UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16462

In the Matter of

LYNN TILTON;
PATRIARCH PARTNERS, LLC;
PATRIARCH PARTNERS VIII, LLC;
PATRIARCH PARTNERS XIV, LLC;
AND
PATRIARCH PARTNERS XV, LLC,

Respondents.

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION *IN LIMINE* TO PRECLUDE TESTIMONY AND EVIDENCE REGARDING THE SUBJECTIVE STATES OF MIND OF ZOHAR FUND INVESTORS

Introduction

Respondents seek to preclude the Division from "introducing evidence of, asking questions about, or soliciting testimony regarding the subjective states of mind of investors in the Zohar funds." Motion at 1. According to Respondents, subjective state of mind evidence includes "what investors thought about Respondents' conduct, Respondents' intent or state of mind, or the materiality of particular disclosures or non-disclosures." *Id.* Although the Division does not anticipate asking investors about Respondents' intent or state of mind, it does intend to elicit testimony on the particularities of an investor-witness's investment in the Zohar Funds, including how Respondents' conduct compared with their representations and disclosures, and what an investors viewed as important in making their decision to invest. Contrary to Respondents' assertions, such testimony and evidence is relevant to this case and is routinely admitted, both in administrative proceedings and in federal court trials. Indeed, it will be persuasive evidence of

Respondents' fraud. Moreover, Respondents' defenses to the Division's allegations include the notion that investors knew about and understood the method of categorization employed by Respondents. Investor testimony on their subjective understanding of how the Zohar Funds were to be managed, and whether Respondents' conduct was consistent with that understanding, is clearly relevant to this defense. Respondents' attempt to prevent such testimony, and their half-hearted request to obtain additional discovery and depose such witnesses before trial, is without merit and should be denied.

Argument

The Division alleges that Respondents, among other things, engaged in a scheme to defraud investors of the Zohar Funds. The Division intends to call multiple investor witnesses at trial. The Division expects these witnesses to testify to, among other matters, their decision to invest in the Zohar Funds, the factors that led to those decisions, communications with Respondents regarding their investments, the applicable deal documents and the protections afforded to investors thereunder, and the importance of those protections to an investor. The investors' testimony on these subjects is relevant to, and highly persuasive evidence of, the allegations of fraud and materiality, which are at the center of this case.

I. Investor Testimony Is Relevant.

Rule 320 provides the standards for admissibility of evidence. *See* 17 C.F.R. § 201.320. When admitting evidence at an administrative hearing before the Commission, the standard of "relevance" is very broad. *City of Anaheim*, 54 S.E.C. 452, 454 & nn.5-7 (1999) ("The notion of 'relevance' [in Rule 320 of the Commission's Rules of Practice] is much broader than that concept under the Federal Rules of Evidence. ... Our law judges should be inclusive in making evidentiary determinations. ... '[I]f in doubt, let it in.'"); *accord Charles P. Lawrence*, 43 S.E.C. 607, 612-13

(1967) ("[A]ll evidence which 'can conceivably throw any light upon the controversy' should normally be admitted."); *see also In the Matter of Russo Securities, Inc.*, Release No. 42115 (Nov. 9, 1999) ("Commission Rule of Practice 320 permits the Commission to receive all relevant evidence and [to] exclude all evidence that is irrelevant, immaterial or unduly repetitious." The notion of "relevance" embodied in Rule 320 is broader than that concept under the Federal Rules of Evidence. The Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications. Administrative agencies such as the Commission are more expert fact-finders, less prone to undue prejudice, and better able to weigh complex and potentially misleading evidence than are juries.").[1]

In the instant case, the Division has alleged that Respondents, among other things, engaged in a fraudulent and deceptive scheme, practice, and course of business. OIP at ¶¶ 1; 51. Materiality is an element of this and other claims. Thus, the Division will present evidence that supports its allegations of material misrepresentations and omissions, including by adducing testimonial evidence from actual investors about their investment in the Zohar Funds, how Respondents' conduct compared with their representations and disclosures, and what the investor deemed important in making their decision to invest.

"[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic Inc. v. Levinson,* 485 U.S. 224, 240 (1988). "A fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have

[1] The Commission's recently-adopted amendments to Rule 320 will apply in this proceeding. *See, e.g.*, Amendments to the Commission's Rules of Practice at 76 (noting that amended Rule 320 applies to "all proceedings where hearing has not begun as of the effective date of these amendments"), available at https://www.sec.gov/rules/final/2016/34-78319.pdf. Under amended Rule 320, "unreliable" evidence is added to the list of evidence that "shall be" excluded. *See, e.g.*, *id.* at 60. Investor testimony on their own investments, and what they deemed important in making their investment decision, is not unreliable.

been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.*, at 231-32. Although materiality is an objective standard, it does not follow that testimony from actual investors or from other victim-witnesses is irrelevant. Of course, the Division cannot call a "reasonable investor" or "hypothetical investor" to the stand. Instead, it must call actual people to explain their investment and what they viewed as important in making their investment decision.

In the instant case, the Division will call investors in the Zohar Funds that have reviewed documents categorizing the collateral in the Zohar Funds and/or calculating the overcollateralization ratio; reviewed the indenture or other deal documents; and communicated with Respondents regarding both the Zohar Funds and their investments. This testimony is not only relevant, but is highly probative of the Division's allegations because investors are in the best position to assist the Court in understanding the importance of the alleged misrepresentations and omissions at issue in this case. *See, e.g., In re Loewen Group Inc. Sec. Litig.*, 395 F. Supp. 2d 211, 217 (E.D. Pa. 2005) (denying summary judgment on finding that since actual investors reacted to disclosures, fair to assume information would have been material to "reasonable investor"). Such investor testimony is routinely admitted in administrative proceedings. *See, e.g., In the Matter of Mohammed Riad*, Release No. 4420A (July 7, 2016) ("The materiality of this information is confirmed by investor testimony in this proceeding.") (citing *Fundamental Portfolio Advisors, Inc.*, Release No. 2146, at *12 (July 15, 2003) (noting, in connection with finding of materiality, that a "public investor ... testified" that he "would not have invested in the Fund" if he had known the truth about its risk and investment strategies)); *In the Matter of Reliance Financial Advisors, LLC*, Release No. 941 (January 11, 2016) ("The materiality of Dembski's oral misrepresentations is

similarly plain and evidenced by testimony of the investors at the hearing, who confirmed that those representations were the reason why they were willing to invest in the Fund.").

Moreover, Respondents claim that investors knew about the categorization method employed by Patriarch, thereby putting investors' subjective understandings of the operation of the Zohar Funds, and whether Respondents' conduct was consistent with that understanding, squarely at issue in this matter. Investor testimony about this subject is directly relevant to refute this defense. *See, e.g., Respondents Motion for Summary Disposition* at 6 ("Parties to the transaction were aware that Ms. Tilton was applying her discretion."); ("This broad language made it abundantly clear to investors from the start that Patriarch was authorized to exercise and would be exercising discretion.") *id.* at 4.

Although Respondents seek to prevent investors from testifying on their "subjective states of mind" (Motion at 2), such testimony is entirely proper and regularly admitted. In fact, it is a common and well-established practice in securities fraud cases to allow investors to testify as to their investment and whether the alleged misstatements or omissions would have affected their investment recommendations or decisions. *See, e.g., United States v. Schlisser*, 168 Fed. Appx. 483, 485 (2d Cir. 2006) ("The testimony bears upon the materiality of [defendant's] misrepresentations to the investors. The government offered other evidence on this point: [investor] testified that [defendant's] representations were 'the most important factor' in [investor's] decision to invest."); *Eisenberg v. Gagnon,* 766 F.2d 770, 780-781 (3d Cir. 1985) (defendant's former business partner permitted to testify as to how he would have viewed the adequacy of an offering memorandum had he had knowledge of certain undisclosed facts); *U.S. v. Reyes*, 660 F.3d 454, 469 (9th Cir. 2011) (there was substantial evidence for the jury to rely on in finding materiality including, among other evidence, the testimony of two actual investors); *SEC v.*

Smart, 678 F.3d 850, 857 (10th Cir. 2012) (looking to investor declarations, among other evidence, in affirming summary judgment in favor of the SEC); *SEC v. Standard*, No. 06 Civ. 7736(GEL), 2009 WL 196023, at *23, 26-27 (S.D.N.Y. Jan. 27, 2009) (after bench trial, citing investor testimony and determining that the Division satisfied the materiality element of its fraud claims); *Branch-Hess Vending Servs. Employees' Pension Trust v. Guebert*, 751 F. Supp. 1333, 1340 (C.D. Ill. 1990) (in securities fraud action alleging a failure to disclose material information, the court considered the actual investors' testimony, noting that "[w]hile the test of materiality depends on the hypothetical *reasonable* investor, the actual Plaintiffs' own testimony is both persuasive and revealing.") (emphasis in original).

Indeed, in *SEC. v. Radius Capital Corp.*, which Respondents cite to support their own arguments (Motion at 4), the district court "f[ound] that there remain[ed] a genuine issue of material fact as to whether the false representations were material" after the defendant submitted a single "declaration" from a witness "express[ing] his subjective belief" that certain alleged misrepresentations "were not material." *SEC v. Radius Capital Corp.*, 2:11-CV-116-FTM-29, 2013 WL 298209, at *5 (M.D. Fla. Jan. 25, 2013). It is therefore perplexing that Respondents' take issue with questions "such as whether the Overcollaterization Ratio test is 'important to you as an investor,' and whether Respondents' alleged conduct 'seem[s] consistent with the indenture to you?'" Motion at 5. Such questions are plainly relevant and probative of materiality and whether Respondents' actions were consistent with their representations.

In fact, not only are investors permitted to testify about their investment and what was material to their investment decision, but courts universally permit "if-you-had-known" questions designed to elicit this very testimony. For example, in *United States v. Laurienti*, 611 F.3d 530 (9th Cir. 2010), the defendants were convicted of securities fraud for a "pump and dump"

scheme in which they purchased stock, artificially inflated its price by selling it to clients, and then refused to allow clients to sell. *Id.* at 537. Defendants appealed their convictions, based in part on the government's use of if-you-had-known questions during its direct examination of government fact witnesses to prove materiality. *Id.* at 549-50. Specifically, witnesses were asked: "If you had known prior to purchasing [the stock] that [defendants] prevented or discouraged their brokers from allowing their clients to sell their shares . . . would you have purchased [the stock]?" *Id.* at 549. The Ninth Circuit affirmed the district court's decision to allow the questions because they were "plainly relevant [to] and probative" of materiality. *Id.* *See also United States v. Cuti*, 720 F.3d 453, 459 (2d Cir. 2013) ("[A] witness may testify to the fact of what he did not know and how, if he had known that independently established fact, it would have affected his conduct or behavior. As this case illustrates, 'what-if-you-had-known' questions that present withheld facts to a witness are especially useful to elicit testimony about the impact of fraud.").

In seeking to exclude relevant and probative investor testimony, which is a staple of fraud cases both criminally and civilly, Respondents complain that investors in this case "may not have understood Patriarch's business model" or incorrectly "believe[ ] an indenture to be misleading." Motion at 5. But Respondents' disagreement with investor testimony (and the Divisions allegations) is not a sufficient reason to exclude evidence. Indeed, it is this very disagreement that is at the heart of this litigation and why the parties are proceeding to a hearing, where Respondents may cross-examine investors called by the Division (as well as call their own witnesses). Put simply, Respondents' disagreement with witness testimony does not make that evidence irrelevant, unduly prejudicial, or inadmissible. *See, e.g., United States v. Matsumaru*, 244 F.3d 1092, 1102 (9th Cir. 2001) ("[I]n answering the prosecutor's questions, the witnesses

explained why knowing certain facts could have affected or influenced their decision to approve the particular visa petition. Government witnesses are permitted ... to testify as to whether certain truths, if known, would have influenced their decision making....This type of lay testimony is entirely proper. If [defendant] disagreed with the witnesses' testimony, he could have cross-examined the witnesses...and he could have called his own [witness] to rebut the government's witnesses...") (internal quotations and citations omitted).

Respondents fail to provide case law that actually supports their argument that "subjective" investor testimony is either irrelevant or unduly prejudicial. For example, Respondents repeatedly cite to *SEC v. Morgan Keegan & Co., Inc.* claiming the case holds that "subjective knowledge or diligence of any particular investor is not relevant to an SEC enforcement action, which focuses on whether a defendant violated the securities laws." Motion at 2, 4 (quoting *SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1247 n. 16 (11th Cir. 2012)). However, Respondents take the quotation entirely out of context. In its entirety, the footnote reads:

> Citing *Dupuy v. Dupuy,* 551 F.2d 1005, 1015 (5th Cir.1977), Morgan Keegan argues that "materiality in SEC enforcement actions is appropriately evaluated in the context of disclosures made 'to the public, not to any particular investor.'" Morgan Keegan cites *Dupuy* wholly out of context. First, the issue in *Dupuy* was whether the private plaintiff acted with due diligence, not whether the defendant's misrepresentations and omissions were material. Second, *Dupuy* does not purport to limit SEC enforcement actions in any way. Rather, the Court was explaining that the subjective knowledge or diligence of any particular investor is not relevant to an SEC enforcement action, which focuses on whether a defendant violated the securities laws, not whether any particular investor was harmed.

Morgan Keegan & Co., Inc., 678 F.3d at 1244 n. 16. As the footnote makes clear, the court merely explained that *Dupuy* dealt with "whether the private plaintiff acted with due diligence" (*id.*), and the *Dupuy* court's recognition that "[i]n an SEC enforcement proceeding, the due care

of the victim generally does not receive consideration." *Dupuy v. Dupuy,* 551 F.2d 1005, 1015 (5th Cir. 1977). Neither *Morgan Keegan & Co., Inc.*, nor *Dupuy*, contemplated, much less held, that subjective investor testimony is irrelevant or inadmissible. Rather, the footnote stands for the unremarkable proposition that an investor's lack of diligence is not a defense to an SEC enforcement proceeding.

Respondents' citation to *In re The Reserve Fund Sec. & Derivative Litig.*, (Motion at 3), is likewise unavailing, as it stands for the similar proposition that the SEC's knowledge of a defendant's financial condition is irrelevant to its allegations that defendant engaged in fraud:

> Defendants have not explained how discovery concerning what the Commission knew about Lehman's financial condition in the months preceding its bankruptcy would shed light on what the Defendants knew or reasonably should have known when they allegedly made false or misleading statements on September 15 and 16 about the effect of the Lehman bankruptcy on the Primary Fund. Defendants have likewise not cited any case law suggesting that a third party's knowledge or views are relevant in determining a defendant's state of mind.

In re The Reserve Fund Sec. & Derivative Litig., 09 CIV. 4346 PGG, 2010 WL 11248673, at *13 (S.D.N.Y. Nov. 30, 2010).

Respondents' additional case law citations are similarly irrelevant to the instant case. For example, Respondents cite to *Carpenters Pension Trust Fund of St. Louis, St. Clair Shores Police & Fire Ret. Sys. v. Barclays PLC*, 56 F. Supp. 3d 549 (S.D.N.Y. 2014), for the proposition that "employee's testimony [is] relevant insofar as it established that defendant made certain statements, but irrelevant insofar as it concerned employee's reaction or interpretation of those statements because employee's 'state of mind is not relevant to [Defendant's] state of mind.'" Motion at 3. This case does not support Respondents' arguments.

In *Carpenters Pension Trust Fund*, the defendant moved to dismiss allegations that, among other things, the defendant engaged in fraud when he "issued an instruction to [his subordinate] to

post lower [LIBOR] rates so that Barclays would not be perceived as an outlier" after the defendant received a phone call from the Bank of England inquiring into why "Barclays's submissions were high compared to other Contributor Panel banks." *Id.* at 556. The defendant's subordinate had previously "testified that he received an instruction from [defendant] to understate LIBOR submissions so that Barclays would 'not be an outlier.'" *Id.* at 556.

In moving to dismiss the complaint, defendant argued that his subordinate's testimony "[did] not give rise to an inference of scienter because [the subordinate] [also] testified that he believed that the Bank of England had communicated the instruction to defendant" and that "if [the subordinate] had believed someone inside Barclays initiated the instruction, he would not have followed it." *Carpenters Pension Trust Fund*, 56 F. Supp. 3d at 556. The court rejected the argument in part because the subordinate's "state of mind is not relevant to [defendant's] state of mind" (*id.*), language that the Respondents' seize upon in order to support their argument. Motion at 3. However, far from supporting Respondents' position that investors cannot opine on the particularities of their investment, or what was important in their investment decision, the court's language merely stands for the ordinary proposition that a subordinate's speculation as to what was said during a phone call, or that his own conduct was done in good faith, does not defeat an inference of fraud as to a third party. *See Carpenters Pension Trust Fund*, 56 F. Supp. 3d at 556-57.

Respondents' citation to *Nathanson v. Polycom, Inc.*, 87 F. Supp. 3d 966 (N.D. Cal. 2015) (Motion at 3), similarly has nothing to do with the case at bar, but rather dealt with the familiar holding that "generalized claims about corporate knowledge [that] offer[ ] no reliable personal knowledge concerning the individual defendants' mental state are insufficient to satisfy the scienter requirement." *Id.* at 980 (alteration in original) (internal quotation marks omitted).

Again, the case did not contemplate much less hold that investors cannot opine on their investment or what they viewed as important in making their investment decision.

Simply put, investors are universally permitted to opine on what they deemed important in making the decision to invest, which necessarily encompasses the particularities of their investment. If-you-had-known questions, which are universally permitted, are specifically designed to contrast a defendant's conduct with their representations and disclosures. Such testimony is wholly proper, and Respondents have provided no case law to the contrary. Their Motion should be denied.

II. Investor Evidence is Not Inconsistent with Rule 300 or 320

Respondents' aver that investor testimony "would be inconsistent with Rule 300's admonition that hearings must be conducted in a fair and impartial manner" and could place "prejudicial testimony and evidence into the record" (Motion at 6). However, aside from conclusory statements, Respondents fail to explain how such testimony is unfair, or how prejudice could result from investors testifying about their investment and investment decision.

Moreover, Respondents' citation to Federal Rule of Evidence 403's "unfair prejudice" prohibition (Motion at 2; 6) is irrelevant to the instant proceeding. As a threshold matter, "[t]he Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications." *In the Matter of Russo Securities, Inc.*, Release No. 42115 (Nov. 9, 1999); *see also id.* ("Administrative agencies such as the Commission are more expert fact-finders, less prone to undue prejudice, and better able to weigh complex and potentially misleading evidence than are juries."). In any event, even in federal court trials, Rule 403 is of little, if any, import when juries are not involved. As explained by the Sixth Circuit:

> In bench trials, the application of the unfair prejudice portion of Rule 403 has been seen as an unnecessary and "useless procedure." *See* 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal

> Practice and Procedure § 5213 (1978 & Supp 1999) ("Since the judge must hear the evidence in ruling on the motion to exclude the evidence under Rule 403, exclusion of the evidence on grounds of prejudice in a bench trial is described as a 'useless procedure.' ') *See also Schultz v. Butcher,* 24 F.3d 626, 632 (4th Cir. 1994) (finding court should not exclude evidence under Rule 403 in bench trial on grounds of unfair prejudice); *Gulf States Utilities Co. v. Ecodyne Corp.,* 635 F.2d 517, 519 (5th Cir.1981) (finding unfair prejudice portion of Rule 403 "has no logical application to bench trials").

