

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MDB TRUCKING, LLC,  
  
Appellant/Cross-Respondent,  
  
vs.  
  
VERSA PRODUCTS COMPANY,  
INC.,  
  
Respondent/Cross-Appellant.

Supreme Court Case No. 75022

Consolidated with Case Nos. 75319,  
75321, 76395, 76396 and 76397.  
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[District Court Case Nos.:  
CV15-02349, CV16-00976 and  
CV16-01914]

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**JOINT APPENDIX VOLUME 9 OF 18**

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Consolidated Appeals from the Second Judicial District Court,  
Orders Granting Motion to Strike Cross-Claim and Orders  
Denying Attorneys' Fees and Granting Reduced Costs,  
The Honorable Judge Elliott A. Sattler, District Court Judge

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DISTRICT COURT  
WASHOE COUNTY, NEVADA

19 ERNEST BRUCE FITZIMMONS and  
20 CAROL FITZSIMMONS, Husband and  
21 Wife,

Plaintiffs,

vs.

22 MDB TRUCKING, LLC, et. al.

Defendants.

23 AND ALL RELATED CASES.

Case No. CV15-02349

Dept. 10

**DEFENDANT/CROSS-  
CLAIMANT/CROSS-DEFENDANT  
VERSA PRODUCTS COMPANY, INC.'S  
REPLY TO MDB TRUCKING LLC'S  
OPPOSITION TO DEFENDANT/CROSS-  
CLAIMANT/CROSS-DEFENDANT  
VERSA PRODUCTS COMPANY INC.'S  
MOTION FOR SUMMARY JUDGMENT  
AGAINST DEFENDANT/CROSS  
CLAIMANT/CROSS-DEFENDANT MDB  
TRUCKING, LLC'S CROSS-CLAIMS**

24 COMES NOW, Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS  
25 COMPANY, INC., by and through its attorneys of record, Josh Cole Aicklen, Esq., David  
26 B. Avakian, Esq. and Paige S. Shreve, Esq., of the law firm LEWIS BRISBOIS  
27 BISGAARD & SMITH, LLP, and hereby replies to MDB TRUCKING LLC's Opposition to  
28 VERSA PRODUCTS COMPANY, INC.'s Motion for Summary Judgment Against  
29 Defendant/Cross Claimant/Cross-Defendant MDB Trucking, LLC's Cross-Claims as  
30 follows:



1            MEMORANDUM OF POINTS AND AUTHORITIES

2 I.        INTRODUCTION

3            Respectfully, both MDB TRUCKING LLC's ("MDB") claims and MDB's Opposition  
4 are misplaced because VERSA PRODUCTS COMPANY, INC. ("VERSA") *absolutely*  
5 *should not be involved in this litigation*. MDB has failed to create a genuine issue of  
6 material fact that the VERSA valve cause or contributed to the subject incident. Simply  
7 put, VERSA's subject valve has no defect and MDB has already admitted as such. None  
8 of MDB's experts provided an expert opinion that the VERSA valve was defective with  
9 any factual basis or supporting evidence. MDB's expert opinions are vague and  
10 speculative at best and do not create a genuine issue of material fact. The simple fact  
11 that the VERSA valve is one component of a larger system that assists the belly dump in  
12 opening and closing does not mean that the VERSA valve was defective. In fact, MDB's  
13 experts state that the VERSA valve worked as it was intended to work. See, Dr. Bosch's  
14 Expert Report, P. 46, a true and correct copy attached hereto as EXHIBIT 6.

15            MDB's Opposition cites considerable case law in what appears to be an attempt to  
16 distract the Court that MDB's claims have some semblance of merit and should be able to  
17 squeak into trial on a highly attenuated circumstantial evidence argument. However,  
18 MDB's argument does not hold water and, more importantly, the fact that MDB's  
19 argument is *purely speculative* places MDB's claims squarely in the crosshairs for  
20 summary judgment.

21            Accordingly, as MDB has failed to create a genuine issue of material fact that the  
22 VERSA valve cause the subject incident, summary judgment is proper to prevent any  
23 more unnecessary litigation costs.

24 II.       LEGAL ARGUMENT

25        A. MBD Is Improperly Attempting to Dispute the Facts by Manufacturing Artificial  
26            Material Facts from Pure Speculation

27            The function of the summary judgment procedure is to test whether, under the  
28 uncontroverted facts, one party is entitled to judgment as a matter of law. See,

1 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), *cert. denied*  
2 481 U.S. 1029 (1987). Simply, its purpose is to determine *whether there is a need for*  
3 *trial*. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Thus, summary  
4 judgment is appropriate where, when viewed in the light most favorable to the non-  
5 moving party, there is no genuine issue of material fact and the movant is entitled to  
6 judgment as a matter of law. NRCP 56(c); Allstate Ins. Co. v. Fackett, 125 Nev. 132, 137,  
7 206 P.3d 572, 575 (2009).

8 A genuine issue of material fact exists where the evidence is such that a  
9 reasonable jury could return a verdict for the non-moving party. Bulbman, Inc. v. Nev.  
10 Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992). However, *there must be some*  
11 *indication that the non-moving party can produce the requisite quantum of evidence to*  
12 *enable the non-moving party to reach the jury with the respective claim.*" Collins v. Union  
13 Fed. S&L Ass'n, 99 Nev. 284, 300, 662 P.2d 610, 620 (1983). Promises that evidence will  
14 be forthcoming are not enough. See Hahn v. Sargent, 523 F.2d 461, 467 (1st Cir. 1975).  
15 Indeed, the nonmoving party is *not entitled to build a case on the gossamer threads of*  
16 *speculation*, surmise, or conjecture. Wood v. Safeway, Inc., 121 Nev. 724, 732, 121 P.3d  
17 1026, 1031 (2005); Dermody v. City of Reno, 113 Nev. 207, 211, 931 P.2d 1354, 1357  
18 (1997).

19 Here, MDB does not dispute any of the facts listed in VERSA's Statement of  
20 Undisputed Facts. MDB's Opposition argues that the VERSA valve is defective,  
21 however, MDB and its experts did not find a defect with the VERSA valve. Both MDB's  
22 Experts, Dr. Bosch and Mr. Anderson, did not demonstrate an actual defect or deficiency  
23 with the VERSA valve that caused or contributed to the subject incident. In fact, Dr.  
24 Bosch and Mr. Anderson's reports state that the VERSA valve functioned as designed  
25 and intended when it was tested:

26 9.1.2 The electromechanical testing of the valve revealed that the  
27 valve functioned as designed.

28 \* \* \*

1 9.1.5 Disassembly of the valve did not reveal an electrical or  
2 mechanical issues or an issue that could cause unintentional  
activation.

3 See, Dr. Bosch's Expert Report, P. 46 (emphasis added), a true and correct copy  
4 attached hereto as EXHIBIT 6.

5 The belly dump system operated as expected without any erratic  
6 behavior. When the lever was pushed toward the trailer, the belly  
7 doors would open. When the lever was pulled away from the  
trailer, the belly dump doors would close.

8 See, Mr. Anderson's Expert Report, P. 8, a true and correct copy attached hereto as  
9 EXHIBIT 7.

10 MDB's experts' opinions that the valve was "defective in design as they are  
11 susceptible to accidental activation from an external magnetic field" was not based on any  
12 accepted methodology or testing. MDB's experts are simply providing their client serving  
13 statements with no foundation as they provided nothing in the way of analysis to support  
14 such an assertion. Therefore, *MDB's claims in it's Opposition that the VERSA valve was*  
15 *defective was premised strictly on speculation.* Again, without any direct or  
16 circumstantial evidence, MDB relies on a highly speculative and fanciful theory that some  
17 unexplained external magnetic force singularly targeted VERSA's valve and had no other  
18 effects on the subject truck or other vehicles in the respective area. MDB cannot produce  
19 even a scintilla of evidence to support it's inventive theory and claims. Moreover, MDB's  
20 experts disregard the fact that the VERSA valve is a small component in a larger system  
21 designed and installed by someone other than VERSA. As discussed above, MDB's  
22 experts opine that the VERSA valve worked as it was intended in the defect.

23 Furthermore, because there is no evidence whatsoever of the alleged magnetic  
24 force, a jury would have to *speculate* that such a force did in fact exist and did in fact  
25 attach to the subject valve. Further, the jury would have to *speculate again* that the  
26 magnetic force activated the subject valve. Finally, the jury would have to *speculate a*  
27 *third time* that MDB's alleged damages stem from a defect in the valve instead of another  
28 cause not related to a defect in the valve. In short, the jury would have to *speculate*

1 *regarding MDB's entire case* in order to return a verdict for MDB. Such speculation goes  
2 directly against the Nevada Supreme Court's summary judgment standard. Accordingly,  
3 applying Wood, because there is no genuine issue of material fact at issue and because  
4 MDB's entire case relies on pure speculation, VERSA is entitled to summary judgment as  
5 to MDB's claims.

6 **B. VERSA's Motion for Summary Judgment Is Meritorious as the Valve Was Not**  
7 **Defective Or Unreasonably Dangerous And MDB Assumed The Risk**

8 To successfully bring a strict products liability claim, the party must show that: 1)  
9 the product had a defect which rendered it unreasonably dangerous; 2) the defect existed  
10 at the time the product left the manufacturer; and 3) the defect caused the plaintiff's injury.  
11 Fyssakis v. Knight Equip. Corp., 108 Nev. 212, 214, 826 P.2d 570, 571 (1992). Nevada  
12 courts have never directly held that circumstantial evidence is sufficient to prove a defect,  
13 yet some Nevada cases have relied on circumstantial evidence to establish the existence  
14 of a defect. Roberts v. Albertson's LLC, 464 F. App'x 605, 607 (9th Cir. 2011).

15 **1. MDB's Claims Are Baseless**

16 Courts will only allow a party to take a case to the jury based purely on  
17 circumstantial evidence of a defect provided that the party has introduced evidence on  
18 two other points. Jenkins v. Whittaker Corp., 785 F.2d 720, 732 (9th Cir. 1986). First, the  
19 party must present evidence which would tend to negate causes for an accident other  
20 than a defect in the product. Id. Second, the party must present proof which would  
21 suggest that whatever defect might have existed was one introduced into the product by  
22 the defendant. Id.

23 *Here, MDB has unquestionably provided no evidence, direct or circumstantial, that*  
24 *the VERSA valve had any defect whatsoever. Rather, MDB has provided the court with*  
25 *an interesting science fiction plot - mysterious magnetic fields that target isolated*  
26 *freightliner parts while not disturbing any other electrical parts or vehicles in the*  
27 *respective area. Moreover, MDB has failed to provide any credible arguments, negating*  
28 *the fact that the likely reason for MDB's inadvertent dump had to do with the subject*

1 truck's electrical system - the same electrical system MDB destroyed in the midst of  
2 litigation and/or some other component within the system the VERSA valve is used.  
3 Accordingly, applying Jenkins, because MDB has not provided credible or sufficient  
4 circumstantial evidence and a more grounded and likely theory indicates that the subject  
5 accident happened void of a defect in VERSA's valve, summary judgment is appropriate.  
6 Jenkins v. Whittaker Corp., 785 F.2d 720, 732 (9th Cir. 1986).

7         Additionally, even entertaining MDB's farfetched claim that an unidentified  
8 magnetic force curiously activated the subject valve, *such an event is an anomaly*.  
9 Indeed, even MDB's own experts have not been able to identify the alleged magnetic  
10 force or even postulate a possible source. Clearly, if such an event was commonplace, or  
11 even in the margin of familiarity, MDB's experts would be able to identify or at least  
12 provide a possible explanation of the alleged mysterious force. However, to date, no such  
13 explanation exists, nor appears to be on the horizon as expert disclosures have now  
14 passed. Thus, such a distinctly unique series of events, if true, rises to a level of  
15 improbability that does not qualify as a defect which renders the subject valve as  
16 unreasonably dangerous.

17         2. MDB Assumed the Risk the Belly Dump Would Open

18         While assumption of risk in no longer a defense to negligence, it is a defense to  
19 strict products liability. In order to establish that the MDB assumed the risk, the  
20 Defendant must show that: (1) the MDB actually knew and appreciated the particular risk  
21 of danger created by the defect; (2) MDB voluntarily encountered the risk while realizing  
22 the danger; and (3) the MDB's decision to voluntarily encounter the known risk was  
23 unreasonable. Central Telephone Co. v. Fixtures Manufacturing Corp., 103 Nev. 298, 738  
24 P.2d 510 (1987).

25         First, MDB had two other dumps with the subject truck and trailers in less than a  
26  
27  
28

1 year from the subject incident<sup>1</sup>. See, Exhibit 7 at P. 6. Thus, MDB clearly knew or  
2 appreciated the fact that there could be an inadvertent activation with the dumping of the  
3 trailer. While MDB could have purchased a different model valve or a valve from a  
4 different manufacturer, MDB chose not to. See, EXHIBIT 5 at P.56-3-18. As such, MDB  
5 knew and appreciated the particular risk that the trailer could have an inadvertent  
6 activation of the VERSA valve, yet chose to continue to use it and continued to use the  
7 subject valve (even after the subject accident) until it was removed for expert testing.

8 Further, MDB's Opposition argues that VERSA manufactured a safer valve design  
9 which included a manual locking system. In doing so, MDB cites the deposition testimony  
10 of VERSA's PMK. However, no where in the cited testimony does it state that VERSA  
11 manufactured a "safer valve design." In fact, as extensively addressed in VERSA's  
12 30(b)(6) deposition testimony, the other model valve that MDB references is simply a  
13 different model valve that is available for purchase based upon the needs of the  
14 customer. See, Deposition of VERSA 30(b)(6) Gerry Gramegna, P. 54:23-56: 25, a true  
15 and correct copy attached hereto as EXHIBIT 7. In fact, it was available for purchase  
16 back when the trailer was first built in 2002. Id. at P. 53:15-18. Further, MDB was aware  
17 of the other model valves prior to the subject incident, but chose not to purchase a  
18 different model because the subject valve is "still the valve used for bottom dump trailers."  
19 See, EXHIBIT 5 at P. 57:16-25; 58:1-12.

20 MDB's Person Most Knowledgeable, Scott Palmer testified as follows:

21 Q. When did you become aware of this other model that is  
22 used on bottom dump trailers?

23 A. In 2014.

24 Q. Do you know when in 2014?

25 A. April?

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27 <sup>1</sup> One occurred on July 25, 2013 and the other occurred five days later on July 30, 2013.

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Q. So you were aware of this prior to the July 7<sup>th</sup>, 2014, incident that occurred?

A. That a different model Versa valve was available?

Q. Yes.

A. I should – well, I would say that prior to that, yes, I did know of trailers that came with different style valve, yes, similar style valve, but slightly different, yes.

Id. at P. 58:1-12.

Therefore, assuming *arguendo*, MDB believes the other model valve offered by VERSA since the late 1990's is a "safer model" that should have been used, MDB assumed the risk when they purchased the subject valve, since they were well aware of two other inadvertent activations of the VERSA valve prior to the subject incident.

Accordingly, pursuant to Fyssakis, because MDB cannot prove all the elements of a strict liabilities cause of action, summary judgment is appropriate. Further, because MDB can provide no evidence (direct or circumstantial) that the VERSA valve was defective or unreasonably dangerous and because MDB assumed the risk, MDB cannot bring equitable contribution claims based upon strict products liability.

### III. CONCLUSION

Based on the foregoing, VERSA respectfully requests that the Court grant summary judgment in it's favor and against MDB on all claims contained in MDB's Cross-Claim.

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**AFFIRMATION**

Pursuant to NRS 239B.030, the undersigned hereby affirms that this document filed in this court does not contain the social security number of any person

DATED this 14th day of July, 2017

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

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PRODUCTS COMPANY, INC.

LIST OF EXHIBITS

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Exhibit 6	Dr. Bosch's Expert Report
Exhibit 7	Mr. Anderson's Expert Report

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2017, a true and correct copy of DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT **VERSA PRODUCTS COMPANY, INC.'S REPLY TO MDB TRUCKING LLC'S OPPOSITION TO DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT **VERSA PRODUCTS COMPANY INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT/CROSS CLAIMANT/CROSS-DEFENDANT **MDB TRUCKING, LLC'S CROSS-CLAIMS**** was served via U.S. Mail addressed as follows:**

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# EXHIBIT 6



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## **Matter of MDB Trucking, Inc.**

Case Number: FE14-1111A

## **Engineering Investigation Report**

June 16, 2017

### **Prepared for:**

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AA001357

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## **1. INTRODUCTION**

On November 11, 2014, Forensic Engineering Incorporated (FEI) was retained by Thorndal Armstrong Delk Balkenbush & Eisinger to provide an independent forensic engineering investigation of the accident involving a tractor triple-bottom-dump-trailer combination. The accident occurred on July 7, 2014, at approximately 9:00 a.m. in the west bound lanes of Interstate 80, near mile marker 39.

The accident was initiated when the third (end or rearmost) bottom dump trailer in the combination suddenly and unexpectedly dumped a load of crushed rock onto the roadway. The accident was exacerbated when a number of vehicles encountered the dumped crushed stone, causing multiple collisions. The bottom dump trailer that malfunctioned was designed and manufactured by Ranch Manufacturing Company (RANCO), Lamar, Colorado, which is presently owned by Dragon Products, LTD, Beaumont, Texas.

Forensic Engineering's investigation to date has included:

- 1.1 Review of the documents supplied by Mr. Barkley, including the relevant vehicle service records;
- 1.2 Case research regarding the bottom dump apparatus control systems and unintended dump scenarios;
- 1.3 Case research regarding unintended electromagnetic solenoid activations;
- 1.4 Fabrication of an dump control valve test system;
- 1.5 Testing, disassembly and examination of an exemplar Versa valve;
- 1.6 Multiple inspections and testing of the accident tractor triple-bottom-dump-trailer combination;
- 1.7 Multiple inspections and testing of the second tractor triple-bottom-dump-trailer combination that suddenly and unexpectedly dumped a load of sand onto the roadway near the location and nearly the same time as the accident combination dumped its load;
- 1.8 Multiple inspections and testing of the Versa valve that was removed from the accident trailer unit 6775;

- 1.9 Multiple inspections and testing of the Versa valve that was removed from the 2<sup>nd</sup> trailer; unit 6778;
- 1.10 Extensive in situ electrical testing of the dump control valve system of both vehicle combinations;
- 1.11 Laboratory testing, disassembly and examination of the Versa valve that was removed from trailer unit 6775.
- 1.12 Laboratory testing, disassembly and examination of the Versa valve that was removed from trailer unit 6778.

Forensic Engineering was requested to prepare a report and to render its conclusions and opinions regarding its investigation. Conclusions and opinions by FEI are contained throughout its report and are summarized in Section 13. Appendix 1 contains the *Curriculum Vitae* of the author.

## **2. SUMMARY OF MATERIALS REVIEWED**

Forensic Engineering reviewed the following documents and technical resources during its investigation. Excerpts from the materials that were relevant to FEI's assignment are provided following the document's listing.

- 2.1 Vehicle Inspection Reports obtained at [www.quicktransportsolutions.com](http://www.quicktransportsolutions.com), 19 pages
- 2.2 RANCO Bottom Dump Operation – Maintenance and Parts Manual, 88 pages
- 2.3 Dragon RANCO Steel Mini Bottom Dump Trailer information from Dragon Products website, 6 pages
- 2.4 State of Nevada Traffic Accident Report, July 7, 2014, 12 pages
  - 2.4.1 Event Number: 140700621
  - 2.4.2 DOI: July 7, 2014
  - 2.4.3 TOI: 9:00 a.m.
  - 2.4.4 LOI: Westbound lanes of I-80 east of Reno, Nevada, approximately 2,640 feet east of mile marker 39

- 2.4.5 Conditions: two-way, divided, median barrier, curve, relatively level, daylight, clear weather conditions, debris in roadway
- 2.4.6 Photographs were taken
- 2.4.7 No diagram was created
- 2.4.8 Narrative: V-3, V-2 and V-1 were traveling west on I-80 near mile marker 39, in that sequence. V-3 spilled a load of gravel on the #1 and #2 westbound travel lanes. V-2 came upon the gravel on the roadway at highway speeds (sic), in a curve. V-2 slowed rapidly and steered right to avoid a collision with a commercial motor vehicle. Accident number 140702588. V-1 was unable to avoid striking V-2. V-1 struck the right rear of V-2 with its left front. V-1 came to rest in the #1 travel lane facing west. V-2 rotated clockwise, struck [the] right concrete barrier with its left front, struck V-1's right side with its front and came to rest with its rear in contact with the concrete barrier and its front in contact with the right side of V-1, on its wheels facing southeast. V-3 stopped west of the accident scene and contacted NHP. [An additional 14 accident numbers are listed.]
- 2.4.9 V-1
  - 2.4.9.1 Mr. Berlie Langston
  - 2.4.9.2 White, 2005 Ford F-150
  - 2.4.9.3 Damaged left front
  - 2.4.9.4 Statement: Gravel on the road created dust (blinding dust). Everyone stop (sic) suddenly. Multitude of veh (sic) involved. Chain reaction.
- 2.4.10 V-2
  - 2.4.10.1 Ms. Olivia John
  - 2.4.10.2 Silver, 2008 Chrysler Sebring
  - 2.4.10.3 Damaged right rear
  - 2.4.10.4 Statement: I drove through the first pile of sand then saw a dust cloud ahead. I then saw the lights on [the] semi-truck. The truck swerved from the slow lane and stopped suddenly. I was in the fast lane. I hit

my brakes and swerved to missed (sic) the semi. I then hit sand and my car began to slide. There was nothing but a dust cloud. I then saw a white truck and other cars. I then came to a stop against another truck.

2.4.11 V-3

2.4.11.1 Mr. Daniel Koski

2.4.11.2 White, 2003 Peterbilt Tractor

2.4.11.3 Statement: I was west bound [on] I-80 at Derby \_\_\_\_\_ (illegible) hauling rock to Cemex on Galletti Way \_\_\_\_\_ (illegible). I was going about 65 mph when a gentleman in a pickup honked and waived me over. I stopped [and] he told me my back trailer gates come (sic) open and spilled the rocks and caused a bad accident. I immediately called 911 and waited for NHP.

2.5 Sierra Appraisal and Adjusting Service repair cost estimate for insured Berlie Langston, 6 pages

2.6 State of Nevada traffic citation number XD1158121, Daniel Koski, illegible, 2 pages

2.7 Safety Measurement System [SMS], Complete SMS Profile, USDOT # 2157396, 5 pages

2.8 Vehicle inspection records (accident vehicle), 2 pages

2.9 Vehicle work orders (accident vehicle), 3 pages

2.10 Health insurance records, Olivia John, 9 pages

2.11 Ten black and white copies of photographs, lever locks, valves, incident scene, 10 pages

2.12 Defendant's [MDB] Answers to Plaintiffs' First Set of Interrogatories, January 12, 2016, 14 pages

2.12.1 As a result of a prior incident involving the same exact Ranco trailer in July 2013, MDB replaced the Versa valve and rewired the dump valve circuit from valve to truck. Thus isolating the dump coil circuit and removing the coil case ground [coil shield] from the circuit.

- 2.12.2 MDB employees added a master switch and changed the voltage source for the dump control system.
- 2.12.3 A similar MDB Ranco semi-trailer self-activated and dumped sand between mile marker 40 and the rest area [on] I80 West ten to fifteen minutes before the accident on the same day and in proximity to the location of the accident between Mile Mark (sic) 38 and Mile Marker 39.
- 2.13 Defendant's [Koski] Answers to Plaintiffs' First Set of Interrogatories, January 12, 2016, 16 pages
  - 2.13.1 On the morning of July 7, 2014, Mr. Koski picked up a load of crushed rock. At approximately 9:00 a.m. he was traveling westbound on I80 between mile marker 39 and 28 en route to deliver the rock to Ready Mix Plant in Reno when the rock in the rearmost trailer inadvertently dumped onto the roadway. The truck he was driving had safety features including a master switch and three slave switches that controlled the dump systems for each of the three individual trailers. The master switch and slave switches were off at the time of the incident. He did not touch nor inadvertently activate the dump control switches. Driver error was not involved. I was employed by MDB from June 8, 2012, until I retired on December 1, 2014.
  - 2.13.2 Mr. Koski picked up the tractor and trailers on July 7, 2014, at the MDB facility at approximately 5:30 a.m. He traveled to Piute Pit Wadsworth and picked up a load of crushed gravel at approximately 7:30 a.m. He entered I80 West at the Wadsworth ramp at approximately 8:40 a.m. and was traveling toward Reno.
  - 2.13.3 Mr. Koski had one prior similar event where the same subject Ranco trailer self-activated and dumped a load. I was cited on July 30, 2013. The charge was dismissed.
- 2.14 Defendant's Rule 16.1 Disclosure Statement, December 15, 2015, 7 pages
  - 2.14.1 Exhibit: State of Nevada Traffic Accident Report, July 7, 2014, 12 pages

- 2.14.2 Exhibit: Sierra Appraisal and Adjusting Service repair cost estimate for insured Berlie Langston, 6 pages
- 2.14.3 Exhibit: State of Nevada traffic citation number XD1158121, Daniel Koski, illegible, 2 pages
- 2.14.4 Exhibit: Safety Measurement System [SMS], Complete SMS Profile, USDOT # 2157396, 5 pages
- 2.14.5 Exhibit: Vehicle inspection records (accident vehicle), 2 pages
- 2.14.6 Exhibit: Vehicle work orders (accident vehicle), 3 pages
- 2.14.7 Exhibit: Health insurance records, Olivia John, 9 pages
- 2.14.8 Exhibit: Ten black and white copies of photographs, lever locks, valves, incident scene, 10 pages
- 2.14.9 Exhibit: Financial Pacific Insurance Company Commercial Lines Policy, countersigned December 12, 2015, 328 pages
  - 2.14.9.1 The following units were insured.
    - 2.14.9.1.1 2003 Peterbilt 379, VIN: 1XP5DB9X73D807486 (Unit #5694, tractor)
    - 2.14.9.1.2 2007 Ranco, VIN: 1R9DBSA2077L008042 (Unit #6773, semi-trailer)
    - 2.14.9.1.3 2003 Ranco, VIN: 1R9BP450631008610 (Unit #6774, trailer)
    - 2.14.9.1.4 2002 Ranco, VIN: 1R9BP45082L008431 (Unit #6775, trailer)
    - 2.14.9.1.5 2006 Peterbilt 379, VIN: 1XP5DB9X76D641667 (Unit #5693, tractor)
    - 2.14.9.1.6 2007 Ranco, VIN: 1R9BSA2047L008046 (Unit #6776, semi-trailer)
    - 2.14.9.1.7 2003 Ranco, VIN: 1R9BP45003L008621 (Unit #6777, trailer)

2.14.9.1.8 2002 Ranco, VIN: 1R9BP450X2L008432 (Unit #6778, trailer)

- 2.15 Plaintiff's Initial Disclosure of Witnesses Pursuant to NRCP 16.1, December 1, 2015, 6 pages
- 2.16 Plaintiff's Initial Production of Documents Pursuant to NRCP 16.1, December 1, 2015, 4 pages
  - 2.16.1 Exhibits: Medical records for Ms. Olivia John, 176 pages
- 2.17 Defendant's [MDB & Koski] Rule 34 Response to Plaintiffs' Request for Production of Documents, January 19, 2016, 12 pages
  - 2.17.1 Exhibit: Service, maintenance and inspection records for truck driven by Mr. Daniel Koski, tractor number 5674, trailer numbers 6773, 6774 and 6775 (front, middle and rear, respectively), 255 pages
    - 2.17.1.1 See summary of records in Section 3 below.
  - 2.17.2 Exhibit: Service, maintenance and inspection records for truck driven by Mr. Scott Palmer, tractor number 5673, trailer numbers 6776, 6777 and 6778 (front, middle and rear, respectively), 82 pages
    - 2.17.2.1 See summary of records in Section 4 below.
- 2.18 Defendants [MDB] Amended Answers to Plaintiff's First Set of Interrogatories, February 3, 2016, 4 pages,
- 2.19 Defendant Versa Products Company, Inc.'s Responses to Defendant MDB Trucking, LLC's First Set of Interrogatories, January 6, 2017, 12 pages
- 2.20 Defendant/Cross-Claimant Versa Products Company, Inc.'s First Supplement to Its Early Case Conference List of Witnesses and Documents, January 24, 2017, 11 pages
  - 2.20.1 Exhibit: QP-11 Assembly Test Procedure, Rev. K, 3 pages
  - 2.20.2 Exhibit: Engineering drawings, 4 pages (see Figures 2-1 through 2-4)
  - 2.20.3 Exhibit: ISO 9001:2008, Certification of Registration, March 20, 2015, 25 pages
  - 2.20.4 Exhibit: Product Return Analysis Reports (Copy), February 18, 2004 through August 2, 2016, 34 pages

- 2.20.5 Exhibit: Engineering Change Requests (ECRs), 8 pages
- 2.20.6 Exhibit: Versa Valves Bottom Dump Control Valves brochure, Bulletin 165, January 2015, 2 pages
- 2.20.7 Exhibit: Valve Repair Kit Instruction Sheet, 2 pages
- 2.20.8 Exhibit: Assembly Job Traveler, VGK-4523-20C-D012, October 26, 2012, 3 pages
- 2.20.9 Exhibit: Warnings Regarding the Design Application, Installation and Service of Versa Products, 1 page
- 2.20.10 Exhibit: UL Certification for Peter Paul Electronics Co. Inc. solenoids, undated, 3 pages
- 2.21 Defendant Versa Products Company, Inc.'s Responses to Defendant MDB Trucking, LLC's First Set of Requests for Production, January 24, 2017, 24 pages
- 2.22 Defendant Versa Products Company, Inc.'s First Amended Responses to Defendant MDB Trucking, LLC's First Set of Requests for Production, May 8, 2017, 7 pages
  - 2.22.1 Exhibit A: Engineering drawings, 64 pages
  - 2.22.2 Exhibit B: Versa's valve failure investigation documents, 11 pages
- 2.23 Defendant/Cross-Claimant/Cross-Defendant Versa Products Company, Inc.'s Motion for Summary Judgement Against Defendant/Cross-Claimant/Cross-Defendant MDB Trucking, LLC's Cross-Claims, May 1, 2017, 16 pages
  - 2.23.1 Exhibit 1: MDB Trucking, LLC's Cross-Claim Against RMC Lamar Holdings, Inc., (fka Ranch Manufacturing Company) and Versa Products Company, Inc., June 15, 2016, 7 pages
  - 2.23.2 Exhibit 2: Volume 3, deposition transcript of Mr. Scott Palmer, March 8, 2017, 101 pages
  - 2.23.3 Exhibit 3: Deposition transcript of Mr. Tracy Shane, April 11, 2017, 130 pages
  - 2.23.4 Exhibit 4: Deposition transcript of Mr. Patrick Bigby, April 10, 2017, 123 pages
  - 2.23.5 Exhibit 5: Volume 2, deposition transcript of Mr. Scott Palmer, March 7, 2017, 196 pages

- 2.24 Defendant Versa Products Company, Inc.'s Second Amended Responses to Defendant MDB Trucking, LLC's First Set of Requests for Production, May 10, 2017, 7 pages
  - 2.24.1 Exhibit: Privilege/Redaction Log, 2 pages
  - 2.24.2 Exhibit: Engineering drawings, 64 pages
- 2.25 Defendant/Third –Party Plaintiff's Request for Testing, September 30, 2016, 5 pages
- 2.26 Moad v Nelse Wynne; Capurro Trucking, Complaint for Personal Injuries, June 24, 2013, 6 pages
  - 2.26.1 Exhibit: Expert report by Peter Philbrick, Ruhl Forensics, May 13, 2014
  - 2.26.2 Mr. Philbrick failed to determine the root cause for the Capurro trucking unintended dump.
  - 2.26.3 Mr. Philbrick was mistaken when he stated that a mechanical failure could have caused the Capurro trucking unintended dump.
  - 2.26.4 Mr. Philbrick was mistaken when he opined that "Since no electrical or mechanical failures were found or noted the only other option is driver error."
  - 2.26.5 Mr. Philbrick was not qualified to make a determination regarding the root cause for the Capurro trucking unintended dump.
  - 2.26.6 The records reviewed by Mr. Philbrick revealed that Capurro trucking had had at least five prior incidents of unintended dumps.
- 2.27 Deposition transcript of Mr. Daniel Koski, March 8, 2017, 107 pages
- 2.28 Deposition transcript of Mr. Daniel Koski, March 8, 2017, 107 pages
- 2.29 Volume 1 deposition transcript of Mr. Scott Palmer, March 6, 2017, 123
- 2.30 Deposition of Mr. Gerald Gramegna, May 9, 2017, 76 pages
- 2.31 Volume 1 deposition transcript of Mr. Bahram Nazmi, May 9, 2017, 135 pages
- 2.32 Volume 2 deposition transcript of Mr. Bahram Nazmi, May 10, 2017, 214 pages
- 2.33 Ranco Bottom Dump Operation – Maintenance & Parts Manual, 88 pages
- 2.34 Dragon Ranco Bottom Dump Trailer brochures, 6 pages
- 2.35 Carfax 2003 Peterbilt Conventional 379, VIN: 1XP5DB9X73D807486
- 2.36 MDB Trucking, LLC Inspection reports, [www.quicktransportsolutions.com](http://www.quicktransportsolutions.com), 23 pages

- 2.37 Versa Valves V and T Series Bulletin, 2014, 72 pages
- 2.37.1 An alternative Versa valve design includes a lockout mechanism described as a "latching/manual reset valve" that functions essentially the same as the lockout mechanism designed and installed by MDB Trucking, LLC.
- 2.38 NV Energy document titled "Generating Resources", 1 page
- 2.39 Article titled "Air valve commands bottom-dump trailer, <http://hydraulicspneumatics.com>, 3 pages
- 2.39.1 The article describes an alternative bottom-dump control valve design manufactured by AIRman, Inc., that precludes tampering and unintended dumps.
- 2.40 Article titled "New Technology for Bottom Dump Hopper Valves Solves Old Problems", 3 pages
- 2.40.1 The article addresses unintended dumps involving train cars that are used to haul coal. The same solution can be applied in the immediate case.

The article essentially states that if residual air pressure is present in the dump reservoir (as little as 15 PSI) and either the manual override is actuated, the control valve could be shifted to the "open" condition without anyone's knowledge. With insufficient pressure to actuate the dump mechanism, the dump cylinder would not move (typical cylinder operating pressure with the car loaded is 25-35 PSI). Once the valve is shifted to the "open" condition, it will stay there until a signal to "close" is sent to it either manually or electrically while there is sufficient pressure to shift the valve element back to the "close" position. During charging of the tractor-trailer combination prior to unloading, a valve left in the "open" position due to some inadvertent action continues to supply air to the "open" side of the cylinder. Once the cylinder reaches a pressure that is high enough to operate the dump mechanism (again 25-35 PSI), the "ticking bomb" explodes – the trailer prematurely dumps. The inherent danger in this situation is that the tractor-trailer combination is in motion and could be at speed on a highway and could lead to an accident involving other vehicles.

In the case being discussed, it is known that there is an internal pilot passage feeding the solenoid. The article essentially states that since this passage exists, it could be equipped with an internal pressure sensing check valve assembly. This safety check assembly would not allow the solenoid to shift the valve's main element to the "open" position unless the supply pressure to the valve was sufficient to actuate the cylinder and thus the dumping mechanism. Since the pilot passage in the valve body contains such a small volume, there would never be enough "stored" or trapped pressure downstream of the safety device to allow unintended movement of the main valve element. This type of technology would indeed prevent inadvertent operation of the opening circuit without someone's knowledge of the event and the premature dumping of coal. Lexair, Inc. has embodied the built-in safety check feature described above as an option for its bottom dump hopper valve product line. A similar design could have been integrated with the existing Versa valve design.

- 2.41 Two protocols written by Erik Anderson, Anderson Engineering, and David Bosch titled "Proposed Protocol for the Recovery of the Versa Valve from MDB Trucking Ranco Trailer Number 6778 and the testing and inspection of the MDB Trucking Tractor Number 5693, and Ranco Trailers Number 6776, Number 6777, and Number 6778" and "Proposed Protocol for the Destructive Testing of the Versa Valves recovered from MDB Trucking Ranco Trailers Number 6775 and Number 6778", October 31, 2016, 4 pages
- 2.42 Protocol written by Erik Anderson and David Bosch titled "Proposed Versa Valve's Valve Examination and Testing Protocol", November 12, 2016, 7 pages
- 2.43 Protocol written by Erik Anderson and David Bosch titled "Proposed Versa Valve's Valve Examination and Testing Protocol – Revision 1", November 10, 2016, 7 pages
- 2.44 FEI and AEI Responses to Versa's Protocol Objections, November 17, 2016, 3 pages
- 2.45 FEI's inspection notes photographs for inspections completed on June 9, 2015, October 24 & 25, 2015, February 29, 2016, April 28 & 29, 2016, May 3, 2016, October 13, 2016, October 24 & 26, 2016, November 2, 2016, November 15, 2016 and November 30, 2016.

- 2.46 MDB Bills of lading #7068 and #7584, July 7, 2014, 2 pages
- 2.47 Driver's Daily Time Sheet & Log, Dan Koski, Tractor 5694, trailers 6773, 6774 and 6775, July 7, 2014, 1 page
- 2.48 Driver's Daily Time Sheet & Log, Scott Palmer, Tractor 5693, trailers 6776, 6777 and 6778, July 7, 2014, 1 page
- 2.49 Versa Valve's document contained within valve packaging, 1 page
  - 2.49.1 There were no installation instructions or valve specification included.
- 2.50 Forty-four color Google Earth images
- 2.51 Five color photographs of the accident scene (contained in Figures 2-5 through 2-9)
- 2.52 Various media website videos describing the accident were reviewed.
- 2.53 Peter Paul Electronics, "Solenoid Valves 101", Copyright 2003, 23 pages
- 2.54 University of Pittsburgh Safety Manual, "Guidelines for Radio Frequency Radiation (RF)", 03-022, August 25, 2015, 6 pages
- 2.55 "Introducing Electromagnetic Field Momentum", Ben Yu-Kuang Hu, European Journal of Physics, 33 (2012), 873-881, 9 pages
- 2.56 "Electromagnetic Induction and Radiation", J. Newman, 2008, 24 pages
- 2.57 "The Fields Outside a Long Solenoid with a Time-Dependent Current", Kirk T. McDonald, Joseph Henry Laboratories, Princeton University, 1996, 11 pages
- 2.58 "Can a solenoid emit/receive electromagnetic radiation?" [www.physicsforums.com](http://www.physicsforums.com), 2 pages

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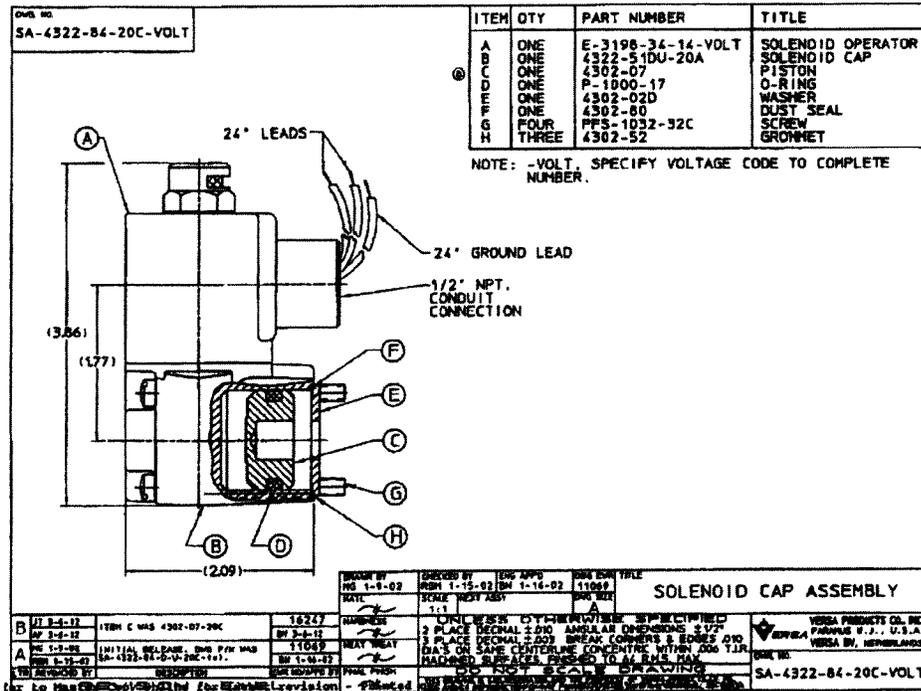


Figure 2-3. Engineering Drawing of Versa Valve Part No. VGK-4523-20C-D0

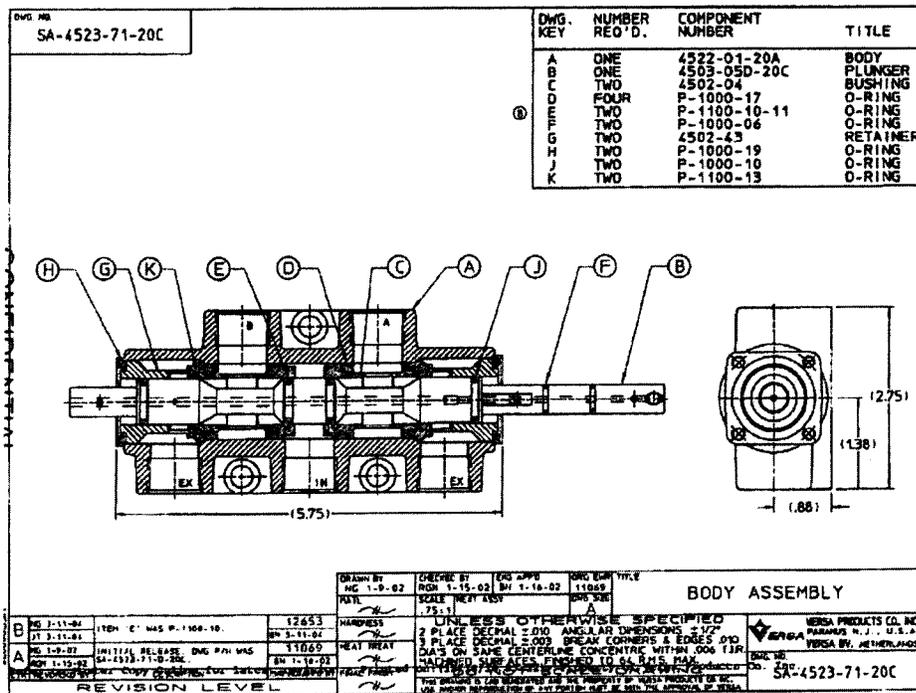


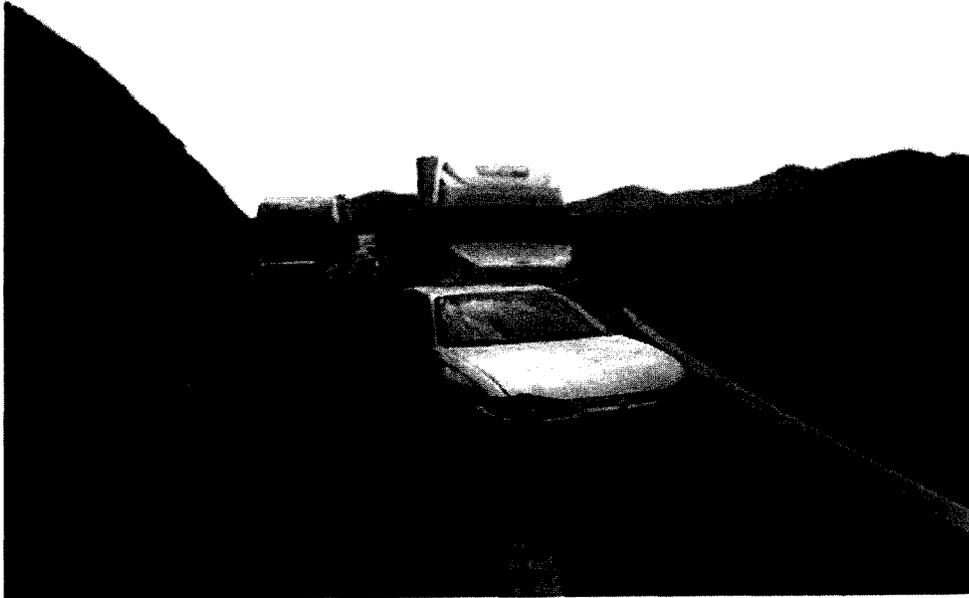
Figure 2-4. Engineering Drawing of Versa Valve Part No. VGK-4523-20C-D0



**Figure 2-5. Accident Scene – Looking Southeast**



**Figure 2-6. Accident Scene – Looking Northeast**



**Figure 2-7. Accident Scene – Looking Southeast**



**Figure 2-8. Accident Scene – Looking Northwest**



**Figure 2-9. Accident Scene – Looking Northwest**

### **3. SUMMARY OF ACCIDENT COMBINATION MAINTENANCE RECORDS**

Table 3-1 contains a summary of the supplied MDB Trucking work orders and maintenance and inspection records for tractor unit number 5694 and trailer unit numbers 6773, 6774 and 6675. The summary is presented in chronological order starting with September 9, 2012 through July 29, 2015.

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**Table 3-1. Summary of Work Order and Inspection Records – Accident Combination**

**NOTES:**

1. Work Orders for the trailer that malfunctioned (6775) are highlighted with yellow.
2. Blue text indicates work that was completed on a trailer dump control system.
3. Red text indicates activities that were associated with an unintended dumping of a load.

09/09/12	5694	DOT annual inspection
10/11/12	5694	No violations found
11/08/12	5694	No violations found
01/19/13	5694	Add oil and antifreeze
02/01/13	5694	R&R steering gear parts
02/02/13	5694	Checked wheel bearing torques, change axle oil
02/05/13	5694	R&R oil cooler, R&R coolant, add engine oil
02/07/13	5694	R&R mud flaps
02/08/13	5694	R&R torque rod bushings
02/08/13	5694	Adjust clutch brake
02/08/13	5694	Re-seal fan hub studs, replace fuel tank cap seals
02/09/13	5694	R&R motor mounts
02/13/13	5694	Re-seal P/S reservoir, R&R transmission oil
02/13/13	5694	R&R shift tower
02/15/13	5694	R&R engine oil and filters
03/06/13	5694	R&R headlight
03/06/13	5694	R&R fan clutch
03/08/13	5694	Inspect, lube
03/09/13	5694	Lube
03/09/13	5694	Add coolant
03/15/13	5694	Inspect, lube, reroute air and electrical lines
03/16/13	5694	R&R windshield
03/22/13	5694	R&R starter
03/22/13	5694	Inspect
03/23/13	5694	R&R starter
03/26/13	5694	R&R rear fender bracket
03/26/13	5694	R&R lamp, service
04/03/13	5694	R&R ECM
04/05/13	5694	Service
04/05/13	6774	DOT inspection
04/06/13	6773	DOT trailer inspection VIN 1R9BSA2077L008042
04/06/13	6773	DOT inspection
04/06/13	6774	DOT inspection
04/06/13	6775	DOT inspection, annual

**Table 3-1. Summary of Work Order and Inspection Records – Tractor Number 5694 (cont'd)**

04/10/13	6773	R&R all wheel studs
04/10/13	6774	Repaired air leak at oiler, inspect, lube
04/11/13	5694	R&R fuel control valve
04/13/13	5694	No power at gate dump 4-way plug – rewired switches from light circuit to accessory circuit – wired ground to cab ground – added 3 <sup>rd</sup> wire for triples
04/30/13	5694	LOF
04/30/13	5694	Adjust clutch brake
05/03/13	6773	Remove auto tire inflation system, R&R wheel hub cover
05/03/13	6773	R&R wheel hub cover, remove auto tire inflation
05/03/13	6773	R&R hub cover, remove auto tire inflation
05/07/13	5694	Fix oil leak and fan hub studs
05/19/13	5694 + trailers	Grease and inspect
05/19/13	5694 + trailers	Inspect, grease
05/19/13	5694 + trailers	Grease, inspect
05/19/13	5694+ trailers	3 trailers, grease, inspect
06/02/13	6774	Inspect, grease, adjust oiler flow
06/03/13	5694	Fix coolant loss
06/05/13	5694	Replace missing oil fill stopper, adjust belts
06/21/13	5694	PM-1
06/21/13	6773	B&L
06/21/13	6775	Inspect, grease, B&L, adjust oiler flow
06/25/13	5694	No violations found
06/25/13	5694	No violations found
06/25/13	5694 6773	No violations found
07/11/13	5694	P and L, adjust clutch
07/11/13	6773	B&L
07/11/13	6774	B&L
07/11/13	6775	R&R cracked air tank
07/11/13	6775	Inspect, grease, B&L

**Table 3-1. Summary of Work Order and Inspection Records – Tractor Number 5694 (cont'd)**

07/16/13	5694	Accessory fabrication
07/18/13	6775	Rebuilt gate control valve
07/23/13	5694	B&L, tighten shock mount, add oil
07/23/13	6773	B&L
07/23/13	6774	B&L, inspect grease
07/23/13	6775	Inspect, grease, B&L
07/26/13	5694	Rewire gate switches
07/29/13	5694	R&R torque bushings
07/31/13	6774	Rewire dump valve air out to isolate from trailer
08/01/13	6775	Investigate unintentional gate opening, replace versa valve and rewired dump valve circuit from valve to truck. Isolate dump coil circuit – remove coil case ground from circuit.
08/03/13	5694	R&R backup alarm
08/06/13	6773	R&R oiler sight glass
08/10/13	5694	LOF, replace horn fuse, R&R turn lamp, fix temperature gages, R&R fuel filters
08/11/13	6773	R&R 7-way – front and rear
08/19/13	5694	Tighten loose hydraulic fitting
08/19/13	5694	Trailer light flashing poor ground, R&R 7-way plate
08/24/13	5694	Inspect, grease, install decals, R&R LR air bag bushing, fit plate light
08/24/13	6773	Inspect, grease, service, oiler
09/12/13	5694	T/S charging systems
09/14/13	5694	R&R 7-way plug, R&R pigtailed on all rear lights, R&R plate light, removed outside temperature gauge
09/15/13	6773+	Inspect, grease, tie up anti-lock brake wires, lamp repair
09/15/13	6774+	Inspect, grease, lamp repair, tie up anti-lock brake wires
09/15/13	6775+	Inspect, grease, lamp repair, tie up antilock brake wires 6775
09/21/13	5694	R&R radiator hose
09/21/13	5694	R&R water filter valves
09/21/13	5694	R&R after cooler mount bushings
09/21/13	5694	R&R hose
09/21/13	5694	R&R air dryer cartridge and purge valve
09/21/13	6773	R&R spring brake valve
09/25/13	5694	Reseal coolant fitting
09/26/13	6774	R&R spring
09/27/13	5694	#3 battery replaced
09/27/13	5694	R&R air fitting

**Table 3-1. Summary of Work Order and Inspection Records – Tractor Number 5694 (cont'd)**

09/27/13	5694	R&R air system check valves
09/28/13	5694	R&R fender mount
09/30/13	5694	DOT annual inspection
10/01/13	5694	PM
10/01/13	6773	B&L
10/01/13	6774	B&L, inspect, lube
10/01/13	6775	Inspect, grease, B&L
10/05/13	6774	R&R hub cover
10/12/13	5694	Lube, inspect
10/12/13	6773+	Inspect, grease, R&R plate light
10/12/13	6774+	Inspect, grease, R&R plate light
10/12/13	6775+	Inspect, grease, replace plate light 6774
10/20/13	5694	R&R alternator mount
10/20/13	5694	R&R engine brake switch, replace master switch for trailer dump valves
10/21/13	5694	R&R air-to-air cooler
10/23/13	5694	R&R all three batteries
11/02/13	5694	R&R belts
11/08/13	5694	R&R air governor
11/08/13	5694	B&L
11/08/13	6773	B&L
11/08/13	6774	Inspect, grease, B&L
11/08/13	6775	Inspect, grease, B&L
11/12/13	5694	PM-1, R&R 4-way on tractor
12/31/13	5694	R&R fuel splitter and primer pump
01/02/14	5694	Tighten shifter knob nut
01/03/14	5694	B&L
01/03/14	6773	B&L
01/03/14	6774	Inspect, grease, B&L
01/03/14	6775	Inspect, grease, B&L
01/12/14	6773	R&R right ICC light
02/06/14	5694	R&R power steering lines, cab power relay and clutch brake, B&L
02/13/14	6774	R&R 7-way plug
02/15/14	5694	R&R fuel filters, grease, inspect, LOF
02/15/14	6774	R&R 4-way plug
02/15/14	6775	R&R 4-way plug
02/25/14	5694	No violations found

**Table 3-1. Summary of Work Order and Inspection Records – Tractor Number 5694 (cont'd)**

02/26/14	6775	Lamp repair
02/28/14	5694	Inspect, grease
03/01/14	6774	Repair cracked frame
03/21/14	5694	R&R center gate switch cover, re-secure deck plates
03/22/14	5694	B&L, R&R mud flap hanger, R&R plate lamp
03/22/14	5694	R&R coolant filter valves
03/22/14	6773	B&L, removed ICC bar
03/22/14	6774	B&L, fixed air leak, grease, inspect
03/22/14	6775	Inspect, grease, B&L, R&R reflector, repair air leak at oiler
04/01/14	6773	DOT inspection
04/01/14	6774	DOT inspection
04/01/14	6775	DOT annual inspection
04/05/14	6773	DOT trailer inspection
04/05/14	6775	DOT annual inspection
04/10/14	5694	Tighten yoke, R&R U-joint
04/24/14	6773	Inspect, grease
04/24/14	6774	Inspect, grease
04/24/14	6775	Inspect, grease
05/06/14	5694	PM-1, B&L
05/09/14	5694	Fix PTO leak, R&R hydraulic pump
05/10/14	6773	Inspect, grease
05/10/14	6774	Inspect, grease
05/10/14	6775	Inspect, grease
05/14/14	5694	R&R yoke and pinion seal
05/27/14	6773	Inspect, grease
05/27/14	6774	Inspect, grease
05/27/14	6775	Inspect, grease
06/01/14	5694	Fix flat tire
06/01/14	6774	Tire work
06/04/14	6775	Repair ABS wire
06/07/14	6775	Tire repair
06/16/14	5694	Fix broken frame belt
06/21/14	5694	Remove asphalt from axles
06/24/14	6774	Tire work
06/25/14	5694	R&R turn signal fuse
06/29/14	6775	Tire repair
06/30/14	6775	Reattach Versa valve

**Table 3-1. Summary of Work Order and Inspection Records – Tractor Number 5694 (cont'd)**

07/01/14	5694	PM-1, B&L, adjust belts
07/01/14	5694	R&R PTO
07/02/14	6773	Inspect, grease, B&L
07/02/14	6774	Inspect, grease, B&L
07/02/14	6775	Inspect, grease, B&L, replace bolt air tank mount
07/02/14	6775	Replaced ABS wires
07/02/14	6775	R&R hub cover
07/07/14	6773	Inspect, fabricate lockout for versa – valve
07/07/14	6774	Fabricate lock out for Versa valve
07/07/14	6775+	Lost load on highway
07/07/14	6775	Fabricate and install lockout on Versa valve
07/07/14	6775+	DOI. Gate opened on highway – 6775 – install positive gate valve locks
07/08/14	6774	Tire work
07/08/14	6775	ABS circuit fault
07/09/14	5694	Tire work
07/10/14	5694	Fix air leak
07/26/14	5694	Tire work
08/03/14	5694	R&R supply and service lines
08/05/14	6773	R&R 4-way connector inspect, grease
08/05/14	6773	R&R wheel seal
08/05/14	6774	Fixed repair intermittent ABS light
08/11/14	6773	R&R mud flaps
08/12/14	5694	PM-1 & PM-2 and B&L
08/12/14	6773	B&L
08/12/14	6774	Inspect, grease, B&L
08/12/14	6775	Inspect, grease, B&L
08/17/14	5694	Tire work
08/19/14	5694	B&L
08/19/14	5694	Fix radiator leak
08/19/14	6773	Inspect, grease, B&L, tighten hub covers screws
08/19/14	6774	Inspect, grease, B&L
08/19/14	6775	Inspect, grease, B&L
08/26/14	5694	Fix radiator leak
09/01/14	5694	DOT inspection
09/16/14	6773	Repaired gate cylinder valves, inspect, grease

**Table 3-1. Summary of Work Order and Inspection Records – Tractor Number 5694 (cont'd)**

09/16/14	6775	Repair gate cylinder, inspect, grease
09/17/14	5694	DOT annual inspection
09/17/14	5694	Fix engine oil leak
09/17/14	5694	Adjust clutch
09/26/14	5694	PM-1, B&L
09/26/14	6773	Inspect, grease, B&L
09/26/14	6774	Inspect, grease, B&L
09/26/14	6775	Inspect, grease, B&L
09/29/14	5694	R&R motor mounts
10/15/14	5694	Inspect, lube, B&L
10/15/14	6773	Inspect, grease, B&L
10/15/14	6774	Inspect, grease, B&L
10/15/14	6775	Inspect, grease, B&L
10/26/14	5694	B&L
10/27/14	5694	Replace radiator tank, air-to-air bushings, hood restraint cable
11/06/14	5694	R&R drive axle brakes
11/06/14	5694	R&R steer axle shocks, inspect
11/07/14	5694	R&R exhaust manifold, turbo, waste gate solenoid, line, replace broken studs and bolts
11/12/14	6774	R&R brake can diaphragm
11/17/14	5694	LOF, inspect
11/17/14	6773	Inspect, grease
11/17/14	6774	Inspect, grease
11/17/14	6774	Repair front gate cylinder
11/17/14	6775	Inspect, grease
11/17/14	6775	Repair air leak rear gate cylinder
12/02/14	5694	Lamp repairs
12/09/14	6774	Tire work
12/11/14	5694	Inspect, grease
12/11/14	6773	Inspect, grease
12/11/14	6774	Inspect, grease
12/11/14	6775	Inspect, grease
12/18/14	5694	Tighten 4-way plug
12/18/14	6773	R&R 4-way connector
12/23/14	6774	Tire work
01/04/15	5694	Inspect, grease
01/04/15	6773	Inspect, grease

**Table 3-1. Summary of Work Order and Inspection Records – Tractor Number 5694 (cont'd)**

01/04/15	6774	Inspect, grease
01/04/15	6775	Inspect, grease
07/29/15	6774	Spring work

**4. SUMMARY OF 2<sup>ND</sup> COMBINATION MAINTENANCE RECORDS**

Table 4-1 contains a summary of the supplied MDB Trucking work order and maintenance and inspection records for tractor unit number 5693 and trailer numbers 6776, 6777 and 6678. The summary is presented in chronological order starting with November 30, 2013 to June 17, 2015.

**Table 4-1. Summary of Work Order and Inspection Records – Trailer Number 6778**

**NOTES:**

1. Work Orders for the trailer that malfunctioned (6778) are highlighted with yellow.
2. Blue text indicates work that was completed on a trailer dump control system.
3. Red text indicates activities that were associated with an unintended dumping of a load.

11/30/13	6777	Rewire trailer to meet MDB standards, replace lights with LEDs
12/03/13	5693	DOT annual inspection
12/04/13	5693	DOT annual inspection
01/03/14	6776	Inspect and lube
01/03/14	6777	Inspect and lube
01/03/14	6778	Inspect and lube
01/05/14	5693	Inspect and lube
01/08/14	5693	R&R turbo waste gate hose
01/17/14	6777	Replace missing slack adjuster bushing
02/05/14	5693	R&R U-bolt
02/13/14	5693	R&R windshield wipers
02/20/14	6777	Repair leaking gate cylinder air leak
03/02/14	5693	Inspect and lube
03/14/14	5693	Inspect and PM-1

**Table 4-1. Summary of Work Order and Inspection Records – Tractor Number 5693 (cont'd)**

03/21/14	5693	R&R steering shaft, steering shaft u-joint, steering gear box and fuel sending unit
04/01/14	6776	Inspect and lube
04/01/14	6777	Inspect and lube
04/01/14	6778	R&R LR reflector
04/06/14	6778	DOT annual inspection
04/06/14	6776	DOT annual inspection
04/06/14	6777	DOT annual inspection
04/09/14	6778	R&R leaking brake line
04/14/14	5693	R&R a/c system
04/16/14	5693	R&R charge air cooler (CAC) hoses
04/16/14	6777	R&R air accumulator on Versa valve
04/16/14	6778	R&R hose hangers on tongue
05/04/14	5693	R&R steer tires
05/08/14	5693	R&R torque arm bushing, un-loader valve and intake valve actuator (IVA) sensor
05/20/14	5693	R&R air compressor return line
05/21/14	5693	R&R relief valve
05/21/14	5693	Inspect, lube and PM-1 and PM-2
05/30/14	5693	Inspect, lube, R&R 4-way plug wiring and hang mud flap
06/10/14	5693	R&R squirrel cage fan, shorten air lines
06/17/14	6777	Adjust air gap on ABS sensor
06/20/14	5693	R&R CB radio
07/07/14	6778	Lost load on highway
07/07/14	6776	Fabricate and install lockout on Versa valve
07/07/14	6777	Fabricate and install lockout on Versa valve
07/07/14	6778	Fabricate and install lockout on Versa valve
07/10/14	6778	R&R LR and RR stop/turn/tail lights
07/23/14	5693	Inspect, lube and PM-1
07/27/14	5693	R&R steer tires
08/05/14	6776	Intermittent 1 <sup>st</sup> trailer gate function, R&R connector
08/09/14	5693	R&R cab air blow gun, tighten coolant filter
08/18/14	5693	R&R input shaft seal on blower
09/25/14	5693	R&R exhaust gaskets
09/26/14	5693	Inspect, lube and PM-1
09/26/14	6776	Inspect and lube
09/26/14	6777	Inspect and lube

**Table 4-1. Summary of Work Order and Inspection Records – Tractor Number 5693 (cont'd)**

09/26/14	6778	Inspect and lube
09/30/14	5693	R&R cruise control switch
10/01/14	5693	Replace missing clutch pedal pad
10/09/14	5693	Inspect and lube
10/15/14	5693	R&R turbo oil line
11/22/14	6776	Inspect, lube and drain tanks
11/23/14	6777	Inspect and lube
11/23/14	6778	Inspect and lube
12/01/14	6777	Gate not closing with switch. Accumulator not working. R&R Versa valve
12/01/14	6778	Reattached safety pin to Versa valve lock
12/02/14	6777	R&R ABS wheel speed sensor
12/02/14	6777	Welded cracks in tab
12/03/14	5693	DOT annual inspection
12/12/14	5693	Inspect and lube
12/12/14	6776	Inspect and lube
12/12/14	6777	Inspect and lube
12/12/14	6778	Inspect and lube
01/03/15	5693	Repair turbo heat shield
01/13/15	5693	Repair head light wiring, install external CB speaker
01/14/15	5693	R&R windshields
01/27/15	5693	R&R right headlight
01/28/15	5693	R&R fan clutch
04/06/15	6776	DOT annual inspection
04/06/15	6777	DOT annual inspection
04/06/15	6778	DOT annual inspection
06/17/15	6776	Adjust air gap on ABS sensor

**5. ACCIDENT TRACTOR TRIPLE-BOTTOM-DUMP-TRAILER COMBINATION INITIAL INSPECTION, JUNE 9, 2015**

An initial inspection of the accident tractor triple-bottom-dump-trailer combination was completed by FEI on June 9, 2015, at MDB's headquarters in Sparks, Nevada. Table 5-1 summarizes the photographic documentation acquired during the inspection.

The following notes were written during FEI's inspection of the accident tractor triple-bottom-dump-trailer combination and later adapted for this report.

**Attendees:** Thierry Barkley, counsel for MDB Trucking  
David Bosch, Forensic Engineering, expert for MDB Trucking  
Tracy Shane, MDB Trucking dispatcher  
Scott Palmer, MDB Trucking driver/mechanic  
Pat Bigby, MDB Trucking mechanic

**Location:** MDB Trucking, Inc. Headquarters  
905 East Mustang Road  
Sparks, Nevada

- 5.1 Aerial views of the MDB Trucking Headquarters are shown in Figures 5-1 and 5-2.
- 5.2 Interview of MDB team members
  - 5.2.1 Mr. Dan Koski was driving the truck at the time of the unintended [2014] dump.
  - 5.2.2 Load King and Trail King trailers use a completely different control system.
  - 5.2.3 USDOT approval is not required for the dump control system.
  - 5.2.4 The tractor mounted dump control system [switches] for the triple-trailer combination is shown in Figure 5-3.
  - 5.2.5 The third (rearmost or last) trailer in the combination was the trailer that dumped.
  - 5.2.6 The first time there was an unintended dumping of a load [July 2013], MDB added a master switch, changed voltage source from a light circuit directly to the batteries and removed the dump valve solenoid shield ground for the dump control system.
  - 5.2.7 The voltage source (+) and ground (-) were both moved directly to the battery.
  - 5.2.8 After the 2014 accident, MDB designed and installed a mechanical lock on all of its trailers in order to eliminate unintended dumping. The lock is shown in Figures 5-4 through 5-6.
  - 5.2.9 Each trailer marker/signal/tail lamp has a ground as part of the 7 wire bundle.
  - 5.2.10 The ABS wires are part of the 6 wire harnesses that are connected to the 7 pin connectors.
  - 5.2.11 The master and slave dump control toggle switches are all guarded.

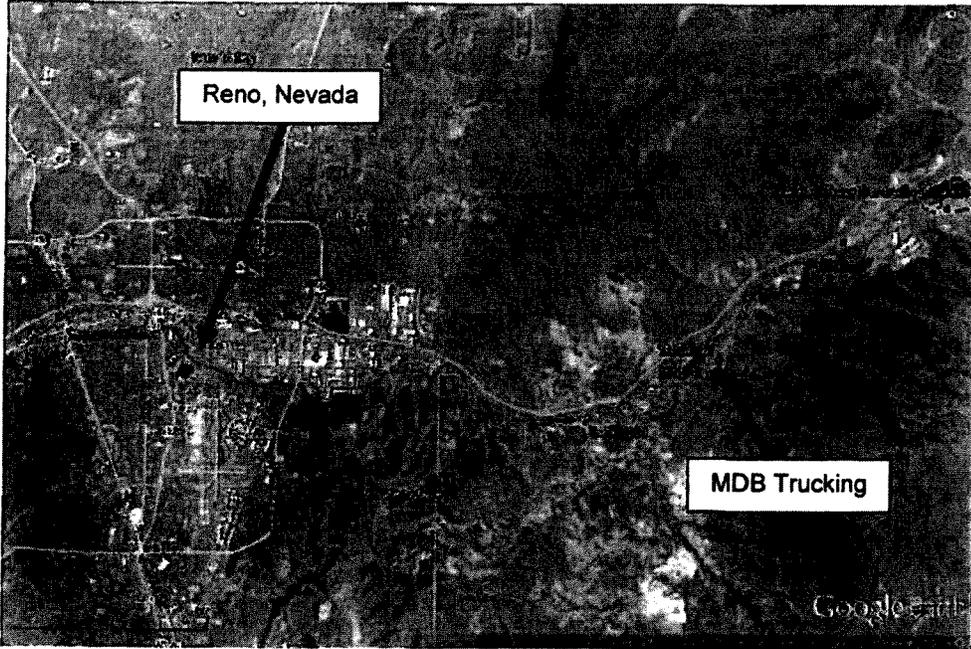
- 5.2.12 When ABS was first implemented, the signal voltage for the dump valve was supplied using the formally "extra" wire (blue) in the 7 conductor bundle.
- 5.2.13 The ABS sensor power supply wire is always energized when the tractor is running.
- 5.2.14 The accumulator valve is opened using the palm button to release the air pressure within the accumulator to allow the gate aperture size to be modulated.
- 5.2.15 The dump valve must be reset by using the cab switch.
- 5.2.16 The drivers are trained to use the cab switch to close the dump aperture rather than the manual valve because if they forget to close (reset) from cab, the dump aperture can open when the trailer is reloaded.
- 5.3 General views of the accident tractor triple-bottom-dump-trailer combination are shown in Figures 5-7 through 5-13.
- 5.4 Tractor Information
  - 5.4.1 VIN: 1XP5DB9X73D807486
  - 5.4.2 2003 Peterbilt Conventional 379, Eaton Fuller 18 speed transmission, Peterbilt Air Track
  - 5.4.3 Unit #: 5694
  - 5.4.4 Plate #: 50261A
- 5.5 1<sup>st</sup> Trailer Information
  - 5.5.1 VIN: 1R9DBSA2077L008042
  - 5.5.2 Ranco Trailer
  - 5.5.3 Unit #: 6773
  - 5.5.4 Manufactured: 10/06
  - 5.5.5 GVWR: 70,000 lb
  - 5.5.6 Plate # TF6506
- 5.6 2<sup>nd</sup> Trailer Information
  - 5.6.1 VIN: 1R9BP450631008610
  - 5.6.2 Ranco Trailer

- 5.6.3 Unit number: 6774
- 5.6.4 Manufactured: 10/03
- 5.6.5 GVWR: 40,000 lb
- 5.6.6 Plate #: 4EP2080
- 5.7 3<sup>rd</sup> Trailer Information
  - 5.7.1 VIN: 1R9BP45082L008431
  - 5.7.2 Ranco Trailer
  - 5.7.3 Unit #: 6775
  - 5.7.4 Manufactured: 09/02
  - 5.7.5 GVWR: 40,000 lb
  - 5.7.6 Plate #: TE3528
- 5.8 Dump Valve Information
  - 5.8.1 Manufacturer: Versa Valve
  - 5.8.2 Model No.: VGK – 4523 – 200 – DO
  - 5.8.3 Air pressure rating: 40 – 175 PSIG max.
  - 5.8.4 Voltage: 2 VDC
  - 5.8.5 Voltage: 12 VDC
- 5.9 Figure 5-14 shows the unit #6775 dump control valve.
- 5.10 The wire bundle that contained the dump valve solenoid activation wires that ran from the tractor to each of the three trailers was examined.
- 5.11 Each of the relevant intra-vehicle electrical connectors was examined.
- 5.12 No electrical issues were identified.
- 5.13 No mechanical issues were identified.
- 5.14 The dump controls were tested remotely (toggle switches) and manually (levers at dump control valves).
- 5.15 The trailer dump control system was determined to operate as designed.
- 5.16 No destructive examination or testing was attempted or completed.

**Table 5-1. Description of FEI Photographs – June 9, 2015**

001-015	General views of the tractor triple-bottom-dump-trailer combination
016-022	Close views of tractor – unit #5694
023-027	Close views of 1 <sup>st</sup> trailer – unit #6773
028-032	Close views of 2 <sup>nd</sup> trailer – unit #6774
033-037	Close views of 3 <sup>rd</sup> trailer – unit #6775
038-102 109-129	Inter- and intra-vehicle wires and routing
103-108 130-143 152-178 193-196	Versa Valve connections and identification
144-151	Versa Valve manual control lever lock by MDB
179-187	Trailer bottom dump actuation mechanism
188-192	Close views of dump control switches

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**Figure 5-1. Aerial View of MDB Trucking Headquarters Location**



**Figure 5-2. Close Aerial View of MDB Trucking Headquarters Location**

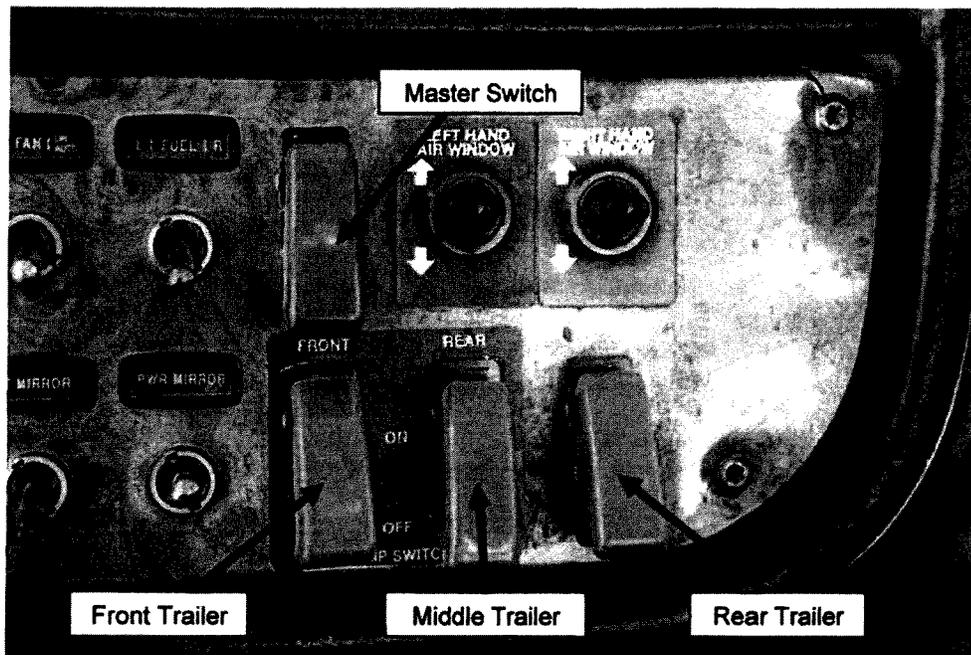


Figure 5-3. Control Switch Configuration

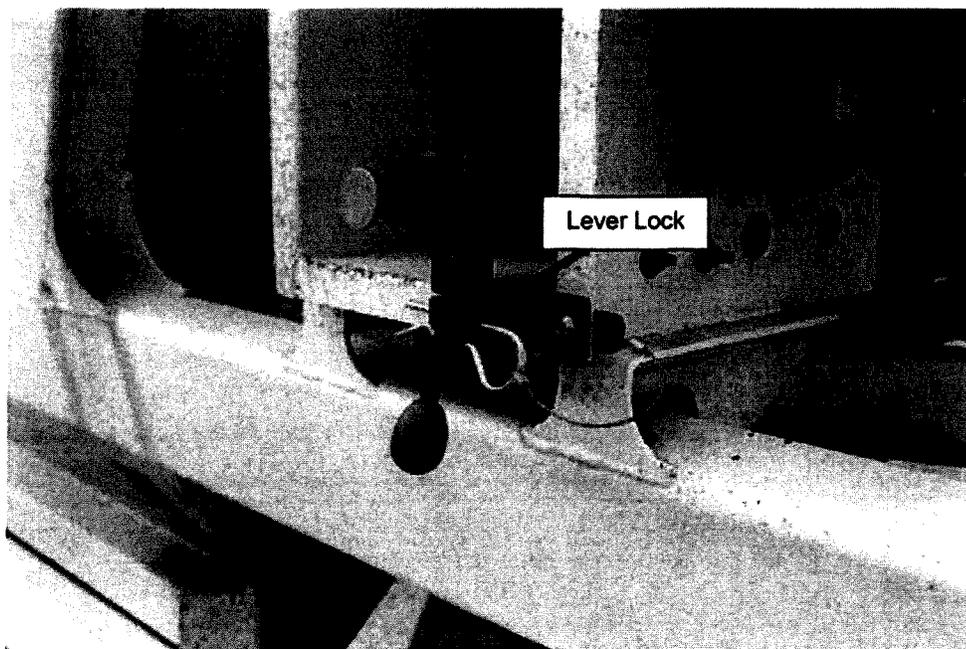


Figure 5-4. Manual Dump Control Lever Lock

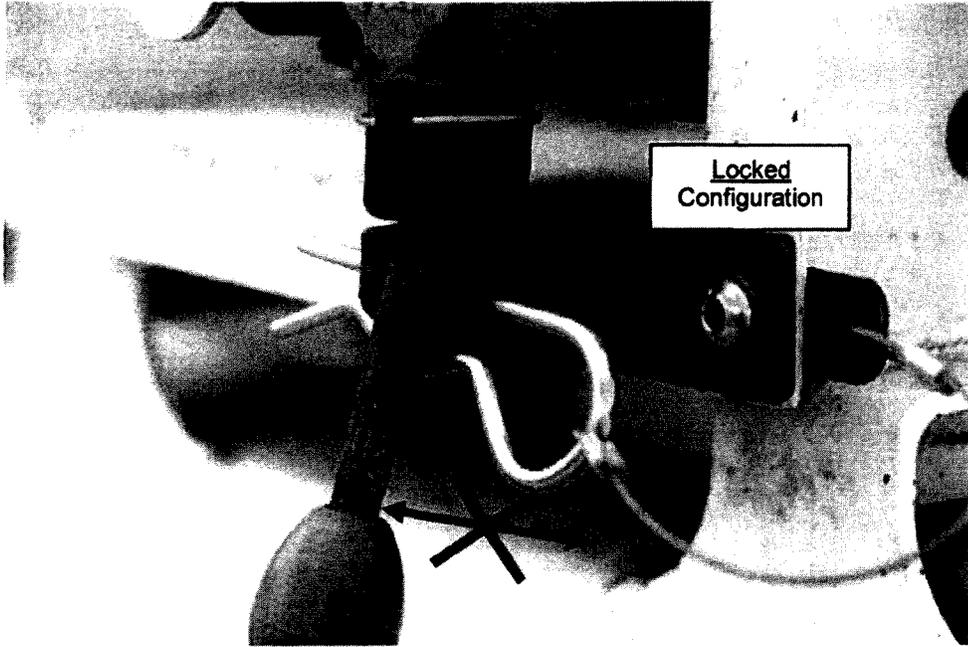


Figure 5-5. Manual Dump Control Lever Lock – Locked

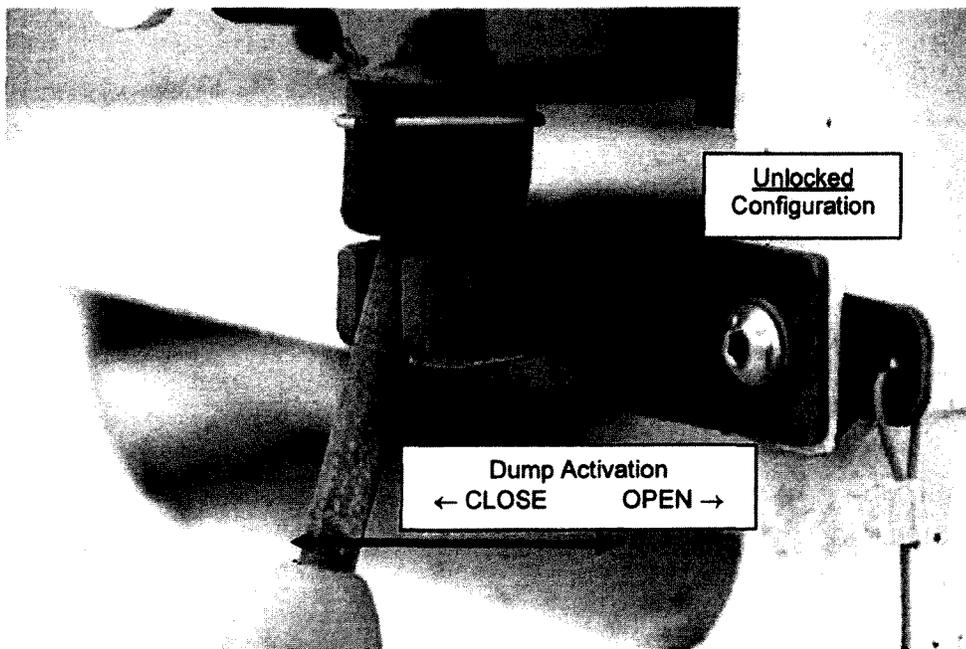


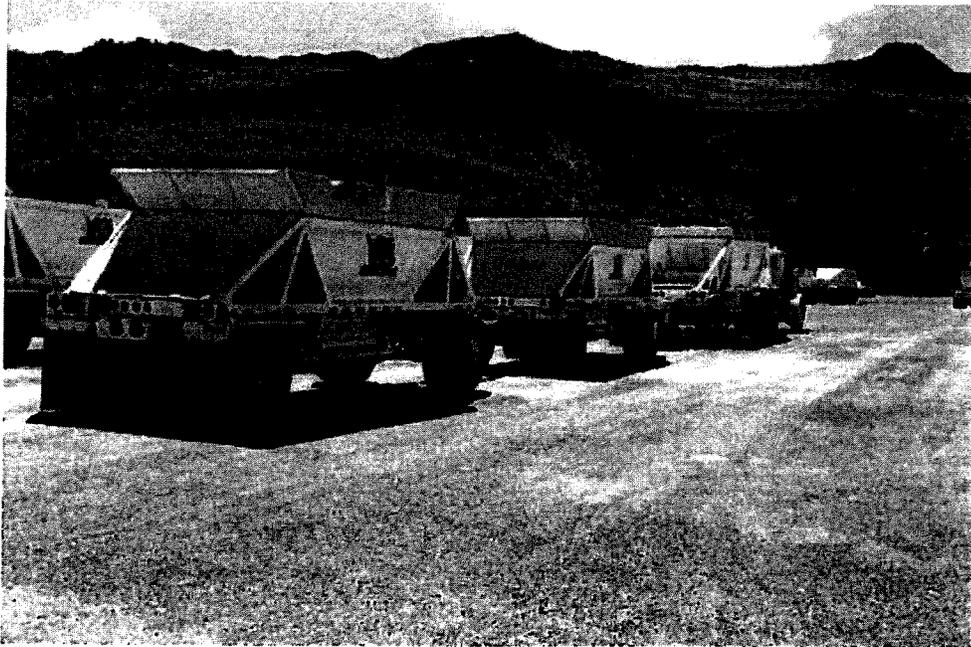
Figure 5-6. Manual Dump Control Lever Lock – Unlocked



**Figure 5-7. Accident Tractor Triple-Bottom-Dump-Trailer Combination**



**Figure 5-8. Accident Tractor Triple-Bottom-Dump-Trailer Combination**



**Figure 5-9. Accident Tractor Triple-Bottom-Dump-Trailer Combination**



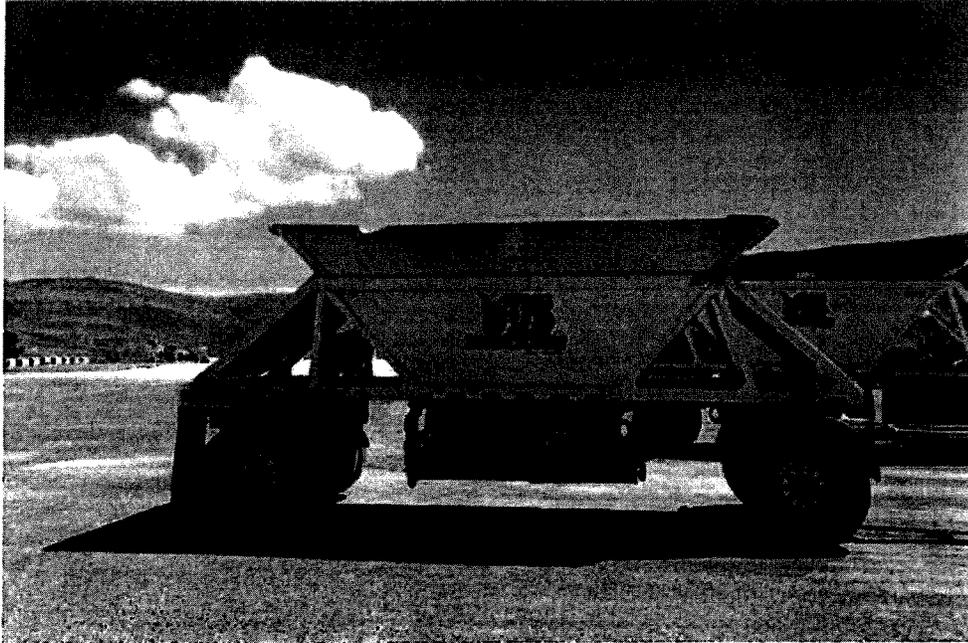
**Figure 5-10. Accident Tractor Triple-Bottom-Dump-Trailer Combination**



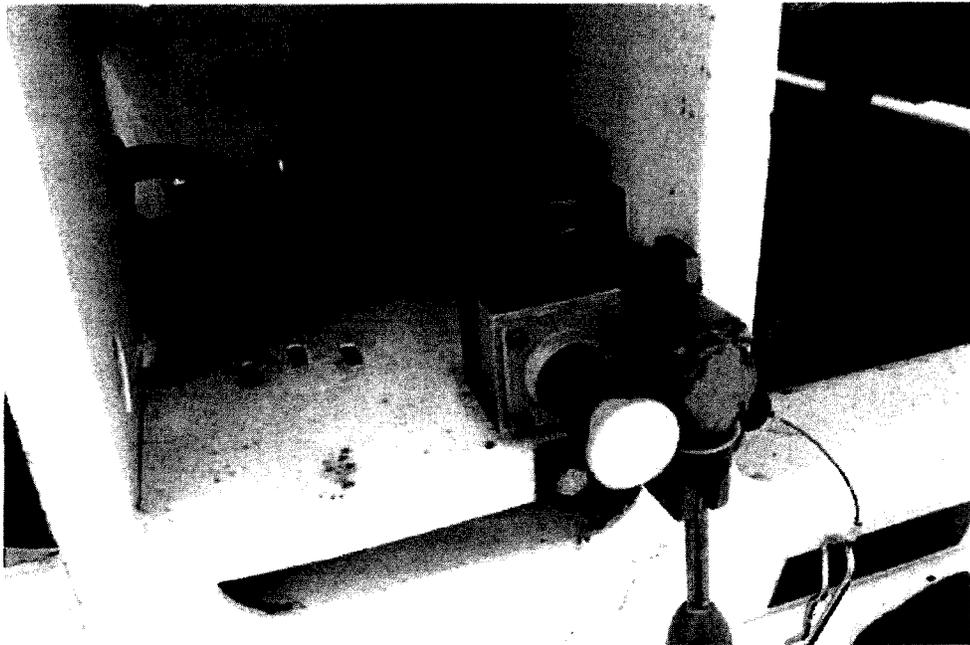
**Figure 5-11. Accident Tractor (Unit #5694) and 1<sup>st</sup> Bottom-Dump Trailer (Unit #6773)**



**Figure 5-12. 2<sup>nd</sup> Accident Bottom-Dump Trailer (Unit #6774)**



**Figure 5-13. 3<sup>rd</sup> Accident Bottom-Dump Trailer (Unit #6775)**



**Figure 5-14. Dump Control Valve – Unit #6775**

**6. ACCIDENT TRACTOR TRIPLE-BOTTOM-DUMP-TRAILER COMBINATION INSPECTION  
AND DUMP SITES INSPECTIONS, APRIL 28 & 29, 2016**

Inspections of the accident tractor triple-bottom-dump-trailer combination and unintended dump sites were completed by FEI and Anderson Engineering, Inc. (AEI) on April 28 and 29, 2016. Table 6-1 summarizes the photographic documentation acquired during the inspection.

The following notes were written during FEI's inspection of the accident tractor triple-bottom-dump-trailer combination and later adapted for this report.

Attendees: Thierry Barkley, counsel for MDB Trucking  
Brian Brown, counsel for MDB Trucking  
David Bosch, Forensic Engineering, expert for MDB Trucking  
Erik Anderson, expert for MDB Trucking  
Pat Bigby, MDB Trucking mechanic  
Scott Palmer, MDB Trucking driver/mechanic

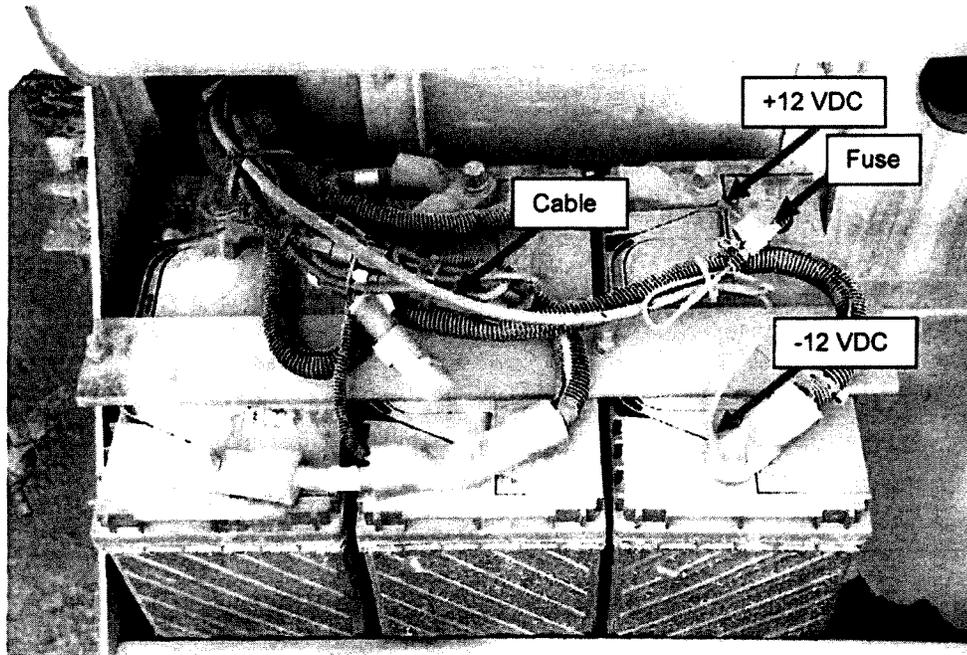
Location: MDB Trucking, Inc. Headquarters  
905 East Mustang Road  
Sparks, Nevada  
Unintended dump sites and travel route

- 6.1 The dump valve control wiring was confirmed to be completely isolated from all other electric power and ground sources. The battery connections are shown in Figure 6-1.
- 6.2 No electrical issues were identified.
- 6.3 No mechanical issues were identified.
- 6.4 Field strength measurements were completed at various locations along the travel route used by the MDB trucks at the time of the unintended dumps.
- 6.5 Figure 6-2 contains a schematic of the switch wiring that is used to control the dump control valves.
- 6.6 No destructive examination or testing was attempted or completed.
- 6.7 Additional discussion regarding the field strength measurements is contained in the AEI report.

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**Table 6-1. Description of FEI Photographs – April 28 & 29, 2016**

212-290 314-343	Field strength measurements
291-297	Dimensions of combination
298-309	Tracing valve control power supply wires tractor unit 5694
310-313	Valve control switches in tractor unit 5693



**Figure 6-1. Tractor Unit 5694 Trailer Valve Control Power Connections**

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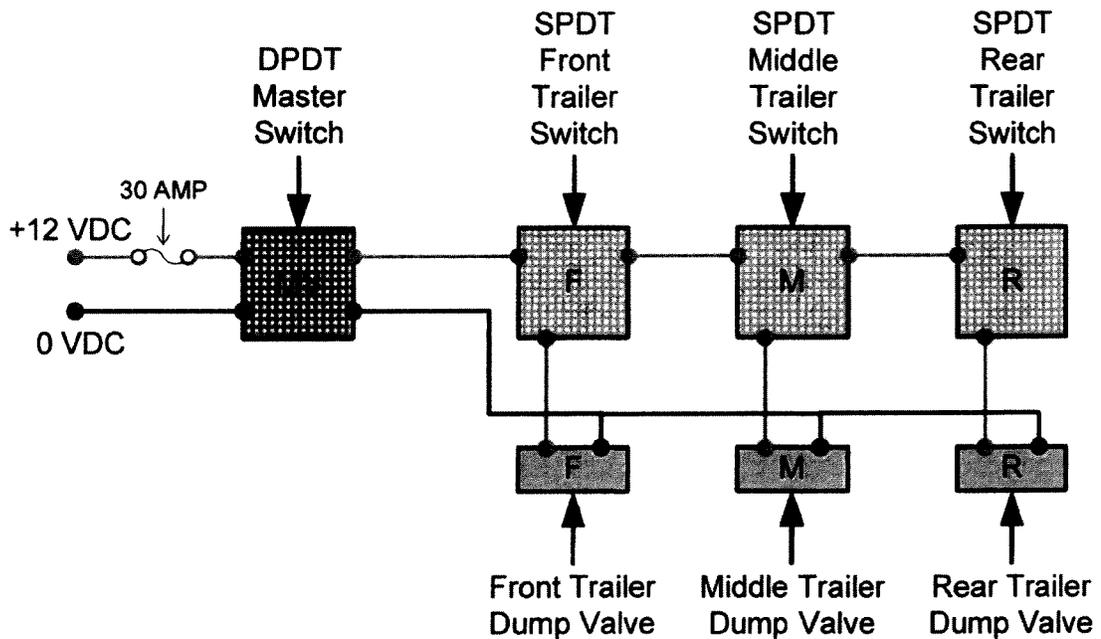


Figure 6-2. Valve Control Switch Schematic

**7. ACCIDENT TRACTOR TRIPLE-BOTTOM-DUMP-TRAILER COMBINATION INSPECTION AND REMOVAL OF TRAILER UNIT 6775 DUMP CONTROL VALVE, OCTOBER 13, 2016**

Forensic Engineering and Anderson Engineering hosted the first inspection of the accident tractor triple-bottom-dump-trailer combination where the other relevant parties were in attendance on October 13, 2016, at MDB's headquarters in Sparks, Nevada. Table 7-1 summarizes the photographic documentation acquired during the inspection.

Attendees: Thierry Barkley, counsel for MDB Trucking  
 Brian Brown, counsel for MDB Trucking  
 David Bosch, Forensic Engineering, expert for MDB Trucking  
 Erik Anderson, expert for MDB Trucking  
 Pat Bigby, MDB Trucking mechanic  
 Scott Palmer, MDB Trucking driver/mechanic  
 Counsel and experts for additional parties

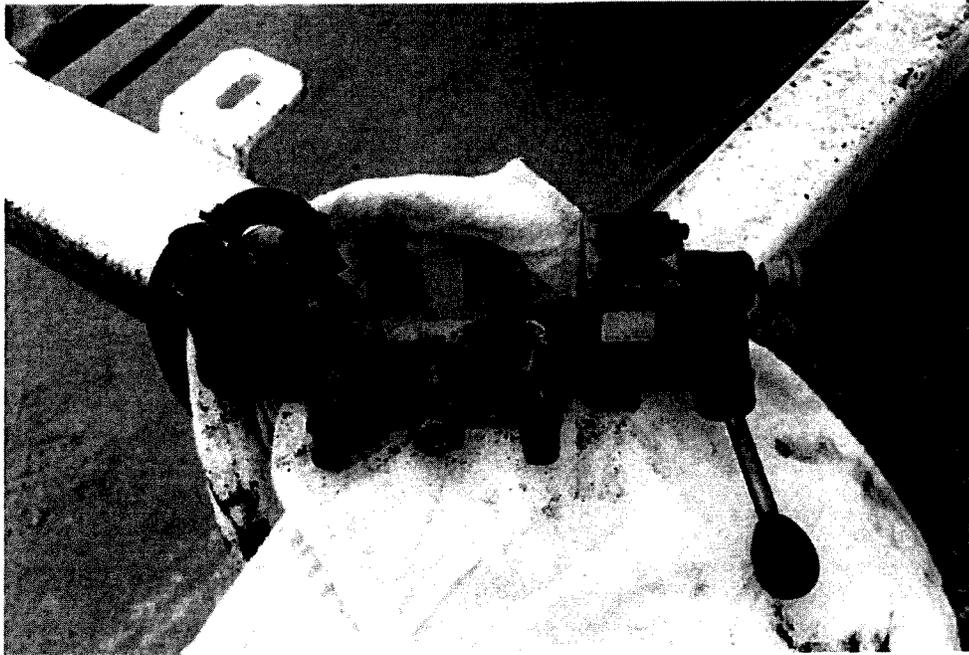
Location: MDB Trucking, Inc. Headquarters  
 905 East Mustang Road  
 Sparks, Nevada

- 7.1 The parties that had not previously viewed the accident combination completed their general inspections.
- 7.2 The function of each trailer dump control system was tested and confirmed to operate as designed.
- 7.3 The valve control system electrical component integrity was tested using a megger. The testing revealed that the system integrity was not compromised. Additional discussion regarding the testing is contained within AEI's report.
- 7.4 No electrical issues were identified.
- 7.5 No mechanical issues were identified.
- 7.6 The Versa bottom dump gate control valve was removed from trailer unit 6775 to facilitate laboratory testing, disassembly and examination.
- 7.7 The removed valve is shown in Figure 7-1.

**Table 7-1. Description of FEI Photographs – October 13, 2016**

350-365	General views of exemplar combination
366-402	Tested electric components
403- 419	Valve removal

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**Figure 7-1. Versa Valve Removed from Trailer Unit 6775**

**8. TRACTOR UNIT 5693 TRIPLE-BOTTOM-DUMP-TRAILER COMBINATION INSPECTION,  
AND TRAILER UNIT 6778 VALVE REMOVAL, NOVEMBER 2, 2016**

Forensic Engineering and Anderson Engineering hosted the first inspection of the tractor triple-bottom-dump-trailer combination power by tractor unit 5693 when the other relevant parties were in attendance on November 2, 2016, at MDB's headquarters in Sparks, Nevada.

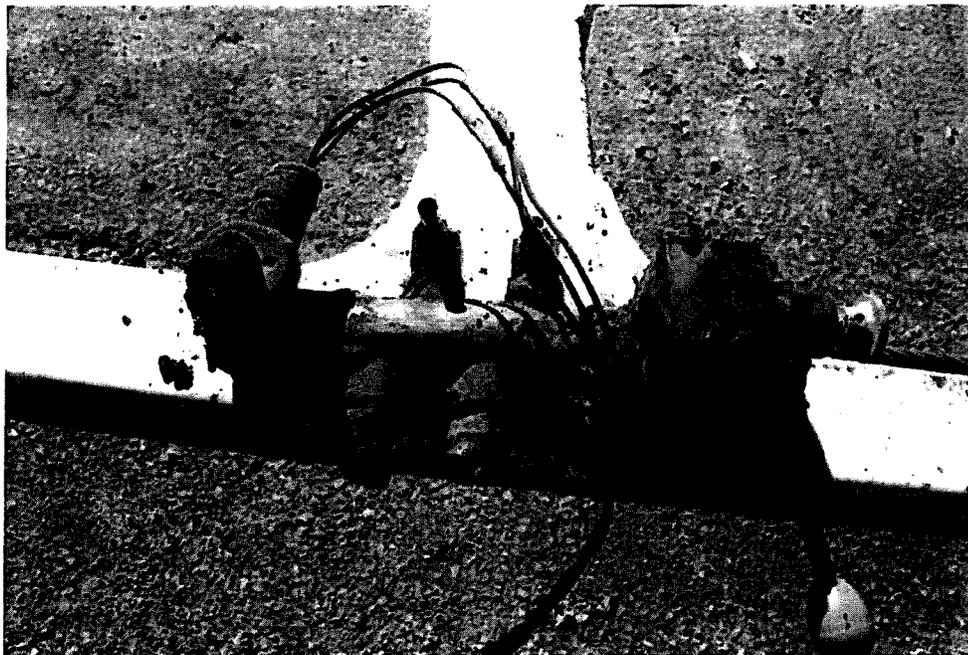
**Attendees:** Thierry Barkley, counsel for MDB Trucking  
David Bosch, Forensic Engineering, expert for MDB Trucking  
Erik Anderson, expert for MDB Trucking  
Pat Bigby, MDB Trucking mechanic  
Scott Palmer, MDB Trucking driver/mechanic  
Counsel and experts for additional parties

**Location:** MDB Trucking, Inc. Headquarters  
905 East Mustang Road  
Sparks, Nevada

- 8.1 The parties that had not previously viewed the tractor unit 5693 powered combination completed their general inspections.
- 8.2 The function of each trailer dump control system was tested and confirmed to operate as designed.
- 8.3 The bottom dump control wiring was traced and examined.
- 8.4 No electrical issues were identified.
- 8.5 No mechanical issues were identified.
- 8.6 The Versa bottom dump gate control valve was removed from trailer unit 6778 to facilitate laboratory testing, disassembly and examination.
- 8.7 The removed valve is shown in Figure 8-1.

**Table 8-1. Description of FEI Photographs – November 2, 2016**

448-463	General views of combination
464-471	Close views of trailer unit 6776
472-481	Close views of trailer unit 6777
482-492	Close views of trailer unit 6778
493-530	Trailer unit 6776 wire harness routing and condition
531-589	Trailer unit 6777 wire harness routing and condition
590-635	Trailer unit 6778 wire harness routing and condition
636-648 656-659	Close views of cab features including air pressure used for functionality testing
649-655	Testing valve function trailer unit 6778
660-675 700-703	Under dashboard valve control components
676-699	Trailer wire continuity and resistance testing
704-713	Examination of terminal boxes
714-738	Removal of valve from trailer unit 6778
739-742	Alternative valve



**Figure 8-1. Versa Valve Removed from Trailer Unit 6778**

#### **9. REMOVED VALVE TESTING, DISASSEMBLY AND EXAMINATION, NOVEMBER 30, 2016**

Forensic Engineering and Anderson Engineering hosted the testing, disassembly and examination of the Versa valves that were removed from trailer unit 6775 and trailer unit 6778. The work was completed on November 2, 2016, at Forensic Engineering's laboratory with all relevant parties in attendance. Table 9-1 summarizes the photographic documentation acquired during the inspection.

The following notes were written during the testing, disassembly and examination of the aforementioned Versa valves and later adapted for this report.

**Location:** Forensic Engineering, Inc.  
4665 South Ash Avenue  
Suite G4  
Tempe, Arizona

**Attendees:** Brian Brown, counsel for MDB Trucking  
David Bosch, Forensic Engineering, expert for MDB Trucking  
Erik Anderson, expert for MDB Trucking

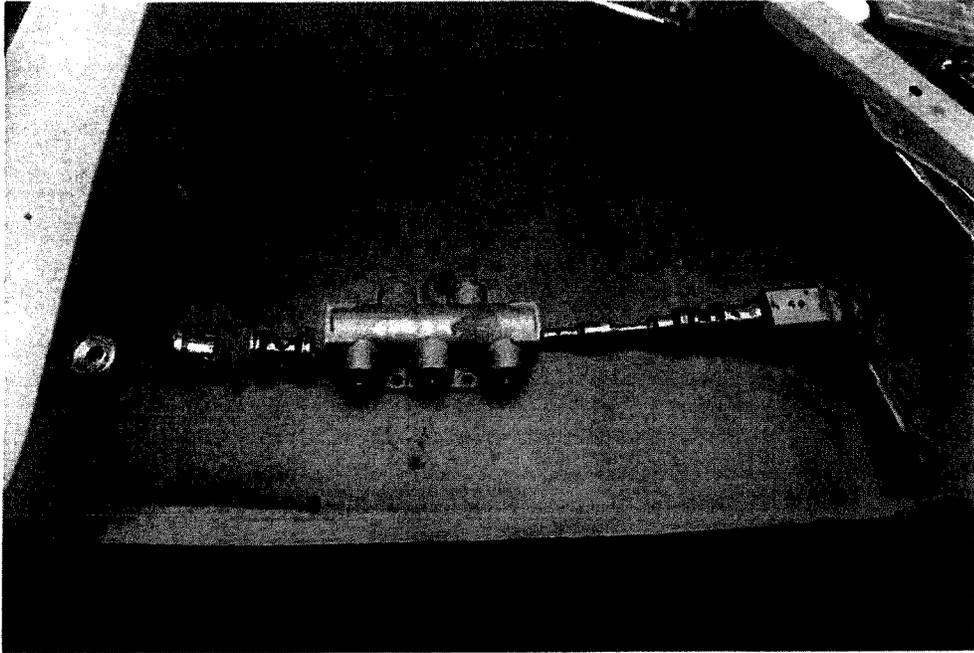
David Rondinone  
John Kleppe  
Garrick Mitchell  
Barham Nazmi  
Paige Shreve  
Jeremy Thompson

- 9.1 Valve Removed from Trailer Unit 6775
  - 9.1.1 Discussion regarding the solenoid activation voltage and current are contained within AEI's report.
  - 9.1.2 The electromechanical testing of the valve revealed that the valve functioned as designed.
  - 9.1.3 After the electrical and electromechanical testing was completed, debris was removed from the valve.
  - 9.1.4 The valve was then disassembled as shown in Figure 9-1.
  - 9.1.5 Disassembly of the valve did not reveal an electrical or mechanical issue or an issue that could cause unintentional activation.
- 9.2 Valve Removed from Trailer Unit 6778
  - 9.2.1 Discussion regarding the solenoid activation voltage and current are contained within AEI's report.
  - 9.2.2 The electromechanical testing of the valve revealed that the valve functioned as designed.
  - 9.2.3 After the electrical and electromechanical testing was completed, debris was removed from the valve.
  - 9.2.4 The valve was then disassembled as shown in Figure 9-2.
  - 9.2.5 Disassembly of the valve did not reveal an electrical or mechanical issue, or an issue that could cause unintentional activation.

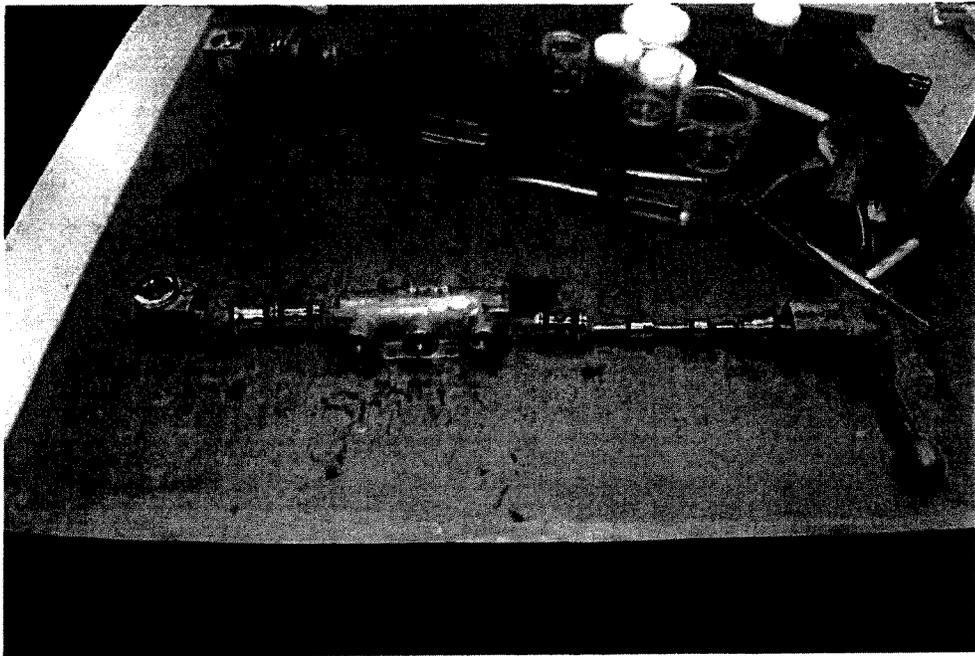
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**Table 9-1. Description of FEI Photographs – November 30, 2016**

<b>Valve Removed from Trailer Unit 6775</b>	
749-753	Packaging and labeling of valve
754-759	General views of valve
760-763	Splice in wires
764-768	Solenoid resistance measurements with splice in place
769 & 770	Sectioned splice
771-797	Solenoid electrical measurements without air pressure
798-806	Removal of original fittings and installation of fittings for pressure tests
807-813	Solenoid electrical measurements with air pressure
814-818	Preparation of valve for debris removal
847-849	Debris removal
856-867	Removal and disassembly of the pilot chamber assembly
868-885	Removal and disassembly of the solenoid cap assembly
886-897	Removal and disassembly of the lever cap assembly, pilot cap assembly and body assembly
<b>Valve Removed from Trailer Unit 6778</b>	
819-822	Packaging and labeling of valve
823-829, 898	General views of valve
830-832	Solenoid electrical measurements without air pressure
833-840	Removal of original fittings and installation of fittings for pressure tests
841-846	Solenoid electrical measurements with air pressure
847-853	Preparation of valve for debris removal
854 & 855	Debris removal
899-907	Removal and disassembly of the pilot chamber assembly
908-923	Removal and disassembly of the solenoid cap assembly
924-935	Removal and disassembly of the lever cap assembly, pilot cap assembly and body assembly
936-939	Repackaging valves



**Figure 9-1. Disassembled Valve Removed from Trailer Unit 6775**



**Figure 9-2. Disassembled Valve Removed from Trailer Unit 6778**

## 10. DRIVER INTERVIEWS, NOVEMBER 2 & 3, 2016

Forensic Engineering and Anderson Engineering interviewed Mr. Dan Koski and Mr. Scott Palmer on November 2 & 3, 2016. The following notes were written by FEI during the interviews and later adapted for this report.

### 10.1 Mr. Scott Palmer

- 10.1.1 It takes approximately 3-4 seconds for a trailer to dump the load.
- 10.1.2 He was traveling toward Reno on I-80 west.
- 10.1.3 After the unintended dump, the valve was still in open position.
- 10.1.4 The trailer dumped just before the rest area.
- 10.1.5 Both he and Dan were hauling from the Paiute pit in Fernley
- 10.1.6 He was hauling concrete sand.
- 10.1.7 Dan was hauling ¾" #67 gravel.
- 10.1.8 When he found the valve in the open position, he flipped the switch on ==> off and the gates then closed.
- 10.1.9 He was at Vista Boulevard before he knew that the gates were open.
- 10.1.10 He was hauling his third load of the day.
- 10.1.11 He had left the Paiute pit at 8:40 a.m.
- 10.1.12 The trailer dumped at 8:50 a.m. or before.
- 10.1.13 An unintended dump had never happened before with this truck/trailer.
- 10.1.14 It was very cloudy, cool, and (relatively) overcast.
- 10.1.15 He did not think lights were on.
- 10.1.16 The unintended dump was not a unique event.
- 10.1.17 He was in San Jose to look at job and saw 30-40 trailers with locks.

### 10.2 Mr. Dan Koski

- 10.2.1 Lakeside Specialized Transport had an unintended dump on I-80 that caused crash.
- 10.2.2 Western Nevada Transport had at least one unintended dump.
- 10.2.3 He was on his third run of day.

- 10.2.4 He was hauling from Paiute Pit in Fernley to the Cemex plant in Reno on Galetti Way.
- 10.2.5 He was hauling ¾" gravel - concrete rock.
- 10.2.6 He was hauling the same material as on the previous two loads.
- 10.2.7 He was driving his issued vehicle.
- 10.2.8 He would occasionally tow different trailer(s).
- 10.2.9 The first unintended dump (July 2013) was in almost same spot - he was hauling sand.
- 10.2.10 The first dump was near the underpass at Derby Dam.
- 10.2.11 He was hauling the same direction for both dumps.
- 10.2.12 He was driving the same truck/trailers.
- 10.2.13 Both dumps were from the last trailer.
- 10.2.14 The Wadsworth Justice Court dismissed case - Tracy Shane attended court.
- 10.2.15 Tracy Shane is now with Cyclone Transport.
- 10.2.16 John Davis Construction was the source of the tractor.
- 10.2.17 He pulled over at Derby Dam and called 911.
- 10.2.18 The trooper claimed no injuries.
- 10.2.19 The gates were still open after he stopped.
- 10.2.20 He always used the manual lever due to his sight.
- 10.2.21 He always cycled the gates when heading into pits to clear material.
- 10.2.22 He heard that the ABS might have had something to do with dump.
- 10.2.23 It was nice weather - no details.
- 10.2.24 The truck/trailers were running normally.
- 10.2.25 The lights were on (safely).
- 10.2.26 Dan's cell phone number is: 775-338-7576.

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## 11. EXEMPLAR VALVE TESTING AND EXAMINATION

Three exemplar Versa valves, two part number VGK-4523-20C-D012 pilot-solenoid actuated valves [identical to the accident valve] and one VGA-4523-181J-U-218A-D012 latching/manual reset valve.

Forensic Engineering fabricated an experimental apparatus to facilitate its investigation regarding the unintended dumps. The apparatus was used with an exemplar valve installed to determine the details of valve function including the solenoid activation and deactivation voltage and current. It was also used to investigate the electrical and/or mechanical conditions that could cause the valve to inadvertently cause the bottom dump gates to open. The experimental apparatus is shown in Figures 11-1 and 11-2.

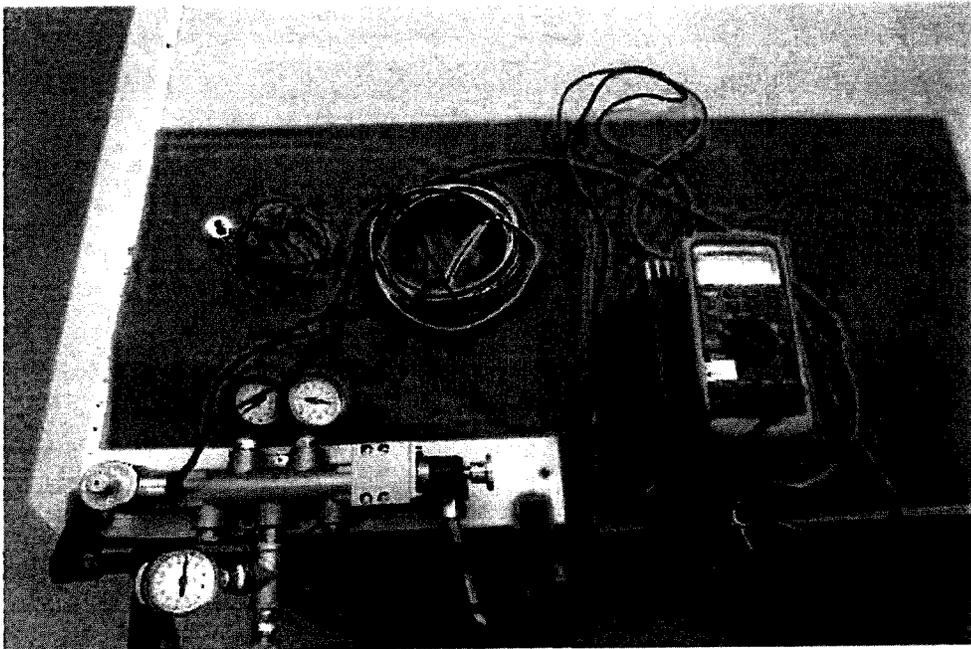
One of the VGK-4523-20C-D0 pilot-solenoid actuated valves was disassembled as shown in Figures 11-3 through 11-6. The design was analyzed and functionality it's determined.

It was determined that the solenoid that controls the dump valve can be activated by a voltage as low as 8.5 VDC; approximately 4.7 VDC lower than the typical system voltage of 13.2 VDC. Additional information obtained using the apparatus is contained in AEI's report.

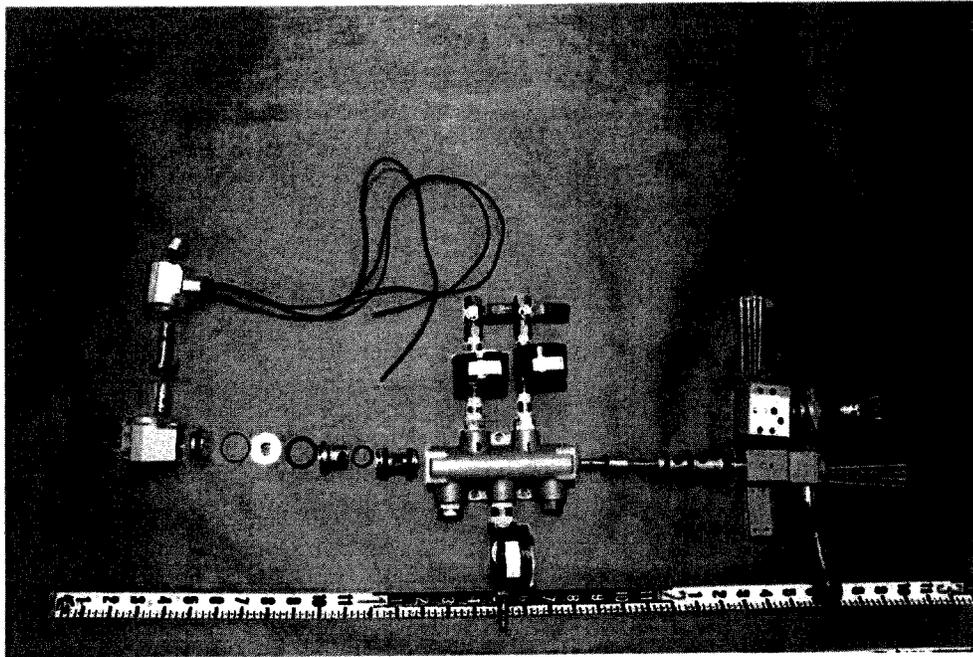
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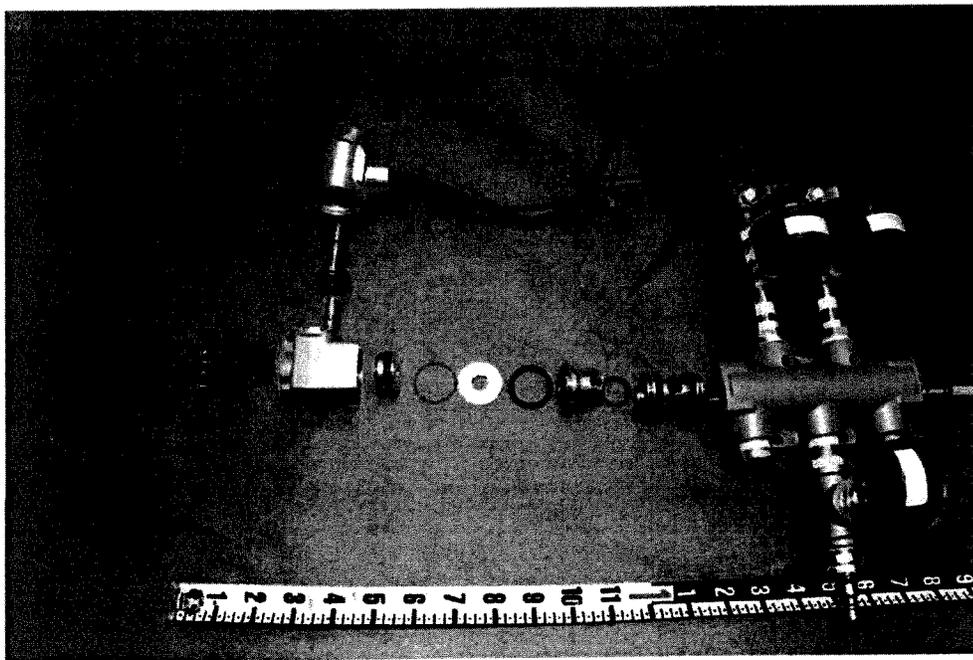
**Figure 11-1. Experimental Apparatus for Dump Valve and Control System Testing**



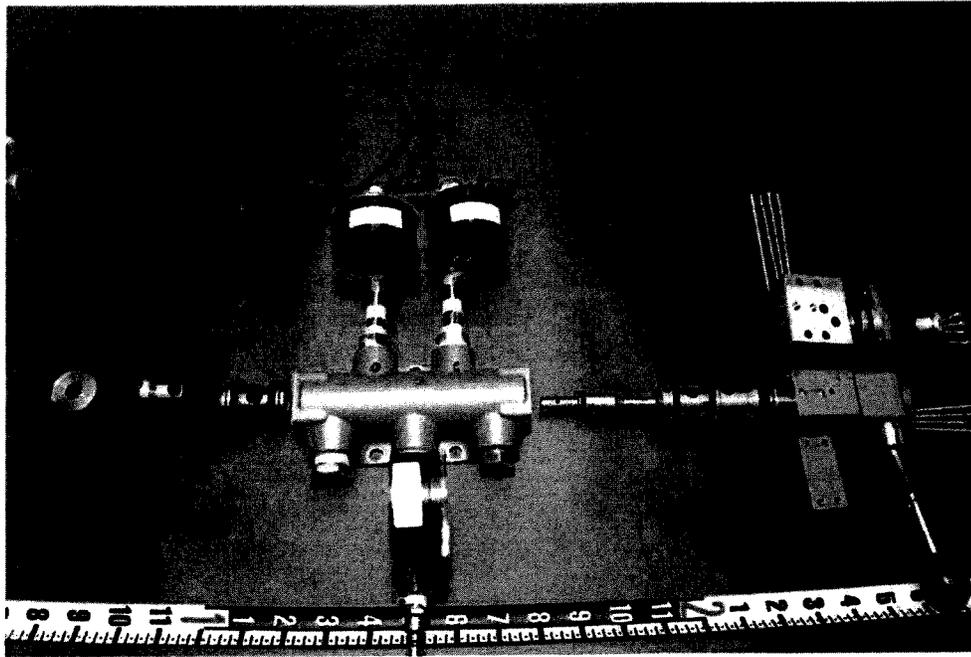
**Figure 11-2. Experimental Apparatus for Dump Valve and Control System Testing**



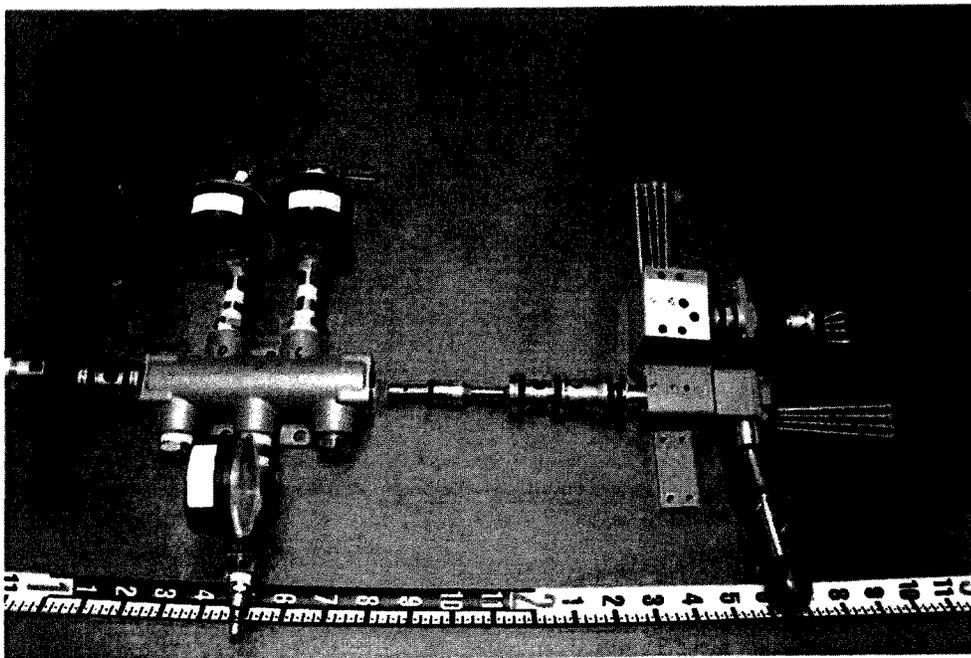
**Figure 11-3. Disassembled Exemplar Versa Bottom Dump Valve**



**Figure 11-4. Close View of Exemplar Versa Bottom Dump Valve Components**



**Figure 11-5. Close View of Exemplar Versa Bottom Dump Valve Components**



**Figure 11-6. Close View of Exemplar Versa Bottom Dump Valve Components**

## **12. SUMMARY OF UNINTENDED DUMP INFORMATION**

- 12.1 Mr. Koski stated that he is aware of other multiple, inadvertent activations of Versa valves used on Western Nevada Trucking trailers.
- 12.2 Capurro Trucking has experienced multiple unintended activations of the belly dump systems since 2006. Three of the unintended activations are discussed in the report by Ruhl Forensic.
- 12.3 Mr. Ferran at Western Nevada Transport (NVT) stated during an interview on October 13, 2016, that he was familiar with the erratic behavior, and unintended dumps involving Versa valves on Ranco belly dump trailers at NVT and other trucking companies including MDB trucking.
- 12.4 On July 25, 2013 and July 30, 2013, the tractor / trailer combination, owned and operated by MDB Trucking, and driven by Mr. Koski experienced unintended activation and dumping of the load in the third trailer.
- 12.5 Mr. Koski stated that he is aware of other multiple, unintended activations of Versa valves used on Western Nevada Trucking trailers.
- 12.6 Mr. Palmer stated that Capurro Trucking had experienced 4 or 5 inadvertent activations of their belly dump mechanisms.

There was never any electrical or mechanical malfunction discovered with any unintended activation of the Versa valves.

Additional information regarding unintended dumps involving Versa valves is being gathered by FEI and will be summarized in a supplemental report.

### **13. SUMMARY OF CONCLUSIONS AND OPINIONS**

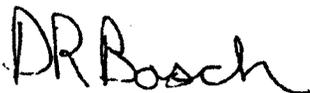
The following summary of conclusions and opinions are based upon FEI's investigation as summarized in Sections 1-1 through 1-12 above and upon the education, experience and training of the author. The opinions and conclusions are within a reasonable degree of scientific and engineering certainty. Forensic Engineering reserves the right to supplement its conclusions and opinions if additional information is discovered and/or provided.

- 13.1 After the unintended dump from the tractor triple-trailer bottom-dump combination (tractor unit 5694 and trailer units 6673, 66743 and 6775) in July 2013, MDB Trucking's mechanics did not find a tractor, trailer or Versa valve-related electrical or mechanical issue that could have caused the dump.
- 13.2 Forensic Engineering's examination of the evidence indicates that MDB Trucking's July 2013 investigation was thorough and complete and that the findings were correct.
- 13.3 In response to the July 2013 dump, MDB replaced the Versa valve (unnecessarily but as an extra measure of caution) on the trailer (unit 6775) that inadvertently dumped. It also isolated the dump valve control system power supply from the vehicle's accessory (lights) electrical system by connecting the dump valve control system directly to the tractor batteries. MDB also added a double-pole single-throw (DPST) master toggle switch in series with the individual trailer dump toggle switches to add a layer of redundancy to the control system. In other words, rather than requiring that one switch be manipulated to dump the chosen trailer, two switches require manipulation in order to complete the dump.
- 13.4 Note that the addition of the DPST master switch not only isolated the "hot" side of the dump valve control circuit from other tractor and trailer circuits, it also isolated the negative or ground side of the control circuit from all other circuits. This action made it impossible for electrical energy from the tractor or trailers to activate any of the dump valves without two toggle switches being placed in the "ON" position.
- 13.5 MDB determined that the probability of the driver causing the July 2013 unintended dump was extremely low.

- 13.6 Forensic Engineering's examination of the evidence indicates that MDB Trucking's response after the July 2013 unintended dump was technically appropriate and correct and completely eliminated any possibility that tractor or trailer-related electrical issues could inadvertently cause another unintended dump.
- 13.7 Given that Versa Valve intended that its valve be used as MDB Trucking used it, it was completely reasonable for MDB to continue using the valve after having eliminated any possibility that the MDB equipment could cause another unintended dump.
- 13.8 After the July 2014 unintended dump from trailer units 6775 and 6778, MDB Trucking immediately removed all of its bottom dump trailers from the roadway.
- 13.9 Forensic Engineering's investigation revealed that there were no electrical issues associated with tractor unit 5694 or trailer units 6772, 6774 or 6775 that caused the July 2014 unintended dump of crushed rock from trailer unit 6775 that lead to plaintiffs' injuries.
- 13.10 Forensic Engineering's investigation revealed that there were no electrical issues associated with tractor unit 5693 or trailer units 6776, 6777 or 6778 that caused the July 2014 unintended dump of sand from trailer unit 6778 near the same time and location as the trailer unit 6775 dump.
- 13.11 After the July 2014 unintended dumps, MDB Trucking legitimately and conscientiously could no longer trust the Versa valve design.
- 13.12 After the July 2014 unintended dumps, MDB Trucking immediately designed and installed on all of its bottom dump trailers a device that mechanically locked the Versa valve in the "gate closed" position and positively eliminated unintended dumps due to the defective Versa valve design.
- 13.13 MDB trucking immediately installed the valve locks on all of its bottom dump trailers before it redeployed the trailers onto the roadways.
- 13.14 Forensic Engineering's examination of the evidence indicates that MDB Trucking's response after the July 2014 unintended dumps was technically appropriate and correct and completely eliminated any possibility that the defectively designed Versa valve could cause any additional unintended dumps.

- 13.15 MDB Trucking's competitors have had many other unintended dumps from bottom dump trailers using the Versa valve, as documented during FEI's investigation.
- 13.16 In most of the unintended dump cases, an electrical issue associated with the truck or trailer(s) has been investigated and determined to not have been the root cause of the dump.
- 13.17 The only logical explanation for the numerous unintended dumps is that the Versa valve design is defective.
- 13.18 The Versa valve part number VGK-4523-20C-D0 design is defective.
- 13.19 The Versa valve part number VGK-4523-20C-D0 is unreasonably dangerous.
- 13.20 MDB Trucking was using the Versa valve as it was intended to be used.
- 13.21 MDB Trucking properly and reasonably maintained its vehicles in a condition that they did not cause the unintended dumps.
- 13.22 There were no vehicle issues that could have caused the Versa valve to activate and dump loads.
- 13.23 There is no evidence that the drivers caused the unintended dumps.
- 13.24 There were multiple alternative designs, including replacement of the electrical solenoid with a pneumatic solenoid that would have eliminated unintended dumps.
- 13.25 Given the severity of the consequences of unintended dumps, a valve that eliminated unintended dumps by redundancy or other alternative design in the control system was appropriate, reasonable and necessary.

The conclusions and opinions contained within this report are to a reasonable degree of certainty.



---

David Bosch, Ph.D.

# EXHIBIT 7



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## ***Forensic Engineering Report***

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**File Name:** MDB Trucking Accident

**Our File Number:** 2015258

**Date of Accident:** July 7, 2014

**Accident Location:** Mile Marker 39, IR80, West Bound  
Wadsworth, Nevada

**Prepared By:** Mr. Erik S. Anderson, P.E., C.F.E.I.

**Prepared For:** Thierry V. Barkley, Esq.  
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Reno, Nevada 89509

**Issue Date:** June 16, 2017

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AA001421

## **I. Summary**

On July 7, 2014, at approximately 9:00 a.m., an accident occurred on Interstate 80, at mile marker 39, outside of Reno, Nevada. The accident occurred when a tractor / triple trailer combination inadvertently released its load from the last trailer onto the Interstate. The tractor / trailer combination was travelling West on the Interstate freeway. The tractor / trailer combination was owned and operated by MDB Trucking at the time of the accident.

I have examined the tractor / trailer combination and the electrical system of the vehicle and trailers associated with the actuator valve for the dumping system. I have examined the route of the tractor / trailer combination from where the load was picked up in Wadsworth, Nevada, to the accident site. I have interviewed those knowledgeable with the facts surrounding the accident and the operation of the dumping system. I have reviewed documents and depositions regarding this accident and the operation of the dumping gate valve manufactured by Versa Products Company.

It is my opinion that the accident was not caused by any action, or inaction of MDB Trucking or its employees. The Versa valve for the dumping system is susceptible to erratic operation and external magnetic fields can cause inadvertent operation. The Versa valve is defective in design due to its propensity for inadvertent operation.

## **II. Introduction / Background Information**

On July 7, 2014, the tractor / trailer combination, owned and operated by MDB Trucking, was hauling aggregate West on Interstate 80, when the third trailer inadvertently dumped its load. The accidental release of material occurred West of exit 40, near mile marker 39, at approximately 9:00 a.m.

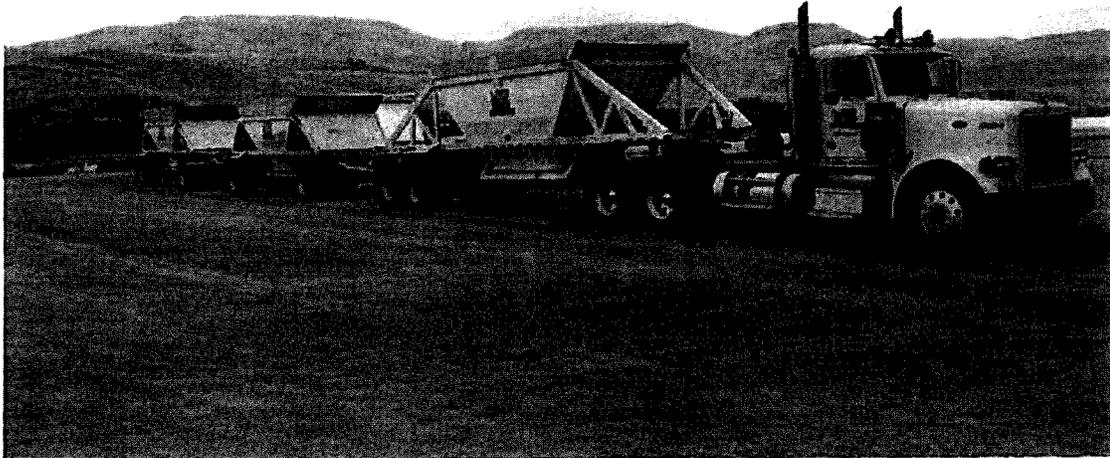
The driver of the tractor / trailer was Mr. Daniel A. Koski. Mr. Koski was a licensed driver working for MDB Trucking. Mr. Koski was unaware that his third trailer had accidentally released. Mr. Koski was flagged down by another vehicle traveling West who informed him of the inadvertent release.

Mr. Koski was hauling concrete rock from the Paiute Pit in Wadsworth, Nevada to the Cemex plant in Reno, Nevada. Mr. Koski was on his third run of the day.

The diesel tractor driven by Mr. Koski was manufactured by Peterbilt Motors Company with a manufacturing date of 01/2003. The tractor VIN is 1XP-5DB9X-7-3D807486. The MDB Trucking number given this tractor is 5694.

The three trailers are of Ranco manufacture.

	<b>VIN</b>	<b>Mfg. Date</b>	<b>MDB Trucking No.</b>
1 <sup>st</sup> trailer (con. to tractor)	1R9DBSA2077L008042	10/2006	6773
2 <sup>nd</sup> trailer (middle)	1R9BP450631008610	10/2003	6774
3 <sup>rd</sup> trailer (last)	1R9BP45082L008431	09/2002	6775



**MDB Trucking Tractor / Trailer Operated by Daniel Koski.**

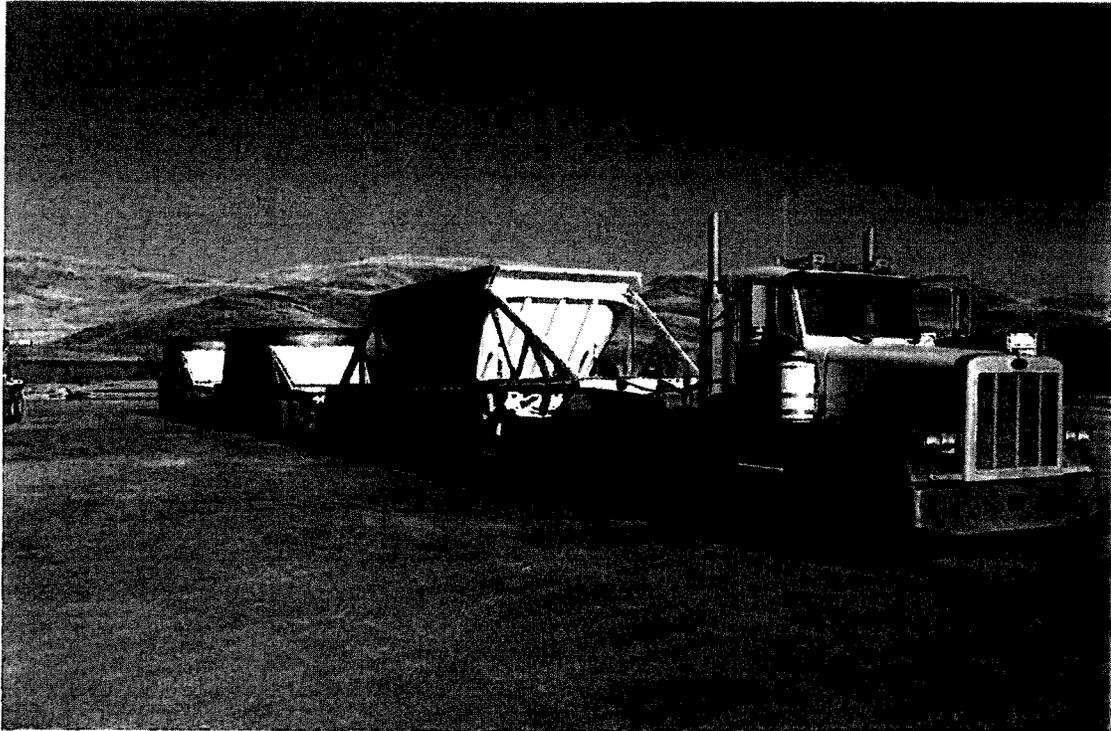
Also on July 7, 2014, another tractor / trailer combination, owned and operated by MDB Trucking was hauling aggregate West on Interstate 80, when the third trailer inadvertently dumped its load. The accident release of material occurred East of exit 40 at approximately 8:50 a.m. The inadvertent activation of the Versa valve occurred near the rest stop at mile marker 42 on Interstate 80.

The driver of the tractor / trailer combination was MDB Trucking licensed driver Mr. Scott Palmer. Mr. Palmer was traveling West, approximately 10 minutes ahead of Mr. Koski. Mr. Palmer was unaware that his third trailer had inadvertently released its load. Mr. Palmer was hauling sand from the Paiute Pit in Wadsworth, Nevada to Cemex in Reno, Nevada. Mr. Palmer discovered that his third trailer accidentally dumped when he received a phone call asking him if his trailer had inadvertently activated when he arrived in Reno. Mr. Palmer was on his third run of the day.

The diesel tractor, driven by Mr. Palmer, was manufactured by Peterbilt Motors Company with a manufacturing date of 01/2003. The tractor VIN is 1XP-5DB9X-7-3D807486. The MDB Trucking number given this tractor is 5693.

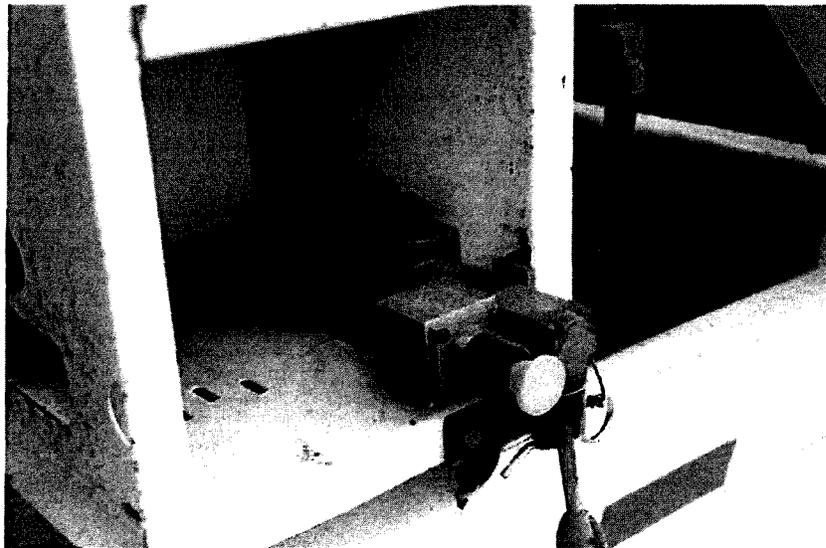
The three trailers are of Ranco manufacture.

	VIN	Mfg. Date	MDB Trucking No.
1 <sup>st</sup> trailer (con. to tractor)	1R9BSA2047L008046	10/2006	6776
2 <sup>nd</sup> trailer (middle)	1R9BP45003L008621	10/2003	6777
3 <sup>rd</sup> trailer (last)	1R9BP450X2L008432	09/2002	6778



**MDB Trucking Tractor / Trailer Operated by Scott Palmer.**

The Ranco trailers owned and operated by MDB Trucking incorporate a valve that controls air pressure utilized to operate the gates of the dumping system. The valves were manufactured by Versa Products Company, Inc. The Versa valves on the Ranco trailers are part number VGK-5423-20C-D012.



**Versa Valve on Trailer 6775.**

On April 28, 2016, the location of the accident and portions of the route traveled by Mr. Koski and Mr. Palmer were examined and documented, along with portions of the MDB Trucking tractor / trailer combination driven by Mr. Koski. Mr. Pat Bigby, head mechanic with MDB Trucking was also interviewed on April 28, 2016.

On October 13, 2016, the tractor / trailer combination driven by MDB Trucking driver Daniel Koski was examined, tested, photographed, and documented. The Versa valve from MDB Trucking trailer number 6775 was removed from the Ranco trailer.

On October 13, 2016, Adam Ferran, the shop foreman for Western Nevada Transport, was interviewed.

On November 2, 2016, the tractor / trailer combination driven by MDB Trucking driver Scott Palmer was examined, tested, photographed, and documented. The Versa valve from MDB Trucking trailer number 6778 was removed from the Ranco trailer.

On November 2, 2016, MDB Trucking driver Scott Palmer was interviewed. On November 3, 2016, MDB Trucking driver Daniel Koski was interviewed.

On November 30, 2016, the Versa valves from MDB Trucking trailer numbers 6775 (Koski) and 6778 (Palmer) were bench tested, documented, and photographed.

A copy of all photographs taken will be supplied with the report along with photograph identifications.

### **III. Documents Relied Upon**

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1. State of Nevada Traffic Accident Report, Accident Number NHP 140700621.
2. State of Nevada Citation Number X00760952.
3. State of Nevada Citation Number X00862816.
4. Driver/Vehicle Examination Report Number NV7290001379.
5. Complaint for Personal Injuries CV13 01372.
6. Report dated 5/13/14 and authored by Peter A. Philbrick.
7. Defendant's (MDB and Koski) Answers to Plaintiffs' First Set of Interrogatories.
8. Defendant Versa Products Company, Inc.'s Responses to Defendant MDB Trucking, LLC's First Set of Interrogatories.
9. Documents produced by Versa Products Company, Inc.
10. Deposition transcript of Scott Palmer dated March 6, 7, and 8, 2017.
11. Deposition transcript of Daniel Koski dated March 8, 2017.
12. Deposition transcript of Tracy Shane dated April 11, 2017.
13. Deposition transcript of Patrick Bigby dated April 10, 2017.
14. Deposition transcript of Gerald Gramegna dated May 9, 2017.
15. Deposition transcript of Bahram Nazmi dated May 9 and 10, 2017.

### **IV. Erratic Operation of Versa Valves**

---

Multiple incidences of erratic operation associated with the Versa valve have been witnessed. Some of those incidences of erratic behavior are described as follows.

- a. Dan Koski, with MDB Trucking, witnessed the Versa valve pulsating back and forth, after removing the Cotter Key that held it in the closed position.
- b. On July 25, 2013 and July 30, 2013, the tractor / trailer combination, owned and operated by MDB Trucking, and driven by Mr. Koski experienced inadvertent activation and dumping of the load in the third trailer.

The tractor / trailer combination Mr. Koski was driving in July 2013, was the same as that he was driving in July 2014. Mr. Koski was driving West on Interstate 80, near mile marker 37 when the inadvertent dumping occurred on July 25, 2013. Mr. Koski was driving West on Interstate 80, near mile marker 41 when the inadvertent dumping occurred on July 30, 2013. The load that was inadvertently dumped was sand from the Paiute Pit in Wadsworth, Nevada.

- c. Capurro Trucking has experienced multiple inadvertent activations of the belly dump systems since 2006. Three of the inadvertent activations are listed below.
  1. Capurro Trucking inadvertent activation of the dumping system occurred on August 27, 2010.
  2. On February 12, 2013, the tractor / trailer combination owned and operated by Capurro, experienced an inadvertent activation and dumping of a trailer. The tractor was manufactured by Peterbilt and the trailers were manufactured by Ranco. The Capurro driver was traveling West on Interstate 80.
  3. On March 10, 2013, the tractor / trailer combination owned and operated by Capurro, and driven by Nelse Wynne, experienced an accidental dumping of a trailer. The trailers were manufactured by Ranco. The tractor was a 2005 Peterbilt. Mr. Wynne was traveling West on Interstate 80.

There was never any electrical or mechanical malfunction discovered with any inadvertent activation of the Versa valves.

#### **V. Inspections / Testing**

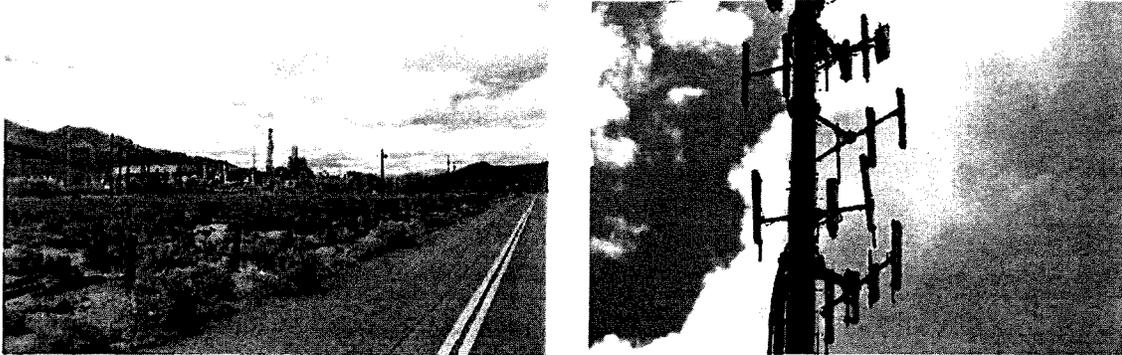
- a. On April 28, 2016, the locations of the inadvertent activation and dumping on July 7, 2014, of the belly dump Ranco trailers that were pulled by tractors driven by Mr. Koski and Mr. Palmer, were viewed and examined.

The inadvertent activations occurred on Interstate 80, Westbound, both East and West of exit 40.

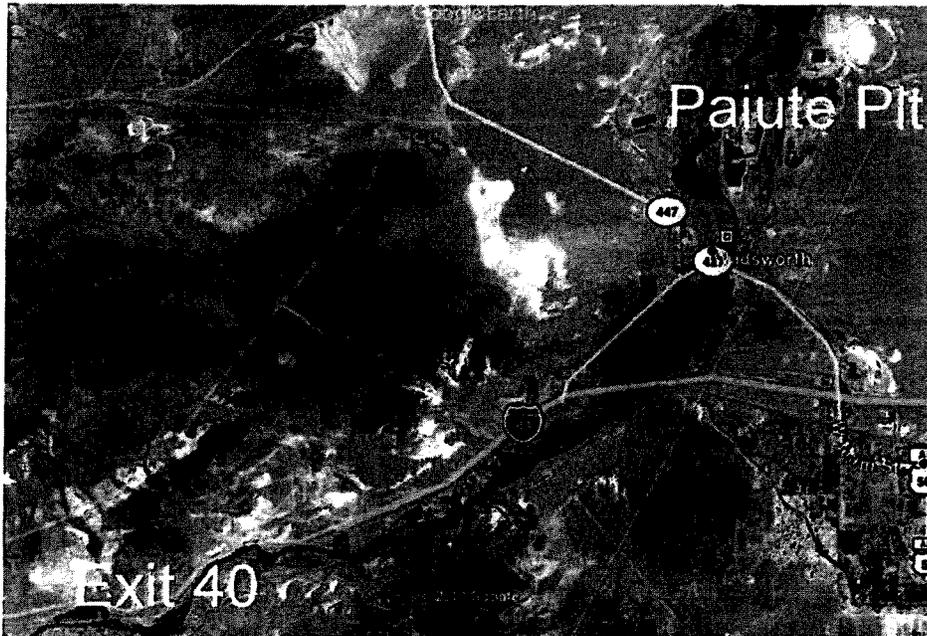
- b. The Paiute Pit in Wadsworth, Nevada, where the aggregate that was accidentally dumped came from, was visited.

The potential sources of electromagnetic interference ("EMI") and radio frequency interference ("RFI") along the route were also observed and documented.

Potential sources of electrical fields were found near exit 30 on Interstate 80. The Frank A. Tracy electrical generation plant is located at this exit. Electrical transmission lines span Interstate 80. At exit 40 on Interstate 80 is a communication tower. The tower has multiple communication antennas attached.



**Electrical Generation Plant and Communications Tower.**



**Google Earth View Path of Travel.**

- c. On April 28, 2016, the tractor / trailer combination driven by Mr. Koski on July 7, 2014, was examined, photographed, and documented. The examination occurred at MDB Trucking located at 905 East Mustang Road, Sparks, Nevada.

The tractor was turned ON and the operation of the belly dump system was observed. The wiring of the electrical system of the belly dump trailers was observed, photographed, and examined.

The tractor / trailer combination is approximately 112 feet long. The electrical wiring for the belly dump system of the truck driven by Mr. Koski was found to have been modified after the accidental dumping in July of 2013. The power to the individual solenoids for the Versa valves are switched individually. There are 3 switches that control individually the Versa valve for each trailer. There was an additional master switch incorporated into the system that switches both the hot and ground conductors for the switches that control the individual Versa valves.



#### **Versa Valve Activating Switches.**

To operate the Versa valves the master switch must be turned ON before any power is delivered to the individual trailer switches. Switch covers were incorporated for the 4 switches that activate the Versa valves.

- d. On October 13, 2016, the tractor / trailer combination driven by MDB Trucking driver Daniel Koski was examined, tested, photographed, and documented. The examination occurred at MDB Trucking located at 905 East Mustang Road, Sparks, Nevada.

During the examination, the truck was started and the air pressure was allowed to increase. It was noted that it took approximately 20 minutes for the air pressure to come up to a level high enough to actuate the belly dump system at the third trailer. Once the air pressure was sufficient, manual operation of the valve on the third trailer was performed with the use of the Versa valve lever. The belly dump system operated as expected without any erratic behavior. When the lever was pushed toward the trailer, the belly dump doors would open. When the lever was pulled away from the trailer, the belly dump doors would close.

An aftermarket Cotter Key and associated bracket was attached to the trailer after the inadvertent activation on July 7, 2014. The Cotter Key modification restricts the Versa valve lever from movement toward the trailer. With the Cotter Key in place, holding the Versa valve

lever stationary, the solenoid for the Versa valve was energized. The belly dump doors did not open, and the Versa valve lever remained in its original position.

Without the Cotter Key in place, the solenoid was activated, the Versa valve lever moved toward the trailer, and the belly dump gates opened. When the solenoid for the Versa valve was deactivated, the lever moved back away from the trailer, and the belly dump gates closed.

All the Versa valves were individually activated and their operation was observed. The belly dump gates for the individual trailers opened and closed as expected from the use of the activation switches in the cab of the tractor. The functionality of the master switch was tested and found to function as expected. With all the individual trailer belly dump switches in the ON position, the main switch was cycled. All the belly dump gates opened and closed on all the trailers with the activation of the master switch.

The wiring to the activation switches for the Versa valves was examined. Power to the master switch comes from one of the 12 Volt batteries for the tractor. The power conductor insulation coming from the positive of the battery has black insulation. The positive black conductor is protected with a 30 Amp fuse. The yellow insulated conductor is attached to the negative of the tractor battery.

The black and yellow conductors are both connected to a DPST (double pole single throw) master switch. The master switch switches both the hot and ground of the power to the Versa valves. From the master switch, the black insulated wire feeds each of the individual trailer Versa valves SPST (single pole single throw) switches.

From the activation switches, 4 wires travel out of the tractor to power the individual Versa valves. The four wires are a common ground and 3 individual hot wires; one for each Versa valve.

Resistance readings were taken and recorded at the activation switches in the cab of the tractor.

	<b>Resistance reading between hot and ground (Ohms)</b>
First trailer	16.0 to 16.6
Second trailer	17.1 to 22.4
Third trailer	22.4 to 23.3

The resistance between the ground wire traveling back to the trailers and the chassis of the tractor was found to be greater than 60 MOhms when tested with a Fluke multimeter. The resistance between the ground conductor and the chassis was found to be approximately 370 MOhms, and increasing, when using a Megger on the 250 Volt DC scale. There are no electrical shorts between the chassis of the vehicle and the return conductor for the Versa valves.

The connections at the back of the first trailer and the second trailer for the 4-wire cable that controls the Versa valves was examined and resistance measurements between the conductors were taken. At the back of the first trailer, resistance readings of 18 Ohms and

15.7 Ohms were found between pins 2 to 4 and pins 1 to 3 respectively. At the back of the second trailer, resistance reading of 16.1 Ohms was found between pins 1 to 3.

The Versa valve from MDB Trucking trailer number 6775 was removed from the Ranco trailer and preserved for further examination.

- e. On November 2, 2016, the tractor / trailer combination driven by MDB Trucking driver Scott Palmer was examined, tested, photographed, and documented. The examination occurred at MDB Trucking located at 905 East Mustang Road, Sparks, Nevada.

The functionality of the Versa valves associated with the tractor / trailer combination was tested similarly as with the tractor / trailer combination driven by Mr. Koski. The Versa valves functioned similarly. The wiring was different from the vehicle driven by Mr. Koski in that it did not incorporate a master switch.

In the cab of the tractor, resistance measurements were taken between the hot conductors to each of the trailer Versa valves and ground.

<b>Resistance between:</b>	<b>Measurement (Ohms)</b>
hot conductor for the first trailer Versa valve to ground	18.3
hot conductor for the second trailer Versa valve to ground	20.7
hot conductor for the third trailer Versa valve to ground	22.1

Resistance measurements were taken at the 4-pin connections from the tractor back to the last trailer. The results are as follows:

<b>Resistance readings at the Pogo Stick Plug connector from the tractor to the first trailer</b>			<b>Connection at the front of the first trailer</b>		
<b>Pins</b>		<b>Resistance (Ohms)</b>	<b>Pins</b>		<b>Resistance (Ohms)</b>
1 to 2		31.4	1 to 2		15.2
1 to 3		11.7	1 to 3		34.5
1 to 4		27.7	1 to 4		32.2
2 to 3		11.8	2 to 3		19.2
2 to 4		34.3	2 to 4		17.4
3 to 4		12.2	3 to 4		32.4
			2 to GND		1.9

<b>Connection at back of first trailer, female connector</b>			
Pins	Resistance (Ohms)		Resistance (Ohms)
1 to 2	12.2		1 to GND
1 to 3	14.9		2 to GND
1 to 4	550 K		3 to GND
2 to 3	16.5		4 to GND
2 to 4	550 K		
3 to 4	530 K		
<b>Connection at back of second trailer</b>			
Pins	Resistance (Ohms)		Resistance (Ohms)
1 to 2	>60 M		1 to GND
1 to 3	17.6		2 to GND
1 to 4	>60 M		3 to GND
2 to 3	>60 M		4 to GND
2 to 4	>60 M		
3 to 4	>60 M		
<b>Connection at back of third trailer</b>			
Pins	Resistance (Ohms)		Resistance (Ohms)
1 to 2	>60 M		1 to GND
1 to 3	>60 M		2 to GND
1 to 4	>60 M		3 to GND
2 to 3	>60 M		4 to GND
2 to 4	15		
3 to 4	>60 M		

The Versa valve from MDB Trucking trailer number 6778 was removed from the Ranco trailer and preserved for further examination

- f. On November 30, 2016, the Versa valves from MDB Trucking trailer numbers 6775 (Koski) and 6778 (Palmer) were bench tested, documented, and photographed. The examination and testing of the Versa valves occurred at 4665 South Ash Avenue, Suite G-4, Tempe, Arizona.

The Versa valves are part number VGK-4523-20C-D012. The Versa valve from trailer 6775 was examined first. The resistance of the coil of the solenoid was measured and found to be approximately 15 Ohms. A DC source of 12 Volts was applied to the solenoid coil. The solenoid activated. The power source was then decreased and the voltage and current were recorded. The voltage was decreased in increments of 0.5 Vols. It appeared that the solenoid

did not deactivate when the voltage was decreased slowly. The test was repeated, and the solenoid was found to deactivate at 1.5 Volts.

Air pressure was then connected to the Versa valve. With a pressurized valve, the voltage to the solenoid coil was increased slowly to determine what voltage the solenoid activates. The solenoid was found to activate at 7.1 Volts and 0.46 Amps.

The Versa valve was then broken down and the individual components were examined.

The Versa valve from trailer 6778 was similarly tested. The resistance of the solenoid coil was measured at approximately 15 Ohms. The solenoid was found to activate at 12 Volts and 0.78 Amps. The minimum amount of voltage to activate the solenoid was found to be 8.1 Volts and .54 Amps, and the solenoid dropped out at 1.4 Volts and 0.08 Amps.

The Versa valve was then broken down and the individual components were examined.

## **VI. Interviews**

- a. Pat Bigby, head mechanic for MDB Trucking, was interviewed on April 28, 2016.

Mr. Bigby stated that after the inadvertent activation of the Versa valve in July of 2013 on the Koski vehicle certain changes were made to the belly dump system. The Versa valve from the last trailer of the vehicle driven by Mr. Koski was replaced with a new Versa valve. The master switch was installed to control the activation switches. The wiring for the activation of the Versa valve solenoids was replaced.

The green wire ground for the Versa valve solenoids was disconnected and taped off. Mr. Bigby stated that this was done because when he energized the green wire, the Versa valve would activate.

- b. Adam Ferran, the shop foreman for Western Nevada Transport, was interviewed on October 13, 2016.

Mr. Ferran stated that Western Nevada Transport purchased the Ranco trailers new and then sold them to MDB Trucking in 2012. Mr. Ferran was familiar with the erratic behavior, and accidental activation of the Versa valves on Ranco belly dump trailers.

- c. Scott Palmer, driver for MDB Trucking, was interviewed on November 2, 2016.

Mr. Palmer learned about the inadvertent dumping on July 7, 2014, when he was called and told that Mr. Koski had inadvertently dumped his load. Mr. Palmer was coming into Reno, Nevada when he received the notifying phone call.

He later learned that he lost the load from his third trailer on this run. The inadvertent dumping occurred on Interstate 80, while traveling West, just East of the rest area near exit 40. Mr. Palmer was hauling concrete sand from the Paiute Pit in Wadsworth, Nevada to the Cemex plant in Reno, Nevada.

Mr. Palmer was driving approximately 10 minutes ahead of Mr. Daniel Koski who was hauling on the same route. Mr. Palmer stated that Mr. Koski recalls driving through the sand that was inadvertently dumped. Mr. Koski experienced an inadvertent activation and dumping of his third trailer's load West of exit 40, while traveling West on Interstate 80, within a few minutes of Mr. Palmer's inadvertent activation and dumping.

The inadvertent activation and dumping of the third trailer was the first time Mr. Palmer lost a load with the tractor / trailer he was driving. Mr. Palmer had experienced inadvertent activation with other vehicles.

Mr. Palmer was unaware that he had experienced an inadvertent dump until he arrived in Reno. To close the belly dump doors, the activation switch was cycled. The switch for the third trailer dumping mechanism was turned ON and then OFF. This then caused the belly dump doors to close. Mr. Palmer stated that all the activation switches in both his truck and Mr. Koski's truck were in the OFF position at the time of the inadvertent activation and dumping.

Mr. Palmer stated that Capurro Trucking had experienced 4 or 5 inadvertent activations of their belly dump mechanisms. Capurro Trucking is located in Sparks, Nevada. Mr. Palmer did not intentionally or accidentally activate the Versa valve for his third trailer.

d. Daniel Koski, former driver for MDB Trucking, was interviewed on November 3, 2016.

Mr. Koski was driving West on Interstate 80 on July 7, 2014, when he was flagged down by another motorist who informed him that his load of aggregate had dumped on the Interstate. Mr. Koski was on his third run between the Paiute Pit in Wadsworth, Nevada to the Cemex plant in Reno. Mr. Koski was hauling gravel, ¾ minus, of concrete rock.

Mr. Koski recalled having previous issues with the inadvertent dumping of his load. His previous inadvertent dumping occurred near the Derby Dam underpass while traveling West on Interstate 80. When the last trailer dumped near Derby Dam, the first two trailers remained full, and the gates to the third trailer remained open. The Derby Dam underpass is near exit 36 on Interstate 80.

Mr. Koski stated that he is aware of other multiple, inadvertent activations of Versa valves used on Western Nevada Trucking trailers. Mr. Koski did not intentionally or accidentally activate the Versa valve on his third trailer.

## **VII. Versa Valve Operation**

The part number VGK-4523-20C-D012 Versa valve is described as bottom dump control valve. The valve can be operated in 2 modes.

One mode is the use of the solenoid. The solenoid must be energized for pressure on one side and exhaust on the other. The energization of the solenoid also pressurizes the air spring. Then when the solenoid is de-energized, the air spring will reverse the pressure and exhaust ports.

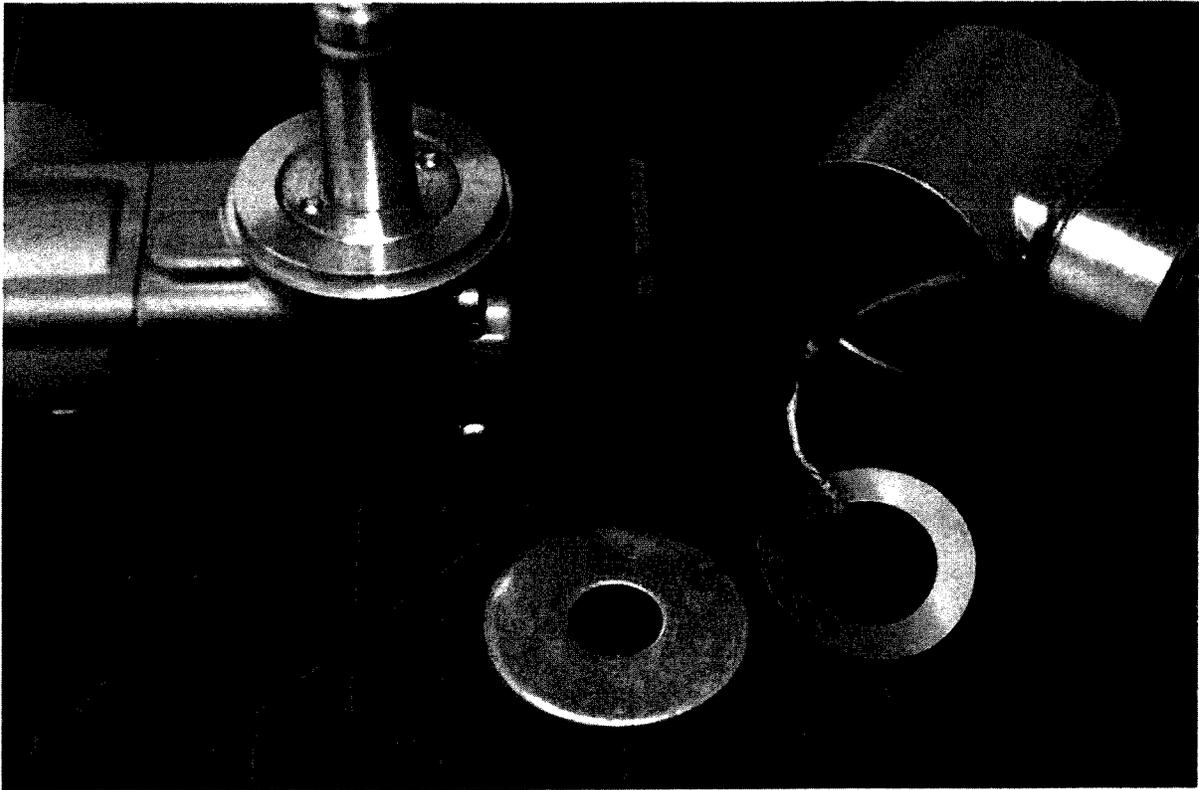
The other mode for use of the valve is manually with the use of the lever. With the solenoid de-energized and the air spring de-pressurized, the lever can move the valve to pressure one side and exhaust the other, to reverse the pressure in the ports, or to close all ports.

The valve operates between 50 to 175 psi. It is rated for 12 Volts and 9.4 Watts. The solenoid coil is rated for continuous duty.

Further analysis of the Versa valve was severely limited due to the lack of information provided regarding the components, testing, and operation of the valve.

### **VIII. Solenoid / Magnetic Theory**

Solenoids are a loop of wire, or a coil, that is used to create a magnetic field. The coil of wire is typically manufactured using solid copper magnet wire. The coil is typically placed around a ferrous material.



**Versa Valve Solenoid Components.**

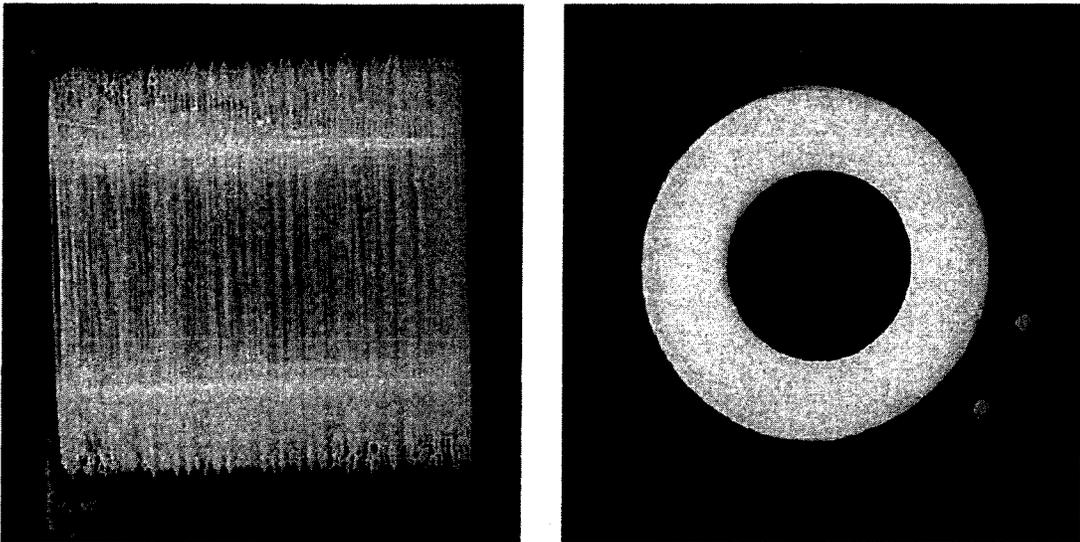
The coil incorporated in the Versa valve solenoid is energized with approximately 12 Volts DC creating a current to flow through the coil. The current is approximately 0.78 Amps, at 12 Volts, and 9.4 Watts. The resistance of the coil is approximately 15 Ohms. The relationship between voltage, current, and power is given by the following laws.

Ohms Law             $V = I \times R$   
Watts Law          $P = V \times I$

Where:

R = Resistance (Ohms)  
V = Voltage (Volts)  
I = Current (Amps)  
P = Power (Watts)

The coil for the Versa valve solenoid appears to have approximately 2500 turns. An x-ray of an exemplar coil from a similar Versa valve is shown below.



**X-Ray Film of Versa Valve Coil.**

The magnetomotive force (mmf) is given by the number of turns on the coil multiplied by the current flowing through the coil.

$$\text{mmf} = N \times I$$

Where:

N = number of turns on coil  
I = Current (Amps)  
mmf = magnetomotive force

and:

$$\text{mmf} = H \int X d\beta$$

Where:

H = Magnetic Field Strength (Ampere Turns / Meter)  
 $\beta$  = Magnetic flux Density (Teslas, Webers / Meter<sup>2</sup>)

and:

$$\beta = \mu H$$

$$\mu = \mu_0 \mu_r$$

Where:

$$\mu_0 = 4\pi \times 10^{-7} \text{ Henrys / meter} = \text{permeability of air}$$

$$\mu_r = \text{relative permeability}$$

The current through the coil creates a magnetic field that is quantified by the amount of current multiplied by the number of turns. The magnetic field produces a proportional magnetic flux, and a magnetic flux density.  $H$  is the magnetic field strength and  $\beta$  is the magnetic flux density.

For the coil to produce a magnetic field and a corresponding magnetic flux, there must be current flow through the coil. Without current flow through the coil, the coil cannot produce a magnetic flux.

The magnetomotive force developed in the solenoid coil on the Versa valve overcomes a spring force and moves a plunger, thus increasing the inductance of the coil, and causing the valve to change state.

The force required to overcome the spring on the solenoid plunger is approximately 1.2 lbs. The movement of travel of the plunger appears to be approximately 0.2 inches.

## **IX. Analysis**

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The potential for an external source of EMI or RFI to interfere with the operation of the Versa valve in the solenoid operation mode was explored. The large size of the tractor / trailer combination can potentially hold a large electric charge. The tractor / trailer combination can also potentially act as a large antenna causing it to be susceptible to RFI. The energy from EMI or RFI would have to discharge through the coil of the solenoid to create the force required to move the plunger. The coils for the Versa valves on Mr. Koski's truck were isolated from the truck. One side of the solenoid coil was not connected to the vehicle ground. Therefore, there is no path for the current to flow to ground, or discharge, through the solenoid coil.

The wiring for the Versa valves for the Koski truck was different than that for the Palmer truck. The Koski truck incorporated a master switch that disconnected the hot and ground from all the solenoids. The Palmer truck did not incorporate a master switch. Both vehicles inadvertently dumped their loads of aggregate at relatively the same time, on the same road, going the same way, on each of their 3<sup>rd</sup> trips on the same routes.

After the inadvertent dumping of aggregate that occurred to the Koski vehicle twice within a few days in 2013, the vehicle was rewired, a new Versa valve was installed, along with the master switch. All these changes did not stop further inadvertent dumping of aggregate.

The Versa valve was found to fluctuate between states multiple times until the air pressure was vented. The fluctuations occurred even when wiring to the Versa valve was disconnected. There have been multiple occasions when inadvertent dumping of loads

occurred on MDB Trucking vehicles, Capurro Trucking vehicles, and other trucking company vehicles, where after close examination of the vehicles involved, no electrical or mechanical malfunction could be found.

The examinations of the MDB Trucking vehicles operated by Mr. Koski and Mr. Palmer revealed that there were no electrical problems with the wiring to the Versa valves on the trailers. There were no shorts to ground and no shorts to hot.

## **X. Discussion**

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The potential for a mechanical failure of the Versa valve will be discussed by Dr. David R. Bosch. It is my understanding that Dr. Bosch's opinion is that the Versa valves did not inadvertently activate due to a mechanical failure of the valve or the vehicle.

The Versa valve was not operating in the lever mode when the inadvertent activations occurred. There was no physical force moving the lever handle causing the Versa valve to activate.

Therefore, the only mode the Versa valve can be operating in at the time of the inadvertent activation is the mode involving the solenoid. The solenoid incorporates a coil to create the force needed to move the plunger. For the coil to be the source of the force to move the plunger, there must be current flowing through the coil.

The witness and the examination of the vehicles precludes current flowing through the coil for the solenoid due to the wiring and the witnessing of the erratic behavior while there was no connection to the coil. Without a connection of power or ground to the coil, there can be no current flow.

The Versa valve is susceptible to external magnetic fields. An external magnetic field can cause the plunger to move. When all other potential failure modes have been negated, the only cause of the failure must be that which cannot be ruled out.

The Versa valve that inadvertently activated on the MDB Trucking vehicle that Mr. Koski was driving on July 7, 2014, was only a year old. The Versa valve that inadvertently activated on the MDB Trucking vehicle that Mr. Palmer was driving on July 7, 2014, was significantly older. Both failed to function properly.

## **XI. Conclusion**

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It is my opinion, within a reasonable degree of engineering certainty, based upon my experience, education, and background, my examination of the vehicles and the Versa valve, my interviews, and the information supplied, that the inadvertent activation and dumping of the Ranco trailers that occurred on July 7, 2014, at approximately 9:00 a.m. on Interstate 80 West at mile marker 39 outside of Wadsworth, Nevada, was not due to any action, or inaction, of MDB Trucking or its employees or drivers.

Further it is my opinion that the Versa valves are defective in design as they are susceptible to accidental activation from an external magnetic field.

These opinions are based on information and work performed to date. I reserve my right to alter my opinion should further work be performed, or in the event of new information.

**XII. Publications**

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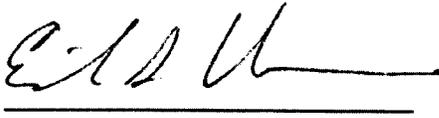
I have not authored any publications within the last ten years.

**XIII. Compensation**

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I am compensated on an hourly rate basis for all work performed on this matter.

Sincerely,



---

Erik S. Anderson, P.E., C.F.E.I.

1 CODE: 4185  
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435 Marsh Avenue  
3 Reno, Nevada 89509  
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4 Court Reporter

5

6 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 THE HONORABLE ELLIOTT A. SATTLER, DISTRICT JUDGE

--oOo--

9

10 CONSOLIDATED: Case No. CV15-02349  
ERNEST BRUCE FITZSIMMONS  
11 and CAROL FITZSIMMONS, Dept. No. 10  
Husband and Wife,

12 Plaintiffs,

13

vs.

14

MDB TRUCKING, LLC; et al.,

15

Defendants.

16

17

18 TRANSCRIPT OF PROCEEDINGS

19 HEARING ON MOTIONS

20 Tuesday, August 29, 2017

21

22

23

24 Reported By: PEGGY B. HOOGS, CCR 160, RDR, CRR  
California CSR 5958

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APPEARANCES :

FOR DANIEL ANTHONY KOSKI  
and MDB TRUCKING, LLC:

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RENO, NEVADA; TUESDAY, AUGUST 29, 2017; 1:27 P.M.

-oOo-

THE COURT: This is CV15-02349, the consolidated case of Fitzsimmons vs. MDB Trucking.

Mr. Wieczorek is here on behalf of Koski and MDB Trucking.

Good afternoon.

MR. WIECZOREK: Good afternoon, Your Honor. Thank you.

THE COURT: Wieczorek; right?

MR. WIECZOREK: Absolutely right.

THE COURT: Mr. Aicklen and Mr. Bick are here on behalf of Versa.

Good afternoon to you both as well, gentlemen.

MR. AICKLEN: Good afternoon, Judge.

MR. BICK: Good afternoon, Your Honor.

THE COURT: And seated out there in the audience like a Cheshire cat with a big grin on his face is Mr. Addison, who is here on behalf of RMC Lamar, I think it is.

MR. ADDISON: That's correct, Your Honor.

THE COURT: You're settled so you are no longer

1 part of the proceedings. Mr. Addison had joined in a  
2 number of the motions that had been filed on behalf of  
3 Versa Enterprise, but I guess you're not necessary  
4 anymore in these proceedings.

5 MR. ADDISON: That's correct, Your Honor.  
6 Therefore, I'd request the Court's permission to be  
7 excused.

8 THE COURT: Any objection from either counsel?

9 MR. WIECZOREK: No, Your Honor.

10 MR. AICKLEN: No objection.

11 THE COURT: Thank you for being here,  
12 Mr. Addison. Have a great day.

13 THE WITNESS: Thank you, Judge.

14 Good luck, gentlemen.

15 THE COURT: We are here for three -- strike  
16 that -- four separate motions. As a preliminary matter,  
17 we started about ten minutes late today. I want to  
18 apologize to all three of you gentlemen. Your time is  
19 just as valuable as mine, and so I try and start on time  
20 all the time, but I was actually looking at some case law  
21 regarding your motion practice, so I wasn't using your  
22 time on somebody else's case, I was using it on yours,  
23 but we did start late, and I apologize to all three of  
24 you for that.

1           We are here today to resolve four outstanding  
2 motions, and we will resolve them in the following order:  
3 The first motion that we will consider is the June 23,  
4 2017, file-stamped MDB Trucking, LLC's Motion for Leave  
5 to Amend Cross-Claim Against Cross-Claimant RMC Lamar  
6 Holdings and Versa Products Company To Add Additional  
7 Cross-Defendant Peter Paul Electronics Company,  
8 Incorporated. The Court has received and reviewed that  
9 document.

10           Further, as I go through the motion practice,  
11 the Court would note that I personally have read each of  
12 the documents in question, I have reviewed each and every  
13 exhibit that is appended to any document, and so if at  
14 any time you feel the need to refer to an exhibit, please  
15 feel free to do. I always print out the documents  
16 themselves because I find it easier to read that way, but  
17 I don't print out exhibits, so if you ever want to talk  
18 about exhibits that you've attached, please just give me  
19 a second and I'll pull it up on my computer.

20           Can you stop doing that?

21           MR. WIECZOREK: Your Honor, thank you.

22           THE COURT: No, no. Stop. I just said stop  
23 doing that. You're clicking your pen. It's one of those  
24 odd OCD --

1           MR. WIECZOREK: Your Honor, I'm going to swap  
2 this pen out because it's a fatal habit of mine. I  
3 apologize to the Court.

4           THE COURT: That's okay. It's one of those  
5 things that drives me crazy, so I apologize to you.

6           The Court has also received and reviewed the  
7 July 13, 2017, file-stamped Defendant/Cross-Claimant/  
8 Cross-Defendant Versa Products Company, Incorporated's  
9 Opposition to Defendant/Cross-Claimant/Cross-Defendant  
10 MDB Trucking, LLC's Motion to Amend Cross-Claim To Add  
11 Additional Party, Peter Paul Electronics Company,  
12 Incorporated.

13           I'll skip over Mr. Addison's joinder and note  
14 that I have also received and reviewed the July 24, 2017,  
15 file-stamped MDB Trucking LLC's Reply in Support of  
16 Motion for Leave to Amend Cross-Claim to Add Additional  
17 Cross-Defendant Peter Paul Electronics Company,  
18 Incorporated. The Motion for Leave to Amend was  
19 submitted for the Court's consideration on July 25th of  
20 2017.

21           Just so you can anticipate where we're going to  
22 go from there, after we resolve that issue, the next  
23 thing we'll take up is the motion for the striking of the  
24 cross-claims or, in the alternative, for an adverse jury

1 instruction; from there we will address MDB Trucking's  
2 motion to continue the trial; and then, finally, we will  
3 address Versa's objection to the recommended order that  
4 was entered by Discovery Commissioner Ayres regarding  
5 some discovery issues that came up during the litigation.

6           So we will start first, as I said, with the  
7 motion to amend. I'll let both of the parties know that  
8 there is some recent and very significant case law  
9 regarding the motion itself. Neither of the parties have  
10 addressed the most recent cases from the Nevada Supreme  
11 Court or I should say the most recent case from the  
12 Nevada Court of Appeals, but it's directly on point  
13 regarding motion for leave to amend a pleading after the  
14 expiration of a deadline established pursuant to Nevada  
15 Rule of Civil Procedure 16.

16           In this case the Court entered a Rule 16 Case  
17 Management Order. That has been acknowledged by both of  
18 the parties. The Case Management Order is file-stamped  
19 January 10th of 2017 and on page 4 of the Case Management  
20 Order, beginning at line 2, it says:

21           "Status of pleadings and parties. No official  
22 parties may be joined unless a motion to amend or add  
23 parties has been duly filed by May 4th of 2017."

24           And as I stated a moment ago, the motion itself

1 to amend and add Peter Paul was filed approximately six  
2 to seven weeks after that deadline, on June 23rd of 2017,  
3 so there is a conflict there.

4           Neither of the parties addressed nor did they  
5 raise the case of Nutton vs. Sunset Station,  
6 Incorporated, 131 Nev. Adv. Op. 34, 357 P.3d 966, a 2015  
7 case from the Nevada Court of Appeals. I'm not sure if  
8 the parties are ready to argue Nutton or not or if you're  
9 familiar with Nutton. If you're not, let me give you a  
10 little background of it.

11           Judge Tao wrote the opinion from the Nevada  
12 Court of Appeals. One of the things I was looking at  
13 before I came on the bench was to see if the Nevada  
14 Supreme Court had addressed Nutton regarding the issues  
15 that we're discussing today, and the Nevada Supreme Court  
16 has taken no action regarding that. So Nutton vs. Sunset  
17 Station, Incorporated is a case directly on point  
18 addressing the tension between Nevada Rule of Civil  
19 Procedure 15 and Nevada Rule of Civil Procedure 16  
20 regarding motions to amend.

21           Ms. Clerk -- excuse me -- Ms. Reporter, I  
22 apologize because I'm going to read some of this for the  
23 parties' benefit. Given the fact everyone is writing  
24 furiously, I'm not quite sure everyone is familiar with

1 the case or not. Has anyone read Nutton?

2 MR. WIECZOREK: Unfortunately not, Your Honor.

3 MR. AICKLEN: No, Your Honor.

4 THE COURT: Let me just give you the  
5 background, and, Counsel, if you'd like some time to  
6 think about it, you can, and I know listening to somebody  
7 read is one of the most unpleasant experiences in human  
8 existence, but here's what Nutton says at page 968 of the  
9 P.3d Reporter in the introduction, Justice Tao -- or  
10 Judge Tao, I should say -- says:

11 "In this appeal we explore the relationship  
12 between Rule 15(a) and Rule 16(b) of the Nevada Rules of  
13 Civil Procedure, both of which govern the process for  
14 seeking leave to amend pleadings in a civil action.  
15 Under NRCP 15(a), a party should be granted leave to  
16 amend the pleading when 'justice so requires' and the  
17 proposed amendment is not futile. However, when a party  
18 seeks to amend a pleading after the deadline previously  
19 set for seeking such amendment has expired, NRCP 16(b)  
20 requires a showing of 'good cause' for missing the  
21 deadline. We further explore whether a proposed  
22 amendment under NRCP 15(a) can be considered to be futile  
23 because it is unsupported by, or contradicts, facts  
24 previously uncovered during discovery.

1            "We conclude that when a motion seeking leave  
2 to amend a pleading is filed after the expiration of the  
3 deadline for filing such motions, the district court must  
4 first determine whether 'good cause' exists for missing  
5 the deadline under NRCP 16(b) before the court can  
6 consider the merits of the motion under the standards of  
7 NRCP 15(a)."

8            That's just the introduction portion.

9            Just so you know the background of the case, it  
10 was a civil action brought before Judge Susan Johnson  
11 down in Las Vegas. The initial issue was -- it was a  
12 bowling center, and somebody fell while he was bowling,  
13 and the argument was made by the person that he fell  
14 because the bowling alley was overly waxed or there was  
15 some substance on the ground, and then as I remember  
16 reading this case, to paraphrase, even his own expert  
17 said there was no issue with extra wax or some foreign  
18 substance on the ground.

19            So then the plaintiff moved to change his  
20 theory, after the time established to amend the pleadings  
21 had expired, to advance a new theory, and the new theory  
22 was that he didn't have his bowling shoes on and that the  
23 Sunset Station didn't require him to wear bowling shoes,  
24 and so it was a completely different theory. It was a

1 negligence theory.

2 At page 968 to 969 the Court says:

3 "Subsequently, Nutton filed a motion with the  
4 district court seeking leave to amend his complaint  
5 pursuant to NRCP 15(a). Conceding that his own expert  
6 had agreed excessive lane oil did not cause his fall,  
7 Nutton sought to amend his theory of liability to instead  
8 plead that the fall was caused by his street shoes and  
9 Sunset Station had negligently failed to ensure he wore  
10 bowling shoes while he bowled."

11 That goes into page 969.

12 Now, these facts actually are very close to the  
13 facts that we have in the motion to amend in this case.

14 The Nevada Court of Appeals described the  
15 timing of the Nutton case on page 969 as follows:

16 "Nutton's motion was filed approximately three  
17 weeks after the expiration of the deadline to amend  
18 pleadings previously imposed by the district court. At  
19 the time, the final discovery cutoff date was just over  
20 two months away, and trial was set to begin three months  
21 after the close of discovery. Nutton's motion to amend  
22 was also filed after the expiration of the statute of  
23 limitations period for asserting a negligence claim."

24 And then there's some discussion about

1 Judge Johnson denying the motion because it was futile,  
2 but Judge Johnson really just went to the NRCP 15  
3 argument rather than first addressing the NRCP 16  
4 argument.

5 At page 970 the Court says the following:

6 "NRCP 15(a) recites that when a party seeks  
7 leave to amend a pleading after the initial responsive  
8 pleadings have been served, 'leave shall be freely given  
9 when justice so requires.' The Nevada Supreme Court has  
10 held that 'in the absence of any apparent or declared  
11 reason -- such as undue delay, bad faith or dilatory  
12 motive on the part of the movant -- the leave sought  
13 should be clearly given,' " citing Stephens,  
14 S-t-e-p-h-e-n-s, vs. Southern Nevada Music Company,  
15 89 Nev. 104 at pages 105 to 106, 507 P.2d 138, 139, a  
16 1973 case.

17 "Thus, NRCP 15(a) contemplates the liberal  
18 amendment of pleadings, which in colloquial terms means  
19 that most such motions ought to be granted unless a  
20 strong reason exists not to do so, such as prejudice to  
21 the opponent or lack of good faith by the moving party.

22 "The liberality reflected in NRCP 15(a)  
23 recognizes that discovery is a fluid process through  
24 which unexpected and surprising evidence is uncovered

1 with regularity," and then parenthetically it says,  
2 "(particularly when important evidence was solely in the  
3 possession of one party when the case was initiated)..."

4 At page 970 the Court goes on state:

5 "One rule that frequently overlaps with  
6 NRCP 15(a) is NRCP 16(b). NRCP 16(b) requires, among  
7 other things, the district court to set deadlines in each  
8 case for the various events, including deadlines for  
9 conducting various types of discovery and for filing  
10 various kinds of motions. One deadline specifically  
11 contemplated by NRCP 16(b) is one by which motions  
12 seeking to amend the pleadings must be filed with the  
13 court. Moreover, NRCP 16(b) recites that the deadlines  
14 imposed by the court under this rule 'shall not be  
15 modified' except 'upon a showing of good cause.'

16 "Thus, when a party seeks leave to amend a  
17 pleading pursuant to NRCP 15(a) after a deadline set  
18 under NRCP 16(b) for filing such a motion has already  
19 elapsed, such motions implicate NRCP 16(b) in addition to  
20 NRCP 15(a) because they effectively seek a waiver or  
21 extension of that deadline so that the merits of the  
22 motion may be considered. If this were not so, and a  
23 motion seeking leave would be considered only under the  
24 standards of NRCP 15(a) no matter when it was filed, then

1 the deadlines required to be imposed under NRCP 16(b)  
2 would become meaningless and could be blithely ignored."

3 This has now gone on to page 971.

4 "Functionally, NRCP 16(b) serves as something  
5 of a counterweight to NRCP 15(a). In contrast to the  
6 fluidity reflected in NRCP 15(a), the purpose of NRCP  
7 16(b) is 'to offer a measure of certainty in pretrial  
8 proceedings, ensuring that at some point both the parties  
9 and the pleadings will be fixed,'" citing Parker vs.  
10 Columbia Pictures Industries, 204 F.3d 326 at pages  
11 339-40, a 2nd Circuit case from the year 2000.

12 The court goes on to state a few lines later:

13 "Disregard of the scheduling order would  
14 undermine the court's ability to control its docket,  
15 disrupt the agreed-upon course of the litigation, and  
16 reward the indolent and cavalier," citing Johnson vs.  
17 Mammoth Recreations, Incorporated, 975 F.2d 604 at  
18 page 610, a 9th Circuit case from 1992.

19 Most of these cases are federal cases, but as  
20 the Nevada Supreme Court repeatedly says, we can rely on  
21 federal cases because our Rules of Civil Procedure are  
22 patterned after the Federal Rules of Civil Procedure.

23 So going on:

24 "NRCP 16 was drafted precisely to prevent this

1 from occurring, and 'its standards may not be  
2 short-circuited by an appeal to those of Rule 15,'" and  
3 that's cited back to the Johnson vs. Mammoth Recreations  
4 case.

5 Judge Tao goes on to note:

6 "The Nevada Supreme Court has never defined  
7 what constitutes 'good cause' under NRCP 16(b)," but  
8 numerous federal courts actually have.

9 Going on to page 971 and to page 972, Judge Tao  
10 says:

11 "The distinction between NRCP 15(a) and NRCP  
12 16(b) is not merely a cosmetic one, because the  
13 definition of 'good cause' under Rule 16(b) is narrower  
14 than the considerably more lenient considerations  
15 governing amendment under Rule 15(a). 'A court's  
16 evaluation of good cause [under 16(b)] is not coextensive  
17 with an inquiry into the propriety of the amendment under  
18 Rule 15," citing back to the Johnson case. "Unlike Rule  
19 15(a)'s liberal amendment policy which focuses on the bad  
20 faith of the party seeking to interpose an amendment and  
21 the prejudice to the opposing party, Rule 16(b)'s 'good  
22 cause' standard primarily considers the diligence of the  
23 party seeking the amendment," and citing back to Johnson.

24 Judge Tao goes on to say:

1            "In determining whether 'good cause' exists  
2 under Rule 16(b), the basic inquiry for the trial court  
3 is whether the filing deadline cannot reasonably be met  
4 despite the diligence of the party seeking the  
5 amendment." And I'll ignore the citations there.

6            "Courts have identified four factors that may  
7 aid in assessing whether a party exercised diligence in  
8 attempting, but failing, to meet the deadline: (1) the  
9 explanation for the untimely conduct; (2) the importance  
10 of the requested untimely action; (3) the potential  
11 prejudice in allowing the untimely conduct, and (4) the  
12 availability of a continuance to cure such prejudice."

