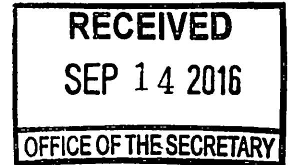
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



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' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO COMPEL THE PRODUCTION OF *BRADY* MATERIALS

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September 13, 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 Exchange Commission ("SEC") to produce *Brady* material under Rule 230 of the SEC Rules of Practice, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

INTRODUCTION

In its opposition brief, the Division fails to provide any reasoned justification for its refusal to respond to Respondents' detailed *Brady* request letter. The Division also fails to address the inherent conflicts of interest and competing incentives that it faces in searching for and producing *Brady* material to Respondents without judicial oversight. And the Division does not claim that the SEC has taken remedial actions like those taken by the Department of Justice—such as detailed, formal procedures and guidelines and training—to redress these widespread problems. Instead, the Division offers only the same tired refrain—that it is "keenly aware of its obligations under *Brady* and its progeny, and has thoroughly abided by them." Opp. 2. But just as the federal courts "no longer accept[] conclusory assertions by the Department of Justice that it 'understands' its *Brady* obligations and 'will comply' or 'has complied' with them," *United States v. Naegele*, 468 F. Supp. 2d 150, 152 n.2 (D.D.C. 2007), neither should Your Honor. The motion should be granted in its entirety, and at the very least the SEC should be directed to provide substantive responses to Respondents' requests so it can be determined if there is any disagreement as to the legal standard that should be applied as to particular requests.

ARGUMENT

The Division asserts that Your Honor "need not order the Division to comply with its *Brady* obligations" because "the Division understands, and is complying with, [those] obligations." Opp. 2. The Division also refuses to "respond to Respondents' [*Brady*] requests," *id.*—that is, Respondents' detailed requests for twenty-seven specific categories of exculpatory and impeachment material—characterizing them as "a fishing expedition," *id.*, and "improper" "discovery requests," *id.* at 5. But the generalized assurance that the Division "is complying," *id.*, and the repeated invocation of the "self-executing" nature of *Brady* obligations, *id.* 3, 5, do not justify the government's trust-us stance for multiple reasons.

First, Respondents' *Brady* letter is not a "discovery request." *Id.* at 5. Respondents requested specific categories of *Brady* materials to ensure that the Division is applying the appropriate legal standard for exculpatory and impeachment material when it reviews its files. And Respondents asked the Division to inform them whether the Division believes that particular categories do not constitute *Brady* material as a matter of law so Your Honor can rule on the specific dispute. Given the Division's refusal to respond to the request letter, it is disingenuous for the Division to claim that the parties "appear not to dispute what legally qualifies as *Brady*." Opp. 3.

Respondents requested evidence relating to the economic incentives of witnesses to testify at the hearing in this matter. *See* Dunning Decl., Ex. 1, at 1, 4. The Division is well aware that three of the witnesses on its "may call" list are from MBIA Insurance Corporation ("MBIA") and Norddeutsche Landesbank Girozentrale ("Nord")—entities that have been and are currently involved in litigation related to Ms. Tilton and certain Patriarch entities. *See, e.g.*, Compl., *Norddeutsche Landesbank Girozentrale v. Tilton, et al.*, No. 651695/2015 (N.Y. Sup. Ct. 2015); Compl., *MBIA v. Patriarch*, 09-cv-3255 (S.D.N.Y. 2009). It has even argued that the

subject of one of the actions, which involves MBIA, could be relevant to sanctions against Respondents here. *See* Division's Opp. to Resps.' Mot. to Exclude the *Zohar CDO 2003-1, LLC v. Patriarch Partners, LLC* Trial Trs., *Tilton*, Admin. Proceeding File No. 3-16462 (Sept. 12, 2016). Moreover, the Division has apparently been in communication with both Nord and MBIA, as representatives from both entities are listed on the Division's witness list. Yet the Division has not produced any information related to MBIA's and/or Nord's motives and incentives for testifying against Respondents at the hearing. The bottom line here is that the Division clearly is aware that its witnesses MBIA and Nord are seeking to obtain vast sums of money from Ms. Tilton and Patriarch in pending litigation and other proceedings, yet it has not provided any information to Respondents about the financial incentives of these witnesses to testify. Accordingly, there plainly is a dispute about whether such materials legally qualify as *Brady* material, contrary to the position that the Division has taken in its opposition brief.

The importance of asking for particular categories of *Brady* materials here is particularly acute because—unlike the Department of Justice, which lists specific categories of materials in the U.S. Attorney's Manual as guidance for its prosecutors—the SEC has taken a black box approach to *Brady*, leaving it to the discretion of each individual enforcement attorney to decide behind closed doors what standard she will apply. All that Respondents and Your Honor are given is the conclusory assurance by the Division that it has complied.

But unfortunately—indeed unconscionably, in the face of the government's obligation to further the ends of justice rather than obtain convictions and sanctions for their own sake—*Brady* violations have become commonplace, notwithstanding the familiar assurances from the government that it has complied with its *Brady* obligations. *See* Opening Br. 14-16; *United States v. Olsen*, 737 F.3d 625, 632 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("There is an

epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."). As a result, federal courts "no longer accept[] conclusory assertions by the Department of Justice that it 'understands' its *Brady* obligations and 'will comply' or 'has complied' with them." *Naegele*, 468 F. Supp. 2d at 152 n.2.

This administrative proceeding is no different: The Division's conclusory assertion that it understands its *Brady* obligations and is complying with them is insufficient to establish that all material exculpatory and impeachment evidence has been produced to Respondents. The Division's refusal to respond to Respondents' twenty-seven specific requests for exculpatory and impeachment material—now standard in criminal and administrative proceedings—is all the more troubling given the SEC's unwillingness to develop clear guidance on *Brady* standards as the Department of Justice has done in the U.S. Attorney's Manual. Indeed, the SEC's enforcement manual does not discuss the Division's disclosure obligations under *Brady* at all.

Second, the Division's repeated invocation of the "self-executing" nature of its disclosure obligation is similarly unavailing. The Division is of course required to produce *Brady* materials in the absence of specific requests from respondents—but the Division's "disclosure obligations are tied to the level of notice afforded to the [government]." *Smith v. Sec'y of New Mexico Dep't of Corr.*, 50 F.3d 801, 826 (10th Cir. 1995). Thus, when a respondent does not make a specific request for *Brady* material, the Division's disclosure obligation is limited to "obviously exculpatory" evidence. *See id.* The Division's general obligation to produce *Brady* material "does not compel the [Division] to draw and disclose inferences from the evidence." *See Discovery and Access to Evidence*, 45 Geo. L.J. Ann. Rev. Crim. Proc. 407, 415 (2016). However, narrowly tailored, specific requests for categories of material—such as those served on the Division by Respondents—give "notice to the prosecution that the defense [does] not already

have that evidence or that it consider[s] the evidence to be of particular value," *United States v. Bagley*, 473 U.S. 667, 711 (1985), and should trigger a reasoned response, *see United States v. Agurs*, 427 U.S. 97, 106 (1976); *Naegele*, 468 F. Supp. 2d at 152 ("[T]oo often in criminal cases the prosecution and defense are like two ships passing in the night when it comes to *Brady*.").

While the SEC has failed to institute formal *Brady* procedures and standards, various state and federal entities have of late acknowledged the pervasive deficiencies in *Brady* disclosures, and taken corrective action in response. For instance, the U.S. Department of Justice has pledged a reevaluation of its discovery practices. *See* Opening Br. 15-16 & n.9. And recently the New York City bar issued a formal opinion that the government must disclose any evidence that "tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence," regardless of whether the government considers the evidence to be material. *See* New York City Bar Prof'l Ethics Committee, Formal Op. 2016-3 (2016).

In the absence of such reforms by the SEC, and in light of the facts presented here, it is incumbent upon Your Honor to ensure that the Division has thoroughly complied with *Brady* here. Administrative Law Judges "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, 70 SEC Docket 668, at *6 (ALJ July 30, 1999). The Division's refusal to respond substantively to Respondents' *Brady* request letter, and the likelihood that the categories requested in the letter will yield impeachment and exculpatory materials, signals that Your Honor should have no such confidence in the Division here.

Under Rule 230(c), Your Honor has the power to ensure that the Division is complying with its *Brady* obligations. Further, under Rule 111, Your Honor is vested with the authority to

"do all things necessary and appropriate to discharge [Your Honor's] duties," including "[r]egulating the course of a proceeding and the conduct of the parties and their counsel." *See* 17 C.F.R. § 201.111(d); *China-Biotics, Inc.*, Exchange Act Release No. 70800 (Nov. 4, 2013) (Rule 111 is "broadly worded to accommodate a law judge's discretion."). It is thus well within Your Honor's authority—and a proper exercise of the supervisory role of ALJs in ensuring fulsome compliance with *Brady*—to order the Division to: (i) respond to Respondents' specific requests for *Brady* material; (ii) explain the basis for its view that the requested categories of information do not constitute *Brady* material; and (iii) produce any evidence in its possession covered by Respondents' specific requests.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Your Honor grant Respondents' motion to compel in its entirety, and at the very least, direct the SEC to respond to Respondents' requests so it can be determined if there is any disagreement as to the legal standard that should be applied to particular requests.

Dated: New York, New York
September 13, 2016

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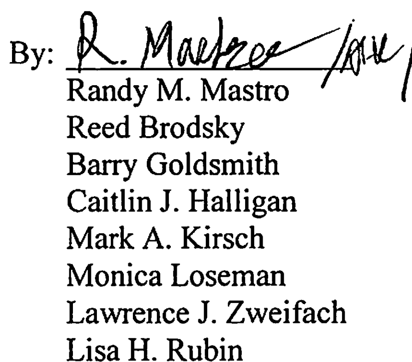

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of Respondents' Reply in Further Support of Their Motion to Compel the Production of *Brady* Materials, on this 13th day of September, 2016, in the manner indicated below:

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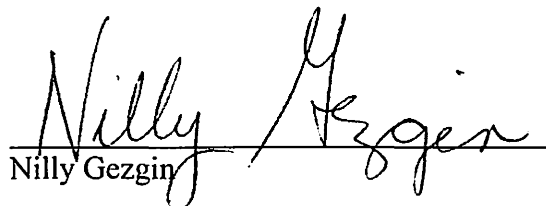

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