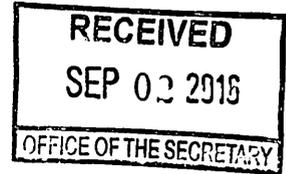


**HARD COPY**

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION



-----	X	
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.	:	
	:	
-----	X	

**DECLARATION OF MARY KAY DUNNING IN SUPPORT OF  
RESPONDENTS' MOTION TO COMPEL THE  
PRODUCTION OF BRADY MATERIALS**

I, Mary Kay Dunning, under penalty of perjury, affirm as follows:

1. I am Of Counsel in the law firm of Gibson, Dunn & Crutcher LLP, attorneys for the above-referenced Respondents. I submit this declaration in support of Respondents' Memorandum of Law in Support of Respondents' Motion to Compel the Production of *Brady* Materials.
2. Attached hereto as Exhibit 1 is a true and correct copy of a letter from Randy M. Mastro, Esq. to Dugan Bliss, Esq., Division of Enforcement, Securities and Exchange Commission, dated August 26, 2016.
3. Attached hereto as Exhibit 2 is a true and correct copy of a letter from Dugan Bliss, Esq., Division of Enforcement, Securities and Exchange Commission, to Randy M. Mastro, dated August 30, 2016.
4. Attached hereto as Exhibit 3 is a true and correct copy of an excerpt from the Expert Report of Michael G. Mayer, dated July 10, 2015.

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

Dated: New York, New York  
August 31, 2016

  
Mary Kay Dunning

# **EXHIBIT 1**

August 26, 2016

VIA E-MAIL (BLISSD@SEC.GOV)

Dugan Bliss, Esq.  
Division of Enforcement  
Securities and Exchange Commission  
Denver Regional Office  
1961 Stout Street, Ste. 1700  
Denver, CO 80294

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

Dear Mr. Bliss:

We write to request prompt production of any and all materials in the possession, custody, or control of the government pursuant to SEC Rule of Practice 230, *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *Giglio v. United States*, 405 U.S. 150 (1972), and *United States v. Bagley*, 473 U.S. 667 (1985), the Fifth Amendment to the Constitution of the United States of America, and all applicable law.

We appreciate your assurances that a review for any such materials has been conducted and completed and your acknowledgement that the U.S. Securities and Exchange Commission (“SEC,” “Commission” or the “Government”) is under a continuing obligation to produce documents pursuant to *Brady* and its progeny.<sup>1</sup> However, the Government’s views of what documents and other information may qualify as *Brady* material under relevant authority are unknown to Respondents and the Administrative Law Judge overseeing this case. To ensure that the Government is, in fact, complying with its *Brady* obligations, Respondents make the particularized requests set forth below.

---

<sup>1</sup> You acknowledged at the May 7, 2015 hearing in this matter that the Government is under a continuing obligation to produce documents pursuant to *Brady* and its progeny:

[A]s we speak to investors, you know, obviously we’re under ongoing *Brady* obligations that I’m well aware of, and when we speak to investors, if there is *Brady* information that comes up, that will be required to be disclosed as the case goes along. So we’re certainly going to comply with those obligations, which addresses at least some of those concerns that Respondents have raised.

May 7, 2015 Hearing Tr. 26:16-23.

# GIBSON DUNN

Dugan Bliss, Esq.  
August 26, 2016  
Page 2

Discovery of the information requested below is reasonable and necessary for the presentation of Respondents' defense in this case. Each of the requests seeks documents or other information that (i) may tend to exculpate Respondents; (ii) may be favorable to the defense; and/or (iii) may tend to affect the weight and/or credibility of evidence to be presented by the Government at trial, including any material that may tend to impeach the credibility of either documentary evidence or testimony. Each of the examples enumerated below specifically includes all statements made by witnesses to the Government, its agents, or other law enforcement officials, whether such statements were memorialized or not. *See United States v. Rodriguez*, 496 F.3d 221 (2d Cir. 2007) (when prosecution is in possession of material information that impeaches its witnesses or exculpates the defendant, it may not avoid its SEC Rule of Practice 230, *Brady*, *Giglio*, and *Bagley* obligation to disclose such information by not memorializing that information in writing).

We seek prompt production of any and all *Brady*, *Giglio*, and *Bagley* materials, including but not limited to the specific examples below, in order to (i) have sufficient time to conduct any necessary investigation; (ii) enable the defense to determine what motions are necessary; and (iii) enable counsel to prepare for trial. We request that you produce any and all *Brady*, *Giglio*, and *Bagley* materials, including but not limited to our specific examples below, by September 9, 2016.

With respect to those materials requested that the Government does not have in its possession, Respondents ask for a particularized response to each such request to the effect that such materials do not exist or are not in the possession of the Government. If the Government is aware that requested material exists, but does not have it in its possession, Respondents request that the Government disclose the whereabouts of the material.

