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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

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION FOR A PROTECTIVE ORDER

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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 for an order of protection as to Respondents' Exhibit 495 and those portions of Ms. Tilton's testimony that concern and contextualize the highly sensitive financial data contained therein.

INTRODUCTION

In preparing for the imminent administrative hearing in these enforcement proceedings, the Securities and Exchange Commission ("SEC") Division of Enforcement (the "Division") has made it increasingly clear that its strategy against Respondents involves downplaying the economic value of the investments at issue. Indeed, the Division appears intent on portraying the Zohar collateralized debt obligations ("CDOs") as primarily fee-producing vehicles in order to suggest that Respondents were principally interested in the using them as fee-generators. No characterization could be further afield from the true nature of the Zohars and Respondents' approach to managing them. Respondents have worked tirelessly to build value for the Zohars and their noteholders in order that the noteholders can be repaid. Respondents can prove the value they have created, if they have the opportunity to present Your Honor with highly sensitive evidence that includes financial information about several of the companies in whose debt the Zohars have invested (the "Portfolio Companies") at the upcoming hearing.

The Zohars were designed to invest in distressed debt and enable Respondents to turn around distressed Portfolio Companies. As a consequence of that design, several of the Portfolio Companies now have substantial value. In fact, if Respondents were able to sell the most valuable Portfolio Companies, the proceeds of such a sale could make all of the Zohars' noteholders whole. Respondents tried to do just that, through a restructuring plan that raised more than a billion dollars from a third-party lender and that, along with $300 million of

Respondents' own money, would have been used to redeem all of the Zohar notes. This loan would have been repaid with the monetization of the more valuable Portfolio Companies. The restructuring plan had one critical condition precedent: MBIA would have to waive certain collateral tests and provide flexibility to facilitate this restructuring, because conventional measures of the Zohars' financial strength would drop if the most valuable assets were sold and only the less valuable companies were retained. MBIA effectively vetoed the proposed restructuring by denying this waiver.

This evidence proves that Respondents are value creators, and the Zohar noteholders can realize this value if MBIA allows the value to be unlocked. Ms. Tilton intends to testify to the underlying financial details, and the value of the Portfolio Companies. Respondents' Exhibit 495, which appears on Respondents' amended exhibit list but has not yet been disclosed pending this motion, would support this testimony with financial data. The financial details, however, are highly sensitive. The Zohars, the noteholders, Respondents, and the Portfolio Companies themselves would likely be prejudiced if this private data were made public. A protective order is therefore necessary to allow presentation of these highly relevant but highly sensitive facts.

ARGUMENT

I. A Protective Order Covering Documentary Evidence And Testimony Is Appropriate If The Harm Resulting From Disclosure Would Outweigh The Benefits Of Disclosure.

Rule 322 of the SEC Rules of Practice (the "Rules"), 17 C.F.R. § 201.322, allows any party to "file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information." Rule 322(a). The motion "shall be granted" if the moving party demonstrates "that the harm resulting from disclosure would outweigh the benefits of disclosure." Rule 322(b).

That finding is appropriate where proffered evidence takes the form of "private, confidential financial statements and documents." *Thomas C. Bridge*, Securities Act Release No. 8952, 2008 WL 3155053, at *1 (Comm'n Aug. 7, 2008). Examples of such sensitive financial information, for which protective orders have been granted pursuant to Rule 322, include: "statements of financial condition and supporting documents," *Michael W. Crow*, Initial Decision Release No. 953, 2016 WL 489352, at *78 (ALJ Feb. 8, 2016); tax returns, *see id.*; *see also VanCook*, Exchange Act Release No. 58756, 2008 WL 4500339, at *1 (Comm'n Oct. 8, 2008) (granting protective order for "tax returns that contain sensitive financial information"); a listing of "fees paid to NASDAQ by . . . financial institutions," *Application of SIFMA*, Admin. Proc. Rulings Release No. 1716, 2014 WL 11207566, at *1 (ALJ Aug. 20, 2014); and the general category of "financial statements, and certain portions of briefing referring to those financial statements," *PageOne Fin. Inc.*, Advisers Act Release No. 4400, 2016 WL 3030845, at *15 (Comm'n May 27, 2016).

The SEC's standard for sealing materials or closing administrative proceedings is distinct from the standard federal courts apply when litigants seek to close a federal courtroom, under which "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure." *Waller v. Georgia*, 467 U.S. 39, 48 (1984). There are good reasons why the standard for a nonpublic administrative hearing under Rule 322 is more easily satisfied than the standard for closure of an Article III federal court proceeding. Indeed, numerous courts have observed that the public interest in access to the courts is "integral to our system of government," *United States v. Erie Cnty.*, 763 F.3d 235, 238-39 (2d Cir. 2014),

because it is related to public "confidence in the administration of justice," *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). While the public interest in administrative proceedings is also important, it is generally treated as less fundamental because of agencies' more limited regulatory purview and concerns that "governmental and private interests could be harmed by release of certain types of information" that are regularly provided to agencies in conjunction with their regulatory oversight. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal quotation marks omitted) (considering breadth of FOIA). In particular, concerns about chilling the open exchange of information between regulated entities and their regulators weigh in favor of a less onerous burden for regulated entities to protect the confidentiality of their information by sealing portions of administrative proceedings. In any event, even if the heightened federal standard were applied here, Respondents would satisfy the requirements for closing these proceedings during the submission of the confidential information at issue in this motion. *See infra* n.3.

