Hughes
Hubbard

HARD COPY

Hughes Hubbard & Reed LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Telephone: +1 (202) 721-4600
Fax: +1 (202) 721-4646
hugheshubbard.com

Terence M. Healy
Partner
Direct Dial: +1 (202) 721-4676
terence.healy@hugheshubbard.com

March 17, 2017

Hon. Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: *In the Matter of RD Legal Capital, LLC, et al.*
Administrative Proceeding No. 3-17342

Dear Judge Patil:

We represent RD Legal Capital, LLC and Roni Dersovitz ("Respondents") in the above matter. We write to seek emergency relief from the Court in connection with a recently discovered violation by the Division of Enforcement (the "Division") of its obligation under Rule 230 of the Rules of Practice not to withhold material exculpatory evidence in contravention of the doctrine set forth in *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Respondents learned for the first time this week that the Division conducted in-person interviews in November 2016 with designated witness Barry A. Cohen and individuals who worked with his law office, and that one of those individuals, Elliott Buchman, told the Division that all of the legal fees that Mr. Cohen's law firm had assigned to Respondents or their affiliates related to cases that were closed at the time of the assignment. This revelation, moreover, is just the latest manifestation of a consistent pattern by the Division of hiding the ball from Respondents.

Mr. Buchman's statement is clearly exculpatory, as it directly contradicts one of the Division's primary claims in this action—namely, that Respondents invested in legal fees owed to Mr. Cohen's firm in connection with cases that were unresolved. The Division's failure to disclose this information is particularly egregious given that Respondents sent a letter on December 5, 2016 specifically requesting that the Division supplement its previous *Brady* disclosures to include any newly obtained information, including "any notes or memoranda related to any interviews the Staff conducted of potential witnesses in the case." As explained below, given the seriousness of the violation and the imminence of the hearing in the matter, Respondents respectfully submit that the appropriate remedy is to dismiss this action in its entirety, or, at a minimum, to prevent the Division from presenting any evidence relating to Respondents' investments in legal receivables originated by Mr. Cohen's law office.

The Claims Against Respondents

In its Order Instituting Administrative and Cease-and-Desist Proceedings (the "OIP"), the Securities and Exchange Commission (the "Commission") charged Respondents with "defraud[ing] investors by (i) marketing and selling investments in two funds based on misrepresentations concerning the type and diversification of assets under management in these funds, and (ii) by withdrawing money from the funds using valuations based on unreasonable assumptions, thereby draining the funds of liquidity at the expense of investors." (OIP ¶ 1.) The Division's theory of the case has evolved throughout the course of this litigation, and uncertainty remains regarding the exact nature of the claims it is pursuing. Indeed, one of the chief difficulties Respondents have faced in attempting to defend themselves throughout this litigation has been that the Division's position has been a moving target. It appears, however, that the Division is no longer challenging the reasonableness of the valuations at issue, and intends to proceed solely on its misrepresentation claims.

As articulated in its prehearing brief, the Division contends that Respondents falsely told prospective investors that the funds they managed (the "Funds") purchased legal receivables related to settled or otherwise final litigation. (Divisions' Prehearing Br. at 6.) While the misrepresentation allegations in the OIP focus primarily on Respondents' decision to invest in legal receivables arising out of a case involving the terrorist bombing of a United States Marine barracks in Beirut, Lebanon, the Division more recently has shifted its focus to secondary claims in the OIP relating to other investments by the Funds in legal receivables generated by two lawyers. As is relevant to this motion, the Division alleges that, "from 2007 to 2009, Respondents used Fund assets to purchase interests in the portfolio of an attorney, Barry Cohen, which included both non-contingent fee work and unsettled cases." (*Id.* at 12.)

The Division's Disclosure of *Brady* Material

Following a request from Respondents, the Division confirmed in a letter dated July 22, 2016 that it would make its investigative file for this matter available to Respondents pursuant to its obligations under Rule 230 of the Rules of Practice. The Division's investigative file included handwritten notes from interviews of certain individuals that the Division had talked to in connection with its investigation. Those notes confirmed that the Division spoke with Mr. Cohen and another individual who works with Mr. Cohen, Domenic Massari, on March 7, 2016. They also establish that the Division had follow up communications with Mr. Cohen on May 16, 2016, and with Mr. Massari on May 18, 2016, although any notes reflecting the substance of those conversations appear to have been redacted.

