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

RESPONDENTS' DISGORGEMENT BRIEF

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I. INTRODUCTION

In *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), the Supreme Court held unequivocally that SEC disgorgement is a civil penalty. *Id.* at 1642 ("We hold that SEC disgorgement constitutes a penalty."). That holding dictates a change in how disgorgement should be calculated in SEC administrative proceedings. Specifically, after *Kokesh*, disgorgement must be treated like other civil penalties, which are subject to statutory limits and must be evaluated in light of several public interest factors set forth in the securities laws.

In its May 1, 2018 Order, the Court correctly explained that "[d]isgorgement and prejudgment interest are discretionary, equitable remedies." (Order at 1.) The Court's discretion is reflected in the securities laws. *See* 15 U.S.C. §§ 78u-2(e) ("[T]he Commission . . . *may* enter an order requiring accounting and disgorgement.") (emphasis added), 78u-3(e) (same). It is also reflected in the case law. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474-75 (2d Cir. 1996) ("The district court has broad discretion not only in determining *whether or not to order* disgorgement but also in calculating the amount to be disgorged.") (emphasis added); *see also SEC v. Metter*, 706 F. App'x 699, 702 (2d Cir. 2017) (quoting same).

The Court thus asked the Parties to address three questions in light of *Kokesh*, the securities laws, and case law regarding the Division's request for more than $50 million in disgorgement, plus prejudgment interest, in this proceeding "in which disgorgement could be ordered for an offense lacking a scienter requirement." (Order at 1.) Specifically, the Court posed the following questions:

1. Whether the Court is bound by the statement in *In the Matter of Jay T. Comeaux*, Securities Act of 1933 Release No. 9633, 2014 WL 4160054 (ALJ Aug. 21, 2014) ("*Comeaux*"), which "'reject[ed] [the] contention that, in determining

disgorgement, [the Court] should apply the public interest facts set forth in *Steadman v. SEC*' and the securities statutes." (Order at 1 (quoting *Comeaux*, 2014 WL 4160054, at *5) (first two alterations in original).)

2. Whether any other considerations, beyond those articulated in *Comeaux*, should guide the decision whether to impose disgorgement and prejudgment interest "in a Commission proceeding, . . . in which disgorgement could be ordered for an offense lacking a scienter requirement." (Order at 1.)

3. Whether the more than $50 million in disgorgement, plus prejudgment interest, sought by the Division is grossly disproportionate to the possible non-scienter based offense contemplated in the Order. (Order at 1-2.)

As explained below, prior cases considering disgorgement, including *Comeaux*, have been undermined by the holding and reasoning of *Kokesh*, and the securities laws governing civil penalties must now be applied to the civil penalty of disgorgement. Moreover, in this case, where investors made double-digit annual returns, and Respondents *lost* money, no disgorgement should be ordered at all. Indeed, the Division has not come close to justifying its request for more than $50 million in disgorgement.[1] Any penalty relating to that amount would be "grossly

[1] As explained in Respondents' Post-Hearing Brief, the astronomical disgorgement award sought by the Division is not even close to "a reasonable approximation of profits causally connected to the [alleged] violation." (Post-Hearing Brief, at 46.) Instead, the Division offered only Respondents' *net revenue* during the relevant time period, with no expert testimony or other evidence to approximate what portion of those amounts were profits causally connected to the alleged wrongful conduct. *Cf. SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("[T]he SEC generally must distinguish between legally and illegally obtained *profits*.") (emphasis added); *see also SEC v. Wyly*, 56 F.Supp.3d 260, 268 (S.D.N.Y. 2014) ("It is the SEC's burden to establish both a reasonable approximation of profits and the causal connection between the approximation and the violations."). This meager showing falls far short of even the proffer in *Comeaux*, where the Commission reversed and remanded a disgorgement award because the Division's expert evidence was insufficient to permit a "meaningful[] review [of] the reasonableness of" the disgorgement award. *Comeaux*, 2014 WL 4160054, at *3.

disproportionate" to the possible non-scienter based infraction contemplated in the Order, and thus would violate the Eighth Amendment's prohibition on excessive fines.

II. *COMEAUX* DOES NOT PREVENT THE COURT FROM CONSIDERING EQUITABLE FACTORS WHEN ASSESSING DISGORGEMENT PENALTIES

In its May 1, 2018 Order, the Court referenced *In the Matter of Jay T. Comeaux*, Securities Act of 1933 Release No. 9633, 2014 WL 4160054, in which the Commission remanded an enforcement action for further administrative proceedings. The Court directed the parties to address whether a statement in *Comeaux* rejecting the application of public interest factors in determining disgorgement is "binding precedent[,] and whether any other considerations, beyond those articulated in *Comeaux*, should guide the decision whether to impose disgorgement and prejudgment interest . . . in this proceeding, in which disgorgement could be ordered for an offense lacking a scienter requirement."[2] (Order at 1.) As explained below, the Court's discretion here is not bound or limited by the Commission's statement in *Comeaux*, which (a) does not control the Court's disgorgement analysis, and (b) is predicated on a premise that has subsequently been rejected and superseded by the Supreme Court in *Kokesh*.

A. Comeaux *Does Not Control The Court's Disgorgement Analysis*

As a threshold matter, and as the Court pointed out in its May 1, 2018 Order, *Comeaux* was a remand order, not a final agency action, which limited its exposure to judicial review and

[2] As the Court is well aware, the Division pegged its case exclusively on the theory that Respondents willfully violated the securities laws, and elected not to submit *any* evidence—expert or otherwise—on the appropriate standard of care against which this Court could measure Respondents' conduct in marketing and operating the Funds. As Respondents argued in their Post-Hearing Brief, this case is analogous to *SEC v. Ginder*, 752 F.3d 569 (2d Cir. 2014), where the Second Circuit reversed a district court's negligence finding because the Division had made a "strategic choice at trial to pursue a theory of scienter or nothing." *Id.* at 576; *see also* Post-Hearing Brief at 45 (observing that "in its opening statement and two-hour closing argument, the Division uttered the word 'negligence' (or derivations thereof) exactly *zero* times, and it also does not argue for negligence in its post-hearing brief").

undercuts its status as controlling authority. *See, e.g., Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1091-92 (9th Cir. 2014) ("In interpreting statutes authorizing judicial review of agency decisions, however, the Supreme Court has held that '[t]he strong presumption is that judicial review will be available only when agency action becomes final.'") (quoting *Bell v. New Jersey*, 461 U.S. 773, 778 (1983) (holding that a statute allowing judicial review of any action by the Secretary of Education gives federal courts jurisdiction only over orders or actions that are final)). Indeed, the Commission confirmed its intention to limit *Comeaux*'s precedential value by expressly stating that "[w]e do not suggest any view as to the outcome on remand." *Comeaux*, 2014 WL 4160054, at *5.[3]

In *Comeaux*, moreover, the Commission did not reverse and remand the initial decision because the administrative law judge applied public interest factors to her disgorgement analysis, but instead held that the Division had provided insufficient evidence to support the disgorgement award. *See id.* at 3 (holding that the Commission "cannot meaningfully review the reasonableness of" the disgorgement award "because the Division did not introduce any of the records on which" the expert offering the disgorgement calculations relied). Thus, even if *Comeaux* had been a final agency action, the statement that this Court quotes in its May 1, 2018 Order regarding the inapplicability of public interest factors to the disgorgement analysis was not part of *Comeaux*'s holding, and accordingly is mere dicta rather than binding precedent. *See Arcam Pharm. Corp. v. Faria*, 513 F.3d 1, 3 (1st Cir. 2007) ("The result, along with those portions of the opinion necessary to the result, are binding, whereas dicta is not."); *see also*

[3] As a practical matter, only two of the five commissioners comprising the Commission at the time endorsed the decision in *Comeaux*, with one commissioner dissenting and two others not participating. *Comeaux*, 2014 WL 4160054. Coupled with the unavailability of judicial review, the fact that *Comeaux* was not embraced by a majority of the Commission further undermines its persuasive value.

United States v. Birge, 830 F.3d 1229, 1233 (11th Cir. 2016) ("'All statements that go beyond the facts of the case . . . are dicta. And dicta is not binding on anyone for any purpose.'") (quoting *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010)).

