

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

United States Courts  
Southern District of Texas  
FILED

MAR 17 2006

Michael N. Milby, Clerk of Court

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Crim. No. H-04-25 (Lake, J.)
	)	
v.	)	
	)	
JEFFREY K. SKILLING,	)	
and KENNETH L. LAY,	)	
	)	
Defendants.	)	

**DEFENDANTS' MOTION TO COMPEL PRODUCTION OF BRADY MATERIALS  
RELATED TO KEVIN HANNON'S "THEY'RE ON TO US" TESTIMONY**

*The Issue Presented.* During his direct testimony, Kevin Hannon claimed that Jeff Skilling said "they're on to us" when the subject of an "Off Wall Street" report was raised at a May 21, 2001 Enron Policy Committee Meeting. Appendix 1 (Trial Tr. at 5974:21). At least three of the Task Force's cooperating witnesses—Andrew Fastow, David Delainey, and Ken Rice—were slated to attend this meeting. See Defense Ex. 25236 (Appendix 3). Delainey sent an email to his secretary, Kay Chapman, saying he "Cannot be late!!!!!" for it, *id.*, and Hannon's FBI 302s confirm Delainey attended. See KH-3500-8, at 3-4, KH-3500-9, at 5, KH-3500-11, at 4-5. According to Hannon, Fastow also attended the meeting and made the comment that prompted Skilling purportedly to say, "they're on to us." Appendix 1 (Trial Tr. at 5974-75).

When examined on direct by the Task Force none of Fastow, Delainey, or Rice was asked whether Skilling or Fastow made the statements attributed to them by Hannon. The Task Force did not ask this question even though Hannon said there was "stunned silence" just before Skilling said "they're on to us." *Id.* at 5974:11-21. It is reasonable to conclude that had they been asked, they would not have corroborated Hannon. Several other witnesses the Task Force

has interviewed during its investigation (including Richard Causey, Lou Pai, and Steve Kean) were slated to attend this policy committee meeting as well. *See* Appendix 3.

The Task Force must have asked its cooperating witnesses and other attendees of the meeting about the “they’re on to us” statement Hannon attributes to Skilling. Yet none of the Jencks materials we have received and none of the Task Force’s *Brady* witness letters make any mention of Skilling’s alleged statement at this meeting. There is no mention whether Fastow, Delainey, and Rice recall this statement being made, even though Hannon attributes such significance to it, and even though the Task Force, collectively, has met with Fastow, Delainey, and Rice over 100 times.

***The Relief We Seek.*** If the Task Force or its cooperating agencies discussed the “they’re on to us” statement with any witness, cooperator or not, and the witness did not remember the statement being made, the Task Force has a duty to inform defendants of that material fact, as it refutes Hannon’s testimony. *See Giglio v. United States*, 405 U.S. 150, 154 (1972); *Graves v. Cockrell*, 351 F.3d 143, 146 (5th Cir. 2003). Such exculpatory statements must be disclosed to defendants whether memorialized in FBI 302s, attorney or agent notes, or even if never reduced to a writing, but remembered by members of Task Force or its cooperating agencies. *See id.*

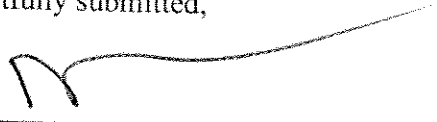
The Task Force cannot dispute such exculpatory information would be material. The Task Force carefully orchestrated its examination of Hannon to elicit this testimony at the very end of the trial week, at 4:30 pm on Thursday afternoon, for heightened dramatic effect. *See* Appendix 1. Newspapers nationwide and in Houston seized on this false testimony, giving it headline attention and describing it as damning. *See* Appendix 2. And Hannon’s recollection of the “they’re on to us” statement is the only statement attributed to Skilling elicited at trial that can remotely be described (even if only falsely) as indicative of guilt.

