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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
Defendants-Below, Appellants	)	Court below: Court of Chancery, 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.	)	

CORRECTED APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

For more than a decade, the Defendant Patriarch entities[1] (collectively, "Patriarch") served, under the leadership of Lynn Tilton, as collateral managers to the Plaintiff Zohar Funds.[2] Ms. Tilton, Patriarch, and other affiliated entities known as the "Octalunas," conceived, structured, created, and still own the Zohars, *see* Post-Trial Memorandum Opinion issued by Vice Chancellor Slights on October 26, 2016 ("Op.") 1-2[3]; A434-35 at 121:18-122:3, A622 at 391:20-22, A628 at 414:21-24, A1702-10, which are three unique collateralized loan obligation ("CLO") investment vehicles that "issued and sold notes to investors for cash and used the proceeds to purchase a pool of assets," Op. 4. The Zohars are own-to-loan funds: Ms. Tilton took equity positions in, and control over, highly-distressed portfolio companies in order to restructure the companies' debt, arrange for the Zohars to loan money to them, and deliver returns by turning the companies around. *See* A628 at 414:20-24.

In early 2016, Patriarch resigned as collateral manager because Ms. Tilton believed it to be in the best interests of the Zohars, given the various disputes that

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[1] The Defendant Patriarch entities are Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC.

[2] The terms "Zohars" or "Plaintiffs" refer collectively to Zohar CDO 2003-1, LLC and Zohar CDO 2003-1, Ltd. ("Zohar I"), Zohar II 2005-1, LLC and Zohar II 2005-1, Ltd. ("Zohar II"), and Zohar III, LLC and Zohar III, Ltd. ("Zohar III").

[3] A copy of the Op. is Exhibit A hereto.

had arisen between Ms. Tilton and MBIA Insurance Company, which insured two of the Zohars. A632 at 431:3-17. Patriarch and Ms. Tilton, the ultimate owner of the Zohars, remained fully dedicated to the Zohars' success and, as such, planned to spend the final month as collateral manager assisting with the transition to a new collateral manager. *See* A628 at 414:21-24, A634 at 437:1-2. But the transition process was hampered by the failure of the Zohars' controlling classes[4] to appoint a new collateral manager until March 3, 2016, two days after Patriarch had intended to resign. Op. 11; A1711-32. Nevertheless, Patriarch and Ms. Tilton began working at that point with the new appointee, Alvarez & Marsal Zohar Management, LLC ("AMZM"), to ensure a smooth transition. Patriarch and Ms. Tilton trained AMZM's employees, responded to AMZM's many inquiries, produced nearly 100,000 pages of documents to aid AMZM, and even offered to take AMZM on a tour of the portfolio companies. *See infra* pp. 15-17. But on April 20, 2016, the Zohars caused the trustee to begin withholding payments owed to Patriarch for services rendered prior to its resignation. *See* A1893-94; *see also infra* pp. 18-19 & n.15.

Two days later, notwithstanding the fact that Patriarch was still in the process of gathering additional information requested by AMZM, the Zohars

[4] The controlling party for Zohars I and II is the credit enhancer, or MBIA, unless and until certain events occur. *See* A732, A1009. The controlling party for Zohar III is the owner of majority of class A-1 notes. *See* A1489-90.

commenced this action. *See infra* pp. 18-19. Their complaint alleged six causes of action; four were expedited and remain at issue on appeal. A504-05. Counts I through III sought declarations that Patriarch had breached the parties' three Collateral Management Agreements ("CMAs")[5] by failing to turn over documents in addition to the nearly 100,000 pages of documents already produced. A61-67; *see* A1887. Count IV sought an award of specific performance ordering further production. A67-68. Patriarch filed an answer and asserted various compulsory counterclaims against the Zohars and third-party claims against AMZM—including several related to the withholding of Patriarch's collateral management fees—but agreed to defer prosecution of those claims until after completion of an expedited trial of the Zohars' Counts I through IV. *See* Op. 31 n.107.[6]

[5] Zohar I entered into a collateral management agreement with Patriarch VIII in 2003 (the "Zohar I CMA"); Zohar II entered into a collateral management agreement with Patriarch XIV in 2005 (the "Zohar II CMA"); and Zohar III entered into a collateral management agreement with Patriarch XV in 2007 (the Zohar III CMA"). *See* A671-704, A951-82, A1430-1464. References to the "CMA" or "CMAs" refer collectively to the Zohar I, Zohar II, and Zohar III CMAs, which are materially the same unless otherwise noted.

[6] In addition to the four claims at issue on appeal, the Zohars brought a claim for a declaratory judgment that Patriarch Partners Agency Services, LLC, and Patriarch Partners, LLC, breached Credit Agreements requiring them to produce documents, and requested specific performance to remedy that alleged breach. A68-70. The Zohars withdrew those claims prior to trial. *See* A504-05. Patriarch brought three counterclaims for breach of contract and anticipatory breach of contract against Zohar Funds I, II, and III, for the Zohars' failure to pay fees owed. A147-51. Patriarch also brought six third-party claims against AMZM, including two claims for tortious interference of contract for encouraging Zohar I and II to withhold fees in violation of the parties' CMAs, three declaratory judgment claims asserting that

At the crux of this case is a dispute about the obligations that the CMAs imposed on Patriarch following its resignation as collateral manager. On summary judgment, Patriarch argued that the CMAs' narrow document production and books and records provisions (Sections 5.7 and 6.3) do not apply to a collateral manager that has resigned, while the Zohars argued otherwise. The Court of Chancery deferred ruling and held a two-day trial on August 9 and August 10, 2016. Op. 3, 19-20.

Among other things, the evidence adduced at trial established the nature and extent of the documents Patriarch had already produced, along with the categories of documents for which the Zohars sought further production. *See, e.g.*, A1835, A1838-39, A1887; *see also* A551 at 107:18-108:2, A638 at 453:17-21. The evidence also revealed that the Zohars had not performed their own contractual obligations, *see* A545 at 82:9-17, A639 at 459:8-21—an essential element of the Zohars' contract claims, which are governed by New York law, Op. 21; *see also* A111-13, A115, A118, A501-02, A1942-43. AMZM's own employee acknowledged this key fact, testifying that the Zohars were withholding fees due to

(Cont'd from previous page)

AMZM has no authority to withhold fees under the CMAs, and a breach of contract claim for AMZM's failure to comply with mandatory reporting deadlines. A151-159.

Patriarch. A545 at 82:9-17; *see also* A639 at 459:8-21. And the Zohars adduced no evidence that they ever paid those fees.

On October 26, 2016, the Court of Chancery issued a Memorandum Opinion holding that Patriarch had breached the CMAs by failing to produce documents of the Zohars that "relat[e] to Collateral." *See* Op. 23-28. The court concluded that Section 5.7's document production requirements apply to a collateral manager that has resigned, and held that, pursuant to the CMAs' survival provision, a collateral manager that has resigned remains bound by Section 6.3's duty to make books and records accessible for inspection by the Zohars. The court further granted the Zohars' request for specific performance and directed Patriarch to produce twelve categories of documents purportedly "relating to Collateral," which the court defined expansively. *See* Op. 32-33; *id.* at 36-50 (delineating document categories). The court directed the Zohars' counsel to submit a proposed implementing order. Op. 51.

On October 31, 2016, the court adopted in full an order proposed by the Zohars.[7] Patriarch moved for reconsideration and a limited stay pending resolution of the reconsideration motion; on November 3, 2016, the court granted reconsideration in part, issued an Amended Order and Judgment, and denied the

[7] The Zohars submitted a proposed order on the evening of Friday, October 28, 2016. On the next business day and before Patriarch could respond, the Court adopted that order in full.

request for a temporary stay. *See* Amended Order and Judgment, entered by Vice Chancellor Slights on November 3, 2016 ("Order")[8] at 3 n.2, ¶ 1 n.3. On Patriarch's motion, the court entered a partial final judgment authorizing immediate appeal pursuant to Court of Chancery Rule 54(b), *see* A2111-12, but denied Patriarch's request for a stay pending appeal, *see* A2107-10. Patriarch filed its notice of appeal on November 14, 2016, and moved this Court for a stay pending appeal, which was denied on November 22, 2016.

On appeal, Patriarch argues that the Court of Chancery erred by (i) failing to hold the Zohars to their burden of proof on establishing their own performance under the CMAs, *see infra* Pt. I; (ii) misinterpreting the plain language of Sections 5.7 and 6.3, which do not apply to a collateral manager that has resigned, and which, in any event, do not require production of certain categories of documents that the court nonetheless ordered to be produced, such as documents relating to taxes paid by Ms. Tilton in her personal capacity, *see infra* Pt. II; and (iii) holding that Patriarch's purported breach was material, without considering Patriarch's substantial production of documents prior to the Zohars' suit, *see infra* Pt. III.[9]

[8] A copy of the Order is Exhibit B hereto.

[9] This case continues to present a live controversy for numerous reasons, including continued disputes between the parties regarding the scope of production, as well as AMZM's reliance on the decision below in another action currently pending in New York Supreme Court. *See U.S. Bank v. Patriarch Partners XIV, LLC & Alvarez & Marsal Zohar Management, LLC,* Index No. 652173/2016 (Sup. Ct. N.Y. Cnty. 2016).

Patriarch therefore respectfully requests that this Court vacate the Amended Order and Judgment and reverse the Court of Chancery's Memorandum Opinion or, in the alternative, remand for further proceedings.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by failing to hold the Zohars to their burden of proof on an essential element of their breach of contract claims: their performance under the operative contracts. Patriarch's agreement to defer prosecution of its counterclaims, which involve, among other things, the Zohars' non-performance, did not relieve the Zohars of their burden of proving each and every element of their affirmative claims, and it was error for the Court of Chancery to hold otherwise.

2. The Court of Chancery erroneously concluded that Sections 5.7 and 6.3 require a collateral manager that has resigned to produce documents to its successor or the Zohars, or to make those books and records accessible for inspection. The plain language of Sections 5.7 and 6.3 impose no production or inspection obligation on a collateral manager that has resigned, and fundamental canons of New York contract law confirm this interpretation of the CMAs. And, even assuming Sections 5.7 and 6.3 did apply (and they do not), Patriarch still would not be required to produce certain categories of documents that fall outside the scope of those provisions.

3. The Court of Chancery erred by awarding specific performance because it concluded that Patriarch's purported breach was material. Contrary to the Court's conclusion, the production of documents does not go to the "root" of

the CMAs, which govern the provision of services to manage the Zohars and maximize the noteholders' returns on investment. As such, the award of specific performance must be reversed. Alternatively, even if the failure to produce documents could be material (which it cannot), the award of specific performance must be vacated because the court failed to assess the materiality of Patriarch's purported breach in light of the facts adduced at trial. Prior to this litigation, Patriarch produced nearly 100,000 pages of documents—and Patriarch was in the midst of gathering additional documents for production when the Zohars commenced this suit—but the court made no effort to determine whether there was any material gap between that production and anything that the CMAs might require.

STATEMENT OF FACTS

A. The Creation of the Zohar Funds

Patriarch is a vertically-integrated investment enterprise that, together with certain of its affiliated entities, buys and sells distressed companies, structures deals, and manages private equity funds, distressed investing funds, and Ms. Tilton's personal money, among other things. *See* A625-26 at 403:23-405:16, A628-29 at 414:12-416:6. Patriarch deploys Ms. Tilton's experience and acumen to acquire and invigorate undervalued and often iconic American brands. *See, e.g.*, A618 at 374:3-18. Pursuant to this multifaceted, hands-on approach, Ms. Tilton (through her Patriarch entities) has successfully restructured hundreds of companies: her time, capital, and sound strategies have rescued numerous businesses from the brink of disaster and preserved jobs in the United States and around the world. *See* A618 at 374:3-18.

Patriarch also provides collateral management services. The Zohars, which Ms. Tilton conceived of, structured, created, and owns, *see* Op. 1-2, 5-7, are among several successful CLO funds for which Patriarch or its affiliates has served as a collateral manager since 2000.[10] *See* A619 at 376:10-11, A621 at 384:21-24, A621 at 386:19-24. Under the guidance and expertise of its principal, Ms. Tilton,

[10] In addition to the three Zohar Funds, Patriarch Partners, LLC and its affiliate also originated and managed two other CLO funds and its affiliates served as successor collateral managers on an additional seven funds. *See* A619 379:4-9, A621 386:19-24.

Patriarch served as collateral manager of the Zohars from their inception until March 2016. A278 at 13:13-18, A336 at 40:8-16, A618-19 at 375:21-377:8, A620-21 at 382:22-385:12; Op. 10.

Zohar I arose out of prior dealings between Patriarch and MBIA Insurance Company. Op. 5. MBIA had served as insurer to one of the Zohars' highly successful predecessors, Ark II, A619 at 377:1-14; Op. 5, and Ms. Tilton's success with the Ark Funds prompted MBIA, which at the time was facing insurance liability for a potential shortfall of $200-300 million on a set of unrelated CDOs, to seek Ms. Tilton's help in creating a transaction designed to reduce that liability. Op. 6. As conceived by Ms. Tilton and MBIA, the resulting Zohar I Fund would—like the successful Ark deals before it—raise new investment funds and purchase a new pool of collateral. Op. 6.

Ms. Tilton launched Zohar I in November 2003, and Patriarch VIII[11] signed a CMA with the Fund shortly thereafter. Op. 6-7. Zohar I's indenture limited the collateral it could hold from any single issuer, so Ms. Tilton created Zohar II and Zohar III in 2005 and 2007, respectively, to access additional capital and engage in larger, more diversified transactions. Op. 7. The parties signed additional CMAs for the new Zohars. Op. 7-8. Ultimately, each Fund's sale of notes generated

[11] Patriarch VIII, Patriarch XIV, and Patriarch XV have no employees; they delegated their functions to Patriarch Partners, LLC. *See* A94-95.

approximately $1 billion, which Ms. Tilton deployed by issuing loans through the Zohars to rescue the distressed portfolio companies. Op. 8.