On December 5, 2016, Respondents sent a letter demanding that the Division supplement its previous production to include, *inter alia*, any *Brady* material "that has come into the possession of the Staff since the time the investigative file has been produced." The letter went on to state that, "[i]n particular, Respondents ask for copies of any notes or memoranda related to any interviews the Staff conducted of potential witnesses in the case." The Division replied to Respondents' renewed request in a letter dated December 12, 2016. The Division's letter enclosed additional documents that the Division had received from various third parties, and also

disclosed potentially exculpatory statements communicated to the Division by various potential witnesses. The letter did not, however, enclose any additional handwritten notes from the Division, nor did it disclose that Division attorneys traveled to Florida to meet in person with Mr. Cohen or anyone else. Copies of Respondents' December 5, 2016 letter and the Division's response dated December 12, 2016 are attached, respectively, as Exhibits A and B.

Respondents' Discovery of the Division's Florida Trip

On Tuesday, March 14, 2017—after the final pretrial conference and less than a week before the start of the hearing in this matter—Respondents learned for the first time that two attorneys for the Division, Michael Birnbaum and Victor Suthammanont, traveled to Florida in late 2016 to meet in person with Mr. Cohen and with certain individuals who worked with Mr. Cohen, including Mr. Massari and another person, Elliott Buchman. Mr. Buchman is a certified public accountant that had served as the chief financial officer for Mr. Cohen's firm. Mr. Buchman confirmed the Division's previously undisclosed trip to Respondents, and further informed Respondents that he expressly told the Division's attorneys when he met with them that all of the legal fees that Mr. Cohen's law firm had assigned to Respondents or their affiliates related to cases that were closed at the time of the assignment. Mr. Buchman also confirmed that the Division's attorneys took handwritten notes during their meeting with him, none of which have ever been produced to Respondents. Mr. Buchman agreed to provide a declaration swearing to these facts under penalty of perjury, a copy of which is attached as Exhibit C.

Following this revelation from Mr. Buchman, Respondents also spoke with Mr. Massari, who confirmed that Messrs. Birnbaum and Suthammanont had traveled to Florida to meet with him, Mr. Cohen, and Mr. Buchman in November 2016. Mr. Massari further informed Respondents that: (a) in their initial telephone call with the Division in March 2016, Messrs. Cohen and Massari informed the Division attorneys that Mr. Buchman had negotiated the transaction and the deal documents evidencing the transaction between Mr. Cohen's law firm and RD Legal; and (b) during their later, previously undisclosed in-person meeting with the Division attorneys, Messrs. Cohen and Massari confirmed that a criminal *qui tam* matter in which RD Legal invested, *United States of America v. WellCare Health Plans, Inc.*, had been settled and that $80 million had been liquidated and set aside at the time Respondents invested in the legal fees earned in that matter. A copy of a sworn declaration form Mr. Massari attesting to these facts is attached as Exhibit D.

Respondents' Right to Relief from the Division's Violation of Its *Brady* Obligations

The Due Process Clause of the Fifth Amendment requires the government to disclose evidence that is favorable to criminal defendants and material to the liability or penalties the government seeks to impose. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). The Commission's Rules of Practice recognize and incorporate this fundamental principle of procedural due process by prohibiting the Division from withholding material evidence that is favorable to a respondent's defense. *See* 17 C.F.R. § 201.230(b)(3) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)); *OptionsXpress, Inc.*, SEC Release No. 9466, 2013 WL 5635987, at *3

(Oct. 16, 2013) ("[The Commission] has incorporated the Supreme Court's *Brady* doctrine in [its] administrative proceedings by adopting [Rule 230(b)(3)]." (quotation marks omitted)).

All disclosure of *Brady* material, moreover, must be made in sufficient time that the accused "will have a reasonable opportunity to act upon the information efficaciously." *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007). When a court "concludes that the government was dilatory in its compliance with *Brady*, to the prejudice of the defendant," it "has discretion to determine an appropriate remedy, whether it be exclusion of the [evidence], limitations on the scope of permitted testimony, . . . or even mistrial." *United States v. Pasha*, 797 F.3d 1122, 1141 (D.C. Cir. 2015) (quoting *United States v. Burke*, 571 F.3d 1048, 1054 (10th Cir. 2009)); *see also United States v. Miranda*, 526 F.2d 1319, 1325 n. 4 (2d Cir. 1975) (where Government has failed to carry out its *Brady* obligations, appropriate sanctions may include "the exclusion or suppression of other evidence concerning the subject matter of the undisclosed material"). "The choice of remedy is in the sound discretion of the district court." *Pasha*, 797 F.3d at 1141 (quoting *Burke*, 571 F.3d at 1054).

