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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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RESPONDENTS' MOTION *IN LIMINE* TO STRIKE AS INADMISSIBLE, IN WHOLE OR IN PART, CERTAIN LAY OPINION TESTIMONY

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September 16, 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 brief in support of their motion *in limine* to exclude the admission of any lay opinion testimony lacking foundation, containing legal conclusions, or containing testimony based on specialized knowledge, offered in any form, whether through prior investigative testimony or live testimony at the hearing, by the Division of Enforcement ("Division") of the Securities and Exchange Commission ("SEC" or "Commission").

INTRODUCTION

The Division designated numerous non-party investigative testimony transcripts as exhibits, even though they are rife with lay opinion testimony that (1) lacks any foundation, relies on speculation, or is otherwise unreliable; (2) offers legal conclusions; or (3) is based on scientific, technical or other specialized knowledge. In its opposition brief, the Division does not dispute that the wholesale admission of those transcripts would be improper. Opposition Brief ("Opp.") 1, 3. The Division also represents that "at this time [it] is not seeking to introduce sworn statements by non-parties," *id.* at 3, and concedes that such statements from the transcripts would be inadmissible unless the Division files, and Your Honor grants, a Rule 235(a) motion, *id.* at 1. What the Division fails to acknowledge, however, is that Your Honor has already indicated that the prior testimony of non-party witnesses "will not be received in evidence in this proceeding," *Lynn Tilton*, Admin. Proceedings Rulings Release No. 4145, at 2 (ALJ Sept. 9, 2016), and thus any effort by the Division to admit such statements should be rejected.[1]

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[1] Respondents do not dispute that such testimony generally may be used at trial, without being admitted in evidence, for impeachment purposes or to refresh a witness's recollection. But "[i]f the Division intends to use the . . . transcripts solely to refresh prospective witnesses' recollection or to impeach them, it should so state." *See Oxford Capital Mgmt., Inc.*, Admin.

[Footnote continued on next page]

The Division also suggests that it should be permitted to elicit the same lay testimony from witnesses at the hearing. Opp. 3-4. But the Division's position is unavailing. As it must, the Division recognizes that lay testimony is inadmissible if it lacks a proper foundation, offers legal conclusions, or is based on specialized knowledge. *Id.* at 3-4. Yet the Division insists that the testimony it has elicited—and ostensibly intends to elicit at the hearing—contains none of these improprieties—an assertion flatly contradicted by the transcripts and the case law cited in Respondents' opening brief. *See* Opening Br. 2-3, 7, 9, 11. The Division also claims that so long as Respondents will have an opportunity to cross-examine witnesses at the hearing, Respondents' objections to testimony that lacks foundation and is speculative are "irrelevant" at this stage of the proceedings. Opp. 2-3; *cf.* Opening Br. 8. But Respondents' objections are far from irrelevant: they underscore Respondents' critical disadvantage in attempting to prepare a defense based on a record that is silent as to the bases for non-party witnesses' opinions, and where the Division apparently intends to elicit similarly speculative testimony at the hearing. The Division's "trial by ambush" strategy should not be permitted, and it should be barred from eliciting such testimony at the hearing. In addition, Respondents should be afforded an opportunity to conduct *voir dire* of any witnesses called upon to offer lay opinion testimony in order to ensure that Respondents have sufficient opportunity to probe the foundation and reliability of each witness.

[Footnote continued from previous page]
Proceedings Rulings Release No. 602, 70 S.E.C. Docket 1050, at *1 (ALJ Jan. 15, 2003). And "if the Division intends to use the investigative transcripts for some broader purpose, it should articulate that purpose in advance of the hearing." *Id.*

