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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

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION *IN LIMINE* TO PRECLUDE THE ADMISSION OF ANY PORTIONS OF INVESTIGATIVE TESTIMONY TRANSCRIPTS WITHOUT THE INTRODUCTION OF CORRESPONDING PORTIONS OF AUDIO RECORDINGS OF THE TESTIMONY, AND TO EXCLUDE TRANSCRIPTS FOR WHICH AUDIO RECORDINGS WERE NOT PRESERVED AND PRODUCED

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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 require that, to the extent the Securities and Exchange Commission ("SEC") Division of Enforcement (the "Division") makes a motion under Rule 235 of the SEC Rules of Practice, 17 C.F.R. § 201.100 et seq. (the "Rules") to admit any portion of any transcript of investigative testimony, it must only be permitted to do so where corresponding portions of the audio recording—which contain the best evidence of what a witness stated during testimony—are available and admitted into evidence as well. Moreover, because the Division has, shockingly, admitted that it taped—but has since misplaced or destroyed, and can therefore no longer find—audio recordings of more than half a dozen investigative examinations of witnesses on its witness list, it should be precluded from introducing into evidence, or using for any purpose, any portion of the investigative transcripts for which it cannot produce audio recordings. Such spoliation of evidence would be dealt with even more harshly in federal court, but Respondents are asking only for targeted relief precluding the use of investigative transcripts where the Division has failed to preserve the best evidence.

INTRODUCTION

During the SEC's investigation prior to the Order Instituting Proceedings ("OIP"), the staff took testimony from nineteen witnesses, ten of whom the Division has listed on its Amended Witness List. *See* Division of Enforcement's Amended Witness List, dated August 22,

2016, at 2-4. The Division has also marked thirteen of the nineteen investigative transcripts as trial exhibits. *See id.*[1]

The Division also apparently arranged for these investigative examinations to be audio-recorded, but it did not produce any of the recordings to Respondents. By letter dated August, 17, 2016, Respondents reminded the Division of its obligation to produce any audio recordings of these investigative examinations, as well as other Jencks Act materials. In its August 29, 2016 Opposition to Respondents' Motion to Compel Production of Witness Statements under the Jencks Act, the Division agreed to produce the audio recordings in its possession by September 2, 2016. On September 6, 2016, the Division notified Respondents that it could only locate six audio recordings, which it subsequently produced. *See* Declaration of Mary Kay Dunning, dated September 12, 2016 ("Dunning Decl."), Ex. 1. It represented that these were "all recordings that are in the possession" of the Division. *Id.*

Should the Division make a motion under Rule 235 for the admission of portions of the investigative testimony, or seek to use it for any purpose, the Division should be required to

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[1] By separate motion *in limine*, Respondents have moved to exclude these proposed exhibits. Specifically, on September 1, 2016, Respondents moved to exclude Division Exhibits 194 through 206 on the grounds that it would be improper to introduce the transcripts of investigative testimony wholesale, and that the Division has not made an appropriate motion under Rule 235 for the introduction of any portion of the transcripts. *See* Respondents' Motion *in Limine* to Exclude Transcripts of Investigative Testimony, Including Division Exhibits 194 Through 206 (Sept. 1, 2016). In its opposition, the Division did not dispute that it would be inappropriate to introduce investigative testimony wholesale, agreed that it would need to make a meritorious motion under Rule 235(a) before any portion of the transcripts of non-party testimony could be introduced into evidence, and represented that at this stage it "does not intend to file such a motion," though it may seek to use investigative testimony of non-parties to refresh the recollection of a witness or for impeachment purposes, and may seek the admission of the investigative testimony of Lynn Tilton under Amended Rule 235(b). *See* Division of Enforcement's Opposition to Respondents' Motion *in Limine* to Exclude Transcripts of Investigative Testimony, Including Division Exhibits 194 through 206 (Sept. 9, 2016).

submit the corresponding portions of audio recordings into evidence as well. Audio recordings are the best evidence of witnesses' investigative testimony, not transcripts riddled with errors and inaccuracies and developed entirely in Respondents' absence, without opportunity to object or cross-examine. This is especially true given that the witnesses were never afforded an opportunity to review the transcripts for errors and inaccuracies. *See infra* Pt. I.

Moreover, by failing to preserve and make the audio recordings of all the investigative testimony available to Respondents, the Division has inexplicably neglected to adhere to its obligation to preserve and turn over evidence relevant to its investigation. The Division's September 6, 2016 letter to Respondents states that the audio recordings were "received and maintained" by the Division's "Records Management office in Washington D.C." but provides no explanation as to why Division staff failed to ensure that audio recordings of the other witnesses' testimony were preserved. *See* Dunning Decl., Ex. 1. The Division instead states that the "court reporters" it retained did not provide the recordings to the office, *id.*, but fails to explain what, if anything, Division staff did to follow up with the court reporting agencies to obtain the audio recordings. *Id.*

The Division has violated its own written evidence preservation rules and procedures, *see infra* Pt. II, and severely prejudiced Respondents, including their rights to witness statements under the Jencks Act and their rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Accordingly, where the Division has failed to preserve audio recordings of an investigative examination, it should be precluded from introducing into evidence, or using for any purpose, any portion of the flawed and unreliable investigative transcripts—as a matter of fundamental fairness, as an appropriate sanction, and because the Rules do not permit the introduction of unreliable evidence.

LEGAL STANDARD

Pursuant to 5 U.S.C. § 556(d), evidence in administrative proceedings must be "reliable," "probative," and "substantial." Rule 300 states that the hearing "shall be conducted in a fair, impartial, expeditious and orderly manner." Amended Rule 320 states that the hearing officer "shall exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unreliable."[2] Although the Federal Rules of Evidence do not govern the Commission's administrative proceedings, they provide helpful guidance on issues not directly addressed by the Rules. *Yanopoulos v. Dept. of Navy*, 796 F.2d 468, 471 (Fed. Cir. 1986); *accord In re Sky Sci., Inc.*, SEC Release No. 137, 1999 WL 114405, at *2 (ALJ Mar. 5, 1999); *In re Miguel A. Ferrer & Carlos J. Ortiz*, SEC Release No. 730, 2012 WL 8751437, at *2-3 (ALJ Nov. 2, 2012). Federal Rule of Evidence 1002—the "best evidence" rule—states that "[a]n ***original*** writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Fed. R. Evid. 1002 (emphasis added).

"'The elementary wisdom of the best evidence rule rests on the fact that the [recording itself] is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description [of it].'" *United States v. Holton*, 116 F.3d 1536, 1545 (D.C. Cir. 1997) (quoting *Gordon v. United States*, 344 U.S. 414 (1953)) (alterations in original). The rule is a "mechanism to prevent fraud or mistransmission of information, *i.e.*, to ensure accuracy." *Id.* When a recording's content, rather than its mere existence, is material to an issue in dispute, the proponent generally must introduce the recording itself. *Carroll v. LeBoeuf, Lamb, Greene & MacRae, L.L.P.*, 614 F. Supp. 2d 481, 484 (S.D.N.Y. 2009); *see also* Wigmore:

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[2] Amended Rule 320 applies in this matter. *See* Amendments to the Commission's Rules of Practice, Exchange Act Release No. 34-78319, at *30 (July 13, 2016).

A Treatise on Evidence § 1.3.7 (discussing the common law origins of the best evidence rule and the reliability concerns that gave rise to it).

Where the best evidence of a litigant's conduct has been destroyed or not maintained—even if done with mere negligence—a spoliation sanction is appropriate. *See Regulatory Fundamentals Grp. LLC v. Governance Risk Mgmt. Compliance, LLC*, No. 13 Civ. 2493(KBF), 2014 WL 3844796, at *14 (S.D.N.Y. Aug. 5, 2014) (finding spoliation where "the deleted emails were the best and most complete evidence of [plaintiff's] conduct" and explaining that "a 'culpable state of mind' for purposes of a spoliation inference includes ordinary negligence. This standard protects the innocent litigant from the destruction of evidence by a spoliator who would otherwise assert an 'empty head, pure heart' defense.") (quoting *Orbit One Commc'ns*, 271 F.R.D. 429, 438 (S.D.N.Y. 2010); *see also Novick v. Axa Network, LLC*, No. 07–CV–7767 (AKH)(KNF), 2014 WL 5364100, at *6-8 (S.D.N.Y. Oct. 22, 2014) (finding spoliation and permitting a negative inference, as well as attorney's fees and costs, where audio recordings from a crucial time period were not maintained, even though emails intended to remedy the issue were produced); *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7 (D.D.C. 2011) (permitting the issuance of an adverse inference instruction where security video footage was destroyed, even though its destruction was neither intentional nor reckless, and explaining that, "[t]o justify the issuance of an adverse inference instruction, . . . negligent spoliation may suffice").

Regardless of the forum, a trier of fact should employ safeguards to ensure that a party cannot introduce inaccurate and unreliable evidence, particularly where respondents are at significant disadvantage in developing their case.

