

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**United States District Court
Central District of California**

SG BLOCKS, INC.,
Plaintiff,
v.
HOLA COMMUNITY PARTNERS et al.,
Defendants.

HOLA COMMUNITY PARTNERS,
Consolidated Plaintiff,
v.
SG BLOCKS, INC. et al.,
Consolidated Defendant and
Third-Party Plaintiff,
v.
TETON BUILDINGS, LLC et al.,
Third-Party Defendants.

Lead Case No:
2:20-cv-03432-ODW (RAOx)
Member Case No:
2:20-cv-04386-ODW (RAOx)

**ORDER DENYING MOTIONS OF
SG BLOCKS, AS THIRD-PARTY
PLAINTIFF, FOR DEFAULT
JUDGMENT AGAINST AVESI
AND SADDLEBACK**

I. INTRODUCTION

This is a consolidated construction dispute involving HOLA Community Partners (“HOLA”) and Heart of Los Angeles Youth, Inc. (together, “HOLA Parties”),

1 the proponents of a construction project; SG Blocks, Inc., a contractor for the project;
2 and several subcontractors. SG Blocks filed a Complaint against the HOLA Parties
3 and the City of Los Angeles. (SG Blocks Compl., ECF No. 1.)¹ HOLA filed a
4 Complaint and then a First Amended Complaint against SG Blocks and three
5 subcontractors. (HOLA First Am. Consol. Compl. (“FACC”), ECF No. 31.) Then,
6 SG Blocks, as Third-Party Plaintiff, filed a Third-Party Complaint and then a First
7 Amended Third-Party Complaint against the same three subcontractors and several
8 additional subcontractors. (SG Blocks First Am. Third-Party Complaint (“FATPC”),
9 ECF No. 79.) The two cases have been consolidated, with SG Blocks as Plaintiff in
10 the lead case and HOLA as Plaintiff in the member case.

11 The parties reached a global settlement of the case, resolving all claims against
12 all parties except the two who failed to appear in this matter—Avesi Construction,
13 LLC and Saddleback Roofing, Inc. (Stip. Dismiss, ECF No. 169; Order Granting
14 Stip. Dismiss, ECF No 170.) SG Blocks, as Third-Party Plaintiff, now moves for
15 default judgment against Avesi and Saddleback as Third-Party Defendants. (Mot.
16 Default J. Avesi (“Avesi Motion” or “Avesi Mot.”), ECF No. 171-1; Mot. Default J.
17 Saddleback (“Saddleback Motion” or “Saddleback Mot.”), ECF No. 172-1.) The
18 Court carefully considered the papers filed in connection with the Motions and
19 deemed the matters appropriate for decision without oral argument. Fed. R. Civ. P 78;
20 C.D. Cal. L.R. 7-15. For the following reasons, the Court **DENIES** SG Blocks’
21 Motions.

22 II. BACKGROUND

23 HOLA is a non-profit organization that provides at-risk youth with free
24 academic, art, and athletic programs. It operates an arts and recreation center in
25 Lafayette Park in Los Angeles, California. The present dispute concerns construction
26 of the center, referred to herein as the “Project.”
27

28 ¹ ECF numbers in this Order refer to those in the lead case.

1 **A. Construction of the Project**

2 In September 2017, the HOLA Parties entered into an agreement with the City
3 of Los Angeles under which the HOLA Parties would lease the land and construct the
4 Project. (Compl. ¶ 11.) HOLA then entered into a contract with SG Blocks to
5 perform construction on the Project, including by fabricating, delivering, and
6 installing modular workspace units. (*Id.* ¶ 16.) In turn, SG Blocks hired several
7 subcontractors to assist with construction on the Project, including Avesi and
8 Saddleback. (FATPC ¶¶ 22–34.) SG Blocks subcontracted Avesi to install the
9 modular units at the Project, (*id.* ¶ 23), and it subcontracted Saddleback to provide
10 roofing for the Project, (*id.* ¶ 32, Ex. J (“Saddleback Proposal”)).

11 According to HOLA, SG Blocks and its subcontractors provided incomplete
12 design plans, delivered dangerously defective building materials, failed to meet
13 deadlines, and performed defective construction work. (*See* FACC ¶ 9.) As is
14 relevant here, HOLA alleges that the inferior work resulted in “[s]tructural defects:
15 defects in walkway/hallway structures (all levels), ensemble room structure, and roof
16 framing structure/s; defective construction assembly of the container stacking
17 attachments and associated assemblies,” and defects with the “[i]nterior walls:
18 defective construction of the wall framing includ[ing] improper attachments, missing
19 structural hardware, and improper construction of firewalls.” (*Id.* ¶ 9(B), (C).) HOLA
20 also alleges that the inferior work resulted in “[r]oofing system defects: roof system
21 installed improperly at the perimeter of the building; perimeter gutter system not
22 properly integrated with roof membrane; penetrations throughout the roof system leak
23 causing damage to the building interior; sheet metal flashing and counter flashing
24 improperly installed.” (*Id.* ¶ 9(G).)

