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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

In re ) Case No. 18-11651-B-11  
)  
GREGORY JOHN te VELDE, )  
)  
Debtor. )

RANDY SUGARMAN, Ch. 11 Trustee, ) Adv. Proceeding No. 19-1033  
)  
Plaintiff, ) DCN: DCT-1  
)

v. )

IRZ CONSULTING, LLC (aka) IRZ )  
Construction Division LLC, )  
Defendant. )

IRZ CONSULTING, LLC (aka) IRZ )  
Construction Division LLC, )

Third-Party Plaintiff, )

v. )

U.S. FARM SYSTEMS; 4 CREEKS, )  
INC., JOHN FAZIO (dba Fazio )  
Engineering); DARI-TECH, INC.; )  
LASER LAND LEVELING, INC.; MAAS )  
ENERGY WORKS, INC.; GEORGE )  
CHADWICK (dba George Chadwick )  
Consulting); VALMONT NORTHWEST, )  
INC.; NUCOR BUILDING SYSTEMS )  
UTAH LLC, )

Third-Party Defendants. )

1                   **FINDINGS AND RECOMMENDATIONS FOR *DE NOVO***  
2                   **CONSIDERATION OF THE DISTRICT COURT AS TO**  
3                   **DARI-TECH, INC.'S MOTION FOR SUMMARY JUDGMENT**

4                   **Before: René Lastreto II, Bankruptcy Judge**

5                   \_\_\_\_\_

6 Duncan Turner, BADGLEY MULLINS TURNER PLLC, Seattle, WA, for  
7 Dari-Tech, Inc., Third-Party Defendant.

8 Benjamin P. Tarczy, MILLER NASH LLP, Portland, OR, for IRZ  
9 Consulting LLC, Defendant/Third-Party Plaintiff.

10                   \_\_\_\_\_

11

12 RENÉ LASTRETO II, Bankruptcy Judge:

13

14                   INTRODUCTION

15                   Summary judgment should not be granted unless the moving  
16 party shows both that there is no genuine dispute as to any  
17 material fact and that movant is entitled to judgment as a  
18 matter of law.<sup>1</sup> Civ. Rule 56 (Rule 7056). A third-party  
19 defendant, here, asks for summary judgment because it is  
20 dissatisfied that the third-party plaintiff's discovery  
21 responses did not sufficiently detail movant's fault. Finding  
22 material factual disputes remain, and for other reasons, the  
23 court recommends the motion be DENIED.

24 ///

25 ///

26                   \_\_\_\_\_

27                   <sup>1</sup> Unless otherwise indicated, references to: (i) "Civ. Rule" will be to  
28 the Federal Rules of Civil Procedure; (ii) "Rule" will be to the Federal  
Rules of Bankruptcy Procedure; (iii) "FRE" will be to the Federal Rules of  
Evidence; (iv) "LBR" will be to the Local Rules of Practice for the United  
States Bankruptcy Court, Eastern District of California; and (v) all chapter  
and section references will be to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

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IRZ timely filed opposition and evidentiary objections.<sup>4</sup> This is a “very straightforward” case, claims IRZ: Dari-Tech created and installed a wastewater management system designed to flush dairy waste. The wastewater management system failed, resulting in waste backup and overflow, and Trustee claims the estate suffered monetary damages as a result.<sup>5</sup> Since Dari-Tech created the system, created the plans for the system, installed the system, and the system failed, IRZ argues that this motion for summary judgment must be denied.<sup>6</sup>

2 Doc. #343.  
3 *Id.*  
4 Docs. #362; #366.  
5 Doc. #362.  
6 *Id.*  
7 Docs. ##369-71.  
8 Doc. #371.

8 Doc. #371.

1 system was faulty, or that Dari-Tech's work was the proximate  
2 cause of damages, it claims that this motion should be granted.<sup>9</sup>

3 This motion for summary judgment was filed on 42 days'  
4 notice as required by LBR 7056-1 and in conformance with Rule  
5 7056 and Civ. Rule 56.<sup>10</sup> This matter was heard by the court on  
6 May 25, 2022.<sup>11</sup> These are the court's findings and  
7 recommendations for *de novo* consideration by the District Court  
8 as to Dari-Tech's motion for summary judgment. The rulings on  
9 the evidentiary objections are at the end of this report.

#### 10 11 PROCEDURAL DEFECTS

12 As a preliminary matter, this motion does not comply with  
13 the local rules.

14 First, *Dari-Tech's Memorandum of Points and Authorities in*  
15 *Support of Its Motion for Summary Judgment* is both a motion and  
16 a memorandum of points and authorities.<sup>12</sup> LBR 9004-2(c)(1)  
17 requires motions, memoranda of points and authorities, and other  
18 specified pleadings to be filed as separate documents. LBR 9014-  
19 1(d)(4) does permit the motion and memorandum of points and  
20 authorities to be combined into one document provided that the  
21 document does not exceed six (6) pages. Here, the combined  
22 motion and points and authorities is fifteen (15) pages long, so  
23 each of these two documents should have been filed separately.

24 Second, Dari-Tech's original notice referenced a hearing  
25 date of May 20, 2022 which is not a date this court held  
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27 <sup>9</sup> *Id.*

28 <sup>10</sup> Doc. #360

<sup>11</sup> Doc. #383.

<sup>12</sup> Doc. #343.

1 scheduled hearings.<sup>13</sup> As result, the Clerk of the Bankruptcy  
2 Court issued a memorandum directing Dari-Tech to submit an  
3 amended notice of hearing.<sup>14</sup> Dari-Tech subsequently filed an  
4 amended notice on April 11, 2022 – still within the 42-day  
5 notice window required by LBR 7056-1.<sup>15</sup> However, it does not  
6 appear that this notice of hearing was ever served on IRZ  
7 because no corresponding certificate of service was filed for  
8 the amended notice. Failure to prove service does not affect the  
9 validity of service and the court may permit the proof of  
10 service to be amended. Civ. Rule 4(1)(3), *incorporated by* Rule  
11 7004(a)(1). However, LBR 9014-1(e) requires service of all  
12 pleadings and documents filed in support of a motion to be made  
13 on or before the day those documents are filed with the court,  
14 with proof of service in the form of a certificate of service to  
15 be filed with the Clerk concurrently with the pleadings or  
16 documents served, or not more than three days after the  
17 documents are filed. LBR 9014-1(e)(1), (e)(2). But since IRZ  
18 filed opposition, it has waived any potential service or notice  
19 defect.

20 Third, Dari-Tech's exhibits do not contain an exhibit index  
21 and do not have consecutively numbered pages. LBR 9004-2(d)(1)-  
22 (d)(3) require exhibits to be filed as a separate document,  
23 include an exhibit index at the start of the document  
24 identifying by exhibit number or letter each exhibit with the  
25 page number at which it is located, and use consecutively  
26 numbered exhibit pages, including any separator, cover, or  
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28 <sup>13</sup> Doc. #344

<sup>14</sup> Doc. #359.

<sup>15</sup> Doc. #360.

1 divider sheets. Although Dari-Tech's exhibits were all filed  
2 separately, they each omitted an exhibit index and lacked  
3 consecutively numbered pages in violation of LBR 9004-2(d)(2)  
4 and (d)(3).<sup>16</sup> The court notes that separate exhibits may be filed  
5 with exhibits relating to another document, or all of the  
6 exhibits may be filed in one large exhibit document. LBR 9004-  
7 2(d)(1).

8 Because IRZ replied, the court overlooked these procedural  
9 deficiencies in this instance. Counsel was advised to review the  
10 local rules and ensure procedural compliance in subsequent  
11 matters.

#### 12 13 BACKGROUND

14 The genesis of this dispute is the chapter 11 bankruptcy of  
15 Gregory John te Velde ("Debtor"). He owned and operated several  
16 large dairies spanning thousands of acres of land across the  
17 Western United States.<sup>17</sup> In late-2015, Debtor hired IRZ as a  
18 general contractor to provide construction management services  
19 for the construction of a new dairy operation in Boardman,  
20 Oregon ("Lost Valley Farm"). IRZ hired sub-contractors to  
21 perform certain services. Dari-Tech was one of them.

22 Things did not go as planned. Soon after substantial dairy  
23 operations commenced, the wastewater management system failed.  
24 Millions of gallons of liquid and solid dairy waste backed up,  
25 overflowed, and were released onto bare soil.<sup>18</sup>

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27  
28 <sup>16</sup> Docs. ##346-48; ##350-53; ##355-57; ##373-75; #381.

<sup>17</sup> Doc. #1.

<sup>18</sup> *Id.*

1 Chapter 11 trustee Randy Sugarman ("Trustee") initiated an  
2 adversary proceeding against IRZ alleging breach of contract and  
3 negligence resulting in more than \$18.8 million in construction  
4 defect damages ("Complaint").<sup>19</sup> The Complaint also included an  
5 objection to the allowance of IRZ's proof of claim. These claims  
6 stem from IRZ's alleged failure to competently perform  
7 construction management services for the planning and  
8 construction of a dairy waste collection, treatment, conversion,  
9 and disposal system for Lost Valley Farm. The complaint includes  
10 four claims for relief: objection to claim, breach of contract,  
11 negligence, and fraudulent transfer.<sup>20</sup>

12 Thereafter, IRZ filed a third-party complaint alleging  
13 negligence, indemnity, and contribution against nine third-party  
14 defendants whose work relates to the allegations in Trustee's  
15 complaint ("Third-Party Complaint").<sup>21</sup> Dari-Tech is one of those  
16 nine third-party defendants.

17 Dari-Tech was asked to propose a bid for a closed-loop  
18 flushing system to be integrated into the waste management  
19 system.<sup>22</sup> Dari-Tech maintains that it was not asked to design the  
20 overall manure handling system; rather, the scope of the  
21 proposal was limited to providing a plan for the closed-loop  
22 component of a manure management program that was to be designed  
23 by someone else.<sup>23</sup> Additionally, Dari-Tech was not asked to  
24 provide and did not provide specifications or designs for below-  
25 ground pipes, nor did it provide the pipes themselves.<sup>24</sup>

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26 <sup>19</sup> *Id.*

27 <sup>20</sup> *Id.*

28 <sup>21</sup> Doc. #162.

<sup>22</sup> DeWaard Decl., Doc. #345, ¶¶ 8-10.

<sup>23</sup> *Id.*, ¶ 10.

<sup>24</sup> *Ibid.*

1 A closed-loop flushing system, when working properly,  
2 clarifies and captures usable water from dairy barn waste. After  
3 screening and filtering the usable wastewater from the dairy  
4 barn, the remaining effluent goes to the lagoons.<sup>25</sup> The system  
5 does require the introduction of fresh water through the process  
6 for the screening and filtering function to work properly.<sup>26</sup> The  
7 system's equilibrium between dairy barn waste, wastewater, and  
8 fresh water is termed "steady state."

