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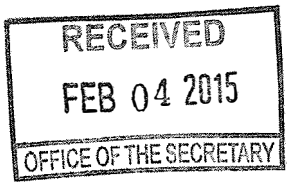
UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15945



In the Matter of

THOMAS A. NEELY, JR.,

Respondent.

DIVISION'S RESPONSE TO RESPONDENT'S REQUEST FOR BRADY MATERIALS AND LIST OF DOCUMENTS WITHHELD

The Division of Enforcement ("Division") hereby responds to Respondent Thomas A. Neely, Jr.'s ("Respondent") Request for Brady Materials and List of Documents Withheld (the "Request"). In his Request, Respondent asks the Court to issue an Order directing the Division to produce all Brady materials and to submit a list of withheld documents pursuant to Rule of Practice 230(c).

I. Rule 230(c) List of Categories of Withheld Documents

Rule 230(c) of the Rules of Practice gives the Court the authority to require the Division to submit a list of categories of documents withheld from the document production set forth in Rule 230(a). Given the impending hearing date, the Division is voluntarily filing herewith a List of Categories of Withheld Documents in the interest of resolving this dispute in an expeditious

manner. The format used by the Division previously has been found compliant with Rule 230(c). See November 7, 2012 Order, Michael Bresner, et al., Admin. File No. 3-15015.

II. Request for Unspecified Brady Material

The Respondent's Request should be denied. The Division is cognizant of its Brady obligations but knows of no Brady material in its possession. See February 2, 2105 Declaration of M. Graham Loomis Regarding the Division's Compliance with its Brady Obligations ("Loomis Dec."), filed herewith. Although the absence of any Brady material moots Respondent's Request (See Egan-Jones Ratings Co., et al., SEC Rel. No. 728, 2012 WL 8718379 at *1 (Oct. 10, 2012) ("affidavits should be the primary tool for resolving Brady disputes")), the Division will nevertheless address Respondent's argument on the merits.

Respondent incorrectly contends that the Division "must" have Brady material in its possession. The support proffered by Respondent for this claim is his cryptic assertion that, some months ago, the Division conducted an hour-long interview of an unidentified witness who possessed unspecified information purportedly favorable to the defense.[1] Request, p. 6. Although Respondent identifies no specific documents or information, he concludes "it is most unlikely" that the Division did not receive Brady material during that interview. Id. Respondent also asserts that "[g]iven that the Division is presumably interviewing many individuals and

[1] In hopes of avoiding further briefing on this ancillary issue so close to the commencement of the hearing, the Division states that, upon information and belief, the witness in question is Regions Chief Accounting Officer and Controller Brad Kimbrough, whom the Division interviewed in October 2014. Mr. Kimbrough was involved in Regions' preparation of a spreadsheet setting out one method of quantifying the impact on the bank's financial statements that resulted from Respondent's actions. The Division produced that spreadsheet as part of its Rule 230 production. No Brady material came out of the Division's interview of Mr. Kimbrough. Loomis Dec., ¶8.

documents in preparation for trial[,] . . . it is likely those interviews or documents have yielded at least some exculpatory information." Id.

Rule of Practice 230(b)(2) makes the criminal law doctrine established in Brady v. Maryland, 373 U.S. 83, 87 (1963), applicable in Commission administrative proceedings. In discussing what may be withheld from the Rule 230 production, Rule 230(b)(2) expressly provides that "nothing in this paragraph (b) authorizes the Division . . . to withhold . . . documents that contain material exculpatory evidence." 17 C.F.R. § 201.230(b)(2). In this case, the Division complied with the Rule as an initial matter by making an "open file" production.[2] John Thomas Capital Mgmt. Grp. LLC, Initial Decision Rel. No. 693 (Oct. 17, 2014), quoting John Thomas Capital Mgmt. Grp. LLC, Exchange Act Rel. No. 71021, 2013 WL 6384275, at *6 (Dec. 6, 2013) (Commission Opinion). In addition, on October 8, 2014, the Division stated it had not encountered any documents or evidence that would qualify as Brady material through that point in time. See October 8, 2014 Response to Respondent's Motion for Extension of Time. That representation remains the same now. See Loomis Dec., ¶5-8.

Respondent also asserts that the Division's obligations under Brady include exculpatory "information and evidence," irrespective of whether that data is contained in a document. Request, p. 5. While the issue has not been squarely decided, recent pronouncements by the Commission suggest that the scope of Rule 230(b)(2) does extend beyond documents to include

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[2] By agreement of the parties, the Division produced its investigative file electronically. See July 9, 2014 Joint Motion to Postpone Hearing and Schedule Prehearing Conference. That "open file" production has been complete for months, and has been quickly supplemented and corrected by the Division whenever necessary.

"material exculpatory facts."[3] John Thomas Capital Mgmt. Grp. LLC, 2013 WL 6384275, at *4; OptionsXpress, Inc., et al., Exchange Act Rel. No. 34-70698, 2013 WL 5635987 at *4 (Oct. 16, 2013). However, even assuming, *arguendo*, that Respondent is correct about the scope of Rule 230(b)(2), the Rules of Practice do not permit non-descript requests for unspecified, speculative information that allegedly "must" exist. As the Commission has stated:

> [I]t is well established that the Supreme Court's Brady decision does not authorize respondents to engage in "fishing expeditions" through confidential Government materials in hopes of discovering something helpful to their defense. Unless defense counsel becomes aware that exculpatory evidence has been withheld and brings it to the judge's attention, the government's decision as to whether or not to disclose information is final. **Mere speculation that government documents may contain Brady material is not enough** to require the judge to make an in camera review. In order to justify such a review, a respondent must first establish a basis for claiming that the documents contain material exculpatory evidence. A "plausible showing" must be made that the documents in question contain information that is both favorable and material to the respondent's defense.

Orlando Joseph Jett, SEC Rel. No 514, 1996 WL 360528 at *1 (June 17, 1996) (emphasis added); see also OptionsXpress, Inc., et al., 2013 WL 5635987 at *5.

In this case, Respondent has not made a "plausible showing" that the documents in question contain material favorable information because he has failed to identify *any* documents. The same logic extends to "material exculpatory facts" – Respondent has made no showing to merit any inquiry by the Court, and based on the few details provided, it would be impossible for him to do so – Respondent claims to know the information possessed by this unnamed witness is "very favorable to the defense," so those facts – whatever Respondent perceives them to

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[3] Even within the context of "material exculpatory facts," the Commission has stated that to trigger a disclosure obligation under Rule 230(b)(2), those facts must: (1) be sufficiently material to present a "reasonable probability" that the evidence would determine the outcome; and (2) be otherwise unavailable to the respondent. OptionsXpress, Inc., et al., 2013 WL 5635987 at *3-4.

demonstrate – are already available and known to Respondent. Request, p. 6; OptionsXpress, Inc., et al., 2013 WL 5635987 at *3-4; see also United States v. Aguirre, 155 Fed. Appx. 145, 151 (5th Cir. 2005) ("the protections of Brady do not require the Government to provide potentially exculpatory information that is already known to the defendant"); Perez v. Smith, 791 F. Supp. 2d 291, 317-18 (E.D.N.Y. 2011).

As for Respondent's speculation that the Division's trial preparation has, in his view, likely "yielded at least some exculpatory information," as noted by the Commission in Jett, "[u]nless defense counsel becomes aware that exculpatory evidence has been withheld and brings it to the judge's attention, **the government's decision as to whether or not to disclose information is final.**" Request, p. 6; 1996 WL 360528 at *1 (emphasis added). As reflected in the Loomis Declaration, the Division is unaware of any Brady material in its possession. Egan-Jones, 2012 WL 8718379 at *1.

Accordingly, for the foregoing reasons, Respondent's Request should be denied.

Dated: February 3, 2015

Respectfully submitted,

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