

1 **\$2515**

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11 **CLARK HILL PLLC**

12 3800 Howard Hughes Parkway, Suite 500

13 Las Vegas, Nevada 89169

14 Telephone: (702) 862-8300

15 Facsimile: (702) 862-8400

16 *Attorneys for Cross-Claimant*

17 *MDB Trucking, LLC*

18
19 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
20 **IN AND FOR THE COUNTY OF WASHOE**

21 JAMES BIBLE

22 Plaintiff,

23 vs.

24 MDB TRUCKING, LLC, et al

25 Defendants.

26 AND ALL RELATED CASES.

Case No.: CV16-01914

Dept. No.: 10

NOTICE OF APPEAL

27 **NOTICE IS HEREBY GIVEN** that Cross-Claimant MDB Trucking, LLC ("MDB"), by
28 and through its counsel of record Nicholas M. Wieczorek, Esq., Jeremy J. Thompson, Esq. and
Colleen E. McCarty, Esq. of the law firm of Clark Hill PLLC, hereby appeals to the Supreme
Court of Nevada from the Order granting 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 35; or in the Alternative, for an Adverse Jury

1 Instruction, entered in this action on the 8th day of February, 2018.

2 DATED this 8th day of March, 2018

4 CLARK HILL PLLC

5 By: Colleen E. McCarty

6 NICHOLAS M. WIECZOREK

7 Nevada Bar No. 6170

8 JEREMY J. THOMPSON

9 Nevada Bar No. 12503

10 COLLEEN E. MCCARTY

11 Nevada Bar No. 13186

12 3800 Howard Hughes Parkway, Suite 500

13 Las Vegas, Nevada 89169

14 *Attorneys for Defendant/Cross-Claimant*

15 *MDB Trucking, LLC*

16 **AFFIRMATION**

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

19 DATED this 8th day of March, 2018.

20 CLARK HILL PLLC

21 By: Colleen E. McCarty

22 NICHOLAS M. WIECZOREK

23 Nevada Bar No. 6170

24 JEREMY J. THOMPSON

25 Nevada Bar No. 12503

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Las Vegas, Nevada 89169

Attorneys for Defendant/Cross-Claimant

MDB Trucking, LLC

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JOSH COLE AICKLEN, ESQ.
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LEWIS BRISBOIS BISGAARD & SMITH LLP
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Attorneys for Defendant
VERSA PRODUCTS CO., INC.

celled

An employee of Clark Hill PLLC

1 **1310**

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14 Telephone: (702) 862-8300

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16 *Attorneys for Cross-Claimant*

17 *MDB Trucking, LLC*

18 **SECOND JUDICIAL DISTRICT COURT**

19 **WASHOE COUNTY, NEVADA**

20 JAMES BIBLE

21 Plaintiff,

22 vs.

23 MDB TRUCKING, LLC, et al

24 Defendants.

25 AND ALL RELATED CASES.

Case No.: CV16-01914

Dept. No.: 10

CASE APPEAL STATEMENT

26 Cross-Claimant MDB Trucking, LLC ("MDB"), by and through its counsel of record
27 Nicholas M. Wieczorek, Esq., Jeremy J. Thompson, Esq. and Colleen E. McCarty, Esq. of the
28 law firm of Clark Hill PLLC, hereby submits its Case Appeal Statement, pursuant to Rule 3(f)(3)
of the Nevada Rules of Appellate Procedure, as follows:

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///

1 **(A) The district court case number and caption showing the names of all parties to the**
2 **proceedings below, but the use of et al. to denote parties is prohibited:**

3 The district court case number and caption are stated above. The parties to the
4 proceedings below are Cross-Claimant, MDB Trucking, LLC, and Cross-Defendant, Versa
5 Products Company, Inc.

6 **(B) The name of the judge who entered the order or judgment being appealed:**

7 Hon. Elliot A. Sattler, Second Judicial District Court, Washoe County, Nevada.

8 **(C) The name of each appellant and the name and address of counsel for each appellant:**

9 MDB Trucking, LLC, Appellant.

10 Nicholas M. Wiczoerk, Esq.
11 Jeremy J. Thompson, Esq.
12 Colleen E. McCarty, Esq.
13 Clark Hill PLLC
14 3800 Howard Hughes Parkway, Suite 500
15 Las Vegas, Nevada 89169
16 Telephone: 702-862-8300
17 Facsimile: 702-862-8400
18 Attorneys for Cross-Claimant/Appellant

19 **(D) The name of each respondent and the name and address of appellate counsel, if**
20 **known, for each respondent, but if the name of a respondent's appellate counsel is**
21 **not known, then the name and address of that respondent's trial counsel:**

22 Versa Products Company, Inc., Respondent.

23 Josh Cole Aicklen, Esq.
24 David B. Avakian, Esq.
25 Paige S. Shreve, Esq.
26 Lewis Brisbois Bisgaard & Smith LLP
27 6385 S. Rainbow Boulevard, Suite 600
28 Las Vegas, Nevada 89118
 Telephone: 702-893-3383
 Facsimile: 702-893-3789
 Trial Counsel for Cross-Defendant/Respondent

///

///

1 (E) Whether an attorney identified in response to subparagraph (D) is not licensed to
2 practice law in Nevada, and if so, whether the district court granted that attorney
3 permission to appear under SCR 42, including a copy of any district court order
granting that permission:

4 Not applicable.

5 (F) Whether the appellant was represented by appointed counsel in the district court,
6 and whether the appellant is represented by appointed counsel on appeal:

7 Not applicable.

8 (G) Whether the district court granted the appellant leave to proceed in forma pauperis,
9 and if so, the date of the district court's order granting that leave:

10 Not applicable.

11 (H) The date that the proceedings commenced in the district court:

12 MDB Trucking, LLC filed its Cross-Claim against Versa Products Company, Inc. and
13 RMC Lamar Holdings, Inc., f/k/a Ranch Manufacturing Company (subsequently dismissed
14 party) in the district court on September 20, 2016. The original filing date for the above-
15 captioned Case No. CV16-01914 was September 20, 2016.

16
17 (I) A brief description of the nature of the action and result in the district court,
18 including the type of judgment or order being appealed and the relief granted by the
19 district court:

20 This case arises from a personal injury action. A complaint was filed by Ernest and Carol
21 Fitzsimmons on December 4, 2015, *Fitzsimmons v. MDB Trucking, LLC, et al.*, Second Judicial
22 District Court Case No. CV15-02349 (the "Fitzsimmons Action").¹ Numerous other plaintiffs
23 were consolidated into the Fitzsimmons Action. Two additional cases, the instant matter and one
24 other, were filed outside of the Fitzsimmons Action. The personal injury claims all related to
25 multiple traffic accidents which occurred when a semi-trailer owned and operated by MDB
26 Trucking, LLC ("MDB") inadvertently dumped a load of gravel on the freeway.
27
28

1 In the instant case being appealed, the Third Party Complaint at issue filed by MDB is
2 one for Contribution from Versa Products Company, Inc. ("Versa"). On May 15, 2017, Versa
3 filed a Motion to Strike MDB's Third Party Complaint, pursuant to NRCP 37, wherein it sought
4 sanctions for the alleged spoliation of evidence. Following briefing and a hearing on August 29,
5 2017 in the Fitzsimmons Action, the District Court issued an Order dated September 22, 2017 in
6 which it found "there would be some sanctions levied on MDB for their discovery abuse: the
7 actual sanction was not determined." The District Court's Order set the matter for evidentiary
8 hearing and further stated "Each party will be familiar with *Young, supra, Nevada Power, supra,*
9 and their progeny and present witnesses in support of their respective positions." The District
10 Court issued its September 22, 2017 Order without discussion of the Supreme Court's holding in
11 *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006).
12

13
14 The District Court held the evidentiary hearing to determine what sanctions to issue
15 against MDB on October 13, 2017. At the conclusion of the hearing the District Court informed
16 the parties that Versa's Motion to Strike would be granted and that case concluding sanctions
17 would be imposed. Thereafter the District Court vacated the October 30, 2017 trial date in the
18 Fitzsimmons Action, and took the matter under submission. At the time it granted case
19 concluding sanctions and vacated the trial date pending shortly thereafter, the District Court had
20 nineteen (19) pre-trial motions under advisement.
21

22
23 The District Court subsequently entered its final written Order in the Fitzsimmons Action
24 on December 8, 2017. Thereafter, in the instant matter, the District Court issued an Order dated
25 January 22, 2018 which held that the aforementioned Order in the Fitzsimmons Action shall be
26 considered dispositive herein as "[t]he issues are identical, as are the relevant parties." Versa
27

28

¹ This matter is also pending before the Supreme Court, styled as *MDB Trucking, LLC v. Versa Products Company, Inc.*, Supreme Court Case No. 75022.

1 served MDB with Notice of Entry of the District Court's Order on February 8, 2018, and MDB's
2 timely appeal followed. In imposing case concluding sanctions pursuant to NRCP 37, the
3 District Court again failed to consider the Supreme Court's long-standing spoliation of evidence
4 jurisprudence, including the limitations on the degree of sanctions to be imposed for negligent
5 spoliation of evidence under *Bass-Davis v. Davis*.
6

7 **(J) Whether the case has previously been the subject of an appeal to or original writ**
8 **proceeding in the Supreme Court or Court of Appeals and, if so, the caption and**
9 **docket number of the prior proceeding.**

10 Not applicable.

11 **(K) Whether this appeal involves child custody or visitation:**

12 Not applicable.

13 **(L) Whether this appeal involves the possibility of settlement:**

14 Yes.

15 DATED this 8th day of March, 2018.
16

17 CLARK HILL PLLC

18 By: Colleen E. McCarty
19 NICHOLAS M. WIECZOREK
20 Nevada Bar No. 6170
21 JEREMY J. THOMPSON
22 Nevada Bar No. 12503
23 COLLEEN E. MCCARTY
24 Nevada Bar No. 13186
25 3800 Howard Hughes Parkway, Suite 500
26 Las Vegas, Nevada 89169
27 Attorneys for Defendant/Cross-Claimant
28 MDB Trucking, LLC

26 ///

27 ///

28 ///

1
2 **AFFIRMATION**

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

5 DATED this 8th day of March, 2018

6 **CLARK HILL PLLC**

7
8 By: Colleen E. McCarty
9 NICHOLAS M. WIECZOREK
10 Nevada Bar No. 6170
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18 *MDB Trucking, LLC*
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Clark Hill PLLC, and that on this 9th day of March, 2018, I served a true and correct copy of the foregoing **CASE APPEAL STATEMENT** via electronic means, by operation of the Court's electronic filing system upon each party in this case who is registered as an electronic case filing user with the Clerk, or by U.S. Mail, postage prepaid thereon, to:

JOSH COLE AICKLEN, ESQ.
DAVID B. AVAKIAN, ESQ.
PAIGE S. SHREVE, ESQ.
LEWIS BRISBOIS BISGAARD
& SMITH LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, Nevada 89118
Attorneys for Defendant
VERSA PRODUCTS COMPANY, INC.



An employee of Clark Hill PLLC

SECOND JUDICIAL DISTRICT COURT**STATE OF NEVADA****COUNTY OF WASHOE****Case History - CV16-01914****Case Description: JAMES BIBLE VS. MDB TRUCKING, LLC ETAL (D10)****Case Number: CV16-01914 Case Type: AUTO - Initially Filed On: 9/20/2016****Parties**

<u>Party Type & Name</u>	<u>Party Status</u>
JUDG - KATHLEEN DRAKULICH - D1	Party ended on: 10/11/2016 4:12:43PM
JUDG - ELLIOTT A. SATTLER - D10	Active
PLTF - JAMES BIBLE - @1298912	Active
DEFT - MDB TRUCKING, LLC - @1280259	Active
DEFT - DANIEL ANTHONY KOSKI - @1123354	Active
DEFT - VERSA PRODUCTS COMPANY, INC. - @1293676	Active
DEFT - RMC LAMAR HOLDINGS, INC. - @1298916	Active
3DEF - DRAGON ESP, LTD. - @1294651	Active
3DEF - THE MODERN GROUP GP-SUB, INC - @1294650	Active
ATTY - David B. Avakian, Esq. - 9502	Active
ATTY - Nicholas M. Wieczorek, Esq. - 6170	Active
ATTY - Colleen E. McCarty, Esq. - 13186	Active
ATTY - Brian M. Brown, Esq. - 5233	Active
ATTY - Matthew Christopher Addison, Esq. - 4201	Active
ATTY - Jeremy J. Thompson, Esq. - 12503	Active
ATTY - James F. Sloan, Esq. - 410	Party ended on: 1/26/2017 12:00:00AM
ATTY - Josh Cole Aicklen, Esq. - 7254	Active
ATTY - Thierry Vincent Barkley, Esq. - 724	Active
ATTY - Katherine F. Parks, Esq. - 6227	Active
ATTY - Paige Suozzi Shreve, Esq. - @1298913	Active
ATTY - Jessica Woelfel, Esq. - 11885	Active
ATTY - Sarah Marie Quigley, Esq. - 11518	Active

Disposed Hearings

- 1 Department: D10 -- Event: STATUS HEARING -- Scheduled Date & Time: 11/4/2016 at 09:00:00
Extra Event Text: STATUS HEARING (1 HOUR)(COURT REPORTER NEEDED)
Event Disposition: D435 - 11/4/2016
- 2 Department: D10 -- Event: STATUS HEARING -- Scheduled Date & Time: 12/16/2016 at 15:00:00

Event Disposition: D435 - 12/16/2016
- 3 Department: D10 -- Event: Request for Submission -- Scheduled Date & Time: 1/19/2017 at 16:40:00
Extra Event Text: MOTION TO WITHDRAW AS ATTORNEY OF RECORD FOR PLAINTIFF FILED 12/29/16
Event Disposition: S200 - 1/26/2017
- 4 Department: D10 -- Event: Request for Submission -- Scheduled Date & Time: 6/6/2017 at 16:05:00
Extra Event Text: DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT AGAIN
Event Disposition: S200 - 6/28/2017

- 5 Department: D10 -- Event: Request for Submission -- Scheduled Date & Time: 7/17/2017 at 17:00:00
Extra Event Text: DEFENDANT/CROSS CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST
Event Disposition: S200 - 8/1/2017
- 6 Department: D10 -- Event: Request for Submission -- Scheduled Date & Time: 8/3/2017 at 16:14:00
Extra Event Text: VERSA PRODUCTS COMPANY, INC'S MOTION FOR PROTECTIVE ORDER REGARDING PRODUCTION OF TRADE SECRET DOCUMENTS /
Event Disposition: S200 - 8/9/2017
- 7 Department: D10 -- Event: Request for Submission -- Scheduled Date & Time: 12/12/2017 at 15:54:00
Extra Event Text: MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 3
Event Disposition: S200 - 1/22/2018
- 8 Department: D10 -- Event: PRE-TRIAL CONFERENCE -- Scheduled Date & Time: 6/8/2018 at 09:00:00
Extra Event Text: PRETRIAL CONFERENCE (JURY TRIAL SET FOR JULY 30, 2018)(1/2 HOUR)
Event Disposition: D870 - 12/5/2017
- 9 Department: D10 -- Event: TRIAL - JURY -- Scheduled Date & Time: 7/30/2018 at 08:30:00
Extra Event Text: NO. 1 SETTING-JURY TRIAL-PERSONAL INJURY MATTER (10 DAYS)
Event Disposition: D870 - 12/5/2017

Actions

- | | <u>Filing Date</u> | <u>-</u> | <u>Docket Code & Description</u> |
|----|--------------------|----------|--|
| 1 | 9/20/2016 | - | \$1380 - \$Change of Venue - Accepting
Additional Text: CHANGE OF VENUE FROM TENTH JUDICIAL DISTRICT COURT, CHURCHILL COUNTY |
| 2 | 9/20/2016 | - | PAYRC - **Payment Receipted
Additional Text: A Payment of -\$260.00 was made on receipt DCDC552940. |
| 3 | 9/20/2016 | - | COV - **Civil Cover Sheet
<i>No additional text exists for this entry.</i> |
| 4 | 9/20/2016 | - | 1375 - Certified Copy of Docket
<i>No additional text exists for this entry.</i> |
| 5 | 9/20/2016 | - | 1425 - Complaint - Civil
<i>No additional text exists for this entry.</i> |
| 6 | 9/20/2016 | - | 1130 - Answer ...
Additional Text: DEFENDANT/CROSS-CLAIMANT VERSA PRODUCTS COMPANY, INC.'S ANSWER TO PLAINTIFF JAMES BIBLE'S COMPLAINT AND CROSS CLAIM AGAINST MDB TRUCKING, LLC; DANIEL ANTHONY KOSKI; AND DOES I-X, INCLUSIVE |
| 7 | 9/20/2016 | - | 1817 - Initial Appear. Fee Disclosure
<i>No additional text exists for this entry.</i> |
| 8 | 9/20/2016 | - | 1580 - Demand for Jury
<i>No additional text exists for this entry.</i> |
| 9 | 9/20/2016 | - | 1475 - Consent ...
Additional Text: CONSENT TO SERVICE BY FACSIMILE TRANSMISSION |
| 10 | 9/20/2016 | - | 4085 - Summons Filed
<i>No additional text exists for this entry.</i> |

- 11 9/20/2016 - 4085 - Summons Filed
No additional text exists for this entry.
- 12 9/20/2016 - 1130 - Answer ...
Additional Text: ANSWER TO COMPLAINT
- 13 9/20/2016 - 4180 - Third Party Complaint
No additional text exists for this entry.
- 14 9/20/2016 - 1575 - Demand for Change of Venue
No additional text exists for this entry.
- 15 9/20/2016 - 1500 - Crossclaim
Additional Text: MDB TRUCKING, LLC'S CROSSCLAIM AGAINST RMC LAMAR HOLDINGS, INC. (fka RANCH MANUFACTURING COMPANY) AND VERSA PRODUCTS COMPANY, INC.
- 16 9/21/2016 - 2030 - Mtn for Change of Venue
No additional text exists for this entry.
- 17 9/21/2016 - 2501 - Non-Opposition ...
Additional Text: NON-OPPOSITION TO MOTION FOR CHANGE OF VENUE
- 18 9/21/2016 - 1130 - Answer ...
Additional Text: RMC LAMAR HOLDINGS, INC.'S ANSWER TO COMPLAINT
- 19 9/21/2016 - 1130 - Answer ...
Additional Text: RMC LAMAR HOLDINGS, INC.'S ANSWER TO CROSS-CLAIM
- 20 9/21/2016 - 1040 - Affidavit of Mailing
No additional text exists for this entry.
- 21 9/21/2016 - 2315 - Mtn to Dismiss ...
Additional Text: 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)
- 22 9/21/2016 - JF - **First Day Jury Fees Deposit
Additional Text: Bond ID: JF-16-00364; Total Bond Amount: \$320.00.

Bond Code, JF, Receipted for: SITE DEFINED TRUST DEPOSIT, on 21-SEP-2016 in the amount of \$320.00 on case ID CV16-01914.
- 23 9/21/2016 - 1312 - Case Assignment Notification
Additional Text: CHANGE OF VENUE FROM TENTH JUDICIAL DISTRICT COURT, CHURCHILL COUNTY - Transaction 5718048 - Approved By: NOREVIEW : 09-21-2016:10:13:59
- 24 9/21/2016 - NEF - Proof of Electronic Service
Additional Text: Transaction 5718052 - Approved By: NOREVIEW : 09-21-2016:10:15:00
- 25 9/26/2016 - 2645 - Opposition to Mtn ...
Additional Text: OPPOSITION TO CROSS-DEFENDANT'S [VERSA PRODUCTS COMPANY, INC.] MOTIONS TO DISMISS - Transaction 5725521 - Approved By: TBRITTON : 09-26-2016:14:33:02
- 26 9/26/2016 - NEF - Proof of Electronic Service
Additional Text: Transaction 5725970 - Approved By: NOREVIEW : 09-26-2016:14:34:13
- 27 9/28/2016 - 3795 - Reply...
Additional Text: CROSS-DEFENDANT VERSA PRODUCTS COMPNAY, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIMANT MDB TRUCKING, LLC'S THIRD CAUSE OF AXCTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5) - Transaction 5730737 - Approved By: YVILORIA : 09-28-2016:14:34:27

- 28 9/28/2016 - NEF - Proof of Electronic Service
Additional Text: Transaction 5731014 - Approved By: NOREVIEW : 09-28-2016:14:35:30
- 29 10/10/2016 - 3370 - Order ...
Additional Text: [CONSOLIDATING CASE INTO CV15-02410 - ks] - Transaction 5749854 - Approved By: NOREVIEW : 10-10-2016:16:46:27
- 30 10/10/2016 - NEF - Proof of Electronic Service
Additional Text: Transaction 5749865 - Approved By: NOREVIEW : 10-10-2016:16:47:37
- 31 10/11/2016 - 1485 - Corrected Judgment or Ord
Additional Text: Transaction 5750347 - Approved By: NOREVIEW : 10-11-2016:09:50:47
- 32 10/11/2016 - NEF - Proof of Electronic Service
Additional Text: Transaction 5750359 - Approved By: NOREVIEW : 10-11-2016:09:51:50
- 33 10/11/2016 - 3242 - Ord Setting Hearing
Additional Text: ORDER SETTING JOINT STATUS HEARING FOR NOVEMBER 4, 2016, AT 9:00 A.M. - Transaction 5751823 - Approved By: NOREVIEW : 10-11-2016:15:35:22
- 34 10/11/2016 - NEF - Proof of Electronic Service
Additional Text: Transaction 5751832 - Approved By: NOREVIEW : 10-11-2016:15:37:50
- 35 11/4/2016 - MIN - ***Minutes
Additional Text: 11/4/16 - STATUS HRG - Transaction 5791809 - Approved By: NOREVIEW : 11-04-2016:13:19:54
- 36 11/4/2016 - NEF - Proof of Electronic Service
Additional Text: Transaction 5791811 - Approved By: NOREVIEW : 11-04-2016:13:21:07
- 37 11/23/2016 - 4050 - Stipulation ...
Additional Text: To Dismiss MDB Trucking, LLC's Cross-Claim for Implied Indemnity - Transaction 5820927 - Approved By: PMSEWELL : 11-23-2016:09:49:21
- 38 11/23/2016 - NEF - Proof of Electronic Service
Additional Text: Transaction 5820945 - Approved By: NOREVIEW : 11-23-2016:09:50:17
- 39 12/16/2016 - 2610 - Notice ...
Additional Text: Joint Discovery Plan & Proposed Scheduling Order - Transaction 5859435 - Approved By: CSULEZIC : 12-16-2016:15:11:03
- 40 12/16/2016 - NEF - Proof of Electronic Service
Additional Text: Transaction 5859631 - Approved By: NOREVIEW : 12-16-2016:15:12:05
- 41 12/16/2016 - MIN - ***Minutes
Additional Text: 12/16/16 - STATUS HRG - Transaction 5859921 - Approved By: NOREVIEW : 12-16-2016:17:15:36
- 42 12/16/2016 - NEF - Proof of Electronic Service
Additional Text: Transaction 5859925 - Approved By: NOREVIEW : 12-16-2016:17:16:36
- 43 12/29/2016 - 2490 - Motion ...
Additional Text: MOTION TO WITHDRAW AS ATTORNEY OF RECORD - Transaction 5877170 - Approved By: TBRITTON : 12-29-2016:15:26:09
- 44 12/29/2016 - NEF - Proof of Electronic Service
Additional Text: Transaction 5877279 - Approved By: NOREVIEW : 12-29-2016:15:29:38
- 45 1/19/2017 - 3860 - Request for Submission

Additional Text: MOTION TO WITHDRAW AS ATTORNEY OF RECORD FOR PLAINTIFF FILED 12/29/16 - Transaction 5906518 -

Approved By: CSULEZIC : 01-19-2017:16:37:28

PARTY SUBMITTING: JAMES SLOAN, ESQ

DATE SUBMITTED: 1/19/17

SUBMITTED BY: CS

DATE RECEIVED JUDGE OFFICE:

46 1/19/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 5906865 - Approved By: NOREVIEW : 01-19-2017:16:40:08

47 1/26/2017 - 3005 - Ord Withdrawal of Counsel

Additional Text: Transaction 5918584 - Approved By: NOREVIEW : 01-26-2017:13:15:34

48 1/26/2017 - S200 - Request for Submission Complet

No additional text exists for this entry.

49 1/26/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 5918587 - Approved By: NOREVIEW : 01-26-2017:13:16:24

50 1/30/2017 - 2540 - Notice of Entry of Ord

Additional Text: Transaction 5924703 - Approved By: NOREVIEW : 01-30-2017:16:48:31

51 1/30/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 5924708 - Approved By: NOREVIEW : 01-30-2017:16:49:27

52 3/30/2017 - 2520 - Notice of Appearance

Additional Text: SARAH M. QUIGLEY ESQ / PLTF JAMES BIBLE - Transaction 6026359 - Approved By: YVILORIA : 03-30-2017:16:40:25

53 3/30/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6026520 - Approved By: NOREVIEW : 03-30-2017:16:41:27

54 4/17/2017 - 3696 - Pre-Trial Order

Additional Text: Transaction 6054639 - Approved By: NOREVIEW : 04-17-2017:13:16:16

55 4/17/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6054643 - Approved By: NOREVIEW : 04-17-2017:13:17:08

56 4/20/2017 - JF - **First Day Jury Fees Deposit

Additional Text: Transaction 6062244 - Approved By: YVILORIA : 04-20-2017:14:17:56

57 4/20/2017 - 1580 - Demand for Jury

Additional Text: DEFTS DANIEL A. KOSKI & MDB TRUCKING LLC - Transaction 6062244 - Approved By: YVILORIA : 04-20-2017:14:17:56

58 4/20/2017 - PAYRC - **Payment Receipted

Additional Text: A Payment of \$320.00 was made on receipt DCDC572955.

59 4/20/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6062273 - Approved By: NOREVIEW : 04-20-2017:14:19:19

60 4/20/2017 - 3975 - Statement ...

Additional Text: DEFENDANT MDB TRUCKING LLC'S NRCP 7.1 CORPORATE DISCLOSURE STATEMENT - Transaction 6062373 - Approved By: YVILORIA : 04-20-2017:14:44:58

61 4/20/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6062437 - Approved By: NOREVIEW : 04-20-2017:14:45:55

- 62 4/25/2017 - 2529 - Notice of Early Case Conferenc
Additional Text: Transaction 6069381 - Approved By: NOREVIEW : 04-25-2017:15:25:37
- 63 4/25/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6069386 - Approved By: NOREVIEW : 04-25-2017:15:26:42
- 64 4/28/2017 - 1250E - Application for Setting eFile
Additional Text: FOR PRETRIAL CONFERENCE ON JUNE 8, 2018, AT 9:00 A.M. AND JURY TRIAL ON JULY 30, 2018, AT 8:30 A.M. - Transaction 6074708 - Approved By: NOREVIEW : 04-28-2017:10:59:00
- 65 4/28/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6074719 - Approved By: NOREVIEW : 04-28-2017:11:00:19
- 66 5/3/2017 - \$2200 - \$Mtn for Summary Judgment
Additional Text: DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT/CROSS-CLAIMANT/THIRD-PARTY PLAINTIFF/CROSS-DEFENDANT MDB TRUCKING LLC'S CROSS-C LAIMS - Transaction 6082213 - Approved By: YVILORIA : 05-03-2017:13:30:13
- 67 5/3/2017 - PAYRC - **Payment Receipted
Additional Text: A Payment of \$200.00 was made on receipt DCDC574152.
- 68 5/3/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6082266 - Approved By: NOREVIEW : 05-03-2017:13:31:08
- 69 5/4/2017 - 2610 - Notice ...
Additional Text: of Association of Counsel - MCDONALD CARANO, LLP ASSOCIATES WITH GREENBERG TRAURIG, LLP FOR THE MODERN GROUP GP-SUB, INC. AND DRAGON ESP, LTD. - Transaction 6084556 - Approved By: PMSEWELL : 05-04-2017:13:44:49
- 70 5/4/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6084710 - Approved By: NOREVIEW : 05-04-2017:13:45:53
- 71 5/12/2017 - 2165 - Mtn for Protective Ord
Additional Text: DEFENDANT/CROSSCLAIMANT/ CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR PROTECTIVE ORDER REGARDING PRODUCTION OF TRADE SECRET DOCUMENTS AND INFORMATION ORAL ARGUMENT REQUESTED - Transaction 6097430 - Approved By: PMSEWELL : 05-12-2017:09:16:08
- 72 5/12/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6097561 - Approved By: NOREVIEW : 05-12-2017:09:17:03
- 73 5/15/2017 - 2475 - Mtn to Strike...
Additional Text: DFX: NO INDEX OF EXHIBITS - 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 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION - Transaction 6100490 - Approved By: YVILORIA : 05-15-2017:13:27:03
- 74 5/15/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6100512 - Approved By: NOREVIEW : 05-15-2017:13:27:57
- 75 5/15/2017 - 1650 - Errata...
Additional Text: 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 - Transaction 6100946 - Approved By: PMSEWELL : 05-15-2017:15:48:13
- 76 5/15/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6101091 - Approved By: NOREVIEW : 05-15-2017:15:49:28
- 77 5/16/2017 - 1650 - Errata...
Additional Text: ERRATA TO DEFENDANT/CROSSCLAIMANT/ CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSSCLAIMANT/ CROSS-DEFENDANT MOB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 37; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION - Transaction 6101524 - Approved By: TBRIITON : 05-16-2017:09:20:19

