

HARD COPY

RECEIVED
AUG 23 2016
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

-----	X	
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.	:	
-----	X	

MOTION FOR LIMITED MODIFICATION OF MAY 7, 2015 ORDER

Upon the accompanying Memorandum of Law, dated August 22, 2016, and the record of proceedings herein, Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC respectfully move this Court for a limited modification to the Prehearing Order, dated May 7, 2015, in the above-captioned matter (the "Order").

Dated: New York, New York

August 22, 2016

GIBSON, DUNN & CRUTCHER LLP

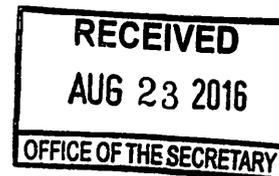
By: Randy M. Mastro/NG

Randy M. Mastro
Reed Brodsky
Barry Goldsmith
Caitlin J. Halligan
Mark A. Kirsch
Monica Loseman
Lawrence J. Zweifach
Lisa H. Rubin

200 Park Avenue
New York, NY 10166-0193
Telephone: 212.351.4000
Fax: 212.351.4035

Susan E. Brune
MaryAnne Sung
BRUNE & RICHARD LLP
One Battery Plaza
New York, NY 10004

Counsel for Respondents



UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

----- X
In the Matter of :
 :
 :
LYNN TILTON, :
PATRIARCH PARTNERS, LLC, :
PATRIARCH PARTNERS VIII, LLC, :
PATRIARCH PARTNERS XIV, LLC and :
PATRIARCH PARTNERS XV, LLC :
 :
Respondents. :
 :
----- X

Administrative Proceeding
File No. 3-16462

Judge Carol Fox Foelak

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS'
MOTION FOR LIMITED MODIFICATION OF MAY 7, 2015 ORDER**

GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
Telephone: 212.351.4000
Fax: 212.351.4035

BRUNE LAW P.C.
450 Park Avenue
New York, NY 10022
Telephone: 212.668.1900
Fax: 212.668.0315

Counsel for Respondents

August 22, 2016

Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, “Patriarch” or “Respondents”), respectfully move for a limited modification to the Prehearing Order, dated May 7, 2015 (the “Order”), to permit them to submit reports from three new expert witnesses. This relief has become necessary because of Your Honor’s decision, over Respondents’ objection, to schedule the trial of this matter in October 2016, which has caused several of Respondents’ previously-designated experts to be unavailable or likely to be unavailable to testify. Indeed, at the time of that decision, Respondents pleaded with Your Honor for a later trial date for the express reason, among others, that several of their experts would likely be unavailable to appear at an October 2016 trial. As a matter of fundamental fairness, due process and necessity to the defense, Respondents now respectfully request this limited modification.

INTRODUCTION

In recognition of the year and a half that will have elapsed from the time the parties first made pretrial exchanges to the date of the upcoming October 2016 hearing—largely due to the intervening Second Circuit stay order—Your Honor appropriately permitted the parties to amend their previously-exchanged witness and exhibit lists, with updated lists to be submitted and exchanged by today, August 22, 2016. Respondents are, accordingly, naming three new expert witnesses on the witness list they are submitting today. As explained in a previous submission, several of Respondents’ experts are simply unavailable to appear at an October 2016 hearing or largely unavailable during that period, rendering them unable to properly prepare and testify at an October 24, 2016 hearing. *See* Memorandum of Law in Support of Respondents’ Expedited Petition to the Commission, dated July 25, 2016 (“Petition Memorandum of Law”), at 29-30. Respondents therefore must replace their unavailable experts with three new expert witnesses.

However, because each expert’s report will serve as that expert’s direct testimony under

the procedures Your Honor established for this proceeding, and because Your Honor's order permitting amended witness lists did not include a date for the submission of newly-named experts' reports, it is necessary for Your Honor also to modify the Order to ensure the same flexibility Your Honor rightly gave the parties to update their respective witness lists and exhibits in all other respects. And this modification is particularly warranted and necessary because several of Respondents' previously-designated experts are now effectively unavailable. Accordingly, Respondents respectfully request that Your Honor modify the Order to permit these three new experts to file reports by October 10, 2016, or such other time as Your Honor deems fair and appropriate under the circumstances.¹ Indeed, absent this relief, Respondents will be denied a fair opportunity to address the Division's broad array of proffered expert testimony with experts of their own and thereby be severely prejudiced.

