

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

**UNITED STATES OF AMERICA**

**v.  
DANIEL BAYLY and  
ROBERT S. FURST**

**Cr. No. H-03-363 (Werlein, J.)**

**DEFENDANT ROBERT S. FURST'S MOTION TO COMPEL THE PRODUCTION OF  
THE COMPLETE ANDREW FASTOW BINDERS**

The Fifth Circuit has ordered the production of the Fastow Binders to Jeffrey Skilling, and those materials were given to Skilling's defense team in late December, around Christmas, upon the Fifth Circuit's *third* order to do so on December 20. Nonetheless, Defendants Robert S. Furst, Daniel Bayly and Jim Brown ("Defendants")<sup>1</sup> have not been provided with this material. Attempts to get these materials from the government have been in vain. Furthermore, the government has now indicated that it will not produce the Fastow Binders unless ordered to do so by this Court. Defendants, therefore, request the Court to order the immediate release of the Fastow Binders to Defendants, subject to the same conditions set forth in the Skilling order.<sup>2</sup> This should include all notes also taken of Fastow interviews by the ETF cooperating agencies, including the SEC and IRS, as have been produced to Skilling as *Brady* material under the Fifth Circuit's order.

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<sup>1</sup> Although Defendant Jim Brown has been severed from this case, he has a mutual interest in and right to receive the Fastow Binders and, therefore, joins in this Motion.

<sup>2</sup>The Fifth Circuit's order states that "[t]he Government's interview notes with Andrew Fastow shall be included in the record under seal but for review only by Appellant and his counsel of record, including any assistants working within the curtelage of attorney-client privilege." The defense in this matter has already agreed to abide by these same terms.

**I. The Fastow Binders.**

The “Fastow Binders” (the “Binders”) refers to materials generated in connection with the government’s multiple interviews of Andrew Fastow beginning in January 2004, when Fastow entered a guilty plea and became a cooperating witness. The binders contain all the raw interview notes, 302s, and other material prepared in connection with interviews that took place over a period of approximately 18 months. In orders dated November 1, November 28, and December 20, 2007, the Fifth Circuit repeatedly mandated the immediate release of these materials to Skilling. See Fifth Circuit Orders, *attached hereto* as Exhibit A. After belatedly questioning Judge Higginbotham’s authority to order the production of this material<sup>3</sup>, the government finally complied and released the Binders to Skilling.

The critical importance of these notes to the defense is undeniable. Although Fastow was not called as a witness in Barge I, his alleged statements were the key to the government’s case against the Defendants. The government relied heavily on its allegation that a phone call took place on December 23, 1999, in which Fastow made an oral guarantee to the Defendants that Enron would, *if necessary*, buy back the barges if Merrill Lynch would agree to purchase them. The government’s evidence at trial, as to what transpired on this call, was *entirely* based on hearsay accounts of the conversation from cooperating witnesses. Fastow himself has since refuted the government’s position as to what transpired on the call.<sup>4</sup> Referring to the Fifth Circuit orders, this Court noted at the hearing on December 21, 2007, “[i]f this is a precedent,

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<sup>3</sup> See Government’s Motion for Reconsideration at p. 6.

<sup>4</sup> All of the participants in this call have now indicated similarly that no such oral guarantee was ever made. Kelly Boots so stated, as evidenced in the 302 Report of her FBI interview. Ms. Boots invoked the Fifth Amendment at trial when called by the defense. See also statement of another participant in the call uncovered by the defense and that was never produced as *Brady* by the government, despite representations to this court as recently as November 2007 that all *Brady* had been produced. [Doc. 1029, Sec. II (filed under seal)]. Dan Boyle, who was convicted in Barge I, but who did not appeal, testified similarly that no oral guarantee to buy back the barges was made during this call. (Tr. at 4963-4965). And now Fastow himself refutes the government’s position. See Newby deposition ( 261:10-16 ), Fastow 302.

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.” Tr. at 27. Moreover, the government has advised that it intends to call Fastow as a witness in Barge II.

