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JUL 12 2016

CLERK U.S. BANKRUPTCY COURT
Central District of California
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION

In re:

Arna Susan Vodenos

Debtor(s).

YOUVAL ZIV

Plaintiff(s),

v.

Arna Vodenos

Defendant(s).

CHAPTER 11

Case No.: 1:10-bk-25103-GM

Adv No: 1:16-ap-01028-GM

**MEMORANDUM OF OPINION GRANTING
MOTION FOR DISMISSAL AND MOTION
FOR REMAND (Dkt. # 32 & 6)**

Date: June 21, 2016

Time: 10:00 AM

Courtroom: 302

This adversary proceeding (the "Quiet Title Action") had originally been pending in California Superior Court for the County of Los Angeles (the "Superior Court") and was removed by defendant Jason Vogel ("Vogel"), who is the husband of co-defendant and debtor Arna Susan Vodenos ("Vodenos" or the "Debtor" and with Vogel, the

1 “Defendants”). Prior to the removal a Motion for Leave to Amend and File a Second
2 Amended Complaint (“Leave to Amend Motion”) by Plaintiff Youval Ziv (“Ziv”) and a
3 Motion for Reconsideration of Order Expunging Lis Pendens (“Reconsideration Motion”)
4 also by Ziv were pending before the Superior Court. Ziv has also brought a Motion to
5 Remand this proceeding to Superior Court (the “Remand Motion”). In addition, Vogel
6 and Vodenos have each brought motions to dismiss this adversary proceeding
7 (“Motions to Dismiss”).
8

9 These motions were heard on May 17, 2016 and continued to July 12, 2016. In
10 the meantime, on May 24, Mr. Vogel substituted in as his own attorney and on May 27,
11 Mr. Herrera, attorney for Ziv, filed a Notice of Voluntary Dismissal in this adversary
12 proceeding (dkt. 32). Attached to the Notice of Voluntary Dismissal is a stipulation (dkt.
13 32-1; the “Stipulation”) to:
14

- 15 • Dismiss the Quiet Title Action in Superior Court BC559813, although it has been
16 removed to this Court, as to Vodenos with prejudice;
- 17 • Dismiss causes of action 1 through 7 of the Quiet Title Action in Superior Court
18 as to Vogel with prejudice;
- 19 • Allow Ziv to file a second amended complaint as to Vogel “only by any procedure
20 permitted by law,” however that cannot include any relief as to the title or
21 ownership of the Property (defined below);
- 22 • Require Ziv to file a request for dismissal of this adversary proceeding;
- 23 • Take Ziv’s Leave to Amend Motion, Reconsideration Motion, and Remand
24 Motion and Vodenos’ Motion to Dismiss off calendar; and
- 25 • Leave all other matters pending in bankruptcy court involving these parties
26 unaffected, including Vodenos’ bankruptcy (10-bk-25103-GM).
27
28

1 Counsel for Ziv and for Vodenos signed the Stipulation. Vogel is not a party to
2 the stipulation.

3 Federal R. of Civil Procedure 41(a) allows a voluntary dismissal as follows:

4 (a) Voluntary Dismissal.

5 (1) By the Plaintiff.

6 (A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2,
7 and 66 and any applicable federal statute, the plaintiff may dismiss
8 an action without a court order by filing:

- 9 (i) a notice of dismissal before the opposing party serves
10 either an answer or a motion for summary judgment; or
11 (ii) a stipulation of dismissal signed by all parties who have
12 appeared.

13 (B) Effect. Unless the notice or stipulation states otherwise, the
14 dismissal is without prejudice. But if the plaintiff previously
15 dismissed any federal- or state-court action based on or including
16 the same claim, a notice of dismissal operates as an adjudication
17 on the merits.

18 (2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action
19 may be dismissed at the plaintiff's request only by court order, on terms
20 that the court considers proper. If a defendant has pleaded a counterclaim
21 before being served with the plaintiff's motion to dismiss, the action may
22 be dismissed over the defendant's objection only if the counterclaim can
23 remain pending for independent adjudication. Unless the order states
24 otherwise, a dismissal under this paragraph (2) is without prejudice.

25 Fed. R. Civ. P. 41.

26 Under Rule 41(a)(1)(A)(i), Ziv could dismiss this proceeding simply by filing a
27 notice of dismissal. The sticking point is the Stipulation, which is not signed by Vogel
28 and thus cannot be the basis of dismissal under Rule 41(a)(1)(A)(ii). However, it is
important that the dismissal be made pursuant to the Stipulation, because the
Stipulation clarifies and limits future actions by Ziv. It is also important to issue a ruling
setting forth the effect of the dismissal and the Stipulation on all matters between these
parties (*i.e.*, what is being dismissed and what is not.) The Court accordingly elected to
treat the notice of dismissal as a motion for dismissal and hold a hearing on its
approval. (Dkt. 34.)

