

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA

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UNITED STATES SECURITIES )  
AND EXCHANGE COMMISSION )  
450 Fifth Street, N.W. )  
Washington, D.C. 20549, )

Applicant, )

MISC. NO. 03-

KENNETH L. LAY )  
2121 Kirby Drive #137 )  
Houston, Texas 77019 )

Respondent. )

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**MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION  
IN SUPPORT OF ITS APPLICATION  
FOR ORDERS TO SHOW CAUSE, FOR AN *IN CAMERA* REVIEW,  
AND REQUIRING OBEDIENCE TO SUBPOENA**

**I. INTRODUCTION**

Kenneth L. Lay has failed to comply with a subpoena for documents relating to Enron during his tenure as the company's Chairman and CEO. Lay initially produced thousands of pages of documents, including records referring to personal matters and documents with his handwriting. Subsequently, Lay withheld certain documents, asserting that his act of production would violate his Fifth Amendment rights. Lay informed the SEC that the documents include copies of Enron memoranda and other documents bearing Lay's handwriting and annotations, as well as copies of letters, position papers, and speeches in draft form.

The documents withheld by Lay, generated during his tenure at Enron, are corporate records. It is well settled that a corporation has no Fifth Amendment rights and an individual

cannot resist the production of corporate records based on the Fifth Amendment, even where the records might tend to incriminate the individual personally. Lay cannot assert the Fifth Amendment with respect to corporate records in his possession and should produce them to the SEC.

Lay has stated that he will not produce the documents to the SEC unless the SEC agrees that production does not constitute a waiver of any Fifth Amendment rights he may have. Such a condition is unacceptable because, with respect to corporate records, Lay has no Fifth Amendment right to withhold the records. With respect to personal records withheld by Lay, if any, Lay cannot have it both ways -- he cannot produce personal records to the SEC that he believes may be incriminating and then claim Fifth Amendment protection to prevent their use by the government. Further, if the SEC agreed that the production of personal records did not constitute a waiver of his Fifth Amendment rights, and Lay was later the subject of an SEC complaint or criminal charges brought by the Department of Justice, Lay could argue such records were used, or furnished a link in a chain of evidence, by the government in violation of his Fifth Amendment rights. Lay continues to refuse to produce corporate records and has offered only to provide a general log with all documents withheld.

The SEC will not permit Lay to dictate the conditions on which he will comply with a lawfully issued subpoena, particularly where such conditions have no legal basis and would compromise the SEC's law enforcement objectives. The SEC has issued a subpoena to Lay for documents, he has refused to comply, and he should be ordered to produce the documents forthwith.

## II. FACTS

### A. The SEC's Investigation

On October 30, 2001, the SEC issued an Order Directing Private Investigation and Designating Officers to Take Testimony in an investigation captioned, In the Matter of Enron Corp. (the "Formal Order"). Declaration of Richard Kutchev ("Kutchev Dec."), ¶ 4 (filed with the Application). The Formal Order describes the parameters of the investigation. The staff of the SEC is investigating, among other things, whether Enron and certain persons and entities associated with Enron, misstated or caused the misstatement of the financial condition and results of operations of Enron and disclosures related thereto, and whether certain persons and entities violated the anti-fraud and other provisions of the federal securities laws, including sales of Enron securities by Enron executives and disclosure relating to such sales. Id. at ¶¶ 5-6. The SEC believes that Lay has personal knowledge of several matters under investigation.

### B. The Subpoena and Lay's Failure to Comply

On January 2, 2002, pursuant to the Formal Order and the SEC's Rules of Practice and Investigations, 17 C.F.R. 203.8, 201.232(c) and 201.150(c)(2), the SEC served Lay with a subpoena requiring that he produce documents by January 9, 2002 and appear for testimony on January 23, 2002. Kutchev Dec. at ¶ 7. Service was proper. At the time of service, Lay was the Chairman and CEO of Enron. Under Lay's employment agreement, all documents relating to Enron's business generated during his employment (during business hours or otherwise and whether on company premises or otherwise) are the "sole and exclusive property" of Enron. Id. at ¶ 26.

The SEC subpoena requested documents concerning Enron, appointment books,

calendars, and similar documents reflecting meetings and conversations concerning Enron and related entities, and documents regarding entities that Lay had an interest in and that had a relationship with Enron.<sup>1</sup> Id. at ¶ 7. The SEC asked Lay to identify any documents withheld for any reason, including assertion of a privilege, and to represent that all documents required to be produced pursuant to the subpoena had been produced. On or before January 9, 2002, the SEC gave Lay permission to produce documents on a rolling basis. Id. at ¶ 8.

On January 16 and 22, 2002, Lay produced thousands of pages of documents in response to the subpoena. Lay produced, among other things, documents containing his handwriting relating to meetings and other activities while he was Chairman and/or CEO of Enron. The documents also include Lay's handwriting on calendars and daytimers reflecting personal matters, such as social engagements, golf outings, and family events. Id. at ¶¶ 9-10.<sup>2</sup> In the production of January 22, 2002, Lay withheld three documents on the basis of the attorney client privilege or work product doctrine. Id. at ¶ 10. However, in these January 2002 productions, Lay did not assert the Fifth Amendment as a basis for withholding any documents.

On January 23, 2002, Lay resigned as Chairman and CEO of Enron. Id. at ¶ 11. Upon his resignation, Lay was required to return to Enron all documents relating to Enron's business. Id. at ¶ 26. On February 13, 2002, Lay appeared for testimony before the SEC in Washington, D.C. pursuant to the subpoena. Lay declined to answer questions, asserting his Fifth Amendment right against self-incrimination. Id. at ¶ 12. On February 21, 2002, Lay produced additional

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<sup>1</sup> The subpoena also requested securities brokerage account and bank account statements. Evidently, Lay has not withheld documents in this category based on the Fifth Amendment.

<sup>2</sup> Should Lay dispute that his handwriting appears on such documents, the SEC will submit additional evidence in the form of sworn testimony by Lay's former executive assistant.

documents in response to the subpoena. In connection with this production, and for the first time, Lay asserted the Fifth Amendment as a basis for withholding “certain responsive documents.” Id. at ¶ 13. Lay claimed he was entitled to withhold the documents under the Fifth Amendment and the act of production doctrine set forth in United States v. Hubbell, 530 U.S. 27 (2000). Id. Lay made the same Fifth Amendment claim in subsequent letters to the SEC. Id. at ¶¶ 14, 19, 24.

During the course of several telephone calls in January 2003, Lay’s attorneys informed the SEC that the documents being withheld by Lay on Fifth Amendment grounds were comprised of approximately two files of papers, and included copies of Enron memoranda and other documents bearing Lay’s handwriting and annotations, as well as copies of letters, position papers, and speeches in draft form. Lay’s attorneys also stated that in determining, at least in part, whether such materials should be withheld, an assessment was made to determine whether the documents reflected Lay’s “thought processes.” Id. at ¶ 20. The SEC informed Lay’s attorneys that it disagreed with Lay’s claim of Fifth Amendment protection. ¶ 23. Lay continues to withhold documents responsive to the SEC’s subpoena. Id. at ¶ 25.

On September 10, 2003, counsel for the SEC informed Lay’s counsel of its plan to file a subpoena enforcement action. Lay’s counsel stated that Lay would not produce records unless the SEC agreed that production of the records did not constitute a waiver of Lay’s Fifth Amendment rights. Ex. 1. The SEC informed Lay’s counsel that since it believed the documents were corporate records to which no Fifth Amendment protection applied, production of such corporate records would not constitute a waiver. Ex. 2. In response, Lay’s counsel asked the SEC to agree that if Lay produced personal records, that production of such records would not

constitute a waiver of any Fifth Amendment rights Lay may have. Ex. 3. The SEC declined to agree to this condition with respect to personal records. Ex. 4. The SEC proposed to Lay's counsel that Lay produce corporate records, that production of personal records would be without conditions and at Lay's own peril, and that if Lay desired to continue to assert the Fifth Amendment with respect to any personal records that he provide a privilege log to the SEC. *Id.* Lay has refused to produce any records. He has refused to produce corporate records and has stated he will only provide a log describing all the documents withheld "generally by category." Ex. 5.

