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October 31, 2016

Hon. Carol Fox Foelak
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 Foelak:

We represent RD Legal Capital, LLC and Roni Dersovitz ("Respondents") in the above matter. We write in response to the October 21, 2016, letter of the Division of Enforcement (the "Division") seeking to compel Respondents to provide a written "disclosure" of the subjects of any legal advice upon which they relied related to the claims in this proceeding. The Division seeks an order from the Court requiring Respondents to provide, in effect, an interrogatory answer describing the basis for the reliance defense Respondents raised in their answer. There is no authority under the Commission's Rule of Practice for the Division to request, or the Court to order, that Respondents describe in writing the details of their reliance defense, and the Division fails to identify any such authority in its letter. The request of the Division should be denied.

Some background on this issue may be helpful. The Division filed this proceeding alleging fraud on July 14, 2016. Both the Division and Respondents thereafter made timely requests to the Office of the Secretary that the new amended Rules of Practice apply in this matter. The amended Rule 220 now provides, in part, that:

> [a] respondent must affirmatively state in the answer any avoidance or affirmative defense, including but not limited to res judicata and statute of limitations. In this regard, a respondent must state in the answer whether the respondent relied on the advice of counsel, accountants, auditors, or other professionals in connection with any claim, violation alleged or remedy sought. Failure to do so may be deemed a waiver.

Rule 220. Respondents filed their answer to the Division's charges on August 5, 2016, and in that answer "affirmatively state[d]" a number of additional special or "avoidance" defenses. *See id.* In one such additional defense, Respondents identified for the Court and the Division that:

> The Division's claims are barred in whole or in part because Respondents relied in good faith upon the judgment, advice, and counsel of attorneys, accountants, auditors, and other professionals, including but not limited to a nationally-recognized third-party valuation agent, as to matters reasonably believed to be within such persons' professional or expert competence.

Resp't Answer at 49. By raising this "avoidance" defense in a timely manner in their answer, Respondents discharged fully their obligation under Rule 220.

Since the time of the filing of the answer, the Division has been aflutter in seeking (or demanding) that Respondents provide additional detail and description of their reliance defense. At the initial conference, in meet-and-confer meetings with counsel, and in prior correspondence to the Court, the Division has asserted that Respondents have some obligation to describe this defense beyond raising it in their answer, lest they risk waiver. In a September 12th letter to the Court, the Division argued it "is entitled to know *whether Respondents are claiming reliance* on counsel as a defense to the allegations in the OIP." Letter from the Div. to the Hon. Carol Foelak at 4 (Sept. 12, 2016)(emphasis added). As stated in our earlier correspondence on this topic, Respondents agree that the Division is entitled to know whether Respondents are claiming reliance as a defense. The fact that Respondents *are* raising reliance as a defense was made clear in the answer. That knowledge has been conveyed.

In its most recent letter to the Court on this subject dated October 21, 2016, the Division cites various legal authorities—none of which is in dispute—regarding a party's ability to conduct discovery into the advice of counsel, where that advice is raised as a defense. The Commission's Adopting Release for the amended rules, for example, states that reliance can be the "focus of prehearing discovery" where reliance is raised in the answer. Letter from the Div. to the Hon. Carol Foelak at 2 (Oct. 21, 2016)(citing Adopting Release at 34). Respondents agree. The Division can make reliance the subject of its prehearing discovery in *this* case, if it chooses, but that discovery is limited to what is afforded under the Rules of Practice. The Division cannot serve what amounts to an interrogatory on Respondents, or expect the Court will compel from Respondents a written answer to such an interrogatory.

The Division also cites in its letter the black-letter legal standard that privilege cannot be used as a "shield and a sword." *Id.* Respondents are, again, in agreement and understand they must allow discovery into the advice any professionals provided them, where that advice forms the basis of a reliance defense. Indeed, the materials produced to the Division during the investigation in this case reflect this understanding, with substantive legal memoranda from the law firm of Reed Smith LLP and others having been provided without objection. Yet, the ability to conduct discovery into this subject does not provide a basis for the Division to bootstrap an entitlement to forms of discovery outside those provided for under the Rules of Practice.

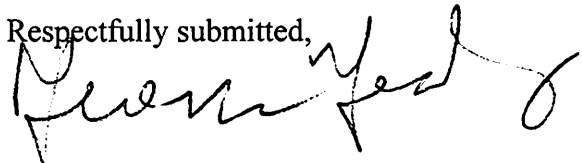
Also, in the same October 21 letter to the Court, the Division states that Respondents have moved to "quash" the Division's request for two subpoenas to be issued. The Division suggests that Respondents' opposition to these subpoenas is an effort to prevent inquiry into the

subject of the reliance defense Respondents raised in their answer. The Division is incorrect. As set forth in Respondents' letter to the Court dated September 30, 2016, they object to the requested subpoenas seeking documents concerning legal advice on the basis that they are overly broad and unduly burdensome. The Division seeks through these subpoenas all communications concerning *any* legal advice requested or received on *any* issue since June 2011. It would be unjustly burdensome for Respondents to have to collect and review essentially all of their communications with counsel since 2011, and then prepare a privilege log of those communications. Respondents object for that reason.

Lastly, Respondents find it somewhat ironic that the Division now claims a potential lack of "fairness" in this proceeding (*id.* at 2) if it must move forward in this case without being able to compel the interrogatory answer it seeks. After a more than year-long *ex parte* investigation with the full subpoena power of the Commission behind it, the Division made the decision to conclude its investigation and file this action as an administrative proceeding. By taking that step, the Division made a clear statement—to the Commission, to the public, and to this Court—that it was prepared to move forward in this matter on an expedited basis and did not require further discovery into the basis of its claims or the defenses to those claims.[1] Had the Division required further discovery beyond that allowed under the Rules of Practice, it should have chosen a different forum.

There is no basis in the Rules of Practice for the relief the Division seeks—essentially an interrogatory answer from Respondents—much less for the Division to expect that this Court would compel such relief. There is similarly no basis for the alternative relief of striking Respondents' reliance on professionals defense where that defense was duly raised in the answer in accordance with Rule 220. Respondents respectfully ask that the Division's request for an order compelling this relief be denied.

Respectfully submitted,



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1 Indeed, the Wells submissions in this case identified reliance on professionals as an independent basis for defeating the charges the Division proposed to bring at that time. The Division could have inquired further into this area, pre-filing, if it had chosen to. The Division did not to take any testimony from those professionals that had been identified in the submissions.