APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed: September 22, 2017]

Grand Jury Panel 17-02
(Filed Under Seal)

IN RE TWELVE GRAND JURY SUBPOENAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

[redacted],

Respondent.

ORDER

[redacted] is the target of an ongoing grand jury investigation of potential tax evasion and other federal crimes. [redacted] failed to timely file employment taxes beginning in 2007, and allegedly has concealed his income and assets by transferring them between his various businesses. [redacted] denies that he has evaded paying taxes, but admits his interest in the businesses.

Before the Court is the United States' sealed motion to compel compliance with certain grand jury subpoenas. Doc. 91. The subpoenas seek production of financial records and were issued to the custodian of records for twelve businesses in which [redacted] holds an interest. *Id.*, Exs. 3-14. The motion is fully briefed,

Docs. 73, 86. For reasons stated below, the motion is granted.[1]

I. Background.

The twelve closely held businesses include law firms established by [redacted] and various limited liability companies (LLCs) in which he has an interest. Doc. 91 at 2. [redacted] does not dispute that he is the custodian of records for each of the twelve businesses. Doc. 73 at 10-11. He objects to the grand jury subpoenas on the basis of the Fifth Amendment and attorney-client privileges, and on the ground that the subpoenas are overly broad and burdensome. *Id.* at 10-15.

The government argues that the "collective entity doctrine" precludes assertion of the Fifth Amendment privilege by [redacted], and that the subpoenas, as narrowed, are reasonable in scope and do not implicate the attorney-client privilege. Doc. 73. The Court agrees.

II. The Fifth Amendment Privilege and the Collective Entity Doctrine.

The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "The word 'witness' in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character." *United States v. Hubbell*, 530 U.S. 27, 34 (2000). The so-called "act of production" doctrine recognizes that, although "the Fifth Amendment does not independently proscribe the compelled production of every

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[1] [redacted] request for oral argument is denied because the issues are fully briefed, the Court has reviewed his arguments with care, and oral argument would not aid the Court's decision. *See* LRCiv 7.2(f); Fed, R. Civ. P. 78(b).

sort of incriminating evidence," it does apply "when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408 (1976) (emphasis in original). In this context, the Fifth Amendment prohibits compelled oral testimony and production of private papers by their owners, *see Boyd v. United States*, 116 U.S. 616, 634-35 (1886), including business records of a sole proprietor, *see United States v. Doe*, 465 U.S. 605, 612-14 (1984),

Under the collective entity doctrine, however, corporations and other collective businesses such as LLCs may not invoke the Fifth Amendment privilege against self-incrimination, as the privilege is a personal one enjoyed only by natural individuals. Indeed, the Supreme Court has long held that the collective entity doctrine precludes a custodian of corporate records from relying on the Fifth Amendment to block production of those records. *See Wilson v. United States*, 221 U.S. 361, 382 (1911) (distinguishing *Boyd*, "where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized," and concluding that "the corporation has no privilege to refuse [and] cannot resist production upon the ground of self-crimination") (emphasis in original); *United States v. White*, 322 U.S. 694, 698-99 (1944) ("The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. . . . Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation."); *Bellis v. United States*, 417 U.S. 85, 88 (1974) (explaining that a "long line of cases has established that an individual cannot rely upon the [Fifth Amendment] privilege to avoid producing the records of a collective entity which are in his

possession in a representative capacity, even if these records might incriminate him personally"); *Fisher*, 425 U.S. at 411 ("This Court has also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor.").

In *Braswell v. United States*, 487 U.S. 99 (1988), the Supreme Court reaffirmed the collective entity doctrine, holding "that without regard to whether the subpoena is addressed to the corporation, [or] to the individual in his capacity as a custodian, [he] may not resist a subpoena for corporate records on Fifth Amendment grounds." *Id.* at 108-09 (citations omitted). This is true regardless of how small the collective business may be, *see Bellis*, 417 U.S. at 100, and the doctrine even applies to single-member LLCs, *see United States v. Lu*, 248 F. App'x 806, 808 (9th Cir. 2007).

[redacted] does not dispute this case law or application of the collective entity doctrine to businesses such as LLCs. Doc. 73 at 4. He instead contends that the Supreme Court's view of the doctrine "is in a significant period of transition" and, if faced with the issue in the future, the Supreme Court is likely to "return to the more expansive view" of the Fifth Amendment set forth in *Boyd*. *Id.* at 4-6. In support of this predicted sea change in Fifth Amendment law, [redacted] relies on Justice Kennedy's dissent in *Braswell* and the recent Supreme Court decisions in *Citizens United* and *Hobby Lobby*.