### **III. ARGUMENT**

#### **A. This Court Has Jurisdiction, and Venue Properly Lies in this District**

When Congress created the SEC and assigned to it the responsibility of protecting investors and ensuring the fairness and honesty of the nation's capital markets, Congress gave the SEC broad authority to conduct investigations and to demand production of evidence relevant to such investigations. *See* Section 20(a) of the Securities Act of 1933, 15 U.S.C. § 77t(a); Section 21(a) and (b) of the Exchange Act, 15 U.S.C. § 78u(a) and (b); *Jerry T. O'Brien*, 467 U.S. 735 (1984); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1379 (D.C. Cir.) (*en banc*), *cert. denied*, 449 U.S. 993 (1980); *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979). The SEC and its officers may, among other things, administer oaths, and subpoena witnesses and compel their testimony and attendance. Section 20(a) of the Securities Act, 15 U.S.C. § 77t(a); Section 21(b) of the Exchange Act, 15 U.S.C. § 78u(b).

When a subpoenaed party, such as Lay, refuses to comply with a subpoena issued by the SEC, the SEC has the authority to seek a court order compelling such compliance. *See* Section

22(b) of the Securities Act, 15 U.S.C. § 77v(b); Section 21(c) of the Exchange Act, 15 U.S.C. § 78u(c). Congress has explicitly conferred jurisdiction on the United States District Courts, upon application by the SEC, to enforce the subpoena. Id. Accordingly, this Court has jurisdiction over the subject matter of this Application.

Venue is proper in this district because a SEC subpoena enforcement action may be brought in any United States District Court “within the jurisdiction of which such investigation or proceeding is carried on.” Section 21(c) of the Exchange Act, 15 U.S.C. § 78u(c). Here, the investigation is being managed by the SEC’s headquarters staff in Washington, D.C., and the subpoena was issued in and made returnable to Washington, D.C. Therefore, venue appropriately lies in this district. See FEC v. Comm. To Elect Lyndon La Rouche, 613 F.2d 849, 853-862 (D.C. Cir. 1979) (FEC subpoena), cert. denied, 444 U.S. 1074 (1980).

**B. The SEC's Subpoena Satisfies All Requirements for Enforcement**

Section 21(c) of the Exchange Act, 15 U.S.C. § 78u(c), authorizes this Court to order enforcement of an SEC subpoena. As this Court has previously held, the "order to show cause" procedure "is appropriate for a subpoena enforcement proceeding." United States v. Stoltz, 525 F. Supp. 617, 620 (D.D.C. 1981) (Department of Energy subpoena); see Committee to Elect Lyndon La Rouche, 613 F.2d at 853-62 (affirming district court's enforcement of FEC subpoenas through order to show cause proceeding); see Jerry T. O'Brien, Inc., 467 U.S. at 750-751 (1984) (noting importance that investigations into violations of federal securities laws be conducted in an expeditious manner).

To enforce an administrative subpoena, a court must be satisfied that: (1) the inquiry is being conducted for a legitimate purpose, within the power of Congress to command; (2) the

subpoena was issued in accordance with the required administrative procedures; and (3) the information sought is relevant to that legitimate purpose. SEC v. Howatt, 525 F.2d 226, 229 (1st Cir. 1975); see also Arthur Young, 584 F.2d at 1024; SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1056 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974). Once these threshold criteria are met, the burden shifts to the opposing party to establish that the subpoena is unreasonable. Brigadoon Scotch, 480 F.2d at 1056; Arthur Young, 584 F.2d at 1034 n.139. When the SEC's inquiry is legally authorized and the information sought is relevant to the inquiry, the burden of showing unreasonableness "is not easily met." Brigadoon Scotch, 480 F.2d at 1056.

**1. The SEC's purpose is lawful**

As stated above, the SEC's investigation is being conducted pursuant to a Formal Order issued by the SEC in accord with Sections 21(a) and 21(b) of the Exchange Act, 15 U.S.C. § 78u(a)-(b). These provisions authorize the SEC to conduct investigations in its discretion to determine whether any provisions of the Securities Act or the Exchange Act, or the rules or regulations promulgated thereunder, "have been or are about to be violated." 15 U.S.C. § 77t(a); 15 U.S.C. § 78u(a).

The Formal Order authorizes the designated officers of the SEC to investigate, among other things, whether violations of the anti-fraud provisions of the federal securities laws have occurred.<sup>3</sup> The SEC possesses regulatory authority over the anti-fraud provisions and has a Congressional mandate to enforce them. See, e.g., 15 U.S.C. § 77t(b) and 15 U.S.C. § 78u(d)

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<sup>3</sup> Exchange Act, Section 10(b), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.



(authorizing the SEC to commence injunctive actions in federal district court).

Moreover, the SEC need not show "probable" or "reasonable" cause to conduct an investigation. Howatt, 525 F.2d at 229; Brigadoon Scotch, 480 F.2d at 1053. In United States v. Morton Salt Co., 338 U.S. 632 (1950), the Supreme Court compared an agency inquiry to that of a grand jury, which can investigate on mere suspicion that the law has been violated, without a showing of probable cause:

Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise the powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too may take steps to inform itself as to whether there is probable violation of the law.

Id. at 642. The SEC performs a function similar to that of a grand jury, and the scope of its inquiries should not be limited narrowly by questions or forecasts of the probable results of its investigations. See United States v. Bisceglia, 420 U.S. 141, 147-48 (1975) (citing Blair v. United States, 250 U.S. 273, 282 (1919)); Arthur Young, 584 F.2d at 1023-24; Brigadoon Scotch, 480 F.2d at 1052-53. See also SEC v. First Security Bank of Utah, 447 F.2d 166, 168 (10<sup>th</sup> Cir. 1971), cert. denied, 404 U.S. 1038 (1972); Penfield Co. v. SEC, 330 U.S. 585 (1947).

In this matter, the SEC seeks to investigate the conduct and financial affairs of Enron, and persons and entities associated with Enron, during the time period at issue. Lay was the Chairman and CEO of Enron during a time period when Enron and its employees engaged in

fraud.<sup>4</sup> The SEC's purpose in obtaining documents from Lay therefore is undoubtedly lawful and within the parameters of the authorizing statutes and case law.

## **2. The SEC has satisfied all administrative requirements**

The SEC issued the subpoena at issue here in accord with all applicable administrative requirements. Section 19(b) of the Securities Act, 15 U.S.C. § 77s(b), and Section 21(b) of the Exchange Act, 15 U.S.C. § 78u(b), provide that the SEC may, in the course of conducting investigations, designate officers and empower them, among other things, to subpoena witnesses. Pursuant to Rule 8 of the SEC's Rules Relating to Investigations, and Rule 14(b)(3) of its Rules of Practice, an officer of the SEC may serve an investigative subpoena by several methods, including by any method conveying actual notice. 17 C.F.R. §§ 203.8. In this instance, a staff attorney of the Division of Enforcement, designated in a Formal Order as an officer of the SEC, issued the subpoena to Lay. Kutchey Dec. at ¶ 7. While receipt of the subpoena by Lay is not in controversy here, the subpoena was validly issued and served in compliance with applicable administrative procedures.

## **3. The SEC's subpoena seeks relevant information**

The Court of Appeals for the District of Columbia Circuit, in addressing the issue of relevance in a subpoena enforcement action, has held that "the test is relevance to the specific purpose, and the purpose is determined by the investigators." Arthur Young, 584 F.2d at 1031.

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<sup>4</sup> The SEC has alleged violations of the antifraud and other provisions of the federal securities laws relating to Enron in several cases. SEC v. Howard, et al., H-03-0905 (S.D. Tex.); SEC v. Merrill Lynch, et al., H-03-0946 (S.D. Tex.); SEC v. Fastow, H-03-3666 (S.D. Tex.); SEC v. Kopper, et al., H-02-3127 (S.D. Tex.); SEC v. J.P. Morgan Chase & Co., H-03-2877 (S.D. Tex). Further, Lay is a defendant in several Enron related actions brought by shareholders and the Department of Labor.

Moreover, information is reasonably relevant to an investigation when “not plainly incompetent or irrelevant to any lawful purpose.” *Id.* at 1029 (quoting Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943)).<sup>5</sup> The D.C. Circuit has also emphasized that “law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.” Arthur Young, 584 F.2d at 1030 (quoting Morton Salt, 338 U.S. at 652).

In this case, the information sought from Lay falls well within the applicable standard. The SEC seeks to learn, among other things, whether Lay and others have violated the anti-fraud and other provisions of the federal securities laws. As Enron’s Chairman and CEO, Lay occupied important positions within Enron and has knowledge about matters under investigation. For example, Lay signed periodic filings and registration statements with the SEC on behalf of Enron.

**C. Lay’s Offer To Produce The Records Subject To Conditions Is Unacceptable**

The SEC is entitled to subpoena and review records held by Lay without conditions attached to their production and use. Lay has stated that he will not produce the documents to the SEC unless the SEC agrees that production does not constitute a waiver of any Fifth Amendment rights he may have. Such a condition is unacceptable because, with respect to corporate records, Lay has no Fifth Amendment rights. Production of corporate records would not constitute a waiver since no Fifth Amendment rights exist with respect to such records.

If any of the records withheld are personal records, the SEC will not agree that production of such records does not constitute a waiver of any Fifth Amendment rights Lay may have. Lay

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<sup>5</sup> See also Moore Business Forms, Inc. v. FTC, 307 F.2d 188, 189 (D.C. Cir. 1962); SEC v. Gulf Resources, Inc., [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,174 (D.D.C. April 15, 1983) (citing Arthur Young, 584 F.2d at 1024).

cannot have it both ways; he cannot produce records to the SEC that he believes may be incriminating and then claim Fifth Amendment protection to prevent their use by the government. Further, if the SEC agreed that the production of personal records did not constitute a waiver of his Fifth Amendment rights, and Lay was later the subject of an SEC complaint or criminal charges brought by the Department of Justice, Lay could argue such records were used, or furnished a link in a chain of evidence, by the government in violation of his Fifth Amendment rights and seek to have charges dismissed.

As a means to avoid court intervention, the SEC informed Lay that he should produce corporate records, and identify personal records on a privilege log if he wished to continue to withhold personal records. Lay has refused to produce corporate records. Instead, Lay has proposed putting all documents on a general categorical log. The SEC is entitled to preserve its rights and to demand production of subpoenaed records without conditions attached by Lay.

**D. Lay's Fifth Amendment Claim Is Without Merit**

**1. Enron Corporate Records Held By Lay Are Not Protected**

The documents subpoenaed from Lay relate to Enron. Lay's description of documents he has withheld strongly suggests these are corporate records. According to Lay's counsel, he is withholding copies of Enron memoranda and other documents bearing Lay's handwriting and annotations, as well as copies of letters, position papers, and speeches in draft form. The documents were generated during Lay's tenure at Enron, and subpoenaed before he left Enron. These type of documents, to the extent they reflect the activities of Lay during his tenure as Chairman and CEO of Enron, are corporate records.<sup>6</sup>

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<sup>6</sup> As an initial matter, there is no question that the contents of the records are not privileged. Braswell v. United States, 487 U.S. 99, 102, 108 S.Ct. 2284, 2287 (1988). Because the records were prepared prior to issuance of the subpoena they cannot be said to contain

As the Supreme Court has repeatedly held, 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 prove personally incriminating. Braswell, 487 U.S. at 111-112, 108 S.Ct. at 2291-92; Fisher, 425 U.S. at 411, 96 S.Ct. at 1581; Bellis v. United States, 417 U.S. 85, 88, 94 S.Ct. 2179, 2183 (1974); United States v. White, 322 U.S. 694, 699, 64 S.Ct. 1248, 1251 (1944); Wheeler v. United States, 226 U.S. 478, 489-490, 33 S.Ct. 158, 162 (1913); Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538 (1911); Dreier v. United States, 221 U.S. 394, 400, 31 S.Ct. 550 (1911). This principle of law is well settled and based on sound reasoning. Collective entities are not protected by the Fifth Amendment. These artificial entities may act only through their agents, and when such agents hold corporate records they do so in a representative rather than a personal capacity. When corporate records are subpoenaed, the custodian's act of production is not deemed a personal act, but rather the act of the corporation. To permit an individual holding corporate records to withhold them based on his Fifth Amendment privilege would be tantamount to a claim of privilege by the corporation, which it does not have. Braswell, 487 U.S. at 109-110, 108 S.Ct. at 2291.

