IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
EMERGE ENERGY SERVICES LP,[1]	)	Case No. 19-11563 (KBO)
	)	
Reorganized Debtor.	)	
	)	
SUPERIOR SILICA SANDS LLC, a Texas limited liability company	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 20-51052 (KBO)
	)	
IRON MOUNTAIN TRAP ROCK COMPANY, a Missouri corporation, and FRED WEBER, INC., a Delaware Corporation	)	
Defendants.	)	

MEMORANDUM ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Defendants Iron Mountain Trap Rock Company ("IMTR") and Fred Weber, Inc. ("Weber") move to dismiss with prejudice (the "Motion to Dismiss") pursuant to Rule 12(b) of the Federal Rules of Civil Procedure (the "Federal Rules"), made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the *First Amended Complaint for (1) Declaratory Relief, (2) Declaratory Relief, (3) Breach of Contract, (4) Equitable Indemnity, (5) Contribution, and (6) Objection to Proof of Claim* (the "First Amended Complaint") filed by Plaintiff Superior Silica Sands LLC ("Superior"). The Court, having considered the briefing submitted by the parties on the Motion to Dismiss,[2] finds and orders as follows:

I. JURISDICTION AND VENUE

The Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334(b). Venue is proper pursuant to 28 U.S.C. § 1409(a).

[1] The Reorganized Debtor in this case, along with the last four digits of the Reorganized Debtor's federal tax identification number, is Emerge Energy Services LP (2937). The Reorganized Debtor's address is 6500 West Freeway, Suite 800, Fort Worth, Texas 76116.

[2] *See* Adv. D.I. 14 (the "First Am. Compl."), 23, 24, 25, 26.

II. SUMMARY OF THE ALLEGED FACTS

Superior is a reorganized Debtor in the jointly administered chapter 11 cases of Emerge Energy Services, LLC and its affiliated debtors and reorganized debtors (collectively, the "Debtors" or "Reorganized Debtors").[3] Superior owns, leases, and/or operates multiple frac sand plants, quarries, and other facilities throughout North America and is the lessee of a sand quarry site located in Chippewa Falls, Wisconsin (the "Quarry").[4]

On April 7, 2011, Superior and Weber entered into the Wet Sand Services Agreement (as amended, the "Services Agreement")[5] pursuant to which Weber agreed to construct a sand processing plant at the Quarry, mine sand, and wash and process the sand to produce the end product.[6] Weber's rights, interests, and obligations under the Services Agreement were later assigned to IMTR,[7] and Weber agreed to guarantee IMTR's performance obligations thereunder.[8]

Pursuant to Section 5.1(e) of the Services Agreement, the Defendants agreed to be responsible for all reclamation that is required at the Quarry arising from their operations (the "Reclamation Obligations").[9] The Defendants' Reclamation Obligations include interim reclamation responsibilities required during the course of each year[10] and final reclamation responsibilities required at the cessation of their Quarry operations.[11]

In 2016 when mining operations were suspended, Superior discovered that the Defendants were not fulfilling their Reclamation Obligations.[12] They either failed to perform them or did so improperly or negligently.[13] The Defendants also failed to perform Reclamation Obligations associated with their future limited mining operations that recommenced in 2017.[14]

In early 2019, Chippewa County notified Superior that its approximate $2.9 million financial assurance posted to secure the performance of Quarry reclamation was increasing to

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[3] First Am. Compl. ¶ 7.

[4] *Id.* ¶ 8.

[5] *Id.* ¶¶ 9, 11. Between August 2011 and April 2017, the parties amended the Services Agreement four times. *Id.* ¶ 12.

[6] *Id.* ¶ 11.

[7] *Id.* ¶¶ 14-15. Weber is the parent company and sole owner of IMTR. *Id.* ¶¶ 9-10.

[8] *Id.* ¶ 16.

[9] *Id.* ¶ 18.

[10] *Id.* ¶ 19.

[11] *Id.* ¶ 23.

[12] *Id.* ¶ 20.

[13] *Id.*

[14] *Id.*

approximately $4.65 million.[15] This increase resulted primarily from the Defendants' reclamation failures.[16] Defendants acknowledged their breaches and agreed to provide the newly requested financial assurance.[17] However, financial assurance has never been given by the Defendants.[18] Moreover, despite Superior demanding and giving the Defendants the opportunity to cure their failures, the Defendants' Reclamation Obligations have not yet been performed.[19] The Defendants have also refused to establish and fund an escrow account in the amount of $13.5 million, as requested by Superior, to fund reclamation costs.[20]

III. RELEVANT PROCEDURAL HISTORY

A day after the Debtors commenced their bankruptcy cases on July 15, 2019 (the "Petition Date") they moved to reject the Services Agreement under section 365(a) of the Bankruptcy Code, effective as of the Petition Date.[21] The Court ultimately approved the rejection.[22] Thereafter, IMTR filed a proof of claim against Superior (the "Proof of Claim"), claiming damages in the total amount of approximately $32 million for unpaid amounts arising from services performed under, and the take-or-pay minimum requirements of, the Services Agreement.[23]

On December 18, 2019, the Court confirmed[24] the Debtors' Second Amended Joint Plan of Reorganization (the "Plan").[25] Almost six months later, the Court closed all of the Debtors' bankruptcy cases except for Emerge Energy Services LP ("Emerge").[26] Superior commenced this proceeding against the Defendants thereafter.

IV. APPLICABLE LEGAL STANDARD

Federal Rule 8(a)(2), made applicable to this proceeding by Bankruptcy Rule 7008, provides that to state a claim for relief, a pleading must contain "a short and plain statement of the

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[15] *Id.* ¶ 22.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* ¶¶ 20-23.

[19] *Id.* ¶ 21.

[20] *Id.* ¶¶ 45-46.

[21] *See* Case No. 19-11563, D.I. 10. All references to the Bankruptcy Code refer to title 11 of the United States Code. *See* 11 U.S.C. §§ 101-1532 (2020).

[22] *See* Case No. 19-11563, D.I. 207.

[23] *See* Proof of Claim No. 31, https://www.kccllc.net/emergeenergy/document/19115661908160000000 00001.

[24] *See* Case No. 19-11563, D.I. 721.

[25] *See* Case No. 19-11563, D.I. 682.

[26] *See* Case No. 19-11563, D.I. 847.

claim showing that the pleader is entitled to relief[.]"[27] This rule imposes a "notice pleading standard . . . to give the defendant fair notice of what the claim is and the grounds upon which it rests."[28] While detailed facts are not necessary, "a plaintiff is required to put the defendant on notice as to the basics of the plaintiff's complaint [and] to set forth the facts with sufficient particularity to apprise the defendant fairly of the charges made against him so that he can prepare an adequate answer."[29]

When reviewing a motion to dismiss under Federal Rule 12(b)(6) challenging the sufficiency of a plaintiff's statement of claim, a court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief."[30] This is a plausibility standard – it requires more than a sheer possibility that a defendant acted unlawfully but is not akin to the probability standard.[31] Rather, a plaintiff must allege sufficient facts to nudge the claims "across the line from conceivable to plausible[.]"[32]

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]"[33] Therefore, "the tenet that a court must accept as true all factual allegations contained in a complaint is inapplicable to legal conclusions."[34] Thus, a plaintiff's threadbare recitals of a cause of action that are only supported by conclusory statements will not suffice.[35]

The United States Court of Appeals for the Third Circuit in *Burtch v. Milberg Factors, Inc.* prescribed a three-step process for courts to determine the sufficiency of a complaint - first, note the elements of the claim; second, identify the allegations that are conclusory and thus not entitled to an assumption of truth; and third, assume the veracity of well-pleaded factual allegations and determine the plausibility of the plaintiff's entitlement to relief.[36]

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[27] FED. R. CIV. P. 8(a).

[28] *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

[29] *In re Lexington Healthcare Grp., Inc.*, 339 B.R. 570, 575 (Bankr. D. Del. 2006); *see also In re APF Co.*, 308 B.R. 183, 188 (Bankr. D. Del. 2004); *Mervyn's LLC v. Lubert-Adler Group IV, LLC (In re Mervyn's Holdings, LLC)*, 426 B.R. 488, 495 (Bankr. D. Del. 2010).

[30] *Crystallex Int'l Corp. v Petrolesos De Venezuela, S.A.*, 879 F.3d 79, 83 n.6 (3d Cir. 2018) (quoting *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 242 (3d Cir. 2015)).

[31] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2007).

[32] *Twombly*, 550 U.S. at 570.

[33] *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) (internal citation omitted).

[34] *Iqbal*, 556 U.S. at 678.

[35] *Id.*

[36] 662 F.3d 212, 221 (3d Cir. 2011) (quoting *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir.

While a court may draw from "judicial experience and common sense" in considering a motion to dismiss,[37] it must only consider alleged facts that are within the scope of the court's review.[38] The scope of what is reviewable includes the complaint, public record, and documents that are "integral to or explicitly relied upon" by a plaintiff, such as documents attached to a complaint and any undisputedly authentic documents upon which the claims are based.[39] Rather than being a mini trial for parties to put forth their whole case and competing viewpoints of what the ultimate outcome should be, a motion to dismiss focuses solely on the narrow and fundamental question of whether, if everything the plaintiff alleges is true, the plaintiff can prevail.[40]

V. LEGAL DISCUSSION

By the First Amended Complaint, Superior seeks confirmation that the Defendants are obligated to fulfill the Reclamation Obligations. It also seeks damages for breach of contract, equitable indemnity, and contribution on account of the Defendants' failure to fulfill their Reclamation Obligations. Finally, it seeks disallowance of IMTR's Proof of Claim.

The Defendants argue that dismissal of the First Amended Complaint is appropriate for several reasons. First, they argue that Superior is judicially estopped from asserting any of its claims because it failed to disclose them in its bankruptcy case. Second, they contend that certain contract claims did not survive rejection of the Services Agreement. Third, they assert that they are not liable for equitable indemnity and contribution under Wisconsin law because they are not "Operators" of the Quarry and because Superior has failed to properly plead the claims. Fourth and finally, they argue that Superior is unable to object to the IMTR Proof of Claim because the time prescribed under the Plan for doing so expired prior to the commencement of this action. For the most part, the Court disagrees.

A. Superior Is Not Judicially Estopped From Asserting Its Claims

The Defendants argue that Superior's claims must be dismissed because they were known claims that were not disclosed in Superior's Schedules of Assets and Liabilities (the "Schedules").[41] Defendants attribute this lack of disclosure to bad faith, arguing that it allowed Superior to conceal the claims and hypothetical proceeds from its unsecured creditors and retain them for itself post-confirmation. They allege a fraud on the Court and creditors and urge application of judicial estoppel to bar Superior from asserting its claims.

2010)).

[37] *Iqbal*, 556 U.S. at 679.

[38] *Davis v. Wells Fargo*, 824 F.3d 333, 341 (3d Cir. 2016); *see also Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014).

[39] *Tanksley v. Daniels*, 902 F.3d 165, 172 (3d Cir. 2018); *see also McTernan v. City of York*, 577 F.3d 521, 526 (3d Cir. 2009); *Davis*, 824 F.3d at 341.

[40] *See Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993).

[41] *See* Case No. 19-11563, D.I. 149.

Courts in the Third Circuit find judicial estoppel appropriate when:

> (1) the party to be estopped is asserting a position that is irreconcilably inconsistent with one he or she asserted in a prior proceeding; (2) the party changed his or her position in bad faith, i.e., in a culpable manner threatening to the court's authority or integrity; and (3) the use of judicial estoppel is tailored to address the affront to the court's authority or integrity.[42]

This doctrine "bars a litigant from asserting a position that is inconsistent with one he or she previously took before a court or agency" but is not intended to eliminate all "slight or inadvertent" inconsistencies.[43] "The basic principle . . . is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."[44]

Unlike equitable estoppel, which focuses on the relationship between parties, judicial estoppel centers on the relationship between the litigant and the court, and seeks to preserve the integrity of the judicial system.[45] Embodied in the doctrine is "the intrinsic ability of courts to dismiss an offending litigant's complaint without considering the merits of the underlying claims when such dismissal is necessary to prevent a litigant from playing fast and loose with the courts."[46] The Court of Appeals for the Third Circuit has cautioned that judicial estoppel should be "used sparingly and reserved for the most egregious case"[47] to avoid "a miscarriage of justice."[48]

Judicial estoppel has been used by courts to prevent a debtor from pursuing claims that it did not properly disclose during a bankruptcy case, including in the schedules of assets and liabilities required to be filed pursuant to section 521 of the Bankruptcy Code.[49] While

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[42] *Danise v. Saxon Mortg. Servs. Inc.*, 738 F. App'x 47, 50 (3d Cir. 2018) (quoting *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 777–78 (3d Cir. 2001)).

[43] *Id.* (citing *Ryan Operations G.P. v. Forrest Paint Co., Inc.*, 81 F.3d 355, 362 (3d Cir. 1996)).

[44] *Ryan*, 81 F.3d at 358 (quoting 18 FED. PRAC. & PROC. § 4477 (1981)).

[45] *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 319 n.7 (3d Cir. 2003) (citing *Delgrosso v. Spang & Co.*, 903 F.2d 234 (3rd Cir.1990)).

[46] *Id.* at 319.

[47] *Id.* at 324.

[48] *Id.* at 319; *see also Ryan*, 81 F.3d at 362-63 (providing that "[a]n inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing" and citing *Total Petroleum, Inc. v. Davis*, 822 F.2d 734 (8th Cir. 1987), which held that the doctrine only applies to deliberate inconsistencies that are "tantamount to a knowing misrepresentation to or even fraud on the court.").

[49] *See, e.g.*, *Krystal*, 337 F.3d at 321, 325 (barring known claims that were not adequately disclosed in debtor's schedules and statements, disclosure statement, and plan and finding that the lack of disclosure affected creditors decision-making on the plan and compromise of their claims); *Danise*, 738 F. App'x at 51 (barring debtor's claims where they would have increased a chapter 13 estate to the benefit of creditors); *Oneida Motor Freight, Inc. v. United Jersey Bank (In re Oneida Motor Freight, Inc.)*, 848 F.2d 414, 418

"hypothetical claims that are so tenuous as to be fanciful" need not be disclosed, debtors must disclose known causes of action, including those of which the debtor has sufficient information to suggest it may have a possible cause of action.[50] A "knowledge of the claim and motive for concealment in the face of an affirmative duty to disclose [gives] rise to an inference of intent sufficient to satisfy the requirements of judicial estoppel."[51]

Superior knew of its claims against the Defendants as of the Petition Date[52] but did not disclose them on its Schedules. Part 11 of the Schedules required Superior to disclose its "Causes of action against third parties (whether or not a lawsuit has been filed)" and any "contingent and unliquidated claims or causes of action of every nature, including counterclaims . . . and rights to set off claims".[53] Superior listed one lawsuit unrelated to its claims against the Defendants and stated that no contingent and unliquidated claims or causes of action existed.[54] Moreover, Superior disclosed IMTR as a creditor with a nonpriority unsecured claim not subject to setoff.[55]

Notwithstanding, the Court does not find that the current assertion of claims against the Defendants is a position that is irreconcilably inconsistent with the disclosures of the Schedules (or lack thereof) because Superior conditioned them on several prominent disclaimers that notified creditors and other parties-in-interest that, despite its reasonable efforts to assemble accurate and complete Schedules, errors or omissions may exist and other filed or potential causes of action against third parties may exist and have been left off the Schedules:

> **GLOBAL NOTES AND STATEMENT OF LIMITATIONS, METHODOLOGY, AND DISCLAIMERS REGARDING DEBTORS' SCHEDULES OF ASSETS AND LIABILITIES AND STATEMENTS OF FINANCIAL AFFIARS**
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> . . . .
>
> Although the Debtors have made every reasonable effort to ensure the accuracy and completeness of the Schedules and Statements, subsequent information or discovery may result in material changes to the Schedules and Statements. . . . As a result, inadvertent errors or omissions may exist.

(3d Cir. 1988) (barring claims that, if disclosed, would have impacted creditors' decision-making on the plan, including defendant's decision to vote in favor).

[50] *Krystal*, 337 F.3d at 323.

[51] *Ryan*, 81 F.3d at 363.

[52] First Am. Compl. ¶ 20.

[53] *See* Case No. 19-11563, D.I. 149.

[54] *Id.* Superior later amended its Schedules but did not modify any disclosures relevant to this dispute. *See* Case No. 19-11563, D.I. 281, 434.

[55] *See* Case No. 19-11563, D.I. 149 (Schedule E/F, Part 2 Attachment).

> Accordingly, the Debtors and their directors, officers, agents, attorneys, and financial advisors cannot guarantee or warrant the accuracy or completeness of the data that is provided in the Schedules and Statements . . . .
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> **Global Notes and Overview of Methodology**
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> . . . .
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> 3. **Reservations and Limitations**. Reasonable efforts have been made to prepare and file complete and accurate Schedules and Statements. However, as noted above, inadvertent errors or omissions may exist. . . . .
>
> > (e) **Causes of Action**. Despite reasonable efforts, the Debtors may not have identified and/or set forth all of their causes of action (filed or potential) against third parties as assets in their Schedules and Statements, including, without limitation, avoidance actions arising under chapter 5 of the Bankruptcy Code and actions under other relevant bankruptcy and non-bankruptcy laws to recover assets. The Debtors reserve all rights with respect to any causes of action, and nothing in these Global Notes or the Schedules and Statements should be construed as a waiver of any such causes of action.[56]

Moreover, even if Superior took inconsistent positions, the Court cannot infer from the totality of circumstances that it acted in bad faith or with an intention to obtain an unfair advantage.[57] As an initial matter, Superior's disclaimers – notifying parties that non-disclosed claims may exist – weigh against an inference of bad faith or improper motive. Moreover, the Court cannot identify a benefit received by Superior from the lack of disclosure.[58] Defendants argue that disclosure of the multi-million-dollar claims would have altered creditors' consideration, analysis, and decision-making with respect to the Plan, but the Court does not believe so. Due to the lack of value available to holders of general unsecured claims, the Plan effectuated a debt-for-equity swap whereby the Debtors' existing secured noteholders received

[56] *Id.*

[57] *Krystal*, 337 F.3d at 324; *Ryan*, 81 F.3d at 363-64.

[58] *See Ryan*, 81 F.3d at 363-65 (examining whether nondisclosure played any role in confirmation or would have led to a different result and cautioning that judicial estoppel is not "meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts.")).

