year-end. Mr. Hughes again directed APACHI division personnel to investigate an alternative to ensure the monetization of the Nigerian barges for fourth quarter 1999.

APACHI finance employees approached Mr. McMahon in mid-December 1999, in his role as the central coordinator of Enron's relationships with banking institutions, to contact a bank or other financial institution that might be capable of closing the division transaction for year-end 1999. Several banks with whom Enron traditionally worked were already progressing on other Enron-related transactions. Merrill Lynch, however, had been seeking an increased

relationship with Enron and was not currently working on an Enron transaction, and thus, the Treasurer's office directed that the contact for the Nigerian barge deal be made with Merrill Lynch. Other financial institutions may have been contacted to explore their interest in this transaction.

Mr. McMahon was informed by the APACHI finance personnel that the commercial risks associated with the Nigerian barge transaction had been mitigated by virtue of a letter of credit from Citibank, purchasing political risk insurance, and the existence of casualty loss insurance for the barges themselves. This representation was also made to Michael Kopper who was simultaneously reviewing the deal for LJM2. Mr. Kopper testified in the Nigerian barge trial that, "[h]e [Fastow] described the deal to me as a transaction that was not going to be taking Nigerian political risks or actually Nigerian credit risk, that there was a letter of credit in place from Citibank." *See Trial Testimony of Michael Kopper dated September 27, 2004, attached as Exhibit I.* Based on the various financial protections put in place, Mr. McMahon concluded the Nigerian barge transaction would be appropriate for a bank to review for investment.

Mr. McMahon, acting on the representations made about the Nigerian barge deal by the APACHI personnel, contacted Merrill Lynch to introduce the transaction and request that it contact the APACHI division finance personnel directly to negotiate the terms and conditions of the deal. Mr. McMahon did not make any commitment to Merrill Lynch or to any other organization that Enron or any of its affiliated entities would repurchase Merrill Lynch's equity position within six months.[2] Any language used by Mr. McMahon 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.

Pursuant to his role as Treasurer, as contrasted with that of a division finance employee, Mr. McMahon did not negotiate the terms and conditions of the transaction with Merrill Lynch. Mr. McMahon recalls discussing the proposed structure with Mr. DeSpain and reiterating that there could be no ongoing financial obligation or risk associated with the transaction, and that a sale must be a sale. After his initial telephone contact, Mr. McMahon did not have any further involvement with the transaction until December 23, 1999.

Mr. McMahon was on vacation from Saturday, December 18, 1999 through Monday, January 3, 2000. *See Payroll Records for Periods Ending 1/15/00 and 1/31/00, attached as*

[2] Neither is Robert Furst's internal Merrill Lynch memorandum, dated December 21, 1999, inconsistent with Mr. McMahon's representation. That memorandum states only that Enron "believe[s] our hold will be for less than six months." It certainly does not rise to the level of a guarantee.

Exhibit J;[3] *see also Email from Debra Korkmas to Katrina Jackiewicz dated December 20, 1999, attached as Exhibit K.* Mr. McMahon was informed during his vacation that Mr. McMahon was required to participate in the December 23, 1999 telephone conference with Merrill Lynch because he had made the initial contact with Merrill Lynch. [4]

Mr. McMahon was not involved in negotiating any terms and conditions for the Nigerian barge transaction. Moreover, none of the emails among the Nigerian barge transaction team describing the changing structure of the transaction were copied to Mr. McMahon. Mr. McMahon never reviewed the draft letter agreement from Merrill Lynch addressed to Mr. McMahon. In short, Mr. McMahon had no involvement or role in the negotiation or structuring of the transaction, and did not review any documentation related to such.

As discussed further below, the telephone conference to discuss the Nigerian barge transaction was held at 9:30 a.m. CST on December 23, 1999.

B. Mr. Fastow's Relationship with Merrill Lynch

In late 1999, Mr. Fastow, on his own initiative and without Mr. McMahon's participation, began encouraging banks to invest in LJM2. As a result, Mr. McMahon began receiving complaints from banks with whom Mr. McMahon maintained relationships on behalf of Enron that Mr. Fastow had requested the banks to invest in LJM2. Several of these banks expressed concern that their failure to invest in LJM2 would result in a loss of Enron's business. Mr. McMahon's subordinates also reported receiving similar telephone calls from banks regarding this issue. Several banks informed Mr. McMahon that they had an express commitment from Mr. Fastow that if they invested in LJM2 they would receive certain future Enron fee-generating business.

Mr. McMahon approached Mr. Fastow on multiple occasions to express his opinion that Mr. Fastow's involvement with these banks in this manner was improper. Mr. Fastow denied that he was coercing banks to invest in LJM2. As Mr. McMahon indicated to Mr. Fastow, however, the problem was not if Mr. Fastow requested the banks directly to invest, but that Mr. Fastow's contact with banks understandably created a presumption that if they failed to invest, they would correspondingly lose Enron's business. Mr. McMahon thus reiterated that Mr. Fastow's requests created a conflict, and that they were improper.

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[3] The attached payroll records, for periods ending January 15, 2000 and January 31, 2000 reflect the holiday and vacation pay for the pay periods ending December 31, 1999 and January 15, 2000, respectively.

[4] Mr. McMahon certainly did not inform Mr. Fastow that the conversation with Merrill Lynch needed to occur, nor did he prepare him for the call.

It was within this framework that Merrill Lynch, beginning in late 1999, began serving as a private placement agent for Mr. Fastow's LJM2. Merrill Lynch was very interested in continuing its relationship with Enron, and in particular, with Mr. Fastow. On December 4, 1999, Schuyler Tilney, a Merrill Lynch managing director, indicated to Dan Bayly, the Merrill Lynch head of investment banking, that "Andy [Fastow] is a very important relationship for the firm and is principally responsible for Merrill Lynch's participation in this project. As you know, Merrill Lynch was nearly excluded from Enron's $750 million common stock offering earlier this year, so this mandate is critical to re-igniting our relationship with Enron." *See Memorandum from Schuyler Tilney to Dan Bayly dated December 3, 1998, attached as Exhibit L.*

In its role as the private placement agent for LJM2, Merrill Lynch raised money on behalf of LJM2, and received fees for services rendered. Specifically, Merrill Lynch raised approximately $265 million on behalf of LJM2, and received more than $3 million in fees. Ultimately, approximately 100 Merrill Lynch employees personally invested roughly $16 million in LJM2.

On December 21, 1999, Mr. Fastow wrote to Mr. Tilney at Merrill Lynch and indicated to him that LJM2 had closed, and thanked Mr. Tilney for "bringing in the Merrill Lynch investment." Mr. Fastow further indicated that it was due to the latter's "efforts and assurances." *See Email from Andrew S. Fastow to Schuyler Tilney dated December 21, 1999, attached as Exhibit M.*

Although Mr. McMahon knew generally about Merrill Lynch's role as a private placement agent, he did not know that many Merrill Lynch employees had invested in LJM2 at the time of the December 23, 1999 telephone conference call regarding the Nigerian barge transaction.

C. December 23, 1999 Conference Call

The scheduled 9:30 a.m. conference call included individuals from both Merrill Lynch and Enron, including Mr. McMahon. Because Mr. McMahon was on vacation, Mr. McMahon participated in the conference call from his home. Mr. McMahon did not have any responsibility for, or involvement in, setting up the conference call or agenda. *See Email from Dan Boyle to Jeffrey McMahon dated December 22, 1999, attached as Exhibit N.* Mr. McMahon did not prepare Andrew Fastow for the conference call. Mr. McMahon did not speak on the conference call other than to acknowledge he was indeed on the conference call.

Any language used by Mr. Fastow in the 9:30 a.m. conference with Merrill Lynch was, of course, directed to his fund's private placement agent and his investors in LJM2. None of this language, by which Mr. Fastow communicated anything with respect to Enron's position regarding the Nigerian barge equity, translated to Mr. McMahon as a commitment for Enron or any of its affiliated entities to repurchase Merrill Lynch's interests. Indeed, Mr. McMahon's position on any sales with ongoing obligations or risks was well-known throughout the company, as demonstrated by the fact that he objected to such arrangements both prior and subsequent to the December 23, 1999 conference call. Mr. McMahon would not have concurred with a transaction in which Enron committed to ongoing obligations or risks, as this would have affected the balance sheet and the company's liquidity position with which he was concerned.

In sum, any language used prior to or during the conference call, directly or indirectly, was not understood by Mr. McMahon to entail a commitment by Enron and its affiliated companies to repurchase Merrill Lynch's interest. Quite simply, Mr. McMahon did not make any commitment to Merrill Lynch or to any other entity, at any time, that Enron or any of its affiliated entities would purchase Merrill Lynch's equity position within six months, nor was he part of, directly or indirectly, anyone else making such a commitment.

Mr. McMahon did not have any role with respect to the transaction after the conference call, contrary to Mr. Kopper's testimony that Mr. McMahon was responsible for closing the deal. There are no documents to support such an allegation, and because Mr. McMahon did not return to Enron during his vacation, he could not have "closed the deal."

III. Mr. McMahon's Removal as Treasurer

Mr. McMahon objected to LJM2 from its formation, and, as noted above, specifically objected to Mr. Fastow's attempt to approach banks to request that they invest in LJM2. Mr. McMahon further objected to Mr. Fastow, Mr. Skilling, and others regarding the conflict of interest presented by LJM2's organization and Mr. Fastow's role as its General Partner.

In general, Mr. McMahon believed that Mr. Fastow's role in LJM2 created a conflict of interest within Enron. The conflict arose because employees under Mr. McMahon's supervision negotiated on Enron's behalf with other Enron employees representing LJM2 on the value of assets to be sold. Enron employees under Mr. McMahon's supervision were instructed to obtain the most advantageous deal for Enron, and Mr. McMahon believed that Enron employees under Mr. Fastow's supervision were instructed the same vis-à-vis LJM2. Since Mr. Fastow made decisions regarding salary and bonuses for employees supervised by Mr. McMahon,

Mr. McMahon was concerned that employees under his supervision would not negotiate as vigorously with those employees representing LJM2 because of Mr. Fastow's involvement.

On March 10, 2000, Mr. McMahon spoke to Rob Furst, managing director at Merrill Lynch, regarding Merrill Lynch's relationship with LJM2. Mr. Furst, who one of the former Merrill Lynch employees identified as Enron's "yes" man, queried whether Mr. McMahon believed that it was a conflict of interest for Merrill employees to invest in LJM2. Mr. McMahon firmly indicated his opinion that such an investment clearly constituted an inherent, and irreparable, conflict of interest.

Mr. Fastow then approached Mr. McMahon and indicated that it was improper for Mr. McMahon to convey to Merrill Lynch that it was a conflict of interest for Merrill Lynch employees to invest in LJM2. On March 15, 2000, Mr. McMahon confronted Mr. Fastow one final time with respect to the conflicts of interest between LJM2 and Enron. On March 16, 2000, Mr. McMahon met with Mr. Skilling to address his concerns regarding Mr. Fastow and the conflict of interest presented by Mr. Fastow's involvement in, and the organization of, LJM2. Mr. Fastow subsequently confronted Mr. McMahon about the fact that Mr. McMahon had relayed his concerns to Mr. Fastow's superior. Mr. Fastow indicated that they could no longer work together.

Shortly after these confrontations, Mr. McMahon was offered a position as the Chief Commercial Officer at a start-up business within Enron, Enron Networks. Mr. McMahon received identical compensation. In this new position, Mr. McMahon reported to Greg Whalley, the Chief Executive Officer. Ben Glisan,[5] Mr. Fastow's limited partner in the Southampton transaction and a principal of LJM2, who had previously been selected to transfer to a position in London, was appointed to replace Mr. McMahon in his role as Treasurer and Senior Vice President, despite the fact that Mr. McMahon had recommended three highly qualified individuals for the position: William Brown, Ray Bowen, and Mike Jakubik. Mr. Glisan would later approve of the purchase of Merrill Lynch's equity in the Nigerian barges in June 2000.

It is undisputed that Mr. McMahon was not part of the Fastow "group." He was not an investor in LJM1 or LJM2 or a partner in the Southampton transaction. His dispute with Mr. Fastow was well-known throughout the organization.

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[5] Mr. McMahon does not have any recollection of the alleged conversation as testified to by Mr. Glisan during the trial of *United States v. Daniel Bayly, et al.* In fact, if Mr. Glisan is to be believed, the alleged conversation occurred when Mr. McMahon was on vacation. It should be noted that Mr. Glisan was not part of the December 23, 1999 telephone conversation, nor did he assume the role of Treasurer until well after the transaction was completed.

IV. Conclusion

As noted at the outset of this letter, this document should not be interpreted as constituting the entirety of the defenses Mr. McMahon would present at a trial of this matter, but is directed to addressing partial reasoning behind why Mr. McMahon should not be indicted with respect to the Nigerian barges issue. As such, the summary below does not constitute a summary of all of Mr. McMahon's arguments.

- Mr. McMahon was not part of the Fastow "group." He was not an investor in any of Mr. Fastow's partnerships, and was removed by Mr. Fastow as Treasurer when he questioned their legitimacy. His adversarial relationship with Mr. Fastow was well-known throughout the company.

- Mr. McMahon, in his role as Treasurer, was interested in the liquidity of the company, and had made it an express policy that the divisions could not obligate Enron to repurchases that would affect the cash flow of the company.

- Because of Mr. McMahon's policy concerning liquidity, Mr. DeSpain informed Mr. Boyle, with a copy to Mr. McMahon that "buying [the equity] back next year is not an option." This email, in light of all these facts, can have only one reasonable meaning and, in fact, its recipients clearly understood that meaning: "[b]ased on the attached, it appears that Enron will have NO ownership control after selldown."

- Mr. McMahon was uniquely out-of-the-loop on the Nigerian barges transaction. He was only responsible for the initial contact with Merrill Lynch, and did not further participate in any negotiations with Merrill Lynch, nor was he involved in any discussions with other Enron personnel regarding the strategy or implementation of the transaction.

- Mr. McMahon was on vacation and out of the office from December 18, 1999 through January 3, 2000, and did not review any documents concerning the transaction. Mr. McMahon's last involvement on the Nigerian barge issue was the telephone conference call, which he participated in from his home while on vacation.

- It is undisputed that Mr. McMahon did not speak on the conference call, other than to introduce himself. Any language used by Mr. Fastow to Merrill Lynch by which he communicated anything with respect to Enron's position regarding the equity did not

translate to Mr. McMahon as a commitment for Enron or any of its affiliated entities to repurchase Merrill Lynch's interests.

- Mr. McMahon did not make any commitment to Merrill Lynch, at any time, that Enron or any of its affiliated entities would repurchase Merrill Lynch's equity position within six months, nor was he part of, directly or indirectly, anyone else making such a commitment.

For these, and other reasons, Mr. McMahon should not be indicted.

Sincerely,

William D. Dolan, III

Attachments
cc: Andrew Weissman, Esquire
Sean Berkowitz, Esquire

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EXHIBIT M

C O N F I D E N T I A L M E M O R A N D U M

To:	John H. Loesch, Branch Chief Securities and Exchange Commission
From:	Tom Kirkendall, Counsel for Jeffrey McMahon
Re:	Jeffrey McMahon – In the Matter of Enron Corp., (HO-09350)
Date:	July 28, 2006

I. Introduction

This memorandum is a privileged and confidential communication for the purpose of facilitating settlement negotiations in the above-captioned matter between the Securities and Exchange Commission ("SEC") and Jeffrey McMahon. In a Wells notice dated October 25, 2005, the SEC has raised certain allegations of violations of securities laws by Mr. McMahon in connection with his actions while employed by Enron Corporation ("Enron").

Due to the pendency of the criminal investigation into Enron-related matters, Mr. McMahon has not been able to defend himself fully against allegations of wrongdoing without risk of waiving his privilege against self-incrimination under the Fifth Amendment of the U.S. Constitution. In view of the delays often involved in the disposition of an SEC enforcement action during the pendency of a parallel criminal investigation, this privileged and confidential memorandum is submitted on Mr. McMahon's behalf to facilitate settlement of the enforcement action. Nothing in this memorandum constitutes — nor should be construed as — a waiver of Mr. McMahon's privilege against self-incrimination.

Mr. McMahon was an exemplary executive while at Enron and conducted himself in accordance with the highest standards of business ethics. His integrity and reputation for honesty was the primary reason that the Enron Board of Directors — when faced in mid-October, 2001 with confidence-shattering disclosures of misconduct and potential illegal activities by former Enron chief financial officer, Andrew Fastow — turned to Mr. McMahon to replace Mr. Fastow as Enron's CFO. Mr. McMahon performed admirably as Enron's CFO and then President during the early stages of the company's chapter 11 case, and was primarily responsible for successfully steering Enron through the chaotic runup to, and early stages of, its bankruptcy case. Not only did Mr. McMahon not violate any securities laws while employed as an Enron executive, he was a vocal proponent within the company for greater disclosure and transparency in the reporting of Enron's finances. Each of Mr. McMahon's undertakings at Enron had a valid business purpose and would be expected of any executive in a Fortune 10 company who has similar responsibilities to those that Mr. McMahon had at Enron.

This memorandum will provide a reasonably detailed overview of Mr. McMahon's position in regard to the SEC's allegations. Documentation corroborating certain portions of Mr. McMahon's positions is available upon request from the undersigned.

II. The Function of the Treasurer's Office within Enron Corporation

A. Overall Responsibilities

Inasmuch as the SEC's allegations of securities law violations pertain primarily to the period in which Mr. McMahon was treasurer of Enron (April, 1998 – March, 2000), it is vitally important to place the role of treasurer of Enron in the context of the allegations. Within the Enron management framework, the treasurer was primarily responsible for three duties:

- Managing Enron's liquidity;
- Managing its capital structure; and
- Coordinating Enron's relationships with its banks and credit rating agencies.

By the late 1990's, Enron was consummating over $20 billion per year in financings on over 100 transactions per year. In so doing, the company maintained commercial relationships with over 120 banks around the world to facilitate those transactions. These transactions were coordinated through the treasurer's office because, without such coordination, financial institutions would cherry-pick the most lucrative transactions and ignore the lower-valued transactions.

However, the coordination of Enron's such transactions with the company's financial institutions does not mean that the treasurer's office had any meaningful role in the structuring or execution of the transactions. Enron operated under a decentralized management model in which financings were designed and executed in each division outside the control or oversight of the treasurer's office. The only transactions over which the treasurer had such authority were those proposed by Enron's corporate group.

In coordinating financings while Mr. McMahon was treasurer, Enron's treasury staff would first identify an "available financial institution" — i.e., one of the 120 institutions with which Enron had a relationship that was not currently working on another Enron financing and had the capability to lead and close a proposed transaction. Then, Mr. McMahon would generally place an introductory telephone call to such a financial institution and request that the institution review a proposed transaction to determine its level of interest. Occasionally, an Enron division finance employee might brief Mr. McMahon on the basic terms of the proposed transaction so that he could communicate them to the financial institution. However, at the conclusion of each such introductory call, Mr. McMahon would instruct the institution's representative to communicate thereafter with the division finance employee responsible for the transaction. Inasmuch as authority to establish and negotiate terms of a particular transaction — and even to bind the company — was held by the division management working on the transaction, Mr. McMahon lacked authority over negotiation or consummation of the transaction.

B. Emphasis on Liquidity

Mr. McMahon's principal goal as Enron's treasurer was to increase the company's liquidity. At the time of Mr. McMahon's appointment as Enron's treasurer, the company was embarking on a series of acquisitions that, coupled with the organic growth of several new divisions, required

commensurate growth in liquidity levels. Accordingly, Mr. McMahon established an important treasury policy in 1999 with respect to any transaction that contained continuing company obligations and risks. Inasmuch as any transaction structure that required Enron to repurchase any portion of assets negatively affected Enron's balance sheet and liquidity, Mr. McMahon implemented a policy that became well-known throughout Enron's management that he would not approve any disposition of an asset in a transaction in which Enron or its related entities retained a commitment to repurchase or refinance the asset. In fact, Mr. McMahon established a well-documented pattern of objecting to transactions in which Enron would incur ongoing obligations or risks because of the detrimental impact that such transactions had on Enron's capital structure and future liquidity. This policy ultimately put Mr. McMahon on a collision course with his direct superior within Enron's management, Mr. Fastow. While Mr. McMahon was focused on Enron's liquidity position, Mr. Fastow was not particularly supportive of Mr. McMahon's efforts in that regard because he believed that sufficient liquidity resources would always be readily available to the company.

C. Accounting Responsibility and Qualifications

An important point of clarification regarding the SEC's allegations against Mr. McMahon is that — with the exception of the roughly one month period that he served as Enron CFO before commencement of Enron's chapter 11 case — Mr. McMahon had no responsibility for Enron's accounting or financial disclosure decisions. Rather, Enron's accounting department under the direction of the chief accounting officer was responsible for those decisions. Indeed, Mr. McMahon never reported to the chief accounting officer, nor did the chief accounting officer ever report to Mr. McMahon. Inasmuch as accounting and financial disclosure decisions were not within the purview of his responsibilities at Enron, Mr. McMahon allowed his Certified Public Accounting certificate to expire in 1996 and was not even current on the relevant accounting or disclosure rules promulgated by the SEC or the FASB during his tenure as Enron treasurer and thereafter.

III. The Nigerian Barge Transaction

A. Overview

Due to the manner in which the Enron Task Force pursued criminal indictments in regard to this matter, the truth of Mr. McMahon's involvement in this transaction has been misrepresented by Messrs. Fastow and Glisan, both of whom have strong incentive to accuse others falsely in an effort to minimize their prison sentences for crimes in which they have admitted participating. Mr. McMahon was involved in no wrongdoing in regard to the Nigerian Barge transaction, had nominal involvement in only the early discussions of the transaction, had no involvement in the structuring, negotiation or execution of the transaction and has no personal knowledge of any wrongdoing having taken place in regard to the transaction.

The following sets forth Mr. McMahon's understanding of the Nigerian Barge transaction. In June 1999, Enron purchased nine power barges for $56.6 million from the Philippine government. Each of the barges — three of which were located off the coast of Nigeria ("the Nigerian barges") — operated as floating electricity generators. Enron contributed the Nigerian barges to Enron Nigeria Barge Limited ("ENBL") in exchange for 100% of the company's stock, with Enron's APACHI division undertaking management responsibility for the barges.

The projected cash flow from the barges was to emanate from a contract with the Nigerian government to provide electricity to the country. Enron estimated cash flow of $39 million in the first three years of the barges' operation. As a result, APACHI division personnel undertook an effort to monetize a portion of the cash flow and recognize a gain by attempting to sell an equity stake in ENBL before December 31, 1999.

In September 1999, APACHI attempted to arrange a transaction with Marubeni under which Marubeni would purchase all of the equity in ENBL. However, by early December 1999, it had become apparent to APACHI management that the proposed sale of ENBL equity to Marubeni could not be completed by year-end. Inasmuch as APACHI management wanted to monetize the cash flow from the Nigerian barges during the fourth quarter of 1999, APACHI considered a number of alternative financing structures, including a proposed sale to LJM2, one of the special purpose entities controlled by Mr. Fastow. LJM2 reviewed the transaction in December, 1999, but passed on it due to risk concerns.

In mid-December 1999, APACHI finance employees approached Mr. McMahon, in his role as the central coordinator of Enron's relationships with banking institutions, regarding his recommendation of a financial institution that might be capable of closing a monetization transaction involving the barges by year-end 1999. Merrill Lynch had made it known to Mr. McMahon and others at Enron that it was seeking an increased and more profitable relationship with the company, and Merrill Lynch at the time was not working on an Enron transaction. Consequently, Enron's treasury department recommended that Merrill Lynch be approached with regard to the Nigerian barge transaction, although it is certainly possible that other financial institutions were contacted by treasury department personnel to explore their interest in the proposed transaction.

At the request of APACHI management, Mr. McMahon contacted Merrill Lynch to introduce the transaction and request that they contact APACHI finance personnel directly to negotiate the terms and conditions of the deal. During this initial contact, Mr. McMahon outlined the general parameters of the proposed transaction to Merrill Lynch as APACHI personnel had explained it for the purpose of encouraging Merrill Lynch to consider undertaking the risk of the transaction. However, at no time did Mr. McMahon say anything during this call (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. In fact, Mr. McMahon recalls discussing the proposed transaction with his assistant treasurer, Timothy DeSpain, at the time and reiterating his well-known position that Enron could not have any ongoing financial obligation or risk associated with the sale of equity to Merrill Lynch because the company could not afford the negative impact on the company's balance sheet and its liquidity position arising from such an ongoing obligation. APACHI personnel involved in the transaction understood Mr. McMahon's position on this issue.

As noted above, after the introductory telephone call to Merrill Lynch, Mr. McMahon had no involvement in structuring or negotiating the terms and conditions of the transaction within Enron or with Merrill Lynch. That lack of involvement is reflected by the fact that Mr. McMahon was not included as a recipient of any of the emails or draft documents exchanged between the Enron or Merrill Lynch Nigerian barge transaction teams regarding the negotiation of the transaction, nor did

Mr. McMahon even receive the draft letter agreement from Merrill Lynch that was initially addressed to Mr. McMahon.

B. Mr. Fastow's Relationship with Merrill Lynch

Despite Mr. McMahon's protests, Mr. Fastow by late 1999 began encouraging financial institutions that conducted business with Enron to invest in LJM2, one of the special purpose entities that Mr. Fastow personally controlled. As a result, Mr. McMahon began receiving complaints from many of Enron's financial institutions that Mr. Fastow had pressured the institutions to invest in LJM2 with the implied threat that a refusal to invest in LJM2 would result in a loss of business from Enron. Mr. McMahon's subordinates in the treasury department also reported receiving similar telephone calls from financial institutions regarding this issue. To make matters worse, in Mr. McMahon's view, several institutions revealed that they had received an express commitment from Mr. Fastow that the institutions would receive certain future Enron fee-generating business in return for investing in LJM2.

Mr. McMahon advised Mr. Fastow on multiple occasions that such pressuring tactics and *quid pro quo* arrangements with Enron's financial institutions were highly improper and should cease immediately. Mr. Fastow denied that he was coercing banks to invest in LJM2 or that he had offered *quid pro quo* arrangements with certain of Enron's financial institutions.

It was under this environment that Merrill Lynch began in late 1999 to serve as a private placement agent for LJM2. In that role, Merrill Lynch raised money on behalf of LJM2 and received fees for providing that service. It is Mr. McMahon's understanding that Merrill Lynch raised approximately $265 million on behalf of LJM2 and received more than $3 million in fees. Moreover, approximately 100 Merrill Lynch employees personally invested roughly $16 million in LJM2. Although Mr. McMahon knew generally about Merrill Lynch's role as a private placement agent for LJM2, he did not know that many Merrill Lynch employees had invested in LJM2 at the time of the December 23, 1999 telephone conference call regarding the Nigerian barge transaction.

C. December 23, 1999 Conference Call

After his introductory telephone contact with Merrill Lynch, the only other involvement Mr. McMahon had in regard to the Nigerian Barge transaction occurred when he learned (while on vacation) that Mr. Fastow had requested his participation on a conference call with Merrill Lynch representatives at 9:30 a.m. on December 23rd. Mr. Fastow apparently wanted Mr. McMahon to participate in the conference call because Mr. McMahon had made the introductory telephone call to Merrill Lynch.

The December 23, 1999 conference call was preceded by a scheduled conference call between Mr. Fastow and some of the Merrill Lynch personnel (including Merrill Lynch executive Schuler Tilney) regarding LJM2, which had recently closed with more than $100 million invested. Mr. McMahon neither knew about, nor participated in, the conference call between Mr. Fastow and the Merrill Lynch executives regarding LJM2. The 9:30 a.m. conference call regarding the Nigerian Barge transaction included other executives from both Merrill Lynch and Enron, including Mr. McMahon, but also included a number of Merrill Lynch executives who had participated in the prior 9:00 a.m. call.

Inasmuch as he was on vacation, Mr. McMahon participated in the conference call from his home, but had no responsibility for, or involvement in, setting up the conference call or its agenda. Mr. McMahon did not speak during the conference call other than to acknowledge during the roll call at the outset that he was on the conference call.

One of the issues discussed in the conference call was that the risk of ownership of the equity interest related to the barges was not the type of risk that Merrill Lynch desired to hold for a long term. Mr. Fastow attempted to reassure 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. However, at no time during the call did Mr. Fastow ever suggest that Enron would "repurchase" the interest from Merrill Lynch or "guarantee" that Merrill Lynch would not incur risk of loss associated with the investment. Inasmuch as Mr. McMahon was well-known within Enron as objecting strenuously to sales of assets that retained ongoing company obligations, he would have remembered any such statements by Mr. Fastow during the conference call and would have objected to such a proposed term of the transaction. Rather, as is normal in many commercial investments, Mr. Fastow, in his capacity as Enron CFO, simply reassured a somewhat reluctant investor in Merrill Lynch that the risk of the proposed investment was reasonable given the potential return on the investment.

After the December 23rd conference call, Mr. McMahon had no further involvement in the Nigerian Barge transaction. The transaction was closed and contained the usual contractual provisions that rendered void any prior oral promise between the parties and required that the parties could rely only on the written representations and obligations contained in the agreements. Under those agreements, Enron had no continuing legal obligation regarding the equity interest sold to Merrill Lynch. 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.

Finally, Mr. McMahon has 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, Mr. McMahon has concluded that both men testified falsely regarding Mr. McMahon's involvement in the transaction.

D. Mr. McMahon's Removal as Treasurer

As noted above, Mr. McMahon objected to the formation of LJM2 and specifically objected to Mr. Fastow's overtures to Enron's financial institutions to invest in LJM2. Mr. McMahon further objected to Mr. Fastow, Mr. Skilling and other Enron management personnel regarding the conflict of interest between Mr. Fastow's role as the General Partner of LJM2 and his duties as Enron's chief financial officer.

In practice, the conflict of interest manifested itself when employees under Mr. McMahon's supervision negotiated on Enron's behalf over the value of assets to be sold to LJM2 with other Enron employees who were representing LJM2. Enron employees under Mr. McMahon's supervision were instructed to obtain the most advantageous deal for Enron, while Enron employees under Mr. Fastow's supervision were instructed the same *vis-à-vis* LJM2. Inasmuch as Mr. Fastow, in his capacity of Mr. McMahon's direct supervisor, made decisions regarding salary and bonuses

for Enron employees who Mr. McMahon supervised, Mr. McMahon was confronted with the untenable prospect that employees under his supervision would not negotiate vigorously on behalf of Enron in regard to assets to be sold to LJM2 out of fear that a tough negotiating posture would result in retribution from Mr. Fastow in connection with Enron's compensation process. As a result of Mr. McMahon's criticism of Mr. Fastow's conflict of interest with regard to LJM2, Mr. McMahon's relationship with Mr. Fastow was increasingly strained during the latter part of 1999 and the beginning of 2000.

At the same time, Mr. Fastow altered Mr. Glisan's employment track at Enron. Mr. Glisan, who was a subordinate of Mr. Kopper in Enron's Global Finance Department, had been slated to become the treasurer of Enron Europe and transferred to London, England in February 2000. Mr. McMahon had arranged this transfer of Mr. Glisan with the division head of Enron Europe and Mr. Fastow. However, on February 8, 2000, Mr. McMahon learned that Mr. Fastow had vetoed Mr. Glisan's transfer with no explanation, which — given Mr. Glisan's employment track at Enron — was highly unusual. Unbeknownst to Mr. McMahon and most others at Enron at the time, Mr. Fastow was contemporaneously arranging Mr. Glisan's $5,000 investment in Southampton, L.P. that ultimately generated over a $1 million payment to Mr. Glisan about two months later. Mr. Glisan did not disclose that arrangement to Mr. McMahon until early November, 2001, at which time Mr. Glisan was fired for failing to disclose the investment when the then newly-appointed CFO Mr. McMahon asked him whether he was involved in any such investments about a week earlier.

On March 10, 2000, Rob Furst, managing director at Merrill Lynch, spoke with Mr. McMahon by telephone regarding Merrill Lynch's relationship with LJM2. Mr. Furst asked Mr. McMahon on whether Mr. McMahon believed that it was a conflict of interest for Merrill employees to invest in LJM2. Mr. McMahon firmly responded to Mr. Furst that, in his opinion, such an investment clearly constituted an irreparable conflict of interest between Merrill Lynch and Enron.

Subsequently, Mr. Fastow contacted Mr. McMahon and told him that it was improper for Mr. McMahon to have told Mr. Furst that it was a conflict of interest between Merrill Lynch and Enron for Merrill Lynch employees to invest in LJM2. On March 15, 2000, Mr. McMahon again confronted Mr. Fastow with respect to the conflicts of interest between LJM2 and Enron. Having gotten nowhere with Mr. Fastow on that issue, Mr. McMahon met with Enron chief executive officer Jeffrey Skilling on March 16, 2000 to address his concerns regarding Mr. Fastow and the conflict of interest between Enron, LJM2 and Enron's financial institutions investing in LJM2. Shortly after that meeting, Mr. Fastow angrily confronted Mr. McMahon about Mr. McMahon's decision to express his objections directly to Mr. Skilling and advised Mr. McMahon that the two of them could no longer work together.

Shortly thereafter, Mr. McMahon was transferred to a position as the chief commercial officer at a start-up business within Enron called Enron Networks. In this new position, Mr. McMahon reported to Greg Whalley, the chief executive officer of Enron Networks. In the meantime, Mr. Fastow rejected Mr. McMahon's recommendations on the company executives most qualified to replace him as treasurer and appointed Mr. Glisan as Enron's treasurer in March, 2000. Mr. Glisan would later approve LJM2's purchase of Merrill Lynch's equity interest in the Nigerian barges in June 2000.

IV. Rating Agency Relationship

A. General

From the outset of his appointment as Enron's treasurer during the second quarter of 1998, Mr. McMahon was Enron management's main proponent of *increased* disclosure to the rating agencies. Upon becoming Enron's treasurer, rating agencies personnel advised Mr. McMahon that Enron's communications with the rating agencies was poor, so one of Mr. McMahon's first tasks as treasurer was to increase rating agency access to key Enron personnel. Mr. McMahon would typically meet with the rating agencies two times per year for approximately one hour each meeting and that was the primary face-to-face contact that Mr. McMahon had with the rating agencies.

B. Steps Taken to Increase Communication and Disclosure

Mr. McMahon commenced several initiatives to improve communication and education about Enron with the rating agencies. First, he assigned Mr. Despain, Enron's assistant treasurer, as the primary Enron contact for the rating agencies with the primary responsibility for keeping the rating agencies completely informed and avoiding surprises regarding Enron's financial matters. As a result, Mr. Despain communicated with the rating agency analysts on a daily basis on a variety of financial and business matters. In so doing, Mr. McMahon encouraged Mr. Despain to provide the rating agencies with the most accurate information available and to direct the rating agency analysts to the particular Enron employees who were experts on specific questions regarding Enron's finances that Mr. Despain could not answer. In fact, under Mr. McMahon's direction, Enron even began to send the rating agency analysts actual draft transaction documents on certain transactions to obtain their comments and/or concerns on such transactions before they were actually consummated.

Secondly, Mr. McMahon provided an "open door" policy directly to his office if the rating agency analysts wanted to speak to him directly. This communication avenue was frequently used by the Moodys analyst in particular, but Mr. McMahon encouraged all the rating agency analysts to call him directly if they had a question regarding Enron's finances that Mr. Despain could not answer.

Thirdly, Mr. McMahon designed and was the main advocate for the inclusion of the unaudited "credit footnote" to Enron's 1999 and 2000 Form 10-K's, which consolidated many potentially confusing credit items in one easy-to-read footnote to the financial statements (Mr. Fastow objected to the footnote). Although the footnote was for informational purposes to the credit community and was not a GAAP disclosure, both Moodys and Standard and Poors analysts considered the footnote to be a template for other companies in the industry to follow in providing similar information in their financial statements.

Finally, Mr. McMahon changed the content of the annual credit conference that Enron hosted to include detailed discussions of the company's financial position as well as providing a road map to the financial statements. Prior conferences had merely involved a restatement of Enron's business objectives and contained little or no substantive financial discussion. Over 200 analysts attended those meetings, which included a comprehensive question-and-answer period that — for the first

time in the history of such conferences at Enron — provided a forum for *any* credit analyst to ask questions regarding Enron's finances.

C. Rating Agency Procedures

As with their review of most public companies, the rating agencies' analysis of Enron began with an internal review of the published financial statements of the company. In fact, all rating agencies issue "shadow" ratings on many companies based solely on the published financial statements without any interaction with management at all. Thus, although obtaining additional information from a company is helpful to facilitate a more accurate rating of the company, the rating agencies do not in all cases require such supplemental information before issuing a rating on a company. Moreover, given that the rating agency evaluation process for public companies is proprietary and confidential, most companies focus their presentations to the rating agencies on issues that the agencies have previously "flagged" as important to their process rather than attempting to guess what issues might be important to the agencies.

In Enron's case, the rating agencies' initial review of the published financial statements would typically generate information requests to Enron to assist in their analysis and Enron would provide this typically non-public information to the rating agencies in response to these requests. Moreover, the rating agencies were provided general business strategy information — division budgets, product margin information, overall market conditions of each business, acquisition plans, divestiture plans, etc. — that were not typically disclosed in Enron's financial statements.

However, the rating agencies made clear to Mr. McMahon and other members of Enron management that the rating agencies were primarily concerned with three major areas:

- Trading activities and associated controls;
- Unrecorded liabilities such as debt on equity investments that do not appear on the balance sheet; and
- Pending major acquisitions or divestitures.

It is Mr. McMahon's understanding that the foregoing type of focus is consistent with the rating agencies' approach with most large public companies. Inasmuch as he was a treasurer of a Fortune 10 company with responsibility for maintaining relationships with over 120 financial institutions, Mr. McMahon could allocate only a portion of his time to communicating with the rating agencies. So, he focused his discussions on the foregoing issues the rating agencies had identified as most important to their process. The remainder of the issues were the responsibility of the assistant treasurer, Mr. DeSpain.

An example of an issue that the ratings agencies did not emphasize was Enron's recorded transactions. Inasmuch as the rating agencies reviewed the transactions recorded in the company's published financial statements in accordance with rating agency policies, it was not common practice for Enron personnel to discuss transactions with the rating agency analysts that were recorded in the financial statements unless the rating agency analysts raised questions about those recorded transactions.

Finally, inasmuch as he was not involved in the preparation or issuance of Enron's financial statements, Mr. McMahon relied on the Enron Accounting Department to prepare the financial statements in accordance with GAAP and on Enron's outside auditors, Arthur Andersen & Co., to review the published financial statements for accuracy and disclosure matters.

V. Prepay Transactions

A. Business Purpose

Inasmuch as Mr. McMahon and many others who have been subjected to the criminal investigation of Enron-related matters, many key witnesses with regard to Enron's structured financing portfolio were not able to provide valuable information to the Bankruptcy examiner and other investigations into Enron's prepay transactions that would have balanced the often biased information that such investigators received from other sources. That is unfortunate because the one-sided nature of the conclusions that emanated from several of the investigations were often erroneous and, in Mr. McMahon's view, asserted for the main purpose of generating claims against entities involved in those transactions.

Prepaid commodity derivatives ("prepays") are a form of commodity finance in which one firm uses derivatives contracts to achieve the economic equivalent of loaning a commodity to another firm by paying cash upfront and agreeing to delay taking delivery on the commodity. These types of transactions have been used for centuries and are so useful that the World Bank relied on them extensively in the 1980's for much of its development and project finance.

Although certain media sources and plaintiff's lawyers have mischaracterized Enron's prepays as thinly-disguised loans that the company buried in its financial statements to fool investors, that was not the purpose of Enron's use of prepays during Mr. McMahon's tenure as treasurer. Enron maintained a large portfolio of energy trading contracts that were recorded on the balance sheet on a mark-to-market basis. The net balance of this portfolio — the discounted value of future cash flows to be received — was a large asset of the company. As a result, Enron used a variety of techniques to "sell" or "monetize" these future cash flows to generate immediate liquidity from Enron's highly-successful trading operations. In fact, Enron's monetization of prepays was well-known in the business community, reflected by the fact that the rating agencies' annual reports on Enron frequently mentioned the program as the "trading book monetization program." As the trading book grew in size (especially with the California electricity crisis and the advent of Enron Online), the need to monetize the trading book to generate liquidity for the company grew at a similar rate. Thus, consistent with Enron's policy since the 1980's, liquidity was extracted from the company's trading book via prepays and other monetization financings.

B. Technical Structure

As noted above, Enron did not invent prepays as a financing technique, which have been commonly utilized in the U.S. energy sector since at least the 1970s. The basic structure is that a company pays today for a product to be delivered in the future ("prepay"). The party receiving the cash records the cash as a liability (or simply a payable) while the party paying the cash records the transaction as an asset (or simply a receivable).

In Enron's case, receipt of such payment was labeled a "Price Risk Management Liability" ("PRML") and was recorded as a liability on its balance sheet. Also included in the PRML were all "out of the money" energy trading contracts that showed on a mark-to-market basis that Enron would be paying out money under these trades in the future. This is compared to Price Risk Management Assets (or "in the money contracts") in which, on a mark-to-market basis, Enron would be receiving money under the trades in the future.

One way to monetize the net asset in the trading book was to execute a prepay for a portion of the net positive balance in the trading book. As a result, Enron would then use the money received in the future under its trading contracts to pay out the money required under the prepay. In effect, under its prepay program, Enron "sold" or "securitized" the future cash flows of the trading book and recorded them as PRML on the company's balance sheet.

Finally, the finance personnel of certain Enron divisions (primarily Enron North America) structured, negotiated and executed prepay transactions. As with other transactions proposed and consummated by such divisions, Mr. McMahon did not have authority over the structure, negotiation or consummation of prepay transactions. Rather, Mr. McMahon became generally knowledgeable about prepays while fulfilling his responsibility to manage the liquidity requirements of Enron's growing trading operation. Personnel in Enron's divisions were responsible for structuring, negotiating and consummating the actual prepay transactions.

C. Disclosure

Every prepay that Enron executed while Mr. McMahon was treasurer was recorded as a liability on the balance sheet of Enron. All credit analysis of Enron performed under traditionally accepted credit analysis included all of the company's liabilities, which included the prepays. These were not off balance sheet liabilities or liabilities somehow buried in the footnotes. These were recorded liabilities on the face of the balance sheet that would have been included in any reasonable credit analysis of Enron.

Moreover, the rating agencies were fully aware of the Enron monetization program. Both of the major rating agencies reference the program in their reports on Enron, which reflects affirmative disclosure to them. The lead analyst at Standard & Poors testified to Congress that Enron personnel had fully informed him about the prepay program, that he understood the impact on Enron's financial statements, and that such transactions were common in the energy industry. On several occasions, both rating agencies provided public ratings on bonds that third parties issued in which the proceeds were used to execute prepays with Enron. In that regard, the rating agencies performed significant due diligence on the offerings and reviewed the underlying prepay contract with Enron before rating these bond issuances. Consequently, the allegation that the rating agencies were not aware and were not informed of Enron's monetization of its prepays is false.

D. Accounting

On the issue of whether Enron's prepays should have been recorded as debt rather than PRML in Enron's financial statements, Mr. McMahon's reliance on the expertise of the accountants advising Enron on these matters was reasonable. Enron's accounting of the prepays as PRML had been determined years before Mr. McMahon became treasurer and he had no reason to question the legitimacy of that determination. At no time did Mr. McMahon have responsibility, authority or the expertise to determine the appropriate accounting or disclosure for the prepays under either GAAP or SEC regulations.

But the accounting issue does illuminate an important point about the prepays — i.e., neither Mr. McMahon nor Enron had any incentive to misrepresent the prepays as PRML. Other financing techniques were readily available to Enron that would have achieved the same liquidity goal as monetizing prepays. Consequently, if the company's accounting experts had determined that the prepays should have been characterized as debt instead of PRML, then Enron would have simply chosen an alternative financing technique to increase the company's liquidity from trading operations, such as the execution of securitizations of the trading book. Those readily available alternative financing techniques strongly mitigates against the allegation that Enron had an improper purpose in accounting for the prepays as PRML.

E. Statements of Mr. Despain

Mr. McMahon knows that Mr. Despain has made several public statements alleging that Mr. McMahon engaged in wrongdoing with regard to disclosure of prepays while employed as Enron's treasurer. Mr. McMahon has compassion for Mr. Despain and his family, who Mr. McMahon and his family know personally. Mr. McMahon notes that Mr. Despain admitted on the record at the court hearing in which his cooperation agreement was approved that he was taking prescription drugs for depression under the care of a physician. Understandably, Mr. Despain was under immense pressure at the time of these statements.

