

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

DANIEL BAYLY,
JAMES A. BROWN, and
ROBERT S. FURST,
Defendants

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CR. NO. H-03-363 (Werlein, J.)

**DEFENDANT JAMES A. BROWN’S SECOND SUPPLEMENTAL
MOTION TO COMPEL THE PRODUCTION OF SPECIFIC DOCUMENTS
AND BRADY MATERIAL**

Defendant James Brown, in light of recent discovery of exculpatory materials withheld by the government in violation of *Brady* and its progeny, hereby files this Second Supplemental Motion to Compel Production of Specific Documents and *Brady* Material. Specifically, Brown herein requests immediate and complete production of two distinct, specific categories of evidence:

- (1) Any material, exculpatory letter(s) or submissions, written by any attorney for a material witness to and/or participant in the Barge transaction to the Enron Task Force or Department of Justice, the Assistant Attorney General for the Criminal Division and/or her deputy on or around April 25, 2005,¹ and to the SEC, on or around July 28, 2006, providing a first-hand account of the Barge transaction,² by a significant participant in it, and all attachments/exhibits to those letters and submissions, including e-mails written within Enron, evidencing that there was no buyback agreement or promise to buyback or guarantee a buyout of Merrill’s equity

¹ This was further identified by author of the letter and by name of the person on whose behalf the letter was written in conversation with AUSA Spencer by Furst’s counsel, Madeleine Johnson, on approximately January 8, 2008. The document still has not been produced.

² One copy of this was obtained recently by Defendant Brown’s independent efforts and is on file with this Court under seal. However, Defendants are entitled to its production—as well—from the files of each of the government agents and attorneys in whose files it exists. *United States v. Wilson*, 289 F.Supp.2d 801, 816 (S.D.Tex. 2003) (“Although [Defendant] *knew* [the truth], impeaching the government’s witnesses by its own records would *prove* much more forceful and credible at trial.” (emphasis in original)). It also bears directly on the misconduct issues material to Brown’s defense.

interest in the Barges made by anyone at Enron. To obtain and produce on behalf of the government every copy of these letters and submissions, AUSA Spencer should be ordered immediately to review all materials, communications or evidence currently or previously contained in the files of the following United States Attorneys or attorneys within the U.S. Department of Justice: **Joe Bianco, Alice Fisher, Sean Berkowitz, Andrew Weissman, Kathryn Ruemmler, Matthew Friederich, and John Hemann.** This material must be reviewed *and the letters and submissions produced from the file of each of the government attorneys in whose files these documents are found*, because they contain evidence material and exculpatory of Defendant Brown, and because the review and production of these documents will enable the determination of the extent of the government's *Brady* violation and the scope of the prosecutorial misconduct in this case—all of which is material to Brown's defense.³

- (2) All materials, evidence, raw interview notes, 302s, draft 302s, composite 302s, interview memoranda, and any other communications by, regarding, from, and to Andrew Fastow by the Department of Justice, Enron Task Force, IRS, and SEC (all cooperating agencies in the Task Force investigation) must be immediately turned over to Defendant Brown—as the government has been ordered to produce them in *United States v. Skilling*.⁴

Brown is entitled to disclosure of these materials immediately so that Brown will have the opportunity to meaningfully prepare his defense, to present his Motion for New Trial, and to prepare his reply to the government's response to his pending motion, now due on February 24, 2008. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 845-46 (1977) (The Prosecutor has “duty under the due process clause to insure that ‘criminal trials are fair’ by disclosing evidence favorable to the defendant upon request.”); *United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004) (same, even if inadmissible at trial). “The government must make [these] disclosures in sufficient time that

³ We also note that these documents are material and exculpatory to the defense of Jeffrey Skilling, whose briefs we have read, as filed in *United States v. Skilling*, No. 06-20885, in the United States Court of Appeals for the Fifth Circuit. If these documents have not been produced by the government to Skilling, then they should be produced to him forthwith, as they are evidence bearing directly on his allegations of *Brady* violations and egregious prosecutorial misconduct.

⁴ We join the Motion to Compel Production of Fastow Binders (Dkt. 1039) being filed contemporaneously on this issue by Co-Defendant Robert Furst.

[Brown] will have a reasonable opportunity to act upon the information efficaciously.” *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) (Disclosure required “in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or use the information to obtain evidence for use in the trial.”). *See Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 1948 (1999); *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555 (1999)). *Accord United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978) (Neither “is the government excused from its obligation [under Rule 16] by the fact that the documents [a]re in the possession of the FBI [or other government agency] prior to trial.”). *See also United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980).

CONCLUSION

For these reasons, and pursuant to *Brady* and its progeny, Defendant James A. Brown requests this Court order the Government immediately to produce all of the documents sought by Defendant, directly to the Defendant.

Dated: January 16, 2008

Respectfully submitted,

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/s/ Sidney Powell _____
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ATTORNEYS FOR DEFENDANT JAMES A. BROWN

CERTIFICATE OF CONFERENCE

By Response filed on October 1, 2007, Mr. Spencer has advised he opposes production of any further *Brady* materials, Rule 16 materials, or any other discovery materials. He has previously agreed to produce the Fastow material ordered by the Fifth Circuit to be produced in *Skilling*, but he has missed two dates by which he said he would produce them, and he still has not done so. Now we are advised by co-counsel that he has said that he will not produce them without an order of this Court.

/s/ Sidney Powell _____
Sidney Powell

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon Arnold Spencer, counsel for the United States, via the ECF system and on all counsel of record.

/s/ Sidney Powell _____
Sidney Powell