100% of reorganized Emerge.[59] General unsecured creditors received no distributions. General unsecured creditors (including the Defendants) rejected the Plan, and the Official Committee of Unsecured Creditors vigorously opposed it.[60] Disclosure of Superior's claim against the Defendants would not have changed these parties' already-hostile view of the Plan. Additionally, after significant discovery and a five-day trial aimed primarily at the valuation of the Debtors, the Court concluded that unsecured creditors were significantly "out of the money."[61] Superior's reclamation claims against the Defendants would neither have altered this conclusion nor interfered with the Court's ultimate confirmation of the Plan. The notion that the Debtors were motivated to hide their claims against the Defendants to receive a benefit post-confirmation to which they are not entitled ignores the Court's conclusions on valuation. The Debtors' noteholders were entitled to receive the benefits of this litigation pre-confirmation and now they may do so as the owners of the Reorganized Debtors.

The Defendants offer no other facts or argument to support a finding that Superior had a motive to conceal, and the Court is unable to independently identify any. Accordingly, the Court cannot conclude that the Debtors' played fast and loose with it and will not bar Superior's claims.[62]

B. Superior Has Adequately Pled Its Contract Claims

Counts 1 and 3 rely on the Services Agreement, which was rejected on the Petition Date. Count 1 of the First Amended Complaint, requests a declaratory judgment that, among other things, IMTR and Weber are obligated to carry out all required reclamation arising from their operation of the Quarry pursuant to Section 5.1(e) of the Services Agreement despite rejection. Count 3 is Superior's related breach of contract claim. Similar to Count 1, it alleges that the Services Agreement obligates the Defendants to carry out all required reclamation arising from their operation of the Quarry pursuant to Section 5.1(e) of the Services Agreement and that, beginning in 2016 and continuing through to the Petition Date, Defendants repeatedly breached such obligation, failed to cure such breaches, and damaged Superior. In this count, Superior also alleges that Defendants' reclamation obligations survived rejection of the Services Agreement.

When an executory contract is rejected in bankruptcy, the contract is not rescinded – it is considered a breach as of the filing of the bankruptcy by the debtor who "repudiate[es] any further performance of its duties" under the contract.[63] "The decision is forward looking, and does not affect the rights and obligations that have already accrued; 'the issues of affirmance or rejection relates only to those aspects of the contract which remained unfulfilled as of the date the petition

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[59] *See generally In re Emerge Energy Serv. LP*, No. 19-11563, 2019 WL 7634308 (Bankr. D. Del. Dec. 5, 2019).

[60] *Id.*

[61] *Id.*

[62] The Defendants also argue that the Debtors' Plan did not provide for the retention of claims against them post-confirmation because the Services Agreement was rejected. The Court does not agree.

[63] *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, __ U.S. __, 139 S. Ct. 1652, 1658, 1661 (2019); 11 U.S.C. § 365(g).

was filed.'"[64] "[E]xecuted portions of the contracts remain intact, and property rights acquired under the contracts prior to filing bec[o]me property of the estate despite the [debtor's] rejection of unperformed obligations of the contracts."[65]

In seeking dismissal of Counts 1 and 3, Defendants reference the Quarry's reclamation plan and allege that there were planned mining phases at the Quarry. They contend that there was no reclamation obligation for a mining phase until the mining activities for such phase were complete.[66] The Defendants argue that, to the extent that Superior is asserting a claim related to reclamation obligations for those areas of the Quarry where mining activities were not yet complete as of the Petition Date, such "final reclamation" claims must be dismissed as "future (executory)" reclamation obligations excused as a result of rejection.[67]

The Court will not dismiss Counts 1 and 3 on this basis. Superior adequately states its claims, and the Defendants have not challenged the sufficiency of their pleading. Moreover, Defendants raised this argument for the first time in their reply briefing, and therefore the Court need not consider it.[68] The Defendants' argument regarding the rejection's effect is also a defense to Superior's claims that raises issues of fact that are outside the allegations of the First Amended Complaint and are inappropriate for consideration at this initial pleading stage.[69]

C. Superior Has Adequately Pled That The Defendants Are Operators

Count 2 is Superior's request for a declaratory judgment finding that, among other things, IMTR is the "Operator" of the Quarry under Wisconsin law and that Weber is a guarantor of IMTR's reclamation responsibilities as Operator. Counts 4 and 5 are Superior's claims against the Defendants for equitable indemnity and contribution for amounts expended by Superior to perform the Defendants' reclamation obligations as Operators under Wisconsin law. It is Superior's assertion that reclamation responsibilities at the Quarry are either solely the Defendants' legal responsibility or exceed any liability of Superior.

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[64] *Empire State Bldg. Co. v. New York Skyline, Inc. (In re New York Skyline, Inc.)*, 432 B.R. 66, 80 (Bankr. S.D.N.Y. 2010) (quoting *Delightful Music Ltd. v. Taylor (In re Taylor)*, 913 F.2d 102, 106 (3d Cir. 1990)).

[65] *In re Tomer*, 128 B.R. 746, 756 (Bankr. S.D. Ill. 1991).

[66] Adv. D.I. 26 at 9-11.

