

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2009

5 (Argued: November 30, 2009 Decided: February 1, 2010)

6 Docket No. 09-3561-cv

7 -----X
8 IN RE GRAND JURY SUBPOENA ISSUED JUNE 18, 2009

9
10 ACCOUNT SERVICES CORPORATION [ASC], KJB FINANCIAL CORPORATION
11 [KJB],

12
13 Appellants,

14
15 - v. -

16
17 UNITED STATES OF AMERICA,

18
19 Appellee.*

20 -----X
21
22 Before: WALKER, McLAUGHLIN, RAGGI, Circuit Judges.

23
24 Appeal from an order of the United States District Court for
25 the Southern District of New York (Sullivan, J.) holding
26 Appellants in contempt for failing to comply with a subpoena
27 duces tecum. This appeal requires us to determine whether a
28 corporation with a sole shareholder, officer, and employee may
29 refuse to comply with a subpoena demanding production of

* At oral argument, the parties agreed that the case, which had formerly been sealed, should be unsealed. The Clerk of the Court is directed to amend the official caption as set forth above.

1 corporate records under the Fifth Amendment's "act of production"
2 privilege. We find it may not.

3 AFFIRMED.

4
5 JOHN V. DONNELLY III, Cozen O'Connor,
6 Philadelphia, Pennsylvania (L. Barrett
7 Boss, Cozen O'Connor, Washington, D.C.,
8 on the brief), for Appellants.

9
10 ARLO DEVLIN-BROWN, Assistant United
11 States Attorney (Michael A. Levy,
12 Assistant United States Attorney, on the
13 brief), for Preet Bharara, United States
14 Attorney for the Southern District of
15 New York, for Appellee.

16 PER CURIAM:

17 Account Services Corporation and KJB Financial Corporation
18 (collectively, "the Companies") appeal an August 17, 2009, order
19 of the United States District Court for the Southern District of
20 New York (Sullivan, J.) holding them in contempt for failing to
21 comply with a subpoena for corporate records. The Companies -
22 which are wholly owned by Douglas Rennick, their sole
23 shareholder, officer, and employee - argue that they may resist
24 the subpoena on Fifth Amendment grounds since Rennick is the only
25 person capable of producing the records and his act of production
26 would be testimonial and potentially self-incriminating.
27 Although the long-established "collective entity rule" prevents
28 corporations from availing themselves of the Fifth Amendment
29 privilege, the Companies contend that the Supreme Court's
30 decision in Braswell v. United States, 487 U.S. 99 (1988),

1 compels us to carve out an exception for one-person corporations.
2 We disagree and affirm the district court's contempt order.

3 **BACKGROUND**

4 On June 18, 2009, a grand jury sitting in the Southern
5 District of New York issued a subpoena duces tecum to Account
6 Services Corporation in connection with an investigation of
7 alleged bank fraud, illegal gambling, and money laundering. The
8 Government and the Companies agreed to construe the subpoena as
9 being directed not just to Account Services Corporation, but to
10 both of the Companies. On July 10, 2009, Rennick moved to quash
11 the subpoena, arguing that his personal Fifth Amendment rights
12 permitted the Companies to resist the subpoena since he was the
13 only individual capable of producing the requested corporate
14 records and the act of production would be testimonial and
15 potentially self-incriminating. Judge Swain, sitting in the
16 Southern District's emergency part, denied the motion. In re
17 Grand Jury Subpoena Issued June 18, 2009, No. M11-189, 2009 U.S.
18 Dist. LEXIS 71610 (S.D.N.Y. Aug. 4, 2009).

19 On August 5, 2009, Rennick was indicted on charges of
20 conspiracy, bank fraud, illegal gambling, and money laundering.
21 Subsequently, the Companies refused to comply with the subpoena,
22 leading Judge Sullivan, who was then sitting in the emergency
23 part, to hold them in contempt. In re Grand Jury Subpoena Issued
24 June 18, 2009, No. M11-189 (S.D.N.Y. Aug. 17, 2009).

1 The Companies now appeal.

2 **DISCUSSION**

3 We review a finding of contempt under an abuse of discretion
4 standard that is "more rigorous" than usual. EEOC v. Local 638,
5 81 F.3d 1162, 1171 (2d Cir. 1996). Abuse of discretion review
6 "incorporates, among other things, de novo review [of the]
7 district court['s] rulings of law." United States v. Hasan, 586
8 F.3d 161, 168 (2d Cir. 2009).

9 The Fifth Amendment guarantees that no person "shall be
10 compelled in any criminal case to be a witness against himself."
11 U.S. Const. amend. V. This text "limits the relevant category of
12 compelled incriminating communications to those that are
13 'testimonial' in character." United States v. Hubbell, 530 U.S.
14 27, 34 (2000). Because the act of producing documents can be
15 both incriminating and testimonial - such as when it confirms the
16 documents' existence, possession, or authenticity - a subpoenaed
17 party may be able to resist production on Fifth Amendment
18 grounds. See United States v. Doe, 465 U.S. 605, 612-13 (1984).

19 Under the long-established "collective entity rule,"
20 however, corporations cannot avail themselves of the Fifth
21 Amendment privilege. Braswell, 487 U.S. at 104-10. A corollary
22 of this rule is that the custodian of corporate records, who acts
23 as a representative of the corporation, cannot refuse to produce
24 corporate records on Fifth Amendment grounds. See Bellis v.

1 United States, 417 U.S. 85, 90 (1974). This is true (1) whether
2 the subpoena is directed to the corporation itself or to the
3 custodian in his representative capacity, see id. at 88, and (2)
4 “regardless of how small the corporation may be,” id. at 100.

5 In In re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52
6 (2d Cir. 1985), we considered whether there was an exception to
7 the collective entity rule for a corporation that was
8 “essentially a one-man operation” (nominally, it had three
9 shareholders). Id. at 54. There, the subpoenaed party made much
10 the same argument that the Companies make here: the custodian of
11 corporate records for a one-person corporation could resist the
12 subpoena since he was the only person capable of producing the
13 documents and the act of production would incriminate him
14 personally. We disagreed, stating emphatically, “[t]here simply
15 is no situation in which the fifth amendment would prevent a
16 corporation from producing corporate records, for the corporation
17 itself has no fifth amendment privilege.” Id. at 57. Assuming
18 it remains good law, this case appears to resolve the issue now
19 before us. See United States v. Wilkerson, 361 F.3d 717, 732 (2d
20 Cir. 2004) (“[We] are bound by the decisions of prior panels
21 until such time as they are overruled either by an en banc panel
22 of our Court or by the Supreme Court.”).

23 Since our ruling in In re Two Grand Jury Subpoenae, the
24 Supreme Court decided Braswell v. United States, 487 U.S. 99

1 (1988), a very similar case. There, the targeted corporations
2 were also essentially one-person operations (the owner's wife and
3 mother served alongside the owner as figurehead directors).
4 Although the Supreme Court held that the corporations' custodian
5 of records could not resist a subpoena on Fifth Amendment
6 grounds, it also held that, should the custodian stand trial, the
7 Government could not introduce evidence that the custodian
8 himself produced the records since he acted in his representative
9 and not personal capacity. Id. at 117-18. The Court
10 acknowledged, however, that the jury might permissibly infer that
11 the custodian was the source of the documents based on his
12 position at the corporation. Id. at 118. In a footnote, the
13 Court "[left] open the question" of whether a custodian could
14 resist a subpoena where he "is able to establish . . . that the
15 jury would inevitably conclude that he produced the records,"
16 such as where the corporation was truly a one-person operation.
17 Id. at 118 n.11.

18 We conclude that Braswell did not overrule In re Two Grand
19 Jury Subpoenae. The Supreme Court explicitly withheld decision
20 on the question of whether an actual one-person corporation could
21 resist a subpoena on Fifth Amendment grounds. This non-decision
22 does not call into question our categorical finding that "[t]here
23 simply is no situation" in which a corporation can avail itself
24 of the Fifth Amendment privilege. In re Two Grand Jury

1 Subpoenae, 769 F.2d at 57. We note that we are not the first
2 circuit court to conclude that Braswell did not overrule such
3 precedent. See Amato v. United States, 450 F.3d 46, 51 (1st Cir.
4 2006).

5 Our conclusion that a one-person corporation cannot avail
6 itself of the Fifth Amendment privilege is not only supported by
7 our precedent, but is sensible. First, it prevents the erosion
8 of the “unchallenged rule that the [corporation] itself is not
9 entitled to claim any Fifth Amendment privilege.” Bellis, 417
10 U.S. at 90. Second, it recognizes that the decision to
11 incorporate is freely made and generates benefits, such as
12 limited liability, and burdens, such as the need to respond to
13 subpoenas for corporate records. See Amato, 450 F.3d at 52.
14 Third, it avoids creating a category of organizations effectively
15 immune from regulation by virtue of being beyond the reach of the
16 Government’s subpoena power. See United States v. White, 322
17 U.S. 694, 700 (1944) (“Were the cloak of the [Fifth Amendment]
18 privilege to be thrown around these impersonal [corporate]
19 records and documents, effective enforcement of many federal and
20 state laws would be impossible.”); see also Braswell, 487 U.S. at
21 115 (noting the importance of subpoenaing corporate records in
22 the fight against white collar crime). Every other court to have
23 considered this issue has reached the same conclusion for largely
24 the same reasons. See, e.g., Amato, 450 F.3d 46, 51-53; United

1 States v. Stone, 976 F.2d 909, 912 (4th Cir. 1992); United States
2 v. Milligan, 371 F. Supp. 2d 1127, 1129 (D. Ariz. 2005); SEC v.
3 Bremont, No. 96 Civ. 8771, 1997 U.S. Dist. LEXIS 6125, at *3
4 (S.D.N.Y. May 6, 1997); United States v. Maxey & Co., 956 F.
5 Supp. 823, 829 (N.D. Ind. 1997); United States v. Ranieri, 895 F.
6 Supp. 699, 706-07 (D.N.J. 1995); United States v. Moseley, 832 F.
7 Supp. 56, 58-59 (W.D.N.Y. 1993).

8 Finally, we question the basic premise of the Companies'
9 argument, namely, that a jury would inevitably conclude that
10 Rennick himself produced the documents. Although the inference
11 would be strong, it would not be automatic. For example, the
12 jury might believe the Government obtained the documents entirely
13 on its own, such as by conducting a search. Even if the jurors
14 learned that the Government obtained the documents via a
15 subpoena, they might infer that the corporation engaged a third
16 party to search its records and make the production on its
17 behalf.

18 In sum, the district court did not abuse its discretion in
19 holding the Companies in contempt for failing to comply with the
20 subpoena.

21 We observe in closing that the subpoena in question requires
22 only that the Companies, and not any particular individual,
23 produce the requested documents; how best to accomplish this is a
24 question for the Companies and not this Court.

1

CONCLUSION

2

For the foregoing reasons, we AFFIRM.