Following this rationale, the Court in Braswell rejected defendant's argument that his act of production of corporate records would incriminate him in violation of the Fifth Amendment. As the Court emphasized, "the official records and documents of the organization that are held by [its officers] in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." Id. (quoting White, 322 U.S. at 699, 64 S.Ct. at 1251). The Court

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compelled testimonial evidence. Fisher v. United States, 425 U.S. 391, 409-410, 96 S.Ct. 1569, 1580-1581 (1976); Hubbell, 530 U.S. at 35-36, 120 S.Ct. at 2043. The only question is whether Lay's act of producing corporate records implicates the Fifth Amendment.

in Braswell also noted that recognizing a Fifth Amendment privilege on behalf of one holding the records of a collective entity “would have a detrimental impact on the Government’s efforts to prosecute ‘white-collar crime,’ one of the most serious problems confronting law enforcement authorities.” 487 U.S. at 115, 108 S.Ct. at 2294.

The same principles apply to corporate records in the possession of a person who is no longer employed by the corporation. Bellis v. United States, 417 U.S. at 88 and 96 n.3, 94 S.Ct. at 2183 and 2187 n.3; In re Grand Jury Subpoena, 957 F.2d 807, 812 (11<sup>th</sup> Cir. 1992) (citing Bellis, 417 U.S. at 97-99 and Wheeler, 226 U.S. at 489, 33 S.Ct. at 162; In re Sealed Case (Government Records), 950 F.2d 736, 740 (D.C. Cir. 1991) (records in possession of former government official); United States v. Dean, 989 F.2d 1205 (D.C. Cir. 1993) (same); Gloves, Inc. v. Berger, 198 F.R.D. 6 (D. Mass. 2000). As the Court stated in In re Grand Jury Subpoena:

We hold that a custodian of corporate records continues to hold them in a representative capacity even after his employment is terminated. It is the immutable character of the records as corporate which requires their production and which dictates that they are held in a representative capacity. Thus, the production of such documents is required regardless of whether the custodian is still associated with the corporation or other collective entity.

957 F.2d at 812. Similarly, the D.C. Circuit made clear in Government Records and Dean that a former government official could not withhold government records in her possession based on the Fifth Amendment. Following Braswell, the court stated that the records did not belong to the individual, but to the government agency, and the individual’s “production thus falls outside the Fifth Amendment privilege, which is a personal one.” Government Records, 950 F.2d at 740; Dean, 989 F.2d at 1207-08.<sup>7</sup> Based on the foregoing, it is irrelevant that Lay is no longer

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<sup>7</sup> These principles were applied to the parties even though they were subpoenaed *after* their employment ended with the collective entities. This case law applies with even stronger force to the present case, because Lay was subpoenaed while he was still employed by Enron.

employed by Enron. Indeed, Lay's employment agreement dictates that documents relating to Enron are company property and should have been returned to the company upon Lay's resignation. Kutchey Dec. at ¶ 26. Lay holds corporate records of Enron in a representative capacity and cannot assert the Fifth Amendment with respect to such records.<sup>8</sup>

## **2. The Act Of Production Doctrine Set Forth In Hubbell Does Not Apply To Corporate Records**

Lay contends that the act of producing the documents would entail testimonial self-incrimination, citing Hubbell, in which the Supreme Court recognized an act of production privilege with respect to personal records. However, as set forth in the cases cited above, the act of production doctrine does not apply to corporate records, even if production of the records would incriminate Lay personally. See also SEC v. Dunlap, 253 F.3d 768 (4<sup>th</sup> Cir. 2001) (in post-Hubbell decision, court followed Braswell and held that broker's act of production of brokerage records, as opposed to his own personal records, was not protected by the Fifth Amendment); United States v. Wujkowski, 929 F.2d 981, 984 (4<sup>th</sup> Cir. 1991) ("the crucial distinction for act of production purposes is between personal documents and corporate documents held by agents in a representative capacity"); United States v. Kennedy, 122

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<sup>8</sup> Moreover, Lay cannot selectively invoke the Fifth Amendment. Before Lay first raised the Fifth Amendment he had already produced thousands of pages of documents, including documents referring to personal matters and documents with his handwriting. When Lay later invoked the Fifth Amendment, he did so selectively, withholding some documents and producing others. Under these facts, Lay has waived his Fifth Amendment rights. In re Mudd, 95 B.R. 426, 432 (Bankr. N.D. Tex. 1989) (court held party had waived the Fifth Amendment by producing many of the same type of documents as those withheld, stating, "the witness cannot claim the Fifth Amendment privilege against self-incrimination after he has produced only a sufficient number of documents to support his side of the story; he must claim the privilege from the outset or not claim it at all"); see also Nutramax Laboratories, Inc. v. Twin Laboratories, Inc., 32 F.Supp.2d 331, 334 (D. Md. 1999) (court held that in the context of testimony, a witness cannot testify on a subject and later assert the Fifth Amendment in refusing to answer questions on the same subject, and stated succinctly: "A witness cannot have it both ways").

F.Supp.2d 1195, 1199 (D. Ok. 2000) (following Braswell and explicitly holding that Hubbell did not apply to trust documents held by the trustee); United States v. B & D Vending, 2003 U.S. Dist. LEXIS 12033 and 2003 U.S. Dist. LEXIS 13268 (D. Ky. 2003) (court held that the act of production doctrine set forth in Hubbell did not apply to corporate records in possession of an individual); Berger, 198 F.R.D. at 9-10 (in post-Hubbell decision, court followed Braswell and held that former employees could not withhold corporate records based on the act of production doctrine). Thus, Lay's invocation of Hubbell with respect to the corporate records he holds is without merit.<sup>9</sup>

**E. The Court Should Review The Documents *In Camera***

Under similar circumstances, courts have reviewed the withheld documents *in camera* to determine whether they are entitled to any protection under the Fifth Amendment. Wujkowski, 929 F.2d at 985; Berger, 198 F.R.D. at 11 n.6; Dean, 989 F.2d at 1206; see also Government Records, 950 F.2d at 738-739 (“We see no other way than actual inspection, however, for the trial court reliably to determine the nature of particular documents. . .”). In this case, the Court should require Lay to produce to it the withheld documents for an *in camera* review. This review should be conducted for the purpose of determining whether the documents are corporate records outside the protection of the Fifth Amendment or personal records that may be subject to the act of production doctrine set forth in Hubbell. See Government Records, 950 F.2d at 740-741

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<sup>9</sup> Even if the records were personal, if the act of producing the documents would not serve to prove their existence, location, or authenticity, production would not violate Lay's Fifth Amendment privilege. Fisher v. United States, 425 U.S. at 411, 96 S.Ct. at 1581; United States v. Teeple, 286 F.3d 1047, 1051 (8<sup>th</sup> Cir. 2002). Here, Lay has admitted to the existence, possession, and location of the documents. The documents can be introduced into evidence and authenticated without reference to Lay's act of production by the use of corporate custodians, and Lay's handwriting can be identified by witnesses familiar with Lay's handwriting. Thus, even if the records were personal, Lay's act of production would not violate the Fifth Amendment. Id.



(discussing functional test employed by courts). Corporate records must be produced. Personal records, if any, must be produced if Lay cannot demonstrate the act of production doctrine applies to such records.

#### IV. CONCLUSION

For the reasons stated above and in the SEC's Application, the SEC requests that the Court grant the Application and enter orders, in the form submitted, requiring Lay to show cause why he should not be ordered to produce the withheld documents to the SEC, for an *in camera* review of the documents, and requiring Lay to obey the subpoena and produce the requested documents.

Dated: September <sup>29</sup>, 2003

Respectfully submitted,



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Luis R. Mejia (D.C. Bar #417043)  
David P. Bloch (D.C. Bar #445990)  
Attorneys for Applicant  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-0911  
(202) 942-4744  
(202) 942-9569 (Fax)

Of Counsel:  
Phil Gross  
Richard J. Kutchev

**CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 2003, a copy of the attached:

SEC's Memorandum in Support of its Application for Orders to Show Cause, for an *In Camera* Review, and Requiring Obedience to Subpoena

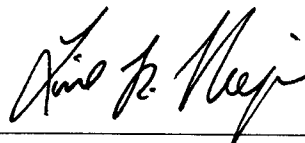
was served upon the following parties or their counsel of record:

**By Hand**

Earl J. Silbert  
Piper Rudnick  
1200 Nineteenth Street, N.W.  
Washington, D.C. 20036-2412  
(202) 861-6250  
(202) 223-2085 (Fax)

**By FedEx**

Bruce W. Collins  
Carrington Coleman Sloman & Blumenthal L.L.P.  
200 Crescent Court, Suite 1500  
Dallas, Texas 75201-1848  
(214) 855-3018  
(214) 758-3718 (Fax)



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Luis R. Mejia