

**ABN AMRO Capital USA LLC v AMERRA Capital
Mgt., LLC**

2022 NY Slip Op 32086(U)

July 2, 2022

Supreme Court, New York County

Docket Number: Index No. 651148/2019

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ABN AMRO CAPITAL USA LLC, SOCIETE GENERALE,
BNP PARIBAS, NATIXIS, NEW YORK BRANCH,
MAQUARIE BANK LIMITED, BANK HAPOALIM BM,
MUFGBANK, LTD., and ISRAEL DISCOUNT BANK OF
NEW YORK,

Plaintiffs,

- v -

AMERRA CAPITAL MANAGEMENT, LLC, AMERRA LATIN
AMERICA FINANCE, LLC, AMERRA AGRI ADVANTAGE
FUND, L.P., AMERRA AGRI OPPORTUNITY FUND, L.P.,
AMERRA AGRI OFFSHORE MASTER FUND II, L.P.,
AMERRA AGRI MULTI STRATEGY FUND, L.P., AMERRA
AGRI FUND II, LP, and NANCY OBLER,

Defendants.

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INDEX NO. 651148/2019

MOTION DATE _____

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 169, 170, 171, 175, 176

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In motion sequence number 003, defendants AMERRA Capital Management, LLC (AMERRA Capital), Nancy Obler (together with AMERRA Capital, AMERRA), AMERRA Latin America Finance, LLC, AMERRA Agri Advantage Fund, LP, AMERRA Agri Opportunity Fund, LP, AMERRA Agri Offshore Master Fund II, L.P., AMERRA Multi Strategy Fund, L.P., and AMERRA Agri Fund II, LP move to dismiss the amended complaint and to strike plaintiffs' demand for punitive damages.

Plaintiffs claims include: (1) aiding and abetting fraud against AMERRA Capital, Obler, AMERRA Agri Advantage Fund, L.P., AMERRA Agri Opportunity Fund, L.P.,

AMERRA Agri Multi Strategy Fund, L.P., and AMERRA Agri Fund II, LP; (2) fraud (conspiracy) against AMERRA Capital and Obler, (3) fraudulent inducement of a contract against AMERRA Capital, AMERRA Agri Advantage Fund, L.P., AMERRA Agri Opportunity Fund, L.P., AMERRA Latin America Finance, LLC, and AMERRA Agri Offshore Master Fund II, L.P.; (4) breach of the 2013 Subordination Agreement against AMERRA Capital, AMERRA Agri Advantage Fund, L.P., AMERRA Agri Opportunity Fund, L.P., AMERRA Latin America Finance, LLC, and AMERRA Agri Offshore Master Fund II, L.P.¹; (5) breach of the Amended Subordination Agreement against AMERRA Capital, AMERRA Agri Advantage Fund, L.P., AMERRA Agri Opportunity Fund, L.P., AMERRA Latin America Finance, LLC, and AMERRA Agri Offshore Master Fund II, L.P.; and (6) unjust enrichment against AMERRA Agri Multi Strategy Fund, L.P. and AMERRA Agri Fund II, LP. (NYSCEF Doc. No. [NYSCEF] 108, Amended Complaint [AC] ¶¶ 204-332.) Plaintiffs seek punitive damages. (*Id.* at 117.)

In the interest of brevity, the court notes that its decision references the allegations in the 118-page amended complaint as necessary.

Background

Plaintiffs ABN AMRO Capital USA LLC (ABN), Société Générale, BNP Paribas (BNP), Natixis, New York Branch, Macquarie Bank Limited, Bank Hapoalim BM, MUFG Bank, Ltd., and Israel Discount Bank of New York (collectively, Lenders), a group of senior secured lenders, extended approximately \$360 million in loans to nonparty Transmar Commodity Group Ltd. (Transmar), an entity that was once engaged in global cocoa trading. (NYSCEF 108, AC ¶¶ 1, 44.) AMERRA Capital is a commodities

¹ The fourth cause of action is asserted by all plaintiffs except for MUFG Bank, Ltd.

investment manager that was Transmar's trading partner and a holder of Transmar's unsecured debt. (*Id.* ¶ 6.) Obler is a co-founder, principal, and Managing Director at AMERRA Capital and one of its two board members. (*Id.* ¶ 39.) AMERRA Capital was also a longstanding lender and trading partner of Transmar's German affiliate, nonparty Euromar GmbH (Euromar). (*Id.* ¶ 19.)

