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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

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO STAY THE PROCEEDINGS AND COMPEL THE DIVISION TO MAKE FURTHER DISCLOSURES REGARDING TWO DIVISION WITNESSES, AND FOR EXPEDITED BRIEFING AND AN EVIDENTIARY HEARING

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October 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 brief in support of their motion to adjourn the imminent trial, and potentially to bar two non-party witnesses from testifying at trial, in the aftermath of the Securities and Exchange Commission's Division of Enforcement's unexpected revelation on October 13, 2016 of information that both undermines the status and credibility of those two non-party Division witnesses, and appears to have been intentionally withheld by the Division until now all the while it was insisting it had no *Brady* material to provide. Because the Division has insisted on confidential treatment of the limited—but critical—information it has revealed, and has refused to respond to numerous reasonable questions about that information, Respondents hereby move to compel the Division to make additional disclosure regarding these revelations.[1]

Respondents request expedited briefing and an evidentiary hearing to explore this new information and the appropriate remedy for the Division's conduct, including, among others, barring these two non-party witnesses from testifying at trial. Indeed, these latest revelations are of a piece with other belated disclosures that, as Your Honor will learn or may already be aware, have now tainted every major non-party witness the Division still intends to call at this trial.

Even with an expedited schedule to address these eleventh-hour revelations, however, there will need to be a delay in the trial, which is to commence in eight days. Respondents

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[1] As this motion is fundamentally about two non-party witnesses and brings into question their status as witnesses, it complies with Your Honor's October 14, 2016 Order precluding further pre-trial motions without leave.

further request that Your Honor decline to treat any of the subject matter of the disclosures as confidential, so that there is full sunshine on the Division's disclosures and conduct here.

FACTUAL BACKGROUND

As Your Honor well knows, the Division is required to produce material exculpatory evidence pursuant to Rule 230 of the SEC's Rules of Practice, *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *Giglio v. United States*, 405 U.S. 150 (1972). Therefore, on August 26, 2016, counsel for Respondents wrote to the Division and made nearly thirty particularized requests for the prompt production of documents or information that may tend to exculpate Respondents or affect the weight or credibility of the evidence the Division presents at trial, including impeachment material. Declaration of Susan Brune ("Brune Decl."), Ex. 1. The Division denied that it had any such material—a position it maintained in later motion practice. *See* Div. Opp'n to Resp'ts' Mot. To Compel, *Tilton*, Administrative Proceedings File No. 3-16462, at 2 (ALJ Sept. 8, 2016).

Late in the evening on October 12, 2016, counsel for the Division emailed Respondents' counsel and stated that "the Division has certain information that it has determined to produce pursuant to [Rule] 230(a)(2)" and representing that the information was confidential. Ex. 2. The Division offered to disclose the information if Respondents would agree not to disclose it to "anyone other than the ALJ, counsel of record in this case, and employees and agents of [such counsel], unless the ALJ permits such disclosure." *Id.* Division counsel also proposed a call with Respondents' counsel "if it would be more productive to discuss over the phone." *Id.* Within minutes, Respondents' counsel responded and requested that the Division "arrange a call as early tomorrow morning as possible to discuss the subject matter of this material, and then we

will respond to your request[ed] condition on the production." *Id.* The next morning, counsel for the Division and Respondents spoke by telephone. Ex. 3.

During that call— more than six weeks after Respondents made specific requests for *Brady* and *Giglio* materials, and more than a month after the Division told Your Honor that Respondents are "attempt[ing] to mask the impropriety of their [*Brady*] requests by hurling *baseless and unsubstantiated accusations* that the Division is engaging in 'gamesmanship with regard to its interpretation of its *Brady* obligations'"—the Division disclosed material exculpatory information about two non-party witnesses on the Division's witness list. *Id.*;[2] *see also* Div. Opp'n to Resp'ts' Mot. To Compel, *Tilton*, Administrative Proceedings File No. 3-16462, at 1 (ALJ Sept. 8, 2016) (emphasis added). Division counsel declined to give any further details, requiring Respondents to put any questions they had in writing. Respondents emailed an extensive list of questions. Hours later, the Division responded via email that it refused to provide further information. Ex. 3.

Notwithstanding that refusal, however, the Division has revealed significant, exculpatory information about two non-party witnesses just eight days before the scheduled start of the trial in this matter. These disclosures closely follow on the heels of several other, similarly late-breaking *Brady* and *Giglio* disclosures, each of which post-dates the Division's numerous assurances that it has already fully disclosed all *Brady* information in its possession. *See, e.g.*, Div. Opp'n to Resp'ts' Mot. To Compel, *Tilton*, Administrative Proceedings File No. 3-16462, at 2 (ALJ Sept. 8, 2016) (claiming that the Division is "keenly aware of its obligations under Brady

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[2] Because the Division has insisted that the information is confidential, Respondents are not identifying in this motion the two non-party witnesses to which it pertains or any other details, but will provide such information to Your Honor during the final pre-hearing conference on October 19, 2016 or any other conference at Your Honor's convenience.

and its progeny, and has thoroughly abided by them"); Decl. of Dugan Bliss Regarding the Division's Search for Material Exculpatory Evidence (Sept. 28, 2016) (certifying compliance with *Brady* obligations).

Respondents believe that the Division has been in possession of the *Brady* and *Giglio* information disclosed Thursday morning each and every time it has represented to Your Honor that "all Brady materials known to the Division have been provided." *See id.*; *see also* Div. Opp'n to Resp'ts' Mot. To Compel, *Tilton*, Administrative Proceedings File No. 3-16462, at 2 (ALJ Sept. 8, 2016). If, as Respondents suspect, the Division has had this information for weeks, if not months, the Division indeed has engaged in gamesmanship in a serious administrative proceeding. The Division's invitation to Respondents to submit written questions concerning the circumstances of this newly-disclosed exculpatory information, only to refuse to answer any of those questions, including how and when the Division staff assigned to this matter became aware of the information, is also telling.

The trial must be postponed so that Respondents can adequately explore the circumstances surrounding both the exculpatory information and the Division's eve-of-trial disclosure. In addition, Respondents respectfully request that Your Honor convene an evidentiary hearing to determine the appropriate remedies for the Division's apparent concealment of this clearly exculpatory information, which could range from witness preclusion to issue preclusion or even termination of this proceeding. At the very least, the Division should be compelled to provide basic information concerning the circumstances of its recent disclosure, and the two implicated non-party witnesses should be precluded from testifying at the upcoming trial.

LEGAL STANDARDS

Rule 230(b) imposes a continuing obligation on the Division to produce material evidence favorable to Respondents, pursuant to *Brady*. *See, e.g.*, *City of Anaheim*, Admin. Proceedings Rulings 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."). Both exculpatory and impeachment evidence is considered "favorable" under *Brady* and must be disclosed by the Division if such evidence is material. *See United States v. Bagley*, 473 U.S. 667, 676-77 (1985); *Giglio*, 405 U.S. at 154-55. Additionally, to comply with *Brady*, the Division "has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case." *City of Anaheim*, 1999 WL 623748, at *1 (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

The Division has an obligation to produce impeachment and exculpatory evidence that is "material either to [the respondent's] guilt or punishment," *Kyles*, 514 U.S. at 432 (internal quotation marks omitted), with the test of materiality being whether the favorable evidence, as a whole, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. Notwithstanding the retrospective nature of the materiality standard, the *Brady* requirement is "premised on the view that due process requires pre-trial, or at least at-trial, disclosure of exculpatory evidence material to guilt or punishment." *City of Anaheim*, 1999 WL 623748, at *2.

In addition, the Division is required to produce exculpatory and impeachment material even if contained in otherwise privileged documents. *See United States v. NYNEX Corp.*, 781 F. Supp. 19, 26 (D.D.C. 1991) ("The government should . . . disclose[] exculpatory facts, even if contained in internal documents otherwise protected by the work product privilege."). While

Rule 230(b)(1) allows the Division to withhold certain documents from production, including documents that are privileged, as well as internal memoranda, notes, or writings prepared by Commission employees, or documents that are otherwise work product, among others, Rule 230(b)(2) provides that nothing in Rule 230(b) authorizes the Division, in connection with an enforcement proceeding, "to withhold, contrary to the doctrine of *Brady*, documents that contain material exculpatory evidence." Rule 230(b)(2); *see also Bandimere*, Admin. Proceedings Rulings Release No. 759, 105 SEC Docket 3776, at *2 (ALJ Mar. 12, 2013). Thus, the Division is obligated to disclose material exculpatory and impeachment evidence, even if contained in internal documents otherwise protected by privilege. To the extent a relevant document contains privileged material, the Division must nonetheless disclose the facts therein that constitute *Brady* material, by, for example, redacting privileged portions or providing summaries of the *Brady* evidence. *See, e.g.*, *Bandimere*, Admin. Proceedings Rulings Release No. 759, at *1.

ARGUMENT

While the Division's Thursday evening disclosures might give the facial appearance of compliance with its *Brady* and *Giglio* obligations, the Division has fallen far short. Its release of only limited information in circumstances where more is clearly warranted, and its insistence that the material is not exculpatory when it so patently is[3] warrant Your Honor's intervention. *Cf.* Rule 300 ("All hearings shall be conducted in a fair, impartial, expeditious and orderly manner."); Rule 111 ("The hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties.").

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3 *See* Resp'ts' Mot. to Compel Production of Brady Material and Jencks Act Witness Statements, *Tilton*, Administrative Proceedings File No. 3-16462 (Oct. 12, 2016).

Here, the Division's disclosure of exculpatory information about two non-party witnesses comes after two other recent *Brady* disclosures, both of which took place after the Division repeatedly represented that it had fully disclosed all *Brady* material. Fairness requires timely and full disclosure of all *Brady* materials. *Cf. Leka v. Portuondo*, 257 F.3d 89, 101 (2d Cir. 2001) (belated disclosure of *Brady* material "tend[s] to throw existing strategies and [trial] preparation into disarray[,]" making it "difficult . . . to assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available").

Instead, however, the Division has on numerous occasions concealed from Respondents plainly relevant—and exculpatory—information. For example, in June 2015, the Division requested from Varde Partners, Inc., a non-party witness expected to testify at the hearing, documents concerning the allegations in the OIP filed more than two months beforehand, in violation of Rule 230(g). *See* Mem. of Law in Support of Resp'ts' Mot. to Preclude Div.'s Witness, Matthew Mach, from Testifying, *Tilton*, Administrative Proceedings File No. 3-16462, at 2-3 (Oct. 11, 2016). The Division did not disclose that it had, in fact, requested the materials well after the close of its investigation, and withheld the correspondence that explained otherwise (which email Respondents eventually obtained pursuant to a September 1, 2016 subpoena to the Commission). *Id.* Similarly, without Respondents' knowledge and despite their request for confidential treatment, in December 2013 and January 2014, the Division provided MBIA with confidential and proprietary financial information of several Patriarch portfolio companies in exchange for extensive information about Respondents. *See* Exs. 4 & 5. The Division even expressly consented in writing to MBIA's use of that information in commercial negotiations with Respondents or in litigation against them—on the condition that MBIA agree to "not cite or

attach any of the documents received from the SEC," *i.e.*, on the condition that the non-public documents not be traceable to the SEC. *Id.*; *see also* Resp'ts' Mem. of Law in Support of Mot. to Compel MBIA to Produce Docs. Responsive to Resp'ts' Subpoenas, *Tilton*, Administrative Proceedings File No. 3-16462 (Oct. 5, 2016). The Division's refusal to provide the most basic details about the exculpatory information concerning two non-party witnesses is yet another game—and one Your Honor should not tolerate.

Further, the Division's conduct has been exacerbated by its witnesses' now-routine refusal to provide Respondents access to plainly relevant documents, even when ordered to do so by Your Honor. For example, according to the Division's witness list, the Division intends to call Matthew Mach, a Varde employee, to testify regarding Varde's "investment in the Zohar Fund(s), communications regarding the investment, relationship with Patriarch, their understanding of the investment, any interaction with [Ms.] Tilton or other Patriarch employees, and the monitoring or assessment of [Varde's] investment." Last month, Your Honor denied Varde's motion to quash Respondents' subpoena because the Division proposes to elicit testimony about these topics, holding that Respondents' requests for documents were "directly relevant to the Division's proposed evidence [,] necessary for cross-examination," and therefore discoverable. *Tilton*, Administrative Proceedings Release No. 4153, at 2 (ALJ Sept. 14, 2016). (emphasis added) (adding that, to the extent the investor had valid confidentiality concerns, the investor and Respondents "may propose the text of a protective order."). Yet Varde continues to withhold its documents, despite Your Honor's Order requiring it to disclose them to Respondents. *See id.*; *see also* Mem. of Law in Support of Resp'ts' Mot. to Preclude Div.'s Witness, Matthew Mach, from Testifying, *Tilton*, Administrative Proceedings File No. 3-16462 (Oct. 11, 2016).

Here, in light of the Division's pattern of failing to disclose Brady material, and in light of the Division's witnesses' persistent refusal to turn over documents "necessary for cross-examination," *Tilton*, Administrative Proceedings Release No. 4153, at 2 (ALJ Sept. 14, 2016), the proceedings should be stayed pending further disclosure from the Division and its witnesses. The Division refuses to provide Respondents even the most basic information concerning its recent disclosure, including, for example, when and how the Division staff assigned to this matter first learned about the exculpatory information revealed to Respondents only three days ago. As a result, it is impossible to adequately determine the impact of the information on the credibility of the two non-party witnesses at issue or the breadth of the Division's misconduct. It is also difficult to believe the Division's assurances that it has produced all *Brady* material to date.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Your Honor stay the proceedings and compel the Division to make further disclosures. Respondents also respectfully request expedited briefing concerning the issues addressed herein, and oral argument at the pre-hearing conference.

Dated: New York, New York
October 16, 2016

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