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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16554

In the Matter of

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

Respondents.

RESPONDENTS' REPLY IN FURTHER SUPPORT OF MOTION FOR PRODUCTION OF PRIVILEGE LOG, *BRADY* MATERIALS, AND JENCKS MATERIALS

Respondents Gray Financial Group, Inc., Laurence O. Gray, and Robert C. Hubbard, IV (collectively "Gray Financial"), hereby submit this Reply in further support of their motion to compel the Division of Enforcement to produce an adequate privilege log, exculpatory and impeachment material under the *Brady* doctrine (Rule 230), and Jencks Act (Rule 231) witness statements.

A. The Division's Sparse, Vague Withheld Documents List Does Not Allow Assessment of Privilege Claims.

The Division's response does not address the very purpose of a privilege log – to enable assessment and challenge of the privilege claimed by the party that bears the burden of establishing that the protection applies. Thus, the privilege log must include "sufficient detail to permit opposing counsel and the Court to assess the applicability of the claimed privilege or protection," including listing authors, all recipients, and descriptions of the subject matter of each document. *Bennett v. CSX Transp., Inc.*, 2006 WL 5249702, at *10 n.7 (N.D. Ga. Sept. 19, 2006). The Division's generic, vague list fails this test.

The two cases the Division cites to support a "category" log actually buttress Gray Financial's request for a "document-by-document" privilege log, which "format has been, undoubtedly will, and should remain, the traditional format." *In re Imperial Corp. of Am.*, 174 F.R.D. 475, 478 (S.D.N.Y. 1997). *Imperial Corp.* permitted an exception to the document-by-document norm because the volume of documents in that case encompassed "hundreds of thousands, if not millions of documents" generated over three years by 50 parties and 20 attorneys. *Id.* No such circumstances exist here, and the Division has not claimed that a more detailed withheld document list is unduly burdensome. Nor has the Division asserted, nor can it, that identifying names of persons it interviewed would by itself disclose attorney work-product. *See U.S. v. Gericare Medical Supply Inc.*, No. CIV.A. 99-0366-CB-L, 2000 WL 33156442, at *4 (S.D. Ala. Dec. 11, 2000). To the contrary, the Division should be ordered to disclose all persons it has and continues to interview. *See* Resp. Motion to Compel the SEC to Disclose All Pre-OIP Contacted Witnesses, New Contacted Witnesses, and to Cease Gathering Evidence ("Motion to Disclose Witnesses") (Dec. 15, 2016). *Gericare Medical* is also inapposite because, unlike the Division's multiple privilege claims, that case concerned solely work-product protection. *Gericare Medical*, 2000 WL 33156442, at *4.

B. The Division's Response Does Not Fulfill Its *Brady* Obligations.

The Division's response demonstrates its cramped reading of the full scope of *Brady* doctrine obligations and the Court's role. The government fails to acknowledge that Rule 230's "doctrine of *Brady*" encompasses not just exculpatory, but also impeachment evidence, such as information about a witness's prior convictions, biases, prejudices, self-interest, unreliability, or motive. *See In re optionsXpress Inc.*, SEC Rel. No. 9466, 2013 WL 5635987, at *3 (Comm'n

Oct.16, 2013) ("materially exculpatory or impeaching evidence" must be produced); *Giglio v. United States*, 405 U.S. 150 (1972).

The Division also incorrectly asserts that internal discussion documents assessing Gray Financial's conduct or the merits of an enforcement action are not covered by *Brady*. First, such documents are at the heart of the *Brady* doctrine if they "harmonize with the theory of the defense." *United States v. Mahaffy*, 693 F.3d 113, 130 (2d Cir. 2012); *see also United States v. Mehanna*, 735 F.3d 32, 65 (1st Cir. 2013) (*Brady* applies to "any evidence that fairly tends to negate guilt, mitigate punishment, or undermine the credibility of government witnesses"). An "assessment" of Gray Financial's actions likely contains some material that reflects weakness of the government's case or supports a defense. Second, the Division is required to produce exculpatory and impeachment material even if contained in otherwise privileged documents. *See United States v. NYNEX Corp.*, 781 F. Supp. 19, 26 (D.D.C. 1991). Thus, even if the documents contain privileged material, the Division must nonetheless disclose the facts that constitute *Brady* material, by, for example, redacting privileged portions or producing summaries of the *Brady* evidence. *See, e.g., In re Bandimere*, SEC Rel. No. 759, 2013 WL 10968374 (Mar. 12, 2013) (Elliot, ALJ). At the very least, Your Honor should order the Division to submit these types of documents for *in camera* review to determine whether they should be disclosed to Gray Financial. *See* Rule 230(c).

