

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, CHAPTER 11 )  
TRUSTEE, ) Adv. Proc. No. 19-01033  
)  
Plaintiff, ) Docket Control No. WJH-4  
)  
v. )  
)  
IRZ CONSULTING, LLC; aka IRZ )  
CONSTRUCTION DIVISION, LLC, )  
)  
Defendant. )  
)  
\_\_\_\_\_)  
)  
AND RELATED THIRD-PARTY )  
COMPLAINT AND CONSOLIDATED )  
ACTIONS. )  
\_\_\_\_\_)

**FINDINGS AND RECOMMENDATIONS FOR  
DE NOVO CONSIDERATION OF THE DISTRICT COURT AS TO  
PLAINTIFF'S THIRD MOTION FOR PARTIAL SUMMARY JUDGMENT**

\_\_\_\_\_  
Kurt F. Vote, WANGER JONES HELSLEY PC, for RANDY SUGARMAN,  
Liquidating Trustee; Carl S. Kravitz, ZUCKERMAN SPAEDER LLP, for  
RANDY SUGARMAN, Liquidating Trustee; R. Miles Clark, ZUCKERMAN  
SPAEDER LLP, for RANDY SUGARMAN, Liquidating Trustee.

Kyle D. Sciuchetti, MILLER NASH LLP, for IRZ Consulting, LLC and  
LINDSAY CORPORATION; Bernard Kornberg, MILLER NASH LLP, for IRZ  
Consulting, LLC and LINDSAY CORPORATION; and Hagop Bedoyan,  
McCORMICK, BARSTOW, et al., for IRZ Consulting, LLC and LINDSAY  
CORPORATION, Defendants.

Randy Sugarman, Chapter 11 Trustee.  
\_\_\_\_\_

RENÉ LASTRETO II, Bankruptcy Judge:

## INTRODUCTION

Randy Sugarman, Liquidating Trustee under a confirmed plan ("Sugarman" or "Trustee" or "Plaintiff"), moves pursuant to Fed. R. Bankr. P. 7056 and Fed. R. Civ. P. 56(g) for partial summary judgment as to the Second Claim for Relief raised in Plaintiff's First Amended Complaint ("Breach of Contract") against Defendants Lindsay Corporation ("Lindsay") and IRZ Consulting, LLC ("IRZ") (collectively "Defendants"). Doc. #761. This is Plaintiff's Third Motion for Partial Summary Judgment (hereinafter "the Third Motion" or simply "the Motion").

The Motion is accompanied by: (1) the Declaration of R. Miles Clark ("Clark" and "the Clark Declaration"), one of Plaintiff's attorneys, which is offered solely to authenticate the attached Plaintiff's Exhibits, Doc. #763; (2) Plaintiff's Exhibits A-M in support of the motion, Doc. #764; (3) a Statement of Undisputed Facts, Doc. #765; and (4) a Memorandum of Authorities, Doc. #766.

On April 2, 2025, the Defendants filed: (1) Defendants' Opposition to the Third Motion, Doc. #800; (2) Defendants' Evidentiary Objections in Opposition to the Summary Judgment Motion, Doc. #796; (3) Defendants' Exhibits A-J in support of Defendants' Opposition to the Motion, Doc. #797; (4) the Declaration of Benjamin P. Tarczy ("Tarczy" and "the Tarczy Declaration"), counsel for Defendants, which is offered solely to authenticate the attached Defendants' Exhibits, Doc. #798; (5) the Declaration of Wayne Downey ("Downey" and "the Downey Declaration"), Director of Construction at IRZ, Doc. #799; and  
///

1 (6) a Response to Sugarman's Statement of Undisputed Material  
2 Facts, Doc. #801.

3 On April 7, 2025, Sugarman filed in reply: (1) the  
4 Declaration of R. Miles Clark ("the Clark Reply"), which is  
5 offered solely to authenticate the attached Plaintiff's Reply  
6 Exhibits Doc. #808; (2) Plaintiff's Exhibits N-O in support of  
7 the Reply; Doc. #809; (3) Plaintiff's Evidentiary Objections in  
8 Reply to Defendants Opposition to the Motion, Doc. #810; and (4)  
9 Plaintiff's Reply Memorandum in Support of the Motion, Doc. #811.

10 In this Third Motion, Plaintiff asks the court to consider  
11 three aspects of the case:

- 12 1. Whether partial summary judgment be granted as to  
13 Plaintiff's breach of contract claim, specifically the  
14 breach of contract elements of (a) the existence of a  
15 contract, (b) its relevant terms, and (c) the existence of a  
16 breach by IRZ;
- 17 2. Whether partial summary judgment can be granted for  
18 Plaintiff with regard to Defendants' Second Affirmative  
19 Defense (In Pari Delicto/ Comparative Fault), Fourth  
20 Affirmative Defense (Fault of Others), and Eleventh  
21 Affirmative Defense (Waiver or Estoppel); and
- 22 3. Whether partial summary judgment should be granted to  
23 Plaintiff as to the question of whether Lindsay (IRZ's  
24 parent company) is obligated to indemnify IRZ for any  
25 losses.

26 Doc. #761. Sugarman concedes that even if this motion is granted,  
27 it will not resolve the case entirely, but he argues that it will  
28 "streamline" the issues for trial.

29 The court has reviewed the voluminous filings and heard  
30 arguments and is prepared to issue its report and recommendations  
31 to the district court.

32 ///

33 ///

34 ///

## **BACKGROUND**

Except where noted otherwise, the facts which set the stage for this play are drawn from this court's *Report and Recommendations on [Plaintiff's] Second Motion for Partial Summary Judgment*, Doc. #556. See also *In re te Velde*, 2022 Bankr. LEXIS 3201 (Bankr. E.D. Cal. Nov. 10, 2022). Additional background information on the tortured history of the Willow Creek Dairy Facility may be found in the court's *Report and Recommendations as to Dari-Tech, Inc.'s Second Motion For Summary Judgment* ("the Dari-Tech Motion" and "the Dari-Tech R&R"), issued by the court on April 24, 2025. Doc. #824.

On or about September 30, 2015, Gregory te Velde ("te Velde" or "Debtor"), debtor in the underlying (and long since closed) Chapter 11 case, and IRZ executed a "Work Order" pursuant to which IRZ agreed that its Construction Division ("ICD") would perform certain preliminary work in connection with the Willow Creek Dairy facility ("the Dairy") which te Velde hoped to build on land he was considering purchasing near Boardman, Oregon. The Work Order was signed by Debtor and Fred Ziari ("Ziari") on behalf of ICD. Pursuant to the Work Order, ICD would perform certain services to Debtor over a three-month period. The Work Order was memorialized in a contract executed by Debtor and Ziari on or about November 17, 2015.

Te Velde subsequently defaulted on his obligation to pay for the services of IRZ/ICD, and they stopped work on the project. IRZ later recorded an Oregon form *Construction Claim of Lien* on the project. On November 17, 2017, IRZ filed a complaint in Oregon state court against Debtor and others seeking damages in

1 the amount of \$393,476.81 for the cost of "labor, equipment,  
2 material, services, supervision, plans, drawings, and surveys . .  
3 . used for the benefit of the Property" from "September 30, 2015,  
4 through August 3, 2017." This complaint was eventually removed  
5 to this court.

6 Te Velde filed for Chapter 11 on April 26, 2018, with  
7 Sugarman was later appointed Trustee. Sugarman became the  
8 Liquidation Trustee under the plan. IRZ duly filed its Proof of  
9 Secured claim in the amount of \$347,057.56, attaching its  
10 mechanics' lien complaint as an exhibit.

11 On February 11, 2019, the Trustee sold the property subject  
12 to IRZ's claim of lien under an *Order Authorizing Sale of Real*  
13 *Property Free and Clear of Liens*. The court directed Trustee to  
14 disburse most of the sales proceeds of the Lost Valley Farm to  
15 various parties in interest; however, the court directed Trustee  
16 to hold back funds to provide "adequate protection" to IRZ on  
17 account of its disputed secured claim.

18 On March 18, 2019, Trustee filed this adversary proceeding  
19 against IRZ and others. The complaint alleges several causes of  
20 action, but only Claim #2 for breach of contract is at issue in  
21 this motion. Doc. #761.

## 22 **DISCUSSION**

### 23 **I.**

## 24 **JURISDICTION**

25 The District Court has jurisdiction of Trustee's complaint under  
26 28 U.S.C. § 1334(b) because it is a civil proceeding arising under  
27  
28 ///

1 Title 11 of the United States Code. This court has jurisdiction by  
2 reference from the District Court under 28 U.S.C. § 157(a).

3 This court has "related to" jurisdiction over IRZ's third-party  
4 complaint under 28 U.S.C. § 157(b)(3) because it is related to  
5 Trustee's complaint against IRZ. Trustee's complaint is a "core"  
6 proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (C), (H), and (O).

7 Since this court's jurisdiction is "related to" the bankruptcy  
8 case, this court cannot render a final judgment in this matter. The  
9 District Court has deferred from withdrawing its reference under 28  
10 U.S.C. § 157(c)(1) and this court is directed to supervise discovery,  
11 rule on non-dispositive motions, and issue findings and recommendations  
12 for de novo consideration by the District Court as to dispositive  
13 motions.

## 14 15 **II.**

### 16 **Legal Analysis**

#### 17 **A. The Summary Judgment Standard.**

18 Civ. Rule 56, as incorporated by Rule 7056, applies in  
19 adversary proceedings. Under Civ. Rule 56(a), summary judgment  
20 should be granted only if the movant shows that there is no  
21 genuine dispute as to any material fact and that the movant is  
22 entitled to judgment as a matter of law. When considering a  
23 motion for summary judgment, facts must be viewed in the light  
24 most favorable to the nonmoving party only if there is a  
25 "genuine" dispute as to those facts. Civ. Rule 56(c); *Scott v.*  
26 *Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007). "[T]he  
27 mere existence of some alleged factual dispute between the  
28 parties will not defeat an otherwise properly supported motion

1 for summary judgment; the requirement is that there be no genuine  
2 issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477  
3 U.S. 242, 247-48, 106 S. Ct. 2505, 2509-10 (1986).

4 "Where the record taken as a whole could not lead a rational  
5 trier of fact to find for the nonmoving party, there is no  
6 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith*  
7 *Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). "As  
8 to materiality, the substantive law will identify which facts are  
9 material. Only disputes over facts that might affect the outcome  
10 of the suit under the governing law will properly preclude the  
11 entry of summary judgment." *Anderson*, 477 U.S. at 248, 106 S. Ct.  
12 at 2510. "[W]hile the materiality determination rests on the  
13 substantive law, it is the substantive law's identification of  
14 which facts are critical and which facts are irrelevant that  
15 governs." *Ibid.*

16 The movant may not argue that its evidence is the most  
17 persuasive or "explain away" evidence unfavorable to its  
18 defenses; rather, it must show that there are no material facts  
19 in dispute, or which can be reasonably resolved by a fact finder.  
20 *Id.* at 250-51, 106 S. Ct. at 2511; *Davis v. Team Elec. Co.*, 520  
21 F.3d 1080, 1089 (9th Cir. 2008) ("Summary judgment is not  
22 appropriate" if a reasonable jury could find in the plaintiff's  
23 favor.) (emphasis added).

24 As the movant here, the burden of proof is on Plaintiff. The  
25 court must draw all reasonable inferences in the light most  
26 favorable to the non-moving party and therefore in favor of  
27 denying summary judgment. *Anderson*, 477 U.S. at 255, 106 S. Ct.  
28 at 2513-14. Further, the non-moving party's evidence is to be

1 believed, and all justifiable inferences are to be drawn in its  
2 favor. *Hutchins v. TNT/Reddaway Truck Line, Inc.*, 939 F. Supp.  
3 721, 723 (N.D. Cal. 1996).

4 If a summary judgment motion is properly submitted, the  
5 burden shifts to the opposing party to rebut with a showing that  
6 there is a genuine issue of material fact. *Henderson v. City of*  
7 *Simi Valley*, 305 F.3d 1052, 1055-56 (9th Cir. 2002). "The  
8 nonmoving party 'may not rely on denials in the pleadings but  
9 must produce specific evidence . . . to show that the dispute  
10 exists.'" *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d  
11 702, 707 (9th Cir. 2008), quoting *Bhan v. NME Hosps., Inc.*, 929  
12 F.2d 1404, 1409 (9th Cir. 1991). Ultimately, the court must grant  
13 summary judgment if the movant shows that the record, taken as a  
14 whole, could not lead a rational trier of fact to find for the  
15 nonmoving party as to any fact that might affect the outcome of  
16 the suit under the governing law, and the nonmovant does not meet  
17 their burden of proof to refute the movant's claims.

18 B. Successive Summary Judgment Motions.

19 As a threshold matter, Defendants argue that this motion  
20 should be denied summarily as "an unnecessary successive Summary  
21 Judgment Motion." Doc. #800. The court recently considered this  
22 issue in the Dari-Tech R&R, which recommended that the Dari-Tech  
23 Motion be denied by the District Court as a successive motion  
24 before going on to address the motion substantively. Doc. #824.  
25 In the Dari-Tech R&R, the court said:

26 Whether a second summary judgment motion should be  
27 permitted is discretionary with the court. *Hoffman v.*  
28 *Tonnemacher*, 593 F.3d 908 (9th Cir. 2010) (Second  
summary judgment permitted after the first was denied,  
additional discovery occurred, there was a partial



1 grant of summary judgment, a trial, a deadlocked jury,  
2 a mistrial, and modification of a pretrial order). In  
3 this circuit, successive summary judgment motions may  
4 be considered if there is an intervening change in  
5 controlling law; the availability of new evidence or an  
6 expanded factual record; and the need to correct a  
7 clear error or prevent manifest injustice. *Brazill v.*  
8 *California North State College of Pharmacy*, 2013 WL  
9 4500667\*1 (E.D. Cal. August 22, 2013) citing *Whitford*  
10 *v. Boglino*, 63 F.3d 527, 530 (7th Cir. 1995).

11 *Id.*

12 *Trustee's First Motion ("the First Motion") for Summary*  
13 *Judgment* against IRZ was filed on September 6, 2022. Doc. #424.  
14 The only issue raised was whether "IRZ'S claim and lien are  
15 unenforceable against the estate because it was not continuously  
16 licensed throughout the work of improvement" and, consequently,  
17 whether IRZ's Proof of Claim should be disallowed on that basis.  
18 *Id.* The court issued a Report and Recommendation that this First  
19 Motion be denied. Doc. #554. The district court has not yet ruled  
20 on the First Motion.

21 *Trustee's Second Motion ("the Second Motion") for Summary*  
22 *Judgment* against IRZ was filed on September 15, 2022. Doc. #440.  
23 The only issue raised in the Second Motion is whether "two  
24 provisions in the design and construction contracts executed by  
25 the Debtor which purport to limit the Plaintiff Trustee's damages  
26 to \$550,000 are enforceable under Oregon law." *Id.* On November  
27 10, 2022, the court issued a Report and Recommendation that the  
28 Second Motion be granted in part as to the narrow issue of the  
effect of a limitation of liability clause in the contract as it  
applies to this case but that the Second Motion be otherwise  
denied. Doc. #556. The district court has not yet ruled on the  
Second Motion.

1 Plaintiff argues that this Third Motion is based "on an  
2 expanded factual record." Doc. #811.

3 Since the filing of Plaintiff's prior motions for  
4 partial summary judgment (on entirely separate issues),  
5 the parties have taken more than a dozen fact  
6 depositions—including the depositions of several  
7 current and former IRZ employees, as well as the  
8 deposition of both Defendants IRZ and Lindsay under  
9 Rule 30(b)(6)—and completed expert discovery. It would  
10 have been premature for Plaintiff to have filed the  
11 instant motion before the close of discovery. The  
12 motion also is a targeted one, seeking partial summary  
13 judgment only on discrete aspects of Plaintiff's breach  
14 of contract claim and on particular defenses related  
15 thereto. And, as expressly stated in Plaintiff's moving  
16 papers, the motion's purpose is to streamline the  
17 matters to be tried and otherwise foster a potential  
18 resolution to this long-pending dispute.

19 *Id.* In the Report and Recommendations issued for the Second  
20 Motion, the court did not address the issue of it being a  
21 successive summary judgment motion, which was not raised at the  
22 time by IRZ. Doc. #556. Indeed, the First and Second Motions were  
23 filed almost contemporaneously (September 6, 2022, and September  
24 15, 2022) and, as Plaintiff notes, prior to the extensive  
25 discovery outlined above.

26 Frankly, the court questions how it is supposed to  
27 "streamline" the matters to be tried if the parties file a  
28 multiplicity of dispositive motions for which this court can only  
29 issue reports and recommendations to the District Court. If  
30 anything, Sugarman's approach to "streamlining" things has had  
31 the effect of clogging both this court's and the District Court's  
32 dockets with piecemeal attacks on the underlying case, and the  
33 court is strongly inclined to exercise its discretion to deny the  
34 motion on that basis alone.

35 ///

1       However, a commitment to thoroughness in preparing a report  
2 and recommendation to the District Court would necessitate a  
3 review of the Third Motion on the merits anyway, and the factual  
4 record has clearly been expanded since the issuance of the  
5 reports and recommendations on the two prior motions.

6 C. Applicable Controlling Law.

7       Sugarman's Third Motion raises issues of comity and choice  
8 of law which must be addressed before the court can address the  
9 underlying issues. The parties all seem to assume that the  
10 contract at the heart of this case is governed by Oregon law.  
11 IRZ is an Oregon corporation. The Dairy site was in Oregon. All  
12 acts by IRZ purported to be breach of contract took place in  
13 Oregon. While the contract is silent on controlling law, it does  
14 say that venue for any civil actions arising under the contract  
15 is proper in Oregon.

16       Thus, without engaging in a lengthy conflicts-of-law  
17 analysis, the court is satisfied that Oregon state substantive  
18 law governs the breach of contract claim.

19 D. The Third Motion On Its Merits.

20       Sugarman argues that there are three specific areas where  
21 there are no disputed issues of material fact and the Plaintiff  
22 is entitled to summary judgment: (1) whether a contract was  
23 formed which IRZ subsequently breached, (2) whether Defendant's  
24 Second and Fourth Affirmative Defenses are inapplicable to the  
25 breach of contract claims, and (3) whether Lindsay is obligated  
26 to indemnify IRZ for any losses. Doc. #761. The court will  
27 address each of these arguments in turn.

28 ///

1           1.     The Contract Claim.

2           Sugarman begins with a recitation of the elements for breach  
3 of contract under Oregon law:

4           To succeed on a breach of contract claim under Oregon  
5 law, a plaintiff must prove "the existence of a  
6 contract, its relevant terms, plaintiff's full  
performance and lack of breach[,] and defendant's  
breach resulting in damage to plaintiff.

7 Doc. #766 (quoting *Lowes v. Thompson*, 331 Ore. App. 406, 546 P.3d  
8 311, 317 (Or. App. Ct. 2024)). Sugarman argues that partial  
9 summary judgment in his favor is proper for three of the four  
10 elements: the existence of a contract, its relevant terms, and  
11 IRZ's breach. *Id.*

12          The court agrees that partial summary judgment should be  
13 granted on the question of whether a contract between Debtor and  
14 IRZ existed, as no suggestion to the contrary has ever been put  
15 forth. Indeed, the existence of the contract forms the basis of  
16 IRZ's Proof of Claim which lies at the heart of this adversary  
17 proceeding.

18          However, the court finds that there are disputed issues of  
19 fact which preclude summary judgment as to the other issues.

20          Sugarman's argument is based on the following premise: The  
21 contract required IRZ to perform "engineering" services. IRZ did  
22 not perform any such "engineering" services and admits so through  
23 its corporate representative during his deposition. *Ergo*,  
24 Sugarman reasons, IRZ has breached the contract.

25          The terms of the contract, of course, speak for themselves.  
26 But while Sugarman quotes liberally from several contract terms  
27 which he claims demonstrates a contractual obligation for IRZ to  
28 perform engineering work, in the court's view, however, the

1 language is not so clear-cut. For example, the first quoted  
2 contract provisions states:

3 **4. Engineered structure designs ready for construction**

4 Meet with OWNER to finalize structure layout and  
5 details sufficient enough to design and engineer  
6 drawings for building permits and review and approval  
of OWNER.

7 Doc. #766 at pg. 10. Sugarman interprets this language to  
8 mean that IRZ would be responsible for "designing and  
9 engineering" the relevant drawings, but a closer reading  
10 suggests that the actual obligation imposed is to "meet with  
11 OWNER to finalize structure layout and details" as a *prelude*  
12 to the design and engineering of those drawings. This  
13 passage does not unambiguously place the onus for producing  
14 the design and engineering drawings on IRZ. Most of the  
15 "scope of work" contract provisions quoted by Sugarman have  
16 similar ambiguities. (e.g. [paragraph 5 "meet OWNER to  
17 finalize site design and layout;" 7 "meet with OWNER and  
18 service providers to determine routes" and "oversee design  
19 and engineering of conduit;" 11 "meet with OWNER to finalize  
20 facility layout and detail sufficient enough to design and  
21 engineer drawings."])

22 And this is precisely what IRZ contends in its  
23 Response. Doc. #800. IRZ asserts that, notwithstanding the  
24 contract's references to engineering work, Debtor actually  
25 hired IRZ to oversee the design and engineering of the  
26 project as performed by other parties rather than directly  
27 perform such work itself (or, to a large degree, oversee the  
28 adaptation of the engineering work that had already been

1 performed for a separate dairy farm also owned by te Velde).  
2 *Id.* IRZ's interpretation of its contractual duties seems to  
3 be supported by the fact that Debtor hired at least one  
4 subcontractor, Fazio Engineering, to perform the actual  
5 engineering work for the dairy's lagoon system. Doc. #799  
6 (Decl. of Wayne Downey).

7 Furthermore, the evidence presented by the Defendants  
8 raises further factual disputes, as, to the extent IRZ was  
9 obligated to perform engineering work and failed to do so,  
10 its ability to perform its duties for Debtor was impaired by  
11 Debtor's failure to pay IRZ, his failure to pay various  
12 subcontractors without whom IRZ could not perform, and his  
13 failure to otherwise perform his duties as general  
14 contractor. Doc. #799.

15 Finally, Sugarman glosses over the fact that Debtor  
16 terminated IRZ on or about August 3, 2017, but continued  
17 work on the Dairy up until sometime around the filing of  
18 Debtor's bankruptcy case on March 18, 2019. *Id.* Assuming  
19 *arguendo* that IRZ was contractually obligated to perform  
20 actual engineering work rather than project oversight, the  
21 motion fails to identify any specific engineering tasks  
22 which IRZ should have already completed as of the date of  
23 its termination.

24 It is axiomatic that when one party terminates a  
25 contract, the other party is released from future  
26 obligations. *See Anderson v. Allison*, 256 Or. 116, 121, 471  
27 P.2d 772, 774 (1970) (holding that when "the conduct of the  
28 defendant has prevented the performance of a contract

1 provision by the plaintiff, he cannot avail himself of any  
2 such failure to perform"). While Sugarman asserts that IRZ  
3 is still liable for its actions or inactions prior to  
4 termination, the Plaintiff's filings do not articulate what  
5 those actions or inactions might be with any specificity,  
6 and certainly not enough to satisfy the heavy burden of  
7 summary judgment.

8 In light of the foregoing, the court finds that there  
9 are disputed issues of material fact, not only as to whether  
10 IRZ was obligated to perform engineering tasks, but also as  
11 to whether any tasks IRZ was theoretically obligated to  
12 perform under the contract were also required to have been  
13 completed at the time Debtor terminated IRZ.

14 2. The Affirmative Defenses.

15 Sugarman next seeks summary judgment on the applicability of  
16 Defendants' Second, Fourth, and Eleventh affirmative defenses.  
17 Doc. #766.

18 The Second Affirmative Defense states:

19  
20 Under the doctrine of *in pari delicto*, plaintiff/  
21 trustee stands in the shoes of the debtor, Gregory John  
22 te Velde. Here, plaintiff's damages, in whole or in  
23 part, are the result of debtor te Velde's comparative  
24 fault, which caused or contributed to plaintiff's  
25 damages and are, based on *in pari delicto*, attributable  
26 to plaintiff.

27 Doc. #137.

28 The Fourth Affirmative Defense states: "Plaintiff's damages,  
if any, are the result of negligence by other parties over which  
IRZ has no obligation, duty or right to control." *Id.*

///  
29

1        Sugarman argues that both these affirmative defenses are  
2        inapplicable due to Oregon law, and Sugarman cites several cases  
3        for the proposition that comparative fault is not a valid defense  
4        to a breach of contract claim. *See generally Hale v. Groce*, 304  
5        Ore. 281; 744 P.2d 1289, 1290 (Or. 1987); *Hampton Tree Farms,*  
6        *Inc. v. Jewett*, 158 Or. App. 376; 974 P.2d 738, 744 n.10 (Or. Ct.  
7        App. 1999); *PacifiCorp v. Northwest Pipeline GP*, 879 F. Supp. 2d  
8        1171, 1210 (D. Or. 2012) *Oregon v. Gutierrez-Medina*, 287 Ore.  
9        App. 240; 403 P.3d 462, 464 (Or. Ct. App. 2017).

10        In response, Defendants seem to abandon the Second  
11        Affirmative Defense to the extent it seeks to apportion fault to  
12        the Debtor. Doc. #800. Instead, Defendants switch gears to claim  
13        that these affirmative defenses are to preserve their rights  
14        against Dari-Tech if the Trustee obtains a verdict for which  
15        Defendants and Dari-Tech are severally liable. *Id.* The court  
16        finds that interpretation of the Second Affirmative Defense  
17        compared to what actually appears in Defendants' Answer to be  
18        dubious. To the extent that Defendants assert the comparative  
19        fault of the Plaintiff as a basis for a partial or total  
20        reduction in any damages awarded, that argument is foreclosed by  
21        Oregon law, and partial summary judgment will be granted to  
22        Plaintiff as to the Second Affirmative Defense.

23        Sugarman's argument is not as strong with regard to the  
24        Fourth Affirmative Defense, which refers to the negligence of  
25        "other parties," including Dari-Tech. The court finds that,  
26        assuming arguendo that Sugarman proves the other elements of his  
27        breach of contract claim, there remain disputed issues of  
28        material fact precluding summary judgment on whether any fault



1 should be apportioned between Defendants and any "other parties  
2 over which IRZ has no obligation, duty or right to control."

3 Under *Lowes*, one element for breach of contract in Oregon is  
4 that "Defendant's breach resulted in damage to Plaintiff." 546  
5 P.3d at 317. The Fourth Affirmative Defense is a challenge to  
6 causation. Arguably, it may not be an affirmative defense at all  
7 but rather an element that Sugarman must prove. "A determination  
8 of liability without a corresponding finding of damages is  
9 insufficient to establish that a party has prevailed on its  
10 breach of contract claim." *Spectra Novae, Ltd. v. Waker*  
11 *Associates, Inc.*, 140 Or. App. 54, 60; 914 P.2d 693 (1996). To  
12 establish damages, the plaintiff must show that its "harm was  
13 both factual and foreseeable consequence of the defendant's  
14 conduct". *Wilcher v. Amerititle, Inc.*, 212 Or. App. 498, 506;  
15 157 P.3d 790 Rev Den, 343 Or. 366 (2007).

16 IRZ has raised disputed issues of fact concerning causation  
17 of damages. Though the Fourth Affirmative Defense may actually  
18 be an element of Plaintiff's claim, there are disputed issues of  
19 fact linking IRZ's alleged breach of contract with the extent of  
20 damages asserted by Plaintiff. IRZ points to many of the third  
21 party defendants as having responsibility for the failure of the  
22 dairy waste system. Whether that failure is caused by an alleged  
23 breach of contract by IRZ or other factors remains in dispute and  
24 is not an appropriate factual basis for a partial summary  
25 judgment as to the Fourth Affirmative Defense.

26 Finally, the Eleventh Affirmative Defense states that  
27 "[s]ome or all of plaintiff's claims are barred in whole or in  
28 part by the doctrines of waiver and estoppel." Doc. #137. The

1 court agrees with Defendants that, even if IRZ had a contractual  
2 duty to perform engineering work for te Velde, there are disputed  
3 issues of material fact pertaining to whether te Velde, by his  
4 conduct, waived his right to enforce those contract requirements.  
5 Certainly, the testimony that te Velde hired Fazio Engineering to  
6 perform engineering work puts the question into dispute.

7 Waiver is "the intentional relinquishment of a known right."  
8 *Wright Schuchart Harbor v. Johnson (In re Johnson*, 133 Or. App.  
9 680, 685; 893 P.2d 560 (1995) quoting *Drews v. EBI Companies*, 310  
10 Ore. 134, 150; 795 P.2d 531 (1990). Waiver must be plainly and  
11 unequivocally manifested either "in terms by such conduct as  
12 clearly indicates an intention to renounce a known privilege or  
13 power." *Wright Schuchart Harbor*, 133 Or. App. at 686. The  
14 question of whether a waiver has occurred is resolved by  
15 examining the particular circumstances of each case. *Id.* citing  
16 *State v. Meyrick*, 313 Ore. 125, 132; 831 P.2d 666 (1992). Waiver  
17 may be either explicit or implicit, that is, implied from party's  
18 conduct. *Wright Schuchart*, 133 Or. App. at 686 citations  
19 omitted.

20 Wayne Downey's declaration (Doc. 799) states that Te Velde  
21 told IRZ that he (Velde) did not want to pay IRZ to engineer the  
22 project. Further, IRZ never billed for engineering services and  
23 Velde never complained about IRZ's failure to provide engineering  
24 services. This evidence, among other evidence, raises the issue  
25 that Velde unequivocally waived any right to require IRZ to  
26 provide engineering services. This is a material issue of fact  
27 since Sugarman claims that IRZ's failure to provide engineering  
28 services was a breach of the IRZ/Velde contract. This evidence

1 and the inferences drawn from the evidence show a material issue  
2 of fact as to whether there was a waiver by the Debtor of those  
3 contractual provisions. This precludes summary judgment.

4 In reply, Sugarman urges that the Debtor was not an engineer  
5 and would not know if IRZ billed for engineering services or not.  
6 True enough, Mr. Velde was not an engineer, but that does not  
7 mean Mr. Downey's testimony should be disbelieved. Velde  
8 operated another dairy and wanted some or all of those systems to  
9 be applied to the Willow Creek project. It is a reasonable  
10 inference that Mr. Velde knowingly waived any right to require  
11 IRZ to perform engineering services.

### 12 3. Indemnification by Lindsay.

13 The Trustee's final argument for partial summary judgment  
14 focuses on whether co-defendant Lindsay is obligated to indemnify  
15 IRZ for any losses incurred by Velde because of the breach. Doc.  
16 #766. Some additional background is necessary to understand the  
17 context of this argument. As Plaintiff's Statement of Undisputed  
18 Facts explains:

19 On August 26, 2011, years before the commencement of IRZ's  
20 work for Velde, Lindsay (or a subsidiary thereof) purchased IRZ  
21 from Fred Ziari, its then owner. On or about September 30, 2015,  
22 IRZ, now a subsidiary of Lindsay, commenced its business  
23 relationship with te Velde. On or about August 3, 2017, te Velde  
24 terminated IRZ's services. On November 17, 2017, IRZ filed for  
25 its mechanic's lien.

26 On April 26, 2018, te Velde filed for Chapter 11, and IRZ  
27 duly filed its Proof of Claim. On March 8, 2019, Sugarman, acting  
28 as Trustee, commenced this adversary proceeding.

1 On August 27, 2021, Lindsay sold IRZ back to Ziari. More  
2 specifically, Lindsay, acting through a subsidiary called Lindsay  
3 Sales Holding Co. ("Lindsay SH") sold its ownership interest in  
4 IRZ to IRZ Holding Company LLC ("IRZ HC"), which is owned by  
5 Ziari. The transfer was effectuated through a Membership Interest  
6 Purchase Agreement ("MIPA") dated August 27, 2021.

7 Under the MIPA, Lindsay SH is identified as the Seller, IRZ  
8 is identified as the Company, and IRZ HC as the Purchaser. While  
9 Sugarman provides excerpts from the MIPA beneficial to his  
10 motion, the entire sections relevant to this motion are quoted  
11 below. The proper names of the parties are substituted in for  
12 clarity.

13 4.3(h) **Willow Creek Litigation: Nasho Project Claim.**  
14 [IRZ HC] and [IRZ] acknowledge and agree that [Lindsay  
15 SH] shall have the right to manage, control, defend,  
16 litigate and settle both the Willow Creek Litigation  
17 and the Nasho Project Claim in its sole discretion, and  
18 [IRZ HC] shall cooperate and cause Company and its  
19 employees and representatives to cooperate with respect  
20 to the Willow Creek Litigation and the Nasho Project  
21 Claim (at [Lindsay SH]'s expense), and otherwise  
22 provide [Lindsay SH] with all reasonable access to the  
23 Company's books, records and personnel, as reasonably  
24 requested in connection with the Willow Creek  
25 Litigation and the Nasho Project Claim, and any related  
26 matters. Notwithstanding any of the foregoing, however,  
27 or any other part of this Agreement, [Lindsay SH] may  
28 not settle, compromise or discharge (including the  
consent to entry of any judgement) any claims related  
to the Willow Creek Litigation or the Nasho Project  
Claim without [IRZ]'s consent, unless the claimants  
against [IRZ] agreed to release and discharge [IRZ] and  
[IRZ HC] of all liability as part of the settlement,  
compromise or Judgement, and the [IRZ] and [IRZ HC] owe  
no obligations and incur no losses or liabilities in  
connection with the settlement, compromise or  
judgement.

Doc. #764 (Exhibit C, ¶4.3(h)).

///

5.1(c) **Indemnification by Seller.** [Lindsay SH] shall indemnify, defend and hold harmless [IRZ HC], and, if applicable, [IRZ HC]'s, owners, affiliates (including [IRZ] after the Closing), lenders, attorneys, accountants, agents and employees and their heirs, successors and assigns (collectively, the "[IRZ HC] Indemnified Parties" and together with the [Lindsay SH] Indemnified Parties the "Indemnified Parties") from, against and in respect and to the extent of any Losses imposed on, sustained, incurred or suffered by any of the [IRZ HC] Indemnified Parties, relating to or arising out of (i) any breach of any representation or warranty made by the Seller in this Agreement (including the Fundamental Representations), (ii) the breach of any covenant or agreement of the [Lindsay SH] contained in this Agreement (iii) the Willow Creek Litigation and (iv) the Nasho Project Claim. Notwithstanding anything herein to the contrary, Seller shall not, and in no event, have any obligation to indemnify, defend, or hold harmless the [IRZ HC] Indemnified Parties for any Losses in excess of the [Lindsay SH] Indemnity Cap under Section 5.1(c)(i) or (ii). Furthermore, [Lindsay SH] shall not have any obligation to indemnify, defend or hold harmless the [IRZ HC] Indemnified Parties pursuant to Section 5.1(c)(i) (other than with respect to Fundamental Representations) for any Losses (y) until the aggregate amount of any Losses exceeds \$50,000, and then only for Losses in excess of \$50,000, and (z) in excess of \$500,000.

Doc. #764 (Exhibit C, ¶5.1(c)).

Sugarman seeks partial summary judgment and an order from this court confirming that, based on the MIPA provisions cited, Lindsay is obligated to indemnify IRZ for any losses incurred in this adversary proceeding. Doc. #766.

Defendants do not directly challenge Sugarman's interpretation of the meaning of the indemnity clauses, but rather raise jurisdictional and standing objections because (a) IRZ HC and Lindsay SH are not parties to this adversary, (b) neither Trustee nor Debtor are parties to the MIPA, and (c) the Complaint pleads no claims seeking relief under the MIPA. Doc. #800.

1 In reply, Sugarman does not address the jurisdictional  
2 problems raised by the fact that Lindsay is not a party to the  
3 MIPA. Instead, they rely entirely on the fact that Ziari, acting  
4 as Lindsay's Rule 30(b)(6) designee during depositions, stated  
5 that ¶¶4.3(h) and 5.1(c) of the MIPA were both still in effect  
6 and in full force, that Lindsay had the right to manage and  
7 control IRZ and Lindsay's defense to the instant litigation, and  
8 that Lindsay was obligated to indemnify IRZ for any losses  
9 arising out of this litigation. Doc. #766; Doc. #764 (Exhibit E  
10 at 20:4-22;2 and 22-3-24).

11 Regardless of Ziari's belief about what Lindsay's  
12 indemnification obligations under the MIPA might have been, the  
13 fact remains that Lindsay HC was the one to sign the MIPA, not  
14 Lindsay. And the plain language of ¶5.1(c) says that it is  
15 Lindsay HC that has accepted that obligation and not Lindsay.

16 Furthermore, the court notes that the indemnity language in  
17 the MIPA is not as unambiguous as Sugarman suggests, as it  
18 contains several conditions and limitations on Lindsay HC's  
19 indemnity obligations. Those conditions require IRZ to cooperate  
20 with Lindsay H C concerning the litigation; provide access to  
21 books and records; and consent to a settlement unless IRZ "walks  
22 away." Finally, there are minimum and maximum indemnity caps on  
23 Lindsay H C's obligations.

24 These jurisdictional questions and disputed issues of  
25 material fact surrounding the breadth and scope of the indemnity  
26 agreement (to say nothing of which parties are actually bound to  
27 it) preclude summary judgment on this point. It may well be the  
28 case that Lindsay is ultimately obligated to indemnify IRZ for

1 any losses arising from this litigation. But that is not  
2 something the court can declare as a matter of law on a motion  
3 for summary judgment at this juncture.

4  
5 **CONCLUSION**

6 Based on the foregoing, the court recommends that the  
7 District Court grant partial summary judgment on the limited  
8 questions of whether a valid contract existed between Velde and  
9 IRZ (it did) and whether Defendants' Second Affirmative Defense  
10 is applicable in this case (it is not). While by no means  
11 limiting what may be both material and disputed issues of fact to  
12 those raised in this report and recommendations, this court  
13 recommends with the above exceptions that the District Court deny  
14 the motion for partial summary judgment on the merits.

15 Objections to the above Report and Recommendation, responses  
16 thereto and other requirements shall be as required by Fed. R.  
17 Bankr. Proc. 9033. Rulings on the evidentiary objections by both  
18 parties are filed concurrently.

19  
20 Dated: May 8, 2025

By the Court

21  
22 /s/ René Lastreto II  
23 René Lastreto II, Judge  
24 United States Bankruptcy Court  
25  
26  
27  
28