UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

**RESPONDENTS' OPPOSITION TO THE DIVISION'S MOTION TO PARTIALLY STRIKE RESPONDENTS' STATEMENTS OF MESSRS. LUNDELIUS, VINELLA, AND SCHWARCZ**

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## TABLE OF CONTENTS

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 opposition to the Division of Enforcement's (the "Division") Motion to Partially Strike Respondents' Statements of Messrs. Lundelius, Vinella, and Schwarz (the "Motion").

Of note, the Division does not seek to preclude these substitute experts from testifying at trial, per the conditions set in Your Honor's September 16, 2016 Order. Rather, the Division merely seeks to "partially strike" portions of the two- to three-page statements that each of these substitute experts provided to explain the opinions they were adopting from two of Respondents' original experts who are unavailable to prepare for and testify at this trial. Thus, these experts will necessarily be testifying in any event, and as Your Honor has already ruled in rejecting our attempts to strike or limit the testimony of the Division's experts, this is a bench trial, at which Your Honor is in a position to hear the evidence and then make any necessary determinations about weight. As a matter of fundamental fairness, given the expedited trial schedule ordered here and witness unavailability under that schedule, Your Honor made an accommodation for substitute experts that Respondents have accepted. Indeed, Respondents have gone further, informing the Division in short written summaries the specific opinions that these substitute experts were adopting and their reasoning for doing so. As a result, consistent with all of these prior rulings, Your Honor should summarily reject the Division's motion as "much ado about nothing," premature, and meritless in any event.

## INTRODUCTION

In this Motion, the Division seeks relief that moves from the merely meritless to the bizarre. Respondents complied with—and, indeed, went above and beyond—the requirements of Your Honor's September 16, 2016 Order regarding expert witnesses. In that Order, Your Honor

wrote, "[S]ince the Division has not raised any objection to the expertise of Vinella, Schwarcz, or Lundelius, Respondents may consider having one or more of them adopt the opinions of the existing expert report[s] as his own and being examined by the Division on those opinions." *Lynn Tilton*, Admin. Proc. Rulings Rel. No. 4161, at 2 (Sept. 16, 2016) (the "September 16 Order") (second alteration in original).

Respondents' substitute experts have "adopt[ed] the opinions" of the unavailable experts to the extent described in their short written statements, just as Your Honor suggested, and are prepared to "be[] examined by the Division on those opinions." *Id.* Respondents even provided the Division with written statements from each substitute expert detailing the "opinions" that he was "adopt[ing]" as well as his reasons for doing so —something Your Honor did not require, but that Respondents provided in the interest of complete disclosure, a full three weeks before the trial date.

Contrary to the Division's contention, Your Honor did not rule that the Respondents' substitute experts must adopt any, let alone all, of the *reasons* offered by the unavailable experts in support of their opinions. Nor did Your Honor rule that the substitute experts would not be permitted to testify about their own reasons for adopting the particular opinions with which they agreed. Respondents have complied with the letter and spirit of the September 16 Order, and the Division cites no authority for the novel proposition that a litigant is entitled to relief from the judge when its adversary *complies with an order*.

In addition, there is absolutely no prejudice to the Division. Charles R. Lundelius, Jr., has adopted *in full* the opinions of J. Richard Dietrich. Peter Vinella and Steven L. Schwarcz have adopted certain specified opinions of Marti P. Murray. Respondents have informed the Division that, to the extent these substitute experts do not "adopt [Ms. Murray's] opinions," her

report has been withdrawn. Respondents' October 3, 2016 letter to the Division (the "October 3 Letter") and the experts' statements setting forth the "adopt[ion]" (attached hereto as Exhibits A-D) are not only consistent with Your Honor's Order but also go beyond it to give the Division express written notice of the specific opinions being adopted as well as the reasons the substitute experts are adopting them. Of course, the substitute experts are not ventriloquist's dummies who will mimic, verbatim, the words in the prior reports at the hearing; that is why Respondents submitted statements from the witnesses explaining which opinions they adopted and why. In other words, Respondents have *already complied* with Your Honor's September 16 Order.

The Division's argument to the contrary is hypertechnical and inconsistent. It is hypertechnical because it starts from the illogical premise that the substitute experts can do no more than repeat *in haec verba* the exact words of the prior experts. Surely that was not Your Honor's intent; indeed, if the substitute expert witnesses were restricted only to reciting the words on the page of the unavailable experts' reports, then any live testimony, on direct or cross examination, would be superfluous. Moreover, the Division erroneously claims that the substitute experts are offering new opinions. Plainly, this is not the case. The reports of Marti P. Murray and J. Richard Dietrich are comprised of opinions and the reasons for those opinions—each offered to rebut the opinions of the Division's experts. As explained above, Messrs. Vinella, Schwarcz and Lundelius have adopted certain opinions of the unavailable experts and have summarized their reasons for doing so. They have not, contrary to the Division's argument, offered new opinions.

The Division's argument is also hypocritical and at odds with Your Honor's prior rulings. Your Honor has consistently ruled that the Federal Rules of Evidence do not apply to these proceedings and that the standard for admissibility is very low, rulings that the Division has

taken advantage of. The Division cannot have it both ways: invoking and relying on looser evidentiary standards when it suits them, but insisting on strict exclusionary rules with regard to Respondents' experts when convenient. As Your Honor has repeatedly made clear, there are no such exclusionary rules here.

Expert testimony will be central to the upcoming hearing. Granting the motion would be tantamount to unfairly denying Respondents their ability to present a full and complete defense. The Motion should be denied in its entirety. Messrs. Vinella, Schwarcz, and Lundelius should be permitted to "adopt the opinions" of the unavailable experts—just as Your Honor suggested—and give their reasons for those opinions.

## FACTUAL AND PROCEDURAL BACKGROUND

The Division instituted these proceedings against Respondents on March 30, 2015. Soon thereafter, Your Honor adopted a case schedule under which the Division's expert reports were due on July 10, 2015; Respondents' expert reports were due on July 31, 2015; and the Division's rebuttal reports were due on August 10, 2015. The parties exchanged expert reports on that schedule, and they exchanged their initial witness and exhibit lists in August 2015. The hearing was scheduled to begin on October 13, 2015. *Lynn Tilton*, Admin. Proc. Rulings Rel. No. 2647, at 1 (May 7, 2015) (the "Prehearing Order"). On September 16, 2015, the Second Circuit stayed this proceeding while it considered Respondents' challenge to the constitutionality of these proceedings; that stay expired earlier this year.

When the stay was lifted, Respondents and the Division "jointly propose[d] a hearing date starting in early December." *See* Letter from D. Bliss to C. Foelak (July 11, 2016). On July 20, 2016, Your Honor ordered instead that the hearing would commence on October 24, 2016. *Lynn Tilton*, Admin. Proc. Rulings Rel. No. 4004, at 1 (Jul. 20, 2016). However, in view of the

passage of time since the parties' initial exchange, Your Honor permitted the parties to exchange updated exhibit and witness lists this past August. *See id.*

On August 22, 2016, Respondents moved for a limited modification of the Prehearing Order to allow Respondents to submit substitute expert reports for unavailable expert witnesses. Respondents intended to submit expert reports by Peter Vinella and Steven L. Schwarz as a replacement for unavailable witness Marti P. Murray, and Charles R. Lundelius, Jr. as a replacement for unavailable witness J. Richard Dietrich. The limited relief Respondents sought was consistent with Your Honor's July 20, 2016 Order—which permitted amendments to the witness and exhibit lists—and was warranted as a matter of fundamental fairness and due process. Nonetheless, Your Honor denied Respondents' motion. However, Your Honor wrote, "[S]ince the Division has not raised any objection to the expertise of Vinella, Schwarcz, or Lundelius, Respondents may consider having one or more of them adopt the opinions of the existing expert report[s] as his own and being examined by the Division on those opinions." September 16 Order at 2 (second alteration in original). Respondents have done just that, as they detailed in the October 3 Letter. *See* Ex. A.[1]

The Division's arguments about Mr. Lundelius are particularly misplaced, because Mr. Lundelius has "adopt[ed]" the "opinions" of Dr. Dietrich in whole, as described in his three-page October 3 statement. *See* Ex. B. As Dr. Dietrich had limited availability during the period of the scheduled trial, it is Respondents' intention to substitute Mr. Lundelius for Dr. Dietrich and call Mr. Lundelius instead. In addition, Peter Vinella and Steven Schwarcz each "adopt[ed]" certain "opinions" of Ms. Murray to the limited extent described in their respective two-page statements.

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[1] References to "Ex. ___" are to exhibits to the Declaration of Goutam U. Jois, filed contemporaneously herewith.

*See* Exs. C, D. As Ms. Murray is unavailable to testify at all during the period of the scheduled trial, Respondents have withdrawn Ms. Murray's report and will not seek to introduce it in evidence or otherwise rely on it in any way, except to the limited extent of the specific opinions adopted by Messrs. Vinella and Schwarcz, who will substitute for Ms. Murray in those limited respects and be called instead.

Although the September 16 Order did not require any further submissions or notice, Respondents, in an abundance of caution and in order to be completely transparent, served the Division with these short written statements from each of the substitute experts outlining exactly what they were "adopt[ing]" from "the opinions of the existing expert reports." *See* Ex. A. Consistent with Your Honor's September 16 Order, Messrs. Vinella, Schwarcz, and Lundelius will "be[] examined by the Division on those opinions" that they "adopt."

The Division—having mischaracterized and misunderstood the October 3 Letter and accompanying statements—now moves to "partially strike" them.[2] But those statements are entirely consistent with the September 16 Order, and they are not yet part of the hearing record in any event. The Division's motion is therefore meritless and should be denied.

## ARGUMENT

The Division's position is hypertechnical and inconsistent, and it fundamentally misunderstands both the September 16 Order and Respondents' position. The motion is unsupported by law or fact, and it should be denied.

### A. The Division's Hypertechnical Interpretation of the September 16 Order Would Arbitrarily Hamstring Respondents' Ability to Present a Defense.

The September 16 Order said, in no uncertain terms:

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[2] The Division contends that Respondents provided the substitute experts' statements "under the guise of unavailability." Motion at 1. Respondents have done no such thing. In reality, Respondents have been saying for months that certain of their experts would be unavailable to prepare for and testify at the hearing.

> Finally, since the Division has not raised any objection to the expertise of Vinella, Schwarcz, or Lundelius, Respondents may consider having one or more of them *adopt the opinions of the existing expert report[s] as his own* and being examined by the Division on those opinions.

September 16 Order at 2 (emphasis added).

Respondents have complied with the September 16 Order in all respects, and have gone further by serving the Division with the October 3 letter. Instead of thanking Respondents for going above and beyond what was required in the September 16 Order, the Division now makes this belated motion to "partially strike" portions of these modest, brief summaries from our substitute experts served well in advance of trial.

The Division's Motion is nonsensical for several reasons, not the least of which is because the "statements" are not themselves yet in evidence. On the merits, the Motion also fails. "[T]he Division has not raised any objection to the expertise of" these highly-qualified substitute experts. September 16 Order, at 2. Yet the Division would have Your Honor require that these substitute experts have to mimic, word for word, the prior experts' reports, suspending any independent thought whatsoever and putting aside their individual experience and expertise—the qualities for which experts are hired in the first place, and to which "the Division has not raised any objection." *Id.*

Your Honor allowed the substitute experts to "adopt the opinions" of the unavailable experts. That is exactly what these substitute experts have now done in writing—Mr. Lundelius, in whole, and Messrs. Schwartz and Vinella, in part. That they express their adoption of those opinions in their own words is not only to be expected but wholly appropriate. For them to do otherwise would bring into question their very objectivity and independent judgment—which the Division would surely do when cross-examining them. Thus, the Division's argument amounts to an absurd distortion of Your Honor's ruling.

Your Honor, in permitting each substitute expert to "adopt the *opinions*" of the prior expert, did not require that the substitute experts adopt all of the reasoning of the unavailable experts—that is, the entire *report*, or every *word*, previously written. And notably, "[t]he Division does not object to Respondents' substitute experts adopting less than the full reports of Dr. Dietrich or Ms. Murray," Motion at 5, or to "withdrawing certain of Ms. Murray's opinions," *id.* at 6 n.1. The substitute experts have reviewed the prior reports, evaluated their content, determined which "opinions" they "adopt[ed]," and explained the reasons why. That process simply implements Your Honor's September 16 Order—and, if anything, it goes above and beyond.

The Division's hypertechnical argument to the contrary is nonsensical. What the Division attempts to categorize as "new expert witness testimony," Motion at 1, is merely part of the rationale of these experts for adopting the prior expert's opinion, as per the September 16 Order.

The Division claims that the substitute experts' October 3 statements "offer a new opinion" because they write that the Divisions' expert reports are "flawed for reasons beyond those described above." Motion at 4, 5. But the Division does not quote the relevant paragraph in full. Mr. Lundelius, for example, wrote,

> I understand that the Court has ordered that I may not submit an expert report in this matter. However, it is my opinion that Dr. Henning's opening and rebuttal reports are flawed for reasons beyond those described above. *If I were permitted to submit an expert report*, I would detail those opinions and the reasons for them.

Ex. B (Statement of Charles R. Lundelius, Jr.), ¶ 12 (emphasis added).[3]

[3] Messrs. Vinella and Schwarcz included substantially similar language in their statements. *See* Ex. C (Statement of Pietro (Peter) Vinella), ¶ 9; *id.* Ex. D (Statement of Steven L. Schwarcz), ¶ 7.

Despite the Division's hand-wringing, that paragraph stands for nothing more than the unremarkable proposition that, *if* Your Honor had ruled in Respondents' favor and permitted new expert reports, Mr. Lundelius *would* have expressed additional opinions in an expert report. But he has not done that here. He merely explains the opinions that he *does* adopt, and it defines the scope of his testimony at the upcoming hearing.

Additionally, by arguing that "disclosing new opinions just weeks before the hearing would cause serious prejudice," the Division disingenuously mischaracterizes both Your Honor's Order permitting Vinella, Schwarcz, and Lundelius to testify, as well as the purpose of their short, two- to three-page statements specifying the prior expert's opinions they are adopting. Motion at 5. Messrs. Vinella, Schwarcz, and Lundelius are not submitting *any* "new opinions." The only purpose of the short statements the submitted on October 3 was to make perfectly clear to the Division which "opinions" the substitute experts had adopt[ed]." Providing the Division with a short summary of the opinions Respondents' substitute experts are adopting within weeks of Your Honor's ruling and several weeks before the hearing cannot possibly have caused any prejudice to the Division, let alone "serious prejudice." Indeed, it did just the opposite—giving the Division clear notice of the specific opinions being adopted and thereby affording the Division the opportunity to focus their preparation on those specific opinions that they have long known supported Respondents' case.

Respondents have complied in every respect with the September 16 Order. In arguing to the contrary, the Division willfully misreads both the September 16 Order (asserting that it requires substitute experts to mimic, word-for-word, prior expert reports) and the October 3 Statements (claiming that they advance "new opinions" when they do no such thing). Accordingly, the Division's hypertechnical arguments are meritless.

**B. The Division's Motion Contradicts Its Own Prior Positions.**

The Division's position here is inconsistent with the positions Your Honor adopted in denying Respondents' motions to preclude or limit the Division's expert witness testimony—and that the Division itself has relied on in its other submissions. In denying Respondents' motions *in limine* and to strike the Division's proffered expert testimony, Your Honor made clear that the Rules of Evidence do not apply, that the standard for relevance is low, and that this is a bench trial where Your Honor is capable of hearing the evidence and evaluating it at that time. The Division cannot embrace that approach when it suits them and then argue the opposite here. It is notable, in that regard, that the Division cites no rule, case, or other authority for its position.

On August 26, Respondents' moved *in limine* to strike the Division's expert reports, arguing that the Division's experts' reports, and therefore the experts' direct testimony, improperly included, *inter alia*, legal conclusions and irrelevant information. Your Honor denied the motion, because "this proceeding is not a jury trial," "the Federal Rules of Evidence are not applicable in administrative proceedings," and "the Commission's standard of relevance is very low." *Lynn Tilton*, Admin. Proc. Rulings Rel. No. 4118, at 1-2 (September 1, 2016). On August 31, Respondents moved to challenge the Division's experts under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Your Honor denied that motion, too, "for the same reasons set forth in" the September 1 order. *Lynn Tilton*, Admin. Proc. Rulings Rel. No. 4124, at 1 (September 2, 2016). Although those motions were both denied before the Division filed papers in opposition, the Division has taken the same position in its other submissions. *See, e.g.*, Div.'s Mem. of Law in Opp. To Resp'ts' Mot. in Limine to Preclude Testimony and Evidence Regarding the Subjective States of Mind of Zohar Fund Investors, at 2 (Sept. 29, 2016) (advocating a "much broader" standard for relevance, and therefore admissibility, than under the

Federal Rules of Evidence); *see also* Div.'s Mem. of Law in Opp. to Resp'ts' Mot. in Limine to Strike Certain Lay Opinion Testimony, at 2 (Sept. 13, 2016) (same).

The Division, which has repeatedly invoked such "broad" standards, has now decided that an exceedingly narrow standard should apply to Respondents. *See* Motion at 6 (arguing that a substitute expert should "not go[] beyond the four corners of the expert report he is adopting"). But that is no standard at all; what's good for the goose is good for the gander.

The Division knows that this is a case where expert testimony will be important to Respondents' defense. As a result, it is trying to use any conceivable tactic to preclude Respondents from presenting a complete defense. But Respondents have complied in every respect with the September 16 Order. The Division's Motion should therefore be denied.

**CONCLUSION**

For the foregoing reasons, the Division's Motion to Partially Strike Respondent's Statements of Messrs. Lundelius, Vinella, and Schwarcz should be denied.

Dated: New York, New York
October 17, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that I served true and correct copies of 1) Respondents' Opposition to the Division's Motion to Partially Strike Respondents' Statements of Messrs. Lundelius, Vinella and Schwarcz, and 2) Declaration of Goutam U. Jois in Support of Respondents' Opposition to the Division's Motion to Partially Strike Respondents' Statements of Messrs. Lundelius, Vinella and Schwarcz and its exhibits, on this 17th day of October, 2016, in the manner indicated below:

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