OFFICE OF THE CHIEF DISCIPLINARY COUNSEL
STATE BAR OF TEXAS
GRIEVANCE FORM

I. GENERAL INFORMATION

I have _____ I have not _X_ contacted the Client-Attorney Assistance Program. It is not applicable.

II. INFORMATION ABOUT YOU -- PLEASE KEEP CURRENT

Name: W. William Hodes, Esq.
Address: The William Hodes Law Firm
811 Chapman Loop
Village of Hemingway
Lady Lake, FL 32162
Cell Phone: (317) 590-1692

Drivers License # H320-920-43-460-0 (FL) Date of Birth December 20, 1943

Name: Sidney K. Powell, Esq.
Address: Sidney Powell P.C.
3831 Turtle Creek Boulevard, #5B
Dallas, TX 75219
Cell Phone: (214) 707-1775

Drivers License # 25517047 (TX) Date of Birth May 1, 1955

Name, address, and telephone number of person who can always reach you.

Name: Hellen Goldfarb Phone: 828-274-4063

Do you understand and write in the English language? Yes

Are you a Judge? No

III. INFORMATION ABOUT ATTORNEY

1. Name: Matthew Friedrich, Esq.
Boies, Schiller & Flexner LLP.
5301 Wisconsin Avenue NW
Washington, D.C. 20015
2. Office Telephone: (202) 237-2727

3. Have you or a member of your family filed a grievance about this attorney previously?

No. However, in 2008 Ms. Powell assisted her then client James A. Brown in filing a grievance against Mr. Friedrich with this Office, arising out of the same set of facts and circumstances as described in Part IV.3. At that time, Mr. Brown, again assisted by Ms. Powell, filed similar complaints against attorney Andrew Weissmann with the Departmental Disciplinary Committee for the First Department of New York, and against attorney Kathryn Ruemmler with the Office of Bar Counsel of the District of Columbia. In addition, Ms. Powell requested on Mr. Brown's behalf that the Department of Justice, Office of Professional Responsibility, conduct an investigation into the conduct of Mr. Friedrich, and that the Office of Public Integrity investigate Ms. Ruemmler's conduct when she was named Assistant White House Counsel.

All aspects of the case involving Mr. Brown (and all of his co-defendants in the underlying case described in Part IV.2) have now been concluded, and far more information is available than was available in 2008. On July 25, 2012, Mr. Hodes and Ms. Powell, the grievants in this matter, filed a complaint with the D.C. Office of Bar Counsel against White House Counsel Kathryn Ruemmler, who was Mr. Friedrich's co-counsel in the underlying case.

4. Please check one of the following:

_____This attorney was hired to represent me.
_____This attorney was appointed to represent me.
___X___ This attorney was hired to represent someone else.

Please give the date the attorney was hired or appointed. _____

Please state what the attorney was hired or appointed to do. Mr. Friedrich was one of the four Enron Task Force prosecutors who prosecuted four Merrill Lynch employees in the so-called Nigerian Barges Deal case, as described in Part IV.2.

5. What was your fee arrangement with the attorney? N/A

How much did you pay the attorney? N/A

If you signed a contract and have a copy, please attach.
If you have copies of checks and/or receipts, please attach.
Do not send originals.

6. If you did not hire the attorney, what is your connection with the attorney? Explain briefly. Sidney Powell represented James Brown, one of the defendants in the Nigerian Barges Deal case, for eight years after conclusion of the criminal trial, from shortly after the jury's verdict in 2004 through the Petition for Writ of Certiorari in the Supreme Court in 2012. William Hodes commenced representation of Mr. Brown shortly before oral argument in the Fifth Circuit in July 2011. Both grievants became intimately familiar with the record in the underlying case, and thus with Mr. Friedrich's misconduct.

7. Are you currently represented by an attorney? No; the grievants are attorneys.
If yes, please provide information about your current attorney: _____

8. Do you claim the attorney has an impairment, such as depression or a substance use disorder? If yes, please provide specifics (your personal observations of the attorney such as slurred speech, odor of alcohol, ingestion of alcohol or drugs in your presence etc., including the date you observed this, the time of day, and location). No

9. Did the attorney ever make any statements or admissions to you or in your presence that would indicate that the attorney may be experiencing an impairment, such as depression or a substance use disorder? If so, please provide details. No

IV. INFORMATION ABOUT YOUR GRIEVANCE

1. Where did the activity you are complaining about occur?
County: Harris City: Houston

2. If your grievance is about a lawsuit, answer the following, if known:

United States of America v. Daniel Bayly, James A. Brown, Robert S. Furst, and William Fuhs, Cr. No. H-03-363, United States District Court for the Southern District of Texas, Houston Division. After the defendants were convicted, the case was appealed, with

opinion at *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007) ("*Brown I*"), and later appealed upon denial of a Motion for New Trial in the case of James Brown only, with opinion at *United States v. Brown*, 650 F.3d 581 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1969 (2012) ("*Brown III*").

If you are not a party to this suit, what is your connection with it? Explain briefly.

As explained in Part III.6, both grievants represented Mr. Brown at various points in the litigation.

If you have copies of court documents, please attach.

[NOTE: Court documents run to thousands of pages and cannot be attached. However, several exhibits, drawn from court documents, are attached, and will be referenced in Part IV.3. Because some of the exhibits include either yellow-highlighting or computer generated color coding, they have been provided in electronic format as well as hard copy. Voluminous additional documentation is available, and will be provided upon request.]

3. Explain in detail why you think this attorney has done something improper or has failed to do something which should have been done. Attach additional sheets of paper if necessary.

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EXHIBITS

I. FACTUAL BACKGROUND AND THE UNDERLYING CASE.

A. *The Enron Task Force and the Nigerian Barges Deal Prosecution*.

In the wake of the December 2001 collapse of Enron Corporation, the federal Government created the Enron Task Force (ETF), a joint effort of the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), and the Internal Revenue Service (IRS). The ETF prosecuted several matters arising out of the Enron bankruptcy, including what came to be known as the Nigerian Barges Deal (NBD) case, *United States of America v. Daniel Bayly, et. al.*, Cr. No. H-03-363, United States District Court for the Southern District of Texas, Houston Division.

Four members of the ETF were responsible for prosecuting the NBD case: the then Director of the ETF, New York lawyer Andrew Weissmann; California lawyer John Hemann; District of Columbia lawyer Kathryn Ruemmler, and Matthew Friedrich, who is the subject of this grievance. Although the four lawyers played different roles in the prosecution, they acted as a coordinated unit, and consulted with each other constantly as the case progressed. For example, although Weissmann was in charge of the grand jury proceedings, worked with the FBI and other law enforcement personnel during the investigatory stage, and obtained the indictments in the case, he also attended almost every day of the six-week trial that began in September 2004, and supervised the trial work of the other three. Hemann delivered an opening statement to the jury, while Friedrich and Ruemmler both made closing arguments; all three trial attorneys examined and cross-examined witnesses and presented evidence.

The gravamen of the case as alleged by the ETF was that in December 1999, several Enron employees conspired with four employees of Merrill Lynch (Daniel Bayly, James Brown,

Robert Furst, and William Fuhs), to arrange a "sham" sale from Enron to Merrill of an interest in three electricity-generating barges moored off the coast of Nigeria. The prosecution maintained that the deal was a sham and a "parking" transaction, because Enron's Treasurer, Jeffrey McMahon, allegedly *guaranteed* both that Merrill would be out of the transaction within 6 months, and that if Enron was unable to find some third party to purchase Merrill's interest, Enron would buy the interest back itself.[1] According to the government's theory of the case, this *guaranteed buy-back* would render false Enron's accounting treatment of the Nigerian Barges Deal as a sale, because it would instead be a loan.[2]

In addition to the substantive charges against the Merrill defendants, which included wire fraud and depended on an allegation that the defendants deprived Enron and its shareholders of Fastow's "honest services," the ETF charged James Brown, the head of Merrill's Strategic Asset and Lease Finance Group, with perjury and obstruction of justice. The basis of those last charges was Brown's voluntary testimony before the Enron grand jury that his personal "understanding"

1 According to the ETF, these guarantees were subsequently ratified by Enron CFO Andrew Fastow in a brief telephone conversation with Merrill Lynch defendant Daniel Bayly, in which McMahon and several others also participated.