But the current law of the Supreme Court, as applied by this Circuit, must control this Court's

decision. The role of district courts is not to "sit as fortune tellers, attempting to discern the future by reading the tea leaves of Supreme Court alignments." *Columbia Nat. Res., Inc. v. Tatum*, 58 F.3d 1101, 1107 n.3 (6th Cir. 1995). Instead, each case must be decided "on its merits in light of precedent, not on speculation about what the Supreme Court might or might not do in the future[.]" *Id.*

In *Braswell*, the Supreme Court unequivocally held that a custodian of business records may not resist a subpoena for such records on the ground that the act of production may personally incriminate him in violation of the Fifth Amendment. 487 U.S. at 111-12 (citing *Fisher*, 425 U.S. at 411). Applying *Braswell* and the collective entity rule in a case where a partner opposed a subpoena served on his law firm, the Ninth Circuit made clear that a "custodian cannot claim a Fifth Amendment privilege with regard to corporate records, even if the records *or the act of producing them* might incriminate him personally." *United States v. Blackman*, 72 F.3d 1418, 1426-27 (9th Cir. 1995) (emphasis in original); *see United States v. Laurins*, 857 F.2d 529, 537 (9th Cir. 1988) (citing *Braswell* and noting that the Supreme Court "recently reaffirmed that the custodian of corporate records may not claim the fifth amendment to resist a subpoena for corporate records, whether the subpoena is directed to the corporation or to the custodian"); *Lu*, 248 F. App'x at 808 ("Having chosen to organize her businesses as LLCs and obtain the benefits of that business structure, Lu cannot now disregard the creation of these separate entities to obtain Fifth Amendment protection for her companies' records."); *see also United States v. Malis*, 737 F.2d 1511, 1512 (9th Cir. 1984) ("It is well established that an individual may not assert the fifth amendment privilege to avoid

producing the records of a collective organization where he possesses such records in a representative capacity") (citing *Bellis); Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2015 WL 12911721, at *3-4 (D. Ariz. Nov. 6, 2015) (collective entity rule precluded a posse member of the sheriffs office from invoking the Fifth Amendment to resist a subpoena).

The Court cannot ignore binding precedent. [redacted] notes that he is the only one in the businesses who can serve as custodian of records, and that the government undoubtedly will try to use the documents he provides to inculpate him. Doc. 73 at 10. But *Braswell* contemplated this scenario when it recognized that "if the defendant held a prominent position within the corporation that produced the records, 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." 487 U.S. at 118; *see In re Grand Jury Proceedings*, 928 F.2d 408 (9th Cir 1991) (same).[2]

III. The Attorney-Client Privilege.

The subpoenas in this case seek bookkeeping and other financial records, as well as a list of account numbers for all accounts at financial institutions, for the twelve businesses. Doc. 91 at 3. As a general rule, client identity, fee agreements, and billing records are not protected from disclosure by the attorney-client privilege. *Blackman*, 72 F.3d at 1424. This Circuit has recognized "limited exceptions to this rule where

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[2] [redacted] cites a decision from the Second Circuit, *In re Three Grand Jury Subpoenas v. Doe*, 191 F.3d 173 (2d Cir. 1999), for the proposition that there is a circuit split over the proper application of the collective entity rule. Doc. 73 at 9. As explained above, however, the law of this Circuit is clear on the issue.

disclosure would compromise confidential communications between attorney and client or constitute the 'last link' in an existing chain of evidence likely to lead to the client's indictment." *Id.* (citing *Rails v. United States*, 52 F.3d 223, 225 (9th Cir. 1995)).

In this case, however, there is nothing to suggest that any of [redacted] clients may be implicated in the ongoing grand jury investigation. Nor has [redacted] met his burden of showing that production of the subpoenaed financial records would disclose confidential attorney-client communications. *See id.* at 1423 (noting that the "burden of proof is on the party seeking to establish that the privilege applies"). Moreover, the government has no objection to the redaction of any privileged communications that may be part of the requested financial records. Doc. 86 at 5 n.3.

[redacted] cites *In re Horn*, 976 F.2d 1314 (9th Cir. 1992), in support of his assertion of the privilege. That case makes clear, however, that "[i]nformation regarding the amount paid for legal services or the form of payment ordinarily does not disclose the subject matter of the professional consultation." *Id.* at 1317. And the government has made clear that the subpoenas at issue seek only information concerning the funds flowing in and out of the twelve businesses [redacted] helped create, not the nature of work performed for clients or any confidential communications with them. Doc. 86 at 5.

Given the fact that the subpoenas seek only financial records of the twelve businesses, and the government's acceptance of appropriate redactions, the Court finds that the subpoenas do not require production of attorney-client privileged information.

