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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 Hon. Judge Carol Fox Foelak

RESPONDENTS' MOTION TO ADJOURN THE TRIAL

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August 21, 2015

PRELIMINARY STATEMENT

Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC and Patriarch Partners XV, LLC (collectively "Patriarch") respectfully move to adjourn the trial date from October 13, 2015 to December 1, 2015, or another date convenient to the Court. This is Patriarch's first request for an adjournment. Patriarch's counsel conferred with counsel for the Division, who said that the Division will oppose adjournment.

Two independent reasons support Patriarch's request.

First, the United States Court of Appeals for the Second Circuit will soon hear Patriarch's request for injunctive relief against the trial. As described below, Patriarch's appeal to the Second Circuit has been fully briefed, and oral argument is anticipated in September. An adjournment until December 1 would allow the Second Circuit a reasonable period of time to consider and address Patriarch's important constitutional claim. The very same claim already has resulted in the federal courts enjoining three other trials before SEC ALJs. These courts have held that proceeding with an unconstitutional trial imposes irreparable harm that cannot be remedied after the fact. A brief adjournment would afford appropriate respect for the role of the federal courts in adjudicating important constitutional questions, especially amid rulings that already have recognized likely constitutional violations.

Second, the Final Witness List provided by the Division of Enforcement lists four investor witnesses about which there is no evidence in the Division's investigative file or other discovery provided to date. On August 17, 2015, Your Honor signed subpoenas *duces tecum* for those witnesses, and Patriarch already has effected service and begun to press for production of responsive materials. Even so, it will take a period of weeks to obtain responsive documents,

and Patriarch then will need time to review the materials to make effective use of them at trial. This process simply cannot be completed for an October 13 trial date, and the substantial prejudice faced by Patriarch provides an additional basis for a brief adjournment.

By adjourning to December 1, the Court will be able to conduct the trial in the time estimated by the parties (two to three weeks) without interruption from the Thanksgiving and year-end holidays. The month of January would remain free for post-trial briefing. And if the Court required additional time to render an Initial Decision, Patriarch will not oppose a request to the Commission from the Chief Judge to allow Your Honor time beyond the 300-day limit contemplated by the Order Instituting Proceedings.

ARGUMENT

I. AN ADJOURNMENT WOULD AFFORD THE SECOND CIRCUIT A REASONABLE OPPORTUNITY TO RULE ON THE CONSTITUTIONALITY OF THE TRIAL

No one can deny that there is a substantial question as to whether this case can proceed to trial without violating the U.S. Constitution. In *Duka v. SEC*, No. 15 Civ. 357 (RMB), slip op. at 3-4 (S.D.N.Y. Aug. 12, 2015) (ECF No. 60), Judge Berman found jurisdiction over the Appointments Clause claim and issued a preliminary injunction, expressly following Judge May's decision to the same effect in *Hill v. SEC*, No. 1:15-CV-1801-LMM, 2015 WL 4307088 (N.D. Ga. June 8, 2015) (to be published in F. Supp. 3d). Judge May enjoined a second SEC ALJ trial in *Gray Financial Group, Inc. v. SEC*, No. 1:15-CV-0492-LMM (N.D. Ga. Aug. 4, 2015) (ECF No. 56). And three judges of the Eleventh Circuit (upon a fully-briefed motion from the SEC) unanimously refused to lift the *Hill* injunction. *Hill v. SEC*, No. 15-12831-CC (11th Cir. Aug. 10, 2015) (SEC's "'Motion to Stay Preliminary Injunction Pending Appeal' is DENIED").

Although Patriarch was the first to raise this constitutional claim, Judge Abrams erroneously disclaimed jurisdiction and failed to reach the merits. *SEC v. Tilton*, No. 15-CV-2472-RA, 2015 WL 4006165 (S.D.N.Y. Jun. 30, 2015). Since then, the federal courts have uniformly exercised jurisdiction and enjoined trials before improperly appointed SEC ALJs. The Second Circuit has granted Patriarch's motion for an expedited appeal, and all briefing has now been completed. On August 19, the Clerk's Office proposed oral argument for the week of September 15, 2015, and the parties are awaiting notification of a confirmed argument date. The Second Circuit is the premier circuit in federal securities matters. Assuming the Second Circuit finds jurisdiction (as it should), the SEC acknowledged in its appellate brief that the Second Circuit has the power to address the Appointments Clause question now, as Patriarch has requested.

No sound reason exists to rush to trial on October 13 under a cloud of potential error, rather than give the Second Circuit a reasonable period of time to address the constitutional claim. Once that trial occurs, the damage to the Respondents cannot be undone. The Appointments Clause claim involves loss of a constitutional right, as to which the Second Circuit presumes irreparable harm.[1] The structural, constitutional flaw in the approaching trial does not pose the type of harm that can be remedied *ex post* by the payment of monies between private litigants. *See Duka,* slip op. at 2 ("Without an injunction, Plaintiff would not only be forced into an unconstitutional proceeding, but would be unable to recover monetary damages from this harm as the SEC possesses sovereign immunity.")

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[1] The SEC has asked the Second Circuit to limit this rule to "alleged deprivations of personal constitutional rights under the First and Eighth Amendments." SEC Br. at 37 n.5. But, as the Supreme Court said in *Free Enterprise Fund v. Public Company Accounting Oversight Board*: "[i]f the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why [this] might be so." 561 U.S. 477, 491 n.2 (2010); *see also id.* at 513 (separation-of-powers violation may create "here-and-now" injury that can be remedied in court).

The burden of structurally invalid proceedings would not be limited to the Respondents. The fiscal, temporal and professional costs of a constitutionally invalid trial undoubtedly will be high for Ms. Tilton, Patriarch, the Zohar Funds' portfolio companies, and their employees. But, the Division also would expend considerable resources on a proceeding that risks being held a nullity under prevailing case law. The burden will also be felt by the Court in terms of Your Honor's time and that of other court personnel.

Finally, this Court should grant the adjournment out of respect for the important and historic role of the federal courts in adjudicating constitutional questions. In the briefing to the Second Circuit, the SEC did not dispute Patriarch's contentions (1) that it was inappropriate to submit the Appointments Clause claim to an SEC ALJ, and (2) that an appeal to the Commission on the basis of the Appointments Clause will be futile in view of the SEC's stated position in the various federal court litigations (*i.e.*, that SEC ALJs are mere employees not subject to the Clause). Since the claim cannot meaningfully be addressed in the administrative context, Your Honor should allow a reasonable opportunity for resolution by the federal courts.

Patriarch recognizes that Your Honor is operating under an OIP requiring an initial decision by the end of January. But the practice of providing no more than 300 days for trial and an initial decision was formulated in a different era, in 2003, when the cases on Your Honor's docket were of a different nature and not part of the current Division push to have increasingly complex cases tried within a matter of months. [2] Under the Rules of Practice, the Commission shall grant a motion for an extension beyond the 300-day limit if it is "necessary or appropriate in the public interest." 17 C.F.R. § 201.360(a)(3). Without question, an extension

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[2] A case of this complexity, with a voluminous investigative record compiled over more than five years, cannot reasonably be tried six months after the filing of charges.

necessitated by the Second Circuit's consideration of an important constitutional issue (concerning the very proceeding requiring an extension) would serve the public interest. If Your Honor adjourned the trial as requested, Patriarch would not oppose any motion to seek an extension of the time limit for an initial decision. *Id.* The Division investigated for more than five years, so it is regrettable that the Division would oppose any adjustment to the trial date in light of the developments in the federal courts and the imminent argument before the Second Circuit. If the current procedural posture does not warrant a six-week adjournment, it is difficult to imagine a scenario that would.

II. AN ADJOURNMENT WOULD ALLOW PATRIARCH A MEANINGFUL OPPORTUNITY TO CONFRONT THE NEW INVESTOR WITNESSES

From the initiation of the OIP, Patriarch was wary that the Division's trial counsel would use the limited discovery rules in this forum to its advantage by finding new witnesses who would not be burdened by historical documents, an investigative transcript or even attorney notes of interviews. Patriarch filed its motion for a more definite statement with this concern in mind, raised the concern explicitly during the initial telephone conference with Your Honor, and then raised the issue again in its motion to halt the Division's search for new investor witnesses. Patriarch's fear was well-founded, as the Division now proposes on its witness list to call four investor witnesses lacking any of these basic components of factual development.[3] Those witnesses are from Varde Partners, SEI, Nord LB and an investment firm called Deer Park Road.

[3] As directed by Your Honor, the Division notified Patriarch on May 29, 2015 that it had contacted nineteen investors, fifteen of whom had not been contacted by the Division prior to the OIP (and therefore were not reflected in the Division's investigative file). Patriarch could not reasonably engage in third-party subpoena practice with respect to fifteen entities, not knowing which of them would appear on the Division's witness list. When the Division provided its witness list on August 7, 2015, Patriarch learned for the first time the identities of the four new investors that the Division had chosen as trial witnesses, prompting Patriarch's application to Your Honor for four subpoenas *duces tecum*.

Patriarch cannot depose these new witnesses under the rules of this forum. But Patriarch can and did issue subpoenas *duces tecum*, and this Court already has signed such subpoenas.

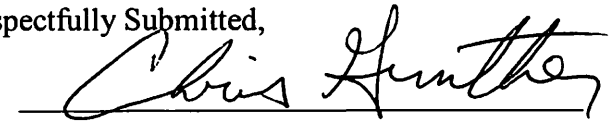
The problem here is that Patriarch will not be able to obtain compliance with the subpoenas and review the materials in time to make meaningful use of them for a trial beginning October 13. Patriarch's subpoenas to previously disclosed investor witnesses (who were identified in the Division's investigative file) have already yielded important information supporting the defense. There is no good reason to deny Patriarch the time to benefit from this crucial discovery tool with respect to the new investor witnesses.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court grant the relief requested herein.

Dated: August 21, 2015
New York, New York

Respectfully Submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on the following on this 21st day of August, 2015, in the manner indicated below:

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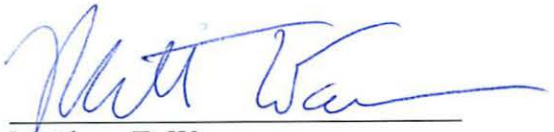

Matthew T. Warren

FACSIMILE CERTIFICATION

I hereby certify that the enclosed filing was transmitted via facsimile on August 21, 2015 to the Office of the Secretary at the number (202) 772-9324.

Matthew T. Warren