2 As will be seen in Part I.B., the defense insisted that there was no guarantee, only a "*best efforts*" undertaking to *remarket* the barges—which the ETF, including Mr. Friedrich specifically, acknowledged would have been lawful. Indeed, Merrill counsel Katherine Zrike told ETF prosecutors that she attempted to insert a "best efforts" clause into the deal documents, but was rebuffed by Enron's counsel from Vinson & Elkins. As described in Part III.C, the ETF suppressed evidence of Zrike's efforts and deceitfully used the *absence* of such a clause as evidence *against* the defendants.

of the NBD was that Enron had given Merrill its "*assurance*" that it would use its "*best efforts*" to *remarket* the barges, but that there was no "promise" in the nature of a guarantee.[3]

In pretrial proceedings, the Merrill defendants repeatedly demanded disclosure of any favorable or exculpatory material held by the government, and the ETF repeatedly denied that any such material existed, while further asserting that it had more than complied with its disclosure obligations by providing the names of the potential witnesses in the case. The defense continued to complain that the ETF had pervasively interfered with its ability to prepare for trial by denying meaningful (and private) access to those very witnesses, and coercing the witnesses into refusing to consent to be interviewed. Eventually, the trial court ordered the prosecution to turn over "summaries of the exculpatory information that led the Government to identify [Merrill counsel] Kathy Zrike and other witnesses as having exculpatory information . . . *in addition to,*

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3 Specifically, Brown was shown an Enron memo—mischaracterized by the prosecution (in the grand jury and in the Indictment) as a Merrill Lynch document. The following exchange, for which Brown was indicted, followed:

> Q: "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] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?
> A: No.

Exhibit C:88 (Brown Grand Jury Transcript). Brown then explained further:

> "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*" *Id*. at 91-92 (emphasis supplied).

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." *See* Exhibit A:7-9 (emphasis supplied).

On July 30, 2004, the ETF provided the "summaries" in a 10-page letter that was faxed to all defense counsel. Exhibit B. The signature block on the letter shows that it was from Weismann as the Director of the ETF, but it was signed by Ruemmler for Weissmann, Friedrich, Hemann, and herself. The summary letter provided information about 22 individuals from Enron or Merrill Lynch, but most of those individuals were marginal participants who either had no firsthand knowledge of the NBD transaction, or whose "exculpatory" information consisted merely of *not* having any inculpatory information.

With respect to key players Jeffrey McMahon, Katherine Zrike, and Gary Dolan, however, the summaries addressed three of the individuals with the most direct and crucial information about the NBD. As discussed fully in Parts III.B, III.C, and III.D, the "summaries" with respect to McMahon, Zrike, and Dolan were in direct contravention of the court's order, because they deliberately concealed information favorable to the defendants rather than summarizing it. Instead of fairly summarizing "the exculpatory information" they possessed with respect to these witnesses—*and highlighted in yellow for the trial court's in camera review*—the prosecutors created "summaries" that were a calculated and deceitful exercise in selective inclusion and misdirection. Indeed, the bogus "summaries" put the defendants in a worse position than they were before the court's order, because the defense had to assume that exculpatory information *not* produced in response to a court order *simply did not exist*.

As described below, the defense did not learn that the summaries were fraudulent until sometime between late 2007 and 2010, as new prosecutors gradually released thousands of pages of grand jury testimony, FBI 302s and raw notes that contradicted and deviated significantly from the misinformation provided by the ETF. Thus, in 2004 the defense was forced to go to trial without complete or accurate exculpatory information, and with a deliberately distorted account of what the key witnesses knew and said.

At the same time, ETF lawyers repeatedly capitalized on their suppression of crucial evidence that would have been favorable to all defendants in the NBD case. ETF prosecutors routinely elicited testimony they *knew* was either false or subject to punishing impeachment, secure in the knowledge that the defense was unaware of the true state of the evidence, and had been unable to talk to any witnesses. As a result, all Merrill defendants were convicted.[4]

The Fifth Circuit reversed the conspiracy, wire fraud, and "honest services" convictions of all Merrill defendants, *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007) ("*Brown I*"), and acquitted Brown's subordinate Bill Fuhs outright, after he spent 5 months in a maximum security prison while the ETF vigorously opposed bail pending appeal. Brown's convictions for perjury and obstruction were affirmed by a divided panel, *Id*. at 536-37 (DeMoss, J., concurring in part and dissenting in part).

From late 2007 until March 2010, pending retrial of the substantive counts with respect to all defendants except Fuhs, new prosecutors disclosed some 6,300 pages of interview notes, FBI 302s, and grand jury testimony that the original prosecutors concealed. In particular, the March 2010 production of about 1,500 pages revealed that the original prosecutors *highlighted in yellow*

4 It should go without saying that any violations of the Rules of Professional Conduct would still be violations, even if some or all of the defendants had been acquitted at trial.

numerous favorable statements made by McMahon, Zrike, and Dolan, for the trial court to review *in camera* before the 2004 trial, *but excluded from the court-ordered summaries the most crucial highlighted material, and excluded other significant exculpatory information as well.*

Based on these revelations, Brown filed a Motion for a New Trial and a Motion to Dismiss for Prosecutorial Misconduct, and repeatedly requested an evidentiary hearing. The trial court denied these requests and Brown's motions, leaving the wire fraud and conspiracy counts ready for retrial. In September 2010, however, just 3 days before the retrial was to begin, the Government dismissed all remaining charges against Brown, having previously dismissed all charges against Daniel Bayly, and entered into a deferment agreement with Furst that resulted in the later dismissal of charges against him, after he too had earlier spent almost a year in prison.

In denying Brown's 2010 Motion for New Trial, the trial court adopted the Government's view and rejected Brown's *Brady* claims, concluding that favorable evidence had not been suppressed, and that even if it had, the evidence was not material to the perjury and obstruction of justice counts under *Brady* and its progeny.

James Brown appealed to the Fifth Circuit Court of Appeals, and that court found some of the trial court's rulings with respect to the "favorability" prong of *Brady* to be *clearly erroneous*. However, the Fifth Circuit, employing an unusual "clear error" standard of review, upheld the trial court's refusal to grant a new trial on the basis of the "materiality" prong of *Brady*, *United States v. Brown*, 650 F.3d 581 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1969 (2012) ("*Brown III*").[5] Nonetheless, the Fifth Circuit squarely held that the prosecutors "plainly suppressed" evidence that was favorable to the defense.

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5 This decision is referred to as *Brown III*, because there was an interim interlocutory

As will be seen in Part II, the two-part holding of the Fifth Circuit is highly relevant for purposes of this grievance, because the applicable Rules of Professional Conduct apply to "*any* evidence or information" that is favorable to the defense, *whether or not the evidence or information is "material" in the constitutional sense*.

Brown petitioned the United States Supreme Court for a Writ of Certiorari, challenging the standard of review employed by the Fifth Circuit, and its distorted definition of "materiality." The Writ was denied, however, on April 23, 2012. While the Petition was pending before the Supreme Court, the government sought resentencing—and more jail time for Brown—on the perjury and obstruction charges, after the substantive charges against Brown had first been reversed and then dismissed. The trial court resentenced Mr. Brown to the one year he had already served, and the denial of the Petition for Certiorari marked the end of every aspect of the Nigerian Barges Deal case.