The Task Force has refused to make any additional *Brady* or *Giglio* disclosures relative to Hannon's "they're on to us" testimony. An order should issue requiring the Task Force to produce any FBI 302s, interview notes, or any other written records that pertain to Skilling's purported statement at the May 21, 2001 meeting. If the Task Force or its cooperating agencies took no notes when this topic was discussed, yet witnesses (or their counsel) told the Task Force or its cooperating agencies that the witnesses did not remember Skilling making the statement Hannon attributes to him, such information is oral *Brady*, and should be documented for defendants in a letter. At the very least, such witness statements should be submitted to the Court for its *in camera* review. See *United States v. Runyan*, 290 F.3d 223, 245 (5th Cir. 2002) ("refusal to compel production or conduct an *in camera* review of *Brady* materials can be reversible error").

Dated: March 17, 2006

Respectfully submitted,

By: \_\_\_\_\_



Of Counsel:  
Ronald G. Woods  
Texas State Bar No. 21964000  
Federal Bar No. 657  
5300 Memorial, Suite 1000  
Houston, TX 77007  
Office: 713-862-9600  
Facsimile: 713-864-8738

Daniel M. Petrocelli  
M. Randall Oppenheimer  
Mark Holscher  
O'MELVENY & MYERS LLP  
1999 Avenue of the Stars, 7th Floor  
Los Angeles, CA 90067  
Office: (310) 553-6700  
Facsimile: (310) 246-6779  
*Attorneys in Charge for Jeffrey K. Skilling*

By: Michael Ramsey / Ray

Michael Ramsey  
Chip Lewis  
River Oaks/Welch Building  
2120 Welch  
Houston, TX 77019  
Office: (713) 227-0275  
Facsimile: (713) 523-7887  
*Attorneys in Charge for Kenneth L. Lay*

Appendix 1

March 02, 2006 - Transcript of Jury Trial, Vol. 19  
page 5971

7 Q And do you recall a meeting with the policy committee in  
8 May, around May 21st of 2001?

9 04:25:27 A Yes.

10 Q What was the topic of discussion on May 21st of 2001 of the  
11 policy committee?

12 A The topic of discussion quickly became a research article  
13 that had been done by a firm called Off Wall Street.

14 04:25:49 Q And could you tell the jury where did this -- where did  
15 this meeting take place?

16 A The Doubletree Hotel downtown.

17 Q And who was present for the meeting?

18 A Mr. Lay and Mr. Skilling, myself, Mr. Causey and  
19 04:26:12 Mr. Fastow.

20 Q Mr. Whalley? Was Mr. Whalley there?

21 A And Mr. Whalley, yes.

22 Q Okay. Now, you said this was -- the topic of the  
23 conversation was an article done by a research firm Off Wall  
24 04:26:22 Street.

25 MR. STRICKLIN: It's Government Exhibit 4128. It's  
page 5972

1 already been admitted into evidence.

2 MR. HOLSCHER: Your Honor, I just object to the  
3 characterization as an article by a research company. It's a --

4 04:26:36 MR. STRICKLIN: I'll tell you what, I'll ask the  
5 witness what it is, Your Honor.

6 THE COURT: Okay, go ahead.

7 BY MR. STRICKLIN:

8 Q Who is Off Wall Street?

9 04:26:51 A My understanding is that they are an investment analysis  
10 boutique-type company who produce -- they produce investment  
11 analysis.

12 Q And the actual term of it is Off Wall Street Consulting  
13 Group, Inc.?

14 04:27:04 A Yes.

15 Q Prior to May 21st, had you heard of Off Wall Street?

16 A I had a brief conversation with Mark Palmer in which he  
17 referred to this article that had been printed by Off Wall -- by  
18 this firm Off Wall Street and had been picked up by, I believe,  
19 04:27:29 TheStreet.com. So, there was a brief mention of it probably a  
20 week before the policy committee meeting.

21 Q And why was this article printed out by Off Wall Street --  
22 why was it such a concern to the very top executives of Enron?

23 A Well, it laid out some pretty specific criticisms, all of  
24 04:27:55 which led to the conclusion of the article that Enron was worth  
25 probably closer to \$27 a share.