- 78 5/16/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6101761 - Approved By: NOREVIEW : 05-16-2017:09:21:19
- 79 6/6/2017 - 3860 - Request for Submission
Additional Text: DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT/CROSS-CLAIMANT/THIRD-PARTY PLAINTIFF/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-C LAIM (PAPER ORDER NOT PROVIDED) - Transaction 6135045 - Approved By: TBRITTON : 06-06-2017:15:59:54
PARTY SUBMITTING: JOSH C. AICKLEN, ESQ.
DATE SUBMITTED: JUNE 6, 2017
SUBMITTED BY: TBRITTON
DATE RECEIVED JUDGE OFFICE:
- 80 6/6/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6135440 - Approved By: NOREVIEW : 06-06-2017:16:00:52
- 81 6/28/2017 - 3105 - Ord Granting ...
Additional Text: ORDER GRANTING MDB'S JOINT MOTION FOR CONTINUANCE AS TO CROSS DEFENDANTS VERSA'S MOTIONS FOR SUMMARY JUDGMENT - Transaction 6170923 - Approved By: NOREVIEW : 06-28-2017:12:05:12
PARTY SUBMITTING: JOSH AICKLEN ESQ
DATE SUBMITTED: 8/03/17
SUBMITTED BY: CS
DATE RECEIVED JUDGE OFFICE:
- 82 6/28/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6170924 - Approved By: NOREVIEW : 06-28-2017:12:06:01
- 83 6/28/2017 - S200 - Request for Submission Complet
No additional text exists for this entry.
- 84 7/7/2017 - 2610 - Notice ...
Additional Text: NOTICE OF ASSOCIATION OF COUNSEL - MORRIS POLICH & PURDY LLP / MDB TRUCKING, LLC AND DANIEL KOSKI - Transaction 6184204 - Approved By: TBRITTON : 07-07-2017:14:20:41
- 85 7/7/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6184582 - Approved By: NOREVIEW : 07-07-2017:14:21:49
- 86 7/7/2017 - 2645 - Opposition to Mtn ...
Additional Text: MDB Oppositon to Versa Motion for Summary Judgment - Transaction 6185381 - Approved By: CSULEZIC : 07-10-2017 :09:35:28
- 87 7/10/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6185688 - Approved By: NOREVIEW : 07-10-2017:09:36:26
- 88 7/17/2017 - 3860 - Request for Submission
Additional Text: Transaction 6199533 - Approved By: SWOLFE : 07-17-2017:17:01:15
DOCUMENT TITLE: DEFENDANT/CROSS CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT AGANIST DEFENDANT/CROSS-CLAIMANT/CROSS DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIMS (NO ORDER PROVIDED)
PARTY SUBMITTING: NICHOLAS M WIECZOREK, ESQ
DATE SUBMITTED: 7/17/17
SUBMITTED BY: SWOLFE
DATE RECEIVED JUDGE OFFICE:
- 89 7/17/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6200151 - Approved By: NOREVIEW : 07-17-2017:17:02:03
- 90 7/20/2017 - 2610 - Notice ...
Additional Text: NOTICE of Firm Name Change - Transaction 6206348 - Approved By: CSULEZIC : 07-20-2017:15:00:11

- 91 7/20/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6206518 - Approved By: NOREVIEW : 07-20-2017:15:01:11
- 92 8/1/2017 - 3347 - Ord to Set
Additional Text: ORDER TO SET HEARING ON MOTION FOR SUMMARY JUDGMENT - Transaction 6225344 - Approved By: NOREVIEW : 08-01-2017:10:57:02
- 93 8/1/2017 - S200 - Request for Submission Complet
Additional Text: PARTIES WILL SET HEARING
- 94 8/1/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6225353 - Approved By: NOREVIEW : 08-01-2017:10:58:01
- 95 8/3/2017 - 3860 - Request for Submission
Additional Text: VERSA PRODUCTS COMPANY, INC.'S MOTION FOR PROTECTIVE ORDER REGARDING PRODUCTION FO TRADE SECRET DOCUMENTS AND INFORMATION FILED May 12, 2017 - Transaction 6231340 - Approved By: CSULEZIC : 08-03-2017:14:59:26
- 96 8/3/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6231504 - Approved By: NOREVIEW : 08-03-2017:15:00:39
- 97 8/4/2017 - 2630 - Objection to ...
Additional Text: MDB TRUCKING LLC'S OBJECTION TO VERSA PRODUCTS COMPANY, INC'S REQUEST FOR SUBMISSION AND ALTERNATIVE REQUEST FOR JUDICIAL NOTICE - Transaction 6234183 - Approved By: YVILORIA : 08-07-2017:08:15:38
- 98 8/7/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6234345 - Approved By: NOREVIEW : 08-07-2017:08:16:35
- 99 8/9/2017 - 3370 - Order ...
Additional Text: ORDER STAYING DECISION ON MOTION FOR PROTECTIVE ORDER - Transaction 6240670 - Approved By: NOREVIEW : 08-09-2017:15:16:19
- 100 8/9/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6240674 - Approved By: NOREVIEW : 08-09-2017:15:17:19
- 101 8/9/2017 - S200 - Request for Submission Complet
No additional text exists for this entry.
- 102 12/5/2017 - 3990 - Stip & Ord Dismiss W/Prejudice
Additional Text: Transaction 6423847 - Approved By: NOREVIEW : 12-05-2017:13:38:34
- 103 12/5/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6423849 - Approved By: NOREVIEW : 12-05-2017:13:39:35
- 104 12/5/2017 - F120 - Stipulated Dismissal
No additional text exists for this entry.
- 105 12/5/2017 - 2990 - Ord Return of Jury Fees
Additional Text: Transaction 6424407 - Approved By: NOREVIEW : 12-05-2017:15:36:57
- 106 12/5/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6424412 - Approved By: NOREVIEW : 12-05-2017:15:37:55
- 107 12/5/2017 - 2990 - Ord Return of Jury Fees
Additional Text: Transaction 6424413 - Approved By: NOREVIEW : 12-05-2017:15:38:35

- 108 12/5/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6424416 - Approved By: NOREVIEW : 12-05-2017:15:39:36
- 109 12/6/2017 - CHECK - **Trust Disbursement
Additional Text: A Disbursement of \$320.00 on Check Number 33701
- 110 12/6/2017 - CHECK - **Trust Disbursement
Additional Text: A Disbursement of \$320.00 on Check Number 33709
- 111 12/12/2017 - 3860 - Request for Submission
Additional Text: - Transaction 6435952 - Approved By: PMSEWELL : 12-12-2017:15:52:08
DOCUMENT TITLE: 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 (NO ORDER PROVIDED)
PARTY SUBMITTING: JOSH AICKLEN, ESQ.
DATE SUBMITTED: DECEMBER 12, 2017
SUBMITTED BY: PMSEWELL
DATE RECEIVED JUDGE OFFICE:
- 112 12/12/2017 - NEF - Proof of Electronic Service
Additional Text: Transaction 6436049 - Approved By: NOREVIEW : 12-12-2017:15:53:07
- 113 1/22/2018 - 3060 - Ord Granting Mtn ...
Additional Text: ORDER GRANTING MOTION TO STRIKE MDB'S CROSS CLAIM; CROSS CLAIM DISMISSED - Transaction 6492531 - Approved By: NOREVIEW : 01-22-2018:16:11:33
- 114 1/22/2018 - S200 - Request for Submission Complet
No additional text exists for this entry.
- 115 1/22/2018 - NEF - Proof of Electronic Service
Additional Text: Transaction 6492544 - Approved By: NOREVIEW : 01-22-2018:16:13:00
- 116 2/8/2018 - 2540 - Notice of Entry of Ord
Additional Text: Transaction 6522573 - Approved By: NOREVIEW : 02-08-2018:13:15:17
- 117 2/8/2018 - NEF - Proof of Electronic Service
Additional Text: Transaction 6522577 - Approved By: NOREVIEW : 02-08-2018:13:16:07
- 118 2/9/2018 - 1950 - Memorandum of Costs
Additional Text: CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS - Transaction 6524896 - Approved By: YVILORIA : 02-09-2018:11:57:58
- 119 2/9/2018 - NEF - Proof of Electronic Service
Additional Text: Transaction 6525059 - Approved By: NOREVIEW : 02-09-2018:11:58:58
- 120 2/9/2018 - 2010 - Mtn for Attorney's Fee
Additional Text: CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 - Transaction 6525131 - Approved By: CSULEZIC : 02-09-2018:12:32:56
- 121 2/9/2018 - NEF - Proof of Electronic Service
Additional Text: Transaction 6525203 - Approved By: NOREVIEW : 02-09-2018:12:34:02
- 122 2/20/2018 - 2430 - Mtn to Retax Costs
Additional Text: MOTION TO RETAX AND SETTLE VERSA VERIFIED MEMORANDUM OF COSTS - Transaction 6539636 - Approved By: PMSEWELL : 02-20-2018:14:18:18
- 123 2/20/2018 - NEF - Proof of Electronic Service
Additional Text: Transaction 6540042 - Approved By: NOREVIEW : 02-20-2018:14:19:21

- 124 3/1/2018 - 2645 - Opposition to Mtn ...
Additional Text: CROSS-CLAIMANT MDB TRUCKING LLC'S OPPOSITION TO CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 - Transaction 6557197 - Approved By: YVILORIA : 03-01-2018:15:33:54
- 125 3/1/2018 - NEF - Proof of Electronic Service
Additional Text: Transaction 6557536 - Approved By: NOREVIEW : 03-01-2018:15:34:57
- 126 3/8/2018 - 2645 - Opposition to Mtn ...
Additional Text: DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S OPPOSITION TO CROSS-CLAIMANT MDB TRUCKING LLC'S MOTION TO RETAX AND SETTLE COSTS - Transaction 6567742 - Approved By: YVILORIA : 03-08-2018:13:25:02
- 127 3/8/2018 - NEF - Proof of Electronic Service
Additional Text: Transaction 6567770 - Approved By: NOREVIEW : 03-08-2018:13:25:52
- 128 3/8/2018 - \$2515 - \$Notice/Appeal Supreme Court
Additional Text: Transaction 6568356 - Approved By: YVILORIA : 03-08-2018:15:20:31
- 129 3/8/2018 - SAB - **Supreme Court Appeal Bond
Additional Text: Transaction 6568359 - Approved By: YVILORIA : 03-08-2018:15:29:50
- 130 3/8/2018 - 1310 - Case Appeal Statement
Additional Text: Transaction 6568372 - Approved By: YVILORIA : 03-08-2018:15:22:30
- 131 3/8/2018 - PAYRC - **Payment Receipted
Additional Text: A Payment of \$34.00 was made on receipt DCDC602923.
- 132 3/8/2018 - NEF - Proof of Electronic Service
Additional Text: Transaction 6568504 - Approved By: NOREVIEW : 03-08-2018:15:21:26
- 133 3/8/2018 - NEF - Proof of Electronic Service
Additional Text: Transaction 6568514 - Approved By: NOREVIEW : 03-08-2018:15:23:16
- 134 3/8/2018 - PAYRC - **Payment Receipted
Additional Text: A Payment of \$500.00 was made on receipt DCDC602928.
- 135 3/8/2018 - NEF - Proof of Electronic Service
Additional Text: Transaction 6568537 - Approved By: NOREVIEW : 03-08-2018:15:30:48
- 136 3/8/2018 - 1350 - Certificate of Clerk
Additional Text: CERTIFICATE OF CLERK AND TRANSMITTAL - NOTICE OF APPEAL - Transaction 6568901 - Approved By: NOREVIEW : 03-08-2018:16:38:55
- 137 3/8/2018 - NEF - Proof of Electronic Service
Additional Text: Transaction 6568909 - Approved By: NOREVIEW : 03-08-2018:16:39:57

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JAMES BIBLE,

Plaintiff,

Case No. CV16-01914

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

Presently before the Court is 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 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on May 15, 2017. Defendant/Cross-Claimant MDB TRUCKING, LLC ("MDB") did not file an Opposition to the Motion.¹ See WDCR 12(2). The Motion was submitted for the Court's consideration on December 12, 2017.

This case arises from a personal injury action. A COMPLAINT was filed by plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015 ("the Fitzsimmons Action"). The Fitzsimmons Action was assigned Second Judicial District Court case number CV15-02349.

¹ The issues presented in the Motion were fully briefed in FITZSIMMONS, et al. v. MDB TRUCKING, LLC, et al., CV15-02349.

1 Numerous other plaintiffs were joined into the Fitzsimmons Action. Two additional cases were filed
2 and prosecuted outside of the Fitzsimmons Action: the instant case and GENEVA M. REMMERDE
3 v. MDB TRUCKING, LLC et al., CV16-00976 (“the Remmerde Action”). The instant action was
4 filed on September 20, 2016. The Remmerde Action was filed May 2, 2016. It is alleged in all three
5 actions that on July 7, 2014, Defendant Daniel Anthony Koski (“Koski”), while driving a truck for
6 MDB, negligently spilled a load of gravel into the roadway. The spilled gravel caused the driving
7 plaintiffs to lose control of their vehicles and numerous accidents occurred resulting in the three
8 separate cases. The plaintiffs sustained physical and emotional injuries as a result of the accidents.
9 In response to the complaint filed in the instant action, MDB filed a THIRD-PARTY COMPLAINT
10 (“the MDB Cross-Claim”) September 20, 2016. The MDB Cross-Claim had two causes of action
11 relative to Versa: Implied Indemnification and Contribution.² MDB alleges it was not Koski’s
12 negligence that caused the gravel to spill; rather, the spill was caused by the “unreasonably
13 dangerous and defective” design and manufacture of the trailer that held the gravel. The MDB
14 Cross-Claim, 4:3-5. Therefore, MDB brought the Cross-Claim against the manufacturers of the
15 trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which
16 would, “activate inadvertently allowing the gates to open and release the load [of gravel] carried by
17 the trailer.” The MDB Cross-Claim, 4:6-8. MDB also claims there were safer alternatives available
18 to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed to provide
19 appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim, 4:12-15.

20 The Motion is the same as the motion practice in the Fitzsimmons Action and the Remmerde
21 Action. The issues are identical, as are the relevant parties. The Court issued an ORDER (“the
22 December Order”) on December 8, 2017, in the Fitzsimmons Action. The December Order
23 conducted a thorough analysis of the issue presented in the Motion. *See generally Young v. Johnny*
24 *Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), and NRCP 37. The Court found in the

26 ² Versa filed CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS CROSS-
27 CLAIMANT MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO
28 NRCP 12(B)(5) (“the MTD”) on September 21, 2016. A Stipulation was filed on November 23, 2016, agreeing to
dismiss MDB’s Cross-Claim for Implied Indemnity. The only remaining cause of action alleged by MDB against Versa
is for Contribution.

1 December Order case concluding sanctions were an appropriate sanction for MDB's spoliation of
2 critical evidence. The Court finds a restatement of the December Order is unnecessary in the instant
3 action. Given the indistinguishable issues the Court attaches hereto and incorporates herein as
4 EXHIBIT A the December Order which shall be considered dispositive of the issue raised in the
5 Motion.³

6 It is hereby **ORDERED** DEFENDANT/CROSS CLAIMANT/CROSS-DEFENDANT
7 VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-
8 CLAIMANT/CROSS DEFENDANT MDB TRUCKING, LLC's CROSS-CLAIM PURSUANT TO
9 NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION is
10 **GRANTED**. MDB TRUCKING, LLC'S CROSS-CLAIM is **DISMISSED**.

11 DATED this 22 day of January, 2018.

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13 ELLIOTT A. SATTLER
14 District Judge
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28 ³ The Court notes D.C.R. 13(3) states, "[f]ailure of the opposing party to serve and file his written opposition may be construed as an admission that the motion is meritorious and a consent to granting the same." Versa has not moved to have the Motion granted under this standard.