Mr. McMahon's response to Mr. Despain's allegations in his cooperation agreement are set forth below:

> *Despain allegation*: "From 1999 through the fall of 2001, in my capacity as an Assistant Treasurer, I was directed by my superiors to engage in, and I did engage in, conduct that I recognized was intended to manipulate fraudulently Enron's credit rating . . . "
>
> *Response*: Mr. McMahon never directed Mr. Despain to engage in any conduct to manipulate Enron's credit rating fraudulently or otherwise, and Mr. Despain has to this day never informed Mr. McMahon that he was engaging in any such wrongful conduct while at Enron.
>
> *Despain allegation*: "In communicating with representatives of the rating agencies, I and others at Enron did not truthfully present the financial position and cash flow of the company and omitted to disclose facts necessary to make the disclosures and statements that were made to the rating agencies truthful and not misleading."

Response: Mr. McMahon always truthfully presented Enron's financial information to the rating agencies and utilized the company's audited and published financial statements as the foundation of all financial information that he presented to third parties.

Despain allegation: "I and others told the rating agencies that the cash generated from Enron's trading operations was from the sale or 'monetization' of trading contracts or the future cash flow streams from those contracts. Fundamentally, the agencies were led to believe that Enron was generating cash by selling an asset, when in fact Enron was generating cash by incurring a future obligation that operated as debt."

Response: Mr. McMahon and others disclosed matters relating to Enron's prepay program in a truthful manner, and no rating agency analyst ever expressed to Mr. McMahon any confusion regarding the nature or accounting of the prepay program. As noted above, Standard and Poors' lead analyst testified that Enron kept him informed regarding the purpose of the prepay program and that he considered the transactions common among companies in the energy industry.

Despain allegation: "I was directed by Enron's Treasurers not to reveal to, or discuss with, the credit rating agencies, the nature and extent of the prepay transactions entered into by Enron, and I complied with this direction. I and the Treasurers recognized that if the rating agencies knew about the nature and extent of Enron's prepay transactions, such information would have had a materially negative effect on Enron's credit rating."

Response: In managing communications with the rating agencies, Mr. Despain was directed to refer rating agency analysts' questions to the appropriate Enron personnel with the expertise to answer them. Mr. Despain was not an expert on prepay financings or other matters related to Enron's trading activities. He did not have a finance or accounting degree and, before becoming assistant treasurer, had no experience with trading activities.

As noted above, trading activities and Enron's controls on those activities were of paramount importance to the rating agencies. Consequently, given Mr. Despain's relative lack of experience in such matters, when rating agency analysts asked a technical question to Mr. Despain relating to Enron's prepay program or the trading book that he did not have the expertise to answer, Mr. Despain was directed not to risk getting the answer wrong by attempting to answer the question himself. Rather, he was instructed to refer the analyst to an expert within Enron on the particular aspect of the trading book to which the analyst's question pertained (in fact, Mr. Despain often directed questions regarding the trading book to Richard Buy, Enron's chief risk officer).

Accordingly, far from attempting to keep information from the rating agencies regarding Enron's prepay program, this directive to Mr. Despain was made for the purpose of providing *better* information to the rating agencies regarding the trading

book. At all times during Mr. McMahon's tenure as treasurer, the rating agencies knew about Enron's trading book monetization program and certainly had more than sufficient information — including access to Enron personnel with expertise in regard to the trading book — to understand the nature and extent of that program.

VI. Yosemite

A. Business Purpose

When Mr. McMahon was appointed Enron's treasurer, the company was heavily reliant on the bank markets for most of its financings worldwide. Inasmuch as banks establish fixed credit limits by counter-party, Enron's current and projected growth made it just a matter of time before the company would begin hitting credit limits with its lead banks. Hitting credit limits would result in a reduction of liquidity and an increase in borrowing costs for Enron, so Mr. McMahon designated one of his subordinates in the treasury department (Bill Brown) to investigate the possibility of securitizing bank transactions and issuing bonds into the capital markets, which would effectively shift a portion of Enron's credit exposure from the bank market to the bond market. Such a securitization would free up bank market liquidity for Enron while at the same time opening a syndication market for future company transactions.

B. Technical Structure

To achieve the above-described business purpose, Mr. Brown engaged Citibank, which structured and executed the Yosemite transaction. Yosemite involved the issuance of public-rated bonds into the market backed up by other Enron bank financings and a financial swap that Citibank issued. The structure provided the bondholder (or buyer) a "synthetic" Enron bond under which the bondholder would receive the same recovery as if it owned a typical Enron bond, while enjoying a slightly higher interest rate based on the higher risk of holding a synthetic Enron bond rather than a conventional Enron bond. This parity with Enron bondholders was disclosed in the Yosemite prospectus for Yosemite and it is Mr. McMahon's understanding that Enron's chapter 11 plan treats the Yosemite bondholders on a *pari passu* basis with Enron bondholders.

VII. Nahanni

A. Business Purpose

Consistent with his emphasis on generating liquidity while Enron's treasurer, Mr. McMahon recognized that another key source of liquidity was from the planned sale of "merchant assets" on Enron's balance sheet. Each Enron operating division was responsible for selling a specific amount of the division's merchant assets annually, but the divisions tended to fall short of achieving their target. Consequently, during the summer of 1999, Mr. McMahon directed one of his subordinates (again, Bill Brown) to investigate other alternatives that would generate liquidity to Enron should the divisions fall short of their merchant asset sales target at year end. Nahanni was one of the transactions that was recommended to Mr. McMahon as one of those alternatives.

Nahanni was a proprietary Citigroup product that provided Enron with merchant assets using a minority interest structure. Citigroup pitched the product to Enron as essentially an insurance

policy to protect Enron against a possible shortfall in the divisions meeting their merchant asset sales targets. Should the divisions fall short of their target, Enron could sell an equivalent amount of Nahanni merchant assets (treasury securities) to generate the liquidity gap resulting from the divisions' shortfall in meeting its merchant asset sales targets.

B. Antifraud Protection

Inasmuch as a part of Citibank's promotion of the Nahanni structure to Enron was that it had been thoroughly reviewed and approved by the bank's compliance department, Mr. McMahon had no reason to question the legality of the transaction structure. Although Citibank's Elliott Conway (Citibank officer in charge of structured products division) pitched the structure as a unique and confidential Citibank product, he emphasized that the structure was popular with other Citibank customers and would become a core product of other financial institutions if disclosed to them. Similarly, the integrity of the entities involved in the transaction — Citibank, Westdeutsche Landesbank, Trust Company of the West, Ambac, Jones, Day, Sherman and Sterling, Potter, Anderson, Arthur Andersen, Enron's in-house legal department and Vinson & Elkins — added credibility to the validity of the structure. Finally, attorneys from both sides of the transaction reviewed all of the transaction documents and signed off on the underlying nature of the transaction — i.e., insurance protection against a target shortfall. No objection was ever raised with Mr. McMahon until well after the commencement of the Enron bankruptcy case that the Nahanni structure might have violated securities laws and/or violate applicable accounting rules.

C. Accounting Matters

As noted above, during practically his entire tenure at Enron, Mr. McMahon was not responsible for accounting decisions or which disclosures were to be made in the financial statements of Enron. The responsibility for financial reporting to the SEC was that of the Enron Accounting Department, which was advised by Arthur Andersen & Co. Mr. McMahon simply was not involved in those processes until he was appointed as Enron's CFO approximately a month before the commencement of Enron's chapter 11 case, and the press of other emergency duties at that time necessitated that his involvement in such processes remain minimal.

D. Rating Agency Knowledge

As noted above in regard to the rating agencies procedures with respect to Enron, the rating agencies reviewed the company's financial statements on a quarterly and annual basis, and were encouraged to ask questions of Enron personnel about the financial statements and related disclosures. Nahanni was disclosed in Footnote 8 to the 1999 and 2000 Form 10-K and both Standard and Poors and Moodys were copied on several legal opinions in December, 1999 relating to the Nahanni transaction structure. To the best of Mr. McMahon's knowledge, the rating agencies raised no questions with anyone at Enron relating to these disclosures or Nahanni.

VIII. Statements in Late 2001 as CFO

Mr. McMahon was appointed CFO on October 24, 2001 after Mr. Fastow was fired by the Enron Board of Directors. Prior to that date, Mr. McMahon had not been involved in Enron's financial matters since March, 2000, when he was removed as the company's treasurer. Whatever public statements Mr. McMahon made during that late 2001 time frame shortly before the company commenced its chapter 11 case were made in good faith based on his limited knowledge of Enron's financial condition at the time.

At that time, Enron had a liquidity crisis that was changing from minute to minute and Mr. McMahon inherited a financial situation from Messrs. Fastow and Glisan that had not been fully disclosed to the company's personnel and Board of Directors, much less Mr. McMahon. Indeed, Messrs. Fastow and Glisan made statements in senior management meetings as late as days before Mr. McMahon was appointed treasurer that the financial condition of Enron was "the best it has ever been" and Enron Board meetings minutes indicate that Messrs. Fastow and Glisan misled the Board on the true financial condition of Enron almost up to the date of termination of their employment with the company. Not until months after Enron's chapter 11 case and multiple investigations had been conducted did the details of the fraud that Mr. Fastow and his associates perpetrated on Enron and its shareholders become generally known. Accordingly, during the difficult time between being appointed Enron's CFO on October 24, 2001 and the commencement of Enron's chapter 11 case on December 2, 2001, Mr. McMahon stated what he believed to be true to the best of his ability based on his knowledge of a highly complex and fluid situation.

IX. Conclusion

Given the economic and financial damage resulting from the demise of Enron, it is understandable that Mr. McMahon's actions and those of other Enron executives should be scrutinized. However, an objective and dispassionate analysis of Mr. McMahon's tenure at Enron will conclude that he was an exemplary executive who was not involved in any intentional violation of securities laws:

- Mr. McMahon was one of the highest-level Enron executives who spoke out against Mr. Fastow's conflict-of-interest and ultimately lost the senior management position of treasurer because of his outspoken objections;

- Mr. McMahon was only tangentially involved in the Nigerian Barge transaction and was one of Enron management's leading advocates that such transactions not include any continuing Enron obligations that would undermine the company goal of improving liquidity;

- In his role as treasurer, Mr. McMahon vastly *improved* communication and disclosure between Enron and each of the rating agencies;

- Mr. McMahon had no involvement in the accounting decisions regarding Enron's prepay program nor the structuring and execution of specific prepay transactions. Rather, Mr. McMahon simply became knowledgeable about the

prepays in the course of managing Enron's liquidity to meet the requirements of the company's growing trading operation;

- With respect to the Yosemite transaction, Mr. McMahon had no reason to believe that it was anything other than a sound financial structure being promoted by a world-renown financial institution that fulfilled the company's goal of increasing liquidity. Similarly, Mr. McMahon understood the Nahanni transaction to be a legitimate insurance policy for a liquidity shortfall that had been vetted by a dozen major banks, law firms and accounting firms. Both of these transactions were recorded in Enron's financial statements, and Mr. McMahon had neither responsibility nor control over disclosures relating to the transactions; and

- After being appointed as Enron's CFO under extremely difficult circumstances in the month before Enron's chapter 11 case, Mr. McMahon made no intentionally false statements to investors or creditors while performing admirably in preserving Enron's assets and, after the filing of Enron's chapter 11 case, placing Enron's estate on the course of a going concern liquidation that would generate the maximum dividend possible on creditors' claims against the company.

In view of the foregoing, Mr. McMahon requests that SEC engage in negotiations for a reasonable settlement of the allegations contained in the SEC's Wells notice against him. If you have any questions or comments regarding the foregoing, please advise.

Very truly yours,

Tom Kirkendall
Counsel for Jeffrey McMahon

c: Jeffrey McMahon

EXHIBIT N

UNITED STATES GRAND JURY

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

RE: INVESTIGATION OF ENRON

BE IT REMEMBERED that on the 15th day of April, 2003, beginning at 9:42 a.m., in the Federal Building, 515 Rusk Avenue, Houston, Texas, the United States Grand Jury convened, at which time the following proceedings were had and testimony adduced as hereinafter set forth.

TESTIMONY OF KATHERINE ZRIKE

ORIGINAL

MINNIE CADENA-MECHE, CSR, RPR
Tel: (281) 996-5698 Fax: (281) 996-5699

chance to ask us those questions and also, I'm going to ask you, as we go forward, it's much easier, your rights and obligations, when you understand them.

The first thing is that you'll notice there's a microphone in front of you.

A. Yes.

Q. And that's not recording -- or maybe -- actually maybe it is also recording, but the main purpose of it is to project your voice. There's a very bad vent system here. So it's hard in the back of the room to hear, so if I can ask you to keep your voice up and speak into the microphone so everybody can hear you.

A. Okay.

Q. First, in terms of your rights as a grand jury witness, you have a right to be represented by counsel in connection with the grand jury appearance. In other words, even though you're a lawyer, you also, like everyone else, enjoy the right to have counsel in connection with the grand jury appearance. Your attorneys cannot be present, as you know, in the grand jury. But as I understand it, you have counsel here and they are right outside in the room next door; is that correct?

A. That's correct.

Q. Could you identify for the record your

counsel?

A. Robert Ramano.

Q. And does he also have a colleague of his, an associate, helping him today?

A. He does, but I don't remember her name. I'm sorry. I just met her recently.

Q. And in addition to Mr. Ramano and his colleague, do you also have -- is there also company counsel here today?

A. Yes, there is.

Q. If you could, just identify them for the record.

A. Charlie Stillman, who is our outside counsel for Merrill Lynch, and an internal counsel, Rick Weinberg.

Q. And is he somebody you know because you're also in-house counsel?

A. Yes. He is involved in our practice litigation and regulatory practice. He bears acquaintances and colleagues.

Q. And so, Mr. Ramano is your personal counsel and their company counsel, correct?

A. Correct.

Q. And is it fair to say, without telling us what was said, that f you met with counsel in connection with

to advise you that if you were to lie or obstruct the grand jury investigation and you were prosecuted and convicted, because they are criminal statutes, they carry with it a possibility of jail. Do you understand that?

A. Yes.

Q. Do you have any questions at all about your rights or obligations?

A. No. I appreciate you going over them again.

Q. Now, let me also go over with you -- as I mentioned to you, I'm not going to give you all of the caveats I told you upstairs but your counsel has asked me with respect to your status whether you were a witness, subject, or a target and you were told that you are a witness.

I already talked over with your counsel one area where I had concern with respect to information that we've learned from your interview, but the main thing I want to make sure you understand is you understand that the representations to your status -- as of your status today is not a prediction as to what the future holds. Do you understand that?

A. Yes, I understand.

Q. Do you have any questions at all about that?

A. No. I appreciate the information.

ourselves against being responsible for whatever disaster could strike or someone, you know, suing us for a big fire that blows up things.

So we would -- you know, we would have approached it differently and -- as well as asking our bankers to approach the economics and the bona fides of the deal differently, I believe.

Q. One of the things you talked about was the risks that if, for instance, the barge blew up. Even though this is a small investment from the perspective of Merrill Lynch as a whole, is it fair to say that there were -- there could be risks in owning a barge in terms of various liabilities that could come from it including environmental risks, all sorts of things that could happen in a country that is viewed by Merrill Lynch and other financial institutions as a risky area to invest in?

A. Yeah. I think we were very concerned in the group that vetted this as well as our legal department about that sort of reputational risk from the disaster scenario where -- you know, we all remember the Bhopal incident -- where, yes, you lose your investment like the barge blew up.

So you don't have the barge anymore. Yet, you've got loss of lives; you've got environmental

pollution which could cost you a lot more; you've got a country that is, you know, very corrupt or known to be corrupt on issues associated with how that barge business is being run.

Being 100 percent owner of it and not being -- you know, we're not actually in the business of running the barge, electrical barge. So what could be attributed to Merrill Lynch as being responsible for, all sorts of issues. And those were raised and discussed in our consideration of this.

Q. Is there anything that goes beyond the representational risk that could also go to that optimal economic risk?

A. You're absolutely right.

Q. So, it's not just --

A. It's not just --

Q. -- Merrill Lynch trying to look --

A. Right. It's more of this could cost more than our loss of the $7 million that was the investment in the barge. It could lead to loss of life, litigation, money, entanglement, complications beyond --

Q. Now, did you understand at any point that either Mr. Davis or anyone else at Merrill Lynch said, "Okay. We'll go into this investment, but it needs to be made clear to Enron that we're in it for $7 million

finding a buyer, isn't -- what better way, since frankly we're doing the misaccommodation, according to you, why not hold their feet to the fire as a way to really keep them interested, which is -- and if they don't find a buyer, they will deal with the consequences of what happens if they have to buy it back?

A. That's just not my understanding of how the conversations were. Everyone understood the rules, the accounting rules and the accounting treatment. Everyone appreciated that -- people were talking about this as a worst-case scenario. There was no real expectation that any of this was going to be happening. The focus was on the fact that this would be gone in January to Marubeni.

I was trying to make sure that Mr. Davis and Mr. Bayly understood that this was a true risk that we would end up owning this barge and so -- and from an exit perspective, we either had to be willing to own it until the thing got sold or -- and keep the risk of what that entails on our balance sheet and -- making sure that they are comfortable with that in the context of making the decision.

Q. Now, one of the things you said in your last answer was about people focusing on and thinking that Marubeni would come through and this would be gone in a month or so. But isn't the -- isn't one of the

ask Enron for such a provision?

A. Merrill -- the Merrill Lynch lawyers in my group and myself did ask that we include a provision that -- two types of provisions that we thought would be helpful to us.

One would be to indemnify us or hold us harmless if there was any sort of liability like a barge explosion or an environmental spill, loss of life, or something that was, you know, a disaster scenario; and that was the first thing we talked to them about.

The second, it may have been around the same time. You know, we marked the agreement up one time and sent it back to them.

The other thing that 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 to conclude the purchase with the -- another third-party purchaser besides ourselves and that -- realizing that from our perspective as Merrill Lynch lawyers that this was not -- this was still a -- was not a guarantee, it was not an absolute, but that at least 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.

In the context of working through the draft of the agreement, you know, our counsel -- it's gone through a merger. I think it was Whitman, Breed & Abbott. Is that right?

Q. I cannot answer questions.

A. Okay. But it was an outside law firm, outside lawyer that was doing a lot of the negotiations with a couple of guys on our staff; and the response from the Enron legal team was that that -- both of those provisions would be a problem or could be viewed by the accountants as undermining the true sales tax because, first of all, with the indemnity, it was a bit of a stretch but we tried. It would -- it would insulate Merrill from any risk of loss, which was the whole point of there being a true sale. And so, it would negate that treatment; and it certainly made sense that the response would be that.

Now, you know, we tested what if we put the damages in caps. You know, we tried to keep it -- we were trying to be creative to protect Merrill, but they kept coming back to the fact that it really had to be a true passage of risk and that -- any risk whatsoever.

On the other side of -- the other part of this was the best efforts clause, the concern that that

that you're still under oath, right?

A. Yes.

Q. When we broke, we were talking about a best efforts provision, among other things, and discussions that you were having with counsel regarding that.

Were there people on your staff who were working on the legal aspects of that deal?

A. Were there people?

Q. Yes.

A. Yes.

Q. Who?

A. There were two lawyers that were involved sort of alternating because it was during the Christmas week. One was Frank Marinaro, and the other was a lawyer named Kerry Dolan.

Q. And when were you dealing with Alan Hoffman as your outside counsel?

A. Alan Hoffman was our outside counsel that they dealt with. I don't believe I ever talked to Alan directly.

Q. Now, in terms of the best efforts provision, did you have any conversation either directly or indirectly with your staff or outside counsel regarding whether there would be any accounting problem in having a re-marketing agreement?

A. With the discussions we had with my staff, who I believe were reflecting Alan's discussions with the other law firm and Alan's, you know, acquiescence in that position or at least understanding where they were coming from, in that a re-marketing agreement or approach to use best efforts to find another purchaser could be problematic for the accounting, there couldn't be any contractual obligations in that regard.

Q. So was it -- I'm just making sure I -- make sure I've covered this, which is: Was there a discussion that you were aware of, whether you participated in it directly or not, regarding whether Merrill Lynch could, consistent with accounting rules, have an agreement whereby Enron would be obligated to try to re-market Merrill's position in the barges?

A. The discussion was on the context of the -- the answer is no. There was not a discussion that a re-marketing, per se, of our agreement of our equity interest would lead there to be a problem under the true sale rules. The discussions that were had with the lawyer, our lawyer and my staff, were that any contractual obligations that would require Enron to use their best efforts to take action to sale -- to sell the equity interest on our behalf could be viewed as then being obligated to buy it back.

Q. Well, what if that was just in the contract, that it's not an obligation to buy it back, it's an obligation to re-market it to a third party?

A. I think, you know, their perspective is they didn't want any risk that --

Q. Did that come up? Did that come up?

A. I think we -- we tried a lot of different, you know, ideas to try to get some -- something, you know, contractual that we could go to court, as they say, and get enforced; and the answer was that anything that could be used that could be taken to require them to buy it in the event that they were unable to find a third party would not be acceptable and that's --

Q. Okay. So --

A. -- why the language was not put into the agreement.

Q. Okay. I'm not that smart. So let me -- this can't be something that I've come up with.

How about an agreement that obligates them to try to re-market but it doesn't require them, as a worst-case scenario, to buy it back?

In other words, you have to help us as if you were -- you were getting a real estate broker to help you find a place, but it doesn't mean your real estate broker is going to have to buy your apartment.

It's just somebody who's going to be required contractually to assist you to re-market but not to actually buy it back. Why not put that in the provisions?

That's the sticking point, the -- that Enron buying it back as opposed to assisting and going and finding a third-party buyer.

Why isn't the solution to a lot of bright people, "Well, fine. Just put that in the agreement"?

A. I think that was our approach in that we were trying to do what we could to get -- consistent with what the business deal was to get some protection, and we were not successful in negotiating that end with Vincent & Elkins.

You'll have to talk to Alan and others who were directly involved in their -- that dialogue.

I'm hearing the reports back and trying, then, to -- telling them to go back and try it this way and that way and not engage in the dialogue.

Q. Okay.

A. So I can't really answer your question specifically --

Q. Okay.

A. -- more specifically.

Q. Let me break it down, then. Do you have a

recollection of any discussions regarding what I'll call "the Weissmann Proposal," which is the re-marketing agreement with a provision that says it doesn't require Enron to buy it back?

A. You know, I cannot -- I can't tell you that that was not a thought. The only part that I'm hesitating on -- the re-marketing idea, I'm not brilliant on either; but I did focus on that.

Whether I would actually go -- is the tail end that's bothering me, without any agreement from Enron to buy it back. I don't know if I combined those two concepts.

Q. Okay.

A. The focus --

Q. Do you remember --

A. The focus I remember is that they will use their best efforts to find a purchaser to close the transaction with a third party, to finish, for a period of time. I don't remember specifically, you know, cutting off -- adding that last piece that you mentioned.

Q. To solve the problem?

A. To solve the problem, yeah.

Q. Now, did you get any advice directly or indirectly, whether you sought it out yourself versus

purchaser. But you said it a little broader than that in your question.

Q. So what's the "no" part? You said there was a yes and no.

A. The "no" part is that they could do whatever it took to get us out of the investment. That was -- they were not committing to do whatever it took. They were committing to take -- and the business ended up being a, you know, oral business understanding as, "Look. We understand you're not only going to hold this and that we have to find another buyer if Marubeni does come through, does not happen."

That was the extent of my understanding. It was more than an understanding. It was representations that were made to me about what they were willing to do.

Q. And who made those representations to you?

A. You know, these were made in the context of various discussions about the deal; but they came from the banking team, Mr. Tilney and Mr. Furst, at various points in time of our discussion.

Q. Let me ask you -- this may be a tough question. It may not. And I don't mean it to be rude, but if there are issues going on in this transaction that to your mind -- and I understand from our interview

several months ago that these were going on in your mind about, you know, "I don't want people to think this is a sham transaction. I want to make sure that this is complete and that there's nothing nefarious going on here. And this is Merrill Lynch. It's a major financial institution. We're not going to do anything close to the line."

If all of that is going on as, I take it, the senior sort of lawyer on the deal, why wasn't something like this -- "there are going to be no oral understandings, oral commitments. Nothing is going to exist between the parties that isn't in writing in the signed purchase agreement because I'm not going to have anyone coming back and saying that there's some other part of this deal. We don't like the deal. So I don't want anyone coming back and questioning what's going on. So there is going to be nothing that is not in writing"?

A. There was some of that discussion when we were trying to negotiate the terms of the purchase agreement itself; and I was looking at it from the perspective of I don't want anyone at Merrill Lynch coming to me and saying, "Why can't we get rid of this barge?"

This is -- was our -- this was our business deal. This was our basis for us going forward and doing a short-term investment.

The fact that they would not put in writing an obligation to buy it back, to indemnify us, all those things were consistent with the business deal and were not things that I felt were nefarious and were problematic.

My focus was more on the fact that our management and -- understand that we are owners of this and could be owners of this for longer than the period of time that they thought --

Q. But --

A. -- because there was no obligation for them to buy it back.

Q. Wasn't it clear --

A. That was made clear from Day 1.

Q. Wasn't it clear to Merrill Lynch and to you that Enron was agreeing that Merrill Lynch would only hold this for a certain period of time, not that Enron would necessarily be the one that's going to buy it back? I mean, there are other ways of disposing of the Merrill Lynch interest. But wasn't it clear that Merrill was only committing on a short-term basis? Wasn't that something that Merrill made clear to Enron?

A. That was the basis of having -- that we bought the investment, yes.

Q. And that provision, all I'm trying to focus on

Q. And Rick is Mr. Weinberg?

A. Mr. Weinberg.

Q. Was it your understanding that there was any commitment or representation by Enron to Merrill Lynch in connection with this deal that was not contained in the purchase agreement?

A. I'm sure there were representations that were made that aren't in the purchase agreement; but whether or not they are representations that we can bring an action against, the answer is no.

Q. And that's because as a lawyer you're thinking if it's oral, it's going to be difficult to bring a lawsuit?

A. Well, and also the more explicitly most discriminate has in its boilerplate that it would say that the purchase agreement contains all of the representations which the company -- in this case, Enron and Merrill gave some representations, too. But it can be, you know, liable for.

So, you know, there are statements that are made. Representations in the general sense are discussed during diligence that may or may not get put into the binding contract.

Q. Have you ever heard of lawsuits being brought based on oral agreements or alleged oral agreements that

purchase price set with Marubeni and they were going to be selling it to Marubeni at that price that -- whatever that was would be what we would get, whatever the spread was; and if it was going to be for a month hold or a two-month hold or three-month hold, however long it was -- I don't know how to calculate what that rate of return would be on the 7 million, but the business and the understanding I had and that everyone had at the meeting where this was considered was that we were buying it, in essence, what Marubeni was buying it at; we were a placeholder until Marubeni could get their act together and buy it for the price they had negotiated.

Q. If you look at the "fees" line, one of the things that we've done is we've looked at that and then we looked at some internal Merrill Lynch documents where people are assessing 15 percent interest to Enron within Merrill. Do you have any information at all about why people would be assessing the exact rate of interest that appears on the Appropriation Request?

A. I have no -- other than someone may have used this as a basis to provide for some -- for the reason for assessing it. This was held in our books as equity and it was booked on our books as equity and it was treated as equity. I don't know anything about assessing any interest at all.

Q. -- where it says: "Dan Bayly will have a conference call with senior management of Enron confirming this commitment to guarantee the ML takeout within six months."

Now, is it your testimony that you didn't see that at any -- that sentence at any time prior to the deal closing?

A. No. I saw that after -- before the deal closed was between Christmas and New Year's. The deal closed on the last day of the week of 2000 -- I mean, 1999, whatever date that was.

And when I came back from Christmas break, I saw this and was -- I focused on it. You know, I hadn't really focused on anything other than the appendix where all the structure and the things were laid out. That's not correct, because it's not -- we're not -- they are not committing to guarantee our takeout -- I don't like the use of the word. But when I read it in the context of the prior sentence which didn't read "Enron will facilitate our exit from the transaction with third-party investors," Dan -- "Dan Bayly will have a conference call with senior management of Enron confirming this commitment to guarantee (our) takeout within six months."

So the fact that they were going to help

us re-market it and get us out within six months, that was not my understanding. I thought it was three, that -- you know, I'm not comfortable with it, plus this document was never viable in my view. It was not a record of the deal, did not reflect the transaction.

Q. Okay. Well, was there a commitment to re-market or not?

A. There was a business understanding to re-market it. There was a business arrangement. You know, when you say the word "commitment," it sounds like a legally binding commitment.

If Enron had done nothing to help us re-market it, we would have -- we would be pretty much annoyed and angry and we could shake our fist at them but there's not going to be much recourse to us to get them to do their job other than just sort of threatening to sell it to somebody that they wouldn't want to be a partner with.

So there was no commitment in a legally binding way; but, yes, there was a business understanding that that's what was going to happen. It was the whole point. I mean, how can you be a temporary bridge to permanent equity and not be the permanent equity? That was the basis for the deal.

Q. Could you turn to Exhibit 78, please?

Q. Okay. I just want to -- let me make sure because I think we've had some miscommunication about what it is that I'm asking you.

A. Okay.

Q. So, let me just try again.

A. Try again.

Q. And I'm taking all responsibility for my question not being clear enough.

My question is: What is your basis of knowledge for the statement that the reason this wasn't sent out was because it was incorrect?

In other words, I think you've explained to us that you understand that this is incorrect; it's not your understanding of the deal; that this person, you know, may have been trying to just clear it off the books or do something; but that this document, as you see it, is not your understanding of the deal and from your perspective, it's wrong.

What I'm trying to find out is about your earlier statement where you said this -- your understanding was that this draft was not sent out precisely because it was not reflective of -- accurately reflecting the deal?

