

10-20621

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE**

v.

**JAMES A. BROWN,
DEFENDANT-APPELLANT**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
No. CR H-03-363**

ORAL ARGUMENT EXHIBITS OF APPELLANT JAMES. A. BROWN

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 - Glisan testimony excerpt of McMahon guarantee
 - ETF repeated argument of McMahon Guarantee
- Typed reproduction of McMahon *Brady* Material That the ETF Concealed (Produced by the Government March 2010) (Brown RE9)
- McMahon Raw Notes (**Highlighted** by ETF - produced March 2010; **red** highlighting by defense counsel) (Brown RE12)

Zrike Materials. 2

- Pretrial disclosure showing exculpatory statement deleted (GovRE30 and BrownRE10)
- Zrike GJ transcript produced by the Government March 2010 showing ETF highlighting and other exculpatory statements omitted (BrownRE10)

Dolan Materials. 3

- Pretrial disclosure (GovRE30)
- Dolan FBI 302 produced by the Government March 2010 showing ETF highlighting and changes ETF made for disclosure letter (Brown Reply at pp. 12-14, 18 (Dkt.1217) and GovRE30):
 - Yellow highlighting** - by ETF
 - Blue underlining - crucial material ETF failed to disclose
 - Red** - Edits and inserts made by ETF to modify the 302 for making its pretrial disclosure

Fastow Materials. 4

- Raw Notes 000263, 000264 and 000349

TAB 1

McMAHON DISCLOSURE FROM PRE-TRIAL BRADY LETTER, DATED JULY 30, 2004:

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.

TESTIMONY OF BEN GLISAN:

Tr. 3600-1: Q. Mr. Glisan, what did you learn, and from whom, about Merrill Lynch's purchase of these barges from Enron?

A. Both Mr. Kopper and Mr. Schnapper and I, in separate conversations, had consistent conversations about this particular transaction with Merrill Lynch. And in both conversations, I was told that Enron would sell the barges to Merrill Lynch based upon Jeff McMahon providing an oral guarantee that Merrill Lynch would be taken out of the transaction in six months for a set return.

Tr. 3602-3: Q. Mr. Glisan, what did you say to Mr. McMahon about the Nigerian barge deal?

A. I stated, in substance, that I thought it was a dangerous transaction and that we risked a bad reaction from the financial market.

Q. Okay. And what did Mr. McMahon say in response?

A. In substance, that he didn't have a problem with any handshake deals.

Q. What did you take Mr. McMahon to mean by "handshake deal"?

Q. Did you later confirm, Mr. Glisan, that Mr. McMahon had, in fact, made an oral guarantee?

A. Yes, I did.

Q. How did you learn that?

A. I learned that from Mr. McMahon in that statement, as well as Messrs. Fastow, Kopper and Schnapper as well.

PROSECUTORS' REPEATED ARGUMENTS TO JURY:

Tr.6144: "You know that Enron, through its treasurer [McMahon] and chief financial officer [Fastow], made an oral guarantee to these Merrill Lynch defendants, that they would be taken out of the barge deal by June 30th, 2000, at a guaranteed rate of return." *See also* Tr. 402-4, 6157-58, 6159-60, 6168, 6216-17, 6218-19, 6510-11, 6527-28.

*

ACKNOWLEDGED McMAHON BRADY MATERIAL THAT THE ETF CONCEALED

WITHHELD STATEMENTS FROM McMAHON

Raw Notes Dated 6/21/02, highlighted by the ETF in 2004 but not disclosed until 2010:

- 000447:** "E[nron] would use best efforts to help them sell assets"
- 000477:** "use best efforts to try to resell—not unusual to not be in writing"
- 000493:** "Looking for Fastow's assurance that E[nron] help Merrill syndicate out w/in 6 months. **Verbal agreement—best efforts. Not typically put in writing.**"
- 000494:** "Andy agreed E[nron] would help remarket [the] equity w/in next 6 months—no further commitment"
- 000513:** "Enron would use best efforts to help remarket the equity."
- 000514:** "A.F. *agreed* that E[nron] would help them remarket in 6 mo[nth]s."

