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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, Defendants-Below, Appellants v. ZOHAR CDO 2003-1, LLC; ZOHAR CDO 2003-1, LTD.; ZOHAR II 2005-I, LLC; ZOHAR II 2005-1 LTD.; ZOHAR III, LLC; and ZOHAR III, LTD., Plaintiffs-Below, Appellees.	No. 549, 2016 Court Below: Court of Chancery of the State of Delaware C.A. No. 12247-VCS

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is a contract case arising out of a breach of the obligation of the Patriarch entities (collectively, "Patriarch") to provide documents to a successor collateral manager of the Zohar Funds after Patriarch's duties as collateral manager ended. The three collateral management agreements ("CMAs") at issue each expressly contemplate that Patriarch might cease to serve as collateral manager for the Zohar Funds, and expressly provide that if the obligations and collateral management duties of Patriarch were to terminate, Patriarch would provide the incoming collateral manager with the Zohar Funds' books and records relating to the Collateral of the Funds and Patriarch's collateral management services. As the Court of Chancery properly found, the obligations are clear from the plain language of the CMAs and "revealed by a relatively straightforward exercise of contract construction that is not confounded by disputed facts." Memorandum Opinion ("Op.") at 20.

The Zohar Funds initiated this action after Patriarch admittedly refused to produce known categories of documents to which the Zohar Funds are entitled. The Zohar Funds' new manager, Alvarez & Marsal Zohar Management LLC ("AMZM"), needs the information to perform its duties as Collateral Manager. Accordingly, the Zohar Funds sought an order requiring Patriarch to specifically perform its contractual obligations. Because the Zohar II Fund was

facing, among other things, the default of $750 million in senior notes becoming due on January 20, 2017, Plaintiffs moved to expedite proceedings to obtain prompt relief.

Patriarch responded by moving to dismiss or stay the action in favor of an interpleader action filed by a non-party in New York. At the time, the New York action involved different parties, issues, and relief than this action. The Court of Chancery denied Patriarch's motion in large part and granted the Zohar Funds' motion for expedition, recognizing the Zohar Funds would need time to obtain the documents, digest the information produced, and implement appropriate steps to avert default. B38-50; B54. *See also* Op. 19 n.80. Following that decision, Patriarch answered the complaint and asserted counterclaims. Patriarch did not seek to expedite the adjudication of its counterclaims, raise them at trial, or otherwise pursue them in the proceedings below.

Throughout this case, Patriarch has asserted a series of shifting defenses. Patriarch first claimed that it had delivered all of the books and records of the Zohar Funds it was contractually required to provide (B677) and had "not withheld any documents due to confidentiality or for any other reason" (B712). When this was revealed not to be correct, Patriarch took the position that it would produce additional materials if the Zohar Funds entered into a confidentiality agreement that would restrict their use and impair the rights of the Zohar Funds

(A1887-88). Then, on the eve of trial, Patriarch claimed that it has no obligation to produce any books and records to Plaintiffs because Patriarch resigned instead of being terminated (A164-185). Their last defense is troubling, as Lynn Tilton, the principal of Patriarch, has signed and authorized multiple letters (including letters from her trial counsel), submitted a sworn affidavit, provided testimony, and filed briefs in the Court of Chancery acknowledging precisely the opposite—that the CMAs impose an obligation on Patriarch to produce the books and records of the Zohar Funds to the Zohar Funds and AMZM. *See infra* p. 30. *See also* Op. 20 n.82.

The parties filed cross-motions for summary judgment on the Zohar Funds' entitlement to books and records under the CMAs. The Court deferred ruling on those motions and conducted a two-day trial to determine whether, and to what extent, Patriarch had documents in its possession relating to the Collateral that it had not provided to Plaintiffs. Following post-trial briefing and argument, the Court of Chancery issued the Memorandum Opinion, finding as a matter of fact that Patriarch had failed to produce numerous categories of documents relating to the Collateral, and finding as a matter of law that the "straightforward" provisions of the CMAs required Patriarch to turn over to Plaintiffs all such documents. Accordingly, the Court held that Patriarch had breached the provisions of the CMAs and ordered the production of twelve categories of documents.

On November 3, 2016, the trial court entered an Amended Order and Judgment which it certified as a partial final judgment under Court of Chancery Rule 54(b). Under the Amended Order, Patriarch was ordered to commence a rolling production of the categories of documents identified in the Opinion and Amended Order, and former Vice Chancellor Noble was selected to serve as a Special Master to assist with the identification and production of documents and to resolve certain categories of potential disputes.

After the Amended Order was entered, Patriarch sought to stay its effect, making two such motions in the Court of Chancery and another such motion in this Court. All three motions to stay were denied.

Since production was ordered, Patriarch has produced over 370,000 additional pages of documents (B373) but has still not fulfilled its contractual obligations – indeed, the Report issued by Special Master Noble expressly finds that Patriarch's efforts to comply with the Amended Order "cannot be classified as reasonable." B385.[1]

[1] Because the implementation of the Amended Order is ongoing, and the Special Master's Report was issued after the initiation of this appeal, the Report was not transmitted to this Court with the remainder of the record. On January 23, 2017, Appellees filed a motion requesting this Court to take judicial notice of the Report on the grounds that the volume of production is not in dispute, Patriarch has expressly advised the trial court that it takes no exception to the Report, and Patriarch has put the volume at issue in this appeal.

SUMMARY OF ARGUMENT

1. Denied. At the time Patriarch breached the CMAs, the Zohar Funds were in full compliance with their obligations under the CMAs. By materially breaching the CMAs on April 1, 2016, Patriarch excused any obligation of the Zohar Funds to perform further under the CMAs, including any obligation to make payment to Patriarch on April 20, 2016. In reviewing the disputed issues of fact and law, the Court of Chancery properly determined that the Zohar Funds had satisfied their burden of proving that Patriarch breached its contractual obligations.

2. Denied. The Court of Chancery correctly determined that the plain language of Section 5.7 of the CMAs required Patriarch to turn over all property and documents of the Zohar Funds relating to the Collateral of the Zohar Funds, and correctly concluded that the plain language of Section 6.3 of the CMAs required Patriarch to make accessible for inspection all books and records of the Zohar Funds relating to the Collateral and Patriarch's collateral management services. Furthermore, the Court of Chancery correctly determined the scope of Patriarch's document production obligations, as the CMAs define the term "Collateral" broadly and further require Patriarch to produce all books and records "relating to Collateral."

