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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of, LYNN TILTON, PATRIARCH PARTNERS, LLC, PATRIARCH PARTNERS VIII, LLC, PATRIARCH PARTNERS XIV, LLC and PATRIARCH PARTNERS XV, LLC Respondents.	Administrative Proceeding File No. 3-16462 Judge Carol Fox Foelak

RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL THE PRODUCTION OF BRADY MATERIALS

GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
Telephone: 212.351.4000
Fax: 212.351.4035

BRUNE LAW P.C.
450 Park Avenue
New York, NY 10022

Counsel for Respondents

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Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, "Respondents"), respectfully submit this brief in support of their motion to compel the Division of Enforcement ("Division") of the Securities and Enforcement Commission ("SEC" or "Government") to produce *Brady* material under Rule 230 of the SEC Rules of Practice (the "Rules") and under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), by September 9, 2016.

INTRODUCTION

There is no dispute that the Division is obligated to produce material exculpatory and impeachment evidence that would be favorable to Respondents. *See Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154-55; Rule 230(b)(2). This obligation, which applies to SEC enforcement attorneys and prosecutors alike, is a cornerstone of a defendant's right to receive a fair trial. Over the years, however, it has become increasingly clear that *Brady* violations by the government have become rampant—notwithstanding assurances given by the government in virtually every case that "the government is aware of its *Brady* obligations and is abiding by them."[1] Bar associations, academics, bench-bar task forces, and others who have studied this

[1] *See, e.g.*, Cadene A. Russell, Comment, *When Justice Is Done: Expanding a Defendant's Right to the Disclosure of Exculpatory Evidence on the 51st Anniversary of* Brady v. Maryland, 58 How. L.J. 237, 242, 261-62 (2014) ("[W]idespread violations of *Brady* continue to result in an abuse of justice and a violation of the due process rights of defendants."); Beth Brennan & Andrew King-Ries, *A Fall from Grace:* United States v. W.R. Grace *and the Need for Criminal Discovery Reform*, 20 Cornell J.L. & Pub. Pol'y 313, 328 (2010) ("Trial courts consistently order the government to disclose all exculpatory and impeachment evidence, but prosecutors routinely withhold such information, either intentionally or inadvertently."); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. Crim. L. & Criminology 415, 415 (2010) ("The government's duty to disclose favorable evidence to the defense under *Brady v. Maryland* has become one of the most unenforced constitutional mandates in criminal law.

epidemic have identified several fundamental underlying problems. First, prosecutors frequently are not provided with guidance as to what actually constitutes *Brady* material.[2] Second, prosecutors make *Brady* decisions behind closed doors—unilaterally and without judicial oversight.[3] Finally, prosecutors typically make *Brady* decisions as advocates—myopically examining possible *Brady* material through the lens of *their* case without carefully considering defenses to their charges or the potential impeachment of their witnesses.[4]

Federal prosecutors and defense lawyers have been taking steps to address this problem. For example, the U.S. Department of Justice now has guidelines in the United States Attorney's Manual giving specific examples of the types of exculpatory and impeachment information that must be disclosed. *See* United States Attorney's Manual § 9-5.001 (2008), *available at* https://www.justice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings. Defense lawyers, in turn, typically make particularized *Brady* requests in order to ensure that the government and the defense have the same understanding of what categories of materials should

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The intentional or bad faith withholding of *Brady* evidence is by far the most egregious type of *Brady* violation and has led to wrongful convictions, near executions, and other miscarriages of justice."); Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for* Brady *Violations*, 115 Yale L.J. 1450, 1453-54 (2006) ("The range and frequency of prosecutors' failures to disclose *Brady* evidence have been widely lamented. A treatise on prosecutorial misconduct states that '[a] prosecutor's violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice . . . .'" (citation omitted)).

[2] *See, e.g.*, Brennan & King-Ries, *supra* n.1, at 317-18; Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 Cardozo L. Rev. 2161, 2163 (2010).

[3] *See, e.g.*, Dewar, *supra* n.1, at 1455 ("Defendants only rarely unearth suppressions."); *United States v. Olsen*, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, J., dissenting) ("Due to the nature of a *Brady* violation, it's highly unlikely wrongdoing will ever come to light in the first place.").

[4] *See* Russell, *supra* n.1, at 250, 261-62 (2014); Dewar, *supra* n.1, at 1454-55.

be produced under *Brady* so that, to the extent there are different views of what the law requires, those differences can be addressed by courts—not decided unilaterally by prosecutors.[5]

Thus, on August 26, 2016, Respondents—following a standard and recommended practice—sent the Division a letter with particularized *Brady* requests. The letter stated:

> We appreciate your assurances that a review for any such material has been conducted and completed and your acknowledgement that the U.S. Securities Exchange Commission ("SEC," "Commission" or the "Government") is under a continuing obligation to produce documents pursuant to *Brady* and its progeny. However, the Government's views of what documents and other information may qualify as *Brady* material under relevant authority are unknown to Respondents and the Administrative Law Judge overseeing this case. To ensure that the Government is, in fact, complying with its *Brady* obligations, Respondents make the particularized requests set forth below.

Declaration of Mary Kay Dunning, dated August 31, 2016 ("Dunning Decl."), Ex. 1, at 1.

As Respondents explained in the letter, to the extent that the Division asserts that any of the categories identified in the particularized requests do not constitute *Brady* material,

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[5] *See, e.g.*, *City of Anaheim*, Admin. Proceedings Rulings Release No. 586, 70 SEC Docket 668, at *6 (ALJ July 30, 1999); Ira Mickenberg, *New Felony Defender Program: A Practical Guide to Brady Motions*, at 7 (2008), *available at* http://www.ncids.org/Defender%20Training/2008%20New%20Felony%20Defender%20Training/BradyHandout.pdf ("By specifically tailoring our demand to the factual needs of our case, we make it difficult for the State or the Court to claim that they didn't know something existed or was relevant."); The Public Defender Service for the District of Columbia, Brady v. Maryland *Outline*, at 12 (2013), *available at* http://www.pdsdc.org/docs/default-source/default-document-library/brady-outline-final-(2013).pdf?sfvrsn=0 ("[I]n order to ensure a defendant obtains the *Brady* information that he is due . . . defense counsel will always want to make written *Brady* requests tailored to the specific facts of the defendant's case."); Robert S. Mahler, *Extracting the Gate Key: Litigating* Brady *Issues*, Champion, May 2001, *available at* https://www.nacdl.org/Champion.aspx?id=22712 ("The prosecutors' duty to investigate the existence of *Brady* evidence in places beyond the tips of their noses creates a concomitant duty on defense counsel to point them in the right direction and to specify, to the extent possible, what information he or she believes will be found there. Trusting the prosecutor to know a piece of favorable evidence when he or she sees it is an extremely risky matter.").

Respondents requested that the Division notify them by August 30, 2016 so that they could seek appropriate relief. Thus, the purpose of Respondents' requests was to enumerate categories of documents which would contain evidence material to Respondents' defense in order to obtain assurance from the Division that it has adequately complied with its *Brady* obligations. To that end, Respondents requested disclosure of twenty-seven categories of documents which constitute *Brady* material that the Division is obligated to disclose. Dunning Decl., Ex. 1, at 6-9. Respondents further requested, at the very least, that the Division state whether it disagreed as to whether any of the categories set forth constitute *Brady* material as it has interpreted its obligations. *Id.* at 2.

The categories identified by Respondents are classic representations of material the government is obligated to disclose under *Brady* and *Giglio*. Respondents identified nine categories of exculpatory evidence that would be material to Respondents' defense under *Brady*, such as: information from witnesses stating that Respondents' management fees were reasonable; information from witnesses stating that Respondents' collateral management fees and loan categorization practices were disclosed; and the exculpatory facts presented to the Commission before the OIP was issued. Respondents also identified eighteen categories of impeachment evidence that the Division is obligated to produce under *Brady* and *Giglio*, including, among others: evidence relating to the economic incentives of witnesses to testify at the hearing in this matter; evidence relating to any expert witness's assistance with the investigation or drafting of the OIP; and any evidence relating to a benefit conferred by the Division on a witness in exchange for cooperation in this matter.

