IN THE SUPREME COURT OF THE STATE OF NEVADA

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No. 87794

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OSCAR HERNANDEZ,
Plaintiff-Appellant,

v.

THE HOME DEPOT, INC., and RIGID TOOL COMPANY,
Defendants-Appellees.

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PLAINTIFF-APPELLANT OSCAR HERNANDEZ'S APPENDIX VOLUME 1

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Certified Question by the United States District Court for the District of Nevada.

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COMP
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CASE NO: A-22-851955-C
Department 17

DISTRICT COURT
CLARK COUNTY, NEVADA

OSCAR HERNANDEZ, Plaintiff, vs. LOWES HOME CENTERS, LLC., RIGID TOOL COMPANY, and DOES I - V, and ROE CORPORATIONS I - V, inclusive, Defendants.	CASE NO: DEPT. NO:

COMPLAINT

COMES NOW, Plaintiff, OSCAR HERNANDEZ, by and through his attorneys, The LAW OFFICE OF DAVID SAMPSON, LLC., and for his causes of action, against the Defendants, and each of them, alleges as follows:

1. That Plaintiff, OSCAR HERNANDEZ, was at all times relevant to this action a resident of Clark County, Nevada.

2. This Court has jurisdiction over this matter under NRS 14.065 and NRS 4.370(1), as the facts alleged occurred in Clark County, Nevada and involve an amount in controversy in excess of $15,000.00. Venue is proper pursuant to NRS 13.040, as Defendant, or any one of them resided in Clark County, Nevada at the commencement of this action, or

venue is proper pursuant to NRS 13.040, as the county in which Defendant resided be unknown to Plaintiff and the action may be tried in any county in which Plaintiff may designate in the complaint, or venue is proper pursuant to NRS 13.040, as none of the Defendants reside in the State and the action may be tried in any county in which Plaintiff may designate in the complaint.

FIRST CAUSE OF ACTION

As for his First Cause of Action, Plaintiff complains of Defendants, and each of them, that:

I

At all times mentioned herein, Plaintiff, OSCAR HERNANDEZ (hereinafter "Plaintiff"), was either a resident of the State of Nevada.

II

At all times mentioned herein, Defendant, LOWES HOME CENTERS, LLC., ("LOWES"), was and is a corporation organized under the laws of the State of Nevada, with its principal place of business located within the State of North Carolina, and was and is the designer, manufacturer, producer, packager, distributor and/or seller of that certain RIGID Round Head Framing Nailer model R350RHF (hereinafter the "RIGID Nail Gun") and as such did transport, ship, introduce and/or cause said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada, and other states.

III

At all times mentioned herein, Defendant, RIGID TOOL COMPANY ("RIGID"), was and is a corporation organized under the laws of the State of Nevada, with its principal place of

business located within the State of Ohio, and was and is the designer, manufacturer, producer, packager, distributor and/or seller of that certain RIGID Nail Gun and as such did transport, ship, introduce and/or cause said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada, and other states.

IV

Defendant ROE WHOLESALER is an unknown entity engaged in the business of selling RIGID Nail Guns at wholesale and was and is the distributor, wholesaler and/or seller of the RIGID Nail Gun and as such did transport, ship, introduce an/or cause said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada and other states.

V

Defendant LOWES is engaged in the business of selling RIGID Nail Guns at retail and was and is the distributor, retailer and/or seller of the RIGID Nail Gun and as such did transport, ship, introduce and/or cause said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada and other states.

VI

The true names or capacities, whether individual, corporate, associate or otherwise, of Defendants DOE I through DOE X, ROE CORPORATION I through ROE CORPORATION X, ROE WHOLESALER and ROE RETAILER, are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as DOE, ROE CORPORATION, ROE

WHOLESALER and ROE RETAILER are responsible in some manner for the events and happenings referred to and caused damages proximately to Plaintiff as herein alleged. Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities of DOE I through DOE X, ROE I through ROE X, ROE WHOLESALER and ROE RETAILER when the same have been ascertained and to join such Defendants in this action.

VII

While engaged in the manufacture and sale of RIGID Nail Guns, Defendant RIGID sold and/or delivered the RIGID Nail Gun to ROE WHOLESALER who in turn sold and/or delivered the same RIGID Nail Gun to LOWES and/or ROE RETAILER.

VIII

Defendants, and each of them, expected the RIGID Nail Gun so sold to reach consumers or users in the condition in which it was sold.

IX

Plaintiff's employer purchased the RIGID Nail Gun from LOWES for the use of driving nails into wood or other materials and actually used the RIGID Nail Gun as a tool to use of drive nails into wood or other materials and Plaintiff's use and manner of use of the RIGID Nail Gun was reasonably foreseeable by the Defendants, and each of them.

X

On March 14, 2021, while on a construction site in Clark County, Nevada, Plaintiff attempted to drive nails into wood using the RIGID Nail Gun following the instructions on the RIGID Nail Gun. The RIGID Nail Gun fell on the ground and a nail shot out from the RIGID Nail Gun hitting Plaintiff in the chest and causing Plaintiff to sustain the injuries hereinafter alleged.

XI

Prior to the time Plaintiff sustained such injuries, Plaintiff's employer had removed the RIGID Nail Gun from the packaging furnished by Defendants, and each of them. Plaintiff is informed and believes, and in reliance thereon alleges, that the RIGID Nail Gun was then and there in the condition existing when Defendants, and each of them sold and/or delivered it to Defendant ROE WHOLESALER, and in the same condition existing when Defendant ROE WHOLESALER sold and/or delivered it to ROE RETAILER. Plaintiff is informed and believes, and in reliance thereon alleges, that the same condition of the product existed when Defendant ROE RETAILER sold and/or delivered the RIGID Nail Gun to the Plaintiff, and the condition of the product remained unchanged when Plaintiff first removed it from the packaging and sustained injuries while using it.

XII

When Plaintiff sustained the injuries hereinafter alleged, the RIGID Nail Gun was in a defective condition and was unreasonably dangerous to a user or consumer in that the nailing and safety mechanisms and nailing and safety design of the RIGID Nail Gun were defective and unreasonably dangerous.

XIII

Defendants, and each of them, knew or through the exercise of reasonable care and diligence, should have known of such defective and unreasonably dangerous conditions.

XIV

Plaintiff relied on the duty of Defendants, and each of them, to deliver the RIGID Nail Gun at the time of sale and/or delivery by each in a condition fit for use for the purpose intended. The RIGID Nail Gun was defective, unreasonably dangerous, and was in fact not fit

for the purposes and uses for which it was intended. The breach of such duty by Defendants, and each of them, and such defective condition of the RIGID Nail Gun, was a proximate cause of the injuries sustained by Plaintiff.

XV

By reason of the premises and as a direct and proximate result thereof, Plaintiff has incurred expenses for medical care and treatment and expenses incidental thereto all to Plaintiff's the present amount of which is in excess of $10,000 and indeed in excess of the Justice Court jurisdictional limit of $15,000.00. Plaintiff is informed and believes, and in reliance thereon alleges, that such expenses will continue in the future, all to his damage in a presently unascertainable amount. Plaintiff prays leave of this Court to insert the full amount of Plaintiff's damages when the same have been fully ascertained.

XVI

By reason of the premises and as a direct and proximate result thereof, Plaintiff was injured in and about his body as he sustained a nail embedded in his chest, and was otherwise injured and caused to suffer great pain of body and mind, all or some of which conditions may be permanent and disabling in nature, all to Plaintiff's general damages in excess of $10,000 and indeed in excess of the Justice Court jurisdictional limit of $15,000.00..

XVII

Prior to the injuries complained of herein, Plaintiff was an able-bodied male, regularly and gainfully employed and physically capable of engaging in all other activities for which Plaintiff was otherwise suited. By reason of the premises and as a direct and proximate result thereof, Plaintiff was required to and did lose time from Plaintiff's employment, continues to and shall continue to be limited in his activities and occupations which has caused and shall

continue to cause Plaintiff a loss of earnings and earning capacity to Plaintiff's damage in a presently unascertainable amount, the allegations of which Plaintiff prays leave of this Court to insert herein when the same shall be finally determined.

XVIII

By reason of the premises and as a direct and proximate result of all of the foregoing, Defendants, and each of them, are strictly liable to Plaintiff for the injuries and damages hereinabove set forth.

SECOND CAUSE OF ACTION

As and for a second, separate and distinct cause of action, Plaintiff complains of Defendants, and each of them, that:

XIX

Plaintiff incorporates by reference as though fully set forth herein, all of the allegations of Paragraphs I through XVIII, above.

XX

Defendants, and each of them, owed a duty to all persons who could reasonably be foreseen to use the RIGID Nail Gun, and such a duty was specifically owed to Plaintiff.

XXI

Defendants, and each of them, breached a duty owed to the Plaintiff consisting of, among other things, the following:

a) Failure to warn by statement on the product, in the instruction booklet, or otherwise, of the unreasonably dangerous conditions of the RIGID Nail Gun;

b) Failure to properly design the RIGID Nail Gun in such a manner as to avoid or minimize the unreasonable danger to users of the RIGID Nail Gun;

c) Failure to properly and adequately test and inspect the RIGID Nail Gun to ascertain its unreasonably dangerous condition;

d) Failure to give adequate instructions regarding the safe use of the RIGID Nail Gun;

e) Failure to use due care to avoid misrepresentations.

XXII

As a direct and proximate result of the negligence of Defendants, and each of them, Plaintiff was caused to suffer the injuries and damages hereinabove set forth.

THIRD CAUSE OF ACTION

As and for a third, separate and distinct cause of action, Plaintiff complains of Defendants, and each of them, that:

XXIII

Plaintiff incorporates by reference as though fully set forth herein, all of the allegations of Paragraphs I through XXII, above.

XXIV

Prior to the purchase of the RIGID Nail Gun by Plaintiff, Defendants, and each of them, in order to induce Plaintiff to agree to purchase the RIGID Nail Gun, provided express warranties and representations, including, but not limited to, the warranty that the product was fit for use for the purpose intended.

XXV

Plaintiff purchased the RIGID Nail Gun in reliance on said express warranties and representations.

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XXVI

Said RIGID Nail Gun was defective and unreasonably dangerous, was not fit for the purposes and uses for which it was intended, and was not of merchantable quality.

XXVII

As a direct and proximate result of the breach of express warranties and representations by the Defendants, and each of them, Plaintiff was caused to suffer the injuries and damages as hereinabove set forth.

FOURTH CAUSE OF ACTION

As and for a fourth, separate and distinct cause of action, Plaintiff complaints of Defendants, and each of them, that:

XXVIII

Plaintiff incorporates by reference as though fully set forth herein, all of the allegations of Paragraphs I through XXVII, above.

XXVIX

Defendants, and each of them, impliedly warranted that the RIGID Nail Gun was fit for use of driving nails into wood or other materials, the purpose for which it was designed, and that the RIGID Nail Gun was fit and suitable for the use in fact made by Plaintiff.

XXX

In purchasing and using the RIGID Nail Gun, Plaintiff relied on the skill and judgment of Defendants, and each of them, and the implied warranty of fitness for the purpose for which Plaintiff used the RIGID Nail Gun.

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XXXI

The RIGID Nail Gun was not fit for use for its intended purpose and Defendants, and each of them, breached the implied warranty of fitness.

XXXII

As a direct and proximate result of the breach of implied warranty of fitness by Defendants, and each of them, Plaintiff was caused to suffer the injuries and damages hereinabove set forth.

WHEREFORE, Plaintiff, expressly reserving the right to amend his Complaint at the time of the trial of the actions herein to include all items of damages not yet ascertained, demand judgment against Defendants, and each of them, for all causes of action as follows:

1. General damages in excess of $10,000and indeed in excess of the Justice Court jurisdictional limit of $15,000.00;
2. Special Damages for Plaintiff, OSCAR HERNANDEZ, medical and miscellaneous expenses, plus future medical expenses and miscellaneous expenses incidental thereto in a presently unascertainable amount;
3. Special damages for lost wages in a presently unascertainable amount, and/or diminution of Plaintiff's earning capacity, plus possible future loss of earnings and/or diminution of Plaintiff's earning capacity in a presently unascertainable amount.
4. Costs of this suit;
5. Attorney's fees; and

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6. For such other and further relief as to the Court may seem just and proper in the premises.

DATED THIS 14th day of March, 2022

LAW OFFICE OF DAVID SAMPSON

BY: /s/ David Sampson

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Attorney for Defendant, Ridge Tool Company

UNITED STATES DISTRICT COURT

CLARK COUNTY, NEVADA

OSCAR HERNANDEZ , Plaintiffs, v. LOWES HOME CENTERS, LLC., RIGID TOOL COMPANY, and DOES 1-V, and ROE CORPORATIONS IV, inclusive, Defendants.	CASE NO.: **DEFENDANT RIDGE TOOL COMPANY'S (incorrectly sued as RIGID TOOL COMPANY) NOTICE OF REMOVAL OF ACTION TO FEDERAL COURT UNDER 28 U.S.C. §1441(b) (DIVERSITY)**

TO: THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA:

Defendant Ridge Tool Company (incorrectly sued as RIGID TOOL COMPANY)[1] by and through its attorney of record, Ellen S. Bowman, of the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, hereby petitions this Court for the removal of a pending action in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, to the United States District Court for the District of Nevada at Las Vegas, pursuant to 28 USC §1441(b), *et seq.*

As part of this Petition, Defendant/Petitioner demonstrates the following to the Court:

[1] Defendant Ridge Tool Company was incorrectly sued as "***Rigid*** Tool Company" and will be referred to herein properly as Ridge Tool Company.

1. Plaintiff first commenced this action against Defendant Ridge Tool Company in the Eighth Judicial District Court, Clark County, State of Nevada, in Case No. A-22-851955-C, Department 17, when Plaintiff filed a Complaint on May 2, 2022, naming Rigid Tool Company (sic) as a defendant. A copy of the Plaintiff's Summons and Complaint setting forth Plaintiff's claims for relief is attached hereto as **Ex. A.** Defendant Ridge Tool Company was first served with the Summons and Complaint on May 13, 2022.

2. Paragraph 1 of Plaintiff's Complaint alleges: "That Plaintiff, OSCAR HERNANDEZ, was at all times relevant to this action a resident of Clark County, Nevada." ***See,* Ex. A. at ¶**

3. Section III of Plaintiff's Complaint alleges: "Defendant, RIGID TOOL COMPANY ("RIGID") (sic) was and is a corporation organized under the laws of the State of Nevada, with its principal place of business located within the State of Ohio, and was and is the designer, manufacturer, producer, packager, distributor and/or seller of that certain RIGID Nail Gun and as such did transport, ship, introduce and/or cause said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada, and other states." ***See,* Ex. A. at 2:26-3:6.** In fact, Defendant Ridge Tool Company is an Ohio corporation with its principal place of business at 400 Clark Street, Elyria, OH 44035-6108. ***See,* Ex. B, Affidavit of Daniel Terpstra at ¶ 5.**

4. Section II of Plaintiff's Complaint alleges: "Defendant, LOWES HOME CENTERS, LLC ("LOWES"), was and is a corporation organized under the laws of the State of Nevada, with its principal place of business located within the State of North Carolina, and was and is the designer, manufacturer, producer, packager, distributor and/or seller of that certain RIGID Round Head Framing Nailer model R350RHF." Plaintiff's Complaint alleges that LOWES "transport[ed], ship[ped], introduce[d] and/or cause[d] said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada, and other states." ***See,* Ex. A. at 2:15-24.**

Proof of service on co-defendant, LOWES HOME CENTERS, LLC has not been filed and

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Ridge Tool Company is not otherwise aware of proper service of process on co-defendant, LOWES HOME CENTERS, LLC.

Regardless, the Model R350RHF RIDGID nail gun allegedly involved in Plaintiff's accident is one of the "RIDGID"- brand power tools marketed by Home Depot, not Lowes. ***See,* Ex. B, Affidavit of Daniel Terpstra at ¶ 7.** Meaning, LOWES HOME CENTERS, LLC is a sham defendant because it would have been Home Depot that would have sold the Model R350RHF RIDGID nail gun, not LOWES HOME CENTERS, LLC. ***See,* Ex. B, Affidavit of Daniel Terpstra at ¶ 8.** LOWES HOME CENTERS, LLC had no role whatsoever in the distribution and sale of the Model R350RHF RIDGID nail gun and as such should be considered a sham defendant for purposes of determining diversity of citizenship jurisdiction, regardless of its service status. ***See,* Ex. B, Affidavit of Daniel Terpstra at ¶ 8.**

In addition, upon information and belief, LOWES HOME CENTER, LLC is a North Carolina corporation with its principal place of business in Mooresville, North Carolina.

5. Plaintiff's Complaint alleges that Rigid Tool Company (sic) defectively designed a RIDGID Nail Gun that was unreasonably dangerous and not fit for the purposes and uses for which it was intended and as a result, caused plaintiff severe injuries during an incident on March 14, 2021 when the gun was dropped and a nail was allegedly discharged and pierced the plaintiff's chest. ***See,* Ex. A.** The incident allegedly occurred when plaintiff was working on a construction site and attempting to drive nails into wood. Plaintiff alleges that the nail gun "fell on the ground and a nail shot out from the RIGID (sic) Nail Gun hitting Plaintiff in the chest and causing Plaintiff to sustain the injuries…" *See,* **Ex. A.** at 4:23-28. As a result, plaintiff alleges he "incurred expenses for medical care and treatment and expenses incidental thereto all to" *See,* **Ex. A.** at 6:6-7 Plaintiff also claims that his medical treatment will "continue in the future, all to his damage in a presently unascertainable amount." *See,* **Ex. A.** at 6:9-12. Plaintiff also generally claims injuries to his body as a result of the nail embedded in his chest, "causing him to suffer great pain of body and mind, all or some of which conditions may be permanent and disabling in nature." *See,* **Ex. A.** at 6:15-20.

Plaintiff generally pleads his damages as in excess of $10,000. *Id*. Plaintiff identifies his special damages to include "medical and miscellaneous expenses, plus future medical expenses and miscellaneous expenses incidental thereto in a presently unascertainable amount. *See,* **Ex. A.** at 10:15-18.

