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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 PRECLUDE THE DIVISION FROM INTRODUCING INTO EVIDENCE EXHIBITS OR PORTIONS OF EXHIBITS CONTAINING UNRELIABLE HEARSAY, INCLUDING (BUT NOT LIMITED TO) EXHIBITS 129, 140, 142, 174, 184, AND 190

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September 22, 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 memorandum of law in further support of their motion *in limine* to preclude the Securities and Exchange Commission ("SEC") Division of Enforcement (the "Division") from introducing into evidence exhibits, or portions of exhibits, containing unreliable hearsay, including (but not limited to) Exhibits 129, 140, 142, 174, 184, and 190.

INTRODUCTION

By seeking the admission of exhibits replete with unreliable hearsay, the Division threatens to exacerbate the procedural inequities that already attend this administrative proceeding. But while the Division enjoys significantly more latitude in an administrative forum, that latitude is not without limits. Both the Administrative Procedure Act ("APA") and SEC Amended Rule 320[1] expressly prohibit the Division from introducing unreliable evidence—a category into which the hearsay statements at issue here plainly fall. Indeed, although Respondents highlighted in their motion over forty exhibits that contain unreliable hearsay, the Division discusses *only four* of those exhibits in its opposition, and its arguments as to those exhibits are unavailing. Moreover, to the extent the Division seeks to admit unreliable hearsay from declarants whom it has elected not to call at the upcoming proceeding, the admission of that hearsay would further jeopardize Respondents' fundamental due process rights. Finally, the Division's mantra—that Respondents' motions are premature because the Division has not decided what it will do at the upcoming hearing—defeats the very purpose of pre-hearing motion

[1] As used herein, "Amended Rule ___" refers to an SEC Rule of Practice, as amended in July 2016, *see* SEC, Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212 (July 29, 2016) ("Amendments to Rules"); and "Rule ___" refers to an SEC Rule of Practice as codified, 17 C.F.R. pt. 201.

practice: to afford the ALJ sufficient time *in advance* of the hearing to rule on evidentiary issues so that the hearing is not bogged down by those issues. Accordingly, Your Honor should preclude the Division from admitting into evidence exhibits, or portions of exhibits, that constitute unreliable hearsay.

ARGUMENT

Both the APA and Amended Rule 320 make clear that unreliable evidence cannot be admitted during an administrative hearing. *See* 5 U.S.C. § 556(d) (evidence in administrative proceedings must be "reliable"); 81 Fed. Reg. at 50,239 ("[T]he hearing officer . . . *shall exclude* all evidence that is . . . unreliable." (emphasis added)). But that is precisely what the Division seeks to accomplish here.

Although the Division broadly argues that its exhibits are reliable, the Division's opposition cherry picks only four of the over forty exhibits that Respondents highlighted as containing patently unreliable hearsay. And even as to those four exhibits, the Division fails to demonstrate that the hearsay at issue is reliable. While the Division argues that Exhibits 129, 140, 142, and 174 contain non-hearsay statements of a party opponent, the Division conspicuously ignores the portions of those exhibits that constitute hearsay. *See, e.g.*, Ex. 140 (email from Todd Kaloudis in which he relates statements from Moody's); Ex. 142 (email from Todd Kaloudis in which he relates statements from Mike Hood[2]); Ex. 174 (email exchange that contains six different emails from Moody's employees). In fact, all of Exhibit 129 is notes from non-party Natixis and thus constitutes hearsay in its entirety. *See* Ex. 129.

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[2] The Division does not argue that Hood was an "officer, director, or managing agent" of Respondents at the time these statements were made. *Cf.* Amended Rule 235(b); *Campinas Found. v. Simoni*, 2005 WL 1006511, at *2 (S.D.N.Y. Apr. 27, 2005) (employee was not a "managing agent" where, *inter alia*, he was not "the final decision-maker on all matters pertinent to the operation and management of [the company]").

And while the Rules do not exclude hearsay categorically, the hearsay at issue here plainly lacks the indicia of reliability that might justify its admission. For example, the Division does not contend that the hearsay declarants are unavailable to testify, or that it has tried unsuccessfully "to compel [such] testimony." 81 Fed. Reg. at 50,226-27 (listing factors that a hearing officer should consider when assessing the admissibility of hearsay evidence).[3] Nor does the Division argue that the hearsay at issue here will be corroborated by other evidence during the proceeding. *See id.* at 50,227 (hearing officers should evaluate hearsay in light of "whether or not the hearsay is corroborated by other evidence in the record"). Further, the Division has failed to demonstrate why it is necessary to rely on hearsay as opposed to calling the witnesses to provide live testimony and affording Respondents an opportunity to confront the witnesses against them, *see* Rule 326—as required by due process[4]—and Your Honor an opportunity to assess the credibility of those declarants.

Instead, the Division resorts to its choice refrain, insisting that these issues are premature.

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[3] Rule 235(a), which governs the admission of prior sworn statements of non-party witnesses, requires the proponent to make a motion seeking introduction of those statements and generally requires the proponent to establish that the witness is unavailable to testify. Where, as here, the hearsay at issue includes unsworn statements that are not subject to Rule 235(a)'s safeguards, it is particularly critical that Your Honor scrutinize the reliability of such evidence and exclude any hearsay lacking sufficient indicia of reliability.

[4] The decisions on which the Division relies in arguing otherwise are distinguishable, as the hearsay at issue in those proceedings bore sufficient indicia of reliability. *See Application of Joseph Abbondante*, Exchange Act Release No. 53066, 2006 WL 42393, at *7 (Jan. 6, 2006) (explaining that the hearsay at issue was corroborated by testimony during the proceeding, including respondent's own admission); *Alessandrini & Co., Inc.*, Exchange Act Release No. 10313, 1973 WL 149296, at *4 n.9 (Aug. 1, 1973) (concluding that live testimony adduced as to results of investigation by third party was not hearsay where, *inter alia*, the testifying witness had a sufficient basis of knowledge and the third party "had left the employ of the NASD which ha[d] no subpoena power"). And even if the admission of a hearsay statement, on its own, would not violate Respondents' due process rights, the cumulative effect of admitting the exhibits, and portions of exhibits, at issue here would violate Respondents' due process rights.

They are not. Unreliable evidence *must* be excluded, and it is well within Your Honor's discretion to do so now, in advance of a hearing that is a mere month away. *See* Rule 300 (hearings "shall" be conducted in a "fair," "expeditious and orderly manner"). The fundamental problems with the unreliable hearsay evidence that the Division seeks to introduce will not be cured by the passage of time—and that is especially true where, as here, many of the hearsay declarants will not be testifying at the upcoming proceeding. For all of these reasons, Your Honor should exclude any exhibits, or portions thereof, that contain unreliable hearsay.

CONCLUSION

For the reasons set forth above and in Respondents' opening brief, Respondents respectfully move for an order excluding exhibits, or portions of exhibits, comprising unreliable hearsay, including (but not limited to) Division Exhibits 129, 140, 142, 174, 184, and 190.

Dated: New York, New York
September 22, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I served true and correct copies of the Reply Memorandum of Law in Further Support of Respondents' Motion i*n limine* to Preclude the Division from Introducing into Evidence Exhibits or Portions of Exhibits Containing Unreliable Hearsay, Including (But Not Limited to) Exhibits 129, 140, 142, 174, 184, and 190 on this 22nd day of September, 2016, in the manner indicated below:

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