A. It's more -- the basis for it is discussions that I had with attorneys in the group who found out

about it and had said -- maybe it was Rob Furst or someone said, "Hey, you're asking me to sign this. This is incorrect." And that's when we found out that this had been prepared and it had been -- this person was acting on their own and with their own steam to sent something out and hadn't really bothered to get it approved and get it vetted and it wasn't a correct representation of what was happening both from the perspective of characterizing the deal and from the obligations that they had under the contract to take action to buy it.

Q. And when was that, this what you're just telling us?

A. I think it was, you know, after the fact that this -- sort of, who did this? You know, not at the time that I -- because I really wasn't involved in the --

Q. When you say "after the fact," can you --

A. I mean after July, after July.

Q. Of 2000?

A. Of 2000.

Q. And can you be any more precise than that because "after July of 2000" could include anytime up until today? So can you --

A. Well, it wasn't like yesterday but it was

like, you know, around the -- I don't know. It could have been in July. It could have been right around August; but it was sort of post the transaction and, you know, looking at where we were and what had happened.

And frankly, Mr. Weissmann, it could have been after this whole investigation. I just remember looking at this going, "Wow. That's not good. This does not look good," and then I was told it wasn't sent.

So it's a combination of -- I just don't think it was before June.

Q. Also, you, at some point, felt like you wanted to speak to counsel. I don't know if there's an issue pending, but if you need an opportunity to speak to counsel now --

A. I've answered you now. So --

Q. Great.

A. That's the last time you're going to trick me into doing that.

Q. No. I mean, seriously, this is really not about -- I mean, there's privilege --

A. I mean, I don't have a problem telling you that I don't think it's -- it's not -- it's not anything other than this is just another situation where something was prepared and it wasn't sent out, and that's basically all I know other than I was glad that

A. Correct. That's a fair way to say it.

Q. Okay. And in terms of the group, in addition to the two individuals that you mentioned, is there anyone else who would be in that group of people who you think that --

A. At that point in time that was pretty much the only people that I had ever, you know, talked to about this just as keeping up with what's going on.

Q. Now -- so, basically, for this document, it's just this document exists but it just isn't consistent with your view of the transaction and somebody was just off -- you know, not on the same page?

A. Correct.

Q. And in terms of the other document involving 15 percent interest being accrued, that would suggest to you somebody else -- or maybe it's the same person. It's just another reflection of they just didn't get it right?

A. Well, it wasn't the same person but -- and the fact is if it had been -- it wasn't the same person.

My view is that it didn't comport with what I understood the deal was; and I certainly didn't like some of the language in it and, therefore, it would have never been circulated. If that's the way we would have gone, it would have been absolutely correct and

legal issues with respect to -- not sort of risk issues but whether it was -- any legal issues were involved, so you gave a legal opinion?

A. I gave legal advice that I didn't see any actions here -- in looking at the year-end trade and the -- you know, whether there was a part because those things were specifically considered -- that this transaction did not -- well, this -- it was a right avenue to consider. It didn't lead to their -- in my view, there was not a part and this was not a sham transaction.

Q. Okay. Who asked you for that legal advice?

A. It was in the context of the Mr. Davis discussion. You know, it was there -- "What are your views, Kathy, about this transaction?"

And I talked about the fact that we had gotten comfortable on two important, sort of what we call legal issues: One is the earnings management, whether or not there is some facilitation of them moving or taking earnings when they shouldn't; and the other is the parking aspect.

But I talked about the fact that there were other legal issues associated with the deal and the way it was structured in that they wanted to understand the risk, and that gets to the point you told me not to

talk about.

Q. Okay. And did you give that opinion in any other form, or was it only with Mr. Davis?

A. I remember explicitly talking about it with Mr. Davis and I also remember explicitly talking about the same issues with Mr. Bayly, but I don't think he asked me, "What's your legal opinion or view on this?" It was, "Give me a brief."

Q. Okay. Did you give him --

A. So I did.

Q. -- your legal opinion?

A. I gave him my legal views on an opinion on the fact that based on what we knew and the information we had and -- this is not illegal.

Q. Now, during your interview with the Department of Justice and the SEC, do you remember talking about whether you gave any legal advice?

A. Yes.

Q. And do you know if you said the same thing, in essence?

A. I think I was trying to make it --

Q. And I don't mean word for word.

A. I don't know that you accepted the point; but I was trying to make a point about giving a legal opinion, that we don't give in the written sense but in

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)
ENRON CORP.) File No. HO-09350-A
)

WITNESS: KATHERINE ZRIKE
PAGES: 1 through 210
PLACE: Morgan Lewis & Bockius, L.L.P.
101 Park Avenue, 45th Floor
New York, New York 10178
DATE: Wednesday, October 29, 2003

The above-entitled matter came on for hearing, pursuant to notice, at 9:37 a.m.

APPEARANCES:

On behalf of the Securities and Exchange Commission:

KURT G. GRESENZ, SENIOR COUNSEL
THOMAS GARGAN, STAFF ATTORNEY
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549
(202) 942-7259

On behalf of the Witness:

ROBERT M. ROMANO, ESQ.
KEVIN T. ROVER, ESQ.
Morgan, Lewis and Bockius, L.L.P.
101 Park Avenue
New York, New York 10178

RICHARD D. WEINBERG, ESQ.
MERRILL LYNCH
Office of General Counsel
222 Broadway
New York, New York 10038

ALSO PRESENT:

EMMA KIM, ASSOCIATE
Morgan Lewis & Bockius

C O N T E N T S

P-R-O-C-E-E-D-I-N-G-S

MR. GRESENZ: We are on the record at 9:37 on October 29, 2003 at the offices of Morgan Lewis & Bockius in New York.

My name is Kurt Gresenz, with me is Thomas Gargan. We are officers of the Commission for the purposes of this proceeding.

Ms. Zrike, your testimony has been requested by the staff as part of a formal investigation by the Securities and Exchange Commission entitled in the matter of Enron Corporation, Case Number HO-9350, to determine whether there have been violations of certain provisions of the Federal securities laws.

However, the facts developed in this investigation might constitute violations of other federal or state, civil or criminal laws.

Ms. Zrike, do you understand that?

THE WITNESS: Yes, I do.

MR. GRESENZ: I would like to now administer your oath.

Would you please raise your right hand.

Whereupon,

KATHERINE ZRIKE,

after having been first duly sworn, was examined and testified as follows:

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I don't know.
Q The reason I'm asking --
A We did not draft it. Merrill Lynch was not involved in the auction or the preparation of the memorandum.
Q Did anyone at Merrill Lynch, to your knowledge, have any discussions with anyone at Marubeni?
A Not to my knowledge.
Q Did the issue of due diligence come up at the DMCC meeting?
A Yes, it did.
Q Do you know who raised that issue?
A I raised it specifically. As something that everyone had to be aware of, that there had been no due diligence done in connection with this transaction, that we were being asked to do this as a bridge. And that we had done no -- we had done no work on it, independent of information from Enron.
Q What was the reaction to that statement by the DMCC?
A Unusual, but the whole thing was unusual.
Whether it's in response to that or sort of coupled with the fact that we're talking about $7 million, what was a $7 million exposure.
Q Let's look back at your notes on Exhibit 946, on the first page of the appendix.

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A Okay.
Q Can you look at this and tell me any other topics that you remember raising at the DMCC?
A We talked about -- we didn't really go through the quarter issue. But I did ask follow up question about the quarter, and making it clear that the quarter -- it was adding a penny in the 4th quarter to $1.10.
I asked him what is the quarter estimates, he said 30 cents.
I said is this something they need to make their quarter. He said no, they are on quarter for their quarter.
Q Who said that?
A Rob Furst.
Q He said that at the DMCC meeting?
A Yes, he said it's not needed to make their quarter, they are on target.
Q Did he give you the information on the 1 cent in your initial conversation with him?
A Yes, and it was repeated in this meeting for everyone to discuss. And hear.
Q The notation high probability of completion with another investor to come in?
A That was another point. I don't know if I said it or he said it.
I made a note it was clearly a bridge and his

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perspective was there was a high probability of it getting completed as he outlined to the committee and he outlined before.
He talked about us being a bridge to that completion.
This is kind of what we had been talking about -- I remember highlighting to them that it's important that this -- we want to understand we are at risk, there is no recourse in the document for them to buy it back, and that this is -- a gain taken on the basis that there is a true sale.
So there can be no conditionality or put rights or any sort of buy-back rights or obligations, really.
Q If you will do me this favor, can you read what your notes say?
A Of course.
Q After appendix?
A Right under the 1 cent slug of text there is a line that says we are at risk.
Underneath that says, no recourse in legal.
Q What does that mean?
A I think that's my shorthand for there's no covenants or agreements that Enron has to -- that we have to avail ourselves of if the sale does not go forward to Marubeni or to some other potentially interested party.

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The next line of text to the right says, bridge to that completion. There's an arrow.
The next line of text says, true sale status, conclusion.
Q I think I know what bridge to that completion means, that means Merrill is the bridge to the ultimate purchaser, is that right?
A I think that's -- that phrase sort of flows more logically from the sentence above it or the phrase above it that says high probability of completion with another investor to come in.
Q What is the meaning of true sales status, conclusion?
A We were making it clear to everybody, as I believe Rob had done with us earlier, both Jim Brown and I, that this is an equity investment that we will own and that we have to have all the risks associated with that equity investment in order for them to take it as a sale and to book the gain or loss, whatever it happens to be -- it happens to be gain in their case, on their financial statements.
So for accounting purposes it had to be a true sale.
And there could be no mitigation of that status.
Q In the box, and in two smaller boxes: 30 cents question mark, $1.20.

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What do those refer to?
A The box, that is just detailed -- I think it relates to the fact that this was annual earnings per share that Enron was expected or anticipated of $1.20 and that the quarter was at the 30 cent level.
Q Below that some bullet points?
A Sanctions. Underneath -- sanction, sorry, and underneath that assets in country.
Q What do those notations mean?
A These are just other risks that I was pointing to. I wanted to highlight the fact that we are talking about -- I did use these thoughts to sort of point out to everyone we're talking about barges that are in an exotic location like Nigeria, they are not in our control. They are in a jurisdiction we don't know that much about.
Sanctions, I was wondering whether or not there were any issues with Nigeria being a company that we worry about from political risk, from expropriation or doing business rules.
Q Beneath that the handwriting with an arrow, they do this all the time, how they manage their merchant?
A That's correct.
Q What does that mean?
A My recollection of how this thought got to be jotted down is that I was asking him to explain why they were

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monetizing this asset and why at this particular point in time.
This was the answer.
MR. ROMANO: Who are you referring to?
THE WITNESS: I believe it was Mr. Furst who was talking most about the deal and the characteristics of the deal.
Q So when it says how they manage their merchant, is that their merchant assets or merchant portfolio, is that the thought that follows there?
A I think the thought is merchant banking activities. They look upon these as little investments, start-up vehicles that they start and then they get them to a state of maturity, this is how he describe it to me at one point, and they start to sort of monetize that, maintaining, of course, because they are a power company, some rights to power and to transmit power and stay in the loop on the power side.
It's not really something you would have thought of them having merchant banking activities but they have these little projects.
Q The last entry?
A I'll read it like it is and go back and explain it.
Real E with only agreement from E to remark at our equity.
That is my sort of shorthand.

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Real equity with only agreement from Enron to remark at our equity.
Q What does that mean?
A This is a point that was made during the meeting that sort of flowed from this thing that I mentioned earlier about us being at risk, that we really are holding this equity and that the only thing -- rights we have vis-a-vis unwinding this transaction is that Enron is going to agree to facilitate the closing with Marubeni or with whatever purchaser they can find.
Q I asked you some questions before we got on this regarding some concepts that may or may not have been discussed at DMCC.
Rather than paraphrase you, I will ask you the questions again and follow up on those now.
A Okay.
Q The first question is: Do you recall anyone saying at the DMCC that Enron has represented that we will be out of this transaction within six months?
A No, I do not.
Q Any words to that effect?
A No.
The only thing I do remember is what my note indicates, that Mr. Furst's few is there was a high probability there would be a completion with somebody else.

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Q Meaning that the exit that was discussed at credit committee was either the Marubeni completion or one of the other interested investors that had expressed interest in the auction process?
A That's correct. That is what I remember.
MR. ROMANO: You said credit committee.
A It's really DMCC.
Q Debt markets commitment committee?
A Yes.
Q Do you recall anyone saying at the DMCC, that Enron has agreed to a specified return in exchange for our participation in this transaction?
A No, I don't.
Q Any words to that effect by anyone?
A No.
Q What I would like to do real quickly, is there any other topics that were raised at DMCC that I haven't asked you about, that you recall sitting here today that you want to tell me about?
A There was a discussion of the importance of the penny, was it additive to their earnings, was it material, what did people think about Enron and its financial position and its performance, and there was a lot of -- a couple of people said much. Oh, come on, there is not important to Enron, Enron is a big company.

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I frankly at that time didn't know much about Enron other than it was a power company.

I didn't know whether they were highly leveraged or needed every -- every penny counted or anything much about them.

So there was some discussion about how Enron was a billion dollar asset company and this was not a big deal.

There was discussion about other risks that flowed from that. Just because of earnings management, and we had just gone through a due diligence education session that every banker had to go to, because of someone overlooking the importance of how missing earnings might create problems in the price -- in the market price of some debt products.

And so we talked a bit about the earnings management implications of this.

And whether it sort of fell into that category of being something that could be improper or involve us in something Enron was doing that was improper.

We talked about the -- important to that was what I just talked about, trying to hone him in on whether or not this was trying to meet some estimates or not, some street estimates or targets.

And whether reputationally that involved us in doing something that we felt was manipulative or inappropriate, portraying a false picture of their

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financials.

And I think the conclusion we had was no, because there really was a transaction pending, my views were there was a transaction pending that had a valid business purpose, and was due to close within a couple of weeks after the closing.

But Jim Brown had raised a couple of -- some points that Jim Brown had raised, some of which I had just gone through.

And then there was a general discussion about whether or not this really was something ha the DMCC could approve or not approve.

And I guess there was some push back on that front given this was an equity investment and their jurisdiction was over debt investments.

I told them I appreciated what they were saying, I didn't think they had to be so technical about it, but in any event this was going to be going up to Mr. Bayly and Mr. Davis for their approval and consideration in any event.

And I wanted to be able to represent that persons other than the banking team were -- had heard about it and were okay with it or had no objections to it.

I think that's pretty much the substance, taking into account the notes we have here.

Q Let me ask you about some specific subjects.

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Did you raise the issue of environmental risk at the DMCC?

A It was discussed. I don't know if I raised it or Jim raised it.

We discussed the fact that there was risk and we were looking into the limited liability nature of this corporation that we -- that owned these barges and whether or not it could be pierced.

Q Did you talk about anything to do with operational risk of the enterprise?

A It kind of went along with the environmental risk.

One of the things I was worried about is that they were sloppy and they didn't cap their pressure valves or whatever. There was explosion, if that is what you mean by operational risks.

Q Relating to actual operations of the barges, in that context?

A We did -- that was raised, and I remember specifically talking about it more in the Tom Davis meeting, myself.

But I think it was addressed in the DMCC.

Q Does the Tom Davis meeting come later?

A Yes, it does.