In September 2011, Transmar entered into a senior secured credit facility with the Lenders (BNP Credit Agreement).² (NYSCEF 108, AC ¶ 45.) The BNP Credit Agreement designated BNP as the Administrative Agent for Lenders. (*Id.*) The BNP Credit Agreement Lenders loaned money to Transmar against its "borrowing base," which was a contractual formula that assigned percentage weights to Transmar's accounts receivable, inventory, and net unrealized forward gains and losses." (*Id.* ¶ 47.) The BNP Credit Agreement required that Transmar provide weekly certified reports calculating the borrowing base. (*Id.*) Although AMERRA Capital was not a lender under the BNP Credit Agreement, AMERRA Capital and Obler had access to the reports and other due diligence documents that Transmar provided to the Lenders. (*Id.* ¶ 48.)

In August 2013, at the same time there was an amendment to the BNP Credit Agreement, the Lenders also executed a subordination agreement with AMERRA Capital, Transmar, and AMERRA Agri Advantage Fund, L.P., AMERRA Agri

² Plaintiff MUFG Bank, Ltd. is not a party to the BNP Credit Agreement. (NYSCEF 108, AC ¶ 45.)

Opportunity Fund, L.P., AMERRA Latin America Finance, LLC,³ which “subordinated an existing \$10 million unsecured loan from the 2013 Subordinated Funds to Transmar” (2013 Subordination Agreement). (*Id.* ¶ 85.) Transmar, AMERRA Capital, and the 2013 Subordinated Funds represented that Transmar’s debt obligations to AMERRA Capital and the 2013 Subordinated Funds was \$10 million and “all such obligations would be memorialized in documents that included an express acknowledgment that the obligations were subordinated to the Lenders’ senior secured debt and not in any other form of documentation.” (*Id.* ¶ 86.)

In 2016, after talks between the Lenders and Transmar to increase the Lenders’ loan in a new credit facility, the parties entered into the second secured lending facility (ABN Credit Agreement). (*Id.* ¶¶ 13, 49.) Pursuant to the ABN Credit Agreement, ABN would become the Lenders’ Administrative Agent. (*Id.*) The plaintiff Lenders in the BNP Credit Agreement, ABN, BNP, Société Générale, Natixis, New York Branch, Macquarie Bank Limited, Bank Hapoalim BM, and Israel Discount Bank (collectively, Continuing Lenders), decided to participate in the ABN Credit Agreement. (*Id.* ¶ 51.) Plaintiff MUFG was the sole new lender. (*Id.*)

The Lenders “required that Transmar, AMERRA Capital, and any AMERRA funds to which Transmar owed money execute a new version of the 2013 Subordination Agreement” as a condition precedent to entering into the ABN Credit Agreement. (*Id.* ¶ 110.) Thus, on February 26, 2016, AMERRA Capital, AMERRA Agri Advantage Fund,

³ AMERRA Agri Advantage Fund, L.P., AMERRA Agri Opportunity Fund, L.P., AMERRA Latin America Finance, LLC are collectively referred to as the 2013 Subordinated Funds.

L.P., AMERRA Agri Opportunity Fund, L.P., AMERRA Latin America Finance, LLC, AMERRA Agri Offshore Master Fund II, L.P.,⁴ ABN, as Agent for the Lenders, and Transmar entered into an amended Subordination Agreement (Amended Subordination Agreement). (*Id.*) However, the 2013 Subordination Agreement remained in effect. (*Id.*) The Lenders allege that when the parties entered into the Amended Subordination Agreement, Transmar had a debt obligation of \$25 million (AMERRA Latin America Finance, LLC., \$12,500,000.00; AMERRA Agri Multi Strategy Fund, L.P., \$7,500,00.00; AMERRA Agri Advantage Fund, L.P., \$2,500,000.00; AMERRA Agri Opportunity Fund, L.P., \$2,500,000) (Third Note) but only represented that no more than \$10 million was owed. (*Id.* ¶¶ 112-114.) Like the 2013 Subordination Agreement, Transmar was not permitted to repay the subordinate debt back to AMERRA Capital or any AMERRA funds until the lenders were paid in full. (*Id.* ¶ 182.) One exception was that Transmar could make a one-time repayment of the entire principal, but there could be no Default or Event of Default under the ABN Credit Agreement. (*Id.* ¶ 181.)

At the heart of this dispute is defendants' alleged conspiracy with Transmar to commit a wide array of fraudulent activity over a period of years for the purpose of misrepresenting Transmar's financial condition to induce plaintiffs to continue to extend credit to Transmar under the Credit Agreements. (NYSCEF 108, AC ¶ 1.) For example, the Lenders allege that defendants created "false and misleading financial statements for Transmar that were intended to be, and were, given to the Lenders with the intention that the Lenders would reasonably rely upon them to their detriment." (*Id.* ¶ 3.) The

⁴ AMERRA Agri Advantage Fund, L.P., AMERRA Agri Opportunity Fund, L.P., AMERRA Latin America Finance, LLC, and AMERRA Agri Offshore Master Fund II, L.P are collectively referred to as the AMERRA Subordinated Funds.

Lenders also allege that defendants engaged in transactions with Transmar that were “designed to mislead the Lenders about Transmar’s true financial conditions, as well as transactions that were intended to evade the contractual limits on Transmar’s ability to borrow money from the Lenders.” (*Id.*) The Lenders allege that the first fraudulent transaction occurred in December 2014 when Transmar documented a \$44 million loan to Transmar by AMERRA as short-term loans to the non-operating entity Euomar Commodities (2014 End of Year Transaction). (*Id.* ¶ 8.) Transmar, not Euomar, fully repaid this loan to AMERRA by April 2016 with 12% interest. (*Id.*)

The Lenders also allege that Transmar and AMERRA engaged in another fraudulent loan transaction at the end of 2015 in order to create the “impression that Transmar had much greater profitability and liquidity than it actually did,” by allowing Transmar to pay down its Borrowing Base at year-end (2015 End of Year Transaction). (*Id.* ¶ 12.) In addition, in August 2016, AMERRA was “a conduit for a transfer of approximately \$8.4 million of collateral from Transmar to Euomar (the ‘August 2016 Transaction’) for no consideration.” (*Id.* ¶ 20.) AMERRA later acquired Euomar’s secured lending facility at a substantial discount. (*Id.*)

Transmar filed for bankruptcy on December 31, 2016. (*Id.* ¶ 1.) The Lenders allegedly learned through discovery in the Transmar bankruptcy proceeding that defendants were involved in Transmar’s scheme to defraud the Lenders. (*Id.*) Three Transmar executives (Peter G. Johnson Sr., Peter B. Johnson Jr, and Thomas Reich) pleaded guilty to conspiracy to commit bank fraud and wire fraud and were sentenced to prison. (*Id.* ¶ 168.)

Defendants now move to dismiss the amended complaint, pursuant to CPLR 3211(a) (1) and (7) and CPLR 3016(b).

Discussion

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the “burden of showing that the relied upon documentary evidence ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.’” (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) “A cause of action may be dismissed under CPLR 3211(a)(1) ‘only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.’” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) “The documents submitted must be explicit and unambiguous.” (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted].) Their content must be “‘essentially undeniable.’” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to “‘support the ground on which the motion is based.’” (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) “[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly

contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

First Cause of Action: Aiding and Abetting Fraud

The Lenders allege that Transmar and its former executives committed fraud by providing the Lenders with false financial statements in order to induce the Lenders into entering into the ABN Credit Agreement. The Lenders further allege that AMERRA Capital and Obler knew these statements were false. The Lenders assert that AMERRA Capital and Obler’s knowledge must be imputed to AMERRA Agri Advantage Fund, L.P., AMERRA Agri Opportunity Fund, L.P., AMERRA Agri Multi Strategy Fund, L.P., and AMERRA Agri Fund II, LP (collectively, AMERRA 2014 Transaction Funds) because they were agents of the AMERRA 2014 Transaction Funds.

To plead an aiding and abetting fraud claim, plaintiff must allege the existence of the underlying fraud, actual knowledge, and substantial assistance. (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 503 [1st Dept 2018] [citations omitted].)

“[T]he elements of an underlying fraud are ‘a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.’” (*Id.*, quoting *Genger v Genger*, 152 AD3d 444, 445, 55 NYS3d 658 [1st Dept 2017].) Defendants argue that the Lenders fail to sufficiently allege an underlying fraud. The court disagrees. The Lenders sufficiently plead an underlying fraud claim by alleging misrepresentations in Transmar’s monthly financial statements and the substance of the misrepresentations,

the falsity of the misrepresentations made for the purpose of inducement, the Lenders' reliance, and injury. (See NYSCEF 108, AC ¶¶ 205-219, 67-73, 76, 79, 99-105.)

As to the second element, "a plaintiff alleging an aiding-and-abetting fraud claim may plead actual knowledge generally, particularly at the pre-discovery stage, so long as such intent may be inferred from the surrounding circumstances." (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010] [citations omitted].) This is because "[p]articipants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud." (*Oster v Kirschner*, 77 AD3d 51, 55-56 [1st Dept 2010].)

The Lenders allege that AMERRA Capital, Obler, and the AMERRA 2014 Transaction Funds knew of the fraud based on a series of emails contemplating transactions to manipulate Transmar's financial statements, then assisted in completing those transactions, which allegedly amounted to an "end of the year window dressing" to "help [Transmar] clean up the balance sheets of the company for the end of year audits." (NYSCEF 108, AC ¶ 68-69, 221-227.) Plaintiffs supply significant, nonconclusory allegations detailing defendants' actual knowledge of the fraud. (*Id.* ¶¶ 148-160.)

As to the third element, substantial assistance requires a defendant to affirmatively assist, help conceal, or fail to act when required to do so, enabling the fraud to proceed, and defendant's actions of proximately caused the primary harm. (*Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009] [citation omitted].) Substantial assistance means the defendant must provide more than routine business services. (*AIG Fin. Products Corp. v ICP Asset*

Mgt., LLC, 108 AD3d 444, 447 [1st Dept 2013] [citation omitted].) The Lenders also sufficiently plead that these defendants assisted Transmar in falsifying Transmar's financial statements by providing loans to inflate Transmar's collateral. (*Id.* ¶¶ 77-79, 108-109, 157-160, 211, 228-240.) Plaintiffs also allege that those acts proximately caused the primary harm to plaintiffs. (*Id.* ¶¶ 236-240.) Thus, the motion to dismiss the first cause of action is denied.

Second Cause of Action: Fraud (Conspiracy)

A claim of civil conspiracy requires plaintiff to demonstrate the primary tort, an agreement between two or more parties, an overt act in furtherance of the agreement, the parties' intentional participation in the furtherance of a plan or purpose and resulting damage or injury. (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010] [citations omitted].) New York law does not recognize conspiracy to commit fraud as a standalone cause of action. (*Id.* [citation omitted].) “[A]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort.” (*Id.*, quoting *Alexander & Alexander of New York, Inc. v Fritzen*, 68 NY2d 968, 969 [1986] [citations omitted].) A conspiracy claim will be dismissed if it is redundant of other claims that already sufficiently plead that tort and the defendants' alleged collusion to commit them. (*American Baptist Churches of Metro. New York v Galloway*, 271 AD2d 92, 101 [1st Dept 2000] [citations omitted].)

Defendants contend, inter alia, that this claim is duplicative of the aiding and abetting fraud claim. The court agrees. The court is not persuaded by the Lender's argument that Obler's design of the fraudulent transactions creates a reasonable inference that there was a conspiratorial agreement, and these are unique overt acts

related to the conspiracy claim, not the aiding and abetting fraud claim. The alleged collusion stems from the same facts alleged to sufficiently plead the aiding and abetting of fraud. (*See Id.*)

The motion to dismiss the second cause of action is granted.

Third Cause of Action: Fraudulent Inducement of a Contract

The Lenders allege that AMERRA Capital and the AMERRA Subordinated Funds knowingly made false representations in the Amended Subordination Agreement about Transmar's debt obligations to induce the Lenders into entering the ABN Credit Agreement.

"To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury." (*Gosmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010] [citations omitted].) "[A] misrepresentation of present facts, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty." (*Id.*)

"A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim. Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty."

(*First Bank of the Ams. v Motor Car Funding, Inc.*, 257 AD2d 287, 291-292 [1st Dept 1999] [citations omitted].)

Defendants argue plaintiffs have not adequately pled misrepresentation or justifiable reliance, and that it is duplicative of the breach of contract claim. Defendants contend there was not a misrepresentation in Section 4 of the Amended Subordination Agreement because defendants were owed a debt from Euromar, not Transmar. Therefore, defendants were not required to disclose that debt. Moreover, defendants argue plaintiffs knew Transmar was not a party to the transaction with Euromar, thus, plaintiffs could not have justifiably relied on the alleged misrepresentation.

The Lenders allege that these defendants represented that Transmar would not repay its indebtedness to AMERRA until after Transmar repaid the Lenders (with certain narrow exceptions) and that Transmar only owed AMERRA Capital and its funds \$10 million, which “would be memorialized only in documents that expressly subordinated those obligations to the Lenders’ senior secured debt.” (NYSCEF 108, AC ¶ 16.) The Lenders allege that these defendants knew these representations were false because AMERRA Capital and three of the AMERRA Subordinated Funds were parties to the Third Note. (*Id.* ¶¶ 260, 262.) The Lenders claim that they relied on the \$10 million obligation limit representation and that provision was material to the eventual ABN Credit Agreement. (*Id.* ¶ 261.) The Lenders contend that AMERRA Capital and the AMERRA Subordinated funds made this representation to induce the signing of the ABN Credit Agreement as the Amended Subordination Agreement was a condition precedent to the ABN Credit Agreement. (*Id.* ¶¶ 110, 263-265.) The Lenders maintain their reliance was justifiable because they were unaware of the alleged fraudulent

transactions taking place involving defendants, Transmar, and Euromar. (*Id.* ¶¶ 266-267.)

At this stage, plaintiffs have adequately pled the necessary elements of a fraudulent inducement of contract claim. While defendants submit the Third Note, which lists Euromar as borrower, the Lenders have presented communication which call into question who owed the debt under the Third Note and possible scheme to conceal Transmar's debt by structuring a loan through Euromar. On this record, it cannot be determined whether the debt was Transmar's and whether there was a larger fraudulent scheme in play.

Further, this claim is not duplicative of the breach of contract claim. (*See First Bank of the Ams.*, 257 AD2d at 291-292 ["if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim".].)

Fourth Cause of Action: Breach of the 2013 Subordination Agreement

The Lenders allege that AMERRA Capital and 2013 Subordinated Funds breached the 2013 Subordination Agreement by receiving and retaining improper payments from Transmar and issuing the Year-End 2014 Original Notes.⁵

The elements of a breach of contract claim are the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting

⁵ The Year-End 2014 Original Notes are the two loans that AMERRA Capital and the AMERRA 2014 Transaction Funds allegedly made to Transmar (one for \$25 million and the other for \$19 million), comprising of the 2014 End of Year Transaction. (NYSCEF 108, AC ¶ 74.)

damages. (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [citations omitted].) The court will enforce a clear and complete written agreement according to its plain meaning, but if the provision in controversy is reasonably susceptible to different interpretations or meanings, a contract may be ambiguous. (*New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177 [1st Dept 2006] [citations omitted].) Simply disagreeing about the meaning of the contract's language is not sufficient to raise a triable issue of fact. (*Id.* at 177-178 [citations omitted].)

Defendants argue Section 4 of the 2013 Subordination Agreement is inapplicable because it controls Transmar's debts and not Euomar's debts. Additionally, defendants contend the plain language of Section 4 is present tense, and therefore, any allegations of misrepresentations regarding the 2014 transactions would inapplicable future representations. The court is unconvinced by defendants' arguments.

Plaintiffs allege the 2013 Subordination Agreement between AMERRA Capital, the AMERRA Subordinated Funds, and BNP as the Agent for the Continuing Lenders is a valid contract. (NYSCEF 108, AC. ¶ 272.) Plaintiffs allege AMMERA Capital and AMERRA Subordinated Funds breached Section 1(a) of the 2013 Subordination Agreement by receiving and keeping payments made by Transmar when in Default or an Event of Default. (*Id.* ¶¶ 274-276; see also NYSCEF 155, Subordination Agreement, at § 1[a].) Plaintiffs further allege AMMERA Capital breached Section 4 the contract by loaning Transmar \$25 million on March 18, 2015, which created new obligations for Transmar to avoid default. (*Id.* ¶¶ 278, 280, 282; see also NYSCEF 155, Subordination Agreement, at § 4.)

Until the Transmar and Euromar transactions are untangled, and it is clear who is the debtor of the Year-End 2014 Original Notes, the court cannot determine whether there was in fact a breach of this agreement. The court cannot accept the 2013 Subordination Agreement at face value because of the sufficient allegations involving defendants, Transmar, and Euromar.

As part of this claim, the Lenders also assert that AMERRA Capital, AMERRA Agri Advantage Fund, L.P., and AMERRA Agri Opportunity Fund, L.P. also breached their implied duty of good faith and fair dealing. A claim for breach of implied duty of good faith and fair dealing will not be maintained where the breach of the covenant is intrinsically tied to the damages allegedly resulting from a breach of contract. (*Board of Managers of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2014].) Defendants argue the implied covenant claims fail because the Subordination Agreements explicitly provide plaintiffs with the priority right to Transmar's assets, so it need not be implied. The court agrees.

Further, defendants argue that the Subordination Agreements expressly barred consequential damages (Section 18 in both the 2013 Subordination Agreement and Amended Subordination Agreement), and even if they did not, the asserted damages did not flow directly from the alleged breach of contract. The court agrees that Section 18 explicitly bars consequential damages and any claim for such damages being sought in connection with the breach of contract claims are dismissed.

The motion to dismiss the fourth cause of action is granted to the extent that the claim for breach of implied duty of good faith and fair dealing is dismissed. Further, the Lenders are barred from seeking consequential damages in connection with this claim.

Fifth Cause of Action: Breach of Amended Subordination Agreement

Defendants submitted combined arguments for the two breach of contract claims. The Lenders allege AMERRA Capital and the AMERRA Subordinated Funds breached the Amended Subordination Agreement by receiving and keeping the improper payments made on the subordinated loan and failing to remit them to ABN as the Agent. (NYSCEF 108, AC ¶¶193-203, 300.) The Lenders claim AMERRA Capital and the AMERRA Subordinated Funds were not entitled to retain the profit payments because they were made when a Default or an Event of Default occurred. (*Id.* ¶¶ 301-302.) Further, the Lenders allege AMERRA Capital and the AMERRA Subordinated Funds represented in Section 4 of the Amended Subordination Agreement that Transmar did not owe more than \$10 million when Transmar actually owed \$17.5 million under the Third Note. (*Id.* ¶¶ 304-305.) The Lenders contend AMERRA Capital and the AMERRA Subordinated Funds breached the implied covenant of good faith and fair dealing by routing funds away from Transmar to receive full payment before the other Lenders, as expressed by the Amended Subordination Agreement. (*Id.* ¶ 314.) For the reasons stated above, the alleged fraud creates factual issues for this claim that cannot be decided on a motion to dismiss. However, the breach of claim for breach of implied duty of good faith and fair dealing is duplicative.

The motion to dismiss the fifth cause of action is granted to the extent that the claim for breach of implied duty of good faith and fair dealing is dismissed. Further, the Lenders are barred from seeking consequential damages in connection with this claim.

Sixth Cause of Action: Unjust Enrichment

“To state a claim for unjust enrichment, a plaintiff must allege that: ‘(1) the [defendant] was enriched, (2) at [plaintiff’s] expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered.’” (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 26 [1st Dept 2015], quoting *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012].) Plaintiff must have a relationship with the defendant that is not too attenuated and could have caused reliance or inducement. (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [citations omitted].) Defendants argue that the Lenders fail to state a claim because they did not have a preexisting right any of the payments made by Euromar to AMERRA pursuant to the 2014 Year-End Transaction.

The Lenders allege AMERRA Agri Multi Strategy Fund, L.P. and AMERRA Agri Fund II were unjustly enriched because they received distributions in the amount of \$3 million plus interest and \$1 million plus interest, respectively, from AMERRA Capital from Transmar’s repayment of the \$19 million Note using money from the plaintiffs. (NYSCEF 108, AC ¶¶ 325, 327.) The Lenders claim AMERRA Agri Multi Strategy Fund, L.P. received \$7.5 million plus interest from AMERRA Capital after Transmar repaid the \$25 million Third Note. (*Id.* ¶ 326.) The Lenders allege they had priority rights over those funds under the Subordination Agreements. (*Id.* ¶ 328.)

The Lenders’ allegations are sufficient to sustain this claim. Again, there are factual issues as to the transactions and payments. The motion to dismiss the sixth cause of action is denied.

Punitive Damages

Defendants argue that the Lenders' demand for punitive damages must be struck because the Subordination Agreements expressly bar punitive damages, and the Lenders have not alleged a public harm. The Lenders contend their punitive damages request stems from the aiding and abetting and fraud claims, not the contract claims, making the provision in the Subordination Agreements irrelevant. Additionally, the Lenders argue that, under New York law, they are not required to allege a harm to the public; however, if they were required to allege a public harm, the fraud and bankruptcy of a significant cocoa company affected the public by impacting the cocoa market and disrupting commodities lending practices satisfy the pleading requirement.

A request for punitive damages in relation to a fraud claim requires an allegation the fraud be aimed at the public generally. (*Vandashield Ltd. v Isaacson*, 146 AD3d 552, 555 [1st Dept 2017] [citations omitted].) Punitive damages are permitted only when "defendants' actions were aimed at the public or 'evinc[ed] a high degree of moral turpitude and demonstrat[ed] such wanton dishonesty as to imply a criminal indifference to civil obligations.'" (*Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418, 419 [1st Dept 2020] [citations omitted].)

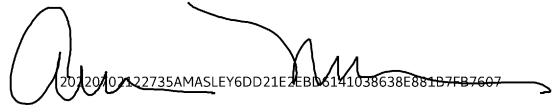
The Lenders' fail to allege that the fraud was aimed at the general public. The motion to dismiss the request for punitive damages is granted.

Accordingly, it is

ORDERED that defendants' motion is granted in part, and denied in part, in so far as the second cause of action (fraud [conspiracy] against AMERRA), breach of the

implied covenant of good faith and fair duty, and the request for consequential and punitive damages are dismissed; and it is further

ORDERED that by August 4, 2022, defendants shall file an answer within 20 days of this decision and the remaining parties shall file a proposed PC order to which all parties agree or competing PC orders if the parties cannot agree to a discovery schedule.



7/2/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE