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' APPLICATION TO QUASH OR MODIFY SUBPOENA TO PRODUCE DOCUMENTS**

Pursuant to Rule 232(e)(1) of the Securities and Exchange Commission Rules of Practice, RD Legal Capital, LLC ("RDLC") and Roni Dersovitz (together with RDLC, "Respondents") respectfully file this application to quash or modify the Subpoena to Produce Documents (the "Subpoena") served on RDLC on January 12, 2017.

INTRODUCTION

In a recent Order, the Court noted it was "unusual" for the Division to request subpoenas *duces tecum* after having already conducted a full investigation prior to bringing a proceeding. Order, Release No. 4387 (ALJ Nov. 23, 2016). Yet here we are with the Division again seeking to compel an extensive document production from Respondents in the weeks before trial. The Division has already served or requested nine document subpoenas on Respondents—six during the investigation and three since[1]—in response to which Respondents have already produced over 940,000 pages of documents, plus vast amounts of raw financial data in electronic form.

[1] *See* SEC Subpoenas to Respondents dated June 8, 2015; Feb. 10, 2016; Feb. 29, 2016; Mar. 31, 2016; May 11, 2016; May 26, 2016; Sep. 16, 2016 (two; modified by Court order); and Dec. 7, 2016 (modified by Court order). The Division also served two subpoenas demanding documents on RDLC employees during its investigation. *See* SEC Subpoena to K. Markovic dated Feb. 8, 2016; SEC Subpoena to L. Zatta dated Mar. 1, 2016.

Now, one week before close of fact discovery and only two months before the hearing, the Division has served a tenth subpoena on Respondents that is unreasonable, oppressive, unduly burdensome, and largely duplicative of requests made during the investigation.

The Subpoena effectively seeks all communications—without time or meaningful subject-matter limitation—between Respondents and fifty-seven actual or prospective investors, many of whom Respondents have had extensive communications with over the years. Responding to this request would require Respondents to review over 17,000 individual emails before making a production. This is unreasonable with the trial only two months away.

Further, the Subpoena inappropriately seeks deposition transcripts and discovery responses in unrelated private litigation involving Respondents. The request for that information is nothing more than a fishing expedition. The Court should quash the Subpoena in its entirety.

LEGAL STANDARD

Pursuant to SEC Rule of Practice 232(e)(1), any person to whom a subpoena is directed and any party may request that that subpoena be quashed or modified. Pursuant to Rule 232(e)(2), the hearing officer "shall quash or modify the subpoena" if compliance "would be unreasonable, oppressive, unduly burdensome or would unduly delay the hearing." In recently amending Rule 232, the Commission "intended to promote the efficient use of time for discovery during the prehearing period." Amendments to the Commission's Rules of Practice ("Amending Release"), 81 Fed. Reg. 50212, 50218 (July 29, 2016).

DISCUSSION

I. THE SUBPOENA

The Subpoena includes two document requests. The first request (the "Delaware Request") seeks "[a]ll deposition transcripts and any exhibits thereto, and all interrogatories and

responses thereto" from a private litigation currently pending before Judge Stark of the United States District Court for the District of Delaware. The second Request (the "Investor Request") seeks "[a]ll communications relating to [Respondents] and any affiliated fund or entity (collectively, 'RD Legal') between (i) RD Legal or any party acting on RD Legal's behalf . . . and (ii) [fifty-seven] investors or prospective investors identified on Respondents' First Amended Preliminary Witness List."

The Delaware Request is duplicative, unreasonably overbroad, and an abuse of the discovery process that this Court should not countenance. The Investor Request is also duplicative; moreover, it is oppressive and unduly burdensome. Each should be quashed.

II. THE DELAWARE REQUEST IS DUPLICATIVE, UNREASONABLY OVERBROAD, AND PROCEDURALLY ABUSIVE

The Delaware Request seeks discovery materials generated in a private litigation pending in the United States District Court for the District of Delaware (the "Delaware Action"). The Delaware Action was filed in August 2015 by investor (and serial litigant) Steven M. Mizel and an entity he directs (collectively, the "Delaware Plaintiffs") against Respondents in this proceeding and an affiliated entity (collectively, the "Delaware Defendants"). The allegations in that case, though claiming "fraud," do not relate to any of the charges pled in this proceeding.

A. The Delaware Request Is Duplicative and Unreasonably Overbroad

The Delaware Request is both duplicative and unreasonably overbroad. Over the course of its investigation, the Division enjoyed a virtually unlimited opportunity to compel testimony and the production of documents. During this time, the Division served a document subpoena on Mr. Mizel, receiving thousands of documents from him in response, and deposed all but one of the individuals that have been deposed in the Delaware Action. In addition, as discussed above, the Division served on Respondents document subpoenas approaching the material issues in this

proceeding from numerous angles, in response to which Respondents produced nearly a million pages of documents, including hundreds of documents concerning the Delaware Plaintiffs.[2] Because the information possessed by Respondents that is both related to the Delaware Action and relevant to this proceeding is thus already within the Division's possession as well, the Delaware Request is largely duplicative.

The Delaware Request is also unreasonably overbroad, because much of the requested discovery material generated in the Delaware Action is irrelevant to this proceeding. The Delaware Action arises from allegations completely distinct from those at the heart of the Order Instituting Proceedings ("OIP"). This proceeding arises from the Division's contention that Respondents "defrauded investors by (i) marketing and selling investments . . . based on misrepresentations concerning the type and diversification of assets under management in these funds, and (ii) by withdrawing money from the funds using valuations based on unreasonable assumptions." OIP ¶ 1. But the Delaware action does not allege any misrepresentation by Respondents (or anyone else) as to the type of assets in which RDLC's funds invested, the diversification of those funds, or the valuation of any assets held by those funds. Indeed, nowhere does the complaint in that case so much as mention various particulars on which the OIP focuses, such as RDLC's marketing materials, the *Peterson* litigation, the Iran SPV, or any specific law firm from which RDLC originated an asset. The Division is mistaken if it believes that the OIP grants it *carte blanche* to demand any discovery material generated in the course of any litigation involving any Respondent. The Delaware Request is unreasonably overbroad and should be quashed on that basis alone.

[2] As further discussed below, among the documents demanded by the Division's prior subpoenas to Respondents were "[a]ll communications with investors in RD Legal," which would include communications with the Delaware Plaintiffs. SEC Subpoena to RDLC dated June 8, 2015 (Doc. Req. No. 7). These communications constitute a significant number of the deposition exhibits in the Delaware Action.

B. The Delaware Request Is Procedurally Abusive

In addition to being both duplicative and overbroad, the Delaware Request constitutes an abuse of the private discovery process that this Court should not countenance. "[T]he Government as investigator has awesome powers that render unnecessary its exploitation of the fruits of private litigation," *United States v. Epstein*, No. 96 CIV. 8307 (DC), 1998 WL 67676, at *2 (S.D.N.Y. Feb. 19, 1998) (quoting *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (internal quotation marks and brackets omitted)), and this Court should not "sanction, and thus [] encourage, the use of private litigants' devices as reinforcements for federal prosecutors," *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 132 (S.D.N.Y. 1976) (forbidding disclosure of fruits of discovery to government). The Division has had ample opportunity to depose and request the individuals and information at issue through the procedural vehicles provided for by statute and regulation. It would be inappropriate to add "resources employed at large private expense" to these substantial "authorized Government energies available against [Respondents]." *Id.*

This general principle is all the more important here given that most of the documents sought under the Delaware Request have been designated as confidential in the Delaware Action pursuant to a Protective Order entered by Judge Stark.[3] "It is an abuse of the discovery process to order a defendant . . . to produce all documents which he had submitted in another case under the judicial imprimatur that those documents, when submitted, were judicially protected as confidential." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, No. 74–2451, 1978 WL 1333, at *3 (E.D. Pa. 1978) (granting motion to quash subpoena *duces tecum* as to documents that the

[3] Specifically, the Delaware Defendants have designated as Confidential (i) 55 out of 69 deposition exhibits; (ii) all deposition testimony pertaining to those exhibits; and (iii) four out of fourteen interrogatory responses. In addition, three out of fourteen interrogatories drafted by the Delaware Plaintiffs contain or derive from information that the Delaware Defendants have designated as Confidential.

subpoena recipient had produced in a separate proceeding subject to a protective order entered in that proceeding); *see also Martindell,* 594 F.2d at 296 (denying Government's order to modify or vacate protective order to permit it access to deposition transcripts protected by the order, because "a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and [] such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony").

If the Division seeks information relevant to this proceeding, it should serve document requests tailored to the particular misconduct alleged in the OIP—as, indeed, the Division has been doing liberally for over a year and a half. But the Division should not be permitted to demand wholesale production of confidential discovery materials generated in the context of an unrelated private litigation. The Delaware Request should be quashed.

III. THE INVESTOR REQUEST IS DUPLICATIVE, OPPRESSIVE, AND UNDULY BURDENSOME

The Investor Request is nearly entirely duplicative and cannot justify the burden that compliance would require. The Investor Request seeks "[a]ll communications" between Respondents or their affiliated entities and fifty-seven investors or prospective investors. But the Division has already served, and Respondents have already responded to, a subpoena demanding production of "[a]ll communications with investors in RD Legal" and another subpoena demanding production of both "[a]ll Documents and Communications . . . with any third parties, including actual or potential investors, regarding the *Peterson* Claims, from January 1, 2009 through the present" and "[a]ll Communications with actual or potential investors in RD Legal from June 1, 2015 through the present." *See* SEC Subpoenas to RDLC dated June 8, 2015 (Doc.

Req. No. 7) and Feb. 29, 2016 (Doc. Req. Nos. 4, 6).[4] In short, the territory covered by the Investor Request is already well-trodden, and any unexplored terrain is vanishingly small.

In stark contrast to that *de minimus* measure, the burden to Respondents of responding to the Investor Request would be enormous. Respondents would be required to review and prepare for production tens of thousands of documents—all during the final week of fact discovery, during which Respondents must also be conducting multiple depositions, preparing expert reports, and drafting and responding to numerous applications to quash document subpoenas. Balanced against the duplicative nature of the Investor Request, the purported imposition of such a burden is unreasonable to the point of being oppressive.

As this Court noted in its November Order, it is unusual for the Division to request post-investigation document subpoenas at all. A request as egregiously duplicative of prior subpoenas and as oppressively burdensome as this one cannot be reasonably defended.[5] The Investor Request should be quashed.

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[4] For additional SEC document requests to RDLC that capture communications with the fifty-seven actual or potential RDLC investors on Respondents' First Amended Preliminary Witness List, see SEC Subpoena to RDLC dated June 8, 2015, at Doc. Req. No. 1 ("All offering memoranda and amendments thereto concerning RD Legal, including associated Documents such as partnership agreements and subscription booklets, regardless of date of creation or modification."); *id.* at Doc. Req. No. 3 ("A list of investors in RD Legal, including Documents sufficient to ascertain the original capital contributions of each investor, changes in the capital accounts of each investor, and the current capital account balance of each investor."); *id.* at Doc. Req. No. 6 ("All Documents, Communications, and files concerning redemptions from RD Legal or the liquidity of RD Legal, including investor requests for redemptions and responses to such requests, including an April 30, 2015 letter to investors from Mr. Dersovitz."); SEC Subpoena to RDLC dated May 11, 2016, at Doc. Req. No. 3 (seeking, *inter alia*, "all drafts and revisions of [RDLC's] Marketing Materials"); SEC Subpoena to RDLC dated May 26, 2016, at Doc. Req. No. 2 ("All communications between any person at RD Legal and any other party, whether internal or external to RD Legal, relating to or concerning [certain] receivables . . . , and all documents relating to such receivables."); *id.* at Doc. Req. No. 3 ("All communications and documents, whether internal or external to RD Legal, about any Marketing Materials, including drafts thereto.").

[5] Both the Commission and this Court have acknowledged that the Rules do not disallow post-investigation SEC subpoenas, for the stated reason that once an administrative proceeding has been instituted, "issues relevant to a claim or defense may . . . warrant new or additional focus in discovery." Amending Release, 81 Fed. Reg. at 50216, *quoted in* Order, Release No. 4387, at 1 (ALJ Nov. 23, 2016). But the Division may not rely on this justification here, given the obvious fact (confirmed by the prior document requests cited above) that Respondents' communication with investors is hardly a "new or additional focus" of this case.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Court enter an order quashing the Subpoena.

Dated: January 19, 2016

Respectfully submitted,

Terence Healy \WSJ

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Respondents' Application to Quash or Modify Subpoena to Produce Documents was served on this 19th day of January 2017 by U.S. Postal Service on the Office of the Secretary and by electronic mail and U.S. Postal Service on the following counsel of record:

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