

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' MOTION AND SUPPORTING BRIEF 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"), pursuant to Commission Rules of Practice 154, 230, and 231, hereby move for an Order requiring the Division of Enforcement to produce: 1) a privilege log detailing withheld documents; 2) exculpatory evidence, including impeachment material, under *Brady* and *Giglio*; and 3) witness statements pursuant to the Jencks Act. In addition, the Division should be ordered to submit declarations describing its compliance with *Brady* and its progeny, and with Rule 231.

A. The Division Should Be Ordered to Submit an Adequate Privilege Log of its Withheld Documents for Review.

The SEC has withheld untold thousands of documents on the basis of vague privilege and work-product assertions, without providing a proper privilege log to enable Respondents or the ALJ to properly evaluate claims of privilege. Commission Rule of Practice 230(c) authorizes Your Honor to require the Division of Enforcement to submit for review a list of documents it

has withheld from production under Rule 230(b)(1)(i) through (iv), and the documents themselves, in order to determine whether the non-production of such documents is appropriate.

The Division, as the party asserting privilege, bears the burden of establishing that a claimed privilege applies. *See, e.g., In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm. WD Energy Servs.*, 439 F.3d 740, 750 (D.C. Cir. 2006). Entries in 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.*, Civ. Action No. 1:05-CV-8390JEC, 2006 WL 5249702, at *10 n.7 (N.D. Ga. Sept. 19, 2006); *In re Michael Sassano*, S.E.C. Release No. 8865, 2007 WL 4699012, at *2 (Nov. 30, 2007) (ALJ ordered Division to prepare document-by-document privilege log).

The bare-bones four-page Withheld Document List provided by the Division is too generalized and vague to assess the propriety of the claimed privileges. (*See Exhibit 1.*) The Division globally asserts privilege over broad, generic categories such as “Internal memoranda”, “Internal correspondence ... including approximately 5,700 emails”, “Non-verbatim notes”, and “Working files.” (*Id.*) There are no titles of documents and no descriptions of their subject matter. There are vague references to “other evidence” and “testimony” and “conversations with witnesses,” but no descriptions of *what* evidence, *whose* testimony, or *names* of witnesses the SEC interviewed or otherwise communicated with. (*See id.*) Further, the Division provides only broad date ranges encompassing multiple years, and fails to provide names of authors and all recipients. (*Id.*) The Division’s list “is not sufficient to meet [its] burden” of establishing whether any privilege properly applies. *In re Thomas R. Delaney II*, S.E.C. Release No. 1652, 2014 WL 11115571, at *3 (July 25, 2014).

As has been ordered in other SEC administrative proceedings, Respondents request that the Division be required to provide a proper privilege log listing each withheld document, to include the date of the document, the author(s) and recipient(s) (including all persons that have been shown the document or been informed of its substance), a description of the document, and the basis for withholding each document. *See Delaney*, 2014 WL 11115571, at *3-4; *In re Bandimere*, S.E.C. Release No. 746, 2013 WL 10967609, at *1 (Feb. 5, 2013) (Elliot, ALJ); *In re Richard Allerton, Jr.*, S.E.C. Release No. 467, 1995 WL 241396, at *1 (Apr. 20, 1995).

B. The Division Must Produce All Exculpatory Evidence under *Brady* and its progeny, and a Declaration of Compliance.

Rule 230(b)(2) expressly provides that the Division cannot withhold privileged or work-product information if the documents “contain material exculpatory evidence” under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Exculpatory material must be produced “even when those facts are recited in privileged documents.” *In re optionsXpress Inc.*, S.E.C. Release No. 9466, 2013 WL 5635987, at *4 (Oct.16, 2013). The Division has a continuing obligation to produce any exculpatory documents within the scope of *Brady*. *In re Harding Advisory LLC*, S.E.C. Release No. 1195, 2014 WL 10937716, at *3 (Jan. 24, 2014) (Elliot, ALJ). The *Brady* doctrine, as expanded by *Giglio v. U.S.*, 405 U.S. 150 (1972), also encompasses evidence that could be used for impeachment, such as agreements with witnesses, and information reflecting on witness competence or credibility or that casts doubt on a witness’s statement. *See, e.g., U.S. v. Montero*, 440 Fed. Appx. 833, 840, 2011 WL 4056738, at *4 & n.2 (11th Cir. 2011); *In re Bandimere*, S.E.C. Release No. 759, 2013 WL 10968374, at *2 n.1 (Mar. 12, 2013) (Elliot, ALJ).

Despite the vagueness of the Division’s Withheld Document List, its contents demonstrate that there is likely *Brady* material which has not been produced. For example, SEC notes “summarizing witness statements” and of “conversations with witnesses” (Ex. 1, p. 3)

containing exculpatory or inconsistent statements are *Brady* material that must be produced. Likewise, memos, emails, other correspondence, and reports containing “evidence” and “testimony” (Ex. 1, pp. 1-3) within the scope of *Brady* and *Giglio* are subject to disclosure. See *In re John J. Aesoph, CPA*, Release No. APR-789, at 1 (Aug. 9, 2013) (Division conducted “two painstaking *Brady* reviews” and produced redacted interview notes “that arguably contained potential *Brady* material”); *In re Bandimere*, S.E.C. Release No. 759, 2013 WL 10968374, at *1 (Mar. 12, 2013) (Elliot, ALJ) (ordering production of summaries of statements by investors).

Further, government lawyers have a duty to learn of and disclose exculpatory evidence, even from other offices. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). The SEC’s withheld documents list reveals that other SEC offices and divisions, in addition to the Enforcement Division, have relevant documents that have not been turned over. The Division must diligently search for and produce any *Brady* material in the files of other SEC offices.

The Supreme Court has dictated that in cases where the government contends its files are confidential, the court conducts an *in camera* review for exculpatory materials. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Accordingly, the documents the Division asserts are privileged should be submitted to the ALJ for *in camera* review. At the conclusion of such review, all non-privileged material must be promptly produced to Respondents.

As has previously been ordered by Your Honor, the Division also should be ordered to file a declaration “which describes its compliance with *Brady v. Maryland* and its progeny ..., and which specifically states that a search for *Brady* material has been made.” *Bandimere*, 2013 WL 10967609, at *5 (Elliot, ALJ); see also *Delaney*, 2014 WL 11115571, at *5 (requiring affirmation of measures SEC took to comply with *Brady* and that “those measure are sufficient to uncover any *Brady* materials in the investigative file”).

C. The Division Must Produce Jencks Act Statements, and a Declaration of Compliance.

Commission Rule 231(a) authorizes Respondents to move for the Division to produce prospective government witnesses' statements that are expected to pertain to their testimony, as required under the Jencks Act, 18 U.S.C. § 3500. The Division is under a continuing obligation to produce all material within the scope of the Jencks Act, which includes statements made before the initiation of the administrative proceeding as well as after, until the witness testifies. *In re Orlando Joseph Jett*, S.E.C. Release No. 504, 1996 WL 271642, at *2 n.2 (May 14, 1996). Notes and summaries of witness interviews and other documents describing statements by a witness may be Jencks Act material, if they "reflect fully and without distortion what has been said." *Palermo v. U.S.*, 360 U.S. 343, 352 (1959); 18 U.S.C. § 3500(e) (witness statement includes "a substantially verbatim recital of an oral statement"). All such materials should be ordered to be produced.

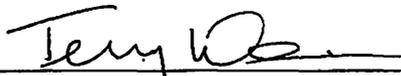
As indicated above, the Division is withholding documents with witness testimony and notes of conversations and interviews with witnesses that likely contain witness statements discoverable under Rule 231.

To the extent the government contends certain documents do not fall within Rule 231's production requirements, it becomes "the function of the trial judge or hearing officer to determine whether materials should be produced," by means of *in camera* review. *Palermo*, 360 U.S. at 354-55; *Jett*, 1996 WL 271642, at *2 (ordering *in camera* review of disputed Jencks documents); *Delaney*, 2014 WL 11115571, at *3 (requiring *in camera* review of SEC's interview notes for any witness). Respondents request that Your Honor order *in camera* review of any documents that the Division contends are non-Jencks material.

In addition, as Your Honor has previously required, the Division should be ordered to submit a declaration that details its compliance with the Jencks Act, as incorporated into Rule 231. See *Bandimere*, 2013 WL 10967609, at *1 (Elliot, ALJ).

For all these reasons, Respondents respectfully request that the Honorable Cameron Elliot grant Respondents' Motion in full.

