STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

**STATE OF NEW YORK**,

*Plaintiff*,

*-against-*

**ALL AROUND STORAGE, LLC d/b/a ALL AROUND EXCAVATING,**

*Defendant.*

Index No. 900009-19

**ALL AROUND STORAGE, LLC d/b/a ALL AROUND EXCAVATING,**

*Third-Party Plaintiff*,

*-against-*

**RUSTON PAVING CO., INC.,**

*Third-Party Defendant.*

**RUSTON PAVING CO., INC.,**

*Fourth-Party Plaintiff*,

*-against-*

**HANSON AGGREGATES NEW YORK, LLC and BARRETT PAVING MATERIALS, INC.,**

*Fourth-Party Defendants.*

# MEMORANDUM OF LAW IN SUPPORT OF FOURTH-PARTY DEFENDANT HANSON AGGREGATES NEW YORK, LLC'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

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## PRELIMINARY STATEMENT

Fourth-Party Defendant Hanson Aggregates New York, LLC ("Hanson") respectfully submits this Memorandum of Law in support of its motion to dismiss the Fourth-Party Complaint of Third-Party Defendant/Fourth-Party Plaintiff Ruston Paving Co., Inc. ("Ruston") pursuant to: 1) CPLR 3211(a)(5), on the basis of the expiration of statute of limitations; 2) CPLR 3211(a)(7) based upon a failure to state a claim upon which relief can be granted, and/or 3) for summary judgment pursuant to CPLR 3212. For the reasons set forth below, the Court should dismiss the Fourth-Party Complaint with prejudice as against Hanson.

The genesis of this matter concerns construction of a porous asphalt parking lot located at the Taughannock Falls Overlook in Trumansburg, New York, operated by Plaintiff State of New York ("the State"). Generally, the State alleges the parking lot was defectively installed, requires replacement, and as a result, it has sustained monetary damages. The State sued Defendant/Third-Party Plaintiff All Around Storage, LLC d/b/a All Around Excavating ("All Around"), the contractor to whom the State awarded the contract for installing the parking lot, alleging claims of breach of contract, breach of warranty and negligence. All Around then brought third-party claims against its subcontractor Ruston who paved the parking lot. Ruston then brought fourth-party claims against Hanson and Barrett Paving Materials, Inc. ("Barrett"), the contractors who supplied asphalt to Ruston for the parking lot under specifications issued by the State.

In the Fourth-Party Complaint, Ruston seeks indemnification and/or contribution from Hanson. However, pursuant to the terms and conditions of the agreement between Ruston and Hanson governing the supply of the asphalt, Ruston had one year from date of delivery to bring a legal action for any cause of action against Hanson. Ruston failed to do so and its claim against Hanson is thus time barred.

Even if Ruston could bring any legal action, the indemnification claims in the Fourth-Party Complaint are also without merit. Ruston has not alleged any contractual indemnification claim and its agreement with Hanson does not provide for any contractual indemnity. Further, there is no basis for common law indemnification because All Around alleges direct wrongdoing by Ruston in the Third-Party Complaint. Thus, as an alleged active tortfeasor, Ruston cannot invoke the doctrine of implied indemnification.

Finally, no remedy of contribution for Ruston exists because the only claims for damages asserted by the State are for damage to property resulting from All Around's breach of contract and/or Ruston's breach of its subcontract. No right to contribution lies where the only damages sought are to recover for purely economic damages directly and/or consequentially resulting from other parties' alleged failures to fulfill contractual obligations. Accordingly, as no claims against Hanson are legally sustainable, the Court should dismiss the Fourth Party Complaint as against Hanson.

## STATEMENT OF FACTS

According to the First-Party Complaint, the State, through the New York State Office of Parks, Recreation and Historic Preservation operates Taughannock Falls State Park located in Trumansburg, New York (Ex. A, ¶¶ 1-2). On or about September 18, 2014, the State awarded All Around Contract No. D004567 (the "Contract") for the Taughannock Falls Overlook Reconstruction Project (the "Project"), which included: "the demolition of existing asphalt paving, a wood frame building and other structures, and the construction of concrete, flagstone, pervious concrete and permeable asphalt paving, a new septic system, site utilities, a new single story building, mortared stone walls, site amenities, embankment for a 0.5 mile multi-use trail, and woodland restoration plantings" (Ex. A, ¶ 4). Work on the Project began on or about March 23,

2015, and the date of physical completion and acceptance of the work was April 27, 2016. The State alleges it paid All Around $1,830,740.61 for the completed work under the Contract (Ex. A, ¶¶ 5-6).

However, the State alleges, "the porous asphalt pavement parking lot installed by [All Around] as part of the Project was inadequate and defective and failed. The failure of the porous asphalt parking lot (the "Parking Lot") appeared within seven months of the date of physical completion. The parking lot needs to be replaced" (Ex. A, ¶¶ 7-9). The State seeks $102,400 in damages for All Around's alleged breach of the Contract with the State, breach of its express warranty to remedy defects and pay for the cost of damage to the Parking Lot, breach of its implied warranty for intended purpose and its negligent construction/installation of the parking lot (Ex. A, ¶¶ 10-32). The First-Party Complaint does not contain any allegations or claims for damages against Hanson. It further does not allege that All Around is vicariously liable for the actions or omissions of any other entity (*See generally* Ex. A).

In the Third-Party Complaint, All Around asserts it entered into a Subcontract with Ruston to perform portions of the obligations arising from the Contract, including but not limited to paving, which is the subject of the First-Party Complaint (Ex. C, ¶ 6). All Around further asserts, "Ruston failed to adequately perform its contracted obligations pursuant to the Subcontract and specifications," that it breached the subcontract and that "Plaintiff's damages are wholly caused by [Ruston] without the fault of [All Around]" (Ex. C, ¶¶ 9-14). All Around seeks indemnification/contribution from Ruston and claims that Ruston breached its express warranty to correct any defective work at its own expense pursuant to the Contract and Subcontract, despite having notice of Plaintiff's claims by April 13, 2017 (Ex. C, ¶¶ 17-23). Finally, it asserts Ruston breach the implied warranty to "perform its obligations in a workmanlike manner and in

accordance with the standards of the industry" (Ex. C, ¶¶ 24-27). Like the First-Party Complaint, the Third-Party Complaint does not contain any allegations against or claims for damages against Hanson. It also does not allege that Ruston is vicariously liable for the actions or omissions of any other entity (*See generally* Ex. C).

In the Fourth-Party Complaint, Ruston alleges that, "the subject porous asphalt parking lot consisted of a subbase which All Around had prepared, on top of which Ruston installed a four (4) inch layer of porous asphalt pursuant to its subcontract with All Around. Ruston purchased the porous asphalt materials that it installed on the subject parking lot from the Fourth-Party Defendants" (Ex. E, ¶¶5-6). Ruston further claims the State "approved the mix design of the material which each Fourth-Party Defendant had proposed to furnish for the porous asphalt parking lot" (Ex. E, ¶ 8). The single cause of action in the Fourth-Party Complaint is for indemnification and/or contribution:

> *If it is determined that there are any defects in the subject porous asphalt parking lot, they were caused, in whole or in part, by the acts or omissions of the Plaintiff, the Third-Party Plaintiff and/or the Fourth-Party Defendants, including by materials furnished by the Fourth-Party Defendants which failed to comply with the mix design that the Plaintiff had approved or which otherwise were defective or unsuitable for installation by Ruston, without any fault, culpable conduct or breach of contract on the part of Ruston causing or contributing thereto.*

(Ex. E, ¶ 10).

Prior to the Project, Ruston executed a Business Credit Application dated July 27, 2011 with Hanson, the terms and conditions of which "apply to all sales of goods and services" between Ruston and Hanson, including sales orders for asphalt for the Parking Lot (*See* Affidavit of Roger R. Hutchinson ["Hutchinson Aff."], ¶¶ 5, 7 & Ex. A thereto). The Business Credit Agreement defines Hanson as "Seller"[1] and Ruston as "Purchaser" (Hutchinson Aff., Ex. A). By executing the Business Credit Application, Ruston attested that, "it has received, reviewed and is in

[1] Specifically, the Business Credit Application states that the term "Seller" "shall include Lehigh Hanson, Inc. and/or any subsidiary or affiliate of Lehigh Hanson, Inc. (including any division of the foregoing) …" Hanson is a wholly owned subsidiary of Lehigh Hanson, Inc. (*See* Hutchinson Aff., ¶ 4 & Ex. A thereto).

agreement with the Terms and Conditions of Sale, reverse side (or page 2) of the Credit Application" (*See* Hutchinson Aff., ¶ 6 & Ex. A thereto). Those General Terms and Conditions of expressly include:

> Notice of defective goods or services must be given to the Seller immediately upon discovery of the defect, notwithstanding the foregoing, final notice of any defect must be given within thirty (30) days from the date of delivery of such goods and services.
>
> * * *
>
> **No legal action** shall be brought by the Purchaser against the Seller for any claim with respect to goods or services sold by Seller to Purchaser more than one (1) year after delivery of such goods and services to the Purchaser. It is agreed that **any cause of action** with respect to such goods or services will accrue on the date of delivery of such goods and services.

