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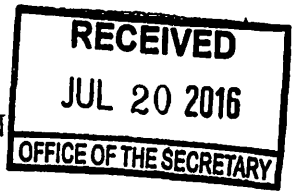

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

MOTION FOR RECONSIDERATION AND ADJOURNMENT OR, IN THE ALTERNATIVE, FOR CERTIFICATION FOR INTERLOCUTORY REVIEW

Upon the accompanying Memorandum of Law and Declaration of Lisa H. Rubin, both dated July 19, 2016, and the record of proceedings herein, Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC move this Court for reconsideration and vacatur of the July 15, 2016 Order (Release No. 3990) (the "Order"), and for a resetting of the hearing date in this matter to December 2016, or, in the alternative, for certification for interlocutory review of the Order, pursuant to Rules 111, 161, 300 & 400 of the Securities and Exchange Commission's Rules of Practice, 17 C.F.R. § 201.100 et seq.

Dated: New York, New York
July 19, 2016

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION FOR RECONSIDERATION AND ADJOURNMENT OR, IN THE ALTERNATIVE, FOR CERTIFICATION FOR INTERLOCUTORY REVIEW

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Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, "Patriarch" or "Respondents"), respectfully move for reconsideration of Your Honor's July 15, 2016 Order (Release No. 3990) (the "Order"), or, in the alternative, for interlocutory review of the Order, pursuant to Rules 111, 161, 300 & 400 of the Securities and Exchange Commission's Rules of Practice, 17 C.F.R. § 201.100 et seq. (the "Rules"). Respondents respectfully request a ruling by Thursday, July 21, as time is of the essence and Respondents intend to move the Commission directly for interlocutory review of the Order after that date. Respondents also respectfully request a conference with Your Honor as soon as possible to address the crucially important timing issues raised by the Order.[1]

PRELIMINARY STATEMENT

Respondents implore Your Honor to reconsider the recent Order rejecting the parties' joint proposal to schedule the hearing in this matter for December 2016 and instead ordering the parties to confer regarding a hearing date in September 2016. Forcing Respondents to trial starting September 6, only seven weeks from now, is fundamentally unfair and wholly inconsistent with due process.[2] It is highly unusual for a court or administrative tribunal to reject

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[1] Respondents are also moving, under separate motion and support, for Your Honor to ask Chief Administrative Law Judge Murray to submit a motion requesting that the Commission extend the 300-day deadline in this proceeding. In addition, if necessary, Respondents intend to move the Commission directly for an order extending the 300-day deadline.

[2] In its letters of July 18 & 19, SEC Division counsel asserts that if the hearing is to commence in September, it must start on September 6 because lead counsel is getting married on October 1, the Division believes the trial will take three weeks and, the Division claims, four investor witnesses are only available in early September. But Division counsel says nothing about these witnesses' availability to testify after September and previously consented to a December trial date, presumably because they are all available in subsequent months.

a joint scheduling proposal made by all parties on consent, let alone where, as here, that request is made by brand new counsel. Respondents will be substantially and deeply prejudiced by the truncated schedule for reasons set forth fully in this brief, not the least of which is that undersigned counsel was retained very recently. Indeed, hearing officers have granted similar requests as a matter of course in the past. *See, e.g.*, *In Re Harrison Sec., Inc.*, Release No. 611 (Oct. 7, 2003) at 4 (granting request to postpone hearing pursuant to Rule 161(b) because new attorneys should be given "a reasonable opportunity to become familiar with the issues before the hearing starts"); *infra* p. 8-9. Respondents bring this motion with the hope and expectation that a full explanation of the circumstances and the ample precedent supporting a joint request for a December hearing will convince Your Honor to reconsider its July 15 Order.

While a December trial date would cause these proceedings to exceed the 300-day deadline imposed by Rule 360, the circumstances here justify a December trial and consequent extension of that deadline pursuant to Rule 161. Respondents make a strong showing that, taking into account all "relevant factors," the denial of Respondents' request for a resetting of the hearing date to December 2016 will "substantially prejudice" Respondents' case, and that the request for a December hearing should therefore have been granted. *See* Rule 161(b). The "relevant factors" include that: (a) the undersigned counsel entered its appearance in this case less than two weeks ago and cannot fairly be expected to be ready to provide the fullest possible defense seven weeks from now, particularly given the size of the case record, the extraordinary complexity of the issues presented by the Government's case, and the number of anticipated witnesses, including multiple expert witnesses; (b) key participants, including expert and other witnesses, are not available for a September 2016 hearing, which is not surprising given that the Second Circuit's stay of these proceedings extended for nearly ten months and was lifted,

without advance notice, less than two weeks ago; (c) Respondents intend to file a number of pre-trial motions, the resolution of which could materially impact the scope and nature of the evidence, including witness testimony, that is admissible at trial; and (d) the parties jointly requested a December 2016 hearing date, in joint recognition of the compelling nature of these circumstances. Moreover, should the Division's case run long—as inevitably happens in nearly every trial, and particularly in a complex case like this one—Respondents' time to put on their case will be unfairly abridged by Division counsel's personal obligations. Having now been made fully aware of the circumstances justifying a December setting, Respondents are hopeful Your Honor will reconsider its July 15 Order.

Should Your Honor decline to reconsider, the July 15 Order should be certified for interlocutory review by the Commission. If the schedule as presently ordered stands, Respondents will be denied their right to a fundamentally fair trial that comports with due process, and will effectively be denied their statutory right to counsel of their choosing in these proceedings. Just days ago, the Commission's apparent recognition that its existing rules are far from fair culminated in its unanimous adoption of a number of meaningful amendments to both scheduling and discovery procedures. While those amendments do not go far enough to rectify the fundamental unfairness of proceedings like this one, they at least add some meaningful protective procedures for respondents. But these new discovery and scheduling-related rules will not automatically be applied to Respondents here.

The consequences to Respondents of any loss at trial are catastrophic and dwarf those of other recent SEC administrative proceedings, individually and cumulatively. The amount that the Division seeks in disgorgement from Ms. Tilton—at least $208 million—is nearly seven times more than the $32 million collected in disgorgement and penalties from all litigated

administrative proceedings in fiscal year 2015. *See Office of Admin. Law Judges, U.S. Sec. Exch. Comm'n,* https://www.sec.gov/alj. The consequences will also be severe for the hundreds of distressed companies that Respondents have invested in, and the tens of thousands of employees who work for those companies. The schedule imposed by the July 15 order and requirements of Rule 360, particularly in light of the highly unusual procedural posture of these proceedings and the undeniably substantial consequences at stake, effectively denies Respondents due process. This denial is a controlling question of law on which there is, at the very least, substantial ground for difference of opinion—though in fact the violation is clear. Moreover, immediate review of the Order will materially advance the completion of the proceedings because one way or another, whether by the Commission or later by a federal court of appeals, correction of this error will require vacatur of the initial decision in this matter. Addressing the issue now will avoid the substantial risk that the parties' and court's resources will be wasted in a retrial.

At all events, the circumstances presented by Respondents' request qualify as "extraordinary," and are therefore appropriate for interlocutory review, even if Your Honor determines that they do not meet the standards of Rule 400(c). *See In re McDuff*, Exchange Act Release No. 78066 (June 14, 2016) [hereinafter, "*McDuff* Op."] at 10 (holding that even where an application for interlocutory review does not satisfy the Rule 400(c) standard, the Commission has the discretion to grant interlocutory review in "extraordinary circumstances").

For all of these reasons, Respondents respectfully request that Your Honor reconsider and vacate its Order setting a September 2016 hearing date, and endorse in its place the parties' joint request for a December 2016 trial date. In the alternative, Respondents respectfully request that Your Honor certify interlocutory appeal of the Order to the Commission.

Respondents are cognizant that Your Honor may apply to the Chief Administrative Law Judge to move the Commission for an extension of the 300-day deadline. Indeed, the Commission may take this matter up of its own accord, particularly given the peculiar procedural posture of the proceedings. *See* Rule 360(a)(3); *McDuff* Op. at 3 ("The Commission has plenary authority over the course of its administrative proceedings . . . irrespective of whether any party has sought relief") (quotation marks omitted). Respondents therefore are also moving, under separate motion and support, to request that Your Honor seek such an extension from the Commission through Chief Administrative Law Judge Brenda Murray. Respondents also intend to move the Commission directly for an order extending the 300-day deadline in order to accommodate a schedule that affords Respondents a fair and unbiased opportunity to be heard in these proceedings.

LEGAL STANDARDS

Your Honor has the authority to reconsider and vacate the Order, and to endorse a new schedule in its place, under a hearing officer's broad Rule 111 powers to "do all things necessary and appropriate to discharge [its] duties," including "regulating the course of a proceeding" and "considering and ruling upon all procedural and other motions." *See, e.g, In the Matter of Bocchino and Harosh*, Exchange Act Release No. 50739 (Nov. 26, 2004) (granting motion for reconsideration). The exercise of that authority is guided by Rule 300, which requires the hearing officer to conduct all hearings "in a fair, impartial, expeditious and orderly manner." 17 C.F.R. § 201.300.

While the Rules impose upon both parties and the hearing officer certain deadlines, it is within the hearing officer's authority to schedule the hearing at a time that provides all parties with a full and fair opportunity to develop their case for hearing. Pursuant to Rule 161(a), "the hearing officer, at any time prior to the filing of his or her initial decision . . . may, for good

cause shown, extend or shorten any time limits prescribed by these Rules of Practice for the filing of any papers and may, consistent with paragraphs (b) and (c) of this rule, postpone or adjourn any hearing." Pursuant to Rule 161(b), while a hearing officer should generally "adhere to a policy strongly disfavoring" adjournments of hearing dates, it should grant a request for an adjournment where the requesting party "makes a strong showing that the denial of the request or motion would substantially prejudice their case" (emphasis added). In making this determination, the hearing officer "shall consider" all "relevant factors." *Id.*[3]

Pursuant to Rule 360, a hearing officer must issue the initial decision within the time period set by the Commission in its order instituting proceedings—here, 300 days. Because the 300-day deadline expires in November 2016 (not counting the period of the Second Circuit stay), Respondents are simultaneously filing a motion expressly authorized by the Rules requesting that Your Honor ask the Chief Administrative Law Judge to seek an extension from the Commission of the 300-day deadline in this proceeding because additional time is "necessary" and "appropriate in the public interest." *See* Rule 360(a)(3).

Finally, pursuant to Rule 400, the Commission may take interlocutory review of any ruling of a hearing officer, either on its own initiative or at the request of a party. A hearing officer may certify its rulings for interlocutory review by the Commission if, "upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion

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[3] Relevant factors include, but are not limited to, "(i) the length of the proceeding to date; (ii) the number of postponements, adjournments or extensions already granted; (iii) the stage of the proceedings at the time of the request; (iv) the impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission; and (v) any other such matters as justice may require." Rule 161(b)(1). Rule 161(c), which concerns postponements and extensions of the time for filing papers and stays pending Commission consideration of offers of settlement, is not relevant here.

that: (i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and (ii) an immediate review of the order may materially advance the completion of the proceeding." Rule 400(c). Moreover, even where an application for interlocutory review does not satisfy this standard, the Commission has the discretion to grant interlocutory review in "extraordinary" circumstances, including where the hearing officer's refusal to postpone a hearing date will make it difficult for counsel to adequately represent the respondents. *See McDuff* Op. at 5 & n.49.

ARGUMENT

I. Your Honor Should Reconsider And Vacate The Order, And Endorse In Its Place The Parties' Joint Proposal Of A December 2016 Hearing Date.

Respondents make an overwhelmingly strong showing that, taking into account all "relevant factors," the denial of the parties' joint request for a December hearing date will "substantially prejudice" Respondents' case. Rule 161(b). Accordingly, Respondents' request for a December 2016 hearing date should be granted.

The "relevant factors" that weigh heavily in favor of postponement include that: (a) the undersigned counsel entered its appearance in this case less than two weeks ago and cannot fairly be expected to be ready to provide the fullest possible defense seven weeks from now, particularly given the size of the case record, the extraordinary complexity of the issues presented by the Government's case, and the number of anticipated witnesses, including multiple expert witnesses; (b) key participants and witnesses, including expert witnesses, are not available for a September 2016 hearing, which is not surprising given that the Second Circuit's stay of these proceedings extended for nearly ten months and was lifted, without advance notice, less than two weeks ago; (c) Respondents intend to file a number of pre-trial motions, the resolution of which could materially impact the scope and nature of the evidence, including witness

testimony, that is admissible at trial; and (d) the parties jointly requested a December 2016 hearing date, in joint recognition that the interests of justice weigh strongly in favor of that date, and the other Rule 161 factors also support the requested postponement.

Moreover, as noted above, Respondents are simultaneously filing a motion asking that Your Honor request that the Chief Administrative Law Judge seek an extension of Rule 360's 300-day deadline from the Commission. Respondents understand that such requests are not usually made until completion of the hearing and submission of the matter for decision, and that such requests are usually made by hearing officers at their own initiative, not at the request of a party. But in light of the extraordinary circumstances presented here—including the Second Circuit stay issued only weeks before the original hearing date and lifted without advance notice more than 9 months later, and the appointment of new counsel immediately following the lifting of that stay, Respondents' ongoing challenge to the constitutionality of these proceedings, and the severe prejudice to Respondents' case if they are forced to proceed with a hearing in September—Respondents believe such a motion, and an extension of the 300-day deadline, is warranted.

A. Respondents Will Be Substantially Prejudiced By A September 2016 Hearing Because New Counsel Cannot Adequately Prepare For Trial In Seven Weeks, Particularly Given The Size Of The Case Record And The Extraordinary Complexity Of The Issues Presented By The Government's Case.

Respondents have engaged new trial counsel appearing for the first time in this matter less than two weeks ago, after the Second Circuit's recent decision in the case. New counsel understandably needs more time to prepare for trial than the few weeks afforded in the Order. Such requests by new counsel are, as far as we can tell, granted as a matter of course. *See, e.g.*, *In the Matter of Fortenberry*, Release No. 1800 (Sept. 12, 2014) at 2 (granting continuance where trial counsel withdrew three weeks before the hearing); *In re Harrison Sec., Inc.*, Release

No. 611 (Oct. 7, 2003) at 4 (granting request to postpone hearing pursuant to Rule 161(b) because new attorneys should be given "a reasonable opportunity to become familiar with the issues before the hearing starts"); *cf. In re Blizzard*, Investment Advisors Act Release No. 2032 (Apr. 24, 2002) at 3 (disqualifying counsel and requiring appointment of new counsel, even though this decision "will necessitate further delay" as "new counsel prepares for [the] representation," because "we must maintain the integrity of the proceedings we are empowered to conduct").[4]

Indeed, the Commission has made clear that it is an abuse of discretion to deny a continuance where doing so leaves a respondent "without assistance of counsel at or near the hearing date." *Gregory M. Dearlove*, Exchange Act Release No. 57244, at 35 & n.157 (Jan. 31, 2008). It is well-established that a "party summoned to appear before a federal agency has a right to be assisted by counsel," *In the Matter of Morgan Asset Mgmt., Inc.*, Release No. 657 (July 19, 2010); *see also* 5 U.S.C. § 555(b) ("A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."). The Administrative Procedure Act not only guarantees the right to counsel, but also the right to counsel of one's

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[4] *See also In the Matter of the Application of Michael Markowski for Review of Disciplinary Action Taken by the Nat'l Ass'n of Sec. Dealers, Inc.*, 51 S.E.C. 553 (June 30, 1993) (noting that request for short postponement had been granted when a new attorney was appointed the day before the scheduled hearing date); *In the Matter of David J. Checkosky & Norman A. Aldrich* (Private Proceeding), Release No. 296 (Apr. 1, 1988) (granting motion for postponement because "recently appointed lead counsel" had "not had the opportunity to familiarize herself with the matters involved in the hearing of this case and the prehearing matters to be performed," and had also undergone emergency surgery); *cf. United States v. Felipe*, No. 94 CR. 395 (LMM), 1996 WL 18985, at *1 (S.D.N.Y. Jan. 18, 1996) (ordering adjournment of trial for six months because the "nature and extent of the charges," the "amount of discovery in the case," and the fact that "new counsel would have only minimal time to prepare for trial . . . . fully warrant an adjournment of the trial date").

choice. *Matter of Morgan*, Release No. 657; *see also SEC v. Csapo*, 533 F.2d 7, 10-11 (D.C. Cir. 1976); *SEC v. Higashi*, 359 F.2d 550, 553 (9th Cir. 1966). This right encompasses the right for counsel of one's choice to be afforded an adequate opportunity to prepare. *Cf. Riggio v. Sec'y, Dep't of Corr.*, 704 F. Supp. 2d 1244, 1252-53 (M.D. Fla. 2010) ("Due to the trial court's erroneous denial of a continuance, Petitioner was denied his right to counsel of his choice."). This is especially important here, where Respondents are accused of fraud, the Division seeks a penalty of over $200 million dollars, and the Division seeks a permanent bar from the industry—each a severe sanction that triggers due process protections and requires the assistance of well-prepared counsel to mount a vigorous defense.

The jointly-requested December hearing date would therefore be necessary, reasonable, and appropriate even if the issues presented were relatively straightforward and the evidence was modest in scope. But that is not the case at all. New counsel understands that the prospective trial evidence includes nearly 1,000 trial exhibits, at least 24 proposed trial witnesses, and 11 expert reports that were exchanged among the parties last summer but not yet presented to Your Honor. In particular, the 11 expert reports—totaling 425 pages, plus almost a thousand pages of exhibits—focus on an array of complex, technical issues, including:

- The structure and operation of the Zohar CLOs, including their categorization of loans;
- The authority invested in the collateral manager and others under the pertinent transaction documents;
- GAAP compliance of the impairment analyses in the Zohar funds' financial statements;
- The proper calculation of the Zohar funds' monthly overcollateralization ratio tests;
- The disclosure of the Zohar Funds' strategies to investors and the availability of information sufficient to enable investors to monitor the performance of the loans held by the Zohar funds and their own investments; and

- The amounts paid to certain Respondents in subordinated collateral management fees and preference share distributions.

This is all in addition to the enormous investigative record produced to Respondents. And even that does not include over 2.5 million pages of documents produced by Respondents in response to Division requests and subpoenas. All of these materials relate to a range of extraordinarily complex financial instruments and products, as well as a significant amount of complex accounting and financial reporting information for numerous entities that is critical to Respondents' defense.

In light of these complexities—with which Your Honor may not yet be entirely familiar—a September 2016 hearing date is premature, infeasible, and unfair under all of the relevant circumstances. Respondents' new counsel has an ethical obligation to familiarize itself with this voluminous record, as well as relevant law, before trial, in carrying out its duties to advise and zealously represent its client in these proceedings. *See Burt v. Titlow*, 134 S. Ct. 10, 19, 571 U.S. ___ (2013) (Sotomayor, J., concurring) ("counsel must 'make an independent examination of the facts, circumstances, pleadings and laws involved and then' . . . provide[] the client with competent and fully informed advice, including an analysis of the risks that the client would face in proceeding to trial") (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (plurality op.)). New counsel simply will not be able to adequately familiarize themselves with this massive amount of information, refine a trial strategy, prepare witnesses for trial, and prepare for cross-examinations in seven weeks, and it denies Respondents a fundamentally fair process to set a schedule that makes it impossible for counsel to prepare adequately.

Not surprisingly—and appropriately—the Commission frequently grants requests for extensions, especially when the ALJ is unable to issue a decision within the timeline required under Rule 360 because the matter is complex, involved a lengthy proceeding, or involved a

significant number of exhibits.[5] Respondents should not be denied a request for a moderate extension of timelines, and a fair hearing, when these same considerations exist.

In refusing the jointly-proposed schedule, the Order states that a new law firm's appearance as new counsel "cannot be allowed to delay the proceeding." Order at 2 n.3. This is simply inconsistent with Commission precedent and the experience of the undersigned. This case is an enforcement action initiated by the government involving serious allegations, and such due process considerations cannot be summarily dismissed over the singular concern of delay, particularly where that delay is not the result of neglect or gamesmanship, but instead the result of a federal appellate court proceeding involving the constitutionality of this very Court. Indeed, even lead counsel for the Division of Enforcement expressed surprise at Your Honor's denial of our proposed joint schedule on consent and described it as unusual.

B. Respondents Will Be Substantially Prejudiced By A September 2016 Hearing Because Key Participants And Witnesses, Including Expert Witnesses, Will Be Unavailable.

Separate and apart from Respondents' counsel's inability to adequately prepare for trial in such an astonishingly short period, Respondents will be substantially prejudiced by a September 2016 hearing date because a number of Respondents' witnesses, including expert

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[5] *See, e.g.*, *Lawrence M. Labine*, Exchange Act Release No. 74883 (May 6, 2015) (Commission granted second extension to allow ALJ additional time to review voluminous exhibits and conduct additional research); *Donald J. Anthony, Jr., et al.*, Exchange Act Release No. 74139 (Jan. 26, 2015) (Commission granted first extension due to the length and complexity of the proceeding and second extension due to conflicts with other pending complex matters); *In the Matter of John P. Flannery & James D. Hopkins*, Securities Act Release No. 9239 (July 18, 2011) (granting extension "because of the size of this particular record and the Office workload," noting that the "record consists of over 3,000 transcript pages reflecting eleven days of hearing, approximately 500 exhibits, and lengthy briefs"); *In the Matter of the Application of Miguel A. Ferrer & Carlos J. Ortiz*, Securities Act Release No. 9441 (Aug. 15, 2013) (granting extension because "the thirteen-day hearing resulted in an extensive record that is taking time to review").

witnesses, are unavailable to be prepared for and to appear at a September 2016 hearing, or have significant conflicts during this period. *See* Decl. of Lisa H. Rubin, dated July 19, 2016 and filed herewith ("Rubin Decl.") ¶¶ 2-8. These witness scheduling conflicts—which were one of primary reasons the parties requested a December 2016 hearing date—are quintessentially sufficient "good cause" to justify the postponement of a hearing. *See, e.g., In the Matter of David J. Checkosky & Norman A. Aldrich* (Private Proceeding), Release No. 296 (Apr. 1, 1988) ("Under the circumstances, including the fact that one of the OCA's expert witnesses will be unavailable during the week of June 6, and another during the week of June 20, I am satisfied that good cause has been shown for the granting of the motion for the period requested."). These witness scheduling conflicts, include, but are not limited to, three of Respondents' five experts:

- Respondents' expert Glenn Hubbard, Dean of the Graduate School of Business at Columbia University, an adviser to the President of the Federal Reserve Bank of New York, and a former Chair of the President's Council of Economic Advisers, who, due to a September 2016 trial in Guernsey at which he is testifying and other professional commitments, is unavailable throughout the months of August and September 2016;

- Respondents' expert Marti Murray, who, due to expert reports due in two separate matters at the end of August and the end of September, and a deposition in a third matter during the first two weeks of September, reported that it would be "impossible" for her to testify at a trial in this matter in September; and

- Respondents' expert Mark Froeba, who, for family reasons, has plans to be in Wisconsin for several weeks in early-to-mid August through early September.

See Rubin Decl. ¶¶ 2-4. Moreover, Ms. Tilton will be attending a trial beginning August 9, 2016 in Delaware Chancery Court, in which certain Respondents are defendants, and is scheduled to be deposed on August 30, 2016 in an insurance coverage litigation relating to this matter. *See id.* ¶¶ 5-6. Similarly, Patriarch employee Carlos Mercado, who is expected to be a fact witness for both sides, will be deposed in that same insurance coverage matter on September 8, 2016. *See id.* ¶ 6. In-house counsel with responsibility for this matter also will be deposed in the above-referenced insurance coverage matter on September 9, 2016, and will need to oversee

preparation for and the defense of four total Patriarch depositions between late August 2016 and September 26, 2016, when fact discovery closes. *See id.* ¶ 7. And three of Respondents' witnesses in this proceeding no longer work for Patriarch or any of its affiliates and are not even in regular contact with Respondents or their counsel. *See id.* ¶ 8. Their schedules will also need to be taken into account. Further, in addition to Respondents' scheduling conflicts, the Division has its own, including Mr. Bliss's October 1, 2016 wedding, making a trial starting during the latter half of September 2016 unworkable. As a result, the Division has requested a September 6, 2016 hearing date—seven weeks from now.

By shoehorning the parties into an unnecessarily early September trial date, the Order not only disregards both sides' interests in adequately preparing for trial in this extremely complex matter, but also fails to take into account the availability of counsel, fact witnesses, and experts alike. Given that the Second Circuit's stay extended for nearly ten months and was lifted less than two weeks ago, it should surprise no one that Respondents' experts, in particular, might have new and different commitments. Indeed, due to their trial and deposition testimony in other matters, academic schedules, and other professional obligations, certain of Respondents' experts are not available until mid-November, which is among the reasons we sought a December 2016 date in the first place. For all of these reasons, Respondents will be severely prejudiced, and will be denied a fair hearing, if they are forced to proceed in September.

Counsel is cognizant of the fact that Your Honor did not have this information when the Order was entered; counsel for all parties reasonably assumed that, because the proposed hearing date was requested jointly by all parties, it would be entered without needing to burden Your Honor with the details of the parties' witness schedules. Now that Your Honor has instead ordered the hearing to occur in September, Respondents take this opportunity to detail these

pertinent facts, and request reconsideration of the Order and entry of a new hearing date of December 2016.

C. Respondents Will Be Substantially Prejudiced By A September 2016 Hearing Because Respondents Intend To File A Number Of Pre-Trial Motions That Will Need To Be Resolved Before The Hearing.

Notwithstanding the Order's reference to the "remaining prehearing steps" being few in number and small in significance such that a September 2016 trial date would be feasible, that is not the case. First, at the time when the Second Circuit stayed this proceeding on September 17, 2015, Your Honor had not yet ruled on Respondents' fully-briefed motion for summary disposition, which was submitted in an effort to conserve all parties' resources. Indeed, that important and potentially dispositive motion remains *sub judice* to this day.[6] Scheduling a September 2016 hearing does not appear to give Your Honor any meaningful time to consider and rule on that motion—or the parties sufficient time to revise their trial plans accordingly, considering that, depending on the disposition of the motion, the scope of the trial may change dramatically.

Second, Respondents intend to file a number of motions prior to trial that will need to be resolved before the hearing, the disposition of which will materially alter the scope of relevant and admissible testimony and other evidence, the witnesses that will need to be called, and other important issues relating to trial preparation. Those submissions include but are not necessarily limited to the following:

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[6] Respondents' Motion for Summary Disposition could substantially narrow the issues to be presented at trial and should therefore be considered prior to the Division's presentation of its case in chief.

- Motions to dismiss, based on the arguments raised in the appellate proceedings and other indicia of the unconstitutionality and illegality of these SEC administrative proceedings, among other grounds;

- Motions to add certain experts as trial witnesses;

- Motions for additional discovery, based on application of the SEC's new rules, adopted just last week;

- A range of other motions challenging the manner of presentation of expert testimony, the lack of discovery concerning certain of the Division's witnesses, and other motions necessary to preserve Respondents' rights, including in any appeal, and demonstrate the inherent absence of due process for Respondents;

- Motions in limine relating to the evidence to be adduced at trial, including expert testimony;

- The pre-hearing briefing contemplated in Your Honor's scheduling orders; and

- Motions, pursuant to Rules 161 and 900 of the Rules of Practice, to extend the hearing date due to the substantial prejudice to Respondents from a September 2016 hearing, the unusual complexity of this case, and the potential issue preclusive effects of a ruling in this matter on pending civil litigations relating to the Zohar funds.

In other words, there are a host of issues still to be addressed before the hearing, and they cannot be adequately addressed in a manner that comports with due process in the few weeks the Order has allowed.

D. The Parties Jointly Requested A December 2016 Hearing Date, In Joint Recognition That The Interests Of Justice Weigh Strongly In Favor Of That Date, And The Other Rule 161(b)(1) Factors Also Overwhelmingly Weigh In Favor Of A Postponement.

The parties jointly requested a December 2016 hearing date, in joint recognition of the compelling nature of the circumstances described above and the fact that the interests of "justice" weigh strongly in favor of that date. *See* Rule 161(b)(1)(v); *In Re Harrison Sec., Inc.*, Release No. 611 (Oct. 7, 2003) at 2 (noting multiple extensions of time granted to Respondents where the Division did not oppose the requests). Both sides have significant interests in adequately preparing for trial in this complex matter, and compelling reasons why a September hearing date

will make adequate preparation and presentation of their respective cases impossible. Moreover, the other factors set out in Rule 161(b)(1) overwhelmingly weigh in favor of postponement, and where they cut the other way do not come close to overriding the substantial prejudice to Respondents—and the government—if the September hearing date is not put off.

In particular: (i) the proceedings to date have not been unduly "length[y]"—to the contrary, except for the period in which the action was stayed by the Second Circuit, the proceedings moved at a brisk pace; (ii) Respondents have sought only one previous postponement, adjournment, or extension, which request was not granted; (iii) the "stage of the proceedings at the time of the request" weighs in favor of a postponement, as Respondents' motion for summary disposition is *sub judice* and the request for a December hearing date was made immediately after the Second Circuit lifted its stay of the proceedings; (iv) the postponement to December will impact the hearing officer's ability to complete the proceeding in the time specified by the Commission, but only marginally, as the 300 days do not run out until November 12, 2016 (not counting the period of the Second Circuit stay), and while inexcusable or unnecessary delay should be avoided, Rule 300 makes clear that proceedings must be scheduled so as to obtain a just, impartial, and orderly hearing; and (v) "any other such matters as justice may require" weigh heavily in favor of a postponement, for the reasons explained above.

For all of these reasons, the Order should be reconsidered and vacated, and the parties' joint proposal of a December 2016 hearing date should be entered in its place.

II. In The Alternative, Your Honor Should Certify Interlocutory Review Of The Order To The Commission.

A. Interlocutory Review Should Be Certified Because The Order, If It Stands, Violates Respondents' Due Process Rights.

Pursuant to Rule 400, Your Honor may certify interlocutory review of an order that "involves a controlling question of law as to which there is substantial ground for difference of opinion; and (ii) an immediate review of the order may materially advance the completion of the proceeding." Here, both conditions are amply satisfied: The Order, if it stands, will make it impossible for Respondents to receive a fair hearing or to adequately defend themselves against the SEC's charges, resulting in denial of their due process rights, as well as their statutory right, under the Administrative Procedure Act (5 U.S.C. § 555(b)), to counsel of their choice; and immediate review of the Order will materially advance the completion of the proceedings because it will enable the Commission to rectify this error of a constitutional magnitude before it infects the initial decision in this matter, necessitating reversal and retrial.

As discussed above, as a matter of fundamental fairness and due process, Respondents cannot possibly get a fair hearing if forced to proceed to trial in seven weeks against the government in an enforcement proceeding the government has been investigating and preparing for years, with new counsel who were retained very recently. And it would violate Respondents' right to the counsel of its choice to effectively punish Respondents for changing counsel recently, for the first time, in this long-running investigation and enforcement action.

The Commission has made clear that hearing officers have "an obligation to ensure that [their] administrative proceedings are conducted fairly in furtherance of the search for the truth and a just determination of the outcome." *In re Blizzard*, Investment Advisors Act Release No. 2032 (Apr. 24, 2002) at 2. Indeed, the Commission has acknowledged the overwhelming authority holding that "a fair trial in a fair tribunal is a basic requirement of due process that

applies in the context of administrative proceedings." *Id.* at 2 n.9 (citing *In re Murchison*, 349 U.S. 133, 136 (1955); *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n*, 198 F.3d 1, 13 (1st Cir. 1999); and *Utica Packing Co. v. Block*, 781 F.2d 71, 77 (6th Cir. 1986)). As discussed above, one fundamental aspect of a fair trial is the right to be represented by counsel who have been given an adequate opportunity to prepare for trial. Although Respondents are charged civilly, not criminally, they are being accused of committing securities fraud, the Division seeks a penalty of over $200 million dollars, and they may be barred permanently from securities work—each a severe sanction that triggers due process protections.

It is fundamentally unfair that, under all of these circumstances where the SEC Staff has been investigating this matter now for more than five years before filing any charges, Respondents, represented by newly appointed counsel, are being forced to try the case in seven weeks. That concern is heightened by the choice of forum here: an SEC proceeding before an ALJ is not an Article III court; it is an arm of the very government entity prosecuting this case. Notably, the very legitimacy and fairness remain the subject of intense scrutiny in the courts and elsewhere, and rulings like the one challenged here exacerbate the perception and concern that these SEC administrative proceedings are fundamentally unfair and deny respondents due process. It is therefore imperative that this tribunal be particularly sensitive to such perceptions and concerns, as the Commission has instructed. *See In re Blizzard*, Investment Advisors Act Release No. 2032 (Apr. 24, 2002) at 2 ("Even the appearance of a lack of integrity could undermine the public confidence in the administrative process upon which our authority ultimately depends.").

The Commission has recently implicitly acknowledged that, for too long, SEC administrative proceedings against respondents such as Ms. Tilton and Patriarch have lacked the

hallmarks of due process required before a deprivation of liberty or property. In an interview with the *Wall Street Journal* last fall, for example, Commission Chair Mary Jo White noted that the SEC's Rules of Practice for administrative proceedings had not been "modernized" for nearly a decade and reflected on the need to ensure that such administrative proceedings convey fairness both in reality and in appearance. *Mary Jo White Explains the New SEC Rules*, Wall St. J., Nov. 24, 2015, http://www.wsj.com/articles/mary-jo-white-explains-the-new-sec-rules-1448302777. Indeed, Your Honor has singled out the "truncated timelines" under the Rules as one of the "systemic causes" of unfairness for all respondents in SEC administrative proceedings. *See Office of the Inspector Gen.*, U.S. Sec. and Exch. Comm'n, Report of Investigation, Case # 15-ALJ-0482-I, at 20 (2016) (citing September 14, 2015 interview with ALJ Foelak).

Just days ago, the Commission's apparent recognition that its existing rules are far from fair culminated in its unanimous adoption of a number of meaningful amendments to both scheduling and discovery procedures. *See* Amendments to the Commission's Rules of Practice, Release No. 34-78319, July 13, 2016, https://www.sec.gov/rules/final/2016/34-78319.pdf. While those amendments do not go far enough to rectify the fundamental unfairness of proceedings like this one, they at least add a procedure for hearing officers to easily extend the initial decision deadline by 30 days, without leave of the Commission, as well as a procedure for any hearing officer to consult with the Chief Administrative Law Judge, who can request from the Commission, on the hearing officer's behalf, an extension of "any length" for the filing of the initial decision, which the Commission may grant whenever it "determines that additional time is necessary or appropriate in the public interest." 17 C.F.R. § 201.360(a)(3) (as amended). The amended rules also afford respondents the ability, among other things, to take up to seven

depositions (without regard to a witness's availability for trial) and to request related document discovery. But these new discovery and scheduling-related rules will not automatically be applied to litigants whose initial pre-hearing conferences have been held or whose cases are pending and have not been stayed as of the effective date.

If the Order stands rushing this high-profile matter to trial much faster than the parties have jointly proposed, Respondents will be deprived of their due process rights—thus bolstering the growing perception that SEC administrative proceedings are fundamentally unfair—a particularly unfortunate outcome in a case where denial of due process to Respondents is a controlling question of law

Moreover, immediate review of the Order will materially advance the completion of the proceedings because, if the Order is left to stand, the initial decision in this proceeding will need to be reversed and vacated for constitutional error, either by the Commission or a federal court, and the matter will need to be retried. Conversely, if interlocutory review is granted and the Commission rectifies this constitutional error before it results in irreparable harm to Respondents, that will eliminate the need for a retrial on the basis of the denial of due process from this rush to judgment, and thereby materially advance the completion of the proceedings. Your Honor should accordingly certify interlocutory review of the Order by the Commission.

B. Interlocutory Review Should Be Certified Because The Order Presents Extraordinary Circumstances Justifying Commission Review.

Although the circumstances set out in Rule 400(c) of the Rules, discussed above, are the traditional vehicle for interlocutory review of a hearing officer's ruling, the Commission only days ago clarified that there are, on rare occasions, "extraordinary circumstances that are appropriate for interlocutory review but that do not involve issues that meet the standards of Rule 400(c)." *McDuff* Op. at 5. The circumstances presented by Respondents' request qualify as

"extraordinary," and therefore appropriate for interlocutory review, even if Your Honor determines that they do not meet the standards of Rule 400(c). In particular, the Commission in *McDuff* noted that "extraordinary circumstances which justif[y] Commission review" of an ALJ's ruling existed where the hearing officer had "refus[ed] to postpone [a] hearing due to respondent counsel's necessary post-operative medical treatment." *Id.* (citing *Philip L. Pascale, CPA*, Order Granting Postponement of Administrative Hearing, File No. 3-11194 (Nov. 24, 2003)). In other words, it is appropriate to grant interlocutory review of a hearing officer's refusal to postpone a hearing where the circumstances militating in favor of adjournment are extraordinary. This is because the prejudice caused to a party by being forced to proceed with a hearing without adequate representation is severe and irreparable.

This concern is all the more manifest in this case, where the stakes for Ms. Tilton and the Patriarch entities are catastrophic, and dwarf those of other recent SEC administrative proceedings, individually or cumulatively. As noted above, the amount that the Division seeks in disgorgement from Ms. Tilton—at least $208 million—is nearly seven times more than the $32 million collected in disgorgement and penalties from all administrative proceedings in fiscal year 2015. *See supra* p.3. By contrast, there is no exigency demanding the immediate trial of this case. Ms. Tilton is not a registered investment adviser, the Patriarch entities are no longer registered investment advisers, and no Patriarch entity serves as a collateral manager to any of the Zohar funds, having resigned those positions in February 2016. As no Respondent is managing the Zohar funds, there is no risk that the alleged continuing breaches or future harms to Zohar fund investors are ongoing.

The factors discussed herein militating in favor of adjourning the hearing in this case to December 2016 are nothing less than extraordinary, and call out for interlocutory review so the prejudice to Respondents can be corrected before it infects the entire proceeding.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Your Honor grant this motion for reconsideration, vacate the Order, and in its place endorse the parties' joint proposal of a December 2016 hearing date or, in the alternative, certify interlocutory review of the Order to the Commission.

* * *

Rule 154(c) Certification: Undersigned counsel certifies that this brief contains 6,846 words and therefore complies with the limitations set forth in Rule 154(c).

Dated: New York, New York
July 19, 2016

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HARD COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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

DECLARATION OF LISA H. RUBIN IN SUPPORT OF RESPONDENTS' MOTION FOR RECONSIDERATION AND ADJOURNMENT OR, IN THE ALTERNATIVE, FOR CERTIFICATION FOR INTERLOCUTORY REVIEW

I, Lisa H. Rubin, 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 for Reconsideration and Adjournment or, in the Alternative, for Certification for Interlocutory Review. As detailed herein, based on my personal knowledge and a review of my firm's records, I understand that several of Respondents' witnesses are unavailable to prepare for and appear at a September 2016 trial or have significant conflicts during this period.

2. On or about July 18, 2016, I learned that Respondents' expert Glenn Hubbard, the Dean of the Graduate School of Business at Columbia University, an adviser to the President of the Federal Reserve Bank of New York and the former Chair of the President's Council of Economic Advisers, will not be available during the months of August and September 2016 due

to a September 2016 trial in Guernsey at which he is testifying and other professional commitments, including, but not limited to, his academic obligations.

3. On July 18, 2016, I had a telephone conversation with Marti Murray, one of Respondents' expert witnesses. During the call, Ms. Murray stated that she has expert reports due in two separate matters at the end of August 2016 and the end of September 2016 respectively. She also stated that she will be deposed in a third matter in which she is serving as an expert witness during the first two weeks of September. Given these and other obligations, Ms. Murray stated that it would be "impossible" for her to testify at a trial in this matter in September 2016.

4. On July 18, 2016, I also had a telephone conversation with Mark Froeba, another of Defendants' experts. During the call, Mr. Froeba stated that for family reasons, he intends to visit Wisconsin for several weeks this summer, beginning in early-to-mid August and continuing through early September.

5. As outside counsel to Respondents and their affiliates in this and other matters, I understand that beginning August 9, there will be an expedited trial in the Delaware Chancery Court in the matter captioned *Zohar CDO 2003-1, LLC* et al. *v. Patriarch Partners, LLC*, et al., and that Ms. Tilton will be in attendance for the duration of that trial.

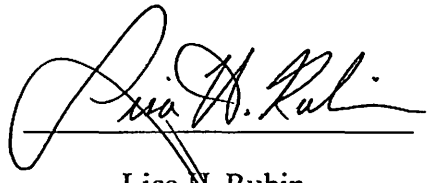
6. Between July 15, 2016 and July 18, 2016, I also learned that Ms. Tilton and Carlos Mercado, each of whom appears on both Respondents' and the Division's witness lists, will be deposed on August 30, 2016 and September 8, 2016 respectively in an insurance coverage litigation pending in the United States District Court for the Southern District of New York and captioned *Patriarch Partners, LLC v. Axis Insurance Co.*

7. In addition, in-house counsel with responsibility for this matter will also be deposed on September 9, 2016 and will need to oversee preparation for and the defense of four Patriarch depositions in total between late August 2016 and September 26, 2016, when fact discovery ends in the *Axis* matter.

8. I further understand that three of the people listed on Respondents' witness lists no longer work for Patriarch or any of their affiliates and are not in regular contact with Respondents or their counsel.

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

Dated: New York, New York
July 19, 2016



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