Moreover, plaintiff alleges that he "was required to and did lose time from plaintiff's employment, continues to and shall continue to be limited in his activities and occupations which has caused and shall continue to cause Plaintiff a loss of earnings and earning capacity to Plaintiff's damage in a presently unascertainable amount…" *See,* **Ex. A.** at 6:23-7:2. Plaintiff further alleges "lost wages in a presently unascertainable amount, and/or diminution of Plaintiff's earning capacity, plus possible future loss of earnings and/or diminution of Plaintiff's earning capacity in a presently unascertainable amount." *See,* **Ex. A.** at 10:19-21.

In *Doelamo v. Karl-Heinz,* which involved similar damages, the defendant argued more than $75,000 was in dispute because plaintiff alleged "approximately $22,000 in past medical damages, and he argues that it is more likely than not that if Plaintiff is successful on his claims for lost wages, future medical damages for his 'permanent' condition(s), past and future pain and suffering, and attorney's fees, he will recover more than $75,000 total in the case."[2] Such a claims for damages was sufficient to establish diversity jurisdiction:

> In the Court's experience, a personal injury claim including $22,000 in past medical bills will normally include a plea to a jury for several times this amount in future medical bills, particularly where one alleges a permanent condition related to the injury. The Court can conclude this without even considering pain and suffering, lost wages, or attorney's fees. Considering those measures of damages and fees, as well, it is nearly certain that Plaintiff in reality seeks more than $75,000. The Court has little doubt that Plaintiff will ask the jury to award him more than $75,000, whether in this Court or in state court.

[2] No. 2:14-cv-339, 2014 U.S. Dist. LEXIS 72664 (D. Nev. May 27, 2014).

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In *Canonico v. Seals*, the plaintiff conceded at least $50,000 was in dispute due to past and future medical treatment and property damage.[3] "The remaining question is whether more than $25,000 is at stake in the form of pain and suffering, loss of earning capacity, loss of enjoyment of life, compensatory damages, attorney's fees, and costs. It almost certainly is."

In *Perreault v. Wal-Mart Stores, Inc*., the complaint sought an amount in excess of $10,000.00, as well as special damages, reasonable attorney's fees, costs, and other appropriate relief.[4] The plaintiff provided an itemized list of her then-current medical costs, totaling $38,769.60 and noted that her medical bills were continuing to "trickle in." The amount in controversy threshold was satisfied as "it appears likely that plaintiff's total requested damages exceed $75,000.00."

Based upon the case law, coupled with the serious nature of plaintiff's claimed injuries, that he allegedly shot a nail into his chest that became embedded, in addition to the claim for past and future pain and suffering, wage loss and loss of earning capacity claims, defendant Ridge Tool Company has a good faith belief that the amount in controversy between the parties exceeds $75,000.00.

6. This Court has original jurisdiction over the subject matter of this action under the provisions of section §1332 of Title 28 U.S.C., in that there is complete diversity between the parties, and more than $75,000.00 in controversy, exclusive of interest and costs. Pursuant to §1441 of Title 28 U.S.C., defendants/petitioners Ridge Tool Company is entitled to remove the action to this Court.

[3] No. 2:13-cv-316, 2013 U.S. Dist. LEXIS 60047 (D. Nev. Apr. 25, 2013).
[4] No. 2:16-cv-809, 2016 U.S. Dist. LEXIS 115591 (D. Nev. Aug. 29, 2016).

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7. A true and correct copy of Ridge Tool Company's Notice of Removal is being filed this date with the Clerk of the Court for the Eighth Judicial District Court of Clark County, Nevada and is attached hereto as **Ex. C**.

DATED this _13th_ day of June, 2022.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: */s/ Ellen S. Bowman* _____
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Attorney for Defendant
Ridge Tool Company

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, and that on this _13th_ day of June, 2022, I served a true and correct copy of the foregoing **DEFENDANT RIDGE TOOL COMPANY'S (incorrectly sued as RIGID TOOL COMPANY) NOTICE OF REMOVAL OF ACTION TO FEDERAL COURT UNDER 28 U.S.C. §1441(b) (DIVERSITY)** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ 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; and pursuant to Rule 9 of the N.E.F.C.R.

☐ via hand-delivery to the addressees listed below;

☐ via facsimile;

☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

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Attorney for Plaintiff,
Oscar Hernandez

BY: */s/ Angela Rafferty*
An Employee of
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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Attorney for Defendant, Ridge Tool Company

UNITED STATES DISTRICT COURT

CLARK COUNTY, NEVADA

OSCAR HERNANDEZ , Plaintiffs, v. LOWES HOME CENTERS, LLC., RIGID TOOL COMPANY, and DOES 1-V, and ROE CORPORATIONS IV, inclusive, Defendants.	CASE NO.: 2:22-cv-00938-APG-EJY **DEFENDANT RIDGE TOOL COMPANY'S (incorrectly sued as RIGID TOOL COMPANY) STATEMENT CONCERNING REMOVAL**

Defendant Ridge Tool Company (incorrectly sued as RIGID TOOL COMPANY)[1] by and through its attorney of record, Ellen S. Bowman, of the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, hereby submits the following statement concerning removal:

1. The date on which you were served with a copy of the Complaint in the removed action:

Response: Defendant Ridge Tool Company was first served with the Complaint on May 13, 2022.

[1] Defendant Ridge Tool Company was incorrectly sued as "***Rigid*** Tool Company" and will be referred to herein properly as Ridge Tool Company.

2. The date on which you were served with a copy of the Summons in the removed action:

Response: Defendant Ridge Tool Company was first served with the Summons on May 13, 2022.

3. In removals based on diversity jurisdiction, the names of any served defendants or citizens of Nevada, the citizenship of the other parties and a summary of defendants' evidence of the amount in controversy:

Response: Removal is based on the amount in controversy and diversity jurisdiction/citizenship:

Plaintiff: Paragraph 1 of Plaintiff's Complaint alleges: "That Plaintiff, OSCAR HERNANDEZ, was at all times relevant to this action a resident of Clark County, Nevada." ***See,* Ex. A. at ¶ 1.**

Defendant RIDGE TOOL COMPANY: Section III of Plaintiff's Complaint alleges: "Defendant, RIGID TOOL COMPANY ("RIGID"), was and is a corporation organized under the laws of the State of Nevada, with its principal place of business located within the State of Ohio, and was and is the designer, manufacturer, producer, packager, distributor and/or seller of that certain RIGID Nail Gun and as such did transport, ship, introduce and/or cause said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada, and other states. ***See,* Ex. A. at 2:26-3:6.** In fact, Defendant Ridge Tool Company is an Ohio corporation with its principal place of business at 400 Clark Street, Elyria, OH 44035-6108. ***See,* Ex. B, Affidavit of Daniel Terpstra at ¶ 5.**

Defendant LOWES HOME CENTERS, LLC: Section II of Plaintiff's Complaint alleges: "Defendant, LOWES HOME CENTERS, LLC ("LOWES"), was and is a corporation organized under the laws of the State of Nevada, with its principal place of business located within the State

of North Carolina, and was and is the designer, manufacturer, producer, packager, distributor and/or seller of that certain RIGID Round Head Framing Nailer model R350RHF." Plaintiff's Complaint alleges that LOWES "transport[ed], ship[ped], introduce[d] and/or cause[d] said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada, and other states." ***See,* Ex. A. at 2:15-24.**

Proof of service on co-defendant, LOWES HOME CENTERS, LLC has not been filed and Ridge Tool Company is not otherwise aware of proper service of process on co-defendant, LOWES HOME CENTERS, LLC.

Regardless, the Model R350RHF RIDGID nail gun allegedly involved in Plaintiff's accident is one of the "RIDGID"- brand power tools marketed by Home Depot, not Lowes. ***See,* Ex. B, Affidavit of Daniel Terpstra at ¶ 7.** Meaning, LOWES HOME CENTERS, LLC is a sham defendant because it would have been Home Depot that would have sold the Model R350RHF RIDGID nail gun, not LOWES HOME CENTERS, LLC. ***See,* Ex. B, Affidavit of Daniel Terpstra at ¶ 8.** LOWES HOME CENTERS, LLC had no role whatsoever in the distribution and sale of the Model R350RHF RIDGID nail gun and as such should be considered a sham defendant for purposes of determining diversity of citizenship jurisdiction, regardless of its service status. ***See,* Ex. B, Affidavit of Daniel Terpstra at ¶ 8.**

In addition, upon information and belief, LOWES HOME CENTER, LLC is a North Carolina corporation with its principal place of business in Mooresville, North Carolina.

Summary of Defendant RIDGE TOOL COMPANY's Evidence of the Amount in Controversy:

Plaintiff's Complaint alleges that Ridged Tool Company (sic) defectively designed a RIDGID Nail Gun that was unreasonably dangerous and not fit for the purposes and uses for which it was

intended and as a result, caused plaintiff severe injuries during an incident on March 14, 2021 when the gun was dropped and a nail was allegedly discharged and pierced the plaintiff's chest. ***See,* Ex. A.** The incident allegedly occurred when plaintiff was working on a construction site and attempting to drive nails into wood. Plaintiff alleges that the nail gun "fell on the ground and a nail shot out from the RIGID (sic) Nail Gun hitting Plaintiff in the chest and causing Plaintiff to sustain the injuries…" *See,* **Ex. A.** at 4:23-28. As a result, plaintiff alleges he "incurred expenses for medical care and treatment and expenses incidental thereto all to" *See,* **Ex. A.** at 6:6-7 Plaintiff also claims that his medical treatment will "continue in the future, all to his damage in a presently unascertainable amount." *See,* **Ex. A.** at 6:9-12. Plaintiff also generally claims injuries to his body as a result of the nail embedded in his chest, "causing him to suffer great pain of body and mind, all or some of which conditions may be permanent and disabling in nature." *See,* **Ex. A.** at 6:15-20. Plaintiff generally pleads his damages as in excess of $10,000. *Id*. Plaintiff identifies his special damages to include "medical and miscellaneous expenses, plus future medical expenses and miscellaneous expenses incidental thereto in a presently unascertainable amount. *See,* **Ex. A.** at 10:15-18.

Moreover, plaintiff alleges that he "was required to and did lose time from plaintiff's employment, continues to and shall continue to be limited in his activities and occupations which has caused and shall continue to cause Plaintiff a loss of earnings and earning capacity to Plaintiff's damage in a presently unascertainable amount…" *See,* **Ex. A.** at 6:23-7:2. Plaintiff further alleges "lost wages in a presently unascertainable amount, and/or diminution of Plaintiff's earning capacity, plus possible future loss of earnings and/or diminution of Plaintiff's earning capacity in a presently unascertainable amount." *See,* **Ex. A.** at 10:19-21.

In *Doelamo v. Karl-Heinz*, which involved similar damages, the defendant argued more than $75,000 was in dispute because plaintiff alleged "approximately $22,000 in past medical damages, and he argues that it is more likely than not that if Plaintiff is successful on his claims for lost wages, future medical damages for his 'permanent' condition(s), past and future pain and suffering, and attorney's fees, he will recover more than $75,000 total in the case."[2] Such a claims for damages was sufficient to establish diversity jurisdiction:

> In the Court's experience, a personal injury claim including $22,000 in past medical bills will normally include a plea to a jury for several times this amount in future medical bills, particularly where one alleges a permanent condition related to the injury. The Court can conclude this without even considering pain and suffering, lost wages, or attorney's fees. Considering those measures of damages and fees, as well, it is nearly certain that Plaintiff in reality seeks more than $75,000. The Court has little doubt that Plaintiff will ask the jury to award him more than $75,000, whether in this Court or in state court.

In *Canonico v. Seals*, the plaintiff conceded at least $50,000 was in dispute due to past and future medical treatment and property damage.[3] "The remaining question is whether more than $25,000 is at stake in the form of pain and suffering, loss of earning capacity, loss of enjoyment of life, compensatory damages, attorney's fees, and costs. It almost certainly is."

In *Perreault v. Wal-Mart Stores, Inc.*, the complaint sought an amount in excess of $10,000.00, as well as special damages, reasonable attorney's fees, costs, and other appropriate relief.[4] The plaintiff provided an itemized list of her then-current medical costs, totaling $38,769.60 and noted that her medical bills were continuing to "trickle in." The amount in controversy threshold was satisfied as "it appears likely that plaintiff's total requested damages exceed $75,000.00."

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[2] No. 2:14-cv-339, 2014 U.S. Dist. LEXIS 72664 (D. Nev. May 27, 2014).
[3] No. 2:13-cv-316, 2013 U.S. Dist. LEXIS 60047 (D. Nev. Apr. 25, 2013).
[4] No. 2:16-cv-809, 2016 U.S. Dist. LEXIS 115591 (D. Nev. Aug. 29, 2016).

Based upon the case law, coupled with the serious nature of plaintiff's claimed injuries, that he allegedly shot a nail into his chest that became embedded, in addition to the claim for past and future pain and suffering, wage loss and loss of earning capacity claims, defendant Ridge Tool Company has a good faith belief that the amount in controversy between the parties exceeds $75,000.00.

4. If your Notice of Removal was filed more than 30 days after you received a copy of the Summons and Complaint, the reason removal has taken place at this time and the date you first received a paper identifying the basis for removal:

Response: Defendant Ridge Tool Company's Notice of Removal was timely filed less than 30 days after service of the Summons and Complaint.

5. In actions removed on the basis of the court's jurisdiction in which the action in State Court was commenced more than a year before the date of removal, the reasons this action should not summarily be remanded to the State Court.

Response: Not applicable.

6. The name(s) of any defendant(s) known to have been served before you filed the Notice of Removal who did not formerly join in the Notice of Removal and the reasons they did not:

Response: Not applicable.

DATED this _13th_ day of June, 2022.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: */s/ Ellen S. Bowman*

Ellen S. Bowman, Esq.
Nevada Bar No. 12118
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Telephone: 702.727.1400
Facsimile: 702.727.1401
Attorney for Defendant
Ridge Tool Company

271732426v.1
271732426v.1
271732426v.1

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, and that on this 13th day of June, 2022, I served a true and correct copy of the foregoing **DEFENDANT RIDGE TOOL COMPANY'S (incorrectly sued as RIGID TOOL COMPANY) STATEMENT CONCERNING REMOVAL** as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ 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; and pursuant to Rule 9 of the N.E.F.C.R.
- ☐ via hand-delivery to the addressees listed below;
- ☐ via facsimile;
- ☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

David F. Sampson, Esq.
LAW OFFICE OF DAVID SAMPSON
630 S. 3rd Street
Las Vegas Nevada, 89101
Telephone: 702-605-1099
Facsimile: 888-209-4199
david@davidsampsonlaw.com
Attorney for Plaintiff,
Oscar Hernandez

BY: */s/ Angela D. Rafferty*
An Employee of
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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271732426v.1

DAVID F. SAMPSON, ESQ.,
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Email: david@davidsampsonlaw.com
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

OSCAR HERNANDEZ, Plaintiff, vs. RIGID TOOL COMPANY and DOES I - V, and ROE CORPORATIONS I - V, inclusive, Defendants.	CASE NO: 2:22-cv-00938-APG-EJY **CERTIFICATE OF INTERESTED PARTIES**

COMES NOW the Plaintiff, OSCAR HERNANDEZ, by and through his attorney DAVID F. SAMPSON, ESQ., of THE LAW OFFICE OF DAVID SAMPSON, LLC., and hereby certifies that there are no known interested parties to this action other than those set forth as parties herein.

DATED THIS 13th day of June, 2022

LAW OFFICE OF DAVID SAMPSON, LLC.

BY: /s/ David Sampson
DAVID SAMPSON, ESQ.
Nevada Bar No.6811
LAW OFFICE OF DAVID SAMPSON
630 S. 3rd Street
Las Vegas, Nevada 89101
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that the above CERTIFICATE OF INTERESTED PARTIES was served on all parties to this action via the Court's CM/ECF electronic filing program the 13th day of June, 2022.

/s/ Amanda Nalder
An employee of THE LAW OFFICE OF DAVID SAMPSON, LLC.

COMP

DAVID F. SAMPSON, ESQ.,
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

OSCAR HERNANDEZ, Plaintiff, vs. THE HOME DEPOT, INC, RIDGE TOOL COMPANY, and DOES I - V, and ROE CORPORATIONS I - V, inclusive, Defendants.	CASE NO: 2:22-cv-00938-APG-EJY

AMENDED COMPLAINT

COMES NOW, Plaintiff, OSCAR HERNANDEZ, by and through his attorneys, The LAW OFFICE OF DAVID SAMPSON, LLC., and for his causes of action, against the Defendants, and each of them, alleges as follows:

1. That Plaintiff, OSCAR HERNANDEZ, was at all times relevant to this action a resident of Clark County, Nevada.

2. This Court has jurisdiction over this matter under NRS 14.065 and NRS 4.370(1), as the facts alleged occurred in Clark County, Nevada and involve an amount in controversy in excess of $15,000.00. Venue is proper pursuant to NRS 13.040, as Defendant, or any one of them resided in Clark County, Nevada at the commencement of this action, or

venue is proper pursuant to NRS 13.040, as the county in which Defendant resided be unknown to Plaintiff and the action may be tried in any county in which Plaintiff may designate in the complaint, or venue is proper pursuant to NRS 13.040, as none of the Defendants reside in the State and the action may be tried in any county in which Plaintiff may designate in the complaint.

FIRST CAUSE OF ACTION

As for his First Cause of Action, Plaintiff complains of Defendants, and each of them, that:

I

At all times mentioned herein, Plaintiff, OSCAR HERNANDEZ (hereinafter "Plaintiff"), was either a resident of the State of Nevada.

II

At all times mentioned herein, Defendant, THE HOME DEPOT, INC., was and is a corporation organized under the laws of the State of Nevada, with its principal place of business located within the State of Georgia, and was and is the designer, manufacturer, producer, packager, distributor and/or seller of that certain RIGID Round Head Framing Nailer model R350RHF (hereinafter the "RIGID Nail Gun") and as such did transport, ship, introduce and/or cause said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada, and other states.

III

At all times mentioned herein, Defendant, RIDGE TOOL COMPANY also known as RIGID TOOL COMPANY ("RIGID"), was and is a corporation organized under the laws of the State of Nevada, with its principal place of business located within the State of Ohio, and was

and is the designer, manufacturer, producer, packager, distributor and/or seller of that certain RIGID Nail Gun and as such did transport, ship, introduce and/or cause said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada, and other states.

IV

Defendant ROE WHOLESALER is an unknown entity engaged in the business of selling RIGID Nail Guns at wholesale and was and is the distributor, wholesaler and/or seller of the RIGID Nail Gun and as such did transport, ship, introduce an/or cause said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada and other states.

V

Defendant THE HOME DEPOT, INC. is engaged in the business of selling RIGID Nail Guns at retail and was and is the distributor, retailer and/or seller of the RIGID Nail Gun and as such did transport, ship, introduce and/or cause said product to be introduced into the State of Nevada and other states, for the purpose of its sale, distribution and/or use within the State of Nevada and other states.

VI

The true names or capacities, whether individual, corporate, associate or otherwise, of Defendants DOE I through DOE X, ROE CORPORATION I through ROE CORPORATION X, ROE WHOLESALER and ROE RETAILER, are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as DOE, ROE CORPORATION, ROE WHOLESALER and ROE RETAILER are responsible in some manner for the events and

happenings referred to and caused damages proximately to Plaintiff as herein alleged. Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities of DOE I through DOE X, ROE I through ROE X, ROE WHOLESALER and ROE RETAILER when the same have been ascertained and to join such Defendants in this action.

VII

While engaged in the manufacture and sale of RIGID Nail Guns, Defendant RIGID sold and/or delivered the RIGID Nail Gun to ROE WHOLESALER who in turn sold and/or delivered the same RIGID Nail Gun to THE HOME DEPOT, INC. and/or ROE RETAILER.

VIII

Defendants, and each of them, expected the RIGID Nail Gun so sold to reach consumers or users in the condition in which it was sold.

IX

Plaintiff's employer purchased the RIGID Nail Gun from THE HOME DEPOT, INC. for the use of driving nails into wood or other materials and actually used the RIGID Nail Gun as a tool to use of drive nails into wood or other materials and Plaintiff's use and manner of use of the RIGID Nail Gun was reasonably foreseeable by the Defendants, and each of them.

X

On March 14, 2021, while on a construction site in Clark County, Nevada, Plaintiff attempted to drive nails into wood using the RIGID Nail Gun following the instructions on the RIGID Nail Gun. The RIGID Nail Gun fell on the ground and a nail shot out from the RIGID Nail Gun hitting Plaintiff in the chest and causing Plaintiff to sustain the injuries hereinafter alleged.

XI

Prior to the time Plaintiff sustained such injuries, Plaintiff's employer had removed the RIGID Nail Gun from the packaging furnished by Defendants, and each of them. Plaintiff is informed and believes, and in reliance thereon alleges, that the RIGID Nail Gun was then and there in the condition existing when Defendants, and each of them sold and/or delivered it to Defendant ROE WHOLESALER, and in the same condition existing when Defendant ROE WHOLESALER sold and/or delivered it to ROE RETAILER. Plaintiff is informed and believes, and in reliance thereon alleges, that the same condition of the product existed when Defendant ROE RETAILER sold and/or delivered the RIGID Nail Gun to the Plaintiff, and the condition of the product remained unchanged when Plaintiff first removed it from the packaging and sustained injuries while using it.

XII

When Plaintiff sustained the injuries hereinafter alleged, the RIGID Nail Gun was in a defective condition and was unreasonably dangerous to a user or consumer in that the nailing and safety mechanisms and nailing and safety design of the RIGID Nail Gun were defective and unreasonably dangerous.

XIII

Defendants, and each of them, knew or through the exercise of reasonable care and diligence, should have known of such defective and unreasonably dangerous conditions.

XIV

Plaintiff relied on the duty of Defendants, and each of them, to deliver the RIGID Nail Gun at the time of sale and/or delivery by each in a condition fit for use for the purpose intended. The RIGID Nail Gun was defective, unreasonably dangerous, and was in fact not fit for the purposes and uses for which it was intended. The breach of such duty by Defendants,

and each of them, and such defective condition of the RIGID Nail Gun, was a proximate cause of the injuries sustained by Plaintiff.

XV

By reason of the premises and as a direct and proximate result thereof, Plaintiff has incurred expenses for medical care and treatment and expenses incidental thereto all to Plaintiff's the present amount of which is in excess of $10,000 and indeed in excess of the Justice Court jurisdictional limit of $15,000.00. Plaintiff is informed and believes, and in reliance thereon alleges, that such expenses will continue in the future, all to his damage in a presently unascertainable amount. Plaintiff prays leave of this Court to insert the full amount of Plaintiff's damages when the same have been fully ascertained.

XVI

By reason of the premises and as a direct and proximate result thereof, Plaintiff was injured in and about his body as he sustained a nail embedded in his chest, and was otherwise injured and caused to suffer great pain of body and mind, all or some of which conditions may be permanent and disabling in nature, all to Plaintiff's general damages in excess of $10,000 and indeed in excess of the Justice Court jurisdictional limit of $15,000.00..

XVII

Prior to the injuries complained of herein, Plaintiff was an able-bodied male, regularly and gainfully employed and physically capable of engaging in all other activities for which Plaintiff was otherwise suited. By reason of the premises and as a direct and proximate result thereof, Plaintiff was required to and did lose time from Plaintiff's employment, continues to and shall continue to be limited in his activities and occupations which has caused and shall continue to cause Plaintiff a loss of earnings and earning capacity to Plaintiff's damage in a

presently unascertainable amount, the allegations of which Plaintiff prays leave of this Court to insert herein when the same shall be finally determined.

XVIII

By reason of the premises and as a direct and proximate result of all of the foregoing, Defendants, and each of them, are strictly liable to Plaintiff for the injuries and damages hereinabove set forth.

SECOND CAUSE OF ACTION

As and for a second, separate and distinct cause of action, Plaintiff complains of Defendants, and each of them, that:

XIX

Plaintiff incorporates by reference as though fully set forth herein, all of the allegations of Paragraphs I through XVIII, above.

XX

Defendants, and each of them, owed a duty to all persons who could reasonably be foreseen to use the RIGID Nail Gun, and such a duty was specifically owed to Plaintiff.

XXI

Defendants, and each of them, breached a duty owed to the Plaintiff consisting of, among other things, the following:

a) Failure to warn by statement on the product, in the instruction booklet, or otherwise, of the unreasonably dangerous conditions of the RIGID Nail Gun;

b) Failure to properly design the RIGID Nail Gun in such a manner as to avoid or minimize the unreasonable danger to users of the RIGID Nail Gun;

c) Failure to properly and adequately test and inspect the RIGID Nail Gun to ascertain its unreasonably dangerous condition;

d) Failure to give adequate instructions regarding the safe use of the RIGID Nail Gun;

e) Failure to use due care to avoid misrepresentations.

XXII

As a direct and proximate result of the negligence of Defendants, and each of them, Plaintiff was caused to suffer the injuries and damages hereinabove set forth.

THIRD CAUSE OF ACTION

As and for a third, separate and distinct cause of action, Plaintiff complains of Defendants, and each of them, that:

XXIII

Plaintiff incorporates by reference as though fully set forth herein, all of the allegations of Paragraphs I through XXII, above.

XXIV

Prior to the purchase of the RIGID Nail Gun by Plaintiff, Defendants, and each of them, in order to induce Plaintiff to agree to purchase the RIGID Nail Gun, provided express warranties and representations, including, but not limited to, the warranty that the product was fit for use for the purpose intended.

XXV

Plaintiff purchased the RIGID Nail Gun in reliance on said express warranties and representations.

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XXVI

Said RIGID Nail Gun was defective and unreasonably dangerous, was not fit for the purposes and uses for which it was intended, and was not of merchantable quality.

XXVII

As a direct and proximate result of the breach of express warranties and representations by the Defendants, and each of them, Plaintiff was caused to suffer the injuries and damages as hereinabove set forth.

FOURTH CAUSE OF ACTION

As and for a fourth, separate and distinct cause of action, Plaintiff complaints of Defendants, and each of them, that:

XXVIII

Plaintiff incorporates by reference as though fully set forth herein, all of the allegations of Paragraphs I through XXVII, above.

XXVIX

Defendants, and each of them, impliedly warranted that the RIGID Nail Gun was fit for use of driving nails into wood or other materials, the purpose for which it was designed, and that the RIGID Nail Gun was fit and suitable for the use in fact made by Plaintiff.

XXX

In purchasing and using the RIGID Nail Gun, Plaintiff relied on the skill and judgment of Defendants, and each of them, and the implied warranty of fitness for the purpose for which Plaintiff used the RIGID Nail Gun.

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XXXI

The RIGID Nail Gun was not fit for use for its intended purpose and Defendants, and each of them, breached the implied warranty of fitness.

XXXII

As a direct and proximate result of the breach of implied warranty of fitness by Defendants, and each of them, Plaintiff was caused to suffer the injuries and damages hereinabove set forth.

WHEREFORE, Plaintiff, expressly reserving the right to amend his Complaint at the time of the trial of the actions herein to include all items of damages not yet ascertained, demand judgment against Defendants, and each of them, for all causes of action as follows:

1. General damages in excess of $10,000and indeed in excess of the Justice Court jurisdictional limit of $15,000.00;
2. Special Damages for Plaintiff, OSCAR HERNANDEZ, medical and miscellaneous expenses, plus future medical expenses and miscellaneous expenses incidental thereto in a presently unascertainable amount;
3. Special damages for lost wages in a presently unascertainable amount, and/or diminution of Plaintiff's earning capacity, plus possible future loss of earnings and/or diminution of Plaintiff's earning capacity in a presently unascertainable amount.
4. Costs of this suit;
5. Attorney's fees; and

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6. For such other and further relief as to the Court may seem just and proper in the premises.

DATED THIS 14th day of June, 2022

LAW OFFICE OF DAVID SAMPSON

BY: /s/ David Sampson

DAVID F. SAMPSON, ESQ.,
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Attorney for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

OSCAR HERNANDEZ, Plaintiff, vs. THE HOME DEPOT, INC, RIDGE TOOL COMPANY, and DOES I - V, and ROE CORPORATIONS I - V, inclusive, Defendants.	CASE NO: 2:22-cv-00938-APG-EJY

NOTICE OF VOLUNTARY DISMISSAL PURSUANT TO F.R.C.P. 41(a)(1)(A)(i)

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), Plaintiff and its counsel hereby give notice that the above-noted action is voluntarily dismissed, without prejudice against Defendant LOWES HOME CENTERS, INC., only.

DATED THIS 16th day of June, 2022

LAW OFFICE OF DAVID SAMPSON, LLC.

BY: /s/ David Sampson
DAVID SAMPSON, ESQ.
Nevada Bar No.6811
LAW OFFICE OF DAVID SAMPSON, LLC.
630 S. 3rd Street
Las Vegas, Nevada 89101
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2022, I electronically filed the foregoing Notice of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(i) with the Clerk of the Court by using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Amanda Nalder
An Employee of the Law Office of David Sampson, LLC

ELLEN S. BOWMAN, ESQ.
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Email: ellen.bowman@wilsonelser.com
Attorney for Defendants
The Home Depot, Inc. and Ridge Tool Company

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

OSCAR HERNANDEZ ,

Plaintiffs,

v.

THE HOME DEPOT, INC, RIDGE TOOL COMPANY, and DOES 1-V, and ROE CORPORATIONS I-V, inclusive,

Defendants.

Case No.: 2:22-cv-00938-APG-EJY

DEFENDANT THE HOME DEPOT, INC. AND RIDGE TOOL COMPANY'S CERTIFICATE OF INTERESTED PARTIES

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Pursuant to Fed. R. Civ. P. 7.1 and LR 7.1-1, Defendants The Home Depot, Inc. and Ridge Tool Company, by and through their attorney of record, Ellen S. Bowman, Esq. of the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, hereby certify that there are no parties known to have an interest in the outcome of this case other than the named parties.

These representations are made to enable the judges of the Court to evaluate possible disqualification or recusal.

DATED this 20th day of June, 2022.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: */s/ Ellen S. Bowman, Esq.*
Ellen S. Bowman, Esq.
Nevada Bar No. 12118
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, Nevada 89119
Telephone: 702.727.1400
Facsimile: 702.727.1401
Attorney for Defendants
The Home Depot, Inc. and Ridge Tool Company

CERTIFICATE OF SERVICE

Pursuant to FRCP 5, I certify that I am an employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, and that on this 20th day of June, 2022, I served a true and correct copy of the foregoing **DEFENDANT THE HOME DEPOT, INC. AND RIDGE TOOL COMPANY'S CERTIFICATE OF INTERESTED PARTIES** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ 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; and pursuant to Rule 9 of the N.E.F.C.R.

☐ via hand-delivery to the addressees listed below;

☐ via facsimile;

☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

David F. Sampson, Esq.
LAW OFFICE OF DAVID SAMPSON
630 S. 3rd Street
Las Vegas Nevada, 89101
Telephone: 702-605-1099
Facsimile: 888-209-4199
david@davidsampsonlaw.com
Attorney for Plaintiff,
Oscar Hernandez

BY: */s/ Joyce L. Radden*
An Employee of
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

ELLEN S. BOWMAN, ESQ.
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Attorney for Defendants
The Home Depot, Inc. and Ridge Tool Company

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

OSCAR HERNANDEZ , Plaintiffs, v. THE HOME DEPOT, INC, RIDGE TOOL COMPANY, and DOES 1-V, and ROE CORPORATIONS I-V, inclusive, Defendants.	Case No.: 2:22-cv-00938-APG-EJY **DISCLOSURE STATEMENT PURSUANT TO FRCP 7.1 BY DEFENDANTS THE HOME DEPOT, INC. AND RIDGE TOOL COMPANY, SUED HEREIN AS 'RIGID TOOL COMPANY'**

Defendants THE HOME DEPOT, INC and RIDGE TOOL COMPANY by and through their attorney of record, Ellen S. Bowman, of the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, and hereby submits their corporate disclosure statement pursuant to Fed. R. Civ. P. 7.1.

Emerson Electric Co. is a public corporation which trades on the New York Stock Exchange, and is the parent company to Defendant, Ridge Tool Company. As such, Defendant Ridge Tool Company is a publically traded corporation with no other publically traded entity owning more than 10% of its stock.

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The Home Depot, Inc. is a Delaware corporation that is publicly traded on the New York Stock Exchange with no other publically traded entity owning more than 10% of its stock.

DATED this 20th day of June, 2022.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: */s/ Ellen S. Bowman, Esq.*
Ellen S. Bowman, Esq.
Nevada Bar No. 12118
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Telephone: 702.727.1400
Facsimile: 702.727.1401
Attorney for Defendants
The Home Depot, Inc. and Ridge Tool Company

CERTIFICATE OF SERVICE

Pursuant to FRCP 5, I certify that I am an employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, and that on this 20th day of June, 2022, I served a true and correct copy of the foregoing **DISCLOSURE STATEMENT PURSUANT TO FRCP 7.1 BY DEFENDANTS THE HOME DEPOT, INC. AND RIDGE TOOL COMPANY, SUED HEREIN AS 'RIGID TOOL COMPANY'** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ 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; and pursuant to Rule 9 of the N.E.F.C.R.

☐ via hand-delivery to the addressees listed below;

☐ via facsimile;

☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

David F. Sampson, Esq.
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630 S. 3rd Street
Las Vegas Nevada, 89101
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david@davidsampsonlaw.com
Attorney for Plaintiff,
Oscar Hernandez

BY: */s/ Joyce L. Radden*
An Employee of
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

OSCAR HERNANDEZ , Plaintiffs, v. THE HOME DEPOT, INC, RIDGE TOOL COMPANY, and DOES 1-V, and ROE CORPORATIONS I-V, inclusive, Defendants.	Case No.: 2:22-cv-00938-APG-EJY **DEFENDANTS THE HOME DEPOT, INC. AND RIDGE TOOL COMPANY, SUED HEREIN AS 'RIGID TOOL COMPANY'S' ANSWER TO PLAINTIFF'S AMENDED COMPLAINT**

Defendants RIDGE TOOL COMPANY and THE HOME DEPOT INC. (collectively referred to herein as "Answering Defendants"), by and through their attorney of record, Ellen S. Bowman, of the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, hereby submits an answer to Plaintiff's Amended Complaint on file admitting, denying, and asserting as follows:

Pursuant to Rule 8(b) of the Federal Rules of Civil Procedure (FRCP), the Answering Defendants deny generally each and every allegation of matter, fact, and thing against them contained in Plaintiff's Amended Complaint, unless otherwise admitted or qualified.

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GENERAL ALLEGATIONS

1. Answering Paragraph 1 of Plaintiff's Amended Complaint, Answering Defendants are without information or documentation sufficient to form a belief as to the allegations contained therein, and therefore, denies the same.

2. Answering Paragraph 2 of Plaintiff's Amended Complaint, Answering Defendants admit, except to note that this matter was property and timely removed by Answering Defendants to this Court.

FIRST CAUSE OF ACTION

3. Answering Section I of Plaintiff's Amended Complaint, Answering Defendants are without information or documentation sufficient to form a belief as to the allegations contained therein, and therefore, denies the same.

4. Answering Section II of Plaintiff's Amended Complaint, Answering Defendants deny the allegations with the exception that Answering Defendants admit that The Home Depot, Inc., maintains its principal place of business in Georgia and, individually or through its affiliated companies, is a retailer of "RIDGID" brand power tools, including, but not limited to, the Model R350RHF RIDGID Nail Gun.

5. Answering Section III of Plaintiff's Amended Complaint, Answering Defendants deny the allegations, except to admit that Ridge Tool Company is an Ohio corporation with its principal place of business in Elyria, Ohio and that Ridge Tool Company and/or its affiliated companies licensed the "RIDGID" trade name to Home Depot.

6. Answering Section IV of Plaintiff's Amended Complaint, Answering Defendants make no response in that the allegations are not directed to Answering Defendants.