Comeaux also involved a very different factual and procedural posture than what is before the Court in this proceeding. Comeaux was a broker-dealer and investment advisor with Stanford Group Company, which was instrumental in funneling millions of dollars of investment income into "one of the biggest Ponzi schemes in U.S. history." Miami Herald, *R. Allen Stanford gets 110-Year Sentence for Ponzi Scheme*, June 14, 2012, http://www.miamiherald.com/latest-news/article1940590.html. Here, by contrast, Respondents made actual (and very profitable) investments in real assets, and this Court has already concluded that the Division's claims regarding alleged improprieties in Respondents' valuation of the Funds' assets "amount to nothing." Administrative Proceedings Rulings Release No. 4976/August 16, 2017, at 15. In addition, the respondent in *Comeaux* entered into a settlement in which he admitted to having willfully committed violations of the federal securities laws, whereas here the Division was unable to elicit *any* testimonial or documentary evidence to suggest that Respondents ever intended to deceive *anyone*.

As the Court points out in its May 1, 2018 order, "[d]isgorgement and prejudgment interest are *discretionary*, *equitable* remedies" (emphasis added), and nothing in *Comeaux* suggests that the Commission intended that remand order to prevent its administrative law judges from exercising discretion and weighing equitable considerations—including the presence or absence of scienter—when determining whether disgorgement is appropriate.

B. Comeaux *Has Been Superseded By* Kokesh

Even if the dicta in *Comeaux* rejecting the application of public interest factors to the disgorgement analysis could have been considered binding precedent at the time *Comeaux* was decided, that statement was expressly predicated on a premise that has since been contradicted by the Supreme Court. Specifically, when analyzing disgorgement in *Comeaux,* the Commission emphasized that "[d]isgorgement is not a punitive sanction, but rather 'primarily serves to prevent unjust enrichment.'" *Comeaux*, 2014 WL 4160054, at *5. In *Kokesh*, however, the Supreme Court ruled that "SEC disgorgement *is* imposed for punitive purposes," 137 S. Ct. at 1643 (emphasis added), and is thus a civil penalty. *id.* at 1642 ("We hold that SEC disgorgement constitutes a penalty."). *Kokesh* accordingly undercuts the basis for the Commission's refusal to apply the public interest factors to its disgorgement analysis in *Comeaux*. *See Comeaux*, 2014 WL 4160054, at *5 (stating that "the public interest factors in Exchange Act Section 21B(c), Advisers Act Section 203(i)(e), and Investment Company Act Section 9(d)(3) are [only] applied when determining whether civil penalties are appropriate").

The portion of *Comeaux* quoted by the Court in its May 1, 2018 Order thus is no longer good law, even if it were considered binding precedent. Indeed, as explained below, following *Kokesh*, consideration of the statutory public interest factors in determining an appropriate disgorgement penalty is not only permitted, but required.

III. UNDER *KOKESH*, DISGORGEMENT IS A CIVIL PENALTY AND IS THUS SUBJECT TO (1) THE STATUTORY LIMITATIONS IMPOSED ON CIVIL PENALTIES; AND (2) THE PUBLIC INTEREST FACTORS USED WHEN CONSIDERING WHETHER TO IMPOSE CIVIL PENALTIES

Although *Kokesh* reserved the questions of "whether courts possess authority to order disgorgement in enforcement proceedings [and] whether courts have properly applied disgorgement principles" in SEC enforcement proceedings, 137 S. Ct. at 1642 n.3, this Court has recently reaffirmed that the securities laws "authorize disgorgement, including reasonable interest, in [administrative proceedings] *if appropriate*." *In the Matter of Angel Oak Capital Partners, LLC*, Administration Proceeding File No. 3-17849, Release No. 5636 at 9 (ALJ Feb. 28, 2018) (emphasis added); *see also* 15 U.S.C. § 78u-2(e). Those same securities laws, however, contain express limitations on the imposition of civil penalties that, under *Kokesh*, now must be applied to disgorgement.

*A. Post-*Kokesh, *the Statutory Maximums for Civil Penalties Apply to Disgorgement*

The general authority to assess civil penalties in administrative proceedings is set forth in 15 U.S.C. §§ 77h-1(g)(1) and 78u-2(a). The Securities Act and the Exchange Act then each set out a three-tiered scheme for determining the *maximum civil penalty* for each violation of those acts. *See* 15 U.S.C. §§ 77h-1(g)(2), 78u-2(b). Under *Kokesh*'s explicit statement that disgorgement is a penalty, these statutory maximums must apply to disgorgement orders in the same way they apply to other civil penalty orders.

