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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of LYNN TILTON, PATRIARCH PARTNERS, LLC, PATRIARCH PARTNERS VIII, LLC, PATRIARCH PARTNERS XIV, LLC and PATRIARCH PARTNERS XV, LLC Respondents.	Administrative Proceeding File No. 3-16462 Judge Carol Fox Foelak

RESPONDENTS' OPPOSITION TO THE DIVISION OF ENFORCEMENT'S REQUEST FOR OFFICIAL NOTICE OF COMPLAINT FILED BY THE ZOHAR FUNDS AGAINST RESPONDENTS, OR IN THE ALTERNATIVE, RESPONDENTS' MOTION TO STRIKE IMPROPERLY NOTICED ALLEGATIONS

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January 20, 2017

Respondents Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC (collectively, "Patriarch" or "Respondents"), respectfully submit this memorandum of law in opposition to the request by the Securities and Exchange Commission ("SEC") Division of Enforcement (the "Division") for official notice, dated January 18, 2017 ("Div. Request"). In the alternative, Respondents respectfully move to strike from the record of this proceeding any materials noticed pursuant to the Division's improper request.

INTRODUCTION

Pursuant to Rule 323 of the SEC Rules of Practice, official notice may be taken only of proffered facts that both (1) are "material," and (2) "might be judicially noticed by a district court of the United States" (among other options not relevant here). 17 C.F.R. § 201.323. A district court, in turn, can take judicial notice only of that which "is not subject to reasonable dispute." Fed. R. Evid. 201(b). Ignoring these limitations, the Division has requested that Your Honor take official notice of a complaint filed this week in *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, No. 17-cv-307 (S.D.N.Y. filed Jan. 16, 2017) (the "S.D.N.Y. Complaint"), seeking to supplement the record with 84 pages of highly disputed allegations, many of which are duplicative of the Division's claims in this proceeding. Your Honor should reject this attempt to inject into this proceeding a civil complaint filed at the behest of MBIA (controlling party of Zohars I and II) and Alvarez & Marsal (the Zohars' new collateral manager), which largely piggybacks on the Division's now-discredited charges. The Division's strategy to bolster its case by importing a copycat civil complaint simply underscores its collusion with private-sector allies MBIA and Alvarez & Marsal, and is particularly inappropriate given the Division's refusal to put MBIA on the witness stand, where its baseless allegations would have been subject to the crucible of the adversarial process.

The Division claims that official notice of the S.D.N.Y. Complaint would provide "additional support for the Division's argument" "that Respondents' knowledge is not imputed to the Zohar Funds," because—in the Division's view—"[1] the Zohar Funds are distinct from Respondents, and [2] Respondents' interests were adverse to the Zohar Funds." Div. Request at 2. But Rule 323 forecloses official notice of the S.D.N.Y. Complaint for the purpose of advancing either of these arguments. As to the first point, Respondents do not dispute that they are separate persons from the Zohars, so any proof of this distinctness is immaterial. The S.D.N.Y. Complaint is likewise immaterial with respect to the second point. To infer any adverse interest from the S.D.N.Y. Complaint, one must (impermissibly) accept the truth of the allegations asserted in the Complaint. And in any event, the evidence at trial showed that Respondents had no interests adverse to the Zohars; to the contrary, they fulfilled their duties to the Zohars faithfully, and even structured their investments in the Zohars and Portfolio Companies to ensure the alignment of their interests. The S.D.N.Y. Complaint's allegations are highly disputed —indeed, they are false—and are not subject to official notice.

LEGAL STANDARDS

Rule 323 provides for official notice of a "material fact which might be judicially noticed by a district court of the United States."[1] This rule imposes two independent limitations: (i) official notice may not be taken of a fact that is "immaterial," *see Application of ACAP Fin., Inc.*, Exchange Act Release No. 70046, 2013 WL 3864512, at *3 n.31 (Comm'n July 26, 2013), and (ii) official notice may not be taken if it would not be allowed in federal court under Rule

[1] The other categories of material facts as to which official notice may be taken under the SEC Rules of Practice—records of the Commission and matters in the Commission's expertise, *see* Rule 323—do not apply here.

201 of the Federal Rules of Evidence, *see Alan Ferraro*, Initial Decision Release No. 558, 2014 WL 345340, at *3 (ALJ Jan. 30, 2014).

"A fact is 'material' when it 'might affect the outcome of the suit under governing law.'" *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 202 (2d Cir. 2007) (quoting *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005)); *see also, e.g.*, *Michael J. Fee*, Admin. Proc. Rulings Release No. 318, 1989 WL 376596, at *3 (ALJ Mar. 1, 1989) ("[I]mplicit in the requirement [of] materiality is a concern that the . . . evidence might have affected the outcome of the trial.").

Whether a district court may take official notice turns on Federal Rule of Evidence 201, which allows judicial notice of "a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).[2] This rule imposes a "test of indisputability," requiring that any fact that is not common knowledge must be "derived from an unimpeachable source" in order to be judicially noticed. *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998).

ARGUMENT

I. The S.D.N.Y. Complaint Is Immaterial To This Proceeding.

A. Respondents Do Not Dispute The Legal Distinctness Between Them And The Zohars.

The Division submits the S.D.N.Y. Complaint in support of its "argu[ment] that Respondents' knowledge is not imputed to the Zohar Funds because the Zohar Funds are distinct

[2] The other category of fact as to which judicial notice may be taken under the Federal Rules of Evidence—"a fact that is not subject to reasonable dispute because it . . . is generally known within the trial court's territorial jurisdiction," Fed. R. Evid. 201(b)(1)—does not apply here.

from Respondents." Div. Request at 2. Respondents do not dispute (and never have disputed) that they are separate persons from the Zohars. To the contrary, Respondents have consistently argued that "[a]s the managers and owners of the Zohars, Respondents were also the agent of the Zohars," and that, as such, their knowledge is imputed to the Zohars. Resp. Post-Hearing Br. 65; *see also* Resp. Pre-Hearing Br. 42. In any event, even if the Zohars and Respondents were not distinct entities, Respondents' knowledge would be the Zohars' knowledge without any imputation; moreover, there could be no fraud, because a person cannot defraud herself.

The distinctness between Respondents and the Zohars also underlies several of Respondents' other arguments in this proceeding: namely, that the Division declined to interview the Zohars' Directors or call them as witnesses, despite their independence from Respondents, and Respondents continued as collateral manager for the Zohars for approximately a year after the Division filed its OIP. *See* Resp. Pre-Hearing Br. 55-56.

Moreover, even if the legal distinctness between the Zohars and Respondents were in dispute, that question would not have the significance that the Division would assign to it. The Division argues that if Respondents and the Zohars are legally distinct, then Respondents' knowledge cannot be imputed to the Zohars. But imputation of knowledge is based on a *principal-agent* relationship and, by definition, requires two legally distinct entities. That is why a low-level employee's knowledge can be imputed to a corporation without regard for their separateness. *See, e.g.*, *Apollo Fuel Oil v. United States*, 195 F.3d 74, 77 (2d Cir. 1999). The Division has never disputed that Respondents acted as the Zohars' agents, *see* Div. Pre-Hearing Br. 29, so Respondents' knowledge is imputed to the Zohars regardless of their distinctness.

B. The S.D.N.Y. Complaint Is Not Evidence Of A Conflict Of Interests, But Even If It Were, It Does Not Rebut Imputed Knowledge.

The Division further contends that the S.D.N.Y. Complaint supports its argument "that Respondents' knowledge is not imputed to the Zohar Funds because . . . Respondents' interests were adverse to the Zohar Funds." Div. Request at 2. But the S.D.N.Y. Complaint is immaterial in this regard, as well.

Given that a complaint can never be subject to official notice "for the truth of the matters asserted in the other litigation," *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992)—and given that the Division does not appear to contend that Your Honor can take notice of the substance of the claims in the S.D.N.Y. Complaint for their truth, *see* Div. Request at 2 (advocating only that "official notice may be taken of the fact of a lawsuit such as the Zohar Funds' new lawsuit")—the S.D.N.Y. Complaint cannot support a finding of adverse interests. Unless the allegations are improperly accepted here as true, the S.D.N.Y. Complaint can support no inference whatsoever, other than the fact that the Zohars sued Respondents in 2017. It says nothing about Respondents' interests in the time period at issue here, which ended no later than March 2015.

It is especially ludicrous to suggest that unproven allegations in a just-filed complaint hold any evidentiary weight here, let alone enough to undermine the unrebutted evidence that Respondents fulfilled their duties to the Zohars. The evidence actually included in the record establishes that Respondents took all of the actions that the SEC challenges here in accordance with their good-faith understanding of their duties and obligations as agents of the Zohars. Those actions were well within the scope of their authority, as defined by the Indentures and Collateral Management Agreements, and cannot possibly be said to represent a total abandonment of the Zohars, as would be required to rebut imputation of knowledge. *See Lynn*

Tilton, Admin. Proc. Rulings Release No. 4157, at 2 (ALJ Sept. 16, 2016) (noting that an agent must "exhibit total abandonment of the principal's interests" for the agent's knowledge to not be imputed to the principal (internal alteration and quotation marks omitted)).

II. No District Court Could Take Notice Of The Disputed, Baseless Allegations In The S.D.N.Y. Complaint.

Given the prohibition of judicial notice for anything "subject to reasonable dispute," Fed. R. Evid. 201(b), a district court commits reversible error if it takes "judicial notice of a complaint that ha[s] been filed in [one] action to . . . support any factual determination in the [other] litigation." *Liberty Mut. Ins. Co.*, 969 F.2d at 1388. The Division nonetheless asks Your Honor to take official notice of the S.D.N.Y. Complaint as proof of adverse interests based on the substance of the allegations in that complaint. The allegations on which the Division relies are untested by the adversarial process (the S.D.N.Y. Complaint was filed just a few days ago) and are highly disputed. The Division's contention that the S.D.N.Y. Complaint demonstrates adverse interests between Respondents and the Zohars rests on the substance of allegations in the Complaint, and the Division's arguments must rise or fall with the merits of the Complaint. The Division therefore asks Your Honor to do what a district court could never properly do: take notice "for the truth of the matters asserted in the other litigation." *Liberty Mut. Ins. Co.*, 969 F.2d at 1388.[3]

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[3] A district court may take notice of the existence *vel non* of court filings "to establish the fact of such litigation," *Int'l Star Class Yacht Racing Ass'n*, 146 F.3d at 70, and SEC law judges therefore may take official notice of the docket reports of lawsuits, *see, e.g.*, *Erick Laszlo Mathe*, Initial Decision Release No. 874, 2015 WL 5013727, at *1 n.2 (ALJ Aug. 25, 2015). If Your Honor determines (against the weight of the authorities, discussed above) that the fact of the S.D.N.Y. lawsuit has any bearing on this proceeding, the proper vehicle for official notice is a docket report, rather than the 84-page, 220-paragraph complaint that the Division seeks to dump into the record. And if Your Honor grants the Division's request, Respondents request an opportunity to rebut the highly disputed allegations in the S.D.N.Y. Complaint. *See* Rule 323

[Footnote continued on next page]

CONCLUSION

For the foregoing reasons, Your Honor should deny the Division's request for notice dated January 18, 2017, or in the alternative, Your Honor should strike any materials already noticed pursuant to the Division's request.

Dated: New York, New York
January 20, 2017

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[Footnote continued from previous page]
(providing that, upon the taking of official notice, "the parties, upon timely request, shall be afforded an opportunity to establish the contrary").

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of Respondents' Opposition to the Division of Enforcement's Request for Official Notice of Complaint Filed by the Zohar Funds Against Respondents, or in the Alternative, Respondents' Motion to Strike Improperly Noticed Allegations this 20th day of January, 2017, in the manner indicated below:

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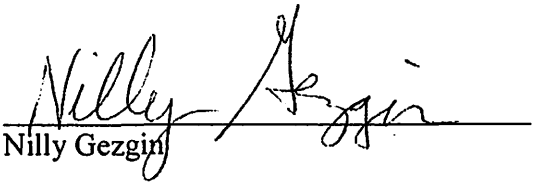

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