Q Any discussions about potential failure to complete by Enron meaning if they don't just get the barges up and

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running, close the contract with Nigeria or get the letters of credit, something that would be a completion risk?

A Yes, we discussed too.

Q Any sort of --

A There was a risk. And Marubeni knew and others bidding on this transaction knew it was not operational yet, I think it was still in develop many, and that that's what they knew when they were going to purchase it.

And those would not be -- those definitely could be risks to us. If things changed, that's where we got back to the fact that we really only had the right to try to keep finding a buyer.

Q Let me show you a page here, Exhibit 928 Bates stamped ML 7904.

I don't want to spend a lot of time on the exhibit unless those are notes on the bottom.

A These are not my notes. You just want me to look at this one page.

Q I won't ask you questions about the exhibit if these are not your notes.

A These are not my notes.

Q Was there any discussion at the DMCC that the pressure to close the deal from Enron was out of proportion to the size of the transaction?

A I wouldn't put it in those words.

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Q What words would you put it in?
A That there was a lot of questioning or people were saying this is such a small transaction, what's the importance of getting it done. Why are we having to do this the week before Christmas, what is so important about it.
Q What was the answer to that concern that was communicated to the DMCC?
A My recollection is that -- the same answer I had gotten from Mr. Furst, this was part of one of the things they wanted to accomplish in 1999, and it was a small transaction because the asset itself was a small transaction.
Q I guess when you say this is something they wanted to accomplish in 1999 --
A Enron's business group.
Q I understand that.
Why is this something they want to accomplish in 1999, we know they want us to close this year, was there the follow-up question: Why do they want us to close this year.
A The background for why they are asking for year-end close was discussed. And it was raised as sort of twofold; one, that this was something that Enron had asked us to do, that was important to them from a business perspective, and that they wanted to book the earnings in this year.
Q How is it important to them from a business perspective, isn't that the same thing?

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Was there some reason why it would not have been important from a business perspective in January?
A I don't know how to answer that question.
MR. ROMANO: The question that you didn't answer because he asked you another one is, did you equate in your mind the goal of booking the earnings with the concept of their business interest, or did you see a difference between those two?
A They wanted to close it for, I think, two reasons.
One, the deal team -- there is what I was told -- the deal team wanted to have it done because they wanted to meet an objective, and they probably wanted to get it done because it did result in there being earnings effect on Enron. And maybe for other reasons.
Q And I guess the two questions, first of all, these were concepts you remember being discussed at the DMCC?
A I remember people being -- questioning: What's the big deal here, it's a small transaction, it can't be that important to Enron.
And the fact that they -- the banker's response was, they want to book the earnings, they have done all the work in this year in connection with the sale, and it's a fluky thing that they got a last minute kink in this from Marubeni, and it's important to the deal team at Enron that we try to close it.

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If we can do the bridge, that would be helpful to them.
Q Apart from the fact -- I'm not saying there is, but apart from the fact, we thought we were going to close and now we're not, is there any other discussion as to why it was important to the deal team to close in that quarter versus the next quarter?
A Not other than I've already said. That's my recollection, that it was in the context of -- it was important for them to get this business objective done for their own benefit, and it was beneficial and important to recognize the earnings.
It led to there being a recognition of the earnings which was not an unwelcome thing.
I didn't really get -- I don't remember any more specific detail.
Jim and I were wondering if there was anything else.
But at the meeting, I think Jim -- I don't remember if he raised it or not. But whether there might be some other benefits from it to them, in terms of how the African subsidiary did or the tax benefits.
But it was -- that was how it was discussed.
Q I think your lawyer, Mr. Romano, really got to the heart of what I was trying to ask.

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When Mr. Furst is communicating that this is an important business objective of Enron, first of all, there was some follow up as to what that -- why that was an important business objective, correct?
A It was an explanation that it was important because it was something that they had on their agenda to get done and wanted to have accomplished in 1999.
Q Just on that issue, I understand the earnings issue, did Mr. Furst say anything as to other than the earnings issue, why getting it done in 1999 conferred some additional benefit on Enron?
A Maybe I'm not being clear.
There was the earnings issue and there was the fact that this would help the Enron team accomplish what they had been told to do by management or in connection with their business objectives for this power project.
That it was in fulfillment of an action plan that they had set into motion during 1999.
That they wanted to get done because that was what was expected of them to get done.
MR. ROMANO: I think we have exhausted this.
Don't keep giving the same answer.
I think we are getting to the point where the questions and answers are repetitive.
I think we have exhausted the witness'

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recollection, frankly. On this point, I am not saying we have exhausted the witness' recollection.

There are other events that occurred later in the story.

There may be other matters that occurred at the DMCC.

MR. GRESENZ: I will leave it for now.

But I will say that it's important to get it done because it's important to get it done. That's not an answer I understand.

THE WITNESS: But that is not the only thing that was said.

It's important to get it done because it does lead to $12 million worth of earnings impact on Enron.

Q I understand.

A Which I guess is something that they wanted.

And that this was a project that they had committed to do and they wanted to get it done for their own personal benefit. And they had done all the work.

That's really the answer that he gave me, or the explanation that he gave to the group.

Q This isn't a question, it's just a statement, that that is the part of it, to me I'm struggling with, because it doesn't seem -- I'll leave it, but --

MR. ROVER: You are asking about the discussion.

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She has told you what the discussion was.

MR. GRESENZ: I'm asking if there is any drilled down --

MR. ROVER: You asked that question, was there any additional push.

Q Mr. Rover, the question that he just suggested, did anyone at DMCC question why it was that completion in year-end 1999 was an important business objective beyond the earnings recognition, beyond the fact that it was -- we would just like to get it done now.

A We asked that question and the answer was they want to get it done now and that it has a positive impact on the earnings.

And we explored that further. What is the impact it's having on the earnings, what is the characterization of that impact.

Is it material, is this something that is -- I don't know whether it would be appropriate for us to have them get it three weeks or four weeks before it was due to be obtained.

So the drill down was more towards okay, we know there's an earnings impact, what is the nature of that earnings impact.

Is it something that is artificial, is it something that seems to be arising out of thin air.

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The answers to those were explored not only by me individually but also discussion in the group.

I do remember as I said before some drill down about does this have any sort of tax impact, or position. And the answer being no.

That is as much of a drill down as I can recall.

Q Prior to the DMCC meeting, did you have any discussions with Mr. Furst or anyone else where a request was made of you that certain discussions or certain topics not be raised to the DMCC concerning the particulars of the deal?

MR. ROVER: Can that be read back?

MR. ROMANO: Did anybody ever ask you on any topic that they were discussing with you, prior to the DMCC meeting not to raise that topic when the DMCC meeting convened, is that your question?

MR. GRESENZ: Yes, sir.

A No one asked me to do that. Or not to do that.

Q I'm not suggesting they did. I'm asking you a question seeking information.

A I understand.

MR. GRESENZ: I think I'm going to move to the next step after DMCC, maybe we should take a break and evaluate whether we want to go a little longer.

MR. WEINBERG: Can we go off the record?

MR. GRESENZ: Absolutely, I want to find out if

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that is consistent with people. Let's go off, please.

(Recess taken.)

MR. GRESENZ: Let's go back on the record.

It's 5:27 p.m.

We have mutually decided to adjourn at this time to recommence at a date convenient to the witness and all parties, unless anyone has anything to add.

Thank you, Ms. Zrike for answering questions today.

THE WITNESS: You're welcome.

(Time noted: 5:27 p.m.)

* * * * *

EXHIBIT O

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/04/2002

GARY CLARK DOLAN, date of birth [redacted], social security number [redacted], home address [redacted], was interviewed at the Bond building in Washington, D.C. DOLAN was represented by RICHARD WEINBERG, FELICIA GROSS, and MARJORIE J. PIERCE. Also present during the interview was Assistant United States Attorney (AUSA) Andrew Weissmann and Securities and Exchange Commission (SEC) attorney Kevin Loftus. After being advised of the identity of the interviewing agent and the nature of the interview, DOLAN provided the following information:

DOLAN received a B.A. from University of Michigan in 1976 and a J.D. from Wayne State University in 1980. In September 1980, DOLAN worked at Merrill Lynch (ML) as an attorney in their Corporate Law department for eight years. DOLAN then transferred to ML's Municipal Markets department and worked their for two to three years. Then, DOLAN transferred to ML's Emerging Markets department where he worked for approximately three years. From April 1999 to present, DOLAN has worked at ML's Investment Banking (IB) department.

DOLAN's responsibilities in the IB department include providing legal advice to ML's private equity placement group, structured leasing finance group, and IB department. Specifically, DOLAN drafted private placement agreements, drafted engagement letters, drafted deal documents, and attended equity committee (ECC) meetings for the Private Equity Placement group. DOLAN attended Structured Leasing Committee meetings as well as drafted deal documents for the Structured Leasing group. Among other things, he drafted engagement letters for the IB department.

The first time DOLAN ever performed any work related to Enron was in the summer of 1999. The Enron work related to ML's Private Equity Placement group and an investment vehicle called LJM2. ML was hired as an underwriter by LJM2 to help place the fund. Regarding LJM2, DOLAN reviewed the engagement letter, drafted deal documents related to the formation of a feeder fund for ML employees which enabled them to invest in LJM2, reviewed the

private placement memorandum (PPM), and attended the ECC review meeting related to LJM2.

DOLAN organized a conference call (sometime between the summer of 1999 and the spring of 2000) between Enron and potential ML employees who were eligible to invest in LJM2. DAVID SULLIVAN, a ML banker, helped DOLAN organize the conference call. The call lasted less than one hour but more than five minutes. ML possibly recorded the conference call for potential ML investors who could not attend the call. If a tape was made, it would have been kept for only one week. FASTOW and someone else who DOLAN does not recall spoke on behalf of LJM2. The purpose of the conference call was to make a presentation to the potential ML investors about LJM2. DOLAN does not recall if there were any conversations about the possible conflict of interest related to FASTOW being the General Partner of LJM2 and Enron's CFO.

KATHY ZRIKE, DON SCHNEIDER (head of Human Resources for ML Investment Banking), and a couple of senior business people at ML decided who at ML could invest in LJM2. DOLAN's role was to prepare and review drafts of documents and E-mails related to ML's solicitation/indication of interest for the LJM2 investment. After the LJM2 investment closed, DOLAN received update letters from LJM2's General Partner and DOLAN forwarded these letters to the ML investors in LJM2. DOLAN worked on LJM2 issues at ML until approximately August 2002. EILEEN PORTER subsequently took over these functions from DOLAN.

In November 2001, various ML investors in LJM2 expressed concerns they had about LJM2 to DOLAN. DOLAN contacted a female employee (does not remember her name) at LJM2 a couple of times and she told DOLAN that the ML LJM2 investors are more nervous than they should be. DOLAN does not remember if this conversation happened before or after Enron declared bankruptcy.

In November or December 2001, MICHAEL KOPPER held a conference call for the ML LJM2 investors. This conference call was initiated because ML's LJM2 investors were concerned about LJM2's future prospects based on the collapse of Enron. KOPPER described what investments were being held in the LJM2 portfolio. KOPPER discussed the valuations of the assets being maintained in LJM2 and there was discussion about the prospect of the banks accelerating LJM2's loan obligations.

Nigerian Barge:

DOLAN first became aware of the prospect of ML investing in an Enron project in Nigeria sometime before Christmas 1999 when he attended a conference call. This conference call was held in ZRIKE's office and JIM BROWN was also present during the conference call. DOLAN took notes during this meeting and still maintains a copy of the notes. BROWN described the Nigerian Barge transaction to the group. BROWN stated that Enron approached ML about purchasing an interest in the Nigerian Barges and described the project as a floating power source for Nigeria. BROWN stated that Enron initially planned to sell an interest in the Nigerian Barges to a company called Marubeni, but Marubeni was not ready to purchase it until early 2000. Enron wanted to sell an interest in the Nigerian Barges by year end 1999 so they could generate earnings for the fourth quarter of 1999. Enron proposed that ML purchase an interest in the Nigerian Barges and that ML would only have to hold it for a short period of time. BROWN stated that the purchase price for ML would be small and that ML would earn a fee from Enron for entering into the transaction.

BROWN stated that there was going to be a conversation between ML executives (DAN BAYLY and ZRIKE) and Enron executives whereby ML was going to seek assurances from a senior officer at Enron that if ML purchased an interest in the Nigerian Barges, Enron would help ML find a buyer for their interest if Marubeni did not purchase ML's interest. Enron had told ML that Marubeni was going to purchase ML's interest in the Nigerian Barges by February 2000.

DOLAN stated that Enron was merely providing a "moral undertaking" to find a buyer for ML's interest in the Nigerian Barges. DOLAN stated that the agreement could not be in writing and it was an oral agreement that had no formal legal significance. DOLAN understood that ML would hold their investment in the Nigerian Barges for up to six month. Dolan had a sense that Enron would not give ML any assurances in writing and ML would not ask Enron for such a request.

DOLAN had a subsequent conversation with BROWN in which BROWN conveyed that he was concerned with the commercial risk ML was taking on the Nigerian Barge transaction. BROWN was worried about the potential environmental risk associated with owning power plants and ML's liability issues. BROWN wanted to ensure that the deal documents addressed these environmental and liability risks.

BROWN complained about the Nigerian Barge transaction. BROWN stated that it was not his transaction and he was being stuck with handling it because the transaction fit into the type of work his group handled. The Nigerian Barge transaction was a deal which was initiated by ML's bankers in Texas. BROWN also complained because his group was not earning any fees for handling the transaction and that the deal was being consummated close to the end of the year.

DOLAN stated that ML was not in the business of purchasing power plant barges in Nigeria and that is why they originally decided to place the deal in ML's leasing unit. DOLAN was not involved in ML's approval process or what internal ML committee should review this transaction.

DOLAN does not remember when he learned that ML's Debt Markets Committee (DMCC) either reviewed or was going to review the Nigerian Barge transaction. DOLAN did not attend the DMCC meeting and he does not know why it was being reviewed by the DMCC. Typically, BROWN took transactions he worked on to the Lease Advisory Committee. However, the Nigerian Barge transaction was taken to the DMCC.

DOLAN was shown a copy of notes (bate stamped MD037405) which DOLAN acknowledged was his notes. DOLAN read his notes to the agents as follows:

"Enron owns Nigerian Barge Co. has oil barges they will build power plants on top and would sell power to Nigeria. Enron wants to sell equity in project to book accounting gain. ML Houston to put $7 million into. $40 million in fees last year and this. ML to buy stock in BargeCo for $7 million and if goes into service earns 22% return. Approved by executive committee. Dan BAYLY, Kevin Cox, Kathy Z, and EVP (executive vice president) who promises we will be taken out within 6 month. Did LLC to be owned MLMLM. $7 million to buy stock in. LLC will borrow $21 million from different Enron subsidiary. No recourse. We to buy $28 million in stock. Pref A, Pref B, common - we buy 20% of voting rights (2/10). We get next 3 years cash flow from Barge operation. Book $12 million gain at year on the stock. Nigerian Co. is in existence. DMCC @ 12:00 today 12/22. 10:30 am (ML suggestion). Dan BAYLY business group at Enron. Cookies for Santa. $250 advisory fee."

