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 FURTHER 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, "Respondents"), respectfully submit this memorandum of law in further support of their motion *in limine* to preclude the attempted admission of investigative testimony by the Securities and Exchange Commission ("SEC") Division of Enforcement (the "Division"), including Division Exhibits 194 through 206.

INTRODUCTION

In its opposition brief, the Division does not dispute that the wholesale admission of non-party investigative testimony transcripts would be improper—despite having listed thirteen entire investigative transcripts on its Amended Exhibit List. And the Division admits that it "must file a motion pursuant to Rule 235(a)" for any portion of the non-party investigative transcripts at issue to be admitted—and now asserts that, "[a]t this stage, the Division does not intend to file such a motion." Opp. 2; *see also Lynn Tilton*, Admin. Proceedings Rulings Release No. 4145, at 2 (ALJ Sept. 9, 2016) (indicating that the prior testimony of non-party witnesses "will not be received in evidence in this proceeding"). In other words, the Division concedes the merit of Respondents' motion with respect to eleven of the thirteen exhibits that the motion attacks.

The only remaining dispute centers on the Division's unfounded assertion that wholesale admission of Ms. Tilton's investigative testimony transcripts would be proper under Rule 235(b). As the Commission's comments to Rule 235(b) make clear, a party seeking the admission of adverse party statements under that rule still must satisfy Rule 320, which mandates the exclusion of irrelevant, immaterial, or unduly repetitious evidence. Because the Division has not even attempted to show, and could not show, that the entirety of Ms. Tilton's investigative testimony satisfies Rule 320, the transcripts should be excluded. If the Division intends to argue that portions of the transcripts do satisfy Rule 320, the Division should be required to designate

those portions before the administrative hearing begins in order to provide Respondents with the opportunity to challenge those designations. The Division should also be required to make a proffer as to the relevance, materiality, and non-repetitiousness of the designated portions.

ARGUMENT

In arguing for the wholesale admission of Ms. Tilton's investigative testimony, the Division relies solely on language in Amended Rule 235(b) that statements made by a party "may be used by an adverse party *for any purpose*." Opp. 3 (emphasis in original). The Division's apparent position is that the "for any purpose" language permits the Division to dump the nearly 500 pages of Ms. Tilton's investigative testimony into the record in this proceeding as affirmative evidence. Indeed, the Division says that Rule 235(b) makes "clear that such testimony is admissible" in its entirety. Opp. 3. But this is simply not correct: the Commission's official comments to the amended rule, and its plain language, demonstrate that the Division drastically over-reads the rule; that such wholesale admission of investigative testimony transcripts is improper; and that the Division would need to seek the admission of any portions of Mr. Tilton's investigative testimony that it wishes to introduce into evidence, and would need to satisfy the mandatory requirements of Rule 320 regarding relevance, materiality, and non-repetitiousness before such testimony could be admitted.

In particular, the Commission's comments to Rule 235(b) make clear that party statements that fall within the rule still must meet the Rules' generally applicable requirements for admissibility before they can be accepted as evidence by the law judge. Specifically, the Commission's comments provide that "[a] party opposing the introduction or use of [party statements under Rule 235(b)] may still object to their admission under amended Rule 320 . . . ." SEC, Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,223 (July 29,

2016). Under Amended Rule 320, evidence "shall" be excluded if it is "irrelevant, immaterial, unduly repetitious, or unreliable." *See id.* at 81 Fed. Reg. 50,239.

Accordingly, Rule 235(b) does not create an open door for the wholesale admission of investigative transcripts. Rather, it is a rule about how relevant, material, non-repetitious *portions* of the transcripts can be used *once the Division establishes that they are admissible.* The language in the rule stating that party statements that fall within the rule can be "*used* . . . for any purpose" is, by its plain terms, about the "use[]" of the statements once they are admitted—as affirmative evidence, for impeachment, to refresh the recollection of a witness, and so on. *See id.* at 81 Fed. Reg. 50,223. The rule says nothing about, and was not intended to override, the mandatory requirements for admissibility established by Rule 320.

Indeed, the very portion of the Commission's comments that the Division relies on strongly supports Respondents' position: "Amended Rule 235(b) will permit an adverse party to *seek the admission* of statements made by a party or the party's officer, director, or managing agent." *See id.* (emphasis added) (quoted at Opp. 3). In other words, the amended rule merely makes explicit what the old rule implied: that while the prior, sworn statements of a "witness, not a party" (superseded Rule 235(a)) are only admissible if they meet the requirements for a Rule 235 motion—having largely to do with witness unavailability—for the prior sworn statements of a *party*, the adverse party may "seek the admission" of those statements subject to Rule 320's requirements even though the party is going to appear live.[1] If, as the Division asserts, Rule 235(b) made such statements automatically admissible—rather than merely spoke

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[1] The amended rule also clarifies that once a party statement is admitted, it can be used for any purpose—again consistent with the practice under the old rules. *See* 81 Fed. Reg. 50,223 ("[W]e proposed to add new paragraph (b) to Rule 235 . . . to clarify that such statements may be used by an adverse party for any purpose.").

to their use at the hearing once the Division demonstrates that they meet the generally applicable requirements for admissibility—the Commission would not have written that the rule "permits" a party to "*seek* the admission" of such statements.

The Division does not even mention Rule 320 in its opposition, or attempt to show that Ms. Tilton's investigative testimony is in its entirety relevant, material, and non-repetitious, nor has it "s[ought] the admission" of the transcripts in whole or in part—likely because it would defy logic to argue that every question and answer in the nearly 500 pages of Ms. Tilton's investigative testimony, spanning two entire days, could possibly satisfy Rule 320's requirements. Indeed, Your Honor has previously prohibited the wholesale admission of transcripts—even if the transcripts consisted of party testimony—based on the obvious conclusion that not every statement in such transcripts will be relevant, material, and not unduly repetitious. *See* Hr'g Tr. at 1478:7-10, *John J. Aesoph*, File No. 3-15168 (Oct. 28, 2013) (Foelak, ALJ) (excluding wholesale admission of transcripts of respondents' investigative testimony); *see also, e.g.*, *Del Mar Fin. Servs., Inc.*, Securities Act Release No. 8314, 2003 WL 22425516, at *9 (Oct. 24, 2003) (Comm'n Op.) (upholding ALJ's decision to exclude wholesale admission of investigative testimony transcripts). Although these decisions were rendered under the old Rule 235, the Commission's comments in amending the rule make clear that the standard has not changed. Because the Division has failed make any showing that the wholesale transcripts of Ms. Tilton's investigative testimony satisfy Rule 320—nor could it—Your Honor should exclude them. *See Toby G. Scammell*, Inv. Advisers Act Release No. 3961, 2014 WL 5493265, at *8 (Oct. 29, 2014) (Comm'n Op.) ("[L]aw judges have broad discretion in deciding whether to admit or exclude evidence [under Rule 320].").

Finally, while the Division asserts that it "has not yet determined whether it will seek to admit the investigative testimony of Ms. Tilton," Opp. 3, Your Honor should instruct the Division to inform Respondents by September 26 whether it intends to seek the admission of any portion of Ms. Tilton's investigative testimony, and the Division should be ordered to designate those portions of the transcripts. The Division should also be required, at the same time, to make a proffer as to the relevance, materiality, and non-repetitiousness of any designated portions. It is well within Your Honor's discretion to "require[e] the Division to specify the specific statements" on which it intends to rely. *Del Mar Fin. Servs.*, 2003 WL 22425516, at *8-9; *see also, e.g.*, *Oxford Capital Mgmt., Inc.*, Admin. Proceedings Rulings Release No. 602, 2003 WL 21282789, at *2 (ALJ Jan. 15, 2003) ("[T]he Division should identify the particular portions of the Wells Submission it intends to use [at the hearing].").

Requiring the Division to do so before the administrative hearing begins would expedite the hearing, and would serve the interests of fairness, by providing Respondents with notice and the opportunity to challenge those designations prior to the hearing. This is the appropriate course of action, as Chief Administrative Law Judge Murray has made clear. *See Angelo P. Danna, CPA*, Admin. Proceedings Rulings Release No. 433, 1994 WL 192562, at *1 (ALJ May 11, 1994) (stating that she "would like [respondents] to have prior notice" of the portions of investigative transcripts the Division intended to admit); *cf.* Rule 300(c) (administrative hearings "shall be conducted in a fair, impartial, expeditious and orderly manner").

CONCLUSION

For the reasons set forth above, Respondents' motion for an order excluding all transcripts of investigative testimony, including Division Exhibits 194 through 206, should be granted.

Dated: New York, New York
September 14, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of Memorandum of Law in Further Support of Respondents' Motion *In Limine* to Exclude Transcripts of Investigative Testimony, Including Division Exhibits 194 Through 206, on this 14th day of September, 2016, in the manner indicated below:

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