Tab B

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Release No. 3733, Release No. 9492, Release No. 30820, Release No. 71021, Release No. 33-9492, Release No. 34-71021, Release No. IA - 3733, Release No. IC - 30820, 2013 WL 6384275 (S.E.C. Release No.)

S.E.C. Release No.
Securities Act of 1933
Securities Exchange Act of 1934
Investment Advisers Act of 1940
Investment Company Act of 1940

SECURITIES AND EXCHANGE COMMISSION (S.E.C.)

IN THE MATTER OF JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC D/B/A PATRIOT28 LLC AND GEORGE R. JARKESY, JR.

Administrative Proceeding File No. 3-15255

December 6, 2013

ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW

I.

Pending before a law judge are administrative proceedings against John Thomas Capital Management Group LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. The Commission issued an interim stay on November 13, 2013 pending consideration of JTCM and Jarkesy's petition for interlocutory review. For the reasons discussed below, interlocutory review is denied.

II.

The Order Instituting Proceedings was issued on March 22, 2013. [FN1] It alleged that JTCM (the adviser to two hedge funds) and Jarkesy (the funds' manager) engaged in fraudulent conduct in connection with the offer, purchase, and/or sale of securities. Among other things, JTCM and Jarkesy were alleged to have recorded arbitrary valuations for certain of the funds' holdings without a reasonable basis for doing so—thus causing the funds' performance figures to be false and misleading and their own compensation to be inflated—and to have marketed the funds on the basis of false representations about, for example, the identities of the funds' auditor and prime broker. The OIP also alleged that JTCM and Jarkesy placed the interests of John Thomas Financial, Inc. ("JTF") (a broker-dealer and the funds' placement agent) and Anastasios "Tommy" Belesis (who controlled a holding company that owned JTF) over those of the funds when they directed millions in fees to JTF for services of dubious value. Furthermore, according to the OIP, JTCM and Jarkesy breached their fiduciary duty of full and fair disclosure by, among other things, falsely representing that JTCM was wholly independent of JTF, that JTCM was solely responsible for managing the funds, and that Jarkesy was responsible for all of the funds' investment decisions. JTF and Belesis were alleged to have willfully aided, abetted, and/or caused JTCM and Jarkesy's violations of the securities laws.

The law judge set the hearing for November 12, 2013. At a prehearing conference on October 24, 2013, the law

judge denied JTCM and Jarkesy's motion for, *inter alia*, production of alleged *Brady* material and a change of venue. The law judge also denied their request for a continuance, although she did further postpone the hearing's commencement until November 18, 2013. [FN2] Subsequently, the law judge denied JTCM and Jarkesy's motion to certify her rulings for interlocutory appeal pursuant to Rule of Practice 400(c) and denied their motion for a stay of proceedings pending appeal. [FN3]

On October 31, 2013, JTCM and Jarkesy filed the instant petition with the Commission for interlocutory review. Their principal contention is that the Division of Enforcement did not comply with its disclosure obligations under Rule of Practice 230(b)(2) and *Brady v. Maryland*.[FN4] They argue that the Division withheld witness interview notes that contain material exculpatory information omitted from the previously produced summaries of those notes. They assert that the Division violated its disclosure obligations by not specifically identifying where within the Division's production of electronic data potential *Brady* material might be found. Finally, JTCM and Jarkesy also contend that the law judge should have set the hearing to be held in Texas rather than in New York.

III.

***2** The order requesting the filing of additional briefs explicitly reserved decision on whether to grant interlocutory review. [FN5] Upon a thorough review of the parties' arguments, it is apparent that the standard for interlocutory review has not been met.

"Rule of Practice 400(a) provides that '[p]etitions by parties for interlocutory review are disfavored' and will be granted only in 'extraordinary circumstances.' [The Commission] adopted this language 'to make clear that petitions for interlocutory review … rarely will be granted.'" [FN6] Moreover, the "Commission generally does not consider petitions for interlocutory review where"—as here—"the law judge has 'declined to certify [the] motion for interlocutory review.'" [FN7] That follows from Rule of Practice 400, which "does not contain any provision relating to a party's ability to petition the Commission directly for interlocutory review" without first obtaining certification from the law judge. [FN8] To the contrary, Rule 400(c) provides that any ruling that a party "submit[s] to the Commission for interlocutory review *must* be certified in writing" by the law judge as satisfying certain criteria. [FN9]

