

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE KAREN B. OWENS



824 N. MARKET STREET
WILMINGTON, DELAWARE
(302) 533-3183

September 11, 2023

VIA CM-ECF

Counsel to David Dunn, as Trustee for the Zohar Litigation Trust-A
Counsel to the Patriarch Stakeholders

In re: Zohar III, Corp., Case No. 18-10512 (KBO)
David Dunn, as Litigation Trustee for Zohar Litigation Trust-A v. Patriarch
Partners, LLC, et al., Adv. Proc. 20-50534 (KBO)¹

Dear Counsel:

This letter is my ruling on *David Dunn Litigation Trustee for the Zohar Litigation Trust-A's Motion to Compel* (the "Motion").² The Motion was filed by the Trustee pursuant to Rule 37 of the Federal Rules of Civil Procedure³ and presents two issues. The first is the Trustee's request for an order compelling the Defendants to search for and produce documents in response to the Trust's first set of requests for the production of documents.⁴ This relief is premature. However, I will order certain related relief to aid the discovery process.

¹ This Court is overseeing two consolidated adversary proceedings pursued by the Zohar Litigation Trust-A (the "Trust") through David Dunn as litigation trustee (the "Trustee") in accordance with the confirmed plan of the Zohar debtors (the "Debtors"). The first, proceeding number 20-50534 (the "Zohar Adversary"), was commenced by certain Debtors against Lynn Tilton and a variety of her affiliated entities. The current operative complaint is the third amended complaint. *See* Zohar Adversary, D.I. 295 ("Third Amended Complaint"). The Trustee has moved for leave to file a fourth amended complaint. *Id.*, D.I. 377. This request is under advisement. The second adversary, proceeding number 20-50776 (the "MBIA Adversary"), was commenced by MBIA Insurance Company ("MBIA") against Ms. Tilton and several of her affiliated entities. The current operative complaint is the second amended complaint. *See* MBIA Adversary, D.I. 105 ("Second Amended Complaint"). Discovery is underway in both adversaries. Pursuant to the consolidation Order, all pleadings are to be filed in the Zohar Adversary. *See* Zohar Adversary, D.I. 226; MBIA Adversary, D.I. 114.

² Zohar Adversary, D.I. 370.

³ Made applicable to the adversary proceedings by Rule 7037 of the Federal Rules of Bankruptcy Procedure.

⁴ *See* Zohar Adversary, D.I. 372, Ex. 1.

As required by our Local Rules, the Trustee and the Patriarch Stakeholders are required to confer in good faith to attempt an agreement on how to conduct discovery, including reasonable e-discovery parameters addressing search methods, custodians, search terms, and time periods.⁵ The parties have attempted to do so but are at an impasse arising from the Defendants' prior productions of documents in litigations conducted outside this Court, including the "SEC Action" and the "Nord Action".⁶ The Defendants argue that the Trust's document requests substantially overlap with the prior productions, that they have made a good faith attempt to conduct a reasonable search for documents responsive to the Trust's requests that fall outside of those productions, and that anything further is burdensome given the reduction of their workforce. The Trust is willing to accept the prior productions but submits that more is needed given the greater scope of this litigation as well as its inability to confirm the discovery parameters implemented in the SEC and Nord Actions.

The current dispute is too broad for me to make any concrete decisions regarding the sufficiency of any prior productions or the burden of any possible further discovery. There is partial overlap, but the claims, subject matter, and time periods covered by pending adversaries are much more expansive than the SEC and Nord Actions. Therefore, while reliance on prior productions may be a reasonable way to ease the discovery burden, it is not an appropriate substitute for the entirety of Defendants' discovery obligations here. In order for me to decide those obligations, however, I cannot simply look to the volume of documents previously produced. Nor am I responsible for reviewing and comparing voluminous prior production requests with the Trust's pending requests.⁷ I also question the usefulness of such a task given that the requests alone (without the underlying search parameters for side-by-side comparison) do not shed sufficient light on the documents actually produced in the past.

I would like the parties first to negotiate reasonable discovery parameters for the adversaries, including time periods, search terms, and custodians relevant to each request. Once the discovery parameters for the adversaries are finalized, then the parties should compare them to the parameters, to the extent available,⁸ employed by the Defendants in the SEC and Nord Actions, in this discovery process to-date, and in the other Zohar-related litigations. There has been no persuasive argument put forth by the Defendants that engaging in these fundamental first-steps of the discovery process is unduly burdensome. If specific and concrete disputes regarding relevancy, proportionality, and the like arise during this exercise despite the parties' good faith attempts, I

⁵ See Local Rule 7026-1(a) ("Parties are expected to confer and in good faith attempt to reach agreement cooperatively on how to conduct discovery under Fed. R. Civ. P. 26-36 and these Local Rules. Parties also are expected to use reasonable, good faith and proportional efforts including to preserve, identify and produce relevant information. This may include identifying appropriate limits to discovery, including limits on custodians, identification of relevant subject matter, time periods for discovery and other parameters to limit and guide preservation and discovery issues."); see also Local Rule 7026-3 (addressing e-discovery obligations).

⁶ See *In re Lynn Tilton et al.*, No. 3-16462 (S.E.C.) (the "SEC Action"); *Norddeutsche Landesbanke Girozentrale, et al. v. Tilton, et al.*, Index No. 651695/2015 (N.Y. Sup. Ct.) (the "Nord Action").

⁷ See Zohar Adversary, D.I. 391, Ex. 2.

⁸ If parameters have not yet been disclosed, they must. If they are unable to be located, then I am not persuaded that the prior productions can reasonably substitute for any discovery obligations in this litigation absent agreement from the Trustee, who was not a party to those actions.

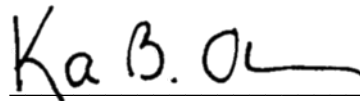
will hear them. And, of course, after comparison of the parameters, if duplication is confirmed to exist between the productions required in this litigation and those of the prior litigations, then the Defendants need not conduct a duplicative search and production.

The second issue presented by the Motion concerns the Defendants' refusal to produce specific categories of documents. The Trust requests unused expert reports and supporting materials from the SEC and Nord Actions, investigative testimony from the SEC Action, and deposition transcripts and exhibits from the Nord Action. Defendants do not meaningfully dispute the relevancy of these documents but focus on the burden if the documents are produced and the parties are required to divert resources to address the expert opinions or relitigate matters addressed in the SEC and Nord Actions. These fears are too speculative to overcome the need to produce the documents. I am confident that I could fashion relief in the future should it be required.⁹

The Trust also requests unredacted versions of Ms. Tilton's personal tax returns. I am sensitive to the expressed concerns of the Defendants regarding the disclosure of Ms. Tilton's personal information. However, I am not persuaded that this information is entirely irrelevant given the tax-related claims pursued by the Trust. Moreover, a confidentiality order is in place, and the Trustee has offered a solution to limit unnecessary disclosure.¹⁰ The process suggested is reasonable. If there is a disagreement regarding the scope of disclosures after the parties have attempted it in good faith, I am available to consider the arguments of counsel and the opinions of the experts in this matter.

The parties should meet and confer regarding an appropriate form of order.

Very truly yours,



Karen B. Owens
United States Bankruptcy Judge

⁹ Defendants also raise admissibility issues, but they do not negate the requirement of production. "Relevance is measured not by admissibility, but by whether the information 'bears on, or [] reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Norguard Ins. Co. v. Serveon, Inc.*, Civ. No. 08-900, 2011 WL 344076, at *4 (D. Del. Jan. 28, 2011) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

¹⁰ Case No. 18-10512, D.I. 3795 (Aug. 22, 2023 Hr'g Tr. 72:6-20) (offering to review one unredacted tax return in an in-person meet and confer with the Trustee's tax expert to determine the proper extent of disclosure).