3. Denied. The Court of Chancery correctly determined that Patriarch's failure to turn over the documents as required under the CMAs was a

material breach of the CMAs. As the Court of Chancery recognized, the primary purpose of the CMAs is to facilitate management of the substantial and diverse Collateral held by the Zohar Funds. The turnover provisions provide the means by which those collateral management services will be transitioned to a successor collateral manager. By failing to turn over the documents permitting the continuation of collateral management obligations once it resigned, Patriarch's breach goes directly "to the root of the agreement" and is therefore material. And, the Court of Chancery made specific findings about the categories of documents that the trial testimony revealed to be in the possession of Patriarch, yet not produced, constituting a material breach of the CMAs.

STATEMENT OF FACTS

A. The Zohar Funds and Patriarch.

The Zohar Funds are special purpose companies that issued and sold securities to investors in the form of notes called collateralized loan obligations ("CLOs"). Op. 4. Using the proceeds from the sale of notes, the funds purchased a pool of assets that were expected to generate income, and serve as collateral, for the funds. *Id*. As interest and principal were paid on the loans that served as collateral, the monies would then be used to pay interest and principal to the Zohar Funds' investors. A87.

Zohar I generated approximately $530 million from the sale of notes with its launch in November 2003; Zohar II generated approximately $1 billion upon its launch in January 2005; and Zohar generated another $1 billion from the sale of notes in April 2007. Op. 6-8. Thus, the Funds collectively raised approximately $2.5 billion.

Under the terms of the CMAs, Patriarch was paid annual fees equal to 2% of the Zohar Funds' assets, or nearly $50 million per year. A686-87 §§ 4.1(b)-(c); A966-67 §§ 4.1(b)-(c); A1445-46 § 4.1(b)-(c); A541 at 65:18-66:09. Since Patriarch served as collateral manager of each of the Funds for at least 10 years, Patriarch was paid hundreds of millions of dollars for its services as collateral manager for the Zohar Funds.

The three Zohar Funds are each comprised of two entities: a Delaware limited liability company (Zohar CDO 2003-1, LLC; Zohar II 2005-1, LLC; and Zohar III, LLC) and a Cayman Islands exempted company (Zohar CDO 2003-1, Ltd.; Zohar II 2005-1, Ltd.; and Zohar III, Ltd.). A505-06. The Zohar Funds have no employees of their own, so to pursue their investment strategy, each Fund retained a Patriarch entity, pursuant to the CMAs, to serve as its agent and to manage the business of the fund.[2] The CMAs set forth the powers, duties and responsibilities of Patriarch as collateral manager, and provided it with authority to act on behalf of the Zohar Funds, subject to limits set forth in the CMAs and the Indentures.

In addition to acting on behalf of the Zohar Funds, Patriarch provided investment advisory services to the Zohar Funds. For example, the Collateral Manager was tasked with: "determin[ing] . . . the specific Collateral to be acquired, originated, restructured, exchanged, held or disposed of by the [Zohar Funds]"; "monitor[ing] the Collateral on an ongoing basis"; preparing certain information, reports and schedules for the Zohar Funds and the Collateral Administrator; and

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[2] It is undisputed that Zohar I and Zohar II enlisted the service of MBIA, Inc. as a "credit enhancer" which guaranteed the notes issued by the Zohar Funds to their investors. *See* Op. at 5, 8-10 & n.31; OB at 2 n.4. The credit enhancers were able, under the relevant Indentures, to determine who served as collateral managers for the Funds. OB at 2 & n.4; *see* Op. at 10 n.31.

determining when certain Collateral Investments become Defaulted Investments. *E.g.*, A1436 § 2.2(a) & A1438 § 2.2(f).

As trial confirmed, the principal of Patriarch, Lynn Tilton, has played myriad and often conflicting roles in respect of the Zohar Funds. Tilton, either directly or through the Patriarch entity that she owns, has been the collateral manager of the Zohar Funds, the preference shareholder of the Zohar Funds, a noteholder of the funds, the sole board member of many of the Zohar Funds' borrowers (sometimes referred to as the "Portfolio Companies"), a creditor of several of the portfolio companies, and the manager of the same portfolio companies. Op. 1-2; A640 at 463; A642 at 471. Tilton claims to own debt and equity of many of the portfolio companies in which the Zohar Funds also have an interest. *See, e.g.*, A628 at 413-14; A640 at 463; A644 at 479-83; A646 at 487-88; A648 at 492-95. Thus, when negotiating a workout of a loan, or a similar transaction, Tilton controlled the creditor (as collateral manager for the Zohar Funds) and the debtor (as board member or manager of the portfolio companies), and claimed to be the owner of both the creditor (through preference shares of the Zohar Funds) and to have interests in the debtors (through claimed ownership of loans to and equity in the portfolio companies). *See, e.g.*, A630 at 422 & A665 at 560 (creditor); A640 at 463 (creditor/manager/CEO); A663 at 555 (preference shareholder); A628 at 414-15 (lender/equity). This dynamic—with Tilton standing

on all sides of various transactions—is of course rife with self-dealing. Tilton attempted to explain this rampant self-dealing as somehow acceptable because she purported to use her "business judgment" as the controlling person of both the creditor and the debtor to determine whether, for example, to "waive, defer, amend, [or] forgive" interest payments or extend loan maturity dates. A630 at 422.

The Patriarch entities served as collateral manager for each of the Zohar Funds from the inception of each of the funds. As noted, Patriarch was paid hundreds of millions of dollars as collateral manager. *Supra* p. 7. In the wake of the Zohar I Fund's default on several notes and a souring relationship with the controlling classes of the Zohar Funds, Patriarch resigned as collateral manager on February 5, 2016, effective March 1, 2016. Op. 8-10.

B. The Disputed Provisions of the CMAs.

The CMAs contain two provisions primarily at issue here. The first provision, entitled "Action Upon Termination," appears as Section 5.7 of the Zohar I and II CMAs, and Section 5.6 of the Zohar III CMA.[3] It provides, in pertinent part:

[3] For ease of reference, Appellees refer to the "Action Upon Termination" provisions in the CMAs as Section 5.7 of the CMAs, in accordance with the section numbering in the Zohar I and II CMAs.

> 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 as soon as practicable (i) deliver to the [Zohar Funds] or (at the direction of the [Zohar Funds]) any successor collateral manager that is appointed all property and documents of the Trustee, the [Zohar Funds,] or the Zohar Subsidiary, as the case may be, relating to the Collateral then in the custody of the Collateral Manager, including without limitation, files in electronic form . . . .

A693-94 § 5.7, A973 § 5.7, A1453 § 5.6.

The second provision, entitled "Records," appears as Section 6.3 of all three CMAs. It provides, in pertinent part:

> The Collateral Manager, with the assistance of the Collateral Administrator, shall maintain appropriate books of account and records relating to services performed hereunder and relating to the Collateral including invoices for professional fees, and such books of account and records shall be accessible for inspection by a representative of the [Zohar Funds] . . . at a mutually agreed time during normal business hours and 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 or cause the Collateral Administrator to maintain, such books and records as provided above for a period of three years (or such longer period required by applicable law) from such termination or (ii) deliver, or cause the Collateral Administrator to 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.

C. The Controlling Classes Appoint AMZM as the New Collateral Manager and Patriarch Delivers Some, But Not All, Of The Required Property, Documents, Books, and Records To AMZM.

Effective March 3, 2016, the Zohar Funds engaged AMZM as their new collateral manager. AMZM's hope, upon its engagement as Collateral Manager of the Zohar Funds, was to work "cooperatively" and "smoothly" with Patriarch to transition collateral management responsibilities. A616 at 367 (Marsal). AMZM recognized that its interests—maximizing recovery value for the Funds on behalf of noteholders—should be aligned with those of Patriarch, and it intended to work together with Patriarch to achieve their presumed shared goal. A541 at 66-67 (LaPuma), A617 at 367-68 (Marsal).

After Patriarch made an initial production of documents, AMZM worked diligently to catalog and digest those documents. These efforts led AMZM to develop, as examples of what it was missing, a specific list of additional documents it needed, which it shared with Patriarch along with requests for missing basic items—including a complete list of the debt and equity investments owned by the Zohar Funds that AMZM was charged with managing. A527-28 at 10-16 (LaPuma); B664; B673; B679-99.

Notwithstanding Patriarch's pledged cooperation, AMZM's follow-up requests were soon met with hostility and stonewalling. A617 at 368-69 (Marsal).

When AMZM emailed Patriarch on March 22, 2016 requesting Patriarch's comprehensive collateral manager books and records and referencing areas where AMZM felt that information was missing, Patriarch responded on March 24, 2016 with a letter that "clearly signaled a change in the tone of the communications between the parties." Op. 17. Patriarch asserted that it had provided a comprehensive set of books and records to AMZM, and that in Patriarch's view, "everything that AMZM had requested either had already been provided *or could readily be obtained by AMZM from other sources*." Op. 17 (emphasis added) (citing JTX-138 (B666-72)). This, of course, ignores the CMAs, which require Patriarch to provide *all* documents, and does not exempt documents that Patriarch believes might be obtainable from some other source.

Patriarch suggested that it remain as collateral manager and assist AMZM, but the controlling classes (*i.e.*, the creditor enhancers for two of the Zohar Funds and majority of the creditors for the third) did not believe that it was necessary to re-hire Patriarch simply to secure documents that Patriarch was contractually obligated to provide. *See* Op. 14.[4]

[4] Patriarch states that it offered to introduce AMZM to the Portfolio Companies. OB 16. In fact, the opposite is true: Patriarch deliberately stymied AMZM's efforts to obtain documents directly from the Portfolio Companies. Ms. Tilton, who is the Managing Member and/or CEO of all of the companies (A666 at 566), admits that when AMZM contacted the

As the trial court correctly found, AMZM's concerns came to a head in late March 2016. Op. 16-17. Tensions continued to heighten in subsequent communications until "[o]n April 1, Tilton responded in a letter that removed all doubt that the relationship between AMZM and Patriarch had turned," suggesting that AMZM was asking Patriarch to do AMZM's job. Op. 18 (citing JTX-158 (B676-78)). As the trial court determined upon its review of the evidence, through this letter, "Tilton staked Patriarch's final position that it had fully complied with its obligation to turn over all of the books and records relating to the Zohar Funds that AMZM needed to perform its function as Collateral Manager." *Id*.

As trial confirmed, Patriarch's statement that it had provided a "comprehensive set of books and records" was false. Trial confirmed the existence of numerous categories of documents related to the Zohar Funds' Collateral that Patriarch had failed to provide to AMZM. These were not outlier documents; even Tilton conceded that basic documents AMZM would need as part of a collateral manager transition—"underlying instrument agreements" and "the latest financial statements" — had not been produced. A622 at 389-90 (Tilton); A528-29 at 15-17

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portfolio companies to attempt to obtain documents, she instructed those entities not to provide any requested documentation to AMZM without first getting Patriarch's approval (A642 at 471) – and that approval was never given. *See* B706-09, B714-18; A528-29 at 16-17.

(LaPuma); B679-99. Plaintiffs demonstrated at trial that Patriarch possessed, but refused to provide, documents in each of the twelve critical requested categories identified by Plaintiffs and incorporated into the Court's amended Order. *See* Op. 35-51. For example, Plaintiffs identified a list of "debt documents" that memorialize loans extended by the Zohar Funds that Patriarch had failed to turn over (B679-99; A528 at 15:13-16:16); equity documents not turned over, including LLC agreements, shareholder agreements (A626 at 405-06, A644-46 at 478-84); stock certificates (Op. 41-42; A646-47 at 487-90); trade tickets evidencing the acquisition or disposition of assets of the Zohar Funds (A530 at 21; A562 at 150-51; A587-88 at 252-54); and tax documents, including tax filings (such as K-1s) filed in the name of the Zohar Funds (A530 at 21; Op. 48-49; A570 at 184-86; A663 at 553-55). In addition, Patriarch did not gather or provide to AMZM historical property, documents, books and records. A453 at 195 (Tilton Dep.); B701-04.

Each of these categories of documents provides AMZM with basic details and objective data about the Collateral portfolio that are fundamental to its ability to provide collateral management services. *See* A615 at 360 (Marsal). Plaintiffs excluded from each of these categories any request for Patriarch's proprietary or internal analyses or assessments, and Patriarch's proprietary credit

templates, which are expressly excluded from "books and records" by Section 6.3 of the CMAs.

D. The Court of Chancery's Memorandum Opinion.

After two days of trial and following full briefing on cross-motions for summary judgment and pre- and post-trial briefing, the Court of Chancery issued its Memorandum Opinion finding Patriarch in breach of its contractual obligations to the Zohar Funds.

Granting the Zohar Funds' motion for partial summary judgment, the Court of Chancery found the plain and unambiguous language of both Section 5.7 and 6.3 of the CMAs supported the Zohar Funds' position and that each Section provided a separate, independent basis to require Patriarch to produce documents. Op. 29. The trial court in turn rejected Patriarch's construction of the contracts, finding that Patriarch's constructions were "not reasonable" (Op. 24), contrary to "[t]he only reasonable construction of Sections 5.6 and 6.3" (*id*. at 28), "not credible" (*id*. at 32), and, with respect to the equity owned by the Zohar Funds, "at best, confusing and, at worst, codswallop." *Id*. at 39, n.128.

Having decided these threshold issues, the Court turned to the twelve categories of documents identified by Plaintiffs as being in issue. The Court noted that the definition of "Collateral" in the CMAs incorporated from the Zohar Indentures is extremely broad, comprising "[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 and rights subject or intended to be subject to the lien of this Indenture . . . pursuant to the Granting Clauses of this Indenture." Op. 32. The Granting Clauses of the Indenture are similarly broad, granting the trustee a security interest in "all accounts, payment intangibles, general intangibles, letter-of-credit rights, chattel paper, electronic chattel paper, instruments, deposit accounts, investment property (each, as defined in the UCC), and any and all other property of any type or nature owned by it (other than Excluded Property), including but not limited to (a) the Collateral Debt Obligations, the Unrestricted Collateral Debt Obligations and any Equity Securities and other Securities or obligations owned or acquired by the Issuer on the Funding Date. . . ." A712-13; A990-91; A1471-72. The only "Excluded Property," which is not "Collateral," is nominal capital of $1,500. A739, A1017, A1496. Moreover, as broad as the Indenture's definition of "Collateral" is, the obligations to produce documents set forth in the CMAs is even broader, as it requires production of all documents "***relating*** to" the Collateral . . ." A693-94 § 5.7, A696 § 6.3, A973 § 5.7, A975-76 § 6.3, A1453 § 5.6, A1456-57 § 6.3. Based on the broad language of the CMAs, the Court correctly ordered Patriarch to produce documents from all twelve of the categories addressed at trial. Op. 32-52.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY FOUND THE ZOHAR FUNDS HAD PROVEN THEIR CONTRACTS CLAIMS.

A. Question Presented

Did the Court of Chancery properly determine that the Zohar Funds had demonstrated Patriarch's breach of the CMAs, and that Patriarch's breaches were not excused, where the Zohar Funds proved Patriarch's material breach of the contract occurred before any claimed breach of the contract by the Zohar Funds?

B. Scope of Review

This Court reviews the Court of Chancery's conclusions of law *de novo* and applies the deferential "clearly erroneous" standard to findings of fact. *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chicago*, 75 A.3d 101, 108 (Del. 2013) (citation omitted). The deferential "clearly erroneous" standard applies "not only to historical facts that are based upon credibility determinations but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts." *Bank of New York Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

C. Merits of Argument

Patriarch first argues that the Court of Chancery erred by failing to require the Zohar Funds to prove their own performance under the CMAs.

Patriarch focuses primarily on the Court of Chancery's statement that the issue of whether the Zohar Funds had wrongfully withheld payment was not tried before it in the underlying proceeding (Op. 31), and contends that the Court of Chancery therefore mistakenly conflated an element of the Zohar Funds' affirmative claim with an element of Patriarch's deferred counterclaim. OB at 20-21. This argument is easily dispelled for two reasons.

First, Patriarch's argument fails because no performance by the Zohar Funds was due—and Patriarch identifies none—at the time of Patriarch's breach on April 1, 2016. As the trial court correctly found, Tilton's letter dated April 1, 2016 made clear that Patriarch would not perform its contractual obligations, as it "staked Patriarch's *final* position that it had fully complied with its obligation to turn over all of the books and records relating to the Zohar Funds that AMZM needed to perform its function as Collateral Manager." Op. 18 (emphasis added). Patriarch does not, and cannot, allege that the Zohar Funds were in violation of the CMAs at that time. Because Patriarch failed to comply with its obligations, Patriarch placed itself in material breach of its contractual obligations by April 1, 2016 at the latest. Patriarch's material breach excused further performance by the Zohar Funds—they were not required to continue paying Patriarch millions of dollars each month in order to pursue a remedy for Patriarch's breach. *See, e.g.*, *Dixon v. Malouf*, 70 A.D.3d 763, 763 (N.Y. App. Div. 2d Dep't 2010) ("An

anticipatory breach by the party from whom specific performance is sought excuses the party seeking specific performance from tendering performance . . . .") (quoting *Zeitoune v. Cohen*, 66 A.D.3d 889, 891 (N.Y. App. Div. 2d Dep't 2009)); *accord Huntington Mining Holdings, Inc. v. Cottontail Plaza, Inc.*, 60 N.Y.2d 997, 998 (N.Y. 1983).[5]

Patriarch tellingly omits any reference to its April letter or the Court of Chancery's factual determination of Patriarch's breach. That factual determination, however, is fully supported by the record, and entitled to deference. Because Patriarch breached its obligations under the CMAs by April 1, 2016, there was no performance obligation on April 20, 2016 for the Zohar Funds to prove.[6]

In all events, the Trustee (which brought the New York interpleader action) was at all times holding the funds in issue. Thus, the Zohar Funds were at all times "ready, willing and able to perform" if it were determined that amounts were actually due to Patriarch in light of its breaches. *See Sosa v. Acevedo*, 40

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[5] The CMAs are governed by New York Law. Op. 21.

[6] In a footnote, Patriarch attempts to sidestep this fatal flaw by suggesting that the Zohar Funds breached their contractual obligations by directing the trustee of the Zohar Funds to withhold payment for services rendered before the effective date of its resignation as collateral manager. OB 21-22 n.16. This is a red herring. Patriarch concedes that obligation was not due until April 20, 2016 (A1943 at 38 & n.26), nearly 3 weeks after Tilton's April 1, 2016 letter repudiating Patriarch's contractual obligations.

A.D.3d 268, 269 (N.Y. App. Div. 1st Dep't 2007) (holding that transfer of funds into attorney's escrow account showed that buyer, who had not paid, was "ready and able to pay," sufficient to establish entitlement to specific performance).

Second, the Court of Chancery did not conflate a counterclaim with an element of Plaintiffs' affirmative claim. The Court of Chancery's rejection of Patriarch's argument simply reflects the fact that the parties and the Court understood, as reflected in the Pretrial Stipulation and Order ("PTO"), that the Zohar Funds' performance was not at issue for purposes of adjudicating the Zohar Funds' right to specific performance of Patriarch's contractual obligations. This should be no surprise to Patriarch, as the PTO afforded each party an opportunity to specify the "Issues of Fact and Law [They] Contend Remain to be Litigated." A511-15. Neither party identified the Zohar Funds' performance as a disputed issue in the PTO. Thus, neither party contended that the Zohar Funds' performance of the contract, prior to Patriarch's breach, needed to be litigated. *See id.*[7] Patriarch did not, for example, assert an affirmative defense that a breach of the CMAs by the Zohar Funds excused its performance.

[7] Narrowing down the disputed issues is of course common in the Court of Chancery, where the preferred practice is to encourage parties to focus on the real issues, particularly where (as here) the litigation is expedited and the trial court is familiar with the case from the underlying proceedings.

In short, if Patriarch thought there was a legal or factual issue that would prevent the Court of Chancery from awarding specific performance, it was its burden to address it as an issue to litigate—it did not, and has no basis to now complain.

II. THE COURT OF CHANCERY CORRECTLY INTERPRETED THE CMAs TO REQUIRE PATRIARCH TO PRODUCE BOOKS AND RECORDS TO THE ZOHAR FUNDS.

A. Question Presented

Whether the Court of Chancery correctly held that each of Sections 5.7 and 6.3 of the CMAs require Patriarch to produce books and records relating to the Collateral, and if so, whether the Court of Chancery correctly determined the scope of Patriarch's document production obligations?

B. Scope of Review

This Court reviews *de novo* the legal determinations of the Court of Chancery in interpreting contracts. *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). The Court reviews a grant of summary judgment *de novo* "to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." *Id*.

C. Merits of Argument

As the trial court properly found, this is a "straightforward breach of contract case, nothing more and nothing less." Op. 21. As the Court further found, the clear language of the CMAs is "reasonably susceptible of only one meaning" and therefore unambiguous. *Id*. at 22 (quoting *Banco Espirito Santo, S.A. v.*

Concessionaria Do Rodoanel Oeste S.A., 951 N.Y.S.2d 19, 24 (N.Y. App. Div. 1st Dep't 2012)). Finding that the unambiguous contract language required Patriarch to provide all documents relating to the Collateral, that Plaintiffs had identified documents Patriarch had not yet produced, that Patriarch conceded it had not provided all such documents, the Court entered judgment for Plaintiffs. Op. 20, 29 n.102, 41-42, 50-51.

Eschewing a natural reading of the contracts and disregarding its own well-documented history of acknowledging the obligations imposed on it by Sections 5.7 and 6.3 (*infra* p. 30), Patriarch contends the Court of Chancery erred in two ways. First, it argues the Court of Chancery erred because Sections 5.7 and 6.3 do not require a collateral manager that has resigned to produce *any* documents to its successor. Second, it argues that even if some documents must be produced, a former collateral manager is not required to produce the scope of documents required by the Opinion. Neither of these arguments has merit. The Court of Chancery correctly found that Section 5.7 and 6.3 each provide an independent basis for production of the documents ordered, and the Court properly set the scope of production based on the broad language of the relevant contractual provisions.

1. The Court of Chancery correctly construed Section 5.7 to require Patriarch to deliver all property and documents of the Zohar Funds to AMZM.

Section 5.7 required Patriarch, upon the termination of its duties and obligations under the CMAs, to deliver all property and documents of the Zohar Funds relating to the Collateral of the Zohar Funds. Section 5.7 provides:

> 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* as soon as practicable (i) deliver to the [Zohar Funds] or (at the direction of the [Zohar Funds]) any successor collateral manager that is appointed all property and documents of the Trustee, the [Zohar Funds,] or the Zohar Subsidiary, as the case may be, relating to the Collateral then in the custody of the Collateral Manager, including without limitation, files in electronic form . . . .

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

Here, it is undisputed that Patriarch's resignation resulted in a termination of its duties and obligations under the CMAs. It is equally undisputed that Section 5.7 of the CMAs is a mandatory provision, as it employs the term "shall" to eliminate any claim of discretion. Under a plain reading of Section 5.7, the termination of Patriarch's "duties and obligations" as collateral manager therefore triggered a mandatory obligation to deliver to the Zohar Funds all property and documents of the collateral then in Patriarch's custody.

Patriarch attempts to evade the natural reading of the provision by contending that its document production obligations under Section 5.7 can only be triggered by a "termination" that is "pursuant to" the CMAs, which (according to Patriarch) exclusively means automatic terminations and terminations for cause, under Sections 5.2 and 5.3 of the CMAs, respectively. OB 25-26. Relying on this premise, Patriarch argues that a court must draw an "irrefutable inference" that the parties did not intend for the obligations under Section 5.7 to be triggered upon a collateral manager's resignation.

Patriarch's construction is contrary to both the language and the purpose of the Agreement. Section 5.7 provides that duties under Section 5.7 are triggered upon "the effective date of the *termination of the Collateral Manager's duties and obligations* pursuant to this Agreement. . . ." (emphasis added). It is undisputed that a termination of such duties occurred on March 1, 2016, when Patriarch resigned as Collateral Manager. Moreover, the phrase "pursuant to this Agreement" immediately follows, and therefore modifies, the phrase "the Collateral Manager's duties and obligations." Hence the natural reading of this provision is that "pursuant to this Agreement" simply specifies the "duties and obligations" that must be terminated—*i.e.* those duties and obligations set out in the CMAs—to trigger the obligations under Section 5.7. The phrase "pursuant to this agreement" does not modify the word "termination"—which appears eight

words earlier in the clause—and therefore does not limit the types of "terminations" that trigger document production obligations under Section 5.7 to the forms of termination addressed in Sections 5.2 and 5.3 of the CMAs. As the Court of Chancery recognized, if Patriarch's view were true, the "termination" language would be rendered "nugatory" —a reading that would be contrary to New York law. Op. 24 (citing *Ruttenberg v. Davidge Data Sys, Corp.*, 626 N.Y.S.2d 174, 177 (N.Y. App. Div. 1995)).[8]

Patriarch effectively rewrites Section 5.7 to move the phrase "pursuant to this agreement" as if the provision had been written:

> From and after the effective date of the termination pursuant to this Agreement of the Collateral Manager's duties and obligations ~~pursuant to this Agreement~~ or removal of the Collateral Manager hereunder. . . .

The provision could have been written as above if the parties had wanted to limit Patriarch's obligation to provide documents to a successor collateral manager only where Patriarch was "terminated pursuant to this Agreement" (*i.e.*, pursuant to Section 5.2 or 5.3). Indeed, the drafting parties could have employed this

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[8] Consequently, Patriarch's claim that the trial court erred because it did not identify a provision "pursuant to" which a resignation occurred (OB 26) is irrelevant. What matters is that a resignation terminates the duties and obligations that a collateral manager performed under the CMA—a point the trial court correctly recognized as "precisely what happened when Patriarch tendered its resignation as Collateral Manager." Op. 24.

construction in Section 5.7, and they did elsewhere in the CMAs. *See* A696 § 6.3 (limiting the right a prospective successor Collateral Manager to access the departing Collateral Manager's books and records to circumstances "following the Collateral Manager's receipt of a notice of its removal *pursuant to Section 5.3 hereof* . . . ." (emphasis added)). But they did not do so under Section 5.7, and the Court must enforce the contract to give effect to what the parties actually wrote.

