UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, June 16, 2021
Place: Department B – Courtroom #13
Fresno, California

ALL APPEARANCES MUST BE TELEPHONIC
(Please see the court's website for instructions.)

Pursuant to District Court General Order 631, courthouses for the Eastern District of California will be reopened to the public effective June 14, 2021. Each Judge has discretion to determine whether to hold hearings in person or remotely. The Honorable René Lastreto II will continue to conduct all hearings in Fresno remotely until June 28, 2021. At this time, when Judge Lastreto will resume in person hearings in the Bakersfield Session is to be determined. No persons are permitted to appear in court unless authorized by order. All appearances of parties and attorneys shall be telephonic through CourtCall. The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.

The court will resume in-person courtroom proceedings in Fresno on June 28, 2021. Parties may still appear telephonically provided that they comply with the court's telephonic appearance procedures. For more information click here.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called, and all parties will need to appear at the hearing unless otherwise ordered. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

9:30 AM

1. 19-10802-B-13 **IN RE: STEVE/SHELLY BIERER**
DMG-2

MOTION TO MODIFY PLAN
5-7-2021 [33]

SHELLY BIERER/MV
D. GARDNER/ATTY. FOR DBT.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

Steve Bierer and Shelly Ann Bierer ("Debtors") seek confirmation of their First Modified Plan. Doc. #33. Debtors wish to extend the duration of their plan from 60 months to 63 months under the COVID-19 Bankruptcy Relief Extension Act of 2021 and 11 U.S.C. § 1329(d).

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected. Doc. #38.

Debtors' attorney, D. Max Gardner ("Counsel"), filed a declaration in response. Doc. #40. Counsel states that he consulted with Trustee's attorney and advised that Debtors would file a modified plan. Counsel intended to file and serve the modified plan on June 9, 2021, but Debtors were unavailable to review the plan.

On June 14, 2021, Debtors filed their Second Amended Chapter 13 Plan, which is set for hearing on July 28, 2021. *See* DMG-3. Consideration of the First Modified Plan and Trustee's objection is therefore moot. Accordingly, this motion to confirm the First Modified Plan will be DENIED AS MOOT because the Debtors filed, served, and set for hearing a new plan for confirmation.

2. 18-12731-B-13 **IN RE: MARK/ALICIA GARAY**
PK-6

CONTINUED MOTION FOR COMPENSATION FOR PATRICK KAVANAGH, DEBTORS ATTORNEY(S)
5-10-2021 [106]

PATRICK KAVANAGH/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after hearing.

Patrick Kavanagh of the Law Office of Patrick Kavanagh ("Movant"), counsel for Mark Garay and Alicia Marie Garay ("Debtors"), requests interim compensation of $5,550.00 for services rendered from April 3, 2018 through February 3, 2021. Doc. #106. Debtors signed a statement stating that they have reviewed the fee application and have no objections. *Id.*, ¶ 7. Movant asks that these fees be paid by chapter 13 trustee Michael H. Meyer ("Trustee").

Opposition was not required and may be presented at the hearing. In the absence of opposition, the court is inclined to GRANT this motion.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

The matter originally pre-disposed and denied without prejudice because the chapter 13 trustee was electronically notified, rather than served by mail in accordance with Fed. R. Bankr. P. 7004. Doc. #120. The court reconsidered service requirements and determined that electronic notification is sufficient under Fed. R. Bankr. P. 2006(a)(6) and 9036. Doc. #128. However, since the matter was filed on less than 28 days' notice, opposition was not required and could have been presented at the original hearing date. Because the matter was not heard, the court continued the matter to June 16, 2021 so that opposition could appear at the hearing. Doc. #130.

Form EDC 3-096, *Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys*, indicates that the parties agreed to pay Movant $5,946.00 for this case, of which $1,070.00 was paid prior to the filing of the case. Doc. #7. Section 3.05 of the Original Plan states that Movant was paid $1,070.00 prior to the filing of the case and $4,876.00 shall be paid through the plan. Doc. #5. The original plan was confirmed on August 29, 2018. Doc. #13.

The First Modified Plan provided for the same fee structure as the original plan, but it was not confirmed. Docs. #35; #49. The Second Modified Plan also provided for the same fee structure and was confirmed on January 8, 2020, but no order confirming plan was ever submitted. Docs. #61; #63. The Third Modified Plan further provided for the same fee structure and was confirmed on July 10, 2020. Docs. #73; #94.

The Fourth Modified Plan provides for pre-petition fees of $1,070.00, with an additional $5,430.00 to be paid through the plan by filing and serving a motion in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017. Doc. #101. The Fourth Modified Plan was denied for procedural reasons on June 3, 2021. Doc. #129. Debtors refiled their motion to confirm the Fourth Modified Plan, which is set for hearing on July 7, 2021 at 9:00 a.m. PK-7. The plan also contains a *Johnson* waiver allowing fees to be paid post-discharge.[1]

Movant requests $5,500.00 in fees, which will be paid using the $1,070.00 retainer, with $4,430.00 to be paid by Trustee in accordance with the Fourth Modified Plan. Movant indicates that his firm spent 23.80 billable hours at $300.00 per hour, totaling $7,140.00 in fees. *Id.*, ¶ 5. However, all fees in excess of $5,500.00, and all expenses, are waived.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses."

Movant's services included, without limitation: (1) advising Debtors about bankruptcy and non-bankruptcy alternatives; (2) reviewing Debtor's financial information, the effects of exemptions, repossession, and value of assets; (3) gathering information and documents to prepare the petition; (4) preparing the petition, schedules, statements, and chapter 13 plan; (5) preparing and sending § 341 meeting documents to Trustee; (6) attending and completing the § 341 meeting of creditors; (7) confirming a chapter 13 plan; and (8) preparing, filing, and prosecuting multiple motions to modify plan. Doc. #108, Ex. B. Debtors state that they have read the fee application and have no objections. Doc. #108, ¶ 7. The court is inclined to find the services reasonable and necessary, and the expenses actual and necessary.

This matter will be called as scheduled to inquire whether any party in interest opposes this motion.

In the absence of opposition, this motion will be GRANTED on an interim basis. Movant will be awarded $5,500.00 in fees for services rendered from April 3, 2018 through February 3, 2021 on an interim basis under 11 U.S.C. § 331, subject to final review pursuant to 11 U.S.C. § 330. Movant will be authorized to draw on the $1,070.00 retainer and Trustee will be authorized to pay Movant $4,430.00 in

[1] *Wolff v. Johnson (In re Johnson)*, 344 B.R. 104 (B.A.P. 9th Cir. 2006).

accordance with the Fourth Modified Plan provided that it is approved at the July 7, 2021 hearing.

3. 18-13447-B-13 **IN RE: WILEY GARDNER**
DRJ-3

MOTION TO MODIFY PLAN
5-5-2021 [54]

WILEY GARDNER/MV
DAVID JENKINS/ATTY. FOR DBT.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

Wiley Carl Gardner ("Debtor") seeks confirmation of his Second Amended Chapter 13 Plan under Local Rule of Practice ("LBR") 3015-1(d)(2). Doc. #54.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected. Doc. #60.

Debtor replied and stipulated to plan confirmation with Americredit Financial Services ("Creditor"). Docs. ##62-63.

Trustee subsequently withdrew his opposition. Doc. #65.

This motion was set for hearing on 35 days' notice as required by LBR 3015-1(d)(2). The failure of the creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest, except Trustee, are entered. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

In reply to Trustee's objection, Debtor stipulated with Creditor to reduce its monthly distribution to $453.56 until the claim is paid in full. Doc. #63. Debtor urges that the stipulation adequately addresses Trustee's objection and does not materially or adversely impact any other creditor. Doc. #62.

Trustee withdrew his objection on June 11, 2016. Doc. #65.

This motion will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed. Trustee to approve the order confirming plan.

4. 18-12050-B-13 **IN RE: GENEVIEVE SANTOS**
ALG-5

CONTINUED MOTION TO MODIFY PLAN
3-29-2021 [105]

GENEVIEVE SANTOS/MV
JANINE ESQUIVEL OJI/ATTY. FOR DBT.
WITHDRAWN. RESPONSIVE PLEADING.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Debtor Genevieve Ann Santos withdrew this motion on May 17, 2021. Doc. #125. Accordingly, this matter will be dropped from calendar.

