UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 759 / March 12, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15124

In the Matter of	:	
	:	ORDER ON MOTION TO
DAVID F. BANDIMERE and	:	COMPEL PRODUCTION OF
JOHN O. YOUNG	:	DOCUMENTS
	:	

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on December 6, 2012, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 9(b) of the Investment Company Act of 1940, and Sections 203(f) and (k) of the Investment Advisers Act of 1940. The hearing is scheduled to begin on April 22, 2013.

On February 5, 2013, I issued an order directing the Division of Enforcement (Division) to file a declaration describing its compliance with Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, and with 17 C.F.R. § 201.231. The Division filed a Declaration of Dugan Bliss Regarding Division's Search for Material Exculpatory Evidence and a List of Possible Material Exculpatory Evidence from Withheld Documents Regarding Respondent Bandimere (List) on February 20, 2013. The List contains short summaries of statements made by fourteen individuals who appear to be some of the allegedly defrauded investors referred to in the OIP. The List states that the Division has identified the statements as "possible material exculpatory evidence," but that the Division takes "no position as to whether the disclosed information actually constitutes Brady material." List, p. 1.

On February 27, 2013, Respondent David F. Bandimere (Bandimere) filed a Motion to Compel Production of Documents Containing Brady Material Pursuant to Rule 230(b)(2) [of the Commission's Rules of Practice] (Motion), with three exhibits attached (Resp. Ex. A-C), arguing that the List of exculpatory material is inadequate and deficient because it only contains a "paraphrase summary" or a "description of the material exculpatory evidence." Motion, p. 3. Bandimere argues that Rule 230(b)(2) of the Commission's Rules of Practice (Commission Rule) requires the Division to provide complete and un-redacted copies of the documents that contain the Brady material. Id., pp. 3-4. The Division filed a Brief in Opposition to Bandimere's Motion (Opposition) on March 1, 2013, arguing that it has complied with its Brady obligation by providing the essential facts and substance of the material exculpatory evidence. Opposition, p. 1. The Division asserts that Bandimere is not entitled to the entirety of the documents because they are attorney work-product notes and therefore privileged. Id., p. 3. Bandimere submitted a Reply to the

Division's Opposition (Reply) on March 6, 2013. For the following reasons, Bandimere's Motion will be denied.

Brady holds that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[1] Brady, 373 U.S. at 87. Brady has been incorporated into Commission Rule 230(b)(2). See 17 C.F.R. § 201.230(b)(2). Commission Rule 230(b)(1) allows the Division to withhold certain documents from production, including documents that are privileged, as well as internal memoranda, notes, or writings prepared by Commission employees, or documents that are otherwise work product, among others. 17 C.F.R. § 201.230(b)(1). Commission Rule 230(b)(2) provides, in relevant part, that nothing in Commission Rule 230(b) authorizes the Division, in connection with an enforcement proceeding, "to withhold, contrary to the doctrine of Brady, documents that contain material exculpatory evidence." 17 C.F.R. § 201.230(b)(2).

Apparently focusing on the Rule's use of the word "documents," Bandimere argues that by its "express terms" Rule 230(b) requires production of the entire document containing the material exculpatory evidence, regardless of whether the document is otherwise privileged. Motion, pp. 3-4; Reply, p. 4. Bandimere contends that the importance of Brady material overrides considerations of privilege. Motion, p. 3. He argues that redacted documents are also insufficient because he would be unable to evaluate the context or the significance of the exculpatory material. Id., pp. 3-4. In short, Bandimere is not arguing that the Division has withheld material exculpatory evidence. Instead, he is seeking access to material that has been withheld as privileged, which itself has not been identified as exculpatory, but happens to be contained within a document that contains exculpatory material, where the identified exculpatory portions have already been produced to respondent.

A similar argument was recently considered and rejected in United States v. Gupta, 848 F. Supp. 2d 491, 497 (S.D.N.Y. 2012). In Gupta, a defendant subject to parallel criminal and civil enforcement proceedings sought access to Commission notes and memoranda memorializing witness interviews. Id. at 493. The judge ordered the government to conduct a Brady review and produce any material exculpatory evidence. Id. at 495. The judge noted that it was "well-established" in that district that Commission interview notes are protected work product and held in the alternative that "to the extent [the defendant] seeks disclosure of the notes and memoranda beyond any Brady material, he has not met the burden to overcome work product protection." Id. at 496-97; see United States v. Peitz, No. 01-852, 2002 U.S. Dist. LEXIS 17750, *25-26 (N.D. Ill. Sept. 20, 2002) (analyzing a Brady claim and stating "the prosecution is only obliged to disclose evidence that would be useful and favorable, not necessarily the privileged document itself"); United States v. Harry, No. 10-1915, 2013 U.S. Dist. LEXIS 25721, *42 (D. N.M. Feb. 6, 2013) (explaining in the context of analyzing Brady and Jencks Act claims that "[t]he investigative notes may be redacted so that the United States turns over only the statements, and not any of the

[1] The Supreme Court has since held that the duty to disclose material exculpatory evidence is applicable even when there has been no request for that information by the accused and that the duty to disclose also extends to impeachment evidence. See City of Anaheim, Administrative Proceedings Rulings Release No. 586 (July 30, 1999), 70 SEC Docket 881, 881 (citing United States v. Agurs, 427 U.S. 97, 107 (1976) and United States v. Bagley, 473 U.S. 667, 676 (1985)).

interviewing agent's thoughts or impressions, as [the defendant] only has a right to the statements, and not more, contained in any investigative notes, under Brady").

I find Gupta to be on all fours with the present controversy. The Division has filed an affidavit stating that it performed a Brady review and it has produced the contents of its privileged internal notes only to the extent of the Brady material. Although Rule 230(b)(2) does refer to "documents" containing material exculpatory evidence, it is entirely unreasonable to construe the Rule as requiring disclosure of entire privileged documents without redaction. If a fact subject to disclosure under Brady is recited in an extremely sensitive and obviously privileged document, for example, an action memorandum, that would surely not by itself make the entire action memorandum discoverable. Bandimere has not pointed to any evidence (as opposed to speculation) that the present privileged documents contain additional material exculpatory evidence. Even assuming that the work product doctrine may be overcome by a sufficient showing, Bandimere has not made such a showing. See Orlando Joseph Jett, 52 S.E.C. 830, 830-31 (June 17, 1996) (an affidavit regarding Brady "remove[d] any doubt about the matter").

Bandimere is not prejudiced by the nature of the Division's disclosure. Brady is not a discovery rule, it is "'intended to insure that exculpatory material known to the Division is not kept from the respondent,'" and it does not "'authorize a wholesale 'fishing expedition' into investigative material.'" Warren Lammert, Securities Act Release No. 8833 (Aug. 9, 2007), 91 SEC Docket 856, 866 (quoting another source); see Smith v. Sec'y of N.M. Dep't of Corr., 50 F.3d 801, 823 (10th Cir. 1995) (stating that Brady "does not require the prosecution to divulge every possible shred of evidence that could conceivably benefit the defendant," and that the purpose of Brady is not "to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur"). The Division conducted a Brady review and provided Bandimere with the potentially material exculpatory statements approximately two months prior to the hearing. The Division notified Bandimere that the redacted documents, if produced, would convey the same information that was provided in the List. Resp. Ex. C, p. 2 ("If you request the actual documents, they will be redacted such that the information you receive is what we conveyed to you today."). Bandimere has not alleged that he does not have access to these witnesses; indeed, he could question the witnesses about their statements to obtain even more information to prepare his case. See United States v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007) ("Brady information must be disclosed . . . in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial.").

Bandimere's remaining arguments are unpersuasive. Rule 230(b)(2) only prohibits the Division from acting "contrary to the doctrine of Brady." I am aware of no support for the proposition that the Commission intended to hold the Division to a higher standard than what Brady requires, nor does Bandimere cite any. Motion, pp. 4-5; Reply, pp. 4-5. Indeed, City of Anaheim, on which Bandimere relies, is squarely to the contrary. 70 SEC Docket at 884-85 ("A review of the Commission's adjudicatory opinions shows that Brady has never been expansively interpreted."). Nor does Rule 230(b) deprive me of the authority to decide how Brady disclosure should take place; again, City of Anaheim is directly on point. Id. at 892 (setting forth procedures for Brady affidavit and in camera review).

Order

Accordingly, it is ORDERED that Bandimere's Motion is DENIED.

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Cameron Elliot
Administrative Law Judge