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 FOR LIMITED MODIFICATION OF MAY 7, 2015 ORDER

Introduction

Despite casting their Motion as one for a minor modification of the prehearing scheduling order, in fact Respondents are attempting to belatedly introduce as-yet-undisclosed opinions of three new expert witnesses. They do so under the guise of the purported unavailability of two current expert witnesses, even though the record makes clear that those witnesses, while perhaps busy, are not unable to participate in the hearing. They do so in contravention of the parties' agreed-upon prehearing schedule, under which expert reports were long ago exchanged. They do so in a manner that would deny the Division the opportunity to proffer rebuttal expert reports, which is again in contravention of the prehearing schedule. And they do so even though the bulk of the expert witnesses' work is done: Respondents' experts have already reviewed and responded to the Division's experts by preparing their own reports, which will serve as their direct testimony at the hearing. Little is left for these experts to do except appear at the hearing and be cross-

examined. Under these circumstances, Respondents should not be permitted to proffer these new expert reports on the eve of the hearing. Respondents' Motion should be denied.

Background

This matter was initially set for a hearing on October 13, 2015. On May 7, 2015, the parties submitted a joint proposed case schedule, which Your Honor adopted with minor modifications. (*See* Ltr. from C. Gunther dated May 7, 2015, attached hereto as Ex. 1 (joint proposal for case schedule); Prehearing Order filed May 7, 2015 (adopting parties' proposed schedule).) According to that agreed-upon schedule, the Division's expert reports were due on July 10, 2015 – three months before the hearing was set to commence. Respondents' expert reports were due a month later, and the Division's rebuttal expert reports were due three weeks after that. Based on this schedule, all expert reports were to be exchanged six weeks prior to the commencement of the hearing. Further, Your Honor ordered that these reports would serve as the experts' direct testimony and that "[t]he experts will present a brief summary of their testimony [at the hearing] and be made available for cross examination." (Prehearing Order, filed May 7, 2015, at n.1.)

On July 10, 2015, the Division disclosed three expert witness reports addressing various topics. A month later, and consistent with the agreed-upon schedule, Respondents disclosed five expert reports responding to the Division's experts and offering opinions of their own. Three weeks after that, the Division's experts disclosed their rebuttal reports. The parties continued to prepare for the October 13, 2015 hearing until September 17, 2015, when the hearing was stayed by the U.S. Court of Appeals for the Second Circuit. That stay was lifted earlier this year.

On July 15, 2016, Your Honor ordered the parties to confer and propose a hearing date in September 2016. (*See* Order, filed July 15, 2016.) On July 18, 2016, Respondents' counsel wrote to Your Honor objecting to a September 2016 hearing date on the grounds that, among other

things, certain of Respondents' expert witnesses would be "unavailable to be prepared for and to appear at a September 2016 hearing, or have significant conflicts during this period." (*See* Ltr. from R. Mastro, dated July 18, 2016, at 4, attached hereto as Ex. 2.) On July 19, 2016, Respondents filed a motion for reconsideration of the July 15 Order, arguing, again, that certain expert witnesses would be unavailable. (*See* MOL in Supp. of Resps.' Mtn. for Reconsideration, filed July 19, 2016, at 13.)

On July 20, 2016, Your Honor issued an Order revising the hearing schedule and setting the hearing to commence on October 24, 2016. (*See* Order, filed July 20, 2016.) In that Order, Your Honor expressly addressed Respondents' claims regarding expert witness unavailability, ruling that "the parties can use available means, including use of subpoenas, to compel attendance of witnesses, or can make arrangements for expert witnesses to appear by video conference if necessary." (*Id.* at 2.) That Order further allowed the parties to amend their witness and exhibit lists, but said nothing about the disclosure of additional expert witness reports. (*See id.*)

On July 25, 2016, Respondents filed an expedited petition to the Commission for review of, among other things, Your Honor's order setting the October 24, 2016 hearing date. In that petition, Respondents argued that certain expert witnesses had conflicts in connection with an October 2016 hearing. (*See, e.g.*, Resps.' MOL in Support of Expedited Pet'n to Comm'n, filed July 25, 2016, at 29-30.) On August 24, 2016, the Commission denied Respondents' petition.

On August 22, 2016, Respondents filed the instant Motion asking the Court to permit it to proffer expert reports of three previously-undisclosed expert witnesses – Peter Vinella, Steven L. Schwarcz, and Charles Ludelius, Jr. Respondents ask that Messrs. Vinella and Schwarcz be permitted to replace one of Respondents' five previously-disclosed experts, Marti P. Murray. Respondents further ask that Mr. Ludelius be permitted to testify either instead of, or in addition to,

another of Respondents' previously-disclosed experts, Dr. J. Richard Dietrich. Respondents did not actually proffer the expert reports of these three previously-undisclosed experts, but rather ask that they be allowed to disclose them on October 10, 2017 – seven weeks from the date of the Motion and only two weeks before the hearing will commence.

Argument

I. Respondents do not need these new expert witnesses because their previously-designated experts are available to testify.

The central premise of Respondents' Motion is that two of their previously-designated expert witnesses – Dr. Dietrich and Ms. Murray – are unavailable to testify at the upcoming hearing. But Respondents' own papers belie that claim. According to Respondents, Dr. Deitrich has teaching obligations at Ohio State University on Mondays, Wednesdays, and Fridays during the three weeks of the hearing, as well as the second Tuesday of the hearing. (*See, e.g.*, Motion at 4 n.2.) Even assuming that Dr. Dietrich could not miss a single day of teaching during the three weeks of the scheduled hearing, and that he is wholly unavailable to testify on those days, Respondents have made no claim that he in unavailable on the other hearing days, which would include October 25, 27, November 3, 8, and 10. A search by undersigned counsel found multiple direct flights each day between Columbus, Ohio and New York City,[1] which presumably means Dr. Dietrich could appear for cross-examination during the hearing and return to attend to his teaching duties without significant difficulty.

[1] According to the Ohio State University website, Port Columbus International Airport is the closest airport to the university. (*See* https://parent.osu.edu/resources/campus_visits, last visited August 27, 2016). By way of example, just on American Airlines, there are five direct flights from Port Columbus to New York City airports on November 3, ranging in departure times from 6:00 a.m. to 4:25 p.m., as well as multiple connecting flights. Similarly, there are five direct flights from New York City airports back to Port Columbus, ranging in departure times from 8:25 a.m. to 8:29 p.m., as well as, again, numerous connecting return flights. (*See* https://www.aa.com/homePage.do, last visited August 27, 2016). Other carriers, including Delta and United Airlines, have similar flights as well.

Similarly, according to Respondents, Ms. Murray has an expert report in another case due October 28, a deposition on October 31, and will testify as an expert at a trial that will occur between November 7 and 11. (*See, e.g.*, Resps.' MOL in Support of Expedited Pet'n to Comm'n, filed July 25, 2016, at 30.) Even assuming Ms. Murray is unavailable the entire week of October 24 (due to her October 28 report), on October 31 (due to her deposition), and late in the week of October 31 (due to her November 7 trial), that still leaves several days the week of October 31 during which she could appear for cross-examination at the hearing.[2] Thus, it is not the case that these experts are unavailable to testify.

Further, it is not true that Respondents would be "denied a fair opportunity" to address the Division's expert witnesses if their Motion is denied. (Motion at 2.) The fact is that Respondents have *already* addressed the Division's experts. In response to the Division's three proffered expert witnesses, Respondents submitted the reports of five expert witnesses of their own. Pursuant to Your Honor's prior orders, those reports will serve as the direct testimony of those experts. The only significant task remaining is for Respondents' experts to appear for cross-examination at the hearing – something that both Dr. Dietrich and Ms. Murray should be able to do.[3] Put simply, Respondents have had – and have taken advantage of – the opportunity to address the Division's experts.

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[2] It appears that Ms. Murray resides in New York City, so presumably she would not have to travel to testify. (*See* Curriculum Vitae of Marti P. Murray (listing office address at 590 Madison Ave., New York, NY) (available at http://static1.squarespace.com/static/55db3c29e4b01e5be14cb277/t/577e7400893fc0510102835d/1467905024307/Murray+CV+July+2016.pdf, last visited August 27, 2016).)

[3] The Division would not object to reasonable accommodations being made to permit Respondents' previously-designated experts to testify. As Your Honor has previously ruled, video conference testimony may be one solution. In addition, the Division would not object to taking witnesses out of order. (*See* Motion at 5 n.3.) Nor would the Division object to holding the record open for a short period to permit Dr. Dietrich and/or Ms. Murray to be examined at a later date.

