UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16462

In the Matter of **LYNN TILTON;** **PATRIARCH PARTNERS, LLC;** **PATRIARCH PARTNERS VIII, LLC;** **PATRIARCH PARTNERS XIV, LLC;** **AND** **PATRIARCH PARTNERS XV, LLC,** **Respondents.**	**DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION TO COMPEL THE PRODUCTION OF WITNESS STATEMENTS UNDER THE JENCKS ACT**

Introduction

Respondents seek production under the Jencks Act, 18 U.S.C. Section 3500, of what they speculate are notes "from which the statements of witnesses can be *gleaned*," (Memo at 2, emphasis supplied) even though the Jencks Act in no way contemplates, much less requires, such a production. "Jencks statements include written statements signed, adopted, or approved by a witness, substantially verbatim and contemporaneously made recordings or transcriptions of the witness' oral statements, and grand jury and grand jury testimony." Mastro, R., *White Collar Crime* § 112:20 (http://www.gibsondunn.com/publications/Documents/MastroDunst-WhiteCollarCrime.pdf). In this matter, the Division of Enforcement (the "Division") has already produced the Jencks material in its possession, namely transcripts of witness testimony taken during the Division's investigation. The Division is also producing existing audio recordings of that testimony. No further production is required or appropriate.

Although styled as a request under the Jencks Act, in actuality Respondents inappropriately seek the Division's trial counsel's notes of their discussions with potential witnesses after the filing of the OIP, as well as all of the Division's notes of its conversations with counsel for potential witnesses. Such notes were never signed, adopted, or approved by a witness, nor do they constitute testimony. Further, the notes are not substantially verbatim statements under the Jencks Act: "[a] government agent's summary of a witness's oral statement that is not signed or adopted by the witness is not producible." *United States v. Allen*, 798 F.2d 985, 994 (7th Cir. 1986) (citing *Palermo v. United States*, 360 U.S. 343, 353 (1959)). And Respondents do not cite any authority for the proposition that notes of the Division attorneys' conversations with counsel for potential witnesses are somehow substantially verbatim statements of a witness.

Ultimately, Respondents simply seek to examine all of the Division's attorney notes based on the pretext and pure speculation that substantially verbatim witness statements might appear somewhere in those notes, despite having been advised by the Division that a review of those notes for both Brady and Jencks materials showed that no such Jencks materials exist within those notes. Respondents' motion should be denied because "Jencks does not authorize fishing expeditions[.]" *United States v. Delgado*, 56 F.3d 1357, 1364 (11th Cir. 1995) (citing *United States v. Graves*, 428 F.2d 196, 199 (5th Cir. 1970)).

Respondents' Motion is especially unsubstantiated in the instant case because the Division provided early and extensive document production far beyond the scope of Rules 230 and 231. In fact, the Division produced its witness interview notes made prior to the filing of the OIP, which total over 750 pages. *See* Exh. 1 (May 27, 2015 Production Letter). To be clear, the Division did not produce those notes as Jencks material. Rather, the production was made pursuant to Rule 230(a)(2)'s provision that the Division may make available documents other than those

required to be produced in administrative proceedings. Accordingly, Respondents' motion is not well-taken.

Legal Standard

The Jencks Act provides a three-part definition of the term "statement":

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e). "This definition clearly was intended by Congress to describe material that could reliably and fairly be used to impeach the testimony of a witness." *Allen*, 798 F.2d at 993-94 (citing *Goldberg v. United States*, 425 U.S. 94, 112 (1976) (Stevens, J., concurring). "Whether a document is an original statement made by the witness, as described in the first sentence of the statutory definition, or a 'substantially verbatim' copy as described in the second sentence of the definition, the emphasis clearly is on whether the statement can fairly be deemed to reflect fully and without distortion the witness's own words." *Allen*, 798 F.2d at 994. "A government agent's summary of a witness's oral statement that is not signed or adopted by the witness is not producible." *Id.* (citing *Palermo*, 360 U.S. at 353); *accord U.S. v. Melo*, 411 F. Supp. 2d 17, 21 (D. Mass. 2006) ("If an agent takes rough notes during the interview of a witness, it is clear in this Circuit that the notes do not become the "statement" of the witness unless the witness adopts or approves the agent's notes."). "A federal agent's written impression of what a witness said, his strategy, or his conclusions from what the witness said are obviously not statements of the witness. . . ." *Allen*, 798 F.2d at 994.

