



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

NORTHERN MARIANAS HOUSING CORPORATION,

Plaintiff,

JESSICA CASTRO, et al.,

Plaintiffs in Intervention,

v.

SSFM INTERNATIONAL, INC.,
TELESOURCE CNMI, INC., and
TELEBOND INSURANCE CORP.,

Defendants.

CIVIL ACTION NO. 06-0123

FINDINGS OF FACT AND
CONCLUSIONS OF LAW WITH REGARD
TO THE COURT'S APPORTIONMENT OF
LIABILITY BETWEEN DEFENDANTS
SSFM AND TELESOURCE FOR
ARBITRATION AWARD

I. INTRODUCTION

THIS MATTER came before the Court on February 3 and 4, 2020, at the Horiguchi Building for trial of the mutual cross-claims of Defendants SSFM International, Inc. ("SSFM") and Telesource CNMI, Inc. ("Telesource") with regard to the proper apportionment of a prior arbitration award in favor of Plaintiffs Northern Marianas Housing Corporation ("NMHC") and Jessica Castro, et al. (the "Castro Homeowners"). Brien Sers Nicholas, Esq. and Bennett J. Chin, Esq. (*pro hac vice*) appeared for SSFM. Joseph E. Horey, Esq. appeared for Telesource.

After hearing and considering the testimony of Defendants' experts and arguments of counsel, and having considered the exhibits and the entire record herein, the Court makes the following findings of fact and conclusions of law.

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1 **II. BACKGROUND**

2 This case arises out of defective conditions found to exist at a low-cost housing development
3 in southern Saipan known as Tottotville. Plaintiff Northern Marianas Housing Corporation
4 (“NMHC”) was the developer of the project. NMHC hired Defendant SSFM International, Inc.
5 (“SSFM”) as the designer/architect and construction manager for the project. NMHC hired Defendant
6 Telesource CNMI, Inc. (“Telesource”) as the general contractor responsible for construction of the
7 project.

8 Numerous issues arose with the Tottotville housing development, and, as a result, NMHC –
9 later joined by intervening Tottotville homeowners – sued SSFM, Telesource, and Telebond Insurance
10 Corp. for damages resulting from the defective conditions of the Tottotville homes. The principal
11 parties (including NMHC, the homeowners, SSFM, and Telesource) eventually engaged in binding
12 arbitration. The matter that was the subject of the arbitration was heard before the Superior Court for
13 the Commonwealth of the Northern Mariana Islands from June 4, 2012 through June 11, 2012. The
14 arbitration judge issued a final arbitration award and judgment on July 24, 2012 (the “Arbitration
15 Award”). *See* Trial Ex. 1 (Amended Arbitration Award and Judgment).

16 In the Arbitration Award, the arbitration judge found SSFM and Telesource jointly and
17 severally liable to NMHC and the Castro Homeowners¹ in the total amount of \$5,459,248.62:

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Plaintiff	Amount
Castro Homeowners damages	\$3,779,476.00
Castro Homeowners attorneys’ fees and costs	\$984,921.89
NMHC (damages plus attorneys’ fees and costs)	\$694,850.73
Total	\$5,459,248.62

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23 ¹ A second group of Tottotville homeowners, the Flores Homeowners, will not be discussed herein. The Flores
24 Homeowners have already settled with Telesource and Telebond, and the arbitration judge found SSFM solely liable for
the award granted to the Flores Homeowners.

1 Interest accrued on the judgment pursuant to law, at the statutory rate of nine percent per annum. *See*
2 7 CMC § 4101.

3 The cross-claims between SSFM and Telesource were among those originally submitted for
4 arbitration, and both parties presented evidence and argument as to how any shared liability should be
5 apportioned between them, but these claims were, for unknown reasons, never resolved by the
6 arbitration judge. Both SSFM and Telesource pointed out this omission in their respective motions to
7 amend the judgment, and they again requested a ruling on apportionment as between the two of them.
8 However, the arbitration judge still did not address the issue. The arbitration judge did not find the
9 parties equally at fault, nor did he settle on any other ratio of fault between the two of them, despite
10 the statutory mandate that “for purposes of contribution . . . the court . . . *shall* determine and state in
11 the judgment each party’s equitable share of the obligation to each claimant in accordance with the
12 respective percentages of fault.” *See* 7 CMC § 2902(c) (emphasis added).

13 The claims of the other parties were resolved in a variety of ways, both before and after
14 arbitration, until the only claims remaining in the case were SSFM’s and Telesource’s mutual cross-
15 claims, with each alleging that the other should pay a greater share of the overall liability. SSFM’s
16 and Telesource’s attempts to settle were unsuccessful, and interest on the Arbitration Award continued
17 to accrue. In consideration for a release of any further liability, and likely to avoid continuing to pay
18 the accruing interest on the Arbitration Award, SSFM entered into a monetary settlement agreement
19 with NMHC and the Castro Homeowners to pay a principal amount of \$3,599,650.45. On December
20 21, 2012, SSFM paid its full settlement amount to NMHC and the Castro Homeowners. Telesource
21 paid the balance of the Arbitration Award over the course of many years pursuant to a payment plan.

22 On February 3 and 4, 2020, SSFM and Telesource proceeded to trial before this Court, each
23 seeking contribution from the other for what each alleges it overpaid. For purposes of the trial, SSFM
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1 and Telesource stipulated that they paid following principal amounts to NMHC and the Castro
2 Homeowners pursuant to the Arbitration Award:

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Defendant	Amount Paid	% of Total
4 SSFM	\$3,599,650.45	65.9%
5 Telesource	\$1,859,598.18	34.1%
Total	\$5,459,248.63	100%

6 *See* Trial Ex. 2 (Stipulated Financials). The breakdown of the amounts paid on the principal is
7 therefore 65.9% paid by SSFM and 34.1% paid by Telesource.

8 Telesource argues that (i) the correct allocation of liability should be 76% of the fault to SSFM
9 and 24% to Telesource, and therefore (ii) Telesource overpaid the Arbitration Award by \$993,215.79.
10 *See* Telesource’s Post-Trial Brief at 12-13. Accordingly, Telesource seeks a judgment from this Court
11 ordering SSFM to pay it \$993,215.79 in contribution. *See id.* at 13.

12 SSFM argues that (i) the correct allocation of liability should be 22.8% of the fault to SSFM
13 and 77.2% to Telesource, and therefore (ii) SSFM overpaid the Arbitration Award by \$2,354,941.76.
14 *See* SSFM’s Post-Trial Brief at 18. Accordingly, SSFM seeks a judgment from this Court ordering
15 Telesource to pay it \$2,354,941.76 in contribution. *See id.*

16 **III. APPLICABLE LAW**

17 Contribution between jointly and severally liable defendants, like SSFM and Telesource, is
18 explicitly provided for in CNMI law: “A right of contribution exists between or among two or more
19 persons who are jointly and severally liable upon the same indivisible claim for the same injury, death,
20 or harm[.]” 7 CMC § 2904(a); *see also* 7 CMC § 4302(a) (“[W]here two or more persons become
21 jointly or severally liable in tort for the same injury to person or property . . . there is a right of
22 contribution among them[.]”).²

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24 ² Contribution in the CNMI is governed by two statutes: the Contribution Among Joint Tortfeasors Act, 7 CMC §§ 4301-4306; and the Uniform Comparative Fault Act, 7 CMC §§ 2901-2907. Where consistent (as they are on this point), they

1 “The basis for contribution is each person’s equitable share of the obligation[,]” 7 CMC
2 § 2904(a), which is based on the “percentage of the total fault” that is allocated to each. 7 CMC
3 § 2902(a)(2). Percentage of fault is in turn based on “both the nature of the conduct of each party at
4 fault and the extent of the causal relation between the conduct and the damages claimed.” 7 CMC §
5 2902(b). Once the parties’ proportionate fault is established in this way, “a party paying more than
6 his equitable share of the obligation . . . may recover judgment for contribution.” 7 CMC § 2905(a).

7 IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

8 Due to the unique posture of this case, and the fact that the only issue before the Court is
9 assignment of the “percentage of the total fault” to SSFM and Telesource, the Court finds it necessary
10 to discuss its findings of fact and conclusions of law simultaneously, rather than in separate sections.

