UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
THOMAS A. NEELY, JR.
Respondent.

Administrative Proceeding File No. 3-15945

THOMAS A. NEELY, JR.'S REPLY TO DIVISION'S RESPONSE TO RESPONDENT'S REQUEST FOR *BRADY* MATERIALS AND LIST OF DOCUMENTS WITHHELD

This is the Reply of Thomas A. Neely, Jr. ("Neely") to the Division of Enforcement's ("Division") Response (filed Feb. 3, 2015) to Neely's Request for *Brady* Materials and List of Documents Withheld (filed Jan. 28, 2015).

> The Supreme Court long ago recognized that one of the overriding objectives of the rules of discovery was to make a trial "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." More recently, the Court has invoked the games of "gambling," "hide and seek," and "scavenger hunts" to characterize the perverse conduct of prosecutors in seeking to avoid their responsibilities under *Brady*. Indeed, there is probably no better context in which to examine prosecutorial gamesmanship than in connection with the *Brady* rule.

Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 538 (2007) (footnotes omitted).

1. The Division is apparently under the erroneous assumption that a respondent must specifically identify the *Brady* material sought before the Division is under any obligation to produce. As a point of constitutional law, the Division's obligation to produce does not depend upon a request. "*Brady* applies whether or not the accused has specifically requested the covered information . . . and it applies to both exculpatory evidence and impeachment evidence . . . ."

United States v. Gonzales, 90 F.3d 1363, 1368 (8th Cir. 1996) (citing *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) and *United States v. Bagley*, 473 U.S. 667, 682 (1995)).

> Since *Brady,* it is clear that the government's duty to disclose does not depend on a specific request from the accused. *See United States v. Agurs,* 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) ("[I]f the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made."). Further, the duty to disclose encompasses impeachment evidence as well as exculpatory evidence. *See United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (citing *Giglio,* 405 U.S. at 154, 92 S.Ct. 763); *United States v. O'Conner,* 64 F.3d 355, 358 (8th Cir.1995) (same).

Honken v. United States, No. CR01-3047-MWB, 2013 WL 9760449, at *48 (N.D. Iowa, Oct. 4, 2013).

2. The Division's "open file policy" does not automatically satisfy its *Brady* obligation.

> "An 'open file' policy is neither mandated by the Constitution ... nor is it ipso facto constitutionally sufficient." *Smith v. Sec'y of N.M. Dep't of Corr.,* 50 F.3d 801, 828 (10th Cir.1995) (internal citations and quotations omitted). "While an open file policy may suffice to discharge the prosecution's *Brady* obligations in a particular case, it often will not be dispositive of the issue." *Smith v. Sec'y of N.M. Dep't of Corr.,* 50 F.3d at 828 (internal quotations omitted).

United States v. Harry, 927 F. Supp. 2d 1185, 1207-08 (D.N.M. 2013), *as amended* (May 13, 2013), *on reconsideration in part,* No. CR 10-1915 JB, 2014 WL 6065672 (D.N.M. Oct. 10, 2014); *see also United States v. Hsia*, 24 F. Supp. 2d 14, 29-30 (D.D.C.1998) ("The Government cannot meet its *Brady* obligations by providing . . . 600,000 documents and then claiming that [the defendant] should have been able to find the exculpatory information[.]").

> Some prosecutors represent that their office maintains a so-called "open file" discovery policy, whereby the entire file of a case is routinely made available to the defense, in all cases, well in advance of the trial. To be sure, an open file policy may be a responsible means of insuring a fair and orderly prosecution. . . . However, even under the most expansive open file policy, prosecutors typically make a distinction between what is required under discovery rules, and what is required under *Brady*, disclosing the former but not the latter.
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> Given the superficial attractiveness of an open file policy, and the institutional benefits allegedly accruing from such a policy, one might assume that such a policy enhances a defendant's ability to obtain more complete discovery,

