

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4124/September 2, 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 Respondents' motions *in limine*, dated August 31, 2016, to exclude the expert testimony of the Division of Enforcement's witnesses Ira Wagner, Steven L. Henning, and Michael G. Mayer; and to preclude the Division from seeking disgorgement. The motions will be denied.

The witnesses' testimony will not be excluded for the same reasons set forth in *Lynn Tilton*, Admin. Proc. Rulings Release No. 4118 (A.L.J. Sept. 1, 2016). Concerning disgorgement, Respondents argue that "the Division has no basis upon which to seek disgorgement other than its purported experts' unreliable reports." It goes without saying, however, that facts, such as the amount of ill-gotten gains, if any, tied to proven violations, cannot be established through expert testimony. Rather, the Division must present evidence to

establish such facts directly, such as through business records associated with Respondents, the Zohar Funds, or portfolio companies.¹

Respondents also state, “Many legal commentators have criticized the Division” for seeking what are actually penalties under the guise of “disgorgement.” However, disgorgement, if any, will be calculated from the amount of ill-gotten gains, if any, tied to proven violations, if any, as required by law. Disgorgement of ill-gotten gains is “an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws.” *Montford & Co. v. SEC*, 793 F.3d 76, 84 (D.C. Cir. 2015) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)). “When calculating disgorgement, ‘separating legal from illegal profits exactly may at times be a near-impossible task.’” *Id.* (quoting *First City Fin. Corp.*, 890 F.2d at 1231). “Thus, ‘disgorgement need only be a reasonable approximation of profits causally connected to the violation.’” *Id.* (quoting *First City Fin. Corp.*, 890 F.2d at 1231); see *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998) (holding disgorgement amount only needs to be a reasonable approximation of ill-gotten gains); accord *First City Fin. Corp.*, 890 F.2d at 1231-32; *Laurie Jones Canady*, Exchange Act Release No. 41250, 1999 SEC LEXIS 669, at *38 (Apr. 5, 1999), *pet. denied*, 230 F.3d 362 (D.C. Cir. 2000). Nonetheless, “the power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment.” *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (internal quotation marks omitted).

Lastly, issues regarding the experts’ qualifications and methodologies are best explored through rebuttal reports, *voir dire* and/or cross-examination at the hearing, and post-hearing briefs.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

¹ Potentially, the parties might stipulate as to the amounts Respondents received, while disagreeing as to the existence and amounts, if any, that were ill-gotten gains.