



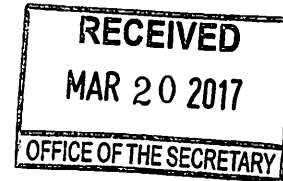
UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
BROOKFIELD PLACE, 200 VESEY STREET, SUITE 400
NEW YORK, NY 10281-1022

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March 17, 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 16, 2017 letter setting forth a protocol to collect and review documents relating to Respondents’ marketing and offering materials Respondents have withheld pursuant to a claim of privilege.

The Division does not object to the search terms or protocol set forth in items (1) through (3) of Respondents’ March 16 letter, though it reserves the right to revisit the terms and protocol should Respondents’ search, or evidence adduced at the hearing, suggest further inquiry is appropriate. The Division requests, however, that the Court set a March 23, 2017 deadline for Respondents to produce a document-by-document privilege log of relevant withheld materials.

The timing of Respondents’ disclosures has real consequences on the fairness of the hearing in this matter. The Court left open the possibility that Respondents would be permitted to adduce evidence of reliance on non-lawyers “based on Respondents’ representation at the [prehearing] conference that they have not withheld from the Division any requested material regarding legal advice bearing on the same subject matter as the aforementioned non-attorney professional advice.” March 17, 2017 Order at 1. Respondents made this representation even while admitting that they had not reviewed the documents they withheld from the Division “other than for privilege.” Prehearing Transcript at 15-16, attached hereto as Exhibit A.

The Division, in presenting its case—including in adducing evidence in anticipation of Respondents’ claimed defenses—is entitled to know what defenses Respondents will be permitted to advance. Respondents assured the Court at the March 13, 2017 prehearing conference that the non-lawyers advice they seek to introduce is “so clearly distinct from the kind of work or analysis or work product a lawyer would provide.” Ex. A, Tr. at 12. Accordingly, as the Division understands the Court’s March 15 Order, Respondents will only be permitted to offer documents or elicit testimony concerning their claimed good faith reliance

defense to the extent the subject matter of non-lawyers' advice is, as represented, distinct from that of any withheld legal advice.

But based on what Respondents have produced to date, it is difficult to imagine how they can credibly distinguish among different contributors' input to the same marketing and offering documents. For example, as set forth in the Division's March 8, 2017 Motion in Limine, Respondents' Exhibit 1524 is a request from RD Legal's Marketing Director, Katarina Markovic, to seven individuals, including in-house counsel Irena Norton and Respondent Roni Dersovitz, for comments on a six page draft Frequently Asked Questions document ("FAQ"), something all parties acknowledge is a marketing material transmitted to potential investors in Respondents' Flagship Funds. Ex. B, attached hereto. Several of the individuals on Exhibit 1524 are likely to be witnesses in this case. If Ms. Norton responded to Ms. Markovic's request for advice concerning the FAQ, the Division is entitled to know that fact and is entitled to know what advice she provided. And if Respondents chose to share the FAQ with potential investors before Ms. Norton responded, that too is relevant to Respondents' claimed good faith reliance on others regarding their marketing materials.

Similarly, Respondents' Exhibit 1482 is an email chain among five individuals, including Mr. Dersovitz, that begins with Ms. Markovic seeking comments on a "1-pg marketing document." Ex. C, attached hereto. The email chain concludes with Ms. Markovic stating that she will send the marketing document to in-house counsel Irena Norton and RD Legal's Chief Compliance Officer, Scott Gottlieb, "for their comments." Presumably, Respondents' document collection protocol will identify any written requests of Ms. Norton, and any comments Ms. Norton may have provided.¹ The Court must be given the opportunity to review such a response as soon as possible so that it may make an informed determination as to whether the advice requested of Ms. Norton overlapped with advice of non-attorneys on Respondents' witness list.²

And just how many *different* subjects could there be in the one page document circulated in Exhibit 1482? The Division assumes that if the non-lawyers were commenting on only aesthetic elements of the marketing documents, such as font selection, then Mr. Dersovitz would not claim such advice as support for any claimed good faith. If the non-lawyers were commenting on the substance of the marketing document, then the Division is entitled to know what Respondents' lawyers said about that content, or if they said anything at all. This is not, as Respondents contend, like *In re Reserve Fund Securities and Derivative Litigation*, where the Court excluded advice from bankruptcy counsel that was "simply irrelevant" to a reliance

¹ The Division has already been deprived of the opportunity to depose Ms. Norton to inquire about any oral communications concerning advice relating to marketing and offering materials. The Division never noticed Ms. Norton's deposition, but this decision was based on Respondents position that their counsel would not be permitted to disclose any legal advice provided to Respondents regarding their marketing and offering materials.

² As set forth in the Division's Motion in Limine, this entire dispute assumes, *arguendo*, that some "reliance on marketing professionals" or other non-lawyers defense exists, a proposition for which Respondents have yet to cite any authority, but that is not the issue presently before the Court.

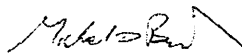
defense concerning communications with the public. *See* Respondents' March 12, 2017 letter to Court at 3, citing *Reserve*, 2012 WL 4774834, at *3 (S.D.N.Y. Sept. 12, 2012). In the case before this Court, Respondents have withheld legal advice concerning the same public communications about which Respondents wish to advance a good-faith defense.

To be clear, the Division is not seeking belated disclosure of documents reflecting Respondents' counsel's advice, or mid-hearing depositions of any lawyers who might have provided—or declined to provide—such advice. This Court's March 10, 2017 Order afforded Respondents a final opportunity to disclose such potential evidence, and Respondents chose instead to maintain that they do not seek to rely upon any legal advice concerning the marketing and offering materials at issue.

The Division has already been prejudiced by not having the opportunity to depose Ms. Norton and the many outside attorneys who Mr. Dersovitz testified provided advice concerning Respondents' marketing and offering documents, or even to get answers from Mr. Dersovitz regarding the content of such advice. Asking the Division to present their entire case without knowing what advice Respondents might have received will compound that prejudice.

Accordingly, the Division seeks an order requiring Respondents to provide a detailed privilege log reflecting all withheld documents concerning their marketing and offering materials no later than March 23, 2017, so that the Division may promptly identify, and this Court may review *in camera*, such documents to determine whether they actually do concern only advice that is "simply irrelevant" to the advice purportedly provided by non-lawyers.

Respectfully submitted



Michael D. Birnbaum

EXHIBIT A

In The Matter Of:
In the Matter of:
RD Legal Capital, LLC and Roni Dersovitz

Reporter's Transcript of Proceedings
March 13, 2017

Behmke Reporting and Video Services, Inc.
160 Spear Street, Suite 300
San Francisco, California 94105
(415) 597-5600

<p style="text-align: right;">Page 9</p> <p>1 or it merely can be used to show a course of conduct and 2 a pattern that's not consistent with the elements of 3 fraud that the staff bears the burden of proof on. 4 All we ask and we tried to highlight in the 5 letter is that to the extent that respondents, Mr. 6 Dersovitz and his employees, used other professionals on 7 issues that are different from the subjects of any legal 8 advice, that the refusal to waive attorney-client 9 privilege should not prevent the respondents from having 10 the ability to present evidence of their use and 11 reliance on other professionals. 12 THE COURT: I understand that. Okay. So I 13 understand there's no reliance on counsel defense at 14 issue in this case then. 15 MR. HEALY: Only with one area, your Honor, I 16 suppose would be to the Peterson case, which you'll hear 17 much about during the trial. We did make a production 18 of all the e-mails relating to a certain set of analysis 19 that the Reed Smith law firm conducted. We produced 20 eight substantive legal memos that the Reed Smith law 21 firm produced. So in that subject area, there is 22 reliance on the advice respondents were given as to the 23 likely course and strengths of the Peterson case. So 24 that has been fully disclosed and there will be a 25 reliance of counsel defense on that.</p>	<p style="text-align: right;">Page 11</p> <p>1 make a good-faith defense drawing on other 2 professionals, you must disclose what those 3 professionals -- all of those other professionals -- 4 said, because what if someone said something contrary. 5 The Division should be able to test that. That's what 6 Judge Woods' decision in Arista stood for; I believe 7 that's what your Honor's decision in citing Wellever 8 stood for. 9 So we could use a little bit of clarity on 10 whether there's really no reliance on counsel defense 11 regarding the marketing materials and offering materials 12 and whether there's a separate reliance on professionals 13 that respondents want to make without disclosing what 14 they learned from attorneys. 15 MR. HEALY: Your Honor, I'm happy to address 16 Mr. Birnbaum's comments, if you like. 17 THE COURT: Yeah, please. 18 MR. HEALY: And I think I can cut through this. As 19 for reliance on legal counsel, that is limited to the 20 clear subject matter for which the respondents have 21 waived privilege. There are eight substantive legal 22 memos that Reed Smith produced and a series of 23 corresponding e-mails underlying those memos and that 24 subject matter for which the respondents will assert a 25 reliance on counsel as to the advice that Reed Smith</p>
<p style="text-align: right;">Page 10</p> <p>1 Otherwise, in the case are different issues 2 outside of Peterson and outside of the marketing 3 materials. There's significant reliance on advice of 4 professionals like auditors and valuation agents and 5 other third parties who provided advice and services to 6 the reliance of this kind of questioning. 7 MR. BIRNBAUM: Your Honor, if we could just ask for 8 a clarification on that? So the first category, what I 9 hear to be reliance on counsel for Peterson, if that is 10 entirely divorced from marketing and offering materials, 11 I could understand that being separate. If respondents 12 intend to make an argument that they relied on that 13 advice, the disclosed advice, in generating, drafting, 14 sharing communications with investors, marketing 15 materials and offering materials. then we're back to 16 where we started, that we ought to get all advice that 17 was rendered, including any advice that was contrary. 18 Then the second category, I'd also ask for some 19 clarification. It sounds like what Mr. Healy is saying, 20 but correct me if I'm wrong, is there will not be a 21 reliance on counsel defense regarding any marketing 22 materials, but there will be a reliance on other 23 professionals, and of course, that's at the heart of our 24 motion and what I understood to be at the heart of your 25 Honor's decision, which said if you want to essentially</p>	<p style="text-align: right;">Page 12</p> <p>1 provided. 2 As for Mr. Birnbaum's question, this does not 3 then dovetail into marketing materials. We're not 4 asserting a reliance on legal counsel as to what was in 5 some marketing brochure for some of the types of issues 6 that the Division has raised as to marketing materials, 7 so I think there's a distinction there. 8 As to the second part of his comments, what he 9 says goes to the heart of the motion, we would just 10 suggest this, your Honor: I think at the hearing, as 11 the evidence comes in and we show the types of issues 12 for which respondents relied upon other professionals, 13 the Court may see that they're so clearly distinct from 14 the kind of work or analysis or work product a lawyer 15 would provide that they really are different and much 16 more akin to the cases we cited in our letter last 17 night, where other courts have found that a waiver in 18 one area does not automatically constitute a waiver in a 19 different area if it's a different subject. 20 So for example, if an employee of Mr. Dersovitz 21 reviewed the marketing materials and felt that they 22 factually and accurately captured the investment 23 strategy of the fund or adequately and accurately 24 described the type of investment opportunity that was 25 provided, that is distinct from any legal opinion and</p>

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1 it's distinct from any analysis that some attorney may
2 have provided -- or we don't even really know if they
3 did provide legal advice -- but it's distinct in subject
4 and contents such that not waiving attorney-client
5 privilege should not mean that respondents can't even
6 put on evidence that they're own employees and
7 consultants provided some guidance.
8 And just to sort of close, your Honor, you
9 know, the only hesitation that respondents have in
10 waiving attorney-client privilege in any area is that
11 it's so difficult to predict and determine what the
12 grounds of that waiver will need to be. So for
13 clarity's sake, we have taken a very clear path in not
14 waiving privilege with one exception in the Reed Smith
15 memoranda, and the reason why that's been waived is
16 simply because respondents had previously shared those
17 memos with investors from the time in question to give
18 them better insight into the Peterson trade as well.
19 **THE COURT:** I'm going to go ahead and allow the
20 respondents to present the reliance evidence for
21 offering memoranda and marketing materials, but I'm
22 going to defer ruling on their exclusion all in caveat.
23 If after hearing that evidence, the Division of
24 Enforcement in reviewing the privilege laws that they
25 have been provided, identifies correspondence from

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1 counsel that are assertedly protected as privileged,
2 that you think you have a good faith reason to believe
3 would show that the legal advice and the professional
4 advice were, in fact, on the same issue, then what I
5 will do is entertain a request for me alone to review
6 those documents in camera and without disclosing to the
7 Division, just as a safeguard or say a check on making
8 sure that there is, in fact, no relationship and the
9 advice is not substantially the same.
10 Mr. Healy, I'm not saying that I doubt you on
11 this, that they're dissimilar and you said I wouldn't
12 find that the professional advice would overlap any of
13 the legal advice because of the nature of the issues
14 they're receiving advice on, but in the event that after
15 we hear this evidence at trial the Division is able to
16 point me to a particular item or items on the privilege
17 laws that could reasonably reflect some overlap, I'll
18 look at that in camera.
19 Of course, an in camera review under these
20 circumstances would not waive the privilege, and I would
21 not, obviously, use that as an opportunity then to order
22 the production of the document. In the event, however
23 unlikely, I were to find that there was substantial
24 overlap of the sort that would require me to consider
25 precluding particular parts of the professional reliance

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1 evidence, we would discuss that at that time, and that's
2 my ruling.
3 **MR. BIRNBAUM:** Your Honor, if I may just ask for one
4 clarifying point. Up until now, respondents have given
5 what they've called a categorical privilege log. It
6 includes, for example, an item -- we provided this to
7 the Court -- listing 4100 documents under the general
8 category of communications or prospective communications
9 with investors. And we were told essentially that
10 because they weren't waiving privilege, so they claimed,
11 we didn't need more than that.
12 I think what your Honor has ordered would
13 require the Division to point to specific line items
14 that we don't yet have, so we would ask that the Court
15 ask respondents to provide a line-itemed privilege log
16 identifying documents that they've already presumably
17 looked at because they put them on their categorical
18 privilege log: Their communications between respondents
19 and counsel relating to the memoranda -- I'm sorry --
20 the marketing memoranda and offering memoranda.
21 **THE COURT:** Right, I think you would need that.
22 **MR. HEALY:** Yes, your Honor. This is Mr. Healy
23 again, if I can provide one comment?
24 **THE COURT:** Yes.
25 **MR. HEALY:** The reason why the respondents provided

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1 a categorical privilege log is this: At one point in
2 the investigation the staff issued a subpoena that was
3 so broad in scope that in a meet-and-confer between
4 myself and Mr. Suthammanont it was agreed that we would
5 provide the data to the staff unreviewed other than for
6 privilege. It was an extraordinarily large production
7 of e-mails of the respondent companies, and because in
8 terms of expense and burden we agreed in negotiations
9 with the staff that we would provide this massive amount
10 of information that we didn't even have a chance to
11 review other than for privilege, we just quickly tried
12 to separate out communications with attorneys and then
13 provided a categorical privilege log.
14 **THE COURT:** What you'll have to do is identify from
15 that larger group, for example, those documents which
16 represent attorney advice on the issue of the offering
17 memoranda and marketing materials. I'm not saying that
18 I would ultimately disagree with your explanation. In
19 some way -- I don't know about the quantity of these
20 documents.
21 If this was just, say, 500 pages, you could
22 just give it all to me, and if the Division were to move
23 to test and verify this contention that the advice with
24 respect to the offering memorandum and marketing
25 materials was separate and distinct from the

EXHIBIT B

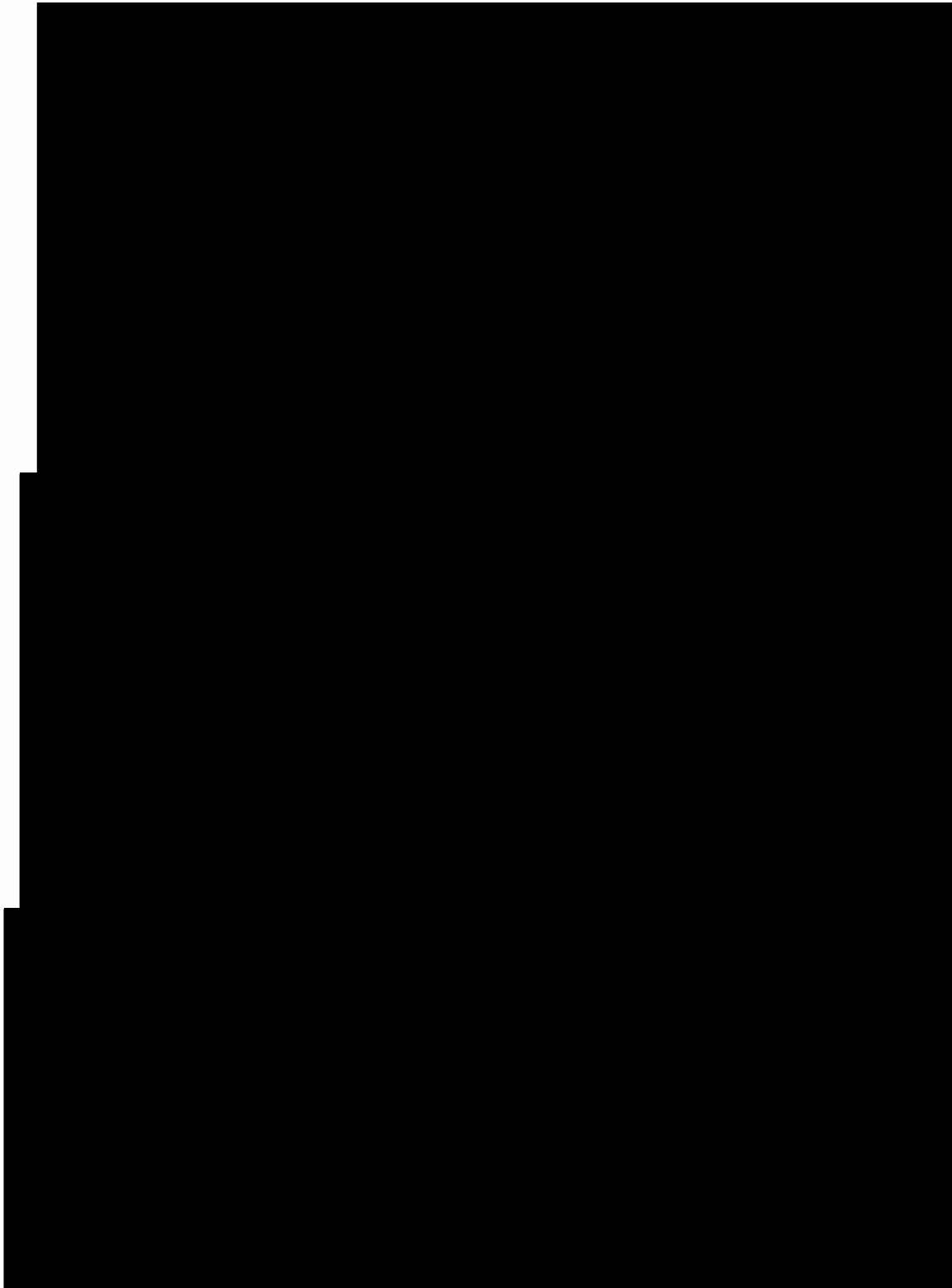
CONFIDENTIAL TREATMENT REQUESTED
BY RD LEGAL CAPITAL, LLC
UNDER 17 C.F.R § 200.83

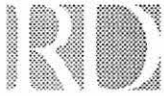
RDLC-SEC 176055

RESP. EX. 1524_0001



RD Legal Capital: Frequently asked Questions





RD Legal Capital: Frequently asked Questions





RD Legal Capital: Frequently asked Questions





RD Legal Capital: Frequently asked Questions



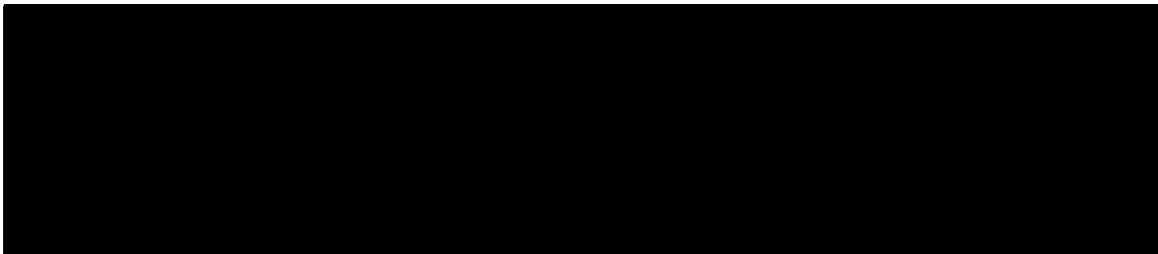
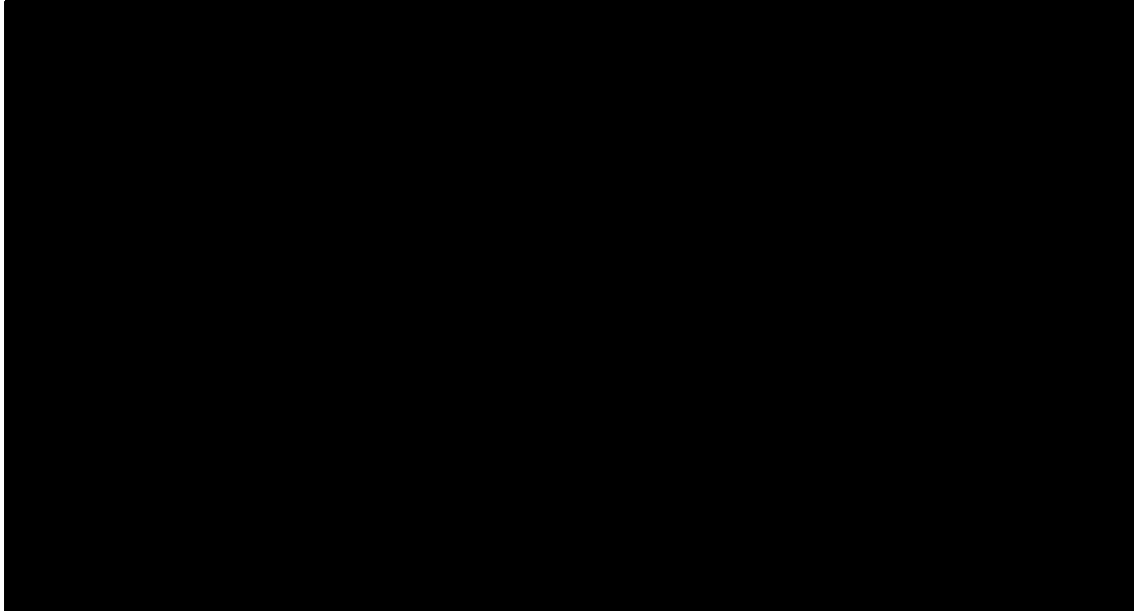
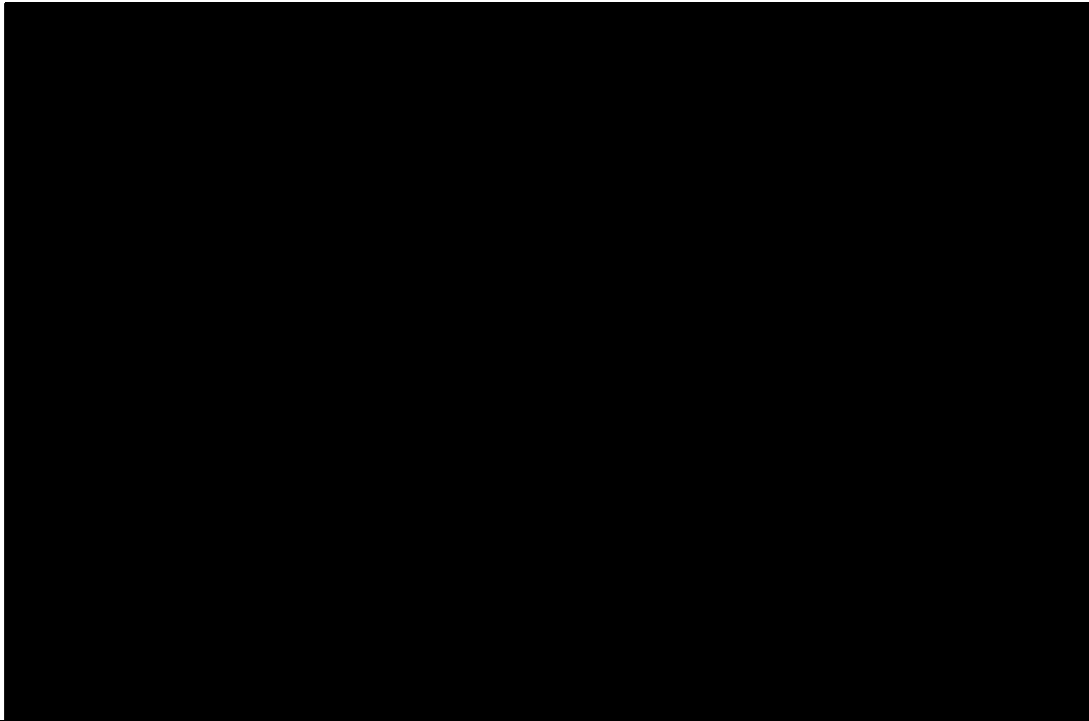
CONFIDENTIAL TREATMENT REQUESTED
BY RD LEGAL CAPITAL, LLC
UNDER 17 C.F.R § 200.83

