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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE DIVISION EXHIBITS 71 THROUGH 73 (MS. TILTON'S TESTIMONY, DECLARATION, AND AFFIDAVIT FROM OTHER PROCEEDINGS)**

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September 22, 2016

Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, "Respondents"), respectfully submit this memorandum of law in further support of their motion *in limine* to preclude the Division of Enforcement (the "Division") of the Securities and Exchange Commission ("SEC") from admitting Ms. Tilton's testimony, declaration, and affidavit from certain prior proceedings (Division Exhibits 71 through 73).

## INTRODUCTION

Yet again, the Division misconstrues Amended Rule 235(b)[1] as permitting the wholesale admission of Ms. Tilton's prior statements, and yet again, the Division is mistaken. Prior sworn statements of a party witness are subject to Rule 320's prohibition against "irrelevant, immaterial or unduly repetitious" evidence. For the reasons set forth in Respondents' reply brief in support of the exclusion of Ms. Tilton's investigative testimony, the Division's interpretation of Amended Rule 235(b) is erroneous, and the wholesale admission of her trial testimony in *MBIA Insurance Corporation v. Patriarch Partners VII, LLC* ("*MBIA* trial") should be precluded. *See* Reply Memorandum of Law in Further Support of Respondents' Motion *in Limine* to Exclude Transcripts of Investigative Testimony, Including Division Exhibits 194 Through 206, at 2-4 (Sept. 14, 2016) ("Investigative Testimony Reply"). If the Division intends to argue that portions of the transcripts of Ms. Tilton's testimony satisfy Rule 320, the Division should be required to designate those portions before the hearing begins. The Division should also be required to make a proffer as to the relevance, materiality, and non-repetitiousness of any

[1] As used herein, "Amended Rule ___" refers to an SEC Rule of Practice, as amended in July 2016, *see* SEC, Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212 (July 29, 2016) ("Amendments to Rules"); and "Rule ___" refers to an SEC Rule of Practice as codified, 17 C.F.R. pt. 201.

designated portions. Finally, to the extent portions of Ms. Tilton's declaration from *Schreiner v. Patriarch Partners LLC* (Exhibit 72) or affidavit from *Patriarch Partners XIV, LLC v. MBIA Insurance Corporation* (Exhibit 73) are relevant, those Exhibits should nevertheless be excluded as unduly repetitious because the Division will have the opportunity to elicit live testimony from Ms. Tilton on any and all relevant issues during the upcoming hearing.

## ARGUMENT

Ms. Tilton's testimony in the *MBIA* trial should be excluded because the Division has failed to establish that it accords with Rule 320's prohibition against evidence that is "irrelevant, immaterial, or unduly repetitious." It is well established that Rule 320 governs *all* evidence, including prior statements of party witnesses. *See* Investigative Testimony Reply, at 2-4. But the Division has made no attempt to identify purportedly relevant portions of Ms. Tilton's trial testimony.[2] Although the Division refers to broad categories of testimony that it deems relevant, the Division fails to cite any specific portions of the transcripts, *see* Opp. at 2, thereby preventing Respondents—and Your Honor—from evaluating the Division's unilateral assessment of relevance, *see, e.g.*, *Del Mar Fin. Servs., Inc.*, Securities Act Release No. 8314, 2003 WL 22425516, at *9 (Oct. 24, 2003) (Comm'n Op.) ("Our law judges are not required to evaluate . . . transcripts on an all or nothing basis. The law judge would have been within her discretion in requiring the Division to specify the specific statements that it was relying on and in excluding

[2] Respondents do not dispute that such testimony generally may be used at trial for impeachment purposes or to refresh a witness's recollection. But "[i]f the Division intends to use the . . . transcripts *solely* to refresh prospective witnesses' recollection or to impeach them, it should so state." *See Oxford Capital Mgmt., Inc.*, Admin. Proceedings Rulings Release No. 602, 2003 WL 21282789, at *1 (ALJ Jan. 15, 2003) (emphasis added). And "if the Division intends to use the investigative transcripts for some broader purpose, it should articulate that purpose in advance of the hearing." *Id.*

irrelevant, immaterial, or unduly repetitious evidence under Rule of Practice 320."). Moreover, the Division does not contend—nor could it—that all 300 pages of Ms. Tilton's *MBIA* testimony satisfy Rule 320.[3]

As explained in Respondents' Investigative Testimony Reply, it is well within Your Honor's discretion to "requir[e] the Division to specify the specific statements" on which it intends to rely, *Del Mar Fin. Servs.*, 2003 WL 22425516, at *9, and to require the Division to do so *before* the hearing begins, *Oxford Capital Mgmt.*, 2003 WL 21282789, at *1 ("[I]f the Division intends to use the investigative transcripts for some broader purpose, it should articulate that purpose *in advance of the hearing*." (emphasis added)); *see also Angelo P. Danna, CPA*, Admin. Proceedings Rulings Release No. 433, 1994 WL 192562 (ALJ May 11, 1994) (Chief ALJ Murray, stating that she wanted respondents "to have *prior notice*" of the portions of transcripts the Division intended to admit (emphasis added)). The Division's suggestion that Respondents have some nefarious motive for insisting that it designate portions of Ms. Tilton's testimony prior to the hearing—which is fewer than five weeks away—is patently erroneous. Prior Commission and ALJ decisions make clear that the Division must identify the portions of transcripts, and the purpose for which those excerpts will be offered, in advance of the hearing. And for good reason: requiring pre-hearing designations ensures that the hearing is conducted in an "expeditious," "orderly," and "fair" manner, as required by Rule 300, by affording Respondents with notice and the opportunity to challenge the Division's designations and by enabling Your Honor to resolve disputes in advance of the hearing.

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[3] Respondents have not argued that *none* of Ms. Tilton's *MBIA* trial testimony could possibly be relevant. Rather, Respondents' position is that because the transcripts are replete with irrelevant testimony, the Division bears the burden of identifying the relevant portions of testimony on which it intends to rely. *See, e.g.*, *Del Mar Fin. Servs.*, 2003 WL 22425516, at *9; *Oxford Capital Mgmt.*, 2003 WL 21282789, at *1-2.

If anything, the Division's refusal to designate portions of transcripts prior to the hearing, which practice is routine in federal court, PCAOB trials, and other administrative hearings, is a transparent act of gamesmanship by the Division—an effort to further exploit the advantages that already inhere in the forum it has selected. But enough is enough. Because the Division has failed to make any showing that the transcript of Ms. Tilton's *MBIA* testimony satisfies Rule 320, Your Honor should exclude it. *See Del Mar Fin. Servs.*, 2003 WL 22425516, at *9; *see also, e.g.*, Hr'g Tr. at 1478:7-10, *John J. Aesoph*, File No. 3-15168 (Oct. 28, 2013) (Foelak, ALJ) (excluding wholesale admission of respondents' investigative testimony). In the alternative, Your Honor should order the Division to designate by September 29, 2016, those portions of Ms. Tilton's *MBIA* trial testimony it seeks to have admitted into evidence. The Division should also be required, at the same time, to make a proffer as to the relevance, materiality, and non-repetitiousness of any designated portions.

Finally, Ms. Tilton's *Schreiner* declaration and *Patriarch Partners* affidavit (Exhibits 72 and 73, respectively) should be excluded because they discuss irrelevant topics, and, to the extent portions of those exhibits discuss relevant issues, they should nevertheless be excluded as unduly repetitious, as the Division will have an opportunity at the upcoming hearing to elicit live testimony from Ms. Tilton regarding any and all relevant issues. *See* Rule 320; *cf. Flowers v. Komatsu Min. Sys., Inc.*, 165 F.3d 554, 556 (7th Cir. 1999) (upholding exclusion of interview transcripts as "cumulative, considering live testimony received during trial").

## CONCLUSION

For the reasons set forth above and in Respondents' opening brief, Respondents respectfully move for an order excluding Division Exhibits 71 through 73 or, with respect to Exhibit 71, directing the Division to specify the portions of that exhibit it will seek to admit in evidence, and to make a proffer as to the relevance, materiality, and non-repetitiousness of any designated portions.

Dated: New York, New York
September 22, 2016

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## CERTIFICATE OF SERVICE

I hereby certify that I served true and correct copies of the Reply Memorandum of Law in Further Support of Respondents' Motion *in limine* to Exclude Division Exhibits 71 Through 73 (Ms. Tilton's Testimony, Declaration, and Affidavit From Other Proceedings) on this 22nd day of September, 2016, in the manner indicated below:

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