9 Dari-Tech proposed a bid for a "turn-key" closed-loop  
10 system marketed under the tradename "Biolyнк."<sup>27</sup> Dari-Tech  
11 provided its initial bid to Debtor on January 26, 2016 ("First  
12 Proposal").<sup>28</sup> The First Proposal included:

- 13 1. Complete Turnkey Biolyнк tank system, piping, and PLC  
14 control, installed;
- 15 2. All flush valves with integrated control;
- 16 3. All manure pumps and agitators with controls;
- 17 4. CST Storage water storage tank, with roof (concrete  
18 floor); and
- 19 5. Optional 48" DT360 separation system.<sup>29</sup>

20 The First Proposal did not include overall design of a  
21 waste management system; the design, selection, or installation  
22 of underground piping; the design of sand lanes; the design of  
23 storage lagoons; the forecasting of fresh water needs or the  
24 sourcing of such water; nor the overall design or construction  
25

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26 <sup>25</sup> *Id.*, ¶¶ 5-7.

27 <sup>26</sup> *Ibid.*

28 <sup>27</sup> *Ibid.*

<sup>28</sup> *Id.*, ¶ 12; see also First Proposal, Doc. #351, Ex. 2.

<sup>29</sup> *Id.*, at 1.



1 management.<sup>30</sup> Mr. David DeWaard, Dari-Tech's President, is the  
2 principal person from Dari-Tech on the Lost Valley Farm  
3 project.<sup>31</sup>

4 Debtor accepted some of the proposed equipment but rejected  
5 others.<sup>32</sup> Certain components were swapped with comparable  
6 competitor-made variants, and some were entirely omitted  
7 altogether.<sup>33</sup>

8 Namely, Dari-Tech did not install recommended mechanical  
9 secondary solids separation.<sup>34</sup> Though Debtor did not agree with  
10 all of Dari-Tech's plan for a Biolynt system as a component of  
11 the flush cycle, Debtor nonetheless purchased equipment from  
12 Dari-Tech and another third-party.<sup>35</sup>

13 Dari-Tech prepared and transmitted an updated proposal on  
14 or about March 17-18, 2016 ("Final Proposal"), which reflected  
15 Debtor's changes to the First Proposal and included (1) the  
16 installation of a complete turnkey Biolynt tank system,  
17 (2) piping and PLC control, (3) manure pumps and agitators with  
18 controls, and (4) CST Storage water storage tank with roof.<sup>36</sup> The  
19 primary purpose of this closed-loop Biolynt flushing system was  
20 to flush and remove waste from the dairy.<sup>37</sup>

21 Debtor accepted the Final Proposal.<sup>38</sup> Thereafter, Dari-Tech  
22 continued to provide specific site plans and installed the

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23 <sup>30</sup> *Id.*, at 4; *cf.* DeWaard Decl., Doc. #345, ¶ 15.

24 <sup>31</sup> *Id.*

25 <sup>32</sup> *Id.*, ¶ 16.

26 <sup>33</sup> *Ibid.*

27 <sup>34</sup> *Id.*, ¶ 17.

28 <sup>35</sup> *Id.*, ¶ 18.

<sup>36</sup> Downey Decl., Doc. #363, at 20 5; Doc. #367, *Ex. 1*.

<sup>37</sup> *Id.*, ¶ 4; O'Donnell Decl., Doc. #367, at ¶ 5; DeWaard Decl.,  
Doc. #345, ¶¶ 5-6.

<sup>38</sup> Final Proposal, Doc. #367, *Ex. 1*, at 12-15; *cf.* DeWaard Decl.,  
Doc. #345, ¶ 18.

1 manure flushing system between March 22, 2016 and June 23,  
2 2017.<sup>39</sup>

3 DeWaard personally went to the site from June 19-23, 2017  
4 and performed the final calibration and quality control on all  
5 of the equipment and systems installed by Dari-Tech.<sup>40</sup> DeWaard  
6 observed the operation of the waste management system in real-  
7 time and confirmed that all equipment was working as  
8 anticipated. *Ibid.* During this time, DeWaard declares that he  
9 ran enough flushing cycles to achieve a "steady-state  
10 operation."<sup>41</sup>

11 Dari-Tech contends that at no time has anyone – including  
12 IRZ – stated any facts suggesting that Dari-Tech's equipment  
13 failed to perform as represented and expected, or that Dari-  
14 Tech's overall services were inadequate or in any way resulted  
15 in harm to the dairy or damages to the Debtor.<sup>42</sup>

16 Dari-Tech argues that IRZ's claims are based solely on  
17 Trustee's allegations against IRZ in the Complaint. These claims  
18 against IRZ, and by extension the nine third-party defendants  
19 via the Third-Party Complaint, can be summarized as: (1) site  
20 planning; (2) a grading plan for mass excavation calculations;  
21 (3) an infrastructure plan for drain lines, underground water  
22 lines, and power lines; (4) an effluent water flow plan to  
23 include lines for drainage, structures, corrals, and effluent  
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<sup>39</sup> *Id.*, ¶ 19; Downey Decl., Doc. #363, ¶ 9.

<sup>40</sup> DeWaard Decl., Doc. #345, ¶ 19.

<sup>41</sup> A "steady-state operation" involves maintaining the recycle loop both  
in terms of volume of liquid and in the percent of unsettlable solids  
present in the cycling water. *Id.*, ¶6. By adding a sufficient quantity of  
fresh water to the loop, the new unsettlable solids can be offset by keeping  
constant the percentage of solids-to-liquids in the system, thereby  
establishing a state of equilibrium. *Ibid.*

<sup>42</sup> *Id.*, ¶¶ 20-21.

1 handling components to the lagoon system; (5) a lagoon design  
2 system; (6) "most egregiously" an irrigation plan that proved  
3 insufficient for the herd size; (7) a defective site plan which  
4 provided insufficient grade in the dairy stalls and an  
5 inadequate flushing system for the waste to flow in the catch  
6 basins; (8) specification for use of porous decomposed granite  
7 for bedding; (9) specified underground piping of insufficient  
8 diameter and flow; (10) specified inadequate impermeable surface  
9 areas throughout the system; (11) specified overflow pipes and  
10 drains of improper height so that effluent improperly spilled  
11 out of the lagoon and the sand lane areas; and (12) failure of  
12 construction management.

13 IRZ concedes that Dari-Tech's work is not implicated in  
14 allegations 3, 4, 5, 6, and 12. As to the other claims, Dari-  
15 Tech contends that no competent evidence has been presented  
16 suggesting that its design was faulty or that its work was the  
17 proximate cause of the dairy's woes.<sup>43</sup>

#### 18 19 Undisputed Facts

20 The parties agree that the following facts are not  
21 disputed:

22 1. Dari-Tech provided multiple proposals for the closed-  
23 loop system. The Final Proposal was submitted March 17-18, 2016  
24 and reflected changes by the Debtor that departed from the  
25 earlier proposal. The Final Proposal was accepted by the Debtor  
26 on March 22, 2016.<sup>44</sup>

27 ///

28 <sup>43</sup> Complaint, Doc. #1, ¶ 29.

<sup>44</sup> Docs. #365; #374, Attach. 2, ¶ 1.

1        2. The Final Proposal included the installation of a  
2 complete turnkey Biolyнк tank system, piping and PLC control,  
3 manure pumps and agitators with controls, and CST Storage water  
4 storage tank with roof. The "piping" specifically excludes  
5 underground piping.<sup>45</sup>

6        3. The primary purpose of a closed-loop Biolyнк flushing  
7 system is to flush and remove waste from the dairy.<sup>46</sup>

8        4. Dari-Tech created the plans for components of the manure  
9 management systems, drawings of pump skids, drawings of the  
10 Biolyнк flush system, drawings of the pop-up flush valve,  
11 drawings of the flush control layout, and drawings of the site  
12 layout overlay.<sup>47</sup>

13       5. Dari-Tech installed the complete turnkey Biolyнк tank  
14 system, piping and PLC control, manure pumps and agitators with  
15 controls, and CST Storage water storage tank with roof as  
16 reflected in the Final Proposal.<sup>48</sup>

17       6. Dari-Tech advised Debtor on the manner in which the  
18 Biolyнк flushing system should be operated.<sup>49</sup>

19       8. Dari-Tech was not asked to prepare infrastructure  
20 plan(s) to include drain lines, underwater lines, and  
21 underground power lines.<sup>50</sup>

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23       <sup>45</sup> *Id.*, ¶ 2.

24       <sup>46</sup> *Id.*, ¶ 3. Dari-Tech does not dispute this statement provided that  
25 "the dairy" means the cow barns. *Ibid.* There are other features of the waste  
26 and manure management system that involve flushing and removing waste from  
the entire dairy, including lagoons and irrigation with liquid waste, which  
were not related to the closed-loop system.

27       <sup>47</sup> *Id.*, ¶ 4. Dari-Tech clarifies that it only prepared the overlay that  
was imposed on a site plan that had been prepared by IRZ. *Ibid.*

28       <sup>48</sup> *Id.*, ¶ 5.

<sup>49</sup> *Id.*, ¶ 6.

<sup>50</sup> Docs. #349; #365, ¶ 3.

9. Dari-Tech had no role in preparing effluent water flow line plan(s) to include adequate lines for drainage, structures, corrals, and effluent handling components to the lagoon system.<sup>51</sup>

10. Dari-Tech had no role in preparing a lagoon design sufficient to satisfy Debtor's obligations under his concentrated animal feeding operation ("CAFO") permit and other dairy entitlements.<sup>52</sup>

11. Dari-Tech had no role in preparing an irrigation plan or in advising the Debtor about his lease obligations to Boardman Tree Farm.<sup>53</sup>

12. Dari-Tech had no construction management responsibilities to provide management and oversight of other subcontractors and materialmen.<sup>54</sup>

13. The waste management system failed.<sup>55</sup>

## Disputed facts

The parties dispute the following factual issues:

1. Whether Dari-Tech had a role in site planning or with determining waste handling locations.<sup>56</sup>

2. Whether Dari-Tech was involved in preparation of grading plans.<sup>57</sup>

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<sup>51</sup> *Id.*, ¶ 4.

<sup>52</sup> *Id.*, ¶ 5.

<sup>53</sup> *Id.*, ¶ 6.

<sup>54</sup> *Id.*, ¶ 12.

<sup>55</sup> Docs. #365; 374, *Attach. 2*, ¶ 7. Dari-Tech clarifies that "the system" that failed is the entirety of the waste management system, including lagoons, storage areas, and approved waste disposal methods, which does not mean that Dari-Tech's contribution was flawed so as to cause the backup. *Ibid.*

<sup>56</sup> Docs. #349; #365; #373, *Attach. 1*, ¶ 1.

<sup>57</sup> *Id.*, ¶ 2.