A year ago, pursuant to the Order, the parties exchanged 11 expert reports totaling more than 400 pages. The Division alone submitted opening and rebuttal reports from each of its three proffered expert witnesses (six reports in total), spanning 255 pages, including 450 exhibits and four appendices, and referencing thousands of additional documents. In accordance with the Order, the Division will seek to introduce into evidence these voluminous reports as their purported experts' direct testimony. Moreover, the witness list submitted by the Division on August 7, 2015, makes plain that the Division will rely heavily on those witnesses' testimony in

¹ Under the protocol to which the parties previously agreed in this case, the parties were not required to seek approval or make any showing before placing an expert on the witness list or exchanging expert reports. Moreover, Your Honor permitted the parties to amend their witnesses lists, including by adding witnesses, by today, August 22, 2016; Respondents, in fact, are submitting an updated witness list today that includes these three new experts. Therefore, the limited relief Respondents seek is the modification of the Prehearing Order issued in 2015 to enable them to serve reports of their new expert witnesses at a time that fits into the current schedule for pre-trial proceedings and trial.

its case-in-chief: indeed, the only witnesses on the Division's "will call" witness list were its three purported experts and Respondent Lynn Tilton. A respondent's right to introduce expert testimony in a complex case is always important, but here—where the Division plans to introduce "expert" reports totaling 225 pages as those witnesses' direct testimony—it is critical that Respondents have a full and fair opportunity to introduce their own expert reports in order to respond to the Division's and to address issues central to the Order Instituting Proceedings ("OIP") in this matter.

The allegations in the OIP relate to two main areas: (i) the nature and operation of the Zohar Funds, and (ii) the financial statements of the Zohar Funds and related accounting issues. Ira Wagner is one of the Division's purported experts addressing that first area. He has submitted a 50-page opening expert report and a 74-page rebuttal report. Mr. Wagner's opinions as expressed in his report contain broad conclusions about collateralized loan obligations ("CLOs"), how CLOs typically operate and are monitored, whether the Zohar Funds operated as "typical CLOs," whether Respondents complied with the indentures governing the Zohar Funds, whether Respondents breached their fiduciary duties, and the effect on investors of Respondents' conduct. Indeed, other than the financial statement and accounting issues raised in the OIP, Mr. Wagner opines on virtually every other topic that the Division aims to address.

Respondents' expert, Marti P. Murray, submitted a report responding to much of Mr. Wagner's far-ranging testimony. However, as previously explained, Ms. Murray is simply unavailable to testify at this hearing, commencing on October 24, 2016. In the short period of time since Your Honor ordered this October 2016 trial date, Respondents have had to locate replacements for Ms. Murray. The limited time remaining until the hearing and the broad scope of Mr. Wagner's testimony have required Respondents to identify two individuals who have the

requisite extensive experience with CLOs (the kind of products at issue here), as well as with distressed companies (which were the focus of the Zohar Funds' investments), and thereby cover the full range of issues addressed by Mr. Wagner and Ms. Murray. To replace Ms. Murray, Respondents intend to call as expert witnesses Peter Vinella, who has operational and management experience with CDOs and CLOs, and Steven L. Schwarcz, who has extensive experience with distressed companies and loan modification. Each of them will have to prepare and submit a report that will serve as their direct testimony.

Dr. Steven L. Henning is the Division's expert regarding financial statement and accounting issues. Dr. Henning opines, among other things, about the Zohar Funds' compliance with GAAP and the accuracy of financial statements. As previously explained, Respondents had intended to call Dr. J. Richard Dietrich to respond to Dr. Henning's report, but Dr. Dietrich is largely unavailable during the period this hearing is to be conducted and therefore will not be able to prepare properly and testify at this trial.² Dr. Dietrich also has other significant restrictions on his time leading up to the trial. His limited availability means that he will be unable to properly prepare for the upcoming hearing and may be unable to testify altogether. Respondents therefore intend to call Charles Lundelius, Jr., as an expert witness on these accounting issues. He has extensive accounting experience and is available to testify in Dr. Dietrich's stead. If Dr. Dietrich ultimately is not able to testify, Mr. Lundelius will respond to Dr. Henning's report in its entirety. In any event, Respondents will call Mr. Lundelius to address certain aspects of Dr. Henning's opinions concerning loan impairment and fair value.

² Dr. Dietrich is completely unavailable on October 24, 26, 28, and 31, and November 1, 2, 4, 7, 9, and 11, and 14. See July 25 Declaration of Lisa H. Rubin ¶ 3 (detailing dates of unavailability).

Therefore, Respondents respectfully request a modification of the Order to allow Peter Vinella, Steven L. Schwarcz, and Charles Lundelius, Jr., to serve expert reports by October 10, 2016—a full two weeks before the scheduled start of the hearing—or such other time as Your Honor determines is fair and appropriate. Respondents respectfully submit that this scheduling approach should permit Respondents’ new experts the time necessary to prepare their expert reports and the Division ample time to then prepare for cross-examination at the hearing commencing at least two weeks later on October 24, 2016.³

BACKGROUND

On May 7, 2015, Your Honor entered the Order, which, in relevant part, provided for a schedule for submission of expert reports:

July 10, 2015 Division’s Expert Reports [1] . . .
August 10, 2015 Respondents’ Expert Reports, including Rebuttal Reports . . .
August 31, 2015 Division’s Rebuttal Expert Reports

[1] Expert witnesses’ direct testimony will be via expert report. The experts will present a brief summary of their testimony and be made available for cross examination.

May 7, 2015 Order at 1.

In accordance with the Order—under which the hearing was to begin on October 13, 2015—on July 10, 2015, the Division submitted expert reports from Ira Wagner, Michael G. Mayer, and Dr. Steven L. Henning. On August 10, 2015, Respondents submitted expert reports from Marti P. Murray, Dr. R. Glenn Hubbard, Mark Froeba, Dr. J. Richard Dietrich, and John H. Dolan. The Division’s experts submitted rebuttal reports on August 31.

³ Another of Respondents’ experts, Dr. Glenn Hubbard, also has limited availability. Accordingly, at the next pre-hearing conference, Respondents will request that, as an accommodation to Dr. Hubbard’s schedule, Your Honor permit his testimony to be taken out of order, if necessary. *See* Rubin Decl., ¶ 2 (explaining that Dr. Hubbard is available to testify on October 26, 27, 28, and November 4).

On September 17, 2015, Your Honor issued an order postponing the prehearing schedule and hearing in light of the stay of this action imposed by the Second Circuit Court of Appeals. On July 11, 2016, shortly after the Second Circuit vacated its stay of these proceedings and we appeared as new counsel for Respondents, the Division wrote to Your Honor indicating that “[t]he parties jointly propose a hearing date starting in early December.” July 11, 2016 Letter from the Division to ALJ Foelak. Two days later, Respondents’ counsel confirmed our consent to that proposal. *See* July 13, 2016 Letter from Respondents to ALJ Foelak. Nevertheless, Your Honor entered an order setting a September hearing date. July 15, 2016 Order at 1.

The July 15 Order also recognized that, “[i]n light of the passage of time,” it was appropriate to permit the parties to “amend their previously filed witness and exhibit lists.” July 15, 2016 Order at 2. The date for the exchange of amended witness and trial lists, originally set for August 15, 2016, later was moved to August 22, 2016 at the parties’ joint request. *See* August 5, 2016 Order. Respondents are filing today their amended witness and exhibits lists, which will include the three new experts discussed herein.

In response to the July 15 Order, Respondents wrote to Your Honor explaining that Ms. Murray, Dr. Hubbard, and Mr. Froeba were unavailable to be prepared for and appear at a September 2016 hearing, or had significant conflicts during that period. In response, on July 20, Your Honor entered an order setting the hearing for October 24, 2016. July 20, 2016 Scheduling Order at 1. As to the unavailability of Respondents’ experts, the order said Respondents could “make arrangements for expert witnesses to appear by video conference if necessary.” *Id.* at 2.

