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 BRADY MATERIALS**

Introduction

Although styled as a "Motion to Compel the Production of Brady Materials" ("Motion"), in actuality Respondents seek an unprecedented order that would require the Division to provide detailed responses to 27 separate and quite broad discovery requests. Apparently recognizing that "*Brady* requests cannot be used as discovery devices," *United States v. Caro,* 597 F.3d 608, 619 (4th Cir. 2010), Respondents attempt to mask the impropriety of their request by hurling baseless and unsubstantiated accusations that the Division is engaging in "gamesmanship with regard to its interpretation of its *Brady* obligations" (Respondents' Memorandum of Law in Support of Their Motion to Compel the Production of Brady Materials at 16), and that the Court "cannot have confidence that the Division has conducted a proper *Brady* review" (*id.* at 8). Respondents' belief notwithstanding, all *Brady* materials known to the Division have been provided.

As previously explained to Respondents, the Division is keenly aware of its obligations under *Brady* and its progeny, and has thoroughly abided by them. *Brady* obligates the Division to produce material exculpatory information to Respondents, whether or not a Respondent makes any such request. Contrary to Respondent's arguments, *Brady* and its progeny contemplate the production of evidence, not detailed responses to any and every discovery request made by a Respondent. Indeed, *Brady* does not grant Respondents the right to engage in a fishing expedition or to use *Brady* as a discovery tool. Respondents' letter containing 27 separate requests is simply a device by which they seek to impermissibly expand discovery. Because the Division is aware of its obligations under *Brady*, and because it is complying with those obligations, the Court need not order the Division to comply with its *Brady* obligations, much less respond to Respondents' discovery requests.

Argument

First, Respondents' Motion is wholly unnecessary because the Division understands, and is complying with, its *Brady* obligations. Ostensibly, Respondents' Motion is premised on their grievance that "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." Motion at 3 (quoting Dunning Decl., Ex. 1, at 1). To clear up any ambiguity, and as previously explained to Respondents, the Division's position regarding its *Brady* obligations is quite clear. It mirrors exactly what the law requires:

> Under *Brady* and its progeny, "the Government has a constitutional duty to disclose favorable evidence to the accused where such evidence is 'material' either to guilt or to punishment." *United States v. Coppa,* 267 F.3d 132, 139 (2d Cir. 2001). "Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness." *Id.* "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had

> the evidence been disclosed, the result of the proceeding would have been different," such that the failure to disclose "'undermine[s] confidence in the verdict.'" *Cone v. Bell,* 556 U.S. 449, 469-70 (2009) (quoting *Kyles v. Whitley,* 514 U.S. 419, 435 (1995)).

United States v. Certified Envtl. Servs., Inc., 753 F.3d 72, 91 (2d Cir. 2014). The Division's view of *Brady* was made explicit in its August 31st letter to Respondents' counsel, as was the Division's reassurance that it "has complied, and will continue to comply, with its *Brady* obligations." (Dunning Decl., Ex. 2, at 1). Yet, the very next day, Respondents filed the instant 17 page motion, which does not take issue with the Division's understanding of *Brady* and its progeny, but rather alleges the Division "[f]ail[ed] [t]o [m]eet [i]ts *Brady* [o]bligations [b]y [r]efusing [t]o [r]espond [t]o [t]he [s]pecific [c]ategories [i]dentified [b]y Respondents." Motion at 7. In this case 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. Respondents cannot credibly argue that the Division is attempting to hide the ball or shirk its discovery obligations. Thus, because the parties appear not to dispute what legally qualifies as *Brady*, and because Respondents are not seeking the production of *Brady* material but rather requesting a detailed response to their specific discovery requests, Respondents' Motion is without merit.

Second, Respondents' Motion reveals a misunderstanding of *Brady*, and the self-executing discovery responsibilities stemming therefrom. In short, the Division is required to produce evidence where such evidence is material either to guilt or to punishment, whether or not such information is requested. *See, e.g., United States v. Agurs*, 427 U.S. 97,110 (1976) (holding that the obligation to produce exculpatory evidence exists even without specific request); *United States v. Grace,* 401 F.Supp.2d 1069, 1076, 1083 (D. Mont. 2005) ("*Brady* imposes a self-executing constitutional obligation, and generally is not the proper subject of court rulings prior to

trial."); *United States v. Hsia*, 24 F. Supp. 2d 14, 30 (D.D.C. 1998) ("Beyond these general warnings, it is not the court's role to 'referee ... disagreements about materiality and supervise the exchange of information," *United States v. McVeigh*, 954 F. Supp. 1441, 1451 (D. Colo. 1997), and the Court has little choice at this juncture but to accept the government's representation that it will immediately disclose any and all *Brady* material that it has, or discovers that it has, in its possession.").

Brady does not, however, obligate or even contemplate that the Division provide detailed responses to any and all discovery requests made by a Respondent. Although Respondents ask this Court to order the Division to respond in detail to their discovery requests – and even argue the Division fails to meet its *Brady* obligations if it does not to submit a detailed responses (Motion at 7) – Respondents fail to cite any authority that *Brady* creates such an obligation. In fact, rather than citing binding or persuasive authority on the subject, Respondents instead declare that their request is a "common practice of defense counsel in order to limit the possibility that the government's view of exculpatory and impeachment evidence is too narrow," and cite only an article written by a criminal defense attorney for the National Association Criminal Defense Lawyers' The Champion magazine. (Motion at 8).

Third, courts universally hold that "*Brady* requests cannot be used as discovery devices." *United States v. Caro*, 597 F.3d 608, 619 (4th Cir. 2010). As explained in a prior Administrative Proceeding:

> *Brady* is not a discovery rule, it is "'intended to insure that exculpatory material known to the Division is not kept from the respondent,'" and it does not "'authorize a wholesale 'fishing expedition' into investigative material." *Warren Lammert*, Securities Act Release No. 8833 (Aug. 9, 2007), 91 SEC Docket 856, 866 (quoting another source); *see Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 823 (10th Cir. 1995) (stating that *Brady* "does not

> require the prosecution to divulge every possible shred of evidence that could conceivably benefit the defendant," and that the purpose of *Brady* is not "to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur").

In the Matter of David F. Bandimere & John O. Young, Release No. 759 (Mar. 12, 2013). Respondents' Motion, while couched in hyperbolic claims of a *Brady* "epidemic" in the justice system (Motion at 2), is really nothing more than a request that the Court order the Division to respond to Respondents' discovery requests. Such a request is improper. To be clear, and contrary to the Respondents' allegations, the Division understands and appreciates the standards for producing evidence favorable to the accused. However, the Division is not required to, and should not be ordered to, provide detailed responses to Respondents' discovery requests, as *Brady* "is not a discovery rule" (*id.*).

Fourth, because the Division is aware of its *Brady* obligations, and because Respondents have made no credible claim that Division is shirking its *Brady* responsibilities, judicial intervention is improper. As noted above, the Division's *Brady* obligations are self-executing (and have been complied with), and do not depend on action from this Court. Thus, a Court order compelling the Division to do that which it is already required to do, and has done, would be superfluous at best. Tellingly, the cases found in Respondents' Motion deal with judicial intervention only after there has been some withholding of information that should have been disclosed pursuant to *Brady*. *See, e.g., City of Anaheim*, Admin. Proceedings Rulings Release No. 586, 70 SEC Docket 668, at *6 (ALJ July 30, 1999). In fact, district courts typically cannot enact their supervisory power over a prosecutor's conduct, including their compliance with *Brady,* prior to a violation of some right. *See, e.g., United States v. Jennings,* 960 F.2d 1488, 1492 (9th Cir. 1992) (recognizing that when the government represents that members of the

prosecution team faithfully conducted *Brady* review, and there was no violation of a recognized right, there is no basis for the district court to impose its own procedures as a remedy because "the presumption is that the [government's] official duty will be done"); *United States v. Wilson*, 278 F.R.D. 145, 156 (D. Md. 2011) (declining to exercise supervisory power because defendant did not show "that his rights have been violated, or rebutted the presumption government] compliance" with *Brady*.). Here, Respondents make no credible claim that the Division has violated the rights of Respondents

Conclusion

The Division understands and appreciates the standards for producing evidence pursuant to *Brady*. Because the Division is keenly aware of its *Brady* obligations and is complying with those obligations, and because *Brady* is not a discovery rule, the Court should decline to order the Division to provide detailed responses to Respondents' discovery requests.

Dated: September 8, 2016

Respectfully Submitted,

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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 BRADY MATERIALS** was served on the following on this 8th day of September, 2016, in the manner indicated below:

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