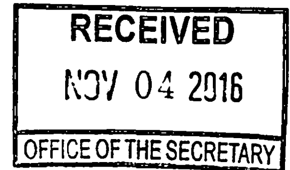
HARD COPY



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 RESPONSE TO RESPONDENTS' REQUEST FOR ISSUANCE OF A SUBPOENA DUCES TECUM DIRECTED AT ANCHIN, BLOCK & ANCHIN**

Introduction

The Division of Enforcement ("Division") respectfully submits this Response to Respondents' request ("Request") for issuance of a subpoena *duces tecum* directed at Anchin, Block & Anchin, LLP ("Anchin"). As stated herein, a subpoena is not required by any purported *Brady* violation, and will likely result in needless delay and expense. If Your Honor is inclined to issue a subpoena, it should be limited to a targeted request for information on other recent engagements between Anchin and the SEC to illuminate the contours of any purported bias on the part of Mr. Peter Berlant.

On Wednesday, October 26, 2016, the Division called Mr. Berlant as a percipient fact witness. He provided testimony on services he performed for Respondents, and testified consistently with his investigative testimony, which occurred on June 8, 2014. Respondents cross-examined Mr. Berlant on October 27, 2016. On October 30, the Division disclosed his firm was

retained by the SEC in a separate and unrelated matter (the "Connecticut Engagement"). Although Mr. Berlant has not, and will not, perform any work on the Connecticut Engagement, his firm stands to profit. As a partner, Mr. Berlant could plausibly share in those profits.

Respondents allege the "belated disclosure...constituted yet another in a long list of *Brady* violations committed by the Division." Request at 2. Respondents' allegations, and their related broad request to subpoena documents, are a result of Respondents' fundamental misunderstanding of *Brady* and its progeny. To be clear, the Division has not committed <u>any</u> *Brady* violations.

There are three components of a Brady violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Here, the evidence is, at best, impeachment evidence (known as *Giglio*) possibly providing a basis for bias. Mr. Berlant has not performed any work on the contract, and his investigative testimony – provided two years before the Connecticut Engagement was entered into – was nearly identical to his trial testimony, which suggests that, whatever the purported bias, it did not impact his testimony.[1] Nonetheless, even assuming the first element could be met, the second and third elements cannot.

---

[1] The concept that a witness cannot be under improper influence or motive if they provided the same statement before the event that triggered such influence or motivation to arise is embodied Fed.R.Evid. 801(d)(1)(B), where a prior consistent statement is admissible to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. *See, e.g., Tome v. United States*, 513 U.S. 150, 157 (1995); *Grisanti v. Cioffi*, 38 Fed. Appx. 653, 655 (2d Cir. 2002) ("According to the Supreme Court's decision in *Tome v. United States*, 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995), a prior consistent statement is admissible non-hearsay under Fed.R.Evid. 801(d)(1)(B) if 'offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive,' and if the statement was made before the motive to fabricate arose.") (quoting *Tome*, 513 U.S. at 157).

The Connecticut Engagement was not suppressed under *Brady*,[2] and Respondents cannot show prejudice. That is because the Connecticut Engagement was disclosed (albeit belatedly), and Your Honor has permitted Respondents to recall Mr. Berlant so he may be questioned on the subject. This is all *Brady* requires. *See, e.g., United States ex rel. Lucas v. Regan,* 503 F.2d 1, 3 n. 1 (2d Cir.1974), *cert. denied,* 420 U.S. 939, 95 S.Ct. 1149, 43 L.Ed.2d 415 (1975) ("Neither *Brady* nor any other case ... requires that disclosure under *Brady* must be made before trial."); *United States v. Davis*, 306 F.3d 398, 421 (6th Cir. 2002) ("Thus, *Brady* generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose...Defendant was given every opportunity to review the [newly disclosed] tapes and to recall [the witness] if necessary, but he refused to do so.") (internal quotations omitted); *United States v. Warren,* 454 F.3d 752, 760 (7th Cir.2006) ("Late disclosure does not itself constitute a *Brady* violation."); *United States v. Shranklen*, 97 Fed. Appx. 687, 689 (8th Cir. 2004) ("Because the evidence was disclosed during the trial, there was no *Brady* violation... Indeed, [defendant] was given an opportunity to recall witnesses after obtaining the information, but did not do so. There is not a reasonable probability the trial's outcome would have differed had the proffer been disclosed earlier."); *United States v. Gordon,* 844 F.2d 1397, 1403 (9th Cir.1988) (*"Brady* does not necessarily require that the prosecution turn over exculpatory material *before* trial[ ]"; therefore, no *Brady* violation where evidence emerged at trial and court allowed defense to recall and cross-

---

[2] Even the delay in disclosure was slight, as impeachment material is typically disclosed after the witness is called to testify at trial and not as part of pretrial discovery. *See, e.g., United States v. Nixon*, 418 U.S. 683, 701 (1974) ("Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial."); *United States v. McGuinness*, 764 F.Supp. 888, 896 (S.D.N.Y.1991) ("it is well settled that the government is not required to disclose impeachment material before the relevant witness has testified") (citations omitted); *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 witnesses before that witness testifies") (citations omitted).

examine relevant witnesses) (emphasis in original); *Dotson v. Scribner,* 619 F.Supp.2d 866, 876 (C.D.Cal.2008) (*"Brady* does not hold that a late disclosure is a violation of due process.").

Indeed, as the late Judge Owen succulently stated, "[Defendant] ignores the simple fact that [n]either *Brady* nor any other case ... requires that disclosure under *Brady* must be made before trial. The Government's *Brady* obligation is satisfied where, as here, the defense receives the information in time to make use of it." *Clark v. United States*, 365 F. Supp. 2d 553, 562–63 (S.D.N.Y. 2005) (internal quotations and citations omitted).

Putting aside Respondents' hyperbole and allegations of misconduct (both of which are inaccurate and irrelevant because the Connecticut Engagement was not suppressed), even was the Connecticut Engagement to qualify as *Brady,* Respondents have already been placed in the same position they would have been placed had this disclosure come earlier. Upon recalling Mr. Berlant, Respondents will be free to question him on what, if any, bias or motivation the Connecticut Engagement creates. Respondents' request that they be permitted to subpoena records as to the Connecticut Engagement is unnecessary because all that is relevant to Mr. Berlant's motives or bias is what Mr. Berlant knows and believes, regardless of what the underlying records of the Connecticut Engagement show.[3] In fact, Respondents made, and Your Honor rejected, these identical arguments when Respondents requested underlying information on certain confidential

---

[3] To be clear, and as previously stated, undersigned counsel confirmed to the best of their ability that (i) Mr. Berlant has performed no work on the Connecticut Matter, (ii) although Mr. Berlant has performed engagements in the past with the Litigation, Forensic and Valuation Services group at Anchin, he is currently performing no work with that group, (iii) although it is possible that Mr. Berlant may be generally aware that the Litigation, Forensic and Valuation Services group at Anchin was retained by the Commission, he has not signed a nondisclosure agreement with the Commission and therefore is not permitted to be made aware of any details of the Connecticut Matter, and (iv) Mr. Berlant has not received and will not receive any direct compensation for the Connecticut Matter.

matters. Just as that information was irrelevant to the cross-examination of those witnesses, the documents they seek are irrelevant to Mr. Berlant.

Here, Respondents have argued the Connecticut Engagement can be used to impeach Mr. Berlant. Such impeachment material is known as *Giglio.* "The thrust of *Giglio* and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury." *Smith v. Kemp*, 715 F2d 1459, 1467 (11th Cir. 1983). Thus, under *Giglio*, the facts that might motivate a witness giving testimony are relevant only so far as what the testifying witness knows or believes. *See U.S. v. Dames*, 380 F. Supp. 2d 270, 272-73 (S.D.N.Y. 2005) (recognizing that *Giglio* obligations relate to "knowledge of the specific testifying Witnesses"). Here, Mr. Berlant is not involved in the Connecticut Engagement. Thus, the underlying records would not provide Respondents with any additional lines of cross-examination, nor would the records have any relevance to this case.

To be clear, the Division has not committed <u>any</u> *Brady* violations, and there is no basis in the law or otherwise to issue any subpoena. Just as with a criminal case, Respondents should be permitted to, if they choose, recall Mr. Berlant and question him on whether the Connecticut Engagement causes him bias toward the Division. Respondents' proposed subpoena as written, however, not only requests information irrelevant to Mr. Berlant's possible bias, but it will do little more than create unnecessary expense unnecessary delay to this case.

The Division therefore respectfully submits that if any subpoena is to be issued, it should be limited to confirming the existence of any recent engagements between Anchin and the SEC other than the Connecticut Engagement, and the question of whether and to what degree Mr. Berlant may potentially share in any profits attributable to that engagement. All other matters – including Mr. Berlant's non-existent role in the Connecticut Engagement and any bias he may have

possessed at the time of his recent direct and cross examination – can be fully and efficiently addressed through focused additional cross examination.

Dated: November 2, 2016

Respectfully Submitted,

Dugan Bliss, Esq.
Nicholas Heinke, Esq.
Amy Sumner, Esq.
Mark L. Williams, Esq.
Division of Enforcement
Securities and Exchange Commission
Denver Regional Office
1961 Stout Street, Ste. 1700
Denver, CO 80294

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENTS' REQUEST FOR ISSUANCE OF A SUBPOENA DUCES TECUM DIRECTED AT ANCHIN, BLOCK & ANCHIN** was served on the following on this 1st day of November, 2016, in the manner indicated below:

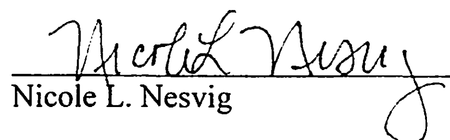
Securities and Exchange Commission
Brent Fields, Secretary
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
(By Facsimile and original and three copies by UPS)

Hon. Judge Carol Fox Foelak
100 F Street, N.E.
Mail Stop 2557
Washington, D.C. 20549
(By Email)

Randy M. Mastro, Esq.
Lawrence J. Zweifach, Esq.
Barry Goldsmith, Esq.
Caitlin J. Halligan, Esq.
Reed Brodsky, Esq.
Monica K. Loseman, Esq.
Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, New York 10166
(By email pursuant to the parties' agreement)

Susan E. Brune, Esq.
Brune Law PC
450 Park Avenue
New York, NY 10022
(By email pursuant to the parties' agreement)

Martin J. Auerbach
Law Firm of Martin J. Auerbach, Esq.
1330 Avenue of the Americas
Ste. 1100
New York, NY 10019
(By email pursuant to the parties' agreement)



Nicole L. Nesvig