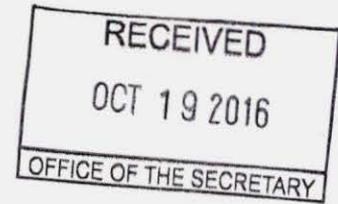


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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of, :
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 :
 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

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RESPONDENTS'
MOTION TO COMPEL MBIA TO PRODUCE DOCUMENTS RESPONSIVE TO
RESPONDENTS' SUBPOENA**

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October 18, 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 reply brief in further support of their motion to compel MBIA Insurance Corporation ("MBIA") to produce immediately documents requested in the subpoena issued September 16, 2016 (the "2016 Subpoena"), or to prohibit the Securities and Exchange Commission's ("SEC" or "Commission") Division of Enforcement ("Division") from offering evidence or testimony at the upcoming hearing that purports to establish that MBIA was a victim or otherwise suffered financial losses as a result of its relationship with Respondents.

INTRODUCTION

The Division does not dispute that the documents MBIA refuses to produce are directly relevant to the Division's theory of the case and critical to Respondents' defense. Nor has the Division made any meaningful effort to rebut the evidence of its improper information sharing with MBIA. Instead, the Division limits its opposition to the narrow issue of whether, if MBIA refuses to comply with the 2016 Subpoena, the Division should be precluded from presenting evidence that purports to establish that MBIA was a victim or otherwise suffered financial losses as a result of its relationship with Respondents. It should.

First, the information sought by Respondents' 2016 Subpoena is critical to Respondents' defense. *See* Resp. Mem. of Law in Support of Mot. to Compel MBIA to Produce Docs. Responsive to Resp. Subpoena, at 11-12 (Oct. 5, 2016) ("Mot. to Compel"). Even if, as the Division argues, it would be prejudiced if it were precluded from presenting evidence related to MBIA, that prejudice would be *far* outweighed by the harm to Respondents if they are deprived of an adequate opportunity to defend against such evidence.

Second, although the Division attempts to cast itself as an innocent bystander in the discovery dispute between Respondents and MBIA, it is not. *See id.* at 3-10. For the past five years, the Division has worked closely with MBIA to build its case against Respondents, including by improperly providing MBIA with the portfolio companies' confidential information and authorizing MBIA to use that information against Respondents in unrelated civil litigation. *See id.* Although the Division has attempted to conceal this collusion—insisting that documents it provided to MBIA not be cited in or attached to any filing in MBIA's litigation against Respondents and agreeing at MBIA's behest not to tell Ms. Tilton about the disclosure of the portfolio companies' confidential information without first informing MBIA—evidence of the Division's misconduct has finally come to light. *See id.* at 6-7.

And yet, rather than dealing with the consequences of its improper alliance with MBIA, the Division seems to suggest that MBIA can, on the one hand, actively cooperate with the *Division's* case in chief, including by preparing with the Division for the testimony of Anthony McKiernan, MBIA's president, while at the same time flouting a subpoena issued by Your Honor (to which neither MBIA nor the Division has objected). It cannot. Fundamental fairness dictates that a third-party witness should not be permitted to ignore legal process from one party while eagerly assisting another party. Therefore, given the extensive prior dealings between MBIA and the Division—which began as early as 2011 and have continued well after the Division filed its OIP—the Division should not be permitted to further benefit from its relationship with MBIA, while Respondents are denied access to information critical to their defense.

ARGUMENT

Pursuant to Rule 111 of the Commission's Rules of Practice ("the Rules"), the "hearing officer shall have the authority to do all things necessary and appropriate to discharge . . . her duties . . . includ[ing] but not limited to . . . considering and ruling upon all procedural and other motions." 17 C.F.R. § 201.111. That authority includes the ability to order a non-party's production of materials pursuant to a duly authorized and issued subpoena. *See, e.g., Piper Capital Mgmt.*, Admin. Proceedings Rulings Release No. 582, 1999 WL 166082, at *4 (ALJ Mar. 18, 1999) (granting motion to compel production of documents from non-party). Further, if a party refuses to comply with a duly issued subpoena, the Commission may seek a court order compelling full compliance. *See* 15 U.S.C. § 80b-12 & 15 U.S.C. § 80b-14 (conferring on United States district courts jurisdiction over subpoena enforcement actions).¹

As detailed in Respondents' Motion to Compel, MBIA has unreasonably refused to produce documents responsive to the subpoena that Your Honor issued on September 16, 2016. MBIA has not offered any valid objection to Respondents' 2016 Subpoena, nor has MBIA moved to quash it. *See* Mot. to Compel at 12. Instead, based on nothing more than its own whim, MBIA has flagrantly violated its obligation to produce documents responsive to the 2016

¹ Respondents' Motion to Compel requested, in the alternative, that Your Honor order the Commission to commence a proceeding in the United States District Court for the Southern District of New York to enforce the 2016 Subpoena. If the hearing in this matter commences, as scheduled, on October 24, 2016, it will be too late for that relief to have any meaningful effect, barring a stay of these proceedings. However, in the event Your Honor grants Respondents' motion for a stay of the hearing due to the Division's late-breaking disclosure of exculpatory information about two Division witnesses, *see* Resp. Mot. to Stay the Proceedings and Compel the Division to Make Further Disclosures Regarding Two Division Witnesses, and for Expedited Briefing and an Evidentiary Hr'g (Oct. 16, 2016), Respondents renew their request that Your Honor order the Commission to proceed in federal court to enforce the 2016 Subpoena.

Subpoena.² Tellingly, the Division “takes no position on whether and to what extent MBIA should be compelled to produce documents.” Division of Enforcement’s Limited Response to Resp. Mot. to Compel MBIA to Produce Docs., at 1 (Oct. 13, 2016) (“Opp.”). Rather, the Division argues that, “regardless of how Your Honor resolves the dispute between Respondents and MBIA . . . Your Honor should not prohibit [the Division] from offering evidence or testimony at the hearing that MBIA was a victim or otherwise suffered financial losses as a result of its relationship with Respondents.” *Id.* at 3 (internal quotation marks omitted). The Division’s argument lacks merit.

A. The Prejudice To Respondents Would Far Outweigh Any Purported Prejudice To The Division.

Even if precluding the Division from offering evidence or testimony that purports to establish that MBIA was a victim or otherwise suffered financial losses as a result of its relationship with Respondents were to result in some prejudice to the Division, that prejudice would pale in comparison to the harm Respondents would suffer if denied the opportunity to meaningfully rebut the Division’s evidence. *See, e.g., Advanced Analytics, Inc. v. Citigroup Glob. Mks., Inc.*, 301 F.R.D. 31, 41 (S.D.N.Y. 2014) (excluding certain evidence as a sanction where “[p]ermitt[ing] [plaintiff] to utilize [that evidence] . . . would result in severe prejudice to Defendants”). The materials that the 2016 Subpoena compels MBIA to produce are highly relevant to Respondents’ defense: Respondents need those materials to prepare for cross-examination of Division witness Mr. McKiernan, and to probe the Division’s extensive

² The Division repeatedly refers to the agreement between Respondents’ prior counsel and MBIA, which related to certain requests in a prior subpoena issued in May 2015, as if that should somehow excuse MBIA from complying with the more recent subpoena that Your Honor issued. It does not. The 2016 Subpoena was necessary to address the real-time developments in this proceeding since the stay was lifted in June 2016.

relationship with MBIA, which included improper information sharing that appears to have influenced MBIA's decision (unbeknownst to Respondents) to abandon restructuring efforts. *See* Mot. to Compel, at 11-12; *see also* *Tilton*, Admin. Proceedings Rulings Release No. 4153, at 2 (ALJ Sept. 14, 2016) (concluding that, where investor was listed on Division's witness list, certain information sought by subpoena issued to investor was "directly relevant to the Division's proposed evidence and necessary for cross-examination"). Therefore, if MBIA continues to deny Respondents access to that information, Your Honor should level the playing field. *See Valente v. J.C. Penney Corp.*, 437 F. App'x 858, 860 (11th Cir. 2011) (affirming sanctions order excluding all evidence from non-party where non-party failed to produce subpoenaed documents in violation of order directing compliance with subpoena).

Attempting to minimize the overwhelming prejudice that Respondents would suffer if MBIA refuses to comply with the 2016 Subpoena and the Division is permitted to introduce evidence regarding MBIA, the Division makes several, related arguments. Specifically, the Division insists that "Respondents have long been aware of the possibility that the Division may seek to rely on witnesses and evidence from MBIA"; "Respondents have long had the opportunity to subpoena documents from MBIA—and to seek to enforce any response considered deficient"; and Respondents have been in possession of evidence of the alliance between MBIA and the Division since May 2015. *See* Opp. at 2-3. Each is unavailing.

Since learning that the Division might seek to rely on witnesses and evidence from MBIA, Respondents have worked diligently to obtain from MBIA information critical to Respondents' defense. *See* Mot. to Compel at 7-10. Indeed, Respondents have repeatedly attempted to negotiate with MBIA to narrow the scope of the subpoena and reach a mutually agreeable arrangement. *See id.* But despite Respondents' good faith efforts—and aside from a

limited agreement related to certain categories of documents responsive to the May 27, 2015, subpoena—MBIA has stonewalled and unreasonably refused to comply with the 2016 Subpoena that Your Honor issued. *See id.* Further, as outlined in Respondents’ Memorandum of Law in Opposition to the Division’s Motion to Strike Respondents’ Further Amended Witness List and Requests for Hearing Subpoenas to Previously Undisclosed Witnesses, at 6-7 (Oct. 18, 2016), Respondents have only recently uncovered traces of the alliance between MBIA and the division, including the fact that the Division improperly authorized MBIA to use the portfolio companies’ confidential information in unrelated civil litigation against Respondents. Having endeavored to hide its collusion with MBIA—instructing MBIA not to “cite or attach any of the documents received from the SEC to any complaint while those documents remain confidential and non-public” and agreeing at MBIA’s behest not to tell Ms. Tilton about the disclosure of the portfolio companies’ confidential information without first informing MBIA—the Division cannot now complain that Respondents took too long to discover its misconduct. *See id.*

B. The Division Should Not Be Allowed To Further Exploit Its Improper Relationship With MBIA, While Respondents Are Denied Information Critical To Their Defense.

Although the Division purports to be an innocent bystander to this discovery dispute, it is not. The evidence reveals that, since 2011, the Division and MBIA have been coordinating and collaborating to build a case against Respondents, including by using wholly improper information sharing tactics that, *inter alia*, authorized MBIA to use Respondents’ confidential information against them in unrelated civil litigation. *See Mot. to Compel* at 3-10. It would be fundamentally unfair to allow the Division to build its case with information gleaned from its five-plus year relationship with MBIA—a relationship marred by violations of SEC regulations and the SEC’s stated policy concerning information sharing, *see id.* at 6-7 & n.1—while MBIA refuses to provide Respondents information critical to its defense. *See supra* pp. 4-5.

Indeed, MBIA's willful refusal to comply with the 2016 Subpoena is especially galling given its asymmetric compliance with process in this matter. Specifically, while MBIA has steadfastly refused to produce any documents in response to the 2016 Subpoena, documents recently produced by the *Division* reflect MBIA's eagerness to cooperate with the Division throughout the post-OIP period and as recently as last month. *See, e.g.,* Declaration of Lisa H. Rubin, dated October 5, 2016, Exs. 23 & 24. The Division wants it both ways: They expect—and by all accounts, are receiving—MBIA's compliance with the *Division's* hearing subpoena, but they are asking Your Honor to look the other way as MBIA ignores *Respondents'* document subpoena. Your Honor should not allow MBIA's gamesmanship to continue without consequences for its erstwhile patron, the Division.

Accordingly, if MBIA does not comply with the 2016 Subpoena immediately, Your Honor should preclude the Division from offering evidence or testimony in this proceeding that purports to establish that MBIA was a victim or otherwise suffered financial losses as a result of its relationship with Respondents.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that Your Honor order MBIA to produce immediately to Respondents the limited categories of documents requested by Respondents' October 3, 2016, email, which further narrows the requests in the 2016 Subpoena, or that Your Honor prohibit the Division from offering evidence or testimony in this proceeding that purports to establish that MBIA was a victim or otherwise suffered financial losses as a result of its relationship with Respondents. In the alternative, and in the event that Your Honor stays the proceeding, Respondents respectfully request that Your Honor order the Commission to immediately commence a proceeding in the United States District Court for the Southern District of New York to enforce the 2016 Subpoena.

Dated: New York, New York
October 18, 2016

GIBSON, DUNN & CRUTCHER LLP

By: Randy M. Mastro / NG

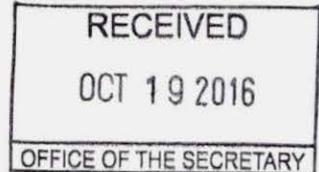
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CERTIFICATE OF SERVICE



I hereby certify that I served a true and correct copy of Reply Memorandum of Law in

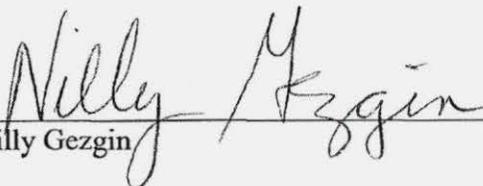
Further Support of Respondents' Motion to Compel MBIA to Produce Documents Responsive to

Respondents' Subpoena on this 18th day of October, 2016, in the manner indicated below:

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Hon. Judge Carol Fox Foelak
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