

1
2
3 **ORDER**

4 Upon review of the above Stipulation in the above-entitled matter,


5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case
6 No. CV16-01335 against the Defendants be dismissed, with prejudice, with each party to bear
7 their own attorney's fees and costs.

8 DATED this 28 day of August, 2017.

9
10 
11 **DISTRICT COURT JUDGE**

12 Respectfully Submitted By:

13 **CLARK HILL PLLC**

14
15 By: 
16 **NICHOLAS M. WIECZOREK**
17 Nevada Bar No. 6150
18 **JEREMY J. THOMPSON**
19 Nevada Bar No. 12503
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11
12 **SECOND JUDICIAL DISTRICT COURT**
13 **WASHOE COUNTY, NEVADA**

15 ERNEST BRUCE FITZSIMMONS and
16 CAROL FITZSIMMONS, Husband and
17 Wife,

18 Plaintiffs,

19 vs.

20 MDB TRUCKING, LLC; DANIEL
21 ANTHONY KOSKI; et al.,

22 Defendants.

23 AND ALL RELATED CASES.
24

Case No.: CV15-02349

Dept. No.: 10


[Consolidated Proceeding]

**STIPULATION AND ORDER FOR
DISMISSAL OF ANGELA MICHELLE
WILT'S COMPLAINT AGAINST
DEFENDANTS IN CASE NO. CV15-02410**


1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-02410 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 23 day of August, 2017.

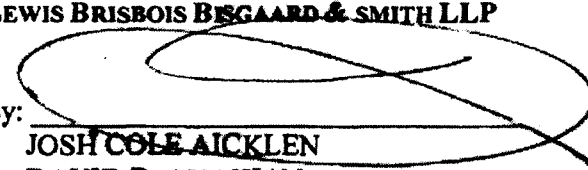
5
6 **CLARK HILL PLLC**

7
8 By: 
9 **NICHOLAS M. WIECZOREK**
10 Nevada Bar No. 6170
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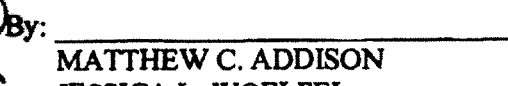
BRADLEY, DRENDEL & JEANNEY

9 By: 
10 **JOSEPH S. BRADLEY**
11 **SARAH M. GUSLEY**
12 P.O. Box 1987
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18 By: 
19 **JOSH COLE AICKLEN**
20 **DAVID B. AVAKIAN**
21 **PAIGE S. SHREVE**
22 6385 S. Rainbow Blvd., Suite 600
23 Las Vegas, Nevada 89118
24 Attorneys for Defendant Versa Products Co.
25 Inc.

MCDONALD CARANO WILSON LLP

18 By: 
19 **MATTHEW C. ADDISON**
20 **JESSICA L. WOELFEL**
21 100 W. Liberty Street, Tenth Floor
22 Reno, NV 89501
23 Attorneys for RMC Lamar Holdings

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-02410 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this _____ day of August, 2017.

5
6 **CLARK HILL PLLC**

BRADLEY, DRENDEL & JEANNEY

7
8 By: _____

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10 Nevada Bar No. 6170
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25
26 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

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27 By: _____

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Attorneys for Defendant Versa Products Co.
Inc.

By: _____

29 MATTHEW C. ADDISON
30 JESSICA L. WOELFEL
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32 Reno, NV 89501
33 Attorneys for RMC Lamar Holdings

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ORDER

Upon review of the above Stipulation in the above-entitled matter,


IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case No. CV15-02410 against the Defendants be dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

DATED this 28 day of August, 2017.


DISTRICT COURT JUDGE

Respectfully Submitted By:

CLARK HILL PLLC

By: 
NICHOLAS M. WIECZOREK
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16 **SECOND JUDICIAL DISTRICT COURT**

17 **WASHOE COUNTY, NEVADA**

18 ERNEST BRUCE FITZSIMMONS and
19 CAROL FITZSIMMONS, Husband and
20 Wife,

21 Plaintiffs,

22 vs.

23 MDB TRUCKING, LLC; DANIEL
24 ANTHONY KOSKI; et al.,

25 Defendants.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF STIPULATION
AND ORDER FOR DISMISSAL OF
ANGELA MICHELLE WILT'S
COMPLAINT AGAINST DEFENDANTS
IN CASE NO. CV15-02410**

26 AND ALL RELATED CASES.

27 PLEASE TAKE NOTICE that on the 28th day of August, 2017, the above-entitled Court
28 entered its Stipulation and Order for Dismissal of Angela Michelle Wilt's Complaint against
Defendants in Case No. CV15-02410.

1 A copy of this Order is attached hereto as Exhibit "1."

2 Dated this 30 day of August, 2017.

3 **CLARK HILL PLLC**

4
5 By: 

6 NICHOLAS M. WIECZOREK

7 Nevada Bar No. 6170

8 JEREMY J. THOMPSON

9 Nevada Bar No. 12503

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16 *Attorneys for MDB Trucking, LLC*

17 **AFFIRMATION**

18 **Pursuant to NRS 239B.030**

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

21 DATED this 30 day of August, 2017.

22 **CLARK HILL PLLC**

23
24 By: 

25 NICHOLAS M. WIECZOREK

26 Nevada Bar No. 6170

27 JEREMY J. THOMPSON

28 Nevada Bar No. 12503

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Telephone: (702) 862-830

Attorneys for MDB Trucking,

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Clark Hill PLLC, and that on this 24th day of August, 2017, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER FOR DISMISSAL OF ANGELA MICHELLE WILT'S COMPLAINT AGAINST DEFENDANTS IN CASE NO. CV15-02410** 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:

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Katherine F. Parks, Esq.,
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Attorneys for Defendants/Third-Party Plaintiff, MDB Trucking, LLC and DANIEL ANTHONY KOSKI

Julia Mor...

An Employee of Clark Hill PLLC

INDEX OF EXHIBITS

Exhibit Number 1 **Number of Pages** 5

Exhibit Description	Stipulation and Order for Dismissal

Exhibit Number _____ **Number of Pages** _____

Exhibit Description _____

Exhibit Number _____ **Number of Pages** _____

Exhibit Description _____

Exhibit Number _____ **Number of Pages** _____

Exhibit Description

Exhibit Number _____ Number of Pages _____

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Exhibit Number _____ Number of Pages _____

Exhibit Description

EXHIBIT 1

EXHIBIT 1

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1 **3990**
2 **NICHOLAS M. WIECZOREK**
3 Nevada Bar No. 6170
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14 JThompson@clarkhill.com

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SECOND JUDICIAL DISTRICT COURT
WASHOE COUNTY, NEVADA

ERNEST BRUCE FITZSIMMONS and
CAROL FITZSIMMONS, Husband and
Wife,

Plaintiffs,

vs.

MDB TRUCKING, LLC; DANIEL
ANTHONY KOSKI; et al.,

Defendants.

AND ALL RELATED CASES.

Case No.: CV15-02349
Dept. No.: 10

[Consolidated Proceeding]

**STIPULATION AND ORDER FOR
DISMISSAL OF ANGELA MICHELLE
WILT'S COMPLAINT AGAINST
DEFENDANTS IN CASE NO. CV15-02410**

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-02410 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 23 day of August, 2017.

5
6 CLARK HILL PLLC

7
8 By: 

9 NICHOLAS M. WIECZOREK
10 Nevada Bar No. 6170
11 JEREMY J. THOMPSON
12 Nevada Bar No. 12505
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15 Attorneys for Plaintiffs

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17
18 By: 

19 JOSH COLE AICKLEN
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21 PAIGE S. SHREVE
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23 Las Vegas, Nevada 89118
24 Attorneys for Defendant Versa Products Co.
25 Inc.

MCDONALD CARANO WILSON LLP

26 By:

27 MATTHEW C. ADDISON
28 JESSICA L. WOELFEL
100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for RMC Lamar Holdings

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-02410 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this _____ day of August, 2017.

5
6 **CLARK HILL PLLC**

7
8 By: _____

9 NICHOLAS M. WIECZOREK
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24 Attorneys for Defendant Versa Products Co.
25 Inc.

MCDONALD CARANO WILSON LLP

By: _____

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ORDER

Upon review of the above Stipulation in the above-entitled matter,


IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case No. CV15-02410 against the Defendants be dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

DATED this 28 day of August, 2017.


DISTRICT COURT JUDGE

Respectfully Submitted By:

CLARK HILL PLLC

By: 
NICHOLAS M. WIECZOREK
Nevada Bar No. 6150
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11
12 **SECOND JUDICIAL DISTRICT COURT**
13 **WASHOE COUNTY, NEVADA**

14
15 ERNEST BRUCE FITZSIMMONS and
16 CAROL FITZSIMMONS, Husband and
17 Wife,

18 Plaintiffs,

19 vs.

20 MDB TRUCKING, LLC; DANIEL
21 ANTHONY KOSKI; et al.,

22 Defendants.

23 AND ALL RELATED CASES.
24
25
26
27
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Case No.: CV15-02349
Dept. No.: 10

[Consolidated Proceeding]

**STIPULATION AND ORDER FOR
DISMISSAL OF ROSA, NATALIE,
CASSANDRA AND BENJAMIN
ROBLES' COMPLAINT AGAINST
DEFENDANTS IN CASE NO. CV16-01124**

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-01124 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 23 day of August, 2017.

5
6 **CLARK HILL PLLC**

7
8 By: 

9 **NICHOLAS M. WIBELZOREK**
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BRADLEY, DRENDEL & JEANNEY

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Attorneys for Plaintiffs

15
16 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

17
18 By: 

19 **JOSH COLE AICKLEN**
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21 **PAIGE S. SHREVE**
6385 S. Rainbow Blvd., Suite 600
22 Las Vegas, Nevada 89118
Attorneys for Defendant Versa Products Co.
23 Inc.

MCDONALD CARANO WILSON LLP

By: 

MATTHEW C. ADDISON
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100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for RMC Lamar Holdings

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IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through their counsel hereto that the Complaint in Case No. CV16-01124 against all the Defendants be dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

DATED this _____ day of August, 2017.

CLARK HILL PLLC


BRADLEY, DRENDEL & JEANNEY

By: _____
NICHOLAS M. WIECZOREK
Nevada Bar No. 6170
JEREMY J. THOMPSON
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By: 
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Attorneys for Plaintiffs

LEWIS BRISBOIS BISGAARD & SMITH LLP

MCDONALD CARANO WILSON LLP

By: 
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DAVID B. AVAKIAN
PAIGE S. SHREVE
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Las Vegas, Nevada 89118
Attorneys for Defendant Versa Products Co.
Inc.

By: _____
MATTHEW C. ADDISON
JESSICA L. WOELFEL
100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for RMC Lamar Holdings

1
2
3 **ORDER**

4 Upon review of the above Stipulation in the above-entitled matter,

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case
6 No. CV16-01124 against the Defendants be dismissed, with prejudice, with each party to bear
7 their own attorney's fees and costs.

8 DATED this 28 day of August, 2017.

9
10 
11 DISTRICT COURT JUDGE

12 Respectfully Submitted By:

13 CLARK HILL PLLC

14
15 By: 

16 NICHOLAS M. WIECZOREK
17 Nevada Bar No. 6150
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16 **SECOND JUDICIAL DISTRICT COURT**

17 **WASHOE COUNTY, NEVADA**

18 ERNEST BRUCE FITZSIMMONS and
19 CAROL FITZSIMMONS, Husband and
20 Wife,

21 Plaintiffs,

22 vs.

23 MDB TRUCKING, LLC; DANIEL
24 ANTHONY KOSKI; et al.,

25 Defendants.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF STIPULATION
AND ORDER FOR DISMISSAL OF
ROSA, NATALIE, CASSANDRA AND
BENJAMIN ROBLES' COMPLAINT
AGAINST DEFENDANTS IN CASE NO.
CV16-01124**

26 AND ALL RELATED CASES.

27 PLEASE TAKE NOTICE that on the 28th day of August, 2017, the above-entitled Court
28 entered its Stipulation and Order for Dismissal of Rosa, Natalie, Cassandra and Benjamin
Robles' Complaint against Defendants in Case No. CV16-01124.

1 A copy of this Order is attached hereto as Exhibit "1."

2 Dated this 30 day of August, 2017.

3 **CLARK HILL PLLC**

4
5 By: 

6 **NICHOLAS M. WIECZOREK**

7 Nevada Bar No. 6170

8 **JEREMY J. THOMPSON**

9 Nevada Bar No. 12503

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15 Telephone: (702) 862-830

16 *Attorneys for MDB Trucking, LLC*

17 **AFFIRMATION**

18 **Pursuant to NRS 239B.030**

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

21 DATED this 30 day of August, 2017.

22 **CLARK HILL PLLC**

23
24 By: 

25 **NICHOLAS M. WIECZOREK**

26 Nevada Bar No. 6170

27 **JEREMY J. THOMPSON**

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Attorneys for MDB Trucking,

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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 28th day of August, 2017, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER FOR DISMISSAL OF ROSA, NATALIE, CASSANDRA AND BENJAMIN ROBLES' COMPLAINT AGAINST DEFENDANTS IN CASE NO. CV16-01124** 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:

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P.O. Box 1987
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Jessica L. Woelfel, Esq.
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Attorneys for Defendant RMC Lamar Holdings
Modern Group GP-SUB, Inc. and Dragon ESP, Ltd.

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Las Vegas, Nevada 89131
Attorneys for Plaintiffs Christy, Shawn and Sonya Corthell


An Employee of Clark Hill PLLC

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Exhibit Description

EXHIBIT 1

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EXHIBIT 1

1 **3990**
2 NICHOLAS M. WIECZOREK
3 Nevada Bar No. 6170
4 JEREMY J. THOMPSON
5 Nevada Bar No. 12503
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14 JThompson@clarkhill.com

12 **SECOND JUDICIAL DISTRICT COURT**
13 **WASHOE COUNTY, NEVADA**

15 ERNEST BRUCE FITZSIMMONS and
16 CAROL FITZSIMMONS, Husband and
17 Wife,

17 Plaintiffs,

18 vs.

19 MDB TRUCKING, LLC; DANIEL
20 ANTHONY KOSKI; et al.,

21 Defendants.
22 _____

23 AND ALL RELATED CASES.
24 _____

Case No.: CV15-02349
Dept. No.: 10

[Consolidated Proceeding]

**STIPULATION AND ORDER FOR
DISMISSAL OF ANGELA MICHELLE
WILT'S COMPLAINT AGAINST
DEFENDANTS IN CASE NO. CV15-02410**

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-02410 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 23 day of August, 2017.

5
6 CLARK HILL PLLC

BRADLEY, DRENDEL & JEANNEY

7
8 By: 

By: 

9 NICHOLAS M. WIECZOREK
10 Nevada Bar No. 6170
11 JEREMY J. THOMPSON
12 Nevada Bar No. 12503
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20 LEWIS BRISBOIS BEGAARD & SMITH LLP

MCDONALD CARANO WILSON LLP

21
22 By: 

By: 

23 JOSH COLE AICKLEN
24 DAVID B. AVAKIAN
25 PAIGE S. SHREVE
26 6385 S. Rainbow Blvd., Suite 600
27 Las Vegas, Nevada 89118
28 Attorneys for Defendant Versa Products Co.
Inc.

MATTHEW C. ADDISON
JESSICA L. WOELFEL
100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for RMC Lamar Holdings

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-02410 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this _____ day of August, 2017.

5
6 **CLARK HILL PLLC**

7
8 By: _____

9 NICHOLAS M. WIECZOREK
10 Nevada Bar No. 6170
11 JEREMY J. THOMPSON
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18 Attorneys for MDB Trucking and Koski

BRADLEY, DRENDEL & JEANNEY

By: _____

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17
18 By: _____

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20 DAVID B. AVAKIAN
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22 6385 S. Rainbow Blvd., Suite 600
23 Las Vegas, Nevada 89118
24 Attorneys for Defendant Versa Products Co.
25 Inc.

MCDONALD CARANO WILSON LLP

By: _____

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Reno, NV 89501
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ORDER

Upon review of the above Stipulation in the above-entitled matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case
No. CV15-02410 against the Defendants be dismissed, with prejudice, with each party to bear
their own attorney's fees and costs.

DATED this 28 day of August, 2017.


DISTRICT COURT JUDGE

Respectfully Submitted By:

CLARK HILL PLLC

By: 

NICHOLAS M. WIECZOREK

Nevada Bar No. 6150

JEREMY J. THOMPSON

Nevada Bar No. 12503

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11
12 **SECOND JUDICIAL DISTRICT COURT**
13 **WASHOE COUNTY, NEVADA**

15 **ERNEST BRUCE FITZSIMMONS and**
16 **CAROL FITZSIMMONS, Husband and**
17 **Wife,**

18 **Plaintiffs,**

19 **vs.**

20 **MDB TRUCKING, LLC; DANIEL**
21 **ANTHONY KOSKI; et al.,**

22 **Defendants.**

23 **AND ALL RELATED CASES.**

Case No.: CV15-02349
Dept. No.: 10

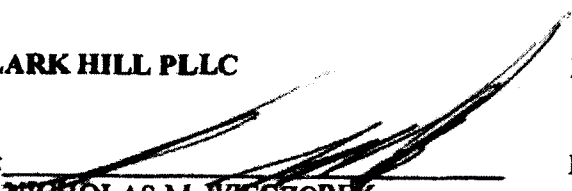
[Consolidated Proceeding]

**STIPULATION AND ORDER FOR
DISMISSAL OF JULIE KINS'
COMPLAINT AGAINST DEFENDANTS
IN CASE NO. CV16-00519**

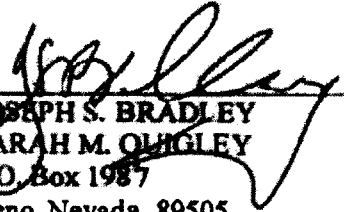
1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-00519 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 23 day of August, 2017.


5
6 **CLARK HILL PLLC**

7
8 By: 
9 **NICHOLAS M. WIECZOREK**
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25 Inc.

MCDONALD CARANO WILSON LLP

18 By: 
19 **MATTHEW C. ADDISON**
20 **JESSICA L. WOELFEL**
21 100 W. Liberty Street, Tenth Floor
22 Reno, NV 89501
23 Attorneys for RMC Lamar Holdings

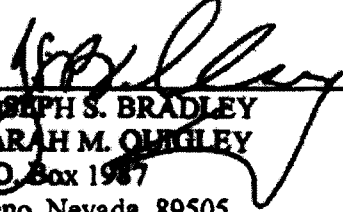
1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-00519 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this _____ day of August, 2017.

5
6 **CLARK HILL PLLC**


BRADLEY, DRENDEL & JEANNEY

7
8 By: _____
9 NICHOLAS M. WIECZOREK
10 Nevada Bar No. 6170
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20 DAVID B. AVAKIAN
21 PAIGE S. SHREVE
22 6385 S. Rainbow Blvd., Suite 600
23 Las Vegas, Nevada 89118
24 Attorneys for Defendant Versa Products Co.
25 Inc.

By: _____
26 MATTHEW C. ADDISON
27 JESSICA L. WOELFEL
28 100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for RMC Lamar Holdings

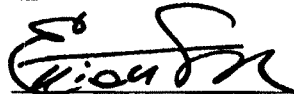
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ORDER

Upon review of the above Stipulation in the above-entitled matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case No. CV16-00519 against the Defendants be dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

DATED this 28 day of August, 2017.



DISTRICT COURT JUDGE

Respectfully Submitted By:

CLARK HILL PLLC

By: 

NICHOLAS M. WIECZOREK

Nevada Bar No. 6150

JEREMY J. THOMPSON

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12 **SECOND JUDICIAL DISTRICT COURT**
13 **WASHOE COUNTY, NEVADA**

15 ERNEST BRUCE FITZSIMMONS and
16 CAROL FITZSIMMONS, Husband and
17 Wife,

17 Plaintiffs,

18 vs.

19 MDB TRUCKING, LLC; DANIEL
20 ANTHONY KOSKI; et al.,

21 Defendants.
22 _____

23 AND ALL RELATED CASES.
24 _____

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF STIPULATION
AND ORDER FOR DISMISSAL OF
JULIE KINS' COMPLAINT AGAINST
DEFENDANTS IN CASE NO. CV16-00519**

25 PLEASE TAKE NOTICE that on the 28th day of August, 2017, the above-entitled Court
26 entered its Stipulation and Order for Dismissal of Julie Kins' Complaint against Defendants in
27 Case No. CV16-00519.
28

1 A copy of this Order is attached hereto as Exhibit "1."

2 Dated this 30 day of August, 2017.

3 **CLARK HILL PLLC**

4
5 By: 

6 **NICHOLAS M. WIECZOREK**

7 Nevada Bar No. 6170

8 **JEREMY J. THOMPSON**

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16 *Attorneys for MDB Trucking, LLC*

17 **AFFIRMATION**

18 **Pursuant to NRS 239B.030**

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

21 DATED this 30 day of August, 2017.

22 **CLARK HILL PLLC**

23
24 By: 

25 **NICHOLAS M. WIECZOREK**

26 Nevada Bar No. 6170

27 **JEREMY J. THOMPSON**

28 Nevada Bar No. 12503

COLLEEN E. MCCARTY

Nevada Bar No, 13186

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Las Vegas, Nevada 89169

Telephone: (702) 862-830

Attorneys for MDB Trucking,

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Clark Hill PLLC, and that on this 27th day of August, 2017, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER FOR DISMISSAL OF JULIE KINS' COMPLAINT AGAINST DEFENDANTS IN CASE NO. CV16-00519** 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:

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Thorndal, Armstrong Delk Balkenbush & Eisinger
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Attorneys for Defendants/Third-Party Plaintiff, MDB Trucking, LLC and DANIEL ANTHONY KOSKI


An Employee of Clark Hill PLLC

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Exhibit Description	Stipulation and Order for Dismissal
<p>1. Plaintiff's Motion to Dismiss Defendant's Answer.</p> <p>2. Defendant's Answer to Plaintiff's Motion to Dismiss Defendant's Answer.</p> <p>3. Plaintiff's Reply to Defendant's Answer to Plaintiff's Motion to Dismiss Defendant's Answer.</p> <p>4. Defendant's Motion to Dismiss Plaintiff's Complaint.</p> <p>5. Plaintiff's Answer to Defendant's Motion to Dismiss Plaintiff's Complaint.</p> <p>6. Defendant's Reply to Plaintiff's Answer to Defendant's Motion to Dismiss Plaintiff's Complaint.</p> <p>7. Plaintiff's Motion for Summary Judgment.</p> <p>8. Defendant's Answer to Plaintiff's Motion for Summary Judgment.</p> <p>9. Plaintiff's Reply to Defendant's Answer to Plaintiff's Motion for Summary Judgment.</p> <p>10. Defendant's Motion for Summary Judgment.</p> <p>11. Plaintiff's Answer to Defendant's Motion for Summary Judgment.</p> <p>12. Defendant's Reply to Plaintiff's Answer to Defendant's Motion for Summary Judgment.</p> <p>13. Plaintiff's Motion for Default Judgment.</p> <p>14. 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Plaintiff's Motion for Appointment of Aunt.</p> <p>98. Defendant's Answer to Plaintiff's Motion for Appointment of Aunt.</p> <p>99. Plaintiff's Motion for Appointment of Uncle.</p> <p>100. Defendant's Answer to Plaintiff's Motion for Appointment of Uncle.</p> <p>101. Plaintiff's Motion for Appointment of Great-Aunt.</p> <p>102. Defendant's Answer to Plaintiff's Motion for Appointment of Great-Aunt.</p> <p>103. Plaintiff's Motion for Appointment of Great-Uncle.</p> <p>104. Defendant's Answer to Plaintiff's Motion for Appointment of Great-Uncle.</p> <p>105. Plaintiff's Motion for Appointment of First-Cousin-Once-Removed.</p> <p>106. Defendant's Answer to Plaintiff's Motion for Appointment of First-Cousin-Once-Removed.</p> <p>107. Plaintiff's Motion for Appointment of Second-Cousin-Once-Removed.</p> <p>108. Defendant's Answer to Plaintiff's Motion for Appointment of Second-Cousin-Once-Removed.</p> <p>109. Plaintiff's Motion for Appointment of Third-Cousin-Once-Removed.</p> <p>110. Defendant's Answer to Plaintiff's Motion for Appointment of Third-Cousin-Once-Removed.</p> <p>111. Plaintiff's Motion for Appointment of Fourth-Cousin-Once-Removed.</p> <p>112. Defendant's Answer to Plaintiff's Motion for Appointment of Fourth-Cousin-Once-Removed.</p> <p>113. Plaintiff's Motion for Appointment of Fifth-Cousin-Once-Removed.</p> <p>114. Defendant's Answer to Plaintiff's Motion for Appointment of Fifth-Cousin-Once-Removed.</p> <p>115. Plaintiff's Motion for Appointment of Sixth-Cousin-Once-Removed.</p> <p>116. Defendant's Answer to Plaintiff's Motion for Appointment of Sixth-Cousin-Once-Removed.</p> <p>117. Plaintiff's Motion for Appointment of Seventh-Cousin-Once-Removed.</p> <p>118. Defendant's Answer to Plaintiff's Motion for Appointment of Seventh-Cousin-Once-Removed.</p> <p>119. Plaintiff's Motion for Appointment of Eighth-Cousin-Once-Removed.</p> <p>120. Defendant's Answer to Plaintiff's Motion for Appointment of Eighth-Cousin-Once-Removed.</p> <p>121. Plaintiff's Motion for Appointment of Ninth-Cousin-Once-Removed.</p> <p>122. Defendant's Answer to Plaintiff's Motion for Appointment of Ninth-Cousin-Once-Removed.</p> <p>123. Plaintiff's Motion for Appointment of Tenth-Cousin-Once-Removed.</p> <p>124. Defendant's Answer to Plaintiff's Motion for Appointment of Tenth-Cousin-Once-Removed.</p> <p>125. Plaintiff's Motion for Appointment of Eleventh-Cousin-Once-Removed.</p> <p>126. Defendant's Answer to Plaintiff's Motion for Appointment of Eleventh-Cousin-Once-Removed.</p> <p>127. Plaintiff's Motion for Appointment of Twelfth-Cousin-Once-Removed.</p> <p>128. Defendant's Answer to Plaintiff's Motion for Appointment of Twelfth-Cousin-Once-Removed.</p> <p>129. Plaintiff's Motion for Appointment of Thirteenth-Cousin-Once-Removed.</p> <p>130. Defendant's Answer to Plaintiff's Motion for Appointment of Thirteenth-Cousin-Once-Removed.</p> <p>131. Plaintiff's Motion for Appointment of Fourteenth-Cousin-Once-Removed.</p> <p>132. Defendant's Answer to Plaintiff's Motion for Appointment of Fourteenth-Cousin-Once-Removed.</p> <p>133. Plaintiff's Motion for Appointment of Fifteenth-Cousin-Once-Removed.</p> <p>134. Defendant's Answer to Plaintiff's Motion for Appointment of Fifteenth-Cousin-Once-Removed.</p> <p>135. Plaintiff's Motion for Appointment of Sixteenth-Cousin-Once-Removed.</p> <p>136. Defendant's Answer to Plaintiff's Motion for Appointment of Sixteenth-Cousin-Once-Removed.</p> <p>137. Plaintiff's Motion for Appointment of Seventeenth-Cousin-Once-Removed.</p> <p>138. Defendant's Answer to Plaintiff's Motion for Appointment of Seventeenth-Cousin-Once-Removed.</p> <p>139. Plaintiff's Motion for Appointment of Eighteenth-Cousin-Once-Removed.</p> <p>140. Defendant's Answer to Plaintiff's Motion for Appointment of Eighteenth-Cousin-Once-Removed.</p> <p>141. Plaintiff's Motion for Appointment of Nineteenth-Cousin-Once-Removed.</p> <p>142. Defendant's Answer to Plaintiff's Motion for Appointment of Nineteenth-Cousin-Once-Removed.</p> <p>143. Plaintiff's Motion for Appointment of Twentieth-Cousin-Once-Removed.</p> <p>144. Defendant's Answer to Plaintiff's Motion for Appointment of Twentieth-Cousin-Once-Removed.</p> <p>145. Plaintiff's Motion for Appointment of Twenty-first-Cousin-Once-Removed.</p> <p>146. Defendant's Answer to Plaintiff's Motion for Appointment of Twenty-first-Cousin-Once-Removed.</p> <p>147. Plaintiff's Motion for Appointment of Twenty-second-Cousin-Once-Removed.</p> <p>148. Defendant's Answer to Plaintiff's Motion for Appointment of Twenty-second-Cousin-Once-Removed.</p> <p>149. Plaintiff's Motion for Appointment of Twenty-third-Cousin-Once-Removed.</p> <p>150. Defendant's Answer to Plaintiff's Motion for Appointment of Twenty-third-Cousin-Once-Removed.</p> <p>151. Plaintiff's Motion for Appointment of Twenty-fourth-Cousin-Once-Removed.</p> <p>152. Defendant's Answer to Plaintiff's Motion for Appointment of Twenty-fourth-Cousin-Once-Removed.</p> <p>153. Plaintiff's Motion for Appointment of Twenty-fifth-Cousin-Once-Removed.</p> <p>154. Defendant's Answer to Plaintiff's Motion for Appointment of Twenty-fifth-Cousin-Once-Removed.</p> <p>155. Plaintiff's Motion for Appointment of Twenty-sixth-Cousin-Once-Removed.</p> <p>156. Defendant's Answer to Plaintiff's Motion for Appointment of Twenty-sixth-Cousin-Once-Removed.</p> <p>157. Plaintiff's Motion for Appointment of Twenty-seventh-Cousin-Once-Removed.</p> <p>158. Defendant's Answer to Plaintiff's Motion for Appointment of Twenty-seventh-Cousin-Once-Removed.</p> <p>159. Plaintiff's Motion for Appointment of Twenty-eighth-Cousin-Once-Removed.</p> <p>160. Defendant's Answer to Plaintiff's Motion for Appointment of Twenty-eighth-Cousin-Once-Removed.</p> <p>161. Plaintiff's Motion for Appointment of Twenty-ninth-Cousin-Once-Removed.</p> <p>162. Defendant's Answer to Plaintiff's Motion for Appointment of Twenty-ninth-Cousin-Once-Removed.</p> <p>163. Plaintiff's Motion for Appointment of Thirtieth-Cousin-Once-Removed.</p> <p>164. Defendant's Answer to Plaintiff's Motion for Appointment of Thirtieth-Cousin-Once-Removed.</p> <p>165. Plaintiff's Motion for Appointment of Thirty-first-Cousin-Once-Removed.</p> <p>166. Defendant's Answer to Plaintiff's Motion for Appointment of Thirty-first-Cousin-Once-Removed.</p> <p>167. Plaintiff's Motion for Appointment of Thirty-second-Cousin-Once-Removed.</p> <p>168. Defendant's Answer to Plaintiff's Motion for Appointment of Thirty-second-Cousin-Once-Removed.</p> <p>169. Plaintiff's Motion for Appointment of Thirty-third-Cousin-Once-Removed.</p> <p>170. Defendant's Answer to Plaintiff's Motion for Appointment of Thirty-third-Cousin-Once-Removed.</p> <p>171. Plaintiff's Motion for Appointment of Thirty-fourth-Cousin-Once-Removed.</p> <p>172. Defendant's Answer to Plaintiff's Motion for Appointment of Thirty-fourth-Cousin-Once-Removed.</p> <p>173. Plaintiff's Motion for Appointment of Thirty-fifth-Cousin-Once-Removed.</p> <p>174. Defendant's Answer to Plaintiff's Motion for Appointment of Thirty-fifth-Cousin-Once-Removed.</p> <p>175. Plaintiff's Motion for Appointment of Thirty-sixth-Cousin-Once-Removed.</p> <p>176. Defendant's Answer to Plaintiff's Motion for Appointment of Thirty-sixth-Cousin-Once-Removed.</p> <p>177. Plaintiff's Motion for Appointment of Thirty-seventh-Cousin-Once-Removed.</p> <p>178. Defendant's Answer to Plaintiff's Motion for Appointment of Thirty-seventh-Cousin-Once-Removed.</p> <p>179. Plaintiff's Motion for Appointment of Thirty-eighth-Cousin-Once-Removed.</p> <p>180. Defendant's Answer to Plaintiff's Motion for Appointment of Thirty-eighth-Cousin-Once-Removed.</p> <p>181. Plaintiff</p>	

Exhibit Number _____ **Number of Pages** _____

Exhibit Description

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EXHIBIT 1

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1 **3990**
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15 **SECOND JUDICIAL DISTRICT COURT**
16 **WASHOE COUNTY, NEVADA**

17 ERNEST BRUCE FITZSIMMONS and
18 CAROL FITZSIMMONS, Husband and
19 Wife,

20 Plaintiffs,

21 vs.

22 MDB TRUCKING, LLC; DANIEL
23 ANTHONY KOSKI; et al.,

24 Defendants.
25
26
27
28

Case No.: CV15-02349
Dept. No.: 10

[Consolidated Proceeding]

**STIPULATION AND ORDER FOR
DISMISSAL OF JULIE KINS'
COMPLAINT AGAINST DEFENDANTS
IN CASE NO. CV16-00519**

AND ALL RELATED CASES.

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-00519 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 23 day of August, 2017.

5
6 **CLARK HILL PLLC**

7
8 By: _____

NICHOLAS M. WIECZOREK
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JEREMY J. THOMPSON
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BRADLEY, DRENDEL & JEANNEY

By: _____

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Telephone: (775) 335-9999
Attorneys for Plaintiffs

15
16 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

17
18 By: _____

JOSH COLE AICKLEN
DAVID B. AVAKIAN
PAIGE S. SHREVE
6385 S. Rainbow Blvd., Suite 600
Las Vegas, Nevada 89118
Attorneys for Defendant Versa Products Co.
Inc.

MCDONALD CARANO WILSON LLP

By: _____

MATTHEW C. ADDISON
JESSICA L. WOELFEL
100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for RMC Lamar Holdings

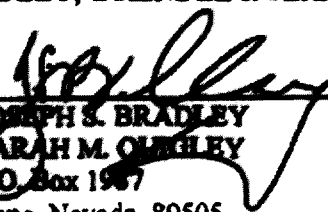
1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-00519 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this _____ day of August, 2017.

5
6 **CLARK HILL PLLC**

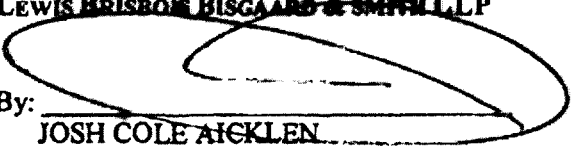
BRADLEY, DRENDEL & JEANNEY

7
8 By: _____
9 NICHOLAS M. WIECZOREK
10 Nevada Bar No. 6170
11 JEREMY J. THOMPSON
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24 Attorneys for Plaintiffs

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17
18 By: 
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20 DAVID B. AVAKIAN
21 PAIGE S. SHREVE
22 6385 S. Rainbow Blvd., Suite 600
23 Las Vegas, Nevada 89118
24 Attorneys for Defendant Versa Products Co.
25 Inc.

By: _____
26 MATTHEW C. ADDISON
27 JESSICA L. WOELFEL
28 100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for RMC Lamar Holdings

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ORDER

Upon review of the above Stipulation in the above-entitled matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case
No. CV16-00519 against the Defendants be dismissed, with prejudice, with each party to bear
their own attorney's fees and costs.

DATED this 28 day of August, 2017.


DISTRICT COURT JUDGE

Respectfully Submitted By:

CLARK HILL PLLC

By: 

NICHOLAS M. WIECZOREK

Nevada Bar No. 6150

JEREMY J. THOMPSON

Nevada Bar No. 12503

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5 **Nevada Bar No. 12503**
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13 **Email: NWieczorek@clarkhill.com**
14 **JThompson@clarkhill.com**

15 **SECOND JUDICIAL DISTRICT COURT**
16 **WASHOE COUNTY, NEVADA**

17 **ERNEST BRUCE FITZSIMMONS and**
18 **CAROL FITZSIMMONS, Husband and**
19 **Wife,**

20 **Plaintiffs,**

21 **vs.**

22 **MDB TRUCKING, LLC; DANIEL**
23 **ANTHONY KOSKI; et al.,**

24 **Defendants.**

Case No.: CV15-02349
Dept. No.: 10

[Consolidated Proceeding]

**STIPULATION AND ORDER FOR
DISMISSAL OF ERNEST BRUCE
FITZSIMMONS AND CAROL
FITZSIMMONS' COMPLAINT
AGAINST DEFENDANTS IN CASE NO.
CV15-02349**

25 **AND ALL RELATED CASES.**

26

27

28

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-02349 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 5 day of ^{Sept}~~August~~, 2017.

5
6 **CLARK HILL PLLC**

7
8 By: 

9 NICHOLAS M. WIECZOREK
10 Nevada Bar No. 6170
11 JEREMY J. THOMPSON
12 Nevada Bar No. 12503
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18 Attorneys for MDB Trucking and Koski

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17
18 By: 

19 JOSH COLE-AICKLEN
20 DAVID B. AVAKIAN
21 PAIGE S. SHREVE
22 6385 S. Rainbow Blvd., Suite 600
23 Las Vegas, Nevada 89118
24 Attorneys for Defendant Versa Products Co.
25 Inc.

MCDONALD CARANO WILSON LLP

By: 

MATTHEW C. ADDISON
JESSICA L. WOELFEL
100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for RMC Lamar Holdings

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-02349 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this _____ day of August, 2017.

5
6 **CLARK HILL PLLC**

7
8 By: _____

9 NICHOLAS M. WIECZOREK
10 Nevada Bar No. 6170
11 JEREMY J. THOMPSON
12 Nevada Bar No. 12503
13 COLLEEN E. McCARTY
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18 Attorneys for MDB Trucking and Koski

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By: _____

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Telephone: (775) 335-9999
Attorneys for Plaintiffs

16 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

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18 By: _____

19 JOSH COLE AICKLEN
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22 6385 S. Rainbow Blvd., Suite 600
23 Las Vegas, Nevada 89118
24 Attorneys for Defendant Versa Products Co.
25 Inc.

MCDONALD CARANO WILSON LLP

By: _____

MATTHEW C. ADDISON
JESSICA L. WOELFEL
100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for RMC Lamar Holdings

1
2
3 **ORDER**

4 Upon review of the above Stipulation in the above-entitled matter,


5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case
6 No. CV16-02349 against the Defendants be dismissed, with prejudice, with each party to bear
7 their own attorney's fees and costs.

8 DATED this 8 day of September, 2017.

9
10 
11 **DISTRICT COURT JUDGE**

12 Respectfully Submitted By:

13 **CLARK HILL PLLC**

14
15 By: 
16 **NICHOLAS M. WIECZOREK**
17 Nevada Bar No. 6150
18 **JEREMY J. THOMPSON**
19 Nevada Bar No. 12503
20 **COLLEEN E. McCARTY**
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23 Las Vegas, Nevada 89169
24 Attorneys for MDB Trucking and Koski
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9 JThompson@clarkhill.com
CMcCarty@clarkhill.com
10 *Attorneys for Defendant/Cross-Claimant*
11 *MDB Trucking, LLC*

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

14 ERNEST BRUCE FITZSIMMONS and
15 CAROL FITZSIMMONS, Husband and Wife,

16 Plaintiffs,

17 vs.

18 MDB TRUCKING, LLC, et al.,

19 Defendants.

20 AND ALL RELATED CASES.
21

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF ORDER FOR
DISMISSAL OF ERNEST BRUCE
FITZSIMMONS AND CAROL
FITZSIMMONS' COMPLAINT
AGAINST DEFENDANTS IN CASE NO.
CV15-02349**

22 **PLEASE TAKE NOTICE** that an Order was entered on the 8th day of September, 2017,
23 ...
24 ...
25 ...
26 ...
27 ...
28 ...

1 in the above-entitled matter, a copy of which is attached hereto as Exhibit 1:

2 DATED this 19 day of September, 2017

3 CLARK HILL PLLC

4
5
6 By:

NICHOLAS M. WIECZOREK

Nevada Bar No. 6170

JEREMY J. THOMPSON

Nevada Bar No. 12503

COLLEEN E. MCCARTY

Nevada Bar No. 13186

3800 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

Telephone: (702) 862-8300

Attorneys for Defendant/Cross-Claimant

MDB Trucking, LLC

14 **AFFIRMATION**

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

18 DATED this 19 day of September, 2017.

21 CLARK HILL PLLC

22
23 By:

NICHOLAS M. WIECZOREK

Nevada Bar No. 6170

JEREMY J. THOMPSON

Nevada Bar No. 12503

COLLEEN E. MCCARTY

Nevada Bar No. 13186

CLARK HILL PLLC

3800 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

Attorneys for MDB Trucking, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of CLARK HILL PLLC, and on this 19 day of September 2017, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER FOR DISMISSAL OF ERNEST BRUCE FITZSIMMONS AND CAROL FITZSIMMONS' COMPLAINT AGAINST DEFENDANTS IN CASE NO. CV15-02349** was served via electronic service and the U. S. mail, postage prepaid upon the following:

Joseph S. Bradley, Esq.
Sarah M. Quigley, Esq.
P.O. Box 1987
Reno, Nevada 89505
Attorneys for Plaintiffs Ernest and Carol
Fitzsimmons and Angela Wilt

Matthew C. Addison, Esq.
Jessica L. Woelfel, Esq.
McDonald Carano Wilson LLP
100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for Defendant RMC Lamar
Holdings
Modern Group GP-SUB, Inc. and Dragon
ESP, Ltd.

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 Co.,
Inc.


An employee of Clark Hill PLLC

EXHIBIT 1

EXHIBIT 1

1 3990
2 NICHOLAS M. WIECZOREK
3 Nevada Bar No. 6170
4 JEREMY J. THOMPSON
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12 SECOND JUDICIAL DISTRICT COURT
13 WASHOE COUNTY, NEVADA

15 ERNEST BRUCE FITZSIMMONS and
16 CAROL FITZSIMMONS, Husband and
17 Wife,

17 Plaintiffs,

18 vs.

19 MDB TRUCKING, LLC; DANIEL
20 ANTHONY KOSKI; et al.,

21 Defendants.
22

23 AND ALL RELATED CASES.
24

Case No.: CV15-02349
Dept. No.: 10

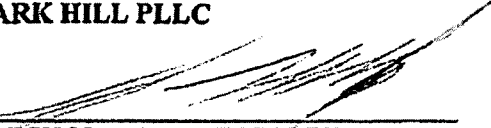
[Consolidated Proceeding]

STIPULATION AND ORDER FOR
DISMISSAL OF ERNEST BRUCE
FITZSIMMONS AND CAROL
FITZSIMMONS' COMPLAINT
AGAINST DEFENDANTS IN CASE NO.
CV15-02349


1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-02349 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 5 day of ^{Sept}~~August~~, 2017.

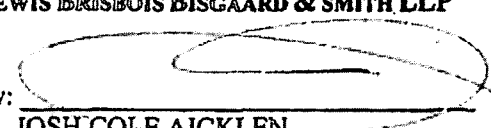
6 **CLARK HILL PLLC**

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8 By: 
9 NICHOLAS M. WIECZOREK
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18 Attorneys for MDB Trucking and Koski


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15 Attorneys for Plaintiffs

16 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

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18 By: 
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20 DAVID B. AVAKIAN
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23 Las Vegas, Nevada 89118
24 Attorneys for Defendant Versa Products Co.
25 Inc.

MCDONALD CARANO WILSON LLP

19 By: 
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21 JESSICA L. WOELFEL
22 100 W. Liberty Street, Tenth Floor
23 Reno, NV 89501
24 Attorneys for RMC Lamar Holdings

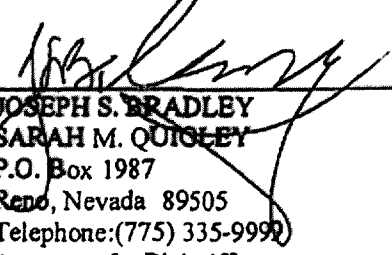
1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-02349 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this _____ day of August, 2017.

5
6 **CLARK HILL PLLC**

7
8 By: _____
9 NICHOLAS M. WIECZOREK
10 Nevada Bar No. 6170
11 JEREMY J. THOMPSON
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ORDER

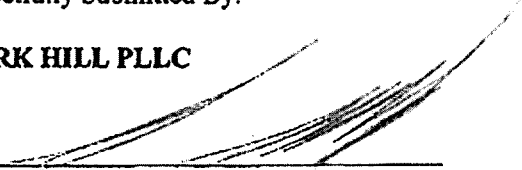
Upon review of the above Stipulation in the above-entitled matter,
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case
No. CV16-02349 against the Defendants be dismissed, with prejudice, with each party to bear
their own attorney's fees and costs.

DATED this 8 day of September, 2017.


DISTRICT COURT JUDGE

Respectfully Submitted By:

CLARK HILL PLLC

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12 **SECOND JUDICIAL DISTRICT COURT**
13 **WASHOE COUNTY, NEVADA**

15 **ERNEST BRUCE FITZSIMMONS and**
16 **CAROL FITZSIMMONS, Husband and**
17 **Wife,**

17 Plaintiffs,

18 vs.

19 **MDB TRUCKING, LLC; DANIEL**
20 **ANTHONY KOSKI; et al.,**

21 **Defendants.**

Case No.: CV15-02349
Dept. No.: 10

[Consolidated Proceeding]

**STIPULATION AND ORDER FOR
DISMISSAL OF OLIVIA JOHN AND
NAKYLA JOHN'S COMPLAINT
AGAINST DEFENDANTS IN CASE NO.
CV15-01337**

23 **AND ALL RELATED CASES.**

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-01337 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 8th day of ~~August~~^{November}, 2017.

5
6 **CLARK HILL PLLC**

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8 By: 

9 NICHOLAS M. WIECZOREK
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19 JOSH COLE AICKLEN
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By: _____

MATTHEW C. ADDISON
JESSICA L. WOELFEL
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Attorneys for RMC Lamar Holdings

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-01337 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 8th day of ~~August~~ ^{November}, 2017.

5
6 CLARK HILL PLLC

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29 JOSH COLE AICKLEN
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35 Inc.

MCDONALD CARANO WILSON LLP

By: 

36 MATTHEW C. ADDISON
37 JESSICA L. WOELFEL
38 100 W. Liberty Street, Tenth Floor
39 Reno, NV 89501
40 Attorneys for RMC Lamar Holdings

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV15-01337 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 5th day of ~~August~~ ^{November}, 2017.

5
6 CLARK HILL PLLC

7
8 By: 

9 NICHOLAS M. WIECZOREK
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ORDER

Upon review of the above Stipulation in the above-entitled matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case No. CV15-01337 against the Defendants be dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

DATED this 8 day of November, 2017.


DISTRICT COURT JUDGE

Respectfully Submitted By:

CLARK HILL PLLC



By: _____
NICHOLAS M. WIECZOREK
Nevada Bar No. 6150
JEREMY J. THOMPSON
Nevada Bar No. 12503
COLLEEN E. McCARTY
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Attorneys for MDB Trucking and Koski

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

26 A: I have seen that, yes.

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

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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24
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 Accordingly, “[a]t the heart of the doctrine is the premise that the person seeking to assert implied
2 indemnity...has been required to pay damages caused by a third party,” even though they have not
3 committed any “independent wrong.” *Primadonna*, 125 Nev. at 589, 216 P.3d at 801 (citing
4 *Harvest Capital v. WV Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509, 513 (2002)). Therefore,
5 implied indemnity is available as a cause of action “after the defendant has extinguished its own
6 liability through settlement or by paying a judgment.” *Id.* (citing *The Doctors*, 120 Nev. at 651, 98
7 P.3d at 686).

8
9 The second requirement is “a legal relationship or duty,” which “supports the claim of
10 indemnity.” *Black & Decker (U.S.), Inc. v. Essex Group, Inc.*, 105 Nev. 344, 346, 775 P.2d 698,
11 699 (1989) (citation omitted); *see also Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citation
12 omitted) (holding the court requires “some nexus or relationship between the indemnitee and
13 indemnitor” to allow a claim for implied indemnity); *see also Pack v. LaTourette*, 128 Nev. Adv.
14 Op. 25, 277 P.3d 1246, 1249 (2012) (citation omitted) (holding there “must be a preexisting legal
15 relation” between the two parties, “or some duty on the part of the primary tortfeasor to protect the
16 secondary tortfeasor”). Accordingly, implied indemnification is not “a license to assert a cross-
17 claim against any third party in hope of alleviating the burden of costs associated with defending
18 litigation.” *Primadonna*, 125 Nev. at 591, 216 P.3d at 802 (citing *Piedmont Equip. Co. Inc. v.*
19 *Eberhard Mfg. Co.*, 99 Nev. 523, 527-28, 665 P.2d 256, 259 (1983)). Because the Nevada
20 Supreme Court has held implied indemnity “should not be construed as permission to open a
21 floodgate for cross-claims” when there is no legal relationship between the parties, the standard for
22 what qualifies as a legal relationship is high. *Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citing
23 *Piedmont*, 99 Nev. at 527–28, 665 P.2d at 259).

1 1. Finding of Liability

2 The Motion contends MDB's claim for Implied Indemnity is yet unripe because "a cause of
3 action for implied indemnity does not run until the target defendant pays the actual loss by way of
4 settlement or judgment." The Motion, 5:25-26. According to the Motion, it would be "entirely
5 prejudicial" to join Modern in an action that is "still pending and is being heavily litigated." The
6 Motion, 5:28; 27. The Motion therefore argues MDB is not eligible for indemnification until there
7 has been a finding of liability in a "settlement or judgment." The Joint Opposition posits NRCP
8 14(a) specifically "allows a Third-Party Plaintiff to implead a Third-Party Defendant 'who is or
9 may be liable to the Third-Party Plaintiff for all or part of the Plaintiff's claim.'" The Joint
10 Opposition, 4:21-23.

11 The Court finds the 3P Complaint pleads sufficient facts to place Modern on notice of their
12 potential liability. By suggesting a finding of liability must occur before a party may *plead a claim*
13 of implied indemnity, the Motion suggests a pleading party would be required to plead an
14 admission of, or facts asserting, its own liability to sustain its claim. However, a court cannot
15 expect a party to admit or assert its own liability in order to plead a claim for relief unless the party
16 is pleading in the alternative, as allowed by NRCP 8(e)(2).³

17 It is important to make the distinction between *pleading a claim* for implied indemnity and
18 indemnification itself. The cases discussed, *supra*, clearly indicate indemnification is not possible
19 or proper without a finding of liability or a requirement that the pleading party pay damages.
20 *Primadonna*, 125 Nev. at 581; 589, 216 P.3d at 796; 801. However, the 3P Complaint does not
21 request indemnification, but rather pleads it as a cause of action. In other words, the 3P Complaint
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28 ³ NRCP 8(e)(2) states, in relevant part, "[a] party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both."

1 need only assert a possibility that if MDB is found liable, it is entitled to indemnification from
2 Modern, thereby obviating the need for additional proceedings to establish Modern's financial
3 responsibility to MDB.

4 Pursuant to NRCP 14(a), a defendant has the ability to bring an indemnity claim as they
5 would any other claim—at any time. In fact, The Nevada Supreme Court has explained NRCP
6 14(a) is “based upon the theory of indemnity,” in which “a defendant is permitted to defend the
7 case and at the same time assert his right of indemnity against the party ultimately responsible for
8 the damage.” *Reid v. Royal Insurance Co., Ltd.*, 80 Nev. 137, 140-41, 390 P.2d 45, 46-47 (1964).
9

10 The 3P Complaint asserts MDB is entitled to indemnity by Modern “with respect to all
11 allegations or liabilities set forth” in the Complaint. The 3P Complaint, 5:5-7. Accordingly, the 3P
12 Complaint effectively places Modern on notice that if it is found at fault for the “allegations or
13 liabilities” in the Complaint, it is entitled to indemnification.
14

15 2. Legal Relationship

16

17 The Motion contends the 3P Complaint fails to allege the legal relationship or pre-existing
18 duty between MDB and Modern required for a claim for implied indemnity to survive. The
19 Motion, 6:12-16. The Joint Opposition argues the 3P Complaint pleads sufficient facts to evidence
20 the legal relationship because it indicates MDB was “the last purchaser and end user of the subject
21 Ranco trailer,” as designed and manufactured by “Defendant RMC Lamar Holdings, Inc. (fka
22 Ranch Manufacturing Company).” The 3P Complaint, 3:27-28; 3:9-11. “Third-Party Defendants
23 the Modern Group and Dragon ESP acquired Ranch Manufacturing on or about August 1, 2007.”
24 The 3P Complaint, 3:12-13. Therefore, the Joint Opposition avers a legal relationship was created
25 when MDB purchased a trailer designed and manufactured by Ranch Manufacturing (“Ranch”),
26 which had been acquired by Modern.
27
28

1 As explained, *supra*, the Nevada Supreme Court has set a high standard for establishment of
2 a legal relationship as it applies to implied indemnity. The Court has found a legal relationship
3 exists in very limited circumstances. *See Black & Decker*, 105 Nev. at 346, 775 P.2d at 700
4 (holding a legal relationship exists in cases of implied warranties of merchantability); *see also*
5 *Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997)
6 (citing *Piedmont*, 99 Nev. at 527-28, 665 P.2d at 259) (holding a legal relationship exists between a
7 contractor and subcontractor); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 360, 989 P.2d 870,
8 874-75 (1999) (holding a legal relationship can exist between an employer and employee where an
9 express indemnity contract is in place); *Outboard Motor Corp. v. Shupbach*, 93 Nev. 158, 165, 561
10 P.2d 450, 454 (1977) (holding a legal relationship can exist between an employer and employee
11 when the employer holds a separate and independent duty to the employee); *Mills v. Continental*
12 *Parking Corp.*, 86 Nev. 724, 725, 475 P.2d 673, 674 (1970) (holding a legal relationship exists as
13 between a bailor and a bailee “where the parking lot attendant collects a fee, has possession of the
14 keys, assumes control of the car and issues a ticket to identify the car for redelivery”); *Troxel v.*
15 *Granville*, 530 U.S. 57, 58, 120 S.Ct. 2054, 2056 (2000) (holding a fundamental legal relationship
16 and constitutional protection exists between a parent and a child).

17
18 The Court finds the 3P Complaint does not plead sufficient facts to indicate the
19 establishment of a legal relationship between MDB and Modern. Although the Joint Opposition
20 avers a legal relationship was formed between MDB and Modern when MDB purchased a Ranch
21 trailer, that transaction does not, *ipso facto*, form a recognized legal relationship. The transaction
22 could create a legal relationship if it involved an implied warranty of merchantability, *Black &*
23 *Decker*, 105 Nev. at 346, 775 P.2d at 700; however, the 3P Complaint does not mention an implied
24 warranty of merchantability. Were the Court to follow the 3P Complaint’s argument to its logical
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1 conclusion, every sale of goods would create the legal relationship necessary for an implied
2 indemnity claim. This is too broad an application of the Nevada Supreme Court's holdings,
3 discussed *supra*, which limit the formation of a legal relationship to very particular circumstances.
4 Further, the 3P Complaint does not plead facts indicating the formation of a legal relationship via
5 any preexisting duty of Modern to MDB. Therefore, because the 3P Complaint has not pled
6 sufficient facts to evidence a legal relationship between MDB and Modern, its first cause of action
7 for implied indemnification against Modern cannot be sustained.
8

9 While the Motion may have pled the facts necessary to satisfy the requirement of liability
10 on the part of Modern, the Motion does not plead the facts necessary to satisfy the requirement of a
11 preexisting legal relationship between the party seeking indemnity, MDB, and the party who would
12 indemnify, Modern. Proper pleading of the liability requirement alone cannot sustain the claim.
13

14 **B. Second Cause of Action for Contribution**

15 The Motion cites to *The Doctors* to explain MDB's Contribution claim fails because a
16 "contribution claim only arises where judgment has been entered in an action against two or more
17 tortfeasors." The Motion, 6:22-23. Additionally, the Motion argues "Third-Party Plaintiffs cannot
18 seek both contribution and indemnity. There can be no contribution where indemnity exists." The
19 Motion, 6:27-28; 7:1. The Joint Opposition contends "[n]either claims for indemnification or
20 contribution are premature at this stage of the proceedings," and it may therefore pursue the 3P
21 complaint "under both alternate theories of recovery." The Joint Opposition, 8:21-22; 19-20.
22

23 "A right to contribution exists 'where two or more persons become jointly or severally
24 liable in tort for the same injury to [a] person...even though judgment has not been recovered
25 against all or any of them.'" *LaTourette*, 128 Nev. Adv. Op. 25, 277 P.3d at 1249 (citing NRS
26 17.225(1)). The *LaTourette* Court explicitly clarified NRCP 14(a) "provides that a third-party
27
28

1 plaintiff may implead a third-party defendant based on an inchoate claim for contribution,” in order
2 to “specifically provide for the possibility of joining a third-party defendant ‘against whom a cause
3 of action has not yet accrued.’” *Id.* (citing NRCp 14(a); 6 Charles Alan Wright, Arthur R. Miller
4 & Mary Kay Kane, Federal Practice and Procedure § 1451 (2010)). The *LaTourette* Court
5 explained the Nevada Supreme Court had “repeatedly recognized that a third-party plaintiff has the
6 right to seek contribution prior to entry of judgment.” *LaTourette*, 128 Nev. Adv. Op. 25, 277 P.3d
7 at 1249.
8

9 The Court finds the 3P Complaint pleads sufficient facts to maintain its second cause of
10 action for contribution. The Motion does not attack the merits of the claim; instead, the Motion
11 contends the claim is “not yet ripe for adjudication.” The Motion, 2:10. The *LaTourette* Court
12 clearly explained a defendant may bring a claim for contribution “prior to entry of judgment;”
13 accordingly, the Motion’s claim a contribution claim can only arise “where judgment has been
14 entered in an action,” is an erroneous application of *The Doctors*. Additionally, the Court finds the
15 issue of whether the 3P Complaint may include claims for both implied indemnity and contribution
16 to be moot given that the Implied Indemnity claim is dismissed. Accordingly, MDB has properly
17 plead a ripe claim for contribution.
18
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1 IT IS ORDERED Modern's THIRD PARTY DEFENDANT THE MODERN GROUP GP-
2 SUB, INC'S MOTION TO DISMISS THIRD PARTY COMPLAINT is hereby GRANTED in part
3 and DENIED in part.
4

5 IT IS FURTHER ORDERED MDB's first claim for relief for Implied Indemnity as to THE
6 MODERN GROUP GP-SUB, INC. and DRAGON ESP, LTD. is hereby DISMISSED.

7 DATED this 26 day of October, 2016.

8 
9 _____
10 ELLIOTT A. SATTLER
11 District Judge
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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
3 of the State of Nevada, County of Washoe; that on this ____ day of October, 2016, I deposited in the
4 County mailing system for postage and mailing with the United States Postal Service in Reno,
5 Nevada, a true copy of the attached document addressed to:
6

7 **CERTIFICATE OF ELECTRONIC SERVICE**

8 I hereby certify that I am an employee of the Second Judicial District Court of the State of
9 Nevada, in and for the County of Washoe; that on the 26 day of October, 2016, I electronically
10 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of
11 electronic filing to the following:
12

13 KENNETH BICK, ESQ.

14 BRENT HARSH, ESQ.

15 JOSEPH BRADLEY, ESQ.

16 JACOB BUNDICK, ESQ.

17 KATHERINE PARKS, ESQ.

18 JESSICA WOELFEL, ESQ.

19 MATTHEW ADDISON, ESQ.

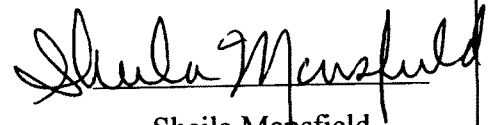
20 LISA ZASTROW, ESQ.

21 SARAH QUIGLEY, ESQ.

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23 BRIAN BROWN, ESQ.

24 THIERRY BARKLEY, ESQ.
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5 Attorneys for Defendants
MDB TRUCKING, LLC and DANIEL A. KOSKI

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

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

Case No. CV15-02349

Dept. No. 15

11 Plaintiffs,

12 vs.

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

16 Defendants.

17
18 AND RELATED THIRD PARTY
COMPLAINT.

19
20 OLIVIA JOHN, individually and as Guardian
Ad Litem for NAKYLA JOHN,

Case No. CV15-01337

Dept. No. 4

21 Plaintiffs,

22 vs.

23 MDB TRUCKING, LLC; DANIEL
24 ANTHONY KOSKI; BERLIE NATHAN
LANGSTON; et. al.

25 Defendants.

26
27 AND RELATED THIRD PARTY CLAIM.

1 BEVERLY A. CROSSLAND, PATRICK E.
2 CROSSLAND, and RYAN P. CROSSLAND,
individuals.

3 Plaintiffs,

4 vs.

5 MDB TRUCKING, LLC; DANIEL
6 ANTHONY KOSKI; et. al.,

7 Defendants.

8 AND RELATED THIRD PARTY
9 COMPLAINT.

10 ANGELA MICHELLE WILT,
11

12 Plaintiff,

13 vs.

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

17 Defendants.

18 AND RELATED CROSS-CLAIM AND
19 THIRD PARTY COMPLAINT.

20 JULIE KINS, as parent and guardian of
21 KANDISE BAIRD, a minor child,

22 Plaintiff,

23 vs.

24 MDB TRUCKING, LLC; DANIEL
25 ANTHONY KOSKI; et. al.,

26 Defendants.

Case No. CV16-00626

Dept. No. 8

Case No. CV15-02410

Dept. No. 10

Case No. CV16-00519

Dept. No. 10

1 **NOTICE OF ENTRY OF ORDER**

2 TO: All Parties and their attorney of record.

3 PLEASE TAKE NOTICE that the above-entitled court entered its Order on October 26,
4 2016. A copy of the Order is attached hereto as Exhibit 1.

5 DATED this 3rd day of November, 2016.

6 THORNDAL ARMSTRONG
7 DELK BALKENBUSH & EISINGER

8 By: 

9 Katherine F. Parks, Esq., State Bar No. 6227

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AFFIRMATION

Pursuant to NRS 239B.030

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

DATED this 3rd day of November, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: 

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CERTIFICATE OF SERVICE

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

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

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

_____ hand delivery

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

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

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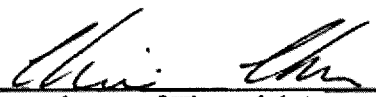
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DATED this 3 day of November, 2016.


An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

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INDEX OF EXHIBIT(S)

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EXHIBIT

1

EXHIBIT

1

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

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

vs.

Dept. No. 10

MDB TRUCKING, LLC., et al.,

Defendants.

ANGELA MICHELLE WILT,

Plaintiff,

Case No. CV15-02410
(consolidated into CV15-02349)

vs.

MDB TRUCKING, LLC., et al.,

Defendants.

ROSA ROBLES, et al.,

Plaintiffs,

Case No. CV16-01124
(consolidated into CV15-02349)¹

vs.

MDB TRUCKING, LLC., et al.,

Defendants.

¹ Consolidated after motion practice was filed.

ORDER

Presently before the Court is THIRD PARTY DEFENDANT THE MODERN GROUP GP-SUB, INC'S MOTION TO DISMISS THIRD PARTY COMPLAINT ("the Motion"). The Motion was filed by Third-Party Defendants THE MODERN GROUP GP-SUB, INC. and DRAGON ESP, LTD. (collectively "Modern"). Modern filed the Motion separately in each of the above named cases. Modern filed the Motion in case number CV15-02349, in regards to Plaintiff Fitzsimmons, on August 1, 2016. Modern filed the Motion in case number CV15-02410, in regards to Plaintiff Wilt, on August 2, 2016; CV15-02410 has since been consolidated into case number CV15-02349. Modern filed the Motion in case number CV16-01124, in regards to Plaintiff Robles, on August 1, 2016; CV16-01124 has since been consolidated into case number CV15-02349. The Motion is identical as filed in all three cases. Third-Party Plaintiff MDB TRUCKING, LLC ("MDB") filed the THIRD PARTY PLAINTIFF'S JOINT OPPOSITION TO THIRD-PARTY DEFENDANT'S [THE MODERN GROUP AND DRAGON ESP, LTD'S] MOTION TO DISMISS THIRD-PARTY COMPLAINT ("the Joint Opposition"). MDB filed the Joint Opposition in case numbers CV15-02349 and CV15-02410, in regards to Plaintiffs Fitzsimmons and Wilt, on August 18, 2016. MDB filed the THIRD PARTY PLAINTIFF'S OPPOSITION TO THIRD-PARTY DEFENDANT'S [THE MODERN GROUP AND DRAGON ESP, LTD'S] MOTION TO DISMISS THIRD-PARTY COMPLAINT ("the Opposition") in case number CV16-01124, in regards to Plaintiff Robles, on August 18, 2016. The Joint Opposition and Opposition are identical as filed in all three cases. Modern filed the REPLY IN SUPPORT OF THIRD-PARTY DEFENDANTS THE MODERN GROUP GP-SUB, INC'S AND DRAGON ESP LTD.'S MOTION TO DISMISS THIRD-PARTY COMPLAINT ("the Reply"). Modern filed the Reply in

1 case number CV15-02349, in regards to Plaintiff Fitzsimmons; in case number CV15-02349, in
2 regards to Plaintiff Wilt; and in case number CV16-01124, in regards to Plaintiff Robles, on August
3 29, 2016. The Reply is identical as filed in all three cases. The Motion was submitted for the
4 Court's consideration in case number CV15-02349, in regards to Plaintiffs Fitzsimmons and Wilt,
5 and in CV16-01124, in regards to Plaintiff Robles, on September 7, 2016.
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7 As the pleadings are identical, the Court will not differentiate between the pleadings as filed
8 in each case.² The parties shall construe this Order to apply equally to all pleadings and parties
9 described, *supra*. As the above-named cases have been consolidated, the Court will dispose of all
10 three Motions in the instant Order.
11

12 FACTUAL BACKGROUND

13 This case arises from a personal injury action. A COMPLAINT was filed in CV15-02349,
14 in regards to Plaintiff Fitzsimmons, on December 4, 2015 ("The Fitzsimmons Complaint"). A
15 COMPLAINT was filed in CV15-02410, in regards to Plaintiff Wilt, on December 16, 2015 ("The
16 Wilt Complaint"). A COMPLAINT was filed in CV16-01124, in regards to Plaintiff Robles, on
17 May 24, 2016 ("The Robles Complaint"). The facts alleged in all three complaints are nearly
18 identical. It is alleged Defendant Anthony Koski ("Koski"), while driving a truck for MDB,
19 negligently spilled a load of gravel into the roadway. The Fitzsimmons Complaint, 3:11-15; 16-
20 18. Plaintiffs ERNEST BRUCE FITZSIMMONS, ANGELA MICHELLE WILT, and the
21 ROBLES family (collectively "the Plaintiffs") were driving on the same roadway. The
22 Fitzsimmons Complaint, 3:19-20. The spilled gravel caused the driving Plaintiffs to lose control of
23 their vehicles and hit a guardrail. The Fitzsimmons Complaint, 3:22-25. The Plaintiffs sustained
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27 ² The Court will cite to the Complaint, Motion, Joint Opposition, and Reply in the Fitzsimmons case for citation
28 purposes. For example, a citation to "the Motion" refers specifically to the Motion as filed in the Fitzsimmons case, but
applies to the Motion as filed in the Wilt and Robles cases as well.

1 physical and emotional injuries as a result of the accident. The Fitzsimmons Complaint, 4:12-14.
2 In response to the Complaint, MDB filed a THIRD-PARTY COMPLAINT ("the 3P Complaint").
3 MDB filed the 3P Complaint in case number CV15-02349, in regards to Plaintiff Fitzsimmons; in
4 case number CV15-02410, in regards to Plaintiff Wilt; and in case number CV16-01124, in regards
5 to Plaintiff Robles, on June 15, 2016. The 3P Complaint is identical as filed in all three cases. The
6 3P Complaint alleged it was not Koski's negligence that caused the gravel to spill; rather, the spill
7 was caused by the "unreasonably dangerous and defective" design and manufacture of the trailer
8 that held the gravel. The 3P Complaint, 3:5-7; 4:1-3. Therefore, MDB brought the 3P Complaint
9 against the manufacturers of the trailer and its components, including Modern. The 3P Complaint,
10 4:14-18. The 3P Complaint includes four claims for relief. The first claim for relief is MDB's
11 claim for Implied Indemnification as to, *inter alia*, Modern. The 3P Complaint, 5:1-2. The second
12 claim for relief is MDB's claim for Contribution as to, *inter alia*, Modern. The 3P Complaint,
13 5:10-11. The Motion moves to dismiss the first and second causes of action as to Modern.

17 LEGAL STANDARD FOR MOTION TO DISMISS

18 NRCP 12(b)(5) states a claim may be dismissed for failure to state a claim upon which
19 relief can be granted. A court must liberally construe the pleadings and accept all asserted
20 allegations as true. *Buzz Stew, LLC. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670,
21 672 (2008). Dismissal is appropriate if the allegations fail to state a cognizable claim of relief
22 when taken at "face value," and construed favorably on behalf of the counterclaimant. *Morris v.*
23 *Bank of Am.*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (quoting *Edgar v. Wagner*, 101 Nev.
24 226, 227-28, 699 P.2d 110, 111-12 (1985)); *see also Stockmeier v. Nevada Dep't of Corrections*,
25 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (holding dismissal is proper where factual allegations
26 "are insufficient to establish the elements of a claim for relief"). Accordingly, the claim should
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1 only be dismissed if it “appears beyond a doubt” the non-moving party could “prove no set of facts,
2 which, if true, would entitle it to relief.” *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

3 Despite a court’s liberal construction of the allegations in the pleading, a pleading party
4 must set forth sufficient facts to establish all necessary elements of a claim against the opposing
5 party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672 (1984) (citing *Johnson v. Travelers Ins. Co.*,
6 89 Nev. 467, 472, 515 P.2d 68, 71 (1973)). These facts are necessary to provide the opposing party
7 with fair notice. *See Hay*, 100 Nev. at 198, 678 P.2d at 673.
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10 ANALYSIS

11 The Motion argues MDB’s causes of action for implied indemnity and contribution fail as a
12 matter of law because they are “not yet ripe for adjudication.” The Motion, 2:19-10. The Motion
13 avers “such claims do not arise until a resolution or judgment is obtained in the underlying matter.”
14 The Motion, 4:19-22.
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17 **A. First Cause of Action for Implied Indemnity**

18 Implied indemnity is “an equitable remedy that allows a defendant to seek recovery from
19 other potential tortfeasors” when the negligence of those tortfeasors is the primary cause of the
20 “injured party’s harm.” *Rodriguez v. Primadonna, Co., LLC*, 125 Nev. 578, 589, 216 P.3d 793, 801
21 (2009) (citing *The Doctors Co. v. Vincent*, 120 Nev. 644, 651, 98 P.3d 681, 686 (2004)). Implied
22 indemnity allows a “complete shifting of responsibility” to a third party. *The Doctors*, 120 Nev. at
23 651, 98 P.3d at 686. There are two requirements for an implied indemnity claim. The first is a
24 finding the third-party defendant is liable for damages to the plaintiff on the underlying claim.
25 *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. This is because implied indemnity “cannot be used
26 to allow one innocent party to recover its defense costs from another innocent party.” *Id.*
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1 Accordingly, “[a]t the heart of the doctrine is the premise that the person seeking to assert implied
2 indemnity...has been required to pay damages caused by a third party,” even though they have not
3 committed any “independent wrong.” *Primadonna*, 125 Nev. at 589, 216 P.3d at 801 (citing
4 *Harvest Capital v. WV Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509, 513 (2002)). Therefore,
5 implied indemnity is available as a cause of action “after the defendant has extinguished its own
6 liability through settlement or by paying a judgment.” *Id.* (citing *The Doctors*, 120 Nev. at 651, 98
7 P.3d at 686).

8
9 The second requirement is “a legal relationship or duty,” which “supports the claim of
10 indemnity.” *Black & Decker (U.S.), Inc. v. Essex Group, Inc.*, 105 Nev. 344, 346, 775 P.2d 698,
11 699 (1989) (citation omitted); *see also Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citation
12 omitted) (holding the court requires “some nexus or relationship between the indemnitee and
13 indemnitor” to allow a claim for implied indemnity); *see also Pack v. LaTourette*, 128 Nev. Adv.
14 Op. 25, 277 P.3d 1246, 1249 (2012) (citation omitted) (holding there “must be a preexisting legal
15 relation” between the two parties, “or some duty on the part of the primary tortfeasor to protect the
16 secondary tortfeasor”). Accordingly, implied indemnification is not “a license to assert a cross-
17 claim against any third party in hope of alleviating the burden of costs associated with defending
18 litigation.” *Primadonna*, 125 Nev. at 591, 216 P.3d at 802 (citing *Piedmont Equip. Co. Inc. v.*
19 *Eberhard Mfg. Co.*, 99 Nev. 523, 527-28, 665 P.2d 256, 259 (1983)). Because the Nevada
20 Supreme Court has held implied indemnity “should not be construed as permission to open a
21 floodgate for cross-claims” when there is no legal relationship between the parties, the standard for
22 what qualifies as a legal relationship is high. *Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citing
23 *Piedmont*, 99 Nev. at 527-28, 665 P.2d at 259).

1 1. Finding of Liability

2 The Motion contends MDB's claim for Implied Indemnity is yet unripe because "a cause of
3 action for implied indemnity does not run until the target defendant pays the actual loss by way of
4 settlement or judgment." The Motion, 5:25-26. According to the Motion, it would be "entirely
5 prejudicial" to join Modern in an action that is "still pending and is being heavily litigated." The
6 Motion, 5:28; 27. The Motion therefore argues MDB is not eligible for indemnification until there
7 has been a finding of liability in a "settlement or judgment." The Joint Opposition posits NRCP
8 14(a) specifically "allows a Third-Party Plaintiff to implead a Third-Party Defendant 'who is or
9 may be liable to the Third-Party Plaintiff for all or part of the Plaintiff's claim.'" The Joint
10 Opposition, 4:21-23.

11 The Court finds the 3P Complaint pleads sufficient facts to place Modern on notice of their
12 potential liability. By suggesting a finding of liability must occur before a party may *plead a claim*
13 of implied indemnity, the Motion suggests a pleading party would be required to plead an
14 admission of, or facts asserting, its own liability to sustain its claim. However, a court cannot
15 expect a party to admit or assert its own liability in order to plead a claim for relief unless the party
16 is pleading in the alternative, as allowed by NRCP 8(e)(2).³

17 It is important to make the distinction between *pleading a claim* for implied indemnity and
18 indemnification itself. The cases discussed, *supra*, clearly indicate indemnification is not possible
19 or proper without a finding of liability or a requirement that the pleading party pay damages.
20 *Primadonna*, 125 Nev. at 581; 589, 216 P.3d at 796; 801. However, the 3P Complaint does not
21 request indemnification, but rather pleads it as a cause of action. In other words, the 3P Complaint
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28 ³ NRCP 8(e)(2) states, in relevant part, "[a] party may also state as many separate claims or defenses as the party has
regardless of consistency and whether based on legal or on equitable grounds or on both."

1 need only assert a possibility that if MDB is found liable, it is entitled to indemnification from
2 Modern, thereby obviating the need for additional proceedings to establish Modern's financial
3 responsibility to MDB.
4

5 Pursuant to NRCP 14(a), a defendant has the ability to bring an indemnity claim as they
6 would any other claim—at any time. In fact, The Nevada Supreme Court has explained NRCP
7 14(a) is “based upon the theory of indemnity,” in which “a defendant is permitted to defend the
8 case and at the same time assert his right of indemnity against the party ultimately responsible for
9 the damage.” *Reid v. Royal Insurance Co., Ltd.*, 80 Nev. 137, 140-41, 390 P.2d 45, 46-47 (1964).
10

11 The 3P Complaint asserts MDB is entitled to indemnity by Modern “with respect to all
12 allegations or liabilities set forth” in the Complaint. The 3P Complaint, 5:5-7. Accordingly, the 3P
13 Complaint effectively places Modern on notice that *if* it is found at fault for the “allegations or
14 liabilities” in the Complaint, it is entitled to indemnification.
15

16 2. Legal Relationship

17 The Motion contends the 3P Complaint fails to allege the legal relationship or pre-existing
18 duty between MDB and Modern required for a claim for implied indemnity to survive. The
19 Motion, 6:12-16. The Joint Opposition argues the 3P Complaint pleads sufficient facts to evidence
20 the legal relationship because it indicates MDB was “the last purchaser and end user of the subject
21 Ranco trailer,” as designed and manufactured by “Defendant RMC Lamar Holdings, Inc. (fka
22 Ranch Manufacturing Company).” The 3P Complaint, 3:27-28; 3:9-11. “Third-Party Defendants
23 the Modern Group and Dragon ESP acquired Ranch Manufacturing on or about August 1, 2007.”
24 The 3P Complaint, 3:12-13. Therefore, the Joint Opposition avers a legal relationship was created
25 when MDB purchased a trailer designed and manufactured by Ranch Manufacturing (“Ranch”),
26 which had been acquired by Modern.
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1 As explained, *supra*, the Nevada Supreme Court has set a high standard for establishment of
2 a legal relationship as it applies to implied indemnity. The Court has found a legal relationship
3 exists in very limited circumstances. See *Black & Decker*, 105 Nev. at 346, 775 P.2d at 700
4 (holding a legal relationship exists in cases of implied warranties of merchantability); see also
5 *Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997)
6 (citing *Piedmont*, 99 Nev. at 527-28, 665 P.2d at 259) (holding a legal relationship exists between a
7 contractor and subcontractor); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 360, 989 P.2d 870,
8 874-75 (1999) (holding a legal relationship can exist between an employer and employee where an
9 express indemnity contract is in place); *Outboard Motor Corp. v. Shupbach*, 93 Nev. 158, 165, 561
10 P.2d 450, 454 (1977) (holding a legal relationship can exist between an employer and employee
11 when the employer holds a separate and independent duty to the employee); *Mills v. Continental*
12 *Parking Corp.*, 86 Nev. 724, 725, 475 P.2d 673, 674 (1970) (holding a legal relationship exists as
13 between a bailor and a bailee "where the parking lot attendant collects a fee, has possession of the
14 keys, assumes control of the car and issues a ticket to identify the car for redelivery"); *Troxel v.*
15 *Granville*, 530 U.S. 57, 58, 120 S.Ct. 2054, 2056 (2000) (holding a fundamental legal relationship
16 and constitutional protection exists between a parent and a child).

17
18 The Court finds the 3P Complaint does not plead sufficient facts to indicate the
19 establishment of a legal relationship between MDB and Modern. Although the Joint Opposition
20 avers a legal relationship was formed between MDB and Modern when MDB purchased a Ranch
21 trailer, that transaction does not, *ipso facto*, form a recognized legal relationship. The transaction
22 could create a legal relationship if it involved an implied warranty of merchantability, *Black &*
23 *Decker*, 105 Nev. at 346, 775 P.2d at 700; however, the 3P Complaint does not mention an implied
24 warranty of merchantability. Were the Court to follow the 3P Complaint's argument to its logical
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1 conclusion, every sale of goods would create the legal relationship necessary for an implied
2 indemnity claim. This is too broad an application of the Nevada Supreme Court's holdings,
3 discussed *supra*, which limit the formation of a legal relationship to very particular circumstances.
4 Further, the 3P Complaint does not plead facts indicating the formation of a legal relationship via
5 any preexisting duty of Modern to MDB. Therefore, because the 3P Complaint has not pled
6 sufficient facts to evidence a legal relationship between MDB and Modern, its first cause of action
7 for implied indemnification against Modern cannot be sustained.
8

9 While the Motion may have pled the facts necessary to satisfy the requirement of liability
10 on the part of Modern, the Motion does not plead the facts necessary to satisfy the requirement of a
11 preexisting legal relationship between the party seeking indemnity, MDB, and the party who would
12 indemnify, Modern. Proper pleading of the liability requirement alone cannot sustain the claim.
13

14 **B. Second Cause of Action for Contribution**

15 The Motion cites to *The Doctors* to explain MDB's Contribution claim fails because a
16 "contribution claim only arises where judgment has been entered in an action against two or more
17 tortfeasors." The Motion, 6:22-23. Additionally, the Motion argues "Third-Party Plaintiffs cannot
18 seek both contribution and indemnity. There can be no contribution where indemnity exists." The
19 Motion, 6:27-28; 7:1. The Joint Opposition contends "[n]either claims for indemnification or
20 contribution are premature at this stage of the proceedings," and it may therefore pursue the 3P
21 complaint "under both alternate theories of recovery." The Joint Opposition, 8:21-22; 19-20.
22

23 "A right to contribution exists 'where two or more persons become jointly or severally
24 liable in tort for the same injury to [a] person...even though judgment has not been recovered
25 against all or any of them.'" *LaTourette*, 128 Nev. Adv. Op. 25, 277 P.3d at 1249 (citing NRS
26 17.225(1)). The *LaTourette* Court explicitly clarified NRCP 14(a) "provides that a third-party
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1 plaintiff may implead a third-party defendant based on an inchoate claim for contribution,” in order
2 to “specifically provide for the possibility of joining a third-party defendant ‘against whom a cause
3 of action has not yet accrued.’” *Id.* (citing NRCP 14(a); 6 Charles Alan Wright, Arthur R. Miller
4 & Mary Kay Kane, Federal Practice and Procedure § 1451 (2010)). The *LaTourette* Court
5 explained the Nevada Supreme Court had “repeatedly recognized that a third-party plaintiff has the
6 right to seek contribution prior to entry of judgment.” *LaTourette*, 128 Nev. Adv. Op. 25, 277 P.3d
7 at 1249.
8

9 The Court finds the 3P Complaint pleads sufficient facts to maintain its second cause of
10 action for contribution. The Motion does not attack the merits of the claim; instead, the Motion
11 contends the claim is “not yet ripe for adjudication.” The Motion, 2:10. The *LaTourette* Court
12 clearly explained a defendant may bring a claim for contribution “prior to entry of judgment;”
13 accordingly, the Motion’s claim a contribution claim can only arise “where judgment has been
14 entered in an action,” is an erroneous application of *The Doctors*. Additionally, the Court finds the
15 issue of whether the 3P Complaint may include claims for both implied indemnity and contribution
16 to be moot given that the Implied Indemnity claim is dismissed. Accordingly, MDB has properly
17 plead a ripe claim for contribution.
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1 IT IS ORDERED Modern's THIRD PARTY DEFENDANT THE MODERN GROUP GP-
2 SUB, INC'S MOTION TO DISMISS THIRD PARTY COMPLAINT is hereby GRANTED in part
3 and DENIED in part.
4

5 IT IS FURTHER ORDERED MDB's first claim for relief for Implied Indemnity as to THE
6 MODERN GROUP GP-SUB, INC. and DRAGON ESP, LTD. is hereby DISMISSED.

7 DATED this 24 day of October, 2016.

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10 ELLIOTT A. SATTLER
11 District Judge
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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
3 of the State of Nevada, County of Washoe; that on this ____ day of October, 2016, I deposited in the
4 County mailing system for postage and mailing with the United States Postal Service in Reno,
5 Nevada, a true copy of the attached document addressed to:
6

7 **CERTIFICATE OF ELECTRONIC SERVICE**

8 I hereby certify that I am an employee of the Second Judicial District Court of the State of
9 Nevada, in and for the County of Washoe; that on the 26 day of October, 2016, I electronically
10 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of
11 electronic filing to the following:
12

13 KENNETH BICK, ESQ.

14 BRENT HARSH, ESQ.

15 JOSEPH BRADLEY, ESQ.

16 JACOB BUNDICK, ESQ.

17 KATHERINE PARKS, ESQ.

18 JESSICA WOELFEL, ESQ.

19 MATTHEW ADDISON, ESQ.

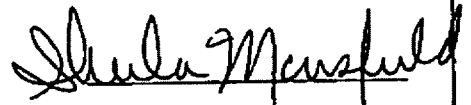
20 LISA ZASTROW, ESQ.

21 SARAH QUIGLEY, ESQ.

22 JOSH AICKLEN, ESQ.

23 BRIAN BROWN, ESQ.

24 THIERRY BARKLEY, ESQ.
25
26
27
28


Sheila Mansfield
Administrative Assistant

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.,

(Consolidated Case Numbers
CV15-01337; CV16-00519;
CV15-02410; CV16-01124;
CV16-00626; CV16-01335)

Defendants.

ORDER

Presently before the Court is THIRD PARTY DEFENDANTS THE MODERN GROUP GP-SUB, INC.'S AND DRAGON ESP, LTD.'S MOTION TO DISMISS THIRD PARTY COMPLAINT ("the Motion"). The Motion was filed by Third-Party Defendants THE MODERN GROUP GP-SUB, INC. and DRAGON ESP, LTD. (collectively "Modern") on September 14, 2016. Third-Party Plaintiff MDB TRUCKING, LLC ("MDB") filed the THIRD-PARTY PLAINTIFF'S OPPOSITION TO THIRD-PARTY DEFENDANTS' [THE MODERN GROUP AND DRAGON ESP, LTD'S] MOTION TO DISMISS THIRD-PARTY COMPLAINT ("the Opposition") on September 29, 2016. Modern filed the THIRD PARTY DEFENDANTS THE MODERN GROUP GP-SUB, INC.'S AND DRAGON ESP, LTD'S REPLY IN SUPPORT OF MOTION TO DISMISS THIRD PARTY COMPLAINT ("the Reply") on October 10, 2016. The

1 Motion was originally filed in case number CV16-00626 (“the Crossland Action”). The Crossland
2 Action has since been consolidated into case number CV15-02349 (“the Fitzsimmons Action”).
3 The Motion was submitted in the Fitzsimmons Action for the Court’s consideration on February
4 24, 2017.

5 FACTUAL BACKGROUND

6 This case arises from a personal injury action. Plaintiff BEVERLY A. CROSSLAND (“the
7 Plaintiff”) filed the COMPLAINT (“the Complaint”) in the Crossland Action on March 22, 2016.
8 The Plaintiff filed the FIRST AMENDED COMPLAINT (“the Am. Complaint”) on June 30, 2016.
9 The Am. Complaint alleges Defendant ANTHONY KOSKI (“Koski”), while driving a truck for
10 MDB, negligently spilled a load of gravel into the roadway. The Am. Complaint, 3:10-18, 22-26.
11 The Plaintiff was driving on the same roadway. The Am. Complaint, 3:5-7. The spilled gravel
12 caused the Plaintiff to lose control of her vehicle and strike the guardrail and vehicle ahead of her.
13 The Am. Complaint, 3:19-21. The Plaintiff sustained serious injuries as a result of the accident.
14 The Am. Complaint, 4:6-10. In response to the Complaints, MDB filed the THIRD-PARTY
15 COMPLAINT (“the 3P Complaint”) on April 21, 2016.¹ The 3P Complaint alleged it was not
16 Koski’s negligence that caused the gravel to spill; rather, the spill was caused by the “unreasonably
17 dangerous and defective” design and manufacture of the trailer that held the gravel. The 3P
18 Complaint, 3:1-3. Therefore, MDB brought the 3P Complaint against the manufacturers of the
19 trailer and its components, including Modern. The 3P Complaint, 3:10-18. The 3P Complaint
20 includes two claims for relief. The first claim for relief is for Implied Indemnification as to, *inter*
21 *alia*, Modern. The second claim for relief is for Contribution as to, *inter alia*, Modern. The Motion
22 moves to dismiss both causes of action as to Modern.

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27 ¹ The Motion claims “MDB has been involved in litigation regarding this incident for over two years.” The Reply
28 repeats this claim and states “MDB has been involved in this litigation for over two years....” The Motion, 2:20; the
Reply: 2:21-22. As explained *supra*, MDB was not joined in this litigation by this particular Plaintiff until April 21,
2016. Therefore, as of the filing of the Motion, MDB had been involved in the litigation for approximately five months.
As of the filing of this Order, MDB has been involved in the litigation for approximately one year.

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ANALYSIS

The Motion argues MDB's causes of action for implied indemnity and contribution fail as a matter of law because they are "not yet ripe for adjudication." The Motion, 2:3-4. The Motion avers "such claims do not arise until a resolution or judgment is obtained in the underlying matter." The Motion, 4:15-16.

A. First Cause of Action for Implied Indemnity

Implied indemnity is "an equitable remedy that allows a defendant to seek recovery from other potential tortfeasors" when the negligence of those tortfeasors is the primary cause of the "injured party's harm." *Rodriguez v. Primadonna, Co., LLC*, 125 Nev. 578, 589, 216 P.3d 793, 801 (2009) (citing *The Doctors Co. v. Vincent*, 120 Nev. 644, 651, 98 P.3d 681, 686 (2004)). Implied indemnity allows a "complete shifting of responsibility" to a third party. *The Doctors*, 120 Nev. at 651, 98 P.3d at 686. There are two requirements for an implied indemnity claim. The first is a finding the third-party defendant is liable for damages to the plaintiff on the underlying claim. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. This is because implied indemnity "cannot be used to allow one innocent party to recover its defense costs from another innocent party." *Id.* Accordingly, "[a]t the heart of the doctrine is the premise that the person seeking to assert implied indemnity...has been required to pay damages caused by a third party," even though they have not committed any "independent wrong." *Primadonna*, 125 Nev. at 589, 216 P.3d at 801 (citing *Harvest Capital v. WV Dept. of Energy*, 211 W.Va. 34, 38, 560 S.E.2d 509, 513 (2002)). Therefore, implied indemnity is available as a cause of action "after the defendant has extinguished its own liability through settlement or by paying a judgment." *Id.* (citing *The Doctors*, 120 Nev. at 651, 98 P.3d at 686).

The second requirement is "a legal relationship or duty," which "supports the claim of indemnity." *Black & Decker (U.S.), Inc. v. Essex Group, Inc.*, 105 Nev. 344, 346, 775 P.2d 698, 699 (1989) (citation omitted); *see also Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citation omitted) (holding the court requires "some nexus or relationship between the indemnitee and indemnitor" to allow a claim for implied indemnity); *see also Pack v. LaTourette*, 128 Nev. 264, 268, 277 P.3d 1246, 1249 (2012) (citation omitted) (holding there "must be a preexisting legal relation" between the two parties, "or some duty on the part of the primary tortfeasor to protect the secondary tortfeasor"). Accordingly, implied indemnification is not "a license to assert a cross-claim against any third party in hope of alleviating the burden of costs associated with defending

1 litigation.” *Primadonna*, 125 Nev. at 591, 216 P.3d at 802 (citing *Piedmont Equip. Co. Inc. v.*
2 *Eberhard Mfg. Co.*, 99 Nev. 523, 527-28, 665 P.2d 256, 259 (1983)). Because the Nevada
3 Supreme Court has held implied indemnity “should not be construed as permission to open a
4 floodgate for cross-claims” when there is no legal relationship between the parties, the standard for
5 what qualifies as a legal relationship is high. *Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citing
6 *Piedmont*, 99 Nev. at 527–28, 665 P.2d at 259).

7 1. Finding of Liability

8 The Motion contends MDB’s claim for Implied Indemnity is yet unripe because “a cause of
9 action for implied indemnity does not run until the target defendant pays the actual loss by way of
10 settlement or judgment.” The Motion, 5:21-22. According to the Motion, it would be “entirely
11 prejudicial” to join Modern in an action that is “still pending and is being heavily litigated.” The
12 Motion, 5:22-24. The Motion therefore argues MDB is not eligible for indemnification until there
13 has been a finding of liability in a “settlement or judgment.” The Opposition posits NRCP 14(a)
14 specifically “allows a Third-Party Plaintiff to implead a Third-Party Defendant ‘who is or may be
15 liable to the Third-Party Plaintiff for all or part of the Plaintiff’s claim.’” The Opposition, 4:16-19.

16 The Court finds the 3P Complaint pleads sufficient facts to place Modern on notice of their
17 potential liability. By suggesting a finding of liability must occur before a party may *plead a claim*
18 of implied indemnity, the Motion suggests a pleading party would be required to plead an
19 admission of, or facts asserting, its own liability to sustain its claim. However, a court cannot
20 expect a party to admit or assert its own liability in order to plead a claim for relief unless the party
21 is pleading in the alternative, as allowed by NRCP 8(e)(2).³

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³ NRCP 8(e)(2) states, in relevant part, “[a] party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both.”

1 It is important to make the distinction between *pleading a claim* for implied indemnity and
2 indemnification itself. The cases discussed, *supra*, clearly indicate indemnification is not possible
3 or proper without a finding of liability or a requirement that the pleading party pay damages.
4 *Primadonna*, 125 Nev. at 581; 589, 216 P.3d at 796; 801. However, the 3P Complaint does not
5 request indemnification, but rather pleads it as a cause of action. In other words, the 3P Complaint
6 need only assert a possibility that if MDB is found liable, it is entitled to indemnification from
7 Modern, thereby obviating the need for additional proceedings to establish Modern's financial
8 responsibility to MDB.

9 Pursuant to NRCPP 14(a), a defendant has the ability to bring an indemnity claim as they
10 would any other claim—at any time. In fact, The Nevada Supreme Court has explained NRCPP
11 14(a) is “based upon the theory of indemnity,” in which “a defendant is permitted to defend the
12 case and at the same time assert his right of indemnity against the party ultimately responsible for
13 the damage.” *Reid v. Royal Insurance Co., Ltd.*, 80 Nev. 137, 140-41, 390 P.2d 45, 46-47 (1964).

14 The 3P Complaint asserts MDB is entitled to indemnity by Modern “with respect to all
15 negligence claims brought against” them in the Complaint. The 3P Complaint, 4:18-19.
16 Accordingly, the 3P Complaint effectively places Modern on notice that *if* it is found negligent, it is
17 entitled to indemnification.

18 2. Legal Relationship

19 The Motion argues the 3P Complaint fails to allege the legal relationship or pre-existing
20 duty between MDB and Modern required for a claim for implied indemnity to survive. The
21 Motion, 6:10-12. The Opposition argues the 3P Complaint pleads sufficient facts to evidence the
22 legal relationship because it indicates MDB was “the last purchaser and end user of the subject
23 Ranco trailer,” as designed and manufactured by “Defendant RMC Lamar Holdings, Inc. (fka
24 Ranch Manufacturing Company).” The Opposition, 6:16-20. “Third-Party Defendants the Modern
25 Group and Dragon ESP acquired Ranch Manufacturing on or about August 1, 2007.” The Motion,
26 3:20. Therefore, the Opposition argues a legal relationship was created when MDB purchased a
27 trailer designed and manufactured by Ranch Manufacturing (“Ranch”), which had been acquired by
28 Modern.

As explained, *supra*, the Nevada Supreme Court has set a high standard for establishment of
a legal relationship as it applies to implied indemnity. The Court has found a legal relationship
exists in very limited circumstances. *See Black & Decker*, 105 Nev. at 346, 775 P.2d at 700

1 (holding a legal relationship exists in cases of implied warranties of merchantability); *see also*
2 *Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997)
3 (citing *Piedmont*, 99 Nev. at 527-28, 665 P.2d at 259) (holding a legal relationship exists between a
4 contractor and subcontractor); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 360, 989 P.2d 870,
5 874-75 (1999) (holding a legal relationship can exist between an employer and employee where an
6 express indemnity contract is in place); *Outboard Motor Corp. v. Shupbach*, 93 Nev. 158, 165, 561
7 P.2d 450, 454 (1977) (holding a legal relationship can exist between an employer and employee
8 when the employer holds a separate and independent duty to the employee); *Mills v. Continental*
9 *Parking Corp.*, 86 Nev. 724, 725, 475 P.2d 673, 674 (1970) (holding a legal relationship exists as
10 between a bailor and a bailee “where the parking lot attendant collects a fee, has possession of the
11 keys, assumes control of the car and issues a ticket to identify the car for redelivery”); *Troxel v.*
12 *Granville*, 530 U.S. 57, 58, 120 S.Ct. 2054, 2056 (2000) (holding a fundamental legal relationship
13 and constitutional protection exists between a parent and a child).

14 The Court finds the 3P Complaint does not plead sufficient facts to indicate the
15 establishment of a legal relationship between MDB and Modern. Although the Opposition avers a
16 legal relationship was formed between MDB and Modern when MDB purchased a Ranch trailer,
17 that transaction does not, *ipso facto*, form a recognized legal relationship. The transaction could
18 create a legal relationship if it involved an implied warranty of merchantability, *Black & Decker*,
19 105 Nev. at 346, 775 P.2d at 700; however, the 3P Complaint does not mention an implied
20 warranty of merchantability. Were the Court to follow the 3P Complaint’s argument to its logical
21 conclusion, every sale of goods would create the legal relationship necessary for an implied
22 indemnity claim. This is too broad an application of the Nevada Supreme Court’s holdings,
23 discussed *supra*, which limit the formation of a legal relationship to very particular circumstances.
24 Further, the 3P Complaint does not plead facts indicating the formation of a legal relationship via
25 any preexisting duty of Modern to MDB. Therefore, because the 3P Complaint has not pled
26 sufficient facts to evidence a legal relationship between MDB and Modern, its first cause of action
27 for implied indemnification against Modern cannot be sustained.

28 While the Motion may have pled the facts necessary to satisfy the requirement of liability
on the part of Modern, the Motion does not plead the facts necessary to satisfy the requirement of a
preexisting legal relationship between the party seeking indemnity, MDB, and the party who would
indemnify, Modern. Proper pleading of the liability requirement alone cannot sustain the claim.

1 **B. Second Cause of Action for Contribution**

2 The Motion cites to *The Doctors* to explain MDB's Contribution claim fails because a
3 "contribution claim only arises where judgment has been entered in an action against two or more
4 tortfeasors." The Motion, 6:18-19. Additionally, the Motion argues "Third-Party Plaintiffs cannot
5 seek both contribution and indemnity. There can be no contribution where indemnity exists." The
6 Motion, 6:23-25. The Opposition contends "[n]either claims for indemnification or contribution
7 are premature at this stage of the proceedings," and it may therefore pursue the 3P Complaint
8 "under both alternate theories of recovery." The Opposition, 8:20-22.

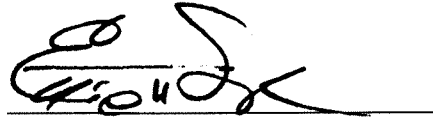
9 "A right to contribution exists 'where two or more persons become jointly or severally
10 liable in tort for the same injury to [a] person...even though judgment has not been recovered
11 against all or any of them.'" *LaTourette*, 128 Nev. at 269, 277 P.3d at 1249 (citing NRS
12 17.225(1)). The *LaTourette* Court explicitly clarified NRCP 14(a) "provides that a third-party
13 plaintiff may implead a third-party defendant based on an inchoate claim for contribution," in order
14 to "specifically provide for the possibility of joining a third-party defendant 'against whom a cause
15 of action has not yet accrued.'" *Id.* (citing NRCP 14(a); 6 Charles Alan Wright, Arthur R. Miller
16 & Mary Kay Kane, Federal Practice and Procedure § 1451 (2010)). The *LaTourette* Court
17 explained the Nevada Supreme Court had "repeatedly recognized that a third-party plaintiff has the
18 right to seek contribution prior to entry of judgment." *LaTourette*, 128 Nev. at 269, 277 P.3d at
19 1249.

20 The Court finds the 3P Complaint pleads sufficient facts to maintain its second cause of
21 action for Contribution. The Motion does not attack the merits of the claim; instead, the Motion
22 contends the claim is "not yet ripe for adjudication." The Motion, 2:4. The *LaTourette* Court
23 clearly explained a defendant may bring a claim for contribution "prior to entry of judgment;"
24 accordingly, the Motion's claim a contribution claim can only arise "where judgment has been
25 entered in an action," is an erroneous application of *The Doctors*. Additionally, the Court finds the
26 issue of whether the 3P Complaint may include claims for both implied indemnity and contribution
27 to be moot given that the Implied Indemnity claim is dismissed. Accordingly, the 3P Complaint
28 properly pleads a ripe claim for contribution.

1 **IT IS ORDERED** Modern's THIRD PARTY DEFENDANTS THE MODERN GROUP
2 GP-SUB, INC'S AND DRAGON ESP, LTD'S MOTION TO DISMISS THIRD PARTY
3 COMPLAINT is hereby GRANTED in part and DENIED in part.

4 **IT IS FURTHER ORDERED** MDB's first claim for relief for Implied Indemnity as to
5 THE MODERN GROUP GP-SUB, INC. and DRAGON ESP, LTD. is hereby DISMISSED.

6 DATED this 19 day of April, 2017.

7 
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9 ELLIOTT A. SATTLER

10 District Judge
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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCp 5(b), I certify that I am an employee of the Second Judicial District Court
3 of the State of Nevada, County of Washoe; that on this ____ day of April, 2017, I deposited in the
4 County mailing system for postage and mailing with the United States Postal Service in Reno,
5 Nevada, a true copy of the attached document addressed to:
6

7 **CERTIFICATE OF ELECTRONIC SERVICE**

8 I hereby certify that I am an employee of the Second Judicial District Court of the State of
9 Nevada, in and for the County of Washoe; that on the 19 day of April, 2017, I electronically filed
10 the foregoing with the Clerk of the Court by using the ECF system which will send a notice of
11 electronic filing to the following:
12

13 BRENT HARSH, ESQ.

CRAIG MURPHY, ESQ.

14 LISA ZASTROW, ESQ.

JACOB BUNDICK, ESQ.

15 KENNETH BICK, ESQ.

TERRY FRIEDMAN, ESQ.

16 JOSH AICKLEN, ESQ.

THIERRY BARKLEY, ESQ.

17 JULIE THROOP, ESQ.

SARAH QUIGLEY, ESQ.

18 MATTHEW ADDISON, ESQ.

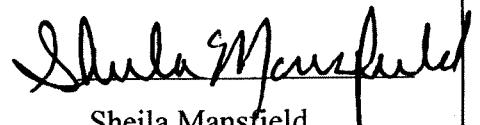
BRIAN BROWN, ESQ.

19 JESSICA WOELFEL, ESQ.

KATHERINE PARKS, ESQ.

20 KEVIN BERRY, ESQ.

JOSEPH BRADLEY, ESQ.

21
22 

23 Sheila Mansfield
24 Administrative Assistant
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23 *Attorneys for Defendant/Cross-Claimant MDB Trucking, LLC*

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

26 ERNEST BRUCE FITZSIMMONS and
27 CAROL FITZSIMMONS, Husband and
28 Wife,

Plaintiffs,

vs.

MDB TRUCKING, LLC, et al.,

Defendants.

AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF ORDER
GRANTING MDB TRUCKING AND
DANIEL ANTHONY KOSKI'S MOTION
FOR DETERMINATION OF GOOD
FAITH SETTLEMENT REGARDING
ERNEST AND CAROL FITZSIMMONS**

1 PLEASE TAKE NOTICE that an Order was entered on the 17th day of July 2017,
2 in the above-entitled matter, a copy of which is attached hereto as Exhibit 1.

3 DATED this 22 day of July, 2017.

4 CLARK HILL PLLC

6 By: 

7 NICHOLAS M. WIECZOREK

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17 Attorneys for MDB Trucking, LLC

18 **AFFIRMATION PURSUANT TO NRS 239B.030**

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

21 DATED this 22 day of July, 2017.

22 CLARK HILL PLLC

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Attorneys for MDB Trucking, LLC

1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that I am an employee of I HEREBY CERTIFY that I am an
3 employee of CLARK HILL PLLC,, and on this 20th day of July 2017, a true and correct
4 copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING MDB**
5 **TRUCKING AND DANIEL ANTHONY KOSKI'S MOTION FOR**
6 **DETERMINATION OF GOOD FAITH SETTLEMENT REGARDING ERNEST**
7 **AND CAROL FITZSIMMONS** was served via the U. S. mail, postage prepaid upon the
8 following:

9 Joseph S. Bradley, Esq.
10 Sarah M. Quigley, Esq.
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12 Reno, Nevada 89505
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14 Angela Wilt

15 Matthew C. Addison, Esq.
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21 Modern Group GP-SUB, Inc. and Dragon ESP, Ltd.

22 Josh Cole Aicklen, Esq.
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An employee of Morris Polich & Purdy LLP

EXHIBIT 1

EXHIBIT 1

1 3060

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22 *Attorneys for MDB TRUCKING, LLC and DANIEL KOSKI*

23 **SECOND JUDICIAL DISTRICT COURT**

24 **WASHOE COUNTY, NEVADA**

25 ERNEST BRUCE FITZSIMMONS and
26 CAROL FITZSIMMONS, Husband and
27 Wife,

28 Plaintiffs,

vs.

MDB TRUCKING, LLC; DANIEL
ANTHONY KOSKI; et al.,

Defendants.

AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**ORDER GRANTING MDB TRUCKING
AND DANIEL ANTHONY KOSKI'S
MOTION FOR DETERMINATION OF
GOOD FAITH SETTLEMENT
REGARDING ERNEST AND CAROL
FITZSIMMONS**

1 Upon review of the Motion for Determination of Good Faith Settlement as well as the
2 non-opposition filed by counsel for Plaintiff Ernest and Carol Fitzsimmons and GOOD CAUSE
3 APPEARING, THEREFORE:

4 IT IS HEREBY ORDERED that this Motion for Determination of Good Faith
5 Settlement is granted.

6 DATED this 17 day of July, 2017.

7
8 
9 DISTRICT COURT JUDGE

10 Submitted by:

11 MORRIS POLICH & PURDY LLP

12
13 By: 

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21 **SECOND JUDICIAL DISTRICT COURT**

22 **WASHOE COUNTY, NEVADA**

23 **ERNEST BRUCE FITZSIMMONS and**
24 **CAROL FITZSIMMONS, Husband and**
25 **Wife,**

26 **Plaintiffs,**

27 **vs.**

28 **MDB TRUCKING, LLC; DANIEL**
ANTHONY KOSKI; et al.,

Defendants.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

STIPULATION AND ORDER FOR
DISMISSAL OF SONYA CORTHELL'S
COMPLAINT AGAINST DEFENDANTS
IN CASE NO. CV16-01335

AND ALL RELATED CASES.

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-01335 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 31 day of July, 2017.

5
6 **MORRIS POLICH & PURDY LLP**

7
8 By: 

9 NICHOLAS M. WIECZOREK
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By: 

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Attorneys for RMC Lamar Holdings

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-01335 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 31 day of July, 2017.

5
6 **MORRIS POLICH & PURDY LLP**

7
8 By: _____

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26 DANIEL KOSKI

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ORDER

Upon review of the above Stipulation in the above-entitled matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case
No. CV16-01335 against the Defendants be dismissed, with prejudice, with each party to bear
their own attorney's fees and costs.

DATED this 8 day of August, 2017.


DISTRICT COURT JUDGE

Respectfully Submitted By:

MORRIS POLICH & PURDY LLP

By:


NICHOLAS M. WIECZOREK

Nevada Bar No. 8150

JEREMY J. THOMPSON

Nevada Bar No. 12503

COLLEEN E. McCARTY

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3800 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

Attorneys for Defendants

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3 Nevada Bar No. 6170
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15 **SECOND JUDICIAL DISTRICT COURT**
16 **WASHOE COUNTY, NEVADA**

17 ERNEST BRUCE FITZSIMMONS and
18 CAROL FITZSIMMONS, Husband and
19 Wife,

20 Plaintiffs,

21 vs.

22 MDB TRUCKING, LLC; DANIEL
23 ANTHONY KOSKI; et al.,

24 Defendants.

25 AND ALL RELATED CASES.

Case No.: CV15-02349
Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF STIPULATION
AND ORDER FOR DISMISSAL OF
SONYA CORTHELL'S COMPLAINT
AGAINST DEFENDANTS IN CASE NO
CV16-01335**

26 PLEASE TAKE NOTICE that on the 8th day of August, 2017, the above-entitled Court
27 entered its Stipulation and Order for Dismissal of Sonya CortHELL's Complaint against
28 Defendants in Case No. CV16-01335.

///

1 A copy of this Order is attached hereto as Exhibit "1".

2 Dated this 2 day of August 2017.

3 CLARK HILL PLLC

4 By: 

5 Nicholas M. Wieczorek, Esq.

6 Jeremy J. Thompson, Esq.

7 Colleen E. McCarty, Esq.

8 3800 Howard Hughes Parkway, Suite 500

9 Las Vegas, Nevada 89169

10 Attorneys for MDB Trucking, LLC

11 AFFIRMATION

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

14 Dated this 2 day of August, 2017.

15 CLARK HILL PLLC

16 By: 

17 Nicholas M. Wieczorek, Esq.

18 Jeremy J. Thompson, Esq.

19 Colleen E. McCarty, Esq.

20 3800 Howard Hughes Parkway, Suite 500

21 Las Vegas, Nevada 89169

22 Attorneys for MDB Trucking, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of CLARK HILL PLLC, and on this 9th day of August 2017, a true and correct copy of **NOTICE OF ENTRY OF STIPULATION AND ORDER FOR DISMISSAL OF SONYA CORTHELL'S COMPLAINT AGAINST DEFENDANTS IN CASE NO CV16-01335** was served via electronic mail and U. S. mail, postage prepaid upon the following:

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CAROL FITZSIMMONS; ANGELAWILT; ROSA,
ROBLES, BENJAMIN ROBLES, NATALIE ROBLES
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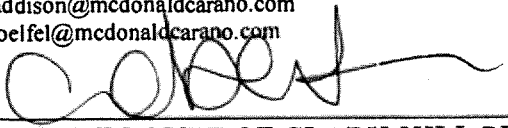

AN EMPLOYEE OF CLARK HILL PLLC

EXHIBIT 1

FILED
Electronically
CV15-02349
2017-08-09 11:55:02 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6239798

EXHIBIT 1

1 **3990**
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21 *Attorneys for MDB TRUCKING, LLC and DANIEL KOSKI*

22 **SECOND JUDICIAL DISTRICT COURT**

23 **WASHOE COUNTY, NEVADA**

24 ERNEST BRUCE FITZSIMMONS and
25 CAROL FITZSIMMONS, Husband and
26 Wife,

27 Plaintiffs,

28 vs.

29 MDB TRUCKING, LLC; DANIEL
30 ANTHONY KOSKI; et al.,

31 Defendants.

32 AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**STIPULATION AND ORDER FOR
DISMISSAL OF SONYA CORTHELL'S
COMPLAINT AGAINST DEFENDANTS
IN CASE NO. CV16-01335**

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-01335 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 31 day of July, 2017.

5
6 **MORRIS POLICH & PURDY LLP**

7
8 By: 

9 **NICHOLAS M. WIECZOREK**
Nevada Bar No. 6170
10 **JEREMY J. THOMPSON**
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DANIEL KOSKI

20
21 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

22 By: _____

23 **JOSH COLE AICKLEN**
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25 **PAIGE S. SHREVE**
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26 Las Vegas, Nevada 89118
Attorneys for Defendant Versa Products Co.
27 Inc.
28

MURPHY & MURPHY

By: 

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MCDONALD CARANO WILSON LLP

By: 

MATTHEW C. ADDISON
JESSICA L. WOELFEL
100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for RMC Lamar Holdings

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-01335 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 31 day of July, 2017.

5
6 **MORRIS POLICH & PURDY LLP**

7
8 By:

9 NICHOLAS M. WIECZOREK
10 Nevada Bar No. 6170
11 JEREMY J. THOMPSON
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26 DANIEL KOSKI

27
28 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

By:

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By:

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ORDER

Upon review of the above Stipulation in the above-entitled matter,
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case
No. CV16-01335 against the Defendants be dismissed, with prejudice, with each party to bear
their own attorney's fees and costs.

DATED this 8 day of August, 2017.


DISTRICT COURT JUDGE

Respectfully Submitted By:

MORRIS POLICH & PURDY LLP

By:


NICHOLAS M. WIECZOREK

Nevada Bar No. 6150

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12 **SECOND JUDICIAL DISTRICT COURT**
13 **WASHOE COUNTY, NEVADA**

15 **ERNEST BRUCE FITZSIMMONS and**
16 **CAROL FITZSIMMONS, Husband and**
17 **Wife,**

18 **Plaintiffs,**

19 **vs.**

20 **MDB TRUCKING, LLC; DANIEL**
21 **ANTHONY KOSKI; et al.,**

22 **Defendants.**

23 **AND ALL RELATED CASES.**

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**STIPULATION AND ORDER FOR
DISMISSAL OF BEVERLY A.
CROSSLAND, PATRICK E.
CROSSLAND AND RYAN P.
CROSSLAND'S COMPLAINT AGAINST
DEFENDANTS IN CASE NO. CV16-00626**

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-00626 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 23 day of July, 2017.

5
6 CLARK HILL PLLC

7
8 By:


NICHOLAS M. WIECZOREK

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Telephone: (702) 862-8300

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KEVIN M. BERRY

By:


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Telephone: (775) 337-2300

Attorneys for Plaintiffs

15
16 LEWIS BRISBOIS BISGAARD & SMITH LLP

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19 DAVID B. AVAKIAN

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21 Las Vegas, Nevada 89118

22 Attorneys for Defendant Versa Products Co.
23 Inc.

MCDONALD CARANO WILSON LLP

By:

MATTHEW C. ADDISON

JESSICA L. WOELFEL

100 W. Liberty Street, Tenth Floor

24 Reno, NV 89501

25 Attorneys for RMC Lamar Holdings

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-00626 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this _____ day of July, 2017.

5
6 **CLARK HILL PLLC**

KEVIN M. BERRY

7
8 By: _____

9 NICHOLAS M. WIECZOREK
10 Nevada Bar No. 6170
11 JEREMY J. THOMPSON
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Attorneys for Plaintiffs

19
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MCDONALD CARANO WILSON LLP

21
22 By: _____

23 JOSH COLE AICKLEN
24 DAVID B. AVAKIAN
25 PAIGE S. SHREVE
26 6385 S. Rainbow Blvd., Suite 600
27 Las Vegas, Nevada 89118
28 Attorneys for Defendant Versa Products Co.
Inc.

By: _____

MATTHEW C. ADDISON
JESSICA L. WOELFEL
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Reno, NV 89501
Attorneys for RMC Lamar Holdings

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ORDER

Upon review of the above Stipulation in the above-entitled matter,

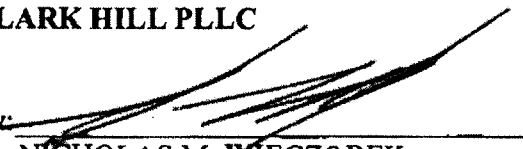
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case No. CV16-01335 against the Defendants be dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

DATED this 28 day of August, 2017.


DISTRICT COURT JUDGE

Respectfully Submitted By:

CLARK HILL PLLC

By: 
NICHOLAS M. WIECZOREK
Nevada Bar No. 6150
JEREMY J. THOMPSON
Nevada Bar No. 12503
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14 JThompson@clarkhill.com

15 **SECOND JUDICIAL DISTRICT COURT**

16 **WASHOE COUNTY, NEVADA**

17 ERNEST BRUCE FITZSIMMONS and
18 CAROL FITZSIMMONS, Husband and
19 Wife,

20 Plaintiffs,

21 vs.

22 MDB TRUCKING, LLC; DANIEL
23 ANTHONY KOSKI; et al.,

24 Defendants.

25 AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF STIPULATION
AND ORDER FOR DISMISSAL OF
BEVERLY A. CROSSLAND, PATRICK
E. CROSSLAND AND RYAN P.
CROSSLAND'S COMPLAINT AGAINST
DEFENDANTS IN CASE NO. CV16-00626**

26 PLEASE TAKE NOTICE that on the 28th day of August, 2017, the above-entitled Court
27 entered its Stipulation and Order for Dismissal of Beverly A. Crossland, Patrick E. Crossland
28 and Ryan P. Crossland's Complaint against Defendants in Case No. CV16-00626.

1 A copy of this Order is attached hereto as Exhibit "1."

2 Dated this 30 day of August, 2017.

3 **CLARK HILL PLLC**

4
5 By: 

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 CLARK HILL PLLC

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14 Las Vegas, Nevada 89169

15 Telephone: (702) 862-830

16 *Attorneys for MDB Trucking, LLC*

17 **AFFIRMATION**

18 **Pursuant to NRS 239B.030**

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

21 DATED this 30 day of August, 2017.

22 **CLARK HILL PLLC**

23
24 By: 

25 NICHOLAS M. WIECZOREK

26 Nevada Bar No. 6170

27 JEREMY J. THOMPSON

28 Nevada Bar No. 12503

COLLEEN E. MCCARTY

Nevada Bar No. 13186

CLARK HILL PLLC

3800 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

Telephone: (702) 862-830

Attorneys for MDB Trucking,

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Clark Hill PLLC, and that on this 26th day of August, 2017, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER FOR DISMISSAL OF BEVERLY A. CROSSLAND, PATRICK E. CROSSLAND AND RYAN P. CROSSLAND'S COMPLAINT AGAINST DEFENDANTS IN CASE NO. CV16-00626** 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:

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Attorneys for USAA [subrogated insurer]

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Thierry V. Barkley, Esq.
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Attorneys for Defendants/Third-Party Plaintiff, MDB Trucking, LLC and DANIEL ANTHONY KOSKI

Robert D. Miller
An Employee of Clark Hill PLLC

INDEX OF EXHIBITS

Exhibit Number 1 **Number of Pages** 5

Exhibit Description	Stipulation and Order for Dismissal
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Exhibit Number _____ Number of Pages _____

Exhibit Description

Exhibit Number _____ Number of Pages _____

Exhibit Description

Exhibit Number _____ Number of Pages _____

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Exhibit Description

EXHIBIT 1

EXHIBIT 1

EXHIBIT 1

1 **3990**
2 **NICHOLAS M. WIECZOREK**
3 Nevada Bar No. 6170
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5 Nevada Bar No. 12503
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14 JThompson@clarkhill.com

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SECOND JUDICIAL DISTRICT COURT
WASHOE COUNTY, NEVADA

ERNEST BRUCE FITZSIMMONS and
CAROL FITZSIMMONS, Husband and
Wife,

Plaintiffs,

vs.

MDB TRUCKING, LLC; DANIEL
ANTHONY KOSKI; et al.,

Defendants.

AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10


[Consolidated Proceeding]

**STIPULATION AND ORDER FOR
DISMISSAL OF BEVERLY A.
CROSSLAND, PATRICK E.
CROSSLAND AND RYAN P.
CROSSLAND'S COMPLAINT AGAINST
DEFENDANTS IN CASE NO. CV16-00626**


1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-00626 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this 23 day of July, 2017.


5
6 CLARK HILL PLLC

7
8 By: 
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16 LEWIS BRISBOIS RISGAARD & SMITH LLP

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18 By: 
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20 DAVID B. AVAKIAN
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23 Las Vegas, Nevada 89118
24 Attorneys for Defendant Versa Products Co.
25 Inc.

MCDONALD CARANO WILSON LLP

By: MATTHEW C. ADDISON
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Reno, NV 89501
Attorneys for RMC Lamar Holdings

1 IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through
2 their counsel hereto that the Complaint in Case No. CV16-00626 against all the Defendants be
3 dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

4 DATED this _____ day of July, 2017.

5
6 CLARK HILL PLLC

KEVIN M. BERRY

7
8 By: _____

NICHOLAS M. WIECZOREK
Nevada Bar No. 6170
JEREMY J. THOMPSON
Nevada Bar No. 12503
COLLEEN E. McCARTY
Nevada Bar No. 13186
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By: 

KEVIN M. BERRY
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Telephone: (775) 337-2300
Attorneys for Plaintiffs

15
16 LEWIS BRISBOIS BISGAARD & SMITH LLP

MCDONALD CARANO WILSON LLP

17
18 By: _____

JOSH COLE AICKLEN
DAVID B. AVAKIAN
PAIGE S. SHREVE
6385 S. Rainbow Blvd., Suite 600
Las Vegas, Nevada 89118
Attorneys for Defendant Versa Products Co.
Inc.

By: 

MATTHEW C. ADDISON
JESSICA L. WOELFEL
100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for RMC Lamar Holdings

EXHIBITS FOR QUESTION 27

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

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

11 IN AND FOR THE COUNTY OF WASHOE

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

Case No. _____

Dept. No. _____

15 Plaintiffs,

16 v.

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

21 Defendants.
22 _____/

23 **COMPLAINT**

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

28 **PARTIES & JURISDICTION**

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

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

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

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

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

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

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

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

3 **FIRST CAUSE OF ACTION**

4 **(Negligence)**

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

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

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

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

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

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

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

1 concrete barrier.

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

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

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

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

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

21 SECOND CAUSE OF ACTION

22 (Negligence Per Se)

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

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

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

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

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

14 **THIRD CAUSE OF ACTION**

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

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

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

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

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

3 **PRAYER FOR RELIEF**

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

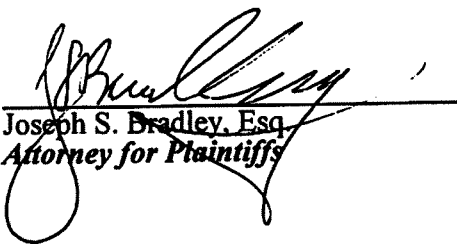
- 7 1. For leave to amend the Complaint upon discovery of the true names and identities
8 of each Doe defendant;
- 9 2. For past and future medical and incidental expenses which will be shown
10 according to proof;
- 11 3. For past and future general damages to Plaintiffs, each in a sum in excess of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

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

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

22 Dated this 4th day of December 2015.

23 **BRADLEY, DRENDEL & JEANNEY**

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

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

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

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

Case No. CV15-02349

Dept. No. 15

12 Plaintiffs,

13 vs.

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

16 Defendants.

17
18 AND RELATED THIRD PARTY
COMPLAINT.

19
20 DEFENDANT/THIRD-PARTY PLAINTIFF,
21 MDB TRUCKING'S AMENDED THIRD-PARTY COMPLAINT

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

27 ///

28 ///

FIRST CLAIM FOR RELIEF

(General Allegations)

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

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

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

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

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

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

///

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

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

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

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

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

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

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

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

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

28 ///

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

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

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

10 **FIRST CLAIM FOR RELIEF**

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

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

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

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

20 **SECOND CLAIM FOR RELIEF**

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

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

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

27 ///

28 ///

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

4 **THIRD CLAIM FOR RELIEF**

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

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

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

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

14 **FOURTH CLAIM FOR RELIEF**

15 **(Contribution as to VERSA)**

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

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

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

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

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

28 ///

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

6 DATED this 19th day of May, 2016.

7 THORNDAL ARMSTRONG
8 DELK BALKENBUSH & EISINGER

9 By: 

10 Katherine F. Parks, Esq., State Bar No. 6227
11 Brian M. Brown, Esq., State Bar No. 5233
12 Thierry V. Barkley, Esq., State Bar No. 724
13 6590 S. McCarran Blvd., Suite B
14 Reno, Nevada 89509
15 Attorneys for Defendants/Third-Party Plaintiff
16 MDB TRUCKING, LLC
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THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER
6590 S. McCarran, Suite B
Reno, Nevada 89509
(775) 784-1000

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AFFIRMATION

Pursuant to NRS 239B.030

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

DATED this 12th day of May, 2016.

**THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER**

By: 

Katherine E. Parks, Esq., State Bar No. 6227

Brian M. Brown, Esq., State Bar No. 5233

Thierry V. Barkley, Esq., State Bar No. 724

6590 S. McCarran Blvd., Suite B

Reno, Nevada 89509

Attorneys for Defendants/Third-Party Plaintiff

MDB TRUCKING, LLC

THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER
6590 S. McCarran, Suite B
Reno, Nevada 89509
(775) 784-7082

1 **CERTIFICATE OF SERVICE**

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

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

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

9 hand delivery

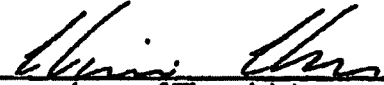
10 electronic means (fax, electronic mail, etc.)

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

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

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

23 DATED this 17 day of May, 2016.

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

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

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

11 **IN AND FOR THE COUNTY OF WASHOE**

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

Case No. CV15-02349

Dept. No. 15

15 **Plaintiffs,**

16 **v.**

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

23 **Defendants.**

24 **FIRST AMENDED COMPLAINT**

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

PARTIES & JURISDICTION

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

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

3. At all times material hereto, Defendant RMC LAMAR HOLDINGS, INC. (fka Ranch

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 **PRAYER FOR RELIEF**

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

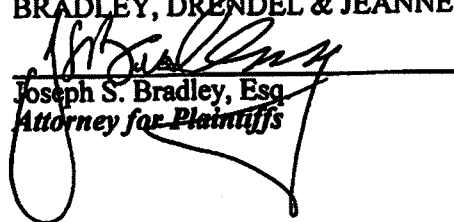
- 9 1. For leave to amend the Complaint upon discovery of the true names and identities
10 of each Doe defendant;
11 2. For past and future medical and incidental expenses which will be shown
12 according to proof;
13 3. For past and future general damages to Plaintiffs, each in a sum in excess of
14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

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

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

24 Dated this 19th day of May 2016

BRADLEY, DRENDEL & JEANNEY

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

1 **CERTIFICATE OF SERVICE**

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

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

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

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

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

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

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

27 DATED this 19th day of May 2016.

28 
Amanda McComb

1 **3860**
Katherine F. Parks, Esq., State Bar No. 6227
2 Brian M. Brown, Esq., State Bar No. 5233
Thierry V. Barkley, Esq., State Bar No. 724
3 Thorndal Armstrong Delk Balkenbush & Eisinger
6590 S. McCarran Blvd., Suite B
4 Reno, Nevada 89509
(775) 786-2882
5 Attorneys for Defendant/Third-Party Plaintiff
MDB TRUCKING, LLC

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

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

Case No. CV15-02349

Dept. No. 15

11 Plaintiffs,

12 vs.

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

17 Defendants.

18 AND RELATED CROSS-CLAIM AND
19 THIRD PARTY COMPLAINT.

20
21 **MDB TRUCKING, LLC'S CROSS-CLAIM AGAINST RMC**
22 **LAMAR HOLDINGS, INC. (fka RANCH MANUFACTURING COMPANY)**
AND VERSA PRODUCTS COMPANY, INC.

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

27 ///

28 ///

FIRST CLAIM FOR RELIEF

(General Allegations)

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

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

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

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

5. A First Amended Complaint was filed on May 19, 2016 in the Second Judicial District Court, Case No. CV15-02349, Department 15 in which the Plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons prayed for damages against Defendant MDB Trucking, LLC alleging negligence with regard to an accident which occurred on July 7, 2014 where a Ranco trailer owned by MDB Trucking, LLC spilled a load of gravel causing an accident and injury which are claims presented by Plaintiffs.

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

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1 7. Cross-Defendant RMC Lamar Holdings, Inc. manufactured the subject Ranco
2 trailer in 2002 under the vehicle brand Ranco with vehicle identification number
3 1R9BP45082L008431 Idaho Plate #TE3528.

4 8. Cross-Claimant MDB Trucking, LLC was the last purchaser and end user of the
5 subject Ranco trailer.

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

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

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

15 c. That Versa Valve manufactured an alternate safer design available in 2002
16 including a manual lock system.

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

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

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

25 ///

26 ///

27 ///

28 ///

11. That to the extent Plaintiffs were injured as a proximate result of the unreasonably dangerous conditions and defects at the time of manufacturing or negligent design, such is a direct and proximate result of the negligence of the Cross-Defendants; and, any negligence that exists as alleged by Plaintiffs is expressly denied. Cross-Defendants were actively negligent and Cross-Claimant was passively negligent.

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

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

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

FIRST CLAIM FOR RELIEF

(Implied Indemnification as to RMC LAMAR)

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

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

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

SECOND CLAIM FOR RELIEF

(Contribution as to RMC LAMAR)

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

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

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

6 **THIRD CLAIM FOR RELIEF**

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

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

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

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

15 **FOURTH CLAIM FOR RELIEF**

16 **(Contribution as to VERSA)**

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

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

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

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

- 25 1. For implied indemnification with respect to all negligence claims brought against
26 Cross-Claimant in this matter;
27 2. For contribution with respect to all negligence claims brought against Cross-
28 Claimant in this matter;

- 1 3. For attorneys' fees and costs expended in this matter; and
2 4. For such other and further relief as this Court deems just and proper in the
3 premises.

4 DATED this 15th day of June, 2016.

5 THORNDAL ARMSTRONG
6 DELK BALKENBUSH & EISINGER

7 By: 

8 Katherine F. Parks, Esq., State Bar No. 6227
9 Brian M. Brown, Esq., State Bar No. 5233
10 Thierry V. Barkley, Esq., State Bar No. 724
11 6590 S. McCarran Blvd., Suite B
12 Reno, Nevada 89509
13 Attorneys for Defendant/Third-Party Plaintiff
14 MDB TRUCKING, LLC

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

DATED this 15 day of June, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By:

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

**THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER**
1501 S. McCarran, Suite B
Reno, Nevada 89502
775/786-2882

1 **CERTIFICATE OF SERVICE**

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

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

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

10 _____ hand delivery

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

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

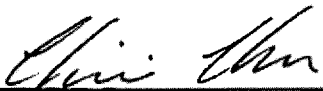
13
14 **Joseph S. Bradley, Esq.**
15 **Bradley, Drendel & Jeanney**
16 **P.O. Box 1987**
Reno, NV 89505
Attorney for Plaintiffs

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

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

25 DATED this 15 day of June, 2016.

26
27 **THORNDAL ARMSTRONG**
DELK BALKENBUSH
& EISINGER
6390 S. McCarran, Suite B
Reno, Nevada 89519
(775) 786-2882

28 
An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

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6385 S. Rainbow Boulevard, Suite 600
5 Las Vegas, Nevada 89118
702.893.3383
6 FAX: 702.893.3789
Attorneys for Defendant/Cross-Claimant
7 VERSA PRODUCTS COMPANY, INC.

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

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

13 Plaintiffs,

14 vs.

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

18 Defendants.

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

20 Cross-Claimant,

21 vs.