United States v. Hall, 202 F.3d 270 (6th Cir. 2000). Because this court is tasked with making evidentiary rulings in the instant proceeding, it is not surprising that Rule 320 does not contemplate excluding evidence that one side deems unduly prejudicial because, as noted above, it would be a "useless procedure." *Id. See* 17 C.F.R. § 201.320 ("The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.").

Lastly, although not relevant, the Court should decline to credit Respondents' assertion that "were this case being tried in a federal district court....the Federal Rules of Evidence would apply, and require exclusion of investor state-of-mind testimony under Rule of Evidence 403 as unduly prejudicial." (Motion at 6). As outlined above, this statement is erroneous. In fact, Respondents cite to just one case to back this contention – *SEC. v. Shanahan*, 646 F.3d 536, 548 (8th Cir. 2011) – which provides no support for the claim. While Respondents declare that in *Shanahan* certain evidence was excluded "pursuant to defendant's motion *in limine* because the evidence to be excluded had the potential for unfair prejudice that would outweigh its probative value" (Motion at 2; 6), the district actually court granted a "motion *in limine* under Rules 404(b) and 403 of the Federal Rules of Evidence, explaining that any alleged impropriety was not 'sufficiently similar to the backdating issues that are at the center of this case,' that the issue risked confusing the jury, and that it would waste time. *Shanahan*, 646 F.3d at 548. Put another way, *Shanahan*

lends no support to Respondents' erroneous claim that the Federal Rules of Evidence "require exclusion of investor state-of mind testimony under Rule of Evidence 403 as unduly prejudicial." Motion at 6.

It is telling that after presumably scouring the judicial landscape, Respondents were unable to find a single case to support their argument that investors in a fraud case – in any forum – should be precluded from testifying about their investment or what they deemed important in making their investment decision. That is because such testimony is not only proper, but is found in almost every case alleging fraud.

III. Respondents are Not Entitled to Additional Discovery.

Respondents half-heartedly argue that were this Court to "permit introduction of subjective investor state of mind evidence, Respondents would in fairness need substantial additional discovery" (Motion at 6), and "reserve the right to seek depositions in this area" (Motion at 7 n.2). The Court should recognize that Respondents' argument is little more than an additional request to delay this case, and to seek "discovery" to which they are not entitled.

As an initial matter, Rule 233(b) only permits depositions when a witnesses "will be unable to attend or testify at the hearing..." 17 C.F.R. § 201.233(b). Thus, Respondents have no "right" to depose witnesses the Division will call to testify. Furthermore, Respondents are keenly aware of the Zohar Fund disclosures, as well as the representations made pursuant to the offerings at issue. The Division produced approximately 400 GB of discovery in this matter, totaling well over 500,000 documents and more than 2,300,000 pages. And the Division went well beyond its document production requirements, having produced on May 27, 2015, the Division's witness interview notes made prior to the filing of the OIP pursuant to SEC Rule of Practice 230(a)(2), which total over 750 pages. Thus, Respondents cannot credibly claim to be in the dark about

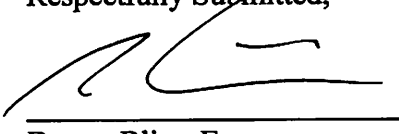
investor testimony. Regardless, at the hearing, Respondents will be free to cross-examine investor witnesses, as well as call their own witnesses to support their arguments.

Conclusion

The Court should permit investors to testify on the particularities of their investment and what they deemed important in making their decision to invest, as is regularly permitted in cases involving fraud. Such evidence is relevant and probative to the issue of materiality, an element that is of consequence to numerous claims in this action. This evidence is also probative to a defense raised by Respondents. The Division therefore respectfully requests that Respondents' Motion *in Limine* to Preclude Testimony and Evidence Regarding the Subjective State of Mind of Zohar Fund Investors be denied.

Dated: August 29, 2016

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION *IN LIMINE* TO PRECLUDE TESTIMONY AND EVIDENCE REGARDING THE SUBJECTIVE STATES OF MIND OF ZOHAR FUND INVESTORS** was served on the following on this 29th day of August, 2016, in the manner indicated below:

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