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.

RESPONDENTS' DISGORGEMENT REPLY BRIEF

Roel C. Campos
Terence M. Healy
Hughes Hubbard & Reed LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
202-721-4600
www.hugheshubbard.com
Counsel for RD Legal Capital, LLC and Roni Dersovitz

David K. Willingham
Michael D. Roth
Eric S. Pettit
Boies Schiller Flexner LLP
725 South Figueroa Street, 31st Floor
Los Angeles, CA 90017-5524
213- 629-9040
www.bsfllp.com
Counsel for Roni Dersovitz

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitution

Rules and Regulations

I. INTRODUCTION

The Division of Enforcement's Disgorgement Brief ("Division's Brief" or "Div. Br.") (1) improperly encourages this Court to ignore the holding and reasoning of *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), and (2) through misstatements of the evidence, seeks to relitigate issues that were not proven at the hearing and which have already been rejected by this Court in its August 16, 2017 Order Granting Respondents' Rule 250(d) Motion on Valuation Allegations (the "Valuation Order"). The Court should reject the suggestion that *Kokesh* does not control the disgorgement analysis here, and should not buy into the Division's revisionist history.

While this Court's May 1, 2018 Order asked the parties to address the import of *Kokesh* on this proceeding, where disgorgement might be imposed for a non-scienter based offense, the Division discounts *Kokesh* entirely, reaffirms its pursuit of an intentional fraud theory, and makes no attempt to explain how its astronomical disgorgement number is "a reasonable approximation of profits causally connected to" any alleged misrepresentation. (RD Post-Hearing Br. at 46.) Indeed, the Division's $56 million disgorgement request is not an approximation of anything—it is only the Division's incorrect calculation of RD Legal Capital's gross revenue from the Flagship Funds during the five-year period prior to the OIP—and is premised on a theory that this Court already rejected in the Valuation Order: that Respondents improperly "withdrew tens of millions of dollars based on unrealized profits." (Div. Br. at 7 n.4.) As this Court held, "there is insufficient evidence to conclude that Respondents' valuation methodology—*or the manner of the withdrawals based on those valuations*—were unreasonable or improper." (Valuation Order at 15 (emphasis added).)

The Division falsely accused Respondents of cooking the books, did not prove any intentional wrongdoing, did not pursue a non-scienter based offense, and has not come close to justifying its demand for $56 million in disgorgement. Even in the face of this two-year

onslaught, Respondents' continuing commitment to their investors and ongoing diligence helped ensure that Respondents' Funds made millions of additional dollars based on the same litigation finance strategy that Respondents have employed and marketed for many years.

II. *KOKESH* UNDERCUTS THE DICTA IN THE *COMEAUX* REMAND ORDER AND REQUIRES THAT DISGORGEMENT BE TREATED AS A CIVIL PENALTY

In *Kokesh*, the Supreme Court clearly defined SEC disgorgement: "We hold that SEC disgorgement constitutes a penalty." 137 S. Ct. at 1642. Neither this Court nor the Commission may ignore the Supreme Court's holding or its reasoning.

A. Dicta from Comeaux *Is Not Binding Authority*

The Division implies that, under the Code of Federal Regulations, this Court is bound by a Commission remand order such as *In the Matter of Jay T. Comeaux*, Securities Act of 1933 Release No. 9633, 2014 WL 4160054 (ALJ Aug. 21, 2014) ("*Comeaux*"). (*See* Div. Br. at 4.) The regulation cited by the Division, however, provides only that "[t]he Commission may affirm, reverse, modify, set aside or remand for further proceedings . . . an initial decision by a hearing officer." 17 C.F.R. § 201.411(a)). Neither the regulations nor any other authority proffered by the Division provide that a non-final, non-appealable order by the Commission is binding authority. The Division simply pronounces that the stare decisis effect of *Comeaux* is not diminished because it is not a final agency action. (Div. Br. at 4-5.) But that makes no sense, as an interim order insulated from judicial review should not have the same precedential effect as a final agency action.

Moreover, as explained in Respondents' Disgorgement Brief (Resp. Br. at 4-5), even if Commission remand orders are generally binding authority, *Comeaux*'s discussion of the inapplicability of the statutory public-interest factors to the disgorgement analysis is non-binding dicta. *See, e.g.*, *Willis Mgmt. (Vt.), Ltd. v. United States*, 652 F.3d 236, 243 (2d Cir. 2011) (a statement that is "not essential to the . . . holding" is non-binding dicta). It is of no consequence

that this Court relied on *Comeaux* as persuasive authority in *In re Curtis A. Peterson*, Release No. ID-1124, 2017 WL 1397544, at *4 (ALJ Apr. 19, 2017). *Curtis A. Peterson* pre-dated *Kokesh*, and *Kokesh* changed the law in a way that undermined the dicta in *Comeaux*, regardless of whether it was previously binding or persuasive precedent.

B. Kokesh *Is Intervening Binding Authority that Supersedes* Comeaux

The Division's discussion of *Kokesh* improperly attempts to limit the Supreme Court's holding and reasoning. Specifically, the Division argues that the statutory public interest factors that apply to "civil monetary penalties" do not apply to disgorgement because "[t]he 'sole question' presented in [*Kokesh*] was 'whether 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." (Div. Br. at 5 (quoting *Kokesh*, 137 S. Ct. at 1639, 1642 & n.3.) The Division's position is incorrect.

In *Kokesh*, the Supreme Court held, without limitation, "that SEC disgorgement constitutes a penalty." 137 S. Ct. at 1642. In reaching its holding, the Court went through an extensive analysis of SEC disgorgement and civil penalties, and—before applying its conclusion to the statute of limitations—reasoned that SEC disgorgement "bears all the hallmarks of a penalty." *Id.* at 1644 ("When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty.").

This Court is bound by the Supreme Court's holding and its reasoning:

> Vertical stare decisis applies to Supreme Court precedent in two ways. First, the *result* in a given Supreme Court case binds all lower courts. Second, the *reasoning* of a Supreme Court case also binds lower courts. So once a rule, test, standard, or interpretation has been adopted by the Supreme Court, that same rule, test, standard, or interpretation must be used by lower courts in later cases.

United States v. Duvall, 740 F.3d 604, 609 (D.C. Cir. 2013) (emphasis in original).

The only post-*Kokesh* authority cited by the Division in support of its attempt to limit the Court's holding is the district court's decision in *SEC v. Jammin Java Corp.*, No. 15-cv-08921, 2017 WL 4286180, at *3-4 (C.D. Cal. Sept. 14, 2017). But *Jammin Java* has been appealed to the Ninth Circuit and is not even persuasive authority. (Exhibit A.) In addition, *Jammin Java* ignored that *Kokesh* relied upon cases defining a "penalty" outside of the statute of limitations context, 137 S.eCt. at 1642-43, and did not attempt to reconcile *Kokesh*'s reasoning (that SEC disgorgemente "bears all the hallmarks of a penalty"), *id.* at 1644, or holding (that "SEC disgorgement constitutes a penalty"), *id.* at 1642, with its own conclusion that disgorgement is not a penalty.

Moreover, in *Kokesh*, the Supreme Court *rejected* the very argument advanced by the Division—that disgorgement is not punitive. *Id.* at 1644 ("The Government's primary response to all of this is that SEC disgorgement is not punitive but 'remedial' . . . ."). Instead, the Court held that because "disgorgement orders 'go beyond compensation, are *intended to punish*, and label defendants wrongdoers' as a consequence of violating public laws, they represent a penalty." *Id.* at 1645 (emphasis added and citation omitted).

As Respondents explained in their Disgorgement Brief, in light of *Kokesh*, disgorgement must be treated like other civil penalties, which are subject to statutory limits and must be evaluated in light of the public interest factors set forth in the securities laws. (Resp. Br. at 7-9.) And each of those factors counsels against ordering disgorgement or any other civil penalty. (*Id.* at 9-13.)

C. The Eighth Amendment Imposes Limits on Any Order of Disgorgement

As Respondents raised in their Constitutional Issues Letter and in their Disgorgement Brief, the $56 million penalty sought by the Division is also grossly disproportionate to the no-loss offense at issue here and, if imposed, would violate the Eighth Amendment. (*Id.* at 13-15.) Rather than discuss the lack of proportionality, the Division argues that SEC disgorgement orders are not a

"fine" or "punishment" implicating the Eighth Amendment, and cites as support a string of cases that pre-date *Kokesh*. (Div. Br. at 9-10 (citing cases).) But regardless of how many pre-*Kokesh* cases held that SEC disgorgement is not a penalty designed to punish, all were discredited by *Kokesh*.

In a bit of sleight-of-hand, the Division references *SEC v. Metter*, 706 F. App'x 699 (2d Cir. 2017), for the proposition that "disgorgement falls outside the limits of the Eighth Amendment's proscriptions." (Div. Br. at 10.) That conclusion, however, was not reached by the Second Circuit in *Metter*, but instead by the lower court decision in that case, *SEC v. Spongetech Delivery Systems, Inc.*, No. 10-cv-2031, 2015 WL 5793303 (E.D.N.Y. Sept. 30, 2015), which was decided *before Kokesh*. While the Second Circuit affirmed the result in *Spongetech*, it assumed that "in light of the Supreme Court's recent decision in *Kokesh* . . . the disgorgement liability imposed . . . was a fine within the meaning of the Excessive Fines Clause." *Metter*, 706 Fed. App'x. at 703.

III. DISGORGEMENT MUST BE ANALYZED IN LIGHT OF *KOKESH*

Instead of analyzing disgorgement in light of the explicit holding in *Kokesh*, the Divisione makes sweeping, erroneous statements about the facts of this case and reasserts its outrageous view that $56 million is an equitable amount of disgorgement. But there is nothing equitable about the Division's demand. The Division's Brief, moreover, is flawed on an even more fundamental level. Specifically, the basic contention that Respondents "le[ft] their investors exposed to undisclosed risks of significant losses," (Div. Br. at 1), is just wrong.

A. The Division Did Not Meet its Burden to Approximate the Amount of Unjust Enrichment Causally Connected to any Alleged Misrepresentation

As a threshold issue, the Division acknowledges that this Court has "broad discretion not only in determining *whether or not to order disgorgement* but also in calculating the amount to be disgorged." (Div. Br. at 6 (quoting *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1474-75 (2d Cir. 1996)).) It also acknowledges that any amount ordered as disgorgement: "must (1) be

causally connected to the violations and (2) reasonably approximate the amount of unjust enrichment." (Div. Br. at 7.) But the Division utterly fails to satisfy these requirements.

Rather than attempt to approximate any amount of unjust enrichment causally connected to an alleged misrepresentation—the issue the Court left open in its Valuation Order[1]—the Division again contends that Respondents' *entire gross revenue* of $56,768,384 is subject to disgorgement. (Div. Br. at 2.) In a moment of candor, however, the Division admits that the allegedly "improper investments" "rose from approximately 57% of the Funds' value in December 2011 to 90% of the Funds' value in December 2015." (Div. Br. at 7 n.3 (citations omitted).) This admission not only assumes that all of the Funds' investors were defrauded—which is obviously not true—it is also fatally inconsistent with the Division's insistence that 100% of the Funds' gross revenue is a reasonable approximation of ill-gotten profits, and that no expenses should be counted. The Division thus did not meet its initial burden of proof, did not provide the Court with any alternative means of calculating disgorgement, and its disgorgement claim should be rejected altogether.

B. The Court Should Reject the Division's Revisionist History

The Division's disgorgement theory is also belied by the facts, as Respondents were permitted to make each of the investments challenged by the Division. (RD PFOF 27-28.) Indeed, the Division offered no expert testimony that Respondents' investments were unauthorized under the Offering Memoranda, and multiple witnesses—including several called by the Division—confirmed that Respondents' investment decisions were within their contractual authority. (RD PFOF 28.)

Instead, the Division's shifting theory of liability ultimately rested on the supposed existence of undisclosed "litigation risk," and its Disgorgement Brief is premised on the idea that Respondents' withdrawal of "unrealized profits" "le[ft] their investors exposed to undisclosed

[1] In the Valuation Order, this Court reserved the question of "what illicit profits, if any, are causally connected to actionable misrepresentations or omissions, if any." (Valuation Order at 14 n.7.)

risks of significant losses." (Div. Br. at 1 & 7 n.4.) But this Court has already rejected the claim that Respondents' withdrawal of unrealized gains was improper, and the Division made no attempt to prove a causal link between any alleged undisclosed risk and the disgorgement sought.

1. *Peterson* Did Not Expose Investors to Undisclosed Risks

As the Court is aware, the core of the Division's case has always centered around the Funds' investments in the collection of the final, non-appealable *Peterson* judgment. (RD PFOF 58(a).) The *Peterson* investments involved the very risks that Respondents disclosed to investors: collection risk (will the Funds collect what is owed), and duration risk (how long will collection take). And the Division failed to present *any* probative evidence that financing a final, non-appealable judgment where money to satisfy the judgment had already been restrained was any riskier than the Funds' other transactions. In fact, the evidence proved that *Peterson* was less risky. (RD PFOF 68-81.)

Indeed, the Division continues to miss the mark when it references litigation risk and the turnover action. (Div. Br. at 1 & 7 n.4.) Once Bank Markazi appeared—thus confirming that the seized funds belonged to Iran and not some third-party—there was no litigation risk and the district court granted the turnover, as a matter of law. Mr. Dersovitz explained this issue at the hearing:

> Q: What [is] the difference between litigation risk and collection risk?
>
> A: [T]he only risk in *Peterson* was collection risk. There was no litigation risk. The judgment was final. If you look . . . at Bank Markazi's appearance in the turnover, not once was the judgment, the underlying judgment ever at issue. There was no litigation risk. Period. End of discussion.

(Tr. 6169:2-12 (Dersovitz); *see also* Tr. 1574:5-1575:11 (Perles) ("Once Markazi entered, there are no more disputed questions of fact[,] . . . Iran owned these assets.").)[2] The collection risk, moreover, further diminished over time, as all three branches of the government took affirmative

[2] *See also, e.g.*, The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (providing for exception from immunity where "action is based upon a commercial activity carried on in the United States"); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (holding issuance and default on bonds was commercial activity excepted from immunity under the FSIA).

actions to ensure that the Marine plaintiffs and their families were compensated. (RD PFOF 58-62.) The Division's only evidence to the contrary was emotive and not based in law or fact—it certainly did not proffer evidence of a real and material legal risk of the restrained funds being returned to Iran.

Ultimately, the Special Master assigned by the federal judge presiding over *Peterson* to review the Funds' transactions found that there was duration risk, credit risk, and some geopolitical risk (which Respondents always maintained was de minimis), but did not find that the transactions were subject to litigation risk. (Div. Br., Ex. B at 47.) The Special Master's report supports Respondents' case and cleared the way for Respondents to collect more than $33 million in additional funds from the *Peterson* transactions. (*See* Exhibit B.)

2. The *Osborn* Workout Proved to be Profitable

In addition, the Division once again erroneously attempts to portray the *Osborn* receivables as unprofitable investments. But the evidence offered at the hearing proved that Respondents had received approximately $13.9 million on their $13.4 million investment in the *ONJ Cases*, for a net return of $508,930.99. (RD PFOF 121.) Since the hearing, Respondents have collected an additional $3,003,673 from the *Osborn* cases (Exhibit B), bringing the total current *profits* from the *Osborn* workout to $3,512,603.99 (an approximately 26% return on the investment).

Respondents, moreover, are continuing to work diligently to recover additional funds from the various sources of collateral for the *Osborn* advances. One of those sources is a subordination agreement signed by Osborn Law's co-counsel in the *ONJ Cases*, Jeffrey Bogert. Respondents have pursued litigation to enforce the subordination agreement in New Jersey, where Bogert attempted to have a summary judgment ruling vacated based on his flawed theory that he should be relieved from his repayment obligations because the evidence at the hearing in this matter showed that the CCY

transactions generated a profit for Respondents on the *Osborn* trades. Although the trial court properly rejected this effort (Exhibit C), the Division now cherry-picks phrases from the briefing in the *Bogert* matter to falsely suggest that pursuing the *Osborn* workout was not profitable.[3] (Div. Br.e at 7 n.4.) But contrary to the Division's assertion, Respondents *do not owe any debt to CCY*. Rather, the receivables purchased by CCY are cross-collateralized so that if one trade is not profitable, CCY can recover a greater percentage of money from other trades in which it invested. (Exhibit 713, ¶ 2.6.) Ultimately, Respondents' deep expertise in litigation finance has enabled them to turn even an unsuccessful investment into a profitable one, resulting in millions of dollars in profit for investors.

C. The Equities Weigh Against Imposing Any Disgorgement or Other Civil Penalty

Although the Court's order specifically requested that the parties address the application of the statutory public interest factors to this proceeding, the Division took the sweeping position that those factors do not apply at all, and thus did not address them. There accordingly is nothing to rebut Respondents' showing that each of the public interest factors weighs against imposing any civil penalty in this proceeding. (Resp. Br. at 9-13.)

Of particular significance, Respondents' investors have continued to profit from their investments in the Funds. (RD PFOF 127-128.) Indeed, in July 2016, after the initiation of this proceeding, the Division informed the founder of Ballantine Partners that "there is no money missing and investors may do quite well." (Ex. 2928_1.) Notwithstanding the position it is now taking in this proceeding, the Division's assessment was correct:

> •e Prior to the initiation of this action, all investors in the Domestic Fund received theire targeted 13.5% cumulative return on their investment. Similarly, prior to its winding up,e investors in the Offshore Fund all received their targeted return. (RD PFOF 127-128.)e

[3] The Division takes issue with the use of quotation marks around the word "profit" in one of the briefs in the *Bogert* case. While Respondents have generated a positive return on the *Osborn* investments, it was not the full amount owed, and the quotation marks thus were used to discount Bogert's argument that he has no ongoing obligations because RDLC already earned its "profit."

• The vast majority of testifying investors explained that they had received most or all of the expected return on their investments. (Inability-to-Pay PFOF 76-91.)

• The Division wrongly asserts that "many investors are sitting on losses of their principal . . . [that] were the direct result of Respondents" alleged misstatements. (Div. Br. at 7 n.4.) The three witnesses upon whose testimony the Division relies do not represent "many" investors, have profited from *all* of their investments in the Domestic Fund, and have profited from one of three of their offshore investments. As for the two offshore investments that currently have unrealized losses, the Division made no effort to tie those losses to *Peterson*, *Osborn*, or any misrepresentation, as opposed to the effects of the liquidation of the Offshore Fund or the impact of this very proceeding on the Funds.

• Respondents have collected and distributed (or are about to distribute) nearly $30 million for the Funds since the hearing, and are continuing to collect and distribute money to investors from *Peterson*, *Osborn*, and many other trades. (Exhibit B.)

This is simply not a case where there was unjust enrichment, investor losses, or a need for deterrence. Rather, Respondents have spent the last two years fighting the Division's meritless accusations while continuing to operate the Funds and recover assets for investors. Significantly, they have done this while there has been a run on redemptions due in large part to the Division's actions, including its spurious accusation that Respondents were cooking their books and defrauding investors. As Amy Hirsch testified:

> [T]he way that the OIP was written, from an investor standpoint, is the worst possible thing you can say about a company, which is that they're inflating their book, they're mismarking their book, and that they're a fraud. . . . It's made it impossible to raise assets. . . . So you have to stop marketing. You can't put new positions in your fund. Then you're left with legacy positions, and that's what it comes down to. Then you have a liquidity issue, and investors have to wait, and they have to wait.

(Tr. (Hirsch) 4512:13-4515:2.)

IV. CONCLUSION

For the foregoing reasons, the Court should find that Respondents did not violate the securities laws, and if they did so unintentionally, decline to impose disgorgement or any other civil penalty.

Dated: May 30, 2018

Respectfully submitted,

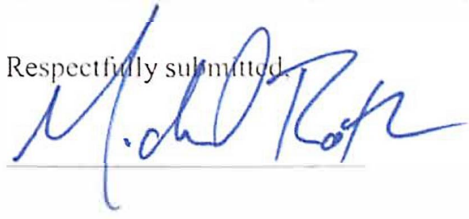

EXHIBIT A

SCHEPER KIM & HARRIS LLP
MARC S. HARRIS (State Bar No. 136647)
mharris@scheperkim.com
MARGARET E. DAYTON (State Bar No. 274353)
pdayton@scheperkim.com
601 West Fifth Street, 12th Floor
Los Angeles, California 90071-2025
Telephone: (213) 613-4655
Facsimile: (213) 613-4656

Attorneys for Defendant Wayne Weaver

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. JAMMIN' JAVA CORP., dba MARLEY COFFEE, SHANE G. WHITTLE, WAYNE S. P. WEAVER, MICHAEL K. SUN, RENE BERLINGER, STEPHEN B. WHEATLEY, KEVIN P. MILLER, MOHAMMED A. AL-BARWANI, ALEXANDER J. HUNTER, and THOMAS E. HUNTER. Defendants.	CASE NO. 2:15-cv-08921 SVW (MRWx) Hon. Stephen V. Wilson **DEFENDANT WAYNE WEAVER'S AMENDED NOTICE OF APPEAL AND NINTH CIRCUIT RULE 3-2 REPRESENTATION STATEMENT** Trial Date: June 27, 2017

NOTICE OF APPEAL

On September 15, 2017, Defendant Wayne Weaver gave notice of his appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on September 14, 2017 (Doc. No. 229), including the partial summary judgment against Wayne Weaver entered in this action on June 8, 2017 (Doc. No. 218).

On September 21, 2017, Plaintiff Securities and Exchange Commission filed a Request to Correct Order and Judgment (Doc. No. 233). In response to this pleading, on September 26, 2017, the Court entered an Order Amending Order Granting Injunctive and Monetary Relief and Correcting Judgment (Doc. No. 236) and entered Judgment as to Wayne Weaver (Doc. No. 235).

Notice is hereby given that Defendant Wayne Weaver appeals from the subsequent judgment and orders entered in this action on September 26, 2017 (Doc. Nos. 236 & 235), including the partial judgment against Wayne Weaver entered in this action on June 8, 2017 (Doc. No. 218) and the judgment entered on September 14, 2017 (Doc. No. 229).

DATED: October 25, 2017

SCHEPER KIM & HARRIS LLP
MARC S. HARRIS
MARGARET E. DAYTON

By: /s/ Marc S. Harris
Marc S. Harris
Attorneys for Defendant Wayne Weaver

REPRESENTATION STATEMENT

Pursuant to Ninth Circuit Rule 3-2(b), Defendant Wayne Weaver files this Representation Statement in conjunction with his Notice of Appeal. The parties to the action and their counsel are:

Plaintiff

United States Securities and Exchange Commission

Counsel for Plaintiff

Timothy S. Leiman
Daniel J. Hayes
Peter Senechalle
United States Securities and Exchange Commission
175 West Jackson Boulevard, Suite 900
Chicago, IL 60604
Telephone: (312) 353-7390
Facsimile: (312) 353-7398
Email: leimant@sec.gov
hayesdj@sec.gov
senechallep@sec.gov

Local Counsel

Lynn M. Dean
United States Securities and Exchange Commission
444 S. Flower Street, Suite 1450
Los Angeles, CA 90071
Telephone: (323) 965-3998
Facsimile: (213) 443-1904
Email: deanl@sec.gov

Defendant

Wayne Weaver

Counsel for Defendant

Marc S. Harris
Margaret E. Dayton
Scheper Kim & Harris LLP
601 West Fifth Street, 12th Floor
Los Angeles, CA 90071
Telephone: (213) 613-4655
Facsimile: (213) 613-4656
Email: mharris@scheperkim.com
pdayton@scheperkim.com

DATED: October 25, 2017

SCHEPER KIM & HARRIS LLP
MARC S. HARRIS
MARGARET E. DAYTON

By: /s/ Marc S. Harris
Marc S. Harris
Attorneys for Defendant Wayne Weaver

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 17-56423 **Docketed:** 09/19/2017
Nature of Suit: 1850 Securities, Commodities, Exchange
USSEC v. Wayne Weaver, et al
Appeal From: U S District Court for Central California, Los Angeles
Fee Status: Paid

Case Type Information:
1) civil
2) united states
3) null

Originating Court Information:
District: 0973-2 : 2:15-cv-08921-SVW-MRW
Court Reporter: Deborah Gackle, Official Court Reporter
Trial Judge: Stephen V. Wilson, District Judge
Date Filed: 11/17/2015

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
09/14/2017	09/14/2017	09/15/2017	09/15/2017

Prior Cases:
None

Current Cases:
None

U.S. SECURITIES & EXCHANGE COMMISSION Plaintiff - Appellee,	Lynn M. Dean, Senior Litigation Counsel Direct: 323-965-3998 [COR LD NTC Government] SEC - Securities and Exchange Commission 5670 Wilshire Boulevard Los Angeles, CA 90036 Daniel Staroselsky Direct: 202-551-5774 [COR NTC Government] Securities & Exchange Commission 100 F Street, NE Washington, DC 20549-9612
v.	
WAYNE S P. WEAVER Defendant - Appellant,	Margaret Dayton, Attorney Direct: 213-613-4655 [COR LD NTC Retained] Scheper Kim & Harris LLP 601 West Fifth Street 12th Floor Los Angeles, CA 90071-202 Marc Scott Harris, Esquire, Attorney Direct: 213-613-4655 [COR LD NTC Retained] SCHEPER KIM & OVERLAND LLP 12th Floor 601 West Fifth Street Los Angeles, CA 90071-2025
JAMMIN JAVA CORP Defendant,	
SHANE G WHITTLE Defendant,	
MICHAEL K SUN Defendant,	

RENE BERLINGER
Defendant,

STEPHEN B. WHEATLEY
Defendant,

KEVIN P. MILLER
Defendant,

MOHAMMED A. AL-BARWANI
Defendant,

ALEXANDER J. HUNTER
Defendant,

THOMAS E. HUNTER
Defendant,

U.S. SECURITIES & EXCHANGE COMMISSION,

Plaintiff - Appellee,

v.

WAYNE S.P. WEAVER,

Defendant - Appellant,

and

JAMMIN JAVA CORP; SHANE G. WHITTLE; MICHAEL K. SUN; RENE BERLINGER; STEPHEN B. WHEATLEY; KEVIN P. MILLER; MOHAMMED A. AL-BARWANI; ALEXANDER J. HUNTER; THOMAS E. HUNTER,

Defendants.

09/19/2017	☐ 1 16 pg, 1 08 MB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 09/26/2017. Transcript ordered by 10/16/2017. Transcript due 11/14/2017. Appellant Wayne S.P. Weaver opening brief due 12/27/2017. Appellee U.S. Securities & Exchange Commission answering brief due 01/29/2018. Appellant's optional reply brief is due 21 days after service of the answering brief. [10586796] (RT) [Entered: 09/19/2017 04:01 PM]
09/21/2017	☐ 2 2 pg, 775 83 KB	Filed (ECF) notice of appearance of Daniel Staroselsky for Appellee USSEC. Date of service: 09/21/2017. [10588665] [17-56423] (Staroselsky, Daniel) [Entered: 09/21/2017 07:07 AM]
09/21/2017	☐ 3	Added attorney Daniel Staroselsky for USSEC, in case 17-56423. [10588813] (CW) [Entered: 09/21/2017 09:03tAM]
09/26/2017	☐ 4 4 pg, 187 41 KB	Filed (ECF) Appellant Wayne S.P. Weaver Mediation Questionnaire. Date of service: 09/26/2017. [10594616] [17-56423] (Harris, Marc) [Entered: 09/26/2017t12:17 PM]
10/10/2017	☐ 5 5 pg, 315 16 KB	MEDIATION CONFERENCE SCHEDULED - Assessment Conference, 11/08/2017, 11:00 a.m. PACIFIC Time. The briefing schedule previously set by the court remains in effect. See order for instructions and details. [10611021] (VS) [Entered: 10/10/2017 11:19 AM]
11/08/2017	☐ 6 2 pg, 35 27 KB	Filed order MEDIATION (SL): This case is RELEASED from the Mediation Program. The briefing schedule previously set by the court is amended as follows: appellant shall file an opening brief on or before January 26, 2018; appellee shall file an answering brief on or before February 26, 2018; appellant may file an optional reply brief within twenty one (21) days from the service date of the answering brief. Counsel are requested to contact the undersigned by email (stephen_liacouras@ca9.uscourts.gov) should circumstances develop that warrant further settlement discussions while the appeal is pending. [10648418] (AF) [Entered: 11/08/2017 02:43 PM]
01/26/2018	☐ 7 58 pg, 343.76 KB	Submitted (ECF) Opening Brief for review. Submitted by Appellant Wayne S.P. Weaver. Date of service: 01/26/2018. [10740900] [17-56423] (Harris, Marc) [Entered: 01/26/2018 04:34 PM]
01/26/2018	☐ 8 713 pg, 34 86 MB	Submitted (ECF) excerpts oftrecord. Submitted by Appellant Wayne S.P. Weaver. Date of service: 01/26/2018. [10740910] [17-56423] (Harris, Marc) [Entered: 01/26/2018 04:41 PM]
01/29/2018	☐ 9 2 pg, 189 38 KB	Filed clerk order: The opening brief [7] submitted by Wayne S.P. Weaver is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed the excerpts of record [8] submitted by Wayne S.P. Weaver. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10741351] (KT) [Entered: 01/29/2018 09:37 AM]
01/31/2018	☐ 10	Filed 4 paper copies of excerpts of record [8] in 4 volume(s) filed by Appellant Wayne S.P. Weaver. [10745807] (KT) [Entered: 01/31/2018 10:47 AM]
01/31/2018	☐ 11t	Received 7 paper copies of Opening Brief [7] filed by Wayne S.P. Weaver. [10746092] (SD) [Entered: 01/31/2018 12:01 PM]
02/06/2018	☐ 12	Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellee USSEC. New requested due date is 03/28/2018. [10752715] [17-56423] (Staroselsky, Daniel) [Entered: 02/06/2018 08:44 AM]
02/06/2018	☐ 13	**Streamlined request [12] by Appellee USSEC to extend time to file the brief is approved. Amended briefing schedule: Appellee U.S. Securities & Exchange Commission answering brief due 03/28/2018. The optional reply brief is due 21 days from the date of service of the answering brief.** [10752745] (JN) [Entered: 02/06/2018 08:56 AM]
03/28/2018	☐ 14 238 pg, 11 4 MB	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee USSEC. Date of service: 03/28/2018. [10816216] [17-56423] (Staroselsky, Daniel) [Entered: 03/28/2018 01:51 PM]
03/28/2018	☐ 15 55 pg, 352 05 KB	Submitted (ECF) Answering Brief for review. Submitted by Appellee USSEC. Date of service: 03/28/2018 [10816233] [17-56423] (Staroselsky, Daniel) [Entered: 03/28/2018 01:53 PM]
03/29/2018	☐ 16 2 pg, 189 36 KB	Filed clerk order: The answering brief [15] submitted by USSEC is filed Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF The Court has reviewed the supplemental excerpts of record [14] submitted by USSEC. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10817271] (KT) [Entered: 03/29/2018 09:32 AM]
04/04/2018	☐ 17	Filed 4 paper copies of supplemental excerpts of record [14] in 1 volume(s) filed by Appellee USSEC. [10824053] (KT) [Entered: 04/04/2018 11:32 AM]
04/04/2018	☐ 18t	

		Filed (ECF) Streamlined request for extension of time to file Reply Brief by Appellant Wayne S.P. Weaver. New requested due date is 05/18/2018. [10824177] [17-56423] (Harris, Marc) [Entered: 04/04/2018 12:33 PM]
04/04/2018	☐ 19	Received 7 paper copies of Answering Brief [15] filed by USSEC. [10824286] (SD) [Entered: 04/04/2018 01:32 PM]
04/04/2018	☐ 20	**Streamlined request [18] by Appellant Wayne S.P. Weaver to extend time to file the brief is approved. Amended briefing schedule: the optional reply brief is due 05/18/2018.** (BG) [Entered: 04/04/2018 02:23 PM]
05/18/2018	☐ 21 32 pg, 174 KB	Submitted (ECF) Reply Brief for review. Submitted by Appellant Wayne S.P. Weaver. Date of service: 05/18/2018. [10878253] [17-56423] (Harris, Marc) [Entered: 05/18/2018 02:58 PM]
05/21/2018	☐ 22 2 pg, 188.94 KB	Filed clerk order: The reply brief [21] submitted by Wayne S.P. Weaver is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10879037] (KT) [Entered: 05/21/2018 09:29 AM]
05/23/2018	☐ 23	Received 7 paper copies of Reply Brief [21] filed by Wayne S.P. Weaver. [10883206] (SD) [Entered: 05/23/2018 01:25 PM]

EXHIBIT B

RD LEGAL ASSET COLLECTIONS AND CASH DISTRIBUTIONS TO INVESTORS SUMMARY

For The Period of 4/17-5/18		*Collections by Entity:* RD Funds - Onshore/Offshore	RD Spec Op Fund	Managed Account 1	ITSG	Other	Check
Total Collections	$ 38,967,971.44	$ 29,474,275.40	$ 1,548,287.24	$ 7,534,815.77	$ 103,098.30	$ 307,494.73	$ 38,967,971.44

	Distributions to Investors by Entity: RD Funds - Onshore/Offshore	RD Spec Op Fund	Managed Account 1	ITSG	Other	
	$ 19,149,261.82	$ 1,500,000.00	$ 7,534,815.77			$ 28,184,077.59
Current Balance: **	$ 8,312,623.85	$ 22,947.24				

** Further distributions to investors will occur shortly after the finalization of the December 2017 NAV.

		Collections by Entity: RD Funds - Onshore/Offshore	RD Spec Op Fund	ITSG	Other	Check
Total Collections Net of Managed Account 1	31,433,155.67	$ 29,474,275.40	$ 1,548,287.24	$ 103,098.30	$ 307,494.73	$ 31,433,155.67

	Distributions by Entity: RD Funds - Onshore/Offshore	RD Spec Op Fund	ITSG	Other	Check
	19,149,261.82	$ 1,548,287.24			20,697,549.06
Current Balance:	$ 8,312,623.85	$ 22,947.24			

Breakdown of Fund Distributions	RD Onshore Date	Gross Amount	RD Offshore Date	Gross Amount
	12/26/2017	$ 1,612,431.13	5/10/2017	$ 2,731,692.17
	1/4/2018	$ 145,590.17	6/22/2017	$ 175,076.66
	1/5/2018	$ 2,786,549.64	1/2/2018	$ 6,000,000.00
	1/9/2018	$ 1,613,057.65	3/14/2018	$ 101,897.91
	1/18/2018	$ 1,502,744.82		
	1/19/2018	$ 2,283,383.00		
	1/23/2018	$ 154,880.38		
	2/28/2018	$ 41,958.29		
		$ 10,140,595.08		$ 9,008,666.74

RD LEGAL ASSET COLLECTIONS AND CASH DISTRIBUTIONS TO INVESTORS

RD Legal Funding Partners, LP
Transaction Detail by Account
January 1 through December 28, 2017

						Collections Allocation					
Name	Account	Type	Date	Num	Deposit	RDLFP Onshore Fund RDLFOF Offshore Fund	Managed Account 1	RD Special Opportunity Fund, Ltd.	ITSG**	Note Paydown / Other (RD)	Total Cash
BP Consultants A&S #1	Accounts Rec-Legal Fees	Payment	6/27/17 to 1/22/18	various	$ 177,429	$ 37,219	$ 105,197	$ -	$ -	$ 35,013	$ 177,429
Carlson, Kenneth D. Carlson, Kenneth D Sch A 01	Accounts Rec-Legal Fees	Payment	6/15/17 to 12/7/17		$ 15,000	$ 22,500	$ -	$ -	(2,500)	$ (5,000)	$ 15,000
Claims Strategies Group, LLC Claims Strategies Grp Sch A-18 to 23	Accounts Rec-Legal Fees	Payment	8/24/17 to 5/14/18		$ 1,218,656	$ 267,575	$ 951,081	$ -	$ -	$ -	$ 1,218,656
CSG #15, #17, #18 / BP Consultants A&S #1	Accounts Rec-Legal Fees	Payment	05/27/2017	various	$ 576,766	$ 122,109	$ 451,033			$ 3,623	$ 576,766
Florida Asset Law Group, P.A. Florida Asset Law Group A&S #1	Accounts Rec-Legal Fees	Payment	4/12 to 9/15/17	Wire	$ 351,934	$ 47,163	$ 199,733	$ -	$ 105,500	$ -	$ 351,934
Grossman & Flanagan Sch A-32	Accounts Rec-Legal Fees	Payment	12/14/2017		$ 18,502	$ -	$ 18,502				$ 18,502
Maine Harness Racing	Accounts Rec-Marines		7/31/17 to 3/9/18	wire	$ 33,362,774	$ 25,589,445	$ 5,225,042	$ 1,548,287	$ -	$ -	$ 33,362,774
Oblon Law - various / Allinity v. Ruiz (partial)	Accounts Rec-Legal Fees		6/21/17 to 4/4/18		$ 3,003,873	$ 2,368,265	$ 564,838	$ -	$ -	$ 30,770	$ 3,003,873
Wrbams, Kent	Accounts Rec-Legal Fees		04/09/2018		$ 243,089						$ 243,089
	TOTAL (ALL)				$ 39,687,871	$ 28,474,276	$ 7,834,916	$ 1,548,287	$ 103,000	$ 64,406	$ 39,724,883

**Payments to Consultant ITSG in accordance with profit share agreement

EXHIBIT C

HON. ROBERT P. CONTILLO, P.J.CH.
SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY JUSTICE CENTER
10 MAIN STREET, HACKENSACK, NJ 07601
PHONE - (201) 527-2615 FAX - (201) 371-1117

FACSIMILE TRANSMITTAL SHEET

TO	FROM:
Barry Muller – 609-896-1469	Robert P. Contillo, P.J.Ch.
	DATE:
Eric Kanefsky – 862-902-5458 Daniel Osborn – 212-500-5115	5/7/2018
	TOTAL NO. OF PAGES INCLUDING COVER: 16

RE: RD Legal Funding v. Powell
Docket No. C-026-15

SUPERIOR COURT OF NEW JERSEY

ROBERT P. CONTILLO, P.J.Ch.
CHANCERY DIVISION

BERGEN COUNTY JUSTICE CENTER
Suite 420
HACKENSACK, N.J. 07601
(201) 527-2615

May 7, 2018

VIA FACSIMILE AND REGULAR MAIL

Barry J. Muller, Esq.
Fox Rothschild LLP
997 Lenox Drive
Bldg. 3
Lawrenceville, NJ 08648

FILED
MAY - 7 2018
Robert P. Contillo
P.J.Ch.

Eric T. Kanefsky, Esq.
Calcagni & Kanefsky
One Newark Center
Newark, NJ 07102

Daniel Osborn, Esq.
Osborn Law, P.C.
43 West 43rd Street
Suite 131
New York, NY 10036

Re: RD Legal Funding Partners, LP v. Mel Powell, et al.
Docket No. C-26-15
Docket No. A-004909-15T2

Dear Counsel:

This matter is before the court upon the order on motion entered by the Appellate Division on January 19, 2018.

A Motion to Vacate Judgment and Leave to File Amended Answer, Counterclaim and Third-Party Complaint was filed by defendants Jeffrey C. Bogert, Esq. ("Bogert") and the Law

Office of Jeffrey C. Bogert, Esq. ("Bogert Law") (collectively, "Bogert Defendants") on February 23, 2018. On March 29, 2018, third-party defendants Daniel Osborn ("Osborn"), Beatie & Osborn, LLP ("B&O"), Osborn Law, P.C. ("Osborn P.C."), and Osborn Law Group ("Osborn Law") (collectively, "Osborn Defendants") filed Opposition. On April 2, 2018, plaintiff RD Legal Funding Partners, L.P. ("Plaintiff" or "RD Legal") filed Opposition to the Motion and a Cross-Motion for Counsel Fees and Costs. On April 10, 2018, Bogert filed an Opposition to RD Legal's Cross-Motion and a Reply in further support of its own Motion. Oral argument was had on May 3, 2018. The court reserved decision.

On March 10, 2016, this court granted summary judgment in favor of Plaintiff RD Legal Funding against Bogert; granted summary judgment in favor of Osborn against Bogert; and denied Bogert's motion for summary judgment as against RD and Osborn.

On April 18, 2016, this court denied Bogert's motion for reconsideration of the summary judgment decisions and granted RD Legal's cross-motion for fees as against Bogert. Bogert appealed. The matter is now before this court upon the application of Bogert to vacate the judgment and for leave to file an Amended Answer, Counterclaim and Third-Party Complaint. It is contended that the relief is justified based on newly discovered evidence. For the following

reasons, the application is denied. Further, RD Legal's cross-motion for fees is denied as being beyond the warrant of the remand.

I.e Timeliness of the Applicatione

The application is not time-barred. Applications for relief from a judgment or order on grounds of newly discovered evidence are governed by R. 4:50-1(d). The Rule allows for vacating a judgment on the grounds that there is "newly discovered evidence which would probably alter the judgment ... and which by due diligence could not have been discovered in time for a new trial under R. 4:49." Pursuant to R. 4:50-2, "The motion shall be made within a reasonable time" and, if based on a claim of newly discovered evidence, "not more than one (1) year after the judgment, order or proceeding was entered or taken".