II. The Court Should Grant A Protective Order, So That The Evidence At The Hearing May Include Highly Confidential Data And Testimony.

The testimony and documentary evidence concerning the Portfolio Companies' financial status is plainly relevant, sensitive information. Public disclosure would be highly prejudicial to the privately held companies whose finances are quantified therein; the data is relevant to rebutting the Division's basic narrative of the case; and the general public has no legitimate interest in this private financial data. Accordingly, this narrow category of evidence meets the straightforward requirement for a protective order under the SEC's Rules of Practice, namely that "the harm resulting from disclosure would weigh the benefits of disclosure." Rule 322(b). Because this private financial data meets the Rule 322 standard, the exhibit portraying this data

should be admitted under a protective order, and that order should also close the courtroom during the provision of testimony discussing this data.

Ms. Tilton intends to discuss, and Respondents' Exhibit 495 portrays, highly sensitive information of several Portfolio Companies. This includes earnings data and sale value. Not only is the data itself highly sensitive, but even the decision to list particular Portfolio Companies on Respondents' Exhibit 495 (which contains a list of a sub-set of the Portfolio Companies) constitutes confidential information. Disclosure of that information could have disruptive effects for the management and stability of the Portfolio Companies and the Zohars.

Public disclosure of this information could also diminish the value of the Zohars, the very instruments at the center of this litigation, in at least four ways:

First, if the Portfolio Companies' competitors gain access to this information, they may seize an unfair advantage by anticipating the financial outlook of the Portfolio Companies.

Second, if potential buyers of these companies gain access to this information, it could suppress offers and disadvantage the Portfolio Companies in any sale negotiations.

Third, disclosure would upset the informational balance struck by the Zohars' governing documents. This financial data at issue is so sensitive that even the Zohars' noteholders do not have access to it in order to preserve the collateral manager's discretion. The Zohars therefore have a strong institutional interest in maintaining the informational balance struck by their governing documents, and prejudice could result if that balance is upset.

Fourth, this financial information relates to other ongoing litigations and disputes, in which it has not been disclosed to other parties. Public disclosure of the information in this proceeding would provide litigation windfalls in cases outside Your Honor's jurisdiction. Accordingly, even if prejudice to the parties is not reason enough to maintain the confidentiality

of this information, Your Honor should grant the protective order as a matter of comity to the other tribunals overseeing ongoing litigation in order to avoid disrupting their matters.

Given the wide-ranging and profound concerns associated with public disclosure of the financial information in the anticipated testimony and Respondents' Exhibit 495, a protective order is necessary for Respondents to present this evidence at the hearing.

Meanwhile, there is no legitimate public interest in disclosure of the financial information in question. The public's generalized interest in the openness of proceedings is not harmed by keeping confidential a small portion of this proceeding. In a trial that is expected to last three weeks and that features hundreds of exhibits, this one-page exhibit and the accompanying short discussion in Ms. Tilton's testimony are *de minimis*. To underscore the lack of harm to the public's interest in transparency, the protective order can and should be narrowly tailored, providing simply that Respondents' Exhibit 495 and Ms. Tilton's testimony on this particular point be confidential (and, during the relevant testimony, the hearing be nonpublic and the transcript under seal) except with respect to Your Honor, counsel, and expert witnesses.[1]

Given the narrowness of the Proposed Protective Order submitted herewith and the lack of any public interest in the material to which that order would apply, the benefits of disclosure are nonexistent. Accordingly, in view of the various forms of prejudice that would result from

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[1] The Proposed Protective Order also includes a warning to the Division's counsel, in light of their misconduct in communications with MBIA, *see* Mem. of Law in Supp. of Respondents' Mot. to Stay the Proceedings and Compel the Division to Make Further Disclosures, at 7-8 (filed Oct. 16, 2016), that sharing the protected information would be considered a violation of the order. Whether or not Your Honor includes such a specific warning, Respondents cannot in good faith present sensitive financial information unless the Protective Order makes clear that transmittal of the information by counsel (other than to expert witnesses) would constitute a violation.

disclosure, Your Honor should find that the harm resulting from disclosure would outweigh the benefits of disclosure and grant the Protective Order.[2]

