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GOVERNMENT'S *BRADY* REPRESENTATIONS

Filing/Docket/Date	Government Representation On Existence of *Brady* Material	Resolution
Original Indictment issued 9/16/03 Dkt.1.		
Phone call of 1/27/04, referenced in Defendants' *Brady* letter of 2/3/04, at p. 4.	*Brady* obligation does not extend to the production of actual testimony that includes exculpatory information from a grand jury witness.	No underlying Grand Jury testimony of witnesses, identified as possessing exculpatory information, was turned over to Defendants until December 2007.
Government Response to Defendants' Motions for *Brady* Material. Dkt.154, **3/22/04**.	"**The government has ... far exceeded the discovery requirements of applicable law." Dkt. 154, at 78. "The government respectfully submits that the discovery afforded to date has been timely and in excess of that required by law**." *Id*. at 79.	**Court denied all *Brady* Motions** at Dkt.177, 4/21/04.
Government letter naming individuals who "arguably" possess exculpatory information 4/5/04. Dkt.1168, Ex. N.	"For the record, our position is that you are already aware of the identity, and potentially exculpatory nature, of all these witnesses, but we provide them to you out of an abundance of caution." Dkt.1168, Ex N, at 3. Naming Kelly Boots, Eric Boyt, Gary Carlin, Kevin Cox, Mike DeBellis, Mark Devito, Bowen Diehl, Gary Dolan, Gerald Haugh, James Hughes, Mark McAndrews, Jeff McMahon, Ace Roman, Barry Schnapper, Scott Sefton, Schuyler Tilney, Kira Toone-Mertens, Paul Wood, Joseph Valenti, Kathy Zrike	No underlying grand jury testimony of witnesses, identified as possessing exculpatory information was turned over to Defendants until December 2007. Redacted FBI 302s of Kelly Boots were turned over on eve of trial, as Boots was listed as a government witness.
Pre-Trial Transcript, April 15, 2004, Dkt.175.	Friedrich: "We see this as the same situation, your Honor, where the defense lawyers already know to a substantial extent what the nature of the exculpatory information is that these witnesses would offer. We provided them a list. We've invited them to go and talk to these witnesses. If, as Mr. Sorkin indicated, that they, you know, try to reach these people and are unable, for example, to place them	

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	under subpoena, are unable to find out from the person's lawyer what the person might say, then we're willing to revisit the issue and we may provide further information at a later time." Dkt.175, at p. 22.	
Government letter with list of "unindicted co-conspirators" in Barge transaction 4/22/04. Dkt.1168, Ex. T.	Naming: Eduardo Andrade, Eric Boyt, Richard Causey, Kevin Cox, Mike DeBellis, Mark Devito, Gary Dolan, Rodney Faldyn, Andrew Fastow, John Garrett, Steve Hirsch, Alan Hoffman, James Hughes, Ben Glisan. Michael Kopper, Sean Long, Mark McAndrews, Rebecca McDonald, Jeff McMahon, Alan Quaintance, Ace Roman, Barry Schnapper, Cassandra Schultz, Jeffrey Skilling, Keith Sparks, Schuyler Tilney, Paul Wood, Joseph Valenti, Kathy Zrike.	No underlying grand jury testimony of witnesses, identified as possessing exculpatory information, was turned over to Defendants until December 2007. Only Fastow evidence turned over prior to Barge trial was 4-page "summary" of his 1,000+ hours of interviews with government agents.
Transcript 4/15/04, pre-trial conf. Dkt.175.	Friedrich: "**This is a situation in which this person, Ms. Zrike, participated with the defendants in the offense itself. That alone would be sufficient to remove the Grand Jury transcript from the rubric of *Brady*.**" Dkt. 175, at 16. "What is -- the reason that the information is being sought, your Honor, we submit, is for a non *Brady* purpose; and that is not something that the Court should be sympathetic to." *Id*. at 19. "[W]e've provided a list of names of potentially exculpatory individuals. **Our belief is many of these individuals are in the same category as Ms. Zrike**. Most of them -- the majority of the people in that -- on that list are current or former employees of Merrill Lynch. **Many of them will be designated as unindicted co-conspirators, as well**. And, again, the issue is: Does the defense have access to the gist of the information that these people could provide." *Id*. at 20-21. "We see this as the same situation, your Honor, where the defense lawyers already know to a substantial extent what the nature of the exculpatory information is that these witnesses would offer. We provided them a list. We've invited them to go and talk to these witnesses." *Id*. at 21. "But we think that the -- we provided the Court with what we believe that -- is clear authority that providing those names is sufficient for *Brady* purposes." *Id*. at 22. "These	**No underlying grand jury testimony of witnesses, identified as possessing exculpatory information, was turned over to Defendants until December 2007.**

