SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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NORDDEUTSCHE LANDESBANK GIROZENTRALE, HANNOVER FUNDING COMPANY LLC,

Plaintiffs,

- v -

LYNN TILTON, PATRIARCH PARTNERS, LLC,PATRIARCH PARTNERS XIV, LLC,PATRIARCH PARTNERS XV, LLC,

Defendants.

INDEX NO. 651695/2015

MOTION DATE N/A

MOTION SEQ. NO. 028

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 028) 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1061, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1169

were read on this motion to PRECLUDE.

In this motion Defendants Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC ("Defendants") seek to preclude Plaintiffs Norddeutsche Landesbank Girozentrale and Hannover Funding Company LLC ("Plaintiffs") from introducing the expert testimony of Professor Ethan Yale ("Yale" or "Professor Yale"). For the reasons described below, the motion is **granted** in part.

"The admission of an expert opinion is a matter within the sound discretion of the court" (*Oboler v City of New York*, 31 AD3d 308, 308 [1st Dep't 2006] [citation omitted]). "The guiding principle is that the expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (*De Long v Cnty. of Erie*, 60 NY2d 296, 307 [1983]). "For a witness to be qualified as an expert, the witness must possess the requisite skill, training, education,

knowledge or experience from which it can be assumed that the opinion rendered is reliable" (*Schechter v 3320 Holding LLC*, 64 AD3d 446, 449 [1st Dep't 2009] [citation omitted]).

Ethan Yale is a Professor of Law at University of Virginia School of Law with a "research and teaching focus on federal income taxation with an emphasis on the taxation of business entities, tax shelters, and tax policy" (NYSCEF 1037, at 1). Yale teaches "classes focusing on the tax, securities, and corporate law governing private fund investments. [He] also teach[es] and ha[s] studied and written about, the tax treatment of distressed debt" (*Id.*). Additionally, Yale has experience consulting "with taxpayers regarding the tax consequences of business and personal transactions" (*Id.*).

In his report, Yale offers three opinions: (1) "[c]ertain Patriarch entities maintained tax databases on behalf of the Zohar funds. The tax databases were used to determine, record, and report the tax characterization of cash received by the funds with respect to loans held by the funds;" (2) "[t]he tax characterization claimed by the owners of the Zohar funds – ultimately Lynn Tilton – depended on the assumption that repayment of many loans held by the funds was doubtful. In other words, Tilton, the taxpayer to whom the funds' taxable income flowed, took the position on her tax returns that the likelihood of repayment of the loans was low;" and (3) "[l]oan credit quality, reported to be low for tax purposes, was reported as high in the funds' financial statements and monthly investor reports. Thus, the Patriarch entities were making inconsistent claims regarding loan credit quality depending on the audience" (*Id.*).

As an initial matter, the Court rejects Defendants' position that tax-related evidence is irrelevant and should be precluded from this action. The Court also notes that Yale possesses the "requisite skill, training, education, knowledge or experience from which it can be assumed [his]

opinion rendered is reliable" (*Schechter*, 64 AD3d at 449). Professor Yale's significant training, education and experience are sufficient to qualify him as an expert in tax law. In fact, in a previous ruling on an earlier motion to preclude Yale's testimony, this Court noted "synthesizing these databases is not something that's within the ken of a normal juror" and that "having somebody synthesize and explain what's in there [would be] helpful" (NYSCEF 889, at 21:8-14). The Court also held "that it's helpful for the trier of fact to understand when a taxpayer takes a position, that that is effectively a factual representation" and that it "necessarily means you're representing to the government that the loan is in some state of disrepair" (*Id.*, at 21:16-22).

Defendants argue that Professor Yale "has no experience structuring or managing CLOs," and that he "has never served as a CDO or CLO collateral manager, collateral administrator, or trustee, nor has he ever advised anyone that has served in any such capacity" (NYSCEF 1053, at 9). However, Professor Yale's opinions do not require expertise in the structure or management of CDOs or CLOs (NYSCEF 1061, at 13). Yale's first two opinions concern the nature and purpose of the Tax Databases maintained by Defendants and the corresponding tax characterizations made (NYSCEF 1037, at 11-14). Professor Yale is sufficiently qualified as an expert in tax law to render these opinions. Further, any objection to Yale's "qualifications go to the weight rather than the admissibility of his testimony" (*Williams v Halpern*, 25 AD3d 467, 468 [1st Dep't 2006]).

In opposition to Professor Yale's third opinion comparing the credit quality ratings, Defendants argue Yale lacks a reliable methodology and the expertise necessary to make such a comparison and that he renders an improper legal opinion in doing so (*see* NYSCEF 1053, at 10-12). The Court agrees with Defendants insofar as they seek to preclude Professor Yale from

offering testimony as to the parties' respective rights and obligations under the Indentures. "Expert witnesses should not be called to offer an opinion as to the legal obligations of parties under a contract" *Colon v Rent-A-Center*, 276 AD2d 58, 58 [1st Dep't 2000]). In any event, this proposed opinion is beyond the scope of the witness's field of expertise.

The Court, however, rejects Defendants' argument that Professor Yale relies on "common sense" to render his opinion comparing the reporting in the monthly reports to the Defendants' tax reporting. Professor Yale reached the conclusion after synthesizing and analyzing voluminous amounts of data contained in the monthly reports made to Zohar Fund investors and the Tax Databases (NYSCEF 1037, at 16). Further, Yale testifies that the facts that go into making the contractual determination under the Indentures are the same facts that are important for tax law, rendering him qualified to draw the comparison. (NYSCEF 759, at 62:23-63:2).

Further, any argument that Professor Yale is unqualified to make the comparison, because the standards for grading loans in the monthly reports and the tax reports are distinct, goes to the weight of his testimony not to its admissibility (*see, e.g., Sadek v Wesley,* 27 NY3d 982, 984 [2016] ["any defects in the opinions of plaintiff's experts or the foundation on which those opinions are based should go to the weight to be accorded that evidence by the trier of fact, not to its admissibility in the first instance]; *Adamy v Ziriakus*, 92 NY2d 396, 402 [1998] ["it falls to the opponent of the testimony to bring out weaknesses in the expert's qualifications and foundational support on cross-examination"]). In fact, Defendants proffer expert testimony of their own to make this point. "Where, as here, both parties present expert testimony in support of

their positions, it is the province of the jury to determine the experts' credibility" (*Monroy v Glavas*, 57 AD3d 631, 632 [2d Dep't 2008]).

Finally, Defendants' arguments concerning Professor Yale's "bad debt" opinions are unavailing. The Court rejects Defendants' argument to the extent they argue the "bad debt" opinions were not made in a timely fashion. Here, the documents upon which Professor Yale based the "bad debt" opinions were not produced by Defendants until one business day before Professor Yale issued his final report, despite a First Department order compelling production of relevant documents. Thus, any failure to include the opinion in his reports is not a result of "willful or prejudicial" noncompliance by Plaintiffs. Moreover, Defendants have time in advance of trial to prepare for cross-examination.

Accordingly, it is

ORDERED that Defendants' Motion in Limine to Preclude the Expert Testimony of Professor Ethan Yale is **granted** in part, as set forth above.

This constitutes the Decision and Order of the Court.

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6/10/2022
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	**X**	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**