Respectfully submitted this 6th day of December, 2016.


Terry R. Weiss
Greenberg Traurig, LLP
3333 Piedmont Road, NE
Terminus 200, Suite 2500
Atlanta, Georgia 30305
Telephone: (678) 553-2603
Facsimile: (678) 553-2604
E-mail: weisstr@gtlaw.com

Attorneys for Respondents

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 **MOTION AND SUPPORTING BRIEF FOR PRODUCTION OF PRIVILEGE LOG, BRADY MATERIALS, AND JENCKS MATERIALS** by electronic mail and by United Parcel Service, addressed as follows:

Secretary Brent J. Fields
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

Honorable Cameron Elliot
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

Pat Huddleston II
William P. Hicks
Attorneys for the Division of Enforcement
Securities and Exchange Commission
950 East Paces Ferry Road, Suite 900
Atlanta, Georgia 30326

This 6th day of December, 2016.



Terry R. Weiss
Greenberg Traurig, LLP
3333 Piedmont Road, NE
Terminus 200, Suite 2500
Atlanta, Georgia 30305
Telephone: (678) 553-2603
Facsimile: (678) 553-2604
E-mail: weisstr@gtlaw.com

Attorneys for Respondents

Exhibit 1

IN THE MATTER OF GRAY FINANCIAL GROUP, INC., ET AL., ADMINISTRATIVE PROCEEDING FILE NO. 3-16554

DIVISION OF ENFORCEMENT'S WITHHELD DOCUMENT LIST UNDER RULE 230(e) OF THE COMMISSION'S RULES OF PRACTICE

| DESCRIPTION OF DOCUMENT(S) | DATES | AUTHOR(S) | RECIPIENT(S) | REASON(S) WITHHELD |
|--|------------------------------|---|---|---|
| Action memoranda sent to the Commission recommending enforcement action. | January 2015 to the present | Division of Enforcement ("Division") attorneys ¹ | SEC Commissioners and Commissioners' staff Attorneys and other staff of various SEC offices and divisions ² | Attorney Client Privilege ("AC") (SEC Rule of Practice 230(b)(1)(i)) Work Product Doctrine ("WP") (SEC Rule of Practice 230(b)(1)(ii)) Government Deliberative Process Privilege ("DP") (SEC Rule of Practice 230(b)(1)(i)) Law Enforcement/ Investigatory Privilege ("LE") (SEC Rules of Practice 230(b)(1)(i)) |
| Internal memoranda (including draft action memoranda) prepared in anticipation of litigation and containing mental impressions of counsel, conclusions, legal theories, and opinions related to: | February 2013 to the present | Division attorneys Division staff acting at the direction of Division attorneys | Division attorneys Division staff acting at the direction of Division attorneys | AC WP DP |

¹ Division of Enforcement attorneys include attorneys involved from the Atlanta Regional Office (primarily W. Hicks, G. Loomis, P. Diskin, L. Gaunt, M. Adler, H. Roback, and K. Mumahan), the Office of Chief Counsel (primarily Lidian Pereira), and the Director of the Division (Andrew Ceresney) and his staff.

² Attorneys of other SEC offices and divisions include attorneys from the Office of the General Counsel, Division of Corporation Finance, and the Office of Compliance Inspections and Examinations. Other SEC staff members included within these communications worked under the supervision and direction of the relevant attorneys.