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	names are not unfamiliar to the defense, your Honor. We believe they are very familiar with these witnesses, they are very familiar with what they might say, and they want the information from the Government not for *Brady* purposes, but to be able to prep these people. And that, we think, is a non *Brady* purpose to which the Court should not be sympathetic." *Id*. at 23.	
Government Response to Furst's Motion for Reconsideration of *Brady* Motion 5/7/04, Dkt.189.	"Furst does nothing to rebut the authority cited by the government establishing that (1) *Brady* is satisfied where the government provides a list of potentially exculpatory witnesses; and (2) information known to the defense is not *Brady*." Dkt. 189, at 2.	**Court denied all *Brady* Motions** at Dkt.228, 6/1/04.
Transcript 5/27/004 pre-trial conf. Dkt.234.	"I think that in our consolidated response, your Honor, what we tried to do is inform the Court of a procedure which we followed in this Court which complied with *Brady*. And that procedure is **providing the defense with a list of potentially exculpatory witnesses complies with *Brady***." Dkt. 234, at 23-24.	Court ordered *in camera* review of some government material – which production to the Court was government selected, and the Court never ordered any of that raw material turned over to the Defendants. Dkt.285, at 34-35.
Government "*Brady*" letter, 6/1/04. Dkt.1168, Ex. I.	"This letter also provides you Jencks Act material for some witnesses the government expects to call in this case, and with information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *United States v. Agurs*, 427 U.S. 97 (1976) and *United States v. Bagley*, 473 U.S. 667 (1985)." Ex. I, at 2. Highly-redacted summaries of information from Kira Toone-Meertens, Michael Kopper, Ben Glisan, Andy Fastow, and Ramon Rodriguez.	No underlying grand jury testimony of witnesses, identified as possessing exculpatory information, was turned over to Defendants until December 2007.
Government Response to Defense *Brady* Motions 6/3/04 Dkt.248	**"Information regarding Fastow is not only not *Brady*, because of its substance and disclosure … but also because the defendants [a]re aware of Fastow's identity and his role as a coconspirator.**" Dkt.248, at 2. "Ironically, Fastow's mere assertion (that his testimony would incriminate him) would belie the suggestion that his testimony is exculpatory in this case." *Id*. at 3.	No further production of Fastow evidence (even summaries of summaries of interviews) was produced by the government until September 2007.