Though Gray Financial specified categories of withheld documents that likely contain exculpatory and impeachment material – such as SEC notes "summarizing witness statements" and of "conversations with witnesses"; and memos, emails, other correspondence, and reports containing "evidence" and "testimony" – the Division did not address Respondents' categories. On information and belief, the SEC has been interviewing new potential witnesses just weeks

before trial, yet the Division has not produced any documents or information concerning these interviews, under its *Brady* obligation or otherwise. *See* Resp. Motion to Disclose Witnesses. When the respondent identifies particular categories of *Brady* materials, "the specificity of the request is inversely related to the [Division's] disclosure obligation." *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 827 (10th Cir. 1995). The Court should order the Division to produce the specified documents, and to specify in its declaration that it has conducted a thorough *Brady* review of the categories identified.

Finally, the *Brady* compliance declaration that the Division agrees to provide should contain sufficient detail to explain the measures taken to comply with *Brady* and what *Brady* analysis the Division performed. The ALJ "must have confidence that the Division has carried out a search of the proper scope and performed a proper *Brady* review before accepting as dispositive the Division's declaration that there are no more undisclosed *Brady* materials." *In re City of Anaheim*, SEC Rel. No. 586, 1999 WL 623748, at *6 (July 30, 1999). *Brady* violations have become commonplace, notwithstanding the familiar assurances from the government that it has complied with its *Brady* obligations. *See, e.g., United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."). It is critical that this Court exercise its authority under the SEC Rules to safeguard the few protections that exist for respondents, including the *Brady* rule.

C. The Division's Proposed Jencks Act *In Camera* Submission is Too Narrow.

The Division contends no order from this Court is necessary regarding witness statements, but the government's understanding of what constitutes Jencks material is too narrow. The Division's claim that "[v]ery few interview notes prepared by attorneys or their

legal staff" qualify within the parameters of the Jencks Act does not withstand scrutiny. A written statement need be only a "substantially verbatim recital." 18 U.S.C. § 3500(e)(2). Thus, a writing that "'fairly follow[s] a witness'[s] words, subject to minor, inconsequential errors' is discoverable." *United States v. Gonzalez-Melendez*, 570 F.3d 1, 4 (1st Cir. 2009) (internal citation omitted); *see also In re Sheldon*, SEC Rel. No. 273, 1986 WL 175660, at *2 (Sept. 10, 1986) ("if the potential witness' statements concerning one or more of the subjects discussed were recorded in substantially verbatim form, the notes should be produced even if his statements were not so recorded in their entirety"). Indeed, in the case relied on by the Division, the ALJ reviewed SEC staff notes of witness interviews and ordered the production of some of the documents. *See In re Schulzetenberg*, SEC Rel. No. 281, 1987 WL 222243, at *2 (Dec. 30, 1987). Further, the Supreme Court has rejected "an attorney work product exception to the Jencks Act." *Id.* at *1 (*citing Goldberg v. U.S.*, 425 U.S. 94, 101-102 (1976) (Jencks Act does not "except[] from production otherwise producible statements on the ground that they constitute 'work product' of Government lawyers"). Thus, witness statements contained in attorney notes or memos should be "excise[d]" from the attorney's work product and produced. *United States v. Clemens*, 793 F. Supp.2d 236, 251 (D.D.C. 2011).

The materials the Division should be ordered to submit for Your Honor's *in camera* review must include all documents related to both pre-OIP and post-OIP conversations with witnesses and/or their counsel. When the Division communicates with *counsel* for witnesses – as opposed to with witnesses directly – the government's notes, memos or emails memorializing witness proffers transmitted by the witness's counsel must be produced under the Jencks Act. *United States v. Sudikoff*, 36 F. Supp.2d 1196, 1205 (C.D. Cal. 1999) ("It is reasonable to conclude that the attorney would only submit [a witness proffer] if it was approved by his client,

the witness."). Further, since the government has been recently interviewing new witnesses, it stands to reason it has notes or memos of such conversations, in addition to its earlier pre-OIP communications with witnesses. While the Division, without providing any support, seeks to limit its *in camera* submission to only "contemporaneous" interview notes, no such limitation is warranted since a subsequently prepared document can also contain witness statements from earlier conversations. Finally, there is no reason for the Division to delay its submission to the Court of potential Jencks Act documents until January 20, 2017, a week after the January 13, 2017 witness list due date. The Division should be ordered to provide the documents to the Court on the same date as its witness list is submitted.

* * *

For the foregoing reasons and the reasons stated in Respondents' Motion, Gray Financial respectfully requests that the Honorable Cameron Elliot grant Respondents' Motion in full.

Respectfully submitted this 16th day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondents Gray Financial Group, Inc., Laurence O. Gray, and Robert C. Hubbard, IV hereby certifies that he has served a copy of the foregoing **RESPONDENTS' REPLY IN FURTHER SUPPORT OF MOTION FOR PRODUCTION OF PRIVILEGE LOG, *BRADY* MATERIALS, AND JENCKS MATERIALS** by electronic mail and by United Parcel Service, addressed as follows:

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