7. Answering Section V of Plaintiff's Amended Complaint, Answering Defendants deny the allegations, except to admit that The Home Depot, Inc. individually or through its affiliated companies, is a retailer of "RIGID" brand power tools, including, but not limited to, the Model R350RHF RIDGID Nail Gun.

8. Answering Section VI of Plaintiff's Amended Complaint, Answering Defendants make no response in that the allegations are not directed to Answering Defendants.

9. Answering Sections VII through VIII of Plaintiff's Amended Complaint, Answering Defendants deny the allegations contained therein.

10. Answering Sections IX through XI of Plaintiff's Amended Complaint, Answering Defendants are without information or documentation sufficient to form a belief as to the allegations contained therein, and therefore, denies the same.

11. Answering Sections XII through XVIII of Plaintiff's Amended Complaint, Answering Defendants deny the allegations contained therein.

SECOND CAUSE OF ACTION

12. Answering Section XIX of Plaintiff's Amended Complaint, Answering Defendants are without information or documentation sufficient to form a belief as to the allegations contained therein, and therefore, denies the same.

13. Answering Sections XX through XXII of Plaintiff's Amended Complaint, Answering Defendants deny the allegations contained therein.

THIRD CAUSE OF ACTION

14. Answering Section XXIII of Plaintiff's Amended Complaint, Answering Defendants are without information or documentation sufficient to form a belief as to the allegations contained therein, and therefore, denies the same.

15. Answering Sections XXIV through XXVII of Plaintiff's Amended Complaint, Answering Defendants deny the allegations contained therein.

FOURTH CAUSE OF ACTION

16. Answering Section XXVIII of Plaintiff's Amended Complaint, Answering Defendants are without information or documentation sufficient to form a belief as to the allegations contained therein, and therefore, denies the same.

17. Answering Sections XXVIX through XXXII of Plaintiff's Amended Complaint, Answering Defendants deny the allegations contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Amended Complaint fails to state a claim against these Answering Defendants upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The loss, injuries and damages which Plaintiff alleges, if any, were directly and proximately caused by the negligence, carelessness or fault of person beyond the control of the Answering Defendants and for whom these Answering Defendants are no liable or responsible.

THIRD AFFIRMATIVE DEFENSE

The loss, injuries and damages alleged, if any, were directly and proximately caused and/or contributed to by the negligence, carelessness or fault of the Plaintiff.

FOURTH AFFIRMATIVE DEFENSE

Answering Defendants fully performed and discharged all obligations owed to Plaintiff and the injured party, meeting the requisite standard of care applicable.

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FIFTH AFFIRMATIVE DEFENSE

The damages sustained by the Plaintiff, if any, were caused by the acts of third persons who are not agents, servants, or employees of these Answering Defendants in any manner or form, and as such, these Answering Defendants are not liable in any manner to the Plaintiff.

SIXTH AFFIRMATIVE DEFENSE

These Answering Defendants allege that the Plaintiff failed to mitigate his damages.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from asserting any claim against these Answering Defendants because the alleged damages were the result of intervening, superseding conduct of others.

EIGHTH AFFIRMATIVE DEFENSE

Answering Defendants assert that Plaintiff's Amended Complaint should be dismissed to the extent it contains allegations barred by the expiration of the statute of limitations.

NINTH AFFIRMATIVE DEFENSE

Any negligence by these Answering Defendants, if any exists at all, was not the proximate cause of injury or damages to the Plaintiff.

TENTH AFFIRMATIVE DEFENSE

Answering Defendants allege that Plaintiff, by his own conduct, acts, and omissions voluntarily, knowingly, and intentionally waived, released, and relinquished any right to assert and of the purported causes of action against the Answering Defendants, or to seek or make any recovery herein against the Answering Defendants.

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ELEVENTH AFFIRMATIVE DEFENSE

All of the risks and dangers, if any, involved in the factual situation described in the Amended Complaint were open, obvious and known to the Plaintiff, and by reason thereof, Plaintiff assumed such risks and dangers incident thereto.

TWELVTH AFFIRMATIVE DEFENSE

At the time of the acts alleged in Plaintiff's Amended Complaint, Answering Defendants did not create any dangerous product or use a product in a dangerous way, therefore, Plaintiff's claims are barred as a matter of law.

THIRTEENTH AFFIRMATIVE DEFENSE

All products, materials, and structure which the Plaintiff complains of complied with all applicable Clark County, Nevada regulations, and federal statutes, regulations and specification and were in compliance and conformity with the state of the art at all relevant times stated in Plaintiff's Amended Complaint.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff did not reasonably rely on any affirmations, warranties or representations, if any, made by these Answering Defendants.

FIFTEENTH AFFIRMATIVE DEFENSE

Answering Defendants discharged their duty to warn, if any, by including fair and adequate warnings as to the risks, precautions and potential adverse reactions, as well as warnings regarding safe and appropriate handling and usage, in the product labeling and instructions therefore. Accordingly, Plaintiff's claims are barred wholly or in part by the learned intermediary doctrine.

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SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff's breach of warranty claims are barred by Plaintiff's failure to provide timely notice of any alleged breach of warranty.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from asserting any claim against these Answering Defendants because the alleged damages were the result a modification and/or alteration of the product by the Plaintiff or other third party.

EIGHTEENTH AFFIRMATIVE DEFENSE

Pursuant to FRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of Plaintiff's Amended Complaint, and therefore, these Answering Defendants reserve the right to amend this Answer to allege additional affirmative defenses if subsequent investigation so warrants.

WHEREFORE, Answering Defendants pray for judgment as follows:

1. Plaintiff takes nothing by way of the Amended Complaint, on file herein;
2. Plaintiff's Amended Complaint be dismissed with prejudice;
3. Answering Defendants be awarded a reasonable sum as and for attorneys' fees and costs of suit incurred herein; and

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4. For such other and further relief as the court may deem just and proper.

DATED this 20th day of June, 2022.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: */s/ Ellen S. Bowman, Esq.*
Ellen S. Bowman, Esq.
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Attorney for Defendants
The Home Depot, Inc. and Ridge Tool Company

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, and that on this 20th day of June, 2022, I served a true and correct copy of the foregoing **DEFENDANTS THE HOME DEPOT, INC. AND RIDGE TOOL COMPANY, SUED HEREIN AS 'RIGID TOOL COMPANY'S' ANSWER TO PLAINTIFF'S AMENDED COMPLAINT** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ 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; and pursuant to Rule 9 of the N.E.F.C.R.

☐ via hand-delivery to the addressees listed below;

☐ via facsimile;

☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

OSCAR HERNANDEZ , Plaintiffs, v. THE HOME DEPOT, INC., RIDGE TOOL COMPANY, and DOES 1-V, and ROE CORPORATIONS IV, inclusive, Defendants.	CASE NO. 2:22-CV-00938-APG-EJY **DEFENDANTS, THE HOME DEPOT, INC. AND RIDGE TOOL COMPANY'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

Defendants, The Home Depot, Inc. and Ridge Tool Company, by and through their attorneys of record, Ellen S. Bowman, Esq. and Rosario M. Vignali, Esq., appearing *pro hac vice*, of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, hereby submit this Partial Motion for Summary Judgment.

This Motion is made and based upon the following: the Declaration of Rosario M. Vignali,

Esq., Memorandum of Points and Authorities and the Affidavit of Daniel Terpstra attached hereto as **Exhibit 1**, and all arguments and evidence permitted at the hearing of this matter.

DATED this 26th day of April, 2023.

By: */s/ Ellen S. Bowman, Esq.*
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Attorney for Defendants
The Home Depot, Inc. and Ridge Tool Company

DECLARATION OF ROSARIO M. VIGNALI, *PRO HAC VICE* COUNSEL IN SUPPORT OFDEFENDANTS' PARTIAL MOTION FOR SUMMARY JUDGMENT

1. I, Rosario M. Vignali, Esq. *pro hac vice* counsel for The Home Depot, Inc. and Ridge Tool Company, have personal knowledge of the following, and make this declaration in support of the instant Motion.

2. Discovery is now closed in this matter.

3. The current case schedule requires the submission of dispositive motions, if any, by May 1, 2023. [See Minute Order of August 29, 2023, [ECF 28].]

4. On April 11, 2023, I spoke with counsel for plaintiff, David Sampson regarding a voluntary dismiss of defendant, Ridge Tool Company, based on the fact that Ridge Tool Company and/or its affiliated companies, was merely the licensor of the RIDGID trade name and was not otherwise involved in the design, manufacture and/or distribution of the nail gun at issue, or the formulation of its warnings. If agreement was reached, the litigation would continue against the remaining defendant, The Home Depot, Inc.

5. Unfortunately, the parties were not able to come to amicable resolution on this issue.

6. Accordingly, the instant Motion became necessary.

7. This Motion is filed in good faith and in an effort to foster judicial economy.

DATED this 26th day of April, 2023.

/s/ Rosario M. Vignali, Esq.
ROSARIO M. VIGNALI, ESQ.
Pro Hac Vice Counsel

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff alleges that on March 14, 2021, while he was using a RIDGID Model R350RHF Nail Gun, the nail gun fell on the ground, causing a nail to be fired and striking the Plaintiff in the chest. *See* [ECF 10], Plaintiff's Amended Complaint at ¶ X. As a result, Plaintiff alleges that the RIDGID Model R350RHF Nail Gun Nailer was "defective, unreasonably dangerous, and was in fact not fit for the purposes and uses for which it was intended." See *Id*. at ¶ XIV. Plaintiff, in filing an Amended Complaint, sued The Home Depot and Ridge Tool Company. However, Ridge Tool Company and/or its affiliated companies were merely the licensor of the "RIDGID" trade name (to Home Depot) and otherwise played no role in the design, manufacture, distribution and sale of the nail gun, or the formulation of its warnings. In this regard, Defendants seek summary judgment as to those claims against Ridge Tool Company.

II. PROCEDURAL POSTURE

Defendant, Ridge Tool Company filed a Petition for removal on June 13, 2022 citing complete diversity of citizenship [ECF 1]. The parties participated in an FRCP 26(f) conference on July 27, 2022. A Joint Proposed Discovery Plan and Scheduling Order was filed on July 27, 2022 [ECF 21]. On August 4, 2022, Defendants served Plaintiff with this first set of Requests for Production of Documents and Interrogatories. This written discovery has been responded to. Plaintiff served his Initial Disclosures on August 8, 2022. Defendants served their Initial Disclosures on August 10, 2022. Thereafter, Defendants subpoenaed Plaintiff's medical records, employment records and worker compensation records. These records have been disclosed in supplemental FRCP 26 disclosures.

On October 25, 2022, Defendants took the deposition of Plaintiff's employer, Randy McKay. On October 26, 2022, Defendants took the deposition of the homeowner, Pamela Provenza.

Defendants then took Plaintiff's deposition on December 12, 2022. On the same day, an inspection of the subject nail gun was completed by both parties and their respective experts. Defendants then noticed an inspection of the location where the alleged incident took place. This inspection was conducted on December 30, 2022.

Plaintiff served written discovery on January 25, 2023. On January 27, 2023, the parties served their Initial Expert Disclosures. On February 27, 2023, the parties served Rebuttal Expert Disclosures. Defendants took the deposition of Plaintiff's expert on March 28, 2023. The same day, discovery closed [ECF 28]. Notably, Plaintiff never took the deposition of a representative of either Defendant. The dispositive motion deadline is May 1, 2023 [ECF 28].

III. STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

Daniel Terpstra sets forth his Affidavit, **attached as Exhibit 1**, and in support of the instant Motion. The contents of the Affidavit are included here as they speak directly to the issue of Defendants' Motion.

- Mr. Terpstra was employed with Emerson Electric Co. ("Emerson") in various capacities from 1976 to 2007. From 1976 to 1991, I was a Project Engineer in the Special Product Division. From 1992 to 2003, I was the Director of Power Tool New Product Development. From 2003 to 2007, I was the Director of Engineering for the RIDGID Brand Protection Organization. Since 2007, I have remained involved with "RIDGID"-branded products as a consultant to Emerson.
- By virtue of my work experience with Emerson, I have first-hand knowledge of Emerson's business practices and those of its related companies, including its wholly-owned subsidiary, Ridge Tool Company. In particular, I have first-hand knowledge of practices related to the licensing of trademarks and brands undertaken over the years by Emerson, and its related companies', including its wholly-owned subsidiary, Ridge Tool Company.
- I understand that Plaintiff alleges that he was injured in March 2021 while operating a Model

[1] Local Rule 56-1 states: "Motions for summary judgment and responses thereto must include a concise statement setting forth each fact material to the disposition of the motion that the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence on which the party relies. The statement of facts will be counted toward the applicable page limit in LR 7-3."

R350RHF "RIDGID" nail gun during the course of his employment. I further understand that Plaintiff alleges that the nail gun was defective and that "Rigid Tool Company" designed and manufactured the nail gun and that his employer purchased the nail gun at a local Home Depot retail store before the accident.

- "RIDGID" is a trademark owned by Ridgid, Inc. In 2003, the "RIDGID" trademark was licensed by Emerson and Ridgid, Inc. to Home Depot, U.S.A., Inc., pursuant to a trademark license arrangement ("the license arrangement"). Once the license arrangement was entered into, Home Depot used the "RIDGID" trademark to market a line of power tools. The power tools marketed by Home Depot under the license arrangement are designed and manufactured by other companies for, and on behalf of, Home Depot.
- Accordingly, the power tools marketed by Home Depot pursuant to the license agreement are not, and never have been, designed or manufactured by Emerson, Ridgid, Inc., Ridge Tool Company or any other Emerson-related company; nor have Emerson, Ridgid, Inc. or Ridge Tool Company or any other Emerson-related company been involved with the formulation of the products' warnings and instructions.
- The Model R350RHF "RIDGID" nail gun allegedly involved in Plaintiff's accident is one of the "RIDGID"-brand power tools marketed by Home Depot under the licensing agreement. Like all "RIDGID"-brand power tools marketed by Home Depot under the licensing agreement, Emerson, Ridgid, Inc. and Ridge Tool Company had no involvement whatsoever in its design, manufacture, distribution and/or sale of the Model R350RHF "RIDGID" nail gun involved in Plaintiff's accident; nor were they involved in the formulation of its product warnings. These functions would have been performed by one or more companies selected by Home Depot to design and manufacture "RIDGID" tools after it acquired the "RIDGID" license noted above.
- As set forth herein, the only involvement by any Emerson-related company with regard to the Model R350RHF "RIDGID" nail gun involved in Plaintiff's accident would have been the licensing of the "RIDGID" tradename by Ridgid, Inc. to Home Depot.

IV. LEGAL ARGUMENT

A. Legal Standards Governing Summary Judgment

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any demonstrate that there is no genuine issue as to any material fact and…the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). To succeed on a motion for summary judgment, the moving party must show (1) the lack of a genuine issue of any material fact, and (2) that the court may grant judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *United States v. Arango*, 670 F.3d 988, 992 (9th Cir. 2012). A material fact is one required to prove a basic element of a claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The failure to show a fact essential to one element, however, "necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson*, 477 U.S. at 249.

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. When the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the non-moving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 323-24.

Once the moving party meets its initial burden on summary judgment, the non-moving party must submit facts showing a genuine issue of material fact. Fed. R. Civ. P. 56(e); *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000). As summary judgment allows a court "to isolate and dispose of factually unsupported claims or defenses," *Celotex*, 477 U.S. at 323-24, the court construes the evidence before it "in the light most favorable

to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The allegations or denials of a pleading, however, will not defeat a well-founded motion. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Thus, the opposing party cannot "'rest upon the mere allegations or denials of [its] pleading' but must instead produce evidence that 'sets forth specific facts showing that there is a genuine issue for trial.'" *Estate of Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir. 2008) (quoting Fed. R. Civ. P. 56(e)).

Facts are only viewed in the light most favorable to the non-moving party where there is a genuine dispute about those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). That is, even where the underlying claim contains a reasonableness test, where a party's evidence is so clearly contradicted by the record as a whole that no reasonable jury could believe it, "a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.*

B. As the Mere Licensor of the "RIDGID" Trademark, Ridge Tool Company is not Liable for an Alleged Product Defect Where it Did Not Participate in the Design, Manufacture and/or Distribution of the Licensee's Product or its Warnings.

Although the licensing of a trademark or tradename can sometimes result in liability to the licensor in the event of injuries caused by an alleged defect in the product carrying the trademark or tradename, the overwhelming trend in American law for the last quarter century has been to restrict such liability only to those situations where the licensor participated substantially in the design, manufacture or distribution of the allegedly defective product.

In 1998, *The Restatement (Third) of Torts: Product Liability* [hereinafter, "*Restatement (Third)*] was published. Section 14 of the *Restatement (Third)* provides, in part, that "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer." However, comment d to the *Restatement (Third)* specifically addresses the liability of trademark licensors and provides that the rule stated in Section 14:

> does *not, by its terms, apply to the owner of a trademark who licenses a manufacturer to place the licensor's trademark or logo on the manufacturer's product and distribute it as though manufactured by the licensor*. In such a case, even if purchasers of the product might assume that the trademark owner was the manufacturer, the licensor does not 'sell or distribute as its own a product manufactured by another' . . . *Trademark licensors are liable for harm caused by defective products distributed under the licensor's trademark or logo when they participate substantially in the design, manufacture, or distribution of the licensee's products*. In these circumstances they are treated as sellers of the products bearing their trademarks.

Comment d, *Restatement (Third)* § 14 (emphasis added).