The summary judgment orders were entered on March 10, 2016, and Bogert's motion for reconsideration was denied on April 18, 2016, some two (2) years ago. However, the Appellate Division would not have remanded the matter for this court to consider the newly discovered evidence if it was of the view that an application to vacate the judgment on the basis of newly discovered evidence would be time-barred, hence futile. And, as pointed out by Bogert's counsel, the Appellate Division could simply have supplemented the record on appeal with the

new evidence pursuant to R. 2:5-5(b), but instead directed this court to evaluate the proffered new evidence and assess whether the underlying judgment should be vacated and whether leave should be granted to Bogert to amend his pleadings.

The court therefore concludes that the matter is not time-barred. RD Legal remains at liberty to make the untimeliness argument anew to the Appellate Division.

II. The Newly Discovered Evidence

The newly discovered evidence derives from a July 14, 216 administrative suit against RD Legal Capital, a general partner of Plaintiff RD Legal, and against RD Legal's principal Mr. Roni Dersovitz ("Dersovitz"). In reviewing the record of the SEC proceedings, Bogert detected two areas of testimony by Dersovitz that, says Bogert, contradict RD Legal's positions in the Chancery litigation, and which are said to undermind the assumptions upon which this court based its summary judgment decisions. As characterized by Bogert, the new evidence contradicts material information RD Legal provided this court, as follows:

- At the time it was representing to the Court that it had lost money on its purchasee of ONJ Legal Fees as an inducement to the Court's grant to it of summarye judgment, RD Legal had in fact been repaid all of the money it had provided toe Osborn for the purchase of ONJ Prospective Fees and had actually turned a profite of $500,000; ande
- RD Legal did not continue to purchase ONJ Prospective Fees for the benefit ofe Bogert in reliance upon the Subordination Agreement, but, rather, "pumped"e

> money into Osborn to keep Osborn "afloat" as a workout situation to protect RD Legal's position and collateral and to ensure repayment of past-due funds.

(Bogert's Moving Brief, p. 19).

Specifically, Bogert cites to SEC testimony of Dersovitz that RD made a profit — on the moneys that were disbursed to Osborn.

In his testimony under oath in the SEC Action, Dersovitz revealed for the first time that:

> "Q. As you sit here today, Mr. Dersovitz, do you have an understanding whether or not RD Legal profited or the investors on the moneys that were disbursed to Osborn.
>
> A.e Yes, I do.e
>
> Q.e And what is your understanding of that?e
>
> A.e That historically we're advanced $13.4 million, and that we've collected — collected $13.9 million.e
>
> Q.e I'm going to stop you right there. So what does that mean; you've deployed 13.4e million, and you've collected 13.9 million? What does that mean?e
>
> A. **We made a half-a-million-dollar profit to date, and we have – and we have plenty of collateral left, so we fully expect to collect the balance due to us.**

[See Muller Cert., Exhibit "DD", 155a (emphasis added by movant).]

The second component of newly discovered evidence is Bogert's contention that the reason RD advanced funds to Osborn was not "for the benefit of Bogert in reliance upon the Subordination Agreement", but rather pursuant to a previously undisclosed intent on the part of

RD Legal to keep Osborn "afloat" as a "work out situation" to protect RD Legal's position and collateral.

The testimony relating to this component is as follows:

> Q.o Even though the ONJ cases had not settled, you were funding Mr. Osborn's Lawo firm, because he was unable to pay money from earlier advances you made to Mr.o Osborn, correct?o
>
> A.o It was a decision that I regret today. That particular firm blew up. He owed us ao balance of money. We had used a well-respected law firm in New York that I hado litigated against myself years and years ago in the defense - - in the defense sideo of the business. We had them evaluate the portfolio. **And we thought that weo were going to help him get out of his obligations to us by factoring his theno unsettled legal fees. It was a workout. No more; no less.** o

(emphasis added by movant).

> Q.o If RD Legal had not made the decision to work out the Osborn matter back ino 2009, would it have been able to recover its principal that had been deployed too Osborn?o
>
> A.o Probably not.o
>
> Q.o Why not?o
>
> A.o The [Osborn] firm would have gone bankrupt.o
>
> Q.o Do you have any belief as to whether or not Mr. Osborn would have been able too continue to operate the law firm and fund the ongoing litigation cases.o
>
> A.o No. He wouldn't have been able to - - to the best of my knowledge, he wouldn'to have been able to litigate these cases. **This was the only way to insure ouro collateral**. And it was our feeling, my feeling that it was in the best interest ofo investors - - of our investors to proceed in that fashion. And it's working out. It'so taking longer than I would have expected, but it's working out. But that's what ao workout is.o

(emphasis added by movant).

Bogert asserts that this explanation of RD Legal motivation in advancing funds was never disclosed, and was in fact concealed by RD Legal through false responses to discovery demands.

In sum, Bogert contends that RD Legal misled the court into thinking that the reason RD Legal continued to purchase what the parties term ONJ prospective fees was in reliance on the Subordination Agreement, when in fact RD Legal was advancing the funds to protect its own collateral; and; instead of losing money in the process, RD Legal made money. This is turn is urged upon the court as the basis to vacate the Judgment, to allow for new pleadings and a new party, and to re-open discovery.

III. The Evidence is "New"

It is acknowledged that the evidence is new, consisting as it does of transcripts of testimony from a proceeding that was not even initiated until after this court's decisions on the summary judgment motions and Bogert's motion for reconsideration, and the memorialization of those decisions in a Judgment and an Order.

The court is not satisfied, however, that this new evidence was unavailable in the case which proceeded before me. Had Bogert inquired as to whether RD Legal was engaged in a "work out" with Osborn, or whether RD Legal considered that its advances to Osborn enhanced the protections to RD Legal's collateral and position, they would have gotten a response. Those

inquiries were not made. Had Bogert inquired as to whether RD Legal was involved in transactions with third-party investors regarding these transactions — involvement that was economically beneficial to RD Legal or not — Bogert would have gotten a response. Having read the discovery demands and responses with which I have been provided, and having re-read my decisions and those portions of the record which counsel have placed before me on this application, I can not conclude that there were any false or misleading responses as to the matters under consideration, i.e., did RD Legal make money on third-party contracts relating to these transactions; was RD Legal engaged in a work out with Osborn to keep him afloat in order to protect RD Legal's position and collateral, irrespective of the Subordination Agreement.

Accordingly, the court finds that the post-decisional SEC transcripts are new in that they did not exist at the time of this court's decision. The court further finds that there was no material breach of discovery obligations on the part of RD Legal demonstrated by Bogert relating to what is referred to or stated by Dersovitz in his cited SEC testimony.

IV. THE EVIDENCE CITED TO BY BOGERT WOULD NOT HAVE ALTERED THE COURT'S SUMMARY JUDGMENT DECISIONS, THE JUDGMENT OR THE ORDER DENYING BOGERT'S MOTION FOR RECONSIDERATION

The side participation agreement between RD Legal and constant Cash Yield Ltd. (CCY) has no impact on the rights and obligations of the parties to this suit under the Subordination Agreement. In its summary judgment and reconsideration decisions, the court read the Subordination Agreement as dispositively casting those rights and obligations, notwithstanding Bogert's efforts to dissociate himself from that Agreement and despite Bogert's claims — which the court rejected as unsubstantiated — to an oral agreement modifying the Subordination Agreement. Mr. Bogert agreed to subordinate his rights to recover attorneys' fees to the right of RD Legal and Osborn to those fees. That RD Legal entered into a side-agreement with a third-party investor — which RD Legal was specifically entitled to do under the Subordination Agreement — does not in any way affect the rights or obligations of the parties under the Subordination Agreement. This court's decision did not turn on whether there was any such third-party investor agreement — which it now appears there was — nor whether RD Legal earned income as a result of any such third-party investor agreement — which it appears RD Legal did.

Likewise, the idea that RD Legal was concerned about Osborn's economic viability and that it infused him with cash to enhance its collateral and protect its collateral is likewise not a piece of information that would cause the court to undo any of the factual or legal predicates of its summary judgment decisions or its denial of Bogert's motion for reconsideration. It does not relate to the parties' rights and remedies under the Subordination Agreement, nor inform the court's determinations that the monies held in Bogert's escrow account be released to RD Legal counsel's trust account, nor the court directive to Bogert to pay to RD Legal fees not deposited in Bogert's escrow account (but paid distributed directly to Bogert), into RD Legal counsel's trust account, & etc. Those remedies were considered appropriate as a means of contractual entitlement, un-dependent or considerations of third-party investment agreements, un-dependent on whether RD Legal made or lost money on any such agreement(s), and un-dependent on whether RD Legal enhanced its collateral and/or protected its position in advancing moneys to Osborn.

With respect to Osborn, the newly discovered evidence does not cause the court to revise its conclusion that there was no agreement between Bogert and Osborn. The evidence is not even relevant to the question.

Accordingly, the motion of Bogert to vacate the judgment, to allow amended pleadings and to reopen discovery will be denied

V. RD Legal's Cross-Motion for Attorney's Fees

As aforesaid, the court will deny RD Legal's cross-motion for legal fees. That claim is beyond the warrant of the remand order.

Orders accompany this decision.

ROBERT P. CONTILLO, P.J.Ch.

FOX ROTHSCHILD LLP
FORMED IN THE COMMONWEALTH OF PENNSYLVANIA
By: Barry J. Muller, Esq. (I.D.# 016911998)
Jonathan D. Weiner, Esq. (I.D.# 256581969)
Princeton Pike Corporate Center
997 Lenox Drive, Building 3
Lawrenceville, New Jersey 08648-2311
(609) 896-3600
Attorneys for Defendants / Third Party Plaintiffs,
Jeffrey C. Bogert, Esq. and
The Law Office of Jeffrey C. Bogert, Esq.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY

Docket No. BER-C-26-15

RD LEGAL FUNDING PARTNERS, LP, Plaintiff, v. **MEL POWELL, ESQ; THE POWELL LAW FIRM; JEFFREY C. BOGERT, ESQ.; and THE LAW OFFICE OF JEFFREY C. BOGERT, ESQ.** Defendants.	Civil Action ORDER
JEFFREY C. BOGERT ESQ. and THE LAW OFFICE OF JEFFREY C. BOGERT, ESQ. Third-Party Plaintiffs, v. **DANIEL OSBORN, ESQ.; BEATIE AND OSBORN, LLP, a New York Profes-sional Corporation; and OSBORN LAW GROUP,** Third-Party Defendants.	

THIS MATTER having been opened to the Court upon the Motion of Defendants / Third-Party Plaintiffs, Jeffrey C. Bogert, Esq. and The Law Office of Jeffrey C. Bogert, Esq. (collectively, "Bogert"), for an Order pursuant to Rule 4:50-1(b), vacating the Judgment entered on March 10, 2016, and granting Bogert leave, pursuant to Rule 4:9-1, to file an Amended Answer, Counterclaim and Third-Party Complaint; and the Court having considered the papers submitted in support hereof and any opposition thereto; and for the reasons set forth on the record; and for other good cause being shown;

IT IS on this 7th day of May 2018;

ORDERED as follows:

1. Bogert's motion is hereby ~~GRANTED;~~ Denied

2. ~~The Judgment entered on March 10, 2016 is hereby VACATED;~~

3. ~~Bogert is hereby granted leave file an Amended Answer, Counterclaim and Third Party Complaint in the form attached to the Notice of Motion within five (5) days after receipt~~ of ~~this Order; and it is~~

FURTHER ORDERED that a copy of this Order shall be served upon all counsel of record and unrepresented parties within five (5) days of receipt hereof.

HON. ROBERT P. CONTILLO, P.J.CH.

Opposed ✓

Unopposed ____

For the reasons set forth in today's letter decision. RPC

Eric T. Kanefsky, Esq. (024292002)
Kevin J. Musiakiewicz, Esq. (035181997)
Martin B. Gandelman, Esq. (015592011)
CALCAGNI & KANEFSKY, LLP
One Newark Center
1085 Raymond Boulevard, 14th Floor
Newark, New Jersey 07102
P.O862.397.1796O
F.O862.902-5458O
Attorneys for Plaintiff,
RD Legal Funding Partners, LP

RD LEGAL FUNDING PARTNERS, LP,

Plaintiff,

vs.

MEL POWELL, ESQ.; POWELL LAW FIRM, PC; JEFFREY C. BOGERT, ESQ.; LAW OFFICE OF JEFFREY C. BOGERT, ESQ.,

Defendants.

JEFFREY C. BOGERT, ESQ. and LAW OFFICE OF JEFFREY C. BOGERT, ESQ.,

Third-Party Plaintiffs,

vs.

DANIEL OSBORN, ESQ.; BEATIE & OSBORN, LLP, a New York Limited Liability Partnership; OSBORN LAW, PC; a New York Professional Corporation; and OSBORN LAW GROUP,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
CHANCERY DIVISION

Docket No. BER-C-26-15

~~[PROPOSED]~~ **ORDER** ON

Cross- Motion

015

THIS MATTER having been opened to the Court upon the Cross-Motion of Plaintiff RD Legal Funding Partners, LP ("RD Legal"), by and through their counsel, seeking an Order granting its Cross-Motion for Counsel Fees and Costs; and the Court having considered the papers submitted in support of an in opposition to the within Motion, including the supporting Certification of Services; and the Court having considered oral argument of the parties, if any; and for the reasons set forth in the record of the proceedings; and for other and good cause having been shown;

IT IS on this 7th day of May, 2018,

ORDERED that RD Legal's Cross-Motion for Counsel Fees and Costs is hereby ~~**GRANTED; and it is further**~~ denied for the reasons set forth in today's letter decision.

ORDERED that RD Legal shall be awarded counsel fees and costs in the amount of $_____ which Defendants Jeffrey C. Bogert, Esq. and Law Office of Jeffrey C Bogert, Esq. shall pay to counsel for RD Legal within fifteen (15) days hereof; and it is further

ORDERED that a copy of this Order shall be served on all counsel of record within seven (7) days of the date hereof.o

HON. ROBERT P. CONTILLO, P.J.CH.