

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4116/September 1, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16462

In the Matter of

LYNN TILTON;	:	
PATRIARCH PARTNERS, LLC;	:	
PATRIARCH PARTNERS VIII, LLC;	:	ORDER
PATRIARCH PARTNERS XIV, LLC; and	:	
PATRIARCH PARTNERS XV, LLC	:	

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on March 30, 2015. The OIP alleges that Respondents violated the antifraud provisions of the Investment Advisers Act of 1940 in their operation of three collateral loan obligation funds (known as the Zohar Funds) by reporting misleading values for the assets held by the funds and failing to disclose a conflict of interest arising from Lynn Tilton's undisclosed approach to categorization of assets. The proceeding was stayed by order of the U.S. Court of Appeals for the Second Circuit between September 17, 2015, and June 2016. *See Tilton v. SEC*, No. 15-2103, 2016 U.S. App. LEXIS 9970, at *37 (2d Cir. June 1, 2016); *Tilton v. SEC*, No. 15-2103, ECF Nos. 76, 125. The hearing is currently scheduled to commence on October 24, 2016.

Under consideration are two requests by Respondents to issue subpoenas to the Commission; oppositions filed by the Division of Enforcement (Division) and by the Commission's Office of Litigation and Administrative Practice (OLAP); and Respondents' reply.

The first subpoena request relates to the Commission's Rules of Practice, applicable to administrative proceedings like this one, and the recent rule making proceeding, that, *inter alia*, relaxed deadlines and increased respondents' ability to conduct discovery. *See* Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212 (July 29, 2016) (Final Rule); 80 Fed. Reg. 60091 (Oct. 5, 2015) (Notice of Proposed Rule Making). The subpoena generally seeks documents related to the applicability of the amended rules to Respondents and this proceeding, including drafting the amended rules and the timing of the Commission vote on the amended rules. Item 6 seeks documents related to the applicability of the amended rules to specified categories of proceedings in addition to this one. Except for Items 4 and 7, the subpoena seeks documents concerning, referencing, or reflecting any communication or meeting among

Commission personnel. Items 4 and 7 call for such documents between the Commission and any third party related to the applicability of the amended rules to Respondents and to the timing of the vote or the date on which the amended rules would be implemented.

In its opposition, OLAP states, without elaboration, that the request “is aimed at the agency’s internal deliberations and decision-making” and “seeks documents protected by multiple [unspecified] privileges.” Indeed, on its face, insofar as it is directed to communications or meetings among Commission personnel involving internal deliberations during the rule making proceeding, the request runs afoul of the deliberative process privilege, which is recognized in many contexts, including Freedom of Information Act Exemption 5, 5 U.S.C. § 552(b)(5). Further, the Commission frowns on “‘fishing expeditions’ through confidential Government materials.” See *Orlando Joseph Jett*, Admin. Proc. Rulings Release No. 514, 1996 SEC LEXIS 1683 (June 17, 1996) (vacating order to produce memoranda containing possible *Brady* material for *in camera* review, decrying “mere speculation” and requiring a “plausible showing” that government documents contain material exculpatory evidence). Respondents’ reliance on *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, *reh’g*, 156 F.3d 1279 (D.C. Cir. 1998), is misplaced. In that case, the D.C. Circuit held that the deliberative process privilege does not apply when a cause of action is directed at the government’s intent, and upon rehearing, clarified that its holding was limited to those circumstances in which the cause of action is directed at agency’s subjective motivation. Here, however, Respondents seek documents regarding collateral issues to this administrative proceeding, and have otherwise failed to make the required showing of “bad faith or improper behavior” to warrant intrusion into the agency’s internal decision-making process. See *In re Subpoena Duces Tecum*, 156 F.3d at 1279-80; *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994). Accordingly, Items 1-3 and 5-6 will be stricken from the first subpoena request.

These considerations do not apply, however, to Items 4 and 7 insofar as they specify “Documents concerning, referencing, or reflecting any meetings or Communications between or among” Commission personnel and “any Third Party” on the specified topics. Such documents, if any, must be provided to Respondents unless they relate to privileged inter-agency communications.

The second request relates to communications or meetings between Commission personnel and several specified commercial entities, prospective expert witnesses, and specified United States Government entities regarding Respondents or the Zohar funds, as well as between any Commissioner’s office and Division personnel and between Commission personnel and the press. OLAP opposes this as overbroad and ill-defined and protected by multiple privileges. The Division opposes it as unreasonable, oppressive, excessive in scope, and unduly burdensome. The request concerning expert witness materials, specified in Items 3 and 4, is contrary to the parties’ May 2015 agreement via email that such material would not be disclosed by either party. That Respondents have retained new counsel does not obviate their agreement. Concerning Government entities, the Division argues that the inter-agency dealings fall within the law enforcement privilege. But no particularized showing as to the law enforcement privilege’s applicability has been made. See *In re City of N.Y.*, 607 F.3d 923, 944 (2d Cir. 2010) (“[T]he party asserting the law enforcement privilege bears the burden of showing that the

privilege applies to the documents in question.”). Accordingly, the materials specified by Items 7-10 should be produced to Respondents unless the Division and/or OLAP submit a timely motion to quash establishing the privilege’s applicability to any discoverable material.

Item 5 (communications between a Commissioner’s office and the Division) is protected by the deliberative process privilege and will be stricken. The material specified in Items 1, 2, and 6 (to the extent it relates to communications between Commission personnel and outside entities or persons) is discoverable and should be produced to Respondents. To the extent Item 2 seeks documents reflecting internal agency communications, those documents, if they exist, may be subject to privileges. The Division and OLAP are encouraged to confer with Respondents to resolve any privilege assertions. The subpoenas, issued today, are modified by this order.

IT IS SO ORDERED.

/s/ Carol Fox Foelak

Carol Fox Foelak
Administrative Law Judge