Raw Notes Dated 6/21/02, not highlighted by the ETF in 2004 and not disclosed to Brown until 2010:

- 000449:** "Never made rep[resentation] to ML [Merrill Lynch] that E[nron] would buy them out at price or @ set rate of return."
- 000449:** "NO - never guaranteed to take out [Merrill Lynch] w/rate of return."

McMahon Letter to the SEC dated July 28, 2006, never disclosed by the Government, accuses Glisan of perjury:

Finally, Mr. McMahon has reviewed the transcript of Mr. Fastow and former Enron treasurer Ben Glisan's testimony in the Lay-Skilling trial, **Mr. Glisan's testimony in the trial of the Nigerian Barge case** and the FBI's Form 302 of Mr. Fastow's statements regarding the transaction. Based on that review and his knowledge of what actually occurred, **Mr. McMahon has concluded that both men testified falsely regarding Mr. McMahon's involvement in the transaction.**

Nigerian Proxy

3 Broker assets of Fair Division

Her people were pretty tight from to sell

Fair of approached some investors - many
which was Phil.

Presented in phone call to E.

F was in, Foster was in, Boyle,
Belin B. Schnapp
Plus Litany of M.L. people

Belin R. Foster M.L. Redstock office

Content of call - M.L. had offered deal
intention would invest

What was that E would assume the
in selling with to number. What
assume that E would
make efforts to syndicate it
out to them.

Dist. between Hardy & M.L.
Agreed that E would use best
efforts to help them sell assets

was there a desire to get sold by end of yr
to Google assets

This was 1976 asset

Alcoa made up to ME that ~~you~~ could
buy them out at price n @ 10%
of PPA.

Why needed someone to step in on short
term basis?

Don't know - 1976 deal

I was involved b/c as TRS, I was in
charge of bank work

ME wanted Deal King 1976 letter, not
and AF.

Even tho 29mm - not unusual to have
all these people involved if one of our
fin institutions - wanted to make
sure all our div contracts y for 1957.
(Team of)

- Did credit agency know how utility prepays? Doesn't know
- Think it would be important to them →

Delta Energy - ~~doesn't recall~~ ^{doesn't recall hearing of it outside of conversation} ~~heard~~ ^{heard}

Mahonia - entity related to prepays done w/ Chase
 - doesn't know who owns it or anything about it

Nigerian Barges

→ wouldn't take the WSJ article on a secret source.

→ 3 buyers assets of Intl. Div. run by Rob McDonald; then fin. people trying to sell those barges; fin folks approached sev. pot. investors; ^{was Merrill}

↳ PC from ML to E.; McMahon + Fastow on call (as well as Fin people)

↳ ML folks - Rob First (ML relat. officer)
 on call - doesn't recall if Schylea Tilley on call

↳ from Enron
 ↳ Dan Boyle
 ↳ Barry Schaeffer
 ↳ Intl. Div.

↳ ML had approved deal internally & wanted assurance E-mail would assist them in reselling that asset in 6 mos.



↳ use best efforts to try to resell

↳ not universal to not be in writing

- Late: Dec. 1999 for the call

↳ ML ready to execute → but wanted to make

↳ he understood ML was trying to validate what had been ~~done~~ agreed upon @ a lower level; trying to confirm his understanding of the deal w/ the E. CFO

WSS Article
McMahon called Merrill

Recount

3) Bargas - Assoc. of Inst'l Divk - Rebecca McDonald
Finance folks in Inst'l appear several individuals
- incl. Merrill

Merrill called E

McMahon, Factor, Boyle, Schnapp on call
plus Tilney of Merrill people
- incl. Rob Furst
N.R. if Tilney

Recollections of call

Merrill had approved purchase of Bargas
Looking for Factor's assurance that
E help Merrill syndicate out within
6 months

Verbal agreement - best efforts

Not typically put in writing

~~late~~ Dec. '99 - home on vacation

Call - purpose was for Merrill to affirm
that resources put behind

Not believe spoke on call

Prob. having prev. call/concern w/ Merrill
- possible - not uncommon

N.R. - if desire to get done by year end

No - never wanted to take out w/ Act of Return

As treasurer coordinate all banks relationship

- so Merrill asked for him to be on place

Perkins (equity) not unusual
Boyd & Schneider in ~~that~~ APACHE
- based in Texas all here

Andy said F would hold, ~~various~~ equity
in next 6 months.

