

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4473/December 20, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16554

In the Matter of

GRAY FINANCIAL GROUP, INC.,
LAURENCE O. GRAY, and
ROBERT C. HUBBARD, IV

ORDER GRANTING IN PART
RESPONDENTS' MOTION FOR
PRODUCTION

On December 7, 2016, Respondents filed a motion asking me to order the Division of Enforcement to produce a detailed privilege log and any withheld *Brady* or Jencks Act material. The Division filed a response on December 13, and Respondents replied by December 19.

The Division's Privilege Log is Adequate

Respondents state that the Division has withheld "thousands of documents" on the basis of the attorney-client, work-product, deliberative-process, and law enforcement investigatory privileges. *See* Mot. at 1-2. Respondents contend that the Division must produce a proper privilege log that will allow for an evaluation of the Division's privilege claims. *Id.* Respondents argue that the Division's current log, which provides broad categories of withheld documents, but no individual details, is insufficient to meet its burden of establishing whether a privilege applies. *Id.* at 2.

However, as the Division correctly points out, the current log satisfies Rule of Practice 230(c), which allows a privilege log to identify documents by category instead of individually. Resp. at 2; 17 C.F.R. § 201.230(c). Although I have discretion to order the production of a more detailed log, I choose not to exercise it here. Taking the Division's representations at face value, the documents generally described appear to qualify for at least attorney work-product and/or attorney-client protections. The log describes, for example, "internal memoranda" and "internal correspondence between SEC staff members" pertaining to the "course of the investigation," the "assessment and analysis of evidence," potential theories of liability, and the Division's recommendations of enforcement action. Mot., Ex. 1 at 1-3. These items are classic forms of privileged material. Similarly, enforcement recommendations provided to the Commission or internal analyses or reports prepared for litigation would not contain information that Respondents would be entitled to. *Id.* A more specific privilege log may satisfy Respondents' curiosity, but would be unlikely to reveal additional discoverable material.

A Declaration that the Division Complied with Brady Will Suffice

Respondents next argue that the Division's current privilege log, although inadequate, indicates that there may be material exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and its progeny that the Division failed to produce. Mot. at 3-4. Respondents therefore request an *in camera* review of all of the documents the Division claims as privileged, and ask me to order the Division to file a declaration stating that they are in compliance with *Brady*. *Id.* at 4.

I decline to order an *in camera* review. The Commission has held that “[m]ere speculation that government documents may contain *Brady* material is not enough to require the judge to make an *in camera* review.” *Orlando Joseph Jett*, Admin. Proc. Rulings Release No. 514, 1996 SEC LEXIS 1683, at *2 (June 17, 1996). *Brady* does not authorize a respondent to engage in a “fishing expedition” in the hopes of uncovering something useful to its defense. *Id.* at *1-2. A respondent must first make a “plausible showing” that favorable and material information to its defense exists in the privileged documents. *Id.* at *2. Respondents have made no such showing here. They merely contend the Division's reference in the log to notes “summarizing witness statements” and to “conversations with witnesses,” as well as to documents containing “evidence” or “testimony,” demonstrates that there is likely undisclosed *Brady* material. Mot. at 3-4. But Respondents' assertion that documents “might” contain *Brady* material is insufficient to justify *in camera* review. *Orlando Joseph Jett*, 1996 SEC LEXIS 1683, at *3.

Moreover, the Division is willing to submit a declaration certifying that it has made a thorough search for all *Brady* material and that it has complied with its *Brady* and other discovery obligations. Resp. at 3. Respondents request that the declaration “should contain sufficient detail to explain the measures taken to comply with *Brady* and what *Brady* analysis the Division performed.” Reply at 4. I will order the Division to provide the declaration Respondents request, which will further mitigate any need for *in camera* review. *See Orlando Joseph Jett*, 1996 SEC LEXIS 1683, at *3.¹

Respondents' Request for In Camera Review of Jencks Material is Granted

Respondents move for the Division to produce all material subject to disclosure under the Jencks Act and ask for an *in camera* review of documents potentially containing discoverable witness statements, such as notes of conversations and interviews with witnesses. Mot. at 5. The Division states that it has already produced everything that it determined to be Jencks Act statements. Response at 6-7. The Division further states, however, that it is willing to submit its notes related to interviews of witnesses who it will call at the hearing for *in camera* review. *Id.* at 7. The Division notes that Respondents are not entitled to any Jencks Act statements until the

¹ To the extent Respondents move for an order directing the Division to produce *Brady* material, it is unnecessary. *See* Mot. at 1. The Division is already required by law to comply with *Brady*. *See* 17 C.F.R. § 201.230(b)(3).

relevant witnesses actually testify but states that it is willing to submit the documents for *in camera* review by January 20, 2017, which is a week after it will finalize its witness list. *Id.*

Although the Division is correct, and Respondents are not entitled to Jencks Act statements until after a witness testifies, 18 U.S.C. § 3500(a); *Palermo v. United States*, 360 U.S. 343, 349 (1959), I will review potential Jencks Act material *in camera* prior to the hearing. Therefore, by January 23, 2017, which is a little more than one week after it submits its final witness list, the Division shall submit for *in camera* review any contemporaneous notes it has of investigative interviews with witnesses on that list.² Contrary to Respondents' assertion, Reply at 6, notes prepared after an interview need not be produced under the Jencks Act. 18 U.S.C. § 3500(e)(2) (defining the notes subject to disclosure under the Act as a "substantially verbatim recital" of a witness's oral statement "recorded contemporaneously with the making of [the] statement").

Respondents also ask that I require the Division to submit a declaration that details its compliance with the Jencks Act. Mot. at 6. However, because I will review the disputed documents *in camera*, I see no reason to require the Division to submit such a declaration. Moreover, the Division stated that it will submit a declaration covering *Brady* "and other discovery obligations." Resp. at 3.

It is therefore ORDERED that Respondents' Motion for production is GRANTED IN PART. The Division shall submit a declaration certifying that it has made a thorough search for all *Brady* material and that it has complied with its *Brady* and other discovery obligations. The declaration should contain sufficient detail to explain the measures taken to comply with *Brady* and what *Brady* analysis the Division performed. Furthermore, by January 23, 2017, the Division shall submit contemporaneous notes of investigative interviews with witnesses on its final witness list for *in camera* review. Respondents' Motion is DENIED in all other respects.

Cameron Elliot
Administrative Law Judge

² The Division suggested January 20, 2017, as the date for its submission, but federal agencies in Washington, D.C., are closed that day due to the presidential inauguration.