IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	CR. NO. H-03-363 (Werlein, J.)
	)	
DANIEL BAYLY	)	
JAMES BROWN	)	
ROBERT FURST,	)	
	)	
Defendants.	)	

UNITED STATES' MOTION TO STRIKE SURPLUSAGE FROM THE INDICTMENT

The United States of America, by and through the undersigned attorneys, respectfully moves the Court to strike Counts Six, Seven and Eight from the Third Superseding Indictment, as those Counts have been resolved and are therefore surplusage. The United States further moves the Court to strike the references to Defendants Sheila Kahanek and William Fuhs from the other Counts in the Third Superseding Indictment as surplusage. The United States further moves the Court to strike the statutory language regarding deprivation of honest services and the sentencing allegations as surplusage.

I. PROCEDURAL HISTORY

Six defendants were charged in an eight count Indictment returned by the Grand Jury on July 22, 2004. All six defendants were charged with one count of conspiracy to commit wire fraud and falsify books and records, in violation of 18 U.S.C. § 371, and two counts of wire fraud, in violation of 18 U.S.C. § 1343 . In Counts Four and Five, Defendant James Brown was

charged with perjury and obstruction of justice, in violation of 18 U.S.C. §§ 1623, 1503. In Counts Six and Seven, William Fuhs was charged with perjury and obstruction of justice. And in Count Eight, Dan Boyle was charged with false statements to the United States Senate.

The charges against Ms. Kahanek, Mr. Fuhs and Mr. Boyle have been fully and finally resolved. Ms. Kahanek was acquitted on all charges by the jury trial before this Court. Mr. Fuhs' convictions were reversed and rendered by the Fifth Circuit on direct appeal. Mr. Boyle was convicted on all charges, and did not appeal. Accordingly, all the allegations against these three individuals have been fully and finally resolved and will not be retried.

Pursuant to decisions issued by of the Fifth Circuit and the United States Supreme Court, the United States intends to narrow its proof at trial and no longer intends to prove up before the jury the allegations in the Third Superseding Indictment regarding deprivation fo honest services or the Sentencing Allegations.

II. ARGUMENT

The United States moves the Court to strike Counts Six, Seven and Eight from the Indictment. These Counts charge Mr. Fuhs and Mr. Boyle with criminal misconduct, and do not contain any reference or allegation against the Defendants whose charges remain pending. Further, the United States moves the Court to remove all specific references to Ms. Kahanek, and Mr. Fuhs in the Introduction, Count One, Count Two and Count Three of the Third Superseding Indictment. Finally, the United States moves this Court to strike as surplusage the allegations regarding the deprivation of the right to honest services based on the United States v Brown, 456 F.3d 509 (5th Cir. 2006) and the section entitled Sentencing Allegations based on United States v. Booker, 543 U.S. 220 (2005).

Specifically, the United States proposes the following language be struck from the following pages of the Third Superseding Indictment:

Pages 1 - 13:	All references to Ms. Kahanek and Mr. Fuhs
Page 2:	Paragraph 7
Page 3:	Paragraph 8
	In Paragraph 10, the language "Williams Fuhs was a Vice President reporting to Brown in Brown's finance group"
Page 6:	Paragraph 19
Page 7:	Paragraph 22
Pages 10-11:	Subparagraph 31(d)
Page 11:	Subparagraph 31(h)
Pages 16-17:	Counts Six, Seven and Eight
Pages 17-18:	Sentencing Allegations
All pages:	All statutory references to 18 U.S.C. § 1346 as well as the statutory language in Counts One, Two and Three "including to deprive them of the intangible right to honest services of its employees,"

all as illustrated in Attachment A.[1]

The Fifth Circuit and the D.C. Circuit have both held, citing Supreme Court precedent, that courts may delete specific factual allegations that the government does not intend to prove as well as theories of prosecution from an indictment so long as doing so narrows, as opposed to expands, the charges a defendant faces. By striking specific allegations or theories from the