- No further commitment

Time is precious at end of 6 mos
Real in Paris that USM large

No indexed-gas phase call

N.R. guaranty/provide ever being discussed

"No idea" JCLTM paid a fee to Paris
Merits interest

N.R. ever reading call for Merrill retransmission

No student/landlord (except Paris) is AES retransmission

Nigerian barges

WSJ article.

• Says McMahon asked if ML would invest in the deal. Enron wanted to raise \$12mm

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

Context of call: ML approved the deal internally. They wanted ENR to help them resell it w/in the next six months.

Enron would use best efforts to help re-market the equity.

bonds debt
stocks equity

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

Happens a lot when Banks would loan us \$

Common to cut them in later to collectively market it later.

My recollection was that this was a conference call.

3 prospective buyers

If the buyer would not be a 1/1 holder it was not unusual to help them market it later.

Doesn't recall any other discussions.

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

Why involved? BC I had the role of coord. all the bank relationships.

They wanted me & A.F.

J.M. was trying to coordinate the overall relationship w/ the bank.

ML wanted A.F. to be involved.

Don Boyle } Finance in Int'l - worked in
Schnapp } APACHE

Transaction Support: doesn't know who worked with

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

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

TAB 2

Catherine Zrike

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

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

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

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

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

See pg. 75 Zrike grand jury where ETF also highlighted but omitted here: "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."

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

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

10 Q. But --

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

13 Q. Wasn't it clear --

14 A. That was made clear from Day 1.

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

22 Wasn't that something that Merrill made clear to Enron?

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

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

1 ask Enron for such a provision?

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

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

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

14 The other thing that we marked up and we
15 wanted to add was a best efforts clause, what's called a
16 best efforts clause that they would use their best
17 efforts to find a purchaser to conclude the purchase
18 with the -- another third-party purchaser besides
19 ourselves and that -- realizing that from our
20 perspective as Merrill Lynch lawyers that this was
21 not -- this was still a -- was not a guarantee, it was
22 not an absolute, but that at least would give us an
23 angle, it would give us a legal angle to get them to
24 focus on that obligation if, in fact, we saw them not
25 paying attention to what was the business deal.

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

5 Q. I cannot answer questions.

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

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

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

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TAB 3

DOLAN DISCLOSURE FROM *BRADY* LETTER DATED JULY 30, 2004

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

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

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

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

The NBD engagement letter was too specific and Dolan wanted the letter to be more general. As to a draft engagement letter in his files, Dolan made changes to some of the engagement letter terms related to the deal because Dolan did not believe that those were the actual terms. Dolan stated that the original draft of the engagement letter obligated Enron to take Merrill out of the NBD eventually. This was contrary to Dolan's understanding of the transaction. Dolan stated that he believed there was no obligation or commitment that Enron would find a buyer or that Enron purchase Merrill's interest if a buyer could not be found. Dolan expressed the view that this was merely an oral understanding between Merrill and Enron that if Marubeni did not purchase Merrill's interest then Enron would help Merrill find another buyer.

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

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Yellow highlighting = What the ETF itself highlighted for the Court
 Blue underlined = Crucial material ETF failed to disclose
 Red = Inserts were added by the ETF in its disclosure letter

Continuation of FD-302 of Gary Clark Dolan, On 10/24/2002, Page 3

DOLAN first became aware of the prospect of ML investing in an Enron project in Nigeria sometime before Christmas 1999 when he attended a conference call. This conference call was held in ZRIKE's office and JIM BROWN was also present during the conference call. DOLAN took notes during this meeting and still maintains a copy of the notes. BROWN described the Nigerian Barge transaction to the group. BROWN stated that Enron approached ML about purchasing an interest in the Nigerian Barges and described the project as a floating power source for Nigeria. BROWN stated that Enron initially planned to sell an interest in the Nigerian Barges to a company called Marubeni, but Marubeni was not ready to purchase it until early 2000. Enron wanted to sell an interest in the Nigerian Barges by year end 1999 so they could generate earnings for the fourth quarter of 1999. Enron proposed that ML purchase an interest in the Nigerian Barges and that ML would only have to hold it for a short period of time. BROWN stated that the purchase price for ML would be small and that ML would earn a fee from Enron for entering into the transaction.

BROWN stated that there was going to be a conversation between ML executives (DAN BAYLY and ZRIKE) and Enron executives whereby ML was going to seek assurances from a senior officer at Enron that if ML purchased an interest in the Nigerian Barges, Enron would help ML find a buyer for their interest if Marubeni did not purchase ML's interest. Enron had told ML that Marubeni was going to purchase ML's interest in the Nigerian Barges by February

Deal

he understood

DOLAN stated that Enron was merely providing a "moral undertaking" to find a buyer for ML's interest in the Nigerian Barges. DOLAN stated that the agreement could not be in writing and it was an oral agreement that had no formal legal significance. DOLAN understood that ML would hold their investment in the Nigerian Barges for up to six month. Dolan had a sense that Enron would not give ML any assurances in writing and ML would not ask Enron for such a request.

he believed

DOLAN had a subsequent conversation with BROWN in which BROWN conveyed that he was concerned with the commercial risk ML was taking on the Nigerian Barge transaction. BROWN was worried about the potential environmental risk associated with owning power plants and ML's liability issues. BROWN wanted to ensure that the deal documents addressed these environmental and liability risks.

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Continuation of FD-302 of Gary Clark Dolan, On 10/24/2002, Page 4

BROWN complained about the Nigerian Barge transaction. BROWN stated that it was not his transaction and he was being stuck with handling it because the transaction fit into the type of work his group handled. The Nigerian Barge transaction was a deal which was initiated by ML's bankers in Texas. BROWN also complained because his group was not earning any fees for handling the transaction and that the deal was being consummated close to the end of the year.

DOLAN stated that ML was not in the business of purchasing power plant barges in Nigeria and that is why they originally decided to place the deal in ML's leasing unit. DOLAN was not involved in ML's approval process or what internal ML committee should review this transaction.

DOLAN does not remember when he learned that ML's Debt Markets Committee (DMCC) either reviewed or was going to review the Nigerian Barge transaction. DOLAN did not attend the DMCC meeting and he does not know why it was being reviewed by the DMCC. Typically, BROWN took transactions he worked on to the Lease Advisory Committee. However, the Nigerian Barge transaction was taken to the DMCC.

DOLAN was shown a copy of notes (bate stamped MD037405) which DOLAN acknowledged was his notes. DOLAN read his notes to the agents as follows:

Dolan was asked about a handwritten M document in which he wrote:

"Enron owns Nigerian Barge Co. has oil barges they will build power plants on top and would sell power to Nigeria. Enron wants to sell equity in project to book accounting gain. ML Houston to put \$7 million into. \$40 million in fees last year and this. ML to buy stock in BargeCo for \$7 million and if goes into service earns 22% return. Approved by executive committee. Dan BAYLY, Kevin Cox, Kathy Z, and EVP (executive vice president) who promises we will be taken out within 6 month. Did LLC to be owned MLMLM. \$7 million to buy stock in. LLC will borrow \$21 million from different Enron subsidiary. No recourse. We to buy \$28 million in stock. Pref A, Pref B, common - we buy 20% of voting rights (2/10). We get next 3 years cash flow from Barge operation. Book \$12 million gain at year on the stock. Nigerian Co. is in existence. DMCC @ 12:00 today 12/22. 10:30 am (ML suggestion). Dan BAYLY business group at Enron. Cookies for Santa. \$250 advisory fee."

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Continuation of FD-302 of Gary Clark Dolan, On 10/24/2002, Page 5

The name "Cox" in DOLAN's notes refers to a ML employee who was a senior person at ML who dealt with commitment issues. The name "Cox" references that either Cox was on the call or that Cox was supposed to be on the call with Enron. The reference "EVP" refers to Executive Vice President at Enron. The word "promises" refers to the assurances made by Enron regarding finding a buyer for ML's interest in the Nigerian Barges. DOLAN explained that "promise" could mean that the conversation where Enron made assurances to ML already happened; not that it was going to happen in the future. "40M in fees" is a reference to the fees earned by ML from Enron.

