UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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January 12, 2018

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:

We write in response to Respondents' January 5 submission, which challenges the validity of the Commission's November 30 Order and maintains that their case should be dismissed on Appointments Clause and separation-of-powers grounds. Respondents' arguments are meritless and contrary to binding Commission precedent. Respondents therefore provide no reason for this Court to disregard the Commission's November 30 directive to reconsider its prior actions and rulings, which, as the Division has previously demonstrated, should be affirmed and ratified.

1. The Commission's November 30 Order itself forecloses Respondents' claim that the Commission failed to effectively ratify the appointment of its ALJs. It is undisputed that the Commission, acting in its capacity as head of a department, has the constitutional authority both to appoint ALJs as inferior officers and to ratify any such appointments after the fact. See U.S. Const. Art. II, § 2, Cl. 2; 15 U.S.C. § 78d(b)(1); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 512 (2010); *Wilkes-Barre Hospital Company, LLC v. National Labor Relations Board*, 857 F.3d 364, 370–71 (D.C. Cir. 2017). The Commission's order exercising that authority and ratifying the appointment of its ALJs is, moreover, binding on those ALJs. The scope of the inquiry before *this* Court is therefore limited to whether—having had his appointment ratified by the Commission—the presiding ALJ should affirm or revise in any respect the Court's prior actions in this proceeding.

What is more, even if this Court could consider the validity of the Commission's ratification of its ALJs' appointments, Respondents err in their claim that the ratification was invalid. Respondents' argument is premised on the false assumption that the act being ratified is the Commission's "delegation of hiring authority"; they insist that such ratification is void because the Commission may not delegate the authority to hire its ALJs. Br. 4-5. But the Commission's order does not ratify a prior *delegation*; rather, it ratifies the original decision to *appoint* the ALJs in the first instance. Whether the Commission may delegate certain hiring

decisions is therefore beside the point—the only relevant question is whether the Commission is constitutionally authorized to appoint its ALJs. And, on that question, as noted above, there is no dispute.

Equally fatal to their challenge is the fact that Respondents appear to misunderstand the nature of ratification itself. Their claim that the Commission cannot retroactively remedy actions taken by its staff runs counter to the doctrine's very purpose: to allow a principal to subsequently authorize the actions taken by an agent acting outside the scope of his or her authority. Restatement (Third) Of Agency, ch. 4, intro. note (2006); *id.* § 4.01 cmt. b; Heinszen & Co., at 382; 1 Floyd R. Mechem, Treatise on the Law of Public Offices and Officers § 536 (1890). This ratification "operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally." *Marsh v. Fulton County*, 77 U.S. (10 Wall.) 676, 684 (1871).

Here, agency staff approved the initial hiring of the Commission's ALJs. Even assuming that this action exceeded the scope of the hiring officials' authority, the defect was remedied by the Commission's November 30 ratification order. 1 Mechem § 533 (ratification of an act "render[s] it good from the beginning and the same as though he had originally authorized or made it"); *accord United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907) (ratification "retroactively give[s]" an agent's acts "validity"). Any defect in the appointment process has therefore been cured, and Respondents' contrary arguments fail.

2. This Court's prior decisions in this case—including its denial of Respondents' March 8, 2017, Motion to Dismiss Unconstitutional Proceeding—should be affirmed and ratified. Respondents cite the government's brief in *Lucia v. SEC*, No. 17-130 (S. Ct.), which concludes that the Commission's ALJs are officers under the Appointments Clause, and they assert that this filing requires that the Court now grant their motion to dismiss. This argument is wrong, as it fails to account for the fact that any Appointments Clause violation was cured by the Commission's November 30 Order. Respondents' Appointments Clause challenge is therefore moot, and the Court's prior decision may be affirmed and ratified on that ground.

3. Respondents' separation-of-powers challenge likewise misses the mark. As the Division explained in its December 6 submission, the Commission's decision in *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *26-28 (Sept. 17, 2015), forecloses Respondents' argument that the manner of removing ALJs is unconstitutional. Respondents' claim that the government's change of position in *Lucia* compels a different result is wrong. Although the Commission had concluded in *Timbervest* that its ALJs were employees, the Commission also expressly stated that "*even if* the Commission's ALJs are considered officers," the method of their removal does not offend separation-of-powers principles because of the long-standing and circumscribed adjudicatory functions that ALJs exercise. *Id.* at *27 (emphasis added). And while Respondents cite *Morrison v. Olson*, 487 U.S. 654 (1988), for the proposition that the separation-of-powers inquiry may not turn on an officer's assigned functions, Respondents ignore the Supreme Court's much more recent suggestion that it does: In *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), the Court expressly declined to extend to ALJs its holding regarding Public Company Accounting Oversight Board members, explaining that

"unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10.

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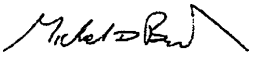
For all of the above reasons—as well as those set forth in the Division's other submissions to date—the Division maintains that this Court's prior decisions in this case should be ratified.

Respectfully submitted



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