In particular, here, Sections 77h-1(g)(2)(A) and 78u-2(b)(1) provide "[t]he *maximum* amount of a penalty for each act or omission" not involving a scienter-based violation of the

securities laws. 15 U.S.C. §§ 77h-1(g)(2)(A) (emphasis added), 78u-2(b)(1) (same). *See, e.g.*, *SEC v. Gruss*, 245 F.Supp.3d 527, 603 (S.D.N.Y. 2017) ("[N]egligence warrants First Tier penalties."); *SEC v. Mattera*, No. 11Civ.8323 (PKC), 2013 WL 6485949, at *17 (S.D.N.Y. Dec. 9, 2013) ("Negligence alone is not sufficient to warrant the imposition of a third-tier penalty on a defendant."); *SEC v. Heart Tronics, Inc.*, No. SACV11-1962 JVS(ANx), 2016 WL 9049642, at *3 (C.D. Cal. Mar. 30, 2016) (imposing first tier penalties in absence of "authority stating that courts may impose second or third tier penalties for negligence").

Accordingly, after *Kokesh*, civil penalties for disgorgement (and any other penalty) are limited to $7,500 for a natural person, or $75,000 for any other person, for each act or omission violating the securities laws, but not involving scienter. *See* 15 U.S.C. §§ 77h-1(g)(2)(A), 78u-2(b)(1), 17 C.F.R. § 201.1001.

B. Post-Kokesh, the Statutory Public Interest Factors Used to Evaluate Civil Penalties Apply to Disgorgement

Additionally, the Exchange Act lists six factors the Court may consider when determining "whether a penalty," such as disgorgement, "is in the public interest." *See* 15 U.S.C. § 78u-2(c); *see also* 15 U.S.C. § 77h-1(g)(1)(B) (authorizing imposition of civil penalties for violations of the Securities Act, where "such penalt[ies are] in the public interest"); *In the Matter of Barbara Duka*, Release Nos. ID-1167, AP-3-16349, 2017 WL 3878811 (ALJ Aug. 29, 2017) (explaining Exchange Act factors apply to violations of the Securities Act).

Following *Kokesh*, the Court may consider the following factors in exercising its "broad discretion . . . in determining whether or not to order disgorgement [and] also in calculating the amount to be disgorged." *First Jersey*, 101 F.3d at 1474-75.

> (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;
>
> (2) the harm to other persons resulting either directly or indirectly from such act or omission;
>
> (3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;
>
> (4) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 78o(b)(4)(B) of this title;
>
> (5) the need to deter such person and other persons from committing such acts or omissions; and
>
> (6) such other matters as justice may require.

15 U.S.C. § 78u-2(c).

As Respondents previously explained (Inability to Pay Brief, at 7-9), and as explained below, each of those factors weighs against ordering any disgorgement or other civil penalty. *See Comeaux*, 2014 WL 4160054, at *5 (noting that statutory factors "are applied when determining whether civil penalties are appropriate" and factors from *Steadman v. SEC* are applied when determining whether a bar is appropriate).

C. The Public Interest Factors Weigh Against Imposing a Penalty

The imposition of a civil penalty is discretionary. *See* 15 U.S.C. §§ 78u-2(a)(1) ("the Commission . . . *may* impose a civil penalty") (emphasis added), 78u-3(e) (same).

Here, each of the public interest factors listed above counsels that this Court should impose no disgorgement or other civil penalty.

First, there is no basis in this proceeding for a finding of any deliberate wrongful conduct. Indeed, the Court's May 1, 2018 Order requesting this briefing focused on how to calculate the disgorgement amount for a non-scienter based offense (Order at 1), and the evidence at trial established conclusively that: (a) Mr. Dersovitz always believed that *Peterson* was the best trade in the book (PFOF 70); (b) he communicated about *Peterson*, and his belief in the trade, to investors (including in the Cobblestone recording—the contemporaneous evidence of Respondents' pitch) (PFOF 82 (communications to potential investors), PFOF 85(c)-(e) (communications with Tiger 21), PFOF 86 (communications to existing investors), PFOF 87-89 (Citibank memorandum on the investor website), PFOF 90 (offering memoranda and marketing materials directing investors to website)); and (c) his belief has proved over time to be accurate (PFOF 79-81).

Second, there was absolutely no evidence of harm to investors, or anyone else, presented at the hearing. The reason for this is simple: even at the time of the hearing, all of RD Legal's investors had received a handsome return on their investments. (Inability to Pay PFOF 76-91 (investors testimony regarding their double-digit returns).) Respondents, moreover, have continued to collect receivables based on the investments that were at issue in this case, and have collected and distributed to investors tens of millions of additional dollars in returns from the *Peterson* trades, and approximately three million additional dollars from the *Osborn* trades, in the year since the conclusion of the hearing.[4] There was, in short, no harm to investors, only profit.

Third, Respondents were not unjustly enriched. *See First City Fin. Corp.*, 890 F.2d at 1230 (explaining disgorgement "is an equitable remedy designed to deprive a wrongdoer of his

[4] Should the Court wish to see evidence of the continued returns and distributions to investors since the hearing, Respondents can supplement the record with such evidence.

unjust enrichment and to deter others"). To the contrary, Respondents *lost* money from the operation of the Funds during the time period relevant to this proceeding. (PFOF 132-134; Inability to Pay PFOF 39-42.) And, since the conclusion of the hearing more than a year ago, Respondents have worked diligently to continue to maximize investor returns while leveraging their own assets to keep the business running during this prolonged proceeding, which has already crippled Respondents' business.[5]

Fourth, Respondents have had no prior violations of the securities laws.

Fifth, this is not the type of case where there is a need for further deterrence. As the evidence at trial showed, *Peterson* was a once in a lifetime trade[6] and, over time, Respondents worked diligently (with industry professionals and attorneys (PFOF 49)) to improve their offering documents and marketing materials to reflect the opportunistic nature of the trade and the changing business model. (*See, e.g.*, PFOF 19-22 (discussing 2013 Offering Memoranda); *compare* Ex. 44-1 (July 2013 Frequently Asked Questions document stating, "The primary focus is on purchasing the aforementioned receivables of settled cases, or non-appealable judgments.") *with* Ex. 2035_0003 (July 2014 Frequently Asked Questions document stating, "The primary focus is on purchasing the aforementioned receivables of settled cases, or judgments where a corpus of money has been identified."); *compare* Ex. 39-11–13 (September 2012 Due Diligence Questionnaire describing the funds' strategy, diversification, and risk management) *with* Ex. 48-8–10 (June 2014 Due Diligence Questionnaire with additional details on receivables involving

[5] In its May 1, 2018 Order, the Court also asked the Parties to address whether any taxes Respondents paid on profits may be offset from disgorgement in light of *Kokesh*'s ruling that disgorgement is a penalty. (Order at 2 n.1.) As Respondents have repeatedly explained, their losses far outpaced any returns during the relevant time period and they accordingly earned no taxable profits. The Division's contention that there were more than $50 million in profits distorts the meaning of the word "profits" beyond any recognizable definition.

[6] (*See, e.g.*, Tr. 5887:24-5888:1 (Dersovitz) ("This was a unique opportunity that no one in my industry had thought of, considered, understood, or had – I think that says it all.").)

both legal fees and plaintiff proceeds, on receivables arising from both "settled cases" and "non-appealable judgments," and on duration and concentration risk).) (*See also, e.g.*, Tr. 5518:5-7 (Dersovitz) ("You notice things as a business evolves. You want to improve documents."); Tr. 5528:11-13 (Dersovitz) ("So as the business evolved, we improved our documents to be more encompassing or broader in nature."); Tr. 4471:11:19 (Hirsch) ("[Roni] spent a huge amount of money on people like myself and Scott and Irena and outside attorneys trying to get it right. Things are going to evolve. And in six months, these documents will look different. I'm doing a review right now of everything again. And I'll do a review in the next six months, and I'll do a review in a year. They're always going to evolve and change."); Tr. 4642:3-6 (Hirsch) ("And you asked why this language would have been amended and evolved. And it would have evolved because of the *Peterson* case."); Tr. 6382:9-6383:11 (Gottlieb) (describing that Respondents were "trying to improve [their] documents," and specifically the Alpha Generation presentation).)

Moreover, Respondents were early participants in the legal financing market and, as the business and industry evolved, so did the disclosures made by Respondents. (*See, e.g.*, Tr. 5842:24-25 (Dersovitz) ("I was one of the earliest players in the space."); Tr. 4466:13-18 (Hirsch) ("I reviewed most of the documents for a period of time. . . . [I]t's important for me to say that this is an evolution. Every firm goes through an evolution. It starts as X, and it evolves. Documents evolve. And as it matures, the documents mature."); Tr. 4625:5 (Hirsch) ("Again, the AUPs evolved as the firm matured."); Tr. 5385:16-5386:21 (Metzger) (explaining some of the ways that hedge funds evolve).) As the Court is aware, there was no evidence that Respondents were not meeting any standard of care in the emerging legal finance business at any given time. Respondents, who worked diligently to be transparent and have earned millions of dollars for their investors, do not need to be deterred. (PFOF 50-51.)

Finally, the Court should consider "other matters as justice requires" and waive any monetary penalties, including disgorgement. As was shown at the hearing, Mr. Dersovitz was and is intensely committed to the success of his business and to maximizing investor returns. Over the last three years (including in the year since the hearing) he has stood behind his business and funded the management of the Funds out of his personal assets and by accumulating a significant personal debt (PFOF 133-134), and that commitment has paid off for investors who have profited enormously from Respondents' hard work.

IV. ANY DISGORGEMENT MUST COMPORT WITH THE EIGHTH AMENDMENT

In its May 1, 2018 Order, the Court also directed the Parties to address "the proportionality of the amount of disgorgement requested." (Order at 2 (citing *Metter*, 706 F. App'x at 703-04)). The short answer is that the more than $50 million in disgorgement sought by the Division is grossly disproportionate to the no-loss offenses at issue in this matter.

The Eighth Amendment prohibits, among other things, the imposition of excessive fines by the government. U.S. Const. amend. VIII. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of [a monetary penalty] must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). "'A civil penalty violates the Excessive Fines Clause if it 'is grossly disproportional to the gravity of' the offense.'" *Collins v. SEC*, 736 F.3d 521, 526 (D.C. Cir. 2013) (quoting *Bajakajian*, 524 U.S. at 334).

In *Bajakian*, the Supreme Court, "for the first time in its history," struck down a civil fine as excessive under the Eighth Amendment. *Kokesh* then cited to *Bajakian* in the process of concluding that SEC disgorgement is punitive in nature and a civil penalty. *Kokesh*, 137 S. Ct. at

1645. In turn, following *Kokesh*, the Second Circuit has assumed that disgorgement is a "fine" within the meaning of the Eighth Amendment. *Metter*, 706 Fed. App'x. at 703 ("[I]n light of the Supreme Court's recent decision in *Kokesh* . . . the disgorgement liability imposed in this matter was essentially punitive in nature and thus was a fine within the meaning of the Excessive Fines Clause of the Eighth Amendment."); *cf. Collins*, 736 F.3d at 526-27 (analyzing SEC disgorgement, pre-*Kokesh*, under the Excessive Fines Clause).

In *Metter*, the Second Circuit considered the constitutionality of a $52,236,995 disgorgement penalty from a pump-and-dump scheme. *Metter*, 706 Fed. Appx. at 702-03. In analyzing whether the penalty was "grossly disproportionate" to the offense, the court examined four factors from *Bajakian*:

> (1) [T]he essence of the crime and its relation to other criminal activity, (2) whether the defendant fits into the class of persons for whom the statute was principally designed, (3) the maximum sentence and fine that could have been imposed, and (4) the nature of the harm caused by the defendant's conduct.

Id. at 703. The court concluded that the "harsh penalty" of $52 million was warranted based on the nature and character of the defendant's admitted actions. *Id.* at 703-04.

Here, the remaining allegations against Respondents pale in comparison to the pump-and-dump scheme at issue in *Metter*. Assuming a non-scienter based offense—as we were directed to address in the Order—the unintentional statements or omissions underlying the OIP caused *no harm* to investors. While the $52 million in ill-gotten gains in *Metter* "flowed ultimately from the pockets of investors," *id.* at 703, here, Respondents earned double-digit profits for investors while RD Legal Capital suffered net losses in excess of $4 million (PFOF 132). Mr. Dersovitz

has personally encumbered his assets and (as of the hearing) contributed more than $9 million to the operation of the Funds since the beginning of 2015. (PFOF 134.) The more than $50 million delta between the economics of this case and *Metter* exemplifies that the disgorgement the Division seeks is "grossly disproportionate" to the non-scienter, no-loss offense contemplated by this Court's Order.

V. CONCLUSION

As discussed herein, and in Respondents' numerous post-hearing briefs, including the Inability-to-Pay Brief, Post-Hearing Brief, and Constitutional Issues Brief, the Court should find that Respondents did not violate the securities laws at all, and if they did so unintentionally, decline to impose any penalty or disgorgement remedy.

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Respectfully submitted,

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