UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17342

In the Matter of

RD LEGAL CAPITAL, LLC and RONI DERSOVITZ,

Respondents.

DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENTS' (I) MOTION *IN LIMINE,* (II) OBJECTIONS TO EXHIBITS, AND (III) MOTION TO DISMISS

Dated: March 12, 2017

DIVISION OF ENFORCEMENT
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PRELIMINARY STATEMENT

The Division of Enforcement ("Division") respectfully submits this Response to Respondents' (i) Motion *in Limine* to Exclude the Testimony of Ian Guy ("Guy Motion"); (ii) Objections to the Division's Proposed Exhibits ("Objections"), and (iii) Motion to Dismiss Unconstitutional Proceeding ("Motion to Dismiss").

Respondents' objections to 177 of the Division's exhibits and the testimony of Ian Guy seek to embark the Court on the same path as their prehearing brief. Namely, Respondents wish to focus the Court not on their misrepresentations as to how Respondents would invest money entrusted to their Funds,[1] or how Respondents actually invested that money, but on sideshows aimed to distract from the damning evidence the Division will adduce. Otherwise, there would be no reason to object to Respondents' own presentations and communications with investors as irrelevant, to register similar objections to Respondents' internal communications about their funds and presentations with investors, to object to summary exhibits meant to streamline the presentation of mountains of data about their portfolios, or to claim prejudice at the prospect of the Court hearing testimony from Ian Guy, a counterparty to transactions at the very heart of this case.

Respondents' objections to the Division's Exhibits come without explanation of the basis of their objections beyond "relevance" or "materiality," leaving the Division to shoot in the dark as to the exact nature of Respondents' objections. These objections should fail, because like Mr. Guy's proposed testimony, the Division's exhibits are not "irrelevant, immaterial, unduly repetitious, or unreliable," the only bases for excluding evidence under Rule of Practice 320.

Finally, Respondents move to dismiss the proceeding on constitutional grounds, challenging the Commission's method of hiring administrative law judges ("ALJs") and asserting

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[1] All capitalized terms not defined herein shall have the meaning ascribed to them in the Division's Prehearing Brief dated March 8, 2017.

violations of procedural due process. But the Commission has consistently rejected substantively identical arguments, and the Court should do the same here.

I. THE TESTIMONY OF IAN GUY IS RELEVANT TO THE DIVISION'S CLAIMS AND SHOULD NOT BE EXCLUDED

Respondents' Motion to preclude Peterson Plaintiff Ian Guy should be denied. The Division intends to ask Mr. Guy about his financial "[t]ransaction with Respondents relating to claims in Marine Barracks litigation and communications with Respondents regarding same." Div. Witness List at 2. Respondents, who spend nearly half of their prehearing brief addressing their investments in the *Peterson* Case, cannot credibly deny the relevance of that investment in this proceeding. In fact, Respondents' own witness list acknowledges the relevance of the agreements relating to their investment in the *Peterson* Case, noting Respondents' intention to call Steven Perles to testify regarding, among other matters, "the agreements his firm entered into to sell certain of its attorney fee receivables to the investor funds at issue and the collateral backing those receivables." Respondents' Witness List at 5. The Division is at a loss to understand how or why the testimony of the attorneys Respondents funded in connection with the *Peterson* Case is relevant, but the testimony of one of the plaintiffs Respondents funded on the same matter is not.

Mindful of the relevance of Mr. Guy's potential testimony, Respondents ask the Court to prevent him from testifying because of the imagined prejudicial impact Respondents fear will flow from Mr. Guy's testimony. Guy Mot. at 3. In particular, Respondents refer to unnamed documents in the Division's production—documents that are not included on any parties' proposed exhibit list—they believe signal Mr. Guy's potential for biasing the Court. Guy Mot. at 3.

But Respondents' motion rests on an improper invocation of Federal Rule of Evidence 403, which they acknowledge does not apply here. *See* Mot. to Dismiss at 3-4. As the Commission has explained repeatedly, Respondents' Rule 403 concerns are not persuasive in bench trials, such as

this proceeding. *See, e.g., Matter of Ralph Calabro*, SEC Rel. No. 9798, 2015 WL 3439152, at *11 n.66 (May 29, 2015) (rejecting challenge to expert testimony). In *Calabro*, the Commission explained that "[t]he 'gatekeeper' doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial." *Id.* (citation omitted); *see also City of Anaheim*, Exch. Act Rel. No. 42140, 54 SEC 452, 1999 WL 1034489, at *2 (Nov. 16, 1999) ("Administrative agencies such as the Commission are more expert fact-finders, less prone to undue prejudice, and better able to weigh complex and potentially misleading evidence than are juries.").

The Division doubts the Court will be prejudiced by documents it never sees, and is certain Mr. Guy's testimony will not threaten the Court's ability to remain "impartial." Guy Mot. at 3. Accordingly, Mr. Guy should not be precluded from providing testimony about his transaction with Respondents regarding the *Peterson* litigation in which Respondents invested so heavily.

II. RESPONDENTS' OBJECTIONS TO THE DIVISION'S EXHIBITS ARE UNFOUNDED AND SHOULD BE OVERRULED

Respondents' objections summarily state the basis of each objection without further explanation (except for Respondents' "Inadmissible Hearsay" objection), leaving the Division to guess at Respondents' reasoning for their objections.[2] The Division respectfully submits that Respondents' objections should be overruled for this reason alone. Nevertheless, the Division addresses each objection—as best the Division can divine the basis—as follows:

Relevance and Materiality Objections to Investor Communications and Presentations. The Division's OIP (*e.g.*, ¶¶ 14-15, 17-19) and the Division's Prehearing Brief (at 7-8) allege that Respondents' communications with investors, including through presentations and written correspondence, misrepresented the composition of the Funds or furthered Respondents' scheme to

[2] Respondents' explanation of their hearsay objections in n.1 of the Objections—i.e., to preserve their constitutional objections—concedes that hearsay evidence is admissible under Commission Rule of Practice 320. Because the exhibits objected to as hearsay are relevant, material, and bear sufficient indicia of reliability, they are admissible in this proceeding.

do so. Nevertheless, Respondents object to a number of communications and presentations containing or concerning such misrepresentations (*e.g.*, Div. Exs. 25-29, 231, 449) on the basis of relevance and materiality. Such objections are plainly frivolous and should be overruled.

Additional Relevance and Materiality Objections. Respondents also offer relevance and materiality objections to a host of other documents, including spreadsheets Respondents prepared concerning, e.g., financial information about Respondents and the Funds, lists of then-current and former investors, and information regarding certain positions within the Funds. (Div. Exs. 165-175, 464.) These documents are relevant to issues at the heart of this matter, including when and how much certain investors invested in the Funds, how RD Legal used investors' funds, and how much Respondents benefitted from their conduct. Presumably, Respondents are not objecting to the veracity of the information *they provided* to the Division, and use of this information should help streamline the introduction of evidence in an otherwise lengthy hearing.

Respondents also object to relevant documents and emails, including investor emails with Respondents (*e.g.*, Div. Ex. 422); emails about such communications (*e.g.*, Div. Ex. 397); internal RDLC emails or documents concerning the Funds' investors, investments, or valuation issues[3] (*e.g.*, Div. Exs. 396, 241-242); communications in which investors informed Respondents that they did not wish to invest in the *Peterson* Cases (*e.g.*, Div. Exs. 322, 366); communications between Respondents' and counterparties relevant to the Funds' investments (*e.g.*, Div. Exs. 310, 417); and communications with the Funds' valuation agent concerning the Funds' positions or valuations (*e.g.*, Div. Exs. 319, 325). Each of these topics is, on its face, relevant and material to the Division's allegations against Respondents.

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[3] For example, Respondents object to Div. Ex. 228, RD Legal's "Underwriting Standards," which contain "Concentration Limit[s]" on positions within the Funds. Respondents' own Prehearing Brief addresses the issue of concentration for more than five pages. RD Legal's "Concentration Limit[s]" are undoubtedly relevant and material to that issue.

Objections to Foundation. Certain documents, such as court documents (*e.g.* Div. Exs. 193, 194), require no foundation—the Court may take judicial notice of their existence. To the extent that foundation for certain other documents is required, the Division has not yet had the opportunity to establish the foundation for its documents through testimony. As such, Respondents' foundation objections are unfounded or premature, and should be overruled.

Summary Witness Exhibits. Because the Division's allegations center on what Respondents told investors about the composition of the portfolios they managed, the true nature of those portfolios is an integral part of the Division's case. To establish what assets (and in what amounts) existed in those portfolios at the end of each month from June 2011 through January 2016, one may look to the monthly valuation reports provided to Respondents by their valuation agent, Pluris Valuation Advisors, LLC ("Pluris") (Division Exhibits 71-161).[4] These documents, however, when transposed to Excel for analytical purposes consist of over 90 reports containing more than 100,000 cells of data spanning over 50 months. Accordingly, to avoid unduly elongating the hearing and overwhelming the record with this voluminous data, a Commission employee has summarized the large trove of information about Respondents' portfolios into only six summary sheets the Division proposes to offer into evidence (Division Exhibits 1-6).

Respondents' bevy of objections to these documents betrays Respondents' true intentions with respect to this matter: to play an unnecessary game of attrition meant to extend these proceedings by objecting even to data provided by Respondents' themselves or prepared not as lay opinion testimony, as Respondents suggest, but simply as a summary. The reliability of these

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[4] Respondents object to certain of these sheets, Division Exhibits 128 through 161, on relevance grounds. These sheets provide monthly snapshots of one of the portfolios that RDLC managed at certain relevant times—the portfolio for the Swiss investor CCY. Because the Division has alleged that Respondents' purposefully misled investors by pointing to RDLC's total assets under management at critical moments, the partition of those assets among the various funds RDLC managed—between the Flagship Funds and CCY's funds—is relevant to these proceedings.

summary exhibits will be properly laid out at the hearing, where the Division's summary witness will explain the manner in which, and source from which, she derived them.[5]

Objections Concerning News Articles. Respondents object to a number of news articles marked as exhibits by the Division (Div. Exs. 54-56, 441) on grounds including relevance, materiality, and reliability.[6] As the articles are relevant to the issues in this case (i.e., the Funds and their investments) as well as for their effect on the readers (investors), and the Division is not offering them for the truth of the matter reported, these objections should be overruled.

Transcripts and Declarations. Respondents object under Rule 235(a) to the transcripts and video recordings of Respondent RDLC or its officers, directors, or managing agents (Div. Exs. 207-213), and a declaration (of attorney Daniel A. Osborn) submitted by RDLC in connection with a complaint it filed in federal court (Div. Ex. 195). But Rule 235(b) allows the Division, as an adverse party, to "use for any purpose" a deposition, investigative testimony, or other sworn statement or declaration of a party or its officers, directors, or managing agents. Div. Ex. 207 (Zatta Tr. 19:20-20:3 (Zatta was CFO of RDLC)); Div. 210 (Markovic Tr. 17:1-4 (Markovic was Head of Investor Relations)); Div. Ex. 211 (Laraia Tr. 6:8-12; 18:2-3 (Laraia was Senior VP and

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[5] Out of an abundance of what has proven to be prescient caution, the Division also proffered as exhibits (a) the other documents provided by Respondents that informed the summary witness' analysis, Div. Exs. 167, 169, 174, and 175, (b) documents to authenticate the Pluris valuation reports upon which the summary witness relied, Div. Exs. 162-164, and (c) the intermediate documents the summary witness prepared to arrive at her ultimate work product, Div. Exs. 7 & 8. These foundational documents were included in anticipation of the sort of frivolous objections Respondents now lodge.

[6] One article to which Respondents object, Div. Ex. 54, was purportedly included on Respondents' investor website cited in Respondents' Prehearing Brief (*e.g.*, at 18-19). The Division rejects Respondents' contentions concerning the investor website, including the relevance of the website to investors who did not review the contents. But Respondents should not be permitted to have it both ways, urging the Court to consider what documents might have been on their website and objecting to the Division's introduction of such documents.

Director of Operations)); Div. Ex. 212 (Larochelle Tr. 6:8-11 (Larochelle testified as an agent of RDLC)); Div. Ex. 213 (Hirsch Tr. 14:4-6 (Hirsch was co-chief investment officer and COO)).

Respondents also object to the testimony of Respondent Dersovitz (Ex. 204-206, 214-15) on the basis that it is "unduly repetitious." But Dersovitz's repeated obfuscations and misrepresentations are themselves highly relevant and material to the Division's case. Accordingly, the Respondents' objections should be overruled.

Recordings of Investor Calls. Respondents' objections to recordings of their calls with potential or existing investors (Div. Ex. 216-217) as irrelevant, immaterial, and unduly repetitious are absurd. In a case about what Respondents said, or failed to say, to investors, it is difficult to find evidence more relevant than recordings of what Respondents actually said to investors. This objection might better be read as "objection, particularly damning evidence," but Rule 320 includes no such grounds for relief.[7]

The Wells Submission of Ms. Markovic. Respondents object to the Wells submission (and supplement) (Div. Exs. 179-180) of Katarina Markovic, RDLC's Head of Investor Relations. The Commission recently reiterated that Wells submissions may be admitted where they otherwise satisfy Rule 320. *See* Adopting Release, Rel. No. 34-78319 at *42-47 (July 13, 2016) (rejecting suggestion to preclude admission of Wells submissions); *id.* at 45 ("A Wells notice provided to a respondent by the Division states that the Commission may use the information contained in such a submission as an admission"). Respondents have offered no reason why Ms. Markovic's Wells submission is not reliable, relevant, or material to allegations set forth in the OIP. To the contrary, her statements about Respondents' communications with investors—and internal communications about same—are plainly relevant. Respondents also do not state what they believe Ms. Markovic's

[7] The Division accepts that the recordings are repetitious of Respondents' misrepresentations to many investors, but given that each misstatement is actionable, they are not *unduly* repetitious.

Wells submission unduly repeats, but that objection is best addressed after the Court has the benefit of hearing what other evidence the parties seek to introduce.

The Expert Report of Prof. Sebok. Respondents object to the Expert Report of Prof. Anthony J. Sebok (Div. Ex. 223) on the basis of relevance, materiality, and reliability. Prof. Sebok's report sets forth the reasons it is relevant, material, and reliable. In summary, Prof. Sebok is a law professor who has consulted for litigation finance companies and studied and written about litigation finance issues (among other things). His opinion addresses the risks inherent in various types of law-related investments and whether the Respondents' representations that the Funds were "factoring" accounts receivables or legal receivables accurately described the risks relating to the Funds' investments.[8] His opinion is relevant to the issues in this case.

Notes of Investors and Ms. Markovic. Respondents object to typed and handwritten notes of investors (*e.g.*, Div. Ex. 232, 251, 263) and Ms. Markovic (Div. Ex. 455, 476) on various bases. As set forth above, documents concerning Respondents' communications with investors are plainly relevant, and Respondents offer no basis to believe the notes at issue are unreliable. The Division will use the investors' handwritten notes only if the relevant investor witness testifies at the hearing, at which time the Court can make an informed decision concerning the reliability and legibility of such notes. As to the legibility objections to the notes of Ms. Markovic—Respondents' employee—they have complete access to Ms. Markovic, and therefore the objection should be overruled as frivolous.

Incomplete Documents. Respondents object on the basis of "incomplete" to a number of Division exhibits. To the extent that such exhibits inadvertently excluded attachments, the

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[8] To the extent that Respondents are claiming that Prof. Sebok's opinion is not relevant because they are conceding that the *Peterson*-related positions were not receivables arising from a settlement or judgment beyond the point of any disputes (as represented to investors), the Division would welcome such clarity and would streamline its case accordingly.

Division has since provided marked versions of such attachments to Respondents.[9] To the extent such exhibits already included marked versions of the attachments, the Division construed the objection as a request to include the native version of the document, and thus produced marked native versions of the documents.[10]

III. THE PROCEEDING IS CONSTITUTIONAL AND SHOULD NOT BE DISMISSED

Respondents contend that this proceeding is unconstitutional in several respects, but their various challenges fail for the reasons below.

First, Respondents argue (Mot. to Dismiss 5-15) that the Commission's method of hiring of ALJs and the manner for their removal violate the Appointments Clause of the Constitution. *See* U.S. Const. art. II, § 2, cl. 2. These arguments fail because, as the Commission has held, the Commission's ALJs are employees, not constitutional officers, and thus are not subject to Article II's requirements. *See Harding Advisory LLC & Wing F. Chau*, S.E.C. Rel. No. 4600, 2017 WL 66592, at *19 n.90 (Jan. 6, 2017), *pet. filed* (D.C. Cir. No. 17-1070).

Respondents note that a divided panel of the Tenth Circuit held that the Commission's ALJs are constitutional officers. *See Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016). But, as they also acknowledge, the D.C. Circuit unanimously reached the opposite conclusion in *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *reh'g en banc granted* (Feb. 16, 2017).[11]

Second, Respondents assert (Mot. to Dismiss 15-17) that the administrative proceeding is "fundamentally unfair[] and lacks sufficient procedural protections to comport with due process." They complain (*id.* at 16), in particular, that the Commission's "[a]dministrative proceedings differ

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[9] Div. Exs. 230, 251, 255, 319, 402. The Division previously had produced the attachments to these exhibits (or the documents were originally Respondents'). As such, Respondents already had access to the "complete" version of such exhibits.

[10] Div. Exs. 242, 272, 284, and 297.

[11] The government still has the opportunity to seek further review of the *Bandimere* decision, including rehearing en banc. The deadline for a petition for rehearing en banc is March 13, 2017.

from federal actions in several critical ways" and suggest that these differences—and, by extension, the Commission's Rules of Practice—render the proceedings constitutionally flawed. That claim has been consistently rejected by both the Commission and the courts. *See, e.g.*, *Cunanan v. INS*, 856 F.2d 1373, 1374 (2d Cir. 1988) ("[A]dministrative proceedings are not controlled by strict rules of evidence; the law requires only that [the respondent] be afforded due process."); *Bernerd E. Young*, Securities Act Release No. 10060, 2016 WL 1168564, at *19 n.84 (Mar. 24, 2016) (noting that the Commission has "long rejected" arguments that administrative proceedings deny respondents due process because federal rules do not apply), *pet. filed* (D.C. Cir. No. 16-1149); *see also, e.g.*, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978) (recognizing that agencies are "free to fashion their own rules of procedure"). Moreover, and in any event, Respondents have not demonstrated the type of prejudice sufficient to establish a due process violation. *See, e.g.*, *Horning v. SEC*, 570 F.3d 337, 347 (D.C. Cir. 2009).

To the extent Respondents' complaint is, more broadly, that the administrative adjudicatory process is itself constitutionally deficient—and, thus, it violates due process to require them to proceed in an administrative forum—that too fails. Again, the Commission and the courts have repeatedly rejected "[s]uch broad attacks on the procedures of the administrative process." *See Harding Advisory LLC*, Securities Act Release No. 9561, 2014 WL 988532, at *8 (Mar. 14, 2014). Indeed, courts have correctly recognized that to accept such challenges "would do considerable violence to Congress['s] purposes in establishing" specialized administrative agencies and would "work a revolution in administrative (not to mention constitutional) law." *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988).

Finally, Respondents argue (Mot. to Dismiss 17-19) that particular aspects of *this* proceeding—the size of the record, the pre-hearing schedule, the "discovery tools" available to the

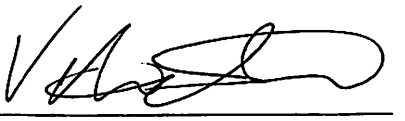
parties, and the possible sanctions that could be imposed upon a finding of liability—violate due process. All of those claims are, at base, complaints about the Commission's Rules of Practice and the application of those rules here which, as discussed above, are meritless.[12]

CONCLUSION

Respondents' objections to the Division's exhibits should be rejected as without merit and premature. Respondents' motions to exclude the testimony of *Peterson* plaintiff Ian Guy and to dismiss this proceeding as unconstitutional should be similarly dismissed.

Dated: March 12, 2017

Respectfully submitted,

By: 

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[12] In several cases, Respondents' claims are also factually untrue—e.g., Respondents complain that they were permitted to depose only five "percipient witnesses" (Mot. to Dismiss at 4), which ignores the Court's *granting* of Respondents' motion to take two additional such witnesses (*see* January 4, 2017 Order at 2)—but even if true, would not warrant granting of Respondents' Motion.