

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.)	

**REPLY OF THE SECURITIES AND EXCHANGE COMMISSION
IN SUPPORT OF ITS APPLICATION FOR ORDER
REQUIRING OBEDIENCE TO SUBPOENA**

I. INTRODUCTION

Despite Lay’s concession that he has no Fifth Amendment right to withhold corporate records from the SEC and the fact that he has produced the same documents at issue to parties in other proceedings, including production to the bankruptcy examiner apparently after the SEC filed this action, Lay continues to withhold corporate records from the SEC. In light of the foregoing, Lay’s continued refusal to designate and produce corporate records to the SEC, unless the SEC “agrees” to his terms, is an outrage and belies his self-serving and disingenuous claim that he has been fully cooperative with the SEC. This Court should not permit Lay to continue this charade.

Lay has demonstrated a frankly whimsical approach to asserting his Fifth Amendment rights. Lay initially produced documents to the SEC without invoking the Fifth Amendment. Lay later asserted the Fifth Amendment in refusing to testify to the SEC, and selectively invoked

the Fifth Amendment with respect to documents, withholding some documents and producing others. Yet Lay has already produced the same records he has withheld from the SEC to at least two parties. Further, just days ago, Lay submitted to questioning by the bankruptcy examiner, apparently without invoking his Fifth Amendment rights. Thus, when conditions suit his purposes Lay talks and provides documents, but when called to answer to law enforcement authorities, he invokes the Constitution, remaining silent and withholding documents. By what logic can Lay claim that he continues to hold a Fifth Amendment right to refuse compliance with the SEC's subpoena when he has produced the same documents to others?

Given Lay's concession on the applicable law, his agreement to submit records for an *in camera* review, and his production of the same records to others, the issues for the Court have narrowed. Because Lay agrees that he has no Fifth Amendment right to withhold corporate records from the SEC: (1) he must designate records as either corporate or personal; (2) produce the corporate records to the SEC; and (3) submit personal records, if any, to the Court for an *in camera* review. Should the Court determine in its *in camera* review that certain records designated by Lay as personal are actually corporate records, such records should be produced to the SEC. Should the Court determine that certain records are personal, such records should also be produced to the SEC if the Court finds that Lay waived his Fifth Amendment rights to such records by producing them to other parties.

II. ARGUMENT

A. Lay Does Not Dispute That He Has No Fifth Amendment Right To Withhold Corporate Records

There is no dispute regarding the law applicable to corporate records in Lay's possession.

Lay now concedes that he cannot assert the Fifth Amendment with respect to corporate records. Lay does not dispute the well settled law cited by the SEC in its Application that an individual may not invoke his personal Fifth Amendment privilege to avoid producing the documents of a collective entity that are in his custody, even if his production of those documents would be personally incriminating. Given Lay's concession, he should be ordered to produce all corporate records in his possession to the SEC forthwith.¹

B. If Lay Designates The Records As Corporate, And The Court Agrees, Lay Is Not Subject To Any Risk Regarding His Fifth Amendment Rights

Despite Lay's concession that he has no Fifth Amendment right to withhold corporate records, he continues to withhold them, purportedly because the SEC will not "agree" that such records are corporate. Lay's theory is that without such an agreement the SEC would be free to later claim that corporate records produced by Lay are personal records, and that production has waived his Fifth Amendment rights. Lay's claim misstates the law and the facts.

Lay has never designated the records he holds as corporate records, so there is nothing for the SEC to "agree" to.² And it is not the SEC's burden to make the initial designation. A party

¹ Lay suggests that it was improper for the SEC to subpoena Lay personally and to apply the collective entity doctrine to records sought in such a subpoena. Lay was subpoenaed while he was still the Chairman of Enron and the collective entity doctrine applies to corporate records held by individuals regardless of the capacity in which they are served. Bellis v. United States, 417 U.S. 85 (1974) (subpoena served on former partner); In re Sealed Case (Government Records), 950 F.2d 736 (D.C. Cir. 1991) (subpoena served on former government employee); In re Grand Jury Subpoena, 957 F.2d 807 (11th Cir. 1992) (subpoena served on former Chairman and CEO). Further, as made clear in the caselaw cited by the SEC, unrebutted by Lay, the act of production doctrine set forth in United States v. Hubbell, 530 U.S. 27 (2000) applies solely to personal records, not, as Lay appears to suggest, to subpoenas served on individuals in their "personal capacity" without regard to the nature of the records at issue.

² Lay does not accurately set forth the dialogue between counsel prior to the filing of the SEC's motion. The accurate pre-filing posture is set forth in the SEC's letter dated

claiming a privilege bears the burden of proving the privilege is applicable. As the D.C. Circuit has held in a similar case, the party asserting the privilege with respect to documents “bears the burden of proving the nature of the documents and their various contents.” (Government Records), 950 F.2d at 741 citing United States v. Wujkowski, 929 F.2d 981, 984 (4th Cir. 1991). It is not for the SEC to make the initial determination that records held by Lay are corporate or personal, particularly when it has never seen the documents. While the SEC believes all of the documents are corporate records, Lay must designate the records he holds as either corporate or personal. Corporate records must be produced.³

Lay has not cited to any authority that would permit him to (a) avoid designating records as either corporate or personal, (b) continue to withhold corporate records that he now concedes he has no Fifth Amendment right to withhold, and (c) force the SEC to “agree” to conditions on production. In the absence of any designation by Lay, he would be able to later argue that the SEC used his “personal” records, directly or indirectly, in violation of his Fifth Amendment rights. The SEC cannot take this risk.

Conversely, the risk perceived by Lay attendant to the production of corporate records will be nullified if Lay simply follows the law in this Circuit. Lay must make the initial

September 24, 2003. SEC Mem, Ex. 4. The SEC did not request personal records once Lay invoked his Fifth Amendment rights. The SEC requested that Lay produce corporate records and if he wished to continue to withhold personal records to provide a log with sufficient information for the SEC to determine whether the claim was appropriate. Lay refused, and tried to extract conditions on the production of records that would insulate Lay and jeopardize potential future actions by the government against Lay. Id., SEC Mem, Ex. 5.

³ Should Lay designate any of the records as personal he should submit them to the Court for an *in camera* review, a procedure to which he has consented. See infra, section D.

designation of each of the records as either corporate or personal. Because he is willing to submit to an *in camera* review he should be ordered to provide the designations and the records to the Court. If the Court finds that records held by Lay are corporate records and orders production of such records to the SEC, Lay will be afforded the protections of a judicial determination on the classification of the records.⁴ If the Court finds that any records are purely personal and covered by United States v. Hubbell, 530 U.S. 27 (2000), and Lay has not waived his Fifth Amendment rights by producing the same records to other parties, such records need not be produced to the SEC at this time.⁵

C. By Producing The Same Records To Other Parties Lay Has Waived Any Fifth Amendment Rights He May Have Regarding Personal Records

Given Lay's concession that he has no Fifth Amendment right to withhold corporate records, the only issue is whether Lay has any right to withhold personal records. Here, Lay's prior production of the same records to other parties, including a production to a party apparently just days ago, is fatal to his claim of privilege regarding personal records. Thus, while the SEC had expressed no desire to obtain Lay's personal records if he had a legitimate Fifth Amendment act of production privilege under Hubbell, the SEC is entitled to personal records given Lay's waiver of this privilege.

⁴ Lay apparently agrees, in footnote 4 of his Response, that the government's use of the corporate records in any later proceeding will be governed by Braswell v. United States, 487 U.S. 99, 118 (1988). Under Braswell, the government may not tell the jury that it was Lay who produced the records but the government still has the right to use the records against Lay if it establishes authenticity. Further, since Lay held a "prominent position" at Enron "the jury may, just as it would had someone else produced the documents, reasonably infer that he had possession of the documents or knowledge of their contents." Id.

⁵ However, if the Court finds a waiver, such personal records should be produced.

Lay cannot rely on Hubbell to continue to withhold personal records. Hubbell applies to personal records only where the act of production would communicate information about the existence, custody, and authenticity of the documents. 530 U.S. at 36-37. In Hubbell, the Court noted that the subpoena required the respondent to assist the prosecutor in identifying potential sources of information and to produce those sources. Id. at 40-42. The respondent’s act of producing personal records carried the risk of incrimination. Indeed, the Court held that respondent’s act of production led to his indictment by the government. Id. at 42-43.

In the present case, Lay cannot satisfy the Hubbell criteria, including (a) whether the act of production would communicate custodial information, and (b) whether the act of production would be potentially incriminating. As to the first point, Lay has already communicated information about the existence, custody, and authenticity of any personal records called for in the subpoena by producing the same records to others. Amended Response; Declaration of Charles J. Clark (“Clark Dec.”) at ¶¶ 11-13, 15 (attached hereto). In fact, apparently after the SEC filed this action, Lay took the extraordinary step of producing the same records to the bankruptcy examiner. Id. at ¶¶ 11-13. Lay has informed the SEC of these prior productions, so the act of production of the same records to the SEC would not disclose any new custodial information to the SEC.⁶ As to the second point, Lay’s act of production to yet another party, the SEC, can hardly be considered potentially incriminating. Unlike Hubbell, Lay’s production to the SEC

⁶ However, Lay did not disclose to the SEC or the Court in its Amended Response significant details: (1) the identity of the private party to whom Lay disclosed the documents (the plaintiffs in the class action, where Lay is a defendant); (2) the date of his productions; (3) the fact that Lay submitted to questioning before the bankruptcy examiner while the SEC’s action was pending, and did not assert the Fifth Amendment; and (4) Lay’s attempt to protect the documents from disclosure to others by entering into a “Confidentiality Agreement” with the bankruptcy examiner. Clark Dec. at ¶¶ 6-15.

would not be the first disclosure by Lay that the documents exist. Lay certainly cannot have any bonafide legal concerns attaching to his physical act of producing the subpoenaed records given the fact that he has now produced them to third parties – the plaintiffs in the class action lawsuit and the bankruptcy examiner – contemporaneous to his being, in his words, “pulverized” by Congress and the media.⁷ It is too little too late for Lay to now claim protection for the act of producing personal records. In light of Lay’s prior productions, he cannot claim a Fifth Amendment act of production privilege to withhold personal records under Hubbell.⁸

Lay argues that his prior productions do not constitute a waiver but does not cite to any applicable authority. The cases cited by Lay are from other jurisdictions, pre-date Hubbell, and deal with prior testimony before the grand jury, not the prior production of documents. Even if cases involving prior grand jury testimony were relevant, the law in the D.C. Circuit does not support Lay’s position. In Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969), a case reluctantly cited by Lay in a footnote, the court held that a witness waived his Fifth Amendment rights by testifying before the grand jury. In so holding the court rejected the Third Circuit’s analysis in In re Neff, 206 F.2d 791 (3rd Cir. 1953), the case on which Lay places principal reliance. Ellis, 416 F.2d at 805. The court held that “where a non-indicted witness has waived his Fifth Amendment privilege by testifying before a grand jury voluntarily and with knowledge

⁷ Four pages of Lay’s Response and six exhibits he has offered relate to allegations made against Lay by Congress and the media. The SEC fails to see the relevance of this material. The SEC does not dispute that it is fairly obvious that Lay is, as he describes, “a Focus of Multiple Governmental Investigations” for his conduct while Chairman and CEO of Enron.

⁸ Lay claims that the SEC’s subpoena was too broad, but the facts are otherwise, as set forth in the undisputed Declaration of Richard J. Kutchey. Kutchey Dec. at ¶¶ 7 (Ex. A), 17 (refining subpoena’s scope). Further, Lay never moved to quash the subpoena on the ground that it was overbroad.

of his privilege, his waiver extends to a subsequent trial based on an indictment returned by the grand jury that heard his testimony.” Id. While Lay attempts to distinguish Ellis by stating that Lay’s prior productions were to different parties, this is too fine a distinction. As the court noted in Ellis, a party who volunteers incriminating testimony in response to questions bears no further risk of incrimination by answering the same questions again. Id. at 802. By analogy, a party who produces documents to others, including public proceedings, bears no further risk of incrimination by his act of producing the same documents to the government.⁹

Lay’s demonstrated continual flip-flopping regarding the Fifth Amendment demonstrates his blatant insincerity in asserting the privilege in this case. Lay did not invoke the Fifth Amendment in his initial productions to the SEC in response to the subpoena. Shortly after his resignation from Enron, Lay’s next production of records pursuant to the subpoena was accompanied, for the first time, by a Fifth Amendment claim. Kutchey Dec. at ¶¶ 9, 10, 13. Curiously, Lay recently entered into a confidentiality agreement with counsel for the bankruptcy examiner and produced the same documents sought by the SEC in the instant action. This production apparently occurred while this very same subpoena enforcement action was pending with the Court. Lay refused to answer questions posed by the SEC based on the Fifth Amendment, yet days ago submitted to questioning by the bankruptcy examiner. Clark Dec. at

⁹ The court in Ellis also addressed the point made in Neff that testifying before the grand jury could not operate as a waiver for trial because the two were separate proceedings. The court stated that “this is a ‘mechanical limitation’ that fails to focus on the underlying interests: whether the witness’s privilege is jeopardized, and the interest of the community in obtaining full disclosure at criminal trials.” 416 F.2d at 804. Similarly, in this case, Lay’s privilege is not jeopardized and the public has an interest in obtaining full disclosure from Lay. Further, Lay’s attempt to distinguish Ellis because it dealt with a witness not accused or under indictment fails, since Lay sits in the same shoes.

¶¶ 6-10.

Not only does Lay abuse the privilege by invoking it only when it suits his purposes but, as noted in footnote 6, *supra*, he has been less than candid with the SEC and the Court regarding the circumstances of his prior productions of the same documents to others. As another example, Lay's counsel claims not to have had knowledge of the production of the same records to the bankruptcy examiner, prompting his belated Amended Response. However, Lay's production to the bankruptcy examiner was accomplished through his various attorneys, and whether the production was by a different law firm or not, Lay as a party to this case had an obligation to disclose the prior production, as well as the details he has still yet to disclose to the SEC and the Court. The timing of Lay's Amended Response is most curious. It followed the SEC's discovery of Lay's production to the bankruptcy examiner and it was heretofore not disclosed in Lay's initial Response.

Lay's inconsistent and abusive invocation of the Fifth Amendment in this case with respect to documents he has withheld, combined with his concessions on the law, results in the following: (1) Lay has waived his Hubbell act of production privilege with respect to personal records and such records should be produced, and (2) Lay must produce corporate records for which he now concedes he has no Fifth Amendment right to withhold. Lay must produce all records, corporate and personal, to the SEC forthwith.

D. The Standards Applicable To The *In Camera* Review Process

Lay agrees that if necessary the Court should conduct an *in camera* review to determine whether the documents he has withheld are corporate or personal in nature. The parties agree that the functional test set forth in Government Records should be applied by the Court in

making this determination. Inquiry into the nature, purpose, and use of the documents is in order. Id. at 741. A “mixed” document containing both personal and corporate notations may qualify as a corporate record. Personal notations on a corporate document do not render it personal rather than corporate. Id. at 740.

While Government Records states that “purely private notations” may be redacted from corporate records prior to production, the Court should closely scrutinize any notations that Lay claims are “purely personal.” Notations that are purely personal are notations such as family birthday reminders, household grocery lists, haircut appointments, and similar notations.¹⁰ However, any notations by Lay made on records during his tenure as the Chairman of Enron, referring to or relating to Enron’s business, or reflecting his views, opinions, reactions, or thoughts on matters relating to Enron, are corporate notations. Further, if Lay did not redact “purely personal” notations from his production of the same documents to other parties he should not be permitted to do so in this case.

_____As part of the *in camera* review, the Court may also take testimony from Lay concerning the nature, purpose, and use of the documents. Government Records, 950 F.2d at 738. An *in camera* examination of Lay by the Court may be useful with respect to documents that contain notations that Lay claims are purely personal. If certain documents are so sensitive that the Court cannot publish reasons for its disposition of those documents without revealing information legitimately kept confidential, the Court can seal and impound that portion of its decision, thus preserving it for possible appellate review. Id. at 739.

¹⁰ However, because Lay has already produced documents to the SEC containing such personal notations (Kutchev Dec. ¶ 9) Lay would be hard pressed to argue similar notations are purely personal and should be redacted.

III. CONCLUSION

Based on the foregoing reasons the Court should grant the SEC's Application and order Lay to produce the subpoenaed documents he has withheld from the SEC.

Dated: October ___, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Reply of the Securities and Exchange Commission in Support of its Application for Order
Requiring Obedience to Subpoena

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

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