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

25 Cross-Defendants.
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Case No. CV15-02349
Dept. 15

Consolidated with Case CV15-02410

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

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

Case No. CV15-02410

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

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

10 RESPONSES TO PARTIES & JURISDICTION

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

15 RESPONSES TO FIRST CAUSE OF ACTION
16 (Negligence)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 **AFFIRMATIVE DEFENSES**

10 **FIRST AFFIRMATIVE DEFENSE**

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

14 **SECOND AFFIRMATIVE DEFENSE**

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

17 **THIRD AFFIRMATIVE DEFENSE**

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

20 **FOURTH AFFIRMATIVE DEFENSE**

21 Plaintiffs have failed to mitigate their damages.

22 **FIFTH AFFIRMATIVE DEFENSE**

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

26 **SIXTH AFFIRMATIVE DEFENSE**

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

1 SEVENTH AFFIRMATIVE DEFENSE

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

3 EIGHTH AFFIRMATIVE DEFENSE

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

6 NINTH AFFIRMATIVE DEFENSE

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

11 TENTH AFFIRMATIVE DEFENSE

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

16 ELEVENTH AFFIRMATIVE DEFENSE

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

22 TWELFTH AFFIRMATIVE DEFENSE

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

26 THIRTEENTH AFFIRMATIVE DEFENSE

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

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

5 **FOURTEENTH AFFIRMATIVE DEFENSE**

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

10 **FIFTEENTH AFFIRMATIVE DEFENSE**

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

17 **SIXTEENTH AFFIRMATIVE DEFENSE**

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

21 **SEVENTEENTH AFFIRMATIVE DEFENSE**

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

25 **EIGHTEENTH AFFIRMATIVE DEFENSE**

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

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NINETEENTH AFFIRMATIVE DEFENSE

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

TWENTIETH AFFIRMATIVE DEFENSE

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

TWENTY-FIRST AFFIRMATIVE DEFENSE

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

TWENTY-SECOND AFFIRMATIVE DEFENSE

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

TWENTY-THIRD AFFIRMATIVE DEFENSE

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

TWENTY-FOURTH AFFIRMATIVE DEFENSE

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

TWENTY-FIFTH AFFIRMATIVE DEFENSE

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

TWENTY-SIXTH AFFIRMATIVE DEFENSE

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

1 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

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

4 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

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

7 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

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

10 **THIRTIETH AFFIRMATIVE DEFENSE**

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

13 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

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

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

23 COMES NOW, Defendant/Cross-Claimant VERSA PRODUCTS COMPANY, INC.
24 (hereinafter "Cross-Claimant") and alleges and files a Cross-Claim against MDB
25 TRUCKING, LLC; DANIEL ANTHONY KOSKI and DOES I - X, inclusive, and each of
26 them as follows:
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28

1 FIRST CROSS-CLAIM

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

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

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

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

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

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

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

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

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

3 PRAYER FOR RELIEF

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

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

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

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

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

15 AFFIRMATION

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

18 DATED this 29th day of June, 2016

19 Respectfully submitted,

20 LEWIS BRISBOIS BISGAARD & SMITH LLP

21

22

23

By

JOSH COLE AICKLEN

Nevada Bar No. 007254

DAVID B. AVAKIAN

Nevada Bar No. 009502

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

Attorneys for Defendant/Cross-Claimant

VERSA PRODUCTS COMPANY, INC.

28

CERTIFICATE OF SERVICE

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

Joseph S. Bradley, Esq.
BRADLEY, DRENDEL & JEANNEY
P.O. Box 1987
Reno, NV 89505
Attorney for Plaintiffs
ERNEST BRUCE FITZSIMMONS and
CAROL FITZSIMMONS

Katherine F. Parks, Esq.
Brian M. Brown, Esq.
Thierry V. Barkley, Esq.
THORNDAL, ARMSTRONG, DELK
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6590 S. McCarran, Ste. B
Reno, NV 89509
P: 775-786-2882
Attorneys for Defendants/Third-Party
Plaintiff MDB TRUCKING, LLC

Matthew C. Addison, Esq.
McDONALD CARANO WILSON LLP
100 W. Liberty St., 10th Floor
Reno, NV 89501
Attorney for Third-Party Defendant
RMC LAMAR HOLDINGS, INC.



Art Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

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

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

vs.

Dept. No. 10

MDB TRUCKING, LLC; et al.,

Defendants.

ANGELA MICHELLE WILT,

Plaintiff,

Case No. CV15-02410
(consolidated into CV15-02349)

vs.

MDB TRUCKING, LLC., et al.,

Defendants.

ROSA ROBLES, et al.,

Plaintiffs,

Case No. CV16-01124
(consolidated into CV15-02349)¹

vs.

MDB TRUCKING, LLC., et al.,

Defendants.

¹ Consolidated after motion practice was filed.

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1 components, including Versa. The Cross Claim, 4:1-5. Included in the Cross-Claim were four
2 claims for relief. The third claim for relief, and the subject of the Motion, is MDB's claim for
3 Implied Indemnification as to Versa. The Cross-Claim, 5:6-14. Versa has moved to dismiss this
4 cause of action.

5 **LEGAL STANDARD FOR MOTION TO DISMISS**

6 NRCP 12(b)(5) states a claim may be dismissed for failure to state a claim upon which
7 relief can be granted. A court must liberally construe the pleadings and accept all asserted
8 allegations as true. *Buzz Stew, LLC. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670,
9 672 (2008). Dismissal is appropriate if the allegations fail to state a cognizable claim of relief
10 when taken at "face value," and construed favorably on behalf of the counterclaimant. *Morris v.*
11 *Bank of Am.*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (quoting *Edgar v. Wagner*, 101 Nev.
12 226, 227-28, 699 P.2d 110, 111-12 (1985)); *see also Stockmeier v. Nevada Dep't of Corrections*,
13 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (holding dismissal is proper where factual
14 allegations "are insufficient to establish the elements of a claim for relief"). Accordingly, the
15 claim should only be dismissed if it "appears beyond a doubt" the non-moving party could "prove
16 no set of facts, which, if true, would entitle it to relief." *Buzz Stew*, 124 Nev. at 228, 181 P.3d at
17 672.

18 Despite a court's liberal construction of the allegations in the pleading, a pleading party
19 must set forth sufficient facts to establish all necessary elements of a claim against the opposing
20 party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (citing *Johnson v. Travelers Ins.*
21 *Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973)). These facts are necessary to provide the opposing
22 party with fair notice. *See Hay*, 100 Nev. at 198, 678 P.2d at 673.

24 **ANALYSIS**

25 The Motion argues MDB's cause of action for implied indemnity fails as a matter of law
26 because, 1) MDB was "actively negligent" in failing to secure the truck load, and 2) there was no
27 pre-existing legal relationship between Versa and MDB. The Motion, 4:7-8.
28

1 Implied indemnity is “an equitable remedy that allows a defendant to seek recovery from
2 other potential tortfeasors” when the negligence of those tortfeasors is the primary cause of the
3 “injured party's harm.” *Rodriguez v. Primadonna, Co., LLC*, 125 Nev. 578, 589, 216 P.3d 793,
4 801 (2009) (citing *The Doctors Co. v. Vincent*, 120 Nev. 644, 651, 98 P.3d 681, 686 (2004)).
5 Implied indemnity allows a “complete shifting of responsibility” to a third party. *The Doctors*,
6 120 Nev. at 651, 98 P.3d at 686. There are two requirements for an implied indemnity claim.
7 The first is a finding the third-party defendant is liable for damages to the plaintiff on the
8 underlying claim. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. This is because implied
9 indemnity “cannot be used to allow one innocent party to recover its defense costs from another
10 innocent party.” *Id.* Accordingly, “[a]t the heart of the doctrine is the premise that the person
11 seeking to assert implied indemnity...has been required to pay damages caused by a third party,”
12 even though they have not committed any “independent wrong.” *Primadonna*, 125 Nev. at 589,
13 216 P.3d at 801 (citing *Harvest Capital v. WV Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509,
14 513 (2002)). Therefore, implied indemnity is available as a cause of action “after the defendant
15 has extinguished its own liability through settlement or by paying a judgment.” *Id.* (citing *The*
16 *Doctors*, 120 Nev. at 651, 98 P.3d at 686).

17 The second requirement is “a legal relationship or duty,” which “supports the claim of
18 indemnity.” *Black & Decker (U.S.), Inc. v. Essex Group, Inc.*, 105 Nev. 344, 346, 775 P.2d 698,
19 699 (1989) (citation omitted); *see also Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citation
20 omitted) (holding the court requires “some nexus or relationship between the indemnitee and
21 indemnitor” to allow a claim for implied indemnity); *see also Pack v. LaTourette*, 128 Nev. Adv.
22 Op. 25, 277 P.3d 1246, 1249 (2012) (citation omitted) (holding there “must be a preexisting legal
23 relation” between the two parties, “or some duty on the part of the primary tortfeasor to protect the
24 secondary tortfeasor”). Accordingly, implied indemnification is not “a license to assert a cross-
25 claim against any third party in hope of alleviating the burden of costs associated with defending
26 litigation.” *Primadonna*, 125 Nev. at 591, 216 P.3d at 802 (citing *Piedmont Equip. Co. Inc. v.*
27 *Eberhard Mfg. Co.*, 99 Nev. 523, 527-28, 665 P.2d 256, 259 (1983)). Because the Nevada
28 Supreme Court has held implied indemnity “should not be construed as permission to open a

1 floodgate for cross-claims” when there is no legal relationship between the parties, the standard for
2 what qualifies as a legal relationship is high. *Primadonna*, 125 Nev. at 590, 216 P.3d at 802
3 (citing *Piedmont*, 99 Nev. at 527–28, 665 P.2d at 259).

4 A. Finding of Liability

5 The Motion argues a cause of action for implied indemnity should be precluded because
6 MDB was negligent in operating and managing its business. The Motion, 8:15-17. The Motion
7 therefore argues because the Complaint alleges MDB’s “active negligence” MDB cannot be
8 eligible for indemnification until it is found liable for that negligence. The Motion, 7:14-19. The
9 Opposition argues the Court need not rely on the Plaintiff’s allegations of MDB’s negligence. The
10 Opposition, 2:14-15.

11 The Court finds the Cross-Claim pleads sufficient facts to place Versa on notice of their
12 potential liability.² By suggesting a finding of liability must occur before a party may *plead a*
13 *claim* of implied indemnity, the Motion suggests a pleading party would be required to plead an
14 admission of, or facts asserting, its own liability to sustain its claim. However, a court cannot
15 expect a party to admit or assert its own liability in order to plead a claim for relief unless the party
16 is pleading in the alternative, as allowed by NRCP 8(e)(2).³

17 It is important to make the distinction between *pleading a claim* for implied indemnity and
18 indemnification itself. The cases discussed, *supra*, clearly indicate indemnification is not possible
19 or proper without a finding of liability or a requirement that the pleading party pay damages.
20 *Primadonna*, 125 Nev. at 581; 589, 216 P.3d at 796; 801. However, the Cross-Claim does not
21 request indemnification, but rather pleads it as a cause of action. In other words, the Cross-Claim
22 need only assert a possibility that if MDB is found liable, it is entitled to indemnification from
23

24
25 ² The Opposition correctly states the Motion includes an improper standard for a 12(b)(5) motion to dismiss. The
26 Opposition, 2:8-10. The Motion applies the higher pleading standard articulated by *Bell Atlantic Corp. v. Twombly*, 550
27 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct.1937 (2009), the Motion, 5:26-28; 6:1-5;
however, the Nevada Supreme Court has specifically stated that it declines to adopt this higher standard. The Cross-
Claim pleads sufficient facts under the proper notice pleading standard followed by Nevada courts.

28 ³ NRCP 8(e)(2) states, in relevant part, “[a] party may also state as many separate claims or defenses as the party has
regardless of consistency and whether based on legal or on equitable grounds or on both.”

1 Versa, thereby obviating the need for additional proceedings to establish Versa's financial
2 responsibility to MDB.

3 The Cross-Claim asserts MDB is entitled to indemnity by Versa "with respect to all
4 allegations or liabilities set forth" in the Complaint. The Cross-Claim, 5:10-12. Accordingly, the
5 Cross-Claim effectively places Versa on notice *if* it is found at fault for the "allegations or
6 liabilities" in the Complaint, it is entitled to indemnification. Further, as stated *supra*, the Motion
7 argues indemnity is improper considering MDB's "active negligence;" the Court fails to recognize
8 how facts asserting MDB's negligence preclude maintenance of a claim that requires a finding of
9 that exact negligence.

10 **B. Legal Relationship**

11 The Motion argues the Cross-Claim fails to allege the legal relationship or pre-existing duty
12 between MDB and Versa required for a claim for implied indemnity to survive. The Motion, 8:25-
13 26. The Opposition argues the Cross-Claim pleads sufficient facts to evidence the legal
14 relationship because it indicates MDB was "the last purchaser and end user of the subject Ranco
15 trailer" and the "Versa Valve solenoid control as a component to the Ranco trailer was
16 unreasonably dangerous and defective." The Cross-Claim, 3:4-5; 17-18. Therefore, the
17 Opposition argues a legal relationship was created when MDB purchased the trailer, which
18 included a component from Versa.

19 As explained, *supra*, the Nevada Supreme Court has set a high standard for establishment of
20 a legal relationship as it applies to implied indemnity. The Court has found a legal relationship
21 exists in very limited circumstances. *See Black & Decker*, 105 Nev. at 346, 775 P.2d at 700
22 (holding a legal relationship exists in cases of implied warranties of merchantability); *see also*
23 *Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997)
24 (citing *Piedmont*, 99 Nev. at 527-28, 665 P.2d at 259) (holding a legal relationship exists between a
25 contractor and subcontractor); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 360, 989 P.2d 870,
26 874-75 (1999) (holding a legal relationship can exist between an employer and employee where an
27 express indemnity contract is in place); *Outboard Motor Corp. v. Shupbach*, 93 Nev. 158, 165,
28 561 P.2d 450, 454 (1977) (holding a legal relationship can exist between an employer and

1 employee when the employer holds an independent duty to the employee); *Mills v. Continental*
2 *Parking Corp.*, 86 Nev. 724, 725, 475 P.2d 673, 674 (1970) (holding a legal relationship exists as
3 between a bailor and a bailee “where the parking lot attendant collects a fee, has possession of the
4 keys, assumes control of the car and issues a ticket to identify the car for redelivery”); *Troxel v.*
5 *Granville*, 530 U.S. 57, 58, 120 S.Ct. 2054, 2056 (2000) (holding a fundamental legal relationship
6 and constitutional protection exists between a parent and a child).

7 The Court finds the Cross-Claim does not plead sufficient facts to indicate the establishment
8 of a legal relationship between MDB and Versa. Although the Opposition avers a legal
9 relationship was formed between MDB and Versa when MDB purchased a trailer that included a
10 Versa component, that transaction does not, *ipso facto*, form a recognized legal relationship. The
11 transaction could create a legal relationship if it involved an implied warranty or merchantability,
12 *Black & Decker*, 105 Nev. at 346, 775 P.2d at 700; however, the Cross-Claim does not mention an
13 implied warranty of merchantability. Were the Court to follow the Cross-Claim’s argument to its
14 logical conclusion, every sale of goods would create the legal relationship necessary for an implied
15 indemnity claim. This is too broad an application of the Nevada Supreme Court’s holdings,
16 discussed *supra*, which limit the formation of a legal relationship to very particular circumstances.
17 Further, the Cross-Claim does not plead facts indicating the formation of a legal relationship via
18 any preexisting duty of Versa to MDB. Therefore, because the Cross-Claim has not pled sufficient
19 facts to evidence a legal relationship between MDB and Versa, its third cause of action for implied
20 indemnification against Versa cannot be sustained.

21 While the Motion may have pled the facts necessary to satisfy the requirement of liability
22 on the part of Versa, the Motion does not plead the facts necessary to satisfy the requirement of a
23 preexisting legal relationship between the party seeking indemnity, MDB, and the party who
24 would indemnify, Versa. Proper pleading of the liability requirement alone cannot sustain the
25 claim.
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1 IT IS ORDERED the CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S
2 MOTION TO DISMISS CROSS-CLAIMANT, MDB TRUCKING, LLC'S THIRD CAUSE OF
3 ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5) is hereby GRANTED.

4 DATED this 19 day of October, 2016.

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7 ELLIOTT A. SATTLER
8 District Judge
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

vs.

Dept. No. 10

MDB TRUCKING, LLC; et al.,

Defendants.

ANGELA MICHELLE WILT,

Plaintiff,

Case No. CV15-02410
(consolidated into CV15-02349)

vs.

MDB TRUCKING, LLC., et al.,

Defendants.

ROSA ROBLES, et al.,

Plaintiffs,

Case No. CV16-01124
(consolidated into CV15-02349)¹

vs.

MDB TRUCKING, LLC., et al.,

Defendants.

¹ Consolidated after motion practice was filed.

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1 manufacture of the trailer that held the gravel. The Cross-Claim, 3:25-26. Therefore, MDB
2 brought the Cross-Claim against the manufacturers of the trailer and its components, including
3 Versa. The Cross Claim, 3:25-27; 4:1-2. Included in the Cross-Claim were four claims for relief.
4 The third claim for relief, and the subject of the Motion, is MDB's claim for Implied
5 Indemnification as to Versa. The Cross-Claim, 5:1-9. Versa has moved to dismiss this cause of
6 action.

7 **LEGAL STANDARD FOR MOTION TO DISMISS**

8 NRCP 12(b)(5) states a claim may be dismissed for failure to state a claim upon which
9 relief can be granted. A court must liberally construe the pleadings and accept all asserted
10 allegations as true. *Buzz Stew, LLC. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670,
11 672 (2008). Dismissal is appropriate if the allegations fail to state a cognizable claim of relief
12 when taken at "face value," and construed favorably on behalf of the counterclaimant. *Morris v.*
13 *Bank of Am.*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (quoting *Edgar v. Wagner*, 101 Nev.
14 226, 227-28, 699 P.2d 110, 111-12 (1985)); see also *Stockmeier v. Nevada Dep't of Corrections*,
15 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (holding dismissal is proper where factual
16 allegations "are insufficient to establish the elements of a claim for relief"). Accordingly, the
17 claim should only be dismissed if it "appears beyond a doubt" the non-moving party could "prove
18 no set of facts, which, if true, would entitle it to relief." *Buzz Stew*, 124 Nev. at 228, 181 P.3d at
19 672.

20 Despite a court's liberal construction of the allegations in the pleading, a pleading party
21 must set forth sufficient facts to establish all necessary elements of a claim against the opposing
22 party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (citing *Johnson v. Travelers Ins.*
23 *Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973)). These facts are necessary to provide the opposing
24 party with fair notice. See *Hay*, 100 Nev. at 198, 678 P.2d at 673.

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ANALYSIS

The Motion argues MDB's cause of action for implied indemnity fails as a matter of law because, 1) MDB was "actively negligent" in failing to secure the truck load, and 2) there was no pre-existing legal relationship between Versa and MDB. The Motion, 4:7-8.

Implied indemnity is "an equitable remedy that allows a defendant to seek recovery from other potential tortfeasors" when the negligence of those tortfeasors is the primary cause of the "injured party's harm." *Rodriguez v. Primadonna, Co., LLC*, 125 Nev. 578, 589, 216 P.3d 793, 801 (2009) (citing *The Doctors Co. v. Vincent*, 120 Nev. 644, 651, 98 P.3d 681, 686 (2004)). Implied indemnity allows a "complete shifting of responsibility" to a third party. *The Doctors*, 120 Nev. at 651, 98 P.3d at 686. There are two requirements for an implied indemnity claim. The first is a finding the third-party defendant is liable for damages to the plaintiff on the underlying claim. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. This is because implied indemnity "cannot be used to allow one innocent party to recover its defense costs from another innocent party." *Id.* Accordingly, "[a]t the heart of the doctrine is the premise that the person seeking to assert implied indemnity...has been required to pay damages caused by a third party," even though they have not committed any "independent wrong." *Primadonna*, 125 Nev. at 589, 216 P.3d at 801 (citing *Harvest Capital v. WV Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509, 513 (2002)). Therefore, implied indemnity is available as a cause of action "after the defendant has extinguished its own liability through settlement or by paying a judgment." *Id.* (citing *The Doctors*, 120 Nev. at 651, 98 P.3d at 686).

The second requirement is "a legal relationship or duty," which "supports the claim of indemnity." *Black & Decker (U.S.), Inc. v. Essex Group, Inc.*, 105 Nev. 344, 346, 775 P.2d 698, 699 (1989) (citation omitted); see also *Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citation omitted) (holding the court requires "some nexus or relationship between the indemnitee and indemnitor" to allow a claim for implied indemnity); see also *Pack v. LaTourette*, 128 Nev. Adv. Op. 25, 277 P.3d 1246, 1249 (2012) (citation omitted) (holding there "must be a preexisting legal relation" between the two parties, "or some duty on the part of the primary tortfeasor to protect the secondary tortfeasor"). Accordingly, implied indemnification is not "a license to assert a cross-

1 claim against any third party in hope of alleviating the burden of costs associated with defending
2 litigation.” *Primadonna*, 125 Nev. at 591, 216 P.3d at 802 (citing *Piedmont Equip. Co. Inc. v.*
3 *Eberhard Mfg. Co.*, 99 Nev. 523, 527-28, 665 P.2d 256, 259 (1983)). Because the Nevada
4 Supreme Court has held implied indemnity “should not be construed as permission to open a
5 floodgate for cross-claims” when there is no legal relationship between the parties, the standard for
6 what qualifies as a legal relationship is high. *Primadonna*, 125 Nev. at 590, 216 P.3d at 802
7 (citing *Piedmont*, 99 Nev. at 527–28, 665 P.2d at 259).

8 **A. Finding of Liability**

9 The Motion argues a cause of action for implied indemnity should be precluded because
10 MDB was negligent in operating and managing its business. The Motion, 7:15-16. The Motion
11 therefore argues that because the Complaint alleges MDB’s “active negligence” MDB cannot be
12 eligible for indemnification until it is found liable for that negligence. The Motion, 7:10-12. The
13 Opposition argues the Court need not rely on the Plaintiff’s allegations of MDB’s negligence. The
14 Opposition, 2:14-15.

15 The Court finds the Cross-Claim pleads sufficient facts to place Versa on notice of their
16 potential liability.² By suggesting a finding of liability must occur before a party may *plead a*
17 *claim* of implied indemnity, the Motion suggests a pleading party would be required to plead an
18 admission of, or facts asserting, its own liability to sustain its claim. However, a court cannot
19 expect a party to admit or assert its own liability in order to plead a claim for relief unless the party
20 is pleading in the alternative, as allowed by NRCP 8(e)(2).³

21 It is important to make the distinction between *pleading a claim* for implied indemnity and
22 indemnification itself. The cases discussed, *supra*, clearly indicate indemnification is not possible
23 or proper without a finding of liability or a requirement that the pleading party pay damages.

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25 ² The Opposition correctly states the Motion includes an improper standard for a 12(b)(5) motion to dismiss. The
26 Opposition, 2:13. The Motion applies the higher pleading standard articulated by *Bell Atlantic Corp. v. Twombly*, 550
27 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct.1937 (2009), The Motion, 5:14-19;
however, the Nevada Supreme Court has specifically stated that it declines to adopt this higher standard. The Cross-
Claim pleads sufficient facts under the proper notice pleading standard followed by Nevada courts.

28 ³ NRCP 8(e)(2) states, in relevant part, “[a] party may also state as many separate claims or defenses as the party has
regardless of consistency and whether based on legal or on equitable grounds or on both.”

1 *Primadonna*, 125 Nev. at 581; 589, 216 P.3d at 796; 801. However, the Cross-Claim does not
2 request indemnification, but rather pleads it as a cause of action. In other words, the Cross-Claim
3 need only assert a possibility that if MDB is found liable, it is entitled to indemnification from
4 Versa, thereby obviating the need for additional proceedings to establish Versa's financial
5 responsibility to MDB.

6 The Cross-Claim asserts MDB is entitled to indemnity by Versa "with respect to all
7 allegations or liabilities set forth" in the Complaint. The Cross-Claim, 5:6-7. Accordingly, the
8 Cross-Claim effectively places Versa on notice that *if* it is found at fault for the "allegations or
9 liabilities" in the Complaint, it is entitled to indemnification. Further, as stated *supra*, the Motion
10 argues indemnity is improper considering MDB's "active negligence;" the Court fails to recognize
11 how facts asserting MDB's negligence preclude maintenance of a claim that requires a finding of
12 that exact negligence.

13 **A. Legal Relationship**

14 The Motion argues the Cross-Claim fails to allege the legal relationship or pre-existing duty
15 between MDB and Versa required for a claim for implied indemnity to survive. The Motion, 8:27-
16 28; 9:1. The Opposition argues the Cross-Claim pleads sufficient facts to evidence the legal
17 relationship because it indicates MDB was "the last purchaser and end user of the subject Ranco
18 trailer" and the "Versa Valve solenoid control as a component to the Ranco trailer was
19 unreasonably dangerous and defective." The Cross-Claim, 3:4-5; 17-18. Therefore, the
20 Opposition argues a legal relationship was created when MDB purchased the trailer, which
21 included a component from Versa.

22 As explained, *supra*, the Nevada Supreme Court has set a high standard for establishment of
23 a legal relationship as it applies to implied indemnity. The Court has found a legal relationship
24 exists in very limited circumstances. *See Black & Decker*, 105 Nev. at 346, 775 P.2d at 700
25 (holding a legal relationship exists in cases of implied warranties of merchantability); *see also*
26 *Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997)
27 (citing *Piedmont*, 99 Nev. at 527-28, 665 P.2d at 259) (holding a legal relationship exists between a
28 contractor and subcontractor); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 360, 989 P.2d 870,

1 874-75 (1999) (holding a legal relationship can exist between an employer and employee where an
2 express indemnity contract is in place); *Outboard Motor Corp. v. Shupbach*, 93 Nev. 158, 165,
3 561 P.2d 450, 454 (1977) (holding a legal relationship can exist between an employer and
4 employee when the employer holds a separate and independent duty to the employee); *Mills v.*
5 *Continental Parking Corp.*, 86 Nev. 724, 725, 475 P.2d 673, 674 (1970) (holding a legal
6 relationship exists as between a bailor and a bailee “where the parking lot attendant collects a fee,
7 has possession of the keys, assumes control of the car and issues a ticket to identify the car for
8 redelivery”); *Troxel v. Granville*, 530 U.S. 57, 58, 120 S.Ct. 2054, 2056 (2000) (holding a
9 fundamental legal relationship and constitutional protection exists between a parent and a child).

10 The Court finds the Cross-Claim does not plead sufficient facts to indicate the establishment
11 of a legal relationship between MDB and Versa. Although the Opposition avers a legal
12 relationship was formed between MDB and Versa when MDB purchased a trailer that included a
13 Versa component, that transaction does not, *ipso facto*, form a recognized legal relationship. The
14 transaction could create a legal relationship if it involved an implied warranty or merchantability,
15 *Black & Decker*, 105 Nev. at 346, 775 P.2d at 700; however, the Cross-Claim does not mention an
16 implied warranty of merchantability. Were the Court to follow the Cross-Claim’s argument to its
17 logical conclusion, every sale of goods would create the legal relationship necessary for an implied
18 indemnity claim. This is too broad an application of the Nevada Supreme Court’s holdings,
19 discussed *supra*, which limit the formation of a legal relationship to very particular circumstances.
20 Further, the Cross-Claim does not plead facts that indicate the formation of a legal relationship via
21 any preexisting duty of Versa to MDB. Therefore, because the Cross-Claim has not pled sufficient
22 facts to evidence a legal relationship between MDB and Versa, its third cause of action for implied
23 indemnification against Versa cannot be sustained.

24 While the Motion may have pled the facts necessary to satisfy the requirement of liability
25 on the part of Versa, the Motion does not plead the facts necessary to satisfy the requirement of a
26 preexisting legal relationship between the party seeking indemnity, MDB, and the party who would
27 indemnify, Versa. Proper pleading of the liability requirement alone cannot sustain the claim.
28

1 IT IS ORDERED the CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S
2 MOTION TO DISMISS CROSS-CLAIMANT, MDB TRUCKING, LLC'S THIRD CAUSE OF
3 ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5) is hereby GRANTED.

4 DATED this 19 day of October, 2016.

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6 ELLIOTT A. SATTLER
7 District Judge
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ERNEST BRUCE FITZSIMMONS, et al., 6

Plaintiffs,

Case No. CV15-02349

vs.

Dept. No. 10

MDB TRUCKING, LLC., et al.,

Defendants.

ANGELA MICHELLE WILT,

Plaintiff,

Case No. CV15-02410
(consolidated into CV15-02349)

vs.

MDB TRUCKING, LLC., et al.,

Defendants.

ROSA ROBLES, et al.,

Plaintiffs,

Case No. CV16-01124
(consolidated into CV15-02349)¹

vs.

MDB TRUCKING, LLC., et al.,

Defendants.

¹ Consolidated after motion practice was filed.

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3 **ORDER**

4 Presently before the Court is THIRD PARTY DEFENDANT THE MODERN GROUP GP-
5 SUB, INC'S MOTION TO DISMISS THIRD PARTY COMPLAINT ("the Motion"). The Motion
6 was filed by Third-Party Defendants THE MODERN GROUP GP-SUB, INC. and DRAGON ESP,
7 LTD. (collectively "Modern"). Modern filed the Motion separately in each of the above named
8 cases. Modern filed the Motion in case number CV15-02349, in regards to Plaintiff Fitzsimmons,
9 on August 1, 2016. Modern filed the Motion in case number CV15-02410, in regards to Plaintiff
10 Wilt, on August 2, 2016; CV15-02410 has since been consolidated into case number CV15-02349.
11 Modern filed the Motion in case number CV16-01124, in regards to Plaintiff Robles, on August 1,
12 2016; CV16-01124 has since been consolidated into case number CV15-02349. The Motion is
13 identical as filed in all three cases. Third-Party Plaintiff MDB TRUCKING, LLC ("MDB") filed
14 the THIRD PARTY PLAINTIFF'S JOINT OPPOSITION TO THIRD-PARTY DEFENDANT'S
15 [THE MODERN GROUP AND DRAGON ESP, LTD'S] MOTION TO DISMISS THIRD-
16 PARTY COMPLAINT ("the Joint Opposition"). MDB filed the Joint Opposition in case numbers
17 CV15-02349 and CV15-02410, in regards to Plaintiffs Fitzsimmons and Wilt, on August 18, 2016.
18 MDB filed the THIRD PARTY PLAINTIFF'S OPPOSITION TO THIRD-PARTY
19 DEFENDANT'S [THE MODERN GROUP AND DRAGON ESP, LTD'S] MOTION TO
20 DISMISS THIRD-PARTY COMPLAINT ("the Opposition") in case number CV16-01124, in
21 regards to Plaintiff Robles, on August 18, 2016. The Joint Opposition and Opposition are identical
22 as filed in all three cases. Modern filed the REPLY IN SUPPORT OF THIRD-PARTY
23 DEFENDANTS THE MODERN GROUP GP-SUB, INC'S AND DRAGON ESP LTD.'S
24 MOTION TO DISMISS THIRD-PARTY COMPLAINT ("the Reply"). Modern filed the Reply in
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1 case number CV15-02349, in regards to Plaintiff Fitzsimmons; in case number CV15-02349, in
2 regards to Plaintiff Wilt; and in case number CV16-01124, in regards to Plaintiff Robles, on August
3 29, 2016. The Reply is identical as filed in all three cases. The Motion was submitted for the
4 Court's consideration in case number CV15-02349, in regards to Plaintiffs Fitzsimmons and Wilt,
5 and in CV16-01124, in regards to Plaintiff Robles, on September 7, 2016.
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7 As the pleadings are identical, the Court will not differentiate between the pleadings as filed
8 in each case.² The parties shall construe this Order to apply equally to all pleadings and parties
9 described, *supra*. As the above-named cases have been consolidated, the Court will dispose of all
10 three Motions in the instant Order.
11

12 **FACTUAL BACKGROUND**

13 This case arises from a personal injury action. A COMPLAINT was filed in CV15-02349,
14 in regards to Plaintiff Fitzsimmons, on December 4, 2015 ("The Fitzsimmons Complaint"). A
15 COMPLAINT was filed in CV15-02410, in regards to Plaintiff Wilt, on December 16, 2015 ("The
16 Wilt Complaint"). A COMPLAINT was filed in CV16-01124, in regards to Plaintiff Robles, on
17 May 24, 2016 ("The Robles Complaint"). The facts alleged in all three complaints are nearly
18 identical. It is alleged Defendant Anthony Koski ("Koski"), while driving a truck for MDB,
19 negligently spilled a load of gravel into the roadway. The Fitzsimmons Complaint, 3:11-15; 16-
20 18. Plaintiffs ERNEST BRUCE FITZSIMMONS, ANGELA MICHELLE WILT, and the
21 ROBLES family (collectively "the Plaintiffs") were driving on the same roadway. The
22 Fitzsimmons Complaint, 3:19-20. The spilled gravel caused the driving Plaintiffs to lose control of
23 their vehicles and hit a guardrail. The Fitzsimmons Complaint, 3:22-25. The Plaintiffs sustained
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27 ² The Court will cite to the Complaint, Motion, Joint Opposition, and Reply in the Fitzsimmons case for citation
28 purposes. For example, a citation to "the Motion" refers specifically to the Motion as filed in the Fitzsimmons case, but
applies to the Motion as filed in the Wilt and Robles cases as well.

1 physical and emotional injuries as a result of the accident. The Fitzsimmons Complaint, 4:12-14.
2 In response to the Complaint, MDB filed a THIRD-PARTY COMPLAINT (“the 3P Complaint”).
3 MDB filed the 3P Complaint in case number CV15-02349, in regards to Plaintiff Fitzsimmons; in
4 case number CV15-02410, in regards to Plaintiff Wilt; and in case number CV16-01124, in regards
5 to Plaintiff Robles, on June 15, 2016. The 3P Complaint is identical as filed in all three cases. The
6 3P Complaint alleged it was not Koski’s negligence that caused the gravel to spill; rather, the spill
7 was caused by the “unreasonably dangerous and defective” design and manufacture of the trailer
8 that held the gravel. The 3P Complaint, 3:5-7; 4:1-3. Therefore, MDB brought the 3P Complaint
9 against the manufacturers of the trailer and its components, including Modern. The 3P Complaint,
10 4:14-18. The 3P Complaint includes four claims for relief. The first claim for relief is MDB’s
11 claim for Implied Indemnification as to, *inter alia*, Modern. The 3P Complaint, 5:1-2. The second
12 claim for relief is MDB’s claim for Contribution as to, *inter alia*, Modern. The 3P Complaint,
13 5:10-11. The Motion moves to dismiss the first and second causes of action as to Modern.
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17 LEGAL STANDARD FOR MOTION TO DISMISS

18 NRCP 12(b)(5) states a claim may be dismissed for failure to state a claim upon which
19 relief can be granted. A court must liberally construe the pleadings and accept all asserted
20 allegations as true. *Buzz Stew, LLC. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670,
21 672 (2008). Dismissal is appropriate if the allegations fail to state a cognizable claim of relief
22 when taken at “face value,” and construed favorably on behalf of the counterclaimant. *Morris v.*
23 *Bank of Am.*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (quoting *Edgar v. Wagner*, 101 Nev.
24 226, 227-28, 699 P.2d 110, 111-12 (1985)); *see also Stockmeier v. Nevada Dep’t of Corrections*,
25 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (holding dismissal is proper where factual allegations
26 “are insufficient to establish the elements of a claim for relief”). Accordingly, the claim should
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only be dismissed if it “appears beyond a doubt” the non-moving party could “prove no set of facts, which, if true, would entitle it to relief.” *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

Despite a court's liberal construction of the allegations in the pleading, a pleading party must set forth sufficient facts to establish all necessary elements of a claim against the opposing party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672 (1984) (citing *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973)). These facts are necessary to provide the opposing party with fair notice. *See Hay*, 100 Nev. at 198, 678 P.2d at 673.

ANALYSIS

The Motion argues MDB's causes of action for implied indemnity and contribution fail as a matter of law because they are "not yet ripe for adjudication." The Motion, 2:19-10. The Motion avers "such claims do not arise until a resolution or judgment is obtained in the underlying matter." The Motion, 4:19-22.

A. First Cause of Action for Implied Indemnity

Implied indemnity is “an equitable remedy that allows a defendant to seek recovery from other potential tortfeasors” when the negligence of those tortfeasors is the primary cause of the “injured party's harm.” *Rodriguez v. Primadonna, Co., LLC*, 125 Nev. 578, 589, 216 P.3d 793, 801 (2009) (citing *The Doctors Co. v. Vincent*, 120 Nev. 644, 651, 98 P.3d 681, 686 (2004)). Implied indemnity allows a “complete shifting of responsibility” to a third party. *The Doctors*, 120 Nev. at 651, 98 P.3d at 686. There are two requirements for an implied indemnity claim. The first is a finding the third-party defendant is liable for damages to the plaintiff on the underlying claim. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. This is because implied indemnity “cannot be used to allow one innocent party to recover its defense costs from another innocent party.” *Id.*

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

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

No. 76395

Electronically Filed
Aug 06 2018 02:49 p.m.

Elizabeth A. Brown
Clerk of Supreme Court
DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Second Department X
County Washoe Judge Elliott A. Sattler
District Ct. Case No. CV15-02349

2. Attorney filing this docketing statement:

Attorney Josh Cole Aicklen and David B. Avakian Telephone 702-893-3383
Firm Lewis Brisbois Bisgaard & Smith
Address 6385 South Rainbow Blvd. Ste. 600
Las Vegas, Nevada 89118

Client(s) VERSA PRODUCTS COMPANY, INC.

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Nicholas M. Wiezcorek Telephone (702)862-8300
Firm Clark Hill, PLLC
Address 3800 Howard Hughes Parkway Ste. 500
Las Vegas, NV 89169

Client(s) MDB TRUCKING, LLC

Attorney _____ Telephone _____
Firm _____
Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|-------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input checked="" type="checkbox"/> Other disposition (specify): <u>Attorney's Fees</u> |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
☐ Venue
☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

MDB Trucking LLC v. Versa Products Company, Inc., Case No. 75022
MDB Trucking LLC v. Versa Products Company, Inc., Case No. 75319
MDB Trucking LLC v. Versa Products Company, Inc., Case No. 75321
MDB Trucking LLC v. Versa Products Company, Inc., Case No. 76397
MDB Trucking LLC v. Versa Products Company, Inc., Case No. 76396

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

1. Fitzsimmons v. MDB Trucking LLC et al., Second Judicial District Court, Case No. CV15-02349. On December 8, 2017, the Court filed an Order dismissing MDB's Cross-Claim. Notice of Entry of Order was filed on December 29, 2017.
2. James M. Bible v. MDB Trucking LLC et al., Second Judicial District Court, Case No. CV16-01914. On January 22, 2018, the Court filed an Order dismissing MDB's Cross-Claim. Notice of Entry of Order was filed on February 8, 2018.
3. Geneva M. Remmerde v. Daniel Anthony Koski; MDB Trucking, LLC et al., Second Judicial District Court, Case No. CV16-00976. On January 22, 2018, the Court filed an Order dismissing MDB's Cross-Claim. Notice of Entry of Order was filed on February 8, 2018.

8. Nature of the action. Briefly describe the nature of the action and the result below:

MDB TRUCKING, LLC brought Cross-Claims against VERSA PRODUCTS COMPANY, INC., in which it asserted a contribution claim against VERSA PRODUCTS COMPANY, INC. for personal injury claims brought by Plaintiffs. Plaintiffs were driving westbound on IR80 when a semi-trailer driven by DANIEL KOSKI and owned by MDB TRUCKING, LLC spilled gravel on the freeway, causing multiple automobile accidents and the injuries alleged by the Plaintiffs. VERSA PRODUCTS COMPANY, INC. filed a Motion to Strike MDB TRUCKING, LLC 's Cross-Claim Pursuant to NRCP 37. The District Court granted the Motion and struck MDB TRUCKING, LLC 's Cross-Claim. VERSA PRODUCTS COMPANY, INC. timely filed its Motion for Attorney's Fees and Costs on January 5, 2018. Thereafter, MDB TRUCKING, LLC timely filed a Motion to Retax and Settle Costs. On June 7, 2018, the District Court granted in part and denied in part the Motion for Attorney's Fees and Costs and Motion to Retax. MDB TRUCKING, LLC appealed the order and now VERSA PRODUCTS COMPANY, INC. cross-appeals the same order to this Honorable Court as to the denial of attorneys fees and the full amount of costs.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether the District Court erred in denying Cross-Appellant/Respondent's Motion for an award of Attorney's Fees and the full amount of Costs.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

1. MDB Trucking LLC v. Versa Products Company, Inc., Case No. 76397. This involves the same issue of whether the District Court erred in denying Cross-Appellant/Respondent's Motion for Attorney's Fees and full Costs.
2. MDB Trucking LLC v. Versa Products Company, Inc., Case No. 76396. This involves the same issue of whether the District Court erred in denying Cross-Appellant/Respondent's Motion for Attorney's Fees and full Costs.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case is presumptively assigned to the Court of Appeals pursuant NRAP 17(b)(8) as it is an appeal from a post-judgment order in a civil case.

14. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? _____

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from June 7, 2018

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served June 16, 2018

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See AA Primo Builders v. Washington*, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed July 24, 2018 (Cross-Appeal)

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

MDB TRUCKING, LLC first appealed the Motion for Attorneys' Fees and Costs and Motion to Retax on July 13, 2018. VERSA PRODUCTS COMPANY, INC. timely filed its Cross-Appeal within 14 days after the date the first notice was served (July 13, 2018).

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---------------------------------------------------|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(1) provides the basis for appeal as the Court entered a final post-judgment order.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiffs-Ernest Fitzsimmons and Carol Fitzsimmons ("Fitzsimmons"); Angela Wilt ("Wilt"); Rosa, Benjamin, Cassandra and Natalie Robles ("Robles"); Sonya Corthell ("Corthell"); Beverly, Patrick and Ryan Crossland ("Crossland"); Olivia and Naykyla John ("John"); Kandise Baird ("Kins")

Defendants- MDB TRUCKING, LLC;VERSA PRODUCTS COMPANY, INC.; Daniel Koski;RMC Lamar Holdings, Inc.

Third-Party Defendants- The Modern Group GP-Sub, Inc. and Dragon Esp, LTD

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

All parties have been formally dismissed except for MDB TRUCKING, LLC and VERSA PRODUCTS COMPANY, INC.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

1. Plaintiffs claim for Negligence and Strict Products Liability against all Defendants. Formal disposition of claim against all Defendants on August 8, 2017.

2. MDB TRUCKING, LLC's Cross-Claim and Third-Party claim for Contribution against VERSA PRODUCTS COMPANY,INC.,RMC Lamar Holdings and Third-Party Defendants. Formal disposition of claim against RCM Lamar Holdings and Third-Party Defendants on March 1, 2018 and VERSA on December 28, 2017.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- è The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- è Any tolling motion(s) and order(s) resolving tolling motion(s)
- è Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- è Any other order challenged on appeal
- è Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

VERSA PRODUCTS COMPANY, INC.
Name of appellant

Josh Cole Aicklen, Esq.
Name of counsel of record

August 6, 2018
Date

Signature of counsel of record

Clark County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 6th day of August, 2018, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

X BY ELECTRONIC SUBMISSION: submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

Dated this 6th day of August, 2018

Signature