11 A. Neither Party Is Foreclosed From Seeking Contribution Against the Other.

12 As an initial matter, the Court will address Telesource’s argument that SSFM is not entitled to
13 any contribution from Telesource – even if the Court finds that it paid more than its proportionate
14 share – because SSFM entered into a settlement agreement with the Plaintiffs that allegedly did not
15 extinguish Telesource’s liability to the Plaintiffs. *See* Telesource’s Post-Trial Brief at 13-14.

16 Notwithstanding the fact that this argument was raised for the first time in Telesource’s Post-
17 Trial Brief, and for that reason alone the Court is inclined to reject it as untimely and waived, the Court
18 also finds Telesource’s position untenable given the unique procedural posture of this case and
19 pursuant to principles of equity and fairness. *See Randy Reynolds & Assocs. v. Harmon*, 193 Wn.2d
20 143, 162 (“[C]ourts possess inherent equitable powers to fashion remedies as justice demands.”); NMI

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23 should both be given effect. *See, e.g., Deleon Guerrero v. Tinian Dynasty Hotel and Casino*, 2006 MP 26 ¶ 31 (“If two
24 statutory provisions are capable of co-existing, then we may regard each as effective.”); *see generally Marianas Eye
Institute v. Moses*, 2011 MP 1 ¶ 11 fn.6 (“[T]he meaning and application of a specific statute or portion of a statute is
determined by looking to statutes which relate to the same person or thing and which have a purpose similar to that of the
statute being construed.”).

1 Const. art. IV, § 2 (“The Commonwealth superior court shall have original jurisdiction in all cases in
2 equity and at law. . . . The superior court shall have all inherent powers[.]”).

3 In support of its position, Telesource cites to 7 CMC § 2904(b), which provides:

4 Contribution is available to a person who enters into a settlement with a claimant *only*
5 (1) if the liability of the person against whom contribution is sought has been
6 extinguished and (2) to the extent that the amount paid in settlement was reasonable.

7 7 CMC § 2904(b) (emphasis added). Telesource does not dispute whether the amount SSFM paid in
8 settlement was reasonable, but argues that its liability was not extinguished by the settlement “because
9 Telesource remained under an order to pay off the remaining balance of the judgment for years
10 afterward.” *See* Telesource’s Post-Trial Brief at 14 (citing Order [in Aid of Judgment] (March 6,
11 2013)). The Court disagrees with Telesource’s characterization of its liability post-arbitration.

12 Under the facts of this case, SSFM’s settlement with Plaintiffs did not need to extinguish some
13 undetermined liability owed by Telesource to the Plaintiffs because that liability had already been
14 determined by the arbitration judge when he found SSFM and Telesource jointly and severally liable
15 to NMHC and the Castro Homeowners for \$5,459,248.62. *See* Trial Ex. 1. This is not a case where
16 NMHC and the Tottotville homeowners sued only SSFM for all of the damages related to the
17 Tottotville development, and SSFM settled with Plaintiffs for the full amount knowing it could later
18 seek contribution against Telesource in a separate lawsuit. Telesource was very much a party to the
19 underlying arbitration, and the arbitration judge explicitly found Telesource at fault for a portion of
20 the \$5,459,248.62 Arbitration Award.³ All that is left to be determined is the apportionment of
21 liability between SSFM and Telesource. Given the underlying arbitration proceedings, and the binding
22 Arbitration Award, Telesource is not in danger of being sued again by Plaintiffs on the issue of
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24 ³ Why the arbitration judge did not go as far as to apportion liability between SSFM and Telesource remains unknown, but that is not the issue before the Court today.

1 liability. Nor is Telesource at risk of double recovery by Plaintiffs since NMHC and the Castro
2 Homeowners have received the full Arbitration Award.

3 Under these circumstances, the Court finds 7 CMC § 2904(b) inapplicable.⁴ Neither party is
4 foreclosed from seeking contribution against the other.

5 **B. The Court Declines to Implement a *Per Se* Rule Holding SSFM Equally Liable for**
6 **Every Construction Defect That Arose as a Result of Telesource’s Workmanship.**

7 Relevant to the Court’s finding of liability is the question of how much direct authority SSFM,
8 as construction manager, had over Telesource, as contractor. Telesource argues that SSFM’s role as
9 construction manager required it to “act as the eyes and ears of the owner [NMHC]” for the purpose
10 of “detecting and correcting, or at least reporting, construction errors.” *See* Telesource’s Post-Trial
11 Brief at 22. Telesource maintains that “the pervasiveness of the same defects throughout the
12 [development]” is indicative of a systemic failure on SSFM’s part to fulfill its role as construction
13 manager. *Id.* at 21-22. Telesource thus argues that SSFM should share, at minimum, equal liability
14 for any defects found by the Court to be a construction (rather than design) defect. *Id.*

15 SSFM disavows any notion that it should share liability in equal parts with Telesource for
16 defects found to be purely errors in construction. *See* SSFM’s Post-Trial Brief at 10-12. SSFM points
17 out that the Telesource-NMHC contract makes no mention of SSFM, let alone confers upon SSFM
18 any direct authority or control over Telesource. *Id.* at 10-11. At most, SSFM argues, its role as
19 construction manager required it to “report[] construction issues to NMHC, who had direct authority
20 over Telesource, and ma[k]e appropriate recommendations.” *Id.* at 11. SSFM argues it should not be
21 held liable for every error that Telesource made because SSFM’s recommendations “were often not
22 followed by NMHC or Telesource.” *Id.*

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⁴ The Court finds 7 CMC § 4302(d) inapplicable for the same reasons.

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1. The SSFM-NMHC Contract⁵

SSFM’s contract with NMHC (the “SSFM-NMHC contract”) identifies and refers to SSFM throughout as the “CONSULTANT” on the Tottotville project. *See* Trial Ex. 3 at 261. Article 2 of the contract provides that “CONSULTANT shall provide comprehensive constructive management services which are described in detail on ‘Exhibit A’.” *Id.* Exhibit A (“Scope of Work”) to the SSFM-NMHC contract outlines the following duties of SSFM in the “Construction Management Phase” of the project:

- ...
- B. Conduct daily inspections of the construction to ensure compliance with the plans and specifications. . . .;
- ...
- F. Constantly monitor contractor’s progress and verify amount of work completed . . .;
- ...
- H. Certify work completed, assist contractor in preparation of as-built plans and close up of project.

Id. at 268. Exhibit B (“General Terms and Conditions”) to the SSFM-NMHC contract provides:

RELATIONSHIP OF CONSULTANT TO NMHC: For the purposes of this Agreement, except as may otherwise be specifically provided, the CONSULTANT shall be considered as an independent Contractor and not as an agent or representative of NMHC and it is understood that neither the CONSULTANT nor its employees or subconsultants shall act for, represent, or bind NMHC in any capacity or manner whatsoever.

Id. at 273. Exhibit B further provides that “[t]he CONSULTANT shall be responsible for the professional quality, technical accuracy, and the coordination of all services furnished by the CONSULTANT under this Agreement.” *Id.*

⁵ *See generally* Trial Ex. 3 at 260-285.

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2. The Telesource-NMHC Contract⁶

Telesource’s contract with NMHC (the “Telesource-NMHC contract”) identifies and refers to Telesource throughout as the “Contractor” on the Tottotville project. *See* Trial Ex. 3 at 287. The contract provides that the Commonwealth of the Northern Mariana Islands is represented by the “Contracting Officer,” who is identified as MaryLou S. Ada, then the Executive Director of NMHC. *Id.* at 289. Dozens of references are made to the “Contracting Officer” throughout the Telesource-NMHC contract showing that the “Contractor” is subject to the ultimate control of the “Contracting Officer.”⁷

Section 7(a) (“Authorities and Limitations”) of the Telesource-SSFM contract provides:

All work under the Contract shall be performed under the general direction of the Contracting Officer, who alone shall have the power to bind the Commonwealth . . . except that he shall have the right to designate authorized representatives to act for him. The authorized representatives are responsible for guiding the technical aspects of the project and for general surveillance of the work performed. . . . Whenever any provisions in the Contract *specify* an individual . . . or an organization (whether government or private) to perform any act on behalf of, or in the interest of the Commonwealth, that individual or organization shall be deemed the Contracting Officer’s authorized representative under the Contract *but only to the extent so specified*.

Id. at 294 (emphasis added). Section 7(c) provides:

The work of the Contractor is subject to inspection to insure strict compliance with the terms of the Contract. No inspector is authorized to change any provision of the specifications without the written authority of the Contracting Officer, nor shall the presence or absence of an inspector relieve the Contractor from any requirements of the work.

Id.

⁶ *See generally* Trial Ex. 3 at 286-320.

⁷ *See, e.g.,* Trial Ex. 3 at 315 (“Any discrepancies between the contract requirements and the existing conditions shall be referred to the Contracting Officer before any work affected thereby has been performed.”), 316 (“The Contractor shall protect and preserve established bench marks and monuments and shall make no changes in locations without written approval of the Contracting Officer.”), 317 (“If the Contractor desires to carry on work outside regular working hours, he shall submit an application to the Contracting Officer[.]”).

1 **3. The Court’s Determination as to SSFM’s Contractual Obligation**

2 Contract interpretation is a question of law, and courts reads contracts according to their plain
3 meaning. *See Manglona v. Baza*, 2012 MP 4 ¶ 12 (“The intent of contracting parties is generally
4 presumed to be encompassed by the plain language of contract terms.”).

5 There is insufficient evidence on the face of either contract to show that SSFM had any sort of
6 direct authority or control over Telesource’s work. The Telesource-NMHC contract plainly designates
7 all controlling authority to the Contracting Officer, who is identified as MaryLou S. Ada, then the
8 Executive Director of NMHC. Although the Telesource-NMHC contract does provide that the
9 Contracting Officer has the right to designate an authorized representative to act on her behalf, such
10 designation must “*specify* [the] individual . . . or [] organization (whether government or private)” that
11 may act on the Contracting Officer’s behalf, and even then the authorized representative may act “only
12 to the extent so specified.” *Id.* at 294 (emphasis added). Nowhere in the Telesource-NMHC contract
13 does it specify any individual or organization as an authorized representative; SSFM is not mentioned
14 once in the Telesource-NMHC contract. In addition, the SSFM-NMHC contract disclaims any
15 possibility that SSFM can act as an agent or representative of NMHC. *See* Trial Ex. 3 at 273 (“[T]he
16 CONSULTANT shall be considered as an independent Contractor and not as an agent or
17 representative of NMHC and it is understood that neither the CONSULTANT nor its employees or
18 subconsultants shall act for, represent, or bind NMHC in any capacity or manner whatsoever.”).

19 The Court finds that SSFM had no direct authority or control over Telesource’s work and thus
20 declines to implement a *per se* rule wherein SSFM is held equally liable for any construction defects
21 that arose due to Telesource’s workmanship. However, the Court finds that SSFM had an independent
22 duty, pursuant to its contract with NMHC, to conduct daily inspections of the construction and to
23 monitor Telesource’s progress to reasonably ensure compliance with the project plans and
24 specifications. *See id.* (“The CONSULTANT shall be responsible for the professional quality,

1 technical accuracy, and the coordination *of all services furnished by the CONSULTANT* under this
2 Agreement.”) (emphasis added). SSFM will be held liable to the extent that the evidence tends to
3 show it failed in those supervisory duties and such failure was within its control. As the project
4 designer/architect, SSFM will also be held liable to the extent that the evidence tends to show a defect
5 was the result of a design error rather than shoddy construction workmanship; Telesource will be held
6 liable to the extent that the evidence tends to show the inverse. Where the evidence tends to show that
7 a defect was the result of both design error and construction error, the Court will apportion liability
8 between SSFM and Telesource based on percentage of fault.

9 **C. The Court’s Apportionment of Liability for the Eighteen Categories of Defects**
10 **Listed in the Arbitration Award for Which Damages Were Awarded.**

11 During the two-day trial held on February 3 and 4, 2020 on the issue of apportionment, the
12 Court heard testimony from two expert witnesses: David A. Knox, who testified on behalf of SSFM,
13 and Stephen J. Cox, who testified on behalf of Telesource. Mr. Knox is an architect and general
14 contractor with a background in forensic consulting based in Honolulu, Hawaii. Mr. Cox is a civil
15 and structural engineer based in Sonoma County, California. Both experts were involved in the
16 underlying arbitration and had personally inspected the defective Tottotville homes either before or
17 during the arbitration. In addition, both experts submitted reports opining on the appropriate
18 apportionment of liability between SSFM and Telesource.

19 The Court will discuss the opinions of both experts, weigh the evidence provided, and come to
20 its own determination of liability as to the eighteen categories of defects for which damages were
21 awarded to NMHC and the Castro Homeowners.⁸

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23 ⁸ There are some categories of defects, for example “Use of Grade 40 Rebar,” for which no incidents were found in any of
24 the Castro Homeowners’ homes, and accordingly no damages were awarded for that category. No discussion is needed as
to these categories of defects because they have no ultimate effect on the Court’s apportionment of liability.

1 **1. Foundation Movement**

2 In the underlying arbitration, foundation movement was found to affect 19 of the 34 Castro
3 Homeowners' homes. Mr. Knox estimated that roughly \$143,242.00 was awarded in damages for
4 foundation movement.⁹ See Trial Ex. 3a at 9 (Arbitration Award Allocation). Of this amount, Mr.
5 Knox attributed 100% liability to Telesource. Mr. Cox attributed 100% liability to SSFM.

6 Mr. Knox testified that he believed the foundation movement occurred solely as a result of
7 inadequate compaction of the fill that was placed below the buildings. See Trial Tr., vol. 1, 87:12-16;
8 see also *id.* at 105:25-105:1-2 ("If [the fill] was not properly compacted it's going to compact over
9 time, naturally. Which is what I think happened."). Compaction of the fill is a contractor's
10 responsibility and difficult to catch as a construction manager, thus Mr. Knox attributed 100% liability
11 to Telesource.

12 Mr. Cox testified that he believed the foundation movement to be the result of a design error:
13 "Investigations of soil and foundation conditions . . . concluded that the foundations designed by
14 SSFM are not appropriate for expansive clays." See Trial Ex. 4 (Cox's expert report) at 2. However,
15 this was rebutted by evidence that SSFM did, in fact, remove the expansive soils below the
16 foundations. See Trial Tr., vol. 1, 85:18-19 ("SSFM attested that they did remove the expansive soils
17 below the slabs."). Further, test samples taken near the foundation footings of the homes revealed a
18 granular material shown to be fill, which further evidences that expansive soils had been removed and
19 replaced with compacted fill. See *id.*, 103:1-25, 104:1-2.

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22 ⁹ See Ex. A to SSFM's Post-Trial Brief (hereinafter "Trial Transcript vol. 1"), 82:22-25, 83:1-6.

23 Q: . . . And then the Award Value, how did you arrive at that number?

24 A: Well, I did it on a per house basis. And using both the numbers that we derived during the underlying arbitration,
as well as Mr. Cox's numbers in the underlying arbitration. His numbers and our numbers were not that different for
many categories. Then there were some categories that I had numbers for that he did not. . . .

1 According to Mr. Knox, because SSFM removed the expansive material beneath the
2 foundations pursuant to a soils report it relied upon, there was nothing faulty about SSFM’s foundation
3 design, which was appropriate for the soil conditions. *See id.*, 104:21-25 (“But you don’t have to use
4 a different foundation design if you’re removing the expansive material that can impact the foundation
5 of the homes. So [SSFM] did everything according to the original soils report.”). Mr. Cox testified
6 that even “if indeed [the foundation movement] was due to consolidation [of fill] due to improper
7 compaction,” he would distribute “a large majority if not all of the liability for that foundation
8 movement to SSFM” for failing to require that compaction be tested in specific locations for each
9 house. *See Ex. B to SSFM’s Post-Trial Brief (hereinafter “Trial Transcript vol. 2”)*, 197:2-6.

10 On balance, the evidence suggests that it is more likely than not that foundation movement
11 occurred as a result of a construction defect. The expansive soils had been removed per the
12 recommendation of the soils report prior to placing the foundation, and thus the foundation designed
13 by SSFM was likely not the cause of the movement. Further, the fact that only about half of the Castro
14 homes experienced foundation movement indicates that it is less likely to be a design issue – which
15 presumably would affect all of the homes, because they are all subject to the same foundation design
16 – and more likely to be an issue of inadequate compaction of the fill at some, but not all, sites.

17 The Court finds Telesource 100% liable for the foundation movement. Out of a total award of
18 \$143,242.00 for this defect, Telesource is responsible for \$143,242.00 and SSFM is responsible for
19 \$0.00.

20 **2. Voids in CMU Walls**

21 In the underlying arbitration, all 34 homes were found to have voids in CMU walls. Mr. Knox
22 estimated that roughly \$34,960.00 was awarded in damages for this defect. *See Trial Ex. 3a at 9.* Of
23 this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed 50% liability to
24 SSFM and 50% liability to Telesource.

1 At trial, neither expert disputed that this was purely a construction error: both experts agreed
2 that SSFM’s design drawings called for Telesource to reinforce/fill all the cells in the CMU walls, and
3 Telesource simply failed to do so. However, Mr. Cox placed 50% of the blame on SSFM for failing
4 to catch this repeated mistake, consistent with Telesource’s position that SSFM as construction
5 manager should be liable for an equal share of fault anytime a defect is found to be Telesource’s fault.
6 *See* Trial Tr., vol. 1, 27: 11-22 (“So Telesource didn’t put reinforcing in to [] CMU walls as the
7 drawings would instruct them to do so. . . . And so, therefore, I considered it to [be] a joint failure
8 between the two. Telesource for not installing the enforcing and SSFM as construction manager
9 inspector for not catching that the reinforcing was missing.”).

10 Mr. Cox testified that if he were the construction manager on site, he would have done his due
11 diligence and caught the error before it permeated every single one of the homes. *See* Trial Tr., vol.
12 2, 189:1-19. Mr. Knox disagreed, stating that a failure to fill all the cells in a wall completely is
13 difficult for a construction manager to detect: “[T]he reality of it is in construction nobody can catch
14 everything that’s done or not done.” *See* Trial Tr., vol. 1, 89:1-2. Mr. Chin suggested, on cross-
15 examination of Mr. Cox, that “there were a number of discussions and criticisms by SSFM of
16 Telesource during construction that they weren’t grouting the walls properly[.]” *See* Trial Tr., vol. 2,
17 228:7-17. However, why these complaints did not reach NMHC or result in the problem getting fixed
18 remains unknown to the Court.

19 As discussed earlier, the Court declines to hold SSFM equally liable for every defect found to
20 be a pure construction defect. Because there is no dispute that this was solely an error on Telesource’s
21 part, the vast majority of the fault must fall on Telesource. However, there is some evidence that
22 SSFM potentially could have caught this mistake with greater diligence or – if it did in fact catch the
23 mistake, as Mr. Chin’s cross-examination of Mr. Cox suggested – that SSFM could have done more
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1 to raise the issue to NMHC’s attention. The Court cannot discount the possibility, though, that the
2 issue was properly raised to NMHC, who simply failed to act on SSFM’s concerns.

3 Accordingly, the Court finds Telesource 95% liable and SSFM 5% liable for voids in CMU
4 walls. Out of a total award of \$34,960.00 for this defect, Telesource is responsible for \$33,212.00 and
5 SSFM is responsible for \$1,748.00.

6 **3. CABO Violations**

7 Pursuant to the Telesource-NMHC contract, Telesource was contractually obligated to comply
8 with the CABO code and all other applicable laws affecting its work:

9 “The Contractor [Telesource], at all times, shall observe and comply with all Federal
10 and local laws, codes, ordinances, and regulations in any manner affecting the conduct
11 of the work, and the Contractor and his surety shall indemnify and save harmless the
12 Commonwealth and all its officers, agents and servants any claim or liability arising
from or based on the violation of any such law, code, ordinance, regulation, order, or
decree, whether by himself or his employees.”

13 *See* Trial Ex. 3 at 307 (Telesource-NMHC contract, Section 27).

14 However, this does not absolve SSFM of its independent duty to inspect Telesource’s work
15 pursuant to its own contract with NMHC. The Court will therefore still apportion liability to SSFM
16 where the Court finds that SSFM failed to catch a CABO violation that could have been caught with
17 reasonable diligence, or where the Court finds that a design defect played a role in the CABO violation.

18 **i. Grading**

19 In the underlying arbitration, 25 of 34 homes were found to violate CABO standards for
20 grading. Mr. Knox estimated that roughly \$98,077.00 was awarded in damages for this CABO
21 violation. *See* Trial Ex. 3a at 9. Of this amount, Mr. Knox attributed 95% liability to Telesource and
22 5% liability to SSFM. Mr. Cox attributed 50% liability to SSFM and 50% liability to Telesource.

23 At trial, both experts agreed that grading was primarily a contractor responsibility, and it just
24 was not done in the majority of the homes. Mr. Cox attributed 50% liability to SSFM for failing to

1 catch this repeated mistake as construction manager, but he did not offer much more by way of his
2 testimony. Mr. Knox attributed 5% liability to SSFM for failing to catch this mistake and stated that
3 “it may have been possible to, by eyesight observe.” *See* Trial Tr., vol. 1, 89:14-16. He noted that for
4 “some of the grading there was cross slopes in the lots. . . . I can acknowledge that SSFM may have
5 been able to detect some of that.” *Id.*

6 Because there is no dispute that this was solely a construction error on Telesource’s part, the
7 vast majority of the fault must fall on Telesource. However, the evidence shows that this mistake was
8 a rather easy one to observe by plain sight, and given the high incidence (grading issues were found
9 in 25 of 34 homes), SSFM presumably should have been able to catch the error with a reasonable
10 amount of diligence.

11 Accordingly, the Court finds Telesource 80% liable and SSFM 20% liable for grading issues.
12 Out of a total award of \$98,077.00 for this defect, Telesource is responsible for \$78,461.60 and SSFM
13 is responsible for \$19,615.40.

14 **ii. Attic Access**

15 In the underlying arbitration, 24 of 34 homes were found to violate CABO standards for attic
16 access. Mr. Knox estimated that roughly \$10,772.00 was awarded in damages for this CABO
17 violation. *See* Trial Ex. 3a at 9. Of this amount, Mr. Knox attributed 90% liability to Telesource and
18 10% liability to SSFM. Mr. Cox attributed 50% liability to SSFM and 50% liability to Telesource.

19 Similar to the issue with grading, discussed above, both experts agreed that attic access was
20 primarily a contractor responsibility. Mr. Cox attributed 50% liability to SSFM for failing to catch
21 this repeated mistake as construction manager, but he did not offer much more by way of his testimony.
22 Mr. Knox acknowledged that “it would have been possible to walk all the houses and see[] that access
23 panel was not in place. But it doesn’t relieve the contractor of the responsibility to do it.” *See* Trial
24 Tr., vol. 1, 90:8-11.

1 Because there is no dispute that this was solely a construction error on Telesource’s part, the
2 vast majority of the fault must fall on Telesource. However, the evidence shows that this mistake was
3 a rather easy one to observe by plain sight, and given the high incidence (issues with attic access were
4 found in 24 of 34 homes), SSFM presumably should have been able to catch the error with a reasonable
5 amount of diligence.

6 Accordingly, the Court finds Telesource 80% liable and SSFM 20% liable for issues with attic
7 access. Out of a total award of \$10,772.00 for this defect, Telesource is responsible for \$8,617.60 and
8 SSFM is responsible for \$2,154.40.

9 **iii. Hallway Width**

10 In the underlying arbitration, 23 of 34 homes were found to violate CABO standards for
11 hallway width. Mr. Knox estimated that roughly \$32,315.00 was awarded in damages for this CABO
12 violation. *See* Trial Ex. 3a at 9. Of this amount, Mr. Knox attributed 100% liability to Telesource.
13 Mr. Cox attributed 100% liability to SSFM where the design drawings were ambiguous or missing
14 dimensions and 100% liability to Telesource where the design drawings were unambiguous and clearly
15 stated that the hallway had to be 36 inches wide. *See* Trial Ex. 3 at 176-209 (Cox’s House Repair
16 Estimates).

17 Mr. Knox testified that there is a very clear CABO code requirement that all hallways must be
18 at least 36 inches wide, and Telesource as the contractor should have been well-aware of this
19 requirement. However, he also testified that “not every house plan had the hallways always
20 dimensioned. Sometimes these hallways were actually hardly hallways. They were sort of a turn a
21 corner where there was a closet and then you go into the rooms. The designs almost have no hallways
22 in them.” *See* Trial Tr., vol. 1, 90:21-25, 91:1-3.

23 SSFM’s failure to properly dimension the hallways on all of the house plans, coupled with its
24 confusing drawings in some instances of hallways that “were actually hardly hallways” strikes the

1 Court as a design error – one which likely confused the contractor, who was under a contractual
2 obligation to follow the design plans as given. In addition, the high incidence of this violation would
3 have made it easier to catch. However, the Court will apportion greater liability to Telesource because,
4 under the terms of its own contract with NMHC, it was required to abide by the CABO code and all
5 other applicable laws regardless of SSFM’s actions or inaction.

6 The Court finds Telesource 70% liable and SSFM 30% liable for issues with hallway width.
7 Out of a total award of \$32,315.00 for this defect, Telesource is responsible for \$22,620.50 and SSFM
8 is responsible for \$9,694.50.

9 **iv. Closet Depth**

10 In the underlying arbitration, 2 of 34 homes were found to violate CABO standards for closet
11 depth. Mr. Knox estimated that roughly \$2,646.00 was awarded in damages for this CABO violation.
12 *See* Trial Ex. 3a at 9. Of this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox
13 attributed 50% liability to SSFM and 50% liability to Telesource.

14 Mr. Cox attributed 50% liability to SSFM for failing to catch this mistake as construction
15 manager, but he did not offer much more by way of his testimony. Mr. Knox testified that closet depth
16 was not dimensioned on every house, but that it was a “standard item” that the “contractor should have
17 complied with,” similar to hallway width. *See* Trial Tr., vol. 1, 91:12-23.

18 As an initial matter, the extremely low incidence of this violation would have made it hard for
19 SSFM to catch even with reasonable diligence. Furthermore, although closet depth was not
20 dimensioned for every house, there is no evidence that any of the design plans for the closets were
21 confusingly drawn or otherwise misleading, as was the case with the hallway drawings.

22 Accordingly, the Court finds Telesource 100% liable for issues with closet depth. Out of a
23 total award of \$2,646.00 for this defect, Telesource is responsible for \$2,646.00 and SSFM is
24 responsible for \$0.00.

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v. Threshold Height

In the underlying arbitration, one home was found to violate CABO standards for threshold height. Mr. Knox estimated that roughly \$756.00 was awarded in damages for this CABO violation. *See* Trial Ex. 3a at 9. Of this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed 50% liability to SSFM and 50% liability to Telesource.

Mr. Cox attributed 50% liability to SSFM for failing to catch this mistake as construction manager, but he did not offer much more by way of his testimony. Mr. Knox testified that this was simply a construction anomaly: “[T]here was only one house where it occurred. . . . [Telesource] constructed the threshold height higher than is allowed. Which is an ADA requirement. So that’s clearly a contractor responsibility.” *See* Trial Tr., vol. 1, 92:1-9.

Given the low incidence, which would make this mistake harder to catch, and the fact that this was purely a construction anomaly, the Court finds Telesource 100% liable for issues with threshold height. Out of a total award of \$756.00 for this defect, Telesource is responsible for \$756.00 and SSFM is responsible for \$0.00.

4. Wall Water Intrusion

In the underlying arbitration, all 34 homes were found to have suffered damage from wall water intrusion. Mr. Knox estimated that roughly \$68,597.00 was awarded in damages for this defect. *See* Trial Ex. 3a at 9. Of this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed 100% liability to SSFM.

Mr. Knox testified that he did not believe the wall water intrusion was due to a design defect. He testified that the wall design SSFM used was a conventional three-coat plaster system over masonry, which is “very common throughout Saipan” and “standard around the island.” *See* Trial Tr., vol. 1, 92:20-25, 93:1-2. Mr. Knox believed that water was getting in due to failed sealant around the doors and windows: “Really, all of the water intrusion that was happening in the walls was happening

1 [] primarily at windows and in some cases at sliding glass doors or entry doors. And the reason was
2 for failed sealant. . . . [T]he water was coming around the, coming into the homes around the perimeters
3 of windows, primarily at jams and sills because of failed sealant.” *Id.* at 93:3-22. Mr. Knox testified
4 that Telesource was responsible for defectively installing the sealant. *Id.* at 93:23-25.

5 Mr. Cox disagreed and testified that the majority of the cause for water intrusion through the
6 wall system was “insufficient instruction, insufficient detailing by SSFM on the design drawings.”
7 *See* Trial Tr., vol. 2, 182:3-9. Specifically, Mr. Cox found that SSFM’s drawings lacked the “flashing
8 and termination details” that one would expect in the wall design. *See* Trial Ex. 4 at 9 (Cox’s Expert
9 Report dated November 14, 2010). Mr. Knox disagreed with this contention: “There was the
10 [accusation] made that these windows and doors didn’t have the flashing that they should have had.
11 But that’s not why they were leaking and that’s – those types of flashings are not typically found on
12 homes of this quality. What is typically found is what was built[.]” *See* Trial Tr., vol. 1, at 93:8-13.

13 On balance, the evidence suggests that it is more likely than not that wall water intrusion
14 occurred as a result of a construction defect, *e.g.* failed sealant. Because failed sealant would have
15 been a difficult thing for SSFM to detect, even with the extremely high incidence of occurrence, the
16 majority of the liability must fall on Telesource. However, the Court will place some fault on SSFM
17 for specifying a sealant that would need to be replaced in as early as five years, which according to
18 Mr. Cox is not typical in construction projects. *See* Trial Tr., vol. 2, 183:1-23 (“[E]ven if I take Mr.
19 Knox’s testimony as he stated, it still points to . . . a significant design problem with these windows
20 and doors in that the sealant . . . used clearly wasn’t appropriate for this application.”).

21 The Court finds Telesource 90% liable and SSFM 10% liable for damage stemming from wall
22 water intrusion. Out of a total award of \$68,597.00 for this defect, Telesource is responsible for
23 \$61,737.30 and SSFM is responsible for \$6,859.70.

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5. Roof Water Intrusion

In the underlying arbitration, all 34 homes were found to have suffered damage from roof water intrusion. Mr. Knox estimated that roughly \$343,932.00 was awarded in damages for this defect. *See* Trial Ex. 3a at 9. Of this amount, Mr. Knox attributed 50% liability to Telesource and 50% liability to SSFM. Mr. Cox attributed two-thirds liability to SSFM and one-third liability to Telesource.¹⁰

Mr. Knox testified that the underlayment that was called for in the roof drawings was not installed by the contractor, “[a]nd that’s why, really, the majority of the cost for this could [be] attributed to Telesource.” *See* Trial Tr., vol. 1, at 94:17-22. He acknowledged, however, that SSFM could have seen that the underlayment was missing but apparently did not, indicating a supervision failure. *Id.* at 94:23-25. Dr. Cox, in his expert report dated November 14, 2010, also opined that the roof water intrusion may have been caused by Telesource’s failure to install an appropriate elastomeric coating to the roof. *See* Trial Ex. 4 at 13. Dr. Cox provided several other possible scenarios that could explain the cause of the leaks in the roofs, some of which implicate design defects. *Id.* at 13-14.

On balance, the Court finds that the most likely cause of the roof water intrusion was failure of Telesource to install the underlayment called for in the design, and failure of SSFM to exercise due diligence in its supervision of Telesource’s work.

The Court finds Telesource 50% liable and SSFM 50% liable for the damage stemming from roof water intrusion. Out of a total award of \$343,932.00 for this defect, Telesource is responsible for \$171,966.00 and SSFM is responsible for \$171,966.00.

¹⁰ Mr. Cox stated at trial that, “[g]enerally speaking, if I saw a defect that I could attribute to design and construction management/inspection by SSFM, and construction by Telesource, I would allocate sort of two parts of the cost of damages to SSFM for that dual role of designer and construction manager and one part to Telesource as contractor.” *See* Trial Tr., vol. 1, 29:1-7.

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6. Termite Damage

In the underlying arbitration, all 34 homes were found to have suffered termite damage. Mr. Knox estimated that roughly \$406,198.00 was awarded in damages for this defect. See Trial Ex. 3a at 9. Of this amount, Mr. Knox attributed 95% liability to Telesource and 5% liability to SSFM. Mr. Cox attributed two-thirds liability to SSFM and one-third liability to Telesource.

Both experts’ reports concluded that the majority of the termite damage was caused by the homeowners’ failure to mitigate their damages. But pursuant to the results of the underlying arbitration, this Court may only apportion liability between Telesource and SSFM. Mr. Knox testified that there was nothing SSFM could have done differently on a low-income housing project subject to budget constraints such as this one, “other than putting a termiticide underneath the slab, which is what was done.” See Trial Tr., vol. 1, at 95:7-22. He opined that the termiticide’s lack of effectiveness was the result of the treatment being put down too soon and getting leached out by rain. Id. at 95:23-25. Mr. Cox acknowledged that “there could have been some issues related to the soil treatment that Telesource was responsible for.” See Trial Tr., vol. 2, at 200:4-5. He testified, however, that the primary cause of the termite issue was SSFM’s selection of wood materials in its design plans. Id. at 199:2-24. On cross-examination, Mr. Cox admitted that he did not know what NMHC’s budget was or how the budget was arrived at. Id. at 230:7-10.

The Court is not convinced that the termite damage was entirely one defendant’s fault or the other. However, both experts appeared to agree that ineffectiveness of the termiticide played at least some role in the termite issue. And to the extent the problem arose from a design flaw, SSFM cannot be entirely to blame because the materials it specified were restricted by NMHC’s budget. Additionally, there is evidence in the record that cabinetry not specified or approved by SSFM, and later rejected in writing by SSFM, was nevertheless installed in each home by Telesource, who obtained permission from NMHC over SSFM’s objections. See SSFM’s Post-Trial Brief at 11, n.4.

1 For these reasons, the Court finds Telesource 80% liable and SSFM 20% liable for the termite
2 damage. Out of a total award of \$406,198.00 for this defect, Telesource is responsible for \$324,958.40
3 and SSFM is responsible for \$81,239.60.

4 **7. Plumbing Leaks**

5 In the underlying arbitration, 31 of 34 homes were found to have plumbing leaks. Mr. Knox
6 estimated that roughly \$34,015.00 was awarded in damages for this defect. *See* Trial Ex. 3a at 9. Of
7 this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed 100% liability to
8 SSFM.

9 Mr. Knox testified that plumbing leaks were “completely a workmanship issue.” *See* Trial Tr.,
10 vol. 1, at 96:10-12. Mr. Cox stated that he “could not determine the cause of the plumbing leaks” but
11 opined that the “selection of specific fixtures and design of the plumbing systems,” among other
12 things, may have been the cause. *See* Trial Ex. 4 at 19-20. Mr. Knox refuted the suggestion that SSFM
13 was responsible for selection of the fixtures, stating that “the plumbing fixtures [were] not something
14 that SSFM selected. That was selected by NMHC.” *See* Trial Tr., vol. 1, at 96:13-15.

15 On balance, the evidence suggests that it is more likely than not that plumbing leaks occurred
16 as a result of a construction defect. The Court finds Telesource 100% liable for the plumbing leaks.
17 Out of a total award of \$34,015.00 for this defect, Telesource is responsible for \$34,015.00 and SSFM
18 is responsible for \$0.00.

19 **8. Electrical Problems**

20 In the underlying arbitration, 16 of 34 homes were found to have electrical problems. Mr.
21 Knox estimated that roughly \$16,819.00 was awarded in damages for this defect. *See* Trial Ex. 3a at
22 9. Of this amount, Mr. Knox attributed 100% liability to Telesource. *See* Trial Tr., vol. 1, at 96:16-
23 20 (“Again, because that’s only a workmanship issue. That’s nothing that anybody can really see until
24 it happens.”). Mr. Cox agreed with this apportionment of liability. *See* Trial Tr., vol. 2, at 209:16-18

1 (“But electrical problems. Mr. Knox testifies that would be 100 percent [Telesource] . . . I do agree
2 with that.”).

3 Accordingly, the Court finds Telesource 100% liable for the electrical problems. Out of a total
4 award of \$16,819.00 for this defect, Telesource is responsible for \$16,819.00 and SSFM is responsible
5 for \$0.00.

6 9. Ceiling Cracks

7 In the underlying arbitration, 30 of 34 homes were found to have ceiling cracks. Mr. Knox
8 estimated that roughly \$17,386.00 was awarded in damages for this defect. *See* Trial Ex. 3a at 9. Of
9 this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed two-thirds liability
10 to SSFM and one-third liability to Telesource.

11 Mr. Knox testified that the ceiling cracks were related to foundation movement, which was
12 related to inadequate compaction of fill material below the buildings. *See* Trial Tr., vol. 1, at 97:11-
13 16. Mr. Cox provided a general explanation that he believed the cracks to be attributable to design
14 flaw, construction flaw, and supervision flaw, but he did not further explain why, and his expert report
15 did not provide any additional detail. *See* Trial Tr., vol. 2, at 210:11-20.

16 Because the Court has already found Telesource 100% liable for foundation movement, due to
17 its failure to adequately compact the fill material below the buildings, it also finds Telesource 100%
18 liable for the ceiling cracks.¹¹ Out of a total award of \$17,386.00 for this defect, Telesource is
19 responsible for \$17,386.00 and SSFM is responsible for \$0.00.

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22 ¹¹ Mr. Cox testified that he was not surprised to learn that cracks were found in the majority of homes—sometimes in all
23 34 homes—even though the arbitration judge only awarded damages for foundation movement for 19 homes: “There was
24 a sort of magnitude associated with [an award for foundation movement] that caused a check to be placed in that box or
not. You could have had—there could have been movement of the soils underlying the structure that could have been less
in magnitude but still cause[d] some issues related to cracks, et cetera, or sloped floor.” *See* Exhibit C to SSFM’s Post-
Trial Brief (Cox Deposition) at 43:2-9.

1 **10. Roof Cracks**

2 In the underlying arbitration, 25 of 34 homes were found to have roof cracks. Mr. Knox
3 estimated that roughly \$26,834.00 was awarded in damages for this defect. *See* Trial Ex. 3a at 9. Of
4 this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed two-thirds liability
5 to SSFM and one-third liability to Telesource.

6 Mr. Knox testified that the roof cracks were related to foundation movement, which was related
7 to inadequate compaction of fill material below the buildings. *See* Trial Tr., vol. 1, at 97:11-16. Mr.
8 Cox provided a general explanation that he believed the cracks to be attributable to design flaw,
9 construction flaw, and supervision flaw, but he did not further explain why, and his expert report did
10 not provide any additional detail. *See* Trial Tr., vol. 2, at 210:11-20.

11 Because the Court has already found Telesource 100% liable for foundation movement, due to
12 its failure to adequately compact the fill material below the buildings, it also finds Telesource 100%
13 liable for the roof cracks. Out of a total award of \$26,834.00 for this defect, Telesource is responsible
14 for \$26,834.00 and SSFM is responsible for \$0.00.

15 **11. Wall Cracks**

16 In the underlying arbitration, all 34 homes were found to have wall cracks. Mr. Knox estimated
17 that roughly \$16,441.00 was awarded in damages for this defect. *See* Trial Ex. 3a at 9. Of this amount,
18 Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed two-thirds liability to SSFM
19 and one-third liability to Telesource.

20 Mr. Knox testified that the wall cracks were related to foundation movement, which was
21 related to inadequate compaction of fill material below the buildings. *See* Trial Tr., vol. 1, at 97:11-
22 16. Mr. Cox provided a general explanation that he believed the cracks to be attributable to design
23 flaw, construction flaw, and supervision flaw, but he did not further explain why, and his expert report
24 did not provide any additional detail. *See* Trial Tr., vol. 2, at 210:11-20.

1 Because the Court has already found Telesource 100% liable for foundation movement, due to
2 its failure to adequately compact the fill material below the buildings, it also finds Telesource 100%
3 liable for the wall cracks. Out of a total award of \$16,441.00 for this defect, Telesource is responsible
4 for \$16,441.00 and SSFM is responsible for \$0.00.

5 **12. Floor Cracks**

6 In the underlying arbitration, 25 of 34 homes were found to have floor cracks. Mr. Knox
7 estimated that roughly \$34,771.00 was awarded in damages for this defect. *See* Trial Ex. 3a at 9. Of
8 this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed two-thirds liability
9 to SSFM and one-third liability to Telesource.

10 Mr. Knox testified that the floor cracks were related to foundation movement, which was
11 related to inadequate compaction of fill material below the buildings. *See* Trial Tr., vol. 1, at 97:11-
12 16. Mr. Cox provided a general explanation that he believed the cracks to be attributable to design
13 flaw, construction flaw, and supervision flaw, but he did not further explain why, and his expert report
14 did not provide any additional detail. *See* Trial Tr., vol. 2, at 210:11-20.

15 Because the Court has already found Telesource 100% liable for foundation movement, due to
16 its failure to adequately compact the fill material below the buildings, it also finds Telesource 100%
17 liable for the floor cracks. Out of a total award of \$34,771.00 for this defect, Telesource is responsible
18 for \$34,771.00 and SSFM is responsible for \$0.00.

19 **13. Door/Window Leaks**

20 In the underlying arbitration, all 34 homes were found to have issues with door/window leaks.
21 Mr. Knox estimated that roughly \$181,982.00 was awarded in damages for this defect. *See* Trial Ex.
22 3a at 9. Of this amount, Mr. Knox erroneously attributed 50% liability to Telesource and 50% liability
23 to SSFM, when in fact he meant to attribute 100% liability to Telesource. Mr. Cox attributed two-
24 thirds liability to SSFM and one-third liability to Telesource.

1 Although Mr. Knox erroneously attributed liability as a 50/50 split, his rationale shows that he
2 had intended to attribute 100% liability to Telesource: “The same logic applies to this one as it does
3 for [wall] water intrusion. . . . As I said before, I believe the leaks are occurring mostly from
4 workmanship issues in failing [sealant]. Because the water is coming through around doors and
5 windows that had sealant dependent joints and the sealant had failed.” *See* Trial Tr., vol. 1, at 97: 17-
6 22, 98:1-5. Mr. Knox had testified to the sealant failing under the “wall water intrusion” category of
7 defects, and there he had attributed 100% liability to Telesource.

8 Because the Court has already found Telesource 90% liable and SSFM 10% liable for wall
9 water intrusion, it will apportion the same percentages for door/window leaks because both issues arise
10 from the same problem – failed sealant. Therefore, out of a total award of \$181,982.00 for this defect,
11 Telesource is responsible for \$163,783.80 and SSFM is responsible for \$18,198.20.

12 **14. Sloped Floors**

13 In the underlying arbitration, 4 of 34 homes were found to have sloped floors. Mr. Knox
14 estimated that roughly \$12,094.00 was awarded in damages for this defect. *See* Trial Ex. 3a at 9. Of
15 this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed two-thirds liability
16 to SSFM and one-third liability to Telesource.

17 Mr. Knox testified that the sloped floors were related to foundation movement, which was
18 related to inadequate compaction of fill material below the buildings. *See* Trial Tr., vol. 1, at 98:6-10.
19 Mr. Cox provided a general explanation that he believed the sloped floors to be attributable to design
20 flaw, construction flaw, and supervision flaw, but he did not further explain why, and his expert report
21 did not provide any additional detail. *See* Trial Tr., vol. 2, at 210:11-20.

22 Because the Court has already found Telesource 100% liable for foundation movement, due to
23 its failure to adequately compact the fill material below the buildings, it also finds Telesource 100%
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1 liable for the sloped floors. Out of a total award of \$12,094.00 for this defect, Telesource is responsible
2 for \$12,094.00 and SSFM is responsible for \$0.00.

3 **15. Malfunctioning Smoke Detectors**

4 In the underlying arbitration, 20 of 34 homes were found to have malfunctioning smoke
5 detectors. Mr. Knox estimated that roughly \$2,457.00 was awarded in damages for this defect. *See*
6 Trial Ex. 3a at 9. Of this amount, Mr. Knox attributed 100% liability to Telesource. *See* Trial Tr.,
7 vol. 1, at 98:11-16 (“[I]t’s just a functioning problem. . . . It’s nothing that SSFM could have seen to
8 know that they were defectively installed.”). Mr. Cox did not testify as to the malfunctioning smoke
9 detectors.

10 Accordingly, the Court finds Telesource 100% liable for the malfunctioning smoke detectors.
11 Out of a total award of \$2,457.00 for this defect, Telesource is responsible for \$2,457.00 and SSFM
12 is responsible for \$0.00.

13 **16. Roof Repairs**

14 In the underlying arbitration, all 34 homes were found to require roof repairs. Mr. Knox
15 estimated that roughly \$283,461.00 was awarded in damages for this defect. *See* Trial Ex. 3a at 9. Of
16 this amount, Mr. Knox attributed 50% liability to Telesource and 50% to SSFM. Mr. Cox attributed
17 two-thirds liability to SSFM and one-third liability to Telesource.

18 Mr. Knox testified – and Mr. Cox did not dispute – that the roof repairs were related to the roof
19 water intrusion, which the Court has already found Telesource and SSFM equally liable for due to
20 Telesource’s failure to install the underlayment called for in the design, and SSFM’s failure to exercise
21 due diligence in its supervision of Telesource’s work. *See* Trial Tr., vol. 1, at 98:17-21.

22 Accordingly, the Court finds Telesource 50% liable and SSFM 50% liable for roof repairs.
23 Out of a total award of \$283,461.00 for this defect, Telesource is responsible for \$141,730.50 and
24 SSFM is responsible for \$141,730.50.

1 **17. Missing Window Rebar**

2 In the underlying arbitration, all 34 homes were found to have missing window rebar. Mr.
3 Knox estimated that roughly \$115,085.00 was awarded in damages for this defect. *See* Trial Ex. 3a at
4 9. Of this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed 50% liability
5 to SSFM and 50% liability to Telesource.

6 At trial, neither expert disputed that this was purely a construction error: both experts agreed
7 that SSFM's design drawings called for Telesource to install the rebar, and Telesource simply failed
8 to do so. However, Mr. Cox placed 50% of the blame on SSFM for failing to catch this repeated
9 mistake, consistent with Telesource's position that SSFM as construction manager should be liable for
10 an equal share of fault anytime a defect is found to be Telesource's fault. *See* Trial Tr., vol. 2, 201:20-
11 23. Mr. Cox testified that "if reinforcing steel is missing from a window, that is an obvious omission
12 that any reasonably competent construction inspector would be able to see it." *Id.* at 200:20-23. Mr.
13 Knox disagreed: "SSFM would have had very little opportunity to know whether the rebar was
14 installed or not installed. That's not the type of thing that typically requires inspection to confirm
15 before grouting of walls." *See* Trial Tr., vol. 1, 99:1-4.

16 As discussed earlier, the Court declines to hold SSFM equally liable for every defect found to
17 be purely a construction defect. Because there is no dispute that this was solely an error on
18 Telesource's part, the vast majority of the fault must fall on Telesource. Although it is not clear to the
19 Court that this error would have been readily obvious to a diligent construction manager, SSFM will
20 be held partially liable for failing to catch the error.

21 The Court finds Telesource 95% liable and SSFM 5% liable for the missing window rebar.
22 Out of a total award of \$115,085.00 for this defect, Telesource is responsible for \$109,330.75 and
23 SSFM is responsible for \$5,754.25.

1 **18. Other**

2 **i. Plumbing fixture problems and low water pressure**

3 In the underlying arbitration, 5 of 34 homes were found to have plumbing fixture problems
4 and low water pressure. Mr. Knox estimated that roughly \$3,024.00 was awarded in damages for this
5 defect. *See* Trial Ex. 3a at 9. Of this amount, Mr. Knox attributed 100% liability to Telesource. Mr.
6 Cox attributed 50% liability to SSFM and 50% liability to Telesource.

7 Mr. Knox testified that “[i]t’s [the] contractor’s responsibility to have adequate water pressure”
8 and added that to the extent the issue was with the plumbing fixtures themselves, “the fixtures . . .
9 were not specified by SSFM. Any problems with them is not an SSFM problem.” *See* Trial Tr., vol.
10 1, 99:12-19. Mr. Cox recognized that the error stemmed from a construction defect rather than a
11 design defect when he attributed “50/50 just out of a sort of equitable distribution based on the role of
12 construction manager and contractor without that sort of added emphasis of being a designer.” *See*
13 Trial Tr., vol. 2, 212:1-4.

14 Because there is no dispute that this was solely an error on Telesource’s part, and because the
15 low incidence and type of defect likely rendered this issue hard to catch, the Court finds Telesource
16 100% liable for the plumbing fixture problems and low water pressure. Out of a total award of
17 \$3,024.00 for this defect, Telesource is responsible for \$3,024.00 and SSFM is responsible for \$0.00.

18 **ii. Uneven interior wall finish**

19 In the underlying arbitration, 3 of 34 homes were found to have uneven interior wall finish.
20 Mr. Knox estimated that roughly \$3,591.00 was awarded in damages for this defect. *See* Trial Ex. 3a
21 at 9. Of this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed 50%
22 liability to SSFM and 50% liability to Telesource.

23 Mr. Knox testified that uneven interior wall finish was “clearly” a workmanship issue. *See*
24 Trial Tr., vol. 1, 99:20-25, 100:1. Mr. Cox recognized that the error stemmed from a construction

1 defect rather than a design defect when he attributed “50/50 just out of a sort of equitable distribution
2 based on the role of construction manager and contractor without that sort of added emphasis of being
3 a designer.” *See* Trial Tr., vol. 2, 212:1-4.

4 Because there is no dispute that this was solely an error on Telesource’s part, and because the
5 extremely low incidence likely rendered this issue hard to catch, the Court finds Telesource 100%
6 liable for the uneven interior wall finish. Out of a total award of \$3,591.00 for this defect, Telesource
7 is responsible for \$3,591.00 and SSFM is responsible for \$0.00.

8 **iii. Exhaust fan inoperable**

9 In the underlying arbitration, only one home was found to have an inoperable exhaust fan. Mr.
10 Knox estimated that roughly \$283.00 was awarded in damages for this defect. *See* Trial Ex. 3a at 9.
11 Of this amount, Mr. Knox attributed 100% liability to Telesource. Mr. Cox attributed 50% liability to
12 SSFM and 50% liability to Telesource. *See* Trial Tr., vol. 2, 212:1-4 (apportioning “50/50 just out of
13 a sort of equitable distribution based on the role of construction manager and contractor”).

14 Because there is no dispute that this was solely an error on Telesource’s part, and because the
15 extremely low incidence and type of defect likely rendered this issue hard to catch, the Court finds
16 Telesource 100% liable for the inoperable exhaust fan. Out of a total award of \$283.00 for this defect,
17 Telesource is responsible for \$283.00 and SSFM is responsible for \$0.00.

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D. Summary of the Court's Apportionment of Liability.

The following table summarizes the Court's apportionment of liability based on the base award for the 34 Castro homes:

ITEM	DEFECT	INCIDENCE	AWARD VALUE	SSFM LIABILITY	%	TELESOURCE LIABILITY	%
1	Foundation Movement	19	\$143,242	-	0%	\$143,242	100%
2	Voids in CMU Walls	34	\$34,960	\$1,748	5%	\$33,212	95%
3	CABO – Grading	25	\$98,077	\$19,615.40	20%	\$78,461.60	80%
	CABO – Attic Access	24	\$10,772	\$2,154.40	20%	\$8,617.60	80%
	CABO – Hallway Width	23	\$32,315	\$9,694.50	30%	\$22,620.50	70%
	CABO – Closet Depth	2	\$2,646	-	0%	\$2,646	100%
	CABO – Threshold Height	1	\$756	-	0%	\$756	100%
4	Wall Water Intrusion	34	\$68,597	\$6,859.70	10%	\$61,737.30	90%
5	Roof Water Intrusion	34	\$343,932	\$171,966	50%	\$171,966	50%
6	Termite Damage	34	\$406,198	\$81,239.60	20%	\$324,958.40	80%
7	Plumbing Leaks	31	\$34,015	-	0%	\$34,015	100%
8	Electrical Problems	16	\$16,819	-	0%	\$16,819	100%
9	Ceiling Cracks	30	\$17,386	-	0%	\$17,386	100%
10	Roof Cracks	25	\$26,834	-	0%	\$26,834	100%
11	Wall Cracks	34	\$16,441	-	0%	\$16,441	100%
12	Floor Cracks	25	\$34,771	-	0%	\$34,771	100%
13	Door/Window Leaks	34	\$181,982	\$18,198.20	10%	\$163,783.80	90%
14	Sloped Floors	4	\$12,094	-	0%	\$12,094	100%
15	Malfunctioning Smoke Detectors	20	\$2,457	-	0%	\$2,457	100%
16	Roof Repairs	34	\$283,461	\$141,730.50	50%	\$141,730.50	50%
17	Missing Window Rebar	34	\$115,085	\$5,754.25	5%	\$109,330.75	95%
18	Other – Plumbing, Low Water Pressure	5	\$3,024	-	0%	\$3,024	100%
	Other – Uneven Interior Wall Finish	3	\$3,591	-	0%	\$3,591	100%
	Other – Exhaust Fan Inoperable	1	\$283	-	0%	\$283	100%
	TOTALS		\$1,889,738	\$458,960.55	24.3%	\$1,430,777.45	75.7%

1 **E. Apportionment of Liability.**

2 The Court finds that Telesource is **75.7%** liable and SSFM is **24.3%** liable for the Arbitration
3 Award.¹² Telesource's share of the \$5,459,248.63 Arbitration Award is \$4,132,651.21, and SSFM's
4 share is \$1,326,597.42.

5 However, SSFM paid \$3,599,650.45 (or 65.9%) of the \$5,459,248.63 Arbitration Award, and
6 Telesource paid \$1,859,598.18 (or 34.1%). The Court finds that SSFM overpaid its share by
7 \$2,273,053.03. Therefore, Telesource owes SSFM **\$2,273,053.03** to account for SSFM's
8 overpayment.

9 **F. Allocation of Interest.**

10 Interest on the Arbitration Award began accruing from the date of the Arbitration Award.
11 SSFM made its \$3,599,650.45 (or 65.9%) payment of the Award on December 21, 2012. As of the
12 date of the February 2020 trial, Telesource was still making payments on the remaining 34.1%. The
13 interest that accrued after December 21, 2012 resulted from Telesource's delay in paying off the
14 remaining amount of the Arbitration Award. Consequently, Telesource is solely responsible for the
15 interest that accrued after December 21, 2012.

16 As of December 21, 2012, the accrued interest was \$165,352.12. SSFM is only responsible
17 for its 24.3% share of \$165,352.12, which is consistent with the Court's apportionment herein.
18 Telesource is responsible for the remainder of the accrued interest. Telesource is also responsible for
19 reimbursing SSFM for any overpayment of interest.¹³

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¹² The CPA Violation Enhancement and additional \$20,000.00 awarded per house for draping shall be allocated in the
23 same proportion as actual damages.

24 ¹³ SSFM has not sought any interest on the amount it overpaid and the Court has not awarded any on the overpayment.
However, should there be a delay in reimbursing SSFM for its overpayment, Telesource will be liable for post-judgment
interest at the statutory rate of 9 percent per annum. See 7 CMC § 4101.

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V. CONCLUSION

THEREFORE, for the reasons stated above, the Court finds that:

1. Telesource is **75.7%** responsible for the Arbitration Award, and SSFM is **24.3%** responsible for the Arbitration Award;
2. Telesource's share of the Arbitration Award is \$4,132,651.21, and SSFM's share of the Arbitration Award is \$1,326,597.42;
3. SSFM overpaid its share by \$2,273,053.03;
4. Telesource therefore owes \$2,273,053.03 to SSFM;
5. SSFM is only responsible for its 24.3% share of the \$165,352.12 in interest that accrued as of December 21, 2012;
6. Telesource is solely responsible for any interest that accrued after December 21, 2012; and
7. Telesource is responsible for reimbursing SSFM for any overpayment of interest.

It is **ORDERED** that Telesource shall pay SSFM \$2,273,053.03 plus the amount of any interest that SSFM has overpaid. Post-judgement interest shall accrue at the statutory rate of 9 percent per annum.

IT IS SO ORDERED this 7th day of March, 2023.

/s/
ROBERTO C. NARAJA, Presiding Judge