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July 18, 2016

VIA EMAIL AND FACSIMILE

The Honorable Carol Fox Foelak
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 25049

Re: *In the Matter of Lynn Tilton*, et al. *(File No. 3-16462)*

Dear Judge Foelak:

I write as new counsel for Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, "Patriarch" or "Respondents") in response to Your Honor's order of last Friday afternoon rejecting the parties' joint request for a trial date starting in December 2016 and, instead, ordering the parties to agree upon a trial date starting in September 2016 -- less than two months from now.

With all due respect, we are surprised by Your Honor's refusal to grant the parties' joint request to commence this trial in December 2016, and even more surprised that Your Honor is ordering the parties to go to trial in this complex matter less than two months from now, starting in September 2016. We understand that the Commission's rules impose certain time limitations, but there is still time to issue an initial decision in this matter under a more reasonable schedule for the parties. Additionally, the Rules of Practice allow for an extension of time, including through applications directly to the Commission. We implore Your Honor to reconsider and endorse the parties' joint proposal of a December 2016 trial date, or, alternatively, ask for a conference with Your Honor on or before Wednesday, July 20, 2016, to address this crucially important timing issue.

As Patriarch's new counsel who first noticed our appearance here only 10 days ago, we want to be crystal clear about this: As a matter of fundamental fairness and due process, Patriarch cannot possibly get a fair hearing if forced to proceed to trial in less than two months; it has several experts and other witnesses critical to its defense unavailable on such short notice; and it has all parties' consent to a reasonable, orderly schedule that gets this enormously complex case to trial before year's end in December 2016. Yet Your Honor has now rejected that joint request, reasoning that a trial date less than five months from now is somehow "inconsistent with a timely resolution of this proceeding." Your Honor's Order also cites the "passage of time" during which the U.S. Court of Appeals for the Second Circuit stayed this proceeding pending its review of whether these types of SEC administrative tribunals are

even constitutional -- a question that a divided three-judge panel of that court ultimately concluded was premature to decide and that our clients have now asked that entire court to review en banc.

Under all of the surrounding circumstances -- including that the SEC has been pursuing this matter for more than six years -- we, as newly appointed counsel, should not be forced to go to trial on this hugely complicated, important and high-profile case in less than two months. A perception persists that these SEC administrative proceedings are fundamentally unfair and deny respondents due process. It is therefore even more imperative that this tribunal be particularly sensitive to such perceptions and concerns and afford us the time necessary and jointly requested to commence this trial.

As Your Honor has noted, we are new counsel for Respondents. Earlier this month, we noticed our appearance in this matter in good faith, replacing prior counsel after the Second Circuit's ruling lifting the stay of this proceeding but at a time when the fairness of the SEC's administrative proceedings is under attack in federal courts across this country. Indeed, less than an hour before we received Your Honor's ruling rejecting the parties' joint request, our clients filed a petition for rehearing en banc by the entire Second Circuit of their constitutional challenge to this proceeding, and they intend to pursue their appellate rights all the way to the Supreme Court if need be.

Our appearance also coincides with the Commission's acknowledgement of the criticism leveled against the SEC's administrative proceedings, including that, for too long, they have lacked the hallmarks of due process required before a deprivation of one's livelihood or property. For example, in a recent interview with the *Wall Street Journal*, Commission Chair Mary Jo White noted that the SEC's Rules of Practice for administrative proceedings had not been "modernized" for nearly a decade and reflected on the need to ensure that such administrative proceedings convey fairness both in reality and in appearance. *Mary Jo White Explains the New SEC Rule*s, Wall St. J., Nov. 24, 2015, http://www.wsj.com/articles/mary-jo-white-explains-the-new-sec-rules-1448302777. And just last Wednesday, the Commission attempted to address the perception that its existing rules are unfair by unanimously adopting a number of substantial amendments. *See* Amendments to the Commission's Rules of Practice, Release No. 34-78319, July 13, 2016, https://www.sec.gov/rules/final/2016/34-78319.pdf. While those amendments do not go far enough to rectify the fundamental unfairness of proceedings like this one, they at least will afford respondents the ability to take up to seven depositions (without regard to a witness's availability for trial) and to request related document discovery. However, these new discovery-related rules will not be applied automatically to litigants whose initial pre-hearing conferences have been held or whose cases are pending and have not been stayed as of the effective date. *Id.*

As Your Honor knows, everything in this case is receiving intense public scrutiny. What the

public will see with this ruling accelerating this case to trial will look like a rush to judgment to target someone with the temerity to challenge the constitutionality of these SEC proceedings. That unintended consequence of this ruling will serve no party's interest here.

There are a host of reasons that Your Honor's latest scheduling order warrants reconsideration.

