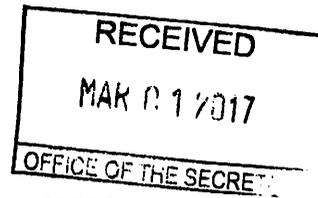


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UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
NEW YORK REGIONAL OFFICE  
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NEW YORK, NY 10281-1022

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February 16, 2017

Via Email and UPS Overnight Delivery

Hon. Carol Fox Foelak  
Administrative Law Judge  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Mail Stop 1090  
Washington, DC 20549

Re: Matter of RD Legal Capital, LLC, et al. File No. 3-17342

Dear Judge Foelak:

We represent the Division of Enforcement (“Division”) in this matter and write to oppose Respondents’ request for leave to file a motion for summary disposition (“Motion”).

Commission Rule of Practice 250(c) permits this Court to grant Respondents leave to file their Motion *only* “if consideration of the motion will not delay the scheduled start of the hearing” and if Respondents show “good cause” for granting such leave. As the Commission explained in recently amending Rule 250, leave should be granted only in “exceptional cases.” SEC Adopting Release, Rel. No. 34-78319, at 57. “The requirement that leave be obtained to make a motion under paragraph (c) is consistent with the Commission’s long-held view that because, “[t]ypically, Commission proceedings that reach litigation involve basic disagreement as to material facts . . . [t]he circumstances when summary disposition prior to hearing could be appropriately sought or granted will be comparatively rare.” *Id.* at 55 (citation omitted); *see also id.* at 57 (“we believe that the good cause standard under paragraph (c) will rarely be satisfied”).

This case does not offer such rare circumstances. Here, Respondents have failed to demonstrate the requisite good cause, and by waiting until February 15, 2017 to file their request for leave, they threaten the schedule this Court established on October 7, 2016.

Respondents’ Request for Leave Is Untimely

Rule 250(c) permits parties to request leave to file a motion for summary disposition at any time “after a respondent’s answer has been filed and documents have been made available to that respondent for inspection and copying pursuant to [Rule 230].” Respondents filed their Answer in this case on August 5, 2016, by which time the Division had made available to Respondents its Rule 230 production. Rather than request leave in the six months that followed, Respondents waited until last night, less than five weeks before the March 20, 2017 hearing in this matter is scheduled to begin, to submit their request.

Even if the Court were to grant Respondents' request for leave immediately, under Rule 250(f)(2)(ii), which allow non-movants 21 days to respond to a motion for summary disposition and grants movants 7 days to submit their reply, Respondents' Motion would not be fully briefed until after this Court holds its final telephonic prehearing conference on March 13, 2017.

Meanwhile, as Respondents know, the parties are required to exchange witness and exhibit lists (and copies of the exhibits themselves) in two weeks, exchange prehearing briefs and any motions *in limine* the following week, and prepare their evidence for a hearing set to begin only twelve days later. Had Respondents moved for summary disposition months ago, a ruling on such a motion might have provided helpful guidance to the parties that would have informed their preparation for the hearing in this matter. But a decision rendered after exhibit lists are exchanged, prehearing briefs are filed and the Court's final prehearing conference is held offers no such benefit. And while moving the hearing date to accommodate Respondents' late request might alleviate some of the burden their Motion imposes, Rule 250(c) is unambiguous in requiring this Court to deny Respondents' request for leave "if consideration of the motion will [] delay the scheduled start of the hearing."

Respondents Have Not Shown Good Cause to Grant Their Motion for Leave

Respondents state in their February 15 letter to the Court that "[g]ood cause exists for granting the motion for leave," but offer no support for their position beyond their conjecture that permitting Respondents to file their motion for summary disposition "will reduce the length of the hearing by approximately one week." The Division presumes Respondents mean that the hearing will be shortened in the event this Court grants their motion for summary disposition—not just their request for leave—but does not see how the hearing will be shortened materially even if Respondents' Motion is granted.<sup>1</sup>

Respondents' Motion seeks partial summary disposition as to two issues: "(1) any claims related to the valuation of the assets held in the funds at issue; and (2) the Division of Enforcement's request for Tier III penalties." A ruling on these issues will not materially change the evidence to be presented at the hearing.

First, *all* of the Division's claims for disgorgement relate to the valuation of the Funds' assets. Those valuations formed the basis of the profits Respondents withdrew from the Funds. As the Division informed Respondents in response to their Motion for More Definite Statement, it is those profits the Division seeks to disgorge in this matter.

Second, as Respondents acknowledge, the Court's authority to impose third-tier penalties turns in part on whether Respondents exposed investors to a "significant risk of substantial losses." (Respondents' Brief at 25-26.) This case is, first and foremost, about the significant risk to which investors' money was exposed when Respondents placed bets on unsettled, ongoing litigation instead of employing the relatively safe, "post-settlement" strategy they told investors they were employing. The Division understands that Respondents will argue that they were

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<sup>1</sup> The Division does not address here the many deficiencies in Respondents' Motion itself, but reserves all right to do so should the Court permit Respondents to file their Motion.

entitled to pursue a riskier strategy than that which they disclosed to potential investors, and will further argue that some of their investments were not riskier than the kinds of investments they claimed the Funds were making. This issue will be just as vigorously contested whether in the context of proving the falsity of Respondents' representations to potential investors or in the context of demonstrating why third-tier penalties are warranted to address Respondents' fraud. At the very least, the significant risk to which Respondents' fraud exposed investors' money is not, as Respondents claim in their February 15 letter, an "issue[] for which there are no material facts in dispute and for which Respondents are entitled to judgment as a matter of law."

In short, Respondents' Motion does not offer this Court the opportunity to narrow the issues to be tried at the hearing or the proof to be adduced to address those issues. What Respondents' Motion does do is threaten the Court's October 7, 2016 Scheduling Order at a time both parties should be preparing for an imminent hearing.

As Respondents have not shown any good cause to grant their motion for leave, and as granting Respondents' Motion is likely to delay the start of the hearing, their request should be denied.

Respectfully submitted,



Michael D. Birnbaum