On July 25, 2016, Respondents filed a petition with the Commission seeking, *inter alia*, an extension of the 300-day rule for this hearing. In their memorandum of law in support of that petition, Respondents explained, “Respondents will be substantially prejudiced by an October

2016 hearing date because a number of Respondents' witnesses, including expert witnesses, are unavailable to prepare for and appear at an October 2016 hearing, or have significant conflicts during this period.” Petition Memorandum of Law at 29; *see also* July 25 Declaration of Lisa H. Rubin in Support of the Petition (“Rubin Decl.”) ¶¶ 2-4 (detailing dates of unavailability).

Nothing has changed since July 25. Ms. Murray is still unable to testify because she is unavailable throughout October and November 2016. Rubin Decl., ¶ 4. Dr. Dietrich is still unavailable on October 24, 26, 28, 31, November 1, 2, 4, 7, 9, and 11, ten of the fifteen days for which this hearing is scheduled. Dr. Dietrich also has other significant restrictions on his time leading up to the trial. *Id.* ¶ 3.⁴

Respondents request that the additional expert reports be submitted by October 10, 2016. That date—seven weeks from today—is the bare minimum amount of time necessary for the proposed witnesses to review the extant expert reports, exhibits, appendices, referenced documents, and other relevant materials; analyze them in light of the broad allegations in the OIP; and draft their own expert reports. The Division will then have two weeks to review the reports and additional time between October 24 and the date of the witness’s testimony to prepare for cross-examination.

ARGUMENT

This is not a case where a “battle of the experts” plays out in the margins while the merits proceeding occupies center stage. Quite the contrary, the Division’s expert reports make clear that those reports—as direct testimony—are the heart of the Division’s case against

⁴ As indicated earlier, Dr. Dietrich is also unavailable November 14. Rubin Decl., ¶ 3. Dr. Hubbard continues to have limited availability as well, although Respondents are not seeking to replace Dr. Hubbard at this time. *See* Rubin Decl., ¶ 2 (explaining that Dr. Hubbard is available to testify only on October 26, 27, 28, and November 4).

Respondents. As a matter of fundamental fairness and due process, it is vital that Respondents be afforded a full and fair opportunity to respond to the expert testimony the Division seeks to introduce.

Mr. Wagner has submitted over 120 pages of expert testimony, which Ms. Murray has responded to (in part) in a 33-page report; Dr. Henning's reports span over 40 pages, and Dr. Dietrich's response is 23 pages—all exclusive of exhibits, appendices, and other referenced documents. Engaging new experts to review these reports, analyze the voluminous exhibits and other documents, and prepare an expert report as direct testimony in response is a herculean task under any circumstances. The deadline Respondents propose—which allows less than two months until the submission of expert reports—is consistent with the previously-established protocol regarding expert witnesses and reasonable in light of the extremely compressed schedule in this case.

It is well-established that an ALJ has broad powers pursuant to Rule 111 of the Commission's Rules of Practice and Section 556(c) of the Administrative Procedure Act to "regulat[e] the course of a proceeding." 17 C.F.R. § 201.111; 5 U.S.C. § 556(c)(5). An ALJ is "permitted to take any action necessary and appropriate to discharge his or her duties." *In the Matter of Russo Securities Inc. Patrick Russo, and Kimberly Kent*, Administrative Proceedings Release No. 564, 66 S.E.C. Docket 2536 (Apr. 23, 1998); *see also Lowder v. Dep't of Homeland Sec.*, 504 F.3d 1378, 1383 (Fed. Cir. 2007) ("The decision whether to admit particular evidence is within the discretion of the administrative judge."). Accordingly, it is within the ALJ's authority to manage the prehearing schedule and permit the parties to replace or add expert witnesses. Indeed, because witnesses are regularly substituted in administrative proceedings, ALJs often simply note the fact of substitution without elaboration. *See e.g., In the Matter of*

Morgan Asset Mgt., Inc. et al., Administrative Proceedings Release No. 655, 98 S.E.C. Docket 2976 (ALJ July 6, 2010) (“I note that Respondents have moved to withdraw one of their expert witness and substitute another. To the extent that the Division seeks documents from the expert who is withdrawing, its application is now moot.”).

As Respondents explained in support of their petition to the Commission, an ALJ’s discretion extends to postponing a hearing in its entirety due to the unavailability of a party’s expert witnesses. *In the Matter of David J. Checkosky, et al.*, Administrative Proceedings Release No. 296, 52 S.E.C. Docket 454 (ALJ Apr. 1, 1988) (“Under the circumstances, including the fact that one of the OCA’s expert witnesses will be unavailable during the week of June 6, and another during the week of June 20, I am satisfied that good cause has been shown for the granting of the motion for the period requested.”). Surely, then, an ALJ has the authority to permit replacement experts to submit substitute reports for previously identified experts who are not available for trial, especially when the new reports will be submitted well in advance of the hearing, will afford the Division ample time to prepare for cross-examination, and will not delay the hearing date. That rule is consistent with the practice in the Federal courts. *See, e.g., Millenkamp v. Davisco Foods Intern., Inc.*, No. CV 03-439-S-EJL, 2005 WL 1863183, at *2 (D. Idaho Aug. 4, 2005) (granting party’s motion to substitute expert witness because the expert was unavailable for trial because “the Court determine[d] that [the party] was diligent in its efforts and has shown good cause for leave from the Scheduling Order to designate a new expert witness”); *Whiteside v. State Farm Fire & Cas. Co.*, No. 11-10091, 2011 WL 5084981, at *1 (E.D. Mich. Oct. 26, 2011) (“Courts have consistently permitted the substitution of expert witnesses when unforeseen events render the original expert witness unavailable to testify at trial.”); *Leibel v. NCL (Bahamas) Ltd.*, No. 1:15-CV-20721, 2016 WL 2621628, at *3 (S.D. Fla.

May 6, 2016) (“Courts have consistently allowed the substitution of expert witnesses when unexpected events prevent the designated expert from testifying at trial.”).

Finally, there will be no prejudice to the Division if the substitution is granted: the proposed expert reports will respond to the Division’s own expert reports and allegations. The Division will have at least two weeks to prepare to cross-examine the new witnesses and prepare its affirmative experts to testify at the hearing. Although it will be a tremendous challenge for Respondents to meet the October 10, 2016 date they propose, the relief requested in this motion will not delay the proceedings.

Your Honor previously has suggested that these witnesses could “appear by video conference if necessary.” Scheduling Order at 2. Respondents, however, submit that testimony by video conference would not resolve the underlying predicament: Respondents’ witnesses are unavailable to testify or have extremely limited time. Testimony by video would not solve this fundamental problem.

Moreover, Respondents will be severely prejudiced if the Division is able to present its expert witnesses unrebutted. The Division relies heavily on experts in this case, and to receive a fair hearing Respondents must be given a full opportunity to respond to the Division’s weighty expert reports.

CONCLUSION

For the foregoing reasons, Respondents respectfully request limited modification of the May 7, 2015 Prehearing Order to permit Peter Vinella, Steven L. Schwarcz, and Charles Lundelius, Jr. to submit expert reports by October 10, 2016, or such other time as is fair to the parties under the circumstances, and for such other and further relief as Your Honor deems just and proper.

Dated: New York, New York
August 22, 2016

GIBSON, DUNN & CRUTCHER LLP

By: Randy M. Mastro / NG

Randy M. Mastro
Reed Brodsky
Barry Goldsmith
Caitlin J. Halligan
Mark A. Kirsch
Monica Loseman
Lawrence J. Zweifach
Lisa H. Rubin

200 Park Avenue
New York, NY 10166-0193
Telephone: 212.351.4000
Fax: 212.351.4035

Susan E. Brune
BRUNE LAW P.C.
450 Park Avenue
New York, NY 10022
Telephone: 212.668.1900
Fax: 212.668.1900

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that I served true and correct copies of Respondents' Motion for Limited Modification of May 7, 2015 Order and a memorandum of law in support thereof, on this 22nd day of August, 2016, in the manner indicated below:

United States Securities and Exchange Commission
Office of the Secretary
Attn: Secretary of the Commission Brent J. Fields
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
Fax: (202) 772-9324
(By Facsimile and original and three copies by Federal Express)

Hon. Judge Carol Fox Foelak
100 F. Street N.E.
Mail Stop 2557
Washington, D.C. 20549
(By Federal Express)

Dugan Bliss, Esq.
Division of Enforcement
Securities and Exchange Commission
Denver Regional Office
1961 Stout Street, Ste. 1700
Denver, CO 80294
(By Email pursuant to parties' agreement)


Nilly Gezgin