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3 UNITED STATES BANKRUPTCY COURT  
4 EASTERN DISTRICT OF CALIFORNIA  
5 SACRAMENTO DIVISION  
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8 In re: )  
9 MICHAEL HAT, ) Case No. 04-32497-B-11  
10 Debtor(s). )  
11 \_\_\_\_\_ )  
12 MICHAEL HAT, )  
13 Plaintiff(s) ) Adv. No. 06-2217-B  
14 vs. )  
15 FARM CREDIT LEASING SERVICES ) Docket Control No. PP-1  
16 CORP., ) Date: November 7, 2006  
17 Defendant(s). ) Time: 9:30 a.m.  
18 \_\_\_\_\_

19 On or after the calendar set forth above, the court issued  
20 the following ruling. The official record of the ruling is  
appended to the minutes of the hearing.

21 Because the ruling constitutes a "reasoned explanation" of  
22 the court's decision under the E-Government Act of 2002 (the  
"Act"), a copy of the ruling is hereby posted on the court's  
23 Internet site, [www.caeb.uscourts.gov](http://www.caeb.uscourts.gov), in a text-searchable  
24 format, as required by the Act. However, this posting does not  
constitute the official record, which is always the ruling  
appended to the minutes of the hearing.

25 **DISPOSITION AFTER ORAL ARGUMENT**

26 This matter continued most recently from October 11, 2006. Oral  
27 argument was heard on that date. Appearances are noted on the record.  
28 The court continued the matter to further consider the pleadings and

1 to determine whether additional oral argument would be helpful.  
2 Finding that additional oral argument was unnecessary, the court  
3 removed the matter from calendar on November 7, 2006 and took it under  
4 submission. The following constitutes the court's findings of fact  
5 and conclusions of law, pursuant to Federal Rule of Bankruptcy  
6 Procedure 7052.

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8 Defendant's motion is denied.

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10 The purpose of a motion to dismiss under Rule 12(b)(6) of  
11 the Federal Rules of Civil Procedure, made applicable  
12 here under F.R.B.P. 7012, is to test the legal  
13 sufficiency of a plaintiff's claims for relief. In  
14 determining whether a plaintiff has advanced potentially  
15 viable claims, the complaint is to be construed in a  
16 light most favorable to the plaintiff and its allegations  
17 taken as true. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct.  
18 1683, 40 L.Ed.2d 90 (1974); Church of Scientology of  
19 Cal. v. Flynn, 744 F.2d 694, 696 (9th Cir.1984).... The  
20 complaint should not be dismissed for a failure to state  
21 a claim unless it appears that the plaintiff can prove no  
22 set of facts in support of the claim which would entitle  
23 plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 78  
24 S.Ct. 99, 2 L.Ed.2d 80 (1957); Jacobson v. Hughes  
25 Aircraft Co., 105 F.3d 1288, 1292 (9th Cir.1997).

26  
27 Quad-Cities Constr., Inc. v. Advanta Business Services Corp. (In re  
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1 Quad-Cities Constr., Inc.), 254 B.R. 459, 465 (Bankr. D. Idaho 2000).

2       The court may "consider exhibits submitted with the complaint,  
3 documents whose contents are alleged in the complaint when  
4 authenticity is not questioned and matters that may be judicially  
5 noticed pursuant to Federal Rule of Evidence 201." Neilsen v. Union  
6 Bank of California, 290 F.Supp.2d 1101, 1112 (C.D. Cal. 2003) *citing*  
7 Branch v. Tunnell, 14 F.3d 449, 454 (9<sup>th</sup> Cir. 1994) *et al.* In this  
8 instance, the court will admit and consider the contract attached to  
9 plaintiff's complaint. The court will also grant in part and deny in  
10 part the defendant's request for judicial notice. The court takes  
11 judicial notice pursuant to Federal Rule of Evidence 201 of the  
12 following documents: exhibits 1, 2 (in part), 3, 4, 5, 6, 7, 8, and 9  
13 submitted with defendant's motion. With respect to exhibit 2, the  
14 transcript of auction proceedings held December 11, 2003, the contents  
15 of that exhibit are not adjudicative facts; however, the transcript is  
16 considered for the statements of Michael Hat. Those statements are  
17 admissions of a party opponent and are not hearsay under Federal Rule  
18 of Evidence 801(d) (2) (A).

19       Broadly, the defendant raises two theories under which it argues  
20 this motion should be granted. The first theory is generally  
21 described as preclusion, and defendant asserts three sub-theories:  
22 claim preclusion, judicial estoppel, and equitable estoppel. The  
23 second theory is indemnity and waiver. None of the theories proves  
24 dispositive on this motion under Federal Rule of Civil Procedure  
25 12(b) (6).

26       1) Claim Preclusion. Defendant cites the correct standard for  
27 finding claim preclusion but the court finds that the doctrine is

1 inapplicable here. "Generally, four elements must be present in order  
2 to establish the defense of *res judicata*: (1) the parties were  
3 identical in the two actions; (2) the prior judgment was rendered by a  
4 court of competent jurisdiction; (3) there was a final judgment on the  
5 merits; and, (4) the same cause of action was involved in both cases."  
6 Heritage Hotel Partnership I v. Valley Bank of Nevada (In re Heritage  
7 Hotel Partnership I), 160 B.R. 374, 376-77 (9<sup>th</sup> Cir. BAP 1993) *citing*  
8 Eubanks v. F.D.I.C., 977 F.2d 166, 169 (5<sup>th</sup> Cir. 1992). The parties  
9 devote substantial time and effort to analyzing whether or not the  
10 first element, that the parties are the same, is met. The court need  
11 not reach that issue because it finds that the defendant has failed to  
12 establish the fourth element.

13 The first action occurred in the bankruptcy case In re Michael  
14 Hat, 04-32497-B-11. In that action, this court approved the sale of  
15 property of the bankruptcy estate, to wit, the Grapeco grape  
16 processing facility and the estate's interest in specific equipment  
17 contained therein, to E & J Gallo Winery. Copies of the orders  
18 approving the sale procedures and the final order approving the sale  
19 are attached as exhibits 7 and 8 to defendant's request for judicial  
20 notice. In that matter, the only issue before the court was approval  
21 of a sale of estate property. In this adversary proceeding, the issue  
22 is whether defendant breached a separate contract between plaintiff  
23 and defendant, a contract that was not before the court in the sale  
24 proceeding. This adversary proceeding is not based on the same claim  
25 addressed in the sale proceeding. For this reason, claim preclusion  
26 is inapplicable.

27 The court considers four factors in determining whether  
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1 successive suits involve the same claims: (1) whether rights or  
2 interests established in the prior judgment would be destroyed or  
3 impaired by prosecution of the second action; (2) whether  
4 substantially the same evidence is presented in the two actions; (3)  
5 whether the two suits involve infringement of the same right; and (4)  
6 whether the two suits arise out of the same transactional nucleus of  
7 facts. Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9<sup>th</sup>  
8 Cir. 1982) *cert. denied* 459 U.S 1087 (1982).

9 As to the first factor, the rights or interests established in  
10 the sale proceeding are not destroyed or impaired by prosecution of  
11 this action. The outcome of this adversary proceeding will not affect  
12 Gallo's acquisition of the Grapeco grape processing facility, or the  
13 estate's receipt of the purchase price for the facility or defendant's  
14 receipt of payment for equipment transferred to Gallo as part of the  
15 sale of the Grapeco grape processing facility. Defendant may incur  
16 liability for breach of a separate contract with plaintiff, which  
17 breach may have been caused by defendant's performance in connection  
18 with the sale of the Grapeco grape processing facility, but that does  
19 not amount to destruction or impairment of rights or interests  
20 established in the sale proceeding.

21 As to the second factor, the evidence that will be presented in  
22 this adversary proceeding is different from the evidence that was  
23 presented in connection with the sale proceeding. The sale proceeding  
24 involved an inquiry whether the proposed sale was beneficial to the  
25 estate. This action involves evidence of an extraneous agreement  
26 between plaintiff and defendant, the conditions contained in that  
27 agreement and the parties' performance under that agreement.

1 As to the third factor, the sale proceeding and this action do  
2 not involve infringement of the same right. Plaintiff contends that  
3 defendant breached an agreement with him. No such claim was involved  
4 in the sale proceeding.

5 As to the fourth factor, for the reasons discussed in connection  
6 with the second factor, the sale proceeding and this action do not  
7 involve the same transactional nucleus of facts.

8 2) Judicial Estoppel. "Judicial estoppel, sometimes also known  
9 as the doctrine of preclusion of inconsistent positions, precludes a  
10 party from gaining an advantage by taking one position, and then  
11 seeking a second advantage by taking an incompatible position.  
12 [citations].... The policies underlying preclusion of inconsistent  
13 positions are general considerations of the orderly administration of  
14 justice and regard for the dignity of judicial proceedings....  
15 Judicial estoppel is intended to protect against a litigant playing  
16 fast and loose with the courts.... Because it is intended to protect  
17 the dignity of the judicial process, it is an equitable doctrine  
18 invoked by a court at its discretion." Rissetto v. Plumbers and  
19 Steamfitters Local 343, 94 F.3d 597, 600-01 (9<sup>th</sup> Cir. 1996). In this  
20 instance, the court in its discretion finds that application of  
21 judicial estoppel is not appropriate. Defendant urges this court to  
22 find that plaintiff's silence in the earlier sale motion constitutes  
23 taking a position that is contrary to his position in this adversary  
24 proceeding. The court is unwilling to make such a finding. The sale  
25 motion was not brought by plaintiff. It was brought by the trustee  
26 appointed in the chapter 11 case. Plaintiff took no active position  
27 in court. The court does not find that plaintiff's silence in  
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1 connection with the sale proceeding is sufficient to invoke judicial  
2 estoppel here.

3 3) Equitable Estoppel. This argument fails because the inquiry  
4 is, by necessity, fact intensive. The elements of equitable estoppel  
5 are: "(1) The party to be estopped must know the facts; (2) He must  
6 intend that his conduct shall be acted on or must so act that the  
7 party asserting the estoppel has a right to believe it is so intended;  
8 (3) The latter must be ignorant of the true facts; and (4) He must  
9 rely on the former's conduct to his injury." U.S. v. Ruby Co., 588  
10 F.2d 697, 703 (9<sup>th</sup> Cir. 1978) (citations omitted). This argument  
11 cannot be resolved in a motion under Rule 12(b)(6) because defendant  
12 cannot show that plaintiff can prove no set of facts that would defeat  
13 the defense. Nothing herein precludes defendant from raising this  
14 issue later in the litigation should the facts warrant.

15 4) Indemnity and Waiver. Defendant relies on the language in  
16 paragraph 9 of the contract attached to the complaint. It states:

17  
18 Michael Hat shall indemnify FCL and its officers,  
19 directors, agents, employees, attorneys, successors and  
20 assigns (the "Indemnitees") and hold harmless the  
21 Indemnitees from the following: 1) any and all claims,  
22 suits, or demands arising from this Agreement, the  
23 Transfer, and the Lease and 2) the conduct of Michael Hat  
24 or his nominee in connection with the Grapeco Equipment.  
25 Michael Hat hereby waives all claims in respect thereof  
26 against the Indemnitees.

1           In essence, defendant asks the court to find that this provision  
2 requires Hat to indemnify FCL for the consequences of FCL's own breach  
3 of the agreement. This argument cannot be resolved in a motion under  
4 Rule 12(b) (6) because defendant cannot show that plaintiff can prove  
5 no set of facts that would defeat the defense. The court finds the  
6 paragraph to be ambiguous because it does not explicitly state the  
7 extraordinary interpretation urged by defendant - that one party to a  
8 contract agrees to indemnify the other party for the latter's breach  
9 of the agreement. Because the clause is ambiguous, the court would  
10 need to resort to extrinsic evidence to determine the intent of the  
11 parties intent as to the meaning of the paragraph. That fact  
12 intensive inquiry cannot occur in the context of this motion. Nothing  
13 herein precludes defendant from raising this issue later in the  
14 litigation should the facts warrant.

15           Because each theory pled in the motion fails, for the reasons set  
16 forth above, the motion is denied.

17           The court will issue a minute order.  
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