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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.

THE EXPERT REPORT OF PROFESSOR ANTHONY J. SEBOK

January 27, 2017

COPY

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I. Introduction and Summary of Opinions

I have been retained as an expert in *In the Matter of RD Legal Capital, LLC and Roni Dersovitz*, File No. 3-17342, by the Division of Enforcement ("Division") of the Securities and Exchange Commission ("SEC"). This action is an Administrative Proceeding brought by the Division against RD Legal Capital, LLC ("RDLC"), a formerly SEC-registered investment advisor, and Roni Dersovitz, President and Chief Executive Officer of RDLC. In this action, the Division alleges that RDLC and Mr. Dersovitz willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The Division also alleges that Mr. Dersovitz willfully aided and abetted and caused RDLC's violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5. According to the Order Instituting Proceedings in this matter, Respondents violated these laws through a scheme to defraud investors that included misrepresenting the type and diversification of assets under management by investment funds under their control, and exploiting unreasonable asset valuations to withdraw fund "profits" at the expense of those funds' liquidity.

Part II of this Report summarizes my background, qualifications, and experience. Part III provides the basis for my report, including the material I reviewed. Part IV provides background on investments in law-related activities and describes the terminology adopted by participants in this area of finance. Part V contains my opinions regarding the nature of the risks of the investments made by two of the investment funds under the control of RDLC and Mr. Dersovitz, RD Legal Funding Partners, LP and RD Legal Offshore Fund, Ltd. (collectively, the "Funds").

My opinions can be summarized as follows:

- There is a distinct market in investment in law-related activities in the United States and it is comprised of various types of litigation investments.
- The Funds controlled by RDLC and Mr. Dersovitz purchased litigation investments.

- The differing types of litigation investments are risky for different reasons endogenous to the investment type.
- RDLC and Mr. Dersovitz described the risk faced by the Funds they controlled by representing the Funds' investments as one investment type, namely factoring. In fact, the Funds bore significant risks which were different in kind, not just degree, from the risks borne by factors when buying accounts receivables.

II. Qualifications, Experience, and Compensation of Expert

A. General Background

I am employed as a Professor of Law by the Benjamin N. Cardozo School of Law of Yeshiva University, where I have taught since 2007. I also serve as Co-Director of the Burns Center for Ethics in the Practice of Law at Cardozo Law School. Prior to 2007, I was the Centennial Professor of Law and Associate Dean for Scholarship at Brooklyn Law School, where I had taught since 1992. Courses I have taught include Torts, Advanced Torts, Professional Responsibility, Insurance Law, Remedies, Third Party Investment in Litigation, Products Liability, Constitutional Law, Jurisprudence and seminars in Mass Torts and Social Justice and Tort Theory. Between 2013 and 2016, I was a Distinguished Research Professor, Swansea University, Wales, UK. I have taught at Columbia University School of Law in New York, NY, Fordham University in New York, NY, Princeton University in Princeton, NJ, Freie Universität, in Berlin, Germany, and Tsinghua University School of Law, in Beijing, China. My academic research includes litigation finance, tort law, and legal ethics.

I received a B.A., *magna cum laude*, from Cornell University in 1984. I received an M.Phil. in Politics from the University of Oxford in 1986. I received a J.D. from Yale Law School in 1991, where I was a Senior Editor of the *Yale Law Journal* and the Managing Editor of the *Yale Law and Policy Review*. I received a Ph.D. in Politics from Princeton University in 1993. After law school, I clerked for the Hon. Edward Cahn, U.S. District Court, Philadelphia, PA. I am licensed to practice law in New York.

B. Academic and Professional Experience

I regularly attend meetings and conferences designed to address issues of litigation investment, civil litigation, and legal ethics. I am a member of the American Law Institute and the Bar Association of the City of New York, where I served on the Products Liability Committee in 2000-2003 and 2005-2007 and the Civil Rights Committee in 1998-1999. I served as the Co-Reporter for the ABA Commission on Ethics 20/20 and the Third-Party Financing Of Litigation Working Group in 2011-2012. I was a Drafter for the Section on Principles of Procedural Justice, ABA Litigation Section Project, "The Rule of Law in Times of Calamity" in 2006. I am the current Chair of the Section on Remedies of the American Association of Law Schools ("AALS"), as well as a member of the AALS Section of Insurance Law and the past Chair of the AALS Section on Torts and Compensation Systems.

I have authored numerous publications and given presentations on topics relating to litigation finance, legal ethics, and tort law. My scholarship has appeared, among other places, in books or as chapters in books published by Wolters Kluwer, Cambridge University Press, Oxford University Press, and Edward Elgar Publishing, and as articles in the *Vanderbilt Law Review*, the *Michigan Law Review*, the *NYU Journal of Law & Business*, the *William & Mary Law Review*, the *DePaul Law Review*, the *Fordham Law Review*, the *Canadian Business Law Journal*, and the *Journal of Tort Law*. A more complete list of my publications and presentations is included in my *curriculum vitae*, attached as Appendix 1.

I have spoken to many audiences on topics relating to litigation finance, legal ethics, and tort law, including conferences and symposia sponsored by Vanderbilt University School of Law, N.Y.U. School of Law, Georgetown University Law Center, Stanford Law School, Washington and Lee University School of Law, the University of Windsor (Ontario) School of Law, George Washington University School of Law, George Mason University School of Law,

Fordham University School of Law, and DePaul University School of Law. I have spoken on the topic of litigation finance and legal ethics at panels sponsored by the Bar Association of the City of New York, the New York State Bar Association, the ABA Center for Professional Development, the ABA National Conference on Professional Responsibility, the Institute for Law & Economic Policy, the Defense Research Institute, and the Rand Corporation's Institute for Civil Justice.

C. Expert Experience

I have served as a consultant for numerous companies involved in litigation finance including Credit Suisse and Juridica Litigation Investment. I am currently an ethics advisor for Burford Capital. I provided an expert affidavit in support of Plaintiffs' Memorandum Responding to the Court's *Sua Sponte* Orders Of August 4, 2010 And August 17, 2010 in *In Re: World Trade Center Disaster Site Litigation*, No. 21-MC-100 (AKH) (S.D.N.Y.), in 2010.

D. Terms of Engagement

I have been engaged by the Division to provide expert services in *In the Matter of RD Legal Capital, LLC and Roni Dersovitz*, File No. 3-17342. I am being compensated at the rate of $500 per hour for research and drafting and $700 per hour for testimony. My compensation is not dependent on the outcome of this proceeding.

III. Basis for Statements of Opinion

I base this Report on my review of certain documents, records, filings and other information related that were provided to me by counsel for the Division or are publicly available. The documents on which I primarily rely include testimony transcripts and exhibits thereto, and other materials, such as the Order Instituting Proceedings and the Wells Submissions of RDLC and Roni Dersovitz. A list of these documents is set forth in Appendix 2. I also base

this Report on my education, training, and experience in the litigation investment industries, and my background in the fields of litigation investment, professional responsibility, and tort law.

IV. Background on Investment in Law-Related Activities

A. Summary

As explained in this section, investment in law-related activities may include:

a) direct investment by a non-lawyer into the cause of action of a plaintiff, including the purchase of pre-settlement or pre-judgment awards (litigation finance);

b) direct investment by an attorney into the cause of action by a client (the contingent fee);

c) conventional lending to attorneys where the obligation to repay is not contingent on the outcome of any legal matter (credit transactions);

d) the purchase of rights to payment of earned legal fees or proceeds arising from cases post-settlement or judgment ("conventional" factoring), and

e) investment in unearned attorney's fees prior to settlement or judgment (the purchase of contract rights in contingent fees).

The risks inherent (or endogenous) to each of these types of law-related investments differ in accordance with the nature of the investment, including possession risk (as defined below).

The following Section IV.B discusses the history of investing into law-related activities, including litigation finance, credit transactions involving attorneys, and factoring of legal receivables. It defines a taxonomy for various legal investment types. Section IV.C defines and discusses the types of risk endogenous in these various legal investments.

B. Investment in Law-Related Activities

Historically speaking, investment in law-related activities has been either prohibited or permitted under extremely limited circumstances.[1] As a historical matter, assignments of causes of action were prohibited, so the only person who could bring a claim against another party in a civil case was the original victim of the adverse party's alleged wrongdoing. The common law doctrine of maintenance prohibited strangers from aiding others to prosecute civil litigation for any reason other than family loyalty or charity. The common law doctrine of champerty prohibited strangers from contracting with strangers to provide any form of aid in the prosecution of a lawsuit for a monetary reward. These doctrines originally extended to attorneys, so the practice of charging contingency fees was prohibited.

1. Modern Assignment and Champerty (Litigation Finance)

Since the late nineteenth century, all of the doctrines described in the previous paragraph have been liberalized so that strangers may invest in law-related activities to varying degrees. Free alienability of causes of action is now the norm, subject only to certain common law and statutory limitations. Maintenance and champerty are permitted in about one half of the

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[1] There is no single definition of the words "invest" or "investment" in law. The words "invest" or "investment" may be defined by a statute or through a meaning adopted by common usage in the courts and legal community. For example, Black's Law Dictionary (14th ed. 2014), defines "invest" as "to make an outlay of money for profit," and "investment" as "an expenditure to acquire property or assets to produce revenue; a capital outlay." *See also Joy A. McElroy, M.D., Inc. v. Maryl Grp., Inc.*, 107 Haw. 423, 435, 114 P.3d 929, 941 (Ct. App. 2005) (adopting a "dictionary definition of 'invest' as 'to put (money) to use, by purchase or expenditure, in something offering profitable returns, esp. interest or income.'"). Under the definitions above, lending is a form of investment. *See Taylor v. Bar Plan Mut. Ins. Co.*, 2014 Mo. App. LEXIS 486, *46 (Ct. App. Apr. 29, 2014) (Fischer, J., dissenting) (the term investment "is broad—an investment is both an outlay of funds with the expectation that some income or profit will result and a purchase with the expectation to receive a benefit").

Furthermore, although this is not dispositive, all of the Offering Memoranda I have reviewed describe the purpose of the Funds as "investing" its assets in the transactions described within the documents.

jurisdictions in the United States, subject to certain limitations.[2] "Litigation finance," therefore, is law-related investment in which the investor's recovery is contingent on the outcome of adjudication. When an attorney invests in her own clients' causes of actions, the transaction is not known as litigation finance, but, for historical reasons, is known as the "contingent fee."[3] Limitations on the contingent fee have been lifted in practically all American jurisdictions, and contingent fee contracts are permitted subject to certain limitations imposed through the doctrines of professional responsibility.[4]

2. Credit Transactions with Attorneys

Investment in law-related activities may include lending to attorneys.[5] Conventional lending to attorneys, in which credit is extended to an attorney or a law firm engaged in the practice of law, does not involve the "investment of money in a common enterprise with profits to come solely from the efforts of others," since the payments received by a conventional lender are not contingent upon the outcome of the activity that the lender is funding, i.e., it is not contingent on the outcome of any particular suit the attorney may be pursuing.[6] However,

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2 In the United States twelve jurisdictions explicitly prohibit champerty. *See* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 102 (2011). There have been recent decisions reaffirming state prohibitions and limitations. *See* John Beisner and Jordan Schwartz, *How Litigation Funding Is Bringing Champerty Back To Life*, Law360, January 20, 2017, at https://www.law360.com/internationalarbitration/articles/882069/how-litigation-funding-is-bringing-champerty-back-to-life (reviewing recent decisions in Pennsylvania and North Carolina) (last visited on January 24, 2017).

3 *See* John Leubsdorf, *Toward a History of the American Rules on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 16-17 (1984).

4 The rules of professional responsibility still prohibit certain forms of investment in law-related activities by non-lawyers, so per Rule 5.4 of the Model Rules of Professional Conduct, non-lawyers may not "share" legal fees with attorneys; non-lawyers may not form a partnership with an attorney to practice law; and an attorney generally may not practice law in a professional corporation organized to practice law if any part of the corporation is owned by a non-lawyer.

5 *See supra* note 1.

6 *SEC v. W. J. Howey Co.*, 328 U.S. 293, 301 (1946).

lending to attorneys where the lending contract either (1) conditions the repayment of the loan on the success of a specific litigation identified by the attorney or (2) gives the lender a security interest in the attorney's unearned fees in a case identified by the attorney, is not conventional lending and is more likely to be considered a form of investment in a law-related activity. Where a loan—whether recourse or non-recourse—incorporates conditions (1) and/or (2) into its credit terms, there is a possibility that the attorney is engaging in fee-splitting and the enforceability of the terms of the transaction may be affected by a local jurisdiction's interpretation of the rules of professional responsibility.[7]

3. Factoring Legal Recoveries and Fees

Investment in law-related activities may include factoring a plaintiff's legal recoveries and/or an attorney's legal fees. "Factoring" is term with a well-established meaning in both legal and commercial usage. "Factoring is a process by which a business sells to another business, at a small discount, its right to collect money before the money is paid."[8]

A party to a lawsuit that has been settled or in which there has been a judgment for money may be faced with a delay between securing a resolution to the case and receiving the proceeds of that resolution. These proceeds may be factored in much the same way that the payment of a completed contract for the delivery of a service or product may be factored. The party who owns the proceeds may sell them to the purchaser (known as the "factor") at a discount, thus enjoying the benefit of certain and immediate possession of the proceeds for a price. Conventional factoring of proceeds does not implicate champerty concerns since the factor's payment does not support the stranger's litigation, as the stranger's litigation has been completed.

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7 *See infra* Section IV.C.2.b.

8 *Houston Lighting & Power Co. v. Wharton*, 101 S.W.3d 633, 636 (Tex. App. 2003).

The same incentives that motivate any business to factor payments may motivate an at-attorney to factor her fees. Where an attorney is employed under an hourly or fixed fee contract, the attorney may wish to gain immediate possession over her earned fees, and she can achieve this by selling her right to payment by her client to a factor (at a discount, of course).[9] Where an attorney is employed under a contingent fee contract, her incentives may be similar to those of a plaintiff who chooses to factor proceeds from cases in which there has been a settlement or a final non-appealable judgment obtained after litigation with an appearing defendant.[10] The attorney who represents a client in a lawsuit that has settled or has gone to final judgment has a legal right to receive the fees from her client, which she may wish to factor.

As noted above, since there is no single definition of "investment," it is possible to apply that term to a wide range of factoring transactions that otherwise have little similarity with each other. In the case of an attorney factoring hourly fees earned over the course of representation of a long-time client, the factor's payment does not depend on any contingency related to the underlying fee due to the attorney, since the number of hours and hourly rate were fixed at the time of billing and before the factor contracted with the attorney. In addition, the duration of the

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9 *See, e.g.*, *Santander Bank, N.A. v. Durham Commercial Capital Corp.*, 2016 U.S. Dist. LEXIS 5430 (D. Mass. Jan. 15, 2016); *Durham Commer. Capital Corp. v. Select Portfolio Servicing, Inc.*, 2016 U.S. Dist. LEXIS 143229 (M.D. Fla. Oct. 17, 2016). In both cases, the factors purchased fees that were charged by law firms representing financial institutions—where the fee agreement is unlikely to be contingent. The facts revealed in each cases indicate that the fee agreements were either hourly or fixed fees.

10 Throughout this report, the distinction between final judgments obtained after litigation with an appearing defendant on one hand and default judgments on the other are important. As such, this report will utilize "judgments" and "default judgments" exclusively of the other term. *See infra* discussion at note 68 for further discussion of why the distinction matters. *See also* discussion at Section IV.C.2.b.

period between the purchase of the fee and the collection of it from the client is often limited and is always defined (e.g., 30 or 90 days after the bill is sent out). It resembles a "true sale."[11]

Some, but not all, of the same elements may be present when a factor purchases post-settlement recoveries from a plaintiff.[12] As one commentator has observed, post-settlement factoring of recoveries from plaintiffs "involves little uncertainty, because the quality and value of legal claims has already been ascertained" and the duration, while longer, may be anticipated.[13] The only difference between factoring post-settlement attorney's fees and factoring plaintiff's post-settlement recoveries is that in the former, the obligor is the attorney's own client, while in the latter it is the plaintiff's opponent. The same is true where a factor purchases post-settlement contingent fees from an attorney—the obligor is now not the attorney's client but the attorney's client's opponent. All three of these variations of factoring (hourly and fixed fee; recoveries; and contingent fees) are examples of factoring a legal "receivable." The only practical difference is that the "counterparty risk"—the risk that the obligor will default—shifts from one third party (a client) to another (the client's opponent).[14]

Factoring legal receivables is a conventional form of factoring and, as such, lacks certain features often associated with investment; specifically, that the factor is not "in a common

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11 *See* Steven L. Schwarcz, *The Parts Are Greater than the Whole: How Securitization of Divisible Interests Can Revolutionize Structured Finance and Open the Capital Markets to Middle Market Companies*, 1993 COLUM. BUS. L. REV. 139, 143 (1993) ("Sales that are effective against creditors and the estate of a bankrupt originator, in that the property is no longer 'property of the debtor's estate' . . . are generally referred to as 'true sales.'" (footnote omitted)).

12 *See* Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 STAN. J.L. BUS. & FIN. 98, 130 (2015) ("In many ways, the post settlement funding is akin to traditional factoring of receivables.").

13 *Id.*

14 *Id.* at 130-31 ("counterparty risk" in post-settlement factoring of recoveries and contingent fees is low because "cases where the depth of the defendant's pockets is in serious question are not very likely to be financed").

enterprise" where the factor's future profits will come solely from the future efforts of others. On the other hand, where the factor "purchases" a *future* recovery from a plaintiff, or a *future* contingent fee from an attorney, the transaction lacks certain features typical of conventional factoring.[15] In pre-settlement funding, the funder purchases a right to collect proceeds *if* they come into existence (i.e., an inchoate right), not actual existing proceeds themselves (as in the

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[15] When an attorney "sells an interest in a contingent fee" to a factor, she may be doing one of two things. She is either selling her rights *in* the proceeds of her fee, in which she has rights *in rem* to money, or she is selling her rights *to* earn her contingent fee, in which case she has equitable rights in a contract right. The former transaction is referred to as the sale of accounts receivables, while the latter is referred to in various ways, depending on whether courts have chosen to use the terminology of the pre-1974 reform UCC, or the post-1974 reform UCC.

The distinction between the sale of earned contingent fees (accounts receivables) and unearned contingent fees (contract rights or accounts) has been recognized by numerous courts. *See, e.g., PNC Bank v. Berg*, 1997 Del. Super. LEXIS 19, *26-27 (Super. Ct. Jan. 31, 1997). As one leading treatise stated, the "[r]ights of lawyers under contingent fee contracts are 'contract rights' or possibly 'accounts' in which an Article 9 security interest may be created." PETER F. COOGAN, ET. AL., SECURED TRANSACTIONS UNDER THE UCC ¶ 19.02 (2016 Matthew Bender).