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Transcript 6/25/04 pre-trial conf. Dkt.285.	MR. SCHAEFFER (for Bayly): … the *Brady* issue….[I]n connection with it, Your Honor, at your direction, my understanding is that the government produced to you, I believe, on June 1st, approximately a week before our previously scheduled June 7th trial date, *Brady* material. Your Honor, my application is to you to direct the Court -- to direct the government at this time to make that material available to each of the defendants. Thank you, Your Honor. *** MR. FRIEDRICH: Yes, Your Honor. I don't think – I don't believe just the fact that they've been given to the Court to review means that should be turned over for the same reasons that we've argued about. I think this is now the third time. There's a procedure that we set up to turn those over to the Court to review. **We provided a list of names**. And the defendants still continue to play this cat and mouse game of not telling the Court who they've talked to, not telling the Court who they've interviewed, not telling the Court what interviews they have gotten pursuant to joint defense agreements, all because, you know, as we said before, this is standing *Brady* on its head. **What many of these folks that we have turned over testimony from to the Court are people that the defendants may intend to call. What they desperately fear is that the government has a record from these folks of what they said and for that reason they want to get that testimony**. As we've previously argued to the Court, that's not the purpose of *Brady*. There's well established authority that -- which expressly adopts and approves of the procedures that we've gone through in letting them know the names of those people so they can choose to interview, if they wish. What they are doing now is saying, we don't have to do any of that, just give us the stuff, which is plainly against the law." Pre-Trial Hearing Transcript, June 25, 2004, Dkt.285, at pp. 35-37. FRIEDRICH: "Just to say, number one, in terms of some of the things that Mr. Cogdell said, it seems every time that *Brady* comes up, it's just sort of compassion speeches by the defense, but absolutely no response to the law we cited to the Court and the authority that we've cited ... that says what we are doing is correct. And it complies with *Brady* by making the names of witnesses available. That is a process that complies with *Brady*, period. There's no response to that. They just don't respond. They just get up	**Court finds that government has met its *Brady* obligations**. Dkt.282, at 92-93. July 14, 2004 Court orders government to provide summaries.

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	and get angry and make compassion speeches. The reason for that is clear, Your Honor. We submit what these defendants desperately want to avoid is a trial on the merits of this case. And by talking again and again and again about *Brady* and things that we've already briefed, that we've already litigated, they are distracting us from moving the case forward. They are distracting us from litigating things like the motion in limine. Those have been briefed for weeks and weeks. Those will matter. Those are definitely opportunities for the Court to review and clarify and narrow the issues that will be presented to the jury. That's where we think it makes sense to go next." *Id*. at p. 44.	
Government "*Brady*" letter,7/30/04. Dkt.1168, Ex. O.	"The following summary is provided to you in compliance with the Court's Order of July 14th, 2004…. As you know, in April of 2004, the Enron Task Force provided you with the names of certain witnesses who possessed exculpatory and even arguably exculpatory information, many of whom you have already interviewed or had access to their information, and all of whom you can subpoena to testify at trial. [FN: "*Brady* requires no more."] As the Court noted, **this summary may provide you with even more than is required to be disclosed pursuant to *Brady***. The information that follows is not a substantially verbatim recitation of the witness's' statements. While the information contained below may be similar to information contained within FBI form 302s, notes, and grand jury transcripts, it is intended only as a summary of information. **We note that many of the witness names provided to you in April 2004 were listed out of an abundance of caution**. Indeed, some of the witnesses believed there was no agreement by Enron to take out Merrill Lynch ("Merrill") from the Nigerian barge deal (the "NBD") or a set rate of return simply because they were not present for inculpatory conversations. **Other witnesses are unindicted conspirators** who denied knowledge that could render them guilty…The summary, for instance, does not include the instances in which the witnesses below later recanted exculpatory information or admitted lying to the government about their knowledge of the deal. Finally, we have not set forth all of the information that would impeach any statements below or statements by the witnesses themselves that are inconsistent with the information set forth below."	**Newly produced evidence shows:** **Summaries, now known to be substantially false, misleading or incomplete especially as to information possessed by Gary Dolan, Alan Hoffman, Jeff McMahon, and Kathy Zrike**

