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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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GREAT AMERICAN INSURANCE  
COMPANY, an Ohio corporation,  
Plaintiff,

CIV NO.: 1:16-00070 WBS SKO  
MEMORANDUM AND ORDER RE: MOTION  
FOR SUMMARY JUDGMENT

v.

ROADWAY ENGINEERING WORKS,  
INC., a California  
corporation, individually and  
doing business as ROADWAY  
ELECTRICAL WORKS, INC.;  
DARLENE CODDINGTON, an  
individual; RANDY MORISOLI,  
an individual; MARLENE  
MCDEVITT, an individual; and  
ROBERT MCDEVITT, an  
individual,  
Defendants.

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Plaintiff Great American Insurance Company ("Great  
American") brought this action, alleging that defendants Roadway  
Engineering Works, Inc., doing business as Roadway Electrical  
Works, Inc. ("Roadway"), Darlene Coddington, Randy Morisoli, and

1 Marlene and Robert McDevitt breached two separate indemnity  
2 agreements.<sup>1</sup> The McDevitts are the only remaining defendants in  
3 this action. Great American now moves for summary judgment  
4 against the McDevitts pursuant to Federal Rule of Civil Procedure  
5 56 on its claims for breach of the indemnity agreements.

6 I. Factual and Procedural History

7 On August 30, 2006, and March 10, 2010, the parties  
8 entered into two separate indemnity agreements ("Indemnity  
9 Agreements"). (Ballinger Decl. ¶¶ 9-10, Exs. 1-2 (Docket No. 44-  
10 7).) Both Indemnity Agreements begin by stating: "This Agreement  
11 binds the undersigned . . . jointly, severally and/or  
12 collectively, to Surety in connection with all Bond(s) heretofore  
13 or hereafter executed, provided or procured by Surety." (Id.  
14 Exs. 1-2.)

15 The Indemnity Agreements require that the Undersigned--  
16 Roadway, Coddington, Morisoli, and the McDevitts--indemnify the  
17 Surety, Great American, from any liability for bonds that Great  
18 American issues on behalf of Roadway. (Id.) Coddington,  
19 Morisoli, and the McDevitts signed both agreements in their  
20 individual capacity. (Id.) The Indemnity Agreements  
21 specifically contain the following provisions in paragraphs two  
22 and sixteen:

23 The Undersigned, jointly and severally, shall  
24 exonerate, indemnify, hold harmless and keep the Surety  
25 indemnified from and against any and all liability for  
losses, costs, and/or expenses of whatsoever kind or

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26 <sup>1</sup> Plaintiff's Complaint also includes claims for  
27 equitable indemnity, Quia Timet and injunctive relief, specific  
28 performance, fraud, and breach of fiduciary duty. (First Am.  
Compl. (Docket No. 6).) Such relief is not at issue in the  
instant motion.

1 nature (including, but not limited to, interest, court  
2 costs, consultant or expert fees, and counsel fees) and  
3 from and against any and all such losses and/or  
4 expenses which the Surety may sustain and incur: (1) By  
5 reason of being requested to execute or procure, or  
6 having executed or procured the execution of the Bonds  
7 on behalf of any of the Undersigned, (2) By reasons of  
8 the failure of the Undersigned to perform or comply  
9 with any of the covenants and conditions of this  
10 Agreement or (3) In enforcing any of the terms,  
11 covenants or conditions of this Agreement . . . . In  
12 the event of any payment of any kind by the Surety, the  
13 Undersigned further agree that in any accounting  
14 between the Surety and the Undersigned, the surety  
15 shall be entitled to charge for any and all  
16 disbursements made by the Surety in good faith in and  
17 about the matters herein contemplated by the Agreement  
18 under the belief that the Surety is or was liable for  
19 the sums and amounts so disbursed, or that it was  
20 necessary or expedient for the Surety to make such  
21 disbursements, whether or not such liability, necessity  
22 or expediency existed; and that the vouchers, invoices,  
23 an affidavit or other evidence of any such payments  
24 made by the Surety shall be prima facie evidence of the  
25 fact and amount of the Undersigned's liability to the  
26 Surety. . . .

