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3 UNITED STATES DISTRICT COURT  
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
5 OAKLAND DIVISION

6 BSD, INC., a California corporation; 21st  
7 CENTURY GROUP, INC., a California  
8 corporation; and YOUSTINE, INC., a  
9 California corporation,

10 Plaintiffs,

11 vs.

12 EQUILON ENTERPRISES, LLC, a Delaware  
13 limited liability company; ANABI OIL  
14 CORPORATION, a California corporation;  
15 and DOES 1 through 100, inclusive,

16 Defendants.

17 AND RELATED COUNTER CLAIMS

Case No: C 10-5223 SBA

**ORDER**

18 On March 11, 2013, the Court issued an Order granting in part and denying in part  
19 Equilon Enterprises, LLC's ("Equilon") motion for partial summary judgment. Dkt. 122.  
20 On March 12, 2013, Equilon filed a motion for leave to file a motion for reconsideration of  
21 this Order. Dkt. 124. Specifically, Equilon requests the Court reconsider its ruling denying  
22 summary judgment on a portion of Equilon's third counterclaim for declaratory relief,  
23 which seeks a determination that Equilon properly terminated Youstine, Inc.'s ("Youstine")  
24 Right of First Refusal ("ROFR") as a matter of law. Equilon's Mtn. at 2-3. The relevant  
25 portion of the Court's Order provides as follows:

26 Equilon's third counterclaim seeks, among other things, a determination that  
27 its termination of Youstine's ROFR was "appropriate." Equilon's Am.  
28 Counterclaim ¶ 43. Equilon contends that it properly terminated Youstine's  
ROFR as a matter of law because Youstine failed to satisfy all past due debts  
as required by Article 4(a) of the ROFR contract. Equilon's Mtn. at 18-19.  
However, as pointed out by Youstine, Equilon failed to submit the ROFR  
contract in support of its motion. Youstine's Opp. at 22-23. According  
to Youstine, because Equilon failed to submit this document or any other  
evidence to support its position, Equilon's motion must be denied. Id. at 23.

1 In its reply brief, Equilon does not dispute that it failed to submit the ROFR  
2 in support of its motion. In fact, Equilon provides no argument in its reply  
brief with respect to this aspect of its motion.

3 By failing to submit the ROFR in connection with its moving papers, Equilon  
4 failed to sustain its burden to show that "there is no genuine dispute as to any  
material fact" and that it "is entitled to judgment as a matter of law."  
5 Fed.R.Civ.P. 56(a). When, as here, the party moving for summary judgment  
would bear the burden of proof at trial, it must come forward with evidence  
6 which would entitle it to a directed verdict if the evidence went  
uncontroverted at trial. C.A.R. Transp. Brokerage Co., 213 F.3d at 480. In  
7 such a case, the moving party has the initial burden of establishing the  
absence of a genuine issue of fact on each issue material to its case. Id.  
8 Accordingly, because Equilon has failed to sustain its initial burden under  
Rule 56, Equilon's motion for summary judgment as to this aspect of  
its declaratory relief claim is DENIED. See Harper, 877 F.2d at 731 (if the  
9 movant fails to sustain its initial burden, no defense to an insufficient  
showing is required).

10 Pursuant to Civil Local Rule 7-9, a party may seek leave to file a motion for  
11 reconsideration of an interlocutory order at any time before judgment. Civ. L.R. 7-9(a). A  
12 motion for reconsideration may be made on one of three grounds: (1) a material difference  
13 in fact or law exists from that which was presented to the court, which, in the exercise of  
14 reasonable diligence, the party applying for reconsideration did not know at the time of the  
15 order for which reconsideration is sought; (2) the emergence of new material facts or a  
16 change of law; or (3) a manifest failure by the court to consider material facts or dispositive  
17 legal arguments presented before such order. Civ. L.R. 7-9(b). The moving party may not  
18 reargue any written or oral argument previously asserted to the court. Civ. L.R. 7-9(c).

19 In the instant motion, Equilon requests leave to file a motion for reconsideration of  
20 the Court's March 11, 2013 Order on the ground that there was a manifest failure by the  
21 Court to consider material facts presented before the Order. Equilon's Mtn. at 4-5.  
22 Specifically, Equilon contends that the Court failed to consider the ROFR in ruling on its  
23 motion for summary judgment on its third counterclaim for declaratory relief. Id. at 3.  
24 Equilon, however, concedes that it "inadvertently omitted a copy of the ROFR from its  
25 moving papers." Id. at 4. Equilon also admits that it submitted a copy of the ROFR after  
26 Youstine filed its opposition in a filing titled "Notice of Errata." Id. at 3. Further, Equilon  
27 does not dispute that it failed to provide any argument in its reply brief in response to  
28

1 Youstine's argument that summary judgment should be denied as to Equilon's declaratory  
2 relief claim because Equilon failed to submit the ROFR contract in support of its motion.

3 By submitting the ROFR after Youstine filed its opposition, Equilon deprived  
4 Youstine of the opportunity to respond to this evidence. While Equilon did not submit the  
5 late-filed ROFR in connection with its reply brief, the submission of the ROFR after  
6 Youstine filed its opposition is akin to presenting new evidence in a reply brief. Ordinarily,  
7 it is not proper for a court to consider new legal arguments or evidence presented in a reply  
8 brief. In re Rains, 428 F.3d 893, 902 (9th Cir. 2005); see Tovar v. U.S. Postal Serv., 3 F.3d  
9 1271, 1273 n. 3 (9th Cir. 1993). The Court notes that had Equilon brought the late-filed  
10 ROFR to the Court's attention in its reply brief, the Court could have afforded Youstine the  
11 opportunity to respond to this evidence through the submission of a supplemental brief.  
12 Accordingly, because Equilon failed to submit the ROFR in its moving papers, and because  
13 Youstine did not have the opportunity to respond to the late-filed ROFR, the Court  
14 concludes that there was not a manifest failure by the Court to consider material facts that  
15 were properly before the Court on Equilon's motion for partial summary judgment. See  
16 Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996) ("Where new evidence is presented  
17 in a reply to a motion for summary judgment, the district court should not consider the new  
18 evidence without giving the [non]-movant an opportunity to respond."). Equilon's motion  
19 for leave to file a motion for reconsideration is therefore DENIED.

20 The Court, however, finds that good cause exists for Equilon to file a successive  
21 motion for partial summary judgment on the issue of whether it properly terminated  
22 Youstine's ROFR as a matter of law. "[D]istrict courts have discretion to entertain  
23 successive motions for summary judgment." See Hoffman v. Tonnemacher, 593 F.3d 908,  
24 911 (9th Cir. 2010) ("the possibility of summary judgment remains on the table even after a  
25 district court has denied a summary judgment motion because that order is 'subject to  
26 reconsideration by the court at any time' "). "[T]he denial of summary judgment does not  
27 preclude a contrary later grant of summary judgment. Consequently, allowing a party to  
28 file a second motion for summary judgment is logical, and it fosters the 'just, speedy, and

1 inexpensive' resolution of suits.' " Id. Nevertheless, given the potential for abuse of the  
2 procedure, district courts retain discretion to "weed out frivolous or simply repetitive  
3 motions." Id.

4       The Court finds that a successive motion for partial summary judgment is  
5 appropriate under the circumstances, particularly since such a motion would expand the  
6 evidence beyond what the Court considered in ruling on Equilon's motion for partial  
7 summary judgment. Hoffman, 593 F.3d at 911 ("a successive motion for summary  
8 judgment is particularly appropriate on an expanded factual record"). Further, the Court  
9 finds that allowing Equilon to file a successive motion for partial summary judgment will  
10 promote the "just, speedy, and inexpensive" resolution of this action. Accordingly, Equilon  
11 may file a successive motion for partial summary judgment no later than seven (7) days  
12 from the date this Order is filed. Equilon's renewed motion shall not exceed ten (10) pages.  
13 Youstine shall file an opposition or statement of non-opposition within seven (7) days from  
14 the date Equilon files its successive motion. Youstine's response shall not exceed ten (10)  
15 pages. Any reply brief filed by Equilon shall be filed no later than seven (7) days from the  
16 date Youstine's response is filed and shall not exceed five (5) pages. The Order terminates  
17 Docket 124.

18           IT IS SO ORDERED.

19 Dated: 3/25/13

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21 SAUNDRA BROWN ARMSTRONG  
22 United States District Judge  
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