including the disclosure of *Brady* evidence, well in advance of trial, enabling a defendant to make an informed decision whether to go to trial or plead guilty. However, this assumption may be flawed. To the extent that an open file policy represents to a defendant that a prosecutor has disclosed everything in her file relevant to the case, it may lull a defendant into believing that he need take no further action to enforce discovery requirements. In such a case, an open file policy may become a trap for the unwary. Through the pretense of transparency, prosecutors have the ability to not only withhold *Brady* evidence—as they may do in any case—but also by suggesting that full disclosure has been made, forestall any further inquiry and, in fact, change the nature of the defense. Indeed, several of the most egregious *Brady* violations have been reported in cases where prosecutors represented that they allegedly maintained an open file policy and had claimed to disclose everything in the file relating to the case, including *Brady* evidence.

The opportunities for gamesmanship under an open file policy are considerable. First, so-called open file discovery is really a misnomer. Even those prosecutors who boast that, upon arraignment, they disclose to defendants every document that has been gathered in the course of an investigation, from every agency involved in the investigation—including the statements of witnesses and other evidence material to the defense—candidly acknowledge that much evidence is *not* disclosed under this policy and that defendants must scavenge for additional evidence. Among the evidence that is not ordinarily disclosed are a prosecutor's work product, summaries of interviews with witnesses, notes and communications with other law enforcement officials, information that is privileged or confidential, and information whose disclosure might threaten the safety of witnesses.

Second, prosecutors acknowledge that even under the most liberal open file policy, open file disclosure does not necessarily include all relevant documents, including *Brady* evidence. Prosecutors know that *Brady* evidence may be in the files of other government agencies, i.e., the police and other law enforcement agencies involved in the investigation. To the extent that a prosecutor represents that he maintains an open file policy, he knows that he may be misleading the defense into believing they are getting a complete file. A good example is *Strickler v. Greene*, where the prosecutor allegedly maintained an open file policy that allowed the defense to inspect the entire case file, including police reports and witness statements. However, several items of evidence that would have seriously discredited a key prosecution witness were not included in the file; they were located in the files of the police and the prosecutor's office in a different county. Relying on the prosecutor's open file representation, defense counsel did not file a pre-trial motion for *Brady* evidence. Thus, whether from negligence or deceit, the prosecutor's assurance caused the defense not to hunt for additional evidence.

That an open file policy may result in *Brady* evidence being withheld by other government officials, including other prosecutors, and not disclosed to the prosecutor who is preparing the case for trial, should not be a surprise. Governmental agencies involved in an investigation may decide not to disclose *Brady* evidence to the prosecutor for various reasons, including a fear that disclosure may undermine the safety of witnesses, compromise the integrity of the

case, or damage other ongoing investigations. The relationship between prosecutors and the police has not been sufficiently examined with respect to the formulation and dissemination of rules and policies for the creation, retention, and disclosure of *Brady* evidence. But it is reasonable to expect that some prosecutors, particularly those who are young and inexperienced, may not press the more experienced police agents too hard. Moreover, there are occasions when the competitive relationship between federal and state law enforcement agencies may result in important evidence in the possession of federal officials being withheld from their state counterparts.

Third, an open file policy may provide a prosecutor with an opportunity to conceal *Brady* evidence with the excuse that he inadvertently slipped up. For example, the prosecutor in the Duke lacrosse rape case, Michael B. Nifong, the former District Attorney of Durham, North Carolina, who apparently had a reputation for giving defense lawyers open access to his evidence, was recently disbarred for suppressing critical exculpatory evidence—a finding by a laboratory that showed DNA evidence from four unidentified men on the clothes of the alleged victim, but no DNA evidence from any lacrosse player. Indeed, the director of the laboratory testified that this information was excluded from his report at the prosecutor's direction, notwithstanding the prosecutor's representation to the court that the report was a complete description of the laboratory's findings. The prosecutor's excuse for his failure to disclose the information was that it got lost in the massive amount of evidence in the case, and that he was distracted by other pressing matters in his office. "You know," he stated, "it's not the only case I have right now."

Even assuming that prosecutors who administer a well-intentioned open file policy may inadvertently omit some crucial *Brady* evidence, there is no doubt that some unscrupulous prosecutors intentionally administer an open file arrangement to trap an unwary defense counsel into believing that he has received full disclosure and that he need not engage in further and unnecessary discovery litigation. One of the most notorious perpetrators of this type of misconduct is the former chief prosecutor in Cuyahoga County, Ohio, Carmen Marino. As anybody who has followed Marino's prosecutorial career is aware, he has been the subject of widespread criticism by courts and commentators for his overzealous and unethical conduct. In several cases, particularly capital prosecutions, Marino's practice was to "open" his files to the inspection and discovery by the defense. According to testimony by defense lawyers, Marino's custom was to have his colleagues lead members of the defense team into the prosecutor's office "to allow defense counsel to look at the file." Under this arrangement, "the defense was not permitted to physically view the police reports and a prosecutor read them to defense counsel." Nevertheless, this practice was a ploy by Marino to lull the defense into believing it had received a complete accounting of the prosecutor's file. As disclosed in legal proceedings many years later, critical *Brady* evidence was hidden from the defense, including evidence that strongly suggested that innocent persons had been wrongfully prosecuted and convicted of capital murder and sentenced to death without access to evidence that would have exonerated them.

> Finally, a variation of the open file gambit that has attracted only modest attention is the practice by some prosecutors, particularly in corporate fraud, tax, and other white-collar crime cases, to overwhelm the defense with massive amounts of documents, including items that may be potential *Brady* evidence, and that are virtually impossible to read and digest in the limited time available for pretrial preparation. For example, in one of the "Enron" cases, the prosecution's open file policy required the defense to review over 80 million pages of documents, without identifying potential *Brady* evidence. In another financial fraud case, the prosecution made roughly 160 boxes and 36 file cabinets of warehouse records available to the defense, without segregating the files or identifying potential *Brady* evidence. To be sure, some prosecutors provide indexes and other identifying data to aid the defense in inspecting the material. But so long as the prosecution has made the files available for defense inspection, the courts do not require the prosecution to "point the defense to specific documents within a larger mass of material that it has already turned over."

Litigating Brady v. Maryland: Games Prosecutors Play, 57 CASE W. RES. L. REV. at 542-48 (footnotes omitted).

3. The Division claims that it "is cognizant of its *Brady* obligations but knows of no *Brady* material in its possession." (Division's Response at p. 2).

> Courts continue to recite the litany that prosecutors who may lack knowledge of the existence of *Brady* evidence have a constitutional and ethical duty to learn about its existence, but prosecutors continue to invoke their own familiar litany when a defendant requests *Brady* evidence: "We are aware of our *Brady* obligation and will comply." However, prosecutors are aware that if they lack knowledge of the existence of *Brady* evidence, there is nothing for them to suppress—or disclose. Thus, prosecutors can avoid complying with *Brady* by asserting either that they are unaware of the existence of *Brady* evidence, or that any *Brady* evidence, even if it exists, is not in their possession or control. Clearly, a claim of ignorance offers a prosecutor a convenient opportunity to engage in gamesmanship to avoid compliance with *Brady*.
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> [A] prosecutor is well aware that if he chooses to remain ignorant of evidence located in the files of another agency, or fails to aggressively look for it, he will only be held accountable for non-compliance with *Brady* if the evidence is eventually is discovered, is deemed to have been in the prosecutor's possession or control, and is found to be material. Accordingly, a prosecutor who seeks to game the system in this way will almost always choose to avoid knowledge and assume the risk—an extremely safe risk— that he will never be held accountable.

Litigating Brady v. Maryland: Games Prosecutors Play, 57 CASE W. RES. L. REV. at 551, 552-553. The Division has never stated that it knows of no *Brady* material in the possession of the

Federal Reserve Board ("FRB"), but correspondence produced to Neely unambiguously indicates the SEC and FRB have coordinated the sharing of documents and information between them in their respective prosecutions of Neely.[1] Additionally, as discussed in more detail below, FRB and SEC representatives have jointly interviewed or have simultaneously attended interviews of relevant witnesses. To meet the requirements of *Brady* and its progeny, a prosecutor must actively search out the evidence in the case file and in the files of related agencies reasonably expected to have possession of such information. *See Kyles*, 514 U.S. at 437; *Bagley*, 473 U.S. at 671 n. 4.

4. The Division asserts that its obligation under *Brady* extends to only "documents" and does not include "information." (Division Response at p. 3). This assertion is totally without legal authority as *Brady* has never been limited to documentary evidence. The Division's assertion that this question "has not been squarely decided" is incorrect. (Division Response at p. 3). The *Brady* Court's opinion is clear: "We now hold that the suppression by the prosecution of **evidence** favorable to an accused upon request violates due process where the **evidence** is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87 (emphasis added). *Brady* clearly applies to "verbal" information and is not limited to documents: "The *Brady* rule applies to evidence affecting key witnesses' credibility, *Giglio v. United States,* 405 U.S. 150, 153-54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and thus would encompass the **verbal** cooperation agreements discussed above." *United States v. Casas*, 425 F.3d 23, 43 (1st Cir. 2005) (emphasis added); *see also Collier v. Davis*, 301 F.3d 843, 851 (7th Cir. 2002) ("verbal statement"). "Under *Brady,* the prosecutor must disclose **evidence or information** that would prove the innocence of the defendant or would enable the defense to more effectively

[1] *See, e.g.*, FRB's July 3, 2014 letter to SEC counsel regarding the use of documents and information in the possession of the FRB in the SEC's prosecution of Mr. Neely, attached hereto as "Exhibit A," and FRB counsel's February 25, 2014 e-mail to an SEC representative regarding documents and attorney communications, attached hereto as "Exhibit B."

impeach the credibility of government witnesses." *Wilson v. Cain*, No. CIV.A. 11-2803, 2014 WL 880380, at *3 (E.D. La. Mar. 5, 2014) (emphasis added).

5. The Division claims that it has no obligation to produce *Brady* material where Neely has not specifically identified the information he seeks. (Division Response at p. 2). If Neely knew the specific information he sought, he would not have filed his *Brady* request. Furthermore, the Division essentially argues "information already known to the defense (or that could have been determined through reasonable diligence) does not constitute *Brady* information that the Government must disclose." *United States v. Motta*, No. CR 06-00080 SOM, 2012 WL 4633899, at *2 (D. Haw. Oct. 1, 2012); *see also Moore v. Quarterman*, 534 F.3d 454, 462 (5th Cir. 2008) (same). This is a "game" often played by the prosecution: "Tell us what the exculpatory evidence is and we'll produce it if we have it." There is **no** constitutional requirement that a defendant must request *Brady* information before the government's constitutional obligation to produce is triggered, so there can hardly be a requirement that a defendant must identify the information sought before the government must produce.

6. Neely is now aware that agents of the Division, post filing charges against Neely, acting at times in concert with the FRB, have interviewed or questioned several individuals in connection with Neely, and that documents have been used in those interviews. In this regard, the Division is specifically requested to search the handwritten notes taken by its agents (as well as the agent's own recollection of verbal information conveyed) when they interviewed/questioned Grant Haines ("Mr. Haines") on or around October 2, 2014. Neely has a good faith basis to believe that FRB representatives were present at Mr. Haines' interview via telephone. The Division is also requested to consider the SEC's interviews of Hardie Bradford Kimbrough, Jr. ("Mr.

Kimbrough") in or around November or December 2014 and Tim McCarthy[2] ("Mr. McCarthy") in or around December 2014. Finally, the Division is specifically requested to review its interview (or any interview by the FRB) of any individual in who could potentially possess exculpatory information regarding Neely. That review should include a search for **any evidence or information**, both verbal and documentary, which constitutes exculpatory or impeaching evidence under *Brady* and its progeny.

7. Upon information and belief, the Division may have been provided with information from the law firm of Sullivan & Cromwell ("S&C") that constitutes *Brady* exculpatory material and for which any applicable privilege has been waived by virtue of its production to the Division. Specifically, in a review of Regions Bank relating to the events made the basis of the Division's charges against Neely, S&C interviewed approximately fifty (50) individuals. To the extent any notes or information, including verbal information, from those interviews were provided the SEC or the FRB, any and all applicable privileges have therefore been waived. Should any such notes or information contain any exculpatory evidence or information, it constitutes *Brady* material and must be produced to Neely.

8. This request for *Brady* material is made to protect the rights afforded to Neely under the United States Constitution and to ensure the proceedings against him are just and fair. Additionally, Neely notes that the production of *Brady* material could possibly lead to additional stipulations between the parties in advance of the Hearing.

Conclusion

As stated in Neely's initial *Brady* request, the Division has not fulfilled its ongoing obligation to produce any and all *Brady* material. The Division's argument that it has fulfilled its

[2] Upon information and belief, Mr. McCarthy was interviewed by the SEC on the exact date, December 10, 2014, that the Division filed its initial Witness List

Brady obligations based on its "open file policy" does not pass muster and meet the due diligence required to be performed under *Brady*. It is also clear that the Division is or should be aware of the existence of some *Brady* material, some or all of which has not yet been produced to Neely. Considering the Division's Response to Neely's *Brady* request and under the circumstances presented, one cannot help thinking that the Division "doth protest too much." William Shakespeare, HAMLET, act III, scene ii, line 242. Claiming that it only has to produce "documentary evidence" and not information lends credence to this unconstitutional thought.

Based on the foregoing, Neely requests that this Court direct the Division to produce all *Brady* material of which it is or should be aware within seven (7) days from the Court's order.

Respectfully submitted,

/s/ **Augusta S. Dowd**
Augusta S. Dowd (ASB-5274-D58A)
J. Mark White (ASB-5029-H66J)
William M. Bowen, Jr. (ASB-1285-E66W)
Linda G. Flippo (ASB-0358-F66L)
Rebecca G. DePalma (ASB-4105-D57R)
Katherine Rogers Brown (ASB-4963-N77R)

OF COUNSEL:
WHITE ARNOLD & DOWD P.C.
[redacted]
P: (205) 323-1888
F: (204) 323-8907
Email: adowd@whitearnolddowd.com
mwhite@whitearnolddowd.com
wmbowen@whitearnolddowd.com
lflippo@whitearnolddowd.com
rdepalma@whitearnolddowd.com
kbrown@whitearnolddowd.com

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

ADDRESS OFFICIAL CORRESPONDENCE
TO THE BOARD

July 3, 2014

Mr. W. Shawn Murnahan
Senior Trial Counsel
U.S. Securities and Exchange Commission
Atlanta Regional Office
950 East Paces Ferry Road, N.E. Suite 900
Atlanta, GA 30326-11382

Re: Use of Confidential Supervisory Information -Regions Financial Corporation

Dear Mr. Diskin:

This responds to your letter dated July 2, 2014, requesting, on behalf of the Securities and Exchange Commission ("Commission"), specific written permission to use confidential supervisory information of the Board of Governors of the Federal Reserve System ("the Board") concerning Regions Financial Corporation and its subsidiary, Regions Bank (collectively, "Regions"), to which the Commission has previously been granted access, in a pending public administrative proceeding.[1]

I understand that the Commission has instituted administrative proceedings against a former Regions employee Thomas A Neely, Jr., ("Neely"), alleging that Neely evaded Regions' policies and procedures by deliberately misclassifying certain commercial loans as being unimpaired for purposes of Regions' accounting. In the Matter of Thomas A. Neely, Jr., SEC Administrative Proceeding File No. 3-15945 (June 25, 2014). Under the Commission's Rules of Practice, 17 C.F.R. § 200.100 *et seq.*, the Commission's Division of Enforcement is required to produce to Neely the investigative file compiled by the staff that resulted in the institution of proceedings against him, including documents received from other agencies. The Commission's staff is also in the process of engaging an expert witness for purposes of a hearing, and will need to share documents obtained from the Board with him.

I also understand that in order to maintain, to the maximum extent possible, the confidentiality of the documents and information provided by the Board, Commission staff intends to seek a Stipulated Protective Order that would be signed by Neely's counsel and entered by the presiding Administrative Law Judge. Under terms of the Stipulated Protective Order, documents provided by the Board would only be publicly

[1] The Board previously granted the Commission access to the confidential supervisory information referenced herein by my letter dated May 4, 2011 to Mr. Peter J. Diskin, Assistant Regional Director, in response to the Commission's April 6, 2011 written request, and by my letter dated December 21, 2012 to Mr. Aaron W. Lipson in response to the Commission's November 16, 2012 written request.

disclosed if they are filed with the Commission's Office of the Secretary in support of a motion or other pleading, or used as an exhibit at the hearing.

Pursuant to 12 C.F.R. § 261.21(d), I hereby authorize Commission staff to use the Board's confidential supervisory information, to which the Commission has previously been granted access to, in the Commission's administrative proceeding against Neely. This authorization is premised on the information the Commission has provided, as well as other information known to the Board which permits me to conclude that disclosure of the requested information to the Commission would be appropriate. The Commission's use of this information is otherwise contingent on the Commission's complying with the restrictions on disclosure that are contained in the Board's Rules Regarding Availability of Information. See 12 C.F.R. § 261.21.

The Commission may use the information provided pursuant to this letter in the inquiry referenced above. This authorization is limited to the referenced inquiry and does not include authorization for the Commission to use the information in any manner that may lead to its public disclosure other than the administrative proceeding referenced herein. Notwithstanding any policy or procedure of the Commission to the contrary, the Board's information may be used in any such inquiry, investigation, action, or proceeding or disclosed outside the Commission only with the specific prior written permission of the Board or its General Counsel. This means, for example, that the Commission may not provide the Board's information to another federal or state agency without the Board's permission. If the Commission receives a legally enforceable demand for the information, the Commission must notify the Board prior to complying with the demand and assert all such legal exemptions or privileges on the Board's behalf as the Board may request.

The Board is providing confidential information to the Commission with the understanding that the Commission will continue to establish and maintain such safeguards as are necessary and appropriate to protect the confidentiality of the information. The disclosure to the Commission of confidential information is governed by the provisions of 12 U.S.C. § 1821 (t). Accordingly, the Board expressly reserves all evidentiary privileges and immunities that are applicable to that information.

If you have any questions regarding the above, you may contact Brad Fleetwood of the Board's Legal Division on [redacted].

Sincerely,

Katherine H. Wheatley

Katherine H. Wheatley
Associate General Counsel

cc: Dwight Blackwood
Federal Reserve Bank of Atlanta

From: Brad Fleetwood [redacted]
Sent: Tuesday, February 25, 2014 10:34 AM
To: Seiden, Neal A.
Subject: Regions -ZFRSSE-
Attachments: Exhibit 163 (2009.03.11 Email from Cash to Carrigan about selling units. West Cutler).pdf; Exhibit 164 (2009.03.12 Email from Govindaraju to Cash and Carrigan Re West Cutler).pdf; Exhibit 165 (2009.03.16 Email from Govindaraju to Carrigan about West Cutler).pdf; Exhibit 166 (2009.03.17 Emails from Cash toLuis Gonzales referring Carrigan).pdf; Exhibit 167 (2009.03.16 Email From Cash asking for meeting with Carrigan).pdf

Neal,

Good meeting with you yesterday. FYI ... notified Kuehr and Willoughby's attorneys last night of likely notice of charges, left message with Neely's attorney.

Here are exhibits.
