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.

DIVISION OF ENFORCEMENT'S RESPONSE TO SUPPLEMENTAL BRIEF REGARDING DISGORGEMENT

DIVISION OF ENFORCEMENT
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INTRODUCTION

In considering the Division's request for disgorgement, this Court's task is to ensure that the disgorgement amount is causally connected to Respondents' misconduct and reasonably approximates their unjust enrichment. *In re Jay T. Comeaux*, Release No. 9633, 2014 WL 4160054, at *3-4 (Aug. 21, 2014); *see SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989). The parties agree that this is an equitable exercise, and that this Court may use its discretion both in determining whether to order disgorgement and in calculating the amount to be disgorged. To this end, the Division has identified several equitable considerations the Court may take into account in determining the amount of disgorgement that would be appropriate in this case. Div. Br. 6-8. The Division believes that this rubric is sufficient to ensure that disgorgement is used appropriately—that is, to prevent Respondents from retaining ill-gotten gains.

ARGUMENT

A. This Court is Bound by *Comeaux*

The Respondents improperly ask the Court to assess disgorgement based on statutory public interest factors that, by their terms, apply exclusively to other types of remedial sanctions. But the Commission already rejected Respondents' request when it "reject[ed] Comeaux's contention that, in determining disgorgement, we should apply the public interest factors set forth in *Steadman v. SEC*, Exchange Act Section 21B(c), Advisers Act Section 203(i)(e), and Investment Company Act Section 9(d)(3)." *Comeaux*, 2014 WL 4160054, at *5. It is this Court's "duty to follow" that "precedent of recent vintage" unless and until the Commission or the Supreme Court says otherwise. *See In re Union Electric Company*, Release No. 18358, 1974 WL 161428, *9 n.48 (Apr. 10, 1974) (noting that a Commission ALJ "was clearly right" that he was bound to follow relevant Commission precedent).

Respondents offer several reasons why they believe the Court should disregard that duty, but none is persuasive. *First*, they claim that *Comeaux*'s purportedly "limited exposure to judicial review" somehow "undercuts its status as controlling authority." Resp. Br. 3-4. But they never explain why, and the rule that judicial review of agency actions generally must await completion of the agency's decision-making process has no bearing on whether this Court must follow Commission precedent in this intra-agency proceeding. *See id.* at 4. The remand order in *Comeaux* is an order of the Commission like any other, and it is binding on this Court like any other. *See* 17 C.F.R. § 201.411(a). The Commission's interpretation and application of the federal securities laws do not need the imprimatur of an Article III court to be binding here. In fact, even if a lower federal court were to question or disapprove of *Comeaux*'s reasoning, this Court would still be bound by it absent disavowal by the Commission. *See generally, e.g.*, *American Tel. & Tel. Co. v. FCC*, 878 F.2d 727, 737 (D.C. Cir. 1992) (acknowledging agency's "right to refuse to acquiesce in one (or more) court of appeals' interpretation of its statute").

Second, the portion of *Comeaux*'s holding that is relevant to this case was not dicta. *Contra* Resp. Br. 4-5. Comeaux argued before the Commission that the public interest factors applicable to other remedial sanctions also applied to disgorgement. *See* Pet. for Rev. 3-4, *In re Jay T. Comeaux*, Admin. Proc. No. 3-15002 (filed Aug. 14, 2013). The Commission considered and rejected that contention in reviewing the ALJ's disgorgement findings, and then reiterated the disgorgement standard before directing the ALJ on remand to act "consistent[ly] with [its] order" in determining "what, if any disgorgement and civil penalties are in the public interest." *Comeaux*, 2014 WL 4160054, at *5. The Commission's rejection of Comeaux's argument was thus "necessary to [the] result" in that case, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996), and binding on this Court. Indeed, it is not as though the Commission directed the ALJ

in *Comeaux* to act "*consistent[ly]*" with the Commission's conclusions (2014 WL 4160054, at *5), but then directed ALJs in all subsequent proceedings to act *inconsistently* with them.

Third, Respondents believe that *Comeaux*'s legal reasoning is somehow less binding because the facts of that case were different. But the Commission "rejected" using other remedies' public interest factors to determine disgorgement based on its reading of the plain text of the securities statutes and related decisional law, not the factual or procedural posture of the case. 2014 WL 4160054, at *5. And in any event, Respondents never explain why the factual and procedural distinctions they claim to identify would yield a different result here. As explained (Div. Br. 5), the public-interest factors for civil money penalties—such as the harm to other persons, or a respondent's history of other violations, *see* 15 U.S.C. § 78u-2(c)(2), (4)—are an imperfect fit for calculating disgorgement.

Finally, Respondents claim that *Kokesh* superseded *Comeaux* and also *requires* this Court to apply the statutory framework applicable to civil money penalties in deciding whether to impose disgorgement. Resp. Br. 6-9. That argument fails for at least two reasons.

Initially, Respondents misread *Kokesh* and *Comeaux*. *Kokesh* held only that "disgorgement, as applied in SEC enforcement actions" brought in Article III courts, is a penalty "within the meaning" of the statute of limitations in 28 U.S.C. § 2462. 137 S. Ct. 1635, 1639, 1642 & n.3 (2017). The Supreme Court said nothing in that case about the Commission's authority to order disgorgement in administrative actions, and the Court expressly disclaimed the suggestion that its holding should be taken beyond the particular facts and statutory context of that case. *Id.* at 1642 n.3. The Court certainly never suggested that it was transforming a "penalty" for purposes of Section 2462 into a "civil penalty" or a "money penalty" for purposes of the Exchange or Advisers Acts. *Contra* Resp. Br. 6.

The Commission in *Comeaux* likewise did not "predicate" its refusal to apply other remedies' public interest factors to disgorgement on the belief that "disgorgement is not a punitive sanction." *Contra* Resp. Br. 6. It simply restated unambiguous statutory text and judicial precedent compelling that conclusion. 2014 WL 4160054, at *5; *compare, e.g.*, 15 U.S.C. § 78u-2(c) *with id.* § 78u-2(e).

Respondents' theory also cannot be squared with the legislative history or text of the remedial provisions of the federal securities laws. As the Division noted, Br. 5, civil money penalties and disgorgement are governed by separate and distinct statutory provisions. *See, e.g.*, 15 U.S.C. §§ 78u-2(c), 78u-2(e), 80b-3(i)(3), 80b-3(j). That was an intentional legislative choice. Congress added civil money penalties in 1990 because—in Congress's view—disgorgement and other then-available remedies were often inadequate to effectively discharge the Commission's duty to protect investors, or ill-suited to the facts of particular cases. *See* S. Rep. No. 337, 101st Cong., 2d Sess., at 7-12 (1990); H.R. Rep. No. 616, 101st Cong., 2d Sess., at 1383-1384 (1990). Eliding the distinction between disgorgement and civil money penalties would flout Congress's intention that they each be independently available. Moreover, it would leave the numerous disgorgement provisions of the securities laws with no work to do, in contravention of the well-settled principle that statutes must be interpreted "to give meaning to every clause and word, and certainly not to treat an entire subsection as mere surplusage." *Donnelly v. FAA*, 411 F.3d 267, 271 (D.C. Cir. 2005).

B. Respondents Misstate Facts Relevant to their Statutory Public Interest Analysis

Even if the Court were to impermissibly import public interest factors into the disgorgement analysis, the factors would weigh in favor of a significant monetary award as set forth in the Division's original post-hearing briefing. But, although the Court asked for legal

briefing on the applicability of *Comeaux* to this case and not for rehashing of the public interest factor analysis, Respondents have engaged in this exercise anyway. But it is for naught, as Respondents offer nothing new to analyze and nothing to rebut the Division's arguments regarding these factors. *See generally* Div. Post-hearing Reply Br. 22-23.

Most saliently, Respondents stubbornly persist in misstating the evidence regarding investor loss, insisting on the untenable position that "there was absolutely no evidence of harm to investors, or anyone else, presented at the hearing." Resp. Br. 10. But one of Jeffrey Burrow's clients invested $500,000 in Respondents' Funds and received none of it back (Div. PFOF ¶ 366), Mr. Ashcraft had received only $76,000 of his $750,000 principal investment (*id.* ¶ 536), and both of Kyle Schaffer's clients were owed at least $1.5 million in principal (*id.* ¶ 582).

Similarly untrue is Dersovitz's assertion that "including in the year since the hearing . . . he has stood behind his business." Resp. Br. 13; *see also id.* at 10 ("[S]ince the conclusion of the hearing more than a year ago, Respondents have . . . leverage[ed] their own assets to keep the business running."). On July 27, 2017, conveniently a few weeks after the close of the evidence, Dersovitz wrote to his employees that "everyone must be laid off" and did lay all of his employees off. *See* Exhibit A. Some of these employees have filed a complaint with the New Jersey State authorities complaining of owed back wages. *See* Exhibit B. By now, Respondents' penchant for telling this Court one thing while taking another position before another jurisdiction should not be surprising, but should not be countenanced by this Court any more than their other inconsistent positions.