11:00 AM

1. 20-13702-B-7 **IN RE: OFELIA AGUILAR**
21-1010

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-26-2021 [1]

FIRST NATIONAL BANK OF OMAHA
V. AGUILAR
CORY ROONEY/ATTY. FOR PL.
DISMISSED 5/4/21, CLOSED 5/24/21

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Plaintiff First National Bank of Omaha dismissed this case with prejudice under Fed. R. Civ. P. 41(a)(1)(A)(i) (applicable by Fed. R. Bankr. P. 7041) by filing a notice of dismissal on May 4, 2021. Docs. #12; #15. The adversary proceeding was closed on May 24, 2021. Accordingly, this status conference will be dropped from calendar as moot.

2. 20-12037-B-7 **IN RE: GURDIAL SINGH**
21-1018

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-30-2021 [1]

SALVEN V. HANNON ET AL
ANTHONY JOHNSTON/ATTY. FOR PL.

NO RULING.

The court intends to grant the motion to approve the settlement agreement between the parties in matter #3, which will resolve all claims in this adversary proceeding. Plaintiff has stated that he will dismiss this adversary proceeding with prejudice upon approval of the settlement agreement. This matter will be called as scheduled to inquire about the parties' positions.

3. 20-12037-B-7 **IN RE: GURDIAL SINGH**
21-1018 ADJ-1

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH LATINO LAW INC.
5-14-2021 [14]

SALVEN V. HANNON ET AL
ANTHONY JOHNSTON/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

Chapter 7 trustee James E. Salven ("Plaintiff") moves for an order approving a settlement agreement between Plaintiff and Latino Law, Inc. ("LLI") under Fed. R. Bankr. P. 9019. Doc. #14. The settlement agreement settles all claims by Plaintiff against LLI and attorney Mark J. Hannon (collectively "Defendants"). Under the terms of the settlement, LLI has paid Plaintiff $3,500.00 in full satisfaction of any claims raised against Defendants. Plaintiff will dismiss this adversary proceeding with prejudice upon approval of this compromise.

Gurdial Singh ("Debtor"), the U.S. Trustee, and all creditors were properly served with this motion. No party in interest timely filed written opposition. This motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

BACKGROUND

Debtor filed chapter 7 bankruptcy on June 15, 2020. Case No. 20-12037. At the time, Debtor was the sole shareholder of Annanoor Transport, Inc. ("Corporation"). Debtor's shares became property of the estate under 11 U.S.C. § 541.

Corporation filed chapter 7 bankruptcy on December 18, 2020. Case No. 20-13878. Defendant Hannon is counsel in both cases. Plaintiff, as chapter 7 trustee of Debtor's bankruptcy estate, did not consent to Corporation's bankruptcy filing. Corporation alleged that Debtor's son paid attorney fees of $5,200.00 to Defendants on June 24, 2020, which was five months before Corporation's bankruptcy was filed.

Hannon allegedly told Plaintiff that legal fees for both cases were paid from Debtor's son's account in the amounts of $4,500.00 and $3,700.00. Doc. #14. However, Plaintiff alleges that Debtor's wife wrote a check to LLI on June 12, 2020 in the amount of $3,700.00, which implies that Defendants were paid $11,900.00 for both cases, which is a $3,700.00 overpayment. Plaintiff acknowledges that the statement of financial affairs in Corporation's bankruptcy indicated legal fees of $5,200.00, so the records are unclear as to how much was paid to Defendants.

Plaintiff filed this adversary proceeding on March 30, 2021 contending that there was no authority for filing Corporation's bankruptcy and seeking disgorgement of legal fees. Plaintiff and Defendants have agreed to settle this action. Under the terms of the settlement, Defendants have paid Plaintiff $3,500.00 in exchange for full release of any claims raised by Plaintiff against Defendants in this adversary proceeding. Plaintiff will dismiss this proceeding with prejudice after the settlement has been approved.

DISCUSSION

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of the creditors with a proper deference to their reasonable views. *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the *Woodson* factors balance in favor of approving the compromise. That is:

1. Probability of success in litigation: Corporation's shares were property of Debtor, and therefore became property of Debtor's bankruptcy estate. Debtor lacked authority to authorize Corporation's bankruptcy filing. Though probability of success is far from assured, it is likely that the court would order disgorgement of legal fees.
2. Difficulties, if any, to be encountered in collection: Plaintiff has already received $3,500.00, which provides funds to administer the estate. Plaintiff is uncertain whether it would be difficult to collect an additional $1,700.00, which is the amount of additional disgorgement if Plaintiff prevails

at trial. Plaintiff suspects that collection efforts would exceed $1,700.00.

3. Complexity of litigation involved, and expense, inconvenience, and delay necessarily attending to it: While the issues involved in this litigation are not complex, litigation itself is time consuming. Proceeding in litigation will decrease the net recovery to the estate due to additional legal fees and expenses. Plaintiff believes that he would easily spend more than the anticipated additional recovery of $1,700.00 to litigate this proceeding to trial.

4. Paramount interest of the creditors: Plaintiff contends that creditors will benefit from the net recovery to the estate, which will allow Plaintiff to pay a dividend to allowed unsecured claims. No creditor has opposed this settlement agreement and all creditors were properly served. Doc. #17.

The settlement is fair and equitable. The court concludes that the compromise is in the best interests of creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. *In re Blair*, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise over litigation for its own sake. *Id.* This motion will be GRANTED.

This ruling is not authorizing the payment of any fees or costs associated with the litigation.

4. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1007

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-7-2019 [1]

SUGARMAN V. BOARDMAN TREE
FARM, LLC ET AL
JOHN MACCONAGHY/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

5. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1033

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-8-2019 [1]

SUGARMAN V. IRZ CONSULTING,
LLC
JOHN MACCONAGHY/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

The court is in receipt of chapter 11 trustee Randy Sugarman's ("Trustee") status report, wherein Trustee requests a continuance of

approximately 60 days to resolve the pleadings, provide documentary discovery to the third-party defendants, and conduct a new Civil Rule 26 conference.[2] Doc. #231. Trustee states that counsel for third-party defendants IRZ, Boardman Tree Farm, Valmont Northwest, and U.S. Farm Systems have agreed to a continuance, and counsel for George Chadwick Consulting has no objection provided that its Civil Rule 12(b)(6) motion is heard.

6. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1033

THIRD-PARTY STATUS CONFERENCE RE: THIRD-PARTY COMPLAINT
2-24-2021 [163]

SUGARMAN V. IRZ CONSULTING, LLC
KYLE SCIUCHETTI/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

The court is in receipt of chapter 11 trustee Randy Sugarman's ("Trustee") status report, wherein Trustee requests a continuance of approximately 60 days to resolve the pleadings, provide documentary discovery to the third-party defendants, and conduct a new Civil Rule 26 conference. Doc. #231. Trustee states that counsel for third-party defendants IRZ, Boardman Tree Farm, Valmont Northwest, and U.S. Farm Systems have agreed to a continuance, and counsel for George Chadwick Consulting has no objection provided that its Civil Rule 12(b)(6) motion is heard.

7. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1033 DLF-1

MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF PROCEDURE 12(B)(6)
4-27-2021 [194]

SUGARMAN V. IRZ CONSULTING, LLC
MICHAEL DIAS/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied. Chadwick to file an Answer within 14 days of entry of the order.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

[2] References to "Civil Rule" are to the Federal Rules of Civil Procedure.

Defendant and Third-Party Plaintiff IRZ Consulting, LLC ("IRZ") filed a third-party complaint against Third-Party Defendant George Chadwick dba George Chadwick Consulting ("Chadwick") and other third-party defendants alleging negligence, indemnity, and contribution. Doc. #163.

Chadwick moves to dismiss IRZ's third-party complaint for failure to state a claim upon which relief can be granted under Civil Rule 12(b)(6).[3] Doc. #194.

IRZ timely opposed. Doc. #222.

This motion will be DENIED. Chadwick shall file and serve an Answer within 14 days of entry of the order denying this motion.

BACKGROUND

This adversary proceeding derives from Gregory John te Velde's ("Debtor") chapter 11 bankruptcy case. Debtor owned a large dairy in Boardman, Oregon ("Lost Valley Farm"), which became property of the bankruptcy estate. Chapter 11 trustee Randy Sugarman ("Trustee") initiated an adversary proceeding against IRZ alleging $18.8 million in construction defect damages on March 8, 2019. Doc. #1. Trustee asserted negligence and breach of contract theories.

