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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 *IN LIMINE* TO EXCLUDE
TRANSCRIPTS OF INVESTIGATIVE
TESTIMONY, INCLUDING DIVISION
EXHIBITS 194 THROUGH 206**

Introduction

The Division of Enforcement (“Division”) respectfully files this opposition to Respondents’ Motion to Exclude Transcripts of Investigative Testimony (“Motion”). Despite Respondents’ hyperbolic rhetoric, the Division has not – and will not – “flout” any rules regarding the admissibility of prior, sworn investigative testimony. Rather, the Division recognizes that, should it seek to admit the investigative testimony transcripts of any non-party witness, it must comply with the provisions of Rule 235(a). The Division does not, at this point, intend to seek the introduction of such testimony, but reserves its right to do so, if appropriate, at the hearing. Of course, the Division does intend to use the investigative testimony transcripts of non-party witnesses for any proper purpose, such as to refresh recollection or impeach the witness. As to the investigative testimony of party witnesses – namely Ms. Tilton – such testimony is plainly admissible “for any purpose,” as the Commission recently made clear in amending the rules

applicable to administrative proceedings. For these reasons, Respondents' motion *in limine* should be denied.

Argument

I. The Division is Not Seeking the Wholesale Admission of the Investigative Testimony Transcripts of Available Non-Party Witnesses.

Respondents' motion *in limine* is largely premature. The Division recognizes that, if it intends to seek the admission of any of the investigative testimony transcripts of non-party witnesses, it must file a motion pursuant to Rule 235(a). At this stage, the Division does not intend to file such a motion, but reserves its right to do so if, for example, a witness is unavailable to testify at the hearing. The Division is not aware of the unavailability of any witness at this point in time.¹

The Division does, of course, intend to use the investigative testimony transcripts for any proper purpose at the hearing, including (if necessary) to refresh the recollection of a witness or (again if necessary) to impeach a witness by their prior inconsistent statement. Such uses are routine in administrative proceedings. *See, e.g., In the Matter of Del Mar Financial Services, Inc.*, Rel. No. ID-188, 2001 WL 919968, *38 n.7 (ALJ Init. Dec. Aug. 14, 2001) (“[I]t is not unusual to list investigative transcripts on prehearing exhibit lists in the Commission’s administrative proceedings. ... [T]he usual use of a party’s or other witness’s transcript at the hearing is to attempt to impeach him with portions of it.”); *In the Matter of Anthony C. Snell*, Rel. No. ID-330, 2007 WL 1297008, *36 (ALJ Init. Dec. May 3, 2007) (noting that the Division used witness’s prior

¹ Contrary to Respondents' claim, the Division has not “failed to comply” with Rule 235(a). Motion at 3. As the Rule itself states, a Rule 235(a) motion need not be made until the time of the hearing itself. *See* Rule 235(a) (“*At a hearing*, any person wishing to introduce a prior, sworn statement of a witness, not a party, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefor.”) (emphasis added). While, again, at this time the Division is not aware of any prior testimony it will be seeking to introduce pursuant to Rule 235(a), such a request need not be made until the hearing itself.

testimony to refresh recollection at the hearing); *cf. In re Wheat*, Rel. No. 48378, 2003 WL 21990950, *2 n.8 (Comm. Op. Aug. 20, 2003) (crediting witness's investigative testimony that was contrary to his hearing testimony).

II. Ms. Tilton's Investigative Testimony is Admissible "For Any Purpose."

While the Division recognizes that it may not move the admission of a non-party's investigative testimony without making the showing contemplated by Rule 235(a), Ms. Tilton's investigative testimony is another matter. As the Commission recently clarified in adopting amendments to Rule 235 – amendments that will, as to that particular rule, apply to this proceeding² – statements made by a party “may be used by an adverse party *for any purpose.*” *See Amendments to the Comm'n's Rules of Prac.*, Rel. No. 34-78319 (July 13, 2016) at 48 (emphasis added), available at <https://www.sec.gov/rules/final/2016/34-78319.pdf>; *see also id.* at 49 (“Amended Rule 235(b) will permit an adverse party to seek the admission of statements made by a party or the party's officer, director, or managing agent.”). Thus, the amended rule provides:

An adverse party may use for any purpose a deposition taken pursuant to §201.233 or §201.234, investigative testimony, or other sworn statement or a declaration pursuant to 28 U.S.C. 1746, of a party or anyone who, when giving the sworn statement or declaration, was the party's officer, director, or managing agent.

Id. at 112 (emphasis added). While the Division has not yet determined whether it will seek to admit the investigative testimony of Ms. Tilton as to her or the other Respondents that she controls, making Respondents' motion premature, the rules are clear that such testimony is admissible.³

² *See, e.g., In the Matter of Lynn Tilton et al.*, Order Denying Pet'n for Interlocutory Review and Pet'n to Apply the Commission's Amended Rules of Practice (filed August 24, 2016) at 8 (noting Amended Rule 235 will apply to this proceeding).

³ Respondents attack the reliability of the investigative testimony transcripts themselves by claiming that “there is serious doubt as to whether the Division retained the audio recordings of this testimony,” leaving them without the ability to “corroborate the content of the transcripts.” Motion at 5. Putting aside the fact that this argument is a *non sequitur*, since Rule 235(a) plainly

Conclusion

For the foregoing reasons, Respondents' motion should be denied.

Dated: September 9, 2016

Respectfully Submitted,



Dugan Bliss, Esq.
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Amy Sumner, Esq.
Mark L. Williams, Esq.
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allows the admission of sworn testimony (which investigative testimony transcripts are) without regard to "corroboration," the Division has, in fact, produced to Respondents the audio recordings of investigative testimony that are in its possession. *See* Ltr. from D. Bliss to R. Mastro, attached as Ex. 1. While the Division does not have all of the audio recordings, that is not a failure to *retain* the recordings, but rather a result of the fact that not all court reporters provided recordings to the Division's Records Management office. *See id.*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE TRANSCRIPTS OF INVESTIGATIVE TESTIMONY, INCLUDING DIVISION EXHIBITS 194 THROUGH 206** was served on the following on this 9th day of September, 2016, in the manner indicated below:

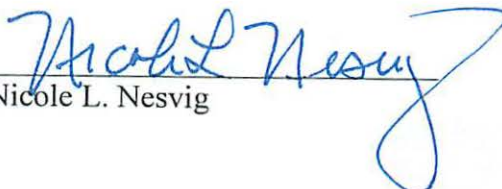
Securities and Exchange Commission
Brent Fields, Secretary
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
(By Facsimile and original and three copies by UPS)

Hon. Judge Carol Fox Foelak
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September 6, 2016

VIA EMAIL and UPS

Randy M. Mastro, Esq.
Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, New York 10166

Re: *In the Matter of Lynn Tilton, et al (File No. 3-16462)*

Dear Mr. Mastro:

Pursuant to your request, attached please find copies the following investigative testimony audio recordings:

1. Peter Berlant (6/18/2014)
2. Carlos Mercado (7/9/2014)
3. Patrick Mottley (4/16/2012)
4. Raina Patel (9/23/2011)
5. Lynn Tilton (2/12/2013 and 6/24/2014)
6. Meric Topbas (8/3/2011)

We are producing copies of all recordings that are in the possession of the Division of Enforcement. By way of background, we were unaware that these recordings existed until we inquired after receiving your August 17, 2016 letter requesting them. These recordings were received and maintained by Enforcement's Records Management office in Washington D.C. and were never in the possession of investigative or trial staff. The Records Management office does not have audio recordings of all investigative testimony because not all court reporters provided it to that office.

Sincerely,

A handwritten signature in black ink that reads "Dugan Bliss / AS".

Dugan Bliss
Senior Trial Counsel



cc via email:

Lawrence J. Zweifach, Esq.
Barry Goldsmith, Esq.
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