27 In the event that Surety shall file suit at law or  
28 equity to enforce the terms of this Agreement, Surety  
shall be entitled to recover its own attorney's fees  
and expenses in connection with such suit.

(Id.)

After the execution of each Indemnity Agreement, Great  
American issued several surety bonds that held it secondarily  
liable as the surety for performance or payment by the principal,  
Roadway, in various construction projects. (Id. ¶¶ 9, 11, 13-14,  
Exs. 3A-3C, 4A-4H.)

Later, suppliers, subcontractors, and bond obligees  
alleged that Roadway defaulted or did not perform on several of  
these bonds and filed claims with Great American. (Id. ¶ 16,  
Exs. 5-29.) In total, these parties submitted thirty-three  
claims against the bonds. (See id. Exs. 5-29; Cabal Decl. Ex. B  
(Docket No. 44-5).) Pursuant to the terms of the Indemnity

1 Agreements, Great American requested that defendants reimburse,  
2 exonerate, and indemnify Great American for these claims.

3 (Ballinger Decl. ¶¶ 18-20, Exs. 30-32.) Great American received  
4 no response from defendants and paid the claimants several months  
5 later. (Id. ¶ 20.)

6 Great American has provided an Accrued Interest  
7 Calculation for each payment it made to claimants that are  
8 covered by the Indemnity Agreements, detailing the payments made  
9 and the interest rate of each payment. (Cabal Decl. ¶ 3, Ex. B.)  
10 As of July 8, 2016, Great American has incurred \$2,579,170.90 in  
11 payments and \$166,077.10 in expenses, excluding attorneys' fees  
12 and interest. (Ballinger Decl. ¶ 23, Ex. 35.) Under a  
13 calculation of interest at 10 percent per annum, interest on the  
14 payments is \$131,285.39. (Cabal Decl. Ex. B.) Great American  
15 seeks a total of \$2,876,633.39.

16 Great American initiated this action, alleging  
17 defendants failed to indemnify Great American as required by the  
18 Indemnity Agreements. After filing for Chapter 7 bankruptcy,  
19 defendants Roadway, Morisoli, and Coddington were dismissed from  
20 this action. (Docket Nos. 40, 43.)

21 Pursuant to Federal Rule of Civil Procedure 56, Great  
22 American moves for summary judgment on its two breach of contract  
23 causes of action against the McDevitts for failure to indemnify  
24 Great American. (Docket No. 44-1.)

## 25 II. Legal Standard

26 Summary judgment is proper "if the movant shows that  
27 there is no genuine dispute as to any material fact and the  
28 movant is entitled to judgment as a matter of law." Fed. R. Civ.

1 P. 56(a). A material fact is one that could affect the outcome  
2 of the suit, and a genuine issue is one that could permit a  
3 reasonable jury to enter a verdict in the non-moving party's  
4 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
5 (1986). The party moving for summary judgment bears the initial  
6 burden of establishing the absence of a genuine issue of material  
7 fact and can satisfy this burden by presenting evidence that  
8 negates an essential element of the non-moving party's case.  
9 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).  
10 Alternatively, the moving party can demonstrate that the non-  
11 moving party cannot produce evidence to support an essential  
12 element upon which it will bear the burden of proof at trial.  
13 Id.

14           Once the moving party meets its initial burden, the  
15 burden shifts to the non-moving party to "designate 'specific  
16 facts showing that there is a genuine issue for trial.'" Id. at  
17 324 (quoting then-Fed. R. Civ. P. 56(e)). The non-moving party  
18 must "do more than simply show that there is some metaphysical  
19 doubt as to the material facts." Matsushita Elec. Indus. Co. v.  
20 Zenith Radio Corp., 475 U.S. 574, 586 (1986). "The mere  
21 existence of a scintilla of evidence . . . will be insufficient;  
22 there must be evidence on which the jury could reasonably find  
23 for the [non-moving party]." Anderson, 477 U.S. at 252.

24           In deciding a summary judgment motion, the court must  
25 view the evidence in the light most favorable to the non-moving  
26 party and draw all justifiable inferences in its favor. Id. at  
27 255. "Credibility determinations, the weighing of the evidence,  
28 and the drawing of legitimate inferences from the facts are jury

1 functions, not those of a judge . . . ruling on a motion for  
2 summary judgment . . . .” Id.

3 III. Discussion

4 California law has long recognized the right of a  
5 surety, such as Great American, to receive indemnification under  
6 the terms of a written indemnity agreement. See, e.g., Fid. &  
7 Deposit Co. of Md. v. Whitson, 187 Cal. App. 2d 751, 756 (2d  
8 Dist. 1960). “An indemnity agreement is to be interpreted  
9 according to the language and contents of the contract as well as  
10 the intention of the parties as indicated by the contract.”  
11 Myers Bldg. Indus., Ltd. v. Interface Tech., Inc., 13 Cal. App.  
12 4th 949, 968 (2d Dist. 1993).

13 In order to demonstrate a valid claim for breach of an  
14 indemnity agreement under California law, a plaintiff must  
15 demonstrate the existence of an indemnity agreement, the  
16 plaintiff’s performance under the agreement, breach of the  
17 agreement, and damages. See Reichert v. Gen. Ins. Co. of Am., 68  
18 Cal. 2d 822, 830 (1968).

19 A. Existence of Agreement and Plaintiff’s Performance

20 It is undisputed that indemnity agreements exist here.  
21 The Agreements contain clauses that indemnify Great American  
22 “from and against any and all such losses and/or expenses which  
23 [Great American] may sustain and incur [b]y reason of having  
24 executed or procured the execution of Bonds on behalf of any of  
25 the Undersigned . . . .” (Ballinger Decl. Exs. 1-2.) Great  
26 American performed under the Indemnity Agreements by issuing  
27 payment and performance bonds on behalf of Roadway, an  
28 Undersigned.

1           B.           Breach of Indemnity Agreement

2           When a surety presents evidence of its payments  
3 pursuant to a prima facie evidence clause, such as that provided  
4 in the two Indemnity Agreements,<sup>2</sup> the burden shifts to the  
5 indemnitors to prove that the surety cannot recover the fees.  
6 Travelers Cas. & Surety Co. of Am. v. Dunmore, No. Civ. 2:07-2493  
7 LKK DAD, 2009 WL 1586936, at \*10 (E.D. Cal. June 5, 2009) (citing  
8 Fallon Elec. Co. v. Cincinnati Ins. Co., 121 F.3d 125, 128 (3d  
9 Cir. 1997)); see also First Nat'l Ins. Co. of Am. v. Hunt, No.  
10 Civ. 2:10-1339 WBS GGH, 2011 WL 2173765, at \*3 (E.D. Cal. June 2,  
11 2011). "Provisions in indemnity agreements . . . providing that  
12 vouchers and other evidence of payment shall be prima facie  
13 evidence of the propriety thereof, have been upheld as not  
14 against public policy and enforced by the courts." Transamerica  
15 Ins. Co. v. Bloomfield, 401 F.2d 357, 362 (6th Cir. 1968).

16           A defendant does not need to indemnify a plaintiff if  
17 the plaintiff breaches the contractual duty of good faith and  
18 fair dealing. See Arntz Contracting Co. v. St. Paul Fire &  
19 Marine Ins. Co., 47 Cal. App. 4th 464, 482 (1st Dist.

20  
21           <sup>2</sup> Paragraph Two of the Indemnity Agreements contain the  
prima facie evidence clause:

22           In the event of any payment of any kind by [Great  
23 American], the [defendants] further agree that in any  
24 accounting between [Great American] and the  
[defendants], [Great American] shall be entitled to  
25 charge for any and all disbursements made by [Great  
26 American] in good faith . . . and that the vouchers,  
invoices, an affidavit or other evidence of any such  
27 payments made by [Great American] shall be prima facie  
evidence of the fact and amount of the [defendant]'s  
liability to [Great American].

28 (Ballinger Decl. Exs. 1-2 (emphasis added).)

1 1996) (citing Carma Developers (Cal.), Inc. v. Marathon Dev. Cal.,  
2 Inc., 2 Cal. 4th 342, 371 (1992)); see Fid. & Deposit Co. of Md.  
3 v. Bristol Steel & Iron Works, Inc., 722 F.2d 1160, 1163 (4th  
4 Cir. 1983) ("The only exception . . . arises when the payment has  
5 been made 'through fraud or lack of good faith' on the part of  
6 the surety . . . ." (quoting Engbrock v. Fed. Ins. Co., 370 F.2d  
7 784, 786 (5th Cir. 1967))). Since Great American provided  
8 evidence of the bonds and payments of claims under the prima  
9 facie evidence clause, the burden thus shifts to the McDevitts to  
10 prove that Great American either acted fraudulently or did not  
11 act in good faith. See Fallon, 121 F.3d at 129.

12 A plaintiff does not act in good faith if the plaintiff  
13 attempts to recover for claims that are not properly covered by  
14 the indemnity agreement. See Arntz, 47 Cal. App. 4th at 482.  
15 But "absent an affirmative showing of fraud or bad faith, the  
16 good faith of the plaintiff-surety [is] presumed." Mountbatten  
17 Surety Co. v. Szabo Contracting, Inc., 812 N.E.2d 90, 103 (Ill.  
18 Ct. App. 2004) (citing U.S. Fid. & Guar. Co. v. Klein Corp., 558  
19 N.E.2d 1047, 1047 (Ill. Ct. App. 1989)).

20 Under California law, "[a] bond shall be in writing  
21 signed by the sureties under oath . . . ." Cal. Civ. Proc. Code  
22 § 995.320(a). According to defendants, they are not obligated to  
23 indemnify Great American because the bonds were not signed under  
24 oath and thus are not valid under § 995.320(a).<sup>3</sup> Great American

25 <sup>3</sup> Defendants also object to the court's consideration of  
26 Exhibits 3A through 3C and 4A through 4H in the Ballinger  
27 Declaration, the bonds issued by Great American on Roadway's  
28 behalf, on the grounds of insufficient foundation, lack of  
authentication, and hearsay. "An affidavit or declaration used  
to support or oppose a motion must be made on personal knowledge,

1 argues that defendants are precluded from this argument because  
2 of admissions in their answer.

3 "Statements made in a pleading may be admitted against  
4 the pleader as evidence in the form of judicial admissions . . .  
5 ." Janich Bros., Inc. v. Am. Distilling Co., 570 F.2d 848, 860  
6 (9th Cir. 1977); see also Brooks v. Great Atlantic & Pac. Tea  
7 Co., 92 F.2d 794, 796 (9th Cir. 1937) ("[A]dmissions in the  
8 answer have the force of evidence . . . ."). Parties cannot  
9 later "controvert these previously admitted facts," including at  
10 summary judgment. Yamaha Corp. of Am. v. ABC Int'l Traders,  
11 Corp., 703 F. Supp. 1398, 1402 (C.D. Cal. 1988) (concluding  
12 plaintiff's admissions in a complaint could not later be

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14 set out facts that would be admissible in evidence, and show that  
15 the affiant or declarant is competent to testify on the matters  
16 stated." Fed. R. Civ. P. 56(c)(4). Mr. Ballinger is a bond  
17 claims representative who received, assembled, developed, and  
18 analyzed the documents and claims related to the bonds that Great  
19 American executed for Roadway. (Ballinger Decl. ¶ 4.) As the  
20 assigned representative on these bonds, Mr. Ballinger has  
21 personal knowledge about the bonds, laid the proper foundation  
22 for knowledge of the bonds, and properly authenticated the bonds.  
23 Further, the McDevitts' Answer conceded that the bonds at issue  
24 were, in fact, valid. (McDevitt Answer ¶¶ 10, 12 (Docket No.  
25 28).) Even if the non-moving party's evidence is presented in a  
26 form that is currently inadmissible, such evidence may be  
27 evaluated on a motion for summary judgment so long as the moving  
28 party's objections could be cured at trial. See Burch v. Regents  
of the Univ. of Cal., 433 F. Supp. 2d 1110, 1119-20 (E.D. Cal.  
2006). Here, the exhibits fall within the exception to hearsay  
for records of a regularly conducted business activity. Fed. R.  
Evid. 803(6). Therefore, these objections are overruled.

The McDevitts also raise fourteen other objections to  
evidence Great American submitted in support of its motion for  
summary judgment. (See Docket No. 47.) Because the court does  
not rely on any of the evidence objected to in the McDevitts'  
remaining objections, the court overrules those objections as  
moot.

1 controverted when attempting to defeat defendant's motion for  
2 summary judgment). Previously admitted facts are "conclusively  
3 binding on the party who made them." Am. Title Ins. Co. v.  
4 Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988).

5 In the First Amended Complaint, Great American alleges,  
6 "In consideration of Defendants . . . executing Agreement 1,  
7 [Great American] agreed to issue certain payment and performance  
8 bonds on behalf of Roadway Electrical Works, Inc. as principal .  
9 . . ." (First Am. Compl. ¶ 10 (Docket No. 6).) Great American  
10 alleges the same for the second indemnity agreement. (Id. ¶ 12.)  
11 In their answer, defendants admit "that [Great American] issued  
12 the payment and performance bonds identified in paragraph 10(a) -  
13 (c) of the Complaint" and "that [Great American] issued the  
14 payment and performance bonds identified in paragraph 12(a) - (h)  
15 of the Complaint." (McDevitt Answer ¶¶ 10, 12 (Docket No. 28).)  
16 The copies of the bonds referred and attached to the First  
17 Amended Complaint are the same bonds attached to the Ballinger  
18 Declaration. (Compare First Am. Compl. Ex. C, with Ballinger  
19 Decl. Exs. 3A-3C, 4A-4H.) The admission in the answer prevents  
20 the McDevitts from contesting the issuance of the bonds, but not  
21 the validity of the bonds under § 995.320.

22 It is undisputed that "[Great American] agreed to issue  
23 certain payment and performance bonds on behalf of Roadway . . .  
24 ." (First Am. Compl. ¶¶ 10, 12; see McDevitt Answer ¶¶ 10, 12.)  
25 It is also undisputed that Great American issued these bonds as  
26 early as November 2009, (Ballinger Decl. Ex. 3A); however, Great  
27 American did not receive the first claim on these bonds until  
28 July 2015, (id. Ex. 5.) The time span between the issuance of

1 the bonds and the claims on those bonds supports the veracity of  
2 the bonds because it indicates that the principal, Roadway, was  
3 performing in reliance on the bonds for some period of time. For  
4 example, the obligee on the November 2009 bond submitted a claim  
5 only once Roadway defaulted on its subcontractor obligations in  
6 October 2015--five years and eleven months after Great American  
7 issued the bond. (Id.)

8 The parties have not provided, and the court is not  
9 aware of, any California case law that holds a bond is invalid if  
10 the surety does not sign it under oath. Section 995.320 of the  
11 California Civil Procedure Code exists to protect the surety by  
12 ensuring that a surety is not liable for a bond or the  
13 principal's actions unless the surety signed the bond under oath.  
14 The defendants do not dispute the issuance of the bonds, do not  
15 dispute the validity of the Indemnity Agreements, and have had  
16 copies of these bonds since the commencement of this action.  
17 Defendants presumably did not question the validity of the bonds  
18 when Roadway performed work and paid subcontractors under them.  
19 Now--years after plaintiff issued the bonds--it is disingenuous  
20 for defendants to claim they are not valid only because plaintiff  
21 did not sign them under oath.

22 Defendants failed to show plaintiff acted in bad faith.  
23 Because it is undisputed that plaintiff issued bonds under which  
24 defendants agreed to indemnify plaintiff and defendants have not  
25 cited any authority suggesting the bonds are invalid because  
26 plaintiff did not sign them under oath, defendants have failed to  
27 create a triable issue of fact with respect to their duty to  
28 indemnify plaintiff. Accordingly, the court must grant

1 plaintiff's motion for summary judgment on its breach of contract  
2 claims.

3 C. Damages

4 The amount of damage is undisputed. The Indemnity  
5 Agreements note that Great American can recover any losses,  
6 interest, expenses, and attorneys' fees incurred as a result of  
7 an indemnity action under the Indemnity Agreements. (Id. Exs. 1-  
8 2.) Great American has paid \$2,579,170.90 in losses and  
9 \$166,077.10 in expenses. (Id. ¶ 23, Ex. 35.) These amounts are  
10 supported by "vouchers, invoices, an affidavit or other  
11 evidence," namely the exhibits to the Ballinger Declaration.  
12 (Id.)

13 "Provisions in indemnity agreements granting to the  
14 indemnitor the right to compromise and settle claims . . . have  
15 been upheld as not against public policy and enforced by the  
16 courts." Transamerica, 401 F.2d at 362. Great American's  
17 decision to settle the claims was within its purview under the  
18 Indemnity Agreements, which grant Great American broad discretion  
19 to review, evaluate, and pay claims. (Ballinger Decl. Exs. 1-2.)

20 Because the McDevitts have not presented any triable  
21 issue of material fact on amount of damages, the statement of  
22 losses and expenses provided by Great American is sufficient  
23 evidence of the damages it incurred.

24 The Indemnity Agreements also provide that Great  
25 American is entitled to interest on the payment of claims.  
26 (Ballinger Decl. Exs. 1-2.) No interest rate was specified in  
27 either Indemnity Agreement. Great American is thus entitled to  
28 the statutory rate of 10 percent per annum. See Cal. Civ. Code §

1 3289 ("If a contract entered into after January 1, 1986, does not  
2 stipulate a legal rate of interest, the obligation shall bear  
3 interest at a rate of 10 percent per annum after a breach.").  
4 The accrued interest on the payments of the claims is  
5 \$131,285.39. (Cabal Decl. Ex. B.)

6 D. Defense to Indemnity Agreement

7 "The language of a contract is to govern its  
8 interpretation, if the language is clear and explicit . . . ."  
9 Cal. Civ. Code § 1638. The McDevitts argue in a short, one-  
10 sentence paragraph at the end of their opposition to Great  
11 American's motion that they are not liable to Great American  
12 because its suit against the individual indemnitors "is  
13 effectively seeking to make the individual indemnitors liable  
14 where they otherwise would not have had any liability by virtue  
15 of the corporate veil." (Docket No. 45.)

16 The McDevitts signed the Indemnity Agreements in their  
17 individual capacities, and the Indemnity Agreements individually  
18 list them as "Undersigned" who agree to "exonerate, indemnify,  
19 hold harmless and keep [Great American] indemnified from . . .  
20 all liability . . . ." (Ballinger Decl. Exs. 1-2.) At the end  
21 of the agreements, Robert McDevitt signed on a line that states  
22 "Robert McDevitt, Individually" and Marlene McDevitt signed on a  
23 line that states "Marlene McDevitt, Individually." Id.  
24 Furthermore, Marlene McDevitt and Coddington signed the Indemnity  
25 Agreements in their official capacities as officers of Roadway  
26 and in their individual capacities, indicating the individual  
27 defendants intended to be individually liable under the Indemnity  
28 Agreements. (See Ballinger Decl. Exs. 1-2.)

1           The Indemnity Agreements are clear and explicit, the  
2 McDevitts signed in their individual capacities. See Sebastian  
3 Int'l Inc. v. Peck, 195 Cal. App. 3d 803, 808-09 (2d Dist. 1987)  
4 (holding corporate officer individually liable for a contract in  
5 which he signed his own name, notwithstanding addition of  
6 corporate title to personal signature line). The McDevitts are  
7 individually liable under the Indemnity Agreements.

8           IT IS THEREFORE ORDERED that plaintiff's motion for  
9 summary judgment on its claims for breach of indemnity agreements  
10 in the amount of \$2,876,633.39 be, and the same hereby is,  
11 GRANTED.

12 Dated: September 20, 2016



13 WILLIAM B. SHUBB  
14 UNITED STATES DISTRICT JUDGE  
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