(*See* Hutchinson Aff., Ex. A, p. 2)

As per sales orders kept in the regular course of Hanson's business, the date of delivery of the asphalt (the "goods and services" at issue in this matter) was August 10, 2015 (*See* Hutchinson Aff., ¶¶ 7-8 & Ex. B thereto). Hanson then sent an invoice to Ruston for the asphalt in the normal course of its business on August 12, 2015, which stated that it was "subject to the terms set forth in the Credit Application and/or General Terms and Conditions of Sale" (*See* Hutchinson Aff., ¶ 9 & Ex. C thereto). Ruston, however, did not bring any legal action against Hanson until almost four years later on July 16, 2019 (*See* Ex. E).

## ARGUMENT

### POINT I

### RUSTON'S CLAIMS AGAINST HANSON ARE BARRED BY A CONTRACTUALLY AGREED UPON STATUTE OF LIMITATIONS

Under New York law, parties may contractually agree to shorten the applicable period of limitations (*See* CPLR 201; *Kassner & Co., Inc. v. City of New York*, 46 N.Y.2d 544, 551 [1979]

*Anderson v. Allstate Ins. Co*., 171 A.D.3d 1331, 1332 [3d Dep't 2019]). Indeed, under New York law:

> . . . the parties may cut back on the Statute of Limitations by agreeing that any suit must be commenced within a shorter period than is prescribed by law. Such an agreement does not conflict with public policy but, in fact, 'more effectively secures the end sought to be attained by the statute of limitations.' Thus, an agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable provided it is in writing.

(*Kassner*, 46 N.Y.2d at 551 [citing CPLR 201]; *See also Jamaica Hosp. Med. Ctr. v Carrier Corp*., 5 A.D.3d 442, 443 [2d Dep't 2004]; *Matter of Incorporated Village of Saltaire v. Zagata*, 280 A.D.2d 547, 547-48 [2d Dep't 2001]). "Absent proof that the contract is one of adhesion or the product of overreaching or that [the] altered period is unreasonably short, the abbreviated period of limitation will be enforced." (*Saltaire*, 280 A.D.2d at 547-48 [quoting *Timberline Elec. Supply Corp. v. Insurance Co. of North Am*., 72 A.D.2d 905, 906 [4th Dep't 1979]). The assumption is that the parties agreed to the shortened period voluntarily unless a party demonstrates that the time is unreasonably short or the agreement on the shortened period was the product of duress, fraud, or misrepresentation (*Id.* at 548). Absent any duress, fraud or misrepresentation, Courts have regularly enforced shortened contractual statute of limitations clauses, even for periods as short as six months and ninety days. (*See*, *e.g*., *Kassner*, 46 N.Y.2d at 551; *Polar Bear Mech., Inc. v. Walison Corp*., 56 Misc. 3d 129(A) [2d Dep't 2017]; *Dart Mechanical Corp. v. City of New York*, 121 A.D.3d 452, 452 [1st Dep't 2014]; *Top Quality Wood Work Corp. v. City of NY*, 191 A.D.2d 264 [1st Dep't 1993]); *Wayne Drilling & Blasting, Inc. v. Felix Industries, Inc*., 129 A.D.2d 633, 633-34 [3d Dep't 1987] [upholding 90 day statute of limitations construction subcontract from date of completion of work]; *See also Snyder v. Gallagher Truck Ctr., Inc*., 89 A.D.2d 705, 706 [3d Dep't 1982] [contractual one-year statute of limitations upheld]).

