06-20885

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEFFREY K. SKILLING,
Defendant-Appellant.

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT JEFFREY K. SKILLING REGARDING ANDREW FASTOW INTERVIEW NOTES

[FILED UNDER SEAL]

On Appeal From The United States District Court
For The Southern District Of Texas, Houston Division
Crim. No. H-04-25 (Lake, J.)

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I. INTRODUCTION

For close to three years, Defendant-Appellant Jeffrey Skilling unsuccessfully sought access to exculpatory *Brady* evidence in the possession of the Enron Task Force, including the raw interview notes of the government's hundreds of hours of meetings with Mr. Skilling's chief accuser, Andrew Fastow. At every turn, the Task Force rejected our requests, representing over and over that it would "honor" *Brady* and disclose to Skilling everything to which he was entitled. *See* Appendix 1 (cataloging Skilling's efforts and the Task Force's responses). In spite of these explicit representations, it was not until after Skilling's appellate reply brief was due that the Task Force first disclosed its raw notes of Fastow's interviews—and *only* because it was ordered to do so by this Court.

The raw notes are *shocking*. The 420 pages of contemporaneous notes, which we have spent the last many weeks comparing to the thousands of pages of trial record and the Task Force's pretrial disclosures, confirm our worst fears. On the most crucial issues in Skilling's case—especially where it was only Fastow's word against Skilling's—the Task Force suppressed vital exculpatory evidence from its "composite" FBI Form 302s for Fastow and all other disclosures given to Skilling. The Task Force then proceeded to present critical testimony and argument at trial it knew was contradicted by the evidence withheld from Skilling.

Much of the suppressed evidence directly relates to—and *refutes*—the Task Force's pivotal contention that Skilling orally agreed to "secret side deals" to manipulate Enron's financial statements. This "side deal" theory underlies *every* count of conviction against Skilling. By depriving Skilling of key exculpatory evidence that Fastow conveyed in his interviews, the Task Force was able to skew the proof and convince the jury to accept Fastow's word *over* Skilling's. As the Task Force later told Fastow's sentencing judge and recounted in a law review article, Fastow's testimony and credibility were the cornerstones to convicting Skilling. R:41433-36, 41438; Enron Task Force Prosecutor John C. Hueston, *Behind the Scenes of the Enron Trial: Creating the Decisive Moments* ("Hueston"), 44 AM. CRIM. L. REV. 197, 197-99 (2007).

The substantial evidence the Task Force kept from Skilling all shares one chatacteristic—it was harmful to the Task Force's case against Skilling. We summarize below some of the evidence withheld and explain how its deprivation severely prejudiced Skilling's defense.

1. Global Galactic. Task Force prosecutors called the "Global Galactic" document "three pages of lies" and the "most incriminating document" in Skilling's entire case. Op.Br.196; R:36538-39. At trial, Fastow testified Skilling knew about Global Galactic because Fastow "confirmed" it with him during a spring 2001 meeting. Skilling denied knowing anything about Global Galactic.

Op.Br.32-36. To bolster Fastow's testimony and impeach Skilling's, the Task Force introduced a set of handwritten "talking points" that Fastow said he prepared in anticipation of his meeting with Skilling. R:22287-88. At trial, Fastow swore he "went over" the talking points with Skilling, including the crucial point "Confirmation of Global Galactic list." *Id.* In closing, the Task Force relied heavily on this document to corroborate Fastow's testimony that he discussed Global Galactic with Skilling. *Id.*

The raw notes of Fastow's interviews *directly* impeach Fastow's testimony and the Task Force's closing arguments. When shown and asked about the talking-points document in his pre-trial interview, Fastow told the Task Force he "*doesn't think [he] discussed list w/ JS.*" AE-27-381.[1]

This obviously exculpatory statement was *not* included in the Task Force's "composite" Fastow 302s given to Skilling. Nor was it included in the "Fastow Binders" the Task Force assembled for the district court's *in camera* review of the raw notes. It is not possible that this omission was inadvertent. Fastow's statement is one of the most important pieces of evidence provided during all his countless hours of interviews. Moreover, in preparing both the composite 302s and Fastow binders, the Task Force extracted and included other—relatively

[1] We have included these interview notes in an Appendix of Exhibits ("AE"). "AE-27-381" means Appellant's Exhibit 27 at page 381. Throughout this brief, emphases are added, except where noted.

inconsequential—statements from the *same* interview date and even the *same* page of notes. The Task Force's exclusion of this critical piece of evidence for over three years is inexcusable and, on its own, warrants a complete reversal of Skilling's convictions and other substantial relief.

2. Raptors. Like Global Galactic, the "Raptors" transactions were featured prominently at Skilling's trial, even meriting their own count (Count 2). At trial, Fastow testified that Skilling knew about an alleged "quid pro quo" underlying the Raptors and Enron hid the side deal from Arthur Andersen in order to secure the auditor's approval of the Raptors transactions. R:22401; 21373-77; Op.Br.29-32; U.S.Br.50-57.

The raw interview notes impeach *both* parts of Fastow's testimony. When interviewed in February 2004, Fastow told the Task Force he was "not sure what Skilling knew" and "d[id]n't know if Skilling can say he didn't know about the QPQ." AE-12-169. Fastow told the Task Force repeatedly the Raptors team

The raw notes suppressed from Skilling tell a different story. They show that Fastow wavered back and forth on what he claims Skilling actually said—at times, LJM "will be fine," at others, LJM "would not get stuck w/ asset—or something similar." AE-9-148; AE-14-188. They contain *no* statement that Skilling promised Enron would buy back Cuiaba, as Fastow testified at trial. In fact, in one pretrial interview, Fastow described a conversation with Skilling months after the alleged side deal, where Skilling "could have said you are stuck w/ Cuiaba." AE-9-149. This statement is inconsistent with Fastow's trial testimony, and its suppression prevented Skilling from impeaching Fastow on critical evidence against Skilling.

The raw notes also directly contradict Fastow's testimony about a key corroborating conversation between Skilling and Kopper. Unlike the detailed discussion described at trial, Fastow admitted that he did *not* "know if MK [Michael Kopper] went to talk w/JS." AE-3-21. In the face of this evidence withheld from Skilling, the Task Force elicited the opposite—and knowingly false—testimony from Fastow at trial.

The Task Force's *Brady* violations in this case are egregious. Individually or collectively—and the law requires the latter—the suppressed evidence uniformly contradicts and disproves the Task Force's theories underlying each of

the 19 counts of conviction. Under any reading of *Brady*, the Task Force had no right to withhold this evidence from Skilling.

There is no innocent explanation for the suppression of this evidence. It was deliberately and systematically withheld in bad faith. This, by itself, establishes materiality and mandates relief. *U.S. v. Jackson*, 780 F.2d 1305, 1311 (7th Cir. 1986). Since his indictment in 2004, Skilling sent letters, filed motions, and made untold demands for full *Brady* disclosure. Appendix 1 catalogs our unyielding yet unsuccessful efforts to obtain *Brady* disclosures prior to trial. It also shows how the Task Force obstructed our efforts every step of the way. In the 18 months leading up to trial, the Task Force persistently represented to the district court that it understood its *Brady* obligations and that *all Brady* information, *if any existed*, had been or would be disclosed. *E.g.*, R:1526-56; 1892-1920; 5690-5749; 10363-64. These representations were knowingly false, and the truth *never* would have come to light had this Court not ordered the disclosure of the raw notes.

One month before trial, Skilling directly challenged the inadequacies of the Fastow 302s and specifically sought access to the agents' raw notes to test the accuracy of the typewritten summaries. R:11660-70. The Task Force assured the district court and us that, because of a rigid checks-and-balance system employed by the Task Force, "the drafting agents were confident in the accuracy of their respective reports." R:11924. The Task Force rejected Skilling's request for the

notes and dismissed his claims of a "due process violation," telling the district court that the 302s "are comprehensive, well-organized road maps of information totaling roughly 240 of single-spaced typescript." R:11927. At a hearing on the matter, the Task Force went so far as to say "the notes … will necessarily be *much more sparse* … than the 302's will be." R:14076. The hundreds of pages of detailed notes instantly expose this falsehood.

In our post-conviction papers filed with the district court before judgment was entered, Skilling again complained mightily of *Brady* violations in this case. As before, our complaints were met with broad denials and representations that no material information had been withheld. R:37996-38050. And again, the raw notes now prove these assertions were false.

In November 2007, the Task Force filed its principal brief on appeal and argued that Skilling's *Brady* claims were "without foundation" because there was "no evidence" to suggest the Task Force withheld any favorable information. U.S.Br.192. Later that month, pursuant to our motion, this Court ordered the Task Force to disclose the raw notes to Skilling. In a last-ditch effort to prevent disclosure, the Task Force sought reconsideration representing, yet again, that the agents' "notes d[o] not contain *Brady* or *Giglio* information that had not been otherwise disclosed to Skilling." U.S. Mot. for Reconsideration by a Three-Judge Panel 8-9 (Nov. 28, 2007).

On review of the notes, we immediately saw material discrepancies between the notes and the 302s. Focusing on the Barges issue, as one example, we wrote to senior leadership at the Department of Justice about the suppression of critical evidence. AE-35. In response, the Department rejected our *Brady* concerns, saying any differences between the Fastow raw notes and 302s were "minor discrepancies" and "not materially inconsistent" with "documents that were produced to [us] in pretrial discovery." AE-36. Aware of no such pretrial discovery, we wrote back and challenged the Task Force to identify the documents "by Bates number (or other identifying information) and date of production." AE-37. Last Friday, the Task Force responded. Unsurprisingly, it was unable to identify a *single* email, note, letter, memo, or other document conveying the information found in the raw notes. Instead, the Task Force merely reverted to its blanket assertion that "the notes are 'not materially inconsistent' with information already in your possession." AE-40.

The time has come to hold the Task Force accountable for its systematic suppression of substantial, crucial, and exculpatory evidence. It misled Skilling and the district court in repeatedly representing it would "honor" Skilling's *Brady* rights. Rather than disclose the raw notes of Fastow's interviews or "comprehensive" and "accurate" 302s, the Task Force carefully and cleverly

scripted the composite summaries to smooth out inconsistencies and omit that which could exonerate Skilling.

Skilling's life has been destroyed. His ability to receive a fair trial has been irretrievably lost. He spent tens of millions of dollars in the first trial and was forced to reveal his defense evidence and trial strategies. His convictions have been broadcast to almost every corner of the globe. Task Force prosecutors have widely publicized their success in articles and speeches throughout the country. Op.Br.174. Mr. Skilling has spent 15 months in federal prison. Given the magnitude of evidence suppressed, the incalculable prejudice to Skilling, and the Task Force's ongoing refusal to acknowledge its undeniable errors, the *only* fair remedy is dismissal. *See, e.g.*, *U.S. v. Sudderth*, 681 F.2d 990, 995 (5th Cir. 1982) ("[A]s this Court has previously expressed, prosecutorial conduct may be so fundamentally unfair as to deny a defendant's constitutional rights and warrant dismissal of the tainted indictment."); *Gov't of Virgin Islands v. Fahie*, 419 F.3d 249, 254-56 (3d Cir. 2005) ("[D]ismissal for a *Brady* violation may be appropriate in cases of deliberate misconduct because those cases call for penalties which are not only corrective but are also highly deterrent."); *U.S. v. Leung*, 351 F. Supp. 2d 992, 998 (C.D. Cal. 2005) (dismissing case; "[T]he government decided to make sure that Leung and her lawyers would not have access to Smith. When confronted

with what they had done, they engaged in a pattern of stone-walling entirely unbecoming to a prosecuting agency.").

II. THE TASK FORCE SUPPRESSED A MASSIVE AMOUNT OF EVIDENCE FAVORABLE TO SKILLING'S DEFENSE.

The Due Process Clause found in the Fifth Amendment requires federal prosecutors to disclose to defendants all favorable, material information in the government's possession. *Brady v. Maryland*, 373 U.S. 83, 87-90 (1963); *Kyles v. Whitley*, 514 U.S. 419, 434, 437-40 (1995); *U.S. v. Agurs*, 427 U.S. 97, 108 (1976). The reason for this rule is that the government enjoys "substantial resources [and] considerable other advantages" over defendants, and thus, the "system reposes great trust in the prosecutor to place the ends of justice above the goal of merely obtaining a conviction." *Kirkpatrick v. Whitley*, 992 F.2d 491, 496 (5th Cir. 1993).

This "great trust" is breached and a *Brady* violation occurs when three things occur: (1) the government fails to disclose information to the defense; (2) the undisclosed information was "favorable" to the defendant; and (3) the undisclosed information was "material" to the outcome of the trial. *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *U.S. v. Sipe*, 388 F.3d 471, 477 (5th Cir. 2004).