In response to Respondents' letter, the Division acknowledged that it is aware of its ongoing *Brady* obligations, but refused to acknowledge whether it disputes that one or more of

the categories listed in Respondents' letter actually constitutes *Brady* material or whether it has reviewed the evidence with those categories in mind. *See* Dunning Decl., Ex. 2. The Division could have responded by stating that it does not possess or is not aware of any material in a particular category, that it does possess such information and will produce it, or that it disagrees that a particular category of material should be produced under *Brady*. Instead, the Division simply balked. The Division's refusal to respond to the categories identified by Respondents illustrates its misunderstanding of its obligations. "When the [government] receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. 97, 106 (1976). It is therefore imperative that this tribunal exercises its authority under Rule 230(c) to ensure that the Division produces all exculpatory and impeachment evidence in its possession. Because the categories requested by Respondents clearly fall within the Division's obligation to produce material exculpatory and impeachment evidence, Respondents request that Your Honor order the Division to comply with Respondents' request: for each category that is listed in Respondents' letter, the Division should disclose the requested information, state that it does not possess or is not aware of such information, or explain why in its view the requested information does not constitute *Brady* material.

The Division's boilerplate "we are aware of our *Brady* obligations" response bespeaks the same kind of "don't tell us what our *Brady* obligations are" attitude of some federal prosecutors that has impelled the U.S. Department of Justice to initiate major reforms in its *Brady* practices. The SEC, like the Department of Justice, should not only be mindful of its obligations, it should take every step possible to ensure that it is fulfilling its obligations. In this case, an important first step would be for the Division to give a substantive response to Respondents' letter.

LEGAL STANDARDS

Rule 230(b) imposes a continuing obligation on the Division to produce material evidence favorable to Respondents, pursuant to *Brady*. *See, e.g.*, *City of Anaheim*, Admin. Proceedings Rulings Release No. 586, at *3 ("[T]he Division unquestionably has *Brady* obligations under Rule 230(b)(2) when it seeks a cease and desist order in the administrative forum."). Both exculpatory and impeachment evidence is considered "favorable" under *Brady* and must be disclosed by the Division if such evidence is material. *See United States v. Bagley*, 473 U.S. 667, 676-77 (1985); *Giglio*, 405 U.S. at 154-55; *see also* Dunning Decl., Ex. 2. Additionally, to comply with *Brady*, the Division "has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case." *City of Anaheim*, Admin. Proceedings Rulings Release No. 586, at *1 (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

The Division has an obligation to produce impeachment and exculpatory evidence that is "material either to [the respondent's] guilt or punishment," *Kyles*, 514 U.S. at 432 (internal quotation marks omitted), with the test of materiality being whether the favorable evidence, as a whole, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *id.* at 435. Notwithstanding the retrospective nature of the materiality standard, the *Brady* requirement is "premised on the view that due process requires pre-trial, or at least at-trial, disclosure of exculpatory evidence material to guilt or punishment." *City of Anaheim*, Admin. Proceedings Rulings Release No. 586, at *2. Moreover, when the respondent makes particularized requests for *Brady* materials, as Respondents did here, "the specificity of the request is inversely related to the [Division]'s disclosure obligation." *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 827 (10th Cir. 1995); *City of Anaheim*, Admin. Proceedings Rulings Release No. 586, at *6 ("Although the obligation to disclose exculpatory material does not

depend on the presence of a specific request, the degree of specificity of such a request may have a bearing on the trial court's assessment of the materiality of the non-disclosure.").

Additionally, the Division is required to produce exculpatory and impeachment material even if contained in otherwise privileged documents. *See United States v. NYNEX Corp.*, 781 F. Supp. 19, 26 (D.D.C. 1991) ("The government should . . . disclose[] exculpatory facts, even if contained in internal documents otherwise protected by the work product privilege."). While Rule 230(b)(1) allows the Division to withhold certain documents from production, including documents that are privileged, as well as internal memoranda, notes, or writings prepared by Commission employees, or documents that are otherwise work product, among others, Rule 230(b)(2) provides that nothing in Rule 230(b) authorizes the Division, in connection with an enforcement proceeding, "to withhold, contrary to the doctrine of *Brady*, documents that contain material exculpatory evidence." *See* Rule 230(b)(2); *see also David F. Bandimere*, Admin. Proceedings Rulings Release No. 759, 105 SEC Docket 3776, at *2 (ALJ Mar. 12, 2013). Thus, the Division is obligated to disclose material exculpatory and impeachment facts, even if contained in internal documents otherwise protected by privilege. To the extent a relevant document contains privileged material, the Division must nonetheless disclose the facts therein that constitute *Brady* material, by, for example, redacting privileged portions or providing summaries of the *Brady* evidence. *See, e.g.*, *David F. Bandimere*, Admin. Proceedings Rulings Release No. 759, at *1.

