

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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**DECLARATION OF RICHARD J. KUTCHEY IN SUPPORT OF  
APPLICATION OF THE SECURITIES AND EXCHANGE COMMISSION  
FOR ORDERS TO SHOW CAUSE, FOR AN *IN CAMERA* REVIEW, AND  
REQUIRING OBEDIENCE TO SUBPOENA**

I, Richard J. Kutchey, 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 Maryland. I am employed as a staff attorney 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 Orders to Show Cause, for an *In Camera* Review, and Requiring Obedience to Subpoena directed to Kenneth L. Lay, and is based on my direct participation in the investigation captioned In the Matter of Enron Corp.

**Respondent**

3. Kenneth L. Lay (“Lay”) is a resident of Houston, Texas. At all times relevant to

the investigation, Lay was Chairman and/or Chief Executive Officer (“CEO”) of Enron Corp. (“Enron”). On January 23, 2002, Lay resigned as Chairman and CEO of Enron.

### **The Commission’s Investigation**

4. On October 30, 2001, pursuant to Sections 21(a) and 21(b) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78u(a)-(b), the Commission 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”).

5. In the Formal Order, the Commission directed that an investigation be conducted to determine, among other things, whether Enron, and certain persons and entities associated with Enron, may have engaged in acts, practices or courses of business in violation of the antifraud provisions of the federal securities laws, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, and other provisions of the federal securities laws, Sections 13(a), 13(b)(2)(A) and (B), and 13(b)(5) of the Exchange Act, 15 U.S.C. §§ 78m(a), 78m(b)(2)(A) and (B), and 78m(b)(5), and Rules 12b-20, 13a-1, and 13a-13 thereunder, 17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13a-13.

6. The Commission’s staff is investigating, among other things, whether certain persons or entities associated with Enron violated the antifraud and other provisions of the federal securities laws, including sales of Enron securities by Enron executives and disclosures relating to such sales. The Commission’s staff believes that Lay has personal knowledge of several matters under investigation.

### **Issuance of Subpoena and Noncompliance**

7. On January 2, 2002, the SEC staff issued and duly served a subpoena *duces tecum* (“the subpoena”) requiring Lay to produce certain documents by January 9, 2002 and to appear for testimony on January 23, 2002. See Lay Subpoena (Exhibit A). The cover letter to the subpoena requested that Lay, among other things, specify 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.

8. On or before January 9, 2002, the SEC staff granted Lay permission to produce materials responsive to the subpoena beyond the January 9, 2002 deadline on a rolling basis.

9. On January 16, 2002, Lay produced several documents (about 3,700 pages) in response to the subpoena. Lay also produced several documents (about 450 pages) obtained from the Enron Special Investigative Committee of the Enron Board of Directors. Included in this production were, among other things, documents containing Lay’s handwriting relating to meetings and other activities and included Lay’s pocket calendars reflecting personal matters, such as social engagements, golf outings and family events while he was Chairman and/or CEO of Enron. Also included in this production were various Lay bank account statements.

10. On January 22, 2002, Lay produced to the SEC staff additional documents (about 7,000 pages) in response to the subpoena. Among the documents produced by Lay were various brokerage account statements. In a cover letter to that production, Lay’s counsel indicated that “three documents which may be responsive to the staff’s subpoena” were being withheld from

production “due to the possibility that they are subject to the attorney client privilege or work product doctrine.” See Letter from Counsel for Lay to Douglas B. Paul, dated January 22, 2002 (Exhibit B). Lay’s counsel also indicated that “I am informed that there is a file of Mr. Lay’s speeches maintained at Enron. These documents are not included in Mr. Lay’s response to the subpoena *duces tecum* because they are company documents.” *Id.*

11. On January 23, 2002, Lay resigned as Chairman and CEO of Enron.

12. On February 13, 2002, Lay appeared pursuant to the subpoena for testimony before the SEC staff with his attorneys. Lay asserted his Fifth Amendment right against self-incrimination in response to questions asked by the SEC staff.

13. On February 21, 2002, Lay produced to the SEC staff an additional 435 pages of documents in response to the subpoena. In a cover letter to that production, Lay’s counsel indicated that “certain responsive documents” were being withheld “in accordance with Mr. Lay’s assertion of his rights under the Fifth Amendment of the United States Constitution and *United States v. Hubbell*, 530 U.S. 27 (2000).” See Letter from Counsel for Lay to Douglas B. Paul, dated February 21, 2002 (Exhibit C).

14. On June 4, 2002, Lay produced to the SEC staff an additional 21 pages of documents in response to the subpoena. In a cover letter to that production, Lay’s counsel indicated that “certain responsive documents” were still being withheld “in accordance with Mr. Lay’s assertion of his rights under the Fifth Amendment of the United States Constitution and *United States v. Hubbell*, 530 U.S. 27 (2000).” See Letter from Counsel for Lay to Douglas B. Paul, dated June 4, 2002 (Exhibit D).

15. On November 6, 2002, the SEC staff requested Lay's counsel to confirm that "all documents required to be produced pursuant to the subpoena ha[d] been produced." *See* Letter from Phil Gross to Counsel for Lay, dated November 6, 2002 (Exhibit E).

16. On November 21, 2002, Lay's counsel responded to the above letter by sending the SEC a letter seeking clarification as to the documents required to be produced by Lay and whether certain types of documents were required to be produced. *See* Letter from Counsel for Lay to Phil Gross, dated November 21, 2002 (Exhibit F).

17. On December 10, 2002, the SEC staff responded to the above letter by sending Lay's counsel a letter seeking to accommodate Lay's concerns by limiting production to those "documents created on or before November 19, 2001." *See* Letter from Phil Gross to Counsel for Lay, dated December 10, 2002 (Exhibit G). The SEC staff also limited, "for the time being," production of those "documents concerning (1) transactions which resulted in, or were the subject of, Enron's October 16, 2001 third quarter release; (2) Enron's November 8, 2001 restatement of prior year financial statements; (3) Enron's third quarter 2001 financial statements filed on November 19, 2001; (4) Enron's representation that its financial statements and audit reports for specified prior fiscal periods could not be relied upon; and (5) the use of Mr. Lay's line of credit, sales of shares to Enron to repay such extensions of credit, and information concerning potential public disclosure thereof." *Id.* The SEC staff letter also requested that Lay submit a privilege log "containing specified identifying information." *Id.*

18. On December 20, 2002, Lay's counsel responded to the above letter by sending

the SEC staff a letter inquiring whether the phrase ““use of Mr. Lay’s line of credit”” in the SEC staff’s December 10, 2002 letter “refers to documents reflecting or referring to Mr. Lay’s requests to obtain advances under the line, and the reasons for those requests.” See Letter from Counsel for Lay to Phil Gross, dated December 20, 2002 (Exhibit H). Lay’s counsel also proposed to make available for inspection all of Lay’s documents gathered in compliance with the subpoena “including those previously produced” to the SEC staff at the law firm of Lay’s attorneys in Dallas, TX. *Id.*

19. On January 16, 2003, the SEC staff reviewed the documents made available for inspection at the law firm of Lay’s attorneys. At that time, Lay’s counsel provided the SEC staff with a privilege log describing eight documents withheld from production based on the attorney client privilege. See Letter from Counsel for Lay to Richard Kutchev, dated January 16, 2003 (Exhibit I). In a cover letter to the privilege log, Lay’s counsel stated that certain documents not included in the privilege log were being withheld “on the basis of Mr. Lay’s rights under the Fifth Amendment of the United States Constitution and *United States v. Hubbell*, 530 U.S. 27 (2000).” *Id.*

20. During several telephone calls in January 2003, Lay’s attorneys stated that the documents being withheld by Lay on Fifth Amendment grounds were comprised of approximately two redweld folders that include copies of Enron memoranda and other documents bearing Mr. Lay’s handwriting and annotations, as well as copies of letters, position papers, and speeches in draft form. See Letter from Phil Gross to Counsel for Lay, dated February 27, 2003 (Exhibit J). Lay’s attorneys also stated that in determining whether such

materials were withheld, an assessment was made to determine whether the documents reflected Lay's "thought processes." *Id.*

21. On January 27, 2003, pursuant to a request by the SEC staff, Lay's attorneys produced copies of the documents (about 23,000 pages) made available to the SEC staff for inspection on January 16, 2003. Included in the production were a few bank statements for a personal account of Lay's wife, Linda Lay, that had not been made available for inspection on January 16, 2003.

22. On February 17, 2003, Lay's counsel sent the SEC staff a letter indicating, among other things, that "after a diligent and thorough search, we are not aware of any further documents within Mr. Lay's possession, custody or control required to be produced pursuant to the [s]ubpoena." *See* Letter from Counsel for Lay to Richard Kutchey, dated February 17, 2003 (Exhibit K).

23. On February 27, 2003, the SEC staff sent Lay's counsel a letter with respect to the documents withheld by Lay's attorneys based on Lay's asserted Fifth Amendment rights. *See* Letter from Phil Gross to Counsel for Lay, dated February 27, 2003 (Exhibit J). In that letter, the SEC staff indicated that it did not agree that the documents were being properly withheld. *Id.*

24. On March 4, 2003, Lay's counsel responded to the above letter by sending the SEC staff a letter indicating, among other things, that under *United States v. Hubbell* and other federal precedent, that the documents in question were being properly withheld in accordance with Lay's Fifth Amendment rights. *See* Letter from Counsel for Lay to Phil Gross, dated March 4, 2003 (Exhibit L).

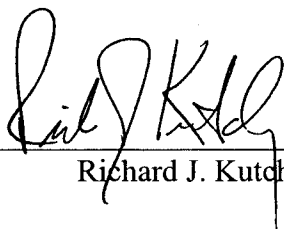
25. Lay continues to withhold documents responsive to the SEC's subpoena.

26. Lay's Employment Agreement and Enron's Code of Ethics (collectively "Agreements") provide, among other things, that all documents, memoranda, notes, records, files, correspondence, and all other writings relating to Enron's business that were "made, developed, or acquired" during employee's employment "are and shall be the sole and exclusive property" of Enron. The Agreements further provide that "[u]pon termination of Employee's employment by [Enron], for any reason, Employee promptly shall deliver the same, and all copies thereof, to [Enron]." See Article 4 of the Employment Agreement between Lay and Enron made effective December 9, 1996 and related Amendments (Exhibit M); Enron's Code of Ethics dated July, 2000, pages 14 and 22 (Exhibit N).

27. At relevant times, Enron published and filed with the Commission annual proxy statements in addition to annual, quarterly and other reports, as well as registration statements, which contained, among other things, Enron's consolidated financial statements. Certain of these reports and registration statements were reviewed and/or signed by Lay.

28. At relevant times, Lay signed and filed with the Commission reports of changes in his beneficial ownership of Enron common stock.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 26, 2003.

  
Richard J. Kutchey



**CERTIFICATE OF SERVICE**

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

Declaration of Richard J. Kutchey in Support of Application of the Securities and Exchange Commission 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 via:

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

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Richard J. Kutchey