The law judge appropriately declined to certify her rulings for interlocutory review. Rule 400(c) states that the law judge "shall not certify a ruling unless," among other things, "(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and (ii) An immediate review of the order may materially advance the completion of the proceeding." [FN10] The rulings for which JTCM and Jarkesy sought certification involve quintessentially "mixed [questions] of law and fact"— namely, the application of established legal standards (*e.g.*, the disclosure obligations under Rule 230(b)(2)) to the evidence in the record—and not controlling questions of law suitable for certification. [FN11] The law judge's denial of certification by itself presents a sufficient basis for denying JTCM and Jarkesy's petition for interlocutory review. [FN12]

Apart from accepting a certified ruling for interlocutory review, the Commission also may direct interlocutory review upon its own motion. The Commission has broad discretion to grant interlocutory review "at any time" and "on its own motion" pursuant to Rule of Practice 400(a)." [FN13] Still, the Commission's emphatic preference—which embodies the "general rule" disfavoring piecemeal, interlocutory appeals [FN14]—is that claims should be presented in a single petition for review after "the entire record [has been] developed"[FN15]

and "after issuance by the law judge of an initial decision."[FN16] That a party may "disagree with the law judge's determination" does not make a ruling "appropriate for interlocutory review." [FN17] JTCM and Jarkesy have failed to set forth any compelling reasons for the Commission to take up their claims on its own motion at this juncture.

***3** Only sparingly has the Commission employed its discretion to direct interlocutory review. For example, the Commission has declined to review uncertified rulings in cases in which the respondent claimed that the Division ""overlooked exculpatory evidence" and was "tardy in producing" its investigative file [FN18] or that the respondent would be deprived of due process if forced to go forward with the hearing given the "voluminous investigatory files" turned over by the Division. [FN19] Of particular relevance here, the Commission has emphasized that interlocutory review is rarely appropriate for "pre-trial discovery orders" and that "complaints about production of documents" will not ordinarily "warrant … interference with the orderly hearing process." [FN20] Such complaints do not constitute ""extraordinary circumstances justifying our intervention" before the completion of proceedings before the law judge. [FN21] The claims now raised by JTCM and Jarkesy are of the same basic kind and character. Accordingly, they do not warrant interlocutory review on the Commission's own motion.

Nonetheless, JTCM and Jarkesy contend that this case is "extraordinary" in that their claims, "[b]y their very nature," supposedly can be vindicated only though immediate review. For instance, they contend that it is "uniquely impossible" to measure and remedy the harm that results from "denial[] of access to evidence" such as undisclosed *Brady* material. This argument lacks merit. On review of an initial decision, the Commission can, if necessary, remedy a law judge's erroneous ruling as to the scope of disclosure "in the same way that an [appellate court can] remedy a host of other erroneous evidentiary rulings: by vacating [the initial decision] and remanding for a new" hearing at which the parties have access to all the evidence to which they are entitled. [FN22] Furthermore, the Commission can allow new evidence to be adduced in the course of its independent review of the record "at any time prior to issuance of a decision" if a party shows with particularity that the evidence is "material" and that there were "reasonable grounds for failure to adduce such evidence previously." [FN23] Therefore, when denying interlocutory review of law judges' discovery rulings, the Commission has often invoked the principle that review following issuance of an initial decision is sufficient to protect the parties' rights. [FN24] This principle applies with equal force to claims that the Division failed to disclose material exculpatory or impeachment evidence. [FN25]

***4** Similarly without merit is JTCM and Jarkesy's argument that the "harm resulting from an unprepared defense"—*i.e.*, because of their alleged inability to prepare for the hearing within the time set by the law judge—cannot be remedied by post-hearing review. As the Commission has explained, the denial of a continuance can "'be effectively reviewed post-judgment"D' by vacatur and remand in the event that the law judge's refusal to postpone the hearing was improper. [FN26] The denial of a motion to transfer venue, too, is "reviewable after [the] entry of judgment."[FN27]

Finally, JTCM and Jarkesy contend that "extraordinary circumstances" exist and interlocutory review is called for whenever a respondent asserts ""Constitutional due process violations." The Commission has rejected this argument. [FN28] A party is not entitled to an interlocutory appeal merely because he or she presses a claim premised on a constitutional right or guarantee. [FN29]

IV.

