

<b>Norddeutsche Landesbank Girozentrale v Tilton</b>
2022 NY Slip Op 31871(U)
June 14, 2022
Supreme Court, New York County
Docket Number: Index No. 651695/2015
Judge: Joel M. Cohen
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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,	INDEX NO. <u>651695/2015</u>
Plaintiffs,	MOTION DATE <u>N/A</u>
- v -	MOTION SEQ. NO. <u>025</u>
LYNN TILTON, PATRIARCH PARTNERS, LLC, PATRIARCH PARTNERS XIV, LLC, PATRIARCH PARTNERS XV, LLC,	<b>DECISION + ORDER ON MOTION</b>
Defendants.	
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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 025) 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1062, 1118, 1119, 1120, 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 Israel Shaked (“Shaked” or “Professor Shaked”). For the reasons described below, the motion is **denied**, but as described below the Court reserves decision as to limiting the scope of his testimony based on the specific questions asked and the evidence introduced at trial.

“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 [1<sup>st</sup> 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 Erie Cnty.*, 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 AD 446, 449 [1<sup>st</sup> Dep’t 2009]).

Professor Shaked is a Professor of Finance and Economics at Boston University’s Questrom School of Business and is the Managing Director of the Michel-Shaked Group, which provides corporate finance and business consulting services to law firms, governmental agencies and corporations worldwide (NYSCEF 994, ¶ 4). Professor Shaked has also taught at the doctoral, graduate and undergraduate levels on topics including financial institutions and markets, corporate finance, business valuation, financial, economic and general management. (Id.) He was also the Director of the Boston Chartered Financial Analysts Examination Review Program, a contributing editor to the American Bankruptcy Institute Journal for 20 years, has testified before Congress on issues of leveraged buyouts, acquisitions, and taxation, and has researched several areas relevant to this matter including distress/restructuring, leveraged buyouts, economic and corporate structure, and corporate financial decisions (NYSCEF 994, ¶¶ 4-5, 7, 10).

Professor Shaked offers four opinions based on his analysis: (1) the Zohar Funds were not structured in the manner represented to the Plaintiffs; (2) the Zohar Funds were not operated or managed by Defendants in the manner represented to the Plaintiffs; (3) the failure of the Zohar Funds is unique among the Collateralized Loan Obligation (“CLO”) variety of Collateralized Debt Obligations (“CDO”) and is not attributable to the 2008 financial crisis or other economic factors; and (4) as a result of the manner in which Defendants constructed and managed the Zohar Funds, Plaintiffs have suffered a loss of a portion of the principal amount of their investments (NYSCEF 994, ¶¶ 14, 16, 19, 22).

Defendants' across-the-board attack on Professor Shaked as a mere "summation" witness is unavailing. Defendants rely on *People v. Inoa* to argue that Shaked simply "tie[s] together all the strands of [Plaintiffs'] case for the jury much as a [lawyer] would in summing up, but perform[s] that task as a purveyor of case-specific expertise rather than as an advocate" (25 NY3d 466, 471 [2015]). In *Inoa*, the relevant expert exceeded the bounds of his expert testimony by purporting to decode "what was coded" in recorded phone conversations arising out of a criminal investigation, and essentially explained "the meaning of virtually everything that was said during [the] recorded conversations, whether it was coded or not" (*Id.* at 473-74). The Court of Appeals found this to be a situation "in which an expert so palpably overtakes the jury's function to decide matters within its unaided competence" (*Id.* at 472).

In contrast, Professor Shaked synthesizes a voluminous record to give expert testimony on what a CDO/CLO is, what a private equity fund is, how each operates, how the Zohar Funds were operated, and draws conclusions based on that analysis. His proposed testimony "elucidate[s] some material aspect of the case that would otherwise resist comprehension by jurors of ordinary training and intelligence" (*Id.*) Moreover, Professor Shaked's proposed testimony as to why the failure of the Funds purportedly was due to Zohar-specific factors rather than to the 2008 Financial Crisis or other general macroeconomic factors is proper expert testimony "calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (*De Long v. Erie Cnty.*, 60 N.Y.2d 296, 307 [1983]). Even assuming it is possible for the jury to understand these issues, "it is common to allow expert testimony to aid a jury in understanding complex and unfamiliar corporate transactions" (*Liberty Media Corp. v Vivendi Universal, S.A.*, 874 F Supp 2d 169, 175 [S.D.N.Y. 2012]).

Finally, the Court finds that Defendants’ criticism of Professor Shaked’s damages methodology – including that he purportedly does not take into account interest and other payments received by Plaintiffs before they liquidated their positions – goes to the weight of his testimony, not its admissibility (*Sadek v Wesley*, 27 NY3d 982, 984 [2016]).

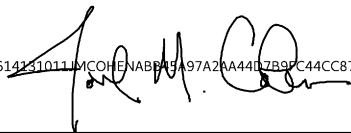
That said, there are portions of Professor Shaked’s expert report that do resemble excerpts of a lawyer’s closing argument, with commentary on the evidence and Defendants’ purported intent in taking certain actions that goes beyond his field of expertise and invades the province of the jury as finders of fact. The Court will require that his testimony be focused on his expert opinions, referencing industry background and the evidence only insofar as they form the context and basis for his opinions, rather than as an advocate providing his views on the evidence. Before making final judgments as to the scope of Professor Shaked’s testimony, the Court will want to understand how it fits in with the rest of the Plaintiff’s presentation of evidence at trial and will entertain objections to the extent he is asked to cross the line from legitimate expert testimony into advocacy on the underlying facts.

Accordingly, it is

**ORDERED** that Defendants’ Motion in Limine to Preclude the Expert Testimony of Professor Israel Shaked is **denied**, with the caveats set forth above.

This constitutes the Decision and Order of the Court.

6/14/2022  
DATE

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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: