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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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11 ZURICH AMERICAN INSURANCE) 3:13-cv-00512-HDM-VPC
12 COMPANY, a foreign corporation,)
13 individually and as subrogee for)
14 its insureds UNION PACIFIC) ORDER
15 RAILROAD COMPANY AND UNION)
16 PACIFIC MOTOR FREIGHT COMPANY;)
17 DISCOVER PROPERTY & CASUALTY)
18 INSURANCE COMPANY, a foreign)
19 corporation, individually and as)
20 subrogee for its insureds UNION)
21 PACIFIC RAILROAD COMPANY and)
22 UNION PACIFIC MOTOR FREIGHT)
23 COMPANY,

24 Plaintiffs,

25 vs.

26 INTERMODAL MAINTENANCE SERVICES,)
27 INC., a foreign corporation; DOES)
28 I-X, inclusive; and ROE INSURANCE)
29 COMPANIES XI-XX, inclusive; and)
30 MOE CORPORATIONS XXI-XXX,)
31 inclusive,

32 Defendants.

33 Plaintiffs' Motion for Summary Judgment, or in the
34 Alternative, Partial Summary Judgment (#43), Defendant's Motion for
35 Partial Summary Judgment (#50), Defendant's Motion to Dismiss for
36 Spoliation of Evidence (#40), Plaintiffs' Motion for Leave to

1 Supplement (#62) and Plaintiffs' Requests for Judicial Notice (##53
2 and 58) having come on for hearing on February 26, 2015, Ryan
3 Kerbow, Esq. appearing on behalf of Plaintiffs ZURICH AMERICAN
4 INSURANCE COMPANY and DISCOVER PROPERTY AND CASUALTY INSURANCE
5 COMPANY (collectively, "Plaintiffs") and Alan Westbrook, Esq.
6 appearing on behalf of Defendant INTERMODAL MAINTENANCE SERVICES,
7 INC. ("Defendant"), the court having reviewed all related briefing
8 and heard oral argument from counsel makes these Findings of Fact
9 and Conclusions of Law.

10 To the extent any Findings of Fact also contain Conclusions of
11 Law, said Conclusions of Law should be considered as such. To the
12 extent any Conclusions of Law also contain Findings of Fact, said
13 Findings of Fact should be considered as such.

14 **Findings of Fact**

15 1. This is an indemnity, contribution, and breach of contract
16 action following the settlement of *Bert & Linda Brasher v. Union*
17 *Pacific Railroad Company, et al.* that was pending in the Second
18 Judicial District Court for the State of Nevada in and for the
19 County of Washoe, Case No. CV08-01825 (the "Underlying Action").
20 Plaintiffs were the defending and indemnifying insurance companies
21 for Union Pacific Motor Freight Company and Union Pacific
22 Corporation ("Union Pacific") in the Underlying Action and paid a
23 total settlement of \$2,000,000 to Bert and Linda Brasher,
24 Plaintiffs in the Underlying Action, on behalf of both Union
25 Pacific and IMS.

26 2. The Underlying Action arose from injuries Mr. Bert Brasher
27 sustained on July , 2006, at a loading dock in Reno, Nevada while
28 employed by Devine Intermodal ("Devine") as a truck driver.

1 Specifically, Mr. Brasher alleged he was manually operating a
2 spring-loaded slider arm to adjust the rear axle assembly of a 53-
3 foot trailer chassis when his left hand was crushed because the
4 slider arm allegedly popped out of position and retracted. As a
5 result, his left hand was pinned between the slider arm handle and
6 the z-bar metal plate of the chassis' tandem axle assembly. Mr.
7 Brasher sustained a laceration to his left middle finger for which
8 he underwent surgery. He later developed reflex sympathetic
9 dystrophy, a type of complex regional pain syndrome. Mr. Brasher
10 claimed he had complete and permanent loss of use of his left arm
11 and constant pain. He asserted multiple damage claims including
12 medical expenses, wage loss, and loss of earning capacity.

13 3. The subject trailer chassis was owned by Union Pacific and
14 interchanged by Devine at Union Pacific's intermodal ramp in
15 Sparks, Nevada. Pursuant to a Ramp Contractor Agreement with Union
16 Pacific (the "Contract"), Defendant performed terminal operating
17 services at the Sparks, Nevada intermodal ramp where the subject
18 trailer chassis was interchanged prior to the accident, including
19 maintenance and repair of the chassis. The Contract contains an
20 express indemnity provision that reads as follows:

21 The Contractor shall indemnify and hold harmless the
22 Railroad [. . .] against and from any and all liability,
23 loss, damage, claims, demands, costs and expenses of
24 whatsoever nature, including court costs and attorneys'
25 fees, arising from or growing out of any injury to or
26 death of persons whomsoever (including officers, agents
27 and employees of the Railroad, of the Contractor and of
28 any subcontractor, as well as other persons) or loss of or
damage to property whatsoever (including property of or in
the custody of the Railroad, the Contractor or any
subcontractor as well as other property). The right to
indemnify shall accrue when such injury, death, loss or
damage occurs from any cause and is associated in whole or
in part with the work performed under this agreement, a
breach of the agreement or the failure to observe the

1 health and safety provisions of the agreement or any
2 activity or omission arising out of performance or
3 nonperformance of this agreement. However, the Contractor
3 shall not indemnify the Railroad when the loss is caused
3 by the direct active negligence of the Railroad.

4 4. The Contract also required Defendant to procure commercial
5 general liability insurance coverage for Union Pacific with a
6 single occurrence limit of \$5 million, including, but not limited
7 to, broad form contractual liability and coverage for bodily
8 injuries. Further, the Contract required Defendant to procure
9 business automobile coverage with a combined single limit of at
10 least \$1 million per occurrence, including, but not limited to,
11 coverage for bodily injuries and for all vehicles non-owned. The
12 Contract stated that "[a]ll policy(ies) required above (excluding
13 Workers Compensation and Professional Liability) shall provide
14 severability of interests and shall name Railroad as an additional
15 insured."

16 5. Section 7 of the Contract entitled "Specifications for
17 Intermodal Trailer/Tire Repairs/Replacements" provides, in part,
18 the following:

19 **Contractor shall perform any necessary repairs to the**
20 **intermodal Equipment in order to keep such Equipment in**
20 **good operating condition.** Contractor shall furnish labor
21 and shall provide all parts, forms, and supplies as
22 requested by the Railroad in order to make repairs to said
23 Equipment. Contractor shall maintain at each Facility an
24 inventory of supplies and repair parts in such content and
24 quality as are jointly determined by Contractor and the
24 Railroad Representative from time to time, but in all
24 cases in such content and quality as are reasonably
24 determined to be required for the Work.

25 (Emphasis added.) Section 9, "Specifications for Intermodal
26 Trailer/Tire Repairs/Replacements," provides, in part:

27 **Railroad agrees to assist Contractor in locating any piece**
27 **of Equipment in need of repair,** and shall position the
28 Equipment at an agreed service area for servicing, if

1 possible, in a manner so as not to cause undue delay to
2 the Maintenance of Equipment.

2 (Emphasis added.) Section 3, "Trailer/Container/Chassis Repair,"
3 provides, in part:

4 Repairs and maintenance to any railroad owned or
5 controlled Intermodal Equipment exceeding \$450.00 for
6 owner responsibility repairs must have an authorization
7 number from the Equipment owner, which is to be obtained
8 by the Contractor from the Equipment owner.

7 Section 5 entitled "Trailer/Container/Chassis Repair" provides, in
8 part, the following:

9 Contractor shall maintain all records of all repairs as
10 well as any and all Federal Highway Administration (FHWA)
11 Inspections or California Bi-Annual (BIT) Inspections, if
12 applicable, performed in accordance with Railroad policy,
13 and shall furnish such reports as required by the Railroad
14 Representative as shown in Item No. 13, Index of
15 Maintenance and Repair Schedules and Forms, upon request.

