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February 5, 2018

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:

Respondents RD Legal Capital, LLC and Roni Dersovitz (“Respondents”) submit this letter in response to the Court’s request that the parties address whether any authority supports the principle that an administrative law judge may dismiss an agency proceeding on constitutional grounds. As explained below: (1) the Commission’s administrative law judges (“SEC ALJs”) are authorized under applicable federal regulations to entertain and rule on all motions, including dispositive motions based on affirmative defenses; (2) the Division of Enforcement (the “Division”), and the Commission more broadly, have embraced the view that Appointments Clause challenges must be raised as affirmative defenses and that SEC ALJs are authorized to rule on these constitutional challenges, and cannot fairly argue to the contrary here; and (3) the Commission specifically instructed this Court to revisit and reconsider all of its prior rulings in this proceeding, which include the prior erroneous denial of Respondents’ motion to dismiss on constitutional grounds (the “Constitutional Motion”). This Court accordingly has both the authority and the responsibility to independently evaluate and decide the Constitutional Motion, and Respondents respectfully submit that, for the reasons stated most recently in their correspondence of January 5, 2018 and January 19, 2018, this Court should exercise its authority to dismiss this proceeding based on uncured and incurable constitutional defects.

First, the Commission has delegated to SEC ALJs the authority to rule on *all* motions. *See* 17 C.F.R. § 200.14 (7); 17 C.F.R. § 201.111(h) (“The powers of the hearing officer include, but are not limited to . . . ruling upon all procedural and other motions.”) The Amended Rules of Practice governing this proceeding, moreover, specifically provide that SEC ALJs are authorized to hear and decide dispositive motions, including motions to dismiss based on affirmative defenses:



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In any proceeding under the 120-day timeframe designated pursuant to § 201.360(a)(2), after a respondent's answer has been filed . . . any party may make a motion for summary disposition on one or more claims or defenses, asserting . . . there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law.

17 C.F.R. § 201.250(b).<sup>1</sup>

Second, respondents in SEC administrative proceedings may bring motions for summary disposition based on *constitutional* defenses. Indeed, the Division has successfully convinced numerous federal courts to dismiss federal, collateral actions challenging SEC administrative proceedings on constitutional grounds—including an action initiated by Respondents in this proceeding—based on the argument that respondents must present their constitutional defenses in the first instance to the SEC ALJs presiding over their administrative proceedings. *See RD Legal Capital, LLC v. S.E.C.*, United States District Court for the District of New Jersey, Case No. 2:16-5104, Order, Oct. 20, 2016 (ECF Dkt. No. 23) (relying on *Jarkesy v. S.E.C.*, 803 F.3d 9, 16 (D.C. Cir. 2015), *Bebo v. S.E.C.*, 799 F.3d 765, 767 (7th Cir. 2015), *Tilton v. S.E.C.*, 824 F.3d 276, 291 (2d Cir. 2016), and *Hill v. S.E.C.*, 825 F.3d 1236, 1252 (11th Cir. 2016)). These courts justified their refusal to entertain collateral constitutional challenges, in part, on the belief that respondents would have a meaningful opportunity to have their constitutional arguments considered and adjudicated by SEC ALJs and the Commission in their administrative proceedings. *See, e.g., Tilton v. S.E.C.*, No. 15-CV-2472 (RA), 2015 WL 4006165, at \*12 (S.D.N.Y. June 30, 2015), *aff'd sub nom. Tilton v. S.E.C.*, 824 F.3d 276 (2d Cir. 2016) (“Furthermore, if the ALJ or the Commission agree with Plaintiffs and dismiss the administrative proceeding [based on constitutional defects], Plaintiffs will have obtained from the agency the relief sought. Seen in this light, the claims are not collateral to the proceedings, but rather intertwined. Indeed, it would be curious for Congress to have intended for a claim *that can be adequately raised within the administrative review procedures* it created to also be considered ‘wholly collateral’ to them.”) (emphases added).

The Division has not deviated in this proceeding from its consistent position that SEC ALJs are authorized to decide constitutional challenges on the merits. To the contrary, as noted

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<sup>1</sup> The prior version of Rule 250 provided only that the parties may make a “motion for summary disposition of any or all allegations of the order instituting proceedings,” which arguably left some ambiguity as to whether respondents could bring motions for summary disposition based on their affirmative defenses. 17 C.F.R. § 201.250(a) (2016 version). The amended and applicable version of Rule 250 removes any such ambiguity, however, by confirming that motions for summary disposition can be predicated on “one or more claims or defenses.” 17 C.F.R. § 201.250(b) (2017 version) (emphasis added).



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above, the Division defeated Respondents' collateral, federal action by arguing that Respondents *must* pursue their constitutional challenge as an affirmative defense in this administrative proceeding:

Plaintiffs further contend (at 34) that they cannot bring their constitutional arguments as defenses or counterclaims in the administrative proceeding. While the SEC's Rules of Practice do not permit counterclaims, Plaintiffs' arguments may be raised as affirmative defenses. Indeed, litigants before the SEC have repeatedly interposed Appointments Clause claims as affirmative defenses.

*RD Legal Capital, LLC v. S.E.C.*, U.S.D.C., District of New Jersey, Case No. 2:16-5104, Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, at 11 (ECF Dkt. No. 14) (citing *Jarkesy*, 803 F.3d at 23, *Bebo*, 799 F.3d at 767, *Tilton*, 824 F.3d at 279, and *Hill*, 825 F.3d at 1239). The Division thus succeeded in forcing Respondents to bring their constitutional challenge as an affirmative defense in this administrative proceeding, and should be estopped from now arguing that this Court cannot summarily adjudicate Respondents' constitutional affirmative defense pursuant to Rule 250 of the Amended Rules of Practice. See *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 792 (D.C. Cir. 2010) ("Courts may invoke judicial estoppel '[w]here a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position.'") (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010), *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).

The Division, moreover, did not argue in its original response to the Constitutional Motion that this Court lacked authority to rule on the merits, and therefore *has waived that argument*. See Division of Enforcement's Response to Respondents' (I) Motion *In Limine*, (II) Objections to Exhibits, and (III) Motion to Dismiss dated March 12, 2017, at 9 (arguing that this Court should *deny* the Constitutional Motion because the Commission's precedent dictates that SEC ALJs "are employees, not constitutional officers, and thus are not subject to Article II's requirements"). It cannot be the case that this Court only has the authority to consider a constitutional challenge on the merits in order to deny it.

Finally, the Commission has specifically directed this Court to revisit and independently evaluate *all* of its prior rulings in this proceeding, which include its denial of the Constitutional Motion. See Commission's November 30, 2017 Order ("11/30/17 Order") at 1-2 (instructing SEC ALJs to "[r]econsider the record, including *all substantive and procedural actions* taken by an administrative law judge[,] and to "[d]etermine, based on such reconsideration, whether to ratify or revise *in any respect all prior actions* taken by an administrative law judge in the proceeding.") (emphases added). The Commission certainly could have indicated an intent to carve out of its 11/30/17 Order, rulings by SEC ALJs on dispositive motions based on constitutional grounds, but it did not. Instead, the 11/30/17

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Order requires this Court to reconsider *all* of its prior actions, including its denial of the Constitutional Motion. This Court is already in the process of complying with the Commission's instruction and, for the reasons stated in Respondents' prior submissions, should now grant Respondents' Constitutional Motion, which should have been granted in the first instance.

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

Sincerely,



MICHAEL D. ROTH

cc: David K. Willingham (email only)  
Terence M. Healy (email only)  
Michael Birnbaum (email only)  
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