Therefore, according to the plain language of Section 14, a trademark licensor must "participate substantially" in a product's design, manufacture or distribution, in order to be liable in strict product liability. Sometimes referred to as the "enterprise liability" test, the rule set forth in Section 14 of the *Restatement (Third)* effectively holds that, *where there is not substantial participation in the product's design, manufacture or distribution, the licensor cannot be liable for an alleged product defect.*

There is a paucity of Nevada law on the subject[2]. However, the overwhelming trend around the United States since the adoption of the *Restatement (Third)* has been to absolve the licensor of alleged products liability claims where the requisite showing of participation has not been shown. In other words, these cases have limited the liability of trademark licensors only to those who have also substantially participated in the process of bringing the product to market:

- *Heinrich v. Master Craft*, 131 F. Supp. 3d 1137 (D. Colo. 2015) (trademark licensor found to have "no involvement in production, marketing, or distribution of (the) product.")
- *Anunciacao v. Caterpillar Inc.*, No. 07-10904-JGD, 2011 U.S. Dist. LEXIS 118374 (D. Mass. Oct. 13, 2011) (only a nonseller trademark licensor which "participates

[2] In *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 970 P. 2d 98 (1998), it was held that a trademark licensor, which otherwise had no relationship of any kind with the recipient of a silicone breast implant, could not be held liable for fraud in connection with the testing and sale of the implant.

substantially in the design, manufacture or distribution of the licensee's product may be held liable under Massachusetts law as an apparent manufacturer.") (emphasis added)

- Auto *Ins. Co. of Hartford Conn. v. Murray*, Inc. 571 F. Supp 2d 408 (W.D.N.Y. 2008) (trademark licensor not liable "where there is no evidence of 'actual control' over the production, including any capacity to exercise control over product quality, or the distribution, including sales." See also, *D'Onofrio v. Boehlert*, 635 N.Y.S.2d 384, 385 (4th Dept. 1995), where New York's Appellate Division upheld the trial court's decision granting defendant Spalding's (a trademark licensor) motion for summary judgment because a "trademark licensor cannot be held liable for injuries caused by a defective product bearing its label where the licensor did not design, manufacture, sell, distribute or market the allegedly defective item" and *Bova v. Caterpillar, Inc.*, 761 N.Y.S.2d 85, 87 (2d Dept. 2003) (products liability could not be imposed on licensor where, although the name "Caterpillar" was on the forklift involved in the accident, plaintiff did not offer evidence that Caterpillar, Inc. had participated in the manufacture, sale or distribution of the forklift).
- *SSP Partners v. Gladstron Invs. (USA) Corp.*, 160 S.W. 3d 27 (Tex. App. 2005) ("trademark licensor may be liable as an apparent manufacturer when the licensor is *significantly* involved in the manufacturing, marketing, or distribution of the defective product." (emphasis added)
- *Schenepf v. Kansas Gas Service Company*, No. 0-4143, 2005 U.S. Dist. LEXIS 4167 (D. Kan. Mar. 4, 2005) (claim against a trademark licensor was viable where there is "substantial or integral involvement in the manufacture, sale, distribution, or marketing of the alleged defective product."

- *Iragorri v. United Techs. Corp.*, 285 F. Supp. 2d 230 (D. Conn. Sept. 30, 2003) (the court noted that the Connecticut Supreme Court had previously refused to extend liability to a trademark licensor "not involved in the production, marketing, or distribution of the defective product" and "where such proof is lacking, a claim must fall.")
- *Harrison v. B. F. Goodrich Co.*, 881 So. 2d 288 (Miss. Ct. App. 2004) (relying on the Restatement (Third), the Court held that "there is no liability for an allegedly defective product on the part of a trademark licensor who was not involved in the design, manufacture or sale of the product."

The only evidence produced in this case is that Defendant, Ridge Tool Company, along with its parent company, Emerson Electric Company, licensed the "RIDGID" tradename to Defendant, Home Depot – which then marketed a line of power tools, including the Model R350RHF RIDGID nail gun at issue, that were designed and marketed by third-party companies. [See Terpstra Affidavit, attached hereto as **Exhibit 1**.] The licensing arrangement was Defendant's, Ridge Tool Company, only involvement – as tangential as it was[3] – with the Model R350RHF RIDGID nail gun. Stated otherwise, Defendant, Ridge Tool Company, had no role whatsoever with the Model R350RHF nail gun's design, manufacture and distribution or the formulation of its warnings or instructions.

C. <u>Plaintiff would not be Prejudiced by Dismissal of Ridge Tool Company</u>

Ridge Tool Company's limited role in this matter was first broadcast to the Plaintiff (and this Court) when the Notice of Removal [ECF 1] was filed containing Mr. Terpstra's first affidavit as an exhibit to the removal document. Then, in response to Plaintiff's Amended Complaint, Defendants' Answer [ECF 17] of June 20, 2022, while denying responsibility for the design and

[3] Indeed, Ridge Tool Company itself was not involved in the licensing arrangement. The licensing arrangement was entered into by its affiliated companies: Rigid, Inc. and Emerson Electric Company.

manufacture for the Model R350RHF RIDGID nail gun at issue, stated that Ridge Tool Company and/or its affiliated companies, had licensed the "RIDGID" trade name to Home Depot, while also acknowledging that Home Depot "is a retailer of 'RIDGID' brand power tools including, but not limited to, the Model R350RHF RIDGID Nail Gun." [ECF 17, Pars. 4 and 5] Thus, even before active discovery in this matter began, Plaintiff had been on notice of Ridge Tool Company's limited role as regards the Model R350RHF RIDGID Nail Gun. For whatever reason, Plaintiff chose not to engage in active discovery against Ridge Tool Company or, certainly, with regard to the trademark licensing issue and cannot now claim prejudice by this motion.

Furthermore, dismissal of Ridge Tool Company exacts justice while not depriving the Plaintiff of his day in Court. The case, very simply, would continue against Home Depot in its capacity as the retailer of the Model R350 RIDGID Nail Gun involved in the accident. Home Depot would be answerable for any product defect found by the trier of fact.

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V. CONCLUSION

Based upon all of the foregoing, Defendants respectfully request that the Court grant summary judgment.

DATED this 26th day of April, 2023.

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INDEX OF EXHIBITS

TO

DEFENDANTS, THE HOME DEPOT, INC. AND RIDGE TOOL COMPANY'S, PARTIAL MOTION FOR SUMMARY JUDGMENT

Hernandez v. The Home Depot, Inc., et al.

CASE NO. 2:22-CV-00938-APG-EJY

EXHIBIT	DOCUMENT	Bate No.
1	Affidavit of Daniel Terpstra	DEFPMSJ0001 DEFPMSJ0003

EXHIBIT “1”
Affidavit
of
Daniel Terpstra

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA ---------- -x OSCAR HERNANDEZ, Plaintiff, -against- THE HOME DEPOT, INC, RIDGE TOOL COMPANY, and DOES I – V, and ROE CORPORATIONS I – V, inclusive ---------- -x	Civil Action No.: 2:22-CV-00938-APG-EJY **AFFIDAVIT**

DANIEL TERPSTRA, being duly sworn, and aware of the penalties of perjury, affirms as follows:

1. I submit this Affidavit in support of Ridge Tool Company's Motion for Summary Judgment.

2. I was employed at Emerson Electric Co. ("Emerson") in various capacities from 1976 to 2007. From 1976 to 1991, I was a Project Engineer in the Special Product Division. From 1992 to 2003, I was the Director of Power Tool New Product Development. From 2003 to 2007, I was the Director of Engineering for the RIDGID Brand Protection Organization. Since 2007, I have remained involved with "RIDGID"-branded products as a consultant to Emerson.

3. By virtue of my work experience with Emerson, I have first-hand knowledge of Emerson's business practices and those of its related companies, including its wholly-owned subsidiary, Ridge Tool Company. In particular, I have first-hand knowledge of practices related to the licensing of trademarks and brands undertaken over the years by Emerson, and its related companies', including its wholly-owned subsidiary, Ridge Tool Company.

4. I understand that Plaintiff alleges that he was injured in March 2021 while operating a Model R350RHF "RIDGID" nail gun during the course of his employment. I further understand that Plaintiff alleges that the nail gun was defective and that "Rigid Tool Company" designed and manufactured the nail gun and that his employer purchased the nail gun at a local Home Depot retail store before the accident.

5. The "RIDGID" brand is known throughout the professional trades for its hallmark characteristics of dependable and reliable performance. "RIDGID" is a trademark owned by Ridgid, Inc. In 2003, the "RIDGID" trademark was licensed by Emerson and Ridgid, Inc. to Home Depot, U.S.A., Inc., pursuant to a trademark license arrangement ("the license arrangement"). Once the license arrangement was entered into, Home Depot used the "RIDGID" trademark to market a line of power tools. The power tools marketed by Home Depot under the license arrangement are designed and manufactured by other companies for, and on behalf of, Home Depot.

6. Accordingly, the power tools marketed by Home Depot pursuant to the license agreement are not, and never have been, designed or manufactured by Emerson, Ridgid, Inc., Ridge Tool Company or any other Emerson-related company; nor have Emerson,

Ridgid, Inc. or Ridge Tool Company or any other Emerson-related company been involved with the formulation of the products' warnings and instructions.

7. The Model R350RHF "RIDGID" nail gun allegedly involved in Plaintiff's accident is one of the "RIDGID"-brand power tools marketed by Home Depot under the licensing agreement. Like all "RIDGID"-brand power tools marketed by Home Depot under the licensing agreement, Emerson, Ridgid, Inc. and Ridge Tool Company had no involvement whatsoever in its design, manufacture, distribution and/or sale of the Model R350RHF "RIDGID" nail gun involved in Plaintiff's accident; nor were they involved in the formulation of its product warnings. These functions would have been performed by one or more companies selected by Home Depot to design and manufacture "RIDGID" tools after it acquired the "RIDGID" license noted above.

8. As set forth herein, the only involvement by any Emerson-related company with regard to the Model R350RHF "RIDGID" nail gun involved in Plaintiff's accident would have been the licensing of the "RIDGID" tradename by Ridgid, Inc. to Home Depot.

Dated: April 21, 2023

Daniel Terpstra

Sworn to before me this
21st day of April, 2023

Notary Public

JUSTIN MAERTZ
Notary Public - Notary Seal
St Louis County - State of Missouri
Commission Number 22741553
My Commission Expires May 9, 2026

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

OSCAR HERNANDEZ, Plaintiff, vs. RIGID TOOL COMPANY and DOES I - V, and ROE CORPORATIONS I - V, inclusive, Defendants.	CASE NO: 2:22-cv-00938-APG-EJY **RESPONSE TO RIGID TOOL COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW the Plaintiff, OSCAR HERNANDEZ, by and through his attorneys DAVID F. SAMPSON, ESQ., of THE LAW OFFICE OF DAVID SAMPSON, LLC., and hereby responds to Rigid Tool Company's Motion for Partial Summary Judgment (ECF 37).

POINTS AND AUTHORITIES

I

UNDERLYING FACTS

As RIGID's motion notes, this matter arose when a RIGID nail gun malfunctioned and shot OSCAR HERNANDEZ in the chest. The gun in question was packaged and sold under the RIGID name. *See*, Exhibit "1". The gun itself prominently bore the RIGID name. *See*, Exhibit "2". Because the gun in question had packaging and labeling prominently holding itself out as a RIGID product OSCAR sued RIGID in the instant matter under a theory of product liability.

After the close of discovery RIGID filed the instant motion for partial summary judgment wherein RIGID now claims it was only the licensor of the gun.

II.

LEGAL STANDARD

The party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). On a motion for summary judgment, the Court must "view the evidence in the light most favorable to the nonmoving party and determine whether there are genuine issues of material fact." *Holley v. Crank*, 386 F.3d 1248, 1255 (9th Cir. 2004). All reasonable inferences supported by the evidence are to be drawn in favor of the nonmoving party. *Villiarimo v. Aloha Island Air, Inc.*, 281 F. 3d 1054, 1061 (9th Cir. 2002)

Where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). It is well established in the State of Nevada that a business owner owes its patron a duty to keep the premises in a reasonably safe condition for use. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 848 P.2d 320 (1993); *Asmussen v. New Golden Hotel Co.*, 80 Nev. 260, 392 P.2d 49 (1964). A Motion for Summary Judgment is only appropriate when there exists no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1031 (2005). The presence of real or material issue of fact precludes summary judgment under NRCP 56. *McColl v. Scherer*, 73 Nev. 226, 315 P.2d 807 (1957), cited, *Zalk Josephs Co. v. Wells Cargo, Inc.*, 77 Nev. 441, at 445, 366 P.2d 339 (1961).

Nevada courts are reluctant to grant summary judgment in negligence cases because foreseeability, duty, proximate cause and reasonableness usually are questions of fact for the

jury. *Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970). "[R]easonable minds often may differ as to whether a risk of harm reasonably should have been foreseen, and the issue should generally be submitted to the trier of fact." *Merluzzi v. Larson*, 96 Nev. 409, 413 (1980).

III.

LEGAL ARGUMENT

Defendant's motion takes the position that summary judgment is warranted in favor of RIGID because RIGID, "was merely the licensor of the RIGID trade name and was not otherwise involved in the design, manufacture and/or distribution of the nail gun at issue. However courts have held that licensors, particularly licensors who hold themselves out as the apparent manufacturer of the good(s) in question are liable under strict product liability law.

Section 400 of the Restatement (Second) of Torts provides that an entity which "puts out" a product as its own will be held liable as though it were the manufacturer of the product. Restatement (Second) of Torts § 400.[1] Named the "apparent manufacturer" doctrine, the rule makes up the basis of many court opinions extending liability to pure licensors such as RIGID that neither manufacture nor sell goods. The rationale for this extension of liability is two-fold. First, having used its trademark to convince the consumer that it was the manufacturer of the goods, the licensor cannot distance itself from the manufacturer when the latter produces a defective good. The second rationale, which was most clearly expressed by the Illinois Supreme Court in *Hebel v. Sherman Equip*., is that "where a defendant puts out a product as its own, the purchaser has no means of ascertaining the identity of the true manufacturer. ... [I]t is thus fair to impose liability on the party whose actions effectively conceal the true manufacturer's identity." *Hebel v. Sherman Equipment*, 442 N.E. 2d 199, 201-03 (Ill. 1982).

[1] The authority and reasoning set forth herein may be found in Jordan Lewis' article, "TM Licensors Beware: Your Product Liability Risks May Vary" Published by Law 360, Portfolio Media Inc., August 29, 2018.

Similarly, the Court in *Connelly v. Uniroyal Inc*. held that the doctrine of strict product liability may be applied, by way of the apparent manufacturer doctrine, to licensors who authorize the use of their trademarks, especially when the products do not include any visible indication that the products were manufactured by any other company. *Connelly v. Uniroyal Inc*., 389 N.E.2d 155, 163 (Ill. 1979). In the instant action the gun in question did not indicate it was manufactured by any company other than RIGID. The packaging and labeling on the gun itself prominently displayed the RIGID name. *See*, Exhibits "1" and "2". There are no visible indications that the product was made by any other company. RIGID cannot disclaim the gun after permitting the prominent use of the RIGID name as was done in this matter.

The principle underlying the *Connelly* decision is often referred to as the "stream of commerce" approach, and is routinely cited for the idea that pure licensors can be apparent manufacturers. The theory behind the stream of commerce approach is that all entities that take part in production or marketing are strictly liable for any injuries resulting from such entity placing a defective good in the stream of commerce.[6] This approach is based in an always-moving cost-benefit analysis, that holds entities who benefit from the sale of defective products responsible for the costs. *Kasel v. Remington Arms Co*., 101 Cal. Rptr. 314, 322 (Cal. Ct. App. 1972).

A multitude of different views have emerged in the case law. The most expansive view holds that the apparent manufacturer doctrine applies to licensors whenever a licensor's name or mark appears on a product. For example, in *Brandimarti v. Caterpillar Tractor Co*., a plaintiff suffered injury while operating a forklift bearing the Caterpillar tradename, and sued Caterpillar for same. *Brandimarti v. Caterpillar Tractor Co*., 527 A.2d 134, 139-40 (Pa. Super. Ct. 1987). The forklift, however, was manufactured by a subsidiary of Caterpillar; Caterpillar was not involved in the design, manufacture or marketing of the product. Nonetheless, the found that Caterpillar could be held strictly liable because "Caterpillar could expect others to purchase the product in reliance on the skill and reputation associated with the Caterpillar name." *Id* at 139.

Notably, the court did not require the plaintiff to show that he or the owner relied on the Caterpillar name before using or purchasing the product, or that Caterpillar exercised quality

control over the product's actual manufacturer. The theme of this holding, and many other courts have followed, is that product manufacturers can expect purchasers or users to rely on the tradename in their decision to buy or operate their products, and therefore can be held strictly liable for a licensee's defective product.

In the aforementioned *Kaesel v. Remington Arms Co.*, 101 Cal. Rptr. 314 (App. Ct. 1972) the Remington Arms Company was held liable for injuries from the explosion of a shotgun shell manufactures by a licensee in Mexico. The California Court held Remington liable under an enterprise theory and rejected the trial court's ruling that would have limited the application of strict liability to actual manufacturers or proof of agency as RIDGE TOOL requests be done in the instant action. In *Remington* the Court ruled in the alternative that as the subsidiary held out the product as being manufactured by the licensor, liability could be imposed upon the licensor. *Id*.

Other states making similar findings include New Jersey, California, New Mexico, Michigan, Pennsylvania, and Washington. *Brandimarti v. Caterpillar Tractor Co*., 527 A.2d 134, 139-40 (Pa. Super. Ct. 1987); *Turner v. Bituminous Casualty Co.*, 244 N.W.2d 873 (Mich. 1976) (holding that the broad "continuity of enterprise" theory mandates the imposition of liability on a licensee); *Kaesel v. Remington Arms Co.*, 101 Cal. Rptr. 314 (App. Ct. 1972); *Saez v. S&S Corrugated Paper Mach. Co.*, 302 N.J. Super, 545 (App. Div. 1997) (applying the "product line" liability doctrine). There is no reason the Court in this matter should permit RIGID to disclaim responsibility for the gun in question given the facts of this matter.

Additionally, this Court should find that under notice pleading, the identity of the proper party must be determined from the allegations of the complaint, and not from the name in the caption, and substitute the manufacturer for RIGID in this matter. *See*, *Bradley v. Total Facility, Inc.,* No, 20-16732, 2022 Us.App. LEXIS 21372 (9th Cir. 2022); *Swartz v. Gold Dust Casino*, 91 F.R.D. 543 (D. Nev. 1981); *Goss v. Hutchins*, 751 S.W.2d 821 (Tenn. 1988). The allegations of the Complaint in this matter make it clear the party identified as RIGID referred

to the manufacturer of the subject gun. If RIGID now claims that some other party manufactured the said gun, the Court should simply find that the manufacturer should be substituted into this action for the party named in the caption as RIGID.

