

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
Zohar III, Corp., ¹)	Case No. 18-10512 (KBO)
)	
Debtor.)	(Jointly Administered)
)	
DAVID DUNN, AS LITIGATION TRUSTEE FOR ZOHAR LITIGATION TRUST-A,)	
)	
Plaintiff,)	
)	
v.)	Adv. Proc. No. 20-50534 (KBO)
)	
PATRIARCH PARTNERS, LLC; PATRIARCH PARTNERS VIII, LLC; PATRIARCH PARTNERS XIV, LLC; PATRIARCH PARTNERS XV, LLC; PHOENIX VIII, LLC; OCTALUNA LLC; OCTALUNA II LLC; OCTALUNA III LLC; ARK II CLO 2001-1, LIMITED; ARK INVESTMENT PARTNERS II, LP; ARK ANGELS VIII, LLC; PATRIARCH PARTNERS MANAGEMENT GROUP, LLC; PATRIARCH PARTNERS AGENCY SERVICES, LLC; and LYNN TILTON,)	Related to Docket No. 377
)	
Defendants, and)	
)	
180S, INC.; BLACK MOUNTAIN DOORS, LLC; CROSCILL HOME, LLC; DURO TEXTILES, LLC; GLOBAL)	
)	

¹ The Debtor in this chapter 11 case, along with the last four digits of its federal tax identification number, is Zohar III, Corp. (9612). The Debtor's address is c/o Province, LLC 70 Canal Street, Suite 12E, Stamford, CT 06902. In addition to Zohar III, Corp., the Debtor's affiliates include the following debtors whose bankruptcy cases have been closed prior to the date hereof, along with the last four digits of their respective federal tax identification numbers and chapter 11 case numbers: Zohar II 2005-1, Corp. (4059) (Case No. 18-10513); Zohar CDO 2003-1, Corp. (3724) (Case No. 18-10514); Zohar III, Limited (9261) (Case No. 18-10515); Zohar II 2005-1, Limited (8297) (Case No. 18-10516); Zohar CDO 2003-1, Limited (5119) (Case No. 18-10517). All motions, contested matters, and adversary proceedings that remained open as of the closing of such cases, or that are opened after the date thereof, with respect to such closed-case debtors, are administered in this remaining chapter 11 case.

AUTOMOTIVE SYSTEMS, LLC;)
HERITAGE AVIATION, LTD.; INTREPID)
U.S.A., INC.; IMG HOLDINGS, INC.;)
JEWEL OF JANE, LLC; MOBILE)
ARMORED VEHICLES, LLC; SCAN-)
OPTICS, LLC; SILVERACK, LLC; STILA)
STYLES, LLC; SNELLING STAFFING,)
LLC; VULCAN ENGINEERING, INC; and)
XPIENT SOLUTIONS, LLC,)
)
Nominal Defendants.)
)

Patriarch Partners VIII, LLC;)
Patriarch Partners XIV, LLC;)
Patriarch Partner XV, LLC;)
OCTALUNA LLC; OCTALUNA II LLC;)
OCTALUNA III LLC; Patriarch)
Partners Agency Services, LLC;)
and Patriarch Partners, LLC,)
)
Counterclaim and Third-)
Party Claimants,)
)

v.)
)
Zohar CDO 2003-1, Limited; Zohar)
CDO 2003-1, Corp.; Zohar II 2005-1,)
Limited; Zohar II 2005-1, Corp.;)
Zohar III, Limited; Zohar III,)
Corp.,)
)
Counterclaim and Third-)
Party Defendants.)
)

**MEMORANDUM ORDER GRANTING THE ZOHAR LITIGATION TRUST-A'S
MOTION FOR LEAVE TO AMEND ITS COMPLAINT**

Upon consideration of the *Zohar Litigation Trust-A's Motion for Leave to Amend Its Complaint* (the "Motion")² and all briefing, submissions, and argument in support of and in opposition to the Motion,³ it is hereby **FOUND** and **CONCLUDED** that:

² Adv. D.I. 377.

³ See, e.g., Adv. D.I. 378, 396, 409, 410.

1. The Zohar Litigation Trust-A (the “Trust”) seeks to add a new claim (Count XLIII) against Patriarch Partners Agency Services, LLC (“PPAS”) and to augment existing claims (Counts IV and XXXIV) against the Patriarch Managers.⁴ The requested amendments relate to \$50 million of borrowings from the Zohar Funds in the time period leading up to the Patriarch Managers’ March 2016 resignation as collateral managers for the Zohar Funds.⁵ Among other things, the Trust alleges that in seeking and facilitating the borrowings, PPAS and the Patriarch Managers breached governing agreements, namely credit agreements that contain specified borrowing mechanics (PPAS) and collateral management agreements that contain certain standard of care obligations (Patriarch Managers).⁶

2. The Trust initially sought to include the proposed new claims as counterclaims in a long-pending action in the Southern District of New York styled *Patriarch Partners Agency Services, LLC v. Zohar CDO 2003-1, Ltd., et al.*, Case No. 16-cv-4488 (VM) (the “PPAS Action”). Following guidance of that court, the Motion was filed in this Court. In particular, the New York court observed that for the sake of judicial economy and efficiency, “it would make more sense to . . . bring [the new] claim[s] in Delaware because all the parties are already in that case[,] [t]he credit agreements are already in [that] case.”⁷ The parties were amenable to that suggestion.⁸

3. Under the Federal Rules, courts “should freely give leave [to amend] when justice so requires.”⁹ The grant or denial of leave to amend is left to the Court’s discretion.¹⁰ “Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility.”¹¹ The Patriarch Defendants oppose the Motion on three separate grounds – undue delay, futility, and prejudice.

4. In support of its contention that the Motion has been unduly delayed, the Patriarch

⁴ The “Patriarch Managers” are Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC. Given the narrow relief addressed in this Memorandum Order, the Court writes solely for the parties. They are familiar with the lengthy and complex procedural and substantive background of this adversary, the chapter 11 cases, and the other related litigations outside this Court.

⁵ The “Zohar Funds” are Zohar CDO 2003-1, Limited, Zohar II 2005-1, Limited, and Zohar III, Limited.

⁶ See generally Adv. D.I. 377, Ex. C (redline of proposed amended fourth complaint). The amendments also allege that PPAS improperly held onto the borrowings and effectively became a shadow revolving lender to the portfolio companies beyond the control of the Zohar Funds. Notwithstanding, the Trust is pursuing these “shadow revolver” claims in the PPAS Action. See Case No. 18-10512, D.I. 3795 (Aug. 22, 2023 Hr’g Tr. 104:17-19 (“[The shadow revolver] claims are in New York and we are not seeking to put those issues in front of your Honor.”)).

⁷ Adv. D.I. 396, Ex. 9 (PPAS Action Hr’g Tr. 40:15-20); see also *id.* at 20:7-10 (“I am sympathetic to the fact that it, in many ways, would make more sense to have this . . . litigated in the Delaware proceeding because the collateral managers are front and center.”); *id.* at 34:19-22 (“So it sounds like the – [the PPAS Action] wouldn’t necessarily have a res judicata or collateral estoppel effect on the claim regarding the initial drawdown.”).

⁸ See, e.g., *id.* at 38:3-7 (stating that the Trust is interested in trying new matters in Delaware); *id.* at 42:5-12 (stating that the Patriarch Defendants would not oppose the Motion on the grounds that it should have been brought in the PPAS Action).

⁹ FED. R. CIV. P. 15(a); see also *Foman v. Davis*, 371 U.S. 178, 182 (1962).

¹⁰ *Forman*, 371 U.S. at 182.

¹¹ *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997).

Defendants advance two arguments. They argue that the Zohar Funds knew or should have known about the lack of borrowing certificates when their chosen replacement collateral manager, Alvarez & Marsal Zohar Management (“AMZM”), approved subsequent funding transactions in or about March 2016 without borrowing certificates. They also argue that, at best, the Trust could have brought the new claims when discovery was produced in the PPAS Action in February 2018 with regard to a sample of ten funding transactions, two of which lacked borrowing certificates.

5. The Court is not persuaded by these arguments. With respect to the latter, asserting the new claim when two out of ten transactions lacked corresponding borrowing certificates would have been at best speculative. Moreover, after receipt of that production, the Trust sought further discovery into 26 other borrowings. That discovery was stayed by the Zohar Funds’ bankruptcy filings in March 2018. When the stay was lifted and discovery in the PPAS Action resumed in spring 2023, the Trust received the requested documentation and discovered that 19 of the requested 26 transactions lacked borrowing certificates. This prompted the Trust to bring the new claim shortly thereafter in the PPAS Action and then in this Court. The Trust’s actions demonstrate a diligent effort to investigate the issue and timely assert the new claim, albeit delayed by the intervening five-year stay.

6. Likewise, the Court is not convinced that AMZM’s 2016 approval of borrowing requests was sufficient to put the Trust on inquiry notice regarding the historical lack of borrowing certificates. The evidence that the Patriarch Defendants cite in support of this argument is a single e-mail communication from U.S. Bank¹² to an AMZM representative, with issue orders and invoices from PPAS attached. Nothing suggests or represents that borrowing certificates would typically have been included in communications between U.S. Bank and AMZM, or otherwise explain why communications between U.S. Bank and AMZM without the certificates would suggest that the funding requests actually lacked them. Moreover, AMZM’s replacement of the Patriarch Managers was contentious and fraught with information sharing deficiencies.

7. The Patriarch Defendants also seek denial of the Motion on grounds of futility. However, the Trust’s proposed amendments survive scrutiny under Rule 12(b)(6), which is the standard when assessing futility.¹³ With respect to new Count XLIII, the Patriarch Defendants contend that borrowing certificates, a condition required for borrowing requests,¹⁴ were waived by the parties’ course of performance. The exemplar credit agreement upon which the parties rely provides that conditions precedent can be waived, but only upon the written consent of the lenders.¹⁵ The Patriarch Defendants have not produced, or cited to, any writing that shows a

¹² “U.S. Bank” refers to U.S. Bank, N.A., the Indenture Trustee under the Zohar Funds’ Indentures.

¹³ *Burlington*, 114 F.3d at 1434.

¹⁴ See Adv. D.I. 378, Ex. H (Croskill Acquisition Credit Agreement) §§ 2.3(b)-(c), 3.2(a).

¹⁵ *Id.* § 2.3(d) (“Except as provided herein, *upon satisfaction or waiver* of the conditions precedent specified herein, the Agent shall make the proceeds of such Term Loans or Revolving Credit Loans, as applicable, available to the Borrower . . .”) (emphasis added); *id.* § 3.2 (“The obligation of each Lender to make any Loan on any Borrowing Date . . . is subject to the satisfaction, or waiver in accordance with Section 10.1, of the following conditions precedent”); *id.* § 10.1(a) (“Subject to Section 10.1(b) and Section 10.1(c) below, no amendment, modification, termination or waiver of any provision of the Credit Documents, or consent to any departure by any Credit Party therefrom, shall be effective without the written consent of the Required Lenders.”).

waiver with regard to the obligation to provide borrowing certificates. Waiver by course of performance is an inherently factual inquiry and more facts beyond those alleged so far by the Trust are required to make this determination. Therefore, any waiver conclusion is premature under Rule 12(b)(6).¹⁶

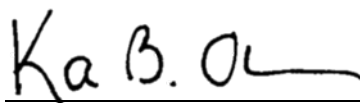
8. The Patriarch Defendants also argue that the Trust has failed to state a claim with regard to the Count IV additions against the Patriarch Managers. The Court finds that the Trust has adequately pled its claim by citing specific terms of the applicable collateral management agreements and explaining that the Patriarch Managers breached these terms by directing disbursement of funds without borrowing certificates and that said breaches materially harmed the Zohar Funds, which had no obligation to loan the funds without the certificates. To the extent that the Patriarch Defendants contend that the terms of the contracts have been amended or waived, such inquiry is premature under Rule 12(b)(6) as noted above.¹⁷

9. Finally, the Court finds that granting the Trust leave to amend its complaint would not be unduly prejudicial. The requested amendments are targeted and narrow, against two existing parties to this litigation. The parties already have agreed that the discovery produced in the PPAS Action would be deemed produced in this adversary proceeding, and any additional discovery would be discrete. Furthermore, discovery is still ongoing in this action.¹⁸ The Patriarch Defendants make much of the fact that the Trust's complaint has been amended three times prior but, given the facts and circumstances surrounding those amendments, they do not weigh in favor of denying the Motion.

10. Accordingly, the Court finds that the Motion has not been unduly delayed, the Trust's request is minimally prejudicial to the Patriarch Defendants, and the proposed amendments are not futile.

Based upon the foregoing, it is hereby **ORDERED** that the Motion is granted.

Dated: September 14, 2023



Karen B. Owens
United States Bankruptcy Judge

¹⁶ See also *Optima Media Grp. Ltd. v. Bloomberg L.P.*, 383 F.Supp.3d 135, 150 (S.D.N.Y. 2019) (“Given the importance of intent to this determination of [waiver], New York law contains a general rule . . . that questions of waiver are not decided on a motion to dismiss.”); Adv. D.I. 378, Ex. H § 10.10 (providing that New York law governs the credit agreement); *id.*, Ex. I § 7.4 (providing that New York law governs the collateral management agreement).

¹⁷ The Patriarch Defendants also have pointed the Court to waiver rulings in the SEC Action (a related prior litigation), but, as the Patriarch Defendants admit, that proceeding did not involve the borrowing transactions at issue here. See Case No. 18-10512, D.I. 3795 (Aug. 22, 2023 Hr’g Tr. 125:2-4).

¹⁸ See Adv. D.I. 439, 443.