Here, the Division was more than just dilatory in its disclosure of information it obtained during its trip to Mr. Cohen's offices in November 2016—it affirmatively stated no further *Brady* material remained to be disclosed. The Division disclosed neither the existence of this trip nor the information it obtained from Mr. Buchman to Respondents, who only learned about these facts because involved third parties were gracious enough to speak to Respondents and to sign sworn declarations confirming them. And while academics may debate when information is sufficiently favorable to constitute *Brady* material that must be disclosed, there can be no question that Mr. Buchman's statements to the Division—which directly contradict its theory of liability with respect to the Cohen investments—fall squarely on the exculpatory side of that line.

The only issue, therefore, is the appropriate remedy for the Division's violation of its *Brady* obligations. As explained above, Respondents' inability to pin the Division down regarding the scope and substance of its claims (*e.g.* whether it is still pursuing the valuation claim included in the OIP) renders its failure to disclose this *Brady* material even more unfair than it would be if the Division had been consistent and transparent in litigating this case. Given the severity of the violation and the fact the hearing is set to commence on Monday, Respondents respectfully submit that the appropriate remedy to ensure that Respondents are not unfairly prejudiced and that the Division will honor its disclosure obligations going forward is to dismiss this action in its entirety and with prejudice. Indeed, the fact that the Division did not disclose this clearly exculpatory information begs the question of what else the Division failed to disclose, and moving forward with the hearing under this cloud of uncertainty would be fundamentally unfair to Respondents.

In the alternative, and at a minimum, the Court should prevent the Division from presenting any evidence regarding the Cohen transactions and dismiss the misrepresentation claims in the OIP to the extent they are predicated on allegations that Respondents misrepresented the nature of the Funds' investment in the Cohen cases. In addition, the Court should order the Division to immediately: (a) identify all telephonic and in-person communications it had with actual or potential witnesses to discuss this action subsequent to the

filing of the OIP in July 2016; (b) disclose all information conveyed in those meetings that could be considered favorable to Respondents and/or inconsistent with the Division's theory of liability in this case; and (c) produce any and all notes (handwritten or otherwise) that Division attorneys took in connection with any of those communications.

Respondents appreciate the Court's prompt attention to this matter, and will be prepared to answer any questions and/or address any issues the Court may have with respect to Respondents' request prior to the commencement of the hearing on Monday.

Respectfully submitted,

Terence Healy

cc: David K. Willingham (email only)
Michael D. Roth (email only)
Michael Birnbaum (email only)
Jorge Tenreiro (email only)
Victor Suthammanont (email only)

Exhibit A

Hughes
Hubbard

Hughes Hubbard & Reed LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Telephone: +1 (202) 721-4600
Fax: +1 (202) 721-4646
hugheshubbard.com

Terence M. Healy
Partner
Direct Dial: +1 (202) 721-4676
terence.healy@hugheshubbard.com

December 5, 2016

BY EMAIL AND USPS

Michael Birnbaum
U.S. Securities and Exchange Commission
New York Regional Office
Brookfield Place
200 Vesey Street, Room 400
New York, New York 10281

Re: *In the Matter of RD Legal Capital, LLC and Roni Dersovitz*, SEC Administrative Proceeding File No. 3-17342

Dear Michael:

We previously requested in a letter dated July 18, 2016 that the Division of Enforcement ("Division") provide Respondents copies of any documents or evidence that: (1) could be exculpatory or weigh against a finding of liability against Respondents under the doctrine of *Brady v. Maryland* and its progeny[1] ("*Brady* material") or (2) that tend to impeach any witness the Division may call or rely upon in the hearing ("*Giglio* material").[2] In that same letter, Respondents also asked for copies of statements of any Division witness that may pertain to his or her expected testimony ("*Jencks* material").[3]

In August we received from the Staff a copy of its investigative file in this matter, including copies of certain handwritten notes the Staff made during meetings with various investors and/or potential witnesses. Respondents now ask the Division to provide, as necessary, any additional *Brady* material, *Giglio* material, or *Jencks* material that has come into the possession of the Staff since the time the investigative file was produced. In particular, Respondents ask for copies of any notes or memoranda related to any interviews the Staff conducted of potential witnesses in the case.

1 *See* Securities and Exchange Commission Rule of Practice 230(b)(2).
2 *See Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667 (1985).
3 *See* Securities and Exchange Commission Rule of Practice 231(a).

Respondents also request that the Assistant Director responsible for this case, or his designee, provide a written certification that the Division has searched its files, and those of any other division or office of the Commission that may have had involvement in this matter, and that all materials required to be provided to Respondents under *Brady* and SEC Rules of Practice 230 and 231 have been produced.

Very truly yours,

Terence Healy

cc: David Willingham
Michael Roth

Exhibit B

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

MICHAEL D. BIRNBAUM
TELEPHONE: (212) 336-0523
EMAIL: birnbaumm@sec.gov

December 12, 2016

VIA UPS AND ELECTRONIC DELIVERY

Terence Healy, Esq.
Hughes Hubbard & Reed LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Terence.Healy@hugheshubbard.com

Re: In the Matter of RD Legal Capital, LLC and Roni Dersovitz;
Admin. Pro. No. 3-17342

Dear Mr. Healy:

I write in response to your December 5, 2016 letter seeking, among other things, updated disclosures contemplated in Commission Rules of Practice 230 and 231.

Please find enclosed copies of additional documents received from various custodians since the institution of the Order Instituting Proceedings ("OIP") in this matter. This production, which supplements other productions by the staff of similar materials—most recently on November 30, 2016—is made voluntarily and without waiving any right to withhold materials collected or generated in the future other than those required to be disclosed under the Commission's Rules of Practice.

The Division does not acknowledge or concede in any way that this production or disclosures below, either themselves or in combination with any other evidence, are material or exculpatory in nature or otherwise relevant to any theory of liability or relief in this matter. The Division reserves the right to dispute any assertion that any portion of its production is in fact material or exculpatory. The Division further reserves the right to dispute the credibility of any statements made by one or more of the RD Legal investors in any produced document or statement described herein.

Subject to the foregoing reservations of rights, and in addition to the materials already produced to Respondents or to be produced herewith, the Division notes the following additional information conveyed to the staff by various individuals since the institution of the OIP:

- David Backens, of Certis Capital Management, Inc., conveyed to the staff his uncertainty as to when he learned of the existence, and specific concentrations, of *Peterson*-related assets in RD Legal Capital, LLC's flagship funds ("Flagship Funds");

- Espen Robak, of Pluris Evaluation Advisors, conveyed to the staff that certain statements made to Pluris by Roni Dersovitz and others at RD Legal entities had the potential to impact Pluris's valuation of assets positively, while other statements had the potential to impact such valuations negatively;

- Lance Paddock conveyed to the staff that he was unaware of any misleading statements made by anyone at RD Legal Capital, LLC;

- Roy Ballentine informed the staff that, after discovering the existence of Iran-related assets in the Flagship Funds, he reviewed the offering memoranda sent to him and determined that they afforded RD Legal flexibility in making investment decisions;

- Thomas Fay and Steve Perles described, in discussions with the staff, the *Peterson* litigation as facing different levels of risk at different times;

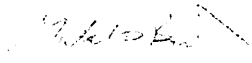
- Steven Wils informed the staff that he believed Katerina Markovic to be a victim of Roni Dersovitz; and

- Salvatore Geraci conveyed to the staff he is not certain of whether Roni Dersovitz mentioned RD Legal's pursuit of Iran-related assets in Mr. Geraci's first meeting with Mr. Dersovitz.

Regarding your request for "Jencks materials," we note the authority you cite, Rule of Practice 231, contemplates a motion to the Court seeking such materials. Nevertheless, the Division will continue to timely produce such materials in the absence of any motion or order.

Finally, pursuant to the request in your December 5 letter, I can confirm that the Division has searched its files, and those of any other division or office of the Commission that may have had involvement in this matter, and that all materials required to be provided to Respondents under *Brady* and SEC Rules of Practice 230 and 231 have been produced.

