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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

RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL THE PRODUCTION OF *BRADY* MATERIAL AND JENCKS ACT WITNESS STATEMENTS

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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 brief in support of their motion to compel the Division of Enforcement ("Division") of the Securities and Exchange Commission ("Commission") to certify that it has complied with its obligations under Rule 230 of the SEC Rules of Practice ("Rule 230") and under the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and to produce witness statements under Rule 231 of the SEC Rules of Practice ("Rule 231") and the Jencks Act, 18 U.S.C. § 3500 by October 18, 2016. Respondents also respectfully request expedited briefing concerning the issues addressed herein, and oral argument, in light of the fact that the hearing is to commence in less than two weeks. Specifically, Respondents request that the Division's brief in opposition be due Monday, October 17, and that Respondents' reply be due Wednesday, October 19.

INTRODUCTION

On September 8, 2016, the Division, in opposing Respondents' motion to compel the production of *Brady* materials, represented to Your Honor and to Respondents that it was "keenly aware of its obligations under *Brady* and its progeny, and ha[d] thoroughly abided by them." Div. Opp'n to Resp'ts' Mot. to Compel, *Tilton*, Administrative Proceedings File No. 3-16462, at 2 (ALJ Sept. 8, 2016). But, as Respondents now know, the Division obtained *Brady* material during a September 7, 2016 witness interview with David Aniloff of SEI Investments Company, a Division-designated witness and noteholder in the Zohar funds. When the Division ultimately disclosed this information to Respondents on September 20, 2016, it "t[ook] no position as to whether this information constitutes material exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1967) and Commission Rule of Practice 230(b)(2)." *See* Declaration of Monica Loseman, dated October 12, 2016 ("Loseman Decl."), Ex. 4 (the "Aniloff

Email"). Instead, the Division purported to be producing the information under Rule 230(a)(2) of the SEC Rules of Practice, 17 C.F.R. § 201.100 *et seq.*, a catchall provision that clarifies that the Division may produce any documents it desires to produce to Respondents.

Thereafter, on October 4, 2016, the Division produced additional *Brady* material it obtained during an interview with Omar Bolli of Norddeutsche Landesbank Girozentrale ("Nord"), another Division-designated witness and noteholder in the Zohar Funds. *See* Loseman Decl., Ex. 5 (the "Bolli Email"). Again, the Division failed to acknowledge that the information contained in the Bolli Email constituted *Brady* material, and instead produced the information under Rule 230(a)(2). *See id.*

Further, as revealed in a September 22, 2016 production by the Commission in response to the two subpoenas that Your Honor issued on September 1, 2016, which concerned the application of the Commission's amended Rules of Practice and communications between and among the Commission and various parties about Respondents in this proceeding (the "September 1, 2016 Commission Subpoenas"), the Division apparently continued to investigate this matter subsequent to the filing of the OIP.[1] Loseman Decl. Exs. 1-3. The documents reveal that Division counsel obtained evidence relevant to its allegations from a witness more than two months after the investigation leading to the institution of proceedings had concluded and

[1] This production of documents revealed that the Division withheld documents from Respondents when, on June 9, 2015, it produced via email to Respondents correspondence received from third party Varde Partners, Inc. ("Varde"), stating, "Please see the attached documents, which were voluntarily provided to us by Varde Partners, Inc." Loseman Decl. Ex. 3 (emphasis added). The "attached documents" consisted of two letters exchanged between Varde's counsel, on the one hand, and Patriarch Partners XV, LLC ("Patriarch"), on the other hand (collectively, the "Varde-Patriarch Correspondence"). However, the Division withheld Varde's transmittal email and cover letter (the "Varde Cover Letter") that had accompanied the Varde-Patriarch Correspondence without so informing Respondents. The previously unproduced Varde Cover Letter reveals that, contrary to the Division's representation to Respondents in its June 9, 2015 email, Varde did not provide the Varde-Patriarch Correspondence voluntarily. Rather, Varde provided the Varde-Patriarch Correspondence to the Division at the request of Division attorney Amy Sumner several weeks after the filing of the March 30, 2015 institution of proceedings in this matter.

without an investigatory subpoena. That would explain the absence of any documents or correspondence in the investigative file for many of the Division's noteholder witnesses, including those from Varde, Nord, SEI and Deer Park.