The strategy for the Zohars was built upon the premise that Ms. Tilton herself would be the catalyst for the success of the portfolio companies, and her interests were aligned with the success of the funds she created. *See* A633 at 432:2-11. As Ms. Tilton testified, she has "a lot of skin in the game, and [is] deeply invested in the success" of the Zohars and their portfolio companies. A628 at 415:1-2. Specifically, Ms. Tilton is the ultimate equity owner of each Fund and has a large personal investment in Zohar I notes. A434-35 at 121:18-122:3, A628 at 414:21-24; Op. 1-2. She has also personally invested hundreds of millions of dollars in the Zohars' borrowers—the portfolio companies, A628-29 414:6-416:6 (testifying that she has "a little over [$]300 million in loans in equity to the portfolio companies")—and has been involved actively in the management of the distressed portfolio companies. A666 at 566:9-11. Ms. Tilton serves as a board member and/or manager of every portfolio company, A666 at 566:9-11, and serves as Chief Executive Officer for many of those companies, A642 at 471:10-17.

Ms. Tilton's expertise was so essential to the Zohars' strategy of investing in distressed companies that she had no right to resign unilaterally as the Zohars'

collateral manager.[12] A632-33 at 431:3-434:3. An investment in Zohar Notes was an investment in Ms. Tilton's judgment, A628 at 415:10-19, and the structure of the Zohars reflects this fact at every step. For example, the Zohars' strategy gave Patriarch and Ms. Tilton broad authority and discretion to control the repayment terms of the loans the Zohars made to the portfolio companies, *see* A630 422:2-21, A677-81 § 2.2, A834 § 7.7(a), and the CMAs make clear that Ms. Tilton was the "key man" to the strategy, *see* A677-81 § 2.2, A957-61 § 2.2, A1436-39 § 2.2, A633 432:2-11.

B. Patriarch Resigns as Collateral Manager

In 2009, MBIA brought suit against Patriarch VIII, contending that it had breached the Zohar I indenture by failing to transfer certain debt securities into structured finance vehicles that issued obligations insured by MBIA.[13] *See* Compl. ¶ 1, *MBIA Ins. Co. v. Patriarch Partners VII*, No. 09-cv-3255, Dkt. No. 1; Op. 9. Two years later, with that litigation still ongoing, Ms. Tilton and Patriarch concluded that it would be in the best interest of all the parties involved if Patriarch stepped down as collateral manager, so that it could focus on creating value at the portfolio companies while a new collateral manager took over the Zohars. A632

[12] By contrast, the CMAs that the Zohars subsequently executed with AMZM provided an express right of resignation. *See* A1752 § 5.3(c), A1783 § 5.3(c), A1815 § 5.3(d).

[13] After four years of litigation, Patriarch prevailed. *See MBIA Ins. Corp. v. Patriarch P'rs VIII, LLC*, 950 F. Supp. 2d 568, 571 (S.D.N.Y. 2013).

431:3-17. But the CMAs did not allow Patriarch or Ms. Tilton to resign unilaterally, and Patriarch's repeated offers to resign as the Zohars' collateral manager were rejected. Op. 9. As such, and despite the ongoing litigation, Ms. Tilton and Patriarch continued their work. Op. 9.

Not until February 2016 did the controlling classes accept Patriarch's resignation, which was to take effect on March 1, 2016. Op. 10. Patriarch had intended to spend the last month of its stewardship transitioning the new collateral manager. A634 at 437:1-2, 439:2-17. But the controlling classes delayed appointment of a new collateral manager, and there was no successor for Patriarch to prepare. *Id.* at 438:21-439:17. Although the controlling classes had accepted Patriarch's resignation and "assured Patriarch that the search for a replacement collateral manager was underway," later responses "took on a sharper tone, suggesting that the Controlling Classes were surprised by Patriarch's 'sudden' decision to resign." Op. 11. Ms. Tilton was perplexed by this shift in tone, but wrote back that Patriarch was prepared to help with the transition, despite Patriarch's concerns regarding the delay in finding a new collateral manager. Op. 11. Despite Patriarch's willingness to assist, however, Patriarch never received any request from the Zohars' controlling classes (or any other representative) for access to or production of books and records prior to its resignation. A535 at 42:19-23, 43:17-24.

C. Patriarch Works to Transition the Zohar Funds

Although Patriarch's resignation was due to take effect on March 1, 2016, the new collateral manager, AMZM, was not appointed until March 3, 2016. Op. 10-12; A1711-32. Nevertheless, Patriarch and Ms. Tilton immediately began working with AMZM to ensure a smooth transition. A638 at 454:10-16. Ms. Tilton knew from experience that effectively transitioning to a new collateral manager was a substantial undertaking, but AMZM had only weeks to orient itself to its new duties before the Zohars' March 2016 reporting deadlines. Op. 12-13; *see* A634 at 439:3-12.

Patriarch went above and beyond its contractual duties in its efforts to aid the transition process: its employees produced books and records for AMZM's review, they taught AMZM's employees how to run the Zohars—including by training AMZM's employees how to conduct the waterfall calculation, which (among other things) ensures that the Zohars' noteholders, equity holders, and service providers are properly paid in the event that a portfolio company is sold. A542-43 at 72:1-73:22, A551 at 107:18-108:2, A630-31 at 423:20-424:23, A638 at 453:10-19, A1835-37, A1838-39, A1887. Patriarch gave AMZM nearly 100,000 pages of documents prior to this litigation, including the portfolio companies' latest financial information, the underlying security documents for all collateral debt obligations listed in the trustee's report, credit documents (along with

associated schedules and amendments), portfolio company litigation documents, and valuation reports issued by the trustee, A527 at 11:23-12:11, A548 at 93:19-94:10, A638 at 453:10-19, A1887, which was more data than Patriarch had received in 2003 and 2004, when MBIA transferred collateral management responsibility to Patriarch for seven other, deeply distressed CDOs, A622 at 388:24-390:11. Patriarch even offered, repeatedly, to provide to AMZM confidential, proprietary documents if AMZM entered into a confidentiality agreement, but AMZM refused. *See, e.g.*, A638 at 453:17-454:9, A1895-96.

Additionally, Ms. Tilton cancelled all business-related travel plans to ensure her availability during the transition process, A634 at 437:8-12, contacted the portfolio companies to encourage them to work cooperatively with the new collateral manager, A642 at 469:17-21, and even offered to personally take AMZM on a tour of the portfolio companies, A639 at 456:21-458:3. After all, Ms. Tilton and her Patriarch enterprise continued to be integrally involved in the Zohar strategy of turning around distressed companies in capacities other than as collateral manager,[14] and they remained committed to the success of the Zohars and the portfolio companies. *See supra* pp. 10-12. Indeed, Ms. Tilton testified that she has invested "approximately $550 million of dollars of [her] personal money"

[14] By contrast, AMZM's role is limited to that of collateral manager—it is not involved with the Zohars or their portfolio companies in other capacities. *See* A526-27 at 8:13-9:5; *see generally* A1733-825.

into the Zohars—through her equity ownership and her purchase of the Zohars' notes, *see* A622 at 391:20-22, A434-35 at 121:18-122:3, A628 at 414:22-24; Op. 1-2—and their portfolio companies, *see* A628 at 414:12-24.

D. The Controlling Classes and AMZM Torpedo the Smooth Transfer of Operations

As a result of Patriarch's efforts, the transition from Patriarch to AMZM began smoothly. Even AMZM's officials conceded that Patriarch's cooperation had been "excellent" and "very forthcoming." *See* A243 at 140:9-141:8, A1838-39. But the controlling classes' delay in selecting AMZM meant that as the Zohars' March reporting deadlines approached, AMZM was nowhere near ready to meet those deadlines. *See* Op. 13. Although Patriarch had tried to resign for nearly five years, Ms. Tilton offered to delay the transfer of the collateral management responsibilities to facilitate the Zohars' compliance with the reporting deadlines and allow AMZM to shadow Patriarch. *Id.* But the Zohars' controlling classes declined that offer. A541 at 65:6-17. They expressed no interest in working with Ms. Tilton to negotiate a smooth transition: on the contrary, they were "willing to be the reason that [the relationship] c[ould not] work." A1827.

Additionally, AMZM's demands began to escalate in late March 2016. *See, e.g.*, A1854-61, A1875-77. Patriarch was gathering and producing thousands of documents to help AMZM and the Zohars, but AMZM was never satisfied: its employees began demanding that Patriarch create new material for them, such as

summaries of existing documents, and peppering Patriarch with questions about how Patriarch managed the Zohars. *See* A1840-42, A1843-46, A1847-53, A1862-74. AMZM's demands took a more threatening turn when its employees started setting unreasonable, arbitrary deadlines for their document demands, *see, e.g.*, A1878, which the CMAs do not even impose in the event of a collateral manager's removal for cause, *see, e.g.*, A693-94 § 5.7—let alone resignation. Nonetheless, Patriarch continued to offer its knowledge and services to help the Zohars. *See, e.g.*, A548 at 94:20-95:4, A639-40 at 458:12-460:14. Even while pushing back against unreasonable demands and deadlines, Patriarch remained committed to ensuring that AMZM had the information necessary to manage the Zohars. *See* A638 at 452:21-454:9, A1879-84, A1885-86.

On April 20, 2016, however, the Zohars (through AMZM) ordered the trustee to withhold from Patriarch accrued collateral management fees that were owed for services Patriarch rendered to the Funds *prior to* Patriarch's resignation as collateral manager. A545 at 82:9-17, A639 at 459:8-21, A1893-94.[15] Two days later, and just seven weeks after AMZM had been appointed, the Zohars commenced this action.

[15] Although the parties dispute the precise amounts being withheld, they agree that Patriarch is owed millions of dollars in collateral management fees.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY FAILING TO HOLD THE FUNDS TO THEIR BURDEN OF PROOF ON ESTABLISHING THEIR OWN PERFORMANCE.

A. Question Presented

Did the Court of Chancery err as a matter of law by failing to hold the Zohars to their burden of proof on an essential element of their breach of contract claims?

Patriarch preserved this argument. *See, e.g.*, A106-08, A112-13, A115, A118, A501-02, A509-10, A545 at 82:9-17, A639 at 459:8-21, A1910, A1942-43, A2023-27 at 56:16-60:17; *see also* Op. 30-31.

B. Standard and Scope of Review

"This Court reviews the trial court's determination of questions of law de novo." *Activision Blizzard, Inc. v. Hayes*, 106 A.3d 1029, 1033 (Del. 2013). Under New York law, the party asserting a breach of contract claim bears the burden of proof as to each element. *Terwilliger v. Terwilliger*, 206 F.3d 240, 245-46 (2d Cir. 2000). And "[t]o prevail on a breach of contract claim under New York law, a plaintiff must prove (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." *Id*. (internal quotation marks omitted).

C. Merits of Argument

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 operative agreements. It is blackletter New York law that one of the "essential elements of a cause of action to recover damages for breach of contract" is the "plaintiff's performance pursuant to the contract." *Carione v. Hickey*, 133 A.D.3d 811, 811 (N.Y. App. Div. 2015) (citation omitted), *appeal denied*, 60 N.E. 3d 1201 (N.Y. 2016); *see also, e.g.*, *Dorfman v. Am. Student Assistance*, 104 A.D.3d 474, 474 (N.Y. App. Div. 2013) (upholding grant of summary judgment in defendants' favor where "[p]laintiff failed to allege, let alone establish, her own performance under the contract," which was "a necessary element of her breach of contract claim"). The Zohars completely failed to make that showing. Indeed, the Court of Chancery affirmatively found there was "no basis in th[e] record to conclude . . . whether the Funds have wrongfully withheld payment from Patriarch for services rendered under the Patriarch CMAs." Op. 31. Because the Zohars' performance is a necessary element of their breach of contract claim, that acknowledgment alone precluded a ruling in the Zohars' favor.

The Court of Chancery waved off this fatal deficiency by saying that the Zohars' performance under the CMAs "was not tried before [it]" as part of the expedited proceedings in this case. *Id.*; *see also* A2109 n.1 (stating that the issue

of Funds' performance "was not tried as part of the expedited trial in this case"). The court noted that Patriarch had "agreed to defer prosecution of its counterclaim[s]," suggesting that this choice allowed the court to leave unexamined the question of whether the Zohars had established the "essential element" or their own performance. That was error.

The Court of Chancery conflated Patriarch's counterclaims with an element that the Zohars had to prove affirmatively. *See* Op. 30-31 & n.107. It was not Patriarch's burden to put forth evidence defeating performance by the Zohars, and Patriarch's agreement to defer prosecution of its counterclaims could not, and did not, excuse the Zohars from proving every element of their claims, including their own performance under the CMAs. *See, e.g.*, *Julie Research Labs. Inc. v. Aul Instrument Inc.*, 57 A.D.2d 814, 814 (N.Y. App. Div. 1977) (distinguishing between plaintiff's contract claim, on which it failed to carry the burden of proof as to performance, and defendant's counterclaim for loss of profits, which involved same issue of plaintiff's performance, but which required defendant to prove additional elements).

The Zohars' failure to satisfy their burden of proof on this "essential element" warrants reversal.[16] *See Roberts v. Karimi*, 251 F.3d 404, 408 (2d Cir.

[16] In fact, not only did the Zohars fail to offer proof of their performance, but the evidence at trial actually established the opposite: the Zohars violated their contractual obligation by directing the Trustee to withhold payment for services

2001) (reversing jury verdict in favor of plaintiff on breach of contract claim under New York law where jury was told that issue of plaintiff's performance was "not for [its] consideration," but where trial court found, in considering a post-trial application for specific performance, that plaintiff had failed to establish its own performance under the contract). At the very least, remand is required for further proceedings to determine whether the Zohars performed adequately under the CMAs. *See, e.g., Krigsfeld v. Feldman*, 115 A.D.3d 712, 712 (N.Y. App. Div. 2014) (reversing trial court's judgment and ordering new trial where "the trial court failed to instruct the jury that one of the essential elements of a cause of action for breach of contract is that the plaintiffs performed under the contract").

(Cont'd from previous page)

Patriarch rendered before the effective date of its resignation as collateral manager. *Supra* pp. 18-19 & n.15; A1893-94; *see also, e.g., Net2Globe Int'l, Inc. v. Time Warner Telecom of N.Y.*, 273 F. Supp. 2d 436, 457 (S.D.N.Y. 2003) (rejecting plaintiff's breach of contract and specific performance claims where plaintiff breached the parties' contract by refusing to pay defendant's invoices). Indeed, the Zohars did so even while Patriarch was continuing to gather documents for production to AMZM. *See* A1879-86.

II. THE COURT OF CHANCERY'S DECISION CONTRAVENES THE EXPRESS LANGUAGE OF THE PARTIES' CONTRACTS AND CANONS OF NEW YORK CONTRACT INTERPRETATION.

A. Question Presented

Did the Court of Chancery err as a matter of law by holding that Patriarch was required under Sections 5.7[17] and 6.3 of the CMAs to produce documents to the Zohars and AMZM after the effective date of Patriarch's resignation, or make those books and records accessible for inspection, including documents that relate to equity upside interests, taxes that Ms. Tilton paid in her personal capacity, and historical debt?

Patriarch preserved its arguments. *See, e.g.*, A91, A105-06, A108, A112-21, A179-84, A199-206, A486-87, A492-96, A515, A1936-42, A1944-45, A1948-59, A2038 at 71:14-17, A2039-44 at 72:18-77:3, A2051 at 84:5-24; *see also* Op. 23-30, 33, 36-42, 48-49.

B. Standard and Scope of Review

This Court reviews questions of contract interpretation de novo. *See GMG Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012). To the extent this Court must review any factual determinations, it reviews

[17] The language that is in Section 5.7 of the Zohar I and Zohar II CMAs appears under Section 5.6 of the Zohar III CMA. For ease of reference, this brief refers to the relevant provisions across the three CMAs as "Section 5.7."

findings of fact for clear error. *Nationwide Emerging Managers, LLC v. Northpoint Hldgs., LLC*, 112 A.3d 878, 889 (Del. 2015).

C. Merits of Argument

The Court of Chancery's interpretations of Sections 5.7 and 6.3 contravene the unambiguous language of those provisions, as well as fundamental canons of New York contract interpretation. Sections 5.7 and 6.3 plainly do not require a collateral manager that has resigned to produce to its successor or the Zohars *any* documents. *See infra* Pts. II.C.1 & II.C.2. Even if they did require some production of documents, they certainly do not require a former collateral manager to produce documents relating to equity upside interests, taxes paid by the owner of the Zohars on non-Zohar Fund tax returns, or historical debt. *See infra* Pt. II.C.3. The Court of Chancery erred by holding otherwise.

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

It is axiomatic under New York law that when language in an agreement "expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *Hirsch v. Qingdao Orien Commercial Equip. Co.*, 2015 WL 1014352, at *12 (E.D.N.Y. Mar. 6, 2015) (citation omitted); *see also, e.g., Uribe v. Merchants Bank of N.Y.*, 91 N.Y.2d 336, 340 (N.Y. 1998)

(explaining that "the inclusion of one is the exclusion of another"). The Court of Chancery contravened that fundamental principle by interpreting Section 5.7 to impose a production obligation on a collateral manager that has resigned.

Section 5.7, entitled "Action Upon Termination," provides in relevant part:

> From 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*, the Collateral Manager shall not be entitled to compensation for services hereunder after the effective date of such termination or removal . . . . Upon such termination or removal, the Collateral Manager shall as soon as practicable: (i) deliver to the [Zohars] or (at the direction of the [Zohars]) any successor collateral manager that is appointed all property and documents of the Trustee, the Company, the Co-Issuer, or the Zohar Subsidiary . . . relating to the Collateral then in the custody of the Collateral Manager . . . .

A693-94 § 5.7, A973 § 5.7, A1453 § 5.6 (emphasis added).

By its plain terms, Section 5.7's document obligations apply only when the collateral manager has been removed *under*, or its duties and obligations terminated "*pursuant to*" the CMA. In turn, Sections 5.1 ("Term"),[18] 5.2

[18] Section 5.1 provides that the CMA "shall continue in force and effect until the first of the following occurs (the 'CMA Termination Date'): (i) the payment in full of the Notes and redemption of the Preference Shares and the termination of the Indenture and the Preference Share Paying Agency Agreement in accordance with their respective terms, (ii) the liquidation of the Collateral and the final distribution of the proceeds in accordance with the Priority of Payments and (iii) the termination of [the CMA] in accordance with this Article V." A692 § 5.1, A971 § 5.1, A1451 § 5.1.

("Automatic Termination"),[19] and 5.3 ("Termination for Cause")[20] set forth the CMA's sole mechanisms for removal of the collateral manager or termination of its obligations. Critically, however, none of those provisions include a mechanism for the collateral manager's resignation. Accordingly, "an irrefutable inference must be drawn," *Hirsch*, 2015 WL 1014352, at *12, that the parties intended Section 5.7 not to apply when a collateral manager resigns.

Although the Zohars argued—and the Court of Chancery agreed—that Patriarch's resignation resulted in a termination of its duties and obligations, neither the Zohars nor the Court of Chancery identified any CMA provision "*pursuant to*" which that resignation purportedly occurred. And for good reason: none exists. *See, e.g.*, *MBIA Ins. Corp. v. Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.*, 2011 WL 1197634, at *13 (S.D.N.Y. Mar. 25, 2011) (rejecting proffered reading of contract that had "no basis in . . . the explicit

[19] Section 5.2 provides that the CMA "shall automatically terminate upon the Company's good-faith determination that the Company, the Co-Issuer, the Zohar Subsidiary, or the pool of Collateral has become required to be registered as an 'investment company' . . . and the Company notifies the Collateral Manager thereof." A692 § 5.2, A971 § 5.2, A1451 § 5.2.

[20] Section 5.3 provides that the "Collateral Manager may be removed for Cause upon 10 Business Days' prior written notice by the Company to the Collateral Manager (which notice may he waived by the Collateral Manager) at the direction of the Controlling Party." A692 § 5.3, A971 § 5.3, A1452-53 § 5.3; *see also* A674-75 (defining "Cause"), A954-55 (same), A1433-34 (same).

termination provisions").[21] The CMAs simply do not provide a mechanism for the collateral manager's resignation[22]—which must instead be effected by agreement between the collateral manager and the controlling classes—or impose any obligations on the collateral manager in the event of a resignation.

Not only does this conclusion follow from the contract's unambiguous language, it also makes sense in light of the parties' intent and the commercial realities of the Zohars' investment structure. *See, e.g., Cole v. Macklowe*, 953 N.Y.S.2d 21, 23 (N.Y. App. Div. 2012) (contract should be construed in a commercially reasonable manner). Patriarch's role as an active manager of the

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[21] To the extent the Court relied upon the CMA's "Appointment of Successor" provision in concluding that Patriarch's obligations terminated upon resignation, *see* Op. 24 & n.93 (citing Zohar I CMA § 5.5(b); Zohar II CMA § 5.5(b); Zohar III CMA § 5.4(a)), that reliance was misplaced. The "Appointment of Successor" provision in the CMAs for Zohars I and II governs the appointment of a successor following *removal* of the collateral manager (*i.e.*, termination for cause under Section 5.3); it does not apply to a collateral manager's consensual *resignation* pursuant to an agreement of the parties that is extrinsic to the terms of the CMAs. *See* A692-93 § 5.5 (Zohar I CMA), A972 § 5.5 (Zohar II CMA). And while the "Appointment of Successor" provision in the Zohar III CMA does nominally refer to a potential "resignation" of the collateral manager, neither that provision nor any other provision of the Zohar III CMA provides any mechanism for the collateral manager to resign. *See* A1452-53 § 5.4 (Zohar III CMA).

[22] By contrast, the Indentures expressly include mechanisms for the resignation of various actors. *See, e.g.*, A821-22 § 6.4 ("Any Authenticating Agent may at any time resign by giving 30 days' prior written notice of resignation to the Trustee and the Issuer."); *see also, e.g.*, A824-25 § 6.10 (providing mechanism for Trustee's resignation). And the CMAs into which AMZM entered expressly permit AMZM to resign. *See, e.g.*, A1752 § 5.3(c) ("The Collateral Manager may resign for any reason upon 10 days' prior written notice to the Company (or such shorter notice as is acceptable to the Company) and the Trustee.").

Zohars—under the hands-on stewardship of the Zohars' ultimate owner Ms. Tilton, *see supra* pp. 10-13—was the linchpin of the parties' deal. The absence of any resignation provision in the CMAs ensured that Patriarch would remain in place as the collateral manager, except in the event that Patriarch was removed or its obligations terminated pursuant to Sections 5.1, 5.2 or 5.3.

The only other alternative was for the parties to expressly agree to permit a resignation—upon terms negotiated between them at the time of resignation. Before agreeing to Patriarch's resignation, the Zohars surely could have negotiated for post-resignation document production by Patriarch similar to what Section 5.7 requires in other circumstances—though Patriarch would have insisted upon confidentiality restrictions to protect, among other things, the portfolio companies' confidential information. *See, e.g.*, A437 at 130:12-22, A626 at 406:3-8, A638 at 453:21-454:9. But the Zohars did not do so, and the Court of Chancery should not have rewritten the CMAs to impose such obligations on Patriarch, with production deadlines that the CMAs do not even impose upon a collateral manager that has been removed for cause. *See* A693-94 § 5.7, A973 § 5.7, A1453 § 5.6.[23]

[23] In fact, even the Zohars' own expert conceded that, in his experience, the transition from one collateral manager to another "took place over *many months*." A606 327:4-10 (emphasis added). Yet the Zohars filed suit in this action a mere seven weeks after AMZM was appointed successor collateral manager (and only two days after Patriarch had indicated that it was still in the process of responding to its various information requests). *See supra* pp. 18-19.

Because Section 5.7 provides the sole basis for ordering Patriarch's production of documents to the Zohars and AMZM, *see infra* pp. 34-35, and because the Court of Chancery's interpretation contravenes the plain language of that provision, this Court should reverse the court's decision and vacate the Amended Order in its entirety.

2. Section 6.3 Does Not Require Patriarch to Provide Access to Its Books and Records.

Just as with its interpretation of Section 5.7, the Court of Chancery erred by concluding that Section 6.3 applied to Patriarch upon resignation. Section 6.3 governs only current collateral managers and former collateral managers whose obligations have terminated "in accordance with [the CMA]." A696 § 6.3, A975-76 § 6.3, A1456-57 § 6.3. Pursuant to Section 6.3, the Zohars had access to Patriarch's books and records while Patriarch was in place as collateral manager—the Zohars could have (and should have) utilized that access to prepare for the transition of collateral management responsibilities to AMZM. But the Zohars declined to do so, and once Patriarch resigned—which did not occur "in accordance" with any CMA provision—Patriarch plainly did not fall within the scope of Section 6.3. *See supra* Pt. II.C.1. As with Section 5.7, this Court should decline to do now what the Zohars should have done prior to Patriarch's resignation or could have negotiated for in the course of considering Patriarch's resignation.

Even if Patriarch's resignation had terminated its obligations "in accordance" with the CMA, Patriarch still would not be required under Section 6.3 to make its books and records "accessible for inspection" because that requirement applies only to current collateral managers, not former ones. Under New York law, contracts are not to be construed "in a way that frustrates the purpose of that contract or that makes any provision of the contract meaningless." *Rex Med. L.P. v. Angiotech Pharm. (US), Inc.*, 754 F. Supp. 2d 616, 624 (S.D.N.Y. 2010). Additionally, it is a "well settled principle" of interpretation that "a contract should not be interpreted to produce an absurd result, [or] one that is commercially unreasonable." *Cole*, 953 N.Y.S.2d at 23. The Court of Chancery's interpretation violated both maxims.

Section 6.3 of the CMAs provides in relevant part:

> The Collateral Manager . . . shall maintain appropriate books of account and records relating to services performed hereunder . . . and such books of account and records shall be accessible for inspection by a representative of [inter alia, the Zohar Funds] . . . the Trustee, . . . and the [noteholders] . . . upon not less than three Business Days' prior written notice . . . . Upon the termination of its obligations hereunder in accordance with this Agreement and the Indenture, the Collateral Manager agrees to either (i) maintain . . . such books and records as provided above for a period of three years . . . from such termination or (ii) deliver. . . all such books and records (or copies thereof) to the Trustee promptly following such termination.

A696 § 6.3, A975-76 § 6.3, A1456-57 § 6.3. Section 6.3 thus plainly differentiates between the obligations of a *current* collateral manager (which is

required to "maintain appropriate books . . . and records" and to make those documents "accessible for inspection by" the Zohars, among other entities) and a *former* one (which is only required to "maintain" books and records for three years following termination of its obligations, or to deliver those records to the Trustee—*not* to the Zohars themselves).

Indeed, the Court of Chancery appears to have recognized that Section 6.3, on its own, would not require a former collateral manager to make books and records accessible for inspection. *See* Op. 27 ("Patriarch's interpretation of Section 6.3 might carry the day if the provision was construed [on its own]."). But the Court of Chancery erroneously concluded that Section 5.6's survival provision imposed upon Patriarch a continuing obligation to satisfy *all* the duties imposed by Section 6.3—both the duties of a former collateral manager *and* those of a current collateral manager. *See* Op. 27-28. That error requires reversal, as it frustrates the carefully delineated distinctions embodied in Section 6.3 and produces an absurd result.

Section 5.6 provides that, "[u]pon any termination or assignment of this Agreement," the provisions of various specified sections of the CMA, including Sections 5.7 and 6.3, "shall survive such termination or assignment and remain

operative and in full force and effect." A693 § 5.6, A973 § 5.6, A1453 § 5.5.[24] Section 5.6 thus makes clear that a former collateral manager remains bound by a narrow, discrete set of obligations, which include the pared-down duties that arise under Section 6.3 "[u]pon the termination of" the collateral manager's obligations. It does not extend indefinitely the separate set of duties that apply to *current* collateral managers.

To hold otherwise, as the Court of Chancery did here, nullifies Section 6.3's express distinction between current and former collateral managers. Under the court's reading, the narrower set of duties that Section 6.3 imposes upon a former collateral manager would be swallowed entirely by the broad duties of the current collateral manager. *See Rex Med.*, 754 F. Supp. 2d at 624; *see also Pearce, Urstadt, Mayer & Greer Realty Corp. v. Atrium Dev. Assocs.*, 77 N.Y.2d 490, 497 (N.Y. 1991) (courts "cannot and should not accept an interpretation that . . . renders certain terms inoperable") (internal quotation marks omitted). For example, the Court of Chancery's interpretation would render void the requirement that a former collateral manager maintain books and records for a period of three years following termination, instead subjecting the former collateral manager to an ongoing obligation to maintain those documents with no apparent end point. The

[24] The language that is in Section 5.6 of the Zohar I and Zohar II CMAs appears under "Section 5.5" of the Zohar III CMA. For ease of reference, this brief refers to the relevant provisions across the three CMAs as "Section 5.6."

consequence of the court's interpretation is that a former collateral manager retains, in perpetuity, virtually all of the same books-and-records obligations as its successor, and that result should not be allowed to stand. *See Cole*, 953 N.Y.S.2d at 23.

Finally, Section 6.3 provides no basis for the Court of Chancery's Amended Order, which requires *production* of books and records to the Zohars and AMZM. The relevant language in Section 6.3 requires only that a current collateral manager make certain books and records "*accessible for inspection*," A696 § 6.3, A975-76 § 6.3, A1456-57 § 6.3 (emphasis added); it does not require the collateral manager to affirmatively "provide . . . [that] information," *Patriarch P'rs XIV, LLC v. MBIA Ins. Corp.*, 2011 WL 2693711, at *4 (N.Y. Sup. Ct. June 27, 2011) (contrasting Section 6.3's language with other provisions in the CMA). Moreover, there is no right to inspection unless the Zohars have provided at least "three Business Days' prior written notice," *see* A696 § 6.3, A698 § 7.2 (outlining what is required for notice to be effective), and the Zohars failed to offer any evidence that they provided the requisite notice here. Accordingly, even if Section 6.3 applied to Patriarch (it does not), Patriarch could only be required to provide access to

documents—not to produce those documents[25]—and only after receiving written notice, which there is no evidence that Patriarch received here.

3. Neither Section 5.7 Nor Section 6.3 Requires Patriarch to Produce or Provide Access to Documents Relating to Historical Debt, Equity Upside Interests, or the Zohars' Non-Existent Tax Liability.

Even if Sections 5.7 and 6.3 required Patriarch, upon resignation, to produce or make "accessible" to the Zohars and AMZM any documents (which they do not), Patriarch still would not be required to produce documents related to: (i) contingent interests in any proceeds derived from potential future sales of equity interests in a portfolio company allocated to the Zohars by Ms. Tilton, whose affiliates retain the associated rights of ownership, including rights of control, and bear the liabilities associated with that equity position ("equity upside interest documents"); (ii) taxes Ms. Tilton paid in her personal capacity as the ultimate equity owner of both the portfolio companies and the Funds themselves ("Schedules K-1") or (iii) assets no longer in the Zohars' portfolios ("historical debt documents").

[25] The Court of Chancery clearly understood Section 6.3's limited scope. *See, e.g.*, Op. 29 n.102 ("Section 6.3 requires Patriarch to make the books of account and records related to its collateral management services and the Collateral *accessible for inspection* . . . ." (emphasis added)). To the extent the court's Memorandum Opinion or Amended Order and Judgment might be read to suggest otherwise, *see id.* at 29 ("Either provision of the Patriarch CMAs provides a separate, independent basis to require Patriarch to *produce* documents." (emphasis added)), this Court should clarify that Patriarch has no obligation under Section 6.3 to produce books and records to the Zohars or AMZM.

In holding that Patriarch was required to produce sweeping categories of documents that purportedly relate to "Collateral," as that term is defined in the Indentures,[26] the Court of Chancery ignored explicit limitations that the CMAs place on the types of documents a collateral manager is obligated to produce or make accessible, and also failed to "giv[e] a practical interpretation to the language employed so that the parties' reasonable expectations are realized." *Gutierrez v. State*, 58 A.D.3d 805, 807 (N.Y. App. Div. 2009) (citation omitted); *see also* Indenture § 1.1 (terms have the meaning set forth "[e]xcept as otherwise specified herein . . . or as the context may otherwise require"). Patriarch's document production obligations (if any) must be interpreted according to the limitations set forth in Sections 5.7 and 6.3 of the CMAs. As set forth below, those provisions do not include the following types of documents:

Equity Upside Interest Documents. The Court of Chancery erred by holding that Sections 5.7 and 6.3 encompass documents related to "equity upside interests." Although the court declined to decide the issue of whether equity

[26] The Indenture—each Zohar Fund Indenture is materially the same unless noted—defines "Collateral" as "[a]ll Money, instruments, accounts, payment intangibles, general intangibles, letter-of-credit rights, chattel paper, electronic chattel paper, deposit accounts, investment property and other property rights subject or intended to be subject to the lien of this Indenture for the benefit of the Secured Parties as of any particular time." Indenture § 1.1. The Patriarch CMAs incorporate the Indentures' definition of Collateral. *See* Op. 32; A674 § 1.1 ("Capitalized terms used herein that are not otherwise defined herein shall have the respective meanings ascribed thereto in the Indenture . . . ."), A954 § 1.1 (same), A1433 § 1.1 (same).

upside interests constitute collateral, it held that, "even if the equity upside interests are not currently Collateral, documents reflecting such interests broadly 'relate to Collateral' in the sense that they relate to rights in equity interests that the [Zohars] may draw upon . . . in the future." Op. 41. That was error. Documents related to equity upside interests, which Ms. Tilton gifted to the Zohars, do not relate to "services performed" by Patriarch in its capacity as collateral manager. *See* A626 at 404:9-20 (explaining that equity interests were acquired not in Patriarch's capacity as collateral manager but as Patriarch's role as a "vertically integrated" enterprise); *see also supra* pp. 10-11. Accordingly, the Zohars have no right to those documents under Section 6.3. Further, the only documents that arguably are "property and documents" of the Zohars within the meaning of Section 5.7 are those that concern the Zohars' limited rights in the equity upside interests—not all documents concerning the broader equity interests in the underlying portfolio companies as to which Ms. Tilton and her affiliates retain the associated rights of ownership and bear the liabilities. *See* A626 at 404:14-405:16. The Court of Chancery therefore erred by issuing a sweeping order for production of any and all documents relating to equity upside interests.

Schedules K-1. The Court should not have ordered production of all tax documents "issued to or in the name of the Funds or prepared on behalf of the Funds." Order ¶ 1(k). The tax documents for the period in question—from Zohar

I's inception until Patriarch's resignation on March 3, 2016—relate to taxes that Ms. Tilton paid in her personal capacity as the ultimate owner of both the portfolio companies and the Zohars themselves. A434-35 at 121:18-122:3, A645 at 482:4-23, A654 at 519:13-21. At that time, the Zohars were not taxpayers—they were disregarded pass-through entities. *See* A607 at 331:23-24, A626 at 405:7-10.

Indeed, the Zohars have never paid any of the taxes attributable to the income of the portfolio companies or income of the Zohars themselves. *See* A645 at 482:4-23. Ms. Tilton is the ultimate owner of this equity, *see* A626 at 404:9-405:16, and she paid the taxes, as only an owner would. *See* A626 at 405:7-10. It was error for the Court of Chancery to find that documents reflecting taxes paid by Ms. Tilton in a capacity other than collateral manager—even if issued in the name of the pass-through Zohars—are "property and documents of" the Zohars "relating to collateral." They are not. The court therefore erred by holding that Patriarch was required to produce those documents.

Historical Debt Documents. The Court of Chancery's interpretation of Sections 5.7 and 6.3 as encompassing historical debt documents impermissibly frustrates the parties' reasonable expectations. *See Gutierrez*, 58 A.D.3d at 807. Sections 5.7 and 6.3 were intended to provide the Zohars and their incoming collateral manager with information necessary to manage the Zohars' current collateral. *See* A696 §§ 5.7 & 6.3, A975-76 §§ 5.7 & 6.3, A1456-57 §§ 5.7 & 6.3

A622 at 388:12-391:11. Indeed, AMZM co-founder and co-CEO Bryan Marsal, who is in charge of the AMZM team that serves as collateral manager of the Zohars, acknowledged that all that is necessary to manage the funds is a list of the Zohars' *current* collateral, underlying transactional documents, and up-to-date financial records of the portfolio companies. *See* A613 at 354:23-355:13; *see also supra* p. 16. Purely historical information—including information related to collateral no longer in the Zohars' portfolios—is not necessary for this purpose, and thus falls outside the intended scope of Sections 5.7 and 6.3.

* * *

At best, the term "Collateral," as used within Sections 5.7 and 6.3, is ambiguous, in which case this Court should remand for the Court of Chancery to determine the contracting parties' intent. *See, e.g.*, *Madison Ave. Leasehold, LLC v. Madison Bentley Assocs. LLC*, 30 A.D.3d 1, 8 (N.Y. App. Div. 2006), *aff'd*, 861 N.E.2d 69 (N.Y. 2006).

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

A. Question Presented

Did the Court of Chancery err by holding that Patriarch's purported breach was material where Patriarch had, among other things, produced nearly 100,000 pages of documents prior to this action?

Patriarch preserved this question for appeal. *See* A497-500, A1959-61, A2027-31 at 60:18-64:22; *see also* Op. 31-32.

B. Scope of Review

"Although a trial court's decision to grant or refuse injunctive relief is generally reviewed for an abuse of discretion, this Court does 'not defer to the trial court on embedded legal conclusions and reviews them de novo.'" *Hill Int'l, Inc. v. Opportunity P'rs L.P.*, 119 A.3d 30, 37 (Del. 2015) (citation omitted).

C. Merits of Argument

The Court of Chancery erred by awarding specific performance despite the Zohars' failure to prove that Patriarch materially breached its purported production obligations. *See, e.g., Concert Radio, Inc. v. GAF Corp.*, 73 N.Y.2d 766, 768 (N.Y. 1988). Courts in New York deny specific performance where it is unnecessary to effectuate the parties' "primary intent" in entering into the contract, *i.e.*, where the breach is not material. *See id.*; *see also Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 186 (2d Cir. 2007). "[F]or a breach of

contract to be material, it must go to the root of the agreement between the parties." *Frank Felix Assocs., Ltd. v. Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997) (internal quotation marks and citation omitted).

Even if the Zohars had proven that Patriarch failed to provide some required documents, that failure would not be a material breach. The CMAs' primary purpose is to establish the services that the collateral manager must perform such that the noteholders can receive any returns that are due to them. *See, e.g.*, A677-81 § 2.2, A957-61 § 2.2, A1436-39 § 2.2; *see also* A536 at 48:3-15, A592 at 271:20-272:1, A628 at 415:15-19. Patriarch performed this role for more than twelve years: among other things, it selected the Collateral to be "acquired, originated, restructured, exchanged, held, or disposed of," A677 § 2.2(a), A957 § 2.2(a), A1436-37 § 2.2(a), and it monitored the performance of the Collateral to ensure that the noteholders were paid, A678-79 § 2.2(f), A958 § 2.2(f), A1438 § 2.2(f). To say that the narrow document production provisions at issue in this action "go to the root of the agreement between the parties," *Septembertide Publ'g, B.V.*, 884 F.2d at 678, is to confuse the CMAs' roots with one of their many branches. *See Donovan v. Ficus Invs., Inc.*, 2008 WL 4073639, at *1, *9 (N.Y. Sup. Ct. Aug. 1, 2008) (rejecting plaintiff's argument that defendant's "refusal to allow [him] access [to books and records] constituted a material breach"). Indeed, if production of documents—many of which have long been accessible to the

Zohars or are irrelevant to the noteholders' ultimate return—is a material term of this agreement, then a court would be hard-pressed to find any provision that was immaterial. As such, the award of specific performance must be reversed.

The Court of Chancery also erred by treating the question of materiality as purely legal in nature. Under New York law, a material breach cannot be demonstrated through "[e]vidence of slight, casual and/or technical breaches." *See Huntingdon Vill. Dental, PC v. Rathbauer*, 2013 WL 238493, at *4 (N.Y. Sup. Ct. Jan. 18, 2013); *cf. Process Am., Inc. v. Cynergy Hldgs., LLC*, 839 F.3d 125, 136 (2d Cir. 2016) (noting that courts must assess the "absolute and relative magnitude of default" in assessing whether a breach was material). Accordingly, the court was required to make findings of fact as to whether Patriarch's failure to produce specific documents was material. In other words, the Court of Chancery should have determined whether the delta between Patriarch's productions (which were still ongoing at the time this action commenced) and the CMAs' obligations constituted a "material" breach of the CMAs—and it should have done so for each category of documents ordered to be produced. But the Court did not, instead holding as a legal matter that the CMAs' production obligation in the abstract was a material term of the CMAs. Op. 31-32; *see also* Order at 4 (ordering production of categories of documents "[t]o the extent they ha[d] not already been produced or otherwise provided to the Funds," without considering the extent of Patriarch's

production as to each of those categories). Even worse, the Court of Chancery so held after repeatedly acknowledging the substantial production Patriarch undertook prior to the litigation, *see* Op. 15-16, 36-37, 37 n.120; A539 at 57:13-59:23, A542 at 69:21-70:16, A638 at 453:10-16, A639 at 459:4-7, which itself suggests that Patriarch's purported breaches were decidedly immaterial. That error at least requires that the order of specific performance be vacated.[27]

Patriarch therefore respectfully requests that this Court reverse the Court of Chancery's order of specific performance or, in the alternative, vacate that order and remand for the Court of Chancery to determine whether any proven deficiency "substantially defeated" the primary purpose of the CMAs.

[27] In addition, although the Court could authorize specific performance only if the Zohars proved that they lacked an "adequate remedy at law," *Ross Univ. Sch. Of Medicine, Ltd. v. Brooklyn-Queens Health Care, Inc.*, 2013 WL 1334271, at *19-20 (E.D.N.Y. Mar. 28, 2013), the Zohars proved no such thing. The court below thus improperly ordered production of these documents. *See 11 Duke St., Ltd. v. Ryman*, 280 A.D.2d 429 (N.Y. App. Div. 2001).

CONCLUSION

For the foregoing reasons, Patriarch respectfully requests that this Court reverse the Court of Chancery's Memorandum Opinion and vacate the Amended Order and Judgment, 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 & Judgment and the Memorandum Opinion and remand for further proceedings.

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/s/ Gregory V. Varallo

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