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

Administrative Proceedings Rulings
Release No. 6655 / August 14, 2019

Administrative Proceeding
File No. 3-15124

In the Matter of

David F. Bandimere and
John O. Young

Order Denying Respondent's Motion for Sanctions

Respondent David F. Bandimere has moved to dismiss this proceeding based on his allegation that, during the 2013 hearing of this matter, the Division of Enforcement improperly withheld material exculpatory evidence in the form of notes of interviews with potential witnesses. He argues that this denied him due process during the first hearing. Bandimere now has the interview notes, and the result of the 2013 hearing has been set aside for unrelated reasons. Because he has received the remedy to which he would be entitled if there had been a violation, his motion will be denied.

Background

The Securities and Exchange Commission instituted this proceeding on December 6, 2012. A hearing was conducted in the spring of 2013, followed by an initial decision by another administrative law judge and then an opinion of the Commission. In 2016, the Tenth Circuit Court of Appeals set aside the Commission's opinion on the basis that the prior administrative law judge was not constitutionally appointed in accordance with the Appointments

Clause.[1] In August 2018, the Commission remanded the matter to this office for a new hearing,[2] which will commence September 9, 2019.

Prior to the first hearing, Bandimere sought the production of the factual portions of notes of interviews taken by the Division. The Division resisted production on the grounds of attorney work product, but provided a thirteen-item list of evidence that it had identified as "possible material exculpatory evidence" from the documents it withheld, and a list of categories of documents it was withholding.[3] After the remand, Bandimere again sought production of the notes. The Division continued to maintain that the notes do not contain material exculpatory information, but agreed to produce the notes in May 2019 on the condition that the production would not be deemed a waiver of any privilege or protection.

Rule 230 and Brady

Commission Rule of Practice 230 requires the Division to make available to Bandimere any documents it obtained during its investigation, starting no later than seven days after service of the order instituting proceedings.[4] The Division may withhold documents containing privileged information or attorney work product, but not to the extent the documents contain material exculpatory evidence under the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963).[5] Although *Brady* applies in criminal cases, the Commission has made it applicable to its administrative proceedings through Rule 230(b)(3).[6]

Subsection (h) of Rule 230 provides a remedy for instances in which the Division fails to make a document available to a respondent. That provision places the burden on the respondent to show that the Division's failure was not harmless error, in which case a rehearing or redecision might be

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1 *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *reh'g and reh'g en banc denied* 855 F.3d 1128 (10th Cir. 2017), *cert. denied SEC v. Bandimere*, 138 S. Ct. 2706 (2018).

2 *Pending Admin. Proc.*, Securities Act Release No. 10536, 2018 WL 4003609 (Aug. 22, 2018).

3 Resp. Ex. 5.

4 17 C.F.R. § 201.230(a), (d).

5 17 C.F.R. § 201.230(b)(1), (3).

6 17 C.F.R. § 201.230(b)(3); *see optionsXpress, Inc.*, Securities Act of 1933 Release No. 9466, 2013 WL 5635987, at *3 (Oct. 16, 2013).

warranted.[7] This is similar to the criminal law, where if a *Brady* claim is raised after trial and it is determined that there is a reasonable probability that the evidence's disclosure would have resulted in a different outcome,[8] the remedy typically is a new trial.[9]

As urged by Bandimere—after weighing the allegations, the evidence put on at the prior hearing, and the withheld evidence—I would find that "[t]he amount, and nature, of suppressed, exculpatory evidence is such that confidence in the result of the first trial would be undermined."[10] But the prior hearing has already been cast aside. When the Commission remanded this case last year, it vacated its prior opinion in this matter and instructed that "an ALJ who did not previously participate in the matter" preside over a "new hearing" and "not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter."[11] Given the Commission's order and that Bandimere has the interview notes to aid in preparing his defense for the upcoming hearing, his *Brady* claim appears moot.[12] It would make little sense then to re-assess the outcome of the prior

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[7] 17 C.F.R. § 201.230(h).

[8] *optionsXpress*, 2013 WL 5635987, at *3 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). In *Kyles*, the Supreme Court stated that a "reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." 514 U.S. at 434 (internal quotation marks omitted).

[9] *United States v. Oruche*, 484 F.3d 590, 595 (D.C. Cir. 2007) ("[O]nce a court finds a *Brady* violation, a new trial follows as the prescribed remedy, not as a matter of discretion.").

[10] Motion at 17.

[11] *Pending Admin. Proc.*, 2018 WL 4003609, at *1.

[12] *Cf. United States v. Zomber*, 299 F. App'x 130, 136 n.9 (3d Cir. 2008) ("Because Zomber will have the opportunity for a new trial, during which he will have access to . . . information that he argues he should have had before the first trial, his additional allegations of *Brady* violations . . . are moot."); *United States v. Huguez-Ibarra*, 954 F.2d 546, 553 (9th Cir. 1992) (holding that *Brady* claim was moot where the court reversed conviction on other grounds; appellants' counsel gained access to all the information that was sought and, in the event of a retrial, would be fully able to employ that information in appellants' defense).

hearing at this juncture. And in fact, I have not reviewed the previous initial decision or the Commission's opinion in this proceeding.

Moreover, even assuming *arguendo* that there was a violation, Bandimere has already received the remedy provided by the Rules of Practice—a new hearing. And he received the interview notes more than three months before the hearing. Despite this, Bandimere argues that dismissal is necessary, citing *United States v. Chapman*.[13] There, the Ninth Circuit held that the district court did not abuse its discretion in dismissing an indictment with prejudice under the court's supervisory powers based on its finding that the prosecutor "acted flagrantly, willfully, and in bad faith."[14] But I have no such "supervisory powers." Regardless, nothing indicates that dismissal is an appropriate remedy in a Commission proceeding for noncompliance with Rule 230's production requirements, including the *Brady* obligations incorporated therein. The Rules of Practice and Commission precedent define my authority, and dismissal is mentioned only once as a sanction in the Rules of Practice, namely for failing to make a required filing or cure a deficient filing.[15] That provision is not applicable here, especially because Rule 230(h) already specifies the applicable remedy. But even if the assumed *Brady* violation could be viewed as a failure to make a required filing, that assumed failure has been cured.

Bandimere's motion is DENIED.

James E. Grimes
Administrative Law Judge

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[13] 524 F.3d 1073 (9th Cir. 2008).

[14] *Id.* at 1084.

[15] 17 C.F.R. § 201.180(c).