[2] Even if the more burdensome federal court standard under *Waller v. Georgia*, 467 U.S. 39, 48 (1984), applied to Respondents' request to close the administrative proceeding during the relevant portion of Ms. Tilton's testimony (and it does not, *see supra* Part I), the confidential financial data would satisfy that standard. Respondents have "advance[d] an overriding interest that is likely to be prejudiced" by disclosure, *id.*, namely the interest privately held companies and their stakeholders have in the confidentiality of their financial data. The requested closure is extremely narrow, covering only the portion of Ms. Tilton's testimony in which she discusses confidential information, and is therefore "no broader than necessary." *Id.* Based on these facts, Your Honor should "make findings adequate to support the closure," *id.*, namely Rule 322(b)'s required finding that the prejudice of disclosure outweighs the public benefits of disclosure. As to the one remaining requirement for a federal court to close a courtroom under *Waller* ("the trial court must consider reasonable alternatives to closing the proceeding," *id.*), that requirement does not apply here because Respondents are only seeking to close the hearing "during the testimony of one witness, albeit an important one." *Ayala v. Speckard*, 131 F.3d 62, 71 (2d Cir. 1997) (en banc). Accordingly, Respondents' requested relief is appropriate under both the Rule 322 and federal court standards.

CONCLUSION

For the foregoing reasons, Respondents respectfully move for an order of protection as to Respondents' Exhibit 495 and those portions of Ms. Tilton's testimony that will address that highly sensitive financial data.

Dated: New York, New York
October 17, 2016

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(PROPOSED) PROTECTIVE ORDER

WHEREAS pursuant to Rule 322(a) of the Securities and Exchange Commission ("SEC" or the "Commission") Rules of Practice, 17 C.F.R. § 201.322(a), a party in an enforcement proceeding may file a motion requesting a protective order to limit the disclosure of documents or testimony that contain confidential information, and Respondents have filed such a motion here; and

WHEREAS the harm from the disclosure of Respondents' Exhibit 495 and any other private or confidential financial data of the Portfolio Companies, beyond the limits set in this Order, would outweigh the benefits of public disclosure;

IT IS THEREFORE ORDERED THAT Respondents' Exhibit 495 shall not be used by the SEC Division of Enforcement (the "Division") or its counsel or agents except for the purposes of this action.

IT IS FURTHER ORDERED THAT during so much of Respondent Lynn Tilton's testimony as concerns Respondents' Exhibit 495 or otherwise concerns the Portfolio Companies' private financial data, this hearing shall be closed to all persons other than the following:

a) The Administrative Law Judge presiding in this matter;

b) A hearing reporter, who will be separately instructed to seal the protected portions of the hearing;

c) Counsel who have appeared of record in this matter and employees or consultants to such counsel, including individuals providing technical and audiovisual support;

d) Any person who has submitted an expert report in this matter; and

e) Respondent Lynn Tilton, as the testifying witness.

IT IS FURTHER ORDERED THAT under no circumstance, other than those specifically provided for in this Order or in a subsequent Order of the Administrative Law Judge, shall the Division or its counsel or agents disclose any part of Respondents' Exhibit 495, or permit the same to be disclosed, to any person other than those specified above who are granted access to the protected testimony.

IT IS FURTHER ORDERED THAT each person specified above who is given access to the protected testimony and to Respondents' Exhibit 495, shall keep the information disclosed therein secure and confidential, and refrain from disclosing it. In particular, counsel for the Division of Enforcement is cautioned that any disclosure of protected information to fact witnesses or other cooperating persons would constitute a violation of this order.

IT IS FURTHER ORDERED THAT should any party seek to use the protected testimony or Respondents' Exhibit 495 in connection with a filing or hearing in this matter (other than in

that portion of the hearing closed to the public pursuant to this Order), the party must do so under seal or after seeking a protective order of a scope equal to this Order.

IT IS FURTHER ORDERED THAT in the event any of the protected testimony or Respondents' Exhibit 495 is used in any manner in this proceeding, the testimony and information disclosed therein shall not lose their confidential status through such use.

IT IS FURTHER ORDERED THAT the disclosure of private financial data through the protected testimony or Respondents' Exhibit 495 in this proceeding shall not be deemed a waiver of any applicable privilege or other basis for confidentiality.

IT IS FURTHER ORDERED THAT any exhibit, testimony, or other information protected by this Ordered may be examined on appeal to the Commission but shall not lose their confidential status through such an appeal.

IT IS FURTHER ORDERED THAT at the conclusion of this matter, including any appeal to the Commission, any record of the protected testimony or Respondents' Exhibit 495 in the custody or control of any counsel or agent of the Division shall be either destroyed by the Division or returned to Respondents for destruction. Counsel for the Division shall notify Respondents of compliance with this paragraph no more than 90 days after the final conclusion of this matter.

Entered this ___ day of October, 2016

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Carol Fox Foelak
Administrative Law Judge