

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4118/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 Respondents' motions *in limine*, dated August 26, 2016, to strike as inadmissible in whole or in part the reports (*i.e.* written direct testimony) of the Division of Enforcement's expert witnesses Ira Wagner, Steven L. Henning, and Michael G. Mayer; and to preclude those witnesses from giving live testimony on the stricken subjects and related topics. The motions will be denied.

In support of their motions, Respondents cite *SEC v. Tourre*, 950 F. Supp. 2d 666 (S.D.N.Y. 2013), in which the court excluded written expert testimony of Ira Wagner to the extent it purported to find facts that were in contention and opine on legal conclusions, in violation of Federal Rule of Evidence 702. However, *SEC v. Tourre* was a jury trial. Since this proceeding is not a jury trial, the fact that Wagner and others arguably are providing legal opinions is not *per se* objectionable, even under FRE 702. *Cf. Wells Fargo Bank N.A. v. Tex. Grand Prairie Hotel Realty, LLC*, 710 F.3d 324, 329 (5th Cir. 2013) (safeguards provided by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), not as essential in a bench trial); *accord David E. Watson, PC v. United States*, 668 F.3d 1008, 1015 (8th Cir. 2012); *United States v. Brown*, 415 F.3d 1257, 1269-70 (11th Cir. 2005). Further, the Commission has stated

many times that the Federal Rules of Evidence are not applicable in its administrative proceedings.¹ See *Del Mar Fin. Servs., Inc.*, Securities Act of 1933 Release No. 8314, 2003 SEC LEXIS 2538, at *28 (Oct. 24, 2003), *recons. denied*, Securities Act Release No. 8386, 2004 SEC LEXIS 331 (Feb. 17, 2004); see also *City of Anaheim*, Securities Exchange Act of 1934 Release No. 42140, 1999 SEC LEXIS 2421, at *4 (Nov. 16, 1999) (“The Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications.” (citing *Opp Cotton Mills, Inc. v. Adm’r*, 312 U.S. 126, 155 (1941))). Concerning relevance, the Commission’s standard of relevance is very low. See *Herbert Moskowitz*, Exchange Act Release No. 45609, 2002 SEC LEXIS 693, at *46 n.68 (Mar. 21, 2002); *City of Anaheim*, 1999 SEC LEXIS 2421, at *4-5 & n.7. Lastly, to the extent the expert reports reference investigative testimony as background material reviewed by the experts, that is not a basis to strike the reports. However, if the Division intends to use prior sworn testimony in its case-in-chief, it must comply with 17 C.F.R. § 201.235, and should not rely on investigative testimony summarized in the reports as establishing facts.

IT IS SO ORDERED.

/s/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

¹ That being said, the Commission does not defer to expert testimony about the meaning of the law. See, e.g., *optionsXpress, Inc.*, Securities Act of 1933 Release No. 10125, 2016 SEC LEXIS 2900, at *9 & n.95 (Aug. 18, 2016); *Mohammed Riad*, Securities Exchange Act of 1934 Release No. 78049A, 2016 SEC LEXIS 2396, at *87 & n.70 (July 7, 2016).