[1] If the Court intends to submit the indictment to the jury following the presentation of evidence, the United States can submit a redacted indictment that omits the honest services language.

charging instrument, the defendant suffers no prejudice. In *United States v. Glassman*, the Fifth Circuit upheld a conviction after the district could had deleted an alternative bases of conviction from an indictment without requiring the government to resubmit the indictment to a grand jury. 562 F.2d 954 (5th Cir. 1977). The Court reasoned:

> The Supreme Court in *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), held that in federal courts an indictment may not be amended except by resubmission to the grand jury unless the change is merely a matter of form. Subsequent cases out of this circuit have not interpreted this as restricting deletion of surplusage from the indictment. Therefore, we find this is not an amendment. The deletion eliminated one of the alternatives specified in the statute and added nothing to the indictment. The remaining allegation charged an offense under 18 U.S.C. §§ 1462 and 2.

Id. at 957 (*citing United States v. Prior*, 546 F.2d 1254 (5th Cir. 1977); *United States v. Musgrave*, 483 F.2d 327 (5th Cir. 1973), *cert. denied* 414 U.S. 1023, 94 S.Ct. 447, 38 L.Ed.2d 315 (1973) and *Womack v. United States*, 414 U.S. 1025, 94 S.Ct. 450, 38 L.Ed.2d 316 (1973); *Thomas v. United States*, 398 F.2d 531 (5th Cir. 1967); *Marsh v. United States*, 344 F.2d 317 (5th Cir. 1965); *Overstreet v. United States*, 321 F.2d 459 (5th Cir. 1963), *cert. denied* 376 U.S. 919, 84 S.Ct. 675, 11 L.Ed.2d 614 (1964)).

In *United States v. Pigrum*, the Fifth Circuit upheld the validity of a conviction after the district court amended an indictment to strike language where doing so "reduced the defendant's exposure to conviction." 922 F.2d 249, 254 (5th Cir. 1991). Similarly, eliminating the honest services fraud allegations from the indictment reduces defendant's exposure to the extent that the United States will proceed at trial against Defendants solely on the ground that they deprived Enron and its shareholders and to obtain money and property by means or materially false pretenses, representations and promises.

In *United States v. Poindexter*, the United States moved to strike language from the first count of a two-count indictment (but not dismiss the entire count) that had the effect of narrowing its proof under that count. The defendant objected and argued that he was entitled to be tried under the broader indictment returned by the grand jury "and none other." 719 F.Supp. 6, 8 (D.C. Cir. 1989) The Court rejected this argument and reasoned:

> That argument conflicts head-on with the decision of the Supreme Court in *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). In that case, a unanimous Supreme Court upheld the validity of a conviction upon proof that was narrower than the indictment. In the view of the Supreme Court, this change in the proof did not deprive the defendant of his right to be tried on an indictment returned by a grand jury. On the same principle, the reduction of the language of an indictment does not deny to a defendant his grand jury rights, provided that (1) the indictment as so narrowed continues to state a complete criminal offense, and (2) the offense is contained in the indictment as originally returned.

Id. at 8-9 (*citing Salinger v. United States*, 272 U.S. 542, 548-49, 47 S.Ct. 173, 175, 71 L.Ed. 398 (1926); *United States v. Zauber*, 857 F.2d 137, 151 (3rd Cir.1988); *United States v. Diaz*, 690 F.2d 1352, 1356 (11th Cir.1982); *United States v. Milestone*, 626 F.2d 264, 268 (3rd Cir.1980); *United States v. Lyman*, 592 F.2d 496, 500 (9th Cir.1978); *Thomas v. United States*, 398 F.2d 531 (5th Cir.1967)). Similarly, the "reduction of the language" of the indictment proposed here does not deny the defendants their grand jury rights.

> In relevant part, the federal wire-fraud statute subjects to punishment:
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses ··· transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings ··· for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343.

