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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:

Pursuant to this Court's December 6, 2017 order in the administrative proceeding referenced above (Release No. 5281), Respondents RD Legal Capital, LLC and Roni Dersovitz ("Respondents") submit this reply to the letters submitted by the Division of Enforcement (the "Division") on January 5, 2018 and January 12, 2018. As explained herein, the Division fails in its letters to address, let alone rebut, the points raised in Respondents' January 5, 2018 submission, and instead simply repeats the faulty claims about "ratification" that the Division first offered in its December 6, 2017 letter to this Court. Those claims continue to lack merit, however, and the Commission's November 30, 2017 Order ("11/30/17 Order") cannot "ratify" or otherwise cure the constitutional defects in this proceeding.

First, the Division claims that "[i]t 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*." (Division January 12, 2018 Letter at 1 (emphasis added).) The authority the Division cites, however, does not support the italicized portion of that proposition. (*See id.*) Neither Article II itself nor the federal statute the Division cites (*i.e.*, 15 U.S.C. § 78d(b)(1)) states that the Commission can retroactively ratify prior appointments of inferior officers that did not comply with the requirements of the Appointments Clause. And neither of the cases the Division cites in support of its claim involved ratification of a prior appointment of an inferior officer that did not comport with the Appointments Clause. (*See id.*) *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), confirms that the Commission acts as the head of a department, but does not discuss ratification *at all*. While the other case on which the Division relies did involve ratification, the ratification did not purport to cure a prior violation of the Appointments Clause. *See Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 370-71 (D.C. Cir. 2017). Instead, in *Wilkes-Barre*, the president cured prior Appointments Clause violations by making *subsequent* valid appointments of members of the National Labor Relations Board ("NLRB"),

and the NLRB then ratified prior acts it had made when it was not properly constituted, including the appointment of a Regional Director. *See id.* Indeed, the case expressly dealt with a constitutional "defect arising from the [NLRB] quorum violation," and the remedy for that particular violation. *Id.* at 371. The case did *not* address whether the Regional Director himself was an inferior officer subject to the Appointments Clause, or whether the ratification of his appointment had any constitutional implications. *See id.* Respondents made this point at pages 5-6 of their January 5, 2018 submission in response to similar cases the Division relied on in its December 6, 2017 letter, but the Division continues to ignore it.

Second, the Division claims that the Commission's 11/30/17 Order "does not ratify a prior *delegation*" of its hiring authority, but rather "ratifies the original decision to *appoint* the ALJs in the first instance." (Division January 12, 2018 Letter at 1 (emphases in original).) As the Commission now admits, however, the Commission's administrative law judges ("SEC ALJs") were *not appointed* "in the first instance." Rather, as Respondents explained in their January 5, 2018 submission at pages 3-5, SEC ALJs were vetted by the Office of Personnel Management, and ultimately hired not by the Commission, but by the chief administrative law judge. The Commission's 11/30/17 Order cannot change that fact, which dooms the Division's argument.

Third, the Division contends in a patronizing tone that "Respondents appear to misunderstand the nature of ratification itself" (Division January 12, 2018 Letter at 2), but Respondents respectfully submit that it is the *Division* that misunderstands the ratification doctrine upon which it relies. As demonstrated above and in Respondents' January 5, 2018 submission, the Division has not and cannot point to any authority for the proposition that the ratification doctrine can be used to retroactively bless a hiring process found to be in violation of the Appointments Clause, or to magically transform that unconstitutional hiring process into a constitutional appointment.

Fourth, contrary to the Division's contention, a detached and considered evaluation of the merits of the previous decisions in this proceeding does not support ratification of the Court's prior order denying Respondents' motion to dismiss based on the Appointments Clause and other constitutional violations (the "Constitutional Motion"). As explained above and in Respondents' prior submission, the Commission cannot retroactively ratify an unconstitutional hiring process, and any subsequent valid appointment would not change the fact that, at the time the Constitutional Motion was filed (and during the entirety of the evidentiary hearing), this proceeding was being presided over by an executive officer who had not been appointed in the manner required by Article II of the Constitution. The Constitutional Motion accordingly should have been granted at the time it was ruled upon, and this Court cannot ratify that erroneous ruling now.

Finally, the Division's continued blind reliance on *In re Timbervest, LLC*, Investment Advisers Act Release No. 4197, 2015 WL 5472520 (Sept. 17, 2015), in opposition to

Respondents' separation of powers argument is unwarranted. There is no dispute that *Timbervest* is on appeal to the D.C. Circuit, and that much of its reasoning has been undermined by the Commission's acknowledgment in the *Lucia* Brief that the status of SEC ALJs as executive officers implicates the prohibition on multi-layer tenure protection described in *Free Enterprise Fund*, 561 U.S. at 492. While the Division notes that *Free Enterprise Fund* declined to address whether administrative law judges are subject to the prohibition on multi-layer tenure protection (*see* Division January 12, 2018 Letter at 2-3), nothing in *Free Enterprise Fund* purports to *exempt* SEC ALJs from that prohibition, or to call into question the Supreme Court's prior holding that the president's removal authority does not turn on the nature of an executive officer's responsibilities. *See Morrison v. Olson*, 487 U.S. 654, 689 (1988). As Respondents explained on pages 11-13 of their January 5, 2018 submission in response to similar arguments the Division raised in its December 6, 2017 letter: *Timbervest* was wrong to conclude (1) that SEC ALJs are not executive officers who exercise "significant authority" (a point the Commission now concedes), (2) that the adjudicative functions of SEC ALJs can be distinguished in a separation of powers analysis from officers exercising executive functions, (3) that the system of appointment and removal applicable to SEC ALJs has been in place since 1946, and (4) that the length of time an unconstitutional practice has been in place can be relevant to an analysis of the practice's constitutionality. The Division's attempt to salvage some portion of *Timbervest* to avoid the constitutional implications of the multi-layer tenure protection afforded to SEC ALJs accordingly must be rejected.

For all the foregoing reasons, and those previously raised by Respondents, Respondents respectfully request that this unconstitutional proceeding be dismissed.

Sincerely,

MICHAEL D. ROTH

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