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

REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO COMPEL MBIA TO PRODUCE DOCUMENTS RESPONSIVE TO RESPONDENTS' SUBPOENAS

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Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, "Respondents"), respectfully submit this reply brief in support of their motion to compel MBIA Insurance Corporation ("MBIA") to produce documents requested by the subpoena issued September 16, 2016 (the "2016 Subpoena"), pursuant to Rule 111 of the SEC Rules of Practice, 17 C.F.R. § 201.100 et seq. (the "Rules"), forthwith.[1]

INTRODUCTION

MBIA's opposition to enforcement of Respondents' September 16 subpoena (the "2016 Subpoena") is full of rhetoric and misrepresentation, but at bottom, MBIA cannot obscure its own misconduct and obligation to produce responsive documents revealing that misconduct.

The indisputable record here shows that MBIA not only has refused to comply with the 2016 Subpoena, about which it never complained to Your Honor until the eve of trial, but that MBIA also has failed to honor the very agreement narrowing Respondents' initial subpoena (the "2015 Subpoena") that MBIA now accuses Respondents of "reneging." Opp. at 9. Indeed, barely one week ago, Respondents discovered that, in another litigation involving these same parties under a protective order that shields them from public view, MBIA produced dozens of documents never produced in this case that reflect communications with the Division's "may call" witness, Anthony McKiernan, [redacted]

[1] In their initial motion, Respondents also requested that the Court preclude the Division from offering evidence or testimony at the hearing that MBIA was a victim or otherwise suffered financial losses as a result of its relationship with Respondents, or in the alternative, to order the Commission's General Litigation Section to immediately commence a proceeding in the United States District Court for the Southern District of New York to enforce the 2016 subpoena. Br. at 1. At the final pre-hearing conference, Your Honor denied the motion to preclude. *See* Reply Declaration of Monica Loseman, Ex. 1 at 40:16-41:3. Moreover, given MBIA's needless extension of this motion practice, any proceedings commenced by the General Litigation Section likely could not be resolved prior to the close of the record in this proceeding.

[redacted] Ex. 2.[2] Those damning documents were directly responsive to the 2015 Subpoena yet inexplicably not timely produced then. Even more significantly here, they confirm the unseemly deal that was struck between MBIA and Division staff through which, in exchange for MBIA's cooperation, the Division delivered to MBIA Respondents' confidential information for MBIA's use in civil litigation against Respondents. Indeed, several of the documents highlight the extent of MBIA's mutually beneficial, illicit partnership with the Division, which fueled the Division's charges against Ms. Tilton, while enabling MBIA to effectuate its takeover of the Zohar Funds. Thus, the "conspiracy theory" MBIA derides in its opposition papers is now proven out of the very documents MBIA's counsel improperly withheld from production in conduct so outrageous and contumacious that it would be sanctionable in any federal court. Opp. at 2, 11.

Other such documents improperly withheld by MBIA until now reflect Ms. Tilton's continued, good-faith efforts to engage Mr. McKiernan in restructuring efforts, including by offering to resign as collateral manager and from all other administrative posts relating to the Zohar Funds, and Mr. McKiernan's behind-the-scenes machinations to derail Ms. Tilton's genuine, good-faith restructuring efforts that would have made all noteholders whole and thereby undermined the SEC's investigation. All are relevant, if not pivotal, to Respondents' defense. And they undoubtedly portend a treasure trove to come of additional documents responsive to Respondents' targeted 2016 Subpoena.

On three separate occasions last week (not the single exchange Mr. Hoff recounts in his declaration), Respondents confronted MBIA's long-time outside counsel, Cadwalader, Wickersham & Taft LLP ("Cadwalader"), led by Mr. Hoff personally, about the existence of

[2] Citations to exhibits to Ms. Loseman's declaration are cited herein as "Ex. __." Citations to the moving Declaration of Lisa H. Rubin are cited as "Rubin Decl., Ex. __."

these documents, demanding their production in this case, as well as an explanation for why they had not been timely produced previously. Lacking any possible justification for withholding them, Cadwalader and Mr. Hoff—the same lawyer who suggested to Your Honor that his firm might not be counsel of record for MBIA in this matter, despite sitting in the courtroom most days last week to observe the hearing for MBIA, having negotiated the prior agreement on the 2015 Subpoena document production, and having made MBIA's productions in both cases—surrendered the documents, with Bates numbers appropriate for this action, without any explanation for their shocking dereliction in having failed to do so before. *See* Exs. 3, 4, & 5.

Under all of these circumstances, Your Honor should not credit one wit MBIA's belated opposition, accompanied, as it is, by a torrent of unseemly and unfounded smear tactics. Your Honor should grant Respondents' motion to compel forthwith on the basis of MBIA's counsel's misconduct alone and send a strong message that this Court will not tolerate such transparent procedural gamesmanship.

Even if MBIA's discovery dereliction and distortions of the record were not enough, Your Honor should grant Respondents' motion to compel for the following additional reasons.

First, MBIA opposes the motion because it would supposedly force MBIA to produce documents on an expedited timeframe. But any time pressures here are solely of MBIA's own making. Respondents first contacted MBIA to produce additional documents under the 2015 Subpoena nearly three months ago, on August 9, 2016. Only after MBIA refused to produce any additional documents, even with respect to categories of documents it conceded, in writing, were open issues following the 10-month-long stay of this case, and insisted that certain of Respondents' requests were outside that prior subpoena did Respondents request the 2016 Subpoena, which was served on September 16. At every point since then, MBIA has dragged its

feet, hoping to run out the clock on Respondents and fly under Your Honor's radar while eagerly communicating with the Division about the discovery efforts at issue in this motion. And MBIA alone bears the blame for any time crunch it faces now, as the hearing is well underway and the Division continues to toy with the idea of calling Mr. McKiernan to testify.

Second, the notion that Respondents are attempting to gain a tactical advantage in other litigation is meritless—and ludicrous. There could be no more important litigation to Respondents than this one, in which Ms. Tilton faces debarment and a huge potential disgorgement exceeding $200 million. Respondents' counsel has abided by all applicable agreements with MBIA; indeed, the undersigned were unable to uncover MBIA's discovery misconduct sooner precisely because they (and their client) obeyed a confidentiality order in another matter. There is no evidence that Respondents or any of their lawyers have breached or would breach any confidentiality agreement or protective order in place in this or any other case. MBIA's counsel shows its desperation in suggesting any such thing.

Third, Respondents have whittled down their document requests in the 2016 Subpoena—and what remains is both reasonable and relevant. In light of the evidence presented both through briefing and at trial, MBIA's communications with the SEC and any of its experts between 2011 and the present—some of which the SEC has itself produced pursuant to subpoenas issued this summer—are unquestionably critical, if not central, to Respondents' defense. So too are Respondents entitled—whether or not Mr. McKiernan is ultimately called as a Division witness—to documents relating to the SEC's improper provision of documents to MBIA for its use in litigation, MBIA's communications and/or common interest arrangements with other Zohar noteholders, MBIA's internal and external communications about the various restructuring proposals put forward by Ms. Tilton and its own plans not simply to recoup its

investment in the Zohar notes but to reap for itself a windfall, and MBIA's recordings of any communications with Ms. Tilton. *See* Br. at 9.

Finally, MBIA's disrespect of Your Honor—especially considering how much it has gained through the SEC's administrative process—is shocking. MBIA has not hesitated to produce documents on an expedited timeframe when a federal judge demands it, yet it has flagrantly ignored a subpoena duly issued by Your Honor—and without any objection from MBIA.

Your Honor should see through MBIA's gamesmanship and smear tactics, which are a transparent attempt to distract from what is really at issue here: MBIA's uninterrupted, ethically-challenged efforts to ensure the Division prevails to advance its own pecuniary interests. MBIA—not Respondents—is treating this proceeding like its personal playground, engaging in a series of unrelenting and unmitigated games that should not be tolerated. Accordingly, as we are now entering week two of this three-week trial, Your Honor should compel MBIA forthwith to produce documents responsive to its narrowed requests in the 2016 Subpoena, as reflected in Respondents' moving brief. *Id.*

ARGUMENT

I. MBIA'S CONCEALMENT OF RESPONSIVE DOCUMENTS RAISES SERIOUS QUESTIONS ABOUT ITS OPPOSITION TO THIS MOTION.

MBIA spills considerable ink in its opposition brief about Respondents' purported "attempt to renege on their prior agreement with MBIA." Opp. at 1; *see also, e.g., id.* at 2, 5, 9, 11. Yet even assuming MBIA's only evidence of that agreement—a self-serving August 19, 2016 letter (the "August 19 Letter") from Mr. Hoff—accurately recites its terms, MBIA mischaracterizes the agreement and minimizes its serious violation thereof. *See* Rubin Decl., Ex. 6.

As an initial matter, the August 19 Letter does not, as MBIA claims, recount an agreement "as to the scope of discovery from MBIA." Opp. at 1. At best, it reflects the end product of the parties' "extensive meet and confer discussions" about the sixteen requests in Respondents' 2015 Subpoena. Opp. at 3. But it does not contain any commitment by Respondents not to seek further discovery, especially where, as here, those requests are premised on later developments in the case. For example, at the time of the parties' negotiations, David Crowle had not yet been identified as a witness for the Division, as he was on both August 17, 2015 *and* August 22, 2016. *See* Ex. 6 & Rubin Decl., Ex. 20.

More fundamentally, Respondents do not dispute that they agreed to narrow Request No. 13 of the Prior Subpoena—which called, *inter alia*, for all Mr. McKiernan's communications "relating to the Zohar Funds, Zohar Notes, or Respondents" excluding communications with Respondents themselves—both in terms of the applicable time frame and certain search terms. Rubin Dec., Ex. 4; *see also id.*, Ex. 6 at 2. Included within those search terms are any combination of the terms "Zohar" or "Patriarch," on the one hand, and "Lynn," "Tilton," "notes," "meeting," and "interest," on the other. Rubin Decl., Ex. 6 at Attachment A (listing search parameters). Yet the events of the last week show that MBIA is the only one to have violated that agreement.

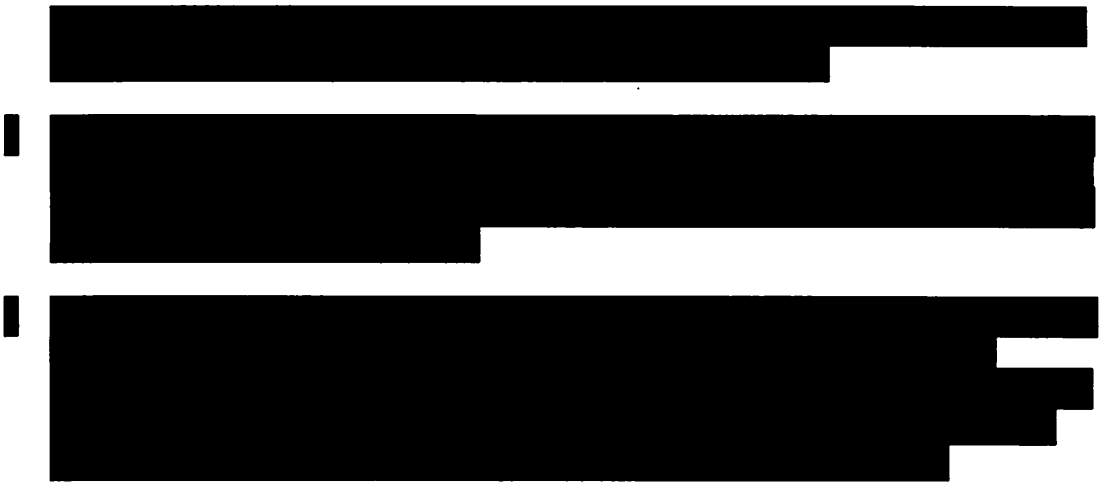
Specifically, on September 20, 2016, Gibson Dunn entered appearances in the Zohar I bankruptcy matter to oppose a recent motion to unseal all confidential materials, including portfolio companies' non-public and proprietary financial information. *See In re Zohar CDO 2003-1, LLC*, 15-23682-rdd (Bankr. S.D.N.Y. 2017), Dkt. Nos. 68-72. Thereafter, Respondents began their rolling review of MBIA's production in that case, and discovered e-mails and other documents that fit squarely within the narrowed criteria for Request No. 13, as set forth in the

August 19 Letter. On each of October 24, 2016, October 26, 2016, and October 27, 2016, Respondents' counsel then e-mailed Mr. Hoff and identified these documents for MBIA's counsel, noted that they were indisputably responsive to the 2015 Subpoena, as narrowed by the parties' agreement, and pledged to seek judicial intervention if MBIA did not produce the documents for use in this matter within hours. *See* Exs. 3, 4, & 5. In each instance, MBIA folded.

At first, faced with a single unproduced e-mail, MBIA's counsel claimed it was "inadvertently omitted from MBIA's production in response to your subpoena in the SEC proceeding." *See* Ex. 3. Yet as the universe of inexplicably withheld documents identified in Respondents' e-mails grew, MBIA offered no excuse. *See* Exs. 4 & 5. Indeed, recognizing the seriousness of its violation, on October 27, MBIA undertook its own search of MBIA's document production in the bankruptcy case "to identify documents pursuant to the agreement reached between MBIA and Patriarch in connection with the May 2015 Subpoena in the SEC Administrative Proceeding" and even requested that Respondents inform MBIA if they believe there are "additional documents from MBIA's Bankruptcy production that are covered by the parties' agreement." Ex. 5.

The dozens of documents produced by MBIA are hardly ancillary to this case. Rather, they include several e-mails critical to Respondents' cross-examination of Mr. McKiernan, whose status as a witness remains in play, as well as to Respondents' defense, including 2015 e-mails in which:

- [redacted]



These documents showcase MBIA's ongoing alliance with Division staff, a shady deal through which MBIA has provided constant support to the Division in pursuit of Ms. Tilton in exchange for the Division's material (and inappropriate) aid to MBIA in its bid to take over the Zohar I and II Funds, [redacted] *Id.* They also are central to Respondents' defense that as Collateral Manager for the Zohar Funds, each of the Patriarch entities and Ms. Tilton consistently operated in good faith and with the goal of maximizing value for all noteholders. Most fundamentally, however, they reveal that MBIA is not telling Your Honor the whole story in implying, through its opposition, that it produced all documents "responsive to the 2015 Subpoena, as narrowed by the agreement." Opp. at 3. Indeed, Respondents' discovery of the documents MBIA initially withheld from production not only raises serious questions about MBIA's intent to fulfill that agreement, but also suggests that any production responsive to the 2016 Subpoena, as narrowed by Respondents, would be equally rich in information "directly relevant to the Division's proposed evidence and necessary for cross examination." *Tilton*, Admin. Proc. Rul. 3-16462, SEC Release No. 4153, at 2 (ALJ Sept. 14, 2016).

II. MBIA INVOKES REVISIONIST HISTORY TO EVADE COMPLIANCE WITH THE 2016 SUBPOENA

For nearly three months, Respondents have made diligent, good-faith efforts to obtain additional documents from MBIA that are relevant to the Division's charges (and Respondents' defense) and critical to Respondents' cross-examination of Mr. McKiernan, whose testimony hangs in the balance. While MBIA now accuses Respondents of unfairly attempting to enforce the 2016 Subpoena "on an unrealistic, highly expedited timeframe," MBIA has deliberately obfuscated Respondents' attempts to obtain targeted discovery since August 9, 2016. MBIA has only itself to blame for the time constraints—and its revisionist history warrants an accurate retelling.

The *true* history of the 2016 Subpoena highlights MBIA's gamesmanship.

Following the lifting of the Second Circuit's stay on July 7, 2016, Respondents' counsel assessed the status of third-party discovery, and on August 9, 2016, Respondents asked Mr. Hoff and Cadwalader to "confirm . . . that MBIA has made a complete production, through the present, of all documents responsive to the subpoena." Rubin Decl., Ex. 5. After promising to provide an "informed response" the following week, Ex. 10, MBIA's counsel sent the August 19 Letter outlining its view of the status of MBIA's production under the 2015 Subpoena. Rubin Decl., Ex. 6. Notably, rather than insisting that MBIA had completed all productions in response to the 2015 Subpoena, the August 19 Letter identifies several issues that remained open as of the imposition of the stay, including MBIA's production of marketing and due diligence materials created for Zohar II in late 2004; MBIA's creation of "a list of employees that had significant responsibilities regarding the valuation of the Zohar Funds;" and MBIA's production of communications between the SEC and more than a dozen MBIA custodians. *Id.* at 2-3 (noting that production in response to Request Nos. 2, 12, and 16, as modified by agreement, had not yet

been completed). MBIA further suggested that it would comply with these open requests, stating that "*[w]ith the exception of specific documents and information set forth above*, MBIA [would] not agree to search for or produce additional documents in connection with the [2015 S]ubpoena." *Id.* at 3 (emphasis added).

After receiving MBIA's August 19 Letter, Respondents awaited MBIA's production of the "specific documents and information" referenced therein, but to no avail: Mr. Hoff and Cadwalader *never* fulfilled their own promise to close out production on the outstanding requests. At the same time, MBIA also maintained that the 2015 Subpoena, as negotiated, did not cover some of what Respondents requested, such as communications to and from David Crowle, another of the Division's "may call" witnesses.

Ultimately, and with the goal of preparing for the hearing now in progress, Respondents had no choice but to request the issuance of the 2016 Subpoena to MBIA, which Your Honor issued without modification on September 16, 2016. Rubin Decl., Ex. 7. That same day, Respondents sent the 2016 Subpoena to Mr. Hoff via email, noting, "If you have not appeared in the above-referenced proceeding on behalf of MBIA and/or will not agree to accept service of the September 16, 2016 Subpoena, a copy of which is enclosed, on behalf of MBIA, please inform us in writing by September 20, 2016." Ex. 11. Mr. Hoff did not respond. Respondents' further outreach to Mr. Hoff was equally unsatisfying.

- Having heard nothing from Mr. Hoff by September 20, on September 21, 2016, Respondents reached out to Mr. Hoff via phone. Only then did Mr. Hoff agree to accept service of the subpoena—which, to that point, had only been sent to him over e-mail.

- The parties spoke again to discuss the substance of the 2016 Subpoena on or around September 28, 2016. During that call, and despite Mr. Hoff's statements in his declaration to the contrary, *see* Hoff Decl. ¶ 18, counsel for Respondents detailed for Mr. Hoff the relevancy of each of their requests, including, but not limited to, the fact that the documents sought went to Mr. McKiernan's credibility as a witness for the Division. Loseman Decl. ¶ 19. Counsel for Respondents repeatedly reassured Mr. Hoff that they

had no intent to unduly burden MBIA; Mr. Hoff, in turn, invited Respondents' counsel to prepare a narrowed set of requests so that he could further discuss them with his client. *Id.*

- Respondents again reached out to Mr. Hoff on October 3, 2016 with proposed, narrowed requests and reminded him that with the hearing "fast approaching," "Respondents need to procure these documents sufficiently in advance to afford them an opportunity to prepare." Respondents' counsel further stated that Respondents intended to move to compel within two days unless MBIA agreed to produce documents responsive to the narrowed requests. Rubin Decl., Ex. 8 at 2.

- Mr. Hoff responded the following day, informing Respondents that it was "highly unlikely that [he'd] be able to respond by tomorrow" and that we would hear from him "[p]robably Thursday." *Id.* at 1. Again, Respondents' counsel was frank and fair:

> *We intend to move to compel Wednesday afternoon but will amend the motion to the extent MBIA agrees to produce anything on Thursday. Based on our last meet and confer call, it seemed highly unlikely MBIA would be inclined to produce anything at all; indeed, you noted MBIA is not inclined to produce any document in response to the second subpoena. Given the impending hearing date, I am not inclined to wait to bring this to the ALJ's attention even one more day.*

Id. at 1 (emphasis added).

As promised, Respondents moved to compel MBIA's compliance with the 2016 Subpoena, as modified, on October 6, 2016. Respondents transmitted a copy of their motion to counsel for MBIA shortly after 1 a.m. on October 6, 2016 and minutes after serving the Division. *See* Loseman Decl., Ex. 12. While the Division opposed the motion on October 13, 2016, MBIA's counsel neither responded to nor acknowledged their receipt of Respondents' motion. In fact, it was not until MBIA's October 20, 2016 letter to Your Honor, two weeks after receiving Respondents' motion and a mere four days before the commencement of the hearing in this proceeding, that MBIA said anything at all about the 2016 Subpoena. The October 20 letter also marked the first time MBIA challenged Respondents' service of their motion. *See* Hoff Decl., Ex. I. Notably, however, Mr. Hoff never claims he did not receive Respondents'

motion—nor can he.[3] Rather, MBIA attempts to stand on the thinnest, ceremonial leg, all in a transparent attempt to postpone any resolution on the subpoena until it is simply too late for Respondents to make any use of responsive materials during this hearing. Indeed, having obtained an additional week to submit its opposition, MBIA then consumed every last minute, serving its opposition after 9:30 p.m. last Friday night. Ex. 13.

The history outlined above lays bare where the fault for any time crunch lies: with MBIA. For months, they have dodged and weaved any and all efforts to obtain additional discovery, even after conceding that it still had documents left to produce in connection with the 2015 Subpoena—including 11 custodians' communications with the SEC. *See* Rubin Decl., Ex. 6 at 3 (discussing Request No. 16). At the same time, MBIA has been in constant contact with the Division not simply about this case but also specifically with respect to its compliance with Respondents' subpoenas. *See* Ex. 17 (Aug. 31, 2016 e-mail from Mr. Hoff to Amy Sumner of the Division describing Respondents' efforts to enforce the 2015 Subpoena and stating that MBIA had "largely completed" its discussions with Respondents about that subpoena).

Yet notwithstanding Respondents' legitimate need for additional documents to relevant to Respondents' defense—and this proceeding's illegitimacy—MBIA has refused to budge. MBIA has only itself to blame for the consequences.

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[3] Mr. Hoff's complaint that he did not agree to and was never asked to accept electronic service of Respondents' motion is not only rich in light of his long-time representation of MBIA across a multitude of matters, but also belies his prior electronic dealings with Respondents' counsel in their capacities as counsel for MBIA and Respondents respectively. On September 21, 2016, Mr. Hoff accepted service of the 2016 Subpoena (as well as a related subpoena to Mr. McKiernan) having only received electronic copies of the same and in advance of Respondents' transmitting the originals via U.S. mail. Ex. 16. Mr. Hoff and Cadwalader also represent MBIA in another, ongoing Zohar Fund-related matter in the Southern District of New York in which he regular communicates via e-mail with Gibson Dunn lawyers, including those who represent Respondents here, and even on the very dates at issue here. *See, e.g., Patriarch Partners VIII, LLC v. U.S. Bank, N.A.*, 1:16-cv-07128-UA (S.D.N.Y.) (Rakoff, J.); *see also* Ex. 15 (Oct. 2016 e-mails from Mr. Hoff to Gibson Dunn lawyers).

III. MBIA'S ACCUSATION OF RESPONDENTS' "TACTICAL" CONDUCT LACKS ANY MERIT

In attempting to distract Your Honor from its own misconduct, MBIA also accuses Respondents of "abusing the discovery process of this proceeding to further [sic] 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." Opp. at 2. MBIA demonstrates both a lack of regard for the truth as well as an astonishing dearth of self-awareness. To date, the only party shown to have used confidential and proprietary information belonging to the other to serve its litigation goals is *MBIA*, which procured from the Division Patriarch-produced, non-public financial documents concerning the portfolio companies, and extracted the Staff's written commitment to allow MBIA to keep the documents and use the information contained therein in future litigation. Rubin Decl., Ex. 14. Nor is there any indication that Respondents or their counsel have sought or would seek discovery obtained in this matter to strengthen their hand in other cases. Indeed, it is because of Respondents' and their counsel's clear allegiance to the confidentiality order in the bankruptcy proceeding that they did not discover the withheld documents until this past week and following Gibson Dunn's appearance as counsel of record in that case.

Nor can MBIA demonstrate that Respondents' discovery requests are designed to harass or burden MBIA. While MBIA insists that it is "well-established" that Respondents are only entitled to discovery of items "material to [their] defense," the two cases it cites for this proposition arise from New York Stock Exchange disciplinary proceedings, which are not governed by the Rules of Practice but by a completely separate and narrower set of procedural rules. Opp. at 12 (citing *Dan Adlai Druz*, Exch. Act Rel. No. 36306, 1995 WL 579536, at *9 (Comm'n Sept. 29, 1995) & *John Gordon Simek*, Exch. Act Rel. No. 27528, 1989 WL 259962,

at *8 (Comm'n Dec. 12, 1989)). Similarly, in an attempt to show that Respondents inappropriately (and purposefully) delayed seeking further discovery, MBIA relies on cases where the discovery sought either is massive, especially in comparison to Respondents' six tailored requests here, or where the facts are simply inapposite, such as where the moving party, by virtue of delays far longer than the time frame at issue here and without the interruption of a ten-month stay, had violated one or more court orders.[4] In short, MBIA's efforts to tag Respondents with its own bad behavior neither finds support in the facts or the law, and should be discounted entirely.

IV. RESPONDENTS' NARROWED REQUESTS ARE REASONABLE AND RELEVANT

MBIA's final argument against an order compelling it to produce documents to Respondents is that the documents sought are either duplicative of those already produced or so far afield from Respondents' defense or cross-examination needs that they are irrelevant, especially when compared to MBIA's "compliance burden and costs." Opp. at 13. Because MBIA is wrong on both fronts, Respondents need not address MBIA's attacks on the legitimacy of each request, the relevance of which should be facially obvious to anyone who, like Mr. Hoff, has sat through the hearing to date.

First, MBIA admits that despite its involvement with the Zohar Funds for nearly twelve years at the time of that production, its first production in this matter totaled only "3,900 pages,"

[4] *See, e.g., Vaigasi v. Solow Mgmt. Corp.*, 2016 WL 616386, at *21 (S.D.N.Y. Feb. 16, 2016) (denying motion to compel where the movant's delay violated two prior court orders and deciding on the basis of the non-compliance with such orders); *Eng-Hatcher v. Sprint Nextel Corp.*, 2008 WL 4104015, at *5 (S.D.N.Y. Aug. 28, 2008) (denying motion to compel where "[n]o explanation [was] provided to the Court" for a pattern of delay prejudicing the defendant); *Mayes v. Local 106, Int'l Union of Operating Eng'rs*, 1992 WL 335964, at *4, *9 (N.D.N.Y. Nov. 12, 1992) (denying motion to compel because of movant's failure to comply with court orders and show good cause for moving six years into the litigation and four years after the discovery deadlines had passed); *Morgan Asset Mgmt., Inc.*, Admin. Proc. Rul. Rel. No. 655, 2010 WL 3405825, at *2-3 (ALJ July 6, 2010) (denying request for subpoenas where subpoenas' short deadline would unduly burden expert witnesses and compete with their ability to prepare for trial); *Raymond James Fin. Servs.*, Admin. Proc. File No. 3-11692, 2004 WL 7199337, at *10 (ALJ Dec. 23, 2004) (denying requests for over sixty subpoenas across twenty entities and persons where requests sought information beyond the OIP and respondent's available defenses).

or not even two boxes. *Id.* at 3. Given the paltry volume of that production, it is reasonable to expect that MBIA, Respondents' most significant counterparty over the nearly 13-year life of the Zohar Funds, has significant volumes of untapped, relevant material that it simply does not want the world to see. Indeed, the three-plus dozen documents produced just this week confirm that.

Moreover, despite Respondents' prior citation of a few communications between the SEC and MBIA to illustrate for Your Honor the collusion between them, Respondents presume that MBIA lacks familiarity with either the SEC's production or that of any third party. Hence, MBIA's claim that Respondents already have "documents duplicative or cumulative of those they now seek from MBIA" is ridiculous. *Id.* at 14.

MBIA also attempts to negate the relevance of Respondents' requests by asserting that any cross-examination of Mr. McKiernan necessarily would be "limited to the scope of Mr. McKiernan's putative testimony," *id.* at 14-15, or that MBIA's collaboration with the Division "ha[s] no bearing" on the Division's charges against Respondents. *Id.* at 13. Again, MBIA misses the mark. Cross-examination broadly encompasses not only the substance of the witness's testimony, but also his credibility and biases. Having altered the course of these proceedings through its direct line to and ultimate partnership with the Division, MBIA cannot argue now that it should be protected from reasonably tailored, related discovery obligations.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Your Honor order MBIA to produce to Respondents the limited categories of documents requested by Respondents' October 3, 2016 email, which further narrows the requests in the 2016 Subpoena, forthwith.

Dated: New York, New York
October 31, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I served true and correct copies of 1) the Reply Memorandum of Law in Support of Respondents' Motion to Compel MBIA to Produce Documents Responsive to Respondents' Subpoena, and 2) Declaration of Monica Loseman in Further Support of Respondents' Motion to Compel MBIA to Produce Documents Responsive to Respondents' Subpoena on this 31st day of October, 2016, in the manner indicated below:

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Fax: (202) 772-9324
(1. Reply Memorandum as redacted, by Facsimile; 2. Three copies and an original of Reply Memorandum as redacted, by Federal Express; and Three copies and an original of the Declaration, in sealed envelopes, by Federal Express)

Hon. Judge Carol Fox Foelak
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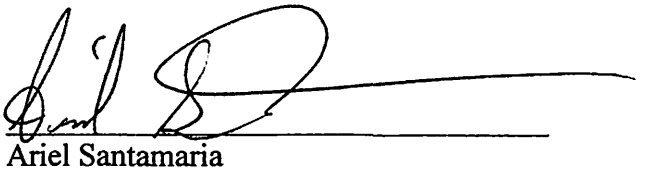

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