The circumstances surrounding the debriefing of Andrew Fastow by the FBI are extraordinary and suspicious. Normally, when the FBI interviews a witness, it creates a 302 contemporaneously with each interview. Here, the government held scores of interviews with Mr. Fastow over 18 months, yet compiled only one composite 302—after apparently destroying any individual 302s or prior drafts of the composite 302 that were created. This does not comport with FBI policy and is highly unusual. *See* Defendant-Appellant Jeffrey K. Skilling’s Opposition to the United States’ Motion for Reconsideration by a Three-Judge Panel of Order Requiring it to Produce FBI Raw Notes, *attached hereto* as Exhibit B. Skilling’s Opposition sheds light on this troubling and highly unusual practice:

One of Skilling’s claims on appeal is that the government impermissibly thwarted his ability to cross-examine Fastow. It did so by violating FBI policy and *Brady*, *Giglio*, and their progeny, *inter alia*, in (1) failing to prepare an FBI form 302 memoranda for each interview it conducted with Fastow; (b) scripting a 200-plus page “composite” Form 302 that masked inconsistencies, contradictions, and the evolution of Fastow’s story; (c) destroying all drafts of the composite 302s; and (d) refusing to provide Skilling with copies of the underlying raw notes from its more than 1,000 hours of interviews with Fastow.

*Id.* at 2.

Moreover, defense counsel in Barge I were never informed by the government that the FBI, contrary to its customary policy, had prepared only one composite 302, rather than a separate 302 for each Fastow interview. This troubling practice of compiling a single 302 to encompass thousands of hours of interviews with Fastow has effectively denied the defendants the benefit of gauging the evolution of Fastow’s story over time, and the shaping by the

government of his story. It is not surprising that given these unusual circumstances, and the critical nature of Fastow's involvement in Enron prosecutions, the Fifth Circuit took the unusual step of ordering the release of the Binders even before final briefing or oral argument in the Skilling appeal.

## ***II. Defendants' Attempts to Obtain the Fastow Binders***

The defense's attempts in the Barge case to obtain these notes have been thwarted. Defendants Furst, Bayly and Brown have been requesting these materials for years. Although the government heavily relied on its version of the Fastow call in its case against the Defendants in Barge I, it has fought to keep the Binders from the Defendants.

Fastow entered his guilty plea on January 14, 2004. This case did not go to trial until September 2004, some eight months later. By the time of trial, the government was well aware of Fastow's exculpatory admissions about the call. Yet the government decided to put on witnesses to provide a well-orchestrated hearsay version of what Fastow said in the call that contradicted Fastow's own version of the call.<sup>5</sup>

Since the time this case was remanded following the *Brown* decision, Defendants have continued to make specific requests for the Binders. In a hearing on April 4, 2007, Sidney Powell, counsel for Defendant Jim Brown, made such a request. Tr. at p. 21. AUSA Arnold Spencer represented in that hearing that he would personally review the prior *Brady* production and all materials received by the Government since Barge I to identify further *Brady* material and would make a supplemental production of materials by August 1, 2007. Tr. at 20. That date came and went without the production of a single document. Brown's Motion to Compel

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<sup>5</sup> During Barge I, the government relied on hearsay testimony of co-conspirators as its "evidence" that Fastow made a guarantee to buy the barges back from Merrill Lynch on the Dec. 23, 1999 call. Their testimony stands in stark contrast to the testimony of Andrew Fastow. In the Newby litigation, Fastow made it clear that he never made a guarantee on the call. *See* Newby Tr. at 260-261 ("Q: Did you ever say to Mr. Bayly, I guarantee we will take you out in six months? A: No, I didn't."); *see also* Fastow 302.

Production of *Brady* [Doc. 948] renewed the request for the Binders. Furst and Bayly reurged that these materials be produced in their joint Motion to Compel the Production of Specific *Brady* Material, filed on September 28, 2007 [Doc. 979].

In the midst of these attempts by Defendants to obtain the Binders, Jeffrey Skilling had filed a motion with the Fifth Circuit to order the immediate release of these materials to the Skilling defense team. On November 1, 2007, the Fifth Circuit granted a defense motion in the Skilling appeal ordering the government to turn over the Binders. The government still refused to produce the materials to Skilling, taking the position that the defense misread the Fifth Circuit's order, and forcing Skilling to file a motion for clarification of the order.

The Skilling Motion for Clarification was pending at the time of the pre-trial hearing in this case on November 16, 2007. At that hearing, this Court urged the government and defense attorneys to work out *Brady* issues. Following up on this request by the Court, Madeleine Johnson, counsel for Mr. Furst, arranged a meeting for November 27, 2007, with Mr. Spencer in his Tyler office to discuss these issues. At that meeting, Mr. Spencer indicated his inclination to release the notes, pending the outcome of Skilling's Motion to Clarify.