IV. The Scope of the Subpoenas.

"The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed." *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991). Unlike federal courts, whose jurisdiction depends on a specific case or controversy, "the grand jury can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Id.* (citation omitted).

[redacted] does not dispute that the grand jury's power to investigate is broad. Doc. 73 at 11. Rather, he claims that the government is on an impermissible "fishing expedition" and there is no reasonable limit to the government's request. *Id.* at 11-12. The Court does not agree.

The financial records sought by the grand jury are relevant to the ongoing investigation into [redacted] potential commission of tax evasion, obstruction of justice, and bankruptcy fraud. Although the government's request goes back ten years, [redacted] concedes that he made late tax payments during the 2007-2011 tax years and that the present investigation arose from those payments. Doc. 73 at 2. [redacted] notes that it would take him several weeks or more to comply with the subpoenas as presently drafted *(id.* at 12-13), but the government has agreed to narrow the scope of the subpoenas to specific bookkeeping and other financial records and a list of bank account numbers (Doc. 91 at 7-8, Ex. 1 at 4). The fact that [redacted] is the only one knowledgeable about the businesses and their financial records – and thus the only possible custodian – is no reason to quash the subpoenas.

"As a necessary consequence of its investigatory function, the grand jury paints with a broad brush." *R. Enters.*, 498 U.S. at 297. "'A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)). [redacted] has not made a "strong showing" that the grand jury has acted outside its authority, *R. Enters.*, 498 U.S. at 300, or that the subpoenas otherwise are "unreasonable or oppressive," Fed. R. Crim. P. 17(c)(2).

IT IS ORDERED that the United States' motion to compel compliance with twelve grand jury subpoenas (Doc. 91) is granted. [redacted] (or another custodian of records designated by him) shall comply with the subpoenas, as narrowed, within 30 days from the date of this order.

Dated this 22nd day of September, 2017.

/s/ David G. Campbell
David G. Campbell
United States District Judge

cc: AUSA/Defense

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Grand Jury Panel 17-02
(Filed Under Seal)

IN RE TWELVE GRAND JURY SUBPOENAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

[redacted],

Respondent.

ORDER

On September 22, 2017, the Court ordered [redacted] to comply with 12 grand jury subpoenas. The subpoenas seek production of financial records and were issued to the custodian of records for 12 businesses in which [redacted] holds an interest.

During hearings on October 18 and 20, 2017, [redacted] stated that he wishes to appeal the Court's decision. The Court declined to certify any question for appeal under 28 U.S.C. § 1292(b), and, following further discussion among the parties, [redacted] concluded that issuance of a contempt finding was necessary to facilitate his appeal. The Court concludes that [redacted] refusal to comply with the subpoenas is without just cause, and holds him in civil contempt of court. 28 U.S.C. § 1826(a).

IT IS ORDERED:

1. [redacted] is found in civil contempt of the Court's order of September 22, 2017, compelling compliance with the grand jury subpoenas.

2. [redacted] is personally assessed sanctions of $2,500 per day until he complies with the Court's order. If compliance is not obtained within ten days, the Court will consider ordering the United States Marshal to take immediate custody of [redacted] and hold him in custody until he complies with the Court's order.

3. These civil contempt sanctions against [redacted] are stayed pending appeal of the Court's September 22, 2017 ruling. They shall become effective again if the Court of Appeals affirms the Court's ruling and if [redacted] does not fully comply with this Court's order within 14 days of issuance of the mandate by the Court of Appeals.

4. During the pendency of the appeal and any related proceedings, [redacted] shall preserve all information called for by the grand jury subpoenas.

Dated this 20th day of October, 2017.

/s/ David G. Campbell
David G. Campbell
United States District Judge

cc: AUSA/Defense

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-17213
D.C. No. 2:17-mc-00056-DGC

IN RE TWELVE GRAND JURY SUBPOENAS,
Grand Jury Panel 17-02,

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, Senior District Judge, Presiding

Argued and Submitted September 5, 2018
San Francisco, California

Filed November 8, 2018

Before: Marsha S. Berzon and Michelle T. Friedland,
Circuit Judges, and Daniel R. Dominguez,*
District Judge.

Per Curiam Opinion

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* The Honorable Daniel R. Dominguez, United States District Judge for the District of Puerto Rico, sitting by designation.

SUMMARY**

Grand Jury Subpoenas

The panel affirmed the district court's order holding an appellant in contempt for his failure to comply with the court's order to respond to twelve grand jury subpoenas in his capacity as a records custodian for various collective entities.

Appellant contended that because the corporations and limited liability companies were small, closely-held entities for which he was either the sole shareholder or sole employee, or was solely responsible for accounting and recordkeeping, he could invoke his Fifth Amendment privilege against self-incrimination to resist producing those collective entities' documents.

The panel held that *Braswell v. United States*, 487 U.S. 99, 104 (1988), remained good law. The panel further held that there were no circumstances under which a records custodian could resist a subpoena for a collective entity's records on Fifth Amendment grounds, and that the size of the collective entity, and the extent to which a jury would assume that the individual seeking to assert the privilege produced the documents, were not relevant.

COUNSEL

Lori L. Voepel (argued), Jones Skelton & Hochuli P.L.C., Phoenix, Arizona; Rhonda Elaine Neff and Clark L. Derrick, Kimerer & Derrick P.C., Phoenix, Arizona; for Respondent-Appellant.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Mark S. Determan (argued) and Gregory Victor Davis, Attorney; S. Robert Lyons, Chief, Criminal Appeals & Tax Enforcement Policy Section; Richard E. Zuckerman, Principal Deputy Assistant Attorney General; Tax Division, United States Department of Justice, Washington, D.C.; for Plaintiff-Appellee.

OPINION

PER CURIAM:

The district court held Appellant in contempt for his failure to comply with the court's order to respond to twelve grand jury subpoenas in his capacity as a records custodian for various corporate entities. He now appeals that order, arguing that, because the corporations and limited liability companies ("LLCs") are small, closely held entities for which he is either the sole shareholder or sole employee, or is solely responsible for accounting and record keeping, he may invoke the Fifth Amendment privilege against self-incrimination to resist producing those collective entities' documents. We join all of our sister circuits to have considered the issue in holding that the Fifth Amendment provides no protection to a collective entity's records custodians—and that the size of the collective entity and the extent to which a jury would assume that the individual seeking to assert the privilege produced the documents are not relevant. We therefore affirm.

I.

Appellant is the subject of an ongoing grand jury investigation of various crimes, including obstruction of justice, tax evasion, and bankruptcy fraud. The grand jury issued twelve subpoenas to the custodian of records of various entities in which Appellant holds an

interest. Appellant, who is the custodian of records for each of the entities, objected to the subpoenas and refused to produce the requested documents. Appellant argued that because, for the years in question, he was either the sole shareholder, officer, or member of the various entities, and because he was the individual responsible for accounting and document preparation for those entities, the compelled production of the documents would incriminate him personally. He therefore contended that his Fifth Amendment right against self-incrimination protected him from complying with the subpoenas.

The Government moved to compel compliance, and the district court thereafter granted the Government's motion, ordering Appellant to comply with all twelve grand jury subpoenas. Appellant again refused, and the district court held Appellant in contempt pursuant to 28 U.S.C. § 1826.

II.

We review *de novo* the legal question whether any exception exists to the general rule that a corporate records custodian may not assert a Fifth Amendment privilege to refuse production of corporate documents. *See United States v. Sideman & Bancroft, LLP*, 704 F.3d 1197, 1201 (9th Cir. 2013) ("We review de novo a district court's application of the Fifth Amendment privilege against self-incrimination." (quoting *United States v. Bright*, 596 F.3d 683, 690 (9th Cir. 2010)); *United States v. Leidendeker*, 779 F.2d 1417, 1418 (9th Cir. 1986) ("The validity of an exercise of fifth amendment privilege is a question of law and is reviewed *de novo*.").[1]

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[1] In some cases, the question whether a privilege applies involves a mixed question of law and fact. *See Tornay v. United*

A.

The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment privilege against self-incrimination extends only to "compelled incriminating communications" that are "'testimonial' in character." *United States v. Hubbell*, 530 U.S. 27, 34 (2000).

Appellant's challenge to the grand jury subpoenas implicates two related Fifth Amendment doctrines: the "act of production" doctrine and the "collective entity" doctrine. The act of production doctrine recognizes "that the act of producing documents in response to a subpoena may have a compelled testimonial aspect," in that the act "may implicitly communicate 'statements of fact,'" such as "that the papers existed, were in [the producer's] possession or control, and were authentic." *Id.* at 36. The collective entity doctrine reflects the fact that the right to resist compelled self-incrimination is a "personal privilege." *Bellis v. United States*, 417 U.S. 85, 90 (1974). The privilege applies to individuals and to sole proprietorships, which do not, as a legal matter, exist separately from the individuals who comprise them, but "corporations and other collective entities" do not enjoy the

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States, 840 F.2d 1424, 1426 (9th Cir. 1988) ("The conclusion that the amount, date, and form of legal fees paid is not a confidential communication protected by the attorney-client privilege is a mixed question of law and fact."). The issues relevant to our decision in this case, however, are entirely legal. Further, even if the question here could be viewed as a mixed question of law and fact, we would nonetheless review the matter de novo because "applying the law [would] involve[] developing auxiliary legal principles of use in other cases." *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018).

privilege. *Braswell v. United States*, 487 U.S. 99, 104 (1988).

In *Braswell*, a corporate custodian of two small, closely held corporations sought to assert his Fifth Amendment privilege to refuse production of corporate documents, arguing that producing the documents would incriminate him personally. *Id.* at 100–01. Considering both the act of production doctrine and the collective entity doctrine, along with the "agency rationale undergirding" the latter,[2] *id.* at 109, the Supreme Court held that a corporate "custodian may not resist a subpoena for corporate records on Fifth Amendment grounds," *id.* at 113, regardless of whether the custodian could "show that his act of production would entail testimonial self-incrimination," *id.* at 104. In a footnote in *Braswell*, however, the Court left "open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records." *Id.* at 118 n.11 (the "*Braswell* footnote").

B.

Appellant offers two arguments in support of his contention that he is entitled to resist producing the subpoenaed documents on Fifth Amendment grounds. First, he argues that *Braswell* is no longer good law in

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[2] As the Court explained, it had "consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity." *Braswell*, 487 U.S. at 109–110. Because "corporations may act only through their agents," a "custodian's act of production is not deemed a personal act, but rather an act of the corporation." *Id.* at 110.

light of the Supreme Court's decisions in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). Second, he argues that we should answer the question left open in the *Braswell* footnote by holding that a custodian who can establish that a jury inevitably would conclude it was he or she who produced the records may be excepted from the rule that the Fifth Amendment does not shield records custodians from being compelled to produce a collective entity's records. We reject both arguments.

1.

First, as to Appellant's argument that we should treat *Braswell* as having been overruled by *Hobby Lobby* and *Citizens United*, we are skeptical that either case has any bearing on the collective entity rule as articulated and applied in *Braswell*.[3] But, regardless, we remain bound by *Braswell* until the Supreme Court says otherwise. Where Supreme Court precedent "has direct application in a case," the Supreme Court has instructed "the Court of Appeals [to] follow the case which directly controls," even if it "appears to rest on reasons rejected in some other line of decisions," and thereby to "leav[e] to th[e] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). *Braswell* has direct application in this case, and it is not for us to question its continuing validity or persuasiveness.

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[3] In addition to *Hobby Lobby* and *Citizens United*, Appellant relies heavily on *Fisher v. United States*, 425 U.S. 391 (1976). But *Fisher* was decided before *Braswell*, hence Appellant's argument that *Fisher* undermines *Braswell* plainly fails.

2.

Appellant next argues that, even if *Braswell* remains good law, we should reach the issue left open in the *Braswell* footnote and hold that Appellant may refuse production on Fifth Amendment grounds. Specifically, Appellant argues that he is akin to a sole proprietor and that he could establish that a "jury would inevitably conclude that [Appellant] produced the records," *Braswell*, 487 U.S. at 118 n.11. Thus, Appellant claims, he fits into the exception whose potential existence was left open by the *Braswell* footnote.[4] Reaching this question for the first time in this circuit, we conclude that no exception exists to the rule that records custodians lack any Fifth Amendment privilege against the compelled production of a collective entity's documents.

First, to recognize an exception for custodians of small, closely held collective entities, including one-person corporations or LLCs, would be inconsistent with the reasoning and holding of *Braswell*. The Supreme Court in *Braswell* reiterated the longstanding principle that "no privilege can be claimed by the custodian of corporate records, *regardless of how small the corporation may be*." *Id.* at 108 (emphasis added) (quoting *Bellis*, 417 U.S. at 100). Notably, *Braswell* itself involved two corporations entirely owned or held (either directly or indirectly) by Petitioner Braswell, with corporate boards consisting only of Braswell, his wife, and his mother. Nevertheless, the Supreme Court held that Braswell could not assert a Fifth

[4] The Government argues that the record does not support Appellant's factual assertion that a jury inevitably would conclude he produced the records. Because we conclude that the exception Appellant hopes to take advantage of does not exist, it is not necessary to resolve this factual dispute.

Amendment privilege to resist producing corporate records on the ground that it would incriminate him personally.

In reaching this conclusion, the Court in *Braswell* considered the possibility that a corporate custodian's production of records could be testimonial in nature. But the Court concluded that this fact did not make the production anything other than an act of the corporation, and that "[a]ny claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege." *Id.* at 110. As the Court explained, "a custodian's assumption of his representative capacity [on behalf of a corporation] leads to certain obligations, including the duty to produce corporate records on proper demand by the Government." *Id.* The Court thus treated the possible testimonial consequences of fulfilling this obligation as beside the point.

Further, in light of this reasoning in the body of the *Braswell* opinion, we are unable to identify any situation in which the *Braswell* footnote would have any practical import. The Court in *Braswell* contemplated—and endorsed—the notion that although the Government could "make no evidentiary use of the 'individual act' against the individual" custodian, it could "use the *corporation's* act of production against the custodian." *Id.* at 118 (emphasis added). Thus, "if the defendant held a prominent position within the corporation that produced the records, the jury may . . . reasonably infer that [the defendant] had possession of the documents or knowledge of their contents." *Id.* The Court explained that "[b]ecause the jury is not told that the defendant produced the records, any nexus between the defendant and the documents results

solely from the corporation's act of production and other evidence in the case." *Id.* In any situation where a jury would inevitably conclude that a defendant produced the records in question, the relevant nexus between the defendant and the documents would still result, first and foremost, from the defendant's role in the corporation. Given the obvious—and wholly permissible—inference that the defendant in such a case must have had possession of the documents or knowledge of their contents, the fact that a jury may also conclude that Appellant produced the documents would be irrelevant to the jury's assessment of guilt or innocence as to the charges in question.

Finally, recognizing an exception for small corporations or LLCs *operating like* sole proprietorships but formally organized as collective entities under state law would give defendants like Appellant a windfall. Appellant argues that it makes little sense to apply the collective entity doctrine to small or family-owned corporations or LLCs that operate like sole proprietorships. But by choosing to operate his businesses as a corporation or LLC and *not* as a sole proprietorship, Appellant knowingly sought out the benefits of these forms. Having done so, he cannot now be shielded from its costs. *See United States v. Stone*, 976 F.2d 909, 912 (4th Cir. 1992) ("[Appellant] chose the corporate form and gained its attendant benefits, and we hold . . . that he cannot now disregard the corporate form to shield his business records from production.").

All of our sister circuits to consider this issue have reached the same conclusion. *See In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 263 (3d Cir. 2015) ("Appellants have advanced no persuasive rationale as to why the reasoning of *Bellis* and *Braswell* does not apply to one-person corporations."); *In re*

Grand Jury Subpoena Issued June 18, 2009, 593 F.3d 155, 158 (2d Cir. 2010) ("'[T]here simply is no situation' in which a corporation can avail itself of the Fifth Amendment privilege." (quoting *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985))); *Amato v. United States*, 450 F.3d 46, 51, 52 (1st Cir. 2006) (reaffirming that "production, including implied authentication, can be required of a corporation through a corporate officer regardless of the potential for self-incrimination," and stating that "the act-of-production doctrine is not an exception to the collective-entity doctrine even when the corporate custodian is the corporation's sole shareholder, officer and employee" (citing *In re Grand Jury Proceedings*, 838 F.2d 624, 626–27 (1st Cir. 1988)); *United States v. Stone*, 976 F.2d 909, 912 (4th Cir. 1992) (holding that "the district court correctly answered the question left open in *Braswell*" by concluding that a one-person corporation could not assert the Fifth Amendment privilege). We now join them in concluding that there are no circumstances under which a records custodian may resist a subpoena for a collective entity's records on Fifth Amendment grounds. Appellant's challenge to the district court's contempt order therefore fails.[5]

III.

For the foregoing reasons, we affirm.

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[5] We need not resolve any factual dispute regarding the number of shareholders or employees in each of the subpoenaed entities. Our holding that there is no exception to the rule that a records custodian may not assert a Fifth Amendment privilege to refuse production of a collective entity's documents applies with equal force to all of the entities at issue in this case.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-17213
(Sealed Case)

IN RE: TWELVE GRAND JURY SUBPOENAS,
Grand Jury Panel 17-02

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

[redacted],

Respondent-Appellant.

On Appeal from the United States District Court for the District of Arizona 2:17-mc-00056-DGC

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Co-Counsel for Respondent-Appellant
[redacted]

* * *

The government has now issued grand jury subpoenas compelling production of the private papers of these twelve closely held businesses. (Doc. 1, 10; ER 16). The records being sought include those for his law practices, which contain attorney-client privileged information. (Doc. 8 at 4).

B. Procedural History.

On or about May 15, 2017, the grand jury issued the twelve subpoenas at issue to the custodian of records of the following entities, demanding production of "the records and books of account relative to the financial transactions" of each entity:

(1) The [redacted]: An Arizona Subchapter S corporation formed on October 29, 1990, owned 100% by [redacted];

(2) [redacted] A Colorado Subchapter S corporation formed on July 29, 2009, owned 100% by [redacted];

(3) [redacted].: An Arizona Subchapter S corporation formed on October 30, 1997, owned 100% by [redacted] and his wife;

(4) [redacted] An Arizona professional limited liability company formed on September 14, 2012, owned by [redacted].[4] This company was initially formed as [redacted] Its name changed to [redacted] on May 7, 2013, and then changed to the present name, [redacted], on March 11, 2014;

(5) [redacted]: An Arizona limited liability company formed on September 12, 2003, owned by [redacted] (99%) and [redacted] (1%).

(6) [redacted]: A Montana limited liability company formed on May 7, 2008, owned by [redacted] and his wife (98%), and [redacted]. (2%);

(7) [redacted] An Arizona limited liability company formed on July 29, 2009, owned by [redacted] and his wife (98%) and [redacted] (2%);

(8) [redacted] An Arizona limited liability company formed on October 28, 1994, owned by [redacted] (99%), and his wife (1%);

(9) [redacted] (Delaware): A Delaware limited liability company formed on April 3, 2013. It was initially owned by [redacted] wife and their daughter, but after their daughter passed away, [redacted] came

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[4] Appellant holds 100% of the economic interest in this LLC. [redacted] has only a 30% capital interest. (Doc. 1, Ex. 2 at 4).

in as an owner. He and his wife own 48%, and [redacted] owns 2%;

(10) [redacted] (Arizona): An Arizona limited liability company formed on August 29, 2013, owned 50% by [redacted] (Delaware) and 50% by [redacted] – [redacted] ho owns no economic interest in the company.

(Doc. 1 at 2 & Ex. 2 at 3-4).

Counsel accepted service on Appellant's behalf, then sent a letter to the government, objecting to the subpoenas on various grounds, including the Fifth Amendment and overbreadth. (Doc. 1, Ex. 2). Counsel also explained that for the years in question, Appellant was either the sole shareholder, officer, or member of the different businesses, and was therefore akin to a sole proprietor. (Id., Ex. 2 at 2). He was also the sole person responsible for the accounting and document preparation for those businesses. (Id.). He is not just the "custodian of records." (Id.).

After the issues could not be informally resolved, the government filed a Motion to Compel Compliance with Twelve Grand Jury Subpoenas on July 26, 2017. (Doc. 1). In his Objection, Appellant agreed that *Braswell v. United States*, 487 U.S. 99, 109 (1988), applied the collective entity doctrine in holding that custodians of even small, closely held corporations "may not resist a subpoena for corporate records on Fifth Amendment grounds." (Doc. 8 at 4-5) (quoting *Braswell*). Appellant questioned, however, the continuing validity of *Braswell* (5-4, J. Kennedy, dissenting), given recent

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SUBPOENA TO TESTIFY BEFORE A GRAND JURY

To: [redacted]

Attention: Custodian of Records

[redacted]

YOU ARE COMMANDED to appear in this United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place: Sandra Day O'Connor U.S. Courthouse
401 W. Washington Street
Room 306, 3rd Floor
Phoenix, Arizona 85003-2151

Date and Time: 06/20/2017 8:45 a.m.

You must also bring with you the following documents, electronically stored information, or objects (*blank if not applicable*):

See Attached.

Date: 05/03/2017

CLERK OF COURT

s/ Brian D. Karth, Clerk

The name, address, e-mail, and telephone number of the United States attorney, or assistant United States attorney, who requests this subpoena, are:

MONICA EDELSTEIN Assistant U.S. Attorney
40 N. Central Avenue, Suite 1200
Phoenix, AZ 85004-4408
(602) 514-7500 or 1-800-800-2570

Financial Privacy Restrictions Apply

○ Yes ⊙ No

6(e) Filed May 24, 2016

PROOF OF SERVICE

This subpoena for (*name of individual or organization*) [redacted] was received by me on (*date*) 5/5/17.

☒ I served the subpoena by delivering a copy to the named person as follows: Kimmer + Derrick PC

on (*date*) 5/16/17 ; or

☐ I returned the subpoena unexecuted because: ___

I declare under penalty of perjury that this information is true.

Date: 5/16/17

/s/ Lisa Sukenic
Server's signature

Lisa Sukenic, Special Agent
Printed name and title

4041 N. Central Ave. Phoenix AZ 85012
Server's address

Additional information regarding attempted service, etc:

Attachment to Grand Jury Subpoena Issued to [redacted]

Please provide all records and books of account relative to the financial transactions of [redacted]

to include but not limited to:

All bookkeeping records and other financial records including General Ledger, General Journals, all Subsidiary Ledgers and Journals, Gross Receipts and income records, Cash Receipts and. Disbursement records and/or Journals, sales and Purchase records and/or Journals, Accounts Receivable and Payable Ledgers and records, Bad Debt records, Cost of Goods Sold records, Loan Receivable and Payable Ledgers, Voucher Register and all sales and expense invoices including all invoices documenting expenses paid by cash (currency) or bank check (cashier or teller checks) and retained copies of any bank checks (cashier or teller checks.)

Inventory records establishing beginning and ending inventories including inventory sheets, work-papers, and valuation records. Records and work-papers reflecting the purchase, basis and depreciable life of assets. Records and work-papers of sales of corporate assets such records disclosing the dates of purchase and sale, cost and sales price, records establishing or adjusting asset basis.

List of all accounts (open and closed) held at financial institutions.

List of all [redacted]. clients.

APPENDIX F

U.S. DEPARTMENT OF JUSTICE
United States Attorney
District of Arizona
Two Renaissance Square
40 N. Central Ave., Suite 1800
Phoenix, AZ 85004-4408
Main: (602) 514-7500
Main Fax: (602) 514-7693
Direct Fax: (602) 514-7650

November 15, 2018

[redacted]
Attention: Custodian of Records
[redacted]

Re: Grand Jury Subpoena No.: 18-02-300
Our file: 2015R20353

Dear Custodian of Records:

You have been subpoenaed to appear before the federal grand jury to produce certain documents on December 4, 2018.

While you are not required to do so, for your convenience you may, prior to the appearance date, turn the subpoenaed documents over to Assistant U.S. Attorney Monica Edelstein. If emailed send to Cristina.Abramo@usdoj.gov, or if mailed, please mail the documents directly to the undersigned Assistant U.S. Attorney, at Two Renaissance Square, 40 N. Central Ave., Suite 1800, Phoenix, Arizona 85004-4408. The grand jury will be notified that these documents have been produced pursuant to a grand jury subpoena. If you elect to do this, you need not appear

personally at the appointed time. **However, in that case, please complete and return the enclosed certification or one from your company and attach it to the requested records.** Questions concerning the subpoena should be directed to the undersigned Assistant U.S. Attorney. Questions regarding the requested records, please contact IRS Special Agent Lisa Sukenic at (602) 323-9730.

Finally, I would also like to point out that any disclosure to any other individual regarding the existence of this subpoena could jeopardize an ongoing federal grand jury investigation.

Your cooperation and courtesy are appreciated.

Sincerely yours,

ELIZABETH A. STRANGE
First Assistant United States
Attorney District of Arizona

/s/ Monica Edelstein
Monica Edelstein
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

SUBPOENA TO TESTIFY BEFORE A GRAND JURY

To: [redacted]

YOU ARE COMMANDED to appear in this United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place: Sandra Day O'Connor U.S. Courthouse
401. W. Washington Street
Room 306, 3rd Floor
Phoenix, Arizona 85003-2151

Date and Time: December 4, 2018 8:45 a.m.

You must also bring with you the following documents, electronically stored information, or objects *(blank if applicable)*:

See Attachment

Date: 11/15/2018

[SEAL]

CLERK OF COURT

s/ Brian D. Karth, Clerk

The name, address, e-mail, and telephone number of the United States attorney, or assistant United States attorney, who requests this subpoena, are:

MONICA EDELSTEIN
Assistant U.S. Attorney
40 N. Central Avenue, Suite 1800
Phoenix, AZ 85004-4408
(602) 514-7500 or 1-800-800-2570

Financial Privacy Restrictions Apply
O Yes ⊙ No
6(e) Filed May 24, 2016

Attachment to Grand Jury Subpoena Issued to [redacted]

Please provide all records and books of account relative to the financial transactions of [redacted]

Bookkeeping records and other financial records, including general ledgers, general journals, all subsidiary ledgers and journals, gross receipts and income records, cash receipts and disbursement records and/or journals, sales and purchase records and/or journals, accounts receivable and payable ledgers and records, bad debt records, cost of goods sold records, loan receivable and payable ledgers, voucher register and all sales and expense invoices including all invoices documenting expenses paid by cash (currency) or bank check (cashier or teller checks);

List of account numbers for all accounts at financial institutions in the name of [redacted]. that were open during the period January 1, 2007 through May 3, 2017.

This subpoena is identical to the subpoena served on May 16, 2017 (Attachment 1), as narrowed by Judge Campbell in his September 22, 2017 order (Attachment 2).