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9 Attorneys for Third-Party Plaintiffs SAN DIEGO METROPOLITAN TRANSIT
10 SYSTEM, a public entity; SAN DIEGO TROLLEY, INC., a California Corporation;
11 SAN DIEGO TRANSIT CORPORATION, a California corporation; UNIVERSAL
12 PROTECTION SERVICE GP, INC., a California corporation; BILL BUCK, an
13 individual; CHRIS MINER, an individual

14 **UNITED STATES DISTRICT COURT**
15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 ALLEN KOKA, an individual,
17
18 Plaintiff,

19 v.

20 SAN DIEGO METROPOLITAN
21 TRANSIT SYSTEM, a public entity,
22 SAN DIEGO TROLLEY, INC., a
23 California corporation; SAN DIEGO
24 TRANSIT CORPORATION, a
25 California corporation; UNIVERSAL
26 PROTECTION SERVICE GP, INC.,
27 a California corporation; BILL
28 BUCK, an individual; CHRIS
MINER, an individual; and DOES 1-
20, inclusive,

Defendants.

SAN DIEGO METROPOLITAN
TRANSIT SYSTEM, a public entity;
SAN DIEGO TROLLEY, INC., a
California Corporation; SAN DIEGO
TRANSIT CORPORATION, a
California corporation; UNIVERSAL
PROTECTION SERVICE GP, INC.,
a California corporation; BILL
BUCK, an individual; CHRIS
MINER, an individual

Third-Party Plaintiffs,

v.

CASE NO. 15 CV 0763 AJB KSC

**THIRD-PARTY COMPLAINT
AGAINST NMS
MANAGEMENT, INC. FOR
INDEMNIFICATION,
CONTRIBUTION AND
DECLARATORY RELIEF**

Judge: Anthony J. Battaglia
Magistrate Judge: Karen S. Crawford
[Complaint Filed: 04/07/15]

[DEMAND FOR JURY TRIAL]

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1 NMS MANAGEMENT, INC., a)
2 California Corporation, and ROES 1-)
20, inclusive.)
3 Third-Party Defendants.)
4

5 Third-Party Plaintiffs SAN DIEGO METROPOLITAN TRANSIT SYSTEM,
6 a public entity; SAN DIEGO TROLLEY, INC., a California Corporation; SAN
7 DIEGO TRANSIT CORPORATION, a California corporation; UNIVERSAL
8 PROTECTION SERVICE GP, INC., a California corporation; BILL BUCK, an
9 individual; CHRIS MINER, an individual (hereinafter collectively referred to as
10 “MTS”) by and through their counsel, Wheatley Bingham & Baker, LLP, for its
11 Third-Party Complaint against NMS Management, Inc. (“NMS”), a California
12 corporation, and ROE Defendants 1-20, alleges on knowledge as to itself and its
13 conduct and upon information and belief as to all other matters as follows:

14 **NATURE OF ACTION**

15 1. This is a Third-Party Complaint for indemnification, contribution and
16 declaratory relief. In the original complaint filed in the above-captioned action,
17 styled Allen Koka v. San Diego Metropolitan Transit System, et al. (the “*Koka*
18 *Complaint*”) Allen Koka alleges *inter alia*, claims against MTS for Civil Rights
19 violations pursuant to 42 U.S.C. § 1983 and California Civil Code §§ 51.7, 52.1, as
20 well as various state law claims for assault, battery, false imprisonment/arrest,
21 intentional infliction of emotional distress, negligence and negligent
22 hiring/supervision of employees. The matter arises from the arrest and detention of
23 Koka by MTS at Metropolitan Transit System’s secured facility located at 1255
24 Imperial Avenue, in San Diego, for violation of MTDB Ordinance No. 13.5 –
25 *Entering a transit property not open to the public*; and Penal Code § 148.1 –
26 *Willfully resisting a public officer*. Koka was at all relevant times herein, an
27 employee of NMS, a vendor under contract with Metropolitan Transit System to
28 ///

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1 perform cleaning services with respect to San Diego Trolley, Inc.’s light rail
2 vehicles.

3 2. NMS executed a contract with Metropolitan Transit System to provide
4 cleaning services for the light rail vehicles (LRVs) operated by San Diego Trolley,
5 Inc. The relevant contract is identified as Standard Service Agreement; MTS Doc.
6 No. G1387.0-11 Janitorial Services (“Service Agreement”). Pursuant to paragraph 4
7 – *Indemnity* of the Service Agreement, NMS (aka “Contractor”) agrees as follows:
8 *“As between MTS and Contractor, Contractor is deemed to assume responsibility*
9 *and liability for, and Contractor shall indemnify and hold harmless, MTS, SDTI,*
10 *SDTC, SD&AE, SD&IV and any and all of its directors, officers, agents or*
11 *employees from and against any and all claims, loss, damage, charge or expense,*
12 *whether direct or indirect, which MTS, SDTI, SDTC, SD&AE, SD&IV or such*
13 *directors, officers, agents or employees may be put or subjected, by reason of any*
14 *damage, loss, or injury of any kind or nature whether to persons or property caused*
15 *by or resulting from or in connection with any negligent act or action, or any*
16 *neglect, omission, or failure to act when under a duty to act on the part of*
17 *Contractor or any of its officers, agents, servants or subcontractors in its or their*
18 *performance under this Agreement. In addition to any other remedy authorized by*
19 *law, so much of the money due Contractor under the Agreement as shall be*
20 *considered necessary by MTS may be retained until disposition has been made of*
21 *any claim for damages.”*

22 3. Pursuant to paragraphs B.1.7 and B.3.6 of the Service Agreement, NMS
23 acknowledges and agrees that *“All MTS facilities are secured facilities and require*
24 *access control devices (identification cards, known as ID cards). Upon award of the*
25 *contract, the Contractor’s employees will be issued photo ID cards [] The*
26 *Contractor and their employees must have visible MTS identification on their*
27 *persons at all times.”*

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1 4. NMS breached its duties and responsibilities under the terms/conditions
2 of the Service Agreement and said breach was the proximate cause of Plaintiff’s
3 alleged damages. Specifically, NMS engaged in the following acts or omissions: (a)
4 Koka was permitted by NMS to commence employment at Metropolitan Transit
5 System’s secured A-Yard without issuing him the requisite identification card/badge
6 in violation of the Service Agreement; (b) NMS failed to train, instruct and/or
7 otherwise supervise Koka regarding Metropolitan Transit System’s prohibition
8 against any persons entering Metropolitan Transit System’s secured facilities without
9 displaying the requisite identification card/badge; (c) NMS’ nighttime
10 supervisory/management staff allowed, encouraged and/or otherwise ratified Koka
11 and other cleaning staff personnel to enter Metropolitan Transit System’s secured
12 facilities without the requisite identification card/badge as mandated by the Service
13 Agreement; (d) NMS administered indoctrination training to Koka at Metropolitan
14 Transit System’s secured facility prior to completion of the requisite background
15 investigation as opposed to conducting said training at NMS’ off-site office in
16 violation of the Service Agreement, as well as NMS’ policies/procedures; and (e)
17 NMS failed to instruct Koka regarding his obligation to submit to the
18 authority/instruction of Code Compliance Inspectors/Transit System Security
19 officers while on Metropolitan Transit System’s secured facilities.

20 5. Pursuant to Rule 14(a) of the Federal Rules of Civil Procedure, MTS as
21 Third-Party Plaintiff, brings this Third-Party Complaint against NMS to protect and
22 secure its indemnification rights under the Service Agreement and in equity. To the
23 extent that MTS may be found liable to Koka for the claims alleged in the *Koka*
24 *Complaint*, or otherwise incurs costs in defending said claims, NMS is contractually
25 and equitably required to indemnify MTS for any liabilities or costs incurred in this
26 action.

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PARTIES

1
2 6. Metropolitan Transit System is a public entity authorized and existing
3 as such in and under the laws of the State of California, with its primary offices
4 located at 1255 Imperial Avenue, San Diego, California 92101. Metropolitan Transit
5 System is responsible for the implementation, management and operation of public
6 transit services in the City of San Diego and other cities/jurisdictions within the
7 County of San Diego.

8 7. San Diego Trolley, Inc. (SDTI) is a California public corporation and
9 subsidiary of Metropolitan Transit System who is responsible for the
10 implementation, management and operation of a public transit light rail system
11 within the boundaries of the County of San Diego.

12 8. San Diego Transit Corporation (SDTC) is a California public
13 corporation and subsidiary of Metropolitan Transit System who is responsible for the
14 implementation, management and operation of a public transit bus service in the City
15 of San Diego and other cities/municipalities within the boundaries of the County of
16 San Diego.

17 9. Universal Protection Service GP, Inc. (UPS) is a California corporation
18 engaged in a contract to provide security/law enforcement services to Metropolitan
19 Transit System and its subsidiaries under the title *Transit System Security*. UPS
20 provides a contracted security force to be utilized onboard Metropolitan Transit
21 System’s vehicles and in its transit facilities/properties located in the City of San
22 Diego and other cities/municipalities in the County of San Diego.

23 10. NMS Management, Inc. (NMS) is a California corporation doing
24 business in the City and County of San Diego, California. NMS is under contract
25 with Metropolitan Transit System to provide cleaning services to the light rail
26 vehicles (LRVs) operated by San Diego Trolley, Inc.

27 11. MTS is ignorant of the true names and capacities of Third-Party
28 Defendants sued herein as ROE DEFENDANTS 1-20, and therefore sues these

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1 Third-Party Defendants by such fictitious names. MTS will amend this Third-Party
2 Complaint to allege their true names and capacities when ascertained.

3 **JURISDICTION AND VENUE**

4 12. The *Koka Complaint* arises under 42 U.S.C. § 1983 and California law.
5 This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §
6 1331.

7 13. This Court further has subject matter jurisdiction over Koka’s state law
8 claims based on supplemental jurisdiction under 28 U.S. § 1367.

9 14. This Court likewise has jurisdiction over this matter and the corporate
10 defendants pursuant to 12 U.S.C. § 1819(b)(2)(A).

11 15. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because
12 the actions challenged herein occurred in the Southern District of California.

13 **STATEMENT OF FACTS**

14 **I. The Failure of NMS and Terms of the Service Agreement.**

15 16. On November 13, 2014, at approximately 10:40 p.m., Code Compliance
16 Inspectors (CCI) Bill Buck (Buck) and Chris Miner (Miner) were on duty in full
17 uniform as public officers employed by San Diego Trolley, Inc. (SDTI), when they
18 observed Koka in Metropolitan Transit System’s secured A-Yard at 1255 Imperial
19 Avenue in San Diego, which is used to accommodate and house SDTI’s trains and
20 operations/maintenance facilities. The area is secured and not open to the public in
21 order to preserve the security and integrity of the light rail vehicles and system.

22 17. Koka was not displaying an MTS badge or authorized clearance
23 identification. CCI Buck and Miner contacted Koka and inquired whether he
24 possessed a badge authorizing him to be on the premises. Koka denied having a
25 badge or authorization but reported being a contract “cleaner” employed by NMS to
26 clean SDTI’s light rail vehicles (LRVs). Koka was advised that he still required a
27 badge whether or not he was a contract cleaner for NMS.

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1 18. Inspector Buck instructed Plaintiff that he would be issuing Plaintiff a
2 citation for violation of MTDB Ordinance 13.5 – *entering a transit property not*
3 *open to the public*. Koka was otherwise to leave the property after receiving the
4 citation. CCI Buck prepared the citation and requested that Plaintiff sign it. Plaintiff
5 nevertheless refused to sign the citation. CCI Buck instructed Plaintiff that if he did
6 not sign the citation, the other alternative would be to place Koka under arrest and
7 transport him to San Diego County Jail.

8 19. Koka continued in his refusal to sign the citation. CCI Buck with the
9 assistance of other Code Compliance Inspectors and Transit System Security officers
10 attempted to take Koka into custody by placing him in handcuffs. A physical
11 altercation subsequently ensued resulting in Koka being taken to the ground and
12 handcuffs placed on his wrists behind his back. Koka was taken into custody and
13 cited for violation of MTDB Ordinance No. 13.5, as well as Penal Code § 148.1 –
14 *willfully resisting a public officer*.

15 20. Koka denies that NMS ever issued him an identification card/badge and
16 he was previously allowed by NMS to work on Metropolitan Transit System’s
17 secured facilities without a badge, in violation of the Service Agreement.

18 21. NMS President David Guaderrama concedes that Koka was allowed by
19 NMS to commence his employment with NMS at Metropolitan Transit System’s
20 secured facilities without first issuing Koka the requisite identification card/badge as
21 mandated by the Service Agreement.

22 22. NMS President Guaderrama nevertheless indicates that “*Our policy is*
23 *never to permit an employee to perform any work on MTS property without complete*
24 *safety training and MTS badging [] NMS’s Company policy mandates that all*
25 *interviewing, training and orientation must occur at NMS Corporate Office in*
26 *National City, and not until completion of NMS’s training regimen and results of*
27 *background investigation are completed, no employee is permitted to enter onto*
28 *MTS grounds.*”

1 23. Notwithstanding the aforementioned NMS's policy, NMS admittedly
2 allowed Koka to enter and perform training without an MTS badge on Metropolitan
3 Transit System's secured facilities on November 7-11, 2014, in violation of the
4 Service Agreement and NMS's policy.

5 24. Security is of utmost importance to MTS as a public transit provider.
6 MTS is reliant on NMS to perform the requisite background investigation with
7 respect to its employees before issuing an MTS badge allowing him or her to enter
8 MTS' secured facilities.

9 25. NMS's written policy is that *"If employee does not have proper*
10 *identification, he/she will not be allowed to enter MTS property."*

11 26. NMS President Guaderrama further indicates that NMS instructs/trains
12 NMS employees that (a) NMS employees will only have access to Metropolitan
13 Transit System's property thirty (30) minutes before their working shift starts and
14 thirty (30) minutes after ending their shift; (b) NMS employees are not allowed to be
15 inside Metropolitan Transit System's secured facilities on their days off; (c) All
16 employees must be wearing their Metropolitan Transit System badge at all times
17 during working hours and are not authorized to give access to others to the property;
18 (d) For all employees that have family members, friends or others that provide
19 transportation, they must advise them to wait outside of Metropolitan Transit
20 System's property; (e) NMS and Metropolitan Transit System do not allow family
21 members, friends or others as visitors to the Metropolitan Transit System's property;
22 and (f) Any NMS employee who trespasses onto Metropolitan Transit System's
23 property, is subject to a written citation from Metropolitan Transit System's Security
24 Department and will be escorted off the premises and risk possible arrest and
25 termination.

26 27. NMS breached its duties and responsibilities under the terms and
27 conditions of the Service Agreement by (a) Allowing Koka to commence
28 employment on behalf of NMS at Metropolitan Transit System's secured facilities

1 without issuing him the requisite identification card/badge; (b) Failing to train,
 2 instruct and otherwise supervise Koka regarding Metropolitan Transit System's
 3 prohibition against any person entering Metropolitan Transit System's secured
 4 facilities without displaying the requisite identification card/badge; (c) Allowing
 5 NMS's nighttime supervisory personnel as required by Section B.2.3 of the Service
 6 Agreement, to allow, encourage and/or otherwise ratify cleaning staff personnel,
 7 including Koka, to enter Metropolitan Transit System's secured facilities without the
 8 requisite identification card/badge; and (d) Failing to train, instruct and advise NMS
 9 employees, including Koka, of the requirement to submit to the authority of Code
 10 Compliance Inspectors/Transit System Security Officers tasked with maintaining
 11 security on Metropolitan Transit System's facilities/vehicles.

12 28. The Service Agreement expressly states that "*Contractor shall be*
 13 *responsible for its own acts and those of its agents and employees during the term of*
 14 *this Agreement.*" Koka's non-compliance with the instructions of the uniformed
 15 public officer violated the aforementioned provision and otherwise caused the
 16 circumstances/events which are the subject of the instant lawsuit.

17 29. Under the Service Agreement, NMS agrees to indemnify MTS for,
 18 among other things, "*All claims, loss, damage, charge or expense, whether direct or*
 19 *indirect, which MTS, SDTI, SDTC, SD&AE, SD&IV or such directors, officers,*
 20 *agents or employee may be put or subjected, by reason of any damage, loss, or*
 21 *injury of any kind or nature whether to persons or property caused by or resulting*
 22 *from or in connection with any negligent act or action, or any neglect, omission, or*
 23 *failure to act when under a duty to act on the part of Contractor or any of its*
 24 *officers, agents, servants or subcontractors in its or their performance under this*
 25 *Agreement...*"

26 **II. Liabilities and Costs Relating to Koka Complaint.**

27 30. In the *Koka Complaint*, Koka is seeking to hold MTS liable for the
 28 arrest and detention of Koka after being contacted on Metropolitan Transit System's

1 secured facilities without an identification card/badge. Koka alleges in part that MTS
2 “unreasonably and unlawfully seized [Koka], used excessive and unreasonable force
3 against [Koka], unlawfully arrested [Koka], and conspired together to justify and
4 conceal their actions against [Koka]. . . .” (Complaint, at p. 12:14-17.) In particular,
5 Koka claims that “Koka was authorized to be on MTS property [] for work, to report
6 to work, and for all work-related matters.” (Complaint, at p. 5:14-16. Koka was
7 contacted by CCI Buck and Miner and asked to present an identification card/badge.
8 (Complaint, at p. 6:4-5.) Koka nevertheless indicated he was a “new” employee and
9 had not yet been issued an identification card/badge. (Complaint, at p. 6:5-6.) CCI
10 Buck and Miner told Koka they were going to cite Koka for trespassing.
11 (Complaint, at p. 7:9-11.) Koka refused to sign the citation. (Complaint, at p. 8:11.)
12 CCI Buck and Miner “told [Koka] that, if he did not sign the ticket, they would
13 arrest him, put him in handcuffs, and take him to jail.” (Complaint, at p. 8:19-20.)
14 Koka still refused to sign the citation resulting in his arrest. (Complaint, at p. 8:21-
15 22.) Koka, however, has not named NMS as a defendant in the *Koka Complaint*
16 despite NMS being the entity responsible for issuing an identification card/badge to
17 Koka and ensuring he is trained/instructed as to the requirements of having such a
18 badge when on the premises and submitting to the authority of Code Compliance
19 Inspectors and Transit System Security Officers while located on said property.

20 31. Under the Service Agreement, MTS did not assume liabilities for the
21 acts and omissions of NMS that are alleged in the *Koka Complaint*. NMS is
22 responsible for (a) Conducting the requisite background checks of each employee
23 hired by NMS to work on Metropolitan Transit System’s secured facilities; (b)
24 Issuing the mandatory identification cards/badges to each employee before allowing
25 the employee to perform work on behalf of NMS on Metropolitan Transit System’s
26 secured facilities; (c) Training, instructing and supervising NMS employees
27 regarding rules/regulations for being on Metropolitan Transit System’s secured
28 facilities, including but not limited to the possession of the requisite badge; and (d)

1 Training, instructing and supervising NMS employees regarding the authority of
2 Code Compliance Inspectors/Transit System Security Officers for enforcing the
3 rules/regulations on Metropolitan Transit System's secured facilities.

4 32. In the Service Agreement, NMS agrees to indemnify MTS against
5 claims arising from the acts and/or omissions of NMS and/or its officers, agents,
6 servants or subcontractors in its or their performance under the Service Agreement,
7 which would include liabilities or costs incurred in defending the claims asserted in
8 the *Koka Complaint*.

9 33. Even if the *Koka Complaint* is dismissed, MTS is entitled to
10 indemnification from NMS for any costs and expenses, including attorney fees,
11 incurred in defending the claims associated in the *Koka Complaint*.

12 **CLAIM FOR RELIEF**

13 **First Cause of Action**

14 **(Indemnification)**

15 34. MTS realleges and incorporates by reference each and every allegation
16 set forth above in paragraphs 1-33, as though fully set forth herein.

17 35. As set forth above, NMS has agreed to indemnify and hold MTS
18 harmless from and against any and all claims, loss, damage, charge or expense which
19 MTS may be subjected by any reason of any damage, loss or injury of any kind
20 resulting from or in connection with any negligent act or action, or any neglect,
21 omission or failure to act by NMS and/or its agents in its or their performance under
22 the Service Agreement.

23 36. While denying the allegations in the *Koka Complaint*, MTS alleges that
24 in the event Koka suffered damages as therein alleged, that said damages and
25 injuries were proximately caused and contributed to by the acts and/or omissions of
26 NMS, and each of them, and that if MTS is found liable and responsible to Koka
27 under any theory of law, then, in that event, MTS alleges that NMS contributed to

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1 the happening of the incident and/or events described in the *Koka Complaint* and
2 caused in some degree the alleged loss, damage and detriment to Koka.

3 37. The conduct of MTS with respect to the events and occurrences
4 referenced in the *Koka Complaint* which allegedly produced injuries and damages to
5 Koka, if any, was passive, secondary and remote.

6 38. By reason of the foregoing, MTS is entitled by reasons of the Service
7 Agreement, as well as the principles of equity and justice, to indemnity from and to
8 be harmless by NMS because of its aforesaid direct, primary, immediate and
9 foreseeable conduct.

10 39. Counsel for MTS notified NMS by letter dated September 3, 2015, that
11 MTS is entitled to indemnification for any liability or costs incurred with respect to
12 the *Koka Complaint*, including the costs of defending the claims and allegations
13 asserted therein.

14 40. NMS has declined its indemnification obligations to MTS in the instant
15 matter.

16 **SECOND CAUSE OF ACTION**

17 **(Comparative Indemnity)**

18 41. MTS realleges and incorporates by reference each and every allegation
19 set forth above in paragraphs 1-40, as though fully set forth herein.

20 42. If MTS is held liable to Koka either by way of judgment or settlement
21 for any claim alleged in the *Koka Complaint*, MTS is entitled to recover from NMS
22 an amount which bears the same ratio to the total recovery of Koka as the ratio of
23 fault on the part of NMS when compared to the total fault of all persons and/or
24 entities whose conduct contributed to the injuries and damages of Koka, if any.

25 **THIRD CAUSE OF ACTION**

26 **(Contribution)**

27 43. MTS realleges and incorporates by reference each and every allegation
28 set forth above in paragraphs 1-42, as though fully set forth herein.

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1 44. In order to prevent a multiplicity of litigation, a determination of the
2 comparative fault, if any, of MTS and NMS, and each of them, should be had at the
3 time of trial of the principal action herein. If Koka recovers judgment against MTS
4 and NMS, or any of them, the amount of damages awarded to Koka should be
5 apportioned between MTS and NMS, and each of them, equitably based upon a
6 comparison of fault of NMS for the amount of any damage awarded in favor of Koka
7 and against MTS, pursuant to the degree of relative fault attributed to MTS and NMS
8 and each of them.

9 **FOURTH CAUSE OF ACTION**

10 **(Declaratory Relief)**

11 45. MTS realleges and incorporates by reference each and every allegation
12 set forth above in paragraphs 1-44, as though fully set forth herein.

13 46. A dispute has arisen and an actual controversy exists between MTS and
14 NMS, and each of them, as to whether NMS must indemnify MTS and pay for
15 reasonable attorneys’ fees, costs and expenses on account of the events and
16 occurrences alleged in the *Koka Complaint* and this Third-Party Complaint, and
17 whether NMS must compensate MTS for any liability sustained by MTS in
18 proportion to the respective ratios of fault.

19 47. A declaration of rights of the parties in this action is necessary in order
20 to avoid a multiplicity of suits and because MTS may have no adequate remedy of
21 law.

22 **WHEREFORE**, MTS respectfully prays for judgment as follows:

23 1. That MTS be awarded judgment against NMS in the amount of any
24 judgment by Koka against MTS, or in the amount of any settlement payment by
25 MTS to Koka;

26 2. For any and all costs, losses, liabilities, expenses, attorneys’ fees, liens,
27 and/or fines incurred by MTS as a result of this action based on the conduct of NMS;
28 and

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3. For such additional relief to MTS as the Court may deem just and proper.

Dated: October 30, 2015

WHEATLEY BINGHAM & BAKER LLP

By: s/Roger P. Bingham
ROGER P. BINGHAM
Attorneys for Third-Party Plaintiffs
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