B. *Guaranteed Buy-Back Versus Best Efforts Remarketing—the Sole Issue in Dispute in the NBD Prosecution*.

Regarding the December 1999 Nigerian Barges Deal, the prosecution and the defense were in basic agreement about the dividing line between a legitimate commercial transaction and a criminal scheme—whether Enron could book a sale of the barges. The disagreement was over what actually happened (and in the last two counts against Brown, whether he truthfully described his understanding of it to the grand jury).

If Enron sold the barges to Merrill Lynch, divesting itself fully of the risk of physical or market loss, that would be a lawful transaction, even if Enron agreed (orally or in writing) to use

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appeal to the Fifth Circuit on double jeopardy and related issues that is referred to as *Brown II*.

its best efforts to "remarket" the barges to a third party. *Enron Task Force prosecutors—and Mr. Friedrich specifically—repeatedly agreed, and so argued to both the trial court and to the jury.*[6] But if Enron personnel made a guarantee to *buy back* the barges within a certain period of time, then risk would not have passed from Enron to Merrill, and the transaction would be a loan or a "parking" transaction, fraudulently characterized by Enron as a sale.

The ETF's theory of the case depended on three propositions. First, the prosecutors claimed that Jeffrey McMahon, the former Treasurer of Enron, was the one who first broached the subject to Merrill, and gave Merrill the illegal buy-back guarantee. This theme was presented to the jury in the opening statement, repeated in the closing argument, and stressed throughout the trial in between. Mr. Friedrich listened while Ms. Ruemmler told the jury that McMahon was "the key"; McMahon was the linchpin.[7] Then Friedrich hammered this theme home in rebuttal and tied it specifically to Mr. Brown: "[Y]ou know from the email, you know from the Tina Trinkle conversation [that McMahon made a guarantee] … that there was an agreement, there

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6 A compendium of such statements may be found in Exhibits D, E and F. For example Matthew Friedrich himself said: "If it's just 'best efforts,' then it would have been okay." Exhibit E:4528, 4520. Then, in closing argument, he told the jury—as he argued the defense claims of a best-efforts agreement to remarket the barges was a lie: "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." Exhibits D:2-3; E:6486. And on the initial direct appeal to the Fifth Circuit, the government acknowledged, "the prosecution repeatedly stated that if it was a re-marketing agreement, there wouldn't have been a problem with that." Brief of Appellee United States, *United States v. Brown*, No. 05-20319 (Oct. 11, 2005 5th Cir.), at 234 n. 90 (citation omitted), Exhibit F.

7 *See* Exhibit D:2-3 for a list of such statements. For example, John Hemann stated in his opening to the jury: "McMahon called Merrill Lynch and he cut a deal …. and what was the deal? …. that was the guarantee that Merrill Lynch got from [] McMahon . . . . The purpose of the handshake … was to confirm the deal that had been cut by Mr. McMahon;" Exhibit D:2-3; Exhibit E:402- 404. Similarly, Ms. Ruemmler told the jury: "So the key . . . was Jeff McMahon. …. [McMahon subordinate] Glisan told you that Jeff McMahon confirmed to him that he gave that exact guarantee"; Exhibit E:6159-60.

was a promise, and that Mr. Brown lied when he went into the Grand Jury." Exhibits D:2; E:6510-11.

Second, the ETF claimed that on December 23, 1999, McMahon brought Enron CFO Andrew Fastow onto a five-minute phone call with several Merrill executives—including defendant Daniel Bayly, but *not* including defendant James Brown—in which Fastow "ratified" McMahon's illegal buy-back guarantee.[8]

Third, the Task Force asserted that the Merrill Lynch defendants concealed this oral buy-back agreement from Merrill counsel. It also asserted that when counsel correctly insisted that a "best efforts" remarketing agreement would be acceptable, but that a guaranteed buy-back would not, the defendants "cut counsel out" of the deal, lied to them, and plunged ahead with the illegal transaction on their own.[9]

For their part, the defendants maintained that Fastow gave a perfectly lawful assurance that Enron would use its "best efforts" to remarket the barges to a third party. They also maintained that they relied on counsel—chiefly Katherine Zrike and Gary Dolan—to handle the transaction lawfully, *and that counsel was, in fact, thoroughly engaged in the negotiations and in documenting the lawful transaction.*

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8 Exhibit D:2-3 also includes statements in which the prosecutors repeated their mantra. Ms. Ruemmler argued to the jury: "The reason why they got on the [Fastow-Bayly] call is so that Mr. Bayly could be assured that Enron was going to stick by the promise that it made [in McMahon's earlier phone call with Furst] . . . . Remember again what Mr. Glisan told you, that . . . Andy Fastow was the one who ratified the comments that had already been made by Mr. McMahon;" Exhibit E:6217-19.

9 Many of the statements the prosecutors made to the jury advancing this theme are gathered in Exhibit D:1-5. Mr. Friedrich argued vehemently that things were hidden from Merrill Counsel Zrike "time and time again." Exhibits D:2-5; E:6503. The actual, active role that Merrill counsel played in documenting the NBD transaction is discussed in Part III.C (Katherine Zrike) (Exhibit D:1, 3-4) and Part III.D (Gary Dolan) (Exhibits D:1,3-5; O, P).

Thus, these competing views of exactly what was said by McMahon and Fastow, and what role Merrill counsel played in the transaction, were the only genuine disputes presented in the case.

The chief contention of this grievance is that Matthew Friedrich and his Enron Task Force colleagues carefully identified, but then, deliberately and systematically, kept critical information about the most crucial first-hand witnesses from the defense and from the jury. Even if Friedrich did not himself credit the statements of these witnesses, it was his ethical obligation and his duty under the District Court's Order to disclose the evidence so that the defense could evaluate it, and then *the jury* could consider it in reaching its verdict.

II. SUMMARY OF THE RULES OF PROFESSIONAL CONDUCT VIOLATED.[10]

The four Merrill Lynch defendants in the NBD case were first indicted in September 2003. They were jointly tried beginning in September 2004, convicted, and then sentenced in Spring 2005. Accordingly, Matthew Friedrich should be—and can only be—judged according to the Disciplinary Rules of Professional Conduct that were in force in Texas during that time period.

At the threshold, the most salient rule is Texas Rule 8.04(a)(1), which is similar to ABA Model Rule 8.4(a):

Rule 8.04. Misconduct.

(a) A lawyer shall not:

10 The text of the applicable Rules may be found in Exhibit G.

(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.

This rule does not call for vicarious disciplinary liability, but here Mr. Friedrich and his three ETF colleagues acted in such close concert, each enabled the other, and they constantly ratified each other's conduct. In the discussion that follows, therefore, misconduct not described as directly attributable to Friedrich alone is nonetheless linked to him through Rule 8.04(a)(1).

Most prominently, Matthew Friedrich (both directly and through the other members of the Enron Task Force assigned to the Nigerian Barge Deal case) serially violated Rule 3.09(d).

Rule 3.09. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

(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 (emphasis supplied).

This is the disciplinary version of the *Brady* rule, but it (like counterpart Model Rule 3.8(d)) contains no "materiality" requirement. *All* evidence that *tends to negate guilt or mitigate the offense* must be disclosed. There is not even a requirement that the defendant make a request for the information (although such a requirement would readily have been satisfied in this case, given that the defense repeatedly demanded information and was repeatedly rebuffed).

As further detailed in Part III, Matthew Friedrich violated the following additional provisions of the Texas Disciplinary Rules of Professional Conduct.

- **Rule 3.04(a). Fairness in Adjudicatory Proceedings.**

Mr. Friedrich "unlawfully obstructed" the defense's "access to evidence," and "unlawfully altered and concealed documents having evidentiary value," in particular evidence of prior statements made by key witnesses and documents embodying those statements. The ETF prosecutors repeatedly threatened key witnesses from Merrill Lynch (such as Katherine Zrike) and Enron (such as Jeffrey McMahon) with prosecution if they did not support the government's theory of the case, and prosecutors also enlisted the aid of Merrill Lynch itself in ensuring that the Merrill witnesses would not provide testimony supporting the "best efforts to remarket" rather than the "guaranteed buy-back" version of the transaction, even if the former was true. In addition, through the "summaries" provided to the defense, the prosecutors altered and misstated the tenor of the documents, sworn testimony, and statements they purported to summarize.

- **Rule 3.04(b). Fairness in Adjudicatory Proceedings.**

Mr. Friedrich "falsified evidence," namely through use of the same misleading and false "summaries" that misled the defense into thinking that favorable evidence was either unfavorable or non-existent.

- **Rule 3.04(d). Fairness in Adjudicatory Proceedings.**

Mr. Friedrich knowingly disobeyed "a ruling of a tribunal" when he deliberately failed to provide genuine and accurate "summaries" of the exculpatory evidence known to the

prosecution, but instead provided bogus and actively misleading summaries that concealed rather than disclosed what the trial court ordered to be disclosed.

- **Rule 3.04(e). Fairness in Adjudicatory Proceedings.**

In addition to obstructing the defense's free access to critical witnesses, Mr. Friedrich personally "requested" those witnesses not to give relevant information to the defense.

- **Rule 8.04(a)(3). Misconduct.**

Mr. Friedrich's use of the false and misleading "summaries," made worse by capitalizing on the defense team's resulting ignorance of the actual facts, is quintessentially "conduct involving dishonesty, fraud, deceit or misrepresentation."

Rule 8.04(a)(4). Misconduct.

Mr. Friedrich's misconduct in the NBD case prosecution constituted "obstruction of justice."

III. PROSECUTORIAL MISCONDUCT CONSTITUTING DISCIPLINARY OFFENSES.

A. *Intimidation and Denial of Pretrial Access to Merrill Lynch Witnesses.*

Matthew Friedrich, Kathryn Ruemmler, and their colleagues on the Enron Task Force employed two interlocking strategies to ensure that the Merrill Lynch defendants in the Nigerian Barges Deal case had no meaningful access to other Merrill personnel who were knowledgeable about the NBD transaction, and who—*as the ETF well knew*—had voluminous and significant evidence and testimony that was favorable to the defense. The ETF then combined this denial of access with systematic suppression of evidence they specifically identified as favorable to the defense for the district court, as summarized earlier and discussed in more detail in Parts III.B, III.C, and III.D.

The payoff for this one-two punch was an unfair trial in which the prosecution could—and did—mischaracterize the evidence with impunity, knowing that the defense could not counter with either evidence or cross-examination about matters that were hidden from it. Indeed, as described more fully in Part III.C, when Merrill Counsel Katherine Zrike was called by one of the defendants "blind," and then cross-examined, the ETF was able to argue to the jury that she was "cut out" of the negotiations by the defendants (Exhibits D:3-4; E:6504) and Mr. Friedrich trumpeted to the jury that she was "devastating for the defense." Exhibit E:6500. Both arguments were possible only because the prosecution deliberately suppressed virtually all of the favorable evidence that Zrike had to give, leaving the defense ignorant of the right questions to ask on direct, and unaware of how to rehabilitate her on redirect.

Indeed, if the defense had the same access to the exculpatory evidence as the prosecutors, the government's very case-in-chief would not have been possible—or supported by Zrike's testimony. Instead, Zrike would have been a compelling defense witness.

Before it could risk going forward with a case in which it would suppress much of the most important evidence favorable to the defense, however, the prosecution had to make certain that the defense would not find the evidence on its own. *That* was the significance of the unethical stratagems the ETF used at the earliest stages of the case—employed directly by Mr. Friedrich. *See* Exhibits H and I.

First, the prosecutors threatened Merrill Lynch with the same corporate destruction that had recently been visited upon Arthur Andersen, forcing Merrill to agree to a Non-Prosecution Agreement (Exhibit H), in which,

a) Merrill was compelled to make its personnel available for interviews, and to provide complete access to it facilities and documents; Agreement, Exhibit H at ¶ 4;

b) Merrill employees were foreclosed from providing the NBD defendants with any information that "contradicted" Merrill's "admissions," or from "making any public statement, in litigation or otherwise, contradicting Merrill Lynch's acceptance of responsibility"; *id.* at ¶ 7;

c) Both Merrill and its employees were threatened with indictment and ruination if they disputed—even truthfully and justifiably—the government's theory of the case; *id.*; and,

d) Determination of whether b) or c) (or any other provision of the Agreement) had been violated rested "in the sole discretion" of the ETF. *Id*.

The net effect of this unusual and arguably unconstitutional agreement[11] was that not only Merrill Lynch as an entity, but individual Merrill employees were barred from providing evidence or testimony that was inconsistent with the government's "guaranteed buy-back" meme rather than the " best efforts remarketing agreement" meme, even if the latter was the truth. Exhibits H and I. Mr. Friedrich took full advantage of this agreement and used it to keep the defense team away from the Merrill witnesses.

When pressed, the ETF argued that the agreement was not binding on Merrill employees speaking in their individual capacities (Exhibit J). However, any employee who did not cooperate with the government was either forced to resign[12] or indicted (like Bayly, Furst, Brown and Fuhs) or repeatedly threatened with indictment (like Katherine Zrike in particular).

11 *United States v. Stein*, 435 F. Supp. 2d 330, 345-46, 349, 357 (S.D.N.Y. 2006), *aff'd*, *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) ("*Stein I*").

12 Tom Davis, President of Merrill Investment Bank, who had the authority to and did approve the transaction refused to cooperate with the government and testify before the grand jury. He was forced to resign, as was anyone else who did not cooperate, including Schuyler Tilney, who was Merrill's primary contact with Enron and who was on the crucial phone call with McMahon and Fastow.

Consequently, especially in light of the enormous chilling effect exerted by point d) listed above, no Merrill Lynch employee would speak to any member of the defense team. Meanwhile, the ETF not only had routine access to any Merrill employee that it wished to interview (because of point a)), it also had continuing access to Merrill documents, including defense team attorney fee statements that were paid by Merrill Lynch (Exhibit H at ¶5).

Second, as if any additional disincentive to speak to the defense was needed, the ETF provided it by naming every Merrill Lynch or Enron employee in any way connected to the NDB as an unindicted co-conspirator, and routinely threatened to indict anyone who might have cooperated with the four defendants. *See* Exhibit Q.

The third tactic employed by prosecution to ensure that the favorable evidence it was suppressing would not be revealed by the witnesses directly was to insist that a representative of the Enron Task Force be present at any defense interview of any Merrill employee. Mr. Friedrich personally informed the defense of this requirement. Exhibit I. Moreover, when confronted by defense counsel, Mr. Friedrich refused to withdraw his "request" that a Task Force attorney participate in any interview by defense counsel. Exhibit I (Schaeffer letter). Given the tense circumstances just described, this was tantamount to a "request" that the witnesses not speak to the defense at all. Indeed, Mr. Friedrich specifically refused to state that Merrill would not suffer adverse consequences if it refused his "request." *See* Exhibits H, I and J.

B. *Suppression of Favorable Evidence: Former Enron Treasurer Jeffrey McMahon.*

As described in Part I.B, Matthew Friedrich and the rest of the prosecution team carefully orchestrated their case to prove that an illegal "buy-back guarantee" for the Nigerian Barges originated with then Enron Treasurer Jeffrey McMahon (in a conversation with Merrill Lynch

employee and defendant Robert Furst). Secondly, Friedrich and his colleagues attempted to prove that this "guarantee" was ratified during a five-minute telephone conversation between McMahon, Enron CFO Andrew Fastow, and several Merrill executives, including defendant Daniel Bayly.

Defendant James Brown was not a party to that phone call, and *none* of the parties who were on the call testified for the government at trial, even though Fastow, the purported guarantor, was cooperating with the government by this time. Instead, the ETF attempted to prove the guarantee, the ratification of the guarantee, and the content of the Fastow-Bayly phone call chiefly through the double (or triple) hearsay testimony of Ben Glisan and Michael Kopper, Fastow subordinates who pled guilty to other crimes.

