

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

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 4673/March 10, 2017

ADMINISTRATIVE PROCEEDING  
File No. 3-17342

In the Matter of

RD LEGAL CAPITAL, LLC, and  
RONI DERSOVITZ

ORDER ON MOTION TO  
PRECLUDE RELIANCE DEFENSE

The order instituting proceedings (OIP) in this matter alleges that Respondents, among other things, made misrepresentations to investors in marketing and offering documents. In their answer to the OIP, one of the defenses Respondents asserted was that they “relied in good faith upon the judgment, advice, and counsel” of attorneys and various other professionals. Answer at 49. After being ordered to provide the Division of Enforcement with more specificity as to the nature of the relied-upon legal advice, Respondents indicated that it likely concerned, among other things, relevant marketing and offering documents. *RD Legal Capital, LLC*, Admin. Proc. Rulings Release No. 4474, 2016 SEC LEXIS 4707, at \*4 (ALJ Dec. 20, 2016). In addressing a discovery dispute between the parties on this topic, Judge Foelak, citing well-established law, emphasized that if Respondents were asserting such a defense, then they waived privilege as to all their communications with counsel regarding those marketing and offering documents (i.e., a subject-matter waiver) and that partial disclosure would not be permitted. *Id.* at \*3-4 & n.2.

On March 8, 2017, the Division submitted a motion to preclude Respondents’ reliance-on-professionals defense vis-à-vis the marketing and offering documents. The motion indicates that Respondents have withheld documents reflecting their communications with counsel on this topic, and that when the Division deposed Roni Dersovitz, he invoked privilege rather than answer questions on the topic. Mot. at 3-5. The motion suggests that Respondents may be trying to assert a reliance defense based only on the advice of *non-lawyer* professionals regarding the marketing and offering documents, while simultaneously asserting a reliance-on-*counsel* defense concerning a narrower or different subject of privileged material they have already disclosed. Mot. at 3-4.

To clarify, if Respondents wish to present evidence at hearing to demonstrate that they relied on the advice of professionals concerning the marketing and offering documents, then Respondents must disclose—to the extent the Division has requested them—communications with *all* professionals, including counsel, concerning the marketing and offering documents.

That is the nature of a subject-matter waiver. As one court facing a comparable circumstance reasoned:

[Counsel] was among the seeming choir of professionals from whom Defendants sought and received advice. Defendants cannot simply omit overt reference to a reliance on counsel defense to avoid the corresponding subject-matter waiver. Nor can Defendants assert a “warranted reliance” defense from the advice of professionals on the one hand, and attempt to exclude examination about whether that advice was truly “warranted” by denying inquiry into the full range of advice received. To permit otherwise in this case would allow Defendants to use the privilege as a sword and a shield—that is, to introduce only the evidence that supports their claim rather than providing the fact-finder with the full picture.

. . . The SEC is entitled to discovery on advice Defendants received from [counsel] regarding [the relevant subject matter] to compare it with the advice from the other professionals and, ultimately, test the veracity of Defendants’ “warranted reliance” and similar defenses.

*SEC v. Welliver*, No. 11-cv-3076, 2012 WL 8015672, at \*10 (D. Minn. Oct. 26, 2012).

Accordingly, I ORDER that Respondents may only assert a reliance-on-professionals defense concerning the marketing and offering documents if they (i) produce to the Division as soon as possible, but no later than March 16, 2017, all requested communications with counsel on that subject that have been withheld, and (ii) make Roni Dersovitz available to the Division by March 19, 2017, to be re-deposed on that subject. If Respondents do not do these two things, they will be precluded from asserting a reliance-on-professionals defense as to the marketing and offering documents.

I will address the remainder of the parties’ March 8, 2017, motions and objections at the prehearing conference on March 13, 2017.

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Jason S. Patil  
Administrative Law Judge