In Sections II.A-D that follow, we show how the first two of these elements have been met. We detail the information the Task Force withheld related to its "secret side-deal" theory of the case and explain why the evidence the Task Force

suppressed was overwhelmingly favorable to Skilling. To be clear, this side-deal evidence is not the only favorable evidence that was suppressed, nor does our recitation below represent all that was suppressed related to these transactions. *See infra* Appendix 2 (collecting additional examples of suppressed information from the agents' notes). The suppressed side-deal evidence, however, establishes beyond any question that the first two elements of a *Brady* claim have been met.

In Part III, we address the materiality element of *Brady* and explain how and why Skilling was denied a fair trial. *U.S. v. Bagley*, 473 U.S. 667, 682 (1985). Finally, in Part IV, we address remedies.

A. Global Galactic

1. The Task Force's Case at Trial

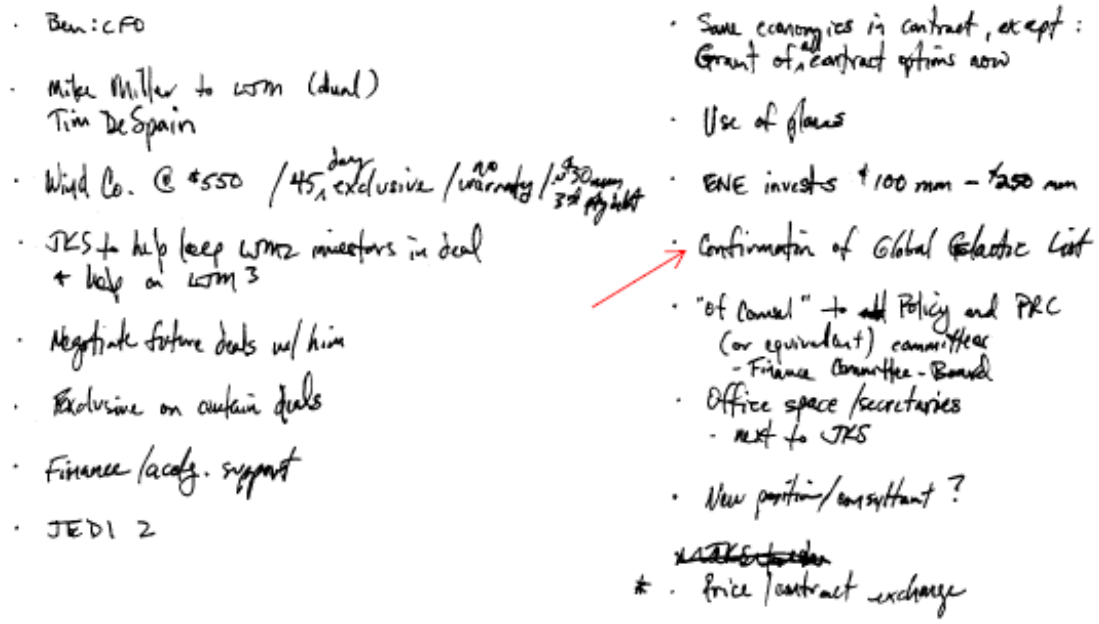
"Global Galactic" is a term Fastow and the Task Force used to describe a three-page handwritten document supposedly memorializing secret oral side deals between LJM and Enron, including the alleged secret side deals underlying the Cuiaba and Nigerian Barges transactions. GX1298; R:858-59. Task Force prosecutors called Global Galactic a "smoking gun" and "one of the Government's best pieces of documentary evidence." R:36536-37, 41433-36; Hueston, 44 AM. CRIM. L. REV. at 197-99.

But for all this rhetoric, Global Galactic bore no connection to Skilling. Without Skilling's name, signature, initials, handwriting, or fingerprints anywhere

on the document, the Task Force could not directly link Skilling to the document. Hueston, 44 AM. CRIM. L. REV. at 197. Indeed, when the Task Force indicted the case, and in the months leading up to trial, it conceded that Global Galactic did not relate to Skilling, but implicated Fastow and Enron's Chief Accounting Officer Rick Causey. Op.Br.33-36; 196-97; R:1888 (Task Force: "The Indictment does not even charge Skilling with being a part of the Global Galactic Agreement.").

When, on the eve of trial, however, Causey pled guilty to a single count—unrelated to Global Galactic—the Task Force switched positions and asserted that Skilling was aware and part of the Global Galactic agreement. R:21312-19, 36537-41, 37021-24. Fastow provided the critical testimony to support this new theory. Though admitting he never showed the document to Skilling or used the term "Global Galactic" with him, R:21315, 21813, Fastow claimed he "confirmed" certain of its deal terms with Skilling during a spring 2001 meeting. R:21364. Besides filing objections to having this new theory sprung on him on the eve of trial, Skilling denied having any such conversation with Fastow. R:29885-88.

To bolster Fastow's credibility, the Task Force introduced government trial exhibit ("GX") 3594, which Fastow testified were "talking points" he prepared in anticipation of his 2001 meeting with Skilling. R:21361-64. These talking points in GX3594 are reproduced below (arrow added):



GOVERNMENT EXHIBIT 3594

We cross-examined Fastow about this document. He admitted he never showed the talking points list to Skilling, but swore he "went through it pretty completely."

> Q. You didn't give this document [GX3594] to Mr. Skilling, did you?
>
> A. Not to my recollection, no.
>
> Q. *And you—you didn't—you didn't even get— you didn't even go over all these items with Mr. Skilling, did you?*
>
> A. *My recollection is that I did discuss this list with Mr. Skilling, and my recollection is that we went through it pretty completely.* R:22827-28.

When Skilling testified, he denied ever seeing the document (GX3594) and that Fastow "confirmed" these talking points with him, especially "Global Galactic" or any alleged side deal. Skilling said that if Fastow had raised the

points in his talking-point list—which included Fastow's leaving Enron to run LJM while maintaining his Enron salary and his use of the Enron company plane—Skilling would have thrown him out of his office. R:29885-29888.

In closing, the Task Force called the talking-points an "incriminating" document about an "incriminating" meeting; ridiculed Skilling's denials, calling them "theater" and "drama"; and said that the document definitively proved that Skilling knew about Global Galactic and that LJM was a "sham."

> Government Exhibit 3594 …. *Mr. Fastow testified to you that these are notes that he took in preparation for a meeting with Mr. Skilling. What does it say? Confirmation of Global Galactic list*. These notes are interesting. The defense has [asked every witness], "Do you have any notes? Do you have any notes to document this conversation -- this incriminating conversation?" That's incredulous. If you don't have notes to the conversation, then it's nonexistent. *Well, guess what? Here are some notes*. You recall Mr. Skilling's reaction to these notes. He said, "This is a joke. This must be a comedy script…. There was all sorts of theater and drama…. I remember he was acting it out. He was saying uses of planes and, you know, things like that. *These notes are incriminating*. They confirm the existence of the Global Galactic document, along with all of the other evidence. *That Global Galactic document makes LJM a total sham. It's fraud. Mr. Skilling knew about it. That's why he has the reaction that he has to these notes*. R:36540-42.

At Fastow's sentencing hearing, the Task Force reiterated the importance of Global Galactic, the talking-points document (GX3594), Fastow's testimony about the document, and how they cemented Skilling's guilt:

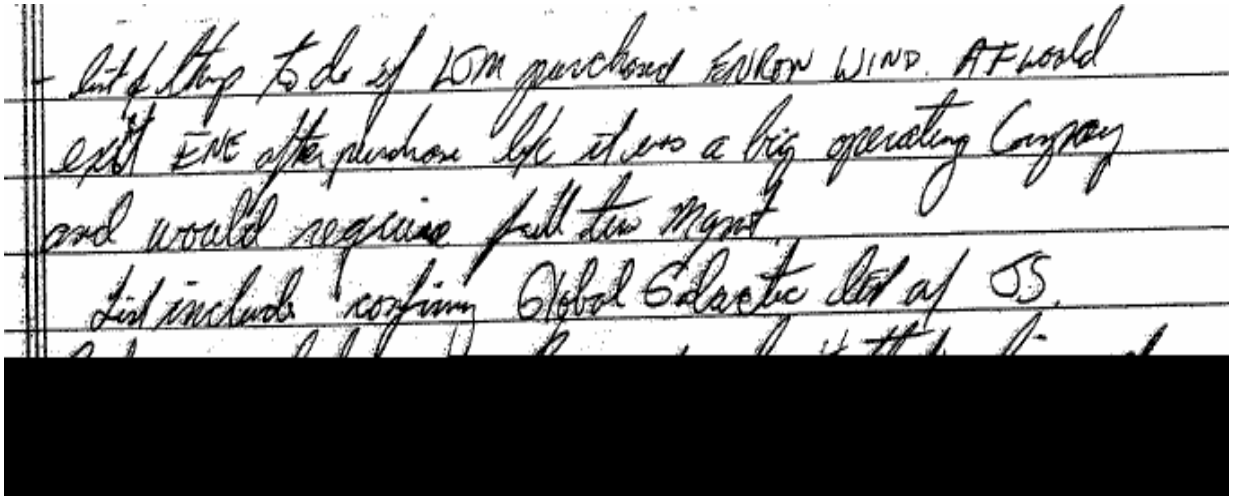
> The road to convicting Mr. Skilling was also built in critical part by Mr. Fastow. For example, *Mr. Fastow provided the key link from the "Global Galactic" document to Mr. Skilling*. That "Global Galactic"

> document provided by Mr. Fastow was one of the Government's best pieces of documentary evidence. *With Mr. Fastow's assistance prior to trial we located corroborating handwritten notes that showed that Mr. Skilling was aware of key "Global Galactic" agreements. Together with Mr. Fastow's meeting notes and his testimony, the "Global Galactic" list of simple deals to circumvent accounting treatment provided a plain and simple fraud tied to Mr. Skilling, one that the jury could easily understand.* R:41433-36, 41438.

2. What the Raw Interview Notes Revealed

Skilling's connection to Global Galactic—and Fastow's testimony supporting it—were manufactured by Fastow and the Task Force despite clear admissions from Fastow to the contrary that were *never* disclosed to the defense. On May 4, 2004, almost two years before Fastow testified, the Task Force showed Fastow the talking-points document (GX3594). The notes contain no indictation that Fastow said the document memorialized an incriminating meeting with Skilling. Just the opposite, the notes explicitly state that Fastow "doesn't think [he] discussed list w/JS [Jeffrey Skilling]." AE-27-381. The notes even contain Fastow's explanation of why he did not think he discussed the document with Skilling—because the "Enron Wind" deal mentioned in the talking points "never happened." *Id*.

Below are the raw interview notes confirming that Fastow did not recall discussing the talking-point list; we have typed the notes for ease of readability:



- *list of things to do if LJM purchased ENRON WIND.* AF would exit ENE after purchase b/c it was a big operating Company and would require full time mgmt.
List includes confirming Global Galactic list w/ JS.
But since [Enron Wind] deal never happened, doesn't think discussed list w/JS. AE-27-381.

Shockingly, given the heavy emphasis it placed on GX3594, the Task Force elected to exclude this note from the "composite" Fastow 302s it prepared and gave to Skilling. Nowhere in the 302s is there any mention of Fastow's talking points list, much less his stunning admission that he "doesn't think [he] discussed [the] list" with Skilling.[2]

[2] Lest there be any doubt, witness interview notes are clearly subject to *Brady*. *U.S. v. Brown*, 303 F.3d 582, 593 (5th Cir. 2002) (FBI agent's notes can contain *Brady*); *Williams v. Whitley*, 940 F.2d 132, 133 (5th Cir. 1991) ("We have recognized that information contained in police reports may be *Brady* material."); *Conley v. U.S.*, 415 F.3d 183, 188-89 (1st Cir. 2005) (reversing conviction where undisclosed FBI memorandum contained information not reflected in witness's grand jury

To call this "suppressed" evidence "favorable" would be a gross understatement.[3] Fastow's admissions directly (a) corroborate Skilling's testimony that he never discussed Global Galactic with Fastow or any of the other items on Fastow's talking-points list, GX3594; (b) refute the Task Force's attack on Skilling's testimony, credibility, and demanor as "theater" and "drama"; (c) explain why, even if Fastow made such a talking-points list, he never discussed it with Skilling—*i.e.*, the Wind "deal never happened"; and (d) contradict Fastow's testimony and the Task Force's closing arguments about this alleged "incriminating" meeting. The contrasts could not be more stark:

Skilling Testimony	Fastow testimony	Fastow Interview
Q. And you didn't talk about, I take, "Confirmation of Global Galactic list" that Mr. Fastow was going to come in – A. *We talked about none of these issues after Mr. Fastow came into my office*. (R:29885-29888)	"*My recollection is that I did discuss this list with Mr. Skilling, and my recollection is that we went through it pretty completely*. (R:22287-88)	*"since [Wind] deal never happened, doesn't think discussed list w/JS."* (AE-27-381)

testimony); *U.S. v. Harrison*, 524 F.2d 421, 427 (D.C. Cir. 1975) ("too plain for argument" that notes can contain *Brady*: "Whether or not the prosecution uses the witness at trial, the notes could contain substantive information or leads which would be of use to the defendants on the merits of the case. If the witness does testify, the notes might reveal a discrepancy between his testimony on the stand and his story at a time when the events were fresh in his mind. The discrepancy would obviously be important for use in impeaching the witness' credibility. The possible importance of the rough notes for these purposes is not diminished in cases where the prosecutor turns over to the defense the 302 reports.").

