

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

UNITED STATES SECURITIES)	
AND EXCHANGE COMMISSION)	
)	
Applicant,)	MISC. NO. 03-1962
)	
v.)	
)	
KENNETH L. LAY,)	
)	
Respondent.)	

**DECLARATION OF CHARLES J. CLARK IN SUPPORT OF
SEC'S APPLICATION FOR ORDER REQUIRING OBEDIENCE TO SUBPOENA**

I, Charles J. Clark, pursuant to 28 U.S.C. § 1746, do hereby declare as follows:

1. I am an attorney admitted to the Bar of the State of New York and the Bar of the District of Columbia. I am employed as an Assistant Director by the United States Securities and Exchange Commission ("Commission") in the Division of Enforcement, at the Commission's headquarters office in Washington, D.C.

2. This declaration is submitted in support of the Commission's Application for an Order, filed with this Court on September 29, 2003, requiring Kenneth L. Lay to comply with a subpoena lawfully issued by the Commission, and is based on my direct participation in the investigation captioned "In the Matter of Enron Corp."

The Appointment Of The Bankruptcy Examiner

3. On December 2, 2001, Enron Corp. filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York. On April 8, 2002, the Court

issued an Order pursuant to 11 U.S.C. §§ 1104(c) and 1106(b) ordering that an Examiner for Enron be appointed. *See* Order (Exhibit A). According to this Order, the Enron Examiner was authorized to “investigate all transactions . . . involving special purpose vehicles or entities created or structured by [Enron] or at the behest of [Enron]” that meet certain criteria.

4. On May 22, 2002, the United States Trustee for the Southern District of New York named R. Neal Batson, an attorney with the law firm of Alston & Bird LLP based in Atlanta, Georgia, to serve as the Enron Examiner. To assist him in discharging his duties pursuant to the Order, the Enron Examiner retained Alston & Bird as counsel to the Examiner.

5. Since his appointment, it is my understanding that Mr. Batson, with the assistance of Alston & Bird attorneys and others, has conducted an investigation pursuant to the Order and has, on three prior occasions, submitted reports to the Bankruptcy Court describing the results of that ongoing investigation. It is also my understanding that his fourth and final report will be submitted to the Bankruptcy Court in October 2003, and that this report will describe, among other things, the role of Lay in the activities under investigation.

Lay Submits To Questioning By The Examiner

6. On October 16, 2003, I received a telephone call from counsel for the Enron Examiner. At that time, and in subsequent telephone calls that day, he informed me that counsel for Lay and counsel for the Enron Examiner had reached an agreement whereby Lay would be made available for questioning by the Examiner for the purposes of his investigation. He further informed me that counsel for Lay and counsel for the Enron Examiner had entered into an agreement whereby they specifically agreed to maintain the confidentiality of the circumstances

and substance of the meeting with Lay. The meeting was to occur during the pendency of the instant subpoena enforcement action.

7. Counsel for the Enron Examiner informed me, however, notwithstanding the confidentiality agreement, he was authorized to provide the following, albeit limited, information: (1) that Lay had agreed to meet with counsel for the Enron Examiner at 9:00 a.m. on Saturday, October 18, 2003; (2) that Lay had agreed to answer questions relating to activities under investigation by the Enron Examiner; (3) that this meeting would be in the form of an interview (rather than transcribed testimony); (4) that the Enron Examiner was allowed to describe and attribute the information provided by Lay in his forthcoming report; and (5) that a number of attorneys representing Lay – including his “criminal counsel” – were aware of Lay’s intention to meet with the Enron Examiner.

8. Counsel for the Enron Examiner also stated that, beyond the information that would be contained in the Examiner’s forthcoming final report, it was not anticipated that the substance of the interview would be disclosed in the future. Citing the agreement with counsel for Lay in which they specifically agreed to maintain the confidentiality of the interview, counsel for the Enron Examiner declined to answer any further questions, including who initiated the meeting and whether this interview would be limited to particular subjects.

9. At approximately 10:00 a.m. on October 22, 2003, I initiated a telephone call to counsel for the Enron Examiner. In response to a series of questions, he told me the following: (1) Lay had met with counsel for the Enron Examiner on Saturday, October 18, 2003; (2) Lay had answered questions as agreed; and (3) Lay had not asserted his Fifth Amendment rights during

the interview. Again citing the agreement with counsel for Lay in which they specifically agreed to maintain the confidentiality of the interview, counsel for the Enron Examiner declined to answer any further questions regarding this interview.

10. At approximately 2:15 p.m. on October 22, 2003, counsel for the Enron Examiner contacted me to clarify certain information he had provided previously. He acknowledged that, earlier in the day, he had stated that in essence while he did not think Lay had asserted his Fifth Amendment rights during the interview, he had not discussed Lay's interview with the attorneys who conducted it and therefore did not know with certainty whether Lay asserted his Fifth Amendment rights as to any particular question. Moreover, pursuant to the confidentiality agreement between counsel for Lay and counsel for the Enron Examiner, even if he did know with certainty what happened during Lay's interview, he stated that he was not permitted to disclose this information. His statements to me were confirmed in a message that was left on my voice-mail shortly before the actual telephone conversation described in this paragraph.

Lay Produced The Documents At Issue To The Examiner, Apparently After This Action Was Filed

11. I have read Lay's Amended Response in this matter and understand that Lay has now disclosed that he produced the documents withheld from the Commission to the Enron Examiner. Lay has not detailed the circumstances of this production, including the date on which the withheld documents were produced. However, I have learned of facts that support the conclusion that Lay produced the documents to the Enron Examiner after the Commission filed this action.

12. During the telephone conversation described in paragraph 10 above, I learned that counsel for the Enron Examiner had “reason to believe” that the documents withheld by Lay from the Commission had been produced to the Examiner. Attorneys from counsel for the Enron Examiner stated that they believed the withheld documents were included in a collection of documents produced pursuant to a “confidentiality agreement” between counsel for Lay and counsel for the Enron Examiner. At my request, counsel for the Enron Examiner provided to me via e-mail a copy of this agreement (unsigned), which is attached hereto as Exhibit B. This letter agreement between counsel for Lay and counsel for the Enron Examiner bears the date October 3, 2003, four days after the SEC filed its Application against Lay. Thus, it appears Lay produced the same documents withheld from the SEC to the Enron Examiner while this matter was pending.

13. At approximately 3:50 p.m., and then again at 4:40 p.m., on October 22, 2003, attorneys from counsel for the Enron Examiner provided additional information concerning Lay’s production of the withheld documents. This additional information is described herein: Lay provided approximately three and one-half boxes of documents to counsel for the Enron Examiner in August 2003. During the course of scheduling the interview described in Paragraphs 6 through 10 above, counsel for the Enron Examiner sought assurances from counsel for Lay that all non-privileged documents responsive to the Examiner’s subpoena had been produced. Thereafter, Lay and the Examiner agreed that Lay would produce additional documents “on a voluntary basis, in lieu of a formal response to Examiner Neal Batson’s Subpoena for Rule 2004 Examination served previously on Mr. Lay[,]” and the Examiner agreed

“not to share the [documents] with any other individual or entity without [Lay’s] permission except by court order.” *See* Exhibit B. Subsequently, on October 6, 2003, Lay produced two compact discs that Lay claimed held copies of documents previously provided to the Commission staff, comprising approximately six boxes. On October 8, 2003, Lay produced two additional compact discs that Lay claimed held copies of documents previously provided to counsel for litigants in the Enron shareholder class action lawsuit, comprising approximately seven boxes. At some point, counsel for Lay specifically told counsel for the Enron Examiner that the documents being sought by the Commission in this subpoena enforcement action were included in the documents that had been produced to the Enron Examiner.

14. At approximately 6:15 p.m. on October 22, 2003, counsel for the Enron Examiner notified me that he would provide no further information to Commission staff concerning the production of documents by Lay to the Enron Examiner.

Lay Produced The Records To Parties In The Enron Class Action

15. Lay has not disclosed in his Amended Response the identity of the other party to whom he has produced the documents withheld from the Commission. However, I have listened to a message left by Lay’s counsel Deborah Meshulam on the voice-mail of Commission counsel Luis Mejia on October 24, 2003 before the filing of the Amended Response. In that message, Lay’s counsel identifies the other disclosure as one made to “private parties” in the “class action.”

Lay Has Not Previously Redacted Personal Notations

16. On prior dates, in response to the Commission’s subpoena for documents relating to Enron, Lay has produced documents that bear notations by Lay referring to personal matters.

Kutchey Dec. ¶ 9. Lay has produced these documents without redacting these notations.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
October ____, 2003.

Charles J. Clark

CERTIFICATE OF SERVICE

I hereby certify that on October ____, 2003, a copy of the attached:

Declaration of Charles J. Clark

was served upon the following parties or their counsel of record via:

- Facsimile
- Federal Express
- First Class Mail, Postage Pre-Paid
- By Hand

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