The next day—*again*-- the Fifth Circuit issued the order on the Motion to Clarify, reiterating that it meant what it said in the first order, *i.e.*, the government had to produce the Binders to Skilling. Within hours, the government filed a Motion for Reconsideration—for the first time asserting that a single judge lacked authority to issue such an order.

A subsequent hearing in this case was held on December 21, 2007. That morning, Defendants learned that the Fifth Circuit had entered another order, denying the government's Motion to Reconsider and, for the *third time*, ordering production of the Binders to Skilling. Sidney Powell obtained and read the order into the record at the hearing. Tr. at 53. This court

then asked Mr. Spencer whether he now intended to produce the Binders, in light of the Fifth Circuit's latest order. Mr. Spencer said he believed the issue of the production of the Binders could now be resolved "relatively quickly." Tr. at 25. The Court then asked, "When do you expect that will be resolved?" Mr. Spencer replied, "we 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.*" Tr. at 27(emphasis added). That would have been by December 28. The Defendants *still* do not have the Binders.

Ms. Johnson contacted Mr. Spencer on January 2, 2008, to follow up on the production of the Binders. Mr. Spencer stated that while he was personally inclined to release the Binders, he was waiting for permission "from Washington" to do so. Mr. Spencer then indicated that he had a complete set of the materials in his office, and that he could overnight them to Furst's attorneys once he "got word from Washington" that the materials could be released. Mr. Spencer indicated that he had not yet gotten word "from Washington," but that he expected to hear any day from "them."

Ms. Johnson called again on January 8. Astonishingly, Mr. Spencer now said not only did he not have permission "from Washington" to produce the Binders, but he did not expect to get permission, and would not release the Binders unless this Court ordered him to do so. He also stated, for the first time, that he would oppose a motion to compel production of the Binders.

### ***III. The Government's Stonewalling Must Cease Immediately.***

Enough is enough. The government's has strung out the defense far too long, hinting all along that it would release the Binders. Despite repeated indications, including the representation made to this Court that the matter would be resolved "relatively quickly," the government is now refusing to produce the Binders without an order from this Court.

The Defendants have been more than patient with Mr. Spencer's "predicament," *i.e.*, that he is unable to make important decisions on this case without "Washington's" approval. Despite being the attorney-of-record in this case, Mr. Spencer has repeatedly alluded to his inability to make critical decisions, including the production of the Binders. If Mr. Spencer cannot speak for the government, then the government must assign someone to the case who can.<sup>6</sup> Important decisions are not being made, severely prejudicing the Defendants. Defendants should no longer have to endure the alleged disconnect between the inclinations of the attorney-of-record in this case, and the dictates of an amorphous "they" in Washington. Certainly the United States Department of Justice must be held to a higher and more professional standard of conduct.

The Fifth Circuit has ordered the Binders to be released to Skilling, recognizing the significance of these materials to Skilling's defense. These documents are of equal (if not greater) importance to the Defendants in this case. Again, as this Court noted in the December 21 hearing, "...If this [Fifth Circuit order] 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." Tr. at 27.

#### ***V. Conclusion***

The government has stonewalled far too long on the production of the Binders. Defendants request that this Court order the immediate release of these materials, including similar notes taken by the SEC and IRS agents in the Task Force interviews to Defendants Furst, Bayly and Brown, subject to the same conditions of release applicable in the Skilling case.

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<sup>6</sup> "The attorney-in-charge is responsible in that action for the party. That individual attorney should attend all court proceedings or send a fully informed attorney with authority to bind the client." Southern District of Texas Local Rule 11.2.

Dated: January 15, 2008

Respectfully submitted,

FISH & RICHARDSON P.C.

By: /s/ Paul E. Coggins

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**CERTIFICATE OF CONFERENCE**

I hereby certify that the parties have conferred on this matter on January 8, 2008,  
and AUSA Arnold Spencer has indicated that the Government is opposed to this motion.

/s/ Madeleine B. Johnson

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of Robert S. Furst's Motion to Compel the Production of the Complete Andrew Fastow Binders has been served on January 15, 2008 on all counsel of record who are deemed to have consented to have electronic service by the Court's CM/ECF system. Any other counsel of record will be served via facsimile.

/s/ Paul E. Coggins

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