

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of :
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 :
 LYNN TILTON, : Administrative Proceeding
 PATRIARCH PARTNERS, LLC, : File No. 3-16462
 PATRIARCH PARTNERS VIII, LLC, :
 PATRIARCH PARTNERS XIV, LLC, and :
 PATRIARCH PARTNERS XV, LLC : Judge Carol Fox Foelak
 :
 Respondents. :
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**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS'
MOTION *IN LIMINE* TO PARTIALLY STRIKE AND PRECLUDE**

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October 17, 2016

Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, “Patriarch” or “Respondents”), respectfully submit this memorandum of law in support of their motion *in limine*: (1) to strike certain portions of the rebuttal expert report of the Division of Enforcement’s (the “Division”) expert witness Ira Wagner; (2) to preclude Wagner and any other witnesses proffered by the Division from testifying about the stricken subjects; and (3) to preclude the Division from making any use of the withdrawn portions of the expert report of Marti P. Murray.

INTRODUCTION

On July 10, 2015, the Division served on Respondents the expert reports of Ira Wagner, Steven L. Henning, and Michael G. Mayer. In response, on August 10, 2015, Respondents served on the Division the expert reports of J. Richard Dietrich, John H. Dolan, Mark Froeba, R. Glenn Hubbard, and Marti P. Murray. The Division’s three experts filed rebuttal expert reports in response to Respondents’ expert reports on August 31, 2015. Substantial portions of the rebuttal report of Mr. Wagner (the “Wagner Rebuttal”) reference and respond to the report of Ms. Murray (the “Murray Report”). *See, e.g.*, Wagner Rebuttal at 4, 6, 38-39, 62-63, 66-68, 73-74; *see generally* Exs. A-B.¹

As Your Honor is aware, Ms. Murray is unavailable to prepare for and testify at the upcoming hearing. *See, e.g.*, Mem. of Law in Supp. of Resp’ts’ Expedited Pet. to the Comm’n, at 29-30 (July 25, 2016). Respondents moved to modify Your Honor’s May 7, 2015 order to permit new expert reports in light of, *inter alia*, Ms. Murray’s unavailability, but Your Honor

¹ For Your Honor’s convenience, an index cataloging the portions of the Wagner Rebuttal that should be stricken is attached as Exhibit A to the Declaration of Goutam U. Jois, filed contemporaneously herewith. An annotated version of that report highlighting the same portions is attached as Exhibit B to the Jois Declaration.

denied that motion. *See* Mem. of Law in Supp. of Resp's' Mot. for Limited Modification (Aug. 8, 2016); *Lynn Tilton*, Admin. Proc. Ruling Rel. No. 4161 (Sept. 16, 2016). That same order made clear that Respondents' substitute experts could testify at the hearing if they were willing to "adopt the opinions of the existing expert report[s] as [their] own and [be] examined by the Division on those opinions." *Id.* at 2 (first alteration in original).

Therefore, on October 3, 2016, Respondents identified the opinions in the Murray Report that the new experts would "adopt" and withdrew the remainder of the Murray Report in all other respects. Notably, although the Division has filed a meritless motion to partially strike statements submitted by the substitute experts, the Division also conceded that Respondents could "withdraw certain of Ms. Murray's opinions." Mem. of Law in Supp. of Div.'s Mot. to Partially Strike (the "Division's MTS"), at 6 n.1 (October 11, 2016).

Because the Murray Report has been withdrawn (except for the opinions adopted by Messrs. Vinella and Schwarcz), the portions of the Wagner Rebuttal which quote, reference, or respond to the Murray Report should be stricken, with the exception of the rebuttal testimony that specifically addresses the opinions in the Murray Report that the substitute experts have adopted. The portions that Respondents seek to strike are no longer relevant and would exceed the permissible scope of a rebuttal report. For that same reason, the Division should be precluded from offering any fact or expert testimony that responds to the withdrawn portions of the Murray Report or otherwise using the withdrawn portion of the Murray Report at the hearing.

Therefore, Respondents respectfully request that Your Honor: (1) strike the portions of the Wagner Rebuttal that respond to or reference the withdrawn portion report of the Murray Report, with the exception of the rebuttal testimony that specifically addresses the opinions in the Murray Report that these substitute experts have adopted; (2) preclude the Division's

witnesses from testifying as to the topics set forth in the portions of the Murray Report that have been withdrawn; and (3) preclude the Division from making any other use of the withdrawn portions of the Murray Report.

ARGUMENT

The SEC Rules of Practice mandate that “the hearing officer . . . *shall exclude* all evidence that is *irrelevant, immaterial* or unduly repetitious.” Rule 320 (emphasis added). This rule derives from a directive from Congress to exclude such evidence. *See* 5 U.S.C. § 556(d) (“[T]he agency as a matter of policy *shall provide* for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”) (emphasis added).

Notwithstanding the “very low” “standard of relevance” that Your Honor has asserted applies to this proceeding, *see Lynn Tilton*, Admin. Proc. Rulings Release No. 4118, at 2 (Sept. 2, 2016), ALJs can and do exclude evidence, including expert evidence, that falls outside the scope of admissibility. *See, e.g., In re IMS/CPAS & Associates et al*, Exchange Act Rel. No. 9042, at *10 (Nov. 5, 2001) (excluding as irrelevant expert testimony regarding the difficulty of properly using a certain financial reporting form where compliance with the form was required); *In re Stanley Jonathan Fortenberry*, Exchange Act Rel. No. 1801 (Sept. 12, 2012) (excluding as irrelevant testimony of SEC lawyers).

Here, the portions of the Wagner Rebuttal that respond to opinions which Respondents will not present are irrelevant under any standard. The evidence cannot possibly “throw any light upon” the “controversy,” *In re Charles P. Lawrence*, Release No. 8213, 1967 WL 86382, at *4 (Dec. 19, 1967), because Respondents eliminated all “controversy” related to Ms. Murray’s opinions when they withdrew those portions of her report. The portions of the Wagner Rebuttal identified in Exhibits A and B therefore respond to nothing that Respondents will offer into evidence at the hearing.

Ensuring the properly limited scope of these reports is particularly important in this case, where the expert reports will come into evidence as the experts' direct testimony itself, as opposed merely to giving notice of future testimony. The importance is amplified by the fact that the Division intends to make its case almost entirely through its expert testimony—as of the date of this filing, the Division's "will-call" witness list includes only its experts and Ms. Tilton. If these portions of the Wagner Rebuttal were not stricken, then the Wagner Rebuttal would exceed the limited scope of rebuttal reports—only to *respond to* the opinions of Respondents' experts. "A rebuttal expert report is not the proper place for presenting new arguments, unless presenting those arguments is substantially justified and causes no prejudice." *Ebbert v. Nassau Cnty.*, 2008 WL 4443238, at *13 (E.D.N.Y. Sept. 26, 2008) (internal quotations omitted).

Because the Murray Report has been withdrawn (except as specifically adopted), any section of the Wagner Rebuttal which responds to the withdrawn sections of the Murray Report would constitute a "new argument[]." There is no "substantial justification," and certainly no need, for the SEC to rebut opinions which will not be presented, especially when the Division has already made clear that it has no objection to Respondents' partial withdrawal of the Murray Report. Division's MTS at 5; *id.* at 6 n.1. By contrast, Respondents will be prejudiced tremendously if the Division is permitted to submit, as direct testimony, a report that quotes and responds to a withdrawn report.

Therefore, Respondents respectfully request that Your Honor: (1) strike the portions of the Wagner Rebuttal that respond to or reference the withdrawn portion report of the Murray Report, with the exception of the rebuttal testimony that specifically addresses the opinions in the Murray Report that these substitute experts have adopted; (2) preclude the Division's witnesses from testifying as to the topics set forth in the portion of the Murray Report that have

been withdrawn; and (3) preclude the Division from making any other use of the withdrawn portions of the Murray Report.

CONCLUSION

For the reasons above, Respondents' Motion to Partially Strike and Preclude should be granted.

Dated: New York, New York
October 17, 2016

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