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1 Q And how did it come to that conclusion?

2 A Several ways: It questioned the quality of Enron's  
3 earnings and questioned whether it was, in fact, a trading  
4 04:28:16 company, questioned the valuation for Broadband and other  
5 divisions.

6 MR. HOLSCHER: Your Honor, if we could just have the  
7 same instruction when this was admitted: It's not for the truth  
8 of the matter asserted; it was just, I believe, for the notice.

9 04:28:30 THE COURT: What's the purpose of you admitting it for  
10 -- or offering it -- or questioning about it?

11 MR. STRICKLIN: The state of mind of the Defendants,  
12 Your Honor.

13 THE COURT: State of mind of whom?

14 04:28:39 MR. STRICKLIN: Of the Defendants.

15 THE COURT: All right, go ahead.

16 BY MR. STRICKLIN:

17 Q And why was -- again, why was -- why was this a concern to  
18 the top executives of Enron?

19 04:28:59 A Well, it seemed to -- it seemed to indicate that the market  
20 was starting to understand how Enron made its money.

21 Q How did the discussion start at the meeting about this --  
22 about this article?

23 A Greg Whalley had a copy of the article, and he held it up  
24 04:29:15 and said, "I don't know if you all have seen this; but other  
25 than the criticism of us being a trading company, it's pretty

page 5974

1 much on target."

2 Q And what was the response to that?

3 A Mr. Fastow was at the meeting. As I remember it,  
4 04:29:35 Mr. Skilling said, "I brought Andy here to talk about LJM."

5 Q And why -- why was -- why was LJM a topic of discussion and  
6 how did that relate to the Off Wall Street article?

7 A In the Off Wall Street article, there's criticisms made of  
8 Enron's use of sales to related parties. It was generally well  
9 04:29:57 known within Enron that the related party was LJM, which was an  
10 investment vehicle controlled by Andy Fastow.

11 Q Did Mr. Fastow address LJM at that meeting?

12 A Briefly, yes.

13 Q What do you recall Mr. Fastow saying?

14 04:30:16 A He said, "LJM is a good deal for me."

15 Q How did -- how did that go over at the meeting of these top  
16 executives?

17 A As I remember, it was met by stunned silence.  
18 Q After the stunned silence, did Mr. Skilling say anything?  
19 04:30:32 A Yes, he did.  
20 Q And what did he say?  
21 A He said, "They're on to us."  
22 Q When Mr. Skilling said, "They're on to us," what did you  
23 understand him to mean?  
24 04:30:46 A The investment community was starting to understand how  
25 Enron made money.  
page 5975  
1 Q And why is that a problem?  
2 A Well, if the criticisms were, in fact, valid, then that  
3 meant that the valuation may be valid, the valuation of \$27 a  
4 04:31:05 share.  
5 At that time, Enron stock was much higher than  
6 \$27. I think it was in the high 50s or maybe 60s. And everyone  
7 had a significant equity investment around the table. That  
8 meant we'd lose a lot of money.  
9 04:31:22 MR. STRICKLIN: Your Honor, I'm getting ready to flow  
10 to a different topic. I don't know how late you want to go  
11 today. I'm prepared to carry on.  
12 THE COURT: Okay. I think this would be a good time.

