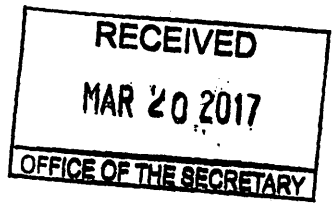
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17342



In the Matter of

RD LEGAL CAPITAL, LLC and
RONI DERSOVITZ

OPPOSITION TO THE DIVISION OF ENFORCEMENT'S OMNIBUS MOTION *IN LIMINE*

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I. INTRODUCTION

Respondents RD Legal Capital, LLC and Roni Dersovitz ("Respondents") oppose the Omnibus Motion *in Limine* filed by the Division of Enforcement (the "Division") on March 8, 2017 (the "Omnibus Motion"). The Division's motion is little more than an effort to preclude Respondents, without evidentiary support, from presenting the ample factual record showing they acted appropriately at all times. The few evidentiary issues raised in the Omnibus Motion are premature, incorrect, and at times frivolous. As explained below, with a few exceptions, the Omnibus Motion should be rejected in its entirety.

II. ARGUMENT

A. Documents Located on Respondents' Website Are Relevant to the Division's Disclosure Claims

The Division's attempt to exclude documents made available to investors on Respondents' website should be rejected. *See* Omnibus Motion at 3. The website documents on Respondents' exhibit list are part of the "total mix" of information that was available to investors in the Funds, and Respondents will present evidence at the hearing that investors had access to these documents through the website during the time period at issue in this case. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (recognizing the standard for disclosure claims is based on the "'total mix" of information "made available" to investors).

That the documents on Respondents' exhibit list were taken from the website as of November 2016 does not undercut either their relevance or their admissibility. The Division's argument implies that Respondents should be required to produce website documents that were time-stamped *prior* to the commencement of this action—a farcical demand that puts Respondents in an impossible position.

More importantly, the exhibits in question will be authenticated and their relevance established by Respondents' witnesses, who will testify regarding the content of the documents as well as the time period when they were available on Respondents' website. That testimony, in conjunction with the documents themselves, will establish the information that was made available to investors on Respondents' website during the period in question.

B. The Division Admits that Documents Made Available to Potential Investors Conducting Due Diligence Are Relevant

Citing arguments advanced in the Prehearing Brief filed concurrently with its Omnibus Motion, the Division claims that "the due diligence Respondents believe investors could, or should, have conducted is not relevant." Omnibus Motion at 4 (citing Prehearing Brief at 27-28). This contention is frankly remarkable and flies in the face of the seminal definition of materiality the Supreme Court articulated in *Basic v. Levenson.* Respondents have cited clear authority in their Pretrial Brief confirming that, "[f]or an alleged misrepresentation or misleading omission to qualify as 'material,' there must be a 'substantial likelihood that the disclosure of [an] omitted fact would have been viewed by a reasonable investor as having significantly altered *the total mix of information made available.*'" Prehearing Brief at 19 (citing *Harding Advisory LLC*, Opinion of Commission, SEC Release No. 4600, 2017 WL 66592 at *6 (Jan. 6, 2017)) (emphasis added).

In any event, the Division concedes that the documents to which this objection are directed are admissible, which obviates any need to resolve this dispute at this juncture. *See* Omnibus Motion at 4 ("To the extent Respondents simply wish to demonstrate—and can demonstrate—that certain information was available to investors, the Division does not object to the introduction of such exhibits").

C. Evidence Regarding Secondary Collateral Backing the Receivables at Issue Goes to the Heart of the Division's Claims

The Division also seeks to "preclude the admission of documents that purport to show secondary collateral Respondents hoped to attain if the attorneys they funded lost their underlying cases, including guaranties or audit reports regarding these attorneys' inventories, as immaterial and irrelevant." Omnibus Motion at 4-5. The Division's argument is absurd on its face, and ignores the fact that the Division's case is built largely on the false narrative that the trades at issue bore more risk than other investments described by Respondents when marketing the Funds. Indeed, it is no accident that the Division uses the word "risk" (or derivations thereof) *ninety-six* times in its Prehearing Brief. Moreover, even a cursory review of the report of the Division's sole expert, Anthony Sebok, shows that his entire opinion resolves around the risk factors of litigation finance transactions.

Given how focused its case is on risk, it simply strains credulity for the Division to argue that secondary collateral that substantially offset the repayment risk of a large percentage of the receivables in question is immaterial or irrelevant.

D. Information Concerning the Administration of the Funds Is Relevant to Issues of Disclosure, Risk, and Valuation

The Division claims that information regarding the administration of the Funds, including testimony from Respondents' expert regarding Respondents' risk management processes, is "immaterial and irrelevant." Omnibus Motion at 5. Evidence of how the Funds were administered by Respondents and third parties, however, is integral to numerous key issues in this case, including Respondents' disclosures to investors and their risk assessment and valuation of the Funds' receivables. opinion of Respondents' expert David Martin that Respondents

properly evaluated and managed portfolio risk for the Funds directly rebuts one of the two primary theories of liability alleged in the OIP, *i.e.*, that Respondents improperly valued the Funds' portfolio based on unreasonable assumptions.

Given its failure to designate its own valuation expert and its avoidance of the issue in its Prehearing Brief, it appears that the Division may be abandoning its valuation claims against Respondents. Respondents previously sought leave to file a dispositive motion regarding the lack of evidence to support the Division's valuation claims, which request for leave Judge Foelak denied. Mr. Martin's testimony regarding Respondents' risk management processes is relevant to various issues before the Court, including the clear lack of evidence of *scienter* anywhere in this case. The Court accordingly should reject the Division's effort to prevent Respondents from offering evidence establishing the manner in which they operated the Funds.

E. The Italian Court Transcript Is Relevant to the Division's Claims Regarding the Peterson Receivables

The Division objects to Respondents' designation as trial exhibits of a sworn declaration by a non-party witness, Ned Doubleday, as well as a transcript of testimony taken by an Italian court. *See* Omnibus Motion at 5-6. Respondents' inclusion of the Doubleday declaration was inadvertent, and they confirm that it will be removed from their trial exhibit list. Respondents agree with the Division that sworn declarations should not be offered as evidence (by either side).

The Division's hearsay objection to the Italian transcript, however, is unfounded. This transcript is not being offered for the truth of the statements it contains, and thus falls outside the definition of hearsay. The transcript is being offered solely to establish key developments in the *Peterson* turnover action and identify information that was available to Respondents as they

evaluated whether investing in the *Peterson* receivables was a sound and prudent strategy for the Funds to pursue. The Division therefore cannot credibly argue that it needs to be able to cross-examine any witnesses whose statements are included in that transcript. The Court should deny the attempt to exclude the Italian transcript from evidence.

F. The Division's Objection to the Anderson Documents Should Be Rejected

The Division next asks the Court to exclude notes and communications by individuals who are not on either side's witness list, including documents that purported "whistleblower" Nate Anderson provided to the Division during the course of its investigation. *See* Omnibus Motion at 6. It is both ironic and frustrating that, after including Mr. Anderson on its preliminary witness list and forcing Respondents to use one of their five depositions to question him, the Division now seeks to expunge all references to him from the record.

In any event, Respondents had included certain documents from Mr. Anderson as trial exhibits in the expectation that the Division would call him as a witness at the hearing. Now that the Division has elected not to call him as a witness, Respondents will remove these documents from their exhibit list.[1]

G. The Division's Conditional Objection to Various Reports Is Neither Ripe Nor Well Taken

The Division includes in its Omnibus Motion a vague objection to "documents that could constitute unreliable hearsay, depending on the purpose for which they are offered." Omnibus Motion at 7. The conditional nature of this objection confirms that it is premature, and even the

[1] In an effort to further streamline their exhibit list, Respondents are also withdrawing the following exhibits identified by the Division: Resp. Exs. 1052, 1055, 1144, 1298, 1366, 1457, 1830, 1839, 1882, 2105, 2183, and 2287. Also, Respondents indicated to the Division in letter dated March 7, 2017 that the Division should remove certain duplicate documents from the set of exhibits Respondents initially provided to the Division.

Division concedes that the Court should not exclude these exhibits "until hearing from the declarants relevant to each document so that it can make an informed, case-by-case determination as to" their admissibility. *Id.* Indeed, it appears that the only purpose of this portion of the Omnibus Motion is to suggest—without any explanation—that valuation and audit reports relating to the Funds might be "unreliable hearsay." The Division will have every opportunity to question the credibility of any exhibit at the hearing, and it is inappropriate for it to take pot shots at Respondents' trial exhibits as unreliable without presenting any supporting evidence or argument.

H. The Redactions the Division Complains About Are Appropriate and Do Not Undercut the Reliability of the Redacted Documents

None of the redacted documents to which the Division objects contains inappropriate redactions, and most of them cannot be presented reliably *without* their redactions. *See* Omnibus Motion at 8. With one exception, the redacted exhibits identified by the Division are audited financial statements from various years that have a handful of redactions to remove information about specific firms and investment names. These financial statements were posted on Respondents' website for investors to review, and were posted in their redacted form on the website. Respondents did not make any further redactions to these documents before producing them to the Division. Accordingly, these documents accurately capture what investors saw when they accessed them from Respondents' website, and are not unreliable in any way. To the contrary, these redactions should be preserved in the exhibits in order to demonstrate what information was and was not available to investors during the relevant time period.

As for the remaining document that contains redactions to which the Division objects—Resp. Ex. 2023—this is the CV of Amy Hirsch, one of Respondents' witnesses, and will be

introduced to demonstrate Ms. Hirsch's background and experience. The redacted section of Ms. Hirsch's CV contains confidential information regarding non-public matters for which she has been retained as an expert witness. This redaction does not undercut the reliability of the remainder of Ms. Hirsch's CV, which should be admitted.

I. Respondent Roni Dersovitz's Tax Returns Are Reliable

Although the Omnibus Motion *in Limine* is not entirely clear on this point, the Division also appears to be seeking to exclude evidence of Respondents' financial condition—a thinly-disguised attempt to obtain summary adjudication of an inability-to-pay defense that will likely never be necessary in the first instance. *See* Omnibus Motion, at 8. Respondents previously requested that any inability-to-pay defense be bifurcated, as the disgorgement and penalties that the Division seeks have no basis in the facts of this case. *See id.* at Ex. C. Although that motion was never resolved, Respondents have offered an abundance of information about their financial condition, and the Division's request should be denied.

During the investigative phase of this proceeding, the Division received a significant amount of data regarding Respondents' financial condition. In particular, Mr. Dersovitz provided bank account statements and spreadsheets detailing the balances of all personal accounts held by himself and by his wife of more than thirty years, as well as information regarding other assets in which he holds interests. Respondent RD Legal Capital, meanwhile, provided its entire QuickBooks accounting database—essentially all of its financial records—to the Division in native form. The Division also subpoenaed directly all records for Respondents' bank accounts from various financial institutions.

Then, in the discovery phase of this proceeding, Mr. Dersovitz produced additional spreadsheets detailing the money that he reinvested to keep the Funds in business for the last two

years, and setting forth the draws he received for his investment management functions. He also produced his joint Form 1040 tax returns for each year covered by this proceeding and, if necessary, will complete the SEC's inability-to-pay form and provide testimony from Mr. Dersovitz regarding his financial condition.

Respondents remain convinced, however, that they will prevail at the hearing on the merits of the claims asserted in the OIP, and that there is no factual basis for the amounts the Division is seeking in disgorgement and penalties. Respondents accordingly renew their request that the Court bifurcate any inability-to-pay defense from the merits of this proceeding, *see* Omnibus Motion, at Ex. C, and permit a full presentation on Respondents financial condition, if needed, at an appropriate time. For now, however, there is no basis to exclude Mr. Dersovitz's tax returns or any other financial information that has been provided.

J. The Division's Objection to "Documents of Unknown Provenance" Is Premature

The Division contends that some of Respondents' exhibits are inadmissible because they are "of unknown provenance or with unknown recipients." Omnibus Motion at 8-9. The Division's objections are premature. Some documents obviously do not identify their author or recipients. Yet it was the Division that chose to try this case in an administrative proceeding, knowing that discovery in this forum would be limited and that it might not be able to obtain discovery on each of the approximately two million pages of documents that have been produced. Because the reliability of the exhibits identified by the Division is best determined in the context of the hearing, when the Court will have the benefit of live testimony, among other things, it is premature at this stage to order a blanket exclusion of documents of "unknown provenance." The Division's objection to any such documents accordingly should be rejected

without prejudice to the admissibility of those documents being considered if, and when, they are used at the hearing.

K. The Division's Attempt to Exclude Expert Opinions on the Ultimate Issue Is in Direct Conflict with Well Established Law

Without citing any provision of the Rules of Practice in support of its position, the Division argues that Respondents' designated experts should not be permitted to opine as to the "ultimate issue" of liability. Omnibus Motion at 9. It is well established in administrative proceedings before the Commission that, where the Rules of Practice are silent, the Court should look to the Federal Rules of Evidence for guidance.[2] In 1972, the Federal Rules of Evidence "specifically abolished" the "so-called" rule prohibiting expert opinion on an "ultimate issue." Fed. R. Evid. 704, notes. Indeed, Rule 704(a) of the Federal Rules of Evidence is explicit: *"An opinion is not objectionable just because it embraces an ultimate issue."* Fed. R. Evid. 704(a) (emphasis added).

The only authority cited by the Division in its attempt to preclude expert testimony on an "ultimate issue" is the 1977 case, *Marx & Co., Inc. v. Diner's Club, Inc.*, 550 F.2d 505, 512 (2d Cir. 1977). Not only did *Marx & Co.* pre-date the controlling standard on the admissibility of expert testimony, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 582 (1993), but *Marx & Co.* itself expressly recognized "that an expert may testify to an ultimate fact." *Marx & Co.*, 550 F.2d at 512.

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[2] *See, e.g., In the Matter of J. S. Oliver Capital Mgmt., L.P.*, Order, Admin. Proc. File No. 3-15446 (Murray, ALJ) (finding the Federal Rules of Evidence "are useful as a reference when the Commission's Rules of Practice are silent on an issue"); *In the Matter of Miguel A. Ferrer and Carlos J. Ortiz*, Admin. Proc. Rel. No. 730, 2012 WL 8751437, *5 at n. 1 (Murray, ALJ) (Nov. 2, 2012)(finding "the Federal Rules of Evidence . . . are often used as a reference point" in administrative proceedings).

The Division's attempt to exclude expert opinion on an "ultimate issue" is one of many examples in this case where the Division is grossly overreaching and simply ignoring settled law. It may also reflect the Division's concern that, in a case raising allegations related to the management of hedge funds and the valuation of illiquid assets, it has failed to designate an expert in either of these areas—leaving the testimony of Respondents' experts on these subjects unrebutted.

L. Respondents are Not Required to Comply With Expert Disclosure Requirements in Order for Percipient Witnesses to Provide Their Informed Perspective on Facts and Events Based on Their Experience and Expertise

The Division also seeks by its Omnibus Motion to prevent Respondents' witnesses other than David Martin and Leon Metzger from providing opinion testimony because Respondents did not make expert disclosures for other witnesses as required under Rule of Practice 222(b). Each of Respondents' other witnesses, however, has *percipient* knowledge of facts and events that are relevant to the issues presented by this case, and they will testify at the hearing based on that percipient knowledge. They are not "experts" within the meaning of Rule 222.

M. The Secretary of the Commission Has Evidence Relevant to Respondents' Constitutional Challenges to This Proceeding

The Division concedes that Judge Foelak was not appointed in the manner required for constitutional officers, and takes the position that accordingly Brent Fields, the Secretary of the Commission, does not possess any information relevant to this proceeding. *See* Omnibus Motion, at 11. Even putting aside the fact that Judge Foelak is no longer presiding over this matter, the Division's position overly simplifies the scope of Mr. Fields' anticipated testimony and Respondents' constitutional challenges. While Mr. Fields' testimony will concern the

appointment of ALJs, it will also address other issues relevant to the constitutional inquiry, including the SEC's process for deciding whether to bring an action in federal court or as an administrative proceeding, as well as the role of ALJs and whether they exercise "significant authority," including authority to enter final decisions.

Respondents were directed by the District Court of New Jersey to bring their constitutional challenges in this proceeding.[3] While Respondents accept the Division's concession regarding Judge Foelak, she is no longer presiding over this hearing, and even if she were, this concession is insufficient to resolve other aspects of Respondents' constitutional challenge. If the Division would like to further stipulate regarding such things as, for example, the manner in which Your Honor was appointed, statements on the SEC's website, the Commission's process for deciding whether to bring an administrative proceeding, and the Commission's issuance of "finality orders," Respondents are willing to entertain such concessions. Otherwise, Respondents should be permitted to call Mr. Fields as a witness.

N. Contrary to the Division's Contention, Respondents' Witness Kyle Vataha Has Relevant Information Regarding the Valuation of the Funds' Assets

Finally, the Division seeks to exclude: (1) all testimony from Kyle Vataha, an employee of Respondents' valuation agent, Pluris Valuation Advisors, LLC; and (2) Respondents' Exhibit

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[3] As the Division is no doubt aware, the Tenth Circuit has already determined that the SEC ALJ program violates Article II of the Constitution. *See Bandimere v. U.S. Sec. & Exch. Comm'n*, 844 F.3d 1168 (10th Cir. 2016). While the Commission ruled in *Harding Advisory LLC & Wing F. Chau*, S.E.C. Rel. No. 4600, 2017 WL 66592, at *19 (Jan. 6, 2017), that its ALJs are employees and not inferior officers subject to the appointments clause, the Commission relied on the D.C. Circuit's decision in *Raymond J. Lucia Companies v. SEC*, 832 F.3d 277, 280 (D.C. Cir. 2016). *Id.* The D.C. Circuit's *Lucia* decision, however, has been vacated and is being reconsidered *en banc* along with the precedent upon which *Lucia* relied. *Raymond J. Lucia Companies v. SEC*, 2017 WL 631733 (D.C. Cir. February 16, 2017). Accordingly, the basis for the *Harding Advisory* decision is no longer good law.

1749, a privileged document inadvertently included on Respondents exhibit list. *See* Omnibus Motion at 11-12.

Respondents withdraw Exhibit 1749 as a trial exhibit and request that the Division destroy all copies of the document. The privileged nature of Exhibit 1749, however, in no way means that Mr. Vataha should be precluded from testifying. To the contrary, Mr. Vataha has percipient knowledge of the valuation processes employed by Respondents and the valuation of the Funds' assets—issues that are directly relevant to the Division's claim in the OIP that Respondents' improperly valued the assets in the Funds' portfolio.

Perhaps in recognition that it has no evidence to undercut Respondents' robust valuation procedures, the Division resorts to sleight-of-hand to try to exclude Mr. Vataha's testimony. Specifically, the Division cites to a letter from Respondents' counsel explaining that a specific Valuation Report prepared for estate planning purposes—and which is not an exhibit or at issue in this proceeding—was prepared "for the sole purpose of assisting [outside counsel] in providing Mr. Dersovitz with legal advice related to estate planning and federal gift tax reporting." Omnibus Motion, Ex. F at 2. But the Division pulls the quotation out of context, and uses brackets in its Motion to insert the pronoun "[It"] and pretend the letter referenced Mr. Vahata's "work" in general, as opposed to the specific Valuation Report that was the subject of the letter.

This type of mischief should not be tolerated. Indeed, Respondents have contended from the beginning that the Division's case is built on cherry-picked statements taken out of context to stitch together misrepresentations that never occurred. The Division has done the same thing here and the Court should deny the request to preclude Mr. Vataha's testimony.

III. CONCLUSION

For the foregoing reasons, with the exception of the documents that Respondents have agreed to withdraw, Respondents respectfully request that the Court deny the Division's Omnibus Motion in its entirety.

Dated: March 10, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served by electronic mail on this 10th day of March 2017 on counsel for the Division of Enforcement:

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