First, this case is tremendously complex. Although, as new counsel, we are still familiarizing ourselves with the entire voluminous record, we understand that the prospective trial evidence (to say nothing of the enormous investigative record) includes nearly 1,000 trial exhibits, at least two dozen proposed trial witnesses, and 11 expert reports that were exchanged among the parties last summer but not yet presented to Your Honor. In particular, the 11 expert reports focus on an array of technical issues, including:

- The structure and operation of the Zohar CLOs, including their categorization of loans;
- The authority invested in the collateral manager and others under the pertinent transaction documents;
- GAAP compliance of the impairment analyses in the Zohar funds' financial statements;
- The proper calculation of the Zohar funds' monthly overcollateralization ratio tests;
- The disclosure of the Zohar Funds' strategies to investors and the availability of information sufficient to enable investors to monitor the performance of the loans held by the Zohar funds and their own investments; and
- The amounts paid to certain Respondents in subordinated collateral management fees and preference share distributions.

In light of these complexities—with which Your Honor may not yet be fully familiar—a September 2016 hearing date strikes us as premature, infeasible and unfair under all of the surrounding circumstances.

Second, Your Honor's order requiring the parties to go to trial in September 2016 puts the cart before the horse in this important sense: At the time the Second Circuit stayed this proceeding on September 17, 2015, Your Honor had not yet ruled on Respondents' fully-briefed motion for summary disposition. Indeed, that important and potentially dispositive motion remains sub judice to this day, yet its resolution would define the scope of this trial

and potentially narrow it, if not obviate the need for it altogether. Scheduling a September 2016 trial does not appear to give Your Honor any meaningful time to consider and resolve that motion, especially given the many other pre-trial motions (described below) that will also require rulings.

Third, both sides requested a December 2016 hearing date for wholly legitimate reasons, separate and apart from the fact that we are new trial counsel appearing for the first time 10 days ago to replace prior counsel after the Second Circuit's decision and we understandably need more time to prepare for trial than the few weeks afforded in Your Honor's directive. Most significantly, a number of Respondents' witnesses are unavailable to be prepared for and to appear at a September 2016 hearing, or have significant conflicts during this period, including but not limited to three of Respondents' five experts:

- Respondents' expert Glenn Hubbard, Dean of the Graduate School of Business at Columbia University, an adviser to the President of the Federal Reserve Bank of New York, and a former Chair of the President's Council of Economic Advisers, who, due to a September 2016 trial in Guernsey at which he is testifying and other professional commitments, is unavailable throughout the months of August and September 2016;

- Respondents' expert Marti Murray, who, due to expert reports due in two separate matters at the end of August and the end of September, and a deposition in a third matter during the first two weeks of September, reported that it would be "impossible" for her to testify at a trial in this matter in September; and

- Respondents' expert Mark Froeba, who, for family reasons, has plans to be in Wisconsin for several weeks in early-to-mid August through early September.

Moreover, Ms. Tilton will be attending a trial beginning August 9, 2016 in Delaware Chancery Court, in which certain Respondents are defendants, and is scheduled to be deposed on August 30, 2016 in an insurance coverage litigation relating to this matter. Similarly, Patriarch employee Carlos Mercado, who is expected to be a fact witness for both sides, will be deposed in that same insurance coverage matter on September 8, 2016. In-house counsel with responsibility for this matter also will be deposed in the above-referenced insurance coverage matter on September 9, 2016, and, in total, will need to oversee preparation for and the defense of four total Patriarch depositions between late August 2016 and September 26, 2016, when fact discovery closes. And three of Respondents' witnesses in this proceeding no longer work for Patriarch or any of its affiliates, cannot be compelled by Respondents to attend a September 2016 hearing, and are not even in regular contact with Respondents or their counsel. Their schedules will also need to be taken into account.

In addition to Respondents' scheduling conflicts, the Division has its own, including Mr. Bliss's October 1, 2016 wedding, making a trial starting during the latter half of September 2016 impossible on the Division's end.[1] This is why the Division has advised us that, given Your Honor's order, it intends to request a September 6, 2016 hearing date -- less than two months from now. Therefore, Your Honor's ruling shoehorns the parties into an early September trial date that neither of them wants. It not only disregards both sides' interests in adequately preparing for trial in this extremely complex matter but also fails to take into account the availability of counsel, experts and fact witnesses alike. Considering the almost 10-month duration of the Second Circuit's stay and that it was lifted less than two weeks ago, it should surprise no one that Respondents' experts, in particular, might have new and different commitments. Indeed, due to their trial and deposition testimony in other matters, academic schedules, and other professional obligations, certain of Respondents' experts are not available until mid-November, which is among the reasons we sought a December 2016 date in the first place. No one, least of all those experts, could have foreseen a September 2016 trial date in a case of this magnitude and complexity.

Fourth, in refusing a proposed consensual trial schedule of December 2016, Your Honor states that our firm's appearance as new counsel "cannot be allowed to delay the proceeding." Order at 2 n.3. Considerations of due process are particularly acute, however, where, as here, the case is an enforcement action based on an investigation that the SEC undertook for more than five years before any charges were filed, yet new counsel is being expected to go to trial in a matter of weeks. That is why scheduling requests of new counsel, even absent the consent opposing counsel has given here, have been routinely granted in SEC administrative proceedings,[2] as well as in federal courts. Indeed, when I spoke last Friday to Dugan Bliss, lead counsel for the Division of Enforcement, even he expressed his surprise at Your Honor's denial of our proposed joint schedule on consent and described it as unusual. And he further said that the Division would consent to our request for a conference with Your Honor on this scheduling issue.