1 The Court set this motion for dismissal for hearing on June 21, 2016. The
2 Stipulation and this motion of dismissal deal only with this adversary proceeding (the
3 Quiet Title Action), but there have been a number of other proceedings between these
4 parties - - in this Court and in Superior Court. The tentative ruling for the June 21
5 hearing accordingly set forth the various other actions, in order to clarify both their
6 status and how the Stipulation affects them as follows (comments from June 21 hearing
7 in italics):
8

9 Unlawful Detainer Action - Superior Court 14R03293 - this case seems to have
10 terminated since Ziv has left the property. Ziv's appeal was dismissed. Is there anything
11 left of this case? If so, what will happen? *Appeal pending; only damages left.*

12 Estimation of Claim #49 - now BAP CC-15-1382 - this concerns the lis pendens and
13 ownership claim. It is on appeal and briefing is continuing on the unjust enrichment
14 issue. Does the stipulation affect this? *Continuing only as to unjust enrichment.*

15 Quiet Title Suit - Superior Court BC559813, removed as 16-ap-1028 - among other
16 motions is one to amend, which adds Vogel as a defendant. Is this entire suit being
17 dismissed? If so, it will not be remanded to the superior court so what does Judge Shaller
18 have to agree to? *Dismissing only causes of action against Vodenos or as affecting*
19 *ownership of the Vulcan property. Dismissing causes of action 1 through 7 only.*

20 Trespass Suit - Superior Court BC571640 - this case has been dismissed and appears to
21 be completed.

22 Ziv Complaint to dismiss Vodenos' Chapter 11 or revoke confirmation - 15-ap-1244 -

23 This was dismissed with prejudice. The time to appeal has passed and no appeal has been
24 filed.

25 Ziv v. Vogel - Superior Court BC566592, Court of Appeal B265103 - This is a
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27
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1 defamation action. It seems to be on appeal as to a SLAPP motion. *Will continue.*

2 Possible new case of Ziv v. Vogel - when the Court held a recent hearing, Herrera
3 informed the Court that he was about to file a new superior court case against Vogel. Has
4 that been filed? What impact, if any, does the settlement have on this? *Seeking TRO as*
5 *to Vogel; will continue.*

6 Motion for Contempt - 10-bk-25103, dkt. 636 - Vodenos filed a motion for contempt. Is
7 that resolved by this stipulation? *Not affected by Stipulation.*

8
9
10 Service: Not in order. Vogel was served by e-mail with a notice of lodgment of the
11 proposed order of dismissal (dkt. 33), although his e-mail address does not appear to
12 be part of the court record, so there is no verification that the e-mail address used
13 resulted in actual notice. Vogel was not served with the Notice of Dismissal filed by Ziv
14 (dkt. 32).

15
16
17 Background: The timeline of events filed by the Court in conjunction with the
18 Memorandum sets out the background for these motions, in particular: VODENOS
19 CHAPTER 11 CASE, QUIET TITLE SUIT, VODENOS REMOVAL OF QUIET TITLE
20 SUIT, VOGEL REMOVAL OF QUIET TITLE SUIT (#1), and VOGEL REMOVAL OF
21 QUIET TITLE SUIT (#2). The following is a short background of these motions:

22 The original complaint commencing this proceeding in state court contained
23 seven causes of action: breach of oral joint venture agreement, breach of fiduciary duty,
24 promissory fraud, specific performance, declaratory relief, quiet title, and unjust
25 enrichment (the "Original Claims"), all arising out of an alleged joint venture agreement
26 between Ziv and Vodenos to sell certain real property owned by Vodenos (the
27 between Ziv and Vodenos to sell certain real property owned by Vodenos (the
28

1 “Property”) to Ziv. Ziv asserted that in August 2009 he and Vodenos entered into an oral
2 joint venture agreement providing that: Vodenos would lease the Property to Ziv for a
3 year and use the lease payments to keep the first priority lien current, Vodenos would
4 file bankruptcy so as to wipe out the second and third priority liens on the Property, and
5 Ziv would ultimately buy the property from Vodenos for \$3.2 million (enabling Vodenos
6 to make a profit of \$200,000). Ziv asserts that he spent \$400,000 improving the
7 Property in reliance on this agreement, but that Vodenos breached the joint venture
8 agreement by refusing to sell the Property to Ziv.
9

10 This original complaint was the basis of claim #49 in the Debtor’s bankruptcy
11 proceeding (the complaint was annexed to the proof of claim). This Court granted
12 summary judgment to the Debtor on six of the seven claims in Claim #49 and estimated
13 the seventh claim (unjust enrichment) at \$0. In granting summary judgment, this Court
14 ruled that such a joint venture agreement, if it existed, is barred by the statute of frauds
15 and cannot be prosecuted and that Ziv’s allegations at most showed preliminary
16 negotiations and not the existence of a valid agreement between the parties. (Tentative
17 Ruling in 10-25103, dkt. 542 @ 19:17-20:4).
18

19
20 Prior to removal of this action to this Court and after this Court had ruled on
21 Claim #49, Ziv filed a first amended complaint (“FAC”) that retained the seven Original
22 Claims, but added Vogel as a defendant. For the most part, the FAC merely added
23 Vogel as a named Doe defendant and changed each cause of action to be “against all
24 defendants” without specifically discussing Vogel’s actions. The FAC did allege that
25 Vogel breached a fiduciary duty arising out of a joint venture agreement, but alleged no
26 joint venture agreement that Vogel was part of. The FAC also alleged very generally
27 that Vogel participated in and induced Vodenos’ torts. Finally, the FAC alleged a
28

1 fraudulent conveyance:

2 [I]t was discovered that Defendant [sic] Vodenos and Vogel engaged in a
3 fraudulent transfer of the third lien position without consideration, the transaction
4 of which was designed to further induce the Plaintiff to rely on the agreement to
purchase the Property.

