UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4466/December 19, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16554

In the Matter of GRAY FINANCIAL GROUP, INC., LAURENCE O. GRAY, and ROBERT C. HUBBARD, IV	ORDER DENYING RESPONDENTS' MOTION TO COMPEL

On December 15, 2016, Respondents filed a motion to compel the Division of Enforcement to disclose certain information and to cease gathering evidence from individuals and entities that were not contacted prior to issuance of the order instituting proceedings (OIP). The motion is DENIED.

Respondents advance three specific requests. First, they ask that the Division "immediately disclose all individuals it contacted or interviewed prior to the May 21, 2015 OIP, and to produce all related documents." Mot. at 2. Rule 230 requires production of such evidence if the contact with the witness was by "written request," and such evidence has presumably already been produced as part of the investigative file. 17 C.F.R. § 201.230(a)(1)(ii), (iii). If the contact was not by written request, the Division need not produce the evidence unless required to do so by another provision of the Rules. Respondents accordingly cite to Rule 230(b), regarding material exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and its progeny, and Rule 231, regarding Jencks Act material. *See* Mot. at 2. The Division's obligations under *Brady* and Rule 231 will be resolved in connection with Respondents' pending motion for production of a privilege log, *Brady* materials, and Jencks materials. However, I remind the Division that even information received informally or without memorialization may constitute *Brady* material.

Second, Respondents ask that the Division "immediately disclose the identity of persons or entities the SEC has contacted since May 21, 2015," disclose such newly contacted witnesses on a rolling basis, and produce all documents related to them. Mot. at 3. Respondents cite an order in a different administrative proceeding to support their request for the identity of witnesses contacted after the issuance of the OIP; however, the cited order merely states that the Division "will notify" Respondents of newly contacted witnesses, as opposed to "shall notify," implying that the administrative judge was not ordering the additional disclosures as a matter of law, but simply noting that the Division had agreed to the procedure in that case. *Lynn Tilton,*

Admin. Proc. Rulings Release No. 2647, 2015 SEC LEXIS 1773, at *2 (ALJ May 7, 2015). Moreover, the order only required the Division to disclose the identity of new *investor* witnesses for a two month period at an early stage of the proceeding. *See id.* Respondents' request here is significantly broader—they ask the Division to disclose the identity of *all potential witnesses* contacted in the last year and a half. Mot. at 3.

Thus, I decline to require the Division to make the requested disclosures. Respondents offer no evidence that they have been unduly prejudiced by the Division's continued evidentiary exploration, and in any event, informally identifying and interviewing witnesses during the pendency of litigation is a common and unremarkable practice, which ordinarily entails no special disclosure obligations. However, I remind the Division that contacting witnesses after issuance of the OIP may result in the creation of *Brady* material or Jencks Act material. I also remind the Division that if it issues investigatory subpoenas under the same investigative file number or pursuant to the same formal order of investigation as the one resulting in the present proceeding, it must comply with Rule 230(g). *See* 17 C.F.R. § 201.230(g).

Third, Respondents ask that the Division be prohibited from "gathering evidence from individuals who were not subpoenaed for testimony or documents prior to the OIP." Mot. at 5. But, as noted above, the Division's continuing informal identification and interviewing of witnesses is unremarkable and permissible. The ability of Respondents and the Division to use compulsory process to gather evidence after issuance of the OIP is entirely symmetrical under the Rules of Practice. *See, e.g.*, 17 C.F.R. § 201.232, .233 (all parties may request subpoenas and take depositions). Notably, investigatory subpoenas are strictly circumscribed, which mitigates Respondents' concerns of unfairness. *See Morgan Asset Mgmt., Inc.*, Admin. Proc. Rulings Release No. 656, 2010 SEC LEXIS 2256, at *5-6, *18-19 (Jul. 12, 2010) (prohibiting use of investigatory subpoenas to gather evidence for hearing). And Respondents offer no evidence that their ability to informally gather evidence is more limited than the Division's. All parties are equally free to informally identify and interview witnesses and otherwise secure evidence between now and the hearing, subject to the requirements of the prehearing schedule.

SO ORDERED.

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Cameron Elliot
Administrative Law Judge