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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LIBERTY MUTUAL INSURANCE
COMPANY,

Plaintiff,

v.

VILA CONSTRUCTION COMPANY, et
al.,

Defendants.

Case No. 19-cv-07306-PJH

**ORDER GRANTING MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Re: Dkt. No. 60

Before the court is plaintiff Liberty Mutual Insurance Company's ("plaintiff") unopposed motion for partial summary judgment against defendants Vila Construction Co. ("Vila Construction"), the RMV Family Trust dated September 19, 2013 (the "RMV Trust"), Richard H. Vila in his individual and trustee capacity, and Maria E. Vila in her individual and trustee capacity (collectively, the "Vila Construction defendants"). Having read plaintiff's papers and carefully considered its argument and the relevant legal authority, and good cause appearing, the court hereby **GRANTS** the motion for partial summary judgment.

BACKGROUND

Plaintiff is an insurance company. As part of its business, plaintiff serves as surety. Dkt. 1 (Compl). ¶ 3. In other words, plaintiff guarantees debts issued on behalf of other parties. There are two debt instruments at issue in this action: payment bonds and performance bonds (collectively, "bonds"). Around 2016, plaintiff began to issue bonds on behalf of Vila Construction. *Id.* ¶ 22. The bonds concerned various public works projects in the Bay Area. *Id.* On December 5, 2016, plaintiff and the Vila Construction

1 defendants entered into a General Agreement of Indemnity (the “indemnity agreement”)
2 in plaintiff’s favor as partial consideration for plaintiff issuing the subject bonds. Id. ¶ 19;
3 Dkt. 60-2 at 2-10 (Agt.). The court will detail the indemnity agreement’s relevant
4 provisions in its analysis.

5 Jason Stonefeld (“Stonefeld”) serves as plaintiff’s in-house counsel. Dkt. 60-1
6 (Stonefeld declaration) ¶ 3. In his declaration, Stonefeld explains that, sometime around
7 November 2018, Vila Construction began to fall behind on payables due on several
8 projects. Id. ¶ 33. Plaintiff advanced funds to it to cover those payables. Id. ¶ 35.

9 Then things got worse. Obligees and other claimants began to make claims
10 against the bonds. Id. ¶ 37. They alleged that Vila Construction defaulted on certain
11 performance and payment obligations on the projects. Id. Plaintiff then evaluated those
12 claims. Id. ¶ 38. In his role as surety counsel, Stonefeld determined that plaintiff was
13 required to make “disbursements” (i.e., payments) to claimants pursuant to plaintiff’s
14 obligations under the bonds. Id. ¶¶ 40, 42. Plaintiff also made various other payments to
15 cover “fees, costs, and expenses” incurred to investigate, settle, litigate, or otherwise
16 resolve those claims. Id. ¶¶ 41, 43.

17 On November 6, 2019, plaintiff filed the instant action. In it, plaintiff asserts ten
18 claims against the Vila Construction defendants and other co-defendants not relevant to
19 the instant motion. Compl. ¶¶ 8-13, 40-45. At core, plaintiff seeks to recover the money
20 that it has paid and will continue to pay in connection with the bonds it issued on Vila
21 Construction’s behalf.

22 On November 30, 2020, plaintiff filed the instant motion for partial summary
23 judgment. Dkt. 60. In it, plaintiff seeks limited relief. In particular, plaintiff asks the court
24 to enter partial judgment against the Vila Construction defendants on its first claim
25 against them for breaching the indemnity agreement. Dkt. 60 at 5-6. Plaintiff asserts that
26 these defendants are jointly and severally liable under that agreement for
27 \$45,055,493.92, comprising \$39,997,733.09 in principal and \$5,057,760.84 in statutory
28 interest. Id.

1 Pursuant to this district’s local rules, the Vila Construction defendants were
2 required to file their opposition by December 14, 2020. However, the Vila Construction
3 defendants did **not** file any opposition to plaintiff’s motion. Then, on February 2, 2021,
4 the parties filed a stipulation requesting that the court extend certain pretrial dates and
5 deadlines. Dkt. 62. In response, the court ordered a telephonic conference. Dkt. 63.

6 During the conference, the court asked counsel for the Vila Construction
7 defendants why they failed to file an opposition to the subject motion. According to
8 counsel, there were technical issues with the registration of his firm’s email address on
9 this court’s electronic case filing (“ECF”) system. Dkt. 65 (February 11, 2021 meeting
10 minutes). Counsel stated that he did not learn about the pending motion until mid-
11 January. Id. The court informed counsel that it could not and would not grant leave to
12 file an opposition to the subject motion unless the Vila Construction defendants first
13 sought it. Counsel stated that the Vila Construction defendants would not seek leave to
14 file a late opposition. Id. The court then explained that the instant motion stands
15 unopposed and under submission. Id.

16 The court permitted the parties until March 4, 2021 to settle this action. Id. On
17 March 5, 2021, plaintiff filed a statement indicating that no portion of this case had settled
18 and requesting that the court rule on the instant motion. Dkt. 72. To date, the court has
19 not heard anything in response from any of the defendants in this action.

20 **DISCUSSION**

21 **I. Legal Standard**

22 Summary judgment is proper where the pleadings, discovery, and affidavits show
23 that there is “no genuine dispute as to any material fact and the movant is entitled to
24 judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those which may
25 affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
26 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a
27 reasonable jury to return a verdict for the nonmoving party. Id. “A ‘scintilla of evidence,’
28 or evidence that is ‘merely colorable’ or ‘not significantly probative,’ is not sufficient to

1 present a genuine issue as to a material fact.” United Steelworkers of Am. v. Phelps
2 Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989).

3 Courts recognize two ways for a moving defendant to show the absence of a
4 genuine dispute of material fact: (1) proffer evidence affirmatively negating any element
5 of the challenged claim or (2) identify the absence of evidence necessary for plaintiff to
6 substantiate such claim. Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099,
7 1102 (9th Cir. 2000) (“In order to carry its burden of production, the moving party must
8 either produce evidence negating an essential element of the nonmoving party's claim or
9 defense or show that the nonmoving party does not have enough evidence of an
10 essential element to carry its ultimate burden of persuasion at trial.”). Rule 56(c)(1)
11 expressly requires that, to show the existence or nonexistence of a disputed fact, a party
12 must “cit[e] to particular parts of materials in the record.” Fed. R. Civ. Pro. 56(c)(1).

13 The party moving for summary judgment bears the initial burden of identifying
14 those portions of the pleadings, discovery and affidavits which demonstrate the absence
15 of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986).
16 Where the moving party will have the burden of proof on an issue at trial, it must
17 affirmatively demonstrate that no reasonable trier of fact could find other than for the
18 moving party. S. California Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir.
19 2003) (“As the party with the burden of persuasion at trial, [plaintiff] must establish
20 beyond controversy every essential element of its [claim under the Constitution’s
21 Contract Clause.]”); Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) (“Thus,
22 if the movant bears the burden of proof on an issue, either because he is the plaintiff or
23 as a defendant he is asserting an affirmative defense, he must establish beyond
24 peradventure *all* of the essential elements of the claim or defense to warrant judgment in
25 his favor.”) (*italics in the original*). That said, on an issue for which the opposing party will
26 have the burden of proof at trial, the moving party need only point out “that there is an
27 absence of evidence to support the nonmoving party's case.” Celotex Corp. v. Cattrett,
28 477 U.S. at 325; In re Brazier Forest Prod., Inc., 921 F.2d 221, 223 (9th Cir. 1990) (“[I]f

1 the nonmoving party bears the burden of proof on an issue at trial, the moving party need
2 not produce affirmative evidence of an absence of fact to satisfy its burden. The moving
3 party may simply point to the absence of evidence to support the nonmoving party's
4 case. The nonmoving party must then make a sufficient showing to establish the
5 existence of all elements essential to their case on which they will bear the burden of
6 proof at trial.”) (quoting Celotex Corp. at 322-23).

7 “Where a moving party carries its burden of production, the nonmoving party must
8 produce evidence to support its claim or defense.” Friedman v. Live Nation Merch., Inc.,
9 833 F.3d 1180, 1188 (9th Cir. 2016) (internal citations omitted). The court is only
10 concerned with disputes over material facts and “factual disputes that are irrelevant or
11 unnecessary will not be counted.” Anderson, 477 U.S. at 248. It is not the task of the
12 court to scour the record in search of a genuine issue of triable fact. Keenan v. Allen, 91
13 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden of identifying, with
14 reasonable particularity, the evidence that precludes summary judgment. Id.

15 The court must view the evidence in the light most favorable to the nonmoving
16 party: if evidence produced by the moving party conflicts with evidence produced by the
17 nonmoving party, the judge must assume the truth of the evidence set forth by the
18 nonmoving party with respect to that fact. Tolan v. Cotton, 134 S. Ct. 1861, 1865 (2014);
19 Leslie v. Grupo ICA, 198 F.3d 1152, 1158 (9th Cir. 1999). If the nonmoving party fails to
20 produce evidence rebutting the moving party’s initial showing, “the moving party is
21 entitled to judgment as a matter of law.” Celotex Corp., 477 U.S. at 323.

22 **II. Analysis**

23 An indemnity is an “obligation resting on one party to make good [on] a loss or
24 damage another party has incurred.” Smoketree-Lake Murray, Ltd. v. Mills Concrete
25 Constr. Co., 234 Cal. App. 3d 1724, 1734 (1991). A claim for indemnification may arise
26 out of equity or contract. Id. at 1737 (“In contrast, express indemnity rests on the contract
27 of the parties; it is the language of the contract, rather than the equities of the situation
28 which govern.”)

1 The California Supreme Court has indicated that a claim for breach of an
2 indemnity agreement rests on materially similar elements to those required to show a
3 claim for breach of contract. Reichert v. Gen. Ins. Co. of Am., 68 Cal. 2d 822, 826, 830
4 n.5 (1968). Such elements include “(1) the contract, (2) plaintiff’s performance or excuse
5 for nonperformance, (3) defendant’s breach, and (4) the resulting damages to plaintiff.”
6 Id. at 830. More recently, California intermediate appellate courts have explained that an
7 indemnitee must specify its “performance of that portion of the contract which gives rise
8 to the indemnification claim” and establish “facts showing a loss within the meaning of the
9 parties’ indemnification agreement.” Four Star Elec., Inc. v. F & H Constr., 7 Cal. App.
10 4th 1375, 1380, 10 Cal. Rptr. 2d 1, 3 (1992), reh’g denied and opinion modified (Aug. 4,
11 1992).

12 As detailed below, the court concludes that plaintiff’s uncontroverted evidence
13 conclusively establishes each element of its claim for breach of the indemnity agreement
14 against the Vila Construction defendants.

15 **A. The Parties Entered into the Indemnity Agreement**

16 In his declaration, Stonefeld attaches a copy of the indemnity agreement at issue.
17 In its introduction, the indemnity agreement provides that “[t]his [indemnity agreement] is
18 between the Indemnitors, Vila Construction Company; RMV Family Trust dated
19 September 19, 2013; Richard H. Vila; Maria Elena Vila . . . in favor of Surety with respect
20 to any Bond requested from or issued by Surety before or after the date of this
21 Agreement, for any Principal . . .” Agt., Intro.

22 In turn, Section 1 defines “Indemnitor” to mean the following:

23 individually and collectively, the persons and entities listed in
24 the introductory paragraph of the Agreement . . . Agt. § 1.

25 Thus, if Vila Construction, the RMV Trust, Richard Vila, and Maria Vila signed the
26 indemnity agreement, then they qualify as indemnitors. Richard Vila and Maria Elena
27 Vila’s signature appears at pages nine and ten of that agreement. Id. at 9-10. When
28 signing, both defendants did so in both their individual and trustee capacities. Id.

1 Richard Vila also signed as president of Vila Construction. Id. Both defendants signed
2 before a notary public. Id.

3 Separately, in their answers, the Vila Construction defendants admitted to signing
4 the indemnity agreement. Dkt. 21 at 4:13-17; Dkt. 22 at 4:7-10; Dkt. 23 at 4:4-7.¹ Given
5 the noticeable pleadings and evidence presented, the court finds that plaintiff has
6 established a contract between it and the Vila Construction defendants.

7 **B. Plaintiff Performed Its Obligations under the Indemnity Agreement and**
8 **as Bond Surety**

9 In its opening brief, plaintiff fails to specify the exact provision in the indemnity
10 agreement that it performed and “gives rise” to its indemnification claim. Instead, plaintiff
11 summarily argues “[i]t is undisputed that Liberty performed its obligations under the
12 Indemnity Agreement.” Dkt. 60 at 18. To support that argument, plaintiff cites
13 Stonefeld’s statement that “Liberty fully performed all of its obligations under the
14 Indemnity Agreement.” Dkt. 60-1 ¶ 55. Plaintiff also vaguely cites the indemnity
15 agreement in its entirety. Dkt. 60 at 18.

16 Despite plaintiff’s failure to thoroughly explain its position, it appears to the court
17 that plaintiff bases the subject performance on two sources. First, plaintiff’s actual
18 issuance of the bonds underlying this action, which, as the Vila Construction defendants
19 indicate in their answers, served as plaintiff’s consideration for the indemnity agreement.
20 See, e.g., Dkt. 23 at 4:4-7 (Richard Vila “admits that . . . the defendant entered into an
21 Agreement of Indemnity with plaintiff for partial consideration **for plaintiff to issue**
22 **surety bonds on behalf of** Vila Construction Company.”) (emphasis added). Second,
23 Section 4’s suggestion that plaintiff might be held liable to obligees and claimants under
24 the bonds that it issued on Vila Construction’s behalf. Agt. § 4 (“Indemnitors shall pay
25 Surety for Loss promptly upon demand. If Surety makes any Loss payment . . . Surety is
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27 ¹ The court **DENIES** plaintiff’s request for judicial notice of the various documents filed on
28 the docket in this case. Dkt. 60-3. The court can always take notice of any filing on its
own docket. Going forward, plaintiff need only cite the relevant docket entry and page or
line.

1 entitled to recover from Indemnitors all disbursements made by it in good faith ***under the***
2 ***belief that it is or was or might be liable for the sums and amounts disbursed*** or
3 that it was necessary or expedient to make such disbursements, whether or not such
4 liability, necessity or expediency existed . . .”) (emphasis added).

5 Having identified those bases, the court finds that plaintiff proffered evidence
6 sufficient to conclusively establish that it performed the obligations giving rise to the
7 instant claim. First, as part of his declaration, Stonefeld attaches exhibits showing that it
8 issued at least 19 bonds on Vila Construction’s behalf. Dkt. 60-2 at 43-102. The court
9 will explain and detail the content of those exhibits in its damages analysis below.

10 Second, as noted above, Stonefeld explains in his declaration that, starting in
11 November 2018, Vila Construction began to fall short on certain payables and expenses
12 due on several projects. Dkt. 60-1 ¶ 34-35. To cure such shortcomings, plaintiff
13 advanced funds to Vila Construction. Id. Stonefeld explains that obligees and claimants
14 then began to make claims on various bonds. Id. ¶ 37. Plaintiff used in-house resources
15 to investigate such claims. Id. ¶ 38. Plaintiff later retained various consultants to assist
16 such investigation. Id. ¶ 39. Where necessary, plaintiff engaged other construction
17 contractors “to complete the performance of its obligations” under some of the bonds. Id.

18 Based on his investigation, Stonefeld directed plaintiff to disburse payments to
19 claimants pursuant to its obligations under the bonds and applicable law. Id. ¶ 40
20 (payment bonds); Id. ¶ 42 (performance bonds). Stonefeld further directed plaintiff to
21 disburse funds for “fees, costs, and expenses” incurred to investigate and resolve the
22 claims made under the bonds. Id. ¶ 41 (payment bonds); Id. ¶ 43 (performance bonds).
23 Stonefeld states that he issued these directions “in good faith under the belief that
24 [plaintiff] is or was or might be liable for the sums and amounts disbursed or that it was
25 necessary or expedient to make such disbursements” and pursuant to plaintiff’s “right, at
26 its option . . . to . . . compromise any claim . . . upon any bond.” Id. ¶¶ 40-44.

27 Incident to their failure to file any opposition, the Vila Construction defendants fail
28 to proffer any evidence disputing plaintiffs’ claimed series of events. Given that and the

1 evidence presented, the court finds that plaintiff has established that it performed its
2 obligations under the indemnity agreement and associated bonds.

3 **C. Plaintiff Suffered a “Loss” under the Indemnity Agreement**

4 Section 4 states that “[I]ndemnitors shall exonerate, hold harmless, indemnify, and
5 keep Surety indemnified from all liability for Loss.” Agt. § 4. Section 1, in turn, defines
6 “Loss” as “any loss, fees, costs and expenses, including pre- and post-judgment interest
7 at the maximum rate permitted by law, court costs, counsel fees, accounting, engineering
8 and outside consulting fees, which Surety may sustain or incur or otherwise determine to
9 pay in its sole and absolute discretion, by reason of” one of the following four events:

- 10 (a) a request for a Bond;
11 (b) execution or procurement of a Bond, including any cost
12 incurred by Surety in fulfilling its obligations under any Bond;
13 (c) the failure of Indemnitors to comply with any covenants or
14 conditions of this Agreement or Other Agreement; or
15 (d) in enforcing any of the covenants and conditions of this
16 Agreement or Other Agreements. Agt. § 1

17 As detailed immediately above, plaintiff has made numerous payments since
18 November 2018 to satisfy its obligations under the bonds. Dkt. 60-1 ¶¶ 40, 42. Plaintiff
19 has also made numerous payments for fees, costs, and expenses incurred to investigate
20 and resolve bond claims. *Id.* ¶¶ 41, 43. The Vila Construction defendants do not contest
21 such disbursements. Given that and the evidence presented, the court finds that plaintiff
22 has established that it has suffered loss within the meaning of the indemnity agreement.

23 **D. The Vila Construction Defendants Breached the Indemnity Agreement**

24 Section 4 provides that the Vila Construction defendants “shall pay Surety for Loss
25 promptly upon demand.” Agt. § 4. In his declaration, Stonefeld states that:

26 Before and after filing its Complaint in this action, Liberty
27 requested, both orally and in writing, for Defendants to
28 “exonerate, hold harmless, indemnify, and keep Surety
indemnified from all liability for “Loss” under the Indemnity
Agreement. Defendants failed, and continue to fail, to do so.
Dkt. 60-1 ¶ 54.

Again, the Vila Construction defendants do not contest such failure. Accordingly,
the court finds that plaintiff has established that the Vila Construction defendants

1 breached the indemnity agreement.

2 **E. Plaintiff Proffered Prima Facie Evidence Showing Its Damages**

3 In its opening brief, plaintiff asserts that it satisfies its burden under Rule 56
4 because the Stonefeld declaration and its attached exhibits serve as “prima facie
5 evidence” of the Vila Construction defendants’ liability under the indemnity agreement.
6 Dkt. 60 at 21. To support that assertion, plaintiff relies on Section 4’s so-called “prima
7 facie evidence” provision, stating the following in relevant part:

8 ***If Surety makes any Loss payment, Indemnitors agree that***
9 ***in any accounting . . . , between Surety and Indemnitors . . .***
10 ***Surety is entitled to recover from Indemnitors all disbursements***
11 ***made by it in good faith under the belief that it is or was or might***
12 ***be liable for the sums and amounts disbursed or that it was***
13 ***necessary or expedient to make such disbursements . . . and***
14 ***that . . . other evidence of any such payments made by***
15 ***Surety shall be prima facie evidence of the fact and amount***
16 ***of the liability to Surety. Agt. § 4 (emphasis added).***

17 Courts outside this circuit have explained that, in the context of an indemnity
18 agreement, a prima facie evidence provision “shifts to the indemnitor the burden of
19 proving that the costs incurred were not recoverable.” Fallon Elec. Co. v. Cincinnati Ins.
20 Co., 121 F.3d 125, 129 (3d Cir. 1997) (interpreting and applying Pennsylvania law).
21 California courts have acknowledged that this sort of provision is enforceable. Fid. &
22 Deposit Co. of Md. v. Whitson, 187 Cal. App. 2d 751, 757 (1960) (“Under the provisions
23 of paragraph Tenth, the foregoing exhibits constituted *prima facie* proof of the fact of such
24 payment and the extent of appellant’s liability under the contract; these provisions, it
25 appears, have the sanction of decisional law . . . indeed, there is authority supporting the
26 validity of provisions that vouchers or other evidence of payment shall be *conclusive*
27 evidence thereof upon a showing that payment was made in good faith.”) (italics in the
28 original).

29 In his declaration, Stonefeld proffers 20 exhibits purportedly summarizing the
30 payments plaintiff has made in connection with the subject bonds. While plaintiff neglects
31 to cite it, Federal Rule of Evidence 1006 provides the following in relevant part:

32 The proponent may use a summary, chart, or calculation to

1 prove the content of voluminous writings, recordings, or
2 photographs that cannot be conveniently examined in court.
3 The proponent must make the originals or duplicates available
4 for examination or copying, or both, by other parties at a
5 reasonable time and place. Fed. R. Evid. 1006.

6 The Ninth Circuit has interpreted this rule to permit the admission of an exhibit to
7 prove a fact at issue if the following two conditions are satisfied: (1) the proponent
8 establishes a foundation that the underlying materials on which the summary exhibit is
9 based are admissible in evidence; and (2) those primary materials were made available
10 to the opposing party for inspection. Amarel v. Connell, 102 F.3d 1494, 1516 (9th Cir.
11 1996), as amended (Jan. 15, 1997).

12 Here, the court finds that both conditions have been satisfied with respect to all 20
13 exhibits attached to Stonefeld's declaration. In his declaration, Stonefeld states that
14 plaintiff maintains an electronic reporting system that records, tracks, and accounts for
15 payments made or received by plaintiff concerning its surety claims (the "claims system").
16 Dkt. 60-1 ¶¶ 5-7. He explains that plaintiff maintains the claims system as part of its
17 regular business practice to manage its losses, costs, payments, expenses, attorneys'
18 fees, and recoveries (i.e., credits against the amount owed to plaintiff). Id. ¶¶ 8-16. He
19 specifies that the claims system provides accurate statements of plaintiff's losses, costs,
20 expenses, payments, attorneys' fees, and recoveries. Id. ¶ 15.

21 Stonefeld is a custodian of record for all files in plaintiff's possession regarding the
22 accounting related to Vila Construction. Id. ¶ 20. He is personally knowledgeable about
23 the claims system as it relates to the Vila Construction defendants. Id. ¶ 19. He used the
24 claims system to print a cumulative report showing the history of plaintiff's losses, costs,
25 expenses, attorneys' fees, payments, and recoveries made or received by it in
26 connection with the bonds issued to Vila Construction (the "loss history report"). Id. ¶¶
27 22-23. He provides that 32-page report as Exhibit 2 of his declaration. Dkt. 60-2 at 11-
28 42. Using the loss history report, Stonefeld then created 19 separate loss summary
29 reports for each bond at issue (collectively, the "loss summary reports"). Dkt. 60-1 ¶ 26.
30 He attaches those reports as Exhibits 3-21 of his declaration. Dkt. 60-2 at 43-102. The

1 information provided in these reports is current through the date plaintiff filed the instant
2 motion, November 30, 2020. Dkt. 60-1 ¶ 45.

3 The court concludes that the summary exhibits are based on primary records that
4 would be admissible in evidence. First, Stonefeld establishes that the claims system
5 relies on “entries” and “data,” Dkt. 60-1 ¶ 13, which may come in the form of “forms, files,
6 and documents,” id. ¶ 6.

7 Second, Stonefeld shows that the claims system accurately records and reflects
8 the content of such primary records. In particular, he states that claims systems’ entries
9 “are made pursuant to Liberty’s established procedures for the systematic, routine, and
10 timely update of the claims system.” id. ¶ 13. He adds that plaintiff has “built safeguards
11 into the claims systems to ensure accuracy and to identify errors.” id.

12 Third, the court repeats, the Vila Construction defendants do not oppose the
13 instant motion. Given that, the court infers that they either did not seek to examine the
14 primary documents or do not care to do so. In any event, they proffer no basis on which
15 to find that the primary documents were unavailable to them. Accordingly, pursuant to
16 Rule 1006, the court will consider the summary loss reports as prima facie evidence of
17 plaintiff’s damages.

18 The court turns to the merits of these reports. The loss summary reports range
19 between one and six pages. Each report lists numerous rows detailing certain
20 transactions associated with a particular bond. Each transaction includes information
21 divided into seven columns. Those columns detail the following sorts of information:

- 22 • Bond number – Each bond has a distinct number.
- 23 • Principal – Vila Construction appears as principal for the vast majority of
24 principal entries. (Two exhibits also include a “Tulum Joint Ventures” as
25 principal. Dkt. 60-2 at 81-86 (Exhibit 15); id. at 102 (Exhibit 21)).
- 26 • Payee – A payee may include a bond obligee, Vila Construction, a
27 construction company, a construction consultant, a law firm, an accounting
28 firm, or some other unspecified business entity.

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- Cost category – Costs are divided into six types: expenses (EXP), disbursements for performance bonds (PER), disbursement for payment bonds (PAY), recoveries of a contract balance from an obligee on a bonded contract (CB), recoveries of funds other than contract balances (SAL), and expenses for special costs for recovering from non-contract balances (SE).
- Check date – All checks were issued between November 2018 and November 2020.
- Check number – All checks include a particular number.
- Sum amount – The amounts vary from less than one dollar to over \$700,000. These sums reflect both plaintiff’s payments and recoveries.

After accounting for payments and recoveries made in connection with its respective bond, each loss summary report details a bottom-line summary of loss. The following table shows each report’s bottom-line summary of loss per bond:

Docket 60-2 Page Range	Exhibit Number	Bond Number	Total Loss (or Recovery)
43-44	3	070022717	\$842.00
45-46	4	070022728	\$57,592.84
47-48	5	070022736	(\$25,350.83)
49-50	6	070022737	\$1,155,921.76
51-55	7	070022739	\$9,299,993.09
56-61	8	070022740	\$3,417,949.92
62-63	9	070022742	\$3,000.00
64-65	10	070022745	\$124,312.23
66-70	11	070022750	\$2,926,082.83
71-74	12	070022751	\$4,148,577.09
75-76	13	070205384	\$45,509.79
77-79	14	070205385	\$512,314.44
80-86	15	070205386	\$7,138,934.34

87-88	16	070205388	\$16,086.25
89-90	17	070205389	\$2,442.16
91-94	18	070205398	\$3,966,774.72
95-98	19	070205399	\$7,206,368.05
99-100	20	070205404	(\$4,387.09)
101-02	21	070205417	(\$4,769.50)

The court personally summed the total net loss for all bonds. Based on that tally, the court calculated a total principal loss of **\$39,988,194.09**.²

Again, the Vila Construction defendants do not contest the evidence proffered by plaintiff in support of its principal loss. Given that and the evidence presented, the court finds that plaintiff has established that the Vila Construction defendants are jointly and severally liable to it for **\$39,988,194.09** in principal loss.

Lastly, in his declaration, Stonefeld attaches a final exhibit (Exhibit 22) detailing the amount of statutory interest owed to plaintiff incident to its claimed principal. In sum, plaintiff asserts that the Vila Construction defendants owe it **\$5,057,760.83** in interest. Dkt. 60-2 at 103-31. The Vila Construction defendants fail to contest that amount. Given that and the evidence presented, the court further finds that plaintiff has established that the Vila Construction defendants are jointly and severally liable to it for **\$5,057,760.83** in interest.³ In light of its findings, the court concludes that the Vila Construction defendants are jointly and severally liable to plaintiff for **\$45,045,954.92** on the basis of plaintiff's claim against them for breach of the indemnity agreement.

CONCLUSION

For the above reasons, the court **GRANTS** Liberty's motion for partial summary

² The court understands that this amount is approximately \$9,000 less than that claimed by plaintiff. The court, however, summed this number twice and is confident in its arithmetic.

³ The court acknowledges that this amount relies on the \$9,000 included in plaintiff's calculation of the total claimed principal. The court finds that any additional interest owed on part of such reliance would be de minimis. Also, the Vila Construction defendants fail to oppose plaintiff's proffered interest amount. As a result, the court will adopt that amount in full.

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judgment.

IT IS SO ORDERED.

Dated: March 12, 2021

/s/ Phyllis J. Hamilton

PHYLLIS J. HAMILTON
United States District Judge