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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 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 reply brief in further 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 portions of any transcript of investigative testimony, it must only be permitted to do so where corresponding portions of the audio recording are available and admitted into evidence as well. Moreover, the Division should be precluded from using for any purpose any portions of investigative transcripts for which it cannot produce audio recordings.

INTRODUCTION

The Division's opposition brief finally explains what happened to seven audio tapes of investigative testimony the Division has failed to produce: those recordings were destroyed in accordance with the Division's contract with the reporting service it enlists to preserve (or not, as the case may be) its testimonial evidence. Opposition Br. ("Opp.") 3 n.2. The Division's opposition brief also finally explains why it has not produced certified copies of the transcripts on which it proposes to rely in lieu of those audio recordings: the Division is "in the process of gathering" them and will eventually produce them. Opp. 2 n.1. Those transcripts, whether certified or not, contain numerous inaccuracies apparent on their face. Respondents quoted four of them in their Opening brief, but the Division's opposition brief does not deign to address them. Instead, the Division stubbornly insists that these error-riddled transcripts of audio tapes—prepared without any opportunity for witness review—are better evidence of the contents of those audio tapes than would be the tapes themselves. Opp. 3-4. The Division's argument defies common sense and the cases the Division cites. *See, e.g., U.S. v. Workinger*, 90 F.3d

1409, 1415 (9th Cir. 1996) (cited in Opp. 4-5, 8) ("[I]f somebody wanted to know the content of that tape, it itself *was* the best evidence of that.") (emphasis in original). The Division's destruction of best evidence, and its proposal to rely on its facially inaccurate and unreliable transcripts instead, should not be countenanced. Indeed, "it is precisely what the best evidence rule was designed to avoid." *Id.*

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 in Evidence.

While "the Division has made clear [that] . . . at this time it does not intend to move the introduction of any non-party investigative testimony transcripts pursuant to Rule 235(a)," Opp. 3, it leaves open the possibility that it will change its mind. It fails, however, to explain why Your Honor should not rule that, should it make such a motion, it should be required to submit into evidence the audio recordings it possesses that correspond to whatever portions of the transcripts it seeks to submit. Instead, much of the Division's opposition brief focuses on a position Respondents have never taken—namely, that even if the Division submits the accompanying audio recordings, the best evidence rule prohibits it from using the corresponding transcripts. *See, e.g.*, Opp. 3-5 (mischaracterizing Respondents as arguing that the Division could never use testimony transcripts at a hearing). To reiterate, Respondents' position is that, "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." Opening Br. 6 (emphasis added). The Division's reluctance to submit the corresponding audio recordings is unjustified, as is the Division's stubborn focus on attacking a position Respondents have never taken.

As demonstrated in Respondents' opening brief, the unreliability and inaccuracy of the transcripts is apparent on their face, making it especially imperative here that the best evidence of the content of the audio recordings—*i.e.*, the audio recordings themselves—be submitted with any transcripts the Division seeks to have admitted into evidence. Opening Br. 6-7. The Division claims that "Respondents have offered nothing more than hyperbolic claims to suggest there are any such inaccuracies," Opp. 3, but Respondents' opening brief cites and quotes four concrete examples.[1] In "response," the Division explains that it "stands ready to discuss with Respondents any particularized issues with the transcripts," yet it avoids any discussion whatsoever of the four examples Respondents already quoted. Opp. 3-4. These and other examples apparent on the face of the transcripts[2] demonstrate the unreliability of the transcripts and the need for submission of the corresponding audio recordings.

Moreover, it is highly likely that there are additional inaccuracies not apparent on the face of the transcripts. After all, the usual safeguards against such inaccuracies were absent here.

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[1] *See* Opening Br. 6 n.4 (quoting May 1, 2014 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 McKiernan Tr. at 82:1-2 ("Referring to Natixis, do you deal what's on the Zohar deals or who have you dealt with?"); May 1, 2014 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.").

[2] *See, e.g.*, May 1, 2014 Aldama Tr. at 74:10-75:14 ("It is *irrational*, . . . As to the validity of that it is completely -- everything in it is completely *rational*. . . . [I]t is not something that has any validity and it's just an *irrational* thought.") (emphases added); June 18, 2014 Berlant Tr. ("I'm not sure how to interpret it *other than either it either did not* change how they determined it or under the new procedures, you ended up in the same result.") (emphasis added).

