IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
PIPELINE FOODS, LLC, *et al.,*	)	Case No. 21-11002 (KBO)
	)	
Debtors.	)	
	)	
NAUNI JO MANTY, Pipeline Foods Liquidating Trust, By and Through Nauni Manty, as Liquidating Trustee,	)	
	)	
Plaintiff,	)	
	)	Adv. Proc. No. 22-50399 (KBO)
v.	)	
	)	**Related Docket No. 74**
AMERRA CAPITAL MANAGEMENT, LLC; AMERRA PF HOLDINGS, LLC; CRAIG TASHJIAN; ROBERT HODGEN; ERIC JACKSON; ANTHONY SEPICH; and MONTY BULLOCK,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Nauni Jo Manty, as Liquidating Trustee (the "Trustee") for the Pipeline Foods Liquidating Trust (the "Trust"), seeks to recover damages from the Defendants for their alleged breaches of fiduciary duties owed to Pipeline Foods, LLC ("Pipeline Foods"), Pipeline Holdings, LLC ("Pipeline Holdings"), and their affiliated debtors and debtors in possession (together with Pipeline Foods and Pipeline Holdings, the "Debtors"). She also seeks damages for fraudulent misstatements made to Cöoperatieve Rabobank U.A. ("Rabobank"), a secured lender of the Debtors.[1] The Defendants are: AMERRA Capital Management, LLC ("AMERRA Capital"), AMERRA PF Holdings, LLC ("AMERRA PF," and together with AMERRA Capital, the "AMERRA Entities"), and Messrs. Tashjian, Hodgen (Tashjian and Hodgen, together with the AMERRA Entities, the "AMERRA Defendants"), Jackson, Sepich, and Bullock.

All Defendants moved to dismiss the Trustee's *Amended Complaint*.[2] Thereafter, the Trustee reached a settlement with Jackson, Sepich, and Bullock. The *AMERRA Capital Management, LLC's, AMERRA PF Holdings, LLC's, Craig Tashjian's and Robert Hodgen's*

[1] Adv. D.I. 64 (the "Am. Compl.").

[2] Adv. D.I. 72, 74, 77, 78. Briefing completed on April 24, 2023. *See* Adv. D.I. 72, 75, 79, 80, 93-97.

Motion to Dismiss Plaintiff's Amended Complaint (the "Motion")[3] moved forward with oral argument, and the Court took the matter under advisement.

I. RELEVANT ALLEGED FACTS

A. The Parties

AMERRA Capital is the manager of AMERRA PF.[4] AMERRA PF is owned by various AMERRA related entities, all of which are also managed by AMERRA Capital.[5] Prior to the Debtors' bankruptcy filing, AMERRA PF held a 97.5% ownership interest in Pipeline Holdings.[6] Pipeline Holdings was the sole member of Pipeline Foods and managed it and the other debtor subsidiaries.[7] Pipeline Holdings and Pipeline Foods were Delaware limited liability companies.[8]

Pursuant to Pipeline Holdings' Operating Agreement (the "Operating Agreement"),[9] Pipeline Holdings was managed by a Board of Managers (the "Board") with three members – Tashjian, Hodgen, and Jackson.[10] Tashjian and Hodgen were appointed by AMERRA PF while Jackson was appointed by a minority member of Pipeline Holdings.[11] In addition to serving on the Board, Hodgen served as an officer of Pipeline Foods and an AMERRA managing director.[12] Tashjian also served as an AMERRA Managing Partner, Chief Investment Officer, and Director.[13] Tashjian and Hodgen were compensated for their various roles by AMERRA.[14]

B. Events Relevant To The Amended Complaint

The Debtors purchased various agricultural commodities, such as cereals and grains, and sold them to purchasers under sale contracts. Their working capital was provided under a revolving credit agreement (as amended, the "Rabobank Credit Agreement")[15] with Rabobank and other lenders (the "Working Capital Lenders").[16] Pursuant to the Rabobank Credit Agreement, the

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[3] Adv. D.I. 74.

[4] Am. Compl. ¶ 32.

[5] *Id.* ¶ 33. "AMERRA" is defined by the Amended Complaint as an affiliated group of companies that include AMERRA Capital, AMERRA PF, and the owners of AMERRA PF. *Id.*

[6] *Id.* ¶¶ 41-42.

[7] *Id.* ¶ 41.

[8] *Id.*

[9] Adv. D.I. 64, Ex. 3 (the "Operating Agreement").

[10] Am. Compl. ¶ 43.

[11] *Id.* ¶¶ 34-36, 43.

[12] *Id.* ¶¶ 35, 46-47.

[13] *Id.* ¶ 34.

[14] *Id.* ¶¶ 46-47.

[15] Adv. D.I. 64, Exs. 6 (the original Rabobank Credit Agreement), 7, 49 (certain amendments).

[16] Am. Compl. ¶¶ 59-61.

Working Capital Lenders provided the Debtors a revolving line of credit up to $60 million (the "Credit Facility"),[17] with the Debtors' ability to borrow dependent on their borrowing base (the "Borrowing Base").[18] To request a loan advance, the Debtors submitted to Rabobank borrowing certificates (the "Borrowing Base Certificates") stating the amount requested and confirming that the Borrowing Base supported the borrowing.[19] The Rabobank Credit Agreement also required the Debtors to calculate the Borrowing Base weekly and submit certified reports (the "Borrowing Base Report") to the Working Capital Lenders.[20]

As the Trustee explains, the precise formula to calculate the Borrowing Base was complex, but generally depended on the value of the Debtors' inventory, including "Eligible Inventory."[21] The Debtors used SmartSoft as their software to manage inventory and accompanying commodity contracts – *i.e.*, to log, track, and record commodity purchases, sales, and inventory.[22] The Debtors also used Great Plains (together with SmartSoft, the "Reporting Systems") as their accounting software to calculate the Borrowing Base and create the Borrowing Base Reports.[23] The Trustee alleges that at all relevant times the Reporting Systems were not compatible with each other and "suffered from inherent and pervasive deficiencies that rendered the Debtors' inventory data inaccurate, unreliable, and untrustworthy."[24] For instance, it is alleged that the Reporting Systems would yield "fake numbers," and that "[m]any values just [didn't] make sense."[25] As a result, the Debtors were forced to rely on error-prone manual processes lacking adequate internal controls that yielded untrustworthy and overstated inventory data.[26]

The Trustee further alleges that the AMERRA Defendants and other Debtor-officers were aware of the problems but never replaced the Reporting Systems or implemented proper internal controls.[27] As early as July 2019, Bullock told Tashjian, Hodgen, and other AMERRA employees that the Debtors were completing new setups for the Reporting Systems.[28] Six weeks later in August, Bullock explained that the efforts failed and that the systems needed replacement.[29] In

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[17] *Id.* ¶ 61.

[18] *Id.* ¶ 62.

[19] *Id.* ¶¶ 5, 67.

[20] *Id.* ¶ 65. The Amended Complaint alleges that Bullock and other members of his team were responsible for preparing the Borrowing Base Reports and for all other accounting and commercial reporting. *Id.* ¶¶ 57, 65, 114-15, 162. It is further alleged that Bullock or Sepich were responsible for signing the Borrowing Base Reports and Borrowing Base Certificates. *Id.* ¶¶ 65 & 67.

[21] *Id.* ¶¶ 5, 63-64, 75, 169. "Eligible Inventory" is a defined term of the Rabobank Credit Agreement. *Id.* ¶ 63 n.7.

[22] *Id.* ¶¶ 6, 78.

[23] *Id.* ¶ 78.

[24] *Id.* ¶ 79; *see also id.* ¶ 83.

[25] *Id.* ¶¶ 106 & 118; *see also id.* ¶¶ 9-11, 105, 107-17, 119-34.

[26] *Id.* ¶¶ 7, 79-85, 104, 169(a)-(h).

[27] *See, e.g.*, *id.* ¶¶ 8-10, 87-134.

[28] *Id.* ¶¶ 89-90.

[29] *Id.* ¶ 90.

the following months, Tashjian and Hodgen were informed multiple times that the Reporting Systems were systematically deficient and produced flawed data.[30]

Despite these known, chronic issues, neither Tashjian nor Hodgen (or the AMERRA Entities) authorized or instructed that the Reporting Systems be replaced or internal controls implemented.[31] Instead, the Debtors continued to calculate and submit weekly Borrowing Base Reports to the Working Capital Lenders, certifying that all information reported therein, including the Borrowing Base and Eligible Inventory, was materially correct, even though it was not.[32] Moreover, the Debtors submitted Borrowing Base Certificates and represented that the Borrowing Base could support the funds requested, even though it could not.[33] These purported misrepresentations and systematic flaws were unbeknownst to the Working Capital Lenders as the Trustee alleges that they were never informed of the pervasive reporting issues undermining the Debtors' calculations.[34] The Trustee maintains that the Working Capital Lenders relied on the representations made in the Borrowing Base Reports and Borrowing Base Certificates to advance the Debtors funds under the Credit Facility and even to amend the Rabobank Credit Agreement to allow for additional availability.[35] In total, the Debtors received approximately $44.35 million under the Credit Facility and a $1.8 million letter of credit.[36]

Ultimately, the Debtors could not overcome cash flow difficulties and poor financial performance, which, according to the Trustee, was the result of the Reporting Systems and inaccurate inventory data.[37] In the spring of 2021, the Working Capital Lenders refused to make further advances and declared an event of default.[38] Meanwhile, the Debtors began employing accounting and restructuring professionals[39] who quickly discovered that the inventory data was untrustworthy and refused to sign any document relying it.[40]

II. RELEVANT PROCEDURAL HISTORY

A. The Chapter 11 Cases

The Debtors commenced their bankruptcy cases in July 2021. Shortly thereafter, the Court authorized the Debtors to sell their commodity inventory by private sale outside the ordinary

[30] *See, e.g.*, *id.* ¶¶ 76, 93-94, 96, 99-133, 135, 149, 155, 163-64.

[31] *See, e.g.*, *id.* ¶¶ 91, 135, 148-49, 154.

[32] *See, e.g.*, *id.* ¶¶ 65, 75-134, 156-57, 160-66.

[33] *See, e.g.*, *id.* ¶¶ 66-68, 75-134, 156-57.

[34] *Id.* ¶¶ 149, 154, 158.

[35] *Id.* ¶¶ 159, 166-67.

[36] *Id.* ¶¶ 5, 69, 159.

[37] *Id.* ¶¶ 168-69.

[38] *Id.* ¶ 170.

[39] *Id.* ¶¶ 171-72.

[40] *Id.* ¶¶ 173-78.

course of business.[41] If the inventory was not needed to fulfill a profitable contract, the Debtors were granted authority to sell it to third parties pursuant to value maximizing terms. It is alleged that the Debtors' estates yielded approximately $19.5 million from the inventory.[42]

On March 1, 2022, the Court entered the order (the "Confirmation Order")[43] confirming the *Debtors' and Creditor Committee's Amended Joint Plan of Liquidation* (the "Plan").[44] The Confirmation Order approved all provisions of the Plan related to the creation of the Trust,[45] the appointment of the Trustee, the formation of the Plan Oversight Committee,[46] and the approval of the Liquidating Trust Agreement (the "LTA")[47] and all other Plan documents and supplements related thereto.

The Confirmation Order provided that all assets of the Debtors as of the Effective Date[48] would transfer to the Trust as "Assets" to be liquidated for the benefit of the holders of allowed claims.[49] Those assets included all "Causes of Action" and "D&O Claims"[50], defined as:

> **"Causes of Action"** means . . . all other claims, actions, causes of action . . . of any Debtor and/or any of the Estates against any Entity, based in law or equity, . . ., and any and all commercial tort claims against any party, including the Debtors' current and former directors and officers . . . . Without limitation of the foregoing, Causes of Action include those claims and actions as shall be set forth as Retained Causes of Action in the Plan Supplement.[51]
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> . . . .
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> **"D&O Claims"** means, collectively: (a) all Causes of Action against the Debtors' current and former directors and officers, subject, however, to any releases or exculpation provisions provided

[41] Case No. 21-11002, D.I. 277.

[42] Am. Compl. ¶ 181.

[43] *Id.* ¶ 24; Case No. 21-11002, D.I. 921 (the "Confirmation Order").

[44] Am. Compl. ¶ 24; Confirmation Order, Ex. A (the "Plan").

[45] Confirmation Order ¶ 9.

[46] *Id.* ¶ 10; Plan § IV(C).

[47] Adv. D.I. 93, Ex. A (the "LTA"). The LTA was incorporated into the Plan as part of the Plan Supplement. Plan § I(A) ¶¶ 81, 90- 91, 93; Case No. 21-11002, D.I. 875 (the "Plan Supplement"), Ex. C (the LTA).

[48] The Plan went effective on March 17, 2022 (the "Effective Date"). *See* Case No. 21-11002, D.I. 970.

[49] Confirmation Order ¶ 9; Plan § IV(A); LTA § 1.1.2 (defining "Beneficiaries" to mean "the Holders of Allowed Claims under the Plan, or any successors to such Holders or their interests in the Trust.").

[50] Plan § IV(A).

[51] *Id.* § I(A) ¶ 16. The Plan Supplement provides that "Retained Causes of Action" include the D&O Claims. Plan Supplement, Ex. F at 32; *accord* Plan § I(A) ¶ 118 (defining "Retained Causes of Action").

> in this Plan, the Confirmation Order or any other Final Order of the Bankruptcy Court; and (b) all Rabobank D&O Claims.[52]

"Rabobank D&O Claims" is defined as "all claims, actions, causes of action . . . of Rabobank against the Debtors' current and former officers in their respective capacities as such."[53] In addition to these claims and causes of action, the LTA also defined its "Assets" to include any property and proceeds acquired by the Trust after the Effective Date.[54]

The LTA authorizes the Trustee to (1) pursue, prosecute, resolve or otherwise compromise, for the benefit of the Trust, any and all Causes of Action;[55] (2) liquidate, sell or abandon the Trust's Assets;[56] and (3) execute any documents, enter into any agreement, and take any other actions related to, or in connection with, the liquidation of the Assets and the exercise of the Trustee's powers.[57] The LTA further permits the Trustee to amend the agreement without Court approval with unanimous consent of the Plan Oversight Committee.[58]

On December 5, 2022, the Trustee and Rabobank executed an agreement (the "Rabobank Assignment")[59] to assign to the Trust additional causes of action deemed the "Rabobank Claims" against, among others, the Debtors' directors, managers, equity holders, and other affiliates. The Trustee and Rabobank agreed in the Rabobank Assignment that proceeds from the Rabobank Claims would be distributed to the Trust beneficiaries according to the terms of the Plan, Confirmation Order, and LTA.[60] Along with the assignment, the Trustee amended the LTA (the "LTA Amendment")[61] to include the Rabobank Claims as Assets of the Trust.[62] Both the Rabobank Assignment and LTA Amendment define "Rabobank Claims" to include:

> [A]ll claims, actions, causes of action . . . of Rabobank, in its capacities as administrative agent, issuer, and lender under the Rabobank Loan Documents, including, without limitation, claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, aiding and abetting fraud, and negligent misrepresentation, against (i) the Debtors' current and former directors and/or managers in their respective capacities as such, including, without limitation, Craig Tashjian and Robert Hodgen;

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[52] Plan § I(A) ¶ 42.

[53] *Id.* § I(A) ¶ 107.

[54] LTA § 1.1.1 (defining "Assets").

[55] *Id.* § 5.8(D).

[56] *Id.* § 5.8(G).

[57] *Id.* § 5.8(I). The Plan contains similar provisions. *See* Plan § IV(B).

[58] LTA § 9.8.

[59] Adv. D.I. 64, Ex. 2 (the "Rabobank Assignment").

[60] *Id.* ¶¶ 2-4 (providing that the Rabobank Claims are for the benefit of the Trust beneficiaries).

[61] Adv. D.I. 64, Ex. 1.

[62] *Id.* § 2(a).

> (ii) the Debtors' current and former direct and indirect equity owners, and any of their respective affiliates, including, without limitation, AMERRA PF . . ., AMERRA Capital . . . .[63]

B. The Adversary Proceeding

The Trustee filed her original complaint (the "Original Complaint") on July 27, 2022.[64] Thereafter, the parties extended the time for the AMERRA Defendants to answer, move, or otherwise respond to the Original Complaint to October 12, 2022, and for the Trustee to file her "opposition to any motion(s) to dismiss" to December 7, 2022."[65] The parties established January 18, 2023 as the deadline for "replies in support of motion(s) to dismiss."[66] Consistent with this agreement, the AMERRA Defendants filed and served on October 12, 2022 a motion to dismiss.[67]

Thereafter, through Certification of Counsel (the "Bullock CoC") and Order,[68] the Trustee and Bullock agreed to further extend the time for Bullock to "answer or otherwise respond to Plaintiff's Original Complaint to December 19, 2022."[69] In the Bullock CoC, the Trustee stated:

> Plaintiff has advised defendant Bullock that Plaintiff intends to file an amended complaint on or about December 7, 2022, in accordance with [prior stipulated Orders]. After Plaintiff files the anticipated amended complaint, the parties will agree on a schedule for all defendants to answer or otherwise respond.[70]

On December 7, 2022 (two days after the Rabobank Assignment and LTA Amendment), the Trustee filed the *Amended Complaint*.[71] It asserts claims for breach of fiduciary duty on behalf of the Debtors (Counts 1 through 4, collectively the "Fiduciary Duty Claims")[72] and claims for fraud on behalf of Rabobank (Counts 5 and 6, collectively the "Fraud Claims").[73]

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[63] *Id.* § 2(d); Rabobank Assignment ¶ 2.

[64] Adv. D.I. 1.

[65] Adv. D.I. 18 ¶¶ 1-2.

[66] *Id.* ¶ 3.

[67] Adv. D.I. 43, 49.

[68] Adv. D.I. 62 (the "Bullock CoC") & 63 (Order).

[69] Bullock CoC ¶ 4.

[70] *Id.* ¶ 3.

[71] Count 7 will be voluntarily dismissed, mooting any dismissal arguments. Adv. D.I. 119 (July 21, 2023 Hr'g Tr. 63:25-64:5).

[72] Count 1 charges Tashjian and Hodgen as Board members for breaching fiduciary duties. Am. Compl. ¶¶ 183-91. Count 2 charges the AMERRA Entities as controllers for breaching fiduciary duties. *Id.* ¶¶ 192-200. Count 3 charges Hodgen as an officer of Pipeline Foods for breaching his fiduciary duty. *Id.* ¶¶ 201-09. Count 4 charges the AMERRA Entities with aiding and abetting the breaches. *Id.* ¶¶ 210-15.

[73] Count 5 charges the AMERRA Defendants with common law fraud, *id.* ¶¶ 216-22, and Count 6 charges the AMERRA Defendants with aiding and abetting the fraud, *id.* ¶¶ 223-26.

The Motion seeks dismissal of all claims for three main reasons. First, the AMERRA Defendants argue that the Amended Complaint must be struck because the Trustee failed to timely amend pursuant to Rule 15(a) of the Federal Rules of Civil Procedure (the "Federal Rules").[74] Second, they contend that the Amended Complaint must be dismissed pursuant to Federal Rule 12(b)(1) for lack of subject matter jurisdiction.[75] Third, and finally, they seek dismissal pursuant to Federal Rules 9(b) and 12(b)(6) for the Trustee's failure to state a claim.[76]

III. DISCUSSION

A. The Court Will Not Strike the Amended Complaint

Federal Rule 15(a)(1)(B) required the Trustee to amend the Original Complaint within 21 days of October 12, 2022, the service date of the AMERRA Defendants' first motion to dismiss. She did not. As a result, Federal Rule 15(a)(2) required the Trustee to obtain the AMERRA Defendants' written consent or an order of the Court before amending. Again, she did not.

The Trustee argues that the AMERRA Defendants consented to the Amended Complaint when they agreed by stipulation to extend the time for her to file an "opposition" to their original dismissal motion. However, an amended complaint is a type of pleading under Federal Rule 7, not an opposition.[77] Moreover, the parties' stipulation contemplated a briefing schedule only for a motion to dismiss. It provided a deadline for the AMERRA Defendants to file a reply in support of a dismissal motion should the Trustee oppose, but it did not provide for a deadline by which the AMERRA Defendants were to answer, move or otherwise respond to an amended complaint. This would have been included if the parties were contemplating this future event.

Also unconvincing is the Trustee's argument that the AMERRA Defendants' failure to object to the Bullock CoC evidences their consent to the late amendment. The Bullock CoC concerns scheduling with respect to Bullock. No affirmative consent was given by the non-Bullock Defendants therein. Moreover, none can be implied. Counsel for the AMERRA Defendants received notice of the Bullock CoC via the Court's electronic case management and filing system, and it is prudent practice for counsel to carefully review each document of which they receive notice. However, there was no duty for the AMERRA Defendants to respond, object, or otherwise take any action to the Trustee's stated intention of amending.

Notwithstanding the improper amendment, the Court will permit the Amended Complaint in the interest of justice.[78] Allowing the amendment will not prejudice the AMERRA Defendants as they have fully briefed and argued the Motion. If the Court were to strike the Amended Complaint and require the Trustee to seek leave to amend, the issues presented would largely duplicate those before the Court. Thus, proceeding in the manner requested by the AMERRA

[74] FED. R. CIV. P. 15(a); FED. R. BANKR. P. 7015.

[75] FED. R. CIV. P. 12(b)(1); FED. R. BANKR. P. 7012(b).

[76] FED. R. CIV. P. 9(b); FED. R. BANKR. P. 7009; FED. R. CIV. P. 12(b)(6); FED. R. BANKR. P. 7012(b).

[77] FED. R. CIV. P. 7(A)(1) ("Only these pleadings are allowed: (1) a complaint[.]"); FED. R. BANKR. P. 7007.

[78] FED. R. CIV. P. 15(a)(2) ("The court should freely give leave when justice so requires.").

Defendants will waste both party and judicial resources.[79] Moreover, the proceeding is in its infancy and there is no tactical disadvantage to moving forward with the Amended Complaint.

B. The Court Has Subject Matter Jurisdiction Over This Proceeding

The AMERRA Defendants facially attack the Court's subject matter jurisdiction pursuant to Federal Rule 12(b)(1).[80] First, they argue that this Court lacks post-confirmation, related-to jurisdiction over the Trustee's claims. Second, they argue that the Trustee lacks standing to pursue certain claims.[81] In making its determination on this attack, the Court "must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff."[82] This is the standard of review applicable to the AMERRA Defendants' arguments under Federal Rule 12(b)(6).[83] When reviewing a motion to dismiss under Federal Rule 12(b)(6), 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."[84] Because the Court is faced with a motion to dismiss under both Federal Rules 12(b)(1) and 12(b)(6), it must consider the jurisdictional issues first "for the obvious reason that if the court lacks jurisdiction to hear the case then *a fortiori* it lacks jurisdiction to rule on the merits."[85]

1. *Post-Confirmation Subject Matter Jurisdiction*

Bankruptcy jurisdiction diminishes after confirmation but it does not disappear.[86] Jurisdiction in core proceedings remains,[87] but jurisdiction over related non-core proceedings

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[79] *Maxus Energy Corp. v. YPF S.A.*, Nos. 16-11501, 18-50489 (CSS), 2021 WL 4271342, at *2 (Bankr. D. Del. Sept. 20, 2021) (noting that courts have discretion to manage their docket); *Atlantic Spinal Care v. Highmark Blue Shield*, No. 13-3159 (JLL), 2013 WL 3354433, at *5 (D.N.J. July 2, 2013) (granting plaintiff leave to amend based on the court's inherent authority to manage its docket).

[80] *Const. Party of Pa. v. Aichele*, 757 F.3d 347, 357-58 (3d Cir. 2014) ("A facial attack . . . is an argument that considers a claim on its face and asserts that it is insufficient to invoke the subject matter jurisdiction of the court because, for example, it does not present a question of federal law, . . . or some other jurisdictional defect is present.")

[81] *See id.* (noting that lack of standing is an appropriate jurisdictional basis for dismissal under Federal Rule 12(b)(1)).

[82] *In re Schering-Plough Corp.*, 678 F.3d 235, 243 (3d Cir. 2012)) (quoting *Gould Elec. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000)).

[83] *Aichele*, 757 F.3d at 358.

[84] *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)) (internal quotation marks omitted). The standard of review under Federal Rule 12(b)(6) is a plausibility standard, requiring more than a sheer possibility that a defendant acted unlawfully. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2007). "While a complaint . . . 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 will not do[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) (internal citation omitted).

[85] *Richardson v. Monaco (In re Summit Metals, Inc.)*, 477 B.R. 484, 494 (Bankr. D. Del. 2012) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 895 n.2 (3d Cir. 1977)) (internal quotation marks omitted).

[86] *Mesabi Metallics Co., LLC v. B. Riley FBR, Inc. (In re Essar Steel Minn., LLC)*, 47 F.4th 193, 198 (3rd Cir. 2022) (quoting *Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 165 (3d Cir. 2004)).

[87] *Id.* at 200 (citing *In re Shenango Grp, Inc.*, 501 F.3d 338 (3d Cir. 2007)); *Geruschat v. Ernst Young, LLP (In re*

"shifts from matters that may have a 'conceivable effect' on the estate (because it no longer exists) to matters that have 'a close nexus to the bankruptcy plan or proceeding[.]'"[88] "Matters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus."[89] With respect to the post-confirmation pursuit of state law claims, a plan provision that retains bankruptcy jurisdiction post-confirmation may satisfy the close nexus requirement if it "specifically describes [the] action over which the Court had 'related to' jurisdiction pre-confirmation and expressly provides for the retention of such jurisdiction to liquidate that claim for the benefit of the estate's creditors[.]"[90]

The AMERRA Defendants do not contend that the Court lacked jurisdiction over the Trustee's claims pre-confirmation. Rather, they argue that the Plan did not sufficiently describe them to give rise to related-to jurisdiction post-confirmation. The Plan and Confirmation Order retained jurisdiction for this Court to hear and determine "Causes of Action,"[91] which include "any and all commercial tort claims against any party, including the Debtors' current and former directors and officers",[92] all causes of action "against the Debtors' current and former directors and officers",[93] and all claims and causes of action "of Rabobank against the Debtors' current and former officers in their respective capacities as such."[94] The Trustee contends this language is sufficiently specific to satisfy the close nexus requirement for the Fiduciary Duty Claims and the Fraud Claims against the Debtors' officers (the "Officer Fraud Claims"). The Court agrees.

The Fiduciary Duty Claims are specifically provided for in the Plan's retention of jurisdiction provision as "commercial tort claims." All parties agree that commercial torts include breach of fiduciary duty claims.[95] Furthermore, jurisdiction is specifically retained for any claim "against the Debtors' current and former directors and officers" (including the noted commercial

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Seven Fields Development Corp.), 505 F.3d 237, 260 (3d Cir. 2007) ("The bankruptcy and district courts were not required to address the "close nexus" test because the test was not applicable in this 'arising in' proceeding.").

[88] *Nystrom v. Madhu Vuppuluri (In re Essar Steel Minn. LLC)*, No. 16-11626 (CTG), 2021 Bankr. LEXIS 2630, at *24 (Bankr. D. Del. Sept. 27, 2021) (citing *In re East West Resort Dev. V, L.P., L.L.P.*, No. 10-10452 (BLS), 2014 WL 4537500, at *1 (Bankr. D. Del. Sept. 12, 2014)).

[89] *Resorts*, 372 F.3d at 167.

[90] *Astropower Liquidating Trust v. Xantrex Tech., Inc. (In re Astropower Liquidating Trust)*, 335 B.R. 309, 325 (Bankr. D. Del. 2005); *see also BWI Liquidating Corp. v. City of Rialto (In re BWI Liquidating Corp.)*, 437 B.R. 160, 165 (Bankr. D. Del. 2010) ("A 'close nexus' may be found where the plan specifically enumerates the cause of action.").

[91] Plan § X(ii) (retaining jurisdiction over "Causes of Action"); Confirmation Order ¶ 34 ("[T]his Court shall retain jurisdiction in accordance with the Plan."); *see also* Plan § I(A) ¶¶ 16 (defining of "Causes of Action"), 42 (defining "D&O Claims"), 107 (defining "Rabobank D&O Claims"), 118 (defining "Retained Causes of Action").

[92] *Id.* § I(A) ¶ 16.

[93] *Id.* § I(A) ¶ 42.

[94] *Id.* § I(A) ¶ 107.

[95] *See, e.g.*, *Polk 33 Lending, LLC v. Schwartz*, 555 F. Supp. 3d 38, 42-43 (D. Del. 2021) (analyzing whether fiduciary duty claims were adequately described to provide a security interest in commercial tort claims); *Regan v. Conway*, 768 F. Supp. 2d 401, 411 (E.D.N.Y. 2011) ("A cause of action for breach of fiduciary duty has been sometimes referred to as a 'commercial tort.'"); *Harrison v. Dixon*, No. 7142-ML, 2015 WL 757819, at *4 (Del. Ch. Feb. 20, 2015) ("An action for breach of fiduciary duty is characterized as a tort.").

tort claims).[96] The Officer Fraud Claims are included within claims of Rabobank against the Debtors' current and former officers.[97] These descriptions are sufficient for a close nexus.

The Court is not persuaded by the AMERRA Defendants' suggestion that a plan must identify claims by both type and potential defendant to create a close nexus. The AMERRA Defendants overstate the level of specificity necessary. Courts in this district have found a close nexus when a plan either describes the facts from which a claim arose, mentions the names of defendants, or identifies the nature of a claim.[98] They have found an insufficient nexus where the plan includes only a general jurisdiction retention provision[99] or describes a broad category of causes of action encompassing all possible claims.[100] As with the cases that have found retention of jurisdiction language sufficiently specific, the Plan describes the post-confirmation causes of action in a manner that provided voting creditors with notice that the Fiduciary Duty Claims and Officer Fraud Claims would be future assets for liquidation and distribution for the benefit of the

[96] Plan § I(A) ¶¶ 16 & 42.

[97] *Id.* § I(A) ¶ 107.

[98] *See, e.g.*, *Astropower*, 335 B.R. at 324 (finding a close nexus where a plan provided for the trust to prosecute "causes of action arising out of or in connection with the debtor's sale of stock" in the defendant's corporation); *EXDS Inc. v. CB Richard Ellis, Inc. (In re EXDS, Inc.)*, 352 B.R 731, 737 (Bankr. D. Del. 2006) (finding a close nexus where the plan mentioned "the names of the defendants or the nature of the claims."); *Liquidating Trustee of MPC Liquidating Trust v. Granite Fin. Sols., Inc. (In re MPC Computs., LLC)*, 465 B.R. 384, 394 (Bankr. D. Del. 2012) (determining that related to jurisdiction existed because the plan, trust agreement, and confirmation order were specific enough to convey the importance of the litigation and because the plan specifically retained jurisdiction over all pending causes of action commenced by the debtors and any action against customers).

[99] *See, e.g.*, *Seagate Tech. (US) Holdings, Inc. v. Global Kato HG, LLC (In re Solyndra, LLC),* No. 11-12799 (MFW), 2015 WL 6125246, at **4-5 (Bankr. D. Del. Oct. 16, 2015) (dismissing the plaintiff's complaint because the plan only "broadly provide[d] for retention of jurisdiction over claims resolution"); *VeraSun Energy Corp. v. West Plains Co. (In re VeraSun Energy Corp.)*, No. 08-12606 (BLS), 2013 WL 3336870, **5-6 (Bankr. D. Del. June 28, 2013) (finding that the close nexus test was not satisfied because the plan only provided for the broad and general retention of jurisdiction without any reference to the specific cause of action); *Fairchild Liquidating Trust v. New York (In re Fairchild Corp.)*, 452 B.R. 525, 532 (Bankr. D. Del. 2011) (dismissing contract claim because, among other things, the plan "only included a broad general retention of jurisdiction provision").

[100] *See, e.g.*, *Gavin Solmonese, LLC v. Syamsundar (In re AmCad Holdings, LLC)*, No. 14-12169 (MFW), 2016 WL 3412289, at *2 (Bankr. D. Del. 2016) (dismissing fiduciary duty claims because the plan retained jurisdiction over all broadly defined "Causes of Action"); *Wash. Mut., Inc. v. XL Specialty Ins. Co. (In re Wash. Mut., Inc.)*, No. 085-12229 (MFW), 2012 WL 4755209, at **4-5 (Bankr. D. Del. Oct. 4, 2012) (dismissing contract and fiduciary duty claims because the plan did not specifically reference any claims but provided for the general retention of jurisdiction "to determine any and all motions, adversary proceedings, applications, and contested or litigated matters that may be pending on the Effective Date"); *BWI*, 437 B.R. at 165-66 (dismissing contract, quantum merit, and unjust enrichment claims because the plan generally retained jurisdiction over "any and all actions, causes of action, liabilities, Avoidance Actions, obligations, rights, suits, debts, sums of money, damages, judgments, Claims or proceedings to recover money or property and demands whatsoever, whether known or unknown, in law, equity or otherwise"); *Shandler v. DLJ Merch. Banking, Inc. (In re Insilco Techs., Inc.)*, 330 B.R. 512, 525 (Bankr. D. Del. 2005) (determining that claims at issue fell within the literal definition of "Rights of Action," but that nothing specifically identified the claims against the defendants as an "asset to be liquidated and distributed to creditors.").

estates.[101] As such, the Court's finding today is consistent with ensuring that its "jurisdiction [will] not raise the specter of unending jurisdiction" post-confirmation.[102]

At a minimum, the AMERRA Defendants urge the Court to dismiss the Trustee's Fraud Claims against the non-officer defendants (the "Non-Officer Fraud Claims"). The Trustee concedes that the Non-Officer Fraud Claims were not transferred to the Trust on the Effective Date and are not specifically described in the Plan's retention of jurisdiction language. She nonetheless maintains that the Court has jurisdiction to hear them given that the AMERRA Defendants have challenged the validity of the LTA Amendment and Rabobank Assignment that transferred them from Rabobank to the Trust. Again, the Court agrees.

As will be discussed, the AMERRA Defendants argue that the Non-Officer Fraud Claims must be dismissed because the LTA Amendment and Rabobank Assignment were impermissible. Such a determination requires the Court to interpret the Confirmation Order, Plan, and LTA. As my colleague held in *NCA Investors Liquidating Trust v. Berkowitz, Trager & Trager, LLC (In re Seaboard Hotel Member Assocs., LLC)*: "The need to interpret the Plan satisfies the 'close nexus' test."[103] Similar to the arguments of the AMERRA Defendants, the defendant in *Seaboard* moved to dismiss certain state law claims, arguing that the plan did not assign them to the post-confirmation trust.[104] As a result, the court determined that the necessity to interpret the plan implicated by the defendant's argument brought the matter within the post-confirmation related-to jurisdiction of the court.[105] The arguments advanced by the AMERRA Defendants will require the Court to do the same. Thus, applying the well-reasoned rational of *Seaboard*, the Court has related to jurisdiction over the Non-Officer Fraud Claims.

2. *The Trustee's Standing*

The Trustee is pursuing the Fiduciary Duty Claims on behalf of the Debtors and the Fraud Claims on behalf of Rabobank. The AMERRA Defendants challenge the Trustee's standing to do so for two reasons. First, they argue that the Trustee fails to allege an injury to the Debtors sufficient to establish Article III standing with respect to the Fiduciary Duty Claims related to the

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[101] *Compare Astropower*, 335 B.R. at 325 (concluding that the claims were specifically treated because the plan "expressly provide[d] for the retention of such jurisdiction to liquidate that claim for the benefit of the estate's creditors."), *with Insilco*, 330 B.R. at 525 ("The general language of the Plan and Disclosure Statement concerning post-confirmation litigation does not provide any notice to creditors (or to the Court, for that matter) as to the importance of this or any particular litigation. If the litigation is truly so critical to the Plan's implementation, it would have been more specifically described in the Disclosure Statement and Plan so that creditors could have considered its effect when deciding whether to vote in favor of the Plan."); *see also BWI*, 437 B.R. at 165-66 (finding that sending a formal letter to a potential defendant regarding asserted claims was insufficient notice because voting creditors had no specific knowledge of the claims).

[102] *Astropower*, 335 B.R. at 325 (citing *Resorts*, 372 F.3d at 167).

[103] No. 15-12510 (LSS), 2021 Bankr. LEXIS 1564, at *19 (Bankr. D. Del. June 10, 2021); *see also Nystrom*, 2021 Bankr. LEXIS 2630, at **24-25 (holding that under the reasoning of *Seaboard*, post-confirmation related to jurisdiction existed because the defendant argued that the plan and trust documents did not authorize the trust to sue).

[104] *Seaboard*, 2021 Bankr. LEXIS 1564, at *18.

[105] *Id.* at **18-19 ("[T]o determine the Motion to Dismiss, and perhaps other arguments in the future, I will need to settle a dispute over whether the Plan permits the Investor Trust to assert the claims detailed in the Complaint.").

Debtors' purported misrepresentations made to the Working Capital Lenders.[106] However, the Amended Complaint adequately alleges that, among other things, the misstatements exposed the Debtors to damage claims as they induced Rabobank to lend. Second, the AMERRA Defendants contend that the Fraud Claims should be dismissed because the Trustee lacks the authority to pursue them on behalf of Rabobank. They advance two theories, each discussed in turn below.

a. The Trustee Is Authorized To Pursue the Fraud Claims

The AMERRA Defendants argue that the Trustee is not authorized to pursue Rabobank's fraud claims as assignee under the holdings of *Caplin v. Marine Midland Grace Tr. Co.*[107] and *Trenwick Am. Litig. Tr. v. Ernst & Young, LLP*.[108] However, the Trustee is correct that these cases are both factually and legally distinguishable from the present circumstances.

In *Caplin*, the United States Supreme Court determined that a reorganization trustee under Chapter X of the Bankruptcy Act did not have standing to assert claims on behalf of a debtor's creditors.[109] In reaching this decision, the Court articulated three major concerns as a basis for its holding. First, nothing in statutory scheme of the Act permitted the bankruptcy trustee to pursue claims on behalf of third parties. Second, under the doctrines of *in pari delicto* and subrogation, the debtor may have had to reimburse the defendant for any recovery by the trustee on behalf of the creditors. Third, permitting the trustee to pursue creditor claims may have resulted in inconsistent judgments if those creditors later brought their own actions.[110]

Importantly, the Court in *Caplin* did not address the applicable issue before this Court – whether a post-confirmation trustee has standing to pursue claims on behalf of assigning creditors.[111] Indeed, as has been recognized by other courts faced with a similar argument, there is a difference between trustees in bankruptcy (like the one in *Caplin*), who derive their authority from the Bankruptcy Code, and trustees post-confirmation (like the Trustee), who do not.[112] The

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[106] *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. __, 139 S.Ct. 1945, 1950 (2019) (explaining that to establish Article III standing, the Trustee must allege (1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision).

[107] *Caplin v. Marine Midland Grace Tr. Co.*, 406 U.S. 416 (1972).

[108] *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 204-07 (Del. Ch. 2006), *aff'd Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007).

[109] *Caplin*, 406 U.S. at 434.

[110] *Id.* at 428-32.

[111] Indeed, most courts have applied *Caplin*'s ruling to trustees in bankruptcy – *i.e.* chapter 7 and chapter 11 trustees. *See e.g.*, *Mixon v. Anderson (In re Ozark Rest. Equip. Co..)*, 816 F.2d 1222 (8th Cir. 1987) (holding that a chapter 7 trustee does not have standing under *Caplin* to bring alter ego claims on behalf of creditors); *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988) (holding that a chapter 7 trustee does not have standing to pursue claims of even when those claims are assigned); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991) (holding that a trustee in bankruptcy lacked standing to bring a claim which belonged solely to the creditors).

[112] *See, e.g.*, *Grede v. Bank of N.Y. Melon*, 598 F.3d 899, 902 (7th Cir. 2010) ("Although the terms of the Bankruptcy Code govern the permissible duties of a trustee *in* bankruptcy, the terms of the plan of reorganization (and the trust instrument) govern the permissible duties of a trustee *after* bankruptcy."); *Zazzali v. Hirschler Fleischer, P.C.*, 482 B.R. 495, 510 (D. Del. 2012) (noting that "unlike the bankruptcy trustee in *Caplin*, who derived authority from the Bankruptcy Code, Zazzali, acting as trustee for the PAT, derives authority from the Private Actions Trust Agreement

Trustee derives her authority from the Confirmation Order, Plan, LTA (as amended), and Rabobank Assignment, all of which authorize her to pursue the Fraud Claims.[113]

The AMERRA Defendants' reliance on *Trenwick* is similarly misplaced. In *Trenwick*, the Delaware Chancery Court held that a post-confirmation litigation trust did not have standing to pursue direct creditor claims because nothing in the plan expressly assigned them to the trust.[114] The court found that the only claims vested to the trust were "derivative creditor and shareholder claims" of Trenwick America (the reorganized chapter 11 debtor).[115] In this proceeding, however, all Fraud Claims were expressly assigned by Rabobank to the Trust either through the Plan or by the LTA Amendment and Rabobank Assignment.

b. The Trustee Has Not Modified The Plan

Notwithstanding their assignment, the AMERRA Defendants argue that the Trustee cannot pursue the Non-Officer Fraud Claims because they did not transfer to the Trust under the Plan on the Effective Date. While they acknowledge the LTA Amendment and Rabobank Assignment attempted to rectify this issue, they argue that they were an untimely attempt to modify the Plan because, pursuant to section 1127(b) of the Bankruptcy Code, modifications of a confirmed chapter 11 plan must occur before it is substantially consummated.[116]

The parties do not dispute that the LTA Amendment and Rabobank Assignment occurred after substantial consummation of the Plan; the dispute is whether they modified it.[117] The Court concludes that they did not. "Modification" is a term left undefined by the Bankruptcy Code. However, many courts have determined that plan modifications occur when changes are made

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and the individual assignment of claims").

[113] The AMERRA Defendants do not argue the presence of the second or third concerns articulated in *Caplin*.

[114] *Trenwick*, 906 A.2d at 189.

[115] *Id.* at 190. If the court in *Trenwick* broadened *Caplin*'s holding to include post-confirmation trusts, this Court declines to do the same. *See id.* (noting that *Caplin* "established that bankruptcy trustees and litigation trusts formed as part of reorganization plans do not have standing to bring direct claims belonging to creditors under the federal bankruptcy statute.").

[116] 11 U.S.C. § 1127(b) ("The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title.").

[117] The Trustee also contends that the AMERRA Defendants lack prudential standing to raise this argument because they are not trust beneficiaries. However, the AMERRA Defendants have standing to argue that the Plan has been improperly modified as a parties-in-interest in the Debtors' bankruptcy cases under section 1109(b). *See* 11 U.S.C. § 1109(b) ("A party in interest . . . may raise and may appear and be heard on any issue in a case under this chapter."); *see also In re Global Indus. Tech.*, 645 F.3d 201, 212-13 (3d Cir. 2011) (en banc) (holding that a party-in-interest under 11 U.S.C. § 1109(b) is "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding." (quoting *In re James Wilson Assocs*, 965 F.2d 160, 169 (7th Cir. 1992)).

directly contradicting the express provisions of the confirmed plan.[118] Changes that either interpret or clarify a plan where it is silent or ambiguous are not modifications.[119]

The Plan is silent as to the Non-Officer Fraud Claims. Therefore, the Rabobank Assignment is not contradictory to its express terms. Even further, the assignment is consistent with its terms. The purpose of the LTA, which was approved when the Plan was confirmed, is to liquidate, collect, and distribute the Trust's Assets for its beneficiaries.[120] Assets include property acquired by the Trust after the Effective Date.[121] Both the Plan and LTA authorize the Trustee to enter into any agreements or documents necessary to liquidate Trust Assets.[122] Furthermore, the LTA expressly permits amendments without Court approval with unanimous consent from the Plan Oversight Committee.[123] The Amended Complaint alleges such consent was received.[124] In sum, the Plan contemplates that the Trust's Assets could be enlarged following the Effective Date in the manner that occurred and then liquidated for the benefit of creditor-beneficiaries. Accordingly, the Trustee acted within her authority and did not modify the Plan when she executed the Rabobank Assignment and amended the LTA.[125]

C. The Trustee Has Adequately Pled Her Claims

1. *The Fiduciary Duty Claims (Counts 1-4)*

In Counts 1 through 3, the Trustee asserts that the AMERRA Defendants breached their fiduciary duties of loyalty and care by acting in bad faith and behaving in a reckless and grossly negligent manner.[126] Namely, she alleges that they failed to implement proper reporting systems and internal controls to accurately report and monitor the Debtors' inventory and financial data and permitted, caused, and encouraged the Debtors to make known material misrepresentations and omissions to the Working Capital Lenders regarding this data to increase borrowings.[127] In Count 4, she alternatively asserts that the AMERRA Entities aided and abetted the breaches.

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[118] *In re SC SJ Holdings, LLC*, No. 22-689, 2023 WL 2598842, at *5 (D. Del. Mar. 22, 2023) (citing *In re Daewoo Motor America, Inc.*, 488 B.R. 418, 426-27 (C.D. Cal. 2011); *In re N.E. Gas Generation, LLC*, 639 B.R. 914, 924 (Bankr. D. Del. 2022); *In re Planet Hollywood Int'l*, 274 B.R. 391, 399-400 (Bankr. D. Del. 2001); *In re Vencor, Inc.*, 284 B.R. 79, 82-89 (Bankr. D. Del. 2002)).

[119] *N.E. Gas*, 639 B.R. at 922; *In re SS Body Armor I, Inc.,* No. 10-11255 (CSS), 2021 WL 2315177, at *5 (Bankr. D. Del. June 7, 2021).

[120] LTA § 2.2 ("Purpose of the Trust").

[121] *Id.* § 1.1.1 (defining "Assets" to include "(ii) any property acquired by the Trust after the Effective Date").

[122] *Id.* §§ 5.8(D), (G), (I).

[123] *Id.* § 9.8.

[124] Am. Compl. ¶ 26.

[125] *See SS Body Armor*, 2021 WL 2315177, at *7 (finding that a request to amend the terms of post-confirmation trust agreement was not a modification under § 1127(b) because (1) the confirmation order granted the trustee authority to amend the trust agreement without court approval and (2) the requested relief was consistent with the plan as it furthered its intent and would maximize distributions).

[126] Am. Compl. ¶¶ 189, 198, 207.

[127] *Id.* ¶¶ 188, 197, 206.

a. The Trustee Has Stated Plausible Claims Against Tashjian And Hodgen (Counts 1 And 3)

The AMERRA Defendants argue that there are no alleged facts showing that Tashjian and Hodgen acted with gross negligence or in bad faith. They claim instead that the alleged facts reveal that Tashjian and Hodgen were informed of the Debtors' inventory issues and attempted to rectify them. Indeed, the Amended Complaint outlines that under the supervision of the Board, the Debtors updated the Reporting Systems and hired an outside consultant to analyze them.[128] According to the AMERRA Defendants, these remedial steps defeat the Trustee's fiduciary duty claims. In response, the Trustee argues against viewing these actions in isolation and contends that the totality of the alleged facts show that Tashjian and Hodgen failed to take the basic, known steps necessary to rectify deficiencies, thereby stating a claim of gross negligence or bad faith.

The duty of loyalty "is not limited to cases involving a financial or other cognizable fiduciary conflict of interest," but also encompasses cases where a fiduciary fails to act in good faith.[129] "A lack of good faith is shown by alleging conduct motivated by a subjective bad intent, or conduct that is an 'intentional dereliction of duty or the conscious disregard for one's responsibilities.'"[130] The duty of care requires the fiduciary to act on an informed basis.[131] Duty of care violations are actionable when a fiduciary acts with "gross negligence."[132] To properly plead gross negligence, the plaintiff must allege facts that plausibly show conduct constituting "reckless indifference" or actions "outside the bounds of reason."[133]

Reading the Amended Complaint as a whole and making all reasonable inferences in favor of the Trustee, the Court concludes that she has stated a plausible claim that Tashjian and Hodgen acted in bad faith and with gross negligence. For instance, the Amended Complaint alleges that, after learning from Bullock that the updated Reporting Systems still produced inaccurate data and required replacement, the Board did nothing and allowed the Debtors to rely on the Reporting Systems.[134] While a consulting firm also assessed the Debtors' internal management and

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[128] *Id.* ¶¶ 90, 135.

[129] *Stone v. Ritter,* 911 A.2d 362, 370 (Del. 2006).

[130] *Theseus Strategy Grp., LLC v. Barsa (In re Old Bpsush, Inc.)*, No. 20-1450 (MN), 2021 WL 4453595, at *11 (D. Del. Sept. 29, 2021) (quoting *McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. Ch. 2008)); *see also In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006) (identifying examples of conduct demonstrating lack of good faith: "[1] where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, [2] where the fiduciary acts with the intent to violate applicable positive law, or [3] where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.").

[131] *Buchwald Cap. Advisors, LLC v. Schoen (In re OPP Liquidating Co.)*, No. 19-10729, 2022 WL 774063 (MFW), at *8 (Bankr. D. Del. Mar. 14, 2022).

[132] *Id.*; *see also Old Bpsush,* 2021 WL 4453595, at *8 ("The fiduciary duty of care requires that officers and directors both: (1) 'use that amount of care which ordinarily careful and prudent men would use in similar circumstances;' and (2) make business decisions by 'consider[ing] all material information reasonably available.'" (quoting *Bridgeport Holdings Inc. Liquidating Trust v. Boyer (In re Bridgeport Holdings, Inc.)*, 388 B.R. 548, 568 (Bankr. D. Del. 2008))).

[133] *Old Bpsush,* 2021 WL 4453595, at *8; *McPadden*, 964 A.2d at 1274 ("Delaware's current understanding of gross negligence is conduct that constitutes reckless indifference or actions that are without the bounds of reason.").

[134] Am. Compl. ¶¶ 90-92, 95-97; *see also id*. ¶¶ 76, 78-79, 89-96, 99-101, 103-05, 110-11, 118-20, 123-30, 148, 154,

Reporting Systems and made recommendations to fix identified issues, the Board still did nothing.[135] The facts suggest that Tashjian and Hodgen turned a blind eye and allowed the Debtors to rely on inaccurate inventory data and to misrepresent, among other things, their Borrowing Base.[136] Finally, the Trustee also alleges that once the Debtors' bankruptcy professionals discovered the inaccuracy and untrustworthiness of the inventory data, they refused to sign any Borrowing Base Report that relied on such data.[137] These facts, if true, bolster the Trustee's claims that Tashjian and Hodgen's failure to act was "outside the bounds of reason" and in conscious disregard of their fiduciary responsibilities. The Trustee, at best, has stated a claim for bad faith and, at minimum, gross negligence. The Motion will be denied as to Counts 1 and 3.[138]

b. The Trustee Has Stated Plausible Claims Against The AMERRA Entities (Counts 2 And 4)

Under Delaware law, whether the Trustee has stated fiduciary duty claims against AMERRA Capital and AMERRA PF turns on whether sufficient facts have been pled to show that they exercised control over the Debtors.[139] The AMERRA Defendants argue that they have not. Notwithstanding, it is alleged that AMERRA Capital is the manager and controller of AMERRA PF, and that AMERRA PF owns a majority interest in the Debtors.[140] It is also alleged that under the Operating Agreement, AMERRA PF had the authority to appoint two members to the three-member Board and, in fact, appointed Tashjian and Hodgen (both of whom are allegedly "top

173-78.

[135] *Id.* ¶¶ 135-49.

[136] *See, e.g.*, *id.* ¶¶ 81-86, 134, 149, 154, 156-58. There has been a suggestion that the Board was prevented from implementing changes due to the pandemic and liquidity issues, but this raises a fact issue for later. The scope of what may be reviewed on a motion to dismiss is limited to the complaint, public record, and documents that are "integral to or explicitly relied upon" by a plaintiff. *Tanksley v. Daniels*, 902 F.3d 165, 172 (3d Cir. 2018).

[137] *See, e.g.*, Am. Compl. ¶¶ 16, 173-78.

[138] The AMERRA Defendants argue that they are exculpated from liability under the Operating Agreement. However, the Operating Agreement does not exculpate the claims alleged here. *See* Operating Agreement §§ 5.16 & 5.17.

[139] *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1274 (Del. 2021) ("Controlling stockholders owe fiduciary duties to the minority stockholders, but they also owe fiduciary duties to the corporation"); *Kelly v. Blum*, No. 4516-VCP, 2010 WL 629850, at *12 (Del. Ch. Feb. 24, 2010) (noting that manager-managed LLCs are, in many ways, analogous to corporations, so the principles of controlling stockholders may be applied); *Klein v. Wasserman*, No. 2017-0643-KSJM, 2019 WL 2296027, at *7-8 (Del. Ch. May 29, 2019) (applying the same principles of controlling stockholder liability to determine whether a member of a manager-managed LLC is a considered a controlling member); *see also Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113 (Del. 1994) ("This Court has held that 'a shareholder owes a fiduciary duty only if it owns a majority interest in or *exercises control* over the business affairs of the corporation.'" (quoting *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987))); *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251 (Del. 2019) ("A stockholder could be found a controller under Delaware law: where the stockholder (1) owns more than 50% of the voting power of a corporation or (2) owns less than 50% of the voting power . . . but exercises control over the business affairs of the corporation." (cleaned up)).

[140] Am. Compl. ¶¶ 32-33, 41-42.

officials" at AMERRA).[141] Together Tashjian and Hodgen controlled the Board.[142] Moreover, Hodgen served as CEO and then COO, and other AMERRA employees assisted with the Debtors' management and operations.[143] The Amended Complaint further alleges that both Tashjian's and Hodgen's sole source of income was from AMERRA.[144] These facts support the reasonable inference that the AMERRA Entities acted through Tashjian and Hodgen to control the Board, which then allowed them to control and manage the business affairs of the Debtors, including the borrowing of money, accounting, financial, and consulting services, and membership on the Debtors' executive team.[145] Therefore, the Trustee has adequately pled facts to support the conclusion that the AMERRA Entities owed fiduciary duties to the Debtors and, for the same reasons stated above, breached them.

In the event that the AMERRA Entities are ultimately found not to owe fiduciary duties, the Trustee claims in Count 4 that they should be found liable for aiding and abetting Tashjian and Hodgen's breaches. Given the Trustee's well-pled breach of fiduciary duty claims against all AMERRA Defendants, the Court will permit the Trustee to maintain this alternative claim.[146] Accordingly, the Motion will be denied as to Counts 2 and 4.

2. *The Fraud Claims* (Counts 5 And 6)

In Count 5, the Trustee brings claims of fraud against the AMERRA Defendants, all of which rest on substantially the same factual allegations as the Fiduciary Duty Claims.[147] Namely, the Trustee asserts that the AMERRA Defendants caused the Debtors to maximize borrowings by (1) issuing Borrowing Base Reports materially misstating the volumes and values of Eligible Inventory and falsely certifying the accuracy of the information; (2) falsely certifying in each Borrowing Base Certificate that the Borrowing Base could support the requested loan; and (3)

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[141] Operating Agreement § 5.1(b) ("The Board of Mangers shall be composed of three Persons, two of which shall be appointed by AMERRA [PF] . . ."); *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 258 (Del. Ch. 2006) ("The fact that an allegedly controlling stockholder appointed its associates to the board of directors is certainly an important factor that provides a court with insight when evaluating whether actual control is pleaded adequately.").

[142] Operating Agreement § 5.1(c) ("[A]ll actions of the Board of Managers shall be taken by the affirmative vote of more than fifty percent (50%) in number of the Managers serving on the Board of Managers"); *id.* §§ 5.2 (listing the actions that require Board authorization) & 5.3 (listing actions that require approval of the AMERRA managers).

[143] Am. Compl. ¶¶ 50-51.

[144] *Id.* ¶¶ 46-47.

[145] *See, e.g.*, *id.* ¶¶ 43-44, 193(e); Operating Agreement §§ 5.2 & 5.3.

[146] *See Miller v. Anconnect, LLC (In re Our Alchemy, LLC),* No. 16-11596 (KG), 2019 WL 444541, at *16 (Bankr. D. Del. Sept. 16, 2019) ("At the pleading stage, the Trustee is entitled to plead in the alternative and to assert claims of aiding and abetting to the extent that some defendants did not themselves have any fiduciary duties or were shielded from breach of fiduciary duty claims by exculpatory provisions of debtor's operating agreement"); *Largo Legacy Grp., LLC v. Charles*, No. 2020-0105-MTZ, 2021 WL 2692426, at *18 (Del. Ch. June 30, 2021) (allowing the aiding and abetting claim to survive to the extent that discovery revealed the defendant did not owe fiduciary duties).

[147] A question exists as to whether Delaware, New York, or Minnesota law applies to the Fraud Claims. Because these states' elements of fraud are nearly identical, the Court need not decide the issue today. *See Bond v. Rosen (In re NSC Wholesale Holdings, LLC)*, 637 B.R. 71, 81 (Bankr. D. Del. 2022); *Ascente Business Consulting, LLC v. DR myCommerce*, 9 F.4th 839, 845 (8th Cir. 2021).

concealing from the Working Capital Lenders the flaws and unreliability of the Debtors' data.[148] Count 6 is the Trustee's alternative claim for aiding and abetting. The AMERRA Defendants argue that the Trustee fails to plead fraud with proper particularity and state her claims.[149]

a. The Trustee Has Pled Fraud With Sufficient Particularity

Claims of fraud must satisfy a heightened pleading standard of Federal Rule 9(b). This standard requires a plaintiff to "state with particularity the circumstances constituting fraud," but allows knowledge and intent to be alleged generally.[150] The purpose of Federal Rule 9(b) is to provide notice of the precise nature of the claim, not to test the factual allegations.[151] Although every material detail, such as the date, place, and time, is not required to be pled with particularity, a plaintiff must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent."[152]

The AMERRA Defendants contend that the Trustee has failed to identify the fraudulent statements, explain how the statements were fraudulent, and set forth each AMERRA Defendant's role in making them. However, the Amended Complaint identifies the alleged misstatements as the Debtors' Borrowing Base, Eligible Inventory, and value and amount of inventory, all of which were reported in the Borrowing Base Reports and Borrowing Base Certificates and submitted to the Working Capital Lenders between June 2018 and April 2021.[153] Each Borrowing Base Report and Borrowing Base Certificate is attached to the Amended Complaint.[154] Moreover, the Amended Complaint alleges in sufficient detail that the Debtors' operations depended on the value and amount of inventory.[155] Because the inventory data is alleged to have always been incorrect and overstated, it is reasonable for the Court to infer that all information using such data, like the Debtors' financial reports and their Borrowing Base calculations, was also incorrect and overstated. Despite the AMERRA Defendants' unsupported contention that the Trustee must specify the extent that each certificate and report was inaccurate, the Court is satisfied that the Trustee has sufficiently explained how they were misstated for notice purposes.

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[148] Am. Compl. ¶ 217.

[149] The AMERRA Defendants have argued that the Fraud Claims should be dismissed as duplicative of contract claims, but the Trustee has not brought any such claims. *See generally In re Fyre Festival Litig.*, 399 F. Supp. 3d 203, 212 (S.D.N.Y. 2019) ("Where a plaintiff alleges both a breach of contract and a fraud claim arising from the same series of events, New York courts have been cautious in sustaining an independent fraud claim"). Accordingly, the cases cited by the AMERRA Defendants are inapposite as they involve suits with overlapping fraud and breach of contract claims. *See GWG MCA Capital, Inc. v. Nulook Capital, LLC*, No. 17-cv-1724, 2019 WL 1084777 (E.D.N.Y. Mar. 7, 2019); *MBI Ins. Corp. v. Credit Suisse Sec. (USA), LLC*, 165A.3d 108, 114 (N.Y. App. Div. 2018); *Triad Intern Corp. v. Cameron Indus., Inc.*, 998 N.Y.S. 2d 13 (N.Y. App. Div. 2013).

[150] FED. R. CIV. P. 9(b).

[151] *Gerbitz v. ING Bank, FSB*, 967 F. Supp. 2d 1072, 1076 (D. Del. 2013).

[152] *Charal Inv. Co. v. Rockefeller* (*In re Rockefeller Ctr. Props., Inc., Sec. Lit.)*, 311 F.3d 198, 253 (3d Cir. 2002).

[153] *See, e.g.*, Am. Compl. ¶¶ 66, 68, 156-57.

[154] Adv. D.I. 69, Ex. 8; Adv. D.I. 64, Ex. 9.

[155] *See, e.g.*, Am. Compl. ¶¶ 5, 62-65, 75-76, 78-87.

With respect to the AMERRA Defendants challenge to the Trustee's reliance on blanket references to "Defendants" rather than individualized detail, they are correct that generalized allegations against a group of defendants do not satisfy Federal Rule 9(b) if the defendants do not have notice of the precise conduct of which they are accused.[156] However, when a complaint provides sufficient particularized allegations, "there is no *per se* rule that group pleading cannot satisfy Rule 9(b)."[157] As will be discussed, the Amended Complaint alleges particularized facts linking Tashjian and Hodgen (and the AMERRA Entities as controllers) to the Borrowing Base Certificates and Borrowing Base Reports through their extensive knowledge of the Borrowing Base and the Rabobank Credit Agreement. Thus, the Trustee has satisfied Federal Rule 9(b).

b. The Trustee Has Stated Claims For Common Law Fraud And Aiding And Abetting

To state a claim for common law fraud, the Trustee must allege:

> (1) a false representation, usually one of fact, made by the Defendant; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of the reliance.[158]

The AMERRA Defendants challenge elements two and three – knowledge and justifiable reliance.

As to knowledge, the AMERRA Defendants highlight that none of them are alleged to have prepared, signed, or submitted the Borrowing Base Reports or Borrowing Base Certificates to the Working Capital Lenders.[159] Under Delaware law, if the AMERRA Defendants are to be liable for fraud, it must be for their own actions.[160] Simply alleging knowledge of tortious conduct is not enough.[161] Rather, to state a claim, the Amended Complaint must, at a minimum, describe "affirmative actions taken by the individual directing, ordering, ratifying, approving or consenting to the tort."[162] It has done that. The Trustee alleges that Tashjian and Hodgen were required to

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[156] *Haskell v. Goldman, Sachs & Co. (In re Genesis Health Ventures, Inc.)*, 355 B.R. 438, 455 (Bankr. D. Del. 2006).

[157] *Id.*

[158] *MarkDutchCo 1 B.V. v. Zeta Interactive Corp.*, 411 F. Supp. 3d 316, 332 (D. Del. 2019) (citing *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992)).

[159] *See supra* note 20.

[160] *Mosiman v. Madison Cos., LLC,* No. 17-1517-CFC, 2019 WL 203126, at *6 (D. Del. Jan. 15, 2019) (citing *Gassis v. Corkery*, No. 88-68-VCG, 2014 WL 3565418, at *5 (Del. Ch. July 21, 2014)); *Agspring Holdco, LLC v. NGP X US Holdings, LLC*, No. 2019-0567-AGB, 2020 WL 435555, at *19 (Del. Ch. July 30, 2020) (noting that under the personal participation doctrine a corporate officer may only be liable for fraud where he is "actively involved in the commission of the tort in that [he] directed, ordered, ratified, approved or consented to the tort.").

[161] *Gassis*, 2014 WL 3565418, at *5.

[162] *Mosiman*, 2019 WL 203126, at *6 (quoting *Gassis*, 2014 WL 3565418, at *5).

approve any request for advancement under the Credit Facility, necessitating the Borrowing Base Certificates.[163] She also alleges facts showing that they knew about the weekly calculations of the Borrowing Base and issuances of the Borrowing Base Reports.[164] They had the power to stop the distribution of the certificates and reports (or at the very least correct them), but they did not. Tashjian and Hodgen as members of the Board, and the AMERRA Entities as controllers, may be liable for fraud based on the actions of officers who prepared and signed the reports and certificates.[165] They may also have committed fraud as a result of their own actions in directing, approving, or consenting to the purported misstatements.

On justifiable reliance, the AMERRA Defendants argue that Rabobank possessed or had access to information revealing the truth of the inaccuracies in the Borrowing Base Certificates and Borrowing Base Reports. Its failure to review the information, they claim, demonstrates unjustifiable reliance. However, whether Rabobank had access to or was in the possession of sufficient information to reveal falsities is an issue of fact that cannot be considered at this stage.[166] The Trustee alleges that all representations in the certificates and reports were certified as accurate, including that the Borrowing Base supported all loan amounts requested.[167] She also alleges that the AMERRA Defendants withheld from Rabobank the fact that the Debtors were using inaccurate inventory data to calculate the Eligible Inventory and Borrowing Base.[168] These facts are sufficient to allege that Rabobank justifiably relied on the purported misstatements in the Borrowing Base Certificates and Borrowing Base Reports when it advanced loans under the Credit Facility.[169]

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[163] *See, e.g.*, Am. Compl. ¶¶ 44, 66-67, 156.

[164] *See, e.g.*, *id.* ¶¶ 3, 5, 15, 51, 69, 76-77, 134, 149, 154, 156, 160-63, 167.

[165] *See Graham v. Taylor Capital Grp., Inc. (In re Reliance Secs. Lit.)*, 91 F. Supp. 2d 706, 720-21 (D. Del. 2000) (determining that, while the complaint did not "attribute any specific misstatements to these defendants, the wrong complained of . . . [was] the kind of matter that these [director] defendants may have been personally responsible for overseeing . . . ."); *see also Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 798-99 (Del. Ch. 2014) ("A principal is liable for the fraud of an agent even though the fraud was committed without the knowledge, consent or participation of the principal if the act was done in the course of the agent's employment and within the apparent scope of the agent's authority.").

[166] The cases cited by the AMERRA Defendants determined justifiable reliance after discovery or trial. *See Crigger v. Fahnestock & Co.*, 443 F.3d 230 (2d Cir. 2006) (reviewing the jury charge as to justifiable reliance); *Grumman Allied Indus., Inc. v. Rohr Indus., Inc*., 748 F.2d 729, 737-38 (2d Cir. 1984) (affirming the district court's rejection of the plaintiff's claim of justifiable reliance "in light of the undisputed evidence" on summary judgment); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 475 (Del. 1992) (reviewing the issue of justifiable reliance after a trial was conducted).

[167] Am. Compl. ¶ 67.

[168] *Id.* ¶¶ 65-66, 79, 149, 154, 158-59.

[169] *Genesis Health*, 438 B.R. at 460 (determining that at the pleading stage it was sufficient for the plaintiffs to allege that they acted in reliance on the defendants' representations and were unaware of the concealed misrepresentations).

In sum, the Trustee states a plausible fraud claim against the AMERRA Defendants. As such, the Court further concludes that the Trustee also states an alternative claim for aiding and abetting. Therefore, the Motion will be denied as to Counts 5 and 6.

An appropriate order will issue.

Dated: October 10, 2023
Wilmington, Delaware

Karen B. Owens
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
PIPELINE FOODS, LLC, *et al.,*	)	Case No. 21-11002 (KBO)
	)	
Debtors.	)	
	)	
	)	
NAUNI JO MANTY, Pipeline Foods Liquidating Trust, By and Through Nauni Manty, as Liquidating Trustee,	)	
	)	
Plaintiff,	)	
	)	Adv. Proc. No. 22-50399 (KBO)
v.	)	
	)	**Related Docket No. 74**
AMERRA CAPITAL MANAGEMENT, LLC; AMERRA PF HOLDINGS, LLC; CRAIG TASHJIAN; ROBERT HODGEN; ERIC JACKSON; ANTHONY SEPICH; and MONTY BULLOCK,	)	
	)	
Defendants.	)	
	)	

ORDER DENYING AMERRA CAPITAL MANAGEMENT, LLC'S, AMERRA PF HOLDINGS, LLC'S, CRAIG TASHJIAN'S AND ROBERT HODGEN'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby **ORDERED** that the *AMERRA Capital Management, LLC's, AMERRA PF Holdings, LLC's, Craig Tashjian's and Robert Hodgen's Motion to Dismiss Plaintiff's Amended Complaint* [Adv. D.I. 74] is denied.

Dated: October 10, 2023
Wilmington, Delaware

Karen B. Owens
United States Bankruptcy Judge