IN THE MATTER OF GRAY FINANCIAL GROUP, INC., ET AL., ADMINISTRATIVE PROCEEDING FILE NO. 3-16554

DIVISION OF ENFORCEMENT'S WITHHELD DOCUMENT LIST UNDER RULE 230(c) OF THE COMMISSION'S RULES OF PRACTICE

| DESCRIPTION OF DOCUMENT(S) | DATES | AUTHOR(S) | RECIPIENT(S) | REASON(S) WITHHELD |
|--|------------------------------|--|---|--|
| <ul style="list-style-type: none"> • The course of the investigation, including the gathering of documents, testimony, and other evidence; • The assessment and analysis of evidence, potential liability and theories thereof; and • The staff's recommendation of enforcement action. | | Attorneys from the Division of Enforcement, with input from other staff of various SEC offices and divisions | Attorneys and other staff of various SEC offices and divisions | <p>LE</p> <p>The Division has not delineated each of these documents separately because SEC Rule of Practice 230(c) permits withheld documents to be "identified by category instead of by individual document" and because to do so would be unduly burdensome.</p> |
| <p>Internal correspondence among SEC staff members, including approximately 5,700 emails, prepared in anticipation of litigation and containing mental impressions, conclusions, legal theories, and opinions containing staff communications related to:</p> <ul style="list-style-type: none"> • The course of the investigation, including the gathering of documents, testimony, and other evidence; • The assessment and analysis of evidence, potential liability and theories thereof; and • The staff's recommendation of enforcement action. | February 2013 to the present | <p>Division attorneys and staff</p> <p>Attorneys and other staff of other SEC offices and divisions</p> | <p>Division attorneys and staff</p> <p>Attorneys and other staff of other SEC offices and divisions</p> | <p>WP</p> <p>DP</p> <p>AC</p> <p>The Division has not delineated each of these documents separately because SEC Rule of Practice 230(c) permits withheld documents to be "identified by category instead of by individual document" and because to do so would be unduly</p> |

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DIVISION OF ENFORCEMENT'S WITHHELD DOCUMENT LIST UNDER RULE 230(c) OF THE COMMISSION'S RULES OF PRACTICE

| DESCRIPTION OF DOCUMENT(S) | DATES | AUTHOR(S) | RECIPIENT(S) | REASON(S) WITHHELD |
|--|-------------------------------|---|---|--|
| | | | | burdensome. |
| <p>Internal analyses and reports prepared by SEC staff at the direction of Division Attorneys in anticipation of litigation and containing mental impressions, conclusions, legal theories, and opinions.</p> <p>Includes:</p> <ul style="list-style-type: none"> • Internal notes and memoranda; and • Spreadsheets and tables containing staff analysis of evidence obtained in the investigation. | February 2013 to the present | Division staff at the direction of Division attorneys and staff of other SEC offices and divisions at the direction of Division attorneys | Division attorneys and staff and the staff of other SEC offices and divisions | <p>WP</p> <p>DP</p> <p>The Division has not delineated each of these documents separately because SEC Rule of Practice 230(c) permits withheld documents to be "identified by category instead of by individual document" and because to do so would be unduly burdensome.</p> |
| <p>Non-verbatim notes taken by SEC counsel summarizing witness statements given during investigative testimonies and conversations with witnesses that were prepared in anticipation of litigation and containing mental impressions, conclusions, legal theories, and opinions. (The verbatim transcripts from the investigative testimonies have already been produced to Respondent's counsel.)</p> | September 2013 to the present | Division attorneys and staff at the direction of Division attorneys | Division attorneys | <p>WP</p> <p>DP</p> <p>The Division has not delineated each of these documents separately because SEC Rule of Practice 230(c) permits withheld documents to be "identified by category instead of by individual document" and because to do so</p> |

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DIVISION OF ENFORCEMENT'S WITHHELD DOCUMENT LIST UNDER RULE 230(c) OF THE COMMISSION'S RULES OF PRACTICE

| DESCRIPTION OF DOCUMENT(S) | DATES | AUTHOR(S) | RECIPIENT(S) | REASON(S) WITHHELD |
|--|------------------------------|---|-------------------------------------|--|
| | | | | would be unduly burdensome. |
| <p>Working files for Division attorneys related to gathering and analysis of evidence, assessment of liability, and analysis of various legal theories and authority.</p> <p>Includes:</p> <ul style="list-style-type: none"> • Legal research; • Attorney notes and memoranda; • Analyses of legal theories; • Drafts of internal and external correspondence; • Interview and Testimony outlines and annotated testimony transcripts; • Annotated exhibits and documents; • Discussion points and outlines for internal and external meetings; • Outlines for meetings and telephone calls; • Drafts of internal memoranda; and • Notes of meetings and telephone calls. | February 2013 to the present | Division attorneys and other SEC staff working at the direction of Division attorneys | Working files of Division attorneys | <p>AC</p> <p>WP</p> <p>DP</p> <p>LE</p> <p>The Division has not delineated each of these documents separately because SEC Rule of Practice 230(c) permits withheld documents to be "identified by category instead of by individual document" and because to do so would be unduly burdensome.</p> |