As applied here, the statute of limitation provision in the terms of the Business Credit Application specifies a shorter, but reasonable, one-year period within which Ruston could commence any legal action against Hanson, as was the case in *Wayne Drilling, supra* (*See* Hutchinson Aff., Ex. A, p. 2). The invoice Hanson sent to Ruston for the asphalt following delivery specifically stated that it was "subject to the terms set forth in the Credit Application and/or General Terms and Conditions of Sale" (*See* Hutchinson Aff., ¶ 9 & Ex. C thereto). Those agreed upon terms and conditions mandated that Ruston had one-year from completion of Hanson's fulfillment of its contractual obligation, *i.e.* "the delivery of any goods or services," to bring a legal claim for **any cause of action** against Hanson (*See* Hutchinson Aff., Ex. A).

As the date of delivery of the products and services at issue in this matter was August 10, 2015, the period of limitations expired on August 10, 2016 (*See* Hutchinson Aff., ¶ 8 & Exs. A-C thereto). There is no evidence of duress, fraud or misrepresentation as Ruston is a sophisticated business entity that voluntarily signed the agreement in 2011 and attested that it "received, reviewed and is in agreement with the Terms and Conditions of Sale"" and there are no claims of fraud or duress in the Fourth-Party Complaint (*See* Ex. E; Hutchinson Aff., ¶ 6 & Ex. A thereto). The contract is further not one of adhesion as Ruston modified the terms of the Business Credit Application (eliminating the personal guaranty provision), which dispels of any claims of the use of "high pressure tactics or deceptive language in the contract and where there is inequality of bargaining power between the parties" required to show an adhesion contract (*See Ball v. SFX Broadcasting*, 236 A.D.2d 158, 161 [3d Dep't 1997]; *Wayne Drilling*, 129 A.D.2d at 634; Hutchinson Aff., Ex. A).

Ruston did not file the Fourth-Party Complaint until almost four years later on July 16, 2019, despite the fact it had notice of All Around's claim as far back as April 13, 2017 and was

contractually obligated to immediately provide notice to Hanson of any claims (*See* Ex. C, ¶¶ 17-23; Ex. E; Hutchinson Aff., Ex. A). As such, the claims against Hanson are time barred. Ruston may claim in opposition to this motion that it had no reason to file a lawsuit within one year of the date of delivery because it had no notice of any claim against it at that time. However, at minimum, it should have given Hanson notice of All Around's claim in April of 2017 and filed suit by April 13, 2018 pursuant to the terms of the Business Credit Application. It failed to do so and did not bring any claim against Hanson until over a year later (*See* Ex. E).

Accordingly, as any legal action by Ruston against Hanson is barred by a contractually agreed upon statute of limitations, the Court must dismiss the Fourth-Party Complaint in its entirety as against Hanson.

## POINT II

## RUSTON HAS NO LEGAL RIGHT TO CONTRACTUAL OR IMPLIED INDEMNIFICATION

In the event the Court does not dismiss the Fourth-Party Complaint based on the expiration of the statute of limitations, it should still dismiss the claim for indemnification against Hanson, as it has no merit. The right to indemnification is either contractual in nature "or may be implied in law to prevent a result which is regarded as unjust or unsatisfactory" (*Rosado v. Proctor & Schwartz,* 66 N.Y.2d 21, 24 [1985] [internal quotation marks and citations omitted]; *See also McDermott v. City of New York,* 50 N.Y.2d 211, 216 [1980]). "The right to contractual indemnification depends upon the specific language of the contract" (*Trawally v. City of NY*, 137 A.D.3d 492, 492-493 [1st Dep't 2016]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Tafolla v. Aldrich Mgt. Co., LLC*, 136 A.D.3d 1019, 1020 [2d Dep't 2016]).

"Implied indemnification is based in simple fairness and seeks to avoid unjust enrichment by 'recogniz[ing] that a person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity'" (*Westbank Contr., Inc. v. Rondout Val. Cent. Sch. Dist.*, 46 A.D.3d 1187, 1189 [3d Dep't 2007] [citing *McDermott*, 50 N.Y.2d at 217; [internal quotation marks and citation omitted]). Stated another way, "[o]ne is entitled to implied indemnification where he or she has committed no wrong but is held vicariously liable for the wrongdoing of another" (*Id.* [citing *Kozerski v. Deer Run Homeowners Ass'n*, 217 A.D.2d 841, 843 [3d Dep't 1995]; *Finch, Pruyn & Co. v. Wilson Control Servs.*, 239 A.D.2d 814, 818 [3d Dep't 1997]]).

Indeed, an award of indemnification is only appropriate when a defendant's role in causing a plaintiff's injury "is ***strictly passive*** and, consequently, its liability purely vicarious" (*Deyo v. County of Broome*, 225 A.D.2d 865, 866 [3d Dep't 1996] [quoting *Grant v. Gutchess Timberlands*, 214 A.D.2d 909, 911 [3d Dep't 1995]]). Consequently, "it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [of indemnification]" (*Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 109 A.D.2d 449, 453 [1st Dep't 1985]; *See also Harrigan v. Super Products Corp.*, 237 A.D.2d 882 [4th Dep't 1997]). And a party sued "solely for [their] own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification" (*Esteva v. Nash*, 55 A.D.3d 474, 475 [1st Dep't 2008]; *See also Hackert v. Emmanuel Cong. United Church of Christ*, 130 A.D.3d 1292, 1295 [3d Dep't 2015]; *Miloscia v. B.R. Guest Holdings, LLC*, 94 A.D.3d 563, 565 [1st Dep't 2012]; *Kozerski*, 217 A.D.2d at 843).

Courts have applied these well-established legal principles in the context of construction defect cases. For example, subcontractors could not maintain a third-party action for

indemnification against a consulting firm who gave the general contractor an allegedly negligent recommendation since there was neither an express contract between the consulting firm and the subcontractors, nor any viable common-law theory of implied indemnity (*See Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corp*., 125 A.D.2d 754, 756 [3d Dep't 1986]). Likewise, where a plaintiff sought to hold a defendant "not vicariously liable for the actions of the subcontractors, but with causing the damages *itself* arising from a breach of contract" the defendant "[could not] invoke the doctrine of implied indemnification" (*See Dormitory Auth. of State of N.Y. v. Scott*, 160 A.D.2d 179, 181 [1st Dep't 1990] [citations omitted]).

Here, the Business Credit Application between Ruston and Hanson has no contractual indemnification provision (*See* Hutchinson Aff., Ex. A). Hanson further had no contract with either the State or All Around, and the Fourth-Party Complaint does not assert a claim for contractual indemnity (*See* Ex. E). As such, Ruston's fourth-party claim for indemnification amounts to one implied by law.

Any claim for common law indemnification also fails. The State's claim in the instant matter is not that All Around bears vicarious responsibility based upon its relationship with any contractor, but that it is an actual wrongdoer (*See* Ex. A). In tandem, All Around alleges in the Third-Party Complaint that Ruston breached warranties with it and negligently performed services under the Subcontract, *i.e.* direct wrongdoing on its part (*See* Ex. C). Thus, if All Around or Ruston are found liable, it will be due to breaches of their respective contracts or their own wrongful actions. Since the Complaint and Third-Party Complaint only allege damages based upon wrongdoing of All Around and Ruston themselves, Ruston has no right to common law indemnification and the Court therefore should dismiss any claim against Hanson for such relief.

## POINT III

## RUSTON'S CLAIM FOR CONTRIBUTION IS BARRED BY THE ECONOMIC LOSS DOCTRINE

Like any claim for indemnification, Ruston's fails to state a cause of action for contribution. "It is well settled that a defendant may not seek contribution from other defendants where the alleged 'tort' is essentially a breach of contract" (*Westbank Contr.*, 46 A.D.3d at 1190 [citing *Tempforce, Inc. v. Municipal Hous. Auth. of City of Schenectady*, 222 A.D.2d 778, 779 [3d Dep't 1995], *lv denied* 87 N.Y.2d 811 [1996]; *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 26-28 [1987]]). "[T]he determining factor as to the availability of contribution is not the theory behind the underlying claim but the measure of damages sought" (*Id.* [quoting *Rothberg v. Reichelt*, 270 A.D.2d 760, 762 [3d Dep't 2000]*; See also Rockefeller Univ. v. Tishman Constr. Corp.*, 232 A.D.2d 155, 155 [1st Dep't 1996], *lv denied* 91 N.Y.2d 803 [1997]]). In other words a "third-party complaint, couched upon a pure breach of contract complaint which alleges economic loss only, fundamentally seeks contribution and therefore fails to state a cause of action" (*Tempforce*, 222 A.D.2d at 780).

"Purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of . . . CPLR 1401" (*Rothberg*, 270 A.D.2d at 762 [quoting *Sargent*, 71 N.Y.2d at 26]). "Economic loss has been defined as 'the direct and consequential damages which may result from product nonperformance'" (*Hemming v. Certainteed Corp*., 97 A.D.2d 976 [4th Dep't 1983] [*appeal dismissed* 61 N.Y.2d 758]). In such cases, the damaged party has lost part of its bargain and the parties are relegated to the contractual remedies they negotiated, including warranties governing the rights and obligations between manufacturers and suppliers of goods" (*Syracuse Cablesystems, Inc. v. Niagara Mohawk Power Corp*., 173 A.D.2d 138, 142 [4th Dep't 1991]). Concurrently, courts have held "the cost of repairs and the difference in value

between what defendants were contractually obligated to provide and what plaintiff actually received" to be "purely economic loss" (*Rothberg*, 270 A.D.2d at 762 [citing *Bellevue S. Assocs. v. HRH Constr. Corp.*, 78 N.Y.2d 282, 294-295 [1991]).

Further, "[i]t is well settled that a claim arising out of an alleged breach of contract may not be converted into a tort action absent the violation of a legal duty independent of that created by the contract" (*Id.* [quoting *Roklina v. Skidmore Coll.,* 268 A.D.2d 765, 766-767 [3d Dep't 2000]; *Scott v. KeyCorp.,* 247 A.D.2d 722, 725 [3d Dep't 1998] [additional citations omitted]]). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*Id.* at 763 [quoting *Clark-Fitzpatrick Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389 [1987] [additional citations omitted]). Therefore, even where a pleading "employs language asserting negligence in some of its causes of action" if the damages it seeks are solely for economic loss contribution is inapplicable (*Id.* [citing *Rothberg*, 270 A.D.2d at 762-763; *Wecker v. Quaderer*, 237 A.D.2d 512, 513 [2d Dep't 1997]; *see also Clark-Fitzpatrick*, 70 N.Y.2d at 390). Stated differently, a claim for a "benefit of the bargain recovery . . . is not enough to create a duty independent of [a contractual obligation] thereby authorizing recovery in tort" (*Tishman*, 240 A.D.2d at 155).

Here, the relief the State seeks in the First-Party Complaint is for damages of $102,400 plus interest and collection fees "as a result of [All Around's]" breaches and negligence. The State did not bring any direct claims for these damages against Hanson. Rather, the State solely attributes its damages to actions and/or omissions by All Around (*See* Ex. A, ¶¶ 17, 22, 28, 32, 34). Correspondingly, the Third-Party Complaint states that the State's allegations "involve negligent acts or omissions of [Ruston] and breach of contract," that Ruston "failed to adequately perform its contracted obligations pursuant to the Subcontract and specifications," that "Plaintiff's

damages are wholly caused by [Ruston]" and seeks damages for breach of contract, indemnity and breach of warranty (*See* Ex. C). There are no claims for passive liability asserted against Ruston in the Third-Party Complaint, nor does it specify any additional damages other than what First-Party Complaint specifies (*See* Ex. C).

Consequently, the economic loss doctrine applies to the fourth-party claims of Ruston. While the First-Party Complaint does set forth allegations of negligence as against All Around, as set forth above, the determining factor for the availability of contribution is not the theory behind the underlying claim, but rather the measure of damages sought. Here, the State makes no claim for personal injury or for damage to any other property except to the Parking Lot (*See* Ex. A, ¶¶ 7-32). Similarly, the Third-Party Complaint only seeks damages for Ruston's breach of the Subcontract and there is no cause of action for negligence (*See generally* Ex. C). No party asserts any other property loss that would create an independent obligation in tort and permit Ruston for recovery under a theory of contribution as against Hanson (*See* Exs. A-G).

Thus, any damages in this case result from purely economic loss and the "benefit of their bargain" of the Contract and/or Subcontract namely, the cost of repairs to the parking lot, loss of use thereof and potentially the diminution in value of the property. Because the damages sought on all of causes of action in any pleading are merely for economic loss, contribution is not available from Hanson and the Court must dismiss the Fourth-Party action against it.

## CONCLUSION

For the reasons set forth above, and in the accompanying affirmation, the Court should grant the Fourth-Party Defendant Hanson Aggregates New York, LLC's motion to dismiss the Fourth-Party Complaint and/or for summary judgment, along with such other relief as the Court deems just, fair and proper.

**DATED:** June 11, 2020

**BARCLAY DAMON LLP**

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