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

PETITION FOR INTERLOCUTORY REVIEW OF THE HEARING OFFICER'S DENIAL OF A STAY OF THIS PROCEEDING, AND FOR A STAY

Upon the accompanying Memorandum of Law, dated June 2, 2017; Declaration of Akiva Shapiro, dated June 2, 2017; and the record of proceedings herein, Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC, respectfully move the Commission, pursuant to Rule 401(a) and (b) of the Commission's Rules of Practice, 17 C.F.R. § 201.100 et seq. (the "Rules"), for an order temporarily staying the instant proceeding pending the resolution by the federal courts (including the U.S. Supreme Court), in *Bandimere v. SEC* and *Raymond J. Lucia Cos., Inc. v. SEC*, of the question of whether this proceeding complies with the Appointments Clause of the U.S. Constitution. To the extent necessary, Respondents seek interlocutory review, pursuant to Rule 400, of the order of Administrative Law Judge Carol Foelak denying Respondents' motion for a stay of proceedings and for certification of this issue for interlocutory review. *See* Release No. 4672 (March 10, 2017).

Dated: June 2, 2017
New York, New York

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RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR PETITION FOR INTERLOCUTORY REVIEW OF THE HEARING OFFICER'S DENIAL OF A STAY OF THIS PROCEEDING, AND FOR A STAY

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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 petition the Commission, pursuant to Rule 401(a) and (b) of the Commission's Rules of Practice, 17 C.F.R. § 201.100 et seq. (the "Rules"), for an order temporarily staying the instant proceeding pending the resolution by the federal courts of the question of whether this proceeding complies with the Appointments Clause of the U.S. Constitution. To the extent necessary, Respondents seek interlocutory review, pursuant to Rule 400, of the order of Administrative Law Judge Carol Foelak (the "ALJ") denying Respondents' motion for a stay of proceedings and for certification of this issue for interlocutory review. *See Lynn Tilton*, Admin. Proc. Rulings Release No. 4672 (March 10, 2017) (Ex. 1).[1]

PRELIMINARY STATEMENT

The federal courts are grappling with the constitutionality of the procedure for appointing SEC administrative law judges, and should soon resolve this fundamental question regarding the legitimacy of the enforcement proceeding against Ms. Tilton. In light of the pending appeals addressing the Appointments Clause challenge, including an expedited en banc proceeding in the U.S. Court of Appeals for the D.C. Circuit argued on May 24, 2017 and a recent decision from the U.S. Court of Appeals for the Tenth Circuit, the interests of justice should compel the Commission to temporarily stay the instant proceeding, which awaits an initial decision from Administrative Law Judge Carol Fox Foelak (the "ALJ") after the completion of post-hearing briefing earlier this year.

In late 2016, the Tenth Circuit ruled that "SEC ALJs are inferior officers who must be

[1] References to "Ex. _" are to the exhibits to the accompanying Declaration of Akiva Shapiro in Support of Respondents' Petition for Interlocutory Review of the Hearing Officer's Denial of a Stay of This Proceeding, and for a Stay, dated June 2, 2017 and filed herewith.

appointed in conformity with the Appointments Clause," *Bandimere v. SEC*, 844 F.3d 1168, 1181 (10th Cir. 2016), and on May 3, 2017, the Tenth Circuit denied the SEC's petition for rehearing or rehearing en banc. On May 22, 2017, "[i]n light of the U.S. Court of Appeals for the Tenth Circuit's recent decision denying rehearing en banc in *Bandimere*," the Commission *sua sponte* "stay[ed] all administrative proceedings assigned to an administrative law judge in which a respondent has the option to seek review in the Tenth Circuit of a final order of the Commission under Section 9(a) of the Securities Act, Section 25(a) of the Securities Exchange Act, Section 43(a) of the Investment Company Act, or Section 213(a) of the Investment Advisers Act." The stay was "effective immediately and shall remain in effect pending the expiration of time in which the government may file a petition for a writ of certiorari in *Bandimere*, the resolution of any such petition and any decision issued by the Supreme Court in that case, or further order of the Commission."

The D.C. Circuit, to which all SEC administrative proceedings can be appealed,[2] is poised to soon decide whether to follow the Tenth Circuit in finding SEC ALJ appointments unconstitutional. On May 24, 2017, two days after the Commission issued its recent order, the D.C. Circuit held an en banc oral argument on the Appointments Clause challenge presented in *Raymond J. Lucia Cos., Inc. v. SEC*, after vacating a prior panel decision upholding the appointment scheme for SEC ALJs. *See Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016); Order Granting Reh'g En Banc, *Raymond J. Lucia Cos., Inc. v. SEC*, No. 15-1345 (D.C. Cir. Feb. 16, 2017).

The D.C. Circuit may very well follow the Tenth Circuit in ruling that the SEC's

[2] *See* 15 U.S.C. § 80b-13(a) (Investment Advisers Act) (permitting review of Commission "order[s]" "in the United States Court of Appeals for the District of Columbia"); § 80a-42(a) (Investment Company Act) (permitting review of any "order" "in the United States Court of Appeals for the District of Columbia"); § 78y(a)(1) (Securities Exchange Act of 1934) (permitting review of "a final order of the Commission" in the "District of Columbia Circuit"); § 77i(a) (Securities Act of 1933) (permitting review of "an order of the Commission" "in the United States Court of Appeals for the District of Columbia").

procedure for appointing ALJs is unconstitutional. In light of the broad availability of the D.C. Circuit as a forum for respondents to appeal adverse decisions in SEC administrative proceedings, such a finding would render the current appointment scheme all but a dead letter, and would compel the dismissal of the instant proceeding, in which Respondents have been charged under the Investment Advisers Act. *See Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 22–23 (D.C. Cir. 2016) (agency must acquiesce when "it knows that its order will be subjected to an adverse circuit's law on appeal," including when there are "two venue choices for the party appealing" the agency's order, and "one circuit's precedent is . . . adverse to [the agency]").

Given the obvious uncertainty of the constitutional landscape and the importance of the issues at stake, the Commission should stay this administrative proceeding against Ms. Tilton. Indeed, the issue is so pressing that it would warrant a stay of *all* pending SEC proceedings overseen by an administrative law judge in which a respondent has raised an Appointments Clause challenge.

It is deeply problematic that Respondents are now being treated differently due to the happenstance of geography: If they had lived or had headquarters in Colorado, Kansas, New Mexico, Oklahoma, Utah, or Wyoming, their case would have been stayed indefinitely. But Respondents get no such relief, even though the constitutional cloud hanging over their proceeding is just as heavy. This is irreconcilable with the principle that the securities laws be uniformly applied and enforced throughout the country, which is the very reason Congress federalized securities law and created the SEC. *See, e.g., Lanier v. Bats Exch., Inc.*, 838 F.3d 139, 155 (2d Cir. 2016) ("From the Exchange Act—which focuses on the need to create a *national* market system—we can infer that Congress intended for the regulations governing national securities exchanges and securities information processors to be uniform.").

Though Respondents here believe strongly that they will be vindicated on the merits because the Division of Enforcement failed to prove its case, it would be inequitable for Respondents to suffer the reputational consequences of an adverse decision that may well be nullified by a decision from the D.C. Circuit. Such harm cannot be undone, even if the decision is later invalidated. And it makes little sense for the Commission or Respondents to expend further resources in an administrative proceeding that may well be invalidated entirely on constitutional grounds. At the same time, any stay would necessarily be of temporary and short duration; the practical effect of the short requested stay would benefit not only Respondents, but also the Commission, as it would not have to spend time litigating an appeal to the Commission from an initial decision that might well be vacated. In sum, for Respondents, who are unfortunate enough to reside and do business outside the Tenth Circuit, the harm from an adverse decision that may subsequently be invalidated due to an unconstitutional process should be avoided, particularly where the requested stay is in all parties' interests.

Respondents have repeatedly raised the Appointments Clause issue in this proceeding. *See, e.g.*, Resp. Pre-Hearing Br. 38 (Oct. 17, 2016) (Ex. 2); Resp. Post-Hearing Br. 109 (Dec. 16, 2016) (Ex. 3); Resp. Proposed Conclusions of Law ("COL") ¶¶ 110-12 (Dec. 16, 2016) (Ex. 4); Resp. Post-Hearing Opp. Br. 45 (Jan. 13, 2017) (Ex. 5). Indeed, Respondents were among the very first to bring a constitutional challenge to the SEC's procedure for appointing ALJs.[3] The ALJ will need to rule on the Appointments Clause question in issuing an Initial

[3] Respondents raised an Appointments Clause challenge in federal district court soon after this administrative proceeding was initiated. Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial, *Tilton v. SEC*, No. 15 Civ. 02472 (S.D.N.Y. Apr. 1, 2015). While Respondents' petition for a writ of certiorari arising from that suit was recently denied, that denial, like the Second Circuit's 2-1 decision affirming the district court's dismissal of the action, was apparently predicated on exhaustion grounds. *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016), *cert. denied*, No. 16-906, 2017 WL 237477 (May 30, 2017). Respondents have preserved and pressed their argument on this issue on the merits in this proceeding, and will continue to do so on appeal from any adverse decision here.

Decision in this case, and it makes no sense for her to do so without the benefit of the D.C. Circuit's en banc ruling in *Lucia*, or any subsequent Supreme Court opinion.

Recognizing the inequity and inefficiency of proceeding to an agency decision under the circumstances presented here, the Commission has in the past stayed an administrative proceeding pending final resolution of a significant legal issue in the federal courts that will "likely impact" that case. *Michael S. Steinberg*, Advisers Act Release No. 4008, 2015 WL 331125, at *2 (Jan. 27, 2015) (granting unopposed motion for "good cause shown" until "the United States Attorney's Office decide[d] whether to petition for rehearing, rehearing en banc, and/or certiorari in" *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), and "any such petitions [were] finally resolved"). Granting a stay in light of pending related or controlling cases is a common practice among district courts as well. *See, e.g., Int'l Painters & Allied Trades Indus. Pension Fund v. Painting Co.*, 569 F. Supp. 2d 113, 120-21 (D.D.C. 2008); *infra* p. 16 & n.11 (citing additional cases).

Because the Tenth Circuit has already found that the appointment of SEC ALJs violate the Appointments Clause, and the D.C. Circuit's en banc decision on the same issue is *sub judice*—and the Supreme Court may well address the issue in the near future—the appropriate and efficient course is to temporarily stay this proceeding until after the en banc court's decision in *Lucia*, the expiration of time in which any party may file a petition for a writ of certiorari in *Lucia* and *Bandimere*, the resolution of any such petitions, and any decision issued by the Supreme Court in those cases.

PROCEDURAL BACKGROUND

In March 2015, after a six-year investigation and by a 3-2 vote, the Commission authorized the Division to institute proceedings against Respondents based on the narrow allegations set forth in the Order Instituting Proceedings ("OIP"). *See Lynn Tilton*,

Investment Advisers Act Release No. 4053 (Mar. 30, 2015). Commissioners Daniel M. Gallagher and Michael S. Piwowar disapproved of any charges being filed. SEC, Final Commissioner Votes, at 849 (Mar. 2015), https://www.sec.gov/foia/docs/votes/2015-03.pdf.

The OIP's charges rest on a single core allegation: that Respondents failed to disclose their use of "subjective" methods for categorizing loans to distressed companies held by the Zohar Funds, for whom Respondents acted as collateral manager, rather than the purportedly objective standards set forth in the Funds' governing documents. *See* OIP ¶¶ 3-6, 29-51. But the deal documents actually permitted Ms. Tilton to amend loan terms and defer interest payments in her business judgment, in order to facilitate the turnaround of the distressed companies to whom the loans were issued. This was, in fact, the Funds' disclosed strategy. The case was tried in October and November 2016 in front of ALJ Foelak.

At trial, Respondents proved that the Division's case was nothing more than a contract dispute and that the Commission grossly overreached in charging Respondents. The trial record overwhelmingly confirmed what the transaction documents, disclosures, and exculpatory materials wrung from the Division of Enforcement had already established—that Respondents' practices were fully authorized by the deal documents, disclosed to investors, and in the best interests of the Zohar Funds and their noteholders. The parties submitted post-hearing briefs in December 2016 and January 2017 and are awaiting an initial decision.

Earlier this year, soon after the D.C. Circuit granted rehearing en banc in *Lucia*, Respondents filed a motion for a stay with ALJ Foelak, based on the Tenth Circuit's decision in *Bandimere* and the pending en banc decision from the D.C. Circuit. In the alternative, Respondents sought certification for interlocutory review of any decision not to stay the proceeding.

