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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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FIRST NATIONAL INSURANCE  
COMPANY OF AMERICA,

NO. CIV. 2:10-1449 WBS GGH

Plaintiff,

MEMORANDUM AND ORDER RE:  
MOTION FOR SUMMARY JUDGMENT

v.

GREGORY L. HUNT, individually  
and doing business as Hunt's  
Excavating; CECILIA HUNT, an  
individual, and ACTION  
CONSTRUCTION CO., a Nevada  
corporation.

Defendants.

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Plaintiff First National Insurance Company of America  
("First National") brought this action, alleging that defendants  
Gregory L. Hunt, individually and doing business as Hunt's  
Excavating, Cecilia Hunt, and Action Construction Co. breached an  
indemnity agreement. First National now moves for summary  
judgment pursuant to Federal Rule of Civil Procedure 56 on its

1 claim for breach of indemnity agreement.<sup>1</sup> Defendants failed to  
2 file an opposition or statement of non-opposition to the motion,  
3 as required by Local Rule 230(c), or a response to plaintiff's  
4 statement of undisputed facts, as required by Local Rule 260(b).

5 I. Standard

6 Summary judgment is proper "if the movant shows that  
7 there is no genuine dispute as to any material fact and the  
8 movant is entitled to judgment as a matter of law." Fed. R. Civ.  
9 P. 56(a). A material fact is one that could affect the outcome  
10 of the suit, and a genuine issue is one that could permit a  
11 reasonable jury to enter a verdict in the non-moving party's  
12 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
13 (1986).

14 Where the moving party bears the burden of proof at  
15 trial, it must come forward with evidence which would entitle it  
16 to a directed verdict if the evidence were uncontroverted at  
17 trial. Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992).  
18 Once the moving party meets its initial burden, the burden shifts  
19 to the non-moving party to "designate 'specific facts showing  
20 that there is a genuine issue for trial.'" Celotex Corp. v.  
21 Catrett, 477 U.S. 317, 324 (1986) (quoting then-Fed. R. Civ. P.  
22 56(e)). To carry this burden, the non-moving party must "do more  
23 than simply show that there is some metaphysical doubt as to the  
24 material facts." Matsushita Elec. Indus. Co. v. Zenith Radio  
25 Corp., 475 U.S. 574, 586 (1986). "The mere existence of a  
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27 <sup>1</sup> Plaintiff's Complaint also includes claims for specific  
28 performance, injunctive relief, and Quia Timet. (Docket No. 2.)  
Such relief is not sought in the instant motion.

1 scintilla of evidence . . . will be insufficient; there must be  
2 evidence on which the jury could reasonably find for the  
3 [non-moving party]." Anderson, 477 U.S. at 252.

4 A party opposing summary judgment who "fail[s]  
5 specifically to challenge the facts identified in the [moving  
6 party's] statement of undisputed facts . . . is deemed to have  
7 admitted the validity of [those] facts . . ." Beard v. Banks,  
8 548 U.S. 521, 527 (2006).

9 II. Relevant Facts

10 Because defendants failed to respond to plaintiff's  
11 motion, the court takes the facts as presented by plaintiff as  
12 undisputed. On September 11, 2008, the parties entered into a  
13 General Agreement of Indemnity for Contractors ("Indemnity  
14 Agreement"). (Wilcox Decl. ¶ 6, Ex. 1 (Docket No. 23).) The  
15 Indemnity Agreement begins by stating:

16 THIS AGREEMENT is made by the Undersigned in favor of the  
17 Safeco Insurance Companies for the purpose of  
18 indemnifying them from all loss and expense in connection  
19 with any Bonds for which any Safeco Insurance Company now  
20 is or hereafter becomes Surety for any of the following  
as Principal (hereinafter referred to as Contractor):  
Action Construction Co.; Hunt's Excavating (Gregory L.  
Hunt, Owner).<sup>2</sup>

21 (Id. Ex. 1.) The agreement is signed by Gregory L. Hunt and  
22 Cecilia Hunt individually and by Gregory L. Hunt as President of  
23 Action Construction Co. (Id.)