The Division's failure to demonstrate an understanding that the Aniloff and Bolli Emails contain *Brady* information, combined with the recent revelation that the Division continued its investigation and obtained documents without a subpoena after the filing of the OIP, raises serious concerns about the Division's past, present, and future compliance with *Brady* and its obligation to provide Respondents with evidence obtained from third parties. Your Honor should therefore order the Division to certify that any information in the Division's possession similar to that contained in the Aniloff and Bolli Emails has been disclosed to Respondents.

Moreover, in disclosing the information in the Aniloff and Bolli Emails to Respondents, the Division was silent as to whether it possesses any Jencks Act witness statements from those witnesses. It is not a stretch to infer the Division must have taken notes and that those notes contain witness statements from these and possibly other meetings we understand the Division has conducted the last several weeks. The Division should thus be directed to produce any Jencks Act witness statements recorded—in whatever format they were recorded—during its interviews with Mr. Aniloff and with Mr. Bolli, or, alternatively, to certify that no such statements exist.

ARGUMENT

I. The Division Should Be Ordered To Re-Certify That It Has Complied With Its Obligations Under Rule 230 And The *Brady* Doctrine.

The Division is subject to a continuing obligation to produce material exculpatory and impeachment evidence to Respondents under Rule 230 and the *Brady* doctrine.[2] *See, e.g.*, *City of Anaheim*, Administrative Proceedings Release No. 586, 1999 WL 623748, at *3 (ALJ July 30, 1999) ("[T]he Division unquestionably has Brady obligations under Rule 230(b)(2) when it seeks a cease and desist order in the administrative forum."); *United States v. Bagley*, 473 U.S. 667, 676-77 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

Information is material to an SEC enforcement proceeding if its disclosure "would likely have changed the decision, taking into account the entire record or, put another way, whether it denied respondents a fair hearing." *First Jersey Sec., Inc.*, Administrative Proceedings Release No. 229, 1980 WL 78890, at *8 (ALJ Feb. 1, 1980). In other words, information that undermines the government's prosecution theory and "harmonize[s] with the theory of the defense case" is material and favorable to the defense and must be produced under the *Brady* doctrine. *United States v. Mahaffy*, 693 F.3d 113, 130 (2d Cir. 2012); *see also United States v.*

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[2] Your Honor's September 16, 2016 Order Denying Respondents' Motion to Compel noted that Respondents had cited *Giglio v. United States*, 405 U.S. 150 (172) and *United States v. Bagley*, 473 U.S. 667 (1985) in their motion to compel, and that neither of those cases is specifically referenced in Rule 230. Under Rule 230, the SEC "incorporated the Supreme Court's Brady doctrine.'" *Optionsxpress Inc.*, Administrative Proceedings Release No. 9466, 2013 WL 5635987, at *3 (Comm'n Oct. 16, 2013) (emphasis added). Rule 230, in fact, specifically references "the doctrine of *Brady v. Maryland*," and not just the *Brady* case itself. *See* Rule 230(b)(2). It is well-settled that the Supreme Court's *Brady* doctrine includes *Giglio*, which applied the *Brady* duty to disclose to impeachment material, and *Bagley*, in which the Supreme Court clarified the materiality standard applicable to *Brady*. *See Optionsxpress Inc.*, 2013 WL 5635987, at *3 (explaining that *Brady* is applicable to SEC proceedings, requires production of "materially exculpatory or impeaching evidence" and citing *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), which quotes *Bagley* for the materiality standard).

Triumph Capital Grp., Inc., 544 F.3d 149, 165 (2d Cir. 2008) (Government's failure to disclose evidence that was at odds with the government's theory of the trial violated *Brady*.). Both the Aniloff and Bolli Emails fall well within these bounds—as they contain information that undermines the core of the Division's case.

First, the Aniloff and Bolli Emails show—in direct contravention to the Division's key allegations—that investors knew that Respondents amended loans to postpone or forgive interest while continuing to categorize the loans at Category 4. Specifically, the Aniloff Email divulges that "Mr. Aniloff noted that in certain cases interest rates of loans *reflected on monthly trustee reports* were lowered and maturity was extended," and that the changes "were not" considered an "amendment and default." Loseman Decl. Ex. 4 (emphasis added). The Aniloff Email also states that "Mr. Anlioff [sic] received information from others that *showed that certain loans were not paying current interest but were still carried as performing loans*." *Id.* (emphasis added). Similarly, the Bolli Email indicates that Mr. Bolli knew from the trustee reports distributed to investors that, "from time to time . . . certain loans were not up to date on their interest payments," and that Mr. Bolli understood that Respondents had the ability to amend interest payments on a loan without changing the categorization, unless Respondents expected that the loan would not be paid in full in the future. Loseman Decl. Ex. 5.

That Mr. Aniloff and Mr. Bolli, whose firms were both Zohar noteholders, were aware from the monthly trustee reports and via information provided to them by "others," that Respondents categorized certain loans that had not paid the full stated interest as "current" is essential to Respondents' defense in this matter. Indeed, the Division's fraud allegations hinge on whether Respondents disclosed this practice to investors. *See, e.g.*, OIP ¶¶ 49-51. The OIP repeatedly alleges that Respondents "never disclosed Tilton's discretionary valuation approach."

OIP ¶ 9; *see also, e.g.*, *id.* ¶¶ 49 ("Respondents have not at any time disclosed Tilton's discretionary approach"), 54 ("undisclosed approach to categorization"), 56 (Respondents "have not disclosed Tilton's actual method of categorization"), 50 (Respondents were the only parties aware of the fact that "Portfolio Companies were not considered defaulted in light of unpaid interest."). Thus, by indicating that both Mr. Aniloff and Mr. Bolli received and reviewed information that disclosed that Respondents continued to categorize as "current" certain loans that had not paid the full stated interest, the Aniloff and Bolli Emails significantly undercut the Division's key allegations, and fall well within *Brady*'s bounds. *See Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) (Evidence that is inconsistent with the State's theory at trial is "classic *Brady* material.").

Second, the Aniloff Email undermines the Division's allegations regarding Respondents' alleged misrepresentations related to GAAP compliance by showing that the at-issue GAAP certification was "not important"—or, in other words, immaterial—to investors. Loseman Decl. Ex. 4. The Division alleges that the Zohar funds' financial statements were misleading because Respondents "attest[ed] to GAAP compliance" when the "financial statements [were] not GAAP-compliant." *See* OIP ¶¶ 57-60. To serve as the basis for a fraud claim, these alleged misrepresentations must be *materially* misleading. *See Ponce*, Administrative Proceedings Release No. 102, 1996 WL 700565, at *14 (ALJ Dec. 4, 1996) ("The Division must "prove that the statements were misleading as to a material fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant."). By disclosing that the attestations that the Zohar funds' financial statements were GAAP compliant were "not important" to Mr. Aniloff, the Aniloff Email emasculates the Division's ability to prove that they were material to investors. Loseman Decl. Ex. 4. Mr. Aniloff's statement, which undermines a

required element of the Division's case, constitutes exculpatory material under *Brady*. *See Mahaffy*, 693 F.3d at 130.

Finally, the Aniloff and Bolli Emails contain material impeachment evidence subject to mandatory disclosure under *Brady*. Specifically, Mr. Aniloff stated that he "hopes that this proceeding against Respondents results in financial recovery for his fund and the fund's clients." Loseman Decl. Ex. 4. In the same vein, Mr. Bolli stated that "he hopes that testimony he gives in this proceeding is helpful to his legacy at Nord," which was purportedly affected by his recommendation to invest in the Zohar funds. *See* Loseman Decl. Ex. 5. These statements show that each investor has a motive to testify favorably for the Division, and thus constitute material impeachment evidence. *See, e.g.*, *Wilson v. Beard*, No. 05-2667, 2006 WL 2346277 (E.D. Pa. Aug. 9, 2006) (finding a *Brady* violation for failure to disclose "[e]vidence that [the witness] may . . . have had a monetary interest in providing . . . information against Petitioner [and which] would have placed Petitioner's trial counsel in a much stronger position to impeach this key witness.").

The Division's failure to demonstrate an appreciation for the material exculpatory and impeachment information contained in the Aniloff and Bolli Emails not only raises concerns about the Division's *Brady* compliance, it also validates concerns raised in Respondents' previous motion to compel the production of *Brady* materials—namely, that the Division's blanket assertion that it understands and has complied with its *Brady* obligations is insufficient to ensure that the Division has produced all material exculpatory and impeachment material in its possession to Respondents. The Division should therefore be ordered to certify that it has complied with its obligations under Rule 230 and the *Brady* doctrine, including by producing any information related or similar to that contained in the Aniloff and Bolli Emails.

The additional misconduct by the Division that has recently come to light provides further support that the Division's unilateral assertions that it is complying with its *Brady* obligations are insufficient to ensure that all *Brady* materials have been produced to Respondents. The Division impermissibly obtained documents from Varde in violation of Rule 230(g). *See* Respts' Mem. of Law in Support of Its Mot. to Exclude Matthew Mach from Testifying, *Tilton*, Administrative Proceedings Release No. 3-16462, at 12-13 (ALJ Oct. 11, 2016). In producing the Varde-Patriarch Correspondence to Respondents, the Division represented that Varde had "voluntarily" produced the correspondence to the Division. But the Division tellingly withheld the transmittal email and Cover Letter from Varde to the Division, which indicated that the Division had in fact requested the documents from Varde. Given this recently-discovered cover-up, Respondents are left questioning whether the Division is impermissibly withholding any other materials from Respondents.

II. The Division Should Be Ordered To Produce Any Witness Statements From Its Interviews With Mr. Aniloff And Mr. Bolli.

Rule 231 and the Jencks Act, 18 U.S.C. § 3500, impose a continuing obligation on the Division to produce "*any statement*" of any witness or potential witness that "pertain[s] or is expected to pertain" to "the witness's direct testimony." *Jett,* Administrative Proceedings Release No. 504, 1996 WL 271642, at *2 (ALJ Foelak May 14, 1996) (emphasis added). Witness "statements" that must be produced under the Jencks Act include both "stenographic, mechanical, electrical, or other recording[s]," and "substantially verbatim recital[s]" of a witness's oral statements. 18 U.S.C. § 3500(e)(2). Moreover, witness statements must be disclosed even when they are contained in attorney notes or memoranda created during witness interviews. *See Goldberg v. United States*, 425 U.S. 94, 101-02 (1976); *see also United States v.*

Clemens, 793 F. Supp. 2d 236, 251-52 (D.D.C. 2011) (quoting *Saunders v. United States.*, 316 F.2d 346, 350 (D.C. Cir. 1963)).

To the extent that the Division recorded any Jencks Act witness statements—in audio or written format— during its interviews with Mr. Aniloff and Mr. Bolli, it should be ordered to produce those witness statements to Respondents. Should the Division continue to assert that it has already fulfilled its obligations under the Jencks Act, Respondents respectfully request that Your Honor order the Division to produce for *in camera* inspection its notes of its interviews with Mr. Aniloff and Mr. Bolli. *See, e.g.*, *Delaney II*, Administrative Proceedings Release No. 1652, 2014 WL 11115571, at *3 (July 25, 2014) (granting *in camera* review despite the fact that there was "nothing that indicate[d] the Division [had] not acted in accord with . . . [its] obligations under the Jencks Act"); *Jett*, 1996 WL 271642, at *2 ("[I]t is the function of the trial judge or hearing officer to determine whether materials should be produced.").

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Your Honor direct the Division to produce any additional information resembling or related to the information contained in the Aniloff and Bolli Emails to Respondents by October 18, 2016. Respondents further request that Your Honor order the Division to produce any Jencks Act witness statements recorded, in audio or written form, during the Division's interviews with Mr. Aniloff and Mr. Bolli by October 18, 2016.

Dated: New York, New York
October 12, 2016

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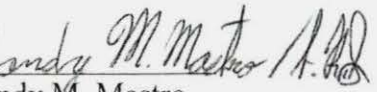
By: 

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