ARGUMENT

I. The Division Fails To Meet Its *Brady* Obligations By Refusing To Respond To The Specific Categories Identified By Respondents.

"[A] presiding Administrative Law Judge must have confidence that the Division has carried out a search of the proper scope and performed a proper *Brady* review before accepting

as dispositive the Division's declaration that there are no more undisclosed *Brady* materials." *City of Anaheim*, Admin. Proceedings Rulings Release No. 586, at *6. Pursuant to Rule 230(c), the ALJ has the authority to ensure that the Division is complying with its *Brady* obligations, and may require the Division to submit documents that it has withheld for *in camera* review and may determine whether any withheld document should be disclosed to Respondents. *See* Rule 230(c). Additionally, where, as here, Respondents have submitted specific requests to the Division, it is appropriate to require the Division to "stat[e] with particularity that each document [it has withheld] has been analyzed in light of" the specific categories identified by Respondents as potentially including *Brady* materials, *City of Anaheim*, Admin. Proceedings Rulings Release No. 586, at *6, or to submit a declaration stating that it has complied with its obligations, *see David F. Bandimere*, Admin. Proceedings Rulings Release No. 746, 105 SEC Docket 2512, at *1-2 (ALJ Feb. 5, 2013). Such requests are common practice of defense counsel in order to limit the possibility that the government's view of exculpatory and impeachment evidence is too narrow. *See, e.g.*, Mahler, *supra* n.5. In such a case, the ALJ should ensure that the Division has analyzed each category of documents to determine whether there is any related material that is favorable to the defense, *i.e.*, any material that "would assist in disproving the allegations set forth in the OIP." *City of Anaheim*, Admin. Proceedings Rulings Release No. 586, at *8.

Because the Division has wholly refused to respond to the categories identified by Respondents as evidence that would be material to their defense, Respondents and Your Honor cannot have confidence that the Division has conducted a proper *Brady* review. When the Division "receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Agurs*, 427 U.S. at 106; *see also Bagley*, 473 U.S. at 667 ("[A]n incomplete response to a specific request not only deprives the defense of certain evidence, but also has the

effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued."). Moreover, mere assertions that the government "'understands' its *Brady* obligations and 'will comply' or 'has complied'" with them are insufficient. *See United States v. Naegele*, 468 F. Supp. 2d 150, 152 & n.2 (D.D.C. 2007). Your Honor should therefore order the Division to either produce documents in its possession within each category, state with particularity that it has conducted a *Brady* review with the categories identified by Respondents in mind, or explain why in its view the requested information does not constitute *Brady* material.

II. Respondents Have Identified Eighteen Types Of Material Impeachment Evidence That Warrant A Particularized Division Response.

Respondents requested eighteen categories of documents relating to witness credibility and impeachment. Dunning Decl., Ex. 1, at 6-8. Impeachment evidence that the Division is obligated to disclose pursuant to *Brady* encompasses a broad range of information that would expose weaknesses in the Division's case or cast doubt on the credibility of the Division's witnesses. The Supreme Court has observed that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Impeachment evidence that is material under *Brady* and *Giglio* includes any information regarding a witness's prior convictions, biases, prejudices, self-interests, or unreliability, or any motive a witness may have to fabricate or curry favor with the government. *See, e.g., Banks v. Dretke*, 540 U.S. 668, 700-03 (2004) (concluding that evidence impeaching the uncorroborated testimony of prosecution witness was material for *Brady* purposes); *Kyles*, 514 U.S. at 444-45 (concluding that evidence

tending to impeach the reliability of the testimony of eyewitness was material); *Horton v. Mayle*, 408 F.3d 570, 578-79 (9th Cir. 2005) (concluding that impeachment evidence suggesting the willingness of a prosecution witness to fabricate evidence was material); *Wilson v. Beard*, 589 F.3d 651, 665 (3d Cir. 2009) (concluding that evidence regarding prior convictions, pro-prosecution bias, and mental impairments was material); *United States v. Sipe*, 388 F.3d 471, 489 (5th Cir. 2004) (concluding that information regarding benefits conferred on witnesses to ensure their cooperation was material).

The categories identified by Respondents clearly constitute impeachment evidence that would be material to Respondents' defense, including: evidence relating to the economic incentives of witnesses to testify at the hearing in this matter; evidence relating to any expert witness's assistance with the investigation or drafting of the OIP; and any evidence relating to a benefit conferred by the Division on a witness in exchange for cooperation in this matter. *See* Dunning Decl., Ex. 1, at 6-8.

The Division's failure to produce any such materials and its outright refusal to respond to Respondents' requests make clear that the Division misinterprets its disclosure obligations. For example, although the Division produced notes from interviews with employees of one of the largest investors in the Zohar Funds, in which those employees concede that the amount of information they were entitled to receive was limited under the agreements governing the Zohar funds—a fact material to Respondents' defense—the Division has conspicuously failed to produce any similar materials—subpoenas, correspondence, notes, or transcripts—reflecting its contacts with other investors whom the Division intends to call at trial.[6] Indeed, the Division has

[6] Those investors include, for example, Värde Partners, Nord/LB, SEI, and Deer Park Road.

produced nothing at all from these other investor witnesses. Any such statements by the government's witnesses are critical impeachment material.[7] Given the frank admissions of one investor in the notes produced by the Division, along with an investigative record seemingly developed so as to avoid disclosure under Rule 230, Respondents reasonably believe materials reflecting the Division's contacts with other investors exist and may contain similar impeachment material.[8]

Additionally, Respondents have reason to believe there is undisclosed impeachment evidence relating to the Division's experts. For example, there is striking overlap between the specific allegations in the March 30, 2015 OIP and the July 10, 2015 report of the Division's expert, Mr. Mayer, evidencing the high likelihood that Mr. Mayer or people acting in concert with him were consulting with the Commission before the OIP was filed. This raises serious concerns about the objectivity of Mr. Mayer's testimony and expert report in which he purports to "determine if the [OIP] allegation[s] [are] true"—the very same allegations he appears to have had a hand in forming. Dunning Decl., Ex. 3, at 20. Mr. Mayer was "asked" by the Division "to determine whether loans made . . . to 14 select borrowers" were current or delinquent and, if delinquent, the impact on the OC Ratio, and the amount of fees paid during the period the OC Ratio tests failed. *Id.* at 19-20; *see also id.* at 3. Mr. Mayer's expert report opines that Zohar II and III failed their OC Ratio Tests "no later than July and June 2009, respectively," *id.* at 56, and

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[7] The Division's notes of one of its calls with an investor evidence a discussion about conducting interviews "off-record," and a reference to it being "possible she'd get access."

[8] Investors whom the Division intends to call may seek to claim a reward under the SEC's whistleblower program. There can be no question that a witness's 10-30% stake in the outcome of a proceeding is impeachment material. Yet the Division refuses even to state whether it considers this fact impeachment material subject to mandatory disclosure.

paid $208 million in fees during the periods the OC Ratio Test alleged failed. *Id.* at 4. And yet, the OIP—filed over three months prior to Mr. Mayer's expert report—states:

> Had Respondents appropriately classified the Zohar Funds' assets, Zohar II and Zohar III would have failed the OC Ratio test by at least the summer of 2009. Tilton's approach allowed Respondents to collect or accrue almost $200 million in Subordinated Fees and preference share distributions to which she was not entitled.

OIP ¶ 44. It is highly unlikely that the Division's OIP would have such precise allegations about the "summer of 2009" and "almost $200 million" without Mr. Mayer's consultation (or perhaps the involvement of one of Mr. Mayer's colleagues at CRA) in the calculation of the $200 million figure prior to the filing of the OIP.

Therefore, to ensure the Division has complied with its obligations and has appropriately interpreted *Brady* and *Giglio*, Your Honor should order the Division to specifically respond to each request.

III. Respondents Have Identified Nine Types Of Material Exculpatory Evidence That Warrant A Particularized Division Response.

