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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SUNTERRA CORPORATION,  
et al.,

No. 2:04-cv-00784-MCE-EFB

Plaintiffs,

v.

MEMORANDUM AND ORDER

PERINI BUILDING COMPANY, INC.,  
et al.,

Defendants.

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Presently before the Court is Perini Corporation's Motion to Dismiss Plaintiffs' Ninth Cause of Action as alleged in their First Amended Complaint ("FAC").<sup>1</sup> For the following reasons, Defendant's Motion is granted.

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<sup>1</sup> On November 17, 2008, the Court issued a Memorandum and Order disposing of Perini Building Company's Motion to Dismiss Plaintiffs' fourth and sixth causes of action. In that Order, the Court requested further briefing on Defendant's Motion to Dismiss Plaintiffs' Ninth Cause of Action. Since then, Plaintiffs filed a Second Amended Complaint ("SAC") incorporating the Court's decision. Plaintiffs' claim for declaratory relief is the eight cause of action in the SAC. Thus, the Court will interpret Defendant's Motion to be directed at both the ninth cause of action in the FAC and the eight cause of action in the subsequent SAC.

1 **BACKGROUND<sup>2</sup>**

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3 Lake Tahoe Resort Partners, LLC ("LTRP") is a wholly-owned  
4 subsidiary of a Diamond Resorts Corporation holding company,  
5 which is, in turn, a wholly-owned subsidiary of Diamond Resorts  
6 (formerly known as Sunterra Corporation). In 1996, LTRP  
7 contracted with Perini Building Company for the development of  
8 the Lake Tahoe Vacation Resort ("Resort"). At the same time,  
9 LTRP and Perini Corporation entered a Guaranty of Performance and  
10 Indemnity Agreement (Agreement) under which Perini Corporation  
11 ("Defendant") guaranteed the performance of Perini Building  
12 Company. Perini Building Company then began construction of the  
13 Resort.

14 Sunterra, along with various affiliated entities,  
15 subsequently initiated bankruptcy proceedings. During those  
16 proceedings, Sunterra discovered a number of defects alleged to  
17 have occurred in the construction of the Resort. Thus, in 2002,  
18 Sunterra instituted the current action against Perini Building  
19 Company to recover for those deficiencies. On June 20, 2008,  
20 Diamond Resorts filed its FAC adding a number of Plaintiffs, a  
21 second Defendant, Perini Corporation, and new causes of action.  
22 Currently before the Court is Defendant's Motion to Dismiss  
23 Plaintiffs' claim for declaratory relief regarding the parties'  
24 rights and obligations under the Agreement.

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28 <sup>2</sup> For convenience, the relevant facts from the Court's  
November 17, 2008, Order are repeated here.

**STANDARD**

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3 On a motion to dismiss for failure to state a claim under  
4 Rule 12(b)(6), all allegations of material fact must be accepted  
5 as true and construed in the light most favorable to the  
6 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,  
7 337-38 (9th Cir. 1996). Rule 8(a)(2) requires only "a short and  
8 plain statement of the claim showing that the pleader is entitled  
9 to relief" in order to "give the defendant fair notice of what  
10 the...claim is and the grounds upon which it rests." Conley v.  
11 Gibson, 355 U.S. 41, 47 (1957). While a complaint attacked by a  
12 Rule 12(b)(6) motion to dismiss does not need detailed factual  
13 allegations, a plaintiff's obligation to provide the "grounds" of  
14 his "entitlement to relief" requires more than labels and  
15 conclusions, and a formulaic recitation of the elements of a  
16 cause of action will not do. Bell Atl. Corp. v. Twombly, ---  
17 U.S. ----, 127 S. Ct. 1955, 1964-65 (2007) (internal citations  
18 and quotations omitted). Factual allegations must be enough to  
19 raise a right to relief above the speculative level. Id. at 1965  
20 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure  
21 § 1216, pp. 235-36 (3d ed. 2004) ("The pleading must contain  
22 something more...than...a statement of facts that merely creates  
23 a suspicion [of] a legally cognizable right of action")).

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1 A court granting a motion to dismiss a complaint must then  
2 decide whether to grant leave to amend. A court should "freely  
3 give[]" leave to amend when there is no "undue delay, bad  
4 faith[,] dilatory motive on the part of the movant,...undue  
5 prejudice to the opposing party by virtue of...the amendment,  
6 [or] futility of the amendment...." Fed. R. Civ. P. 15(a); Foman  
7 v. Davis, 371 U.S. 178, 182 (1962). Generally, leave to amend is  
8 denied only when it is clear the deficiencies of the complaint  
9 cannot be cured by amendment. DeSoto v. Yellow Freight Sys.,  
10 Inc., 957 F.2d 655, 658 (9th Cir. 1992).

## 11 ANALYSIS

### 12 I. PLAINTIFFS HAVE FAILED TO STATE AN INDEMNITY CLAIM

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14  
15 First and foremost, the parties disagree as to whether  
16 Plaintiffs' declaratory relief claim is properly couched in terms  
17 of an indemnity agreement or a guaranty agreement. "Indemnity is  
18 a contract by which one engages to save another from a legal  
19 consequence of the conduct of one of the parties, or of some  
20 other person." Cal. Civ. Code § 2772. "A surety or guarantor is  
21 one who promises to answer for the debt, default, or miscarriage  
22 of another, or hypothecates property as security therefor." *Id.*,  
23 § 2787. "A guarantor makes a direct promise to perform the  
24 principal's obligation in the event the principal fails to  
25 perform. An indemnitor does not make a direct promise to perform  
26 the principal's obligation, but promises to reimburse the  
27 indemnitee for losses suffered or to hold the indemnitee  
28 harmless."

1 Trust One Mortg. v. Invest American Mortg., 134 Cal. App. 4th  
2 1302, 1309 (4th Dist. 2005).

3 The Agreement entered into by LTRP and Defendant contains an  
4 indemnity clause that states as follows:

5 In addition to the guaranties given by Guarantor under  
6 this Agreement, and without limiting the terms and  
7 conditions thereof, Guarantor hereby agrees to  
8 indemnify and hold Owner harmless from and against any  
9 and all damage, cost, loss, claim, demand, expense, or  
10 liability (including attorneys' fees and expenses),  
arising directly or indirectly from Contractor's  
failure to perform Contractor's Obligations or from  
Contractor's breach of any covenant, representation,  
warranty or indemnity contained in the Construction  
Agreement or arising therefrom.

11 Agreement, § 7. Based on the foregoing language, Plaintiffs  
12 argue that Defendant is required to indemnify them for the losses  
13 Plaintiffs suffered as a result of Perini Building Company's  
14 alleged breach of the construction contract.

15 Nevertheless, according to Plaintiffs, their "claim for  
16 indemnity does not accrue until Perini Building Company is found  
17 liable for breach and Perini Corporation's indemnity obligations  
18 are triggered." Plaintiffs' Supplemental Brief, 5:26-28.

19 Though, as discussed below, the parties disagree as to whether  
20 the applicable statute of limitations has run as to Plaintiffs'  
21 potential guaranty claim, Plaintiffs contend that their rights  
22 under the indemnity clause have not yet accrued because Perini  
23 Building Company's liability has not been established. Thus,  
24 Plaintiffs do not now allege Perini Corporation is currently  
25 liable under the Agreement and instead seek declaratory relief as  
26 to the relative future obligations of the parties.

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1 Plaintiffs' analysis misses the mark. "In indemnity  
2 contracts the engagement is to make good and save another from  
3 loss upon some obligation which he has incurred or is about to  
4 incur to a third person, and is not, as in guaranty and  
5 suretyship, a promise to one to whom another is answerable...The  
6 essential distinction between an indemnity contract and a  
7 contract of guaranty or suretyship is that the promisor in an  
8 indemnity contract undertakes to protect his promisee against  
9 loss or damage through a liability on the part of the latter to a  
10 third person, while the undertaking of a guarantor or surety is  
11 to protect the promisee against loss or damage through the  
12 failure of a third person to carry out his obligations to the  
13 promisee." Somers v. United States Fidelity & Guaranty Co., 191  
14 Cal. 542, 547 (1923), (emphasis added) (internal quotations and  
15 citations omitted).

16 Plaintiffs allege that they have been injured as a direct  
17 result of Perini Building Company's alleged breach of the  
18 construction contract. Plaintiffs are not asking the Court to  
19 determine that Perini Corporation need indemnify Plaintiffs  
20 against Plaintiffs' own alleged liability to some hypothetical  
21 third party. Rather, Plaintiffs seek indemnification only for  
22 injuries allegedly suffered by Plaintiffs as a result of Perini  
23 Building Company's alleged, but not yet established, liability to  
24 them. That is not an indemnity claim and can only be construed  
25 as a guaranty. Thus, Plaintiffs have failed to state a claim  
26 against Perini Corporation for indemnification.

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1 **II. PLAINTIFFS' GUARANTY CLAIM IS BARRED BY THE APPLICABLE**  
2 **STATUTE OF LIMITATIONS**

3 It follows that Plaintiffs' declaratory relief claim is  
4 properly construed as arising under the guaranty of performance  
5 provisions of the Agreement. In that regard, the Agreement  
6 states in pertinent part:

7 Guarantor hereby absolutely and unconditionally  
8 guarantees to and for the benefit of Owner, and  
9 independently assumes liability to Owner, without any  
10 requirement whatsoever of resort by Owner to any other  
11 party, that in the event Contractor fails to complete  
12 the construction of the improvements as described in  
13 the Construction Agreement...or fails to perform its  
14 other obligations thereunder, or in any manner defaults  
15 under the Construction Agreement, then, within five (5)  
16 days after written demand by Owner, Guarantor will  
17 immediately assume all responsibility for the  
18 completion of the Improvements under and in accordance  
19 with all terms and disbursement procedures of the  
20 Construction Agreement and shall unconditionally  
21 guarantee, fulfill and perform all obligations of  
22 Contractor under the Construction Agreement.

23 Agreement, § 1. Thus, it appears from Plaintiffs' allegations and  
24 the terms of the Agreement that LTRP and Perini Corporation entered  
25 a valid guaranty agreement under which Plaintiffs could state a  
26 claim. However, the applicable statute of limitations poses a  
27 complete bar to what may otherwise be a cognizable cause of  
28 action.

29 Pursuant to California Code of Civil Procedure § 337 "[a]n  
30 action upon any contract, obligation or liability founded upon an  
31 instrument in writing" must be commenced within four years.  
32 Since the Agreement is a written contract, the parties agree that  
33 the four-year statute of limitations applies.

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1            "[T]he liability of a surety...accrues at the same time as  
2 that of the principal, or upon default of the principal."<sup>3</sup> Bloom  
3 v. Bender, 48 Cal. 2d 793, 799 (1957). Under the discovery rule,  
4 which is applicable here, "[d]epending on the theory of recovery,  
5 a lawsuit alleging a latent defect in the construction of an  
6 improvement to real property must be brought within three or four  
7 years after the plaintiff discovers the defect, or should have  
8 done so." Lantzy v. Centex Homes, 31 Cal. 4th 363, 366 (2003).

9            This Court agrees with Defendants that Plaintiffs had to have  
10 discovered the construction defects prior to filing their original  
11 action. This litigation was initiated in 2002, well over four  
12 years prior to Plaintiffs' amendment of their Complaint to add the  
13 only cause of action alleged against Defendant. Therefore, even  
14 if the cause of action based upon the guaranty did not accrue  
15 until the defects were discovered, for accrual purposes such  
16 discovery had to have occurred prior to the filing of this suit,  
17 and Plaintiffs are now barred from pursuing such a claim.<sup>4</sup>

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20            <sup>3</sup> Under California law there is no distinction between  
sureties and guarantors. Cal. Civ. Code § 2787.

21            <sup>4</sup> The Court is aware that years after filing the original  
22 Complaint, and only after substituting new counsel and conducting  
23 further testing, Plaintiffs claim to have discovered additional  
24 defects. The late discovery of these alleged defects does not  
25 change the fact that Plaintiffs had already previously uncovered  
26 defects sufficient to warrant the filing of their original suit  
27 against Perini Building Company. Those same defects allegedly  
28 gave rise to a claim against Perini Corporation. Thus, the  
statute of limitations applicable to claims arising from both the  
Guaranty Agreement and the construction agreement accrued as of  
Plaintiffs' initial discovery of the construction defects.  
Nevertheless, despite their actual knowledge of facts giving rise  
to a claim against Perini Corporation, Plaintiffs failed to file  
suit and cannot rely on after-discovered defects to sustain their  
current claim.



1           **A. Perini Corporation Did Not Waive the Protection of the**  
2           **Statute of Limitations Via the Agreement**

3           Plaintiffs next contend that, per the Agreement, Perini  
4 Corporation and LTRP contracted to forego the protections of the  
5 applicable statute of limitations. Plaintiffs rest their  
6 argument on the following contract language:

7           Guarantor hereby consents to: Any and all action or  
8 inaction by Owner (including, without limitation,  
9 election of remedies, amendment and enforcement), taken  
10 or forestalled in its sole and unfettered discretion,  
11 even though any rights and defenses which Guarantor may  
12 otherwise have by subrogation, reimbursement,  
13 indemnification or otherwise against Contractor or  
14 others may be diminished, destroyed, or otherwise  
15 adversely affected by any such alternation, impairment,  
16 suspension, termination, expiration, action or  
17 inaction. Accordingly, Guarantor agrees that it shall  
18 not be exonerated, released or discharged by  
19 application of and Guarantor hereby waives the benefits  
20 of, to the greatest extent permitted by law, Sections  
21 2809, 2810, 2819, 2825, 2839, 2845, 2846, 2847, 2848  
22 and 3433 of the California Civil Code or under any  
23 other law, rule, arrangement or relationship from its  
24 absolute, unconditional and independent liabilities  
25 hereunder by any such alteration, impairment,  
26 suspension, termination, expiration, action or  
27 inaction.

18 Agreement, § 4(c).

19           However, "[t]he whole of a contract is to be taken together,  
20 so as to give effect to every part, if reasonably practicable,  
21 each clause helping to interpret the other." Cal. Civ. Code  
22 § 1641. Additionally, "[r]epugnancy in a contract must be  
23 reconciled, if possible, by such an interpretation as will give  
24 some effect to the repugnant clause, subordinate to the general  
25 intent and purpose of the whole contract." Id., § 1652.  
26 Finally, "[a] standard rule of contract interpretation is that  
27 when provisions are inconsistent, specific terms control over  
28 general ones."

1 Southern California Gas v. City of Santa Ana, 202 F. Supp. 2d  
2 1129, 1134 (C.D. Cal. 2002).

3 Applying these fundamental rules of construction, the Court  
4 cannot accept Plaintiffs' interpretation of the Agreement because  
5 Plaintiffs' reading of section 4(c) is contrary to the plain  
6 language of section 18, which provides:

7 This Guaranty shall be effective until the final  
8 completion of the improvements upon the Land, and  
9 satisfaction of all present and contingent obligations  
10 contemplated by the Construction Agreement, but under  
11 no circumstances longer than the time limits for  
12 warranties and correction of work set forth under  
Section 12.2.2 of the Heritage Green General Conditions  
of the Contract for Construction, AIA Document A201,  
1987 Edition as modified by the Owner and Contractor,  
and the applicable statutes of limitation set forth in  
Article 13.7 of such General Conditions.

13 Article 13.7 of the General Conditions then states:

14 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

15 13.7.1 As between the Owner and Contractor with  
16 respect to the Work:

17 .1 Before Substantial Completion. As to acts or  
18 failures to act occurring prior to the relevant  
19 date of Substantial Completion, any applicable  
20 statute of limitations, except with respect to  
limitations based on discovery shall commence to  
run and any alleged cause of action shall be  
deemed to have accrued in any and all events not  
later than such date of Substantial Completion;

21 .2 Between Substantial Completion and Final  
22 Certificate for Payment. As to acts or failures  
23 to act occurring subsequent to the relevant date  
24 of Substantial Completion and prior to issuance of  
25 the final Certificate for Payment, any applicable  
26 statute of limitations, except with respect to  
27 limitations based on discovery shall commence to  
28 run and any alleged cause of action shall be  
deemed to have accrued in any and all events not  
later than the date of issuance of the Final  
Certificate for Payment; and

1 .3 After Final Certificate for Payment. As to  
2 acts or failures to act occurring after the  
3 relevant date of issuance of the final Certificate  
4 for Payment, any applicable statute of  
5 limitations, except with respect to limitations  
6 based on discovery shall commence to run and any  
7 alleged cause of action shall be deemed to have  
8 accrued in any and all events not later than the  
9 date of any act or failure to act by the  
Contractor pursuant to any warranty provided under  
Paragraph 3.5, the date of any correction of the  
Work or failure to correct the Work by the  
Contractor under Paragraph 12.2, or the date of  
actual commission of any other act or failure to  
perform any duty or obligation by the Contractor  
or the Owner, whichever occurs last.

10 Thus, section 18, which incorporates section 13.7 of the General  
11 Conditions, clearly contemplates that the protections afforded by  
12 relevant statutes of limitations apply to the Agreement.<sup>5</sup> The  
13 Court cannot interpret the Agreement such that the more general  
14 language of section 4(c) nullifies the specific language of  
15 section 18 and its incorporation of section 13.7 of the General  
16 Conditions. Therefore, the Court rejects Plaintiffs' argument  
17 that Defendant expressly waived the application of California  
18 Code of Civil Procedure 337. The four-year limitations period  
19 controls.

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21 <sup>5</sup> The Court disagrees with Plaintiffs' assertion that  
22 "Paragraph 13.7 specifically does not allow commencement of the  
23 statute of limitations for defects that were not discovered  
24 before the date of the final certificate of payment." Plaintiff  
25 relies on the phrase "except with respect to limitations based on  
26 discovery" to argue that the parties did not intend the relevant  
27 statute of limitations to apply at all to defects discovered  
28 after the Final Certificate of Payment. Contrary to Plaintiffs'  
assertions, Paragraph 13.7 does not state that the statute of  
limitations for undiscovered defects never accrues. Rather, it  
sets a concrete date for accrual of claims not subject to the  
discovery rule. The language of paragraph 13.7 makes clear that,  
regardless of the manner in which the accrual date is determined,  
the parties intended the relevant statute of limitations to  
apply.

1           **B.    Plaintiffs' Current Claim Against Perini Corporation**  
2           **Does Not Relate Back to The Original Complaint**

3           Finally, Plaintiffs argue that their declaratory relief  
4 cause of action relates back to their original Complaint under  
5 Federal Rule of Civil Procedure 15(c), which states:

6           (1) When an Amendment Relates Back. An amendment to a  
7 pleading relates back to the date of the original  
8 pleading when:

9           (A) the law that provides the applicable statute of  
10 limitations allows relation back;

11           (B) the amendment asserts a claim or defense that arose  
12 out of the conduct, transaction, or occurrence set out  
13 -- or attempted to be set out -- in the original  
14 pleading; or

15           (C) the amendment changes the party or the naming of  
16 the party against whom a claim is asserted, if Rule  
17 15(c)(1)(b) is satisfied and if, within the period  
18 provided by Rule 4(m) for serving the summons and  
19 complaint, the party to be brought in by amendment:  
20 (i) received such notice of the action that it will not  
21 be prejudiced in defending on the merits; and  
22 (ii) knew or should have known that the action would  
23 have been brought against it, but for a mistake  
24 concerning the proper party's identity.

25 Thus, a prerequisite to relation back under the federal rules is  
26 that Plaintiffs were mistaken as to the proper Defendant's  
27 identity upon filing of the original complaint. Such  
28 circumstances do not exist here.

          In 2002, Plaintiffs originally filed suit only against  
Perini Building Company based on the construction contract.  
Nevertheless, LTRP originally contracted with both Perini  
Building Company and Perini Corporation as separate entities and  
now seeks to sue both entities individually. Plaintiffs were  
aware of the existence of both agreements and yet, until 2008,  
failed to file suit against Perini Corporation.

1 Plaintiff does not now seek to substitute a proper defendant.  
2 Instead, Plaintiffs have now alleged an entirely distinct claim  
3 against a before unmentioned entity. Rule 15(c) simply does not  
4 cover this set of circumstances.

5 Plaintiffs' reliance on Smith v. Guaranty Service Corp., 51  
6 F.R.D. 289 (N.D. Cal. 1970), is inapposite. In Smith, the court  
7 allowed additional claims to be made against a defendant  
8 passively named in the original complaint as a stakeholder. In  
9 the current case, Perini Corporation was not named at all in the  
10 original Complaint and cannot be brought in now. Thus,  
11 Plaintiffs have failed to state a claim against Perini  
12 Corporation.

13  
14 **CONCLUSION**  
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16 Defendant's Motion to Dismiss Plaintiffs' Declaratory Relief  
17 Cause of Action (Docket Number 622) is granted with leave to  
18 amend.<sup>6</sup> Plaintiffs are directed to file a Third Amended  
19 Complaint, should they choose to do so, within twenty (20) days  
20 of this Order.

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27 <sup>6</sup> Because oral argument will not be of material assistance,  
28 the Court ordered this matter submitted on the briefing. E.D.  
Cal. Local Rule 78-230 (h).

1 If Plaintiffs do not file a Third Amended Complaint, Defendant  
2 Perini Corporation will be terminated from this action and the  
3 Court will address the Motion to Strike Plaintiffs' SAC (Docket  
4 Number 686).

5 IT IS SO ORDERED.

6 Dated: January 13, 2009

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MORRISON C. ENGLAND, JR.  
10 UNITED STATES DISTRICT JUDGE  
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