DOLAN has no reason to believe that "DMCC @ 12:00 today 12/22" on bates stamp page ML037406 is not accurate with respect to the date the DMCC meeting was held. DOLAN is not sure if "Book \$12M @ year on the stock" refers to the amount Enron was able to book due to ML's investment in the Nigerian Barges.

Sometime close to the end of the fourth quarter 1999, DOLAN reviewed and made comments to a draft of the Nigerian Barge engagement letter between ML and Enron. The purpose of the engagement letter was to memorialize the agreement between ML and Enron so if there were any questions about the deal in the future, it would be in writing. The engagement letter also insured that ML would receive their fee for entering into the Nigerian Barge transaction.

DOLAN also had a conversation with JEFF WILSON about the engagement letter. DOLAN believes WILSON helped draft the engagement letter. DOLAN requested that WILSON delete some of the language in the engagement letter. Generally, ML engagement letters use general terms to describe a deal because the deal terms can subsequently change. The Nigerian Barge engagement letter was too specific and DOLAN wanted the letter to be more general.

Furthermore, DOLAN made changes to some of the terms related to the deal that were provided in the engagement letter because DOLAN did not believe that those were the actual terms. DOLAN stated that the original draft of the engagement letter obligated Enron to eventually take ML out of the Nigerian Barge transaction. This was contrary to DOLAN's understanding of the transaction and DOLAN believed that such an agreement would be improper because such a transaction could be viewed as a "parking" transaction.

as to the draft
engagement
letter in his files,

engagement letter

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Continuation of FD-302 of Gary Clark Dolan, On 10/24/2002, Page 6he believed

DOLAN's understanding was that ML purchased an interest in the Nigerian Barges with the expectation that Enron would help ML find a buyer for ML's interest in the Nigerian Barges. DOLAN stated that there was no obligation or commitment that Enron would find a buyer or that Enron purchase ML's interest if a buyer could not be found. ~~This was merely an oral understanding between ML and Enron that if Marubeni did not purchase ML's interest then Enron would help ML find another buyer.~~ Dolan expressed the view that

DOLAN was shown a copy of an E-mail from WILSON to DOLAN dated 12/23/1999 (bate stamped ML034707). This E-mail contained a copy of the proposed changes to the engagement letter made by DOLAN. DOLAN acknowledged that the handwriting on the page is his. DOLAN does not remember talking to anyone at Enron about the changes he made to the engagement letter. However, DOLAN did receive handwritten comments from someone from Enron. Enron did not object to the language in the original draft of the engagement letter which stated that "Enron will buy or find affiliate to buy. . . ." However, DOLAN did object to this language and made the necessary changes.

DOLAN acknowledged that he had seen the interoffice memorandum bate stamped MD037390 through MD037395 at the time the Nigerian Barge transaction was being consummated. DOLAN does not remember seeing the appropriation request bate stamped MD037396 until he prepared for his interview with the FBI.

DOLAN did not remember what ML's rate of return was for the Nigerian Barge transaction. ML was also paid a fee by Enron for entering into the transaction. DOLAN did not believe there was a cap on how much money ML could make on their investment in the Nigerian Barges.

Sometime in January or February 2000, DOLAN had a meeting with ALLAN HOFFMAN, an attorney not from ML, where they discussed the formation of a ML entity which would house the Nigerian Barges. ML formed a Cayman company for tax purposes. DOLAN was in charge of forming the Cayman company for ML.

In June 2000, DOLAN was contacted by JOE VALENTI, or someone who worked for VALENTI, who told DOLAN that ML was selling their interest in the Nigerian Barges. DOLAN was asked to review the documentation and draft the resolutions. DOLAN does not remember if he knew that the purchaser was LJM2.

TAB 4

- 5) Had Mr. Essex such as Dan Beagle invested in LTM 2 yet? Don't know.
- 6) This type of transaction, warehouse deals - such was type of deal LTM contemplated that neither AP or ~~EN~~ Mr. mentioned concern about

DP 636766

Benefits to Fenon Summary - Beagle

- 1) The 1st Paragraph - Description of transaction.
- 2) Summary not consistent w/ AP's memory of not word "promise"
- 3) It was EN's obligation to use "best effort" to find 3rd party. stated & went on to say there would be 3rd party like AP & mortgage of 3rd party.
 - a) Use of EN's actions over years would have taken MC out.
 - b) Phone call did not obligate EN to buy out, but did not intend to bind EN, was binding LTM to do something. LTM was 3rd party & was already found.
- 4) "Best Efforts" - must do anything possible that a reasonable person would do to achieve result.
 - a) Best effort different from guarantee like still obligated to perform. Best effort would be to find 3rd party to accomplish buy out.
- 5) Could have said "promise to use best effort" but don't recall saying that.

DP 44156

Section F → whole section.

This is summary of benefits to Enon deal. Beagle would have been responsible for creating

Section F. Consisted of AP's understanding of transaction. Benefits to EN were used by AP to ~~describe~~ describe accomplishments to JS. Created from ^{LTM} Dash sheets

Sent sentence not completely consistent b/c indicates EN would buy back if no 3rd party found. AP told MC that EN would get MC out, would get involved or LTM to buy out. Did not have to get step where EN would buy out. Could also complete through additional business etc.

- 3) Don't recall reading docs + think people got deal wrong. Saw summary in a different version - has among documents. ^{found on} ~~was~~ ^{benefit} to EN.
- 4) In call, could you have said thing generally - such as "you'll be out in 6.000" AF was speaking as ENRON CFO. Referred to LSM as 3rd person. Said "Huffly confident you will be out by June 30th"
- 5) Purpose of using "I can't say guarantee" is to convey guarantee w/out using that word.
 - a) Used that phrase but never had to explain what meant. Can I recall whether used phrase "I can't say guarantee" in the call.
 - b) This was a "bantering" conversation - you don't have to worry about this - Wain + Condonable

Email 5/14/2000

DAN Boyle to Sharon Log OS: Huffler, Glorant Schnapper.

- Don't recall Huffler, Schnapper or BS on call, but could have been.
- Don't recall people speaking about MA, but would have had to reverse.
- Next EMail - for BS. 5/11/00
- 1) ~~Enron~~ Didn't see EMail by 4 today. object to word obligated. not bothered that it is ENR w/ obligation.

Did Don do anything to determine fair price for bag? No really.

- 1) Did not look at Market, took price ^{paid} to ME, added ERP + paid to me
- 2) Nobody analyzed market or did due diligence. Didn't go to Nigeria to determine whether Bagge there. Just accepted paid price.
- 3) ENR was a marketing agent. Could not make anyone buy ^{at} specific time, price return.
- 4) "We have no ability to roll the structure. Structure was what held leverage and couldn't be expanded."

J Huffler Email 5/11/2000

Jan Huffler was #2 person under Rebecca Mac Donald at Enron.
 If nonperforming we will inherit it. Then ENR will buy back + Enron will have to reverse earnings.

at Redmond

- 1) credibly used a shorthand word for promise or guarantee as
- 2) internally at Enron. At 5M + 65 would tell Enron people this was a guarantee so to light a fire with Int'l people - so it should be in paperwork.

3) On phone call, didn't say En would buy back, - Reported by 3rd Party. Explicit.
Internally said Fokson would buy back. Was low probability of Enron of LSW
 "Enron will take necessary steps to make sure you are out of the by June 00."

DP 36766 Ace Rona - assessmt + summary - for comment
 even w/ word ~~summary~~ promise

→ Reasonable for years or others to think Enron.

DP 44150 sector f - summary accurate. - Subtly is that En buy back is last - would by LSW point.

Don't recall anyone saying that is what said to have. Nobody said they reached agreement - but never heard of problems would have

A) If call was transcribed - it should have been the account. And an account firm would want to know about call was making determination of whether true site

B) No doubt conveying message of 6 mos. Can't recall if it was preceded by correct wording

① Don't recall much discussion about this. They didn't ask questions about how.

c) "I give you my word" out in Enron - Could have said, but would be in addition to simply confident or extremely confident. Was making the commitment.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the Oral Argument Exhibits of Appellant James A. Brown has been served via hand delivery on counsel of record as listed below, on this 5th day of July, 2011:

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