HARD COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of, LYNN TILTON PATRIARCH PARTNERS, LLC, PATRIARCH PARTNERS VIII, LLC, PATRIARCH PARTNERS XIV, LLC and PATRIARCH PARTNERS XV, LLC Respondents.	Administrative Proceeding File No. 3-16462 Judge Carol Fox Foelak

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RESPONDENTS' EXPEDITED PETITION TO THE COMMISSION FOR (A) AN ORDER EXTENDING THE 300-DAY RULE IN THIS PROCEEDING AND SETTING A DECEMBER 2016 HEARING DATE, (B) INTERLOCUTORY REVIEW OF HEARING OFFICER DETERMINATIONS, AND (C) AN ORDER APPLYING THE SEC'S AMENDED RULES OF PRACTICE TO THIS PROCEEDING

GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
Telephone: 212.351.4000
Fax: 212.351.4035

BRUNE LAW P.C.
450 Park Avenue
New York, NY 10022

Counsel for Respondents

August 3, 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 reply brief in further support of their pending petition to the Commission (the "Petition").[1]

ARGUMENT

1. In its opposition brief ("Opp."), the Division concedes that the "parties jointly proposed an early December 2016 hearing date," and that the parties—including the Division—"were and are all willing to proceed in December." Opp. 2. The Division does not dispute that Respondents have made an overwhelmingly strong showing that additional time is "necessary or appropriate in the public interest," Rule 360(a)(3), not least because an October 2016 hearing will "substantially prejudice" Respondents' case, Rule 161(b), while a December hearing will "serve the interests of justice and not result in prejudice to the parties to the proceeding," Rule 100(c). *See* Br. 15-32.

Instead, the Division's sole response is to assert that "[o]rdering a hearing to begin on October 24, 2016 will not infringe on Respondents' due process rights." Opp. 4; *see also* Opp. 2 (same). This argument misses the mark for two crucial reasons: (1) the truncated schedule imposed here *will* leave Respondents without adequate time to prepare for trial and deprive them of due process, *see infra* pp. 2-3; Br. 2-7, 18-20; and (2) the legal standard for an extension and resetting of a hearing date is whether it would be "in the public interest" to do so, Rule 360(a)(3), not whether the current schedule violates Respondents' constitutional rights—and the Division does not so much as suggest that Respondents have failed to meet *that* standard, *see infra* pp. 3-

---

[1] Unless otherwise defined, all capitalized terms have the meaning given them in Respondents' memorandum of law in support of the Petition, dated July 25, 2016 ("Br.").

5; Br. 15-18, 20-32. The hearing date should be set for December and the 300-day deadline should be extended accordingly.

First, as set forth in Respondents' opening brief, Respondents' due process rights—including the right to be represented by counsel who have been given an adequate opportunity to prepare—will be violated by the ALJ's needless rush to trial in a matter of weeks. *See* Br. 2-7, 18-20. While the Division argues that Respondents were aware of the status of these proceedings when they retained new counsel, and note that one lawyer who still serves as co-counsel has represented Respondents throughout the case, Opp. 2-3, that is irrelevant. Respondents retained new counsel under the reasonable presumption that if and when the Second Circuit's stay was lifted, the ALJ would agree to a sensible—and, it turns out, jointly proposed—schedule for the remainder of the case, in order to permit the parties to complete discovery and adequately prepare for trial, after a long hiatus of indeterminate duration.

The Division also claims that the trial schedule complies with due process because the period between the expiration of the stay and the hearing date "comports with the amount of time routinely provided to the parties in administrative hearings." Opp. 3. Yet through its recent amendments to the Rules of Practice, the Commission itself has extended the "truncated timelines" regularly imposed upon respondents in SEC administrative proceedings, *Office of the Inspector Gen.*, U.S. Sec. and Exch. Comm'n, Report of Investigation, Case # 15-ALJ-0482-I, at 20 (2016) (citing Sept. 14, 2015 interview with ALJ Foelak), and has thereby implicitly

acknowledged that they were unduly harsh. Even if this case were routine—which it is not—the Commission's prior practice provides no basis to deny adequate time in this case.[2]

Second, as the petition makes clear, the touchstone of a meritorious request for an extension of the 300-day deadline is whether additional time is "necessary or appropriate in the public interest," Rule 360(a)(3), not whether the denial of additional time will violate a party's due process rights. *See* Br. 15-18. The "due-process-or-bust" standard the Division proposes has no legal basis, and the Division does not purport to apply it when making its own requests for extensions of the 300-day rule. *See In re Michael Sassano, et al.*, Investment Advisers Act Release No. 2679 (Nov. 30, 2007), at 4-5 (granting Division's request, made directly to the Commission, for a 120-day tolling of the 300-day deadline). Nor is it the standard the Commission applies in routinely granting ALJ requests for additional time for a variety of workflow and other bureaucratic reasons. *See* Br. 6-7 (citing Commission decisions). Indeed, the Rules themselves direct that extension requests be assessed under the public interest standard: "If the Commission determines that additional time is necessary or appropriate in the

---

[2] The Division cites *Dearlove v. SEC*, 573 F.3d 801, 807 (D.C. Cir. 2009), for the proposition that there is "no due process violation when respondents [are] provided four months to prepare for [an] administrative hearing." Opp. 3. But *Dearlove* creates no such per se rule, and in fact supports Respondents on the facts presented here. The Court did not disagree with Dearlove's assertion that it was error for an ALJ to "treat[] the time specified by the Commission to complete the proceeding as mandatory, when in fact he could have extended the deadline." *Id.* But the Court found that the ALJ had not done that, and had instead properly "considered each of the five factors specified in the rules [for granting an extension] and treated none as dispositive." *Id.* In contrast, here the ALJ erred in not addressing *any* of the factors set forth in the rules—most importantly, the public interest concerns weighing in favor of a December hearing date, *see* Rule 360(a)(3), and the substantial prejudice to Respondents inflicted by an October hearing, *see* Rule 161(b). Instead, the judge "treat[ed] the time specified by the Commission to complete the proceeding as mandatory," 573 F.3d at 807, and dispositive, notwithstanding Respondents' strong showing in favor of an extension. The resulting trial schedule violates Respondents' due process rights, and at a minimum easily meets the standard under the Rules for an extension. *See infra* pp. 3-5.

public interest, the Commission *shall* issue an order extending the time period for filing the initial decision." Rule 360(a)(3) (emphasis added).

Here, the Division does not claim—nor could it—that Respondents' detailed, affidavit-backed petition and supporting brief failed to demonstrate that is in the public interest to set a December 2016 hearing date, as the parties originally jointly requested, and to extend the 300-day deadline in this proceeding. It is manifestly in the public interest for the Commission to ensure that Respondents have sufficient time to build their defense and prepare for trial in this complex case,[3] particularly where new counsel has just been engaged. *See* Br. 20-27. These concerns are only heightened by the fact that discovery is ongoing, with both parties having exchanged subpoena requests over the last two weeks. Motion practice on the subpoenas (which needs to be resolved before documents are produced) is imminent. Moreover, even as the Division forges ahead with new discovery, it appears to have failed to comply with its disclosure obligations, and the Division's communications with potential witnesses may have unfolded in a manner that sidesteps its Jencks Act and *Brady* obligations. *See* Br. 27-30; *see also* Rules 230 & 231. This, too, will likely necessitate motion practice. Additionally, the ALJ has imposed a deadline of August 15 for the Division's production of exculpatory materials, with motions anticipated if there are any deficiencies in that production. All of this must be completed before Respondents can designate final witnesses and exhibits for trial, let alone be trial-ready.

---

[3] The prejudice caused by an October hearing date is compounded by the volume of trial evidence and the unavailability of important witnesses for Respondents at that time. *See* Br. 23, 29-30. The Division responds only that a number of the trial experts, witnesses, and exhibits "are [Respondents'] own," as if Respondents' need to put on a robust defense to the Division's charges negates—rather than supports—the complexity of the trial.

Finally, the ALJ's inflexible application of procedural rules, as in the rulings challenged here, exacerbates the perception that these SEC administrative proceedings are fundamentally unfair to respondents. It is imperative, and very much in the public interest, that the Commission be particularly sensitive to such concerns. *See* Br. 19-20, 31-32.

2. Alternatively, the Commission should treat Respondents' petition as a request for interlocutory review of the hearing officer's decisions not to set the hearing for December 2016, and not to seek an extension of the 300-day deadline, and should grant review of those determinations. *See* Br. 32-35. In its brief, the Division says nothing at all about Respondents' request for interlocutory review. It does not dispute that immediate review would "materially advance the completion of the proceeding," Rule 400(c), and it does not contest that the circumstances presented are extraordinary, even if the hearing date did not violate Respondents' due process rights. In the absence of opposition, the Commission should therefore grant interlocutory review, if it does not directly extend the deadline and set a December hearing.

3. Finally, the Division does not counter Respondents' arguments as to why it would be in the "interests of justice and not result in prejudice," Rule 100(c), to direct that the amended rules be applied for the remainder of this proceeding. *See* Br. 35-39 (citing numerous cases in which the Commission has invoked Rule 100(c) to disregard certain Rules of Practice or to apply alternative procedures). Instead, the Division asserts only that "[a]fter reasoned consideration, the Commission constructed a schedule of how the amended rules apply" to pending proceedings, and that Respondents "offer no compelling argument" to "revisit this well-reasoned decision." Opp. 4. In fact, Respondents have detailed exactly why the particular circumstances of *this* case provide compelling reasons to apply the amended rules here, and the Rules clearly contemplate doing so. *See* Rule 100(c) (empowering the Commission to "direct, in a particular

proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary").

Just to provide one example, the Order Instituting Proceedings ("OIP") and the Division's expert reports allege that Respondents did not adequately disclose their approach to valuing assets in the relevant portfolio companies, and that investors lacked sufficient information to understand the performance and valuation of such assets. *See* OIP, File No. 3-16462, ¶¶ 1-9, 29-73; Division of Enforcement's Brief in Opposition to Respondents' Motion for Summary Disposition, File No. 3-16462, at 8-17 (representing that the Division's expert reports are consistent with the allegations of the OIP). With these allegations, the Division has attempted to put at issue the knowledge, investment strategy, and decision-making processes of collateralized loan obligation investors. For Respondents to mount a meaningful defense, they must have the opportunity to learn what types of documents might shed light on the investors' knowledge, which individuals were involved in making investment choices, and the respective roles of these individuals as relevant to the OIP and the reports of the Division's experts. The chance to obtain such information is *precisely* the purpose of discovery tools such as interrogatories and depositions, all of which are available of right in a federal court proceeding. While Respondents have objected on constitutional grounds to litigating this case before an ALJ instead of a district court judge, fairness demands that—at a minimum—the Commission make available to Respondents basic discovery tools in this proceeding, including the depositions that the Commission has already authorized for newly-filed or early-stage cases in adopting the amended rules.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Commission grant in its entirety the relief requested by the petition.

Dated: New York, New York
August 3, 2016

GIBSON, DUNN & CRUTCHER LLP

By: Randy M. Mastro (16)
Randy M. Mastro
Reed Brodsky
Barry Goldsmith
Caitlin J. Halligan
Mark A. Kirsch
Monica Loseman
Lawrence J. Zweifach
Lisa H. Rubin

200 Park Avenue
New York, NY 10166-0193
Telephone: 212.351.4000
Fax: 212.351.4035

Susan E. Brune
BRUNE LAW P.C.
450 Park Avenue
New York, NY 10022

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that I served true and correct copies of the foregoing on this 3rd[th] day of August, 2016, in the manner indicated below:

United States Securities and Exchange Commission
Office of the Secretary
Attn: Secretary of the Commission Brent J. Fields
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
Fax: (202) 772-9324
(By Facsimile and original and three copies by Federal Express)

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

Dugan Bliss, Esq.
Division of Enforcement
Securities and Exchange Commission
Denver Regional Office
1961 Stout Street, Ste. 1700
Denver, CO 80294
(By Email pursuant to parties' agreement)

Leigh K. Fanady

Leigh K. Fanady