Moreover, the Zohar Funds' interpretation of Section 5.7 is the only interpretation that achieves a commercially reasonable result. *See Greenwich Capital Fin. Prods. v. Negrin*, 903 N.Y.S. 2d 246, 415 (N.Y. App. Div. 1st Dep't 2015) ("a contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties"). The Zohar Funds were set up to be run entirely by the collateral manager. They have no employees, no institutional knowledge (apart from that of the collateral manager) and no books or records, apart from those kept by the collateral manager on the Funds' behalf. *See supra* Part A. It is self-evident that if a party no longer serves as collateral manager—whether as a result of resignation, removal, replacement or otherwise—the successor collateral manager will require possession of documents from the former collateral manager to effectively continue the operations of the Zohar Funds. Unless books and records are turned over by the outgoing collateral manager, neither the Zohar Funds nor the successor

collateral manager will have the ability to continue to manage the Funds. There is no commercially valid reason—and certainly none has been offered by Patriarch—why, in one instance (*i.e.*, a firing or removal) the former collateral manager would be obligated to turn over books and records, but in another instance (*i.e.*, a resignation), there would be no such obligation. Nor is there a commercially valid reason for the former collateral manager to retain the Zohar Funds' books and records.

Patriarch asserts that its interpretation of the provisions makes sense under the "commercial realities" of the Zohar Funds' investment structure and argues that, in the resignation scenario, the parties can negotiate some extra-contractual turn over of documents (and then speculates about what Tilton would have negotiated for in that case). *See* OB 27-28. This is frivolous. First, whether Tilton would have negotiated otherwise is speculation and irrelevant when the plain language of the CMAs is clear. Second, Patriarch's litigation-driven description of the "commercial realities" is completely undermined by Tilton's repeated acknowledgement, over the course of three months, that upon its resignation as collateral manager, Patriarch is obligated to provide books and records to AMZM and the Zohar Funds under the CMAs. A few examples:

- B677 Letter from Lynn Tilton dated April 1, 2016 ("Under our Collateral Management Agreements we were required to turn over to you our collateral management books and records as of March 2, 2016 . . .").
- A1879 Letter from Counsel dated April 20, 2016 (acknowledging contractual obligations under Sections 5.6, 5.7 and 6.3).
- A1885 Letter from Counsel dated April 20, 2016 (acknowledging contractual obligations under CMAs).
- B6 Affidavit of Lynn Tilton dated May 5, 2016 ("The CMAs provide that, upon the appointment of a successor collateral manager, the Patriarch Managers shall deliver certain documents to the successor collateral manager. . .")
- B719-20 Letter from Patriarch's counsel dated May 12, 2016 (admitting obligations but claiming obligation was subject to signing a confidentiality agreement).
- B17, 20 Brief in Opposition to Motion to Expedite, filed May 20, 2016. ("Patriarch has already transmitted to A&M all documents required under the relevant contracts."); *id*. at 5 (acknowledging contractual obligations).
- B71 Brief in Opposition to Motion to Compel, filed July 8, 2016 (recognizing contractual obligations under Section 6.3).
- A440 at 144-45 Lynn Tilton's deposition testimony, one day before trial, at that she "personally . . . believed the obligations would have been the same" for a collateral manager that resigned compared to one that was removed.

Patriarch's newfound claims about the parties' supposed intent, and its claimed "commercial realities," cannot be accepted in view of these admissions.

2. Section 6.3 of the CMAs Require Books and Records Relating To Services Provided Thereunder And The Collateral Be Made Accessible To The Zohar Funds.

Section 6.3 provides a second, independent basis, to require Patriarch to grant Plaintiffs access to all books and records of the Zohar Funds relating to the Collateral and Patriarch's collateral management services:

> The Collateral Manager, with the assistance of the Collateral Administrator, shall maintain appropriate books of account and records relating to services performed hereunder and relating to the Collateral including invoices for professional fees, and such books of account and records shall be accessible for inspection by a representative of the [Zohar Funds] . . . at a mutually agreed time during normal business hours and upon not less than three Business Days' prior written notice . . .

A696 § 6.3, A975-76 § 6.3, A1456-57 § 6.3. Continuing, Section 6.3 addresses Patriarch's obligations to maintain books and records, including the obligation to maintain books and records for three years upon the termination of its obligations:

> Upon the termination of its obligations hereunder in accordance with this Agreement and the Indenture, the Collateral Manager agrees to either (i) maintain or cause the Collateral Administrator to maintain, such books and records as provided above for a period of three years (or such longer period required by applicable law) from such termination or (ii) deliver, or cause the Collateral Administrator to deliver, all such books and records (or copies thereof) to the Trustee promptly following such termination.

Id.

Section 6.3 therefore imposes several obligations, including (1) that Patriarch "maintain appropriate books of account and records relating to services performed hereunder and relating to the Collateral," and (2) that the books and account be made available to the Zohar Funds, utilizing mandatory language to state that the books and records "*shall* be accessible for inspection" by a representative of the Company . . . at a mutually agreed time during normal business hours and upon not less than three Business Days' prior written notice."

The CMAs impose no limits on the ability of a "representative of the Company" to access and make copies of the aforementioned books and records. In this respect, Patriarch's citation to *Patriarch P'rs XIV, LLC v. MBIA Ins. Corp.*, 2011 WL 2693711, at *4 (N.Y. Sup. Ct. June 27, 2011) (OB 33) favors Appellees, as the New York Supreme Court, in considering Section 6.3, found "no reason that MBIA cannot bring in whatever resources are necessary to scan or otherwise make its own copies of the original documents" where the CMA contained no prohibition on MBIA (as the credit enhancer) possessing copies of the original documents. A similar result should be reached here, as the CMAs contain no restrictions on AMZM possessing copies of original documents. Moreover, such a result is consistent with Delaware's interpretation of the term "accessible" as permitting photocopying of records obtained. *See, e.g.*, *Mickman v. American Int'l Proc., LLC*, 2009 WL 2244608, at *3 (Del. Ch. Jul. 28, 2009) ("I construe 'access'

as having its ordinary meaning, which includes the right to make photocopies."). Thus, AMZM's right to access (and photocopy) the books of account and records related to the Collateral as well as the Collateral Manager's services under the CMAs, is unqualified and absolute, within certain procedural guidelines quoted above (*e.g.*, three days' written notice, during normal business hours).

Patriarch attempts to escape its obligations under Section 6.3 through two arguments. First, it makes the same argument it makes concerning Section 5.7 – that because it resigned rather than being removed, the contractual provisions are not implicated. OB 29. This argument is no more persuasive here than it was in response to Section 5.7.

Second, Patriarch argues that the first quoted provision of Section 6.3 applies only to current collateral managers, while the second clause applies to former collateral managers. Thus, current collateral managers are required to maintain records and permit inspection, while former collateral managers can turn documents over to the Trustee, or maintain them for three years, but need not permit inspection. OB 30-33.

This argument has no support in the words of the contract. The first clause of Section 6.3 is, by its terms, not limited to a "current" collateral manager, nor does it indicate the obligation to permit inspection terminates if the collateral manager is removed or replaced. In fact, the opposite is true: the duties imposed

on Patriarch under Section 6.3 of the CMAs are expressly made subject to the "Survival" clauses of the CMAs, which provide that "[u]pon any termination or assignment of this Agreement, the provisions of Section[] . . . 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.[9]

This provision is straightforward: Section 6.3 survives a termination of the CMAs and its provisions remain "in full force and effect." The survival clause is not qualified and by its terms applies only to former collateral managers, since it governs upon "termination or assignment" of the CMAs. Thus, a former collateral manager, following the termination of its ongoing collateral management obligations under the CMAs, remains bound by Section 6.3 and must "maintain" the records it has and make them "accessible for inspection by a representative of the [Zohar Funds]. . . ."

Patriarch argues that that application of the survival clause produces an absurd result and would "nullif[y] Section 6.3's express distinction between current and former collateral managers." OB 32. There is no such distinction, however, and certainly not any "express" distinction, as Section 6.3 makes no

[9] For ease of reference, Appellees refer to the survival clause as Section 5.6 of the CMAs, in accordance with the section numbering in the Zohar I and II CMAs.

reference to either "current" or "former" collateral managers. Moreover, it is Patriarch's construction of Section 6.3 that would lead to an absurd result – it would require former collateral managers to either deliver all books and records to the Trustee or Collateral Administrator or to "maintain . . . such books and records as provided above for a period of three years." A696 § 6.3, A975-76 § 6.3, A1456-57 § 6.3. But an obligation of the Collateral Manager to maintain books and records post-termination would have no purpose or practical effect if the right of the Zohar Funds (or others) to access those records did not also survive termination.

Patriarch's construction of Section 6.3 would also nullify the Survival Clause of the CMAs (Section 5.6). If Section 5.7 requires a former collateral manager to maintain books and records for a period of three years after termination as collateral manager, what is the purpose of the application of the Survival clause to Section 6.3? It would have none. As the parties agree, contracts should not be construed to render certain provisions surplus age or nugatory. *See* OB 30, B142, 148. *See also* Op. 24.

Patriarch's overbreadth argument, that Section 6.3 "would render void the requirement that a former collateral manager maintain books and records for a period of three years following termination . . . with no apparent end point" (OB 32-33), is meritless. The language and intent of Section 6.3 are clear: a collateral

manager is required to maintain records for three years from the termination of its obligation. Section 5.6 operates to preserve this obligation to maintain records for three years by providing that it will remain "in full force and effect"; there is nothing in Section 5.6 that somehow modifies the three-year duration of Section 6.3 to impose an obligation "in perpetuity." OB 33. Thus this inspection right survives. This result makes sense, as the successor or its representative must have a period of time in which to inspect the books and records.

Patriarch's final two arguments fare no better. Patriarch's argument that the Amended Order should have granted only "inspection" of books and records (OB 33-34) is unpersuasive. As noted above (pp. 32-33, *supra*), *Patriarch Partners XIV, LLC v. MBIA Insurance Corp.*, 2011 WL 2693711, at *4, holds that the right to inspect documents includes the right to make copies. Patriarch's "gotcha" argument that the Zohar Funds failed to provide "three Business Days' prior written notice requirement," is frivolous. Plaintiffs have been seeking these documents since March, and the record is rife with written communications by which Plaintiffs sought access. *See* Op. 12-18 (citing communications). For Patriarch to argue that a notice requirement had not been met, while simultaneously touting the 100,000 pages of documents it produced during the time it contends notice was due (OB 2, 3, 9, 15, 39), is simply not credible.

3. The Court of Chancery Correctly Determined the Scope of Production.

Under the CMAs, the Patriarch Managers are required to turn over "all property and documents of [the Zohar Funds] . . . *relating to the Collateral* then in the custody of the Collateral Manager" under Section 5.7 (A693-94 § 5.7, A973 § 5.7, A1453 § 5.6) and to maintain and make accessible "appropriate books of account and records relating to services performed hereunder *and relating to the Collateral*" under Section 6.3. A696 § 6.3, A975-76 § 6.3, A1456-57 § 6.3 (emphasis added).

The scope of production obligations under each provision is therefore necessarily dependent on the definition of "Collateral." Op. 32. As noted at pages 16-17, *supra*, "Collateral," is defined extremely broadly, encompassing all "property of any type or nature" owned by the Zohar Funds, other than "Excluded Property" consisting of $1,500 of capital.

Importantly, Patriarch's document production obligations "are not limited to documents that themselves represent or evidence collateral." Op. 33. Sections 5.7 and 6.3 of the CMAs explicitly include all property and books of account and records "***relating*** to Collateral." *Id*. As the Court of Chancery recognized, the phrase "relating to" is broadly defined under New York law (Op. 33 & n.109) to "mean 'connected by reason of an established or discoverable

relation.'" *HMS Hldgs. Corp. v. Moiseenk*, 49 Misc.3d 1215, at * 4 (N.Y. Sup. 2015) (citations omitted).

Patriarch has no credible response. In addressing whether "equity upside interests" "relate to Collateral," it simply rewrites the language of Section 5.7 and 6.3 to include only documents and property "relate[d] to 'services performed'" and contends that the documents concerning the Zohar Funds' equity interests have nothing to do with "services performed" by Patriarch because Tilton "gifted" them to the Zohar Funds. OB 36. Setting aside that Plaintiffs vehemently dispute that these interests are anything but direct equity holdings (*see* B360 n.7), the Court of Chancery correctly recognized that even it accepted Patriarch's description, the documents would still reflect equity interests "that the Zohar Funds may draw upon at a 'particular time' in the future" and therefore (i) "relate" to Collateral and (ii) are subject to production. Op. 41.

Patriarch's argument that tax documents issued to or in the name of the Zohar Funds are not subject to production because Tilton purportedly paid the taxes on those assets is also meritless. The trial court found that the evidence showed that Schedule K-1s were issued in the name of the Zohar Funds and therefore reflect assets of the Zohar Funds and tax obligations on those assets. Op. 49 & n.146 (citing Tr. 553 (A663) and JTX-36 (A1702)). This not only accords with the language of the CMAs but makes common sense. The Zohar Funds have

a responsibility to know what has been filed in their name with the I.R.S. and to understand the full picture of that filing. They cannot simply rely on Tilton's word in the event they are audited.

In short, whether Tilton paid the taxes or not is irrelevant; tax or accounting documents issued in the name of the Zohar Funds or by the Zohar Funds to other entities, including but not limited to Schedule K-1 tax disclosures and all supporting documents, plainly relate to Collateral. Op. 49; Amended Order ¶ 1(k).

Finally, Patriarch's argument that the order to produce historical debt documents "impermissibly frustrates the parties' reasonable expectations" fails under the language of the CMAs. As the Court of Chancery recognized, neither Section 5.7, Section 6.3, nor the definition of "Collateral" within the Zohar Indentures, contains any temporal restriction. Op. 33-34. Moreover, this result also makes practical sense. The documents fill in gaps in existing underlying transactional documents and allows AMZM to conclusively confirm the collateral that it is "being asked to manage" (A613 at 355 (Marsal)) by tracing that collateral ownership over time. Trial in fact offered an example of why this is important, as Tilton's testimony as to what the Zohar Funds own conflicted with Patriarch's own documentation, in a circumstance that raises legitimate questions regarding whether the Zohar Funds may have some present entitlement to hundreds of

millions of dollars in proceeds from the sale of the company HVEASI. *Compare* A659 at 538-39 *with* B450. *See also* B303-04.

In sum, AMZM cannot rely on Tilton's recollection to do its job—documents are needed. The Court of Chancery appropriately ordered the production of historical debt documents that relate to "Collateral."

III. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT PATRIARCH MATERIALLY BREACHED THE CMAs.

A. Question Presented

Did the Court of Chancery correctly determine that Patriarch's contractual obligation to produce the property, books and records is a material obligation of the CMAs, and that Patriarch's failure to produce the documents was a material breach of the CMAs?

B. Scope of Review

This Court reviews the Court of Chancery's conclusions of law *de novo* and applies the deferential "clearly erroneous" standard to findings of fact. *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chicago*, 75 A.3d 101, 108 (Del. 2013) (citation omitted). The deferential "clearly erroneous" standard applies "not only to historical facts that are based upon credibility determinations but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts." *Bank of New York Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

C. Merits of Argument

For its final argument, Patriarch contends that even if it is in breach of the CMAs, its failure to turn over required documents is not a material breach of the CMAs (OB 39). The Court of Chancery appropriately rejected this argument, as Patriarch's argument ignores the undeniably material impact of Patriarch's ongoing breach. After having presided over two days of testimony, the Court of Chancery put it best: "To characterize this transition process as immaterial' is simply not credible. I suspect if the shoe was on the other foot, Patriarch would agree." Op. 32.

1. The Court of Chancery Correctly Concluded that Patriarch's Obligation to Produce Books and Records is a Material Obligation.

As Patriarch recognizes, a breach is material if it "substantially defeats [the] purpose" of the agreement. *See, e.g.*, *DeMille Co. v. Casey*, 201 N.Y.S. 20, 24 (N.Y. Sup. Ct. 1923).

As the trial court properly found, the primary purpose of the CMAs is to facilitate management of the substantial and diverse collateral of the Zohar Funds. Op. 31. Patriarch does not truly disagree—its own words assert that the "'central aspect' and 'primary purpose' of the CMAs is to manage the collateral of

the Zohar Funds." A498.[10] It is this very purpose that has been frustrated by Patriarch's refusal to provide AMZM with documents necessary to manage that Collateral—indeed, its refusal even to tell AMZM exactly what that Collateral *is*. Accordingly, Patriarch's obligation to turn over documents permitting the continuation of collateral management obligations once it has resigned goes directly "to the root of the agreement," and its breach is thus a material one. *Donovan v. Ficus Invs., Inc.*, 2008 WL 4073639, at *9 (N.Y. Sup. Ct. Aug. 1, 2008) (internal quotation omitted).[11]

Patriarch's argument also has troubling implications. Because books and records provisions are often found in agreements whose "primary purpose" is something other than the exchange of books and records, if Patriarch's argument were credited, it would be difficult, if not impossible, for any plaintiff to obtain

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[10] As with other issues, Patriarch's view of the "primary purpose" of the CMAs has now shifted to solely "establish[ing] the services that the collateral manager must perform" such that noteholders can receive any returns. OB 40.

[11] Patriarch's citation to *Donovan* for the proposition that a refusal to allow access to books and records is not a material breach is misplaced. As Plaintiffs have previously explained (B354), *Donovan* concerned limited books and records access rights under an LLC agreement. This bears little relationship to the broad turnover obligations under the CMAs. Unlike *Donovan* and similar cases, Patriarch's failure to turn over necessary documents to its successor has "substantially defeat[ed] the purpose" of the CMAs even as Patriarch defines that purpose, and is thus material.

specific performance of breach of a books and records provision. This effort to escape its contractual obligations should be rejected.

Finally, Patriarch's remaining argument—that the Court of Chancery erred by not making findings of fact as to whether Patriarch's failure to produce was material, and should have "determined whether the delta between Patriarch's productions . . . and the CMAs' obligations constituted a 'material' breach of the CMAs," and "should have done so for each category of documents" (OB 41)—is baseless. First, the evidence clearly established that Patriarch had failed to produce numerous documents, including entire categories, at the time of their breach. *See supra* pp. 14-15. Second, Patriarch has no support for its statement that the trial court must review the "delta" for each category of documents. The categories were used to help focus the issues at trial (B94-106; B165 & B184-85); Patriarch cannot simply gin up a new materiality test that has no basis in the contracts. Third, determining the magnitude of the documents that Patriarch failed to produce would be impossible—neither the Plaintiffs nor the Court could quantify the documents that Patriarch deliberately failed to produce.[12]

[12] In fact, Patriarch's counsel contributed to this impossibility, helping to frame the issues at trial by opposing motions to compel on the grounds that "the two-day trial that Your Honor has scheduled is not a forensic audit. It's to determine Patriarch's contractual obligation to turn anything else over. It doesn't turn on whether a particular document was turned over or not."

Finally we now know that, while Patriarch produced approximately 100,000 pages of documents before the Opinion was issued, it subsequently produced an additional 370,000 pages—and must take additional steps to identify and produce further documents. B385-91. Plainly, the failure to produce documents before the Opinion was "material" by any standards. Patriarch has no standing to now complain that the scope of its failure to produce documents was not quantified.

B164-65; *id*. at B165 ("The question is what are the categories of documents that could be considered books and records or material that belongs to the Zohar entities. That's the issue in the case.").

CONCLUSION

For the reasons stated herein, the decision set forth in the Memorandum Opinion should be affirmed.

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