3. Whether Dari-Tech had any role in preparing the site plan or the location of the dairy stalls.<sup>58</sup>

4. Whether Dari-Tech had any role in specification or selection of materials to be used in the bedding of the dairy stalls, specifically porous decomposed granite that absorbed and became saturated with waste and prevented the waste from flowing by gravity into catch basins.<sup>59</sup>

5. Whether Dari-Tech specified underground piping of insufficient diameter and flow, thereby causing the underground waste pipes consistently clogged and backed up.<sup>60</sup>

6. Whether Dari-Tech specified inadequate impermeable surface areas throughout the system, particularly at the sand lane, so that waste regularly came in contact with unprotected soil.<sup>61</sup>

7. Whether Dari-Tech specified overflow pipes and drains at improper heights so that effluent improperly spilled out of the lagoons and the sand lane areas.<sup>62</sup>

8. Whether Dari-Tech, as the party that designed, supplied, installed, and advised on the use of the system, is the party that caused the closed-loop Biolynt flushing system to fail, resulting the alleged damages suffered by Debtor and Trustee.<sup>63</sup>

## JURISDICTION

The United States District Court for the Eastern District of California has jurisdiction of Trustee's complaint under 28

<sup>58</sup> *Id.*, ¶ 7.

59 *Id.*, ¶ 8.

60 *Id.*, ¶ 9.

<sup>61</sup> *Id.*, ¶ 10.

62 *Id.*, ¶ 11.

<sup>63</sup> Doc. #365, 374, Attach. 2, ¶ 7.

1 U.S.C. § 1334(b) because it is a civil proceeding arising under  
2 title 11 of the United States Code. The District Court has  
3 referred Trustee's Complaint to this court under 28 U.S.C.  
4 § 157(a).

5 This court has "related to" jurisdiction over IRZ's Third-  
6 Party Complaint under 28 U.S.C. § 157(b)(3) because it is  
7 related to Trustee's Complaint against IRZ. Trustee's Complaint  
8 is a "core" proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (C),  
9 (H), and (O), as well as Rules 3007(b) and 7001(a)(2), and  
10 whether the chapter 11 estate is fully compensated by IRZ could  
11 conceivably depend on whether IRZ is successful in the Third-  
12 Party Complaint. The District Court has deferred from  
13 withdrawing its reference under 28 U.S.C. § 157(c)(1) and  
14 allowed this court to supervise discovery, rule on non-  
15 dispositive motions, and issue findings and recommendations for  
16 *de novo* consideration by the District Court as to dispositive  
17 motions.<sup>64</sup>

18 Additionally, the court may exercise supplemental  
19 jurisdiction under 28 U.S.C. § 1367(a) because the third-party  
20 claims relate to Dari-Tech's work on the dairy, which share a  
21 common nucleus of operative facts with the allegations in  
22 Trustee's Complaint.<sup>65</sup>

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27 <sup>64</sup> See *Order Denying Defendant's Motion to Withdraw Reference*,  
28 Doc. #162; cf. *Civil Minutes re: Motion/Application for Abstention and/or to Dismiss* (Apr. 28, 2021), Doc. #198.

<sup>65</sup> *Id.*

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1 identification of which facts are critical and which facts are  
2 irrelevant that governs." *Ibid.*

3 The movant may not argue that its evidence is the most  
4 persuasive or "explain away" evidence unfavorable to its  
5 defenses; rather, it must show that there are no material facts  
6 in dispute, or which can be reasonably resolved by a fact  
7 finder. *Anderson, Id.*, at 250-51, 2511; *Davis v. Team Elec. Co.*,  
8 520 F.3d 1080, 1089 (9th Cir. 2008) ("Summary judgment is not  
9 appropriate" if a reasonable jury *could* find in the plaintiff's  
10 favor.) (emphasis added).

11 As the movant, the burden of proof is on Dari-Tech. The  
12 court must draw all reasonable inferences in the light most  
13 favorable to the non-moving party, and therefore in favor of  
14 denying summary judgment. *Anderson*, 477 U.S. at 255, 106 S. Ct.  
15 at 2513-14. Further, the non-moving party's evidence is to be  
16 believed, and all justifiable inferences are to be drawn in its  
17 favor. *Hutchins v. TNT/Reddaway Truck Line, Inc.*, 939 F. Supp.  
18 721, 723 (N.D. Cal. 1996).

19 If a summary judgment motion is properly submitted, the  
20 burden shifts to the opposing party to rebut with a showing that  
21 there is a genuine issue of material fact. *Henderson v. City of*  
22 *Simi Valley*, 305 F.3d 1052, 1055-56 (9th Cir. 2002). "The  
23 nonmoving party 'may not rely on denials in the pleadings but  
24 must produce specific evidence . . . to show that the dispute  
25 exists.'" *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d  
26 702, 707 (9th Cir. 2008), quoting *Bhan v. NME Hosps., Inc.*, 929  
27 F.2d 1404, 1409 (9th Cir. 1991).

28 ///

Ultimately, the court must grant summary judgment if the movant shows that the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party as to any fact that might affect the outcome of the suit under the governing law, and the nonmovant does not meet their burden of proof to refute the movant's claims.

## Negligence

IRZ's first third-party claim is for negligence.<sup>66</sup> This negligence action is based upon an underlying claim under Oregon law. *Gasperini v. Ctr. For Humanities*, 518 U.S. 415, 419, 116 S. Ct. 2211, 2215 (1996); *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938). "[W]hen a plaintiff does not join a tortfeasor as a defendant, the comparative negligence statutes permit the named defendant to file a third-party complaint against the tortfeasor." *Lasley v. Combined Transp., Inc.*, 351 Or. 1, 21-22, 261 P.3d 1215, 1227 (2011), citing Or. Rev. Stat. ("ORS") § 31.600(3). Such "third-party defendant will not be liable to the defendant but, potentially, will be liable to the plaintiff." *Id.*, at 22. Third-party negligence could extend "to anyone foreseeably injured by that negligence." *Verd v. I-Flow, LLC*, No. 3:11-cv-00677-AA, 2013 U.S. Dist. LEXIS 70807, at \*\*11-12 (D. Or. May 14, 2013).

Traditionally, common law negligence requires a plaintiff to prove that the "defendant owed [the] plaintiff a duty, that [the] defendant breached that duty, and that the breach was the cause-in-fact of some legally cognizable damage to [the]

<sup>66</sup> Third-Party Complaint, Doc. #163.

1 plaintiff." *Towe v. Sacagawea, Inc.*, 357 Or. 74, 86, 347 P.3d  
2 766, 774-75 (2015), quoting *Brennen v. City of Eugene*, 285 Or.  
3 401, 405, 591 P.2d 719, 722 (1979).

4 Duty

5 Under Oregon law, the traditional duty-breach analysis is  
6 supplanted by an inquiry into whether the defendant's conduct  
7 resulted in a "foreseeable and unreasonable risk of harm of the  
8 kind the plaintiff suffered." *Towe*, 357 Or. at 86, 347 P.3d at  
9 775, citing *Solberg v. Johnson*, 306 Or. 484, 490, 760 P.2d 867,  
10 870 (1988) and *Or. Steel Mills, Inc. v. Coopers & Lybrand, LLP*,  
11 336 Or. 329, 340, 83 P.3d 322, 339 (2004). Thus, generally, a  
12 plaintiff pleading negligence does not need to prove that the  
13 defendant owed the plaintiff a duty because "everyone owes each  
14 other the duty to act reasonably in light of foreseeable risks  
15 of harm." *Towe*, 357 Or. at 86, 347 P.3d at 775.

16 Dari-Tech engaged in supplying, assembling, and installing  
17 equipment, which created a foreseeable risk that such equipment  
18 would fail, resulting in damages.

19 IRZ contends that Dari-Tech breached its duty of reasonable  
20 care by failing to (1) perform work in a good or workmanlike  
21 manner in accordance with the prime contract, subcontract,  
22 manufacturer's specifications, industry standards, applicable  
23 building code, or governmental regulation; and/or (2) use  
24 reasonable care to ensure its work was complete, free of  
25 defects, and otherwise free of substandard work. Doc. #362.

26 IRZ's position is that Dari-Tech:

27 ///

28 ///

- 1 (a) provided proposals for a closed-loop Biolyнк flushing  
2 system and the Final Proposal was accepted by Debtor  
3 on March 22, 2016;<sup>67</sup>
- 4 (b) created plans for components of the manure management  
5 systems, including drawings of the site layout, pump  
6 skids, the Biolyнк flush system layout, the pop-up  
7 flush valve, and the flush control layout;<sup>68</sup>
- 8 (c) installed the proposed turnkey Biolyнк tank system,  
9 piping and PLC control, manure pumps and agitators  
10 with controls, and CST Storage water tank with roof  
11 between March 22, 2016 and June 23, 2017;<sup>69</sup>
- 12 (d) advised Debtor on the manner in which the Biolyнк  
13 flushing system should be operated.<sup>70</sup>

14 In short, IRZ claims the evidence proves that Dari-Tech  
15 specifically planned, designed, and installed the system to  
16 flush waste from the dairy. However, the system failed, and  
17 millions of gallons of dairy waste overflowed back up within the  
18 dairy.<sup>71</sup> IRZ argues that it is neither foreseeable nor reasonable  
19 that a Biolyнк flush system would fail in the absence of  
20 negligence.<sup>72</sup> Since Dari-Tech designed, supplied, and installed  
21 the system, IRZ insists that Dari-Tech is the party that caused  
22 the closed-loop Biolyнк system to fail, resulting in the damages  
23 suffered by Debtor and Trustee.<sup>73</sup>

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25 <sup>67</sup> Downey Decl., Doc. #363, ¶ 5; Plans, Doc. #367, Ex. 1.

26 <sup>68</sup> Downey Decl., Doc. #363, ¶6.

27 <sup>69</sup> *Id.*, ¶ 9; DeWaard Decl., Doc. #345, ¶ 19.

28 <sup>70</sup> *Id.*, ¶ 19.

<sup>71</sup> *Id.*, ¶ 20; Downey Decl., Doc. #363, ¶ 11.

<sup>72</sup> *Id.*, ¶ 12.

<sup>73</sup> *Id.*, ¶ 13; O'Donnell Decl., Doc. #367, ¶ 8.

1 In response, Dari-Tech says that Oregon's application of  
2 the Economic Loss Rule precludes tort claims and limits IRZ to  
3 contract claims.<sup>74</sup>

4 Economic Loss Rule

5 Under the Economic Loss Rule, if a plaintiff seeks to  
6 recover for "purely economic losses" without injury to a person  
7 or property, the plaintiff must provide some other "limiter" or  
8 "source of duty beyond the common law." *JH Kelley, LLC v.*  
9 *Quality Plus Servs.*, 305 Or. App. 565, 574-75, 472 P.3d 280, 288  
10 (2020). "[T]he concept of duty as a limiting principle takes on  
11 a greater importance than it does with regard to the recovery of  
12 damages for personal injury or property damage." *Ibid.*, quoting  
13 *Onita Pac. Corp. v. Trs. of Bronson*, 315 Or. 149, 159, 843 P.2d  
14 890, 896 (1992); *Hale v. Groce*, 304 Or. 281, 284, 744 P.2d 1289,  
15 1291 (1987). Such "injuries to persons or property" are defined  
16 as "personal injuries, i.e., bodily injuries including their  
17 psychic consequences, and physical damage to existing tangible  
18 property, but not financial losses such as a reduced value of  
19 the completed project due to the unsatisfactory performance of  
20 the work or the added cost of satisfactory completion or  
21 replacement." *Securities-Intermountain, Inc. v. Sunset Fuel Co.*,  
22 289 Or. 243, 251, 611 P.2d 1158, 1162 (1980).

23 Dari-Tech cites to *Jones* as a similar situation involving a  
24 building contractor that did not give rise to tort liability.  
25 However, in *Jones*, the court emphasized that the plaintiffs  
26 failed to provide adequate evidence as to the nature of their  
27 relationship with the defendants. *Jones v. Emerald Pac. Homes*,

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28 <sup>74</sup> Doc. #371.

1 *Inc.*, 188 Or. App. 471, 478-79, 71 P.3d 574, 579-80 (2003). The  
2 same cannot be said here. IRZ has presented adequate evidence  
3 documenting the contractual relationship and the scope of Dari-  
4 Tech's work on the project.

5 Such "limiter" or "source of duty beyond the common law" to  
6 satisfy the Economic Loss Rule is a heightened duty of care as  
7 an architectural or engineering design professional, which Dari-  
8 Tech appears to be.

9 Architects and engineers owe a heightened duty of care to  
10 persons that retain their architectural or engineering services.  
11 *Onita*, 315 Or. at 161, 843 P.2d at 897 ("Engineers and  
12 architects are among those who may be subject to liability to  
13 those who employ (or are the intended beneficiaries of) their  
14 services and who suffer losses caused by professional  
15 negligence."); *see also*, *Roberts v. Fearey*, 162 Or. App. 546,  
16 549-50, 986 P.2d 690, 692 (1999) ("Such a duty arises only in  
17 attorney-client, architect-client, agent-principal, and similar  
18 relationships where the professional owes a duty of care to  
19 further the economic interests of the 'client.'").

20 Here, Dari-Tech was IRZ's subcontractor and was retained to  
21 perform architectural and engineering services. Consequently,  
22 Dari-Tech owed IRZ a duty to possess and exercise the care and  
23 skill of those ordinary skilled in the profession. *White v.*  
24 *Pallay*, 119 Or. 97, 99-100, 247 P. 316, 317 (1926). Dari-Tech  
25 was obliged to act with reasonable diligence in the performance  
26 of its duties. *Scott v. Potomac Ins. Co. of DC*, 217 Or. 323,  
27 331-332, 341 P.2d 1083, 1087 (1959). As a result, Dari-Tech may  
28

1 be liable for economic losses through the heightened duty of  
2 care exception to the Economic Loss Rule.

3       Alternatively, if Dari-Tech does not technically classify  
4 as an "architect" or an "engineer" under this exception, it  
5 still may owe a heightened duty based on its particular  
6 relationship with IRZ and the context of its services performed,  
7 and improvements made. Based on this functional analysis, the  
8 court may determine whether such a special relationship exists.  
9 *Bell v. Public Employees Retirement Bd.*, 239 Or. App. 239, 251,  
10 247 P.3d 319, 326 (2010). "The crucial aspect of the  
11 relationship is not its name, but the roles that the parties  
12 assume in the particular interaction where the alleged tort and  
13 breach of contract occur." *Strader v. Grange Mut. Ins. Co.*, 179  
14 Or. App. 329, 334, 39 P.3d 903, 906 (2002).

15       A similar situation occurred in *Abraham*, where plaintiffs  
16 hired a defendant contractor to build their house before  
17 discovering extensive water damage. *Abraham v. T. Henry Constr.,*  
18 *Inc.*, 350 Or. 29, 249 P.3d 534 (2011). Plaintiffs subsequently  
19 filed a lawsuit for breach of contract and negligence, alleging  
20 that the damage was caused by Defendants' faulty work and  
21 failure to comply with the Oregon Building Code. The defendants  
22 moved for summary judgment on the basis that the contract claim  
23 was time barred, and the negligence claim could not be brought  
24 because the plaintiffs did not have a "special relationship"  
25 with the defendants.

26       The state trial court granted the motion and the plaintiffs  
27 appealed. *Id.*, at 33, 536. The Court of Appeals disagreed and  
28 reversed the summary judgment as to the negligence claim only.

1 *Ibid.*; cf. *Abraham v. T. Henry Constr., Inc.*, 230 Or. App. 564,  
2 217 P.3d 212 (2009). The defendants appealed to the Oregon  
3 Supreme Court. In finding for the plaintiffs and affirming on  
4 broader grounds, the Oregon Supreme Court stated:

5 [W]e conclude that neither a special relationship nor a  
6 statutory standard of care, such as the building code,  
7 is necessary to bring a negligence claim here. . . .  
8 plaintiffs stated a common law negligence claim based on  
9 defendants' alleged failure to exercise reasonable care  
10 to avoid foreseeable harm to plaintiffs' property. That  
11 negligence claim is not foreclosed by their contract  
12 with defendants, because the terms of the contract do  
not purport to alter or eliminate defendants' liability  
for the property damage plaintiffs claim to have  
suffered.

13 *Abraham*, 350 Or. at 36, 249 P.3d at 538. The court reasoned that  
14 a common law negligence claim can be legally cognizable despite  
15 a contractual relationship between the parties if the  
16 plaintiffs' contract with defendants "creates, defines, or  
17 limits" that negligence claim in a manner that does not  
18 eliminate liability. *Id.*, at 37, 538, citing *Fazzolari v.*  
19 *Portland School Dist. No. 1J*, 303 Or. 1, 734 P.2d 1326 (1987).  
20 If so, the inquiry is how the contract altered or eliminated a  
21 defendant's common law duty to avoid harming plaintiffs, but  
22 "[i]f it did not, then the contract does not bar plaintiffs from  
23 bringing a negligence action against defendants." *Abraham*, 350  
24 Or. at 37, 249 P.3d at 538.

25 Dari-Tech filed a copy of the "back page" of its standard  
26 Purchase Agreement, which was used here.<sup>75</sup> In sum, the terms and  
27 conditions of the sale are as follows:

28 <sup>75</sup> See Doc. #375, Ex. 1; DeWaard Decl., Doc. #372; compare with Purchase Agreement, Doc. #367, Ex. 1, at 15.



- 1     - Risk of loss transfers to the buyer on delivery.
- 2     - Dari-Tech retains title and rights to possession until
- 3       final payment is made and upon any default in the buyer's
- 4       obligation to remit payment.
- 5     - Dari-Tech has the right to claim and repossess equipment
- 6       without demand or notice, without any court order or other
- 7       process of law, and without regard for inconvenience or
- 8       hardship created by said equipment's absence.
- 9     - Dari-Tech has the right to pursue any other remedy
- 10       available at law or in equity.<sup>76</sup>

11 Additionally, Dari-Tech's limited warranty includes the  
12 following terms:

- 13     - Dari-Tech equipment is warranted by Industrial Mfg. for a
- 14       period of one year from the date of installation of the
- 15       original equipment against defects in materials and
- 16       workmanship when installed, provided that the equipment is
- 17       serviced and operated in accordance with Dari-Tech's
- 18       written instructions, subject to certain exclusions and
- 19       limitations.
- 20     - Dari-Tech will, at its option, repair or replace equipment
- 21       that is defective in materials or workmanship during the
- 22       warranty period. Normal wear of items, labor,
- 23       transportation, and service charges are not included.
- 24     - Damage to all equipment and/or related parts due to abuse
- 25       or misuse by the operator or animals are excluded from the
- 26       limited warranty and the entire part must be returned for
- 27       warranty consideration.

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28     <sup>76</sup> Doc. #375, Ex. 1.

- 1     - The warranty extends only to the original purchaser and  
2       cannot be transferred.
- 3     - The warranty is valid on the original installation unless  
4       Dari-Tech otherwise agrees in writing.
- 5     - The warranty is in lieu of all other express warranties,  
6       obligations, and liabilities.
- 7     - All implied warranties, including implied warranties of  
8       merchantability and fitness for a particular purpose are  
9       expressly disclaimed and excluded.
- 10    - In no event shall Dari-Tech be liable for special,  
11      incidental, or consequential damages or for any delay in  
12      warranty performance due to causes beyond its control.
- 13    - Any express warranties need to be included in the comments  
14      on the reverse side [in the Purchase Agreement].<sup>77</sup>

15       Although Dari-Tech's terms, conditions, and limited  
16 warranty are broad, there is no specific mention of negligence,  
17 nor anything else that would create, define, or limit a  
18 negligence cause of action. The only reference to other  
19 liability states that the warranty is "in lieu of all other  
20 express warranties, obligations, and liabilities." This  
21 provision seems to be limited to other express "obligations and  
22 liabilities." Negligence is not mentioned.

23 Res Ipsa Loquitur

24       Alternatively, IRZ cites the doctrine of *res ipsa loquitur*  
25 to create an inference of negligence or causation.<sup>78</sup> IRZ must  
26 establish: "(1) that there is an injury, (2) that the injury is  
27 of a kind which ordinarily does not occur in the absence of

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28       <sup>77</sup> *Ibid.*

<sup>78</sup> Doc. #362.

1 someone's negligence, and (3) that the negligence that caused  
2 the event was more probably than not attributable to a  
3 particular defendant." *Hammer v. Fred Meyer Stores, Inc.*, 242  
4 Or. App. 185, 190-91, 255 P.3d 598, 601 (2011) (internal  
5 quotations omitted).

6 In rebuttal, Dari-Tech insists that *res ipsa loquitur* is  
7 inapplicable because this is a contract claim.<sup>79</sup> Even if this was  
8 a tort claim, Dari-Tech says that it would still not be  
9 applicable.

10 It is undisputed that Dari-Tech installed the closed-loop  
11 flush system at the dairy. DeWaard, Dari-Tech's president,  
12 supervised the installation and remained on site for a number of  
13 days after installation and trained dairy staff in proper use of  
14 the equipment. During that time, the dairy was in operation and  
15 supported a large number of cows, and the closed-loop system  
16 achieved and maintained a "steady state." Thereafter, nobody  
17 contacted Dari-Tech about any problems or difficulties with the  
18 system until the entire dairy waste system had utterly failed.<sup>80</sup>

19 With respect to the *res ipsa loquitur* elements, Dari-Tech  
20 says that IRZ has not met the requirement "that the negligence  
21 that caused the event was more probably than not attributable to  
22 a particular defendant." *Hammer*, 242 Or. App. at 190, 255 P.3d  
23 at 601. Since IRZ has "pointed the finger" at everyone, it has  
24 failed to identify a particular defendant. Under *Hammer*, "it  
25 must appear from the evidence that the negligence of which the  
26 thing speaks is probably that of defendant and not of another."  
27 *Id.*, at 191, 602; *cf. Hagler v. Coastal Farm Holdings, Inc.*, 244

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<sup>79</sup> Doc. #371.

<sup>80</sup> DeWaard Decl., Doc. #345, ¶¶ 15-17, 19-20.

1 Or. App. 675, 686-87, 260 P.3d 764, 770 (2011) (rejecting an  
2 inference of negligence and affirming summary judgment). Unlike  
3 *Hagler*, Dari-Tech claims that it was even more remote from the  
4 equipment, which leaves operator error as the sole cause of the  
5 damages alleged here.

6 But that misses the point. The system failed. The cause of  
7 the failure is a factual issue. It is not undisputed how the  
8 system failed, nor is it undisputed that Dari-Tech is blameless  
9 in the failure. Dari-Tech's offering an explanation as operator  
10 error causing the problem is speculative and based on hearsay.  
11 It also ignores Dari-Tech's role in supervising the dairy  
12 workers in operating the machinery and training the workers in  
13 proper use of the equipment. This raises factual issues  
14 concerning causation.

15 *Breach of Duty*

16 IRZ alleges that Dari-Tech breached its duty of reasonable  
17 care by failing to: (1) perform work in a good and workmanlike  
18 manner in accordance with the prime contract, subcontract,  
19 manufacturer's specifications, industry standards, the  
20 applicable building code, or governmental regulation; and/or  
21 (2) use reasonable care to ensure its work was complete, free of  
22 defects, and otherwise free of substandard work.

23 Specifically, Dari-Tech planned, designed, and installed  
24 the system to flush waste from the dairy. The system failed, and  
25 millions of gallons of dairy waste were backed up within the  
26 dairy.<sup>81</sup> IRZ argues that it is neither foreseeable nor reasonable  
27 that a Biolynt flush system would fail in the absence of

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28 <sup>81</sup> *Id.*, ¶ 20; Downey Decl., Doc. #363, ¶ 11.

1 negligence.<sup>82</sup> Since Dari-Tech designed, supplied, and installed  
2 the system, IRZ says that Dari-Tech is the party that caused the  
3 closed-loop Biolynt system to fail, resulting in the damages  
4 suffered by Debtor and Trustee.<sup>83</sup>

5 Dari-Tech's challenges to John O'Donnell's (IRZ's expert)  
6 opinions do not minimize the material factual disputes on  
7 causation. First, under FRE 704(a), an expert opinion is not  
8 objectionable just because it embraces the ultimate issue.  
9 Opinions can be attacked by "[v]igorous cross-examination,  
10 presentation of contrary evidence or careful instructions on the  
11 burden of proof are the traditional and appropriate means of  
12 attacking shaky but admissible evidence." *Daubert v. Merrell Dow*  
13 *Pharm., Inc.*, 509 U.S. 579, 596, 113 S. Ct. 2786, 2798 (1993).  
14 Dari-Tech lists numerous questions in their reply suggesting why  
15 O'Donnell's opinions should not be considered. Those are attacks  
16 on the weight of the evidence only. That does not mean the  
17 testimony is inadmissible or "shaky." Summary judgment is not  
18 the appropriate forum for weighing the evidence.

19 Second, the court has discretion whether to exclude expert  
20 testimony during summary judgment proceedings. *Newmaker v. City*  
21 *of Fortuna*, 842 F.3d 1108, 1110 (9th Cir. 2016). O'Donnell's  
22 causation testimony should not be excluded since causation need  
23 not be established to a high degree of certainty for expert  
24 testimony to be admissible under FRE 702.<sup>84</sup> See, *Kennedy v.*  
25 *Collagen Corp.*, 161 F.3d 1226, 1230 (9th Cir. 1988) (reversing  
26 summary judgment for defendant because trial court improperly  
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28 <sup>82</sup> *Id.*, ¶ 12.

<sup>83</sup> *Id.*, ¶ 13; O'Donnell Decl., Doc. #367, ¶ 8.

<sup>84</sup> *Id.*

1 excluded expert testimony on causation). O'Donnell states his  
2 opinions and what he reviewed to reach them, including a  
3 document review, and visiting the work site. Could more tests be  
4 completed before trial as suggested by Dari-Tech? Yes. But that  
5 does not mean summary judgment should be granted now.

6 Third, Dari-Tech's authorities are distinguishable. In  
7 those cases, the expert opinion was excluded because the  
8 conclusion was unrelated to stated expertise, *Stotts v. Heckler*  
9 *& Koch, Inc.*, 299 F. Supp. 2d 814 (W.D. Tenn. 2004) and *Solaia*  
10 *Tech. LLC v. ArvinMeritor, Inc.*, 361 F. Supp 2d 797, 813-14  
11 (N.D. Ill. 2005); there was no foundation for the opinion, *In re*  
12 *Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 805-6 (N.D.  
13 Ohio 2004) and *Casper v. SMG*, 389 F. Supp. 2d 618 (D.N.J. 2002);  
14 or the expert failed to analyze a critical issue, *Fisher v.*  
15 *Sellas (In re Lake States Commodities, Inc.)*, 272 B.R. 233, 244-  
16 45 (Bankr. N.D. Ill. 2002).

17 O'Donnell's opinion is supported by his review of the site  
18 and documentation. Nevertheless, the possibility that an expert  
19 may be impeached is not a reason to exclude an opinion. *Alaska*  
20 *Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 966  
21 (9th Cir. 2013).

22 Causation remains in dispute

23 Here, it is undisputed that Dari-Tech provided proposals,  
24 created plans, and supplied and installed the Biolynt flushing  
25 system. The flushing system, or some component of the system,  
26 failed and caused the damages suffered by Debtor and Trustee.  
27 The dispute lies in which party is to blame for causing the  
28 system to fail. However, IRZ says that Dari-Tech is the only

1 party that contracted with Debtor for installation and Dari-Tech  
2 conducted the entirety of the work in the installation of the  
3 flushing system.

4 Dari-Tech points to Debtor's use of other suppliers for  
5 parts of the flushing system connected to Dari-Tech's system.  
6 But Dari-Tech supplied components of the system. Dari-Tech knew  
7 that part of the equipment comprising the system was not  
8 furnished by Dari-Tech, yet Dari-Tech went forward with the  
9 project anyway. This does not mean it is "undisputed" that Dari-  
10 Tech's equipment did not fail.

11 Accordingly, the court recommends that this motion be  
12 DENIED as to the negligence cause of action because genuine  
13 issues of material fact exist.

14 Next, we will address IRZ's other claims: Indemnity  
15 and Contribution.

#### 17 Indemnity

18 To prevail on a cause of action for indemnity, "the  
19 claimant must plead and prove that (1) he has discharged a legal  
20 obligation owed to a third party; (2) the defendant was also  
21 liable to the third party; and (3) as between the claimant and  
22 the defendant, the obligation ought to be discharged by the  
23 latter." *Rains v. Stayton Builders Mart, Inc.*, 359 Or. 610, 640,  
24 375 P.3d 490 (2016), quoting *Eclectic Inv., LLC v. Patterson*,  
25 357 Or. 25, 33, 346 P.3d 468, 472 (2015), *opinion adhered to as*  
26 *modified on recons.*, 357 Or. 327, 354 P.3d 678 (2015).

27 A defendant may, as third-party plaintiff, "serve a summons  
28 and complaint on a nonparty who is or may be liable to it for

1 all or part of the claim against it." Civ. Rule 14(a)(1)  
2 (emphasis added). "A third-party claim may be asserted under  
3 [Civ.] Rule 14(a) only when the third party's liability is in  
4 some way dependent on the outcome of the main claim or when the  
5 third party is secondarily liable to defendant. The basis of the  
6 third-party claim may be *indemnity*, subrogation, *contribution*,  
7 express or implied warranty, or some other theory." *SCD RMA, LLC*  
8 *v. Farsighted Enters., Inc.*, 591 F. Supp. 2d 1141, 1145 (D. Haw.  
9 2008) (emphasis added; citations omitted). This policy is  
10 designed to "promote judicial efficiency by eliminating the  
11 necessity for the defendant to bring a separate action against a  
12 third party who may be derivatively liable to the defendant for  
13 all or part of the plaintiff's original claim." *Kim v. Fujikawa*,  
14 871 F.2d 1427, 1434 (9th Cir. 1989).

15 "To require a defendant who raises an indemnity cross-claim  
16 to plead and prove actual discharge of a judgment before the  
17 judgment is entered against the defendant raising it would  
18 contravene the purpose and destroy the usefulness of the cross-  
19 claim rule." *Kahn v. Weldin*, 60 Or. App. 365, 371-72, 653 P.2d  
20 1268, 1272-73 (1982). Similarly, requiring IRZ to plead and  
21 prove actual discharge of a judgment before a judgment is  
22 entered against IRZ would destroy the purpose of the third-party  
23 claim rule.

24 IRZ argues it is not liable for the defects alleged in  
25 Trustee's Complaint.<sup>85</sup> But, to the extent it is determined that  
26 IRZ is liable for any of the defects, IRZ insists that it and  
27 Dari-Tech will both share a common liability with Dari-Tech as

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28 <sup>85</sup> Doc. #362.



1 the result of Dari-Tech's creation of the closed-loop Biolyнк  
2 flushing system that ultimately failed.

3 The court notes that Oregon law no longer provides for  
4 joint liability of multiple tortfeasors. "[T]he Oregon  
5 Legislative Assembly has instituted a system of comparative  
6 fault in which (1) the trier of fact allocates fault and  
7 responsibility for payment of damages between the parties; and  
8 (2) each tortfeasor is liable for damages attributable to only  
9 its own negligence." *Eclectic*, 357 Or. at 35-36, 346 P.3d at 474  
10 ("Oregon's comparative fault system eliminates the need for  
11 judicially created indemnity in situations like this one-in  
12 which a defendant is liable, if at all, for only the damages  
13 that resulted from its own negligence[.]").

14 *Rains* involved strict products liability, which is treated  
15 differently than negligence with respect to indemnity and  
16 contribution. See also *Wyland v. W.W. Grainger, Inc.*, 2015 U.S.  
17 Dist. LEXIS 76156, at \*6 (D. Or. June 11, 2015) ("[T]he Oregon  
18 Legislature set product liability apart from all other tort  
19 claims covered by comparative fault.").

20 When ORS § 31.610 applies, common law indemnity is not  
21 available. *Eclectic*, 357 Or. at 330, 354 P.3d at 679. "Thus, in  
22 the circumstances presented here—in which ORS § 31.610 applies,  
23 joint tortfeasors are liable only for their own negligence, and  
24 a jury determines the relative fault and responsibility of each  
25 tortfeasor—a judicially created claim for common-law indemnity  
26 is unnecessary." *Ibid.*

27 IRZ's indemnity claim does not initially appear to be  
28 applicable under *Rains* because (1) this case does not involve

1 claims of strict products liability, and (2) ORS § 31.610  
2 applies to the negligence claims. However, Trustee's second  
3 cause of action against IRZ is for breach of contract under the  
4 September 30, 2015 written work order and November 17, 2015  
5 agreement.<sup>86</sup> ORS § 31.610 only applies to indemnity for  
6 negligence causes of action, so indemnity may still be available  
7 for contractual liability.

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9 . . . [The claim] cannot simply be an independent or  
10 related claim but must be based upon plaintiff's claim  
11 against defendant. The crucial characteristic of a  
12 [Civ.] Rule 14 claim is that defendant is attempting to  
13 transfer to the third-party defendant the liability  
14 asserted against [the defendant] by the original  
plaintiff. The mere fact that the alleged third-party  
claim arises from the same transaction or set of facts  
as the original claim is not enough.

15 *Stewart v. Am. Int'l Oil & Gas Co.*, 845 F.2d 196, 200 (9th Cir.  
16 1988), quoting 6 *Fed. Prac. & Proc.* § 1446 at 257 (1971 ed.).  
17 Indemnity can also rest on broader equitable principles.  
18 Reporters Note, *Restatement (Third) of Restitution* § 23 comment  
19 a (" . . . most claims of indemnity . . . rest on overlapping  
20 grounds of liability: a varying combination of implied contract,  
21 breach of duty, and unjust enrichment").

22 Here, the third-party indemnity claim is based upon  
23 Trustee's cause of action for breach of contract against IRZ.  
24 IRZ is attempting to transfer the liability to Dari-Tech and the  
25 other third-party defendants. Though indemnity for negligence  
26 appears to be precluded under ORS § 31.610, the same is not true  
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<sup>86</sup> Doc. #1.

1 for breach of contract. Accordingly, the court recommends that  
2 summary judgment be DENIED as to the indemnity cause of action.

### 3 4 Contribution

5 Under ORS § 31.800(1), contribution is available when two  
6 or more persons are liable in tort for the same injury to  
7 property. The right of contribution exists even if judgment has  
8 not yet been entered against any of them. Since Trustee asserted  
9 a claim for negligence against IRZ for construction defects, IRZ  
10 has asserted a negligence claim against third-party defendants,  
11 including Dari-Tech, for those same defects.

12 When the Oregon legislature changed its comparative  
13 negligence scheme in 1995 to eliminate joint and several  
14 liability, claims for contribution were modified as well.  
15 ORS § 31.610. The Oregon Supreme Court in *Lasley* stated:

16 [U]nder Oregon's current comparative negligence scheme,  
17 no tortfeasor is liable for more than its percentage of  
18 fault, and that percentage of fault is determined in the  
19 original negligence action brought by the plaintiff. ORS  
20 [§] 31.610(2); ORS [§] 31.805. A defendant cannot bring  
21 a contribution action to seek a different determination  
22 of its percentage of fault. A contribution action serves  
23 only to permit a defendant who has "paid more" than its  
"proportional share of the common liability" to obtain  
contribution from another person who is also liable for  
the same injury or death. ORS [§] 31.800(2).

24 *Lasley*, 351 Or. at 19, 261 P.3d at 1226. "[M]uch like  
25 contribution, a claim of common-law indemnity is unnecessary and  
26 unjustified 'in cases . . . in which jurors allocate fault'  
27 pursuant to [ORS] § 31.605, which allows a party to pose special  
28 questions to a fact-finder as to each party's degree of fault."

1 *Wyland v. W.W. Grainger, Inc.*, 2015 U.S. Dist. LEXIS 76156 at \*6  
2 (D. Or. June 11, 2015).

3 As with indemnity, it is conceivable that IRZ could be  
4 found liable on a breach of contract theory or a tort theory.  
5 There may be indemnity and contribution liability on behalf of  
6 Dari-Tech and the other third-party defendants.

7 Civ. Rule 14(a)(1) permits an action against a nonparty  
8 “who . . . may be liable to it for all or part of the claim  
9 against it.” This provision permits acceleration of a  
10 substantive claim through the impleader rule by allowing the  
11 defendant to assert the claim before the claim arises under the  
12 substantive law. See 3 *Moore’s Federal Practice-Civil* § 14.05  
13 (2022). This has occurred and is permissible here.

14 Dari-Tech can be protected from paying more than its share,  
15 if any, before accrual of liability. The court can fashion a  
16 judgment providing for that protection or stay execution of the  
17 judgment until other parties pay their allocated share. Civ.  
18 Rule 62(a) (Rule 7062).

19 Accordingly, the court recommends that summary judgment be  
20 DENIED as to contribution.

#### 21 CONCLUSION

22 There are genuine issues of material fact with respect to  
23 negligence, indemnity, and contribution. The court recommends  
24 that Dari-Tech’s motion for summary judgment be DENIED.

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**RULINGS ON EVIDENTIARY OBJECTIONS**

The court's rulings on IRZ's objections to evidence submitted by Dari-Tech in support of the Motion for Summary Judgment are set forth below:

OBJECTIONS TO THE FIRST DECLARATION OF DAVID DEWAARD

Material Objected To:	Grounds for Objections:	Court's Ruling:
1. "However, even a closed loop system will require longer term storage for waste that settles out during the flush water recycling process. This is reflected in the plans for the Debtor's dairy that indicate planning for lagoons." DeWaard Decl., Doc. #345, ¶ 5, 5:21-24.	1. Lack of personal knowledge. FRE 602.	1. OVERRULED. DeWaard is qualified with sufficient expertise to determine the purpose of the lagoons from the plans.
2. "As noted below, the Debtor rejected Dari-Tech's proposal in favor of his own design." <i>Id.</i> , ¶ 8, 5:13-15.	2. Inadmissible hearsay. FRE 801, 802.	2. OVERRULED. DeWaard has personal knowledge of the rejection of his proposal and knowledge of substitutions because he installed the system.
3a. "Mr. teVelde wanted a system which would be adaptable to feeding a future anaerobic digester, which he knew requires a closed loop flush system on a dairy such as his." <i>Id.</i> , ¶ 9, 5:21-24.  3b. "Having spent fifteen years operating a large dairy as part of the Columbia River Dairies at Threemile Canyon, Oregon, he showed me in our discussions that he was familiar with both the necessity of the closed loop flush for a digester, and the requirements for closed loop operations." <i>Id.</i> , 5:23-28.	3a. Lack of personal knowledge. FRE 602. Inadmissible hearsay. FRE 801, 802.  3b. Lack of personal knowledge. FRE 602.	3a. SUSTAINED with respect to DeWaard's lack of personal knowledge as to what Debtor knew. SUSTAINED as to hearsay if Debtor's statements regarding what he wanted are used to prove the truth of the matter asserted. OVERRULED insofar as "what Debtor wanted" is offered as evidence of legally operative verbal acts or conduct. <i>U.S. v. Pang</i> , 362 F.3d 1187, 1192 (9th Cir. 2004).  3b. SUSTAINED with respect to DeWaard's lack of personal knowledge of Debtor's experience and familiarity with closed-loop systems and operations.

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Material Objected To:	Grounds for Objections:	Court's Ruling:
4. "Following this meeting, Dari-Tech was asked to provide a proposal for a Biolynt system for the dairy, i.e., the closed loop flushing system. Dari-Tech was not asked to design the overall manure handling system. Rather, the scope of the proposal sought from Dari-Tech was limited to providing a plan for the closed-loop component of an overall manure management program that was to be designed by someone else. Dari-Tech was not asked to provide - and did not provide - specifications or designs for belowground pipes, and it did not provide the pipes themselves." <i>Id.</i> ¶ 10, 6:1-8.	4. Inadmissible hearsay. FRE 801, 802.	4. OVERRULED insofar as what Dari-Tech was asked to provide is offered as evidence of legally operative verbal acts or conduct. <i>U.S. v. Pang</i> , 362 F.3d 1187, 1192 (9th Cir. 2004). SUSTAINED if used to prove the truth of the matter asserted.  OVERRULED as to what Dari-Tech was not asked to provide, because that is not hearsay.
5. "The proposed price for the Biolynt system was \$342,007. The proposed price for flush valves and controls was \$159,146. The proposed price for manure pumps and agitators was \$150,686.64 and \$48,477, respectively. The complete package for the water storage tank (materials, labor, and freight) was \$231,511. The proposed price for the complete separation system was \$616,174. The sum of the price for the entire proposal was \$1,548,001.64. Nothing in this proposal included overall design of a waste management system; the design, selection, or installation of underground piping; the design of sand lanes; the design of storage lagoons; the forecasting of fresh water needs or the sourcing of such water; nor overall design or construction management." <i>Id.</i> , ¶ 15, 7:12-16.	5. Best evidence rule. FRE 1002.	5. OVERRULED. The proposal is attached to DeWaard's declaration as <i>Exhibit 3</i> . See Doc. #351.

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Material Objected To:	Grounds for Objections:	Court's Ruling:
6. "Mr. teVelde accepted some of the proposed equipment in Exhibit 3 and rejected others. In some instances, he decided to omit certain functions and equipment that had been proposed by Dari-Tech. In other instances, he purchased equipment from another manufacturer, a competitor of Dari-Tech." <i>Id.</i> ¶ 16, 7:17-21.	6. Inadmissible hearsay. FRE 801, 802.  Lack of personal knowledge. FRE 602.  Best evidence rule. FRE 1002.	6. OVERRULED as to hearsay if construing acceptance and rejection of equipment as evidence of legally operative verbal acts or conduct, but SUSTAINED if used to prove the truth of the matter asserted.  OVERRULED as to lack of personal knowledge. DeWaard designed the proposal and installed the equipment, and therefore he has personal knowledge of the equipment he personally assembled.  OVERRULED AS MOOT as to the best evidence rule because IRZ filed a copy of the proposal transmitted March 17-18, 2016 and accepted by Debtor on March 22, 2016 as <i>Exhibit 1</i> . See Docs. #363, ¶ 5; #367, <i>Ex. 1</i> , at 15.
7. "In particular with regard to changes and/or omissions decided upon by Mr. teVelde, he opted not to install recommended mechanical secondary solids separation, relying on settling cells as secondary separators. So, while the Exhibits 2 and 3 recommended it, Dari-Tech was not asked to and did not provide secondary separation." <i>Id.</i> , ¶ 17, 7:21-25.	7. Inadmissible hearsay. FRE 801, 802.  Lack of personal knowledge. FRE 602.  Best evidence rule. FRE 1002.	7. OVERRULED as to hearsay if Debtor's changes and/or omissions are construed as evidence of legally operative verbal acts or conduct. SUSTAINED if used to prove the truth of the matter asserted.  OVERRULED as to personal knowledge. DeWaard designed the proposal, installed the equipment, and has personal knowledge of the equipment he personally assembled.  OVERRULED AS MOOT as to the best evidence rule because IRZ filed a copy of the proposal transmitted March 17-18, 2016 and accepted by Debtor on March 22, 2016 as <i>Exhibit 1</i> . See Docs. #363, ¶ 5; #367, <i>Ex. 1</i> , at 15.

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Material Objected To:	Grounds for Objections:	Court's Ruling:
<p>8. "In essence, Mr. teVelde rejected the overall plan for a Biolynk system as a component of the flush cycle but decided to purchase equipment from Dari-Tech and another to support a manure waste management plan of his own design." <i>Id.</i> ¶ 18, 8:1-3.</p>	<p>8. Inadmissible hearsay. FRE 801, 802.</p> <p>Lack of personal knowledge. FRE 602.</p> <p>Best evidence rule. FRE 1002.</p>	<p>8. OVERRULED as to hearsay if construing rejection of Dari-Tech's plan as evidence of legally operative verbal acts or conduct. SUSTAINED if used to prove the truth of the matter asserted.</p> <p>OVERRULED as to personal knowledge. DeWaard designed the proposal, installed the equipment, and has personal knowledge of the equipment he personally assembled.</p> <p>OVERRULED AS MOOT as to the best evidence rule because IRZ filed a copy of the proposal. Docs. #363, ¶ 5; #367, <i>Ex. 1</i>, at 15.</p>
<p>9a. "For months after June 23, 2017, neither I or anyone else at Dari-Tech heard from Mr. teVelde or any of his employees or agents, including specifically anyone from IRZ, that the equipment and sound system that Dari-Tech had installed had stopped functioning." <i>Id.</i>, ¶ 20, 8:17-19.</p> <p>9b. "It is my understanding that the closed loop flush system worked as intended during that time." <i>Id.</i>, 8:19-20.</p> <p>9c. "In fact, any time I called the dairy staff to check in, they reported how well the system was working." <i>Id.</i>, 8:20-22.</p> <p>9d. "Finally, at some point (presumably as the dairy was being closed down by the State of Oregon for a host of problems), a member of Mr. teVelde's dairy staff contacted me and told me that the system had become inoperable due to their failure to operate the system within its required parameters. Specifically, they had stopped using the necessary fresh water that, for reasons stated above, the system requires for maintaining an acceptable level of unsettleable solids." <i>Id.</i>, 8:21-27.</p>	<p>9a. Lack of personal knowledge. FRE 602.</p> <p>9b. Lack of personal knowledge. FRE 602.</p> <p>9c. Inadmissible hearsay. FRE 801, 802.</p> <p>9d. Lack of personal knowledge. FRE 602. Inadmissible hearsay. FRE 801, 802.</p>	<p>9a. OVERRULED. DeWaard is the person most likely to know if Dari-Tech received any complaints because he is its president and was personally involved in designing, assembling, and installing the equipment.</p> <p>9b. SUSTAINED as to personal knowledge of whether the closed-loop flush system continued to work as intended but OVERRULED as to personal knowledge of whether DeWaard received any complaints.</p> <p>9c. SUSTAINED as to hearsay if being used to prove the system was working properly. OVERRULED as to DeWaard's receipt of complaints.</p> <p>9d. SUSTAINED as to DeWaard lacking personal knowledge that the dairy was being closed down by the State of Oregon. OVERRULED as to DeWaard's knowledge of any complaints. SUSTAINED if the statements of the dairy staff to DeWaard are used to prove the truth. OVERRULED as to DeWaard learning that the system he designed and installed was not working.</p>



Material Objected To:	Grounds for Objections:	Court's Ruling:
10. "In this litigation, Dari-Tech has asked many times that IRZ identify any fault whatsoever with the equipment or services that Dari-Tech provided to Mr. teVelde, and to date IRZ has been unable to name even one shortcoming." <i>Id.</i> , ¶ 21, 9:1-3.	10. Irrelevant. FRE 401, 403.  Best evidence rule. FRE 1003.	10. SUSTAINED with respect to relevance. Dari-Tech has not filed any motions regarding any discovery disputes, and this is not a proper forum to raise such disputes.  OVERRULED as to the best evidence rule because the Interrogatories have been filed. See Doc. #346. But still irrelevant.

Docs. #345; #366; #370.

OBJECTIONS TO THE DECLARATION OF DUNCAN C. TURNER

Material Objected To:	Grounds for Objections:	Court's Ruling:
11. "The claims against Dari-Tech are extremely vague. The Trustee's Complaint, Dkt. #1, does not mention Dari-Tech by name at all. IRZ's Complaint mentions Dari-Tech once, in Paragraph 9: . . . ." Turner Decl., Doc. #354, ¶ 2, 2:14-20 (block quote omitted).	11. Irrelevant. FRE 401, 403.  Best evidence rule. FRE 1003.	11. SUSTAINED with respect to relevance. The statement is also argumentative.  OVERRULED as to the best evidence rule because Trustee's Complaint and IRZ's Complaint have been filed and docketed. See Complaint, Doc. #1; Third-Party Complaint, Doc. #163.
12. "Neither the Trustee's nor IRZ's Complaint alleges that any component or system supplied by Dari-Tech failed or that any such failure caused the damages claimed by the Trustee." <i>Id.</i> , ¶ 3, 2:20-22.	12. Irrelevant. FRE 401, 403.  Best evidence rule. FRE 1003.	12. SUSTAINED with respect to relevance. The statement is also argumentative.  OVERRULED as to the best evidence rule because Trustee's Complaint and IRZ's Complaint have been filed and docketed. See Complaint, Doc. #1; Third-Party Complaint, Doc. #163.
13. "In an attempt to determine whether there is any substance to IRZ's claim against Dari-Tech, I have corresponded with and spoken to IRZ's counsel many times since the filing of IRZ's Complaint." <i>Id.</i> , ¶ 4, 2:23-26.	13. Irrelevant. FRE 401, 403.  Best evidence rule. FRE 1003.	13. OVERRULED with respect to relevance. The factual contents are relevant to the substance of the declaration.  OVERRULED as to the best evidence rule because no original writing, recording, or photograph is cited without submission.

Material Objected To:	Grounds for Objections:	Court's Ruling:
14. "On July 22, 2021, I wrote to Kyle Sciuchetti, IRZ's lead counsel to express my observation that IRZ had expressed no facts indicating fault on the part of Dari-Tech. This letter is attached as Exhibit 1 to this declaration. My letter included the following: . . ." <i>Id.</i> , ¶ 5, 3:1-18 (block quote omitted).	14. Irrelevant. FRE 401, 403.  Best evidence rule. FRE 1003.	14. SUSTAINED with respect to relevance. The statement is also argumentative.  OVERRULED as to the best evidence rule because Dari-Tech filed a copy of the Turner letter dated July 22, 2021. Doc. #350, <i>Ex. 1</i> .
15. "On November 10, 2021, IRZ's counsel Benjamin Tarczy responded to my letter. His response is attached as Exhibit 2 to this declaration. Mr. Tarczy's primary argument is that 'Federal Law expressly allows for alternative pleadings,' but it is my belief that even alternative pleadings require some basis in law or fact to substantiate each alternative. Mr. Traczy [ <i>sic</i> ] also made a reference to 'a factual dispute as to causation' of the failure of the dairy, but he failed to identify any basis for the opposing position in that so-called 'factual dispute.'" <i>Id.</i> , ¶ 6, 3:19-26.	15. Irrelevant. FRE 401, 403.  Improper lay opinion. FRE 701.  Best evidence rule. FRE 1003.	15. SUSTAINED with respect to relevance.  OVERRULED as to improper lay opinion.  OVERRULED as to the best evidence rule because Dari-Tech filed a copy of the Tarczy letter dated November 10, 2021. Doc. #357, <i>Ex. 2</i> .
16. "In the interim between the two letters referenced above, on September 17, 2021, Dari-Tech propounded interrogatories and requests for production to IRZ asking, in many ways, for some statement of fact that would substantiate IRZ's claims against Dari-Tech. These discovery requests with IRZ's responses are attached as Exhibit 3." <i>Id.</i> ¶ 7, 3:26-28, 4:1-2.	16. Irrelevant. FRE 401, 403.  Best evidence rule. FRE 1003.	16. OVERRULED with respect to relevance. The paragraphs give context to the substance of the motion and show that Dari-Tech has complied with any meet-and-confer requirement.  OVERRULED as to the best evidence rule because Dari-Tech filed a copy of the discovery requests with IRZ's responses. Doc. #353, <i>Ex. 3</i> .

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Material Objected To:	Grounds for Objections:	Court's Ruling:
<p>17. "After serving the discovery response, counsel for IRZ and I had a 'meet and confer' regarding IRZ's objections to the number of interrogatories (based on IRZ's count of 'discrete subparts.'[]) In my letter to Mr. Tarczy of October 13, 2021, (Exhibit 4 hereto) I identified what I thought were the most critical questions, leaving aside any dispute over subparts. Most significantly, however, I highlighted our goal in seeking this discovery: . . . " <i>Id.</i>, ¶ 8, 4:3-13 (block quote omitted).</p>	<p>17. Irrelevant. FRE 401, 403.</p> <p>Best evidence rule. FRE 1003.</p>	<p>17. SUSTAINED with respect to relevance. Dari-Tech has not filed any motions regarding any discovery disputes, and this is not a proper forum to raise such disputes.</p> <p>OVERRULED as to the best evidence rule because Dari-Tech filed a copy of the Turner letter dated October 13, 2021. Doc. #348, Ex. 4.</p>
<p>18. "Paragraph 15 of the IRZ Complaint contains counsel's certification that they had 'consulted a design professional . . . who is qualified, available and willing to testify to admissible facts and opinions sufficient to create issues of fact as to the liability of third-party defendants,' so in Interrogatory No. 2, Dari-Tech asked that IRZ identify these persons and the facts upon which the proffered, but undisclosed, testimony relied. IRZ did not respond substantively to the question, choosing instead to assert work-product and attorney-client privilege claims, despite having waived these by incorporating the hidden opinions in its Complaint. IRZ added that 'Discovery is ongoing. IRZ reserves the right to supplement, amend, or correct this response.'" <i>Id.</i>, ¶ 10, 4:16-24.</p>	<p>18. Irrelevant. FRE 401, 403.</p> <p>Best evidence rule. FRE 1003.</p>	<p>18. OVERRULED with respect to relevance. The paragraphs give context to the substance of the motion and show that Dari-Tech has complied with any meet-and-confer requirement.</p> <p>OVERRULED with respect to the best evidence rule. The referenced Third-Party Complaint has been filed and docketed. See, Third Party Complaint, Doc. #163.</p>
<p>19. "In Interrogatory No. 4, . . . IRZ dodged the question by saying that it had not 'yet made a determination of what contentions will be presented at trial.' IRZ did identify equipment that Dari-Tech supplied to the dairy but failed to identify any failure or shortcoming in the equipment. In what it called 'discrete subparts,' IRZ listed alleged shortcomings in the functioning of the Dairy, but none of these were the responsibility of Dari-Tech." <i>Id.</i> ¶ 11, 4:25-28, 5:1-4. (Interrog. No. 4 omitted).</p>	<p>19. Irrelevant. FRE 401, 403.</p> <p>Best evidence rule. FRE 1003.</p>	<p>19. SUSTAINED with respect to relevance. Dari-Tech has not filed any motions regarding any discovery disputes, and this is not a proper forum to raise such disputes.</p> <p>OVERRULED with respect to the best evidence rule because the interrogatories and corresponding responses have been filed by Dari-Tech. Doc. #353, Ex. 3. But still irrelevant.</p>

Material Objected To:	Grounds for Objections:	Court's Ruling:
20. "Interrogatory No. 6 contained a list of deficiencies that the Trustee had alleged against IRZ (Trustee Complaint ¶ 29) and that IRZ had repeated verbatim in the IRZ Complaint in ¶ 5. The interrogatory asked IRZ to identify, for each such deficiency on the list, any act or omission by Dari-Tech <b>that resulted in the deficiency</b> . For some of the alleged deficiencies, IRZ admitted that Dari-Tech had no role. For the others, IRZ again side-stepped the question by saying that it had not developed its contentions and that discovery was ongoing, adding that Dari-Tech had supplied '(1) complete turnkey Biolynt tank system, piping and PLC control; (2) manure pumps and agitators with controls; and (3) CST Storage water storage tank with roof.' IRZ in no way provided any facts that addressed either a flaw in Dari-Tech's services or equipment or that related to how anything Dari-Tech did 'resulted in' the claimed deficiencies of the Dairy." <i>Id.</i> , ¶ 12, 5:5-16 (emphasis in original).	20. Irrelevant. FRE 401, 403.  Improper lay opinion. FRE 701.  Best evidence rule. FRE 1003.  Lack of personal knowledge. FRE 602.	20. SUSTAINED with respect to relevance. Dari-Tech has not filed any motions regarding any discovery disputes, and this is not a proper forum to raise such disputes.  OVERRULED as to improper lay opinion.  OVERRULED as to the best evidence rule because the interrogatories and corresponding responses have been filed by Dari-Tech. See, Doc. #353, Ex. 3.  SUSTAINED as to lack of personal knowledge.
21. "Dari-Tech also propounded requests for production, and Request No. 4 asked IRZ to 'produce every document that you will contend relates to the alleged acts or omissions by Dari-Tech as identified in response to your interrogatories.' As noted above, IRZ did not identify and [sic] 'act or omission' that would implicate Dari-Tech in the losses claimed by the Trustee. In response to RFP 4, IRZ merely pointed to the 5,092 pages of documents that were previously in Dari-Tech's counsels' possession." <i>Id.</i> , ¶ 13, 5:16-23.	21. Irrelevant. FRE 401, 403.  Improper lay opinion. FRE 701.  Best evidence rule. FRE 1003.  Lack of personal knowledge. FRE 602.	21. SUSTAINED with respect to relevance. Dari-Tech has not filed any motions regarding any discovery disputes, and this is not a proper forum to raise such disputes.  OVERRULED as to improper lay opinion.  OVERRULED as to the best evidence rule.  SUSTAINED as to lack of personal knowledge.

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Material Objected To:	Grounds for Objections:	Court's Ruling:
22. "Because of my continuing dissatisfaction with IRZ's inadequate response which I had observed were similar in their unresponsiveness to that proposed by other third-party defendants, I had thought to file a motion to compel to seek the court's assistance. In preparation for this, I sent IRZ's counsel a portion of a motion to compel that I had already drafted. By letter dated December 17, 2021, IRZ agreed to supplement portions of Interrogatory 4 and 6. See Exhibit 5." <i>Id.</i> , ¶ 14, 5:23-26, 6:1-2.	22. Irrelevant. FRE 401, 403.	22. SUSTAINED with respect to relevance. Dari-Tech has not filed any motions regarding any discovery disputes, and this is not a proper forum to raise such disputes.
23. "These numbers refer to pages in the original 5,092 pages of IRZ documents that Dari-Tech already had plus another 20,204 pages that Dari-Tech learned about from other third-party defendants. It seems that IRZ merely word-searched the entire production and identified all documents where 'Dari-Tech' was referenced." <i>Id.</i> , ¶ 17, 6:19-23.	23. Irrelevant. FRE 401, 403.  Improper lay opinion. FRE 701.  Best evidence rule. FRE 1003.  Lack of personal knowledge. FRE 602.	23. SUSTAINED with respect to relevance. Dari-Tech has not filed any motions regarding any discovery disputes, and this is not a proper forum to raise such disputes.  SUSTAINED as to improper lay opinion.  OVERRULED as to the best evidence rule.  SUSTAINED as to lack of personal knowledge.
24. "I have looked at each of these documents, and none of them suggest any fault by Dari-Tech and/or any adverse result on the Dairy from Dari-Tech's products or services." <i>Id.</i> , ¶ 18, 24-26.	24. Irrelevant. FRE 401, 403.  Improper lay opinion. FRE 701.  Best evidence rule. FRE 1003.  Lack of personal knowledge. FRE 602	24. SUSTAINED with respect to relevance. Dari-Tech has not filed any motions regarding any discovery disputes, and this is not a proper forum to raise such disputes. Civ. Rule 56(d) is inapplicable here.  SUSTAINED as to improper lay opinion.  OVERRULED as to the best evidence rule.  SUSTAINED as to lack of personal knowledge.

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Material Objected To:	Grounds for Objections:	Court's Ruling:
25. "On December 30, 2021 I emailed IRZ's counsel with my observations about the responses, as revised: . . ." <i>Id.</i> , ¶ 19, 7:1-5 (block quote omitted).	25. Irrelevant. FRE 401, 403.  Inadmissible hearsay. FRE 801, 802.	25. SUSTAINED with respect to relevance. Dari-Tech has not filed any motions regarding any discovery disputes, and this is not a proper forum to raise such disputes. Civ. Rule 56(d) is inapplicable here.
26. "When I saw that IRZ's only response was to offer me the haystack and an invitation to look for needles that were not there, I decided to forgo a motion to compel and file the motion for summary judgment. By email dated January 7, 2022, I advised IRZ's counsel as follows: . . ." <i>Id.</i> , ¶ 20; 7:5-15 (block quote omitted).	26. Irrelevant. FRE 401, 403.  Improper lay opinion. FRE 701.  Best evidence rule. FRE 1003.	26. SUSTAINED with respect to relevance. Dari-Tech has not filed any motions regarding any discovery disputes, and this is not a proper forum to raise such disputes.  SUSTAINED as to improper lay opinion.  OVERRULED as to the best evidence rule.

Docs. #354; #366; #370.

The court's rulings on Dari-Tech's objections to evidence submitted by IRZ in opposition to the Motion for Summary Judgment are set forth below:

OBJECTIONS TO THE DECLARATION OF JOHN O'DONNELL

Material Objected To:	Grounds for Objections:	Court's Ruling:
1. "I have been a Licensed Civil Engineer for 32 years. As a Licensed Civil Engineer, I am qualified to testify to admissible facts and opinions related to the design, construction, and operation of the Willow Creek Dairy (the 'Dairy')." O'Donnell Decl., Doc. #364, ¶ 2, 2:18-20.	1. Qualification as an expert, specifically as to whether he has designed or operated the type of system at issue, and whether he has expertise in the design, installation, or operation of a system that moves mixtures of solids and liquids through such a system. FRE 702.	1. OVERRULED. O'Donnell has been a Licensed Civil Engineer for 32 years. Whether he has designed, operated, installed, or has expertise in the same goes to the weight of his testimony and his credibility, not qualification.

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Material Objected To:	Grounds for Objections:	Court's Ruling:
2. "Based on my review of the relevant documents in this matter and inspection of the property, Dari-Tech planned, designed, and installed the self-contained waste recycling system failed at the Dairy [sic]." <i>Id.</i> , ¶ 6, 2:28-3:2.	2. The witnesses bases the opinion on a "review of documents" and an "inspection of the property" but fails to identify which documents, fails to state the inspection date, whether the dairy was operating, and whether the dairies failure was underway during his inspection.  Lack of personal knowledge of the training that Dari-Tech provided to staff, or whether he witnessed the staff operating the equipment.	2. OVERRULED with respect to the details of O'Donnell's inspection, which occurred on December 6, 2019. <i>Id.</i> , ¶ 3. The bases of the witness' opinion can be explained in later discovery or trial.  SUSTAINED with respect to lack of personal knowledge regarding the level of training provided to Dari-Tech staff because the witness has not specified whether he saw the dairy staff operating the equipment.
3. "Based on my review of the relevant documents in this matter and inspection of the property, the self-contained waste recycling system failed at the Dairy." <i>Id.</i> , ¶ 7, 3:3-4.	3. Opinion of ultimate issue or legal conclusion.	3. OVERRULED. An opinion is not objectionable just because it embraces an ultimate issue. FRE 704(a). It is undisputed that the waste management system failed.
4. "Based on my review of the relevant documents in this matter and inspection of the property, the failures of the Dairy, including the failure of the Dairy's self-contained waste recycling system, were caused by Dari-Tech and/or Third-Party Defendants U.S. Farm Systems; 4 Creeks, Inc.; John Fazio d/b/a Fazio Engineering; Laser Land Leveling, Inc.; Maas Energy Works, Inc.; George Chadwick d/b/a George Chadwick Consulting; Valmont Northwest, Inc.; Nucor Building Systems Utah LLC, and/or Debtor Greg te Velde." <i>Id.</i> , ¶ 8, 3:5-10.	4. Opinion of ultimate issue or legal conclusion.	4. OVERRULED. An opinion is not objectionable just because it embraces an ultimate issue. FRE 704(a). It is undisputed that the waste management system failed.

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Material Objected To:	Grounds for Objections:	Court's Ruling:
5. The entire declaration of John O'Donnell.	5. Inadequate bases. FRE 703.	5. OVERRULED. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. O'Donnell has visited the dairy, reviewed the documents in this case, and may reasonably rely on those facts in forming his opinion. At the summary judgment stage, all reasonable inferences in the light most favorable to the non-moving party.  The objection goes to credibility and weight of testimony.

Docs. #364; #369.

OBJECTIONS TO THE DECLARATION OF WAYNE DOWNEY

Material Objected To:	Grounds for Objections:	Court's Ruling:
6. "It is not foreseeable, nor reasonable, that a Biolynt flush system will fail in the absence of negligence." Downey Decl., Doc. #363, ¶ 12, 4:6-7.	6. Ultimate issue. FRE 704.  Bias. <i>Accutane Prods. Liab.</i> , 511 F. Supp. 2d 1288, 1297 (2007).  Not helpful to trier of fact. FRE 702(a).	6. OVERRULED as to ultimate issue. An opinion is not objectionable just because it embraces an ultimate issue. FRE 704(a).  OVERRULED as to alleged bias. Downey is IRZ's Director of Construction. Objection goes to weight and credibility.  OVERRULED as to helpfulness to a trier of fact. The objection goes to weight and credibility.

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Material Objected To:	Grounds for Objections:	Court's Ruling:
7. "The failures of the Dairy, including the failure of the Dairy's self-contained waste recycling system, were caused by Dari-Tech and/or Third-Party Defendants U.S. Farm Systems; 4 Creeks, Inc.; John Fazio d/b/a Fazio Engineering; Laser Land Leveling, Inc.; Maas Energy Works, Inc.; George Chadwick d/b/a George Chadwick Consulting; Valmont Northwest, Inc.; Nucor Building Systems Utah LLC, and/or Debtor Gregory te Velde." <i>Id.</i> , ¶ 13, Lines 4:8-12	7. Not helpful to trier of fact. FRE 702(a).	7. OVERRULED as to helpfulness to a trier of fact. Objection goes to weight and credibility.

Docs. #363; #369.

Dated: June 16, 2022

By the Court

/s/ René Lastreto II  
René Lastreto II, Judge  
United States Bankruptcy Court