

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4162/September 16, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16462

In the Matter of

LYNN TILTON;	:	
PATRIARCH PARTNERS, LLC;	:	
PATRIARCH PARTNERS VIII, LLC;	:	ORDER
PATRIARCH PARTNERS XIV, LLC; and	:	
PATRIARCH PARTNERS XV, LLC	:	

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on March 30, 2015. The OIP alleges that Respondents violated the antifraud provisions of the Investment Advisers Act of 1940 in their operation of three collateral loan obligation funds (known as the Zohar Funds) by reporting misleading values for the assets held by the funds and failing to disclose a conflict of interest arising from Lynn Tilton's undisclosed approach to categorization of assets. The proceeding was stayed by order of the U.S. Court of Appeals for the Second Circuit between September 17, 2015, and June 2016. *See Tilton v. SEC*, No. 15-2103, 2016 U.S. App. LEXIS 9970, at *37 (2d Cir. June 1, 2016); *Tilton v. SEC*, No. 15-2103, ECF Nos. 76, 125. The hearing is currently scheduled to commence on October 24, 2016.

Under consideration are Respondents' August 31, 2016, Motion to Compel the Production of Brady Materials; the Division of Enforcement's September 8, 2016, Opposition; and Respondents' September 13, 2016, Reply.

Pursuant to 17 C.F.R. § 201.230 (Rule 230), the Division "shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings." Rule 230(b) describes documents that may be withheld and provides: "Nothing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence." Rule 230(b)(2).

Citing Rule 230(b)(2), Respondents ask for an order compelling the production of documents pursuant to that rule.¹ Respondents state that *Brady* violations by the government are rampant and describe steps taken by the United States Department of Justice to deal with the problem of intentional or unintentional withholding of *Brady* material. Respondents attach an exchange of correspondence with the Division. Their August 26, 2016, letter to the Division asks for the production of “all materials in the possession, custody, or control of the government pursuant to [Rule 230], [*Brady*] . . . , *Giglio v. United States*, 405 U.S. 150 (1972), and *United States v. Bagley*, 473 U.S. 667 (1985), the Fifth Amendment to the Constitution of the United States of America, and all applicable law.” Motion, Ex. 1 at 1. The letter includes a list of twenty-seven examples of material they seek in the categories of exculpatory information and witness credibility and impeachment. *Id.* at 6-9. The Division’s August 30, 2016, response describes the twenty-seven examples as interrogatories or similar discovery requests and states that it has complied, and will continue to comply, with its *Brady* obligations. Motion, Ex. 2. The Division reiterates this in its opposition to Respondents’ motion. In reply, Respondents decry the Division’s “black box approach to *Brady*.”

Respondents seek material in the possession, custody, or control of the “Commission and any of its current and former Commissioners, officers, employees, staff, appointees, personnel, contractors or representatives, including but not limited to the Division of Enforcement (“Division”), the Office of Administrative Law Judges, the Office of the Chief Counsel (“OCC”), the Office of the General Counsel (“OGC”), and the Office of the Whistleblower.” Motion, Ex. 1 at 2. For example, items twenty-three through twenty-seven specify possible information held by current or former commissioners. *Id.* at 9. However, Rule 230 relates only to documents obtained by the Division. “Documents located only in the files of other divisions or offices are beyond the scope of this rule.” Rules of Practice, 60 Fed. Reg. 32738, 32762 (June 23, 1995). Therefore, the motion must be denied insofar as it seeks such documents.

Further, while the policies and procedures of the Department of Justice concerning prosecutors’ *Brady* obligations in the prosecution of criminal cases may be desirable, they are not the Commission’s policies. See *Orlando Joseph Jett*, Admin. Proc. Rulings Release No. 514, 1996 SEC LEXIS 1683 (June 17, 1996) (vacating the undersigned’s order to produce for *in camera* review documents that a respondent suspected were *Brady* materials). Frowning on “fishing expeditions,” the Commission ruled:

Unless defense counsel becomes aware that exculpatory evidence has been withheld and brings it to the judge’s attention, the government’s decision as to whether or not to disclose information is final. Mere speculation that government documents may contain *Brady* material is not enough to require the judge to make an *in camera* review. In order to justify such a review, a respondent must first

¹ Specifically, Respondents request the production of material under Rule 230, *Brady*, and *Giglio v. United States*, 405 U.S. 150 (1972), and also cite *United States v. Bagley*, 473 U.S. 667 (1985). Neither Rule 230 nor the comments thereto mention *Giglio* or *Bagley*, however. See Rules of Practice, 60 Fed. Reg. 32738, 32761-63 (June 23, 1995). It goes without saying that *Giglio* and *Bagley*, as well as *Brady*, were criminal cases while the instant administrative proceeding is a civil matter.

establish a basis for claiming that the documents contain material exculpatory evidence. A “plausible showing” must be made that the documents in question contain information that is both favorable and material to the respondent’s defense.

Id. at *2 (footnotes omitted). Respondents have not met this standard.

Accordingly, Respondents’ motion must be denied. The Division is directed to file an affidavit about its compliance with Rule 230(b)(2). *See id.* at *3 (affidavit “remove[d] any doubt about the matter”).

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge