

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-11201

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
November 10, 2003

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In the Matter of :  
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NEVIS CAPITAL MANAGEMENT, LLC, : ORDER  
DAVID R. WILMERDING, III, :  
and JON C. BAKER :  
:   
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SECURITIES & EXCHANGE COMMISSION  
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FIRST CLASS

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on July 31, 2003. The OIP is based upon a referral to the Division of Enforcement (Division) concerning issues that arose during the November 1999 Investment Adviser Examination and Investment Company Examination of Respondents (November 1999 Examination).

On October 23, 2003, the Division filed a Motion for In Camera Review of Examination Staff Document requesting review of a portion of a fifty-one page pre-printed checklist utilized by the Commission's Examination Staff during the November 1999 Examination, attached thereto as Exhibit B.<sup>1</sup> Specifically, the Division requests that I review the information contained in three questions of the checklist, on pages 26, 38, and 39, and determine whether or not the information falls within the purview of Brady v. Maryland, 373 U.S. 83, 87 (1963), as exculpatory evidence that must be disclosed to Respondents. On October 31, 2003, Respondents filed a reply and motion for in camera review of additional staff documents seeking review of all documents relating to the November 1999 Examination and rulings on their production. On November 4, 2003, the Division replied to Respondents' motion for in camera review of additional staff documents contending that Respondents have no right to review all documents created by the Commission's Examination Staff.

Rule 230 of the Commission's Rules of Practice governs the production of documents in enforcement and disciplinary proceedings. 17 C.F.R. § 201.230. According to Rule 230(b)(1)(ii), the Division is authorized to withhold certain internal memoranda, notes, and

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<sup>1</sup> I will refer to the Motion for In Camera Review of Examination Staff Document as "(Div. Motion)" and to the attached Exhibits as "(Div. Motion, Ex. \_\_\_\_)."

writings prepared by a Commission employee, subject to certain exceptions. In particular, the Division cannot withhold final examination or inspection reports prepared by the Commission. See 17 C.F.R. § 201.230(a)(1)(vi), (b)(1)(ii).<sup>2</sup> The Division's authority to withhold documents is further limited by Rule 230(b)(2), which prohibits, pursuant to Brady, 373 U.S. at 87, the withholding of documents that contain material exculpatory evidence. Brady, however, does not authorize "fishing expeditions" whereby Respondents request overly broad searches of confidential government materials in hopes that something relevant will turn up. Orlando Joseph Jett, 52 S.E.C. 830, 830 (1996).

I have conducted an in camera review of the designated portions of the November 1999 Examination checklist as initially requested by the Division. Additionally, I have reviewed the expert reports of Jeffry L. Davis and Marianne K. Smythe, and Respondents' Wells Submission filed August 26, 2003, which all contain references to the Nevis Fund "flipping" stock in initial public offerings. After reading these materials, I have concluded that certain information on pages 38 and 39 of the checklist relating to "flipping" should be disclosed to Respondents. Accordingly, the Division shall disclose to Respondents by November 14, 2003, all information contained between and including the sentence in the middle of page 38, "[o]bserve trading over time focusing on client accounts involved and answer the following" and the sentence in the middle of page 39, "[e]xaminers should thoroughly document all relevant records if such a situation appears to exist." (Div. Motion, Ex. B at 38-39.) The rest of the checklist, including the information contained on page 26, will remain withheld under Rule 230(b)(1)(ii).

Regarding Respondents' request for in camera review of all documents relating to the November 1999 Examination, I find that Respondents have failed to make a "plausible showing" that these documents contain information favorable and material to their defense. See Orlando Joseph Jett, 52 S.E.C. at 831 (citation omitted) ("Mere speculation that government documents may contain Brady material is not enough to require the judge to make an in camera review."). Thus, Respondents request for in camera review of all documents relating to the November 1999 Examination is DENIED.

SO ORDERED.

  
Robert G. Mahony  
Administrative Law Judge

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<sup>2</sup> The Division has provided Respondents with the reports to which they are entitled under Rule 230(b)(1)(ii), 17 C.F.R. § 230(b)(1)(ii), which are the final reports from the November 1999 Examination. (Div. Motion at 3, Exhibit C.)