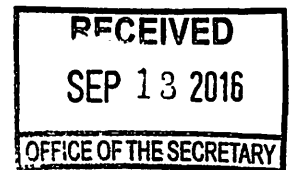


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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



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 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

Introduction

The Division of Enforcement (“Division”) respectfully files this opposition to 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 (“Motion”). As with Respondents’ *in limine* motion to exclude the investigative testimony transcripts, this Motion is premature. The Division does not, at this point, intend to seek the introduction of any non-party sworn statements made during the *Zohar CDO 2003-1, LLC et al. v. Patriarch Partners, LLC et al.* trial (the “*Zohar* trial”). However, the Division does intend to use testimony from the *Zohar* trial for any proper purpose, such as to refresh recollection or impeach Ms. Tilton (whose prior sworn testimony is admissible “for any purpose” pursuant to the Amended Rule 235(b)). That is because, contrary to Respondents’ claim, the issues in the *Zohar* trial are relevant to the present proceeding. The *Zohar* trial involves claims that Respondents have refused to provide financial records of the *Zohar* funds to the new collateral

manager of the Zohar CLOs.¹ The new collateral manager claims that it has been unable to obtain from Respondents even basic information needed to value the CLOs' collateral.² There is significant overlap between testimony in the *Zohar* trial and certain issues in this proceeding, including 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. Moreover, the conduct at issue in the *Zohar* trial may be relevant to sanctions against Respondents. Sanctions are determined based on a public interest standard that contemplates a broad inquiry into Respondents' behavior and their fitness to remain in the securities industry. Further, ALJs often look to conduct that post-dates the order instituting proceedings to assess sanctions. For all of these reasons, Respondents' Motion should be denied.

Argument

I. The Division is Not Seeking the Wholesale Admission of the *Zohar* Trial Testimony of Available Non-Party Witnesses.

As with Respondents' motion *in limine* regarding transcripts of investigative testimony, this Motion is premature. The Division recognizes that, if it intends to seek the admission of any of the portions of the *Zohar* trial transcripts of non-party witnesses,³ it must file a motion pursuant to

¹ See, e.g., Fortune, *Lynn Tilton Sued by Her Own Fund*, April 25, 2016, available at <http://fortune.com/2016/04/25/lynn-tilton-zohar/> (last visited Sept. 11, 2016); Business Insider, *Lynn Tilton defends against allegation of loan fund "shell game,"* Aug. 10, 2016, available at <http://www.businessinsider.com/r-lynn-tilton-defends-against-allegation-of-loan-fund-shell-game-2016-8> (last visited Sept. 11, 2016).

² See *id.*

³ While the Respondents note that, other than Ms. Tilton, the witnesses who testified at the *Zohar* trial are not listed on either party's amended witness list, both the Division and Respondents have reserved the right to call rebuttal or authentication witnesses. Respondents have also listed an unnamed "summary witness." Thus, it is possible that witnesses from the *Zohar* trial other than Ms. Tilton could be potential witnesses in this proceeding and, if unavailable, their testimony in the *Zohar* trial could be the subject of a proper Rule 235(a) motion.

Rule 235(a). At this stage, the Division does not intend to file such a motion, but reserves its right to do so at the hearing if appropriate. The Division does, of course, intend to use the investigative testimony transcripts for any proper purpose at the hearing, including (if necessary) to refresh the recollection of a witness or (again if necessary) to impeach a witness by their prior inconsistent statement. As explained in the Division's response to Respondents' motion *in limine* regarding transcripts of investigative testimony, such uses are routine in administrative proceedings. *See* Div. Opp. to Resps.' Mot. *in Limine* to Exclude Trans. of Inv. Test. (filed Sept. 9, 2016) at 2-3 (citing cases).

II. Ms. Tilton's Prior Testimony is Admissible "For Any Purpose."

Ms. Tilton testified during the *Zohar* trial. As also explained in the Division's response to Respondents' motion *in limine* regarding transcripts of investigative testimony, unlike a non-party witness, these sworn statements are admissible in this proceeding "for any purpose." *See* Am. Rule 235(b); *see also* Div. Opp. to Resps.' Mot. *in Limine* to Exclude Trans. of Inv. Test. (filed Sept. 9, 2016) at 3. While the Division has not yet determined whether it will seek to admit all or part of Ms. Tilton's *Zohar* trial testimony in this proceeding, making Respondents' motion premature, the rules are clear that such testimony is admissible.

III. The *Zohar* Trial Testimony is Relevant to this Proceeding.

Respondents claim that the *Zohar* trial dealt with issues wholly separate from – and irrelevant to – the issues in this proceeding. Respondents are wrong. Among other things, Ms. Tilton testified in the *Zohar* trial 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. These issues plainly "implicate the allegations in the" OIP. Motion at 4; *see also, e.g.*, Order Instituting Proceeding at ¶¶ 15-23 (allegations regarding formation of *Zohar*

funds and indenture), ¶¶ 37-42 (allegations regarding collection of interest and resulting categorization pursuant to indenture). While it is uncertain at this pre-hearing stage whether the Division will need to refer to portions of the *Zohar* trial transcript – for example, to refresh Ms. Tilton’s recollection or to impeach her hearing testimony – the fact is that the *Zohar* trial testimony overlaps with the issues in this case. A blanket ruling that the testimony is entirely irrelevant to this proceeding would be inappropriate.

In addition, Respondents’ conduct that is at issue in the *Zohar* trial – and specifically allegations that Respondents have refused to provide information that the new *Zohar* collateral manager feels is necessary to properly operate the *Zohar* funds – may be relevant to sanctions against Respondents. The Division is seeking sanctions against Respondents under Section 203 of the Investment Advisers Act and Section 9(b) of the Investment Company Act, sanctions which may include bars. Sanctions are determined pursuant to a public interest standard. *See, e.g., In the Matter of Gibson*, Rel. No. ID-319, 2006 WL 2712002, *4 (ALJ Init. Dec. Sept. 22, 2006). This standard contemplates a broad inquiry into Respondents’ behavior and their fitness to remain in the securities industry. *See, e.g. In the Matter of Kornman*, Rel. No. 2840, 2009 WL 367635, *7 (Comm. Op. Feb. 13, 2009) (“The securities industry presents continual opportunities for dishonesty and abuse and depends heavily on the integrity of its participants and on investors’ confidence.”); *id.* at *9 (“[O]ur focus is on the welfare of investors generally and the threat one poses to investors and the markets in the future.”); *In the Matter of Lawrence M. Labine*, Rel. No. ID-973, 2016 WL 824588, *41 (Init. Dec. March 2, 2016) (“It is well established that a respondent’s honesty and integrity are critical in deciding whether he should remain in the securities industry.”). Respondents’ conduct at issue in the *Zohar* trial – although occurring subsequent to the allegations in the OIP – may be relevant to this public interest inquiry. *See, e.g.,*

In the Matter of Labine, 2016 WL 824588 at *26, 41-42 (considering respondent’s post-OIP conduct in contacting or attempting to contact hearing witnesses in assessing sanctions); *In the Matter of Michael W. Crow*, Rel. No. ID-953, 2016 WL 489352, *72 (Init. Dec. Feb. 8, 2016) (considering respondent’s post-OIP conduct in making statement to investors in assessing sanctions and noting that such conduct gave “considerable concern for [the respondents’] future actions”).

Finally, Respondents generically argue that the *Zohar* trial testimony is inadmissible because it is hearsay from witnesses that, Respondents claim, are “biased and lack credibility.” Motion at 5-6. Again, since the Division is not seeking to introduce any *Zohar* trial testimony under Rule 235 at this time, such arguments are premature. Should the Division make a Rule 235(a) motion, or seek to introduce Ms. Tilton’s trial testimony under Rule 235(b), such arguments could be assessed on a more specific basis.

Conclusion

For the foregoing reasons, Respondents’ motion should be denied.

Dated: September 12, 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 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** was served on the following on this 12th day of September, 2016, in the manner indicated below:

Securities and Exchange Commission
Brent Fields, Secretary
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
(By Facsimile and original and three copies by UPS)

Hon. Judge Carol Fox Foelak
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