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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARCH INSURANCE COMPANY, a  
Missouri corporation,

Plaintiff,

v.

SIERRA EQUIPMENT RENTAL, INC., a  
California corporation; MELVIN R.  
WEIR, an individual; CAROLYN S.  
SCAROLA, as trustee of the Dry Creek  
Ranches Trust; CAROLYN S. SCAROLA,  
an individual,

Defendants.

No. 2:12-cv-00617-KJM-KJN

ORDER

This matter is before the court on the motion for partial summary judgment brought by plaintiff Arch Insurance Company (Arch), on its breach of contract claim against defendant Sierra Equipment Rental, Inc. (Sierra). Mot., ECF No. 154. The motion is unopposed, as Sierra is without counsel.<sup>1</sup> The court held a hearing on May 6, 2016, and neither party appeared. The court subsequently ordered the parties to show cause as to why they should not be sanctioned for failing to appear. ECF No. 170. Arch responded, indicating it did not appear at

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<sup>1</sup> The court has previously addressed the problem posed by the lack of counsel for Sierra given its corporate status. ECF Nos. 163, 167.

1 the hearing due to a calendaring error compounded with the confusion over Sierra's lack of  
2 representation. ECF No. 171. For reasons explained below, the court GRANTS Arch's motion  
3 for partial summary judgment and DISCHARGES the order to show cause as to Arch. Sierra's  
4 OSC is also DISCHARGED, given that nothing before the court indicates it could enforce any  
5 monetary sanctions ordered, and in light of the adverse decision by the court against Sierra in the  
6 resolution of this motion.

7 I. FACTUAL BACKGROUND

8 In 2012, Sierra was a corporate entity in good standing with rights to conduct business in  
9 California. Stmt. of Undisputed Material Facts (SUMF) No. 23, ECF No. 155. Previously, on  
10 August 12, 2005, Sierra and others, including Melvin Weir and Carolyn Scarola (collectively,  
11 "Indemnitors"), executed a General Indemnity Agreement (GIA) as partial consideration for  
12 Arch's issuance of bonds covering Sierra's construction contracts for the two projects at issue  
13 here: the Lake County and Shasta County Projects. See SUMF Nos. 1, 2, 8; Pearce Decl., Ex. A,  
14 ECF No. 157 at 12.<sup>2</sup> In consideration of Arch's issuance of the payment and performance bonds,  
15 the GIA requires Sierra to indemnify and hold Arch harmless for any "loss" as defined in the  
16 GIA, which includes

17 Any and all liability, losses, costs, expenses, and fees of whatever  
18 kind or nature, that [Arch] may sustain or incur as a result of  
19 executing any [b]ond or as a result of the failure of [Sierra] or  
20 Indemnitors to perform or comply with [the GIA]. Loss includes  
21 but is not limited to: (a.) sums posted by [Arch] as a reserve for the  
22 payment of potential losses and / or expenses, (b.) all costs and  
23 expenses incurred in connection with investigating, paying or  
24 litigating any claim, and / or enforcing [the GIA], including but not  
25 limited to legal fees and expenses, professional and consulting fees,  
26 technical and expert witness fees and expenses, (c.) all accrued and  
27 unpaid premiums owing to [Arch] for the issuance, continuation or  
28 renewal of any [b]onds or for any policy of insurance issued by  
[Arch] for [Sierra] or Indemnitors, (d.) funds advanced by [Arch] to  
[Sierra] in connection with a Bonded Contract, and (e.) all other  
amounts payable to [Arch] according to the terms and conditions of  
[the GIA] . . . .

26 SUMF No. 4; Pearson Decl., Ex. A at 9.

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28 <sup>2</sup> All page numbers in this order cite to the ECF pagination unless otherwise stated.

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The GIA also requires the following:

4. Posting of Collateral – Indemnitors agree to deposit with [Arch], immediately upon demand by [Arch], an amount equal to the greater of (a.) the amount of any reserve established by [Arch] to cover any actual or potential Loss, or (b.) the amount of any claim or claims or other liabilities asserted against [Arch] as a result of issuing any [b]ond . . . .

. . .

8. Discharge of Surety – Upon the request of [Arch], [Sierra] and Indemnitors will procure the discharge of [Arch] from any [b]ond, and all liability arising therefrom, and provide evidence to [Arch] regarding the same.

