

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 4474/December 20, 2016

ADMINISTRATIVE PROCEEDING

File No. 3-17342

In the Matter of	:	
	:	
RD LEGAL CAPITAL, LLC, and	:	ORDER
RONI DERSOVITZ	:	

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on July 14, 2016, pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, Sections 203(e) and 203(f) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940. The hearing is set to commence on March 20, 2017.

Under consideration are: (1) Respondents' motion to quash or modify the subpoena directed to RD Legal Capital, LLC, issued on December 8, 2016, at the Division of Enforcement's request; (2) Reed Smith LLP's motion to quash the subpoena directed to it, issued on November 23, 2016, at the Division's request, and responsive pleadings; and (3) Respondents' notice of deposition and subpoena directed to "SEC Summary Witness in Administrative Proceeding No. 3-17342," the Division's motion to quash, and responsive pleadings.

RD Legal Subpoena

Previously, subpoenas were issued requesting as to each Respondent "[a]ll documents relating to any legal advice requested by, or provided to, [Respondent or affiliates] concerning any communications since June 2011 regarding RD Legal Funding Partners, LP, RD Legal Funding Offshore Fund, Ltd., RD Legal Special Opportunities Fund L.P., or RD Legal Special Opportunities Fund L.P. Ltd. ('Funds') including, without limitation, any offering memoranda, marketing materials or other written or oral communication regarding the Funds." This request related to Respondents' reliance on advice of counsel defense stated in their Answer.¹ Answer at 49. The subpoenas were modified as overbroad and burdensome, and Respondents were required to produce, by December 5, 2016, a narrative describing legal advice concerning the issues alleged in the OIP and to identify all "attorneys, accountants, auditors, and other professionals, including but not limited to a nationally-recognized third-party valuation agent" consulted. *RD Legal Capital*,

¹ As amended, 17 C.F.R. § 201.220(c) requires a respondent to disclose such reliance in its answer. See Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212, 50219-20 July 29, 2016).

LLC, Admin. Proc. Rulings Release No. 4387, 2016 SEC LEXIS 4373 (A.L.J. Nov. 23, 2016) (Nov. 23 Order). A subpoena directed to RD Legal was issued on December 8, 2016, at the Division's request for all documents relating to Respondents' reliance defense as described in the December 5 narrative. Respondents' motion to quash or modify represents that they were served with the December 8 subpoena on December 14, 2016, and requests an extension of the return date from December 19, 2016, to January 13, 2017. The return date will be extended to January 13, 2017, as requested. Respondents represent that they have produced, or will produce, all documents relevant to the defense of reliance on advice of counsel or other professionals that they will actually pursue in the proceeding. They are required to produce only such documents; this will confirm that the Nov. 23 Order limited their obligation to produce accordingly.

As to the scope of Respondents' waiver of privilege over such documents, Respondents are reminded that they "cannot partially disclose privileged communications or affirmatively rely on privileged communications to support [their] claim or defense and then shield the underlying communications from scrutiny by the opposing party." *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000). Accordingly, their waiver must extend to "all communications to and from counsel concerning the transaction for which counsel's advice was sought." 6 James Wm. Moore et al., *Moore's Federal Practice* § 26.49[5][c] (Matthew Bender 3d ed. 2016) (emphasis added). That is, when Respondents chose to assert a reliance-on-counsel defense, they "waived the attorney-client privilege with regard to any attorney-client communications relating to the same subject matter." *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006). For example, Respondents' narrative suggests that they may assert that they relied on the advice of Reed Smith concerning, among other things, "marketing materials" and "offering documents" relevant to this proceeding. Narrative at 1. If so, Respondents waive privilege as to all their communications with Reed Smith regarding such marketing materials and offering documents.²

Reed Smith Subpoena

The subpoena will be modified in light of the Nov. 23 Order and Reed Smith's motion to quash. The subpoena requests "[a]ll documents concerning legal advice requested of, or provided by Reed Smith to [Respondents] relating to (i) any disclosures or communications with potential investors in RD Legal Capital, LLC [or affiliates], or (ii) the value of any assets held by RD Legal Capital, LLC [or affiliates]." Request (i) relates Respondents' reliance defense. The request will be modified for the reasons set forth in the Nov. 23 Order modifying a similar request in subpoenas directed to Respondents at the Division's request.

Respondents' December 5 narrative generally described legal advice purportedly concerning the issues alleged in the OIP and identified attorneys consulted, including Reed Smith. In light of the fact that Respondents authored the narrative and are themselves producing documents relevant to their reliance defense, Respondents are ordered to confer with Reed Smith regarding the scope of their reliance defense as it pertains to Reed Smith as well as the extent of duplication between

² If Respondents have withheld such documents to date, they should produce them to the Division. *See, e.g.*, Div. December 7, 2016, Letter, Ex. A at 1 (Respondents' September 30, 2016, privilege log indicating the withholding of 4,478 documents relating to the "review of prospective or current investor materials," which presumably could contain communications regarding marketing materials and offering documents, which would be subject to the privilege waiver).

responsive documents possessed by Respondents and possessed by Reed Smith. The subpoena to Reed Smith will be modified such that Reed Smith should produce all documents in its possession relating to Respondents' reliance defense, as informed by Respondents. If, after conferring with Respondents, Reed Smith learns that Respondents have produced (or will be producing) all responsive Reed Smith documents, Reed Smith need produce nothing. If Reed Smith has additional responsive documents, it should obtain a waiver of the attorney-client privilege from Respondents and produce the documents. If there are additional documents and Respondents refuse to waive the privilege, Reed Smith should respond to the subpoena by providing that information. The return date on the Reed Smith subpoena will be January 27, 2017, two weeks after RD Legal's return date.

Request (ii), relating to Respondents' financial condition, will be quashed as unreasonable and excessive in scope for the reasons set forth in the Nov. 23 Order.

Summary Witness

The notice of deposition will be quashed and the subpoena will be issued as modified accordingly, to require only the production of documents requested. This result is required by 17 C.F.R. § 201.232(e)(3)(i),³ which provides that the administrative law judge:

shall quash or modify a deposition notice or [associated] subpoena unless the requesting party demonstrates that . . . [t]he proposed deponent was a witness of or participant in any event, transaction, occurrence, act, or omission that forms the basis for any claim asserted by the Division . . . , any defense, or anything else required to be included in an answer . . . by any respondent in the proceeding.” (emphasis added).

Respondents have not demonstrated that the unidentified Summary Witness was “a witness of or participant” in any such “event, transaction, occurrence, act, or omission.” While it may seem unfair that the Division can call a witness who cannot be deposed, the unfairness is mitigated by requiring the production of documents on which the witness's testimony will be based, as the Division has represented that the Summary Witness, if called, will testify solely as to the contents of documents or records too voluminous to examine individually. Div. Reply at 2. Since they will have those documents before the hearing, Respondents will be able to effectively cross-examine the Summary Witness without having deposed that witness.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

³ The parties agree that the Summary Witness is neither an expert witness nor a custodian of documents within the meaning of 17 C.F.R. § 201.232(e)(3)(ii), (iii).