Respondents also requested nine categories of exculpatory information that would be material to their ability to defend against the allegations set forth in the OIP. *See* Dunning Decl., Ex. 1, at 8-9. Evidence is deemed to be exculpatory if it tends to negate guilt, diminish culpability, support an affirmative defense, or if the evidence could potentially reduce the severity of the penalty imposed. *See, e.g.*, *United States v. Mehanna*, 735 F.3d 32, 65 (1st Cir. 2013) (explaining that *Brady* applies to "any evidence that fairly tends to negate guilt, mitigate punishment, or undermine the credibility of government witnesses"); *United States v. Ross*, 372 F.3d 1097, 1108 (9th Cir. 2004) (holding *Brady* violation would exist if new information supports affirmative defense).

Again, Respondents requested material that clearly qualifies as exculpatory information under *Brady*, including information from witnesses stating that Respondents' management fees were reasonable; information from witnesses stating that Respondents' collateral management fees and loan categorization practices were disclosed; and the exculpatory facts presented to the Commission before the OIP was issued. Respondents' request for information suggesting that management fees taken by Respondents were reasonable under the circumstances is favorable and material, for example, because the OIP relies on the theory that Ms. Tilton took "excessive fees" from the Zohar Funds. OIP ¶ 6; *see also id.* ¶ 44. Additionally, the allegation that Respondents failed to disclose their practices regarding management fees and loan categorization practices is central to the Division's case, *see id.* ¶¶ 5, 6, 44, 49-51, 54-56, and any evidence to the contrary is likely to impact the outcome of this proceeding.

If the Division has any information within the categories identified by Respondents, it would be material to Respondents' ability to defend themselves in this proceeding. Indeed, notes of the Division's communications with an investor witness regarding Patriarch's 2% total management fee reflect that the investor viewed the management fee as reasonable under the circumstances, stating "CLO is more hands on deal (active mgmt), so this isn't way out of line for a fee structure." Notes of the Division's communications with counsel for that same investor witness also undermine the Division's allegations that investors were misled, as counsel stated that it hadn't "heard complaints from [investor witness] re bei[n]g mislead [sic] about deal." Given that the Division has failed to produce notes of all of its communications with investors and/or their counsel, has demonstrated an intent to conceal such conversations, and has refused to assure Respondents that it has produced *Brady* material with items identified by Respondents in mind, it is impossible to be confident that the Division has complied with its

obligations. Your Honor should therefore order the Division to respond to each of Respondents' specific requests.

IV. Compliance With *Brady* In This Administrative Proceeding Is Especially Crucial In Light Of The Government's Failures To Comply With *Brady* And The Public Focus On The Fairness Of This Administrative Forum.

Adjudicators, including administrative law judges, have an especially important responsibility when *Brady* violations are suspected. *See, e.g.*, *Olsen*, 737 F.3d at 626 ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."). Following several high profile cases involving the government's failure to disclose exculpatory evidence, the government's chronic shortcomings with respect to *Brady* compliance have been a focus of legal scholars, courts, and the public, and should be a priority of this tribunal. *See generally, e.g.*, Brennan & King-Ries, *supra* n.1. "[W]idespread violations of *Brady* continue to result in an abuse of justice and a violation of the due process rights of defendants." Russell, *supra* n.1, at 242. "Numerous scholars have indicated that the extensive nature of *Brady* violations is a result of a widespread and overt disregard for the constitutional duty to disclose material evidence under the *Brady* Rule." *Id.* at 249; *see also supra* n.1.

The frequency of these violations is not at all surprising due to the conflicts of interest and competing incentives that enforcement officials face. *See id.* at 261-62 ("At best, prosecutors process information selectively, 'undervaluing the potentially exculpatory evidence and overrating the strength of the rest of the prosecution case.'") (citation omitted)). For example:

> "Commentators have variously attributed these violations to excessive caseloads and inexperience; the desire to win for professional or political gain; aspirations to 'do the higher justice' by ensuring the conviction of the guilty even at the cost of suppressing evidence; and the inherent conflict between

> prosecutors' habitual role as 'zealous advocates' and the task of searching for evidence that might jeopardize their own cases.

Dewar, *supra* n.1, at 1454-55.

This tendency of the government to narrowly approach its *Brady* obligations is precisely the reason that defense counsel routinely submit specific, particularized requests for exculpatory and impeachment information that would be material to the defense. *See, e.g.*, The Public Defender Service, *supra* n.5, at 12 ("[I]n order to ensure a defendant obtains the *Brady* information that he is due . . . defense counsel will always want to make written *Brady* requests tailored to the specific facts of the defendant's case."); Mahler, *supra* n.5 ("The prosecutors' duty to investigate the existence of *Brady* evidence in places beyond the tips of their noses creates a concomitant duty on defense counsel to point them in the right direction and to specify, to the extent possible, what information he or she believes will be found there. Trusting the prosecutor to know a piece of favorable evidence when he or she sees it is an extremely risky matter.").

Even the U.S. Department of Justice has recognized the government's shortcomings with respect to disclosing *Brady* material. *See, e.g.*, Green, *supra* n.2, at 2162 ("The DOJ was motivated to pledge a reevaluation of discovery practices by its awareness that the Ted Stevens prosecution was only one in a series of federal criminal cases in which it was embarrassed by its lawyers' discovery failures."). The DOJ has accordingly issued guidance regarding the government's *Brady* obligations, including guidelines in the United States Attorney's Manual giving specific examples of what it is obligated to produce.[9] *See* Green, *supra* n.2, at 2163; *see*

[9] "In January 2010, based on the recommendations of its discovery working group, the DOJ unveiled a series of new initiatives. A principal product of the DOJ's study was a commitment to educate federal prosecutors more rigorously regarding their disclosure duties.

also United States Attorney's Manual § 9-5.001. The SEC, on the other hand, does not even discuss the Division's *Brady* obligations in its enforcement manual, despite the fact that it has specifically incorporated *Brady* into its Rules of Practice.

The Commission's Rules give the ALJ discretion to oversee the Division's withholding of documents for precisely this reason. It is imperative that the ALJ utilize that discretion to ensure that the Division's failure to comply with its obligations under Rule 230(b) and *Brady* do not undermine the fundamental fairness required in an administrative hearing. The Division's gamesmanship with regard to its interpretation of its *Brady* obligations is especially worrisome given that the fairness of the administrative forum remains the subject of intense scrutiny. *See generally, e.g.*, Ryan Jones, *The Fight over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. Rev. 507 (2015). It is therefore especially important that Your Honor be proactive in safeguarding the few protections that exist for Respondents, including the *Brady* rule. *See Clarke T. Blizzard,* Investment Advisers Act Release No. 2032, 77 SEC Docket 1355 (2002), at *2 (2002) ("Even the appearance of a lack of integrity could undermine the public confidence in the administrative process upon which our authority ultimately depends.").

Having previously called upon federal prosecutors' offices to designate discovery coordinators, the DOJ now called on the coordinators to provide annual training to their offices and 'serve as on-location advisors,' and announced that it would develop resources for prosecutors regarding discovery. The DOJ appointed a new national coordinator for criminal discovery initiatives to oversee the educational efforts and other initiatives. The pedagogic focus presupposes that one important explanation for why federal prosecutors sometimes fail to comply with their disclosure obligations is that they are unaware of the relevant law, misunderstand it, misapply it, or do not know how to implement it." Green, *supra* n.2, at 2163.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Your Honor order the Division to disclose the evidence in its possession in each of the categories identified by Respondents in their letter of August 26, 2016 by September 9, 2016. Alternatively, Respondents request that Your Honor order the Division to comply with Respondents' request: for each category that is listed in Respondents' letter, the Division should disclose the requested information, state that it does not possess or is not aware of such information, or explain why in its view the requested information does not constitute Brady material.

Dated: New York, New York
August 31, 2016

GIBSON, DUNN & CRUTCHER LLP

By: Randy M. Mastro/KB

Randy M. Mastro
Reed Brodsky
Barry Goldsmith
Caitlin J. Halligan
Mark A. Kirsch
Monica Loseman
Lawrence J. Zweifach
Lisa H. Rubin

200 Park Avenue
New York, NY 10166-0193
Telephone: 212.351.4000
Fax: 212.351.4035

Susan E. Brune
LAW P.C.
450 Park Avenue
New York, NY 10022

Counsel for Respondents