UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
BROOKFIELD PLACE, 200 VESEY STREET, SUITE 400
NEW YORK, NY 10281-1022

JORGE G. TENREIRO
TELEPHONE: (212) 336-9145
EMAIL: TENREIROJ@SEC.GOV

March 18, 2017

Via Email and UPS Overnight Delivery

Hon. Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, NE
Mail Stop 1090
Washington, DC 20549

Re: Matter of RD Legal Capital, LLC, et al. File No. 3-17342

Dear Judge Patil:

The Division of Enforcement ("Division") writes in response to Respondents' March 17, 2017 letter regarding a supposed violation of the Division's obligations under Brady v. Maryland.

Having raised an unmeritorious due process challenge to these proceedings before the United States District Court and before this Court,[1] Respondents now seek to paper up the record they hope to one day show a three-judge panel of the Court of Appeals in support of the same baseless due process contentions that have failed them twice before. Specifically, Respondents launch an equally unfounded, eleventh-hour attack on the fairness of these proceedings by calling into question the Division's compliance with its obligations under Brady v. Maryland. But Respondents' contentions rest on a deliberate mischaracterization of the Division's claims regarding Respondents' fraudulent conduct and of the statements made to them by the two individuals they have long had access to and from whom they obtained affidavits. Accordingly, their request for relief should be denied.

The Division's contentions with respect to Respondents' funding—in contravention of innumerable statements to investors—of Mr. Barry A. Cohen, have been straightforward and unchanged from the Order Instituting Proceedings ("OIP") in this matter through the Division's Prehearing Brief.

---

[1] See Order in RD Legal Capital LLC v. U.S. S.E.C., No. 16-Civ-5104 (MCA) (MAH) (D.N.J. Oct. 20, 2016) (D.E. 23); Order Following Prehearing Conference in Matter of RD Legal Capital, LLC, Rel. No. 4683 (Mar. 15, 2017).

As Respondents are aware, the allegations related to Mr. Cohen are contained in paragraphs 51 and 52 of the OIP, where the Division contended that Respondents advanced funds to Mr. Cohen with respect to "millions in legal fees from a criminal defendant" (the "Licata Case"), as well as with respect to a qui tam action where "a settlement had been reached between the defendant in the civil case and the United States in a related criminal matter, but the civil matter [brought by Mr. Cohen's client] was not resolved" (the "WellCare Case"). OIP ¶ 51. In describing the Licata Case in its prehearing brief, the Division similarly contended that Respondents funded Mr. Cohen "for an interest in . . . fees that a criminal defendant (i.e., a non-contingent fee client) owed Mr. Cohen." Division Prehearing Br. at 12. The prehearing brief then explained that "[w]hen Respondents purchased interests in the WellCare Case fees they knew that a settlement agreement had been reached between WellCare and the United States in the related criminal matter but that Mr. Cohen's client was neither a party to that settlement nor otherwise a party to that award, and, therefore, Mr. Cohen was owed no fee from the criminal settlement." Id. at 12-13.

Nothing in the two affidavits in Respondents' letter motion contradicts the foregoing contentions, let alone exculpates Respondents. To the contrary, the affidavits prove the Division's claims with respect to Respondents' funding of Mr. Cohen. For example, in what seems to be the basis of Respondents' motion, Elliott Buchman states that he told the Division that "all of the legal fees that Mr. Cohen's law firm had assigned to RD Legal related to cases that were closed at the time of the assignment." Respondents' Letter, Ex. C at ¶ 7. Respondents leave to the reader to figure out what Mr. Buchman meant by "closed," but as Respondents point out, Respondents' Letter at 3, the Division's attorneys did not need to guess—the Division met with Mr. Cohen himself to inquire about the nature of the cases relating to Respondents' investments. In fact, when the Division asked Mr. Buchman about the nature of those cases, he explained that the best person to ask about the cases themselves was Mr. Cohen, which is exactly what the Division did.

Furthermore, the Division has never made any contention with respect to whether the Licata Case was or was not "closed" at the time of the assignment. Instead, the Division's contention has always been that advances to Mr. Cohen with respect to the Licata Case were different from how Respondents described their investments to investors because they arose out of a non-contingent criminal matter with an indeterminate fee. Division Prehearing Br. at 12. Nor has the Division ever contended that the WellCare criminal case was not the subject of a settlement agreement, acknowledging instead that Respondents purport to have advanced Mr. Cohen funds with respect to that criminal case (to which Mr. Cohen's client was not a party).[2] The Division's contention, from the outset, has been that the case was not settled with respect to Mr. Cohen's client. Mr. Buchman's statements are not contrary to those contentions.

Domenic Massari's statements are similarly not exculpatory. Mr. Massari states that in meeting with two Division attorneys, "Mr. Cohen and [he] confirmed that pursuant to a Deferred

---

[2] See, e.g., Div. Ex. 202-81 (schedule to assignment and sale agreement between Respondents' funds and Mr. Cohen, purporting to fund the "Case: United States of America v. WellCare Health Plans, Inc.").

Prosecution Agreement entered into by Wellcare and the United States in the criminal case against Wellcare (Case # 8:09-cr-00203-JDW-EAJ a/k/a 8:09-CR-203-T-27EA) that [sic] it had been settled for a liquidated amount of $80 Million. I understood that that [sic] the $80 Million had actually been received and set aside at the time RD Legal entered into the deal with the Cohen Firm and made its advances." Respondents' Letter, Ex. D at ¶ 6. Far from refuting the Division's contentions, Mr. Massari's statements confirm what the Division has all-along alleged, namely that the settlement agreement in the WellCare matter was between the United States and WellCare and not Mr. Cohen's whistleblower client. See OIP ¶ 51; Division Prehearing Br. at 12-13.[3] Indeed, Mr. Massari explains that he told the Division attorneys that "at that time, the exact amount realized as Cohen Firm legal fees from the $80 Million [sic] could only be estimated." Respondents' Letter, Ex. D at ¶ 6.

The Division's claims with respect to Respondents' funding of Mr. Cohen also track almost verbatim Respondents' own characterization of these transactions. In a lawsuit they filed against Mr. Cohen, Respondents explained they advanced him monies "to purchase legal fees due the Cohen Firm . . . arising out of an action entitled, In the Matter of the Criminal Prosecution of James. J. Licata," and after WellCare entered into a deferred prosecution agreement with the United States Attorney's Office. Div. Ex. 201 ¶¶ 21, 42. Respondents' claim that they misunderstood the Division's contention with respect to Mr. Cohen, or that Mr. Buchman's and Mr. Massari's statements are contrary to them, is spurious.

Simply put, the Division did not circumvent its Brady obligations. The Division did not disclose the content of the conversations with Mr. Massari and Mr. Buchman because there was nothing to disclose.

Mr. Massari's affidavit also states that Mr. Buchman is the person most knowledgeable about negotiations between Mr. Cohen's law firm and RD Legal. Id. at ¶ 3. If this is true, then Respondents' Brady arguments are even more frivolous. Mr. Buchman is not some secret potential witness about whom Respondents are only now becoming aware. He is apparently a person with whom Respondents communicated for many years, and who continues to be willing to speak with Respondents. "Brady is designed to 'assure that the defendant will not be denied access to exculpatory evidence known only to the government'" and no violation occurs with respect to facts the defendant knew or should have known to take advantage of. United States v. Grossman, 843 F.2d 78, 85 (2d Cir. 1988) (citation omitted) (emphasis in original).

Accordingly, Respondents' theatrical production of last-minute affidavits should not entitle them to once more flout this Court's scheduling orders by adding two witnesses they knew or should have known they would want to call at trial. Respondents' letter betrays dereliction in their discovery efforts, given that they waited until March 14, 2017 to contact an

---

[3] Indeed, the Division placed the publicly available Deferred Prosecution Agreement (dated May 5, 2009) on its Exhibit List (Div. Ex. 199), along with RD Legal Funding, LLC's own compliant against Mr. Cohen (Div. Ex. 201) and its attachments (Div. Ex. 202) showing that funding on the WellCare case was made as of June 3, 2009 (Div. Ex. 202-81). Respondents objected to these exhibits. See Resp. Objections dated March 8, 2017.

individual they now state was the central player with respect to some of the transactions the Division has had questions about since the investigation of this matter. See Respondents' Letter at 3. Respondents should not be permitted to erase this error on the basis of flimsy charges against the Division's attorneys.

As the Court may infer, the other transparent purpose of Respondents' baseless allegations is to backdoor their way into the Division's work product, to which they know they are not otherwise entitled. The Division has gone to great lengths to be inordinately transparent in these proceedings by for example taking the unusual step of making available to Respondents copies of notes of communications with witnesses the staff had created during the investigation of this matter. Respondents' Letter at 2. And while the Division did not continue to produce notes of meetings subsequent to the filing of the OIP—a step Respondents seem to acknowledge is not required—the Division was sure to disclose to Respondents any facts learned during post-filing interviews that even remotely approached exculpatory information. See, e.g., Respondents' Letter, Ex. B.

Respondents are entitled to no more. "[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." Matter of Orlando Joseph Jett, 1996 WL 360528, at *1 (June 17, 1996). Respondents overplay their hand in seeking disclosure of a list of all communications the Division had with actual or potential witnesses subsequent to the filing of the OIP and of the Division's work product in preparation for this hearing. There is no legal basis on which to sustain such request, and Respondents' hackneyed Brady accusations do not otherwise provide one. Their request should be denied.

Respectfully submitted,

Jorge G. Tenreiro