[67] *Id.*

[68] *See, e.g.*, *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 146 (3d Cir. 2017) (noting the common rule that the court will not consider arguments raised for the first time in a reply brief). The Defendants argued generally in their opening brief that dismissal of all of Superior's contract claims were barred by rejection. *See* Adv. D.I. 24 at 13-14. They abandoned this argument in the reply and asserted for the first time that only certain of their mining activities did not give rise to reclamation obligations as of the Petition Date and thus were unripened, future obligations excused upon rejection.

[69] 5B FED. PRAC. & PROC. CIV. § 1349 (3d ed.) (noting that motions to dismiss under Rule 12(b) "should be granted sparingly and with caution to make certain that the plaintiff is not improperly denied a right to have his claim adjudicated on the merits.").

Chapter NR 135 of the Wisconsin Administrative Code[70] (the "Reclamation Statute") requires reclamation of nonmetallic mining sites and sets forth reclamation standards, permitting requirements, and various procedures and requirements applicable to mines and reclamation programs to accomplish this goal.[71] It requires each county to enact and administer a nonmetallic reclamation ordinance that complies with the Reclamation Statute.[72] Article 2 of Chapter 30 of the Chippewa County Code of Ordinances addresses reclamation of nonmetallic mining sites in the county (the "Chippewa Code").[73]

With limited exception, the Reclamation Statute and the Chippewa Code do not permit persons to "engage in nonmetallic mining or in nonmetallic mining reclamation without obtaining a nonmetallic mining reclamation permit issued pursuant to the applicable reclamation ordinance and [the Reclamation Statute]."[74] Counties or, in some instances, municipalities or the Wisconsin Department of Natural Resources, are to issue the reclamation permits.[75] Permits are to be applied for and obtained by "the Operator" of any nonmetallic mining site before beginning mining operations.[76] In doing so, the Operator must submit a reclamation plan and certify that it will provide, as a condition of the reclamation permit, the financial assurance (a commitment of funds or resources)[77] to pay for required reclamation activities.[78] Following approval of the permit, the Operator is required to, among other things, provide the required financial assurance, submit an annual report for the permitted site, and pay certain fees.[79]

An "Operator" is defined by the Reclamation Statute and Chippewa Code as "any person who is engaged in, or who has applied for a permit to engage in, nonmetallic mining, whether

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[70] WIS. ADMIN. CODE §§ NR 135.01-135.64 (2021); *see also* WISC. STAT. ANN. § 295.12 (requiring that the Wisconsin Department of Natural Resources promulgate rules establishing uniform statewide standards for nonmetallic reclamation, provisions for administration, and uniform statewide requirements and procedures for the administration of a reclamation program by any county, city, village, or town).

[71] WIS. ADMIN. CODE § NR 135.01.

[72] *Id.* § 135.32.

[73] CHIPPEWA CODE §§ 30-31–30-180 (2018), https://www.co.chippewa.wi.us/home/showpublisheddocument/25 0/636758805424900000.

[74] WIS. ADMIN. CODE § NR 135.16; *accord* CHIPPEWA CODE § 30-105 ("Every operator of a nonmetallic mining site in the county who engages in or plans to engage in nonmetallic mining after September 1, 2001, shall obtain a reclamation permit issued under this section . . . .").

[75] WIS. ADMIN. CODE § NR 135.17.

[76] *Id.* § 135.18(1); *see also* CHIPPEWA CODE § 30-101 (requiring operators to apply for reclamation permits from the county).

[77] WIS. ADMIN. CODE § NR 135.03(8).

[78] *Id.* § NR 135.18(1)(b)(3)-(4); *see also id.* § NR 135.19 (setting forth the requirements of an operator's reclamation plan, including a certification from the operator that reclamation will be carried out in accordance with the reclamation plan); *accord* CHIPPEWA CODE §§ 30-102–30-103 (discussing reclamation plans and financial assurance of operators).

[79] WIS. ADMIN. CODE §§ NR 135.36, 135.39 135.40; CHIPPEWA CODE §§ 30-103, 30-133, 30-135.

individually, jointly, or through subsidiaries, agents, employees, contractors or subcontractors."[80] In support of dismissal of Counts 2, 4 and 5, the Defendants argue that Superior is the only Operator of the Quarry. They argue that Wisconsin law requires Operators to have reclamation permits and that Superior (not the Defendants) have the Quarry permit. Therefore, under their interpretation of the definition of Operator, Defendants argue that they do not qualify. Superior acknowledges that it obtained the Quarry's permit, that the permit listed it as Operator, and that it provided financial assurance to Chippewa County as required to obtain the permit.[81] However, Superior argues that the Defendants, through their alleged services and activity, fall within the scope of an Operator as defined by the Reclamation Statute and Chippewa Code.

When interpreting the definition of Operator set forth by the Reclamation Statute and Chippewa Code, the Court must apply its plain meaning.[82] Because Superior applied for and obtained a permit to engage in nonmetallic mining[83] at the Quarry, it qualifies as an Operator. Notwithstanding these facts, the definition of Operator is not limited to only the entity who has applied for a permit to engage in nonmetallic mining - it also applies to any person who is engaged in nonmetallic mining. The statute is broadly drafted and the use of the word "or" provides two alternative circumstances in which any person could be classified as an Operator, neither to the exclusion of the other. The definition does not plainly limit the number of Operators at a nonmetallic mining site, and the parties agree that there can be more than one. Therefore, the Court rejects the Defendants' interpretation of the Operator definition and holds that the Defendants can also qualify as Operators notwithstanding Superior's status as one.

Applying the allegations of the First Amended Complaint to the Operator definition, the Defendants could qualify as a person who is engaged in nonmetallic mining. First, Superior alleges that the Defendants are corporations,[84] which qualify as "persons" under the Reclamation Statute.[85] Second, Superior alleges that the Defendants, among other things, operated the mining operations at the Quarry, mined sand from the Quarry, and washed and processed the sand to produce the end product.[86] Moreover, the Defendants concede that IMTR "engaged in certain physical activities at the Quarry, *i.e.*, mining, cleaning, and drying the sand, so Superior could sell

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[80] WIS. ADMIN. CODE § NR 135.03(17); CHIPPEWA CODE § 30-38(17).

[81] Adv. D.I. 25 at 23.

[82] *See Jungbluth v. Hometown, Inc.*, 548 N.W.2d 519, 522 (Wis. 1996) ("This court's first resort is to the plain language of the statute itself. If the meaning of the statute is plain, we are prohibited from looking beyond the language to ascertain its meaning.").

[83] Sand is considered a "nonmetallic mineral" under the Reclamation Statute and Chippewa Code. WIS. ADMIN. CODE § NR 135.03(11); CHIPPEWA CODE § 30-38(12).

[84] First Am. Compl. ¶¶ 9-10.

[85] WIS. ADMIN. CODE § NR 135.03(17m) (defining "person" as "an individual, owner, operator, corporation, limited liability company, partnership, association, county, municipality, interstate agency, state agency or federal agency.").

[86] First Am. Compl. ¶¶ 8, 11, 20-21.

it to its customers."[87] These actions fall within the scope of "nonmetallic mining" under the Reclamation Statute:

> "Nonmetallic mining" or "mining" means all of following:
>
> (a) Operations or activities at a nonmetallic mining site for the extraction from the earth of mineral aggregates or nonmetallic minerals for sale or use by the operator. Nonmetallic mining includes use of mining equipment or techniques to remove materials from the in-place nonmetallic mineral deposit, including drilling and blasting, as well as associated activities such as excavation, grading and dredging. . . . .
>
> (b) Processes carried out at a nonmetallic mining site that are related to the preparation or processing of the mineral aggregates or nonmetallic minerals obtained from the nonmetallic mining site. . . . .[88]

Accordingly, the Court will not dismiss Superior's Counts 2, 4, and 5 on the basis that Superior failed to state a claim that the Defendants are Operators.[89]

D. Superior Has Adequately Pled A Claim for Contribution But Not Equitable Indemnity

As noted, Count 4 is Superior's claim for equitable indemnity arising from its payment of reclamation costs that are the liability of the Defendants as Operators. Alternatively, Count 5 seeks contribution for such expenses. Equitable indemnity and contribution are alternative theories of liability. "Unlike contribution where liability is shared, indemnity is a principle that 'shift[s] the loss from one person who has been compelled to pay to another who on the basis of equitable principles should bear the loss.'"[90] The elements required to plead a cause of action for equitable indemnity are "the payment of damages and lack of liability."[91] A contribution claim requires

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[87] Adv. D.I. 26 at 14 n.15.

[88] WIS. ADMIN. CODE § NR 135.03(13); *accord* CHIPPEWA CODE § 30-38(13).

[89] The Court acknowledges that it fails to understand how the Defendants were able to perform nonmetallic mining activities at the Quarry without a permit and without penalty given the seemingly clear directives of the Reclamation Statute and Chippewa Code. *See e.g.*, WIS. ADMIN. CODE § NR 135.43 (authorizing a regulatory authority to enforce the Reclamation Statute and related ordinances and to penalize parties who violate or fail to comply); CHIPPEWA CODE §§ 30-56 – 30-58 (discussing enforcement rights). However, this and other related questions are not before the Court today and do not affect the Court's plain language interpretation of the definition of Operator.

[90] *Brown v. LaChance*, 477 N.W.2d 296, 302 (Wis. Ct. App. 1991) (quoting *Kutner v. Moore*, 464 N.W.2d 18, 20 (Wis. Ct. App. 1990)).

