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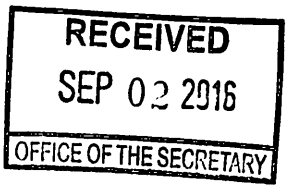

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

RESPONDENTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO COMPEL THE PRODUCTION OF WITNESS STATEMENTS UNDER THE JENCKS ACT

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September 1, 2016

Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, "Respondents"), respectfully submit this reply in further support of their motion to compel the Division of Enforcement ("Division") of the Securities and Enforcement Commission ("SEC") to produce witness statements under Rule 231 of the SEC Rules of Practice ("Rule 231") and the Jencks Act, 18 U.S.C. § 3500.

INTRODUCTION

The Division contends that Respondents' motion to compel should be denied on the sole basis that the Division has asserted its compliance with the Jencks Act. The Division insists that Your Honor has no role to play here because the determination of whether documents contain material that must be produced under the Jencks Act is the Division's alone to make in its sole, unreviewable discretion. That is not, and cannot be, the case. To the contrary, both logic and legal precedent dictate "that when a defendant seeks the production of a statement as defined [by the Jencks Act], the district court has an *affirmative duty* to determine whether any such statement exists and is in the possession of the Government and, if so, to order the production of the statement." *Saunders v. United States*, 316 F.2d 346, 349 (D.C. Cir. 1963) (emphasis added) (citing *Campbell v. United States*, 365 U.S. 85, 95 (1961)). Abdicating that responsibility to the Division would eviscerate the critical protections provided to Respondents by Congress in the Jencks Act, and would allow the Division to engage in trial by ambush—exactly what the Jencks Act, and Rule 231, were designed to prevent. *See infra* Pt. I.

Respondents therefore respectfully request that Your Honor order the Division to immediately produce all witness statements contained in the Division's notes and/or memoranda, including witness statements transmitted to the Division through counsel, as well as any audio

recordings of witness interviews not produced by the Division by September 2, 2016. Should the Division continue to assert that it has already fulfilled its obligations under the Jencks Act, Respondents respectfully request that Your Honor order the Division to produce for *in camera* inspection its notes and memoranda of pre-OIP meetings with witnesses' counsel and post-OIP meetings with witnesses and/or their counsel. Only by doing so can Your Honor fulfill the judiciary's critical role as arbiter and protector of respondents' Jencks Act rights, consistent with the SEC Rules of Practice and longstanding case law. *See infra* Pt. II. Finally, Respondents respectfully request that Your Honor require the Division to make an appropriate certification with respect to any witness interviews for which an audio recording does not exist, as set forth in more detail below. *See infra* Pt. III.

ARGUMENT

I. Your Honor Is The Final Arbiter Of Whether The Division's Notes And Memoranda Contain Jencks Act Material.

In its opposition brief, the Division fails to address longstanding precedent from the U.S. Supreme Court and the federal courts of appeal that emphatically places on the judiciary the obligation to safeguard a defendant's fundamental right to impeachment material under the Jencks Act. *See, e.g., Campbell v. United States*, 365 U.S. 85, 92 (1961). The cases are clear that a trial court may not "abdicate" the responsibility of determining whether the government possesses Jencks material to the government itself. *See United States v. Leyland*, 112 F.3d 506 (2d Cir. 1997) (collecting cases). Instead, the trial court *must* engage in an "adequate inquiry into the nature of the documents before ruling against Jencks Act production"—notwithstanding representations from the government, and contrary to the Division's unsupported contentions. *See, e.g., United States v. N. Am. Reporting, Inc.*, 740 F.2d 50, 55 (D.C. Cir. 1984) ("While prior to trial the prosecutor maintained her 'very, very firm position that [the notes] . . . have not been

adopted by the witnesses,' the Jencks determination is to be made by the court, not the prosecutor."); *see also United States v. Stanfield*, 360 F.3d 1346, 1355 (D.C. Cir. 2004) (district court erred by failing to "inquir[e] further into the nature of the material" or "examin[e] the documents themselves," and instead relying on the government's representations).

Active judicial involvement is the only way that the Jencks Act could adequately ensure "the fair and just administration" of proceedings brought by the government. *Goldberg v. United States*, 425 U.S. 94, 107 (1976) (citing *Campbell*, 365 U.S. at 92). Indeed, it would be fundamentally *unfair* to allow the Division to determine for itself—without oversight—that its interview notes do not contain Jencks material, and thereby withhold essential impeachment material from Respondents, who are facing a potential sanction of over $200 million and a lifetime ban from the industry.

Here, the Division improperly contends that its artificially narrow interpretation of the law, and mischaracterizations of Respondents' requests, should be substituted for Your Honor's independent judgment. That cannot be. *See United States v. Landron-Class*, 696 F.3d 62, 73 (1st Cir. 2012) ("Where a defendant requests discovery of potential Jencks material, our precedent requires the district judge to conduct an *independent* investigation[.]" (emphasis in original)). Respondents do not—as the Division asserts—seek "the production of all of the Division's notes of conversations with counsel for potential witnesses," Opp. at 4, but rather all Jencks Act statements that are contained in the Division's notes and/or memoranda, including witness statements transmitted to the Division through counsel in connection with a proffer or otherwise. Witness statements contained in attorney notes and memoranda must be produced under the Jencks Act. *See* Opening Br. at 3-9; *see also, e.g.*, *Goldberg*, 425 U.S. at 101-02; *United States v. Clemens*, 793 F. Supp. 2d 236, 252 (D.D.C. 2011); *In re Donald T. Sheldon*,

Release No. 273, 52 SEC Docket 434, at *1 (Sept. 10, 1986). The Division provides no support for its troubling position that attorney notes are never subject to production under the Jencks Act, or that witness statements contained in interview memoranda are somehow protected from disclosure.[1] Your Honor should therefore order the Division to re-review its witness interview notes and memoranda, and produce any witness statements contained therein—whether provided directly by a witness or through counsel—consistent with prevailing law.

II. At A Minimum, Your Honor Should Conduct An *In Camera* Review To Evaluate The Division's Position That None Of Its Notes Or Memoranda Contains Jencks Act Materials.

The Division's contention that Respondents must establish that the Division's notes contain witness statements subject to production under the Jencks Act before Your Honor may conduct an *in camera* review of the notes is incorrect and illogical. Any such requirement "would [mean] that a hearing could not be had except on proof which, if available, would make the hearing unnecessary." *Ogden v. United States*, 303 F.2d 724, 737 (9th Cir. 1962).[2] The

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[1] The Division misleadingly cites *United States v. Allen*, 798 F.2d 985, 994 (7th Cir. 1986), as holding that "[a] government agent's summary of a witness's oral statement that is not signed or adopted by the witness is not producible." Opp. at 2, 3. But *Allen* stands only for the unremarkable proposition that "'statements' under the Jencks Act do not 'include . . . protected material flowing from the attorney's mental processes.'" *Clemens*, 793 F. Supp. 2d at 252 (quoting *Saunders*, 316 F.2d at 350)). It does not support the Division's unsubstantiated contentions that attorney notes are never subject to production under the Jencks Act, or that witness statements contained in interview memoranda are protected from disclosure.

[2] The Division's cases to the contrary are inapposite. Both cases address defense counsel's obligation to lay a predicate during cross-examination that Jencks materials may exist to impeach the testifying witness by, *inter alia*, asking the witness whether she had adopted or approved any government summaries of previous interviews. *See United States v. Delgado*, 56 F.3d 1357, 1364 (11th Cir. 1995) (*in camera* review not warranted where defense failed during cross examination "to lay the predicate required to invoke the Jencks Act protections"); *United States v. Gaston*, 608 F.2d 607, 611 (5th Cir. 1979) ("[D]efense counsel failed to initiate an inquiry of the witnesses [as to whether the witness had signed or adopted the FBI 302] which might have triggered the need for further examination.").

Division ignores the authority cited in Respondents' opening brief that confirms that there is no such procedural requirement and that the trial court's "affirmative duty to determine whether any [Jencks Act] statement exists and is in the possession of the Government and, if so, to order the production of the statement," is triggered by the defendant's simple request for the "production of a statement." *Saunders*, 316 F.2d at 349 (quoted at Opening Br. 8).

Consistent with the case law, the SEC Rules of Practice are silent on any such threshold requirement or burden; the comments to Rule 231 instead direct only that, "[w]here the staff believes a witness statement falls outside the purview of the rule, the hearing officer may require that the documents in question be turned over for *in camera* inspection." Comment to Rule 231, SEC Rules of Practice Final Rules Release, SEC Release No. 35833, 59 SEC Docket 1170, at *57 (June 9, 1995). The comment tracks the facts here exactly: The staff believes statements contained in its attorney notes—particularly but not exclusively witness statements conveyed by counsel—"fall[] outside the purview of the rule," while Respondents have provided contrary authority. *See* Opening Br. Pt. I; *see also, e.g.*, *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1197 (C.D. Cal. 1999) (noting that if a "written proffer is proposed by the witness's attorney," any record of that proffer must be produced under the Jencks Act, because "[i]t is reasonable to conclude that the attorney would only submit such material if it was approved by his client, the witness"). Your Honor therefore "may require that the documents in question be turned over for *in camera* inspection." Comment to Rule 231, SEC Rules of Practice Final Rules Release, SEC Release No. 35833, at *57.

The Division does not cite a single SEC decision placing the burden on a respondent. To the contrary, hearing officers liberally grant *in camera* inspection to respondents who move to compel the production of Jencks material. *See, e.g.*, *In re Thomas R. Delaney II*, Release No.

1652, 109 SEC Docket 2282, at *3 (July 25, 2014) (granting *in camera* review despite the fact that there was "nothing that indicate[d] the Division [had] not acted in accord with . . . [its] obligations under the Jencks Act"); *In re Bank of Boston*, Release No. 424, 56 SEC Docket 1573, at *1, 2 (Apr. 19, 1994) (granting *in camera* review where respondent claimed that interview notes "might come within the scope of Jencks Act material" although the Division had determined otherwise); *In re Stuart-James Co, Inc., et al.*, Release No. 343, 52 SEC Docket 504, at *1 (Aug. 30, 1989) (ordering *in camera* review notwithstanding that the Division represented that its attorneys "avoided recording substantially verbatim statements during interviews in an effort to protect trial strategies; that in many instances notes were not prepared until after interviews; and that the attorneys' notes contain[ed] their own thoughts as well as legal analysis and trial strategy and as such [were] protected work product and not Jencks material"). It is only by doing so that hearing officers properly and adequately fulfill their critical role as arbiter and protector of respondents' Jencks Act rights.

Moreover, several federal courts have held that "[t]he burden is not upon the defendant to prove that the statements requested are substantially verbatim recitals within the meaning of the Act" before an *in camera* review is warranted. *See, e.g., Williams v. United States*, 328 F.2d 178, 180-81 (D.C. Cir. 1963). Indeed, the Division's own case confirms that "if the defendant claims that the documents he seeks are statements as defined by the Jencks Act, but the government says they are not, then the *presumption* should be that the district court should hold an *in camera* hearing and after reviewing the documents make a determination of what should be turned over to the defendant." *Allen*, 798 F.2d at 994 (emphasis in original).

The Division's contrary position would effectively deny Your Honor that authority, and allow the Division to appoint itself both prosecutor and judge where the Jencks Act is

concerned—leaving Respondents at the mercy of the very government officials who are prosecuting them to produce materials harmful to those same officials' case. The appearance of a conflict of interest in such a situation is manifest, and harmful to the reputation of the Commission and the federal government, not to mention to Respondents' right to a fair hearing.

Even if Respondents were required to meet some indistinct burden before Your Honor could conduct an *in camera* review, Respondents have done so here. The Division does not dispute that it interviewed witnesses from at least 19 institutional investors since it filed the Order Instituting Proceedings—a number of which are on the Division's amended witness list—or that it did not produce any Jencks Act materials from those interviews. Opp. at 5-6. Moreover, the Division's investigative file reveals that the Division communicated with four of those investors' counsel more than 50 times during its investigation, whether in person, over the telephone, or by email. Opening Br. at 1.

III. Your Honor Should Order The Division To Certify That It Has Not Lost Or Destroyed Any Audio Recordings Of Witness Interviews Related To This Proceeding.

In its opposition, the Division states that in the time since Respondents requested audio recordings of witness interviews, it has "learned that some audio recordings of witness testimony do exist in off-site storage," and will produce any "*existing* audio recordings." Opp. at 1, 7-8 (emphasis added). The Division's promise to produce "existing" recordings implies that not all of the audio recordings made in connection with this proceeding have been properly maintained. Under the procedures established by the Division's Enforcement Manual Policy 3.2.9.3, the Division was required to log, label, and mark for preservation all audio recordings before sending them to storage. Opening Br. at 9-10. All audio recordings of witness interviews should therefore still exist. To the extent that the Division no longer has in its possession audio recordings of some witness interviews, or such recordings no longer exist, Respondents request

that Your Honor order the Division to certify that the recordings were never made, and if they were made and lost or destroyed, to order the Division to explain its efforts and processes for maintaining the recordings and the events leading to their loss or destruction.

Should it turn out that the Division has not properly maintained these recordings, Respondents will respectfully request appropriate relief, because such spoliation would be the farthest thing from "harmless error." *See* Rule 230(h). In particular, although the Division notes that it has produced the written transcripts of these witness interviews already—implying that the audio recordings are somehow unimportant or duplicative—it is obvious to any seasoned trial lawyer that transcripts do not substitute for live recordings. Contrary to the Division's suggestion, then, the audio recordings of witness interviews are critical trial preparation materials, as Respondents seek to gauge the demeanor and credibility of potential witnesses, and these recordings will be critical for cross-examination and impeachment as well.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Your Honor order the Division to produce to Respondents all witness statements contained in the Division's notes and/or memoranda, including witness statements transmitted to the Division through counsel, as well as any audio recordings of witness interviews not produced by the Division by September 2, 2016. Should the Division continue to assert that it has already fulfilled its obligations under the Jencks Act, Respondents respectfully request that Your Honor order the Division to immediately produce for *in camera* inspection its notes and memoranda of pre-OIP meetings with witnesses' counsel and post-OIP meetings with witnesses and/or their counsel. In addition, Respondents respectfully request that Your Honor require the Division to make an appropriate certification

with respect to any witness interviews for which an audio recording does not exist, consistent with the relief requested above.

Dated: New York, New York
September 1, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of Respondents' Reply Memorandum of Law in Further Support of Their Motion to Compel the Production of Witness Statements Under the Jencks Act, on this 1st day of September, 2016, in the manner indicated below:

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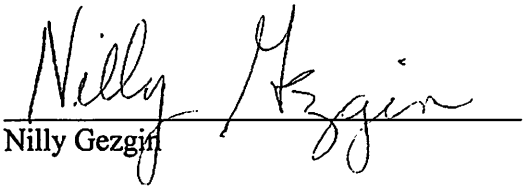

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