

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]

JOINT APPENDIX VOLUME 1 OF 18

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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11 DISTRICT COURT

12 WASHOE COUNTY, NEVADA

13 ERNEST BRUCE FITZIMMONS and
14 CAROL FITZSIMMONS, Husband and
Wife,

15 Plaintiffs,

16 vs.

17 MDB TRUCKING, LLC, et. al.

18 Defendants.

19 AND ALL RELATED CASES.

Case No. CV15-02349

Dept. 10

ERRATA TO DEFENDANT/CROSS-
CLAIMANT/CROSS-DEFENDANT
VERSA PRODUCTS COMPANY, INC.'S
MOTION TO STRIKE
DEFENDANT/CROSS-
CLAIMANT/CROSS-DEFENDANT MDB
TRUCKING, LLC's CROSS-CLAIM
PURSUANT TO NRCP 37; OR IN THE
ALTERNATIVE, FOR AN ADVERSE
JURY INSTRUCTION

22
23
24 COMES NOW, Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS
25 COMPANY, INC., (hereinafter "VERSA"), by and through its attorneys of record, Josh
26 Cole Aicklen, Esq., David B. Avakian, Esq. and Paige S. Shreve, Esq. of LEWIS
27 BRISBOIS BISGAARD & SMITH, LLP, and hereby files this ERRATA TO
28 DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS

1 COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-
2 DEFENDANT MDB TRUCKING, LLC's CROSS-CLAIM PURSUANT TO NRCP 37; OR
3 IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION filed on May 15,
4 2017.

5 PLEASE TAKE NOTICE that the Errata is to change the reference from NRCP 35
6 to NRCP 37 in the title of the Motion and the Affidavit of David B. Avakian, Esq.

7 AFFIRMATION

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

10 DATED this 15th day of May, 2017

11 Respectfully submitted,

12 LEWIS BRISBOIS BISGAARD & SMITH LLP

13
14
15 By /s/ David B. Avakian

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2017, a true and correct copy
of ERRATA TO MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-
DEFENDANT MDB TRUCKING, LLC's CROSS-CLAIM PURSUANT TO NRCP 37; OR
IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION was served via U.S.

Mail addressed as follows:

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

GENEVA M. REMMERDE,
Plaintiff,

Case No. CV16-00976
Dept. No. 10

vs.

DANIEL ANTHONY KOSKI, MDB
TRUCKING, LLC, DOES 1-X and
ROE I-V

Defendants.

MDB TRUCKING, LLC, a Nevada limited
liability company,

Third-Party Plaintiff,

vs.

RMC LAMAR HOLDINGS, INC. a
Colorado Corporation; VERSA PRODUCTS
COMPANY, INC., a New Jersey Corporation
THE MODERN GROUP GP-SUB, INC., a
Texas corporation and general partnership;
DRAGON ESP, LTD., a Texas limited
partnership; and DOES 1-10 and BLACK
AND WHITE COMPANIES,

Third-Party Defendants.

THIRD-PARTY COMPLAINT

COMES NOW the Defendant/Third-Party Plaintiff, MDB Trucking, LLC (hereinafter
"MDB") by and through its counsel of record Thorndal Armstrong Delk Balkenbush & Eisinger,
and hereby brings this Third-Party Complaint against Third-Party Defendants RMC Lamar

///

1 Holdings, Inc, Versa Products Company, Inc., and the Modern Group GP-Sub, Inc. and Dragon
2 ESP, Ltd. and hereby alleges as follows.

3 **FIRST CLAIM FOR RELIEF**

4 **(General Allegations)**

5 1. Third-Party Plaintiff incorporates herein that Plaintiff's Complaint solely for the
6 purposes of establishing that a Complaint has been filed against MDB Trucking, LLC, but
7 without admitting the truth of any allegation therein except for such allegations which may have
8 been admitted in Third-Party Plaintiff's Answer. Third-Party Plaintiff is informed and believes
9 and therefore alleges that the matters referred to in Third-Party Plaintiff's Complaint were
10 proximately caused by the acts and omissions of Third-Party Defendants.

11 2. Third-Party Plaintiff MDB Trucking, LLC was at all relevant times a Nevada
12 limited liability company authorized to conduct business within the State of Nevada.

13 3. Third-Party Defendants DOES 1-10 and BLACK AND WHITE COMPANIES are
14 sued herein under fictitious names and the true names and capacities of said Third-Party
15 Defendants are not known by Third-Party Plaintiff who asked leave of court to amend this Third-
16 Party Complaint to set forth same as it becomes known or ascertained.

17 4. Third Party Defendant RMC Lamar Holdings, Inc. (fka Ranch Manufacturing)
18 was at all relevant times hereto a Colorado corporation engaged in the business of designing and
19 manufacturing trailers and semi-trailers and placed same into the stream of commerce and was
20 doing business in the State of Nevada.

21 5. Third-Party Defendant Versa Products Company, Inc was at al relevant times
22 hereto a New Jersey Corporation engaged in the business of designing and manufacturing
23 pneumatic air solenoid valves specifically for bottom dump trailers and gate activated controls
24 and placed into the stream of commerce and was doing business in the State of Nevada.

25 6. Third-Party Defendant the Modern Group GP-Sub, Inc. was at all relevant times
26 hereto a Texas corporation and the general partner of Dragon ESP, Ltd., a Texas limited
27 partnership.

28 ///

1 7. Third Party Defendant Dragon ESP, Ltd. was at all relevant times a Texas limited
2 partnership.

3 8. A Complaint was filed on May 2, 2016 in the Second Judicial District Court,
4 Case No. CV16-00976, Department 10 in which the Plaintiff Geneva M. Remmerde prayed for
5 damages against Defendant MDB Trucking, LLC alleging negligence in regards to an accident
6 which occurred on July 7, 2014 where a trailer owned by MDB Trucking, LLC spilled a load of
7 gravel causing an accident and injury which are claims presented by Plaintiff.

8 9. Upon information and belief, the Ranco trailer was activated inadvertently causing
9 the gates of the trailer to release a subject load of gravel on the highway and was defective in
10 whole or in part as designed by the Defendant RMC Lamar Holdings, Inc. (fka Ranch
11 Manufacturing Company) (also known by the trade name and trademark Ranco).

12 10. Third Party Defendant RMC Lamar Holdings, Inc. manufactured the subject
13 Ranco trailer in 2002 under the vehicle brand Ranco with VIN No. 1R9BP45082L008431 Idaho
14 Plate No. TE3528.

15 11. Third-Party Defendants the Modern Group and Dragon ESP acquired Ranch
16 Manufacturing on or about August 1, 2007 through an Asset Purchase Agreement.

17 12. Upon information and belief, Third-Party Defendant Dragon, ESP has continued
18 to sell Ranco trailers and semi-trailers with the same components within the same general market
19 and to same customers.

20 13. Third-Party Defendant Dragon ESP has maintained its manufacturing and
21 assembly locations in the same venue of Lamar, Colorado after its acquisition of Ranch
22 Manufacturing Company.

23 14. William Carder the former President and owner of Ranch Manufacturing, Inc.
24 became an officer with Dragon ESP, Ltd. and maintained his position as Vice-President for
25 Ranco through all relevant times up to and including 2015.

26 15. Upon information and belief, Dragon ESP, Ltd. is a *de facto* successor to Ranch
27 Manufacturing, Inc. and has engaged in substantial continuation of Ranco's business.

28 ///

1 16. Dragon ESP, Ltd. is liable to Third-Party Plaintiff to the same extent as RMC
2 Lamar Holdings, Inc. (fka Ranch Manufacturing Company).

3 17. Third-Party Plaintiff MDB Trucking, LLC in 2012 was the last purchaser and end
4 user of the subject Ranco trailer and the direct purchaser of the subject Versa Valve unit
5 in 2013.

6 18. On or before July 7, 2014, the Ranco trailer that left Ranch Manufacturing's
7 control as designed, assembled, and manufactured by Ranco was unreasonably dangerous and
8 defective in one or more of the following respects:

9 a. The semi-trailer was designed, assembled and manufactured and/or
10 configured in such a manner that the Versa solenoid valve would activate inadvertently allowing
11 the gates to open and release the load carried by the trailer; and

12 b. That the Ranco trailer was designed, assembled, manufactured and/or
13 configured in such a manner that the Versa Valve was not equipped with a safety lock to prevent
14 inadvertent activation allowing the gates to open.

15 19. Ranch Manufacturing knew that Versa Products Company, Inc. had a safer
16 design available in the stream of commerce on or about 2002 which employed a manual lock
17 safety design; and, that same should have been provided to its end use customers in lieu of the
18 Versa Valve model incorporated in the subject Ranco trailer.

19 20. Upon information and belief, Versa Products Company also knew both
20 in 2002 and 2014 that they had an alternate safer design available in the stream of commerce
21 which employed a manual lock safer design; and, that same should have been provided to its end
22 user customers MDB Trucking in lieu of the model incorporated in the subject Ranco trailer.

23 21. To the extent Plaintiff was injured as a proximate result of the unreasonably
24 dangerous conditions and defects at the time of manufacturing or negligent design, such as a
25 direct and proximate result of the negligence of Third-Party Defendants; and any negligence that
26 exists as alleged by the Plaintiffs is expressly denied. Third-Party Defendants were actively and
27 solely negligent and Third-Party Plaintiff was passively negligent or without fault.

28 ///

22. Third-Party Defendants' breach of duty of care owed to the Third-Party Plaintiff and Third-Party Defendants are required to indemnify and hold Third-Party Plaintiff harmless with respect to all allegations and liabilities as set forth in the Complaint filed in this matter.

23. Third-Party Plaintiff has placed Third-Party Defendants on notice of claims pending in this matter.

24. Third-Party Plaintiff is required to expend costs and attorneys' fees in defending the negligence claims in the Complaint on file herein and for prosecuting the instant Third-Party Complaint.

FIRST CLAIM FOR RELIEF

**(Implied Indemnification as to Third-Party Defendants
RMC LAMAR HOLDINGS &
THE MODERN GROUP and DRAGON ESP)**

25. Third-Party Plaintiff realleges each and every allegation contained in paragraphs 1-24 as more fully set forth herein.

26. Third-Party Plaintiff is therefore entitled to complete indemnification against Third-Party Defendants with respect to all allegations or liabilities set forth in the Complaint on file in this matter.

27. Third-Party Plaintiff is entitled to all costs and fees expended in the defense of claims of negligence in this matter as well as prosecution of this Third-Party Complaint.

SECOND CLAIM FOR RELIEF

**(Contribution as to Third-Party Defendants
RMC LAMAR HOLDINGS &
THE MODERN GROUP and DRAGON ESP)**

28. Third-Party Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-27 above as if more fully set forth herein.

29. Third-Party Plaintiff is entitled to contribution from Third-Party Defendants with respect to any settlement, judgment, awards or any other type of resolution or claims brought forward by the Plaintiff in her Complaint on file herein.

30. Third-Party Plaintiff is entitled to all costs and fees expended in defense of claims of negligence in this matter as well as prosecution of the Third-Party Complaint.

1 **THIRD CLAIM FOR RELIEF**

2 **(Implied Indemnification as to VERSA)**

3 31. The Third-Party Plaintiff repeats and realleges each and every allegation contained
4 in paragraphs 1-30 above as if more fully set forth herein.

5 32. The Third-Party Plaintiff is entitled to complete indemnity against VERSA
6 PRODUCTS COMPANY, INC. with respect to all allegations or liabilities set forth in the First
7 amended Complaint.

8 33. The Third-Party Plaintiff is therefore entitled to all costs and fees expended in the
9 defense of the claims of negligence in this matter as well as prosecution of the Third-Party
10 Complaint.

11 **FOURTH CLAIM FOR RELIEF**

12 **(Contribution as to VERSA)**

13 34. The Third-Party Plaintiff repeats and realleges each and every allegation contained
14 in paragraphs 1-33 above as if more fully set forth herein.

15 35. The Third-Party Plaintiff is entitled to contribution from the Third-Party
16 Defendant VERSA PRODUCTS COMPANY, INC., with respect to any settlement, judgment,
17 awards, or any other type of resolution of the claims brought forward by the Plaintiffs in her
18 Complaint on file herein.

19 36. The Third-Party Plaintiff is entitled to all costs and fees expended in the defense
20 of the claims for negligence in this matter as well as prosecution of the Third-Party Complaint.

21 WHEREFORE, Third-Party Plaintiff demands judgment against Third-Party Defendants
22 as follows:

- 23 1. For implied indemnification with respect to all negligence claims brought against
24 Third-Party Plaintiff in this matter;
25 2. For contribution with respect to all negligence claims brought against Third-Party
26 Plaintiff in this matter;
27 3. For attorneys' fees and costs expended in this matter; and
28

1 4. For such other and further relief as this Court deems just and proper in the
2 premises.

3 DATED this 22nd day of June, 2016.

4 THORNDAL ARMSTRONG
5 DELK BALKENBUSH & EISINGER

6 By: 

7 Katherine F. Parks, Esq., State Bar No. 6227
8 Brian M. Brown, Esq., State Bar No. 5233
9 Thierry V. Barkley, Esq., State Bar No. 724
10 6590 S. McCarran Blvd., Suite B
11 Reno, Nevada 89509
12 Attorneys for Defendant/Third-Party Plaintiff
13 MDB TRUCKING, LLC
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27 THORNDAL ARMSTRONG
28 DELK BALKENBUSH
& EISINGER
6590 S. McCarran, Suite B
Reno, Nevada 89509
(775) 786-2882

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned hereby affirms that the preceding document filed in above-entitled court does not contain the social security number of any person.

DATED this 22nd day of June, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: 

Katherine F. Parks, Esq., State Bar No. 6227
Brian M. Brown, Esq., State Bar No. 5233
Thierry V. Barkley, Esq., State Bar No. 724
6590 S. McCarran Blvd., Suite B
Reno, Nevada 89509
Attorneys for Defendant/Third-Party Plaintiff
MDB TRUCKING, LLC

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk
3 Balkenbush & Eisinger, and that on this date I caused the foregoing **THIRD-PARTY**
4 **COMPLAINT** to be served on all parties to this action by:

5 _____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the
6 United States mail at Reno, Nevada.

7 ☒ Second Judicial District Court Eflex ECF (Electronic Case Filing)

8 _____ hand delivery

9 _____ electronic means (fax, electronic mail, etc.)

10 _____ Federal Express/UPS or other overnight delivery fully addressed to

11
12 **Kathleen A. Sigurdson, Esq.**
13 **1440 Haskell Street**
14 **Reno, Nevada 89509**
15 **Attorneys for Plaintiff**

16 **Matthew C. Addison, Esq.**
17 **Jessica L. Woelfel, Esq.**
18 **McDonald Carano Wilson LLP**
19 **100 W. Liberty Street, Tenth Floor**
20 **Reno, NV 89501**
21 **Third-Party Defendant RMC Lamar Holdings**

22 **Josh Cole Aicklen**
23 **David B. Avakian**
24 **Lewis Brisbois Bisgaard & Smith, LLP**
25 **6385 S. Rainbow Blvd., Suite 600**
26 **Las Vegas, NV 89118**
27 **Third-Party Defendant Versa Products Co., Inc.**

28 DATED this 22 day of June, 2016.

24
25 
26 An employee of Thorndal Armstrong
27 Delk Balkenbush & Eisinger

1 JOSH COLE AICKLEN
Nevada Bar No. 007254
2 Josh.aicklen@lewisbrisbois.com
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8 Attorneys for Cross-Defendant
VERSA PRODUCTS COMPANY, INC.
9

10 IN THE SECOND JUDICIAL DISTRICT COURT

11 WASHOE COUNTY, NEVADA

12 ERNEST BRUCE FITZSIMMONS and
CAROL FITZSIMMONS, Husband and
13 Wife,

14 Plaintiffs,

15 vs.

16 MDB TRUCKING, LLC; RMC LAMAR
HOLDINGS, INC.; VERSA PRODUCTS
17 COMPANY, INC.; DANIEL ANTHONY
KOSKI; ABC Corporations I-X; Black and
18 White Companies, and DOES I-XX,
inclusive,

19 Defendants.

20 MDB TRUCKING, LLC, a Nevada limited
liability company,

21 Cross-Claimant,

22 vs.

23 RMC LAMAR HOLDINGS, INC., a
24 Colorado corporation; VERSA
PRODUCTS COMPANY, INC., a New
25 Jersey corporation; and DOES 1-10 and
26 BLACK AND WHITE COMPANIES,

27 Cross-Defendants.
28

Case No. CV15-02349
Dept. 15

CROSS-DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S MOTION
TO DISMISS CROSS-CLAIMANT, MDB
TRUCKING, LLC'S THIRD CAUSE OF
ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCP12(B)(5)

DATE:

TIME:

REQUEST FOR ORAL ARGUMENT

1 CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO DISMISS
2 CROSS-CLAIMANT MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR
3 IMPLIED INDEMNITY PURSUANT TO NRCP12(B)(5)

4 COMES NOW, Cross-Defendant VERSA PRODUCTS COMPANY, INC., by and
5 through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
6 Paige S. Shreve, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP, and hereby
7 moves the Court for an Order, dismissing Cross-Claimant, MDB Trucking, LLC's Third
8 Cause of Action for Implied Indemnity, with prejudice, pursuant to NRCP 12(b)(5).

9 This Motion is made and based upon the Points and Authorities attached hereto,
10 NRCP 12(b)(5), the papers and pleadings on file herein, and any oral arguments that may
11 be entertained at the hearing on this matter.

12 DATED this 27th day of June, 2016

13 Respectfully submitted,

14 LEWIS BRISBOIS BISGAARD & SMITH LLP

15 By 

16 JOSH COLE AICKLEN
17 Nevada Bar No. 007254
18 DAVID B. AVAKIAN
19 Nevada Bar No. 009502
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25 Attorneys for Cross-Defendant VERSA
26 PRODUCTS COMPANY, INC.
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NOTICE OF MOTION

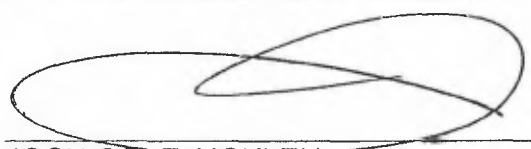
YOU AND EACH OF YOU PLEASE TAKE NOTICE that Cross-Defendant will bring the foregoing CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO DISMISS CROSS-CLAIMANT, MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP12(B)(5) on for hearing on the ____ day of _____, 2016, before Department XV, at the hour of _____.m., or as soon thereafter as counsel may be heard.

DATED this 27th day of June, 2016

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By



JOSH COLE AICKLEN
Nevada Bar No. 007254
DAVID B. AVAKIAN
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Attorneys Cross-Defendant VERSA
PRODUCTS COMPANY, INC.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 VERSA PRODUCTS COMPANY, INC. (hereinafter referred to as "VERSA")
4 respectfully requests that this Court dismiss MDB TRUCKING, LLC'S (hereinafter
5 referred to as "MDB") Third Cause of Action for implied indemnity. MDB has not and
6 cannot plead facts sufficient to support a cause of implied indemnity against VERSA.
7 This is because MDB was actively negligent and there is no special relationship or pre-
8 existing duty between MDB and VERSA. Further, VERSA requests that the Court
9 dismiss the implied indemnity cause of action with prejudice, because MDB cannot plead
10 facts which would entitle MDB to implied indemnity.

11 II. FACTS AND BACKGROUND

12 This lawsuit stems from an accident that took place on July 7, 2014 in Washoe
13 County, Nevada. See, Plaintiffs' First Amended Complaint 3:15-19 (May 19, 2016), a true
14 and correct copy of which is attached hereto as **EXHIBIT 1**. ERNEST FITZSIMMONS
15 and CAROL FITZSIMMONS ("PLAINTIFFS") were driving westbound on IR80 when a
16 semi-trailer driven by DANIEL KOSKI (and owned by Cross-Claimant MDB) spilled gravel
17 on the freeway, causing a series of automobile accidents and injuries alleged by
18 PLAINTIFFS. Id. at 3:15-28; 4:1-10.

19 On December 4, 2015, PLAINTIFFS filed their Complaint in the Second Judicial
20 District Court seeking damages against MDB and DANIEL KOSKI. PLAINTIFFS plead
21 causes of action for: (1) Negligence; (2) Negligence Per Se alleging MDB and DANIEL
22 KOSKI did not comply with NRS 484D.850; and (3) Negligent Infliction of Emotional
23 Distress alleging MDB and DANIEL KOSKI's negligence caused emotional distress. See,
24 Plaintiffs' Complaint (December 4, 2015), a true and correct copy of which is attached
25 hereto as **EXHIBIT 2**.

26 On December 29, 2015, MDB filed a Third-Party Complaint against RMC LAMAR
27 HOLDINGS, INC. ("RMC"). See, Defendant/Third-Party Plaintiffs' Third-Party Complaint
28 (December 29, 2015), a true and correct copy of which is attached hereto as **EXHIBIT 3**.

1 On May 17, 2016, MDB filed its Amended Third-Party Complaint against RMC and
2 VERSA. MDB's Amended Third-Party Complaint sought (1) Implied Indemnity; and (2)
3 contribution from VERSA and RMC. See, Defendant/Third-Party Plaintiff's Amended
4 Third-Party Complaint (May 17, 2016), a true and correct copy of which is attached hereto
5 as EXHIBIT 4.

6 On May 19, 2016, PLAINTIFFS filed their First Amended Complaint ("First
7 Amended Complaint") adding VERSA and RMC to their cause of action for Negligent
8 Infliction of Emotional Distress, and additional claims for liability under: (1) *Res Ipsa*
9 *Loquitur*- Negligence alleging all defendants are negligent under this theory; and (2) Strict
10 Products Liability against RMC Lamar Holdings, Inc. and VERSA. See, Plaintiffs' First
11 Amended Complaint (May 19, 2016). On June, 15, 2016, MDB filed its Cross-Claim
12 against RMC and VERSA asserting the same allegations as MDB's Third-Party
13 Complaint. MDB's Cross-Claim (June 15, 2016), a true and correct copy of which is
14 attached hereto as EXHIBIT 5.

15 As is explained below, MDB's cause of action for implied indemnity against
16 VERSA is fatally flawed and should be dismissed with prejudice.

17 III. LEGAL ARGUMENT

18 A. Standard of Review

19 Nevada Rule of Civil Procedure 12(b)(5) provides that a Complaint may be
20 dismissed for "failure to state a claim upon which relief can be granted." See, NRCP
21 12(b)(5). When considering a Motion to Dismiss, the Court must accept all the factual
22 allegations in the complaint as true. See, Bemis v. Bemis, 114 Nev. 1021, 1024 (1998);
23 see also, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515, 92
24 S.Ct. 609, 614, 30 L.Ed.2d 642 (1972). However, a court should not "assume the truth of
25 legal conclusions merely because they are cast in the form of factual allegations." W.
26 Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Despite the existence of
27 liberal pleading requirements, a Plaintiff still must make sufficient factual allegations to
28 establish a plausible entitlement to relief, not merely "conceivable" or "speculative." Bell

1 Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). Such
2 allegations must amount to “more than labels and conclusions, and a formulaic recitation
3 of the elements of a cause of action.” Id. at 1964-65. This Court also need not accept
4 legal conclusions couched as factual allegations. See also, Ashcroft v. Iqbal, 129 S.Ct.
5 1937, 1949-50 (2009). Dismissal of a complaint without leave to amend may be
6 appropriate. See, Brown v. Capanna, 105 Nev. 665 (1989) (stating that instances do
7 exist where a court should not grant leave). A district court may dismiss a complaint
8 without leave to amend if a complaint suffers a fatal flaw that cannot be saved by any
9 amendment. See, Bemis v. Bemis, 114 Nev. 1021, 1024 (1998) (a claim may be
10 dismissed if “the Plaintiff is not entitled to relief under any set of facts which could be
11 proved in support of the claim”) (quotations, citations omitted). A Court’s decision to
12 dismiss a complaint without leave to amend will not be overturned absent abuse of
13 discretion. See, Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 23, 62 P.3d 720, 734-35
14 (2003); Nelson v. Sierra Constr. Corp., 77 Nev. 334, 364 P.2d 402 (1961).

15 B. The Court Should Dismiss MDB’S Cause of Action for Implied Indemnity as
16 a Matter of Law, Because MDB is Actively Negligent and it did Not Have a
Pre-Existing Relationship with VERSA.

17 MDB was actively negligent and failed to plead a pre-existing legal relationship
18 between it and VERSA. Absent such a relationship, as a matter of law there is no basis
19 for a claim for implied indemnification.

20 Implied indemnity is only available when a Defendant is free from wrongdoing, but
21 is held liable for the loss of a plaintiff caused by another party. Pack v. LaTourette, 128
22 N.A.O. 25, 277 P.3d 1246, 1248-1249 (2012). In Nevada, the right of one tortfeasor to
23 seek indemnification from another tortfeasor is limited. The Nevada Supreme Court held
24 that in order for a defendant to be entitled to indemnity from a joint tortfeasors, “there
25 must be a pre-existing legal relationship between them, or some duty on the part of the
26 primary tortfeasor to protect the secondary tortfeasor.” Id.; See, Black & Decker v. Essex
27 Group, 105 Nev. 344, 775 P.2d 698 (1989).

1 In Pack, plaintiff got into a car accident with a cab driver and sought medical care
2 from a doctor for his injuries, both whom may have caused part of the plaintiff's injuries.
3 Pack v. LaTourette, 277 P.3d at 1247-1248. Plaintiff filed suit against the cab driver for
4 alleged negligent driving. Id. The alleged negligent driver filed a third-party complaint
5 against the doctor for indemnity due to the doctor's alleged negligence in treating the
6 plaintiff. Id. The Nevada Supreme Court affirmed the district court's Order dismissing a
7 claim for implied indemnity, holding the claim for implied indemnity failed as a matter of
8 law because there was no pre-existing legal relationship between the parties and the
9 underlying litigation alleged the third-party plaintiff's own active negligence. Id.

10 Therefore, when a party is actively negligent and/or there is no pre-existing legal
11 relationship between the parties, a claim for implied indemnity cannot exist as a matter of
12 law. Id.

13 1. Indemnity is Not Available Because MDB was Actively Negligent

14 MDB's active negligence prohibits it from seeking indemnity as a matter of law.
15 The Supreme Court first recognized that indemnity "is generally available to remedy the
16 situation in which the defendant, who has committed no independent wrong, is held liable
17 for the loss of a plaintiff caused by another party." Id. at 1248-1249 (internal citations
18 omitted). However, when "a party has committed an "independent wrong," and is thus
19 actively negligent, that party has no right to indemnity." Id.

20 The difference between primary and secondary liability depends on a difference in
21 the character or kind of wrongs that cause the injury and the legal obligation owed by
22 each of the wrongdoers to the injured party. Black & Decker, 105 Nev. at 346, 775 P.2d
23 at 669-70. Both parties must be responsible for the same kind of wrong in order for no
24 independent wrong to exist. Id. Further, when the underlying litigation alleges a third-
25 party plaintiff/cross-claimant's own negligence, the third-party plaintiff/cross-claimant is
26 therefore actively negligent and unable to seek indemnity from another tortfeasor. Pack,
27 277 P.3d at 1247.

1 In the present case, the Court must look to the allegations in the PLAINTIFFS'
2 Amended Complaint in order to determine whether MDB is alleged to be actively
3 negligent, thus prohibiting implied indemnity as a matter of law. PLAINTIFFS' Amended
4 Complaint alleges MDB was negligent because: (1) it failed to hire, train, supervise and
5 evaluate its drivers and properly equip, maintain, drive and operate their vehicles in a
6 safe and prudent manner and under respondeat superior; (2) *res ipsa loquitur*, and (3) it
7 violated NRS 484D.850, all of which caused the PLAINTIFFS' injuries. See, Plaintiff's
8 Amended Complaint (May 19, 2016).

9 Using the operative Complaint, there is clearly an allegation of active negligence
10 and fault on MDB. PLAINTIFFS' Amended Complaint essentially alleges MDB is liable
11 because of its negligence in operating and managing it's business, and VERSA is liable
12 because of strict liability and negligence based on a product. Id. The kinds of wrong
13 alleged against MDB and VERSA in the Amended Complaint are clearly different and
14 independent from one another, thus making MDB actively negligent. Id.

15 Because implied indemnity is only available once a party is found liable, MDB is
16 essentially demanding that VERSA reimburse MDB for the damages it allegedly caused
17 the Plaintiff due to MDB's own negligence in operating and managing its business.
18 VERSA has no control over the way MDB operates and manages it's business, further
19 illustrating PLAINTIFFS' allegations against MDB are an independent wrong from
20 VERSA.

21 MDB is actively negligent and so has no right to seek indemnity from other
22 tortfeasors. As a consequence, MDB's claim for implied indemnity fails as a matter of
23 law.

24 2. There Was No Pre-Existing Relationship Between MDB and VERSA

25 In addition to MDB's active negligence, indemnity is not available as a matter of
26 law because there is no pre-existing relationship between MDB and VERSA.

27 In Nevada, implied indemnity is unavailable when joint or concurrent tortfeasors
28 have no legal relation to one another. Reid v. Royal Ins. Co., 80 Nev. 137, 141 (1964).

1 Therefore, even if a defendant has not committed an independent wrong, in order
2 for him to seek indemnification from another tortfeasor, there must be a pre-existing legal
3 relationship between them or "some duty on the part of the primary tortfeasor to protect
4 the secondary tortfeasor." Pack, 277 P.3d at 1249. To allow recovery absent a "special
5 relationship" is a cause of action for contribution, and would render a cause of action for
6 implied indemnity superfluous. Ringsby Truck Lines, Inc. v. Bradfield, 193 Colo. 151,
7 155, 563 P.2d 939 (1977).

8 MDB failed to demonstrate any special relationship with VERSA. See, MDB's
9 Cross-Claim (June 15, 2016). MDB has failed to demonstrate that VERSA has no pre-
10 existing legal relationships or duty to protect MDB for MDB's failure to hire, train,
11 supervise and evaluate its drivers or its failure to equip, maintain, drive and operate its
12 vehicles. Id. MDB has failed to demonstrate that VERSA had no pre-existing legal
13 relationship or duty over the exclusive right to control MDB's driver and it's truck. Id.
14 Finally, MDB has failed to demonstrate that VERSA had no pre-existing legal relationship
15 or duty to protect MDB for its failure to comply with all the laws and statues. Id.

16 Since, MDB failed to allege (and cannot allege) it had a pre-existing legal
17 relationship with VERSA, i.e., employer-employee; principal-agent, etc, MDB has no right
18 to indemnity as a matter of law.

19 Due to the allegations in PLAINTIFFS' Amended Complaint that MDB was actively
20 negligent and the lack of pre-existing relationship between MDB and VERSA, MDB is
21 prohibited from seeking indemnity from VERSA as a matter of law. Thus, VERSA
22 respectfully asks that the Court dismiss the cause of action against VERSA for implied
23 indemnity.

24 **B. The Court Should Dismiss the Implied Indemnity Cause of Action with**
25 **Prejudice Because Allowing MDB to Amend Would be Futile**

26 VERSA asks that the Court dismiss the cause of action for implied indemnity with
27 prejudice. A district court may dismiss a Complaint with prejudice if it suffers a fatal flaw
28 that cannot be saved by any amendment. See, Bemis v. Bemis, 114 Nev. 1021, 1024

1 (1998) (a claim may be dismissed if “the plaintiff is not entitled to relief under any set of
2 facts which could be proved in support of the claim”) (quotations, citations omitted). A
3 Court’s decision to dismiss a claim without leave to amend will not be overturned absent
4 abuse of discretion. See, Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 23, 62 P.3d 720,
5 734-35 (2003); Nelson v. Sierra Constr. Corp., 77 Nev. 334, 364 P.2d 402 (1961). Where
6 there are no set of facts which could be proved in support of the claim, dismissal with
7 prejudice should be granted. See, Fischer v. Executive Fund Life Ins. Co., 88 Nev. 704,
8 504 P.2d 700 (1972).

9 MDB cannot allege any set of facts justifying amendment of the implied indemnity
10 cause of action in the Cross-Complaint, because under these facts MDB has no ability to
11 amend the operative complaint to remove PLAINTIFFS’ negligence claims against it.
12 Additionally, there is no special relationship or pre-existing duty between MDB and
13 VERSA, and so an amendment to the Cross-Complaint would be futile. Accordingly,
14 VERSA respectfully requests that the Court dismiss the implied indemnity cause of action
15 against it, with prejudice.

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CONCLUSION

Based upon the foregoing, VERSA respectfully requests an Order from this Court dismissing MDB's implied indemnity claim against it, with prejudice.

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 27th day of June, 2016

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By



JOSH COLE AICKLEN
Nevada Bar No. 007254
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Nevada Bar No. 009502
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Attorneys for Cross-Defendant VERSA
PRODUCTS COMPANY, INC.

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LIST OF EXHIBITS

- | | |
|-----------|---|
| Exhibit 1 | Plaintiffs' First Amended Complaint |
| Exhibit 2 | Plaintiffs' Complaint |
| Exhibit 3 | Defendant/Third-Party Plaintiff's Third-Party Complaint |
| Exhibit 4 | Defendant/Third-Party Plaintiff's Amended Third-Party Complaint |
| Exhibit 5 | MDB's Cross-Claim |

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 27th day of June, 2016, a true and correct copy
3 of CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO
4 DISMISS CROSS-CLAIMANT, MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION
5 FOR IMPLIED INDEMNITY PURSUANT TO NRCP12(B)(5) was served electronically
6 with the Court addressed as follows:

7 Joseph S. Bradley, Esq.
8 BRADLEY, DRENDEL & JEANNEY
9 P.O. Box 1987
10 Reno, NV 89505
11 Attorney for Plaintiffs
12 ERNEST BRUCE FITZSIMMONS and
13 CAROL FITZSIMMONS

Katherine F. Parks, Esq.
Brian M. Brown, Esq.
Thierry V. Barkley, Esq.
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Attorneys for Defendants/Cross-Claimant
MDB TRUCKING, LLC

12 Matthew C. Addison, Esq.
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14 100 W. Liberty St., 10th Floor
15 Reno, NV 89501
16 Attorney for Cross-Defendant
17 RMC LAMAR HOLDINGS, INC.

18 
19 An Employee of
20 LEWIS BRISBOIS BISGAARD & SMITH LLP
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2016-06-27 03:14:42 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5581376 : yvilorla

EXHIBIT 1

4845-3057-6394.1

AA000031

1 **\$1425**
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Facsimile No. (775) 335-9993
5 *Attorney for Plaintiffs*

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 ERNEST BRUCE FITZSIMMONS and
CAROL FITZSIMMONS, Husband and
9 Wife,

Case No. CV15-02349

Dept. No. 15

10 Plaintiffs,

11 v.

12 MDB TRUCKING, LLC.; RMC LAMAR
HOLDINGS, INC.; VERSA PRODUCTS
13 COMPANY, INC.; DANIEL ANTHONY
KOSKI; ABC Corporations I-X, Black and
14 White Companies, and DOES I-XX,
inclusive,

15 Defendants.
16 _____/

17 **FIRST AMENDED COMPLAINT**

18 COMES NOW Plaintiffs, ERNEST BRUCE FITZSIMMONS and CAROL FITZSIMMONS,
19 Husband and Wife, by and through their counsel of record, Joseph S. Bradley, Esq. of the law firm
20 of Bradley, Drendel and Jeanney, and for a cause of action against the Defendants, each of them,
21 hereby alleges and complaints as follows:

22 **PARTIES & JURISDICTION**

23 1. At all times material hereto, Plaintiffs, ERNEST BRUCE FITZSIMMONS and
24 CAROL FITZSIMMONS, Husband and Wife, were and are residents of Fallon, Churchill County,
25 Nevada.

26 2. At all times material hereto, Defendant MDB TRUCKING, LLC., is a domestic
27 corporation doing business in Washoe County, Nevada.

28 3. At all times material hereto, Defendant RMCLAMAR HOLDINGS, INC.(fka Ranch

-1-

Our File No. 202592

1 Manufacturing Company) (also known by the trade name Ranco trailers) is a Colorado corporation
2 engaged in the business of designing and manufacturing trailers and semi-trailers and placed the
3 same into the stream of commerce and was doing business in the State of Nevada.

4 4. At all times material hereto, Defendant VERSA PRODUCTS COMPANY,
5 INC., was a New Jersey Corporation engaged in the business of designing and manufacturing
6 pneumatic air solenoid valves specifically for the bottom of dump trailers and gate activated controls
7 and placed the same into the stream of commerce and was doing business in the state of Nevada.

8 5. At all times material hereto, Defendant DANIEL ANTHONY KOSKI, was and is a
9 resident of Washoe County, Nevada and at all times material hereto is the agent, employee, or
10 ostensible agent, or ostensible employee of Defendant MDB TRUCKING, LLC., or other unknown
11 Defendants and at all times was acting with the permission and consent and within the course and
12 scope of employment and agency.

13 6. Pursuant to NRCP 10(a) and *Nurenberger Hercules-Werke GMBH, vs. Virotek*, 107
14 Nev. 873, 822 P.2d 1100 (1991), the identity of Defendants designated as DOES I through XX,
15 inclusive; ABC CORPORATIONS I through X, inclusive; and BLACK AND WHITE
16 COMPANIES I through X, inclusive are unknown at the present time; however, it is alleged and
17 believed these Defendants were involved in the initiation, approval, support or execution of the
18 wrongful acts upon which this litigation is premised, and that said fictitiously designated Defendants
19 are jointly and severally liable for the damages sustained by Plaintiffs as alleged herein. When
20 Plaintiffs become aware of the true names of said Defendants, they will seek leave to amend this
21 Complaint in order to state the true names in the place and stead of such fictitious names.

22 7. Plaintiffs do not know the true names and capacities, whether corporate or otherwise,
23 of these Defendants sued herein as DOES I through XX, inclusive; ABC CORPORATIONS I
24 through X, inclusive; and BLACK AND WHITE COMPANIES I through X, inclusive and Plaintiffs
25 pray leave that when the true names of said Defendants are ascertained, they may insert the same at
26 the appropriate allegations. Plaintiffs are informed and believes, and upon such information and
27 belief, allege that each of the Defendants designated herein by such fictitious names are negligently
28 responsible in some manner for the events and happenings herein referred to and negligently caused

1 the injuries to Plaintiffs. Plaintiffs further allege that each Defendant designated herein by such
2 fictitious names are and at all times relevant hereto were, agents of each other and have ratified the
3 acts of each other Defendant and acted within the course and scope of such agency and have the right
4 to control the actions of the remaining Defendants.

5 8. At all times herein mentioned, Defendants, and each of them, were the apparent
6 ostensible principals, principals, apparent ostensible agents, agents, apparent ostensible servants,
7 servants, apparent ostensible employees, employees, apparent ostensible assistants, assistants,
8 apparent ostensible consultants and consultants of their Co-Defendants, and were as such acting
9 within the course, scope and authority of said agency and employment, and that each and every act
10 of such Defendants, as aforesaid, when acting as a principal, agent, employee, assistant or consultant,
11 were responsible in some manner for the events and happenings herein referred to.

12 **FIRST CAUSE OF ACTION**
13 **(Negligence)**

14 9. Plaintiffs reallege Paragraphs 1 through 8 of this Complaint and incorporates the same
15 herein as though set forth at length.

16 10. That on or about July 7, 2014, Plaintiff ERNEST BRUCE FITZSIMMONS was
17 driving his 1996 Chevrolet Suburban westbound on IR80 in Washoe County, Nevada near Mile
18 Marker 39. Plaintiff CAROL FITZSIMMONS was traveling as the front seat passenger of her
19 husband, ERNEST BRUCE FITZSIMMONS' vehicle.

20 11. That on or about July 7, 2014, Defendant DANIEL ANTHONY KOSKI, was
21 transporting a load of gravel in a Ranco semi-trailer manufactured by Defendant RMC LAMAR
22 HOLDINGS, INC. and registered to Defendant MDB TRUCKING, LLC. with knowledge,
23 permission, and consent and while in the course and scope of his employment with Defendant MDB
24 TRUCKING, LLC. westbound on IR80 in Washoe County, Nevada near Mile Marker 39.

25 12. That on or about July 7, 2014, the load of gravel that was being transported by
26 Defendant DANIEL ANTHONY KOSKI in the Ranco semi-trailer spilled onto the number one and
27 number two westbound travel lanes of IR580.

28 13. That Plaintiff ERNEST BRUCE FITZSIMMONS was traveling behind the semi-

1 trailer operated by Defendant DANIEL ANTHONY KOSKI at highway speed when the gravel
2 spilled from the Ranco semi-trailer.

3 14. Plaintiff ERNEST BRUCE FITZSIMMONS' vehicle made contact with the spilled
4 gravel on the roadway causing him to lose complete control of his vehicle. The left rear of Plaintiff's
5 vehicle struck the left guard rail face which caused the vehicle to rotate clockwise and strike the right
6 concrete barrier with the right front of the vehicle where it came to a rest.

7 15. That on or about July 7, 2014, another vehicle that was also traveling westbound on
8 IR580 approached the spilled gravel. The driver was unable to slow her vehicle to accommodate the
9 gravel and consequently collided into the rear of Plaintiffs' vehicle that was at a rest near the right
10 concrete barrier.

11 16. That Defendant MDB TRUCKING, LLC., had a duty to hire, train, supervise, and
12 evaluate their drivers and to properly equip, maintain, drive and operate their vehicles in a careful,
13 safe and prudent manner so as to avoid harm to others, including Plaintiffs ERNEST BRUCE
14 FITZSIMMONS and CAROL FITZSIMMONS.

15 17. That Defendant MDB TRUCKING, LLC., breached their duty of care by failing to
16 hire, train, supervise and evaluate their drivers and properly equip, maintain, drive and operate their
17 vehicles, among other acts of negligence, in a careful, safe and prudent manner.

18 18. That any breach of duty and negligence on the part of Defendant DANIEL
19 ANTHONY KOSKI, in operating the Ranco semi-trailer as described in this Complaint is imputed
20 to Defendant MDB TRUCKING, LLC. Under the law of *respondeat superior*.

21 19. As a direct and proximate result of the acts of Defendant MDB TRUCKING, LLC.
22 and Defendant DANIEL ANTHONY KOSKI, Plaintiffs ERNEST BRUCE FITZSIMMONS and
23 CAROL FITZSIMMONS sustained severe personal injuries, causing extreme anguish, pain and
24 suffering, all to their general damages in a sum in excess of Ten Thousand Dollars (\$10,000.00)
25 each.

26 20. As a further direct and proximate result of the acts of Defendant MDB TRUCKING,
27 LLC. and Defendant DANIEL ANTHONY KOSKI, as aforesaid, Plaintiffs ERNEST BRUCE
28 FITZSIMMONS and CAROL FITZSIMMONS, have incurred hospital, doctor and medical bills, and

1 will incur further medical bills in the future, in an amount presently unknown. Plaintiffs pray leave
2 to amend this Complaint to include such sums when the same become known.

3 **SECOND CAUSE OF ACTION**
4 **(Res Ipsa Loquitur - Negligence)**

5 21. Plaintiffs reiterate Paragraphs 1 through 20 of this Complaint and incorporates the
6 same herein as though set forth at length.

7 22. As alleged herein, on July 7, 2014, Plaintiffs ERNEST BRUCE FITZSIMMONS
8 and CAROL FITZSIMMONS sustained injuries as a result of the aforementioned incident. The
9 conduct and omissions of Defendants, and each of them, are presumed to be negligent because:

- 10 a) This incident was caused by an agency or instrumentality over which
11 Defendants, and each of them, had the exclusive right of control originally,
12 and which was not mishandled or otherwise changed after Defendants
13 relinquished control.
- 14 b) This type of incident would not have ordinarily occurred in the absence of
15 someone's negligence.
- 16 c) The incident which occurred on said date, was not due to any voluntary
17 action or contribution on the part of the Plaintiffs which was the
18 responsible cause of their injuries in that Plaintiffs are not in a position to
19 know what specific conduct caused the incident, whereas the one in charge
20 of the instrumentality may reasonably be expected to know and be able to
21 explain the cause of the incident.

22 23. As a direct and proximate result of the acts of Defendants, each of them, Plaintiffs
23 ERNEST BRUCE FITZSIMMONS and CAROL FITZSIMMONS sustained severe personal
24 injuries, causing extreme anguish, pain and suffering, all to their general damages in a sum in
25 excess of Ten Thousand Dollars (\$10,000.00) each.

26 24. As a further direct and proximate result of the acts of Defendants, each of them,
27 Plaintiffs ERNEST BRUCE FITZSIMMONS and CAROL FITZSIMMONS, have incurred
28 hospital, doctor and medical bills, and will incur further medical bills in the future, in an amount

1 presently unknown. Plaintiffs pray leave to amend this Complaint to include such sums when the
2 same become known.

3 **THIRD CAUSE OF ACTION**
4 **(Negligence Per Se)**

5 25. Plaintiffs reiterate Paragraphs 1 through 24 of this Complaint and incorporates the
6 same herein as though set forth at length.

7 26. At the time and place of the injuries and damages complained of herein, there
8 existed in the State of Nevada, certain statutes, laws and ordinances designed to regulate and
9 control the operation of motor vehicles along the roadways of this state, for among other things,
10 the protection and safety of the general public.

11 27. In particular, and among other laws existed NRS 484D.850 which established
12 that: "No vehicle shall be driven or moved on any highway unless such vehicle is so constructed
13 or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping
14 therefrom...[and that] no person shall operate on any highway any vehicle with any load unless
15 the load and any covering thereon is securely fastened so as to prevent the covering or load from
16 becoming loose, detached or in any manner a hazard to other users of the highway."

17 28. Plaintiffs allege upon information and belief that at the time and place of the
18 injuries and damages complained of herein, Defendant MDB TRUCKING, LLC. and Defendant
19 DANIEL ANTHONY KOSKI did not comply with the aforesaid laws and were in violation of
20 those laws.

21 29. During all times relevant to this Complaint, Plaintiffs ERNEST BRUCE
22 FITZSIMMONS and CAROL FITZSIMMONS were members of the class of persons which the
23 aforesaid statutes, laws and ordinances were designed to protect against the risk of harm which
24 was, in fact, incurred by Plaintiffs as a result of Defendants' violations of the law.

25 **FOURTH CAUSE OF ACTION**
26 **(Strict Products Liability as to RMC LAMAR HOLDINGS, INC.)**

27 30. Plaintiffs reiterate Paragraphs 1 through 29 of this Complaint and incorporates the
28 same herein as though set forth at length.

31. That Defendant RMC LAMAR HOLDINGS, INC. (fka Ranch Manufacturing

1 Company) was engaged in the business of designing, manufacturing, fabricating, assembling,
2 marketing, distributing, installing, or otherwise placing into the stream of commerce a Ranco
3 semi-trailer (Vehicle Identification Number 1R9BP45082L008431).

4 32. As part of their respective businesses, Defendant RMC LAMAR HOLDINGS,
5 INC., designed, manufactured, fabricated, assembled, distributed, installed and sold said Ranco
6 semi-trailer (Vehicle Identification Number 1R9BP45082L008431).

7 33. At all times mentioned here, Defendant RMC LAMAR HOLDINGS, INC., knew
8 and intended the Ranco semi-trailer (Vehicle Identification Number 1R9BP45082L008431) to be
9 used by the general public.

10 34. As a direct result of the Defendant RMC LAMAR HOLDINGS, INC.'s, conduct
11 in designing, manufacturing, assembling, marketing, distributing installing, and placing into the
12 stream of commerce the Ranco trailer identified above, Plaintiffs ERNEST BRUCE
13 FITZSIMMONS and CAROL FITZSIMMONS suffered severe and permanent personal injuries
14 all to their general damages in the sum in excess of TEN THOUSAND DOLLARS (\$10,000.00).

15 35. As a further direct and proximate result of the acts of Defendant RMC LAMAR
16 HOLDINGS, INC., as aforesaid, Plaintiffs ERNEST BRUCE FITZSIMMONS and CAROL
17 FITZSIMMONS, have incurred hospital, doctor and medical bills, and will incur further medical
18 bills in the future, in an amount presently unknown. Plaintiffs pray leave to amend this
19 Complaint to include such sums when the same become known.

20 **FIFTH CAUSE OF ACTION**
21 **(Strict Products Liability as to VERSA PRODUCTS COMPANY, INC.)**

22 36. Plaintiffs reiterate Paragraphs 1 through 35 of this Complaint and incorporates the
23 same herein as though set forth at length.

24 37. That Defendant VERSA PRODUCTS COMPANY, INC. was engaged in the
25 business of designing, manufacturing, fabricating, assembling, marketing, distributing, installing,
26 or otherwise placing into the stream of commerce a solenoid control as a component to the Ranco
27 semi-trailer as identified above.

28 38. As part of their respective businesses, Defendant VERSA PRODUCTS

1 COMPANY, INC. designed, manufactured, fabricated, assembled, distributed, installed and sold
2 said solenoid control.

3 39. At all times mentioned here, Defendant VERSA PRODUCTS COMPANY, INC.
4 knew and intended the solenoid control to be used by the general public as a component to the
5 Ranco semi-trailer.

6 40. As a direct result of the Defendant VERSA PRODUCTS COMPANY, INC.
7 conduct in designing, manufacturing, assembling, marketing, distributing installing, and placing
8 into the stream of commerce solenoid control as identified above, Plaintiffs ERNEST BRUCE
9 FITZSIMMONS and CAROL FITZSIMMONS suffered severe and permanent personal injuries
10 all to their general damages in the sum in excess of TEN THOUSAND DOLLARS (\$10,000.00).

11 41. As a further direct and proximate result of the acts of Defendant VERSA
12 PRODUCTS COMPANY, INC., as aforesaid, Plaintiffs ERNEST BRUCE FITZSIMMONS and
13 CAROL FITZSIMMONS, have incurred hospital, doctor and medical bills, and will incur further
14 medical bills in the future, in an amount presently unknown. Plaintiffs pray leave to amend this
15 Complaint to include such sums when the same become known.

16 **SIXTH CAUSE OF ACTION**
17 **(Negligent Infliction of Emotional Distress)**

18 42. Plaintiffs reiterate Paragraphs 1 through 41 of this Complaint and incorporates the
19 same herein as though set forth at length.

20 43. That as a further and direct proximate result of the negligence and carelessness of
21 the Defendants, and each of them, Plaintiff ERNEST BRUCE FITZSIMMONS personally
22 witnessed and was present at the time that Plaintiff CAROL FITZSIMMONS sustained her
23 severe injuries, and Plaintiff ERNEST BRUCE FITZSIMMONS experienced emotional distress,
24 including, but not limited to anger, grief, worry, and anxiety all to Plaintiff ERNEST BRUCE
25 FITZSIMMONS' general damages in an amount in excess of Ten Thousand Dollars
26 (\$10,000.00).

27 44. That as a further and direct proximate result of the negligence and carelessness of
28 the Defendants, and each of them, Plaintiff CAROL FITZSIMMONS personally witnessed and

1 was present at the time that Plaintiff ERNEST BRUCE FITZSIMMONS sustained his severe
2 injuries, and Plaintiff CAROL FITZSIMMONS experienced emotional distress, including, but
3 not limited to anger, grief, worry, and anxiety all to Plaintiff CAROL FITZSIMMONS' general
4 damages in an amount in excess of Ten Thousand Dollars (\$10,000.00).

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiffs ERNEST BRUCE FITZSIMMONS and CAROL
7 FITZSIMMONS, Husband and Wife, pray judgment against the Defendants, each of them, as
8 follows:

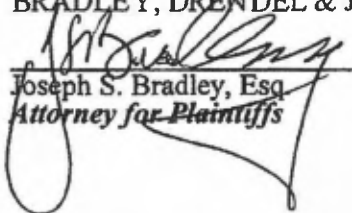
- 9 1. For leave to amend the Complaint upon discovery of the true names and identities
10 of each Doe defendant;
- 11 2. For past and future medical and incidental expenses which will be shown
12 according to proof;
- 13 3. For past and future general damages to Plaintiffs, each in a sum in excess of
14 \$10,000.00;
- 15 4. For the suffering of emotional distress to Plaintiffs, each in a sum in excess of
16 \$10,000.00;
- 17 5. For costs of suit and reasonable attorney fees herein;
- 18 6. For pre-judgment and post-judgment interest as allowed by law; and
- 19 7. For such other and further relief, at law or in equity, as this Court may deem
20 equitable and just.

21 **AFFIRMATION Pursuant to NRS 239B.030**

22 The undersigned does hereby affirm that the preceding document does not contain the
23 social security number of any person.

24 Dated this 19th day of May 2016

BRADLEY, DRENDEL & JEANNEY

25 
26 Joseph S. Bradley, Esq.
27 Attorney for Plaintiffs
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of BRADLEY, DRENDEL &
3 JEANNEY, and that on this date, I served a true and correct copy of the foregoing on the party(s)
4 set forth below by placing an original or true copy thereof in a sealed envelope placed for
5 collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following
6 ordinary business practices addressed as follows:

7 Brian M. Brown, Esq.
8 Katherine F. Parks, Esq.
9 Thierry V. Barkley, Esq.
10 Thorndal, Armstrong, Delk, Balkenbush & Eisinger
6590 South McCarran Blvd., Suite B
Reno, NV 89509
Attorney for: MDB Trucking Company & Daniel Anthony Koski

11 Matthew C. Addison, Esq.
12 McDonald Carano Wilson
13 100 West Liberty Street, 10th Floor
Reno, NV 89501
Attorney for RMC Lamar Holdings, Inc.

14 Sarah M. Quigley, Esq.
15 Bradley, Drendel & Jeanney
6900 S. McCarran Blvd, Suite 2000
Reno, NV 89509
16 *Attorney for Plaintiffs*
17 *Angela Wilt*

18 Terry A. Friedman, Esq.
19 Julie McGrath Throop, Esq.
300 South Arlington Avenue
Reno, NV 89501
20 *Attorneys for Plaintiffs*
Olivia John, individually and as Guardian Ad Litem for Nakyla John

21 Sean P. Rose, Esq.
22 Rose Law Office
150 W. Huffaker Lane, Suite 101
Reno, NV 89511
23 *Attorney for Plaintiff*
24 *Julie Kins, as parent and guardian of Kandise Baird, a minor child*

25 Kevin M. Berry, Esq.
26 247 Court Street, Suite A
Reno, NV 89501
Attorneys for Plaintiffs
Beverly A. Crossland, Patrick E. Crossland, and Ryan P. Crossland

27 DATED this 19th day of May 2016.

28 
Amanda McComb

FILED
Electronically
CV15-02349
2016-06-27 03:14:42 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5581376 : yvilorla

EXHIBIT 2

4845-3057-6394.1

AA000042

1 **\$1425**
2 Joseph S. Bradley, Esq.
3 Nevada State Bar No. 1787
4 BRADLEY, DRENDEL & JEANNEY
5 P.O. Box 1987
6 Reno, NV 89505
7 Telephone No. (775) 335-9999
8 Facsimile No. (775) 335-9993
9 *Attorney for Plaintiffs*

10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

11 IN AND FOR THE COUNTY OF WASHOE

12 ERNEST BRUCE FITZSIMMONS and
13 CAROL FITZSIMMONS, Husband and
14 Wife,

Case No. _____

Dept. No. _____

15 Plaintiffs,

16 v.

17 MDB TRUCKING, LLC.; DANIEL
18 ANTHONY KOSKI; ABC Corporations
19 I-X, Black and White Companies, and
20 DOES I-XX, inclusive,

21 Defendants.
22 _____/

23 **COMPLAINT**

24 COMES NOW Plaintiffs, ERNEST BRUCE FITZSIMMONS and CAROL FITZSIMMONS,
25 Husband and Wife, by and through their counsel of record, Joseph S. Bradley, Esq. of the law firm
26 of Bradley, Drendel and Jeanney, and for a cause of action against the Defendants, each of them,
27 hereby alleges and complaints as follows:

28 **PARTIES & JURISDICTION**

1. At all times material hereto, Plaintiffs, ERNEST BRUCE FITZSIMMONS and
CAROL FITZSIMMONS, Husband and Wife, were and are residents of Fallon, Churchill County,
Nevada.

2. At all times material hereto, Defendant MDB TRUCKING, LLC., is a domestic
corporation doing business in Washoe County, Nevada.

3. At all times material hereto, Defendant DANIEL ANTHONY KOSKI, was and is a
resident of Washoe County, Nevada and at all times material hereto is the agent, employee, or

-1-

Our File No. 202592

1 ostensible agent, or ostensible employee of Defendant MDB TRUCKING, LLC., or other unknown
2 Defendants and at all times was acting with the permission and consent and within the course and
3 scope of employment and agency.

4 4. Pursuant to NRCP 10(a) and *Nurenberger Hercules-Werke GMBH, vs. Virotek*, 107
5 Nev. 873, 822 P.2d 1100 (1991), the identity of Defendants designated as DOES I through XX,
6 inclusive; ABC CORPORATIONS I through X, inclusive; and BLACK AND WHITE
7 COMPANIES I through X, inclusive are unknown at the present time; however, it is alleged and
8 believed these Defendants were involved in the initiation, approval, support or execution of the
9 wrongful acts upon which this litigation is premised, and that said fictitiously designated Defendants
10 are jointly and severally liable for the damages sustained by Plaintiffs as alleged herein. When
11 Plaintiffs become aware of the true names of said Defendants, they will seek leave to amend this
12 Complaint in order to state the true names in the place and stead of such fictitious names.

13 5. Plaintiffs do not know the true names and capacities, whether corporate or otherwise,
14 of these Defendants sued herein as DOES I through XX, inclusive; ABC CORPORATIONS I
15 through X, inclusive; and BLACK AND WHITE COMPANIES I through X, inclusive and Plaintiffs
16 pray leave that when the true names of said Defendants are ascertained, they may insert the same at
17 the appropriate allegations. Plaintiffs are informed and believes, and upon such information and
18 belief, allege that each of the Defendants designated herein by such fictitious names are negligently
19 responsible in some manner for the events and happenings herein referred to and negligently caused
20 the injuries to Plaintiffs. Plaintiffs further allege that each Defendant designated herein by such
21 fictitious names are and at all times relevant hereto were, agents of each other and have ratified the
22 acts of each other Defendant and acted within the course and scope of such agency and have the right
23 to control the actions of the remaining Defendants.

24 6. At all times herein mentioned, Defendants, and each of them, were the apparent
25 ostensible principals, principals, apparent ostensible agents, agents, apparent ostensible servants,
26 servants, apparent ostensible employees, employees, apparent ostensible assistants, assistants,
27 apparent ostensible consultants and consultants of their Co-Defendants, and were as such acting
28 within the course, scope and authority of said agency and employment, and that each and every act

1 of such Defendants, as aforesaid, when acting as a principal, agent, employee, assistant or consultant,
2 were responsible in some manner for the events and happenings herein referred to.

3 **FIRST CAUSE OF ACTION**

4 **(Negligence)**

5 7. Plaintiffs reallege Paragraphs 1 through 6 of this Complaint and incorporates the same
6 herein as though set forth at length.

7 8. That on or about July 7, 2014, Plaintiff ERNEST BRUCE FITZSIMMONS was
8 driving his 1996 Chevrolet Suburban westbound on IR80 in Washoe County, Nevada near Mile
9 Marker 39. Plaintiff CAROL FITZSIMMONS was traveling as the front seat passenger of her
10 husband, ERNEST BRUCE FITZSIMMONS' vehicle.

11 9. That on or about July 7, 2014, Defendant DANIEL ANTHONY KOSKI, was
12 transporting a load of gravel in a 2003 Peterbilt Tractor Truck registered to Defendant MDB
13 TRUCKING, LLC. with knowledge, permission, and consent and while in the course and scope of
14 his employment with Defendant MDB TRUCKING, LLC. westbound on IR80 in Washoe County,
15 Nevada near Mile Marker 39.

16 10. That on or about July 7, 2014, the load of gravel that was being transported by
17 Defendant DANIEL ANTHONY KOSKI in the 2003 Peterbilt Tractor Truck spilled from the vehicle
18 onto the number one and number two westbound travel lanes of IR580.

19 11. That Plaintiff ERNEST BRUCE FITZSIMMONS was traveling behind the tractor
20 truck operated by Defendant DANIEL ANTHONY KOSKI at highway speed when the gravel spilled
21 from the tractor truck.

22 12. Plaintiff ERNEST BRUCE FITZSIMMONS' vehicle made contact with the spilled
23 gravel on the roadway causing him to lose complete control of his vehicle. The left rear of Plaintiff's
24 vehicle struck the left guard rail face which caused the vehicle to rotate clockwise and strike the right
25 concrete barrier with the right front of the vehicle where it came to a rest.

26 13. That on or about July 7, 2014, another vehicle that was also traveling westbound on
27 IR580 approached the spilled gravel. The driver was unable to slow her vehicle to accommodate the
28 gravel and consequently collided into the rear of Plaintiffs' vehicle that was at a rest near the right

1 concrete barrier.

2 14. That Defendants, and each of them, had a duty to hire, train, supervise, and evaluate
3 their drivers and to properly equip, maintain, drive and operate their vehicles in a careful, safe and
4 prudent manner so as to avoid harm to others, including Plaintiffs ERNEST BRUCE
5 FITZSIMMONS and CAROL FITZSIMMONS.

6 15. That Defendants, and each of them, breached their duty of care by failing to hire,
7 train, supervise and evaluate their drivers and properly equip, maintain, drive and operate their
8 vehicles, among other acts of negligence, in a careful, safe and prudent manner.

9 16. That any breach of duty and negligence on the part of Defendant DANIEL
10 ANTHONY KOSKI, in operating the tractor truck as described in this Complaint is imputed to
11 Defendant MDB TRUCKING, LLC. Under the law of *respondeat superior*.

12 17. As a direct and proximate result of the acts of Defendants, each of them, Plaintiffs
13 ERNEST BRUCE FITZSIMMONS and CAROL FITZSIMMONS sustained severe personal
14 injuries, causing extreme anguish, pain and suffering, all to their general damages in a sum in excess
15 of Ten Thousand Dollars (\$10,000.00) each.

16 18. As a further direct and proximate result of the acts of Defendants, each of them, as
17 aforesaid, Plaintiffs ERNEST BRUCE FITZSIMMONS and CAROL FITZSIMMONS, have
18 incurred hospital, doctor and medical bills, and will incur further medical bills in the future, in an
19 amount presently unknown. Plaintiffs pray leave to amend this Complaint to include such sums when
20 the same become known.

21 **SECOND CAUSE OF ACTION**

22 **(Negligence Per Se)**

23 19. Plaintiffs reiterate Paragraphs 1 through 18 of this Complaint and incorporates the
24 same herein as though set forth at length.

25 20. At the time and place of the injuries and damages complained of herein, there
26 existed in the State of Nevada, certain statutes, laws and ordinances designed to regulate and
27 control the operation of motor vehicles along the roadways of this state, for among other things,
28 the protection and safety of the general public.

1 21. In particular, and among other laws existed NRS 484D.850 which established
2 that: "No vehicle shall be driven or moved on any highway unless such vehicle is so constructed
3 or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping
4 therefrom...[and that] No person shall operate on any highway any vehicle with any load unless
5 the load and any covering thereon is securely fastened so as to prevent the covering or load from
6 becoming loose, detached or in any manner a hazard to other users of the highway."

7 22. Plaintiffs allege upon information and belief that at the time and place of the
8 injuries and damages complained of herein, Defendants, each of them, did not comply with the
9 aforesaid laws and was in violation of those laws.

10 23. During all times relevant to this Complaint, Plaintiffs ERNEST BRUCE
11 FITZSIMMONS and CAROL FITZSIMMONS were members of the class of persons which the
12 aforesaid statutes, laws and ordinances were designed to protect against the risk of harm which
13 was, in fact, incurred by Plaintiffs as a result of Defendants' violations of the law.

14 **THIRD CAUSE OF ACTION**

15 **(Negligent Infliction of Emotional Distress)**

16 24. Plaintiffs reiterate Paragraphs 1 through 23 of this Complaint and incorporates the
17 same herein as though set forth at length.

18 25. That as a further and direct proximate result of the negligence and carelessness of
19 the Defendants, and each of them, Plaintiff ERNEST BRUCE FITZSIMMONS personally
20 witnessed and was present at the time that Plaintiff CAROL FITZSIMMONS sustained her
21 severe injuries, and Plaintiff ERNEST BRUCE FITZSIMMONS experienced emotional distress,
22 including, but not limited to anger, grief, worry, and anxiety all to Plaintiff ERNEST BRUCE
23 FITZSIMMONS' general damages in an amount in excess of Ten Thousand Dollars
24 (\$10,000.00).

25 26. That as a further and direct proximate result of the negligence and carelessness of
26 the Defendants, and each of them, Plaintiff CAROL FITZSIMMONS personally witnessed and
27 was present at the time that Plaintiff ERNEST BRUCE FITZSIMMONS sustained his severe
28 injuries, and Plaintiff CAROL FITZSIMMONS experienced emotional distress, including, but

1 not limited to anger, grief, worry, and anxiety all to Plaintiff CAROL FITZSIMMONS' general
2 damages in an amount in excess of Ten Thousand Dollars (\$10,000.00).

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiffs ERNEST BRUCE FITZSIMMONS and CAROL
5 FITZSIMMONS, Husband and Wife, pray judgment against the Defendants, each of them, as
6 follows:

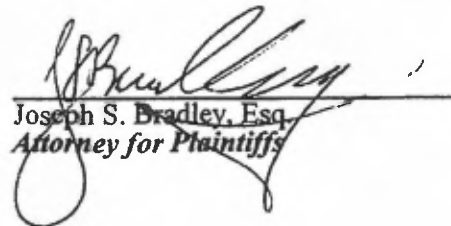
- 7 1. For leave to amend the Complaint upon discovery of the true names and identities
8 of each Doe defendant;
- 9 2. For past and future medical and incidental expenses which will be shown
10 according to proof;
- 11 3. For past and future general damages to Plaintiffs, each in a sum in excess of
12 \$10,000.00;
- 13 4. For the suffering of emotional distress to Plaintiffs, each in a sum in excess of
14 \$10,000.00;
- 15 5. For costs of suit and reasonable attorney fees herein;
- 16 6. For pre-judgment and post-judgment interest as allowed by law; and
- 17 7. For such other and further relief, at law or in equity, as this Court may deem
18 equitable and just.

19 **AFFIRMATION Pursuant to NRS 239B.030**

20 The undersigned does hereby affirm that the preceding document does not contain the
21 social security number of any person.

22 Dated this 4th day of December 2015.

23 **BRADLEY, DRENDEL & JEANNEY**

24 
25 Joseph S. Bradley, Esq.
26 Attorney for Plaintiffs
27
28

FILED
Electronically
CV15-02349
2016-06-27 03:14:42 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5581376 : yvilorla

EXHIBIT 3

4845-3057-6394.1

AA000049

1 Code: 4180
Katherine F. Parks, Esq., State Bar No. 6227
2 Brian M. Brown, Esq., State Bar No. 5233
Thierry V. Barkley, Esq., State Bar No. 724
3 Thorndal Armstrong Delk Balkenbush & Eisinger
6590 S. McCarran Blvd., Suite B
4 Reno, Nevada 89509
(775) 786-2882
5 Attorneys for Defendants

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 ERNEST BRUCE FITZSIMMONS and
10 CAROL FITZSIMMONS, Husband and
Wife,

11 Plaintiffs,

12 vs.

13 MDB TRUCKING, LLC; DANIEL
14 ANTHONY KOSKI; ABC Corporations I-X,
Black and White Companies, and DOES I-
15 XX, inclusive,

16 Defendants.

17 MDB TRUCKING, LLC, a Nevada limited
liability company,

18 Third-Party Plaintiff,

19 vs.

20 RMC LAMAR HOLDINGS, INC., a
Colorado corporation; and DOES I-10, and
21 BLACK AND WHITE COMPANIES,

22 Third-Party Defendants.

Case No. CV15-02349

Dept. No. 15

23 **DEFENDANT/THIRD-PARTY PLAINTIFF,**
24 **MDB TRUCKING'S THIRD-PARTY COMPLAINT**

25 COMES NOW the Defendant/Third-Party Plaintiff, MDB Trucking, LLC (hereinafter
26 "MDB") by and through its counsel of record Thorndal Armstrong Delk Balkenbush & Eisinger,
27 and hereby brings this Third-Party Complaint against Third-Party Defendant RMC Lamar
28 Holdings, Inc. (fka Ranch Manufacturing Company) and hereby alleges as follows.

FIRST RELIEF

1
2 1. That Defendant/Third-Party Plaintiff, MDB Trucking, LLC was at all relevant
3 times a Nevada limited liability company authorized to conduct business with the State of
4 Nevada.

5 2. That Third-Party Defendants DOES 1-10 and BLACK AND WHITE
6 COMPANIES are sued herein under fictitious names because the true names and capacities of
7 said Defendants are not known by Third-Party Plaintiff, who ask leave of the court to amend this
8 Third-Party Complaint to set forth same as they become known or ascertained.

9 3. That Third-Party Defendant RMC Lamar Holdings, Inc. (fka Ranch
10 Manufacturing Company) was at all relevant times hereto a Colorado corporation engaged in the
11 business of designing and manufacturing trailers and semi-trailers and placed same into the
12 stream of commerce and was doing business in the State of Nevada.

13 4. A Complaint was filed on December 4, 2015 in the Second Judicial District
14 Court, case no. CV15-02349, Department 15 in which the Plaintiffs Ernest Bruce Fitzsimmons
15 and Carol Fitzsimmons prayed for damages against Defendant MDB Trucking, LLC alleging
16 negligence with regard to an accident which occurred on July 7, 2014 in which a semi-trailer
17 owned by MDB Trucking, LLC spilled a load of gravel causing an accident and injury, which are
18 claims presented by Plaintiffs.

19 5. That upon information and belief, the Ranco trailer was activated inadvertently
20 causing the gates of the semi-trailer to release the subject load of gravel on the highway and was
21 defective in part or in whole as designed by the Third-Party Defendant RMC Lamar Holdings,
22 Inc. (fka Ranch Manufacturing Company) (also known by the trade name Ranco trailers).

23 6. Third-Party Defendant manufactured the subject Ranco trailer in 2002 under the
24 vehicle brand Rancho with a vehicle identification 1R9BP45082L008431 Idado Plate #TE3528.

25 7. MDB Trucking, LLC was the last purchaser and user of the subject Ranco trailer.

26 8. On or before July 7, 2014, the Ranco trailer that left the Third-Party Defendant's
27 control as designed, assembled and manufactured by the Third-Party Defendant was
28 unreasonably dangerous and defective in one or more of the following respects:

1 a. The semi-trailer was designed, assembled, and manufactured and/or
2 configured in such a manner that the Versa solenoid valve would activate inadvertently allowing
3 the gates to open and release the load carried by the trailer; and,

4 b. That the Ranco trailer was designed, assembled, manufactured, and/or
5 configured in such a manner that the Versa valve was not equipped with a safety lock to prevent
6 inadvertent activation allowing the gates to open.

7 9. That to the extent Plaintiffs were injured as a proximate result of the unreasonably
8 dangerous conditions and defects at the time of manufacturer or negligent design, such is a direct
9 and proximate result of the negligence of Third-Party Defendant; and, any negligence that exists
10 as alleged by Plaintiffs is expressly denied. Third-Party Defendant was actively negligent and
11 Third-Party Plaintiff was passively negligent.

12 10. The Third-Party Defendant breached a duty of care owed to the Third-Party
13 Plaintiff and Third-Party Defendant is required to indemnify and hold Third-Party Plaintiff
14 harmless with respect to all the allegations and liabilities set forth in the Complaint filed in this
15 matter.

16 11. The Third-Party Plaintiff has placed Third-Party Defendant of notice of the claims
17 pending in this matter.

18 12. The Third-Party Plaintiff has been required to expend costs and attorneys' fees in
19 defending the negligence claims in the Complaint on file herein and for prosecuting the instant
20 Third-Party Complaint.

21 **FIRST CLAIM FOR RELIEF**

22 **(Implied Indemnification)**

23 13. The Third-Party Plaintiff repeats and realleges each and every allegation contained
24 in paragraphs 1-12 above as if more fully set forth herein.

25 14. The Third-Party Plaintiff is therefore entitled to complete indemnity with respect
26 to all allegations or liabilities set forth in the Complaint on file in this matter.

27 15. The Third-Party Plaintiff is therefore entitled to all costs and fees expended in the
28 defense of the claims of negligence in this matter as well as prosecution of this Third-Party

1 Complaint.

2 **SECOND CLAIM FOR RELIEF**

3 **(Contribution)**

4 16. The Third-Party Plaintiff repeats and realleges each and every allegation contained
5 in paragraphs 1-15 above as if more fully set forth herein.

6 17. The Third-Party Plaintiff is entitled to contributions from the Third-Party
7 Defendant with respect to any settlement, judgment, awards, or any other type of resolution of the
8 claims brought forward by the Plaintiffs in their Complaint on file herein.

9 18. The Third-Party Plaintiff is therefore entitled to all costs and fees expended in the
10 defense of the claims of negligence in this matter as well as prosecution of the Third-Party
11 Complaint.

12 WHEREFORE, Third-Party Plaintiff demands judgment against Third-Party Defendant
13 as follows:

- 14 1. For implied indemnification with respect to all negligence claims brought against
15 Third-Party Plaintiff in this matter;
16 2. For contribution with respect to all negligence claims brought against Third-Party
17 Plaintiff in this matter;
18 3. For attorneys' fees and costs expended in this matter; and
19 4. For such other and further relief as this Court deems just and proper in the
20 premises.

21 **AFFIRMATION**

22 Pursuant to NRS 239B.030

23 The undersigned hereby affirms that the preceding document filed in above-entitled court

24 * * *

25 * * *

26 * * *

27 * * *

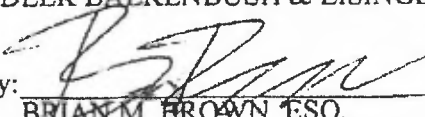
28 * * *

THORNDAL ARMSTRONG
DILLI BALKENHUIS
& EISINGER
SUSAN McCutchan, Clerk of
Hawaii, 1994-1995
1995, 1996, 1997

1 does not contain the social security number of any person.

2 DATED this 29th day of December, 2015.

3 THORNDAL ARMSTRONG
4 DELK BALKENBUSH & EISINGER

5 By: 
6 BRIAN M. BROWN, ESQ.
7 State Bar No. 5233
8 6590 S. McCarran Blvd., Suite B
9 Reno, Nevada 89509
10 Attorney for Defendants/Third-Party Plaintiff

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27 THORNDAL ARMSTRONG
28 DELK BALKENBUSH
& EISINGER
6590 S. McCarran, Suite B
Reno, Nevada 89509
(775) 786-2882

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk
3 Balkenbush & Eisinger, and that on this date I caused the foregoing **DEFENDANT/THIRD-**
4 **PARTY PLAINTIFF, MDB TRUCKING'S THIRD-PARTY COMPLAINT** to be served on
5 all parties to this action by:

6 _____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the
7 United States mail at Reno, Nevada.

8 ☒ Second Judicial District Court Efile ECF (Electronic Case Filing)

9 _____ hand delivery

10 _____ electronic means (fax, electronic mail, etc.)

11 _____ Federal Express/UPS or other overnight delivery

12 fully addressed as follows:

13
14 Joseph S. Bradley, Esq.
Bradley, Drendel & Jeanney
15 P.O. Box 1987
Reno, NV 89505
16 Attorney for Plaintiffs

17 DATED this 29th day of December, 2015.

18 *Delia Bautista*
19 An employee of Thorndal Armstrong
20 Delk Balkenbush & Eisinger

FILED
Electronically
CV15-02349
2016-06-27 03:14:42 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5581376 : yvloria

EXHIBIT 4

4845-3057-6394.1

AA000056

4180
Katherine F. Parks, Esq., State Bar No. 6227
Brian M. Brown, Esq., State Bar No. 5233
Thierry V. Barkley, Esq., State Bar No. 724
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6590 S. McCarran Blvd., Suite B
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(775) 786-2882
Attorneys for Defendants/Third-Party Plaintiff
MDB TRUCKING, LLC

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ERNEST BRUCE FITZSIMMONS and
CAROL FITZSIMMONS, Husband and
Wife,

Case No. CV15-02349

Dept. No. 15

Plaintiffs,

vs.

MDB TRUCKING, LLC; DANIEL
ANTHONY KOSKI; ABC Corporations I-X,
Black and White Companies, and DOES I-
XX, inclusive,

Defendants.

AND RELATED THIRD PARTY
COMPLAINT.

DEFENDANT/THIRD-PARTY PLAINTIFF,
MDB TRUCKING'S AMENDED THIRD-PARTY COMPLAINT

COMES NOW the Defendant/Third-Party Plaintiff, MDB Trucking, LLC (hereinafter
"MDB") by and through its counsel of record Thorndal Armstrong Delk Balkenbush & Eisinger,
and hereby brings this Amended Third-Party Complaint against Third-Party Defendant RMC
Lamar Holdings, Inc. (fka Ranch Manufacturing Company), and Versa Valve Products,
Inc., "Versa Valve") and hereby alleges as follows.

///

///

1 FIRST CLAIM FOR RELIEF

2 (General Allegations)

3 1. That Defendant/Third-Party Plaintiff, MDB Trucking, LLC was at all relevant
4 times a Nevada limited liability company authorized to conduct business with the State of
5 Nevada.

6 2. That Third-Party Defendants DOES 1-10 and BLACK AND WHITE
7 COMPANIES are sued herein under fictitious names because the true names and capacities of
8 said Defendants are not known by Third-Party Plaintiff, who ask leave of the court to amend this
9 Third-Party Complaint to set forth same as they become known or ascertained.

10 3. That Third-Party Defendant RMC Lamar Holdings, Inc. (fka Ranch
11 Manufacturing Company) was at all relevant times hereto a Colorado corporation engaged in the
12 business of designing and manufacturing trailers and semi-trailers and placed same into the
13 stream of commerce and was doing business in the State of Nevada.

14 4. That Third-Party Defendant Versa Products Company, Inc. was at all relevant
15 times hereto a New Jersey Corporation engaged in the business of designing and manufacturing
16 pneumatic air solenoid valves specifically for bottom dump trailers and gate activated controls
17 and placed into the stream of commerce and was doing business in the state of Nevada.

18 5. A Complaint was filed on December 4, 2015 in the Second Judicial District
19 Court, case no. CV15-02349, Department 15 in which the Plaintiffs Ernest Bruce Fitzsimmons
20 and Carol Fitzsimmons prayed for damages against Defendant MDB Trucking, LLC alleging
21 negligence with regard to an accident which occurred on July 7, 2014 where a semi-trailer owned
22 by MDB Trucking, LLC spilled a load of gravel causing an accident and injury, which are claims
23 presented by Plaintiffs.

24 6. That upon information and belief, the Ranco trailer was activated inadvertently
25 causing the gates of the semi-trailer to release the subject load of gravel on the highway and was
26 defective in part or in whole as designed by the Third-Party Defendant RMC Lamar Holdings,
27 Inc. (fka Ranch Manufacturing Company) (also known by the trade name Ranco trailers).

28 ///

1 7. Third-Party Defendant RMC LAMAR HOLDINGS INC manufactured the subject
2 Ranco trailer in 2002 under the vehicle brand Rancho with vehicle identification number
3 1R9BP45082L008431 Idado Plate #TE3528.

4 8. MDB Trucking, LLC was the last purchaser and user of the subject Ranco trailer.

5 9. On or before July 7, 2014, the Ranco trailer that left the Third-Party Defendant's
6 control as designed, assembled and manufactured by the Third-Party Defendant was
7 unreasonably dangerous and defective in one or more of the following respects:

8 a. The semi-trailer was designed, assembled, and manufactured and/or
9 configured in such a manner that the Versa solenoid valve would activate inadvertently allowing
10 the gates to open and release the load carried by the trailer; and,

11 b. That the Ranco trailer was designed, assembled, manufactured, and/or
12 configured in such a manner that the Versa Valve was not equipped with a safety lock to prevent
13 inadvertent activation allowing the gates to open.

14 10. On or before July 7, 2014, that Versa Valve solenoid control as a component
15 to the Ranco trailer was unreasonably dangerous and defective in one or more of the following
16 respects:

17 a. The Versa Valve solenoid valve would activate inadvertently allowing the
18 gates to open and release the load carried by the trailer; and,

19 b. Versa Products Company Inc. had a safer design available in the stream of
20 commerce on or before 2002 which employed a manual lock safety design that should have been
21 provided to its end use customers in lieu of a the Versa Valve installed both at time of the
22 manufacturer in 2002 and/or standard maintenance replacement in 2013.

23 11. That to the extent Plaintiffs were injured as a proximate result of the unreasonably
24 dangerous conditions and defects at the time of manufacturer or negligent design, such is a direct
25 and proximate result of the negligence of Third-Party Defendants; and, any negligence that exists
26 as alleged by Plaintiffs is expressly denied. Third-Party Defendants were actively negligent and
27 Third-Party Plaintiff was passively negligent.

28 ///

TJOWNDAL ARMSTRONG
DEAN DALKEBURN
& EISINGER
4391 S. McCortan, Suite B
Reno, Nevada 89509
(775) 784-2882

1 12. The Third-Party Defendants breached a duty of care owed to the Third-Party
2 Plaintiff and Third-Party Defendants are required to indemnify and hold Third-Party Plaintiff
3 harmless with respect to all the allegations and liabilities set forth in the Complaint filed in this
4 matter.

5 13. The Third-Party Plaintiff has placed Third-Party Defendant RMC LAMAR
6 HOLDINGS INC. on notice of the claims pending in this matter.

7 14. The Third-Party Plaintiff has been required to expend costs and attorneys' fees in
8 defending the negligence claims in the Complaint on file herein and for prosecuting the instant
9 Third-Party Complaint.

10 **FIRST CLAIM FOR RELIEF**

11 **(Implied Indemnification as to RMC LAMAR)**

12 15. The Third-Party Plaintiff repeats and realleges each and every allegation contained
13 in paragraphs 1-14 above as if more fully set forth herein.

14 16. The Third-Party Plaintiff is therefore entitled to complete indemnity against
15 RMC LAMAR HOLDINGS INC. with respect to all allegations or liabilities set forth in the First
16 Amended Complaint on file in this matter.

17 17. The Third-Party Plaintiff is therefore entitled to all costs and fees expended in the
18 defense of the claims of negligence in this matter as well as prosecution of this Amended Third-
19 Party Complaint.

20 **SECOND CLAIM FOR RELIEF**

21 **(Contribution as to RMC LAMAR)**

22 18. The Third-Party Plaintiff repeats and realleges each and every allegation contained
23 in paragraphs 1-17 above as if more fully set forth herein.

24 19. The Third-Party Plaintiff is entitled to contribution from the Third-Party
25 Defendant RMC LAMAR with respect to any settlement, judgment, awards, or any other type of
26 resolution of the claims brought forward by the Plaintiffs in their Complaint on file herein.

27 ///

28 ///

THOMASAL ABRAHAMSON
BULK HALLENDUSSE
& EISINGER
6190 S. McCann, Suite 8
Reno, Nevada 89507
(775) 744-3887

1 20. The Third-Party Plaintiff is therefore entitled to all costs and fees expended in the
2 defense of the claims of negligence in this matter as well as prosecution of the Third-Party
3 Complaint.

4 **THIRD CLAIM FOR RELIEF**

5 **(Implied Indemnification as to VERSA)**

6 21. The Third-Party Plaintiff repeats and realleges each and every allegation contained
7 in paragraphs 1-19 above as if more fully set forth herein.

8 22. The Third-Party Plaintiff is entitled to complete indemnity against VERSA
9 PRODUCTS COMPANY, INC. with respect to all allegations or liabilities set forth in the
10 First Amended Third-Party Complaint.

11 23. The Third-Party Plaintiff is therefore entitled to all costs and fees expended in
12 the defense of the claims of negligence in this matter as well as prosecution of the Third-Party
13 Complaint.

14 **FOURTH CLAIM FOR RELIEF**

15 **(Contribution as to VERSA)**

16 24. The Third-Party Plaintiff repeats and realleges each and every allegation contained
17 in paragraphs 1-23 above as if more fully set forth herein.

18 25. The Third-Party Plaintiff is entitled to contribution from the Third-Party
19 Defendant VERSA PRODUCTS COMPANY, INC., with respect to any settlement, judgment,
20 awards, or any other type of resolution of the claims brought forward by the Plaintiffs in their
21 Complaint on file herein.

22 26. The Third-Party Plaintiff is entitled to all costs and fees expended in the defense
23 of the claims for negligence in this matter as well as prosecution of the Third-Party Complaint.

24 WHEREFORE, Third-Party Plaintiff demands judgment against Third-Party Defendants
25 as follows:

- 26 1. For implied indemnification with respect to all negligence claims brought against
27 Third-Party Plaintiff in this matter;

28 ///

2. For contribution with respect to all negligence claims brought against Third-Party Plaintiff in this matter;
3. For attorneys' fees and costs expended in this matter; and
4. For such other and further relief as this Court deems just and proper in the premises.

DATED this 12th day of May, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: 

Katherine F. Parks, Esq., State Bar No. 6227
Brian M. Brown, Esq., State Bar No. 5233
Thierry V. Barkley, Esq., State Bar No. 724
6590 S. McCarran Blvd., Suite B
Reno, Nevada 89509
Attorneys for Defendants/Third-Party Plaintiff
MDB TRUCKING, LLC

THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER
6590 S. McCarran, Suite B
Reno, Nevada 89509
(775) 784-2882

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned hereby affirms that the preceding document filed in above-entitled court does not contain the social security number of any person.

DATED this 12th day of May, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: 

Katherine E. Parks, Esq., State Bar No. 6227
Brian M. Brown, Esq., State Bar No. 5233
Thierry V. Barkley, Esq., State Bar No. 724
6590 S. McCarran Blvd., Suite B
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Attorneys for Defendants/Third-Party Plaintiff
MDB TRUCKING, LLC

THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER
6590 S. McCarran, Suite B
Reno, Nevada 89509
(775) 786-1081

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk
3 Balkenbush & Eisinger, and that on this date I caused the foregoing **DEFENDANT/THIRD-**
4 **PARTY PLAINTIFF, MDB TRUCKING'S AMENDED THIRD-PARTY COMPLAINT** to
5 be served on all parties to this action by:

6 / placing an original or true copy thereof in a sealed, postage prepaid, envelope in the

7 / United States mail at Reno, Nevada.

8 / Second Judicial District Court Efile ECF (Electronic Case Filing)

9 hand delivery

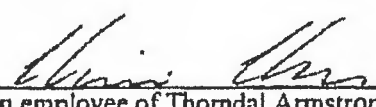
10 electronic means (fax, electronic mail, etc.)

11 Federal Express/UPS or other overnight delivery fully addressed as follows:

12
13 **Joseph S. Bradley, Esq.**
14 **Bradley, Drendel & Jeanney**
15 **P.O. Box 1987**
16 **Reno, NV 89505**
17 **Attorney for Plaintiffs**

18
19 **Matthew C. Addison, Esq.**
20 **Jessica L. Woelfel, Esq.**
21 **McDonald Carano Wilson LLP**
22 **100 W. Liberty Street, Tenth Floor**
23 **Reno, NV 89501**

24
25 DATED this 17 day of May, 2016.

26
27 
28 An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

1 JOSH COLE AICKLEN
Nevada Bar No. 007254
2 Josh.aicklen@lewisbrisbois.com
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4 LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
5 Las Vegas, Nevada 89118
702.893.3383
6 FAX: 702.893.3789
Attorneys for Defendant/Cross-Claimant
7 VERSA PRODUCTS COMPANY, INC.

8
9 IN THE SECOND JUDICIAL DISTRICT COURT
10 WASHOE COUNTY, NEVADA

11 ERNEST BRUCE FITZSIMMONS and
CAROL FITZSIMMONS, Husband and
Wife,

12 Plaintiffs,

13
14 vs.

15 MDB TRUCKING, LLC; RMC LAMAR
HOLDINGS, INC.; VERSA PRODUCTS
COMPANY, INC.; DANIEL ANTHONY
16 KOSKI; ABC Corporations I-X; Black and
White Companies, and DOES I-XX,
17 inclusive,

18 Defendants.

19 MDB TRUCKING, LLC, a Nevada limited
liability company,

20 Cross-Claimant,

21
22 vs.

23 RMC LAMAR HOLDINGS, INC., a
Colorado corporation; VERSA
PRODUCTS COMPANY, INC., a New
24 Jersey corporation; and DOES 1-10 and
BLACK AND WHITE COMPANIES,

25 Cross-Defendants.
26
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28

Case No. CV15-02349
Dept. 15

Consolidated with Case CV15-02410

DEFENDANT/CROSS-CLAIMANT
VERSA PRODUCTS COMPANY, INC.'S
ANSWER TO PLAINTIFFS ERNEST
BRUCE FITZSIMMONS AND CAROL
FITZSIMMONS' FIRST AMENDED
COMPLAINT AND CROSS-CLAIM
AGAINST MDB TRUCKING, LLC; DANIEL
ANTHONY KOSKI; AND DOES I - X,
INCLUSIVE

1 VERSA PRODUCTS, INC.
2 Cross-Claimant,
3 vs.
4 MDB TRUCKING, LLC; DANIEL
5 ANTHONY KOSKI, individually and DOES
6 I - X, inclusive
7 Cross-Defendants.
8 ANGELA MICHELLE WILT,
9 Plaintiff,
10 vs.
11 MDB TRUCKING, LLC; RMC LAMAR
12 HOLDINGS, INC. a Colorado corporation;
13 VERSA PRODUCTS COMPANY, INC., ;
14 New Jersey corporation; DANIEL
15 ANTHONY KOSKI; ABC Corporations I-X;
16 Black and White Companies, and DOES I-
17 XX, inclusive,
18 Defendants.
19 MDB TRUCKING, LLC, a Nevada limited
20 liability company,
21 Cross-Claimants,
22 vs.
23 RMC LAMAR HOLDINGS, INC., a
24 Colorado corporation; VERSA
25 PRODUCTS COMPANY, INC., a New
26 Jersey corporation; and DOES 1-10 and
27 BLACK AND WHITE COMPANIES,
28 Cross-Defendants.
VERSA PRODUCTS, INC.
Cross-Claimant,
vs.
MDB TRUCKING, LLC; DANIEL
ANTHONY KOSKI, individually and DOES
I - X, inclusive
Cross-Defendants.

Case No. CV15-02410

1 DEFENDANT/CROSS-CLAIMANT VERSA PRODUCTS COMPANY, INC.'S ANSWER
2 TO PLAINTIFFS ERNEST BRUCE FITZSIMMONS AND CAROL FITZSIMMONS' FIRST
3 AMENDED COMPLAINT AND CROSS-CLAIM AGAINST MDB TRUCKING, LLC;
4 DANIEL ANTHONY KOSKI; AND DOES I - X, INCLUSIVE

5 COMES NOW, Defendant/Cross-Claimant VERSA PRODUCTS COMPANY, INC.,
6 ("Defendant") by and through it's attorneys of record, Josh Cole Aicklen, Esq., and David
7 Avakian, Esq., of LEWIS BRISBOIS BISGAARD & SMITH LLP, and hereby responds to
8 Plaintiffs ERNEST BRUCE FITZSIMMONS and CAROL FITZSIMMONS' First Amended
9 Complaint and Cross-Claims as follows:

10 RESPONSES TO PARTIES & JURISDICTION

11 1. Answering Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 Plaintiffs' First Amended
12 Complaint, Defendant is without sufficient knowledge or information to form a belief as to
13 the truth of the allegations of said paragraphs and, on that basis, denies each and every
14 allegation set forth therein.

15 RESPONSES TO FIRST CAUSE OF ACTION
16 (Negligence)

17 2. Answering Paragraph 9 of Plaintiffs' First Amended Complaint, Defendant
18 repeats and realleges it's responses to Paragraphs 1-8 as if fully set forth herein.

19 3. Answering Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of
20 Plaintiffs' First Amended Complaint, Defendant is without sufficient knowledge or
21 information to form a belief as to the truth of the allegations of said paragraphs and, on
22 that basis, denies each and every allegation set forth therein.

23 RESPONSES TO SECOND CAUSE OF ACTION
24 (Res Ipsa Loquitur - Negligence)

25 4. Answering Paragraph 21 of Plaintiffs' First Amended Complaint, Defendant
26 repeats and realleges it's responses to Paragraphs 1-20 as if fully set forth herein.

27 5. Answering Paragraphs 22, 23 and 24 of Plaintiffs' First Amended
28 Complaint, Defendant is without sufficient knowledge or information to form a belief as to

1 the truth of the allegations of said paragraphs and, on that basis, denies each and every
2 allegation set forth therein.

3 RESPONSES TO THIRD CAUSE OF ACTION
4 (Negligence Per Se)

5 6. Answering Paragraph 25 of Plaintiffs' First Amended Complaint, Defendant
6 repeats and realleges it's responses to Paragraphs 1-24 as if fully set forth herein.

7 7. Answering Paragraphs 26, 27, 28 and 29 of Plaintiffs' First Amended
8 Complaint, Defendant is without sufficient knowledge or information to form a belief as to
9 the truth of the allegations of said paragraphs and, on that basis, denies each and every
10 allegation set forth therein.

11 RESPONSES TO FOURTH CAUSE OF ACTION
12 (Strict Products Liability as to RMC LAMAR HOLDINGS, INC.)

13 8. Answering Paragraph 30 of Plaintiffs' First Amended Complaint, Defendant
14 repeats and realleges it's responses to Paragraphs 1-29 as if fully set forth herein.

15 9. Answering Paragraphs 31, 32, 33, 34 and 35 of Plaintiffs' First Amended
16 Complaint, Defendant is without sufficient knowledge or information to form a belief as to
17 the truth of the allegations of said paragraphs and, on that basis, denies each and every
18 allegation set forth therein.

19 RESPONSES TO FIFTH CAUSE OF ACTION
20 (Strict Products Liability as to VERSA PRODUCTS COMPANY, INC.)

21 10. Answering Paragraph 36 of Plaintiffs' First Amended Complaint, Defendant
22 repeats and realleges it's responses to Paragraphs 1-35 as if fully set forth herein.

23 11. Answering Paragraphs 37, 38, 39, 40 and 41 of Plaintiffs' First Amended
24 Complaint, Defendant is without sufficient knowledge or information to form a belief as to
25 the truth of the allegations of said paragraphs and, on that basis, denies each and every
26 allegation set forth therein.

1 RESPONSES TO SIXTH CAUSE OF ACTION
2 (Negligent Infliction of Emotional Distress)

3 12. Answering Paragraph 42 of Plaintiffs' First Amended Complaint, Defendant
4 repeats and realleges it's responses to Paragraphs 1-41 as if fully set forth herein.

5 13. Answering Paragraphs 43 and 44 of Plaintiffs' First Amended Complaint,
6 Defendant is without sufficient knowledge or information to form a belief as to the truth of
7 the allegations of said paragraphs and, on that basis, denies each and every allegation
8 set forth therein.

9 AFFIRMATIVE DEFENSES

10 FIRST AFFIRMATIVE DEFENSE

11 That it has been necessary for Defendant to employ the services of an attorney to
12 defend this action and a reasonable sum should be allowed it as and for attorneys' fees,
13 together with costs expended in this action.

14 SECOND AFFIRMATIVE DEFENSE

15 Defendant alleges that no contract exists between the parties sufficient to support
16 a claim for property damage and/or personal injuries.

17 THIRD AFFIRMATIVE DEFENSE

18 Defendant avers that the allegations contained in the First Amended Complaint fail
19 to state a cause of action upon which relief can be granted.

20 FOURTH AFFIRMATIVE DEFENSE

21 Plaintiffs have failed to mitigate their damages.

22 FIFTH AFFIRMATIVE DEFENSE

23 Defendant alleges that the damages, if any, suffered by Plaintiffs, as set forth in
24 the First Amended Complaint, were caused in whole or in part by the negligence of a third
25 party over which Defendant had no control.

26 SIXTH AFFIRMATIVE DEFENSE

27 Plaintiffs by their conduct have waived and/or abandoned any and all claims as
28 alleged herein against Defendant.

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SEVENTH AFFIRMATIVE DEFENSE

Defendant cannot be compelled to make contribution beyond its equitable share.

EIGHTH AFFIRMATIVE DEFENSE

The claims in Plaintiffs' First Amended Complaint are barred or limited by the doctrines of estoppel, waiver, release and/or license.

NINTH AFFIRMATIVE DEFENSE

The damages, if any, incurred by Plaintiffs are not attributable to any act, conduct or omission on the part of Defendant; that Defendant denies that it was negligent in any manner or in any degree with respect to the matter set forth in the Plaintiffs' First Amended Complaint.

TENTH AFFIRMATIVE DEFENSE

If, in fact, any untoward, unsafe, or defective condition existed in the product mentioned in the First Amended Complaint, which this answering Defendant denies, said condition was caused and contributed to by the negligence of the Plaintiffs and/or other third parties, and not by any tortious actions or failure to act by this answering Defendant.

ELEVENTH AFFIRMATIVE DEFENSE

If, in fact, any untoward, unsafe, or defective condition existed in the product mentioned in the First Amended Complaint, which this answering Defendant denies, said condition was caused and contributed to by the actions or inactions of Plaintiffs and/or other third parties, in that it/they changed and altered said product, thereby barring Plaintiffs' right to recovery against this answering Defendant.

TWELFTH AFFIRMATIVE DEFENSE

Between this answering Defendant and the Plaintiffs and/or other third parties, the equities do not so preponderate in favor of the Plaintiffs so as to allow recovery based upon equitable indemnity as against this answering Defendant.

THIRTEENTH AFFIRMATIVE DEFENSE

That any and all events and happenings in connection with the allegations contained in the First Amended Complaint, and any resulting injuries and damages, were

1 proximately caused and contributed to by the negligence of other entities; and that
2 Defendant's liability to Plaintiffs, if any, is proportionate only to its respective degree of
3 negligence in comparison to all other responsible entities, as determined by the trier of
4 fact.

5 FOURTEENTH AFFIRMATIVE DEFENSE

6 That the events, injuries and damages complained of in Plaintiffs' First Amended
7 Complaint, if any, were the result of an unavoidable accident insofar as Defendant is
8 concerned and incurred without any negligence, want of care, default, breach of warranty
9 or other breach of duty to Plaintiffs on the part of Defendant.

10 FIFTEENTH AFFIRMATIVE DEFENSE

11 Defendant alleges that the Plaintiffs and/or other third-parties are responsible for
12 comparative fault in the matter set forth in the First Amended Complaint and said
13 comparative fault on the Plaintiffs and/or other third-parties part caused or contributed to
14 the injuries or damages complained of, if any. The Court is requested to determine and
15 allocate the percentage of negligence attributable to said Plaintiffs and/or other third-
16 parties.

17 SIXTEENTH AFFIRMATIVE DEFENSE

18 Plaintiffs and/or other third-parties had knowledge of the risks and hazards set
19 forth in the First Amended Complaint and the magnitude thereof, and did voluntarily
20 assume the risks thereof.

21 SEVENTEENTH AFFIRMATIVE DEFENSE

22 Defendant alleges that the injury, damage, or loss, if any, sustained by the
23 Plaintiffs and/or other third-parties was due to and proximately caused by the misuse,
24 abuse, and misapplication of the product described in the First Amended Complaint.

25 EIGHTEENTH AFFIRMATIVE DEFENSE

26 Defendant alleges that the injury, damage or loss, if any, sustained by the Plaintiffs
27 and/or other third parties, was due to the use of a product for a purpose for which it was
28 not intended.

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NINETEENTH AFFIRMATIVE DEFENSE

The product identified in the First Amended Complaint was altered or modified in such a way that was not reasonably foreseeable by Defendant and precludes or reduces the liability of Defendant, if any.

TWENTIETH AFFIRMATIVE DEFENSE

The product identified in the First Amended Complaint conformed with the state of the art at the time of the sale.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs and/or other third-parties use of the subject product identified in the First Amended Complaint was contrary to instructions and/or warnings provided with the subject product thereby precluding recovery against or reducing the liability of this answering Defendant.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiffs and/or other third-parties injuries, if any, were aggravated by their failure to mitigate such damages.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Plaintiffs and/or other third-parties claims are barred by disclaimer.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Plaintiffs and/or other third-parties and this answering Defendant are not in privity of contract.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Defendant had no duty to warn of any alleged danger where such danger was open and obvious to all persons of ordinary intelligence and experience, including the Plaintiff and/or other third parties.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in that a manufacturer or seller has no duty to warn of patent or obvious dangers.

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TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in that the product was not in a reasonably dangerous or defective condition at the time it left Defendant's control.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in that Defendant was not and is not a merchant within the meaning of the implied warranty of merchantability.

TWENTY-NINTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in that this answering Defendant is not the manufacturer of the allegedly defective product(s).

THIRTIETH AFFIRMATIVE DEFENSE

Plaintiffs' damages, if any there were, are barred and/or Plaintiffs' recovery must be reduced due to Plaintiffs' own comparative fault.

THIRTY-FIRST AFFIRMATIVE DEFENSE

Defendant hereby incorporates by reference those affirmative defenses enumerated in Rule 8 of the Nevada Rules of Civil Procedure as if fully set forth herein. In the event further investigation or discovery reveals the applicability of any such defenses, Defendant reserves the right to seek leave of court to amend this Answer to specifically assert any such defenses. Such defenses are herein incorporated by reference for the specific purpose of not waiving any such defenses.

DEFENDANT/CROSS-CLAIMANT VERSA PRODUCTS COMPANY, INC.'S CROSS-CLAIM AGAINST MDB TRUCKING, LLC; DANIEL ANTHONY KOSKI; AND DOES I-X, INCLUSIVE

COMES NOW, Defendant/Cross-Claimant VERSA PRODUCTS COMPANY, INC. (hereinafter "Cross-Claimant") and alleges and files a Cross-Claim against MDB TRUCKING, LLC; DANIEL ANTHONY KOSKI and DOES I - X, inclusive, and each of them as follows:

1 FIRST CROSS-CLAIM

2 (Contribution against Cross-Defendants MDB TRUCKING, LLC; DANIEL ANTHONY
3 KOSKI and DOES I through X, inclusive, and each of them)

4 That Cross-Claimant VERSA PRODUCTS COMPANY, INC. is at all times relevant
5 hereto, a foreign limited liability company.

6 1. Cross-Claimant is unaware of the true names and legal capacities, whether
7 individual, corporate, associate, or otherwise, of the Cross-Defendants sued herein as
8 DOES I - X, inclusive, and therefore sues said Cross-Defendants by fictitious names.
9 Cross-Claimant prays for leave of court to insert said Cross-Claim true names and legal
10 capacities when they are ascertained.

11 2. Cross-Claimant is informed and believes, and thereupon alleges, that each
12 of the Cross-Defendants designated herein as a DOE is in some way directly or
13 vicariously responsible and liable for the events referred to herein and proximately
14 caused the damages alleged, if any, in that the DOE negligently owned, operated,
15 maintained, serviced and/or entrusted the subject tractor trailer.

16 3. Cross-Claimant alleges that Cross-Defendants MDB TRUCKING, LLC;
17 DANIEL ANTHONY KOSKI and DOES I - X, inclusive, and each of them, negligently
18 operated, maintained, owned, serviced and/or entrusted the subject tractor trailer as
19 alleged by Plaintiff in her First Amended Complaint.

20 4. Cross-Claimant alleges that Cross-Defendants MDB TRUCKING, LLC;
21 DANIEL ANTHONY KOSKI and DOES I - X, inclusive, and each of them, are liable to
22 Cross-Claimant for any judgment rendered against it in this action.

23 5. In the event of any judgment for the Plaintiff and against Cross-Claimant,
24 said Cross-Claimant is entitled to contribution from said Cross-Defendants MDB
25 TRUCKING, LLC; DANIEL ANTHONY KOSKI and DOES I - X, inclusive, and each of
26 them, pursuant to NRS 17.225, et. seq.

27 6. By reason of this action it has been necessary for Cross-Claimant to incur
28 costs and retain an attorney to defend and prosecute this action on their behalf, and

1 therefore Cross-Claimant VERSA PRODUCTS COMPANY, INC. is entitled to costs of
2 suit and reasonable attorneys' fees incurred.

3 PRAYER FOR RELIEF

4 WHEREFORE, Defendant/Cross-Claimant VERSA PRODUCTS, INC. prays for
5 judgment as follows:

6 1. For judgment over and against Cross-Defendants MDB TRUCKING, LLC;
7 DANIEL ANTHONY KOSKI and DOES I - X, inclusive, inclusive, and each of them, for
8 their pro-rata share and contribution for the amount of any judgment entered against the
9 Cross-Claimant and in favor of Plaintiffs ERNEST BRUCE FITZSIMMONS and CAROL
10 FITZSIMMONS.

11 2. That Plaintiffs ERNEST BRUCE FITZSIMMONS and CAROL
12 FITZSIMMONS First Amended Complaint be dismissed with prejudice;

13 4. For an award of attorneys' fees and costs incurred herein; and

14 5. For such other and further relief as this Court deems just and proper.

15 AFFIRMATION

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

18 DATED this 29th day of June, 2016

19 Respectfully submitted,

20 LEWIS BRISBOIS BISGAARD & SMITH LLP

21
22
23 By

24 JOSH COLE AICKLEN
25 Nevada Bar No. 007254
26 DAVID B. AVAKIAN
27 Nevada Bar No. 009502
28 6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Defendant/Cross-Claimant
VERSA PRODUCTS COMPANY, INC.

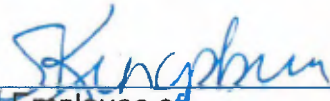
1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 29th day of June, 2016, a true and correct copy
3 of DEFENDANT/CROSS-CLAIMANT VERSA PRODUCTS COMPANY, INC.'S ANSWER
4 TO PLAINTIFFS ERNEST BRUCE FITZSIMMONS AND CAROL FITZSIMMONS' FIRST
5 AMENDED COMPLAINT AND CROSS-CLAIM AGAINST MDB TRUCKING, LLC;
6 DANIEL ANTHONY KOSKI AND DOES I - X, INCLUSIVE was served electronically with
7 the Court addressed as follows:

8 Joseph S. Bradley, Esq.
9 BRADLEY, DRENDEL & JEANNEY
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11 Reno, NV 89505
12 Attorney for Plaintiffs
13 ERNEST BRUCE FITZSIMMONS and
14 CAROL FITZSIMMONS

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Attorneys for Defendants/Third-Party
Plaintiff MDB TRUCKING, LLC

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17 Attorney for Third-Party Defendant
18 RMC LAMAR HOLDINGS, INC.

19 
20 An Employee of
21 LEWIS BRISBOIS BISGAARD & SMITH LLP
22
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1 2645
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5 Attorneys for Defendant/Cross-Claimant
MDB TRUCKING, LLC

6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF WASHOE

9 ERNEST BRUCE FITZSIMMONS and
10 CAROL FITZSIMMONS, Husband and
Wife,

11 Plaintiffs,

12 vs.

13 MDB TRUCKING, LLC; RMC LAMAR
14 HOLDINGS, INC.; VERSA PRODUCTS
COMPANY, INC.; DANIEL ANTHONY
15 KOSKI; ABC Corporations I-X, Black and
White Companies, and DOES I-XX,
16 inclusive,

17 Defendants.

Case No. CV15-02349

Dept. No. 15

Consolidated
with Case No. CV15-02410

Dept. No. 10

18 AND RELATED CROSS-CLAIMS AND
19 THIRD PARTY COMPLAINTS.

20
21 **JOINT OPPOSITION TO CROSS-DEFENDANT'S [VERSA PRODUCTS**
22 **COMPANY, INC.] MOTIONS TO DISMISS**

23 COMES NOW, Defendant/Cross-Claimant, MDB Trucking, LLC, by and through their
24 undersigned counsel of record and hereby submits this Joint Opposition to Cross-Defendant's
25 Motion to Dismiss Third Claim for Relief on Implied Indemnification respectively filed in Case
26 No. CV15-02349 and Case No. CV15-02410.

27
28
THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER
6590 S. McCarran, Suite B
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AA000077

1 This opposition is based upon the pleadings and papers on file herein, the memorandum
2 of points and authorities, together with such other further evidence or testimony as may be proper
3 in the premises.

4 MEMORANDUM OF POINTS AND AUTHORITIES

5 I.

6 INTRODUCTION

7 To the present motion, Versa Products, Inc. seeks a dismissal of MDB Trucking's Cross-
8 Claim for implied indemnification. Versa Product's argument is flawed from inception because it
9 improperly relies upon the heightened burden for surviving a motion to dismiss stated by the
10 United States Supreme Court in *Bell Atlantic Corp. v. Trombly*, 127 S.Ct. 1955, 1965 (2007);
11 and *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951 (2009). The Nevada Supreme Court has yet to
12 expressly adopt these particular precedents. Nevada continues to use the liberal standard that has
13 long been the law of Nevada which remains in effect.

14 Furthermore, Versa Products' arguments fails on two premises. First, that the Court must
15 rely upon Plaintiffs' allegations that MDB was actively negligent and/or that MDB has failed to
16 plead a pre-existing legal relationship between MDB and Versa Products. These arguments are
17 flawed procedurally and substantively.

18 II.

19 A. STANDARD MOTION TO DISMISS.

20 The purpose of a motion to dismiss pursuant to NRCP 12(b)(5) is to test the formal
21 sufficiency of a claim for relief. See *Simpson v. Mars, Inc.*, 113 Nev. 188, 929 P.2d 966 (1997).
22 All allegations of material fact in the complaint are taken as true and construed in the light most
23 favorable to the non-moving party. *Hynds Plumbing & Heating Co. v. Clark County School Dist.*,
24 94 Nev. 776, 777, 587 P.2d 1331, 1332 (1978). Although Nevada is a notice pleading
25 jurisdiction, a party must be given reasonable advance notice of an issue to be raised and an
26 opportunity to respond. *Anastassatos v. Anastassatos*, 112 Nev. 317, 320, 913 P.2d 652, 653
27 (1996). Notice pleading requires plaintiff to set forth the facts to support a legal theory but does
28 not require the legal theory relied upon to be correctly identified. *Liston v. Las Vegas*

1 *Metropolitan Police Dist.*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).

2 In *Torres v. Nev. Direct Ins. Co.*, 131 Nev. Adv. Rptr. 54, 353 P.3d 1203 (2015), the
3 Nevada Supreme Court stated:

4 "A decision to dismiss a complaint under NRCP 12(b)(5) is
5 rigorously reviewed on appeal with all the alleged facts in the
6 complaint presumed true and all inferences drawn in favor of the
complainant. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev.
224, 227-28, 181 P.2d 670, 672 (2008)."

7 Dismissing a complaint is appropriate:

8 "Only if it appears beyond a doubt that [the plaintiff] could prove
9 no set of facts, which, if true, would entitle [the plaintiff] to relief."
Id. at 228, 181 P.3d at 672.

10 MDB submits the claims stated by its Cross-Claim survives Plaintiff's motions to dismiss
11 under Nevada law.

12 **B. THERE IS A SUFFICIENT PRE-EXISTING RELATIONSHIP BETWEEN MDB AND**
13 **VERSA PRODUCTS.**

14 Non-contractual or implied indemnity is an equitable remedy that allows a Defendant to
15 seek recovery from other potential tortfeasors whose negligence primarily caused the injured
16 party's harm. *Doctors Company v. Vincent*, 120 Nev. 644, 650, 98 P.3d 681, 686 (2004). "At the
17 heart of the doctrine is the premise that the person seeking to assert implied indemnity-the
18 indemnitee-has been required to pay damages caused by a third-party-the indemnitor." *Harvest*
19 *Capital v. WV DOE*, 560 S.E.2d 509, 513 (W. Virginia 2002).

20 Implied indemnification is an equitable remedy developed by courts to address the
21 unfairness which results when one defendant party, who has committed no independent wrong, is
22 held liable for the loss of a plaintiff caused by another party. *Id.* at 512.

23 Generally, the remedies available are only after a defendant has extinguished its own
24 liability through settlement or by paying a judgment. *Doctors Company*, 120 Nev. at 651, 98 P.2d
25 at 686. This court has stated that a "cause of action for indemnity...accrues when payment has
26 been made." *Aetna Cas. & Sur. v. Aztec Plumbing*, 106 Nev. 474, 476, 796 P.2d 227, 229 (1990).

27 Thus, a claimant seeking equitable indemnity must plead and prove that (1) it has discharged a
28 legal obligation owed to a third party; (2) the party from whom it seeks liability also was liable to

1 the third party; and (3) as between the claimant and the parties from whom it seeks indemnity,
2 the obligations ought to be discharged by the latter. 41 Am.Jur.2d Indemnity, Sec. 20 (2005). The
3 latter has also required "some nexus or relationship between the indemnitee and indemnitor." See
4 *Piedmont Equipment Co. v. Eberhard Manuf.*, 99 Nev. 523, 526, 665 P.2d at 259 (1983).

5 In *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 216 P.3d 793 (2009), the Supreme
6 Court affirmed a denial of summary judgment since implied indemnification could not be
7 asserted without determining liability of the third party to the injured party and the showing of a
8 nexus or special relationship between the indemnitee and the proposed indemnitor. Therefore, the
9 Court concluded that the District Court's denial of *Primadonna's* motion for summary judgment
10 was proper as to these factual matters.

11 As to the question of a special relationship, MDB's Cross-Claim alleges in paragraph 8 of
12 its first claim for relief that:

13 "Cross-claimant MDB Trucking, LLC was the last purchaser and
14 end user of the subject Ranco trailer."

15 The Cross-Claim further alleges in par. 10:

16 "On or before July 7, 2014, that Versa Valve solenoid control as a
17 component to the Ranco trailer was unreasonably dangerous and
defective in one or more of the following respects:..."

18 "b. Versa Products Company, Inc. had a safer design available in
19 the stream of commerce on or before 2002 which employed a
manual lock safety design that should have been provided to its
20 end use customers in lieu of the Versa Valve installed... and/or as a
standard maintenance replacement in 2013." (Emphasis added).

21 MDB Trucking, LLC purchased the Versa Valve component as part of the standard
22 maintenance replacement in 2013.

23 In *Black & Decker v. Essex Group*, 105 Nev. 344, 775 P.2d 698 (1989) the court
24 recognized that a pre-existing legal relationship between the parties could include a breach of the
25 implied warranty of merchantability by and between the party that purchased a defective unit
26 from the manufacturer who was liable for strict products liability theory to the plaintiff. See,
27 *Ringsby Truck Lines, Inc. v. Bradfield* 563 P.2d 939, 943 (Colo. 1977); and *Jacobson v.*

28 ///

1 *Dahlberg*, 464 P.2d 298 (Colo. 1970) (manufacturer of gun owner owed duty to purchaser who
2 sought indemnification).

3 Thus, as MDB as the end user and purchaser of the claimed defective component from
4 Versa Products Company, Inc., has a special legal relationship sufficient to support a claim for
5 implied equitable indemnification.

6 C. MDB IS ALSO ENTITLED TO CLAIM EQUITABLE INDEMNIFICATION SHIFTING
7 THE BURDEN OF LOSS TO THE MANUFACTURER OF THE DEFECTIVE COMPONENT.

8 In *Hydro Air Equip. v. Hyatt Corp.*, 852 P.2d 403 (9th Cir. Nev. 1988), the Ninth Circuit
9 Court of Appeals recognized that the doctrine of equitable indemnification could look beyond the
10 special relationship. The Ninth Circuit stated:

11 "The principle of implied equitable indemnity is designed to
12 prohibit one from profiting by his own wrong at the expense of one
13 who is either free from fault or negligent to a lesser degree.
14 *Santisteven v. Dow Chemical Co.*, 506 F.2d 1216, 1219 (9th Cir.
15 1974 (construing Nevada law). In evaluating a claim for implied
16 indemnity, courts must carefully examine both parties' conduct on
17 a case-by-case basis, with the ultimate goal of doing what is fair or
18 just. *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 440 F.Supp. 394,
19 399 (D. Nev. 1977). While it is true that the obligation to
20 indemnify clearly arises in certain situations, for example, when a
21 master-servant relationship exists, implied equitable indemnity
22 may be entirely proper if it is simply fairer to shift the burden of
23 loss. *Santisteven*, 506 F.2d at 1219..."

24 This doctrine of equitable indemnification was further recognized in a decision by the
25 Supreme Court of Illinois in *Suvada v. White Motor Co.*, 210 N.E. 2d 182 (Ill. 1965). There,
26 plaintiffs had apparently purchased a used reconditioned tractor trailer unit from a defendant
27 seller. The brake system was manufactured by the defendant manufacturer and installed by the
28 seller. The system failed and a collision ensued. Thereafter, the plaintiff settled various personal
injury and property claims and sought recovery from the defendants. This seminal decision also
ultimately recognized the doctrine of strict product liability as was discussed by the Nevada
Supreme Court in *Ginnes v. Mapes* 86 Nev. 408, 413 (1970).

As was held by the Illinois Supreme Court in *Suvada*, *supra*:

1 "There is an important distinction between contribution which
2 distributes loss among tortfeasors by requiring each to pay his
3 portion and share and indemnity which shifts the entire loss from
4 one tortfeasor who has been compelled to pay it to the shoulders of
5 another who should bear it instead. The two are often confused and
6 there are many decisions in which indemnity has been allowed
7 under the nature 'contribution'. The principle is not, however,
8 limited to those who are personally free from fault. A similar rule
9 has been applied to indemnity against the supplier of goods when a
10 retailer or user of the goods incurs liability by a reason of negligent
11 reliance upon his proper care."

12 "Indemnity here is not, however, premised on a theory of active or
13 passive negligence. (To require proof that Bendix was actively
14 negligent would be the antithesis of strict liability)..."

15 In *Sivada*, the Illinois Supreme Court held the purchaser of a reconditioned used tractor
16 trailer stated a sufficient cause of action for indemnification from the manufacturer of a defective
17 brake for sums paid by them in settlement of claims against them resulting from an accident
18 caused by the defective brakes.

19 III.

20 CONCLUSION

21 For all the foregoing reasons, MDB respectfully requests this Court deny the respective
22 Cross-Defendant's motions to dismiss as to the third claim for relief for implied equitable
23 indemnification.

24 DATED this 14th day of July, 2016.

25 THORNDAL ARMSTRONG
26 DELK BALKENBUSH & EISINGER

27 By: 

28 Katherine F. Parks, Esq., State Bar No. 6227
Brian M. Brown, Esq., State Bar No. 5233
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Attorneys for Defendant/Cross-Claimant
MDB TRUCKING, LLC

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned hereby affirms that the preceding document filed in above-entitled court does not contain the social security number of any person.

DATED this 14th day of July, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: 

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing **JOINT OPPOSITION TO CROSS-DEFENDANT'S [VERSA PRODUCTS COMPANY, INC.] MOTIONS TO DISMISS** to be served on all parties to this action by:

_____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada.

☒ Second Judicial District Court Eflex ECF (Electronic Case Filing)

_____ hand delivery

_____ electronic means (fax, electronic mail, etc.)

_____ Federal Express/UPS or other overnight delivery fully addressed as follows:


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Lewis Brisbois Bisgaard & Smith, LLP
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Las Vegas, NV 89118
Defendant Versa Products Co., Inc.

DATED this 14 day of July, 2016.

THORNDAL ARMSTRONG
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An employee of Thorndal Armstrong
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8 Attorneys for Third-Party Defendant
VERSA PRODUCTS COMPANY, INC.
9

10 IN THE SECOND JUDICIAL DISTRICT COURT

11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE

13 Plaintiff,

14 vs.

15 MDB TRUCKING, LLC; DANIEL
ANTHONY KOSKI; and DOES I-X and
16 ROE I-V corporations,

17 Defendants.

18 MDB TRUCKING, LLC, a Nevada limited
liability company,

19 Third-Party Plaintiff,

20 vs.

21 RMC LAMAR HOLDINGS, INC., a
Colorado corporation; VERSA
22 PRODUCTS COMPANY, INC., a New
Jersey corporation; THE MODERN
23 GROUP GP-SUB, INC., a Texas
corporation and general partnership;
24 DRAGON ESP, LTD., a Texas limited
partnership; and DOES 1-10 and BLACK
25 AND WHITE COMPANIES,

26 Third-Party Defendants.
27
28

Case No. CV16-00976
Dept. 10

THIRD-PARTY DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S MOTION
TO DISMISS THIRD PARTY PLAINTIFF,
MDB TRUCKING, LLC'S THIRD CAUSE
OF ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCP12(B)(5)

DATE:

TIME:

REQUEST FOR ORAL ARGUMENT

1 THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO
2 DISMISS THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC'S THIRD CAUSE OF
3 ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5)

4 COMES NOW, Third-Party Defendant VERSA PRODUCTS COMPANY, INC., by
5 and through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
6 Paige S. Shreve, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP, and hereby
7 moves the Court for an Order dismissing Third-Party Plaintiff MDB Trucking, LLC's Third
8 Cause of Action for Implied Indemnity, with prejudice, pursuant to NRCP 12(b)(5).


9 This Motion is made and based upon the Points and Authorities attached hereto,
10 NRCP 12(b)(5), the papers and pleadings on file herein, and any oral arguments that may
11 be entertained at the hearing on this matter.

12 DATED this 18th day of July, 2016

13 Respectfully submitted,

14 LEWIS BRISBOIS BISGAARD & SMITH LLP

15 By

16 
17 JOSH COLE AICKLEN
18 Nevada Bar No. 007254
19 DAVID B. AVAKIAN
20 Nevada Bar No. 009502
21 PAIGE S. SHREVE
22 Nevada Bar No. 013773
23 6385 S. Rainbow Boulevard, Suite 600
24 Las Vegas, Nevada 89118
25 Tel. 702.893.3383
26 Attorneys for Third-Party Defendant
27 VERSA PRODUCTS COMPANY, INC.
28

1 NOTICE OF MOTION

2 YOU AND EACH OF YOU PLEASE TAKE NOTICE that Cross-Defendant will
3 bring the foregoing THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY,
4 INC.'S MOTION TO DISMISS THIRD-PARTY PLAINTIFF, MDB TRUCKING, LLC'S
5 THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP12(B)(5)
6 on for hearing on the ____ day of _____, 2016, before Department 10, at the
7 hour of _____.m., or as soon thereafter as counsel may be heard.

8 DATED this 18th day of July, 2016

9 Respectfully submitted,

10 LEWIS BRISBOIS BISGAARD & SMITH LLP

11
12 By 

13 JOSH COLE AICKLEN
14 Nevada Bar No. 007254
15 DAVID B. AVAKIAN
16 Nevada Bar No. 009502
17 PAIGE S. SHREVE
18 Nevada Bar No. 013773
19 6385 S. Rainbow Boulevard, Suite 600
20 Las Vegas, Nevada 89118
21 Tel. 702.893.3383
22 Attorneys for Third-Party Defendant
23 VERSA PRODUCTS COMPANY, INC.
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 VERSA PRODUCTS COMPANY, INC. (hereinafter referred to as "VERSA")
4 respectfully requests that this Court dismiss Third-Party Plaintiff MDB TRUCKING, LLC'S
5 (hereinafter referred to as "MDB") Third Cause of Action for Implied Indemnity. MDB has
6 not and cannot plead facts sufficient to support a cause of action for implied indemnity
7 against VERSA. This is because MDB was actively negligent and there is no special
8 relationship or pre-existing duty between MDB and VERSA. Further, VERSA requests
9 that the Court dismiss the implied indemnity cause of action with prejudice, because MDB
10 cannot plead facts which would entitle MDB to implied indemnity.

11 II. FACTS AND BACKGROUND

12 This lawsuit stems from an accident that took place on July 7, 2014 in Washoe
13 County, Nevada. See, Plaintiff's Complaint 2:17-25 (May 24, 2016), a true and correct
14 copy of which is attached hereto as EXHIBIT 1. GENEVA REMMERDE ("PLAINTIFF")
15 was driving westbound on I80 when a semi-trailer driven by DANIEL KOSKI (and owned
16 by Cross-Claimant MDB) spilled gravel on the freeway, causing a series of automobile
17 accidents and the injuries alleged by Plaintiff. Id.

18 On May 2, 2016, Plaintiff filed her Complaint in the Second Judicial District Court
19 seeking damages against MDB and DANIEL KOSKI. Id. Plaintiff plead causes of action
20 for negligence, alleging Defendants MDB and DANIEL KOSKI failed to properly secure
21 the truck's load. Id.

22 On June 22, 2016, MDB filed it's Third-Party Complaint against RMC LAMAR
23 HOLDINGS, INC. ("RMC"), VERSA, THE MODERN GROUP GP-SUB, INC. and
24 DRAGON ESP, LTD. See, MDB's Third-Party Complaint (June 22, 2016), a true and
25 correct copy of which is attached hereto as EXHIBIT 2. MDB's Cross-Claim sought
26 (1) Implied Indemnity from RCM, THE MODERN GROUP and ERAGON ESP (2)
27 Contribution from RCM, THE MODERN GROUP and ERAGON ESP; (3) Implied
28 Indemnity for Versa; and (4) Contribution from Versa. Id.

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1 As is explained below, MDB's cause of action for implied indemnity against
2 VERSA is fatally flawed and should be dismissed with prejudice.

3 III. LEGAL ARGUMENT

4 A. Standard of Review

5 Nevada Rule of Civil Procedure 12(b)(5) provides that a Complaint may be
6 dismissed for "failure to state a claim upon which relief can be granted." See, NRCP
7 12(b)(5). When considering a Motion to Dismiss, the Court must accept all the factual
8 allegations in the complaint as true. See, Bemis v. Bemis, 114 Nev. 1021, 1024 (1998);
9 see also, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515, 92
10 S.Ct. 609, 614, 30 L.Ed.2d 642 (1972). However, a court should not "assume the truth of
11 legal conclusions merely because they are cast in the form of factual allegations." W.
12 Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Despite the existence of
13 liberal pleading requirements, a Plaintiff still must make sufficient factual allegations to
14 establish a plausible entitlement to relief, not merely "conceivable" or "speculative." Bell
15 Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). Such
16 allegations must amount to "more than labels and conclusions, and a formulaic recitation
17 of the elements of a cause of action." Id. at 1964-65. This Court also need not accept
18 legal conclusions couched as factual allegations. See also, Ashcroft v. Iqbal, 129 S.Ct.
19 1937, 1949-50 (2009).

20 Dismissal of a complaint without leave to amend may be appropriate. See, Brown
21 v. Capanna, 105 Nev. 665 (1989) (stating that instances do exist where a court should not
22 grant leave). A district court may dismiss a complaint without leave to amend if a
23 complaint suffers a fatal flaw that cannot be saved by any amendment. See, Bemis v.
24 Bemis, 114 Nev. 1021, 1024 (1998) (a claim may be dismissed if "the Plaintiff is not
25 entitled to relief under any set of facts which could be proved in support of the claim")
26 (quotations, citations omitted). A Court's decision to dismiss a complaint without leave to
27 amend will not be overturned absent abuse of discretion. See, Cohen v. Mirage Resorts,
28 Inc., 119 Nev. 1, 23, 62 P.3d 720, 734-35 (2003); Nelson v. Sierra Constr. Corp., 77 Nev.

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1 334, 364 P.2d 402 (1961).

2 B. The Court Should Dismiss MDB'S Cause of Action for Implied Indemnity as
3 a Matter of Law, Because MDB is Actively Negligent and it did Not Have a
4 Pre-Existing Relationship with VERSA.

5 MDB was actively negligent and failed to plead a pre-existing legal relationship
6 between it and VERSA. Absent such a relationship, as a matter of law there is no basis
7 for a claim for implied indemnification.

8 Implied indemnity is only available when a Defendant is free from wrongdoing, but
9 is held liable for the loss of a plaintiff caused by another party. Pack v. LaTourette, 128
10 N.A.O. 25, 277 P.3d 1246, 1248-1249 (2012). In Nevada, the right of one tortfeasor to
11 seek indemnification from another tortfeasor is limited. The Nevada Supreme Court held
12 that in order for a defendant to be entitled to indemnity from a joint tortfeasors, "there
13 must be a pre-existing legal relationship between them, or some duty on the part of the
14 primary tortfeasor to protect the secondary tortfeasor." Id.; See also, Black & Decker v.
15 Essex Group, 105 Nev. 344, 775 P.2d 698 (1989). In Pack, plaintiff got into a car
16 accident with a cab driver and sought medical care from a doctor for his injuries, both
17 whom may have caused part of the plaintiff's injuries. Pack v. LaTourette, 277 P.3d at
18 1247-1248. Plaintiff filed suit against the cab driver for alleged negligent driving. Id. The
19 alleged negligent driver filed a third-party complaint against the doctor for indemnity, due
20 to the doctor's alleged negligence in treating the plaintiff. Id. The Nevada Supreme Court
21 affirmed the district court's Order dismissing a claim for implied indemnity, holding the
22 claim for implied indemnity failed as a matter of law because there was no pre-existing
23 legal relationship between the parties and the underlying litigation alleged the third-party
24 plaintiff's own active negligence. Id.

25 Therefore, when a party is actively negligent and/or there is no pre-existing legal
26 relationship between the parties, a claim for implied indemnity cannot exist as a matter of
27 law. Id.

28 1. Indemnity is Not Available Because MDB was Actively Negligent

MDB's active negligence prohibits it from seeking indemnity as a matter of law.

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1 The Supreme Court first recognized that indemnity "is generally available to remedy the
2 situation in which the defendant, who has committed no independent wrong, is held liable
3 for the loss of a plaintiff caused by another party." Id. at 1248-1249 (internal citations
4 omitted). However, when "a party has committed an "independent wrong," and is thus
5 actively negligent, that party has no right to indemnity." Id.

6 The difference between primary and secondary liability depends on a difference in
7 the character or kind of wrongs that cause the injury and the legal obligation owed by
8 each of the wrongdoers to the injured party. Black & Decker, 105 Nev. at 346, 775 P.2d
9 at 669-70. Both parties must be responsible for the same kind of wrong in order for no
10 independent wrong to exist. Id. Further, when the underlying litigation alleges a third-
11 party plaintiff's own negligence, the third-party plaintiff is deemed actively negligent and
12 unable to seek indemnity from another tortfeasor. Pack, 277 P.3d at 1247. In the present
13 case, the Court must look to the allegations in the Plaintiff's Complaint in order to
14 determine whether MDB is alleged to be actively negligent, thus prohibiting implied
15 indemnity as a matter of law. Plaintiff's Complaint indeed alleges MDB was negligent
16 because it failed to properly secure the truck load. See, Plaintiffs' Complaint, Exhibit 1.

17 Using the operative Complaint, there is clearly an allegation of active negligence
18 and fault on MDB. Because implied indemnity is only available once a party is found
19 liable, MDB is essentially demanding that VERSA reimburse MDB for the damages it
20 allegedly caused the Plaintiff due to MDB's own negligence in its failure to properly
21 secure the truck load. VERSA has no control over the way MDB loads and secures it's
22 truck load, illustrating Plaintiff's allegations against MDB are independent from any
23 alleged wrong attributable to VERSA.

24 MDB is actively negligent and so has no right to seek implied indemnity from other
25 tortfeasors. As a consequence, MDB's claim for implied indemnity fails as a matter of
26 law.

27 2. There Was No Pre-Existing Relationship Between MDB and VERSA

28 In addition to MDB's active negligence, implied indemnity is not available as a

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1 matter of law because there is no pre-existing relationship between MDB and VERSA.

2 In Nevada, implied indemnity is unavailable when joint or concurrent tortfeasors
3 have no legal relation to one another. Reid v. Royal Ins. Co., 80 Nev. 137, 141 (1964).
4 Therefore, even if a defendant has not committed an independent wrong, in order for him
5 to seek indemnification from another tortfeasor there must be a pre-existing legal
6 relationship between them or "some duty on the part of the primary tortfeasor to protect
7 the secondary tortfeasor." Pack, 277 P.3d at 1249. To allow recovery absent a "special
8 relationship" is a cause of action for contribution, and would render a cause of action for
9 implied indemnity superfluous. Ringsby Truck Lines, Inc. v. Bradfield, 193 Colo. 151,
10 155, 563 P.2d 939 (1977).

11 MDB failed to allege any special relationship with VERSA as it relates to MDB.
12 See, MDB's Third-Party Complaint, **Exhibit 2**. MDB has failed to allege that VERSA has a
13 pre-existing legal relationships or duty to protect MDB.

14 MDB failed to allege (and cannot allege) it had a pre-existing legal relationship with
15 VERSA, i.e., employer-employee; principal-agent, etc. As a consequence, MDB has no
16 right to implied indemnity as a matter of law.

17 Due to the allegations in Plaintiff's Complaint that MDB was actively negligent and
18 the lack of pre-existing relationship between MDB and VERSA, MDB is prohibited from
19 seeking indemnity from VERSA as a matter of law. Thus, VERSA respectfully asks that
20 the Court dismiss the implied indemnity cause of action against VERSA.

21 **B. The Court Should Dismiss the Implied Indemnity Cause of Action with**
22 **Prejudice Because Allowing MDB to Amend Would be Futile**

23 VERSA asks that the Court dismiss the cause of action for implied indemnity with
24 prejudice. A district court may dismiss a Complaint with prejudice if it suffers a fatal flaw
25 that cannot be saved by any amendment. See, Bemis v. Bemis, 114 Nev. 1021, 1024
26 (1998) (a claim may be dismissed if "the plaintiff is not entitled to relief under any set of
27 facts which could be proved in support of the claim") (quotations, citations omitted). A
28 Court's decision to dismiss a claim without leave to amend will not be overturned absent

1 abuse of discretion. See, Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 23, 62 P.3d 720,
2 734-35 (2003); Nelson v. Sierra Constr. Corp., 77 Nev. 334, 364 P.2d 402 (1961). Where
3 there are no set of facts which could be proved in support of the claim, dismissal with
4 prejudice should be granted. See, Fischer v. Executive Fund Life Ins. Co., 88 Nev. 704,
5 504 P.2d 700 (1972).

6 MDB cannot allege any set of facts justifying amendment of the implied indemnity
7 cause of action in the Third-Party Complaint, because under these facts MDB has no
8 ability to amend the operative complaint to remove Plaintiff's negligence claims against it.
9 Further, there is no special relationship or pre-existing duty between MDB and VERSA,
10 and so an amendment to the Third-Party Complaint would be futile. Accordingly, VERSA
11 respectfully requests that the Court dismiss the implied indemnity cause of action against
12 it.

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CONCLUSION

Based upon the foregoing, VERSA respectfully requests an Order from this Court dismissing MDB's implied indemnity claim against it, with prejudice.

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 10th day of July, 2016

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By



JOSH COLE AICKLEN
Nevada Bar No. 007254
DAVID B. AVAKIAN
Nevada Bar No. 009502
PAIGE S. SHREVE
Nevada Bar No. 013773
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Third-Party Defendant
VERSA PRODUCTS COMPANY, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2016, a true and correct copy of THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO DISMISS THIRD-PARTY PLAINTIFF, MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP12(B)(5) was served electronically with the Court addressed as follows:

Kathleen A. Sigurdson, Esq.

1440 Haskell Street

Reno, NV 89505

Attorney for Plaintiffs

ROSA ROBLES and BENJAMIN ROBLES,

Husband and Wife and ROSA ROBLES

and BENJAMIN ROBLES as next friend of

NATALIE ROBLES and CASSANDRA

ROBLES, minors

Katherine F. Parks, Esq.

Brian M. Brown, Esq.

Thierry V. Barkley, Esq.

THORNDAL, ARMSTRONG, DELK

BALKENBUSH & EISINGER

6590 S. McCarran, Ste. B

Reno, NV 89509

P: 775-786-2882

Attorneys for Defendant/Third-Party

Defendant MDB TRUCKING, LLC

Matthew C. Addison, Esq.

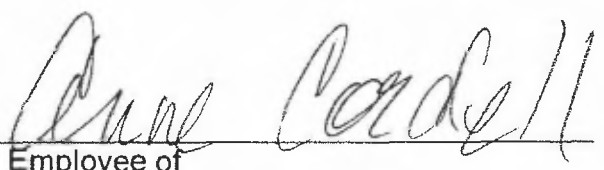
McDONALD CARANO WILSON LLP

100 W. Liberty St., 10th Floor

Reno, NV 89501

Attorney for Third-Party Defendant

RMC LAMAR HOLDINGS, INC.


An Employee of

LEWIS BRISBOIS BISGAARD & SMITH LLP

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LIST OF EXHIBITS

Exhibit 1 Plaintiff's Complaint
Exhibit 2 MDB's Third-Party Complaint

FILED
Electronically
CV16-00976
2016-07-19 09:09:17 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5614508 : csulezic

EXHIBIT 1

EXHIBIT 1

AA000097

1 \$1425
2 KATHLEEN A. SIGURDSON, ESQ.
3 Nevada State Bar No. 06823
4 1440 Haskell Street
5 Reno, NV 89509
6 (775) 337-0300
7 Facsimile (775) 337-1335
8 kathleen@sigurdsonlaw.com
9 Attorney for Plaintiff

10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
11 IN AND FOR THE COUNTY OF WASHOE

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

Case No. _____

15 DANIEL ANTHONY KOSKI;
16 MDB TRUCKING, LLC.,
17 DOES I – X and ROE I-V corporations,

Dept. No. _____

18 Defendants.
19 _____/

20 **COMPLAINT**

21 Plaintiff, GENEVA M. REMMERDE, by and through her attorney, KATHLEEN A.
22 SIGURDSON, ESQ., hereby alleges as follows:

23 **PARTIES**

24 1. At all times referred to herein, Plaintiff was and is now a resident of Washoe
25 County, Nevada.

26 2. Plaintiff is informed and believes, and therefore alleges that at all times referred to
27 herein, Defendant DANIEL ANTHONY KOSKI was, and is, a resident of Washoe County,
28 Nevada.

29 3. Plaintiff is informed and believes and therefore alleges, that at all times referred
30 to herein, Defendant MDB TRUCKING, LLC has been, and is now a corporation organized and
existing under the laws of the State of Nevada, and is doing business in the State of Nevada.

4. The true names or capacities, whether individual, corporate, associates, co-partnership, or otherwise of Defendants DOES I-X and ROE CORPORATIONS I-V are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and therefore alleges that each of the Defendants designated as DOES I-X and ROE CORPORATIONS I-V are responsible in some manner for the offense and happenings referred to in this action, and proximately caused the damages to Plaintiff described herein.

5. Plaintiff requests leave of this Court to amend the Complaint to insert the true names and capacities of the DOE and ROE Defendants when they are ascertained, to join such Defendants in this action and assert the appropriate charging allegations.

6. At all times pertinent hereto, the Defendants, and each of them, were acting as the authorized employee, agent and/or representative of each and every other Defendant, and were acting within the course and scope of their capacity. The conduct of each and every Defendant was ratified and adopted by each and every other Defendant.

FIRST CLAIM FOR RELIEF

7. Plaintiff realleges each and every allegation of paragraphs 1 through 6 of her Complaint, as if fully set forth herein.

8. On or about July 7, 2014, Plaintiff was traveling in her 2005 Saturn Ion west on IR80 near mile marker 39, Washoe County, Nevada.

9. Defendant was traveling ahead of Plaintiff's vehicle in a 2003 Peterbilt Truck Tractor.

10. At some point during Defendant's travel in the area, Defendant spilled a load of gravel onto travel lanes 1 and 2, ahead of Plaintiff's traveling path.

11. Plaintiff came upon the gravel covered roadway at highway speed and in a curve.

12. Plaintiff lost control of her vehicle and rotated counter clockwise and struck the left guardrail face with the left front of her vehicle.

13. As a direct and proximate result of Defendant's failure to properly secure his truck load, Plaintiff has suffered, and will continue to suffer in the future, severe physical and emotional injuries, all to her general damage in an amount in excess of TEN THOUSAND AND 00/100

1 DOLLARS (\$10,000.00).

2 14. As a further direct and proximate result of Defendant's failure to properly secure
3 his truck load, Plaintiff has incurred, and will continue to incur in the future, expenses for medical
4 care and treatment, in an amount not yet ascertained. Plaintiff requests leave to amend this
5 Complaint to insert this amount when it becomes known to Plaintiff.

6 **SECOND CLAIM FOR RELIEF**

7 15. Plaintiff realleges each and every allegation listed above, as if fully set forth herein

8 16. Plaintiff is informed and believes, and therefore alleges, that at the time Defendant
9 DANIEL ANTHONY KOSKI operated the Peterbilt Truck Tractor owned by Defendant MDB
10 TRUCKING, LLC, Defendant KOSKI was employed by Defendant MDB TRUCKING LLC and
11 was acting within the scope and course of his employment. Defendant MDB TRUCKING LLC is
12 therefore liable to Plaintiff under the doctrine of respondeat superior.

13 **WHEREFORE**, Plaintiff prays for judgment against the Defendants, and each of them, as
14 follows:

- 15 1. For general damages in an amount in excess of TEN THOUSAND DOLLARS
16 AND 00/100 (\$10,000.00);
17 2. For special damages according to proof at the time of trial;
18 3. For costs of suit, including reasonable attorney's fees; and
19 4. For such other and further relief as this Court deems just and proper.

20 **AFFIRMATION Pursuant to NRS 239B.030:** The undersigned does hereby affirm that the
21 preceding document does not contain the social security number of any person.

22 DATED this 2d day of May, 2016.


23
24 
25 KATHLEEN A. SIGURDSON, ESQ.
26 State Bar No. 06823
27 1440 Haskell St.
28 Reno, NV 89509
Attorney for Plaintiff

EXHIBIT 2

EXHIBIT 2

1 Code: 4085

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8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF WASHOE

10 GENEVA M. REMMERDE,

CASE NO.: CV16-00976

11 Plaintiff,

DEPT. NO.: 10

12 vs.

13 DANIEL ANTHONY KOSKI; MDB
14 TRUCKING, LLC., DOES I-X and ROE I-V
corporations,

15 Defendants.

16 _____/
17 MDB TRUCKING, LLC, a Nevada limited
liability company,

18 Third-Party Plaintiff,

19 vs.

20 RMC LAMAR HOLDINGS, INC. a
Colorado Corporation; VERSA PRODUCTS
21 COMPANY, INC., a New Jersey Corporation
THE MODERN GROUP GP-SUB, INC., a
22 Texas corporation and general partnership;
23 DRAGON ESP, LTD., a Texas limited
partnership; and DOES 1-10 and BLACK
AND WHITE COMPANIES,

24 Third-Party Defendants.

25 **SUMMONS**

26 **TO THE THIRD-PARTY DEFENDANT: VERSA PRODUCTS COMPANY, INC. YOU**
27 **HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR**
28 **BEING HEARD UNLESS YOU RESPOND IN WRITING WITHIN 20 CALENDAR DAYS.**
READ THE INFORMATION BELOW VERY CAREFULLY.

1 A civil complaint has been filed by the Third-Party Plaintiff against you for the relief as set
2 forth in that document (see Third-Party Complaint). The object of this action is: For implied
indemnification and contribution.

- 3 1. If you intend to defend this lawsuit, you must do the following within 20 calendar
4 days after service of this summons, exclusive of the day of service:
5 a. File with the Clerk of the Court, whose address is shown below, a **formal**
6 **written answer** to the Amended Third-Party Complaint, along with the
appropriate filing fees, in accordance with the rules of the Court, and;
7 b. Serve a copy of your answer upon the attorney for Third-Party Plaintiff whose
8 name and address is shown below.
9 2. Unless you respond, a default will be entered upon application of the Third-Party
10 Plaintiff and this Court may enter a judgment against you for the relief demanded in
11 the Amended Third-Party Complaint.

12 Dated this 23 day of July, 2016.

13 Issued on behalf of Third-Party Plaintiff:

14 Name: Brian M. Brown, Esq.
15 Address: Thorndal Armstrong Delk
16 Balkenbush & Eisinger
17 6590 S. McCarran Blvd., Suite B
18 Reno, Nevada 89509
19 Phone Number: (775) 786-2882

JACQUELINE BRYAN
CLERK OF THE COURT

By: J. Bryant
Deputy Clerk,
Second Judicial District Court
75 Court Street
Reno, Nevada 89501

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AFFIRMATION

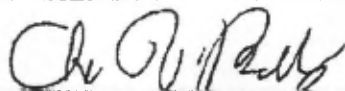
Pursuant to NRS 239B.030

The undersigned hereby affirms that the preceding document filed in above-entitled court does not contain the social security number of any person.

DATED this 23rd day of June, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: _____



Katherine F. Parks, Esq., State Bar No. 6227
Brian M. Brown, Esq., State Bar No. 5233
Thierry V. Barkley, Esq., State Bar No. 724
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(775) 786-2882
5 Attorneys for Defendant/Third-Party Plaintiff
MDB TRUCKING, LLC

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8
9 GENEVA M. REMMERDE,

10 Plaintiff,

11 vs.

12 DANIEL ANTHONY KOSKI, MDB
TRUCKING, LLC, DOES I-X and
13 ROE I-V

14 Defendants.

15 MDB TRUCKING, LLC, a Nevada limited
liability company,

16 Third-Party Plaintiff,

17 vs.

18 RMC LAMAR HOLDINGS, INC. a
Colorado Corporation; VERSA PRODUCTS
COMPANY, INC., a New Jersey Corporation
19 THE MODERN GROUP GP-SUB, INC., a
Texas corporation and general partnership;
20 DRAGON ESP, LTD., a Texas limited
partnership; and DOES I-10 and BLACK
21 AND WHITE COMPANIES,

22 Third-Party Defendants.
23

24 THIRD-PARTY COMPLAINT

25 COMES NOW the Defendant/Third-Party Plaintiff, MDB Trucking, LLC (hereinafter
26 "MDB") by and through its counsel of record Thorndal Armstrong Delk Balkenbush & Eisinger,
and hereby brings this Third-Party Complaint against Third-Party Defendants RMC Lamar

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1 Holdings, Inc, Versa Products Company, Inc., and the Modern Group GP-Sub, Inc. and Dragon
2 ESP, Ltd. and hereby alleges as follows.

3 **FIRST CLAIM FOR RELIEF**

4 **(General Allegations)**

5 1. Third-Party Plaintiff incorporates herein that Plaintiff's Complaint solely for the
6 purposes of establishing that a Complaint has been filed against MDB Trucking, LLC, but
7 without admitting the truth of any allegation therein except for such allegations which may have
8 been admitted in Third-Party Plaintiff's Answer. Third-Party Plaintiff is informed and believes
9 and therefore alleges that the matters referred to in Third-Party Plaintiff's Complaint were
10 proximately caused by the acts and omissions of Third-Party Defendants.

11 2. Third-Party Plaintiff MDB Trucking, LLC was at all relevant times a Nevada
12 limited liability company authorized to conduct business within the State of Nevada.

13 3. Third-Party Defendants DOES 1-10 and BLACK AND WHITE COMPANIES are
14 sued herein under fictitious names and the true names and capacities of said Third-Party
15 Defendants are not known by Third-Party Plaintiff who asked leave of court to amend this Third-
16 Party Complaint to set forth same as it becomes known or ascertained.

17 4. Third Party Defendant RMC Lamar Holdings, Inc. (fka Ranch Manufacturing)
18 was at all relevant times hereto a Colorado corporation engaged in the business of designing and
19 manufacturing trailers and semi-trailers and placed same into the stream of commerce and was
20 doing business in the State of Nevada.

21 5. Third-Party Defendant Versa Products Company, Inc was at al relevant times
22 hereto a New Jersey Corporation engaged in the business of designing and manufacturing
23 pneumatic air solenoid valves specifically for bottom dump trailers and gate activated controls
24 and placed into the stream of commerce and was doing business in the State of Nevada.

25 6. Third-Party Defendant the Modern Group GP-Sub, Inc. was at all relevant times
26 hereto a Texas corporation and the general partner of Dragon ESP, Ltd., a Texas limited
27 partnership.

28 ///

TIMOTHY L. ARMSTRONG
DELAWARE BAR NO. 11111
& JESSICA
11111 S. McCarty, Suite 10
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1 7. Third Party Defendant Dragon ESP, Ltd. was at all relevant times a Texas limited
2 partnership.

3 8. A Complaint was filed on May 2, 2016 in the Second Judicial District Court,
4 Case No. CV16-00976, Department 10 in which the Plaintiff Geneva M. Remmerde prayed for
5 damages against Defendant MDB Trucking, LLC alleging negligence in regards to an accident
6 which occurred on July 7, 2014 where a trailer owned by MDB Trucking, LLC spilled a load of
7 gravel causing an accident and injury which are claims presented by Plaintiff.

8 9. Upon information and belief, the Ranco trailer was activated inadvertently causing
9 the gates of the trailer to release a subject load of gravel on the highway and was defective in
10 whole or in part as designed by the Defendant RMC Lamar Holdings, Inc. (fka Ranch
11 Manufacturing Company) (also known by the trade name and trademark Ranco).

12 10. Third Party Defendant RMC Lamar Holdings, Inc. manufactured the subject
13 Ranco trailer in 2002 under the vehicle brand Ranco with VIN No. 1R9BP45082L008431 Idaho
14 Plate No. TE3528.

15 11. Third-Party Defendants the Modern Group and Dragon ESP acquired Ranch
16 Manufacturing on or about August 1, 2007 through an Asset Purchase Agreement.

17 12. Upon information and belief, Third-Party Defendant Dragon, ESP has continued
18 to sell Ranco trailers and semi-trailers with the same components within the same general market
19 and to same customers.

20 13. Third-Party Defendant Dragon ESP has maintained its manufacturing and
21 assembly locations in the same venue of Lamar, Colorado after its acquisition of Ranch
22 Manufacturing Company.

23 14. William Carder the former President and owner of Ranch Manufacturing, Inc.
24 became an officer with Dragon ESP, Ltd. and maintained his position as Vice-President for
25 Ranco through all relevant times up to and including 2015.

26 15. Upon information and belief, Dragon ESP, Ltd. is a *de facto* successor to Ranch
27 Manufacturing, Inc. and has engaged in substantial continuation of Ranco's business.

28 ///

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DEAN WALKER
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1 16. Dragon ESP, Ltd. is liable to Third-Party Plaintiff to the same extent as RMC
2 Lamar Holdings, Inc. (fka Ranch Manufacturing Company).

3 17. Third-Party Plaintiff MDB Trucking, LLC in 2012 was the last purchaser and end
4 user of the subject Ranco trailer and the direct purchaser of the subject Versa Valve unit
5 in 2013.

6 18. On or before July 7, 2014, the Ranco trailer that left Ranch Manufacturing's
7 control as designed, assembled, and manufactured by Ranco was unreasonably dangerous and
8 defective in one or more of the following respects:

9 a. The semi-trailer was designed, assembled and manufactured and/or
10 configured in such a manner that the Versa solenoid valve would activate inadvertently allowing
11 the gates to open and release the load carried by the trailer; and

12 b. That the Ranco trailer was designed, assembled, manufactured and/or
13 configured in such a manner that the Versa Valve was not equipped with a safety lock to prevent
14 inadvertent activation allowing the gates to open.

15 19. Ranch Manufacturing knew that Versa Products Company, Inc. had a safer
16 design available in the stream of commerce on or about 2002 which employed a manual lock
17 safety design; and, that same should have been provided to its end use customers in lieu of the
18 Versa Valve model incorporated in the subject Ranco trailer.

19 20. Upon information and belief, Versa Products Company also knew both
20 in 2002 and 2014 that they had an alternate safer design available in the stream of commerce
21 which employed a manual lock safer design; and, that same should have been provided to its end
22 user customers MDB Trucking in lieu of the model incorporated in the subject Ranco trailer.

23 21. To the extent Plaintiff was injured as a proximate result of the unreasonably
24 dangerous conditions and defects at the time of manufacturing or negligent design, such as a
25 direct and proximate result of the negligence of Third-Party Defendants; and any negligence that
26 exists as alleged by the Plaintiffs is expressly denied. Third-Party Defendants were actively and
27 solely negligent and Third-Party Plaintiff was passively negligent or without fault.

28 ///

THOMAS ALAN TRUONG
DELA HALLADAY
& ASSOCIATES
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1 **THIRD CLAIM FOR RELIEF**

2 (Implied Indemnification as to VERSA)

3 31. The Third-Party Plaintiff repeats and realleges each and every allegation contained
4 in paragraphs 1-30 above as if more fully set forth herein.

5 32. The Third-Party Plaintiff is entitled to complete indemnity against VERSA
6 PRODUCTS COMPANY, INC. with respect to all allegations or liabilities set forth in the First
7 amended Complaint.

8 33. The Third-Party Plaintiff is therefore entitled to all costs and fees expended in the
9 defense of the claims of negligence in this matter as well as prosecution of the Third-Party
10 Complaint.

11 **FOURTH CLAIM FOR RELIEF**

12 (Contribution as to VERSA)

13 34. The Third-Party Plaintiff repeats and realleges each and every allegation contained
14 in paragraphs 1-33 above as if more fully set forth herein.

15 35. The Third-Party Plaintiff is entitled to contribution from the Third-Party
16 Defendant VERSA PRODUCTS COMPANY, INC., with respect to any settlement, judgment,
17 awards, or any other type of resolution of the claims brought forward by the Plaintiffs in her
18 Complaint on file herein.

19 36. The Third-Party Plaintiff is entitled to all costs and fees expended in the defense
20 of the claims for negligence in this matter as well as prosecution of the Third-Party Complaint.

21 WHEREFORE, Third-Party Plaintiff demands judgment against Third-Party Defendants
22 as follows:

- 23 1. For implied indemnification with respect to all negligence claims brought against
24 Third-Party Plaintiff in this matter;
- 25 2. For contribution with respect to all negligence claims brought against Third-Party
26 Plaintiff in this matter;
- 27 3. For attorneys' fees and costs expended in this matter; and

28 ///

1 4. For such other and further relief as this Court deems just and proper in the
2 premises,

3 DATED this 22nd day of June, 2016.

4 THORNDAL ARMSTRONG
5 DELK BALKENBUSH & EISINGER

6 By: 

7 Katherine F. Parks, Esq., State Bar No. 6227
8 Brian M. Brown, Esq., State Bar No. 5233
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AFFIRMATION

Pursuant to NRS 239B.030

The undersigned hereby affirms that the preceding document filed in above-entitled court does not contain the social security number of any person.

DATED this 2nd day of June, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing **THIRD-PARTY COMPLAINT** to be served on all parties to this action by:

_____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada.

☒ Second Judicial District Court Efile ECF (Electronic Case Filing)

_____ hand delivery

_____ electronic means (fax, electronic mail, etc.)

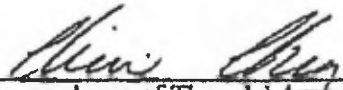
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6385 S. Rainbow Blvd., Suite 600
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Third-Party Defendant Versa Products Co., Inc.

DATED this 22 day of June, 2016.



An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

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VERSA PRODUCTS COMPANY, INC.
9

10 IN THE SECOND JUDICIAL DISTRICT COURT

11 WASHOE COUNTY, NEVADA

12 ERNEST BRUCE FITZSIMMONS and
CAROL FITZSIMMONS, Husband and
13 Wife,

14 Plaintiffs,

15 vs.

16 MDB TRUCKING, LLC; RMC LAMAR
HOLDINGS, INC.; VERSA PRODUCTS
17 COMPANY, INC.; DANIEL ANTHONY
KOSKI; ABC Corporations I-X; Black and
18 White Companies, and DOES I-XX,
inclusive,

19 Defendants.

20 MDB TRUCKING, LLC, a Nevada limited
liability company,
21

22 Cross-Claimant,

23 vs.

24 RMC LAMAR HOLDINGS, INC., a
Colorado corporation; VERSA
25 PRODUCTS COMPANY, INC., a New
Jersey corporation; and DOES 1-10 and
26 BLACK AND WHITE COMPANIES,

27 Cross-Defendants.
28

Case No. CV15-02349
Dept. 15

Consolidated with Cases:
CV15-01337
CV16-00626
CV15-02410
CV16-00519

CROSS-DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S REPLY
IN SUPPORT OF MOTION TO DISMISS
CROSS-CLAIMANT MDB TRUCKING,
LLC'S THIRD CAUSE OF ACTION FOR
IMPLIED INDEMNITY
PURSUANT TO NRCP 12(B)(5)

ORAL ARGUMENT REQUESTED

1 CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S REPLY IN SUPPORT
2 OF MOTION TO DISMISS CROSS-CLAIMANT MDB TRUCKING, LLC'S THIRD CAUSE
3 OF ACTION FOR IMPLIED INDEMNITY
4 PURSUANT TO NRCP 12(B)(5)

5 COMES NOW, Cross-Defendant VERSA PRODUCTS COMPANY, INC., by and
6 through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
7 Paige S. Shreve, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP, and hereby
8 submits this Reply in Support of VERSA's Motion to Dismiss Cross-Claimant MDB
9 Trucking, LLC's Third Cause of Action for Implied Indemnity, with prejudice, pursuant to
10 NRCP 12(b)(5).
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Simply put, MDB TRUCKING, LLC'S (hereinafter referred to as "MDB")
4 Cross-Claim for implied indemnity fails to state a claim upon which the Court can grant
5 relief. The facts are simple. The operative Complaint alleges claims against MDB for its
6 own negligence and VERSA PRODUCTS COMPANY, INC. (hereinafter referred to as
7 "VERSA") for strict liability. MDB did not oppose VERSA's contention that MDB was
8 actively negligent in it's Opposition. However, MDB argues that implied indemnity is
9 available because MBD's purchase of a VERSA product created a special legal
10 relationship. See, MDB's Opposition to Versa's Motion to Dismiss at P. 5:3-5. Even if
11 there was no special legal relationship, MDB argues that the burden of loss always shifts
12 to the manufacturer of an allegedly defective product, therefore entitling MDB to implied
13 indemnification.

14 MDB's arguments are incorrect. MDB cites case law that is either: (1) from
15 another jurisdiction; and/or (2) substantially distinguishable in it's facts. Not only does
16 MDB cite case law that is not binding on this Court, MDB cites case law that is no longer
17 valid, having been overruled.

18 MDB agrees with VERSA that a pre-existing legal relationship is needed for a
19 cause of action of implied indemnity, but MDB did not (and cannot) plead a pre-existing
20 legal relationship between MDB and VERSA. Further, the law is very clear that a party
21 cannot seek indemnity for their own negligence. Thus, MDB's cause of action for implied
22 indemnity is fatally defective, and should be dismissed with prejudice.

23 II. LEGAL ARGUMENT

24 A. Legal Standard of Review

25 Nevada has long recognized that a complaint must at least "set forth sufficient
26 facts to demonstrate the necessary elements of a claim for relief so that the defending
27 party has adequate notice of the nature and relief sought." W. States Const., Inc. v.
28 Michoff, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). Pursuant to NRCP 12(b)(5), a

1 defendant is entitled to dismissal when the complaint fails to state a claims upon which
2 relief can be granted. In considering the dismissal of a complaint, this Court must
3 “determine whether or not the challenged pleading set for allegations sufficient to make
4 out the elements of a right to relief.” Bemis v. Estate of Bemis, 114 Nev. 1021, 1021, 967
5 P.2d 437, 439 (1998)(emphasis added) (*citing* Edgar v. Wagner, 101 Nev. 226, 227, 699
6 P.2d 110, 111 (1985)).

7 In making that determination, the Court is required to accept all factual allegations
8 as true, and to draw all inferences in favor of the non-moving party. Buzz Stew, LLC v.
9 City of North Las Vegas, 124 Nev. 224, 181 P.3d 670, 672 (2008). However, the Nevada
10 Supreme Court has instructed that a dismissal for failure to state a claim should be
11 affirmed “if it appears beyond a doubt that [Plaintiffs] could prove no set of facts, which, if
12 true, would entitle it to relief.” *Id.* (emphasis added).

13 As discussed below, MDB cannot plead any set of facts, even if true, that would
14 entitle MDB to relief since the underlying Complaint alleges negligence against MDB.
15 Thus, this Court should dismiss MBD’s claims for implied indemnity.

16 **B. MDB Failed to State a Claim for Implied Indemnity**

17 **1. Indemnity is Not Available Because MDB was Actively Negligent**

18 MDB did not oppose VERSA’s contention that MDB was actively negligent for the
19 subject accident. The Supreme Court has stated that indemnity “is generally available to
20 remedy the situation in which the defendant, who has committed no independent wrong,
21 is held liable for the loss of a plaintiff caused by another party.” Pack v. LaTourette, 277
22 P.3d 1246, 1248-49 (Nev. 2012)(internal citations omitted). However, when “a party has
23 committed an “independent wrong,” and is thus actively negligent, that party has no right
24 to indemnity.” See, Rodriguez, 125 Nev. at 589, 216 P.3d at 801; see also Doctors
25 Company, 120 Nev. at 658, 98 P.3d at 690; see also, Pack, at 1248-49. When the
26 underlying litigation alleges a defendant’s own negligence, the defendant is deemed
27 actively negligent and unable to seek indemnity from another tortfeasor. Pack, 277 P.3d
28 at 1247.

1 MDB and VERSA are allegedly joint tortfeasors in this matter. As MDB failed to
2 Oppose this point in its Opposition, the Court may take that as an admission that
3 VERSA's position is meritorious. See, DCR 12(3); Walls v. Brewster, 112 Nev. 175, 178,
4 912 P.2d 261, 263 (1996)("Failure of the opposing party to serve and file written
5 opposition may be construed as an admission that the motion and/or joinder is
6 meritorious and a consent to granting the same."). Since MBD is actively negligent, it has
7 no cause of action for implied indemnity against a joint tortfeasor, i.e., VERSA.

8 MDB's active negligence prohibits it from seeking implied indemnity from another
9 tortfeasor. As a consequence, MDB's claim for implied indemnity fails as a matter of law.

10 **2. MDB Has Not and Cannot Plead a Pre-Existing Relationship**
11 **Between MDB and VERSA**

12 In it's Opposition, MDB conceded that "implied indemnity could not be asserted
13 without . . . the showing of a nexus or special relationship between the indemnitee and
14 proposed indemnitor." See, MDB's Opposition to Versa's Motion to Dismiss, P.4:6-8.
15 However, MDB has not pled a nexus or pre-existing legal relationship between MDB and
16 VERSA. Since MDB failed to (and cannot) plead a special relationship in it's Cross-
17 Claim, MDB has no right to indemnity as a matter of law.

18 MDB's Opposition argues it should be able to maintain an equitable indemnity
19 cause of action against VERSA because MDB's purchase of the VERSA product created
20 a special legal relationship between them. Id. at 5:3-5. However, MDB did not purchase
21 the subject valve directly from VERSA. MDB cites Black & Decker v. Essex Group, 105
22 Nev. 344, 775 P.2d 698 (1989) to support it's position. Black & Decker, is distinguishable
23 from this case.

24 In Black & Decker, the operative complaint alleged a cause of action for strict
25 liability against Black & Decker and Essex Group, Inc. See, Black & Decker, 150 Nev. at
26 344. VERSA does not disagree that a pre-existing legal relationship could exist between
27 two manufacturers for strict products liability because strict liability extends to the
28 members in the chain of distribution of a defective product. Outboard Motor Corp. v.

1 Schupbach, 93, Nev. 158, 561, P.2d 450 (1997). Here, Plaintiffs are not suing MDB for
2 strict products liability; they are suing MDB for MDB's own negligence. See, Plaintiffs'
3 Complaint, attached to VERSA's Motion to Dismiss as Exhibit 1. MDB has not (and
4 cannot) plead any legal relationship between MDB and VERSA that requires VERSA to
5 indemnify MDB for MDB's own negligence. Thus, since no pre-existing legal relationship
6 exists, there can be no cause of action for implied indemnity.

7 3. VERSA Should Not Bear the Burden of MDB's Negligence

8 MDB cites two non-binding cases it contends stand for the proposition that VERSA
9 should bear the burden of MDB's own negligence. See, MDB's Opposition to Versa's
10 Motion to Dismiss, P. 5:7-26; P. 6:1-12. However, these cases do not support MDB's
11 argument. An analysis of these two cases proves that they are not applicable in the
12 instant case.

13 First, MDB's Opposition alleges that "the doctrine of equitable indemnification
14 could look beyond the special relationship," citing Hydro-Air Equip., Inc. v. Hyatt Corp.,
15 852 F.2d 403 (9th Cir. 1988). See, MDB's Opposition to Versa's Motion to Dismiss,
16 P. 5:8-10. However, that is a incorrect reading of the case and in direct conflict of the
17 case MDB cited earlier in it's Opposition "implied indemnity could not be asserted without
18 . . . the showing of a nexus or special relationship between the indemnitee and proposed
19 indemnitor." See, MDB's Opposition to Versa's Motion to Dismiss, P. 4:6-8. Additionally,
20 the Court in Hydro-Air Equip., Inc. actually held the opposite. The Court illustrated the
21 importance of having a special relationship in order to trigger implied indemnity. Hydro-
22 Air Equip., Inc. at 406. Further, the Court in Hydro-Air Equip., Inc. cited Munoz v. Davis,
23 141 Cal. App. 3d 420, 190 Cal. Rptr. 400 (1983) which involved a claim of attorney
24 malpractice:

1 [T]he attorney sought indemnification from a third-party
2 negligent driver for causing the accident that led to his
3 representation of the plaintiff. The court properly denied
4 indemnification because no connection or nexus existed
5 between the attorney's misconduct and the negligent driver's
6 misconduct.

7 Id.

8 Like the Munoz case, there is no connection between MDB's alleged negligent
9 conduct and VERSA's alleged wrongdoing. As such, MDB is not entitled to
10 indemnification from VERSA. Further, the facts in Hydro-Air Equip., Inc. differ significantly
11 from the instant case. MDB and VERSA are both parties to the underlying litigation,
12 unlike the parties in Hydro-Air. "Indemnity is not available in cases involving joint or
13 concurrent tortfeasors having no legal relationship to one another and each owing a duty
14 of care to the injured party." Hydro-Air Equip., Inc. v. Hyatt Corp., 852 F.2d 403, 405 (9th
15 Cir. 1988).

16 Additionally, there was a legal relationship between Hydro-Air Equip., Inc. and
17 Hyatt Corp which differs from the parties in this matter. The relationship between the
18 indemnitee and indemnitor was one of predecessor and successor-in-interest, because
19 Hydro Air purchased Hyatt Corp's ventilation business. Id. at 405. The Court relied on
20 Ray v. Alad, 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977), holding that implied
21 indemnity could apply only because Hydro-Air's successor-in-interest to Hyatt created a
22 special relationship between Hydro-Air and Hyatt in which Hyatt would be liable for the
23 alleged product defects caused by Hyatt. See, Hydro-Air Equip., Inc. at 406 (citing Ray v.
24 Alad, 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977)).

25 Here, there is no successor-in-interest relationship between MDB and VERSA.
26 MDB did not acquire VERSA; VERSA is not dissolved; and Plaintiff does have a remedy
27 against VERSA if the Court determines an allegedly defective VERSA product caused the
28 Plaintiffs' alleged injuries because VERSA is a party in the underlying litigation.

Second, MDB cites to the non-binding case of Suvada v. White Motor Co., 210
N.E. 2d 182 (Ill. 1965) to support it's argument that the burden of loss should shift to

1 VERSA. Not only is Suvada not binding in Nevada, it is no longer good law in Illinois.
2 The Supreme Court of Illinois overruled Suvada in Dixon v. Chicago & North Western
3 Transportation Co., 151 Ill. 2d 108, 123, 601 N.E.2d 704, 176 Ill. Dec. 6 (1992).¹
4 Ironically, the case that reaffirmed the overruling of Suvada is substantially similar to this
5 present matter.

6 In Dixon, Defendant Hauser (while working for defendant Chicago & North
7 Western Transportation Co. ("North Western") was driving the Plaintiff, Dixon, in his Jeep
8 when the "Jeep went out of control on the highway exit ramp" and caused the plaintiff
9 severe injuries. Dixon v. Chi. & N. W. Transp. Co., 151 Ill. 2d 108, 112, 176 Ill. Dec. 6, 8,
10 601 N.E.2d 704, 706 (1992). Plaintiff sued Hauser and North Western for negligence and
11 the Jeep Defendants for strict products liability. Id. Hauser and North Western filed a
12 counter-claim against Jeep for implied indemnity. Id. The Court overruled Suvada,
13 holding a party cannot make a claim for implied indemnity when liability is premised only
14 on it's own negligence:

15
16 Accordingly, for Hauser to be found liable to Dixon, a finding
17 of negligence on Hauser's part would have to be made.
18 Hauser's indemnity claim seeks indemnification from
19 American Motors Sales Corporation and Jeep Corporation
20 "for any and all amounts for which he may be held liable to
21 [Dixon]." Because Hauser's liability to Dixon could be
22 premised only on Hauser's negligence, Hauser is barred
23 under Frazer from seeking indemnification for that liability.

24 Id. at 121.

25 Like Dixon, MDB can only be liable to Plaintiffs' if there is a finding of negligence
26 on MDB's part. Since MDB's liability to Plaintiffs' is premised only on it's own negligence,
27 MDB cannot seek implied indemnity from VERSA. Thus, the Court should dismiss the
28 cause of action against VERSA for implied indemnity.

¹ " . . . Suvada holding can no longer be considered viable." Id.

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CONCLUSION

Based upon the foregoing, VERSA respectfully requests an Order from this Court dismissing MDB's implied indemnity claim against it, with prejudice.

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 25th day of July, 2016

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP



By _____
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CERTIFICATE OF SERVICE

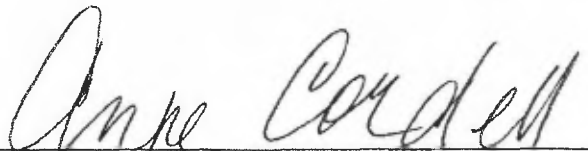
I hereby certify that on this 25th day of July, 2016, a true and correct copy of CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S REPLY IN SUPPORT OF IT'S MOTION TO DISMISS CROSS-CLAIMANT MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5) was served electronically with the Court addressed as follows:

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6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8
9 IN AND FOR THE COUNTY OF WASHOE

9 GENEVA M. REMMERDE,

Case No. CV16-00976

10 Plaintiff,

Dept. No. 10

11 vs.

12 DANIEL ANTHONY KOSKI; MDB
13 TRUCKING, LLC, DOES I-X, and
ROE I-V,

14 Defendants.

15 MDB TRUCKING, LLC, a Nevada limited
16 liability company,

17 Third-Party Plaintiff,

18 vs.

19 RMC LAMAR HOLDINGS, INC., a
Colorado Corporation; VERSA PRODUCTS
20 COMPANY, INC., a New Jersey
Corporation, The MODERN GROUP GP-
21 SUB, INC., a Texas corporation and general
partnership; DRAGON ESP, LTD., a Texas
22 limited partnership; et al Defendants

23
24 **OPPOSITION TO THIRD-PARTY DEFENDANT'S [VERSA PRODUCTS
COMPANY, INC.] MOTIONS TO DISMISS**

25 COMES NOW, Defendant/Third-Party Plaintiff MDB Trucking, LLC, by and through
26 their undersigned counsel of record and hereby submits this Opposition to Third-Party
27 Defendant's Motion to Dismiss Third Claim for Relief on Implied Indemnification.
28

THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER
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Reno, Nevada 89509
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AA000124

1 This opposition is based upon the pleadings and papers on file herein, the memorandum
2 of points and authorities, the exhibits, together with such other further evidence or testimony as
3 may be proper in the premises.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I.**

6 **INTRODUCTION**

7 To the present motion, Versa Products, Inc. seeks a dismissal of MDB Trucking's Third-
8 Party Complaint for implied indemnification. Versa Product's argument is flawed from inception
9 because it improperly relies upon the heightened burden for surviving a motion to dismiss stated
10 by the United States Supreme Court in *Bell Atlantic Corp. v. Trombly*, 127 S.Ct. 1955, 1965
11 (2007); and *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951 (2009). The Nevada Supreme Court has yet
12 to expressly adopt these particular precedents. Nevada continues to use the liberal standard that
13 has long been the law of Nevada which remains in effect.

14 Furthermore, Versa Products' arguments fails on two premises. First, that the Court must
15 rely upon Plaintiffs' allegations that MDB was actively negligent and/or that MDB has failed to
16 plead a pre-existing legal relationship between MDB and Versa Products. These arguments are
17 flawed procedurally and substantively.

18 **II.**

19 **A. STANDARDS FOR MOTION TO DISMISS.**

20 The purpose of a motion to dismiss pursuant to NRCP 12(b)(5) is to test the formal
21 sufficiency of a claim for relief. See *Simpson v. Mars, Inc.*, 113 Nev. 188, 929 P.2d 966 (1997).
22 All allegations of material fact in the complaint are taken as true and construed in the light most
23 favorable to the non-moving party. *Hynds Plumbing & Heating Co. v. Clark County School Dist.*,
24 94 Nev. 776, 777, 587 P.2d 1331, 1332 (1978). Although Nevada is a notice pleading
25 jurisdiction, a party must be given reasonable advance notice of an issue to be raised and an
26 opportunity to respond. *Anastassatos v. Anaastassatos*, 112 Nev. 317, 320, 913 P.2d 652, 653
27 (1996). Notice pleading requires plaintiff to set forth the facts to support a legal theory but does
28 ///

1 not require the legal theory relied upon to be correctly identified. *Liston v. Las Vegas*
2 *Metropolitan Police Dist.*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).

3 In *Torres v. Nev. Direct Ins. Co.*, 131 Nev. Adv. Rptr. 54, 353 P.3d 1203 (2015), the
4 Nevada Supreme Court stated:

5 "A decision to dismiss a complaint under NRCP 12(b)(5) is
6 rigorously reviewed on appeal with all the alleged facts in the
7 complaint presumed true and all inferences drawn in favor of the
8 complainant. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev.
9 224, 227-28, 181 P.2d 670, 672 (2008)."

10 Dismissing a complaint is appropriate:

11 "Only if it appears beyond a doubt that [the plaintiff] could prove
12 no set of facts, which, if true, would entitle [the plaintiff] to relief."
13 *Id.* at 228, 181 P.3d at 672.

14 MDB submits the claims stated by its Third-Party Complaint for implied indemnification
15 survives Third-Party Defendant's motions to dismiss under Nevada law.

16 **B. THERE IS A SUFFICIENT PRE-EXISTING RELATIONSHIP BETWEEN MDB AND**
17 **VERSA PRODUCTS.**

18 Non-contractual or implied indemnity is an equitable remedy that allows a Defendant to
19 seek recovery from other potential tortfeasors whose negligence primarily caused the injured
20 party's harm. *Doctors Company v. Vincent*, 120 Nev. 644, 650, 98 P.3d 681, 686 (2004). "At the
21 heart of the doctrine is the premise that the person seeking to assert implied indemnity-the
22 indemnitee-has been required to pay damages caused by a third-party-the indemnitor." *Harvest*
23 *Capital v. WV DOE*, 560 S.E.2d 509, 513 (W. Virginia 2002).

24 Implied indemnification is an equitable remedy developed by courts to address the
25 unfairness which results when one defendant party, who has committed no independent wrong, is
26 held liable for the loss of a plaintiff caused by another party. *Id.* at 512.

27 Generally, the remedies available are only after a defendant has extinguished its own
28 liability through settlement or by paying a judgment. *Doctors Company*, 120 Nev. at 651, 98 P.2d
29 at 686. This court has stated that a "cause of action for indemnity...accrues when payment has
30 been made." *Aetna Cas. & Sur. v. Aztec Plumbing*, 106 Nev. 474, 476, 796 P.2d 227, 229 (1990).

31 Thus, a claimant seeking equitable indemnity must plead and prove that (1) it has discharged a

1 legal obligation owed to a third party; (2) the party from whom it seeks liability also was liable to
2 the third party; and (3) as between the claimant and the parties from whom it seeks indemnity,
3 the obligations ought to be discharged by the latter. 41 Am.Jur.2d Indemnity, Sec. 20 (2005). The
4 latter has also required "some nexus or relationship between the indemnitee and indemnitor." See
5 *Piedmont Equipment Co. v. Eberhard Manuf.*, 99 Nev. 523, 526, 665 P.2d at 259 (1983).

6 In *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 216 P.3d 793 (2009), the Supreme
7 Court affirmed a denial of summary judgment since implied indemnification could not be
8 asserted without determining liability of the third party to the injured party and the showing of a
9 nexus or special relationship between the indemnitee and the proposed indemnitor. Therefore, the
10 Court concluded that the District Court's denial of *Primadonna's* motion for summary judgment
11 was proper as to these factual matters. Thus, issues of active versus passive negligence should
12 be resolved by the trier of fact.

13 As to the question of a special relationship, MDB's Third-Party Complaint alleges in par.
14 17 that:

15 "Third-Party Plaintiff MDB Trucking, LLC was the last purchaser
16 and end user of the subject Ranco trailer and the direct purchaser of
the subject Versa Valve Unit in 2013."

17
18 The Third-Party Complaint further alleges in par. 20

19 "Upon information and belief, Versa Products Company, Inc.
20 also knew both in 2002 and 2014 that they had an alternate
21 safer design available in the stream of commerce which
22 employed a manual lock safer design; and, that same should
have been provided to its end user customers MDB
Trucking in lieu of the model incorporated in the subject
Ranco trailer."

23 MDB Trucking, LLC purchased the Versa Valve component as part of a
24 standard maintenance replacement in 2013. See Defendant's Rule 16.1 Disclosures served
25 in a consolidated discovery case [Olivia John Case No. CV15-01337] on December 18, 2015
26 [Item 15, MDB Work Order August 1, 2013 for unit 6775 attached as Exhibit 1.]

1 In *Black & Decker v. Essex Group*, 105 Nev. 344, 775 P.2d 698 (1989) the Court
2 recognized that a pre-existing legal relationship between the parties could include a breach of the
3 implied warranty of merchantability by and between the party that purchased a defective unit
4 from the manufacturer who was liable for strict products liability theory to the plaintiff. See,
5 *Ringsby Truck Lines, Inc. v. Bradfield* 563 P.2d 939, 943 (Colo. 1977); and *Jacobson v.*
6 *Dahlberg*, 464 P.2d 298 (Colo. 1970) (manufacturer of gun owner owed duty to purchaser who
7 sought indemnification).

8 Thus, as MDB as the end user and purchaser of the claimed defective component from
9 Versa Products Company, Inc., has a special legal relationship sufficient to support a claim for
10 implied equitable indemnification.

11 C. MDB IS ALSO ENTITLED TO CLAIM EQUITABLE INDEMNIFICATION SHIFTING
12 THE BURDEN OF LOSS TO THE MANUFACTURER OF THE DEFECTIVE COMPONENT.

13 In *Hydro Air Equip. v. Hyatt Corp.*, 852 P.2d 403 (9th Cir. Nev. 1988), the Ninth Circuit
14 Court of Appeals recognized that the doctrine of equitable indemnification could look beyond the
15 special relationship. The Ninth Circuit stated:

16 "The principle of implied equitable indemnity is designed to
17 prohibit one from profiting by his own wrong at the expense of one
18 who is either free from fault or negligent to a lesser degree.
19 *Santisteven v. Dow Chemical Co.*, 506 F.2d 1216, 1219 (9th Cir.
20 1974 (construing Nevada law). In evaluating a claim for implied
21 indemnity, courts must carefully examine both parties' conduct on
22 a case-by-case basis, with the ultimate goal of doing what is fair or
just. *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 440 F.Supp. 394,
399 (D. Nev. 1977). While it is true that the obligation to
indemnify clearly arises in certain situations, for example, when a
master-servant relationship exists, implied equitable indemnity
may be entirely proper if it is simply fairer to shift the burden of
loss. *Santisteven*, 506 F.2d at 1219..."

23 This doctrine of equitable indemnification was further recognized in a decision by the
24 Supreme Court of Illinois in *Suvada v. White Motor Co.*, 210 N.E. 2d 182 (Ill. 1965). There,
25 plaintiffs had apparently purchased a used reconditioned tractor trailer unit from a defendant
26 seller. The brake system was manufactured by the defendant manufacturer and installed by the
27 seller. The system failed and a collision ensued. Thereafter, the plaintiff settled various personal
28 injury and property claims and sought recovery from the defendants. This seminal decision also

ultimately recognized the doctrine of strict product liability as was discussed by the Nevada Supreme Court in *GINNES v. MAPES* 86 Nev. 408, 413 (1970).

As was held by the Illinois Supreme Court in *Suvada, supra*:

"There is an important distinction between contribution which distributes loss among tortfeasors by requiring each to pay his portion and share and indemnity which shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead. The two are often confused and there are many decisions in which indemnity has been allowed under the nature 'contribution'. The principle is not, however, limited to those who are personally free from fault. A similar rule has been applied to indemnity against the supplier of goods when a retailer or user of the goods incurs liability by a reason of negligent reliance upon his proper care."

"Indemnity here is not, however, premised on a theory of active or passive negligence. (To require proof that Bendix was actively negligent would be the antithesis of strict liability)..."

In *Suvada*, the Illinois Supreme Court held the purchaser of a reconditioned used tractor trailer stated a sufficient cause of action for indemnification from the manufacturer of a defective brake for sums paid by them in settlement of claims against them resulting from an accident caused by the defective brakes. This case was subsequently overruled by the Illinois Supreme Court when Illinois rejected the no contribution rule in *Skinner v. Reed-Prentice*, 374 NE2d 437, 442 (Ill. 1977) later codified by Illinois Statute. Illinois thus rejected any active-passive indemnity after the enactment of their Contribution Act. See *National Can Co. v. Vinylex Corp.*, 687 F.Supp. 375, 377 (N. Dist. Illinois 1988). In Nevada, the doctrine of implied indemnification [active versus passive] remains a viable claim regardless of contribution claims. However, *Suvada* also remains a significant precedent in several other jurisdictions. See. *Jones v. Aero-Chem Corp.*, 680 F.Supp. 338, 340 (D. Mont. 1987)(discussing upstream indemnification).

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III.

CONCLUSION

For all the foregoing reasons, MDB respectfully requests this Court deny the Third-Party Defendant's motions to dismiss as to the third claim for relief for implied equitable indemnification.

DATED this 29th day of July, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: 

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MDB TRUCKING, LLC

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AFFIRMATION

Pursuant to NRS 239B.030

The undersigned hereby affirms that the preceding document filed in above-entitled court does not contain the social security number of any person.

DATED this 29th day of July, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: 

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk
3 Balkenbush & Eisinger, and that on this date I caused the foregoing **OPPOSITION TO**
4 **THIRD-PARTY DEFENDANT'S [VERSA PRODUCTS COMPANY, INC.] MOTIONS**
5 **TO DISMISS** to be served on all parties to this action by:

6 ☒ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the
7 United States mail at Reno, Nevada.

8 ☐ Second Judicial District Court Eflex ECF (Electronic Case Filing)

9 ☐ hand delivery

10 ☐ electronic means (fax, electronic mail, etc.)

11 ☐ Federal Express/UPS or other overnight delivery fully addressed as follows:

12
13 **Kathleen A. Sigurdson, Esq.**
14 **1440 Haskell Street**
15 **Reno, NV 89509**
16 **Attorney for Plaintiffs**

17 **Matthew C. Addison, Esq.**
18 **Jessica L. Woelfel, Esq.**
19 **McDonald Carano Wilson LLP**
20 **100 W. Liberty Street, Tenth Floor**
21 **Reno, NV 89501**
22 **Defendant RMC Lamar Holdings**

23 **Josh Cole Aicklen, Esq.**
24 **David B. Avakian, Esq.**
25 **Lewis Brisbois Bisgaard & Smith, LLP**
26 **6385 S. Rainbow Blvd., Suite 600**
27 **Las Vegas, NV 89118**
28 **Defendant Versa Products Co., Inc.**

DATED this 29 day of July, 2016.

26 
27 An employee of Thorndal Armstrong
28 Delk Balkenbush & Eisinger

INDEX OF EXHIBIT(S)

Exhibit No.	Exhibit Description	No. of Pages
1	Item 15, MDB Work Order August 1, 2013 for unit 6775	10

1 JOSH COLE AICKLEN
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7 702.893.3383
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8 Attorneys for Third-Party Defendant
VERSA PRODUCTS COMPANY, INC.

10 IN THE SECOND JUDICIAL DISTRICT COURT

11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE

13 Plaintiff,

14 vs.

15 MDB TRUCKING, LLC; DANIEL
ANTHONY KOSKI; and DOES I-X and
16 ROE I-V corporations,

17 Defendants.

19 MDB TRUCKING, LLC, a Nevada limited
liability company,

20 Third-Party Plaintiff,

21 vs.

22 RMC LAMAR HOLDINGS, INC., a
23 Colorado corporation; VERSA
PRODUCTS COMPANY, INC., a New
24 Jersey corporation; THE MODERN
GROUP GP-SUB, INC., a Texas
25 corporation and general partnership;
DRAGON ESP, LTD., a Texas limited
26 partnership; and DOES 1-10 and BLACK
AND WHITE COMPANIES,

27 Third-Party Defendants.
28

Case No. CV16-00976
Dept. 10

THIRD-PARTY DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S REPLY
IN SUPPORT OF MOTION TO DISMISS
THIRD-PARTY PLAINTIFF MDB
TRUCKING, LLC'S THIRD CAUSE OF
ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCP 12(B)(5)

ORAL ARGUMENT REQUESTED

THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S REPLY IN
SUPPORT OF MOTION TO DISMISS THIRD-PARTY PLAINTIFF MDB TRUCKING,
LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCP 12(B)(5)

COMES NOW, Third-Party Defendant VERSA PRODUCTS COMPANY, INC., by and through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and Paige S. Shreve, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP, and hereby submits this Reply in Support of VERSA's Motion to Dismiss Third-Party Plaintiff MDB Trucking, LLC's Third Cause of Action for Implied Indemnity, with prejudice, pursuant to NRCP 12(b)(5).

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Simply put, MDB TRUCKING, LLC'S (hereinafter referred to as "MDB")
4 Third-Party Complaint for implied indemnity fails to state a claim upon which the Court
5 can grant relief. The facts are simple. The operative Complaint alleges a claim of
6 negligence against MDB for its own negligence. MDB did not oppose VERSA's
7 contention that MDB was actively negligent in it's Opposition. However, MDB now argues
8 that implied indemnity is available because MBD's purchase of a VERSA product created
9 a special legal relationship. Even if there was no special legal relationship, MDB argues
10 that the burden of loss always shifts to the manufacturer of an allegedly defective product,
11 therefore entitling MDB to implied indemnification.

12 MDB's arguments are incorrect and without merit. MDB cites case law that is
13 either: (1) from another jurisdiction; and/or (2) substantially distinguishable in it's facts.
14 Not only does MDB cite case law that is not binding on this Court, MDB cites case law
15 that is no longer valid.

16 MDB agrees with VERSA that a pre-existing legal relationship is needed for a
17 cause of action of implied indemnity, but MDB did not (and cannot) plead a pre-existing
18 legal relationship between MDB and VERSA. Further, the law is very clear that a party
19 cannot seek indemnity for their own negligence. Thus, MDB's cause of action for implied
20 indemnity is fatally defective, and should be dismissed with prejudice.

21 II. LEGAL ARGUMENT

22 A. Legal Standard of Review

23 Nevada has long recognized that a Complaint must at least "set forth sufficient
24 facts to demonstrate the necessary elements of a claim for relief so that the defending
25 party has adequate notice of the nature and relief sought." W. States Const., Inc. v.
26 Michoff, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). Pursuant to NRCP 12(b)(5), a
27 defendant is entitled to dismissal when the complaint fails to state claims upon which
28 relief can be granted. In considering the dismissal of a Complaint, this Court must

1 “determine whether or not the challenged pleading set for allegations sufficient to make
2 out the elements of a right to relief.” Bemis v. Estate of Bemis, 114 Nev. 1021, 1021, 967
3 P.2d 437, 439 (1998)(emphasis added) (*citing* Edgar v. Wagner, 101 Nev. 226, 227, 699
4 P.2d 110, 111 (1985)).

5 In making that determination, the Court is required to accept all factual allegations
6 as true, and to draw all inferences in favor of the non-moving party. Buzz Stew, LLC v.
7 City of North Las Vegas, 124 Nev. 224, 181 P.3d 670, 672 (2008). However, the Nevada
8 Supreme Court has instructed that a dismissal for failure to state a claim should be
9 affirmed “if it appears beyond a doubt that [Plaintiffs] could prove no set of facts, which, if
10 true, would entitle it to relief.” Id. (emphasis added).

11 First, MDB cites to disclosures in another case to support it’s arguments that a
12 special relationship exists between MDB and VERSA. This is improper for a 12(b)(5)
13 Motions to Dismiss because the Court is making the determination based solely on the
14 pleadings only. Further, as discussed below, MDB cannot plead any set of facts, even if
15 true, that would entitle MDB to relief since the underlying Complaint alleges negligence
16 against MDB. Thus, this Court should dismiss MBD’s claims for implied indemnity.

17 **B. MDB Failed to State a Claim for Implied Indemnity**

18 **1. Indemnity is Not Available Because MDB was Actively Negligent**

19 MDB did not oppose VERSA’s contention that MDB was actively negligent for the
20 subject accident. The Supreme Court has stated that indemnity “is generally available to
21 remedy the situation in which the defendant, who has committed no independent wrong,
22 is held liable for the loss of a plaintiff caused by another party.” Pack v. LaTourette, 277
23 P.3d 1246, 1248-49 (Nev. 2012)(internal citations omitted). However, when “a party has
24 committed an “independent wrong,” and is thus actively negligent, that party has no right
25 to indemnity.” See, Rodriguez, 125 Nev. at 589, 216 P.3d at 801; see also Doctors
26 Company, 120 Nev. at 658, 98 P.3d at 690; see also, Pack, at 1248-49. When the
27 underlying litigation alleges a defendant’s own negligence, the defendant is deemed
28 actively negligent and unable to seek indemnity from another tortfeasor. Pack, 277 P.3d

1 at 1247.

2 As MDB failed to Oppose this point in its Opposition, the Court may take that as an
3 admission that VERSA's position is meritorious. See, DCR 12(3); Walls v. Brewster, 112
4 Nev. 175, 178, 912 P.2d 261, 263 (1996)("Failure of the opposing party to serve and file
5 written opposition may be construed as an admission that the motion and/or joinder is
6 meritorious and a consent to granting the same."). Since MBD is actively negligent, it has
7 no cause of action for implied indemnity against VERSA.

8 MDB's active negligence prohibits it from seeking implied indemnity from another.
9 As a consequence, MDB's claim for implied indemnity fails as a matter of law.

10 **2. MDB Has Not and Cannot Plead a Pre-Existing Relationship**
11 **Between MDB and VERSA**

12 In it's Opposition, MDB conceded that "implied indemnity could not exist without . .
13 . the showing of a nexus or special relationship between the indemnitee and proposed
14 indemnitor." See, MDB's Opposition to Versa's Motion to Dismiss, P.4:7-9. However,
15 MDB has not pled a nexus or pre-existing legal relationship between MDB and VERSA.
16 Since MDB failed to (and cannot) plead a special relationship in it's Third-Party
17 Complaint, MDB has no right to implied indemnity as a matter of law.

18 MDB incorrectly argues it should be able to maintain an equitable indemnity cause
19 of action against VERSA because MDB's purchase of the VERSA product created a
20 special legal relationship between them. Id. at 5:8-10. However, MDB did not purchase
21 the subject valve directly from VERSA. MDB cites Black & Decker v. Essex Group, 105
22 Nev. 344, 775 P.2d 698 (1989) to support it's position. However, Black & Decker, is
23 easily distinguishable from this case.

24 In Black & Decker, the operative complaint alleged a cause of action for strict
25 liability against Black & Decker and Essex Group, Inc. See, Black & Decker, 150 Nev. at
26 344. VERSA does not disagree that a pre-existing legal relationship could exist between
27 two manufacturers for strict products liability because strict liability extends to the
28 members in the chain of distribution of a defective product. Outboard Motor Corp. v.

1 Schupbach, 93, Nev. 158, 561, P.2d 450 (1997). Here, Plaintiffs are not suing MDB for
2 strict products liability; they are suing MDB for MDB's own negligence. See, Plaintiffs'
3 Complaint, attached to VERSA's Motion to Dismiss as Exhibit 1. MDB has not (and
4 cannot) plead any legal relationship between MDB and VERSA that requires VERSA to
5 indemnify MDB for MDB's own negligence. Thus, since no pre-existing legal relationship
6 exists, there can be no cause of action for implied indemnity.

7 **3. VERSA Should Not Bear the Burden of MDB's Negligence**

8 MDB cites two non-binding cases it contends stand for the proposition that VERSA
9 should bear the burden of MDB's own negligence. See, MDB's Opposition to Versa's
10 Motion to Dismiss, P. 5:7-26; P. 6:1-12. However, these cases do not support MDB's
11 argument. An analysis of these two cases proves that they are not applicable in the
12 instant case.

13 First, MDB's Opposition alleges that "the doctrine of equitable indemnification
14 could look beyond the special relationship," citing Hydro-Air Equip., Inc. v. Hyatt Corp.,
15 852 F.2d 403 (9th Cir. 1988). See, MDB's Opposition to Versa's Motion to Dismiss,
16 P. 5:13-15. However, that is a incorrect reading of the case and in direct conflict of the
17 case MDB cited earlier in it's Opposition that held "implied indemnity could not be
18 asserted without . . . the showing of a nexus or special relationship between the
19 indemnitee and proposed indemnitor." See, MDB's Opposition to Versa's Motion to
20 Dismiss, P. 4:7-9. Additionally, the Court in Hydro-Air Equip., Inc. actually held the
21 opposite. The Court illustrated the importance of having a special relationship in order to
22 trigger implied indemnity. Hydro-Air Equip., Inc. at 406.

23 Further, the Court in Hydro-Air Equip., Inc. cited Munoz v. Davis, 141 Cal. App. 3d
24 420, 190 Cal. Rptr. 400 (1983) which involved a claim of attorney malpractice:

25 ///

26 ///

1 [T]he attorney sought indemnification from a third-party
2 negligent driver for causing the accident that led to his
3 representation of the plaintiff. The court properly denied
4 indemnification because no connection or nexus existed
5 between the attorney's misconduct and the negligent driver's
6 misconduct.

7 Id.

8 Like the Munoz case, there is no connection between MDB's alleged negligent
9 conduct and VERSA's alleged wrongdoing. As such, MDB is not entitled to
10 indemnification from VERSA. Further, the facts in Hydro-Air Equip., Inc. differ significantly
11 from the instant case.

12 First, a legal relationship between Hydro-Air Equip., Inc. and Hyatt Corp differs
13 from the parties in this matter. The relationship between the indemnitor and indemnitee
14 was one of predecessor and successor-in-interest, because Hydro Air purchased Hyatt
15 Corp's ventilation business. Id. at 405. The Court relied on Ray v. Alad, 19 Cal. 3d 22,
16 136 Cal. Rptr. 574, 560 P.2d 3 (1977), holding that implied indemnity could apply only
17 because Hydro-Air's successor-in-interest to Hyatt created a special relationship between
18 Hydro-Air and Hyatt in which Hyatt would be liable for the alleged product defects caused
19 by Hyatt. See, Hydro-Air Equip., Inc. at 406 (citing Ray v. Alad, 19 Cal. 3d 22, 136 Cal.
20 Rptr. 574, 560 P.2d 3 (1977)). Here, there is no successor-in-interest relationship
21 between MDB and VERSA. MDB did not acquire VERSA; and VERSA did not dissolve.

22 Second, MDB cites to the non-binding case of Suvada v. White Motor Co., 210
23 N.E. 2d 182 (Ill. 1965) to support it's incorrect argument that the burden of loss should
24 shift to VERSA. It is somewhat perplexing as to why Suvada is even referenced in MDB's
25 Opposition. As MDB noted, Ginnes v. Mapes, 86 Nev. 408, 413 (1970) cites to Suvada
26 in regards to the doctrine of strict product liability. There is no allegation of strict product
27 liability in the underlying Complaint, only negligence and respondeat superior as it relates
28 to MDB and DANIEL KOSKI. Further, while the Nevada Supreme Court cited to one
narrow portion of a case, it in no way means the Court adheres to everything held in the
whole case.

1 Not only is Suvada not binding authority in Nevada, it is no longer even good law in
2 Illinois which MDB fully admits. The Supreme Court of Illinois overruled Suvada in Dixon
3 v. Chicago & North Western Transportation Co., 151 Ill. 2d 108, 123, 601 N.E.2d 704, 176
4 Ill. Dec. 6 (1992).¹ Ironically, the case that reaffirmed the overruling of Suvada is
5 substantially similar to this present matter.

6 In Dixon, Defendant Hauser (while working for defendant Chicago & North
7 Western Transportation Co. ("North Western") was driving the Plaintiff, Dixon, in his Jeep
8 when the "Jeep went out of control on the highway exit ramp" and caused the plaintiff
9 severe injuries. Dixon v. Chi. & N. W. Transp. Co., 151 Ill. 2d 108, 112, 176 Ill. Dec. 6, 8,
10 601 N.E.2d 704, 706 (1992). Plaintiff sued Hauser and North Western for negligence and
11 the Jeep Defendants for strict products liability. Id. Hauser and North Western filed a
12 counter-claim against Jeep for implied indemnity. Id. The Court overruled Suvada,
13 holding a party cannot make a claim for implied indemnity when liability is premised only
14 on it's own negligence:

15 Accordingly, for Hauser to be found liable to Dixon, a finding
16 of negligence on Hauser's part would have to be made.
17 Hauser's indemnity claim seeks indemnification from
18 American Motors Sales Corporation and Jeep Corporation
19 "for any and all amounts for which he may be held liable to
20 [Dixon]." Because Hauser's liability to Dixon could be
21 premised only on Hauser's negligence, Hauser is barred
22 under Frazer from seeking indemnification for that liability.

23 Id. at 121.

24 Like Dixon, MDB can only be liable to Plaintiffs' if there is a finding of negligence
25 on MDB's part. Since MDB's liability to Plaintiffs' is premised only on it's own negligence,
26 MDB cannot seek implied indemnity from VERSA. Thus, the Court should dismiss the
27 cause of action against VERSA for implied indemnity.

28 Further, MDB's discussion of National Can Co. v. Vinylex Corp., 687 F. Supp. 375
(N. Dist. Illinois 1998) to argue that Illinois rejected any active-passive negligence is

¹ " . . . Suvada holding can no longer be considered viable." Id.

1 irrelevant because it does not matter what Illinois accepts or rejects regarding implied
2 indemnity for strict liability, since this matter involves a cause of action for negligence
3 regarding MDB not strict products liability. However, MDB fails to recognize that the
4 Court also held that "upstream implied indemnity² actions in Illinois was abolished." *Id.* at
5 380. MDB is attempting to argue an upstream implied indemnity action in the instant
6 case, further confounding the rationale as to why MDB cited to these inapplicable Illinois
7 cases.

8 In closing, MDB's cites Jones v. Aero-Chem Corp., 680 F.Supp. 338, 340 (D. Mont.
9 1987)(another non-binding case) in an attempt to argue that Suvada is still good law in
10 other states.³ Like all the other case law cited in MDB's Opposition, Jones involves a
11 strict products liability action in the underling complaint. There is no such cause of action
12 in this matter. Plaintiff does not allege a cause of action for strict products liability
13 against MDB; it only alleges negligence in regards to MDB. As a result, MDB has no right
14 to seek indemnity from VERSA. Thus, the Court should dismiss the cause of action
15 against VERSA for implied indemnity.

24
25 ² "In an upstream implied indemnity action, a party who is liable to another for injuries caused by a
26 defective product and who is downstream in the distribution chain (e.g., a distributor or retailer) seeks
indemnification from the manufacturer who placed the product, or a component part of it, in the stream of
commerce." Nat'l Can Co. v. Vinylex Corp., 687 F. Supp. 375, 378 n.4 (N.D. Ill. 1988).

27 ³ This is irrelevant to Nevada since the Nevada case law cited in this underling motion is in line with Dixon
28 and therefore contradicts Suvada.

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CONCLUSION

Based upon the foregoing, VERSA respectfully requests an Order from this Court dismissing MDB's implied indemnity claim, with prejudice.

AFFIRMATION

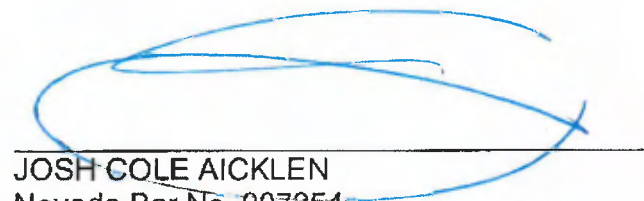
Pursuant to NRS 239B.030, the undersigned hereby affirms that this document filed in this court does not contain the social security number of any person.

DATED this 8th day of August, 2016

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By



JOSH COLE AICKLEN
Nevada Bar No 007254
DAVID B. AVAKIAN
Nevada Bar No. 009502
PAIGE S. SHREVE
Nevada Bar No. 013773
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Third-Party Defendant
VERSA PRODUCTS COMPANY, INC.

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 8th day of August, 2016, a true and correct copy
3 of THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S REPLY IN
4 SUPPORT OF IT'S MOTION TO DISMISS THIRD-PARTY PLAINTIFF MDB TRUCKING,
5 LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP
6 12(B)(5) was served electronically with the Court addressed as follows:

7 Kathleen A. Sigurdson, Esq.
8 1440 Haskell Street
9 Reno, NV 89505
10 Attorney for Plaintiff
11 GENEVA M. REMMERDE

Katherine F. Parks, Esq.
Brian M. Brown, Esq.
Thierry V. Barkley, Esq.
THORNDAL, ARMSTRONG, DELK
BALKENBUSH & EISINGER
6590 S. McCarran, Ste. B
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P: 775-786-2882
Attorneys for Defendant/Third-Party Plaintiff
MDB TRUCKING, LLC

12 Matthew C. Addlson, Esq.
13 McDONALD CARANO WILSON LLP
14 100 W. Liberty St., 10th Floor
15 Reno, NV 89501
16 Attorney for Third-Party Defendant
17 RMC LAMAR HOLDINGS, INC.

18 
19 An Employee of
20 LEWIS BRISBOIS BISGAARD & SMITH LLP

CV16-01914
JAMES BIBLE VS
MDB TRUCKING, 7 Pages
District Court
Washington County
DC-09933080656-045
09/20/2016 04:07 PM
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2016 AUG 15 PM 3:54

DEBORAH BRYANT
CLERK OF THE COURT
BY [Signature] DEPUTY

SUE SEVON
COURT CLERK
BY [Signature] DEPUTY

CASE NO. 16-10DC-0824
DEPT. NO. I
[The undersigned hereby affirms this document
does not contain a social security number]

IN THE TENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CHURCHILL

JAMES BIBLE,
Plaintiff,

vs.

MDB TRUCKING, LLC; a Nevada Limited
Liability Company; RMS [sic] LAMAR
HOLDINGS, INC.; a Colorado Corporation;
VERSA PRODUCTS COMPANY, INC.; a
New Jersey Corporation; DANIEL
ANTHONY KOSKI, et. al.,

Defendants.

MDB TRUCKING, LLC, a Nevada limited
liability company,

Cross-Claimant,

vs.

RMC LAMAR HOLDINGS, INC., a
Colorado corporation; VERSA PRODUCTS
INC., a New Jersey Corporation; and DOES
1-10, and BLACK AND WHITE
COMPANIES 1-10,

Cross-Defendants.

MDB TRUCKING, LLC'S CROSS-
CLAIM AGAINST RMC
LAMAR HOLDINGS, INC. (fka RANCH
MANUFACTURING COMPANY)
AND VERSA PRODUCTS COMPANY,
INC.

CV16 01914

DI

Defendant and Cross-Claimant, MDB Trucking, LLC, by and through its counsel of
record Thorndal Armstrong Delk Balkenbush & Eisinger hereby brings its cross-claim against
Cross-Defendants RMC Lamar Holdings, Inc. (fka Ranch Manufacturing Company) and Versa
Products Company, Inc.

///

THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER
5590 S. McCarran, Suite D
Reno, Nevada 89509
(775) 781-2882

AA000145

1 **FIRST CLAIM FOR RELIEF**

2 **(General Allegations)**

3 1. That Defendant/Cross-Claimant MDB Trucking, LLC was at all relevant times a
4 Nevada limited liability company authorized to conduct business within the state of Nevada.

5 2. That Cross-Defendants DOES 1-10 and BLACK AND WHITE COMPANIES 1-
6 10 are sued herein under fictitious names and capacities of said Defendants are not known by
7 Cross-Claimant, who ask leave of this court to amend this Cross-Claim to set forth same as they
8 become known or ascertained.

9 3. Cross-Defendant RMC Lamar Holdings, Inc. (fka Ranch Manufacturing
10 Company) was at all relevant times hereto a Colorado corporation engaged in the business of
11 designing and manufacturing trailers and semi-trailers and placed same into the stream of
12 commerce and was doing business in the State of Nevada.

13 4. Cross-Defendant Versa Products Company, Inc. was at all relevant times hereto a
14 New Jersey Corporation engaged in the business of designing and manufacturing pneumatic air
15 solenoid valves specifically for bottom dump trailers and gate activated controls and placed into
16 the stream of commerce and was doing business in the State of Nevada.

17 5. A Complaint was filed on July 7, 2016 in the Tenth Judicial District Court, Case
18 No. 16-10DC-0824, Department I in which the Plaintiff James Bible prayed for damages against
19 Defendant MDB Trucking, LLC alleging negligence with regard to an accident which occurred
20 on July 7, 2014 where a Ranco trailer owned by MDB Trucking, LLC spilled a load of gravel
21 causing an accident and injury which are claims presented by Plaintiffs.

22 6. That upon information and belief, the Ranco trailer was activated inadvertently
23 causing the gates of the semi-trailer to release the subject load of gravel on the highway and was
24 defective in part or in whole as designed by Defendant RMC Lamar Holdings, Inc. (fka Ranch
25 Manufacturing Company) (also known by the trade name and trademark Ranco).

26 7. Cross-Defendant RMC Lamar Holdings, Inc. manufactured the subject Ranco
27 trailer in 2002 under the vehicle brand Ranco with vehicle identification number
28 1R9BP45082L008431 Idaho Plate #TE3528.

1 8. Cross-Claimant MDB Trucking, LLC was the last purchaser and end user of the
2 subject Ranco trailer in 2012.

3 9. On or about 2002, the Ranco trailer that left Cross-Defendant's control as
4 designed, assembled and manufactured by the Cross-Defendant was unreasonably dangerous and
5 defective in one or more of the following respects:

6 a. The semi-trailer was designed, assembled, and manufactured and/or
7 configured in such a manner that the Versa solenoid valve would activate inadvertently allowing
8 the gates to open and release the load carried by the trailer; and,

9 b. That the Ranco trailer was designed, assembled, manufactured, and/or
10 configured in such a manner that the Versa Valve was not equipped with a safety lock to prevent
11 inadvertent activation allowing the gates to open.

12 c. That Versa Valve manufactured an alternate safer design available in 2002
13 including a manual lock system which was available to Ranco.

14 10. On or about July 7, 2014, that Versa Valve solenoid control as a component to the
15 Ranco trailer was unreasonably dangerous and defective in one or more of the following respects:

16 a. The Versa Valve solenoid valve would activate inadvertently allowing the
17 gates to open and release the load carried by the trailer; and,

18 b. Versa Products Company, Inc. had a safer design available in the stream of
19 commerce on or before 2002 which employed a manual lock safety design that should have been
20 provided to its end use customers in lieu of the Versa Valve installed both at the time of the
21 manufacturer in 2002 and directly sold to MDB as a standard maintenance replacement in 2013.

22 11. That to the extent Plaintiff was injured as a proximate result of the unreasonably
23 dangerous conditions and defects at the time of manufacturing or negligent design, such is a direct
24 and proximate result of the negligence of the Cross-Defendants; and, any negligence that exists as
25 alleged by Plaintiff is expressly denied. Cross-Defendants were actively negligent and Cross-
26 Claimant was passively negligent but also an innocent defendant with no culpable fault at all.

1 12. That Cross-Defendants breached a duty of care owed to the Cross-Claimant and
2 Cross-Defendants are required to indemnify and hold Cross-Claimant harmless with respect to all
3 the allegations and liabilities set forth in the Complaint filed in this matter.

4 13. Cross-Claimant has placed Cross-Defendant RMC Lamar Holdings, Inc. on notice
5 of the claims pending in this matter prior to initiation of litigation.

6 14. That Cross-Claimant has been required to expend costs and attorneys' fees in
7 defending the negligence claims in the Complaint on file herein and for prosecuting the instant
8 Cross-Complaint.

9 **FIRST CLAIM FOR RELIEF**

10 **(Implied Indemnification as to RMC LAMAR)**

11 15. Cross-Claimant repeats and realleges each and every allegation contained in
12 paragraphs 1-14 above as if more fully set forth herein.

13 16. Cross-Claimant is therefore entitled to complete indemnity against RMC Lamar
14 Holdings, Inc. with respect to all allegations or liabilities set forth in the Complaint on file in this
15 matter.

16 17. That Cross-Claimant is therefore entitled to total costs and fees expended in the
17 defense of the claims of negligence in this matter as well as prosecution of this Cross-Complaint.

18 **SECOND CLAIM FOR RELIEF**

19 **(Contribution as to RMC LAMAR)**

20 18. Cross-Claimant repeats and realleges each and every allegation contained in
21 paragraphs 1-17 above as if more fully set forth herein.

22 19. Cross-Claimant is entitled to contribution from Cross-Defendant RMC Lamar with
23 respect to any settlement, judgment, awards, or any other type of resolution of the claims brought
24 forward by the Plaintiffs in their First Amended Complaint on file herein.

25 20. Cross-Claimant is therefore entitled to all costs and fees expended in the defense of
26 claims of negligence in this matter as well as prosecution of the Cross-Complaint.

1 **THIRD CLAIM FOR RELIEF**

2 **(Implied Indemnification as to VERSA)**

3 21. Cross-Claimant repeats and realleges each and every allegation contained in
4 paragraphs 1- 20 above as if more fully set forth herein.

5 22. Cross-Claimant is entitled to complete indemnity against Versa Products
6 Company, Inc. with respect to all allegations or liabilities set forth in the First Amended
7 Complaint.

8 23. That Cross-Claimant is therefore entitled to all costs and fees expended in the
9 defense of claims of negligence in this matter as well as prosecution of the Cross-Complaint.

10 **FOURTH CLAIM FOR RELIEF**

11 **(Contribution as to VERSA)**

12 24. Cross-Claimant repeats and realleges each and every allegation contained in
13 paragraphs 1-23 above as if more fully set forth herein.

14 25. Cross-Claimant is entitled to contribution from Cross-Defendant Versa Products,
15 Company, Inc. with respect to any settlement, judgment, awards, or any other type of resolution of
16 the claims brought forward by the Plaintiffs in their First Amended Complaint on file herein.

17 26. Cross-Claimant is entitled to all costs and fees expended in the defense of the
18 claims for negligence in this matter as well as prosecution of the Cross-Complaint.

19 WHEREFORE, Cross-Claimant demands judgment against Cross-Defendants as follows:

- 20 1. For implied indemnification with respect to all negligence claims brought against
21 Cross-Claimant in this matter;
22 2. For contribution with respect to all negligence claims brought against Cross-
23 Claimant in this matter;
24 3. For attorneys' fees and costs expended in this matter; and

25 ///

26 ///

27 ///

28 ///

1 4. For such other and further relief as this Court deems just and proper in the
2 premises.

3 DATED this 24th day of August, 2016.

4 THORNDAL ARMSTRONG
5 DELK BALKENBUSH & EISINGER

6 By: 

7 Katherine F. Parks, Esq., State Bar No. 6227
8 Brian M. Brown, Esq., State Bar No. 5233
9 Thierry V. Barkley, Esq., State Bar No. 724
10 6590 S. McCarran Blvd., Suite B
11 Reno, Nevada 89509
12 Attorneys for Defendant/Cross-Claimant
13 MDB TRUCKING, LLC
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27 THORNDAL ARMSTRONG
28 DELK BALKENBUSH
& EISINGER
6590 S. McCarran, Suite B
Reno, Nevada 89509
(775) 786-2302

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk
3 Balkenbush & Eisinger, and that on this date I caused the foregoing **MDB TRUCKING, LLC'S**
4 **CROSS-CLAIM AGAINST RMC LAMAR HOLDINGS, INC. (fka RANCH**
5 **MANUFACTURING COMPANY) AND VERSA PRODUCTS COMPANY, INC.** to be
6 served on all parties to this action by:

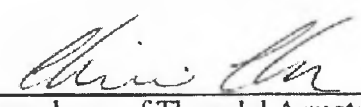
- 7 ☒ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the
8 United States mail at Reno, Nevada.
9 ☐ hand delivery
10 ☐ electronic means (fax, electronic mail, etc.)
11 ☐ Federal Express/UPS or other overnight delivery fully addressed as follows:

12
13 **James F. Sloan, Esq.**
14 **977 West Williams Avenue**
15 **Fallon, Nevada 89506**
Attorneys for Plaintiff

16 **Matthew C. Addison, Esq.**
17 **Jessica L. Woelfel, Esq.**
18 **McDonald Carano Wilson LLP**
19 **100 W. Liberty Street, Tenth Floor**
Reno, NV 89501
Defendant RMC Lamar Holdings

20 **Josh Cole Aicklen**
21 **David B. Avakian**
22 **Lewis Brisbois Bisgaard & Smith, LLP**
23 **6385 S. Rainbow Blvd., Suite 600**
Las Vegas, NV 89118
Defendant Versa Products Co., Inc.

24 DATED this 15 day of August, 2016.

25 
26 An employee of Thorndal Armstrong
27 Delk Balkenbush & Eisinger

FILED

FILED

CASE NO. 16-10DC-0824
DEPT NO. I

ORIGINAL
2016 SEP 21 AM 8:37

2016 SEP -8 PM 4:10

JACQUELINE ARVANT
CLERK OF THE COURT

SUE SEYON
COURT CLERK

IN THE TENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CHURCHILL

CV16 01914

DI

JAMES BIBLE,

Plaintiff,

vs.

MDB TRUCKING, LLC, a Nevada Limited Liability Company; RMS LAMAR HOLDINGS, INC. a Colorado Corporation; VERSA PRODUCTS COMPANY, INC., a New Jersey Corporation; DANIEL ANTHONY KOSKI; ABC CORPORATIONS; BLACK AND WITH COMPANIES; XYZ PARTNERSHIPS; and DOES I through X, inclusive

Defendants.

VERSA PRODUCTS COMPANY, INC.,

Cross-Claimant,

vs.

MDB TRUCKING, LLC; DANIEL ANTHONY KOSKI and DOES I - X, inclusive,

Cross-Defendants.

MDB TRUCKING, LLC, a Nevada Limited Liability Company,

Cross-Claimant,

vs.

RMS LAMAR HOLDINGS, INC. a Colorado Corporation; VERSA PRODUCTS COMPANY, INC., a New Jersey Corporation; and DOES 1-10, and

Case No. 16-10DC-0824
Dept. No. I

CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO DISMISS CROSS-CLAIMANT MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP12(B)(5)

DATE:

TIME:

REQUEST FOR ORAL ARGUMENT

CV16-01914
DC-0990000700-208
JAMES BIBLE vs. MDB TRUCKING, LLC
District Court
Churchill County
09/21/2016 08:37 AM
2315
bwc/rlf

LEWIS
BRISBOIS
BIGGAARD
& SMITH LLP
ATTORNEYS AT LAW

4835-6350-0344.1

AA000152

1 BLACK AND WHITE COMPANIES 1-10,
2 inclusive,

3 Cross-Defendants.

4 CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO DISMISS
5 CROSS-CLAIMANT MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR
6 IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5)

7 COMES NOW, Cross-Defendant VERSA PRODUCTS COMPANY, INC., by and
8 through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
9 Paige S. Shreve, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP, and hereby
10 moves the Court for an Order, dismissing Cross-Claimant, MDB Trucking, LLC's Third
11 Cause of Action for Implied Indemnity, with prejudice, pursuant to NRCP 12(b)(5).

12 This Motion is made and based upon the Points and Authorities attached hereto,
13 NRCP 12(b)(5), the papers and pleadings on file herein, and any oral arguments that may
14 be entertained at the hearing on this matter.

15 DATED this 7th day of September, 2016

16 Respectfully submitted,

17 LEWIS BRISBOIS BISGAARD & SMITH LLP

18 By 

19 JOSH COLE AICKLEN

20 Nevada Bar No. 007254

21 DAVID B. AVAKIAN

22 Nevada Bar No. 009502

23 PAIGE S. SHREVE

24 Nevada Bar No. 013773

25 6385 S. Rainbow Boulevard, Suite 600

26 Las Vegas, Nevada 89118

27 Tel. 702.893.3383

28 Attorneys for Defendant/Cross-

Defendant/Cross-Claimant

VERSA PRODUCTS COMPANY, INC.

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NOTICE OF MOTION

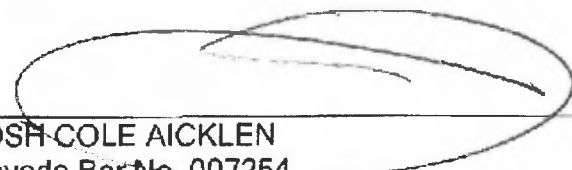
YOU AND EACH OF YOU PLEASE TAKE NOTICE that Cross-Defendant will bring the foregoing CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO DISMISS CROSS-CLAIMANT, MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP12(B)(5) on for hearing on the ____ day of _____, 2016, before Department I, at the hour of _____.m., or as soon thereafter as counsel may be heard.

DATED this 7th day of September, 2016

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By



JOSH COLE AICKLEN
Nevada Bar No. 007254
DAVID B. AVAKIAN
Nevada Bar No. 009502
PAIGE S. SHREVE
Nevada Bar No. 013773
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Tel. 702.893.3383
Attorneys for Defendant/Cross-
Defendant/Cross-Claimant
VERSA PRODUCTS COMPANY, INC.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 VERSA PRODUCTS COMPANY, INC. (hereinafter referred to as "VERSA")
4 respectfully requests that this Court dismiss MDB TRUCKING, LLC'S (hereinafter
5 referred to as "MDB") Third Cause of Action for implied indemnity. MDB has not and
6 cannot plead facts sufficient to support a cause of implied indemnity against VERSA.
7 This is because MDB was actively negligent and there is no special relationship or pre-
8 existing duty between MDB and VERSA. Further, VERSA requests that the Court
9 dismiss the implied indemnity cause of action with prejudice, because MDB cannot plead
10 facts which would entitle MDB to implied indemnity.

11 II. FACTS AND BACKGROUND

12 This lawsuit stems from an accident that took place on July 7, 2014 in Washoe
13 County, Nevada. See, Plaintiff's Complaint P. 2:24-26;3:115 (July 7, 2016), a true and
14 correct copy of which is attached hereto as EXHIBIT 1. JAMES BIBLE, ("Plaintiff") was
15 driving westbound on IR80 when a semi-trailer driven by DANIEL KOSKI (and owned by
16 Cross-Claimant MDB) spilled gravel on the freeway, causing a series of automobile
17 accidents and injuries alleged by Plaintiff. Id.

18 On July 7, 2016, Plaintiff filed his Complaint in the Tenth Judicial District Court
19 seeking damages against MDB, DANIEL KOSKI, RMS [sic] LAMAR HOLDINGS, INC.
20 and VERA. Id. Plaintiff's Complaint alleges as follows: (1) Negligence against MDB and
21 DANIEL KOSKI; (2) Negligence *Per Se*, alleging MDB and DANIEL KOSKI did not
22 comply with NRS 484D.850; and (3) Strict Products Liability against RMS LAMAR
23 HOLDINGS, INC. and VERSA. Id. On August 15, 2016, MDB filed it's Cross-Claim
24 against RMC LAMAR HOLDINGS, INC. and VERSA. See, MDB's Cross-Claim (August
25 15, 2016), a true and correct copy of which is attached hereto as EXHIBIT 2. MDB's
26 Cross-Claim seeks:(1) Implied Indemnity from RCM; (2) Contribution from RCM; (3)
27 Implied Indemnity from Versa; and (4) Contribution from Versa. Id.

1 As is explained below, MDB's third cause of action for implied indemnity against
2 VERSA is fatally flawed and should be dismissed with prejudice.

3 **III. LEGAL ARGUMENT**

4 **A. Legal Standard of Review**

5 Nevada has long recognized that a complaint must at least "set forth sufficient
6 facts to demonstrate the necessary elements of a claim for relief so that the defending
7 party has adequate notice of the nature and relief sought." W. States Const., Inc. v.
8 Michoff, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). Pursuant to NRCP 12(b)(5), a
9 defendant is entitled to dismissal when the complaint fails to state claims upon which
10 relief can be granted. In considering the dismissal of a complaint, this Court must
11 "determine whether or not the challenged pleading set forth allegations sufficient to make
12 out the elements of a right to relief." Bemis v. Estate of Bemis, 114 Nev. 1021, 1021, 967
13 P.2d 437, 439 (1998)(emphasis added) (citing Edgar v. Wagner, 101 Nev. 226, 227, 699
14 P.2d 110, 111 (1985)).

15 In making that determination, the Court is required to accept all factual allegations
16 as true, and to draw all inferences in favor of the non-moving party. Buzz Stew, LLC v.
17 City of North Las Vegas, 124 Nev. 224, 181 P.3d 670, 672 (2008). However, the Nevada
18 Supreme Court has instructed that a dismissal for failure to state a claim should be
19 affirmed "if it appears beyond a doubt that [Plaintiffs] could prove no set of facts, which, if
20 true, would entitle it to relief." Id. (emphasis added).

21 Dismissal of a complaint without leave to amend may be appropriate. See, Brown
22 v. Capanna, 105 Nev. 665 (1989) (stating that instances do exist where a court should not
23 grant leave). A district court may dismiss a complaint without leave to amend if a
24 complaint suffers a fatal flaw that cannot be saved by any amendment. See, Bemis v.
25 Bemis, 114 Nev. 1021, 1024 (1998) (a claim may be dismissed if "the Plaintiff is not
26 entitled to relief under any set of facts which could be proved in support of the claim")
27 (quotations, citations omitted). A Court's decision to dismiss a complaint without leave to
28 amend will not be overturned absent abuse of discretion. See, Cohen v. Mirage Resorts,

1 Inc., 119 Nev. 1, 23, 62 P.3d 720, 734-35 (2003); Nelson v. Sierra Constr. Corp., 77 Nev.
2 334, 364 P.2d 402 (1961).

3 B. The Court Should Dismiss MDB'S Cause of Action for Implied Indemnity as
4 a Matter of Law, Because MDB is Actively Negligent and it did Not Have a
5 Pre-Existing Relationship with VERSA

6 MDB was actively negligent and failed to plead a pre-existing legal relationship
7 between it and VERSA. Absent such a legal relationship, as a matter of law, there is no
8 basis for a claim for implied indemnification.

9 Implied indemnity is only available when a Defendant is free from wrongdoing, but
10 is held liable for the loss of a plaintiff caused by another party. Pack v. LaTourette, 128
11 N.A.O. 25, 277 P.3d 1246, 1248-1249 (2012). In Nevada, the right of one tortfeasor to
12 seek indemnification from another tortfeasor is limited. The Nevada Supreme Court held
13 that in order for a defendant to be entitled to indemnity from a joint tortfeasors, "there
14 must be a pre-existing legal relationship between them, or some duty on the part of the
15 primary tortfeasor to protect the secondary tortfeasor." Id.; See, Black & Decker v. Essex
16 Group, 105 Nev. 344, 775 P.2d 698 (1989). In Pack, plaintiff got into a car accident with
17 a cab driver and sought medical care from a doctor for his injuries, both whom may have
18 caused part of the plaintiff's injuries. Pack v. LaTourette, 277 P.3d at 1247-1248. Plaintiff
19 filed suit against the cab driver for alleged negligent driving. Id. The alleged negligent
20 driver filed a third-party complaint against the doctor for indemnity due to the doctor's
21 alleged negligence in treating the plaintiff. Id. The Nevada Supreme Court affirmed the
22 District Court's Order, dismissing the claim for implied indemnity and held that the claim
23 for implied indemnity failed as a matter of law because there was no pre-existing legal
24 relationship between the parties and the underlying Complaint alleged active negligence
25 against the Third-Party Plaintiff. Id.

26 Therefore, when a party is actively negligent and/or there is no pre-existing legal
27 relationship between the parties, a claim for implied indemnity cannot exist as a matter of
28 law. Id.

1 1. Indemnity is Not Available Because MDB was Actively Negligent

2 MDB's active negligence prohibits it from seeking indemnity as a matter of law.
3 The Supreme Court first recognized that indemnity "is generally available to remedy the
4 situation in which the defendant, who has committed no independent wrong, is held liable
5 for the loss of a plaintiff caused by another party." Id. at 1248-1249 (internal citations
6 omitted). However, when "a party has committed an "independent wrong," and is thus
7 actively negligent, that party has no right to indemnity." Id.

8 The difference between primary and secondary liability depends on a difference in
9 the character or kind of wrongs that cause the injury and the legal obligation owed by
10 each of the wrongdoers to the injured party. Black & Decker, 105 Nev. at 346, 775 P.2d
11 at 669-70. Both parties must be responsible for the same kind of wrong in order for no
12 independent wrong to exist. Id. Further, when the underlying litigation alleges a third-
13 party plaintiff/cross-claimant's own negligence, the third-party plaintiff/cross-claimant is
14 therefore actively negligent and unable to seek indemnity from another tortfeasor. Pack,
15 277 P.3d at 1247. In the present case, the Court must look to the allegations in the
16 Plaintiff's Complaint in order to determine whether MDB is alleged to be actively
17 negligent, thus prohibiting implied indemnity as a matter of law. Plaintiffs' Complaint
18 alleges MDB was negligent because: (1) it failed to hire, train, supervise and evaluate its
19 drivers and properly equip, maintain, drive and operate their vehicles in a safe and
20 prudent manner and under respondeat superior; and (2) it violated NRS 484D.850, all of
21 which caused the Plaintiff's injuries. See, Plaintiff's Complaint (July 7, 2016).

22 Using the operative Complaint, there is clearly an allegation of active negligence
23 and fault against MDB. Plaintiff's Complaint essentially alleges MDB is liable because of
24 it's negligence in operating and managing it's business, and VERSA is liable because of
25 strict liability based on an allegedly defective product. Id. The causes of action Plaintiff
26 alleges against MDB and VERSA in the Complaint are clearly different and independent
27 from one another. Id.

1 Because implied indemnity is only available once a party is found liable, MDB is
2 essentially demanding that VERSA reimburse MDB for the damages it allegedly caused
3 the Plaintiffs due to MDB's own negligence in operating and managing its business.
4 VERSA has no control over the way MDB operates and manages its business, further
5 illustrating that Plaintiff's allegations against MDB are completely independent from
6 VERSA.

7 MDB is actively negligent and so has no right to seek indemnity from other
8 tortfeasors. As a consequence, MDB's claim for implied indemnity fails as a matter of
9 law.

10 **2. There Was No Pre-Existing Relationship Between MDB and VERSA**

11 In addition to MDB's active negligence, indemnity is not available as a matter of
12 law because there is no pre-existing relationship between MDB and VERSA.

13 In Nevada, implied indemnity is unavailable when joint or concurrent tortfeasors
14 have no legal relation to one another. Reid v. Royal Ins. Co., 80 Nev. 137, 141 (1964).
15 Therefore, even if a Defendant has not committed an independent wrong, in order for him
16 to seek indemnification from another tortfeasor, there must be a pre-existing legal
17 relationship between them or "some duty on the part of the primary tortfeasor to protect
18 the secondary tortfeasor." Pack, 277 P.3d at 1249. To allow recovery absent a "special
19 relationship" is a cause of action for contribution, and would render a cause of action for
20 implied indemnity superfluous. Ringsby Truck Lines, Inc. v. Bradfield, 193 Colo. 151,
21 155, 563 P.2d 939 (1977).

22 MDB has failed to demonstrate any special relationship with VERSA. See, MDB's
23 Cross-Claim (August 15, 2016). MDB has failed to demonstrate that VERSA has any pre-
24 existing legal relationship or duty to protect MDB for MDB's failure to hire, train, supervise
25 and evaluate its drivers or its failure to equip, maintain, drive and operate its vehicles. Id.
26 MDB has failed to demonstrate that VERSA had any pre-existing legal relationship or
27 duty over the exclusive right to control MDB's driver and it's truck. Id. Finally, MDB has
28 failed to demonstrate that VERSA had any pre-existing legal relationship or duty to

1 protect MDB for its failure to comply with all the laws and Nevada statutes. Id.

2 Since, MDB failed to allege (and cannot allege) it had a pre-existing legal
3 relationship with VERSA, i.e., employer-employee; principal-agent, etc., MDB has no right
4 to indemnity as a matter of law.

5 Due to the allegations in Plaintiff's Complaint that MDB was actively negligent and
6 the lack of pre-existing relationship between MDB and VERSA, MDB is prohibited from
7 seeking indemnity from VERSA as a matter of law. Thus, VERSA respectfully asks that
8 the Court dismiss the cause of action against VERSA for implied indemnity.

9 **B. The Court Should Dismiss the Implied Indemnity Cause of Action with**
10 **Prejudice Because Allowing MDB to Amend Would be Futile**

11 VERSA asks that the Court dismiss the cause of action for implied indemnity with
12 prejudice. A District Court may dismiss a Complaint with prejudice if it suffers a fatal flaw
13 that cannot be saved by any amendment. See, Bemis v. Bemis, 114 Nev. 1021, 1024
14 (1998) (a claim may be dismissed if "the plaintiff is not entitled to relief under any set of
15 facts which could be proved in support of the claim") (quotations, citations omitted). A
16 Court's decision to dismiss a claim without leave to amend will not be overturned absent
17 abuse of discretion. See, Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 23, 62 P.3d 720,
18 734-35 (2003); Nelson v. Sierra Constr. Corp., 77 Nev. 334, 364 P.2d 402 (1961). Where
19 there are no set of facts which could be proved in support of the claim, dismissal with
20 prejudice should be granted. See, Fischer v. Executive Fund Life Ins. Co., 88 Nev. 704,
21 504 P.2d 700 (1972).

22 MDB cannot allege any set of facts justifying amendment of its implied indemnity
23 cause of action in the Cross-Claim, because under the present facts MDB has no ability
24 to amend the operative complaint to remove Plaintiff's negligence/allegations.

25 Additionally, there exists no special relationship or pre-existing legal duty between MDB
26 and VERSA. Therefore, any amendment to the Cross-Claim would be futile.

27 Accordingly, VERSA respectfully requests that the Court dismiss the implied indemnity
28 cause of action against it, with prejudice.

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CONCLUSION

Based upon the foregoing, VERSA respectfully requests an Order from this Court, dismissing MDB's implied indemnity claim against it, with prejudice.

AFFIRMATION

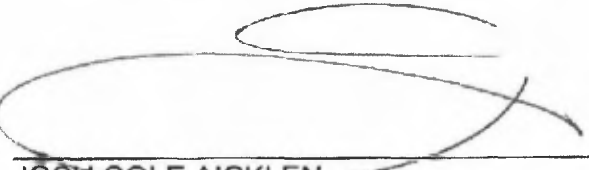
Pursuant to NRS 239B.030, the undersigned hereby affirms that this document filed in this court does not contain the social security number of any person.

DATED this 7th day of September, 2016

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By



JOSH COLE AICKLEN

Nevada Bar No. 007254

DAVID B. AVAKIAN

Nevada Bar No. 009502

PAIGE S. SHREVE

Nevada Bar No. 013773

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

Attorneys for Defendant/Cross-

Defendant/Cross-Claimant

VERSA PRODUCTS COMPANY, INC.

LIST OF EXHIBITS

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Exhibit 1 Plaintiff's Complaint
Exhibit 2 MDB's Cross-Claim

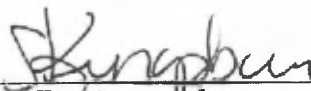
CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of Sept, 2016, a true and correct copy of CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO DISMISS CROSS-CLAIMANT MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP12(B)(5) was served by U.S. Mail addressed as follows:

James F. Sloan, Esq.
JAMES F. SLOAN, LTD.
977 W. Williams Ave.
Fallon, NV 89406
Attorney for Plaintiff
JAMES BIBLE

Katherine F. Parks, Esq.
Brian M. Brown, Esq.
Thierry V. Barkley, Esq.
THORNDAL, ARMSTRONG, DELK
BALKENBUSH & EISINGER
6590 S. McCarran, Ste. B
Reno, NV 89509
P: 775-786-2882
Attorneys for Defendant/Cross-Defendant
MDB TRUCKING, LLC

Matthew C. Addison, Esq.
McDONALD CARANO WILSON LLP
100 W. Liberty St., 10th Floor
Reno, NV 89501
Attorney for Defendant
RMC LAMAR HOLDINGS, INC.


An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP



CV16-01914 DC-09900080700-009
JAMES BIBLE VS MCB TRUCKING, 8 Pages
District Court 09/21/2016 08:37 AM
Washoe County 2315
CY1 DMSFJF11

EXHIBIT 1

4845-3057-6394.1

AA000164

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CASE NO. 16-10DC- 0824

DEPT. NO. I

FILED
2016 JUL -7 PM 2:31
CLERK OF DISTRICT COURT
JUDICIAL DISTRICT NO. 10
FALLON, NEVADA

IN THE TENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CHURCHILL

JAMES BIBLE,

Plaintiff,

vs.

COMPLAINT

MDB TRUCKING, LLC, a Nevada
Limited Liability Company; RMS
LAMAR HOLDINGS, INC., a
Colorado Corporation; VERSA
PRODUCTS COMPANY, INC., a
New Jersey Corporation; DANIEL
ANTHONY KOSKI; ABC
Corporations; Black and White
Companies; XYZ Partnerships; and
DOES I through X, inclusive,

Defendants.

Plaintiff, JAMES BIBLE, by and through his Attorney, JAMES F. SLOAN, ESQ., hereby
alleges as follows:

GENERAL ALLEGATIONS

1. At all times mentioned herein, Plaintiff, JAMES BIBLE, was a resident of Fernley,
Lyon County, Nevada.

2. Defendant, MDB TRUCKING, LLC., was, at all times mentioned herein, a
domestic limited liability company doing business in the State of Nevada.

3. Defendant, RMS LAMAR HOLDINGS, INC., was, at all times mentioned herein,
a Colorado Corporation. Said Defendant was engaged in the business of designing and

1 manufacturing trailers utilized to haul rock, dirt or gravel material. Said trailers were utilized in
2 commerce in the State of Nevada. Said Defendant, under such circumstances, was doing business
3 in the State of Nevada.

4 4. Defendant, VERSA PRODUCTS COMPANY, INC., was, at all times mentioned
5 herein, a New Jersey Corporation. Said Defendant was engaged in the business of designing and
6 manufacturing air valves for the bottom gates of dump trailers. Said valves were utilized in
7 commerce in the State of Nevada. Said Defendant, under such circumstances, was doing business
8 in the State of Nevada.

9 5. Defendant, DANIEL ANTHONY KOSKI, was, at all times mentioned herein, an
10 employee or agent of Defendant, MDB TRUCKING, LLC. Said Defendant was acting in the
11 course of employment and agency of Defendant, MDB TRUCKING, LLC.

12 6. ABC Corporations, Black and White Companies, XYZ Partnerships, and DOES
13 I through X, are fictitious names of Defendants whose true identities are unknown at the time of
14 filing of this Complaint. Said Defendants may have joint and several liability for damages
15 sustained by Plaintiff. Plaintiff, upon learning the true names and identities of said Defendants,
16 will move to amend this Complaint to include the true names and identities of said Defendants.

17 7. Defendants, at all times mentioned herein, either jointly or severally, were
18 principals, agents, employees, or a person of another identity acting within the scope and
19 authority of said capacity. Said Defendants were either jointly or severally responsible for the
20 event and damages herein after alleged.

21 **FIRST CAUSE OF ACTION - NEGLIGENCE**

22 8. Plaintiff re-alleges paragraphs 1 through 7 of this Complaint as if set forth herein
23 in verbatim.

24 9. On or about July 7, 2014, Plaintiff, JAMES BIBLE, was driving his 2004 Chevrolet
25 Vehicle westbound on I80 in Washoe County, Nevada, near Mile Marker 39.

26 10. On or about July 7, 2014, Defendant, DANIEL ANTHONY KOSKI, was operating

1 a truck transporting a load of gravel in a Ranco semi-trailer manufactured by Defendant, RMC
2 LAMAR HOLDINGS, INC., and registered to Defendant, MDB TRUCKING, LLC., with
3 knowledge, permission, and consent and while in the course and scope of his employment with
4 MDB TRUCKING, LLC., westbound on I80 in Washoe County, Nevada, near Mile Marker 39.

5 11. On or about July 7, 2014, the load of gravel that was being transported by
6 Defendant, DANIEL ANTHONY KOSKI, in the Ranco semi-trailer, spilled onto the westbound
7 lanes of travel of I80.

8 12. Plaintiff, JAMES BIBLE, was traveling behind the truck and semi-trailer operated
9 by Defendant, DANIEL ANTHONY KOSKI, at a speed within the speed limit when the gravel
10 spilled from the Ranco semi-trailer, resulting in a multiple vehicle accident.

11 13. Plaintiff, JAMES BIBLE, came upon the scene of the accident and proceeded to
12 bring his vehicle to a stop.

13 14. On or about July 7, 2016, another vehicle that was also traveling westbound on I80
14 approached the accident. The driver was unable to bring their vehicle to a stop and consequently
15 collided into the rear of Plaintiff's vehicle.

16 15. Defendant, MDB TRUCKING, LLC., had a duty to hire, train, supervise, and
17 evaluate their drivers and to properly equip, maintain, drive and operate their vehicles in a
18 careful, safe and prudent manner so as to avoid harm to others, including Plaintiff, JAMES
19 BIBLE.

20 16. Defendant, DMB TRUCKING, LLC., breached their duty of care by failing to hire,
21 train, supervise and evaluate their drivers and properly equip, maintain, drive and operate their
22 vehicles, among other acts of negligence, in a careful, safe and prudent manner.

23 17. Any breach of duty and negligence on the part of Defendant, DANIEL ANTHONY
24 KOSKI, in operating the Ranco semi-trailer as described in this Complaint is imputed to
25 Defendant, MDB TRUCKING, LLC.

26 18. Plaintiff, JAMES BIBLE, as a direct and proximate result of the acts of Defendants,

James F. Sloan, Esq. • Attorney at Law
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1 MDB TRUCKING, LLC., and DANIEL ANTHONY KOSKI, sustained personal injuries,
2 resulting in pain and suffering, temporary and permanent disability, all to his general damages
3 in a sum in excess of TEN THOUSAND DOLLARS (\$10,000.00).

4 19. Plaintiff, JAMES BIBLE, as a direct and proximate result of the acts of Defendants,
5 MDB TRUCKING, LLC., and DANIEL ANTHONY KOSKI, has incurred hospital, doctor,
6 ambulance and medical bills, and will incur further medical bills in the future, in an amount
7 presently unknown. Plaintiff prays leave to amend this Complaint to include such sums when the
8 same become known.

9 20. Plaintiff, JAMES BIBLE, as a direct and proximate cause of the acts of Defendants,
10 MDB TRUCKING, LLC., and DANIEL ANTHONY KOSKI, sustained property damage and
11 loss of use of his vehicle in the approximate amount of FIVE THOUSAND DOLLARS
12 (\$5,000.00). Plaintiff will move to amend this Complaint when the exact amount is known.

13 **SECOND CAUSE OF ACTION - Negligence Per Se**

14 21. Plaintiff re-alleges paragraphs 1 through 20 of this Complaint as if set forth herein
15 in verbatim.

16 22. At the time and place of the injuries and damages complained of herein by Plaintiff,
17 the law of the State of Nevada provided under N.R.S. 484D.850 as follows: "No vehicle shall be
18 driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any
19 of its load from dropping, sifting, leaking or otherwise escaping therefrom...[and that] no person
20 shall operate on any highway any vehicle with any load unless the load and any covering thereon
21 is securely fastened so as to prevent the covering or load from becoming loose, detached or in any
22 manner a hazard to other users of the highway."

23 23. Plaintiff alleges upon information and belief that at the time and place of the
24 injuries and damages complained of herein, Defendant, MDB TRUCKING, LLC., and
25 Defendant, DANIEL ANTHONY KOSKI, did not comply with the aforesaid laws and were in
26 violation of those laws.

24. During all times relevant to this Complaint, Plaintiff, JAMES BIBLE, was a member of the class of persons which the aforesaid statutes, laws and ordinances were designed to protect against the risk of harm which was, in fact, incurred by Plaintiff as a result of Defendants' violations of law and negligence.

THIRD CAUSE OF ACTION - Strict Products Liability as to

RMC LAMAR HOLDINGS, INC.

25. Plaintiff re-alleges paragraphs 1 through 24 of this Complaint as if set forth herein in verbatim.

26. Defendant, RMC LAMAR HOLDINGS, INC., was engaged in the business of designing, manufacturing, and distributing into the stream of commerce a Ranco semi-trailer (VIN 1R9BP45082L008431).

27. Defendant, RMC LAMAR HOLDINGS, INC., designed, manufactured and sold said Ranco semi-trailer (VIN 1R9BP45082L008431).

28. Defendant, RMC LAMAR HOLDINGS, INC., at all times mentioned herein, knew and intended the Ranco semi-trailer (VIN 1R9BP45082L008431) to be used in the transportation of gravel material on public roads and highways.

29. As a direct result of the Defendant, RMC LAMAR HOLDINGS, INC.'s, conduct in designing, manufacturing, distributing and placing into the stream of commerce the Ranco trailer identified above, Plaintiff, JAMES BIBLE, suffered personal injuries all to his general damages in the sum in excess of TEN THOUSAND DOLLARS (\$10,000.00).

30. As a further direct and proximate result of the acts of Defendant, RMC LAMAR HOLDINGS, INC., as aforesaid, Plaintiff, JAMES BIBLE, has incurred hospital, ambulance, doctor and medical bills, and will incur further medical bills in the future, in an amount presently unknown. Plaintiff prays leave to amend this Complaint to include such sums when the same become known.

31. As a direct and proximate result of the acts of Defendant, RMC LAMAR

1 HOLDINGS, INC., Plaintiff, JAMES BIBLE, suffered property damage and loss of the use of
2 his vehicle in the approximate amount of FIVE THOUSAND DOLLARS (\$5,000.00). Plaintiff
3 will move to amend this Complaint when the exact amount is known.

4 FOURTH CAUSE OF ACTION - Strict Products Liability as to

5 VERSA PRODUCTS COMPANY, INC.

6 32. Plaintiff re-alleges paragraphs 1 through 31 of this Complaint as if set forth herein
7 in verbatim.

8 33. Defendant, VERSA PRODUCTS COMPANY, INC., was engaged in the business
9 of designing, manufacturing, marketing, distributing, installing, or otherwise placing into the
10 stream of commerce a solenoid control as a component to the Ranco semi-trailer as identified
11 above.

12 34. As part of their respective businesses, Defendant, VERSA PRODUCTS
13 COMPANY, INC., designed, manufactured, distributed and sold said solenoid control.

14 35. Defendant, VERSA PRODUCTS COMPANY, INC., at all times mentioned herein,
15 knew and intended the solenoid control to be used by the general public as a component to the
16 Ranco semi-trailer.

17 36. As a direct result of the conduct of Defendant, VERSA PRODUCTS COMPANY,
18 INC., in designing, manufacturing, distributing, and placing into the stream of commerce
19 solenoid control as identified above, Plaintiff, JAMES BIBLE, suffered personal injuries all to
20 his general damages in the sum in excess of TEN THOUSAND DOLLARS (\$10,000.00).

21 37. As a further direct and proximate result of the acts of Defendant, VERSA
22 PRODUCTS COMPANY, INC., as aforesaid, Plaintiff, JAMES BIBLE, has incurred hospital,
23 ambulance, doctor and medical bills, and will incur further medical bills in the future, in an
24 amount presently unknown. Plaintiff prays leave to amend this Complaint to include such sums
25 when the same become known.

26 38. As a direct and proximate result of the acts of Defendant, VERSA PRODUCTS

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1 COMPANY, INC., Plaintiff, JAMES BIBLE, suffered property damage and loss of the use of
2 his vehicle in the approximate amount of FIVE THOUSAND DOLLARS (\$5,000.00). Plaintiff
3 will move to amend this Complaint when the exact amount is known.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff, JAMES BIBLE, pray judgment against the Defendants, jointly
6 and severally, as follows:

7 1. For leave to amend the Complaint upon discovery of the true names and identities
8 of fictitious Defendants named in paragraph 6, above;

9 2. Special damages for medical and incidental expenses in an amount to be proved
10 at trial;

11 3. General damages to Plaintiff for pain and suffering and temporary and permanent
12 disability in a sum in excess of TEN THOUSAND DOLLARS (\$10,000.00);

13 4. Property damage and loss of use of vehicle in the approximate amount of FIVE
14 THOUSAND DOLLARS (\$5,000.00) or in an amount proved at trial;

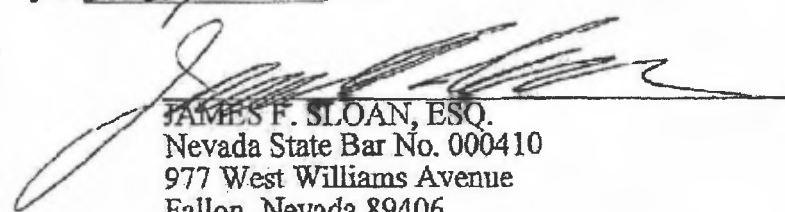
15 5. Reasonable attorney fees and costs, as provided by Chapter 18 of NRS; and

16 6. For such other and further relief, at law or in equity, as this Court may deem
17 equitable and just.

18 **AFFIRMATION PURSUANT TO N.R.S. 239B.030**

19 The undersigned does hereby affirm the preceding document does not contain the social
20 security number of any person.

21 DATED this 7th day of July, 2016.

22
23 
24 JAMES F. SLOAN, ESQ.
25 Nevada State Bar No. 000410
26 977 West Williams Avenue
Fallon, Nevada 89406
Tel. No. (775)423-3006

Attorney for Plaintiff

CV16-01914 DC-09920080700-010
JAMES BIBLE VS MCB TRUCKING, 8 Pages
District Court 09/21/2016 08:37 AM
Washoe County 2315
FVS DMSPNFI1

EXHIBIT 2

4845-3057-6394.1

AA000172

1 CASE NO. 16-10DC-0824

2 DEPT. NO. I

3 [The undersigned hereby affirms this document
4 does not contain a social security number]

5
6 IN THE TENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF CHURCHILL

8 JAMES BIBLE,

9 Plaintiff,

10 vs.

11 MDB TRUCKING, LLC; a Nevada Limited
12 Liability Company; RMS [sic] LAMAR
13 HOLDINGS, INC.; a Colorado Corporation;
14 VERSA PRODUCTS COMPANY, INC.; a
15 New Jersey Corporation; DANIEL
16 ANTHONY KOSKI, et. al.,

17 Defendants.

18
19 MDB TRUCKING, LLC, a Nevada limited
20 liability company,

21 Cross-Claimant,

22 vs.

23 RMC LAMAR HOLDINGS, INC., a
24 Colorado corporation; VERSA PRODUCTS
25 INC., a New Jersey Corporation; and DOES
26 1-10, and BLACK AND WHITE
27 COMPANIES 1-10,

28 Cross-Defendants.

MDB TRUCKING, LLC'S CROSS-
CLAIM AGAINST RMC
LAMAR HOLDINGS, INC. (fka RANCH
MANUFACTURING COMPANY)
AND VERSA PRODUCTS COMPANY,
INC.

29 Defendant and Cross-Claimant, MDB Trucking, LLC, by and through its counsel of
30 record Thorndal Armstrong Delk Balkenbush & Eisinger hereby brings its cross-claim against
31 Cross-Defendants RMC Lamar Holdings, Inc. (fka Ranch Manufacturing Company) and Versa
32 Products Company, Inc.

33 ///

THORNDAL, ARMSTRONG
DELK, BALKENBUSH
& EISINGER
c/o J. S. McCann, Suite B
Reno, Nevada 89509
(775) 784-2582

AA000173

1 **FIRST CLAIM FOR RELIEF**

2 **(General Allegations)**

3 1. That Defendant/Cross-Claimant MDB Trucking, LLC was at all relevant times a
4 Nevada limited liability company authorized to conduct business within the state of Nevada.

5 2. That Cross-Defendants DOES 1-10 and BLACK AND WHITE COMPANIES 1-
6 10 are sued herein under fictitious names and capacities of said Defendants are not known by
7 Cross-Claimant, who ask leave of this court to amend this Cross-Claim to set forth same as they
8 become known or ascertained.

9 3. Cross-Defendant RMC Lamar Holdings, Inc. (fka Ranch Manufacturing
10 Company) was at all relevant times hereto a Colorado corporation engaged in the business of
11 designing and manufacturing trailers and semi-trailers and placed same into the stream of
12 commerce and was doing business in the State of Nevada.

13 4. Cross-Defendant Versa Products Company, Inc. was at all relevant times hereto a
14 New Jersey Corporation engaged in the business of designing and manufacturing pneumatic air
15 solenoid valves specifically for bottom dump trailers and gate activated controls and placed into
16 the stream of commerce and was doing business in the State of Nevada.

17 5. A Complaint was filed on July 7, 2016 in the Tenth Judicial District Court, Case
18 No. 16-10DC-0824, Department I in which the Plaintiff James Bible prayed for damages against
19 Defendant MDB Trucking, LLC alleging negligence with regard to an accident which occurred
20 on July 7, 2014 where a Ranco trailer owned by MDB Trucking, LLC spilled a load of gravel
21 causing an accident and injury which are claims presented by Plaintiffs.

22 6. That upon information and belief, the Ranco trailer was activated inadvertently
23 causing the gates of the semi-trailer to release the subject load of gravel on the highway and was
24 defective in part or in whole as designed by Defendant RMC Lamar Holdings, Inc. (fka Ranch
25 Manufacturing Company) (also known by the trade name and trademark Ranco).

26 7. Cross-Defendant RMC Lamar Holdings, Inc. manufactured the subject Ranco
27 trailer in 2002 under the vehicle brand Ranco with vehicle identification number
28 1R9BP45082L008431 Idaho Plate #TE3528.

THORNDAL ARMITTRONG
DELEK HALL/KEEN BUSBY
& EMMINGER
ATTORNEYS AT LAW
100 S. McCarran, Suite B
Reno, Nevada 89501
(775) 786-2222

1 8. Cross-Claimant MDB Trucking, LLC was the last purchaser and end user of the
2 subject Ranco trailer in 2012.

3 9. On or about 2002, the Ranco trailer that left Cross-Defendant's control as
4 designed, assembled and manufactured by the Cross-Defendant was unreasonably dangerous and
5 defective in one or more of the following respects:

6 a. The semi-trailer was designed, assembled, and manufactured and/or
7 configured in such a manner that the Versa solenoid valve would activate inadvertently allowing
8 the gates to open and release the load carried by the trailer; and,

9 b. That the Ranco trailer was designed, assembled, manufactured, and/or
10 configured in such a manner that the Versa Valve was not equipped with a safety lock to prevent
11 inadvertent activation allowing the gates to open.

12 c. That Versa Valve manufactured an alternate safer design available in 2002
13 including a manual lock system which was available to Ranco.

14 10. On or about July 7, 2014, that Versa Valve solenoid control as a component to the
15 Ranco trailer was unreasonably dangerous and defective in one or more of the following respects:

16 a. The Versa Valve solenoid valve would activate inadvertently allowing the
17 gates to open and release the load carried by the trailer; and,

18 b. Versa Products Company, Inc. had a safer design available in the stream of
19 commerce on or before 2002 which employed a manual lock safety design that should have been
20 provided to its end use customers in lieu of the Versa Valve installed both at the time of the
21 manufacturer in 2002 and directly sold to MDB as a standard maintenance replacement in 2013.

22 11. That to the extent Plaintiff was injured as a proximate result of the unreasonably
23 dangerous conditions and defects at the time of manufacturing or negligent design, such is a direct
24 and proximate result of the negligence of the Cross-Defendants; and, any negligence that exists as
25 alleged by Plaintiff is expressly denied. Cross-Defendants were actively negligent and Cross-
26 Claimant was passively negligent but also an innocent defendant with no culpable fault at all.

27 TIGI ANDAL ARMSTRONG
JULIE BALCONRUSH
& DAVIDSON
6791 S. McCARR, SUITE B
DENVER, COLORADO 80237
(303) 746-2882

27 ///
28 ///

1 12. That Cross-Defendants breached a duty of care owed to the Cross-Claimant and
2 Cross-Defendants are required to indemnify and hold Cross-Claimant harmless with respect to all
3 the allegations and liabilities set forth in the Complaint filed in this matter.

4 13. Cross-Claimant has placed Cross-Defendant RMC Lamar Holdings, Inc. on notice
5 of the claims pending in this matter prior to initiation of litigation.

6 14. That Cross-Claimant has been required to expend costs and attorneys' fees in
7 defending the negligence claims in the Complaint on file herein and for prosecuting the instant
8 Cross-Complaint.

9 **FIRST CLAIM FOR RELIEF**

10 (Implied Indemnification as to RMC LAMAR)

11 15. Cross-Claimant repeats and realleges each and every allegation contained in
12 paragraphs 1-14 above as if more fully set forth herein.

13 16. Cross-Claimant is therefore entitled to complete indemnity against RMC Lamar
14 Holdings, Inc. with respect to all allegations or liabilities set forth in the Complaint on file in this
15 matter.

16 17. That Cross-Claimant is therefore entitled to total costs and fees expended in the
17 defense of the claims of negligence in this matter as well as prosecution of this Cross-Complaint.

18 **SECOND CLAIM FOR RELIEF**

19 (Contribution as to RMC LAMAR)

20 18. Cross-Claimant repeats and realleges each and every allegation contained in
21 paragraphs 1-17 above as if more fully set forth herein.

22 19. Cross-Claimant is entitled to contribution from Cross-Defendant RMC Lamar with
23 respect to any settlement, judgment, awards, or any other type of resolution of the claims brought
24 forward by the Plaintiffs in their First Amended Complaint on file herein.

25 20. Cross-Claimant is therefore entitled to all costs and fees expended in the defense of
26 claims of negligence in this matter as well as prosecution of the Cross-Complaint.

27 THOMAS ARMSTRONG
DELR BALKEBUSH
& ELLIS-OGA
4320 S. McCarran, Suite B
Reno, Nevada 89509
(775) 784-1942

27 ///

28 ///

1 **THIRD CLAIM FOR RELIEF**

2 **(Implied Indemnification as to VERSA)**

3 21. Cross-Claimant repeats and realleges each and every allegation contained in
4 paragraphs 1- 20 above as if more fully set forth herein.

5 22. Cross-Claimant is entitled to complete indemnity against Versa Products
6 Company, Inc. with respect to all allegations or liabilities set forth in the First Amended
7 Complaint.

8 23. That Cross-Claimant is therefore entitled to all costs and fees expended in the
9 defense of claims of negligence in this matter as well as prosecution of the Cross-Complaint.

10 **FOURTH CLAIM FOR RELIEF**

11 **(Contribution as to VERSA)**

12 24. Cross-Claimant repeats and realleges each and every allegation contained in
13 paragraphs 1-23 above as if more fully set forth herein.

14 25. Cross-Claimant is entitled to contribution from Cross-Defendant Versa Products,
15 Company, Inc. with respect to any settlement, judgment, awards, or any other type of resolution of
16 the claims brought forward by the Plaintiffs in their First Amended Complaint on file herein.

17 26. Cross-Claimant is entitled to all costs and fees expended in the defense of the
18 claims for negligence in this matter as well as prosecution of the Cross-Complaint.

19 **WHEREFORE, Cross-Claimant demands judgment against Cross-Defendants as follows:**

- 20 1. For implied indemnification with respect to all negligence claims brought against
21 Cross-Claimant in this matter;
22 2. For contribution with respect to all negligence claims brought against Cross-
23 Claimant in this matter;
24 3. For attorneys' fees and costs expended in this matter; and

25 ///

26 ///

27 ///

28 ///

THOMAS ARMSTRONG
DELOACH, BALKENBUSH
& EISINGER
1301 S. McCain, Suite B
Boca Raton, Florida 33431
(772) 384-2182

1 4. For such other and further relief as this Court deems just and proper in the
2 premises.

3 DATED this 26th day of August, 2016.

4 THORNDAL ARMSTRONG
5 DELK BALKENBUSH & EISINGER

6 By: 

7 Katherine F. Parks, Esq., State Bar No. 6227
8 Brian M. Brown, Esq., State Bar No. 5233
9 Thierry V. Barkley, Esq., State Bar No. 724
10 6590 S. McCarran Blvd., Suite B
11 Reno, Nevada 89509
12 Attorneys for Defendant/Cross-Claimant
13 MDB TRUCKING, LLC
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THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER
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(775) 286-2883

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk
3 Balkenbush & Eisinger, and that on this date I caused the foregoing MDB TRUCKING, LLC'S
4 CROSS-CLAIM AGAINST RMC LAMAR HOLDINGS, INC. (fka RANCH
5 MANUFACTURING COMPANY) AND VERSA PRODUCTS COMPANY, INC. to be
6 served on all parties to this action by:

7 ☒ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the
8 United States mail at Reno, Nevada.

9 ☐ hand delivery

10 ☐ electronic means (fax, electronic mail, etc.)

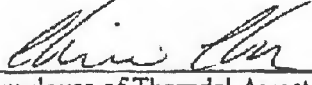
11 ☐ Federal Express/UPS or other overnight delivery fully addressed as follows:

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13 James F. Sloan, Esq.
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Fallon, Nevada 89506
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19 Defendant RMC Lamar Holdings

20 Josh Cole Aicklen
21 David B. Avakian
Lewis Brisbois Bisgaard & Smith, LLP
22 6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118
23 Defendant Versa Products Co., Inc.

24 DATED this 15 day of August, 2016.

25
26 
An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

27 THORNDAL ARMSTRONG
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9 Attorneys for Defendant/Cross-Claimant
10 MDB TRUCKING, LLC

11
12 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
13
14 IN AND FOR THE COUNTY OF WASHOE
15

16 JAMES BIBLE,

Case No. CV 16-01914

17 Plaintiff,

Dept. No.: 1

18 vs.

19 MDB TRUCKING, LLC; a Nevada Limited
20 Liability Company; RMS[sic] LAMAR
21 HOLDINGS, INC.; a Colorado Corporation;
22 VERSA PRODUCTS COMPANY, INC.; a
23 New Jersey Corporation; DANIEL
24 ANTHONY KOSKI, et al.,

25 Defendants.

26 AND RELATED CROSS-CLAIMS AND
27 THIRD PARTY COMPLAINTS.
28

29
30 **OPPOSITION TO CROSS-DEFENDANT'S [VERSA PRODUCTS**
31 **COMPANY, INC.] MOTIONS TO DISMISS**

32 COMES NOW, Defendant/Cross-Claimant, MDB Trucking, LLC, by and through their
33 undersigned counsel of record and hereby submits this Opposition to Cross-Defendant's Motion
34 to Dismiss Third Claim for Relief on Implied Indemnification.

35 This opposition is based upon the pleadings and papers on file herein, the memorandum
36 of points and authorities, together with such other further evidence or testimony as may be proper
37 in the premises.
38

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 To the present motion, Versa Products, Inc. seeks a dismissal of MDB Trucking's Cross-
5 Claim for implied indemnification. Versa Product's argument is flawed from inception because it
6 improperly relies upon the heightened burden for surviving a motion to dismiss stated by the
7 United States Supreme Court in *Bell Atlantic Corp. v. Trombly*, 127 S.Ct. 1955, 1965 (2007);
8 and *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951 (2009). The Nevada Supreme Court has yet to
9 expressly adopt these particular precedents. Nevada continues to use the liberal standard that has
10 long been the law of Nevada which remains in effect.

11 Furthermore, Versa Products' arguments fail on two premises. First, that the Court must
12 rely upon Plaintiffs' allegations that MDB was actively negligent and/or that MDB has failed to
13 plead a pre-existing legal relationship between MDB and Versa Products. These arguments are
14 flawed procedurally and substantively.

15 **II.**

16 **A. STANDARD FOR MOTION TO DISMISS.**

17 The purpose of a motion to dismiss pursuant to NRCP 12(b)(5) is to test the formal
18 sufficiency of a claim for relief. See *Simpson v. Mars, Inc.*, 113 Nev. 188, 929 P.2d 966 (1997).
19 All allegations of material fact in the complaint are taken as true and construed in the light most
20 favorable to the non-moving party. *Hynds Plumbing & Heating Co. v. Clark County School Dist.*,
21 94 Nev. 776, 777, 587 P.2d 1331, 1332 (1978). Although Nevada is a notice pleading
22 jurisdiction, a party must be given reasonable advance notice of an issue to be raised and an
23 opportunity to respond. *Anastassatos v. Anaastassatos*, 112 Nev. 317, 320, 913 P.2d 652, 653
24 (1996). Notice pleading requires plaintiffs to set forth the facts to support a legal theory but does
25 not require the legal theory relied upon to be correctly identified. *Liston v. Las Vegas*
26 *Metropolitan Police Dist.*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).

27 In *Torres v. Nev. Direct Ins. Co.*, 131 Nev.Adv.Rptr. 54, 353 P.3d 1203 (2015), the
28 Nevada Supreme Court stated:

1 "A decision to dismiss a complaint under NRCP 12(b)(5) is
2 rigorously reviewed on appeal with all the alleged facts in the
3 complaint presumed true and all inferences drawn in favor of the
4 complainant. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev.
5 224, 227-28, 181 P.2d 670, 672 (2008)."

6 Dismissing a complaint is appropriate:

7 "Only if it appears beyond a doubt that [the plaintiff] could prove
8 no set of facts, which, if true, would entitle [the plaintiff] to relief."
9 *Id.* at 228, 181 P.3d at 672.

10 In reviewing claims for indemnification, the accepted view of indemnification for
11 negligence is that the Court should look to the actual facts rather than just the conclusory
12 allegations made by a third-party (the Plaintiff) in determining whether the indemnitee was
13 negligent; and, therefore barred from receiving indemnification.

14 See, e.g., *INA Ins. Co. of N. Amer. v. Valley Forge Ins. Co.*, 150 Ariz. 248, 722 P.2d 978,
15 980-81 (Ariz. Ct. of App. 1986); *Pike Creek Chiropractic Center, P.A. v. Robinson*, 637 A.2d
16 418, 421 (Del. 1994); *Ins. Co. of N. Amer. v. King*, 340 So. 2d 1175, 1176 (Fla. Dist. Ct. of App.
17 1976); *Piedmont Equip. Co. v. Eberhard Mfg., Co.*, 99 Nev. 253, 665 P.2d 256, 259-60 (Nev.
18 1983); *Pullman Standard, Inc. Abex Corp.*, 693 S.W. 2d 336 (Tenn. 1985) (analyzing this under
19 our motion to dismiss standard); *Reliance Ins. Co. of Illinois v. Richfield Hospitality Servs.*, 92
20 F.Supp.2d 1329, 1337 (S.Dist. Ga. 2000).

21 MDB submits the claims stated by its Cross-Claim survives Plaintiffs' motions to dismiss
22 under Nevada law.

23 **B. THERE IS A SUFFICIENT PRE-EXISTING RELATIONSHIP BETWEEN MDB AND**
24 **VERSA PRODUCTS.**

25 Non-contractual or implied indemnity is an equitable remedy that allows a Defendant to
26 seek recovery from other potential tortfeasors whose negligence primarily caused the injured
27 party's harm. *Doctors Company v. Vincent*, 120 Nev. 644, 650, 98 P.3d 681, 686 (2004). "At the
28 heart of the doctrine is the premise that the person seeking to assert implied indemnity-the
indemnitee-has been required to pay damages caused by a third-party-the indemnitor." *Harvest
Capital v. WV DOE*, 560 S.E.2d 509, 513 (W. Virginia 2002).

1 Implied indemnification is an equitable remedy developed by courts to address the
2 unfairness which results when one defendant party, who has committed no independent wrong, is
3 held liable for the loss of a plaintiff caused by another party. *Id.* at 512.

4 Generally, the remedies available are only after a defendant has extinguished its own
5 liability through settlement or by paying a judgment. *Doctors Company*, 120 Nev. at 651, 98 P.2d
6 at 686. This court has stated that a "cause of action for indemnity...accrues when payment has
7 been made." *Aetna Cas. & Sur. v. Aztec Plumbing*, 106 Nev. 474, 476, 796 P.2d 227, 229 (1990).
8 Thus, a claimant seeking equitable indemnity must plead and prove that (1) it has discharged a
9 legal obligation owed to a third party; (2) the party from whom it seeks liability also was liable to
10 the third party; and (3) as between the claimant and the parties from whom it seeks indemnity,
11 the obligations ought to be discharged by the latter. 41 Am.Jur.2d Indemnity, Sec. 20 (2005). The
12 latter has also required "some nexus or relationship between the indemnitee and indemnitor." *See*
13 *Piedmont Equipment Co. v. Eberhard Manuf.*, 99 Nev. 523, 526, 665 P.2d at 259 (1983).

14 In *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 216 P.3d 793 (2009), the Supreme
15 Court affirmed a denial of summary judgment since implied indemnification could not be
16 asserted without determining liability of the third party to the injured party and the showing of a
17 nexus or special relationship between the indemnitee and the proposed indemnitor. Therefore, the
18 Court concluded that the District Court's denial of *Primadonna's* motion for summary judgment
19 was proper as to those factual matters. *See also Terrell v. Cent. Wash. Asphalt, Inc.* 2016 U.S.
20 Dist. Lexis 30481 (D. Nev. 2016)(denying summary judgment since issues of fact remained
21 for the trier of fact on implied indemnification relying on *Cent. Tel. Co. v. Fixtures Mfg. Corp.*
22 103 Nev. 298 (1987)).

23 As to the question of a special relationship, MDB's Cross-Claim alleges in paragraph 8 of
24 its first claim for relief that:

25 "Cross-claimant MDB Trucking, LLC was the last purchaser and
26 end user of the subject Ranco trailer."

27 The Cross-Claim further alleges in par. 10:

28 "On or before July 7, 2014, that Versa Valve solenoid control as a
component to the Ranco trailer was unreasonably dangerous and

1 defective in one or more of the following respects:...”

2 “b. Versa Products Company, Inc. had a safer design available in
3 the stream of commerce on or before 2002 which employed a
4 manual lock safety design that should have been provided to its
5 end use customers in lieu of the Versa Valve installed both at the
6 time of the manufacturer in 2002 and directly sold to MDB as a
7 standard maintenance replacement in 2013.” (Emphasis added).

8 MDB Trucking, LLC purchased the Versa Valve component directly from Versa Products
9 as part of a standard maintenance replacement in 2013. Nevada does not require that the legal
10 theory be correctly stated as long as adequate facts place the defendant on notice. *See Abarra*
11 *v. State*, 131 Nev. Adv. Rep. 3, 342 P.2d 994, 996 (2015) citing *Liston*, *supra*. with approval.
12 The direct sale of a defective product by Versa Products to MDB in 2013 is more than adequate
13 to support a breach of the implied warranty of merchantability - namely the special relationship
14 necessary for implied indemnification. See, e.g., *Larsen v. Pacesetter Sys., Inc.*, 837 P.2d
15 1273, 1277 (Haw. 1992)(discussing the term “defectiveness” as to both product liability and
16 implied warranty).

17 In *Black & Decker v. Essex Group*, 105 Nev. 344, 775 P.2d 698 (1989) the court
18 recognized that a pre-existing legal relationship between the parties could include a breach of the
19 implied warranty of merchantability by and between the party that purchased a defective unit
20 from the manufacturer who was liable for strict products liability theory to the plaintiff. See,
21 *Ringsby Truck Lines, Inc. v. Bradfield* 563 P.2d 939, 943 (Colo. 1977); and *Jacobson v.*
22 *Dahlberg*, 464 P.2d 298 (Colo. 1970) (manufacturer of gun owner owed duty to purchaser who
23 sought indemnification).

24 Thus, as MDB as the end user and purchaser in 2013 of the claimed defective component
25 from Versa Products Company, Inc., has a nexus or special legal relationship sufficient to
26 support a claim for implied equitable indemnification.

27 **C. MDB IS ALSO ENTITLED TO CLAIM EQUITABLE INDEMNIFICATION SHIFTING
28 THE BURDEN OF LOSS TO THE MANUFACTURER OF THE DEFECTIVE COMPONENT.**

29 In *Hydro Air Equip. v. Hyatt Corp.*, 852 P.2d 403 (9th Cir. Nev. 1988), the Ninth Circuit
30 Court of Appeals recognized that the doctrine of equitable indemnification could look beyond the

1 special relationship. The Ninth Circuit stated:

2 "The principle of implied equitable indemnity is designed to
3 prohibit one from profiting by his own wrong at the expense of one
4 who is either free from fault or negligent to a lesser degree.
5 *Santisteven v. Dow Chemical Co.*, 506 F.2d 1216, 1219 (9th Cir.
6 1974 (construing Nevada law). In evaluating a claim for implied
7 indemnity, courts must carefully examine both parties' conduct on
8 a case-by-case basis, with the ultimate goal of doing what is fair or
just. *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 440 F.Supp. 394,
399 (D. Nev. 1977). While it is true that the obligation to
indemnify clearly arises in certain situations, for example, when a
master-servant relationship exists, implied equitable indemnity
may be entirely proper if it is simply fairer to shift the burden of
loss. *Santisteven*, 506 F.2d at 1219..."

9 This doctrine of equitable indemnification was further recognized in a decision by the
10 Supreme Court of Illinois in *Suvada v. White Motor Co.*, 210 N.E. 2d 182 (Ill. 1965). There,
11 plaintiffs had apparently purchased a used reconditioned tractor trailer unit from a defendant
12 seller. The brake system was manufactured by the defendant manufacturer and installed by the
13 seller. The system failed and a collision ensued. Thereafter, the plaintiffs settled various personal
14 injury and property claims and sought recovery from the defendants.

15 In *Ginnis v. Mapes*, 86 Nev. 408, 413, 470 P.2d 135 (1970), the Nevada Supreme Court
16 adopted the doctrine of strict liability. To that extent, the court relied heavily upon the discussion
17 by then Supreme Court of Illinois in *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1965). The
18 Plaintiffs had purchased a *used* reconditioned tractor trailer unit from a Defendant seller. The
19 brake system was manufactured by the Defendant manufacturer and installed by the seller. The
20 system failed and a collision ensued. Thereafter, the Plaintiffs settled various personal injury and
21 property claims and sought recovery from these Defendants under equitable indemnification.

22 As the Supreme Court in Illinois further discussed as it adopted the provisions of Section
23 402A of the American Law Institute's revised Restatement of the Law of Torts:

24 "The section provides: '(1) One who sells a product in a defective
25 condition unreasonably dangerous to the user or consumer or to his
26 property is subject to liability for physical harm thereby caused to
27 the ultimate user or consumer, or to his property, if (a) the seller is
28 engaged in the business of selling such a product, and (b) is
expected to reach the user or consumer in the condition in which it
is sold..."

1
2 In *Jones v. Aero-Chem. Corp.*, 680 F.Supp.338 (Dist. Mont. 1987), the Court
3 distinguished theories based on negligence and implied indemnification when it came to products
4 liability or strict liability. As discussed, the Court stated:

5 "The latter equitable principal of active/passive negligence allows
6 a joint tortfeasor whose negligence was a remote, passive and
7 secondary cause of injury but was nevertheless exposed to liability
8 by the acts of the joint tortfeasor to maintain an action for
9 indemnification against that joint tortfeasor whose negligence was
10 the primary active and proximate cause of the injury..." (citations
11 omitted).

12 "Liability in products cases on the other hand is a liability based on
13 the placing of into commerce a product, which, if defective, is
14 likely to cause injury under normal use. Because the liability in
15 products cases are imposed regardless of whether the defect
16 resulted from the negligence of the manufacturer, it focuses solely
17 on the condition of the product..."

18 "The foregoing distinction in mind, one must ask what utility the
19 principle of active/passive negligence would have in the areas for
20 strict products liability. Fault-weighting process which the principle
21 of active/passive negligence is designed to accomplish must be
22 considered irrelevant in determining the propriety of granting a
23 right of indemnification in the strict product liability context..."
(citations omitted).

24 "Because liability for a defective product is imposed regardless of
25 whether the defect resulted from the negligence of the
26 manufacturer, negligence is the determining liability. Application
27 of the principle of active/passive negligence to the strict products
28 liability context is not only impossible, but serves to frustrate the
policy of shifting the full loss caused by a defective product to the
manufacturer of that product. As stated in *Suvada v. White Motor*
Co.... 210 NE.2d 182 (1965), aptly stated in discussing the propriety
of applying the principle of active/passive negligence in an
indemnification action predicated on strict products liability:
'Indemnity here is not, however, premised on a theory of active and
passive negligence. (To require proof that [the indemnitor] was
actively negligent would be the antithesis of strict liability.)...210
NE. 2d at 189...' (emphasis added).

24 III. CONCLUSION

25 For all the foregoing reasons, MDB respectfully requests this Court deny the Cross-
26 Defendant's motions to dismiss as to the third claim for relief for implied equitable
27 indemnification.
28

1
2 DATED this 26th day of September, 2016.

3 THORNDAL ARMSTRONG
4 DELK BALKENBUSH & EISINGER

5
6 By: /s/ Thierry V. Barkley

7 Katherine F. Parks, Esq., State Bar No. 6227
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Attorneys for Defendant/Cross-Claimant
MDB TRUCKING, LLC

10 **AFFIRMATION**

11 **Pursuant to NRS 239B.030**

12 The undersigned hereby affirms that the preceding document filed in above-entitled court
13 does not contain the social security number of any person.

14 DATED this 26th day of September, 2016.

15 THORNDAL ARMSTRONG
16 DELK BALKENBUSH & EISINGER

17
18 By: /s/ Thierry V. Barkley

19 Katherine F. Parks, Esq., State Bar No. 6227
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Attorneys for Defendant/Cross-Claimant
MDB TRUCKING, LLC

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk
3 Balkenbush & Eisinger, and that on this date I caused the foregoing **OPPOSITION TO**
4 **CROSS-DEFENDANT'S [VERSA PRODUCTS COMPANY, INC.] MOTION TO**
5 **DISMISS** to be served on all parties to this action by:

6 _____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the
7 United States mail at Reno, Nevada.

8 ☒ Second Judicial District Court Eflex ECF (Electronic Case Filing)

9 _____ hand delivery

10 _____ electronic means (fax, electronic mail, etc.)

11 _____ Federal Express/UPS or other overnight delivery fully addressed as follows:

12 **James F. Sloan, Esq.**
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15 **Attorney for Plaintiff**

16 **Matthew C. Addison, Esq.**
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22 **Josh Cole Aicklen, Esq.**
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26 **Las Vegas, NV 89118**
27 **Defendant Versa Products Co., Inc.**

28 **Jacob D. Bundick, Esq.**
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The Modern Group

29 DATED this 26th day of September, 2016.

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29 /s/
An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

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9 Claimant/Cross-Defendant
VERSA PRODUCTS COMPANY, INC.

DISTRICT COURT
WASHOE COUNTY, NEVADA

12 JAMES BIBLE,
13
14 Plaintiff,

15 vs.

16 MDB TRUCKING, LLC, a Nevada Limited
Liability Company; RMC LAMAR
17 HOLDINGS, INC., a Colorado
Corporation; VERSA PRODUCTS
COMPANY, INC. a New Jersey
18 Corporation; DANIEL ANTHONY KOSKI;
ABC CORPORATIONS I-X; BLACK AND
19 WHITE COMPANIES; XYZ
PARTNERSHIPS; and DOES I-X,
20 inclusive,

21 Defendants.

22 VERSA PRODUCTS COMPANY, INC.,

23 Cross-Claimant,

24 vs.

25 MDB TRUCKING, LLC; DANIEL
ANTHONY KOSKI; and DOES I-X,
26 inclusive,

27 Cross-Defendants.

28 MDB TRUCKING, LLC,

Case No. CV16-01914
Dept. 1

CROSS-DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S REPLY
IN SUPPORT OF MOTION TO DISMISS
CROSS-CLAIMANT MDB TRUCKING,
LLC'S THIRD CAUSE OF ACTION FOR
IMPLIED INDEMNITY
PURSUANT TO NRCP 12(B)(5)

ORAL ARGUMENT REQUESTED

1 Third-Party Plaintiff,
2 vs.
3 THE MODERN GROUP GP-SUB, INC., a
4 Texas corporation and general
5 partnership; DRAGON ESP, LTD. A Texas
6 limited partnership; and DOES 1-10 and
7 BLACK AND WHITE COMPANIES, 1-10,
8 Third-Party Defendants.
9
10 MDB TRUCKING, LLC, a Nevada limited
11 liability company,
12 Cross-Claimant,
13 vs.
14 RMC LAMAR HOLDINGS, INC., a
15 Colorado corporation; VERSA
16 PRODUCTS, INC. a New Jersey
17 corporation and DOES 1-10 and BLACK
18 AND WHITE COMPANIES, 1-10,
19 Cross-Defendants.

20 CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S REPLY IN SUPPORT
21 OF MOTION TO DISMISS CROSS-CLAIMANT MDB TRUCKING, LLC'S THIRD CAUSE
22 OF ACTION FOR IMPLIED INDEMNITY
23 PURSUANT TO NRCP 12(B)(5)

24 COMES NOW, Cross-Defendant VERSA PRODUCTS COMPANY, INC., by and
25 through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
26 Paige S. Shreve, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP, and hereby
27 submits this Reply in Support of VERSA's Motion to Dismiss Cross-Claimant MDB
28 Trucking, LLC's Third Cause of Action for Implied Indemnity, with prejudice, pursuant to
NRCP 12(b)(5), in Case No. CV16-01914.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

MDB TRUCKING, LLC (hereinafter referred to as "MDB") alleges VERSA's Motion to Dismiss is flawed from inception because it improperly relies on the United States

1 Supreme Court cases of Bell Atlantic Corp. v. Trombly, 127 S.Ct. 1955, 1965 (2007) and
2 Ashcroft v. Iqbal, 129 S.Ct. 1937, 1951 (2009). However, VERSA does not cite to either
3 of those cases in its Motion and only cites Nevada case law regarding the standard of
4 review for a Motion to Dismiss.

5 Simply put, MDB's Cross-Claim for implied indemnity fails to state a claim upon
6 which the Court can grant relief. The facts are simple. The operative Complaint alleges
7 claims against MDB for its own negligence and VERSA PRODUCTS COMPANY, INC.
8 (hereinafter referred to as "VERSA") for strict liability only. There is no strict liability claim
9 against MDB.

10 MDB did not oppose VERSA's contention that MDB was actively negligent in its
11 Opposition. However, MDB now argues that implied indemnity is available because
12 MDB's purchase of a VERSA product created a special legal relationship. Even if there
13 was no special legal relationship, MDB argues that the burden of loss always shifts to the
14 manufacturer of an allegedly defective product, therefore entitling MDB to implied
15 indemnification. However, MDB's arguments are incorrect and without merit. MDB cites
16 case law that is either: (1) from another jurisdiction; and/or (2) substantially
17 distinguishable in its facts. Not only does MDB cite case law that is not binding on this
18 Court, MDB cites case law that is no longer valid.

19 MDB agrees with VERSA that a pre-existing legal relationship is required for a
20 cause of action of implied indemnity, but MDB did not (and cannot) plead a pre-existing
21 legal relationship between MDB and VERSA. Further, MDB fails to cite any case law, in
22 any jurisdiction, to support its argument that MDB can seek implied indemnity from
23 VERSA based on MDB's own negligence¹. This is because the law is very clear that a
24 party cannot seek indemnity for their own negligence. Thus, MDB's cause of action for
25

26 ¹ The case law MDB cites in its Opposition involved a cause of action for strict products liability only which
27 is substantially different than a cause of action for negligence. There is no cause of action against MDB for
28 strict products liability. Thus, none of the case law cited in MDB's Opposition is applicable to the current
issue at hand.

1 implied indemnity is fatally defective, and should be dismissed with prejudice.

2 II. LEGAL ARGUMENT

3 A. Legal Standard of Review

4 Nevada has long recognized that a Complaint must at least "set forth sufficient
5 facts to demonstrate the necessary elements of a claim for relief so that the defending
6 party has adequate notice of the nature and relief sought." W. States Const., Inc. v.
7 Michoff, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). Pursuant to NRCP 12(b)(5), a
8 defendant is entitled to dismissal when the complaint fails to state claims upon which
9 relief can be granted. In considering the dismissal of a Complaint, this Court must
10 "determine whether or not the challenged pleading set for allegations sufficient to make
11 out the elements of a right to relief." Bemis v. Estate of Bemis, 114 Nev. 1021, 1021, 967
12 P.2d 437, 439 (1998)(emphasis added) (*citing* Edgar v. Wagner, 101 Nev. 226, 227, 699
13 P.2d 110, 111 (1985)).

14 In making that determination, the Court is required to accept all factual allegations
15 as true, and to draw all inferences in favor of the non-moving party. Buzz Stew, LLC v.
16 City of North Las Vegas, 124 Nev. 224, 181 P.3d 670, 672 (2008). However, the Nevada
17 Supreme Court has instructed that a dismissal for failure to state a claim should be
18 affirmed "if it appears beyond a doubt that [Plaintiffs] could prove no set of facts, which, if
19 true, would entitle it to relief." *Id.* (emphasis added).

20 As discussed below, MDB cannot plead any set of facts, even if true, that would
21 entitle MDB to relief since the underlying Complaint alleges negligence against MDB.
22 Thus, this Court should dismiss MBD's claims for implied indemnity.

23 B. MDB Failed to State a Claim for Implied Indemnity

24 1. Indemnity is Not Available Because MDB Was Actively Negligent

25 MDB did not oppose VERSA's contention that MDB was actively negligent for the
26 subject accident. The Supreme Court has stated that indemnity "is generally available to
27 remedy the situation in which the defendant, who has committed no independent wrong,
28 is held liable for the loss of a plaintiff caused by another party." Pack v. LaTourette, 277

1 P.3d 1246, 1248-49 (Nev. 2012)(internal citations omitted). However, when “a party has
2 committed an “independent wrong,” and is thus actively negligent, that party has no right
3 to indemnity.” See, Rodriguez, 125 Nev. at 589, 216 P.3d at 801; see also Doctors
4 Company, 120 Nev. at 658, 98 P.3d at 690; see also, Pack, at 1248-49. When the
5 underlying litigation alleges a Defendant’s own negligence, the defendant is deemed
6 actively negligent and unable to seek indemnity from another tortfeasor. Pack, 277 P.3d
7 at 1247.

8 As MDB failed to Oppose this point in its Opposition, the Court may take that as an
9 admission that VERSA’s position is meritorious. See, DCR 12(3); Walls v. Brewster, 112
10 Nev. 175, 178, 912 P.2d 261, 263 (1996)(“Failure of the opposing party to serve and file
11 written opposition may be construed as an admission that the motion and/or joinder is
12 meritorious and a consent to granting the same.”). Since MBD is actively negligent, it
13 cannot maintain a cause of action for implied indemnity against VERSA.

14 MDB’s active negligence prohibits it from seeking implied indemnity from another.
15 As a consequence, MDB’s claim for implied indemnity fails as a matter of law.

16 2. MDB Has Not and Cannot Plead a Pre-Existing Relationship 17 Between MDB and VERSA

18 In its Opposition, MDB conceded that “implied indemnity could not be asserted
19 without . . . the showing of a nexus or special relationship between the indemnitee and
20 proposed indemnitor.” See, MDB’s Opposition to VERSA’s Motion to Dismiss, P.4:15-17.
21 However, MDB has not pled a nexus or pre-existing legal relationship between MDB and
22 VERSA. Since MDB failed to (and cannot) plead a special relationship in its Cross-Claim,
23 MDB has no right to implied indemnity as a matter of law.

24 MDB’s argument that an alleged breach of implied warranty of merchantability
25 somehow creates a special relationship necessary for implied indemnification for MDB’s
26 own negligence is unsupported. The only case law MDB cites in an attempt to support
27 this notion is a case involving a cause of action for implied warranty of merchantability.
28 The case makes no mention of any special relationship or indemnification and is

1 irrelevant to the issue at hand.

2 Further, MDB incorrectly argues it should be able to maintain an implied indemnity
3 cause of action against VERSA because MDB's purchase of the VERSA product created
4 a special legal relationship between them. Id. at 5:16-18. However, MDB did not
5 purchase the subject valve directly from VERSA. MDB cites Black & Decker v. Essex
6 Group, 105 Nev. 344, 775 P.2d 698 (1989) to support its position. However, Black &
7 Decker, is easily distinguishable from this case.

8 In Black & Decker, the operative complaint alleged a cause of action for strict
9 liability against Black & Decker and Essex Group, Inc. See, Black & Decker, 150 Nev. at
10 344. VERSA does not disagree that a pre-existing legal relationship could exist between
11 two manufacturers for strict products liability because strict liability extends to the
12 members in the chain of distribution of a defective product. Outboard Motor Corp. v.
13 Schupbach, 93, Nev. 158, 561, P.2d 450 (1997). Here, Plaintiffs are not suing MDB for
14 strict products liability; they are suing MDB for MDB's own negligence. See, Plaintiffs'
15 Complaint, attached to VERSA's Motion to Dismiss as Exhibit 1. MDB has not (and
16 cannot) plead any legal relationship between MDB and VERSA that requires VERSA to
17 indemnify MDB for MDB's own negligence. Thus, since no pre-existing legal relationship
18 exists, there can be no cause of action for implied indemnity.

19 3. VERSA Should Not Bear the Burden of MDB's Negligence

20 MDB cites two non-binding cases it contends stand for the proposition that VERSA
21 should bear the burden of MDB's own negligence. See, MDB's Opposition to VERSA's
22 Motion to Dismiss, P. 5:7-26; P. 6:1-12. However, these cases do not support MDB's
23 argument in its moving papers. An analysis of these two cases proves that they are not
24 applicable in the instant case.

25 First, MDB's Opposition alleges that "the doctrine of equitable indemnification
26 could look beyond the special relationship," citing Hydro-Air Equip., Inc. v. Hyatt Corp.,
27 852 F.2d 403 (9th Cir. 1988). See, MDB's Opposition to VERSA's Motion to Dismiss,
28 P. 5:13-15. However, that is a incorrect reading of the case and in direct conflict of the

1 case MDB cited earlier in its Opposition that held "implied indemnity could not be
2 asserted without . . . the showing of a nexus or special relationship between the
3 indemnitee and proposed indemnitor." See, MDB's Opposition to VERSA's Motion to
4 Dismiss, P. 4:7-9. Additionally, the Court in Hydro-Air Equip., Inc. actually held the
5 opposite. The Court illustrated the importance of having a special relationship in order to
6 trigger implied indemnity. Hydro-Air Equip., Inc. at 406.

7 Further, the Court in Hydro-Air Equip., Inc. cited Munoz v. Davis, 141 Cal. App. 3d
8 420, 190 Cal. Rptr. 400 (1983) which involved a claim of attorney malpractice:

9 [T]he attorney sought indemnification from a third-party
10 negligent driver for causing the accident that led to his
11 representation of the plaintiff. The court properly denied
12 indemnification because no connection or nexus existed
13 between the attorney's misconduct and the negligent driver's
14 misconduct.

15 Id.

16 Like the Munoz case, there is no connection between MDB's alleged negligent
17 conduct and VERSA's alleged wrongdoing. As such, MDB is not entitled to
18 indemnification from VERSA. Further, the facts in Hydro-Air Equip., Inc. differ
19 significantly from the instant case.

20 First, MDB and VERSA are both parties to the underlying litigation, unlike the
21 parties in Hydro-Air. "Indemnity is not available in cases involving joint or concurrent
22 tortfeasors having no legal relationship to one another and each owing a duty of care to
23 the injured party." Hydro-Air Equip., Inc. v. Hyatt Corp., 852 F.2d 403, 405 (9th Cir. 1988).

24 Second, a legal relationship between Hydro-Air Equip., Inc. and Hyatt Corp differs
25 from the parties in the instant matter. The relationship between the indemnitor and
26 indemnitee was one of predecessor and successor-in-interest, because Hydro Air
27 purchased Hyatt Corp's ventilation business. Id. at 405. The Court relied on Ray v. Alad,
28 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977), holding that implied indemnity could
apply only because Hydro-Air's successor-in-interest to Hyatt created a special
relationship between Hydro-Air and Hyatt in which Hyatt would be liable for the alleged
product defects caused by Hyatt. See, Hydro-Air Equip., Inc. at 406 (citing Ray v. Alad,

1 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977)). Here, there is no successor-in-
2 interest relationship between MDB and VERSA. MDB did not acquire VERSA; VERSA
3 did not dissolve; and Plaintiff does have a remedy against VERSA if the Court determines
4 an allegedly defective VERSA product caused the Plaintiffs' alleged injuries because
5 VERSA is a party in the underlying litigation.

6 Third, MDB cites to the non-binding case of Suvada v. White Motor Co., 210 N.E.
7 2d 182 (Ill. 1965) to support its incorrect argument that the burden of loss should shift to
8 VERSA. It is somewhat perplexing as to why Suvada is even referenced in MDB's
9 Opposition. As MDB noted, GINNES v. MAPES, 86 Nev. 408, 413 (1970) cites to Suvada
10 in regards to the doctrine of strict product liability. However, there is no allegation of strict
11 product liability in the underlying Complaint against MBD, only negligence and
12 respondeat superior against MDB and DANIEL KOSKI. Further, while the Nevada
13 Supreme Court cited to one narrow portion of a case, it in no way means the Court
14 adheres to everything held in the whole case.

15 Not only is Suvada not binding authority in Nevada, it is no longer even good law in
16 Illinois. The Supreme Court of Illinois overruled Suvada in Dixon v. Chicago & North
17 Western Transportation Co., 151 Ill. 2d 108, 123, 601 N.E.2d 704, 176 Ill. Dec. 6 (1992).²
18 Ironically, the case that reaffirmed the overruling of Suvada is substantially similar to this
19 present matter.

20 In Dixon, Defendant Hauser (while working for defendant Chicago & North
21 Western Transportation Co. ("North Western") was driving the Plaintiff, Dixon, in his Jeep
22 when the "Jeep went out of control on the highway exit ramp" and caused the plaintiff
23 severe injuries. Dixon v. Chi. & N. W. Transp. Co., 151 Ill. 2d 108, 112, 176 Ill. Dec. 6, 8,
24 601 N.E.2d 704, 706 (1992). Plaintiff sued Hauser and North Western for negligence and
25 the Jeep Defendants for strict products liability. Id. Hauser and North Western filed a
26

27 ² "... Suvada holding can no longer be considered viable." Id.
28

1 counter-claim against Jeep for implied indemnity. Id. The Court overruled Suvada,
2 holding a party cannot make a claim for implied indemnity when liability is premised only
3 on it's own negligence:

4 Accordingly, for Hauser to be found liable to Dixon, a finding
5 of negligence on Hauser's part would have to be made. Hauser's indemnity claim seeks indemnification from
6 American Motors Sales Corporation and Jeep Corporation "for any and all amounts for which he may be held liable to
7 [Dixon]." Because Hauser's liability to Dixon could be
8 premised only on Hauser's negligence, Hauser is barred
under Frazer from seeking indemnification for that liability.

9 Id. at 121.

10 Like Dixon, MDB can only be liable to Plaintiffs' if there is a finding of negligence
11 on MDB's part. Since MDB's liability to Plaintiffs' is premised only on it's own negligence,
12 MDB cannot seek implied indemnity from VERSA. Thus, the Court should dismiss the
13 cause of action against VERSA for implied indemnity.

14 In closing, MDB's cites Jones v. Aero-Chem Corp., 680 F.Supp. 338, 340 (D. Mont.
15 1987)(another non-binding case)³. Like all the other case law cited in MDB's Opposition,
16 Jones involves a strict products liability action in the underling complaint. There is no
17 such cause of action in this matter against MDB. Plaintiff does not allege a cause of
18 action for strict products liability against MDB; it only alleges negligence in regards to
19 MDB. As a result, MDB has no right to seek indemnity from VERSA.

20 In fact, the Jones decision actually supports the assertion that VERSA cannot be
21 held liable for the negligence of MDB. MDB's argument in the instant matter is very to the
22 Courts ruling in Montana which held that "misguided attempts to analyze the issue of
23 indemnity in actions" for strict liability with respect to issues of indemnity in negligence
24 actions. Id. at 341. The Jones Court held that:

25 [b]ecause negligence and strict products liability are distinct
26 torts, such an analysis is neither pragmatic nor logical.
Liability in a negligence action is based upon a person's

27 ³ The portion of the case law cited by MDB relies on Suvada, which as discussed above, is no longer good
28 law in its own state.

1 conduct. Where the conduct of two or more individuals
2 causes an injury-producing wrong, those individuals are
3 considered joint tortfeasors and are held jointly and severally
4 liable.

5 Id. at 341-342.

6 There is no cause of action for strict products liability against MDB. As such,
7 MDB's attempts to rely on cases involving strict liability actions only are improper as they
8 are both separate and distinct torts. Unlike VERSA, MDB is unable to cite to any Nevada
9 case law (or any case law for that matter) to support its argument because no such case
10 law exists. Thus, the Court should dismiss the cause of action against VERSA for implied
11 indemnity.

12 III. CONCLUSION

13 Based upon the foregoing, VERSA respectfully requests an Order from this Court,
14 dismissing MDB's implied indemnity claim, with prejudice.

15 AFFIRMATION


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

18 DATED this ¹²28 day of September, 2016

19 Respectfully submitted,

20 LEWIS BRISBOIS BISGAARD & SMITH LLP

21 By

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CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of September, 2016, a true and correct copy of CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIMANT MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5) was served electronically with the Court addressed as follows:

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

vs.

Dept. No. 10

MDB TRUCKING, LLC; et al.,

Defendants.

ANGELA MICHELLE WILT,

Plaintiff,

Case No. CV15-02410
(consolidated into CV15-02349)

vs.

MDB TRUCKING, LLC., et al.,

Defendants.

ROSA ROBLES, et al.,

Plaintiffs,

Case No. CV16-01124
(consolidated into CV15-02349)¹

vs.

MDB TRUCKING, LLC., et al.,

Defendants.

¹ Consolidated after motion practice was filed.

ORDER

Presently before the Court is CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S MOTION TO DISMISS CROSS-CLAIMANT, MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5) ("the Motion"). The Motion was filed by Cross-Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on June 27, 2016. Cross-Claimant MDB TRUCKING, LLC ("MDB") filed the JOINT OPPOSITION TO CROSS-DEFENDANT'S [VERSA PRODUCTS COMPANY, INC.] MOTION TO DISMISS ("the Opposition") on July 14, 2016. Versa filed the CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIMANT MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5) ("the Reply") on July 25, 2016. The Motion was submitted for the Court's consideration on August 10, 2016.

FACTUAL BACKGROUND

This case arises from a personal injury action. The COMPLAINT ("the Complaint") was filed on December 4, 2015. The Complaint alleges three causes of action: Negligence; Negligence Per Se; and Negligent Infliction of Emotional Distress. It is alleged Defendant Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a load of gravel into the roadway. The Complaint, 3:11-14; 16-18. Plaintiffs CAROL FITZSIMMONS and BRUCE FITZSIMMONS (collectively "the Plaintiff") were driving on the same roadway. The Complaint, 3:7-10. The spilled gravel caused the Plaintiff to lose control of his vehicle and hit a guardrail. The Complaint, 3:22-25. The Plaintiff sustained "personal injuries, causing extreme anguish, pain and suffering" as a result of the accident. The Complaint, 4:12-14. In response to the Complaint, MDB filed MDB TRUCKING, LLC'S CROSS-CLAIM AGAINST RMC LAMAR HOLDINGS, INC. (fka RANCH MANUFACTURING COMPANY) AND VERSA PRODUCTS, INC. ("the Cross-Claim") on June 15, 2016. The Cross-Claim alleged it was not Koski's negligence that caused the gravel to spill; rather, the spill was caused by the "unreasonably dangerous and defective" design and manufacture of the trailer that held the gravel. The Cross-Claim, 3:17-18; 4:1-5. Therefore, MDB brought the Cross-Claim against the manufacturers of the trailer and its

1 components, including Versa. The Cross Claim, 4:1-5. Included in the Cross-Claim were four
2 claims for relief. The third claim for relief, and the subject of the Motion, is MDB's claim for
3 Implied Indemnification as to Versa. The Cross-Claim, 5:6-14. Versa has moved to dismiss this
4 cause of action.

5 LEGAL STANDARD FOR MOTION TO DISMISS

6 NRCP 12(b)(5) states a claim may be dismissed for failure to state a claim upon which
7 relief can be granted. A court must liberally construe the pleadings and accept all asserted
8 allegations as true. *Buzz Stew, LLC. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670,
9 672 (2008). Dismissal is appropriate if the allegations fail to state a cognizable claim of relief
10 when taken at "face value," and construed favorably on behalf of the counterclaimant. *Morris v.*
11 *Bank of Am.*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (quoting *Edgar v. Wagner*, 101 Nev.
12 226, 227-28, 699 P.2d 110, 111-12 (1985)); *see also Stockmeier v. Nevada Dep't of Corrections*,
13 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (holding dismissal is proper where factual
14 allegations "are insufficient to establish the elements of a claim for relief"). Accordingly, the
15 claim should only be dismissed if it "appears beyond a doubt" the non-moving party could "prove
16 no set of facts, which, if true, would entitle it to relief." *Buzz Stew*, 124 Nev. at 228, 181 P.3d at
17 672.

18 Despite a court's liberal construction of the allegations in the pleading, a pleading party
19 must set forth sufficient facts to establish all necessary elements of a claim against the opposing
20 party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (citing *Johnson v. Travelers Ins.*
21 *Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973)). These facts are necessary to provide the opposing
22 party with fair notice. *See Hay*, 100 Nev. at 198, 678 P.2d at 673.

23 ANALYSIS

24 The Motion argues MDB's cause of action for implied indemnity fails as a matter of law
25 because, 1) MDB was "actively negligent" in failing to secure the truck load, and 2) there was no
26 pre-existing legal relationship between Versa and MDB. The Motion, 4:7-8.
27
28

1 Implied indemnity is “an equitable remedy that allows a defendant to seek recovery from
2 other potential tortfeasors” when the negligence of those tortfeasors is the primary cause of the
3 “injured party's harm.” *Rodriguez v. Primadonna, Co., LLC*, 125 Nev. 578, 589, 216 P.3d 793,
4 801 (2009) (citing *The Doctors Co. v. Vincent*, 120 Nev. 644, 651, 98 P.3d 681, 686 (2004)).
5 Implied indemnity allows a “complete shifting of responsibility” to a third party. *The Doctors*,
6 120 Nev. at 651, 98 P.3d at 686. There are two requirements for an implied indemnity claim.
7 The first is a finding the third-party defendant is liable for damages to the plaintiff on the
8 underlying claim. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. This is because implied
9 indemnity “cannot be used to allow one innocent party to recover its defense costs from another
10 innocent party.” *Id.* Accordingly, “[a]t the heart of the doctrine is the premise that the person
11 seeking to assert implied indemnity...has been required to pay damages caused by a third party,”
12 even though they have not committed any “independent wrong.” *Primadonna*, 125 Nev. at 589,
13 216 P.3d at 801 (citing *Harvest Capital v. WV Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509,
14 513 (2002)). Therefore, implied indemnity is available as a cause of action “after the defendant
15 has extinguished its own liability through settlement or by paying a judgment.” *Id.* (citing *The*
16 *Doctors*, 120 Nev. at 651, 98 P.3d at 686).

17 The second requirement is “a legal relationship or duty,” which “supports the claim of
18 indemnity.” *Black & Decker (U.S.), Inc. v. Essex Group, Inc.*, 105 Nev. 344, 346, 775 P.2d 698,
19 699 (1989) (citation omitted); *see also Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citation
20 omitted) (holding the court requires “some nexus or relationship between the indemnitee and
21 indemnitor” to allow a claim for implied indemnity); *see also Pack v. LaTourette*, 128 Nev. Adv.
22 Op. 25, 277 P.3d 1246, 1249 (2012) (citation omitted) (holding there “must be a preexisting legal
23 relation” between the two parties, “or some duty on the part of the primary tortfeasor to protect the
24 secondary tortfeasor”). Accordingly, implied indemnification is not “a license to assert a cross-
25 claim against any third party in hope of alleviating the burden of costs associated with defending
26 litigation.” *Primadonna*, 125 Nev. at 591, 216 P.3d at 802 (citing *Piedmont Equip. Co. Inc. v.*
27 *Eberhard Mfg. Co.*, 99 Nev. 523, 527-28, 665 P.2d 256, 259 (1983)). Because the Nevada
28 Supreme Court has held implied indemnity “should not be construed as permission to open a

1 floodgate for cross-claims” when there is no legal relationship between the parties, the standard for
2 what qualifies as a legal relationship is high. *Primadonna*, 125 Nev. at 590, 216 P.3d at 802
3 (citing *Piedmont*, 99 Nev. at 527–28, 665 P.2d at 259).

4 A. Finding of Liability

5 The Motion argues a cause of action for implied indemnity should be precluded because
6 MDB was negligent in operating and managing its business. The Motion, 8:15-17. The Motion
7 therefore argues because the Complaint alleges MDB’s “active negligence” MDB cannot be
8 eligible for indemnification until it is found liable for that negligence. The Motion, 7:14-19. The
9 Opposition argues the Court need not rely on the Plaintiff’s allegations of MDB’s negligence. The
10 Opposition, 2:14-15.

11 The Court finds the Cross-Claim pleads sufficient facts to place Versa on notice of their
12 potential liability.² By suggesting a finding of liability must occur before a party may *plead a*
13 *claim* of implied indemnity, the Motion suggests a pleading party would be required to plead an
14 admission of, or facts asserting, its own liability to sustain its claim. However, a court cannot
15 expect a party to admit or assert its own liability in order to plead a claim for relief unless the party
16 is pleading in the alternative, as allowed by NRCP 8(e)(2).³

17 It is important to make the distinction between *pleading a claim* for implied indemnity and
18 indemnification itself. The cases discussed, *supra*, clearly indicate indemnification is not possible
19 or proper without a finding of liability or a requirement that the pleading party pay damages.
20 *Primadonna*, 125 Nev. at 581; 589, 216 P.3d at 796; 801. However, the Cross-Claim does not
21 request indemnification, but rather pleads it as a cause of action. In other words, the Cross-Claim
22 need only assert a possibility that if MDB is found liable, it is entitled to indemnification from
23

24
25 ² The Opposition correctly states the Motion includes an improper standard for a 12(b)(5) motion to dismiss. The
26 Opposition, 2:8-10. The Motion applies the higher pleading standard articulated by *Bell Atlantic Corp. v. Twombly*, 550
27 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct.1937 (2009), the Motion, 5:26-28; 6:1-5;
however, the Nevada Supreme Court has specifically stated that it declines to adopt this higher standard. The Cross-
Claim pleads sufficient facts under the proper notice pleading standard followed by Nevada courts.

28 ³ NRCP 8(e)(2) states, in relevant part, “[a] party may also state as many separate claims or defenses as the party has
regardless of consistency and whether based on legal or on equitable grounds or on both.”

1 Versa, thereby obviating the need for additional proceedings to establish Versa's financial
2 responsibility to MDB.

3 The Cross-Claim asserts MDB is entitled to indemnity by Versa "with respect to all
4 allegations or liabilities set forth" in the Complaint. The Cross-Claim, 5:10-12. Accordingly, the
5 Cross-Claim effectively places Versa on notice *if* it is found at fault for the "allegations or
6 liabilities" in the Complaint, it is entitled to indemnification. Further, as stated *supra*, the Motion
7 argues indemnity is improper considering MDB's "active negligence;" the Court fails to recognize
8 how facts asserting MDB's negligence preclude maintenance of a claim that requires a finding of
9 that exact negligence.

10 **B. Legal Relationship**

11 The Motion argues the Cross-Claim fails to allege the legal relationship or pre-existing duty
12 between MDB and Versa required for a claim for implied indemnity to survive. The Motion, 8:25-
13 26. The Opposition argues the Cross-Claim pleads sufficient facts to evidence the legal
14 relationship because it indicates MDB was "the last purchaser and end user of the subject Ranco
15 trailer" and the "Versa Valve solenoid control as a component to the Ranco trailer was
16 unreasonably dangerous and defective." The Cross-Claim, 3:4-5; 17-18. Therefore, the
17 Opposition argues a legal relationship was created when MDB purchased the trailer, which
18 included a component from Versa.

19 As explained, *supra*, the Nevada Supreme Court has set a high standard for establishment of
20 a legal relationship as it applies to implied indemnity. The Court has found a legal relationship
21 exists in very limited circumstances. *See Black & Decker*, 105 Nev. at 346, 775 P.2d at 700
22 (holding a legal relationship exists in cases of implied warranties of merchantability); *see also*
23 *Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997)
24 (citing *Piedmont*, 99 Nev. at 527-28, 665 P.2d at 259) (holding a legal relationship exists between a
25 contractor and subcontractor); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 360, 989 P.2d 870,
26 874-75 (1999) (holding a legal relationship can exist between an employer and employee where an
27 express indemnity contract is in place); *Outboard Motor Corp. v. Shupbach*, 93 Nev. 158, 165,
28 561 P.2d 450, 454 (1977) (holding a legal relationship can exist between an employer and


1 employee when the employer holds an independent duty to the employee); *Mills v. Continental*
2 *Parking Corp.*, 86 Nev. 724, 725, 475 P.2d 673, 674 (1970) (holding a legal relationship exists as
3 between a bailor and a bailee “where the parking lot attendant collects a fee, has possession of the
4 keys, assumes control of the car and issues a ticket to identify the car for redelivery”); *Troxel v.*
5 *Granville*, 530 U.S. 57, 58, 120 S.Ct. 2054, 2056 (2000) (holding a fundamental legal relationship
6 and constitutional protection exists between a parent and a child).

7 The Court finds the Cross-Claim does not plead sufficient facts to indicate the establishment
8 of a legal relationship between MDB and Versa. Although the Opposition avers a legal
9 relationship was formed between MDB and Versa when MDB purchased a trailer that included a
10 Versa component, that transaction does not, *ipso facto*, form a recognized legal relationship. The
11 transaction could create a legal relationship if it involved an implied warranty or merchantability,
12 *Black & Decker*, 105 Nev. at 346, 775 P.2d at 700; however, the Cross-Claim does not mention an
13 implied warranty of merchantability. Were the Court to follow the Cross-Claim’s argument to its
14 logical conclusion, every sale of goods would create the legal relationship necessary for an implied
15 indemnity claim. This is too broad an application of the Nevada Supreme Court’s holdings,
16 discussed *supra*, which limit the formation of a legal relationship to very particular circumstances.
17 Further, the Cross-Claim does not plead facts indicating the formation of a legal relationship via
18 any preexisting duty of Versa to MDB. Therefore, because the Cross-Claim has not pled sufficient
19 facts to evidence a legal relationship between MDB and Versa, its third cause of action for implied
20 indemnification against Versa cannot be sustained.

21 While the Motion may have pled the facts necessary to satisfy the requirement of liability
22 on the part of Versa, the Motion does not plead the facts necessary to satisfy the requirement of a
23 preexisting legal relationship between the party seeking indemnity, MDB, and the party who
24 would indemnify, Versa. Proper pleading of the liability requirement alone cannot sustain the
25 claim.
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1 IT IS ORDERED the CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S
2 MOTION TO DISMISS CROSS-CLAIMANT, MDB TRUCKING, LLC'S THIRD CAUSE OF
3 ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5) is hereby GRANTED.

4 DATED this 19 day of October, 2016.

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6 ELLIOTT A. SATTLER
7 District Judge
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

MDB TRUCKING, LLC; DANIEL
ANTHONY KOSKI; and DOES I-X
and ROE I-V corporations,

Defendants.

AMENDED ORDER¹

Presently before the Court is THIRD PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO DISMISS THIRD PARTY PLAINTIFF, MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRC 12(B)(5) ("the Motion"). The Motion was filed by Third-Party Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on July 19, 2016. Third-Party Plaintiff MDB TRUCKING, LLC ("MDB") filed the OPPOSITION TO THIRD-PARTY DEFENDANT'S [VERSA PRODUCTS COMPANY, INC.] MOTIONS [sic] TO DISMISS ("the Opposition") on July 29, 2016. Versa

¹ This Order has been amended strictly to correct case citation errors. All changes have been highlighted in bold type.

1 filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC'S REPLY IN
2 SUPPORT OF MOTION TO DISMISS THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC'S
3 THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5)
4 ("the Reply") on August 8, 2016. The Motion was submitted for the Court's consideration on
5 August 10, 2016.
6

7 **FACTUAL BACKGROUND**

8 This case arises from a personal injury action. The COMPLAINT ("the Complaint") was
9 filed on May 2, 2016. The Complaint alleges two causes of action, negligence and *respondeat*
10 *superior*. It is alleged Defendant Anthony Koski ("Koski"), while driving a truck for MDB,
11 negligently spilled a load of gravel into the roadway. The Complaint, 2:21-22. Plaintiff Geneva
12 Remmerde ("the Plaintiff") was driving on the same roadway. The spilled gravel caused her to lose
13 control of her vehicle and hit a guardrail. The Complaint, 2:24-25. The Plaintiff sustained "severe
14 physical and emotional injuries" as a result of the accident. The Complaint, 2:26-28. In response
15 to the Complaint, MDB filed the THIRD-PARTY COMPLAINT ("the 3P Complaint") on June 22,
16 2016. The 3P Complaint alleged it was not Koski's negligence that caused the gravel to spill;
17 rather, the spill was caused by the "unreasonably dangerous and defective" design and manufacture
18 of the trailer that held the gravel. The 3P Complaint, 3:8-10; 4:7-8. Therefore, MDB brought the
19 3P Complaint against the manufacturers of the trailer and its components, including Versa. The 3P
20 Complaint, 2:21-23. Included in the 3P Complaint were four claims for relief. The third claim for
21 relief, and the subject of the Motion, is MDB's claim for Implied Indemnification as to Versa. The
22 3P Complaint, 6:1-10. Versa has moved to dismiss this cause of action.
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LEGAL STANDARD FOR MOTION TO DISMISS

NRCP 12(b)(5) states a claim may be dismissed for failure to state a claim upon which relief can be granted. A court must liberally construe the pleadings and accept all asserted allegations as true. *Buzz Stew, LLC. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissal is appropriate if the allegations fail to state a cognizable claim of relief when taken at “face value,” and construed favorably on behalf of the counterclaimant. *Morris v. Bank of Am.*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (quoting *Edgar v. Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985)); *see also Stockmeier v. Nevada Dep’t of Corrections*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (holding dismissal is proper where factual allegations “are insufficient to establish the elements of a claim for relief”). Accordingly, the claim should only be dismissed if it “appears beyond a doubt” the non-moving party could “prove no set of facts, which, if true, would entitle it to relief.” *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

Despite a court’s liberal construction of the allegations in the pleading, a pleading party must set forth sufficient facts to establish all necessary elements of a claim against the opposing party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672 (1984) (citing *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973)). These facts are necessary to provide the opposing party with fair notice. *See Hay*, 100 Nev. at 198, 678 P.2d at 673.

ANALYSIS

The Motion argues MDB’s cause of action for implied indemnity fails as a matter of law because, 1) MDB was “actively negligent” in failing to secure the truck load, and 2) there was no pre-existing legal relationship between Versa and MDB.

1 Implied indemnity is “an equitable remedy that allows a defendant to seek recovery from
2 other potential tortfeasors” when the negligence of those tortfeasors is the primary cause of the
3 “injured party's harm.” *Rodriguez v. Primadonna, Co., LLC*, 125 Nev. 578, 589, 216 P.3d 793, 801
4 (2009) (citing *The Doctors Co. v. Vincent*, 120 Nev. 644, 651, 98 P.3d 681, 686 (2004)). Implied
5 indemnity allows a “complete shifting of responsibility” to a third party. *The Doctors*, 120 Nev. at
6 651, 98 P.3d at 686. There are two requirements for an implied indemnity claim. The first is a
7 finding the third-party defendant is liable for damages to the plaintiff on the underlying claim.
8 *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. This is because implied indemnity “cannot be used
9 to allow one innocent party to recover its defense costs from another innocent party.” *Id.*
10 Accordingly, “[a]t the heart of the doctrine is the premise that the person seeking to assert implied
11 indemnity...has been required to pay damages caused by a third party,” even though they have not
12 committed any “independent wrong.” *Primadonna*, 125 Nev. at 589, 216 P.3d at 801 (citing
13 *Harvest Capital v. WV Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509, 513 (2002)). Therefore,
14 implied indemnity is available as a cause of action “after the defendant has extinguished its own
15 liability through settlement or by paying a judgment.” *Id.* (citing *The Doctors*, 120 Nev. at 651, 98
16 P.3d at 686).

17 The second requirement is “a legal relationship or duty,” which “supports the claim of
18 indemnity.” *Black & Decker (U.S.), Inc. v. Essex Group, Inc.*, 105 Nev. 344, 346, 775 P.2d 698,
19 699 (1989) (citation omitted); *see also Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citation
20 omitted) (holding the court requires “some nexus or relationship between the indemnitee and
21 indemnitor” to allow a claim for implied indemnity); *see also Pack v. LaTourette*, 128 Nev. Adv.
22 Op. 25, 277 P.3d 1246, 1249 (2012) (citation omitted) (holding there “must be a preexisting legal
23 relation” between the two parties, “or some duty on the part of the primary tortfeasor to protect the
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secondary tortfeasor”). Accordingly, implied indemnification is not “a license to assert a cross-claim against any third party in hope of alleviating the burden of costs associated with defending litigation.” *Primadonna*, 125 Nev. at 591, 216 P.3d at 802 (citing *Piedmont Equip. Co. Inc. v. Eberhard Mfg. Co.*, 99 Nev. 523, 527-28, 665 P.2d 256, 259 (1983)). Because the Nevada Supreme Court has held implied indemnity “should not be construed as permission to open a floodgate for cross-claims” when there is no legal relationship between the parties, the standard for what qualifies as a legal relationship is high. *Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citing *Piedmont*, 99 Nev. at 527–28, 665 P.2d at 259).

A. Finding of Liability

The Motion argues a cause of action for implied indemnity should be precluded because MDB was negligent when it failed to properly secure the truck’s load. The Motion, 7:15-16. The Motion therefore argues that because the Complaint alleges MDB’s “active negligence” MDB cannot be eligible for indemnification until it is found liable for that negligence. The Motion, 7:17-21. The Opposition argues the Court need not rely on the Plaintiff’s allegations of MDB’s negligence. The Opposition, 2:14-15. The Opposition also argues the issue of whether MDB was actively or passively (primarily or secondarily) negligent, should be decided by the trier of fact. The Opposition, 4:11-12.

The Court finds the 3P Complaint pleads sufficient facts to place Versa on notice of their potential liability.² By suggesting a finding of liability must occur before a party may *plead a claim* of implied indemnity, the Motion suggests a pleading party would be required to plead an

² The Opposition correctly states the Motion includes an improper standard for a 12(b)(5) motion to dismiss, the Opposition, 2:13. The Motion applies the higher pleading standard articulated by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct.1937 (2009), The Motion, 5:14-19; however, the Nevada Supreme Court has specifically stated that it declines to adopt this higher standard. The 3P Complaint pleads sufficient facts under the proper notice pleading standard followed by Nevada courts.

1 admission of, or facts asserting, its own liability to sustain its claim. However, a court cannot
2 expect a party to admit or assert its own liability in order to plead a claim for relief unless the party
3 is pleading in the alternative, as allowed by NRCPP 8(e)(2).³
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5 It is important to make the distinction between *pleading a claim* for implied indemnity and
6 indemnification itself. The cases discussed, *supra*, clearly indicate indemnification is not possible
7 or proper without a finding of liability or a requirement that the pleading party pay damages.
8 *Primadonna*, 125 Nev. at 581; 589, 216 P.3d at 796; 801. However, the 3P Complaint does not
9 request indemnification, but rather pleads it as a cause of action. In other words, the 3P Complaint
10 need only assert a possibility that if MDB is found liable, it is entitled to indemnification from
11 Versa, thereby obviating the need for additional proceedings to establish Versa's financial
12 responsibility to MDB.
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14 The 3P Complaint asserts MDB is entitled to indemnity by Versa "with respect to all
15 allegations or liabilities set forth" in the Complaint. The 3P Complaint, 6:5-7. Accordingly, the 3P
16 Complaint effectively places Versa on notice that *if* it is found at fault for the "allegations or
17 liabilities" in the Complaint, it is entitled to indemnification. Further, as stated *supra*, the Motion
18 argues indemnity is improper considering MDB's "active negligence;" the Court fails to recognize
19 how facts asserting MDB's negligence preclude maintenance of a claim that requires a finding of
20 that exact negligence.
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23 **B. Legal Relationship**

24 The Motion argues the 3P Complaint fails to allege the legal relationship or pre-existing
25 duty between MDB and Versa required for a claim for implied indemnity to survive. The Motion,
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28 ³ NRCPP 8(e)(2) states, in relevant part, "[a] party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both."

1 8:11-13. The Opposition argues the 3P Complaint pleads sufficient facts to evidence the legal
2 relationship because it indicates MDB was “the last purchaser and end user of the subject Ranco
3 trailer and the direct purchaser of the subject Versa unit in 2013.” The 3P Complaint, 4:3-5.
4 Therefore, the Opposition argues a legal relationship was created when MDB purchased the trailer
5 component from Versa.
6

7 As explained, *supra*, the Nevada Supreme Court has set a high standard for establishment of
8 a legal relationship as it applies to implied indemnity. The Court has found a legal relationship
9 exists in very limited circumstances. *See Black & Decker*, 105 Nev. at 346, 775 P.2d at 700
10 (holding a legal relationship exists in cases of implied warranties of merchantability); *see also*
11 *Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997)
12 (citing *Piedmont*, 99 Nev. at 527-28, 665 P.2d at 259) (holding a legal relationship exists between a
13 contractor and subcontractor); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 360, 989 P.2d 870,
14 874-75 (1999) (holding a legal relationship can exist between an employer and employee where an
15 express indemnity contract is in place); *Outboard Motor Corp. v. Shupbach*, 93 Nev. 158, 165, 561
16 P.2d 450, 454 (1977) (holding a legal relationship can exist between an employer and employee
17 when the employer holds a separate and independent duty to the employee); *Mills v. Continental*
18 *Parking Corp.*, 86 Nev. 724, 725, 475 P.2d 673, 674 (1970) (holding a legal relationship exists as
19 between a bailor and a bailee “where the parking lot attendant collects a fee, has possession of the
20 keys, assumes control of the car and issues a ticket to identify the car for redelivery”); *Troxel v.*
21 *Granville*, 530 U.S. 57, 58, 120 S.Ct. 2054, 2056 (2000) (holding a fundamental legal relationship
22 and constitutional protection exists between a parent and a child).
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27 The Court finds the 3P Complaint does not plead sufficient facts to indicate the
28 establishment of a legal relationship between MDB and Versa. Although the Opposition avers a

1 legal relationship was formed between MDB and Versa when MDB purchased a trailer that
2 included a Versa component, that transaction does not, *ipso facto*, form a recognized legal
3 relationship. The transaction could create a legal relationship if it involved an implied warranty or
4 merchantability, *Black & Decker*, 105 Nev. at 346, 775 P.2d at 700; however, the 3P Complaint
5 does not mention an implied warranty of merchantability. Were the Court to follow the 3P
6 Complaint's argument to its logical conclusion, every sale of goods would create the legal
7 relationship necessary for an implied indemnity claim. This is too broad an application of the
8 Nevada Supreme Court's holdings, discussed *supra*, which limit the formation of a legal
9 relationship to very particular circumstances. Further, the 3P Complaint does not plead facts that
10 indicate the formation of a legal relationship via any preexisting duty of Versa to MDB. Therefore,
11 because the 3P Complaint has not pled sufficient facts to evidence a legal relationship between
12 MDB and Versa, its third cause of action for implied indemnification against Versa cannot be
13 sustained.
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17 While the Motion may have pled the facts necessary to satisfy the requirement of liability
18 on the part of Versa, the Motion does not plead the facts necessary to satisfy the requirement of a
19 preexisting legal relationship between the party seeking indemnity, MDB, and the party who would
20 indemnify, Versa. Proper pleading of the liability requirement alone cannot sustain the claim.
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1 IT IS ORDERED Versa's THIRD PARTY DEFENDANT VERSA PRODUCTS
2 COMPANY, INC'S MOTION TO DISMISS THIRD PARTY PLAINTIFF, MDB TRUCKING,
3 LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP
4
5 12(B)(5) is hereby GRANTED.

6 DATED this 19 day of October, 2016.

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9 ELLIOTT A. SATTLER
10 District Judge
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