What's more, none of the cases cited by Respondents compel the result they seek: the substitution of new experts for previously-designated experts long after reports have been disclosed, and just weeks before the hearing will commence. (*See* Motion at 8-9 (citing cases).) For example, Respondents cite to *In the Matter of Morgan Asset Management, Inc.*, Admin. Proc. Rel. No. 655, 98 S.E.C. Docket 2976 (July 6, 2010) to support their request for substitution. However, while there appears to have been a request for substitution in *Morgan Asset Management, Inc.*, that request was made *before* expert witness reports were scheduled to be disclosed. *See id.* at *1 & n.1 (noting, in an order dated July 6, 2010, that respondents had moved to withdraw one of their experts and substitute another; further noting that respondents' deadline for filing experts' direct written testimony was July 27, 2010). Moreover, in *Morgan Asset Management*, expert reports were disclosed on schedule. *See, e.g., In the Matter of Morgan Asset Mgt., Inc.*, Admin. Proc. File No. 3-13847, Order Addressing the Division of Enforcement's Renewed Motion *in Limine*, filed Sept. 7, 2010 (noting that respondents filed the direct written testimony of four experts consistent with deadline).[4]

Similarly, in *Millenkamp v. Davisco Foods International, Inc.* and *Whiteside v. State Farm Fire & Casualty Co.*, the substitution of experts and production of the new expert reports was done months before the respective trial dates. *Millenkamp v. Davisco Foods Intern., Inc.*, 2005 WL 1863183, at *2 (D. Idaho Aug. 4, 2005) (granting request to substitute expert "since no parties will be unduly prejudiced as trial in this matter is not set until" months later); *Whiteside v. State Farm Fire and Cas. Co.*, 2011 WL 5084981, at *2 (E.D. Mich. Oct. 26, 2011) ("Plaintiffs were notified

[4] By order dated July 20, 2010, the ALJ extended the deadline for respondents to file their experts' direct written testimony from July 27, 2010 to August 10, 2010 based on a dispute over a document subpoena to the Office of Compliance, Inspection, and Examination ("OCIE"). *See In the Matter of Morgan Asset Mgt., Inc.*, Admin. Proc. Rel. No. 658, 98 S.E.C. Docket 3382, 2010 WL 7765367, filed July 20, 2010.

of Defendant's need to substitute expert witnesses three months before the scheduled trial date, and have ample time to prepare a trial strategy to rebut [the substitute expert's] report and testimony.").

The instant case is in an entirely different posture: Respondents' request comes well after the deadline for disclosing their expert reports has passed, and seeks to disclose these new expert reports just two weeks before the hearing. Particularly in light of the fact that Respondents have not demonstrated that Dr. Dietrich or Ms. Murray are actually unavailable to be cross-examined, their request to replace those experts should be denied.

II. Respondents attempt to do more than simply replace "unavailable" experts.

In addition to seeking to replace certain purportedly (but not actually) unavailable expert witnesses, Respondents also seek to introduce the report of Mr. Lundelius *whether or not* their other experts are available. (*See* Motion at 4 ("In any event, Respondents will call Mr. Lundelius to address certain aspects of Dr. Henning's opinions ...").) In other words, Respondents' attempt to belatedly introduce the yet-undisclosed report of Mr. Lundelius is not at all dependent on the unavailability of their current experts. Presumably, Respondents are seeking to benefit from some different opinion than their expert witnesses have previously proffered. Requests to substitute are routinely denied in these circumstances. *See, e.g.*, *Medpace, Inc. v. Biothera, Inc.*, 2014 WL 1045960, at *4 (S.D. Ohio March 17, 2014) ("Courts considering motions to substitute expert testimony after the close of discovery have routinely denied them" where, among other things, "the moving party seeks to benefit from broader or different testimony than the original expert"). Respondents' attempt to simply proffer additional expert testimony more than a year after expert reports were due to be exchanged – and only two weeks before the hearing will commence – should not be condoned. *See, e.g.*, *Synygy, Inc. v. ZS Associates, Inc.*, 2015 WL 4578807, at *3 (E.D. Pa. July 30, 2015) ("The purpose of allowing substitution of an expert is to put the movant in

the same position it would have been in but for the need to change experts; it is not an opportunity to designate a better expert.").