16 6. On June 30, 2008, the Brashers filed a Complaint (Case No.
17 CV08-01753) naming Union Pacific as a defendant. Mr. Brasher's
18 employer on the date of loss, Devine Intermodal, filed a Complaint
19 on July 7, 2008 (Case No. CV08-01825). The two cases were
20 consolidated on December 9, 2008.

21 7. The Brashers' Complaint alleged that "Union Pacific
22 Railroad Company [. . .] negligently and carelessly performed
23 various functions, including, but not limited to, negligent
24 inspection, maintenance, servicing and repair of said trailer
25 chassis, horizontal sliding bar and key way slot." (Complaint,
26 Paragraph 15.)

27 8. On June 6, 2012, through legal counsel, Union Pacific sent
28 a letter tendering its defense and indemnity regarding the
29 Brashers' claims to Defendant. In a letter dated July 25, 2012,
30 Defendant rejected union Pacific's defense and indemnity.

31 9. On September 13, 2012, Union Pacific filed a third-party

1 complaint against Defendant in the Underlying Action for
2 contractual indemnity, contribution and breach of contract. In its
3 breach of contract claim, Union Pacific alleged that Defendant
4 failed to procure an insurance policy naming Union Pacific as an
5 additional insured as required pursuant to the Contract.

6 10. On November 26, 2012, the Brashers filed a Third Amended
7 Complaint to Substitute Proper Parties naming IMS as a defendant in
8 the Underlying Action. The complaint alleged, in part:

9 Intermodal Maintenance Services, Inc. [. . .] negligently
10 and carelessly performed various functions, including, but
not limited to, negligent inspection, maintenance
11 servicing and repair of said trailer chassis, horizontal
sliding bar and key way slot.

12 11. At an all-party mediation on November 16, 2012, in Case
13 No. CV08-01753, Plaintiffs negotiated a settlement with the
14 Brashers in the amount of \$2 million to extinguish both Union
15 Pacific and Defendant's legal liabilities and in exchange for
16 dismissal of the Brashers' Complaint against Union Pacific and
17 Defendant. On November 21, 2013, Union Pacific filed a Motion for
18 Determination of Good Faith Settlement and also placed the material
19 terms of its settlement on the Court's record at a hearing on
20 November 29, 2012. IMS opposed Union Pacific's Motion, and the
21 Motion was argued on January 24, 2013.

22 12. During the hearing on January 24, 2013, the court asked
23 counsel for Union Pacific to identify "what litigation or what
24 causes of action would survive" if the Court granted the motion.
25 Counsel responded as follows:

26 [I]f the motion is granted, then the only action Union
27 Pacific will be involved in, also, given that the motions
for determination by SAF and Hyundai were just granted, if
28 our motion is also granted, the only remaining action
involving my client would be its cross-claim for express

1 indemnity and contribution against IMS and Devine
2 Intermodal.

3 Shortly thereafter, the court asked whether anyone disagreed
4 with what would be left, and permitted counsel for Union Pacific to
5 proceed. Counsel then stated, in part:

6 Okay. So as we sort of alluded to already, Your Honor, IMS
7 is the only party that's filed an opposition and an errata
thereto that clarified that if our motion is granted, it
8 does not affect any express contractual claims between
Union Pacific and Devine. That's an accurate statement of
law.

9 On February 8, 2013, the Court issued an Order Granting Union
10 Pacific's Motion. On February 15, 2013, IMS filed a Motion that
11 requested the court issue a supplemental order clarifying that all
12 claims filed against IMS except Union Pacific's are dismissed and
13 forever barred as a result of Union Pacific's settlement with
14 Plaintiffs. The court issued an Order Granting IMS's Motion to
15 Clarify on March 15, 2013, and a Corrected Order that the \$2
16 million settlement extinguished both Union Pacific and Defendant's
17 legal liabilities to all parties. Footnote 5 on page 7 of the
18 Corrected Order states,

19 As discussed above, UPRR asserts all of its claims against
20 IMS survive after the instant Motion is granted. By
granting the instant Motion, the Court does not decide
21 whether UPRR's assertion is accurate. Nor does the Court
express an opinion as to whether UPRR will succeed on the
merits of any of its claims. Those matters are not before
the Court by way of the instant motion.

22 13. On March 4, 2013, in Case No. CV08-01753, Defendant filed
23 a Motion in Limine arguing that it was entitled to summary
24 adjudication on Union Pacific's contractual claims on the basis
25 that Union Pacific could not establish damages because Union
26 Pacific's insurers (Plaintiffs in the present case) funded the
27 settlement. Subsequently, on March 25, 2013, Union Pacific and IMS
28

1 entered into a Settlement Agreement and Release and Reservation of
2 Claims. That agreement provides, in part, the following:

3 Mutual Releasees acknowledge that this Release is limited and
4 does not include, affect, or otherwise release any other claims,
5 rights or defenses Mutual Releasees have, and in no way shall act
6 as a bar, defense, waiver, estoppel, or retraxit in any separate
7 subrogation action by Zurich America Insurance Company ("Zurich")
8 and/or Discover Property & Casualty Insurance Company ("Discover")
9 against Releasees and/or Releasees' insurance carriers regarding
10 the \$2,000,000.00 settlement paid by Zurich and Discover on behalf
11 of Releasees and Releasees to Plaintiffs in the Underlying Action,
12 and the defense fees and costs paid by Zurich in its defense of
13 Releasees in the Underlying Action.

14 An Order Granting Stipulation for Dismissal of Union Pacific's
15 Cross-Claim against IMS without prejudice was filed on March 28,
16 2013. A Stipulation for Dismissal With Prejudice of the Brashers'
17 Complaint against IMS was filed on March 28, 2013.

18 14. On September 17, 2013, Union Pacific assigned all rights
19 of action arising out of the Contract to Plaintiffs. On September
20 18, 2013, Plaintiffs filed the instant Complaint asserting claims
21 for relief for Breach of Contract, Express Indemnity, Implied and
22 Equitable Indemnity, and Contribution (#1). IMS filed an Answer on
23 November 13, 2013 (#6).

24 15. Plaintiffs were damaged in the amount of \$2,589,313 in
25 connection to the Brasher's claims. This amount consists of a
26 \$2,000,000 settlement payment to the Brashers, plus \$589,313 in
27 fees and costs incurred in connection to Union Pacific's defense in
28 the underlying litigation.

1 **Conclusions of Law**

2 16. IMS's duty under the Contract to indemnify Union Pacific
3 was broad. The duty was triggered by any personal injury or claim
4 associated in whole or in part with the work under the Contract. No
5 finding of negligence by IMS was required for the duty to indemnify
6 to trigger.

7 17. In the Underlying Action, Mr. Brasher's personal injury
8 arose in connection to a bent slider bar on an intermodal trailer
9 chassis that, prior to the injury had been located at Union
10 Pacific's intermodal ramp in Sparks, Nevada, where IMS was
11 contracted to perform maintenance services on Union Pacific's
12 intermodal equipment.

13 18. The Contract clearly sets forth a duty for IMS to inspect
14 intermodal equipment at Union Pacific's facility, including trailer
15 chassis of the sort that injured Mr. Brasher and to repair such
16 equipment in order to keep it in good operating condition. Mr.
17 Brasher's injury was, therefore, associated in whole or in part
18 with IMS's work under the Contract. Thus, Mr. Brasher's injuries in
19 the underlying litigation were associated in whole or in part with
20 IMS's work under the Contract and triggered IMS's contractual duty
21 to indemnify Union Pacific. There are no material issues of fact in
22 this regard.

23 19. Similarly, Mr. Brasher's injury claims and Mrs. Brasher's
24 related loss of consortium claims in the underlying litigation
25 arose in connection to the bent slider bar. In particular, the
26 Brashers sued IMS directly in that litigation alleging that Mr.
27 Brasher's personal injuries resulted from IMS's negligent
28 performance of its inspection and maintenance duties. Therefore,

1 MR. And Mrs. Brasher's claims in the underlying litigation were
2 associated in whole or in part with IMS's work under the Contract
3 and, therefore, triggered IMS's contractual duty to indemnify Union
4 Pacific. There are no material issues of fact in this regard.

5 20. The Contract contains an express exception to the duty to
6 indemnify that applies where an injury or claim is caused by Union
7 Pacific's direct active negligence. IMS posits that Union Pacific's
8 duty to inspect the subject chassis and failure to do so raises a
9 material issue of fact regarding whether the Brasher's injuries or
10 claims were caused by Union Pacific's active negligence. However, a
11 failure of Union Pacific to identify or repair the bent slider arm
12 is not material to IMS avoiding liability. Since IMS is unable to
13 provide any evidence that an affirmative act by Union Pacific may
14 have caused Mr. Brasher's injuries - such as evidence that Union
15 Pacific bent the slider handle or knew that the slider handle was
16 bent but decided to leave it in place - IMS has failed to raise a
17 triable issue of fact that the "active negligence" exception to the
18 Contract's indemnity provision applies in this case.

19 21. In response to Plaintiffs' assertion that IMS failed to
20 procure a commercial liability policy in the amount of \$5 million
21 and a business automotive insurance policy in the amount of \$1
22 million, both naming Union Pacific as an additional insured,
23 counsel for IMS concedes that policies meeting these requirements
24 have not been produced in this litigation. The only evidence IMS
25 provides in defense of the alleged breach of the Contract is
26 speculative deposition testimony from an IMS representative that
27 she believes IMS may have obtained the insurance policies in
28 accordance with the Contract. This evidence is insufficient. The

1 Court, therefore, concludes that no triable issue of fact exists
2 that IMS breached the Contract by failing to procure the specified
3 insurance coverage.

4 22. IMS raises a statute of limitations defense regarding
5 Plaintiffs' breach of contract claim. An issue exists regarding
6 whether Nebraska's five-year statute of limitations or Nevada's
7 six-year statute of limitations period applies to this dispute.
8 Plaintiffs argue that the statute of limitations of the forum state
9 (Nevada) applies to this dispute while IMS argues that Nebraska's
10 statute of limitations applies pursuant to the Contract's choice of
11 law provisions. Here, applying the Restatement's conflict of law
12 provision, the court finds (1) there is no evidence that Nebraska
13 governing law was selected in anything other than good faith
14 between the parties; (2) Nebraska has a substantial relation to the
15 transaction because Union Pacific is headquartered in Nebraska; and
16 (3) applying Nebraska's statute of limitations comports with
17 Nevada's recognized public interest in recognizing freedom to
18 contract. Therefore, the court concludes Nebraska's statute of
19 limitations applies to this case.

20 23. The court finds that IMS had a continuing obligation under
21 the Contract to provide the specified insurance. Therefore, IMS was
22 in continuing breach of the Contract until the contract period
23 ended on November 15, 2007. Since Plaintiffs filed the present
24 action on September 18, 2013, this would be outside the five-year
25 statute of limitations period under Nebraska law. Therefore, if
26 equitable tolling did not apply in this case regarding the breach
27 of contract claim, this claim would be time-barred.

28 24. The court finds as a matter of law that the circumstances

1 justify application of the doctrine of equitable tolling.
2 "Equitable tolling is generally applied in situations 'where the
3 claimant has actively pursued his judicial remedies by filing a
4 defective pleading during the statutory period, or where the
5 complainant has been induced or tricked by his adversary's
6 misconduct into allowing the filing deadline to pass.'" *O'Donnell*
7 *v. Vencor, Inc.*, 465 F.3d 1063, 1068 (9th Cir. 2006) (quotation
8 omitted). Here, Union Pacific brought the breach of contract claim
9 regarding insurance coverage in the underlying case on September
10 13, 2012, which was within the five-year statutory period.
11 Subsequently, on March 25, 2013, after the court in the underlying
12 case granted Union Pacific's motion for a good faith settlement,
13 IMS and Union Pacific entered a written agreement pursuant to which
14 Union Pacific dismissed its third-party claims against IMS so that
15 the real parties in interest on those claims, Plaintiffs in this
16 case, could pursue this subrogation action. In effect, the court
17 finds as a matter of law that Plaintiffs in this matter have been
18 diligently pursuing the contract claim against IMS since Union
19 Pacific's third-party claim against IMS was filed on September 13,
20 2012. As a result, the defense of the statute of limitations does
21 not bar that claim.

22 25. IMS raises a judicial estoppel defense to the breach of
23 contract claim principally based on one comment made by counsel for
24 Union Pacific at the hearing on the Motion for Determination of
25 Good Faith Settlement on January 24, 2013. Namely, during a
26 discussion on the record regarding what claims would survive a good
27 faith settlement determination, counsel for Union Pacific did not
28 mention the contract claim. In *New Hampshire v. Maine*, 532 U.S.

1 742, 743, 121 S.Ct. 1808 (2001), the Court described the doctrine
2 of judicial estoppel as follows:

3 Judicial estoppel is a doctrine distinct from the res
4 judicata doctrines of claim and issue preclusion. Under
5 the judicial estoppel doctrine, where a party assumes a
6 certain position in a legal proceeding, and succeeds in
7 maintaining that position, he may not thereafter, simply
8 because his interests have changed, assume a contrary
9 position formerly taken by him. *Davis v. Wakelee*, 156 U.S.
10 680, 689, 15 S.Ct. 555, 39 L.Ed. 578. The purpose of the
11 doctrine is to protect the integrity of the judicial
12 process by prohibiting parties from deliberately changing
13 positions according to the exigencies of the moment.
14 Courts have recognized that the circumstances under which
15 judicial estoppel may appropriately be invoked are not
16 reducible to any general formulation. Nevertheless,
17 several factors typically inform the decision whether to
18 apply the doctrine in a particular case: First, a party's
19 later position must be clearly inconsistent with its
20 earlier position. Second, courts regularly inquire whether
21 the party has succeeded in persuading a court to accept
22 that party's earlier position, so that judicial acceptance
23 of an inconsistent position in a later proceeding would
24 create the perception that either the first or the second
25 court was misled. Third, courts ask whether the party
26 seeking to assert an inconsistent position would derive an
27 unfair advantage or impose an unfair detriment on the
28 opposing party if not estopped. In enumerating these
factors, this Court does not establish inflexible
prerequisites or an exhaustive formula for determining the
applicability of judicial estoppel. Additional
considerations may inform the doctrine's application in
specific factual contexts.

19 Here, none of the factors for application of the doctrine are
20 present. That is, the inclusion of the breach of contract claim in
21 the present action is not clearly inconsistent with the earlier
22 position taken by Plaintiffs' predecessor in interest in the
23 Underlying Action, Union Pacific. Notably, counsel for Union
24 Pacific stated during the hearing that the settlement would not
25 affect any of Union Pacific's express contract claims. Further the
26 Settlement Agreement and Release and Reservation of Claims that
27 Union Pacific and IMS entered on March 25, 2013, expressly
28 preserved the entire subrogation action with no limitation

1 regarding the breach of contract claim.