1. **THE ENRON TRIAL / Skilling told team 'they're on to us,' witness says [Corrected 03/15/06]**  
Houston Chronicle, 3 March 2006, 910 words, (English)  
"They're on to us," Jeff Skilling told an inner circle of top Enron executives at a mid-2001 meeting, a witness recounted in testimony Thursday.  
More Like This
2. **Skilling: 'They're on to us'**  
Tulsa World, 3 March 2006, 503 words, (English)  
HOUSTON -- Former Enron Corp. Chief Executive Jeffrey Skilling told other top executives "they're on to us," when a small analyst firm produced a research note critical of the company's sales to partnerships run by then-Chief Financial ...  
More Like This
3. **Skilling told execs, 'They're on to us'**  
Buffalo News, 3 March 2006, 205 words, (English)  
Former Enron Corp. Chief Executive Jeffrey Skilling told other top executives "they're on to us," when a small analyst firm produced a research note critical of the company's sales to partnerships run by then-Chief Financial Officer Andrew ...  
More Like This
4. **Witness: 'They're on to us' ; Former Enron executive says that's how Skilling reacted to critical article**  
USA Today, 3 March 2006, 523 words, (English)  
HOUSTON -- A government witness in the trial of former Enron CEOs Ken Lay and Jeff Skilling testified Thursday that Skilling said, "They're on to us," after an obscure investment newsletter criticized Enron for using related-party ...  
More Like This
5. **Executives on Trial: Big Enron Witness Waits on Deck --- Fastow's Past May Undercut Him; Jury Hears That Skilling Fretted At a Meeting, 'They're On to Us'**  
The Wall Street Journal, 3 March 2006, 1407 words, (English)  
Houston -- HERE COMES Andrew Fastow. After a smattering of lower-profile witnesses, the prosecution in the Enron trial is expected to call the failed energy firm's former chief financial officer to the stand next week. Mr. Fastow's ...  
More Like This
6. **'They're on to us,' Skilling reportedly said ; Witness says Enron's former CEO addressed company's other top executives**  
The Grand Rapids Press, 3 March 2006, 456 words, (English)  
HOUSTON -- Former Enron Corp. Chief Executive Jeffrey Skilling told other top executives "they're on to us," when a small analyst firm produced a research note critical of the company's sales to partnerships run by then-Chief Financial ...  
More Like This
7. **ENRON CHIEF WARNED 'THEY'RE ON TO US', FRAUD TRIAL IS TOLD; STANDARD REPORTER**  
The Evening Standard, 3 March 2006, 131 words, (English)  
Enron ex-chief Jeffrey Skilling warned colleagues that a damning analyst's report on the company just months before it collapsed meant Wall Street was about to uncover the firm's deceitful accounting practices, a Houston court has heard. ...  
More Like This
8. **Witness recalls Skilling saying 'they're on to us'**  
The Fort-Worth Star-Telegram, 3 March 2006, 322 words, (English)  
HOUSTON -- Former Enron Corp. Chief Executive Jeffrey Skilling told other top executives "they're on to us" when a small analyst firm produced a research note critical of the company's sales to partnerships run by then-CFO Andrew Fastow, a ...  
More Like This
9. **Enron trial witness: Former CEO told execs 'they're on to us'**  
The Philadelphia Inquirer, 3 March 2006, 739 words, (English)  
HOUSTON Former Enron Corp. chief executive officer Jeffrey Skilling told other top executives "they're on to us," when a small analyst firm produced a research note critical of the company's sales to partnerships run by Andrew Fastow, then ...  
More Like This

- 10. **Skilling told team 'they're on to us,' witness says**  
Houston Chronicle (KRTBN), 3 March 2006, 897 words, (English)  
Mar. 3--"They're on to us," Jeff Skilling told an inner circle of top Enron executives at a mid-2001 meeting, a witness recounted in testimony Thursday. The comment came just after a Wall Street analysis questioned the quality of the ...  
[More Like This](#)
- 11. **'They're on to us,' at Enron trial**  
The News & Observer, 3 March 2006, 86 words, (English)  
The News & Observer does not own the rights to republish this article. See microfilm for full text.  
[More Like This](#)
- 12. **Witness Says Enron Chief Told Others, 'They're On to Us'**  
The New York Times, 3 March 2006, 676 words, (English)  
HOUSTON, March 2 -- The former chief executive of Enron, Jeffrey K. Skilling, told other top executives "they're on to us," after a small analyst firm produced a research note critical of some company transactions, a former executive ...  
[More Like This](#)
- 13. **Enron chief said, 'They're on to us,' at analyst criticism of partnerships, witness says**  
Associated Press Newswires, 19:13, 2 March 2006, 917 words, (English)  
HOUSTON (AP) - Former Enron Corp. Chief Executive Jeffrey Skilling told other top executives "They're on to us," when an analyst firm produced a research note critical of the company's sales to partnerships run by then-Chief Financial ...  
[More Like This](#)
- 14. **Skilling said, "They're on to us," at analyst criticism of partnerships, witness says**  
Associated Press Newswires, 18:57, 2 March 2006, 915 words, (English)  
HOUSTON (AP) - Former Enron Corp. Chief Executive Jeffrey Skilling told other top executives "they're on to us," when a small analyst firm produced a research note critical of the company's sales to partnerships run by then-Chief Financial ...  
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APPENDIX 3

**From:** David W Delaine [David W Delaine/HOU/EES@]  
**Sent:** Wednesday, May 16, 2001 12:23 AM  
**To:** Kay Chapman  
**Subject:** Policy Committee Meeting - Monday, May 21  
Cannot be late!!!!

----- Forwarded by David W Delaine/HOU/EES on 05/15/2001 06:22 PM -----

***Sherri Sera@ENRON***  
***05/15/2001 02:03 PM***

**To:** Kenneth Lay/Corp/Enron@ENRON, cliff baxter, Richard Causey/Corp/Enron@ENRON, James Derrick/Corp/Enron, Andrew S Fastow/HOU/ECT, Steven J Kean/NA/Enron@Enron, Mark Frevert/NA/Enron, Greg Whalley/HOU/ECT@ECT, David W Delaine/HOU/EES@EES, John Sherriff/LON/ECT@ECT, Lou L Pal/HOU/EES@EES, Kevin Hannon/Enron Communications@Enron Communications, Ken Rice/Enron Communications@Enron Communications, Stan Horton/Houston/Eott@Eott

**cc:** Rosalee Fleming/Corp/Enron@ENRON, susan skarness, Sharron Westbrook/Corp/Enron@ENRON, Stephanie Harris/Corp/Enron, Bridget Maronge/HOU/ECT, Maureen McVicker/NA/Enron@Enron, Nicki Daw/NA/Enron, Liz M Taylor/HOU/ECT@ECT, Kay Chapman/HOU/EES@EES, Lauren Urquhart/LON/ECT@ECT, Karen Owens/HOU/EES@EES, Carol Ann Brown/Enron Communications@Enron Communications, Dorothy Dalton/Enron Communications@Enron Communications, Cindy Stark/Corp/Enron@ENRON, Joannie Williamson/Corp/Enron@ENRON, Sherri Sera/Corp/Enron@ENRON, Suzanne Danz/Corp/Enron@ENRON

**Subject:** Policy Committee Meeting - Monday, May 21


Just a reminder regarding the above referenced policy committee meeting. It will take place from 8:30 a.m. to 1:00 p.m. at the DoubleTree Allen Center (400 Dallas) in the Austin Room. A direct telephone number and fax number has been reserved for this meeting (numbers below) and Suzanne Danz will assist the committee in taking messages and disseminating faxes and courier packages.

Buffet breakfast and lunch will be available at this meeting. Please call me should you have any questions. SRS (x3-5984)

Direct phone: 713.752.2139  
Direct fax: 713.752.0836

CERTIFICATE OF SERVICE

This is to verify that true and correct copies of the following documents (Defendants' Motion To Compel Production Of *Brady* Materials Related To Kevin Hannon's "They're On To Us" Testimony) have been served on this 17th day of March, 2006 on counsel listed below.

  
\_\_\_\_\_  
Matthew T. Kline

Sean Berkowitz  
John Hueston  
Kathy Ruemmler  
Enron Task Force  
DOJ Criminal Division  
1400 New York Avenue, NW  
10<sup>th</sup> Floor  
Washington, D.C. 20530  
Facsimile: (202) 353-3165  
*Enron Task Force*

Michael Ramsey  
Chip Lewis  
River Oaks/Welch Building  
2120 Welch  
Houston, Texas 77019  
Facsimile: (713) 523-7887  
*Counsel for Kenneth L. Lay*

