



By order of the Court, Presiding Judge Roberto C. Naraja

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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JAMES CAMACHO BOWIE, and)	CIVIL ACTION NO. 13-0092
LINDA MANAHANE BOWIE,)	
)	
Plaintiffs,)	ORDER GRANTING SUMMARY
)	JUDGMENT IN PLAINTIFFS'
v.)	FAVOR ON DEFENDANT
)	NMHC'S BREACH OF
APEX CONSTRUCTION, INC.,)	CONTRACT COUNTERCLAIM
NORTHERN MARIANAS HOUSING)	UPON RECONSIDERATION
CORPORATION, and)	
COMMONWEALTH OF THE)	
NORTHERN MARIANA ISLANDS,)	
)	
Defendants.)	

I. INTRODUCTION

This matter came before the Court on the parties' briefs pursuant to this Court's order partially granting Plaintiffs' motion for reconsideration, entered on May 24, 2016.¹ Plaintiffs James Camacho Bowie and Linda Manahane Bowie were represented by attorney Joseph E. Horey. Defendant Northern Marianas Housing Corporation (NMHC) was represented by attorney Mark A. Scoggins. Defendant Apex Construction, Inc., represented by attorney Joaquin Torres, was not ordered to submit briefs on this matter. Defendant Commonwealth of the Northern Mariana Islands

¹ *Bowie v. Apex Constr., Inc.*, No. 13-0092 (NMI Super. Ct. May 24, 2016) (Order at 8) ("[Plaintiffs] may submit a brief on the issue of NMHC's counterclaim on or before June 16, 2016. NMHC may file an opposition before on or before June 30, 2016. [Plaintiffs] may submit a reply brief on or before July 7, 2016. The Court is inclined to decide the issue on the submitted briefs, unless the parties request a hearing on this matter.").

1 was dismissed from the matter by this Court's order granting the Commonwealth's motion to
2 dismiss, entered on December 9, 2014.²

3 Because the parties have not requested a hearing on this matter,³ the Court rules on the
4 pending summary judgment motion on NMHC's breach of contract counterclaim on the submitted
5 briefs. NMHC requests that summary judgment be entered in their favor on the argument that
6 Plaintiffs breached their promise not to sue. Plaintiffs also request that summary judgment be
7 entered in their favor on their argument that the contract provisions in question do not contain
8 Plaintiffs' promise not to sue NMHC. According to Plaintiffs, those provisions are either
9 insufficiently clear under tort principles or the requested construction contravenes public policy.
10 Plaintiffs further argue that NMHC cannot claim to be an intended beneficiary of a contract that
11 Plaintiffs and their contractor, Apex Construction, entered into.

12 Based on each party's memorandum of points and authorities, and the applicable law,
13 NMHC's motion for summary judgment on its breach of contract counterclaim is **GRANTED** in
14 Plaintiffs' favor, pursuant to NMI R. Civ. P. 56(b).

15 **II. BACKGROUND**

16 NMHC administers the HOME Investment Partnerships Program, a program funded by the
17 U.S. Department of Housing and Urban Development. Under this program, NMHC assists low-
18 income families with purchasing, building, or rehabilitating a home through an interest-free home
19 mortgage loan, known by the parties as a home rehabilitation grant. Plaintiffs applied to NMHC for
20 a home rehabilitation grant under the HOME Investment Partnerships Program by letter, dated
21 October 14, 2009. Plaintiffs sought construction work on their home to include wheelchair access,
22 featuring a slope reduction component on their home's wheelchair ramp. Three months later, on

23 ² *Bowie v. Apex Constr., Inc.*, No. 13-0092 (NMI Super. Ct. Dec. 9, 2014) (Order at 6) (dismissing the Commonwealth
24 pursuant to 2 CMC § 7122(f) (statutory immunity)).

³ *Bowie*, No. 13-0092 (NMI Super. Ct. May 24, 2016) (Order at 8).

1 January 19, 2010, Plaintiffs notified NMHC that they had selected Apex Construction as their
2 contractor for the home rehabilitation project.

3 On May 7, 2010, Plaintiffs entered into a contract with Apex Construction.⁴ Paragraph 13 of
4 the Construction Contract states that ". . . Contractor and [Plaintiffs] hereby indemnify and shall
5 hold harmless NMHC from any liability, claims, damages, injuries, or expenses arising out of any
6 action of NMHC as may be performed under this contract." Paragraph 13 also states that NMHC
7 "shall not be liable in any way whatsoever, to any party, owner, or contractor for NMHC's actions
8 under this Contract."

9 On the same day, Plaintiffs also entered into a Grant Agreement with NMHC. Paragraph 8
10 of the Grant Agreement states that: "[Plaintiffs] hereby indemnifies and holds harmless NMHC
11 from any loss, claim, and/or damages, which may arise or relate to [Plaintiffs'] use of the premises,
12 possession, ownership of the property and construction of any structures, buildings or
13 improvements thereon."

14 On April 25, 2011, James Bowie was ascending the ramp in his wheelchair when, upon
15 reaching a particularly steep section, the wheelchair suddenly tipped backwards, resulting in
16 physical injury. Plaintiffs filed a complaint in this action against all three defendants, including
17 NMHC, on April 23, 2013. In response, on January 1, 2015, NMHC filed its counterclaim for
18 breach of contract.

19 In Paragraphs 20–23 of the counterclaim, NMHC alleged that Plaintiffs were in breach of
20 the following provisions of Paragraph 13 of the Construction Contract. The specific excerpts were
21 presented under Paragraphs 20 and 22 as follows:

22
23 ⁴ According to the factual findings as stated in the Court's order granting NMHC's motion for summary judgment,
24 Plaintiffs initially entered into a Construction Contract with Apex Construction on February 26, 2010. However,
because there was a notarization issue, Plaintiffs entered into a subsequent contract with Apex Construction on May 7,
2010.

1 . . . NMHC shall not be liable in any way whatsoever, to any party, owner, or contractor for
2 NMHC's actions under this Contract. There are no warranties express or implied by NMHC
3 in any way as a result of its actions or approvals. The Contractor and Owner hereby waive
any claims or actions they have or may have against NMHC for its actions or any approvals
granted pursuant to this Contract.

4 ...

5 Contractor and Owner shall hereby indemnify and shall hold harmless NMHC from any
6 liability, claims, damages, injuries, or expenses arising out of any action of NMHC as may be
performed under this Contract.

7 On March 15, 2016, the Court granted summary judgment in NMHC's favor as to all of
8 Plaintiffs' causes of action.⁵ In a ruling issued on the same day, the Court granted summary
9 judgment in favor of NMHC's breach of contract counterclaim. The Court entered two legal
10 conclusions: (1) that Plaintiffs had breached Paragraph 8 of the Grant Agreement—specifically,
11 Plaintiffs' promise to hold NMHC harmless from any damages resulting from James Bowie's use of
12 the constructed ramp; and (2) that NMHC could not enforce Paragraph 13 of the Construction
13 Contract as an intended third-party beneficiary. Both legal conclusions were the result of the
14 respective parties' failure to address these issues in their cross-motions for summary judgment.⁶

15 Among other items,⁷ Plaintiffs moved to reconsider the ruling on NMHC's breach of
16 contract counterclaim. Plaintiffs' motion to reconsider the issue was granted; and the parties
17 submitted their respective briefs.

20 _____
21 ⁵ *Bowie v. Apex Constr., Inc.*, No. 13-0092 (NMI Super. Ct. Mar. 15, 2016) (Order at 15) (entering summary judgment
in favor of NMHC for Plaintiffs' first cause of action for negligence; third cause of action for breach of contract; and
fifth cause of action for per se public nuisance, pursuant to Section 7126(d)).

22 ⁶ On December 29, 2015, Plaintiffs and NMHC both filed their respective cross-motions for summary judgment.

23 ⁷ In addition, Plaintiffs moved to reconsider the Court's orders granting summary judgment in favor of NMHC on the
following legal conclusions: (1) that NMHC owed no duty in negligence to Plaintiffs; (2) that NMHC did not breach the
Grant Agreement, pursuant to Restatement (Second) of Contracts § 225(3); and (3) that, under 2 CMC § 7126(d), a
lending institution, such as NMHC, could not be held liable for "causing to permit" a violation of the Building Safety
Code. Plaintiffs' motion for reconsideration of these issues was denied. *Bowie*, No. 13-0092 (NMI Super. Ct. May 24,
2016) (Order at 7).

1 **III. LEGAL STANDARD**

2 Under NMI R. Civ. P. 56, a moving party has the initial burden to show that he or she is
3 entitled to summary judgment. *Furuoka v. Dai-Ichi Hotel (Saipan), Inc.*, 2002 MP 5 ¶ 22. If the
4 moving party is the plaintiff, he or she must show that the undisputed facts establish every element
5 of his or her claim. *Id.* If the defendant is the moving party, he or she must either show that the
6 undisputed facts establish every element of an asserted affirmative defense or that the plaintiff
7 cannot establish his or her prima facie case. *Id.* ¶¶ 22, 23.

8 If the moving party satisfies the initial burden, the nonmoving party must respond by
9 showing that there is a genuine issue of material fact. *Id.* ¶ 24. If the nonmoving party cannot, then
10 the court may grant summary judgment to the moving party as a matter of law. NMI R. Civ. P.
11 56(c). In considering the motion, the court views facts and inferences in the light most favorable to
12 the non-moving party. *Fujie v. Atalig*, 2014 MP 14 ¶ 7. After evaluating the merits of the motion,
13 the Court may also enter summary judgment in favor of the nonmoving party on the moving party's
14 claims. NMI R. Civ. P. 56(b). *See CDA v. Tenorio*, 2004 MP 22 ¶ 24 (explaining that the court may
15 enter summary judgment for the nonmoving party sua sponte).

16 **IV. DISCUSSION**

17 The Court now reconsiders entry of summary judgment of two issues: (1) whether Plaintiffs
18 breached Paragraph 8 of the Grant Agreement when it filed the instant complaint, on April 23,
19 2013; and (2) whether NMHC can enforce Paragraph 13 of the Construction Contract as an
20 intended third party beneficiary. The Court concludes that Plaintiffs cannot be held liable for
21 allegedly breaching their promise 'to hold harmless' NMHC under Paragraph 8 of the Grant
22 Agreement; and also concludes that NMHC may enforce Paragraph 13 of the Construction Contract
23 as an intended third-party beneficiary, but that NMHC may not maintain its counterclaim for breach
24 of contract.

1 **A. The 'To Hold Harmless' Provision of Paragraph 8 of the Grant Agreement**

2 NMHC argues that Plaintiffs breached their promise 'not to sue NMHC' when Plaintiffs filed
3 their complaint, which names NMHC as a party. A plaintiff breaches a contract term upon their
4 nonperformance of a contractual duty of immediate performance. *Manglona v. Baza*, 2012 MP 4 ¶
5 13. But before reaching the legal conclusion of whether Plaintiffs breach a contract term, the Court
6 turns to principles of contract interpretation or of contract construction to ascertain the promises the
7 parties made to each other in their contract.

8 Contract interpretation is a question of law. *Id.* ¶ 11. There is a presumption that the intent
9 of the contracting parties—what the parties agreed to—is expressed within the four corners of the
10 contract. *Id.* ¶ 22. Accordingly, the court turns to extrinsic evidence to interpret the contracting
11 parties' intent only when the contract terms are ambiguous. *Riley v. Public School System*, 4 NMI
12 85, 89 (1994). Where there is no ambiguity in the plain meaning of the contract terms, the court
13 applies the principles of contract construction to determine the contract term's legal effect—also a
14 question of law. *Id.* at 88.

15 **1. There is no ambiguity in the 'to hold harmless' provision**

16 A contract term is ambiguous either if it is (1) facially inconsistent (patent ambiguity), or (2)
17 either where there is disputed relevant extrinsic evidence or where the contract language shows a
18 potential reasonable differing meaning of the terms when extrinsic evidence is taken into account
19 (latent ambiguity). *See id.* at 89 n.5 (explaining the difference between contract interpretation, a
20 process where the courts choose between alternative reasonable meanings to a contract term; and
21 contract construction, a process where the contract terms are given its legal effect). Where there is
22 no patent or latent ambiguity, courts turn to the generally understood legal meaning to construe a
23 contract term. *See id.* at 89 (construing the term "dependent," "spouse," and "repatriation" by its
24 generally understood meaning by referencing Black's Law Dictionary (6th ed. 1990)); *accord Rooz*

1 v. *Kimmel*, 64 Cal. Rptr. 2d 177, 184 (Cal. App. 1997) (construing indemnity and hold harmless
2 provisions as a question of law because there was no conflicting extrinsic evidence).

3 With respect to the Grant Agreement, the Court does not find that the contract terms are
4 facially inconsistent (patent ambiguity) or that determination of the parties' intent is necessary
5 through external evidence (latent ambiguity). In addition, the parties have not argued that a contract
6 term in the Grant Agreement ambiguous. *See, e.g., Trident Ctr. v. Connecticut Gen. Life Ins. Co.*,
7 847 F.2d 564, 569 (9th Cir. 1988) ("If one side is willing to claim that the parties intended one thing
8 but the agreement provides for another, the court must consider extrinsic evidence of possible
9 ambiguity."). Accordingly, the Court turns to principles of contract construction to ascertain the
10 parties' promises.

11 NMHC relies on the 'to hold harmless' language contained in Paragraph 8 of the Grant
12 Agreement and asserts that a promise 'to hold harmless' is a promise to not to sue NMHC; and that
13 Plaintiffs are in breach of that promise. On the other hand, Plaintiffs assert that what NMHC seeks
14 is not enforcement of a 'to hold harmless' provision; but rather, enforcement of the defensive right
15 of a 'release of liability'⁸—as construed from the 'to hold harmless' language. Accordingly, the
16 Court turns to case law to construe a promise 'to hold harmless' under principles of contract
17 construction.

18 **2. Generally 'to hold harmless' is synonymous with 'to indemnify'**

19 In the absence of either a patent or latent ambiguity, courts have constructed 'to hold
20 harmless' and indemnification provisions as synonymous or duplicative in reference to Black's Law
21 Dictionary. *E.g., Majkowski v. Am. Imaging Mgmt. Servs.*, 913 A.2d 572, 588 (Del. Ch. 2006)

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23 ⁸ *E.g., Rooz v. Kimmel*, 64 Cal. Rptr. 2d 177, 182–83 (Cal. App. 1997) ("Here, North American is not seeking
24 indemnification. Instead, North American relies on the general 'hold harmless' provision in the indemnity and hold
harmless agreement to prevent Rooz from directly recovering against North American for damages he incurred as a
result of North American's own negligence. Thus, in this case, the pertinent agreement is best viewed as a 'release of
liability' as opposed to an indemnity agreement.").

1 ("Indeed, modern authorities confirm that 'hold harmless' has little, if any, different meaning than
2 the word 'indemnify.' Black's Law Dictionary in fact defines 'hold harmless' by using the word
3 'indemnify.' It defines 'hold harmless agreement' as a 'contract in which one party agrees to
4 indemnify the other.' In defining 'hold harmless clause,' it simply says '[s]ee INDEMNITY
5 CLAUSE.') (citing Black's Law Dictionary 749 (8th ed. 2004)); *see, e.g., MT Builders LLC v.*
6 *Fisher Roofing, Inc.*, 197 P.3d 758, 763 (Ariz. App. 2008) (treating promises to indemnify and to
7 hold harmless as a single promise to 'indemnify and to hold harmless'); *Medcom Holding Co. v.*
8 *Baxter Travenol Labs., Inc.*, 200 F.3d 518, 519 (7th Cir. 1999) (equating promise to indemnify with
9 promise 'to hold harmless'); *Praetorian Ins. Co. v. Site Inspection, LLC*, 604 F.3d 509, 515 (8th Cir.
10 2010) (explaining that an indemnity clause is also termed as a 'hold harmless' clause) (citing Black's
11 Law Dictionary 784 (9th ed. 2009)); *but see Exxon Mobil Corp. v. New W. Petroleum, LP*, 369 Fed.
12 Appx. 805, 807 (9th Cir. 2010) (unpublished) (citing *Queen Villas Homeowners Assn. v. TCB*
13 *Property Mgmt.*, 56 Cal. Rptr. 3d 528, 534 (Cal. App. 2007) (explaining that to indemnify is to
14 assert an offensive right, while to hold harmless is to assert a defensive right)).

15 Indemnification is a contractual obligation by one party, the indemnitor, to reimburse
16 another party, the indemnitee, for the indemnitee's legal liabilities or losses. *E.g., Rexam Bev. Can*
17 *Co. v. Bolger*, 620 F.3d 718, 735 (7th Cir. 2010). An indemnitor's obligation to reimburse the
18 indemnitee for its legal liabilities takes place at the end of a case, when the indemnitee has a
19 judgment entered against it for damages, or has made payments, or has suffered actual loss. *E.g.,*
20 *Mizuho Corporate Bank (USA) v. Cory & Assocs.*, 341 F.3d 644, 650 (7th Cir. 2003).
21 Indemnification agreements ordinarily relate to third party claims. *E.g., Queens Village*
22 *Homeowners Assoc.*, 56 Cal. Rptr. 3d at 529. But indemnification agreements are not limited only
23 to third party claims. For example, an indemnitee may bring a legal action against the indemnitor
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1 for reasonable attorney's fees⁹ under an indemnity provision, but only when the contract in question
2 explicitly considers a payment of reasonable attorney's fees at the conclusion of an indemnitee's
3 action to enforce an indemnity agreement. *E.g.*, *SCIE LLC v. Reinsurance Am., Inc.*, 397 Fed.
4 Appx. 348, 351–52 (9th Cir. 2010) (unpublished) (citing *Carr Bus. Enter., Inc. v. City of*
5 *Chowchilla*, 82 Cal. Rptr. 3d 128, 135 (Cal. App. 2008) (explaining that, under California law, the
6 primary purpose of indemnification agreements is for the indemnitee to be compensated against
7 losses incurred from third party tort claims)).

8 Here, Paragraph 8 of the Grant Agreement provides the following:

9 8. **INDEMNIFICATION**: [Plaintiffs] hereby indemnifies and holds harmless NMHC from
10 any loss, claim, and/or damages which may arise or relate to [Plaintiffs'] use of the premises,
11 possession, ownership of the property and construction of any structures, building or
improvements thereon."

12 Accordingly, because the promises 'to indemnify' and 'to hold harmless' is generally
13 understood to be synonymous, the promise contained in Paragraph 8 of the Grant Agreement would
14 normally be construed as the Plaintiffs' singular promise 'to indemnify and to hold harmless'
15 NMHC, the indemnitee, in the face of an adverse judgment in favor of a third party.¹⁰

16 **3. The promise 'to hold harmless' as stated in Paragraph 8 of the Grant Agreement is not a**
17 **release from liability in favor of NMHC**

18 Courts have also construed a promise 'to hold harmless' as an independent promise—either
19 in the context of a direct, two-party exculpatory clause;¹¹ or in the context of the lack of an
20

21 ⁹ Reasonable attorney's fees are generally recoverable for the losses incurred in defending a third party lawsuit, but
22 indemnitee's reasonable attorney's costs for enforcing an indemnity right against an indemnitor are generally not
recoverable. *E.g.*, *Klock v. Grosodonia*, 674 N.Y.S.2d 187, 188 (N.Y. App. Div. 1988).

23 ¹⁰ Moreover, NMHC has explicitly disclaimed enforcement of the 'indemnity' provision. NMHC's Opp'n Br. at 3
("NMHC is not now, nor has it ever been, seeking to be indemnified for its own negligence.")

24 ¹¹ *E.g.*, *Rooz*, 64 Cal. Rptr. 2d at 182–83; *but see Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 265 (Fla. 2015)
(explaining that "although indemnification agreements can sometimes produce the same result as an exculpatory
provision by shifting responsibility for the payment of damages back to the injured party, Florida courts recognize a
distinction between exculpatory clauses and indemnity clauses.") (internal citations omitted).

1 indemnitor's indemnity rights against the indemnitee as a result of third party litigation.¹² For
2 example, in *Rooz v. Kimmel*, a California intermediate appellate court held that the 'to hold
3 harmless' provision at issue in the case¹³ was, in effect, an exculpatory agreement for a 'release of
4 liability'—where one party is absolved of all liability to the other. 64 Cal. Rptr. 2d at 183.

5 In *Rooz*, the plaintiff, in lieu of opening a formal escrow and choosing to forego purchase of
6 title insurance, requested that the title company defendant record a trust deed as an
7 'accommodation.' *Id.* at 180. The parties then proceeded to enter into an 'indemnity and hold
8 harmless' agreement, which provided in relevant part that:

9 Whereas, The Company [North American] is being requested and will in the future be
10 requested by Indemnitor [Rooz] to record for the benefit of Indemnitor various documents
11 (hereinafter 'Documents'), with legal effect(s) on real property, without benefit of
12 examination of conformity of documents or real property title, such documents to be
13 recorded with various county[] Recorder's office(s) (hereinafter the act(s) of so recording said
14 Documents . . . referred to as 'Recordings'); and

15 Whereas, no benefit, business or otherwise, is derived by and for The Company by the
16 Recordings, and Indemnitor acknowledges that The Company does not now nor will derive a
17 benefit therefrom and Indemnitor further acknowledges that Indemnitor does and/or will
18 derive a benefit from said Recordings; and

19 Whereas, The Company is unwilling to carry out and perform the Recordings; and

20 Whereas, the Indemnitor recognizes that The Company, in the normal course of its business,
21 would not so carry out and perform the Recordings of Documents unless the Indemnitor
22 indemnifies The Company as hereafter agreed.

23 Now, Therefore, the Indemnitor Agrees that in consideration of The Company's Recordings
24 of Documents at the present and future requests of Indemnitor, the Indemnitor will hold
25 harmless, protect and indemnify The Company from and against any and all liabilities,
26 losses, damages, expenses and charges . . . which may be sustained or incurred by The
27 Company under, or arising directly or indirectly out of the Recordings at requests of

21 ¹² E.g., *Queen Villas Homeowners Assn.*, 56 Cal. Rptr. 3d at 534; *but see Praetorian Ins. Co.*, 604 F.3d at 516 (rejecting
22 the necessity of a third-party action to enforce an indemnification right pursuant to the 'to hold harmless' provision).

23 ¹³ 61 Cal. Rptr. 2d at 180 ("Rooz also signed a 'Master Agreement of Indemnification' (hereinafter indemnity and hold
24 harmless agreement) which provided in part that he would 'hold harmless, protect and indemnify [North American]
25 from and against any and all liabilities, losses, damages, expenses, and charges . . . which may be sustained or incurred
26 by [North American] under, or arising directly or indirectly out of the Recordings at requests of Indemnitor and
27 resulting directly or indirectly from any claim, action, proceeding, judgment, order or process arising from or based
28 upon or growing out of said Recordings of Documents.").

1 Indemnitor and resulting directly or indirectly from any claim, action, proceeding, judgment,
2 order or process arising from or based upon or growing out of said Recordings of
Documents.

3 *Id.* at 185. The parties entered into the agreement, but the defendant failed to record the title in a
4 timely fashion. *Id.* at 181. The plaintiff sued for breach of contract. *Id.* However, the trial court
5 concluded that the 'indemnity and hold harmless agreement' absolved the defendant title company
6 from all liability in the lawsuit. *Id.* at 182; *see also id.* at 183 (explaining that the general rules for
7 construing indemnity provisions apply to exculpatory provisions).

8 The appellate court affirmed the trial court's ruling, narrowly holding that where (1) a
9 contracting party made it clear that it receives no commercial benefit from entertaining plaintiff's
10 request for an 'accommodation recording'; and (2) a contracting party made it clear that it was
11 generally unwilling to carry out the 'accommodation recording' unless the plaintiff entered into an
12 indemnification agreement absolving the contracting party from all related liabilities; a ruling that
13 the agreement was not an exculpatory release would deprive the contracting party of the benefit of
14 the bargain. *See id.* at 185.

15 For the reasons explained below, the terms of the Grant Agreement do not make it clear that
16 the 'to hold harmless' provision, contained in Paragraph 8, should be construed as a release from
17 liability in favor of NMHC for two reasons. First, NMHC potentially receives some commercial
18 benefit if Plaintiffs are unable to reimburse NMHC for the \$40,000 rehabilitation mortgage loan.
19 Second, there is no language in the Grant Agreement that makes it clear that NMHC is unwilling to
20 enter into the Grant Agreement unless the parties agree to release NMHC from all liability.

21 As to the possible lack of commercial benefit in favor of NMHC, Paragraph 1 of the Grant
22 Agreement suggests that NMHC receives no commercial benefit from issuing a home rehabilitation
23 grant to Plaintiffs. The \$40,000 award to Plaintiffs is awarded at a 0% annual interest rate on the
24

1 declining balance, with a maturity date of 20 years following the completion of the rehabilitation.¹⁴
2 However, Paragraph 3 of the Grant Agreement contains Plaintiffs' promise to mortgage their
3 improved home to NMHC as collateral for the \$40,000 interest-free loan, in the case that they are
4 unable to reimburse NMHC for the full loan amount. Accordingly, unlike the agreement in *Rooz*,
5 the Grant Agreement does not make it clear that NMHC receives no commercial benefit by entering
6 into the agreement.

7 Furthermore, unlike in the agreement in *Rooz*, there is no explicit contract language
8 contained in the Grant Agreement that makes it clear that NMHC is unwilling to enter into the
9 agreement with Plaintiffs, unless they were to release NMHC of all liabilities. Therefore, the 'to
10 hold harmless' provision, contained in Paragraph 8 in the Grant Agreement, does not evince the
11 parties' contractual intent to release NMHC from liability as a benefit of the bargain. Therefore, the
12 'to hold harmless' provision contained in Paragraph 8 of the Grant Agreement is not construed as a
13 release of liability in favor of NMHC.

14 **4. The promise 'to hold harmless' is also an indemnitee's affirmative defense to an**
15 **indemnitor's enforcement of an indemnification right.**

16 Having determined that Paragraph 8 of the Grant Agreement does not contain a release of
17 liability in favor of NMHC, the Court turns to the California intermediate appellate case of *Queen*
18 *Villas Howeowners Association v. TCB Property Management*, 56 Cal. Rptr. 3d at 528, for an
19 alternate construction of the 'to hold harmless' provision. In *Queen Villas*, the court held that—
20 when an indemnity provision is not construed as a release of liability—a promise 'to hold harmless'
21 is a defensive right in favor of the indemnitee that releases an indemnitee from liability to the

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23 ¹⁴ 1. **GRANT:** In accordance to the HOME Program Policies and Procedures for Homeowner Rehabilitation, NMHC
24 shall make a grant to the Borrower, such grant having the following basic terms:
Principal Grant Amount: \$40,000;
Interest: 0% per annum on the declining balance;
Maturity Date of Grant: Twenty (20) years following the completion of rehabilitation; []

1 indemnitor; in the court's words, "it is a right *not to be bothered* by the other party itself seeking
2 indemnification." *Id.* at 534 (relying on the canon against surplusage to evaluate the material
3 difference of a contract term 'to indemnify' and 'to hold harmless' in an 'indemnity and hold
4 harmless' agreement).

5 In other words, under *Queen Villas*, in the face of an adverse judgment from a third party
6 claim, an indemnitee could enforce a promise 'to hold harmless' only when an indemnitor attempts
7 to enforce an indemnity right, as if it were the indemnitee. For example, if Plaintiffs and NMHC
8 were subject to a lawsuit from a third party, were to be jointly liable to an adverse judgment, and if
9 Plaintiffs were to bring an indemnity claim against NMHC to be compensated for Plaintiffs' losses;
10 only then would NMHC be able to enforce a 'to hold harmless' provision as an affirmative defense
11 against Plaintiffs' indemnification claim. That has not happened in this case. Therefore, even if the
12 Court were to adopt the construction of the 'to hold harmless' provision as the court did in *Queen*
13 *Villas*, Plaintiffs would not be liable to NMHC's breach of contract counterclaim because Plaintiffs
14 have not brought an indemnity claim against NMHC.

15 **5. Plaintiffs' promise 'to hold harmless' is not a promise not to sue NMHC.**

16 Courts are required, whenever possible, to give contract terms its "ordinary and common
17 meaning." *Riley*, 4 NMI at 90. Given the courts' constructions of a promise 'to indemnify and to
18 hold harmless' as a singular promise to indemnify; or a promise 'to hold harmless' as either as a
19 release of liability or as an affirmative defense to an indemnity claim, the Court does not conclude
20 that Paragraph 8 of the Grant Agreement's 'to hold harmless' provision contains a promise not to sue
21 NMHC. A contrary construction in favor of NMHC would go beyond the normal and reasonable
22 understood legal meaning of a promise 'to hold harmless.'¹⁵ Therefore, the Court concludes that

23 _____
24 ¹⁵ In fact, a contrary conclusion may be barred by the application of common law limitations provided under 7 CMC §
3401. *See, e.g.,* Bryan A. Garner, *indemnify.*, 15 GREEN BAG 2D 17, 23 (2011) ("True, the majority rule is that
indemnify and hold harmless is a unitary phrase that means nothing more than *indemnify* alone.") (citing *Brental v.*

1 Plaintiffs are not in breach of the 'to hold harmless' provision contained in Paragraph 8 of the Grant
2 Agreement.

3 **B. Intended Third Party Beneficiary**

4 NMHC argues that the corporation is a beneficiary to the construction contract executed by
5 Plaintiffs and Apex Construction. The question of whether a beneficiary to a contract can assert a
6 breach of contract counterclaim is a question of standing. *Aplus Co. v. Niizeki Int'l Saipan Co.*, 2006
7 MP 13 ¶ 1. If a person is not a party to a contract, they are a third party. A third party has standing
8 to enforce a contract provision only when they are an intended beneficiary. *See id.* ¶ 13. On the
9 contrary, if a third party is not an intended beneficiary, they are an incidental beneficiary—a person
10 who lacks standing to enforce a provision of a contract they are not a party to. *Id.* The legal
11 conclusion of whether a third party is an intended or incidental beneficiary depends on the factual
12 question of whether the contract contains, by the terms of the contract or by necessary implication,
13 the parties' 'intent to benefit' the third party. *Id.* (citing *East Meadows Co. v. Greeley Irrigation Co.*,
14 66 P.2d 214, 217 (Colo. App. 2003)).

15 There is a three-part test to determine whether the parties intended to benefit the third party:
16 (1) the parties have not agreed otherwise; (2) recognition of the right to performance is appropriate
17 to effectuate the intent of the parties; (3) the circumstances indicate that either the performance of
18 the promise will satisfy the obligation or discharge a duty owed by the promisee to the beneficiary
19 or the promisee intends to give the beneficiary the benefit of the promised performance. *Id.* ¶ 14
20 (citing Restatement (Second) of Contracts § 301)).

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24 *Holmes*, 1 Root (Conn.) 291; *Long Beach v. McAllister-Long*, 221 S.W.3d 1, 10 (Tenn. Ct. App. 2006); *Loscher v. Hudson*, 182 P. 3d 25, 33 (Kan. Ct. App. 2008); *Majkowski*, 913 A.2d at 588).

1 The Court concludes that the 'intent to benefit' test is met for three reasons. First, there is no
2 language in the construction contract that limits the benefit of an indemnity or hold harmless clause
3 to Plaintiffs and Apex Construction.

4 Second, allowing NMHC to enforce Paragraph 13 of the Construction Contract would be
5 appropriate to effectuate the intent of the parties because it furthers the parties' objectives in making
6 the agreement. In doing so, the court determines what the parties intended to accomplish by their
7 agreement—and also determines that whether recognizing the third party's right to enforce a
8 contract provision would undermine the parties' intent. *Aplus Co.*, 2006 MP 13 ¶ 16 (citing *Owner-
9 Operator Indep. Drivers Ass'n v. Concord EFS, Inc.*, 59 S.W.3d 63, 70–71 (Tenn. 2001)).

10 The full text of Paragraph 13 of the Construction Contract provides as follows:

11 **13. APPROVAL BY THE NMHC.** NMHC is the financing institution hereunder and any
12 approvals, directions, consent, or actions on the part of NMHC shall not be deemed in any
13 way whatsoever that NMHC is an agent, joint venturer or a representative of the Owner or
14 Contractor. NMHC is simply acting in its own best interest to see that the funds are disbursed
15 for the work performed, and NMHC shall not be liable in any way whatsoever, to any party,
owner, or contractor for NMHC's actions under this Contract. There are no warranties
expressed or implied by NMHC in any way as a result of its actions or approvals. The
Contractor and Owner hereby waive any claims or actions that they have or may have against
NMHC for its actions or any approvals granted pursuant to this Contract.

16 Further, Contractor and Owner hereby indemnify and shall hold harmless NMHC from any
17 liability, claims, damages, injuries, or expenses arising out of any action of NMHC as may be
performed under this contract.

18 Accordingly, under Paragraph 13, the parties' evident intent is to ensure that NMHC fulfills
19 its promise to disburse funds for work performed by Apex Construction—and that NMHC shall not
20 be held liable to either Plaintiffs or Apex Construction for liability for its actions, such as approvals,
21 relating to the construction work performed under the contract. Two additional paragraphs,
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1 Paragraph 1 and Paragraph 3 of the Construction Contract support this interpretation of the parties'
2 intent.¹⁶

3 Paragraph 1 of the Construction Contract explains that the housing rehabilitation
4 construction project is to be paid out of the proceeds of the Plaintiffs' rehabilitation mortgage loan
5 from NMHC:

6 **1. HOLD HARMLESS.** Contractor shall agree to defend, indemnify, and hold harmless the
7 Owner and [NMHC], from liability and claim for damages, sickness, disease or less and
8 expense arising from Contractor's Performance under this agreement to install or construct
9 housing rehabilitation to be paid for out of the proceeds of the Owner's rehabilitation loan.
10 Contractor is acting in the capacity of an independent contractor with respect to the Owner.

11 Read in conjunction with Paragraph 1, Paragraph 3 of the Construction Contract explains
12 the scope of the construction work that Apex Construction promised to perform for Plaintiffs, in
13 exchange for Plaintiffs' promise to pay Apex Construction out of the proceeds of Plaintiffs'
14 rehabilitation mortgage loan, provided by NMHC. Paragraph 3 reads:

15 **3. SCOPE OF WORK.** Contractor acknowledges that it has prepared the Contractors'
16 Proposal and that such proposal is accurate and consistent as to the name of the Contractor,
17 scope of work that the Contractor will undertake, and price. Contractor agrees to provide all
18 the labor, materials, and equipment and to do all things necessary for the proper rehabilitation
19 and repair of the property located at Dandan, Saipan (village and island) on Lot Number 026
20 K 19, all in accordance with the plans and specifications as approved by NMHC.

21 Accordingly, in order for the parties to achieve their objectives, they would need NMHC to
22 issue a rehabilitation mortgage loan to Plaintiffs in order for Apex Construction to be paid for the
23 construction work, as detailed in Paragraph 3 of the Construction Contract. Therefore, merely
24 recognizing NMHC's right to enforce the provisions under Paragraph 13 to be held not liable from
any party, to be able to exercise a right to be indemnified, or a right to be held 'harmless' would not

¹⁶ The Court's interpretation of the contract is evaluated under the view most favorable to the non-moving party, Plaintiffs. *See, e.g., Aplus Co.*, 2006 MP 13 ¶ 17 (explaining that upon a motion for summary judgment, the undisputed facts are construed in favor of the non-moving party).

1 undermine the parties'—Plaintiffs' and Apex Constructions'—intent to perform under the
2 Construction Contract.

3 **C. Paragraph 13 of the Construction Contract and Plaintiffs' Promise not to Sue**

4 Having found that NMHC can enforce Paragraph 13 of the Construction Contract as an
5 intended third-party beneficiary, but also previously having found that NMHC could not enforce a
6 'to hold harmless' provision to claim a release from liability, the Court now turns to the remaining
7 question of whether NMHC can enforce a 'promise not to sue' under any other provision of
8 Paragraph 13 of the Construction Contract. The Court concludes that NMHC cannot for the
9 following reasons.

10 The parties have not asserted that any language under Paragraph 13 is ambiguous.
11 Accordingly, the Court applies the principles of contract construction to determine whether
12 Paragraph 13 contains a promise by Plaintiffs to not sue NMHC within the four corners of the
13 contract. The closest language that the Court can discern from the contract language and from
14 NMHC's pleadings¹⁷ and arguments made on this issue¹⁸ is the following provision, which explains
15 that NMHC "shall not be liable in any way whatsoever, to any party, owner, or contractor for
16 NMHC's actions under this Contract."¹⁹

17 However, in applying the ordinary and commonly understood meaning to this language
18 from Paragraph 13, the Court concludes that the language cannot be construed to contain a
19 plaintiff's promise not to sue. Contract terms that contain a promise for one party not to sue another

20 ¹⁷ *E.g.*, NMHC's Ans. ¶¶ 20–22.

21 ¹⁸ *E.g.*, NMHC's Reply to Opp'n to Mot. to Dismiss and for Summary J. (Oct. 2, 2013) at 8–10.

22 ¹⁹ 13. APPROVAL BY THE NMHC. NMHC is the financing institution hereunder and any approvals, directions,
23 consent, or actions on the part of NMHC shall not be deemed in any way whatsoever that NMHC is an agent, joint
24 venturer or a representative of the Owner or Contractor. NMHC is simply acting in its own best interest to see that the
funds are disbursed for the work performed, and NMHC shall not be liable in any way whatsoever, to any party, owner,
or contractor for NMHC's actions under this Contract. There are no warranties expressed or implied by NMHC in any
way as a result of its actions or approvals. The Contractor and Owner hereby waive any claims or actions that they have
or may have against NMHC for its actions or any approvals granted pursuant to this Contract.

Further, Contractor and Owner hereby indemnify and shall hold harmless NMHC from any liability, claims, damages,
injuries, or expenses arising out of any action of NMHC as may be performed under this contract.

1 must be clear or obvious from the plain language of the contract. *See, e.g., Artvale, Inc. v. Rugby*
2 *Fabrics Corp.*, 363 F.2d 1002, 1008 (2d Cir. 1966) ("Certainly it is not beyond the powers of a
3 lawyer to draw a covenant not to sue in such terms as to make clear that any breach will entail
4 liability for damages, including the most certain of all—defendant's litigation expense. Yet to distill
5 all this out of the usual formal covenant would be going too far; its primary function is to serve as a
6 shield rather than as a sword, often being employed instead of a release to avoid the common law
7 rule with respect to the effect of a release on joint tort-feasors."). In addition, even when a promise
8 not to sue is evident from the plain language of the contract, the promise generally operates as an
9 affirmative defense—and, when proven, the remedy is dismissal of the opponent's claim. *See, e.g.,*
10 *The Luce Co. v. Hoefler*, 464 A.2d 213, 215 (Me. 1983); *Chauvlier v. Booth Creek Ski Holdings,*
11 *Inc.*, 35 P.3d 383, 386–387 (Wash. Ct. App. 2001); *Bates & Rogers Constr. v. N. Shore San.*, 471
12 N.E.2d 915, 976 (Ill. App. Ct. 1984); *First Nat. Bank v. Higgs*, 406 So. 2d 673, 676 (La. Ct. App.
13 1981); *Bank Mut. v. SJ Boyer Constr., Inc.*, 785 N.W.2d 462, 491 (Wis. 2010).

14 There are no words contained in Paragraph 13 of the Construction Contract that would allow
15 a legal conclusion that Paragraph 13 contemplates an award of damages in the event that one party
16 to a contract sues an intended beneficiary. Instead, Paragraph 13, read in its entire context, contains
17 Plaintiffs' promise that NMHC would be released from liability resulting from the corporation's
18 actions, including approvals, as a financing institution—in relation to the construction contract
19 between Plaintiffs and Apex Construction. Accordingly, the Court now turns to whether any release
20 contained in Paragraph 13 of the Construction Contract is enforceable under our controlling
21 precedents on exculpatory clauses, including releases of liability.

22 **D. Enforceability of the Release of Liability Provision**

23 As a general rule, a blanket provision for release of liability is not valid and enforceable as
24 to each and every cause of action. For example, a release of liability against any harms resulting

1 from intentional or reckless acts is unenforceable on public policy grounds. Restatement (Second)
2 of Contracts § 195(1). In addition, in *Ito v. Macro Energy, Inc.*, 4 NMI 46, 56 (1993), the NMI
3 Supreme Court held that a release of liability against negligence claims are unenforceable on public
4 policy grounds unless the contract expressly mentions that the releasor assumes the risk arising
5 from the releasee's negligent or reckless conduct. *See also* Restatement (Second) of Contracts §
6 195(2). Moreover, an exculpatory clause is not enforceable as to any cause of action so long as the
7 interest in a contract provision's enforcement is clearly outweighed by a public policy against the
8 enforcement of such terms. Restatement (Second) of Contracts § 178.²⁰

9 To determine whether a contract provision should be deemed unenforceable for public
10 policy reasons, the following factors are balanced against each other:

11 In weighing the interest in the enforcement of a term, account is taken of

- 12 (a) the parties' justified expectations,
- 13 (b) any forfeiture that would result if enforcement were denied, and
- 14 (c) any special public interest in the enforcement of the particular term.

15 In weighing a public policy against enforcement of a term, account is taken of

- 16 (a) the strength of that policy as manifested by legislation or judicial decisions,
- 17 (b) the likelihood that a refusal to enforce the term will further that policy,
- 18 (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
- 19 (d) the directness of the connection between that misconduct and the term.

20 *Id.* § 178 (2)–(3).

21 In applying these principles to Paragraph 13 of the Construction Contract, it is clear that
22 NMHC would not be able enforce Paragraph 13 to shield itself from liability for any intentional tort
23 as a matter of law. In addition, NMHC would not be able to enforce Paragraph 13 in a matter which
24 would absolve the corporation from liability for negligence because Paragraph 13 does not identify
the specific risks that may arise from NMHC's negligent or reckless acts.

²⁰ The Court is not persuaded by Plaintiffs' argument that the Court should apply Restatement (Third) of Torts §2, cmt. e (2000), citing *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963) (*Tunkl* factors). The specific question that Restatement (Third) of Torts § 2 resolves is whether a defendant can enforce an express assumption of risk provision under a contract in the torts context. *Id.* cmt. a. However, that question does not resolve, for example, whether NMHC can enforce a release of liability in the face of a breach of contract cause of action.

1 As to whether enforcement of a *limited* release of liability as to any remaining causes of
2 action under Paragraph 13 is clearly outweighed by a public policy against enforcement, the Court
3 concludes in favor of NMHC. *See* Restatement (Second) of Contracts § 184 (allowing selective
4 enforcement of a contract deemed unenforceable on public policy grounds). To formulate a
5 common law rule based on public policy, the policy must be implicated in either local law or a
6 recognized need to guard the welfare of the general public. *Castro v. Hotel Nikko Saipan, Inc.*, 4
7 NMI 268, 275 (1995). Plaintiffs, however, have not pointed to a public policy—either local law or
8 the identified need to guard the public welfare—that would weigh in favor or against enforcement
9 of a release of liability contained in Paragraph 13.

10 The factors that support enforcement of the limited release of liability outweigh the factors
11 against enforcement for the following reasons. NMHC's reliance on the limited release of liability
12 contained in Paragraph 13 was reasonably justified. At the present posture of the instant litigation,²¹
13 NMHC would not suffer a result of forfeiture. But there is some public interest in ensuring that a
14 limited release of liability remains enforceable. *Phoenix Ins. Co. v. Rosen*, 949 N.E.2d 639, 644 (Ill.
15 2011) (" . . . it should be remembered that it is to the interest of the public that persons should not
16 be unnecessarily restricted in their freedom to make their own contracts."). Finally, the Court has
17 neither found nor concluded that NMHC engaged in any misconduct from the undisputed facts of
18 the case. *See generally Bowie v. Apex Construction, Inc.*, No. 13-0092 (NMI Super. Ct. Mar. 15,
19 2016) (entering summary judgment in favor of NMHC on all of Plaintiffs' claims). Therefore, the
20 Court concludes that Paragraph 13 of the Construction Contract contains an enforceable limited
21 release of liability, acting only to suppress any causes of action that are neither (1) resulting from an
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24 ²¹ Plaintiffs concede that there are no pending causes of action against NMHC. Pls.' Suppl. Brief at 7 ("Since the [Plaintiffs'] claims against NMHC have already been dismissed, the release can serve no further purpose.").

1 intentional or reckless act by NMHC; nor (2) resulting from an act of negligent or reckless conduct
2 by NMHC.

3 V. CONCLUSION

4 The Court has concluded that Paragraph 8 of the Grant Agreement does not contain
5 Plaintiffs' promise not to sue NMHC because a promise 'to hold harmless' is either Plaintiffs'
6 promise to indemnify NMHC for its losses or a reciprocal promise to not indemnify NMHC for
7 Plaintiffs' losses. The Court has also concluded that NMHC may enforce Paragraph 13 of the
8 Construction Contract as an intended third-party beneficiary, but that Paragraph 13 only contains a
9 limited release of liability in favor of NMHC for causes of action that are either: (1) not resulting
10 from an intentional or reckless act by NMHC; or (2) not resulting from an act of negligent or
11 reckless conduct by NMHC. The Court also concludes that neither Paragraph 8 of the Grant
12 Agreement nor Paragraph 13 of the Construction Contract contain Plaintiffs' promise not to sue
13 NMHC. Therefore, summary judgment is granted in favor of Plaintiffs on NMHC's breach of
14 contract counterclaim as to Paragraph 8 of the Grant Agreement and as to Paragraph 13 of the
15 Construction Contract.

16 For the foregoing reasons, summary judgment is **GRANTED** in Plaintiffs' favor on
17 NMHC's breach of contract counterclaim as to Paragraph 8 of the Grant Agreement and as to
18 Paragraph 13 of the Construction Contract, pursuant to NMI R. Civ. P. 56(b).

19 While not discussed in the instant order, Plaintiffs had also requested that the Court enter
20 summary judgment on all remaining counterclaims by NMHC.²² Before the Court issues a ruling on
21 Plaintiffs' additional request for relief, the parties are **ORDERED** to appear for a status conference
22 to discuss any remaining issues on September 28, 2016, at 9:00 a.m. in Courtroom 202A. All
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24 ²² Pls.' Op. Br. at 10 (citing NMHC's Ans. ¶¶ 24–28).

1 parties, including Apex Construction, are **ORDERED** to appear.

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3 **IT IS SO ORDERED** this 15th day of September, 2016.

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/s/ _____
Roberto C. Naraja
Presiding Judge

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