The ALJ denied both requests. She determined that a stay was not warranted because

it would not "avoid unnecessary expenditure of resources," since "the parties have completed their post-hearing briefing." Order, *Lynn Tilton*, Admin. Proc. Rulings Release No. 4672 (March 10, 2017), at 2. In light of the fact that the Commission had not "disavowed its previous stance that its proceedings are constitutional," she determined that arguments on the constitutional question were "speculative" and that "immediate review" of the stay denial by the Commission would "not materially advance the completion of this proceeding" under Rule 400(c). *Id.*[4]

The ALJ misapprehended the standard for evaluating a request for Commission review. Interlocutory Commission review is appropriate where the decision involves a "controlling question of law as to which there is substantial ground for difference of opinion," and review "may materially advance the completion of the proceeding," Rule 400(c)(2). This motion unquestionably meets that standard, as the Appointments Clause issue is a controlling question of law, and the Tenth Circuit's decision in *Bandimere*, as well as the D.C. Circuit's decision to hear *Lucia* en banc, demonstrate that there is, at the very least, a "substantial ground for difference of opinion" on that issue. In addition, review "may materially advance the completion of the proceeding," Rule 400(c)(2)(ii), contrary to the hearing officer's determination, because the Commission may stay the proceeding pending the resolution of the issue in the federal courts. Finally, immediate review here, and the imposition of a temporary stay, will avoid the unnecessary expenditure of Commission resources in the ALJ's preparation of an initial decision that may later be rendered void by a ruling on the Appointments Clause challenge, as well as the waste of the resources of all involved in

[4] The ALJ also declined the stay request because, she held, the Rules of Practice "do not provide for [ALJs] to grant stays of indefinite duration" except during the pendency of a related criminal investigation or proceeding. Order, *Lynn Tilton*, Admin. Proc. Rulings Release No. 4672 (March 10, 2017), at 2, Whatever powers the ALJ may or may not have to grant a stay of indefinite duration, there is no question that the Commission has such authority. The Rules of Practice explicitly provide that "[t]he Commission may grant a stay in whole or in part, and may condition relief under this rule upon such terms, or upon the implementation of such procedures, as it deems appropriate." Rule 401(b).

briefing and argument of appeals of that initial decision to the Commission.

The notion that the "Commission has not disavowed its previous stance that its proceedings are constitutional," Order, *Lynn Tilton*, Admin. Proc. Rulings Release No. 4672 (March 10, 2017), at 2, is also no longer accurate, further undermining the ALJ's conclusion declining to find that interlocutory review may materially advance the completion of this proceeding, and further strengthening the grounds for a stay. While the recent order staying proceedings appealable to the Tenth Circuit is of course temporary, the Commission clearly understands that it may not continue to assign proceedings to administrative law judges within the geographic area covered by the Tenth Circuit. It is also clearly aware of the precarious constitutional position of all of its administrative proceedings overseen by ALJs. In light of the Commission's order, which undermines the grounds for the hearing officer's denial of Respondents' stay and interlocutory appeal requests, Respondents now seek review by, and a stay from, the Commission.

LEGAL STANDARD

The Commission has broad authority to "grant a stay in whole or in part, . . . as it deems appropriate." Rule 401(b); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").[5] As evidenced by the Commission's recent stay order relating to proceedings appealable to the Tenth Circuit, the Commission has the authority to grant stays not

[5] In addition, Rule 161(a) authorizes the Commission to grant adjournments and postponements "for good cause shown." Rule 161(b) lists factors relevant to a hearing officer's (and, by extension, the Commission's) determination of good cause under that rule, including substantial prejudice to the moving party if the stay is not granted, the length of the proceeding to date, the number of postponements already granted, the stage of the proceeding, the impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission, and "[a]ny other such matters as justice may require."

only on the application of a party, but also *sua sponte*, and not only of an individual case but also of any class of cases, as it sees fit.

The Commission may grant a stay "if it finds that 'justice so requires.'" *In re Electronic Transactions Clearing, Inc.*, Exchange Act Release No. 73698, 2014 WL 6680112, at *1 (Nov. 26, 2014). In determining whether "justice so requires," the Commission often considers four factors: "(1) whether the applicants have shown a strong likelihood that they will prevail on the merits of the appeal; (2) whether the applicants have shown that they will be irreparably harmed if the stay is not granted; (3) whether the granting of a stay would result in substantial harm to other parties; and (4) whether the issuance of a stay would likely serve the public interest." *Id.* When the four-factor test is applied, the factors are considered holistically. *Id.* For example, "a stay may be granted where there is a high probability of irreparable harm but a lower probability of success on the merits, or vice versa." *Id.*

The Commission need not consider the four factors where there is good cause for a stay, such as where "a stay avoids potentially unnecessary costs, regulatory uncertainty, and disruption" in light of ongoing challenges to the validity of the proceedings. *Bus. Roundtable,* Securities Act Release No. 9149, 2010 WL 3862548, at *1 (Oct. 4, 2010) (staying certain rules "during the pendency of a challenge to their validity"); *Steinberg*, 2015 WL 331125, at *2 (finding "good cause" for a stay where a legal issue presented in the appeal of another pending case would "likely impact" the case);[6] *Raymond J. Lucia Cos.*, Exchange Act Release No. 75837, 2015 WL 6352089, at *1 n.7 (staying monetary sanctions pending appeal "without reference to the applicant's likelihood of success on the merits" or the other components of the

[6] The stay in *Steinberg*, which was imposed without consideration of the four factors, lasted until any petitions for certiorari were resolved and any decision issued by the Supreme Court, much like the stay in the recent Commission order. *See* 2015 WL 331125, at *2. While the Commission in *Steinberg* relied on Rule 161(a), noting that a stay under Rule 401(c) is available only once the Commission has issued an order appealable in federal court, it did not address stays under Rule 401(a) & (b), which are not so limited. *See id.*

four-factor test).[7] Moreover, the four-factor test by its terms applies to appeals of initial decisions (the first factor, for example, concerns the "merits of the appeal"), but here, an Initial Decision has not been issued. Because no Initial Decision has been issued, and because pending cases may render this proceeding unconstitutional, the Commission may find good cause for a stay here without recourse to the four-factor test. As demonstrated below, Respondents would also prevail under the four-factor test.

Pursuant to Rule 400(a), the Commission may "at any time" review "any matter . . . submitted to it for review," either on its own initiative or at the request of a party. Interlocutory review is appropriate if "(i) [t]he ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and (ii) [a]n immediate review of the order may materially advance the completion of the proceeding." Rule 400(c)(2). Moreover, while the "Rule 400(c) inquiry is intended to identify the rare set of issues that are appropriate for interlocutory review," the Commission may, in "extraordinary" circumstances, grant interlocutory review even where an application for review does not satisfy the Rule 400(c) inquiry. *Gary L. McDuff*, Exchange Act Release No. 78066, at 6, 8-10 (June 14, 2016) (citing Rule 400(a)).

ARGUMENT

The Commission should stay this proceeding until the federal courts finally resolve *Lucia* and *Bandimere*. It would be both unfair and inefficient for this pending administrative proceeding (which is appealable to the D.C. Circuit) to proceed to an initial decision before that occurs, particularly because all cases appealable to the Tenth Circuit have already been stayed pending final resolution of *Bandimere*.

[7] Granting a stay in light of pending related or controlling cases is a common practice among district courts as well. See *infra* p. 16 & n.11.

As the Commission is aware, the constitutionality of the selection procedure for the SEC's ALJs has been repeatedly challenged by litigants in administrative proceedings, including Respondents here. SEC ALJs are not selected by the Commission or through one of the other means prescribed by the Appointments Clause, such as by the President or the courts. *See* U.S. Const. art. II, § 2, cl. 2. ALJs are chosen instead by SEC staff from candidates identified by the Office of Personnel Management. *Bandimere*, 844 F.3d at 1181.

In August 2016, the U.S. Court of Appeals for the District of Columbia Circuit held that SEC ALJs were not inferior officers, and therefore not subject to the Appointments Clause's requirements. *See Lucia*, 832 F.3d at 289. On December 27, 2016, the Tenth Circuit—the same circuit where the SEC Regional Office prosecuting this case is located—held exactly the opposite: that SEC ALJs were inferior officers because they exercise significant authority under federal law, and under the U.S. Supreme Court's decision in *Freytag v. Commissioner*, 501 U.S. 868 (1991), they were subject to, yet failed to meet, the selection requirements of the Appointments Clause. *See Bandimere*, 844 F.3d at 1181.[8] A number of district courts in other circuits have reached the same conclusion. *See Hill v. SEC*, 114 F. Supp. 3d 1297, 1319 (N.D. Ga. 2015) ("*Freytag* mandates a finding that . . . SEC ALJs exercise 'significant authority' and are thus inferior officers."), *vacated on other grounds*, 825 F.3d 1236 (11th Cir. 2016); *Duka v. SEC*, No. 15 Civ. 357 (RMB) (SN), 2015 WL 4940057, at *2 (S.D.N.Y. Aug. 3, 2015) ("The Court here concludes that SEC ALJs are 'inferior officers' because they exercise 'significant authority pursuant to the laws of the United States.'" (quoting *Freytag*, 501 U.S. at 881)), *vacated on other grounds*, No. 15-2732 (2d Cir. June 13, 2016).

[8] As a result of its ruling, the Tenth Circuit "set aside the SEC's opinion," noting that the panel's resolution of "this question relieves Mr. Bandimere of all liability." *Bandimere*, 844 F.3d at 1172, 1188.

Bandimere created a split with the D.C. Circuit's decision in *Lucia* on the constitutionality of SEC proceedings overseen by ALJs. Now, the D.C. Circuit has voted to vacate its decision and has reheard *Lucia* en banc, even though the D.C. Circuit "rehears virtually none of its cases." *See* Jonathan H. Adler, "Is *Halbig v. Burwell* en banc worthy?", The Volokh Conspiracy via *The Washington Post* (Aug. 5, 2014) (commenting that the "bar on *en banc* rehearing in the D.C. Circuit has been higher than the bar for certiorari in the Supreme Court"). "Each year the court's three-judge panels make roughly 500 rulings, but the court averages roughly one *en banc* rehearing." *Id.* (quoting Adam J. White, No Need for a Halbig Rehearing, *Wall Street Journal* (Aug. 4, 2014)). In 2014, the D.C. Circuit heard only two. *Id.* In 2013, zero. *Id.* The D.C. Circuit's decision to rehear *Lucia* and vacate its prior decision upholding the appointment scheme for SEC ALJs illustrates the importance and unsettled nature of the controversy on this issue—a point that the Commission clearly recognizes, given that it has now stayed all administrative proceedings in which an appeal to the Tenth Circuit is available until the Supreme Court declines *certiorari* in *Bandimere* (in which case the Commission will presumably dismiss all such pending administrative proceedings), or grants certiorari and hears and decides the Appointments Clause issue.

In light of the D.C. Circuit's forthcoming en banc decision on the constitutionality of the SEC's procedure for appointing ALJs, and the Tenth Circuit's recent decision finding that procedure to be unconstitutional, the U.S. Supreme Court will likely review the issue. If the en banc D.C. Circuit upholds the SEC ALJ appointment scheme, the circuit split on the question would be reinstated, increasing the likelihood of Supreme Court review. If the D.C. Circuit finds in favor of the petitioners in *Lucia*, the decision would effectively bar proceedings like this one before an ALJ, given the availability of the D.C. Circuit as a venue for review of Commission orders. *See, e.g.*, 15 U.S.C. § 80b-13(a) (permitting review of Commission "order[s]" arising out

of the Investment Advisers Act "in the United States Court of Appeals for the District of Columbia"). In either event, the Supreme Court would likely grant review of *Bandimere* or *Lucia*.[9]

Given the obvious uncertainty of the constitutional landscape with respect to the Appointments Clause issue, the universally acknowledged importance of the issues involved, and the availability of review in the D.C. Circuit of any final decision here, the Commission should expand its recent stay order to cover this administrative proceeding.

With respect to the first of the four traditional factors for granting a stay, Respondents are likely to succeed on the merits of their appeal. Putting aside the weakness of the Division's evidence at trial and focusing only on the Appointments Clause issue, Respondents are likely to succeed—and the challenge is, at the very least, substantial—for the reasons set out in the Tenth Circuit's decision in *Bandimere*, and in light of the D.C. Circuit's decision to vacate the panel decision in *Lucia* and hear the case en banc.

Turning to the second factor, in the absence of a stay, there is a significant risk that Respondents will be irreparably harmed by an adverse initial decision. It would be inequitable for Respondents—who, to reiterate, believe strongly that they will be vindicated on the merits—to suffer the reputational consequences of an adverse decision by what may well soon be determined to be an unconstitutionally appointed hearing officer. While such a decision would invalidate any adverse decision rendered in the interim, the reputational harm of a finding on the merits would remain.

As for the third factor, a stay at this point in the proceeding would not prejudice any party. There are no concerns about preserving witness memory in this case because the hearing

[9] As noted, Petitioners' petition for rehearing en banc in *Lucia* was granted by the D.C. Circuit on February 16, 2017 and argued May 24, 2017, and the government's petition for rehearing and rehearing en banc was denied in *Bandimere* on May 3, 2017.

has already concluded. And there is no risk of alleged ongoing or future harm to fund investors—the Patriarch entities are no longer registered investment advisers, and no Patriarch entity has served as a collateral manager to any of the relevant funds since February 2016. Nor are Respondents seeking a stay of indefinite duration—rather, Respondents request a stay only until the constitutionality of these proceedings under the Appointments Clause is resolved. Conversely, if a stay is not granted, Respondents may suffer severe repercussions from any negative ruling on the merits of their case, as noted above. Such harm cannot be undone even if the constitutional issue is later resolved in Respondents' favor.

The fourth factor, concerning the public interest, favors a stay in two ways. First, a stay would further the public interest in conserving resources that would otherwise be expended on proceedings that may very well be nullified on constitutional grounds. It would be a waste of the resources of all involved—including the Commission's and its ALJs'—to invest time and money in the preparation of an initial decision or Commission review, only to have those proceedings and decisions nullified in the near future by an en banc decision from the D.C. Circuit that follows that of the Tenth Circuit, or by the U.S. Supreme Court. *See Bus. Roundtable*, 2010 WL 3862548, at *1; *Steinberg*, 2015 WL 331125, at *2. As the federal courts have recognized in similar situations involving a pending appellate court's review of a dispositive legal issue, "a stay will reduce the additional expenditure of the parties' time and resources, which is of particular importance if the Supreme Court's decision ultimately disposes of th[e] action." *Munoz v. PHH Corp.*, 2011 WL 4048708, at *4 (E.D. Cal. Sept. 9, 2011). A stay will, moreover, merely preserve the status quo pending final resolution of this issue by the federal courts; if at the end of the process the Supreme Court finds in favor of the Commission on the constitutional question (or declines review of a decision in the Commission's favor in *Lucia*), the administrative proceeding can continue.

Second, a stay would further the public interest in uniformity of the enforcement of the securities laws while *Lucia* and *Bandimere* are pending. It is important that the securities laws be applied and enforced uniformly throughout the country; that is, in fact, the very reason Congress federalized securities law and created the SEC. *See, e.g., Lanier*, 838 F.3d at 155; *Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 354 (2d Cir. 1990) (federal securities regulation is "national in scope and in need of uniform rules"); *see also* Securities Exchange Act of 1934, Sec. 4, 15 U.S.C. § 78d (creating SEC). An arbitrary stay of the kind issued recently by the Commission does violence to that salutary principle.

These are much the same "prudent[ial]" concerns that compelled the Commission's recent order in light of *Bandimere*, and they counsel strongly in favor of staying this proceeding. *See In re Pending Admin. Proceedings*, Investment Advisers Act Release No. 4708, 2017 WL 2224348, at *1. That would be especially appropriate given that, as noted above, Respondents have repeatedly challenged the constitutionality of the appointment procedure for SEC's ALJs in this very proceeding. *See, e.g.*, Resp. Pre-Hearing Br. 38 (Oct. 17, 2016) (Ex. 2); Resp. Post-Hearing Br. 109 (Dec. 16, 2016) (Ex. 3); Resp. Proposed Conclusions of Law ("COL") ¶¶ 110-12 (Dec. 16, 2016) (Ex. 4); Resp. Post-Hearing Opp. Br. 45 (Jan. 13, 2017) (Ex. 5). The ALJ will need to rule on the Appointments Clause question in issuing an Initial Decision, which is *sub judice*. She should not do so without the benefit of the D.C. Circuit's en banc ruling in *Lucia*, or any subsequent Supreme Court opinion.[10]

Granting a stay in these circumstances not only furthers fairness and efficiency, but is also consistent with Commission practice, which makes clear that a stay is appropriate where a dispositive legal issue is pending in the circuit court and may be taken up soon by the U.S.

[10] As noted above, to the extent respondents in other pending proceedings seek the same relief, the Commission could limit stays to proceedings, like this one, in which respondents have already raised the Appointments Clause issue.

Supreme Court, separate and apart from the four factors that comprise the traditional test. In *Steinberg*, for example, the respondent sought a stay of his administrative proceeding after the Second Circuit's decision in *Newman*, 773 F.3d 438, concerning the elements required for an insider trading conviction. *Steinberg*, 2015 WL 331125, at *1-2. Without applying the four factors articulated above, the Commission granted Steinberg's stay motion for "good cause shown," in light of the *Newman* case's "likely impact on Steinberg's conviction." *Id.* at *2. It ordered that the stay would remain in place until "the United States Attorney's Office decide[d] whether to petition for rehearing, rehearing en banc, and/or certiorari in" *Newman*, and "any such petitions [were] finally resolved." *Id.* Federal district courts likewise stay cases as a routine matter when the resolution of a pending appeal in another action would provide binding authority as to questions presented in the district court case. *See, e.g., Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (noting that the court "[o]ften" issues stays "in light of other pending proceedings that may affect the outcome of the case before us"); Order (Dkt. 28), *Acton v. Intellectual Capital Mgmt., Inc.*, No. 15-cv-4004 (JS) (ARL) (E.D.N.Y. Dec. 28, 2015) (granting stay pending resolution of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)).[11] The Commission should do the same here.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Commission stay this proceeding (after granting interlocutory review of the ALJ's order denying a stay) pending resolution by the federal courts of appeal and the U.S. Supreme Court, in *Raymond J. Lucia*

[11] *See also, e.g.*, Order (Dkt. 52), *Fontes v. Time Warner Cable, Inc.*, No. 14-2060 (C.D. Cal. Dec. 17, 2015) (granting stay "in light of the risk of wasting the resources of the Court and the parties as well as the high degree of uncertainty in this area of the law"); *Fergerstrom v. PNC Bank, N.A.*, 2014 WL 1669101, at *13 (D. Haw. Apr. 25, 2014) (accepting magistrate recommendation to grant stay "[i]n light of the similar factual and legal issues raised in [pending] cases and the pending appeals"); *Munoz v. PHH Corp.*, 2011 WL 4048708, at *4 (E.D. Cal. Sept. 9, 2011) (holding that "[t]here is no rational reason to proceed further in this case until the standing issue has been clarified by the Supreme Court" in a case then pending before the court).

Cos., Inc. v. SEC and *Bandimere v. SEC,* of the question of whether proceedings held before an SEC administrative law judge comply with the Appointments Clause of the U.S. Constitution.

* * *

Rule 154(c) Certification: Undersigned counsel certifies that this brief (together with the accompanying motion) contains 6,353 words and therefore complies with the length limitations set forth in Rule 154(c).

Dated: June 2, 2017
New York, New York

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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

DECLARATION OF AKIVA SHAPIRO IN SUPPORT OF RESPONDENTS' PETITION FOR INTERLOCUTORY REVIEW OF THE HEARING OFFICER'S DENIAL OF A STAY OF THIS PROCEEDING, AND FOR A STAY

I, Akiva Shapiro, under penalty of perjury, affirm as follows:

1. I am an attorney in the law firm of Gibson, Dunn & Crutcher LLP, attorneys for the above-referenced Respondents. I submit this declaration in support of Respondents' Petition for Interlocutory Review of the Hearing Officer's Denial of a Stay of This Proceeding, and for a Stay.

2. Attached hereto as Exhibit 1 is the Order of Administrative Law Judge Carol Foelak denying Respondent's motion for a stay of proceedings and for certification of this issue for interlocutory review.

3. Attached hereto as Exhibit 2 is an excerpt from Respondents' Pre-Hearing Brief, filed October 17, 2016.

4. Attached hereto as Exhibit 3 is an excerpt from Respondents' Post-Hearing Brief, filed December 16, 2016.

5. Attached hereto as Exhibit 4 is an excerpt from Respondents' Proposed Conclusions of Law, filed December 16, 2016.

6. Attached hereto as Exhibit 5 is an excerpt from Respondents' Post-Hearing Opposition Brief, filed January 13, 2017.

7. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: New York, New York
June 2, 2017

Akiva Shapiro

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4672/March 10, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-16462

In the Matter of		
LYNN TILTON; PATRIARCH PARTNERS, LLC; PATRIARCH PARTNERS VIII, LLC; PATRIARCH PARTNERS XIV, LLC; and PATRIARCH PARTNERS XV, LLC	: : : : : :	ORDER

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on March 30, 2015. The OIP alleges that Respondents violated the antifraud provisions of the Investment Advisers Act of 1940 in their operation of three collateral loan obligation funds (known as the Zohar Funds) by reporting misleading values for the assets held by the funds and failing to disclose a conflict of interest arising from Lynn Tilton's undisclosed approach to categorization of assets. The proceeding was stayed by order of the U.S. Court of Appeals for the Second Circuit between September 17, 2015, and June 2016. *See Tilton v. SEC*, 824 F.3d 276, 291 (2d Cir. 2016); *Tilton v. SEC*, No. 15-2103 (2d Cir.), ECF Nos. 76, 125. The hearing commenced on October 24, 2016, and concluded on November 10, 2016. The parties completed their post-hearing briefing with opposition filings on January 13, 2017.

Stay

Under consideration is Respondents' February 23, 2017, Motion to Stay and responsive pleadings. The Motion to Stay concerns the argument of Respondents and others that administrative proceedings such as the instant proceeding are unconstitutional because the presiding administrative law judges were appointed in violation of the U.S. Constitution. Specifically, Respondents point to *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016) (holding such proceedings to be unconstitutional), and the February 16, 2017, grant of rehearing en banc of *Raymond J. Lucia Cos.*, 832 F.3d 277 (D.C. Cir. 2016) (holding such proceedings to be constitutional). In light of these developments, and the possibility that the issue may reach the Supreme Court, Respondents argue that a stay of this proceeding is appropriate. Respondents also point to the Supreme Court's recent grant of certiorari in *SEC v. Kokesh*, 834 F.3d 1158 (10th Cir. 2016), which presents the question of whether the five-year statute of limitations applicable to civil penalties applies to disgorgement, noting that the Division of Enforcement has requested disgorgement based in part on conduct more than five years before the date of the OIP.

The stay will not be granted. Respondents' suggestion that a stay would avoid unnecessary expenditure of resources on a proceeding whose constitutionality is in question overlooks the fact that the parties have completed their post-hearing briefing.[1] At any rate, the Commission's rules of practice do not provide for the undersigned to grant stays of indefinite duration except for stays "during the pendency of a criminal investigation or prosecution arising out of the same or similar facts that are at issue" in the administrative proceeding. 17 C.F.R. § 201.210(c)(3). *See also* 17 C.F.R. § 201.161(c)(2) (authorizing stays of limited duration pending Commission consideration of offers of settlement). The possibility, not to mention the timing, of any future Supreme Court opinion on the constitutional issue is speculative, and the Commission has not disavowed its previous stance that its proceedings are constitutional.

Interlocutory Review

Respondents' request for certification for interlocutory review pursuant to 17 C.F.R. § 201.400 (Rule 400) of a decision by the undersigned not to stay the proceeding will be denied.

Rule 400(c)(2) provides, in relevant part:

(c) *Certification Process.* A ruling submitted to the Commission for interlocutory review must be certified in writing by the hearing officer . . . . The hearing officer shall not certify a ruling unless:

. . .

(2) upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that:

(i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) an immediate review of the order may materially advance the completion of the proceeding.

Concerning Rule 400(c)(2)(i), the Commission has not disavowed its position that its proceedings are constitutional. As a consequence, immediate review of this order will not materially advance the completion of this proceeding.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

[1] Respondents also advert to irreparable reputational harm to Respondents and negative impact on distressed companies in which they have invested that would occur from a negative ruling in this case if not foreclosed by a stay. During the hearing Respondents voiced a more optimistic outlook on the possible outcome in urging that the post-hearing briefing and initial decision occur quickly. *See* Tr. 3633-37 (Nov. 9, 2016).

UNITED STATES OF AMERICA
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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

RESPONDENTS' PRE-HEARING MEMORANDUM

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October 17, 2016

Respondents have, *inter alia*, contested in federal actions the validity of this proceeding under the Appointments Clause and as a violation of their due process and equal protection rights under the Fifth Amendment of the U.S. Constitution.[15] Respondents urge Your Honor to find this proceeding to be invalid for each of these reasons. In addition, since the Division issued the OIP, Respondents have filed a series of motions aimed at obtaining a full and fair hearing, including, among others, two motions to compel production of *Brady* materials pursuant to Rule 230, and a motion to stay the proceedings and compel further *Brady* disclosures in light of the Division's repeated misconduct discovered on the eve of trial. *See* Mem. of Law in Supp. Resp. Mot. to Compel Production of *Brady* Materials (Aug. 31, 2016); Mem. of Law in Supp. Resp. Mot. to Compel. Production of *Brady* Material and Jencks Act Witness Statements (Oct. 12, 2016); Mem. of Law in Supp. Resp. Mot. to Stay Proceedings and Compel Div. to Make Further Disclosures Regarding Two Witnesses (Oct. 16, 2016). The Division's misconduct at issue in these motions warrant remedies ranging from witness preclusion, issue preclusion, or even termination of this proceeding. In addition to moving to compel exculpatory and impeachment evidence, Respondents have challenged the fundamentally unfair timing of the hearing, filed motions to strike the Division's expert witnesses, moved to preclude the Division from introducing irrelevant, unreliable, immaterial, and unduly repetitious evidence, and filed a motion for summary disposition. Respondents incorporate by reference and reiterate all of the motions Respondents have made throughout this proceeding that have been denied in whole or in part. To the extent Respondents' motions have been denied, Respondents urge Your Honor to

[15] *See, e.g.*, Compl., *Tilton v. SEC*, No. 15 Civ. 02472 (S.D.N.Y. Apr. 1, 2015); Pet. to Comm'n, Tilton, Admin. Proc. File No. 3-16462 (July 25, 2016); Applic. Stay Pending Filing & Disp. Pet. Writ Cert., *Tilton v. SEC*, No. 16A242 (U.S. Sept. 2, 2016).

Dated: New York, New York
October 17, 2016

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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.	x	Administrative Proceeding File No. 3-16462 Judge Carol Fox Foelak

RESPONDENTS' POST-HEARING BRIEF

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comply with GAAP, but also that the Noteholders, who never once asked a question about the financial statements over the course of 15 years, did not deem the financial statements important in light of the total mix of information available to them. *See* Tr. 1981:2-8 (Tilton); Tr. 1356:14-18 (Mercado); FOF ¶¶ 226, 236, 273-76.

III. The Unconstitutionality Of These Proceedings And The Division's Litigation Misconduct Each Present Independent Reasons To Dismiss The Charges.

A. The Denial Of Respondents' Constitutional Rights Presents An Independent Basis To Dismiss.

Respondents have previously argued, and continue to assert, that this proceeding violates their constitutional rights in several critical respects. *See* COL ¶¶ 110-127; FOF ¶¶ 344-55.

- The SEC's internal administrative tribunals, including this one, are facially unconstitutional under the Appointments Clause of Article II of the U.S. Constitution.[66]

- This forum violates Respondents' due process rights by, *inter alia*, requiring enforcement cases to be tried to an initial decision in an unduly limited timeframe regardless of their complexity; insisting that the SEC need not specify salient factual allegations in the OIP; denying Respondents a meaningful opportunity to gather information from key witnesses; interpreting in overly narrow terms the Division's obligation to turn over exculpatory materials; approving the Division's improper use of experts to introduce legal conclusions; and admitting hearsay and other forms of unreliable evidence.[67] *See* FOF ¶¶ 302-03, 306, 327, 335, 344-55, App'x B.

- To the extent recent amendments to the Commission's Rules of Practice were not deemed applicable to Respondents in this proceeding, the Commission's failure to apply all of the amended Rules to Respondents and those similarly situated violates Respondents' equal protection rights.[68]

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[66] *See, e.g.*, Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial, *Tilton v. SEC*, No. 15 Civ. 02472 (S.D.N.Y. Apr. 1, 2015); Pet. To Comm'n, *Tilton*, Admin. Proc. File No. 3-16462 (July 25, 2016); Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial, *Tilton v. SEC*, No. 16 Civ. 07048 (S.D.N.Y. Sept. 9, 2016).

[67] *See* sources cited *supra* n.66.

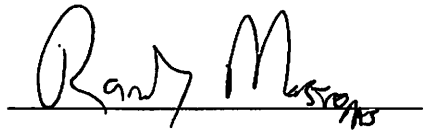
[68] *See* sources cited *supra* n.66.

CONCLUSION

For the foregoing reasons, the Division has failed to meet its burden of proving the charges set forth in the OIP, and Your Honor should issue an initial decision finding Respondents not liable.

Dated: New York, New York
December 16, 2016

GIBSON, DUNN & CRUTCHER LLP

By: 

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

RESPONDENTS' PROPOSED CONCLUSIONS OF LAW

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December 16, 2016

emails to the Division. *See Chapman*, 524 F.3d at 1073; Respondents' Post-Hearing Brief, Pt. III.B.

106. The Division engaged in serious misconduct when it refused to produce to Respondents interview notes from its interviews with witnesses reflecting those witnesses' statements and bearing on their likely direct testimony. *See Goldberg v. United States*, 425 U.S. 94, 101-02 (1976) (witness statements must be disclosed even where they are contained in attorney notes or memoranda created during witness interviews); Respondents' Post-Hearing Brief, Pt. III.B.

107. The Division engaged in serious misconduct when it repeatedly, but falsely, represented to this tribunal that it was in compliance with its obligations under *Brady*, *Giglio*, and the Jencks Act. *See, e.g.*, *Chapman*, 524 F.3d at 1073; Respondents' Post-Hearing Brief, Pt. III.B.

108. The Division engaged in serious misconduct when it provided to MBIA confidential, non-public information produced by Respondents in the Division's investigation in exchange for MBIA's cooperation in this investigation. *See* Respondents' Post-Hearing Brief, Pt. III.B.

109. The Division's serious misconduct related to this proceeding, including its failure to adhere to constitutional, statutory, and ethical duties, and its false representations concerning its compliance with disclosure obligations, warrants dismissal of the OIP.

VII. This Forum's Denial Of Respondents' Constitutional Rights

110. Under the Appointments Clause of Article II of the U.S. Constitution, inferior officers of the United States must be appointed by a limited set of Executive Branch officials,

which set includes the Commission. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010).

111. SEC ALJs are inferior officers for purposes of the Appointments Clause, yet they are not appointed by the Commission.

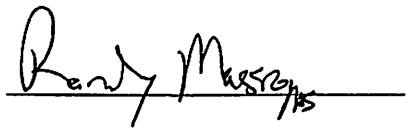
112. This forum is therefore unconstitutional under the Appointments Clause of Article II of the U.S. Constitution. *See Freytag v. Comm'r*, 501 U.S. 868, 878-90 (1991) (where judge serves in violation of the Appointments Clause, the error is "structural," with resulting constitutional harm regardless of how the proceeding is otherwise conducted); Respondents' Post-Hearing Brief, Pt. III.A.

113. Respondents in an adjudicative administrative proceeding are entitled to due process. *See Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (finding the constitutional guarantees of substantive and procedural due process are fully applicable in administrative proceedings); *Kevin Hall*, Exchange Act Release No. 3080, 2009 WL 4809215, at *22 & n.97 (Dec. 14, 2009) (respondents are entitled to "'the full panoply' of safeguards" of due process) (quoting *Hannah v. Larche*, 363 U.S. 420, 442 (1960)); *Gregory M. Dearlove*, Initial Decision Release No. 315, 2006 WL 2080012, at *55 (ALJ July 27, 2006) ("[T]he due process clause of the Constitution and the Administrative Procedure Act do ensure the fundamental fairness of an administrative hearing.").

114. Respondents in administrative proceedings, like defendants in other contexts, have a constitutional right to be informed of the specific nature of the charges brought against them, and thereby be given notice of all grounds on which they may be found liable. *See W. Pac. Capital Mgmt. LLC*, Admin. Proc. Rulings Release No. 681, 2012 WL 8700141, at *1 (ALJ

Dated: New York, New York
December 16, 2016

GIBSON, DUNN & CRUTCHER LLP

By: 

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UNITED STATES OF AMERICA
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In the Matter of LYNN TILTON, PATRIARCH PARTNERS, LLC, PATRIARCH PARTNERS VIII, LLC, PATRIARCH PARTNERS XIV, LLC and PATRIARCH PARTNERS XV, LLC Respondents.	x	Administrative Proceeding File No. 3-16462 Judge Carol Fox Foelak

RESPONDENTS' POST-HEARING OPPOSITION BRIEF

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Counsel for Respondents

January 13, 2017

about the importance of this information to him is not credible. The Division thus failed to present any credible evidence of materiality. And at all events, the importance of the information provided in the financial statements must be evaluated in the context of the total mix of information available to noteholders, including the much more detailed and voluminous information provided in the Trustee Reports. *See id.* at 106-08.

III. The Unconstitutionality Of These Proceedings And The Division's Litigation Misconduct Each Present Independent Reasons To Dismiss The Charges.

As outlined in Respondents' opening post-hearing brief, Respondents have challenged the constitutionality of this proceeding on numerous grounds, including under the Appointments Clause and as violative of their due process and equal protection rights. *See* Resp. Br. 109-10. After Respondents submitted their brief, the Tenth Circuit held that SEC ALJs' appointments are unconstitutional under the Appointments Clause, further buttressing Respondents' position on this issue. *See Bandimere v. SEC*, 2016 WL 7439007, at *1 (10th Cir. Dec. 27, 2016). The Division has not addressed Respondents' arguments concerning the unconstitutionality of this proceeding, including specific examples of due process deprivations. *See* Resp. Br. 110 & App'x B. Nor does the Division address in its opening post-hearing brief the numerous instances of serious litigation misconduct by the Division raised by Respondents throughout the trial, which warrant dismissal of the charges. *See* Resp. Br. 110-12. The Division should not be rewarded for hiding its head in the sand in the hope that its misconduct will be ignored.

IV. If Respondents Were To Be Found Liable, Any Significant Sanctions Would Not Be Appropriate.

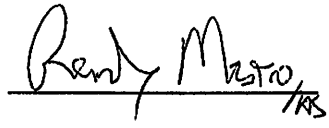
The Division's opening post-hearing brief makes clear what Respondents have known to be true since the OIP was filed: not only was the Division mistaken in charging and prosecuting Respondents, it has also grossly overreached in its requests for sanctions. The Division seeks a litany of severe punishments: a permanent industry bar, over $200 million in disgorgement,

CONCLUSION

For the foregoing reasons, the Division has failed to meet its burden of proving the charges set forth in the OIP, and Your Honor should issue an initial decision finding Respondents not liable.

Dated: New York, New York
January 13, 2017

GIBSON, DUNN & CRUTCHER LLP

By: 

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Counsel for Respondents

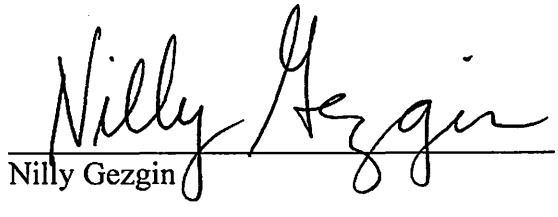
CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of 1) Respondents' Petition for Interlocutory Review of the Hearing Officer's Denial of A Stay of This Proceeding, and For A Stay, 2) a memorandum of law in support thereof, and 3) the Declaration of Akiva Shapiro in Support of Respondents' Petition for Interlocutory Review of the Hearing Officer's Denial of A Stay of This Proceeding, and For A Stay on this 2nd day of June, 2017, in the manner indicated below:

United States Securities and Exchange Commission
Office of the Secretary
Attn: Secretary of the Commission Brent J. Fields
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
Fax: (202) 772-9324
(By Facsimile and original and three copies by Federal Express)

Hon. Judge Carol Fox Foelak
100 F. Street N.E.
Mail Stop 2557
Washington, D.C. 20549
(By Federal Express)

Dugan Bliss, Esq.
Division of Enforcement
Securities and Exchange Commission
Denver Regional Office
1961 Stout Street, Ste. 1700
Denver, CO 80294
(By Email pursuant to parties' agreement)



Nilly Gezgin