CONCLUSION

For the foregoing reasons Rigid's Motion should be denied.

DATED THIS 15th day of May, 2023

LAW OFFICE OF DAVID SAMPSON, LLC.

BY: /s/ David Sampson

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CERTIFICATE OF SERVICE

I certify that the above RESPONSE was served on all parties to this action via the Court's CM/ECF electronic filing program the 15th day of May, 2023.

___/s/ Amanda Nalder_____
An employee of THE LAW OFFICE OF DAVID SAMPSON, LLC.

EXHIBIT "1"

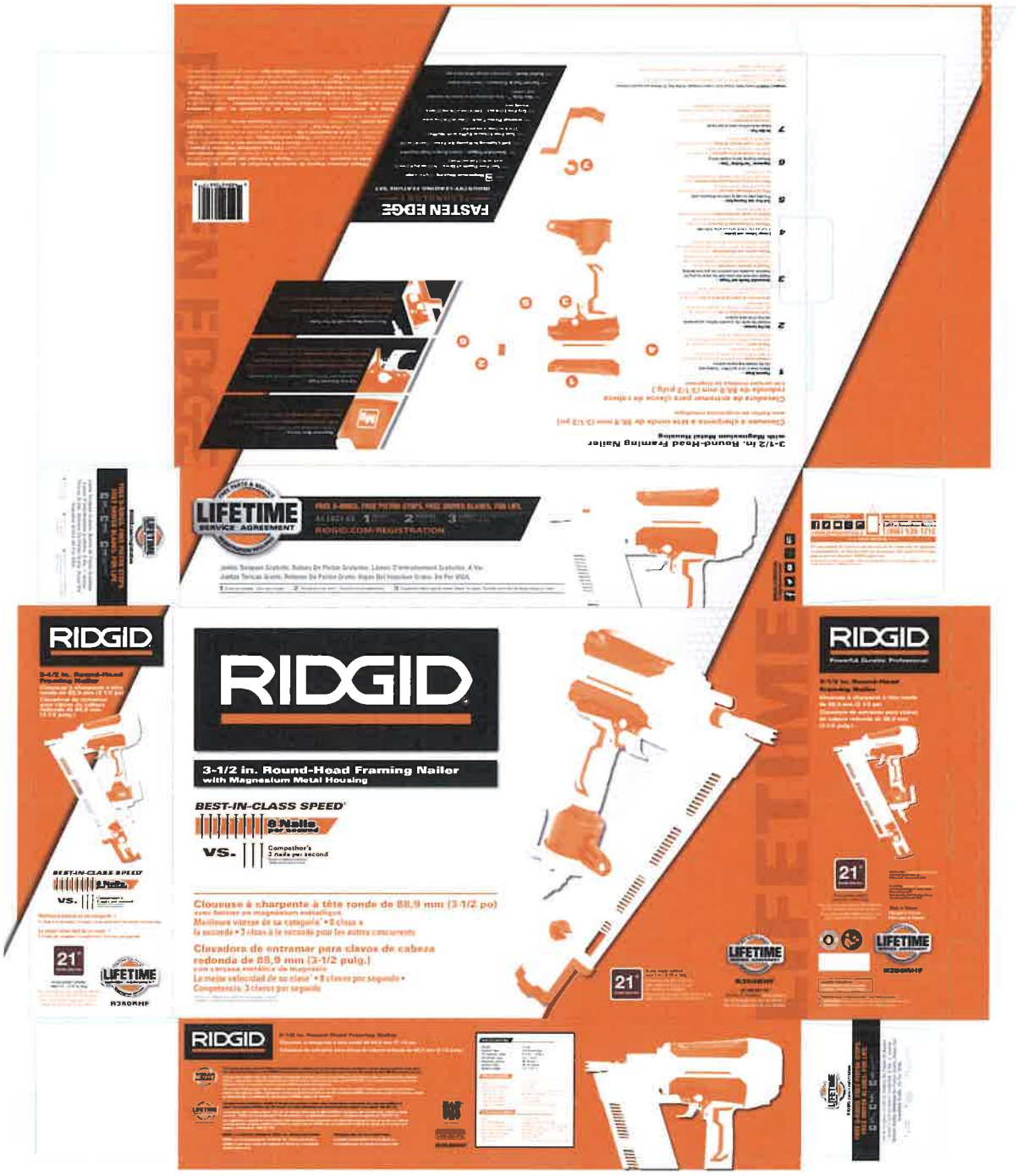
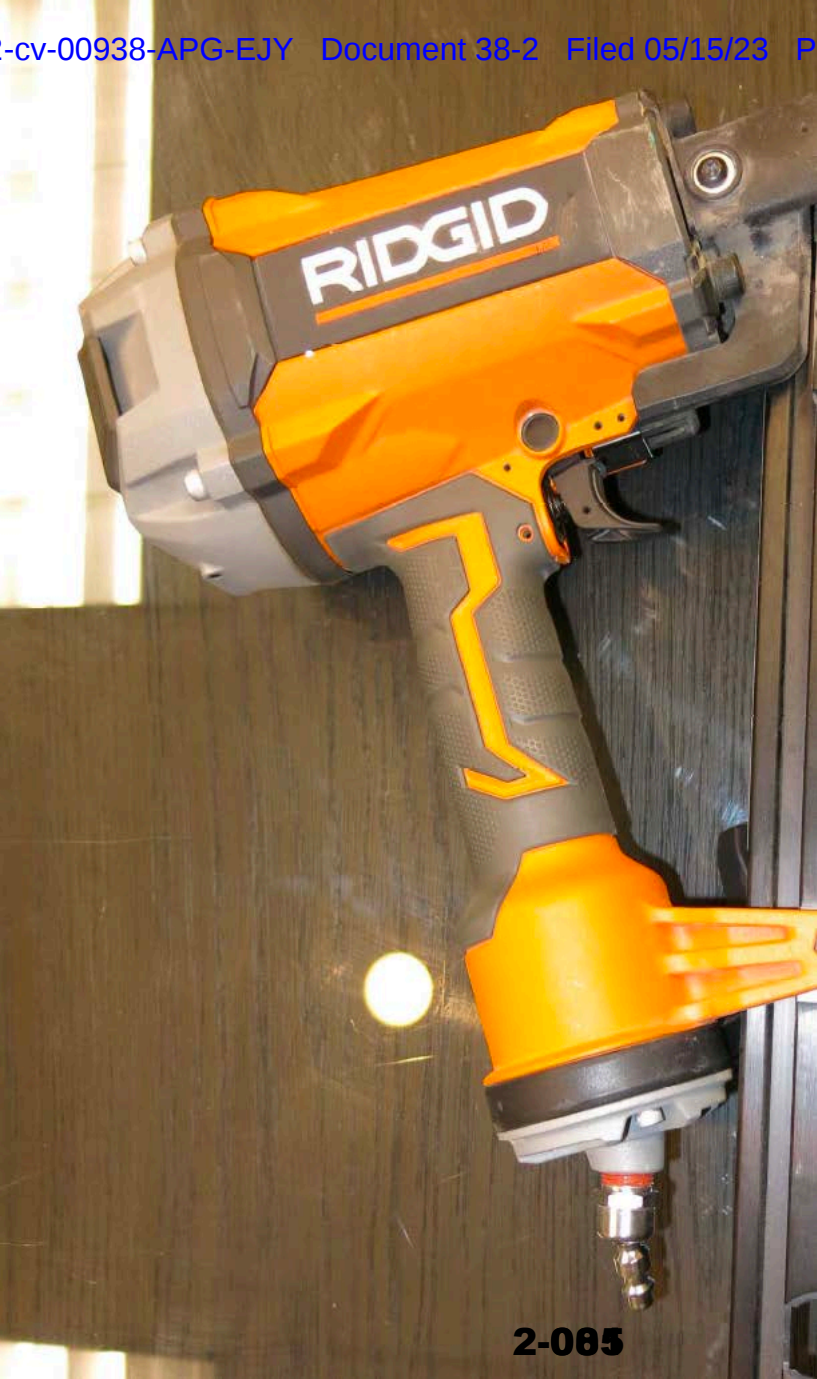

RIDGID
3-1/2 in. Round-Head Framing Nailer
with Magnesium Metal Housing
BEST-IN-CLASS SPEED
LIFETIME
SERVICE AGREEMENT
FASTEN EDGE

EXHIBIT "2"


RIDGID

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

OSCAR HERNANDEZ , Plaintiffs, v. THE HOME DEPOT, INC., RIDGE TOOL COMPANY, and DOES 1-V, and ROE CORPORATIONS IV, inclusive, Defendants.	CASE NO. 2:22-CV-00938-APG-EJY **DEFENDANTS', THE HOME DEPOT, INC. AND RIDGE TOOL COMPANY, REPLY IN SUPPORT OF THEIR PARTIAL MOTION FOR SUMMARY JUDGMENT**

Defendants, The Home Depot, Inc. and Ridge Tool Company, by and through their attorneys of record, Ellen S. Bowman, Esq. and Rosario M. Vignali, Esq., appearing *pro hac vice*, of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, hereby submit this Reply to the Plaintiff's Opposition to Defendants' Partial Motion for Summary Judgment.

This Reply is made and based upon the following Memorandum of Points and Authorities

and all arguments and evidence permitted at the hearing of this matter.

DATED this 24th day of May, 2023.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Nothing in Plaintiff's response to the motion for summary judgment should dissuade this Court from granting the motion in its entirety. In fact, Plaintiff's response misstates the applicability, and historical development, of the Apparent Manufacturer Doctrine, while downplaying – if not outright ignoring – that Ridge Tool did not actually *sell* the nail gun at issue. Plaintiff's opposition also implies that Defendants have hid, or otherwise failed to disclose, the limited role played by Ridge Tool Company as it pertains to the Model R350RHF "RIDGID" nail gun at issue. This is in no way accurate, as the fact remains that Plaintiff has been "on notice" since the very beginning of this litigation of Ridge Tool's status as the mere licensor of the "RIDGID" trade name, as well as the identity of the actual manufacturer of the product.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

Defendants incorporate their statement of undisputed facts as included in their original moving papers.

III. LEGAL ARGUMENT

A. Plaintiff Ignores The Third Restatement and the Modern Trend of the Law.

The Apparent Manufacturer Doctrine (AMD) was first applied in the early 20th century, well-before the widespread use of trademark licensing so common in modern American commerce[2]. The AMD was applied to wholesale and retail sellers that placed their own house labels or trademarks on goods that had been manufactured by others. [For example, Sears' use of the "Craftsman" label on power tools and the "Die Hard" label on automobile batteries.[3]] At that time, modern legal concepts akin to "strict liability" for defective products (attaching liability to non-manufacturers) had not yet been developed by American courts. Wholesale/retail sellers, in order to avoid potential liability for an allegedly defective product, often took the position that, as a non-manufacturer who simply placed its logo or trademark on the product, it could not be liable for a product defect. Against this setting, and by using estoppel-type principles, the AMD emerged to prevent the wholesale/retail seller from denying that it manufactured the goods in question, especially where the trademark or logo likely lead reasonable consumers to believe that wholesale/retail seller had, in fact, manufactured the goods.

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[1] Local Rule 56-1 states: "Motions for summary judgment and responses thereto must include a concise statement setting forth each fact material to the disposition of the motion that the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence on which the party relies. The statement of facts will be counted toward the applicable page limit in LR 7-3."

[2] The analysis of the historical development of the AMD is taken from David J. Franklyn, *The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts*, 49 Case W. Rsrv. L. Rev. 671 (1999), and *Hebel v. Sherman Equipment*, 442 N.E. 2d 199, 201 (Ill. 1982), one of the cases discussed in Plaintiff's Response.

[3] See, *Carney v. Sears, Roebuck & Co.*, 309 F. 2d 300 (4th Cir. 1962).

Two reasons were commonly cited for the application of the AMD. First, it was developed to protect the consumer who expected that the product in question carried the level of quality that the consumer had come to expect from the apparent manufacturer. Secondly, it was developed to provide the injured consumer with a remedy against some entity if the identity of the actual manufacturer of the defective produce was not disclosed or otherwise undiscoverable. Different interpretations of the AMD developed, but all eventually converged in Section 400 of the *Second* Restatement of Torts when it was published in the 1960s.

Undoubtedly, some courts have used Comment D to Section 400 of the *Second* Restatement to extend the reach of the AMD to trademark licensors who did not actually sell the product. However, the ***Brandimarti*** case (cited by the Plaintiff is an example) and others like it are clearly in the minority. In the case of trademark licensors, the fact remains that the very wording of the *Second* Restatement applies the AMD only to those that actually *sell* the product:

- The title to Section 400 of the *Second* Restatement is "*Selling* as Own Product Chattel Made by Another" (emphasis added)
- The text of Section 400 reads that it applies to an entity which, "puts out as (its) own product a chattel manufactured by another"

Moreover, Comment A to Section 400 provides that the term 'one who puts out a chattel' includes "anyone who *supplies* it to others for their own use or for the use of third persons, *either by sale or lease or by gift or loan*" (emphasis added). Hence, Section 400 of the *Second* Restatement appears to expressly apply only to entities that actually sell or otherwise transfer the goods at issue. Trademark licensors like Ridge Tool Company do not fall in that category.

With cases like *Brandimarti* in conflict with the very wording of the *Second* Restatements, the inherent confusion as to the full reach of the AMD was cleared up by the Restatement (Third) of Torts: Products Liability published in 1998 (herein, "*Third* Restatement"). The *Third*

Restatement, in Section 14, specifically rejects the notion that the AMD can attach liability to non-selling licensors, making it clear that the AMD applies only to product sellers and distributors who place their own marks or names on the product they actually sell.[4] Comment (d) to Section 14 expressly states that *the AMD does not apply to trademark licensors:*

> "The rule stated in this Section does not, by its terms, apply to the owner of a trademark who licenses a manufacturer to place the licensor's trademark or logo on the manufacturer's product and distribute it as though manufactured by the licensor. *In such a case . . . the licensor does not 'sell or distribute as its own a product manufactured by another*.' Thus, the manufacturer may be liable [under the Sections that apply to manufacturer liability], but the licensor, who does not sell or otherwise distribute products, is not liable under this section of this Restatement. (emphasis added)

The cases cited by the Plaintiff are unavailing. They were all decided before the Third Restatement was ever published, whereas the post-*Third* Restatement cases cited in Defendants' Memorandum (dkt. 37) clearly show that the modern trend is undeniable. The *Turner* and *Saez* cases cited by the Plaintiff involve Michigan's adaption of "successor liability" (*Turner*) and New Jersey's adoption of the "product line" theory of "successor liability" (*Saez*) – neither appearing to contain any discussion whatsoever of the AMD. The *Connelly* case did not impose liability on the licensor (Uniroyal), but simply held that the mere fact that it was not in the chain of the product's distribution was not dispositive on the issue. In *Hebel*, the licensor was ultimately found not liable (while distinguishing itself from *Connelly*). Finally, in *Kasel*, the licensor was held liable for the underlying product defect only because it was found to be inextricably involved with the product's development – a far cry from the facts of this case.[5]

Even the 2018 Lewis article cited by the Plaintiff (Exhibit A) does not help his cause:

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[4] Specifically, Section 14 states: "*One engaged in the business of selling or otherwise distributing products who sell or distributes as its own a product manufactured by another is subjects to the same liability as though the seller or distributor were the product's manufacturer*."

[5] The majority's decision in *Kasel* closed by noting that its decision "is confined to the specific facts of this case", including that the licensor (Remington) had caused the manufacturer to be formed, equipped and launched; had personnel at the manufacturer's facility; had trained the manufacturer's key personnel; had stock ownership, and common officers and directors, in the manufacturer; had financed, and had received substantial revenue from, the manufacturer; and had rights to control over the quality of the goods produced by the manufacturer.

- Citing Sec. 14 of the Third Restatement, it states that the AMD "*was designed only to extend manufacturer liability to retail sellers who place their trademark on goods. Thus, unless the trademark licensor also sells the goods. . . they cannot be held liable under the doctrine*."
- The expansive view of the AMD reflected in cases like *Brandimarti* (Pennsylvania) and *Hebel* (Illinois) is the minority view;
- Most states have limited the reach of the AMD[6], while others have held that the AMD is limited to actual sellers;
- Other jurisdictions apply the AMD only to those instances where the licensor plays a significant role in the production, marketing or chain of distribution of the product.

B. Plaintiff Has Been on Notice of this Issue Since the Case First Began.

Defendants would be remiss in this reply if they did not address Plaintiff's claim[7] that it was only in this motion for summary judgment that Defendants first claimed that Ridge Tool Company was merely the licensor of the nail gun – the implication being that Defendants have laid a trap for the Plaintiff and are essentially springing a surprise with this motion. Nothing can be further from the truth!

As set forth in Defendants' Memorandum (dkt. 37), Section IV.C., Ridge Tool's status as the mere licensor of the "RIDGID" tradename was first made known to the Plaintiff in Defendants' Notice of Removal and then, almost immediately thereafter, in Defendants' Answer. Moreover, Defendants' Rule 26 Automatic Disclosure, dated August 10, 2022, at paragraphs 3, 4 and A12a

[6] This includes the Ninth Circuit's rejection of the AMD under Arizona law in *Torres v. Goodyear Tire*, 867 F. 2d 1234 (1989), while certifying other questions to the Arizona Supreme Court.

[7] "*After* the close of discovery RIGID (sic) filed the instant motion for partial summary judgment wherein RIGID *now* claims it was only the licensor of the gun." (italics added) "If RIGID *now* claims that some other party manufactured the said gun. . . , (italics added).