Recognizing that the defendants steadfastly maintained that McMahon and Fastow agreed only to a lawful "best efforts" attempt to remarket the barges, the prosecutors coupled their attempt to prove the guarantee with a vigorous push to disprove the existence of a "best-efforts" agreement, and to prevent the defense from establishing it. In closing argument, Friedrich repeatedly ridiculed the notion that an agreement to use best efforts to remarket the barges was contemplated. And, as will be seen in Part III.C, Mr. Friedrich and Ms. Ruemmler repeatedly mocked the inability of the defense to point to a "best efforts" clause in the transaction documents, while the prosecutors hid the very evidence that showed *why* there was no such clause.[13]

13 As Mr. Friedrich and the other prosecutors knew, there was no such clause in the NBD documents because, as Merrill counsel Katherine Zrike told the grand jury, the SEC, Mr. Weissmann, and the ETF, she tried to include one to document the actual agreement, but *Enron's* counsel vetoed it. Information about counsel's efforts in this regard was among the most important information withheld—some of which the prosecutors even yellow-highlighted for the

To prove that McMahon made a guarantee, Matthew Friedrich and his colleagues ultimately fell back on a much more effective—albeit illegal and unethical—strategy. In possession of hundreds of pages of FBI 302s, grand jury testimony of transaction participants, and raw notes of interviews with Mr. McMahon by six different interviewers, in which he unequivocally *denied* making the guarantee that was the *sine qua non* of their case, the ETF prosecutors simply suppressed the information and refused to turn it over to the defense.

And when the District Court ordered the prosecution to provide summaries of the exculpatory information it had, *see* Exhibit A:9, the prosecutors simply violated the court's order by surgically *removing* the crucial exculpatory information contained in the McMahon materials, and instead providing a fake "summary" that was patently inconsistent with the actual notes of the interviewers, and in fact directly contradicted them.

The "summaries" that Ms. Ruemmler signed on behalf of Friedrich and the other ETF prosecutors involved in the NBD case, *see* Exhibit B, ran some 10 pages, and covered 22 witnesses--purportedly summarizing thousands of pages of testimony, 302s and interview notes. However, with respect to Jeffrey McMahon—the alleged original guarantor and the individual the ETF repeatedly described to the jury as "the key"—the entire summary consisted of only the following 4 sentences, all of which were apparently based only on the yellow-highlighting in the raw notes of one interviewer—Stephanie Segal (*see* Exhibit K:000529-30):

> 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.

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trial court's pretrial *in camera* review and then *still* concealed. (Exhibit D:1-5; Part III.C).

When compared with the actual raw notes of Ms. Segal *and those of the other five interviewers*, which the defense did not obtain until late March 2010, this "summary" is both misleading and false. The second sentence is misleading, because it reveals only that Merrill *wanted* a remarketing agreement, and says nothing about what Enron (through McMahon and Fastow) *actually provided*. It also says nothing about what actually happened in further negotiations and when the final deal was struck. Yet the actual raw notes of at least five separate interviewers—yellow-highlighted by Friedrich and his colleagues—provide positive evidence that even the purported "secret side deal" was a purely lawful agreement to use best efforts to remarket the barges *from Enron's point of view, as well as McMahon and Fastow's*. And counsel for both Enron and Merrill were aware of and responsible for omitting even that lawful level of commitment from the transaction documents.

The last sentence of the McMahon "summary" is completely at odds with the raw notes of the other five interviewers. The other notes show unequivocally that McMahon *did* recall the situation respecting a "guaranteed take-out at the end of the 6 month remarketing period." *He not only recalled, but he explicitly declared that there was no such guarantee* and no commitment beyond use of best-efforts.

The following statements in the raw notes were *highlighted in yellow* by the ETF and then submitted to the trial court for *in camera* review before trial, but not a single one was either provided to the defense team in 2004, or even tangentially referenced in the 2004 McMahon "summary." *See* Exhibit B. Even more evidence favorable to the defense existed in the McMahon interview notes of several of the interviewers, but was not highlighted. This evidence

proved the heart of the defense and contradicted the prosecutors' only theory of any crime. Exhibit K.

- Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. Agreed E[nron] would use best efforts to help them sell assets. *Id*. at 000447 (Roach).[14]

- Andy agreed E would help remarket equity w/in next 6 months. –no further commitment. *Id*. at 000494 (Kirschner).

- 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. *Id*. at 000478 (Henseler).

- Enron would use best efforts to help remarket the equity. *Id*. at 000513 (Casette).

- AF agreed that ENE would help them remarket in 6 mos. *Id*. at 000514 (Casette).

- Andy said–Enron help remarket in next six months. *Id*. at 000560 (Pitrizzi).

- Enron "[n]ever made rep[resentation] to ML [Merrill Lynch] that E[nron] would buy them out or [] @ set rate of return." *Id*. at 000449 (Roach).

- NO - never guaranteed to take out [Merrill Lynch] w/rate of return. *Id*. at 000493 (Kirschner).

Even if Ms. Segal's account was correct, and all five other interviewers were wrong, misunderstood, or falsified their reasonably consistent accounts of Jeffrey McMahon's statements favorable to the defense, or even if McMahon said different things to different interviewers at different times, Friedrich and his colleagues had an ethical duty to disclose *all* of that evidence.

14 The raw notes from hundreds of hours of interviews with Andrew Fastow were also concealed by the ETF, which provided a 4-page summary of a summary instead. Even Fastow, who was cooperating with the government by the time of the NBD trial, told the agents that this was only a "best efforts" agreement, thus corroborating both McMahon *and Brown*. Exhibit D:2. The Fastow notes will be provided upon request.

In addition, the District Court ordered the prosecutors to summarize "the exculpatory information" they possessed with respect to each of the witnesses that had been identified--not cherry-pick a sample that suited the government's "theory" of the case. Perhaps more important, the Court explicitly stated that the exculpatory information was to be summarized *regardless whether it was or otherwise required to be disclosed under Brady v. Maryland and its progeny, and regardless whether the government made other Brady-compliant disclosures*. *See* Exhibit A:9. The court order imposed a requirement on the prosecutors to give the defendants summaries—presumably full and accurate summaries—independent of any *Brady* obligation.

When James Brown's Motion for New Trial on the perjury and obstruction charges came before the Fifth Circuit in 2011, with the truth about the false and misleading summaries now revealed, the Court ultimately ruled against him on the grounds of lack of "materiality" of the suppressed evidence to those discrete convictions. The Fifth Circuit agreed, however, that the ETF "plainly suppressed" evidence favorable to the defense, stating that "the McMahon notes contain numerous passages that unequivocally state that . . . there was only a 'best efforts' agreement and no 'promise'"; *Brown III*, 650 F.3d at 591-92. As the Court tartly remarked with respect to the four sentence summary of the McMahon materials, "'No' is not the same thing as 'I do not recall.'" *Id*. at 592.

The prosecution's illegal hide-the-ball tactics with respect to exculpatory information from Mr. McMahon did not end with the attempt to mischaracterize "NO" as "I do not recall." On April 25, 2005, after the trial was over, McMahon's lawyers sent a 40-page letter to the Department of Justice, with copy to ETF Director Andrew Weissmann, explaining in detail McMahon's lack of culpability in the Nigerian Barges Deal, and again denying that he made any

illegal buy-back guarantee. *See* Exhibit L. The letter was received by the government only three days after Mr. Friedrich and Ms. Ruemmler argued for harsh prison terms for all four of the Merrill Lynch defendants, *but before the District Court entered judgment*.

Instead of disclosing McMahon's unequivocal and repeated statements that he (and therefore the Merrill defendants) did not engage in any wrongdoing, the Enron Task Force hid the existence of the letter from the defendants, the District Court, and the Fifth Circuit Court of Appeals, all while the case was still pending. Instead, Mr. Friedrich and the other ETF lawyers demanded (and obtained) the incarceration of Bayly, Furst, Brown, and Fuhs, without bail pending their appeals. Despite the detailed and unequivocal statements by the key player in the NBD, contradicting the government's case on all counts, Friedrich and his colleagues argued repeatedly—in the District Court and later in the Fifth Circuit—that bail should be denied, because there was no substantial issue for appeal.

Even if Friedrich argues that McMahon's letter, being a plea for exoneration and release from the threat of indictment, was self-serving and entitled to little weight,[15] that argument would again miss the point. A prosecutor's obligation is to disclose evidence favorable to the defense, and let the defense, the courts and the jury determine what to make of it.

15 About a year later, McMahon provided a similar Memorandum to the SEC, with additional material that was exculpatory of the defendants in the NBD case, including McMahon's specific statement that government witness Ben Glisan committed perjury when he gave hearsay testimony about McMahon having made the illegal guarantee. *See* Exhibit M. The SEC was part of the Enron Task Force; this submission was known to the ETF, and Mr. Friedrich was still in the Department of Justice and consulting with the new prosecutors on the Brown case. Mr. Friedrich was Counselor to the Attorney General of the United States at the time. However, no one disclosed the McMahon memo to the defense, even though Brown was still in prison, and the Fifth Circuit was still considering the appeals of all of the defendants.

Moreover, it is apparent that the ETF *did* recognize the significance of much that McMahon said. After all, it was the prosecutors who yellow-highlighted McMahon's exculpatory statements before trial, thus recognizing that these passages spoke to the crux of their case and that of the defense. Friedrich and Ruemmler told the jury 16 times in closing arguments alone that *McMahon* made the illegal guarantee. And, although all four Merrill Lynch defendants were convicted for their role in "accepting" the buy-back guarantee that Jeffrey McMahon allegedly made, and although James Brown still stands convicted of perjury for saying that in his "understanding" Mr. McMahon did *not* make any such guarantee, McMahon, who repeatedly denied making the guarantee, was never charged or indicted.

C. *Suppression of Favorable Evidence: Merrill Counsel Katherine Zrike.*

Throughout the NBD case, the Merrill Lynch defendants asserted that they relied on Merrill counsel, that counsel proceeded with full knowledge of the negotiations and transaction, and that counsel documented the transaction to insure its legality. In contrast, Matthew Friedrich and the ETF prosecutors repeatedly claimed that defendants lied to corporate counsel about the details of the agreement, that defendant William Fuhs deleted the buy-back language from the engagement letter in order to hide it from counsel, that counsel knew nothing of a buy-back, and that Merrill counsel's "belief" that there was a "best-efforts" agreement was a cover-story.[16]

According to the ETF, Merrill Counsel Kathryn Zrike was simply "cut out" of the deal, (Exhibit E:6503-04). Mr. Friedrich argued forcefully: "Things were hidden from her time and time again." *Id.* Indeed, in his closing argument to the jury, Friedrich repeatedly ridiculed the defense for even suggesting that counsel was involved in all aspects of the transaction, saying:

16 Many of the statements made to the jury are found in Exhibit E:419, 3493-94, 3950, 3962, 6151-52, 6206, 6486, 6497, 6500, 6503-04; and, charted in Exhibit D:2-6.

"This was a case, not about reliance on counsel; this was a case about defiance of counsel." Exhibits D:4; E:6500.

In addition, Mr. Friedrich cross-examined Ms. Zrike when she testified. In preparation for that, he must have reviewed her grand jury testimony, her SEC testimony and her 302. All of those documents—hundreds of pages—contained significant information favorable to the defense, even including some crucial statements that had been yellow-highlighted by the prosecutors. Moreover, ETF Director Andrew Weissmann, who presented Zrike as a witness in the grand jury *and* personally interviewed her (for the FBI 302), sat in front of her as she testified in the trial.

Friedrich listened as Kathryn Ruemmler also mocked the defense's "suggestion" that the only agreement was to use best efforts to remarket the barges:

> [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.

See Exhibits D:3; E:6151-52.

Friedrich amplified this theme during his closing argument in rebuttal, knowing that he had successfully hidden direct sworn testimony of the key defense witness that would squarely counter his deceitful contentions:

> The Merrill Lynch Defendants take the uniform approach . . . that all that was going on was just that it was a remarketing agreement. That's all it was. There was no buyback. It's just a remarketing agreement. But ask yourselves this simple question: *If* it's a remarketing agreement, if that's all it is, *why was it not put in writing*? Kathy Zrike, all the witnesses who testified, tell you there is nothing wrong with remarketing. There's nothing wrong with that. They could have gotten sale and a gain treatment on this. If it

> was a remarketing agreement, there wouldn't have been a problem with that. If that's all it was, *why wasn't it put in writing*? During the time the Merrill lawyers spoke to you for almost four hours, no one even addressed that question once. They don't have an explanation.

See Exhibit E:6485-86 (emphasis added).

But even as Mr. Friedrich and Ms. Ruemmler belittled counsel's role in the NBD transaction, and issued their bold challenge regarding the *absence* of key language in the transaction documents, they both knew that the argument was disingenuous, misleading and directly contradicted by the evidence they concealed. Their arguments would not have been possible unless they had intentionally and systematically suppressed Ms. Zrike's evidence about her role in the transaction and the later negotiations, unequivocally explained in her grand jury testimony, her SEC testimony and her 302.

Once again, because of the surgical excision of virtually everything favorable to the defense from the deceitful "summaries" the ETF provided, *see* Exhibit B, the defense was powerless to meet the prosecutors' challenge.

The "summary" with respect to Katherine Zrike was one page longer than the 4-sentence McMahon "summary," *supra*, and it did contain some evidence that was favorable to the defense. For example, the fact that Zrike warned Merrill Lynch executives that there was risk that Merrill would be stuck owning the barges suggests that she, at least, was clear that there was no guaranteed buy-back, because if there was going to be a certain buy-back, then there would be no risk.[17]

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17 Even here, however, the ETF carefully left out more explicit—and thus more useful to the defense—statements that Zrike made. For example, with respect to the perjury count in particular, defendant James Brown would have benefitted greatly from knowing of the following SEC testimony:

Paradoxically, however, the defense was actually led *further* astray by the Zrike "summary," because the defense had no way of knowing how much—and how much more crucial—exculpatory evidence had been *excluded*. Accordingly, the defense had to assume that such exculpatory evidence did not exist in the hundreds of pages of Zrike's testimony and 302 that the ETF suppressed.

Friedrich continued—rubbing it in thoroughly for the jury:

> There is a suggestion . . . that what's going on is sort of a good-faith exchange between two parties as they try to negotiate different legal documents that sort of come back and forth, and sometimes language comes in, sometimes it's taken out, that kind of thing. This is not the average business case. This is not a case where people are trying to . . . put language into documents as some sort of good-faith negotiating process. Exhibit E:6493-94.

At the same time, Friedrich and his colleagues concealed Katherine Zrike's exculpatory answer to that very question—*why* the "best efforts" agreement wasn't in writing—which proved that there *was* the very back and forth in documenting the deal that Friedrich said did not exist. As Zrike had explained to the grand jury:

> 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 harmless if there was any sort of liability like a barge explosion or environmental spill, loss of life, or something like that . . . a disaster scenario. . . *The other thing that we marked up and wanted to add was a best efforts clause*, . . . that they would use their best efforts to find a [third-party] purchaser . . . [T]he response from the *Enron* legal team was that–both of those provisions would be a

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> 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 b – 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.*

Exhibits D:4; N:192 (emphasis supplied). *See also id.* at 196-207.

> problem. . . .they kept coming back to the fact that *it really had to be a true passage of risk*. . . . [W]e were not successful negotiating that [in] with Vinson & Elkins.

Exhibits D:3; N:63, 64, 82 (emphasis supplied).

According to 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.

Exhibit E:6504-5. Strikingly, and in the same vein as Friedrich's claim of "defiance of counsel," (*Id*. at 6500), the yellow-highlighted statement from Zrike's grand jury testimony that the ETF omitted from the "summary" was the statement that the defendants needed the most:

> 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.

Exhibits D:1; N:75. This omission could not have been inadvertent. Not only had the key exculpatory statement been yellow-highlighted, it was the first sentence on the page, and the prosecutors *included* the very next (more innocuous) highlighted sentence on the same page of Zrike's grand jury testimony, which was elicited by Weissmann.

The exculpatory evidence the government withheld demonstrated that Zrike was central to the process. She was not out of the loop; she completed it. The testimony that the ETF suppressed indicated that Zrike knew of the best-efforts agreement, the defendants followed her advice, and she *tried to document best efforts*, well after Friedrich and his colleagues claimed the defendants lied to her about the true nature of the transaction.

As before, the point is not what Friedrich and his colleagues thought about the truthfulness of Zrike's sworn grand jury, 302 and SEC testimony; the testimony was clearly favorable to the defense and it was "clearly suppressed," as the Fifth Circuit said. Friedrich was ethically obligated to provide this information, and he had been ordered by the District Court to provide it as well. The defense team was entitled to have all of Zrike's testimony before trial, so that it could plan its approach to this key witness, rather than flying blind and examining a witness who was under constant threat of indictment and bound by the Merrill Non-Prosecution agreement to satisfy the government with her "cooperation."

D. *Suppression of Favorable Evidence: Merrill Counsel Gary Dolan.*

Gary Dolan was counsel for James Brown's Strategic Asset and Lease Finance Group within Merrill Lynch, and he was directly involved, at Katherine Zrike's direction, in the negotiation of the NBD transaction with Enron's counsel. According to the information he gave the FBI, as reflected in his original 302, Exhibit O, Dolan admitted that *he* was responsible for editing out the buy-back language from the early versions of the transaction documents—*not* Fuhs, and *not* Fuhs's superior, Brown—as the ETF asserted.

But, like the other key witnesses, Dolan was unavailable to the defense team because of the prosecutors' tactics, as described in Part III.A. Moreover, as with McMahon and Zrike, the ETF not only provided the defense—Brown and Fuhs in particular in this instance—with a false and misleading "summary" of what Dolan said, *see* Exhibits B:4-5; D:1, 5; O; P, as described below, but also capitalized on the defendants' ignorance by making arguments to the jury that would have been impossible if the true state of the evidence was known.

For example, at trial prosecutors told the jury:

> 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.

Exhibits D:5; E:6222.

Focusing on William Fuhs more explicitly, prosecutors argued that his claim to have relied on Gary Dolan for advice was a lie, and that the removal of some of the guarantee-like language from an early draft was his doing, designed to mislead Dolan and all the lawyers about the true nature of the illegal deal. Mr. Friedrich argued to the jury:

> 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.

Id. at 6538-39; D:5.

But the prosecutors meticulously doctored the "summary" of Merrill Counsel Dolan's 302—not only by exclusion of crucial material that the ETF highlighted in yellow, not only by exclusion of other important and favorable-to-the-defense material, not only by mischaracterization of some other material, but also through the *addition* of language that cast the remaining language in a false light. Exhibits D:1; O, P. This is "falsification of evidence." Texas R.P.C. Rule 3.04(b). This is "conduct involving dishonesty, fraud, deceit or misrepresentation;" Texas R.P.C. Rule 8.04(a)(3). And this is, of course, contumacious violation of the District Court's order to provide summaries in the first place, if one makes the obvious assumption that the Court meant to order *accurate and not misleading* summaries.

The only way to appreciate the enormity of the Dolan Summary scam is to put the undoctored, original 302, Exhibit O (as highlighted before trial by the ETF), side-by-side with the summary, Exhibit B:4-5, and compare them line-by-line. That has been done in Exhibit P, which was originally filed with the District Court in connection with James Brown's Motion for a New Trial (but color-coded slightly differently). The material in Exhibit P starts with the raw 302, and then color-codes it in four ways.

Language coded in red underlining is language that was *favorable to the defense* and also *excluded* from the summary. Some of this omitted language was yellow-highlighted by the prosecution before trial, as indicated by the yellow highlights in the exhibit. Language coded in purple in Exhibit P is language that the ETF *added* to the raw 302—sometimes innocuously (such as adding "NBD" for clarity), but most often, as described below, to mislead. Fourth, language coded in green is language that survived from the raw 302 into the summary, and thus should match Exhibit B:4-5 if read alone. Finally, language that does not bear a specific color is language that was omitted when the summary was produced, but is innocuous, cumulative, or insignificant for purposes of this grievance.

The following few examples should serve to demonstrate how the ETF went to great lengths to suppress and alter the Dolan evidence and how that misconduct enabled the ETF prosecutors to distort the case against James Brown and William Fuhs in particular.

1. The following language was omitted from the summary: "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 assurance 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*." Exhibits B:4-5; O:3; P:3 (emphasis supplied).

2. The ETF completely omitted Dolan's statement to the FBI that it was *he* (not Fuhs) who deleted language suggestive of an illegal buy-back: "DOLAN believes [JEFF] WILSON helped draft the engagement letter. DOLAN requested that WILSON delete some of the language in the engagement letter." Exhibits B:4-5; O:5; P:5.

3. Immediately after the above paragraph, the ETF "summarized" Dolan's discussion of the relationship between an original preliminary draft and the final engagement letter. After quoting Dolan's statement (coded in green) that certain terms "were contrary to DOLAN's understanding of the transaction," the ETF's "summary" stopped short—deliberately omitting the most important part of the sentence, which the ETF highlighted for the District Court: "and DOLAN believed that such an agreement would be improper because such a transaction could be viewed as a 'parking' transaction,'" Exhibits B:4-5; O:5; P:5.

4. Although Dolan himself deleted the buy-back language from the final engagement letter, as described in the previous two items and item 5, prosecutors began the second passage with language that was manufactured out of whole cloth (and therefore coded in a purple box): "*As to the draft engagement letter in his files* [Dolan made changes]." Exhibits B:4-5; O:5; P:5 (emphasis supplied). This misleadingly suggests that Dolan had merely edited *his own file copy* as a draft—rather than having edited *the actual engagement letter* because "such an agreement would be improper" because it "could be viewed as a 'parking' transaction."

5. The ETF also withheld yet another crucial paragraph from the Dolan 302 in which Dolan specifically stated that the handwriting deleting the buy-back language in the engagement letter was his:

   DOLAN was shown a copy of an E-mail from WILSON to DOLAN dated 12/23/1999 (Bates-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. . . . 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. Exhibits O:6; P:6

6. Referencing Dolan's account of a conversation between Dolan and Brown about the latter's concern about the risk that ML was undertaking, prosecutors changed the tenor and import of the sentence by rendering "had a subsequent conversation" simply as "had a conversation." Exhibits B:4-5; O:3; P:3. Leaving

> out the single word "subsequent" could not have been inadvertent, because changing the timing of Brown's expression of concern falsely suggested that he abandoned his objections at some point, and became a willing participant in an illegal guaranteed buy-back conspiracy. (Then, that is exactly what the prosecutors argued at trial, although it was directly refuted by the concealed Dolan 302, which made clear that Brown met with Dolan *later* and was *still* concerned about Merrill's risk of loss—because there was no guarantee.).

If the defense team (and then the jury) had been aware of these and the other omissions and distortions that are painfully evident in Exhibit P, Mr. Friedrich and his colleagues could not have made any of the arguments laid out at the beginning of this Part III.D. The truth from Merrill Counsel Dolan directly contradicted the ETF and Mr. Friedrich's specific arguments.

That is the point, of course, of the ethical requirement that *all* favorable evidence be disclosed to the defense, and no doubt the reason why the District Court required the prosecution to produce (presumably accurate) summaries of *all* of the exculpatory evidence it had.

IV. CONCLUSION.

In long retrospect, the prosecutorial misconduct evident in the NBD case is strikingly similar to that revealed recently, arising from the prosecution of the late Senator Ted Stevens that has been so much in the news, and in which Mr. Friedrich played a substantial role. No conviction would have been possible in either case if the prosecutors behaved ethically.

A jury returned a verdict of guilty against Senator Stevens and as a result, he lost his bid for re-election before the misconduct came to light. The Merrill Lynch defendants, Daniel Bayly, James Brown, Robert Furst, and William Fuhs, all spent between 5 months to a year in prison—Fuhs in a maximum security facility until he was actually acquitted by the Fifth Circuit. James Brown still stands convicted of perjury and obstruction of justice, even though the Fifth Circuit agreed that the Enron Task Force had "plainly suppressed" evidence favorable to the defense.

There is no further redress for these defendants in the criminal justice system, and federal prosecutors like Matthew Friedrich are absolutely immune from suit, precisely because they engaged in their misconduct in the actual trial of the case. That leaves only the disciplinary system to provide both punishment and prophylaxis, and to send the message that this kind of deliberate prosecutorial abuse will not stand.

Moreover, it should not escape notice that the grievants in this matter are *not* the wronged defendants who served prison time because of this misconduct.[18] This grievance comes from long-standing citizens at the Bar, who are concerned about their own profession, the administration of justice, and the standing of the Bar in the community.

V. HOW DID YOU LEARN ABOUT THE STATE BAR OF TEXAS'S ATTORNEY GRIEVANCE PROCESS?

__ Yellow Pages
__ Internet
_X_ Other
[The grievants are attorneys.]

VI. ATTORNEY-CLIENT PRIVILEGE WAIVER

This provision is not applicable, because the grievants were never clients of the respondent. We understand that the Office of Chief Disciplinary Counsel maintains as confidential the processing of Grievances.

18 Sidney Powell represented James Brown for eight years, including from the Motion for a New Trial through the Petition for Writ of Certiorari in the Supreme Court. William Hodes commenced representation of Mr. Brown at about the time of oral argument in the Fifth Circuit in 2011. Mr. Brown is aware of the filing of this Complaint and approves of it, but he had no hand in drafting it.

Dated: July 30, 2012

William Hodes
W. William Hodes, Esq.
The William Hodes Law Firm
811 Chapman Loop
Village of Hemingway
Lady Lake, FL 32162
Cell Phone: (317) 590-1692

Sidney Powell
Sidney K. Powell, Esq.
Sidney Powell P.C.
3831 Turtle Creek Boulevard, #5B
Dallas, TX 75219
Cell Phone: (214) 707-1775

TO ENSURE PROMPT ATTENTION, THE GRIEVANCE SHOULD BE MAILED TO:

THE OFFICE OF CHIEF DISCIPLINARY COUNSEL
P.O. Box 13287
Austin, Texas 78711

INCLUDE THE NAMES, ADDRESSES, AND TELEPHONE NUMBER OF ALL PERSONS[1] WHO KNOW SOMETHING ABOUT YOUR GRIEVANCE.

Andrew M. Lawler
Attorney at Law
641 Lexington Ave
New York, NY 10022
(212) 832−3160

Brian T. Rafferty
Dornbush Schaeffer et al
747 Third Ave, 11th Floor
New York, NY 10017
(212) 759−3300

Hillary Elizabeth Schaeffer
Dornbush Schaeffer et al
747 Third Avenue, 11th Floor
New York, NY 10017
(212) 759−3300

Peter J. Venaglia
Dornbush Schaeffer et al
747 Third Ave, 11th Floor
New York, NY 10017
(212) 759−3300

Richard J. Schaeffer
Dornbush Schaeffer et al
747 Third Ave, 11th Floor
New York, NY 10017
(212) 759−3300

Robert B. Fiske , Jr
Davis Polk et al
450 Lexington Ave
New York, NY 10017
(212) 450−4000

[1] This list is extensive but it is not ALL the people who may have evidence of this grievance. There are a number of individuals and attorneys who may have evidence, including everyone named on the list of unindicted co-conspirators and their counsel.

Thomas Childs
Davis Polk et al
450 Lexington Ave
New York, NY 10017
(212) 450−4000

Thomas Anthony Hagemann
Gardere Wynne et al
1000 Louisiana, 33rd Fl
Houston, TX 77002−5007
(713) 276−5064

Holly K. Kulka
NYSE Euronext
20 Broad Street, 12th Floor
New York, NY

Lawrence Zweifach
Gibson, Dunn & Crutcher
200 Park Avenue
New York, NY 10166-0193
(212) 351-2625

Dan Lamar Cogdell
Cogdell Law Firm, PLLC
1401 McKinney St.
Suite 1625
Houston, TX 77010
(713) 426−2244

Daniel K Hedges
Porter &Hedges
1000 Main St
36th Floor
Houston, TX 77002
(713) 226−6641

James Madison Ardoin
Ardoin Law, PLLC
700 Louisiana
Suite 3950
Houston, TX 77002
(713) 574−8900

Daniel J. Horwitz
Dickenstein Shapiro et al
1177 Avenue of the Americas
New York, NY 10036
(212) 896−3711

Erin Koenen
Carter Ledyard and Milburn
2 Wall Streen
New York, NY 10005
(212) 732−3200

Ira Lee Sorkin
Lowenstein Sandler PC
1251 Avenue of the Americas
New York, New York 10020
(646) 414-6830

John W Nields , Jr
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-5058

Michael Feinberg
Carter Ledyard
2 Wall Street
New York, NY 10005
(212) 732−3200

Nicole Wrobleski
Dickstein Shapiro et al
1177 Avenue of the Americas
New York, NY 10036
(212) 835−1446

R. Trent Gaither
Law Office of Trent Gaither
314 N. Post Oak Ln
Houston, TX 77024
(713) 865−5600

R. Thomas Seymour
Seymour Law Firm
550 Oneok Plaza
100 W Fifth St
Tulsa, OK 74103

William G. Rosch , III
4605 Post Oak Place Dr, Suite 224
Houston, TX 77027
(713) 222−9595

Amy Richardson
Wiltshire Grannis LLP
1200 18th St N.W.,
12th Floor
Washington, DC 20036
(202) 730−1329

Chris Flood
Flood &Flood
914 Preston, Ste 800
Houston, TX 77002−1832
(713) 223−8877

Christopher W. Dysard
Spears Imes LLP
51 Madison Ave, 25th Flr
New York, NY 10010
(212) 213−6996

David Spears
Spears &Imes LLP
51 Madison Ave, 25th Flr
New York, NY 10010
(212) 213−6996

Paul A. Engelmayer
Wilmer Cutler et al
399 Park Ave
New York, NY 10022
(212) 230−8820

Seth P. Waxman
Wilmer Cutler et al
2445 M St NW
Washington, DC 20037
(202−663−6800

Audrey Strauss
President
New York Council Of Defense Lawyers
One New York Plaza
New York, N.Y. 10004
(212) 859-8544

Marc Greenwald
Co-Chair, *Amicus*
Committee
New York Council Of Defense Lawyers
51 Madison Ave., 22d Floor
New York, N.Y. 10010
(212) 849-7000

Steven F. Molo
Mololamken Llp
540 Madison Ave.
New York, N.Y. 10022
(212) 607-8160

Lucas M. Walker
Martin V. Totaro
Mololamken Llp
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000

Robert Romano
Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, NY 10178-0060
(212) 309-7083

Ron Minkoff
Frankfurt Kurnit Klein & Selz PC
488 Madison Avenue #10
New York, NY, 10022
(212) 705-4837

Torrence E. Lewis
Sidney Powell, P.C.
3831 Turtle Creek Blvd. #5B
Dallas, TX 75219
(646) 387-8483