RDLC-SEC 176059

RESP. EX. 1524_0005



RD Legal Capital: Frequently asked Questions





RD Legal Capital: Frequently asked Questions

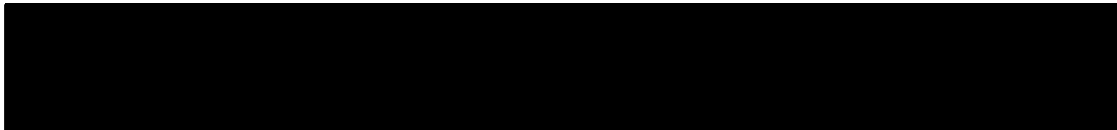
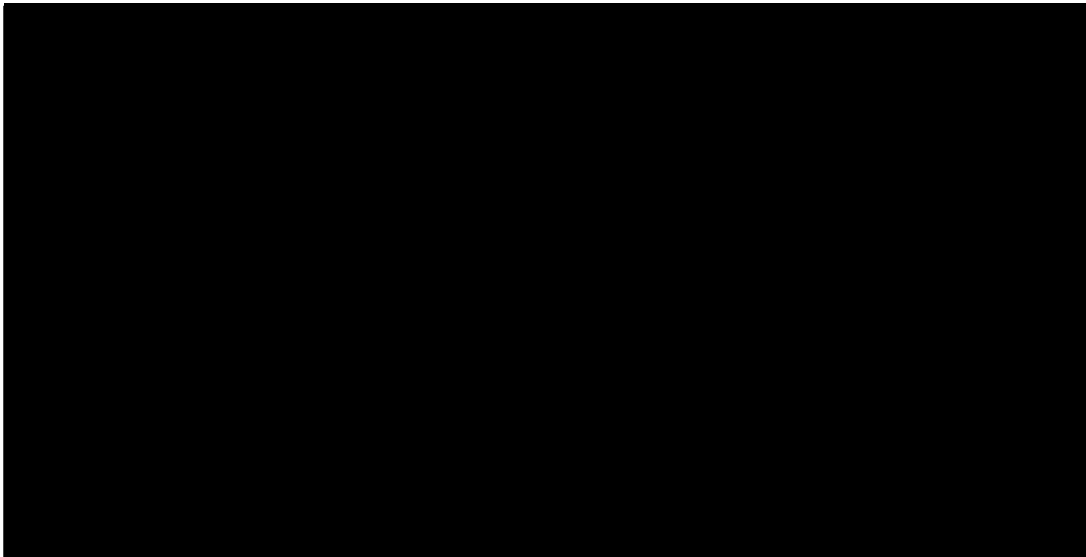
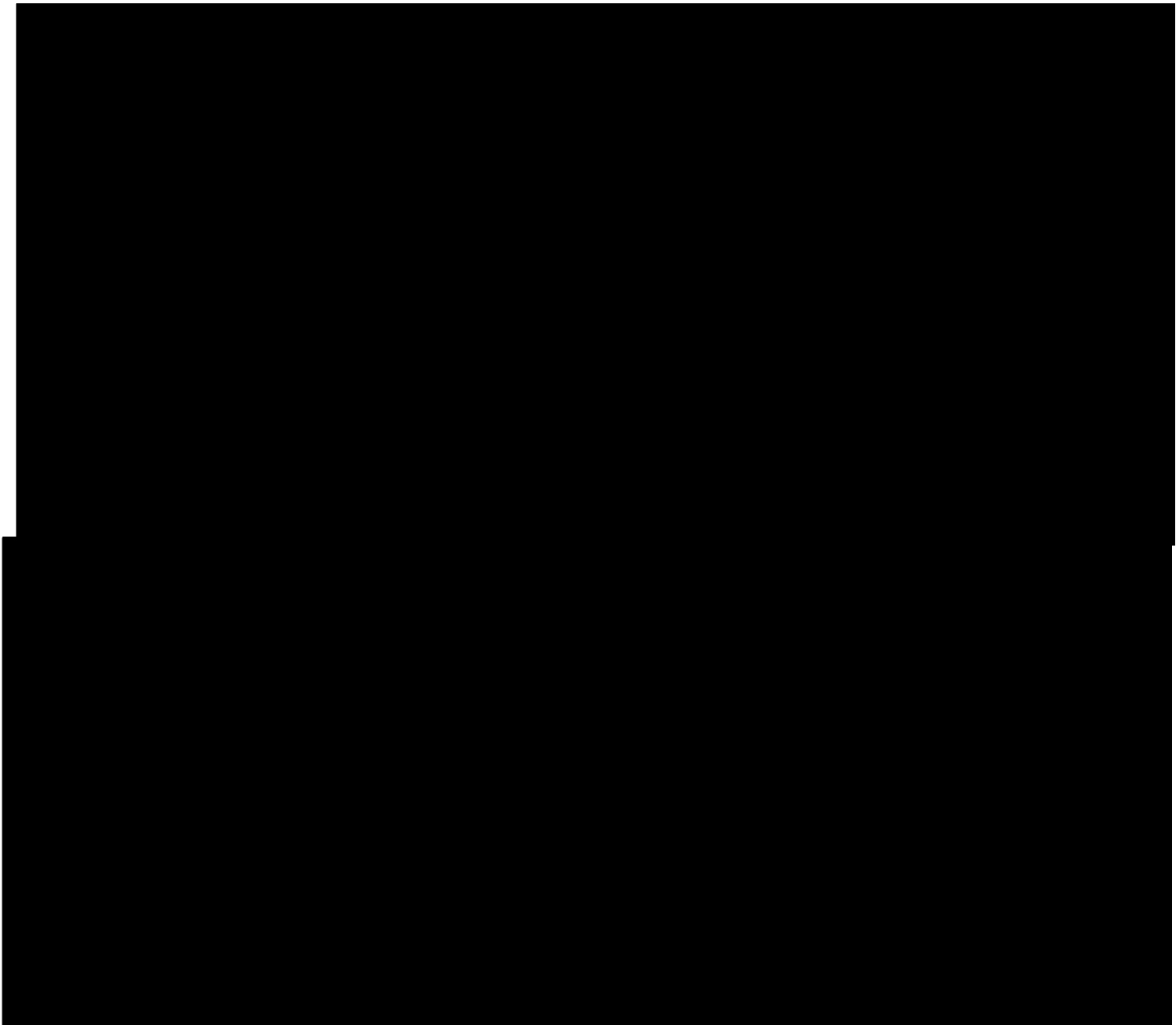


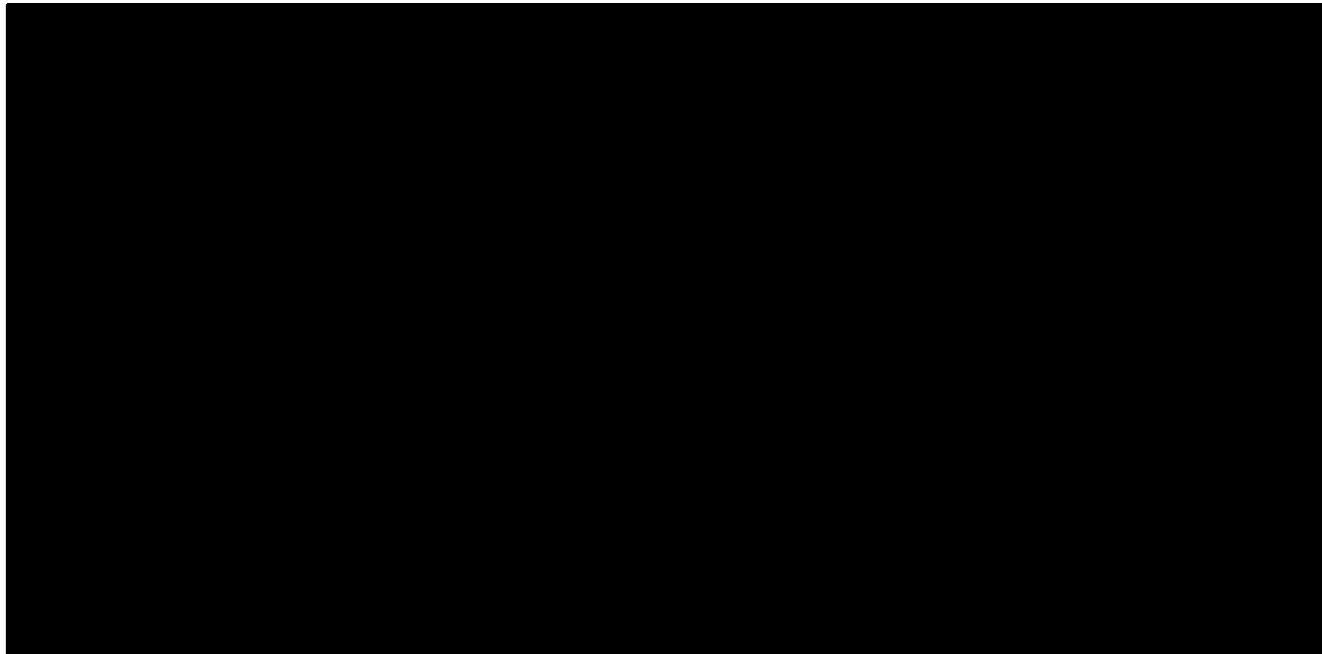
EXHIBIT C



CONFIDENTIAL TREATMENT REQUESTED
BY RD LEGAL CAPITAL, LLC
UNDER 17 C.F.R § 200.83

RDLC-SEC 173162

RESP. EX. 1482_0001



CONFIDENTIAL TREATMENT REQUESTED
BY RD LEGAL CAPITAL, LLC
UNDER 17 C.F.R § 200.83

RDLC-SEC 173163

RESP. EX. 1482_0002