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8/1/04 through 9/1/07.	Not a single *Brady* production. In the interim, Defendants are convicted, sentenced, and sent to prison. The Fifth Circuit reviews cases on appeal and reverses 12 out of 14 convictions, for fatally flawed indictment. One Defendant is acquitted after spending 8 months in prison.	
Brief of Appellee United States, *U.S. v. Brown*, No. 05-20319 (5th Cir.) 12/12/05.	Brief for United States: "**The prosecution met its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by providing a letter that informed the defendants precisely what Fastow told FBI agents about what he said during the December 23 conference call**. The prosecution was not required to disclose the FBI Form 302 memorializing Fastow's interview with the agents, because the letter already provided the relevant information. In any event, as the letter reflects, nothing in the Form 302 can plausibly be deemed exculpatory under *Brady*, because Fastow's statements only underscore that he provided an oral guarantee that 'Enron or an affiliate' would buy Merrill's interest in the barges even if no industry purchaser could be found. Fastow FBI Letter, Furst RE8 at 3-5. Because the defendants have not made a 'plausible showing' that the Form 302 contains 'material' exculpatory evidence, the district court properly declined to conduct an *in camera* inspection of the form." *Id*. at 58.	**Fifth Circuit does not reach any *Brady* issues on appeal**.
Transcript 4/4/07 pre-trial conf. Dkt.939.	AUSA Spencer "commit[ed] to the Court that [he would] personally [] go back over the discovery that was made, as well as any documents the government has received in the interim from the time the discovery was produced in the first trial until today; and [that the prosecution] will make subsequent supplemental production." Dkt. 939, at 15. Indeed, the government agreed to turn over this production by August 1, 2007, if not earlier. *Id*. at 10, 11, 15-20. Court says in response to defense: "Well, this is the first I've heard of any *Brady* claim being made against the Government in connection with this." *Id*. At 24.	AUSA Spencer makes limited production of highly-redacted Fastow 302s in September 2007. **No Court disposition on this or any other *Brady* matter as of 7/15/10**.
Government's Opposition to Brown's Request for Production of *Brady* Materials, 10/1/07. Dkt.986.	"Defendants' requests are moot and beyond the scope of *Brady*, *Giglio*, and Rule 16 of the Federal Rules of Criminal Procedure." Dkt. 986, at 1. Based on the record of production, the **Government asserts that "it has fulfilled its obligations under ***Brady***."** *Id*. at 2. "**The government is not aware of any documents that have been created since the first trial that would constitute**	**No Court disposition on this or any other *Brady* matter as of 7/15/10**. **Defendants tried repeatedly to use the**

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	***Brady* materials**." *Id*. The government also asserts that "it does not agree that the Fastow 302[s] constitute[] <u>*Brady*</u> materials." *Id*. at 7. In another utterly unfathomable claim, the government asserts that "it is curious that none of the Defendants in the first trial . . . used the summary of [Fastow's] statements to impeach other witnesses." *Id*. at 9.	**Fastow summary at trial to impeach witnesses. The government vehemently objected, and the District Court did not allow use of evidence.**
Government's Opposition to Bayly and Furst's Request for Production of *Brad*y Materials, 10/12/07. Dkt.1001.	"Based upon this record of production, **the government believes it has fulfilled its obligations under *Brady***." Dkt.1001, at 2. "The Defendants repeatedly speculate that the requested materials contain *Brady*. Using speculative phrases such as 'likely to contain' and 'it is highly unlikely that,' the Defendants presume to know the contents of documents. **Of course, the Defendants are not aware of contents**, but they are not entitled under the applicable rules and procedures to discover this information, unless it is material information that is either exculpatory or impeaching. 'Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for in *camera* review, much less reversal for a new trial.' *United States v. Morris*, 957 F.2d 1391, 1403 (7th Cir.1992)." *Id*. at 3-4. "Finally, Defendants seek discovery of information which is inculpatory, even though such information is not discoverable under *Brady*. **... It is undisputed that these lawyers were not fully informed of the terms of the transactions, or even involved in the negotiations**." *Id*. at 6. "The Defendants' requests for materials related to Katherine Zrike are illustrative. The Defendants called Ms. Zrike, a sympathetic colleague of the Defendants, at the first trial, and the Defendants elicited information they believe was exculpatory. Clearly, they were able to obtain this information 'through … other means.' Having obtained her testimony, the Defendants are hardpressed to argue that they did not have an opportunity to discover additional, exculpatory testimony, and therefore are entitled to discovery of the Form 302s, grand jury testimony, or other testimony." *Id*. at 7.	**No Court disposition on this or any other *Brady* matter as of 7/15/10**. **Zrike testimony disclosed after these representations reveals startling exculpatory information the government withheld. Government still withholding Zrike SEC testimony.**
Pre-Trial Conference Transcript, 11/16/07. Dkt.1010.	"And, Your Honor, I have not reviewed the decisions that were made by the Task Force the first time. I have consulted with them. I believe that they acted in good faith the first time. I have reviewed a number of pieces of evidence. They've asked me to review a number of	

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	specific pieces of evidence, particularly those documents and testimony that's been taken since the first *Barge* trial has ended, and what I have identified as *Brady* in those or when I just even thought it wasn't *Brady* but it was going to be argued as some sort of extreme theory, I produced those also." Dkt.1010, at 83-84. "I am happy to submit any piece in-camera. I am happy to review the former Task Force's decisions." *Id*. at 85. "**The Government understands its *Brady* obligations as being fulfilled by disclosing exculpatory information without necessarily disclosing the 302, without necessarily disclosing the grand jury testimony, and the Task Force did that in advance of Barge I**. There were no issues that came out of that on appeal. There were no decisions that were made. There were no sanctions that were issued. There was no finding that we didn't submit all the *Brady*. **They now believe that we have this Fastow evidence and they keep repeating that. And, suffice it to say, the Government takes a very different view.**" *Id*. at 86-87.	Fifth Circuit did not reach any *Brady* issues on appeal. AUSA Spencer makes limited production of additional 302s and Grand Jury testimony of Merrill employees on December 12, 2007.
Pre-Trial Conference Transcript, 12/21/07. Dkt.1034.	AUSA Spencer: "[W]ith regard to the *Brady* materials, there are several points to be made there. First of all, the defense is taking the position this is the first time that any of this [the production of December 2007] has been disclosed, and that's simply not the case. **The Court is aware the government made extensive disclosures about the testimony, and *Brady testimony* prior to the first trial**." Dkt.1034, at 21 (emphasis added). AUSA Spencer: "I have not [had] a chance since Mr. Hagemann filed the motion to sit down and compare what was disclosed in the summaries to - - -." *Id*. at 22. "THE COURT: Well, then how can I accept what you are saying to me that it was all disclosed and it wasn't a *Brady* violation if you haven't examined the letters yourself in order to make those comparisons? **AUSA SPENCER: If the question is whether or not there is a *Brady* violation, that needs to be seriously briefed and considered**." *Id*. at 22. "AUSA SPENCER: With regard to the Fastow notes, I don't think those will be – it sounds like we are going to make, come to a resolution on that relatively quickly, and again –	**No Court disposition on this or any other *Brady* matter as of 7/15/10**.

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	THE COURT: When do you expect that will be resolved? AUSA SPENCER: Well, I have not even seen the order yet on it, Your Honor. Nobody has seen the order. THE COURT: Is it your understanding, though, that the Fifth Circuit has ordered the disclosure of those notes? AUSA SPENCER: I have heard that representation from the defense attorneys this morning. It's the first I heard about it, when I walked in the courtroom today. **** THE COURT: How long would it take you to come up, I No. 1, determine whether you are going to make the same disclosure on Mr. Fastow in this case since the Fifth Circuit now has ordered in the other, in the case that I gather that it has before it on appeal, and how long would it take you to review all those notes and disclose the portions of it that, or at least, I guess, No. 1, reach agreement with the defendants on what portions should be. Mr. Hagemann is wanting something dealing with those LJMs, or whatever they were, in addition to just what had to do with the barge transaction? AUSA SPENCER: I understand the Court implicitly to be saying that you would urge us to conduct ourselves, the government, to the extent the government – THE COURT: I am just asking how long will it take to work through all of that, because if this is a precedent that would indicate **these defendants ought to have the same kind of information or basic notes of what Mr. Fastow said, since he was pretty critical to this barge transaction**. AUSA SPENCER: I guess the answer to my question, is the Court looking at the Fifth Circuit ruling as precedential? To the extent that it is, I would answer the question that we would anticipate producing the notes within the -- assuming the order says what it says, assuming there are no other significant issues, I would be in a position to produce these notes by the end of next week." *Id*. at 25-27.	

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Government's Response to Defendants' Motions to Compel Production of Fastow Binders and Related Materials, 2/19/08. Dkt.1059.	**Government resumes opposing production of Fastow raw notes: "These Motions should be denied because the Defendants have no right under Federal Rule of Criminal Procedure 16 or *Brady* to review any and all notes of** federal law enforcement agents. The Defendant's Motion to compel production based upon *Brady* is not timely, given the absence of a current trial setting." Dkt.1059, at 1. "**[T]he government is not obligated to produce the notes under *Brady* and its progeny**." *Id*. at 5. "**There has been no finding that these raw notes contain such *Brady* information - not by several different teams of government lawyers, not by any District Court, and not by the Fifth Circuit. But at this time, there is no ground on which to order the government to produce the raw notes**." *Id*. at 6.	**On 3/24/08, and only after the Fifth Circuit orders the Fastow raw notes unsealed in *Skilling*, government produces Fastow raw notes to the defense. They contain significant *Brady* materials.**
ON APPEAL TO FIFTH CIRCUIT	Stokes writes that Skilling has recently received these documents, and while many have nothing to do with the Barge transaction, he is providing them out of "an abundance of caution." Letter from Patrick Stokes to Sidney Powell, May 28, 2009.	On 5/28/09, Brown receives over 2,000 pages of raw notes and transcriptions of interviews withheld since 2004, which clarify various other belated productions.
ON REMAND Government "production" letter, 3/30/10.	The accompanying letter states that these documents formed the basis for the ETF's "summaries" that the court ordered given to the defense in 2004 – over ETF objection–after its *in camera* review. Stokes further represents via email that these were, in fact, the exact same documents that were provided for the court's *in camera* review. Email from Patrick Stokes to Sidney Powell, March 19, 2010.	On 3/30/10 Brown receives production of 1005 pages of *Brady* material from Stokes. **Materials were highlighted before submission to the court; yet, in court-ordered "summaries" to the defense, highlighted and other *Brady* material was willfully excluded.**
Pre-Trial Conference Transcript, 4/16/10. Dkt.1051.	"Ms. Powell has throughout this accused the government of misconduct, ..., *without any basis in fact whatsoever*. We are not -- nonetheless, we are recognizing that it's Mr. Brown who is on trial. And so, we are trying to be -- trying to work out a reasonable resolution. But it is difficult when the *allegations against the government are*	**No Court disposition on this or any other *Brady* matter as of 7/15/10**.

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	simply not founded in any fact and it makes it difficult for us to negotiate in that sort of posture." Dkt.1051, at 13.	
Government's Response in Opposition to Brown's Motion to Compel, 5/28/10. Dkt.1189.	"The Court should deny Brown's motion in its entirety because Brown has already received from the government all the *Brady* materials in the government's possession, custody and control to which he is entitled." Dkt.1189, at 1. "As has become standard fare for Brown, he levels serious allegations of prosecutorial misconduct with little to no regard for actual facts. In this motion, Brown breezily accuses prosecutors of rampant *Brady* violations as his basis for a stunningly broad set of requests. His allegations are without basis, and his requests far exceed any reasonable interpretation of *Brady*. **Moreover, his motion should be denied in whole because the government has complied and will continue to comply with its discovery obligations in this case**, whether under Rule 16, *Brady*, *Giglio*, or *Jencks*." *Id*. at 4-5.	**No Court disposition on this or any other *Brady* matter as of 7/15/10**.
Government "production" letter, 6/1/10.	"While these memoranda do not contain exculpatory information, the government will provide them to Brown. Dkt.1189, at 7. "The government does not possess exculpatory material related to Lyons. **However, because the government has continued to provide extensive disclosures related to this case despite it exceeding its discovery obligations**, it will make available to Brown a transcript of his testimony related to issues raised in Brown's motion." *Id*. at 8.	On 6/1/10 government produces two FBI 302s and one SEC transcript of Vinson & Elkins Attorneys, and ETF testimony from a Merrill employee. Government says this is not *Brady* material. **No Court disposition on this or any other *Brady* matter as of 7/15/10**.