III. Respondents' request would prejudice the Division.

Not only is Respondents' request unnecessary, since their experts are not actually unavailable, the request would significantly prejudice the Division. Prejudice to the non-moving party is a factor courts routinely consider in assessing whether to permit the substitution of expert witnesses. *See, e.g., Medpace*, 2014 WL 1045960 at *2 (noting that, among the factors courts consider is "the surprise or prejudice to the blameless party").[5] Respondents propose disclosing these new experts' reports on October 10, 2016 – only two weeks before the hearing will commence. (*See, e.g.*, Motion at 5.) As a threshold matter, that is entirely inconsistent with the previously-agreed to schedule, which saw disclosure of Respondents' experts more than two months prior to the date the hearing was set to commence, and which gave the Division's expert witnesses three weeks to prepare rebuttal reports. (*See* Prehearing Order, filed May 7, 2015.) In any event, being forced to digest three new, and presumably substantial, expert reports on the eve of the hearing would without question prejudice the Division. Among other things, disclosure at such a late date would effectively eliminate the Division's ability to proffer rebuttal expert reports – something the parties' agreed-to prehearing schedule expressly contemplated. Respondents' bald claim that the Division would suffer no prejudice defies credulity. *See United States v. State Farm Fire and Casualty Co.*, 2013 WL 11320132, at *3 (S.D. Miss. March 22, 2013) (refusing to

[5] Other factors considered include "any bad faith involved in not producing the evidence earlier," "the ability of the offending party to cure resulting prejudice," and "the amount of disruption to the trial that would result from permitting the use of the evidence." *Id.* It is unclear how Respondents could cure the prejudice to the Division from the eleventh-hour disclosure of three new expert reports. Disrupting the hearing by continuing the start date is not a possibility, for reasons that Your Honor has previously made clear.

allow substitution of expert witness and finding that non-moving party would be "greatly prejudiced" since proposed new expert report was disclosed only 4 days before trial).[6]

IV. At a minimum, Respondents should not be permitted to proffer new expert opinions.

For all of these reasons, Respondents' Motion should be denied. But even if Dr. Dietrich and Ms. Murray were actually unavailable to testify, any replacement witnesses should not be permitted to offer new expert opinions. When courts do permit the substitution of expert witnesses, they frequently require the new experts to limit their opinions to "establishing the veracity and integrity of [the original expert] and the conclusions reached in [the] original expert report," or, at most, to the same subject matter as the prior expert's opinion. *Assaf v. Cottrell, Inc.*, 2012 WL 245196, at *5 (N.D.Ill. Jan. 26, 2012) (alternations in original); *see also id.* at *7 (limiting substitution expert to prior expert's "opinions and reports"); *Medpace*, 2014 WL 1045960 ("Courts granting motions to substitute experts after the close of discovery have routinely required the new expert's testimony to be limited to the subject matter opinions espoused in the first expert's report."); *Whiteside*, 2011 WL 5084981, at *2 (permitting substitution where, *inter alia*, substitute expert's findings "will be substantially similar to [original expert's] findings, and thus, Plaintiffs will not suffer prejudice from new findings or opinions being 'sprung' on them at trial"); *Synygy, Inc.*, 2015 WL 4578807, at *3 (limiting substitute expert to "findings that are substantially similar to those presented by" original expert).

In any case, Respondents have failed to show that their existing experts are actually unavailable to testify, and have failed to justify modifying the scheduling order in a manner that would severely prejudice the Division. Respondents should not be permitted to adjust their

[6] Even if the reports were to be disclosed at some earlier time, such as the beginning of October, the Division would still be prejudiced in having to review three new reports and ask its experts to prepare rebuttal reports (or prepare for rebuttal testimony) only weeks before the start of the hearing.

previously-disclosed expert opinions on the eve of trial under the guise of the unavailability of certain witnesses.

Conclusion

This is not a case where, without the belated addition of an expert witness or witnesses, Respondents would be left without the benefit of critical evidence. Rather, in this case, the overwhelming amount of work by Respondents' experts is already done: they have reviewed and responded to the Division's expert reports by preparing their own reports, which will serve as their direct testimony at the hearing. Moreover, while Dr. Dietrich and Ms. Murray do appear to have some scheduling conflicts, they are not unavailable, and the Division does not object to reasonable accommodations being made to permit their cross-examination to occur. And finally, Respondents proposal – to disclose three new, presumably substantial expert reports just two weeks before the hearing – would substantially prejudice the Division by, among other things, denying it the opportunity to proffer rebuttal expert reports. In short, allowing Respondents to substitute three entirely new expert witnesses on the eve of trial is unnecessary and prejudicial. For all of these reasons, Respondents' Motion should be denied.

Dated: August 29, 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 FOR LIMITED MODIFICATION OF MAY 7, 2015 ORDER** was served on the following on this 29th day of August, 2016, in the manner indicated below:

Securities and Exchange Commission
Brent Fields, Secretary
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(By Facsimile and original and three copies by UPS)

Hon. Judge Carol Fox Foelak
100 F Street, N.E.
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May 7, 2015

By Email and Fax

Honorable Carol Fox Foelak
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: In the Matter of Lynn Tilton et al. (3-16462)

Dear Judge Foelak:

We are counsel to Respondents. With the consent of the Division of Enforcement, we write respectfully to submit for Your Honor's consideration the parties' joint proposal for a trial date and related scheduling items. The proposal is:

Jun. 5 -	Respondents' Motion for Summary Disposition
Jun. 26 -	Division's Response to Motion for Summary Disposition
Jul. 10 -	Respondents' Reply in Support of Summary Disposition
Jul. 10 -	Division's Expert Reports
Aug. 7 -	Division's Witness and Exhibit Lists, and 3500 Materials
Aug. 10 -	Respondents' Expert Reports, including Rebuttal Reports
Aug. 17 -	Respondents' Witness and Exhibit Lists
Aug. 31 -	Division's Rebuttal Expert Reports
Sept. 18 -	Motions in Limine
Sept. 25 -	Oppositions to Motions in Limine
Oct. 5 -	Pretrial Conference
Oct. 13 -	Trial

Separately, and only on behalf of Respondents, we note that Respondents join this proposal in recognition that Your Honor must operate under time constraints for issuing an initial decision as provided in the Commission's Order Instituting Proceedings and the Rules of Practice. Respondents respectfully submit that those time constraints, which are beyond Your Honor's control, will not provide us with an adequate opportunity to prepare for trial given the volume of discovery produced by the Division to date, the complexity of this case, and the wide-ranging nature of the investigation conducted by the Division over a period of more than five years.

We also wish to apprise Your Honor that on April 1, 2015, Respondents filed an action against the SEC in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief against the administrative hearing on constitutional grounds. *Tilton et al. v. SEC*, No. 15 Civ. 02472 (S.D.N.Y.) (RA). Respondents and the U.S. Department of Justice (which is representing the SEC in the lawsuit) have fully briefed Respondents' motion for a preliminary injunction against the administrative hearing, and Judge Ronnie Abrams has scheduled a preliminary injunction hearing for Monday, May 11. We will keep Your Honor advised if developments in the District Court action affect the schedule in this matter.

Respectfully submitted,

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July 18, 2016

VIA EMAIL AND FACSIMILE

The Honorable Carol Fox Foelak
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 25049

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

Dear Judge Foelak:

I write as new counsel for Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, "Patriarch" or "Respondents") in response to Your Honor's order of last Friday afternoon rejecting the parties' joint request for a trial date starting in December 2016 and, instead, ordering the parties to agree upon a trial date starting in September 2016 -- less than two months from now.

With all due respect, we are surprised by Your Honor's refusal to grant the parties' joint request to commence this trial in December 2016, and even more surprised that Your Honor is ordering the parties to go to trial in this complex matter less than two months from now, starting in September 2016. We understand that the Commission's rules impose certain time limitations, but there is still time to issue an initial decision in this matter under a more reasonable schedule for the parties. Additionally, the Rules of Practice allow for an extension of time, including through applications directly to the Commission. We implore Your Honor to reconsider and endorse the parties' joint proposal of a December 2016 trial date, or, alternatively, ask for a conference with Your Honor on or before Wednesday, July 20, 2016, to address this crucially important timing issue.

As Patriarch's new counsel who first noticed our appearance here only 10 days ago, we want to be crystal clear about this: As a matter of fundamental fairness and due process, Patriarch cannot possibly get a fair hearing if forced to proceed to trial in less than two months; it has several experts and other witnesses critical to its defense unavailable on such short notice; and it has all parties' consent to a reasonable, orderly schedule that gets this enormously complex case to trial before year's end in December 2016. Yet Your Honor has now rejected that joint request, reasoning that a trial date less than five months from now is somehow "inconsistent with a timely resolution of this proceeding." Your Honor's Order also cites the "passage of time" during which the U.S. Court of Appeals for the Second Circuit stayed this proceeding pending its review of whether these types of SEC administrative tribunals are

even constitutional -- a question that a divided three-judge panel of that court ultimately concluded was premature to decide and that our clients have now asked that entire court to review en banc.

Under all of the surrounding circumstances -- including that the SEC has been pursuing this matter for more than six years -- we, as newly appointed counsel, should not be forced to go to trial on this hugely complicated, important and high-profile case in less than two months. A perception persists that these SEC administrative proceedings are fundamentally unfair and deny respondents due process. It is therefore even more imperative that this tribunal be particularly sensitive to such perceptions and concerns and afford us the time necessary and jointly requested to commence this trial.

As Your Honor has noted, we are new counsel for Respondents. Earlier this month, we noticed our appearance in this matter in good faith, replacing prior counsel after the Second Circuit's ruling lifting the stay of this proceeding but at a time when the fairness of the SEC's administrative proceedings is under attack in federal courts across this country. Indeed, less than an hour before we received Your Honor's ruling rejecting the parties' joint request, our clients filed a petition for rehearing en banc by the entire Second Circuit of their constitutional challenge to this proceeding, and they intend to pursue their appellate rights all the way to the Supreme Court if need be.

Our appearance also coincides with the Commission's acknowledgement of the criticism leveled against the SEC's administrative proceedings, including that, for too long, they have lacked the hallmarks of due process required before a deprivation of one's livelihood or property. For example, in a recent interview with the *Wall Street Journal*, Commission Chair Mary Jo White noted that the SEC's Rules of Practice for administrative proceedings had not been "modernized" for nearly a decade and reflected on the need to ensure that such administrative proceedings convey fairness both in reality and in appearance. *Mary Jo White Explains the New SEC Rules*, Wall St. J., Nov. 24, 2015, http://www.wsj.com/articles/mary-jo-white-explains-the-new-sec-rules-1448302777. And just last Wednesday, the Commission attempted to address the perception that its existing rules are unfair by unanimously adopting a number of substantial amendments. *See* Amendments to the Commission's Rules of Practice, Release No. 34-78319, July 13, 2016, https://www.sec.gov/rules/final/2016/34-78319.pdf. While those amendments do not go far enough to rectify the fundamental unfairness of proceedings like this one, they at least will afford respondents the ability to take up to seven depositions (without regard to a witness's availability for trial) and to request related document discovery. However, these new discovery-related rules will not be applied automatically to litigants whose initial pre-hearing conferences have been held or whose cases are pending and have not been stayed as of the effective date. *Id.*

As Your Honor knows, everything in this case is receiving intense public scrutiny. What the

public will see with this ruling accelerating this case to trial will look like a rush to judgment to target someone with the temerity to challenge the constitutionality of these SEC proceedings. That unintended consequence of this ruling will serve no party's interest here.

There are a host of reasons that Your Honor's latest scheduling order warrants reconsideration.

First, this case is tremendously complex. Although, as new counsel, we are still familiarizing ourselves with the entire voluminous record, we understand that the prospective trial evidence (to say nothing of the enormous investigative record) includes nearly 1,000 trial exhibits, at least two dozen proposed trial witnesses, and 11 expert reports that were exchanged among the parties last summer but not yet presented to Your Honor. In particular, the 11 expert reports focus on an array of technical issues, including:

- The structure and operation of the Zohar CLOs, including their categorization of loans;
- The authority invested in the collateral manager and others under the pertinent transaction documents;
- GAAP compliance of the impairment analyses in the Zohar funds' financial statements;
- The proper calculation of the Zohar funds' monthly overcollateralization ratio tests;
- The disclosure of the Zohar Funds' strategies to investors and the availability of information sufficient to enable investors to monitor the performance of the loans held by the Zohar funds and their own investments; and
- The amounts paid to certain Respondents in subordinated collateral management fees and preference share distributions.

In light of these complexities—with which Your Honor may not yet be fully familiar—a September 2016 hearing date strikes us as premature, infeasible and unfair under all of the surrounding circumstances.

Second, Your Honor's order requiring the parties to go to trial in September 2016 puts the cart before the horse in this important sense: At the time the Second Circuit stayed this proceeding on September 17, 2015, Your Honor had not yet ruled on Respondents' fully-briefed motion for summary disposition. Indeed, that important and potentially dispositive motion remains sub judice to this day, yet its resolution would define the scope of this trial

and potentially narrow it, if not obviate the need for it altogether. Scheduling a September 2016 trial does not appear to give Your Honor any meaningful time to consider and resolve that motion, especially given the many other pre-trial motions (described below) that will also require rulings.

Third, both sides requested a December 2016 hearing date for wholly legitimate reasons, separate and apart from the fact that we are new trial counsel appearing for the first time 10 days ago to replace prior counsel after the Second Circuit's decision and we understandably need more time to prepare for trial than the few weeks afforded in Your Honor's directive. Most significantly, a number of Respondents' witnesses are unavailable to be prepared for and to appear at a September 2016 hearing, or have significant conflicts during this period, including but not limited to three of Respondents' five experts:

- Respondents' expert Glenn Hubbard, Dean of the Graduate School of Business at Columbia University, an adviser to the President of the Federal Reserve Bank of New York, and a former Chair of the President's Council of Economic Advisers, who, due to a September 2016 trial in Guernsey at which he is testifying and other professional commitments, is unavailable throughout the months of August and September 2016;

- Respondents' expert Marti Murray, who, due to expert reports due in two separate matters at the end of August and the end of September, and a deposition in a third matter during the first two weeks of September, reported that it would be "impossible" for her to testify at a trial in this matter in September; and

- Respondents' expert Mark Froeba, who, for family reasons, has plans to be in Wisconsin for several weeks in early-to-mid August through early September.

Moreover, Ms. Tilton will be attending a trial beginning August 9, 2016 in Delaware Chancery Court, in which certain Respondents are defendants, and is scheduled to be deposed on August 30, 2016 in an insurance coverage litigation relating to this matter. Similarly, Patriarch employee Carlos Mercado, who is expected to be a fact witness for both sides, will be deposed in that same insurance coverage matter on September 8, 2016. In-house counsel with responsibility for this matter also will be deposed in the above-referenced insurance coverage matter on September 9, 2016, and, in total, will need to oversee preparation for and the defense of four total Patriarch depositions between late August 2016 and September 26, 2016, when fact discovery closes. And three of Respondents' witnesses in this proceeding no longer work for Patriarch or any of its affiliates, cannot be compelled by Respondents to attend a September 2016 hearing, and are not even in regular contact with Respondents or their counsel. Their schedules will also need to be taken into account.

In addition to Respondents' scheduling conflicts, the Division has its own, including Mr. Bliss's October 1, 2016 wedding, making a trial starting during the latter half of September 2016 impossible on the Division's end.[1] This is why the Division has advised us that, given Your Honor's order, it intends to request a September 6, 2016 hearing date -- less than two months from now. Therefore, Your Honor's ruling shoehorns the parties into an early September trial date that neither of them wants. It not only disregards both sides' interests in adequately preparing for trial in this extremely complex matter but also fails to take into account the availability of counsel, experts and fact witnesses alike. Considering the almost 10-month duration of the Second Circuit's stay and that it was lifted less than two weeks ago, it should surprise no one that Respondents' experts, in particular, might have new and different commitments. Indeed, due to their trial and deposition testimony in other matters, academic schedules, and other professional obligations, certain of Respondents' experts are not available until mid-November, which is among the reasons we sought a December 2016 date in the first place. No one, least of all those experts, could have foreseen a September 2016 trial date in a case of this magnitude and complexity.

Fourth, in refusing a proposed consensual trial schedule of December 2016, Your Honor states that our firm's appearance as new counsel "cannot be allowed to delay the proceeding." Order at 2 n.3. Considerations of due process are particularly acute, however, where, as here, the case is an enforcement action based on an investigation that the SEC undertook for more than five years before any charges were filed, yet new counsel is being expected to go to trial in a matter of weeks. That is why scheduling requests of new counsel, even absent the consent opposing counsel has given here, have been routinely granted in SEC administrative proceedings,[2] as well as in federal courts. Indeed, when I spoke last Friday to Dugan Bliss, lead counsel for the Division of Enforcement, even he expressed his surprise at Your Honor's denial of our proposed joint schedule on consent and described it as unusual. And he further said that the Division would consent to our request for a conference with Your Honor on this scheduling issue.

Fifth, there is an additional—and significant—reason that denying us more time to prepare is unjust: the consequences to Respondents of any loss at trial are catastrophic and dwarf those of other recent SEC administrative proceedings, individually or cumulatively. The amount that the Division seeks in disgorgement from Ms. Tilton -- at least $208 million -- is nearly

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[1] There are additional dates in September 2016 with which lawyers representing Respondents also have scheduling conflicts, but will not detail here as we remain hopeful that an appropriate hearing date ultimately will be scheduled.

[2] *See, e.g., In Re Harrison Sec., Inc.*, Release No. 611 (Oct. 7, 2003) at 4 (granting request to postpone hearing pursuant to Rule 161(b) because new attorneys should be given "a reasonable opportunity to become familiar with the issues before the hearing starts").

seven times more than the $32 million ordered in disgorgement and penalties in all SEC administrative proceedings combined during fiscal year 2015. By contrast, there is no exigency compelling the immediate trial of this case. Ms. Tilton is not a registered investment adviser, the Patriarch entities are no longer registered investment advisers, and no Patriarch entity serves as a collateral manager to any of the Zohar funds, having resigned those positions in February 2016. As no Respondent is managing the Zohar funds, they pose no risk of any alleged ongoing or future harm to any Zohar Fund investors.

Sixth, notwithstanding Your Honor's apparent belief that the "remaining prehearing steps" are so few in number and small in significance that a September 2016 trial date would be feasible, that is definitely not the case. Respondents were planning and still intend to file many motions prior to trial. Those submissions include but are not necessarily limited to the following:

- Motions to dismiss, based on the arguments raised in the appellate proceedings and other indicia of the unconstitutionality and illegality of these SEC administrative proceedings, among other grounds;

- Motions to add certain experts as trial witnesses;

- Motions for additional discovery, based on application of the SEC's new rules, adopted just last week;

- A range of other motions challenging the manner of presentation of expert testimony, the lack of discovery concerning certain of the Division's witnesses, and other motions necessary to preserve Respondents' rights, including in any appeal, and demonstrate the inherent absence of due process for Respondents;

- Motions in limine relating to the evidence to be adduced at trial, including expert testimony;

- The pre-hearing briefing contemplated in Your Honor's scheduling orders; and

- Motions, pursuant to Rules 161 and 900 of the Rules of Practice, to extend the hearing date due to the substantial prejudice to Respondents from a September 2016 hearing, the unusual complexity of this case, and the potential issue preclusive effects of a ruling in this matter on pending civil litigations relating to the Zohar funds.

In other words, there are a host of issues still to be addressed before this matter should go to trial, and they certainly cannot be adequately addressed in a manner that comports with due process in the few weeks Your Honor has allowed.

Seventh, Your Honor has previously expressed concerns about "truncated timelines" in SEC administrative proceedings. As a recent report by the Commission's Office of Inspector General ("OIG") noted, Your Honor was interviewed by the OIG about bias in SEC administrative proceedings. That interview occurred during the pre-trial phase of this case and days before the Second Circuit issued its 10-month stay here. Rather than denying that SEC administrative proceedings are biased, Your Honor, among others, apparently identified "systemic causes" of that bias, including "the rules of practice (which the SEC has recently proposed to amend), limited access by respondents to discovery and the investigative case file, and truncated timelines." U.S. Securities and Exchange Commission, Office of Inspector General, *Report of Investigation*, Case # 15-ALJ-0482-I, at 20 (citing September 14, 2015 interview with ALJ Foelak). Given Your Honor's concern that "truncated timelines" in SEC administrative proceedings may affect fairness for all respondents, we are simply asking for fairness in the scheduling of this case.

Finally, we are not understanding the rush. There is additional time to resolve this case even under the existing schedule (obviously, not counting the period of any court-imposed stay), and the SEC's Rules of Practice permit extensions of time under circumstances such as these. We also understand from Division counsel and our firm's own experience that such extensions are readily available and routinely granted.

Accordingly, we respectfully implore Your Honor to reconsider and endorse the December 2016 trial date jointly proposed by the parties, or alternatively, to schedule a conference on or before Wednesday, July 20, to address this crucial issue. This letter will, of course, be followed by a formal motion for reconsideration, and in the alternative, for certification for interlocutory appeal, pursuant to the SEC's Rules of Practice, as well as other motions, including directly to the Commission, to extend the time frame for deciding this matter. But given the time exigencies here, we wanted to bring this critically important issue to Your Honor's attention immediately. And we also hope Your Honor will understand that we feel so strongly about this, and are expressing ourselves so frankly in this letter, precisely because

forcing our clients to have to go to trial in September 2016, just a few weeks from now, is fundamentally unfair and wholly inconsistent with due process.

Respectfully,

Randy M. Mastro

cc: Susan Brune, Esq.
Dugan Bliss, Esq.
Nicholas Heinke, Esq.
Amy Sumner, Esq.