The "defense must establish that the document falls within the reach of Jencks." *Delgado*, 56 F.3d at 1364 (citing *United States v. Gaston*, 608 F.2d 607, 611 (5th Cir. 1979)). A "court need not examine the reports *in camera* when nothing before it suggests a verbatim account or adoption by the witness. When defense counsel fails to establish Jencks applies, the trial court does not err in refusing to order the government to produce reports for inclusion in the record." *Id.*; *see also Allen*, 798 F.2d at 995 (in order to trigger an *in camera* inspection, the defense must have a reasonable argument that a witness statement exists and can possibly be used as impeachment).

Argument

I. Respondents' request for witness proffers made to the Division by potential witness's counsel should be denied because no such proffers occurred and because Jencks does not require production of notes of conversations with counsel.

Respondents ask for the production of all of the Division's notes of conversations with counsel for potential witnesses, far beyond the substantially verbatim witness statements of which Jencks requires production for impeachment purposes. Tellingly, Respondents do not – because they cannot – cite any authority for the proposition that notes of a conversation with a witness's attorney result in witness statements under Jencks. Rather, they rely on a single case stating that *written* proffers by a witness's counsel or *oral* proffers by a witness with counsel present (which are reflected in notes) are subject to Jencks. *See U.S. v. Sudikoff*, 36 F. Supp. 2d 1196, 1205 (C.D. Cal. 1999). But there were no such proffers in this case.

Respondents incorrectly assert that "in reviewing its files for Jencks Act materials, the Division explained to Respondents that it did not look for – and certainly did not produce – any Division attorney notes memorializing witness proffers transmitted by counsel for witnesses to the Division." Motion at 5-6. That is not what counsel for the Division explained. In fact, the Division reviewed all its attorney notes (and all withheld documents) for both Brady and Jencks

purposes. And the Division's notes of conversations with counsel for potential witnesses contain no statements or proffers subject to Jencks.

The Division's notes of conversations with counsel for potential witnesses are not subject to production under Jencks, so Respondents' motion should be denied.

II. Respondents' request for witness interview notes made by the Division's trial counsel should be denied because those notes contain no substantially verbatim witness statements, and Respondents only speculate – without reasonable basis – that such statements exist.

Respondents ask that the Division be required to produce the witness interview notes made by its trial counsel since the filing of the OIP.[1] These notes were never signed, adopted, or approved by a witness, nor do they constitute testimony. The Division's review of these notes for *Brady* and Jencks purposes has shown that they contain no substantially verbatim statements under the Jencks Act. *See, e.g.*, *Allen*, 798 F.2d at 994 ("A government agent's summary of a witness's oral statement that is not signed or adopted by the witness is not producible."). Rather than accept this reality, Respondents – without any reasonable basis – request a fishing expedition into all of the Division's notes, which is impermissible: "Jencks does not authorize fishing expeditions[.]" *United States v. Delgado*, 56 F.3d 1357, 1364 (11th Cir. 1995) (citing *United States v. Graves*, 428 F.2d 196, 199 (5th Cir. 1970)).

Not only is Respondents' request made without foundation in the record, it is made on the basis of mischaracterizing the record. Respondents assert that "the Division contacted 19 witnesses during the week of May 25, 2015 *and likely contacted several other witnesses in the 15 months that have elapsed since then.*" Motion at 7. But on July 31, 2016, counsel for Respondents

[1] As noted above, the Division went beyond its document production requirements in this matter already, by producing the Division's witness interview notes made prior to the filing of the OIP. Because the documents did not qualify as Jencks, the Division produced these materials under Rule 230(a)(2)'s provision that the Division may make available documents other than those required to be produced in administrative proceedings.

asked counsel for the Division to identify "all other contacts with investors up to the time of your response to this email," since those 19 witness contacts during the week of May 25, 2015. Counsel for the Division responded: "The Division has not contacted any additional investors beyond those previously identified to Respondents." Exh. 2 (Aug. 1, 2016 e-mail). Respondents omit this key information from their motion.

Having based their motion on this mischaracterization, Respondents then go on to argue that if the Division is not lying about the lack of substantially verbatim witness statements in its notes, "then there is no doubt that the Division was conducting its trial preparation in a manner that was directly calculated to avoid its obligations under the Jencks Act." Motion at 7. This accusation is as outrageous as it is absurd. The Division has in no way conducted itself to avoid any discovery obligations. As already discussed, the Division has conducted a Brady and Jencks review and also already produced far more material than is required under the SEC Rules of Practice. Beyond that, Respondents' implicit position is that any time an attorney for the Division interviews a witness there is an obligation to take verbatim notes, otherwise a federal statutory violation has occurred. No authority supports this position.

Further, Respondents are not without options to discover what any of the witnesses involved in this proceeding have to say. Like the Division, Respondents have the ability to subpoena witnesses for the hearing. Like the Division, Respondents have the ability to talk to counsel for witnesses (which Respondents' counsel have acknowledged to the Division they have done), and request witness interviews themselves. And like the Division, Respondents can cross examine witnesses at the hearing. While Respondents may wish to probe into the Division's work product to prepare for the hearing, there is simply no right to know what a witness will say prior to

taking the witness stand. Indeed, the Division is in the same position as Respondents on this front, as Respondents have listed witnesses on their witness list to whom the Division has not spoken.

In sum, Respondents' request for a fishing expedition into the Division's attorney notes should be denied. The request is based on speculation and mischaracterization, when, in fact, no Jencks statements are present in the Division's notes.

III. Respondents' request for an *in camera* review of witness interview notes made by the Division's trial counsel should be denied because there is no reasonable basis to suggest that substantially verbatim statements are present in those notes.

The burden is on Respondents to establish that a "document falls within the reach of Jencks." *Delgado*, 56 F.3d at 1364 (citing *United States v. Gaston*, 608 F.2d 607, 611 (5th Cir. 1979)). A "court need not examine the reports *in camera* when nothing before it suggests a verbatim account or adoption by the witness. When defense counsel fails to establish Jencks applies, the trial court does not err in refusing to order the government to produce reports for inclusion in the record." *Id.*; *see also Allen*, 798 F.2d at 995 (in order to trigger an *in camera* inspection, the defense must have a reasonable argument that a witness statement exists and can possibly be used as impeachment).

Because Respondents' request for an *in camera* review is based on speculation and mischaracterization, rather than a reasonable basis, the motion should be denied.

IV. The Division is producing audio recordings of witness testimony.

Lastly, Respondents mischaracterize the record relating to audio recordings of what Respondents claim were "witness interviews." As already explained to Respondents by the Division, after Respondents inquired as to whether audio recordings exist of witness testimony – *testimony from which the Division has already produced written transcripts* – counsel for the Division learned that some audio recordings of witness testimony do exist in off-site storage, and

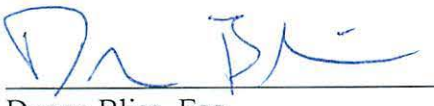
the Division is producing those recordings this week (which are of course duplicative of the underlying transcript).[2] Thus, any further relief on this point is unnecessary, and in any case Respondents already had in their possession transcripts of said testimony.

Conclusion

The Court should deny Respondents' fishing expedition into the Division's attorney notes in search of speculative witness statements that do not exist. The Division therefore respectfully requests that Defendants' Motion to Compel the Production of Witness Statements Under the Jencks Act be denied.

Dated: August 29, 2016

Respectfully Submitted,



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Nicholas Heinke, Esq.
Amy Sumner, Esq.
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Division of Enforcement
Securities and Exchange Commission
Denver Regional Office
1961 Stout Street, Ste. 1700
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[2] To be clear, there are no audio recordings of witness interviews or discussions, only of witness testimony for which transcripts have already been provided.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION TO COMPEL THE PRODUCTION OF WITNESS STATEMENTS UNDER THE JENCKS ACT** was served on the following on this 29th day of August, 2016, in the manner indicated below:

Securities and Exchange Commission
Brent Fields, Secretary
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
(By Facsimile and original and three copies by UPS)

Hon. Judge Carol Fox Foelak
100 F Street, N.E.
Mail Stop 2557
Washington, D.C. 20549
(By Email)

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DIVISION OF
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May 27, 2015

Christopher J. Gunther
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036-6522

Re: *In the Matter of Lynn Tilton, et al (File No. 3-16462)*

Dear Mr. Gunther:

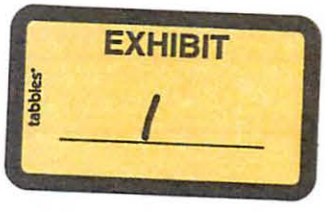
Enclosed please find a disc containing redacted copies of confidential internal witness interview notes being produced pursuant to SEC Rule of Practice 230(a)(2). This production is not intended to be a waiver of any applicable privilege or protection. The password for the disc has been sent to you by e-mail.

Please let me know if you have any questions.

Sincerely,

Dugan Bliss
Senior Trial Counsel

Enclosure
Cc: Nicholas Heinke
Amy Sumner



Bliss, Dugan

From:	Bliss, Dugan
Sent:	Monday, August 01, 2016 4:29 PM
To:	'Rubin, Lisa H.'
Cc:	Heinke, Nicholas; Sumner, Amy A.; Mastro, Randy M.; Zweifach, Lawrence J.; Kirsch, Mark A.; Goldsmith, Barry; Brodsky, Reed; Loseman, Monica K.
Subject:	RE: List of Division's Contacts with Investors

Lisa:

The Division has not contacted any additional investors beyond those previously identified to Respondents.

Dugan

From: Rubin, Lisa H. [mailto:LRubin@gibsondunn.com]
Sent: Sunday, July 31, 2016 12:11 PM
To: Bliss, Dugan
Cc: Heinke, Nicholas; Sumner, Amy A.; Mastro, Randy M.; Zweifach, Lawrence J.; Kirsch, Mark A.; Goldsmith, Barry; Brodsky, Reed; Loseman, Monica K.
Subject: List of Division's Contacts with Investors

Dear Dugan,

As you know, Judge Foelak's May 7, 2015 prehearing order directed the Division to "notify Respondents on a rolling basis up to July 10, 2015, of additional investors that it contacts." On May 29, 2015, the Division provided a list of investors it stated that it had contacted. We ask that you supplement that list by 5:00 p.m. tomorrow (August 1), identifying all other contacts with investors up to the time of your response to this email, or state that there have been no further contacts since your May 29, 2015 letter.

It is essential to the preparation of Respondents' defense that the Division identify Zohar Fund investors it has contacted. Failure to make the requested identification will only compound the prejudice of the extreme due process violations to which Respondents have already been subjected. Indeed, the concerns animating Judge Foelak's original disclosure order are only more pressing today, with a trial date bearing down on Respondents, for whom we are new counsel, and 14 months having passed since the Division last advised Respondents of investors it had contacted.

We assume the Division will make this bow to basic fairness, but if it does not, Respondents reserve all rights to seek relief as necessary.

Sincerely,

Lisa

Lisa H. Rubin
Of Counsel

GIBSON DUNN

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