ARGUMENT

I. For the Transcripts for which Audio Recordings Are Available, the Division Should Be Required to Submit the Portion of the Audio Recordings Corresponding to Any Portion of the Transcripts It Seeks to Have Admitted into Evidence.

Should the Division seek the admission of portions of the transcripts of non-party investigative examinations under Rule 235(a), or seek the admission of the investigative testimony of Ms. Tilton (the audio recordings of which have been produced), it is expected that the Division will be doing so to prove the truth of their contents.[3] And to the extent that the Division seeks to use portions of investigative transcripts solely for purposes of impeachment or refreshing recollection, it is still critical that the transcripts be accurate. But these transcripts were not prepared under circumstances ensuring their accuracy, nor were witnesses given an opportunity to review and correct them. These defects are no mere technicalities; the transcripts are riddled with obvious errors, some of which affect the meaning and relevance of the purported testimony.[4] Without witness review—let alone an opportunity for Respondents to pose questions—it is impossible to tell whether the poor transcription contains additional, latent errors

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[3] For example, the Division asserts that it should be permitted to introduce the prior testimony of Ms. Tilton "for any purpose." Division of Enforcement's Opposition to Respondents' Motion *in Limine* to Exclude Transcripts of Investigative Testimony, Including Division Exhibits 194 Through 206 (Sept. 9, 2016), at 3.

[4] For example, the transcripts contain indecipherable questions by the Division that appear to be the product of transcription errors. *See, e.g.*, May 1, 2014 Robit Chaku Tr. at 37:20-22 ("Have you ever talked to anyone at the trustee for Zohar and that entity has changed over time, U.S. Bank or Bank of America, in the Zohar capacity?"); May 6, 2014 Anthony McKiernan Tr. at 82:1-2 ("Referring to Natixis, do you deal what's on the Zohar deals or who have you dealt with?"). The same is true of witness answers. *See, e.g.*, May 1, 2014 Jaime Aldama Tr. at 43:6-10 ("And Ms. Tilton implied on her e-mail that because of our intent of selling the assets, she didn't really have any responsibility to us and her responsibility lied with the holder that did to want to sell the position or wanted to stay behind."); *id.* at 44:11-15 ("So, as a rule at this juncture hedge fund or private equity that wants go after her would that information ultimate recovery in the company would be harmed if portfolio information is getting into the wrong hands.").

as well. The reporter's certificate, scopist certificate, and proofreader's certificate are unsigned in the versions produced by the Division to Respondents.

In light of the Division's failure to prevent or correct inaccuracies, the transcripts do not constitute the best evidence of the investigative testimony. The uncertified and error-ridden transcripts should not be permitted to displace the best evidence of the statements contained therein—the original recordings themselves. *See, e.g.*, *Dagen v. CFC Grp. Holdings, Ltd.*, No. 00 Civ. 5682(CBM), 2004 WL 830057, at *1 (S.D.N.Y. Apr. 13, 2004) (stating that a party had been barred from "publishing uncertified transcripts [it] created of [a] tape's conversations because doing so was inconsistent with the Best Evidence Rule"); *Molodecki v. Robertson Display, Inc.*, No. 8:00–cv–2469–T–17F, 2002 WL 34421226, at *3 (M.D. Fla. Sept. 10, 2002) (striking affidavit filed to attest to a tape-recorded conversation because "the tape of the recorded conversation is the best evidence of the conversation"); *In re Piper Capital Mgmt., Inc.*, SEC Release No. 2163, 2003 WL 22016298, at *13 n.60 (Aug. 26, 2003) (where parties disagreed about the accuracy of transcripts, court "relied on the recordings rather than the parties' transcriptions").

The investigative examination transcripts are also unreliable because they do not convey the true nature of the testimony reflected therein—nor could they. A written transcript cannot, by its inherent nature, capture all of the qualities that bear on the meaning and credibility of a person's testimony. The tone, tempo, pattern, inflection, and other audio-only qualities of testimony are critical to assessing the substance and weight of such testimony, but these are altogether absent from a written record. *See Pool v. Comm'r of Internal Revenue*, 251 F.2d 233, 247 n.28 (9th Cir. 1957) ("'A stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the

words signify.'") (quoting *Broad. Music, Inc. v. Havana Madrid Rest. Corp.*, 175 F.2d 77, 80 (2d Cir. 1949)). Because the original recordings are available, they are the best evidence of what the witnesses said during the Division's investigative examinations, and Your Honor should require that they—not flawed, error-ridden written transcripts—be used.[5]

II. The Seven Transcripts for Which the Division Failed to Preserve Audio Recordings Should Be Excluded.

The Division's failure to preserve and produce audio recordings of seven out of thirteen investigative examinations for which transcripts are listed on the Division's exhibit list justifies the denial of any request by the Division to introduce or otherwise use these transcripts.

The Division's Enforcement Manual Policy repeatedly affirms its obligations to preserve evidence under "[v]arious federal laws, the Commission's internal rules and policies, and the Division's procedures requir[ing] proper maintenance of investigative files," Enforcement Manual Policy 3.2.9: (1) Enforcement Manual Policy 3.2.9.4 obligates the Division to preserve evidence relevant to an investigation or litigation and notes that failure to preserve "ESI [Electronically Stored Information] and paper records can result in Court sanctions"; (2) Division's Enforcement Manual Policy 3.2.9.3 requires the Division to log, label, and mark for preservation all audio recordings before sending them to storage, and; (3) Enforcement Manual

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[5] This is not to say that transcripts can never be used to assist in understanding an original recording. But a court must first take steps to protect against inaccuracy, such as requiring that the "original tape [be made] available" during the proceedings. *Holton*, 116 F.3d at 1545. Thus, to the extent portions of the investigative testimony transcripts are admitted, Your Honor should condition such admission on the introduction of the original audio recordings to, *inter alia*, rebut inaccuracies created by the flawed transcripts. *Cf. In re Koch*, SEC Release No. 3836, 2014 WL 1998524 at *4 n.28 (May 16, 2014) ("The doctrine of completeness allows the party against whom a statement or portion of a statement has been introduced in evidence to introduce additional portions of the statement or another statement when necessary to 'eliminate the misleading impression created by taking a statement out of context.'") (citing *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982)).

Policy 3.2.9.8 states that the Division "should be able to trace the receipt and custody of the audio recording data from the time they are received . . . and demonstrate that the audio recordings were securely stored once they came into the staff's possession" by examining the relevant log.

The Division has inexplicably failed to adhere to its obligation to preserve and turn over evidence relevant to its investigation; indeed, its September 6, 2016 letter to Respondents states that it was "unaware that these recordings existed" prior to the Respondents' inquiries. Dunning Decl., Ex. 1. The Division noted that the audio recordings were "received and maintained" by the Division's "Records Management office in Washington D.C." and provided no explanation as to why Division staff failed to ensure that audio recordings for the other twelve days of testimony were preserved. *See id.* The Division instead stated that the "court reporters" it retained did not provide the recordings to the office, *id.*, but again failed to explain what, if anything, Division staff did to follow up with the court reporting agencies to obtain the audio recordings. *Id.*

Nowhere does the Division reconcile, let alone acknowledge, its responsibility to "preserve ESI in enforcement investigations," including by keeping "the originals [of audio recordings] in a safe location and [using] copies during the course of the investigation." Enforcement Manual Policy 3.2.9; Enforcement Manual Policy 3.2.9.8. The Division's total abandonment of its duty to preserve the audio recordings was a violation of "[v]arious federal laws, the Commission's internal rules and policies, and the Division's procedures requir[ing] proper maintenance of investigative files," Enforcement Manual Policy 3.2.9, as well as a violation of the Rules, the Jencks Act, and the Division's *Brady* obligations.

Where a party has failed to preserve evidence, despite a clear obligation to do so, the imposition of sanctions is appropriate. *See Regulatory Fundamentals Grp. LLC*, 2014 WL 3844796, at *14 (finding spoliation where "the deleted emails were the best and most complete evidence of [plaintiff's] conduct" and imposing the sanction of termination); *Novick*, 2014 WL 5364100, at *6-8 (finding spoliation and permitting a negative inference, as well as attorney's fees and costs, where audio recordings from a crucial time period were not maintained, even though emails intended to remedy the issue were produced); *Chen*, 839 F. Supp. 2d at 15 (permitting the issuance of an adverse inference instruction where security video footage was destroyed, even though its destruction was neither intentional nor reckless).

Your Honor should accordingly rule that the Division's unjustified failure to preserve the best evidence of its investigative examinations precludes it from introducing into evidence, or using for any purpose, the error-ridden transcripts—as a matter of fundamental fairness, as an appropriate sanction, and because the Rules do not permit the introduction of unreliable evidence. *See* Rule 320 (the hearing officer "*shall* exclude all evidence that is . . . unreliable.") (emphasis added). To do otherwise would encourage the Division's abdication of its preservation obligations, to Respondents' detriment.

CONCLUSION

For the foregoing reasons, Respondents respectfully move for an order precluding the admission of any portions of investigative testimony transcripts without the introduction of corresponding portions of audio recordings of the testimony, and excluding and precluding the use of any investigative transcripts for which audio recordings were not preserved and produced.

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