9. Access to Books & Records – [Arch], including its designated agents, shall, at any and all times, have unrestricted access upon reasonable notice to review all books and records of [Sierra] and Indemnitors . . . .

SUMF Nos. 4, 5, 6; Pearson Decl., Ex. A at 9–10. Lastly, the GIA also provides that Sierra and the Indemnitors agree to accept vouchers or other evidence of payments made by Arch for any Loss sustained or incurred by reason of having executed any Bond. SUMF No. 26; Pearson Decl., Ex. A at 9.

In reliance on Sierra and Indemnitors’ representations in the GIA, Arch issued bonds guaranteeing Sierra’s performance of two contracts, and Sierra’s payments to subcontractors and suppliers in connection with those contracts: (1) Sierra’s contract with the California Department of Transportation (CalTrans) for construction on Route 53 in Lake County (the Lake County Project) (payment and performance bonds, with penal sums of \$11,311,521.95 and \$5,655,768.98, respectively to cover alternative performance of the contract if needed); and (2) Sierra’s subcontract with Tutor-Saliba Corporation (Tutor) for construction on Antler’s Bridge located in Shasta County (the Shasta County Project) (payment and performance bonds, with a penal sum of \$6,532,874.00 to cover alternative performance of the subcontract if needed). SUMF Nos. 8–9. The bonds are collectively referred to as the “Bonds” in this order.

By January 2012, Sierra had failed to pay a number of subcontractors on the Lake County Project, resulting in numerous claims on the Bonds for that project. SUMF No. 10. At

1 the same time, Sierra requested financial assistance from Arch. SUMF No. 11. In mid-February  
2 2012, Arch demanded that Sierra fulfill its obligations under the GIA, including exonerating Arch  
3 from potential liabilities, indemnifying Arch, and providing collateral in the amount of  
4 \$1,461,918.83, the total amount in claims asserted against Arch's Bonds at the time. SUMF No.  
5 15. However, by the end of February 2012, Sierra defaulted not only on its contract for the Lake  
6 County Project but also for the Shasta County Project contract, resulting in claims against both  
7 Projects' Bonds by the Project owners, CalTrans and Tutor, and \$6,737,855.98 in losses to Arch  
8 as of January 12, 2016. SUMF No. 10–13; Pearce Decl. ¶ 9, Ex. E. Tutor, with whom Sierra  
9 subcontracted for the Shasta County Project, filed a civil action against both Sierra and Arch as a  
10 result of the default, alleging damages in excess of \$6,532,874.00. *Id.* at 13–14. At the time Arch  
11 filed its motion, the civil action was pending in Los Angeles Superior Court. *Id.*

12                 Since 2012 Arch has made numerous requests to inspect Sierra's books and  
13 records. SUMF No. 25. Sierra has refused, and Arch retained legal counsel to gain access. *Id.*  
14 Arch has recovered \$2,821,915.45 in credits against its losses under the Bonds. SUMF No. 27.  
15 As of January 12, 2016, Sierra's corporate status with the California Secretary of State was  
16 forfeited, meaning Sierra has not filed its franchise tax return or paid the tax due thereunder.  
17 SUMF No. 28; Van Ornum Decl. ¶ 5 & Ex. B, ECF No. 156; *see also Business Search – Field*  
18 *Descriptions and Status Definition*, California Secretary of State web page, available at  
19 <http://www.sos.ca.gov/business-programs/business-entities/cbs-field-status-definitions/> (last  
20 visited May 2, 2016 16:17GMT). Arch's counsel has attempted to secure a stipulated judgment  
21 from Sierra but has been unsuccessful.

## 22 II. PROCEDURAL HISTORY

23                 Arch filed the complaint in this action on March 9, 2012. Compl., ECF No. 2. On  
24 May 18, 2012, the court granted Arch's ex parte application for a right to attach order and writ of  
25 attachment against Sierra and the Indemnitors in the amount of \$1,661,980 based on California  
26 Code of Civil Procedure section 487.010. *See* May 2012 Order, ECF No. 36. Subsequently on  
27 November 13, 2012, the court granted Arch's motions for leave to amend the complaint and for a  
28 preliminary injunction freezing the assets of Sierra and Indemnitors. *See* November 2012 Order,

1 ECF No. 71. In the same order, the court denied Arch’s request for a temporary restraining order  
2 to prevent Scarola individually, among other defendants who have since been dismissed from the  
3 case, from dissipating or concealing any assets she received from Sierra or the Indemnitors. *Id.* at  
4 9–11.

5 The First Amended Complaint alleges a total of eleven claims for relief, some  
6 against all defendants, and some against only certain defendants. *See generally* First Am. Compl.  
7 (FAC), ECF No. 68. Arch moves for summary judgment only on the first cause of action: breach  
8 of contract against Sierra and the Indemnitors. FAC ¶¶ 36–48.

9 As noted, Arch indicated it did not appear at hearing on the motion due to a  
10 calendaring error compounded with the confusion over Sierra’s lack of representation. ECF No.  
11 171. Given Arch’s response to the order to show cause and the court’s interest in reaching the  
12 merits of the case, the order to show cause against Arch is DISCHARGED. Sierra’s OSC is also  
13 DISCHARGED.

### 14 III. SUMMARY JUDGEMENT

#### 15 A. Legal Standard

16 As noted, Arch’s motion for partial summary judgment is unopposed. While “[a]  
17 district court may not grant a motion for summary judgment solely because the opposing party  
18 has failed to file an opposition,” *Cristobal v. Siegel*, 26 F.3d 1488, 1494–95 & n.4 (9th Cir.  
19 1994), “[t]he court may . . . grant an unopposed motion for summary judgment if the movant’s  
20 papers are themselves sufficient to support the motion and do not on their face reveal a genuine  
21 issue of material fact.” *United States v. Real Property at Incline Village*, 47 F.3d 1511, 1520 (9th  
22 Cir. 1995) (local rule cannot mandate automatic entry of judgment for moving party without  
23 consideration of whether motion and supporting papers satisfy Federal Rule of Civil Procedure  
24 56).

25 The court does not weigh evidence or assess the credibility of witnesses; rather, it  
26 determines which facts are undisputed, then draws all inferences and views all evidence in the  
27 light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255  
28 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

1 “Where the record taken as a whole could not lead a rational trier of fact to find for the non-  
2 moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (quoting *First*  
3 *Nat’l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

4 The moving party bears the initial burden of “informing the district court of the  
5 basis for its motion, and identifying those portions of [the record] which it believes demonstrate  
6 the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
7 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing  
8 law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 247–48.

9 B. Breach of Contract

10 The surety contracts of the kind at issue here are construed according to the same  
11 rules that govern interpretation of all contracts. *Pacific Employers Ins. Co. v. City of Berkeley*,  
12 158 Cal. App. 3d 145, 150 (1984). To prevail on a breach of contract claim under California law,  
13 which applies in this case, a plaintiff must prove (1) the existence of a contract, (2) the plaintiff’s  
14 performance of its obligations under the contract or excuse for nonperformance, (3) the  
15 defendant’s breach, and (4) resulting damage to the plaintiff. *Richman v. Hartley*, 224 Cal. App.  
16 4th 1182, 1186 (2014). The court looks first at whether a contract existed between Arch and  
17 Sierra.

18 1. Existence of a Contract

19 In California, to prove the existence of a contract, a plaintiff must show: (a) parties  
20 capable of contracting, (2) the parties’ consent, (3) a lawful object, and (4) consideration. *See*  
21 Cal. Civ. Code § 1550. “Every contract requires the mutual assent or consent of the parties.”  
22 *Meyer v. Benko*, 55 Cal. App. 3d 937, 942 (1976) (citing Cal. Civ. Code §§ 1550, 1565). Consent  
23 may be manifested in several ways—in writing, through speech or by conduct—and “may be  
24 implied through action or inaction.” *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir.  
25 2014). Ultimately, “[t]he existence of mutual consent is determined by objective rather than  
26 subjective criteria, the test being what the outward manifestations of consent would lead a  
27 reasonable person to believe.” *Meyer*, 55 Cal. App. 3d at 943. Parties consent when they “all  
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1 agree upon the same thing in the same sense.” Cal. Civ. Code § 1580; *Bustamante v. Intuit, Inc.*,  
2 141 Cal. App. 4th 199, 209 (2006).

3 First, a corporation has the power to enter into contracts in conducting its  
4 activities, and Sierra, at the time of contract was a corporate entity in good standing with the  
5 ability to conduct business lawfully in California. Cal. Corp. Code § 9140(i); *see also Bates v.*  
6 *Coronado Beach Co.*, 109 Cal. 160, 162 (1895) (corporation has the power to enter into any  
7 contract essential to the transaction of its ordinary affairs). Second, the GIA was a six-page  
8 document, including the signature pages, with each provision clearly titled and numbered. *See*  
9 *generally Pearce Decl., Ex. A.* Sierra signed the GIA, and the signature was witnessed. *Id.* at 12–  
10 15. Objectively, a reasonable person would find that Sierra consented to the GIA. *Cf. Silicon*  
11 *Valley Self Direct, LLC v. Paychex, Inc.*, No. 14-1055, 2015 WL 4452373, at \*3 (N.D. Cal. July  
12 20, 2015) (mutual consent is determined by objective outward manifestation); *see also Marin*  
13 *Storage & Trucking, Inc. v. Benco Contracting & Eng’g*, 89 Cal. App. 4th 1042, 1049 (2001)  
14 (“ordinarily one who signs an instrument which on its face is a contract is deemed to assent to all  
15 its terms,” and “[a] party cannot avoid the terms of a contract on the ground that he or she failed  
16 to read it before signing.”). Third, California recognizes surety contracts as lawful instruments.  
17 *Pacific Employers Ins. Co.*, 158 Cal. App. 3d at 150. Lastly, in return for Arch’s issuance of the  
18 Bonds covering Sierra’s construction contracts, Sierra agreed to indemnify and hold Arch  
19 harmless for certain losses as defined by the GIA, post collateral, procure Arch’s discharge from  
20 any Bond issued under the GIA, and provide Arch with access to its financial books and records  
21 if Arch requested. SUMF Nos. 1–6; *Pearce Decl., Ex. A* at 9–10. In other words, the GIA was  
22 supported by consideration. *See Steiner v. Thexton*, 48 Cal. 4th 411, 420-21 (2010) (for  
23 consideration to be valid, recipient of promise must provide bargained-for benefit or suffer  
24 prejudice in exchange for promise).

25 The court finds as a matter of law that a contract existed between Arch and Sierra.

26 2. Plaintiff’s Performance or Excuse from Non-Performance

27 The court next looks at whether Arch performed or was excused from non-  
28 performance. Here, Sierra agreed to the requirements in the GIA as consideration in exchange for

1 Arch's issuance of performance and payment bonds for Sierra's construction projects. Arch  
2 issued the Bonds covering Sierra's contracts for both the Lake County and Shasta County  
3 Projects. SUMF Nos. 8–9. Accordingly, the court finds that as a matter of law, Arch has  
4 performed its obligation under the GIA. *Cf. American Express, F.S.B., Federal Sav. Bank v.*  
5 *Wright*, No. 11-4492, 2012 WL 2343674, at \*2 (N.D. Cal. June 20, 2012) (summary judgment  
6 granted where no genuine dispute of material fact exists as to whether plaintiff performed).

7 3. Defendants' Breach

8 The third element of a breach of contract claim is the defendant's breach of the  
9 contract, or in this case, Sierra's breach of the GIA. Arch argues Sierra breached its obligation to  
10 (1) indemnify, (2) provide collateral, (3) exonerate Arch, and (4) provide access to its books and  
11 records. Mot. at 8–10.

12 Here, in terms of indemnification, Sierra agreed in the GIA to indemnify and hold  
13 Arch harmless for any "loss" as defined in the agreement, which includes, "Any and all liability,  
14 losses, costs, expenses, and fees of whatever kind or nature, that [Arch] may sustain or incur as a  
15 result of executing any [b]ond or as a result of the failure of [Sierra] or Indemnitors to perform or  
16 comply with [the GIA]." SUMF No. 4; Pearson Decl., Ex. A at 9. Sierra has yet to indemnify  
17 Arch for its defense costs arising from the claims asserted against the Bonds, and Arch's  
18 payments on the Bonds to CalTrans, subcontractors, materialmen, and laborers. SUMF Nos. 12–  
19 22.

20 With respect to providing collateral, Sierra agreed,

21 [T]o deposit with [Arch], immediately upon demand by [Arch], an  
22 amount equal to the greater of (a.) the amount of any reserve  
23 established by [Arch] to cover any actual or potential Loss, or  
(b.) the amount of any claim or claims or other liabilities asserted  
against [Arch] as a result of issuing any [b]ond . . . .

24 SUMF No. 4; Pearson Decl., Ex. A at 9. On February 17, 2012, Arch demanded that Sierra post  
25 \$1,461,918.83 in collateral, the total amount in claims asserted against Arch's Bonds at the time.  
26 SUMF No. 15. Sierra did not deposit the requested collateral. SUMF No. 20. Sierra also did not  
27 deposit any collateral for Tutor's claim against Arch in connection with the Shasta County  
28 project, in the sum of \$6,532,874.00 after Arch demanded it do so. SUMF No. 9, 13–14, 15. As



1 discussed above, Tutor has filed a civil action against Arch, and in connection with that action, to  
2 date, Sierra has not “procure[d] the discharge of [Arch] from any Bond, and all liability arising  
3 therefrom, and provide[d] evidence to [Arch] regarding same.” SUMF No. 5; Pearson Decl., Ex.  
4 A at 10.

5 Finally, Sierra agreed at the time of contracting to provide access to its books and  
6 records under the GIA at Arch’s request. SUMF No. 6; Pearson Decl., Ex. A at 10. Since 2012  
7 Arch has made numerous requests to inspect Sierra’s books and records, in vain. SUMF No. 25.  
8 Arch has had to retain legal counsel to advance its interests in the face of Sierra’s refusal. *Id.*

9 As a matter of law, the court finds Sierra has breached its obligations with respect  
10 to indemnification, collateralization, exoneration, and provision of access to books and records.

11 4. Damages

12 Once a breach of contract has been shown, California law applies a liberal rule in  
13 allowing a court or jury to determine the amount of damages. *Hunt Foods v. Phillips*, 248 F.2d  
14 23, 33 (9th Cir. 1957); *Cal. Lettuce Growers v. Union Sugar Co.*, 45 Cal. 2d 474, 486–87 (1955).  
15 California law also limits contract damages to damages reasonably within the contemplation of  
16 the parties as a probable result of a breach at the time the contract was formed. *Brandon & Tibbs*  
17 *v. George Kevorkian Accountancy Corp.*, 226 Cal. App. 3d 442, 457 (1990). The California Civil  
18 Code provides that “[n]o damages can be recovered for a breach of contract which are not clearly  
19 ascertainable in both their nature and origin.” Cal. Civ. Code § 3301.

20 Here, the GIA provides that Sierra, among others, “agree[s] to indemnify and hold  
21 harmless [Arch] for any and all Loss sustained or incurred by reason of having executed any and  
22 all Bonds.” SUMF No. 3; Pearce Decl., Ex. A at 9. As a result, Arch can recover, based on  
23 Sierra’s breach of contract, the \$6,737,855.98 it incurred in losses paid for claims on the Bonds,  
24 loss adjustment expenses, consulting fees, attorney’s fees and related costs, less the  
25 \$2,821,915.45 recovered from other Indemnitors or defendants since the beginning of this action,  
26 for a total of \$3,915,940.53. SUMF No. 10–13; Pearce Decl. ¶ 9, Ex. E. However, with respect  
27 to the additional \$6,532,874.00 Arch may suffer as a result of Tutor’s pending civil action arising  
28 from Sierra’s breach of contract, that amount is not currently recoverable, because it has not been

1 finally determined. *See StreamCast Networks, Inc. v. IBIS LLC*, No. 05-04239, 2006 WL  
2 5720345, at \*4 (C.D. Cal. 2006) (Where the underlying action to a claim is not final and a breach  
3 of contract claim will not settle all of the contractual issues on which plaintiff seeks relief,  
4 declaratory relief is appropriate).

5 IV. CONCLUSION

6 Arch's motion for summary judgment is GRANTED. Arch is awarded  
7 \$3,915,940.53 in damages.

8 The order to show cause issued on May 12, 2016 is DISCHARGED as to Arch and  
9 Sierra.

10 IT IS SO ORDERED.

11 DATED: July 25, 2016.

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15 UNITED STATES DISTRICT JUDGE  
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