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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16462

In the Matter of **LYNN TILTON;** **PATRIARCH PARTNERS, LLC;** **PATRIARCH PARTNERS VIII, LLC;** **PATRIARCH PARTNERS XIV, LLC;** **AND** **PATRIARCH PARTNERS XV, LLC,** **Respondents.**	**DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION TO COMPEL THE PRODUCTION OF BRADY MATERIAL AND JENCKS ACT WITNESS STATEMENTS**

Introduction

The Division of Enforcement ("Division") respectfully submits this Response in opposition to Respondents' Motion to Compel the Production of *Brady* Material and Jencks Act Witness Statements ("Motion").

Respondents' Motion and supporting Memorandum of Law ("MOL") is little more than a request to reconsider Your Honor's prior rulings. Indeed, Respondents' instant Motion disregards both the spirit and explicit language of Your Honor's previous Orders, which denied Respondents' earlier Motion to Compel the Production of Brady Materials, and earlier Motion to Compel the Production of Witness Statements under the Jencks Act. Ironically, in the instant Motion, the bulk of Respondents' arguments explain how the Division properly disclosed certain information obtained in two witness interviews, but then nonsensically concludes that the Division is shirking its discovery obligations and therefore Your Honor should reconsider prior rulings. Moreover,

Respondents' request that Your Honor review Division attorney notes is another attempt at a fishing expedition that Your Honor already denied. Lastly, Respondents' claim that the Division committed "misconduct" and violated Rule 230(g) is false and frivolous. Thus, Respondents' Motion should be denied in its entirety.

Background

On August 22, 2016, Respondents filed a Motion to Compel the Production of Witness Statements under the Jencks Act. Respondents requested, among other things, notes of the Division's communications with attorneys for witnesses, and that Your Honor to review all of the Division attorney's notes *in camera*. The Division filed an opposition brief on August 29, and Respondents filed a Reply in support of their motion three days later. Thus, the parties fully briefed the Division's disclosure obligations under the Jencks Act.

On September 8, Your Honor denied Respondents' Jencks Act motion, finding that the request was based on the assumption that "there must be more there there," and that Respondents' motion indicated that they were engaging in a "fishing expedition."

On August 31, 2016, Respondents filed a Motion to Compel the Production of *Brady* Materials, requesting that Your Honor order the Division to respond to twenty-seven requests for materials Respondents sought under *Brady*. On September 8, the Division filed its opposition, and on September 13, Respondents filed a reply brief in support of their motion. Thus, the parties fully briefed the Division's disclosure obligations under *Brady*.

On September 16, Your Honor denied Respondents' *Brady* motion. Your Honor again noted that the Commission frowns on "fishing expeditions," and recognized the Commission rule on requests made pursuant to *Brady*:

> Unless defense counsel becomes aware that exculpatory evidence has been withheld and brings it to the judge's attention, the

> government's decision as to whether or not to disclose information is final. Mere speculation that government documents may contain *Brady* material is not enough to require the judge to make an *in camera* review. In order to justify such a review, a respondent must first establish a basis for claiming that the documents contain material exculpatory evidence. A "plausible showing" must be made that the documents in question contain information that is both favorable and material to the respondent's defense.

Finding that "Respondents ha[d] not met this standard," Your Honor instead directed the Division "to file an affidavit about its compliance with Rule 230(b)(2)."

On September 28, Mr. Bliss filed an affidavit detailing the Division's compliance with Rule 230(b)(2). Therein, Mr. Bliss attested that, among other things, "[t]he Division has provided possible material exculpatory evidence to Respondents' counsel via e-mail" and "[t]he Division continues to review information it obtains (including through witness interviews) on an ongoing basis, and recognizes its ongoing obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, and 17 C.F.R. § 201.231." Bliss Decl. at ¶¶ 5, 6.

On September 20, the Division sent to Respondents the "Aniloff Email," which disclosed certain information that the Division learned during Mr. Aniloff's interview on September 7.[1] On October 4, the Division sent to Respondents the "Bolli Email," which disclosed certain information that the Division learned during Mr. Bolli's interview on September 28.

On October 12, Respondents filed the instant Motion again seeking certain disclosures pursuant to *Brady* and the Jencks Act.

[1] As the Division explained to Respondents, between the date of the Division's meeting with Mr. Aniloff and the date of the Aniloff email, the Division was required to respond to *eight* separate motions *in limine* filed by Respondents, which is why the Aniloff Email was not sent earlier. *See* Ex. 1.

Argument

First, the Division is abiding by its obligations under *Brady*. In compliance with Your Honor's previous Order, Mr. Bliss filed a declaration attesting that, among other things, "[t]he Division has provided possible material exculpatory evidence to Respondents' counsel via e-mail" and "[t]he Division continues to review information it obtains (including through witness interviews) on an ongoing basis, and recognizes its ongoing obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, and 17 C.F.R. § 201.231." Bliss Decl. at ¶¶ 5, 6.

Consistent with Mr. Bliss's declaration, the Division has continued to meet with witnesses in the lead up to trial, and has continued to disclose to Respondents possible exculpatory information obtained from these witness meetings. The Aniloff and Bolli emails did just that. The Division will continue to meet with witnesses, and will continue to disclose possible exculpatory information obtained from those witness meetings. This is consistent with the Division's obligations under Rule 230(b)(2), and Your Honor's prior Order. Thus, there is no need for judicial intervention, and there is certainly no need to order the Division to "re-certify" (MOL at 4) that the Division as complied with its obligations under Rule 320 and the *Brady* doctrine.

Second, Respondents' Motion is purely a motion for reconsideration. Respondents previously filed a Motion to Compel the Production of *Brady* Materials, which was denied by Your Honor. Through the instant Motion, Respondents again seek to go on a fishing expedition and request judicial intervention into the Division's compliance with *Brady*. It is telling that Respondents do not cite to the Commission rule on the standard a Defendant must bear under *Brady*, as explained in Your Honor's prior ruling. That is because their request remains at odds with this rule. It is even more significant that, to support their arguments, Respondents spend the

bulk of their Motion explaining how the Division properly disclosed possible exculpatory information in the Aniloff and Bolli Emails, only to nonsensically conclude that the Division has "fail[ed]to demonstrate an appreciation for the material exculpatory and impeachment information contained in the Aniloff and Bolli Emails." MOL at 7. Put simply, Respondents' arguments are odds with their requested relief, as the Division *disclosed* the information that Respondents feel so strongly exonerates them. Respondents' own Motion merely confirms that the Division is abiding by its *Brady* obligations through disclosing certain information that may be favorable to the Respondents.

Third, to the extent that Respondents fault the Division for not explicitly stating the information in the Aniloff and Bolli Emails constitutes *Brady* (*see* MOL at 1-2), that is because the Division (like Respondents) cannot know at this time whether the information is "material" within the meaning of *Brady*. *See Cone v. Bell*, 556 U.S. 449, 469–70 (2009) (recognizing "evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."); *United States v. Sudikoff*, 36 F.Supp.2d 1196 (C.D. Cal. 1999) ("Whether disclosure would have influenced the outcome of a trial can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighed against the presumed effect of the undisclosed Brady material."); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005) (recognizing it is "extremely difficult if not impossible to discern before trial what combination of evidence will be deemed 'material' after trial under *Brady*.").

To be clear, the Division recognizes its disclosure obligations under *Brady*,[2] and is abiding by those obligations. Indeed, it is erring on the side of disclosure and has gone well past its obligation under Rule 230(b)(2). However, it is hardly improper to make broad disclosures but refrain from stating that the information will be material to guilt (and therefore qualifies as *Brady*) when that cannot be known at this stage of the litigation.

Fourth, the Division does not have any Jencks Act witness statements from its interviews of Mr. Aniloff or Mr. Bolli. Respondents simply disregard Your Honor's prior Order denying their Motion Compel the Production of Witness Statements under the Jencks Act, and speculate that *Jencks* statements must exist and that "Your Honor [should] order the Division to produce for *in camera* inspection its notes of its interviews with Mr. Aniloff and Mr. Bolli." MOL at 9. Although the Division is, of course, willing to submit its notes for *in camera* inspection, Your Honor need not review these notes merely because Respondents seek to engage in yet another fishing expedition speculating "there must be more there there."

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[2] As stated in its opposition to Respondents' first Motion to Compel the Production of *Brady* Materials, the Division's position regarding its *Brady* mirrors exactly what the law requires:

> Under *Brady* and its progeny, "the Government has a constitutional duty to disclose favorable evidence to the accused where such evidence is 'material' either to guilt or to punishment." *United States v. Coppa,* 267 F.3d 132, 139 (2d Cir. 2001). "Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness." *Id.* "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different," such that the failure to disclose "'undermine[s] confidence in the verdict.'" *Cone v. Bell,* 556 U.S. 449, 469-70 (2009) (quoting *Kyles v. Whitley,* 514 U.S. 419, 435 (1995)).

United States v. Certified Envtl. Servs., Inc., 753 F.3d 72, 91 (2d Cir. 2014).

Fifth, Respondents' allegation that the Division engaged in "misconduct" and "cover-up" by "impermissibly obtain[ing] documents from Varde in violation of Rule 230(g)" is frivolous. As an initial matter, this allegation has no relevance to their request for *Brady* and Jencks Act disclosures. It was simply included to smear Division attorneys. Moreover, it is a false allegation. Rule 230(g) deals only with information obtained by subpoena. Indeed, Rule 230(g)'s title is "Issuance of Investigatory Subpoenas After Institution of Proceedings." Despite hurling the serious allegation of Division misconduct, Respondents implicitly concede that the Division could not have violated Rule 230(g) because the evidence was obtained "without an investigatory subpoena." MOL at 3. Undeterred by this fact, Respondents nonetheless argue that the Division misrepresented these documents were "voluntarily" produced because the Division "had in fact requested the documents from Varde" (MOL at 8). As Respondents well know, the production was voluntarily as the production was made "without an investigatory subpoena." MOL at 3. Thus, Respondents' claims of "misconduct," and a "recently-discovered cover-up," are both preposterous and frivolous. Your Honor should so hold.[3]

Conclusion

Respondents' Motion should be denied. Your Honor should decline to revisit prior rulings, and should not credit Respondents' baseless claims that the Division does not understand its obligations under *Brady* and the Jencks Act. Your Honor should further find Respondents' allegations that Division attorneys committed "misconduct" and a "cover-up" are frivolous.

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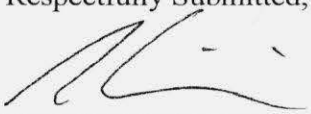
[3] Separately, the Division is submitting a Response to Respondents' Motion to Preclude Matt Mach – a Varde employee – from Testifying. The Response fully addresses Respondents' allegations regarding the Varde document. The Division incorporates those portions of Response here.

Dated: October 18, 2016

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION TO COMPEL THE PRODUCTION OF BRADY MATERIAL AND JENCKS ACT WITNESS STATEMENTS** was served on the following on this 18th day of October, 2016, in the manner indicated below:

Securities and Exchange Commission
Brent Fields, Secretary
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
(By Facsimile and original and three copies by UPS)

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100 F Street, N.E.
Mail Stop 2557
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Nicole L. Nesvig

From:	Heinke, Nicholas
To:	"Dunning, Mary Kay"; Bliss, Dugan; Sumner, Amy A.; Williams, Mark L
Cc:	Mastro, Randy M.; Zweifach, Lawrence J.; Kirsch, Mark A.; Halligan, Caitlin J.; Brodsky, Reed; Loseman, Monica K.; Rubin, Lisa H.; Kravat, Zachary; Fanady, Leigh; Susan E. Brune (sbrune@brunelaw.com)
Subject:	RE: In the Matter of Lynn Tilton et al. (File No. 3-16462)
Date:	Monday, September 26, 2016 10:31:00 PM

Counsel – I write in response to Mr. Mastro's September 22, 2016 letter. Counsel for the Division met with Mr. Aniloff on September 7, 2016. The information contained in the Division's September 20, 2016 email regarding information provided by Mr. Anlioff (the "Aniloff Email") was information the Division learned during that September 7 meeting.

As an initial matter, there were no Jencks Act statements generated during or after the September 7 meeting. *See, e.g., U.S. v. Allen*, 798 F.2d 985, 994 (7th Cir. 1986) ("A government agent's summary of a witness's oral statement that is not signed or adopted by the witness is not producible.").

Although we decline to address your characterization of the information in the Aniloff Email, even if the information constituted *Brady* material, the Division provided "sufficient disclosure in sufficient time to afford the defense an opportunity to use." *United States v. Paredes-Cordova*, 504 Fed. Appx. 48, 53 (2d Cir. 2012) (quoting *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir.2001)). I note that, between the September 7 meeting and the September 20 email, the Division was engaged in responding to eight motions *in limine* filed by Respondents. I further note that the disclosure was made more than one month before the hearing. Even in the criminal context, the timing of such a disclosure is appropriate. *See, e.g., United States v. Kelly*, 91 F.Supp.2d 580, 585 (S.D.N.Y.2000) ("*Brady* 'impeachment' information is properly disclosed when the witness is called to testify at trial."); *United States v. Abrams*, 539 F.Supp. 378, 390 (S.D.N.Y. 1982) ("Brady does not require the Government to disclose information pertaining to the credibility of a witness before that witness testifies.").

Going forward, the Division anticipates meeting with witnesses to prepare for the hearing. The Division will continue to disclose appropriate materials in a timely manner. In short, the Division has complied, and will continue to comply, with its obligations under *Brady* and the Jencks Act. We decline to provide the additional information requested in your letter, as it is not required by *Brady*, Jencks, or any of the law judge's rulings in this matter.

Regards,

Nicholas P. Heinke
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From: Dunning, Mary Kay [mailto:MKDunning@gibsondunn.com]
Sent: Thursday, September 22, 2016 4:30 PM
To: Heinke, Nicholas; Bliss, Dugan; Sumner, Amy A.; Williams, Mark L
Cc: Mastro, Randy M.; Zweifach, Lawrence J.; Kirsch, Mark A.; Halligan, Caitlin J.; Brodsky, Reed; Loseman, Monica K.; Rubin, Lisa H.; Kravat, Zachary; Fanady, Leigh; Susan E. Brune (sbrune@brunelaw.com)
Subject: In the Matter of Lynn Tilton et al. (File No. 3-16462)

Dear Counsel,

Attached please find a letter from Randy Mastro.

Thanks,
Mary Kay

Mary Kay Dunning
Of Counsel

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