

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of,	:	
	:	
LYNN TILTON,	:	Administrative Proceeding
PATRIARCH PARTNERS, LLC,	:	File No. 3-16462
PATRIARCH PARTNERS VIII, LLC,	:	
PATRIARCH PARTNERS XIV, LLC and	:	Judge Carol Fox Foelak
PATRIARCH PARTNERS XV, LLC	:	
	:	
Respondents.	:	
	:	
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**MEMORANDUM OF LAW IN FURTHER SUPPORT OF RESPONDENTS’
MOTION *IN LIMINE* TO EXCLUDE THE *ZOHAR CDO 2003-1, LLC, ET AL., V.
PATRIARCH PARTNERS, LLC, ET AL.*, CASE NO. 12247-VCS (DEL. CH. AUG. 9 & 10,
2016) TRIAL TRANSCRIPTS MARKED DIVISION EXHIBITS 207 AND 208**

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September 15, 2016

Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, “Respondents”), respectfully submit this memorandum of law in further support of their motion *in limine* to exclude the *Zohar CDO 2003-1, LLC, et al., v. Patriarch Partners, LLC, et al.*, Case No. 12247-VCS (Del. Ch. Aug. 9 & 10, 2016) trial transcripts, marked by the Securities and Exchange Commission (“SEC”) Division of Enforcement (the “Division”) as Exhibits 207 and 208.

INTRODUCTION

Despite having included on its exhibit list the entire 580-page transcript of the *Zohar CDO 2001-LLC v. Patriarch Partners, LLC* (“*Zohar*”) trial, which is an unrelated case currently pending before the Delaware Chancery Court, the Division now concedes in its opposition that the testimony of six of the seven witnesses who testified at that trial (the non-party witnesses) is inadmissible unless the Division files—and Your Honor grants—a Rule 235(a) motion. *See* Opp. 1, 3. And while the Division purports to “reserve[] its right” to make a Rule 235(a) motion “at the hearing,” *id.* at 3, the Division ignores Your Honor’s clear indication that the prior testimony of non-party witnesses “*will not be received in evidence in this proceeding,*” *Lynn Tilton*, Admin. Proceedings Rulings Release No. 4145, at 2 (ALJ Sept. 9, 2016) (emphasis added). As for the Division’s contention that Rule 235(b) gives it *carte blanche* to admit “all or part of Ms. Tilton’s *Zohar* trial testimony,” Opp. 3, the Division is mistaken. Prior sworn statements of a party witness, like those of a non-party witness, are subject to Rule 320’s prohibition against “irrelevant, immaterial, unduly repetitious, or unreliable evidence.”

For all of the reasons offered in Respondents’ reply brief regarding the exclusion of Ms. Tilton’s investigative testimony, the Division’s reading of Rule 235(b) is incorrect, and the wholesale admission of her prior testimony in the *Zohar* trial should be precluded. *See* Reply

Memorandum of Law in Further Support of Respondents' Motion *in Limine* to Exclude Transcripts of Investigative Testimony, Including Division Exhibits 194 Through 206 (Sept. 14, 2016) ("Investigative Testimony Reply"), at 2-4 (citing, *inter alia*, SEC, Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,223 (July 29, 2016)). If the Division intends to argue that portions of the transcripts of Ms. Tilton's testimony do satisfy Rule 320, the Division should be required to designate those portions before the administrative hearing begins in order to provide Respondents with the opportunity to challenge those designations. The Division should also be required to make a proffer as to the relevance, materiality, and non-repetitiousness of any designated portions.

ARGUMENT

Your Honor has already indicated that the prior testimony of non-party witnesses will not be admitted during this proceeding, and thus the Division must be prohibited from offering any portions of *Zohar* trial testimony by non-party witnesses. *See Lynn Tilton*, Admin. Proceedings Rulings Release No. 4145, at 2 (ALJ Sept. 9, 2016).

Furthermore, Ms. Tilton's testimony in the *Zohar* trial should be excluded because the Division has not shown that it accords with Rule 320's prohibition against evidence that is "irrelevant, immaterial, [or] unduly repetitious."¹ Rule 320 governs all evidence, including prior statements of party witnesses. *See Investigative Testimony Reply*, at 2-4. Because the Division has not even attempted to show—and could not show, because that the *Zohar* case is an

¹ Respondents do not dispute that such testimony generally may be used at trial for impeachment purposes or to refresh a witness's recollection. "But [i]f the Division intends to use the . . . transcripts *solely* to refresh prospective witnesses' recollection or to impeach them, it should so state." *See Oxford Capital Mgmt., Inc.*, Admin. Proceedings Rulings Release No. 602, 2003 WL 21282789, at *1 (ALJ Jan. 15, 2003) (emphasis added). And "if the Division intends to use the investigative transcripts for some broader purpose, it should articulate that purpose in advance of the hearing." *Id.*

unrelated contract dispute—that the entirety of Ms. Tilton’s *Zohar* testimony satisfies Rule 320, the *Zohar* trial transcripts should be excluded, and any effort to admit purportedly relevant portions of them should be decided on a case-by-case basis.

Instead of citing to particular portions of Ms. Tilton’s *Zohar* trial testimony that it will seek to admit in evidence, the Division summarily states that portions of Ms. Tilton’s testimony “regarding the formation of the Zohar I CLO, the negotiation of the Zohar I indenture, and issues related to the collection of interest from the portfolio companies to which Zohar made loans” are relevant. Opp. 3. But it is impossible for Respondents—or Your Honor—to assess the validity of the Division’s vague assertions of relevance unless and until the Division designates specific portions of testimony. *See, e.g., Del Mar Fin. Servs., Inc.*, Securities Act Release No. 8314, 2003 WL 22425516, at *9 (Oct. 24, 2003) (Comm’n Op.) (“Our law judges are not required to evaluate . . . transcripts on an all or nothing basis. The law judge would have been within her discretion in requiring the Division to specify the specific statements that it was relying on and in excluding irrelevant, immaterial, or unduly repetitious evidence under Rule of Practice 320.”).²

Finally, the Division’s contention that the “conduct that is at issue in the *Zohar* trial . . . may be relevant” to what sanctions, if any, should be imposed if the Division is successful in proving the allegations in the OIP, is without merit. Opp. 4. The *Zohar* case is a complex commercial dispute involving competing interpretations of a contractual books-and-records provision and has no conceivable bearing on Respondents’ “fitness to remain in the securities

² Moreover, to the extent that this testimony contains relevant background information, it would be unduly repetitious: the Division will have the opportunity at the upcoming hearing to elicit live testimony from Ms. Tilton and other witnesses regarding any and all relevant issues. *See* Rule 320; *cf. Flowers v. Komatsu Min. Sys., Inc.*, 165 F.3d 554, 556 (7th Cir. 1999) (upholding exclusion of interview transcripts as “cumulative, considering live testimony received during trial”).

industry.” *Id.* In claiming otherwise, the Division does not assert that the *Zohar* case raises claims of fraud or similar causes of action sounding in dishonesty—because it does not—but instead asserts, without citation, that the dispute involves “allegations that Respondents have refused to provide information that the new Zohar collateral manager feels is necessary to properly operate the Zohar funds.” *Id.* The Division is plainly overreaching. Mere “allegations” based on what a private party “feels” about the proper interpretation of an unrelated contract cannot plausibly be deemed relevant to the issue of sanctions in an administrative proceeding alleging securities fraud.

Accordingly, because the Division has failed to make any showing that the transcript of Ms. Tilton’s *Zohar* testimony satisfies Rule 320, Your Honor should exclude it. *See Del Mar Fin. Servs.*, 2003 WL 22425516, at *9; *see also, e.g.*, Hr’g Tr. at 1478:7-10, *John J. Aesoph*, File No. 3-15168 (Oct. 28, 2013) (Foelak, ALJ) (excluding wholesale admission of respondents’ investigative testimony). In the alternative, Your Honor should order the Division to designate by September 26 those portions of Ms. Tilton’s *Zohar* trial testimony it seeks to have admitted into evidence. The Division should also be required, at the same time, to make a proffer as to the relevance, materiality, and non-repetitiousness of any designated portions. *See Oxford Capital Mgmt.*, 2003 WL 21282789, at *1-2 (Division should articulate purpose(s) for which it intends to use transcripts “*in advance of the hearing*” (emphasis added)); *see also Angelo P. Danna, CPA*, Admin. Proceedings Rulings Release No. 433, 1994 WL 192562 (ALJ May 11, 1994) (Chief ALJ Murray, stating that she wanted respondents “to have prior notice” of the portions of investigative transcripts the Division intended to admit); *cf.* Rule 300(c) (administrative hearings “shall be conducted in a fair, impartial, expeditious and orderly manner”).

As discussed in more detail in the Investigative Testimony Reply, it is well within Your Honor's discretion to "requir[e] the Division to specify the specific statements" on which it intends to rely, *Del Mar Fin. Servs.*, 2003 WL 22425516, at *8-9, and requiring the Division to do so before the administrative hearing begins would expedite the hearing and serve the interests of fairness by providing Respondents with notice and the opportunity to challenge those designations prior to the hearing. See Investigative Testimony Reply, at 5.

CONCLUSION

For the reasons set forth above and in Respondents' opening brief, Respondents respectfully move for an order excluding Division Exhibits 207 and 208 or, in the alternative, directing the Division to specify the portions of the transcripts that it will seek to admit in evidence.

Dated: New York, New York
September 15, 2016

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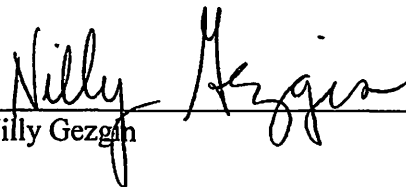
CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of Respondents' Memorandum of Law in Further Support of their Motion *In Limine* to Exclude the *Zohar CDO 2003-1, LLC, et al. v. Patriarch Partners LLC, et al.*, Case No. 12247-VCS (Del. Ch. Aug. 9 & 10, 2016), Trial Transcripts Marked Division Exhibits 207 and 208, on this 15th day of September, 2016, in the manner indicated below:

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