



October 21, 2016

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

The Honorable Carol Fox Foelak
100 F Street, NE
Mail Stop 2557
Washington, DC 20549

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

Dear Judge Foelak:

I write on behalf of Respondents in the above-captioned matter to respectfully request that Your Honor issue hearing subpoenas to Allison Herren Lee, Nicole Creola Kelly, and Brent Mitchell. During the final pre-hearing conference on Wednesday, October 19, 2016, Your Honor stated that Respondents would be permitted to make a submission as to the relevance and scope of Respondents' proposed examinations of Ms. Lee, Ms. Kelly, and Mr. Mitchell (collectively, the "Notes Authors"), provided such submission was made by 12:00 p.m. on Friday, October 21, 2016. As set forth below, it is imperative that Respondents have the opportunity to question Ms. Lee, Ms. Kelly, and Mr. Mitchell regarding the narrow but crucially important issue of the Division's information-sharing arrangement with MBIA. That testimony is essential to Respondents' defense, as it will, among other things, enable Respondents to conduct a fulsome cross-examination of MBIA President and Division witness Anthony McKiernan.

As Your Honor is aware, Respondents have uncovered evidence that the Division improperly collaborated with MBIA to build a case against Respondents, including by sharing with MBIA confidential information produced by Respondents under the rubric of the Division's investigation and expressly authorizing MBIA to use that confidential information in unrelated civil litigation against Respondents. Evidence of the alliance between the Division and MBIA includes a series of handwritten notes taken by SEC employees during the Division's investigation, which memorialize communications between the Division and MBIA. Initially, the Division refused to disclose the identities of the authors of the handwritten notes, but after Respondents moved to compel disclosure,¹ the Division caved

¹ See Resp'ts' Mem. of Law in Supp. of Mot. to Compel the Disclosure of the Identities of the Authors of the Division's Handwritten Notes (Oct. 5, 2016).

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and provided the names of the SEC employees who authored those notes: Ms. Lee, Ms. Kelly, and Mr. Mitchell.² The following day, Respondents submitted to Your Honor a request that hearing subpoenas be issued to the three Notes Authors. The Division opposed Respondents' request.

It is essential that Respondents be permitted to conduct narrowly tailored examinations of the Notes Authors regarding the Division's conversations with MBIA that the notes memorialize, including with respect to the information-sharing agreement between the Division and MBIA. While the handwritten notes provide useful information, portions of those notes warrant further questioning to provide a fuller account of the communications between the Division and MBIA. Accordingly, Respondents should be afforded the opportunity to supplement and clarify the handwritten notes through examination of their authors.

This testimony is of critical importance, as the communications between the Division and MBIA, and any promises made by either party—including promises not memorialized in writing, and therefore inaccessible to Respondents absent testimony from the notes authors—go to Mr. McKiernan's bias, credibility, and motive for testifying in a manner beneficial to the Division and harmful to Respondents. Without testimony from the Notes Authors, Respondents' ability to cross-examine Mr. McKiernan will, accordingly, be fundamentally impaired, as will its ability to tell the full story of the Division's involvement with MBIA in torpedoing a Zohar restructuring that would have made all noteholders whole—and would have eviscerated the Division's case.

Moreover, it appears that Mr. McKiernan did not participate in certain conversations between the Division and MBIA. As such, his testimony regarding the details and extent of the relationship between MBIA and the Division will be incomplete. Respondents should therefore be permitted to conduct a narrow examination of the Notes Authors regarding the details of the communications their notes memorialize.

Finally, although the Division has objected to the issuance of subpoenas to Ms. Lee, Ms. Kelly, and Mr. Mitchell on the ground that, *inter alia*, those individuals "were counsel for the Division during the investigation in this matter," that fact does not insulate the Notes Authors from being required to testify at the upcoming hearing regarding the very narrow subject of the notes they took and the communications that those notes memorialize. In opposing

² See Division of Enforcement's Resp. to Resp'ts' Mot. to Compel Disclosure of the Identities of the Authors of the Division's Handwritten Notes, at 3 (Oct. 13, 2016). Additionally, one note was authored by "an intern for the Division [who] is no longer associated with the Commission," and another was written by Amy Sumner. See *id.* at 3 & n.2. Respondents have not requested a hearing subpoena for the former Division intern, and Your Honor has denied Respondents' request for a hearing subpoena to Ms. Sumner.

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Respondents' request for a hearing subpoena to Ms. Sumner, the Division relied heavily on the Eighth Circuit's decision in *Shelton v. American Motors Corporation*, 805 F.2d 1323, 1327 (8th Cir. 1986) for the proposition that "there is a heavy burden on parties seeking testimony from an opponent's attorney." See Division's Mot. to Strike Resp'ts' Further Amended Witness List and Requests for Hr'g Subpoenas to Previously Undisclosed Witnesses, at 6 (Oct. 11, 2016). Here, however, *Shelton* does not apply because the SEC witnesses will not be serving as trial counsel, *see, e.g., U.S. Fid. & Guar. Co. v. Brastrepo Oil Servs. Co.*, 2000 WL 1253262, at *2 (S.D.N.Y. Sept. 1, 2000) (permitting deposition of opposing attorneys where "none . . . [would be serving as] trial counsel"), and, additionally, because Respondents' examination of those witnesses will be limited to pre-litigation matters, *see, e.g., United States v. Philip Morris, Inc.*, 209 F.R.D. 13, 17 (D.D.C. 2002) (concluding that *Shelton* did not apply where, *inter alia*, the attorneys were not litigation or trial counsel and the deposition would not cover litigation strategy). In other words, testimony by the SEC witnesses will be like that "of any other percipient or fact witness, and should not be prohibited." *Younger Mfg. Co. v. Kaenon*, 247 F.R.D. 586 (C.D. Cal. 2007).³

For the foregoing reasons, Respondents respectfully request that Your Honor issue hearing subpoenas to Ms. Kelly, Ms. Lee, and Mr. Mitchell.

Respectfully,


Randy M. Mastro

Randy M. Mastro

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

³ In any case, numerous courts, including the Second Circuit, have criticized *Shelton* as unduly restrictive. See Resp'ts' Opp. to the Division's Mot. to Strike Resp'ts' Further Amended Witness List and Requests for Hr'g Subpoenas to Previously Undisclosed Witnesses, at 8 (Oct. 18, 2016) (citing, *inter alia, In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 67 (2d Cir. 2003)). And even if Your Honor were to apply the test set forth in *Shelton*, Respondents would easily satisfy that burden: (i) the information sought is not privileged, as it relates to communications between the Division and a third-party (MBIA); (ii) as set forth above, that information is crucial to Respondents' defense; and (iii) the SEC witnesses possess detailed, firsthand knowledge of the alliance between the Division and MBIA, beyond that which is memorialized in their notes or possessed by Mr. McKiernan. *See, e.g., Bastrepo Oil Servs.*, 2000 WL 1253262, at *3; *Bogan v. N.W. Mut. Life Ins. Co.*, 152 F.R.D. 9, 14 (S.D.N.Y. 1993).

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of Respondents' letter in support of their request for hearing subpoenas to Allison Herren Lee, Nicole Creola Kelly, and Brent Mitchell on this 21st day of October, 2016, in the manner indicated below:

United States Securities and Exchange Commission
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(By Facsimile and original, and three copies by Federal Express)

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Melanie Binet