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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16554

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In the Matter of

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

Respondents,

Division of Enforcement's Response to Respondents' Motion for Privilege Log, Brady Material and Jencks Materials

The Division of Enforcement ("Division") hereby responds to the Respondents' Motion for Production of Privilege Log, Brady Material and Jencks Material, as follows. First, the Division has already produced a list of withheld documents which satisfies the requirements for a privilege log. Second, the Division has notes of witness interviews in its possession which constitute work product and which were not produced. Although the Division does not believe that any of those statements are verbatim witness statements which constitute Jencks material, in an abundance of caution, the Division does not object to submitting interview notes in its possession, regarding interviews with witnesses who will be on its witness list, to the Court for an *in camera* review. The Division also does not object to providing a declaration establishing its compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and Rule 231.

In opposition to the Respondents' motion, the Division states as follows:

I. The Division Has Produced a Privilege Log

On June 30, 2015, the Division produced to Respondents a list of withheld documents pursuant to Rule 230(c) of the Commission's Rules of Practice, attached to Respondents' Motion as Exhibit 1. That log satisfies the requirements of Rule 230(c) in that it identifies the documents by category, and by category provides a date range, a description of the authors (generally SEC staff) and the relevant reason the documents were withheld.

Contrary to Respondents' assertions, a log which list documents by category is acceptable. Rule 230(c) explicitly provides that the Division may withhold and identify certain types of documents by category, including documents that are privileged or that are internal notes, memoranda or writings authored by Commission employees or otherwise work product. It is clear from the Division's withheld list that all of the documents on the list fit within that description and are properly identified by category. *See, e.g., In re Imperial Corp. of America*, 174 F.R.D. 475 (S.D.N.Y.1996) (concluding that privilege log identifying only broad categories as acceptable); *U.S. v. Gericare Medical Supply Inc.*, 2000 U. S. Dist. LEXIS 19662 (M. D. Ala., 2000), and cases cited therein.

The cases cited by Respondents do not contravene the Division's position. *In re Bandimere*, SEC Release No. 746, WL 10967609 (Feb. 5, 2013) (Elliott, ALJ), cited by Respondents, requires only that the Division submit a withheld documents list complying with Rule 230 (c). The Division has already complied with that rule. Respondents also cite *In re Thomas R. Delaney*, SEC Release No. 1652, 2014 WL 1115571 (July 25, 2014). The Division's withheld list in this case is vastly more detailed than the list discussed in *Delaney* and fully

complies with Rule 230(c). The Commission's list in this case includes only internal documents and communications between SEC staff.[1]

II. A Certification Should Satisfy the Division's Brady Obligations

The Division does not object to the request by Respondents for a declaration describing the Division's compliance with *Brady* and Rule 231. Rule 230(b)(2) provides that the Division may not withhold "material exculpatory evidence" under the doctrine of *Brady*, even if the information is otherwise exempt from disclosure in Rule 230. In *Brady*, the Supreme Court held 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." 373 U.S. at 87 (1963).

In response to the relief requested by the Respondents in their *Brady* motion, the Division does not object to submitting a declaration certifying that the Division has conducted a thorough search for all *Brady* material and that it has complied with its *Brady* and other discovery obligations. The Division expects to represent that it has reviewed the investigative files for all documents falling within the parameters of Rule 230, which consisted primarily of the investigative files related to Gray Financial and this case, and that based on that review, the Division did not withhold from Respondents any documents that contained material exculpatory evidence relevant to the claims asserted in the Order Instituting Proceedings in this matter. The Division does not interpret *Brady* to extend to documents or information reflecting internal staff discussions including assessments of Respondents' conduct, or to internal staff discussions regarding the merits of a potential enforcement action against Respondents. Such materials are irrelevant.

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[1] In *Delaney*, the Division's list consisted of five two sentence paragraphs. One withheld category was described as "some e-mail communications with third parties".

No order of any kind directing the disclosure of *Brady* materials by the Division is necessary or appropriate. The Division has primary responsibility for determining whether *Brady* requires the production of documents or information from its files. The Division will satisfy its obligation by submitting a declaration stating that the files at issue have been reviewed and do not contain *Brady* material. *See Thomas Bridge, et al.*, 2009 SEC LEXIS 3367, Securities Act of 1933 Release No. 9068 (September 29, 2009) (concluding that the Division complied with Rule 230 where the Division represented that it was not aware of any *Brady* material in any of the investigative files).

The Division's declaration should resolve this matter. In *City of Anaheim*, 70 SEC Docket 881, 887 (July 30, 1999), the administrative law judge held that "affidavits should be the primary tool for resolving *Brady* disputes." *See also, Orlando Joseph Jett*, 52 S.E.C. 830, 831 (June 17, 1996) (stating that an affidavit regarding *Brady* "remove[d] any doubt about the matter").

III. The Division Will Produce its Notes of Witness Interviews for a Jencks Review

The Respondents further request that the Court issue an order directing the Division to produce all documents reflecting statements of third party witnesses. There is no basis for such an order. The Division has already produced all transcripts. Nevertheless, the Division does not object to submitting its notes related to interviews of persons who will be called by the Division for *in camera* review by the Court. This is more than what is required. The Commission has ruled that "the government's decision as to whether or not to disclose information is final" and that in order to get *in camera* review of a document, a respondent must make some showing that

it contains *Brady* material. *Orlando Joseph Jett*, 62 S.E.C. Docket 510, 1996 WL 360528 (June 17, 1996).[2] No such showing has been made.

The goal under the Rules of Practice being to "secure the just, speedy, and inexpensive determination of every proceeding," prehearing discovery in administrative proceedings is strictly limited to that provided under Rules 230-234. Rule of Practice 103. Respondents have invoked Rule 231, which governs production of witness statements. It provides in pertinent part as follows:

> (a) Availability. Any respondent in an enforcement or disciplinary proceeding may move that the Division of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the Division of Enforcement that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500. For purposes of this rule, statement shall have the meaning set forth in 18 U.S.C. 3500(e). Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

Rule 231(a) thus adopts the definition of "statement" set forth in the Jencks Act. Subsection (e) of the Jencks Act, 18 U.S.C. § 3500, provides as follows:

> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means-
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

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[2] *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) cited by Respondents, states the same point. Specifically, Ritchie states "[i]n the typical case where a defendant makes only a general request for exculpatory material under *Brady* v. *Maryland*, 373 U.S. 83 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention... the prosecutor's decision on disclosure is final."

Accordingly, pursuant to Rule 231(a), Respondents may move for witness statements that fall within the parameters of Rule 231(a), but when viewed within the context of the definition of "statement" contained within the Jencks Act, that category is very narrow. In fact, as stressed in *Palermo v. United States*, 360 U.S. 343 (1959), only statements which may properly be called the witness' own words should be made available to the defense for purposes of impeachment. The Supreme Court went on to say that to be producible, a statement must reflect fully and without distortion what was said, and that summaries of an oral statement which evidence substantial selection of material are not to be produced. *Id.* at 352. Very few interview notes prepared by attorneys or their legal staff are going to fit that description.

Moreover, as the Commission explained in *In the Matter of John M. Schulzetenberg*, SEC Rel. No. 281, 1987 WL 222243 at *1 (Dec. 30, 1987), regarding the Supreme Court's ruling in *Goldberg v. United States*, 425 U.S. 94 (1976), insofar as it relates to work product:

> . . . On the other hand, as the Court pointed out, the primary policy underlying the work product doctrine--i.e., protection of the privacy of an attorney's mental processes--is adequately safeguarded by the Jencks Act itself. That is so because proper application of the Act will not compel disclosure of a government lawyer's recordation of "mental impressions, personal beliefs, trial strategy, legal conclusions, or anything else that 'could not fairly be said to be the witness' own' statement." Goldberg v. US, supra, at 106.

Schulzetenberg, 1987 WL 222243 at *1 (emphasis added). Thus, staff documents that contain work product are, by the definition set out in the Jencks Act, not a substantially verbatim recital of an oral statement and are therefore not subject to production.[3]

The Division has reviewed Rule 231(a) and the definition of "statement" set forth in the Jencks Act, 18 U.S.C. § 3500(e) and produced what it considered to be qualifying witness

[3] The Division represents to the Court that it has no documents in its possession that fall into either the first or the third categories within the definition of "statement" as set forth in the Jencks Act, i.e., statements signed or adopted by the witness or statements made to a grand jury.

statements within its files. Out of an abundance of caution and in keeping with the resolution reached in the majority of these cases, the Division proposes to review its files and submit to the Court for *in camera* inspection any contemporaneous interview notes in its possession that reflect to some extent oral statements made by a witness on the Division's witness list.[4]

The Division notes, however, that, as a technical matter, Respondents are not entitled to receive any such statements until the relevant witnesses actually testify. *See In the Matter of Piper Capital Management, et al.*, SEC Rel. No. 582, 1999 WL 166082 at *2 (Mar. 18, 1999) ("Focusing on the Division's opposition, I agree that neither the Jencks Act nor the Commission Rules of Practice required Division to produce the January 20, 1997 memorandum to Respondents until Ms. Winson testified at hearing."); *Palermo v. United States*, 360 U.S. at 349 (interpreting the Jencks Act and finding that statements need not be turned over until the witness has given direct testimony because the statutory goal of the Act "restricts the use of such statements to impeachment"); *see also, In the Matter of Orlando Joseph Jett, et al.*, SEC Rel. No. 504, 1996 WL 271642 at *2 (May 14, 1996) (ruling that proximity to the trial and the need to expedite the flow of the proceeding warranted that the ALJ conduct any necessary review during the hearing: "Immediately prior to the testimony of each witness, the Division shall offer a description of each withheld document, at which time the Respondents may request that it conduct a review to determine whether the document should be turned over pursuant to Rule 231.")

As stated, the Division does not object to providing to the Court its contemporaneous notes of investigative interviews of witnesses who will be called by the Division, within a reasonable time after the witness list is finalized (the Division suggests January 20, 2017).

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[4] The Division proposes to submit the documents within a reasonable time after finalizing its witness list, currently due on January 13.

The Court can then determine whether Respondents are entitled to view those documents. The Respondents' request should otherwise be denied.

CONCLUSION

For all of the reasons stated herein, the Division does not object to an Order requiring it to submit a declaration regarding its compliance with Brady, and to submit its contemporaneous investigative notes of interviews with trial witnesses for *in camera* review, but the Respondents' motion should otherwise be denied.

Respectfully submitted this 13th day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the DIVISION'S RESPONSE TO PRODUCTION OF PRIVILEGE LOG, BRADY MATERIAL AND JENCKS MATERIALS, by electronic mail and by United Parcel Service, and addressed as follows:

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This 13th day of December, 2016.

/s/ William P. Hicks
William P. Hicks