The name "Cox" in DOLAN's notes refers to a ML employee who was a senior person at ML who dealt with commitment issues. The name "Cox" references that either Cox was on the call or that Cox was supposed to be on the call with Enron. The reference "EVP" refers to Executive Vice President at Enron. The word "promises" refers to the assurances made by Enron regarding finding a buyer for ML's interest in the Nigerian Barges. DOLAN explained that "promise" could mean that the conversation where Enron made assurances to ML already happened; not that it was going to happen in the future. "40M in fees" is a reference to the fees earned by ML from Enron.

DOLAN has no reason to believe that "DMCC @ 12:00 today 12/22" on bates stamp page ML037406 is not accurate with respect to the date the DMCC meeting was held. DOLAN is not sure if "Book $12M @ year on the stock" refers to the amount Enron was able to book due to ML's investment in the Nigerian Barges.

Sometime close to the end of the fourth quarter 1999, DOLAN reviewed and made comments to a draft of the Nigerian Barge engagement letter between ML and Enron. The purpose of the engagement letter was to memorialize the agreement between ML and Enron so if there were any questions about the deal in the future, it would be in writing. The engagement letter also insured that ML would receive their fee for entering into the Nigerian Barge transaction.

DOLAN also had a conversation with JEFF WILSON about the engagement letter. DOLAN believes WILSON helped draft the engagement letter. DOLAN requested that WILSON delete some of the language in the engagement letter. Generally, ML engagement letters use general terms to describe a deal because the deal terms can subsequently change. The Nigerian Barge engagement letter was too specific and DOLAN wanted the letter to be more general.

Furthermore, DOLAN made changes to some of the terms related to the deal that were provided in the engagement letter because DOLAN did not believe that those were the actual terms. DOLAN stated that the original draft of the engagement letter obligated Enron to eventually take ML out of the Nigerian Barge transaction. This was contrary to DOLAN's understanding of the transaction and 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 ML purchased an interest in the Nigerian Barges with the expectation that Enron would help ML find a buyer for ML's interest in the Nigerian Barges. DOLAN stated that there was no obligation or commitment that Enron would find a buyer or that Enron purchase ML's interest if a buyer could not be found. This was merely an oral understanding between ML and Enron that if Marubeni did not purchase ML's interest then Enron would help ML find another buyer.

DOLAN was shown a copy of an E-mail from WILSON to DOLAN dated 12/23/1999 (bate stamped ML034707). This E-mail contained a copy of the proposed changes to the engagement letter made by DOLAN. DOLAN acknowledged that the handwriting on the page is his. DOLAN does not remember talking to anyone at Enron about the changes he made to the engagement letter. However, DOLAN did receive handwritten comments from someone from Enron. Enron did not object to the language in the original draft of the engagement letter which stated that "Enron will buy or find affiliate to buy. . ." However, DOLAN did object to this language and made the necessary changes.

DOLAN acknowledged that he had seen the interoffice memorandum bate stamped MD037390 through MD037395 at the time the Nigerian Barge transaction was being consummated. DOLAN does not remember seeing the appropriation request bate stamped MD037396 until he prepared for his interview with the FBI.

DOLAN did not remember what ML's rate of return was for the Nigerian Barge transaction. ML was also paid a fee by Enron for entering into the transaction. DOLAN did not believe there was a cap on how much money ML could make on their investment in the Nigerian Barges.

Sometime in January or February 2000, DOLAN had a meeting with ALLAN HOFFMAN, an attorney not from ML, where they discussed the formation of a ML entity which would house the Nigerian Barges. ML formed a Cayman company for tax purposes. DOLAN was in charge of forming the Cayman company for ML.

In June 2000, DOLAN was contacted by JOE VALENTI, or someone who worked for VALENTI, who told DOLAN that ML was selling their interest in the Nigerian Barges. DOLAN was asked to review the documentation and draft the resolutions. DOLAN does not remember if he knew that the purchaser was LJM2.

DOLAN does not know if ML performed any due diligence or analyzed any valuations with respect to the Nigerian Barge transaction.

DOLAN was shown a copy of documents bate stamped MD037412-037417. DOLAN does not remember seeing these E-mails. DOLAN was shown a copy of hand written notes bate stamped MD037424 which he did not recognize. DOLAN was shown a copy of document related to a special meeting of the ML Board of Directors dated 12/29/99 (bate stamped MD037482-037483). DOLAN does not remember seeing this document. DOLAN does not remember this meeting and he does not remember working on 12/29/1999. MARK MCANDREWS was the Chief Administrative Officer at ML. DOUGLAS P. MADDEN was a paralegal at ML.

In early 2002, ZRIKE asked DOLAN what he recalled from the Nigerian Barge transaction. DOLAN does not recall anything else from this conversation.

DOLAN did not work on drafting a ML demand letter to Enron regarding being taken out of the Nigerian Barge transaction.

DOLAN did not work on an energy swap deal between Enron and ML.

EXHIBIT P

Language that is Underlined in Green is the language that the ETF included in its 2004 Summaries; See Exhibit B.

Language that is Highlighted in Yellow is the language that the ETF itself yellow-highlighted for the District Court's *in camera* review.

Language that is Underlined in Red is favorable-to-the-defense evidence that the ETF omitted from its 2004 Summaries, whether or not it had also been yellow-highlighted. (Caveat: in a small number of instances, words that are underlined in red were apparently omitted for innocuous editorial reasons.)

Language contained in a Purple Box is language that the ETF inserted into its 2004 Summaries, or substituted for other language in the material that was being summarized.

Language that has no color code is language that was legitimately omitted from the 2004 Summaries, because it was innocuous, cumulative or insignificant.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/04/2002

GARY CLARK DOLAN, [redacted] was interviewed at the Bond building in Washington, D.C. DOLAN was represented by RICHARD WEINBERG, FELICIA GROSS, and MARJORIE J. PIERCE. Also present during the interview was Assistant United States Attorney (AUSA) Andrew Weissmann and Securities and Exchange Commission (SEC) attorney Kevin Loftus. After being advised of the identity of the interviewing agent and the nature of the interview, DOLAN provided the following information:

DOLAN received a B.A. from University of Michigan in 1976 and a J.D. from Wayne State University in 1980. In September 1980, DOLAN worked at Merrill Lynch (ML) as an attorney in their Corporate Law department for eight years. DOLAN then transferred to ML's Municipal Markets department and worked their for two to three years. Then, DOLAN transferred to ML's Emerging Markets department where he worked for approximately three years. From April 1999 to present, DOLAN has worked at ML's Investment Banking (IB) department.

DOLAN's responsibilities in the IB department include providing legal advice to ML's private equity placement group, structured leasing finance group, and IB department. Specifically, DOLAN drafted private placement agreements, drafted engagement letters, drafted deal documents, and attended equity committee (ECC) meetings for the Private Equity Placement group. DOLAN attended Structured Leasing Committee meetings as well as drafted deal documents for the Structured Leasing group. Among other things, he drafted engagement letters for the IB department.

The first time DOLAN ever performed any work related to Enron was in the summer of 1999. The Enron work related to ML's Private Equity Placement group and an investment vehicle called LJM2. ML was hired as an underwriter by LJM2 to help place the fund. Regarding LJM2, DOLAN reviewed the engagement letter, drafted deal documents related to the formation of a feeder fund for ML employees which enabled them to invest in LJM2, reviewed the

private placement memorandum (PPM), and attended the ECC review meeting related to LJM2.

DOLAN organized a conference call (sometime between the summer of 1999 and the spring of 2000) between Enron and potential ML employees who were eligible to invest in LJM2. DAVID SULLIVAN, a ML banker, helped DOLAN organize the conference call. The call lasted less than one hour but more than five minutes. ML possibly recorded the conference call for potential ML investors who could not attend the call. If a tape was made, it would have been kept for only one week. FASTOW and someone else who DOLAN does not recall spoke on behalf of LJM2. The purpose of the conference call was to make a presentation to the potential ML investors about LJM2. DOLAN does not recall if there were any conversations about the possible conflict of interest related to FASTOW being the General Partner of LJM2 and Enron's CFO.

KATHY ZRIKE, DON SCHNEIDER (head of Human Resources for ML Investment Banking), and a couple of senior business people at ML decided who at ML could invest in LJM2. DOLAN's role was to prepare and review drafts of documents and E-mails related to ML's solicitation/indication of interest for the LJM2 investment. After the LJM2 investment closed, DOLAN received update letters from LJM2's General Partner and DOLAN forwarded these letters to the ML investors in LJM2. DOLAN worked on LJM2 issues at ML until approximately August 2002. EILEEN PORTER subsequently took over these functions from DOLAN.

In November 2001, various ML investors in LJM2 expressed concerns they had about LJM2 to DOLAN. DOLAN contacted a female employee (does not remember her name) at LJM2 a couple of times and she told DOLAN that the ML LJM2 investors are more nervous than they should be. DOLAN does not remember if this conversation happened before or after Enron declared bankruptcy.

In November or December 2001, MICHAEL KOPPER held a conference call for the ML LJM2 investors. This conference call was initiated because ML's LJM2 investors were concerned about LJM2's future prospects based on the collapse of Enron. KOPPER described what investments were being held in the LJM2 portfolio. KOPPER discussed the valuations of the assets being maintained in LJM2 and there was discussion about the prospect of the banks accelerating LJM2's loan obligations.

Nigerian Barge:

DOLAN first became aware of the prospect of ML investing in an Enron project in Nigeria sometime before Christmas 1999 when he attended a conference call. This conference call was held in ZRIKE's office and JIM BROWN was also present during the conference call. DOLAN took notes during this meeting and still maintains a copy of the notes. BROWN described the Nigerian Barge transaction to the group. BROWN stated that Enron approached ML about purchasing an interest in the Nigerian Barges and described the project as a floating power source for Nigeria. BROWN stated that Enron initially planned to sell an interest in the Nigerian Barges to a company called Marubeni, but Marubeni was not ready to purchase it until early 2000. Enron wanted to sell an interest in the Nigerian Barges by year end 1999 so they could generate earnings for the fourth quarter of 1999. Enron proposed that ML purchase an interest in the Nigerian Barges and that ML would only have to hold it for a short period of time. BROWN stated that the purchase price for ML would be small and that ML would earn a fee from Enron for entering into the transaction.

BROWN stated that there was going to be a conversation between ML executives (DAN BAYLY and ZRIKE) and Enron executives whereby ML was going to seek assurances from a senior officer at Enron that if ML purchased an interest in the Nigerian Barges, Enron would help ML find a buyer for their interest if Marubeni did not purchase ML's interest. Enron had told ML that Marubeni was going to purchase ML's interest in the Nigerian Barges by February 2000.

Deal.

he understood

DOLAN stated that Enron was merely providing a "moral undertaking" to find a buyer for ML's interest in the Nigerian Barges. DOLAN stated that the agreement could not be in writing and it was an oral agreement that had no formal legal significance. DOLAN understood that ML would hold their investment in the Nigerian Barges for up to six month. Dolan had a sense that Enron would not give ML any assurances in writing and ML would not ask Enron for such a request.

that

he believed

DOLAN had a subsequent conversation with BROWN in which BROWN conveyed that he was concerned with the commercial risk ML was taking on the Nigerian Barge transaction. BROWN was worried about the potential environmental risk associated with owning power plants and ML's liability issues. BROWN wanted to ensure that the deal documents addressed these environmental and liability risks.

NBD

the NBD

BROWN complained about the Nigerian Barge transaction. BROWN stated that it was not his transaction and he was being stuck with handling it because the transaction fit into the type of work his group handled. The Nigerian Barge transaction was a deal which was initiated by ML's bankers in Texas. BROWN also complained because his group was not earning any fees for handling the transaction and that the deal was being consummated close to the end of the year.

DOLAN stated that ML was not in the business of purchasing power plant barges in Nigeria and that is why they originally decided to place the deal in ML's leasing unit. DOLAN was not involved in ML's approval process or what internal ML committee should review this transaction.

DOLAN does not remember when he learned that ML's Debt Markets Committee (DMCC) either reviewed or was going to review the Nigerian Barge transaction. DOLAN did not attend the DMCC meeting and he does not know why it was being reviewed by the DMCC. Typically, BROWN took transactions he worked on to the Lease Advisory Committee. However, the Nigerian Barge transaction was taken to the DMCC.

DOLAN was shown a copy of notes (bate stamped MD037405) which DOLAN acknowledged was his notes. DOLAN read his notes to the agents as follows:

Dolan was asked about a handwritten M document in which he wrote:

"Enron owns Nigerian Barge Co. has oil barges they will build power plants on top and would sell power to Nigeria. Enron wants to sell equity in project to book accounting gain. ML Houston to put $7 million into. $40 million in fees last year and this. ML to buy stock in BargeCo for $7 million and if goes into service earns 22% return. Approved by executive committee. Dan BAYLY, Kevin Cox, Kathy Z, and EVP (executive vice president) who promises we will be taken out within 6 month. Did LLC to be owned MLMLM. $7 million to buy stock in. LLC will borrow $21 million from different Enron subsidiary. No recourse. We to buy $28 million in stock. Pref A, Pref B, common - we buy 20% of voting rights (2/10). We get next 3 years cash flow from Barge operation. Book $12 million gain at year on the stock. Nigerian Co. is in existence. DMCC @ 12:00 today 12/22. 10:30 am (ML suggestion). Dan BAYLY business group at Enron. Cookies for Santa. $250 advisory fee."

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engagement letter

he believed

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EXHIBIT Q

U.S. Department of Justice

Enron Task Force

1400 New York Avenue
Washington, D.C. 20530

April 22, 2004

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Re: United States v. Daniel Bayly, et al. Criminal Docket No. H-03-363 (Werlein, J.)

Dear Counsel:

With regard to Count One of the above captioned matter, the following is a list of unindicted co-conspirators, of which the government is aware:

Eduardo Andrade
Eric Boyt
Richard Causey
Kevin Cox
Mike DeBellis
Mark Devito
Gary Dolan
Rodney Faldyn
Andrew Fastow
John Garrett
Steve Hirsch
Alan Hoffman
James Hughes
Ben Glisan
Michael Kopper
Sean Long
Mark McAndrews
Rebecca McDonald
Jeff McMahon
Alan Quaintance
Ace Roman
Barry Schnapper
Cassandra Schultz
Jeffrey Skilling
Keith Sparks
Schuyler Tilney
Paul Wood
Joseph Valenti
Kathy Zrike

We believe that most of the defendants are aware of the identity of most if not all of these individuals, and their role as co-conspirators. As you know, the government is not legally required to provide the identities of unindicted co-conspirators, but is doing so voluntarily because the defense has claimed that it needs such information to prepare its case. Accordingly, this list is furnished to you to assist you in case preparation. This list is not a basis upon which to exclude any evidence. This list itself is not evidence. We reserve the right to supplement this list.

Very truly yours,

ANDREW WEISSMANN
Director, Enron Task Force

By: _____
Matthew W. Friedrich
David H. Hennessy
Kathryn H. Ruemmler
Enron Task Force