

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4338/November 9, 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*, 824 F.3d 276, 291 (2d Cir. 2016); *Tilton v. SEC*, No. 15-2103 (2d Cir.), ECF Nos. 76, 125. The hearing commenced on October 24, 2016, and is expected to conclude on November 10, 2016.

Under further consideration is Respondents' October 17, 2016, Motion to Compel the Office of Litigation and Administrative Practice to Produce Documents Responsive to Respondents' Subpoenas. The Motion to Compel states that Respondents and the Commission's Office of Litigation and Administrative Practice (OLAP) held numerous meet and confers to resolve any privilege assertions, but that OLAP continues to withhold inter-agency communications that the undersigned had ordered to be released. Ex. 2 of the Declaration of Mary Beth Maloney attached to the Motion to Compel is a privilege log sent to Respondents on October 14, 2016. Next to each withheld document is a privilege claim of work product doctrine, law enforcement privilege, and/or deliberative process privilege. But no particularized showing as to the applicability of any privilege was made. OLAP was therefore ordered to submit the withheld items to the undersigned for *in camera* review. *See Lynn Tilton*, Admin. Proc. Rulings Release No. 4274, 2016 SEC LEXIS 3917 (A.L.J. Oct. 18, 2016).

On October 21, 2016, OLAP submitted the withheld documents and a verified explanation of privileges asserted in its privilege log for *in camera* review. Due to deficiencies in its privilege log and failure to submit a declaration in accordance with long-established circuit case law, OLAP was then ordered to file an amended privilege log and a declaration. *See Lynn*

Tilton, Admin. Proc. Rulings Release No. 4314, 2016 SEC LEXIS 4068 (A.L.J. Oct. 31, 2016). On November 3, 2016, OLAP filed an amended privilege log and the declarations of Associate General Counsel Richard M. Humes and Division of Enforcement Counsel Brent S. Mitchell. On November 4, 2016, Respondents submitted a letter and two exhibits in reply.

The undersigned's review has confirmed that several withheld documents are subject to the protections of the work product doctrine, law enforcement privilege, and/or deliberative process privilege. See *In re City of N.Y.*, 607 F.3d 923, 944 (2d Cir. 2010) (listing the types of information protected by the law enforcement privilege); *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (for the deliberative process privilege to apply, "the material must be predecisional and it must be deliberative"); *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1203 (D.C. Cir. 1991) ("[W]here an attorney prepares a document in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party, it has litigation sufficiently 'in mind' for that document to qualify as attorney work product."). Although such privileges are qualified and may be overcome by a sufficient showing of need for the information, no such showing has been established here. See *In re City of N.Y.*, 607 F.3d at 945; *In re Sealed Case*, 121 F.3d at 737-38; *In re Sealed Case*, 856 F.2d 268, 272-73 (D.C. Cir. 1988). For example and contrary to Respondents' contention, documents 2 to 11—which pertain to an immunity request by an individual who spoke to the Division during the investigation but who is not a witness in this proceeding and is unrelated to any non-party witness who either testified or was named on any witness list—do not contain "material exculpatory evidence" subject to disclosure under 17 C.F.R. § 201.230(b)(2). Any statements made by this individual to the Division are irrelevant and cannot form the basis of any findings.

However, at least some of OLAP's asserted grounds for withholding documents are doubtful. For example, OLAP withheld documents 99 to 104 on the basis of law enforcement privilege and work product protection. These documents consist of emails between a Division attorney and an Assistant U.S. Attorney in June 2015 concerning access to filings made by Respondents in this proceeding, and copies of their publicly filed motions. They do not reveal confidential law-enforcement techniques or confidential sources. The notion that disclosure would harm ongoing or future investigations is unsupported speculation, particularly because OLAP provides no reason to believe that any investigation is, in fact, ongoing. Also, it is not apparent that the Assistant U.S. Attorney's request for Respondents' filings was part of the course of an active investigation focused on any specific possible violation by Respondents or others.

Moreover, certain documents withheld by OLAP were already produced by the Division to Respondents, suggesting that any claimed privilege as to the specific communications contained in those documents may have been waived. Compare Respondents' Nov. 4, 2016, Letter, Exs. A-B with OLAP Doc. Nos. 16, 18, 20, 22, 30, 54-58, 60.

Nevertheless, even if no privilege applies to some documents, production at this stage will not be compelled as the documents contain no relevant evidence and, in particular, no exculpatory or impeachment material. A few examples illustrate the point. Document 12 simply contains a request by Division counsel to a U.S. Attorney's Office to borrow a conference room, a fact already disclosed by the privilege log. Documents 16 to 29, 43 to 47, and 71 to 74

primarily pertain to requests by other agencies to access the Division's investigative file and the Commission's approval of such requests, which are facts already disclosed by the privilege log; both the request forms and the approval letters appear to be boilerplate. Documents 30 to 35 concern the formatting of investigative documents. Documents 61 and 63 contain links to a YouTube video of a Senator's floor speech and an online blog article. Documents 83 to 89, 94 to 98, and 105 to 108 are communications about the production of documents from the Division to a U.S. Attorney's Office. Many of the remaining documents primarily involve scheduling conference calls or contact information, or, as referenced above, are public filings or documents already in Respondents' possession.

Accordingly, Respondents' Motion to Compel is denied.

IT IS SO ORDERED.

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