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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PATRIARCH PARTNERS, LLC, PATRIARCH PARTNERS VIII, LLC, PATRIARCH PARTNERS XIV, LLC, and PATRIARCH PARTNERS XV, LLC	)	No. 549, 2016
	)	Court below: Court of Chancery,
Defendants-Below, Appellants	)	C.A. No. 12247-VCS
v.	)	
ZOHAR CDO 2003-1, LLC, ZOHAR CDO 2003-1 LTD., ZOHAR II 2005-1 LLC, ZOHAR II 2005-1 LTD., ZOHAR III, LLC, and ZOHAR III, LTD.,	)	
Plaintiffs-Below, Appellees.	)	

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Zohar Funds' answering brief does nothing to cure the fundamental legal errors that infect the Court of Chancery's decision below. Their thinly-veiled attempts to rewrite the record—not only to shore up their defense of the Court of Chancery's ruling, but also to further other actions that the Zohars and their allies have launched against Patriarch and Ms. Tilton—should be rejected. Their legal arguments are equally unavailing. For the reasons set forth in its opening brief and below, Patriarch respectfully requests that this Court reverse the Court of Chancery's decision and vacate the Amended Order.[1]

First, the Court of Chancery erred by failing to hold the Zohars to their burden of proof on a necessary element of their breach of contract claims: the Zohars' own performance under the CMAs. The Zohars contend that Patriarch's breach occurred "by April 1, 2016 at the latest," AB 19, thereby excusing their own performance, but that is bald revisionism. The court neither assigned a date to Patriarch's purported breach nor found that the Zohars' performance was "excused." The Zohars' failure to prove the "essential element[]" of their performance requires reversal, *Carione v. Hickey*, 133 A.D.3d 811, 811 (N.Y. App. Div. 2015), or at least remand.

[1] Capitalized terms and abbreviations not otherwise defined herein have the meanings ascribed to them in Patriarch's Opening Brief ("OB"). Citations to "AB" refer to the Zohars' Answering Brief.

Second, the Court of Chancery erroneously concluded that Sections 5.7 and 6.3 of the CMAs require a collateral manager that has resigned to produce documents to its successor or the Zohars, or to make books and records accessible for inspection after the effective date of its resignation. The unambiguous terms of those provisions do not apply where, as here, a collateral manager has resigned by extra-contractual agreement rather than having its obligations terminated "pursuant to" or "in accordance with" the CMAs. The court further erred in holding that Sections 5.7 and 6.3 require Patriarch to produce documents relating to upside equity interests, taxes that Ms. Tilton paid as the Zohars' ultimate owner, and collateral no longer in the Zohars' portfolios. Those records are not "property and documents of" the Zohars, A693-94 § 5.7, A973 § 5.7, A1453 § 5.6, and the parties never contemplated that Patriarch would have to produce documents that are wholly irrelevant to managing the Zohars' current collateral (including documents that are over a decade old and relate to companies that have not been in the Funds' portfolio for years).

Third, the Zohars offer no credible basis for concluding that Patriarch's purported breach was material. The Zohars cite not a single case holding that the books-and-records provisions of a contract for management or other commercial services are material as a matter of law. Nor do they defend the court's failure to

examine Patriarch's performance prior to litigation in assessing the materiality of its purported breach.

Because of the Court of Chancery's legal errors, Patriarch has expended significant resources to produce hundreds of thousands of documents to which the Zohars are not entitled under the CMAs. That result is especially troubling given that the Zohars apparently instituted this action not because AMZM needed documents to manage the Zohars' collateral (Patriarch had previously provided all the information necessary for that purpose, *see* OB 38)—but because the Zohars' controlling party,[2] MBIA, wanted access to those documents for use in its multi-jurisdictional efforts to seize portfolio company equity owned by Ms. Tilton.[3]

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[2] In late January 2017, Ms. Tilton exercised her rights as majority owner of the Zohars' preference shares to replace the Zohars' directors. As a result, Ms. Tilton is currently director and managing member of Zohar CDO 2003-1 Ltd., Zohar CDO 2003-1, LLC, Zohar II 2005-1 Ltd., Zohar III, Ltd., and Zohar III, LLC. These changes in corporate governance do not affect this appeal. None of the Zohars has withdrawn its opposition to Patriarch's appeal, and the Indentures of Zohars II and III do not permit Ms. Tilton, as director, to do so unilaterally. Furthermore, Ms. Tilton has not withdrawn Zohar I's opposition to this appeal, and AMZM—who still claims to be Zohar I's agent—continues to possess documents that the Court of Chancery erroneously ordered produced. As such, Zohar I remains adverse to Patriarch.

[3] Last month, the Zohars filed a sweeping complaint in federal court, *Zohar CDO 2003-1, Ltd., et al. v. Patriarch P'rs, LLC, et al.*, No. 17-cv-307, (Jan. 16, 2017 S.D.N.Y.), ECF No. 1, alleging that documents Patriarch produced pursuant to the Amended Order "permitted them to begin to piece together the puzzle, set out here, of the Defendants' fraudulent misconduct and outright theft." *Id.* ¶ 86. Needless to say, Patriarch vehemently disputes the allegations of wrongdoing and is confident it will prevail in that case.

Patriarch therefore respectfully requests that, in addition to reversing the Court of Chancery's decision and vacating the Amended Order, this Court also instruct the Court of Chancery to order the return of any and all documents produced by Patriarch pursuant to the Amended Order.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY FAILING TO REQUIRE THAT THE ZOHARS PROVE THEIR OWN PERFORMANCE.

The Zohars do not dispute that they failed to prove their performance under the CMAs, which was an "essential element" of their breach of contract claims. *Carione*, 133 A.D.3d at 811. To the contrary, there was evidence that the Zohars withheld from Patriarch payment for services rendered prior to Patriarch's resignation. *See* A1893-94; *see also* A509-10. Instead, the Zohars maintain that the court properly granted judgment in their favor because their performance was "excused" by Patriarch's purported breach or, alternatively, because their performance "was not at issue below." AB 19, 21. Neither argument is persuasive.

First, the Court of Chancery's opinion makes no reference to the Zohars' revisionist "excuse" theory. The court did not find that Patriarch's purported breach excused the Zohars from performing their own obligations.[4] Quite the opposite: it found "no basis in th[e] record to conclude one way or the other

[4] If the mere existence of a material breach satisfied a plaintiff's burden to prove performance, as the Zohars argue, *see* AB 18-19, breach and performance would no longer be distinct elements, as required under New York law, *see, e.g.*, *Carione*, 133 A.D.3d at 811. Moreover, the CMAs plainly contemplate that a collateral manager's breach of the agreements will not excuse the Zohars' subsequent payment of fees accrued prior to that breach. *See, e.g.*, A687 § 4.1(d), A693-94 § 5.7.

whether the Zohar Funds ha[d] wrongfully withheld payment from Patriarch." Op. 31.

Nor did the court find that "Patriarch placed itself in material breach of its contractual obligations by April 1, 2016 at the latest." AB 19. That claim is particularly disingenuous. The court never assigned a date to Patriarch's purported breach. While the court characterized the April 1, 2016 letter as "stak[ing] Patriarch's final position that it had fully complied with its obligation to turn over all of the books and records," Op. 18, it did not find that the letter breached the CMAs. For good reason: the CMAs do not provide a date by which documents must be turned over, *see* OB 28; the Zohars' own expert testified that the transition between collateral managers takes "many months," OB 28 n.23; Ms. Tilton expressly stated in the April 1st letter that her "team [was] preparing responses to [AMZM's] most recent, lengthy list of questions," B678; and Patriarch was gathering additional documents and responding to AMZM's requests for information when the Zohars began withholding payment on April 20th, *see* A1879-84, A1885-86. There is no basis to conclude that Patriarch breached its contractual obligations "by April 1, 2016 at the latest," AB 19, and the court made no such determination.[5]

[5] The Zohars' current collateral manager, AMZM, made the same argument in the pending New York interpleader action, which the Trustee brought to determine whether, *inter alia*, it must pay to Patriarch fees being withheld at the Zohars'

Perhaps realizing the extent to which they have mischaracterized the court's opinion, the Zohars now claim that the April 1st letter was an anticipatory repudiation of Patriarch's contractual obligations. *See* AB 19-20 & n.6. But the Zohars may not introduce this claim for the first time on appeal, having failed to plead—or even mention—it below. If anything, this theory highlights the fallacy of the Zohars' position that the April 1st letter breached the CMAs. "Anticipatory repudiation occurs when, *before the time for performance has arisen*, a party to a contract declares his intention not to fulfill a contractual duty." *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) (emphasis added). Implicit in the Zohars' contention that the April 1st letter constituted an anticipatory repudiation is an acknowledgment that Patriarch's performance was not yet due on April 1st—which means Patriarch could not have breached the CMAs by that date.

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direction. AMZM told that court that "Vice Chancellor Slights's ruling in the Delaware Action conclusively resolves that Patriarch breached its contracts with the Zohar Funds as of April 1, 2016," and moved for summary judgment on the ground that Patriarch's purported April 1st breach excused the subsequent withholding of fees on April 20th. *See* Interpleader Def. & Cross-Claim Def. Alvarez & Marsal Zohar Mgmt. LLC's Mem. Law Supp. Mot. Summ. J., *U.S. Nat'l Assoc. v. Patriarch Partners et al.*, Index. No. 652173/2016, at 6-7 (N.Y. Sup. Ct. Jan. 12, 2017). The New York Court declined at this time to grant AMZM's motion and, instead, temporarily stayed the case, noting its assumption that "the circumstances that the Delaware Chancery Court expressly declined to rule on the issue of Patriarch's entitlement or non-entitlement to compensation for services rendered prior to March 1, 2016 preclude[d] th[e c]ourt from summarily adjudicating that issue." Order, *U.S. Nat'l Assoc. v. Patriarch P'rs et al.*, Index. No. 652173/2016, at 2 (N.Y. Sup. Ct. Jan. 17, 2017).

Second, the Zohars' performance under the CMAs was necessarily "at issue" below because it was an essential element of their contract claims. OB 19. While a plaintiff's performance is not an element of a breach of contract claim under Delaware law, *see Connelly v. State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1279 n.28 (Del. 2016), New York law requires a plaintiff to affirmatively prove its performance under the contract (or excusal thereof), *see Carione*, 133 A.D.3d at 811.[6] Moreover, Patriarch affirmatively raised the issue of the Zohars' performance before, during, and after trial—including in the PTO.[7] *See* OB 19; *see also British Am. & E. Co. v. Wirth Ltd.*, 592 F.2d 75, 79 (2d Cir. 1979) (rejecting argument that plaintiff's performance was not in dispute where issue was explicitly raised in defendant's answer and post-trial brief). The only reason the court declined to address the Zohars' performance is because it mistakenly conflated that

[6] While the Zohars are correct that their specific performance claim required them to prove that they were "ready, willing, and able" to perform the executory obligations that remained unperformed at the time of Patriarch's purported breach, AB 20, they did not show—and the court did not find—satisfaction of that element. As for the Zohars' breach of contract claims, those required proof of their *actual performance* of obligations due prior to Patriarch's purported breach—as to which there was no proof and no finding below.

[7] The PTO listed the following fact as "admitted" and "requiring no proof": "On April 20, 2016, [AMZM] directed the Trustee to withhold certain collateral management fees that Patriarch XIV contends it is owed. Subsequently, [AMZM] directed the Trustee to withhold other collateral management fees Patriarch VIII and Patriarch XV contend they are owed." A509-10; *see also, e.g.*, A1943 ("Plaintiffs argue they had no obligation to perform under the CMAs because Patriarch purportedly failed to turn over documents . . . . That defense rings hollow.")

element of the Zohars' affirmative claim with Patriarch's counterclaims, on which Patriarch agreed to defer prosecution. *See* Op. 31 n.107 (declining to consider issue of Zohars' performance because "Patriarch's *counterclaim* was not included in the [PTO]" (emphasis added)); *see also* OB 20-21. That error requires reversal or, at the very least, remand for a determination of whether the Zohars proved their performance under the CMAs.

II. THE COURT OF CHANCERY ERRED BY HOLDING THAT THE CMAs REQUIRE PATRIARCH, FOLLOWING ITS RESIGNATION, TO PRODUCE DOCUMENTS TO THE ZOHARS OR AMZM.

A. Section 5.7 Does Not Require a Collateral Manager that Has Resigned to Produce Documents to Its Successor or the Zohars.

Section 5.7 applies only when the collateral manager has been removed under, or its duties and obligations have been terminated "pursuant to," the CMA. A693-94 § 5.7, A973 § 5.7, A1453 § 5.6. Because neither scenario occurred here, where Patriarch resigned through an extra-contractual agreement with the Zohars' controlling classes, Section 5.7 is inapplicable. OB 25-27.

The Zohars do not dispute that Patriarch was neither removed under, nor were its duties and obligations terminated pursuant to, any provision of the CMAs. Instead, they argue that Section 5.7 is triggered upon *any* termination of the collateral manager's contractual duties and obligations, whether effectuated pursuant to the CMAs or not. AB 25-28. That interpretation of Section 5.7 is arbitrary and unreasonable.

Section 5.7 provides that document-production obligations are triggered "[f]rom and after the effective date of the termination of the Collateral Manager's duties and obligations pursuant to this Agreement or removal of the Collateral Manager hereunder." A693-94 § 5.7, A973 § 5.7, A1453 § 5.6. Rather than reading "pursuant to this Agreement" as modifying the phrase that precedes it ("termination of the Collateral Manager's duties and obligations"), the Zohars

insist that "pursuant to this Agreement" modifies only *part* of the preceding phrase ("the Collateral Manager's duties and obligations"). AB 26-27. That interpretation should not be credited. Indeed, it directly conflicts with the Zohars' reading of the same phrase for purposes of Section 5.7's "effective date." The Zohars claim that Section 5.7's "effective date" is the date of "*termination of the Collateral Manager's duties and obligations*." AB 26 (emphasis in Zohars' brief). In other words, the Zohars ask this Court to read "termination of the Collateral Manager's duties and obligations" as a single phrase for purposes of defining the effective date, without distinguishing between "termination" and "the Collateral Manager's duties and obligations." Along those lines, "pursuant to this Agreement" modifies the same phrase ("termination of the Collateral Manager's duties and obligations") in its entirety, not just a portion of that phrase ("the Collateral Manager's duties and obligations").[8]

Nor can the Zohars argue that their reading of the CMAs is the only commercially reasonable interpretation.[9] Their suggestion that Patriarch's reading

[8] Even if this language could have been drafted more precisely, that fact would not compel a different interpretation. *See, e.g., Am. Movie Classics Co. v. Time Warner Entm't, L.P.*, 2005 WL 3487852, at *11 (N.Y. Sup. Ct. 2005).

[9] Patriarch's interpretation produces a result that is commercially reasonable and consistent with the reasonable expectations of the parties, as reflected in the CMAs and the Indentures. *See* OB 27-28; *see also In re Lipper Hldgs., LLC*, 766 N.Y.S.2d 561, 562 (N.Y. App. Div. 2003) ("[A] contract should not be interpreted to produce a result that is absurd, commercially unreasonable, or contrary to the

of Section 5.7 would leave the Zohars and the successor collateral manager without documents necessary "to effectively continue the operations of the Zohar Funds," AB 28, is incorrect. While Patriarch remained as collateral manager, the Zohars had virtually unfettered access to books and records under Section 6.3, *see* OB 29, and the controlling classes dictated the timing of Patriarch's resignation, *see* OB 27-28. The Zohars and their controlling classes could have—and should have—availed themselves of their right to access books and records before consenting to Patriarch's resignation, to ensure they had the documents necessary for continued operations. In the case of a collateral manager's removal, the CMAs clearly contemplated that the controlling classes would ensure that the successor collateral manager had received any necessary documents by the time it assumed its role as the new collateral manager. *See* A696 § 6.3, A975-76 § 6.3, A1456-57 § 6.3. While Patriarch was not removed here, the result should have been the same. Instead, the controlling classes rebuffed Patriarch's efforts to facilitate an orderly transition. OB 29. The controlling classes also could have negotiated extra-contractual production requirements as a condition of Patriarch's resignation, but having failed to do so, they should not now be permitted to read into the CMAs post-resignation obligations that do not exist. OB 28.

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reasonable expectations of the parties." (internal quotation marks and alterations omitted)).

Finally, the Zohars' resort to extrinsic evidence, *see* AB 29-30, is foreclosed. The Court of Chancery correctly determined that the "clear and unambiguous" CMAs could "be construed by reference only to the terms that appear[ed] within their four corners," and thus refused to consider any "extrinsic evidence offered by the parties." Op. 21. Accordingly, the Zohars cannot inject extrinsic evidence on appeal. Moreover, the evidence cited by the Zohars here—statements made by Ms. Tilton or former counsel more than a decade after the CMAs were negotiated, regarding their purported subjective understanding of contract terms—is irrelevant and inadmissible. Such statements, made "well after contract formation," are not "admissible extrinsic evidence of the parties' mutual intent in entering into their agreement, but merely a unilateral expression of one party's postcontractual subjective understanding of the terms of the agreement." *Murray Walter, Inc. v. Sarkisian Bros.*, 183 A.D.2d 140, 145 (N.Y. App. Div. 1992). They are "not probative as an aid to the interpretation of the contract." *Id.*; *accord Faulkner v. Nat'l Geographic Soc'y*, 452 F. Supp. 2d 369, 379 (S.D.N.Y. 2006).

B. Section 6.3 Does Not Require a Collateral Manager that Has Resigned to Provide Access to Its Books and Records.

As set forth in Patriarch's Opening Brief, Section 6.3 governs only current collateral managers and former collateral managers whose obligations have terminated "in accordance with" the CMAs. OB 29-31. Because Patriarch is no longer a collateral manager, and because the Zohars do not dispute that Patriarch's

obligations were not terminated "in accordance with" the CMAs, Section 6.3 does not apply.[10]

Even if Patriarch were subject to requirements imposed on a former collateral manager, it would not be obligated to make books and records accessible for inspection, as that duty falls exclusively within the scope of a *current* collateral manager's obligations. OB 30-31. The Zohars contend that because Section 6.3 does not expressly use the terms "current" and "former" to refer, respectively, to an acting collateral manager and a collateral manager whose obligations have terminated in accordance with the agreement, it does not distinguish between the two. AB 33. That argument is a nonstarter. Section 6.3 plainly imposes one set of duties upon a current collateral manager (to maintain books and records and make them available for inspection), while imposing a narrower set of duties "upon the termination" of the collateral manager's obligations (to maintain books and records for three years, or to turn them over to the Trustee). OB 30-31.

Section 5.6's survival clause does not change this result. It merely ensures that a former collateral manager remains bound by a pared-down set of post-

[10] The Zohars deem this interpretation unpersuasive, AB 33, but offer no alternative reading as to what the term "in accordance with this Agreement" modifies, if not the preceding phrase, "termination of its obligations hereunder." *See* A696 § 6.3, A975-76 § 6.3, A1456-57 § 6.3 ("Upon *the termination of its obligations hereunder in accordance with this Agreement* . . . the Collateral Manager agrees to either (i) maintain . . . books and records . . . for a period of three years . . . or (ii) deliver. . . books and records . . . to the Trustee . . . ." (emphasis added)).

termination duties, but does not subject a former collateral manager to the broader, ongoing obligations imposed on the current collateral manager.[11] *See* OB 31-32. Although the Zohars argue that the survival clause would serve no purpose if it merely confirmed what Section 6.3 already makes clear—that certain obligations apply upon termination, *see* AB 35—that is wrong. The survival clause also applies to Section 5.7, even though Section 5.7 makes clear that each of its provisions applies upon termination of the collateral manager's obligations. A693-94 § 5.7, A973 § 5.7, A1453 § 5.6. The survival clause thus confirms what Section 5.7 already provides: a collateral manager has certain expressly prescribed obligations "upon . . . termination or removal." *Id.* The survival clause's effect upon Section 6.3 is exactly the same. Therefore, the Zohars' surplusage argument fails.

The Zohars also contend that "an obligation of the Collateral Manager to maintain books and records post-termination would have no purpose or practical effect if the right . . . to access those records did not also survive termination." AB 35. But there are numerous reasons why the CMAs might require a former

[11] The Zohars concede that "nothing in Section 5.6 . . . modifies" a former collateral manager's duty "to maintain books and records for a period of three years after termination as collateral manager." AB 35. Thus, the survival clause does not subject a former collateral manager to the ongoing maintenance requirements of a current collateral manager. Likewise, the survival clause does not subject a former collateral manager to the inspection requirements of a current collateral manager.

collateral manager to maintain documents for three years (e.g., to comply with regulatory record-keeping requirements or to ensure availability of records in the event of future litigation), while declining to subject a former collateral manager to the ongoing possibility that, upon a mere three days' notice, any number of different parties might demand access to books and records.

Additionally, the Court of Chancery independently erred by holding Patriarch in breach of Section 6.3 without first considering whether the Zohars had provided the requisite notice under Sections 6.3 and 7.2. *See* OB 33. Although the Zohars maintain that "the record is rife with written communications by which Plaintiffs sought access," AB 36, they do not indicate whether those communications complied with Section 7.2's notice requirements[12]—and more importantly, the court made no such finding.

Finally, the Court of Chancery erred to the extent that it relied on Section 6.3 as a basis for its Amended Order. Even affording Section 6.3 the broadest possible interpretation, it would require only that Patriarch make books and records "accessible for inspection," A696 § 6.3, A975-76 § 6.3, A1456-57 § 6.3, and perhaps copying. It would not require, as the Amended Order does here, that

[12] Section 7.2 requires that "[n]otice shall be deemed duly given, made and received when delivered against receipt or upon actual receipt of registered or certified mail, postage prepaid, return receipt requested, or, in the case of facsimile notice, when received in legible form, addressed as set forth below." A698 § 7.2, A977 § 7.2, A1458 § 7.2.

Patriarch affirmatively produce to the Zohars and AMZM broad categories of documents—or that Patriarch do so at its own, significant expense.

C. The Court of Chancery Erred in Requiring Patriarch to Produce Documents Plainly Beyond the Scope of Sections 5.7 and 6.3.

The CMAs cannot be construed to require Patriarch to produce documents relating to: (i) contingent upside equity interests (i.e., interests held by the Zohars in the proceeds of a potential eventual sale of portfolio company equity); (ii) tax obligations that Ms. Tilton bore in her personal capacity as ultimate beneficial owner of the Zohars and the portfolio companies; or (iii) collateral no longer in the Zohars' portfolio ("historical debt documents"). The Zohars provide no credible justification for the Court of Chancery's broad order to the contrary.

Documents relating to upside equity interests and Ms. Tilton's tax liability are not documents "relating to services performed hereunder," A696 § 6.3, A975-76 § 6.3, A1456-57 § 6.3, or "property and documents of" the Zohars, A693-94 § 5.7, A973 § 5.7, A1453 § 5.6, nor do they "relat[e] to Collateral," *id.* Ms. Tilton gave to the Zohars limited upside equity interests and bore other risks of ownership—like paying the taxes—not in her capacity as collateral manager but rather as the portfolio companies' and the Zohars' ultimate beneficial owner. OB 35-37. Such documents therefore do not relate to services performed as collateral manager. OB 34-35. Even if the equity interests themselves were "property" of the Zohars, and even if documents reflecting those interests (such as

stock certificates) were "documents of" the Zohars, documents that merely relate to upside equity interests would not belong to the Zohars. Instead, those documents belong to the beneficial equity owner: Ms. Tilton. The same is true for the tax documents the court ordered produced. OB 36-37. That such a document mentions one of the Zohars by name, Order ¶ 1(k), does not make it "property and documents of" that fund nor relevant to any fund's collateral.[13]

The Zohars' rationale for seeking historical debt documents falls flat. Even after having the opportunity to review hundreds of thousands of pages of documents, the Zohars claim only that historical debt documents might bolster their efforts to obtain proceeds from the sale of a company called HVEASI. AB 39-40. But as Ms. Tilton testified at trial, the 100% owner of HVEASI was Ark II CLO-2001 (an entirely separate investment fund that Ms. Tilton wholly owns, and in which the Zohars have no interest). A660 at 540:22-541:5; *see* A659 at 538:8-20 (explaining that a statement to the contrary in a presentation was a typographical error). Public records confirm Ms. Tilton's testimony: Ark II—not the Zohars—owned HVEASI. *See In re High Voltage Eng'g Corp.*, No. 05-10787, at 1 (Bankr. D. Mass. July 25, 2005), ECF No. 1038. The Zohars therefore have no need for documents relating to HVEASI (or any company that is no longer in

[13] While the Amended Order allows Ms. Tilton to redact purely personal information, that has no bearing on the fact that the tax documents themselves are property of Ms. Tilton, not the Zohars.

the Zohars' portfolio) as that company is entirely divorced from the Zohars' "collateral."

III. THE COURT OF CHANCERY ERRED BY HOLDING THAT PATRIARCH'S PURPORTED BREACH WAS MATERIAL.

The Court of Chancery improperly found Patriarch's purported breach material. Rather than pointing to any precedent in support of the court's conclusion, AB 43, the Zohars attempt to distinguish *Donovon v. Ficus Invs., Inc.*, 2008 WL 4073639 (N.Y. Sup. Ct. Aug. 1, 2008), on the ground that the document production requirement in *Donovan* was narrower than that in the CMAs, AB 43 n.11. But *Donovan* did not hold the document production requirements in that case immaterial because they were narrow. Instead, the court assessed whether the contract's requirement to provide access to books and records materially impacted the contract's purpose: purchasing, managing, and selling real estate mortgages. *Donovan*, 2008 WL 4073639, at *9. The Zohars do not—and cannot—explain why the document-production requirements in the CMAs are more central to the Zohars' purchasing, managing, and selling collateral than such a requirement was in *Donovan*. If anything, Patriarch's purported breach was *less* material than that in *Donovan*, where the defendant provided no access whatsoever to documents. *Id.*[14]

[14] The Zohars also contend, without citation to the record, that Patriarch's description of the CMAs' purpose has "shifted." AB 43 n.10. That is incorrect. Before the Court of Chancery, Patriarch argued that the "primary purpose of the CMAs is to outline the collateral management services that a manager must perform in exchange for fees." A1960. Here, Patriarch notes that the CMAs' primary purpose is to "establish the services that the collateral manager must

The Zohars also contend that if Patriarch's purported breach is immaterial, then *no* breach of a production requirement can be material. AB 43-44. But any slippery slope cuts the other way: If the Court of Chancery properly deemed Sections 5.7 and 6.3 material to the contract as a matter of law, then *all* document-production provisions would necessarily be material. That simply cannot be true. *See Donovan*, 2008 WL 4073639, at *9. The Zohars identify no case in which a court deemed material to a contract a books and records provision, and the Zohars' resort to the slippery slope does not provide a basis for affirming the court's ruling here.

Nor can the Zohars defend the Court of Chancery's failure to assess any gap between Patriarch's actual performance and that which the CMAs purportedly require. The Zohars contend that this "test . . . has no basis in the contracts," AB 44, but do not dispute that the test has basis in law—indeed, law that the court ignored, *see Huntingdon Vill. Dental, PC v. Rathbauer*, 2013 WL 238493, at *4 (N.Y. Sup. Ct. Jan. 18, 2013); *Donovan*, 2008 WL 4073639, at *10-11 (analyzing *actual* performance compared to required performance); *cf. Process Am., Inc. v. Cynergy Hldgs., LLC*, 839 F.3d 125, 136 (2d Cir. 2016). Patriarch's pre-litigation performance—producing some 100,000 pages of documents that AMZM would

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perform such that the noteholders can receive any returns that are due to them." OB 40. Any difference in word choice is immaterial.

need to manage the funds, including credit agreements and portfolio companies' financial statements—was substantial, and sufficient to give the new collateral manager what it needed to do its job. OB 40-41.

The Zohars do not deny that the Court of Chancery had before it evidence that Patriarch produced over 100,000 pages of documents prior to this litigation. Instead, they contend that the court *also* had before it evidence regarding documents that Patriarch did not produce. AB 44.[15] But that does not justify the court's refusal to apply the governing test for materiality by determining whether the documents Patriarch produced prior to litigation were sufficient. Rather, the court determined only that the "transition process" purportedly established by the CMAs—the production of books and records to help transition the new collateral manager—was material in the abstract. Op. 32. At a minimum, this deficiency requires a remand to assess the delta between actual and required performance, as New York law requires.

[15] The document for which the Zohars requested judicial notice is not relevant to whether the Court of Chancery properly determined that Patriarch's breach was material in light of the evidence adduced at trial. *See generally* D.R.E. 401. To the extent this Court believes it necessary to compare the import of Patriarch's substantial pre-litigation production with that produced after the Court of Chancery filed the Memorandum Opinion, this Court should remand to the Court of Chancery to conduct that analysis in the first instance.

CONCLUSION

For all of the foregoing reasons, and those set forth in Patriarch's Opening Brief, Patriarch respectfully requests that this Court reverse the Court of Chancery's Memorandum Opinion and vacate the Amended Order, with instructions for the Court of Chancery to order the return of any and all documents that Patriarch has produced pursuant to the Amended Order. In the alternative, Patriarch requests that this Court vacate the Amended Order and the Memorandum Opinion and remand for further proceedings.

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