Nor by deleting the surplusage would the Court limit the Indictment in such a way that the Indictment no longer charges an offense. After the surplusage is struck, the Indictment contains specific allegations in support of each of elements of conspiracy and wire fraud. In this case, "the indictment follows the statutory language of [section 1343]", *United States v. Thomas*, 348 F.3d 78, 82 (5th Cir. 2003), to the letter. Thus, the "indictment as so narrowed continues to state a complete criminal offense and the offense is contained in the indictment as originally returned." *Poindexter*, 719 F.Supp. 6 at 8. Again, the Defendants suffer no prejudice from the deletion of the surplusage.

IV. CONCLUSION

For all of the foregoing reasons, the United States respectfully requests that the Court strike the language identified as surplusage from the Third Superseding Indictment.

April 2, 2007
Houston, TX

Respectfully submitted,
STEVEN A. TYRRELL
Acting United States Attorney

____/s/_____
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CERTIFICATE OF CONFERENCE

I hereby certify that the United States has, in accordance with Criminal Local Rule 12.2, conferred with defense counsel of record about the foregoing Motion in person on March 20, 2007, at which time defense counsel stated that they did not agree to the relief sought in the foregoing motion.

____/s/_____
ARNOLD A. SPENCER

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April 2007, I caused a true and correct copy of the foregoing filing to be served via the ECF system upon all counsel of record.

____/s/_____
ARNOLD A. SPENCER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
v.	§	Cr. No. H-03-363 (Werlein, J.)
	§	
DANIEL BAYLY,	§	Violations:18 U.S.C. §§ 371 (Conspiracy);
DAN O. BOYLE,	§	1001(a)(2) (False Statements); 1343,
JAMES A. BROWN,	§	(Wire Fraud); 1503 (Obstruction of Justice);
	§	1623 (Perjury)
ROBERT S. FURST, and	§	
	§	
	§	
Defendants.	§	

THIRD SUPERSEDING INDICTMENT

The Grand Jury charges:

I. Introduction

A. Enron

1. At all times relevant to this Indictment, Enron Corp. ("Enron") was an Oregon corporation with its headquarters in Houston, Texas. Among other businesses, Enron was engaged in the purchase and sale of natural gas, construction and ownership of pipelines and power facilities, provision of telecommunication services, and trading in contracts to buy and sell various commodities. Before it filed for bankruptcy on December 2, 2001, Enron was the seventh largest corporation in the United States.

2. Enron was a publicly traded company whose shares were listed on the New York Stock Exchange. As a public company, Enron was required to comply with regulations of the

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United States Securities and Exchange Commission ("SEC"). Those regulations protect members of the investing public by, among other things, ensuring that a company's financial information is accurately recorded and disclosed to the public.

3. Under SEC regulations, Enron and its officers had a duty to make and keep books, records and accounts that fairly and accurately reflected Enron's business transactions and to file with the SEC reliable quarterly and annual reports.

4. Conspirator Andrew S. Fastow was Enron's Chief Financial Officer ("CFO") from March 1998 to October 24, 2001. As CFO, Fastow had oversight over many of Enron's financial activities. During the time that he served as Enron's CFO, Fastow also served as the general partner and otherwise was in control of certain special purpose entities with which Enron did business, including LJM 2 Co-Investment, L.P. and its affiliates ("LJM2").

5. Conspirator Ben F. Glisan. Jr., was Enron's Treasurer from the spring of 2000 until the fall of 2001. Glisan assisted in supervising Enron's structured finance, cash flow and debt management activities.

6. Defendant DAN O. BOYLE joined Enron in 1998 and held a variety of positions, including Vice President in Global Finance. BOYLE was a lead employee assigned to effectuate the Nigerian barge transactions discussed below.

B. Merrill Lynch & Co., Inc.

9. Merrill Lynch & Co., Inc. ("Merrill Lynch") was a Delaware corporation with its headquarters in New York, New York. Merrill Lynch was a major financial institution, with offices in Houston and Dallas, Texas, among other places. Merrill Lynch engaged in business with various leading corporations, including Enron.

10. At all times relevant to Count One of this Indictment, defendant DANIEL BAYLY was the head of the Global Investment Banking division at Merrill Lynch; defendant JAMES A. BROWN was the head of Merrill Lynch's Strategic Asset Lease and Finance (formerly known as Global Structured Finance) group;

and defendant ROBERT S. FURST was the Enron relationship manager for Merrill Lynch in the investment banking division and as such was responsible for generating business for Merrill Lynch from Enron. Defendants BAYLY, BROWN, and FURST were all Managing Directors of Merrill Lynch.

II. The Nigerian Barge Transactions

11. From in or about and between December 1999 through January 2001, as part of a scheme to manipulate Enron's reported earnings, Enron and Merrill Lynch executives engaged in a year-end 1999 deal that involved the "parking" of Enron assets with Merrill Lynch. The parking of the assets with Merrill Lynch enabled Enron executives to enhance fraudulently Enron's year-end 1999 financial position that Enron presented to the public and to pay Enron executives unwarranted bonuses. By facilitating the Enron executives' deception, Merrill Lynch

executives solidified Merrill Lynch's status as a "friend of Enron" and thereby positioned Merrill Lynch and themselves to receive an increased slice of the lucrative deals that Enron dispensed to financial institutions. Defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, ROBERT S. FURST, and conspirators Fastow and Glisan, and others, all knowingly participated in this illegal scheme.

12. In 1999, Enron unsuccessfully sought to sell an interest in electricity-generating power barges moored off the coast of Nigeria. When Enron failed to sell the project by December 1999, Enron executives, including Fastow, defendant BOYLE and others arranged for Merrill Lynch to serve as a temporary buyer so that Enron could record earnings and cash flow in 1999 and thus appear more profitable to the public than it in fact was. Merrill Lynch agreed to pay $28 million for the barges, with 75% of that amount fronted by Enron itself. Merrill Lynch's purchase of the Nigerian barges allowed Enron executives to record improperly $12 million in earnings and $28 million in funds flow in the fourth quarter of 1999. Those inflated numbers in turn enabled the business unit from which the barge deal emanated to meet its targeted financial goals for the year, which in turn led to increased unwarranted bonuses to executives in that business unit.

13. Merrill Lynch executives, including defendants DANIEL BAYLY, JAMES A. BROWN, and ROBERT S. FURST, and others, agreed to purchase the Nigerian barges only because Merrill Lynch executives knew that the "purchase" was not real. Enron executives promised Merrill Lynch that it would receive a return of its investment plus an agreed-upon profit within six months. Specifically, Enron executives promised in an oral "handshake" side-deal that Merrill Lynch would receive a rate of return of approximately 22%

and that Enron would sell the barges to a third party or repurchase the barges within six months. Because of these promises from Enron executives, Merrill Lynch's supposed equity investment was not truly "at risk" and Enron should not have treated the transaction as a sale from which earnings and cash flow could be recorded in 1999.

14. In order to mask the full agreement from regulators, auditors, and others, Enron and Merrill Lynch executives entered into written agreements on December 29, 1999, that gave the outward appearance that Merrill Lynch was truly buying the Nigerian barges and accepting all the risks and rewards of an equity investment. Hidden from outside parties were the oral components of the agreement between the parties, which guaranteed Merrill Lynch a rate of return and set a deadline by which Merrill Lynch would no longer hold the barges for Enron.

15. On June 29, 2000, with no true third-party purchaser having been found to buy Merrill Lynch's interest as the six-month deadline loomed, Enron executives arranged for LJM2, which was operated and controlled by Fastow, to purchase Merrill Lynch's interest. Without any negotiation between Merrill Lynch and LJM2 as to the purchase price, Enron executives caused LJM2 to pay $7,525,000 to Merrill Lynch, which represented a $525,000 premium over Merrill Lynch's original investment to account for the agreed-upon approximate 22% rate of return promised by Enron. Enron executives also agreed to pay LJM2 a substantial but undisclosed fee for entering into the deal with Merrill Lynch. Enron executives subsequently arranged for a third party to purchase LJM2's interest in the barges, again at a profit to LJM2.

III. The Defendants' Obstruction of The Investigations Into The Nigerian Barge Transactions

16. The Nigerian barge transactions have been the subject of investigation by various entities. To hide their criminal conduct, the defendants DANIEL BAYLY, JAMES A. BROWN,

ROBERT S. FURST, and DAN O. BOYLE and others, obstructed those investigations.

A. The Enron Grand Jury Investigation

17. In March 2002, a special Grand Jury empaneled in the Southern District of Texas (the "Enron Grand Jury") commenced a criminal investigation of all matters relating to Enron's collapse involving potential violations of the federal criminal laws, including an examination of financial institutions' employees who may have conspired with and aided and abetted Enron's employees in criminal offenses. Among other matters, the Enron Grand Jury has examined the Nigerian barge transactions to determine whether Enron and Merrill Lynch entered into an oral side agreement in December 1999. As part of that investigation, the Enron Grand Jury has heard from dozens of witnesses and reviewed voluminous records from Enron, Merrill Lynch, and LJM2, among others.

18. As part of its investigation concerning the Nigerian barge transactions, on September 25, 2002, the Enron Grand Jury called as a witness defendant JAMES A. BROWN to testify. While under oath, defendant BROWN testified falsely as to a material matter by stating that he did not know of any oral promise between Enron and Merrill Lynch relating to the barge transaction.

B. The SEC Investigation

20. The SEC has conducted a civil investigation into the Nigerian barge transactions as part of its larger investigation into the collapse of Enron. It too sought to determine whether there was an oral side agreement between Enron and Merrill Lynch. As part of its investigation it interviewed and deposed numerous witnesses and reviewed voluminous documents concerning the barge transactions.

21. On July 10, 2002, the SEC called defendant DANIEL BAYLY as a witness to testify under oath in a deposition concerning the barge transactions. Defendant BAYLY testified falsely as to a material matter by stating, among other things, that he did not know of any oral guarantee between Enron and Merrill Lynch relating to the barge transaction.

23. On November 20, 2002, the SEC called defendant JAMES A. BROWN as a witness to testify under oath in a deposition concerning the barge transactions. Defendant BROWN again testified falsely as to a material matter by stating, among other things, that he did not know of any oral agreement between Enron and Merrill Lynch relating to the barge transaction. In fact, Brown was aware of an oral agreement between Merrill Lynch and Enron regarding the barges. On March 2, 2001, Brown sent an email ("the BROWN E-mail") to colleagues concerning his suggestion that Merrill Lynch enter into an oral side agreement in a deal with a company

unrelated to Enron (the "Company"). The BROWN E-mail stated in relevant part:

> I'm not convinced yet that we can't obligate [the Company] more than Frank indicated, but I've been on the road the last 3 days and haven't been able to determine that. If its [sic] as grim as it sounds, I would support an unsecured deal provided we had total verbal surrances [sic] from [the Company] ceo or Cfo, and schulte was strongly vouching for it. We had a similar precedent with Enron last year, and we had Fastow get on the phone with [defendant Daniel] Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well.

C. The Congressional Investigation

24. In the summer of 2002, the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate ("the Congressional Committee") conducted an investigation and hearing concerning, among other things, the Nigerian barge transactions. As part of that investigation, which was conducted pursuant to the authority of the Congressional Committee consistent with applicable rules of that body, the staff of the Congressional Committee interviewed and deposed witnesses and reviewed hundreds of documents concerning the transactions.

25. On July 17, 2002, the staff of the Congressional Committee interviewed defendant ROBERT S. FURST concerning the barge transactions. Defendant FURST made false statements as to a material matter by stating, among other things, that he did not know of any oral promise or guarantee between Enron and Merrill Lynch relating to the barge transaction.

26. On July 19, 2002, the staff of the Congressional Committee also interviewed defendant DAN O. BOYLE concerning the barge transactions. Defendant BOYLE made false statements as to a material matter by stating, among other things, that he did not know of any oral promise or guarantee between Enron and Merrill Lynch relating to the Barge transaction.

27. The staff of the Congressional Committee also sought to interview defendant JAMES A. BROWN concerning the Nigerian barge transactions. Defendant BROWN authorized the submission of information concerning the barge transaction to the Congressional Committee staff. On July 28, 2002, defendant BROWN caused his agents to make false statements as to a material matter by causing them to state, among other things, that BROWN did not know of any oral promise or guarantee between Enron and Merrill Lynch relating to the barge transaction.

28. On July 30, 2002, the staff of the Congressional Committee deposed defendant DANIEL BAYLY under oath concerning the barge transaction. Defendant BAYLY testified falsely as to a material matter by testifying, among other things, that he did not know of any oral commitment or guarantee between Enron and Merrill Lynch relating to the barge transaction.

COUNT ONE
(Conspiracy to Commit Wire Fraud and Falsify Books and Records)

29. The allegations of paragraphs 1 through 28 are realleged as if fully set forth here.

30. In or about and between December 1999 and January 2001, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, ROBERT S. FURST, along with conspirators Andrew S. Fastow and Ben F. Glisan, Jr., and others conspired to: (a) knowingly and intentionally devise a scheme and artifice to defraud Enron and its shareholders,

and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to transmit and cause to be transmitted by means of wire communication in

interstate and foreign commerce writings, signs, signals, pictures and sounds, all in violation of Title 18, United States Code, Sections 1343, 1346; and (b) knowingly and willfully falsify books, records and accounts of Enron in violation of Title 15, United States Code, Sections 78m(b) (2) (A) & (B), 78m(b) (5) and 78ff and Title 17, Code of Federal Regulations, Section 240.13b2-1.

OVERT ACTS

31. In furtherance of the conspiracy and to effect the objects thereof, within the Southern District of Texas and elsewhere, the defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, , ROBERT S. FURST, and their conspirators did commit and cause to be committed the following overt acts, among others:

a. In late December 1999, FURST caused a document that summarized the proposed Nigerian barge transaction between Enron and Merrill Lynch to be circulated within Merrill Lynch, including in Merrill Lynch's Houston, Texas office; the document stated that defendant BAYLY "will have a conference call with senior management of Enron confirming this commitment to guaranty the ML [Merrill Lynch] takeout within six months" and noted that the proposed return on the transaction would be "$250,000 plus 15% per annum or a flat 22.5% return per annum."

b. In late December 1999, FURST spoke to BROWN concerning the terms of the proposed Nigerian barge transaction between Enron and Merrill Lynch.

c. On or about December 22, 1999, FURST, BROWN and others at Merrill Lynch participated in a meeting to discuss the proposed Nigerian barge transaction.

e. On or about December 22, 1999, Merrill Lynch executives spoke with BAYLY concerning the proposed Nigerian barge transaction.

f. On or about December 23, 1999, BAYLY spoke on a conference call to Fastow in Houston, Texas, and Fastow promised BAYLY that Enron would take Merrill Lynch out of the deal within six months.

g. On or about December 29, 1999, in Houston, Texas and elsewhere, the defendants caused Enron and Merrill Lynch to finalize their written agreement concerning the Nigerian barge transaction, which did not set forth the oral agreements reached between the parties.

i. On or about June 14, 2000, when Enron had not yet found a third party to buy the barges from Merrill Lynch, FURST, BROWN and others caused a letter to Enron to be drafted demanding payment by Enron of the agreed-upon return on its investment in the barges by June 30, 2000.

j. On or about June 14, 2000, in Houston, Texas, Fastow and others arranged for LJM2 to buy Merrill Lynch's investment in the barges, fulfilling the promise by Enron executives to Merrill Lynch that it would be bought out within six months at a rate of return of approximately 22%.

k. On or about June 14, 2000, in Houston, Texas and elsewhere, BOYLE communicated

that Enron had found a buyer for the barges at the "agreed upon" price.

(Title 18, United States Code, Sections 371 and 3551 et seq.)

COUNTS TWO AND THREE
(Wire Fraud)

32. The allegations of paragraphs 1 through 28 are realleged as if fully set forth here.

33. On or about the dates set forth below, each such date constituting a separate count of this Indictment, within the Southern District of Texas and elsewhere, defendants DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, ROBERT S. FURST, and

having devised a scheme and artifice to defraud Enron and its shareholders,

and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to defraud, did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, specifically those identified below:

Count	Defendant(s)	Date	Wire Communication
2.	DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, ROBERT S. FURST, and	December 29, 1999	facsimile of Merrill Lynch Engagement letter from Enron International, Houston to Merrill Lynch, New York

Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?

A. It's inconsistent with my understanding of what the transaction was.

(Tr. at 80, lines 6-11.)

Q: ...Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?

A: In - - no, I don't - - the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though.

Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?

A: No.

(Tr. at 88, lines 13-23.)

(Title 18, United States Code, Sections 1623 and 3551 et seq.)

COUNT FIVE
(BROWN: Obstruction of the Enron Grand Jury Investigation)

38. The allegations of paragraphs 1 through 15, 17, 18, 36 through 37 are realleged as if fully set forth here.

39. On or about September 25, 2002, in the Southern District of Texas, defendant JAMES A. BROWN did corruptly endeavor to influence, obstruct, and impede the due administration of justice in

that BROWN did knowingly and willfully make false and misleading declarations before the Grand Jury with intent to obstruct and impede the Enron Grand Jury investigation.

40. At the time and place stated above, BROWN corruptly endeavored to influence, obstruct, and impede the due administration of justice by giving false and misleading testimony: the declarations which are underscored in Count Four.

(Title 18. United States Code, Sections 1503 and 3551 et seq.)

Dated: Houston, Texas
July 22, 2004

A TRUE BILL

Linda Clifton
FOREPERSON

JOSHUA R. HOCHBERG
Acting U.S. Attorney

ANDREW WEISSMANN
Director, ENRON TASK FORCE

By: Kathryn H. Ruemmler
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John H. Hemann
Kathryn H. Ruemmler
Assistant United States Attorneys
ENRON TASK FORCE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	CR. NO. H-03-363 (Werlein, J.)
	)	
DANIEL BAYLY	)	
JAMES BROWN	)	
ROBERT FURST,	)	
	)	
Defendants.	)	

ORDER

The United States' Motion to Strike is GRANTED.

It is hereby ORDERED that the surplusage referenced below shall be struck from the of the Third Superseding Indictment:

Pages 1 - 13:	All references to Ms. Kahanek and Mr. Fuhs
Page 2:	Paragraph 7
Page 3:	Paragraph 8
	In Paragraph 10, the language "Williams Fuhs was a Vice President reporting to Brown in Brown's finance group"
Page 6:	Paragraph 19
Page 7:	Paragraph 22
Pages 10-11:	Subparagraph 31(d)
Page 11:	Subparagraph 31(h)
Pages 16-17:	Paragraphs 41-47, entitled Counts Six, Seven and Eight
Pages 17-18:	Paragraphs 48-51, entitled Sentencing Allegations

All pages: All statutory references to 18 U.S.C. § 1346 as well as the statutory language in Counts One, Two and Three "including to deprive them of the intangible right to honest services of its employees,"

Signed this _____ day of _____, 2007.

_____
Hon. Ewing Werlein
United States District Court Judge