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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

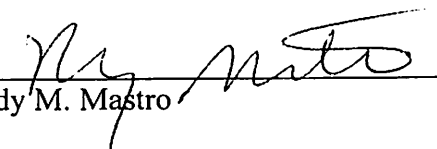
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In the Matter of,	:	
	:	
LYNN TILTON	:	Administrative Proceeding
PATRIARCH PARTNERS, LLC,	:	File No. 3-16462
PATRIARCH PARTNERS VIII, LLC,	:	
PATRIARCH PARTNERS XIV, LLC and	:	Judge Carol Fox Foelak
PATRIARCH PARTNERS XV, LLC	:	
	:	
Respondents.	:	
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RESPONDENTS' MOTION *IN LIMINE* TO PRECLUDE TESTIMONY AND EVIDENCE REGARDING THE SUBJECTIVE STATES OF MIND OF ZOHAR FUND INVESTORS

Pursuant to Rules 300 and 320 of the U.S. Securities and Exchange Commission (the "Commission") Rules of Practice (the "Rules"), 17 C.F.R. §§ 201.300, 201.320, 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 (collectively, "Patriarch" or "Respondents"), respectfully move for an order precluding the Division of Enforcement (the "Division") from introducing evidence of, asking questions about, or soliciting testimony regarding the subjective states of mind of Zohar fund investors in the above-captioned matter.

Dated: New York, New York
August 22, 2016

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**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION *IN LIMINE*
TO PRECLUDE TESTIMONY AND EVIDENCE REGARDING THE SUBJECTIVE
STATES OF MIND OF ZOHAR FUND INVESTORS**

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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 submit this brief in support of their motion *in limine* to preclude the Division of Enforcement (the “Division”) from introducing evidence of, asking questions about, or soliciting testimony regarding the subjective states of mind of investors in the Zohar funds.

INTRODUCTION

The Division has made clear through its prior submissions in this matter that it intends to introduce at the upcoming hearing testimony and other evidence concerning the subjective states of mind of investors in the funds to which Respondents served as investment advisers, including what those investors purportedly believed or thought about Respondents’ conduct and the relevant documents in the case. *See infra* Pt. II. Although Respondents vigorously dispute the Division’s characterizations of those investors’ subjective states of mind, it is in any case well-established 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.” *S.E.C. v. Morgan Keegan & Co. Inc.*, 678 F.3d 1233, 1247 n.16 (11th Cir. 2012); *see also infra* Pt. I. While it may be appropriate to introduce evidence regarding relevant, objective historical facts, such as what documents investors received from Respondents, and what information Respondents conveyed to investors during meetings, any testimony or other evidence concerning what particular investors purportedly subjectively believed or thought—including what investors thought about Respondents’ conduct, Respondents’ intent or state of mind, or the materiality of particular disclosures or non-disclosures—is entirely irrelevant in evaluating the merits of the charges brought, and sanctions sought, by the Division. *See infra* Pt. III. The Division should be barred from unnecessarily extending the hearing in this matter by introducing such irrelevant and potentially prejudicial testimony and evidence. If Your Honor

permits the Division to introduce evidence about investors' subjective states of mind, Respondents should be permitted to take depositions of the proposed investor witnesses under Your Honor's Rule 300 authority to implement procedures necessary to ensure a fair proceeding, and in accordance with Respondents' pending petition to the Commission to apply the new rules of practice.

LEGAL STANDARDS

Under Rule 320 of the U.S. Securities and Exchange Commission (the "Commission") Rules of Practice, the hearing officer "shall exclude all evidence that is irrelevant, immaterial or unduly repetitious." 17 C.F.R. § 201.320 (emphasis added). Rule 300 dictates that "[a]ll hearings shall be conducted in a fair, impartial, expeditious and orderly manner." *Id.* § 201.320; *cf.* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); *S.E.C. v. Shanahan*, 646 F.3d 536, 548 (8th Cir. 2011) (upholding exclusion of certain evidence 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).

Hearing officers commonly grant motions *in limine* to exclude testimony on grounds of irrelevance or immateriality. *See, e.g., In the Matter of Stanley Jonathan Fortenberry*, Administrative Proceedings Release No. 1801, 109 S.E.C. Docket 4608 (ALJ Sept. 12, 2014) (granting motion *in limine* to exclude testimony on grounds of irrelevance and immateriality); *In the Matter of Daniel Bogar, Bernerd E. Young, & Jason T. Green*, Administrative Proceedings Release No. 745, 105 S.E.C. Docket 2595 (ALJ Feb. 4, 2013) (same); *In re Richmark Capital Corp.*, Administrative Proceedings Release No. 201, 77 S.E.C. Docket 526 (ALJ Mar. 18, 2002) (same).

ARGUMENT

I. Investors' Subjective State of Mind Testimony is Irrelevant and Immaterial to the Violations Alleged in the OIP.

Investors' purported subjective states of mind have no bearing on whether Respondents should be found liable for the conduct alleged in the Order Instituting Proceedings ("OIP"), as none of the claims in the OIP depend or relate in whole or in part to what the investors in the Zohar funds subjectively believed or thought. Accordingly, testimony and evidence as to investor state of mind should be excluded from the hearing in this matter.

The only possible state of mind at issue here is *Respondents'*—an issue as to which the *investors'* states of mind are wholly irrelevant. See *Morgan Keegan*, 678 F.3d at 1247 n.16 (“[T]he 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.”); *Nathanson v. Polycom, Inc.*, 87 F. Supp. 3d 966, 980 (N.D. Cal. 2015) (finding that plaintiff’s speculation about defendant CFOs’ state of mind was “insufficient to satisfy the scienter requirement”); cf. *Carpenters Pension Trust Fund of St. Louis, St. Clair Shores Police & Fire Ret. Sys. v. Barclays PLC*, 56 F. Supp. 3d 549, 556–57 (S.D.N.Y. 2014) (employee’s testimony 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”). There is, accordingly, a telling absence of “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.*, No. 09 Civ. 4346 PGG, 2010 WL 11248673, at *13 (S.D.N.Y. Nov. 30, 2010).

One of the investors has made this point in moving to quash the subpoena issued to it in this case. *See* Memorandum of Non-Party Varde Partners, Inc. in Support of its Motion to Quash Subpoena Served by Respondents, dated Aug. 4, 2016, at 16; *see also* Non-Party Varde Partners, Inc.'s Reply to Respondents' Opposition to Motion to Quash Subpoena, dated Aug. 19, 2016, at 3-7.¹ Indeed, the Commission itself has previously argued that testimony concerning an investor's "subjective belief" is "irrelevant." *S.E.C. v. Radius Capital Corp.*, No. 2:11-cv-116-FTM-29DNF, 2013 WL 298209, at *5 (M.D. Fla. Jan. 25, 2013). The same is true here.

II. The Division Clearly Intends to Introduce Testimony and Other Evidence Concerning Investors' Purported Subjective State of Mind.

Despite the legal irrelevance of investor testimony and other evidence regarding the Zohar fund investors' purported subjective states of mind, it is plain that the Division intends to attempt to introduce such testimony. Indeed, the Division appears to place great weight on investors' purported subjective beliefs and thoughts, as evidenced by the prominence it gave testimony on this subject in its Opposition to Respondents' Motion for Summary Disposition, dated June 26, 2015 ("Summary Disposition Brief"), and on its August 22, 2016 Amended Witness List, which includes 10 investor witnesses.

The Summary Disposition Brief is rife with irrelevant investor testimony concerning investors' supposed subjective states of mind. In lengthy excerpts from the Division's

¹ Of course, as Respondents noted in their brief in opposition to Varde's motion to quash, because the Division's case appears to rely heavily on assertions regarding the subjective beliefs of investors, Respondents need the subpoenaed documents to adequately prepare for trial and cross-examination, unless and until Your Honor rules that such testimony and other evidence is inadmissible and, separately, to the extent such documents relate to other relevant issues, as discussed below. *See* Memorandum of Law in Opposition to the Motion of Non-Party Varde Partners, Inc. to Quash the Subpoena Served by Respondents, dated Aug. 11, 2016, at 5 n.2; *see also infra* pp. 6-7 (discussing investor-related documents that would fall outside the scope of the instant motion).

investigative interviews with investors that are quoted in the Summary Disposition Brief, the Division reports investors' responses to questions such as whether the Overcollateralization Ratio test is "important to you as an investor," and whether Respondents' alleged conduct "seem[s] consistent with the indenture to you?" See Summary Disposition Br. 10-11, 13 (quoting Rohit Chaku (Barclays), Jaime Aldama (Barclays), Wendy Ruttle (Rabobank), and Anthony McKiernan (MBIA)). That the Division asked these questions in investigative interviews confirms its interest in investors' subjective views; that the Division quoted these transcripts at such length in its filings underscores the significance it places on the investors' state of mind, and certainly suggests that the Division is likely to attempt to introduce such testimony and evidence at trial. Indeed, by listing 10 investor witnesses on its August 22, 2016 Amended Witness List—including the three individuals named above—and by noting that each may be called to testify regarding, *inter alia*, his or her "understanding of the investment," the Division has confirmed that it intends to press these points at the hearing. See Division of Enforcement's Amended Witness List, at 2-4.

It is clear that the Division plans to attempt to introduce testimony and evidence at the hearing concerning investors' purported subjective understandings and beliefs. Such investor testimony and evidence is clearly irrelevant and immaterial, and should be excluded.

III. Respondents' Request to Exclude Investor State of Mind Testimony and Evidence is Limited in Scope, But Important to Ensure that Trial is Conducted in a Fair, Impartial, and Expeditious Manner.

Respondents' request concerning investor state of mind testimony and evidence is narrow. Respondents seek only to exclude testimony and evidence regarding investors' supposed subjective states of mind—testimony that has no legal relevance or material connection to the charges of the OIP. An investor's testimony that he or she may not have understood Patriarch's business model or believes an indenture to be misleading, for example, has no place

in this case. Similarly, any testimony or other evidence concerning what particular investors subjectively believed or thought—including regarding Respondents’ conduct, Respondents’ intent or state of mind, or the materiality of particular disclosures or non-disclosures—is entirely irrelevant in evaluating the merits of the charges brought by the Division, or in determining the appropriateness of any sanction.

Permitting the Division to introduce such irrelevant and potentially prejudicial testimony and evidence into the record would be inconsistent with Rule 300’s admonition that hearings must be conducted in a fair and impartial manner. Indeed, were this case being tried in a federal district court—the appropriate forum for a case of this complexity and with these significant stakes—the Federal Rules of Evidence would apply, and require exclusion of investor state-of-mind testimony under Rule of Evidence 403 as unduly prejudicial. *Cf. Shanahan*, 646 F.3d at 548. Permitting the introduction of this testimony and evidence would also unnecessarily extend what will already be lengthy proceedings, waste Your Honor’s and the parties’ time, and force Respondents to expend resources, in an already compressed schedule, preparing for cross-examination and the presentation of rebuttal evidence on irrelevant issues—all of which is inconsistent with the “expeditious and orderly” hearing mandated by Rule 300.

Moreover, if Your Honor were to deny this motion and permit introduction of subjective investor state of mind evidence, Respondent would in fairness need substantial additional discovery of all written materials concerning investors’ subjective states of mind, including their reasoning and understanding in deciding to make the relevant investments, and their reasons for

continuing to hold or sell those investments. These materials would include, without limitation, internal reports, emails, data, memoranda, and risk assessment models.²

Respondents are not, however, asking that all investors be barred from testifying, nor that all investor testimony or evidence be precluded. Respondents do not dispute that evidence regarding relevant, objective historical facts such as what documents investors received from Respondents and what information Respondents conveyed to investors during meetings, and that otherwise meets the requirements for admission under the Rules of Practice, is admissible. Respondents should likewise be permitted to testify concerning such objective historical facts, and to cross examine investor witnesses concerning them.³ Such testimony and evidence is more probative of the relevant issues, and less likely to be unduly prejudicial, than investor testimony or other evidence—whether post-hoc or contemporaneous—about, for example, what an investor believes or thinks she *should* have received.

² Respondents also reserve the right to seek depositions in this area.

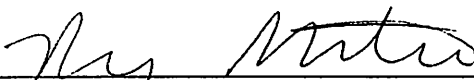
³ Additionally, Respondents should be permitted to obtain discovery concerning: (a) all communications between the investors and Respondents or the trustee, because such communications, especially insofar as they reveal what information the investors sought and what information Respondents provided, may bear on Respondents' alleged material nondisclosures of information; and (b) all information investors obtained from third parties regarding the relevant investments, because such information is relevant to the purported materiality of the alleged misrepresentations and omissions.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Division be precluded from introducing evidence of, asking questions about, or soliciting testimony regarding the subjective states of mind of investors in the Zohar funds.

Dated: New York, New York
August 22, 2016

GIBSON, DUNN & CRUTCHER LLP

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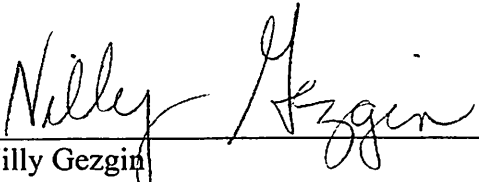
CERTIFICATE OF SERVICE

I hereby certify that I served true and correct copies of Memorandum of Law in Support of Respondents' Motion in Limine to Preclude Testimony and Evidence Regarding the Subjective States of Mind of Zohar Fund Investors, on this 22nd day of August, 2016, in the manner indicated below:

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