Unlike in the case of deposition testimony, for example, the witnesses here had no opportunity to review and correct the transcripts of their testimony. Similarly, opposing counsel was not permitted to observe the taking of testimony, let alone to review its transcription for errors. In short, while it is clear that the transcripts contain numerous errors—enough to demonstrate their unreliability in the absence of corresponding audio recordings—it is unclear how many more inaccuracies would be apparent upon comparing the transcripts with the audio recordings.[3]

None of this prevents the Division from making the outlandish claim that in using these transcripts without the audio, it would be doing what "any lawyer in any court in this country does every day." Opp. 5. To the contrary, it is *not at all* commonplace for lawyers to rely on (a) facially inaccurate transcripts of testimony (b) given in the absence of opposing counsel (c) without any opportunity for the witness (or opposing counsel) to review and correct inaccuracies. The Division should be required to submit the corresponding audio recordings for any portions of investigative transcripts it seeks to admit into evidence.

II. The Seven Transcripts Corresponding to Audio Recordings the Division Now Explains Were Destroyed in Accordance with Its Contracts Should Be Excluded.

As uncommon as it is to rely on facially inaccurate transcripts of testimony given in the absence of counsel and without any opportunity for witnesses' review, it is even more uncommon for a government agency to agree to the destruction of the evidence it collects and will be required to produce if it is properly maintained. Yet that is precisely what the Division now says that it does as a matter of course, entering into contracts that permit audio files to be destroyed after one year despite the fact that SEC investigations and proceedings regularly take

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[3] In its opposition brief, the Division explains for the first time that even though it never produced to Respondents certified copies of the transcripts, and even though the Division apparently does not currently possess certified copies, the Division is now "in the process of gathering" them, "and will produce" them to Respondents in the future. Opp. 2 n.1.

far longer than that. Opp. 3 n.2 (explaining that the service that the Division entrusts with preserving the best evidence of its investigative testimony, "per the terms of the contract . . . is only required to maintain the backup audio files for one year").

The Division goes to great lengths to explain how its failure to maintain the audio recordings of its investigative interviews (and indeed, its contractual permission to destroy them prior to the hearing) supposedly does not run afoul of its Enforcement Manual. Opp. 6-7. The Enforcement Manual, the Division assures Your Honor, only addresses "audio tapes produced *by third parties*," *id.* 6 (emphasis in original), not tapes created by the Division itself. As to those, the Division is supposedly free to destroy them without consequence, and then proceed to rely solely on facially inaccurate transcripts purportedly conveying the content of the destroyed tapes. If the Division's interpretation of its Enforcement Manual is correct (which Respondents contend it is not), then the Division should change its Enforcement Manual. It cannot, however, change amended Rule 230, which requires exclusion of unreliable evidence. Nor can it change the case law providing for exclusion and sanctions where evidence is negligently, let alone intentionally, destroyed. *See* Opening Br. 5 (citing cases). It is hard to understand what the point of backup audio files would be if not to keep them long enough to correct inaccurate transcriptions.

III. The Division's Cases Do Not Support Its Novel Position Concerning Destruction of Evidence.

The Division attempts to argue that that transcripts of the audio tapes that were destroyed in accordance with its contract are better evidence of the content of those tapes than are the tapes themselves. That absurd position is contradicted by the cases the Division cites. As explained in *Workinger*, "if somebody wanted to know the content of that tape, it itself *was* the best evidence of that." 90 F.3d at 1415 (emphasis in original) (cited in Opp. 4-5, 8).

The Division points out that in *Workinger*, counsel was allowed to use the transcript at issue where there was no audio tape available, despite the transcript's not being the best evidence. Opp. 4-5. But the Division omits the *Workinger* court's explanation of *why* the court allowed the government to use the transcript—namely, because the tape's creation and erasure by its private citizen owner occurred "in the ordinary course of [the tape owner's] business and not at the behest of the government." 90 F.3d at 1415. In other words, in *Workinger* the government was allowed to use the transcript in the absence of the tape *because the government was not responsible* for the tape's creation, maintenance, or destruction, and there was consequently little risk that the government would be encouraged to have a de facto policy of relying on second-best (or worse) forms of evidence. *See id.* This limitation was important; a rule allowing unhindered admission of transcripts where audio recordings had been destroyed "would lead to transcripts being submitted with the admonition 'Trust me, the transcript *does* reflect what was taped.' . . . That cannot be right; it is precisely what the best evidence rule was designed to avoid." *Id.* (emphasis in original). Yet the Division here proposes just such a rule. Here, not only was the Division responsible for the tapes' creation, maintenance, and destruction; the Division apparently provided for the tapes' destruction as a matter of policy via its contract with those agents it designates to preserve its evidence. This is exactly the systematic reliance on sub-par evidence that *Workinger* cautioned should not be tolerated, let alone encouraged. *See also U.S. v. Flanders*, 752 F.3d 1317, 1336 (11th Cir. 2014) (cited at Opp. 8) (allowing use of transcript where audio recording "had been inadvertently destroyed," rather than destroyed in accordance with a government contract, and there was "no evidence" that "the transcript was untrustworthy").

Aside from *Workinger* and *Flanders*, neither of which supports the Division's position, the Division's cases are irrelevant. Although the cases reference use of transcripts, none of them address admission of transcripts under circumstances akin to those here presented. Some have nothing whatsoever to say about the transcripts at issue or the circumstances surrounding their use.[4] In one, neither party objected to the use of the transcript.[5] In another, no audio recordings appear ever to have been made, let alone been the basis for an evidentiary objection.[6] Others are silent as to whether any such audio recordings were submitted into evidence or otherwise used, and whether the transcripts appeared to contain inaccuracies.[7] Finally, some of the cases concern deposition transcripts, which are produced under conditions that make them significantly more reliable (*e.g.*, in the presence of opposing counsel and with the benefit of witness review).[8] The Division appears to think these cases are relevant simply because they demonstrate that courts *sometimes* consider transcripts, but as explained above, *supra* Pt. I, Respondents have never claimed otherwise.

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[4] *See, e.g., Del Mar Fin. Servs.*, Administrative Proceeding Release No. 188, 75 S.E.C. Docket 1473, *17 (Aug. 14, 2001); *Valicenti Advisory Servs., Inc.*, Administrative Proceeding Release No. 111, 64 S.E.C. Docket 2281, *3 (July 2, 1997).

[5] *Mohammed Riad*, Administrative Proceeding Release No. 871, 107 S.E.C. Docket 1311 (Sept. 16, 2013) (parties jointly moved to admit transcripts into evidence).

[6] *U.S. ex rel. King v. Hilton*, 503 F. Supp. 303, 312 (D.N.J. 1979) (addressing best evidence of the content of stenographic record, not an audio recording).

[7] *U.S. v. Flanders*, 752 F.3d 1317, 1336 (11th Cir. 2014) (explaining that there was "no evidence" that "the transcript was untrustworthy").

[8] *See, e.g., A.H.D.C. v. City of Fresno*, Cat, No. CV-F-97-54980 OWW SMSS, 2000 WL 35810722, at *14 (E.D. Cal. Aug. 31, 2000) (addressing transcripts of depositions, where opposing counsel was present and witness had an opportunity to review for error).

In sum, the Division cites no cases concerning use of transcripts by the government (or any other party) under circumstances similar to those here—that is, where opposing counsel was not permitted to be present during the testimony, where the witnesses were not permitted to review the transcripts or otherwise correct inaccuracies, where the resulting transcripts contain numerous inaccuracies on their face, and where the best evidence of what was actually said (*i.e.*, audio recordings of the testimony) was destroyed in accordance with the party's contractual agreement. Contrary to the Division's unsubstantiated assertion, it is in fact the farthest thing from what "any lawyer in any court in this country does every day." Opp. 5.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Your Honor preclude the admission of any portions of investigative testimony transcripts without the introduction of corresponding portions of audio recordings of the testimony, and exclude and preclude the use for any purpose of any investigative transcripts for which audio recordings were not preserved and produced.

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 Respondents' Reply Memorandum of Law in Further 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 on this 22nd day of September, 2016, in the manner indicated below:

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