In a truly unusual case, and *if* serious and prejudicial error were plainly apparent upon even a cursory review of the record, then deferring review until issuance of an initial decision might well postpone an inevitable later vacatur and remand. [FN30] But that is not this case. It appears evident that granting interlocutory review is unlikely to promote the efficient resolution of these proceedings.

JTCM and Jarkesy's principal complaint is that the Division did not produce its notes from certain witness interviews. Asserting privilege, the Division instead provided a declaration from its lead counsel describing the statements from those witnesses constituting, in the Division's view, potential *Brady* material. Although "the disclosure of material exculpatory *facts* not otherwise available to the respondent" is required even "when those facts are recited in privileged documents," the Division can satisfy its obligations by providing the respondent with the substance of the materially exculpatory statements; it need not turn over the documents themselves. [FN31]

JTCM and Jarkesy do not take issue with this proposition as a general matter. They argue, though, that there is reason to believe that the Division's summaries omit *Brady* material. Handwritten notes from one of the interviews—that of JTCM investor Steven Benkovsky—were later inadvertently produced by the Division. JTCM and Jarkesy claim that those notes contain material exculpatory evidence not found in the summary previously produced to them. This, according to JTCM and Jarkesy, raises an inference that the Division's summaries of notes from *other* interviews (which they do not have) also are incomplete.

***5** The premise of their argument is faulty because the notes from Benkovsky's interview do not, in fact, contain material exculpatory or impeachment evidence that has not elsewhere been disclosed to respondents. For example, although it may be somewhat impeaching as to Benkovsky that he admitted during the interview that he did not read the funds' private placement memorandum, the Division's summary disclosed that admission. More fundamentally, JTCM and Jarkesy take an overly broad view of what constitutes *Brady* material. The fact that Benkovsky testified that *Belesis* made false statements to him in order to induce him to invest has no bearing on whether *JTCM and Jarkesy* made the misrepresentations for which they have been charged. [FN32] Evidence that Belesis lied to Benkovsky about certain topics is irrelevant to whether Jarkesy *also* lied to Benkovsky (and other investors) as to the matters specified in the OIP and in the Division's pre-hearing brief; it does not contradict or undermine the Division's theory of the case. [FN33] Because JTCM and Jarkesy have not shown that the notes from Benkovsky's interview contain undisclosed *Brady* material, their argument concerning the *other* interview notes necessarily rests on mere speculation—which is not enough to obtain relief. [FN34] They have failed to make the requisite ""plausible showing" that those notes might contain *Brady* material, and therefore they are not entitled to demand that the law judge or the Commission conduct an *in camera* review of them. [FN35]

JTCM and Jarkesy also argue that the Division should be required to turn over the "settlement offer, communications[,] and supporting documents" with respect to JTF and Belesis. Here too, they have not made the requisite "plausible showing" that these settlement-related communications contain material exculpatory or impeachment evidence. The Commission has previously rejected the contention that the "government must disclose all proffers" or that it must disclose statements "contained in the back-and-forth hypothesizing that commonly occurs during plea negotiations between the prosecution and defense attorneys." [FN36]

Next, JTCM and Jarkesy contend that the Division violated its disclosure obligations by producing its investigative file in the form of a hard drive containing 700 GB of electronic data. According to JTCM and Jarkesy, it is not feasible for them to go through all of this information in advance of the hearing. The Division

counters—and JTCM and Jarkesy do not dispute—that the files were produced to respondents in the "same way the files are kept by the Division" itself and, where applicable, in the same way that the Division received documents from third parties. Further, it is undisputed that the Division supplied the documents in an electronically searchable Concordance database format. [FN37]

***6** JTCM and Jarkesy assert that the Division must go further and specifically identify material exculpatory or impeaching evidence within the production or, at the very least, provide a "roadmap" for those documents. That is not so. Neither Rule 230(b)(2) nor *Brady* requires the Division to prepare respondents' case for them. The basic purpose of Rule 230(b)(2) is to ensure that "exculpatory material known to the Division is not kept from the respondent." [FN38] To that end, although "Rule 230(b)(1) enumerates certain grounds on which the Division may withhold documents, Rule 230(b)(2) makes clear that the former subsection does not 'authorize[] the Division … to withhold, contrary to the doctrine of *Brady*[,] … documents that contain material exculpatory evidence."' [FN39] On its face, documents that the Division has produced to respondents have not been "kept" or "withheld" from them in violation of Rule 230(b)(2). The Division's "open file" production of its investigative file is consistent with the text of Rule 230(b)(2); JTCM and Jarkesy do not seriously contend otherwise.