25 HOLA eventually terminated its agreement with SG Blocks and hired a
26 nonparty to complete construction of the Project at additional expense. (Compl. ¶ 33;
27 *see* FACC ¶¶ 10(D), 38(B).)

28

1 **B. Pleadings and Proceedings**

2 On April 13, 2020, SG Blocks filed this action against the HOLA Parties,
3 alleging that, among other things, HOLA failed to timely pay SG Blocks. (Compl.
4 ¶ 42.) On April 20, 2020, HOLA filed suit against SG Blocks in Los Angeles Superior
5 Court, claiming SG Blocks’ construction on the Project was structurally defective and
6 incomplete. Compl. ¶ 8, *HOLA Cmty. Partners v. SG Blocks, Inc. et al.*, No. 2:20-cv-
7 04386-ODW (RAOx) (C.D. Cal filed May 14, 2020) (“*HOLA II*”), ECF No. 1-3.
8 After SG Blocks removed *HOLA II* to federal court, the Court consolidated the two
9 cases. (Min. Order Consolidate, ECF No. 26); Min. Order Consolidate, *HOLA II*,
10 ECF No. 16.

11 In its First Amended Consolidated Complaint, HOLA asserts claims against
12 SG Blocks, Avesi, and others for (1) negligence; (2) strict products liability; (3) breach
13 of contract; (4) breach of express warranty; (5) violation of California Business &
14 Professions Code § 7031(b); and (6) violation of California Business & Professions
15 Code § 17200. (FACC ¶¶ 8–52.) HOLA asserts all these claims against SG Blocks.
16 (*Id.* ¶¶ 8–18, 33–52.)

17 On November 17, 2020, HOLA dismissed all its claims against Avesi and
18 certain other parties without prejudice. (Min. Order Dismiss, ECF No. 48.)

19 On July 23, 2021, SG Blocks filed its First Amended Third-Party Complaint,
20 asserting claims against the Third-Party Defendants—including Avesi and
21 Saddleback—for (1) contractual indemnity; (2) equitable indemnity; and
22 (3) contribution. (FATPC ¶¶ 38–56.) By way of these claims, SG Blocks demands
23 that the Third-Party Defendants indemnify it in the event it is found liable to HOLA
24 for the claims HOLA alleged in the First Amended Consolidated Complaint. (*Id.*
25 ¶ 45.) SG Blocks asserts all three of these claims against Avesi, and it asserts the
26 second and third claims against Saddleback. (*Id.*)

27 One of the Third-Party Defendants, the McIntyre Company, moved for partial
28 summary judgment on SG Blocks’ express indemnity claim against it, arguing that

1 California Business and Professions Code section 7031(a) prevented SG Blocks, as an
2 unlicensed contractor, from obtaining a judgment of express indemnity against
3 McIntyre. (Mot. Partial Summ. J., ECF No. 153.) The Court granted the Motion and
4 dismissed the express indemnity claim against McIntyre. (Order Granting Partial
5 Summ. J. 8, ECF No. 166 (“[B]ecause SG Blocks is unlicensed, section 7031(a)
6 renders McIntyre’s express indemnity obligation to SG Blocks unenforceable.”).)

7 In time, the parties reached a global settlement of the case under which
8 SG Blocks agreed to pay HOLA \$1 million. (Notice of Settlement, ECF No. 167;
9 (Decl. John C. Goodman ISO Avesi Mot. (“Avesi Goodman Decl.”) ¶ 3, ECF
10 No. 171-3.) Pursuant to the settling parties’ joint stipulation, the Court dismissed the
11 entire consolidated action against all parties except Avesi and Saddleback. (Stip.
12 Dismiss; Order Granting Stip. Dismiss.) After this dismissal, the only claims that
13 remain are SG Blocks’ indemnity and contribution claims against Avesi and
14 Saddleback. (See Order Reinstating SG Blocks, ECF No. 174.)

15 **C. Defaults of Avesi and Saddleback; Default Judgment Motions**

16 On August 23, 2021, several months before the parties reached a settlement, SG
17 Blocks served Avesi with the First Amended Third-Party Complaint and HOLA’s
18 First Amended Consolidated Complaint. (Proof Service Avesi, ECF No. 93.)
19 According to counsel for SG Blocks, Avesi² has made “no attempt to appear in this
20 action or to contact counsel for [SG Blocks] or anyone” else regarding the matter.
21 (Avesi Goodman Decl. ¶ 2.) On February 9, 2022, the Clerk entered Avesi’s default.
22 (Avesi Default, ECF No. 134.)

23 Also on August 23, 2021, SG Blocks served Saddleback with the First
24 Amended Third-Party Complaint and HOLA’s First Amended Consolidated

25 ² In more than one instance, counsel failed to ensure that counsel’s declaration for the Avesi Motion
26 referenced Avesi only (and not Saddleback), and vice versa. (See, e.g., Decl. John C. Goodman ISO
27 Avesi Mot. ¶ 2, ECF No. 171-3 (stating, in declaration regarding default judgment against Avesi,
28 that *Saddleback* made no attempt to appear in the action).) For the purpose of this Motion, the Court
will assume that these errors were scrivener’s errors. The Court expects future motions and
supporting evidence to be free of such errors.

1 Complaint. (Proof Service Saddleback, ECF No. 106.) At first, SG Blocks did not
2 hear from Saddleback. (Decl. John C. Goodman ISO Saddleback Mot. (“Saddleback
3 Goodman Decl.”) ¶¶ 2–3, ECF No. 172-3.) Eventually, on October 27, 2022, an
4 insurance adjuster contacted SG Blocks’ counsel via email regarding Saddleback.
5 (*Id.* ¶ 2.) SG Blocks replied, informing the insurance adjuster that SG Blocks
6 intended to move for default judgment against its insured, Saddleback. (*Id.*) The
7 adjuster did not respond to this reply. (*Id.*) On February 9, 2022, the Clerk entered
8 Saddleback’s default. (Saddleback Default, ECF No. 135.)

9 SG Blocks, as Third-Party Plaintiff, now moves for default judgment against
10 Avesi and Saddleback as Third-Party Defendants. SG Blocks asks the Court to enter
11 judgment in the amount of \$1 million jointly and severally against Avesi and
12 Saddleback. SG Blocks also asks the Court to enter additional several (that is,
13 individual) judgments against Avesi and Saddleback in the amounts of \$112,190.66
14 and \$76,380.09, respectively. (Proposed Default Js., ECF Nos. 171-4, 172-4.) SG
15 Blocks served a copy of the Saddleback Motion on the insurance adjuster at both the
16 adjuster’s email address and the physical address listed on the adjuster’s emails.
17 (Saddleback Goodman Decl. ¶ 2.)

18 III. LEGAL STANDARD

19 Federal Rule of Civil Procedure (“Rule”) 55(b) authorizes a district court to
20 grant a default judgment after the Clerk enters default under Rule 55(a). Before a
21 court can enter a default judgment against a defendant, the plaintiff must satisfy the
22 procedural requirements in Rules 54(c) and 55 and Central District Civil Local
23 Rules 55-1 and 55-2.

24 However, even if these procedural requirements are satisfied, “[a] defendant’s
25 default does not automatically entitle the plaintiff to a court-ordered judgment.”
26 *PepsiCo, Inc., v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002).
27 Instead, “[t]he district court’s decision whether to enter a default judgment is a
28 discretionary one.” *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).

1 Generally, after the Clerk enters a default, the defendant’s liability is conclusively
2 established, and the well-pleaded factual allegations in the plaintiff’s complaint “will
3 be taken as true” except those pertaining to the amount of damages. *TeleVideo Sys.,*
4 *Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (per curiam) (quoting
5 *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977)). In entering default
6 judgment, the court need not make detailed findings of fact, except as to damages.
7 *See Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990).

8 IV. DISCUSSION

9 Both Motions suffer from deficiencies related to (1) the procedural
10 requirements, (2) the second and third so-called *Eitel* factors, and (3) proof of
11 damages. The Court details these deficiencies below and provides SG Blocks with an
12 opportunity to amend its Motions to cure the deficiencies.

13 A. Procedural Requirements

14 Both Motions fail to meet some of the requirements of Central District Local
15 Rule 55-1. As set forth in Central District Local Rule 55-1, parties moving for default
16 judgment must submit a declaration (not merely an argument in a brief) establishing:
17 (1) when and against which party default was entered; (2) the pleading to which
18 default was entered; (3) whether the defaulting party is a minor or incompetent
19 person; (4) that the Servicemembers Civil Relief Act does not apply; and (5) that the
20 defaulting party was properly served with notice, if required under Rule 55(b)(2). In
21 turn, Rule 55(b)(2) requires written notice on the defaulting party “[i]f the party
22 against whom a default judgment is sought has appeared personally or by a
23 representative.” Fed. R. Civ. P. 55(b)(2).

24 As Avesi and Saddleback are entities, not natural persons, the third and the
25 fourth of the above requirements do not apply here, but the remaining requirements
26 are crucial. SG Blocks’ declarations of counsel do not address these requirements.
27 (*See generally* Avesi Goodman Decl., Saddleback Goodman Decl.) The Court may
28 properly deny the Motions on this basis.

1 **B. *Eitel* Factors**

2 In exercising discretion to enter default judgment, courts consider the “*Eitel*
3 factors”: (1) the possibility of prejudice to plaintiff; (2) the merits of plaintiff’s
4 substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake;
5 (5) the possibility of a material factual dispute; (6) whether the default was due to
6 excusable neglect, and (7) the strong policy favoring decisions on the merits. *See*
7 *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). “Of all the *Eitel* factors,
8 courts often consider the second and third factors to be the most important.” *Vietnam*
9 *Reform Party v. Viet Tan - Vietnam Reform Party*, 416 F. Supp. 3d 948, 962 (N.D. Cal.
10 2019) (internal quotation marks omitted).

11 In considering whether the second and third factors—the merits of SG Blocks’
12 claims and the sufficiency of SG Blocks’ First Amended Third Party Complaint—
13 support default judgment, the Court observes three material concerns: SG Blocks’
14 failure to (1) address the effect of SG Blocks’ unlicensed status in light of the Court’s
15 prior finding regarding unlicensed contractors asserting contractual indemnity claims,
16 (2) meaningfully engage with the elements of any of its claims, and (3) demonstrate
17 that part of the judgment should be entered in joint and several fashion.

18 1. *Failure to Address Effect of SG Blocks’ Unlicensed Status on Availability*
19 *of Default Judgment*

20 Previously in this matter, now-dismissed Third-Party Defendant McIntyre
21 moved for partial summary judgment in order to obtain this Court’s ruling on a
22 discrete legal issue. (*See* Mot. Partial Summ. J.) That issue was whether California
23 Business and Professions Code section 7031(a) bars unlicensed contractors from suing
24 for express indemnity, that is, for indemnity expressly set forth in a written contract.
25 The Court answered this question in the affirmative. (Order Granting Partial Summ.
26 J. 8–11.) SG Blocks was unlicensed at the time it worked on the Project, and
27 accordingly, McIntyre’s express indemnity obligation to SG Blocks was
28 unenforceable. (*Id.*)

1 SG Blocks asserts its express (or contractual) indemnity claim against Avesi.
2 (See FATPC ¶¶ 39–40 (quoting Avesi Subcontract and alleging that “[u]nder the
3 Avesi Subcontract, Avesi is obligated to indemnify, defend, and hold harmless [SG
4 Blocks] from the claims asserted by [HOLA] in its [First Amended Consolidated
5 Complaint]”).) Moreover, nothing in the record suggests SG Blocks has dismissed its
6 express indemnity claim against Avesi. Yet, SG Blocks does not address the effect of
7 the Court’s summary judgment order on this claim. (See generally Avesi Mot.)

8 The “law of the case” doctrine applies whenever a court is asked to revisit a
9 decision on a rule of law previously made by that same court or a higher court in the
10 same case. *Chinatown Neighborhood Ass’n v. Harris*, 33 F. Supp. 3d 1085, 1093
11 (N.D. Cal. 2014). The doctrine “posits that when a court decides upon a rule of law,
12 that decision should continue to govern the same issues in subsequent stages in the
13 same case.” *Arizona v. California*, 460 U.S. 605, 618 (1983). The law of the case
14 doctrine “also serves to maintain consistency.” *Jeffries v. Wood*, 114 F.3d 1484, 1489
15 (9th Cir. 1997) (citing 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper,
16 *Federal Practice and Procedure* § 4478 (1981)), *overruled on other grounds by*
17 *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012). The doctrine “is not a
18 limitation on a tribunal’s power, but rather a guide to discretion.” *United States v.*
19 *Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

20 Applying the law of the case doctrine here, it appears that SG Blocks’
21 express/contractual indemnity claim against Avesi is barred by this Court’s prior
22 determination—namely, that Business and Professions Code section 7031(a) renders
23 SG Blocks’ express indemnity claims unenforceable. The Court sees no reason why
24 its determination regarding indemnity by McIntyre should not also apply to SG
25 Blocks’ demand for indemnity by Avesi. In amending its Motion for default
26 judgment against Avesi, SG Blocks shall either stipulate to dismissal of its contractual
27 indemnity claim against Avesi or shall demonstrate why the Court’s prior legal
28

1 determination regarding section 7031(a) does not apply. Failure to do so will be
2 deemed a concession to dismissal of the contractual indemnity claim.

3 2. *Failure to Engage with Elements of Claims*

4 SG Blocks' remaining claims against Avesi and Saddleback are for equitable
5 indemnity and contribution. "Equitable indemnity . . . is premised on a joint legal
6 obligation to another for damages . . ." *C.W. Howe Partners Inc. v. Mooradian*,
7 43 Cal. App. 5th 688, 700 (2019) (internal quotation marks omitted); *see Prince v.*
8 *Pac. Gas & Elec. Co.*, 45 Cal. 4th 1151, 1159 (2009) ("[T]here can be no indemnity
9 without liability."). Claims for equitable indemnity are "subject to allocation of fault
10 principles and comparative equitable apportionment of loss." *Mooradian*, 43 Cal.
11 App. 5th at 700. Equitable indemnity "requires no contractual relationship," *Prince*,
12 45 Cal. 4th at 1158, and "is a matter of fairness," *Smoketree-Lake Murray, Ltd. v.*
13 *Mills Concrete Constr. Co.*, 234 Cal. App. 3d 1724, 1736 (1991).

14 A claim for contribution arises when "a party to a joint, or joint and several
15 obligation, who satisfies more than [their] share of the claim against all, may require a
16 proportionate contribution from all the parties joined with [them]." Cal. Civ. Code
17 § 1432; *see also Morgan Creek Residential v. Kemp*, 153 Cal. App. 4th 675, 684
18 (2007) (describing a claim for contribution as accruing "[i]n situations where two or
19 more parties are jointly liable on an obligation").

20 In arguing that its claims are sufficiently pleaded and meritorious, SG Blocks
21 asserts that its "substantive claims appear facially meritorious[,] and the [Third-Party
22 Complaint], combined with the allegations brought by HOLA[,] are sufficient to
23 support a judgment." (Avesi Mot. 5; Saddleback Mot. 6.) However, in making this
24 argument, SG Blocks does not actually engage with any of the elements of either of its
25 claims, nor does it cite to any paragraphs in the FACC or the FATPC that contain
26 facts which, if true, would make a prima facie case for either claim. Similarly, SG
27 Blocks asserts that it "has stated relevant authority pursuant to which the court may
28

1 provide relief,” (Avesi Mot. 5; Saddleback Mot. 6), but the Court reviewed SG
2 Blocks’ Motions and found no such authority.

3 To obtain a judgment, SG Blocks must point to allegations, and may
4 supplement those allegations with evidence, regarding what actually happened at the
5 Project—the work Avesi and Saddleback each performed, how the work was
6 deficient, how HOLA remedied those specific deficiencies, and what it cost HOLA to
7 do so. This is required in order to show the Court that Avesi or Saddleback should be
8 required to pay some or all of SG Blocks’ \$1 million settlement payment to HOLA.
9 The allegations must be sufficient to place Avesi and Saddleback on notice of the
10 nature of the potential liability, and the allegations and additional evidence, taken
11 together, must provide a sufficient demonstration of the second and third *Eitel* factors.

12 3. *Failure to Support Request for Joint and Several Liability*

13 The next concern is that SG Blocks fails to support its request for a judgment of
14 liability that is joint and several. SG Blocks proposes a default judgment imposing, in
15 part, \$1 million in joint and several liability on Avesi and Saddleback.

16 “A creature of tort law, joint and several liability ‘applies when there has been a
17 judgment against multiple defendants.’” *Honeycutt v. United States*, 581 U.S. 443,
18 447 (2017) (quoting *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220–21 (1994)). “If
19 two or more defendants jointly cause harm, each defendant is held liable for the entire
20 amount of the harm; provided, however, that the plaintiff recover only once for the
21 full amount.” *Id.* at 447–48.

22 Here, SG Blocks’ Motions are devoid of any mention of joint and several
23 liability. SG Blocks simply argues in one Motion that Avesi caused over \$1 million in
24 completion cost damages plus general conditions and should therefore indemnify
25 SG Blocks for the \$1 million it paid HOLA. (Avesi Mot. 4.) It argues the same thing
26 in the other Motion with respect to Saddleback. (Saddleback Mot. 4.) Without
27 additional arguments or evidence demonstrating Avesi and Saddleback *jointly caused*
28 *the same harm*, it is not clear that there is a basis for imposing joint and several

1 liability under these facts. In amending its Motions, SG Blocks shall address this
2 issue, including by providing legal authority demonstrating that joint and several
3 liability is appropriate under these facts, or by proposing an alternate form of liability.

4 The Court will provide SG Blocks an opportunity to remedy the three foregoing
5 concerns. The Court defers analysis of the remaining *Eitel* factors, to be determined
6 upon SG Blocks' anticipated amended motion.

7 **C. Proof of Damages**

8 As allegations related to damages are not deemed true upon default, *TeleVideo*
9 *Sys.*, 826 F.2d at 917–18, a party seeking default judgment must prove their damages,
10 *Rubicon Global Ventures, Inc. v. Chongqing Zongshen Grp. Imp./Exp. Corp.*, 226 F.
11 Supp. 3d 1141, 1148 (D. Or. Dec. 30, 2016). “[D]istrict courts within the Ninth
12 Circuit have required plaintiffs to prove . . . compensatory damages with ‘reasonable
13 certainty’ even in situations of default.” *Id.* at 1149.

14 Here, the Court has three concerns with SG Blocks' proof of damages. First,
15 SG Blocks' claims for “General Conditions” are conclusory and unsupported.
16 Second, there are foundational evidentiary concerns with the evidence SG Blocks
17 submits in support of damages. Third, there are problems with the methodology
18 SG Blocks' expert used to reach his conclusions.

19 *I. “General Conditions” Not Supported or Itemized*

20 SG Blocks' expert, Paul Kushner, determined that a fair allocation of the
21 damages alleged by HOLA for which Avesi is responsible is \$1,343,627.00. (Avesi
22 Mot. 4; Decl. Paul V. Kushner ISO Avesi Mot. (“Avesi Kushner Decl.”) ¶ 10, ECF
23 No. 171-2.) Kushner then adds \$370,473.54, representing a 52.1% pro rata share of
24 the General Conditions costs, for a total potential liability of \$1,714,100.54. (Avesi
25 Kushner Decl. ¶ 10; Avesi Mot. 4 (indicating a 52.17% pro rata share).)

26 Kushner further determined that a fair allocation of the damages alleged by
27 HOLA for which Saddleback is responsible is \$913,551.00. (Saddleback Mot. 4;
28 Decl. Paul V. Kushner ISO Saddleback Mot. (“Saddleback Kushner Decl.”) ¶ 10, ECF

1 No. 172-2.) Kushner then adds \$251,890.20, representing a 35.47% pro rata share of
2 the General Conditions costs, for a total potential liability of \$1,165,441.20.
3 (Saddleback Mot. 4; Saddleback Kushner Decl. ¶ 10.)

4 SG Blocks does not provide the Court with a definition of “General
5 Conditions,” nor does it explain the nature of the claimed General Conditions in this
6 case. In reviewing the charts SG Blocks submitted in support of its Motions, the
7 Court found no further detail about the nature of the General Conditions costs
8 SG Blocks claims, such as an itemized list of the components of the expense or a
9 declaration describing the nature of the expense. Moreover, SG Blocks provides no
10 citations to any contractual provisions or case law supporting its assertion that Avesi
11 or Saddleback should be required to provide equitable indemnity or contribution for
12 costs arising from General Conditions, either as a general rule or under the facts of
13 this case.

14 2. *Evidentiary Problems with SG Blocks’ Evidence*

15 Second, there are problems with the key evidence SG Blocks submits in support
16 of its Motions. As a threshold issue, it appears SG Blocks submitted an unintended,
17 incorrect document in connection with the Saddleback Motion. In the Kushner
18 Declaration accompanying the Saddleback Motion, Kushner states that Exhibit G is a
19 “spreadsheet which allocates HOLA’s incurred repair costs to the various
20 Subcontractors which are Third-Party Defendants in this action, including
21 Saddleback.” (Saddleback Kushner Decl. ¶ 9.) Yet, Exhibit G to this declaration
22 appears to be the Avesi allocation spreadsheet. (*Id.* Ex. G, ECF No. 172-2.) It is the
23 exact same spreadsheet SG Blocks attached in support of the Avesi Motion; it bears an
24 “Avesi Construction” headline, and it contains a column for “Avesi Construction” and
25 none for Saddleback. (*Id.*) This chart is the key chart purporting to support damages
26 against Saddleback, yet the chart makes no mention of Saddleback. The failure to
27 submit the correct evidence is grounds for denying the Saddleback Motion.

28

1 Beyond this obvious clerical error, there is a foundational problem with all the
2 material evidence SG Blocks submits. The key evidence at issue in both Motions is:

- 3 • Exhibit C to each Motion’s Kushner Declaration. Exhibit C is a spreadsheet
4 entitled “Owner Incurred Repair-Replacement Costs.” Kushner asserts these
5 costs were incurred by HOLA to correct construction deficiencies and defects at
6 the subject project. (*See* Avesi Kushner Decl. ¶ 7; Saddleback Kushner Decl.
7 ¶ 7.)
- 8 • Exhibit D to the Avesi Motion’s Kushner Declaration. Exhibit D is purportedly
9 the subcontract between SG Blocks and Avesi. (*See* Avesi Kushner Decl. ¶ 8.)
- 10 • Exhibit F to the Saddleback Motion’s Kushner Declaration. Exhibit F is
11 purportedly the subcontract between SG Blocks and Saddleback. (*See*
12 Saddleback Kushner Decl. ¶ 8.)
- 13 • Exhibit G to the Avesi Motion’s Kushner Declaration. Exhibit G is a
14 spreadsheet entitled “Owner Incurred Repair-Replacement Costs / Allocation
15 Spreadsheet—Avesi Construction.” (Avesi Kushner Decl., Ex. G, ECF
16 No. 171-2.)

17 Evidence submitted to the Court must be admissible. *See* Fed. R. Evid. 1101.
18 “Authentication is a special aspect of relevancy concerned with establishing the
19 genuineness of evidence.” *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 n.7
20 (9th Cir. 2002). It is a “condition precedent to admissibility” which is satisfied by
21 “evidence sufficient to support a finding that the matter in question is what its
22 proponent claims.” *Id.* at 773 (citing Fed. R. Evid. 901(a)). Here, all four of the
23 foregoing Exhibits fail the authentication requirement.

24 a. Exhibits C and G

25 First, Exhibits C and G are exhibits purporting to contain the dollar amounts
26 supporting SG Blocks’ direct liability to HOLA and Avesi’s and Saddleback’s
27 resulting liability in indemnity to SG Blocks. Kushner introduces Exhibit C to the
28 Court by stating that he “is informed and believe[s] that Exhibit C summarizes the

1 costs actually incurred by HOLA to correct construction deficiencies and defects at the
2 subject project.” (See, e.g., Avesi Kushner Decl. ¶ 7.) However, the nature of some of
3 the information on Exhibit C is unclear; for example, it is unclear whether the
4 “Subcontractor” column lists the subcontractor who *caused* the defect, or the
5 subcontractor that HOLA hired to execute the change order and *remedy* the defect.

6 As for Exhibit G, Kushner introduces this Exhibit as “a spreadsheet” without
7 providing further information about the source of the spreadsheet. (See *id.* ¶ 9.) He
8 indicates in passing that the dollar amounts reflected on the spreadsheet. are
9 “HOLA’s incurred repair costs to the various Subcontractors” without explaining how
10 he obtained those figures. (See *id.* ¶ 9.) Because Kushner does not specify the source
11 of the spreadsheet, the Court cannot determine the origin of the numbers on the
12 spreadsheet. As a result, the Court cannot determine if the spreadsheet provides
13 meaningful proof of damages.

14 Moreover, with regards to both Exhibits C and G, it does not appear that
15 Kushner, a retained consultant and potential expert witness, has the personal
16 knowledge required to verify that these exhibits (1) are true and correct copies of SG
17 Blocks’ business records; and/or (2) that the key dollar amounts on the Exhibits are
18 accurate based on SG Blocks’ financial records.

19 b. Exhibits D and F

20 Exhibits D and F are the purported subcontracts and, like Exhibits C and G, are
21 improperly authenticated. Kushner does not appear to have any association with SG
22 Blocks beyond this lawsuit, and therefore appears to lack the personal knowledge
23 required to state that Exhibits D and F are indeed contracts that SG Blocks executed
24 with Avesi and Saddleback, respectively. Moreover, Kushner lacks the knowledge
25 required to verify that these contracts were in effect and operative at the time of the
26 events alleged in the First Amended Consolidated Complaint and the First Amended
27 Third Party Complaint. The contracts are therefore unauthenticated and cannot
28 provide proof of damages.

1 That SG Blocks may have attached one or more of these subcontracts to a prior
2 pleading does not cure the foregoing deficiencies. (See FATPC Ex. C (“Avesi
3 Subcontract”), ECF No. 79-3; *id.* Ex. J (“Saddleback Proposal”), ECF No. 79-10.) If
4 SG Blocks intends to point to a previously filed exhibit in support of its Motions for
5 Default Judgment, SG Blocks should provide a citation to that exhibit in a
6 memorandum of points and authorities, signed by counsel of record for SG Blocks.
7 Fed. R. Civ. P. 11(a); C.D. Cal. L.R. 11-1.

8 3. *Expert’s Methodology Unexplained and Unsound*

9 SG Blocks submits the expert testimony of Kushner in order to establish that
10 Avesi and Saddleback are responsible for \$913,551 and \$1,343,627, respectively, of
11 the \$3.28 million in repair costs SG Blocks incurred in total.

12 “A party offering expert testimony must establish that the testimony satisfies
13 Rule 702 of the Federal Rules of Evidence.” *BBK Tobacco & Foods LLP v. Central*
14 *Coast Agriculture Inc.*, 615 F. Supp. 3d 982, 999 (D. Ariz. 2022). Rule 702 provides:

15 A witness who is qualified as an expert by knowledge, skill, experience,
16 training, or education may testify in the form of an opinion or otherwise
17 if:

18 (a) the expert’s scientific, technical, or other specialized knowledge will
19 help the trier of fact to understand the evidence or to determine a fact in
20 issue;

21 (b) the testimony is based on sufficient facts or data;

22 (c) the testimony is the product of reliable principles and methods; and

23 (d) the expert has reliably applied the principles and methods to the facts
of the case.

24 Fed. R. Evid. 702; *see also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589
25 (1993) (“[T]he trial judge must ensure that any and all scientific testimony or evidence
26 admitted is not only relevant, but reliable.”).

27 “As gatekeepers, trial judges make a preliminary assessment as to whether
28 expert testimony is admissible.” *BBK Tobacco*, 615 F. Supp. 3d at 999. This inquiry

1 is “flexible.” *Id.* (quoting *Daubert*, 509 U.S. at 594.) The Court’s focus should
2 remain “solely on principles and methodology, not on the conclusions that they
3 generate.” 509 U.S. at 593.

4 Applying these principles, Kushner’s declarations are insufficient. Beginning
5 with the Saddleback Motion’s declaration, and setting aside the fact that SG Blocks
6 appears to have attached the wrong document as Exhibit G, Kushner declares the
7 following about how Exhibit G was prepared:

8 Exhibit G is a true and correct copy of a spreadsheet which allocates
9 HOLA’s incurred repair costs to the various Subcontractors which are
10 Third-Party Defendants in this action, including Saddleback. Exhibit G
11 allocates the Owner Incurred Repair Costs (Exhibit C) to the the [sic]
roofing subcontractor’s scope of work for Saddleback.

12 (Saddleback Kushner Decl. ¶ 9; *see also* Avesi Kushner Decl. ¶ 9 (describing
13 Exhibit G in similar terms with respect to Avesi).)

14 Based on that Exhibit, along with Kushner’s own review of other related
15 documents, Kushner opines “that \$913,551.00 represents a fair and reasonable
16 allocation of HOLA’s costs to repair attributable to the various scopes of work
17 Saddleback Roofing [sic].” (Saddleback Kushner Decl. ¶ 10; *see also* Avesi Kushner
18 Decl. ¶ 10 (asserting a similar opinion with respect to Avesi “pursuant to the Avesi
19 Subcontract”).)

20 These statements constitute the entirety of Kushner’s description of his
21 principles and methods and how he applied them to the case. The statements are
22 entirely insufficient to allow the Court to conclude that (1) Kushner is employing
23 reliable principles and methods and that (2) Kushner has properly applied those
24 principles and methods to the case. At minimum, if Exhibit G is to constitute an
25 admissible expert opinion, Kushner must coherently explain to the Court how the
26 figures in Exhibit C lead to the conclusions embodied in Exhibit G.

27 More fundamentally, the Court is unconvinced that SG Blocks’ allegations and
28 evidence support assigning indemnity solely according to the scope of work as set

1 forth in the subcontracts. As discussed, it appears that SG Blocks' only viable claims
2 are equitable claims. (*See supra* Part IV.B.1.) Given that the viable claims are
3 equitable and not contractual in nature, it appears that sufficient proof of damages
4 would be based not merely on an academic analysis of the subcontracts but instead on
5 fair, evidence-backed estimates of the additional costs to complete the project that
6 Avesi or Saddleback actually caused. These costs would, in turn, be based on the
7 work each entity actually did on the Project, or the work each entity agreed to do but
8 did not do. To obtain default judgment, SG Blocks must articulate established
9 principles for determining damages on equitable indemnity and contribution claims,
10 and it must submit evidence (expert or otherwise) that demonstrates damages
11 according to those principles. SG Blocks does not do so in this instance, and the
12 Court denies the Motions on this basis.

13 **D. Further Instructions**

14 The Court herein provides SG Blocks with an opportunity to amend its Motions
15 and address the deficiencies discussed above. In so doing, the Court provides
16 SG Blocks with additional orders regarding the form and service of the Motion, as
17 provided below.

18 **V. CONCLUSION**

19 For the reasons discussed above, the Court **DENIES** SG Blocks' Motions for
20 Default Judgment. (ECF Nos. 171, 172.) By no later than **May 30, 2023**, SG Blocks
21 shall file an Amended Motion for Default Judgment. Failure to do so may result in
22 dismissal of the case for lack of prosecution.

23 The Court further **ORDERS** as follows:

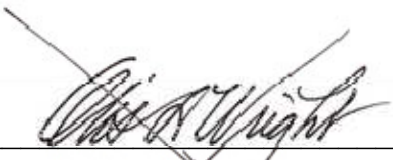
- 24
- 25 • SG Blocks shall file one single amended default judgment motion covering both
26 defaulting Defendants. SG Blocks shall include a word count certificate of
27 compliance pursuant to Central District of California Local Rule 11-6.
 - 28 • SG Blocks shall provide the Court with a courtesy copy of the amended motion
and supporting materials.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- SG Blocks shall serve the amended motion on (1) Avesi and Saddleback in accordance with Federal Rule of Civil Procedure 4(h) and (2) Saddleback’s putative insurance adjuster by postal mail and email. SG Blocks shall file a Proof of Service of the amended motion no later than seven (7) days after the date it files the amended motion.

IT IS SO ORDERED.

May 8, 2023



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE