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 PRECLUDE THE DIVISION FROM INTRODUCING INTO EVIDENCE EXHIBITS OR PORTIONS OF EXHIBITS CONTAINING UNRELIABLE HEARSAY, INCLUDING (BUT NOT LIMITED TO) EXHIBITS 129, 140, 142, 174, 184, AND 190

Introduction

The Division of Enforcement ("Division") respectfully files this opposition to Respondents' Motion *in Limine* to Preclude the Division from Introducing into Evidence Exhibits or Portions of Exhibits Containing Unreliable Hearsay, Including (But Not Limited to) Exhibits 129, 140, 142, 174, 184, and 190 ("Motion"). As the Commission recently reaffirmed in adopting the amended Rules of Practice, hearsay evidence is admissible in administrative proceedings. The Division recognizes that hearsay evidence must be "relevant, material, and bear[ ] satisfactory indicia of reliability." *See* Am. Rule of Prac. 320(b). But at this prehearing stage, Respondents have not shown that the challenged exhibits fail this test. For these reasons, Respondents' Motion should be denied.

Legal Standard

Under longstanding Commission precedent, law judges are to be inclusive in making evidentiary determinations. *See, e.g.*, *City of Anaheim*, 54 S.E.C. 452, 454 & nn.5-7 (1999) ("Our

law judges should be inclusive in making evidentiary determinations. ... '[I]f in doubt, let it in.'"); *accord Charles P. Lawrence*, 43 S.E.C. 607, 612-13 (1967) ("[A]ll evidence which 'can conceivably throw any light upon the controversy' should normally be admitted."). Further, law judges should be particularly hesitant to exclude evidence on a motion *in limine*, doing so only when "'the evidence is clearly inadmissible on all potential grounds.'" *In the Matter of Morgan Asset Management, Inc.*, Admin. File No. 3-13847 (Sept. 7, 2010) (quoting *SEC v. U.S. Envtl., Inc.*, 2002 U.S. Dist LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)).

These guidelines apply when considering evidence that a party contends is hearsay. "There is no *per se* bar to the admission of hearsay evidence in the Commission's administrative proceedings." *In the Matter of Stanley J. Fortenberry*, 2014 WL 11123298, at *1 (ALJ Order July 31, 2014) (citing *Guy P. Riordan*, Securities Act of 1933 Release No. 9085, 97 SEC Docket 23445, 23469 (Dec. 11, 2009); *Edgar B. Alacan*, 57 S.E.C. 715, 729 (2004)). "Rather, the fact that evidence constitutes hearsay goes to its weight, not its admissibility." *Id.* (citing *Guy P. Riordan*, 97 SEC Docket at 23469); *see also In the Matter of Clean Energy Capital, LLC*, 2014 WL 11115561, *1 (ALJ Order July 22, 2014) ("The fact that evidence constitutes hearsay goes to weight, not admissibility, and is thus a proper subject for cross-examination or post-hearing briefing.").

The Commission recently reaffirmed the admissibility of hearsay in administrative proceedings. Amended Rule 320 – which will apply in this proceeding[1] – provides that "evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." *Amendments to the Comm'n's Rules of Prac.*, Rel. No. 34-78319

[1] *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 320 will apply to this proceeding).

(July 13, 2016) at 115 (emphasis added), *available at* https://www.sec.gov/rules/final/2016/34-78319.pdf. In adopting this amended rule, the Commission explained that "[t]he admission of hearsay evidence that satisfies a threshold showing of relevance, materiality, and reliability also is consistent with the [Administrative Procedures Act], and the 'indicia of reliability' standard for admitting such evidence is grounded in well-established interpretations of administrative law." *Id.* at 62.

Argument

I. Prehearing Exclusion of Exhibits as Hearsay Would Be Inappropriate.

Respondents ask Your Honor to make blanket rulings excluding numerous exhibits at this prehearing stage. Motion at 3-5. Such a ruling would be inappropriate. The exhibits are relevant and reliable. For example, several exhibits are substantive, business-related emails written by employees of Patriarch Partners, LLC, which is a respondent in this case, and often include Ms. Tilton herself. *See, e.g.*, Div. Ex. 140 (email from "Todd.Kaloudis@PatriarchPartners.com" to Ms. Tilton), 142 (same), 174 (email chain including emails from "Karen.Wu@PatriarchPartners.com" and copying Ms. Tilton). These exhibits are not hearsay at all, as they contain statements of a party opponent. *See, e.g.*, *In the Matter of Sky Scientific, Inc.*, 1999 WL 114405, *2 (ALJ Init. Dec. Mar. 5, 1999) ("[A] party's own statement is not considered hearsay if it is offered against that party."). Other exhibits include substantive notes or conversations between investors in the Zohar funds. *See, e.g.*, Div. Ex. 129 (notes of call between Natixis, which was a Zohar investor, and Ms. Tilton and others at Patriarch; notes reflect discussion of performance of Zohar fund). These exhibits are "relevant, material, and bear[ ] satisfactory indicia of reliability," *Amendments to the Comm'n's Rules of Prac.*, Rel. No. 34-78319 at 115; at a minimum, they are not "clearly inadmissible on all potential grounds," *In the Matter of Morgan Asset Management, Inc.*, Admin. File No. 3-13847

(Sept. 7, 2010). Respondents' motion *in limine* to exclude these exhibits should be denied, at least until Your Honor can evaluate the exhibits and the context in which they are offered. *See, e.g., In the Matter of Morgan Asset Management, Inc.*, Admin. File No. 3-13847 (Sept. 7, 2010) ("Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context.").

II. Admission of Hearsay Evidence does not Violate Due Process.

Respondents also argue that the admission of hearsay evidence would violate their due process rights, including their right to cross-examine the witness. Motion at 5-7. Similar arguments have previously been considered and rejected by the Commission. *See In the Matter of the Application of Joseph Abbondante*, 2006 WL 42393, *7 (Comm. Op. Jan 6, 2006) (rejecting argument that respondent was "deprived of his right to due process, and his right to confront the evidence before him, because [certain exhibits] were inadmissible as hearsay"; "[T]his Commission is [not] bound by rules of evidence and may rely upon hearsay evidence under appropriate circumstances. In determining whether to rely on hearsay evidence, it is necessary to evaluate its probative value and reliability, and the fairness of its use."); *In the Matter of the Application of Alessandrini & Co., Inc.*, 1973 WL 149296, *4 (Comm. Op. Aug. 1, 1973) ("There is no substance to applicants' contentions that they were denied due process because the NASD examiner who conducted the major part of the investigation was not called as a witness by the NASD and could not be cross-examined, and that the testimony adduced as to the results of his examination was hearsay."). In addition, in considering the recent amendments to the Rules, the Commission affirmed that "[t]he admission of hearsay evidence that satisfies a threshold showing of relevance, materiality, and reliability ... is consistent with the APA, and the 'indicia of

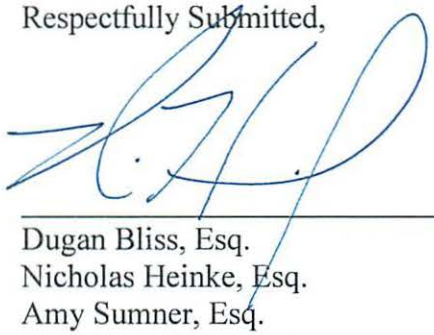
reliability' standard for admitting such evidence is grounded in well-established interpretations of administrative law." For these reasons, Respondent's due process arguments should be rejected.

Conclusion

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

Dated: September 19, 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 *IN LIMINE* TO PRECLUDE THE DIVISION FROM INTRODUCING INTO EVIDENCE EXHIBITS OR PORTIONS OF EXHIBITS CONTAINING UNRELIABLE HEARSAY, INCLUDING (BUT NOT LIMITED TO) EXHIBITS 129, 140, 142, 174, 184, AND 190** was served on the following on this 19th day of September, 2016, in the manner indicated below:

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