ARGUMENT

I. Respondents' Motion Is Not Premature.

The Division repeatedly contends that Respondents' motion is "irrelevant and premature" because the Division does not intend to admit the transcripts it identified on its exhibit list and "will be calling live witnesses that the Respondents can cross-examine." Opp. 3-4. That Respondents may have a belated opportunity to attack unreliable and irrelevant testimony on cross-examination is no substitute for the exclusion of that testimony in the first instance. Moreover, that Your Honor is the fact finder and may be more discerning or less susceptible to prejudice than a jury does not obviate the requirement, under the SEC Rules of Practice, to exclude testimony that is improper, irrelevant, and unreliable. *See* SEC Rules of Practice 320, 17 C.F.R. § 201.100 *et seq.* (the "Rules") (hearing officer "*shall exclude* all evidence that is irrelevant, immaterial, unduly repetitious, or unreliable") (emphasis added); Opp. 2 n.1 (noting that amended Rule 320 applies to this proceeding and requires exclusion of "unreliable" evidence). Such exclusion is appropriate here to spare the parties and the tribunal an unnecessary expenditure of time and energy on evidence that simply cannot be considered. *See* Rule 300 ("All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.").

II. The Division Should Be Precluded From Introducing Live Lay Testimony That Is Speculative, Without Foundation, Or Otherwise Unreliable, That Includes Legal Conclusions, Or That Concerns Specialized Knowledge.

As explained in Respondents' opening brief, the Division's questioning of its witnesses in this matter frequently proceeded without any proper foundation and improperly elicited legal conclusions and specialized knowledge. *See* Opening Br. 2-3, 7, 9, 11 (quoting examples). Although the Division has disavowed its interest in admitting the transcripts containing such

testimony, the Division suggests that this testimony is proper and can be elicited live at the hearing. The Division is mistaken in several respects.

First, the Division expresses "disagree[ment]" with Respondents' contention that portions of the investigative transcripts include unreliable speculation. Opp. 3. The Division does not explain why this testimony is, in fact, reliable, but it is hard to fathom how the Division might do so with regard to the specific testimony Respondents identified in their opening brief, in which witnesses expressly disclaim any personal knowledge. *See, e.g.*, Opening Br. 7 (quoting SEC Ex. 198 at 29:18-30:6 (McKiernan Investigative Testimony Tr.) ("I have no actual knowledge of what's going on in the individual company so I don't know what's really happening or not, . . . I believe there is restrictions on lending from one company to another, especially with funds from the transactions, things of that nature.")). Testimony not based on personal knowledge is inherently unreliable and should not be admitted.

Second, the Division denies that the testimony it has elicited contains inadmissible legal conclusions, Opp. 3-4, insisting instead that what appear to be legal conclusions are admissible because they are "probative of [the Division's witnesses'] understanding of how the funds were being managed." Opp. 4. This argument is untenable when one examines the questions the Division actually asked its witnesses—for example, whether, under investors' current understanding of the indentures, certain alleged actions violate "the terms of the indenture[s]." Opening Br. 9 (quoting SEC Ex. 198 at 117:14-15 (McKiernan Investigative Testimony Tr.)).

Such questions (of which there are numerous examples in the transcripts[2]) plainly elicit inadmissible legal conclusions that should not be admitted.

Finally, the Division claims that it did not seek to elicit testimony concerning specialized knowledge when, for example, it asked, "Did you ever encounter in your experiences as a manager not having or a company not having audited financial statements?" Opp. 4 (discussing Opening Br. 11). The Division, citing *Ryan Dev. Co. v. Ind. Lumbermens Mut. Ins. Co.*, 711 F.3d 1165, 1170-71 (10th Cir. 2013), claims that such questions are appropriate because they ask about a witness's "experience." But *Ryan* is inapposite. There, the plaintiff company's accountants testified as to the company's lost profits, based on what they had observed and written while acting as the company's accountants. *Id.* Here, the testimony at issue asks about not just the witness's experience with the Respondents, nor even the witness's experience working for the institutional investor for whom he purportedly speaks. Instead, the Division asked precisely the sort of question appropriate, if at all, for expert testimony: namely, what the norm is in the industry generally. Moreover, the Division ignores the case cited by Respondents on this point, *Bank of China v. NBM LLC*, 359 F.3d 171, 180-83 (2d Cir. 2004) (cited in Opening Br. at 11), which held, in circumstances similar to those presented here, that testimony regarding compliance with the business community's standards constituted improper lay opinion to the extent it was based on the witness's specialized knowledge and industry experience rather than his perceptions. In short, Respondents' position is not merely unsupported by case law; it has been rejected.

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[2] In addition to the examples cited in Respondents' Opening Brief at 2-3, 9, see SEC Ex. 198 at 63:14-64:12 (McKiernan Investigative Testimony Tr.) ("Is that explanation consistent with the terms of the indenture, to your understanding?").

In light of the Division's expansive (and wholly unsupported) view of admissibility and reliability, and its demonstrated tendency to elicit improper lay opinion testimony, *see* Opening Br. 2-3, 7, 9, 11, Your Honor should hold the Division to a strict standard of admissibility at the hearing and should exclude any live lay opinion testimony that lacks a proper foundation, includes legal conclusions, or is based on specialized knowledge.

III. Respondents Must, At The Very Least, Be Afforded The Opportunity To Conduct *Voir Dire* Of Any Witnesses Called By The Division To Offer Lay Testimony.

As Respondents explained in their opening brief, Rule 300 requires that "[a]ll hearings be conducted in a fair, impartial, expeditious and orderly manner." Toward that end, litigants in administrative proceedings are often afforded an opportunity to conduct *voir dire* of witnesses in order to determine the foundation (or lack thereof) for their testimony, as well as its reliability or unreliability. *See, e.g.*, *Valicenti Advisory Servs., Inc.*, Administrative Proceeding Release No. 111, 64 S.E.C. Docket 2281, at *11 (ALJ July 2, 1997) (Foelak, J.) (noting "extensive *voir dire*" earlier in proceeding); *First Jersey Sec., Inc.*, Administrative Proceeding Release No. 232, 52 S.E.C. Docket 348, at *1 (ALJ Feb. 26, 1980) (noting "prolonged and minute examination of the Division's witness . . . on *voir dire*"); *Michael Bresner*, Administrative Proceeding Release No. 517, 107 S.E.C. Docket 3364, at *76 n.17 (ALJ Nov. 8, 2013) (noting "lengthy *voir dire*" in the proceeding).[3] Here, the Division has failed to establish a foundation for witnesses' testimony in the transcripts it has produced, and numerous witnesses listed in the Division's "may call" witness list are not even mentioned in the investigative testimony transcripts. Opening Br. 8. These "trial by ambush" tactics make especially important procedures like *voir dire* that would at

[3] It is all the more appropriate that Respondents have an opportunity to conduct *voir dire* given that the SEC's amended Rules of Practice state that the hearing officer "shall exclude all evidence that is . . . unreliable." Rule 320 (emphasis added).

least partially reduce unfair surprise, inefficiency, and disorder at the hearing. Respondents therefore respectfully reiterate their request that they be afforded the opportunity to conduct *voir dire* of any witnesses called by the Division to offer lay opinion testimony to enable them to probe the foundation and reliability of that testimony before it is admitted. *See* Opening Br. 4 n.2.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Your Honor exclude the admission of any lay opinion testimony lacking foundation, containing legal conclusions, or that is based on specialized knowledge, offered in any form by the Division, whether through prior investigative testimony or live testimony at the hearing.

Dated: New York, New York
September 16, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of Respondents' Reply Memorandum of Law in Further Support of Their Motion *In Limine* to Strike As Inadmissible, In Whole or In Part, Certain Lay Opinion Testimony, on this 16th day of September, 2016, in the manner indicated below:

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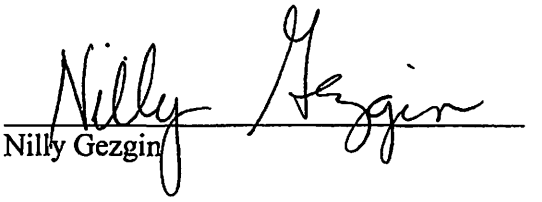

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