2 In regard to the second factor, the facts show that counsel's
3 statement did not have the effect of misleading the court. Notably,
4 in its Corrected Order of March 15, 2013, the court specifically
5 wrote, "UPRR asserts *all of its claims* against IMS survive after
6 the instant Motion is granted." (Emphasis added.) Thus, if the
7 court had any confusion regarding UPRR's position on which claims
8 would survive the good faith settlement determination, it was
9 cleared up by the time the court made its ruling. Moreover, the
10 court wrote, "By granting the instant Motion, the Court does not
11 decide whether UPRR's assertion [that all its claims against IMS
12 survive a good faith settlement determination] is accurate. [. . .]
13 Those matters are not before the Court by way of the instant
14 Motion." Thus, the court's ruling granting the Motion for
15 Determination of Good Faith Settlement was not in any way based on
16 a representation by counsel for Union Pacific that the breach of
17 contract claim would not survive the good faith settlement
18 determination.

19 Third, the court finds there is no prejudice to IMS resulting
20 from the inclusion of the contract claim in the present action. IMS
21 argues that it has suffered an unfair detriment because the
22 contract claim is "new and unexpected." However, the claim is
23 neither new nor unexpected since it was present in the Underlying
24 Action and since the parties entered a written agreement that
25 expressly preserved the entirety of Plaintiff's claims against IMS.
26 The court finds that Union Pacific's settlement with the Brashers
27 in the underlying case had no impact on Union Pacific's breach of
28 contract claim against IMS other than to add the amount paid in

1 settlement to the damages resulting from IMS's breach. As a matter
2 of law, the doctrine of judicial estoppel does not bar Plaintiff's
3 contract claim regarding insurance coverage.

4 26. IMS has failed to assert that there are any material
5 issues of fact in dispute on the amount of damages Plaintiffs
6 sustained, including the \$2,000,000 settlement, together with fees
7 and costs of \$589,313. The court finds that there are no material
8 issues of fact in this regard.

9 27. The court finds that the issues raised in Plaintiffs'
10 motion are dispositive. Consequently, it does not need to reach the
11 issues raised in IMS's Motion to Dismiss for Spoliation of
12 Evidence.

13 28. The court reviewed the issues raised by both parties
14 regarding Plaintiffs' Motion for Leave to Supplement its Motion for
15 Summary Judgment. Under Federal Rule of Civil Procedure 56(e), the
16 court may give a party an opportunity to properly support an
17 assertion of fact in a motion for summary judgment. Here, IMS
18 objected to certain documentary evidence in support of Plaintiffs'
19 motion on the grounds of hearsay and lack of foundation. Plaintiffs
20 then moved to supplement their motion to address the objections.
21 The court grants Plaintiffs' Motion. The court finds the
22 documentary evidence, combined with the supplement, sufficient to
23 deny the original objection IMS raised.

24 29. Plaintiffs have two outstanding requests for judicial
25 notice that IMS opposed asserting that Plaintiffs had misused the
26 doctrine. The Court may take judicial notice of judicial or
27 administrative proceedings which have a direct relation to the
28 matter at issue, as is the case here, provided that notice does not

1 extend to the veracity of the arguments and disputed facts
2 contained therein. The court takes judicial notice of the existence
3 of the matters of public record presented by Plaintiffs.

4 30. Plaintiffs are entitled to judgment in the amount of
5 \$2,589,313.

6 Conclusion

7 Based on the Findings of Fact and Conclusions of Law set forth
8 above,

9 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs'
10 Motion for Summary Judgment on its express indemnity and breach of
11 contract claims is GRANTED. Plaintiffs are entitled to judgment in
12 the amount of \$2,589,313, together with interest at the lawful rate
13 at the time of entry of judgment until paid in full.

14 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that IMS's Motion
15 for Partial Summary Judgment is DENIED.

16 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that IMS's Motion
17 to Dismiss for Spoliation of Evidence is DENIED.

18 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs'
19 Motion for Leave to Supplement its Motion for Summary Judgment
20 under F.R.C.P. 56(e) is GRANTED.

21 IT IS FURTHER ORDERED ADJUDGED AND DECREED that Plaintiffs'
22 Requests for Judicial Notice are GRANTED.

23 || TT TS SQ ORDERED.

24 DATED: This 20th day of March, 2015.

Howard D. McKibben
UNITED STATES DISTRICT JUDGE