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1 FOR PUBLICATION

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 3 **IN THE SUPERIOR COURT**  
 4 **FOR THE**  
 5 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6 **BYOONG SEOB CHOI,**

7 **Plaintiff,**

8 **v.**

9 **JUNG JA KIM et. al.,**

10 **Defendants.**

) **CIVIL CASE NO. 10-0114**

) **ORDER GRANTING**  
 ) **CROSS-DEFENDANT'S**  
 ) **MOTION TO DISMISS**

11  
 12 **I. INTRODUCTION**

13 **THIS MATTER** came before the Court on May 16, 2012 for a status conference and motions  
 14 hearing. Attorney Robert T. Torres appeared on behalf of Defendants, and Cross-Defendants Jung Ja  
 15 Kim, Soi-In Corporation, Dr. Ko, LLC, and Kosta LLC. Attorneys Ramon K. Quichocho and Robert H.  
 16 Myers appeared on behalf of Defendants and Cross-Plaintiffs Ramon K. Quichocho, Frances  
 17 Quichocho, Tan Dingo LLC, and Latte Stone, LLC. Plaintiff Byoong Seob Choi, and Defendant  
 18 Anthony Long failed to appear either personally or through counsel. Upon thorough review of the  
 19 motion, pleadings, oral argument and relevant law, the Court now renders its written decision.

20 **II. BACKGROUND**

21 On February 28, 2011 Byoong Seob Choi ("Choi") filed a Third Amended Complaint against  
 22 twenty named defendants. Among the defendants are Choi's ex-wife, Jung Ja Kim, ("Kim"); Ramon  
 23 Quichocho, Kim's former attorney, and his wife, Frances Quichocho, Tan Dingo, LLC, and Latte Stone,  
 24

By Order of the Court, Judge Joseph N. Camacho

1 LLC (collectively “Quichocho Defendants”). Choi seeks to recover alleged marital property which he  
2 claims was fraudulently conveyed to the Quichocho Defendants by Jung Ja Kim.

3 On December 16, 2011,<sup>1</sup> the Quichocho Defendants (hereinafter “Cross-Plaintiffs”) timely filed  
4 an “Answer and Cross-Claim” (“Cross-Claim”) against Kim, Soi-In Corporation, Dr. Ko, LLC, Kosta,  
5 LLC, Pacific Saipan, LLC, and Does 1-20 (collectively “Cross-Defendants”). They allege fraud against  
6 Kim (Count I) and seek equitable indemnity individually from Kim (Count II) and from all Cross-  
7 Defendants (Count III).

8 On January 6, 2012, Cross-Defendants filed “Defendant Jung Ja Kim’s Motion to Dismiss  
9 Counterclaims Filed By Defendants Ramon Quichocho, Franches Quichocho, Tan Dingo, LLC and  
10 Latte Stone, LLC” (“Motion”) and on January 23, 2012 Cross-Plaintiffs filed with the Court an  
11 “Opposition to Motion to Dismiss the Cross-Claim” (“Opposition”).

### 12 III. DEFENDANT KIM’S MOTION TO DISMISS

13 Cross-Defendants argue that Cross-Plaintiffs’ claims for fraud and indemnity should be  
14 dismissed pursuant to NMI R. Civ. P. 12(b)(6) for failure to state a claim, and pursuant to NMI R. Civ. P.  
15 9(b), for failure to state fraud with particularity. Cross-Plaintiffs counter that their fraud and indemnity  
16 claims are sufficiently plead and ask the Court for leave to amend in the event that the Motion is  
17 granted.

#### 18 A. FAILURE TO STATE A CLAIM FOR FRAUD – 12(b)(6) & 9(b)

19 The issue is whether Cross-Plaintiffs state a claim for fraud. Under NMI R. Civ. P. 12(b)(6), a  
20 complaint or pleading is subject to dismissal where it lacks a cognizable legal theory or fails to allege  
21 facts constituting a cognizable legal theory. *Bolain v. Guam Publications, Inc.*, 4 NMI 176 (1994). In  
22 deciding a motion to dismiss the court must assume the truth of all factual allegations in the challenged  
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24 <sup>1</sup> The procedural history of this case spans nearly two years, the Court recounts only that which is relevant to the Motion at issue.

1 pleading and construe them in the light most favorable to the non-moving party. *Cepeda v. Hefner*, 3  
2 NMI 121, 127-28 (1992); *Govendo v. Marianas Pub. Land Corp.* 2 NMI 482, 490 (1992).

3 The factual matter of the complaint, accepted as true, must “state a claim to relief that is  
4 plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v.*  
5 *Twombly*, 550 U.S. 544, 570 (2007)).<sup>2</sup> First, the court must “identify[] the allegations in the complaint  
6 that are not entitled to the assumption of truth.” *Id.* at 1951. In so doing, the court separates factual  
7 allegations from legal conclusions. “[T]he tenet that a court must accept as true all of the allegations  
8 contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a  
9 cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 1949.

10 Second, the court must assume the veracity of any “well-pleaded factual allegations” and then  
11 determine “whether they plausibly give rise to an entitlement to relief.” *Id.* at 1950. A claim is  
12 “plausible on its face” when the plaintiff pleads factual content that allows the court “to draw the  
13 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949. The  
14 plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than a sheer  
15 possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556).

16 The CNMI recognizes a cause of action for tortious misrepresentation or fraud. To state a claim  
17 the aggrieved party must show, “(1) a representation, (2) its falsity, (3) its materiality, (4) defendants’  
18 knowledge of or recklessness as to its falsity, (5) defendants’ intent that plaintiffs act on it in the manner  
19 reasonably contemplated, (6) plaintiffs’ ignorance of its falsity, (7) their reliance on its truth, (8) their  
20 right to rely on it, and (9) their resulting damage. *Del Rosario v. Camacho*, 2001 MP 3 ¶ 79.

21 The factual basis asserted in support of the fraud claim is that Kim: (1) lied about the delivery of  
22 sixteen poker machines; (2) lied to the Quichocho to try to destroy their relationship and take Frances

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24 <sup>2</sup> “[W]hen interpreting our rules of civil procedure, which are patterned after the federal rules, we will principally look to  
federal interpretation for guidance.” *Commonwealth Dev. Auth. v. Camacho*, 2010 MP 19 ¶16.

1 away from Ramon; (3) lied about not receiving payments for the poker machines; and (4) failed to  
2 disclose to Mr. Choi about her adulterous affairs with Mr. Long and Mr. Torres, and; (5) concealed the  
3 true nature of her fraudulent schemes. (Cross-Claim at 15.) The Cross-Plaintiffs claim that these  
4 representations were material, Kim knew they were false when she made them and acted intentionally,  
5 and the Quichochos reasonably relied on them to their detriment. (*Id.*) They claim that if they were  
6 aware of Kim’s “fraudulent scheme” they could have avoided this victimization which caused them  
7 substantial harm. (*Id.*) They also mysteriously allege that Kim “further committed fraud against Cross-  
8 Plaintiffs by deliberately and intentionally concealing the true nature of her fraudulent schemes.” (*Id.*)  
9 The Court is unable to divine any relationship between each allegation of misrepresentation, thus each  
10 will be analyzed individually.

#### 11 **1. Lying About the Delivery of Poker Machines**

12 The issue is whether Kim lying about the delivery of the sixteen poker machines, and allegations  
13 of any consequences therefrom state a claim for fraud. Cross-Defendants argue that Cross-Plaintiffs fail  
14 to state a claim because failure of a promise alone does not constitute fraudulent misrepresentation.  
15 (Motion at 8-9) (citing *Del Rosario*, 2001 MP 3 ¶ 80 (“Failure to perform a promise alone does not  
16 constitute a fraudulent misrepresentation; there must be evidence that, *at the time defendant made the*  
17 *promise*, he made it with the intent not to perform, or with reckless disregard as to whether he could  
18 perform.”)). This is an accurate statement of the law. However, the *Del Rosario* court did not address the  
19 quantum of evidence of present intent to defraud needed to state a cause of action at the pleading stage.

20 A misrepresentation can be a statement about a party’s intent if their intent is other than how  
21 they represent it. *Fusco v. Matsumoto*, 2011 MP 17 ¶ 47; *see also* Restatement (Second) of Torts § 530  
22 subsection 1 (1977) (“A representation of the maker’s own intention to do or not to do a particular thing  
23 is fraudulent if he does not have that intention.”)

1           The representation alleged here is a promise to deliver poker machines assertedly made with the  
2 knowledge of its falsity at the time it was made, which can be the basis of actionable fraud. *Matsumoto*,  
3 2011 MP 17 ¶ 47; *Del Rosario*, 2001 MP 3 ¶ 80.

4           To state a claim the representation must also be material. Cross-Defendants argue that to be  
5 actionable the alleged false representation must relate to a past or existing material fact, as opposed to a  
6 “mere broken promise[], unfulfilled prediction[] or expectation[].” See *Benavente v. Marianas Pub.*  
7 *Land Corp.*, 2000 MP 13 ¶ 43.

8           A representation is material if “it relates directly to the matter in controversy and is of such a  
9 nature that the ultimate result would not have followed if there had been no representation, or if the one  
10 who acted upon it had been aware of its falsity.” *Refrigeration Indus. v. Nemmers*, 880 S.W. 2d 912, 917  
11 (Mo. Ct. App. 1994). A promise to deliver goods is generally material, because any reasonable buyer  
12 would not agree to a sale without the expectation of delivery. *Id.* Thus, Kim’s promise to deliver poker  
13 machines relates to an existing material fact if her intent at the time, was not to deliver them—this is  
14 exactly what the complaint asserts.

15           The Cross-Plaintiffs further assert that Kim knew the representation was false, and intended for  
16 them to rely on it in order to enrich herself at their expense. It is clear from *Del Rosario*, 2001 MP 3 ¶  
17 79, that to prove intent Cross Plaintiffs may not rely merely on the fact of non-performance. Here,  
18 however, Cross-Plaintiffs allege circumstances from which a present intent to defraud may be drawn.  
19 The Cross-Claim alleges that Kim “reveal[ed] to Frances about her financial problems and her  
20 companies’ debts,” “convinced Frances to buy old poker machines,” promised to deliver them, received  
21 money from Frances for them, received income from the poker machines, and failed to deliver six of the  
22 promised ten poker machines. (Cross-Claim at 13, 16). At the pleading stage, it is reasonable to infer  
23 both reckless disregard as to the honesty of the promise to deliver, and intent to induce reliance based on  
24

1 these circumstances. Moreover, pursuant to NMI R. Civ. P. 9(b) “intent may be averred generally”—  
2 which has been done here.<sup>3</sup>

3 The Cross-Plaintiffs also allege they reasonably relied on the promise to their detriment. On a  
4 motion to dismiss the Court must assume the truth of factual allegations but not legal conclusions.  
5 *Ashcroft*, 129 S. Ct. at 1949. The “allegation,” that the Quichocho’s reasonably relied on the  
6 misrepresentations and suffered damage are legal conclusions not entitled to a presumption of truth.  
7 Even so, the alleged facts and reasonable inferences here demonstrate that Frances paid for sixteen poker  
8 machines, ostensibly because she believed that Kim would pay for them as promised, and Kim only  
9 delivered ten. It can reasonably be inferred that Frances relied on the promise by paying for the poker  
10 machines, and sustained damage at least for the amount she paid for the poker machines that were not  
11 delivered and for the lost use of the same. Her reliance could certainly be reasonable given the close  
12 relationship that developed between Kim and the Quichocho’s described in the Cross-Claim. These facts  
13 state a claim that is plainly plausible on its face. *Id.* at 1549 (*quoting Twombly*, 550 U.S. at 570).

14 In addition to the basic pleading requirements, allegations of fraud “shall be stated with  
15 particularity.” NMI R. Civ. P. 9(b). To comply with Rule 9(b), allegations of fraud must be “specific  
16 enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud  
17 charged so that they can defend against the charge . . .” *Neubronner v. Milken*, 6 F. 3d 666, 672 (9th  
18 Cir. 1993). “[S]tatements of the time, place and nature of the alleged fraudulent activities are sufficient,  
19 [while] mere conclusory allegations of fraud are insufficient.” *Moore v. Kayport Package Express*, 885  
20 F.2d 531, 540 (9th Cir. 1989); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)

21  
22 <sup>3</sup> The Court refuses to read into the holding in *Del Rosario* a requirement that a Plaintiff in a fraud cause must allege specific  
23 evidence of intent in order to withstand a Motion to Dismiss when NMI R. Civ. P. 9(b), and the general pleading  
24 requirements are clearly to the contrary. Rather, *Del Rosario* restates the general proposition representing the majority  
common law view in the United States that *to prevail* on a fraud claim based on a broken promise there must be  
“circumstantial evidence that the promisor never intended to keep the promise at the time the promise was made” *Fusco v.*  
*Matsumoto*, 2011 MP 17, ¶45-49 (Reconciling CNMI case law regarding promises of future action and present intent to  
defraud).

1 (finding that a complaint alleging fraud must specify the fraudulent statements, identify the speaker,  
2 state when and where the statements were made, and why the statements were fraudulent). Intent,  
3 however, may be averred generally. NMI R. Civ. P. 9(b).

4 Here, the speaker (Kim) and the general statement, “lying about the delivery of the sixteen poker  
5 machines,” were identified. However, there are no allegations regarding when and where any  
6 promise/promises were made, or references to the content of the alleged promises and the method of  
7 communication, which would enable Cross-Defendant to respond to the charge. *Moore*, 885 F.2d at  
8 540. Consequently the Cross-Claim fails to allege fraud with particularity. NMI R. Civ. P. 9(b).

## 9 **2. Lying to try to Destroy Relationship**

10 The issue is whether Kim “lying to Quichocho and Frances to try to destroy [their] relationship  
11 so that she can take Frances away from Quichocho,” states a claim for fraud. (Cross-Claim at 16).

12 The Cross-Claim alleges that Kim pursued a sexual relationship with Frances allegedly following  
13 Frances and her daughter to California. Kim took Frances to Las Vegas, where she “encouraged Frances  
14 to leave her husband with the promise that Kim will take care of Frances and make her rich.” (Cross-  
15 Claim at 12.) The Cross-Plaintiffs claim that:

16 [I]n her effort to destroy the Quichocho’s marital relationship, Kim  
17 misrepresented lied and did everything she could to make sure that Quichocho  
18 and Frances stop communicating. For example Kim would go to Frances and  
Lie to her that Quichocho is saying horrible things about Frances,” and vice  
versa. (Cross-Claim at 15.)

19 The Quichocho claim these acts “temporarily destroyed their marriage,” and that due to the “emotional  
20 distress of the sexual advances and numerous false gossips from Kim, Frances had a miscarriage (*Id.*)

21 The promise to Frances to “take care of Frances make her rich,” (“Vegas Promise”), cannot  
22 support a claim for fraud because Frances apparently never left her husband to be with Kim so there was  
23 no reliance.

1 The lies or “false gossips,” Kim told each of them do not support a fraud claim because there are  
2 no facts showing what was said to whom which would indicate if there were material misrepresentations,  
3 and no facts tending to show reliance, or damages as a result of the reliance.

4 As for the damage alleged—that “the emotional distress of the sexual advances and numerous  
5 false gossips” caused Frances to have a miscarriage—this is not the type of detriment contemplated in a  
6 fraud action. A fraud action contemplates that the injured party reasonably believes an untrue statement,  
7 or representation, acts in reliance upon that statement and is harmed thereby. *See Del Rosario*, 2001 MP  
8 3 ¶ 79. First, no clear statement with the requisite intent is alleged. Second, no reliance is alleged,  
9 justifiable or otherwise. Third, no relationship is shown between the damage claimed and reliance by the  
10 Quichocho.

11 Thus, because there is no factual showing of materiality, reliance or damages caused by the  
12 reliance, in relation to any of the above alleged misrepresentations, Cross-Plaintiffs fail to state a claim.

13 Further, the lies or “false gossips,” to each spouse about the other are not plead with particularity  
14 because Cross-Plaintiffs fail to provide any specific facts regarding the basic what was said, to whom,  
15 when it was said, where, and why they such statements were fraudulent. *Mills*, 12 F.3d at 1175. The  
16 Vegas Promise is also not stated with particularity—even though the location and the content are  
17 mentioned— because it is not at all clear why the statement is fraudulent. *Id.*

### 18 **3. Lying About Not Receiving Payment for Poker Machines**

19 The next issue is whether lying about not receiving payment for poker machines is an actionable  
20 misrepresentation. This claim stands wholly unsupported in the complaint. There is no statement  
21 whatsoever explaining how this alleged misrepresentation is a fraud upon Cross-Plaintiffs.

22 First, the statement is conclusory, and cannot plausibly state a claim. NMI R. Civ. P. 12(b)(6).  
23 Second, the claim lacks particularity—it is not clear who Kim lied to about payment, what she said,  
24 when or where she said it, or how it is fraudulent. NMI R. Civ. P. 9(b).



1 To the extent that Cross-Plaintiffs meant that Kim lied in connection with her case against them  
2 in Federal District Court or in the Motion at issue here, Cross-Plaintiffs fail to state a claim. In order to  
3 induce reliance the misrepresentation must be before the reliance. In this case, both actions would have  
4 been filed after the poker transactions and statements made therein could not have induced them.

#### 5 **4. Failed to Disclose to Choi Adulterous Relationships**

6 The issue is whether Kim's failure to disclose alleged affairs with her two attorneys to her  
7 husband supports a cause of action for fraud against the Quichocho. A failure to disclose a material fact  
8 constitutes a misrepresentation only where there is a legal duty to disclose by relationship, or statute.  
9 See Restatement (Second) Torts §551 (1977) ("One who fails to disclose . . . is subject to the same  
10 liability to the other as though he had represented the nonexistence of the matter . . . but only if, he is  
11 under a duty to the other . . ."); *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics,*  
12 *Inc.*, 818 F.2d 1466, 1472 (9th Cir. 1987) ("Absent an independent duty, such as a fiduciary duty or an  
13 explicit statutory duty, failure to disclose cannot be the basis of a fraudulent scheme."). Here, no such  
14 duty toward the Quichocho's is alleged. Moreover, there are no facts asserted which would tend to  
15 show reasonable reliance, and damages resulting therefrom, thus Cross-Plaintiffs fail to state a claim.  
16 NMI R. Civ. 12(b)(6).

#### 17 **5. Concealing the True Nature of Her Fraudulent Schemes**

18 The issue is whether Cross-Plaintiffs "deliberately and intentionally concealing the true nature of  
19 her fraudulent schemes," supports a claim for fraud. This is too vague to put the Cross-Defendant on  
20 notice under either standard. NMI R. Civ. P. 12(b)(6); NMI R. Civ. P. 9(b).

21 Finally, the Cross-Plaintiffs allege one cause of action for fraud, but include the several bases  
22 which have already been addressed. The Court notes that addressing the fraud claim as one fraudulent  
23 scheme would not make it more factually sufficient, or less lacking in particularity. Thus, to the extent  
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1 that the Cross-Plaintiffs allege that the misrepresentations are part of some global fraud scheme, for the  
2 reasons already set forth, Cross-Plaintiffs' fraud claim fails.

3 **B. LEAVE TO AMEND – 15(a)**

4 The Cross-Plaintiffs requests leave to amend, in the event that the Motion is granted. Pursuant to  
5 Rule 15(a), leave to amend should be freely granted “when justice so requires.” NMI R. Civ. P. 15(a).  
6 On a motion to dismiss, the Court must grant leave to amend unless it “determines that the pleading  
7 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th  
8 Cir. 2000) (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (holding that leave should be  
9 granted unless defect cannot be cured).

10 The CNMI Supreme Court has held that where a fraud count is dismissed under Rule 9 for lack  
11 of particularity, it should grant leave to amend to allow the plaintiff the opportunity to satisfy the  
12 particularity requirement. *Seman v. K. Sadhwani's Inc.*, 3 NMI 303, 311 (1992). Following *Seman*, the  
13 Court will allow leave to amend Count I, for fraud, to comply with Rules 8(a) and 9(b).

14 **C. FAILURE TO STATE A CLAIM FOR EQUITABLE INDEMNITY – 12(b)(6)**

15 The Court addresses whether Cross-Plaintiffs state a cognizable claim for equitable indemnity  
16 against Kim individually and against all defendants. Cross-Defendants argue that the claim should be  
17 dismissed because: (1) the Cross-Plaintiffs cannot point to any contract or statutory obligation giving  
18 rise to a right of indemnification; (2) they cannot meet the elements of equitable indemnity; and (3) the  
19 CNMI does not recognize a cause of action for indemnification absent an underlying duty in tort or  
20 contract. (Motion at 10-11). The Cross-Plaintiffs counter that “a right of indemnification may arise ‘as a  
21 result of contract or equitable considerations and is not restricted to situations involving a wholly  
22 vicarious liability, such as where a master has paid a judgment for damages resulting from the voluntary  
23 act of his servant.’” (Opposition at 7) (citing *Peters v. City & County of San Francisco*, 41 Cal. 2d 419,  
24 431 (1953)). Cross-Plaintiffs also argue that Kim should be liable in their stead because: (1) they are

1 bona fide purchasers; (2) they were not knowingly a party to fraud; (3) they did not have notice of any  
2 adverse claim by Mr. Choi; (4) they acted in good faith; and (5) Mr. Choi's injuries were caused by  
3 Kim. (Opposition at 7-8.)

4 Here, Cross-Defendants are correct that no statutory or contractual indemnity is alleged in this  
5 case, but that does not end the inquiry. The CNMI Supreme Court has not yet had an opportunity to  
6 address an equitable indemnity claim. Nonetheless, equitable indemnity has long been recognized as an  
7 equitable remedy to prevent unjust enrichment. *See* 41 Am Jur 2d Indemnity § 20 (citing cases).

8 The Restatement (Third) of Torts: Apportionment of Liability § 22, (2000)<sup>4</sup> provides the  
9 following rule:

10 (a) When two or more persons are or may be liable for the same harm and one  
11 of them discharges the liability of another in whole or in part by settlement or  
12 discharge of judgment, the person discharging the liability is entitled to  
recover indemnity in the amount paid to the plaintiff, plus reasonable legal  
expenses, if:

13 (1) the indemnitor has agreed by contract to indemnify the indemnitee, or

14 (2) the indemnitee

15 (i) was not liable except vicariously for the tort of the indemnitor, or

16 (ii) was not liable except as a seller of a product supplied to the indemnitee by  
17 the indemnitor and the indemnitee was not independently culpable.

18 (b) A person who is otherwise entitled to recover indemnity pursuant to  
19 contract may do so even if the party against whom indemnity is sought would  
not be liable to the plaintiff.

20 In other words, a claim for indemnity under the Restatement arises only when: (1) liability is  
21 extinguished; and (2) the indemnitee is only vicariously liable or strictly liable in the products liability  
22 context. *Id.* Equitable indemnity, unlike comparative fault, is generally not a fault-sharing mechanism,

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24 <sup>4</sup> In *Estate of Ogumoro v. Ko*, 2011 MP 11, ¶64 the CNMI Supreme Court interpreting 7 CMC § 3401 held that “[T]he Restatements are the operative rules of decision in the Commonwealth, even when the relevant provision does not accord with United States common law.”

1 that allows a party, whose negligence was comparatively minor, to recover from the tortfeasor with a  
2 more dominant role. Restatement (Third) of Torts: Apportionment of Liability § 22, cmt. a. (2000)  
3 (explaining that the 1977 section “sometimes provided for indemnity when the indemnitee was  
4 negligent, such as a negligent retailer who was liable for a manufacturer’s defective product.  
5 Comparative responsibility undermines the need for indemnity in these situations. Accordingly, this  
6 Section does not provide for indemnity to a person who is independently responsible.”).

7 Cross-Plaintiffs here cannot show they have discharged liability therefore no right of indemnity  
8 exists. Thus, it is at best premature to resolve the issue of indemnity. *See, e.g., Doe v. City of Chicago*,  
9 360 F. 3d 667, 672 (7th Cir. 2004) (“We have warned repeatedly against trying to resolve indemnity  
10 before liability). Moreover, the Restatement rule reflects the reality that most states and the  
11 Commonwealth have adopted comparative fault statutes, which obviate the need for equitable indemnity  
12 in many cases. *See* Restatement (Third) of Torts: Apportionment of Liability § 22 cmt. a (2000). Thus,  
13 the rule limits claims for non-contractual indemnity to those situations where liability is vicarious or  
14 where strict liability is imposed in the products liability context. The Restatement (Third) of Torts:  
15 Apportionment of Liability § 22(a)(2)(i), (ii) (2000). Neither one of those situations applies in this case.  
16 Further, Cross-Plaintiffs effectively admit that there is no relationship upon which to argue that their  
17 liability, if any, would be vicarious – thus the complaint could not be cured with the addition of other  
18 facts and leave to amend would be futile.

#### 19 **IV. CONCLUSION**

20 Cross-Plaintiff’s fail to state a plausible claim for relief as to Counts I for fraud, and Counts II  
21 and III for equitable indemnity.

22 Therefore, with respect to Count I, the Motion is **GRANTED** with **LEAVE TO AMEND**. With  
23 respect to Counts II, and III, the Motion is **GRANTED** and those counts are hereby **DISMISSED**.

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**IT IS SO ORDERED** this 30th day of May, 2012.

                                /s/                                  
Joseph N. Camacho, Associate Judge