Respondents' other public interest factor arguments remain as unpersuasive as they were last year. Their claim that they were not unjustly enriched continues to rest on nothing but

summary documents they themselves prepared without offering any backup documentation. *Compare* Resp. Br. 10-11 (citing Resps' PFOF ¶¶ 132-134; Resps' Inability to Pay PFOF ¶¶ 39-42) *with* Div. Resp. to Inability to Pay PFOF ¶¶ 39-42. And their assertion that there is no basis for finding any deliberate wrongful conduct because of Dersovitz's belief in the *Peterson* trade, Resp. Br. 10, is as irrelevant to the question of remedies as it is to liability. *See* Div. Posthearing Br. at 35 (citing *Lawrence M. Labine*, Release No. ID-973, 2016 WL 824588 (Mar. 2, 2016)).[1]

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[1] Respondents also contend that the Division's calculation is not a reasonable approximation of ill-gotten gains for two related but equally erroneous reasons. Resp. Br. at 2 n.1. First, they incorrectly suggest that the Division can only "causally connect[]" their revenues to the alleged wrongful conduct through "expert testimony," ignoring cases that award disgorgement of the entire proceeds of fraud involving the overwhelming majority of a business's operations. *See* Div. Post-hearing Br. at 42 n.42; Br. at 6 n.3. Second, Respondents purport to fault the Division for seeking net revenues. As the Division has pointed out, however, it is Respondents who have failed in their evidentiary proffer. Br. at 3 n.1. It is bad enough that Respondents continue to seek reductions for expenses despite clear case law to the contrary. Worse, their insistence, for example, that the Court discount *all* of RDLC's expenses from RDLC's revenues derived only from *the Funds*, *see* Resp. Br. at 2 n.1, ignores that a portion of RDLC's income was generated from managing assets other than the Funds, none of which are included in the Division's disgorgement calculations, Br. at 3 n.1, and Respondents offer no reason to credit RDLC with the expenses of running funds not at issue in this case.

Respondents' suggestion that Dersovitz's disgorgement be reduced by the amounts he returned to RDLC and other non-Fund companies in 2015 and 2016 suffers from the same defect: because RDLC was then managing other assets, it is not clear what assets Dersovitz's contributions were used to manage. Given that Respondents have offered no evidence of what exactly Dersovitz's supposed contributions were earmarked for, at most one could perform a crude calculation of what percentage of the 2015 and 2016 amounts Dersovitz put into his businesses actually went to manage the *Funds*, by looking at the proportion of RDLC's total assets under management that the Funds represented at that time—67%, Br. App'x A. Thus, even if the Court were to credit Dersovitz's unsubstantiated contention that he returned $8,341,919 to RDLC and other entities in 2015 and 2016, *see* Ex. 2379, at most, only 67% of that amount, or approximately $5,589,085, should be considered as returned to the Funds as opposed to the other assets managed by RDLC and the other entities, reducing Derovitz's profits from the Funds to $2,723,805 for the relevant period.

C. The Disgorgement Amount is Not Disproportional

As the Division has explained (Br. 9-11), the notion of Eighth Amendment proportionality is irrelevant in this case because a Commission civil disgorgement order is not a "fine" or "punishment" for purposes of the Eighth Amendment. But even if that were not true, a constitutional proportionality analysis such as that adopted for criminal forfeiture proceedings in *United States v. Bajakajian*, 524 U.S. 321 (1998), is unnecessary because properly ordered disgorgement "will always be proportional, or rationally-related, to the defendant's illegal profit." *SEC v. O'Hagan*, 901 F. Supp. 1461, 1468-1470 (D. Minn. 1995). Although the Second Circuit in *SEC v. Metter* conducted an Eighth Amendment proportionality analysis on the assumption that a district court's disgorgement order could qualify as a "fine" under the Excessive Fines Clause, it recognized that because the proposed disgorgement "almost precisely equaled the gains from the illicit conduct," it could not be excessive because it was "directly keyed to the scope of the wrongdoing." 706 F. App'x 699, 703 (2017).

Even if Eighth Amendment proportionality principles applied, however, Respondents have not shown that the disgorgement amount requested in this case would fail constitutional scrutiny. They claim that the Division's proposed disgorgement amount is unconstitutional because the allegations against them "pale in comparison to the pump-and-dump scheme at issue in *Metter*," Resp. Br. 14. But even if that were true, it is irrelevant. What matters is whether the Division's proposed disgorgement amount is grossly disproportional to the gravity of *Respondents'* offenses. And as the Division has already explained, that is not the case.

CONCLUSION

The Court should find Respondents liable and order full disgorgement.[2]

Dated: New York, NY
May 30, 2018.

Respectfully submitted.

DIVISION OF ENFORCEMENT

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[2] The Division's opening brief explained why Respondents are not entitled to an offset of the disgorgement amount for any taxes they might have paid on profits. Div. Br. 8-9. Because Respondents have declined the Court's invitation to discuss this in their opening brief, the Division will not have the opportunity to refute any contentions about this topic that may appear in Respondents' reply brief.

Exhibit A

Gmail Charles Zitzmann [redacted]

Exhibit E

1 message

Charles Zitzmann [redacted] Thu, Aug 17, 2017 at 4:18 PM
To: Charles Zitzmann <[redacted]>

---------- Forwarded message ----------
From: Charles Zitzmann <czitzmann@rdlegalgroup.com>
Date: Thu, Jul 27, 2017 at 4:51 PM
Subject: Fwd: <no subject>
To: Charles Zitzmann <[redacted]>

Sent from my iPhone

Begin forwarded message:

From: Roni Dersovitz <rdersovitz@legalfunding.com>
Date: July 27, 2017 at 4:12:58 PM EDT
To: Roni Dersovitz <rdersovitz@legalfunding.com>
Cc: Rogelio Matos <rmatos@legalfunding.com>
Subject: <no subject>

Hello All,

As you all know, I have personally supported the firm financially out of pocket for the past two years. I can no longer do it.

The Trustee's refusal to distribute our money, coupled with the SEC investigation have exhausted our resources.

It is with a heavy heart that we must begin the layoff process. Everyone must be laid off officially effective Friday, July 28th, 2017. Everyone will receive all payroll owed to them

once the firm becomes liquid. It is my hope that this will occur within the next 4-8 weeks. For the sake of clarity, I know that each of you received payroll on July 14th that should have been distributed on June 23rd. ADPe has said that they cannot re-run payroll with the correct date. Further, I will attempt to pay everyone's COBRA health insurance until October 31st and will let everyone know if this will be feasible as soon as possible.

I cannot begin to thank you for your loyalty and understanding these past weeks. I truly hope we can bring the team back together when things normalize.

While we have discussed this over the past weeks, this is the formal written communique required by law.

As always, please see me directly with any questions.

With gratitude and regrets,

Roni Dersovitz

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Email: rdersovitz@legalfunding.com

Website: www.legalfunding.com

Video Conference SIP: 38.68.130.227

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13K

Exhibit B

December 18, 2017

Mr. Sanjay Wadhwa
Senior Associate Regional Director (Enforcement)
U.S. Securities & Exchange Commission
200 Vesey Street, Suite 400
New York, NY 10281

Mr. Wadhwa,

We write to as former employees of Roni and Jake Dersovitz, as well as, several entities bearing the "RD Legal" name. Please note that Roni Dersovitz and "RD Legal Capital, LLC" have been the subject of an investigation and enforcement action by the SEC in 2016-2017.

Roni Dersovitz and Jake Dersovitz, who is the sole member of RD Legal Group, LLC, have stolen three pay-periods of wages and other earnings from us. To recover these wages and earnings, we have petitioned the New Jersey Department of Labor. The NJ DoL has conducted an investigation, during which representatives of the various "RD Legal" entities admitted that the former employees are owed back wages and other earnings. We enclose a copy of the NJ DoL investigation case file for your reference. We also recommend that you contact Mr. Howard Stein, a Hearing Officer in the NJ DoL. Division of Wage & Hour Compliance, who presided over the December 18, 2017 hearing concerning Mr. Derosvitz' violations of New Jersey wage and hour laws.

We realize that this dispute is not within the SEC's jurisdiction. However, we feel obligated to advise the SEC of the dispute, considering the impact it may have on investors of RD Legal Capital, LLC; RD Legal Finance, LLC; RD Legal Funding, LLC; etc.

Best regards,

The former employees of Roni and Jake Dersovitz