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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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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.	:	
	:	
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**RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION TO COMPEL THE DISCLOSURE OF THE IDENTITIES OF THE
AUTHORS OF THE DIVISION'S HANDWRITTEN NOTES**

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October 5, 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 brief in support of their motion to compel the Division of Enforcement (“Division”) of the Securities and Exchange Commission (“SEC” or “Commission”) to disclose the identities of the authors of its handwritten notes prepared during its investigation of Respondents, pursuant to Rule 326 of the SEC Rules of Practice (the “Rules”), as well as basic notions of procedural due process.

INTRODUCTION

The Division has recently informed Respondents that it does not intend to disclose the identities of the individuals who authored handwritten notes (“Notes”) of the Division’s communications with its May Call Witness Anthony McKiernan of MBIA and his counsel. The Division’s refusal to provide this information directly contravenes Respondents’ right to a full and fair opportunity to defend themselves against the allegations in the Commission’s Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, and Notice of Hearing (“OIP”) in *In the Matter of Lynn Tilton et al.*, File No. 3-16462.

BACKGROUND

On October 3, 2016, Respondents sent a letter to the Division requesting more detailed information concerning 17 sets of handwritten notes, within the set of notes bearing Bates numbers SECNOTES000001 – SECNOTES000764, that the Division previously produced to Respondents on May 27, 2015. *See* Declaration of Monica K. Loseman, dated October 5, 2016 (“Loseman Decl.”), Ex. 1, App. A. These notes were taken by Division employees during

communications and meetings with Mr. McKiernan and his counsel during the investigation of Respondents.

Rather than replying by letter, the Division instead chose to address Respondents' request with two sentences that it included within the text of an October 4, 2016 email pertaining to a separate and unrelated issue. *See* Loseman Decl., Ex. 2. The Division refuses to provide Respondents with the identities of the notetakers. The Division contends that the notetakers' identities are irrelevant and that it has no legal obligation to disclose such information.

LEGAL STANDARDS

Under Rule 326, a party to an adjudicatory hearing is "entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the Commission or the hearing officer, may be required for a full and true disclosure of the facts."

Respondents in an adjudicatory hearing are entitled to procedural due process rights, which are satisfied when there is a "full litigation of the issues" and parties are "afforded full opportunity to justify [their] conduct." *In re Oppenheimer & Co.*, Admin. Proceedings Rulings Release No. 207, 1978 WL 207543, at *6 (Oct. 19, 1978). Courts have long established that procedural due process is applicable to administrative proceedings, as it also is in judicial proceedings. *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

ARGUMENT

Fundamental notions of procedural due process and fairness require that "parties named as respondents in agency actions be allowed to access materials that relate to the allegations against them so that they have a full and fair opportunity to defend their interests." *In re Thorn, Welch & Co., Inc.*, Admin. Proceedings Rulings Release No. 3-8400, 1995 WL 148989, at *2

(March 28, 1995). In exercising their rights to present a full defense, respondents in an administrative hearing may cross-examine witnesses and present rebuttal evidence as is necessary for a “full and true disclosure of the facts.” 17 C.F.R. § 201.326 (2016). Furthermore, a respondent’s ability to access information relevant to the Division’s allegations is particularly significant where this information would have been more readily available if the Division’s case was otherwise litigated in a federal district court. *SEC v. Sells*, No. 11-CV-04941 CW NC, 2013 WL 450844, at *1–2 (N.D. Cal. Feb. 4, 2013) (finding that defendant presented adequate reasons to justify plaintiff SEC’s production of information that was not previously available to defendant during a prior administrative proceeding, but was now available by deposition); *In re Thorn*, 1995 WL 148989, at *4 (noting the lack of prehearing discovery in Commission administrative proceedings, and subsequently requiring that Division disclose statements made by its own witnesses that pertained to an important event leading up to the current hearing).

Here, the Division persists in withholding information pertaining to documents that form the very basis of the Commission’s allegations against Respondents, without having any logical justification for doing so, and notwithstanding Respondents’ repeated requests that the Division disclose the identities of the individuals who authored the Notes. The Division has made clear that Mr. McKiernan’s and MBIA’s interactions with Respondents are an essential component of its case-in-chief to be presented in the administrative hearing to commence on October 24, 2016. The Division interviewed Mr. McKiernan on the record during its investigation of Respondents, placed Mr. McKiernan on its witness lists dated August 7, 2015 and August 22, 2016, and it has more recently sent Mr. McKiernan a subpoena *ad testificandum* calling him to testify during the upcoming hearing. Mr. McKiernan and MBIA are prominently featured in the documents that the Division has designated as potential trial exhibits. Moreover, the Division engaged in

extensive communications with Mr. McKiernan and his counsel during its investigation of Respondents and in the years leading up to the Commission's filing of the OIP.

There is simply no justification for the Division's refusal to disclose the identities of the Notes' authors where the burden of doing so is negligible, and where the non-disclosure prevents Respondents from presenting a full and fair defense against the Commission's allegations against them. Information about the identities of the Notes' authors is neither confidential nor privileged. Additionally, in the event that Mr. McKiernan is unable on cross examination to recall statements that he made during his communications with Division employees—as memorialized in the Division's Notes—Respondents intend to introduce these statements by calling the Notes' authors to authenticate the Notes and verify their own handwriting. Without knowledge of the authors' identities, Respondents may be deprived of any ability to cross-examine or impeach Mr. McKiernan regarding certain statements that he made during communications between the SEC and Mr. McKiernan and/or his counsel. Indeed, the Division's failure to disclose this information appears to have no purpose other than to place Respondents at a fundamentally unfair disadvantage that is wholly contrary to their right to a just proceeding.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Your Honor order the Division to disclose the identity of the authors of the Notes identified by Respondents in their letter of October 3, 2016 by October 10, 2016.

Dated: New York, New York
October 5, 2016

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