Still, JTCM and Jarkesy argue that the Division's production method has, as a practical matter, deprived them of the benefit of the *Brady* doctrine, which is effectively "incorporated" in administrative proceedings by Rule 230(b)(2).[FN40] But even if this were a criminal proceeding (and *Brady* thus were directly applicable), the Division's "open file" production would satisfy its disclosure obligations. It is settled that the government is not required to direct a defendant to specific items of potentially exculpatory evidence within a larger body of disclosed material. [FN41] Indeed, the Supreme Court has made clear that the government may satisfy its *Brady* obligations through an ""open file" policy, which the Court reasoned could well "increase the efficiency and the fairness of the criminal process."[FN42]

JTCM and Jarkesy fail to grapple with this authority. Their contrary reliance on the unpublished district court decision in *United States v. Salyer* is misplaced. [FN43]*Salyer* can be distinguished in various ways—among other things, the court rested its order directing the government to identify exculpatory material on its "case management" authority under the Federal Rules of Civil Procedure, which do not apply in administrative proceedings. [FN44] But principally, its reasoning is simply unpersuasive: The overwhelming weight of authority holds that *Brady* is not violated when, as here, the government turns over its investigative file—voluminous though it might be—in an electronically searchable format and there is no suggestion of bad faith (such as the burying of known exculpatory evidence within a production deliberately padded with irrelevant documents).[FN45] Nothing in either Rule 230(b)(2) or *Brady* requires the Division to go further and prepare a "roadmap" of the documents for the respondent's benefit.

***7** Finally, JTCM and Jarkesy contend that New York is a burdensome venue and that the law judge should be directed to hold the hearing in Texas, which is where they are located. This argument is insubstantial. Rule of Practice 200(c) provides that the "time and place for any hearing shall be fixed with due regard for the public interest and the convenience of the parties."[FN46] This language "expressly speaks of the convenience of the 'parties,"' and thus calls for consideration of "the convenience of *all persons concerned*," including "the convenience of the agency." [FN47] It does not "require [] … a hearing site convenient to [the respondent's] place of business."[FN48] In light of the undisputed facts that (1) JTCM and Jarkesy chose to use a New York-based broker-dealer (*i.e.*, JTF) as the placement agent for the funds; (2) JTF and Belesis are located in New York; (3) most of the witnesses designated by the parties do not reside in Texas and many reside in the New

York area; and (4) the Division staff is from the New York Regional Office, New York appears to be a reasonable choice of venue.

Accordingly, it is ORDERED that the petition for interlocutory review be, and it hereby is, denied. [FN49]

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary

FN1. *John Thomas Capital Mgmt. Group LLC*, Securities Exchange Act Release No. 69208, 2013 WL 1180836 (Mar. 22, 2013).

FN2. Separately, on October 16, the proceeding was stayed as to only JTF and Belesis pursuant to Rule 161(c)(2) to permit the Commission's consideration of their offer of settlement. *See*17 C.F.R. § 201.161(c)(2). The Commission accepted the offer of settlement on December 5. *John Thomas Capital Mgmt. Group LLC*, Securities Exchange Act Release No. 70989 (Dec. 5, 2013).

FN3. 17 C.F.R. § 201.400(c).

FN4. 17 C.F.R. § 201.230(b)(2); *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, the prosecution in a criminal proceeding must disclose materially exculpatory or impeaching evidence to the defendant. Although *Brady* has no direct application to administrative proceedings, Rule of Practice 230(b)(2) is generally consistent with *Brady*. *See optionsXpress, Inc.*, Exchange Act Release No. 70698, 2013 WL 5635987, at *3 & n.15 (Oct. 16, 2013).

FN5. *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 70841, 2013 WL 5960689 (Nov. 8, 2013).

FN6. *Warren Lammert*, Exchange Act Release No. 56233, 2007 WL 2296106, at *3 (Aug. 9, 2007) (quoting 17 C.F.R. § 201.400(a) and *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Exchange Act Release No. 49412, 2004 WL 503739, at *12 (Mar. 12, 2004)).

FN7. *Eric David Wagner*, Exchange Act Release No. 66678, 2012 WL 1037682, at *2 (Mar. 29, 2012) (quoting *Montford & Co., Inc.*, Investment Advisers Act Release No. 3311, 2011 WL 5434023, at *2 n.3 (Nov. 9, 2011))); *Vincent Poliseno*, Exchange Act Release No. 38770, 1997 WL 346154, at *1 (June 25, 1997) ("[A] ruling submitted for review ordinarily must be certified by the law judge.").

FN8. *Jean-Paul Bolduc*, Exchange Act Release No. 42096, 1999 WL 1048643, at *2 (Nov. 4, 1999).

FN9. 17 C.F.R. § 201.400(c) (emphasis added).

FN10. *Id.*

FN11. *See, e.g., Montford & Co.*, 2011 WL 5434023, at *2 & n.7; *City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *1 (Nov. 16, 1999) (denying petition for interlocutory appeal of certified ruling because the ruling did not involve a "question of law that controls the outcome").

FN12. *See, e.g., Jean-Paul Bolduc*, 1999 WL 1048643, at *2; *Poliseno*, 1997 WL 346154, at *1.

FN13. 17 C.F.R. § 201.400(a); *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, 2004 WL 503739, at *12 ("[T]he Commission retains discretion to undertake such [interlocutory] review on its own motion at any time."). This "discretion to grant interlocutory review" exists even when the law judge has declined to certify the ruling in question. *Eric David Wagner*, 2012 WL 1037682, at *2; *see also City of Anaheim*, 1999 WL 1034489, at *1 & n.3 (explaining that Rule 400 "in no way limits the Commission's discretion to direct that matters be submitted to it").

FN14. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (collecting cases).

FN15. *Kevin Hall*, Exchange Act Release No. 55987, 2007 WL 1892136, at *2 (June 29, 2007).

FN16. *Gregory M. Dearlove*, Admin. Proc. File No. 3-12064, 2006 SEC LEXIS 3191, at *6 (Jan. 6, 2006).

FN17. *Montford & Co.*, 2011 WL 5434023, at *3.

FN18. *Kevin Hall*, 2007 WL 1892136, at *1.

FN19. *Gregory M. Dearlove*, 2006 SEC LEXIS 3191, at *6; *see also Kevin Hall*, 2007 WL 1892136, at *2 (declining to review "law judge's decision not to postpone the proceeding").

FN20. *Michael Sassano*, Exchange Act Release No. 56874, 2007 WL 4699012, at *3 (Nov. 30, 2007) (declining to review uncertified discovery ruling) (quotation marks omitted).

FN21. *Id.*

FN22. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108-109 (2009) (confirming "settled" rule disfavoring interlocutory review of "pretrial discovery orders" on the ground that "postjudgment appeals generally suffice to protect the rights of litigants"); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1172 (D.C. Cir. 1985) (observing that review of "[o]rders relating to discovery matters … must usually wait until a final judgment"). The Supreme Court made plain in *Mohawk* that postjudgment review is sufficient even though it might not completely remedy the effects of the erroneous ruling: "That a ruling may burden litigants in ways that are only imperfectly reparable … has never sufficed" to warrant immediate interlocutory review. 558 U.S. at 107 (quotation marks omitted).

FN23. Rule of Practice 452, 17 C.F.R. § 201.452. In view of the Commission's independent review of the record, the respondent also must show that the error was not harmless. *See* Rules of Practice 230(h) & 231(b), *id.* §§ 201.230(h) & 201.231(b); *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *18 n.129 (Nov. 4, 2013); *William H. Gerhauser, Sr.*, Exchange Act Release No. 40639, 1998 WL 767091, at *7 (Nov. 4, 1998).

FN24. *E.g.*, *Warren Lammert*, 2007 WL 2296106, at *7 (alleged failure to ""preserve crucial evidence" did not warrant interlocutory review); *Kevin Hall*, 2007 WL 1892136, at *1 ("tardy" production of Division's investigative file); *Benjamin G. Sprecher*, Exchange Act Release No. 36574, 1995 WL 735903, at *1 (Dec. 12, 1995) ("law judge's refusal to issue … requested subpoenas").

FN25. *United States v. Lewis*, 368 F.3d 1102, 1107 (9th Cir. 2004) ("Courts typically review *Brady* violations post-trial."); *Warren Lammert*, 2007 WL 2296106, at *7 (denying petition for interlocutory review of claim premised on alleged *Brady* violation).

FN26. *Gregory M. Dearlove*, 2006 SEC LEXIS 3191, at *6 n.7 (quoting *United States v. Breeden*, 366 F.3d 369, 375 (4th Cir. 2004)).

FN27. *United States v. Snipes*, 512 F.3d 1301, 1302 (11th Cir. 2008); *see also FDIC v. McGlamery*, 74 F.3d 218, 221-22 (10th Cir. 1996).

FN28. *Gregory M. Dearlove*, 2006 SEC LEXIS 3191, at *5 (denying interlocutory review notwithstanding respondent's argument that the "matter at hand presents extraordinary circumstances with due process implications").

FN29. *E.g.*, *Flanagan v. United States*, 465 U.S. 259, 266-67 (1984) (claim "based on the Due Process Clause of the Fifth Amendment" not subject to interlocutory appeal); *United States v. Wampler*, 624 F.3d 1330, 1338 (10th Cir. 2010) ("Fourth or Sixth Amendment violations … long been held unamenable to interlocutory appellate review").

FN30. *Cf. City of Anaheim*, 1999 WL 1034489, at *1 (granting interlocutory review in the "interests of expediting the disposition of th[e] matter, avoiding a future remand, and providing general guidance with regard to the conduct of our proceedings").

FN31. *optionsXpress, Inc.*, 2013 WL 5635987, at *4 & n.19 (emphasis added). The Division is not obligated to disclose its *analysis* of the statements elicited during the interviews or its legal theories. *See id.* at *7. Nor is the Division required to produce "evidence that is not exculpatory but is merely not inculpatory." *United States v. Poindexter*, 727 F. Supp. 1470, 1485 (D.D.C. 1989); *accord United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988) (holding that *Brady* does not require "the Government to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning").

FN32. In any event, the Division had also produced a sixteen-page Statement of Claim that Benkovsky filed against respondents in a FINRA arbitration, which includes claims based on JTF's and Belesis's alleged misconduct. The Division is not required to disclose information that the respondent already knows about or should know about. *optionsXpress, Inc.*, 2013 WL 5635987, at *8 & n. 50; *see also United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) ("[T]he *Brady* rule does not apply if the evidence in question is available to the defendant from other sources[.]") (quoting *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir.1986)).

FN33. *See, e.g.*, *Jones v. Bagley*, 696 F.3d 475, 486 (6th Cir. 2012) (evidence that hotel "routinely hired criminals" and had "more crime than other hotels" not exculpatory because it did not show that "someone other than [the defendant] was responsible for [the particular] murder" at that hotel); *United States v. Saget*, 108 F. App'x 667, 669 n.2 (2d Cir. 2004) ("[The witness's] statement that [he did not purchase guns for the co-defendant] is not exculpatory, because that fact has no bearing on [the witness's] testimony that he purchased guns for [the defendant]."); *United States v. Ailport*, 17 F.3d 235, 237 (8th Cir. 1994) (evidence tending to show that a particular individual was "one of [the co-defendant's] suppliers" did not "support … the position that [the defendant claiming the *Brady* violation] was *not* a supplier") (emphasis added); *United States v. De Peri*, 778 F.2d 963, 983-84 (3d Cir. 1985) ("Evidence that not all vendors were extorted is irrelevant to the charge that defendants conspired to extort and did extort protection payments from certain vendors."); *United States v. Pappas*, 602 F.2d 131, 134 (7th Cir. 1979) ("The fact that [the defendant] did not try to influence [the witness] on [a certain date] is a negative fact and has no bearing on other evidence that he attempted to influence other people at other times.").

FN34. *optionsXpress, Inc.*, 2013 WL 5635987, at *6 & nn.37-40.

FN35. *Id.* at *6 & n.35.

FN36. *Id.* at *8 (quotation marks omitted) (denying request for "settlement communications between the Division and [the settling party]").

FN37. The Concordance software package enables users to conduct a "quick and thorough search" of the database and identify documents that contain matches to specified search parameters. *See, e.g.*, *United States v. Warshak*, 631 F.3d 266, 298 n.29 (6th Cir. 2010); *United States v. Ohle*, No. S3 08 CR 1109(JSR), 2011 WL 651849, at *4 (S.D.N.Y. Feb. 7, 2011). Thus, JTCM and Jarkesy's estimates for how long it would take to conduct a page-by-page review of the materials are irrelevant; they can use Concordance's search capabilities to home in on the documents that they need to prepare for the hearing.

FN38. *optionsXpress, Inc.*, 2013 WL 5635987, at *6 (quotation marks omitted).

FN39. *Id.* at *3 (quoting 17 C.F.R. § 201.230(b)(2)).

FN40. *Orlando Joseph Jett*, Admin. Proc. Rulings Release No. 514, 1996 WL 360528, at *1 (June 17, 1996).

FN41. *See, e.g.*, *Rhoades v. Henry*, 638 F.3d 1027, 1039 n.12 (9th Cir. 2011) (noting "that 'there is no authority for the proposition that the government's *Brady* obligations require it to point the defense to specific documents with[in] a larger mass of material that it has already turned over"') (quoting *United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997)); *Warshak*, 631 F.3d at 297 (holding that defendant's argument that the "government was obliged to sift fastidiously through the evidence … in an attempt to locate anything favorable to the defense … comes up empty"); *United States v. Pelullo*, 399 F.3d 197, 212 (3d Cir. 2005) ("*Brady* and its progeny permit the government to make information within its control available for inspection by the defense, and impose no additional duty … to ferret out any potentially defense-favorable information from materials that are … disclosed"); *United States v. Wooten*, 377 F.3d 1134, 1142 (10th Cir. 2004) ("no *Brady* violation where the evidence was available to the defendant through the government's open file policy").

FN42. *See Strickler v. Greene*, 527 U.S. 263, 283 n.23 (1999).

FN43. Cr. No. S-10-0061 LKK (GGH), 2010 WL 3036444 (E.D. Cal. Aug. 2, 2010).

FN44. *Compare id.* at *2, *with Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 WL 2482466, at *5 n.24 (Aug. 25, 2006) ("The Federal Rules of Civil Procedure do not apply in administrative proceedings."). Additionally, *Salyer* involved a "singular, individual defendant, who is detained in jail pending trial, and who is represented by a relatively small defense team" and a substantial amount of the documentary evidence was in the form of "hard paper" that filled multiple storage containers. 2010 WL 3036444, at *3, 7; *see also United States v. Rubin/Chambers, Dunhill Ins. Servs.*, 825 F. Supp. 2d 451, 456 (S.D.N.Y. 2011) (distinguishing *Salyer*); *Ohle*, 2011 WL 651849, at *3 (same). None of these circumstances is present here.

FN45. *See supra* note 41 (collecting cases); *cf. Warshak*, 631 F.3d at 297-98 (cautioning that the government cannot deliberately "lard[] its production with entirely irrelevant documents"); *United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009) ("[I]t should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it."), *vacated in part on other grounds*, 561 U.S. 358 (2010).

FN46. 17 C.F.R. § 201.200(c).

FN47. *Burnham Trucking Co. v. United States*, 216 F. Supp. 561, 564 (D. Mass. 1963) (construing Section 5(b) of the Administrative Procedure Act, 5 U.S.C. § 554(b)); *see also E. Utils. Assocs. v. SEC*, 162 F.2d 385, 387 n.1 (1st Cir. 1947) (similar). Because the Commission's formal adjudications are subject to the APA, *Rules of Practice*, Exchange Act Release No. 35833, 1995 WL 368865, at *17 (June 9, 1995), and the language of Rule 200(b) essentially tracks Section 5(b) of that Act, *id.* at *43, it is appropriate to draw guidance from the case law interpreting the APA's venue provision.

FN48. *McCormick v. Edwards*, No. Civil 82-32-S, 1982 WL 1146, at *2 (M.D. Ala. Aug. 24, 1982) (construing Section 5(b) of the Administrative Procedure Act).

FN49. JTCM and Jarkesy have requested oral argument. Because the "presentation of facts and legal arguments in the briefs and the decisional process" would not be significantly aided by oral argument, this request is denied. Rule of Practice 451(a), 17 C.F.R. § 201.451(a).

Release No. 3733, Release No. 9492, Release No. 30820, Release No. 71021, Release No. 33-9492, Release No. 34-71021, Release No. IA - 3733, Release No. IC - 30820, 2013 WL 6384275 (S.E.C. Release No.)

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