Sincerely yours,



Michael D. Birnbaum

Enclosure

Exhibit C

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

DECLARATION OF ELLIOTT BUCHMAN

I, Elliott Buchman, declare as follows:

1. I am a certified public accountant and a resident of the State of Florida. I submit this declaration in connection with the administrative proceeding entitled *In the Matter of RD Legal Capital, LLC and Roni Dersovitz*, File No. 3-17342. I have personal knowledge of the facts stated herein, and would and could testify competently thereto if called as a witness in this matter.

2. In or around September 2016 I received a telephone call from someone purporting to be an attorney with the Securities and Exchange Commission (the "SEC"). I was told on that call that I had come to the SEC's attention in the course of a conversation that SEC attorneys had previously had with Barry Cohen and Domenic Massari, and that the SEC was interested in speaking with me regarding Roni Dersovitz and RD Legal Capital, LLC, and any affiliated entities (collectively, "RD Legal").

3. I responded that I would be willing to meet with SEC attorneys in Florida, but that, because of my tax preparation practice, I would not be able to meet with them until sometime after October 15, 2016.

4. I met with two attorneys from the SEC, one named Michael Birnbaum and another named "Victor," at Mr. Cohen's law offices in Florida sometime after October 15, 2016. The SEC attorneys took handwritten notes during our conversation.

5. My meeting with the SEC attorneys lasted about an hour to ninety minutes, but most of that time was spent discussing my background and professional relationship with Mr. Cohen. I confirmed with the SEC attorneys that I had been the primary point of contact in connection with funding that Mr. Cohen's firm had received from RD Legal.

6. The SEC attorneys explained that they were investigating whether RD Legal had invested in cases that were not "closed."

7. I told the SEC that all of the legal fees that Mr. Cohen's law firm had assigned to RD Legal related to cases that were closed at the time of the assignment.

8. I then asked the SEC attorneys if there were any RD Legal investments in legal matters handled by Mr. Cohen's office that the SEC had reason to believe were not closed, but they did not identify any specific matters. The SEC also did not ask me any follow up questions in response to my confirmation that all legal fees assigned by Mr. Cohen's firm to RD Legal involved cases that were closed at the time of the assignment.

9. At the end of the meeting the SEC attorneys told me that they would reach out to me if they had any other questions. The SEC attorneys asked if I would inform them if anyone from RD Legal or any attorneys representing RD Legal reached out to me.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed March 16, 2017, at Boca Raton, Florida.

Elliott Buchman

Exhibit D

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

DECLARATION OF DOMENIC MASSARI

I, Domenic Massari, declare as follows:

1. I am a resident of the State of Florida. I submit this declaration in connection with the administrative proceeding entitled *In the Matter of RD Legal Capital, LLC and Roni Dersovitz*, File No. 3-17342. I have personal knowledge of the facts stated herein, and would and could testify competently thereto if called as a witness in this matter.

2. In or around March 2016 I spoke by telephone with SEC attorneys Michael Birnbaum and Victor Suthammanont regarding Roni Dersovitz and RD Legal Capital, LLC (collectively, "RD Legal"). Attorney Barry A. Cohen also participated in that telephone call.

3. During that telephone call Mr. Cohen and I informed the SEC attorneys that Elliott Buchman was the person who had negotiated the transaction and the deal documents evidencing the transaction between Mr. Cohen's law firm and RD Legal. Mr. Buchman is the person most knowledgeable about those negotiations and the Cohen firm's entry into the deal with RD Legal.

4. The SEC later called me to ask for contact information for Mr. Buchman.

5. On or about November 7, 2016, Mr. Cohen and I met in person with Messrs. Birnbaum and Suthammanont at Mr. Cohen's law offices in Tampa, Florida.

6. During that meeting Mr. Cohen and I confirmed that pursuant to a Deferred Prosecution Agreement entered into by Wellcare and the United States in the criminal case against Wellcare (Case # 8:09-cr-00203-JDW-EAJ a/k/a 8:09-CR-203-T-27EA) that it had been settled for a liquidated amount of $80 Million. I understood that that the $80 Million had actually been received and set aside at the time RD Legal entered into the deal with the Cohen Firm and made its advances. However, in response to their questions, we told the SEC attorneys

that, at that time, the exact amount realized as Cohen Firm legal fees from the $80 Million could only be estimated.

7. I met with the same SEC attorneys and with Mr. Buchman at Mr. Cohen's offices later that day or the following day, but I was only present for the beginning of that meeting.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed March 17, 2017, at Tampa, Florida.

Domenic Massari