[3] "Suppression" simply means a "failure to disclose" to the defense. *Kyles*, 514 U.S. at 437-38; *Wright v. Quarterman*, 470 F.3d 581, 591 (5th Cir. 2006).

A conviction based on knowingly false or misleading testimony must be reversed if there is any "reasonable likelihood" that the false testimony could have affected the jury's verdict. *See Napue v. Illinois*, 360 U.S. 264, 268-70 (1959). Here, the Task Force both presented false testimony by Fastow and suppressed the exculpatory evidence that would have exposed the testimony as a lie. *See Brady*, 373 U.S. at 87-90.

In *U.S. v. Pelullo*, 105 F.3d 117, 118-19 (3d Cir. 1997), the court reversed a CEO's wire-fraud conviction on a much less direct showing of suppression. There, the key disputed factual issue was whether Pelullo used company funds *improperly* to pay a loan shark or *properly* to repay an intercompany debt. *Id.* at 119. FBI Agent Wolverton testified that, before trial, he interviewed Pelullo and Pelullo admitted using the money to pay the loan shark. *Id.* After the jury convicted, Pelullo obtained Wolverton's raw interview notes. As here, the notes contradicted his testimony, stating that Pellulo's reason for the payment was "repaying intercompany debt." *Id.* at 120. As here, this critical exculpatory statement appeared only in the raw interview notes, and "did not appear[] in the FBI 302 report." *Id.* The notes, thus, constituted "valuable *Brady* material" that the

government had a duty to disclose. *Id.* at 122. As in *Pelullo*, Skilling's convictions cannot stand.[4]

B. Raptors

The Raptors were four structured-finance transactions that Enron used to offset risk to which it was exposed in various third-party investments. Raptors worked as follows:

(1) *The Put*: Enron purchased a "put," or insurance policy, from each Raptor vehicle for $41 million. In return, if the price of Enron's stock dropped below a certain price within a prescribed period of time, the Raptor vehicle—funded by LJM2 investors—would pay Enron the difference.

(2) *The Hedges*: If and only if the put settled favorably for the Raptor vehicle (*i.e.*, Enron's stock price did *not* drop), then the Raptor vehicle

[4] Pretrial disclosure of the raw notes would have provided other important evidence regarding Global Galactic. For instance, the composite 302s state that "Fastow forgot about" the one and only copy of Global Galactic "until seeing it" in June 2004, when his wife found the document in the family's safety-deposit box. AF-3500-9-65. The notes do not contain any indication that Fastow "forgot" about the copy of Global Galactic. To the contrary, on February 3, 2004, *four months before* Fastow's wife allegedly found the copy, Fastow told the Task Force there "may be another copy [of Global Galactic] somewhere." AE-11-164. The Task Force deprived Skilling of evidence to cross-examine Fastow on this issue. Having limited the proof, the Task Force then argued that Fastow had no reason to lie about Global Galactic because by the time the document emerged, both Fastow's and his wife's plea deals were "locked." Op.Br.34; Rep.Br.138-41; *Harrison*, 524 F.2d at 427; *see also* Appendix 2.

could distribute the $41 million premium to its owner, LJM2. LJM2 then had the ability to begin hedging transactions with Enron, in which Enron offset its risks in its third-party investments. Op.Br.29-32; U.S.Br.52-56; Reply 9-13.

As Skilling testified at trial, the Raptors structure was designed to create capital (if Enron stock went up) to provide hedges for particular types of securities. The put portion of the transaction protected Enron if, during a set period of time, the Enron stock went down rather than up. In that event, payment of the put offset the loss on shares specifically issued for this transaction. There is nothing improper about this structure, provided the accounting and legal documents are properly designed and executed, and the company went to great lengths to ensure that the transactions were properly designed and executed. R:28824. Over 100 professionals at Enron, Arthur Andersen, and outside law firms worked on the Raptors, and the transactions were heavily documented. Op.Br.32.

At trial, the Task Force told the jury it need not "get into the accounting" of these complex structures or be misled by the large number of people who reviewed and documented them, because what made the Raptors fraudulent was a "secret oral side deal":

> Now, you're going to hear a lot about Raptors at trial. They're very complicated financial structures. You'll see diagrams of them. They look like spider webs. You'll hear that the accountants and the lawyers crawled all through those spider webs checking them out.

> Ladies and gentlemen, you won't have to go into that spider web. You know why? It's a case about lies, folks. *The lie, the secret deal, wasn't in the spider web*. R:14781-82.

Calling the Raptors "secret side deal" a "quid pro quo," the Task Force alleged that Enron guaranteed LJM2 an $11 million profit from the put (the quid) and, in exchange, LJM2 would let Enron hedge any asset at any price without performing any due diligence (the quo). R:855; 21378-82, 21403-04, 24269-72. The Task Force's attack on the Raptors transactions rested primarily on the existence and effect of the alleged secret side deal—the quid pro quo. The Task Force's Raptors case against Skilling rested *entirely* on proving he knew about and approved the *quid pro quo*. Op.Br.29-32; Reply 9-14. On both issues, the Task Force withheld vital exculpatory evidence from Skilling.

1. Suppression No. 1: Anderson's Knowledge of the Quid Pro Quo

In support of his reliance defense, Skilling showed that Arthur Andersen had been fully informed about and approved the Raptors transactions. R:24263-64; 24266. The Task Force challenged Skilling's reliance defense, claiming Skilling and Enron hid the quid pro quo from Anderson. R:855.

Fastow was the Task Force's main witness on this point.[5] Fastow was asked

[5] When Enron Treasurer Ben Glisan, the "architect" of the Raptors, was asked whether "the accountants understood that the commercial intent was for LJM to have an opportunity to get its money back plus an opportunity to have a subsequent

at trial whether everything "relative to the Raptors" had been "checked off on" by Anderson. Fastow answered "everything was checked off, *except I would say that in addition to what was checked off, I had the quid pro quo*." R:22401.

Prior to trial, Fastow told the Task Force just the opposite, as the raw notes reveal. In two separate interviews, Fastow told the Task Force that he and others did not think the quid pro quo was wrong; the quid pro quo was "not a secret"; it never crossed Fastow's mind the quid pro quo "was hidden from AA"; and he "never doubted that [Enron] was sharing the entire deal w/ AA." AE-12-168-69, 173; AE-18-241. The raw notes could not be more explicit and exculpatory:

- "*They [Rick Causey's group and the many other people working on Raptors] didn't think that QPQ was wrong - Didn't think should be hiding this*…." AE-12-168.
- "Every lawyer involved understood this [quid pro quo]. *Not a secret. Never on ASF's mind that hidden from AA.*" AE-12-173.
- "QPQ - discussed w/ RC [Causey] + BG [Glisan]. (1) *not a secret.* No reason not to discuss together. Was built into the structure in a way, but not valuation issue. (2) discussed w/ RC, JS [Skilling] + BG. (a) *QPQ valuation issue was not a secret to AF -- no attempt to conceal*. AE-18-241.
- "What does this say about AA's role. (1) Opinion → AA's role was to help EN find ways to navigate through the rules to find a way for EN to get treatment it desired. They did this through a very technical analysis of the rules. (2) *Did AA know this was return of money? AF's opinion: AA knew*. AA actively helping EN to find ways to navigate around the rules." *Id.*
- "*AF believed they (AA) were complicit. AF never doubted that EN was sharing <u>entire</u> deal w/ AA.*" *Id.*

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30 million-dollar distribution," Glisan replied, "I think Arthur Andersen understood that, yes." R:25009.

The Task Force's suppression of this crucial evidence was instrumental in securing all 19 counts of conviction against Skilling. The Raptors transactions played a dominant role in the Task Force's case. They were the only transactions singled out for a separate count—Count 2—and were made a part of every count in the indictment. For example, in the five counts of conviction for making false statements to auditors, the Task Force argued Skilling lied by hiding the secret oral side deals. Op.Br.56-57. Far from lying to Andersen about anything, the raw notes prove that Fastow "never doubted that EN was sharing entire deal w/ AA." AE-18-241. Yet the composite 302 was written to falsely state: "Fastow believes Enron showed AA the entire deal *except for the quid pro quo*." AF-3500-9 at 57. This was the same testimony—and same lie—Fastow repeated at trial. R:22401.

2. Suppression No. 2: Skilling's Knowledge of the Quid Pro Quo

As part of its claim that Skilling lied to the public and Arthur Andersen, the Task Force further alleged that Skilling knew about and approved the quid pro quo. R:855; 14781-82. Skilling denied knowing of any improper side deal in connection with the Raptors (or any other transaction):

> Q. Okay. Now, did you have any knowledge of any secret side deal or any quid pro quo in connection with the Raptor transactions?
> A. No. R:28834 (direct examination).
>
> * * *
>
> Q. And Mr. Fastow talked about a guarantee; correct? And he talked about the fact that there was no way that he would have done [the Raptors] without assurances; correct? You heard that testimony?

A. Which is absolutely false. R:30050 (cross examination).

Fastow disputed this, testifying that he personally discussed the quid pro quo with Skilling. R:21373 ("Q: And did you discuss that deal with anyone else? A. Mr. Skilling."). To drive the point home, the Task Force asked again: "[T]he understanding [the quid pro quo] was struck with whom?" Fastow answered: "Mr. Causey and Mr. Skilling." R:21373-77.

Before trial, Fastow was interviewed about the quid pro quo on numerous occasions. In later meetings, Fastow said he discussed the quid pro quo with Skilling. However, during his first interview on the quid pro quo, Fastow identified four people (aside from himself) who knew about the deal: Causey, Glisan, Michael Kopper, and LJM employee Anne Yaeger. AE-3-27. Fastow did not mention Skilling, even though he knew Skilling was the Task Force's primary target. During the second interview, Fastow was explicit and confirmed he knew little about Skilling's knowledge and involvement:

> *Not sure what Skilling knew*. Causey + Glisan explained structure to JS [Skilling].
> 1) Told JS that BG [Glisan] solved problem on back end.
> 2) *Don't know if JS can say he didn't know about QPQ*, but shouldn't matter b/c entire purpose of Raptor is to conceal financials/manipulate financials of ENE - This continues through Restructuring etc. AE-12-169.

At trial, the Task Force had Fastow say that he "struck" the quid-pro-quo deal with "Mr. Skilling." R:21373-77. And to ensure Skilling's inability to

impeach this critical testimony, the composite Fastow 302s were prepared to say: "Skilling understood the quid pro quo," AF-3500-9 at 57, contrary to Fastow's previous—and undisclosed—admissions that he was "not sure what Skilling knew" about the quid pro quo. AE-12-169.

3. Suppression No. 3: Andersen's Role in the Quo

The Task Force's "quo" theory was that once LJM2 received the premium from the put (the quid), Enron could hedge "any asset at any price" in the Raptors without performing the due diligence a "true" third-party would perform. R:855. In opening statement, the Task Force employed a used-truck metaphor to explain this part of the alleged "side deal":

> Think of [Raptors] this way… Let's say, Enron bought a truck for $25,000. It would put on its report card that Enron now had an asset worth $25,000… The truck gets driven around. It gets into an accident, blows out a couple of tires and starts to rust…. It's now worth about $5,000… [Now] let's say that Enron's trying to sell that truck. A real independent buyer, if they were looking at that truck, would come up to the truck, kick its tires, try to drive it around even though it had the flat, ask some questions about it, and bargain hard with Enron about what the price should be. That's a real independent third party. But [LJM2] wouldn't look under the hood. And it happened because Fastow got money up front to not act like that independent buyer. R:14780-14782.

When he testified, Fastow claimed that LJM2 allowed Enron to put assets into the Raptors "at whatever level they wanted" without performing due diligence because, pursuant to the quid pro quo, LJM2 no longer had skin in the game. R:21401-04. Skilling disputed this, showing that diligence was done on the deals,

Fastow and LJM2 retained risk, and LJM2 and its investors very much wanted a return on their investment proceeds remaining in the hedging vehicles. R:30726-30; Rep.Br.11-13.

Again, the issue boiled down to Fastow's word against Skilling's. Once again, the evidence proving Fastow was lying was contained in the raw notes kept from Skilling, but not in the composite 302s given to Skilling. In an interview with the Task Force, Fastow conceded he "instructed LJM people to accept [Enron's] valuations" not because LJM2 had *no* equity at risk, but "b/c [Arthur Andersen] would approve [the] valuations." AE-18-244.[6] Rather than simply recount this statement, the composite 302s were worded to state: "LJM2 would not do due diligence [on the assets hedged in Raptors] but simply accepted the valuations on Enron's books. AA had already signed off on these valuations." AF-3500-9 at 58.

After Skilling's trial, Fastow was deposed in the civil *Newby* case. As he told the Task Force in his initial interviews, Fastow testified that LJM2 "allow[ed] Enron to hedge virtually any asset at whatever prices it determined were appropriate," in part, because "Arthur Anderson was signing off" on the values every quarter. Def.-Appellant Jeffrey K. Skilling's Unopposed Mot. To Supp. The Record On Appeal To Include Civil Dep. Testimony Of Andrew Fastow Ex. A at

[6] To extend the Task Force's used-truck metaphor, LJM2 did not "look under the hood" because an independent appraiser—Arthur Andersen—vetted and approved the valuations underlying the hedges.

1759-62. When Fastow was challenged that this deposition answer was inconsistent with his trial testimony, Fastow admitted he needed to "clarify" his trial testimony and again admitted that the hedging prices were being "approved by Arthur Andersen on a quarterly basis." *Id.*

Fastow clarified nothing of the sort at trial, and his "clarification" was purposefully omitted from the composite 302s. Skilling could not impeach Fastow's contrary testimony because the impeaching evidence was buried in an interview note not disclosed until December 2007 (18 months after his trial) and given in a deposition session that occurred *after* Skilling was convicted, sentenced, and judgment had been entered in his case.

C. Cuiaba

1. Suppression No. 1: The Alleged Guarantee to LJM1

In the fall of 1999, Enron sold LJM1 a minority interest in a Brazilian power plant named Cuiaba. Op.Br.27-29; U.S.Br.42-44. According to the Task Force, LJM1 was not willing to accept risk on Cuiaba and agreed to "purchase" the interest "only" because Fastow received an undisclosed "guarantee" that if Enron could not find a third-party purchaser, it would buy back LJM1's interest in Cuiaba at a profit. R:856. This side deal, the Task Force argued, eliminated the transfer of risk and enabled Enron to improperly record earnings from the sale. *Id.*

Initially, the Task Force accused Rick Causey of giving Fastow the improper guarantee. R:856 (Indictment: "LJM agreed to 'buy' this interest [in Cuiaba] only because, as Skilling knew, Causey in a secret-side deal agreed that Enron would buy back the interest, if necessary, at a profit to LJM."). At trial, and with Causey not in the case, the Task Force again switched theories and said Skilling gave Fastow the guarantee. R:14778.

The Task Force relied entirely on Fastow's testimony.[7] Fastow testified that approximately two to three weeks before the end of the third quarter of 1999, Skilling summoned him for a one-on-one meeting and said he wanted LJM1 to purchase an interest in Cuiaba. R:21278-79. Fastow testified he refused because the project was plagued by problems. R:21280-84. Fastow testified Skilling then said: "Don't worry. I'll make sure you're all right on the project. You won't lose any money." *Id.* Fastow admitted Skilling never used the words "promise," "guarantee," or "buyback," but he nevertheless "interpreted" Skilling to have provided a "guarantee" that "Enron would find a new buyer for [Cuiaba] or buy it back." *Id.* Fastow opined this "bear hug" deal was wrong and said he "knew" it at

[7] Ben Glisan, who communicated daily with Fastow and was heavily involved in the Cuiaba transaction, had "no knowledge" that Skilling gave anyone a "guarantee, verbal agreement, assurance, or bear hug" on Cuiaba. R:24617-18. LJM Analyst Chris Loehr heard Fastow had "received assurances from Enron that LJM would not lose money" on Cuiaba, but he could not say whether the alleged assurance came from Skilling. R:22600-01; 22663-64. No other government witness testified about an alleged guarantee regarding Cuiaba.

the time. R:21299-21300; 21320. When asked whether he "guaranteed that LJM would never lose any money on the [Cuiaba] deal," Skilling answered, "absolutely not." R:28708-12. The Task Force introduced no documents—no memo, no email, no notes—to substantiate the claim that Skilling and Fastow struck a secret side deal.

The Task Force interviewed Fastow six times regarding Cuiaba before trial. The agents' notes of those interviews contain a number of critical admissions *not* disclosed to Skilling:

- Fastow admitted it "may have been AFs idea"—not Skilling's—"to have LJM buy [Cuiaba] + LJM would be considered a hero b/c allowed EN to make #'s." AE-3-18. This admission contradicts Fastow's testimony that Skilling called Fastow to his office and pressured LJM1 into investing in Cuiaba. R:21278-79.
- In separate interviews, Fastow reported that Skilling said LJM1 is "going to be fine" and "LJM would not get stuck w/ asset—or something similar." AE-9-148; AE-14-188. The discrepancy between Fastow's trial testimony ("You won't lose any money") and his interviews (LJM "is going to be fine" and "won't get stuck with asset") severely calls into question Fastow's ability to accurately recall his conversation with Skilling. As explained in our opening and reply briefs in this appeal, Skilling's actual words are

and the investors would make money; it was a win-win situation." AE-38 at 5-6. Not only does this alleged "assurance" by Causey come nowhere close to a risk-eliminating guarantee, Op.Br.105-18; Reply 72-82, there is no mention anywhere of a conversation with Skilling about Cuiaba, let alone a guarantee.

To the contrary, the evidence shows that:

- In December 2002, Kopper told the Task Force he met with Causey—*not Skilling*—and Causey merely told Kopper that Enron would continue to use LJM if he were to purchase Fastow's interest in the investment fund. AE-38. The Task Force withheld the Form 302 reflecting this information.
- One year later, in December 2003, Fastow admitted to the Task Force that he did not know if Kopper actually spoke to Skilling. The Task Force did not disclose this admission. AE-3-21.
- At Skilling's trial in 2006, the Task Force did not call Kopper as a witness and elicited false testimony from Fastow that Kopper said he spoke to Skilling, who "said he would buy the Cuiaba plant back as originally planned." R:21295

This Court has reversed convictions in similar—but far less egregious—circumstances. For example, in *U.S. v. Fisher*, 106 F.3d 622, 634 (5th Cir. 1997), *abrogated on other grounds in U.S. v. Ohler*, 529 U.S. 753 (2000), the government charged Fisher with bank fraud. A key disputed fact was whether Branson knew

187)	other. Int'l asset people had reputation for not fulfilling promises after they received their bonuses. b) always distrust b/tw old ECT (Skilling group) + Marks Int'l Group - changed later c) AFs concern not so much trust as no incentive to sell (1) Barges a little different b/c when sold, barges actually had profits. Not that bad an asset."
Feb. 17, 2004 (AF-20-268)	A*) Conversation w/ JS + J. McMahon - in Skilling's office* *1) JS - asked why wouldn't LJM buy?* Explained + offered to take out later - in 6 mos - after close. a) Told JS about multiple closings b) Just name Nigerian Barges was enough to scare off - Had explained to investors this would be mainly NA [North American] investments. (1) Business unit still acted as if would get an industry player (2) Name didn't matter b/c didn't expect to end up w/ Barges c) At same meeting, think discussed LJM in 6 mos. So, although [sic] believes that led to the ML 6 mos timeframe. d) at end of meeting, McMahon was to go get ML.

The progression, evolution, and evidence of these inconsistencies in Fastow's story were not disclosed to Skilling in Fastow's 302s or otherwise. This was important evidence:

- During the first two interviews, when Fastow described LJM2's involvement in the Barges transaction (Dec. 18 and 22, 2003), he never mentioned Skilling's name, much less his claim at trial that Skilling guaranteed LJM2 against a loss.
- In the third interview (Feb. 5, 2004), Fastow gave substantial detail about his alleged conversation with Skilling but, again, did not report any guarantee or

"bear hug." To the contrary, the notes say "AF gave entire reason for refusal" and "JS understood," and conclude "AF didn't want to own barges."

- Notes from the fourth interview (Feb. 6, 2004) state: "Due to discussion w/ JS comfortable would not be stuck w/ Barge." This is the *only* note even remotely suggesting Skilling said something comforting to Fastow, but there is no reference to a guarantee, buyback, obligation, or assurance by Skilling. Furthermore, "not being stuck" with the Barges is something very different than a promise to buyback or a guarantee against loss, especially in light of the circumstances. Fastow knew—as the notes reveal—that Enron was marketing the barges to several industry buyers, including Maurbeni and AES, but needed "bridge equity" to accept risk on a portion of the barges until the final sale could be completed. AE-3-33. "Not being stuck" denotes that the anticipated sale from Enron to an industry player was likely to happen; it does *not* signify that Enron would repurchase LJM's interest or guarantee LJM against loss, as the Task Force alleged. Indeed, in June 2000, Enron actually brokered a sale of all the barges to AES at a profit. R:22038-22039, 22066-22068.
- Finally, in the fifth and final interview (Feb. 17, 2004), Fastow again described his conversation with Skilling, but said nothing about a guarantee. Moreover, Fastow reported that Enron Treasurer Jeff McMahon was also

present for the discussion, a statement in conflict with Fastow's trial testimony that he met with Skilling *alone* and only "after" he had spoken to McMahon. R:21301-04.

Suppressing all this evidence prevented Skilling from exposing how Fastow's uncorroborated story about the alleged guarantee evolved over time, was internally inconsistent, and contradicted Fastow's testimony at trial. In moving for access to the raw interview notes, we specifically complained that the "composite" 302s deprived us of precisely this tym275 0 TDd Fa

3. Suppression No. 3: The Alleged Corroboration of Guarantee to Merrill Lynch

At trial, the Task Force sought to corroborate that Fastow made a secret side deal with Merrill, presenting the testimony and documents (*e.g.*, GX1225 and GX1354) of Fastow's subordinates, Ben Glisan and Chris Loehr. R:22451-52. In yet another undisclosed interview session, Fastow explained to the Task Force that he *lied* to "subordinates" by "tell[ing] Enron people this was a guarantee" in order to "motivate" and "light a fire" within Enron to remarket the barges to a third-party. AE-25-357.

Had the Task Force disclosed its notes reporting that Fastow "did not obligate Enron" to repurchase Merrill's interest in the barges, Skilling could have impeached Fastow's testimony to the contrary. Had the Task Force disclosed Fastow's admission that he lied to "subordinates" about Enron's "guarantee" to "motivate" them to do something perfectly legal (remarket the barges to a third party), Skilling could have severely undermined the effect of Loehr's testimony—a young subordinate of Fastow whose testimony was singled out by a Task Force prosecutor as essential to convicting Skilling. Hueston, 44 AM. CRIM. L. REV. at 217-18 ("[W]e believed that, if a witness could crisply and quickly corroborate key aspects of Fastow's testimony regarding frauds committed for the purpose of achieving Enron's earnings objections—regardless of a direct tie-in to either

Skilling or Lay—the jury would not discard Fastow's testimony…. That witness, whom we deemed the 'remora' to Fastow's shark, was Christopher Loehr.").

III. THE EVIDENCE THE TASK FORCE SUPPRESSED WAS MATERIAL.

In assessing "materiality," the essential question asked by the courts is whether the defendant received a fair trial. Although phrased in terms of whether a "reasonable probability [exists] that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *U.S. v. Bagley*, 473 U.S. 667, 682 (1985), the materiality "question is *not* whether the defendant would more likely than not have received a different verdict with the evidence, *but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence*." *U.S. v. Brown*, 303 F.3d 582, 593 (5th Cir. 2002); *Kyles*, 514 U.S. at 434.

In making this determination, courts consider the "totality of circumstances," *U.S. v. Kelly*, 35 F.3d 929, 936 (4th Cir. 1994), including (1) the "importance of the witness," (2) the "the significance of the evidence," and (3) the existence, if any, of government bad faith in failing to disclose the favorable information. *Perez v. Cain*, 2008 U.S. Dist. LEXIS 1660, at *60 (Jan. 8, 2008 E.D. La.); *U.S. v. Jackson*, 780 F.2d 1305, 1311 (7th Cir. 1986) ("The fact that the government seeks in bad faith to suppress certain evidence indicates that such evidence may indeed be material."). Where, as here, Op.Br.16-21, "the government's case is tenuous or

filled with gaps, weaknesses, and uncertainties, the suppressed evidence is more likely to be found material." *Perez*, 2008 U.S. Dist. LEXIS 1660, at *60-61.

Also important given the extent of suppression in this case is the rule that materiality of evidence is assessed not individually but must be "evaluate[d] cumulative[ly]." *Kyles*, 514 U.S. at 436 (courts "evaluate … cumulative effect [of undisclosed information] for purposes of materiality"); *Graves v. Dretke*, 442 F.3d 334, 340 (5th Cir. 2006) (same); *U.S. v. Sipe*, 388 F.3d 471, 477 (5th Cir. 2004) ("Even if none of the nondisclosures standing alone could have affected the outcome, when viewed cumulatively in the context of the full array of facts, we cannot disagree with the conclusion of the district judge that the government's nondisclosures undermined confidence in the jury's verdict.").

Finally, "once this court has determined that there has been a constitutional error, there is no need for a harmless-error review." *U.S. v. Patrick*, 985 F. Supp. 543, 560 n.8 (E.D. Pa. 1997). By any measure of materiality, the evidence suppressed in this case tainted Skilling's trial and the jury's verdict.

1. Fastow Was the Task Force's Most Important Witness.

Although it may now try to minimize his importance, AE-36, when it mattered, the Task Force emphasized to the courts just how "critical" Fastow was to obtaining convictions against Skilling:

> Prior to the guilty plea of Mr. Fastow, the outcomes of the investigations of Mr. Skilling and Mr. Lay were in doubt. The

> Department of Justice was in the middle of the largest white-collar crime investigation ever mounted in this country. Many top former Enron executives had either refused to cooperate or simply lacked meaningful contact with Mr. Skilling or Mr. Lay. *Mr. Fastow's decision to cooperate … was a key breakthrough [and] the road to convicting Mr. Skilling was built in critical part by Mr. Fastow.…* R:41433-36, 41438.[13]

In opening statement, the Task Force labeled Fastow one of Skilling's "top lieutenants" and promised he would bring the jury inside the doors of Enron's executive offices and "tell you how he created a false image of Enron to the investing world." R:14779; Hueston, *supra*, 199-200 ("Fastow's cooperation provided a global perspective of Skilling and Lay's knowledge of earnings manipulation schemes, as well as the underpinnings of a false statements case.").

The jury's assessment of Fastow's testimony and credibility was a linchpin to convicting Skilling—Fastow was the Task Force's *only* witness to link Skilling to the alleged secret side deals. Furthermore:

- Each of the alleged incriminating conversations was one-on-one between Skilling and Fastow;
- Little or no documentary evidence corroborated Fastow's version of events;

[13] Task Force prosecutor John Hueston, who presented Fastow's testimony at trial, elsewhere added: "No cooperator in the history of federal white-collar crime investigations was debriefed more thoroughly and extensively than Mr. Fastow. Government prosecutors and investigators collectively spent well in excess of 1,000 hours working with Mr. Fastow to untangle the manipulation schemes and webs of false statements by top Enron executives." Op.Br. 200; R:41435.

- Fastow admitted stealing tens of millions of dollars from Enron and lying to Skilling about it;
- Fastow testified under a cooperation agreement, pursuant to which the Task Force dropped 96 felonies against him and agreed to limit his potential prison sentence. R:14779;
- The Task Force told the jury Fastow had no motive to lie because his sentence was "locked at ten years." R:21329, 22429-30; 37020-21; Op.Br.197.[14]

Courts (including those in the *Pelullo*, *Fisher*, and *Service Deli*, discussed *supra*) have reversed convictions in similar circumstances where a key government witness could have been impeached by raw interview notes that undermined his testimony. These and other courts have rejected the Task Force's argument that just because the defense was able to impeach its witness in other ways, the suppression of evidence should be excused. In *Pelullo*, 105 F.3d at 122-23, Agent Wolverton's undisclosed raw interview note was material because, like Fastow,

[14] This was false and another egregious *Brady* violation, as we have elsewhere explained. Op.Br.138-41; Rep.Br.196-200; 28j letter; *Tassin v. Cain*, Case No. 07-70013 (5th Cir. Feb. 14, 2008); *U.S. v. Smith*, 480 F.2d 664 (5th Cir. 1973) (failure of the government to disclose plea bargaining negotiations with a key witness violated *Brady*); *U.S. v. Tashman*, 478 F.2d 129, 131 (5th Cir. 1973) (same); *Blanton v. Blackburn*, 494 F. Supp. 895 (M.D. La. 1980) ("The District Attorney denie[d] that any formal plea bargain was entered into with [government witness] Harris. The Court finds that there was an understanding agreed to by the state and Harris by which she would not go to jail. This understanding should have been disclosed to the jury.").

Wolverton's "credibility" was the "linchpin" of the government's case and the "jury very well could have reached a different verdict had Pelullo been armed with this impeachment evidence." And in *Service Deli*, 151 F.3d at 943-44, the court rejected the government's argument that its failure to produce its raw notes was immaterial because, like Fastow, Ditzel was the government's key witness and a large part of "Service Deli's defense was built around attacking Ditzel's credibility."

It does not matter that the evidence suppressed was relevant for impeachment. In *Fisher*, 106 F.3d at 634-35, this Court rejected the government's argument that an undisclosed 302 was immaterial because the information it contained did not "directly exculpate" Fisher and because "much other evidence was presented that proved Fisher's guilt."

> Since Tannery was the key witness against [Fisher] on [the bank fraud charge], and since Tannery's believability was critical to a jury finding of guilty on that count, disclosure of the 302 would have made a different result reasonably probable, as required to prevail under *Brady* and its progeny… While the 302 would not have directly exculpated Fisher, it would have severely impeached the testimony of a key government witness.[15]

[15] *Accord Sipe*, 388 F.3d at 477-78 (information that could have impeached key government witness was material); *Graves*, 442 F.3d at 339 ("*Brady* applies equally to evidence relevant to the credibility of a key witness in the state's case against a defendant."); *U.S. v. Weintraub*, 871 F.2d 1257, 1262 (5th Cir. 1989) ("[W]here the [undisclosed] evidence would seriously undermine the testimony of a key witness on an essential issue *or* there is no strong corroboration [of that testimony], the withheld evidence has been found to be material."); *Martinez v.*

Id. at 635.

Nor does it matter that Skilling was able to impeach Fastow with other evidence. Undisclosed information "can be immaterial because of its cumulative nature *only if* the witness was already impeached at trial by the *same kind of evidence*." *U.S. v. Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996). Here, we impeached Fastow with his personal crimes that he hid from Skilling and others at Enron. We were not able to impeach him with crucial admissions in the raw notes that refuted essential parts of trial testimony.[16]

Put another way, the jury's "awareness" of "other grounds" for Fastow's bias (his desire to avoid life in prison) does not convert an "otherwise [] tainted

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Wainwright, 621 F.2d 184, 188 (5th Cir. 1980) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility … justifies a new trial.") (citation omitted); *U.S. v. Gutierrez*, 2007 WL 3026609, at *8 (W.D. Tex. Oct. 16, 2007) ("In determining whether the Court's 'confidence in the outcome of the trial' has been undermined, it is important to remember that at trial, the credibility of a key witness could make the difference in Defendant's fate."); *U.S. v. Cuffie*, 80 F.3d 514, 517 (D.C. Cir. 1996) (undisclosed information is material if it "could have substantially affected the efforts of defense counsel to impeach the witness"); *Kelly*, 35 F.3d at 937 ("[E]vidence that seriously undermined [important government witness's] credibility must be considered material."); *Patrick*, 985 F. Supp. at 561 ("[T]here is a reasonable probability that the outcome of the trial would have been different because these documents would have provided the defendant with information that could have been used to impeach one of the main prosecution witnesses.").

- *Counts 14 and 16-20*: *False Financial Statements*. The indictment alleges Enron's failure to disclose the Barges, Cuiaba, and Raptors side-deals rendered false and misleading every public financial statement Enron filed from the third quarter of 1999 through Enron's bankruptcy. R:867, 887-88, 10739-47; 14045-53; RE-3.
- *Counts 22-26: False Statements to Analysts*. The indictment alleges Enron's failure to disclose the Cuiaba, Barges, and Raptors guarantees rendered false and misleading Skilling's portrayal of Enron's financial condition to analysts. R:866-67, 889-890; RE-3.
- *Counts 31-32, 34-36: False Statements to Auditors*. The indictment alleges "SKILLING and CAUSEY falsely represented to Enron's accountants that … all related party transactions, including sales and guarantees (both oral and written), were properly recorded and disclosed." R:891-92; RE-3. Addressing these counts, the Task Force focused on Global Galactic and asked Andersen accountant Tom Bauer whether the Global Galactic document was "inconsistent" with Enron's representations to its auditors. R:23534-36; 23544-46. In closing argument, the Task Force emphasized that Skilling committed crimes by falsely representing there was "no fraud" at Enron and no undisclosed "guarantees." Op.Br.74-76; R:37025-26.

- *Count 51: Insider Trading*. The Task Force argued Skilling's knowledge of the Count 1 conspiracy, which included Global Galactic and the alleged Barges, Cuiaba, and Raptors guarantees, was the "inside information" on which Skilling illegally traded Enron stock. R:37010.

Apart from the indictment, more than 100 trial exhibits concern Cuiaba, Barges, Raptors, and Global Galactic. These four terms were uttered almost 2,750 times during trial.

The Task Force's closing argument prominently featured each of the alleged side-deal transactions and Global Galactic and tied them to every count in the indictment. R:36446, 36459-61, 36532, 36537, 36539, 36541, 36543-49, 37021-22, 37026-28.

Finally, the Task Force's suppression of the Fastow notes affects almost every argument Skilling advances on appeal:

- *Prosecutorial Misconduct*. The revelation of the Fastow raw notes substantiates Skilling's claims that the Task Force actively suppressed exculpatory evidence and witnesses. Op.Br.174-205.
- *Side-Deal Jury Instruction*. Skilling requested (and was denied) a jury instruction "addressing the government's side deal theory and the rules governing it." Op.Br.109-110. On appeal, the Task Force has argued the district court's failure to give such an instruction was harmless error

because "[t]he issue at trial was simple and straightforward: Fastow testified that he received oral guarantees from Skilling or Causey that he would not lose money on certain transactions, including Cuiaba, the Nigerian barges, and the Raptors. Skilling denied that he had given any such guarantees. Thus, this issue turned on a simple credibility dispute, not on an arcane definition of 'guarantee.'" U.S.Br.131. The raw Fastow notes decisively favor Skilling's position on this "credibility dispute." They reveal that the various statements did not create guarantees, did not create improper arrangements, and were of no consequence at all. *E.g.*, *supra*, Section II.D.2.

- *Honest Services Fraud*. The Task Force argued Skilling committed honest-services fraud merely by approving LJM and Raptors, exposing Enron to accounting and "*Wall Street Journal*" risk and breaching his fiduciary duties to Enron. Op.Br.60-80; Rep.Br.14-46. Fastow's undisclosed admissions in the raw notes show that Andersen vetted these deals, knew all their terms, and "kicked the tires." *E.g.*, *supra*, Section II.B.1.
- *Reliance Instruction*. On appeal, the Task Force seeks to justify the district court's failure to give Skilling a proper reliance jury instruction, arguing that Enron hid secret side deals from Andersen. U.S.Br.53. The

raw Fastow interview notes not only refute the side-deal theory, but reveal that Andersen was *not* kept in the dark. *E.g.*, *supra*, Section II.B.1.

3. The Task Force Acted Deliberately and in Bad Faith.

Although Skilling need not prove the Task Force acted in bad faith or willfully to establish a *Brady* violation, *U.S. v. Agurs*, 427 U.S. 97, 110 (1976); *Brady*, 373 U.S. at 87, evidence of bad faith is powerful proof of materiality. As one court put it:

> The fact that the government seeks in bad faith to suppress certain evidence indicates that such evidence may indeed be material. [It is] doubtful that any prosecutor would in bad faith act to suppress evidence unless he or she believed it could affect the outcome of the trial.

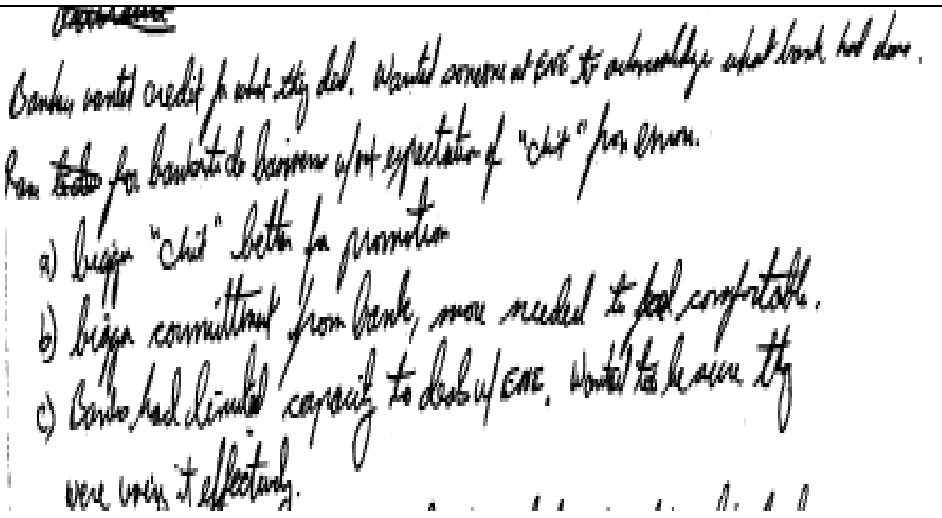
U.S. v. Jackson, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986); *U.S. v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995) (bad faith "may support … inference that the prosecutors resorted to improper tactics because they were justifiably fearful without such tactics the defendants might be acquitted"); *U.S. v. Sepulveda*, 15 F.3d 1216, 1220 (1st Cir. 1993).