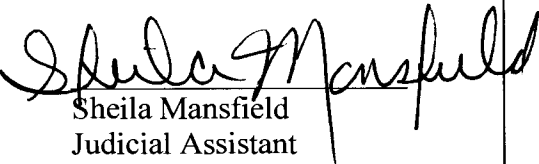
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2
3
4 **CERTIFICATE OF MAILING**

5 Pursuant to NRCp 5(b), I certify that I am an employee of the Second Judicial District Court
6 of the State of Nevada, County of Washoe; that on this ____ day of January, 2018, I deposited in
7 the County mailing system for postage and mailing with the United States Postal Service in Reno,
8 Nevada, a true copy of the attached document addressed to:
9
10
11
12

13 **CERTIFICATE OF ELECTRONIC SERVICE**

14 I hereby certify that I am an employee of the Second Judicial District Court of the State of
15 Nevada, in and for the County of Washoe; that on the 22 day of January, 2018, I electronically
16 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice
17 of electronic filing to the following:
18

19 MATTHEW ADDISON, ESQ.
20 JOSH AICKLEN, ESQ.
21 KATHERINE PARKS, ESQ.
22 BRIAN BROWN, ESQ.
23 THIERRY BARKLEY, ESQ.
24 SARAH QUIGLEY, ESQ.
25 JESSICA WOELFEL, ESQ.
26 JACOB BUNDICK, ESQ.
27 NICHOLAS M. WIECZOREK, ESQ.
28


Sheila Mansfield
Judicial Assistant

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EXHIBIT “A”

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

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

Presently before the Court is 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 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS, INC. ("Versa") on May 15, 2017.¹ Defendant/Cross-Claimant, MDB Trucking, LLC ("MDB") filed MDB'S OPPOSITION TO VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE AND/OR SPOILIATION INSTRUCTIONS ("the Opposition") on June 2, 2017. Versa filed DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA

¹ Versa filed the 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 ("the Errata") on May 5, 2017. The Errata clarifies Versa is bringing the Motion pursuant to NRCP 37, not NRCP 35 as noted in the caption to the Motion. The reference to NRCP 35 is made only in the caption to the pleading; therefore, the Court presumes it is merely a typographical error.

1 PRODUCTS COMPANY, INC.'S REPLY TO MDB'S OPPOSITION TO VERSA PRODUCTS
2 COMPANY, INC.'S MOTION TO STRIKE MDB TRUCKING, LLC'S CROSS-CLAIM
3 PURSUANT TO NRCP 37; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY
4 INSTRUCTION ("the Reply") on June 12, 2017, and contemporaneously submitted the matter for
5 the Court's consideration. The Court entered an ORDER on August 1, 2017, setting the Motion
6 for oral argument.² The Court heard the arguments of counsel on August 29, 2017, and took the
7 matter under submission.

8 The Court felt case concluding sanctions were a potential discovery sanction for the alleged
9 abuse following the oral argument. An evidentiary hearing affording both sides the opportunity to
10 present witnesses was required given this conclusion. *See generally, Nevada Power v. Fluor Illinois*,
11 108 Nev. 638, 837 P.2d 1354 (1992). The Court entered an ORDER ("the September Order") on
12 September 22, 2017, directing the parties to set the matter for an evidentiary hearing. The
13 evidentiary hearing was conducted on October 13, 2017 ("the October Hearing"). Versa called one
14 expert witness, Scott Palmer ("Palmer"), and one lay witness Garrick Mitchell ("Mitchell") at the
15 October Hearing. MDB called one expert witness, Dr. David Bosch ("Dr. Bosch"), and two lay
16 witnesses, Patrick Bigby ("Bigby") and Erik Anderson ("Anderson") at the October Hearing. The
17 Court admitted numerous exhibits during the October Hearing. The Court permitted the parties to
18 argue their respective positions. Trial was scheduled to begin on October 30, 2017. The Court was
19 aware of its obligation to make detailed findings of facts and conclusions of law. Further, the Court
20 wanted to fulfill these obligations in a thoughtful manner and in writing pursuant to the mandates of
21 the Nevada Supreme Court. The Court informed the parties the Motion would be granted and
22 vacated the trial date. The Court took the matter under submission. This written ORDER follows.

23 This case arises from a personal injury action. A COMPLAINT ("the Complaint") was filed
24 by Plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015. Numerous
25 other plaintiffs were joined into the Fitzsimmons case. It is alleged on July 7, 2014, Defendant
26 Daniel Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a load of
27

28 ² There were numerous other pre-trial motions scheduled for oral argument on the same date.

1 gravel into the roadway. The spilled gravel caused the driving plaintiffs to lose control of their
2 vehicles and numerous accidents occurred. The plaintiffs sustained physical and emotional injuries
3 as a result of the accidents. In response to the Complaint, MDB filed a THIRD-PARTY
4 COMPLAINT ("the MDB Cross-Claim") June 15, 2016. The MDB Cross-Claim had two causes
5 of action relative to Versa: Implied Indemnification and Contribution.³ MDB alleges it was not
6 Koski's negligence that caused the gravel to spill; rather, the spill was caused by the "unreasonably
7 dangerous and defective" design and manufacture of the trailer that held the gravel. The MDB
8 Cross-Claim, 3:5-7. Therefore, MDB brought the Cross-Claim against the manufacturers of the
9 trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which
10 would, "activate inadvertently allowing the gates to open and release the load [of gravel] carried by
11 the trailer." The MDB Cross-Claim, 3:10-11. MDB also claims there were safer alternatives
12 available to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed
13 to provide appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim,
14 3:12-18.

15 Versa has denied its product is defective and further denies any responsibility for the spilling
16 of the gravel. Additionally, Versa filed DEFENDANT/CROSS-CLAIMANT VERSA PRODUCTS
17 COMPANY, INC.'S ANSWER TO PLAINTIFFS ERNEST BRUCE FITZSIMMONS AND
18 CAROL FITZSIMMONS' FIRST AMENDED COMPLAINT AND CROSS-CLAIM AGAINST
19 MDB TRUCKING, LLC; DANIEL ANTHONY KOSKI; AND DOES I-X, INCLUSIVE ("the
20 Versa Cross-Claim") on June 29, 2016. The Versa Cross-Claim alleges one cause of action against
21 MDB: Contribution. Versa alleges MDB "negligently operated, maintained, owned, serviced and/or
22 entrusted the subject trailer...." The Versa Cross-Claim, 10:17-18. Versa and MDB are the only
23 remaining parties in this litigation: all of the plaintiffs consolidated into these proceedings, and all
24 of the other defendants have been dismissed and/or settled.

25
26
27 ³ Versa filed CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S MOTION TO DISMISS CROSS-
28 CLAIMANT, MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT
TO NRCF 12(B)(5) ("the MTD") on June 27, 2016. The Court granted the MTD on October 19, 2016. The only
remaining cause of action alleged by MDB against Versa is for Contribution.

1 The Motion avers MDB has destroyed or disposed of critical evidence which directly
2 impacts Versa's ability to represent itself in the instant litigation. Specifically, the Motion contends
3 after the accident MDB continued to use the truck in question; failed to keep the truck in the same
4 condition as it was on the day in question; serviced the truck routinely; repaired and replaced the
5 electrical systems that control the solenoid which operated the Versa valve; and failed to take steps
6 to preserve this critical evidence knowing litigation was highly probable. The Opposition contends
7 there has been no spoliation of evidence in this case. Further, the Opposition posits there was
8 nothing more than routine maintenance done on the trailer; therefore, Versa's ability to defend itself
9 has not been impaired.

10 The Motion avers MDB had a duty to preserve the discarded electrical systems in
11 anticipation of the underlying action. In *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648,
12 651, 747 P.2d 911, 914 (1987), the Nevada Supreme Court held, "even where an action has not been
13 commenced and there is only a potential for litigation, the litigant is under a duty to preserve the
14 evidence which it knows or reasonably should know is relevant to the action." The Motion
15 concludes the appropriate sanction for the failure to preserve this crucial evidence should be
16 dismissal of the entire action. See generally *Young v. Johnny Ribeiro Building Inc.*, 106 Nev. 88,
17 787 P.2d 777 (1990), and NRCP 37.

18 Discovery sanctions are within the discretion of the trial court. See *Stubli v. Big D Int'l*
19 *Trucks, Inc.*, 107 Nev. 309, 312, 810 P.2d 785, 787 (1991), and *Kelly Broadcasting v. Sovereign*
20 *Broadcast*, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980). "Generally, sanctions may only be
21 imposed where there has been willful noncompliance with the court's order, or where the adversary
22 process has been halted by the actions of the unresponsive party." *Zenith*, 103 Nev. at 651, 747
23 P.2d at 913 (citing *Finkelman v. Clover Jewelers Blvd. Inc.*, 91 Nev. 146, 147, 532 P.2d 608, 609
24 (1975) and *Skeen v. Valley Bank of Nevada*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973)).
25 *Accord GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995).
26 Dismissal of an entire action with prejudice is a dramatic punishment for a discovery abuse. The
27 Nevada Supreme Court cautions district courts the use of such a Draconian sanction should be
28 approached with caution. "The dismissal of a case, based upon a discovery abuse such as the

1 destruction or loss of evidence, ‘should be used only in extreme situations; if less drastic sanctions
2 are available, they should be utilized.’” *GNLV*, 111 Nev. at 870, 900 P.2d at 326 (citation omitted).
3 Additionally, the *Nevada Power* Court held it was an abuse of discretion for a district court to grant
4 case concluding sanctions without an evidentiary hearing. The *Nevada Power* Court held the party
5 facing a case terminating sanction needs an “opportunity to present witnesses or to cross-examine
6 [the movant] or their experts with regard to [the discovery violations].” *Nevada Power*, 108 Nev. at
7 646, 837 P.2d at 1360. *Cf. Bahena v. Goodyear Tire & Rubber Co. (“Bahena II”)*, 126 Nev. 606,
8 612, 245 P.3d 1182, 1186 (2010).

9 The Nevada Rules of Civil Procedure provide that a party who fails to comply with discovery
10 orders or rules can be sanctioned for that failure. NRCP 37(b). Sanctions against a party can be
11 graduated in severity and can include: designation of facts to be taken as established; refusal to allow
12 the disobedient party to support or oppose designated claims or defenses; prohibition of the
13 offending party from introducing designated matters in evidence; an order striking out pleadings or
14 parts thereof or dismissing the action; or rendering a judgment by default against the disobedient
15 party. NRCP 37(b)(2). Case concluding sanctions need not be preceded by other less severe
16 sanction. *GNLV*, 111 Nev. at 870, 900 P.2d at 325. A disobedient party can also be required to pay
17 the reasonable expenses, including attorney fees caused by the failure. NRCP 37(b)(2)(E).

18 The *Young* Court adopted an eight factor analysis (“the *Young* factors”) district courts must
19 go through if they feel a discovery abuse is so severe it warrants dismissal. The *Young* Court held,
20 “every order of dismissal with prejudice as a discovery sanction be supported by an express, careful
21 and preferably written explanation of the court’s analysis of the pertinent factors.” *Young*, 106 Nev.
22 at 93, 787 P.2d at 780. The *Young* factors are as follows: (1) the degree of willfulness of the
23 offending party; (2) the extent to which the non-offending party would be prejudiced by a lesser
24 sanction; (3) the severity of the sanction of dismissal relative to the severity of the discovery abuse;
25 (4) whether any evidence has been irreparably lost; (5) the feasibility and fairness of less severe
26 sanctions; (6) the policy favoring adjudication on the merits; (7) whether sanctions unfairly operate
27 to penalize a party for the misconduct of his or her attorney; and (8) the need to deter parties and
28 future litigants from similar abuses. *Id.* In discovery abuse situations where possible case-

1 concluding sanctions are warranted, the trial judge has discretion in deciding which factors are to be
2 considered on a “case-by-case” basis. *Bahena II*, 126 Nev. at 610, 245 P.3d at 1185 (citing *Higgs v.*
3 *State*, 126 Nev. 1, 17, 222 P.3d 648, 658 (2010)). The *Young* factor list is not exhaustive and the
4 Court is not required to find that all factors are present prior to making a finding. “Fundamental
5 notions of fairness and due process require that discovery sanctions be just and . . . relate to the
6 specific conduct at issue.” *GNLV*, 111 Nev. at 870, 900 P.2d at 325.

7 The Nevada Supreme Court has addressed orders of case concluding sanctions on numerous
8 occasions. The *Zenith* Court found a party whose agent destroyed and/or lost a television prior to
9 the commencement of the underlying action, after the party’s expert had an opportunity to test the
10 television and opine on the television as a cause of a fire, had committed a discovery abuse
11 warranting case concluding sanctions.⁴ The *Zenith* Court held, “[t]he actions [of the appellant] had
12 the effect of reserving to itself all expert testimony based upon examination of the television set.”
13 103 Nev. at 652, 747 P.2d at 914.

14 The *Kelly Broadcasting* Court held the striking of an answer and entry of a judgment in favor
15 of the non-offending party (Kelly) was an appropriate sanction for failing to complete discovery by
16 the offending party (Sovereign). *Kelly Broadcasting*, 96 Nev. at 192, 606 P.2d at 1092. Sovereign
17 argued a lesser sanction of striking only the affirmative defense to which the interrogatories applied
18 was a more appropriate sanction. The *Kelly Broadcasting* Court disagreed, noting “[t]he question is
19 not whether this court would as an original matter have entered a default judgment as a sanction for
20 violating a discovery rule; it is whether the trial court abused its discretion in so doing. We do not
21 find an abuse of discretion in this case.” *Id.*

22 The *Stubli* Court upheld case concluding sanctions when the appellant or its agents failed to
23 preserve evidence related to the cause of a trucking accident. The respondent provided expert
24 affidavits which posited the cause of the accident could have been something other than the
25 respondent’s work on the truck. “The experts further asserted that appellant’s failure to preserve the
26

27 ⁴ The trial court actually struck the appellant’s expert witness from the trial. The appellant indicated it had insufficient
28 evidence to proceed without its expert and the trial court granted summary judgment in favor of the respondent. *Zenith*,
103 Nev. at 651, 747 P.2d at 913.

1 [truck and its components] had made it impossible for respondents to establish their defense theory.”
2 *Stubli*, 107 Nev. at 312, 810 P.2d at 787. *See also*, *North American Properties v. McCarran*
3 *International Airport*, 2016 WL 699864 (Nev. Supreme Court 2016). *But see*, *GNLV, supra* (case
4 concluding sanctions not appropriate when other evidence existed which experts could use to assist
5 in their analysis including the statements of witnesses who saw the spoliated evidence).

6 The Court has considered the arguments of counsel, all of the pleadings on file in the instant
7 action, the testimony of the witnesses at the evidentiary hearing, the exhibits admitted at that
8 hearing, and the relevant case law discussed, *supra*. The issue presented in the case is actually very
9 narrow: MDB claims it was a defective solenoid manufactured by Versa that malfunctioned causing
10 a truck full of gravel to dump onto one of the two busiest roadways in Washoe County. MDB does
11 not dispute the electrical systems were not preserved in anticipation of the trial or potential testing.
12 MDB took no steps to warn its employees to keep any components in the electrical system should
13 they need to be replaced. There are no pictures taken of the electrical system or the components.
14 MDB’s employees cannot testify to the condition of the components when they were replaced.
15 Versa avers there were other potential causes of the malfunction, including an electrical issue. Versa
16 further contends it cannot present these issues to the jury in support of its defense because the
17 evidence no longer exists. The Court reviews the *Young* factors as follows:

18 *I. Willfulness*

19
20 The first *Young* factor is willfulness. In *Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598,
21 599 (1984), the Nevada Supreme Court found the term willful, “implies simply a purpose or
22 willingness to commit the act or to make the omission in question. The word does not require in its
23 meaning any intent to violate law, or to injure another, or to acquire any advantage.” Willfulness
24 may be found when a party fails to provide discovery and such failure is not due to an inability on
25 the offending party’s part. *Havas v Bank of Nevada*, 96 Nev. 567, 570, 613 P.2d 706, 708 (1980).
26 The Nevada Supreme Court has not opined that it is necessary to establish wrongful intent to
27 establish willfulness.
28

1 Clearly MDB should have anticipated extensive litigation as a result of the incident that
2 occurred on July 7, 2014. This was not a mere “slip and fall” where the putative plaintiff initially
3 claims he/she is not injured only later to come back and sue. There were numerous accidents and
4 injuries as a result of collisions occurring on a highway. MDB, or its counsel, had to know there
5 would be litigation as a result of these events. The Court heard no testimony that MDB took any
6 steps to preserve the truck or trailer in any way. There was no testimony indicating memorialization
7 of the condition of the vehicle was ever contemplated by anyone at MDB. On the contrary, the truck
8 and trailer continued to be in use after the events of July 7, 2014. It was subject to “routine”
9 maintenance. The Court may have condoned the continued use of the truck, and even the trailer, had
10 there been *any* steps taken to preserve the appearance of these items as they existed at the time of the
11 event, or prior to the “routine” maintenance. The memorialization did not occur.

12 It would have been simple to inform the shop staff to photograph the truck and trailer on or
13 about July 7, 2014. It would have required minimal effort to inform the shop staff to preserve any
14 electrical parts taken off the truck or trailer during the maintenance. If these steps had been taken
15 the Court would be looking at this case through the prism of *GNLV* because both parties would have
16 had alternative ways to prove or disprove their theory of the case. Based on the inaction of MDB in
17 preserving or memorializing the condition of the truck and trailer the Court must view this case
18 through the prism of *Stubli* and *Zenith*: MDB alone has the ability to call experts to support their
19 position. Versa’s expert has a theory he can neither confirm nor refute based on the loss of the
20 electrical components. The Court does not find MDB intentionally disposed of the components in
21 order to harm Versa, nor were MDB’s employees acting with any malevolence; however, the Court
22 does find MDB is complicit of benign neglect and indifference to the needs of Versa regarding
23 discovery in this action.

24 *II. The possibility of a lesser sanction*

25
26 The second *Young* factor is possible prejudice to Versa if a lesser sanction were imposed.
27 The Court would consider lesser sanctions, including an adverse inference instruction, a rebuttable
28 presumption instruction, and the striking of the MDB’s expert as alternative sanctions. The Court

1 does not find any of these sanctions strike the appropriate balance between MDB's actions and the
2 harm imposed on Versa's case. Should the Court strike Dr. Bosch from being a witness at the trial
3 MDB would be in the same position as the appellant in *Zenith*: unable to prove its case given the
4 lack of expert testimony and subject to a motion for summary judgment. This outcome would be a
5 patent waste of limited judicial resources and of the jury's time. The Court does not find an adverse
6 inference instruction pursuant to NRS 47.250(3) and *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d
7 103 (2006), is appropriate under the circumstances before the Court.⁵ As noted by the *Zenith* Court,
8 "[t]he actions of [MDB] had the effect of reserving to itself all expert testimony based upon
9 examination of the [electronic components]. Any adverse presumption which the court might have
10 ordered as a sanction for the spoliation of evidence would have paled next to the testimony of the
11 expert witness." *Zenith*, 103 Nev. at 652, 747 P.2d at 914. Additionally, an adverse inference
12 instruction requires an "intent to harm another party through the destruction and not simply the
13 intent to destroy evidence." *Bass-Davis*, 122 Nev. at 448, 134 P.3d at 106. The Court does not find
14 MDB intended to harm Versa by destroying or disposing of the electrical components; therefore, it
15 could not give this instruction. The Court can conceive of no other sanction which would be
16 appropriate under these circumstances.

17
18 ⁵ At oral argument counsel for MDB stated:

19 Recently the Nevada Supreme Court has declared that the Bass versus Davis case is the prevailing case on the
20 spoliation of evidence, not Young versus Ribeiro. And in a case called Walmart Stores, Inc. versus the Eighth
21 Judicial District, No. 48488, January 31st of 2008, the court said, "It is an abuse of discretion for a district court
22 not to consider the case of Bass-Davis versus Davis when imposing sanctions pursuant to Nevada Rule of Civil
23 Procedure 37 for an allegation of spoliation."

24 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING, 208:15-24. The citation to an unpublished
25 disposition of the Nevada Supreme Court issued prior to January 1, 2016, is a violation of ADKT 0504 and SCR 123
26 (the SCR was repealed by the ADKT). The Court found it difficult to believe the Nevada Supreme Court would make
27 such a sweeping change to firmly established precedent as that represented by counsel in an unpublished disposition.
28 The Court was unfamiliar with *Walmart*, so the Court endeavored to familiarize itself with the case. The Court looked
up the case number provided by counsel on the Nevada Supreme Court webpage. Troublingly, the Court was unable to
verify the veracity of the proposition proffered by MDB *because the parties agreed to dismiss their proceedings and
the Nevada Supreme Court vacated the order upon which MDB makes its argument*. The Nevada Supreme Court had
granted a Writ of Mandamus on January 31, 2008; however, it withdrew that order on a subsequent date. The Nevada
Supreme Court webpage indicates the parties contacted the Supreme Court on February 2, 2008, and indicated they had
settled their case. The Nevada Supreme Court entered an order vacating the January 31, 2008, order upon which MDB
relies and "den[ie]d the petition as moot" on February 13, 2008. In short, the "case" MDB relies upon does not even
exist.

1 III. The severity of the sanction of dismissal relative to the severity of the discovery abuse

2
3 “The dismissal of a case, based upon a discovery abuse . . . should be used only in extreme
4 situations; if less drastic sanctions are available, they should be utilized.” *GNLV*, 111 Nev. at 870,
5 900 P.2d at 325 (*citing Young*, 106 Nev. at 92, 787 P.2d at 779-80). The Court is keenly aware that
6 granting the Motion effectively ends the case. The Court does not take this action lightly. The *only*
7 issue in this case is why the door to the trailer opened causing the gravel to dump into the roadway.
8 The Court finds MDB’s disposal of the electronic components without memorializing them in any
9 way effectively halted the adversarial process. It left all of the “cards” in MDB’s hands and left
10 Versa with nothing other than a theory it could neither prove nor disprove. MDB could simply rely
11 on its expert during trial and argue Versa had no proof of its theory and the theory itself was
12 preposterous. This is the position taken by MDB at the evidentiary hearing. Versa is left with no
13 way of verifying its theory of the case.

14 Counsel for MDB directed the Court’s attention at the evidentiary hearing to the strength of
15 their expert (Dr. Bosch) and the weakness of Versa’s expert (Palmer). Counsel further emphasized
16 the lack of plausibility of the Palmer’s conclusions that it could have been an abraded wire which
17 caused an electrical failure rather than some issue with the solenoid or the Versa valve. The Court is
18 not convinced this should be the deciding factor in resolving the issue of case concluding sanctions
19 for the following reasons:

- 20 1. MDB’s own employee (the same employees who serviced the truck and trailer)
21 acknowledged at the evidentiary hearing that the abrasions Palmer referenced actually do
22 occur;⁶ and

23
24 ⁶ Q: Okay. You also mentioned that you want to replace those cords, the seven and the – the seven-conductor and the
25 four-conductor cords because they will get cut on the deck plate, they will get abraded, they will become cracked; is that
26 correct?

27 A: I have seen that, yes.

28 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING (testimony of Patrick Bigby), 154:1-6.

1 2. Dr. Bosch had to acknowledge, though grudgingly and with great circumspection, that it
2 was possible though highly unlikely the electrical system could have caused the valve in
3 question to open.⁷

4 The Court's decision regarding the issue presented in the Motion is not predicated on who has
5 the "stronger case" or the "better expert" at the evidentiary hearing. If this were the analysis the
6 Court would agree with MDB: Dr. Bosch is a very credible witness and it is likely MDB has the
7 more compelling argument to present to the jury. This, however, is not the issue. The issue in the
8 Court's analysis is MDB's actions deprived Versa of *any* ability to prove its case: the adversarial
9 process was stymied by MDB regarding the most critical pieces of evidence. Had MDB's witnesses
10 testified the abrasions never occur, or abrasions were photographed and/or documented and none
11 existed on this truck, the Court's conclusion may have been different. Here we know it *could have*
12 occurred as Palmer suggested.

13 IV. Whether evidence is irreparably lost

14 Clearly the relevant evidence is lost. The employees of MDB testified at the evidentiary
15 hearing the electronic components had been thrown away.

16 V. The feasibility and fairness of a less severe sanctions

17 The Court discussed the possibility of less severe sanctions in section II. The same analysis
18 applies here. There does not appear to be any sanction short of case concluding sanctions which
19 would be appropriate under the circumstances of this case. The Court also acknowledges that
20 progressive sanctions are not always necessary. The circumstances presented in the Motion are
21 unique and the most severe sanction is appropriate.
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25 ⁷Q: Is there any scenario under which current from the seven-prong cord having contact with the four-prong cord could
26 open the versa valve?

27 A: Anything is possible, but it's highly improbable in this case.

28 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING (testimony of Dr. Bosch), 161:5-9. Dr. Bosch's
 testimony clearly established he did not believe there was a short or other electrical failure that caused the valve to open.

1
2 VI. The policy favoring adjudication on the merits; and

3 VII. The need to deter parties and future litigants from similar abuse
4

5 The Court considers the sixth and eighth *Young* factors together. Nevada has a strong policy,
6 and the Court firmly believes, that cases should be adjudicated on their merits. See, *Scrimmer v. Dist.*
7 *Court*, 116 Nev. 507, 516-517, 998 P.2d 1190, 1196 (2000). See also, *Kahn v. Orme*, 108 Nev. 510,
8 516, 835 P.2d 790, 794 (1992). Further, there is a need to deter litigants from abusing the discovery
9 process established by Nevada law. When a party repeatedly and continuously engaged in discovery
10 misconduct the policy of adjudicating cases on the merits is not furthered by a lesser sanction.
11 *Foster*, 126 Nev. at 65, 227 P.3d at 1048. The case *sub judice* is not one of systemic discovery
12 abuse. However, the Court concludes to allow the case to go forward as it is currently postured
13 would be the antithesis of allowing it to proceed “on the merits.” The merits of Versa’s case would
14 not be able to be evaluated by the jury because Versa could not test its theory on the actual
15 components. The jury would be left to guess about what may have occurred rather than weigh the
16 competing theories presented. MDB would have an overwhelmingly unfair advantage given its
17 action.

18 The Court balances the laudable policy of trial on the merits against the need to deter future
19 litigants from abusing the discovery process. The Court turns back to the *Zenith* Court’s direction to
20 all potential litigants regarding their duty to preserve evidence. The *Zenith* Court stated, “[i]t would
21 be unreasonable to allow litigants, by destroying physical evidence prior to a request for production,
22 to sidestep the district court’s power to enforce the rules of discovery.” *Id.* 103 Nev. at 651, 747
23 P.2d at 913. Accord, *Colfer v. Harmon*, 108 Nev. 363, 832 P.2d 383 (1992). To allow this case to
24 go forward, when the only evidence which may have supported Versa’s defense was in the sole
25 possession of MDB and MDB did nothing to preserve or document that evidence, would set a
26 dangerous precedent to similarly situated parties in the future. It would also be antithetical to a
27 potential litigant’s obligation to preserve the very evidence it may have to produce during discovery.
28

1 When the Court balances the sixth and eighth *Young* factor it concludes dismissal of MDB's claims
2 against Versa are appropriate.

3 *VIII. Whether sanctions unfairly operate to penalize a party for the misconduct of his or her*
4 *attorney*

5
6 There is no evidence to show MDB's counsel directed MDB to destroy or fail to memorialize
7 the evidence in question. The Court finds this factor to be inapplicable to the *Young* analysis.

8 "Fundamental notions of fairness and due process require that discovery sanctions be just
9 and . . . relate to the specific conduct at issue." *GNLV*, 111 Nev. at 870, 900 P.2d at 325 (citing
10 *Young*, 106 Nev. at 92, 787 P.2d at 779-80). The Court recognizes that discovery sanctions should
11 be related to the specific conduct at issue. The discovery abuse in this case crippled one party's
12 ability to present its case. Weighing all eight factors above the Court concludes the dismissal of the
13 MDB Cross-Claim is appropriate. Due to the severity of MDB's discovery abuse there are no lesser
14 sanctions that are suitable.

15 It is hereby **ORDERED** DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT
16 VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-
17 CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO
18 NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION is
19 **GRANTED**. MDB TRUCKING, LLC'S CROSS-CLAIM is DISMISSED.

20 DATED this 8 day of December, 2017.

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23 ELLIOTT A. SATTLER
24 District Judge
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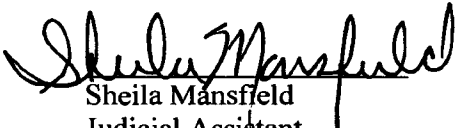
CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of December, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 8 day of December, 2017, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

JOSH AICKLEN, ESQ.
MATTHEW ADDISON, ESQ.
KATHERINE PARKS, ESQ.
BRIAN BROWN, ESQ.
THIERRY BARKLEY, ESQ.
SARAH QUIGLEY, ESQ.
JESSICA WOELFEL, ESQ.
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9 PRODUCTS COMPANY, INC.

10
11 DISTRICT COURT
12 WASHOE COUNTY, NEVADA

13 JAMES BIBLE,
14 Plaintiff,
15 vs.
16 MDB TRUCKING, LLC, et. al.
17 Defendants.
18 AND ALL RELATED CASES.

Case No. CV16-01914
Dept. 10
NOTICE OF ENTRY

21 TO: ALL INTERESTED PARTIES:

22 ///

23 ///

1 PLEASE TAKE NOTICE that the Order was entered by the above-entitled Court on
2 the 22nd day of January, 2018, a copy of which is attached hereto as **Exhibit 1** and made
3 a part hereof.

4 **AFFIRMATION**

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

7 DATED this 8th day of February, 2018

8 Respectfully Submitted,

9 LEWIS BRISBOIS BISGAARD & SMITH LLP
10
11

12 By /s/ Josh Cole Aicklen

13 JOSH COLE AICKLEN
Nevada Bar No. 007254

14 DAVID B. AVAKIAN
Nevada Bar No. 009502

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17 Attorneys for Defendant/Cross-Defendant
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LIST OF EXHIBITS

Exhibit 1 Order

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2018 a true and correct copy of **NOTICE OF ENTRY** was served via the Court's electronic e-filing system addressed as follows:

Matthew C. Addison, Esq.
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DANIEL ANTHONY KOSKI

/s/ Susan Kingsbury
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT 1

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

JAMES BIBLE,

Plaintiff,

Case No. CV16-01914

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

Presently before the Court is 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 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on May 15, 2017. Defendant/Cross-Claimant MDB TRUCKING, LLC ("MDB") did not file an Opposition to the Motion.¹ See WDCR 12(2). The Motion was submitted for the Court's consideration on December 12, 2017.

This case arises from a personal injury action. A COMPLAINT was filed by plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015 ("the Fitzsimmons Action"). The Fitzsimmons Action was assigned Second Judicial District Court case number CV15-02349.

¹ The issues presented in the Motion were fully briefed in FITZSIMMONS, et al. v. MDB TRUCKING, LLC, et al., CV15-02349.

1 Numerous other plaintiffs were joined into the Fitzsimmons Action. Two additional cases were filed
2 and prosecuted outside of the Fitzsimmons Action: the instant case and GENEVA M. REMMERDE
3 v. MDB TRUCKING, LLC et al., CV16-00976 (“the Remmerde Action”). The instant action was
4 filed on September 20, 2016. The Remmerde Action was filed May 2, 2016. It is alleged in all three
5 actions that on July 7, 2014, Defendant Daniel Anthony Koski (“Koski”), while driving a truck for
6 MDB, negligently spilled a load of gravel into the roadway. The spilled gravel caused the driving
7 plaintiffs to lose control of their vehicles and numerous accidents occurred resulting in the three
8 separate cases. The plaintiffs sustained physical and emotional injuries as a result of the accidents.
9 In response to the complaint filed in the instant action, MDB filed a THIRD-PARTY COMPLAINT
10 (“the MDB Cross-Claim”) September 20, 2016. The MDB Cross-Claim had two causes of action
11 relative to Versa: Implied Indemnification and Contribution.² MDB alleges it was not Koski’s
12 negligence that caused the gravel to spill; rather, the spill was caused by the “unreasonably
13 dangerous and defective” design and manufacture of the trailer that held the gravel. The MDB
14 Cross-Claim, 4:3-5. Therefore, MDB brought the Cross-Claim against the manufacturers of the
15 trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which
16 would, “activate inadvertently allowing the gates to open and release the load [of gravel] carried by
17 the trailer.” The MDB Cross-Claim, 4:6-8. MDB also claims there were safer alternatives available
18 to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed to provide
19 appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim, 4:12-15.

20 The Motion is the same as the motion practice in the Fitzsimmons Action and the Remmerde
21 Action. The issues are identical, as are the relevant parties. The Court issued an ORDER (“the
22 December Order”) on December 8, 2017, in the Fitzsimmons Action. The December Order
23 conducted a thorough analysis of the issue presented in the Motion. *See generally Young v. Johnny*
24 *Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), and NRCP 37. The Court found in the

25
26 ² Versa filed CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS CROSS-
27 CLAIMANT MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO
28 NRCP 12(B)(5) (“the MTD”) on September 21, 2016. A Stipulation was filed on November 23, 2016, agreeing to
dismiss MDB’s Cross-Claim for Implied Indemnity. The only remaining cause of action alleged by MDB against Versa
is for Contribution.

1 December Order case concluding sanctions were an appropriate sanction for MDB's spoliation of
2 critical evidence. The Court finds a restatement of the December Order is unnecessary in the instant
3 action. Given the indistinguishable issues the Court attaches hereto and incorporates herein as
4 EXHIBIT A the December Order which shall be considered dispositive of the issue raised in the
5 Motion.³

6 It is hereby **ORDERED** DEFENDANT/CROSS CLAIMANT/CROSS-DEFENDANT
7 VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-
8 CLAIMANT/CROSS DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO
9 NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION is
10 **GRANTED**. MDB TRUCKING, LLC'S CROSS-CLAIM is **DISMISSED**.

11 DATED this 22 day of January, 2018.

12 
13 ELLIOTT A. SATTLER
14 District Judge
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27 ³ The Court notes D.C.R. 13(3) states, "[f]ailure of the opposing party to serve and file his written opposition may be
28 construed as an admission that the motion is meritorious and a consent to granting the same." Versa has not moved to
have the Motion granted under this standard.

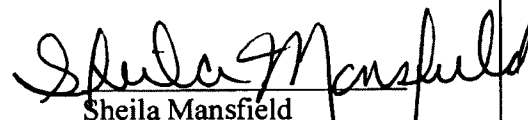
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4 **CERTIFICATE OF MAILING**

5 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
6 of the State of Nevada, County of Washoe; that on this ____ day of January, 2018, I deposited in
7 the County mailing system for postage and mailing with the United States Postal Service in Reno,
8 Nevada, a true copy of the attached document addressed to:
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10
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12

13 **CERTIFICATE OF ELECTRONIC SERVICE**

14 I hereby certify that I am an employee of the Second Judicial District Court of the State of
15 Nevada, in and for the County of Washoe; that on the 22 day of January, 2018, I electronically
16 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice
17 of electronic filing to the following:
18

19 MATTHEW ADDISON, ESQ.
20 JOSH AICKLEN, ESQ.
21 KATHERINE PARKS, ESQ.
22 BRIAN BROWN, ESQ.
23 THIERRY BARKLEY, ESQ.
24 SARAH QUIGLEY, ESQ.
25 JESSICA WOELFEL, ESQ.
26 JACOB BUNDICK, ESQ.
27 NICHOLAS M. WIECZOREK, ESQ.
28


Sheila Mansfield
Judicial Assistant

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EXHIBIT “A”

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

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

Presently before the Court is 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 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS, INC. ("Versa") on May 15, 2017.¹ Defendant/Cross-Claimant, MDB Trucking, LLC ("MDB") filed MDB'S OPPOSITION TO VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE AND/OR SPOILIATION INSTRUCTIONS ("the Opposition") on June 2, 2017. Versa filed DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA

¹ Versa filed the 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 ("the Errata") on May 5, 2017. The Errata clarifies Versa is bringing the Motion pursuant to NRCP 37, not NRCP 35 as noted in the caption to the Motion. The reference to NRCP 35 is made only in the caption to the pleading; therefore, the Court presumes it is merely a typographical error.

1 PRODUCTS COMPANY, INC.'S REPLY TO MDB'S OPPOSITION TO VERSA PRODUCTS
2 COMPANY, INC.'S MOTION TO STRIKE MDB TRUCKING, LLC'S CROSS-CLAIM
3 PURSUANT TO NRCP 37; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY
4 INSTRUCTION ("the Reply") on June 12, 2017, and contemporaneously submitted the matter for
5 the Court's consideration. The Court entered an ORDER on August 1, 2017, setting the Motion
6 for oral argument.² The Court heard the arguments of counsel on August 29, 2017, and took the
7 matter under submission.

8 The Court felt case concluding sanctions were a potential discovery sanction for the alleged
9 abuse following the oral argument. An evidentiary hearing affording both sides the opportunity to
10 present witnesses was required given this conclusion. *See generally, Nevada Power v. Fluor Illinois*,
11 108 Nev. 638, 837 P.2d 1354 (1992). The Court entered an ORDER ("the September Order") on
12 September 22, 2017, directing the parties to set the matter for an evidentiary hearing. The
13 evidentiary hearing was conducted on October 13, 2017 ("the October Hearing"). Versa called one
14 expert witness, Scott Palmer ("Palmer"), and one lay witness Garrick Mitchell ("Mitchell") at the
15 October Hearing. MDB called one expert witness, Dr. David Bosch ("Dr. Bosch"), and two lay
16 witnesses, Patrick Bigby ("Bigby") and Erik Anderson ("Anderson") at the October Hearing. The
17 Court admitted numerous exhibits during the October Hearing. The Court permitted the parties to
18 argue their respective positions. Trial was scheduled to begin on October 30, 2017. The Court was
19 aware of its obligation to make detailed findings of facts and conclusions of law. Further, the Court
20 wanted to fulfill these obligations in a thoughtful manner and in writing pursuant to the mandates of
21 the Nevada Supreme Court. The Court informed the parties the Motion would be granted and
22 vacated the trial date. The Court took the matter under submission. This written ORDER follows.

23 This case arises from a personal injury action. A COMPLAINT ("the Complaint") was filed
24 by Plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015. Numerous
25 other plaintiffs were joined into the Fitzsimmons case. It is alleged on July 7, 2014, Defendant
26 Daniel Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a load of
27

28 ² There were numerous other pre-trial motions scheduled for oral argument on the same date.

1 gravel into the roadway. The spilled gravel caused the driving plaintiffs to lose control of their
2 vehicles and numerous accidents occurred. The plaintiffs sustained physical and emotional injuries
3 as a result of the accidents. In response to the Complaint, MDB filed a THIRD-PARTY
4 COMPLAINT ("the MDB Cross-Claim") June 15, 2016. The MDB Cross-Claim had two causes
5 of action relative to Versa: Implied Indemnification and Contribution.³ MDB alleges it was not
6 Koski's negligence that caused the gravel to spill; rather, the spill was caused by the "unreasonably
7 dangerous and defective" design and manufacture of the trailer that held the gravel. The MDB
8 Cross-Claim, 3:5-7. Therefore, MDB brought the Cross-Claim against the manufacturers of the
9 trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which
10 would, "activate inadvertently allowing the gates to open and release the load [of gravel] carried by
11 the trailer." The MDB Cross-Claim, 3:10-11. MDB also claims there were safer alternatives
12 available to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed
13 to provide appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim,
14 3:12-18.

15 Versa has denied its product is defective and further denies any responsibility for the spilling
16 of the gravel. Additionally, Versa filed DEFENDANT/CROSS-CLAIMANT VERSA PRODUCTS
17 COMPANY, INC.'S ANSWER TO PLAINTIFFS ERNEST BRUCE FITZSIMMONS AND
18 CAROL FITZSIMMONS' FIRST AMENDED COMPLAINT AND CROSS-CLAIM AGAINST
19 MDB TRUCKING, LLC; DANIEL ANTHONY KOSKI; AND DOES I-X, INCLUSIVE ("the
20 Versa Cross-Claim") on June 29, 2016. The Versa Cross-Claim alleges one cause of action against
21 MDB: Contribution. Versa alleges MDB "negligently operated, maintained, owned, serviced and/or
22 entrusted the subject trailer...." The Versa Cross-Claim, 10:17-18. Versa and MDB are the only
23 remaining parties in this litigation: all of the plaintiffs consolidated into these proceedings, and all
24 of the other defendants have been dismissed and/or settled.

25
26
27 ³ Versa filed CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S MOTION TO DISMISS CROSS-
28 CLAIMANT, MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT
TO NRCP 12(B)(5) ("the MTD") on June 27, 2016. The Court granted the MTD on October 19, 2016. The only
remaining cause of action alleged by MDB against Versa is for Contribution.

1 The Motion avers MDB has destroyed or disposed of critical evidence which directly
2 impacts Versa's ability to represent itself in the instant litigation. Specifically, the Motion contends
3 after the accident MDB continued to use the truck in question; failed to keep the truck in the same
4 condition as it was on the day in question; serviced the truck routinely; repaired and replaced the
5 electrical systems that control the solenoid which operated the Versa valve; and failed to take steps
6 to preserve this critical evidence knowing litigation was highly probable. The Opposition contends
7 there has been no spoliation of evidence in this case. Further, the Opposition posits there was
8 nothing more than routine maintenance done on the trailer; therefore, Versa's ability to defend itself
9 has not been impaired.

10 The Motion avers MDB had a duty to preserve the discarded electrical systems in
11 anticipation of the underlying action. In *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648,
12 651, 747 P.2d 911, 914 (1987), the Nevada Supreme Court held, "even where an action has not been
13 commenced and there is only a potential for litigation, the litigant is under a duty to preserve the
14 evidence which it knows or reasonably should know is relevant to the action." The Motion
15 concludes the appropriate sanction for the failure to preserve this crucial evidence should be
16 dismissal of the entire action. See generally *Young v. Johnny Ribeiro Building Inc.*, 106 Nev. 88,
17 787 P.2d 777 (1990), and NRCP 37.

18 Discovery sanctions are within the discretion of the trial court. See *Stubli v. Big D Int'l*
19 *Trucks, Inc.*, 107 Nev. 309, 312, 810 P.2d 785, 787 (1991), and *Kelly Broadcasting v. Sovereign*
20 *Broadcast*, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980). "Generally, sanctions may only be
21 imposed where there has been willful noncompliance with the court's order, or where the adversary
22 process has been halted by the actions of the unresponsive party." *Zenith*, 103 Nev. at 651, 747
23 P.2d at 913 (citing *Finkelman v. Clover Jewelers Blvd. Inc.*, 91 Nev. 146, 147, 532 P.2d 608, 609
24 (1975) and *Skeen v. Valley Bank of Nevada*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973)).
25 *Accord GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995).
26 Dismissal of an entire action with prejudice is a dramatic punishment for a discovery abuse. The
27 Nevada Supreme Court cautions district courts the use of such a Draconian sanction should be
28 approached with caution. "The dismissal of a case, based upon a discovery abuse such as the

1 destruction or loss of evidence, 'should be used only in extreme situations; if less drastic sanctions
2 are available, they should be utilized.'" *GNLV*, 111 Nev. at 870, 900 P.2d at 326 (citation omitted).
3 Additionally, the *Nevada Power* Court held it was an abuse of discretion for a district court to grant
4 case concluding sanctions without an evidentiary hearing. The *Nevada Power* Court held the party
5 facing a case terminating sanction needs an "opportunity to present witnesses or to cross-examine
6 [the movant] or their experts with regard to [the discovery violations]." *Nevada Power*, 108 Nev. at
7 646, 837 P.2d at 1360. *Cf. Bahena v. Goodyear Tire & Rubber Co. ("Bahena II")*, 126 Nev. 606,
8 612, 245 P.3d 1182, 1186 (2010).

9 The Nevada Rules of Civil Procedure provide that a party who fails to comply with discovery
10 orders or rules can be sanctioned for that failure. NRCP 37(b). Sanctions against a party can be
11 graduated in severity and can include: designation of facts to be taken as established; refusal to allow
12 the disobedient party to support or oppose designated claims or defenses; prohibition of the
13 offending party from introducing designated matters in evidence; an order striking out pleadings or
14 parts thereof or dismissing the action; or rendering a judgment by default against the disobedient
15 party. NRCP 37(b)(2). Case concluding sanctions need not be preceded by other less severe
16 sanction. *GNLV*, 111 Nev. at 870, 900 P.2d at 325. A disobedient party can also be required to pay
17 the reasonable expenses, including attorney fees caused by the failure. NRCP 37(b)(2)(E).

18 The *Young* Court adopted an eight factor analysis ("the *Young* factors") district courts must
19 go through if they feel a discovery abuse is so severe it warrants dismissal. The *Young* Court held,
20 "every order of dismissal with prejudice as a discovery sanction be supported by an express, careful
21 and preferably written explanation of the court's analysis of the pertinent factors." *Young*, 106 Nev.
22 at 93, 787 P.2d at 780. The *Young* factors are as follows: (1) the degree of willfulness of the
23 offending party; (2) the extent to which the non-offending party would be prejudiced by a lesser
24 sanction; (3) the severity of the sanction of dismissal relative to the severity of the discovery abuse;
25 (4) whether any evidence has been irreparably lost; (5) the feasibility and fairness of less severe
26 sanctions; (6) the policy favoring adjudication on the merits; (7) whether sanctions unfairly operate
27 to penalize a party for the misconduct of his or her attorney; and (8) the need to deter parties and
28 future litigants from similar abuses. *Id.* In discovery abuse situations where possible case-

1 concluding sanctions are warranted, the trial judge has discretion in deciding which factors are to be
2 considered on a "case-by-case" basis. *Bahena II*, 126 Nev. at 610, 245 P.3d at 1185 (citing *Higgs v.*
3 *State*, 126 Nev. 1, 17, 222 P.3d 648, 658 (2010)). The *Young* factor list is not exhaustive and the
4 Court is not required to find that all factors are present prior to making a finding. "Fundamental
5 notions of fairness and due process require that discovery sanctions be just and . . . relate to the
6 specific conduct at issue." *GNLV*, 111 Nev. at 870, 900 P.2d at 325.

7 The Nevada Supreme Court has addressed orders of case concluding sanctions on numerous
8 occasions. The *Zenith* Court found a party whose agent destroyed and/or lost a television prior to
9 the commencement of the underlying action, after the party's expert had an opportunity to test the
10 television and opine on the television as a cause of a fire, had committed a discovery abuse
11 warranting case concluding sanctions.⁴ The *Zenith* Court held, "[t]he actions [of the appellant] had
12 the effect of reserving to itself all expert testimony based upon examination of the television set."
13 103 Nev. at 652, 747 P.2d at 914.

14 The *Kelly Broadcasting* Court held the striking of an answer and entry of a judgment in favor
15 of the non-offending party (Kelly) was an appropriate sanction for failing to complete discovery by
16 the offending party (Sovereign). *Kelly Broadcasting*, 96 Nev. at 192, 606 P.2d at 1092. Sovereign
17 argued a lesser sanction of striking only the affirmative defense to which the interrogatories applied
18 was a more appropriate sanction. The *Kelly Broadcasting* Court disagreed, noting "[t]he question is
19 not whether this court would as an original matter have entered a default judgment as a sanction for
20 violating a discovery rule; it is whether the trial court abused its discretion in so doing. We do not
21 find an abuse of discretion in this case." *Id.*

22 The *Stubli* Court upheld case concluding sanctions when the appellant or its agents failed to
23 preserve evidence related to the cause of a trucking accident. The respondent provided expert
24 affidavits which posited the cause of the accident could have been something other than the
25 respondent's work on the truck. "The experts further asserted that appellant's failure to preserve the
26

27 ⁴ The trial court actually struck the appellant's expert witness from the trial. The appellant indicated it had insufficient
28 evidence to proceed without its expert and the trial court granted summary judgment in favor of the respondent. *Zenith*,
103 Nev. at 651, 747 P.2d at 913.

1 [truck and its components] had made it impossible for respondents to establish their defense theory.”
2 *Stubli*, 107 Nev. at 312, 810 P.2d at 787. *See also*, *North American Properties v. McCarran*
3 *International Airport*, 2016 WL 699864 (Nev. Supreme Court 2016). *But see*, *GNLV, supra* (case
4 concluding sanctions not appropriate when other evidence existed which experts could use to assist
5 in their analysis including the statements of witnesses who saw the spoliated evidence).

6 The Court has considered the arguments of counsel, all of the pleadings on file in the instant
7 action, the testimony of the witnesses at the evidentiary hearing, the exhibits admitted at that
8 hearing, and the relevant case law discussed, *supra*. The issue presented in the case is actually very
9 narrow: MDB claims it was a defective solenoid manufactured by Versa that malfunctioned causing
10 a truck full of gravel to dump onto one of the two busiest roadways in Washoe County. MDB does
11 not dispute the electrical systems were not preserved in anticipation of the trial or potential testing.
12 MDB took no steps to warn its employees to keep any components in the electrical system should
13 they need to be replaced. There are no pictures taken of the electrical system or the components.
14 MDB’s employees cannot testify to the condition of the components when they were replaced.
15 Versa avers there were other potential causes of the malfunction, including an electrical issue. Versa
16 further contends it cannot present these issues to the jury in support of its defense because the
17 evidence no longer exists. The Court reviews the *Young* factors as follows:

18 *I. Willfulness*

19
20 The first *Young* factor is willfulness. In *Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598,
21 599 (1984), the Nevada Supreme Court found the term willful, “implies simply a purpose or
22 willingness to commit the act or to make the omission in question. The word does not require in its
23 meaning any intent to violate law, or to injure another, or to acquire any advantage.” Willfulness
24 may be found when a party fails to provide discovery and such failure is not due to an inability on
25 the offending party’s part. *Havas v Bank of Nevada*, 96 Nev. 567, 570, 613 P.2d 706, 708 (1980).
26 The Nevada Supreme Court has not opined that it is necessary to establish wrongful intent to
27 establish willfulness.
28

1 Clearly MDB should have anticipated extensive litigation as a result of the incident that
2 occurred on July 7, 2014. This was not a mere "slip and fall" where the putative plaintiff initially
3 claims he/she is not injured only later to come back and sue. There were numerous accidents and
4 injuries as a result of collisions occurring on a highway. MDB, or its counsel, had to know there
5 would be litigation as a result of these events. The Court heard no testimony that MDB took any
6 steps to preserve the truck or trailer in any way. There was no testimony indicating memorialization
7 of the condition of the vehicle was ever contemplated by anyone at MDB. On the contrary, the truck
8 and trailer continued to be in use after the events of July 7, 2014. It was subject to "routine"
9 maintenance. The Court may have condoned the continued use of the truck, and even the trailer, had
10 there been *any* steps taken to preserve the appearance of these items as they existed at the time of the
11 event, or prior to the "routine" maintenance. The memorialization did not occur.

12 It would have been simple to inform the shop staff to photograph the truck and trailer on or
13 about July 7, 2014. It would have required minimal effort to inform the shop staff to preserve any
14 electrical parts taken off the truck or trailer during the maintenance. If these steps had been taken
15 the Court would be looking at this case through the prism of *GNLV* because both parties would have
16 had alternative ways to prove or disprove their theory of the case. Based on the inaction of MDB in
17 preserving or memorializing the condition of the truck and trailer the Court must view this case
18 through the prism of *Stubli* and *Zenith*: MDB alone has the ability to call experts to support their
19 position. Versa's expert has a theory he can neither confirm nor refute based on the loss of the
20 electrical components. The Court does not find MDB intentionally disposed of the components in
21 order to harm Versa, nor were MDB's employees acting with any malevolence; however, the Court
22 does find MDB is complicit of benign neglect and indifference to the needs of Versa regarding
23 discovery in this action.

24 II. The possibility of a lesser sanction

25 The second *Young* factor is possible prejudice to Versa if a lesser sanction were imposed.
26 The Court would consider lesser sanctions, including an adverse inference instruction, a rebuttable
27 presumption instruction, and the striking of the MDB's expert as alternative sanctions. The Court
28

1 does not find any of these sanctions strike the appropriate balance between MDB's actions and the
2 harm imposed on Versa's case. Should the Court strike Dr. Bosch from being a witness at the trial
3 MDB would be in the same position as the appellant in *Zenith*: unable to prove its case given the
4 lack of expert testimony and subject to a motion for summary judgment. This outcome would be a
5 patent waste of limited judicial resources and of the jury's time. The Court does not find an adverse
6 inference instruction pursuant to NRS 47.250(3) and *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d
7 103 (2006), is appropriate under the circumstances before the Court.⁵ As noted by the *Zenith* Court,
8 "[t]he actions of [MDB] had the effect of reserving to itself all expert testimony based upon
9 examination of the [electronic components]. Any adverse presumption which the court might have
10 ordered as a sanction for the spoliation of evidence would have paled next to the testimony of the
11 expert witness." *Zenith*, 103 Nev. at 652, 747 P.2d at 914. Additionally, an adverse inference
12 instruction requires an "intent to harm another party through the destruction and not simply the
13 intent to destroy evidence." *Bass-Davis*, 122 Nev. at 448, 134 P.3d at 106. The Court does not find
14 MDB intended to harm Versa by destroying or disposing of the electrical components; therefore, it
15 could not give this instruction. The Court can conceive of no other sanction which would be
16 appropriate under these circumstances.

17
18 ⁵ At oral argument counsel for MDB stated:

19 Recently the Nevada Supreme Court has declared that the Bass versus Davis case is the prevailing case on the
20 spoliation of evidence, not Young versus Ribeiro. And in a case called Walmart Stores, Inc. versus the Eighth
21 Judicial District, No. 48488, January 31st of 2008, the court said, "It is an abuse of discretion for a district court
22 not to consider the case of Bass-Davis versus Davis when imposing sanctions pursuant to Nevada Rule of Civil
23 Procedure 37 for an allegation of spoliation."

24 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING, 208:15-24. The citation to an unpublished
25 disposition of the Nevada Supreme Court issued prior to January 1, 2016, is a violation of ADKT 0504 and SCR 123
26 (the SCR was repealed by the ADKT). The Court found it difficult to believe the Nevada Supreme Court would make
27 such a sweeping change to firmly established precedent as that represented by counsel in an unpublished disposition.
28 The Court was unfamiliar with *Walmart*, so the Court endeavored to familiarize itself with the case. The Court looked
29 up the case number provided by counsel on the Nevada Supreme Court webpage. Troublingly, the Court was unable to
30 verify the veracity of the proposition proffered by MDB *because the parties agreed to dismiss their proceedings and*
31 *the Nevada Supreme Court vacated the order upon which MDB makes its argument.* The Nevada Supreme Court had
32 granted a Writ of Mandamus on January 31, 2008; however, it withdrew that order on a subsequent date. The Nevada
33 Supreme Court webpage indicates the parties contacted the Supreme Court on February 2, 2008, and indicated they had
34 settled their case. The Nevada Supreme Court entered an order vacating the January 31, 2008, order upon which MDB
35 relies and "den[ie]d the petition as moot" on February 13, 2008. In short, the "case" MDB relies upon does not even
36 exist.

1 III. The severity of the sanction of dismissal relative to the severity of the discovery abuse

2
3 "The dismissal of a case, based upon a discovery abuse . . . should be used only in extreme
4 situations; if less drastic sanctions are available, they should be utilized." *GNLV*, 111 Nev. at 870,
5 900 P.2d at 325 (citing *Young*, 106 Nev. at 92, 787 P.2d at 779-80). The Court is keenly aware that
6 granting the Motion effectively ends the case. The Court does not take this action lightly. The *only*
7 issue in this case is why the door to the trailer opened causing the gravel to dump into the roadway.
8 The Court finds MDB's disposal of the electronic components without memorializing them in any
9 way effectively halted the adversarial process. It left all of the "cards" in MDB's hands and left
10 Versa with nothing other than a theory it could neither prove nor disprove. MDB could simply rely
11 on its expert during trial and argue Versa had no proof of its theory and the theory itself was
12 preposterous. This is the position taken by MDB at the evidentiary hearing. Versa is left with no
13 way of verifying its theory of the case.

14 Counsel for MDB directed the Court's attention at the evidentiary hearing to the strength of
15 their expert (Dr. Bosch) and the weakness of Versa's expert (Palmer). Counsel further emphasized
16 the lack of plausibility of the Palmer's conclusions that it could have been an abraded wire which
17 caused an electrical failure rather than some issue with the solenoid or the Versa valve. The Court is
18 not convinced this should be the deciding factor in resolving the issue of case concluding sanctions
19 for the following reasons:

- 20 1. MDB's own employee (the same employees who serviced the truck and trailer)
21 acknowledged at the evidentiary hearing that the abrasions Palmer referenced actually do
22 occur;⁶ and

23
24 ⁶ Q: Okay. You also mentioned that you want to replace those cords, the seven and the – the seven-conductor and the
25 four-conductor cords because they will get cut on the deck plate, they will get abraded, they will become cracked; is that
26 correct?

27 A: I have seen that, yes.

28 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING (testimony of Patrick Bigby), 154:1-6.

1 2. Dr. Bosch had to acknowledge, though grudgingly and with great circumspection, that it
2 was possible though highly unlikely the electrical system could have caused the valve in
question to open.⁷

3 The Court's decision regarding the issue presented in the Motion is not predicated on who has
4 the "stronger case" or the "better expert" at the evidentiary hearing. If this were the analysis the
5 Court would agree with MDB: Dr. Bosch is a very credible witness and it is likely MDB has the
6 more compelling argument to present to the jury. This, however, is not the issue. The issue in the
7 Court's analysis is MDB's actions deprived Versa of *any* ability to prove its case: the adversarial
8 process was stymied by MDB regarding the most critical pieces of evidence. Had MDB's witnesses
9 testified the abrasions never occur, or abrasions were photographed and/or documented and none
10 existed on this truck, the Court's conclusion may have been different. Here we know it *could have*
11 *occurred* as Palmer suggested.

12 IV. Whether evidence is irreparably lost

13
14 Clearly the relevant evidence is lost. The employees of MDB testified at the evidentiary
15 hearing the electronic components had been thrown away.

16 V. The feasibility and fairness of a less severe sanctions

17 The Court discussed the possibility of less severe sanctions in section II. The same analysis
18 applies here. There does not appear to be any sanction short of case concluding sanctions which
19 would be appropriate under the circumstances of this case. The Court also acknowledges that
20 progressive sanctions are not always necessary. The circumstances presented in the Motion are
21 unique and the most severe sanction is appropriate.
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26 ⁷Q: Is there any scenario under which current from the seven-prong cord having contact with the four-prong cord could
open the versa valve?

27 A: Anything is possible, but it's highly improbable in this case.

28 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING (testimony of Dr. Bosch), 161:5-9. Dr. Bosch's
testimony clearly established he did not believe there was a short or other electrical failure that caused the valve to open.

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VI. The policy favoring adjudication on the merits; and

VII. The need to deter parties and future litigants from similar abuse

The Court considers the sixth and eighth *Young* factors together. Nevada has a strong policy, and the Court firmly believes, that cases should be adjudicated on their merits. *See, Scrimmer v. Dist. Court*, 116 Nev. 507, 516-517, 998 P.2d 1190, 1196 (2000). *See also, Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992). Further, there is a need to deter litigants from abusing the discovery process established by Nevada law. When a party repeatedly and continuously engaged in discovery misconduct the policy of adjudicating cases on the merits is not furthered by a lesser sanction. *Foster*, 126 Nev. at 65, 227 P.3d at 1048. The case *sub judice* is not one of systemic discovery abuse. However, the Court concludes to allow the case to go forward as it is currently postured would be the antithesis of allowing it to proceed “on the merits.” The merits of Versa’s case would not be able to be evaluated by the jury because Versa could not test its theory on the actual components. The jury would be left to guess about what may have occurred rather than weigh the competing theories presented. MDB would have an overwhelmingly unfair advantage given its action.

The Court balances the laudable policy of trial on the merits against the need to deter future litigants from abusing the discovery process. The Court turns back to the *Zenith* Court’s direction to all potential litigants regarding their duty to preserve evidence. The *Zenith* Court stated, “[i]t would be unreasonable to allow litigants, by destroying physical evidence prior to a request for production, to sidestep the district court’s power to enforce the rules of discovery.” *Id.* 103 Nev. at 651, 747 P.2d at 913. *Accord, Colfer v. Harmon*, 108 Nev. 363, 832 P.2d 383 (1992). To allow this case to go forward, when the only evidence which may have supported Versa’s defense was in the sole possession of MDB and MDB did nothing to preserve or document that evidence, would set a dangerous precedent to similarly situated parties in the future. It would also be antithetical to a potential litigant’s obligation to preserve the very evidence it may have to produce during discovery.

1 When the Court balances the sixth and eighth *Young* factor it concludes dismissal of MDB's claims
2 against Versa are appropriate.

3 *VIII. Whether sanctions unfairly operate to penalize a party for the misconduct of his or her*
4 *attorney*

5
6 There is no evidence to show MDB's counsel directed MDB to destroy or fail to memorialize
7 the evidence in question. The Court finds this factor to be inapplicable to the *Young* analysis.

8 "Fundamental notions of fairness and due process require that discovery sanctions be just
9 and . . . relate to the specific conduct at issue." *GNLV*, 111 Nev. at 870, 900 P.2d at 325 (citing
10 *Young*, 106 Nev. at 92, 787 P.2d at 779-80). The Court recognizes that discovery sanctions should
11 be related to the specific conduct at issue. The discovery abuse in this case crippled one party's
12 ability to present its case. Weighing all eight factors above the Court concludes the dismissal of the
13 MDB Cross-Claim is appropriate. Due to the severity of MDB's discovery abuse there are no lesser
14 sanctions that are suitable.

15 It is hereby **ORDERED** DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT
16 **VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-**
17 **CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO**
18 **NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION is**
19 **GRANTED. MDB TRUCKING, LLC'S CROSS-CLAIM is DISMISSED.**

20 DATED this 8 day of December, 2017.

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23 ELLIOTT A. SATTLER
24 District Judge
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of December, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 8 day of December, 2017, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

JOSH AICKLEN, ESQ.
MATTHEW ADDISON, ESQ.
KATHERINE PARKS, ESQ.
BRIAN BROWN, ESQ.
THIERRY BARKLEY, ESQ.
SARAH QUIGLEY, ESQ.
JESSICA WOELFEL, ESQ.
JACOB BUNDICK, ESQ.
NICHOLAS WIECZOREK, ESQ.


Sheila Mansfield
Judicial Assistant

CASE NO. CV15-01337	<u>OLIVIA JOHN ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV15-02349	<u>FITZSIMMONS ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-00519	<u>JULIE KINS VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-00626	<u>CROSSLAND ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-00976	<u>GENEVA REMMERDE VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01087	<u>STATE FARM VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01335	<u>CORTHELL ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01410	<u>JOSE NACULANGGA VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01914	<u>JAMES BIBLE VS. MDB TRUCKING, LLC ETAL</u>

DATE, JUDGE
OFFICERS OF
COURT PRESENT

Page 1

APPEARANCES-HEARING

11/4/16
HONORABLE
ELLIOTT A.
SATTLER
DEPT. NO. 10
M. White
(Clerk)
L. Urmston
(Reporter)

STATUS HEARING

9:04 a.m. – Court convened.

Counsel present on behalf of the Plaintiffs:

Joseph Bradley, Esq., was present on behalf of Plaintiffs Ernest & Carol Fitzsimmons.
Sarah Quigley, Esq., was present on behalf of Plaintiffs Angela Wilt, Benjamin & Rosa Robles, Julie Kins, and Geneva Remmerde.

Terry Friedman, Esq., was present on behalf of Plaintiff Olivia John.

Craig Murphy, Esq., was present on behalf of Plaintiffs Christy & Shawn Corthell.

James Sloan, Esq., was present on behalf of Plaintiff James Bible.

Kevin Berry, Esq., was present on behalf of Plaintiffs Beverly, Patrick & Ryan Crossland.

Riley Clayton, Esq., was present on behalf of Plaintiff State Farm Mutual Auto Insurance Company.

Counsel present on behalf of the Defendants:

Brian Brown, Esq., was present on behalf of Defendants, MDB Trucking, LLC and Daniel A. Koski.

Paige Shreve, Esq., was present on behalf of Defendant Versa Products Company, Inc.

Lisa Zastrow, Esq., was present on behalf of Defendants The Modern Group GP-SUB, Inc., and Dragon ESP, Ltd.

Jessica Woelfel, Esq., was present on behalf of Defendant RMC Lamar Holdings, Inc.

Stephen Kent, Esq., was present on behalf of Defendant MDB Trucking, LLC, in CV16-01087.

Brent Harsh, Esq., was present on behalf of Defendant Vicki Meissner.

COURT reviewed the procedural history of the cases, noting that they were assigned to various departments throughout the Second Judicial District Court, and Chief Judge Flanagan decided that it would be more prudent for all cases to be handled by a single department, and therefore all cases have been transferred to this Court; and he further noted that if any other actions are filed in Washoe County as a result of the July 2014 incident, they will be assigned to Department Ten.

CASE NO. CV15-01337	<u>OLIVIA JOHN ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV15-02349	<u>FITZSIMMONS ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-00519	<u>JULIE KINS VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-00626	<u>CROSSLAND ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-00976	<u>GENEVA REMMERDE VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01087	<u>STATE FARM VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01335	<u>CORTHELL ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01410	<u>JOSE NACULANGGA VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01914	<u>JAMES BIBLE VS. MDB TRUCKING, LLC ETAL</u>

DATE, JUDGE
OFFICERS OF
COURT PRESENT

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APPEARANCES-HEARING

11/4/16
HONORABLE
ELLIOTT A.
SATTLER
DEPT. NO. 10
M. White
(Clerk)
L. Urmston
(Reporter)

STATUS HEARING

Counsel Clayton advised the Court that the State Farm case (CV16-01087) has been settled, and he will be getting settlement documents to the Court within the next couple of weeks. **COURT** excused counsel Clayton from the remainder of the hearing. Counsel Kent concurred with counsel Clayton regarding CV16-01087, however noted that he has filed a new case regarding the carriers, in which MDB Trucking is the Plaintiff, and all clients present today have been named in the new lawsuit; and he further advised the Court that it is his intention today to get the parties served, and to perhaps set up a global mediation.

At this point in the hearing, the Clerk determined that the new case number is CV16-02091, MDB Trucking, LLC etal vs. Financial Pacific Insurance Company etal, and it is assigned to Department Eight.

COURT advised the parties that his Judicial Assistant has been contacted by the Clerk, and she is working on getting CV16-02091 transferred to Department 10.

Counsel Brown advised the Court that he has not been served in CV16-01410, and therefore he is not appearing in that case.

COURT noted that no parties have been served in CV16-01410; and he further reviewed the procedural history of the cases.

Discussion ensued between the Court and counsel Bradley regarding the trial date set in CV15-02349, which was originally set for March 20, 2017, in Department Fifteen, however when the case was transferred to Department Ten, the March 20, 2017, date was vacated.

Upon questioning by the Court, counsel Bradley indicated that they would not object to some of the other cases being consolidated into their case.

Discussion ensued between the Court and respective counsel regarding consolidation of the cases.

Counsel Brown presented the Court and respective counsel with a draft of proposed discovery deadlines; and he further gave the Court information regarding the incident that occurred in these cases, which is why he believes that there will be 2 phases of discovery – first to determine why the gravel was on the road, and second to determine damages. Counsel Brown requested that the Court eventually enter an order which will guide the discovery process as the cases move forward.

CASE NO. CV15-01337	<u>OLIVIA JOHN ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV15-02349	<u>FITZSIMMONS ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-00519	<u>JULIE KINS VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-00626	<u>CROSSLAND ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-00976	<u>GENEVA REMMERDE VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01087	<u>STATE FARM VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01335	<u>CORTHELL ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01410	<u>JOSE NACULANGGA VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01914	<u>JAMES BIBLE VS. MDB TRUCKING, LLC ETAL</u>

DATE, JUDGE
OFFICERS OF
COURT PRESENT

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APPEARANCES-HEARING

11/4/16
HONORABLE
ELLIOTT A.
SATTLER
DEPT. NO. 10
M. White
(Clerk)
L. Urmston
(Reporter)

STATUS HEARING

COURT noted that he is aware that the parties were granted a preferential trial setting in CV15-02349; further discussion ensued regarding the March 20, 2017, trial date that was set in Department Fifteen, prior to the case being transferred to Department Ten. Discussion then ensued between the Court and respective counsel regarding the possibility of settlement work.

Counsel Brown indicated that the parties have been working together very well, and he suggested that the Court require them to submit a joint status report.

COURT ORDERED: A Joint Status Report shall be filed by 5:00 p.m. on Wednesday, November 16, 2016; all parties must participate in the Joint Status Report (with the exception of the Naculangga matter.)

COURT FURTHER ORDERED: The previous trial date set in CV15-02349 shall be maintained, and therefore a ten (10) day Jury Trial shall be set in CV15-02349 for March 20, 2017, at 8:30 a.m., in Department Ten.

Counsel Zastrow gave the Court information regarding the Motions to Dismiss that have been fully briefed but not submitted, noting that she is holding off on submission of the Motions as she is working on a stipulation with some of the other parties.

Counsel Murphy advised the Court that he intends to file a Motion to Consolidate in his case, CV16-01335.

Discussion ensued between the Court and respective counsel regarding an additional Status Hearing.

Counsel Zastrow noted that it is costly for her to appear in person at Status Hearings, and requested that she be allowed to be present telephonically.

COURT DENIED counsel Zastrow's request, noting that all counsel must be present in person at all future hearings.

COURT ORDERED: An additional Status Hearing is set for **December 16, 2016, at 10:00 a.m.**

10:33 a.m. – Court adjourned.

CASE NO. CV15-02349	<u>FITZSIMMONS ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-00976	<u>GENEVA REMMERDE VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01410	<u>JOSE NACULANGGA VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01914	<u>JAMES BIBLE VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-02091	<u>MDB TRUCKING, LLC ETAL VS. FINANCIAL PACIFIC INS. ETAL</u>

DATE, JUDGE
OFFICERS OF
COURT PRESENT

Page 1

APPEARANCES-HEARING

12/16/16
HONORABLE
ELLIOTT A.
SATTLER
DEPT. NO. 10
M. White
(Clerk)
L. Urmston
(Reporter)

STATUS HEARING

3:07 p.m. – Court convened.

Counsel present on behalf of the Plaintiffs:

Sarah Quigley, Esq., was present on behalf of Plaintiffs Ernest & Carol Fitzsimmons, Angela Wilt, Benjamin & Rosa Robles, Julie Kins, and Geneva Remmerde.

Julie Throop, Esq., was present on behalf of Plaintiff Olivia John.

James Sloan, Esq., was present on behalf of Plaintiff James Bible.

Kevin Berry, Esq., was present on behalf of Plaintiffs Beverly, Patrick & Ryan Crossland.

Stephen Kent, Esq., was present telephonically on behalf of MDB Trucking, LLC in case number CV16-02091.

Counsel present on behalf of the Defendants:

Thierry V. Barkley, Esq., was present on behalf of Defendants, MDB Trucking, LLC and Daniel A. Koski.

Ken Bick, Esq., was present on behalf of Defendant Versa Products Company, Inc.

Jacob Bundick, Esq., was present telephonically on behalf of Defendants The Modern Group GP-SUB, Inc., and Dragon ESP, Ltd.

Matt Addison, Esq., was present on behalf of Defendant RMC Lamar Holdings, Inc.

Ted Kurtz, Esq., was present telephonically on behalf of Associated International Insurance Company in case number CV16-02091.

COURT advised respective counsel that he has recently discovered that his wife and counsel Brown's wife are friends, and while this will not impact his ability to be fair and impartial in this case in any way, he must put this information on the record, and the parties are free to file a motion regarding this issue if they wish.

COURT further reviewed the procedural history of the cases, noting that the upcoming trial date in CV15-02349 was vacated.

Counsel Quigley advised the Court that the parties have agreed to reset the trial date in CV15-02349 for October 31, 2017.

Counsel Barkley advised the Court that there will additional subrogation cases filed.

Discussion ensued between the Court and respective counsel regarding this matter being declared complex litigation.

CASE NO. CV15-02349	<u>FITZSIMMONS ETAL VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-00976	<u>GENEVA REMMERDE VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01410	<u>JOSE NACULANGGA VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-01914	<u>JAMES BIBLE VS. MDB TRUCKING, LLC ETAL</u>
CASE NO. CV16-02091	<u>MDB TRUCKING, LLC ETAL VS. FINANCIAL PACIFIC INS. ETAL</u>

DATE, JUDGE
OFFICERS OF
COURT PRESENT

Page 2

APPEARANCES-HEARING

12/16/16
HONORABLE
ELLIOTT A.
SATTLER
DEPT. NO. 10
M. White
(Clerk)
L. Urmston
(Reporter)

STATUS HEARING

COURT ORDERED: CV15-02349 shall be declared complex litigation pursuant to NRS 16.1 (f).

COURT advised respective counsel that with regards to the consolidated cases, all documents must now be filed in CV15-02349.

Upon questioning by the Court, counsel Addison recommended that two additional status hearings be set, equidistant between now and the trial date.

Discussion ensued regarding discovery, and the Pretrial Order.

COURT advised respective counsel to pay close attention to the Pretrial Order, specifically to submission deadlines for pretrial motions and motions in limine. Discussion ensued regarding how long the parties expect the trial to last in CV15-02349.

COURT ORDERED: Respective counsel shall meet and confer, and then contact the Department Ten Judicial Assistant, Sheila Mansfield, to set two additional status hearings; one hearing shall be set in April 2017, and one shall be set in August 2017. Counsel must be present in person at all future hearings.

3:41 p.m. – Court adjourned.

CIVIL COVER SHEET

Churchill County, Nevada

Case No. 16-10DC-0824

(Assigned by Clerk's Office)

FILED

2016 SEP 20 PM 3:53

JACQUELINE BRYANT
CLERK OF THE COURTBY [Signature]
DEPUTY

Party Information (provide both home and mailing address if different)

Plaintiff(s) (name/address/phone): James Bible
7th Street, Fernley, NV 89408

Defendant(s) (name/address/phone): MDB Trucking, LLC, et al.

Counsel (name/address/phone): JAMES F. SLOAN, ESQ.
W. Williams Ave., Fallon, NV 89406 (775)423-3006

Attorney (name/address/phone):

Nature of Controversy (please select the one most applicable filing type below)

Civil Case Filing Types

CV16 01914

Real Property	Torts	
Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant <input type="checkbox"/> Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property <input type="checkbox"/> Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input checked="" type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Surviving Spouse <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Greater than \$300,000 <input type="checkbox"/> \$200,000 - \$300,000 <input type="checkbox"/> \$100,001 - \$199,999 <input type="checkbox"/> \$25,001 - \$100,000 <input type="checkbox"/> \$20,001 - \$25,000 <input type="checkbox"/> 2,501 - \$20,000 <input type="checkbox"/> \$2,500 or less	Construction Defect & Contract <input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect <input type="checkbox"/> Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Probation <input type="checkbox"/> Other Civil Writ		Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil cover sheet.

Date 7/2/16Signature of initiating party or representative [Signature]
 DC-09900080656-033
 JAMES BIBLE VS MDB TRUCKING, 1 Page
 District Court 09/20/2016 03:53 PM
 Washoe County
 CV16-01914

1 **Code 1350**

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3
4 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
5 **IN AND FOR THE COUNTY OF WASHOE**

6 **JAMES BIBLE,**

Case No. CV16-01914

7
8 **Plaintiff,**

Dept. No. 10

9 **vs.**

10 **MDB TRUCKING, LLC; et al.,**

11 **Defendants.**

12 _____ /
13 **CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL**

14 I certify that I am an employee of the Second Judicial District Court of the State of Nevada,
15 County of Washoe; that on the 8th day of March, 2018, I electronically filed the Notice of Appeal in
16 the above entitled matter to the Nevada Supreme Court.

17 I further certify that the transmitted record is a true and correct copy of the original
18 pleadings on file with the Second Judicial District Court.

19 Dated this 8th day of March, 2018

20 Jacqueline Bryant
21 Clerk of the Court

22 By /s/ Yvonne Vilorio
23 Yvonne Vilorio
24 Deputy Clerk
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27
28

AMERICAN LEGAL INVESTIGATION
SERVICES NEVADA, INC.
FIELD ACCOUNT

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8 Mar 2018

11-35/1210

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