DEPARTMENTAL DISCIPLINARY COMMITTEE
FOR THE FIRST DEPARTMENT
New York & Bronx Counties
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EXHIBITS

DEPARTMENTAL DISCIPLINARY COMMITTEE
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Date: July 31, 2012

A. Complainants:

W. William Hodes, Esq.
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B. Attorney Complained Of:

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C. Have you filed a complaint about this matter anywhere else? If yes, please give details.

Yes; the complainants have filed a similar complaint against Kathryn Ruemmler in the District of Columbia, and a similar grievance against Matthew Friedrich in Texas. These lawyers were Enron Task Force prosecutors who worked under the supervision of Andrew Weissmann in the prosecution of the underlying case described in Section D.

In addition, in 2008 Ms. Powell assisted her then client James A. Brown in filing a complaint against Mr. Weissmann with this Committee. At that time, Mr. Brown, again assisted by Ms. Powell, filed similar complaints, arising out of the same set of facts and circumstances, against attorney Kathryn Ruemmler with the District of Columbia and Virginia Bars, and against attorney Matthew Friedrich with the Texas Office of Chief Disciplinary Counsel.

Ms. Powell also 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.

New information, including exculpatory information that was suppressed by the prosecutors, has come to light since 2008. Moreover, all aspects of the case involving Mr. Brown (and all of his co-defendants in the underlying case described in Section D) have been concluded as of April 2012, and far more information is available than was available in 2008.

D. Name of the court where the underlying case was filed, and the case name and number

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"*).

E. Do you have other documents that are relevant? If yes, please provide copies.

Yes. Several exhibits are attached, and will be referenced in the Details of Complaint. 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.

F. Details of Complaint:

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: Texas lawyer Matthew Friedrich; California lawyer John Hemann; District of Columbia lawyer Kathryn Ruemmler, and the then Director of the ETF, New York lawyer Andrew Weissmann, who is the subject of this Complaint. 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, 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. Weissmann was in charge of the grand jury proceedings, worked with the FBI and other law enforcement personnel during the investigatory stage, obtained the indictments in the case, and attended almost every day of the six-week trial that began in September 2004. As the senior attorney on the Task Force and its designated Director, Weissmann also directed and supervised the trial work of the other three.

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" of the NBD was that Enron gave 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]

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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 acknowledged would have been lawful. Indeed, Merrill counsel Katherine Zrike told Weissmann both in an early interview in October 2002 (which was reported in an FBI 302) and again in the Grand Jury in April 2004 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, Weissmann and the ETF suppressed evidence of Zrike's efforts and deceitfully used the *absence* of such a clause as evidence *against* the defendants.

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: <u>In - - no, I don't - - the short answer is no, I'm not aware of the promise</u>. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, <u>and I did not think it was a promise though</u>.

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 exceeded its disclosure obligations in any event 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, 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 Weissmann as the Director of the ETF, and signed in handwriting by Ruemmler for Weissmann, Hemann, Friedrich, and herself. The summary letter provided information about 22 individuals from Enron or Merrill Lynch, but most of those individuals were marginal participants who

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> 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).

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 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* 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 and unequivocal 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

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.

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 held that prosecutors "plainly suppressed" evidence that was favorable to the defense.

As will be seen in Part II, the two-part holding of the Fifth Circuit is highly relevant for purposes of this Complaint, 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

5 This decision is referred to as *Brown III*, because there was an interim interlocutory appeal to the Fifth Circuit on double jeopardy and related issues that is referred to as *Brown II*.

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 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 its best efforts to "remarket" the barges to a third party. *Enron Task Force prosecutors 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

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6 A compendium of such statements may be found in Exhibits D, E and F. For example Matthew Friedrich 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 that 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." Exhibit E:6486. And on the initial direct appeal to the Fifth Circuit, the prosecutors acknowledged in their Brief, "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.

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, repeatedly in the closing argument, and throughout the trial in between: prosecutors stated that McMahon was "the key"; McMahon was the linchpin.[7]

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 secret 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

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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.

8 Exhibit D:2-3 also includes statements in which the prosecutors hammered home this contention. In addition, 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.

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 McMahon (and later, 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*.

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 Complaint is that Andrew Weissmann and his Enron Task Force colleagues and subordinates 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 Weissmann 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

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9 Many of the statements the prosecutors made to the jury advancing this theme are gathered in Exhibit D:1, 2-5. 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, 5; O, P).

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

Spring 2005. Accordingly, Andrew Weissmann should be—and can only be—judged according to the Code of Professional Responsibility that was in force in the State of New York during that time period.

That said, the NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY Rule 1-105, in effect during all times relevant to this complaint,[11] sets out a mandatory choice of law rule for conduct in connection with a particular court proceeding. Under that rule, the applicable disciplinary rules are the (then) Texas Disciplinary Rules of Professional Conduct.

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

> **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.

This rule does not call for vicarious disciplinary liability, but here Mr. Weissmann and his team of ETF colleagues acted in 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 Weissmann alone is nonetheless linked to him through Texas Rule 8.04(a)(1).

11 The current Rule, NEW YORK RULES OF PROFESSIONAL CONDUCT Rule 8.5, in effect since April 2009, is identical.

In addition, because Andrew Weissmann was the lawyer actively supervising the work of the other three lawyers, he is liable for their misconduct—not vicariously, but because his actions fell within the ambit of Texas Rule 5.01(a):

> **Rule 5.01. Responsibilities of a Partner or Supervisory Lawyer.**
>
> A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:
>
> (a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved.

Most prominently, Andrew Weissmann (both directly and through the other members of the Enron Task Force assigned to the Nigerian Barge Deal case) serially violated Texas 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. Under the Texas rule, moreover, 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, Andrew Weissmann violated the following additional provisions of the Texas Disciplinary Rules of Professional Conduct.

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

  Mr. Weissmann "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. Weissmann "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. Weissmann 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, Andrew. Weissmann effectively "requested" those witnesses not to give relevant information to the defense.

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

Mr. Weissmann'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.**

Andrew Weissmann'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.*

Andrew Weissmann and his colleagues and subordinates 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 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 deal by the defendants (Exhibits D:3-4; E:6504) and later trumpet to the jury that she was "devastating for the defense." Exhibit E:6500. Both arguments—and others—were possible only because the prosecution deliberately suppressed almost 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 employed at the earliest stages of the case. *See* Exhibits H and I.

First, the prosecutors, including Andrew Weissmann himself, 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,[12] signed by Mr. Weissmann as deputy director of the ETF, 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*.

When pressed, the ETF argued that the agreement was not binding on Merrill employees speaking in their individual capacities (Exhibit J), but any employee who did not cooperate with the government was either forced to resign[13] or indicted (like Bayly, Furst, Brown and Fuhs) or repeatedly threatened with indictment (like Katherine Zrike in particular). 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

12 *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*").

13 Tom Davis, President of Merrill Investment Bank, who had the authority to and did actually 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.

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 NBD as an unindicted co-conspirator, and routinely threatened to indict anyone who cooperated with the four defendants. *See* Exhibit Q (a letter signed by Matthew Friedrich for Director Weissmann).

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. Given the tense circumstances just described, this was tantamount to a "request" that the witnesses not speak to the defense at all. *See* Exhibits H, I and J.

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

As described in Part I.B, Andrew Weissmann and his prosecution team crafted their case to prove that an illegal "buy-back guarantee" for the Nigerian Barges originated with Enron Treasurer Jeffrey McMahon (in a conversation with Merrill Lynch employee and defendant Robert Furst). Secondly, Weissmann 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's 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, as Weissmann looked on, the ETF prosecutors 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, the prosecutors 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—much of it elicited in the grand jury or in interviews by Weissmann himself—that showed *why* there was no such clause.[14]

To prove that McMahon made a guarantee, Andrew Weissmann 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.

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14 As Mr. Weissmann and the other prosecutors knew, there was no such clause in the NBD documents because, as Merrill counsel Katherine Zrike told Weissmann and the grand jury, 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 trial court's pretrial *in camera* review and then *still* concealed. (Exhibit D:1-5; Part III.C).

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 directly contradicted them.

The "summaries" that Kathryn Ruemmler signed on behalf of Weissmann and the ETF prosecutors involved in the NBD case, *see* Exhibit B, ran some 10 pages, and covered 22 witnesses. However, with respect to Jeffrey McMahon—the alleged original guarantor and the individual the ETF described to the jury as "the key"—the 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.

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 when the final deal was struck and documented. Yet the actual raw notes of at least five separate interviewers—yellow-highlighted by Weissmann and his colleagues—provide positive evidence that even the

"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 from McMahon's and Fastow's*.

The last sentence of the McMahon "summary" is directly controverted by 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 the 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 "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 squarely contradicted the ETF's 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).[15]

- 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).

15 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 a "best efforts" agreement, thus corroborating both McMahon *and Brown*. Exhibit D:2. The Fastow notes will be provided upon request.

- 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, Weissmann and his subordinates had a duty to disclose *all* of that evidence.

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.

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. 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 linked to Mr. McMahon did not end with the attempt to mischaracterize "NO" as "I do not recall." On April 21, 2005, after the trial was over, McMahon's lawyers sent a 40-page letter to the Department of Justice, with copy to ETF Director 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 3 days after the ETF prosecutors 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 with regard to the underlying transaction, 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. Weissmann 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, the ETF argued repeatedly—in the District Court and in the Fifth Circuit—that bail should be denied, because there was no substantial issue for appeal.

Even if Mr. Weissmann argues that McMahon's letter, being a plea for his own exoneration and release from the threat of indictment, was self-serving and not entitled to great

weight,[16] that argument would again miss the point. The obligation of the prosecution is to disclose evidence that is favorable to the defense, and let the defense and the courts and the jury determine what to make of it.

Moreover, it is apparent that the ETF *did* recognize the significance of exactly what McMahon said. After all, the prosecutors 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. They told the jury 16 times in closing arguments alone that *McMahon* made the illegal guarantee. Yet, 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 transaction, and that counsel documented the transaction to insure its legality. In contrast, the ETF prosecutors repeatedly claimed that the 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

16 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. By this time, Mr. Weissmann had left the government, but this submission was known to the remaining ETF attorneys. It was not disclosed by them to anyone, however, even though Brown was still in prison, and the Fifth Circuit was still considering the appeals of all of the defendants.

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.[17]

Andrew Weissmann was the prosecutor who elicited Zrike's sworn testimony before the grand jury, he was present when she was interviewed by the FBI, resulting in the 302 that Weissmann suppressed, and he sat in the courtroom throughout her testimony in the NBD trial, actively condoning the trial prosecutors' arguments that were directly contradicted by the evidence they withheld.

As Weissmann watched in silence, Ruemmler and Friedrich told the jury that Merrill Counsel Kathryn Zrike was simply "cut out" of the deal, (Exhibit E:6503-04). "Things were hidden from her time and time again." *Id.* Indeed, in his closing argument to the jury, ETF lawyer Matthew Friedrich ridiculed the defense for even suggesting that counsel was involved in all aspects of the transaction, saying: "This was a case, not about reliance on counsel; this was a case about defiance of counsel." Exhibits D:4; E:6500.

Similarly, Kathryn Ruemmler picked up on this theme in her closing argument:

> [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's closing argument included more in this vein:

> 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

17 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:3-6.

> 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:6486 (emphasis added).

But even as the ETF belittled counsel's role in the NBD transaction, and issued its bold challenge regarding the *absence* of key language in the transaction documents, the prosecutors, including ETF Director Weissmann, knew that the argument was disingenuous and misleading. Their arguments would have been impossible but for the fact they intentionally and systematically suppressed Ms. Zrike's sworn testimony, in the grand jury, before the SEC, and as reflected in her FBI interview, about her role in the transaction and the later negotiations.

Once again, because of the surgical excision of virtually everything favorable to the defense from the deceitful "summaries," signed by Ms. Ruemmler for Mr. Weissmann, *see* Exhibit B, the defense was powerless to meet her challenge. The "summary" with respect to Katherine Zrike was one page longer than the 4-sentence McMahon "summary" discussed in Part III.B, and it contained 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; and, with a certain buy-back, there would be no risk.[18] But the disclosure of that point actually

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18 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:

> 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

allowed the prosecutors to argue that the defendants then proceeded without Zrike--and in defiance of her. So, paradoxically, 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 critical—exculpatory evidence was *excluded*, and thus deliberately suppressed. Accordingly, the defense was forced to assume that such exculpatory evidence did not exist in the hundreds of pages of Zrike's testimony and 302 that the ETF suppressed.

For example, with respect to the course of the negotiations and the presence or absence of specific language and terms in the final agreement between Merrill Lynch and Enron, Katherine Zrike told Weissmann and 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 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).

Strikingly, the yellow-highlighted statement from Zrike's grand jury testimony that Weissmann and his subordinates omitted from the "summary" was the statement that the defendants needed the most:

> 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.

> 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.

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 Andrew Weissmann and his ETF colleagues and subordinates suppressed indicated that Zrike knew of the best-efforts agreement *and tried to document best-efforts*, well after the government claimed the defendants lied to her about the true nature of the transaction. The suppression of that testimony also enabled the prosecutors to call upon the defense to explain why the best-efforts agreement wasn't in writing—when the prosecutors knew the precise answer to that question.

As before, the point is not what Weissmann and his team of prosecutors thought about the truthfulness of Zrike's testimony; the testimony was clearly favorable to the defense, and it was "clearly suppressed," as the Fifth Circuit said. Andrew Weissmann was ethically obligated to provide this information, and he was 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; he was the person to whom Brown and Fuhs looked for legal advice. According to the information Dolan gave Weissmann and the FBI, as reflected in his original 302, Exhibit O, Dolan admitted that *he* was responsible for editing 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. Again, as with Katherine Zrike, Weissmann remained silent as his prosecutors argued as fact key points that were directly controverted by evidence Weissmann personally elicited from Gary Dolan and then helped suppress.

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:

> The fact that Fuhs is sending lawyers documents with the bad language deleted out of the engagement letter doesn't prove anything about his intent. . . . 'reliance on advice of counsel' doesn't mean just some random attorney someplace getting a document that has strike-out language. . . . The lawyer has to know what's going on; they have to know all the facts. . . . there's no evidence that Mr. Fuhs made any efforts to talk to a lawyer or had any reliance on a lawyer about what was going on. . . . [Fuhs] gets copies, for example, of the engagement letter that had the offending language included, and that shows you what he knew at the time the deal was.

Id. at 6538-39; D:5.

But the ETF prosecutors meticulously doctored the "summary" of Dolan's 302—not only by exclusion of crucial material 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 *legitimately* omitted when the summary was produced, because it is innocuous, cumulative, or insignificant.

The following few examples should serve to demonstrate how the suppression and alteration of the Dolan evidence enabled the ETF prosecutors to wrongfully convict 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 Weissmann and 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," Mr. Weissmann'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, 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 *merely edited his own file copy as a draft—rather than having edited the actual letter for the reasons given above.*

5. The ETF also omitted 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 (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. . . . 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.

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 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. (That is 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 *still* was 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. Weissmann and his subordinates could not have made any of the arguments laid out at the beginning of this Part III.D.

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 Nigerian Barges Deal 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. No conviction would have been possible in either of these cases if 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, after the Fifth Circuit agreed that the Enron Task Force "plainly suppressed" evidence favorable to the defense, but ultimately ruled against him on the "materiality" prong of *Brady v. Maryland*.

There is no further redress for these defendants in the criminal justice system, and federal prosecutors like Andrew Weissmann 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 complainants in this matter are *not* the wronged defendants who served prison time because of this misconduct.[19] This Complaint 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.

Dated: July 31, 2012

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19 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. The other three defendants are not aware that this Complaint is being filed.