[91] *Id.*

common liability to the same party and that the party seeking contribution has paid more than a fair share of such obligation.[92]

In the first instance, the Defendants argue that the equitable indemnity claim must be dismissed because Superior cannot deny its own liability for the Quarry's reclamation obligations as an admitted permit holder and thus Operator. In *Foss v. Madison Twentieth Century Theaters, Inc.*, a persuasive case upon which the Defendants rely, the Wisconsin Court of Appeals determined that plaintiff-property owners possessed no claim for equitable indemnity against the former property owner and real estate agent who sold them contaminated property.[93] The court in *Foss* reached this conclusion because the plaintiffs had an independent duty as property owners to clean up the property under Wisconsin law and thus were not "compelled to pay damages for which [they] had no liability.[94] Superior does not attempt to distinguish this case and even concedes that Operators are liable for reclamation costs under Wisconsin law.[95] Accordingly, because Superior is an Operator and does not lack liability, the claim will be dismissed.

The Defendants next urge the Court to dismiss the contribution claim because Superior did not specifically allege the amount it has expended on reclamation, thus contending that Superior failed to properly plead facts to support its allegation that it paid more than its fair share of the reclamation obligations. The Court disagrees. The crux of Superior's complaint is that the Defendants promised to shoulder all responsibility for reclamation. In light of the foregoing, Superior's allegations that it carried out reclamation activities and paid substantial sums in connection therewith[96] sufficiently support its claim that it paid more than its fair share, which based on Superior's theory should be zero.

E. Superior's Objection To IMTR's Proof Of Claim Is Not Time-Barred

Count 6 is Superior's objection to IMTR's Proof of Claim. The Defendants argue that the objection is time-barred by the Plan. The Plan provides in relevant part that objections to proofs of claim must be brought no later than one hundred eighty (180) days after the effective date of the Plan or such other date as may be specifically fixed by the Court (the "Claims Objection Deadline").[97] The Plan went effective on December 20, 2019.[98] Therefore, the initial Claims Objection Deadline established by the Plan ran on June 17, 2020. The Court entered four orders

[92] *Kafka v. Pope*, 533 N.W.2d 491, 494 (Wis. 1995).

[93] 551 N.W.2d 862, 867 (Wis. Ct. App. 1996).

[94] *Id.*

[95] Adv. D.I. 25 at 28 ("As an "operator" of the Quarry, Defendants are liable for reclamation costs under Wisconsin law.").

[96] First Am. Compl. ¶¶ 62, 69.

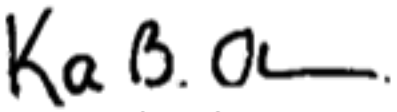
[97] *See* Case No. 19-11563, D.I. 682, Art. I § A (defining "Claims Objection Deadline") & Art. VIII § A.4 (setting deadline to file objections to claims).

[98] *See* Case No. 19-11563, D.I. 733.

extending the Claims Objection Deadline.[99] The Claims Objection Deadline is currently set to expire on October 12, 2021.[100] This action was commenced on December 23, 2020.[101] Accordingly, Superior's objection is timely.[102]

VI. CONCLUSION

For the foregoing reasons, the Court hereby dismisses Count 4 of the First Amended Complaint. The remaining relief requested in the Motion to Dismiss is denied.



Dated: August 26th, 2021
Wilmington, Delaware

KAREN B. OWENS
UNITED STATES BANKRUPTCY JUDGE

[99] *See* Case No. 19-11563, D.I. 862 (extending the claims objection deadline to October 15, 2020), D.I. 924 (extending the claims objection deadline to February 12, 2021), D.I. 976 (extending the claims objection deadline to June 14, 2021), D.I. 1009 (extending the claims objection deadline to October 12, 2021).

[100] *See* Case No. 19-11563, D.I. 1009 ¶ 2.

[101] *See* Adv. D.I. 1.

[102] In a footnote, the Defendants argue that the extensions of the Claims Objection Deadline do not apply to Superior because Emerge was the Reorganized Debtor that brought the underlying motions to extend. *See* Case No. 19-11563, D.I. 854, 914, 970, 1003 (Emerge's motions to extend the Claims Objection Deadline). However, the extension orders did not limit the application of the extended Claims Objection Deadline to only those claims asserted against Emerge. They extended the deadline provided for in the Plan applicable to all the Reorganized Debtors. *See* Case No. 19-11563, D.I. 862 ¶ 2 ("[T]he Claims Objection Deadline . . . is hereby extended through and including October 15, 2020); *accord* Case No. 19-11563, D.I. 924, 976, 1009 (using similar language when granting further extensions); *see also* Case No. 19-11563, D.I. 854 ¶¶ 4, 6 (seeking, through the motions to extend, an extension of the Plan's Claims Objection Deadline); *accord* Case No. 19-11563, D.I. 914 ¶¶ 4, 7, D.I. 970 ¶¶ 4, 8, D.I. 1003 ¶¶ 4, 9.