Trustee also objected to IRZ's claim in the amount of $347,057.56. *See* Claim #19. IRZ filed a third-party complaint (attaching a copy of the underlying complaint) against nine third-party defendants, including Chadwick, whose work relates to the allegations in Trustee's complaint. Doc. #163. IRZ alleges that Chadwick performed a hydrogeological survey necessary for Debtor's Confined Animal Feeding Operation ("CAFO") permit, as well as monitoring groundwater and supervising construction of several wells on the property.[4]

Third-Party Complaint

IRZ asserts three causes of action as to all third-party defendants: (1) negligence; (2) indemnity; and (3) contribution. Under Or. Rev. Stat. ("ORS") § 31.300, IRZ contends: (1) that it was not involved in the design of Debtor's farm; (2) to the extent that there are defects in the design of Debtor's farm, they are the responsibility of the third-party defendants who were involved in the design of the farm and self-contained recycling system; (3) IRZ alleges conduct in the complaint regarding the design of Debtor's farm that fails to meet the standard of professional skill and care ordinarily provided by other design professionals with similar credentials, experience, and expertise and practicing under the same or similar

[3] Unless otherwise indicated, references to "LBR" will be to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rule" will be to the Federal Rules of Bankruptcy Procedure; "Civil Rule" will be to the Federal Rules of Civil Procedure; and all chapter and section references will be to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

[4] Trustee also alleged the damage "cap" in the te Velde/IRZ contract is a fraudulent transfer. This theory is not at issue here.

circumstances; and (4) IRZ alleges that the failure to properly design was a cause of the claimed property damages, losses, or other harm.

First, IRZ denies liability as to the defects and damages alleged by Trustee and contends that the third-party defendants breached their duty of reasonable care by failing to (1) perform work in a good and workmanlike manner, in accordance with the contract, subcontract, manufacturer's specifications, industry standards, applicable building code, or regulation; and (2) use reasonable care to ensure its work was complete, free of defects, and otherwise free of substandard work. If Trustee incurred damages as result of third-party defendants' conduct and those damages are recovered from IRZ, IRZ contends that the damages are attributable to third-party defendants, are foreseeable, and the proximate result of the third-party defendants' conduct. IRZ insists that it is entitled to recover the cost of damages, including the cost of defending the action.

Second, if IRZ is found liable for damages associated with the work of the third-party defendants, then IRZ's fault giving rise to such liability was passive and secondary, while the fault of the third-party defendants was active and primary. IRZ contends that it is entitled to common law indemnity from third-party defendants for the full amount IRZ is required to pay to Trustee, and for attorney fees and costs incurred.

Third, to the extent that there is any liability assessed in this case, IRZ asserts that it is owed contribution by third-party defendants for its proportionate share of fault under ORS § 31.800.

Chadwick moves for dismissal under Civil Rule 12(b)(6) alleging that IRZ has failed to sufficiently plead each cause of action.

DISCUSSION

Motion to Dismiss Standard

Civil Rule 12(b)(6) states dismissal is warranted "for failure to state a claim upon which relief can be granted." Courts may dismiss a complaint if it "fails to state a cognizable legal theory or fails to allege sufficient factual support for its legal theories." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016) (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, F.3d 1035, 1041)); *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). "A complaint need not state 'detailed factual allegations,' but must contain sufficient factual matter to 'state a claim to relief that is plausible on its face.'" *Doan v. Singh*, 617 F.App'x 684, 685 (9th Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544-55 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

When considering a motion to dismiss, all material facts alleged in the complaint are to be taken as true and showed be viewed in the light most favorable to the plaintiff. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). "[T]he tenet that a court must accept as true all allegations in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 662 (citing *Twombly*, 550 U.S. at 555). The court may also draw on its "judicial experience and common sense." *Id.* at 679. Additionally, the court may consider the following limited material without converting the motion to dismiss into a motion for summary judgment under Civil Rule 56 (made applicable by Rule 7056): (1) documents attached to the complaint as exhibits; (2) documents incorporated by reference into the complaint; and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (*per curium*) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004).

Dismissal under Civil Rule 12(b)(6) based on an affirmative defense is proper only if the defendant shows some obvious bar to securing relief on the face of the complaint. *ASARCO, LLC v. Union Pacific R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2004).

Negligence

To state a cause of action for negligence under Oregon law, the plaintiff must demonstrate:

(1) a legal duty of care;
(2) a breach thereof; and
(3) damage to plaintiff which was proximately caused by the breach.

Twin City Fire Ins. Co. v. Phila. Life Ins. Co., 795 F.2d 1417, 1430 (9th Cir. 1986).

Chadwick argues that IRZ's complaint does not plead any specific factual conduct demonstrating negligent conduct by Chadwick, only conclusions of law. Doc. #194. Chadwick notes that the only time he is referenced in the third-party complaint is in paragraph 12, which states that Chadwick performed the hydrogeological survey required for the CAFO permit.

Since negligence requires a showing that defendant's conduct caused a foreseeable risk of harm, there must be at least a plain, concise statement of the ultimate facts constituting a claim for relief to service a motion to dismiss. *Id.*, citing Civil Rule 8(a)(2); *Stewart v. Kids Inc. of Dallas*, OR, 245 Or. App. 267 (2011). Chadwick argues that the pleadings do not list any damage suffered as the result of his survey. There is nothing in the third-party complaint that asserts that Chadwick's survey caused harm to IRZ. Rather, the complaint is "conclusory and formulaic" and "devoid of any factual accusations that give rise to any liability on the part of Chadwick." Doc. #194.

Civil Rule 8(a)(2) only requires "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 545.

IRZ notes that it has not had any opportunity to conduct discovery related to the third-party defendants, including Chadwick. IRZ contends that Chadwick's hydrogeological survey played an integral part in Debtor's ability to obtain a CAFO permit to operate his dairy. Trustee alleges in his complaint that Lost Valley Farm is in an environmentally sensitive area with elevated nitrates in the groundwater. Doc. #1, ¶ 11. To obtain and maintain a CAFO permit, Debtor was required to dispose of dairy waste in an environmentally responsible manner, which required professional assistance to determine the feasibility of designing a disposal system. This required a hydrogeological survey.

Chadwick provided professional assistance to determine the feasibility of designing a waste management system. Chadwick's work included analyzation of the groundwater to obtain the CAFO permit required by the Oregon Department of Agriculture ("ODA"), preparation of groundwater monitoring plan, continued monitoring of the quality and quantity of groundwater, and supervision of construction of several wells on the property. IRZ contends that Chadwick was responsible for providing data and reports regarding the quantity and quality of groundwater to ODA for review, and for reporting the effects of the presence of the cattle herd and dairy relating to the quality and quantity of water on the farm.

IRZ emphasizes that paragraph 5 of the third-party complaint specifically incorporates paragraph 29 of Trustee's complaint. While performing his hydrogeological survey, monitoring groundwater, and constructing wells, IRZ contends that Chadwick:

- Failed to prepare an adequate and competent preliminary and/or final infrastructure plan to include adequate onside drain lines, underground water lines, and underground power lines.
- Failed to prepare an adequate and competent preliminary and/or final effluent water flow line plan to include adequate lines for site drainage, structures, corrals, and effluent handling components to the lagoon systems.
- Failed to prepare an adequate and competent preliminary and/or final lagoon design sufficient to satisfy the Debtor's obligations under his CAFO permit and other dairy entitlements.
- Most egregiously, prepared a defective irrigation plan and failed to advise the Debtor that there were too many acres under lease to Boardman Tree Farm, LLC, to enable the Debtor to install a sufficient number of irrigation pivots to properly dispose of the effluent from a 12,000 head dairy herd.
- Failed to adequately perform its construction management and oversight of the Debtor's subcontractors and materialmen to ensure that the construction was undertaken in accordance with IRZ's plans, to the extent those plans were not defective, and

> in a manner which would enable the Debtor to lawfully operate under his CAFO permit once the dairy was commissioned.

Docs. #163, ¶ 5; #1, ¶ 29. On this basis, IRZ argues that Chadwick received fair notice of the claims asserted and the facts are sufficient to state a plausible claim for relief. Doc. #222.

IRZ also asserts that it has been damaged by Chadwick in an amount to be proven at trial. Trustee asserts an $18.8 million claim against IRZ, and a portion of that is attributable to Chadwick.

The third-party complaint attaches the underlying complaint which specifically alleges the negligent acts that caused damage to the estate asset. Chadwick's survey is alleged to be part of the process for environmental certification and ODA review. Chadwick has fair notice of the allegations against it.

The court agrees that IRZ has sufficiently pleaded its negligence claim. Chadwick's motion to dismiss will be DENIED as to the first cause of action for negligence.

Indemnity

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

Chadwick argues that IRZ has not plead any facts demonstrating that a legal obligation has been discharged that would render Chadwick liable for indemnity. Chadwick's only contribution is that he performed a geological survey for a CAFO permit. Since indemnity "requires that a common duty be mutually owed to a third party[,]" IRZ has failed to plead any facts to establish a common duty owed by Chadwick to IRZ. *Id.*, citing *Citizens Ins. Co. of N.J. v. Signal Ins. Co.*, 261 Or. 294, 297 (1972); *Ironwood Homes, Inc. v. Bowen*, 719 F. Supp. 2d 1277, 1294 (D. Or. 2010). Since the second claim fails to meet the *Rains* elements and the Civil Rule 8(a)(2) pleading standards, Chadwick asks this motion to be granted.

IRZ disagrees. Doc. #222. Civil Rule 14(a)(1) (adopted under Rule 7014) provides that "[a] defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is *or may be liable* to it for all or part of the claim against it." Civil Rule 14(a)(1) (emphasis added). "A third-party claim may be asserted under [Civil] Rule 14(a) only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant. The basis of the third-party claim may be indemnity, subrogation, contribution, express or implied warranty, or some other theory." *SCD RMA, LLC v. Farsighted Enters., Inc.*, 591 F. Supp. 2d 1141, 1145 (D. Haw. 2008) (citations omitted). The purpose of Civil Rule 14(a) is to "promote

judicial efficiency by eliminating the necessity for the defendant to bring a separate action against a third party who may be derivatively liable to the defendant for all or part of the plaintiff's original claim." *Kim v. Fujikawa*, 871 F.2d 1427, 1434 (9th Cir. 1989).

IRZ agrees with the general elements of an indemnity claim between a plaintiff and defendant but insists that Chadwick is mistaken as to a third-party plaintiff's pleading requirements for a common law indemnity claim, which are lessened. Doc. #222. IRZ relies on *Kahn v. Weldin*, 60 Or. App. 365, 371-72, 653 P.2d 1268, 1272-73 (1982) ("To require a defendant who raises an indemnity cross-claim to plead and prove actual discharge of a judgment before the judgment is entered against the defendant raising it would contravene the purpose and destroy the usefulness of the cross-claim rule.") Similarly, requiring IRZ to plead and prove actual discharge of a judgment before a judgment is entered against IRZ would destroy the purpose of the third-party claim rule.

IRZ states that Chadwick and IRZ both share the common duty to avoid the foreseeable risk of property damage to the Debtor caused by work on the same project. IRZ claims that in sharing this common duty, it has sufficiently alleged a third-party claim for indemnity against Chadwick and the motion should be denied.

However, neither party addresses that, as of 1995, Oregon law no longer provides for joint liability of multiple tortfeasors. "[T]he Oregon Legislative Assembly has instituted a system of comparative fault in which (1) the trier of fact allocates fault and responsibility for payment of damages between the parties; and (2) each tortfeasor is liable for damages attributable to only its own negligence." *Eclectic*, 357 Or. at 35-36, 346 P.3d at 474 ("Oregon's comparative fault system eliminates the need for judicially created indemnity in situations like this one—in which a defendant is liable, if at all, for only the damages that resulted from its own negligence[.]").

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

When ORS § 31.610 applies, common law indemnity is not available. *Eclectic*, 357 Or. 327, 330, 354 P.3d 678 (2015). "Thus, in the circumstance presented here—in which ORS 31.610 applies, tortfeasors are liable only for their own negligence, and a jury determines the relative fault and responsibility of each tortfeasor—a judicially created claim for common-law indemnity is unnecessary." *Ibid.*

At first glance, IRZ's indemnity claim does not appear to be applicable under *Rains* because (1) this case does not involve claims of strict products liability, and (2) ORS § 31.610 applies to the negligence claims. However, Trustee's second cause of action against IRZ is for breach of contract under the September 30, 2015 written

work order and November 17, 2015 agreement. Doc. #1. ORS § 31.610 only applies to indemnity for negligence causes of action, so indemnity may still be available for any contractual liability.

The crucial characteristic of a Civil Rule 14 claim is that a defendant is attempting to transfer to the third-party defendant the liability asserted against it by the original plaintiff. *Stewart v. Am. Int'l Oil & Gas Co.*, (9th Cir. 1988).

The claim is sufficiently plead.

Contribution

As to contribution, Chadwick cites to ORS § 31.800, which provides for the right of contribution when "two or more individuals are found liable jointly or severally in tort. . ." ORS § 31.800(1). Chadwick insists that IRZ alleges no facts giving rise to tort liability, including negligence. Since IRZ failed to establish its first claim for relief, no right to contribution exists. Since IRZ has failed to establish any facts that there is a common liability, the claim for contribution must fail by operation of law. Doc. #194. The court discussed negligence above.

IRZ, meanwhile, urges that it has sufficiently stated a claim for contribution against Chadwick. ORS § 31.800(1) provides that when two or more persons are liable in tort for the same injury to property, then there is a right of contribution even if judgment has not yet been entered against any of them. Doc. #222. Since Trustee asserted a claim for negligence alleging construction defects in Debtor's Lost Valley Farm, IRZ asserted a negligence claim against third-party defendants, including Chadwick, for those same defects. IRZ argues that the negligence claim satisfies the pleading requirements of Civil Rule 8(a)(2).

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

> [U]nder Oregon's current comparative negligence scheme, no tortfeasor is liable for more than its percentage of fault, and that percentage of fault is determined in the original negligence action brought by the plaintiff. ORS 31.610(2); ORS 31.805. A defendant cannot bring a contribution action to seek a different determination of its percentage of fault. A contribution action serves 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).

Lasley v. Combined Transp., Inc., 351 Or. 1, 19, 261 P.3d 1215, 1226 (2011). "[M]uch like contribution, a claim of common-law indemnity is unnecessary and unjustified 'in cases . . . in which jurors allocate fault' pursuant to [ORS] § 31.605, which allows a party to pose special questions to a fact-finder as to each party's degree of

fault." *Wyland*, 2015 U.S. Dist. LEXIS 76156, at *5 (quoting *Eclectic*, 357 Or. at 38, 346 P.3d at 475).

As noted with indemnity, it is conceivable that IRZ could be found liable on a breach of contract theory. In which case, there may be indemnity and contribution liability on behalf of the third-party defendants.

Independently, Chadwick ignores Civil Rule 14 (a)(1)'s provision permitting an action against a nonparty *"who . . . may be liable to it for all or part of the claim against it."* This provision permits acceleration of a substantive claim through the impleader rule by allowing the defendant to assert the claim before the claim arises under the substantive law. *See* 3 Moore's Federal Practice-Civil § 14.05 (2021). This has occurred and is permissible here.

Chadwick can be protected from paying more than Chadwick's share, if any, before accrual of liability. The trial court can fashion a judgment providing for that protection or stay execution of the judgment until other parties pay their allocated share. Civil Rule 62(a) (Rule 7062).

CONCLUSION

In conclusion, IRZ has sufficiently pleaded its cause of action for negligence, indemnity, and contribution. This motion to dismiss will be DENIED. Chadwick to file an answer within 14 days of entry of this order.

8. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1037

CONTINUED STATUS CONFERENCE RE: NOTICE OF REMOVAL
7-23-2018 [1]

IRZ CONSULTING LLC V. TEVELDE
ET AL
HAGOP BEDOYAN/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

9. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
20-1001

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-6-2020 [1]

SUGARMAN V. CRAWFORD ET AL
JOHN MACCONAGHY/ATTY. FOR PL.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to September 1, 2021 at 11:00 a.m.

NO ORDER REQUIRED.

The parties stipulated to continue this status conference to September 1, 2021 so that they could conduct depositions and engage in mediation. On June 14, 2021, the court approved the stipulation, vacated the scheduling order, and continued the status conference. Doc. #41. Accordingly, this status conference is continued to September 1, 2021 at 11:00 a.m. and will proceed as a scheduling conference. Both parties shall submit proposed scheduling dates not later than seven days before the continued status conference.

10. 18-13677-B-9 **IN RE: COALINGA REGIONAL MEDICAL CENTER, A**
20-1051 **CALIFORNIA LOCAL HEALTH CARE DISTRICT**

PRE-TRIAL CONFERENCE RE: COMPLAINT
8-11-2020 [1]

COALINGA REGIONAL MEDICAL
CENTER, A CALIFORNIA LOC V.
MICHAEL WILHELM/ATTY. FOR PL.
DISMISSED 12/11/20; CLOSED 12/29/20

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

The parties stipulated to dismiss this adversary proceeding with prejudice, which was approved on December 11, 2020. Doc. #18. The adversary proceeding was closed on December 29, 2020. Accordingly, this status conference will be dropped from calendar as moot.