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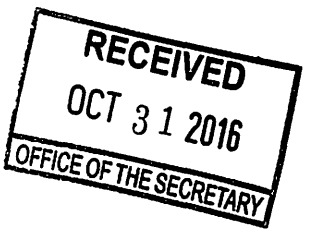

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

NON-PARTY MBIA INSURANCE CORPORATION'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION TO COMPEL MBIA TO PRODUCE DOCUMENTS RESPONSIVE TO RESPONDENTS' SUBPOENA

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Non-party MBIA Insurance Corporation ("MBIA") respectfully submits this memorandum of law in opposition to Respondents' Motion To Compel MBIA To Produce Document Responsive To Respondents' Subpoenas (the "Motion").[1] For the reasons stated below, Respondents' Motion should be denied in its entirety.

PRELIMINARY STATEMENT

In yet another transparent effort to distract the Court's attention from the real issues in this proceeding—which are whether or not Respondents engaged in fraudulent conduct and breaches of fiduciary duty in connection the Zohar Funds—Respondents unjustifiably seek to compel MBIA to produce documents that are wholly unrelated to those issues.

Having spent much of the last year attacking the legitimacy of this proceeding, Respondents intentionally (or at least conveniently) ignore that MBIA, pursuant to a negotiated agreement reached with Respondents, made a production of documents over a year ago in response to the subpoena served by Respondents on MBIA in May 2015. Now, at the eleventh hour, Respondents attempt to renege on their prior agreement with MBIA in a blatant effort to turn the focus away from Respondents and onto MBIA and other non-parties who are not – unlike Patriarch – the subject of this proceeding, as well as the U.S. Securities and Exchange Commission (the "Commission"). Violating their prior agreement as to the scope of discovery from MBIA, Respondents now seek to compel the following documents: (1) communications with the Commission; (2) communications with third party Zohar investors and ratings agencies; (3) communications with Respondents themselves; (4) common interest or joint defense agreements; (5) recordings of conversations with Respondents and (6) Zohar-related documents from former MBIA employee David Crowle. *See* Resp. Br. at 9.

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[1] Respondents' memorandum of law in support of their Motion shall be referred to herein as "Respondents' Brief" or "Resp. Br."

Respondents' sole proffered justification for their Motion is their baseless and paranoid conspiracy theory that MBIA somehow manipulated the Commission into bringing the current enforcement proceeding. This theory is wholly made up, without any credible support. But putting that aside, this theory has absolutely nothing to do with whether Respondents committed fraud or breached their fiduciary duties. Respondents are simply abusing the discovery process of this proceeding to further improper purposes, including harassment of MBIA or to seek tactical advantages in connection with their disputes with MBIA having nothing to do with this proceeding.

In sum, the Motion should be denied because Respondents seek documents that (1) renege on Respondents' prior agreement with MBIA; (2) are irrelevant to this proceeding; (3) are overbroad in scope and the production of which would be burdensome and unreasonable; and (4) are duplicative and cumulative of documents already in Respondents' possession either because Respondents are already a party to the documents requested or because they have already obtained the requested discovery from the Commission. Accordingly, Your Honor should deny Respondents' Motion.

BACKGROUND[2]

This administrative proceeding was initiated by the Commission's Order Instituting Proceedings ("OIP"), dated March 30, 2015. On May 27, 2015, Respondents requested the issuance of a subpoena (the "2015 Subpoena") to MBIA pursuant to which Respondents sought sixteen categories of documents, many of which were objectionable on various grounds,

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[2] Facts in support of this memorandum of law are set forth in the Declaration of Jonathan M. Hoff, dated October 28, 2016 (the "Hoff Decl.") and the exhibits attached thereto, which are referenced herein as "Ex. __."

including because they were overbroad and burdensome for a non-party such as MBIA. *See* Ex. A. The 2015 Subpoena sought, among other documents, the following:

- "All Communications relating to the Zohar Funds, Zohar Notes, or Respondents for custodians Anthony McKiernan and Jonathan Sloan with the exception of e-mail Communications between such custodians on the one hand and Respondents on the other."
- "All Documents relating to conference calls or meetings with Respondents relating to the Zohar Funds."
- "All Communications and all Documents relating to all Communications with the SEC relating to the Zohar Funds and/or Respondents."

Ex. A ¶¶ 13,14, 16. Rather than engage in costly motion practice to quash the 2015 Subpoena, MBIA negotiated with Respondents, and, after engaging in extensive meet and confer discussions, MBIA and Respondents agreed to narrow the scope of the documents that MBIA would produce in discovery. *See* Ex. B (Letter from J. Hoff, dated Aug. 19, 2016). In reliance on the agreement between MBIA and Respondents, MBIA conducted a search for and reviewed documents and electronically stored information collected from thirteen different document custodians and, by July 24, 2015, produced to Respondents over 3,900 pages of documents responsive to the 2015 Subpoena as narrowed by the agreement. *Id.*[3]

After having received MBIA's document production in response to the 2015 Subpoena, as modified by agreement, Respondents did not object and did not communicate with MBIA regarding discovery in this proceeding for nearly a year. Then, on August 9, 2016, Respondents unreasonably demanded that MBIA confirm within days that MBIA had completed its

[3] In the past week, Respondents informed MBIA that they identified certain documents that MBIA had produced to Respondents and their affiliates in another litigation, but which also appeared to have been covered by the parties' agreement with respect to the 2015 Subpoena. After Respondents identified these documents, MBIA compared the production it had made in the other litigation with the production it made in response to the 2015 Subpoena and identified additional documents that should have been produced and then produced them to Respondents. As a result of this exercise, MBIA has produced 40 documents that had not been produced previously in response to the 2015 Subpoena, as modified by agreement. Hoff Decl. ¶ 19.

production in response to the 2015 Subpoena, and demanded that MBIA update its document collection and search on a continuing basis. *See* Ex. C. On August 19, 2016, MBIA provided Respondents a detailed summary of the parties' prior agreement as to each category of documents sought by Respondents in the 2015 Subpoena and the status of MBIA's document production with respect to each such category, and advised Respondents that MBIA was under no continuing discovery obligation to produce documents that post-dated the 2015 Subpoena. *See* Ex. B.

MBIA also advised Respondents that their new request for documents created after the OIP was filed on March 30, 2015 was inappropriate and directly contrary to the position Respondents previously had taken in this very proceeding. *Id.* Specifically, Respondents moved to quash a subpoena directed at MBIA at the request of the Commission on the grounds that documents created after the OIP was filed were "outside the scope of the OIP," including because they were "outside its timeframe." *Id.* at 4; *see also* Ex. D at 1, 3-5 (Memorandum of Law in Support of Respondents' Motion to Quash the Subpoena Issued by the Division to MBIA Insurance Company [*sic*]). Respondents did not respond to MBIA's August 19, 2016 letter and made no further efforts to communicate with MBIA regarding the 2015 Subpoena or its document production in response thereto.

Instead, on September 16, 2016—nearly one month following MBIA's August 19 letter and only five weeks prior to the commencement of the trial in this proceeding—Respondents requested that the Court issue two new substantially similar subpoenas directed to MBIA and to MBIA's Chief Financial Officer, Anthony McKiernan (the "2016 Subpoenas"). Exs. E, F. The 2016 Subpoenas requested six broad categories of documents relating to a time period of more than eight years—January 1, 2008 through the date of production. *Id.* The 2016 Subpoenas also purported to require MBIA to collect, search, review and produce documents in response to these

new Subpoenas in less than 5 days—on September 21, 2016 at 10:00 a.m. During a telephone conversation with Respondents' counsel on September 21, 2016, counsel for MBIA agreed to accept service of the Subpoenas as of that date. Hoff Decl. ¶ 17.

On September 28, 2016, MBIA's counsel and Respondents' counsel engaged in a meet and confer call regarding the scope of the 2016 Subpoenas and the nature of the documents sought by Respondents. Hoff Decl. ¶ 18. During the meet and confer call, MBIA communicated its objections to the 2016 Subpoenas as being overbroad, duplicative of the prior 2015 Subpoena, inconsistent with the parties' agreement with respect to the 2015 Subpoena and cumulative of documents already in Respondents' possession or which Respondents have sought from others, particularly the Commission. *Id.* Respondents failed to articulate how the requests in the 2016 Subpoenas differed from the requests in the 2015 Subpoena or how the requests in the 2016 Subpoenas did not seek documents cumulative of documents that Respondents have obtained from the Commission. *Id.* Respondents also did not explain the relevance of the documents sought in 2016 Subpoenas to any claim or defense in this proceeding. *Id.* Nor have Respondents justified their refusal to honor the parties' prior agreement with respect to the scope of discovery from MBIA. *Id.* Accordingly, MBIA stated its position that the duplicative and overbroad discovery sought in the 2016 Subpoenas was inappropriate. *Id.*

Based on its acceptance of service of the 2016 Subpoenas as of September 21, 2016, counsel for MBIA determined that the Commission's Rules of Practice provided that any motion to quash would be due on October 6, 2016. *See* 17 C.F.R. § 201.232(c) (a motion to quash is timely within 15 days after service of a subpoena); Hoff Decl. ¶ 17. However, on October 3, 2016, three days prior to the deadline for MBIA to move to quash the Subpoenas, Respondents notified MBIA that they had modified their document requests. Ex. G; *see also* Resp. Br. at 9. Respondents further stated in their October 3 email that unless MBIA agreed to collect, search,

review and produce documents responsive to Respondents' modified requests within less than 48 hours, Respondents would file a motion to compel. Ex. G. MBIA did not agree to Respondents' unreasonable and burdensome demands.

On October 5, 2016—before the date by which MBIA would have filed a motion to quash—Respondents filed their instant Motion and served copies of their moving papers on the Court, the Office of the Secretary of the Commission, and Dugan Bliss, of the Commission's Division of Enforcement (the "Division"). Ex. H. As set forth in MBIA's letter to the Court, dated October 20, 2016, Respondents did not ask counsel for MBIA to accept service of Respondents' Motion on behalf of MBIA by email (or any other method). Ex. I. Nor did Respondents provide MBIA with copies of Respondents' Motion by personal delivery, U.S. mail, commercial courier, express mail or facsimile as required by Rule 150 of the Commission's Rules of Practice. *Id.* MBIA now responds to Respondents' Motion in light of the reasonable time provided by the Court in its Order dated October 21, 2016.

ARGUMENT

Respondents' right to obtain discovery in this proceeding is limited. In contrast to the Federal Rules of Civil Procedure, "[t]he Commission's Rules of Practice do not allow large scale and time consuming pre-trial discovery." *Raymond James Fin. Servs., Inc.*, File No. 3-11692, 2004 SEC LEXIS 3161, at *23 (Dec. 23, 2004). Even more stringent limits apply when a party to a Commission proceeding seeks documents from a non-party. In particular, a party's right to discovery is balanced against both the burden imposed on the non-party as well as the expense of compliance by the non-party. *See Morgan Asset Mgmt., Inc.*, Exch. Act. Rel. No. 655, 2010 SEC LEXIS 2200, at *2 (ALJ July 6, 2010). Parties must "take reasonable steps to avoid imposing undue burden or expense when they subpoena non-parties." *Id.* at *2-3. Respondents are "not

entitled to conduct a fishing expedition . . . in an effort to discover something that might assist [them] in [their] defense." *Dan Adlai Druz*, Exch. Act Rel. No. 36306, 1995 WL 579536, at *9 (Sept. 29, 1995) (citing *John Gordon Simek*, Exch. Act Rel. No. 27528, 1989 WL 259962), *aff'd* 103 F.3d 112 (TABLE) (3d Cir. 1996)).

Here, Respondents seek an order to compel MBIA to produce 6 categories of documents:

(a) All Documents reflecting any Communications, including but not limited to interviews, telephone calls and other meetings or discussions, with the SEC relating to the SEC's investigation of the Zohar Funds, Patriarch, and/or Respondents prior to and subsequent to the Order Instituting Proceedings. This would include communications between January 3, 2011 (the first day we believe the Division contacted MBIA) and the present between You, on the one hand, and any member of the Division of Enforcement or any other employee, agents or representative of the SEC (including, for example, any communications with Charles River & Associates), on the other hand, relating to the investigation or this proceeding.

(b) Any and all communications concerning or relating to the Division of Enforcement's provision of documents to you on or about December 18, 2014 and January 30, 2014, or any other documents provided to you by the Division in connection with the investigation or this proceeding, including but not limited to internal communication, and communications with others on the Division's list, the Trustee or the subsequent collateral manager.

(c) All communications between January 3, 2011 and the present with those entities listed in Request No. 2 concerning or relating to the effect of the SEC investigation or the Administrative Proceeding on a) Your rights and responsibilities as Credit Enhancer or the Controlling Party for Zohar I and Zohar II, b) any potential restructuring or extension of maturity of Zohar I and Zohar II, and c) the sale of any Zohar I or Zohar II obligors or Collateral.

(d) Any and all recordings of communications between You and Ms. Tilton or any other employee or representative of Respondents

(e) Any common interest or joint defense agreement with Barclays, Nord, Rabobank, Varde, SEI, and/or any other investors in the Zohar Funds related in any way to Respondents or the Zohar Funds.

(f) All Communications and Documents related to the Zohar Funds, Zohar Notes, Patriarch, or Respondents for custodian David Crowle.

Resp. Br. at 9, 13; *see also* Hoff Decl, Ex. G. Respondents apparently have abandoned the remaining overbroad and burdensome document requests set forth in their 2015 and 2016 Subpoenas.

Although difficult to discern from the three-page argument section of their Brief, Respondents essentially make three arguments in support of their Motion. Apparently, Respondents contend that (1) MBIA did not move to quash the Subpoenas and, thus, should not be permitted to assert that discovery here would be unduly burdensome, (2) the documents they seek are relevant to the Respondents' assertion of improper conduct by the Division and an alleged conspiracy between the Division and MBIA and (3) the documents are necessary for Respondents' cross-examination of MBIA's Chief Financial Officer, Anthony McKiernan—assuming he even testifies—because they relate to MBIA's prior dealings with the Commission and other non-party Zohar noteholders. Respondents' first argument is a nonstarter. In light of the Motion, which was filed before MBIA would have had to file a motion to quash, it was unnecessary for MBIA to move to quash. And because Respondents deliberately failed to properly serve MBIA with their Motion, Respondents should not benefit from their gamesmanship at the expense of MBIA, a non-party. Respondents' arguments are otherwise without merit and should be rejected.

I. Respondents' Improper Attempt To Renegotiate The Scope Of Discovery Is Unduly Burdensome And Inequitable

As set forth above, a party's right to discovery is strictly limited by the costs and burdens imposed by discovery on the non-party. *See supra* at 6 (citing *Raymond James Fin. Servs.*, 2004 SEC LEXIS 3161, at *10; *Morgan Asset Mgmt.*, 2010 SEC LEXIS 2200, at *2-3). It is also well-established that a court should deny motions to compel discovery where the movant has delayed, without explanation, in seeking the information. *Eng-Hatcher v. Sprint Nextel Corp.*,

No. 07 CIV. 7350, 2008 WL 4104015, at *5 (S.D.N.Y. Aug. 28, 2008) (motion to compel denied where movant exhibited "lack of diligence . . . by her failure to object specifically to the defendants' response to her document request"); *see also Vaigasi v. Solow Mgmt. Corp.*, 11 Civ. 5088, 2016 WL 616386, at *21 (S.D.N.Y. Feb. 16, 2016) (motion to compel denied in entirety and movants sanctioned where volume of requests and delay indicated purpose of discovery was to harassment and burden respondent through discovery). Indeed, "[t]o allow [a party] to nearly double the scope of discovery at this late date given the burden . . . to produce the required information would be unduly burdensome and would serve no purpose other than to prolong discovery." *Mayes v. Local 106, Int'l Union of Operating Eng'rs*, No. 86-CV-41, 1992 WL 335964, at *6 (N.D.N.Y. Nov. 12, 1992) (granting protective order denying discovery requests).

Respondents' request to compel MBIA to engage in expensive and unduly burdensome document discovery on an unrealistic, highly expedited timeframe is completely unjustified. Many, if not all, of the documents at issue in Respondents' Motion were subject to negotiations between the parties following Respondents' 2015 Subpoena, which resulted in an agreement that either narrowed the scope of MBIA's production or Respondents' abandonment of the document requests. MBIA relied on the parties' agreement when it undertook its collection, review and production of documents. In reneging on their agreement, Respondents now seek to require MBIA to start over again with that process, which would require the application of search terms to electronically stored information and the review of documents identified by those search terms to ascertain what documents are responsive and what documents should be withheld on the basis of privilege. This would be a time consuming and expensive process. As such, Respondents' burdensome, eleventh-hour request is needless, untimely and patently unfair.

Among the documents Respondents seek to compel MBIA to produce are (a) communications with the Commission relating to its Zohar investigation; (b) communications

concerning the Commission's provision of documents relating to its Zohar investigation; (c) internal and third-party communications, including with Zohar investors and rating agencies, concerning the effect of the Commission's Zohar investigation on MBIA's role as Credit Enhancer for Zohar I and Zohar II and on any restructuring of Zohar II and II or on the sale of Zohar I or II Collateral; (d) recordings, if any, of communications between MBIA and any of the Respondents; and (e) all documents related to the Zohar Funds or Respondents for custodian David Crowle. Resp. Br. at 9; Ex. G. Each of these categories of documents, however, is covered by Request Nos. 13, 14 and 16 in the 2015 Subpoena and the parties' agreement relating thereto. Exs. A, B. As set forth above, Respondents' 2015 Subpoena expressly sought all documents relating to communications with the Commission as well as all documents relating to calls or meetings with Respondents. *See supra* at 3. Further, Request No. 13 of the 2015 Subpoena sought all communications relating to the Zohar Funds or Respondents from Anthony McKiernan and Jonathan Sloan. Ex. A.

The parties agreed, however, that MBIA would only be required to produce a narrow subset of documents covered by these requests. Specifically, with respect to Request Nos. 13 and 14 of the 2015 Subpoena, the parties agreed that MBIA would review and produce documents located after applying mutually agreed-upon search terms to documents collected from thirteen document custodians, including Mr. McKiernan, but excluding David Crowle. Ex. B at 2. Significantly, the parties agreed to limit MBIA's production to these document custodians despite Respondents' knowledge that Mr. Crowle—who will not be a witness at this trial—had testified in connection with the Commission's investigation. *Id.* With respect to Request No. 16, the parties agreed that Respondents would provide MBIA with dates that MBIA would use to search for responsive emails. *Id.* at 3. Respondents never provided MBIA with these dates. *Id.*

Consistent with the parties' agreement and MBIA's discovery obligations, MBIA produced over 3,900 pages of documents to Respondents. Indeed, Respondents concede that MBIA has already produced many of the documents Respondents now seek. Resp. Br. at 9 n. 4. When it made that document production, MBIA relied on Respondents honoring their agreement with MBIA regarding the scope of discovery from MBIA. Respondents' request that the Court disregard the parties' prior agreement regarding the same documents that Respondents moved to compel only 19 *days* before the scheduled trial would commence is unduly burdensome and unfair, particularly given Respondents' own dilatory practice. In that regard, Respondents spent more than a year unsuccessfully challenging the legitimacy and authority of the Court while making no efforts to engage MBIA or address the document productions MBIA made pursuant to the parties' agreement. Then, rather than follow up with MBIA regarding its August 19, 2016 letter, Respondents elected to wait two weeks to have two new 2016 Subpoenas issued with many of the same deficiencies that the parties spent weeks addressing through extensive negotiations and meet and confers in connection with the 2015 Subpoena. Respondents compounded their delay by waiting until October 3—less than two weeks prior to the commencement of trial in this proceeding—before identifying for MBIA the six categories of documents they now claim are essential to their case and that Respondents request the Court compel MBIA to produce.

This course of events, along with Respondents' inexplicable failure to serve MBIA with their Motion, completely undermines Respondents' claims of urgency and necessity for the documents sought. Respondents have had 19 *months* since the OIP to seek reasonable discovery from MBIA, and moved to compel with only 19 *days* remaining. Their abusive discovery tactics—particularly in pursuit of a fanciful conspiracy theory—should not be rewarded.

II. Respondents Seek Documents That Are Irrelevant To This Proceeding And Duplicative Of Documents Already In Their Possession Or That They Have Sought From Other Parties

It is the movant's burden to demonstrate that the documents sought on a motion to compel are relevant to the claims and defenses at issue in the case. *See J. Kenneth Alderman*, Exch. Act. Rel. No. 744, 2013 WL 10967607, at *3 (ALJ Feb. 1, 2013) (motion to compel denied because respondents "failed to sufficiently explain why any other document . . . would have any relevance"); *see also Perkins v. Chelsea Piers Mgmt.*, 11 CIV. 8998, 2012 WL 4832814, at *1 (S.D.N.Y. Oct. 10, 2012) (party seeking to compel discovery bears the burden of establishing relevance). It is well established in Administrative Proceedings involving charges and conduct similar to those here that a non-party's communications with Commission investigators are not relevant to a respondent's defense. *See Druz*, 1995 WL 579536, at *9 (respondent's requested discovery of testimony and communications between nonparty and investigators was properly denied because respondent "was entitled only to items "'material to his defense'"); *Simek*, 1989 WL 259962, at *8 (same). Discovery of such investigative material is particularly inappropriate where, like here, a respondent's defense is based on "a myriad of accusations of . . . collusion" between Commission investigators and the non-party. *Druz*, 1995 WL 579536, at *9 (rejecting "accusations of impropriety" where respondent's misconduct at issue was supported by preponderance of evidence).

Courts also have made clear that parties are not entitled to require the production of materials that are already available or in the possession of the requesting party. *See Keith M Roberts*, Admin. Proceeding File No. 3-11471 at 4 (Aug. 5, 2004), available at http://www.sec.gov/alj/aljorders/2004/3-11471.pdf (quashing subpoena because "Respondent . . . has had the Division's investigative file that contains subpoenaed materials available for some time"); *see also Dennis J. Malouf*, Exch. Act Rel. No. 1827, 2014 SEC LEXIS 3493, at *12 (ALJ

Sept. 22, 2014) (subpoena recipient need not "produce documents it knows to have been produced to either the Commission or [Respondent] during" a state court proceeding).

Here, Respondents contend that the documents sought are relevant to the "preparation of their defense" (Resp. Br. at 11), however, Respondents provide no support for their conclusory assertion of relevance for any of the categories of documents they seek. The only categories of documents for which Respondents even attempt to demonstrate a basis for relevance are the communications between MBIA and the Commission and communications between MBIA and other non-parties regarding the Commission's investigation. With these categories, as with the others, Respondents fail to meet their burden to demonstrate that the discovery sought is relevant and appropriate, particularly given the compliance burden and costs imposed on MBIA.

First, with respect to communications between MBIA and the Commission and communications relating to the Commission's provision of documents to MBIA, Respondents appear to contend that such documents are relevant because MBIA somehow improperly influenced the Commission's decision to charge Ms. Tilton and her affiliates with fraud and breach of fiduciary duties. Resp. Br. at 11. Respondents' theory is preposterous. However, even if the Court intends to entertain Respondents' baseless conspiracy theories, the Commission's motives for bringing an enforcement proceeding have no bearing on whether Respondents did or did not violate the securities laws as alleged in the OIP. Indeed, to the extent that the handwritten SEC notes Respondents cite can be understood at all,[4] they merely

[4] Having no facts to support their theory of collusion between MBIA and the Commission, Respondents create them from whole cloth through mischaracterizations of handwritten notes and emails produced by the Commission in this proceeding. *See* Exs. 9, 11 to the Motion. To the contrary, however, the handwritten notes by an unidentified Commission employee are unintelligible to anyone but the author. *Id.* They do not communicate complete thoughts, let alone articulate any analysis or conclusions evidencing any impact by MBIA on the Commission's investigation. *See id.* To the extent that any of the handwritten text can be deciphered or understood, Respondents selectively quote individual words and short phrases without any context or explanation of how such language was used by the unidentified Commission employee in the underlying document. *See* Resp. Br. at 3-5. Rather, Plaintiffs reshuffle

demonstrate that the Commission contacted MBIA and that MBIA cooperated with the regulator as a good corporate citizen is expected to do. This is entirely appropriate, and it is unsurprising that the Commission either would interview or otherwise communicate with MBIA to obtain facts and gain an understanding of the Zohar Funds from MBIA as a logical source of information.

Respondents' unsupported allegations of collusion between MBIA and the Commission do not support the eleventh-hour, burdensome discovery sought here for the additional reason that Respondents already possess the documents now sought from MBIA. The very documents cited by Respondents in connection with this Motion demonstrate that the Commission produced to Respondents documents duplicative or cumulative of those they now seek from MBIA. Resp. Br. at 6-8. Thus, it is unnecessary and inappropriate to require MBIA to incur the costs and burden of producing materials Respondents have already requested through multiple subpoenas and obtained from the Commission, which is, of course, a party to this proceeding. Ex. J (communications between MBIA and the Commission already produced to Respondents by the Commission); Ex. K (Respondents' subpoenas on non-parties).

Second, Respondents' assertion that communications between MBIA and other Zohar investors or ratings agencies regarding the Commission's investigation are "essential" because Mr. McKiernan "may have a financial interest or seek to advance MBIA's litigation objectives through testifying in support of the Division's claims" is a non-sequitur. Resp. Br. at 11-12. Respondents fail to establish any link between the documents they seek and Respondents' baseless speculation regarding MBIA's interests, and such documents certainly are not necessary or essential for cross-examination which is limited to the scope of Mr. McKiernan's putative

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those words and sentence fragments interspersed with their own unsupported commentary and theories regarding MBIA's and the Commission's actions. *Id.*

testimony—*i.e.*, MBIA's insurance of the Zohar I and II notes and MBIA's relationship with Patriarch—even assuming that Mr. McKiernan actually testifies. Ex. 15 at 3 (Commission list of witness who may or are expected to testify). Respondents' Motion reveals they are not seeking documents relating to any legitimate defense in this proceeding, but rather to gain an advantage with respect to separate legal proceedings between Respondents and MBIA. *See* Resp. Br. at 9, 11-12. (seeking discovery relating to "any potential restructuring or extension of maturity of Zohar I and Zohar II, and . . . the sale of any Zohar I or Zohar II obligors or Collateral").

Third, Respondents' request for recordings of communications between MBIA and Ms. Tilton and Respondents' employees—assuming such recordings even exist—are likewise not discoverable. Respondents make no attempt to establish how communications between MBIA and Respondents themselves tie into the allegations in the OIP or any of Respondents' defenses. Separate and apart from any recordings (to the extent they even exist), Respondents also already have in their possession communications they had with MBIA, either from their own files or from MBIA's production in response to the 2015 Subpoena.

Fourth, Respondents fail to establish that any common interest or joint defense agreements between MBIA and other Zohar investors are relevant to the claims and defenses in this proceeding. There is no dispute that Respondents and their affiliates are involved in multiple litigations or disputes with MBIA and others. Whether or not MBIA has entered into joint defense or common interest agreements with other entities is not relevant to this proceeding, that is to say, whether Respondents engaged in fraudulent conduct or breached their fiduciary duties. Further, such agreements themselves constitute information protected from disclosure under the attorney-client privilege, work product doctrine and—as Respondents concede—the common interest doctrine, which is a doctrine that protects privileged information and work product concerning "pending or anticipated" litigation. *Ambac Assur. Corp. v. Countrywide Home*

Loans, Inc., 57 N.E.3d 30, 32 (N.Y. 2016). Revealing to Respondents any such agreements that may exist is intrusive and serves no purpose other than to allow Respondents to leverage discovery in this proceeding to gain advantages in other litigation with MBIA and others.

Fifth, Respondents have similarly made no effort to demonstrate how documents for the custodian David Crowle relate to the claims or defenses in this proceeding. Mr. Crowle will not be a witness in this trial. Indeed, Respondents do not even identify Mr. Crowle's position at MBIA, his relationship with any of the Respondents or what they expect to find in documents which Respondents concede may not even exist. Resp. Br. at 9 n. 4. Further, MBIA cannot be expected to collect, search and review "all Communications and Documents" for Mr. Crowle—who has not worked at MBIA since approximately 2009—on a reasonable time frame and without incurring unreasonable expense.[5]

As demonstrated above, the documents sought by Respondents are not relevant to the claims or defenses in this proceeding, are cumulative and duplicative of documents already in Respondents' possession, and the production of which would be oppressive, costly and unduly burdensome. Accordingly, each of Respondents' requests should be rejected.

CONCLUSION

For the reasons stated, MBIA Insurance Corporation respectfully requests that Respondents' motion to compel be denied.

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[5] Respondents' contention that compelling MBIA to produce the documents they seek because MBIA recently engaged in expedited discovery in separate litigation before the Honorable Jed S. Rakoff misses the mark. Among other things, Respondents fail to mention that the expedited discovery that Respondents describe was limited to only two of twenty-four document requests issued by Respondents' affiliates in that action, both of which were limited to 10 month time frames concerning discrete topics—much different from the more than ten year period at issue under Respondents' unreasonable document requests. Ex. M (Sept. 20, 2016 Hr'g Tr. at 29:11-17, *Patriarch Partners XV, LLC v. U.S. Bank Nat'l Ass'n*, No. 16-Civ.-7128 (JSR)). Even with these restrictions on the scope of expedited discovery, Judge Rakoff also allowed MBIA 12 days to comply, noting that the burden of preparing a production is "another thing if they've got to do it in a week or even less." *Id.* at 13:10-19, 16:23-24.

Dated: New York, New York
October 28, 2016

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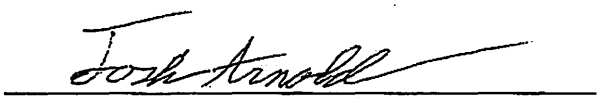
CERTIFICATE OF COMPLIANCE

I, Joshua P. Arnold, hereby certify that, pursuant to Rule 154(c) of the Rules of Practice of the Securities and Exchange Commission, this brief complies with the length limitation of Rule 154(c) because it contains 5,468 words, excluding the parts of the brief exempted by Rule 154(c).

Dated: New York, New York
October 28, 2016



Joshua P. Arnold