The evidence of bad faith is overwhelming in this case. First, as demonstrated in Appendix 1, the Task Force compliance with its *Brady* obligations was a central issue Skilling repeatedly and exhaustively raised. *See infra* App. 1. Each time, the Task Force represented to Skilling and the district court it had fully disclosed any and all *Brady* materials. When Skilling sought disclosure of

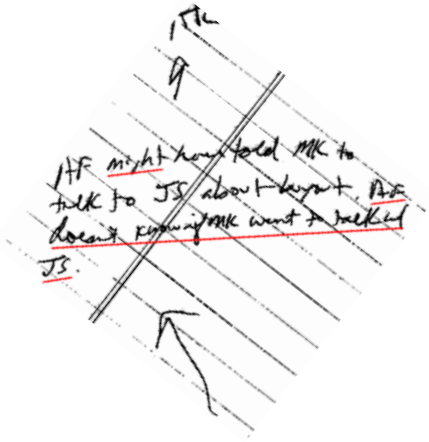
Fastow's raw notes, the Task Force emphatically represented that they contained no undisclosed *Brady m*aterial. These representations were false. *See U.S. v. Weintraub*, 871 F.2d 1257, 1261 n.6 (5th Cir. 1989) (government's failure to produce evidence after specific request is "one factor a reviewing court may consider in assessing the materiality of the withheld evidence").

Second, common sense dictates there is no legitimate explanation for how or why so many important pieces of exculpatory information so clearly reflected in the raw notes are absent from the composite 302s. Comparing the composite 302s to the raw notes shows that the Task Force copied *inculpatory* statements from the raw notes into the 302s but left out the *exculpatory* statements that appear in the *same* notes, on the *same* page, and often *right next to* the statement the Task Force copied.

To take just a few examples, on February 5, 2004, Fastow discussed Cuiaba with the Task Force, admitting that when he approached Skilling in 1999 seeking "assurance" for LJM, he "[d]idn't have feeling asking JS to do anything unusual or that hadn't been done." AE-13-177. Although this highly exculpatory admission is omitted from the composite 302s, Fastow's discussion in the same interview about Enron's interactions with its banks is included:

Agents' Notes (AE-13-177)	
Composite 302 AF-3500-9 at 131	Bankers always wanted a "chit" i.e. a) credit for doing a deal and b) that high ranking people at Enron acknowledged that the bank's doing the deal was important to Enron. Bankers always wanted to speak to higher people at Enron to get the chit and to discern Enron's plans. The bigger the "chit", the more opportunity for the bank's involvement in bigger deals and the individual banker's opportunity for internal promotion.

In another interview, Fastow said he "might" have told Kopper to talk to Skilling about Cuiaba but admitted he "doesn't know" if Kopper actually spoke to Skilling. Again, the composite 302 omits the critical "doesn't know" admission:

Agents Notes (AE-3-21)	
Composite 302 AF-3500-7 at 16	FASTOW may have told KOPPER to talk to SKILLING about the "bear hug" when KOPPER purchased his interest in LJM1. FASTOW made false representations to AA about Enron's repurchase of Cuiaba.

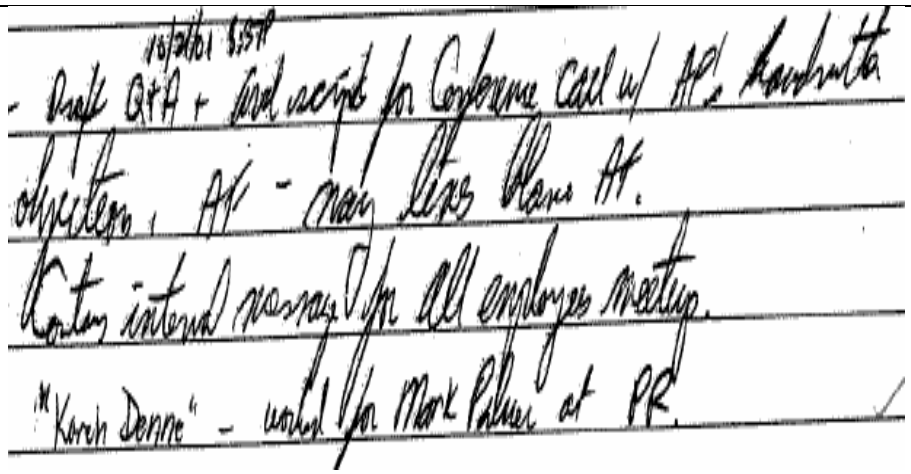
On virtually every meaningful aspect of the Nigerian Barges, the Task and cleverly and wrongly misrepresented Fastow's statements in the composite 302s:

Raw Notes	Composite 302
[Shown GX1354] "2) Summary *not consistent* w/ AF's memory b/c not word 'promise'… *Phone call did not obligate ENE to buy out. Did not intend to bind ENE*. Was binding LJM to do something. LJM was 3rd party and was already found. (AE-20-271)	[Shown GX1354] "*Fastow agreed that these written descriptions are a fair description of the BargeCo deal*. It is consistent for the people listening on the telephone to believe that Enron had made that promise. Fastow does not disagree with the word promise used in the summary." AF-3500-7 at 40-41
[Shown GX1225] Did not see email b/4 today. *Object to word obligated*. Not bothered that it is ENE w/ obligation. (AE-20-272)	[Shown GX1225] "Fastow had never seen the Email before but was not bothered that Glisan said Enron was obligated." AF-3500-7 at 42
"*W/ Subordinates* 1) Probably used a shorthand word like promise or guarantee 2) *Internally at Enron. AF, JM + BG 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* - Rep of 3rd party. Explicit. *Internally said Enron would buy back.* *Unit less motivated if know of LJM.* (AE-25-357)	None

On Raptors, the Task Force grossly mischaracterized what Fastow said concerning Andersen's and Skilling's knowledge of the alleged quid pro quo:

Raw Notes	Composite 302
"*They didn't think that QPQ was wrong - Didn't think should be hiding this*…" (AE-12-168) "Every lawyer involved understood this [quid pro quo]. *Not a secret. Never on ASF's mind that hidden from AA.*" (AE-12-173) "*QPQ valuation issue was not a secret to AF -- no attempt to conceal.* (AE-18-241) "*AF believed they (AA) were complicit. AF never doubted that EN was sharing <u>entire</u> deal w/ AA.*" (AE-18-241)	"Fastow believes Enron showed AA the entire deal *except for the quid pro quo*." (AF-3500-9 at 57)
Not sure what Skilling knew… 2) *Don't know if JS can say he didn't know about QPQ*, but shouldn't matter b/c entire purpose of Raptor is to conceal financials/manipulate financials of ENE - This continues through Restructuring etc. (AE-12-169)	"*Regardless of the quid pro quo*, Skilling knew the purpose of the Raptor was to conceal Enron's valuation of the assets and manipulate Enron's financial statements. This goal remained throughout the life of the Raptors." (AF-3500-9 at 58)

On Global Galactic, there is not a single reference in the lengthy composite 302s to Fastow's stunning admission that he "doesn't think he discussed [his talking-points] list w/ JS." AE-27-381. The omission was deliberate. The composite 302s contain almost verbatim quotes from the *same* interview and *same* page of notes.

Agents' Notes (AE-27-381)	
Composite 302 AF-3500-9 at 112	Fastow provided a draft of the expected questions and answers in anticipation of the October 23, 2001, conference call (ASF-CW-4701-13). This particular draft, which also contains a script for the call, is dated October 21, 2001, at 8:37 p.m. and contains Fastow's handwritten objections. Fastow's primary objection was that he was blamed for many of the problems at Enron. The document contains an internal message for the all employee meeting. Karen Denne of the public relations group is also mentioned. Fastow also provided the script for the

Worse still, the admission does not even appear in the version of the raw notes the Task Force provided the district court as part of the so-called "Fastow Binders." We only found this evidence when we noticed gaps in the notes in the Fastow Binders and demanded that the missing pages be produced.

The Task Force's failure to include this interview note in the Fastow Binders cannot be excused as an oversight. In December 2005, Skilling exposed that the Task Force had failed to produce the original 302s for Fastow and that the Task Force had deleted its working drafts. R:11660-70; 11920-30; R:14079-80. In January 2006, the district court refused to provide Skilling the raw interview notes

as a substitute, but ordered the Task Force to submit to the court—but not Skilling—binders containing "an index of Mr. Fastow's trial testimony…with cross-references to his 302s [and] *all rough notes of the FBI agents related to that part of the 302*." R:14074. On direct examination, the Task Force questioned Fastow about his "talking points" document and Cuiaba. Although the Task Force included in the Fastow Binders numerous notes concerning Global Galactic and Cuiaba, it *omitted* both of Fastow's devastating admissions that he did not think he went over the talking points with Skilling and "JS could have said you are stuck w/ Cuiaba." AE-27-381; AE-9-149.

In sum, given the magnitude and scope of the evidence suppressed, the importance of Fastow's testimony, the significance of the undisclosed information to the Task Force's case against Skilling, and the clear evidence of the Task Force's bad faith, there can be no reasonable dispute that the evidence withheld was material.

IV. SKILLING IS ENTITLED TO DISMISSAL OF THE INDICTMENT WITH PREJUDICE.

This Court has broad discretion to fashion a remedy. In far less egregious circumstances, courts have dismissed indictments *with prejudice* in order to punish the government for unscrupulous conduct and to deter misconduct. *U.S. v. Sudderth*, 681 F.2d 990, 995 (5th Cir. 1982) ("[P]rosecutorial conduct may be so fundamentally unfair as to … warrant dismissal of the tainted indictment."); *U.S. v.*

Ornelas-Rodriguez, 12 F.3d 1339, 1349 (5th Cir. 1994) (court may dismiss an indictment "as a remedy designed to deter further illegal conduct."); *Gov't of Virgin Islands v. Fahie*, 419 F.3d 249, 254-56 (3d Cir. 2005) (dismissal warranted to punish and deter); *U.S. v. Lewis*, 368 F.3d 1102, 1107 (9th Cir. 2004) ("[Courts] can dismiss actions where government attorneys have 'willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.'"); *U.S. v. Leung*, 351 F. Supp. 2d 992, 997 (C.D. Cal. 2005) (same); *U.S. v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998) (same).

Even more important than punishing the government, however, dismissal with prejudice is necessary to remedy the grave injustice and prejudice to which Skilling has been subjected. Skilling was forced to spend tens of millions of dollars defending against the largest criminal investigation in the history of the Department of Justice. He was forced to sell his home and virtually all his personal possessions. The rest of his assets have been frozen. His family has been subjected to ridicule, scorn, and physical threats. Skilling had restricted bond provisions for years, enhanced bond provisions through trial, and subjected to home confinement for six months after conviction. He has been incarcerated in federal prison for 15 months, during which both his parents passed away. He was compelled to defend himself in the face of the Task Force's intransigent refusal to disclose exculpatory evidence. His attorneys have fully disclosed his defense

theories and strategies. Worst of all, the jury pool has been hopelessly tainted by countless reports calling Skilling's conviction "justice," "closure", and a badly-needed "exorcism." R:38944-45, 38948-49, 38965-66, 42049-51; JKS-22-23.

"Although dismissal of an indictment for prosecutorial misconduct is an extreme sanction, it is a sanction within a court's discretion if sufficiently egregious prosecutorial misconduct has occurred and has prejudiced the defendant." *U.S. v. Lyons*, 352 F. Supp. 2d 1231, 1251 (M.D. Fla. 2004); *accord U.S. v. Welborn*, 849 F.2d 980, 985 (5th Cir. 1988) (court can dismiss indictment under supervisory authority "where the government's misconduct has prejudiced the defendant"); *U.S. v. Fulmer*, 722 F.2d 1192, 1195 (5th Cir. 1983) (same); *Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982) (double jeopardy bars retrial when government manipulation of trial process denies defendant "primary control over the course to be followed in the event of such error"); *U.S. v. Wallach*, 979 F.2d 912, 915-16 (2d Cir. 1992) (*Kennedy* rationale applies to *any* case where, as here, the prosecutor distorts the legal process to thwart or avoid a likely acquittal); *Commonwealth v. Smith*, 532 Pa. 177, 186, 615 A.2d 321 (Penn. 1992) (*Kennedy* bars retrial when suppression of *Brady* evidence was intended to subvert the protections afforded by the double jeopardy clause). On this record, this Court can and should dismiss the indictment with prejudice.

Alternatively, the Court should reverse each of the convictions and remand to the district court to retry the case. In that event, Skilling is entitled to relief to level the playing field, including: (a) an evidentiary hearing to ferret out the full scope of Task Force misconduct, *Service Deli*, 151 F.3d at 943; *U.S. v. Stein*, 435 F. Supp. 2d 330, 382 (S.D.N.Y. 2006) (allowing discovery and hearing; ultimately dismissing case); (b) an order permitting Skilling to take the depositions of a limited set of witnesses who refused to meet with Skilling because they fear Task Force reprisals, *U.S. v. Carrigan*, 804 F.2d 599, 601 (10th Cir. 1986) ("The district court then ordered that defendants be permitted to take the depositions of Jett and Steele in the presence of their attorney and the government's counsel. The court based its order on findings of fact that the prosecutors [committed misconduct]."); (c) an order prohibiting the Task Force from refusing to immunize witnesses with evidence contrary to evidence provided by witnesses who testify pursuant to cooperation or plea agreements or under government-instituted immunity, *Autry v. Estelle*, 706 F.2d 1394, 1402 (5th Cir. 1983) (court can order defense witness immunity if defendant "show[s] that the state had no legitimate purpose for refusing immunity and did so to deprive the defense of essential exculpatory testimony"); *U.S. v. Thevis*, 665 F.2d 616, 640-41 (5th Cir. 1982) (courts may order immunity "when it finds government abuse"); and (d) an order providing Skilling significant monetary relief so that he may mount a full and complete

defense on retrial. *Cf.* Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519, *reprinted in* 18 U.S.C.A. § 3006A (Hyde Amendment) (permitting attorney's fees/litigation expenses to a prevailing party in a federal criminal case for egregious misconduct); *U.S. v. Lake*, 472 F.3d 1247, 1250-51 (10th Cir. 2007) ("[G]iven the dependence of the conspiracy charges on the evidence and instructions regarding the substantive charges, we must also reverse the conspiracy convictions and remand for retrial. The forfeitures likewise cannot stand.").

V. CONCLUSION

In its zeal to prosecute and convict Skilling, the Enron Task Force did not merely cross the line—they obliterated it. The misconduct we have detailed and documented here was willful, deliberate, and essential to securing convictions. There is no legitimate explanation for it. From the outset, Skilling was treated as though he had no rights. The Task Force exhibited a sense of purpose that the ends

[redacted]

Dated: March 3, 2008

Respectfully submitted,

By: /

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CERTIFICATE OF SERVICE

APPENDIX 1

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT JEFFREY K. SKILLING REGARDING ANDREW FASTOW INTERVIEW NOTES

Date	Event	Citation	Brady Request/Denial
4/7/04	Letter from Skilling to Enron Task Force	R:1565-80	Skilling: "We request all documents and information that are discoverable under the Fifth and Sixth Amendments to the United States Constitution, Brady v. Maryland, 373 U.S. 83 (1963), Fed. R. Crim. P. 16, and other provisions of federal law set forth below." (R:1565)
5/5/04	Letter from Enron Task Force to Skilling	R:1607-10	Task Force: "Please be assured that the government is aware of its obligations under Brady and its progeny and will comply with them… If we identify particular materials that are exculpatory we will endeavor to produce them to you directly rather than expecting you to find them within the discovery materials… [T]he government emphasizes that, with respect to the rolling "hot document" production, we are including relevant materials whether we intend to introduce them or not. Thus, you may find materials within the hot documents that you find useful in making your arguments to the jury (although we may not believe any of the materials are actually exculpatory)." (R:1608)
5/20/04	Fifth Joint Status Report Regarding State of Discovery Under Rule 16	R:749-51	Skilling and Task Force: "[C]ounsel for Skilling believes that the government's responses to date have not satisfactorily complied with, inter alia, Rule 16 and Brady, and have not provided sufficient specificity regarding the allegations in the indictment to enable defendants to effectively defend themselves. The government believes that it has complied with Rule 16 and Brady." (R:749)
6/15/04	Letter from Skilling to Enron Task Force	R:1589-90	Skilling: "Pursuant to your obligations under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, please specifically identify and make available to us all oral statements, testimony or FBI 302's that would tend to exculpate Mr. Skilling with respect to the charges in the indictment or that would tend to reduce any sentence." (R:1589)

6/15/04	Letter from Skilling to Enron Task Force	R:1593-94	Skilling: "Statements such as 'no comment' or 'there is no Brady' are simply counterproductive… The notion that no Brady materials exist among millions of pages of documents and hundreds of witness interviews defies credulity. Moreover, the last minute disclosures of critical exculpatory information in the Nigerian Barge case increases our concern that the Task Force has a different view of its discovery obligations than the defense bar at large, and quite possibly the courts." (R:1593)
6/28/04	Letter from Enron Task Force to Skilling	R:1706-10	Task Force: "We understand and have complied (and will continue to comply) with our obligations under Rule 16, without the need to engage in debate by correspondence over what Rule 16 requires… With respect to your Brady requests, as we have previously stated, the government is aware of its obligations under Brady and its progeny and will comply with them… As stated above, the government is aware of its obligations under Brady and its progeny and will comply with them." (R:1708-09)
7/1/04	Letter from Skilling to Enron Task Force	R:1596-97	Skilling: "Your blanket assertion that 'the government is aware of its obligations under Brady and its progeny and will comply with them,' when you also appear to take the position in this case and other cases that there is no Brady material, is difficult to accept. The notion that no Brady materials exist among millions of pages of documents and hundreds of witness interviews defies credulity. In our view, it is not reasonable for you to refuse to confirm whether any agents or attorneys for the Task Force have actually reviewed the materials in your possession to identify Rule 16, Brady, and other discoverable materials." (R:1596-97)
7/15/04	Ninth Joint Status Report Regarding State of Discovery Under Rule 16	R:922-32	Skilling and Task Force: "Defendants' position is that the government's "open file" discovery approach does not satisfy its obligations under Rule 16 and Brady… The government's position is that it is aware of its obligations under Brady and its progeny and Rule 16, and has complied, and will continue to comply with those obligations." (R:924-25)
8/11/04	Pre Trial Hearing Before The Honorable Sim Lake United States District Judge	SR1: 196-97; 210	Hearing - Pretrial Hearing page 25 23 THE COURT: So your response is, under Brady, 24 if you produce all the documents, then it's the defense 25 counsel's obligation to find which of that category of

			page 26 1 documents are helpful, but you don't have specific 2 obligation under Brady to point out particular documents in 3 that category that are helpful to the defense? Hearing - Pretrial Hearing page 26 4 MS. LACEWELL: No, Your Honor. We recognize 5 Brady as our obligation. And we are reviewing the 6 documents, and will continue to review the documents for 7 any Brady. And if we find it, we will point it out. We're 8 not going to, you know, rely on them to somehow find it. Hearing - Pretrial Hearing page 39 4 What are you doing to satisfy your Brady 5 obligations? I'm going to come back to that point. 6 MS. LACEWELL: Yes, Your Honor. Of course, we 7 did make those available. We didn't specifically send a 8 letter out and say, "Here are these specific documents," 9 number one; number two, we don't agree that those are Brady 10 documents; number three, what we are doing, as I alluded to 11 earlier, is when we are calling the documents with a 12 particular transaction, if there are documents there that 13 constitute Brady, we will send them out separately and 14 earmark them for the defense. 15 THE COURT: But you haven't sent any out yet? 16 MS. LACEWELL: Well, we haven't found any. 17 And we're very conscious, Your Honor, of our Brady 18 obligations, and we're conscious of it in every interview 19 that we do, and every time we do a document review. 20 And we understand Brady is our obligation. 21 We embrace it. (SR1:196-97; 210)
8/23/04	Letter from Enron Task	R:1671-76	Task Force: "In this case, there is no undisclosed information in the

	Force to Skilling		government's possession that is material, as defined by Brady and its progeny, to the defendant's guilt, innocence or punishment." (R:1673)
9/17/04	Letter from Skilling to Enron Task Force	R:1604-05	Skilling: "However, we do want your views on the following subject. If your position is that the Mintz email was exculpatory, but that we knew about it and, thus, under your (erroneous) view of Brady you had no obligation to produce it, what other exculpatory evidence - whether in documentary and oral form - falls into this category and is being withheld? Given your desire not to talk to close to the wind, and the Court's desire to streamline pre-trial preparation, please immediately provide us with a list of all such documents and a written description of all such Brady material." (R:1604)
9/23/04	Skilling's Motion for the Identification and Production of Brady and Rule 16 Materials; Memorandum in Support Thereof	R:1526-57	Skilling: "For the past several months, we have implored the Task Force - in letters, in meetings, in court filings, and in open court - to comply with its Rule 16 and Brady obligations." (R:1534)
10/13/04	Government's Memorandum of Law in Response to Defendant Skilling's Motion for the Identification and Production of Brady and Rule 16 Materials	R:1852-91	Task Force: "The government is mindful of its obligations under Brady v. Maryland and has complied with those requirements and will continue to do so… The government respectfully submits that Skilling's unsupported allegations aside, there is no evidence that the government has intentionally withheld exculpatory evidence or otherwise failed to comply with its Brady obligations." (R:1866-67)
10/14/04	Skilling's Motion for the Identification and Production of Brady, Rule 16 and Jencks Act Materials in the Possession of Cooperating State and Federal Agencies, the Enron Bankruptcy	R:1892-1920	Skilling: "Defendant Jeffrey Skilling moves pursuant to the Fifth Amendment to the United States Constitution, Brady v. Maryland, 373 U.S. (1963), Federal Rule of Criminal Procedure 16, and 18 U.S.C. § 3500 (the "Jencks Act") for an order directing the Enron Task Force to identify and disclose all materials required to be produced under these authorities that are in the possession of any agency or other investigator cooperating with the Task Force or to which the Task Force has access." (R:1892)

	Examiners, and Other Cooperating Investigators		
10/20/04	Skilling's Reply Memorandum in Support of Motion for the Identification and Production of Brady and Rule 16 Material	R:2462-74	Skilling: "Knowing that its open-ended "open file" was not a fair substitute for the separate identification of Brady materials, the Task Force promised counsel for Skilling and the Court that, if it did find any Brady, it would "point it out" rather than "rely on [us] to somehow find it." The Task Force has not lived up to its word." (R:2464)
2/17/05	Twenty-Second Joint Status Report Regarding State of Discovery Under Rule 16	R:4593-4614	Skilling and Task Force: "Finally, in addition to a full and complete list of Brady witnesses, Skilling is entitled to the exculpatory statements of individuals whom the Task Force does not intend to call as witnesses at trial… Despite conducting over 1,000 witness interviews as a part of this investigation, the Task Force has yet to produce a single such statement… Althought the SEC made certain of its document files available to Skilling, Skilling has requested and has been denied access to the witness statements and interview notes in the possession of the SEC (and also the Task Force). Consequently, the Task Force and SEC are obligated - at a minimum - to produce all Brady evidence contained in these materials. To date, Skilling has received no such Brady evidence despite his repeated requests." (R:4601-04)
5/17/05	Skilling's Motion to Compel Production of Exculpatory and Rule 16 Materials; Memorandum in Support Thereof	R:5690-5749	Skilling: "Defendant Jeffrey Skilling moves pursuant to the Fifth and Sixth Amendments to the United States Constitution, Roviaro v. United States, 353 U.S. 53 (1957), Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), United States v. Gaston, 608 F.2d 607 (5th Cir. 1979), United States v. Buckley, 586 F.2d 498 (5th Cir. 1978), United States v. Fischel, 686 F.2d 1082 (5th Cir. 1982), and the Federal Rules of Criminal Procedure for an order… directing the Task Force to identify and disclose the universe of materials at issue in this case as well as all Brady, Giglio, and Jencks material by October 14, 2005." (R:5690-92)
9/27/05	Skilling's Motion to Compel Immediate Production of All	R:9459-67	Skilling: "Defendant Jeffrey Skilling, through undersigned counsel, moves pursuant to the United States Constitution, Brady v. Maryland, 373 U.S. 83 (1963), the Federal Rules of Criminal Procedure, and the Court's

	Exculpatory Materials		supervisory powers for an Order requiring the Task Force, by October 17, 2005, to (1) complete its designation of hot documents; and (2) identify all exculpatory material in the possession, custody, or control of the Task Force or its cooperating agencies." (R:9459)
9/29/05	Scheduling Conference Before The Honorable Sim Lake United States District Judge	R:9553-64	Hearing Transcripts (Scheduling Conference) page 20 20 MS. RUEMMLER: Your Honor, our response is that we 21 have exceeded our Brady obligations in providing a summary of 22 the reasons why the government designated a witness as 23 someone who defense may want to speak with. (R:9553)
10/18/05	Skilling's Brady Witness Motion	R:9893-9906	Skilling: "Defendant Jeffrey Skilling, through undersigned counsel, moves pursuant to the United States Constitution, Brady v. Maryland, 373 U.S. 83 (1963), and the Court's supervisory powers for an order directing the Enron Task Force to produce to defendant by no later than October 28, 2005 all