To the extent that the Government asserts that any of the categories identified below do not constitute *Brady* material, we request that you notify Respondents by August 30, 2016 so that we may seek appropriate relief.

## ***Definitions***

"Government" or "Commission" means the U.S. Securities and Exchange Commission and any of its current and former Commissioners, officers, employees, staff, appointees, personnel, contractors or representatives, including but not limited to the Division of Enforcement ("Division"), the Office of Administrative Law Judges, the Office of the Chief Counsel ("OCC"), the Office of the General Counsel ("OGC"), and the Office of the Whistleblower.

# GIBSON DUNN

Dugan Bliss, Esq.  
August 26, 2016  
Page 3

“Agency” means the United States Department of Justice, New York Department of Financial Services, and/or any other applicable state or federal agencies, and any of their officers, employees, staff, personnel, contractors or representatives.

“Foreign Agency” means any foreign equivalents of the U.S. Securities and Exchange Commission, including but not limited to the Japanese Financial Services Agency, and any of their officers, employees, staff, personnel, contractors or representatives.

“Agent” means any individual or entity who, either presently or formerly, is or was employed or obligated to act on behalf of the Government or any Agency to represent the Government or any Agency in negotiations or dealings with third parties.

“Potential Witness” means any witness listed on the Division’s or Respondents’ August 22, 2016 Witness Lists, any person interviewed or contacted by the Government in the course of its investigation of Respondents, or any other potential witness.

“Affiliated Entity” means any current or former employer of any Potential Witness, or partnership or company in which the Potential Witness is a partner or member.

“OIP” means the Order Instituting Administrative Cease-and-Desist Proceedings, *In the Matter of Lynn Tilton; Patriarch Partners, LLC; Patriarch Partners VIII, LLC; Patriarch Partners XIV, LLC; and Patriarch Partners XV, LLC*, Administrative Proceeding File No. 3-16462, dated March 30, 2015.

“Investigation” means and refers to the investigation of Respondents and any Potential Witness or Affiliated Entity conducted by the Government regarding the allegations in the OIP.

“Communication” means any form of contact, documentary, written or oral, formal or informal, at any time or place and under any circumstances whatsoever whereby information of any nature is transmitted or transferred by any means, including, but not limited to statements, letters, memoranda, notes, transcripts, reports, emails, text messages, telegrams, invoices, telephone conversations, voicemail messages, audio recordings, visual recordings, face-to-face meetings and conversations, and any other form of communication or correspondence.

“Information” means all documents, objects, Communications, statements, and any other evidence and information and/or notes or recordings related thereto in the possession, custody, or control of the Government, its Agents, any Agency, and any Agency’s Agents if that Agency provided assistance to the Government in its Investigation or concurrently investigated the allegations contained in the OIP. Identification of all Information requires a

# GIBSON DUNN

Dugan Bliss, Esq.  
August 26, 2016  
Page 4

review of the following sources, among others, which are likely to contain Information: internal correspondence, external correspondence, emails, voicemails, text messages, documents, audio files, visual files, notes, transcripts, recordings, spreadsheets, tables, internal memoranda, action memoranda submitted to the Commission, memoranda transmitted to any Agency, Communications with expert witnesses, and all Information stored at Iron Mountain. Information also includes all Information that comes to the Government's attention at any point in the future.

"Exculpatory Information" means any Information that could have any exculpatory effect with respect to any allegations made in the OIP, regardless of the Government's assessment of the evidentiary weight or credibility of such material.

"Proffer" means any Communications between any Potential Witness or Affiliated Entity, on the one hand, and the Government or any Agency, on the other hand, relating to the Investigation.

"Attorney Proffer" means any Communications between counsel for any Potential Witness or Affiliated Entity, on the one hand, and the Government or any Agency, on the other hand, whether or not the Potential Witness or Affiliated Entity is present, relating to the Investigation.

"Proffer Agreement" means any and all agreements between any Potential Witness or Affiliated Entity, on the one hand, and the Government or any Agency, on the other hand, providing that any statements made by any Potential Witness or Affiliated Entity may not be used against that Potential Witness or Affiliated Entity in subsequent proceedings.

"Governing Documents" means any indentures, collateral management agreements, collateral administration agreements, and/or any other documents governing the terms of the management of the Zohar Funds.

"Respondents" means Lynn S. Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC, either individually or collectively.

"Zohar Funds" means the following collateralized loan obligations: Zohar CDO 2003-1, Limited ("Zohar I"), Zohar II 2005-1, Limited ("Zohar II"), and Zohar III, Limited ("Zohar III").

"Zohar Investor" means any current or former investor in the Zohar Funds.

"Zohar III Controlling Class" has the meaning set forth in the Zohar III Indenture,

# GIBSON DUNN

Dugan Bliss, Esq.  
August 26, 2016  
Page 5

and includes, but is not limited to, Varde Partners, Deer Park Road Corporation, Rabobank Group, and Halcyon Capital Management, LLC, and their respective direct or indirect corporate parents, subsidiaries, affiliates, predecessors or successors, and their respective officers, directors, members, employees, partners, representatives, agents, including in-house and outside counsel, and all other persons or entities acting or purporting to act on their behalf.

“A&M” means Alvarez & Marsal Zohar Management, LLC, and all of its present and former divisions, groups, parents, subsidiaries, subdivisions, predecessors, successors, and affiliated entities (whether organized or doing business under the laws of the United States or under the laws of a foreign country), its and their present and former officers, directors, employees, partners, principals, representatives and agents, and its and their present and former counsel.

“Hannover” means Hannover Funding Company LLC, and all of its present and former divisions, groups, parents, subsidiaries, subdivisions, predecessors, successors, and affiliated entities (whether organized or doing business under the laws of the United States or under the laws of a foreign country), its and their present and former officers, directors, employees, partners, principals, representatives and agents, and its and their present and former counsel.

“MBIA” means MBIA Insurance Corporation and all of its present and former divisions, groups, parents, subsidiaries, subdivisions, predecessors, successors, and affiliated entities (whether organized or doing business under the laws of the United States or under the laws of a foreign country), its and their present and former officers, directors, employees, partners, principals, representatives and agents, and its and their present and former counsel.

“Millennium” means Millennium Partners and all of its present and former divisions, groups, parents, subsidiaries, subdivisions, predecessors, successors, and affiliated entities (whether organized or doing business under the laws of the United States or under the laws of a foreign country), its and their present and former officers, directors, employees, partners, principals, representatives, agents, and its and their present and former counsel.

“Nord” means Norddeutsche Landesbank Girozentrale and all of its present and former divisions, groups, parents, subsidiaries, subdivisions, predecessors, successors, and affiliated entities (whether organized or doing business under the laws of the United States or under the laws of a foreign country), its and their present and former officers, directors, employees, partners, principals, representatives, agents, and its and their present and former counsel.

“U.S. Bank” means U.S. Bank, National Association, in its capacity as indenture

# GIBSON DUNN

Dugan Bliss, Esq.  
August 26, 2016  
Page 6

trustee for each of the Zohar Funds, and all of its present and former divisions, groups, parents, subsidiaries, subdivisions, predecessors, successors, and affiliated entities (whether organized or doing business under the laws of the United States or under the laws of a foreign country), its and their present and former officers, directors, employees, partners, principals, representatives, agents, and its and their present and former counsel.

“SEC Enforcement Manual” means the Enforcement Manual of the Division of Enforcement of the Securities and Exchange Commission, dated June 4, 2015.

“SEC Whistleblower Program” means the Securities Whistle Blower Incentives and Protection provisions codified in 15 U.S.C.A. § 78u-6.

Reserving our rights to provide you with additional examples, we seek all *Brady*, *Giglio*, and *Bagley* materials, including the following specific examples:

## **I. Material Regarding Witness Credibility and Impeachment**

1. Any and all Information regarding the economic incentive of any Potential Witness to testify at the hearing ordered in the OIP including but not limited to any pending lawsuits filed by Potential Witnesses or Affiliated Entities and/or any future lawsuits to be filed by Potential Witnesses or Affiliated Entities.
2. Any and all Information concerning, referencing, or reflecting any assistance provided by any expert witness listed on the Division’s August 22, 2016 Witness List in connection with the Investigation or the drafting of the OIP, including but not limited to invoices from the expert witnesses for services performed before March 30, 2015.
3. Any and all Information from any Potential Witness or Affiliated Entity to the Government through a Proffer or an Attorney Proffer reflecting that any Potential Witness or Affiliated Entity is now, or at any time during the Investigation was, a subject of any investigation filed by the Government or any Agency or any Foreign Agency.
4. Any and all Exculpatory Information concerning, referencing, or reflecting any Communications between or among (a) the Government, on the one hand, and (b) any Potential Witness including but not limited to MBIA, A&M, U.S. Bank, Nord, Hannover, the Zohar III Controlling Class, any other Zohar Investor, or Millennium, including through their respective in-house or outside counsel, on the other hand, relating to any of the Respondents or the Zohar Funds, including any Information

# GIBSON DUNN

Dugan Bliss, Esq.  
August 26, 2016  
Page 7

reflecting the respective and collective economic incentives of each of these Potential Witnesses to testify against Respondents in the hearing ordered in the OIP.

5. Any and all Information regarding requests for remuneration or other things of value by any Potential Witness, including but not limited to Michael Craig-Scheckman, in connection with the Potential Witness's cooperation with the Government or any Agency.
6. Any and all Information from any Potential Witness or Affiliated Entity to the Government, including without limitation any and all Information from any Potential Witness or Affiliated Entity to the Government through a Proffer or an Attorney Proffer, that the Government knows, or through reasonable diligence should have reason to know, is false or misleading.
7. Any and all Information from any Potential Witness or Affiliated Entity to the Government, including without limitation any and all Information from any Potential Witness or Affiliated Entity to the Government through a Proffer or an Attorney Proffer, that the Government knows, or through reasonable diligence should have reason to know, evidences bias of a Potential Witness or Affiliated Entity.
8. Any and all Information concerning, referencing, or reflecting any instruction by the Government to any other employee or appointee of the Commission not to take notes respecting Communications with any Potential Witness or Affiliated Entity and/or Communications with counsel for any Potential Witness or Affiliated Entity relating to any of the Respondents or the Zohar Funds.
9. Any and all Information in Attorney Proffers or Proffers made to the Government, or any Agency or Foreign Agency, by any Potential Witness or Affiliated Entity, that tends to negatively affect the weight or credibility of the evidence to be presented against Respondents during the hearing ordered in the OIP.
10. Any and all Proffer Agreements between the Government or any Agency, on the one hand, and any Potential Witness or Affiliated Entity, on the other hand.
11. Any and all Information regarding requests for witness immunity orders or immunity letters, as those terms are used in the SEC Enforcement Manual, for any Potential Witness or Affiliated Entity.
12. Any and all termination letters, as that term is used in the SEC Enforcement Manual, sent to any Potential Witness or Affiliated Entity and/or counsel for the Potential Witness or Affiliated Entity.

# GIBSON DUNN

Dugan Bliss, Esq.  
August 26, 2016  
Page 8

13. Any and all Communications from the Government to any Potential Witness or Affiliated Entity and/or counsel for the Potential Witness or Affiliated Entity, including without limitation statements concerning criminal prosecutions, investigations, or civil or administrative proceedings that could be brought by the Government or any Agency or any Foreign Agencies against any such Potential Witness or Affiliated Entity.
14. Any and all cooperation, deferred prosecution, or non-prosecution agreements between the Government or any Agency, on the one hand, and any Potential Witness or Affiliated Entity, on the other hand.
15. Any and all Information provided by any Potential Witness or Affiliated Entity and/or counsel for any Potential Witness or Affiliated Entity to obtain cooperation credit or similar consideration for non-prosecution, deferred prosecution, or reduction in civil penalties, bars, disgorgement, and/or prejudgment interest for any Potential Witness or Affiliated Entity.
16. Any and all Information regarding cooperation by, including but not limited to the Government's evaluation of the sufficiency of cooperation by, any Potential Witness or Affiliated Entity.
17. Any and all Information relating to any oral assurances provided by the Government or any Agency to any Potential Witness or Affiliated Entity.
18. Any and all Information regarding the submission of any Information, including but not limited to tips, complaints, or referrals, purportedly regarding possible securities law violations to the Commission in order to be considered or as a condition of qualifying for a potential award under the SEC Whistleblower Program associated with this proceeding.

## **II. Exculpatory Information**

19. Any and all Exculpatory Information provided to the Government or any Agency or Foreign Agency by any Potential Witness or Affiliated Entity or their counsel.
20. The names and addresses of all persons whom the Government believes may have Exculpatory Information regarding the charges in the OIP but whom the Government does not propose to call as witnesses, and any Exculpatory Information from such persons.

# GIBSON DUNN

Dugan Bliss, Esq.  
August 26, 2016  
Page 9

21. Any and all Information from any Potential Witness stating or suggesting that management fees taken by Respondents were reasonable under the circumstances.
22. Any and all Information from any Potential Witness stating or suggesting that Respondents' collateral management fees and loan categorization practices were disclosed by Respondents or through other sources.
23. Any and all Exculpatory Information provided to the Commissioners by the Division or other sources.
24. Any and all Exculpatory Information considered or relied upon by Commissioners Gallagher and Piwowar in dissenting from the Commission's vote to order the institution of proceedings against Respondents.
25. Any and all Exculpatory Information concerning, referencing, or reflecting Commissioners Gallagher and Piwowar's deliberation that resulted in their dissents from the Commission's vote to order the institution of proceedings against Respondents.
26. Any and all Exculpatory Information reflected in oral or written opinions of Commissioners Gallagher and Piwowar in dissenting from the Commission's vote to order the institution of proceedings against Respondents.
27. Any and all Exculpatory Information considered by any Commissioner in declining to apply certain amendments to the SEC Rules of Practice to these proceedings.

Respondents expressly reserve the right to seek subsequent items of discovery not requested here, particularly if the need arises out of disclosures made pursuant to this request.

Sincerely,

  
Randy M. Mastro

cc: Nicholas Heinke  
Amy Sumner  
Mark L. Williams

# **EXHIBIT 2**



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
DENVER REGIONAL OFFICE  
1961 STOUT STREET  
SUITE 1700  
DENVER, COLORADO 80294-1961

DIVISION OF  
ENFORCEMENT

Direct Number: (303) 844.1041  
Facsimile Number: (303) 297.3529

August 30, 2016

Randy M. Mastro, Esq.  
Gibson, Dunn & Crutcher LLP  
200 Park Avenue  
New York, New York 10166

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

Dear Mr. Mastro:

I write regarding your August 26, 2016 epistolary discovery requests. To the extent that your requests are to be construed as interrogatories or similar discovery requests, the SEC's Rules of Practice do not allow for any such request. Moreover, "*Brady* requests cannot be used as discovery devices." *United States v. Caro*, 597 F.3d 608, 619 (4th Cir. 2010).

To the extent that your requests are to be construed as an inquiry into the Division of Enforcement's understanding of, or compliance with, Rule of Practice 230 and *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, the Division is well aware of its obligations, and takes those obligations seriously. As explained by the Second Circuit:

Under *Brady* and its progeny, "the Government has a constitutional duty to disclose favorable evidence to the accused where such evidence is 'material' either to guilt or to punishment." *United States v. Coppa*, 267 F.3d 132, 139 (2d Cir. 2001). "Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness." *Id.* "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different," such that the failure to disclose "undermine[s] confidence in the verdict." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

*United States v. Certified Env'tl. Servs., Inc.*, 753 F.3d 72, 91 (2d Cir. 2014). The Division has complied, and will continue to comply, with its *Brady* obligations.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dugan Bliss', with a stylized flourish at the end.

Dugan Bliss  
Senior Trial Counsel

cc via email:

Lawrence J. Zweifach, Esq.  
Barry Goldsmith, Esq.  
Caitlin J. Halligan, Esq.  
Reed Brodsky, Esq.  
Monica K. Loseman, Esq  
Lisa Rubin, Esq.  
Susan Brune, Esq.  
Martin J. Auerbach, Esq.  
Nicholas Heinke, Esq.  
Amy Sumner, Esq.  
Mark Williams, Esq.

# **EXHIBIT 3**

**In the Matter of Lynn Tilton;  
Patriarch Partners, LLC;  
Patriarch Partners VIII, LLC;  
Patriarch Partners XIV, LLC, and  
Patriarch Partners XV, LLC, Respondents**

United States of America before the Securities and Exchange  
Commission

Administrative Proceeding, File No. 3-16462

**Expert Report of Michael G. Mayer**

**Prepared By:**

Charles River Associates  
One South Wacker Drive, 34<sup>th</sup> Floor  
Chicago, Illinois 60606

Date: July 10, 2015

---

CRA Project No. D20381.00

## 1 EXPERT QUALIFICATIONS

### 1.1 Michael G. Mayer

My name is Michael G. Mayer. I am a Vice President of Charles River Associates. I graduated with distinction from Indiana University's Kelley School of Business in 1983 and earned an MBA from Northwestern University's Kellogg School of Management in 1985. I am a CFA (Chartered Financial Analyst) charter holder, a CFE (Certified Fraud Examiner), and am associated with other professional organizations, including the Business Valuation Association and the CFA Society of Chicago.

A copy of my curriculum vitae and a listing of prior testimony and publications can be found as Exhibit 1. My hourly billing rate is \$695.

### 1.2 Charles River Associates

Charles River Associates ("CRA") is an international consulting firm providing financial advisory services to businesses, law firms, academic institutions and government agencies. The firm primarily advises clients on matters involving business and commercial disputes. The firm draws upon the multi-disciplinary skills of its professional team in accounting, finance, economics, marketing and statistics. CRA's personnel include CPAs, MBAs, and PhD graduates, and others with diverse business experience. Much of the firm's work is in the context of U.S. Federal, State, and Tax Courts, forums requiring the utmost adherence to principles of proof and independence.

## 2 SCOPE OF ASSIGNMENT

I have been engaged by the Division of Enforcement of the United States Securities and Exchange Commission (the "Division") to opine on the following:

1. Whether, since inception, the Zohar I, Zohar II, or Zohar III CLOs failed any of their monthly overcollateralization ratio tests.
2. Whether an investor in the Zohar I, II, or III CLOs could independently determine whether the CLO passed or failed its monthly overcollateralization tests.
3. The amount, if any, of subordinated management fees and/or preference share distributions paid during periods when the Zohar I, Zohar II, and Zohar III CLOs failed their respective overcollateralization ratio tests.

## 3 SUMMARY OF OPINIONS

1. The Zohar II and Zohar III CLOs failed their monthly OC Ratio tests starting in July 2009 and June 2009 respectively.

2. A large amount of data needs to be accessed (including data beyond the trustee reports) and be maintained, updated, and analyzed in order for an investor to calculate whether the Zohar CLOs passed or failed their OC Ratio tests.
3. The Zohar II and Zohar III CLOs paid \$208 million in subordinated collateral management fees and preference share distributions during periods in which the CLOs failed their OC Ratio tests.

## 4 INFORMATION REVIEWED IN REACHING MY OPINIONS

A list of the documents and information reviewed is provided as Exhibit 2, and the information relied upon in reaching my opinions is cited in this report and the supporting schedules to this report.

## 5 BACKGROUND

### 5.1 Collateralized Loan Obligations

#### 5.1.1 Overview

A collateralized loan obligation ("CLO") is a collateralized debt obligation ("CDO") that invests in corporate loans.<sup>1</sup> More specifically, a CLO is a special purpose vehicle ("SPV") that acquires a portfolio of diversified syndicated leveraged loans using funds it raised through the private placement of rated debt and equity securities.<sup>2</sup> The CLO often provides investors with differentiating risk and reward profiles<sup>3</sup> by offering debt and equity with different levels of seniority with respect to receiving interest and principal payments and the distribution of losses.<sup>4</sup>

A leveraged loan is typically a bank-originated senior secured loan to large and mid-size businesses that are secured by a first lien on the cash flow and assets of the corporation.<sup>5</sup> Such loans generally consist of revolving credit and/or term loan facilities.<sup>6</sup>

It is common for CLOs to obtain these senior secured loans from the originating bank, or another financial institution such as an investment bank, that acts as an arranger or

---

<sup>1</sup> See Fabozzi, Frank, 2008, *Handbook of Finance, Volume 1: Financial Markets and Instruments*, Hoboken, NJ: John Wiley & Sons, Inc., p. 396, and Fabozzi, Frank, et al., 2006, *Introduction to Structured Finance*, Hoboken, NJ: John Wiley & Sons, Inc., p. 119.

<sup>2</sup> See <http://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-collateralized-loan-obligations-december-1302015.pdf>.

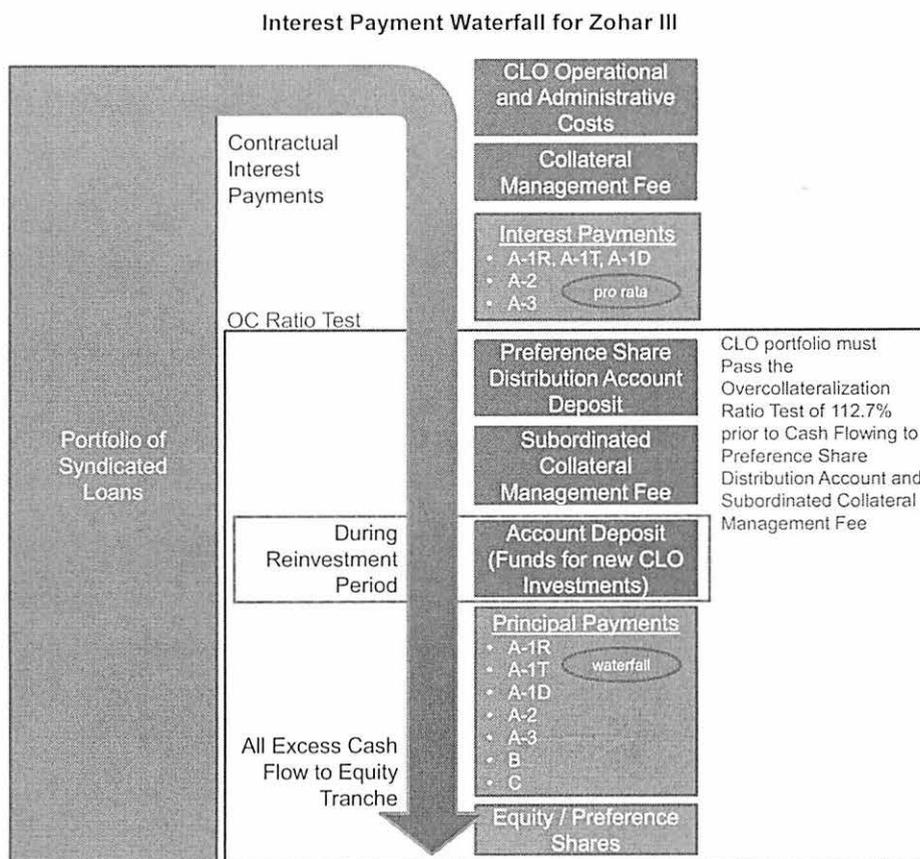
<sup>3</sup> See <http://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-collateralized-loan-obligations-december-1302015.pdf>.

<sup>4</sup> "Alternative Income: The Role of CLO Investments in a Low-Yield Environment," Behringer white paper, January 2014, p. 8.

<sup>5</sup> "Alternative Income: The Role of CLO Investments in a Low-Yield Environment," Behringer white paper, January 2014, p. 4.

<sup>6</sup> See <http://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-collateralized-loan-obligations-december-1302015.pdf>. Also see "Alternative Income: The Role of CLO Investments in a Low-Yield Environment," Behringer white paper, January 2014, p. 4.

Figure 11<sup>85</sup>



Like a typical CDO, Zohar III had incorporated two important compliance tests, the OC Ratio test and the interest coverage test.<sup>86</sup>

#### 5.4 Matter at Issue

It is my understanding that, among other things, Respondents are accused of the following with respect to the Zohar I, Zohar II, and Zohar III CLOs:

1. Improperly categorizing some of the portfolio loans as current versus delinquent on interest payments (Zohar I, II, and III) resulting in a passing score on the OC Ratio test when it should have failed (Zohar II and III);<sup>87</sup> and
2. As a result of the improper categorization of portfolio loans and resultant improper passing score on the OC Ratio test, subordinated fees and preference share

<sup>85</sup> See Indenture among Zohar III, Limited, Zohar III, Corp., Zohar III, LLC, Natixis Financial Products Inc., and LaSalle Bank National Association dated April 6, 2007, pp. 10 and 178 – 182.

<sup>86</sup> See Indenture among Zohar III, Limited, Zohar III, Corp., Zohar III, LLC, Natixis Financial Products Inc., and LaSalle Bank National Association dated April 6, 2007, p. 8.

<sup>87</sup> The OIP, pp. 7-8.

distributions (Zohar II and III) were collected by Patriarch that should not have been paid.<sup>88</sup>

## 6 OPINIONS

The following sections detail my opinions.

### 6.1 The Zohar II and Zohar III CLOs Failed their Monthly OC Ratio Tests starting in July 2009 and June 2009 Respectively

It is my understanding that, among other things, the Respondents are accused of improperly categorizing some of the Zohar I, II, and III portfolio loans as being current on their interest payments when they were not. This mis-categorization is alleged to have led to passing scores on the OC Ratio tests for Zohar II and III when in fact, they should have failed.<sup>89</sup>

In order to determine if the allegation is true, the Division has asked me to determine whether loans made by the CLOs to 14 select borrowers<sup>90</sup> were current or delinquent with respect to interest rate payments<sup>91</sup> and if delinquent (and reflected as current in the monthly investor reports), reduce the amount of loan principal included in the OC Ratio (as mandated by the respective indenture) and compare this adjusted OC Ratio to the minimum required OC Ratio in the indenture (the OC Ratio test).<sup>92</sup>

The following is a summary of the 14 select borrowers and how many loans each borrower had with Zohar I, Zohar II, and Zohar III.

---

<sup>88</sup> The OIP, p. 8.

<sup>89</sup> The OIP, pp. 7-8.

<sup>90</sup> It is only necessary to look at 14 borrowers rather than all borrowers because if we assume all other borrowers are current, but after review of the 14, the CLO still fails the OC test, there is no need to look further at the others. Any delinquent loans beyond the 14 would only serve to lower the OC ratio further.

<sup>91</sup> I focused on interest payments, not principal payments, as I understand that the current or not current status of interest payments impacts the OC Ratio for Zohar I and Zohar II. For Zohar III, I understand that the current or not current status of interest or principal payments impacts the OC Ratio for Zohar III. Thus to the extent that principal payments are not current and would impact the OC Ratio, I am being conservative by not making an adjustment. See Sections 6.1.1.1 (Zohar I), 6.1.1.2 (Zohar II), and 6.1.1.3 (Zohar III).

<sup>92</sup> It is my understanding that the Zohar II and Zohar III indentures mandate that the amount of principal included in the OC Ratio be an amount less than 100% when such loan is not current on interest payments. See the rest of this section for additional detail.

### 6.1.3 Results of My OC Ratio an OC Ratio Test Analyses

For Zohar II, as noted in Figure 50 above, if the OC Ratio falls below 112.0% (after the ramp up period), then Zohar II fails its OC Ratio test.<sup>181</sup> Similarly, for Zohar III, as noted in Figure 50 above, if the OC Ratio falls below 112.7% (after the ramp up period), then Zohar III fails its OC Ratio test.<sup>182</sup>

Based on the above analyses, I was able to determine, as shown in the tables below, that the Zohar II and Zohar III CLOs failed their OC ratio tests no later than July 2009 and June 2009, respectively and for every quarter thereafter.<sup>183</sup>

Figure 51<sup>184</sup>

#### Zohar II OC Ratio Test Results by Quarter

Zohar II CLO						Zohar II CLO					
Year	Quarter Ending	Original	CRA Adjusted	Minimum	Pass/Fail	Year	Quarter Ending	Original	CRA Adjusted	Minimum	Pass/Fail
2005	Jul-05	118.38%	118.38%	112.00%	Pass	2010	Jan-10	121.66%	105.59%	112.00%	Fail
	Oct-05	113.95%	113.95%	112.00%	Pass		Apr-10	120.45%	103.69%	112.00%	Fail
2006	Jan-06	118.49%	118.36%	112.00%	Pass	Jul-10	120.07%	101.80%	112.00%	Fail	
	Apr-06	122.53%	122.41%	112.00%	Pass	Oct-10	120.35%	101.77%	112.00%	Fail	
2007	Jul-06	122.39%	122.27%	112.00%	Pass	2011	Jan-11	119.44%	100.73%	112.00%	Fail
	Oct-06	123.86%	123.74%	112.00%	Pass		Apr-11	120.29%	101.11%	112.00%	Fail
	Jan-07	123.12%	122.78%	112.00%	Pass	Jul-11	120.26%	100.47%	112.00%	Fail	
	Apr-07	123.36%	123.02%	112.00%	Pass	Oct-11	120.41%	100.94%	112.00%	Fail	
2008	Jul-07	120.50%	119.40%	112.00%	Pass	2012	Jan-12	119.72%	99.91%	112.00%	Fail
	Oct-07	122.97%	122.59%	112.00%	Pass		Apr-12	120.23%	100.02%	112.00%	Fail
	Jan-08	122.06%	121.47%	112.00%	Pass	Jul-12	120.56%	100.07%	112.00%	Fail	
	Apr-08	121.45%	121.00%	112.00%	Pass	Oct-12	118.23%	98.52%	112.00%	Fail	
2009	Jul-08	123.57%	120.85%	112.00%	Pass	2013	Jan-13	118.03%	98.26%	112.00%	Fail
	Oct-08	121.97%	119.15%	112.00%	Pass		Apr-13	115.26%	95.40%	112.00%	Fail
	Jan-09	125.93%	121.93%	112.00%	Pass	Jul-13	115.35%	95.35%	112.00%	Fail	
	Apr-09	124.38%	120.35%	112.00%	Pass	Oct-13	115.45%	95.30%	112.00%	Fail	
	Jul-09	121.19%	111.65%	112.00%	Fail	2014	Jan-14	115.54%	95.51%	112.00%	Fail
	Oct-09	121.88%	107.82%	112.00%	Fail		Apr-14	115.29%	97.78%	112.00%	Fail
					Jul-14		115.60%	97.64%	112.00%	Fail	
					Oct-14		114.79%	97.76%	212.00%	Fail	

<sup>181</sup> The OC Ratio test may occur more often than monthly. See Indenture among Zohar II 2005-1, Limited, Zohar II 2005-1, Corp., Zohar II 2005-1, LLC, MBIA Insurance Corporation, Ixis Financial Products Inc., and LaSalle Bank National Association dated January 12, 2005, pp. 12, 36, and 193.

<sup>182</sup> The OC Ratio test may occur more often than monthly. See Indenture among Zohar III, Limited, Zohar III, Corp., Zohar III, LLC, Natixis Financial Products Inc., and LaSalle Bank National Association dated April 6, 2007, pp. 10 and 34.

<sup>183</sup> Note that these analyses are based on review of the 14 selected borrowers. It is possible that some of the tests that are designated "Pass" in Figure 51 and Figure 52 would in fact become "fail" if we expanded our review to other borrowers.

<sup>184</sup> See Exhibit 3.0.

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be served true and correct copies of 1)

Respondents' Motion to Compel the Production of Brady Materials and a memorandum of law in support thereof, and 2) the Declaration of Mary Kay Dunning in Support of Respondents'

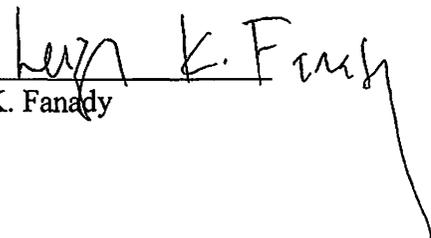
Motion to Compel the Production of Brady Materials and its exhibits on this 1st day of

September, 2016, 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 hand)

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

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)

  
\_\_\_\_\_  
Leigh K. Fanady