5 FAC at 5:27-6:2. However, the FAC never denominated a cause of action for fraud or
6 fraudulent conveyance.

7 Shortly after filling the FAC, Ziv sought leave of the court to file a second
8 amended complaint (“SAC”) that adds seven additional claims against Vodenos and
9 Vogel for: fraud and intentional deceit, intentional misrepresentation, negligent
10 misrepresentation, constructive fraud, conspiracy to defraud, and promissory estoppel
11 (the “New Claims”). Each essentially alleges that the Defendants promised to sell the
12 Property to Ziv on particular terms but never intended to keep their promise and that Ziv
13 relied on this promise to his detriment by paying rent, improving the property, and
14 foregoing the purchase of other property. This Leave to Amend Motion was pending
15 when this proceeding was removed, as was the Lis Pendens Motion (seeking
16 reconsideration of a Superior Court order expunging a lis pendens on the Property).
17 Shortly after removal, Ziv filed his Remand Motion.

18
19 The Court had prepared a tentative ruling on the Motions to Dismiss and the
20 Leave to Amend Motion. The analysis and conclusion in this tentative ruling is
21 instructive in considering whether the Court should approve the dismissal of all causes
22 of action in this adversary proceeding on the terms set forth in the Stipulation. Thus,
23 these tentative rulings are set forth below.
24
25

26
27 **Motions to Dismiss by Vogel and Vodenos:**

28 Motions:

1 Fed. R. Civ. P. 12(b) provides that an action can be dismissed for failure to state a
2 claim upon which relief can be granted. The Original Claims alleged in the FAC are
3 identical to the claims previously adjudicated by this Court in Claim #49. As this Court
4 entered summary judgment in favor of the Debtor of six of the claims and estimated the
5 remaining claim at \$0, the doctrine of res judicata bars Ziv from re-litigating these
6 claims.
7

8 Res judicata, or claim preclusion, provides that a final judgment on the
9 merits of an action precludes the parties from relitigating all issues connected with
10 the action that were or could have been raised in that action. Claim preclusion is
11 appropriate where: (1) the parties are identical or in privity; (2) the judgment in
12 the prior action was rendered by a court of competent jurisdiction; (3) there was a
13 final judgment on the merits; and (4) the same claim or cause of action was
14 involved in both suits.

15 *Rein v. Providian Fin. Corp.*, 270 F.3d 895, 898-99 (9th Cir. 2001)(citations omitted).

- 16 1. Parties identical or in privity: For Vodenos' motion, the parties are identical. For
17 Vogel's motion, the parties are in privity. Privity exists if there is sufficient
18 commonality of interest. "Here, Vogel and the Plaintiff are on title to the subject real
19 estate." Vogel Motion at 5:15. (*Note: It is not clear what this means, as Vodenos is*
20 *the only owner on the title report for the Property. See Property Title Report annexed*
21 *to Ziv's opposition to Vogel's Motion to Dismiss (dkt. #26).)*
- 22 2. Judgment rendered in court of competent jurisdiction: Ziv submitted to the
23 jurisdiction of this Court by filing Claim #49.
- 24 3. Final Judgment on the merits: Summary judgment on the six claims is a final
25 judgment on the merits and the \$0 estimation of the seventh claim is a determination
26 on the merits. (*Note: In actuality, only the \$0 unjust enrichment estimation is on*
27 *appeal.*)
- 28 4. Same claims or causes of action:

1 To decide the identity of claims, we have applied four criteria:(1) whether
2 rights or interests established in the prior judgment would be destroyed or
3 impaired by prosecution of the second action; (2) whether substantially the
4 same evidence is presented in the two actions; (3) whether the two suits
involve infringement of the same right; and (4) whether the two suits arise out
of the same transactional nucleus of facts.

5 *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1150 (9th
6 Cir. 2011).

- 7
- 8 i. *Rights established in prior judgment would be destroyed*: This Court's
9 determination that Ziv had no entitlement to estate property would be
10 destroyed by prosecution of the FAC.
- 11 ii. *Same evidence*: Ziv would be presenting the same evidence regarding the
12 validity of his interest in the Property.
- 13 iii. *Infringement of the same right*: The rights at issue in both are whether Ziv
14 has the right to quiet title on the Property.
- 15 iv. *Same transactional nucleus of facts*: Claim #49 simply appended the
16 original complaint, so the facts are identical. The FAC only added Vogel.
17

18 Thus, all of the elements of res judicata are established.

19 The Vogel Motion also quotes this Court's March 1, 2016 tentative ruling in
20 which it stated that Vogel's liability with respect to Vodenos' alleged joint venture with
21 Ziv is meaningless because this court has already ruled (in granting summary judgment
22 on six claims in Claim #49) that there was no joint venture.

23 Opposition to Vodenos' Motions to Dismiss

24 This Court removed this action for all purposes in a general unlimited remand,
25 thus res judicata prohibits the Court from exercising jurisdiction over this action.
26
27
28

1 The Debtor's Motion to Dismiss is premised on the finality of the Court's ruling
2 on Claim #49, but that ruling is on appeal to the B.A.P. and may be overturned. (*Note: In*
3 *actuality, only the \$0 unjust enrichment estimation is on appeal.*)

4 Ziv has made plausible claims in this action, thus meeting the "fair notice"
5 standard of Fed. R. Civ. P. 8(a).
6

7 The Debtor is forum shopping. Contrary to the Debtor's factual recitation, Judge
8 Shaller vacated the original demurrer not due to attorney negligence, but because the
9 demurrer was inconsistent with the Debtor's own stay. (*Note: Ziv does not provide any*
10 *support in the record for this assertion and the Superior Court's minute order granting a*
11 *second demurrer but with leave to amend indicates that the Superior Court changed it's*
12 *ruling because "since this is the first demurrer the court feels compelled to grant an*
13 *opportunity to amend."* See minute order attached to bk. dkt. 715.) Unhappy with this
14 order of the Superior Court, the Debtor then removed this action for a second time. The
15 Superior Court gave Ziv leave to amend the remanded matter and it should remain in
16 Superior Court.
17

18 Debtor's Reply

19 Unless this Court remands this action, the Court has jurisdiction and can rule on
20 the Debtor's motion to dismiss.
21

22 Six of the Original Claims were resolved by summary judgment by this court.
23 The seventh cause of action was estimated at \$0 – this claims estimation is the only ruling
24 on Claim #49 that is under appeal.
25

26 Opposition to Vogel's Motion to Dismiss

27 This Court does not have jurisdiction, as set forth in Ziv's concurrently heard
28 motion to remand.

1 Vogel's entire argument is that the Court's ruling on Claim #49 should apply to
2 Vogel, but Vogel was not a party to the bankruptcy proceeding or the claims adjudication
3 and he does not have privity with the Debtor. Vogel argues that the Debtor and Vogel are
4 "on title together on the property" – but that is untrue and irrelevant. (*Note: A title report*
5 *for the Property, showing it is owned by Vodenos, is annexed to the opposition.*) Ziv does
6 not seek *in rem* relief against estate property, but simply tort relief under state law for
7 Vogel's independent torts. Judge Shaller specifically allowed an amendment to include
8 Vogel. (*Note: Ziv does not provide any support in the record for this assertion, and the*
9 *Court has not found any reference to Vogel in the Superior Court's grant of leave to*
10 *amend. See minute order attached to bk. dkt. 715.*)

11
12
13 Vogel does not have the standing to remove this action, because he is not a party
14 to the bankruptcy, a creditor, a claimant, or an interested party.

15 Ziv has made plausible claims in this action, thus meeting the "fair notice"
16 standard of Fed. R. Civ. P. 8(a).

17 Vogel is forum shopping and removed this action only after Judge Shaller vacated
18 the demurrer and gave Ziv leave to amend.

19
20 Vogel's Reply

21 The seven Original Claims all concern the Property, and the title report attached
22 to Ziv's opposition shows that Vogel is not on the title to the Property. Thus, these claims
23 against Vogel must be dismissed.

24 Vogel has not filed any demurrers or motions in Superior Court, so the forum
25 shopping argument is unintelligible.

26
27 The "flip-flop" in the opposition, contrary to the pleadings, means Ziv's lawyer is
28 either bad or dishonest. (*Note: It is not clear what "flip-flop" Vogel refers to and the*

1 *Court will ignore accusations irrelevant to determining the proper outcome of these*
2 *motions.)*

3
4 **Leave to Amend Motion**

5 **Motion**

6
7 Ziv asserts that information was not available at the time of the filing of the
8 complaint that gave rise to additional causes of action. Although discovery has been
9 stayed (which Ziv argues is due to Vodenos' gamesmanship), Ziv independently
10 discovered new information after October 3, 2015. Accordingly, Ziv seeks leave to
11 amend the operative complaint to add additional facts and causes of action: specifically,
12 to add Vogel to the pleading caption, to add the New Claims, and to correct an error in
13 the seventh cause of action (page 11, line 22, ¶56 in Exhibit A (black-lined version of the
14 SAC)).

15
16 Motion for leave to amend should be liberally granted, especially in the early
17 stages of a case when little prejudice to the defendants would result. No answer has been
18 filed and no discovery has been taken in this proceeding, thus allowing the SAC will not
19 meaningfully prejudice the defendants. The New Claims are brought as a result of Ziv's
20 discovery of Vogel's participation in wrongful conduct, which further exposes the
21 wrongful conduct of other defendants. This motion was filed immediately following the
22 filing of the FAC, with the intent of avoiding further prejudice to the Defendants.

23
24 Amendments should be allowed unless they state wholly unrelated causes of
25 action, but these new facts and allegations in the SAC are the same or similar to the
26 operative complaint.
27
28

1 Ziv also argues that this motion could have been avoided, but counsel for the
2 Defendants refused to stipulate to the relief sought in this motion.

3 Opposition

4 Leave to amend should be denied because each and every causes of action in the
5 SAC requires the existence of a joint venture that this Court has already determined does
6 not exist. Ziv cannot assert any of the claims in the SAC as a matter of res judicata.

7
8 The court previously adjudicated the merits of six of the seven Original Claims in
9 the FAC when it granted summary judgment on Claim #49. It also ruled on the seventh –
10 unjust enrichment – by estimating it at \$0. Now Ziv asks to file the SAC, which has the
11 same seven Original Claims, as well as the seven New Claims. The new claims in the
12 SAC seek to expand the original claims by asserting an element of
13 fraud/deceit/misrepresentation, but this cannot cure the fundamental defect of a lack of an
14 agreement.
15

16
17 Legal Analysis

18 Legal Standards - Motions to Dismiss

19
20 “A motion to dismiss [pursuant to Rule 12(b)(6)] will only be granted if the
21 complaint fails to allege enough facts to state a claim to relief that is plausible on its
22 face.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (internal quotation marks
23 omitted)(citing, *inter alia*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007); *Ashcroft*
24 *v. Iqbal*, 556 U.S. 662, 678, (2009)). “Federal Rule of Civil Procedure 8(a)(2) requires
25 only ‘a short and plain statement of the claim showing that the pleader is entitled to
26 relief,’ in order to ‘give the Debtor fair notice of what the . . . claim is and the grounds
27 upon which it rests.’” *Twombly*, 550 U.S. at 555 (citations omitted). “[F]acts must be
28

1 alleged to sufficiently apprise the Debtor of the complaint against him." *Kubick v. Fed.*
2 *Dep. Ins. Corp. (In re Kubick)*, 171 B.R. 658, 660 (B.A.P. 9th Cir. 1994).

3 Legal Standards - Leave to Amend Motion

4 Fed. R. Civ. P. 15(a)(1) gives a party a right to amend a pleading as a matter of
5 course within (A) 21 days after serving the pleading or (B) within 21 days after service of
6 the earlier of a responsive pleading or a motion under Rule 12(b),(e) or (f). (Although
7 not applicable to an action removed to bankruptcy court (*see* Fed. R. Bankr. P. 9027(g)),
8 Cal. Civ. Proc. Code §472 provides a very similar rule.) Ziv has exercised his one-time
9 right to amend his complaint by filing the FAC. Rule 15(a)(2) provides that any other
10 amendment requires the court's leave or the opposing parties' consent.
11

12
13 Leave to amend a complaint should be liberally granted, especially when, as here,
14 the proceeding is in its early stages and little prejudice to the defendants should result.
15 However, the Court will not grant such leave if such an amendment would be futile.

16 Finality of Rulings on Claim #49

17 Claim #49 has seven parts to it. Six concern the alleged oral agreement to form a
18 joint venture and/or sell the real property to Ziv. The seventh is for unjust enrichment in
19 which Ziv claims that he had spent substantial money improving the property prior to his
20 eviction. On May 12, 2015 the Court granted summary judgment on the first six issues
21 and the order on that was entered on July 2, 2015 (10-bk-25103, dkt. 575) A motion to
22 reconsider was denied (dkt. 592) and the only remaining portion of the claim – for unjust
23 enrichment – was later estimated at \$0.
24

25 Although the order of July 2, 2015 was clearly severable and may have been
26 ready for appeal, the Court did not specifically certify it as such. Thus it was not truly
27 final until the entire claim was disposed of. This occurred with the order entered on
28

1 November 2, 2015 (dkt. 635). Four days later Ziv filed his appeal, but limited it to the
2 estimation of the unjust enrichment portion of the claim (dkt. 645).

3 On April 8, 2016, Ziv filed his opening brief in his appeal to the Bankruptcy
4 Appellate Panel (BAP CC15-1382, dkt. 24) in which he never mentions the summary
5 judgment or the quiet title issues. In fact, he only refers to the November 2, 2015 order:
6

7 It was during the leasehold term that Vodenos entered into an agreement
8 with Ziv to sell him the Property. Pursuant to this agreement, Ziv invested
9 substantial sums for improvements into the Property. It is these sums and the
10 resulting claim for unjust enrichment, included within Ziv's Claim No. 49 (Ex. B,
11 P. 25-36) (the "Claim"), which is the subject of this appeal, subsequent to the trial
12 court's (Hon. Geraldine Mund) entry of an Order of November 2, 2015 assigning
13 this claim a zero value, although there was considerable, substantial evidence of a
14 great deal of expenditures by Ziv (AR, Ex. L1-L10). Id., p. 2.

15 After disallowing the bulk of Ziv's claims, the trial court then denied
16 Vodenos' Motion to disallow the Unjust Enrichment portion of the Claim, and
17 Vodenos quickly moved to estimate that at zero. In this appeal, Ziv contends that
18 the trial court improperly valued the unjust enrichment Claim at \$0, and
19 disregarded substantial evidence of the loss which consisted of hundreds of
20 financial documents. (AR, Ex. L1-L10) Id., p. 3.

21 Under Fed. R. Civ. P. 54, (made applicable to bankruptcy cases by Fed. R. Bank.
22 P 7054), the July 2, 2015 order was never certified as a final order and therefore the
23 judgment disallowing the first six causes of action did not become final until the claims
24 estimation order was entered. At that time all portions of the objection to claim 49 were
25 resolved and ready for appeal. However, Ziv limited his appeal to the unjust enrichment
26 claim estimation.
27

28 Fed. R. App. P. 3(c)(1)(B) requires that a notice of appeal must specify the
"judgment, order, or part thereof being appealed." When there is a mistake in
designation, the appellate court will allow the appeal to go forward if the intent of the
appellant to include other matters can be fairly inferred and the appellee is not prejudiced
by the mistake. The Ninth Circuit Court of Appeals has ruled that "[i]n determining
whether 'intent' and 'prejudice' are present, we apply a two-part test: first, whether the

1 affected party had notice of the issue on appeal; and second, whether the affected party
2 had an opportunity to fully brief the issue.” *Ahlmeyer v. Nev. Sys. Of Higher Educ.*, 555
3 F.3d 1051, 1054 (9th Cir. 2009), quoting *Lynn v. Sheet Metal Workers’ Int’l Ass’n*, 804
4 F.2d 1472, 1481 (9th Cir. 1986).

5
6 In *Ahlmeyer*, the circuit found that the notice of appeal met both requirements in
7 that it stated precisely the issue presented on the appeal and the appellee had the
8 opportunity to brief the issue and actually did so. Although it is possible that Ziv may try
9 to file a new brief raising the quiet title issues, it is highly unlikely (virtually impossible)
10 that the BAP (and perhaps later the Ninth Circuit) would find that he met either of these
11 requirements. The quiet title issues are not mentioned in the notice of appeal or in the
12 opening brief.

13
14 Thus, for purposes of the motions before this Court, the summary judgment as to
15 the first six causes of action in the quiet title suit, as included in claim #49, became final
16 not later than November 17, 2015.

17 Original Claims: First through Seventh Causes of Action

18 This final ruling is entitled to claims preclusion (res judicata) or issue preclusion
19 (collateral estoppel) status in a state court matter if it meets the requirements of state law.
20 *Roos v. Red*, 130 Cal. App. 4th 870 (Ct. Ct. App. 2d Dist. 2005); *Martin v. Martin*, 2 Cal.
21 3d 752, 758 (Cal. 1970). Under California law, claims preclusion requires:

22
23 the claim in the present action must be identical to a claim litigated or that could
24 have been litigated in a prior proceeding; (2) the prior proceeding resulted in a
25 final judgment on the merits; and (3) the party against whom the doctrine is being
asserted was a party or in privity with a party to the prior proceeding.

26 *Bucur v. Ahmad*, 244 Cal. App. 4th 175, 185 (Cal. Ct. App. 2016), reh'g denied (Feb. 17,
27 2016), review denied (Apr. 13, 2016). In this case, the First through Sixth causes of
28 action are literally identical to the claims on which this Court granted summary judgment.

1 That judgment is a final judgment on the merits. Ziv was a party to that claims
2 adjudication. Thus, as a matter of res judicata, the First through Sixth causes of action
3 against Vodenos do not state a claim upon which relief can be granted and should be
4 dismissed.

5
6 The estimation of the Seventh (and final) cause of action in the FAC – unjust
7 enrichment – may not be entitled to res judicata effect in this proceeding. Beyond the
8 fact that it is on appeal, even if it wasn't there is no consensus and certainly no binding
9 authority that a claim estimation has preclusive effect in other contexts and forums:

10 The bankruptcy court's ability to estimate claims derives from either Bankruptcy
11 Code § 502(c) or Fed. R. Bankr. P. 3018. Bankruptcy Code § 502(c) mandates the
12 estimation of a contingent or unliquidated claim “for purposes of *allowance* ... [if]
13 the fixing or liquidation ... would unduly delay the administration of the estate.”
(Emphasis added). . . .

14 Whether a claim estimation determination under § 502(c) has preclusive
15 effect is a matter of disagreement among the courts. As the court in *In re A.P.I.,*
16 *Inc.*, 331 B.R. 828, 846 (Bankr. D. Minn.2005), noted:

17 Some courts hold that the estimation of a claim under § 502(c)(1)
18 has binding effect *per se* only for the administration of claims and assets
19 in a bankruptcy case, and does not give rise to a fixed and liquidated claim
20 cognizable in any other forum. *E.g.*, *In re Eagle Bus Mfg., Inc.*, 158 B.R.
21 421, 437–438 (S.D. Tex. 1993); *In re Teigen*, 228 B.R. 720, 722 (Bankr.
22 D.S.D. 1998); *Matter of Interco Inc.*, 137 B.R. 993, 999 (Bankr. E. D.
23 Mo.1992). Others have envisioned an estimation under § 502(c)(1) as
24 having preclusive effect, but have recognized the bankruptcy court's
25 power to limit or deny that effect in deference to another forum, at the
26 instance of party or parties, or not. *In re Indian Motorcycle Co., Inc.*, 261
27 B.R. 800, 808 (1st Cir. BAP 2001); *In re Handy & Harman Refining*
28 *Group, Inc.*, 262 B.R. 211, 215–216 (Bankr. D. Conn.2001).

The Bankruptcy Appellate Panel for the First Circuit has opined:

Ordinarily, an estimated claim may have the same preclusive effect as any
other order from a court of competent jurisdiction, raising the possibility
that the bankruptcy court's order would invoke res judicata or collateral
estoppel on the issue of the amount of the taxes. *See* 4 Collier on
Bankruptcy ¶ 502.04[3]. However, we also note that under some
circumstances an estimated claim may be limited by the court in deference
to another court's jurisdiction over a matter. *See In re Bicoastal Corp.*, 122
B.R. 771, 774–75 (Bankr. M.D. Fla.1990). *See also* 4 Collier on
Bankruptcy at ¶ 502.04[3].

United States of America v. Sterling Consulting Corp. (In re Indian Motorcycle
Co.), 261 B.R. 800, 808 (B.A.P. 1st Cir. 2001) (holding use of § 502(c) estimation

1 procedure governing prepetition claims for estimation of post-petition taxes was
2 in error).

3 *In re Loucheschi LLC*, 2013 WL 6009947, at *11 (Bankr. D. Mass. Nov. 13, 2013). Thus,
4 this Court cannot conclude at this time that the unjust enrichment cause of action against
5 Vodenos is barred by res judicata and does not state a claim upon which relief can be
6 granted.

7 It is not clear whether res judicata similarly bars any of the claims against Vogel,
8 because the allegations against Vogel in the FAC are unclear. That lack of clarity means
9 that the FAC fails to give Vogel fair notice of what the . . . claim is and the grounds upon
10 which it rests.” Merely adding Vogel to each count without reference to his actions does
11 not provide any factual basis for the claim. The breach of fiduciary duty allegation is
12 meaningless without an allegation of a joint venture agreement binding on Vogel.

13 Liability for participating in or inducing the Debtor’s actions is also meaningless after
14 this Court has ruled that the Debtor’s actions did not give rise to liability: she did not
15 enter into a joint venture agreement with Ziv and thus did not breach any joint venture
16 agreement or fiduciary duty to Ziv, and she did not commit promissory fraud. The FAC
17 refers to fraud or to the fraudulent transfer of a third lien (and Ziv’s opposition to Vogel’s
18 Motion to dismiss refers to Vogel putting a “phony lien” on the Property), but the FAC
19 denominates no such cause of action. (Nor does it allege Ziv’s standing to bring a
20 fraudulent transfer cause of action.) Ziv’s opposition only compounds this confusion by
21 asserting that Ziv does not seek any property-based relief against Vogel, only tort relief.
22 This statement cannot be reconciled with the quiet title, specific performance, and
23 declaratory causes of action regarding the Property. Accordingly, dismissal under Rule
24 12(b)(6) for failure to state a claim upon which relief can be granted is also appropriate
25
26
27
28

1 for all seven claims against Vogel. However, this failure could potentially be cured by
2 amendment.

3 New Claims: Eighth through Fourteenth Causes of Action

4 As noted in the preceding section, the Court's summary judgment on Claim #49 is
5 also entitled to issue preclusion (collateral estoppel) status in a state court matter if it
6 meets the requirements of state law. Under California law, issue preclusion can be
7 applied when: (1) the issue decided in the prior proceeding is identical to the issue sought
8 to be relitigated in the subsequent proceeding; (2) the issue was actually litigated in the
9 prior proceeding; (3) the issue was necessarily decided in the prior proceeding; (4) a final
10 judgment on the merits was issued in the prior proceeding; and (5) the party against
11 whom issue preclusion is sought was a party to the prior proceeding. *Lucido v. Superior*
12 *Court*, 51 Cal. 3d 335, 341, *cert. denied*, 500 U.S. 920 (1991).)

13
14
15 The New Claims, at least against the Debtor, are dependent on issues actually
16 litigated in adjudicating Claim #49 and necessarily decided in this Court's grant of
17 summary judgment against Ziv. Thus, they are barred as a matter of collateral estoppel.
18 Claims 8, 9, 10, 12, and 13 (fraud and intentional deceit, intentional
19 misrepresentation, negligent misrepresentation, conspiracy to defraud, and promissory
20 estoppel) are all essentially the *same claim* as the promissory fraud that the Court has
21 already ruled on in granting summary judgment for Vodenos. Each essentially alleges
22 that Vodenos promised to sell the Property to Ziv on the terms in the alleged joint venture
23 agreement, but never intended to keep her promise, and Ziv relied on this promise to his
24 detriment by paying rent, improving the property, and foregoing the purchase of other
25 property.
26
27

28 Further, in granting summary judgment, this Court has found as follows:
However, while Ziv contends Debtor agreed to the sale of the Property once the

1 second and third liens were extinguished in the bankruptcy, these "terms" are
2 merely preliminary terms or an agreement for a future negotiation of the sale of
3 the Property. *Ehlert v. America's Servicing Co*, 2011 U.S. Dist LEXIS 118072,
4 *10-*11 (S.D. Cal. 2011). Ziv has not set forth definite terms of the joint venture
5 agreement that clarify each party's obligations under the contract. Rather, Ziv's
6 allegations lead this Court to find that any alleged discussions concerning the
7 Vulcan Property's sale between the parties were merely, at most, preliminary
8 [oral] negotiations that are not the functional equivalent of a valid, subsisting
9 agreement. *Id.*

10 (Bk. dkt. 542 19:12-21.) Claim 11 (constructive fraud) - and Claim 14 (breach of implied
11 covenant of good faith and fair dealing) are based on the joint venture agreement that the
12 Court has ruled that Vodenos did not enter into with Ziv. Thus, it appears that every New
13 Claim that Ziv seeks to bring against Vodenos in the SAC is futile. The Court will not
14 grant Ziv leave to amend to add the New Claims against Vodenos.

15 The New Claims appear to be similarly futile as against Vogel, as they also
16 appear to be premised on the same joint venture agreement and same promises that the
17 Court has previously ruled do not exist. However, as described above, the FAC and thus
18 the SAC are not entirely clear on the allegations against Vogel. This is particularly true
19 with respect to the New Claims premised on promises to sell the Property, as Vogel does
20 not own the Property. In an abundance of caution and with deference to the principle that
21 leave to amend should be freely granted, the Court will allow Ziv to amend the FAC
22 against Vogel.

23 **Ruling:**

24 The First through Sixth causes of action against Vodenos will be dismissed with
25 prejudice and the Motion to Amend will be denied as to Vodenos. This leaves only the
26 seventh cause of action - for unjust enrichment - remaining against Vodenos in this
27 proceeding.
28

1 All causes of action against Vogel will be dismissed without prejudice. Ziv may
2 file a motion to file a second amended complaint stating claims against Vogel, but no
3 new claims against Vodenos. This motion is to be filed no later than June 10, 2016. This
4 proposed second amended complaint should not bring any claims against Vogel that are
5 barred by claim or issue preclusion, *i.e.*, the claims cannot be based on an alleged joint
6 venture agreement between Vodenos and Ziv or allegations that Vodenos conducted
7 anything more than preliminary negotiations with Ziv over the Property. (As noted in
8 Ziv's motion for remand, once this amended complaint is filed, the Court can consider
9 whether remand is appropriate.)
10

11 If no motion is timely filed, the first amended complaint will remain in force with
12 the only cause of action being solely against Vodenos and only for unjust enrichment.
13 Although the motion to remand appears to be solely as to the proposed second amended
14 complaint, to the extent that it might apply to this limited first amended complaint, it will
15 be denied.
16

17
18 The Court's tentative rulings on the Motions to Dismiss and Leave to Amend
19 Motion would have led to very similar outcomes as the Stipulation.
20

21 In the case of Vodenos, the outcomes are nearly identical. In the Court's
22 tentative rulings, all causes of action against Vodenos would have been dismissed with
23 prejudice except for the unjust enrichment cause of action. The Stipulation dismisses all
24 causes of action including the unjust enrichment, but this leads to similar result because
25 the Stipulation leaves the Debtor's chapter 11 case unaffected. Thus, Ziv's unjust
26 enrichment *claim* against the Debtor's bankruptcy estate and his BAP appeal regarding
27 that claim remain.
28

1 Under the Court's tentative rulings, the claims against Vogel would have been
2 dismissed without prejudice and Ziv would have been allowed to file an amended
3 complaint against Vogel (not to include certain claims regarding the Property that were
4 barred as a matter of collateral estoppel). The Court would then have considered
5 whether remand was appropriate, which would have depended on the new claims
6 brought by Ziv. The Stipulation dismisses all claims in against Vogel in this bankruptcy,
7 but allows Ziv to bring non-Property-related claims in Superior Court.
8

9 The Stipulation leads to the same result as the tentative rulings with respect to
10 Vogel, because if Ziv had refiled non-Property-related claims against Vogel (but not
11 Vodenos) pursuant to the tentative rulings, this Court would have remanded this
12 proceeding to Superior Court. 28 U.S.C. §1452(b) provides that a court to which a claim
13 is removed pursuant to §1334 "may remand such claim ... on any equitable ground."
14

15 The "any equitable ground" standard is not statutorily defined. Accordingly, case
16 law has imported the "factors" governing discretionary abstention to assist with
17 the remand decision. *See In re Enron Corp.*, 296 B.R. 505, 508–9
18 (C.D.Cal.2003)(importing the discretionary abstention factors into the remand
19 analysis and affirming the bankruptcy court's remand to state court of two of the
20 over 100 securities actions filed nationwide instead of transferring venue to the
21 New York bankruptcy court). The imported factors are:

- 22 (1) the effect or lack thereof on the efficient administration of the estate if
23 the Court recommends [remand or] abstention; (2) extent to which state
24 law issues predominate over bankruptcy issues; (3) difficult or unsettled
25 nature of applicable law; (4) presence of related proceeding commenced
26 in state court or other nonbankruptcy proceeding; (5) jurisdictional basis, if
27 any, other than §1334; (6) degree of relatedness or remoteness of
28 proceeding to main bankruptcy case; (7) the substance rather than the
form of an asserted core proceeding; (8) the feasibility of severing state
law claims from core bankruptcy matters to allow judgments to be entered
in state court with enforcement left to the bankruptcy court; (9) the burden
on the bankruptcy court's docket; (10) the likelihood that the
commencement of the proceeding in bankruptcy court involves forum
shopping by one of the parties; (11) the existence of a right to a jury trial;
(12) the presence in the proceeding of nondebtor parties; (13) comity; and
(14) the possibility of prejudice to other parties in the action.

Enron, 296 B.R. at 508, n. 2; *see also In re Tucson Estates, Inc.*, 912 F.2d 1162,
1167 (9th Cir.1990)(citing to a Texas bankruptcy case which articulates a similar

1 list). While these factors assist a court's remand decision, they do not control it.
2 The standard remains "any equitable ground."

3 *In re Roman Catholic Bishop of San Diego*, 374 B.R. 756, 761-62 (Bankr. S.D. Cal.
4 2007).

5 The non-Property-related causes of action against Vogel are not claims against
6 the Debtor's estate and do not involve the estate's Property. They would have no effect
7 on the administration of the estate. They involve state law issues. Ziv did not consent to
8 the jurisdiction of this court for his causes of action against Vogel by filing proofs of
9 claim against Vodenos. These claims are probably not even "related to" Vodenos'
10 bankruptcy case. Thus, this Court probably lacks jurisdiction to hear these claims and
11 certainly would not have the authority to finally determine these claims (and thus would
12 need to issue proposed findings of fact and conclusions of law to the District Court).

13 *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Executive Benefits Ins. Agency v. Arkison*,
14 134 S. Ct. 2165 (2014). The proceeding would be between two non-debtor parties, who
15 probably both have a right to a jury trial. Accordingly, there would be compelling
16 grounds for equitable remand of non-Property related by Ziv against Vogel.
17

18
19 As the Stipulation's effect essentially mirrors the rulings that the Court had been
20 prepared to make before Ziv and Vodenos settled, the Court concludes that the
21 dismissal of causes of action 1 through 7 pursuant to the terms of the Stipulation is
22 reasonable and should be approved. The Court will also order the remand of this
23 proceeding to Superior Court, in order to effectuate the terms of the Stipulation.
24

25 However, Vogel has neither signed the Stipulation nor even been given notice of
26 this motion for dismissal pursuant to the Stipulation. Thus, Vogel will be given 14-days'-
27 notice of and an opportunity to object to the order dismissing all causes of action in this
28

1 adversary proceeding and remanding this proceeding to Superior Court. If he does not
2 file an objection in that time, the order will become effective.

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24 Date: July 12, 2016



Geraldine Mund
United States Bankruptcy Judge