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

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE TRANSCRIPTS OF INVESTIGATIVE TESTIMONY, INCLUDING DIVISION EXHIBITS 194 THROUGH 206

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Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, "Patriarch" or "Respondents"), respectfully submit this memorandum of law in support of their motion *in limine* to exclude the attempted admission of investigative testimony by the Security and Exchange Commission ("SEC") Division of Enforcement (the "Division"), including Division Exhibits 194 through 206.

INTRODUCTION

Flouting a well-established rule prohibiting admission of transcripts wholesale, the Division's August 22, 2016, amended exhibit list includes every page of thirteen separate transcripts from the Division's investigation. *See* Division's Amended Exhibit List, Aug. 22, 2016, Exs. 194-206. Due process concerns counsel against the admission of wholesale transcripts, *see, e.g.*, Hearing Transcript at 1491:18-24, *In re John J. Aesoph*, SEC Administrative Proceeding File No. 3-15168 (Oct. 28, 2013) (Foelak, ALJ), and those concerns are implicated even more strongly when the transcripts offered are based on investigative testimony not subject to cross-examination, *see, e.g.*, *In re Del Mar Fin. Servs., Inc.*, Release No. 188, 2001 WL 919968, at *4 (Aug. 14, 2001) (Foelak, ALJ). Here, certain portions of the investigative testimony are plagued with unreliable and inadmissible lay opinion testimony, multiple levels of hearsay, and speculation in the absence of personal knowledge. Accordingly, Respondents move to exclude Division Exhibits 194 through 206.

LEGAL STANDARD

The Administrative Procedure Act ("APA") requires that any agency order that issues after a hearing must be based on evidence that is "reliable," "probative," and "substantial." 5 U.S.C. § 556(d). The SEC Rules of Practice, 17 C.F.R. pt. 201 ("Rules of Practice"), mandate that "the hearing officer . . . shall exclude all evidence that is irrelevant, immaterial or unduly

repetitious." Rule 320. Rule 235(a) provides that prior sworn statements of witnesses who are available to testify are generally inadmissible. Rule 300 states that the hearing "shall be conducted in a fair, impartial, expeditious and orderly manner."

ARGUMENT

Respondents respectfully move for the exclusion of Division Exhibits 194 through 206, which mark the entirety of thirteen investigative transcripts.

I. Wholesale Admission Of Investigative Testimony Transcripts Is Improper.

As Your Honor has previously recognized, the wholesale admission of investigative testimony transcripts is not permitted. *See* Hearing Transcript at 1478:7-10, *In re John J. Aesoph*, File No. 3-15168 (Oct. 28, 2013) (Foelak, ALJ); *see also In re Del Mar Fin. Servs,, Inc.*, Securities Act Release No. 8314, 2003 WL 22425516, at *8-9 (Oct. 24, 2003) (Op. of the Comm'n) (upholding exclusion of entire investigative transcripts offered by the Division); *In re Martin B. Sloate*, Exchange Act Release No. 38373, 1997 WL 126707, at *2 (Mar. 7, 1997) (Op. of the Comm'n) (upholding exclusion of prior trial testimony offered by the Division where the witnesses were available to testify at the hearing); *see also In re Shahrokh Nikkah*, No. 95-13, 2000 WL 622872, at *6-7 (CFTC May 12, 2000) (noting ALJ's discretion, when the CFTC Division of Enforcement seeks to admit transcript of entire investigative deposition, to require the Division to specify on which portions of the transcripts it will rely).

Division Exhibits 194 through 206 are the complete transcripts of thirteen days of testimony from twelve individuals. The Division has not designated any portion of those transcripts or otherwise demonstrated the relevance of the entirety of the thirteen transcripts. Nor has the Division explained the necessity of their admission, as all witnesses are available to testify, and there is a strong presumption in favor of oral testimony subject to cross-examination where Your Honor can evaluate the credibility of each witness. Indeed, nearly all of the

individuals who testified are on the Division's Amended Witness List. The admission of the transcripts would be unduly repetitious of and a poor substitute for live testimony at the hearing. Accordingly, Division Exhibits 194 through 206 should be excluded in their entirety.

II. The Division Has Failed To Comply With Rule 235.

The Division's Exhibits 194 through 206 do not comply with Rule 235. Rule 235 requires that a party seeking to admit any investigative testimony must file a motion setting forth the reasons for introducing each statement. Although the Commission amended Rule 235 this year, both the pre- and post-amendment versions of the Rule require "a motion setting forth the reasons" to justify admission of prior testimony. As the Commission explained in its comments to the amendment:

> [A] person must make a motion setting forth reasons for introducing the statement. The standard for granting such a motion focuses on the admissibility and relevance of the statement, the availability of the witness for the hearing, and the presumption favoring oral testimony of witnesses in an open hearing.

SEC, Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,223 (July 29, 2016).

The Division has filed no such motion. For that reason alone, Your Honor should exclude this prior sworn testimony from the Division's case-in-chief. *See In re Lynn Tilton*, Admin. Proceedings Rulings Release No. 4118 (Sept. 1, 2016) ("[I]f the Division intends to use prior sworn testimony in its case-in-chief, it must comply with [Rule 235] . . . ."). Moreover, for the reasons explained herein, the Division cannot justify admission of these transcripts in lieu of live testimony in any event and for any purpose.