(Exhibit B), again broadcast "*Ridge Tool Company's licensing of the 'RIDGID' trade name and the company's non-involvement in the product's design and manufacture or the formulation of its warnings*", and identifies the name of the product manufacturer: Techtronic Industries Power Equipment.[8] Also, several of the documents made part of Defendants' Rule 26 disclosure and subsequent document productions also featured the name and/or corporate logo of the actual product manufacturer – One World Technologies, Inc. and/or Techtronics a/k/a "TTI" – including the nail gun's Repair Sheet, Operator's Manual, Packaging Carton, Procedures/Evaluation Document and Driver Maintenance Kit, as well as the relevant excess insurance policy Declarations Page[9]. (Exhibit C)

Plaintiff's deposition took place on December 12, 2022. A representative of the product manufacturer, David Anderson, was present for the testimony and the subsequent product inspection that took place later in the day at Plaintiff's counsel's office. Mr. Anderson was introduced to Plaintiff and his counsel, both of whom were told of his association with Techtronics, and his name appears on the official transcript as a representative of "Techtronic Industries". At the start of the deposition, he was again introduced to the Plaintiff on the record as "*David Anderson of Techtronic Industries, One World Technologies"*. (Exhibit D)

Plaintiff, for whatever reason, decided to ignore all of the above. He allowed discovery to close without any Interrogatories, without any depositions and, certainly, without any discovery on the licensing issue. That was his decision. He cannot now, however, complain of "prejudice".

IV. CONCLUSION

Although the *Second* Restatement has been misapplied from time-to-time, the modern trend of case law, in particular those decided after the 1998 publishing of the *Third* Restatement, is to

[8] The company was formerly known as "One World Technologies, Inc.", prior to undertaking a name change in 2021.
[9] Other documents produced by the Defendants did the same. They are not produced herein (but could be made available to the Court) because of their confidential/trade secret nature.

absolve mere trademark licensors of any potential liability for product defects. This is especially so where the licensor, like Ridge Tool Company, did not actually sell the product or become involved in the product's fabrication, quality control, marketing, etc.

The paucity of Nevada case law on the subject notwithstanding, this Court does not need to adapt the *Third* Restatement as the controlling law in Nevada; it only has to acknowledge that the unmistakable national trend in the case law embodied in Section 14 and Comment (d) is the better rule. Plaintiff case could then proceed against Home Depot, the admitted retail seller of the nail gun at issue.

For these reasons, Defendants motion for partial summary judgment should be granted in its entirety.

DATED this 24th day of May, 2023.

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, and that on this 24th day of May, 2023, I served a true and correct copy of the **DEFENDANTS', THE HOME DEPOT, INC. AND RIDGE TOOL COMPANY, REPLY IN SUPPORT OF THEIR PARTIAL MOTION FOR SUMMARY JUDGMENT** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☒ 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; and/or

☐ via hand-delivery to the addressees listed below.

David Sampson, Esq.
LAW OFFICE OF DAVID SAMPSON, LLC
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By: */s/ Joyce L. Radden*
An Employee of
WILSON, ELSER, MOSKOWITZ, EDELMAN
& DICKER LLP

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

OSCAR HERNANDEZ,

Plaintiff

v.

THE HOME DEPOT, INC. and RIDGE TOOL COMPANY,

Defendants

Case No.: 2:22-cv-00938-APG-EJY

Order Granting in Part Defendants' Motion for Partial Summary Judgment

[ECF No. 37]

Oscar Hernandez was allegedly injured while using a "RIDGID" branded nail gun. He sues The Home Depot, Inc. and Ridge Tool Company under theories of (1) strict liability, (2) negligence, (3) breach of express warranty, and (4) breach of implied warranty of fitness. The defendants moved for partial summary judgment as to Ridge Tool Company, arguing that it played no role in the design, manufacture, distribution, or sale of the nail gun, or in the formulation of its warnings, other than to license the RIDGID trademark to The Home Depot. They argue that a mere licensor of a trademark cannot be held liable for a defective or unreasonably dangerous product. Hernandez responds that Rigid Tool Company is strictly liable for the nail gun under either the apparent manufacturer doctrine or the stream of commerce approach.[1] I grant the motion for partial summary judgment as to the negligence, express warranty, and implied warranty claims. In a separate order, I will certify a question to the

[1] Alternatively, Hernandez requests in his opposition that I "substitute the manufacturer [of the nail gun] for RIGID [Ridge Tool Company] in this matter" because "[t]he allegations of the Complaint . . . make it clear the party identified as RIGID referred to the manufacturer of the subject gun." ECF No. 38 at 5-6. This request fails because he does not identify a specific party to substitute, a new party can be added only through an amended pleading, and he has not moved to amend the complaint. *See* Fed. R. Civ. P. 15(c); LR 15-1; LR 26-1(b)(2).

Supreme Court of Nevada regarding whether a trademark licensor is subject to strict products liability.

I. BACKGROUND

Hernandez alleges that he was injured while using a RIDGID branded nail gun while on a construction site. ECF No. 10 at 4. Hernandez's employer allegedly purchased the nail gun from The Home Depot. *Id.* The nail gun and its packaging both prominently bore the RIDGID name and trademark. ECF Nos. 38-1; 38-2.

"The 'RIDGID' brand is known throughout the professional trades for its hallmark characteristics of dependable and reliable performance." ECF No. 37-2 at 3. In 2003, "Ridge Tool Company and/or its affiliated companies licensed the 'RIDGID' trademark to Home Depot."[2] ECF No. 13 at 2. Under that licensing agreement, The Home Depot used the RIDGID trademark to market and retail a line of power tools, including the nail gun used by Hernandez. ECF Nos. 17 at 2; 37-2 at 3-4. That line of power tools was designed and manufactured "by other companies for, and on behalf of, Home Depot," not by Ridge Tool Company or its affiliated companies. ECF No. 37-2 at 3. Ridge Tool Company and its affiliated companies were not involved with the design, manufacture, distribution, or sale of the nail gun, nor with the formulation of its warnings. *Id.* at 3-4. Their "only involvement" with the nail gun is that they licensed the RIDGID trademark to The Home Depot. *Id.* at 4.

[2] Ridge Tool Company is a wholly owned subsidiary of Emerson Electric Co. and is affiliated with Ridgid, Inc. ECF Nos. 37 at 11; 37-2 at 2-3. Ridgid, Inc. owns the "RIDGID" trademark. ECF No. 37-2 at 3. Emerson Electric Co. and Ridgid, Inc. licensed the trademark to The Home Depot. *Id.* The defendants do not make any analytical distinctions between the roles of the three companies, so I will proceed with the analysis as if Ridge Tool Company was the trademark licensor.

II. DISCUSSION

Summary judgment is appropriate if the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party is entitled to a judgment as a matter of law when the nonmoving party has failed to make a sufficient showing on an essential element for which it has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The burden then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018). I view the evidence and reasonable inferences in the light most favorable to the non-moving party. *Zetwick v. Cnty. of Yolo*, 850 F.3d 436, 440-41 (9th Cir. 2017).

A. Negligence

To prevail on a negligence theory, Hernandez must demonstrate that (1) the Ridge Tool Company owed him a duty of care, (2) it breached that duty, (3) the breach was the legal cause of his injuries, and (4) he suffered damages. *Foster v. Costco Wholesale Corp.*, 291 P.3d 150, 153 (Nev. 2012). Though negligence is often a question of fact for the jury, summary judgment is proper when at least one element of negligence is negated, preventing the plaintiff from recovering as a matter of law. *Id.*; *Celotex*, 477 U.S. at 323.

Hernandez alleges that the defendants failed to properly design, test, and inspect the nail gun and that they failed to warn and give adequate instructions. Ridge Tool Company contends that it is not liable because it was "merely the licensor" of the RIDGID trademark and "otherwise played no role in the design, manufacture, distribution and sale of the nail gun, or the formulation of its warnings." ECF No. 37 at 4. Hernandez presented evidence that the RIDGID trademark was prominently displayed on the nail gun and its packaging and contends that whether a defendant was negligent is generally a question of fact for the jury. The parties do not dispute that Ridge Tool Company's role in connection with the nail gun was limited to licensing the trademark. The question is whether that role is sufficient to impose a duty on Ridge Tool Company for negligence purposes.

The Supreme Court of Nevada has analyzed negligence liability for a trademark licensor once before, albeit obliquely, in *Dow Chemical Co. v. Mahlum*, 970 P.2d 98 (Nev. 1998), *overruled in part on other grounds by GES, Inc v. Corbitt*, 21 P.3d 11 (Nev. 2001). In *Dow Chemical*, the plaintiff was injured by defective silicone breast implants manufactured by Dow Corning, a company created and owned in part by Dow Chemical. *Id.* at 103, 106. The plaintiff sued Dow Chemical for negligent performance of an undertaking based on the theory that it undertook the safety testing of the silicone compounds. *Id.* at 106-07. In addition to testing the compounds and providing other technical support, Dow Chemical also licensed the "Dow" trademark to Dow Corning. *Id.* at 114, 117. The licensing agreement allowed Dow Chemical to "inspect Dow Corning's manufacturing process to assure the quality of its products" and to "revoke Dow Corning's license to use the corporate name 'Dow' on any questionable products." *Id.* at 105, 119. The Supreme Court of Nevada noted that the trademark agreement was one factor in assessing whether a reasonable jury could find that Dow Chemical undertook the testing

of the silicone, but that "the language in the trademark agreement, by itself, is not sufficient to create tort liability on Dow Chemical's part." *Id*. at 117.[3]

When the Supreme Court of Nevada has not spoken on an issue, I generally must predict how it would adjudicate the issue. *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007). The present claim is not a negligent performance of an undertaking claim as in *Dow Chemical*. But based on the language in *Dow Chemical*, I predict that the Supreme Court of Nevada would hold that licensing the RIDGID trademark to The Home Depot, by itself, is insufficient to impose a negligence duty on Ridge Tool Company to ensure the safety of the nail gun or the adequacy of its warnings or instructions. Hernandez does not provide evidence of any other factors that would support Ridge Tool Company owing him a duty to ensure the nail gun's safety. Therefore, I grant summary judgment in Ridge Tool Company's favor as to the negligence claim.

B. Warranty Claims

Express warranties are created by affirmations of fact, promises, or descriptions of the goods that become "part of the basis of the bargain." Nev. Rev. Stat. § 104.2313(1). Implied warranties of fitness arise when "the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." *Id.* § 104.2315. In Nevada, "unless there is privity, liability to the consumer must be in tort and not in contract." *Amundsen v. Ohio Brass Co.*, 513 P.2d 1234, 1235 (Nev. 1973) (quotation omitted); *see also Long v. Flanigan Warehouse*

[3] Justice Maupin of the Supreme Court of Nevada expounded on this issue in a partial dissent in *Dow Chemical*. 970 P.2d at 132. He stated that the language in the trademark licensing agreement is merely required to retain the licensor's ownership of trademark rights, and that there was no evidence Dow Chemical actually inspected the breast implants, so the licensing agreement could not impose a duty to inspect the trademarked product nor constitute an undertaking to guarantee the product's safety. *Id*. at 136-37.

Co., 382 P.2d 399, 402 (Nev. 1963) (breach of implied warranty was not an available remedy absent privity, and there was no privity when the defective product was purchased by the plaintiff's employer rather than the plaintiff).

Ridge Tool Company contends that it is a mere trademark licensor that was not involved in the sale of the nail gun. Hernandez has not provided any evidence that he was in privity with Ridge Tool Company. In fact, he alleged that his employer purchased the gun from The Home Depot. Hernandez also does not point to any evidence that Ridge Tool Company made an express warranty. Therefore, I grant summary judgment in Ridge Tool Company's favor as to both warranty claims.

C. Strict Liability

The defendants argue that because Ridge Tool Company only licensed the trademark but played no role in manufacturing or selling the nail gun, it cannot be liable on a strict products liability theory. Hernandez responds that Ridge Tool Company is strictly liable under the apparent manufacturer doctrine as restated by § 400 of the Restatement (Second) of Torts. In addition, he argues that, under the stream of commerce approach, strict liability should be imposed on any entity that "take[s] part in [the] production or marketing" of a defective product. ECF No. 38 at 4. Ridge Tool Company contends that § 400 is inapplicable here because it is limited to sellers of the product. Alternatively, it relies on § 14 of the Restatement (Third) of Torts to contend that the "trend" in applying the apparent manufacturer doctrine is to "absolve the [trademark] licensor of alleged products liability claims" unless they "'participate substantially in the design, manufacture, or distribution of the licensee's products.'" ECF No. 37 at 9 (quoting Restatement (Third) of Torts: Products Liability (1998), § 14, comment d (emphasis omitted)). Relatedly, Ridge Tool Company contends that trademark licensors found

strictly liable in the cases cited by Hernandez were much more involved in the product's development than in the present case.

1. No Clearly Controlling Precedent in Nevada Law

I could not find, nor did parties cite to, any Nevada law regarding whether a trademark licensor is subject to strict liability for a defective product bearing the licensed mark. The only Nevada case about the liability of a trademark licensor for a defective product is *Dow Chemical*, but that case did not involve a strict liability claim. 970 P.2d 98. In that case, the Supreme Court of Nevada stated that a trademark agreement "by itself, is not sufficient to create tort liability" for the licensor, but the agreement's "existence is one factor in assessing [the licensor's] knowledge and involvement" in the manufacture of the defective product. *Id.* at 117 (quotation omitted). Because it was stated in the context of a negligent performance of an undertaking claim, it seems apt to understand the phrase "not sufficient to create tort liability" as limiting only the negligence liability, not the strict liability, of a trademark licensor. Therefore, it is not clear that *Dow Chemical* would apply to the strict liability issue in the present case.

2. Apparent Manufacturer Doctrine

The apparent manufacturer doctrine holds vicariously liable an entity that appears to make a product but does not actually manufacture it. *See Kealoha v. E.I. du Pont de Nemours & Co.*, 82 F.3d 894, 903 (9th Cir. 1996). A rationale for the apparent manufacturer doctrine is that "the vendor who, through its labeling or advertising of a product, caused the public to believe that it was the manufacturer and to buy the product in reliance on the vendor's reputation and care in making it," should "assume[] the obligations of a manufacturer and to be estopped to deny its identity as the manufacturer." *Hebel v. Sherman Equip.*, 442 N.E.2d 199, 201 (Ill. 1982). In Nevada, manufacturers are strictly liable for defective products. *See Ginnis v. Mapes Hotel*

Corp., 470 P.2d 135, 138 (Nev. 1970). So, if Nevada adopted the apparent manufacturer doctrine, it would impose strict liability on apparent manufacturers.[4]

Section 400 of the Restatement (Second) of Torts (1965) states the rule as: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." The title and comment a of § 400 suggest it is limited to sellers or suppliers of the product.[5] However, comment d to § 400 notes that "one puts out a chattel as his own product when he . . . affixes to it his trade name or trademark" because consumers may frequently use the product believing that the product was made by or for the apparent manufacturer and rely on the reputation of the trademark as "an indication of the quality . . . of the chattel."

Section 14 of the Restatement (Third) of Torts: Products Liability (1998) restates the rule as: "One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer." Comment d to § 14 notes that the rule "does not, by its terms, apply to the owner of a trademark who licenses a manufacturer to place the licensor's trademark or logo on the manufacturer's product and distribute it as though

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[4] The apparent manufacturer doctrine "predates by some years the advent of the doctrine of strict liability," so it appears that the two doctrines evolved as distinct legal concepts. *Hebel*, 442 N.E.2d at 201. However, they now overlap in their application. *Id.* at 202 ("The function of the apparent-manufacturer doctrine has . . . been absorbed by . . . strict liability."); Restatement (Third), § 14, comment b ("To the extent that nonmanufacturers in the chain of distribution are held to the same standards as manufacturers, the rule stated in this Section is of little practical significance.").

[5] The title of § 400 is "Selling as Own Product Chattel Made by Another." Comment a states that "[t]he words 'one who puts out a chattel' include anyone who supplies it to others for their own use or for the use of third persons, either by sale or lease or by gift or loan."

manufactured by the licensor," but does apply to trademark licensors "when they participate substantially in the design, manufacture, or distribution of the licensee's products."

Courts vary in the contexts in which they apply the apparent manufacturer doctrine, § 400, and § 14. Some jurisdictions have limited the application of the doctrine only to sellers or suppliers. *See e.g., Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1235 (9th Cir. 1989) (predicting Arizona would not apply § 400 to non-seller trademark licensor); *Burkert v. Petrol Plus of Naugatuck, Inc.*, 579 A.2d 26, 33 (Conn. 1990). In comparison, one jurisdiction applied the doctrine to a non-seller trademark licensor merely because the licensor had authorized its name to appear on the injurious product, based on the rationale that consumers would purchase the product in reliance on the quality symbolized by the trademark. *Brandimarti v. Caterpillar Tractor Co.*, 527 A.2d 134, 139-40 (Pa. Super. Ct. 1987). Other jurisdictions have applied the apparent manufacturer doctrine as restated by § 14, imposing liability on non-seller trademark licensors only if they are substantially involved in the design, manufacture, or distribution of the defective product. *See, e.g., Lou v. Otis Elevator Co.*, 933 N.E.2d 140, 148 (Mass. App. Ct. 2010) (adopting § 14 rule); *Ellis v. Dixie-Narco, Inc.*, No. CIV. 97-1619-K1, 1999 WL 373793, at *4 (D. Or. Apr. 26, 1999) (predicting that Oregon would require trademark licensor to be a seller, manufacturer, or substantially involved in the product design to be liable under either § 400 or § 14).

Because Nevada has not recognized or rejected the apparent manufacturer doctrine, and because other states have applied the apparent manufacturer doctrine incongruously, I hesitate to predict whether and how the Supreme Court of Nevada would apply the rule. Therefore, I cannot conclude whether the apparent manufacturer doctrine would lead to strict products liability for Ridge Tool Company in Nevada. Instead, I certify the question to that court.

3. Stream of Commerce

The stream of commerce approach imposes strict liability on anyone having a "participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product," rather than limiting liability to only actual sellers and manufacturers. *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 725 (Cal. Ct. App. 1972). California, Illinois, and Arizona have used the stream of commerce approach to impose liability on trademark licensors that do not sell or manufacture the defective product where the licensors have participated in, to different degrees, putting the defective products into the stream of commerce. *See, e.g., Kasel*, 24 Cal. App. 3d at 725-27; *Connelly v. Uniroyal, Inc.*, 389 N.E.2d 155, 161 (Ill. 1979), *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939, 942 (Ariz. 1990).

In *Kasel*, the plaintiff was injured by a defective shotgun shell bearing the "Remington" trademark. 24 Cal. App. 3d at 717. Remington did not manufacture or sell the shell, but it was involved in setting up the manufacturer and provided training, personnel, and consultation to the manufacturer. *Id.* at 717-19. The California Court of Appeal observed that, "Remington had more involvement in the enterprise which produced the defective shell than the typical retailer, distributor or wholesaler upon whom the courts have had no trouble imposing strict liability." *Id.* at 727. The court held that "as long as the . . . trademark licensor can be said to be a link in the marketing enterprise which placed a defective product within the stream of commerce, there is no reason in logic for refusing to apply strict liability in tort to such an entity." *Id.* at 725.

In *Connelly v. Uniroyal, Inc.*, the Supreme Court of Illinois held that a trademark licensor of a defective tire that had contracted to share profits with, and to provide technical instructions and assistance to, the tire manufacturer was strictly liable for a defective product. 389 N.E.2d at

161-63. It held that participation in the product's distribution is not required for strict liability to apply, based on the following reasoning:

> The major purpose of strict liability is to place the loss caused by defective products on those who create the risk and reap the profit by placing a defective product in the stream of commerce . . . . A licensor is an integral part of the marketing enterprise, and its participation in the profits reaped by placing a defective product in the stream of commerce . . . presents the same public policy reasons for the applicability of strict liability which supported the imposition of such liability on wholesalers, retailers and lessors.

Id. at 162-63 (quotation omitted). It went on to hold that strict liability should be applied to an entity that, "for a consideration, authorizes the use of [its] trademark, particularly when, as here, the product bears no indication that it was manufactured by any other entity." *Id.* at 163.

In *Torres v. Goodyear Tire & Rubber Co.*, the Supreme Court of Arizona also imposed strict liability on a non-seller and non-manufacturer, Goodyear, which did not design, manufacture, or distribute the product, but had "actual ability to control" the manufacturers. 786 P.2d at 941-42. Among other things, the licensing agreement required manufacturers to make the tires "in accordance with formulas, specifications, and directions given by Goodyear," use materials Goodyear approved, and comply with Goodyear's instructions on labeling, marketing, packaging, and advertising the tires. *Id.* at 942.

The Supreme Court of Arizona noted that strict liability is considered a "policy device to spread the risk . . . to those who marketed the product, profit from its sale, and have the know how to remove its defects before placing it in the chain of distribution." *Id.* (quotation omitted). Based on this policy, the Supreme Court of Arizona found that "the degree of control possessed by Goodyear . . . is a factor that militates in favor of applying strict liability to such licensors." *Id.* Therefore, it held that strict liability was properly applicable to Goodyear because it was "in

the business of placing products in the stream of commerce," though it was not the actual manufacturer or seller. *Id.* at 943 (quotation omitted). The court stopped short of addressing the precise question here, noting that if a defendant "merely licenses a manufacturer to use a particular . . . trademark . . . it might well be inappropriate to impose strict liability," but this was "not an issue [it] need[ed] to decide" because the facts showed that Goodyear was significantly involved in creating the product. *Id.* at 945.

In Nevada, manufacturers and distributors are strictly liable for defective products. *See Ginnis*, 470 P.2d at 138; *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 420 P.2d 855, 857 (Nev. 1966). However, it is not clear that *only* those entities are strictly liable, because Nevada's stated public policy regarding strict products liability appears aligned with the stream of commerce approach as adopted by California, Illinois, and Arizona. In Nevada's seminal case of strict products liability, the Supreme Court of Nevada explained:

> The public interest in human safety requires the maximum possible protection for the user of the product . . . . By placing their goods upon the market, the suppliers represent to the public that they are suitable and safe for use; and by packaging, advertising, and otherwise, they do everything they can to induce that belief. . . . The supplier has invited and solicited the use; and when it leads to disaster, he should not be permitted to avoid the responsibility . . . . [P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.

Shoshone, 420 P.2d at 857 (quotations omitted). In addition, the court noted that the rationale of strict liability is to "insure that the cost of injuries resulting from defective products are borne by the manufacturer that put such products on the market." *Id.* (quotation omitted).

The nail gun and its packaging prominently bore the RIDGID name and trademark, which are "known . . . for its hallmark characteristics of dependable and reliable performance,"

and no other branding. ECF Nos. 37-2 at 3; 38-1; 38-2. On the other hand, the parties do not dispute that Ridge Tool Company's only role here was licensing its trademark. Even if Nevada were to follow California, Illinois, and Arizona in extending strict liability beyond actual sellers and manufacturers under the stream of commerce approach, it is unclear what additional conduct, if any, a trademark licensor would need to engage in to be considered as participating in the stream of commerce. Therefore, I hesitate to predict whether the Supreme Court of Nevada would or would not extend strict liability to Ridge Tool Company under the stream of commerce theory. Instead, I certify the question to that court.

4. Question for Certification

In my discretion, "[w]hen state law issues are unclear, [I] may certify a question to a state's highest court to obtain authoritative answers." *Potter v. City of Lacey*, 46 F.4th 787, 791 (9th Cir. 2022) (quotation omitted). Certification may be appropriate for state law issues that carry "significant policy implications" and "will have broad application." *Id.*; *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003). Nevada Rule of Appellate Procedure 5 permits me to certify a question of Nevada law "which may be determinative of the cause then pending" in my court when "it appears to [me] there is no controlling precedent in the decisions of the Supreme Court or Court of Appeals of [Nevada]." The certified question does not have to resolve or conclude the entire case; it only needs to be determinative of "part of the federal case." *See Volvo Cars of N. Am., Inc. v. Ricci*, 137 P.3d 1161, 1164 (Nev. 2006) (en banc).

Whether strict liability applies to a mere trademark licensor is a question of broad application that will determine the outcome of this case as to Ridge Tool Company. There is no clearly controlling Nevada precedent. The scope of strict products liability is an important question of state law that should be left to the state court. *See Torres v. Goodyear Tire & Rubber*

Co., 867 F.2d 1234, 1239 (9th Cir. 1989) (certifying a similar question to the Arizona Supreme Court); *see also Rivera v. Philip Morris*, 209 P.3d 271, 274 (Nev. 2009) (en banc) (certification regarding the evidentiary burden in a strict liability case was appropriate). Therefore, I will certify by separate order the following question to the Supreme Court of Nevada:

- Does Nevada impose strict products liability on an entity whose only involvement with a defective or unreasonably dangerous product is to license its trademark to be used to market the product and where the product and packaging prominently display its trademark?

In the interim, I deny the defendants' motion for partial summary judgment as to the strict liability claim without prejudice to refiling it within 30 days of the Supreme Court of Nevada's decision on the certified question.

III. CONCLUSION

I THEREFORE ORDER that the defendants' motion for partial summary judgment (**ECF No. 37**) is **GRANTED** as to the negligence, express warranty, and implied warranty of fitness claims, and **DENIED** without prejudice as to the strict liability claim. The defendants may file a new motion as to the strict liability claim within 30 days of the Supreme Court of Nevada's decision on the certified question.

DATED this 18th day of December, 2023.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

OSCAR HERNANDEZ,

Plaintiff

v.

THE HOME DEPOT, INC. and RIDGE TOOL COMPANY,

Defendants

Case No.: 2:22-cv-00938-APG-EJY

Order Certifying Question to the Supreme Court of Nevada

I respectfully certify to the Supreme Court of Nevada the following question of law that may be determinative as to part of a case before me and as to which there is no clearly controlling precedent in the decisions of the Supreme Court of Nevada or the Nevada Court of Appeals:

- Does Nevada impose strict products liability on an entity whose only involvement with a defective or unreasonably dangerous product is to license its trademark to be used to market the product and where the product and packaging prominently display its trademark?

I. STATEMENT OF ALL FACTS RELEVANT TO THE CERTIFIED QUESTION

Oscar Hernandez alleges that he was injured while using a "RIDGID" branded nail gun while on a construction site. Hernadez's employer allegedly purchased the nail gun from The Home Depot. The nail gun and its packaging both prominently bore the RIDGID name and trademark. The RIDGID brand is known throughout the professional trades for its hallmark characteristics of dependable and reliable performance.

In 2003, Ridge Tool Company or its affiliated companies licensed the RIDGID trademark to The Home Depot. Under that licensing agreement, The Home Depot used the RIDGID

trademark to market and retail a line of power tools, including the nail gun Hernandez used. That line of power tools was designed and manufactured by other companies for, and on behalf of, The Home Depot, not by Ridge Tool Company or its affiliated companies. Ridge Tool Company and its affiliated companies were not involved with the design, manufacture, distribution, or sale of the nail gun, nor with the formulation of its warnings. Their only involvement with regard to the nail gun is that they licensed the RIDGID trademark to The Home Depot.

II. NATURE OF THE CONTROVERSY IN WHICH THE QUESTION AROSE

Hernandez sues The Home Depot, Inc. and Ridge Tool Company under theories of (1) strict liability, (2) negligence, (3) breach of express warranty, and (4) breach of implied warranty of fitness. The defendants moved for partial summary judgment as to Ridge Tool Company, arguing that it played no role in the design, manufacture, distribution, or sale of the nail gun, or in the formulation of its warnings, other than to license the RIDGID trademark to The Home Depot. They did not move for summary judgment as to The Home Depot. I granted summary judgment in Ridge Tool Company's favor for the negligence, breach of express warranty, and breach of implied warranty claims.

Hernandez contends that Ridge Tool Company is strictly liable under the apparent manufacturer doctrine, which imposes liability on an entity that appears to make a product but does not actually manufacture it, as restated by § 400 of the Restatement (Second) of Torts. In addition, he argues that, under the stream of commerce approach, strict liability should be imposed on any entity that takes part in the production or marketing of a defective product. Ridge Tool Company contends that § 400 is inapplicable here because it is limited to sellers of the product. Alternatively, it relies on § 14 of the Restatement (Third) of Torts to contend that

the trend in applying the apparent manufacturer doctrine is to absolve the trademark licensor of strict products liability claims unless the licensor participates substantially in the design, manufacture, or distribution of the licensee's products. Relatedly, Ridge Tool Company contends that trademark licensors found strictly liable in the cases cited by Hernandez were much more involved in the product's development than in the present case.

I could not find, nor did parties cite to, any Nevada law applying or rejecting the apparent manufacturer doctrine or the stream of commerce approach. The Supreme Court of Nevada should decide the scope of Nevada's strict products liability law, because that decision will have important public policy implications. So I denied summary judgment as to the strict liability claim without prejudice to refiling it, and I certify the question to the Supreme Court of Nevada.

III. NO CLEARLY CONTROLLING PRECEDENT IN NEVADA LAW

I have found no clearly controlling precedent on the certified question. The only Nevada case about the liability of a trademark licensor for a defective product is *Dow Chemical Co. v. Mahlum*, but it does not clearly address the question of strict liability. 970 P.2d 98 (Nev. 1998), *overruled in part on other grounds by GES, Inc v. Corbitt*, 21 P.3d 11 (Nev. 2001). In *Dow Chemical*, the plaintiff was injured by defective silicone breast implants manufactured by Dow Corning, a company created and owned in part by Dow Chemical. *Id.* at 103, 106. The plaintiff sued Dow Chemical for negligent performance of an undertaking based on the theory that it undertook the safety testing of the silicone compounds. *Id.* at 106-07. In addition to testing the silicone compounds and providing other technical support, Dow Chemical also licensed the "Dow" trademark to Dow Corning. *Id.* at 114, 117.

In deciding *Dow Chemical*, the Supreme Court of Nevada stated that the "language in the trademark [licensing] agreement, by itself, is not sufficient to create tort liability" for the licensor

Dow Chemical but that the agreement's "existence is one factor in assessing [the licensor's] knowledge and involvement" in the manufacture of the defective product. *Id.* at 117 (quotation omitted).[1] Because it was stated in the context of a negligent performance of an undertaking claim, it seems apt to understand the phrase "not sufficient to create tort liability" as limiting only the negligence liability, not the strict liability, of a trademark licensor. Therefore, it is not clear that *Dow Chemical* would apply to the strict liability issue in the present case.

Nevada's jurisprudence on strict products liability also does not clearly answer the certified question. In Nevada, manufacturers and distributors are strictly liable for defective products. *See Ginnis v. Mapes Hotel Corp*., 470 P.2d 135, 138 (Nev. 1970); *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 420 P.2d 855, 857 (Nev. 1966). However, it is not clear that *only* those entities are strictly liable, because Nevada's stated public policy regarding strict products liability appears aligned with the stream of commerce approach as adopted by California, Illinois, and Arizona. *See Shoshone*, 420 P.2d at 857. These states have used the stream of commerce approach to impose liability on trademark licensors that did not sell or manufacture the defective product but participated in, to different degrees, putting the defective products into the stream of commerce. *See, e.g., Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 725-27 (Cal. Ct. App. 1972); *Connelly v. Uniroyal, Inc.*, 389 N.E.2d 155, 161 (Ill. 1979); *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939, 942 (Ariz. 1990). The Supreme Court of Arizona stopped short of addressing the precise question here, noting that if a defendant "merely licenses

[1] Justice Maupin expounded on this issue in a partial dissent in *Dow Chemical*. 970 P.2d at 132. He stated that the language in the trademark licensing agreement is merely required to retain the licensor's ownership of trademark rights, and that there was no evidence Dow Chemical actually inspected the breast implants, so the licensing agreement could not impose a duty to inspect the trademarked product nor constitute an undertaking to guarantee the safety of the product. *Id.* at 136-37. However, Justice Maupin's dissent did not discuss the significance of the trademark agreement in the context of strict liability. *See id.*

a manufacturer to use a particular . . . trademark . . . it might well be inappropriate to impose strict liability," but this was "not an issue [it] need[ed] to decide" because the defendant in that case was significantly involved in creating the product. *Torres*, 786 P.2d at 945.

Even if Nevada were to follow California, Illinois, and Arizona in extending strict liability beyond actual sellers and manufacturers under the stream of commerce approach, it is unclear what additional conduct, if any, a trademark licensor would need to engage in to be considered as participating in the stream of commerce. Therefore, I certify the question of strict liability to the Supreme Court of Nevada.

III. PARTIES' NAMES AND DESIGNATION OF APPELLANT AND RESPONDENTS

Plaintiff: Oscar Hernandez

Defendants: The Home Depot, Inc. and Ridge Tool Company

The defendants argue that they are entitled to summary judgment as to Ridge Tool Company because strict liability does not apply to a mere trademark licensor, so I designate the defendants as respondents and the plaintiff as appellant.

IV. NAMES AND ADDRESSES OF COUNSEL FOR THE PARTIES

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IV. ANY OTHER MATTERS THE CERTIFYING COURT DEEMS RELEVANT TO A DETERMINATION OF THE QUESTION CERTIFIED

The clerk of court will forward my order on the defendants' motion for partial summary judgment (filed concurrently herewith) as it contains additional analysis and references to the evidence underlying the facts of the case. I defer to the Supreme Court of Nevada to decide whether it requires any other information to answer the certified question. I do not intend my framing of the question to limit the Supreme Court of Nevada's consideration of the issues.

VI. CONCLUSION

I THEREFORE ORDER the clerk of court to forward this order and my order on partial summary judgment under official seal to the Supreme Court of the State of Nevada, 201 South Carson Street, Suite 201, Carson City, Nevada 89701-4702.

DATED this 18th day of December, 2023.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR HERNANDEZ,
Appellant,
vs.
THE HOME DEPOT, INC.; AND RIDGE TOOL COMPANY,
Respondents.

No. 87794

ORDER ACCEPTING CERTIFIED QUESTION, DIRECTING BRIEFING AND DIRECTING SUBMISSION OF FILING FEE

This matter involves a legal question certified to this court, under NRAP 5, by the United States District Court for the District of Nevada. Specifically, the U.S. District Court has certified the following question to this court:

> Does Nevada impose strict products liability on an entity whose only involvement with a defective or unreasonably dangerous product is to license its trademark to be used to market the product and where the product and packaging prominently display its trademark?

As no clearly controlling Nevada precedent exists with regard to this legal question and the answer may determine part of the federal case, we accept the certified question. *See* NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006) (discussing the factors this court considers when determining whether to accept a certified question).

Appellant shall have 30 days from the date of this order to file and serve an opening brief. Respondent Ridge Tool Company shall have 30 days from the date the opening brief is served to file and serve an answering

brief.[1] Appellant shall then have 21 days from the date the answering brief is served to file and serve any reply brief. The parties' briefs shall comply with NRAP 28, 28.2, 31(c), and 32. *See* NRAP 5(g)(2). The parties may file a joint appendix containing any portions of the record before the U.S. District Court that are necessary to this court's resolution of the certified questions. *See* NRAP 5(d), (g)(2).

Lastly, in any proceeding under NRAP 5, fees "shall be the same as in civil appeals . . . and shall be equally divided between the parties unless otherwise ordered by the certifying court." NRAP 5(e). The U.S. District Court's order does not address the payment of this court's fees. Accordingly, appellant and Ridge Tool Company shall each tender to the clerk of this court, within 14 days from the date of this order, the sum of $125, representing half of the filing fee. *See* NRAP 3(e); NRAP 5(e).

It is so ORDERED.

_____, C.J.
Cadish

_____, J.
Stiglich

_____, J.
Pickering

_____, J.
Herndon

_____, J.
Lee

_____, J.
Parraguirre

_____, J.
Bell

[1]Although Home Depot is listed as a respondent, it does not appear that Home Depot is involved with the issues that generated the certified question. We will presume that Home Depot does not wish to be involved in this matter unless notified otherwise by the time an answering brief is due.

cc: Law Office of David Sampson
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas
Rosario M. Vignali
Clerk, United States District Court for the District of Nevada

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CERTIFICATE OF SERVICE

I certify that pursuant to NRAP 25(d) and NRAP 30(f)(2) the above APPELLANT'S APPENDIX VOLUME 1 was served on all parties to this action via the Court's CM/ECF electronic filing program the 26th day of April, 2024.

/s/ Amanda Nalder
An employee of THE LAW OFFICE OF DAVID SAMPSON, LLC.