

Who Needs Prep Time? This Litigator of the Week Stepped In Last Minute for Huge Win Against SEC

By Jenna Greene

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This was the lay of the land when Randy Mastro met Lynn Tilton.

Dubbed the Diva of Distressed, Tilton was facing what's been described as the largest administrative case in U.S. Securities and Exchange Commission history, with \$200 million and a lifetime industry ban on the line.

She'd already spent years arguing that the agency's administrative forum was unconstitutional, culminating in a 2-1 loss before the U.S. Court of Appeals for the Second Circuit in June of 2016.

Now facing trial for fraud, Tilton was looking to replace her counsel at Skadden, Arps, Slate, Meagher & Flom.

Even under the best of circumstances, the odds of winning were terrible—the SEC prevails about 90 percent of the time in its home court. And her trial was scheduled to start in just six weeks.

Mastro, who co-chairs the litigation practice at Gibson, Dunn & Crutcher, rose to the challenge, leading an all-star team of litigators to prevail across the board on Wednesday.

"The conventional wisdom was that it couldn't be done," he said. "She was completely vindicated."

It was a truly remarkable performance, one that made Mastro a shoo-in for litigator of the week. And it underscores the firm's success overall—Gibson Dunn's F. Joseph Warin and Jason Mendro won the honor last week for defending a data breach case, the first back-to-back wins we at the Lit Daily can remember.

Mastro vividly recalls when Tilton first came to his office in New York for a meeting arranged by Tilton's



Randy Mastro

longtime personal lawyer Susan Brune of Brune Law PC, who served as co-counsel in the case.

He and Tilton spoke for hours, Mastro said, bonding over the fact they both grew up in New Jersey and overlapped at Yale, though they didn't know each other.

"I was struck by her passion and energy, and the righteous indignation that she had been falsely accused," he said.

Tilton's personal story became part of her defense—how she gave up her dream of playing tennis professionally to work on Wall Street to support her mother and put her brother through college after her father's death, becoming a self-made billionaire.

“She’s a character. She’s larger than life. And she’s all woman,” Mastro in his opening said of his glamorous, flashy client, according to a transcript of the proceedings.

Tilton founded private equity firm Patriarch Partners in 2000, which invests in distressed companies.

The SEC case was focused on three collateralized loan obligations known as the Zohar funds, which raised \$2.5 billion. Money from the funds was used by Tilton to buy or make loans, primarily to private, mid-sized distressed companies.

The SEC said Tilton disregarded disclosure requirements by characterizing the loans “however she personally saw fit, without disclosure to investors.” The SEC also alleged that she hid the true financial conditions of the underlying companies and that she enriched herself at the expense of her investors.

Mastro had never before litigated a case in the SEC’s administrative forum, though the actual trial—which aroused considerable public interest—was held in an unused courtroom in the Southern District of New York.

Familiar setting aside, the experience was “hugely different” from litigating in an Article III court, Mastro said, with minimal discovery, little ability to enforce subpoenas and no depositions. That meant “effectively cross-examining witnesses without knowing what they would say,” Mastro said.

Last year, the SEC rolled out new rules for its administrative cases to allow for more discovery and give respondents more time to mount a defense, but the changes came too late to benefit Tilton. (Indeed, Mastro was soundly rebuffed by the ALJ when he asked that the trial date be pushed back, though it was

delayed a month to October 2016 to accommodate an SEC lawyer’s wedding.)

The Gibson Dunn team, which included partners Mark Kirsch, Reed Brodsky, Lawrence Zweifach and Monica Loseman, and Brune in a pivotal role, hammered home a basic theme: “Where was the fraud? There was none,” Mastro said.

Mastro in court stressed that the institutional investors “knew exactly what the model was, they knew exactly what they were investing in, and they knew exactly from trustee reports every quarter and every month, that many of these companies were given some relief on their interest payments. And they could see it in black and white,” he said, according to a transcript.

“Your honor, I submit to you that because of the sophistication and uniqueness of this particular product and this industry, the SEC just got it wrong. It happens sometimes.”

In a 57-page opinion, Administrative Law Judge Carol Fox Foelak agreed, dismissing all the charges.

“Not only were these large financial institutions able to obtain the information from the trustee reports, it would have been unreasonable for them to expect all of the companies to pay all of their interest according to the interest rates on their loans, given the business model of loaning to distressed companies,” she wrote.

In an interview, Tilton called Mastro “amazing—incredibly intelligent and talented and also passionate,” she said. “I think he believed in me from Day One. He felt this was a travesty of justice.”

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