24 As relevant to this motion, the Indemnity Agreement  
25 contains the following provisions:

26 INDEMNITY TO SURETY: Undersigned agree to pay to Surety  
upon demand:

27 \_\_\_\_\_  
28 <sup>2</sup> First National is one of the Safeco Insurance Companies  
listed as "Surety." (Wilcox Decl. Ex. 1 (Docket No. 23).)

1 1. All loss, costs, and expenses of whatsoever kind and  
2 nature, including court costs, reasonable attorney fees  
3 (whether Surety at its sole option elects to employ its  
4 own attorney, or permits or requires Undersigned to make  
5 arrangements for Surety's legal representation),  
6 consultant fees, investigative costs and any other  
7 losses, costs or expenses incurred by Surety by reason of  
8 having executed any Bond, or incurred by it on account of  
9 any Default under this agreement by any of the  
10 Undersigned, or by reason of the refusal to execute any  
11 Bond. In addition the Undersigned agree to pay to Surety  
12 interest on all disbursements made by Surety in  
13 connection with such loss, costs and expenses incurred by  
14 Surety at the maximum rate permitted by law calculated  
15 from the date of each disbursement;

16 . . .

17 With respect to claims against Surety:

18 1. Surety shall have the exclusive right for itself and  
19 the Undersigned to determine in its sole and absolute  
20 discretion whether any claim or suit upon any Bond shall,  
21 on the basis of belief of liability, expediency or  
22 otherwise, be paid, compromised, defended or appealed.

23 2. Surety may incur such expenses, including reasonable  
24 attorneys' fees, as deemed necessary or advisable in the  
25 investigation, defense and payment of such claims and  
26 completion of any Contract with respect to which Surety  
27 has issued any Bond.

28 3. Surety's determination in its sole and absolute  
discretion of the foregoing shall be final and conclusive  
upon the Undersigned.

4. An itemized statement of loss and expense incurred by  
Surety, sworn to by an officer of Surety, shall be prima  
facie evidence of the fact and extent of the liability of  
Undersigned to Surety in any claim or suit by Surety  
against Undersigned.

5. . . .

(Id.)

Following the execution of the Indemnity Agreement,  
Hunt's Excavating entered into two public works contracts  
("Projects"), which required that Hunt's Excavating furnish the  
respective project owners with a performance bond or a labor and  
materials payment bond. (Id. ¶ 9.) First National issued

1 certain performance and payment bonds on behalf of Hunt's  
2 Excavating ("Bonds"). (Id. ¶ 10.) Several subcontractors,  
3 suppliers, and "materialmen" providing labor and materials on the  
4 Projects alleged that Hunt's Excavating defaulted on certain  
5 payment obligations and made claims against the Bonds. (Id. ¶  
6 11.) The Division of Labor Standards Enforcement also asserted a  
7 claim against the contract funds due from the Truckee Donner  
8 Utility District, the obligee of the Bonds. (Id. ¶ 12.)

9 Plaintiff then requested, orally and in writing, that  
10 defendants protect, exonerate, and indemnify plaintiff from the  
11 expenses associated with the Bonds. (Id. ¶ 26.) Defendants  
12 failed, and continue to fail, to protect, exonerate, and  
13 indemnify plaintiff, as required by the Indemnity Agreement.  
14 (Id. ¶ 27.)

15 Plaintiff has provided a Claims Payment History Report  
16 detailing the payments made, including payments for claims under  
17 the Bonds, attorney's fees and expenses associated with  
18 investigating those claims, and attorney's fees associated with  
19 the instant action. (Id. Ex. 2.) As of April 30, 2011, the  
20 payments made by or on behalf of First National totaled  
21 \$402,237.51, exclusive of interest. (Id. ¶ 13, Ex. 2.) Under a  
22 calculation of interest at 10 percent per annum, interest on the  
23 payments totals \$43,926.53. (Id. ¶ 30, Ex. 2.) The total sought  
24 by First National is \$446,164.04. (Id. ¶ 31, Ex. 2.)

#### 25 IV. Discussion

26 California law has long recognized the right of a  
27 surety, such as First National, to be indemnified under the terms  
28 a written indemnity agreement. See, e.g., Fid. & Deposit Co. of

1 Md. v. Whitson, 187 Cal. App. 2d 751, 756 (2d Dist. 1960).

2           In order to demonstrate a valid claim for breach of an  
3 indemnity agreement under California law, a plaintiff must  
4 demonstrate the existence of an indemnity agreement, the  
5 plaintiff's performance under the agreement, breach of the  
6 agreement, and damages. See Reichert v. Gen. Ins. Co. of Am., 68  
7 Cal. 2d 822, 830 (1968); Four Star Elec., Inc. v. F & H Constr.,  
8 7 Cal. App. 4th 1375, 1380 (3d Dist. 1992). "An indemnity  
9 agreement is to be interpreted according to the language and  
10 contents of the contract as well as the intention of the parties  
11 as indicated by the contract." Myers Bldg. Indus., Ltd. v.  
12 Interface Tech., Inc., 13 Cal. App. 4th 949, 968 (2d Dist. 1993).

13           Here, the terms of the Indemnity Agreement at issue are  
14 clear. Defendants expressly agreed to indemnify First National  
15 on demand for any losses, costs, and expenses, including court  
16 costs, reasonable attorney's fees, consultant fees, investigative  
17 costs, and any other losses, costs, or expenses incurred by  
18 reason of having executed any Bond, or incurred on account of  
19 defendants' default under the Agreement.<sup>3</sup>

20           It is undisputed that all of the necessary elements of  
21 a claim for breach of indemnity agreement are met. An indemnity  
22 agreement exists, plaintiff has performed under the agreement,  
23 defendants failed to indemnify plaintiff for claims already paid,  
24 and plaintiff has suffered damage as a result.

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26 <sup>3</sup> This includes plaintiff's attorney's fees in bringing  
27 the instant action. See Safeco Ins. Co. of Am. v. Chiang, No. C-  
28 04-1977, 2007 WL 460844, at \*2 (N.D. Cal. Feb. 7, 2007)  
(interpreting similar contractual language as providing recovery  
of attorney's fees incurred in enforcing the agreement).

1           The amount of damage is similarly undisputed. When a  
2 surety presents evidence of its payments pursuant to a prima  
3 facie evidence clause such as that provided in the Indemnity  
4 Agreement, the burden shifts to the indemnitors to prove that the  
5 fees may not be recovered. Travelers Cas. & Sur. Co. of Am. v.  
6 Dunmore, No. CIV S-07-2493 LKK DAD, 2009 WL 1586936, at \*10 (E.D.  
7 Cal. Jun. 5, 2009) (citing Fallon Elec. Co. v. Cincinnati Ins.  
8 Co., 121 F.3d 125, 128 (3d Cir. 1997)). Because defendants have  
9 not presented any genuine issue of material fact, the statement  
10 of losses and expenses provided by First National is sufficient  
11 evidence of the damages it incurred.

12           The Indemnity Agreement also provides that First  
13 National is entitled to prejudgment interest. Because no  
14 interest rate was specified, plaintiff is entitled to the  
15 statutory rate of 10 percent per annum. See Cal. Civ. Code §  
16 3289(b).

17           Because there is no genuine issue as to any material  
18 fact on plaintiff's claim for breach of indemnity agreement or  
19 the damages arising from the breach, the court will grant  
20 plaintiff's motion for summary judgment as to that claim.

21           IT IS THEREFORE ORDERED that plaintiff's motion for  
22 summary judgment on its claim for breach of indemnity agreement  
23 in the amount of \$446,164.04 be, and the same hereby is, GRANTED.  
24 DATED: June 2, 2011

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26   
27 WILLIAM B. SHUBB  
28 UNITED STATES DISTRICT JUDGE