13 Those four factors are cited back to S&W Enterprises, LLC  
14 versus South Trust Bank of Alabama, NA, 315 F.3d 533 at  
15 page 536, a 5th Circuit case from 2003.

16            Judge Tao goes on to note:

17            "However, the four factors are nonexclusive and  
18 need not be considered in every case because, ultimately,  
19 if the moving party was not diligent in at least  
20 attempting to comply with the deadline, 'the inquiry  
21 should end,' citing back to Johnson 975 F.2d at 609.

22            "Thus, of the four factors, the first (the movant's  
23 explanation for missing the deadline) is by far the most  
24 important and may in many cases be decisive by itself,"

1 citing back to Johnson.

2           And then there's an internal quote that says --  
3 or parenthetical quote that says, "('Although the  
4 existence or degree of prejudice to the party opposing  
5 the modification might supply additional reasons to deny  
6 the motion, the focus of the inquiry is upon the moving  
7 party's reasons for seeking modification.')" Lack of  
8 diligence has been found when a party was aware of the  
9 information behind its amendment before the deadline, yet  
10 failed to seek amendment before it expired." And then  
11 the Court says, "See Perfect Pearl Company vs. Majestic  
12 Pearl & Stone, Incorporated," 889 F. Supp. 2d 453 at  
13 page 457, a Southern District of New York case from 2012,  
14 and then parenthetically a quote back to the Perfect  
15 Pearl case says, "('A party fails to show good cause when  
16 the proposed amendment rests on information that the  
17 party knew, or should have known, in advance of the  
18 deadline.')" In addition, 'carelessness is not compatible  
19 with a finding of diligence and offers no reason for a  
20 grant of relief,' citing back to Johnson, 975 F.2d at  
21 page 609.

22           The end of the reading is as follows, and this  
23 is now on page 972:

24           "Even where good cause has been shown under

1 NRCP 16(b), the district court must still independently  
2 determine whether the amendment should be permitted under  
3 NRCP 15(a)."

4           And so what Judge Tao tells us is that you have  
5 to go through those four factors first under the 16(b)  
6 analysis and good cause under these circumstances. You  
7 can't just rely on all the Rule 15 arguments that are  
8 made by the parties and opposed by the parties in their  
9 moving papers because there's been the expiration of the  
10 deadline that was set by the Court in the order of  
11 January 1st of 2017. I apologize. I believe it was  
12 January 10th of 2017. That's right, January 10th.

13           So, Mr. Wieczorek, it is your motion, and as I  
14 said, there's nothing worse than sitting there listening  
15 to someone read, especially on something as intricate of  
16 the interplay of NRCP 16 and NRCP 15 when you haven't  
17 heard it before. It makes me think back to my days in  
18 law school and my civ. pro. teacher, Dallas Isom. He was  
19 not a compelling individual, and so he would just kind of  
20 read to you forever. Mr. Isom read and read and read.

21           But I think you need to address the Nutton case  
22 first before we even get to thinking about whether or not  
23 an amendment to add Peter Paul Enterprises would be  
24 futile. We have to get over the good cause hurdle first.

1 Why was there not only the delay from the notice that was  
2 provided to you by Versa? And Versa argues that the  
3 notice was provided by sending the UL certificate in  
4 January of -- is it January or March?

5 MR. AICKLEN: January of '17.

6 THE COURT: January 24th of 2017, I think it  
7 was.

8 MR. AICKLEN: It was, yes, sir, January 24,  
9 2017.

10 THE COURT: So they sent it to you January 24th  
11 of 2017. And then your argument is that you didn't  
12 really find out about any of this until you were speaking  
13 to Mr. Mangiafico, which is not a wrestler. That's  
14 actually a person. Is that how you pronounce his name,  
15 Mr. MAG-NIF-IH-KOE? I'm not trying to -- it's not a  
16 quiz. As I was reading the exhibit --

17 MR. WIECZOREK: Your Honor, actually, I think  
18 it was a different individual.

19 THE COURT: Well, it was Mr. Nasme?

20 MR. AICKLEN: I believe it was Baharem Nasme.

21 THE COURT: Mr. Nasme said he was speaking to  
22 Mr. Mangiafico at Peter Paul Enterprises --

23 MR. WIECZOREK: Correct.

24 THE COURT: And maybe it's not MAG-NIF-IH-KOE.

1 It's spelled M-a-n-g-i-a-f-i-c-o. I guess that's not  
2 pronounced MAG-NIF-IH-KOE, but it looked like  
3 Mr. Magnifico to me when I read it.

4 So go ahead now that I've yammered on for a  
5 while about your case.

6 MR. WIECZOREK: So first, with Nutton, I  
7 appreciate your Court's summary of the case. I think we  
8 can deal with it, and I'd like to address it by pointing  
9 out some things which our motion does not attempt to do  
10 here.

11 So in Nutton, one of the concerns was that a  
12 new theory of liability was being proffered. Here it is  
13 not a new theory of liability at all; it is the  
14 identification of a new potential tortfeasor responsible  
15 for the same product failure.

16 This is an effort to bring in another party for  
17 contribution purposes, so I don't think any amendment  
18 would be futile because the right accrues at some point  
19 later on, and I don't believe there is a statutory issue.

20 With regard to the most important part of the  
21 case that you recited, the concern of the Court for  
22 parties blithely ignoring the dictates of the scheduling  
23 order, certainly that is not the case here. The concern  
24 of this case now is not so much that there are injured

1 plaintiffs seeking recovery for damages because those  
2 individuals have all been settled and are no longer in  
3 the equation of the case. This is a business dispute  
4 primarily now between companies, and the good cause  
5 issue -- good cause focus that I think Nutton is  
6 confronting is looking to reconcile competing interests.

7           So, for example, the overt explanation I have  
8 for you as to why the motion was not filed prior to  
9 May 4, 2017, is because the deposition of Mr. Nasme did  
10 not take place until May 9th of 2017.

11           THE COURT: Let's just accept that is the  
12 accepted chronology. So why wasn't a motion filed on  
13 May 10th? Why was there a delay from May 9th when you  
14 were made aware of it to June 23rd when the motion was  
15 actually filed?

16           I acknowledge that the Court's Case Management  
17 Order says May 4th, and so May 9th is five days after you  
18 find out, but it would at least be somewhat more  
19 persuasive to me if the motion to amend is filed  
20 immediately upon learning of Mr. -- excuse me -- learning  
21 of the potential contribution from Peter Paul  
22 Enterprises, but you waited six weeks to file.

23           MR. WIECZOREK: Certainly. And I can be  
24 faulted for a strategic decision, but upon learning of

1 Peter Paul's status as the component part supplier of the  
2 solenoid which is the critical issue in this case, our  
3 office chose to try to obtain documents or records from  
4 Peter Paul to validate or at least provide some  
5 additional information on that front because we were  
6 still dealing with a discovery issue with Versa inasmuch  
7 as it had neglected to produce certain documents or  
8 produce documents with heavy redactions, which is the  
9 subject of a second motion.

10 We chose to try to get records from Peter Paul  
11 through subpoena duces tecum. Upon the response date,  
12 Peter Paul filed an objection to produce nothing,  
13 whereupon we filed the motion based on the information we  
14 had. We are still in a discovery dispute with Peter  
15 Paul, they still have not produced any evidence, and we  
16 still may be raising a discovery proceeding in that  
17 matter.

18 THE COURT: Are they in Connecticut? Do I  
19 remember that correctly?

20 MR. WIECZOREK: I believe that's true. They  
21 have counsel, local counsel, and we've been in dialogue,  
22 but we have no agreements yet, and, again, we have not  
23 received anything from Peter Paul.

24 So the five-week delay, I appreciate, takes it

1 further outside of that CMO cutoff case, case management  
2 cutoff date, but we were trying to endeavor to get good  
3 information to support a motion to bring Peter Paul into  
4 the case.

5 THE COURT: Was there discussion between Versa  
6 and MDB -- I should say between MDB and Versa --  
7 immediately upon hearing this, that we're going to have  
8 to bring in Peter Paul Enterprises? So put another way,  
9 Mr. Wieczorek, once you find out during Mr. Nasme's  
10 deposition that Peter Paul is out there --

11 MR. WIECZOREK: Right.

12 THE COURT: -- immediately is there a  
13 conversation with MDB along the lines of "Hey, we're  
14 going to have to move to amend them or, alternatively, we  
15 start doing some investigation," and they don't even know  
16 about the potential of having Peter Paul Enterprises  
17 added as a cross-claimant until they get the motion on  
18 June 23, 2017?

19 MR. WIECZOREK: I was not at Mr. Nasme's  
20 deposition so I don't know what conversation took place  
21 there. I'm going to give you my educated opinion that  
22 probably that information was taken by the attorney from  
23 my office who was there that was then sent back to me,  
24 and then we made a decision that we needed to investigate

1 Peter Paul. I personally did not pick up the phone and  
2 call Versa's attorneys, primarily because we have  
3 competing views of how the case should be litigated, and  
4 in many respects I'm not sure whether me giving a  
5 heads-up to Versa is the cutting issue here.

6           The cutting issue here, though, is when MDB  
7 should be charged with notice of Peter Paul's existence  
8 in this case under the current scheduling. And, again,  
9 you've seen that January 7th list. It provides  
10 information. Peter Paul's name is on it. That list was  
11 examined by our experts and others and people in my  
12 office, and none of us apparently connected the dots  
13 earlier with respect to that information. The deposition  
14 testimony of the witness certainly connected those dots.  
15 I think that --

16           THE COURT: Mr. Wieczorek, just so you know,  
17 I'm pulling up that list. I think it's an exhibit to the  
18 opposition.

19           MR. WIECZOREK: I think it's Exhibit 6.

20           THE COURT: Is it Exhibit 5 or 6? Let me  
21 check.

22           Now I've got it. I apologize. Go ahead.

23           MR. WIECZOREK: So if you're looking at it,  
24 perhaps that name jumps out at you upon looking at that

1 document. It didn't for us, and I can take full  
2 responsibility for that, for not having identified it.

3 But, again, it was clear from Mr. Nasmе's  
4 deposition that not only was Peter Paul the component  
5 supplier, but there had also been discussions between  
6 representatives of Versa and Peter Paul about at least  
7 potential for inadvertent activation of the valve due to  
8 an electromagnetic force field, which is an issue in this  
9 case.

10 So I think we exercised diligence in trying to  
11 identify information about Peter Paul. We've hit a brick  
12 wall with respect to compliance from Peter Paul. We are  
13 still moving forward on that front, as evidenced by our  
14 related motion to continue the trial date.

15 Further, if you're looking at the --

16 THE COURT: Are you going to object?

17 MR. AICKLEN: No.

18 THE COURT: Are you just stretching your legs?

19 MR. AICKLEN: I'm just standing up. My back  
20 hurts.

21 THE COURT: Okay. Go ahead.

22 MR. AICKLEN: That's okay.

23 THE COURT: I thought you were about to object  
24 to something.

1 MR. AICKLEN: No. I wouldn't interrupt, Your  
2 Honor. My back hurts.

3 THE COURT: If you want to stand up, feel free.  
4 I've got a bad back, too.

5 MR. AICKLEN: That's okay. I'll just stretch  
6 my legs.

7 THE COURT: Stand if it makes you feel better.

8 MR. WIECZOREK: So if we're looking at another  
9 Nutton factor, the issue of prejudice to the opposing  
10 party, I know at the outset, just intuitively, it would  
11 seem to make sense that a party defendant in a product  
12 defect liability case would not oppose the joinder of  
13 another potential co-defendant tortfeasor involved in the  
14 manufacture of that device. That's an intuitive  
15 statement.

16 In this particular case, Versa is saying it's  
17 being prejudiced because, one, we waited too long. I  
18 understand that argument. Second, that it's going to  
19 nullify all the work that went into the case thus far.

20 I don't see that at all. The experts have  
21 looked at this issue. The experts have rendered their  
22 opinions. To the extent Peter Paul has anything new or  
23 different to add to the equation based upon information  
24 from their experts, they can certainly supplement. I

1 don't think it's going to vitiate anyone's position.

2 THE COURT: But it seems to me that that is the  
3 standard position that attorneys take when they're  
4 seeking to bring in new parties, that they're only  
5 focused on the parties that are in the case now, and by  
6 the way, I would note you kind of skipped from NRCP 16  
7 now to NRCP 15, and I'm not sure we've gotten over the 16  
8 hurdle yet.

9 But when people start arguing about, well, you  
10 know, it's not going to be any prejudice because, we, the  
11 people, the kids in the pool already, have done all our  
12 work, it denies the fact or it completely ignores the  
13 fact that if you were to bring in Peter Paul Enterprises  
14 into this case, you're starting all over again. You're  
15 not just bringing in one additional person who has some  
16 small or negligible role in the process. You're  
17 suggesting that they are potentially entirely responsible  
18 for everything.

19 I'm going to guess that Peter Paul Enterprises  
20 would want to have their own experts. We would just be  
21 hitting the reset button on the entire case. It's never  
22 as simple as, well, we'll just bring them in and pull an  
23 extra chair up to the table. You're starting all over  
24 again with discovery issues, with brand new experts.

1 They will undoubtedly look at the expert opinions that  
2 have been prepared in this case, and if any of them  
3 suggest that the solenoid that they produced -- and by  
4 "they" I mean Peter Paul Enterprises -- was somehow  
5 responsible for the dumping of the gravel, I don't see  
6 that -- I don't see it as a giant leap of logic to  
7 believe they're going to have somebody that they want to  
8 come in and file an opposing position, and then your  
9 experts need to look at it all over again.

10           So it's never just as simple as we here in the  
11 litigation now can easily accommodate it. You're  
12 bringing in somebody who is theoretically entirely  
13 responsible based on one analysis. It really in my mind  
14 just starts the whole thing all over again.

15           MR. WIECZOREK: And I fully understand that,  
16 Your Honor, and I agree Peter Paul would come into this  
17 case and say, "We need time to do this and that."

18           I can also tell you that during the life of  
19 this case, probably the first 18 months or more of this  
20 case was focused on plaintiffs, individuals. Really, the  
21 product discovery didn't even commence until after  
22 mediation in May. There was written discovery, but  
23 certainly not deposition discovery, certainly not expert  
24 discovery.

1           So if Peter Paul comes in and says, "Well,  
2 we're behind the curve," well, you're 90 days behind the  
3 curve on what the parties have done to date.

4           THE COURT: But that was a choice that you all  
5 made, including the plaintiffs' attorneys and counsel for  
6 all of the other parties, in how you would continue to  
7 prepare for trial in this case. That you chose to wait  
8 toward the end to do your expert work or to do the  
9 depositions or whatever else you needed to do, that was a  
10 conscious choice that was made by the litigants  
11 currently.

12           I don't think when you bring in some brand new  
13 party, you can say, "Well, we're just as far behind as  
14 you are" or "We're just a couple weeks ahead of you."

15           MR. WIECZOREK: I offer that not as an excuse,  
16 but as a fact that that's the way this case lined up. I  
17 think it is clear, however, that, again, a slightly  
18 different fact pattern from Nutton. There's no change in  
19 theory here. There is no change in factual underpinnings  
20 of this case. We all know what happened.

21           The question is, who is responsible for this  
22 inadvertent activation of this valve? Versa certainly  
23 made it. Versa certainly did not disclose, other than  
24 this one-sheet document, in the eight months of written

1 discovery, what it did produce, "Hey, look at Peter Paul.  
2 They made the solenoid. You know, chase them."

3 THE COURT: When you say they made it, they  
4 didn't make it, "it" being the solenoid, the piece in  
5 question.

6 MR. WIECZOREK: Peter Paul, yeah.

7 So I'm just pointing out Versa did not front  
8 the information that Peter Paul was a component part  
9 supplier and they happened to make the solenoid. That  
10 was not part of the initial case disclosures, it's not  
11 part of the discovery disclosures. It may still be part  
12 of documents that are still the subject of dispute of the  
13 discovery commissioner's order. I don't know because we  
14 haven't seen them.

15 But the progress or the fact that the  
16 investigation was in fact delayed by those discovery  
17 issues, the irrefutable fact is it was May 9th when this  
18 information hit the case domain, if you will, and we took  
19 steps to do it.

20 So I understand, again, Nutton looking for  
21 rational cases for complying with cutoff dates and court  
22 orders, and I respect those completely. This case -- you  
23 know, perhaps as all attorneys would say, this case is  
24 slightly different because of the way the facts

1 developed, the way the case has now procedurally set  
2 itself up because it is no longer a plaintiff case, it is  
3 a business dispute case.

4           And, again, I go back to the issue, Versa is  
5 not prejudiced because it's already committed its  
6 position. I would expect Peter Paul would probably back  
7 it up because they are -- they are manufacturers of the  
8 same product with different positions.

9           Again, I think the equity of the situation, if  
10 we can get past the compliance issue -- and I don't know  
11 if Your Honor is or not -- but if we get to the equity of  
12 the situation, it is far better to have those who are the  
13 responsible parties for creating an allegedly defective  
14 product before the trier of fact at one time than  
15 piecemealing it and letting potentially Versa play off  
16 Peter Paul at trial in this case, letting Peter Paul play  
17 off something else at some future point.

18           THE COURT: That does raise an issue that I  
19 have thought about, and the issue is this: Let's assume  
20 for the sake of argument that I deny the motion. You  
21 can -- and by "you" I mean MDB -- can still file an  
22 entirely new action, assuming the statute of limitations  
23 hasn't expired, against Peter Paul Enterprises should you  
24 choose to do so.

1           I can't tell you the number of contribution  
2 cases that I have had where one of the causes of action  
3 in a cross- or counterclaim is for contribution and the  
4 argument is "Well, we haven't fixed the amount or that  
5 there's an amount owed yet, and therefore the  
6 contribution claim is too early." The answer to that  
7 always is "No. We're just going to do one trial instead  
8 of two."

9           But, theoretically, you could be asking to do  
10 just that, which is, if I deny your motion, we go forward  
11 with trial on October 30th of 2017, and then if at some  
12 point it is established by the jury that MDB is  
13 responsible in some way, then you can still file a cause  
14 of action possibly against Peter Paul Enterprises for  
15 contribution.

16           MR. WIECZOREK: I agree. And you're  
17 piecemealing litigation where we're all interested in  
18 judicial economy. Certainly the economies of scale put  
19 it better to have one trial with one trier of fact and  
20 one set of facts and parties.

21           Again, I do not doubt Peter Paul, if they're  
22 joined in this case, will argue for an extension of  
23 existing deadlines for probably more than the four months  
24 I ask for. I don't know. It is a rather discrete issue

1 at this point. We're not parsing medical records. We're  
2 parsing drawing diagrams and engineering technique and  
3 the fact of an event, so we could --

4 THE COURT: I'm going to jump over the NRCP 16  
5 hurdle now, not that -- I'm not saying we have or haven't  
6 cleared it, but I'm going to talk for a second,  
7 Mr. Wieczorek, about NRCP 15 and the futility of bringing  
8 in Peter Paul Enterprises.

9 I don't know the answer to this question and  
10 that's why I ask. The parties have much more knowledge  
11 about the discovery process and what has been produced,  
12 but as I recall reading Mr. Nasmе's excerpt testimony at  
13 his deposition, the argument is that somehow giant  
14 magnetic fields can cause this solenoid potentially to  
15 activate, and therefore the gravel would fall out of the  
16 bottom of the trailer and we have all of these accidents.

17 But then the follow-up question that was asked  
18 by Mr. Nasmе to the person I keep calling  
19 Mr. Mangiaficio was "Has that ever happened?" And he  
20 said, "No." "Is there any evidence of that ever  
21 happening anywhere?" And, again -- I'm paraphrasing --  
22 but it's just "No."

23 And even assuming, let's say, for the sake of  
24 argument that it has happened, that you've gone -- that

1 somehow a truck has gone through this giant magnetic  
2 field and that that did occur, that the solenoid did  
3 activate, is there any evidence in the case whatsoever  
4 anywhere that there was a giant magnetic field on  
5 Interstate 80 as this truck was driving along that caused  
6 that to happen?

7 I mean, it's assuming so many steps. It's  
8 assuming that a magnetic field could cause that, and then  
9 it's assuming that that magnetic field was, in fact,  
10 present; therefore, it's reasonable or at least it's  
11 arguable or plausible that that might happen.

12 MR. WIECZOREK: Right. So --

13 MR. AICKLEN: May I address that?

14 THE COURT: Yes.

15 MR. AICKLEN: It's a factual question, and I  
16 took the deposition -- I've completed my expert  
17 discovery -- Josh Aicklen for the defense, Your Honor. I  
18 took Erik Anderson's deposition. He's the electrical  
19 engineer that MDB has retained on its -- for the products  
20 theory.

21 First we took Bausch, and Bausch is easy to  
22 deal with. He found no defect, either electrical or  
23 mechanical, so he referred to Anderson. I asked Anderson  
24 about this theory, the electromagnetic field theory, and

1 he said -- I asked him the Hallmark factors of it.

2 I said, "Did you drive that route and find any  
3 source of electromagnetic energy?"

4 He said, "No."

5 I said, "You show a lot of photographs" --

6 THE COURT: No, he didn't drive it or none  
7 existed?

8 MR. AICKLEN: No, he didn't drive it. He  
9 didn't test his theory.

10 I said, "I see a lot of photographs in your  
11 workbook of high power lines. What's running through  
12 those high power lines?"

13 He says, "AC."

14 I said, "What is the solenoid activated by?"

15 "DC."

16 I said, "So is that your" --

17 "He said, "No, no, no. That's not the source  
18 of the electromagnetic force."

19 I said, "How did you get the solenoid to  
20 trigger?"

21 He said, "I held a ferrous magnet next to it,  
22 right next to it, and it triggered."

23 And literally I said to him, "Assuming there  
24 wasn't a guy running down the highway at 65 miles per

1 hour with a ferrous magnet, what is your theory as to the  
2 electromagnetic force which caused that related trigger?"

3 He said, "I don't have one. I don't know."

4 So that is the evidence of this theory that the  
5 solenoid was defective.

6 Now, even more importantly than that, remember,  
7 this is a solenoid on a truck. The systems -- and I  
8 asked Anderson this, and he had no idea of this. Your  
9 electric door locks are a solenoid. Your starter motor  
10 on your car is a solenoid. Your gas release hatch is a  
11 solenoid. Your trunk release hatch is a solenoid.

12 I asked Anderson, "Is there any evidence that  
13 any other solenoids other than the solenoid on  
14 Mr. Koski's second trailer dumped along this stretch of  
15 the road?"

16 He said, "No. I've never heard of it."

17 And then to further that theory about the  
18 electromagnetic force, I asked him in deposition, "Did  
19 you reach out to any of your peers and run this by them  
20 to see what they thought?"

21 "No."

22 "Are you aware of any other expert ever giving  
23 this opinion?"

24 And he said, "No."

1 I said, "Have you ever published on this  
2 opinion?"

3 "No."

4 "Are you aware of any peer-reviewed articles  
5 that state that electromagnetic fields can trigger --  
6 randomly trigger solenoids in a roadway?"

7 And he said, "No."

8 So the bottom line of the question factually --  
9 and we have the transcript. I don't have it here because  
10 it was done after the briefing. The bottom line of the  
11 factual basis of this whole electromagnetic field theory  
12 is nothing.

13 THE COURT: I don't want to make -- I'm not  
14 making the argument for either party. It may  
15 theoretically be possible. My question is, is there any  
16 evidence in the case to support the theory that it  
17 happened here?

18 Do you understand what I'm saying,  
19 Mr. Wieczorek? I'm not agreeing or disagreeing with the  
20 analysis that was just made. I'm simply saying, okay,  
21 let's just, for the sake of argument, assume that that  
22 is -- that Peter Paul Enterprises somehow is responsible  
23 because of this magnetic field theory beyond what  
24 experimenting conducted, which is holding a magnet next

1 to itself, is there any evidence that any of that ever  
2 occurred?

3 MR. WIECZOREK: Right. So without having had  
4 the benefit of engineering or other documents from Peter  
5 Paul and Versa on this issue, it is a fact that at that  
6 same location, less than an hour before this relevant  
7 event, another truck dumped its load because its valve  
8 inadvertently activated. It is also a fact that other  
9 trucking companies have experienced these inadvertent  
10 activations that we are chasing the information on.

11 THE COURT: Like the Bermuda Triangle of truck  
12 dumps?

13 MR. WIECZOREK: Well, every expert in this  
14 case, based on the pool of information they have to date,  
15 which doesn't include Peter Paul's stuff and doesn't  
16 include Versa's stuff, says it is a conundrum as to what  
17 happened here, but EMF is our best estimation.

18 Mr. Anderson did not have the benefit of Mr. --  
19 of the principal of Peter Paul who happened to tell the  
20 guy at Versa in his deposition, "It would require a  
21 tremendous amount of magnetic field if it could happen."  
22 He couldn't imagine how that could happen.

23 "Did you have a discussion with Mark about the  
24 size of the field that would be required?"

1            "We may have talked about it. I don't know if  
2 he had ideas.

3            "The only thing you recall is he said large?

4            "Right. Large."

5            That's what we know so far from this  
6 deposition.

7            There is information in this world based -- in  
8 Peter Paul's records and Versa's files that we have not  
9 seen yet which fill in information on this. The problem  
10 with this approach, with Versa opposing this motion now,  
11 is -- you know, pick your football analogy -- they're  
12 trying to run the clock out. They're trying to scramble  
13 for time.

14           They have not produced full information yet,  
15 which is the subject of another motion today, yet they  
16 want this trial date to stand, yet they want status quo  
17 to be where it is. And I don't think that's appropriate,  
18 and I think that is actually a run around the amendment  
19 discussion in Nutter --

20           THE COURT: You mean Nutton, N-u-t-t-o-n.

21           MR. WIECZOREK: Nutton. Pardon me.

22           -- because Nutton is putting the onus on the  
23 party seeking leave to amend to make their case. Here  
24 part of that factor is the fact that the other parties

1 have not produced full documentation which may have  
2 allowed for an earlier decision. So that's my -- that's  
3 the tension I recognize in this matter right now.

4 THE COURT: Okay. Mr. Aicklen, just one  
5 moment.

6 Mr. Aicklen, maybe it was Exhibit 2 to your  
7 opposition where the UL listing is made. Is that  
8 correct?

9 MR. AICKLEN: I don't recall the exhibit  
10 number, Your Honor. I actually have them on a computer  
11 because I flew up and I couldn't carry the binder, but it  
12 was -- the date of production was January 24, 2017, you  
13 are correct. And it does identify the UL certification  
14 and Peter Paul Industries as the manufacturer of the  
15 solenoid.

16 THE COURT: I just want to look at it one  
17 moment.

18 MR. AICKLEN: Sure.

19 THE COURT: Okay. Go ahead and make your  
20 argument.

21 MR. AICKLEN: Thank you, sir.

22 Let's go back to NRCP 16 because the issue here  
23 is, is there good cause for the delay? And you're right,  
24 I was not aware of the Nutton case. However, the

1 analysis is -- essentially what you do under Rule 16, the  
2 analysis of that is, do they show good cause for not  
3 having done this before?

4           Their theory of this case, this whole  
5 electromagnetic theory, has been articulated long before  
6 January. They were focused on some electric theory, and  
7 the interesting reason why that is, is because nobody who  
8 has inspected this valve has ever found anything wrong  
9 with it.

10           So their expert, Erik Anderson, says, well,  
11 it's got to be some type of external force triggering it  
12 because it's been torn down and they've never found any  
13 type of electro or mechanical defect in it.

14           So in January of 2017, what they see as the  
15 problem with the Versa valve or the component of the  
16 Versa valve is identified as being manufactured by a  
17 different manufacturer, and they do no discovery on it.  
18 They didn't send any rogs to us. I mean, why did they  
19 not send out a commission deposition subpoena in January  
20 to Maryland to get information if this was truly crucial  
21 to their theory.

22           The motion here for leave to amend to --  
23 actually, I think it would be a third-party complaint as  
24 opposed to a cross-claim -- it would be to amend their

1 answer and assert a third-party complaint -- is filed  
2 July 25, 2017, I believe, by the Court's reckoning --  
3 correct? -- on the filing date.

4           So they did not take any steps to investigate  
5 this potential defendant on their own stated theory until  
6 six months post-expert initial disclosures. That is not  
7 good cause. That is not due diligence.

8           At a minimum, when this conversation went on  
9 with Versa's 30(b)(6) witness where he says, "I spoke to  
10 the chief engineer at Peter Paul, the one that provides  
11 us with the relay and the solenoid, and, you know, I  
12 asked him, 'Could the presence of a large magnetic field  
13 cause the solenoid to activate?' And he said, 'No,'" I  
14 mean, isn't that at a minimum, at the moment where  
15 they're saying, "Okay, we have a potential target  
16 defendant here. They're denying that that could be the  
17 cause. That is the theory of the cause in our case,"  
18 shouldn't they at that moment have said, "We have this  
19 theory. They deny it. Even if it's anecdotally through  
20 a third party, we need to move to amend to get them into  
21 this case"?

22           Why are we doing this after all the experts  
23 have been designated and rebuttals, after I've taken the  
24 experts' depositions? Two years they had to work up

1 their products liability case. And as you said, the  
2 parties wanted to try and mediate. Well, we did, and we  
3 settled -- they settled out with the plaintiffs, and we  
4 got all that taken care of, but I'll tell you what:  
5 During the course of that time, I did my due diligence; I  
6 did my discovery; I've taken my experts' depositions; I've got  
7 the documents that I need to take the case to trial.

8           So if he thinks -- if Mr. Wieczorek and his  
9 client think they have a viable claim against this  
10 potential third-party defendant, then let's go down on  
11 the 30th and let's try the case to a jury, and if the  
12 jury comes back and says, hey, it's not Versa valve, it's  
13 somebody else, then they can try that theory against  
14 them.

15           But what's going to happen if you grant this  
16 amendment this late with no good cause in this case is  
17 going to go on for another two years, and it's going to  
18 cost my client another \$350,000 in fees and costs, and  
19 that is the actual -- they say there's no prejudice to  
20 us. That is the prejudice to the parties. I know that  
21 that's Rule 15 analysis, but that is a significant  
22 prejudice.

23           This has been extremely disruptive to my  
24 client's business. There's been a number of depositions,

1 depositions -- you know, going back to where the client  
2 is, there are general counsel involved, all those things.  
3 They had the time; they didn't do it. Time to put up or  
4 shut up. Let's go to trial.

5 THE COURT: Thank you, Mr. Aicklen.

6 Any reply to that, Mr. Wieczorek?

7 MR. WIECZOREK: Very briefly, Your Honor.

8 Let's assume I was a smarter guy than I  
9 apparently am and I immediately filed this motion,  
10 immediately to join Peter Paul. That didn't change any  
11 of the currently scheduling deadlines. We would have  
12 still been taking expert depositions. We would have  
13 still been issuing rebuttal reports. We would have still  
14 been going across the country deposing people based on  
15 the information they had because the Court had not  
16 changed the order.

17 And Mr. Aicklen was very clear; he did not want  
18 to stipulate to change any of those dates. So we  
19 complied to the letter with the existing order. Whether  
20 I filed it four weeks earlier or not, I don't know when  
21 the Court would have gotten around to setting the hearing  
22 on this, but I don't think it would have changed in terms  
23 of his client being inconvenienced by these issues.

24 I think the fact here is that his client has

1 not assisted the investigation of these issues. His  
2 client has not disclosed the information to allow the  
3 full flushing out of these issues. His client is the  
4 subject of a separate motion this afternoon regarding a  
5 discovery order on producing documents, which may fill in  
6 new facts, which may make me come back and say we do need  
7 to continue the trial because Versa did not disclose  
8 important information in a timely fashion. I'm not -- I  
9 don't know that, but I don't think it's appropriate to  
10 say they dragged their feet, they could have done this  
11 motion three weeks earlier, the scheme of this case and  
12 the scheduling order, nothing would have been different.

13 THE COURT: Thank you, Mr. Wieczorek.

14 The Court has considered the motions and the  
15 exhibits. Further, the Court has considered the oral  
16 arguments of Counsel, and importantly, the Court is  
17 considering the analysis as directed by Judge Tao in  
18 *Nutton versus Sunset Station, Incorporated*.

19 As I stated a couple of times, the threshold  
20 issue given the timing of the motion is whether or not  
21 good cause exists for the Court to disregard the Rule 16  
22 Case Management Order that was entered on January 10th of  
23 2017. And to repeat the analysis that I should go  
24 through or the factors I should consider in deciding

1 whether or not good cause has been demonstrated, the  
2 Nutton court says I should consider the explanation for  
3 the untimely conduct, the importance of the requested  
4 untimely action, the potential prejudice in allowing the  
5 untimely conduct, and the availability of a continuance  
6 to cure the prejudice. And, further, the factors aren't  
7 weighed equally. The primary factor that the court  
8 should consider is the first factor, the explanation for  
9 the untimely conduct. And as Judge Tao says, ultimately,  
10 if there's not a good explanation regarding why the party  
11 was not diligent, in this case why MDB was not diligent,  
12 then the inquiry should, in fact, end.

13           The Court finds, under the first Nutton good  
14 cause factor, that the explanation for the untimely  
15 conduct proffered by MDB is unpersuasive. The Court  
16 finds that the information was provided to MDB by Versa  
17 in January of 2017.

18           While it's true that there wasn't a highlight  
19 on it or maybe arrows pointing to something, it cannot be  
20 successfully argued to me that somehow the information  
21 was withheld. It might not have been looked at or the  
22 import of the evidence might not have been immediately  
23 apparent to MDB in its analysis, but there's no disputing  
24 the fact that they were at least provided the information

1 that the solenoid was prepared or was manufactured by  
2 someone else in January. They simply didn't look at it  
3 closely enough, and therefore the Court finds that the  
4 explanation, that being "We didn't know about it until  
5 May" -- one moment -- "until May 9th of 2017 during  
6 Mr. Nasmе's deposition" is unpersuasive. They should  
7 have known about it or certainly could have known about  
8 it in January, some four months earlier.

9           Further, the Court would note that MDB  
10 Trucking, by its own admission, knew of the issue on  
11 May 9th of 2017, and as we've already noted, that's only  
12 five days after the deadline. While I doubt that Versa  
13 would have simply consented to an amendment of the  
14 complaint or cross-complaint to add Peter Paul as a new  
15 cross-party, the fact that six months -- "six months," I  
16 apologize -- six weeks approximately went by before the  
17 motion was even made is certainly telling and does  
18 prejudice Versa and would prejudice Peter Paul as well.

19           Once they became aware on May 9th, at least if  
20 you had come forward right away and said to Versa, "We're  
21 thinking about filing a motion, we're going to do it  
22 tomorrow," then the parties at least would have been able  
23 to act appropriately, but instead weeks and weeks and  
24 weeks went by as we were rapidly approaching an

1 October 30th trial date, and nothing was done until the  
2 end or until the motion was filed on June 23rd.

3           And then we also have to take into  
4 consideration District Court Rule 12 and Local Rule 13  
5 and Nevada Rule of Civil Procedure 6, all of which lay  
6 out the time frame for a motion to be heard and  
7 considered.

8           MDB Trucking's motion wasn't filed on an  
9 expedited basis when leave could have been sought to have  
10 it heard immediately. What happened was it was just  
11 filed in the normal course, and that normal course takes  
12 approximately three weeks to work itself out from the  
13 filing of the motion, and you don't count that day it's  
14 filed, but then you get ten days plus three days, not  
15 counting nonjudicial days. So it's at least two weeks  
16 before an opposition has to be filed, and then after the  
17 opposition is filed, there's statutory rules, the amount  
18 of time that has to take place before the reply gets  
19 filed, then it gets submitted to the Court for  
20 consideration. So it's additional weeks upon weeks for a  
21 motion to be brought to the Court's attention when leave  
22 is not sought for an expedited hearing, and that leave  
23 was not sought in this case.

24           So by the time I'm finally getting to the issue

1 after it has been submitted for my consideration -- it's  
2 submitted for my consideration on July 25th of 2017 -- I  
3 see it, it's brought to my attention quickly, I enter an  
4 order on August 1st of 2017 to have the hearing, but now  
5 it's August 29th of 2017, so, you know, we're give or  
6 take two months away from trial.

7           When I take all of that into consideration, the  
8 Court finds that the explanation proffered by MDB for the  
9 untimely conduct is unacceptable and is not good cause.  
10 The Court could end its analysis right there. However, I  
11 think it's always beneficial for the prevailing party who  
12 will prepare the order in this case, and for the  
13 nonprevailing party, to know how I would rule on the  
14 additional three factors.

15           Regarding the importance of the requested  
16 untimely action, I did inquire of Mr. Wieczorek about  
17 this magnetic field. What I know about the case as I sit  
18 here right now, the likelihood of what is being argued  
19 would be the basis for Peter Paul's responsibility is so  
20 wildly implausible to me, and I don't know that there's  
21 any evidence that supports it in the record beyond what  
22 has been referenced by Mr. Aicklen, I just don't even see  
23 that it's that important. The importance of bringing in  
24 Peter Paul Enterprises at this point is at best

1 negligible.

2           The third factor is the potential prejudice in  
3 allowing the untimely conduct. I am concerned about the  
4 fact that by allowing a brand new party into this action,  
5 it would dramatically impact the other parties' ability  
6 to have a reasonable resolution of the case in a timely  
7 fashion.

8           NRCP 1 tells us that all judges should construe  
9 the Rules of Civil Procedure to ensure the just, speedy,  
10 and inexpensive resolution of every civil action -- I  
11 think that's what the three factors are -- and if an  
12 amendment came 60 days before trial in a complex case  
13 like this, adding an entirely new party who arguably, at  
14 least it's argued on behalf of MDB, might be entirely  
15 responsible for what occurred, that would be antithetical  
16 to NRCP 1 because it would just be starting the process  
17 all over again.

18           And I do appreciate the fact that Versa now, as  
19 the only remaining party in this case along with MDB,  
20 really would have to spend hundreds of thousands of  
21 dollars. I don't think that's an overestimation, but at  
22 least six figures in order to be ready to go to trial  
23 with that brand new party as part of the proceedings.  
24 And so the Court would find that there is great potential

1 prejudice in allowing the untimely conduct.

2           Finally, we'll talk in a moment about the  
3 ability of a continuance to cure the prejudice. A  
4 continuance in this case is not likely. I would note  
5 that Mr. Wieczorek is requesting a continuance and that  
6 he wants a continuance for approximately 120 days or at  
7 the next available date for the Court. I know my  
8 colleagues down in the Eighth are very busy and so are  
9 we.

10           First off, Mr. Wieczorek requests that I  
11 continue the trial to February 27, 2018, or the next  
12 available stack. Luckily, I don't practice down in  
13 Las Vegas or haven't had to go through the stack process.  
14 I don't even know what that is, but we don't stack -- we  
15 don't have stacks of cases. We set trials. We still  
16 have the ability, luckily, for us to do that, but I'm  
17 setting trials three deep into the end of next year, so I  
18 don't have a three-week trial hole that I can plug you  
19 guys into in February.

20           I went, actually, through my calendar and  
21 looked at February, March, into the end of April, and I'm  
22 two or three deep trials of criminal cases and civil  
23 cases, complex litigation, one murder case that's two  
24 weeks long, a sexual assault case, and then on April 30th

1 of 2018, I begin a four-week penalty hearing on a death  
2 penalty case in the State of Nevada vs. Ricky Sechrest.  
3 Mr. Sechrest was convicted in 1982 of strangling and  
4 murdering two young girls here in Washoe County, and he  
5 received the death penalty, and that death penalty was  
6 overturned in 2015. So we're going to, for four weeks,  
7 be doing the penalty hearing in all of May for  
8 Mr. Sechrest's case.

9 I'm not expecting sympathy from anybody, but my  
10 calendar is just completely stacked. There's just not  
11 some reasonable date in the very near future in a couple  
12 of weeks or 120 days out that I can give you. There is  
13 no availability of a continuance to cure the prejudice  
14 because the continuance, literally, would be almost this  
15 time next year is my guess, and I don't think that that  
16 is reasonable under the circumstances of this case. And  
17 so the Court would find under the NRCP 16(b) analysis  
18 that good cause has not been demonstrated to amend and  
19 add Peter Paul Enterprises.

20 The Court has made its finding regarding all  
21 four factors. Further, given the fact that the Court  
22 does not find the good cause has been demonstrated  
23 pursuant to NRCP 16(b), the Court sees no need to analyze  
24 the NRCP 15(a) portion regarding the futility argument,

1 and so the Court does not address that at all.

2           Mr. Aicklen, do you need any additional  
3 information from the Court in order to prepare the  
4 findings of fact, the conclusions of law, and the order  
5 for me to sign?

6           MR. AICKLEN: No, sir. We're good.

7           THE COURT: Okay. So we've solved that issue.

8           MR. WIECZOREK: Your Honor, before we move off  
9 this motion -- I apologize -- I'm not asking you to  
10 change your mind, but as we were discussing this issue of  
11 the Court's comments about how MDB could have let Versa  
12 know what was going with respect to Peter Paul, I was  
13 reminded of the fact that about a week after the  
14 mediation session, my office requested, and the Court had  
15 granted us, a telephonic status check on this case. My  
16 recollection at that status conference is I notified both  
17 the Court and Versa's counsel that part of what we were  
18 looking to do, which resulted in my request at that  
19 status conference for a potential stipulated continuance  
20 of the trial, was that we were looking to join a third  
21 party who had been identified, being Peter Paul, and Your  
22 Honor said, "That's fine. I'm not going to grant an oral  
23 motion for continuance. You'll have to work out a  
24 stipulation with the parties or make a timely motion."

1 I believe that is the record of that  
2 conversation, and for purposes of this record I simply  
3 wanted it to be part of the fact pattern.

4 THE COURT: So noted.

5 MR. WIECZOREK: Thank you.

6 THE COURT: I don't have an independent  
7 recollection of that nor do I have the minutes here in  
8 front of me. I'm sure I could find them somewhere in the  
9 Court's digital record, but I don't have them in front of  
10 me at this point, and I don't believe that that would  
11 change the Court's analysis at all.

12 Mr. Wieczorek does make a reference to the  
13 June 7th status hearing on page 4 of 7 of his motion that  
14 was filed on June 23rd of 2017.

15 Is that the same telephonic status check that  
16 you're talking about, Mr. Wieczorek?

17 MR. WIECZOREK: Yes, Your Honor.

18 THE COURT: There's nothing in that footnote  
19 regarding that issue. The Court doesn't have an  
20 independent recollection at all of the suggestion that  
21 Mr. Wieczorek informed the Court that they, they being  
22 MDB, was looking to join another party. I don't believe  
23 that the telephone conference was recorded.

24 THE CLERK: Your Honor, there was a court

1 reporter there. I don't think a transcript has been  
2 filed yet.

3 THE COURT: We don't have -- if there was a  
4 court reporter there, the transcript, it does not appear,  
5 has been prepared and filed, and as I said, I don't have  
6 a recollection independently that that was discussed,  
7 Mr. Wieczorek. I'm not suggesting that it wasn't. I'm  
8 just saying I don't remember that.

9 MR. WIECZOREK: I appreciate that, Your Honor.  
10 Again, I simply wanted to have that point on the record  
11 for whatever purpose it may serve in the future.

12 THE COURT: So even so, it really doesn't  
13 change fundamentally the Court's analysis because the  
14 deadline had already expired, the notice of Peter Paul  
15 had been provided in January and shaves a couple weeks  
16 off of it but does not substantively change the Court's  
17 analysis one way or the other given the timing of the  
18 pleadings practice that occurred in this case.

19 Anything else to add --

20 MR. AICKLEN: Just a question.

21 THE COURT: -- or are you stretching your back?

22 MR. AICKLEN: No, no. This is a question.

23 My understanding, listening to your rationale,  
24 would be that you really actually ruled on the motion to

1 continue trial as well, No. 3.

2 THE COURT: I said I was going to get to that  
3 one --

4 MR. AICKLEN: I'd rather argue the motion to  
5 strike, but it sounds like the rationale between 1 and 3  
6 are the same and that they are both denied.

7 THE COURT: Let's go to -- we've got some time  
8 left. Don't worry. We're going to go to MDB Trucking,  
9 LLC's Motion to Continue Trial Setting and Related Dates.  
10 That document is file-stamped June 26th of 2017. The  
11 Court has received and reviewed the document.

12 Further, the Court has received and reviewed  
13 the July 13, 2017, file-stamped Defendant/Cross-Claimant/  
14 Cross-Defendant Versa Products Company, Incorporated's  
15 Opposition to Defendant/Cross-Claimant/Cross-Defendant  
16 MDB Trucking, LLC's Motion to Continue Trial Setting and  
17 Related Dates.

18 The Court has also received and reviewed the  
19 July 24, 2017, file-stamped MDB Trucking, LLC's Reply in  
20 Support of Motion to Continue Trial Setting and Related  
21 Dates, and the matter was submitted for my consideration  
22 on July 25th of 2017, and then, as you know, I directed  
23 that be set for today for oral argument by way of an  
24 order entered on August 1st of 2017.

1           Mr. Aicklen, you really did correctly apprehend  
2 that I don't believe that a continuance is warranted  
3 under the circumstances of the case as I currently know  
4 them to be, given the fact that Peter Paul Enterprises is  
5 not being joined as a party. That's basically the thrust  
6 of MDB's motion to continue is the need to conduct this  
7 additional discovery, and it presupposes that MDB would  
8 be granted its leave to add Peter Paul Enterprises as a  
9 cross-defendant.

10           I would go ahead and defer to Mr. Wieczorek.  
11 It is your motion, so it would inappropriate for Mr.  
12 Aicklen to begin arguing, but to use a poker analogy, I  
13 guess I've tipped my hand a little bit about what my  
14 analysis is. There's just not a lot of space to put you  
15 in right now that doesn't look like at least the late  
16 fall of next year for a three-week trial.

17           And I would also note that I've been setting  
18 all of my other cases around your case, so when we carved  
19 out three weeks for one trial, it's very difficult for  
20 this department, or at least in this district, to find  
21 another three-week spot within the next year. We're  
22 looking oftentimes far down the road.

23           We were able to accommodate the parties'  
24 initial request by some pretty heavy lifting, and it was

1 in consideration of the fact that Mr. and Mrs.  
2 Fitzsimmons, if I remember correctly, were elderly, and  
3 so they had a right to demand a preferential trial  
4 setting. I know that all of the corporate parties were  
5 against that, and I just said no, we're going to try to  
6 keep working to get that done because they have a right  
7 to have that preferential trial setting.

8 Just because the Fitzsimmons and all the other  
9 plaintiffs are no longer in the case doesn't mean it's  
10 any easier for me to find that time in the Court's  
11 calendar to give you three weeks in the next six weeks,  
12 as I said, or eight months. It's just not there.

13 MR. WIECZOREK: Your Honor, for what it's  
14 worth, it's no longer a three-week case. I think it's a  
15 five-day trial now because we're just dealing with a  
16 discrete product issue. All the plaintiffs are gone, and  
17 I think this case can be put on very efficiently.

18 The alternative reason for continuing this  
19 trial date, in addition to trying to get Peter Paul into  
20 it, is the ongoing nature of discovery that is still  
21 happening. We are not at discovery cutoff yet, although  
22 it's right there.

23 MR. AICKLEN: Day after tomorrow.

24 THE COURT: Two days.

1           MR. WIECZOREK: I have an outstanding subpoena  
2 duces tecum against Peter Paul which they have ignored,  
3 which I will follow up with them on, which I will seek to  
4 enforce, which I will seek the Court's intervention if I  
5 must to get some documents that will allow me to  
6 effectively try this case.

7           I have outstanding discovery requests to Versa  
8 that have been pending since last December, which is the  
9 subject of the fourth motion today, which depending on  
10 how the Court rules, Versa may be producing additional  
11 new and unredacted documents for my review and my  
12 experts' consideration. I don't know what's in those  
13 because they haven't produced them, so I believe -- I can  
14 expeditiously review documents once they're in my hands,  
15 but as long as parties are attempting to avoid compliance  
16 with subpoenas or avoid discovery obligations, it makes  
17 it very difficult.

18           So the standalone reason for continuing the  
19 trial now is I expect I'm still going to be in court a  
20 month and a half from now trying to get compliance with  
21 certain document requests. I believe it is, again,  
22 inappropriate, as I said at the last motion, for Versa to  
23 try to run the clock out on this trial date, oppose any  
24 continuance while stonewalling written discovery. I

1 understand Mr. Aicklen has his position on it, but that's  
2 what it is. They're not producing documents, and the  
3 discovery commissioner at least agrees in part with that  
4 proposition.

5           So in the balancing of the equities, I  
6 understand the Court doesn't have three weeks for us  
7 between now and next year. I don't know if the Court has  
8 five days for us sometime in the beginning of the year.  
9 I think it would be an expeditious way to allow MDB, if  
10 it's going to try this case, to at least do it  
11 effectively and based on full information.

12           Right now the parties are not producing stuff.  
13 I ascribe no motivation other than the fact they haven't  
14 produced it, and Peter Paul is, in my view, in contempt  
15 of a subpoena. How I can deal with that between now and  
16 October 30th is a great challenge, and I think it will  
17 impact the trial, and I think it will impact my ability  
18 to make out a case against Versa where now I am owning  
19 the indemnity payments to all the plaintiffs because I  
20 was the named defendant at least in most of those cases,  
21 but Versa was a named defendant, too, in some.

22           I'm owning that, and I'm looking to effectively  
23 and properly exercise rights of contribution. I can't do  
24 that if the information is withheld, and that's the

1 separate reason that I think a brief continuance of the  
2 trial is warranted, especially since now the scope of it  
3 has been drastically cut down.

4 THE COURT: Okay.

5 MR. AICKLEN: It's interesting. There's a  
6 pattern here. It's somebody else's issue why they need  
7 the time. The only issue -- I know the Court has read  
8 our objection to the discovery commissioner's report and  
9 recommendations. The only things that were redacted are  
10 the tolerances and specifications of the valve, which is  
11 a very trade-secret-privileged piece of information.

12 I don't see how the tolerances and the  
13 specifications -- we gave them the schematics, and it's  
14 just the micron tolerances that were redacted out, and  
15 the reason, since they raised the issue -- it kind of  
16 segues into the objection to the DCR's report -- is that  
17 the confidentiality order which is in place here is not  
18 enough to protect my client.

19 My client has -- this is the one valve that is  
20 used by most of the pneumatic controls in the world, and  
21 I'm sure the Court is aware, as everybody else is, if  
22 you've ever walked down Canal Street in New York or  
23 Tchoupitoulas Street in New Orleans or Market Street in  
24 Los Angeles, that if the tolerances and specifications of

1 an item are released, that item will be counterfeited,  
2 and that's why my client did not turn those things over.

3           What do the microns of that valve have to do  
4 with his need for a continuance for a trial? It doesn't  
5 make any sense.

6           THE COURT: But we're not talking about that  
7 yet.

8           MR. AICKLEN: But that's what he raised. He  
9 said I am obstructing his discovery. That's why he needs  
10 a continuance.

11           The only outstanding issue -- and I know the  
12 Court has read it, you read the DCRR -- and do you really  
13 think I've tried to obstruct his discovery by not giving  
14 up information which could put my client out of business  
15 because nobody in the world except the United States will  
16 enforce trade market copyright protections? And the  
17 confidentiality order we have now has a bunch of holes in  
18 it, and it would not protect it.

19           I've got to tell you, Your Honor --

20           THE COURT: But, Mr. Aicklen, regarding the  
21 confidentiality order, wasn't the confidentiality order  
22 drafted by the parties and agreed to by the parties?

23           MR. AICKLEN: But not about the specifications  
24 for an actual trade-secret-protected item. It wasn't

1 contemplated that we would turn over how to build the  
2 world's best-selling pneumatic valve down to the micron.  
3 That wasn't contemplated at that time, Your Honor.

4 THE COURT: Well, we'll talk about that  
5 momentarily.

6 Do you have anything else to add regarding the  
7 motion to continue?

8 MR. AICKLEN: I think the trial will be a  
9 little bit shorter. I wouldn't say five days. I'd say  
10 seven because generally it takes -- you've got a day of  
11 arguing motions, you've got two days of picking a jury --

12 THE COURT: No, we don't. We don't argue  
13 motions. We're going to trial on Monday, October 30th.  
14 I appreciate everybody's different and you haven't done a  
15 trial with me before, but all pretrial issues, all  
16 pretrial motions need to be fully briefed and submitted  
17 to the Court for consideration 30 days before trial.  
18 That's not filed. That's fully submitted. That's  
19 pursuant to the Court's pretrial order. All motions in  
20 limine are fully briefed and submitted to the Court for  
21 consideration no fewer than 15 days before trial, and I  
22 resolve all of those issues.

23 When I'm in trial, we start at 8:30 and we do  
24 trial work. We don't waste the jury's trial arguing

1 pretrial motions. They're here, we're here. We grind  
2 from 8:30 until about quarter of 5:00 every day with  
3 reasonable breaks three times a day.

4 MR. AICKLEN: I was not aware of the Court's  
5 practice, and that is a great one because, as you say, it  
6 is boring for the jury to sit out at all. I have tried  
7 cases up here and some of the other judges aren't as --  
8 they're more like you come in and now you're going to  
9 argue the motions and things like that.

10 But nonetheless, I don't see five days. I  
11 don't see picking a jury and putting on four different  
12 experts and all the damages and amounts and PMKs in five  
13 days. I would say seven to ten days. Maybe even that is  
14 an aggressive estimate.

15 And, again, I'd rather just go on October 30th.  
16 If the reason for the continuance was they needed their  
17 case against Peter Paul, they don't have a case against  
18 Peter Paul. Let's go try the case we have now. I'm  
19 ready to go.

20 THE COURT: Anything else to add,  
21 Mr. Wieczorek?

22 MR. WIECZOREK: We're all interested in trying  
23 the case, Judge. Let's just try a fair case. Again, I  
24 would kind of like to try a case based on full disclosure

1 evidence, full information regarding the salient issue in  
2 this case.

3           Your Honor has expressed some skepticism about  
4 this theory of EMF. Somewhere in those documents that  
5 answer is found, and parties have not been willing to  
6 produce it yet, and I am working hard to get it, but I  
7 have not experienced full compliance with my request to  
8 be able to start on October 30th and tell the jury this  
9 is it.

10           Thank you.

11           THE COURT: Thank you.

12           The Court does not find that there is good  
13 cause as the case is currently situated to continue the  
14 trial. The Court will address momentarily the discovery  
15 issue that remains outstanding.

16           The two reasons for the continuance primarily  
17 are that the thought that somehow Peter Paul Enterprises  
18 would be brought in as a cross-defendant in this case and  
19 the thought that there is additional discovery that needs  
20 to be provided and looked into. Both of those issues  
21 have been or will be resolved today. The first one was  
22 resolved by the denial of the motion to amend. The  
23 second one will be addressed momentarily, but neither of  
24 those issues rise to the level of a need for continuance

1 as we sit here on August 29th of 2017.

2 I'm not suggesting that things will change  
3 between now and October 30th. Certainly the closer we  
4 get to the trial date, the more critical eye I would  
5 apply to any motion or a renewed motion to continue, but  
6 if circumstances change, legitimately change, as you  
7 prepare for trial on October 30th, Mr. Wieczorek, you  
8 have the right to raise the issue again if it's  
9 different, if something new has occurred, not on what you  
10 think may have occurred or what may occur.

11 That's kind of the argument that you're making  
12 now: I'm having difficulty; I don't know if I can be  
13 able to go; I don't know if they're going to provide me  
14 what I need. Those are all hypotheticals. If something  
15 actually takes place, then you can file a motion to  
16 continue, you can ask that it be set on an expedited  
17 basis, the Court will consider both requests in a timely  
18 fashion, and we'll go from there.

19 But as I currently sit, the Court sees no good  
20 cause to continue the trial, and therefore the motion to  
21 continue is denied. And, again, Mr. Aicklen, as the  
22 prevailing party, you can prepare the findings of fact  
23 and conclusions of law and order of the Court.

24 MR. AICKLEN: Will do, Your Honor.

1           Now we are moving into the motion filed by  
2 Mr. Aicklen, the Defendant/Cross-Claimant/Cross-Defendant  
3 Versa Products Company, Incorporated's Motion to Strike  
4 Defendant/Cross-Claimant/Cross-Defendant MDB Trucking,  
5 LLC's Cross-Claim Pursuant to NRCP 35 or, In the  
6 Alternative, for an Adverse Jury Instruction.

7           That document was filed on May 15th of 2017.  
8 There was an errata filed on May 15th of 2017 and an  
9 errata filed on May 16th of 2017. The Court has received  
10 and reviewed all of those documents.

11           Additionally, the Court has received and  
12 reviewed the June 2, 2017, file-stamped MDB's Opposition  
13 to Versa Products Company, Incorporated's Motion to  
14 Strike and/or Spoliation Instructions; and the Court has  
15 received and reviewed the June 12, 2017, file-stamped  
16 Defendant/Cross-Claimant/Cross-Defendant Versa Products  
17 Company, Incorporated's Reply to MDB's Opposition to  
18 Versa Products Company, Incorporated's Motion to Strike  
19 MDB Trucking, LLC's Cross-Claim Pursuant to NRCP 37 -- I  
20 thought that was wrong, it's 37 in the reply -- and then  
21 it goes on, the title -- or, In the Alternative, for an  
22 Adverse Jury Instruction.

23           I think in the original motion from May 15th of  
24 2017 it should say NRCP 37, not 35.

1 MR. AICKLEN: Right. And that was the errata,  
2 and I was not happy.

3 THE COURT: That's okay. But that was funny  
4 when I read that. It was like, wait a minute, and then I  
5 forgot the errata part.

6 And then the matter was submitted for the  
7 Court's consideration on June 12th of 2017 and has been  
8 directed to be part of the oral arguments today.

9 Mr. Aicklen, go ahead.

10 MR. AICKLEN: Thank you, sir.

11 This sounds kind of odd. Could I use your  
12 chalkboard? Do you mind?

13 THE COURT: You would be the first person in  
14 almost five years to actually use the chalkboard. I  
15 thought about getting rid of it. I've got a whiteboard.

16 MR. AICKLEN: No, no. I think it's important,  
17 actually, and it would be helpful.

18 THE COURT: Please feel free to use the  
19 chalkboard.

20 MR. AICKLEN: Can you see it?

21 THE COURT: I can see it on this side.

22 MR. AICKLEN: The reason I want to use is  
23 because I think it's very important to visually  
24 understand what is going on with the evidence in this

1 case.

2           This motion is brought under 37(f) and Young  
3 vs. Ribeiro, but it's not where somebody puts a note into  
4 their diary to try and document damages like Young was.  
5 This is about adversely and, in fact, willfully throwing  
6 away evidence. So I think it's important for the Court  
7 to understand what's written down here but to be able to  
8 visualize it.

9           You know, basically everybody knows -- I'm a  
10 terrible artist, okay -- but everybody knows we have a  
11 tractor-trailer, and that is the Freightliner in this  
12 case, and at the back of that tractor-trailer you have  
13 where the trailers hook onto it, and then we have two  
14 trailers, tandem trailers, that are bottom dumpers, and,  
15 you know, the quality of my artistic talents is very low,  
16 but this part of it is not that important.

17           You have a control panel up where the driver  
18 sits, and at that control panel is a switch, and it  
19 energizes all the way back to here (indicating) because  
20 this is where that -- this is where those pneumatic gates  
21 are. And you read all this stuff, but it helps to  
22 visualize it.

23           This is why this is important. The controls  
24 actually run in what's called a four-plug cable, and they

1 are routed through the frame of the Freightliner, and  
2 they come out at the back -- and this is all based on  
3 both the plaintiffs' and defendants' experts' testimony  
4 and photographs -- and they come out the back and they're  
5 actually suspended on a little coil, and that is either a  
6 male or female plug, meaning one plugs into the other.

7           And then on the first trailer where it  
8 connects, you have a connector that connects with the one  
9 that's coming off of the tractor-trailer, so that's your  
10 first connection.

11           And then there is a series of cable that's run  
12 through the trailer, and then at the back, that cable has  
13 another connector on it, and the back trailer has another  
14 connector, and those two connect, and that is what  
15 controls the valve. So you have a connection in the  
16 cab -- one-, two- -- four-pin connectors, a cable --  
17 one-, two- -- four-pin connectors, and then it controls  
18 the valve.

19           The evidence from MDB's witnesses is that all  
20 of these connectors were removed between the time of the  
21 dump that they sued over and the time that the experts  
22 inspected it, they were all removed and thrown away, but  
23 not -- they weren't just removed and thrown away. They  
24 were removed and thrown away almost two years after the

1 incident. They were torn out in an incident and then put  
2 back on, and then when they were broken a second time,  
3 they were replaced and thrown away.

4           Why is that important? Well, first of all,  
5 what the experts looked at is not the component -- the  
6 electrical components in this case. They've been  
7 replaced. So the electrical components that were there  
8 in July 2014 are not what the experts inspected. How is  
9 my expert, how is my expert supposed to say it wasn't the  
10 problem with the valve or -- strike that -- a problem  
11 with the connector, a failure of the connector, when he  
12 didn't look at the actual connectors because MDB took  
13 them off and threw them away. That is the first and  
14 crucial issue because that's related to the electronics  
15 or the electrical system.

16           The second issue is -- I want to show you --  
17 and I'm not saying anything here that none of the experts  
18 haven't said -- that's a four-pin plug, and in the  
19 four-pin plug you have a hot and a neutral for each of  
20 the -- a hot and a ground, you call it, in a DC system --  
21 for each of the gates, and this is insulated with a  
22 substance that's called Bakelite, which is plastic, and  
23 if Bakelite gets hit -- it's very brittle -- if Bakelite  
24 gets hit, then these contacts will go short to ground.

1 And this is in the experts' reports as well.

2           What is the importance of that? Well, if the  
3 hot wire goes to ground, that opens or that opens  
4 (indicating). So if all the experts have inspected all  
5 of the remaining materials and all they can say is that  
6 it's some type of EMF force that we don't know -- and  
7 that's plaintiffs, that's not my people, by the way,  
8 that's not the defense experts -- defendants' experts say  
9 more likely than not it was an inadvertent dump by  
10 Mr. Koski or a failure of one of the connecting  
11 components.

12           How can I defend against their electrical  
13 failure claim when they have thrown away key components  
14 that could have been, and more likely than not were, the  
15 cause of the dump? They knew about the litigation. They  
16 threw these things away after the lawsuit has been filed.

17           You'll recall that -- I appreciate you letting  
18 me do that. You'll recall that I tried to move to compel  
19 to find out if the defense counsel had ever told MDB that  
20 they needed to save this evidence, because I'll tell you,  
21 it wasn't just electrical components that were torn out  
22 and thrown away. They continued to use the truck and all  
23 the components for two and a half years.

24           THE COURT: Well, that raises an interesting

1 issue, and I thought about it as I was reading your  
2 motion practice.

3           Is there some analysis that a property owner  
4 needs to go through to determine what to do with the  
5 property under these circumstances? So, theoretically,  
6 if it's -- I'm trying to think of something innocuous --  
7 if it's a toaster and the toaster is the subject of the  
8 question, you know, we can say, well, go buy another  
9 toaster and put that one toaster aside. It's 30 bucks  
10 or, if my wife buys it, it's \$70, but it's a toaster.

11           But then it becomes more and more difficult,  
12 arguably, if it's some big piece of equipment like this.  
13 I mean, this is MDB's business, so is the suggestion that  
14 MDB had a responsibility, under the facts and  
15 circumstances of this case, to take this entire rig from  
16 front to back out of service and leave it sitting in a  
17 lot somewhere or a garage somewhere available for  
18 everyone to inspect? Is that what you're thinking? Or  
19 is it just they had an obligation to maintain it, and if  
20 something happened to it, they can't dispose of the  
21 components that are obviously important to the cause of  
22 action?

23           MR. AICKLEN: I think your first question is,  
24 should they have put Versa on notice? Absolutely. If

1 their theory was that this Versa valve failed and it  
2 caused these 28 collisions, then they should have sent a  
3 certified letter to Versa saying, "Your valve failed.  
4 We're going to seek indemnity against you. Keep all your  
5 documents that you have related to this." At a minimum  
6 they should have put us on notice.

7 But we're not even talking about that. We're  
8 talking about them continuing to use it and then to take  
9 the components. I am not suggesting that they had to  
10 take the whole Freightliner and both of those trailers  
11 and park them on a yard until the case went to trial.  
12 That's not what I'm suggesting.

13 THE COURT: Or at least until some sort of  
14 discovery could have been done or inspection occurs.

15 MR. AICKLEN: Or how about just this? You,  
16 MDB, contend that it is a failure of the Versa valve.  
17 You must take out the entirety of the system that  
18 controls the Versa valve and retain that so that we can  
19 defend ourselves against the claim that it is defective.

20 And you know what? The interesting thing, too,  
21 is -- and this is why it's so important in this case --  
22 none of any of the parties, whether they work for MDB or  
23 work for the plaintiffs -- MDB's experts or our defense  
24 experts have ever found that they found a defect with the

1 subject valve. They even tore it down and nobody found a  
2 defect with it. So that means that the defect must have  
3 been in one of the components that was thrown away. That  
4 is crucial evidence, and that's not --

5 I see you turn away there. Are you thinking --

6 THE COURT: No. I apologize. I put my glasses  
7 on and glanced down at something.

8 MR. AICKLEN: I'm sorry. I thought you were  
9 thinking that I was going to wait for you.

10 THE COURT: No. I'd just interrupt you if  
11 that's the case.

12 MR. AICKLEN: That's normally how I do it, too.  
13 I'm sorry. I've got a little headache because of my  
14 back.

15 But this isn't a tire on the back that was  
16 changed between the time of the inadvertent dump and the  
17 present. This was their theory of the case that it was  
18 an electrical malfunction that inadvertently triggered  
19 it. They either didn't know or purposefully tore out  
20 components of the system they allege to be defective and  
21 threw them away. Not just tore them out, but threw them  
22 away.

23 They also altered the actual gate itself. They  
24 welded onto it and drilled and put a pin into it, and

1 then they continued to use the subject valve. How about  
2 just take the subject valve off two and a half years ago?  
3 Because even if it might be microns, every time you  
4 operate steel on steel, it changes the tolerances. There  
5 is wear. So the hundreds or thousands of times that  
6 these things have been dumped since the time of the  
7 July 2014 dumping to the time it was taken off the truck,  
8 not even the subject valve is the same.

9           And who did that? The party that did it is the  
10 one that's saying, "Oh, your product is defective, but  
11 we're going to throw away the evidence you need to prove  
12 that it was one of these components in the electrical  
13 system as opposed to your product that did it."

14           I'm not saying they should have parked that  
15 truck for two years and not used it. They should have  
16 given us notice and they should have allowed us to  
17 inspect. They didn't do that. Even after the lawsuit  
18 was filed, they still tore things out and threw them  
19 away, and if you look -- you have to take that  
20 information.

21           If you do not take any action, if you do not  
22 strike the cross-claim, then what have they done?  
23 They've thrown away the evidence that I need to prove my  
24 defenses, but they're going to get rewarded for it. On

1 cross-examination they're going to be able to look at my  
2 expert and say, "You didn't look at the same system, did  
3 you? It was a different system." They're going to be  
4 rewarded.

5           If this case goes to trial and we don't strike  
6 this complaint, this is worse than Young vs. Ribeiro  
7 because in that case they caught him on cross-exam, and  
8 they proved that he had faked the evidence and that's why  
9 they struck his complaint.

10           Here what they've done is throw away the  
11 evidence so I can't defend, and then they get to use that  
12 against me at the trial of the case.

13           THE COURT: Isn't that the Zenith case -- I'm  
14 trying to remember -- where there was a TV that was lost?

15           MR. AICKLEN: Yes. Yes. In a subro action, a  
16 fire subro action. And it's very similar. In fact, this  
17 is even a better analogy. You talked about the toaster  
18 oven, that your wife would go get another one?

19           THE COURT: Yes.

20           MR. AICKLEN: What if when that occurred, what  
21 if you kept the toaster elements and threw away the cord  
22 and the connections and then said to the toaster company,  
23 "Your product was defective," when it could have just  
24 been you plugged it in backwards, the cord was frayed,

1 all those things.

2           They have deprived me of the evidence to prove  
3 my case, and if nothing happens, then they benefit from  
4 it. I know you know that -- that you have read these  
5 pleadings, but I think that we need to look at just at  
6 least a couple of the Young factors. All right?

7           The first, the degree of willfulness of the  
8 offending party. Their PMK said, "Oh, yeah, not only did  
9 we take that stuff off, we threw it away."

10           They had to know, with a 28-car collision on  
11 the freeway where people are taken away in ambulances and  
12 they know that they've got claims from it, that there is  
13 going to be a lawsuit. "We took the components off and  
14 we threw them away."

15           The extent to which the nonoffending party  
16 would be prejudiced, I cannot mount a definitive defense  
17 because everybody who's looked at my valve says, "Oh,  
18 there's no defect to it," which means logically to me --  
19 I was an electrician for 20 years before I went to law  
20 school -- if there's no electrical defect with the valve,  
21 then one of those components in the system went short to  
22 ground and triggered it, but they tore it out and they  
23 threw it away.

24           So what's the prejudice to me? I can't defend

1 with what was probably, in my mind, absolutely the cause  
2 of that trigger, a failure of one of those male or female  
3 couplings.

4           The severity of the sanction of dismissal  
5 relative to the severity of the discovery abuse. Well,  
6 if I can't prove my defense, why is it too severe to  
7 strike his cross-claim? It wasn't me that did it. It  
8 was MDB that did it. I don't think the severity is too  
9 much.

10           They're coming back after me saying, "We want  
11 \$2,000,000 for indemnity monies we paid out to the  
12 plaintiffs in these cases, but we threw away the evidence  
13 you need to defend it." I didn't do it, so the severity  
14 is not too severe.

15           Whether any evidence has been irreparably lost.  
16 That's clear. The PMK said, "We threw it out. We threw  
17 it in the trash after we took it off." No question  
18 there.

19           The feasibility and fairness of alternative,  
20 less severe sanctions. What would the less severe  
21 sanctions be? I really can't think of -- this isn't a  
22 negligence claim, this is a products claim, so if you  
23 don't have the component --

24           THE COURT: Hold on, Mr. Aicklen.

1 Another sanction short of striking their claim,  
2 theoretically, could be striking their expert.

3 MR. AICKLEN: Well, that's going to come  
4 anyway.

5 Let's think about this logically. Let's think  
6 about this logically. If you strike their expert on a  
7 products liability case, can they go to trial? No, they  
8 can't. They have to have an expert.

9 THE COURT: I'm trying to think how it would  
10 work. I love that type of mental gymnastics. I'm not  
11 saying I'm going to strike their expert. I'm trying to  
12 think how it would work.

13 MR. AICKLEN: This would be beyond the  
14 understanding of the standard juror, I think is the  
15 standard such that you have to have expert testimony. So  
16 if you struck their expert for destroying the evidence,  
17 I'd nonsuit them or I'd ask for a motion for directed  
18 verdict immediately because they wouldn't be able to meet  
19 the burden of proof. The average juror is not going to  
20 understand the operation of a hydropneumatic and solenoid  
21 valve.

22 THE COURT: They would with a fancy drawing  
23 like that.

24 MR. AICKLEN: That is poor, that is very poor.

1           So there's really no less severe sanction,  
2 or what if you crafted a jury instruction that said, "Due  
3 to MDB recklessly or willfully throwing away evidence  
4 crucial to the defense of the case, you must presume that  
5 that evidence would have been in favor of the defendant  
6 Versa"?

7           Well, what have you just done? You've just  
8 given a directed verdict on a products liability claim;  
9 do you see? Any sanction other than striking the claim  
10 is the same thing. It just takes me all the way to trial  
11 and another 50-, \$75,000 to get there.

12           THE COURT: Well, that's not always the case.  
13 I know from not my own personal experience but experience  
14 with a colleague of mine, that on one occasion a judge  
15 gave the jury an advisory opinion suggesting that the  
16 jury should find -- in this case it was a criminal  
17 case -- but find the defendant not guilty. There is no  
18 such thing as a -- the Court doesn't directly do that.  
19 All the Court can do in Nevada, unlike other states, is  
20 advise the jury that the Court believes that the State  
21 has not met its burden beyond a reasonable doubt.

22           MR. AICKLEN: That's a criminal case, though.

23           THE COURT: I understand that, but the reason  
24 I'm making that point is this: The jury disregarded it

1 and convicted the guy anyway. And I can tell you that  
2 the attorney who prevailed on that was very angry at the  
3 judge because he thought his case just went into the  
4 toilet and then went in and argued it and said, "Hey,  
5 disregard what the judge says. Find the defendant guilty  
6 anyway. He's just giving you his opinion. It's up to  
7 the 12 of you" -- or in this case the 8 of you -- "to  
8 decide what happened."

9           It's not always the case that just because that  
10 inferential instruction is given, that the jury will  
11 regard it. I think it's reasonable to assume 95 times at  
12 least out of 100 that they will.

13           MR. AICKLEN: But, see, if you gave the  
14 instruction that you would assume that the evidence would  
15 be favorable to the defendant, that would mean that it  
16 wasn't a product defect, and therefore they could not  
17 meet the burden of proof.

18           This isn't a slip-and-fall where the average  
19 person would know, hey, if you don't put out a sign, it's  
20 dangerous, or you're doing 60 in a 55, you shouldn't do  
21 that. Those are the types of things the jury is going to  
22 have without an expert.

23           They couldn't not have an expert here, and if  
24 you instructed them, even a rebuttable presumption, I

1 would immediately move -- if the state of the evidence  
2 was such that you struck their expert or said, "You must  
3 presume that it would have exonerated the defendant," I'd  
4 immediately move for a directed verdict because they  
5 cannot meet the burden of proof.

6           They have to prove that a product was defective  
7 and it was defective when it left the factory, and it was  
8 used as intended and it caused the damage. Well, if you  
9 don't have the product and you give them that  
10 instruction, you can't prove it was defective and you  
11 can't prove it was defective when it came out of the  
12 factory, and that is a directed verdict.

13           So essentially, by acknowledging what they're  
14 doing and the results of it and the willfulness of it,  
15 you are getting to that solution two months and \$150,000  
16 earlier.

17           The 7th one is whether sanctions unfairly  
18 operate to penalize a party for the misconduct of his or  
19 her attorney. I do not know -- I don't know if prior  
20 defense counsel -- not Mr. Wieczorek -- if prior defense  
21 counsel told MDB, "Hey, you better hold onto the stuff,"  
22 but I do know that they still had it on the road and they  
23 were still using after the lawsuit was filed. So it was  
24 either -- it may have been the party before -- right? --

1 that did it, but after the lawsuit was filed, if they're  
2 still using it on the road, I presume that the lawyers  
3 didn't tell them not to.

4           So that is a toss-up. And you know what?  
5 Truthfully, it doesn't even matter because there's not an  
6 issue here of whether it happened, and it certainly  
7 wasn't the lawyers that tore out that stuff and threw it  
8 away. So you're not punishing the client for the actions  
9 of the attorney. Maybe they didn't tell them, but that  
10 was already after the stuff was thrown away. Maybe the  
11 lawyer said, "Take that thing off the road. Take the  
12 components out. We have to save it. It's evidence."  
13 But that isn't who actually threw away the evidence. It  
14 was the plaintiff themselves. So that is not -- you're  
15 not punishing the party for the actions of the attorney.

16           I think this one is really important, No. 8,  
17 the need to deter both the parties and future litigants  
18 from similar abuses. In the facts of this case, the  
19 evidence that was thrown away is the exact evidence that  
20 I need to prove my defense of the case. This is the most  
21 egregious example.

22           I'm not being rhetorical here. If my  
23 product that everybody has looked at is not defective,  
24 then one of those cables or connectors was. That's all

1 it was. It wasn't little green men shooting EMF out of  
2 the sky, and it wasn't a guy running alongside the truck  
3 at 65 miles an hour with a ferrous magnet. It was one of  
4 those connectors and they threw it away.

5           So if you don't strike their complaint, you're  
6 just telling them, you know what? Egregious, willful,  
7 went on for years. Not only took it off and put it into  
8 a box to held onto it, but took it off and threw it away.  
9 That's okay. You can do that. You can do that again.  
10 No. This is what Rule 37 and Young-Ribeiro were made  
11 for. Their claim, they did it, strike it.

12           THE COURT: Thank you.

13           Counsel, we're going to take a brief recess.  
14 It's 20 minutes after 3:00. So we'll be in recess until  
15 about 3:30 so everyone can stretch their legs.

16           (A recess was taken.)

17           THE COURT: We'll go back on the record in  
18 Fitzsimmons vs. MDB Trucking, et al., in considering the  
19 motion for sanctions pursuant to NRCP 37 filed on behalf  
20 of Versa.

21           Mr. Wieczorek, your argument.

22           MR. WIECZOREK: Thank you, Your Honor.

23           First, I think it bears pointing out the timing  
24 of this motion. This motion was filed on May 15th of

1 this year, which is roughly two weeks before mediation in  
2 the case, and I think it was filed roughly in tandem with  
3 Versa's motion for summary judgment on other issues in  
4 the case.

5           The fact of this theory that Mr. Aicklen had  
6 was well known two and a half months before the filing of  
7 this motion. So going back to our earlier discussion  
8 about Peter Paul, if they had known something that was so  
9 drastically important to their case at the time it  
10 happened, they should have moved forward more  
11 expeditiously and smoothly.

12           Having said that, though, the theory that  
13 Mr. Aicklen has spent time telling the Court is fine.  
14 The problem is no one else apparently believes it. So if  
15 you read the expert reports not only of the MDB experts,  
16 who completely discount this idea of the wiring and pins  
17 actually being a precipitating cause of the incident, if  
18 you look at Versa's own expert, Garrett Mitchell's,  
19 reports, he doesn't discuss this issue. He doesn't raise  
20 this issue. He doesn't say his investigation was  
21 hampered by this issue. He doesn't say he couldn't  
22 complete his investigation because of this issue. He  
23 never addresses that issue. His case, as his focus  
24 should be, is on the Versa valve and how it came to

1 inadvertently activate.

2           So to the extent Mr. Aicklen is asking for a  
3 death knell sanction against MDB for his theory of what  
4 may have happened, it should at least be borne out by  
5 some competent expert opinion that validates his  
6 position, and there is none in this case.

7           The issue of maintenance on this valve has been  
8 well known through discovery. This is not somebody  
9 hiding the ball. This was revealed in the case, and,  
10 again, this motion was filed about a month before Versa's  
11 expert's initial report was published. One would think  
12 if this was such a critical factor in this case, damaging  
13 Versa's defenses, their own expert would opine on it, and  
14 he chose not to, again, because in my view it simply is a  
15 nonissue. It's a device to get a motion before Your  
16 Honor, which is, I think, a sideshow to the big issue,  
17 which is the Versa valve itself.

18           Add to that the fact that the experts in this  
19 case, including Versa's own expert, not only inspected  
20 the at-issue truck, but an exemplar truck. Not only an  
21 exemplar truck, but the exact same truck that was  
22 involved in the exact same dumping episode an hour before  
23 the incident in this case, presumably with the same  
24 wiring.

1           THE COURT: But the difficulty I would have  
2 with that argument, Mr. Wieczorek, is this: We don't  
3 know exactly what conditions that exact same truck was  
4 exposed to, and so it's easy to say that it's the exact  
5 same truck, but it's really not because it hasn't been  
6 subject to the same conditions that the truck in question  
7 was exposed to.

8           And even if we assume that you got all the  
9 maintenance logs for both and they appear to be the same,  
10 given the nature of what we're talking about, it's not  
11 exactly the same. The only way we would know it is  
12 exactly the same is if it was exposed to the exact same  
13 conditions at the exact same time, but if one truck is  
14 always in Phoenix and the other truck is always in Des  
15 Moines, they're exposed to different weather conditions.

16           MR. WIECZOREK: Certainly. But we do know the  
17 exact same thing happened to that truck within one hour,  
18 the exact same thing happened, an inadvertent activation  
19 of the valve.

20           So I understand Mr. Aicklen's theory, I  
21 understand the fact he would have perhaps liked to have  
22 seen the original pins and the original wiring and the  
23 original whatever else was swapped out so this truck  
24 could remain in operation, but the fact is none of the

1 experts who are going to testify in this case have  
2 adopted that analysis or that rationale.

3           It would be inappropriate to sanction MDB based  
4 on a theory that their counsel holds which apparently  
5 none of the experts do, and to the extent we spent time  
6 going through the Ribeiro factors, you know, you -- I can  
7 recite them all to yourself, Your Honor. This is not --  
8 Versa likes to throw out the term "abusive litigation  
9 practices." That's the thrust of this motion, that MDB  
10 engaged in abusive litigation practices.

11           And you just look at the facts of this case.  
12 You know, this is a company that's trying to keep its  
13 fleet in operation. They use these trucks; they perform  
14 maintenance on them. There's no connection as to whether  
15 that impacted or affected this event at all, and counsel  
16 was not hiding the ball on this. It became well known  
17 through discovery and, again, none of the experts have  
18 opined on it.

19           So I think this is not a motion based in good  
20 faith on trying to salvage defenses for a party that's  
21 going to get slapped at trial because real evidence was  
22 damaged or destroyed. This is a shift or a diversion  
23 from the real issue in this case, which is the valve  
24 itself and what I think was Versa's attempt to simply

1 obtain some leverage for purposes of other factors in  
2 this case, including the mediation which occurred less  
3 than two weeks after the motion was filed.

4 THE COURT: Anything else?

5 MR. WIECZOREK: No. Thank you.

6 THE COURT: Thank you.

7 Hold on a second. Let me look at something.

8 Mr. Aicklen, go ahead.

9 MR. AICKLEN: Thank you, Your Honor.

10 There is no strategic timing of this motion.

11 The motion became ripe when we finished all the discovery  
12 and the depositions, especially when we found that they  
13 had thrown it away.

14 An expert's opinion is just that, an expert's  
15 opinion. How can an expert opine, "Hey, I found what  
16 triggered it. It was a busted four-way connector, the  
17 Bakelite was gone, it touched short to ground, and it  
18 triggered the valve," when they threw the connector away?  
19 How can the expert say, "Eureka, I found it," when they  
20 threw away the evidence?

21 There seems to be a pattern of trying to, like,  
22 blame me or Versa for -- and in this circumstance MDB --  
23 throwing away the evidence. This is not a sideshow. As  
24 the Court pointed out, exemplar evidence is not the

1 actual evidence in the case. We don't -- Hallmark  
2 doesn't say you go try cases on exemplar evidence. In  
3 fact, it rejects -- I mean, if that's all you can get and  
4 you don't have anything else, you're done.

5           And to say that, you know, I'm sure the experts  
6 would have liked to see it, no, that's not what it is.  
7 It's evidence in the case where your theory is that it  
8 was an electrical malfunction, and you threw away one,  
9 two, three, four, five, six key components of the  
10 electrical system. And now you come and say, well, the  
11 experts didn't find that to be the problem, so it's a  
12 sideshow show, it's not important.

13           Well, it is their theory. How can the experts  
14 opine on what is not there? The experts have said there  
15 is no evidence of any defect, but if the original of the  
16 connectors had been there -- just think about it. If all  
17 the experts say there's no defect, it's this  
18 electromagnetic force, which by the way didn't trigger  
19 any other solenoids -- we didn't have people's hoods  
20 popping open and their trunks popping open driving across  
21 the freeway -- if their theory of the case is these  
22 electromagnetic forces, which they can't tell us where  
23 they came from, and all the experts say, you know what,  
24 based on the state of the evidence, we don't find a

1 defect, so it's got to be human error, then how can you  
2 say that it is -- it is not a case dispositive sanction  
3 to throw away a series of components that are crucial to  
4 the issue?

5           They allege an electrical malfunction. They  
6 threw away a big chunk of the electrical system, and  
7 anything other than striking their cross-claim will tell  
8 them and others in the future that you can chuck out the  
9 evidence and still go forward with your case.

10           THE COURT: Remind me, if you could,  
11 Mr. Aicklen, regarding the truck that we're talking about  
12 on July 7th of 2014, were both trailers full of gravel or  
13 just one trailer?

14           MR. AICKLEN: Both trailers were full of  
15 gravel.

16           THE COURT: Did both trailers dump the gravel?

17           MR. AICKLEN: Just the rear dumped the gravel.  
18 That would seem --

19           THE COURT: Does that support or refute the  
20 whole solenoid magnetic field argument because --  
21 granted, this is my high school education coming into  
22 play -- but if there's a magnetic field that would cause  
23 this to occur, then presumably wouldn't it occur with  
24 both of the trailers as they pass through the magnetic

1 field?

2 MR. AICKLEN: And how about the starter motor,  
3 which is actuated by a solenoid, and the electric door --

4 THE COURT: I guess what I would say about that  
5 is I don't know if they're identical solenoids. I guess  
6 you have to look at each type of solenoid and see if it's  
7 similarly affected by magnetic fields. It gets back to  
8 the argument about trunks popping open or your gas tank  
9 popping open.

10 MR. AICKLEN: It's a magnetic relay. If you  
11 put 12 volts to it, it pulls a pole. You hear it when  
12 you unlock your doors. You energize it, it energizes a  
13 magnet, it pulls a pole and opens.

14 So you are correct. If there had been some  
15 type of electromagnetic force that had acted upon the  
16 truck, there is an exact same Versa valve on double No.  
17 1, and it would have triggered that. And that actually  
18 supports the fact that the loss of these component  
19 systems is even more crucial, because odds are it was  
20 somewhere back of the first valve because they're two  
21 separate systems. It's in one four-pin connector, but  
22 there's two circuits. You trigger one circuit, the front  
23 one dumps. You trigger the second circuit, the back one  
24 dumps. The fact that the back one dumped and the front

1 one did not actually supports the theory that there was a  
2 failure in that four-pin connector, but we will never  
3 know because they tore it off and threw it away. Didn't  
4 even keep it. They threw it away.

5 THE COURT: Okay, Counsel.

6 It's interesting. I had to address a similar  
7 issue late last year, the issue of spoliation of  
8 evidence. It was a case of then Judge Stiglich's, but  
9 she had been appointed to the Nevada Supreme Court, so at  
10 the time I was considering the case and she was Justice  
11 Stiglich at that point, but it was a motion to dismiss  
12 based on spoliation of evidence.

13 The parties in that case were a local casino  
14 and an elevator corporation or an elevator service  
15 corporation, and the issue there was that the casino had  
16 some degradation in the hoist cables on the elevator.  
17 And what happened was that the elevator company with whom  
18 they had a servicing contract said, "No, that's your  
19 fault because you allowed them to get wet," and the  
20 casino said, "No, you need to come in pursuant to our  
21 service agreement and replace these hoist cables." And  
22 the defendant said, "No, we don't."

23 And so then the casino went out and paid some  
24 other elevator company to come in and replace the hoist

1 cables, and then the second elevator company who came in  
2 disposed of the hoist cables. So they weren't able to  
3 determine if it was rust or it was some other type of  
4 degradation that was causing the problem, and they  
5 couldn't certainly do any testing on it because the  
6 second elevator company, who was the agent of the hotel,  
7 disposed of the cables, and they came in and testified,  
8 "It's just what we do. We go there, we fix it, and we  
9 throw the other stuff in the garbage unless they want us  
10 to keep it."

11 So I'm familiar with the issues that are  
12 presented. The Nevada Supreme Court has addressed those  
13 issues, and I believe that district courts need to  
14 approach case-concluding sanctions with great caution,  
15 and the Nevada Supreme Court certainly confirms that.

16 If I were to grant the motion filed by Versa,  
17 it would be a case-concluding sanction. There are no  
18 other outstanding claims between Versa and MDB; is that  
19 correct?

20 MR. AICKLEN: That is correct.

21 THE COURT: It just ends the -- it puts a  
22 period at the end of the entire process.

23 In Stubli, S-t-u-b-l-i, vs. Big D International  
24 Trucks, Incorporated, 107 Nev. 309 at page 312,

1 810 P.2d 785, page 787, a 1991 case, and Kelly  
2 Broadcasting vs. Sovereign Broadcasting, 96 Nev. 188 at  
3 page 192, 606 P.2d 1089 at page 1092, a 1980 case, the  
4 Nevada Supreme Court affirms what it says all of the  
5 time, and that is, discovery sanctions are within the  
6 discretion of the trial court. However, the Supreme  
7 Court has also said that, as I mentioned a moment ago,  
8 that we should be very cautious as we approach  
9 case-concluding sanctions.

10           The Supreme Court says in GNLV Corporation vs.  
11 Service Control Corporation, 111 Nev. 866 at 870,  
12 900 P.2d 323 at page 326, a 1995 case:

13           "The dismissal of a case based upon a discovery  
14 abuse such as the destruction or loss of evidence" -- and  
15 then there's an internal quote -- "'should be used only  
16 in extreme situations. If less drastic sanctions are  
17 available, they should be utilized.'" And that's the end  
18 of the internal quotation.

19           The internal quotation is from Nevada Power vs.  
20 Flower Illinois, 108 Nev. 638 at page 645, 837 P.2d 1354  
21 at page 1359, a 1992 case.

22           And then in Young vs. Ribeiro -- let me find  
23 the citation for it -- Young vs. Johnny Ribeiro Building,  
24 Incorporated, 106 Nev. 88, 787 P.2d 777, a 1990 case, the

1 Nevada Supreme Court places a special burden on district  
2 courts. It's not a special burden. They just expect us  
3 to do our jobs.

4 At page 93 of the Nevada Reporter, the Nevada  
5 Supreme Court says:

6 "We will further require that every order of  
7 dismissal with prejudice as a discovery sanction be  
8 supported by an express, careful, and preferably written  
9 explanation of the Court's analysis of the pertinent  
10 factors," those being the eight factors that we've  
11 discussed today.

12 I would like to go back and look at a couple of  
13 the cases that I have reviewed in the past regarding  
14 spoliation of evidence and the loss or destruction of  
15 that evidence, specifically Fire Insurance Exchange vs.  
16 Zenith Radio Corporation, 103 Nev. 648 at page 651,  
17 747 P.2d 911 at page 914, a 1987 case, the Young vs.  
18 Ribeiro case, and the GNLV Corporation vs. Services  
19 Control Corporation. I think that those will inform my  
20 decision on what to do, whether or not to grant the  
21 motion. I will give the parties a preliminary  
22 understanding of what my thought process is.

23 There will be a sanction for the loss of the  
24 evidence. I don't know what the sanction will be at this

1 point. If it will be a granting of the motion, then I do  
2 need to go through the careful and written analysis that  
3 is required by the Nevada Supreme Court pursuant to Young  
4 vs. Ribeiro. If it is some lesser sanction, then I don't  
5 believe that you need to go through that full analysis  
6 because the Court simply is concluding that  
7 case-concluding sanctions aren't necessary.

8           But I'll also have to think about the argument  
9 that Mr. Aicklen has made, and that is, regardless of  
10 what you do, it's a case-concluding sanction anyway. I'm  
11 not sure about that, though it's an interesting argument  
12 and I will have to give it some thought, but I want the  
13 parties both to be aware that there will be some sanction  
14 as a result of the loss of this information -- excuse  
15 me -- the loss of this evidence.

16           The Court in Ribeiro made a very important  
17 observation, and it applies to this case. Strike that.  
18 It's in the Fire Insurance Exchange vs. Zenith Radio  
19 Corporation case, a 1997 case.

20           The Nevada Supreme Court states at page 651 of  
21 the Nevada Reporter and at page 914 of the Pacific  
22 Reporter:

23           "Even where an action has not been commenced  
24 and there is only a potential for litigation, the

1 litigant is under a duty to preserve the evidence which  
2 it knows or reasonably should know is relevant to the  
3 action."

4           And so the fact that this came later or that  
5 there was a complaint on file immediately is not going to  
6 be dispositive of the issue, nor is the fact maybe that  
7 the cables and the electronics were not replaced  
8 immediately. I don't know that MDB had an obligation to  
9 go and warehouse the entirety of the truck. That strikes  
10 me as unreasonable. I don't know that they had an  
11 obligation to rip out all of the electronics of the  
12 solenoids right when the accident occurred to preserve  
13 them intact. That may or may not be unreasonable, but  
14 certainly it is reasonable to assume that once these  
15 items are being replaced, at a minimum they'll be  
16 retained in order to be looked at or, alternatively, some  
17 notice would be provided by MDB to Versa letting them  
18 know this truck, which is the subject of litigation or  
19 the anticipated subject of litigation, is going to be  
20 subject to maintenance, "Do you want us to preserve these  
21 items?"

22           If memory serves me correctly from the case  
23 that I had, that argument was raised by the hotel, the  
24 argument being, "Well, we denied that this was part of

1 our service agreement, and you said you were going to get  
2 somebody else to do it. You never told us to maintain  
3 the evidence."

4           And my recollection of the research I did  
5 regarding that issue was there is no affirmative duty on,  
6 in this case, MDB's part to tell Versa, "We're going to  
7 dispose of this stuff. Do you want to us retain it?"  
8 They just have an obligation to retain it.

9           So at a minimum the Court will be determining  
10 that some sanction is required. I don't know if it will  
11 be the adverse inference instruction or one of the other  
12 potential sanctions contemplated by Nevada Rule of Civil  
13 Procedure 37 or if it will be the striking of the  
14 cross-claim in its totality. We'll just have to wait and  
15 see, but I'll take this one motion under advisement and  
16 do some more legal research and then write an appropriate  
17 order based on the arguments and the motion practice.

18           The final motion for the Court's consideration  
19 today has already been briefly touched on, and that is  
20 the August 3, 2017, file-stamped Defendant/  
21 Cross-Claimant/Cross-Defendant Versa Products Company,  
22 Incorporated's Objection to the Discovery Commissioner's  
23 Recommendation For Order dated July 27th of 2017. The  
24 Court has received and reviewed that document.

1           Further, the Court has received and reviewed  
2 the August 7, 2017, file-stamped MDB Trucking, LLC's  
3 Response to Defendant/ Cross-Claimant/Cross-Defendant  
4 Versa Products Company, Incorporated's Objection to  
5 Discovery Commissioner Recommendation For Order dated  
6 July 27th of 2017.

7           The Court entered an order on August 9th of  
8 2017 informing the parties that we would set this for  
9 hearing today. The matter wasn't formally submitted for  
10 the Court's consideration. If I remember correctly, I  
11 did indicate that Versa could file a reply if you wanted  
12 to, but I don't have the reply.

13           Did you file a reply?

14           MR. AICKLEN: Let me take a look, Your Honor.

15           THE COURT: Oh, I did receive a reply. I just  
16 didn't get to the bottom.

17           MR. AICKLEN: Mine are out of order. I have  
18 the objection, and I think the opp. and reply are in  
19 front.

20           THE COURT: No. And I've got the reply. It  
21 was just stuck on here. It's file-stamped August 11th of  
22 2017, and it is titled the Defendant/Cross-Claimant/  
23 Cross-Defendant Versa Products Company, Incorporated's  
24 Reply in Support of the Objection to Discovery

1 Commissioner's Recommendation dated July 27th of 2017.

2           So I entered the order. You still have the  
3 opportunity to file the reply, and you did after the  
4 order was entered, and then I reviewed it.

5           Mr. Aicklen, go ahead.

6           MR. AICKLEN: Thank you, Your Honor.

7           As you said, we briefly touched on this. What  
8 the request seeks is the actual specifications and  
9 clearances and tolerances and so forth which have  
10 absolutely nothing to do with the electrical system.  
11 You're talking about mechanical tolerances, how closely  
12 do things fit, how are they cut, so forth. They have  
13 absolutely nothing to do with their theory of the case,  
14 which is that it was an electrical defect, but more  
15 importantly than that, this information has never been  
16 given up unredacted.

17           This would literally -- Versa is the  
18 best-selling valve, and this information would allow  
19 reverse engineering, and that's what the Trade Secret  
20 Protection Act is meant to avoid.

21           We have the affidavit -- we filed the affidavit  
22 of the engineer from Versa Valve, who states that if we  
23 give up these drawings, which we never have, somebody can  
24 reverse engineer them because -- and in their opposition

1 they say, well, you can tear it down and reverse engineer  
2 it. That's not true because you're not going to have the  
3 same -- whenever anything is manmade, it is not exactly  
4 to what the specifications are. There's always  
5 differences because men are not perfect and machines are  
6 not perfect, but if you put the tolerances and  
7 measurements and the specs out and they are -- they are  
8 obtained by other people, then it can be reverse  
9 engineered en masse, and that would harm my client.

10 THE COURT: Let me interrupt you, then.

11 Here's the concern I have. Commissioner Ayres  
12 noted this in his Recommendation For Order.

13 There is a confidentiality agreement in place.  
14 Your response to that earlier today was, there's so many  
15 holes in that that it's not going to cover what our  
16 concerns are.

17 These issues are discussed -- and by "these  
18 issues" I mean trade secrets -- are discussed all the  
19 time in civil litigation, and confidentiality agreements  
20 are put in place. I'm not minimizing your client's  
21 concerns in the least that if this information were to  
22 fall into the wrong hands, the hands of either a  
23 competitor or some manufacturer outside of the  
24 jurisdiction of the United States, that could be very

1 detrimental to Versa's business. I get that, but I still  
2 don't see why the confidentiality agreement that's in  
3 place now between just MDB and Versa doesn't cover this  
4 issue.

5           You know, I'm thinking the secret formula for  
6 Coca-Cola, the 11 herbs and spices from Kentucky Fried  
7 Chicken, all of this very proprietary information that is  
8 hidden away somewhere deep inside a vault. If it became  
9 an issue in a case -- the Court doesn't say you don't  
10 have to provide it if it's a legitimate issue. Your  
11 argument just is it has nothing to do with the outcome of  
12 this case, and therefore we don't have to provide it?

13           MR. AICKLEN: No, no. Our argument is we have  
14 provided the schematics. Their theory is that there was  
15 a failure of a relay, which is an electronic device, not  
16 that the tolerances weren't proper or the measurements  
17 were wrong in this device or so forth.

18           So what they're trying to get -- and it's  
19 political, it absolutely is political -- pressing this  
20 point is trying to get my client to knuckle under because  
21 they've never turned it over because they know it could  
22 be the death knell of that line of business.

23           So he was talking about other motives and  
24 filing things and so forth at different times. What is

1 the relevance of measurements and micrometers and so  
2 forth of production when balanced against a company  
3 losing a very proprietary and very trade secret piece of  
4 information?

5 THE COURT: Again, it circles back to the same  
6 point. How do we know that they're losing it? It's  
7 presupposing that there will be a breach in the  
8 confidentiality agreement.

9 So you're saying, "We're going to lose this."  
10 In essence, the argument you're making is that somehow  
11 it's going to become public knowledge, and therefore it  
12 can lead to the loss of business or the destruction of  
13 Versa's superiority --

14 MR. AICKLEN: -- in the marketplace.

15 THE COURT: Right. But that's an assumption.

16 MR. AICKLEN: I've been doing this 27 years,  
17 Your Honor. I've seen it happen a lot, and I've seen it  
18 break companies, too. And I'm sure you've seen it  
19 happen, too.

20 There are always orders at the end -- when  
21 there are confidentiality agreements, there's orders that  
22 you have to destroy this or you have to provide it back  
23 to us, and then I see it especially in elevator cases --  
24 you were mentioning elevator cases -- I see the specs for

1 KONE and Thyssenkrupp and Otis Elevators coming back and  
2 they're marked "Confidential" on the bottom and the date  
3 and time. I know that Otis Elevator took an expert to --  
4 for a contempt of court order in federal court for  
5 turning over information like this.

6           What I'm saying is that the potential breach of  
7 this information could be fatal to my client's business,  
8 so why, if their theory -- why, if their theory is  
9 electronic based, do they need to know how to build the  
10 exact tolerances of this device? If their theory is that  
11 it's Peter Paul's relay that's bad --

12           Remember, all the experts have looked at the  
13 actual mechanics of this electromechanical valve. If  
14 their theory is that it's the electronics that are bad,  
15 why do they need to know the specs and the measurements?  
16 And it is political, and it's meant as a club.

17           THE COURT: Sometimes we wield clubs. I'm not  
18 suggesting that's what's occurring in this case, but if  
19 there is some relevance -- and that's what the threshold  
20 at the discovery level is, is it relevant. If there's  
21 some relevancy that can be articulated, then I believe  
22 that Commissioner Ayres' order would stand.

23           Now, I do have a concern for Versa's express  
24 desire to maintain its premier place in the marketplace

1 and to maintain its work product. Is there a way that  
2 the parties can fashion something short of photocopying  
3 and dissemination that would accomplish the same goal?  
4 That's the first thing I was thinking of.

5           And the second thing I was thinking of is your  
6 express concern about the holes that are present in the  
7 confidentiality agreement that the parties provided to  
8 the Court and that the Court entered. Are there ways  
9 that you can shore up the holes? That's the second  
10 question.

11           So the first one is -- I guess what I'm  
12 thinking, Mr. Aicken, is, can you have a circumstance  
13 where rather than -- I say "Aicken" -- I apologize,  
14 Mr. Aicklen --

15           MR. AICKLEN: That's okay.

16           THE COURT: No, it's not. I apologize.

17           Can you have a circumstance where rather than  
18 we photocopy these things and we stamp them  
19 "Confidential" all over the place and provide them to  
20 you, we allow your expert to come and look at them -- not  
21 to photograph them, not to do anything specific to copy  
22 them -- but you're allowed to view them. That might  
23 solve the problem.

24           It's not that they're going to be out there in

1 the world, so to speak, in an unredacted form. It would  
2 just give the expert the opportunity to review the  
3 information, and if he needs to review it again,  
4 obviously we can fashion an order that allows the expert  
5 to come in and see that information again, but it's not  
6 something that has been memorialized and disseminated,  
7 not sitting in somebody's file somewhere to be snatched  
8 up.

9 MR. AICKLEN: That seems like a very prudent  
10 compromise between the two, and I appreciate it. And  
11 what -- if I could propose something? Perhaps  
12 Mr. Wieczorek and I could talk about it and come back to  
13 the Court in, like, seven days and then ask for a ruling?  
14 Is that acceptable?

15 MR. WIECZOREK: Your Honor, here's the problem  
16 I have. I'm 60 days from trial. I'm waiting on these  
17 documents. My experts are in Phoenix. I suppose the  
18 suggestion is they can get on a plane and fly to New  
19 Jersey and look at these documents in a conference room  
20 after their phones are taken away from them and then do  
21 with it what they will.

22 THE COURT: No, that wouldn't be the  
23 compromise. The compromise is --

24 MR. AICKLEN: We'd have to take them to

1 Phoenix.

2 THE COURT: -- we're reaching for them, and by  
3 "we," I mean the system is reaching to accommodate Versa,  
4 and so Versa bears the cost of that. They come to your  
5 expert. Obviously you're present and Mr. Aicklen is  
6 present, but you set up a process where the information  
7 is brought to your expert, your expert is allowed to view  
8 it, he's allowed to obviously make notes.

9 We can't expect that the expert has a  
10 photographic memory, but the expert can view the  
11 information, have the time that he or she needs to view  
12 it in a reasonable -- it's not five minutes, here's 5,000  
13 pages, figure out what you need, go.

14 So we would set up a process. I'd allow the  
15 two of you to set up a process and only get involved if  
16 necessary where your clients aren't bearing any of the  
17 cost and it is done in a way that accommodates your  
18 client's and your experts' interests. That's my thought.  
19 Not we're going to do it in Las Vegas because that's  
20 where you guys are or we're going to do it here in the  
21 discovery commissioner's office in Reno so everybody's  
22 flying all over the place, only I'm not inconvenienced.

23 We'll go to Phoenix if that's where your guy  
24 is, take care of it in Phoenix.

1 MR. AICKLEN: Both of their experts are in  
2 Phoenix, although I don't know -- Bausch said in his depo  
3 that he deferred all of electrical issues to Anderson.

4 THE COURT: And it would happen within seven  
5 days of today's date.

6 MR. WIECZOREK: Believe me, I appreciate this.  
7 The problem I have is I haven't vetted this with my  
8 experts. Let's say they see this stuff. Let's say they  
9 find something in there very important. Let's say they  
10 need to consult with some colleagues about how it impacts  
11 the issues of this case. Let's say they need to expose  
12 some of this information that Versa finds confidential to  
13 assist my representation of the client.

14 There are a lot of unknowns in this process,  
15 and I can only represent to you, Your Honor -- and  
16 Mr. Aicklen has been around a long time, I've been a  
17 lawyer for 35 years -- I've never been on the downside of  
18 a protective order and the onus is on me.

19 If my secretary leaks this to CNN, I'm the one  
20 who is going to hear about it, so I take these things  
21 very seriously. I think we're introducing hoops into an  
22 equation that really are not necessary because I can  
23 vouch for taking control of this and keeping a lid on it.

24 THE COURT: Well, I can appreciate that,

1 Mr. Wieczorek. The counter argument to that is this: I  
2 was watching a program on CNN recently -- I watch CNN and  
3 Fox, I watch everything -- but there was this very  
4 interesting program on CNN about cyber espionage and  
5 about corporate espionage and about entities outside of  
6 the United States and the efforts that they will take to  
7 access the digital records of corporations inside the  
8 United States in order to get their trade secrets. And  
9 we don't have to go very far. HBO has been recently the  
10 subject of a gigantic hack where terabytes of information  
11 were stolen, and I believe that was domestic, if memory  
12 serves me correctly, but regardless, huge amounts of  
13 information worth hundreds of millions of dollars was  
14 stolen from HBO.

15 I'm assuming you have a very sophisticated IT  
16 presence, but there's just no way to guarantee that kind  
17 of stuff. And so I get the argument that the fewer  
18 people out there that they have to go poking around for  
19 to find, the better.

20 So let's say we give it to you, and you're  
21 right, I have no doubt at all, Mr. Wieczorek, that you  
22 would do everything humanly possible to maintain the  
23 confidentiality of that information, to make sure that it  
24 was not disseminated to anyone, but the minute it is

1 digitally produced, it's easily accessible. The minute  
2 it's stored somewhere -- I guess if it's in a file  
3 cabinet, at least it's theoretically harder to get to  
4 these days than if it's digitally stored, but it's still  
5 there. So I get the concern, and I'm not going to -- I  
6 don't want to set up something where I'm saying, well,  
7 we're not going to do this because theoretically  
8 something might happen.

9           You're right. Maybe your experts look at it  
10 and say, "Yes, we need more information. We need to take  
11 some additional steps. We need to take some additional  
12 time or consult other people." That will require you or  
13 the parties to contact me, and I'll take whatever  
14 additional action needs to be taken, and if it's  
15 eventually just enforcing Commissioner Ayres'  
16 recommendation for an order, then that's what it will be,  
17 but I'm trying to fashion something that takes into  
18 consideration both sides' concerns: Your desire to  
19 expeditiously have the information so you can continue to  
20 prepare for trial and Versa's legitimate interest in  
21 making sure that their trade secrets are not exposed  
22 unnecessarily.

23           MR. WIECZOREK: Your Honor, that's very fair,  
24 Your Honor. I'm willing to work with Mr. Aicklen. I'm

1 not about busy work. My experts may look at this stuff  
2 and say, "Who cares?" And they may look at it and say,  
3 "Wow, this changes things." So I do not know, but to the  
4 extent that it assuages Mr. Aicklen's client's concerns  
5 that they fly down to Phoenix and we all look at it in  
6 someone's office, I guess I can persuade Mr. Anderson to  
7 do that.

8 THE COURT: Any objection to that as a  
9 preliminary step, Mr. Aicklen?

10 MR. AICKLEN: Not from me, but I would have to  
11 talk to the client, but to me it sounds reasonable.

12 THE COURT: You can tell the client the  
13 alternative at this point in time is --

14 MR. AICKLEN: Turn over copies, right.  
15 Understood.

16 THE COURT: -- Commissioner Ayres' order is  
17 confirmed.

18 MR. AICKLEN: Within seven days we will take a  
19 set of the plans unredacted -- that were produced  
20 redacted -- unredacted, allow --

21 Is it just Anderson or Bausch or both?

22 MR. WIECZOREK: I have to check with them. I  
23 don't know.

24 MR. AICKLEN: We've got two experts, so allow

1 their two experts to view and take notes but not to  
2 photograph and/or copy. Versa will take those to Phoenix  
3 to them.

4 THE COURT: Correct.

5 MR. AICKLEN: Okay. I think that sounds  
6 reasonable and I will recommend that my client follow it.

7 THE COURT: And if there is some issue  
8 regarding that, then please contact my office immediately  
9 and I'll take further action regarding Commissioner  
10 Ayres' order, but hopefully that will resolve the  
11 situation and get the information to MDB that they need  
12 to make their final trial preparations and also at the  
13 same time protect the interests that are being expressed  
14 by Versa.

15 MR. AICKLEN: Thank you.

16 THE COURT: Mr. Aicklen, can you prepare an  
17 order consistent with that conclusion regarding the  
18 discovery issue?

19 MR. AICKLEN: Yes, sir.

20 THE COURT: Okay, counsel. It is 4:15.  
21 Hopefully, your flights home are --

22 MR. AICKLEN: I've still got two more days,  
23 Your Honor.

24 Your Honor, may I ask a housekeeping matter?

1 THE COURT: Regarding this case or just in  
2 general?

3 MR. AICKLEN: This case.

4 THE COURT: Yes.

5 MR. AICKLEN: Do you know how long it will take  
6 you to take a look at the issue of motion to strike  
7 because that may have an effect on other things?

8 THE COURT: It will probably be -- I'm just  
9 trying to think of what my week is like next week. I  
10 remember looking at it and it's a nightmare. I know that  
11 we've got a holiday next week as well.

12 My week next week is Monday's a day off;  
13 Tuesday, I have numerous matters set; Wednesday, I've got  
14 a writ hearing on a murder case from 2012; I've got my  
15 criminal calendar Thursday plus a special-set sentencing  
16 and then two more things in the afternoon; and then  
17 Friday I have four things on calendar, including I'm  
18 marrying a couple of people.

19 MR. AICKLEN: You are marrying two people?

20 THE COURT: Yes. I presume it's two people.  
21 Things have changed, but not that much.

22 MR. AICKLEN: I was teasing you because you  
23 said you're marrying two people.

24 THE COURT: I'm performing a wedding for a very

1 nice couple, so I'm doing that in the afternoon on  
2 Friday.

3 Let me just look at what the following week  
4 looks like so I can get a better idea.

5 MR. AICKLEN: So you think probably at least  
6 two weeks?

7 THE COURT: I'm thinking about two weeks.

8 MR. AICKLEN: I just wondered. And I would  
9 assume that you will be preparing that order and you will  
10 want me to do drafts of the other three?

11 THE COURT: Correct. If I grant the  
12 case-concluding sanction order, then it will be an order  
13 consistent with the analysis required pursuant to Young  
14 vs. Johnny Ribeiro. If not, it will be much shorter and  
15 just describe what the sanction is, but as I said, there  
16 will be -- you should anticipate there will be some  
17 sanction. I just don't know what it is yet.

18 Anything else on behalf of Versa?

19 MR. AICKLEN: No, sir.

20 THE COURT: On behalf of MDB?

21 MR. WIECZOREK: Your Honor, just inquiry on  
22 your consideration of the motion to strike under the  
23 Ribeiro factors, and I understand that your intention is  
24 to actually grant the case-terminating sanction.

1           My read of the case law says that in addition  
2 to analyzing the factors, it may be necessary to hold an  
3 evidentiary hearing to make sure that the representations  
4 made in court today are, in fact, accurate. I don't know  
5 if that's obligatory or optional to Your Honor, but  
6 that's how I've experienced these cases in the past. If  
7 you're going to dismiss -- do a death knell --

8           THE COURT: I've had that come up before, but  
9 that is -- that prove-up hearing is -- if the  
10 case-concluding sanctions are in favor of the plaintiff,  
11 then you have to have a prove-up hearing to determine  
12 what the actual damages are.

13           Here, if the case-concluding sanction is in  
14 favor of Versa, the cross-defendant, I'm not quite sure  
15 because there's -- there's no --

16           MR. AICKLEN: I believe the case law is that  
17 there does not have to be a hearing. If it's clear upon  
18 the evidence, there does not have to be an evidentiary  
19 hearing, and all the evidence that we've submitted is the  
20 deposition testimony of MDB and their discovery  
21 responses, so that's not -- I don't think that counsel is  
22 going to say that's an issue. That's his own client's  
23 testimony and documents.

24           THE COURT: Well, I'll make sure that it's

1 correct. How about that? I'll do my best to make sure  
2 that it's correct.

3 MR. AICKLEN: That's all I ask.

4 THE COURT: Thank you. Court's in recess.

5 (Proceedings concluded.)

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1 STATE OF NEVADA )  
2 ) ss.  
3 COUNTY OF WASHOE )

4

4 I, PEGGY B. HOOGS, Certified Court Reporter in  
5 and for the State of Nevada, do hereby certify:

6 That the foregoing proceedings were taken by  
7 me at the time and place therein set forth; that the  
8 proceedings were recorded stenographically by me and  
9 thereafter transcribed via computer under my supervision;  
10 that the foregoing is a full, true and correct  
11 transcription of the proceedings to the best of my  
12 knowledge, skill and ability.

13 I further certify that I am not a relative nor  
14 an employee of any attorney or any of the parties, nor am  
15 I financially or otherwise interested in this action.

16 I declare under penalty of perjury under the  
17 laws of the State of Nevada that the foregoing statements  
18 are true and correct.

19 Dated this 30th day of September, 2017.

20

21 /s/ Peggy B. Hoogs

22 Peggy B. Hoogs, CCR #160, RDR

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