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UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of,	:	
	:	
LYNN TILTON,	:	Administrative Proceeding
PATRIARCH PARTNERS, LLC,	:	File No. 3-16462
PATRIARCH PARTNERS VIII, LLC,	:	
PATRIARCH PARTNERS XIV, LLC and	:	Judge Carol Fox Foelak
PATRIARCH PARTNERS XV, LLC	:	
	:	
Respondents.	:	
	:	
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**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS'  
MOTION *IN LIMINE* TO EXCLUDE DIVISION EXHIBITS 71 THROUGH 73  
(MS. TILTON'S TESTIMONY, DECLARATION, AND AFFIDAVIT FROM OTHER  
PROCEEDINGS)**

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September 12, 2016

Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, “Respondents”), respectfully submit this brief in support of their motion *in limine* to preclude the admission of Ms. Tilton’s testimony, declaration, and affidavit from certain unrelated proceedings. *See* Securities and Exchange Commission (“SEC”) Division of Enforcement (“Division”) Amended Exhibit List, Aug. 22, 2016, Exs. 71-73.

### INTRODUCTION

Despite the fact that the Division will have a full opportunity to examine Ms. Tilton live at the upcoming hearing, the Division seeks to admit Ms. Tilton’s entire testimony from an unrelated trial, *MBIA Insurance Corporation v. Patriarch Partners VIII, LLC* (“*MBIA* testimony”), along with Ms. Tilton’s declaration and affidavit from similarly unrelated proceedings: *Schreiner v. Patriarch Partners, LLC* and *Patriarch Partners XIV, LLC v. MBIA Insurance Corporation*. *See* Division’s Amended Exhibit List, Aug. 22, 2016, Exs. 71-73. As with the Division’s attempted admission of the investigative testimony<sup>1</sup> and the trial transcripts of *Zohar CDO 2003-1, LLC v. Patriarch Partners, LLC*,<sup>2</sup> the Division’s attempt to introduce Ms. Tilton’s entire *MBIA* testimony contravenes the well-established prohibition against wholesale admission of transcripts. Moreover, Ms. Tilton’s *MBIA* testimony and her declaration and

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<sup>1</sup> *See* Memorandum of Law in Support of Respondents’ Motion *in Limine* to Exclude Transcripts of Investigative Testimony, Including Division Exhibits 194 Through 206 (Sept. 1, 2016).

<sup>2</sup> *See* Memorandum of Law in Support of Respondents’ Motion *in Limine* to Exclude the *Zohar CDO 2003-1, LLC et al. v. Patriarch Partners, LLC, et al.*, Case No. 12247-VCS (Del. Ch. Aug. 9 & 10, 2016) Trial Transcripts Marked Division Exhibits 207 and 208 (Sept. 2, 2016).

affidavit from other proceedings are overwhelmingly irrelevant. Respondents therefore respectfully request that Your Honor exclude Division Exhibits 71 through 73.<sup>3</sup>

### LEGAL STANDARDS

The Administrative Procedure Act (“APA”) requires that any agency order that issues after a hearing must be based on evidence that is “reliable,” “probative,” and “substantial.” 5 U.S.C. § 556(d). SEC Amended Rule 320<sup>4</sup> mandates that “the hearing officer . . . shall exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unreliable.” Rule 300 states that the hearing “shall be conducted in a fair, impartial, expeditious and orderly manner.”

### ARGUMENT

#### **I. Wholesale Admission Of Ms. Tilton’s MBIA Testimony (Exhibit 71) Is Improper.**

As Your Honor has previously made clear, the wholesale admission of witness testimony transcripts is improper. *See* Hearing Tr. 1478:7-10, *John J. Aesoph*, File No. 3-15158 (Oct. 28, 2013) (Foelak, ALJ) (excluding wholesale admission of transcripts of respondents’ investigative testimony); *see also Del Mar Fin. Servs., Inc.*, Security Act Release No. 8314, 2003 WL 22425516, at \*8-9 (Oct. 24, 2003) (Comm’n Op.) (upholding exclusion of entire investigative transcripts offered by the Division); *In re Martin B. Sloate*, Exchange Act Release No. 38373,

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<sup>3</sup> Ms. Tilton’s deposition testimony and declaration in the Zohar I bankruptcy proceeding, *Zohar CDO 2003-1, LLC*, Nos. 15-23680, -23681, -23682 (Bankr. S.D.N.Y.), are covered by the confidentiality order governing that proceeding and, therefore, are not disclosable, consistent with Your Honor’s September 9, 2016 order on Respondents’ motion to quash the subpoena issued to MBIA Insurance Corporation (“MBIA”). *See Lynn Tilton*, Admin. Proceedings Rulings Release No. 4145. Accordingly, there is no need to include those documents in this motion *in limine*.

<sup>4</sup> As used herein, “Amended Rule \_\_\_” refers to an SEC Rule of Practice, as amended in July 2016, *see* SEC, Amendments to the Commission’s Rules of Practice, 81 Fed. Reg. 50,212 (July 29, 2016); and “Rule \_\_\_” refers to an SEC Rule of Practice as codified, 17 C.F.R. pt. 201.

1997 WL 126707, at \*2 (Mar. 7, 1997) (Comm'n Op.) (upholding exclusion of prior trial testimony offered by the Division where the witnesses were available to testify at the hearing).

Here, the Division seeks to admit Ms. Tilton's entire *MBIA* testimony, which spans over 300 pages of trial transcripts. But the Division has neither designated portions of Ms. Tilton's *MBIA* testimony, nor demonstrated the relevance of that testimony. See *Gregory M. Dearlove, CPA*, Admin. Proceedings Rulings Release No. 315, 2006 WL 2080012, at \*54 (ALJ July 27, 2006) (reaffirming bench ruling to exclude exhibits where Division attempted to "dump a multi-page document into the record when only a portion of the document was relevant to the issues in the OIP"); see also *Oxford Capital Mgmt., Inc.*, Admin. Proceedings Rulings Release No. 602, 2003 WL 21282789, at \*2 (ALJ Jan. 15, 2003) ("Within seven days from the date of this Order, the Division shall explain how it intends to use [certain] proposed [e]xhibits . . ."). Moreover, the Division has failed to explain why the admission of Ms. Tilton's *MBIA* testimony is necessary when Ms. Tilton is available—and the Division intends to call her—to testify at the upcoming hearing. See Division's Amended Witness List (Aug. 22, 2016). Therefore, in light of the strong preference for live testimony and the well-established prohibition against wholesale admission of transcripts, Ms. Tilton's *MBIA* testimony should be excluded.

Indeed, the relevance of Ms. Tilton's testimony in the *MBIA* proceeding is not at all clear as that dispute concerned conduct and issues well outside the scope of the Order Instituting Proceedings ("OIP"). The *MBIA* action involved claims that Patriarch Partners VIII, LLC and LD Investments, LLC<sup>5</sup> breached the "Master Agreement"<sup>6</sup>—an agreement that is not at issue in the OIP—by failing to transfer Zohar I Class B Notes to certain CDOs distinct from the Zohar

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<sup>5</sup> LD Investments, LLC is not named as a Respondent in this action.

<sup>6</sup> The "Master Agreement" is an agreement between MBIA, Patriarch Partners VIII, LLC, and LD Investments, LLC that concerns CDOs that are distinct from the Zohar Funds.

Funds. See Complaint, *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, No. 9 Civ. 3255 (RWS) (S.D.N.Y. June 16, 2009), Dkt. 16. The dispute turned in significant part on whether the Patriarch defendants took commercially reasonable efforts to have the Class B notes rated—an issue wholly irrelevant to the allegations in the OIP. See Opinion, *MBIA Ins. Corp.*, No. 9 Civ. 3255 (RWS) (S.D.N.Y. June 10, 2013), Dkt. 133.<sup>7</sup> The *MBIA* transcripts are thus replete with testimony unrelated to the instant action.

In the alternative, Your Honor should order the Division to identify, “*in advance of the hearing,*” the “particular portions of the [*MBIA* testimony] it intends to use” and the purpose(s) for which it intends to use those portions of testimony. *Oxford Capital Mgmt.*, 2003 WL 21282789, at \*1-2 (emphasis added).

## **II. Division Exhibits 72 And 73 Should Also Be Excluded.**

Division Exhibits 72 and 73, the declaration and affidavit from unrelated disputes, should also be excluded because, among other reasons, they are irrelevant. Ms. Tilton’s declaration and affidavit in the other disputes concern narrow issues outside the scope of the OIP, including Patriarch Partners, LLC’s relationship with the portfolio company American LaFrance, LLC and its lack of contacts in South Carolina (Division Exhibit 72), and a dispute with MBIA in 2011 related to MBIA’s access to certain information (Division Exhibit 73). Accordingly, because the declaration and affidavit are irrelevant and immaterial to the allegations in the OIP, they should be excluded from the hearing in this matter. See, e.g., *Gregory M. Dearlove*, 2006 WL 2080012,

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<sup>7</sup> Judge Sweet found that MBIA “failed to satisfy its burden of proof with respect to its breach of contract and anticipatory breach of contract claims against Patriarch” and, therefore, entered judgment “in favor of Patriarch with costs and disbursements.” See Opinion, *MBIA Ins. Corp.*, No. 9 Civ. 3255 (RWS) (S.D.N.Y. June 10, 2013), Dkt. 133, at 151.

at \*54; *Richmark Capital Corp.*, S.E.C. Release No. 201, 2002 WL 412145, at \*24 (ALJ Mar. 18, 2002).

**CONCLUSION**

For the reasons set forth above, Respondents respectfully move for an order excluding Division Exhibits 71 through 73.

Dated: New York, New York  
September 12, 2016

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