Had the Division even attempted to file a motion under Rule 235, that motion would have revealed the irreconcilable tension between the Division's strategy and the Rule. An ALJ may grant a motion under Rule 235 only if the motion demonstrates either (1) that the witness is

unavailable for reasons specified in the Rule, or (2) that the interests of justice weigh so strongly in favor of the hearsay statement's admission that they overcome "the presumption that the witness will testify orally in an open hearing." Rule 235(a). Here, the Division seeks to admit investigative testimony of individuals who will testify at the hearing or whom the Division could have chosen to call as witnesses. These witnesses are precisely the opposite of the witnesses described in Rule 235(a): they are so eminently available that they either will testify before Your Honor or would have testified had the Division called them to do so. It is inappropriate to permit the Division to strategically employ out-of-court statements that were not subject to cross-examination and strategically forgo its opportunity to elicit live testimony from the same individuals that would be subject to cross-examination before your Honor.

III. Admission Of Investigative Testimony Is Fundamentally Unfair To Respondents.

As Your Honor has previously recognized, the admission of investigative testimony against respondents in administrative proceedings is fundamentally unfair and imperils due process rights. Respondents' counsel was prohibited from attending nearly all of the investigative testimony that the Division seeks to admit, *see* Div. Exs. 194-201, 204-06, leaving that testimony unchallenged by objections or cross-examination. When Respondents were able to attend an interview, they were not permitted to ask questions. As a result, the testimony in Division Exhibits 194, 195, 196, 197, 198, 199, 200, 201, 204, 205 and 206 presents an unreliable record—one-sided at best, and in any event devoid of the integrity of an adversarial factfinding process.

As Your Honor held in *In re Del Mar Financial Services, Inc.*, the Division cannot import vast amounts of investigative testimony into the administrative record. Release No. 188, 2001 WL 919968, at *4 (Aug. 14, 2001). The rejection of the Division's evidence was required by fundamental fairness and due process:

> There is no doubt that the investigative testimony of [respondent] should not be admitted against [other respondents] because it would be fundamentally unfair to do so. It would cast doubt on whether they were accorded due process in this proceeding. These Respondents did not have the opportunity, and were forbidden by the Commission's Rules, to confront [the testifying respondent] and to cross-examine him.

Id. (citing 17 C.F.R. § 203.7(b)). The Commission affirmed the exclusion of the transcripts, "disapproving of [the] practice of depositing entire investigative transcripts into record." *In re Del Mar Fin. Servs., Inc.*, Securities Act Release No. 8314, 2003 WL 22425516, at *8-9 & n.22 (Oct. 24, 2003) (Op. of the Comm'n).

Compounding the unreliability of the transcripts that the Division now submits as evidence, those who testified were not allowed to review the transcripts to identify and correct errors in the transcription. The absence of any quality control over the transcription process is particularly concerning here. The transcripts are riddled with obvious errors, some of which affect the meaning and relevance of the purported testimony. Without witness review (let alone an opportunity for Respondents to ask questions), it is impossible to tell whether the poor transcription contains latent errors as well. And oddly, the reporter's certificate, scopist certificate, and proofreader's certificate are unsigned in the versions produced by the Division to Respondents.

The reliability of these transcripts as substitutes for live testimony is highly problematic given that at least some of the audio recordings of this testimony appear to be no longer available. As Respondents have explained elsewhere, there is serious doubt as to whether the Division retained the original audio recordings of this testimony and, as a result, there is no way to corroborate the content of the transcripts the Division now seeks to admit. *See* Respondents' Reply in Further Support of Their Motion to Compel the Production of Witness Statements Under the Jencks Act at 7-8, Sept. 1, 2016.

IV. Wholesale Admission Of Investigative Transcripts Would Taint The Record With Inadmissible And Objectionable Testimony.

Wholesale admission of investigative transcripts is fundamentally unfair for the additional reason that many portions of Division Exhibits 194 through 206 contain testimony inadmissible for a variety of other reasons. Their wholesale admission, however, would require Respondents to list particularized objections to each objectionable part of those transcripts. And Your Honor would then have to consider and rule on each such particularized objection, despite the irrelevant, immaterial, or repetitive nature of the investigative testimony.

For example, amended Rule 320, which applies to the hearing in this matter, provides that hearsay is admissible only "if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." Rule 320(b). Indeed, "[m]ere uncorroborated hearsay" in an administrative hearing "does not constitute substantial evidence." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 230 (1938); *see also* 5 U.S.C. § 556(d) (requiring that evidence in administrative proceedings be "reliable" and "probative").

Transcripts that contain hearsay upon hearsay are especially unreliable, so the use of such compound hearsay in this proceeding—particularly in lieu of live witness testimony—is inherently unfair. The investigative testimony is also replete with witness speculation regarding matters for which the witnesses have no personal knowledge. Personal knowledge is "a foundational requirement for fact witness testimony." *United States v. Cuti*, 720 F.3d 453, 458-59 (2d Cir. 2013). Such testimony may be admitted only if a "reasonable trier of fact could believe the witness had personal knowledge" of the subject matter to which they are testifying. *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 764 (2d Cir. 1991); *cf.* Fed. R. Evid. 602, 701. Indeed, the transcripts offered by the Division include admissions by witnesses that they have no personal knowledge of events about which they are questioned, and they are

peppered with speculation about what could or may have happened. Such speculation is neither reliable nor probative. *See California v. Green*, 399 U.S. 149, 155 (1970). The Division should therefore be precluded from seeking wholesale admission of investigative transcripts, including Exhibits 194 through 206.

CONCLUSION

For the reasons set forth above, Respondents respectfully move for an order excluding all transcripts of investigative testimony, and specifically excluding Division Exhibits 194 through 206.

Dated: New York, New York
September 1, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I served true and correct copies of Respondents' Motion *In Limine* to Exclude Transcripts of Investigative Testimony, Including Division Exhibits 194 Through 206, and a memorandum of law in support thereof on this 1st day of September, 2016, in the manner indicated below:

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