Fifth, there is an additional—and significant—reason that denying us more time to prepare is unjust: the consequences to Respondents of any loss at trial are catastrophic and dwarf those of other recent SEC administrative proceedings, individually or cumulatively. The amount that the Division seeks in disgorgement from Ms. Tilton -- at least $208 million -- is nearly

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[1] There are additional dates in September 2016 with which lawyers representing Respondents also have scheduling conflicts, but will not detail here as we remain hopeful that an appropriate hearing date ultimately will be scheduled.

[2] *See, e.g., In Re Harrison Sec., Inc.*, Release No. 611 (Oct. 7, 2003) at 4 (granting request to postpone hearing pursuant to Rule 161(b) because new attorneys should be given "a reasonable opportunity to become familiar with the issues before the hearing starts").

seven times more than the $32 million ordered in disgorgement and penalties in all SEC administrative proceedings combined during fiscal year 2015. By contrast, there is no exigency compelling the immediate trial of this case. Ms. Tilton is not a registered investment adviser, the Patriarch entities are no longer registered investment advisers, and no Patriarch entity serves as a collateral manager to any of the Zohar funds, having resigned those positions in February 2016. As no Respondent is managing the Zohar funds, they pose no risk of any alleged ongoing or future harm to any Zohar Fund investors.

Sixth, notwithstanding Your Honor's apparent belief that the "remaining prehearing steps" are so few in number and small in significance that a September 2016 trial date would be feasible, that is definitely not the case. Respondents were planning and still intend to file many motions prior to trial. Those submissions include but are not necessarily limited to the following:

- Motions to dismiss, based on the arguments raised in the appellate proceedings and other indicia of the unconstitutionality and illegality of these SEC administrative proceedings, among other grounds;

- Motions to add certain experts as trial witnesses;

- Motions for additional discovery, based on application of the SEC's new rules, adopted just last week;

- A range of other motions challenging the manner of presentation of expert testimony, the lack of discovery concerning certain of the Division's witnesses, and other motions necessary to preserve Respondents' rights, including in any appeal, and demonstrate the inherent absence of due process for Respondents;

- Motions in limine relating to the evidence to be adduced at trial, including expert testimony;

- The pre-hearing briefing contemplated in Your Honor's scheduling orders; and

- Motions, pursuant to Rules 161 and 900 of the Rules of Practice, to extend the hearing date due to the substantial prejudice to Respondents from a September 2016 hearing, the unusual complexity of this case, and the potential issue preclusive effects of a ruling in this matter on pending civil litigations relating to the Zohar funds.

In other words, there are a host of issues still to be addressed before this matter should go to trial, and they certainly cannot be adequately addressed in a manner that comports with due process in the few weeks Your Honor has allowed.

Seventh, Your Honor has previously expressed concerns about "truncated timelines" in SEC administrative proceedings. As a recent report by the Commission's Office of Inspector General ("OIG") noted, Your Honor was interviewed by the OIG about bias in SEC administrative proceedings. That interview occurred during the pre-trial phase of this case and days before the Second Circuit issued its 10-month stay here. Rather than denying that SEC administrative proceedings are biased, Your Honor, among others, apparently identified "systemic causes" of that bias, including "the rules of practice (which the SEC has recently proposed to amend), limited access by respondents to discovery and the investigative case file, and truncated timelines." U.S. Securities and Exchange Commission, Office of Inspector General, *Report of Investigation*, Case # 15-ALJ-0482-I, at 20 (citing September 14, 2015 interview with ALJ Foelak). Given Your Honor's concern that "truncated timelines" in SEC administrative proceedings may affect fairness for all respondents, we are simply asking for fairness in the scheduling of this case.

Finally, we are not understanding the rush. There is additional time to resolve this case even under the existing schedule (obviously, not counting the period of any court-imposed stay), and the SEC's Rules of Practice permit extensions of time under circumstances such as these. We also understand from Division counsel and our firm's own experience that such extensions are readily available and routinely granted.

Accordingly, we respectfully implore Your Honor to reconsider and endorse the December 2016 trial date jointly proposed by the parties, or alternatively, to schedule a conference on or before Wednesday, July 20, to address this crucial issue. This letter will, of course, be followed by a formal motion for reconsideration, and in the alternative, for certification for interlocutory appeal, pursuant to the SEC's Rules of Practice, as well as other motions, including directly to the Commission, to extend the time frame for deciding this matter. But given the time exigencies here, we wanted to bring this critically important issue to Your Honor's attention immediately. And we also hope Your Honor will understand that we feel so strongly about this, and are expressing ourselves so frankly in this letter, precisely because

forcing our clients to have to go to trial in September 2016, just a few weeks from now, is fundamentally unfair and wholly inconsistent with due process.

Respectfully,

Randy M. Mastro

cc: Susan Brune, Esq.
Dugan Bliss, Esq.
Nicholas Heinke, Esq.
Amy Sumner, Esq.