	John Lavorato		
1/12/06	Transcripts of Hearing Proceedings Before The Honorable Sim Lake United District Judge	R:14070-14113	Transcript of Proceedings page 4 17 THE COURT: All right. The draft summaries of 18 Mr. Fastow's interviews prepared by the FBI agents and the FBI 19 agents' rough notes are not Jencks Act material. However, 20 they could be discoverable as material to the preparation of 21 the defense under Brady. Transcript of Proceedings page 10 22 MR. PETROCELLI: Second, Your Honor, there's the 23 issue about the various electronic drafts of the 302 that at 24 least at one point existed. I'd like to -- the Court to 25 inquire whether or not there's any way that those electronic page 11 1 drafts of the individual 302's might be retrieved, because 2 that would solve a lot of problems. 3 THE COURT: No. It wouldn't solve any problems, in 4 my view. You put that in your motion. I said that's all the 5 relief I am going to grant. If I intended to grant that, I 6 would have asked the Government about it. 7 MR. PETROCELLI: Your Honor, I had to follow up 8 because it's not clear to me on what basis that we would not 9 be entitled to those documents if they exist. I'm only 10 inquiring whether or not they exist. 11 THE COURT: Well, do they exist? 12 MR. HUESTON: Your Honor, my understanding is they 13 don't exist. (R:14073; 14079-80)
3/17/06	Skilling's Motion To	R:23338-48	Skilling: "The Task Force has refused to make any additional Brady or

	Compel Production Of Brady Materials Related To Kevin Hannon's "They're On To US" Testimony		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 July 21, 2001 meeting." (R:23340)
9/14/07	Skilling's Motion to Supplement the Record on Appeal	Sep. 14, 2007	Skilling: "In addition, Skilling requests that the government submit to the Court the binders of FBI notes underlying the composite FBI Form 302s created for witness Andrew Fastow ("the Fastow Binders"), and that the Court accept the Fastow Binders as part of the record on appeal."
10/4/07	Skilling's Reply in Support of Motion to Supplement the Record on Appeal	Filed Oct. 4, 2007	Skilling: "At the very minimum, the Task Force should be ordered to lodge forthwith the Fastow Binders with this Court. In addition, either this motions panel or the merits panel should afford Skilling access to these binders for the reasons we explained. Opening Br. 200-02."
11/15/07	Skilling's Motion for Clarification of Court Order	Filed Nov. 15, 2007	Skilling: "For the foregoing reasons, this Court should clarify its Order and/or compel the government to file and provide the Fastow Binders to Skilling no later than November 20, 2007."
11/21/07	Skilling's Reply to Motion Clarification of Court Order	Filed Nov. 21, 2007	Skilling: "Skilling and his counsel do not need to see witness examination outlines in the Fastow Binders or even the form 302s they contain. What is critical is the notes, and Skilling needs them now—not weeks from now—to respond to the government's claim that he has "no evidence" to support his Brady claim."
11/28/07	Task Force's Motion for Reconsideration of Court's Order Requiring Disclosure of Fastow Notes	Filed Nov. 28, 2007	Task Force: "Here, the government concluded that the notes did not contain Brady or Giglio information that had not otherwise been disclosed to Skilling."
11/30/07	Skilling's Opposition to Task Force's Motion for Reconsideration of Court's Order Requiring Disclosure of Fastow Notes	Filed Nov. 30, 2007	Skilling: "Of these three items in the Fastow Binders, Skilling seeks only the raw interview notes. They are vital to his claims on appeal and will help refute the government's claim that it did not violate Skilling's constitutional rights. With access to the notes, Skilling will be able identify material inconsistencies among the notes, the composite 302, and Fastow's trial testimony. Identifying such material inconsistencies is a well-recognized way of establishing a Brady claim requiring reversal."

1/25/08	Letter from Skilling to Enron Task Force	AE-35	Skilling: "These raw interview notes—which are far more extensive and illuminating than the highly edited, composite 302s the Task Force provided to the district court and Mr. Skilling at trial—indisputably confirm that material exculpatory evidence was withheld from Mr. Skilling … on the most pivotal issues in the case."
2/1/08	Letter from Enron Task Force to Skilling	AE-36	Task Force: "After carefully considering your allegations and all the available evidence, I have concluded that the information on which you rely was either disclosed to you before trial or is immaterial to Mr. Skilling's guilt or innocence."
2/12/08	Letter from Skilling to Enron Task Force	AE-37	Skilling: "The raw notes of the Task Force's interviews with Mr. Fastow—which the Department fought so hard to keep from us—reveal that material, exculpatory information was purposefully suppressed not only regarding the Barges transaction, but on virtually every key issue in the case, including transactions like Raptors and Chewco, the alleged Global Galactic agreement, the financial health of Enron when Mr. Skilling resigned, the conspiracy and false statements to auditors counts, and alleged misrepresentations concerning Enron Broadband Services and Enron Energy Services."
2/29/08	Letter from Enron Task Force to Skilling	AE-40	Task Force: "[W]e continue to believe that the notes are 'not materially inconsistent' with information already in your possession, including information that was provided to you before trial."

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APPENDIX 2

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SUPPLEMENTAL BRIEF OF DEFEND ANT-APPELLANT JEFFREY K. SKILLING REGARDING ANDREW FASTOW INTERVIEW NOTES

This appendix catalogs exculpatory information contained in the Task Force's raw notes underlying their interviews of Andrew Fastow that was never before disclosed to Skilling. The examples herein are in addition to those identified in Skilling's Supplemental Brief.

For convenience, we separated the information into subjects and provide a comparison table for each. The left-hand column of the table contains exact quotes from the agents' notes; the right-hand column contains exact quotes from Fastow's composite 302s. The bolded text in the left column represents the exculpatory information omitted from or misrepresented in the composite 302s.

1. Raptors - The Task Force alleged that, as part of the Raptors transactions, Enron and LJM settled a put on a particular date but improperly backdated it. Backdating was done, the theory goes, so Enron could argue to Arthur Anderson that the Raptor began hedging Enron's investment in a company called Avici the day the aforementioned put was settled, which just happened to be Avici's all-time high. R:855. During one interview, the Task Force asked Fastow what Skilling knew about the backdating of the put. Fastow said he could not recall specific conversation with Skilling and admitted that he "can't say he definitely told JS [Skilling] about settlement." The Fastow 302 omits these admissions and, instead, states definitively that "Fastow told Skilling that they hedged Avici at its highest value."

Notes	Composite 302
"4. Did you tell JS agreed to take hedge b/4 received payment. a. AF sure he told JS they took Avici at highest point. (1) Can't recall specific conversation Æ can't say he definitely told JS about settlement. But logically AF would have told JS in bragging about LJM. (2) Always spoke to JS + Finance Committee about what LJM did for ENE a) documents for year end accomplishments" (AE-18-244)	"Yaeger, Loehr, and Ace Roman all knew that documents reflecting the hedging of Avici shares were backdated. Fastow probably discussed the Avici back-dating or the items hedged in Raptors with certain attorneys. These would have included Ron Astin and Mark Spradling of V&E for Enron, and Edsall and a junior person of K&E for LJM2. Fastow told Skilling that they hedged Avici at its highest value" (AF-3500-9 at 60)

2. Raptors - In late 2000, the Raptors suffered from a "credit crunch." Enron and Arthur Anderson suggested a temporary fix called the "cross-collateralization." At trial, the Task Force alleged Skilling knew about the credit crunch at the time. Skilling denied the accusation. In a pre-trial interview, the Task Force asked Fastow what Skilling knew. Fastow admitted that he "doesn't recall talking to" Skilling about the credit crunch and that he "cannot recall speaking to Skilling about the raptor problem." The Fastow 302 omits these admissions and reports only that because "Causey met regularly with Skilling, it" is "likely" that Causey briefed Skilling on the Raptor cross collateralization."

Notes	Composite 302
"- Credit Crunch in Raptors or Restructuring - doesn't recall talking to JS but had conv. w/ RC (year end 00 + Spring '01) [illegible] RC + his team (Rodney Faldyn, Ryan Schuarek [sic]) worked on [illegible] to restructure Raptor so credit worthy + no write-down + default." (AF-3-30) "Failure of Raptors were big problem. Cannot recall speaking to Skilling about the raptor problem. "AF knew Raptor problem was big issue with Causey. Causey met regularly with Skilling about flash report issues and what levers to pull. It is highly probably that JS was completely briefed on this issue." (AF-13-176-77)	"Causey met regularly with Skilling about accounting, finance, and the 'flash report' issues and which 'levers' to pull so it is likely that Causey briefed Skilling on the Raptor cross collateralization." (AF-3500-9 at 71-72)

3. LJM - The Task Force argued that LJM was one of the "levers" and devices co-conspirators used to mislead the public about Enron's financial health. R:855-59. During one of his first interviews with the Task Force, Fastow said he is now ashamed of LJM and its transactions but "at the time, [he] thought [it] was ingenious and successful." This admission is omitted from the Fastow 302. The word "ingenious" appears nowhere in the 302s and the word "successful" is not part of any section describing LJM.

Notes	Composite 302
"AF know [sic / now] ashamed of LJM + its transactions but @ time thought that was ingenious + successful" (AE-3-12)	NONE

4. LJM - A disputed issue at trial and on appeal is whether Enron fairly disclosed the conflict of interest that arose from Fastow, who was Enron's CFO, also acting as general partner for LJM, an investment fund that entered into transactions with Enron. During one interview, Fastow conceded he had "no recollection of trying to minimize that [conflict] issue." Fastow was comfortable with the structure because there were two levels of "safeguards": Enron approval and "accounting integrity." The Fastow 302 omits Fastow's key admission that he did not recall trying to "minimize" the conflict and mischaracterizes and waters down the "integrity" safeguard by saying only "approval from AA [Arthur Anderson]."

8. Backbone - Backbone was a transaction between Enron and LJM. Enron sold something called "dark fiber" to LJM. During one interview, the Task Force asked Fastow whether he thought Backbone was a "true sale." Fastow said he "d[id]n't know" and postulated that "if" LJM was not a true 3d party, then Backbone would not be a true sale. In contrast, the Fastow 302 omits Fastow's admission that he did not know whether Backbone was a true sale and rather than accurately report the conditional "if" nature of Fastow's statements, the Task Force wrote "Backbone was not a true sale because LJM2 was not a true third party."

Notes	Composite 302
"C) Was this a true sale? (1) If LJM not a true 3rd party, then not a true sale. (2) Don't know (3) Booked as a true sale -- structured to technically meet requirements of a true sale. (4) Did Kopper ever say deal modified to address accounting issues? Possible." (AE-15-207)	"Backbone was not a true sale because LJM2 was not a true third party. However, it was booked as a true sale and was structured to technically meet the requirements of a true sale. Kopper may have told Fastow that the deal was modified to address accounting issues to receive true sale treatment." (AF-3500-9 at 20-21)

9. Liquidity - The agents' notes reflect that during another interview Fastow was asked about Ken Lay's statement at an 2001 All-Employee meeting that Enron's liquidity was "strong." Fastow stated that based on what he knew, Lay's statement was "fair." In contrast, the Fastow 302 reports that when Fastow heard Lay's description of Enron's liquidity he "felt it was an overstatement."

Notes	Composite 302
"K.L. - Liquidity strong -- At all employee meeting -- At conference call thought it fair given what AF knew." (AE-31-405)	"The [Oct. 23, 2001] conference call was followed by an Enron All-Employees meeting. During the meeting Lay stated, "Our liquidity is fine. As a matter of fact, it's better than fine, it's strong." Fastow heard Lay's description and felt it was an overstatement because of a) the need to demonstrate Enron's liquidity to increase public confidence, b) that commercial paper investors had stopped investing, and c) trading book issues that Lay and others had to know of by this time." (AF-3500-9 at 115)

10. Raptors - During one interview the Task Force asked Fastow about a notation on his calendar that said "9/6/00 Meet w/ RC [Rick Causey] re Global Galactic." Fastow stated that there was a "good chance that if AF [Fastow] and RC [Causey] had not settled [the Raptor put] b/4, [they] would settle in this meeting." The 302 misrepresents Fastow's statement. It says that "[o]n September 6, 2000, Fastow met with Causey on Global Galactic." Opposed to the conditional "if" Fastow really said, the 302 states: "It is likely that Fastow and Causey had not settled the Raptor before this meeting so it was settled in the meeting."

Notes	Composite 302
"9/6/00 Meet w/ RC on Global Galactic re Global Galactic. a) good chance that if AF + RC had not settled b/4, would settle in this meeting." (AE-18-245)	"On September 6, 2000, Fastow met with Causey on Global Galactic. It is likely that Fastow and Causey had not settled the Raptor before this meeting so it was settled in the meeting." (AF-3500-9 at 65)

11. Raptors - During one interview, Fastow was asked about a $250,000 fee Enron paid to LJM to manage the Raptors. Fastow told the Task Force that he did not believe "he" disclosed the management fee to Anderson. However, the Fastow 302 recasts what Fastow said to be: "He [Fastow] does not believe it [the fee] was disclosed to AA."

Notes	Composite 302
"(3) Raptor $250K Payment / Per Year (a) $ paid by EN to LJM or maybe paid to Raptor + then LJM Æ Not sure if went to GP as management fee (b) $250 fee came about as a negotiation b/w RC + AF - not sure if done before Raptor 1 or subsequent Æ was done to get AF more $ (c) AF doesn't know if $250 fee was disclosed in deal docs +	