While courts have been willing to recognize that contract rights or accounts in unearned legal fees in the context of secured transactions under Article 9, they have also recognized that they are not like accounts receivables in ways that may matter to the holder of the collateral. The most important difference that courts have noted in the context of unearned fees—especially unearned contingent fees—is that their value is more indeterminate than the same fee *after* it has been earned. As the court in *U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC*, 519 F. Supp. 2d 515 (E.D. Pa. 2006), observed, while it is true that the reason a right to an unearned contingent fee is treated as property, and not a general or payment intangible, is that it is not contingent and its monetary value depends entirely on the existence—in the future—of a judgment or settlement, which means that while the equitable right to payment can never be destroyed, its monetary value may turn out to be zero:

> What was transferred by virtue of the purchase agreements at issue here was not the underlying tort claims of the claimants, but rather the right of [the lawyers] to collect legal fees for the services they provided in prosecuting those claims... [W]here a fee contract is involved . . . there is nevertheless a "right to payment," even if that right is rendered *more speculative* by the fact that the amount of payment earned by future performance depends on a favorable resolution of the underlying legal action.

Id. at 522 (emphasis added).

sale of earned hourly or fixed fees or a judgment).[16] The transaction is for a contract right, not a settlement or judgment reduced to proceeds.[17]

In fact, while it is theoretically possible to refer to the purchase of contingent plaintiff recoveries as "factoring," it is not common practice. Firms that purchase such interests refer to the practice as "litigation finance."[18] Given that a factor receives only a contingent or inchoate right when purchasing an interest in a recovery before it has been settled or reduced to judgment, these transactions are, despite the label someone might put on it, really nothing less than investment in litigation (*see supra* Section IV.B.1). When an investor purchases a right to collect inchoate proceeds, they are engaged in litigation finance (in those states that permit it) and champerty (in those states that forbid it). No court calls it factoring.[19]

Furthermore, while it is theoretically possible to refer to the purchase of contingent legal fees as "factoring," that too, is not common practice. No court calls the purchase of inchoate legal fees "factoring" for two reasons. The first is just an extension to unearned legal fees of the

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16 *See, e.g., Congoleum Corp. v. Pergament (In re Congoleum Corp.)*, 2007 Bankr. LEXIS 4357, *21 (Bankr. D.N.J. Dec. 28, 2007) ("While the Debtor is correct in noting that this Letter Agreement discusses assignment of 'proceeds,' the Court is satisfied that the term 'proceeds' means the funds themselves, not some inchoate right to collect the funds.").

17 *See, e.g., Utica Nat'l Bank & Trust Co. v. Associated Producers Co.*, 622 P.2d 1061, 1064 (Okla. 1980) ("A 'contract right', as distinguished from an account, is 'any right to payment under a contract not yet earned by performance.' Contract rights may be regarded as 'potential accounts' which ripen into accounts by an effected performance.").

18 Burford Capital, a leading commercial litigation investor, states that it "provide[s] funding secured by legal receivables . . . [b]y assuming the cost and risk of litigation through a non-recourse investment." Buford Capital, "Defining Litigation Finance" at http://www.burfordcapital.com/wp-content/uploads/2016/09/Burford-Commercial_Litigation_Finance-US_Web.pdf (last visited on January 14, 2017).

19 *See, e.g., Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 727 (N.D. Ill. 2014) ("The ABA Commission on Ethics 20/20's white paper of February, 2012 concluded that 'shifts away from older legal doctrines such as champerty, and society's embracing of credit as a financial tool have paved the way for a litigation financing. . . .'") (citations omitted).

reasoning applied above to unearned recoveries.[20] The second reason courts do not use the term factoring in the context of unearned contingent fees extends beyond one of terminology. It is that parties may be wary of bringing cases involving disputes over investment by non-lawyers into unearned contingent fees before the courts because they are of questionable enforceability. Numerous state ethics opinions have held that a lawyer may not allow a non-lawyer to take a security interest in an unearned contingent fee.[21] The rationales for this prohibition are various. Most ethics committees are concerned that, were a non-lawyer to own a property interest in an attorney's contingent fee award, that lawyer would be splitting her fee with a non-lawyer in violation of Model Rule of Professional Conduct 5.4(a). The status of this prohibition is currently unclear, but until it is clarified, it would be inaccurate to state that the purchase of unearned contingent fees, to the extent that it occurs, is a form of factoring.

Finally, it should be noted that in addition to the legal and ethical concerns, there is a practical reason why neither investors nor the courts refer to investment in pre-settlement or pre-judgment legal fee or recovery receivables as factoring, and reserve the term factoring only for use in connection with the purchase of post-settlement or judgment legal receivables. Pre-settlement or judgment "factoring" is typically riskier than conventional factoring. The additional risk arises not only from the increased duration between the factor's purchase of the proceeds and the point in time when the factor is paid, but also due to the increased risk inherent

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20 *See, e.g.*, *PNC Bank*, 1997 Del. Super. LEXIS 19 at *25-26 (contrasting attorney's accounts receivables, which are earned, with attorney's contract rights to fees, which are inchoate and contingent).

21 *See* North Carolina Formal Ethics Op. 2006-12; Maine Prof. Ethics Comm. Formal Op. 193 (2007); Utah Ethics Advisory Opinion No. 97-11; Utah Ethics Advisory Opinion No. 02-01; Utah Ethics Advisory Opinion No. 06-03; Advisory Opinion, Ohio Supreme Court's Board of Commissioners on Grievances and Discipline, Opinion 2004-2. *See also* Beisner and Schwartz, *supra* note 2 (reporting a Pennsylvania court's rejection of lending agreement secured by an attorney's expected fees).

(or endogenous) to litigation—a contingent event that depends on numerous factors, such as the subjective attitudes of judges and juries; the possibility that new facts and law will be developed after the factoring contact is complete, and the possibility that the attorneys prosecuting the case will violate their ethical obligations or commit malpractice. While some of these risks (or some other similar risk, including insolvency) might manifest themselves in the period of time between the completion of a post-settlement or post-judgment factoring contract and the factor's coming into possession of the earned proceeds or fee, the risk is much smaller—not only because the duration of time is ordinarily shorter, but because the range of the risks is simply narrower and, to the extent that some risks are inevitable, post-settlement or judgment risks can be identified and underwritten more accurately *ex ante* in the case of conventional factoring.[22]

In sum, investment in law-related activities may include: (a) litigation finance (the direct investment by a non-lawyer into the cause of action of a plaintiff or the purchase of such plaintiff's proceeds pre-settlement or pre-judgment); (b) the contingent fee (the direct investment by an attorney into the cause of action by a client); (c) credit transactions (conventional lending to attorneys where the obligation to repay is not contingent on the outcome of any legal matter); (d) "conventional" factoring (the purchase of rights earned legal fees or proceeds arising from cases post-settlement or post-judgment); and (e) investment in unearned attorney's fees prior to settlement or judgment (the purchase of contract rights in contingent fees). There remains some controversy over what to call transactions that purport to "purchase" inchoate rights to legal recoveries and legal fees; in my opinion the question is settled with regard to the former and somewhat unsettled with regard to the latter. The former (relating to legal recoveries) are simply

[22] *See* Goral, *Justice Dealers*, at 127 ("Since facts or law relevant for the outcome [in cases pre-settlement or judgment] remain unknown or undecided, such disputes are subject to substantial uncertainty and are considered high-risk. Their evaluation requires case-specific expertise, which results in relatively higher transaction costs.").

cases of litigation finance, and therefore not a type of factoring. The latter transactions (relating to legal fees), if they are valid, are sales of contract rights—and not a type of factoring, either.

C. Types of Risks in Legal Investment

There is a market for legal investment consisting of the types of litigation investment vehicles listed above. Within the class of permissible investments (investments that are currently permitted by courts), market participants choose among the different vehicles as a matter of business judgment.[23] The reasons for a person investing in litigation to choose to employ any of the vehicles described above can vary according to various factors, including the investor's familiarity with certain segments of the legal system.[24] In addition to other subjective factors that may inform a decision by an investor with regard to what kind of investment to make, the investment decision will obviously be informed by the risk that each investment decision poses.[25]

1. Exogenous and Endogenous Risk

Litigation investors use different kinds of information to evaluate risk. Risk can be exogenous (i.e., not correlated to the elements that define the investment type) or endogenous (i.e., those risks that are correlated to the investment type). Facts concerning the specifics of a particular transaction—the character of the underlying legal matter; facts about the adverse party and the counterparty to the transaction; and other facts that may affect both the time and likelihood that the underlying litigation investment contract will be performed—are exogenous

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[23] *See* Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 LOYOLA UNIV. CHI. L.J. 1239, 1245 (2016) ("Important to the investment decision of any litigation investor is whether or not the claim is likely to yield a positive return.").

[24] *See* Joanna M. Sheppard, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 933 (2015) ("Third-party litigation financiers employ relationships within the legal sector, knowledge of specific law firms (and even specific lawyers), and knowledge of legal positions to evaluate cases.").

[25] *See id.* at 932 (". . . litigation financiers are, first and foremost, investors. In general, investors all share a common want: the maximum possible risk-adjusted return on investment.").

to the type of litigation investment. They are not correlated to the elements that define the par-particular investment type and distinguish it from other types.

On the other hand, there are some facts about a transaction that refer to risks endogenous to the type of litigation investment, meaning those facts help distinguish one type of legal investment from another. For example, the reason that the legal investment market distinguishes between litigation finance on the one hand and factoring on the other is that the investor's recovery in the former relies on a risk that is salient to that investment type, namely that "facts or law relevant for the outcome remain unknown or undecided."[26] The reason that the legal investment market distinguishes between credit transactions and factoring is that the investor's recovery in the former relies on a different risk that is salient to that investment type, namely that the counterparty (i.e., the borrowing attorney) will be insolvent.[27]

The point is not that a risk endogenous to one investment type is not present to some extent in the others. The point is that when participants in the litigation investment market make statements about risk, they are expressing beliefs about the character of the risks endogenous to the investment type. Insolvency is a risk found in all types of investment in law-related activities. But it is not the most salient endogenous risk in all the investment types. The most salient endogenous risk of credit transactions is insolvency. The most salient endogenous risk of litigation finance is completion. The salient endogenous risk of *conventional* factoring is delay of possession. The corollary to this is that a statement that refers to one of the investment types identified in this section is a statement about its salient endogenous risk. Thus, if a speaker calls

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[26] *See* Goral, *Justice Dealers*, at 127.

[27] *See* Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 393-394 (2014) (distinguishing recourse lending from "specialized non-recourse lenders"); Victoria Shannon Sahani, *Harmonizing Third-Party Litigation Funding Regulation*, 36 Cardozo L. Rev. 861, 892 (2015) (distinguishing champerty from lending).

a transaction "factoring legal receivables" when in fact the transaction's endogenous risks re-resemble those of "pre-settlement funding" or "litigation finance," then the statement is inaccurate as it relates to the information it coveys about the endogenous risk faced by the investment type.

2. Endogenous Risk in Factoring Legal Receivables

The type of risk endogenous to the conventional factoring of legal fees actually earned by an attorney is the risk that the money owned by the factor will not come into his possession when he anticipated it would or that it never comes into his possession at all. This focus on the risk of non-possession is based on an analysis of the structure and economics of the factoring transaction. Where possession comes later than anticipated, the possession risk is one of *delay*, and the cost is the time-value of money. Where possession never comes at all, the risk is to *the whole transaction* and the cost is the entire investment and its time-value. The first kind of risk of non-possession is what most people think about when they try to understand why there is any money to be made in factoring. In a conventional factoring transaction, even if the factor is confident that he will receive the money owned by the counterparty; the factor cannot be rationally confident about the time of delivery.[28]

In my opinion, however, it is a mistake to assume that the only risk of non-possession is delay in possession. There is always additional non-possession risk arising from the factor never coming into possession of the money that he bought from the counterparty. This opinion calls the risk of permanent non-possession "possession risk." In conventional factoring involving earned *hourly* fees, possession risk is the risk faced by the factor that the counterparty's client

[28] *See* Goral, *Justice Dealers*, at 130 ("Since the legal disputes suitable for post-settlement funding have already been finally resolved, the funder advances money against proceeds which by then are earned but not yet satisfied by the losing party, at a discount commensurate with the risk that they will not be paid on time.").

will not deliver to the factor payment upon presentation of a verified invoice. In conventional factoring involving earned *contingent* fees, possession risk is the risk faced by the factor that the counterparty or the adverse party sued by the counterparty will not deliver to the factor payment upon presentation of an enforceable settlement agreement or judgment resulting from a proceeding in which the adverse party has appeared and contested the counterparty's suit (as opposed to a default judgment[29]). In both cases, the most important endogenous risk faced by an investor who chooses to factor earned attorney's fees (after the risk of delay in possession) comes from the failure of transfer of money to which the factor clearly has title.[30] In general, possession risk is low: that is why factoring contracts are usually priced at a small discount to the face value of the accounts receivables purchased, even in legal fees receivables factoring.[31]

Possession risk is itself a product of identifiable sub-risks that combine together to make possession more or less likely. These sub-risks comprising possession risk include theft, insolvency, and completion risk.

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[29] The risk of collection on default judgments is distinguishable from judgments in which a party appeared to contest the suit. *See* discussion *infra* Section V.A.3.a. *See also supra* note 10.

[30] As one commentator described it:

> The proceeds of a finally resolved case owed to the plaintiff (and from the plaintiff to her lawyer under the contingency fee agreement) become bookable assets - accounts receivable. They are . . . assigned to the financier for collection purposes, usually with a full, subsidiary recourse (in case the defendant fails to make good on the award or settlement, the financier has the right to demand payment from the plaintiff) . . . .

Goral, *Justice Dealers*, at 130 n.107.

[31] *See Houston Lighting,* 101 S.W.3d at 636 ("Factoring is a process by which a business sells to another business, *at a small discount*, its right to collect money before the money is paid." (emphasis added)); Goral, *Justice Dealers*, at 130 (describing legal receivables factoring as "a special kind of bridge financing").

a. Theft and Insolvency Risks to Possession

The first of these risks is theft: the risk that the party in possession of the money to which the factor has title will illegally refuse to allow the factor to take possession. Risk of theft is not insignificant. A counterparty may sell their accounts receivables to more than one factor.[32] It is also possible that the counterparty holding the proceeds of a settlement or judgment in a client escrow account steals all or part of the funds. Finally, it is possible that the counterparty's account debtor (the client) will successfully steal the money owned by the factor.[33]

The second sub-risk is insolvency: the risk that the party in possession of the money to which the factor has title lacks assets. The risk of insolvency of an account debtor (i.e., a client with an ongoing hourly or fixed fee agreement with the counterparty) or a settlement or judgment debtor (i.e., the adverse party in litigation with the client) is not insignificant and something for which the factor may underwrite using various tools, including research into the financial situation of the counterparty's client.[34] In addition, in cases involving the factoring of earned contingent fees, the factor's ability to evaluate the debtor's creditworthiness is much higher than in most cases of litigation finance, since the time between the purchase of the fee and point of possession is compressed compared with pre-settlement or pre-judgment investment.[35]

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[32] *See U.S. Claims, Inc.*, 519 F. Supp. 2d 515. The counterparty allegedly sold the same asset twice, which is theft by fraud.

[33] In most contingent fee cases, the recovery is deposited in an escrow account controlled by the attorney.

[34] The factor's one advantage during insolvency is the bankruptcy protection that a UCC filing may provide against unsecured creditors, since the proceeds of a judgment (including the proceeds of a judgment that comprise earned attorney's fees) are property of the counterparty (and her attorney) and not the bankruptcy estate.

[35] *See* Goral, *Justice Dealers*, at 130-31 (factoring involves little uncertainty, because the only risk that "remains is the counterparty risk (the chance that the defendant will default), although cases where the depth of the defendant's pockets is in serious question are not very likely to be financed.").

b. Completion Risk

A third sub-risk is "failure to complete": the risk that the party in possession of the money to which the factor has title does not transfer the money due to the counterparty's failure to complete all the steps which would make possession possible. This opinion will refer to this as "completion risk." Completion risk is a risk that a factor must consider regardless of whether the attorney's proceeds arise post-settlement or post-judgment.

i. Completion Risks in Certain Post-Judgment Matters

Completion risk post-judgment (in instances after a trial or a contested dispositive motion[36]) is extremely low since the adverse party has already accepted jurisdiction and has cooperated with the attorney to the extent that it has made pre-trial and (in cases that go that far) trial appearances. For example, the adverse party may either refuse to satisfy the judgment, in which case the attorney has to take additional steps relating to enforcement (attachment, sheriff sale, etc.), or that there may be multiple judgments against the adverse party and the attorney must rush to complete the case before bankruptcy is declared.[37] Yet the burdens of enforcement that determine the completion risk endogenous to a factoring contract *post-judgment* are relatively minimal where the judgment arises from adjudication. This is because the party has appeared and availed itself of the judicial process, typically an indicator that there is an ability and incentive to pay a lawfully rendered judgment.[38]

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[36] Assuming appellate rights are exhausted and the adverse party has an incentive to pay, as discussed *infra* note 68.

[37] This is the situation that faced the attorneys who successfully won trial judgments against A.H. Robins before it declared bankruptcy. *See A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 996 (4th Cir. 1986) ("Prior to the filing, a number of suits had been tried and, while Robins had prevailed in some of the actions, judgments in large and burdensome amounts had been recovered in others.").

[38] *See infra* note 68 discussing incentives of parties to pay judgments.

On the other hand, as will be discussed in detail below in Section VI, completion risk is relatively high post-default judgment where there has been no appearance by the adverse party. In that case, the endogenous completion risk is not speculative or prospective—the adverse party has refused to participate in the judicial process, perhaps because it rejects the court's jurisdiction, is judgment proof, or is otherwise avoiding enforcement (e.g., dissipating assets). In some cases—such as the *Peterson* case that is part of the Division of Enforcement's complaint against RDLC[39]—the burdens of enforcement are so high that the completion risk faced by the plaintiff attorney cannot be compared to the completion risks faced by attorney who factored their legal fees after obtaining a settlement or winning a trial. It would be like comparing apples and oranges. When the completion risk in a default judgment becomes as high as it was at certain points in *Peterson,* the investment risk in the attorney's fee is similar to the investment risks in pre-settlement or pre-judgment litigations. In other words, when the completion risk in a default judgment becomes as high as it was at certain points in *Peterson,* the investment risk looks more like the risk found in litigation finance, as opposed to factoring.

ii. Completion Risks in Post-Settlement Factoring With Few or No Conditions

In contrast to the completion risk faced by an investor in default judgments, completion risk in post-settlement factoring is extremely low because (i) a factor, by definition, can more definitively ascertain "the quality and value" of the legal claim upon which the counterparty's proceeds depend,[40] and (ii) the adverse party has already accepted jurisdiction and has cooperated with the attorney by entering into a settlement agreement. But the completion risk is

[39] The "*Peterson* case" refers to the litigation against Iran described in the Order Instituting Administrative Proceedings, File No. 3-17342, ¶ 21 n.1, culminating in the Supreme Court's decision in *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

[40] *Id.*

not zero: A court's approval of a settlement may include conditions subsequent.[41] Furthermore, some post-settlement factoring occurs before court approval if there is a memorandum of understanding ("MOU") between the counterparty and the adverse party.[42] Since the proceeds of an earned fee are not created until the "conclusion of [a] suit," a factor's right to possession is subject to actions subsequent to a settlement (or a judgment) that would defeat or reduce the counterparty attorney's right to the proceeds purchased by the factor.[43]

Completion risk is lowest in factoring involving attorney's fees that are purchased after the parties have received court approval for their settlement. In court approved settlements, all of the parties are motivated to see that conditions subsequent—even those outside of their control, as in *Cadle Co. v. Schlichtmann*, 267 F.3d 14 (1st Cir. 2001)—are fulfilled. The risk is only marginally higher in settlements awaiting court approval since a court may find the terms of the settlement inadequate or may find fault with the performance of those terms. Finally, while it is theoretically true that attorneys are subject to disciplinary and malpractice complaints by dissatisfied clients after having secured proceeds for them through a settlement, such complaints

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41 This happened in *Cadle Co. v. Schlichtmann*, where a buyer took possession of contingent fees that were earned by an attorney in a case that was settled for $825,000 "with distribution subject to the settlement's approval by the Massachusetts Department of Environmental Protection." 267 F.3d 14 (1st Cir. 2001). In a subsequent action to take possession of the contingent fee, the court held that, at the date of the settlement, the buyer had an equitable ownership interest in the fee that became a right to the proceeds upon the approval of the settlement's terms by the Massachusetts Department of Environmental Protection. *Id.*

42 *See, e.g.*, *RDLF Fin. Servs., LLC v. Esquire Capital Corp.*, 34 Misc. 3d 1235(A), 2012 N.Y. Misc. LEXIS 914 (Sup. Ct. N.Y. County 2012). In this case, the purchaser purchased contingent fees that were earned by an attorney in a case settled for "the prospective sum of $607,500." *Id.* at *4. The settlement had not yet been approved by the court, and when it was, the court approved the settlement for $506,659.

43 *See Marsh, Day & Calhoun v. Solomon*, 204 Conn. 639, 643 (1987) (an attorney's right to a fee is protected by a "charging lien, which is a lien placed upon any money recovery or fund due the client *at the conclusion of suit*" (emphasis added)). Such actions might include, for example, a claim by the counterparty's client that the fee was not earned fully (or at all) because it was excessive or because of other malpractice.

are very rare (since clients who receive proceeds are often grateful) and, even if they occur, they are unlikely to succeed (because the claim relies on proving that the attorney could have secured even more for the client, or could have secured the same result for a lower fee).

iii. Completion Risks in Default Judgments and Settlements with Many Conditions

Under conditions where completion requires significant attorney legal services, such as in a default judgment or a settlement where the conditions subsequent are complex and might take years to resolve, the contract becomes much riskier. The additional quantum of complexity introduces additional uncertainty of outcome—since it is harder to be confident that a settlement will be approved if there are multiple conditions subsequent requiring multiple stages of judicial and third party approval. The more work that must be done by the counterparty attorney after a factoring contract is signed, the more it looks like pre-settlement legal investment, or litigation finance, and less like conventional factoring. Calling such a transaction "factoring" would be placing form over substance.

The following is a simple illustration of the point made in the previous paragraph. In *Cadle*, a debt buying firm, Cadle, took possession of an attorney's earned fee because it purchased debt from a bank that held a secured interest in the attorney's contingent fee, which became the bank's property after the attorney's law firm went bankrupt. When Cadle bought the debt, the case out of which the fee would be earned had settled but was awaiting a condition subsequent to be satisfied, which happened four years later.[44]

One could imagine the facts of *Cadle* altered in the following way. Cadle could have simply bought the contingent fee from the attorney in 1991, when the underlying case settled and

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[44] The question in *Cadle* was whether the entire fee earned by the attorney was property owned by Cadle, even though some of the fee was earned after the attorney began work on his own post-bankruptcy. The answer was yes. *See Cadle*, 267 F.3d at 21.

the attorney reasonably believed that his fee would be 32% of $825,000—the amount that was placed into escrow as required by the court, which also required a condition subsequent to be satisfied for the case to be "complete." Had Cadle done so, it would have engaged in a transaction that faced certain completion risks. The condition subsequent—approval of a clean-up by a state agency that was not a party to the litigation—occurred in 1995. In the intervening four years, according to the court records, the attorney put significant new work into the case to secure the condition subsequent. To describe the hypothetical 1991 transaction as "post-settlement factoring" puts form over substance and would inaccurately describe the risks of the hypothetical transaction. The transaction would have involved the payment of money to an attorney where the parties knew, when the funding occurred, that the case required significant additional legal work despite the existence of a court-approved settlement. The money paid to the attorney by Cadle would likely have been used to secure the completion of the case on behalf of the attorney's client. Therefore, the attorney had not yet fully earned his fee when he took the money from Cadle, because at the time of the transaction more work had to be done, comprising part of his fee. As such, the fee would not come into existence as proceeds until many years after the settlement and after the attorney's work had been completed.[45] In other words, the

[45] For this reason, one ethics committee took the position that it is *per se* unethical for an attorney to factor her contingent fees:

> Delay between reaching a settlement agreement and the payment of the settlement funds is not justification for a lawyer selling his or her legal fee to obtain immediate cash. Delay is part of the process. Attorneys and clients should be well aware that money does not appear like magic upon reaching a settlement agreement.
>
> *A lawyer's legal representation of the client does not end upon reaching a settlement agreement, but continues from settlement agreement through the time of receiving and disbursing the settlement money.* A lot can happen in that interval. As one example, settlement agreements requiring court approval always carry uncertainty as to whether approval will be forthcoming from the court. Until the money agreed upon in the settlement is paid and disbursed, the attorney has not completed his or her legal representation of the client.

hypothetical transaction between Cadle and the attorney would be a classic example of litigation finance.

In this hypothetical, the fact that Cadle gave the money only after a court-ordered settlement had been obtained is irrelevant to the correct description of the investment type: it would be inaccurate to describe the hypothetical transaction as factoring the attorney's accounts receivables for two reasons. First, when the completion risk of a transaction becomes too large, the transaction can no longer be called factoring, even if it occurs after a settlement or a judgment. And second, factoring necessarily implies that a fee has been fully earned; as such, the hypothetical transaction cannot be described as factoring because when the investor paid the attorney, the fees had not been fully earned.

V. Expert Opinions

This part of my report states RDLC inaccurately described the litigation investments in which it was expending funds as factoring legal fees when a significant portion of its transactions with attorneys was not factoring. Further, RDLC inaccurately represented the degree of possession risk it faced in its transactions with attorneys by omitting any discussion of the completion risk endogenous to the type of investment in which a significant portion of their investments were made, namely, the purchase of contract rights to unearned contingent fees arising from a default judgment as well as the funding of lawyers involved in a criminal action, a *qui tam* action, and unsettled multi-district mass tort litigation.

Advisory Opinion, Ohio Supreme Court's Board of Commissioners on Grievances and Discipline, Opinion 2004-2 (emphasis added).

A. Describing the Funds as Factoring Legal Receivables Derived from Settlements and Judgments Failed to Capture Significant Risks Endogenous to Many of the Funds' Investments

1. RDLC Financed Pre-Settlement and Pre-Judgment Cases

RDLC says that it is the only "significant sized, SEC registered entity . . . with a 'post settlement' strategy."[46] RDLC defines itself in contrast to firms that invest in litigation prior to settlement and judgment. In plain English, RDLC says that it does factoring and that the "other firms" do litigation finance. The statement that "[t]here are entities that lend money to contingency fee attorneys, but they take litigation risk, which we don't," draws a distinction between RDLC and firms like Burford, LawCash, and Bentham IMF—firms that explicitly take on litigation risk as part of their investment strategy because they invest in litigation before it has been resolved by settlement or judgment.[47]

In my opinion, RDLC's transactions with certain law firms that were involved in mass torts and *qui tam* actions were pre-settlement, litigation finance transactions that are indistinguishable from transactions that are typically conducted by firms that "take litigation risk," like Burford, LawCash, and Bentham. In other words, RDLC took litigation risk in its positions in the Funds.

For example, since 2005, RDLC has engaged in pre-settlement litigation funding with attorneys who were counsel in litigation relating to the class of drugs known as bisphosphonates manufactured and sold under the brand names "Aredia" and "Zometa" by Novartis, "Fosamax"

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46 January 2013 Frequently Asked Questions Document ("FAQ") at p. 3; *and see* June 2014 Due Diligence Questionnaire ("DDQ") at p. 9 ("We have not identified any other registered entities that traffic solely in post-settlement legal fee receivables.").

47 June 2014 DDQ at p. 9.

by Merck, and "Actonel" by Procter & Gamble/Sanofi-Aventis.[48] Based on documents I re-reviewed, it appears that between 2007 and 2014, RDLC advanced millions of dollars to counsel in these cases to fund the ongoing litigation.[49] The cases were in a classic "pre-settlement" posture through at approximately 2014.[50]

In addition, in 2009, RDLC "purchased" $4.2 million in unearned contingent fees from attorneys representing a relator in a *qui tam* action in the Southern District of Florida.[51] Apparently, the *qui tam* action had both criminal and civil components, and the attorneys represented to RDLC that their fee would total at least $4.2 million and perhaps "in excess" of $5.8 million.[52] At that time, the attorneys had not yet earned their fee (because the relator award had not been determined), the civil portion of the action had not yet been settled, and any final settlement would be subject to additional negotiations with the Justice Department. The cases upon which the attorney's fees would be derived were in a classic "pre-settlement" posture and, as such, were subject to litigation risk distinguishable from the completion risks endogenous to settled cases.

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48 *See also* Verified Complaint For Injunctive and Other Relief, *RD Legal Funding Partners, LP v. Mel Powell, et al.*, No. 14-cv-7983 (FSH-MAH) (D.N.J. Dec. 23, 2014), at ¶ 12 (hereinafter, "Powell Complaint").

49 *See* Attachment to Nov. 6, 2013 Email from Philip Larochelle to Eric Liu, RDLC-SEC 313840 (showing the sum of the "Purchase Price" to counsel between 2007 and 2013 exceeding $11 million).

50 *See* Powell Complaint at 17-18; Jan. 12, 2017 Deposition of Daniel A. Osborn at 56:7-58:5 (describing timeline leading to Novartis settlement).

51 *See* Complaint, *RD Legal Funding, LLC v. Barry A Cohen, P.A., et al.*, No. 13-cv-077 (JLL-MAH) (D.N.J. Jan. 3, 2013), at ¶ 39.

52 *Id.* at ¶ 44.

2. Through Early 2013, RDLC Inaccurately Conveyed That It Factored Only Settlements

As discussed below, the Offering Memoranda (i.e., the various Confidential Private Offering Memoranda) and Marketing Documents (e.g., Frequently Asked Question ("FAQs"), Due Diligence Questionnaires ("DDQs"), and other marketing presentations used in connection with offerings to investors) utilized by RDLC and Mr. Dersovitz between 2010 and early 2013 to solicit investors for the Funds convey that the Funds had factored only receivables arising from settlements and, beginning sometime in 2013, judgments. In my opinion, statements by RDLC through early 2013 that the Funds only factored settlements or receivables derived from settled cases were not accurate.

As stated above in Section IV.B.3, "post-settlement" investing is not a type of litigation investment; it is an indication of the investment type called "factoring."[53] In testimony, Mr. Dersovitz stated that RDLC's investment strategy was built on one investment type, i.e., factoring:

> What do we do? We factor legal fees. . . . [I]t doesn't matter to me how a legal fee comes about. That's the point that I was making earlier. *It merely needs to be demonstrated and collectible and predictable to some extent in terms of how long it will take.*[54]

The Offering Memoranda in the Funds between 2007 and 2014 purport to tell investors about the Funds' investment goals and strategies. Beginning in 2007, the Offering Memoranda describe the Funds' strategy as based on three different types of investment: "Legal Fee

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[53] This is because post-settlement purchases of attorney's fees are only one type of factoring legal proceeds. It does not include, for example, factoring earned hourly and fixed legal fees.

[54] Mar. 15, 2016 Testimony of Roni Dersovitz, at 528:12-18. *See also id.* at 491:12-13 ("At the end of the day, we factor legal fees.").

Factoring," "Credit Lines," and "Other Advances to Law Firms." I will discuss only "Legal Fee Factoring," which, according to RDLC, comprised the bulk of the capital invested by RDLC.[55]

Between 2007 and 2013, the Offering Memoranda defined "legal fee factoring" (or "Factoring Transaction") in the section entitled "Investment Strategy."[56] The text's description of factoring was conventional: the sale by a seller (e.g., an attorney) of its rights to payment, known as receivables, from a third party, known as a debtor, to a buyer (e.g., the Funds).[57] It is identical to the definition of factoring provided in Section IV.B.3, *supra.* The term "receivable" (in the context of the legal fee factoring) is defined by the Offering Memoranda. A "Legal Fee Receivable" is the purchase of "accounts receivables representing legal fees derived by the Law Firms from litigation, judgments and settlements."[58]

The phrase "litigation, judgments and settlements" requires parsing, since it appears, at first glance, to fail the basic tenet of legal drafting that no definition should contain surplusage.[59] Before a court can issue a judgment or approve a settlement, it must have before it a cause of action. The act of preparing and filing a cause of action for a client is "litigation." Therefore, attorney's fees earned as a result of a judgment or settlement are inherently earned by litigation. Fees "derived" from a judgment or a settlement are, by definition, derived from litigation.

To rescue the definition of a Legal Fee Receivable in the Offering Memoranda from surplusage, it would be necessary to impute a non-standard use of the word "litigation."

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55 *E.g.*, April 2011 DDQ at 10-11 (stating that approximately 95% of the Fund is invested in the factoring of legal fee receivables).

56 *E.g.*, April 2012 Confidential Private Offering Memorandum ("POM") for RD Legal Funding Partners, LP at 8-12.

57 *Id.* at 8-9.

58 *Id.* at 7.

59 *See generally, e.g., JA Apparel Corp. v. Abboud*, 568 F.3d 390, 408 (2d Cir. 2009) (on the "the rule against surplusage").

Judgments and settlements result in judicial orders resolving the cause of actions (i.e., the litiga-litigations) before the court. In a non-standard context, "litigation" may refer to legal services performed on behalf of the client that are not calculated to result in a *judicial* order. Such services might include representing a client in a compensation program, communicating with a liability insurer, or communicating with a potential adverse party in order to avoid filing a case.[60] In my opinion, however, this is an awkward and non-standard understanding of the words "litigation," "judgment," and "settlement." Although the use of the words "litigation," "judgment," and "settlement" in the definition of Legal Fee Receivable does not expressly contradict standard usage, it is confusing, and as such, is incomplete without further elaboration in the Offering Memoranda.

Further elaboration is provided in the explanation of "Legal Fee Factoring" in the Investment Strategy section of the Offering Memoranda. Between 2007 and 2012, the Offering Memoranda state that "[a]ll of the legal receivables purchased by the Partnership arise out of litigation in which a binding settlement agreement or memorandum of understanding among the parties has been reached."[61] This sentence, read in conjunction with the definition of Legal Fee Receivable provided earlier in the Offering Memoranda, communicates to the investor that the Funds, while capable of investing in (i) attorney receivables that are derived from legal services related to representation not intended to result in a cause of action or (ii) legal services related to representation intended to secure judgments, are, for all material purposes, in fact investing in attorney receivables related to representation where a settlement has been secured.

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[60] One possible purpose for adding the word 'litigation' in this context was to convey to the investor that legal fee factoring may involve the purchase of accounts receivables arising from hourly or fixed fee retainer agreements and not only contingent fee agreements, since it is more likely (but by no means necessary) that attorneys would be retained to handle legal matters *not intended* to result in the filing of a case under a contract involving an hourly or fixed fee.

[61] April 2012 POM at 9.

In other words, the purpose of the definition of Legal Fee Receivable at the beginning of the section describing the Funds' investment strategy is to define in what the Funds *could* invest, while the text that comes later in the same section informs the investor in what the Funds *have* invested. This reading of the structure of the section of the Offering Document entitled "Investment Program" is supported by the fact that the description of the types of legal receivables in which the Funds have invested is significantly different after 2012.

In 2013, the Offering Memoranda mention, for the first time, that the Funds' investment goals include investments in receivables that are *not* attorney receivables. In the introductory section titled "Investment Objective and Strategy," the Offering Memoranda state that the Funds will invest in "accounts receivable representing the plaintiff's portion of proceeds arising from final judgment awards or settlements."[62] In this section, the Offering Memoranda define the term "Plaintiff Receivables" in parallel with the already-existing defined term Legal Fee Receivable, the definition of which remains identical to the definition employed in 2007–2012.

Later in the section on Investment Strategy, the section that was once titled "Legal Fee Factoring" is now titled "Legal Fee Receivables and Plaintiff Receivables Factoring."[63] The section states that "all of the Receivables" in which the Funds are investing "arise from litigation in which a binding settlement agreement or memorandum of understanding among the parties has been reached, *or a judgment has been entered against a judgment debtor*" (emphasis added). This sentence implies that, in contrast to the statements made for the identical purpose in the Offering Memoranda in 2007-2012, the investor is being informed that the Receivables in which the Funds are investing include proceeds derived from a judgment.

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62 June 2013 POM for RD Legal Funding Partners, LP at 7.

63 *Id.* at 9.

Since the defined term "Receivables" in the 2013 Offering Memoranda includes both Plaintiff Receivables and Legal Fee Receivables, it is possible that the text conveys to the investor that the Funds have begun to invest in two different receivables: attorneys' and plaintiffs'. It does not clearly state that both of these receivables are derived from judgments; it is possible that its meaning is that only plaintiffs' receivables are derived from judgments and attorneys receivables are still derived only from settlements. This reading would be consistent with the fact that the Offering Memoranda in 2013 adopted for its definition of Legal Fee Receivable (fees derived from litigation, judgments and settlements) the same terms it has used since 2007—a definition that, as explained above, was offered in conjunction with the statement that RDLC only factors fees arising from settlements.

When the Marketing Documents refer to "legal fee factoring" or the factoring of "Legal Fee receivables," they only refer to settlements as the source of the attorney's fees that are purchased by RDLC for its Funds. For example, in a 2013 FAQ, RDLC stated that "the primary strategy employed is one in which receivables arising from *settled lawsuits* are purchased at a discount."[64] In a 2011 Due Diligence questionnaire, RDLC defined factoring as "fee acceleration" and then made the following statement: "A fee acceleration investment is the purchase of a legal fee at a discount from a law firm, *once a settlement has been reached* and the legal fee is earned."[65] This statement conveys that RDLC only factors fees derived from settlements. It also conveys that it factors fees that have been "fully earned," something which, as I will explain in the next section, is not true in the case of the default judgments in which RDLC invested.

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64 January 2013 FAQ at p. 1 (emphasis added) (no other strategy is mentioned).

65 December 2010 DDQ at p. 11 (emphasis added) (the face of the document bears the date December 2010, but the document properties reveal that it was created on March 31, 2011).

In my opinion,[66] the Offering Memoranda through early 2013, when read in their entirety in connection with, or independently of, the Marketing Documents, convey the meaning that the Funds were only investing in attorney's fees derived from settlements. This statement is not accurate because, since 2010, the Funds had invested in legal fee receivables arising from the *Peterson* case, which was a case involving a default judgment, not a settlement and, in addition, the Funds were invested in the pre-settlement pharmaceutical and *qui tam* actions described in Section V.A.1. Logically, if the fact that the Funds were beginning to invest in "judgments" was significant and worth an explicit notation when the Funds began to invest in plaintiffs' receivables arising from default judgments in 2013, the Offering Memoranda should have attached the same significance—and made the same explicit notation—when the Funds invested in the attorneys' legal fee receivables arising from the *Peterson* default judgments in 2010.

3. RDLC Inaccurately Described the Possession Risk Endogenous to Litigation Investment in Attorney's Fees Derived from Default Judgments

a. RDLC's Statements That Settlements and Judgments Are Interchangeable Proxies For Possession Risk Are Incorrect

RDLC has taken the position that the investment risks endogenous in legal fee receivables arising from settlements are the same as those arising from judgments and so the terms can be used interchangeably:

> Q: Let me ask you a clarifier. What you described as judgments, were you including that in the -- in your definition of settlements?
>
> THE WITNESS: .... Yes... Settlements and/or judgments are subject to the final approval. Whether it be of the settlement or of the turnover we discount the

[66] I understand that RDLC and Mr. Dersovitz did not produce privileged communications concerning the Offering Memoranda. I was unable to consider the effect, if any, of such communications in this opinion. As such, my opinion is based on the construction of the versions of such documents provided to investors.

process. And with an understanding in both instances that there is inherent risk of failure.[67]

In my opinion, the terms "settlements" and "judgments" are not interchangeable in the context of RDLC's description of its investment strategy. As explained in Section IV.B, the statements concerning investment strategy inform the reader or listener of the types of litigation investment that the Funds either have made or plan to make. Terms such as "litigation finance," "lending," and "factoring" communicate important information about endogenous risks borne by the investor. A statement about the type of legal outcome (e.g., settlement vs. judgment) underlying the type of legal investment pursued (e.g., litigation financing vs. factoring) is not a substitute for a statement about the type of legal investments that comprise an investment strategy. A statement about the type of legal outcome underlying the type of legal investment pursued may illustrate the strategy adopted by the investor for weighing the various sub-risks that comprise the risk endogenous to a type of legal investment. If, however, a legal outcome presents sub-risks that are atypical of the type of legal investment to which it purportedly belongs, then the speaker is mislabeling the investment by failing to note that they are using legal investment terminology in a non-standard manner.

The terms "settlements" and "judgments" may be interchangeable when communicating the degree of possession risk faced by a factor where the sub-risks comprising each are similar, such as in the case where the judgment is a result of adjudication against a party with the ability and incentive to pay a lawfully issued judgment.[68] "Adjudication" refers to a court order

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[67] Mar. 15, 2016 Testimony of Roni Dersovitz at 425:17-22.

[68] By way of illustration, an unappealable judgment lawfully issued against McDonald's as a result of adjudication is likely to be satisfied by the judgment debtor, which has the ability to pay and every incentive to obey the ruling of the court in order to retain access to the courts and markets, avoid costly and disruptive judgment enforcement efforts, and avoid reputational harm.

following either a trial or a dispositive motion where the adverse party has accepted the court's jurisdiction and attempted to defend against the claim or otherwise respond to them in good faith. The reasons for the similarity between a settlement approved by a court and a judgment resulting from such adjudication are easy to see: in both types of legal outcomes "the quality and value of legal claims has already been ascertained" by the time the factor makes the investment.[69] The similarity between a settlement not yet approved by a court and a judgment resulting from adjudication may be less that than the similarity between a settlement approved by a court and a judgment resulting from adjudication, but these differences are of degree and not kind.[70]

But, as explained above in Section IV.C.2.b.iii, there comes a point where the possession risk of a default judgment, like that of certain settlements, is so great that it is misleading to treat an investment in the fees arising from it as factoring (as opposed to litigation financing), and, more to the point, it is inaccurate to say that its possession risk is represented by reference to "settlements" in general. Default judgments typically present a very different kind of possession risk than judgments resulting from adjudication or settlement. This is why, for example, the market in default judgments is characterized by much higher discounts than the market in the factoring of legal fees or proceeds arising from settlement.[71] The *Peterson* case, while unusual in some ways, presents an investment opportunity based on the possession of legal fees arising

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The ability to pay and these incentives may be lacking on the part of default judgment debtors. *See also supra* discussion in Section IV.C.2.b.

69 Goral, *Justice Dealers*, at 130.

70 See the discussion of the factoring of legal proceeds post-settlement where there is an MOU, not court approval, in Section IV.3, *supra.*

71 There are few opportunities for investment in either legal fees or proceeds arising from judgment for various reasons. Perhaps most significant is that there is no market: the share of cases resolved through adjudication the plaintiff's favor is much smaller than the share of cases resolved by settlement or default judgment. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994) (referring to research indicating that seventy-eight percent of surveyed cases ended in settlement).

from a default judgment. In my opinion, it is inaccurate to use the term "settlement" to represent the possession risk posed by *Peterson* to RDLC, or even the term "judgment" without qualifying it as a default judgment subject to multiple completion risks, including most significantly, the failure of the turnover litigation.

b. Default Judgments Face High Completion Risk

A client who retains an attorney on a conditional fee agreement retains the attorney to competently represent him until the completion of the matter. This means that the attorney does not have rights to the proceeds produced by the representation on behalf of the client until the representation is completed. Obviously, *completion* of representation can only be stated with confidence once the client has obtained his ends, which in the case of legal representation to obtain compensation, is the client taking possession of the recovery.[72]

Possession risk in a factoring contract for contingent fees reflects the completion risk faced by the attorney. In some cases, e.g., most settlements and judgments by adjudication, the completion risk will be low. However, *relative to the completion risk typical to settlements and judgments by adjudication*, the completion risk faced by attorneys in default judgments is significantly higher. It is similar to the completion risk faced by the attorney in the *Cadle Co.* hypothetical discussed in Section IV.C.2.b.iii, *supra.*

Completion risk is much higher in investments in attorney's fees arising from default judgments than in investments in attorney's fees arising from settlements primarily because the cost of enforcement is high or the likelihood of successful enforcement is low (and sometimes

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[72] *See Collins v. Shayne*, 1978 Ohio App. LEXIS 10249, at *9 (Ct. App. Dec. 28, 1978) ("Clearly, no right to a fee exists, unless and until the work is satisfactorily concluded . . ."); Advisory Opinion, Ohio Supreme Court's Board of Commissioners on Grievances and Discipline, Opinion 2004-2 ("Until the money . . . is paid and disbursed, the attorney has not completed his or her legal representation of the client.").

both). In both settlements and judgments resulting from adjudication, the enforcement cost is low relative to default judgments, and the likelihood for success is relatively higher. In a settlement, the adverse party expressed a subjective intention to cooperate with the attorney's client; thus, the likelihood of completion is high. On the other hand, the adverse party in a default judgment often expressed no subjective intentions at all, and, if they did, the intentions are to reject cooperation with the court or the client, as demonstrated by a rejection of jurisdiction.[73]

As noted by RDLC, since there is no point for the adverse party to spend money (his own lawyers' legal fees) on settlement negotiation unless there was reason to believe that there were funds sufficient to satisfy the amount agreed upon in the settlement, there is a good chance that enforcement of the settlement will require minimal additional legal activity by the attorney who has sold her accounts receivables.[74] The opposite is the case in default judgments. If the reason the adverse party has defaulted is that they were not aware of the suit, then the attorney for a party who has secured a default judgment will have to perform additional legal services to locate and enforce the judgment against the adverse party. If the reason the default party has defaulted

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[73] Mr. Dersovitz denied that the subjective intent manifested by settling parties is relevant to his evaluation of possession risk:

> Q: So in the context of settlements . . . you have two parties reaching an agreement and that gives you some comfort?
>
> A: I take no comfort . . . because that's irrelevant. The difference between a settlement and a judgment, in a settlement you have two counterparties that have come to terms. In a judgment you've effectively got a judgment debtor who says, Find the money if you can. And the creditor says, Got you.

Mar. 15, 2016 Dersovitz Tr. at 434:24–435:8. This statement is incorrect in at least one respect: An attorney cannot honestly represent to a factor that she has completed the case from which her fee will be derived if (i) the adverse party is saying "Find the money if you can," and (ii) if the attorney, should she find the money, must commence proceedings to obtain the money.

[74] *See, e.g.*, July 2013 Alpha Generation Presentation at p. 12 ("Defendants have no incentive to settle if they cannot make payment.").

is that they reject jurisdiction or believe that they can avoid enforcement through additional litigation, then the attorney for a party who has secured a default judgment knows that the bulk of the legal services for which they have been retained will occur after the default judgment is obtained. Therefore, in my opinion, the completion risk to a factor who buys a contingent fee deriving from a default judgment cannot be compared to the completion risk to a factor who buys a contingent fee deriving from a settlement or MOU.

The possession risk endogenous to RDLC's investment in attorney's fees (as opposed to plaintiffs' judgments) arising from the *Peterson* case is similar to the completion risks faced by the attorneys themselves. These completion risks, i.e., those faced by an attorney in a case in which the legal services provided to the client necessarily involves the enforcement of a default judgment against a foreign government that is hostile to the United States, is illustrated in *Jacobson v. Oliver.*[75] In *Jacobson*, an attorney was retained in 1992 by a client to sue the Republic of Iran for damages resulting from acts of terrorism. In 1998, the attorney secured a default judgment which was not enforceable until Congress passed the Victims of Trafficking and Violence Protection Act of 2000.[76] The client dismissed the attorney in 2000, and in 2006, the client sued the attorney in malpractice and asked to have the attorney's lien on his award set aside.[77] The client's arguments for malpractice included the claim that the contingent fee agreement was unreasonable because of changed circumstances—where it may have been reasonable for the attorney to have anticipated that a reasonable fee for the litigation was 35% in 1992, it was no longer reasonable in 1998 because "Iran's decision not to appear . . . rendered the

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[75] 555 F. Supp. 2d 72 (D.D.C. 2008).

[76] *Id.* at 76.

[77] *Id.*

agreement unreasonable because it drastically reduced the amount of work required of defend-defendant."[78]

The court rejected the client's argument because the attorney proved that the enforcement of the default judgment required significant additional legal work and that the work performed after the default judgment contributed to the completion of the legal representation of the client.[79] The court observed that, at the point at which the default judgment had been obtained, the risk that the attorney would receive no proceeds from the case were high.[80] *Jacobson* illustrates that the completion risk faced by an attorney in a default judgment case with a foreign adverse party that rejects jurisdiction is equivalent to the risk faced by an attorney at the outset of litigation. In other words, for an investor seeking to invest in proceeds arising from the enforcement of a default judgment in a case like *Jacobson*, it is more accurate to say that the possession risk was similar to that of pre-settlement litigation finance rather than post-settlement factoring.

When RDLC made its initial investment in the *Peterson* case, the completion risk faced by the attorneys whose fees it "purchased" was qualitatively similar to the completion risk faced by the attorney in *Jacobson* at the point that the court in *Jacobson* deemed such risk to be high. From 2010 until August 2012—when Congress passed the "Iran Threat Reduction and Syria Human Rights Act of 2012"—the completion risk faced by the attorneys in *Peterson* paralleled the completion risk faced by the attorneys in *Jacobson* between 1998 and 2000 (which is when

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78 *Id.* at 84.

79 *Id.* at 86.

80 *Id.*

the Victims of Trafficking and Violence Protection Act of 2000 was passed by Congress). The *Jacobson* court judged the completion risk to be "consistently and invariably high."[81]

In my opinion, there is no point in speculating when, if ever, the completion risk in *Peterson* decreased to the point where it would be accurate to use the word "settlement" to characterize the completion risk faced by the attorneys in *Peterson.* No reasonable person would have said that an investment in the contingent attorney's fees arising from *Peterson* possessed the same completion risk as such fees arising from a settlement in 2008 (when the default judgment was entered in the case). RDLC's and Mr. Dersovitz's contention that the contingent attorney's fees arising from *Peterson* possessed the same completion risk as a settlement in 2010, when a turnover action was filed by the attorneys, is not accurate in my opinion. RDLC's same statements in 2011, despite no further developments in the case, were also inaccurate. RDLC made the same statement in June 2012, when the only new development was an executive action by President Obama that blocked the movement of assets allegedly subject to enforcement by the attorneys.[82] In my opinion, that statement also inaccurately conveyed the risks of investing in the *Peterson* receivables in June 2012. RDLC made the same statement in September 2012, after Congress passed the Iran Threat Reduction and Syria Human Rights Act of 2012.[83] In my opinion, that statement was similarly inaccurate concerning the risks.

These statements were inaccurate for two reasons. First, when the Act was passed, the attorneys and RDLC knew that collection was subject to the contested turnover litigation, which came to include challenges to the Iran Threat Reduction and Syria Human Rights Act of 2012. That litigation could have resulted in varying outcomes over varying timelines, including the

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81 *Id.*

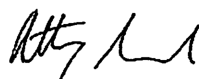
82 *See* June 15, 2012 Alpha Generation Presentation.

83 *See* September 2012 DDQ.

statute being struck down, precisely the same risk that exists in pre-settlement legal finance—that new facts and law will be developed after the factoring contact is complete.[84] This risk continued into 2016 since the legal challenges to Iran Threat Reduction and Syria Human Rights Act of 2012 persisted through the date of the Supreme Court's decision in *Peterson*.[85] Moreover, in the context of all its previous statements, RDLC's use of the word "settlement" in September 2012 and thereafter could only have been understood as a continuation of the previous false statement claim that *any* default judgment posed the same completion risk as a settlement.

VI. Summary

I was asked to consider whether investments described as the purchase of law firms' accounts receivables and the factoring of legal receivables possess the same kinds of investment risk as investments made by the Funds controlled by RDLC and Mr. Dersovitz, such as default judgments against foreign nations that had refused to appear in court and unearned fees in mass tort litigation that had not yet settled. In my opinion, the terms "accounts receivables" and "factoring legal receivables" do not accurately represent the risks relating to many of the investments made by the RD Legal Funds.



Anthony J. Sebok
January 27, 2017

[84] *See supra* Section IV.B.1.

[85] *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

APPENDIX 1

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EDUCATION

Princeton University, Ph.D. (Politics) 1993

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University of Oxford, M.Phil. (Politics) 1986

Cornell University, B.A. *magna cum laude* (Philosophy) 1984

EMPLOYMENT

Professor of Law, Benjamin N. Cardozo School of Law, New York, NY, 2007 – present

Distinguished Research Professor, Swansea University, Wales, UK, 2013 – 2016

Joseph F. Cunningham Visiting Professor of Commercial and Insurance Law, Columbia Law School, New York, NY, Fall 2011

Visiting Professor of Law, Tsinghua University School of Law, Beijing, China, Summer 2010

Visiting Professor of Public and International Affairs, Princeton University, 2007-08

Associate Dean for Research, Brooklyn Law School, Brooklyn, NY, 2006-07

Fellow, Program in Law and Public Affairs and **Visiting Professor of Public and International Affairs,** Princeton University, 2005-06

Centennial Professor of Law, Brooklyn Law School, Brooklyn, NY, 2005-2007

Professor, Brooklyn Law School, Brooklyn, NY, 1997-2005

DAAD Visiting Professor, Freie Universität, Berlin, 2001

Berlin Prize Fellow, The American Academy in Berlin, 1999

Visiting Associate Professor, Benjamin N. Cardozo School of Law, New York, NY, Spring 1997

Assistant Professor, Brooklyn Law School, Brooklyn, NY, 1992-95

Law Clerk, Chief Judge Edward Cahn, U.S. District Court, Philadelphia, PA, 1991-1992

TEACHING

Torts, Professional Responsibility, Jurisprudence, Advanced Torts, Remedies, Insurance Law, Mass Torts and Social Justice (seminar), Tort Theory (seminar), Comparative Products Liability, Constitutional Law

BOOKS AND ESSAYS

TORT LAW: GLOBAL PERSPECTIVES (with Mauro Bussani) (Oxford University Press, forthcoming 2017)

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A Frolic Of His Own (June 17, 2015)

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Television: The Oprah Winfrey Show, CBS Evening News, CNN, BBC World Business Report, Reuters TV, and RNN

Radio: NPR, WNYC, PRI's Marketplace. BBC Radio, Bavaria Radio and South African Radio

AWARDS AND FELLOWSHIPS	Berlin Prize Fellow, The American Academy in Berlin, 1999 Research Fellow, Humboldt Universität, Berlin, Germany, 1999 Fellow, Program in Law and Public Affairs, Princeton University, Princeton, NJ, 2005-06
PROFESSIONAL ACTIVITIES	American Bar Association American Law Institute American Association of Law Schools (Sections on Insurance Law, Remedies, Torts and Compensation Systems (President, 2014-15), and Jurisprudence) Ethics Consultant, Burford Group (U.K. and USA) Co-Reporter, ABA Commission on Ethics 20/20, Third-Party Financing Of Litigation Working Group (2011 – 2012) Drafter, Section on Principles of Procedural Justice, ABA Litigation Section Project, "The Rule of Law in Times of Calamity" (2006) Products Liability Committee, Association of the Bar of the City of New York (2000-03) (2005 – 2007) Civil Rights Committee, Association of the Bar of the City of New York (1998 – 1999) Lectures and Continuing Education Committee, Association of the Bar of the City of New York (1995 – 96)

APPENDIX 2

List of Materials Consulted in Addition to Division Exhibits

Cases

A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986)

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Maine Prof. Ethics Comm. Formal Op. 193 (2007)

Utah Ethics Advisory Opinion No. 97-11

Utah Ethics Advisory Opinion No. 02-01

Utah Ethics Advisory Opinion No. 06-03

Advisory Opinion, Ohio Supreme Court's Board of Commissioners on Grievances and Discipline, Opinion 2004-2

Testimony (including Exhibits)

SEC Testimony of Roni Dersovitz

Deposition of Roni Dersovitz

Deposition of Daniel A. Osborn

RDLC Marketing Materials

R.D. Legal Funding Partners, LP Due Diligence Questionnaire, dated:

- December 2010 (the face of the document bears the date December 2010, but the document properties reveal that it was created on March 31, 2011)
- September 2012
- June 2014

RD Legal Funding and RD Legal Funding Offshore Fund Marketing Presentation, dated:

- December 31, 2010
- August 31, 2011

RD Legal Capital, LLC Confidential Overview Alpha Generation and Process, dated:

- June 2009
- December 2010
- August 2011
- December 2011
- January 2012
- May 2012
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RD Legal Capital: Frequently Asked Questions, dated:

- January 2013
- July 2013
- July 2014

RD Legal Capital Summary of Investment Opportunity, dated:

- August 15, 2012
- August 31, 2013

RDLC Offering Documents

Confidential Private Offering Memorandum, Limited Partnership Interests of RD Legal Funding Partners LP, dated:

- July 2007
- October 2008
- February 2011
- December 2011
- April 2012
- June 2013

Confidential Explanatory Memorandum, RD Legal Funding Offshore Fund, LTD., dated:

- August 2007
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- February 2013
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Confidential Explanatory Memorandum, RD Legal Special Opportunities Partners, LP, dated:

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Verified Complaint For Injunctive and Other Relief, *RD Legal Funding Partners, LP v. Mel Powell, et al.*, No. 14-cv-7983 (FSH-MAH) (D.N.J. Dec. 23, 2014)

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Other Documents

Attachment to Nov. 6, 2013 Email from Philip Larochelle to Eric Liu, RDLC-SEC 313840

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Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 STAN. J.L. BUS. & FIN. 98 (2015)

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John Leubsdorf, *Toward a History of the American Rules on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984)

Victoria Shannon Sahani, *Harmonizing Third-Party Litigation Funding Regulation*, 36 Cardozo L. Rev. 861 (2015)

Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011)

Joanna M. Sheppard, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919 (2015)